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Respondent.

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1 A Spanish.

2 Q Okay. Does he indicate to you -- and do you have -- and he's -- is the
3 Spanish interpreter interpreting both your questions and his answers in English and
4 Spanish?

5 A Yes, sir.

6 Q So you can hear what he has to say?

7 A Yes, sir.

8 Q All right. So you read him his rights; did the defendant indicate that he
9 understood those rights?

10 A Yes, he did.

11 Q All right. Now, these reports came in back in October of --
12 October 17, 2016; is that right?

13 A Yes, sir.

14 Q The walk-in? Prior to this, had you looked around the Charleston
15 Garden Apartments for the defendant?

16 A Yes --

17 Q Prior to Henderson finding him?

18 A Yes, I have.

19 Q Okay. Did you have any interactions with his wife?

20 A I did.

21 Q Okay. And just for the purpose of your investigation, did she indicate
22 whether he had been at this residence for that period of time or he had been gone?

23 A She said he'd been gone for a couple of weeks.

24 Q Okay. Let's get back to this interview. When you walk in, do you talk to
25 the defendant about where he's been?

1 A Yes. I asked him where had he been.
2 Q Tell -- tell the jury about that portion of your interview.
3 A I -- I told him I had gone to see his wife, he had -- and asked her if this
4 was his name and she said, Yes.

5 I said, Where's your husband?
6 She said, I don't know. He's been gone for a few weeks.
7 So I ask him, I said, Where have you been?
8 And he said, Well, I've been at a job.
9 I said, Well, where was the job?
10 In Henderson.
11 I said, Well, how did you get there?
12 I stayed there in a hotel -- hotel and something else.
13 I said, Do you have a car?
14 He said, No. I take the bus.
15 I said, Okay. I said, Did you tell your wife where you were?
16 And he said, No. I don't always tell her where I'm at or -- I don't
17 always communicate or -- I don't remember the exact words, but...

18 Q Well, did he state, Because I almost never tell her anything; is that what
19 he said to you?

20 A Yes. That's what he -- it kind of struck me odd.

21 Q Okay. Did you -- did you follow up by asking, You don't even tell you
22 where you're going?

23 A Uh-huh. Yes.

24 Q And what did he respond to that question?

25 A No.

1 Q Did you talk to him about -- what was the next thing you kind of followed
2 up with; do you remember that?

3 A I asked him about his dogs, because I was told that he had an Infinity
4 and just loved his dogs.

5 Q Okay. And what was his response about, Well, don't you miss your
6 dogs?

7 A Yeah, I said -- I asked him, I said, I was told that you loved your dogs
8 almost like they're your own children.

9 And he said -- told me he didn't miss the dogs. And then he
10 said, I don't even love myself.

11 Q Okay. Did you ask him why?

12 A Yeah. I said, Well, why -- why don't you love yourself?

13 And I don't remember if there was a response. And I said -- kind
14 of odd that people make a statement that they don't love themselves.

15 Q Did he indicate to you to that question, Because I don't?

16 A Because I don't.

17 Q So that sounds about right --

18 A Uh-huh. Yes, sir.

19 Q -- as you sit here today? Did you talk to him about the whole David
20 thing? David-first-name thing?

21 A I did. I asked --

22 Q What --

23 A Oh, I'm sorry.

24 Q Tell -- tell the jury -- tell the jury about that.

25 A I said, Why do people call you -- or why do they call you David?

1 And he said, I don't know.

2 Q Okay. Did he state to you specifically when asked, How come other
3 people tell me -- how come you tell -- excuse me. How come you tell other people
4 that your name is David? Did he respond to you, "No, I have never told anyone that
5 was my name"?

6 A Yes, he did.

7 Q He said those words to you?

8 A Yes.

9 Q When he tells you that, what's your response?

10 A Kind of struck me odd, because everybody I'd spoken to up to that point
11 or listened to in the interviews, that's the only name they referred to him as is David
12 or Don David.

13 Q Did you bring up the fact that Amanda knew him as David?

14 A I did.

15 Q And did you ask him if he'd ever told Amanda his name was David?

16 A I did.

17 Q And what did he response to that?

18 A No.

19 Q Did you ask him how long he's known Amanda?

20 A I did.

21 Q What did he say?

22 A Since -- first he said, Since she's been here.

23 Then I asked him, Well, is it one, two, ten years?

24 And he said, About three years.

25 Q Okay. Based on your interactions with Amanda, do you know how

1 long -- based on your understanding of your investigation, do you know
2 approximately how long Amanda had lived at the Charleston Garden Apartments?

3 A Yeah. She told me eight years.

4 Q At some point in the interview, is he claiming maybe somebody
5 misheard his name Jose for David?

6 A Yes.

7 Q Do you ask him if knows Amanda's three children?

8 A I did. Yes.

9 Q So he acknowledges that he knew them?

10 A Yes.

11 Q Do you ask him if he knows their name?

12 A Yes, I do.

13 Q And what does he say at first?

14 A Yes.

15 Q And then what does he do?

16 A Then I asked him what their names were and he changed, he says, No,
17 I don't know their names.

18 Q So he says yes and then he says no when you ask him to actually give
19 the names?

20 A Yes.

21 Q And what -- do you kind of seek some clarification on that?

22 A Yeah. I said, You just told me that you knew their names.

23 Q And what does he respond to that?

24 A Why -- he asked me why I was trying to get him to say something that
25 he doesn't know or try to force him to do something.

1 Q So what did you respond to that?

2 A I said --

3 Q How did he respond to that?

4 A I said, I'm not. You told me that you knew their names.

5 Q Okay. Does he eventually indicate that he knows at least one of the

6 children's names?

7 A Yes.

8 Q And which child is that?

9 A Jatziri.

10 Q Okay. At a later point in the interview, do you bring up the name

11 Mirabel?

12 A I did.

13 Q And does he respond with confusion to that name?

14 A No. He said, What about Mirabel?

15 Q Did he tell you what those Moreno children called him, the Moreno

16 girls?

17 A Uh-huh.

18 Q What did he say they called him?

19 A Grandfather or *abuelo*.

20 Q Okay. And did he indicate that he cared for them?

21 A Yes.

22 Q I want to ask you about -- did you bring up the topic about whether or

23 not the kids would ever come over to his house?

24 A I did.

25 Q Tell me about what he says initially.

1 A First he said no. Then he talked about them -- they would come over if
2 they -- if they're mother sent them over for a tomato or something.

3 Q And let me -- I know -- let me at least -- would it help refresh your
4 recollection to see page 12? I know you said no at least initially, but I want to -- I'm
5 referring to page 12.

6 A Yeah. That -- yes.

7 Q All right.

8 MR. HAMNER: Record reflect I was referring to page 12.

9 Q Take a look at the top of the page. I want you to --

10 A Oh, I'm sorry. Yes.

11 Q Okay.

12 A Yes, the come over.

13 Q All right. So when you first ask him, Did they ever come over to your
14 house, how does he answer?

15 A Yes, they come.

16 Q Okay. And then what happens?

17 A Then he started -- he said they never come over by themselves. And
18 then he said and then he said they would come when their -- she sent them. And I
19 asked him to clarify who she was.

20 Q Okay. Do you ever cover the topic of just simply offering the kids in the
21 neighborhood candy?

22 A Yes. Several times.

23 Q What does he say about just that --

24 A Said --

25 Q -- offering kids just candy?

1 A He said no.

2 Q With respect to boys and girls he said just no?

3 A Yeah.

4 Q Okay. What is -- what else does he say?

5 A He said that -- reference the candy?

6 Q Yeah. In reference to the candy.

7 A He was adamant. He said that the kids would come over, but just to

8 get something else. He wouldn't offer candy.

9 Q So let me ask you this. Did you follow up when he says, No, I've never

10 given any of the boys or girls candy in the neighborhood; do you say, Well, why

11 would the girls say that?

12 A Yes.

13 Q Say that? Did you say that to him?

14 A I did. And then --

15 Q What is his response?

16 MR. WESTBROOK: Objection. This is all leading, Your Honor. He

17 can ask what was said and then he can answer and he can direct him to pages.

18 That's how it works in direct.

19 THE COURT: All right. Well, you need to follow --

20 BY MR. HAMNER:

21 Q How did you --

22 THE COURT: -- more proper protocol. So.

23 MR. HAMNER: Okay.

24 BY MR. HAMNER:

25 Q What's your follow-up question?

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1 A Then why are all the kids saying that they -- you come over -- or you're
2 offering them candy; why do they call you the candy man?

3 Q Well, can I -- now, I want to just -- I want to refresh your recollection to
4 page 15, Detective.

5 MR. WESTBROOK: And, objection, Your Honor.

6 MR. HAMNER: Well --

7 MR. WESTBROOK: Move to strike that last statement.

8 MR. HAMNER: I have no objection to that.

9 THE COURT: So sustained. You're going to -- so you're going to look
10 at the statement and then he's going to ask you if it refreshes your recollection. All
11 right. Don't read from the statement.

12 THE WITNESS: Okay.

13 THE COURT: Just look at it and then -- and then listen to the
14 questions.

15 THE WITNESS: Yes, sir.

16 THE COURT: All right?

17 MR. HAMNER: And Your Honor, I'm sorry. Could you direct that it was
18 stricken to the jury?

19 THE COURT: Yes.

20 MR. HAMNER: Thank you.

21 THE COURT: Yeah. The last statement is -- is stricken.

22 BY MR. HAMNER:

23 Q I want you --

24 THE COURT: His last --

25 BY MR. HAMNER:

1 Q -- in relation --

2 THE COURT: -- answer is stricken.

3 BY MR. HAMNER:

4 Q In -- in relation to the question of what is your next question, I want you
5 to look at here and this particular answer. Okay. Tell me when your memory's
6 refreshed.

7 A Okay.

8 Q Read these four lines and tell me -- at the top of 15, tell me when you're
9 memory's refreshed --

10 A Okay.

11 Q -- in relation to the question, what is your next question?

12 A Okay.

13 Q What exactly did you say?

14 A Why do they call you that?

15 Q Who's they?

16 A The girls.

17 Q Okay. So it wasn't everybody, it's the girls?

18 A The girls, yes.

19 Q Okay. And what is his answer to that question?

20 A I don't know.

21 THE COURT: Is it a good time for a break? Or --

22 MR. HAMNER: Sure.

23 THE COURT: I -- I think we probably need to give the jury a break.

24 MR. HAMNER: That's fine.

25 THE COURT: All right. Great. Let's do 15 minutes. And when we

1 come back, I plan to go to 12:30; does that work for everybody?

2 MR. HAMNER: That's fine for the State.

3 THE COURT: All right. Mr. Westbrook, when we come back from the
4 break we'll go to about 12:30 or so.

5 MR. WESTBROOK: That sounds good, Your Honor. I do need to
6 discuss a quick scheduling thing.

7 THE COURT: That's fine. Not a problem. All right.

8 Ladies and gentleman of the jury, I'm -- I'm going to excuse you
9 for a 15-minute recess. During this recess, you're not to talk about the case with
10 anybody; you're not to form any opinions; you're not to do any independent
11 research or evaluation; and the -- the prior admonishments I gave you apply; do not
12 talk to any of the witnesses, the attorneys or any of the parties. All right.

13 See you back here in 15 minutes. All right. So it will be 11:27.

14 [Jury recessed at 11:10 a.m.]

15 THE COURT: We're outside the presence of the jury.

16 Detective, you are excused. You may step down. While you're
17 on break, please do not discuss your testimony with any of the parties.

18 THE WITNESS: Yes, sir.

19 THE COURT: All right. And watch your step.

20 THE WITNESS: Okay. Thanks.

21 THE COURT: Thank you.

22 What --

23 MR. WESTBROOK: Scheduling, Your Honor.

24 THE COURT: Yeah. What's the -- what -- what do we need to
25 discuss?

1 MR. WESTBROOK: I scheduled my expert. And yeah, I moved him up
2 to today.

3 THE COURT: Okay. Good.

4 MR. WESTBROOK: Because of the pace of the case. And then I
5 scheduled him for 10:00.

6 THE COURT: Oh.

7 MR. WESTBROOK: He's been here.

8 THE COURT: Oh, shoot.

9 MR. WESTBROOK: I talked to him. I -- I told him hopefully 11:00.
10 Obviously, Detective Campbell's going to take a lot longer than that. I suspect
11 Detective Campbell will go lunch. Unfortunately, my guy can't testify after 1:30.

12 So my options today are doing out of order again, which I really
13 don't want to do. Or going down and seeing if he can come back Monday. But
14 what's the -- I just wanted to let you know about that.

15 THE COURT: Well, I appreciate. What -- what does the State think we
16 should do?

17 MR. HAMNER: I don't have a problem if they want to call him out of -- I
18 mean, I really don't care. It's fine by me.

19 MS. KIERNY: I could call him in between Campbell.

20 MS. KOLLINS: Are you going to get through him by 1:30, though?

21 MR. WESTBROOK? Yes. That's the problem. Campbell is the last
22 witness for the State, right?

23 THE COURT: Well, we could ask -- I mean, do you want me to ask the
24 jurors if they don't mind taking a really late lunch so we can -- and I'll have to ask
25 my staff, too --

1 MR. WESTBROOK: If we can get --
2 THE COURT: -- so you can get through them.
3 MR. WESTBROOK: -- through, but it's -- it's a hard deadline for him
4 at 1:30. He's got a...
5 THE COURT: Okay.
6 MS. KOLLINS: Does he have a class or --
7 THE COURT: Well, you guys work it out and tell me what you want to
8 do.
9 MR. WESTBROOK: I'll go -- I'll go check with him about Monday --
10 THE COURT: Okay.
11 MR. WESTBROOK: -- and I'll be [indiscernible].
12 THE COURT: I'm flexible. Let's just stay on the record momentarily, I
13 guess, till he comes back.
14 We're going to -- we're just waiting a few minutes to see.
15 Thanks, marshal.
16 [Pause in proceedings.]
17 THE COURT: All right. This is *State vs. Azucena*, C-321044. All right.
18 What did you guys decide about scheduling? What do you want
19 to do?
20 MR. WESTBROOK: Professor, who I'm now calling Saint Kagan, has
21 agreed to cancel his afternoon appointment.
22 THE COURT: Wow.
23 MR. WESTBROOK: So he will be able to come back after lunch. We'll
24 be able to finish our case today. The birds will chirp --
25 THE COURT: You're amazing.

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1 MR. WESTBROOK: -- and the angels will sing.
2 THE COURT: We're going to -- we're going to change the -- we're
3 going to give you a gold star out there now.
4 MR. WESTBROOK: Excellent. Please replace the --
5 MS. KIERNY: What was --
6 MR. WESTBROOK: Well, it was the --
7 MS. KIERNY: -- the battle horns before?
8 MR. WESTBROOK: I think it was poop emoji before.
9 THE COURT: Oh, no, no, no.
10 MR. WESTBROOK: So an upgrade.
11 THE COURT: It was nothing bad. We're just going to give you a gold
12 star.
13 MS. KOLLINS: I was looking at my phone, man.
14 THE COURT: Let's bring the jury in. Where's my marshal?
15 MS. KIERNY: He went to get them. Oh, jinx.
16 THE COURT: We're all set, marshal.
17 [Pause in proceedings.]
18 [Jury reconvened at 11:30 a.m.]
19 THE COURT: All right. You guys all set?
20 MS. KOLLINS: Yes, sir.
21 THE COURT: All right. I think we're going to go until about 12:30. All
22 right. We'll try -- we'll see. All right.
23 Detective, you're still under oath, still required to testify truthfully;
24 you understand, sir?
25 THE WITNESS: Yes, sir.

1 THE COURT: All right. You may have a seat. All right.

2 State may proceed.

3 MR. HAMNER: Thank you very much.

4 **DIRECT EXAMINATION (CONT.)**

5 BY MR. HAMNER:

6 Q And so, Detective, we -- we talked about kind of the name thing, the
7 candy thing, inviting into the house and him saying those things, he didn't say those
8 things, right; something along those lines?

9 A Yes.

10 Q Okay. Then -- does your interview then turn to kind of the allegations
11 that the girls are saying that he had -- he had touched them?

12 A Yes.

13 Q Okay. What does he say in response to you bringing up that topic?

14 A That he did not touch them. He asked -- yes.

15 Q All right. Does he indicate that he has a relationship with any of these
16 girls?

17 A No, he did not.

18 Q Okay. So he denies having any sort of relationship with them?

19 A Yes. Correct.

20 Q Okay. At this point -- let me ask you this.

21 Are you familiar with using a ruse in an interview technique?

22 A Yes.

23 Q Okay. Tell this jury what -- what do you -- what do I mean or what that
24 term ruse means for interviewing suspects.

25 A Sometimes we'll use what's called a ruse to try to elicit a confession

1 from a suspect.

2 Q And what is a ruse?

3 A It's not always the truth.

4 Q Okay. Or it can be completely not the truth, right?

5 A Yep.

6 Q Okay. So you had brought up the topic, hey, did you touch any of these
7 kids, he's telling you no. Do you move to a ruse technique at that point?

8 A I did.

9 Q Okay. What was the ruse that you used?

10 A I asked him if he knew what his DNA was. And then I went forward to
11 explain to him that every person has specific DNA. No two people have the same
12 DNA. And then I kind of went through a [indiscernible] of elimination.

13 Q Did -- did you indicate -- did you talk about the possible location of your
14 team finding an Hispanic male's DNA?

15 A I did.

16 Q And where did you tell the defendant that DNA was found?

17 A On the girls' clothing.

18 Q Okay. Was that true?

19 A No.

20 Q Did you actually -- I know you talked before about delayed disclosure;
21 Did you even process the area?

22 A No. We did not.

23 Q Okay. And -- and why are you doing this? Again, explain to the jury,
24 why are you telling him this story?

25 A Because I'm trying to see if he will confess to what he's did.

1 Q And -- and does he admit --
2 MS. KIERNY: I'm going to object as to characterization of what he did.
3 THE COURT: Yes. Sustained. What he's alleged to have done.
4 MR. HAMNER: Okay.
5 THE WITNESS: I'm sorry.
6 MR. HAMNER: Alleged to have done.
7 THE WITNESS: I'm sorry. Alleged -- what he's alleged to have done.
8 MR. HAMNER: All right.
9 THE COURT: Thank you, sir.

10 BY MR. HAMNER:

11 Q And -- and when you -- and it's -- and it's pretty lengthy, right? You go
12 on for a little bit in the interview about it.

13 A Yes.

14 Q Okay. Ultimately, does he ever admit, even when you bring up the
15 possibility of having Hispanic male's DNA on one of these girls, does he say to
16 you -- does he confess in any way?

17 A No.

18 Q Okay. And at that point is your -- and you concluded your interview at
19 that point?

20 A Yes.

21 Q Your interview's done?

22 A Yep.

23 Q Okay. Let me just go back, all the way back.

24 Remember when we talked about you reading his Miranda
25 rights?

1 A Yes.

2 Q And we -- I asked you did he say he understood those rights?

3 A Yes.

4 Q One thing I didn't ask you is did he agree to speak to you?

5 A I didn't ask him if he would speak to me.

6 Q Okay. Did he just start speaking to you?

7 A Yes.

8 Q Okay. Did he say at the beginning of the interview that he did not want

9 to speak to you?

10 A No.

11 Q Okay.

12 MR. HAMNER: I have no further questions at this time.

13 THE COURT: All right. Cross-examination.

14 MR. WESTBROOK: All right.

15 **CROSS-EXAMINATION**

16 BY MR. WESTBROOK:

17 Q Good still barely morning --

18 A Morning, sir.

19 Q -- Detective Campbell. Okay. Police isn't glamour and car chases like

20 on TV, is it?

21 A Not always.

22 Q And not most days, if you're lucky?

23 A Correct.

24 Q All right. A lot of it is about paperwork, right?

25 A Yes.

1 Q You write a lot of reports.
2 A Yes, I do.
3 Q You're actually trained to write reports?
4 A Yes.
5 Q Okay. You're trained that your reports need to be accurate, right?
6 A Yes.
7 Q And your reports need to be detailed, right?
8 A Yes.
9 Q It's important to have accurate and detailed reports, because some day
10 you might have to go to court, right?
11 A Correct.
12 Q You want to make sure that you have the right information, right?
13 A Correct.
14 Q You want to make sure that you get the right people for committing --
15 the right suspects, correct?
16 A Correct.
17 Q You want to make sure that if someone didn't do something, you don't
18 put an innocent person in jail, right?
19 A Yes, sir.
20 Q So accurate, detailed reports are extremely important to police work,
21 right?
22 A Yes.
23 Q Maybe even more important than fast cars and sirens?
24 A Probably so.
25 Q Well, maybe it's a tie. All right. I'm going to approach you with some

1 reports and just ask you a few questions about them.

2 MR. WESTBROOK: This is not on. Is it -- could we have this off,
3 please? Thanks.

4 THE COURT: Yeah.

5 MR. WESTBROOK: I just wanted it for the space to sit it down.

6 THE COURT: Of course.

7 MR. WESTBROOK: I don't want to show him anything.

8 There we go. Thank you.

9 THE COURT: It should be off.

10 MR. WESTBROOK: Great. I would push a button here, but there's so
11 many buttons, it's --

12 THE COURT: I know.

13 MR. WESTBROOK: -- it's a very -- oh, there's actually a note that says,
14 Do not turn off. There you go. That's why I couldn't find the off button. It's
15 ingenious.

16 BY MR. WESTBROOK:

17 Q All right. Did you bring your reports with you today?

18 A Yeah. They're in the back.

19 Q Okay. They're on the back?

20 A Yeah.

21 Q I'm going to bring you a stack of reports and just ask you a few
22 questions about them. Could you just review those quickly and let me know if that
23 is all your reports.

24 MR. HAMNER: Is there -- is there a question pending at this point for
25 the --

1 THE COURT: He said review what he has and let us know if that is all
2 of his reports. The question is --

3 MR. HAMNER: Okay.

4 THE COURT: -- are these all of your reports?

5 MR. HAMNER: Okay. All right. Thank you, Your Honor. Can I at least
6 come --

7 THE COURT: So he's not looking at the substance, he's only looking at
8 the existence.

9 MR. HAMNER: Could I actually come up and actually see what --

10 THE COURT: Yeah, sure.

11 MR. HAMNER: -- reports are being handed over?

12 THE COURT: Sure, yeah.

13 THE WITNESS: Should I start back?

14 MR. WESTBROOK: I'm sorry?

15 THE WITNESS: Do I need to start back at the beginning?

16 MR. WESTBROOK: Sure.

17 THE WITNESS: Okay.

18 THE COURT: If you don't mind.

19 THE WITNESS: Sure. No problem.

20 THE COURT: So the question is are these all of the reports that you've
21 prepared in connection with this case, right?

22 MR. WESTBROOK: Yeah.

23 THE COURT: Okay.

24 MR. WESTBROOK: Prepared or sent to the lead detective that you've
25 collected in -- in addition -- or in connection with this case.

1 THE COURT: And so I don't want my jury to be confused. When you
2 use the term report, does that mean something different than just all of his
3 documents? Is that a subset of documents for -- I just don't want my jury to -- to --

4 THE WITNESS: Sure.

5 MR. WESTBROOK: Sure.

6 THE COURT: -- not understand what you're asking.

7 MR. WESTBROOK: I'll actually ask the -- the witness to explain --

8 THE COURT: Okay. Very good.

9 MR. WESTBROOK: -- what a report is. I think that's a good idea.

10 THE COURT: Thank you. I appreciate that.

11 MR. HAMNER: Sorry, counsel.

12 MR. WESTBROOK: That's all right.

13 BY MR. WESTBROOK:

14 Q Okay. Is that all the reports you've generated in this case? And by
15 that, I mean declarations of arrests, arrest reports, you know, investigatory reports;
16 are those all the reports you generated in this case?

17 A You're missing the Rangel --

18 Q The Rangel report. That's right. I do have that, as well.

19 MR. WESTBROOK: Actually, if the State has the Rangel report handy,
20 we can use that, too.

21 MR. HAMNER: Yeah.

22 MR. WESTBROOK: But I think I've got it here.

23 MR. HAMNER: Yeah. Can we just briefly approach on a quick matter
24 before we go any further?

25 THE COURT: I suppose.

1 MR. WESTBROOK: Thanks so much.

2 THE COURT: Of course.

3 [Bench conference transcribed as follows:]

4 THE COURT: What's up?

5 MR. HAMNER: The only concern that we have is I don't know exactly
6 where the questioning is going. But there could be a danger, if we start pressing,
7 about if these are all the reports per se. You might start delving into a detective
8 saying -- mentioning other type -- the -- the other kids that potentially come forward.
9 And that's --

10 MR. WESTBROOK: We could certainly --

11 THE COURT: Yeah. Be careful --

12 MR. WESTBROOK: -- well, I'm not --

13 THE COURT: -- you don't --

14 MR. WESTBROOK: I'm not going to do that. But we could certainly
15 advise him never to say those two names. He should already have been advised of
16 that.

17 MR. HAMNER: No, I -- I know. Well -- -

18 MS. KOLLINS: Well --

19 MR. HAMNER: -- yes. But --

20 MS. KOLLINS: -- but -- but --

21 MR. HAMNER: -- your questions are --

22 MS. KOLLINS: -- throwing a stack of documents at him and just, you
23 know, this would be a horrible --

24 THE COURT: Do we need to take a break and caution him again?

25 Or --

1 MS. KOLLINS: Yes. That would --
2 MR. HAMNER: I would --
3 THE COURT: -- do you want to take a --
4 MR. HAMNER: I would --
5 THE COURT: [Indiscernible], can we -- can we just pull him outside?
6 MR. WESTBROOK: We can just take him outside.
7 THE COURT: And caution him not to get into --
8 MR. WESTBROOK: Yeah.
9 THE COURT: -- bad acts.
10 MR. WESTBROOK: We can go together, yeah.
11 THE COURT: You guys can go together, is that --
12 MR. WESTBROOK: Yeah. We'll just --
13 MS. KOLLINS: Yes.
14 MR. WESTBROOK: -- go out in the hallway for a second.
15 THE COURT: Okay. All right. Great.
16 [End bench conference.]
17 THE COURT: Detective --
18 THE WITNESS: Yes.
19 THE COURT: -- I am going to excuse you very temporarily, just to
20 step -- we're not going anywhere. Just you step outside with an attorney from each
21 side. They just need to tell you something.
22 THE WITNESS: Okay.
23 THE COURT: All right. Outside the presence of the jury, and then you
24 come right back.
25 THE WITNESS: Yes, sir.

1 THE COURT: It should just take a moment.

2 THE WITNESS: Uh-huh.

3 THE COURT: Thank you, sir. All right.

4 [Pause in proceedings.]

5 THE COURT: All right. You're back on the stand. Please take your
6 seat and you're still under oath.

7 THE WITNESS: Okay. Yes, sir.

8 THE COURT: All right. You may proceed, Mr. Westbrook.

9 MR. WESTBROOK: Thank you, Your Honor.

10 THE COURT: Yes, sir.

11 MR. WESTBROOK: And the state's going to grab that Rangel report,
12 just to make sure we have a complete list of your reports in this case.

13 THE COURT: Was --

14 MR. WESTBROOK: They're just grabbing the Rangel report for me.
15 My Rangel report is missing the cover page. I wanted to make sure he had all the
16 pages. It's my fault. I'm sorry about that.

17 MR. HAMNER: Here, David. You can have this one.

18 MR. WESTBROOK: Thank you.

19 MR. HAMNER: Yep.

20 BY MR. WESTBROOK:

21 Q Okay. So is this the Rangel report that you were talking about?

22 A Oh, that's the arrest report. There's also --

23 Q Oh, yeah, the --

24 A -- our report --

25 Q -- declaration page is missing.

1 A -- for --

2 Q Okay.

3 A That one.

4 Q All right.

5 A We don't have that. It's a different event number.

6 Q Okay. So with this arrest report and with the declaration page, does
7 that complete your reports?

8 A Minus a property report when we, like, impound CDs, translation or --

9 Q Okay.

10 A -- but those come and go. So -- and then there's also the request for
11 prosecution and the witness list.

12 Q Okay.

13 A That -- that's mandated for our reports.

14 Q Okay. That's also mandated for your reports?

15 A Yes.

16 Q Okay. So it's what's in front of you, a witness list, a property report --
17 and when you impounding CDs, you're talking about, say, CDs of witness
18 interviews?

19 A Yes.

20 Q Okay. In fact, in this case, the CDs of all seven witness interviews were
21 impounded, correct?

22 A Everybody's -- everybody's interviews. Yes, sir.

23 Q Okay. And so there would be a property report that just says on
24 such-and-such day, we took a recording of such-and-such interview, and it was
25 impounded in an evidence locker; something like that?

1 A Something like that.

2 Q Okay. So, essentially, those are your substantive reports?

3 A Yeah. Minus your photo lineup.

4 Q Minus my -- my highlighter?

5 A The photo lineup, I mean.

6 Q Okay.

7 A The extensive photo lineups.

8 Q Correct. Correct. And we have the photo lineups over there and we've

9 seen those.

10 A Oh, okay. Oh, I'm sorry. Yes.

11 Q Okay. I just want to make sure that we know that when I'm asking you

12 about reports, this is the universe I'm asking you about.

13 A Yes.

14 Q I know it's a lot to go through, but I want to make sure that we're both

15 talking the same language. Okay.

16 So when you take reports, the typed filed reports are essentially

17 a final draft that gets filed with the department, correct?

18 A Yes.

19 Q Okay. But first, before you actually file the reports, though, you take

20 handwritten notes, right?

21 A Yes.

22 Q Okay. Do you take them, like, in a notebook with a pen?

23 A Yes.

24 Q Okay.

25 MR. WESTBROOK: May I approach?

1 THE COURT: Yes.

2 MR. WESTBROOK: I didn't wait for an answer --

3 THE COURT: No, no, no.

4 MR. WESTBROOK: -- I just went walking up.

5 THE COURT: That's okay.

6 MR. WESTBROOK: I apologize.

7 BY MR. WESTBROOK:

8 Q Are these your handwritten notes in this case?

9 A Yes.

10 Q Okay. Can you look through them to just tell me if you -- if they're -- if
11 they're all there? They should be.

12 MR. HAMNER: And, Your Honor, can I just approach just to see what
13 they're referencing?

14 THE COURT: Yes.

15 MR. HAMNER: Thanks so much.

16 Go ahead, sir.

17 BY MR. WESTBROOK:

18 Q The bottom thing appears to be a receipt for gas mileage
19 reimbursement and is not part of the handwritten notes, right?

20 A You're correct. I didn't recognize that one.

21 Q They don't reimburse much money for gas, do they?

22 A No.

23 Q They should -- they should up that a little bit. Okay.

24 Do you also have something called folder notes?

25 A Yes, I do.

1 Q Okay. I'm going to approach with these, but not leave them with you. If
2 you could take a look at this and --

3 MR. WESTBROOK: This is the same, this is a court exhibit.

4 Q Are these your folder notes from the case?

5 A Yes.

6 Q Okay. And these folder notes --

7 A Thank you.

8 Q -- they're obviously not handwritten; they're kept on a computer, right?

9 A Yes, sir.

10 Q In fact, is the file that you keep these in or the program you keep these
11 in different from the official computer file where you file your official reports?

12 A Yes.

13 Q Okay. Can anyone access this folder note file besides you?

14 A The DA's office has access to it. My lieutenant, and, obviously, my
15 sergeant. My chain of command does, also.

16 Q Okay. So the District Attorney's Office and --

17 MR. HAMNER: I don't remember that --

18 BY MR. WESTBROOK:

19 Q -- your chain of command --

20 MR. HAMNER: We --

21 BY Mw

22 Q -- your sergeant, they can also access the computer file these folder
23 notes are kept?

24 A Correct.

25 Q Okay.

1 MR. HAMNER: Can we approach?

2 THE COURT: I suppose.

3 [Bench conference transcribed as follows:]

4 THE COURT: What's up?

5 MR. HAMNER: At this point, my objection is going to be relevance as
6 to this line of questioning, at this point. The witness hasn't said anything, so I'm a
7 little confused as to what the relevance is.

8 MR. WESTBROOK: And I set up some foundation. We're going to go
9 now.

10 MS. KOLLINS: Well, and --

11 THE COURT: I'm not sure we're going. He's just trying to find what
12 his --

13 MS. KOLLINS: I don't have the access to that --

14 THE COURT: -- the documents are in the case and why he's ----

15 MR. HAMNER: And I don't have access to it.

16 THE COURT: -- that's where you're going, right?

17 MR. WESTBROOK: I'm not going to talk about if he has access to it
18 during this cross-examination. We might talk about it later.

19 MS. KOLLINS: You -- you just did, though.

20 MR. HAMNER: Well, we don't have access to it.

21 MS. KOLLINS: I don't have access to that.

22 THE COURT: Or you -- yeah. You can cover that on -- on cross, if it's
23 an important issue.

24 MR. WESTBROOK: I asked him the question assuming that he would
25 say they DAs don't have access to it. That's what we were told before.

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1 THE COURT: Yeah.

2 MR. WESTBROOK: But he said they do. So I don't know. They can
3 cross him on that. It's not relevant to the claim.

4 THE COURT: So where are you going that he says objection,
5 relevance, is what he's saying.

6 MR. WESTBROOK: The relevance is that he keeps notes and keeps
7 reports.

8 THE COURT: Yeah. I think that's relevant.

9 MR. WESTBROOK: And they have to be complete and accurate.

10 THE COURT: Yeah.

11 MR. WESTBROOK: It's relevant.

12 THE COURT: I was going to -- just, you know, right.

13 [End bench conference.]

14 THE COURT: All right.

15 MR. WESTBROOK: I'm sorry, Your Honor. State's objection is
16 overruled?

17 THE COURT: It's overruled. You may continue.

18 MR. WESTBROOK: Thank you.

19 BY MR. WESTBROOK:

20 Q Okay. So you've got the reports, they're official, they're filed. You've
21 got the notes. You keep these, but they're not official. They're not officially filed
22 with the department. And you've got the folder notes there in a computer, they're
23 not officially filed, but they're accessible; is that fair to say?

24 A Correct.

25 Q All right. Now, I think you already said that the purpose of creating

1 these notes is to help you create your report, right?

2 A The handwritten notes?

3 Q The handwritten notes, yes.

4 A Yes.

5 Q Okay. You don't want to forget things, you want to make sure that
6 you've got everything that you think is pertinent in the reports, right?

7 A Correct.

8 Q Okay. You also use these handwritten notes to remind you to follow up
9 with evidence; is that right?

10 A Correct.

11 Q Okay. If you're interviewing a witness in your investigation and you
12 hear something that you think is credible, you want to follow up with it, right?

13 A Correct.

14 Q If you hear something you don't think is credible, you probably don't
15 follow up with it, right?

16 A Correct.

17 Q All right. You decide what makes it from the notes into the reports,
18 right?

19 A Yes.

20 Q Okay.

21 A To my -- to my folder notes?

22 Q From your -- well, both your folder notes, and I think more directly right
23 now, your handwritten notes. I want to focus on those right now.

24 A Oh, yeah. My handwritten notes is what I -- the notes I take from there
25 is what I put to the report.

1 Q Right. And you're the lead detective in this case, right?

2 A Yes, sir.

3 Q Being the lead detective in this case means that you've got to not only

4 worry about your own reports, but you have to worry about everyone else's

5 reporting to you, right?

6 A Correct.

7 Q Okay. For example, in this case, an arrest was made in Henderson of

8 my client, right?

9 A Yes.

10 Q Okay. You didn't personally make the arrest; two other officers working

11 in Henderson did, correct?

12 A They detained him. They didn't arrest him.

13 Q They detained -- they detained him?

14 A Yes.

15 Q Okay. But you weren't there for that, correct?

16 A No.

17 Q You were directing them what to do?

18 A They found him.

19 Q Yes.

20 A And then they contacted our agency --

21 Q And talked to you?

22 A -- eventually. They didn't, my lieutenant did.

23 Q Your lieutenant did? Okay.

24 A Yes.

25 Q So the instructions came from your office?

1 A Yes.

2 Q Okay. So when you were deciding what information -- I'm sorry. Let
3 me back up a second.

4 When we ask the police department for discovery of your
5 reports, we get that stuff, right? We get your final reports, the ones that are filed
6 with the department, right?

