

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

SIAOSI VANISI,

Appellant,

vs.

WILLIAM GITTERE, WARDEN,
and
AARON FORD, ATTORNEY
GENERAL FOR THE
STATE OF NEVADA.

Respondents.

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APPELLANT'S APPENDIX

Appeal from Order Denying Petition for Writ of
Habeas Corpus (Post-Conviction)
Second Judicial District Court, Washoe County
The Honorable Connie J. Steinheimer

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28	137. Memorandum to Vanisi File from MRS April 27, 1998.....	AA05856 – AA05858
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- 36 1. Transcript of Proceedings – Status Hearing, *Vanisi v. State of Nevada*, Second Judicial District Court of Nevada, Case No. CR98-0516
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12	Transcript of Proceedings – Trial Volume 12, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 6, 1999.....	AA2414 – AA02522

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th day of September, 2019.

Electronic Service of the foregoing Appellant's Appendix shall be made in accordance with the Master Service List as follows:

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1 Police Department and talked with a Sergeant Jeff Partyka?

2 A Possibly.

3 Q You don't remember that?

4 A I don't really remember, no. I could have if
5 obviously you have the date for it.

6 Q Well, I'm just asking you, do you remember
7 placing that phone call?

8 A Yes.

9 Q Do you remember telling the police some facts
10 about Mr. Vanisi that you knew?

11 A Yes.

12 Q You had been married for four years?

13 A Correct.

14 Q That you had two children, ages one and three?

15 A Well, at that time they were -- okay.

16 Q Do you remember saying that?

17 A Not the exact words, but I'm sure I must have
18 if you have it there.

19 Q And that you had been separated at the time of
20 the phone call for four months from the defendant.

21 A In January?

22 Q Yes.

23 A No. That's not true.

24 Q How long had you been separated?

25 A A year.

1 Q And that the reason for your separation was
2 several things. One was spousal abuse; is that correct?

3 A That's correct.

4 Q Number two is the defendant's lack of
5 motivation to seek employment?

6 A That's correct.

7 Q And that you had to work two jobs and care for
8 both of the children?

9 A That's correct.

10 Q The question that counsel just asked you that
11 he was a good father, I kind of am confused. Are you
12 talking about how he related to the children as opposed to
13 his roles and responsibilities of being a father besides
14 just playing with the children?

15 A His interaction with them, the way he related
16 to them.

17 Q But as far as getting a job, working, helping
18 pay the bills, he wasn't very good at that?

19 A Towards the end, that's correct.

20 Q You said also that after the birth of the
21 children, that there was a change in Mr. Vanisi. Do you
22 remember what you told Sergeant Partyka the change was?

23 A No.

24 Q Let me see if I can refresh your memory. That
25 Mr. Vanisi couldn't manage family life and that he wanted to

1 go out and party in nightclubs. Do you remember that?

2 A That's correct.

3 Q Is that true?

4 A Uh-huh, it would be like a seasonal thing.

5 Q That he frequented nightclubs and enjoyed being
6 the center of attention. Do you remember saying words to
7 that effect to Sergeant Partyka?

8 A I wouldn't say frequented. It sounds a little
9 exaggerated.

10 Q Besides the term frequent, that he went to
11 nightclubs and he enjoyed being the center of attention as
12 being part of the --

13 A That's true.

14 Q -- as part of the symptoms that Mr. Vanisi
15 exhibited when he changed; is that true?

16 A That's true.

17 Q And that Mr. Vanisi wore wigs in the past and
18 that he usually purchased them from thrift stores and he
19 enjoyed wearing them to nightclubs. Do you remember telling
20 Sergeant Partyka that?

21 A I'm just thinking about the nightclub thing.
22 But yeah, he would buy the wigs at the thrift store.

23 Q And the next part is that you said that he
24 enjoyed wearing those wigs when he went out to the
25 nightclubs.

1 A I'm trying to remember an instance where he
2 did. I don't remember if he wore them to the nightclub. He
3 possibly could have.