7 A Would you say that one more time?

8 Q If we request your reports, we get the reports that are filed with the
9 department, right? Those are the official reports.

10 A Yes.

11 Q Okay. We don't get your handwritten notes usually, do we?

12 A No.

13 Q Okay. These have to be requested specially and they have to be
14 turned over specially, right?

15 A Yeah. If they're asked, we'll give them to them.

16 Q So the handwritten notes are not part of the official file?

17 A Correct.

18 Q All right. So the only way we would know what's in the handwritten
19 notes would be to go through the process of making special requests and having
20 those requests honored; is that right?

21 A Probably so.

22 Q Okay. In this case, certainly so, correct?

23 A Uh-huh.

24 Q I mean, when you initially did your record turnover in this case, you
25 didn't turn these over, did you?

1 A Did I put that with -- in my --

2 MR. HAMNER: Object.

3 THE WITNESS: -- arrest packet?

4 BY MR. WESTBROOK:

5 Q Yeah. In your original arrest packet that you turned over in this case to
6 the District Attorney's Office and to our office, these notes weren't in it, were they?

7 A No. We never do.

8 Q Okay. You never do?

9 A No.

10 Q Okay. In deciding what made it from these notes into your official
11 report used as the basis for the charges in this case, there were some things that
12 transferred and some things that didn't. I'd like to direct you to the first page of your
13 notes. I've copied them there. These are notes it looks like that are related
14 Maradel Moreno, right?

15 A Yes.

16 Q Okay.

17 A May I get my glasses?

18 Q Absolutely, yeah.

19 A I'm getting old.

20 Q I have glasses. I'm just too proud to wear them.

21 A Yes.

22 Q Okay. According to your notes, Mirabel said, If you tell anyone about
23 the -- I'm sorry. Maradel said that Don David said, If you tell anyone about things,
24 something's going to happen to your mom, right?

25 A Where are you at?

1 Q Right in the middle of the page.

2 A Oh, yes.

3 Q Okay. And then underneath that -- and so it says anyone -- if you tell
4 anyone about these things, something's going to happen to your mom. And then
5 there's an exclamation point, right?

6 A Uh-huh.

7 Q Okay. Right underneath it, it says, Who's Elexi, where does she live,
8 right?

9 A Uh-huh.

10 Q Okay. And you have it down as Elexi; You know that now to be Litzi,
11 right?

12 A Yes.

13 Q Okay. These are things that you wrote down in your notes.

14 In your reports that were turned over, the ones that are in front of
15 you now --

16 A Yes.

17 Q -- do you mention Litzi?

18 A I don't believe so, because we hadn't identified her yet.

19 Q You had a name, though, right?

20 A I had Elexi.

21 Q Okay. But nothing in those reports about Litzi?

22 A No. In the arrest report?

23 Q Nothing in there about that, right?

24 A No.

25 Q Okay.

1 A No.

2 Q And you didn't file an additional report later talking about Litzi, did you?

3 MR. HAMNER: I'm going to object at this point. Can we approach? I

4 think it requires a little more --

5 THE COURT: I know -- I want to keep -- keep the flow going here.

6 MR. WESTBROOK: Right.

7 THE COURT: I think this -- these are relevant questions relating to the

8 scope of the investigation. The public deserves to know what happened and what's

9 going on.

10 MR. HAMNER: That's fine, but I'm going to object on the grounds it

11 misstates what was provided to the defense initially.

12 THE COURT: All right.

13 MR. HAMNER: Because these --

14 THE COURT: You can cover that on cross, then.

15 MR. WESTBROOK: Cover it on cross.

16 THE COURT: I mean, this isn't the time to provide testimony. We'll let

17 the witness testify and then you can -- get to deal with it on cross.

18 MR. WESTBROOK: Right.

19 BY MR. WESTBROOK:

20 Q And to be clear --

21 THE COURT: So let's keep going.

22 BY MR. WESTBROOK:

23 Q -- you said these are never provided, right?

24 A I don't.

25 Q Okay. Well --

1 A The -- my handwritten notes?

2 Q Yeah. You never provide those?

3 A Not in my arrest packet.

4 Q Okay.

5 A I -- I don't put them in an arrest packet, because they're not supposed
6 to be in an arrest packet.

7 Q Right. I understand. And Metro policy, Metro never provides these as
8 a matter of course, right?

9 A I don't know if Metro -- but I know I don't.

10 Q You don't? Okay. The reason I said Metro policy is because you said
11 we're not supposed to. And when someone says to me we're not supposed to, that
12 indicates to me that there are some rules, right?

13 A When we submit an arrest packet --

14 Q Yeah.

15 A -- we get what they're requesting from the DA's office.

16 Q Okay. And these notes are not part of it?

17 A Correct.

18 Q That makes sense. All right.

19 Did you file an additional report talking about Litzi?

20 A No.

21 Q The answer's no?

22 A No.

23 Q Okay.

24 A I'm sorry.

25 Q Next page of your notes, four lines down, it says: How many times?

1 And then you wrote: Inconsistent with times of occurrence.

2 Right?

3 A Yes.

4 Q Okay. You have a very detailed section in your report about Maradel in
5 front of you; where in that report do you indicate that you -- you noticed that the
6 evidence is that she was inconsistent?

7 A Some of the things early on in her statement that I needed to get
8 clarified.

9 Q Okay. But in your official report, do you put down that she's
10 inconsistent?

11 A No, because it was clarified.

12 Q Okay.

13 A By Elizabeth --

14 Q So --

15 A -- in the interview.

16 Q -- you don't put down the initial inconsistencies, you don't mention those
17 in your report?

18 A No.

19 Q All right. You also wrote down -- and this two-thirds of the way towards
20 the bottom, but it's separated -- that Maradel said -- asked -- is S a suspect?

21 A Where are you -- where at?

22 Q Right in the middle the page. And I can actually --

23 MR. WESTBROOK: If I can approach?

24 Q It's on page 2. This part right here.

25 A Oh, at Yezline's party? Oh, up there.

1 Q Yeah.

2 A Wickam [phonetic]?

3 Q Right here. Right here, yeah.

4 A Uh-huh.

5 Q It says:

6 Maradel said S would get scolded?

7 A Yeah.

8 Q Who's S?

9 A Suspect. It's just my abbreviation.

10 Q Okay. And then there's a who with a question mark, right?

11 A Uh-huh.

12 Q Did you ever follow up -- is there anything in your reports about
13 someone getting scolded?

14 A No.

15 Q Okay. Now, down at the bottom of the page, you say that Maradel
16 changes statement saying this happened at, and then there's something -- oh, at
17 suspect's house. But then she changed it to Lexi's house, meaning Litzi's house,
18 right? That's in there.

19 A Yes.

20 Q Okay. But you don't mention anywhere in your official reports that
21 these -- the -- the witness changed her story and that she said it happened in Litzi's
22 house, do you?

23 A No.

24 Q You don't mention Litzi's house at all, do you?

25 A No.

1 Q That's something you chose to leave out of your official report, but it
2 was in your written notes?

3 A Not everything that I put in my written notes -- I cannot translate into the
4 official document. That's why we have the transcripts --

5 Q Okay.

6 A -- given.

7 Q Sure. But you are the one who chooses what goes into your official
8 reports, right?

9 A Before it's submitted to the District Attorney's Office, it's approved by
10 my supervisor.

11 Q Yes. But you're the one who chooses, you've already said this, what
12 goes from your written report into the final report, right?

13 A Sure.

14 Q You chose not to mention Litzi, you chose not to mention that the
15 witness changed their story?

16 A Yes.

17 Q Page 3, it says -- there's two statements. This is about two-thirds the
18 way to the bottom. Okay. It says:

19 Suspect tells Maradel --

20 MR. WESTBROOK: Court's indulgence.

21 Q Sorry. This is about -- page 3 is about Mirabel, isn't it? Mirabel with an
22 B?

23 A Mirabel, yes.

24 Q All right.

25 A Uh-huh.

1 Q Suspect tells Mirabel if they tell their mom, he's going to take them far
2 away, right?

3 A Yes.

4 Q Okay. Later on, you write:

5 Suspect tells Mirabel he will kill them -- or kill their moms if they
6 tell anyone.

7 Right?

8 A Yeah. That's what she said.

9 Q Okay. On the next page, page 4, there's a big star right at the top,
10 right?

11 A Uh-huh.

12 Q And it says:

13 When is the last time you saw his thing?

14 Correct?

15 A Uh-huh.

16 Q Okay. You put a big star by it, because that's important information,
17 right?

18 A I wanted to speak to Elizabeth about that, yeah.

19 Q Okay. Because knowing when something happened or supposed to
20 have happened is important to the case, right?

21 A Yes.

22 Q Okay. Now, according to your notes, Mirabel said she saw Yezline get
23 tape put over her mouth and pulled into the house on, according to your notes,
24 Friday, October 28th, 2016, right?

25 If you're having a hard time finding it, I can approach.

1 A No. I'm looking.

2 Q Okay.

3 A I'm reading it. Yeah. That's what she said.

4 Q Okay. Anywhere on you reports where you mention the date Friday,
5 October 28th, 2016?

6 A No, because I couldn't verify it.

7 Q Now, Friday, October 28th, 2016, is only five days before you took
8 these notes, right?

9 A Yes.

10 Q Okay. I mean, based on this, did you go search the apartment?

11 A I did not.

12 Q Okay. You didn't bring a CSA to go look at the apartment or have a
13 CSA go look at the apartment?

14 A I had her take photos.

15 Q You had her take photos of the apartment. Did you have them do --

16 A No, no.

17 Q -- any forensic work?

18 A Not -- just outside. We did not --

19 THE COURT: You guys --

20 MR. WESTBROOK: -- process it.

21 THE COURT: -- don't talk over each other, please.

22 THE WITNESS: Oh, I'm sorry.

23 THE COURT: Mr. -- well, Mr. Westbrook, please make sure you control
24 that better.

25 MR. WESTBROOK: I will. Thank you.

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1 BY MR. WESTBROOK:

2 Q Okay. So you brought someone to take pictures of the outside of the
3 apartment.

4 A Of the door.

5 Q Did you have anyone go inside the apartment?

6 A No, we did not.

7 Q Okay. So if no one went inside, you didn't process for fingerprints,
8 right?

9 A Correct.

10 Q You didn't process for DNA evidence, right?

11 A Correct.

12 Q Did you pull the security camera footage from the apartment complex?

13 A They don't have security camera footage.

14 Q You -- you know they don't have security camera footage?

15 A When I spoke to the front office, they said they did not have any
16 footage on that camera.

17 Q Okay. So they have --

18 A Or on apartment.

19 Q Okay. So they have security cameras all over the apartment complex,
20 right?

21 A I don't know. They said they did not have any footage on that area of
22 the -- the apartment complex.

23 Q Okay. So you're saying that you had a whole meeting with the
24 apartment management, correct?

25 A Uh-huh.

1 Q And you met with them and you asked them questions about security
2 camera footage, correct?

3 A Uh-huh.

4 Q And they --

5 MS. KOLLINS: Excuse me --

6 THE COURT: Sir, you have to --

7 THE WITNESS: I'm sorry. Yes, sir.

8 MR. WESTBROOK: Yes?

9 THE COURT: Thank you.

10 THE WITNESS: I apologize.

11 MR. WESTBROOK: Okay.

12 THE COURT: No problem.

13 MR. WESTBROOK: Sorry. I should have caught that, Your Honor.

14 BY MR. WESTBROOK:

15 Q And they reviewed the security camera footage from the area, correct?

16 A No. They said they did not have any video camera footage of his
17 apartment.

18 Q Okay.

19 A That area of the apartment complex.

20 Q That area of the apartment complex?

21 A Yes, sir.

22 Q What about anywhere else in the apartment complex where these
23 things were alleged to have happened?

24 MR. HAMNER: Objection. All these this calls for hearsay.

25 MR. WESTBROOK: I'm asking what he found out during his

1 investigation.

2 THE COURT: So we need to find out what he was told about the
3 security cameras. So it's part of the investigation, it's important to know what he
4 found out. So -- so I'll allow those questions.

5 Go ahead.

6 BY MR. WESTBROOK:

7 Q You were reviewing --

8 THE COURT: Don't -- you don't need to tell us --

9 MR. WESTBROOK: Yeah.

10 THE COURT: -- I mean, don't -- you don't need to tell us what they told
11 you. You need to tell us what you knew. All right?

12 MR. WESTBROOK: Okay.

13 THE WITNESS: They -- I knew that they did not have video camera
14 footage of the alleged suspect's apartment in that area.

15 BY MR. WESTBROOK:

16 Q Okay. Did you question them about whether they had any other video
17 camera footage of any other part of the -- of the apartment complex?

18 A I did not.

19 Q Okay. So you know that nothing that they have -- they don't have any
20 security footage of any crimes being committed -- committed, right?

21 A I don't know.

22 Q They didn't tell you that they had anything that showed any kind of
23 crimes being committed, right?

24 A They said they did not have video footage -- any cameras facing the
25 alleged suspect's apartment.

1 Q Okay. You're talking about one place in this apartment complex where
2 things were alleged to have occurred, right?

3 A Correct.

4 Q But you didn't bother to go in and get any of the video camera footage
5 from any of the other places where things were alleged to have occurred, correct?

6 A What other allegations? I'm not understanding.

7 Q Let me be very specific.

8 A Okay.

9 Q Did you go and find out whether there was video camera footage from
10 the security cameras of Litzi's apartment?

11 A No, I did not.

12 Q Okay. How about the square or the quad; did you find any security
13 camera footage from that? Did you ask about it?

14 A I don't know what the square or quad or is, so.

15 Q Okay. The spaces in between the buildings where most of these
16 people live; did you find out if there was any footage of that?

17 A No.

18 Q Okay. And there's a question about when Mr. Azucena was coming
19 and going from the apartment complex, isn't there?

20 A Oh, how long he'd been gone?

21 Q In this case, like -- yeah. If -- if he had left for a long time or not, or if he
22 was going by -- I mean, his whereabouts are important, right?

23 A Yes. [Indiscernible.]

24 THE COURT: Let's try to have --

25 MR. WESTBROOK: Okay.

1 THE COURT: -- one question at a time.

2 MR. WESTBROOK: Sure.

3 THE COURT: All right. You're -- you're kind of being compound there.

4 MR. WESTBROOK: You're right. I'm sorry, Your Honor.

5 THE COURT: Just want to make sure we are getting -- that we -- the
6 jurors know what question the answer relates to.

7 MR. WESTBROOK: Thank you, Your Honor.

8 BY MR. WESTBROOK:

9 Q Mr. Azucena's comings and goings are an important element of this
10 case for you, correct?

11 A I was trying to locate him, yes.

12 Q Right. There's only one entrance and exit point to this apartment
13 complex, isn't there?

14 A Yes.

15 Q Okay. There are security cameras at the entrance and exit point to this
16 apartment complex, aren't there?

17 A I don't know.

18 Q You don't know, because you didn't ask?

19 A I -- I didn't ask.

20 Q Okay. You don't even mention security cameras anywhere in your
21 reports, do you?

22 A No.

23 Q You don't even mention a conversation with the office about security
24 cameras anywhere in your reports, do you?

25 A No.

1 Q On page 5, still referring to Mirabel, you wrote down right in the middle
2 of the page:

3 Can't remember any details other than I did not like that.

4 Right?

5 A Correct.

6 Q Okay. You actually -- you put a star by that, too, right?

7 A Uh-huh. Yes. I'm sorry.

8 Q Details help you test whether a story is true or false, don't they?

9 MR. HAMNER: Objection. It's argumentative.

10 MR. WESTBROOK: Goes to his investigation.

11 THE COURT: So don't make a statement. Ask it in the form of a
12 question.

13 BY MR. WESTBROOK:

14 Q Do -- do details help you test whether a story is true or false?

15 A Yes and no.

16 Q Okay.

17 A And if I -- if you'd like me to clarify --

18 Q Well, I -- I'll go into the clarification. I think I know where you're going.

19 When there are no details, you consider that a sign that the story
20 may not be true, right?

21 A I'm not going to say it's not going to be true. I'm not going to say that at
22 this age of children.

23 Q Okay. But where there are no details, it doesn't help you very much,
24 does it?

25 A Again, these are my personal notes.

1 Q Yes, sir.

2 A I know what I'm asking.

3 Q Okay.

4 A And that's not what I was writing.

5 Q All right. But it -- you did not put in your officially filed report the fact

6 that she couldn't remember any details, right? You left that out?

7 A No, I didn't leave it out.

8 Q You -- you wrote in your report that she can't --

9 A Again --

10 Q -- remember the details?

11 A -- these are my notes --

12 Q Yes.

13 A -- that I know what I'm asking. It's not what is definitely going in the

14 report. The details I'm asking -- looking for here are -- she did not give me specific

15 details of what he touched --

16 Q Okay.

17 A -- what he allegedly touched, what he allegedly did not. Because that

18 determines what crime I may or may not charge the person with.

19 Q So when you're writing these notes, I mean, you're writing notes about

20 what's important to you, right?

21 A What I need to do for my investigation, yes.

22 Q For your investigation. And what's important to you are the things that

23 will get you a conviction; is that correct?

24 A No, sir.

25 Q Well, Litzi contradicted --

1 MR. HAMNER: It's --

2 THE COURT: Hold -- hold -- Mr. Westbrook, hold on, because Mr.
3 Hamner's standing up behind you with a --

4 MR. HAMNER: Your Honor, it's getting pre-argumentative at this point.
5 These aren't really fact-finding questions. They're more argumentative statements
6 at this point. I'd -- I'd ask that that question be sustained.

7 MR. WESTBROOK: This is cross-examination, Your Honor.

8 MR. HAMNER: Or objection be sustained.

9 MR. WESTBROOK: And his -- his motives and bias and credibility are
10 always effective and allowable.

11 THE COURT: Well, the jury already heard his answer. He -- he said
12 no to your question. And so you're getting close to being argumentative. A proper
13 argumentative question is one where, as you know -- you know, you're -- you're
14 making your statement to the jury rather than really seeking a response from the --
15 from the witness. So let's just -- let's just be careful on that.

16 MR. HAMNER: Thank you, Your Honor.

17 THE COURT: All right.

18 MR. WESTBROOK: To be --

19 THE COURT: So let's -- let me see where this is going.

20 MR. WESTBROOK: Thank you.

21 THE COURT: Just -- just be mindful to -- to ask questions where you
22 truly intend to get an answer from the witness that is meaningful towards helping
23 this jury decide the facts of the case.

24 BY MR. WESTBROOK:

25 Q Very relevant question. And be very clear. What I want to know is your

1 motivations. Okay?

2 A Uh-huh.

3 Q I want to be very clear about that. That's extremely important to this
4 case.

5 A Okay.

6 THE COURT: Uh-huh.

7 BY MR. WESTBROOK:

8 Q When you're transferring your written notes to your official report, do
9 you leave things out that hurt your case?

10 A No, I do not.

11 Q And yet you left out information about Litzi, who contradicts other
12 witnesses in this case, didn't you?

13 A I didn't speak with Lexi at this time. Or Litzi.

14 Q Okay. She's not in this report, but you didn't file a supplemental report
15 about Litzi, did you?

16 A No, I did not.

17 Q Okay. Scarlett is not in your original reports, is she?

18 A In this one?

19 Q Yeah. In your original report that was filed it has Yezline and it has the
20 twins and it has Jatziri; is Scarlett in your original report?

21 A Because I submitted for a warrant.

22 Q Correct. And --

23 A So I did not know about her yet.

24 Q You didn't know about her yet?

25 A I did not have her statement yes -- yet.

1 Q And when you knew about her and when you had her statement,
2 Scarlett, who accuses my client of committing a crime, she got a report written
3 about her, didn't she? You have a report on Scarlett?

4 A Scarlett?

5 Q Yeah.

6 A Yes. Her -- her father filed a report.

7 Q Correct. And you mentioned it, it's all in your materials, and it was
8 officially filed, right?

9 A Yes. I re-booked him on it.

10 Q Okay.

11 A But Litzi never did make a statement.

12 Q I'm sorry. You're saying that Litzi never made a statement?

13 A Litzi never made a statement to me stating -- or to Elizabeth -- that a
14 crime -- Elexi? This is the one you're talking about here? The alleged witness?

15 Q Yeah, Litzi is her actual name, yeah.

16 A Okay.

17 THE COURT: We're talking about Litzi, right? L-I-T-Z-I?

18 THE WITNESS: Okay. She's not the first four.

19 BY MR. WESTBROOK:

20 Q Okay.

21 A Right?

22 Q Let's -- this is a little of a break from what I was going to do, but let's
23 talk about that now.

24 THE COURT: Litzi, L-I-T-Z-I?

25 BY MR. WESTBROOK:

1 Q Litzi, L-I-T-Z-I. Yeah, the witness in this case. I know she's -- there's a
2 couple different names that she was called, Alexi or Elexi or Lexi, right?

3 A Yes, sir.

4 Q Okay. Litzi was interviewed by Elizabeth Espinoza, correct?

5 A Not at this time.

6 Q I know she wasn't done at this time.

7 A Well, that -- and that's what I'm trying to say. These -- these notes are
8 not from Lixi -- Alex -- or Lexi.

9 Q Right. You knew -- and I'm referring now to your folder notes -- you
10 knew about the existence of Lexi/Litzi on January 24th, 2017, at the very latest,
11 right?

12 A That she was a possible witness. They didn't know what was pertaining
13 to her.

14 Q Correct.

15 A Correct.

16 Q You had a phone number for her, you had an address for her, right?

17 A Yes.

18 Q In the same apartment complex as Apartment No. 7, right?

19 A Yes.

20 Q All right. I'm going to refer to the second page. I'll come and show it to
21 you first.

22 A Okay.

23 Q I'm pointing to a part of the page; is this a note that you added?

24 MR. HAMNER: If I could just approach --

25 THE COURT: Do you want --

1 MR. HAMNER: -- and see what's he referring to?
2 THE COURT: Yeah, of course.
3 MR. WESTBROOK: Sure. It's second page, two-thirds of the way
4 down.
5 MR. HAMNER: Is it -- is that the folder notes?
6 MR. WESTBROOK: I'm referring to this, I assume this is the e-mail.
7 MR. HAMNER: Okay.
8 MR. WESTBROOK: Because of that mark, correct?
9 THE COURT: Folder notes, page 2.
10 MR. WESTBROOK: Page 2, correct.
11 THE WITNESS: Yeah. Uh-huh.
12 BY MR. WESTBROOK:
13 Q This line down here, is this something that you added?
14 A I don't remember. This is a e-mail, correct?
15 Q The first part appears to be an e-mail. You can take a look at it --
16 A Okay.
17 Q -- and you can [indiscernible].
18 A If I [indiscernible], is that okay?
19 Q Yeah, please do.
20 THE COURT: Mr. -- let's --
21 THE WITNESS: Oh, I'm sorry.
22 THE COURT: Yeah. Give him a chance to see what it is.
23 THE WITNESS: Oh, that's fine. That's okay.
24 Normally, there would be a heading -- oh, okay. Yes. He sent
25 me this.

1 BY MR. WESTBROOK:

2 Q Uh-huh.

3 A Mr. Hamner sent me this and I copied and pasted. Yes.

4 Q Okay. Now, this part down here, tell me -- tell me if this is right. It
5 appears to me the e-mail ends right here. And then down here there's a dash. And
6 there are some additional notes; is that correct?

7 A Yes.

8 Q Are those additional notes written by you?

9 A I believe so.

10 Q Okay. You don't know whether those additional notes were written at
11 the end of the original e-mail you got in January or whether they were written when
12 you were preparing these folder notes, do you?

13 A I -- I don't --

14 Q Okay.

15 A -- recall when I actually typed that in.

16 Q But the folder notes themselves, according to this, were created on
17 March 13th, 2017, right?

18 A Yes.

19 Q Okay. And, you know, the kids here, Litzi and Leo, were interviewed by
20 Interviewer Espinoza March 1st and March 7th, right?

21 A Yes.

22 Q Okay. So it makes sense that maybe that's March 13th, right?

23 A Probably so. Yes, sir.

24 Q Okay. So that means that of March 13th, you knew, and this is
25 according to your note, Litzi was interviewed at the CAC by Interviewer Espinoza;

1 there was no disclosure, right?

2 A Correct.

3 Q Meaning she didn't allege any crimes had been committed, correct?

4 A Correct.

5 Q All right. Leo was interviewed at the CAC by Interviewer Espinoza;
6 there was no disclosure, correct?

7 A Correct.

8 Q Okay. The witnesses in your case had previously given you information
9 that both Litzi and Leo had been present during crimes, had been victims of crimes,
10 and could corroborate that evidence, correct?

11 A They didn't give that to me.

12 Q They gave it to Ms. Espinoza. You were sitting there watching the
13 interviews, so you knew it, right?

14 A They said there were other children there. I got that e-mail with those
15 specific names from Mr. Hamner.

16 Q You found out that Litzi and Leo did not corroborate any of the stories
17 told by the other witnesses, right?

18 A Correct.

19 Q All right. You impounded --

20 THE COURT: And that was from Mr. Hamner that he found out?
21 BY MR. WESTBROOK:

22 Q The original e-mail from January 24, 2017, was from Mr. Hamner,
23 correct?

24 A Yes, sir.

25 Q The notes, however, at the bottom are your notes taken after the

1 interviews of Litzi and Leo performed by Ms. Espinoza, correct?

2 A Yes, sir. Yes.

3 THE COURT: But -- I --

4 BY MR. WESTBROOK:

5 Q So they were added March 13th?

6 THE COURT: Here's -- here's what I need -- here's -- you know what,
7 I'm not going to ask the question. I'll let Mr. Hamner ask the question.

8 MR. WESTBROOK: Okay.

9 BY MR. WESTBROOK:

10 Q So --

11 THE COURT: I just need -- I need a better understanding of the
12 timeframe here.

13 But I'll -- Mr. Hamner, you're going to have to follow up on this.

14 MR. HAMNER: I -- I will.

15 MR. WESTBROOK: Okay.

16 THE COURT: All right.

17 MR. HAMNER: No problem.

18 MR. WESTBROOK: I -- I think that some of the timeframe was
19 discussed. And, Your Honor, I can -- I can try to help with that a little bit, too.

20 THE COURT: All right.

21 BY MR. WESTBROOK:

22 Q I believe some of the time frame was discussed earlier when you were
23 talking to Mr. Hamner. You were saying that you were aware of Litzi and Leo on
24 Tuesday, January 24th, because of the e-mail, correct?

25 A Yes.

1 Q Aware of their existence?
2 A Yes.
3 Q You weren't able to contact them and set up an interview immediately,
4 right?
5 A Correct.
6 Q Okay. The interviews were actually conducted March 1st and March
7 7th, respectively, right?
8 A Yes.
9 Q Okay. So sometime between January 24th and March 1st/March 7th,
10 you successfully contacted them, correct?
11 A Uh-huh. Yes.
12 Q You set up interviews, correct?
13 A Yes.
14 Q Okay. And then sometime -- I'm sorry. Were -- you were also watching
15 on the closed circuit camera --
16 A Yes, sir.
17 Q -- during these interviews, too?
18 A Yes, sir.
19 Q So you actually witnessed these interviews, which means that when
20 they were interviewed on March 1st and March 7th, you knew what they said?
21 A Yes.
22 Q You saw it live?
23 A Yes.
24 Q All right. You impounded the recordings of those interviews, right?
25 A If -- I got them from Elizabeth. Because when they're conducted at the

1 CAC --

2 Q Uh-huh.

3 A -- they have to e-mail them to me.

4 Q Okay. Eventually --

5 A So if they send them --

6 Q -- you had them?

7 A Yes. They would be impounded in our evidence.

8 Q Eventually you had them, right?

9 A Yes.

10 Q Okay. You didn't make any transcripts of them, did you?

11 A I don't remember if Elizabeth was going to or if we were going to.

12 Q Okay.

13 A I don't remember.

14 MR. WESTBROOK: Court's indulgence.

15 May I approach, Your Honor?

16 THE COURT: What do you got?

17 MR. WESTBROOK: I just have the transcripts that were used earlier.

18 THE COURT: All right.

19 MR. WESTBROOK: We're not admitting them or anything.

20 BY MR. WESTBROOK:

21 Q Have you ever seen these before?

22 A Yes. Mr. Hamner gave those to me.

23 Q Mr. Hamner gave them to you when?

24 A Yesterday.

25 Q Yesterday. Had you ever seen them before yesterday?

1 A No. These are not from Metro.

2 Q Right. There are no Metro transcripts, right?

3 A I don't know. I just told you that.

4 Q You're the lead detective on the case; do you not know whether there
5 are or are there no Metro transcripts?

6 A I do not know if Elizabeth had them translated or if they sent them to us
7 and -- I don't remember. I did not.

8 Q Did you personally order that they be transcript -- transcribed?

9 A I don't remember. I'd have to through my folder notes, because --

10 Q Go through your folder notes.

11 A -- that's normal --

12 MR. WESTBROOK: May I approach?

13 THE COURT: Yes. So the question is, did this Detective personally
14 order the transcripts to be prepared?

15 MR. WESTBROOK: Yes.

16 THE COURT: And which transcripts are we talking about?

17 MR. WESTBROOK: It would be the ones of --

18 THE COURT: You're talking about Litzi and --

19 MR. WESTBROOK: -- Litzi --

20 THE COURT: -- Leo?

21 MR. WESTBROOK: -- and Leo. Correct.

22 THE COURT: Okay.

23 THE WITNESS: Are these in chronologic from the earliest to the back?

24 BY MR. WESTBROOK:

25 Q They're in the order that they were submitted to me.

1 A Okay.

2 Q However, I don't believe that was chronological.

3 THE COURT: Mr. Hamner is standing.

4 Are you making an objection, sir?

5 MR. HAMNER: The State will stipulate that Metro did not order the
6 transcripts.

7 THE WITNESS: Okay.

8 MR. HAMNER: The transcriptions were both done by the defense.

9 MR. WESTBROOK: Okay.

10 THE COURT: Very good. Thank you.

11 So we -- we can move on --

12 THE WITNESS: There you go.

13 THE COURT: -- Mr. Westbrook.

14 MR. WESTBROOK: All right.

15 BY MR. WESTBROOK:

16 Q You had the recorded interviews of Mirabel and Maradel and Yezline,
17 Jatziri, you had all of those -- oh, Scarlett, as well. Those were all transcribed by
18 Metro or through the CAC, right?

19 A Yes, sir.

20 Q But you didn't order these were transcribed, did you?

21 A Apparently, I did not, sir.

22 Q All right. In fact, Metro had those since at least March 1st and
23 March 7th --

24 A Not necessarily.

25 Q -- of --

1 A We don't always get them in a timely manner from the CAC.
2 Q You sat and watched the interviews on March 1st and March 7th, right?
3 A I did.
4 Q So you had this information in your head, right?
5 A Yeah.
6 Q March 1st and March 7th?
7 A But not in the folder. That's why I sent that e-mail to Mr. Hamner.
8 Q Okay. And you didn't even turn it over until April 7th, did you?
9 A Oh, with the handwritten notes?
10 Q No. I'm talking about with the recordings of these interviews.
11 A I didn't return what?
12 Q You did not turn over the recordings of these interviews until April 7th,
13 did you?
14 THE COURT: Which interviews?
15 MR. WESTBROOK: The interviews of -- of Lexi and Leo -- Litzi and
16 Leo.
17 THE COURT: Recordings.
18 BY MR. WESTBROOK:
19 Q The recordings.
20 A I don't remember which day I give it to them, sir.
21 Q Okay. It wasn't March 1st or March 7th, right?
22 A Because I don't have them then. That's what I'm trying to explain to
23 you. It does -- it takes the CAC a while to get them to us.
24 Q Okay.
25 A And when they do, I burn them to CD.

160

1 Q And you don't know where -- when you turned them over?

2 A I do not.

3 Q Just that when you turned them over, they hadn't been translated or

4 transcribed, right?

5 A No. They were not.

6 Q Okay. Let's go back to the notes for a second.

7 A The handwritten notes?

8 Q The handwritten notes, yeah.

9 A Okay.

10 Q Referring to page 10, right at the top, it says:

11 White tape from wife's bags.

12 Right?

13 A Yes.

14 THE COURT: From what?

15 MR. WESTBROOK: White tape from wife's bags.

16 THE COURT: Okay.

17 BY MR. WESTBROOK:

18 Q Correct?

19 A Yes.

20 Q Is that because of information that was shared by the witness that there

21 was white tape retrieved from the -- from Mr. Azucena's wife's bag or handbag?

22 A Which witness are you talking about?

23 MR. HAMNER: Your Honor, if I could --

24 THE COURT: Yeah.

25 MR. HAMNER: That was precisely the comment I was going to make.

1 If Mr. Westbrook could clarify with respect to which interview these handwritten
2 notes on page 10 are referring to just for --

3 MR. WESTBROOK: Sure.

4 MR. HAMNER: -- clarification?

5 THE COURT: Yes. That's a valid point.

6 MR. HAMNER: Thank you very much.

7 MR. WESTBROOK: You're right. I should have done that to begin
8 with.

9 BY MR. WESTBROOK:

10 Q It appears to me that page 10 is about Yezline Estrella; is that correct?

11 A Yes.

12 THE COURT: Yezline.

13 BY MR. WESTBROOK:

14 Q Okay. She starts on page 9. Next page is page 10.

15 A Uh-huh.

16 Q You were watching these interviews. She mentioned white tape being
17 in your suspect's wife's bag, right?

18 A Yes. She was my fourth victim, yes.

19 Q Your fourth alleged victim, right?

20 A Yes.

21 Q Thank you. Did you search the bag?

22 A No, I did not.

23 Q I'm going to direct you two pages later to a piece of paper that says:

24 Follow up to-do list for event.

25 And then it gives a long event number. Okay. You have a lot of

1 things on here, a lot of them are checked. Case note checked. Download, burn
2 audio checked. Follow-up interviews checked. Search warrant not checked. You
3 hadn't gotten a search warrant at this point?

4 A Correct.

5 Q Okay. Pen register has administered subpoenas, property connect,
6 those are all say N/A, because they're not part of this case, right?

7 A Yes.

8 Q Photo lineup check. And then it says:

9 Impound evidence.

10 And that's also checked. And then down below, you have a star,
11 and it says:

12 Look for white tape.

13 Right?

14 A Correct.

15 Q But you didn't do that?

16 A I did not get a search warrant.

17 Q Did you knock on the door and say, Hey, do you mind if we search?

18 A No.

19 Q I mean, you don't need a search warrant if you have permission, right?

20 A Correct. Consent to search.

21 Q But you didn't even try, did you?

22 A I did not talk to her --

23 Q All right.

24 A -- after that.

25 Q Sure. Yezline also said that she was threatened that if they talk --

1 MR. HAMNER: Which page?

2 MR. WESTBROOK: This is also still page 10. Sorry. We're in the
3 middle now.

4 THE COURT: Page 10?

5 MR. WESTBROOK: Page 10 in the middle.

6 THE COURT: Still? All right.

7 BY MR. WESTBROOK:

8 Q If they talk, the kids will be taken far away if they -- if they told, right?

9 A Yes.

10 Q Okay.

11 MR. WESTBROOK: Your Honor, I have a little bit more. It's 12:25.
12 Would you like to break now or would like me to press on?

13 THE COURT: This is a good stopping point. Sure.

14 MR. WESTBROOK: Okay.

15 THE COURT: Do you want to stop now?

16 MR. WESTBROOK: I am through the notes. That's why I was giving
17 the option.

18 THE COURT: It's a good time to stop. All right.

19 Ladies and gentleman, I'm going to give you an hour lunch break.
20 I want you back here outside this courtroom doors at 1:30.

21 You're admonished don't communicate with anybody about the
22 case; don't form any opinions about the case; do not seek any information about
23 the case from any source; don't do any research or investigation and do not talk to
24 any of the witnesses, the attorneys or the parties. Do you understand those
25 instructions? All right.

1 You're excused to be back here at 1:30. All right.

2 Detective, just hang back for a moment, sir.

3 THE WITNESS: Yes, sir.

4 THE COURT: All right.

5 [Jury recessed at 12:24 p.m.]