4 Q Do you remember telling Sergeant Partyka that
5 in January of 1998?

6 A No, I don't.

7 Q Is it possible you could have told him that and
8 you just don't remember today?

9 A Yes, it's very possible.

10 Q So is it your testimony today that you don't
11 remember your husband wearing the wigs to nightclubs when he
12 went out, it could have happened but you just don't
13 remember?

14 A That's correct.

15 Q Now, your testimony is today that he's wearing
16 women's leggings and believing he's a super hero?

17 A That's correct.

18 Q Did you ever tell Sergeant Partyka that when
19 you called him in January of 1998?

20 A No, not that I recall.

21 Q Why didn't you?

22 A I don't know.

23 Q Pardon me?

24 A I don't know.

25 Q You don't know why you didn't tell Sergeant

1 Partyka that?

2 A I don't know.

3 MR. BOSLER: Asked and answered.

4 THE COURT: She started to answer. Go ahead
5 with what you were saying.

6 THE WITNESS: I probably didn't want to release
7 too much information.

8 BY MR. STANTON:

9 Q You were willing to tell him about he beat you,
10 you were willing to tell him he wasn't a good father as far
11 as working and taking care of business, and that he was sick
12 of family life and wanted to be single --

13 MR. BOSLER: Objection, compound, Your Honor.

14 BY MR. STANTON:

15 Q -- but you didn't want to tell him about
16 personal things like wearing leggings and wanting to be a
17 superhero?

18 THE COURT: Overruled.

19 BY MR. STANTON:

20 Q That's correct?

21 A That's correct.

22 Q Detectives from Reno Police Department over the
23 past year have attempted to contact you and to interview you
24 when you moved to Los Angeles; is that correct?

25 A That's correct.

- 1 Q What was your response to them?
- 2 A I didn't want to speak with them.
- 3 Q Weren't you upset that Mr. Vanisi spent several
- 4 thousand dollars at a strip club in Las Vegas?
- 5 A Yes.
- 6 Q That upset you greatly, didn't it?
- 7 A Yes.
- 8 Q How was Mr. Vanisi employed in Los Angeles when
- 9 he was employed?
- 10 A Various things. He was a waiter. He did some
- 11 working with the film industry, being a grip.
- 12 Q As an actor?
- 13 A Yes, he was an actor.
- 14 Q Did he ever mention to you a hatred of white
- 15 people?
- 16 A No.
- 17 Q Did he ever mention a hatred of white police
- 18 officers?
- 19 A Not hated, no.
- 20 Q What did he say about white police officers?
- 21 A That they would always harass him. And not
- 22 just white, just police in general.
- 23 Q So he was harassed by police officers?
- 24 A Yes.
- 25 Q That's what he told you?

1 A That's what I had seen. Well, no, what I've
2 heard.

3 Q So you haven't seen any, you've just heard
4 this?

5 A That's correct.

6 Q Now, you said that the defendant went to China?

7 A Yes.

8 Q How many times did he go to China and when?

9 A Once. It must have been late '96.

10 Q Now, he goes to China in late '96. I believe
11 in your testimony in direct examination in 1996, things are
12 financially pretty tight for your family.

13 A Right.

14 Q Is that correct?

15 A Uh-huh.

16 Q He goes to China, comes back from China with a
17 lot of bottles of Phen Fen, right?

18 A Uh-huh.

19 Q Now, how many times did you tell Sergeant
20 Partyka during your phone conversation in January of 1998
21 about his use and purchase of Phen Fen and his bizarre
22 behavior?

23 A I don't know. I don't recall.

24 Q Would it surprise you that you never did?

25 A It was such a long time ago, I really wouldn't

1 remember what I told him over the phone.

2 Q From the murder of Sergeant Sullivan
3 January 13, 1998 until today's date when you came in here
4 under oath and testified, have you told any member of any
5 police department what you've testified here today to?