6 THE COURT: Detective, you are excused also, and don't discuss your
7 testimony with anybody.

8 THE WITNESS: Yes, sir.

9 THE COURT: All right. Watch your step.

10 How much longer do you think you're going to have,
11 Mr. Westbrook? Roughly?

12 THE WITNESS: Do I just -- do I just leave this up here?

13 THE COURT: Just leave that there.

14 THE WITNESS: Okay.

15 MR. WESTBROOK: I'd say 30 minutes.

16 THE COURT: Okay. Very good. Thank you.

17 MR. WESTBROOK: Thank you, Your Honor.

18 THE COURT: All right. We'll see you back here in 30 minutes. Or, I
19 mean, an hour and then -- and then after your 30 minutes -- well, when we're done
20 with this guy, is that when you're bringing your expert?

21 MR. WESTBROOK: That's correct.

22 THE COURT: All right. Great.

23 MR. WESTBROOK: He -- he stuck around for me.

24 THE COURT: All right. Thanks.

25 Court's in recess.

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1 [Court recessed at 12:25 p.m., until 1:35 p.m.]

2 [Outside the presence of the jury.]

3 THE COURT: All right. Line them up, and then Mr. Hamner will be
4 here momentarily.

5 MS. KIERNY: So scheduling wise, we are going to, after Detective
6 Campbell, call Leo and we are going to call Professor Kagan --

7 THE COURT: Your expert.

8 MS. KIERNY: -- and we will then rest.

9 THE COURT: Perfect. All right. And I still need to canvass the
10 defendant.

11 MS. KIERNY: Oh. We did -- we'll need a few minutes to talk.

12 THE COURT: Is he ready to do that now or?

13 MR. WESTBROOK: We could do that now, yeah.

14 MS. KIERNY: Oh.

15 THE COURT: Or -- or do you want to wait?

16 MS. KIERNY: We can do that.

17 MS. KOLLINS: We can do it now.

18 MR. WESTBROOK: We can do that now.

19 THE COURT: All right. Do we have an interpreter?

20 [Pause in proceedings.]

21 THE COURT: All right. I'm going to canvass the defendant now.

22 Mr. Westbrook, I understand that you conferred with your client
23 about his constitutional rights regarding testifying or not testifying?

24 MR. WESTBROOK: I did, Your Honor.

25 THE COURT: All right. Then let me go ahead and ask Mr. Azucena,

1 under the Constitution of the United States and under the Constitution of the State
2 of Nevada, you cannot be forced to testify in this case; do you understand that, sir?

3 THE DEFENDANT: Yes.

4 THE COURT: Very well. You may, at your own request, give up this
5 right and take the witness stand and testify. If you do, you will be subject to
6 cross-examination by the deputy district attorney, and anything that you may say
7 either on direct or cross-examination can be the subject of fair comment when the
8 deputy district attorney speaks to the jury in his or her final argument; do you
9 understand that also?

10 THE DEFENDANT: I do understand.

11 THE COURT: There's more. If you choose not to testify, the court will
12 not permit the deputy district attorney to make any comments to the jury because
13 you have not testified; do you understand?

14 THE DEFENDANT: I understand.

15 THE COURT: All right. If you decide not to testify, and if your attorney
16 requests, which I assume he will, then I will instruct the jury substantially as follows:

17 The law does not compel a defendant in a criminal case to take
18 the stand and testify, and no presumption may be raised and no inference of any
19 kind may be drawn from the failure of the defendant to testify.

20 Do you have any questions so far about these rights?

21 THE DEFENDANT: I only would like to speak to my attorney.

22 THE COURT: Right now? You may.

23 MR. WESTBROOK: Sure.

24 THE COURT: Why don't you guys --

25 MR. WESTBROOK: Can we step out real quick?

1 THE COURT: You may.

2 MR. WESTBROOK: Thank you.

3 THE COURT: And there's more that I need to tell him about being
4 exempt with respect to any felonies.

5 MR. WESTBROOK: Thank you, Your Honor.

6 [Pause in proceedings.]

7 MS. KIERNY: I think we can continue with the --

8 MR. WESTBROOK: The canvass.

9 MS. KIERNY: -- canvass.

10 THE COURT: Great.

11 MS. KIERNY: I was going to say admonition.

12 THE COURT: So, Mr. Azucena, you are further advised that if you
13 have a felony conviction and more than 10 years has not elapsed from the date that
14 you had been convicted or discharged from prison, parole, or probation, whichever
15 is later, and the defense has not sought to preclude that from coming before the
16 jury, and if you take the stand and testify, then the deputy district attorney, under
17 those circumstances, in the presence of the jury, can ask some questions.

18 They can ask:

19 1. Have you been convicted of a felony?

20 2. What was the felony? And

21 3. When did it happen?

22 But they cannot go into any details beyond that; do you
23 understand, sir?

24 THE DEFENDANT: I do understand.

25 THE COURT: All right. So based upon all that information, it is your

1 choice now; do you elect to exercise your constitutional right not to testify?

2 THE DEFENDANT: I'm not going to testify.

3 THE COURT: Okay. Very well. So that means you have the
4 constitutional right not to testify, and you exercise that right not to testify. Very
5 good, sir.

6 Does counsel for Mr. Azucena have anything they want to add on
7 the record with respect to the canvass?

8 MS. KIERNY: No, Your Honor.

9 MR. WESTBROOK: No, Your Honor.

10 MS. KIERNY: That was complete.

11 THE COURT: All right. Very good. If something happens where he
12 changes his mind, you are -- it's your burden to let me know in a timely manner.

13 MS. KIERNY: Of course.

14 THE COURT: All right. Very well.

15 Let's go ahead and bring the jury in.

16 MS. KIERNY: Thank you.

17 [Jury reconvened at 1:43 p.m.]

18 THE COURT: All right. Detective, welcome back. You're still under
19 oath and still required to testify truthfully; do you understand that, sir?

20 THE WITNESS: Yes, sir, I do.

21 THE COURT: Thank you very much. You may make yourselves --
22 make yourself comfortable.

23 Mr. Westbrook.

24 MR. WESTBROOK: Thank you, Your Honor.

25 THE COURT: You may proceed.

1 I had -- I had a question, I was hoping you could just clarify this
2 one -- you know, either the State or you could clarify. The handwritten notes that
3 you're reading from, when -- when were those prepared? Do you have -- does --

4 MR. WESTBROOK: I can certainly clarify that. Although, I -- I do know
5 that they were prepared --

6 THE COURT: I'm trying to prepare a timeline. And I just want to know
7 when the notes were prepared.

8 MR. WESTBROOK: Sure.

9 **CROSS-EXAMINATION (CONT.)**

10 BY MR. WESTBROOK:

11 Q Detective --

12 THE COURT: Now, you were reading from that 10 -- how many
13 pages -- you were up to page 10, I don't know how many pages that is.

14 MR. WESTBROOK: I believe it's 16, but I'm not positive about that.

15 THE COURT: Okay. Great.

16 Anyway, you may proceed, sir. Thank you.

17 BY MR. WESTBROOK:

18 Q Your -- your notes were prepared concurrently with the interview of
19 the -- of the twins and Jatziri and Yezline; is that correct?

20 A Yes, sir.

21 Q Okay. So at least the first part of the notes, maybe stuff was added
22 later, but the notes began, I believe, then on November 6, 2016; is that right?

23 A Yeah. I take the notes as the interviews are going on.

24 Q Yeah, and there's no -- there's no date on them, but from context, that
25 seemed like that was right?

1 A Yeah. There's a date. Right at the top.

2 Q Oh, there is?

3 A 11/2/16.

4 Q Oh, 11/2/16. Okay. I'm sorry. I -- I missed the date myself.

5 MR. WESTBROOK: So 11/2/16, Your Honor.

6 BY MR. WESTBROOK:

7 Q Thanks for clarifying -- clarifying that.

8 THE COURT: Thank you, sir.

9 BY MR. WESTBROOK:

10 Q Okay. I want to talk to you a little bit about the interview with
11 Mr. Azucena.

12 Now, Mr. Azucena, he didn't have to talk to you, did he?

13 A No, sir.

14 Q Okay. In fact, you told him he had the right to remain silent?

15 A Yes, sir.

16 Q But he did talk to you, right?

17 A Yes, sir.

18 Q Okay. Now, I want to talk to you about a few of the things he said, just
19 some of the small things. You talked about -- he told you he doesn't check in with
20 his wife when he goes places, right?

21 A Correct.

22 Q Okay. He -- he goes in and out; he doesn't check with her first. All
23 right.

24 You're not a marriage counselor, right?

25 A No, sir.

1 Q You don't have any is special insight into their personal relationship,
2 right?

3 A No, sir.

4 Q You don't know how they are with each other when they are alone or
5 how long they've been together?

6 A No, sir.

7 Q Okay. As for the name David, he told you he doesn't tell people his
8 name is David, right?

9 A Correct.

10 Q But everyone calls him David, though?

11 A Everyone that we interviewed did.

12 Q Okay. David is his middle name, right?

13 A Yes, sir.

14 Q Maria Estrella Barajas, she goes by the name Esther; right?

15 A I would have to refer to my notes.

16 Q You can refer to your note, sure.

17 A I didn't write that down. I just wrote her name.

18 Q Okay. So do you recall people that you've interviewed saying things
19 happened at Esther's house or referring to her as Esther?

20 A I don't. But if -- I mean, if it's in my notes or in the statement, it would
21 be. But I don't remember that.

22 Q You don't remember it personally. All right. There's nothing weird
23 about someone going by their middle name, is there?

24 A No.

25 Q Okay. When the Henderson police contacted my client, he was at

1 work, right?

2 A He was at a place where he said he had a job to do, yes.

3 Q Okay. He was in there. They saw him working. That's where they
4 found him at work, right?

5 A Uh-huh.

6 Q Yes?

7 A Yes. Yes, I'm sorry.

8 Q In the interview with him, when you asked where he'd been, he said he
9 was at work, right?

10 A He said he had a job, yes.

11 Q He had a job?

12 A Yes, uh-huh.

13 Q That he had to finish, right?

14 A Yes.

15 Q Okay. You had learned from other witnesses, like Ricardo and
16 Amanda, they told you that he was at his workplace, right? Or at least they told the
17 Henderson police that he was at his workplace, right?

18 A I don't know what they told Henderson police.

19 Q Okay. Henderson police found him at his workplace, right?

20 A Yes.

21 Q Okay. So there was information he was at his workplace; he was found
22 at his workplace. He told you he was at his workplace, and he was, in fact, at his
23 workplace, correct?

24 A He told me he was at a job, yeah.

25 THE COURT: Well, hold on.

1 THE WITNESS: He didn't tell me he was at his workplace.

2 THE COURT: What?

3 MR. HAMNER: Is there a question? Once again, I think it's kind of
4 argumentative.

5 THE COURT: Yeah, that was -- you're -- you're, like, repeating --

6 MR. WESTBROOK: I'm just summarizing.

7 THE COURT: It's asked and answered. So.

8 MR. WESTBROOK: -- but I'll do it slowly.

9 BY MR. WESTBROOK:

10 Q He told you he had a job to complete, right?

11 A Yes.

12 Q Witnesses said that he would be at the place where he works, right?

13 A They didn't say he'd be there. They said this is a place where they
14 knew he worked.

15 Q Okay.

16 A I didn't know where he was.

17 Q And when the police went they went to the place where he works, right?

18 A Yes, they did.

19 Q And he found him -- and they found him there working, right?

20 A I don't know what he was doing. They found him.

21 Q They found him at his workplace, right?

22 A Yes. I --

23 Q Okay.

24 A You asked if he was working. I don't know if he was working.

25 Q Okay.

1 A He was there.

2 Q All of that is consistent. He said he was working. All the witnesses said
3 he was working. He was found working. That's consistent, right?

4 MR. HAMNER: I mean, Your Honor, I think it's improper to ask this
5 witness to be judging the consistency of people's statements.

6 MR. WESTBROOK: He's the lead detective in a felony case, and he
7 can't judge consistency, Your Honor?

8 MR. HAMNER: I mean, if --

9 THE COURT: Hold on.

10 MR. HAMNER: -- I can start talking about this witness about
11 consistency things about other witnesses he's talked about, then I -- I guess so.
12 But I believe it's improper for any witness to be making calls like that. That's a --
13 that's a jury call.

14 MR. WESTBROOK: I agree, Your Honor.

15 THE COURT: I don't know that it's --

16 MR. WESTBROOK: I agree to the extent that --

17 THE COURT: -- his state of mind as to -- consistency is relative here.
18 So I'm going to sustain the objection and ask you to please move on.

19 MR. WESTBROOK: Sorry.

20 THE COURT: It's up to the jury to decide the extent of consistency of
21 all the evidence in this case.

22 MR. WESTBROOK: Yeah. My -- my response, Your Honor, was it
23 goes to the potential bias of this witness and of the investigation. This isn't just any
24 witness. This is the lead detective in a criminal case.

25 THE COURT: Uh-huh.

1 MR. WESTBROOK: And he's a lead detective who is in charge of
2 putting together evidence to prosecute my client. His idea about what is consistent
3 and what is inconsistent is very important.

4 THE COURT: So, okay, you don't need to make an argument in front
5 of the jury.

6 MR. WESTBROOK: Okay.

7 THE COURT: All right. I sustained the objection. Let's just move on.

8 MR. WESTBROOK: All right.

9 THE COURT: Thank you.

10 BY MR. WESTBROOK:

11 Q During this case, you ordered a police report about a case involving
12 Mr. Azucena that had taken place in 2011, right?

13 A I order a report?

14 Q Yeah. Sure.

15 MR. WESTBROOK: May I approach the witness?

16 THE COURT: Yes.

17 BY MR. WESTBROOK:

18 Q This was in your packet. I took it, put a tab on it.

19 A Oh, yes, yeah.

20 MR. HAMNER: What's --

21 BY MR. WESTBROOK:

22 Q Okay.

23 MR. HAMNER: Objection. What's -- what's the relevance in -- can we
24 please approach so we can discuss its potential relevance or irrelevance.

25 THE COURT: Can I -- can I see what you're showing the witness,

1 please.

2 MR. WESTBROOK: Your Honor, may I approach?

3 THE COURT: Yeah, you can approach. Let me -- but I've got to see
4 what it is you're showing him. Remember, you guys get to see all the exhibits
5 before I do, so.

6 [Bench conference transcribed as follows.]

7 THE COURT: All right. Have you seen that?

8 MR. HAMNER: I -- yeah, I know what it is.

9 THE COURT: You know what it is? Okay. What's -- so what's the --

10 MR. HAMNER: And it's my objection --

11 MR. WESTBROOK: The relevance, Your Honor is that it --

12 THE COURT: Well, let him -- he --

13 MR. WESTBROOK: It's -- it's --

14 THE COURT: He objects.

15 MR. WESTBROOK: I thought his objection was relevance and I can
16 explain.

17 MR. HAMNER: I objected to -- that's okay. He can start first.

18 THE COURT: Okay. You can start.

19 MR. WESTBROOK: The relevance is [indiscernible] weird that he
20 would be [indiscernible] this isn't -- this is a police report ordered by this detective
21 from 2011 where he was encountered by a group of immigration [indiscernible]
22 exactly what they're claiming. [Indiscernible] something that's apparently normal for
23 him, we're aware of that.

24 THE COURT: So he was there at night one time eight years ago --

25 MR. WESTBROOK: Yeah. Six --

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1 THE COURT: -- or six years ago?

2 MR. WESTBROOK: Yeah. They're saying that it's strange that he
3 would be working night [indiscernible].

4 MR. HAMNER: Okay. My response is --

5 THE COURT: Okay. So Mr. --

6 MR. HAMNER: -- number one, that document is hearsay. It would be
7 offering it for the truth of the matter asserted. Well, you -- absolutely [indiscernible]
8 it's representing to this court you wanted to rebut a claim that it would be improper
9 or strange that he was at his place of work and not in his home. You are offering
10 the content of that document for the truth of the matter asserted. And at this point,
11 my objection is going to be hearsay with respect to that. And they need to notice a
12 witness or bring someone with personal knowledge of that. They cannot bring it in
13 through this police officer.

14 THE COURT: It is -- I mean, it is hearsay, when you can do it as -- if
15 this detective has seen it, he can use it to refresh his recollection, but it is not
16 admissible. You know, you can -- you can --

17 MR. WESTBROOK: Well, I don't want to admit the document. I
18 simply want to --

19 THE COURT: You don't want to what?

20 MR. WESTBROOK: I want to establish that he was aware, it goes to
21 his state of mind, it's, for example, this --

22 THE COURT: So you -- you can ask him his state of mind.

23 MR. WESTBROOK: Fine. That's what I want.

24 THE COURT: But you can't -- the jury doesn't get the document.

25 MR. WESTBROOK: What he's aware -- I don't want the jury to get the

1 document.

2 THE COURT: Okay.

3 MR. WESTBROOK: Yeah. I never intended them to [indiscernible].

4 THE COURT: All right. I mean, you can -- you can refresh someone's
5 recollection by showing them a pen.

6 MR. WESTBROOK: Well, I'd move --

7 THE COURT: You know, but the doesn't go to the jury. So.

8 MR. WESTBROOK: I understand. I am simply going to ask him --

9 MS. KOLLINS: But then what he would be testifying to would be
10 hearsay.

11 MR. HAMNER: Right.

12 THE COURT: Yeah. The document -- the hearsay objection is
13 sustained.

14 MR. WESTBROOK: Your Honor, it goes --

15 THE COURT: But you can ask the question.

16 MR. WESTBROOK: It goes to the knowledge of his investigation
17 [indiscernible].

18 THE COURT: What goes to the knowledge?

19 MR. WESTBROOK: The knowledge that he had --

20 THE COURT: What's the pending question?

21 MR. WESTBROOK: [Indiscernible.] The pending question is, do -- do
22 you remember getting this police report and -- in this case? That was my question.

23 MR. HAMNER: And what's --

24 MR. WESTBROOK: And then there was an objection under relevance.

25 MR. HAMNER: Hold on. Okay. What would be the follow up to that?

1 Because he can say yes or no to that. Where are you going beyond that?

2 MR. WESTBROOK: The follow-up is, you have information that
3 Mr. Azucena was a victim of burglary.

4 MR. HAMNER: Irrelevant and it's hearsay.

5 MR. WESTBROOK: It's not hearsay. It's the information that they
6 have. He's the lead detective, Your Honor.

7 THE COURT: If he has a witness testifying on the stand as to his -- as
8 to what information he knows is not hearsay.

9 MR. HAMNER: No. But --

10 THE COURT: All right.

11 MR. HAMNER: -- the content -- but offering the content --

12 THE COURT: The content of the document is hearsay.

13 MR. HAMNER: Right.

14 THE COURT: He can't offer the content of the document. He can ask
15 the witness what he knows.

16 MR. WESTBROOK: [Indiscernible.]

17 THE COURT: This is simple stuff.

18 MR. WESTBROOK: I know.

19 THE COURT: I don't know why --

20 MR. WESTBROOK: It is simple. I don't know why we're up here.

21 THE COURT: All right. Then let's go -- let's -- let's go.

22 MR. WESTBROOK: All right.

23 [End of bench conference.]

24 BY MR. WESTBROOK:

25 Q Are you aware that, from your investigation and your work as a lead

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1 detective in this case, of -- did you become aware that on April -- in April of 2011
2 Mr. Azucena was a victim of a burglary?

3 A Yes.

4 Q The burglary took place at his workplace, correct?

5 A I believe so, yes.

6 Q Okay. And it happened at 2:00 in the morning or so, correct?

7 MR. HAMNER: Objection. It's hearsay.

8 THE WITNESS: I don't know what time.

9 THE COURT: He's asking what this -- the personal knowledge of this
10 witness on the stand now. He's not asking what anybody said in a prior statement
11 outside of court. So I -- overruled. It's not hearsay.

12 Go ahead.

13 BY MR. WESTBROOK:

14 Q You said you -- you don't recall what time the burglary occurred; would
15 looking at the document refresh your recollection?

16 A Yes. It -- it'll say on there.

17 Q All right.

18 THE COURT: Now, you're just looking at a document. You're not
19 going to describe what the document is or what's in the document. You're simply
20 looking at the document to see if it refreshes your recollection. Then he's going to
21 take the document away. If it refreshes your recollection, your present recollection
22 sitting here today of facts that are within your personal knowledge, then you can
23 testify as to those facts.

24 THE WITNESS: Yes, sir.

25 THE COURT: All right. Go ahead. Don't tell us what the document

1 says --

2 BY MR. WESTBROOK:

3 Q Go ahead, just take a look at --

4 THE COURT: -- or anything in the document.

5 THE WITNESS: Yes.

6 BY MR. WESTBROOK:

7 Q Okay. Thank you.

8 THE COURT: All right. Take the document away.

9 BY MR. WESTBROOK:

10 Q Does that refresh your recollection as to what time this burglary was
11 alleged to have occurred?

12 A Yes.

13 Q Okay. What time?

14 A 2:42.

15 Q A.m., correct?

16 A Yes.

17 Q Okay. So Mr. Azucena, being in his workplace, spending the night
18 there, doesn't seem to be uncommon to him, does it?

19 MR. HAMNER: Objection. Calls for speculation.

20 MR. WESTBROOK: Based on this evidence.

21 THE COURT: So sustained. You're asking him to speculate as to
22 someone else's --

23 MR. WESTBROOK: Okay.

24 THE COURT: -- state of mind.

25 BY MR. WESTBROOK:

1 Q During the interview --

2 THE COURT: You said uncommon to him. It's not --

3 MR. WESTBROOK: I -- I agree, Your Honor. You're -- you're correct.

4 THE COURT: Thank you.

5 MR. WESTBROOK: I'm incorrect on that.

6 BY MR. WESTBROOK:

7 Q During the interview, you asked him if he was working. He told you that
8 he was working and that he had been spending the nights there, correct? Among
9 other things.

10 A No. He didn't say he had spent the night there.

11 Q Sometimes there, sometimes in a hotel?

12 A He never said there. He said hotel and other places.

13 Q All right. He was working on a long project, he was working late?

14 A That's what he said.

15 Q Okay. Even way back in 2011, he's at work -- he's at work very late,
16 and, in fact, he was at work when someone tried to rip off the place, correct?

17 A I don't know.

18 Q Okay.

19 A I worked parole for eight years. A lot of time when there was a
20 commercial burglary, they would come to the scene when the police arrived. I don't
21 know if he was staying there or if he got called there by patrol.

22 Q Would reading -- or would looking at this document refresh your
23 recollection?

24 A Sure.

25 THE COURT: Now, this process is to see if your recollection of things

1 you already knew in the past comes back to you. You're not supposed to just read
2 something that's in the letter. So I just caution you again.

3 THE WITNESS: Okay.

4 THE COURT: All right. The purpose of this is to see if your memory of
5 something that you knew during the investigation comes back to you. All right.

6 THE WITNESS: Should I --

7 THE COURT: Do you understand the process?

8 THE WITNESS: I do. But I probably need to clarify something on this,
9 though.

10 THE COURT: Well, that's up to --

11 THE WITNESS: And I don't know when I do that.

12 THE COURT: -- that's up to the attorneys.

13 THE WITNESS: Okay. Okay.

14 THE COURT: I can't --

15 THE WITNESS: Okay.

16 THE COURT: You know, there's no question pending.

17 THE WITNESS: Okay.

18 BY MR. WESTBROOK:

19 Q Could you just read it over. And then I'll -- I'll ask you a question.

20 A Okay.

21 Q And then if we need to clarify, we can do that.

22 A Okay.

23 Q Okay. So he was there when the break-in happened, right?

24 A Yes. According to that, yes.

25 Q He'd be sleeping there, right?

1 A That night, yes.

2 Q Okay. Moving on.

3 When you conduct an interrogation of a suspect, the purpose is
4 to get the suspect to confess, right?

5 A In the interview?

6 Q Yes.

7 A If that's what my goal is.

8 Q Okay. In fact, you're trained in different interrogation techniques, aren't
9 you?

10 A Interview and interrogation, yes.

11 Q Okay. You call them interviews, not interrogations?

12 A I said interview and interrogations.

13 Q Okay. I see.

14 A This was only an interview.

15 Q This was only an interview?

16 A We didn't -- we didn't get that far.

17 Q Okay. You say it would have turned into something later --

18 A No.

19 Q -- if you got farther?

20 A I didn't say that at all.

21 Q Okay. So you're saying this was an interview?

22 A Yes.

23 Q He was in your custody, right?

24 A Yes.

25 Q All right. So it's not an interview, like, if I want a job at a bank, I go get

1 an interview there; this was an interview where he was in your custody?

2 A Correct.

3 Q Okay. So some of the interview techniques involve, I don't know, just --
4 just being a nice guy; is that the technique for interviews?

5 A It's who I am. I'm a nice --

6 Q So you're just a nice guy?

7 A I'm a nice guy.

8 Q Okay. Being nice, you make them feel comfortable, right?

9 A Yes.

10 Q Gain their trust?

11 A I try.

12 Q Okay. Once they're comfortable, they're more likely to confess, right?

13 A Hopefully.

14 Q Okay. There's some interview techniques -- sorry. Just slipped over
15 my words.

16 The there are some interview techniques that are more
17 complicated, right? Than just having a conversation.

18 A Yes.

19 Q Okay. Are you familiar with the Reid technique, nine-step Reid
20 technique?

21 A Long, long time ago.

22 Q Okay. That -- that would be one of the more complicated ones, right?

23 A Yeah.

24 Q I won't ask you what all the nine steps are.

25 A Good. That's good.

1 Q Okay. Some of those involve keeping a suspect off guard; is that fair to
2 say?

3 A Yes.

4 Q Okay. Making them worry one minute and then trying to gain their trust
5 the next minute; is that a technique?

6 A They may use that.

7 Q Okay. Now, a lot of interview techniques kind of combine different
8 approaches, right?

9 A Yes.

10 Q Okay. And in this particular technique -- a particular technique you
11 used in this interview is something that you refer to as the ruse; is that right?

12 A I used a ruse, yes.

13 Q Okay. Specifically, you used a DNA ruse, right?

14 A Yes, sir.

15 Q All right. You didn't just mention DNA; you spent 14 pages talking
16 about -- you know setting up your ruse, correct?

17 A Yes.

18 Q Okay. In fact, you said that there are seven billion people in the world,
19 no two people have the same DNA, right?

20 A Yes.

21 Q You wanted to establish this, because you wanted to make sure he
22 knew what DNA was, right?

23 A Yes.

24 Q A ruse doesn't work if he doesn't know what DNA is?

25 A Correct.

1 Q You convinced him that DNA, you know, was a scientific process and
2 that it couldn't be mistaken for somebody else. In fact, you even established that
3 he didn't have an identical twin, right?

4 A Yes.

5 Q Because an identical twin could share DNA, right?

6 A Yes.

7 Q But he doesn't have an identical twin, as you found out, which means
8 that there wouldn't be a mistake if his DNA was on the scene, correct?

9 A Correct.

10 Q Okay. That setup was a big part of the ruse, right?

11 A Yes.

12 Q Then after your setup, you specifically claimed -- this is on page 27 --
13 we found DNA of Hispanic origin -- and actually, I'm remembering now, was it
14 Hispanic male origin; is what that you said?

15 A I believe. I would have to review -- or review my notes.

16 Q Okay. You don't have them in front of you, do you?

17 A No, I do not.

18 Q I can get it for your real quick.

19 I'm referring to page 27. Oh, male DNA. There you are.

20 A Yes.

21 Q Okay. So we -- we found male DNA of Hispanic origin; you told him
22 that?

23 A Yes.

24 Q And then you said that it was found on different parts of their body,
25 referring to the girls, correct?

1 A Yes.

2 Q Okay. So you told him that they found male DNA of Hispanic origin on

3 the girls' bodies, different parts of their bodies, right?

4 A Yes.

5 Q Okay. I mean, that doesn't sound like a ruse; that's a lie, right?

6 A It's a ruse. It's what we use.

7 Q All right. You think there's a difference between a ruse and a lie?

8 A I think we use a ruse in police work to try to gain a confession, if we

9 need to.

10 Q Okay. Well, Mr. Hamner asked you whether your DNA story was true

11 or false, and you testified it's not exactly true, right? You said it's not exactly true?

12 A The ruse?

13 Q Yeah. Mr. Hamner asked you whether the DNA, that information you

14 gave him, was true or false. You said it's not exactly true, right?

15 MR. HAMNER: That -- that misstates the question. I'm going to object.

16 MR. WESTBROOK: Okay.

17 THE COURT: So I don't remember your exact wording, Mr. Hamner.

18 MR. HAMNER: Just for the record --

19 MR. WESTBROOK: I don't either, Your Honor. And -- and --

20 THE COURT: Hold -- hold on. He was --

21 MR. HAMNER: Just --

22 THE COURT: -- starting to talk.

23 MR. HAMNER: -- just for the record, the question that I asked was,

24 You used a ruse? And I said, Is that when you say something that's untrue?

25 His answer was, Not all the time.

1 And then I followed up with a second question along the lines of,
2 But in this case, the DNA ruse was not true?

3 And he acknowledged, Yes.

4 So when he says --

5 THE COURT: All right.

6 MR. HAMNER: I just wanted a clarification as to the question I posed.

7 THE COURT: All right. Thank you for the clarification.

8 MR. HAMNER: Thank you.

9 THE COURT: All right. Appreciate that.

10 BY MR. WESTBROOK:

11 Q You said --

12 THE COURT: And I'll sustain your objection based on your
13 representation.

14 MR. WESTBROOK: Right. I appreciate the representations, because I
15 didn't write down verbatim what the question was.

16 BY MR. WESTBROOK:

17 Q However, what you said was it's not exactly true, correct?

18 A To his question, yes.

19 Q Yes. Okay. And -- and you've testified that it's not exactly true --

20 A Yes.

21 Q -- right? Okay.

22 A To his question, yes.

23 Q All right. Saying it's not exactly true is not exactly true, is it?

24 A Yes, it is.

25 Q If you say there's DNA and there's no DNA, that's a lie, isn't it?

1 A I didn't say there was no -- or it was exactly true what your second
2 question -- I said --

3 Q You said --

4 A -- it was to his first question.

5 Q You said we found DNA of Hispanic origin --

6 THE COURT: So counsel -- so the purpose of having the witness on
7 the stand is not to get into an argument over what he said in direct examination.
8 We're here to find the facts and focus on the facts of the case and not trying to
9 cross-examine him on what, you know, what he remembers about saying to
10 Mr. Hamner. All right.

11 MR. WESTBROOK: Oh, I agree, Your Honor. I'm just --

12 THE COURT: All right.

13 MR. WESTBROOK: I'm just trying to get precise answers to these
14 important questions. And I'll -- I'll try harder.

15 THE COURT: All right. But they are important questions.

16 MR. WESTBROOK: Okay.

17 THE COURT: I appreciate -- appreciate your questions.

18 BY MR. WESTBROOK:

19 Q You -- you said we found DNA of Hispanic origin; was that true or
20 false?

21 A It was false.

22 Q Okay. And you knew it was false; it wasn't a mistake that it was false,
23 right?

24 A Right. Because we didn't do a DNA.

25 Q Okay. So you intentionally lied to him, right?

1 A I did a ruse, which is common practice in police work and has been for
2 years.

3 Q I see. And you just won't say the word lie; is that correct? You won't
4 just admit that --

5 MR. HAMNER: Objection.

6 BY MR. WESTBROOK:

7 Q -- that it's a lie?

8 MR. HAMNER: It's -- it's -- it's argumentative. You've been warning
9 counsel about this --

10 THE COURT: So you know --

11 MR. HAMNER: -- it has --

12 THE COURT: Mr. Westbrook, I -- I think it is what it is.

13 MR. WESTBROOK: Okay.

14 THE COURT: We've just got to move on. The jury can assess what to
15 make from -- from this.

16 MR. WESTBROOK: All right.

17 THE COURT: All right.

18 BY MR. WESTBROOK:

19 Q So you told Mr. Azucena that it's -- that it was true, but it wasn't true; do
20 you agree with that?

21 A Correct.

22 Q All right. The purpose of this falsehood -- is that word okay?

23 A Ruse.

24 Q Ruse?

25 A Yes, sir.

1 Q The purpose -- the purpose of this thing that you told him that wasn't
2 true was to get a confession, right?

3 A Yes, sir.

4 Q And the purpose of getting a confession is to get a conviction, right?

5 A Yes, sir.

6 Q So you're willing to say something that isn't true in order to get a
7 conviction; is that correct?

8 A I'm willing to use a ruse if someone has committed a crime against
9 another person and if that gets them to confess. Yes, I am.

10 Q Okay.

11 MS. KIERNY: I'm going to object to committed another crime --
12 committed a crime.

13 BY MR. WESTBROOK:

14 Q If you believe somebody has committed a crime?

15 THE COURT: He -- he means if he believes. So --

16 BY MR. WESTBROOK:

17 Q If you believe somebody has committed a crime?

18 THE COURT: So will you -- will you clarify that?

19 THE WITNESS: Yes, sir, I'm sorry.

20 THE COURT: All right.

21 BY MR. WESTBROOK:

22 Q So you're saying that if you believe somebody has committed a crime,
23 you're willing to say something false in order to get a conviction, right?

24 A Because they're not going to confess if they didn't do anything.

25 Q They're not going to confess if they didn't do anything?

1 MR. WESTBROOK: Thank you. I'm done.

2 THE COURT: All right. Thank you, Mr. Westbrook.

3 Any --

4 MR. HAMNER: Oh, yeah.

5 THE COURT: -- redirect?

6 MR. HAMNER: I've got a few questions.

7 David, did you want your --

8 MR. WESTBROOK: Oh, yeah. Thanks.

9 THE WITNESS: Does he want these? Or do I leave these here?

10 MR. HAMNER: You can leave those there, Detective, that's fine.

11 **REDIRECT EXAMINATION**

12 BY MR. HAMNER:

13 Q I'm going to need to cover a few topics. I'm sorry. That was a long
14 cross.

15 I want to go all the way back to the beginning.

16 You remember when you were being asked about your folder
17 notes versus your handwritten notes --

18 A Yes.

19 Q -- do you remember that?

20 A Yes.

21 Q And you were asked a question about who has access to it. Detective,
22 do Ms. Kollins and I have access to those particular notes or did we ask you,
23 actually, to produce those because we didn't actually have access?

24 A You did not ask me to produce my folder notes.

25 Q Okay. But we asked you to produce these folder notes, isn't those --

1 those are the recreations of what we asked you to do a little while ago, these
2 items?

3 MR. HAMNER: Approaching with the folder notes.

4 MS. KIERNY: Yeah.

5 THE WITNESS: Yes.

6 BY MS. HAMNER:

7 Q Okay. So I just want to show you this to make --

8 THE COURT: Just show him to make sure we're on the same page.

9 MR. HAMNER: Sure. I just want to make sure --

10 THE WITNESS: Oh, I'm sorry.

11 MR. HAMNER: -- we're on the same page.

12 THE WITNESS: I'm sorry.

13 BY MR. HAMNER:

14 Q These are your folder notes, right?

15 A Yes, sir.

16 Q Okay. These were located, I think you said, maybe in a database, like
17 PremierOne?

18 A Yes.

19 Q Okay. I think you had said on direct -- or on cross that the DA had
20 access to it. But in this case, did we produce these or did we ask you to actually
21 make these because we didn't have --

22 A You asked me to make those.

23 Q Okay. So you made those at our request, because we didn't have any
24 access to them?

25 MR. WESTBROOK: Objection. Calls for speculation. I'm not sure he

1 knows about the access of the DA's office.

2 MR. HAMNER: He -- he made a --

3 THE COURT: Well, but he said, in response to your question, that the
4 DA has access.

5 MR. WESTBROOK: Okay.

6 THE COURT: All right. I -- I'm not going to ask him to follow up on
7 what that means. That's for you guys --

8 MR. WESTBROOK: Fair enough, Judge.

9 THE COURT: -- on what access means. All right. If -- so whatever.

10 MR. WESTBROOK: Okay.

11 THE COURT: Let's keep going.

12 BY MR. HAMNER:

13 Q Let's now talk about handwritten notes.

14 A Yes, sir.

15 Q Do you see these? You can see them?

16 A Yes.

17 Q All right. Okay. Just referring to these in general. I want to -- I want to
18 set the stage a little bit.

19 When you have handwritten notes, when are you taking these
20 notes down?

21 A As --

22 Q In this case, when were you taking these handwritten notes down?

23 A As the interview is going on.

24 Q Okay. So if Maradel is sitting with Elizabeth, and you're sitting in the
25 side room, are you writing as they're talking?