6 A I don't recall. The only phone call I had was
7 the only contact I had with the police department.

8 Q You don't recall. Has there been another time
9 when you've contacted police --

10 A No, I'm saying when I spoke to the police on
11 the phone, that was the only contact I had with them.

12 Q So my question is: From January 13, 1998,
13 until your testimony today, when have you contacted police
14 to tell them about his bizarre behavior, the use of women's
15 leggings and the fact that he used Phen Fen? When have you
16 told police that?

17 A I guess I haven't.

18 Q Pardon me?

19 A I had not.

20 Q You never have, correct?

21 A That's correct.

22 Q And yet the police have repeatedly tried to
23 contact you, both the Reno Police Department and
24 investigators from the Washoe County District Attorney's
25 Office?

1 MR. BOSLER: Asked and answered, Your Honor.

2 THE COURT: Sustained.

3 MR. STANTON: No further questions.

4 THE COURT: Redirect?

5 REDIRECT EXAMINATION

6 BY MR. BOSLER:

7 Q Let's talk about this first. You say you never
8 witnessed harassment by police against Mr. Vanisi?

9 A Right.

10 Q Was there an occasion you can remember back in
11 Simi Valley where some harassment was reported to you?

12 A He would just --

13 MR. STANTON: I'm going to object to any
14 testimony of this witness about what was reported to her.

15 MR. BOSLER: This is a sentencing hearing, Your
16 Honor.

17 MR. STANTON: Your Honor, that's correct.

18 But --

19 THE COURT: Counsel approach.

20 (Whereupon, a bench conference was held among
21 Court and counsel as follows:)

22 THE COURT: Counsel?

23 MR. STANTON: In response to counsel's answer
24 to my objection that this is a sentencing, the standard of
25 proof for evidence on a sentencing being capital or not is

1 whether or not the evidence is highly suspect or
2 unpalatable. I believe this witness' previous testimony is
3 incredulous, to say the least, and that her testimony should
4 be viewed with great suspicion by this Court and obviously
5 this jury. And I don't think it passed that test so that
6 she can now testify to hearsay about what she's heard about
7 the defendant's interaction with police.

8 THE COURT: What are you asking you for, what
9 she heard from whom?

10 MR. BOSLER: Vanisi went down to the store to
11 get some milk, didn't come back for an hour and a half
12 because, as he was walking down the street, he was accosted
13 by the Simi Valley Police Department for nothing other than
14 walking down the street, and it took him an hour and a half
15 to walk to the corner and back.

16 THE COURT: Who told her that it was a Simi
17 Valley police officer who stopped him?

18 MR. BOSLER: It will be Vanisi. And if the
19 State is alleging that she's fabricated this information
20 about the leggings and the Phen Fen, I'm more than willing
21 to call our investigator who has had contact with her who is
22 going to verify this information as a prior consistent
23 statement.

24 MR. STANTON: That's a unique one. I've never
25 heard you can now call your own investigator to establish a

1 prior consistent statement in a pretrial --

2 MR. BOSLER: The allegation of fabrication,
3 that's what the standard is --

4 THE COURT: Don't talk over each other. She
5 can only take one at a time.

6 Did you want to say something on the record?

7 MR. GREGORY: He's making the allegation that
8 she's fabricated the statements at this time while she's on
9 the stand under oath, and we can call our investigator to
10 show a prior consistent statement under those circumstances
11 under the evidence code.

12 MR. STANTON: My comment is that she has never
13 made any statement to anybody since the time of his arrest
14 that her husband is wearing women's clothing and is acting
15 irrational. That's for the jury to conclude whether or not
16 that has any indicia of reliability. It's a separate
17 assessment for this Court on the rules of evidence whether
18 or not this witness can testify to something that she had
19 heard of from the defendant. That's a clear hearsay. The
20 question is: Is it highly suspect or unpalatable?