1 A Yes.

2 Q And what is the purpose of these notes for you? Why are you writing
3 little things down as you're listening?

4 A Twofold -- first, I'm trying to jot things that she's staying that I can stick
5 in my memory that I can address later when I get the transcripts.

6 Q Okay.

7 A Sometimes they -- she -- the person giving the statement may say
8 something that I need clarified, so I may jot something down. And as you can see
9 on my notes, I wrote to the side, several times, clarify.

10 Q So multiple times you're writing clarify down?

11 A Yes.

12 Q Okay. I want to -- I want to ask you about that.

13 When you're listening and you're writing things down, are you
14 doing that in part within here to see if you think possibly a crime was committed,
15 because you're trying to decide whether you arrest somebody for X, Y, or Z; is that
16 what --

17 A Definitely.

18 Q -- part of it's for?

19 A Definitely.

20 Q Okay. And -- and let me ask you this. Were you ever able to sit down
21 in a room and talk to these children and -- and ask -- do an interview, like you would
22 an adult?

23 A No.

24 Q Okay. So -- and here's the other thing. When Elizabeth is sitting with
25 these children, are you aware that she's got rules to follow by, there's certain

1 questions she can't ask, certain techniques she can't use when talking with
2 children?

3 A Yes, I am.

4 Q Okay. So even if you want some clarification, are you somewhat
5 limited in even asking certain follow-ups, even if you really want to, because it's in a
6 forensic setting, rather than a normal adult police officer setting?

7 A Yes. She's actually told me before that she can't ask that due to the
8 forensic interview first.

9 Q So there's times that you even get told to pound sand, even when you
10 want to go further?

11 A Yes.

12 Q Okay. I want to talk about Maradel for a second. We've got to go all
13 the way back to the beginning. That's the beginning part of your notes. If your
14 notes are there, you can kind of look.

15 I'd like you to look at page 1. Do you remember, there were all
16 those questions about Lexi, right? And you wrote, Who is Elexi?

17 A Yes.

18 Q Do you see that in the middle of your page --

19 A Yes, I do.

20 Q -- in page 1? Okay. When you wrote that down, do you remember kind
21 of what you were thinking or why you put that down?

22 A Yeah. Because her name was brought up.

23 Q Okay. Now, do you recall -- do you independently recall whether or not
24 Maradel actually said Lexi was subject to some sort of inappropriate conduct? Do
25 you remember that or the context in which she even talked about Lexi as you sit

1 here today?

2 A I -- I do not.

3 Q Okay. I -- would it help refresh your recollection if you could refer to the
4 voluntary statement of -- of Maradel?

5 A Yes.

6 Q Okay. I'm going to refer to pages 14 and 20. Starting turning to
7 page 14, this is Maradel -- well, there's a typo here -- it says Maradel, but does this
8 appear to be Maradel's interview?

9 A Yeah. Yes.

10 Q All right.

11 A I'm sorry.

12 Q I want to refer you to page 14. Okay.

13 A Uh-huh.

14 Q I want you to read the bottom part of here.

15 A Okay.

16 Q All right. Have you got that portion down?

17 A Yes.

18 Q Okay. I'm going to refer you to page 20. Page 20 and page 19, the
19 bottom of 19. Read here --

20 A Uh-huh.

21 Q -- and then following on page 20, read here.

22 A Uh-huh.

23 Q Does that refresh your memory as to references Maradel made to
24 Lexi -- about Lexi?

25 A Yes.

1 Q Okay. And -- and to be clear, you later learned Lexi's name is really
2 Litzi, but the translation has Lexi in here; is that right?

3 A Yes.

4 Q And even you, when you listened, you wrote down Elexi --

5 A Yes.

6 Q -- is that right? Okay. Does that refresh your memory as to whether or
7 not Maradel actually made a disclosure that somehow that child was inappropriately
8 touched or if she was just present at different periods of time?

9 A Present at different times.

10 Q Okay. So it's not a situation where when you were listening to this
11 interview, she's actually saying Elexi was subject to some type of abuse?

12 A Correct. That's correct.

13 Q Okay. And I want to actually go back. There was something else I
14 wanted to touch on. Oh, right.

15 Do you remember when you were asked at the very beginning of
16 cross-examination, oh, were these all your reports? And things like that, and he
17 handed you things, and you flipped through them?

18 A Yes.

19 Q Did he hand you any of the voluntary statements of any of these people
20 that -- that we -- we're talking about?

21 A No, sir.

22 Q Did he provide you Maradel's?

23 A No, sir.

24 Q Mirabel's?

25 A No, sir.

1 Q Jatziri?

2 A No, sir.

3 Q Yezline?

4 A No, sir.

5 Q Amanda?

6 A No, sir.

7 Q Marta?

8 A No, sir.

9 MR. WESTBROOK: Your Honor, objection. I'm concerned that this is
10 burden shifting, and it's inappropriate.

11 MR. HAMNER: It's with respect to the cross-examination question.

12 THE COURT: It -- it's not --

13 MS. KIERNY: These are documents he produced.

14 THE COURT: -- burden shifting.

15 MR. WESTBROOK: The defense has no burden to produce these
16 documents.

17 THE COURT: The defense has no burden to produce them, but what --
18 what he's -- he's -- he's rebutting a point you made in your cross-examination. All
19 right. So you may continue.

20 MR. HAMNER: Thank you.

21 BY MR. HAMNER:

22 Q Ricardo's voluntary?

23 A No, sir.

24 Q Scarlett's voluntary?

25 A No, sir.

1 Q Okay. Did you provide transcripts to the -- to the State to give to the
2 defense in this case?

3 A Yes, sir.

4 Q Was that part of your case file? All of those interviews and -- and
5 transcriptions?

6 A Yes, sir.

7 Q Okay. So while those may be your reports, you also have all of these
8 voluntary statements, right?

9 A Yes, sir.

10 Q And do they track word for word what every witness said?

11 A Yes, sir.

12 Q And they were provided to everybody?

13 A Yes, sir.

14 Q Okay. Let -- let me ask you this, since we're talking about report writing
15 so much, is -- is your --

16 MR. WESTBROOK: And I'm sorry. Objection. It misstates it. They
17 don't say word for word what every witness said, because he didn't give transcripts
18 of Litzi or Leo.

19 THE COURT: Well --

20 MR. WESTBROOK: So it's --

21 MR. HAMNER: Well, let me -- I'll -- I'll -- I could --

22 THE COURT: Word for word might be a stretch, so -- or --

23 MR. HAMNER: Well, let me -- let me -- I'll rephrase.

24 THE COURT: Please rephrase. Thank you.

25 BY MR. HAMNER:

1 Q Did you provide audios of every one of those interviews?

2 A Yes, sir.

3 Q Audios that gave you the opportunity to transcribe word for word
4 everything that was being said?

5 A Yes, sir.

6 Q And did you provide the audios of Litzi and Leo?

7 A Yes, sir.

8 Q Okay. Now, let me ask you this, Detective.

9 In some of you cases, do you typically -- do you transcribe every
10 single interview?

11 A No, sir.

12 Q Okay. So sometimes you do, sometimes, you know, you transcribe
13 some and sometimes you don't?

14 A Correct.

15 Q But you do provide audios?

16 A Yes.

17 Q Okay. And did you do that in this case?

18 A Yes, sir.

19 Q And did you have transcribed by Metro every single voluntary statement
20 with the exception of Leo and Litzi?

21 A Yes, sir.

22 Q But you provided those audios to the State?

23 A Yes, sir.

24 Q With the intention that they would be disseminated to the defense?

25 A Yes, sir.

1 Q Okay. Great.

2 So let's get back to Maradel for a second. And let's talk about
3 report writing. I want to get on the -- I jumped. I want to talk about report writing for
4 a second.

5 Detective, when you're trained, is your job in a report to write
6 down every single word a witness says in a voluntary statement and just put it in
7 your report?

8 A No, sir, I can't.

9 Q Okay. Why -- why are you not supposed to do that?

10 A It's why we have the voluntary statements transcribed, so they can --

11 Q Okay. So the -- so if I'm hearing you correctly, part of the idea is to
12 have that report, but also have the accompanying statements that can give you line
13 by line the statements, the specific details that all these witnesses are saying?

14 A Yes, sir.

15 Q Okay. And that was provided with respect to all these people we've
16 been talking about?

17 A Yes, sir.

18 Q All right. Let's get back to Maradel. And there was -- and, precisely,
19 there were cross questions about you don't mention Lexi in your report?

20 A Correct.

21 Q But you did provide the voluntary statements where Maradel mentions
22 the context in which she remembered Litzi?

23 A Yes.

24 Q Or Lexi, depending -- I mean, it's --

25 A Yes, sir.

1 Q -- we're all clear. Okay. So is that -- is that a reason why you didn't
2 include Litzi in your report?

3 A Yes.

4 Q When you wrote your original arrest report?

5 A Yes.

6 Q There was a question about Maradel being inconsistent with the time of
7 events; do you remember that question?

8 A Yes.

9 Q Why did you write that down? Or what's the purpose of that for you?
10 Why did you kind of note that?

11 A I wanted to have Elizabeth just clarify it. I want -- we needed to
12 establish a time of when things had taken place.

13 Q Okay.

14 A And when we establish a time, we can establish different events that
15 may or may not have happened.

16 Q Okay.

17 A Which would depend on what we may or may not charge someone
18 with.

19 Q So let -- let me ask you this. In your -- how -- how many cases do you
20 get in a year involving kids? Ballpark, if you can do it.

21 A Probably a hundred to 150.

22 Q Okay. How many years have you been doing the sexual --

23 A It's going on five.

24 Q Okay. Have you had experience with children who were able to do that
25 very thing, give kind of distinguishable times, like, on -- it was on a Wednesday and

1 da, da, da, da, da happened. And --

2 A Yes.

3 Q -- the next time was a Saturday, ba, da, da; you have kids that do that?

4 A Yes.

5 Q Do you have kids that are the contrary? Have you listened to kids
6 unable to do that, just kind of describe events, but not be able to delineate that
7 happened two weeks ago, that happened a month ago?

8 A Yes.

9 Q Have you had that?

10 A Yes.

11 Q Is -- is one more common than the other or what's -- what's, in your
12 experience of listening to kids?

13 A Really, we take into different factors, as far as we talk to their parents,
14 as far as, like, if they're in the IEPs, with school.

15 Q And I guess my question is just this, is it common, over the five years
16 you've been working, to have kids be able to delineate particular days and months
17 of the week; is that something you regularly see?

18 A Sure.

19 MR. WESTBROOK: Objection. Speculation.

20 MR. HAMNER: It's about his own personal experience.

21 THE COURT: Well, see, you put in issue the good faith of whether his
22 investigation was in good faith, which puts at issue his state of mind. So this
23 question is really going to his state of mind. We're more interested in what he
24 believed rather than what the actual fact was about -- such as kids' ability to
25 remember things. So I'll allow it.

1 MR. HAMNER: Okay.

2 THE COURT: For that -- I'll allow it for that reason.

3 BY MR. HAMNER:

4 Q So let me ask you the question again.

5 In your experience, have you regularly seen kids that can give
6 you kind of specific days and timelines, just over the five years?

7 A Yes, sir.

8 Q And in your experience, have you regularly seen kids who cannot do
9 that?

10 A Yes, sir.

11 Q Does their age play a factor?

12 A Sometimes, yes.

13 Q Okay. And you're saying education or intellect level to some extent
14 also plays a factor?

15 A Yes.

16 Q All right. Let's move on to Mirabel.

17 You were asked on cross-examination about a note that you
18 wrote saying, When is the last time you saw his thing; do you remember being
19 asked that on cross? I don't know if you definitely do.

20 A I'm sorry, I do not.

21 Q You don't -- okay.

22 A I'm sorry.

23 Q And it would be on page 4 of your notes.

24 A Okay.

25 Q You starred it --

1 A Oh, I'm sorry. Yes, the star.

2 Q -- on top of it.

3 A Yes.

4 Q Do you remember opposing counsel asking you, Hey, when is the last
5 time you saw his thing? And you writing it down; do you remember that line of
6 questioning?

7 A Yes, I'm sorry.

8 Q And I think you may have said something to the effect of, I wanted to
9 speak to Elizabeth about it.

10 A Yes.

11 Q Okay. Did you speak to Elizabeth about it?

12 A I did. Anytime I put a star or clarify anything, I always talk to her when
13 she comes in for a break.

14 Q Okay. Do you remember what happened when you talked to her about
15 it? Or if she tried to ask a question to clarify it? Or if she told you I couldn't? Or --

16 A I -- I don't remember what the response was.

17 Q But you put that note as a follow-up for Elizabeth and you believe, as
18 you sit here today, you actually did try to follow up with that?

19 A Yes.

20 Q Okay. Referring to page 4, there was that whole line of questioning
21 about supposedly it happened last Friday on October 28, 2016; do you remember
22 that --

23 A Yes.

24 Q -- question on cross?

25 A Yes, sir.

1 Q And then you were asking a lot of questions about why didn't you go
2 send the CSAs.

3 A Yes, sir.

4 Q Do you remember again the date that these parents walked in alleging
5 when the alleged touching happened with --

6 A Yes.

7 Q -- the defendant?

8 A Yes, sir.

9 Q What day was that again?

10 A 10/17.

11 Q Okay. So 11 days before this -- I'm sorry -- 11 days before this claim
12 of 10/28?

13 A Yes.

14 Q Okay. When you heard that that -- and -- and this interview was
15 conducted on what date; do you remember?

16 A 11/2.

17 Q So this is happening on November 2nd. When you -- when you heard
18 that, did you think it would be -- knowing that they've come in disclosing on 10/17,
19 and now you're kind of talking to them on 11/2, and there's this mention of a 10/28
20 date, did you think it would be a good idea to start getting search warrants in
21 process?

22 A Not at that point, because I knew there was --

23 Q Why?

24 A I'm sorry.

25 Q Tell the jury why, so we can kind of get an understanding of what's in

1 your head; why didn't you do it?

2 A I knew from the detective that wrote the -- I spoke to him directly when
3 he took this report. And our --

4 MS. KIERNY: I'm going to object as to detective and hearsay within
5 whoever he's talking to -- about.

6 THE COURT: Well --

7 MR. HAMNER: I think --

8 THE COURT: -- it's not being offered for the truth of the matter
9 asserted, so -- so it's not hearsay. So I'll allow it.

10 Go ahead.

11 THE WITNESS: Okay. Our protocol is anytime there's an allegation of
12 child abuse, whether it be physical or sexual, our protocol, along with CPS, is to put
13 what's called a safety plan in effect. Meaning the child cannot go anywhere near
14 the alleged suspect and -- from that point forward until the investigation is
15 completely over.

16 So we established that with the mothers that filed the report on
17 October 17th. So they -- they were told do not let your kids go back to the alleged
18 suspect's residence, anywhere near him. Do not play out in the area. They told us,
19 okay, no problem.

20 BY MR. HAMNER:

21 Q And -- and here's a -- I want to follow up on a couple other things.

22 Did the -- did the kid rattle off the actual date of October 28th, or
23 did she say something more along to the last Friday?

24 A I would have to look back at the notes. I -- I don't recall.

25 Q Okay. But this is -- okay. And, well, let me ask you also this. You also

1 had the benefit on November 2nd to sit and listen in realtime all these kids telling
2 you about these things, right?

3 A Yes.

4 Q Did you -- and when you listen to all of these kids, do you kind of listen
5 to it, try to get a sense -- try to get a picture --

6 MR. WESTBROOK: Objection. Leading.

7 MR. HAMNER: I haven't -- I'm just trying to -- I'll rephrase the question,
8 but I didn't even finish the question, but I can rephrase it.

9 THE COURT: Yeah. It sounded like it was starting to be leading.

10 MR. HAMNER: Okay.

11 THE COURT: So I'll -- I'll sustain.

12 Please rephrase.

13 BY MR. HAMNER:

14 Q Is it important to kind of compare what all the kids are saying about
15 what happened and when --

16 A Yeah.

17 Q -- when you listen to them?

18 A Yes, sir.

19 Q Are you listening --

20 MR. WESTBROOK: Objection. That's also leading.

21 THE COURT: Do you also -- well, let's hear that one before -- let me
22 hear the whole question.

23 MR. HAMNER: Okay.

24 BY MR. HAMNER:

25 Q Why is it important to listen to these kids to get a sense of the timeline?

1 THE COURT: All right. That's fine.

2 THE WITNESS: I'm sorry. Would --

3 BY MR. HAMNER:

4 Q Why is it -- why are you listening to these kids to try to get a sense of
5 the timeline from them?

6 A Because if we -- we're interviewing four different children at one time,
7 back to back to back to back. We're trying -- they've all said, throughout their
8 interviews, We're playing together, we're playing together. Periodically one would
9 say a little -- but, we're just trying to get a totality of the circumstances. And we've
10 already seen -- because I did write in there Friday, and then I put the date.

11 Very -- we just -- our job is to make sure we can find the truth.
12 That's what our whole goal is. So we listen to everybody and we gather every -- all
13 the information before. That's why I've got all these weird notes.

14 BY MR. HAMNER:

15 Q Okay. And -- and Detective, after listening to Yezline, Jatziri, Mirabel,
16 Maradel, as well as any information you gleaned from Detective Garris, did you
17 think you were dealing with an acute situation on November 2nd, 2016?

18 A No, I did not.

19 Q That would require dusting for fingerprints and -- and DNA?

20 A Yes.

21 Q Okay. So you did not think --

22 A That -- yeah.

23 Q Okay. All right.

24 Security footage, let's talk about that. Do you remember that
25 whole back-and-forth about cameras and locations and things like that?

1 A Yes, sir.

2 Q Just clarify for the jury, what did you ask the building managers about
3 wanting footage? What specifically were you asking for?

4 A I was looking for camera footage in the northwest corner of the -- of the
5 apartment complex.

6 Q Okay.

7 A And they told me they did not have any.

8 Q Are those the words you used, Detective?

9 A Northwest corner? Yes.

10 Q Okay. So you didn't specify a particular home; you said just northwest?

11 A Correct.

12 Q Okay. I'm showing 23.

13 MR. HAMNER: Publishing State's 23.

14 Q This is the Charleston Garden Apartments?

15 A Oh.

16 Q Is this the Charleston Garden Apartments, Detective?

17 A I'm going to say yes. I've -- I've never seen the -- and aerial view, but...

18 Q Okay. Well, would you like to look at it up close to maybe get a better
19 sense?

20 A If I could.

21 Q And let me also show you State's 22.

22 Let's take a look at State's 22. Is that an overhead --

23 A Yes.

24 Q -- of that apartment complex?

25 A Yes.

1 Q Okay.

2 A I'm sorry.

3 Q That's okay. And is this, on State's 23, a more blown-up version of this

4 area?

5 A Yes.

6 Q Okay. So you said you were asking for camera footage in the

7 northwest. But let me show you State's 22 for a second. When you said northwest,

8 were you referring to one side -- like, northwest of both buildings or one set of

9 buildings?

10 A I said the northwest corner of the complex.

11 Q Okay. So the -- the most northwest corner, I guess, would be over

12 here?

13 A Yes.

14 Q This area over here?

15 A Yes.

16 Q Okay. Is that where the defendant resided, in that general area?

17 A Yes.

18 Q And that's the geographic words you used, northwest portion?

19 A Yes.

20 Q And not his house?

21 A Correct.

22 Q Okay. And what did they tell you about whether there was footage

23 available from the northwest area?

24 A They did not have it.

25 Q If they had gave it to you, would you have impounded it?

1 A Of course.

2 Q I want to turn your attention to page 5. It says there was -- you starred
3 an area that says:

4 Can't remember any details other than I did not like that.

5 What did you mean when you wrote that down? Do you see that
6 on page 5?

7 A I do.

8 Q Why the star?

9 A We deal with different crimes in sex abuse. And depending on where a
10 person is touched and how they're touched will determine the charges we're looking
11 for. So when I'm asking her for her -- Elizabeth is swearing, then I wrote -- there's
12 no details, she was not giving specific details of certain days what exactly was
13 going on with the touching.

14 Q Okay. So from what you could hear in realtime, it sounded more
15 general and not to a specific body part?

16 A Correct.

17 Q And that was the purpose of you writing that particular note to yourself?

18 A Yes.

19 Q To remind you for that child --

20 A Yes.

21 Q -- that was what we were getting in terms of level of detail?

22 And you were -- you were asked, well, you didn't put it -- that in a
23 report; why didn't you put that little note in there in the report? Why wouldn't you do
24 that?

25 A Because a lot of my notes are just thoughts that pop in my head --

1 Q Okay.

2 A -- and I just jot them down so I don't forget.

3 Q In this case you said this particular note was for you to formulate

4 whether you could specify a particular type of potential crime?

5 A Correct. What the actual touching was, what didn't she like about it.

6 Q You were asked questions about kind of your motivations. There was a

7 lot of talk about that. Can you explain to the jury, were you deliberately trying to

8 hide details from your notes in that report?

9 A No.

10 Q Is that was -- what you were trying to do when you wrote your reports?

11 A No, I was not.

12 Q Okay. I will ask you about this. You did not prepare a supplemental

13 report for Litzi and Leo, though; is that right?

14 A No, I did not.

15 Q Okay. Can you just explain why you did not do a supplemental for

16 them?

17 A Mr. Hamner asked me to have these two kids interviewed, so we did.

18 When there's no disclosure, there's no really -- there's really no report. We just

19 document it in -- whether it's our folder notes, and then we let them know.

20 Q And did you document it in your folder notes?

21 A Yes, I did.

22 Q Okay. Did you provide those audios to the State?

23 A Yes, I did.

24 Q For the intention that they be turned over to the defense, as well?

25 A Yes, I did.

1 Q You were questioned about why in your -- and -- about your first arrest
2 report. And that was with respect to the -- the Moreno children and Yezline?

3 A Uh-huh.

4 Q So the three girls and Yezline, why you didn't mention Scarlett; do you
5 remember that?

6 A Yes.

7 Q Okay. Did you prepare a separate arrest report for Scarlett?

8 A Yes, I did.

9 Q Okay. Let me ask you this. Do you -- can you tell the jury what an
10 event number is?

11 A Every time a call comes in to Metro, whether it's 311 or 911, it's
12 assigned what's called an event number. So it starts off with the month. If it was
13 today, it would be 170505, dash, and the very first call right after midnight is 0001.
14 And that goes all the way up till 235959 at the end of the day. So every phone call
15 that is -- comes in to Metro is assigned an event number.

16 Q Okay. Did the event involving the Moreno girls and Yezline have a
17 different event number than Scarlett?

18 A Yes.

19 Q Okay. Does that affect how you write your arrest reports?

20 A Yes.

21 Q Okay. How does it affect that?

22 A Everything in my first report referenced the first allegation was written
23 with the statements from the witnesses and the victims. Alleged witnesses, alleged
24 victims.

25 And then my interview with Mr. Azucena at -- that was submitted

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1 then.

2 When the second report came in, I believe the 7th, 11/7 or 11/8,
3 I took the initial probable cause from the first one and then I just added the
4 statement that she gave, and then when she picked out in the photo lineup.

5 Q Okay. You were asked questions about the memorializing, you know,
6 e-mail that I sent you back in January about possibly talking to some other kids.
7 And then you memorialized that on March 13th; is that right?

8 A Yes.

9 Q And so you -- you didn't enter any other further notes with respect to
10 that? It was just the fact that those two kids, Lexi and -- and Litzi did not disclose;
11 is that right?

12 A Correct.

13 Q Okay. And you explained kind of the reason earlier about why there
14 would be a supplemental for them?

15 A Yes, sir.

16 Q You were asked questions -- and referring to page 10 of your notes --
17 that -- and -- and a check-off list about the white tape being in the wife's bag; can
18 you explain why you did not do this?

19 A Time frame of when the allegations happened. I did not know if I would
20 be able to find anything in her bag at the time.

21 Q But, ultimately, you noted that it might be something you wanted to do,
22 but, ultimately, you didn't do it?

23 A Correct.

24 Q Okay. Let's talk about the interview. On cross you were asked, Isn't it
25 true that the defendant said doesn't check in with her. That's his response as to

1 why he didn't talk to his wife?

2 A Yes.

3 Q Do you recall of whether or not those were the exact words he used?

4 A I don't believe it was his exact words.

5 Q Okay. Would it help refresh your recollection to see page 6 of your
6 voluntary statement?

7 A Yes.

8 Q Referring to page 6, near the bottom. Please let me know when that
9 refreshes your memory about his exact words that he said when asked that
10 question.

11 A Yes.

12 Q You asked, Why didn't your wife know where you were? What are the
13 exact words the defendant uses?

14 A Because I almost never tell her anything.

15 Q You were asked on cross-examination, It's not a weird thing to go by
16 your middle name, right? Do you remember being asked that?

17 A Correct.

18 Q Were -- what did you think when you heard the defendant say, I've
19 never told anyone my name is David. And every interview you had listened to up
20 this point, they had referred to him as David?

21 A I thought it was extremely odd.

22 Q At any point in that interview does the defendant say to you that
23 sometimes I go by David?

24 A No, he never said that.

25 Q Or my friends call me David?

1 A No.

2 Q Anything like that?

3 A No, sir.

4 Q You were asked questions about an old burglary case where the
5 defendant was the victim; do you remember that?

6 A Yes.

7 Q You were asked a bunch of questions about some report; is that right?

8 A Yes.

9 Q A couple of things. In that -- from what you could glean, did it indicate
10 that he spent weeks away from his wife around that time, working in that
11 apartment -- or working in that shop?

12 A No.

13 Q But that was something that happened in -- in this interview?

14 A Yes.

15 Q Was there any indications in an old case that he had had no contact
16 with his wife for weeks?

17 A No.

18 Q But that happened in this case?

19 A Yes, sir.

20 MR. WESTBROOK: Objection. This is all speculation.

21 MR. HAMNER: I'm basing it solely off the information he reviewed.

22 MR. WESTBROOK: He's having him speculate on things that are
23 outside of the report in 2011. It's completely speculative.

24 MR. HAMNER: I'll confine my question to the report. But you spent a
25 lot of time questioning about it.

1 THE COURT: Why don't you clarify it?

2 MR. HAMNER: Sure.

3 THE COURT: I'm going to sustain and -- and let's clarify it.

4 BY MR. HAMNER:

5 Q Pursuant to the -- pursuant to the report you reviewed that you were
6 just asked about on cross-examination, is there any references that the defendant
7 spending weeks away from his home while working in that -- in his shop?

8 A No, sir.

9 Q Pursuant to the report that you reviewed, did it indicate that while he
10 was working in the shop back then, that he hadn't heard from his wife or had no
11 contact with his wife for weeks?

12 MR. WESTBROOK: Objection, Your Honor. The report would never
13 have anything to do with this.

14 THE COURT: Well, that's --

15 MR. WESTBROOK: Mr. Hamner knows this.

16 THE COURT: That's argument. I mean --

17 MR. WESTBROOK: This is argumentative.

18 THE COURT: Okay. Well, we're -- he can -- he -- look, I think you
19 opened the door to -- to whether he would know, right, about what was going on
20 back in this timeframe. So I'm going to let him -- I'm going to let him talk about
21 what -- what he believed what his state of mind was. It all goes to his state of mind.

22 MR. WESTBROOK: Your Honor, I asked him as to what was actually
23 in the report, not speculating about a biography that would never be a part of the
24 report.

25 MR. HAMNER: Well, I think Mr. Westbrook is speculating right now. I

1 just want to focus on what's in and not in the report.

2 THE COURT: I'm going to let him ask the questions. You can -- you
3 get the last word on -- on recross. So if you want to bring it back up, you can.

4 BY MR. HAMNER:

5 Q Detective, let me ask you that question just one more time.

6 When you reviewed that report, did the report give any indication
7 that he hadn't spoke to his wife for -- he had no contact with his wife for potentially
8 weeks?

9 A No, sir, it did not.

10 Q Okay. But that happened in this case?

11 A Yes, sir.

12 Q Okay. And then, you know, there was a lot of questions about --

13 MR. WESTBROOK: Also objections, Your Honor. It misstates the
14 testimony. No one has said that -- there's no evidence in this case that my client
15 didn't have any contact with his wife for weeks.

16 MR. HAMNER: I can --

17 THE COURT: Well --

18 MR. HAMNER: I don't think it misstates the testimony, but I can ask
19 more questions.

20 THE COURT: You know what, I'm going to overrule. And just on the
21 basis of there's been a lot of testimony over the last two weeks, and I don't
22 remember specifically what was said about the contact between your client and his
23 wife. And -- and the jury should -- just going to have to try to remember what's in
24 their notes. And you guys can remind them what they have heard in your closing
25 arguments.

1 That's the best I can do for you.

2 MR. WESTBROOK: The second one is it would be hearsay, since they
3 haven't presented his wife to testify --

4 THE COURT: Yeah.

5 MR. WESTBROOK: -- and we've had heard from her. So.

6 MR. HAMNER: I can -- I -- it doesn't come from that source.

7 Let me -- if I could just ask another -- I'll clear it up if I could ask
8 another question.

9 THE COURT: So he's withdrawing the question, so it renders the
10 objection moot. And you can ask it a different way.

11 MR. HAMNER: Sure. And then I'll get back to that question and we'll
12 do it again.

13 BY MR. HAMNER:

14 Q The top of that interview with the defendant, this -- this -- well, when
15 you talked to him in this case, did you ask him -- did you tell him, Hey, I talked to
16 you wife and she said you've been gone for weeks?

17 A Yes.

18 Q Okay. So you actually talked about that?

19 MR. WESTBROOK: Objection. Hearsay.

20 MR. HAMNER: It's not --

21 MR. WESTBROOK: What his wife would have said is hearsay,
22 Your Honor.

23 MR. HAMNER: And we addressed that at the beginning of my direct.

24 THE COURT: So --

25 MR. HAMNER: It's not being -- her statement is not offered for the truth

1 of the matter asserted, but for the effect on the listener, the listener being him.

2 THE COURT: It's -- that's why I'm going to overrule the objection. It's
3 not coming in for the truth of the matter asserted. Okay?

4 BY MR. HAMNER:

5 Q Let's ask that question again.

6 THE COURT: This -- a big part of his case is his state of mind, and
7 that's what we need to find out. All right.

8 So go ahead.

9 BY MR. HAMNER:

10 Q Detective, at the top of your investigation or in interview with the
11 defendant, do you tell him about the fact that his wife told you she hadn't heard
12 from you in weeks?

13 A Yes.

14 Q And when you asked him about that she hasn't heard from you, why?,
15 is that when he says, Because I never tell her anything?

16 A Yes.

17 Q Okay. Now, let's get back to the report.

18 Pursuant to the report that you read from a few years back, did
19 the report contain any information saying that he had gone for weeks without talking
20 for -- to his wife?

21 A No, sir.

22 Q Okay. It didn't happen back then, but it happened in this case?

23 A Yes, sir.

24 MR. WESTBROOK: Objection. Now he's saying it as if it was true,
25 Your Honor.

1 MR. HAMNER: I'll move on.

2 MR. WESTBROOK: I mean, he -- it's one thing to say it's not for the
3 truth of the matter asserted. It's another thing to insist that it's true --

4 MR. HAMNER: I'll move on.

5 MR. WESTBROOK: -- which is exactly what Mr. Hamner is doing. I
6 ask you to strike all of that testimony.

7 MR. HAMNER: I can withdraw the question.

8 THE COURT: We're not striking any testimony. We're striking the
9 question. And he -- we're moving on.

10 MR. HAMNER: I'll move on.

11 MR. WESTBROOK: And the response.

12 THE COURT: There was no response to that last question. I -- I didn't
13 hear a response.

14 BY MR. HAMNER:

15 Q You were asked a lot of questions about the ruse; do you remember
16 that?

17 A Yes.

18 Q Okay. Are sometimes a ruse -- ruses entirely false?

19 A Are sometimes they entirely false? Yes.

20 Q Okay. So sometimes you entirely lie to a suspect, fair?

21 A Yes, sir.

22 Q Okay. And sometimes are some of your ruses partially true?

23 A Yes.

24 Q Okay. In this case was the -- the Hispanic DNA on the kids, was that
25 entirely false?

1 A Yes.

2 Q Okay. So you did flat out lie to him to try to get a confession, fair?

3 A Yes. I used the ruse, yes.

4 Q Okay. The -- the -- you were asked questions about the fact that the

5 defendant didn't admit to touching any of these children; do you remember he

6 asked that on cross?

7 A Yes.

8 Q Did he also deny offering them candy?

9 A Yes.

10 Q Did he also deny that his name was David?

11 A Yes.

12 Q Okay.

13 MR. HAMNER: I have no further questions at this time.

14 THE COURT: All right. Now it's your turn.

15 MR. WESTBROOK: I have no questions, Your Honor.

16 THE COURT: You don't want to -- okay. Well, that's fine.

17 Hold on. We've got to see if the jurors have any questions. They

18 might have some questions here. I see a couple writing. So I'm just going to give

19 them a moment.

20 [Pause in proceedings.]

21 THE COURT: What do we got? Let me take a look.

22 You guys can approach.

23 MR. HAMNER: Thank you, so much.

24 [Bench conference transcribed as follows.]

25 THE COURT: Okay.

1 MS. KIERNY: Thank you.

2 MR. HAMNER: Was there a warrant for his arrest.

3 THE COURT: I had -- I had a question. I'm probably not going to ask
4 it. But it's --

5 MS. KIERNY: I'll let you ask -- I'll let you -- yeah, give us your question.
6 I think this is appropriate; do you agree?

7 MS. KOLLINS: There was -- well, there was a warrant for Scarlett's
8 case, because he was booked on the warrant in the detention center and the new
9 case was filed. There was not a warrant on the initial case.

10 There's two separate cases.

11 MR. HAMNER: They're not together.

12 MS. KOLLINS: It came in as two cases.

13 THE COURT: So do you want this -- is she --

14 MS. KIERNY: I thought the issue --

15 MR. WESTBROOK: He's already asked that second one. That's
16 irrelevant.

17 MS. KOLLINS: Right. But, I mean --

18 THE COURT: Probably shouldn't ask this, then.

19 MR. WESTBROOK: Well, you can -- he can verify it that there was no
20 warrant, and I'll [indiscernible], that's one question, and that's absolutely
21 appropriate. The second one is complicated, [indiscernible] the second warrant.

22 However, it is appropriate to ask the question was there a
23 warrant when Jose was arrested? So that's the first question to ask.

24 MS. KOLLINS: Well, but that --

25 MR. WESTBROOK: The answer is no.

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1 MS. KOLLINS: Well, and the answer is yes, because the second case.
2 Yes, to your there was a warrant --

3 THE COURT: But he was arrested in this case, there was a warrant in
4 the second case?

5 MS. KOLLINS: No. He was arrested on the first case. He was
6 probable cause arrested on the first case. He went into custody. And then,
7 basically, a warrant comes through and he's rebooked on the second case. So
8 there was a warrant. So it's a yes-and-no.

9 MS. KIERNY: That's fine.

10 THE COURT: So was there a warrant for --

11 MS. KIERNY: I think that clarification is fine.

12 THE COURT: -- her husband's arrest? And that's true.

13 MS. KIERNY: But when he was arrested --

14 THE COURT: I mean, we can ask the first question.

15 MS. KIERNY: He was not -- the minute he was -- when he was
16 arrested in Henderson, there was not a warrant for his arrest. And I think --

17 MS. KOLLINS: Well, and I guess it's --

18 MS. KIERNY: And then later --

19 MS. KOLLINS: -- I guess it's just -- he's re-arrested and rebooked.

20 MS. KIERNY: -- there was a warrant issued for Scarlett.

21 THE COURT: Well...

22 MS. KIERNY: Do you want to do a stipulation maybe?

23 THE COURT: Why don't you guys stipulate. Because otherwise, he's
24 going to --

25 MR. WESTBROOK: That's fine. Our [indiscernible], when he was

1 arrested [indiscernible] there was no warrant for his arrest. We have a -- we have a
2 police report proving that.

3 THE COURT: Okay.

4 MS. KIERNY: Later, after --

5 THE COURT: If that's true --

6 MS. KIERNY: -- after his arrest, an -- an arrest warrant was issued
7 pursuant.

8 MR. WESTBROOK: And then our position would be also
9 [indiscernible]. So.

10 THE COURT: You could try to --

11 MS. KOLLINS: I'll do whatever you guys want.

12 THE COURT: -- concerned about that stipulation.

13 MS. KOLLINS: No. I --

14 THE COURT: No?

15 MS. KIERNY: It seems like you want to make sure they know that
16 there was a warrant issued for Scarlett.

17 MS. KOLLINS: I just want to make sure that clear to them that those
18 were two cases.

19 MR. HAMNER: [Indiscernible] also preparing a warrant --

20 THE COURT: I have to go on and mention the other case.

21 MR. HAMNER: -- for how much time -- not that -- listen, look, I
22 understand it, I just think --

23 MS. KOLLINS: It's submitted thinking he had --

24 MR. HAMNER: -- I don't want to submit it for a warrant on the first
25 case. It hasn't been --

1 MR. WESTBROOK: That's where --
2 THE COURT: So it was pending.
3 MS. KOLLINS: Yeah. But it was pending.
4 MR. HAMNER: It was pending [indiscernible].
5 MS. KIERNY: There wasn't actually one in the system.
6 MR. HAMNER: Well --
7 MS. KOLLINS: [Indiscernible] clarify all of that.
8 MR. HAMNER: Well, listen, I think he -- I think if you -- if you cut it off
9 and simply say he was simply arrested on one case and one case only, I think it's
10 an incomplete picture. Because the reality is, he was preparing a warrant.
11 Henderson then locates him, they do a PC arrest, because technically the warrant
12 wasn't submitted to a court. And then they do a warrant on the second case.
13 MS. KIERNY: So -- so there was --
14 THE COURT: I don't know why the jury needs to know this.
15 MR. WESTBROOK: I think [indiscernible].
16 THE COURT: I'm not going to give it. So here's my question --
17 concern, question.
18 The detectives think that during breaks on the interview that he
19 was watching, right? Going in and ask questions, right?
20 MR. WESTBROOK: Not to -- to -- no, he wouldn't talk to Elizabeth.
21 MS. KIERNY: No, no.
22 THE COURT: Just to Elizabeth?
23 MR. HAMNER: Never the kids.
24 THE COURT: Not to the children? Because I --
25 MR. HAMNER: And he didn't testify to talking to the children.

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THE COURT: Okay.

MR. HAMNER: So he could never talk to the children.

THE COURT: Okay. I just want to clarify that.

MR. HAMNER: Yeah, that was clear.

THE COURT: All right. Thank you, guys.

MR. HAMNER: Sure.

[End of bench conference.]

THE COURT: Okay. You're off the hook. I'm not going to ask this question. All right.

THE WITNESS: Yes, sir.

THE COURT: We talked about it, I decided -- was there -- was there anything -- don't concern yourself as to why I'm not asking the question. I just -- I can't for reasons -- or I'm not going to for reasons that don't matter. All right. And don't speculate as to what the answer would or would not have been.

Any other questions? No? Okay.

Detective, you're excused. Thank you, sir.

THE WITNESS: Thank you, sir.

THE COURT: Watch your step there.

THE WITNESS: Yes, sir.

THE COURT: All right. The State may call its next witness.

MR. HAMNER: Well, State would like to just approach to check our exhibits.

THE COURT: You may.

MR. HAMNER: Thank you, so much.

[Pause in proceedings.]

1 MS. KOLLINS: Your Honor, I believe the State is satisfied all of our --
2 our exhibits have been admitted.

3 THE COURT: Excellent. Thanks for double checking.

4 MR. HAMNER: State rests at this point, Your Honor.

5 THE COURT: State rests. All right.

6 The defense may call its next witness.

7 MS. KIERNY: Okay. The defense would call Leonardo De Santiago.

8 THE COURT: Leonardo De Santiago. This is defense witness No. 2?

9 MS. KIERNY: Correct. Thank you.

10 [Pause in proceedings.]

11 THE COURT: All right. Are you Leo?

12 THE WITNESS: Uh-huh.

13 THE COURT: How you doing, Leo?

14 THE WITNESS: Good. How are you?

15 THE COURT: Good. Thank you for coming today. You're going to sit
16 up here, okay, next to me.

17 So I'm -- I'm the judge in the case. And the -- the attorneys are
18 going to have some questions. You have an interpreter, so feel free to speak in
19 Spanish, okay?

20 All right. Are you comfortable, sir? You comfortable? Well, why
21 don't you scoot a little bit closer. Do you see that -- you see that book? On top of
22 that book is a microphone. We just need to make sure we can hear your voice,
23 okay?

24 All right. And all the folks over here, see all the people?
25 They're -- they're participating in this, and they're going to help us make a decision

1 later on -- on -- on some things that we have to decide. Okay?

2 So will -- will you help us today?

3 MR. DE SANTIAGO: Uh-huh.

4 THE COURT: Great. And Ms. Kierny here, she's going to -- she's
5 going to ask you some questions. Okay?

6 All right. Thanks, Leo.

7 **LEONARDO DE SANTIAGO,**

8 [having first been qualified by the judge, testified through the interpreter as follows.]

9 **DIRECT EXAMINATION**

10 BY MS. KIERNY:

11 Q Hi, Leo. How you doing?

12 A Good.

13 Q Do you know the difference between a truth and a lie?

14 A [No audible response.]

15 Q And that microphone right there is picking up everything you say, but
16 unfortunately, it can't pick up nods. So if you could say it out loud.

17 THE COURT: So we need to hear you out loud, *si* or no. Thanks.

18 BY MS. KIERNY:

19 Q Okay. So do you know the difference between the truth and a lie?

20 A [In English] Yes.

21 Q Now, if I told you that my shirt was pink, would that be the truth or a lie?

22 A [In English] Lie.

23 Q Okay. Now, what if I told you that it is snowing in this courtroom right
24 now, would that be the truth or a lie?

25 A Lie.

1 Q Now, what if I told you you were wearing a *Star Wars* shirt, would that
2 be the truth or a lie?

3 A [In English] Truth.

4 Q Okay. And you promise to tell only the truth in here, right, Leo?

5 A Yes.

6 Q What is your full name Leo or Leonardo?

7 A Leonardo.

8 Q Okay. Do you know how to spell that? I'm going to spell it and you tell
9 me if I'm right. Okay? Is your first name L-E-O-N-A-R-D-O?

10 A [In English] Yes.

11 Q Okay. And your last name is De Santiago, right?

12 A Uh-huh. Yes.

13 Q And that would be D-E, space, S-A-N-T-I-A-G-O?

14 A Yes.

15 Q Okay.

16 MS. KIERNY: Would -- would -- would you accept my qualification?

17 THE COURT: Well, Mr. Santiago -- or Leo, how old are you, eight?

18 THE WITNESS: Uh-huh.

19 THE COURT: All right. Very good. And do you know it's wrong to tell
20 a lie, right?

21 THE WITNESS: [In English] Yes.

22 THE COURT: All right. Thank you.

23 You may proceed.

24 MS. KIERNY: Okay. Thank you.

25 BY MS. KIERNY:

1 Q Well, the judge stole my first question about how old you are.

2 Where do you live, Leo?

3 A In Charleston Gardens.

4 Q Okay. Now, do you live in an upstairs apartment or in a downstairs
5 apartment?

6 A [In English] Upstairs.

7 Q Upstairs? Okay. Do you live in the front of the apartment complex
8 when you enter or in the back?

9 A In the back.

10 Q And who do you live with in Charleston Gardens?

11 A [In English] My dad, my mom, and my brother.

12 Q All right. And your brother and your mom came with today?

13 A Yes.

14 Q Okay. Do you know three girls who live in that apartment complex
15 named Jatziri, Maradel, and Mirabel?

16 A Yes.

17 Q Okay. Do you ever play with those girls?

18 A [In English] Yes.

19 Q Do you know a man named David?

20 A [In English] Uh-huh.

21 Q Now, do you know him by name or just from seeing him around the
22 apartment?

23 A [In English] From seeing him.

24 THE COURT: Leo, can I interrupt for a second? So you're obviously
25 very smart, because you know both English and Spanish. But we can only have

1 one language. So can you wait until the interpreter says the question in Spanish,
2 and then you can answer. Okay? Is that okay? All right. Unless you would rather
3 just speak in English. What do you prefer?

4 THE WITNESS: [In English] English.

5 THE COURT: English?

6 THE WITNESS: [In English] Uh-huh.

7 THE COURT: You want -- prefer English? Okay. Tell you what, we'll
8 have -- we'll let you speak in English, but we'll keep the interpreter here in case you
9 need some help, okay?

10 THE WITNESS: [In English] Uh-huh.

11 THE COURT: Okay. Is that okay, Ms. Kierny?

12 MS. KIERNY: Yes. That's perfect.

13 THE COURT: That's perfect. All right. Thank you.

14 MS. KIERNY: I appreciate that. Thank you.

15 THE COURT: Thank you, Leo.

16 THE WITNESS: Uh-huh.

17 [Direct examination continued in English.]

18 BY MS. KIERNY:

19 Q Now, this man named David, who you said you know, does he live in
20 your apartment complex?

21 A Yes. He used to.

22 Q What?

23 A He used to.

24 Q He used to? Good -- good catch. Do you see David in court today
25 anywhere?

1 A Uh-huh.

2 Q Can you point to him and describe something he's wearing?

3 A Right there.

4 Q And what color is his --

5 A He's wearing blue.

6 Q In blue? And does he have a tie on or no tie?

7 A No tie.

8 Q All right.

9 MS. KIERNY: Would the record reflect the in-court identification of
10 Mr. Azucena?

11 THE COURT: Yes, it does.

12 MS. KIERNY: Thank you.

13 BY MS. KIERNY:

14 Q Did David ever offer you candy?

15 A Yes.

16 Q Did you take the candy?

17 A Sometime and sometime I don't.

18 Q Okay. And when you didn't take the candy, why would that be?

19 A Because sometimes I don't -- I don't like -- I don't want to eat candy.

20 Q Okay. And were there times that you had candy at home, too?

21 A Uh-huh.

22 Q Got it. Would he get mad at you if you wouldn't take his candy?

23 A No.

24 Q Is that a no? I saw you shaking your head --

25 A No.

1 Q -- but the record won't pick that up.

2 All right. When he gave you the candy, were Jatziri, Maradel,
3 and Mirabel with you?

4 A Yes.

5 Q And after he gave you the candy, did you guys say anything to him that
6 you recall?

7 A Yeah. It was, like, thank you and then we'd leave.

8 Q And then what did he say when you said that?

9 A He'd say, You're welcome.

10 Q Okay. Did David ever show you anything on his cell phone?

11 A No.

12 Q Okay. Did you ever see David pull his pants down?

13 A No.

14 Q And now, there is a part that boys use to go pee, right? You know that.

15 A Uh-huh.

16 Q And that's a private part, right?

17 A Yeah.

18 Q You never saw David's private part?

19 A No.

20 Q Did you ever see David touch Jatziri, Maradel, or Mirabel?

21 A No.

22 Q Okay.

23 MS. KIERNY: Court's brief indulgence.

24 I would pass the witness.

25 THE COURT: All right. Mr. Hamner.

1 MR. HAMNER: Thank you very much.

2 THE COURT: The gentleman has some questions for you now.

3 THE WITNESS: Okay.

4 **CROSS-EXAMINATION**

5 BY MR. HAMNER:

6 Q Hey, Leo, how are you?

7 A Good.

8 Q I like your shirt, man. It's pretty cool.

9 A Thank you.

10 Q Who's your favorite character in *Star Wars*?

11 A Chewbacca.

12 Q Pretty good. Pretty good. You see any of the new movies?

13 A No.

14 Q No, not yet? Well, Chewy's pretty awesome.

15 Okay. Let me ask you a couple of questions. Okay?

16 So you said that -- that David would offer you guys candy
17 sometimes, right?

18 A Yes.

19 Q Okay. And you'd be with Jatziri, Mirabel, and Maradel?

20 A Yes.

21 Q Is that right? And -- and I just couldn't hear, because I was kind of far
22 away; did you say you took the candy sometimes?

23 A Yes.

24 Q Okay. And maybe sometimes you didn't take it?

25 A Uh-huh.

1 Q Okay. He used to offer you KitKats, right?

2 A Uh-huh. Yes.

3 Q Okay. And you remember -- you remember one of those candies was
4 KitKats, right?

5 A Yes.

6 Q And he would also give KitKats to the girls, too, wouldn't he?

7 A Yes.

8 Q One of the places that he would give you guys candy would be
9 sometimes in his house, right?

10 A Yes. Sometimes where the door is at.

11 Q Oh, so he'd hang out kind of by the door?

12 A Uh-huh.

13 Q And offer you guys KitKats?

14 A [No audible response.]

15 Q Okay. Let me grab a couple photos real quick. All right. Just hold on a
16 second.

17 [Pause in proceedings.]

18 BY MR. HAMNER:

19 Q So did you live on top of kind of David's apartment? Did you live on the
20 second floor?

21 A Yes.

22 Q Okay. Cool. Let me show you State's 24. If you look on that TV
23 screen, you can see that picture; do you see it?

24 A Yeah.

25 Q Cool. Do you see David's house there?

240

1 A Yes.

2 Q Do you see the door of his house? If you take this pen -- go ahead,
3 make a circle where -- where David's house is. Oh no -- oh, don't -- no, no -- don't
4 highlight it.

5 Hold on a second. You don't need to take the pen cap off. You
6 can just --

7 THE COURT: Good catch.

8 MR. HAMNER: Okay. It's making a mark, but we can clear it. If I could
9 ever clear it, that would be nice. Okay.

10 THE COURT: Do you want to use something with --

11 MR. HAMNER: No, you're --

12 THE COURT: I have a cap.

13 MR. HAMNER: No, you're good.

14 BY MR. HAMNER:

15 Q You -- you've got -- just -- you can make a mark with it, just don't take
16 the cap off.

17 A Okay.

18 Q You can totally do it. Go ahead.

19 So go ahead, circle -- circle David's door.

20 A Oh, door?

21 Q Yeah.

22 MR. HAMNER: Okay. Let the record reflect the witness circled the
23 white door and -- and kind of the center just beyond the power box in State's 24.

24 Q So he'd be standing in that door offering you guys KitKats, right?

25 A Uh-huh.

1 MS. KOLLINS: Is that a yes?

2 BY MR. HAMNER:

3 Q Oh, you'll need to say yes or no, Leo.

4 A Oh, yes.

5 Q Sorry, man.

6 And sometimes he'd offer you KitKats by -- by his car, right?

7 A Yes.

8 Q Let me show you State's 33; do you see an area where his car
9 sometimes would be parked? Not that his car is necessarily there, but do you see
10 the area where he would be giving out candy by his car?

11 A No.

12 Q Okay. Is it in a different spot?

13 A Yes.

14 Q Okay. And he would hand out his candy by the trunk of his car?

15 A Yes.

16 Q Would Jatziri be there sometimes by the car when that would happen?

17 A Yes.

18 Q How about Mirabel?

19 A Yes.

20 Q How about Maradel?

21 A Yes.

22 Q Okay. And his car was tan-ish, right?

23 A Yes.

24 Q And would it be somewhere -- would it be any other places that you can
25 remember? Kind of -- let me re-show you here. Do you see any other places in

1 State's 24 where you remember getting candy from him, aside from the door?

2 A No.

3 Q Okay. And he gave you candy more than one time, right?

4 A Yes.

5 Q And he would hand out different candies, sometime, not just KitKats,
6 right?

7 A Yes.

8 Q And he'd ask you guys if you wanted some?

9 A Yes.

10 Q And you were pretty happy when you'd get candy from him, right?

11 A Sometimes.

12 Q And the -- sometimes you were?

13 A Yeah.

14 Q Well, why sometimes not?

15 A Because I -- I don't feel like eating candy.

16 Q Okay. That's fair. It might give you a tummy ache.

17 Were the girls -- did the girls seem happy when he would give
18 them candy, too?

19 A Yes.

20 Q Okay. When you would play in the neighborhood, would you also play
21 with other kids, too?

22 A Yes.

23 Q Okay. So you didn't spend all your time with Jatziri and -- and the
24 twins, did you?

25 A No.

1 Q Okay. So a lot of times you'd be doing different things and the girls
2 would be doing different things, right?

3 A Yes.

4 Q Okay.

5 MR. HAMNER: Court's indulgence.

6 BY MR. HAMNER:

7 Q Oh, totally forgot.

8 Do you remember Yezline; do you know who that is?

9 A Yes.

10 Q She used to live there, right? Couple doors down from David?

11 A Yes.

12 Q Do you ever remember seeing Don David give her candy?

13 A Yes.

14 Q Did he used to give her KitKats, too?

15 A Uh-huh.

16 Q Kind of by the door, like we were talking about?

17 A Yes.

18 Q Did you remember seeing her getting candy over by the car?

19 A Yes.

20 Q Okay.

21 MR. HAMNER: I have no further questions.

22 Thanks, Leo.

23 THE WITNESS: Uh-huh.

24 MS. KIERNY: I have no further redirect.

25 I don't know if the jurors have any questions.

1 THE COURT: I have a question --
2 MS. KIERNY: Oh, sure.
3 THE COURT: -- I really wanted to ask, but I probably shouldn't ask it.
4 MS. KIERNY: Let -- let us approach.
5 THE COURT: All right.
6 MS. KIERNY: Maybe you can.
7 [Bench conference transcribed as follows.]
8 THE COURT: I should ask you guys first.
9 MS. KIERNY: Okay.
10 THE COURT: I just -- you know, I -- I would have asked if -- if he ever
11 saw the girls going into Don David's house.
12 MR. WESTBROOK: [Indiscernible.]
13 THE COURT: Okay. All right. All right. Then I will see if --
14 MR. HAMNER: I can reopen and ask it.
15 THE COURT: Well, probably would -- I don't know, because then it's
16 like --
17 MR. WESTBROOK: Your Honor, if he asks -- we're not doing redirect.
18 THE COURT: I know, I'm not supposed to, like --
19 MS. KOLLINS: Okay.
20 THE COURT: I don't want to be accused of helping the State. I just
21 have that question in my mind.
22 MS. KIERNY: It's not a problem now.
23 MR. HAMNER: It's all right. No big deal.
24 THE COURT: Do you know what I'm saying?
25 MS. KIERNY: It's okay. No, I get it. But it's not in the statement

245

1 [indiscernible] --

2 THE COURT: Oh, okay.

3 MS. KIERNY: -- [indiscernible] asking.

4 THE COURT: All right. Thank you.

5 [End of bench conference.]

6 THE COURT: All right. Anything from the jurors? I see one hand.
7 Okay. Did you -- was that raising your hand there? No? Okay. You sure? It
8 looked like you raised your hand, you've got to have a question now. Okay.

9 No. We have one question. We're just waiting for them to finish
10 writing it.

11 [Pause in proceedings.]

12 THE COURT: All right. Let's take a look.

13 [Bench conference transcribed as follows.]

14 THE COURT: Well.

15 MS. KIERNY: Is it the same question you had?

16 THE COURT: No. It's a little different. But it's -- it -- you would have
17 personal knowledge.

18 MS. KIERNY: Sure.

19 THE COURT: Okay.

20 MS. KOLLINS: I don't have a problem with that.

21 THE COURT: All right. Let's see what he...

22 [End of bench conference.]

23 THE COURT: Does this have the juror number? Yep.

24 Leo, hi. Did you ever go into David's apartment?

25 THE WITNESS: No.

1 THE COURT: No?

2 THE WITNESS: Only sometimes.

3 THE COURT: Only sometimes?

4 THE WITNESS: Yes.

5 THE COURT: Okay.

6 I'll let you guys follow up on that, if you want to, but keep it
7 limited to the scope.

8 The State should go first if they're going to go. Because you --

9 MR. HAMNER: Oh, it's their --

10 MS. KIERNY: Oh, I'm -- it's my witness.

11 MR. HAMNER: It's their witness.

12 THE COURT: Oh, wait, that's your witness.

13 MR. HAMNER: Their witness.

14 THE COURT: You should go first. Yes. Thank you. I -- my mistake.

15 MS. KIERNY: That's okay.

16 THE COURT: It is your witness.

17 **REDIRECT EXAMINATION**

18 BY MS. KIERNY:

19 Q Leo, you said no, and then you said sometimes. Which is it?

20 A Sometimes.

21 Q Okay. And how often -- how many times do you think you went into his
22 apartment?

23 A Oh, like, two or three.

24 Q Okay. And was that to get candy?

25 A Some -- yeah, yeah.

1 Q Yeah?
2 A Uh-huh.
3 Q You were going to say sometimes again.
4 A Yeah. This time, no.
5 Q Okay.
6 A So I want to say yes.
7 Q And would you go in when his wife was there?
8 A Sometimes.
9 Q Okay. Who else was with you when you went in the apartment?
10 A The three girls.
11 Q Okay.
12 MS. KIERNY: Any follow-up?
13 MR. HAMNER: Yeah. Just real briefly.

14 **RECROSS-EXAMINATION**

15 BY MR. HAMNER:

16 Q You mentioned that you saw those girls go in with you sometimes,
17 right?

18 A Yes.

19 Q Did you ever see them go in -- those girls go in without you?

20 A Yes.

21 Q Okay. Then when we say those girls, are we --

22 MS. KIERNY: I think that's beyond the scope of the question.

23 THE COURT: Well... Well, I think --

24 MR. HAMNER: The witness --

25 THE COURT: -- you opened the door. Just let's -- let's just follow up it

1 up a little bit.

2 BY MR. HAMNER:

3 Q I just want clarification on those girls. Was that -- did that include
4 Jatziri?

5 A Yes.

6 Q How about Mirabel?

7 A Yes.

8 Q How about Maradel?

9 A Yes.

10 Q How about Yezline?

11 A Yeah.

12 Q Okay. Thanks, Leo.

13 THE COURT: I think that's all we need. Right?

14 MR. WESTBROOK: Yeah. Nothing further, Your Honor. Thank you.

15 THE COURT: Okay. Great.

16 MS. KIERNY: Thanks.

17 THE COURT: No, thanks, guys for...

18 I didn't see any more questions -- hands, right? All right.

19 Then, Leo, thank you very much for being here. And you're a
20 very smart boy. And I wish you a lot of success and happiness.

21 THE WITNESS: Okay.

22 THE COURT: Okay. Take care. Thank you.

23 All right. The State may call its next witness.

24 MR. WESTBROOK: The defense? Is our case up?

25 THE COURT: I'm sorry, the defense.

1 MR. WESTBROOK: This is our case. We get cases.
2 THE COURT: It's your case. You can call your next witness.
3 MR. WESTBROOK: Thank you, Your Honor. I'll be right back.
4 THE COURT: Yes, sir.

5 [Pause in proceedings.]

6 MR. WESTBROOK: The defense will call to the stand Professor
7 Kagan.

8 THE COURT: Professor Kagan, how you doing, sir?

9 THE WITNESS: Good. How are you?

10 THE COURT: Great. Welcome. You can bring your -- bring it with
11 you. Bring -- you can -- whatever you want to bring with you, that's fine.

12 MR. WESTBROOK: I have coffee for you.

13 THE COURT: Okay. Come on up here. Right up here in the -- the
14 upper witness chair. And remain standing and the court clerk will administer your
15 oath. And then she'll ask you for your name and your spelling.

16 MR. KAGAN: Sure.

17 **MICHAEL KAGAN**

18 [having been called as a witness and being first duly sworn, testified as follows:]

19 THE CLERK: Thank you. Please be seated.

20 MR. WESTBROOK: And Your Honor, before we start with Professor
21 Kagan, I'd like to approach with the State. This will be extremely quick.

22 THE COURT: Yeah. Of course.

23 [Bench conference transcribed as follows.]

24 MR. WESTBROOK: A normal thing to do --

25 MS. KOLLINS: [Indiscernible] can I hear this, please?

250

1 MR. WESTBROOK: A -- a normal thing to do when you're crossing an
2 expert witness is to find out what the relationship is between the expert witness and
3 the person doing the direct. That makes sense.

4 THE COURT: Sure.

5 MR. WESTBROOK: I'm going to, you know, ask him have we ever
6 worked together. I'm going to say, you know, are your clients for immigration
7 management [indiscernible]. We're not going to mention defendants.

8 MS. KOLLINS: Oh, absolutely not.

9 MR. WESTBROOK: [Indiscernible]. Okay. So I just wanted to make
10 sure we're on board.

11 THE COURT: Yeah, make sure he doesn't say that.

12 MR. WESTBROOK: I already did it.

13 THE COURT: Okay. Perfect.

14 MR. WESTBROOK: I just wanted to make sure that everyone was on
15 the same page. Okay.

16 MS. KOLLINS: Okay. But --

17 THE COURT: Defense attorney.

18 MS. KOLLINS: But I am going to ask him if he was paid by you.

19 MR. WESTBROOK: Oh, I'm going to ask him that.

20 MS. KOLLINS: Okay.

21 THE COURT: Okay. All right.

22 [End of bench conference.]

23 THE COURT: Very good. Thank you, guys. All right.

24 MR. WESTBROOK: Thank you, Your Honor.

25 THE CLERK: Sir, will you please state and spell your first and last

1 name for the record.

2 THE WITNESS: Sure. It's Michael Kagan, M-I-C-H-A-E-L K-A-G-A-N.

3 THE CLERK: Thank you, so much.

4 **DIRECT EXAMINATION**

5 BY MR. WESTBROOK:

6 Q Good afternoon, Professor Kagan. Thank you for waiting here the
7 entire day, I appreciate it.

8 A No problem.

9 Q I asked you to come in today to discuss immigration law and U visas.
10 But before we do that --

11 A Uh-huh.

12 Q -- please tell us who you are and what you do.

13 A Okay. I'm a professor of law at University of Nevada Las Vegas at the
14 Boyd School of Law. And I direct the immigration clinic and I teach immigration
15 law.

16 Q Okay. Are you an attorney?

17 A Yes, I am.

18 Q Okay. In order to do your job, what kind of educational background do
19 you have?

20 A I have a law degree, a juris doctor, and I've got a law license from
21 New York State and a law license in Nevada.

22 Q Where'd you go to school?

23 A Law school at the University of Michigan, undergrad at Northwestern.

24 Q Okay. Do you have any publications?

25 A Yes. I have a lot of publications. That's a big part of the job as a -- as a

1 law professor.

2 Q Explain what a publication is --

3 A Well, so --

4 Q -- in this context.

5 A So you might have heard sort of in academia, it's publish or perish. So
6 if I don't publish law review articles, I'd be fired, basically.

7 I -- I've written lots of different kinds of publications, but probably
8 the ones you're -- you're getting at, I have a lot of law review publications that are
9 very significant, very long law review articles, you know 50 pages is perhaps
10 average, with lots of footnotes. And since I practice -- focus on immigration law,
11 most of mine, although not all, but most of them are about immigration law,
12 including one on the U visa.

13 Q Okay. So you've published a paper on the U visas in the past?

14 A That's right, yes.

15 Q Okay. I'm going to talk to you a little bit more about U visas in a
16 second. But I wanted to ask you, have you ever worked with me before?

17 A I have, yes.

18 Q Okay. Fair to say, I've brought you clients who have immigration issues
19 and you've met with them on -- on my behalf?

20 A Correct. Yes.

21 Q Okay. When you meet with them, is this part of your work at the
22 immigration clinic?

23 A Well, so at the immigration clinic, I super -- it's a bit like a teaching
24 hospital for -- for lawyers. We have a -- we have, actually, two fellows and myself.
25 We practice law, so we've got around 140, 150 open cases right now. We do

1 deportation defense, primarily. So we -- I supervise law students in defending
2 immigrants against deportation. And then I also do consultations on the way
3 immigration law intersects with criminal cases, basically.

4 Q Okay. So you meet with -- with these clients for free; is that correct?

5 A That's right, yes.

6 Q Okay. How many clients do you think you see in a year? I mean, you
7 said you had 150 cases open right now.

8 A Right.

9 Q But those are just the cases; do you also meet with people who don't
10 end up becoming cases for the clinic?

11 A Oh, yeah. Definitely. And I totally don't have a careful count of that. It
12 depends on what context you -- you include, because we do a lot of community
13 events where we'll talk to people informally, as well.

14 I'm -- I'm sure the number of people that -- that I -- the clinic
15 speaks to totally numbers in the hundreds.

16 Q Okay. Of these people that you're seeing, are a lot of them
17 undocumented?

18 A Yes. A lot of them are. Not all of them, but a lot of them are.

19 Q Okay. And you mentioned clinic and you mentioned fighting
20 deportation. Is there some other work that you do for clients of the -- of the law
21 clinic, the legal clinic?

22 A Not actually quite sure what you're -- what you're getting at.

23 Q Doing deportation -- doing deportation proceedings --

24 A Yeah.

25 Q -- what kind of work do you do during a deportation proceeding?

1 A Oh, I see. So a lot of them, say, would be asylum cases. Our largest
2 group of our clients are children, so -- especially from Central America who are
3 fleeing gang violence. So we would help them with asylum applications, which I
4 don't know how much in the weeds you want to get into this, but asylum
5 applications can be filed with several different branches of the federal government.
6 We do those. That's extremely intensive work about people's trauma.

7 Sometimes we are in the immigration court, arguing about whether a
8 particular crime is a deportable crime. That's a complicated area of law. That's a
9 minority of cases.

10 But, so it's -- they -- they range, but probably a -- cases with
11 humanitarian reasons for staying in the country are the most numerous.

12 Q Okay. So is it fair to say that your expertise in -- in this area extends to
13 all aspects of immigration law?

14 A Especially those involving low income immigrants, I would say. I have
15 less experience with business immigration, for instance. I teach --

16 Q Business immigration?

17 A I teach it in my class. I'm definitely aware of it, but I don't do it in
18 practices.

19 Q Okay. Does your work include listening to the questions and concerns
20 of undocumented immigrants?

21 A Absolutely.

22 Q Okay. What are their questions and concerns?

23 A Well, right now there's a lot of anxiety about can I call the police if I
24 have a routine problem? Am I safe taking my kids to school? People will be
25 worried about -- and since a lot of our clients are actually in deportation

1 proceedings, obviously they want to know what are their chances of avoiding
2 deportation, and so talking them through that process is key.

3 So -- and -- and we look -- you know, obviously, we try to be as
4 thorough as possible in terms of looking for every possible type of relief that they
5 might be able to find.

6 Q Have you observed them express their feelings about deportation?

7 A Yeah. Absolutely. I mean, not -- not everybody fears deportation, to be
8 clear. But our clients, by definition, are people who are fighting their deportation,
9 and often choosing to remain in detention for long periods of time so that they can
10 fight their deportation. So our clients are terrified of -- of being deported, often
11 because they fear being killed or raped or tortured, where they're -- where they're
12 going, and -- and often are actively choosing to rather stay in prison in the United
13 States, essentially, than be deported.

14 So yeah, I mean, for many people fear of deportation is
15 extremely strong. I mean, it's stronger than fear of going to prison for -- for some
16 people.

17 Q Have you observed their feelings towards government and the police?

18 A Yeah.

19 Q Okay. Do they trust the police or are they fearful of the police?

20 A That really varies. Actually, the U.S. law enforcement is very
21 complicated, particularly -- even for Americans, but even -- especially for people
22 from foreign countries, because we have a federal system. We have so many
23 different police forces -- forces, that -- a fact that you could drive through the
24 Las Vegas valley, and in 25 minutes pass through the jurisdictions of three or four
25 police agencies is very confusing. I think most Americans find it confusing. And

1 the -- and people from foreign countries who don't speak English definitely find it
2 very confusing.

3 So to explain the difference, say, between ICE, basically, the
4 federal immigration police and, say, Las Vegas Metro --

5 Q And could you clarify what the -- what ICE stands for?

6 A Oh, yeah. Immigration and Customs Enforcement.

7 Q Okay. Are -- go ahead.

8 A So this is the -- yeah, this -- sorry.

9 Q I was going to ask you to explain that, but you're already doing it.

10 A So ICE, Immigration and Customs Enforcement, is a part of the
11 Department of Homeland Security. And they are essentially the federal immigration
12 police. So for people who are already inside the United States, ICE are the police
13 who arrest an immigrant and seek to deport them.

14 Q Okay.

15 A And I was going to say that it can be confusing for people to explain the
16 difference, say, between, Las Vegas Metro -- local police -- and ICE.

17 Q Do you think the people are drawing a distinction between the local
18 police and the federal deportation -- you know, ICE and those organizations?

19 A Some understand that better than others.

20 Q Okay. Have you testified as an expert in a case before?

21 A Yes, once.

22 Q One time?

23 A One time.

24 Q So it's not part of your normal thing?

25 A Not a regular thing, no.

1 Q Okay. Was that in a criminal case that you testified?
2 A No. It was a civil -- legal malpractice case, actually.
3 Q Legal malpractice, okay.
4 A Yeah.
5 Q So this is the first time you ever testified in a case that involves
6 allegations of a crime?
7 A Yes.
8 Q Okay. And you're being paid \$250 for testifying today?
9 A That's correct, yes.
10 Q I guess your hourly went down, the longer you waited outside. Thanks
11 again.
12 A If you calculate it that way, yes.
13 Q Is the money from --
14 THE COURT: You probably owe him a really good dinner or lunch or
15 something.
16 MR. WESTBROOK: No, 250. That's it, Your Honor.
17 THE WITNESS: No. I -- I agree with what he says.
18 MR. WESTBROOK: It's a business.
19 BY MR. WESTBROOK:
20 Q Is this money providing you an incentive to testify here today?
21 A No. Actually, I was going to do this for free. I'm not very good at
22 negotiating for my time.
23 Q Clearly, I'm worse.
24 A Yeah. And then you offered to pay me and I accepted.
25 Q Is -- so -- so why is the money not an incentive to come in here and --

1 and do this?

2 A Well, I find the -- the issue is generally interesting. I think the
3 intersection of the way -- of immigration law makes other areas of law more
4 complicated is sort of my main area of interest.

5 And I also think -- you know, I teach at a -- I'm the only
6 immigration law professor in the state of Nevada and it's a public law school, and I
7 think a certain amount of public service is part of my job.

8 Q Okay. I'm going to talk to you now about U visas and immigration
9 issues. I'm going to give you a scenario.

10 A Okay.

11 Q A woman enters this country on a temporary work visa. The work visa
12 expires. She lives here for 10 years. While she's here, she gives birth to children.

13 A Uh-huh.

14 Q They're born on American soil. She wants to stay in America. Under
15 those facts alone, how can she get legal status?

16 A Probably can't.

17 Q Okay. So there's -- there's no option that you can think of for her to get
18 legal status, just under those facts?

19 A Not -- not without adding to it, no. The fact that she has U.S. citizen
20 children would not allow her to stay here until the children turn 21. And even after
21 that, it would require a very long wait for a visa.

22 Q Okay.

23 A So, basically, the answer is no, there's no way.

24 Q Okay. Scenario No. 2, take the exact same scenario as the first one,
25 but add one fact: She files a police report saying that her children were the victims

1 of sexual abuse.

2 A Uh-huh.

3 Q Does that change her options?

4 A It could, yes. Because it could lead to her being eligible for a U visa.

5 Q Okay. You said you worked with U visas before in your capacity as an
6 immigration attorney and you've filed a paper on them.

7 A Uh-huh.

8 Q At least one.

9 A Uh-huh.

10 Q What is a U Visa?

11 THE COURT: I'm going to -- sorry.

12 THE WITNESS: Oh, sorry, yes.

13 THE COURT: You've just got to --

14 THE WITNESS: Yes.

15 THE COURT: -- express yourself verbally.

16 THE WITNESS: Sorry, yes.

17 THE COURT: Thank you.

18 BY MR. WESTBROOK:

19 Q Sorry. Explain what a U visa is.

20 A So a U Visa is a crime victim visa. Congress established this visa to
21 assist undocumented people who are victims of crime and also parents of children
22 who are victims of crime. And it's -- the -- the idea is -- the problem is that an
23 undocumented immigrant might be afraid to go to the police when they're a victim
24 of a crime, because they could, say, be a victim of an armed robbery, but might be
25 afraid that if I call the police, I could also be deported.

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1 So Congress created a visa that a person in that situation could
2 be able to say legally in the United States, if local law enforcement certifies that
3 they're actually a victim and are cooperating with law enforcement.

4 Q Okay. How do people find out about U visas?

5 A Well, that varies from person to person. I'm -- I'm not aware of any
6 study showing how aware undocumented immigrants are of it. I've seen here in
7 Las Vegas, for instance, there's one large law firm that has billboards out in
8 Spanish telling people that if you're a victim of crime, you can apply for a U visa.
9 But we -- most of the people we meet, when they -- our clients, who when they are
10 victims of crime, are often totally unaware of it and are often quite apprehensive
11 about reporting cases to -- to Metro, for instance.

12 So we're often in a position of trying to encourage our clients to
13 report, say, domestic violence to Metro.

14 Q Is Metro or other police departments doing anything to get the word out
15 about U visas, that you know of?

16 A I'm not aware of Metro -- Metro does a lot of community outreach
17 activities. I'm not aware of them doing anything, specifically, informing people
18 about U visas. Metro has an officer -- usually an officer who is in charge of
19 reviewing and certifying U visas forms and applications.

20 Q Okay. What about organizations like Hermandad Mexicana --

21 A Yeah. So --

22 Q -- are you familiar with them?

23 A Right. And so there -- there are organizations that -- that help people
24 fill out U visa applications, for sure. And Hermandad Mexicana that is one of them.

25 Q Yeah. And -- and -- if you're aware, do they work with police in order to

1 get information out to the public?

2 A Yes. You have to. Because in order to do a U visa application, you
3 need to take down your client's story. And then you have to go to the police.
4 Usually you'd want to pull the police report and go to the police. And you have to
5 ask the police to certify the U visa request.

6 That would be the usual way it would work, if it's the person on
7 the outside asking Metro to certify.

8 Q Okay. And, actually, that kind of gets me to my next question. How
9 does someone go about getting a U visa?

10 A Right. So you have to -- to fill out an application, it's the I-918.
11 Everything in immigration is a form number.

12 And part of the application you fill out yourself or you would fill it
13 out -- you could fill it out with an attorney or with an organization of nonattorneys,
14 like Hermandad. Some of its name -- basically name, rank, and serial number-type
15 of information in terms of your address, family structure, that sort of thing.

16 The substantive part of it, though, you have to provide a -- a personal
17 narrative of the crime that you were a victim of, how it affected you -- because you
18 have to show significant physical or mental abuse as part of the crime, any other
19 documentation you can provide of the crime, but whether someone has any would
20 vary. You know, for instance, if you had someone who had bruises from domestic
21 violence, you -- you certainly, for our clients, we would certainly send in the
22 photographs of the bruises. But --

23 Q Just to interrupt for a second.

24 A Oh.

25 Q Is physical evidence required?

1 A It's not strictly required -- no, actually, it's not required at all, because
2 sometimes the person applying themselves does not have access to any physical
3 evidence.

4 It's -- you're basically encouraged to supply as much evidence
5 as you can. The key part of the application, the decisive part of the application, is
6 the local law enforcement certification. This is required. You basically cannot send
7 the application in unless you have this part signed. It's called Supplement B.

8 And that can be certified by either local police, prosecutor, or a
9 judge. Here, it's -- in all cases I'm aware of, it's the police.

10 Q Okay. Let's get to that. Is anyone who is involved with the processing
11 or the certification of the U visa testing the evidence in the police report to see
12 whether it's true or false?

13 A Well, I'm not sure what you mean quite by testing. But Las Vegas
14 Metro, say, or the police signing it would, essentially, say that they believe this
15 person is a victim -- is a genuine victim of crime.

16 Q Sure.

17 A But that's sort of not so different from a police report where they've
18 decide to make an arrest. It's the opinion of the police. It's not -- there's no need to
19 wait, say, for a court verdict, if that's what you mean.

20 Q Okay.

21 A And it can be done at any stage in the process. So it -- it could be done
22 even before charges are filed.

23 Q Okay. So is the certifying official -- and -- and again, you just said that
24 in this case, as far as you know, it's always, like, a Metro lieutenant --

25 A Uh-huh.

1 Q -- someone who is in charge of doing that.

2 Are they looking to see if the applicant is cooperating with the
3 police investigation?

4 A Yeah. Yeah. That's one of the things they actually have to attest to,
5 basically. So the -- the Metro officer, essentially, is asked to sign under certain -- to
6 attest the certain things, that the person is believed to be a victim of a qualifying
7 crime. Not all crimes qualify. Say, if you're a victim of petty theft, that's not good
8 enough for a U visa. It has to be more serious -- it's a more -- list of more serious
9 crimes. And they have to be cooperating with law enforcement, and you have to
10 have information that would be useful to law enforcement.

11 Q Okay. And this is a little bit of a non sequitur.

12 A Uh-huh.

13 Q I don't want to get us too off track. But have you ever had a Cuban
14 immigrant apply for a U visa?

15 A So I can't recall if we've ever represented a -- we have Cuban clients. I
16 can't recall if any of them applied for U visas.

17 Q Right. It's probably --

18 A There's certainly no reason a Cuban can't apply for a U visa, but it
19 would be less likely, because -- well, at least until recently, Cubans had other
20 means of -- of getting legal status.

21 Q Are you talking about wet feet/dry land?

22 A Yeah. The wet feet/dry feet policy.

23 Q Okay. Well, what is that?

24 A Okay. So until January of this year, the wet feet/dry feet policy meant
25 that if a Cuban was caught at sea, they could be immediately returned to Cuba.

1 But if they made it to U.S. territory, the dry feet, then they -- they would be
2 paroled -- paroled is the technical term -- essentially allowed into the United States,
3 and after one year could apply to get a green card.

4 So Cubans were -- had an advantage that, say, a Mexican did
5 not have in -- in doing that. That policy ended in January.

6 Q But people who, say, arrived here in 2016, they're -- they're still part of
7 the policy, they can still apply?

8 A They would have been paroled in, yes.

9 Q So unlike the other people you talked about who, you know, in -- in my
10 little example, you know, someone who came from Mexico, for example --

11 A Uh-huh.

12 Q -- and whose visa expired, she doesn't have that option.

13 Somebody coming from Cuba, however, has an option to get
14 legal that does not include a U visa?

15 A Correct.

16 Q Okay. And, in fact, if they've been here a year, they probably are legal,
17 right?

18 A Well, they'd have to know to apply. And -- and there's a lot of -- people
19 are just not very aware sometimes of their rights under immigration. So it's not
20 uncommon to find someone who could apply for something who don't.

21 Q Of course.

22 A But --

23 Q Of course. Provided they have the knowledge, someone who came
24 here in April of 2016 can apply for, you know, legal residency status, a green card?

25 A Yes.

1 Q Which is better -- a green -- what's the difference between a green card
2 and a visa?

3 A Okay. So green card is the colloquial term for legal permanent
4 residence. And legal permanent resident is the best immigration status you can
5 have, other than becoming a U.S. citizen. And it's permanent until you commit --
6 usually, until you commit a -- a serious crime, essentially.

7 So and the green card is a euphemism, they're often not green,
8 but you actually get an ID card that looks like a driver's license.

9 A visa is any permit issued by a government to allow you to
10 enter. So tourists coming to have a good time over the weekend in Las Vegas get
11 a tourist visa. If they're coming for a business conference, they could get a
12 business visa. There are student -- students would get a student visa. It's all --
13 it's -- visa is simply a permission from the government for a noncitizen to enter the
14 country.

15 Q Okay. So a visa is temporary by its very definition.

16 A Uh-huh.

17 Q But the -- the green card, as we call it, is a more permanent resident
18 status?

19 A Right.

20 Q Okay. And if you're a Cuban, you have a path to getting that green
21 card that is not available to people from other countries; is that fair to say?

22 A Correct, yes.

23 Q All right. All right. So an accusation has been made. There's been a
24 police report. And the certifying official is making sure that there is cooperation
25 from the applicant and then decides whether to approve the application; is that

1 correct?

2 A Correct. That's right.

3 Q All right. Once that approval has been given, once that box has been
4 signed by the lieutenant --

5 A Uh-huh.

6 Q -- or whoever, is that permanent or can the approval be withdrawn?

7 A According to federal law, it can be withdrawn.

8 Q So if the accusers, say, drop the charges, can the approval be
9 withdrawn?

10 A It could be, yes.

11 Q Okay. And they keep checking -- I mean, you have to keep working
12 with the police and being cooperative in order to qualify, correct?

13 A That's right.

14 Q Okay. If there's a criminal case, and the defendant is found not guilty,
15 is the U visa denied?

16 A No, not necessarily.

17 Q Okay. When you say not necessarily, go ahead and expand on that.

18 A That would be -- if -- if the local law enforcement does not withdraw the
19 certification, it would be up to U.S. Citizenship and Immigration Services to decide
20 whether the case qualifies or not.

21 Q Oh, I see. Okay.

22 A And there's no formal reason why a not guilty verdict would mean that --
23 or even charges being dropped by the prosecutor, that wouldn't inherently mean
24 that the U visa application is no longer eligible. It -- it's something that they -- they
25 have to decide that we think the crime really happened. So they might, if -- ask to

1 review more evidence. That's not uncommon.

2 Q Okay. However, there's nothing -- there's no, like, check mark on the
3 box that says that there was an acquittal, so therefore the U visa application is
4 denied, correct?

5 A No.

6 Q Okay. And in addition, I guess, are you saying that there's no one --
7 there's a -- a long process to get a U visa, is that right?

8 A That's right. Actually, it takes many years for many reasons. First, that
9 you apply -- it can take one to two years for the application to be reviewed in -- in
10 my experience recently. They first decide if you're a prima facie eligible. And then
11 if you're prima facie eligible, you get employment authorization and deferred action.
12 There's a quota on how many actual U visas can be issued a year, so you have to
13 wait in line, basically, to get one of the real U visas, so it takes a while.

14 In most cases, actually, the criminal case is finished long before
15 the U visa application is finished.

16 Q Okay. So then that's another reason, I guess, why they wouldn't be tied
17 to the results, because they move at different speeds; is that fair to say?

18 A That's right, yes.

19 Q Okay. Did you say what the average wait time is for U visas at this
20 point? Or do you know?

21 A Well, so it's really hard to get exact reads on it. Practicing attorneys
22 basically share information with each other. Our experience recently is that it
23 seems to be getting up to two years for processing time. But we've had other
24 cases where you get the initial prima facie review in less than a year, too. They're
25 not very consistent. USCIS is not always the most organized agency.

1 Q Undocumented immigrants can be deported at any time; is that a true
2 statement?

3 A Legally, that's right, yes.

4 Q Okay. If someone applies for a U visa, but they are deported --

5 A Uh-huh.

6 Q -- while the application is still pending --

7 A Yeah.

8 Q -- can they still get a U visa?

9 A Yeah, they can. And they would be allowed, actually, to reenter the
10 country.

11 Q So somebody who applied for a U visa and then was deported to, say,
12 Mexico --

13 A Uh-huh.

14 Q -- their application doesn't stop being processed; is that --

15 A Correct. That's right.

16 Q Okay. And then if it's ultimately approved, they actually get to come
17 back; is that what you're saying?

18 A That's right.

19 Q Okay. Is that just them or does it also apply to their families?

20 A U visas benefit the -- the applicant and -- and their immediate
21 dependents, as well. So it's quite beneficial for -- for their family.

22 Q Okay.

23 A There's one -- one exception to that, which is that if -- if the perpetrator
24 of the crime is in the family, that's usually saying a domestic violence situation,
25 then -- then, obviously, the sponsorship wouldn't apply to the, say, the -- the

1 abusive husband.

2 Q That makes sense. That makes sense.

3 You've said what you -- what you do for a living.

4 A Uh-huh.

5 Q You help undocumented immigrants in a lot of cases try to find a path
6 of citizenship, including sometimes helping them get U visas.

7 So it's clear you value the U visa system, but is the U visa system open
8 to abuse?

9 A Yeah. Every victim-based visa system is open to abuse. Actually, not
10 just visas and immigration, every federal benefit that's -- that provides a benefit to
11 someone for suffering something is open to abuse. So just like, say, disability
12 insurance is open to abuse, victim-based visas in the immigration system are open
13 to abuse, that someone has a basically built-in incentive to invent the abuse case.

14 Q Okay. So they have an incentive, in your words, to invent the abuse
15 case or to make false accusations?

16 A Yes.

17 Q Okay. Just one second.

18 MR. WESTBROOK: Thank you, Professor Kagan.

19 I'll pass the witness.

20 THE COURT: So hold on one second. I think we came back at 1:43,
21 we've been going quite a while. Should we take a break now or do you --

22 MS. KOLLINS: Sure.

23 THE COURT: -- I'm assuming you have cross, right?

24 MS. KOLLINS: I do. Very brief, though.

25 THE COURT: Just very brief.

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1 MS. KOLLINS: Say about 20 minutes, maybe.

2 THE COURT: So you guys -- you guys want to break? Anyone need
3 to take a break? I don't want anyone to -- no? All right. And I see my marshal
4 brought coffee over there. It's probably very tempting. If anyone wants to grab
5 some coffee, feel free. You sure you want to --

6 UNIDENTIFIED JUROR: Yes, can I?

7 THE COURT: Do you want -- yeah. Do you want -- it smells really
8 good. It's probably distracting for some people.

9 Let's just -- just grab some right now. Be very careful with it.

10 Yes, sir?

11 UNIDENTIFIED JUROR: Restroom?

12 THE COURT: So why -- you know what, why don't we take a -- let's
13 take -- Professor, I'm sorry, but our jurors have been here a long time. I just want
14 them to stretch a little bit.

15 THE WITNESS: That's all right. I understand.

16 THE COURT: We're going to take a 10-minute break. Okay.

17 THE WITNESS: That's -- that's fine.

18 THE COURT: All right. Prior admonishment applies. Don't do any
19 research; don't do -- form any opinions; don't talk to anybody about the case; and
20 all the other admonishments. All right. Thank you. Please -- please feel free to
21 stretch and take a short break.

22 You want to keep it to 10 minutes and you can drink your coffee
23 there in the -- in the witness box or in the jury box.

24 [Court recessed at 3:37 p.m., until 3:45 p.m.]

25 [In the presence of the jury.]

1 THE COURT: All right. Welcome back, everybody. All right. Nobody
2 needs a refill of coffee? Feel free to grab, you know, just don't trip over anybody
3 when you... All right.

4 MR. WESTBROOK: I'm sorry, Your Honor, can I reopen for two
5 questions?

6 THE COURT: Yes. We're back on the record. And you can reopen for
7 a -- for a couple more questions.

8 MR. WESTBROOK: Thank you, Your Honor.

9 **DIRECT EXAMINATION (CONT.)**

10 BY MR. WESTBROOK:

11 Q I'm sorry. Before I sat down -- I sat down a little bit too quickly there. I
12 just had two more questions I wanted to ask you.

13 A Uh-huh.

14 Q You talked about ICE --

15 A No problem.

16 Q -- being the federal agency that is actually in charge of the deportations.
17 Is it common for ICE to find out about the existence of certain undocumented
18 immigrants from local law enforcement, for example, Metro police officers?

19 A Yeah. Metro has what's known as a 287G agreement with ICE. That
20 means that there are Metro officers in the jail who are deputized by ICE. They
21 actually wear ICE uniforms. And they will identify people for potential deportation
22 out of the group of people who are arrested by Metro officers in the field.

23 Q Okay. And have you ever seen a case where the police reported an
24 undocumented immigrant to ICE after the immigrant filed a U visa application?

25 A I've not, no.

1 Q Okay.

2 MR. WESTBROOK: That's all I had. Thank you.

3 THE COURT: All right. Thank you.

4 Ms. Kollins, your witness.

5 **CROSS-EXAMINATION**

6 BY MS. KOLLINS:

7 Q Afternoon, Professor. I understand you're on a time crunch. My name
8 is Stacey Kollins, I'm with the DA's office. I have just a few questions for you.

9 A No problem.

10 Q We're just going to dive right into the U visa process. I understand your
11 qualifications. You're a professor at law. This is something that at least you
12 practice somewhat in your clinic, right?

13 A Uh-huh. That's right.

14 Q You assist with U visa applications?

15 A Yes.

16 Q So the first step in that is, then, to see if there is a qualifying crime?

17 A Correct.

18 Q And that's a big list?

19 A It's roughly 15 to 20 crimes, yeah.

20 Q Okay. A lot of them involve physical violence, sexual assault, domestic
21 violence, human trafficking?

22 A That's right.

23 Q Most -- most of them are those types of things, right?

24 A Yes.

25 Q Okay. And if you deem that somebody has a qualifying crime, then you

1 assist them in filling out the application for UCICS?

2 A USCIS, yes.

3 Q UC -- sorry.

4 THE COURT: Mr. Westbrook --

5 BY MS. KOLLINS:

6 Q Long day. Wrong acronym.

7 THE COURT: -- is -- is it working?

8 MR. WESTBROOK: Oh, I'm sorry.

9 THE WITNESS: It's okay.

10 BY MS. KOLLINS:

11 Q You know what I'm talking about.

12 A Yeah, I know what you're talking about, yeah.

13 Q Okay. So that application gets filled out and then it goes to a law
14 enforcement agency, correct?

15 A Yeah. The Supplement B.

16 Q And it could -- in this jurisdiction, that could be Metro or North
17 Las Vegas or Henderson Police Department, or the FBI, if it's a federal crime
18 correct?

19 A That's right.

20 MS. KOLLINS: Your Honor, may I approach the witness?

21 THE COURT: Yes.

22 BY MS. KOLLINS:

23 Q Showing you 51; is that -- I know you have a -- I don't know what you've
24 reviewed for this case. Have you reviewed anything for this case?

25 A I -- I have reviewed nothing about the specifics of this case.

1 Q Okay. All right. But just in term -- in general terms, is that what one of
2 those applications looks like?

3 A Yeah. This is the Supplement B. This is the form that the certifying law
4 enforcement agency would be asked to sign.

5 Q Okay. So this would be the documentation that you would help, like, in
6 your clinic, them fill out and send it off to law enforcement?

7 A That's right. Yeah. So we would fill it out, but then we would --
8 essentially, our filling it out is the proposal of what we'd like Metro to sign, usually.
9 And then we send it to them. They're free to revise it if they want to, or they can
10 just sign it.

11 Q Sure. And then after that process happens, then the certification
12 comes back to you?

13 A Yeah. So this form would come back to us and then we would put it
14 together with all the other documents into an envelope and mail it off to the U.S.
15 Citizenship and Immigration Services.

16 Q Okay.

17 A Yes.

18 Q When that comes back to you, certified, if law enforcement says, in fact,
19 that the party has been cooperative --

20 A Uh-huh.

21 Q -- because that's really all they're saying, right?

22 A Yeah.

23 Q That comes back to you. And then you ask for extra documentation.
24 And sometimes that includes a voluntary statement by the person victimized,
25 correct?

1 A We usually would have done that in advance. That would be -- end up
2 being part of that whole packet that we'd send off.

3 Q But that is part of the documentation that you then send off to --

4 A USCIS is --

5 Q -- USCIS. I had it right yesterday. I just got --

6 A Okay.

7 Q -- not articulating well this afternoon. Pardon me.

8 And also any police reports --

9 A Uh-huh.

10 Q -- personal documentation, birth certificates, things like that, correct?

11 A Yeah. That's right.

12 Q And then that is mailed to USCIS?

13 A Uh-huh.

14 Q Is that a yes?

15 A That's yes. I'm sorry.

16 Q Okay.

17 A Yes.

18 Q And that is the beginning of the application process with that agency,
19 correct?

20 A Correct.

21 Q Now, are you aware right now that the applications that are being
22 reviewed right now are from June, July of 2014; does that sound about right?

23 A Well, it depends what you mean by reviewed. This is kind of
24 complicated, because they -- there are several stages of their review. And I know
25 of cases that are more recent than that, that have already gotten initial decisions.

1 Q Is it your general understanding that there is a backlog?

2 A Oh, yes.

3 Q Okay. And we're talking at least a couple years to get through that
4 process, for some people, right? Not for all, but for some?

5 A That's correct, yes.

6 Q Okay. So you know of some anomalies, but is it more common that the
7 wait is longer?

8 A I don't know what is an anomaly and what is -- is normal, so as I said,
9 there's several parts of the -- there's several different lines you have to wait in,
10 basically, in sequence.

11 Q And we're just talking about the first line.

12 A The first line can take, in my experience, anything from nine months to
13 two years.

14 Q Okay. And then there's the second part of the line, correct?

15 A Uh-huh.

16 Q Is that a yes?

17 A Yes.

18 Q Okay. And that first part of the line, the person that has applied has no
19 protection, correct?

20 A No formal protection. That's right.

21 Q Okay. So can be deported at any time?

22 A Yes.

23 Q And then the second part of the line does not mean that you magically
24 have a U visa at that point, either, do you?

25 A You don't formally have a U visa, but you've been told by the

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1 government that you're eligible and probably going to get one.

2 Q Do they tell them you're probably going to get one or you're --

3 A They don't use that term.

4 Q Okay.

5 A They -- they -- what they say is you are a prima facie eligible on the
6 substantive criteria. It's kind of like if a university were to tell you you meet our
7 requirements for admission, but we don't have a seat for you, so you need to wait
8 until next year.

9 Q Okay. So you did what you needed to do on the LSAT. You graduated
10 from undergraduate. Now we're going to see if we're going to give you a seat in
11 law school, sort of?

12 A That's basically right. Except that you've already been told that you
13 meet our requirements.

14 Q Okay. Well, you've taken the LSAT, meet our requirements, you have
15 the grades, you just have to wait.

16 A Right.

17 Q So to speak.

18 THE COURT: I don't know if the jurors know what an LSAT is.

19 BY MS. KOLLINS:

20 Q You've taken the admission test for law school.

21 A Yeah.

22 Q Okay. During -- after the prima facie finding, there's no protection?

23 A That's -- no, that's not quite true. After -- after the prima facie finding,
24 the government's policy is to give people deferred action. Which means that the
25 government knows you are here, but we're deciding not to take enforcement action

1 against you, and they're use -- and they're provided employment authorization, as
2 well, during that time.

3 Q How many U visa applications are extended in a one-year period of
4 time -- or U visa -- I'm sorry, I said that incorrectly.

5 How many U visas are granted a year?

6 A The quota of full-fledged U visas is 10,000 per year.

7 Q Okay. So that's for every state, for every jurisdiction across the
8 country, correct?

9 A Right.

10 Q So those have to be divided however USCIS sees fit?

11 A Well, they're dealt with on a first-come-first-serve basis. But yes.

12 Q They still have -- they have to deem them prima facie qualified --

13 A Right.

14 Q -- and all those things?

15 A Once you're prima facie qualified, you sort of get in line, basically, for
16 one of those.

17 Q Because you do this with the clinic, how many pending applications for
18 U visas are there with UC -- USCIS right now?

19 A I don't know that number. But I know that the wait -- then this would be
20 the way we've been talking about it -- the second wait is three or four years.

21 Q Have you heard the -- the number in the hundreds of thousands, like,
22 over a hundred thousand?

23 A No. That would strike me as high, actually.

24 Q Okay. But you -- but you don't have any idea in your either teaching or
25 your practice what number of applications are pending?

1 A So the -- I've seen statistics, they are a couple years old, about the
2 number of applications running more than double the number of visas that are
3 available. And because -- and most of them are found to be prima facie eligible,
4 and that leads to the wait times, and the wait times have been progressively
5 growing. So the wait times recently have been at least three years.

6 Q Okay. So in other words, if you had 80,000 prima facie applications
7 that came in this year, then only 10,000 of those people would be eligible to get
8 those visas. They don't increase the number, right?

9 A Correct. The -- the number is set by congress. 80,000 I think is high.
10 But -- but they -- that would lead to an eight-year wait, I think. But the -- the wait is
11 more like three to four years.

12 Q Have you heard of cases where the wait can be five, six, seven years?

13 A I've not, actually. That -- that -- look, the wait's been getting longer
14 progressively. But five, six, seven years, absent some unusual processing delay,
15 would be much longer than what I'm used to.

16 Q Okay. What's the longest wait you've ever heard of then --

17 A Four years, I would say.

18 Q -- if you're not comfortable -- four years? Okay.

19 I didn't have my paper notes for you. So give me just a moment,
20 please.

21 How long does a U visa last, if you got one?

22 A Four years.

23 Q Four years?

24 A And then -- but you -- four years formally, but it can be extended or the
25 person can apply for legal permanent residence.

1 Q And the extension process, is it similar to the application process?
2 A It's not as long to be reviewed.
3 Q Okay. You are -- you didn't review any documents in this case?
4 A That's correct.
5 Q Okay. So you don't know the status of the moms or the fathers of the
6 kids in this case?
7 A No.
8 Q Have you, in your clinic, reviewed U visa applications for parents of
9 children of sexual abuse or physical abuse?
10 A I believe we have handled a case like that, yes.
11 Q Okay.
12 MS. KOLLINS: May I approach the witness, Your Honor, and grab
13 that?
14 THE COURT: Yes, you may.
15 MS. KOLLINS: Thank you.
16 I will pass the professor, Your Honor.
17 THE COURT: All right. Very good.
18 MS. KOLLINS: Thank you, sir.
19 THE COURT: Thank you.
20 Redirect?
21 MR. WESTBROOK: Hi. Yeah, just briefly.
22 **REDIRECT EXAMINATION**
23 BY MR. WESTBROOK:
24 Q So once the application is processed and you're prima facie eligible --
25 A Uh-huh.

1 Q -- you're getting the U visa; is that what I heard?

2 A Nearly always.

3 Q Okay.

4 A What will happen -- first of all, I mean, when that happens for our
5 clients, we treat that as extremely good news, and our clients are usually quite
6 happy. They -- what will happen -- well, I'll just tell you what we -- what we would
7 tell our clients at that stage --

8 Q Sure.

9 A -- which is that they found you eligible. They will assess your case
10 again when the visa becomes available. So, say, three years from now they will
11 assess it again to make sure you're still eligible. It's important, say, to stay out of
12 trouble, not get arrested for any crimes, because that would make the application
13 much more complicated.

14 But assuming nothing --

15 Q Sorry to interrupt, but also if they weren't cooperating with the police,
16 that can also be withdrawn?

17 A That -- that's right. If -- if the police -- if the certification were withdrawn,
18 then -- by the time it's reviewed a few years later, than that would actually render
19 the application invalid.

20 Q Okay. All right. So once they're prima facie eligible, provided they're
21 cooperating with police, you said it might take up to four years to actually get the
22 U visa?

23 A Yeah.

24 Q Okay.

25 A That's right.

1 Q And then you said U visas are good for four years; does that four-year
2 clock start when you actually get it?

3 A That's right, yes.

4 Q Okay. So if you do have to wait for four years, then you get the U visa,
5 you get another four years, you've just bought eight years; is that fair to say?

6 A That's right, yes. And then after that, you can apply to get legal
7 permanent residence.

8 Q Right. Which really is the ultimate goal, isn't it?

9 A Usually.

10 Q The U visa is not the ultimate goal.

11 A Yeah. I mean, that -- that's -- that's -- for the immigrant, that's definitely
12 a win. There's no doubt about it. That means legal right to say, full rights -- it's as
13 close as you can get to citizenship without having citizenship.

14 Q And a lawful permanent residence; do they apply for citizenship
15 sometimes?

16 A Right. Legal permanent residence is the first step towards citizenship.

17 Q So even though you might wait four years, during that four years, you
18 said you get deferred action?

19 A Right.

20 Q So they're not going to deport you -- the federal government is agreeing
21 they're not going to deport you; is that what that means?

22 A That's -- it's a promise not to deport -- deport you.

23 Q Okay. And you get -- did you say employment authorization?

24 A That's right.

25 Q So that means that you can legally work?

1 A Correct.

2 Q Is it true that illegal immigrants or undocumented immigrants can't
3 legally work, as well?

4 A If you want to get very technical about it. This confuses a lot of people.
5 Technically, actually, undocumented immigrants can work, but no one is allowed to
6 employ them.

7 Q Ah, I see. So technically you can work, but anyone who employs you is
8 actually breaking the law, which kind of chills it?

9 A That's exactly right. That's exactly right.

10 Q Okay. But if you're prima facie eligible, even though you're waiting for
11 the U visa, and you might be waiting for four years, people can hire you?

12 A Absolutely, yes.

13 Q Okay.

14 A You can have my job with an employment authorization.

15 Q And you are protected from deportation by the government's promise
16 not to deport you?

17 A Yes. By that deferred action promise.

18 Q Okay.

19 MR. WESTBROOK: Thank you very much, Professor.

20 THE WITNESS: Thank you.

21 THE COURT: All right. Ms. Kollins, you get the last --

22 MS. KOLLINS: Very briefly.

23 THE COURT: -- word.

24 **RECROSS-EXAMINATION**

25 BY MS. KOLLINS:

1 Q Professor, are you proud of the work you do with U visas?

2 A Yes, I am.

3 Q Do you think it's a legitimate process?

4 A I -- I think protecting immigrant victims of crime is essential. And I'm
5 very worried about immigrants being afraid to call the police, and we have to
6 convince people to call the police. I have concerns about the way congress
7 structured the U visa, because I don't want there to be doubt cast on immigrants
8 who report crimes. But the way they structured the U visa creates that.

9 Q Not on every victim of crime, now, right?

10 A Well, that's -- that's my concern, that essentially anyone who seeks -- or
11 gets a U visa, there's going to be a question about why did you report the crime?
12 And just as most people who, say, apply for disability benefits are probably really
13 disabled, but there are some people who abuse the system and then it casts doubt
14 over everybody else. That's what concerns me about the way congress structured
15 it.

16 Q But you would defend all the U visa applications that you've participated
17 in?

18 A In the ones we've participated in?

19 Q Uh-huh.

20 A Yes.

21 Q Okay.

22 MS. KOLLINS: Nothing else.

23 THE COURT: All right. Thank you.

24 Anything from the jurors? Okay. We might have a question.

25 Take your time.

1 MS. KOLLINS: May I approach your clerk, Your Honor?
2 THE COURT: Yes, you may.
3 MS. KOLLINS: Thank you.
4 [Bench conference transcribed as follows.]
5 THE COURT: All right.
6 MS. KIERNY: Actually, they're our last juror questions at this trial.
7 THE COURT: What?
8 MS. KIERNY: These are our last --
9 THE COURT: Oh, yes.
10 MS. KOLLINS: I brought the shots.
11 THE COURT: Okay. All right. Those are important questions,
12 because it's the right time.
13 MR. WESTBROOK: That's fine.
14 THE COURT: Wow, this is a good question, too.
15 MS. KOLLINS: Social security number?
16 THE COURT: You okay with both questions?
17 MS. KOLLINS: Sure. That's -- sure.
18 THE COURT: All right.
19 MS. KIERNY: He would have a long answer to that.
20 [End of bench conference.]
21 THE COURT: All right. Juror questions.
22 First question -- and these are from the jurors --
23 THE WITNESS: Uh-huh.
24 THE COURT: -- so direct your responses back to them --
25 THE WITNESS: Sure.

1 THE COURT: -- if you can answer the questions.

2 If they have applied for a U visa, how long does it take before
3 they can receive a Social Security Number?

4 THE WITNESS: Great question. So the -- if you have an employment
5 authorization document, you can get a Social Security Number. So in a typical
6 case, as I was describing earlier, you would get employment authorization after you
7 get the prima facie eligibility decision, so that's what I said would take, say,
8 nine months to two years. When you get that employment authorization card,
9 which again, looks like a driver's license, you can take that to the Social Security
10 Administration and ask for a Social Security Number.

11 THE COURT: Thank you. Next question, could a Cuban know about a
12 U visa or learn of one?

13 THE WITNESS: Well, sure. I think some immigrants know about U
14 visas in advance, and -- and some don't. I'm not sure -- I don't think Cubans are
15 any different from anybody else.

16 THE COURT: Great. Next question. Have you noticed an increase in
17 Hispanic's fear of deportation since Trump became President, and a rise in U visa
18 applications?

19 THE WITNESS: I -- I'll answer those backwards. I do not know if
20 there's been an increase in U visa applications. I think we might know that
21 eventually, but the government I think reports that annually, so we might -- it might
22 be next year before we would know if that has happened.

23 There's definitely been an increase in fear among immigrant
24 populations, particularly Latino, since January -- since Trump took office. So we've
25 seen, for instance, some police departments -- not here in Las Vegas, I should say,

1 but others, say, Los Angeles, Houston, Denver -- reporting declines in reports of
2 crime, for especially domestic violence and sexual assault, particularly among
3 Latino populations, in which those police departments have attributed to fear of
4 deportation, not to a reduction in actual crime.

5 THE COURT: Thank you, Professor.

6 Mr. Westbrook, any follow up?

7 MR. WESTBROOK: Nothing.

8 THE COURT: All right. Ms. Kollins, any follow up?

9 MS. KOLLINS: No, sir. Thank you.

10 THE COURT: All right. Anything else from the jurors?

11 All right. Then, Professor, we'll let you go on your way. You are
12 excused. Thank you very much for your time.

13 THE WITNESS: Thank you very much.

14 THE COURT: And watch your step there.

15 THE WITNESS: Thank you.

16 THE COURT: All right. I'll give these to the court clerk to mark as court
17 exhibits.

18 All right. The State may call its next witness.

19 MR. WESTBROOK: The defense?

20 THE COURT: Darn it. The defense may call its next witness.

21 MR. WESTBROOK: The defense rests.

22 THE COURT: All right. Very good.

23 The defense rests.

24 Is there any rebuttal case by the State?

25 MR. HAMNER: No, Your Honor.

1 THE COURT: All right. Then this closes the evidence portion of the
2 trial.

3 At this point in time, I'm going to let the jurors go home. And --
4 and what -- what's going to happen Monday is I am going to read you the jury
5 instructions and then we're going to have closing arguments. And then you can
6 begin to deliberate on Monday.

7 So let me ask the parties, did you guys want to spend an hour
8 now going over instructions? Or can you -- can you get them to me on -- over the
9 weekend? I'll go through them over the weekend, and we'll spend maybe an
10 hour -- how about this, an hour Monday morning, settling them.

11 MR. WESTBROOK: Ms. Kollins and I were going to go back and forth
12 and then try to get you a very truncated list, and then we'll -- we'll certainly do it.

13 THE COURT: So I'm thinking about having the jurors here at 10:00,
14 then.

15 MR. WESTBROOK: Sounds good.

16 THE COURT: Does that -- does that work for both sides?

17 MS. KOLLINS: Sure.

18 MS. KIERNY: Quick --

19 THE COURT: Do you guys want to approach? Why don't we do this.

20 MS. KIERNY: Yeah.

21 THE COURT: All right. Give me a second here. I'm going to -- what's
22 that? 10:00 won't work?

23 UNIDENTIFIED JUROR: No, I said we're here at 11:00?

24 [Bench conference transcribed as follows.]

25 MS. KIERNY: Stacey has -- Stacey has a doctor's appointment.

1 THE COURT: Oh, I'm sorry. Did I know -- not know that?
2 MS. KIERNY: 11:00?
3 THE COURT: I'm sorry.
4 MS. KOLLINS: We talked about it.
5 THE COURT: I'm sorry.
6 MR. HAMNER: I forgot, as well.
7 MS. KIERNY: So if we want to have them back --
8 THE COURT: 10:30?
9 MS. KIERNY: -- at 11:00 --
10 THE COURT: 11:00?
11 MS. KIERNY: -- we'll come here at 10:00 to -- we can work out
12 instructions as best we can.
13 THE COURT: Why we do 11:00, anyway, because otherwise I read
14 instructions and send them to lunch and that'll be kind of...
15 MS. KOLLINS: Okay.
16 THE COURT: Does 11:00 work?
17 MS. KOLLINS: Yeah. I just -- it's at 8:00, and it should be
18 about 45 minutes. And it takes me about a half hour to get here, 40 minutes to get
19 here, so.
20 THE COURT: And you'll be here at -- do you want to -- want
21 Mr. Hamner to start with the settling jury instructions?
22 MS. KOLLINS: Well, and -- and just so you know, Mr. Westbrook and I
23 are going to try to settle what we can over the weekend.
24 THE COURT: Okay.
25 MS. KOLLINS: And then just come in and argue them and settle them

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1 on the record.

2 THE COURT: Yeah. Let's do that.

3 MS. KOLLINS: Okay.

4 THE COURT: So if you can get me something Sunday, that would be
5 really -- I just want a heads up.

6 MS. KOLLINS: Can I -- can I send it to your law clerk's e-mail? Where
7 should I send it?

8 THE COURT: Just e-mail it to me. I'll give you my e-mail address.

9 MS. KOLLINS: Okay. All right.

10 THE COURT: And you can just e-mail me or both -- I'll give it to you.

11 MS. KOLLINS: Okay.

12 THE COURT: So we'll tell the jurors 11:00.

13 MS. KOLLINS: Okay.

14 THE COURT: Does that work?

15 MR. HAMNER: Can you have your JEA e-mail us your e-mail address
16 to the parties, and that way --

17 THE COURT: I'm just going to write it down.

18 MS. KIERNY: Oh, he's just going to --

19 MR. HAMNER: Oh, cool. Great.

20 MS. KOLLINS: Okay. Perfect.

21 THE COURT: All right. And then -- but you're going to try to be here
22 at -- at 10:00? And we'll tell the jurors 11:00.

23 MR. HAMNER: I'll be here whenever you want me to be here.

24 THE COURT: Let's say 10:00.

25 MS. KIERNY: We will be here at 10:00.

1 THE COURT: Thanks. All right.

2 [End of bench conference.]

3 THE COURT: So you guys, 11:00 on -- on Monday, okay? All right.

4 All right.

5 So I'm going to go ahead and let you go home. You're
6 admonished, do not communicate among yourselves or with anybody else about
7 this trial or the subject matter of this trial; do not communicate at all with any of the
8 parties, attorneys, or witnesses involved with this trial; do not seek to obtain any
9 information or comments about this case from any source, including without limited
10 to newspapers, television, radio, Internet, e-mail, cell phones, or any other
11 electronic device; do not read, watch, or listen to any report of or commentary about
12 the case; do not express any opinion on any subject connected with this trial until
13 the case is finally submitted to you for deliberations; and do not perform any
14 research or investigations. All right.

15 Leave your notes here now. They'll be collected. No one's going
16 to look at your notes still. Enjoy your weekend. And I'll see you back here Monday,
17 at 11:00. Okay. All right. Thank you.

18 And I've instructed my JEA at having lunch brought in for you
19 guys. I need to see how -- how that'll work where we're -- technically -- oh,
20 don't leave yet.

21 But, technically, I'm not supposed to give you lunch until -- until
22 you're starting to deliberate. But we're going to try to work it out so -- you've been a
23 really good jury. Okay. So we'll -- we'll get lunch for you. Do you want pizza or
24 sandwiches? Sandwiches? All right. We'll -- we'll get sandwiches for you. All
25 right. We'll -- we'll talk more about that on Monday. All right. See you Monday.

1 Thank you.

2 [Jury recessed at 4:10 p.m.]

3 THE COURT: All right. Hold on. Outside the presence of the jury. All
4 right. Let's -- so let's just reconfirm what we're doing. We're going to try to start
5 settling jury instructions at 10:00. Right? Can I ask the State to take the laboring
6 over in producing the final approved set and getting that --

7 MS. KOLLINS: I will.

8 THE COURT: I mean, what -- you can e-mail it to -- to my JEA once it's
9 all finalized, and we'll print it out for you.

10 MS. KOLLINS: Okay. Just so the court understands, I will do my
11 best to get you the cleanest copy I can. But I'm going to have a secretary that's
12 going to format all that for me.

13 THE COURT: Perfect.

14 MS. KOLLINS: Over the week -- like, I don't have somebody over the
15 weekend that can do that, so what I'm going to be sending you is going to be a little
16 bit --

17 THE COURT: That's fine.

18 MS. KOLLINS: -- not perfect.

19 THE COURT: Yeah. No, that's fine.

20 MS. KOLLINS: Okay. And you understand that, right?

21 MS. KIERNY: And then we've got to format it on Monday. That's fine.

22 MS. KOLLINS: Yeah. And then I'll have them format it on Monday,
23 when I get --

24 MS. KIERNY: Ours will be the same, not -- not format -- maybe not
25 formatted.

1 THE COURT: That's fine. At clerk...

2 MR. WESTBROOK: And you're just going to send me your proposed
3 first and then we'll -- we'll -- just -- just give me your proposed and you can have
4 this isolated.

5 THE COURT: So here's my e-mail. And I'll -- you know what, I'll have
6 Melody e-mail -- e-mail you my e-mail. It's just scottir@clarkcountycourts.us.

7 MR. WESTBROOK: We actually have all received an e-mail a few --
8 like, I guess, a week ago or something. I sent that bench memo.

9 THE COURT: Oh.

10 MR. WESTBROOK: To everybody, so everyone should it have
11 somewhere, but --

12 THE COURT: Well, here, let me write it down for you, anyway. Just --

13 MR. WESTBROOK: Oh, thanks.

14 MS. KOLLINS: I'm going to send it [indiscernible].

15 THE COURT: And I'll go ahead and resend something so you guys will
16 have it. All right.

17 MR. WESTBROOK: Thank you, Your Honor.

18 MS. KIERNY: Okay. Thank you, Judge.

19 THE COURT: All right. All right.

20 UNIDENTIFIED SPEAKER: Your Honor, so is he coming back Monday
21 at 10:00, you want him back at 10:00?

22 THE COURT: That's up to his attorneys on whether they want him here
23 for the settling of jury instructions. He has the right to be here.

24 MR. WESTBROOK: Okay. He would like to be back. Thank you.

25 THE COURT: All right. Then we need him back here at 10:00.

1 Thank you, marshals. Thank you very much. Everyone have a
2 good weekend. Court's adjourned.

3 [Court recessed at 4:12 p.m., until Monday, May 8, 2017, at 10:39 a.m.]
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13 ATTEST: I do hereby certify that the foregoing is a true and correct transcript, to the
14 best of my ability, from the audio/visual recording of the proceedings in the above-
15 entitled case.
16

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19 _____
20 Shawna Ortega, CET*562
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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JOSE AZUCENA,

Defendant.

CASE NO. C-17-321044-1

DEPT. NO. II

BEFORE THE HONORABLE RICHARD SCOTTI, DISTRICT COURT JUDGE

MONDAY, MAY 8, 2017

**TRANSCRIPT OF PROCEEDINGS RE:
JURY TRIAL - DAY 10**

APPEARANCES:

For the Plaintiff:

STACEY L. KOLLINS, ESQ.
Chief Deputy District Attorney
CHRISTOPHER S. HAMNER, ESQ.
Deputy District Attorney

For the Defendant:

P. DAVID WESTBROOK, ESQ.
Deputy Public Defender
CARLI L. KIERNY, ESQ.
Deputy Public Defender

RECORDED BY: DALYNE EASLEY, COURT RECORDER
TRANSCRIBED BY: SHAWNA ORTEGA, CET-562

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1 **LAS VEGAS, NEVADA, MONDAY, MAY 8, 2017**

2 [Proceedings commenced at 10:39 a.m.]

3
4 [Outside the presence of the jury.]

5 THE COURT: All right. Good morning, everybody. Ms. Kollins, I
6 guess you had a busy morning already, huh?

7 MS. KOLLINS: I -- you know, I had -- and I apologize, I'm running just a
8 tad behind, because as soon as I got downtown, somebody needed me in another
9 department for nothing.

10 THE COURT: Okay. Well, I'm glad you made it.

11 So we're on the record now in *State vs. Azucena*, C-321044.
12 This is the time we set aside now to -- to settle jury instructions.

13 Looks like we have some tech work going down there.

14 MR. WESTBROOK: We do, just for the closing. But we can --

15 THE COURT: Do you need another minute?

16 MR. WESTBROOK: No. We can do instructions without this. This is
17 just a -- this is for the closings.

18 THE COURT: Okay. Great.

19 MR. WESTBROOK: We're multitasking, Your Honor.

20 THE COURT: All right. Well, let's do this, let's first go through the
21 State's proposed. That's the way I'd like to do it first. And I -- I've studied
22 everything and done a lot of research.

23 I so think what I'd like to do first is go through the State's
24 proposed and -- and the first order of business will be to ascertain if the defense
25 has any objections to the State proposed.

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So State's Proposed No. 1 begins:

It is now my duty as a judge.

Does that -- is that acceptable?

MR. WESTBROOK: Yeah. Yeah. First one is fine, Your Honor.

THE COURT: All right.

And second one is the indictment language. It says:

If in these instructions.

Is that acceptable?

MR. WESTBROOK: Sorry, Your Honor, I'm turning to that. A second amended indictment is but a formal method, that's fine.

THE COURT: No. The one before that. It begins:

If in these instructions.

MR. WESTBROOK: Oh, yes, I see it.

THE COURT: You're -- is that acceptable?

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

THE COURT: All right. And then you've already agreed to the next one that begins:

The second amended indictment.

MR. WESTBROOK: Correct.

THE COURT: And then the next one:

To constitute the crime charged.

Any objection?

MR. WESTBROOK: No, Your Honor.

THE COURT: The next one:

The defendant is presumed innocent until the contrary is proved.

1 Any objection?

2 MR. WESTBROOK: Yes, Your Honor. I believe you probably have in
3 front of me my -- my written proposed changes to that.

4 THE COURT: Give me a moment. Yeah. I'm not going -- I'll do -- let's
5 see, the defendant is presumed innocent. I -- you know, I -- I often get requests to
6 change until to unless, I think that's appropriate. So I'm going to go ahead and
7 change until to unless.

8 MR. WESTBROOK: And then my -- my second request was beyond a
9 reasonable doubt being added to the first --

10 THE COURT: We don't need to add that, because that's in the next
11 sentence. So.

12 MR. WESTBROOK: Okay.

13 THE COURT: So that one will be -- we don't need that. Do you want
14 this one marked for the record, though?

15 MR. WESTBROOK: Yes, Your Honor. And then also there was an S I
16 think that should be added to crimes, because it's just -- it's more than one crime in
17 this case.

18 THE COURT: And I saw that. And that seemed to be an appropriate
19 change, too. So we'll add the S. All right.

20 MR. WESTBROOK: Thank you, Your Honor.

21 THE COURT: So my pen just -- would you get me a red pen? This
22 one might work.

23 MR. WESTBROOK: I have a bunch in my Marvel cup.

24 THE COURT: I'm good. I found one that's working now. All right.

25 So this is rejected as written. All right.

1 So then the next instruction is:
2 You are here to determine the guilt or innocence of the
3 defendant.
4 It looks like you object to that one and have some proposed
5 changes.

6 MR. WESTBROOK: I do, Your Honor.

7 THE COURT: Did the State accept or reject those proposals?

8 MS. KOLLINS: Court's indulgence.

9 [Pause in proceedings.]

10 MS. KOLLINS: No, I do. I'm sorry. I'm just try to do six things at once.

11 THE COURT: Let's just do this thing.

12 MS. KOLLINS: That's -- that's fine, Your Honor. That's fine.

13 THE COURT: That's fine, their changes?

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

15 MS. KOLLINS: Their changes, yeah.

16 MR. WESTBROOK: Thank you, Your Honor.

17 MS. KOLLINS: May I approach the court?

18 THE COURT: Yes.

19 MS. KOLLINS: I sent an e-mail late last night, with -- I had an
20 additional instruction for my packet.

21 THE COURT: Uh-huh. Okay.

22 MS. KOLLINS: [Indiscernible] our flight instruction.

23 THE COURT: All right. So it -- so it looks like we're modifying the
24 State's proposed to -- to read as requested by the defense.

25 And Ms. Kollins, you'll make those changes for us?

1 MS. KOLLINS: I -- I will, Your Honor. I'm going to have to go back to
2 my office to make those, obviously.

3 THE COURT: All right. That's why we've got to get this done fast,
4 because we have the jury coming in 15 minutes.

5 All right. The next one:

6 The evidence which you are to consider.

7 Any objection?

8 MR. WESTBROOK: Sorry, Your Honor. Which one are we on?

9 THE COURT: The evidence which you are to consider.

10 MR. WESTBROOK: Okay. So the last one was accepted. Evidence
11 which you are to consider is fine, Your Honor. No objection.

12 THE COURT: All right. Very good. Thank you.

13 The next one:

14 Credibility or believability.

15 You made some great suggestions changing his to his or her. I
16 recommend that we do that. Will the State make those changes?

17 MS. KOLLINS: Yes, Your Honor.

18 MR. WESTBROOK: Thank you, Your Honor.

19 THE COURT: All right. Then the next one is:

20 A witness who has special knowledge, skill.

21 MR. WESTBROOK: No objection.

22 THE COURT: Great. Thank you.

23 The next one:

24 A person who subjects a minor under 14, et cetera.

25 Any --

1 MR. WESTBROOK: No objection.
2 THE COURT: Okay. And the next one:
3 Physical force is not necessary.
4 MR. WESTBROOK: No objection.
5 THE COURT: The next one:
6 A person is not required to do.
7 MR. WESTBROOK: I just --
8 THE COURT: You changed --
9 MR. WESTBROOK: -- I changed the gender neutrals.
10 THE COURT: You made it gender neutral. Will the State please make
11 those changes?
12 MS. KOLLINS: That's fine, Your Honor.
13 THE COURT: Thank you.
14 MR. WESTBROOK: This one also has a gender neutral in the middle.
15 THE COURT: Great. The next -- the next instruction:
16 There is no requirement that the testimony.
17 Looks like no objection, other than making it gender neutral, and
18 the State will make those changes.
19 Okay. The next instruction -- and this might take a moment to
20 discuss, so let's go ahead and do that now.
21 It's the *Townsend/Crowley* instruction. It begins:
22 Where multiple sexual acts occur as part of a single criminal
23 encounter.
24 I have read the State's version and the defense version. I read
25 the defense detailed objection to this proposed instruction. So now we need to

1 hear the State's response.

2 MS. KOLLINS: Your Honor, my --

3 THE COURT: Did you guys work this out?

4 MR. WESTBROOK: We have not, Your Honor.

5 THE COURT: Okay.

6 MS. KOLLINS: No, I'm sorry. We didn't have a chance last night. I
7 apologize.

8 The State's position is this, there are some counts in this
9 indictment, second amended indictment, that are in the alternative.

10 THE COURT: Uh-huh.

11 MS. KOLLINS: So that would be the sexual assault counts for Yezline.
12 And I know that probably Ms. Kierny was aware of that.

13 So in other words, there is a sexual assault for digital penetration,
14 and then an alternative lewdness for touching or rubbing the genital area. So those
15 are in the alternative. So the State would not be asking for convictions on both of
16 those. So I think that's what this speaks to.

17 Am I correct, Mr. Westbrook?

18 MR. WESTBROOK: That -- that is correct, Your Honor. It's just not --
19 it's not a correct statement of law and exceeds *Crowley* and *Townsend*. And then
20 leaves part of the instruction out.

21 Defendant's Proposed Instruction No. 1 is designed to replace
22 this instruction in its entirety.

23 THE COURT: Let's take a look. Okay.

24 MR. WESTBROOK: Which will accomplish, obviously, what the State's
25 trying to accomplish, but be legally accurate.

1 THE COURT: So both of you agree that the first sentence is correct.
2 And I've studied the law pretty carefully on this. And I'm not where -- I know some
3 of the State's language here, I don't see that in *Crowley* or *Townsend* and -- and
4 then -- well, let's go to this -- the defendant's proposed.

5 Do you have Defendant's proposed in front of you,
6 Mr. Westbrook?

7 MR. WESTBROOK: I do, Your Honor.

8 THE COURT: Okay. So you have the same first sentence?

9 MR. WESTBROOK: Same first sentence. First sentence is fine.

10 THE COURT: And then in the second sentence that you have it says:
11 However, when the sexual acts are part of the same episode, the
12 defendant may be found guilty of only one count of sexual assault or lewdness.

13 MS. KOLLINS: We don't --

14 THE COURT: That's generally correct, except for leading out the part
15 where they have to be not separate and distinct.

16 MR. HAMNER: Your Honor --

17 MS. KOLLINS: We don't have a copy of his proposed. All we have is
18 the commentary on the bottom of ours. So his proposed is not in our packet.

19 MR. WESTBROOK: Your Honor, I can copy them really quick. I
20 e-mailed them to everybody, but I'll --

21 THE COURT: I got them in the same e-mail, it went to both you and
22 us.

23 MS. KOLLINS: Is it in a different e-mail? Hold on. Well, some things
24 he's --

25 THE COURT: He had two attachments on that e-mail that --

1 MS. KOLLINS: Oh, yeah. I have it.

2 THE COURT: Okay. So I think -- I think if I were to give your -- your
3 proposed, Mr. Westbrook, your second sentence needs to say:

4 However when the sexual acts are not separate and distinct,
5 comma, but instead part of the same episode.

6 If you had that not separate and distinct, because that seems to
7 be the overriding consideration.

8 MR. WESTBROOK: I think that's a good suggestion, Your Honor.

9 THE COURT: Then your third sentence, I was actually okay with your
10 third sentence.

11 Your fourth sentence actually is leaving out an important part.
12 Your fourth sentence -- if you look at *Crowley*, when -- when *Crowley* -- I'm sorry --
13 yeah, *Crowley*, when it's discussing whether the -- the initial lewdness act that
14 preceded the sexual assault, whether that was intended to predispose the victim,
15 and whether it was part of the same episode or not part of the same episode, that
16 entire discussion is after the court notes the predicate fact that there was no
17 interruption in the actions. All right.

18 MR. WESTBROOK: Okay.

19 THE COURT: And you see, that's the very first part of that entire
20 paragraph. And so you would need to preface your last sentence with, if it's -- if
21 there's uninterrupted acts of sexual assault and/or lewdness.

22 MS. KOLLINS: And --

23 THE COURT: So --

24 MS. KOLLINS: Oh, I'm sorry. I thought you were done. Go ahead. I'm
25 sorry.

1 THE COURT: Nope. So I'm telling him how to rewrite that last
2 paragraph. So I would -- I think you need to -- it needs to read:

3 Additionally.

4 And then add the predicate from -- from *Crowley*:

5 If there are uninterrupted acts of sexual assault and/or lewdness,
6 comma.

7 And -- and then to make it flow -- flow properly, you need to say:

8 And the initial act is done merely to predispose the alleged
9 victims to a subsequent act. The acts --

10 And then keep -- keep going -- how we have it. The actual part
11 of the same episode and the defendant may be convicted of only one count of
12 sexual assault or lewdness.

13 MR. WESTBROOK: Okay. Your Honor, and you say, and the initial act
14 is -- and then I --

15 THE COURT: And the initial act is done -- and then -- then keep going
16 with your language -- is done.

17 MR. WESTBROOK: Sure.

18 THE COURT: And then, of course -- that's --

19 MR. WESTBROOK: Oh, I see it.

20 THE COURT: -- each alleged victim, because you can have more than
21 one count if you have more than one victim witnessing of the lewdness. So I think
22 you need to add at the end for each alleged victim.

23 MR. WESTBROOK: Okay. So --

24 THE COURT: So and with those changes, I'm -- I'm kind of more
25 inclined to take your -- your version than the State's version, because I think your

1 version, I did see it more closely tracking *Crowley* and -- and *Townsend* and
2 *Gaxiola* and *Cunningham* and *Sanchez*.

3 MR. WESTBROOK: Okay.

4 MS. KOLLINS: Just --

5 THE COURT: Let's -- but -- but hold on.

6 Ms. -- Ms. Kollins wants to jump in here.

7 MS. KOLLINS: Just for the record, there is no --

8 THE COURT: Yeah.

9 MS. KOLLINS: -- factual basis for that instruction in this case, because
10 our case --

11 THE COURT: Which part?

12 MS. KOLLINS: For there must be some separation between the acts.
13 Because here, our counts that where any separation would even be at issue, they
14 are in the alternative. They are not -- we're not asking them to find him guilty of a
15 lewdness for touching the vagina, then a digital penetration for a sexual assault, if --
16 because, obviously, there's some touching before there's penetration. We're not
17 asking them to find him guilty of both of those. Those are in the alternative.

18 So there's no touching or molestation in this case that involves
19 the factual scenario that's in these cases. That's what I'm trying to say, because
20 they are charged in the alternative.

21 THE COURT: Well, but you did have evidence you presented to the
22 jury that there was, like, touching on top of the clothes and then reached his hand in
23 and touched under the clothes. So that's -- that could be the -- there can't be two
24 different counts for that, because the one would be the touching outside of the
25 clothes would be predisposing to go inside the clothes, which is the exact situation

1 that *Crowley* is dealing with.

2 MS. KOLLINS: Well, and -- and I -- I think the way this case is charged,
3 that's not really an issue.

4 THE COURT: It's not an issue.

5 MS. KOLLINS: Because we don't have -- if -- if the child is molested in
6 this case and they were touched over the clothes and then under the clothes on
7 their -- on their genital area, there's only -- I mean --

8 THE COURT: So you have two charges for that?

9 MS. KOLLINS: No, no.

10 THE COURT: You don't have two charges for that?

11 MS. KOLLINS: We -- we have charges stemming out of different
12 incidents, but not during the same episode. These came --

13 THE COURT: So you don't have the -- oh, it's not the same episode.
14 So you don't have, like, in the same uninterrupted course of events where he
15 touches outside the clothes and then inside the clothes, you didn't charge that
16 twice?

17 MS. KOLLINS: Correct. And the only --

18 THE COURT: Is there any situation where there's two charges related
19 to one encounter?

20 MS. KOLLINS: When Yezline is kidnapped, he is charged for touching
21 her breast, which is completely separate from digital penetration.

22 THE COURT: Right, right. Of course.

23 MS. KOLLINS: And then he's charged with touching her on the butt,
24 which is again completely separate from digital penetration of the female genital
25 area. So I don't -- we didn't charge him for any predicate conduct for rubbing and

1 touching the genital area and then digital penetration in that count.

2 THE COURT: What about -- what about if he touched the butt, you
3 know, lifting -- because this is when she -- she got taped up and put in the room,
4 right?

5 MS. KOLLINS: Right.

6 THE COURT: Well, he touched the butt to lift her up and put her on the
7 bed. Isn't that incidental, I mean, allegedly?

8 MS. KOLLINS: We didn't charge --

9 THE COURT: Didn't you make that argument? You charged her with
10 touching -- charged him with touching her butt.

11 MS. KOLLINS: Well, in the bed. In the bed.

12 THE COURT: In the bed? Not lifting up to put her on the bed?

13 MS. KOLLINS: No, sir.

14 THE COURT: Hmm. So --

15 MS. KOLLINS: That's not my recollection.

16 THE COURT: So what would be your response, then, Mr. Westbrook,
17 that she's contending that there is no instance where there's more than one charge
18 for the same episode?

19 MR. WESTBROOK: I don't think that's clear to the jury. However, what
20 it seems to do to me would be to take out the entire purpose for the instruction they
21 originally proposed. But --

22 THE COURT: Well, no, they didn't have a predisposition. So you have
23 this predisposition --

24 MR. WESTBROOK: Right. Correct.

25 THE COURT: -- paragraph.

1 Look, I liked your instruction, the first three paragraphs, but that
2 last one on predisposition is -- that's the only element we're talking about here.

3 MR. WESTBROOK: Okay. I understand, Your Honor.

4 THE COURT: I don't know how there was a --

5 MR. WESTBROOK: Well, there was a -- there's a companion
6 instruction that I submitted to this, which goes together, and I think addresses the
7 concerns about single acts constituting both sexual assault and lewdness. And
8 that's Defendant's Proposed Instruction No. 2, which I think addresses a lot of what
9 Ms. Kollins was talking about.

10 THE COURT: Yeah. Well that's -- and that's -- that's Black Letter Law,
11 as well.

12 MR. WESTBROOK: Sure.

13 THE COURT: So I -- I think -- I think I -- I agree with Ms. Kollins based
14 upon her -- her explanation of how the counts were set up.

15 Here's what I'm going to do, guys. I'm -- I'm not going to give the
16 State's proposed. I'm going to reject that, and instead give the Defense proposed,
17 as I modified, but only the first three paragraphs.

18 That last paragraph on predisposition, I don't think it's, as
19 Ms. Kollins stated, it's not supported by the facts combined with the allegations -- or
20 I'm -- I'm sorry, the -- the indictment counts. Because there is no --

21 MR. WESTBROOK: Okay.

22 THE COURT: -- there is no situation where there's two counts for the
23 same episode.

24 MR. WESTBROOK: I understand, Your Honor. My only comment on
25 the last line of my Proposed No. 1 is they're talking about acting done merely to

1 predispose. They -- they did an entire expert on grooming, which I think is covered.
2 And -- and then that makes this factually necessary.

3 MS. KOLLINS: I don't think -- I don't think that --

4 THE COURT: Well, but -- but they didn't charge the giving of candy.
5 The giving of candy might be grooming, but it's not a lewdness act.

6 MS. KOLLINS: Correct.

7 THE COURT: So -- so that -- I don't think that -- I -- I don't think that
8 applies, so.

9 MR. WESTBROOK: Okay.

10 THE COURT: I understand, you made your objection. But what I'm
11 going to do is I'm giving yours -- your first three paragraphs, remember, I modified
12 that second sentence. All right.

13 MR. WESTBROOK: I'm sorry, we -- we're just discussing the
14 modification.

15 THE COURT: That's State's...

16 MR. WESTBROOK: So if we could, Your Honor, just for our clarity --

17 THE COURT: I'm marking in the record. Just give me a minute.

18 MR. WESTBROOK: All right.

19 THE COURT: I need to put it in the record, all right. Defendant's
20 proposed.

21 [Pause in proceedings.]

22 THE COURT: All right. So your -- your Proposed No. 1, I wrote down
23 not given as written. And -- and given -- I'm marking that. That'll be part of the
24 record.

25 Okay, Mr. Westbrook?

1 MR. WESTBROOK: Thank you, Your Honor. And so just so we have
2 the text right, because I know Ms. Kollins is going to be typing this up --

3 THE COURT: Okay. The first sentence, just like hers, is exactly like
4 she has it.

5 MR. WESTBROOK: Correct.

6 THE COURT: The second sentence reads:

7 However, when the sexual acts are not separate and distinct.

8 And Ms. Kollins, I'm kind of reading this for your benefit too. Do
9 you want me to go slower or you got it?

10 MS. KOLLINS: No. We're just trying to --

11 THE COURT: Okay.

12 MS. KOLLINS: -- make sure we highlight the correct portion, so I can
13 make sure I have a secretary and get it over there and --

14 THE COURT: Thanks.

15 MS. KOLLINS: We're working on it.

16 MR. HAMNER: Okay. However, when the sexual acts are not
17 separate and distinct --

18 THE COURT: Are not separate and distinct, comma, but instead part
19 of the same episode, comma.

20 And then the rest of what he has.

21 MR. WESTBROOK: Great.

22 THE COURT: And then his third paragraph is fine as is, but I'm not
23 giving the fourth -- fourth paragraph, based on Ms. Kollins' argument.

24 MR. WESTBROOK: Terrific.

25 MR. HAMNER: Hold on, hold on.

1 MS. KOLLINS: All right.

2 MR. HAMNER: Your Honor, I need to just hear it read. So it's going to
3 read:

4 However, when the sexual acts are not -- are -- are separate --

5 THE COURT: Not separate and distinct.

6 MR. HAMNER: -- not separate and distinct --

7 THE COURT: Comma, but instead --

8 MR. HAMNER: -- but instead part of the same episode.

9 And then read me the --

10 THE COURT: The defendant may be found guilty of only one count of
11 sexual assault or lewdness.

12 MR. HAMNER: Okay. So I have that down. And then the third
13 paragraph or third sentence will be:

14 When there's no interruption between the acts or any interruption
15 amounts to a merely hyper technical division of a single act, the sexual acts
16 are part of the same episode.

17 THE COURT: Yes, sir.

18 MR. HAMNER: Okay. Thank you very much, Your Honor.

19 MS. KOLLINS: Do we have to keep the word hyper technical?

20 MR. WESTBROOK: It's directly out of the case.

21 THE COURT: Well, yeah, it is in the case. I think it's -- I think -- I think
22 it's an important distinction.

23 MR. HAMNER: Okay.

24 MS. KOLLINS: Just -- just to let the court know --

25 THE COURT: Yeah.

1 MS. KOLLINS: -- my PowerPoint presentation, and I know the court's
2 kind of in a hurry to get this done, is about 80 slides long. And based on your
3 changes, I'm going to have to change some slides.

4 THE COURT: Okay.

5 MS. KOLLINS: So I'm going to need just a little bit more.

6 THE COURT: Well, we -- hopefully won't have -- this is the most
7 significant change of everything.

8 MS. KOLLINS: Okay.

9 THE COURT: So just this one.

10 MR. WESTBROOK: Yes. And Your Honor, as far as going in order,
11 since they --

12 THE COURT: But I'll give you the time to do that. I understand.

13 MS. KOLLINS: Thank you.

14 MR. WESTBROOK: Would it be appropriate to -- to discuss, since it's a
15 companion instruction, Defendant's Proposed Instruction No. 2 in this spot?

16 THE COURT: Well, let -- let me ask -- let me ask the State.

17 Ms. Kollins, look at Defendant's Proposed No. 2.

18 MS. KOLLINS: It's on the bottom of the other one. Court's indulgence.

19 THE COURT: So first as to Defendant's No. 2, I'm not going to give his
20 third paragraph. I don't -- I don't think that's a correct, precise statement of the law.

21 MS. KOLLINS: Well --

22 THE COURT: But let's look at the first two paragraphs of his
23 Proposed No. 2. The second paragraph is a -- is an exact statement right out of
24 *Gaxiola*.

25 MS. KOLLINS: Well, and I -- I think that just kind of mirrors his previous

1 instruction. I mean, I'm not going to stand up here and ask for a conviction on both.
2 I told you it arises only in one place. I don't -- I don't know how that elaborates on
3 the one that we just modified.

4 THE COURT: I -- I don't think we've told the jury yet that they can't find
5 both sexual assault and lewdness from the same episode.

6 MS. KOLLINS: Well, and that's generally part of my closing. I mean, I
7 tell them -- you know, find one or the other --

8 THE COURT: Okay.

9 MS. KOLLINS: -- if you think we've proved it beyond a reasonable
10 doubt. If you think there's penetration, then sexual assault is your verdict. But
11 otherwise, it's rubbing or touching or fondling.

12 And -- and nonetheless, Your Honor, they could convict on both.
13 You could only sentence on one. And that's kind of -- it's like a burglary and a
14 home invasion.

15 MR. HAMNER: And I -- I would note --

16 THE COURT: Hold on, hold on.

17 MR. HAMNER: Okay.

18 THE COURT: All right. That's a good point. I -- I'm not sure I can
19 accept your word on that. I suppose, but I want to double check.

20 MS. KOLLINS: Well, and -- and I could --

21 THE COURT: Because he has the word conviction in there. Let's see
22 if -- can you convict on both?

23 MR. WESTBROOK: You cannot.

24 THE COURT: Well, where's -- let's find the language on that.

25 MR. WESTBROOK: It's quoted --

1 THE COURT: Well, looking at -- *Gaxiola* contends this court should
2 reverse the two lewdness convictions since the conduct was a mere prelude to the
3 sexual assault.

4 So I think they agreed with that. I think you can't have a
5 conviction based on that.

6 MR. WESTBROOK: You can't for the same act. It's actually
7 Footnote 4 of my proposed instruction.

8 THE COURT: Footnote 4. Yeah. So, all right. So I -- I'm going to give
9 Defendant's Proposed No. 2, just the first two paragraphs.

10 MR. WESTBROOK: Thank you, Your Honor.

11 THE COURT: All right. And it sounds like it's consistent with what
12 Ms. Kollins argues, anyway.

13 MR. WESTBROOK: Good.

14 THE COURT: All right. But I'm not giving your paragraph 3. All right. I
15 don't think that's correct statement of law, plus -- and we are --

16 MR. HAMNER: So let me -- and just -- can I just have for clarification
17 purposes, I'm just -- so the Defense Proposed 2 will be:

18 When a single act constitutes both a sexual assault and the
19 lewdness, the defendant may not be convicted of both crimes. Before you
20 may find the defendant guilty --

21 Da, da, da, da, da, in that paragraph.

22 And what we'll remove is, an act of lewdness is incidental -- and
23 everything below that.

24 THE COURT: Yes.

25 MR. HAMNER: Okay.

1 THE COURT: Yes. Exactly.

2 MR. HAMNER: Thank you.

3 THE COURT: So let me find that version and make sure we mark that,
4 put it in the record.

5 So I'm marking your Proposed No. 2, not given as written,
6 because we modified it. Okay.

7 I need to get you one that doesn't have all my scratches over it.
8 She'll print it -- she'll print out one for you that doesn't have all the markups. All
9 right. All right.

10 So now let's go back to the State's. Okay. Guys, let's go to the
11 next one -- the next State's proposed instruction is:

12 Any person who willfully commits.

13 Any objection to that?

14 MR. WESTBROOK: No objection.

15 THE COURT: All right. Then the next one -- oh, by the way,
16 Ms. Kollins.

17 MS. KOLLINS: Yes, sir.

18 THE COURT: These -- these two instructions that we just went over
19 about, you know, multiple acts and -- and not having lewdness and sexual assault,
20 you know, those two.

21 MS. KOLLINS: Yes, sir.

22 THE COURT: You probably want to put that after you define the
23 lewdness offense, which is the next instruction, rather than before.

24 MS. KOLLINS: Okay.

25 THE COURT: Because you don't -- you don't discuss lewdness yet,

1 and yet you're talking about lewdness in that instruction. So I would move it --
2 move it down one.

3 MS. KOLLINS: Sure. Sure.

4 MR. WESTBROOK: I have no objection to the move.

5 THE COURT: Is it -- okay. Then the next one is:

6 Any person who willfully commits any lewd or lascivious act.

7 No objection to that? All right.

8 MR. WESTBROOK: Correct.

9 THE COURT: Then your next instruction is:

10 An act done with intent to commit to crime.

11 No objection to that, right?

12 MR. WESTBROOK: No objection.

13 THE COURT: Next one is:

14 The law does not require.

15 No objection to that, right?

16 MR. WESTBROOK: No objection.

17 THE COURT: The next one is:

18 To constitute a lewdness with a minor under the age of 14.

19 No objection to that, right?

20 MR. WESTBROOK: No objection.

21 THE COURT: Okay. Your next instruction:

22 Lewdness with a child under the age of 14 years requires.

23 MR. WESTBROOK: And we object to the instruction in its entirety and
24 ask that it be stricken.

25 THE COURT: All right. I -- I think it's a correct statement of the law. I

1 read your objection. I think it's supported by the evidence in the case, so I'm going
2 to go ahead and give it. And your objection is noted for the record.

3 MR. WESTBROOK: Okay.

4 THE COURT: All right.

5 MR. WESTBROOK: Is the State going to be identifying which charge, if
6 any, forms a factual basis for the instruction? Like, as part -- as part of their
7 closing?

8 MS. KOLLINS: Certainly, grabbing towards his genital area for candy,
9 multiple victims.

10 THE COURT: Okay. Let's continue. Where -- this isn't time for
11 argument. We've got to settle these.

12 MR. WESTBROOK: Okay.

13 THE COURT: Next one is:

14 Where a child has been a victim of sexual assault.

15 You didn't -- you don't have any objection to that one, right?

16 MR. WESTBROOK: No objection.

17 THE COURT: Okay. The next one:

18 Consent, in fact, of a minor child.

19 I didn't see any objection to that one, correct?

20 MR. WESTBROOK: No objection.

21 THE COURT: The next, the kidnapping instruction:

22 A person who leads, takes, entices.

23 Looks like you don't have any objection to that, correct?

24 MR. WESTBROOK: No objection.

25 THE COURT: The next one is the endangerment instruction:

1 A person who willfully causes a child.
2 No objection to that one, correct?
3 MR. WESTBROOK: No objection.
4 THE COURT: Okay. Next one -- the statutory -- yeah:
5 As used in these instructions, with the definitions of abuse or
6 neglect.
7 Et cetera?
8 MR. WESTBROOK: I -- I have no objection. Obviously, the highlighted
9 thing, effective 10/1/15, is -- is not going to be part of the instruction, right?
10 MS. KOLLINS: No. I was just letting everybody know that that was the
11 new AB language.
12 MR. WESTBROOK: That's what I thought.
13 THE COURT: We appreciate that. Thank you.
14 MR. WESTBROOK: Thank you.
15 THE COURT: Then the next is the indecent exposure instruction:
16 A person who makes any open and indecent.
17 MR. WESTBROOK: No objection.
18 THE COURT: Okay. And then the next one, I know you have an
19 objection to this one. Let's see, it begins -- well, you just made it person neutral.
20 An exposure becomes indecent when it.
21 MR. WESTBROOK: Yep.
22 THE COURT: Okay. Looks like you didn't have any --
23 MR. WESTBROOK: Just changing man to person --
24 THE COURT: Right.
25 MR. WESTBROOK: And adding or her to all the his's.

1 THE COURT: All right. And then you had -- sorry. Then the next one
2 is the well-settled and generally known significance of a phrase. And it looks like
3 you didn't have any objection to that one, correct?

4 THE WITNESS: Correct.

5 THE COURT: Then the next instruction:

6 Although you are to consider only the evidence.

7 No objection to that, correct?

8 MR. WESTBROOK: No objection.

9 THE COURT: Then the next one:

10 In your deliberation, you may not discuss or consider.

11 Looks like you had a change here.

12 Has the State had a chance to look at that proposed change?

13 MR. WESTBROOK: And Your Honor, this change would make it the
14 same language the State already approved in the earlier instruction.

15 MS. KOLLINS: That's fine.

16 MR. HAMNER: No objection.

17 THE COURT: Great. So the State will make this proposed change.

18 MS. KOLLINS: And, Your Honor --

19 THE COURT: So that -- yes. That's okay.

20 MS. KOLLINS: We -- we will make that change. I just wanted to let the
21 court know before we get too late into the end of these, our flight instruction,
22 wherever you want to put that.

23 THE COURT: Yeah. Could I deal with that at the end?

24 MS. KOLLINS: Sure, sure.

25 THE COURT: Then I can fold it in where --

1 MR. HAMNER: Sure.

2 THE COURT: -- if we accept it. All right.

3 So -- so the instruction that we're accepting at this point in -- in
4 the packet is going to read:

5 In your deliberation you may not discuss or consider the subject
6 of punishment, as this is a matter which lies solely with the court. Your duty
7 is confined to determining whether the State has proven the defendant is
8 guilty beyond a reasonable doubt.

9 MR. WESTBROOK: Correct.

10 THE COURT: Is that acceptable to everybody?

11 MR. WESTBROOK: But with defendant spelled correctly.

12 THE COURT: Yes.

13 MR. WESTBROOK: I -- I misspelled it.

14 THE COURT: All right. The next instruction will read:

15 When you retire to consider your verdict.

16 MR. WESTBROOK: No objection.

17 THE COURT: The next one will be:

18 If, during your deliberation, you should desire.

19 MR. WESTBROOK: No objection.

20 THE COURT: The next one should -- will read:

21 Now, you will listen to the arguments of counsel.

22 MR. WESTBROOK: No objection.

23 THE COURT: And then the verdict form; do both parties agree to the
24 form of the verdict?

25 MR. HAMNER: Defendant's name is spelled wrong. And on the first

1 sentence, Greg Anthony Williams is not correct. We need to get that fixed.

2 MR. WESTBROOK: No. I'm fine with that.

3 THE COURT: All right. Now, let's discuss the proposed circumstantial
4 evidence inflicting the interpretation instructions proposed by the defendant. And
5 then we'll get to the flight instruction.

6 Defendant has -- had proposed, I guess, what's known as the -- I
7 call it the -- here, let me find it. I've been referring to this as the *Supranovich*
8 instruction is what I call it. This is the -- the comprehensive two reasonable
9 interpretations instructions.

10 When I first looked at this, I thought, well, this -- you guys are
11 listening, right?

12 MS. KOLLINS: Yes, sir.

13 THE COURT: When I first saw this, I -- I thought, you know, this really
14 isn't a circumstantial evidence case, because we really have direct evidence. It's
15 the -- either the -- the witnesses or the alleged victims. And -- and didn't seem
16 initially that there was any significant circumstantial evidence.

17 Then I thought, well, wait a minute, what about -- what about
18 maybe the state of mind of the defendant? And the State had an expert on
19 grooming, and grooming seems to be based on a lot of circumstantial evidence. I
20 think that the expert on grooming was saying that, you know, providing candy is
21 circumstantial evidence of an intent to predispose the alleged victims to -- to the
22 abuse.

23 So maybe I'm wrong and maybe there's -- this is a circumstantial
24 evidence case. So I guess I need to hear argument on that.

25 MR. WESTBROOK: That is exactly --

1 THE COURT: Who wants to go first?

2 MR. WESTBROOK: Oh, I -- I'm proposing. I can go first, Your Honor.

3 Yeah, I'm --

4 THE COURT: Do you see anything -- what else do you think is part of

5 your circumstantial case here?

6 MR. WESTBROOK: Well, first of all, Your Honor, this is a theory of the

7 case instruction, which elevates it to something different than normally.

8 THE COURT: Well --

9 MR. WESTBROOK: But --

10 THE COURT: -- not exactly true. Because -- because in *Troy*

11 *Donahue Olivera vs. State*, May 31, 2016, the supreme court reminded the -- the

12 district courts that:

13 "The Supreme Court has repeatedly held that when the jury is

14 properly instructed, a reasonable doubt is not error for the district court to

15 refuse to give an instruction on circumstantial evidence or evidence

16 susceptible to two reasonable interpretations."

17 Citing some other cases.

18 So this is not one of those situations where your -- you know,

19 under *Carter*, a theory of the case instruction is required. It's my -- within my

20 discretion. So you've got to convince me --

21 MR. WESTBROOK: Okay.

22 THE COURT: -- without telling me I'm required to do it, why -- why --

23 MR. WESTBROOK: Sure.

24 THE COURT: -- I should exercise my discretion to do it.

25 MR. WESTBROOK: You hit the nail on the head with your first -- with

1 your -- with your first statements. The fact is they're trying to suggest that just
2 giving out the candy was proof of sexual intent here. And they've charged some
3 things in this case which wouldn't necessarily be sexual contact in other -- in other
4 circumstances.

5 The mens rea of these crimes is the intent to arouse or appeal to
6 the sexual desires of the victim or of -- of the suspect or the defendant himself.

7 So his state of mind is important in this. They're coloring his
8 actions by saying that he's grooming, and that everything that he's been doing in
9 this case is a process of grooming. So this is very much a circumstantial evidence
10 case.

11 In addition, whenever you have a case that's so involved with
12 hearsay upon hearsay, then it also becomes a circumstantial evidence case.
13 Because, you know, most of the witnesses who testified as to what happened in
14 this case didn't see anything. And so the state of the mind of the people who gave
15 them the information in the first place, you know, the original speakers who they
16 talked to outside of court and who they gathered hearsay from is very important.
17 And that makes this very much a circumstantial case.

18 THE COURT: Okay. Who wants to be heard from? First of all, do you
19 have an objection to that proposed instruction? And, if so --

20 MR. HAMNER: I -- yes, we -- yes, we do, Your Honor.

21 THE COURT: Okay.

22 MR. HAMNER: And -- and let me -- let me preface this by the
23 following. I think the court's initial instincts about the cases in light of *Bales* is
24 accurate. And I remember the *Bales* case. I've -- I've argued this before.

25 This is a very -- this case is very factually distinct than when you

1 have an instruction in *Bales*, because what happens in *Bales* is the following: The
2 defendant is being charged with burglary for entering into a courthouse and stealing
3 a flag.

4 And so the -- the reasonable interpretation of circumstantial
5 evidence is this, what is his intent upon entering into the courthouse? Is it for a
6 lawful purpose? Or is it to do something illegal, like steal a flag?

7 And that's why this instruction was given and it was kind of
8 cautioned, you don't just kind of throw it out there willy-nilly. It really needs to be
9 something like that. In a case like that, that makes sense, right?

10 When -- when the defense says this is really a circumstantial
11 case, that's absolutely incorrect with respect to the crimes charged.

12 This -- every single crime charged is being offered through direct
13 evidence. Every victim is saying he rubbed my vagina; he offered my chocolates,
14 rubbed it on his penis and asked me to take it and -- and kind of pulled me close;
15 he showed me pornography on his phone.

16 Those things are not circumstantial in any way, shape, or form.
17 That's coming out through the direct testimony. So there's no way that you can
18 look at rubbing a child's vagina and interpret it like walking into a public building
19 during open hours. They're really apples and oranges. Same thing with showing
20 porn on a phone to a kid. Same thing with rubbing chocolate on your genitalia.
21 They don't -- they are not the same thing. And our case is being proved through
22 direct evidence.

23 And then when we get to the comment about, well, you know,
24 there's so much hearsay upon hearsay; that's an inaccurate statement, as well.

25 The crimes being charged are being proven through direct

1 evidence, and then as additional corroborative evidence, there has been child
2 hearsay that has been admitted so that you can evaluate the credibility when a
3 victim says, with direct evidence, I saw X, if they had said it previously at another
4 time in a spontaneous way. So it's really not a circumstantial case.

5 Pointing out the grooming evidence or giving of candy is
6 inaccurate. He's not been charged with the crime of giving candy.

7 The only crimes that talk about referencing candy at all is when
8 he took the candy and rubbed it on his genitalia, something that, with all due
9 respect, can't be interpreted as being a legitimate reason. No one rubs chocolate
10 on their penises in front of kids. Doesn't happen, and it's not confusing in any way
11 for some lawful thing.

12 So I think this is too much of a stretch in this case, because what
13 you have are victims very clearly offering direct testimony of very clearly illegal acts.

14 Yes, there's some additional grooming evidence out there, but
15 that is not a crime charged. And that, if there was a crime of offering candy to kids,
16 I would say this instruction would more -- more appropriately apply.

17 But porn on the phones to children, rubbing chocolate on
18 genitalia, rubbing children's vaginas, there's nothing ambiguous about that type of
19 conduct.

20 THE COURT: Well, you -- but you -- so you had a -- I'm going to give
21 this instruction --

22 MR. HAMNER: Okay.

23 THE COURT: -- because you had -- you had a grooming expert who
24 was the only expert in the case. It's a huge part of the case. The expert said
25 grooming involves noncriminal conduct. And -- and the -- it could involve

1 noncriminal conduct. And the noncriminal conduct that he attributed to the -- the
2 grooming was the giving of candy, the innocent giving of candy. And -- and I
3 think -- I think it was expected that the jury would draw an inference of some
4 improper mens rea based upon the -- just the mere giving of candy. And so you're
5 asking the jury to draw an inference.

6 MR. HAMNER: Fine.

7 THE COURT: So -- so I'm going to give it.

8 MR. HAMNER: Understood.

9 THE COURT: And plus, you know another reason why, which I might
10 change in the future, you know, when I read my preliminary instructions, I read one
11 on circumstantial evidence. And without giving the -- without -- without explaining
12 to the jury the correct burdens that are involved in that. So in part, I think in the
13 future, in the criminal cases, I'm going to stop -- I'm going to stop giving the
14 circumstantial evidence preliminary instruction, because I think I have to give this
15 now to make sure I correct any potential error in not giving the complete standard.

16 MR. HAMNER: Understood, Your Honor.

17 THE COURT: That's another reason why I'm going doing it.

18 MR. HAMNER: Is there a preference that --

19 THE COURT: I don't care where you put it.

20 MR. HAMNER: Okay.

21 THE COURT: I'll let you decide, perhaps somewhere, you know, near
22 the end, but before the complete instructions.

23 MR. HAMNER: Okay. Okay. Understood.

24 THE COURT: All right.

25 MR. HAMNER: And then we have that last flight instruction.

1 THE COURT: And just make a note that we don't give that
2 circumstantial evidence preliminary instruction anymore in criminal cases. All right.
3 Thank you. All right.

4 So that one is given.

5 Now, let's go to the flight instruction --

6 Oh, wait. Are there any additional instructions that the defense
7 wants to propose?

8 MR. WESTBROOK: There are not. However, there may be,
9 depending on what the court's ruling on the flight instruction is.

10 THE COURT: All right. Are there any additional objections other than
11 what's -- the defense the has put on the record that you want to make, other than
12 objections to the flight instruction?

13 MR. WESTBROOK: No, Your Honor.

14 THE COURT: All right. Let's talk about the State's proposed flight
15 instruction.

16 Ms. -- Ms. Kollins, let me -- I have it right here.

17 The -- the Nevada Supreme Court has said a flight instruction is
18 only valid if there is evidence sufficient to support a chain of unbroken inferences
19 from which the defendant's behavior to the defendant's guilt of the crime charged.

20 So do we have that? And if so, convince me.

21 MS. KOLLINS: Well, Your Honor, I think the evidence is clear that he
22 left the apartment complex. He wasn't around for a couple weeks immediately
23 following the report to the police, and Elena knowing that he was going. So he was
24 gone and the only reason he was found is because this family knew he sometimes
25 worked at this upholstery shop, and that's where he was located ultimately by

1 Henderson police.

2 THE COURT: Where was he sleeping during this timeframe?

3 MS. KOLLINS: I don't know. I don't have access to him.

4 THE COURT: All we know is he was -- there's some evidence that he
5 was gone for -- was it established the precise period of time? Or was it just two
6 weeks?

7 MS. KOLLINS: That he was not -- that he was not seen again the day
8 after it was reported to the police. He was not seen from then --

9 THE COURT: And then he was seen again at work, two weeks later?

10 MS. KOLLINS: Well --

11 MR. HAMNER: No. It's -- it's -- he -- it is reported -- it is reported to the
12 police on October 17th, 2016.

13 MS. KOLLINS: Correct.

14 MR. HAMNER: The witnesses -- the residents in that community
15 testified they did not see him after that. And with one of the neighbors, it was one
16 day later. And then they never saw him again.

17 He is then located at -- in Henderson on November 12th, so it's
18 approximately one month he's been away.

19 MS. KOLLINS: Yeah.

20 MR. HAMNER: The conversation between the detective and the
21 defendant was, hey, your wife hasn't seen you in a few weeks, you know, where
22 you been? And then he says, I've just been working -- I've been staying in
23 Henderson.

24 THE COURT: So one other thing that I -- that I noticed from the cases
25 is a flight instruction is only appropriate if the flight is, number one, immediately

1 after the crime; or, number two, after the defendant is accused of the crime. All
2 right.

3 Obviously, in this case, the crime -- alleged crime had been going
4 for a while, so he didn't just flee because he just did something and he's running
5 away, showing consciousness of guilt.

6 So then we need to look at the next factor, did he flee because
7 he was accused of the crime?

8 MR. HAMNER: Yes.

9 THE COURT: And what is he -- put -- put in the record, so I make sure
10 I understand it, what is the evidence that he developed a state of mind that he was
11 being turned in?

12 MR. HAMNER: I -- I believe that the circumstantial evidence is this,
13 you -- we know that this is a close family relationship between all of them. They're
14 all very tight. They all live in this close community.

15 We know that on October 7 -- on October 16, when the children
16 disclose, Elena, his wife, is present at Maria's apartment. And that the parents are
17 trying to keep her kind of at bay from finding out.

18 This is all the same day where the defendant wants to take him
19 away to Chuck -- take those kids away to Chuck E. Cheese, and in their panic --

20 THE COURT: Yeah.

21 MR. HAMNER: -- they tell their parents we don't want to go with him.

22 The -- within 24 hours, the parents then go straight to the police
23 and report him. He is not seen after that point. Once that report is filed, he's a
24 ghost at that apartment complex, an apartment complex that he's lived at for
25 basically nearly a decade, if not more than that.

1 THE COURT: And there's something about the dog. Did he leave his
2 dog? Or what was that about the dog?

3 MR. HAMNER: Well, I think what it was was --

4 THE COURT: I'm trying to remember what --

5 MR. HAMNER: -- he has these dogs that they -- you know, the couple
6 really cares about and that they like. And so the detective says to --

7 THE COURT: Were they still there?

8 MR. HAMNER: No. The detective says, well, I heard -- you know, you
9 haven't even seen your dogs. Don't you miss your dogs? I hear they're your life.

10 And he's like, I don't -- no, I don't care about them. I don't even
11 care about myself.

12 THE COURT: Sounds like you have circumstantial evidence of flight?

13 MR. HAMNER: Yes.

14 THE COURT: Okay. So that kind of bolsters the reason we need
15 circumstantial instruction?

16 MR. HAMNER: Correct.

17 THE COURT: Okay. Let me hear from the defendant.

18 MR. WESTBROOK: Your Honor, there's no chain of unbroken
19 inferences, not even close. Some -- someone in the apartment complex saying --

20 THE COURT: Well...

21 MR. WESTBROOK: -- that he loves the poodles, which belong to his
22 wife, by the way, as you could tell from the fact they are wearing little shirts with
23 pink writing on them, is completely immaterial.

24 But let's talk about what they've actually proven here, which they
25 have to do. Him not being around for a couple of weeks -- that was only submitted

1 for the effect on the listener. It is not submitted for the proof of the matter asserted.

2 The he-hasn't-been-around-for-two-weeks-per-his-wife thing, is
3 not evidence in this case that goes to the matter asserted. It only went to the effect
4 on the listener. Therefore, it's inappropriate --

5 THE COURT: So...

6 MR. WESTBROOK: -- to try to rely on that hearsay testimony to prove
7 that he hasn't been around for a couple of weeks.

8
9 MR. HAMNER: It's -- it's --

10 MR. WESTBROOK: Second of all --

11 THE COURT: Did it come in just for that limited purpose or full
12 purposes?

13 MR. WESTBROOK: It did. Nope. Just for the limited purpose. It was
14 only accepted to show the effect --

15 THE COURT: Mr. Hamner?

16 MR. WESTBROOK: -- on the listener, Detective Campbell.

17 MR. HAMNER: Yeah. What -- what -- once again, Mr. Westbrook is
18 misinterpreting the law as to why hearsay exception comes in.

19 The -- the -- that statement -- we said that it comes in for the
20 effect on the listener and the effect on the hearer. And what happens in that
21 interview is that information is asked -- obtained by Detective Campbell from the
22 wife, right? He then relays it to the defendant to see what effect it can have on him.
23 And his response is, I never tell her anything.

24 And he's, like, you don't tell your wife where you've been for
25 several weeks?

1 He's, like, no, I never tell her anything.

2 THE COURT: And that -- that's substantive evidence there, that --

3 MR. HAMNER: Correct.

4 THE COURT: So I'm -- Mr. Westbrook --

5 MR. WESTBROOK: But, Your Honor, he didn't admit to being gone for
6 several weeks. He just said he doesn't talk to his wife.

7 THE COURT: No. Here's -- here's what I'm going to do. I'm going to
8 give the flight instruction. But I think we need to add, if flight is proved beyond a
9 reasonable doubt. Add the beyond a reasonable doubt in there, because that's an
10 important --

11 MR. WESTBROOK: Well, actually, Your Honor, may I finish my
12 argument on it? Because I have more arguments. It's -- it's --

13 THE COURT: Oh, more arguments? Oh, I -- I didn't --

14 MR. WESTBROOK: I don't think they've gotten this at all.

15 THE COURT: All right.

16 MR. WESTBROOK: They're claiming that they have evidence that he
17 was a ghost afterwards and he wasn't around.

18 THE COURT: Right.

19 MR. WESTBROOK: The -- there's two problems with that. Number
20 one, they haven't proven how often he was around beforehand. In fact, the
21 evidence that came out in the case was that he's very rarely around. His wife,
22 Elena, according to other witnesses, including Maria, is always by herself. She's by
23 herself during the day. And she usually eats dinner with Maria and her family. My
24 client is almost never there.

25 We also have evidence going all the way back to 2011 that it's

40

1 typical for him to go into -- or at least it's been in other times -- there's been another
2 time where he has spent the night at his job, because he's extremely busy working.
3 He has two jobs.

4 So at 2:00 in the morning in 2011, he was there when someone
5 tried to break into the place and rob it.

6 THE COURT: Well, let me just interrupt for a second.

7 Mr. Hamner, can a juror draw an inference that he actually
8 disappeared if they only see him remotely?

9 MR. HAMNER: I think --

10 THE COURT: Or sporadically.

11 MR. HAMNER: I think the answer is yes. And I don't think that
12 Mr. Westbrook has appropriately reflected all of the testimony. I think that's an
13 argument they're entitled to make to rebut flight, but it doesn't mean the flight
14 instruction doesn't come in.

15 What the testimony was, was Maria Barajas said there were
16 times when she provided food to Maria. That's all that was said. But what you had
17 from Yusnay was after this was reported, Yusnay Rodriguez said, I never saw the
18 defendant again. Amanda --

19 THE COURT: I thought she'd said before --

20 MR. WESTBROOK: She's only seen him a couple times.

21 THE COURT: -- she had only seen him, like, twice.

22 MR. WESTBROOK: In four months.

23 MR. HAMNER: I understand.

24 MR. WESTBROOK: She's seen him twice.

25 MR. HAMNER: I understand that. So she -- but we're talking about

1 after the fact. The evidence that this court and this jury had after the fact to warrant
2 admitting the flight instruction.

3 Amanda flat out says that after I reported, he disappeared and he
4 never came back to the apartment. Someone who there's been no evidence to the
5 contrary to say that they didn't interact very regularly. It was very frequent.

6 Maria Barajas also testified that after they reported, they never
7 saw him back on the grounds again. You had Yusnay also stating I don't
8 remember seeing him also on the grounds after it was reported, either.

9 THE COURT: All right. Let me hear the rest of Westbrook's
10 arguments.

11 MR. WESTBROOK: Okay. The only person that would know whether
12 he was back at the apartment is Elena, a witness the State chose not to call.
13 That's -- that's important.

14 Also, Litzi said, specifically, that he works a lot. Everyone says
15 he works a lot.

16 It's important that they show his pattern of behavior prior to this
17 incident and after this incident to see if he's deviated.

18 MR. HAMNER: Well --

19 MR. WESTBROOK: Because the point is --

20 Stop interrupting me, please. I haven't interrupted you once.

21 The -- the -- it's important, because you have to show an
22 aberration of behavior. They have to show this, you know, unbroken inference that
23 he has changed his behavior to be away from the apartment, when the reality is --
24 of it is -- and the evidence is he hasn't changed at all. He's always at work. And he
25 was -- he told everybody he was at work. The witnesses knew he was at work. His

1 wife knew he was at work. The police found him at work, and they found him
2 working. The evidence is overwhelming that he wasn't fleeing from anything.

3 Also there is zero evidence that he was ever accused.

4 THE COURT: But here's the -- you know, by itself --

5 MR. WESTBROOK: And there was no warrant.

6 THE COURT: -- I -- I might have -- I would maybe have trouble with the
7 inference that we're asking the jury to draw. But you combine that with the fact that
8 he told the kids he's going to take them to Chuck E. Cheese and then take them far
9 away. And kids were scared and -- and worried that they were going to be gone.
10 And that -- I think a jury can -- can draw an inference that he was thinking of fleeing.
11 That something was up. He was -- knew he was getting accused. He's trying to
12 flee.

13 MR. WESTBROOK: But just --

14 THE COURT: Look, it's --

15 MR. WESTBROOK: But not without proof of flight. I mean, he went to
16 his office. Where he works.

17 THE COURT: I think there's enough. All right.

18 MR. WESTBROOK: Okay.

19 THE COURT: Granted it's -- it's not a -- a powerful argument the State
20 has. But there is enough there that, you know, a reasonable juror could conclude
21 there's flight, at least in my opinion.

22 Do I think he's going to convince the jury that there was flight?
23 I -- you know what, that's up to the jury. But -- but I'm going to let it go to the jury.
24 All right. So --

25 MR. WESTBROOK: In that case, Your Honor, I have a proposed flight

1 instruction that is more consistent with *McGuire vs. State*, as this one is not.

2 THE COURT: I'm -- yeah, I'm familiar with *McGuire*. Let's see what
3 you wrote.

4 MR. WESTBROOK: Okay. I can approach. Actually, I can --

5 THE COURT: Do you have it written down?

6 MR. WESTBROOK: Can I copy it? I have it, yeah.

7 THE COURT: Do you have a copy that the State can look at?

8 MR. WESTBROOK: I don't, because I didn't know they were doing a
9 flight instruction. This was just a backup safety. Because this wasn't --

10 THE COURT: Yeah.

11 MR. WESTBROOK: -- provided before. But I can go copy --

12 THE COURT: I'm actually -- well, as soon as Stacey last night says, I
13 forgot one. I pulled out my flight folder, because I know -- that's the one I didn't
14 see.

15 MR. WESTBROOK: Yeah. Can I make a copy real quick?

16 THE COURT: Yeah.

17 MR. WESTBROOK: I'll be right back. Thanks.

18 THE COURT: All right. So we'll -- we'll -- we just don't have any, like,
19 substantive argument, unless --

20 MR. HAMNER: And I was going to --

21 THE COURT: Well, go ahead. I mean, if you're okay with him...

22 MR. HAMNER: No. I was just -- it was in reference to your desire to
23 have the language of beyond a reasonable doubt. I was wondering if you would
24 prefer it to be after the end of the first sentence, so it would read:

25 The flight of a person --

1 If you accept this instruction.

2 The flight of a person after the commission of a crime is not
3 sufficient in itself to establish guilt. However, if flight is proved, is
4 circumstantial evidence in determining guilt or innocence beyond a
5 reasonable doubt.

6 Is that how you wanted it phrased or did you want it phrased
7 somehow differently?

8 MS. KIERNY: I don't know that that's an accurate statement of the law.
9 Innocence beyond a reasonable doubt is not a phrase that we ever see or use.

10 THE COURT: Yeah. I think it needs to be -- I appreciate your --

11 MR. HAMNER: Yeah, I just didn't know where you wanted it.

12 THE COURT: -- effort. I think it's the flight that has to be proved
13 beyond a reasonable doubt.

14 MS. KIERNY: If flight is proved beyond a reasonable doubt, then,
15 comma.

16 THE COURT: But let's -- let me see what -- what he wrote.

17 MR. HAMNER: Sure. Understood.

18 MS. KIERNY: Okay.

19 THE COURT: Thanks. But I am going to give a flight instruction, I think
20 there's barely enough there to give it.

21 MS. KOLLINS: Your Honor, we're probably not going to have a
22 secretary, so this might take just a little bit more time --

23 THE COURT: Uh-oh.

24 MS. KOLLINS: -- than it usually would. Sorry.

25 THE COURT: What I'll do is we'll give the jury lunch before we read the

1 instructions, then. Does that work for you guys?

2 MR. HAMNER: That works great.

3 MS. KOLLINS: That would be great.

4 THE COURT: Give the jury lunch before we read the...

5 MR. WESTBROOK: That's perfect. Thank you, Your Honor.

6 THE COURT: All right.

7 MR. WESTBROOK: Hang on. Just court's indulgence for one second.

8 THE COURT: Hopefully they'll have lunch here, told them to get it here
9 as soon as possible.

10 [Pause in proceedings.]

11 MR. WESTBROOK: And, Your Honor, I just incorporated your change
12 into this regarding beyond a reasonable doubt. I agree that that's the standard.

13 THE COURT: I'm surprised you didn't think of that one.

14 MR. WESTBROOK: You're right. It was -- it was late.

15 THE COURT: Let's see what --

16 MR. WESTBROOK: May I approach, Your Honor, and I'll actually mark
17 this on there right at the top.

18 THE COURT: I'm going to have her grab the --

19 MR. WESTBROOK: Defense No. 4.

20 THE COURT: -- *McGuire* case, as soon as she knows the cite.

21 MR. WESTBROOK: I've got the cite right here.

22 THE COURT: Yeah. She's going to grab it for me as soon as she
23 knows it.

24 MR. WESTBROOK: I'm writing it on the top. Here you are,
25 Your Honor.

1 THE COURT: Just grab Volume --
2 MR. WESTBROOK: And I'll give you the cite for *McGuire*, I've got it up.
3 THE COURT: Just tell us what --
4 MR. WESTBROOK: It's 86 Nevada --
5 THE COURT: Just go grab 86.
6 MR. WESTBROOK: -- 262.
7 THE COURT: All right.
8 MR. WESTBROOK: And I think the appropriate line is at 266.
9 THE COURT: All right. So let's have the State look at your language
10 first, because maybe there's no problem with your language. But I'm going to read
11 it at the same time as them.
12 MR. HAMNER: I think the -- I -- I don't have a problem with their first
13 paragraph with the insertion of beyond a reasonable doubt. I think that reads fine.
14 I -- I do have a problem with them removing the sentence:
15 The essence of flight embodies the idea of deliberately going
16 away with consciousness of guilt and for the purpose of avoiding
17 apprehension or prosecution.
18 Because it deprives the jury with an understanding as to how the
19 law defines what flight really means or what means to trip --
20 THE COURT: So why don't we give his first, your second, and his
21 third?
22 MR. HAMNER: I don't --
23 THE COURT: I mean, his -- his second as -- as the third.
24 MR. HAMNER: And I don't -- and I don't have a problem with using
25 his -- his sentence. So it'll read his first paragraph, our first sentence of our second

1 paragraph, and then we'll read his last sentence, which is its own separate
2 paragraph.

3 THE COURT: Yeah, I like his last sentence.

4 MR. HAMNER: That's fine.

5 THE COURT: So we'll just take your second sentence and put it in
6 between his two paragraphs?

7 MR. HAMNER: Yes, Your Honor.

8 THE COURT: All right. That's what we're going to do, then.

9 MR. WESTBROOK: Thank you, Your Honor.

10 THE COURT: But your objection is still noted, though, for flight in
11 general. All right?

12 MR. WESTBROOK: Okay, great. Yeah. The -- the key to *McGuire*,
13 and I know this has been discussed by the -- the jury instruction committee, is -- is
14 that No. 3 is -- is mandatory, and it will be part of the new packet.

15 [Pause in proceedings.]

16 THE COURT: Yeah. Thank you. Thanks for -- copy that for me.
17 Because I want to make sure I put it in this folder with the flight instruction, right,
18 *McGuire*.

19 All right. Does one -- does the State have any additional
20 instructions they want to propose?

21 MR. HAMNER: No, Your Honor. I don't believe so.

22 THE COURT: All right. Anything else to put on the record regarding
23 the settling of jury instructions?

24 MR. WESTBROOK: No, Your Honor.

25 MR. HAMNER: Not with respect to that.

1 MS. KIERNY: I have just one thing. I know that we read the charges to
2 them before they were sworn. The parties would agree that you do not have to
3 read the charges if you don't want. We would both stipulate to that.

4 THE COURT: The State stipulates to that, too?

5 MR. HAMNER: Yes, Your Honor. We don't have an objection.

6 THE COURT: All right. Do we need to -- so without reading the
7 charges, do we still need to read the -- the titles of the charges or can we skip that,
8 as well? Or what do you think is a -- or -- or rather -- rather doing all 40 counts, you
9 know how the indictment just lists the --

10 MS. KIERNY: The -- the opening paragraph.

11 THE COURT: -- we just state each count one time, rather than every
12 time it's mentioned; you know, what I'm saying?

13 MS. KOLLINS: That's fine, Your Honor. Whether the court wants to
14 read just the captions or just the titles of each count. Court's preference. The State
15 doesn't care.

16 THE COURT: Well, where's the actual indictment?

17 MS. KOLLINS: Second amended?

18 THE COURT: I have it somewhere. Here, so we would read -- if you
19 have a copy of the amended indictment, we would just read kind of like everything
20 that there is before the specificity of the counts.

21 MR. HAMNER: That's fine.

22 THE COURT: Just that part.

23 MR. HAMNER: And it needs --

24 MS. KIERNY: Or even that opening paragraph is okay with us.

25 THE COURT: What's what I mean is the opening paragraph.

1 MS. KIERNY: Yes, okay.

2 MR. HAMNER: And for the record, you have the second amended
3 indictment in your hands?

4 THE COURT: No. I have the old one. I know it's the old one. But
5 I'm -- I'm going to get the seconded amended and make sure --

6 MR. HAMNER: Thank you very much.

7 THE COURT: I'll just read, you know, the State of Nevada, County of
8 Clark, defendant above named, et cetera, et cetera, committed, you know, at and
9 within the County of Clark, state of Nevada, on or between November 1st, 2014,
10 and 20 -- or November 30th, 2016, the charges as previously stated, something like
11 that.

12 MS. KIERNY: To which he's entered a plea of not guilty.

13 THE COURT: To which he's entered a plea of not guilty. Yeah. Thank
14 you. I'll -- I'll modify that accordingly.

15 So let's go ahead and -- I should probably reflect that. It has to
16 be formally written up in the jury instructions, actually.

17 MS. KOLLINS: What does?

18 MR. HAMNER: How -- how I read it has to be in the jury instructions
19 that gets filed with the clerk. And so --

20 MS. KOLLINS: I can't --

21 THE COURT: And you -- you're short on staff?

22 MS. KOLLINS: Well, I just -- I don't feel comfortable removing all the
23 language of the charging document, because they need that to go by. That can't
24 be removed from the -- for purposes of deliberation.

25 THE COURT: All right. Then here's what I'm going to do -- here's what

1 I'm going to do. I'll read it as is -- I mean, I'll read it with the counts and the titles,
2 but just skip the body of the language. And the parties just have a stipulation in the
3 record that the substance of each count can be omitted from the court's reading of
4 the instructions, but it will still be contained in the instructions and go back to the
5 jury room as one copy, available to the jurors. Does everybody agree with that?

6 So I'll read, Count 1, lewdness with a child --

7 MR. HAMNER: No, I --

8 THE COURT: -- under the age of 14. Count 2, lewdness with a child
9 under the age of 14.

10 MR. HAMNER: I understand all of that, Your Honor. I -- I was just --
11 we were just being --

12 MS. KOLLINS: Just thinking out loud.

13 MR. HAMNER: We were just thinking out loud. Our only concern is
14 that if it's going to be some sort of --

15 THE COURT: You can change your mine. I -- you know, I --

16 MR. HAMNER: My -- my big concern about it is what if it's raised as
17 some weird appellate issue, like, you know, the court erred by not by not reading,
18 you know, the language and da, da, da, da, da.

19 MS. KIERNY: I am agreeing to it.

20 THE COURT: I know.

21 MS. KIERNY: I am agreeing to waive it.

22 THE COURT: I appreciate that. But I -- I need -- look, I'm -- I have to
23 read it unless both sides agree.

24 MS. KIERNY: Okay. If you're not agreeing --

25 MR. HAMNER: I just -- I'm just -- it's just I was thinking out loud, our

1 only concern is that it gets raised as some type of issue and then it comes back to
2 bite us or the court, you know, you shouldn't have done that.

3 MS. KOLLINS: And -- and I know the reading of it is by statute, but I
4 don't know if it's waive-able. So that's my only concern.

5 THE COURT: Okay.

6 MS. KIERNY: Okay. We'll do that.

7 THE COURT: We'll take turns reading parts. Anybody have a problem
8 with that?

9 MR. HAMNER: No, Your Honor.

10 THE COURT: Okay.

11 MR. WESTBROOK: Sounds good to me.

12 MR. HAMNER: All right. So the -- this -- this concludes the settling of
13 jury instructions.

14 We're going to take a break now. We probably won't have food
15 for the jurors until about 12:15 is when -- probably when the food is going to get
16 here.

17 Can -- do you want to check with Mel on that?

18 THE CLERK: Sure.

19 MR. WESTBROOK: Your Honor, can I make a quick record before
20 we --

21 THE COURT: Yes.

22 MR. WESTBROOK: -- before we break?

23 THE COURT: Yes. All right.

24 MR. WESTBROOK: First of all, I'm sure this is clear on the record
25 anyway.

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JOSE AZUCENA) No. 74071
)
 Appellant,)
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 v.)
)
 THE STATE OF NEVADA,)
)
 Respondent.)
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PHILIP J. KOHN Clark County Public Defender 309 South Third Street Las Vegas, Nevada 89155-2610 Attorney for Appellant	STEVE WOLFSON Clark County District Attorney 200 Lewis Avenue, 3 rd Floor Las Vegas, Nevada 89155 ADAM LAXALT Attorney General 100 North Carson Street Carson City, Nevada 89701-4717 (702) 687-3538 Counsel for Respondent
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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10 day of April, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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JOSE AZUCENA, #1183653
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

BY /s/ Carrie M. Connolly
Employee, Clark County Public Defender's Office