21 MR. BOSLER: Judge, they've already alleged
22 that he was abusive and she essentially left him. So at
23 that time, there wouldn't be a lot for her to say in his
24 behalf to indicate that she's going to fabricate
25 information.

1 THE COURT: This is the problem: It isn't just
2 them that have alleged that. You brought it out in your
3 direct. So the issue is whether or not the statement is
4 reliable. Even if I were to believe that someone told her,
5 and if it's a statement made by the defendant to her, it's
6 self-serving. It's not particularly reliable in light of
7 what she's already told us about their relationship. It's
8 not particularly reliable as far as I'm concerned that
9 that's really what he was doing for the hour and a half.
10 That's what makes it suspect, not whether or not she's
11 telling the truth about whatever he told her. If he wants
12 to talk about it, there's a way for him to talk about it.

13 MR. BOSLER: All right. We'll just note the
14 objection for the record. That's fine.

15 (Whereupon, the following proceedings were held
16 in open court, in the presence of the jury.)

17 BY MR. BOSLER:

18 Q Deanna, where do you live right now?

19 A Simi Valley, California.

20 Q And how long have you been staying down there?

21 A About three years.

22 Q You know several times the prosecution has
23 attempted to contact you?

24 A Yes.

25 Q Is there a reason why you're not cooperating?

1 A I just feel that they would twist anything that
2 I had to say.

3 Q Do you remember how long your conversation with
4 Mr. Partyka was?

5 A No.

6 Q Did he ever ask you to -- did he ever send you
7 a copy of his report so you could verify to see if it was
8 correct?

9 A No.

10 Q Ever ask you if it was okay to tape your
11 telephone conversation?

12 A No.

13 Q Ever even seen his report?

14 A No.

15 MR. BOSLER: Nothing further, Your Honor.

16 THE COURT: Mr. Stanton?

17 RE CROSS-EXAMINATION

18 BY MR. STANTON:

19 Q Ma'am, there's been testimony in this courtroom
20 that the defendant told people in Reno that the reason why
21 he hated white police officers is because you left him for a
22 white police officer. Is that true or untrue?

23 A It's false. It's not true.

24 Q Do you have any idea why Mr. Vanisi would say
25 something like that?

1 A He's a storyteller.

2 Q So he lied?

3 A Yes.

4 MR. STANTON: Nothing further.

5 MR. BOSLER: Nothing further, Your Honor.

6 THE COURT: You may step down.

7 MR. BOSLER: Your Honor, may I have a moment?

8 Toa Vimahi, Your Honor.

9 THE COURT: Is that on your witness list,
10 No. 7?

11 MR. BOSLER: Yes.

12 (Witness sworn.)

13 THE COURT: Is this one of our witnesses that
14 needs an interpreter?

15 MR. BOSLER: I don't believe so. I'll inform
16 the Court if my opinion changes.

17 TOA VIMAH I

18 called as a witness on behalf of the Defendant,

19 having been first duly sworn,

20 was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. BOSLER:

23 Q Can you hear me okay?

24 A Yeah.

25 Q If you could, you'll have to speak into this

1 microphone so that everybody else can hear. You may have to
2 scoot your chair up a little bit.

3 Can you state your full name.

4 A Toa Vimahi.

5 Q And spell your last name.

6 A V-i-m-a-h-i.

7 Q Toa, how old are you?

8 A Sixty-eight.

9 Q And you know George Tafuna?

10 A Yes, I really know him.

11 Q And how do you know George Tafuna?

12 A What?

13 Q How do you know him? What's his relation to
14 you?

15 A I'm older than his mother.

16 Q You're older than his mother?

17 A Yes.

18 Q How are you related to his mother?

19 A Sister.

20 Q She's your sister?

21 A Yeah.

22 Q And are you speaking of Umu or his biological
23 mother?

24 A Umu is younger than me.

25 MR. BOSLER: Your Honor, perhaps the English is

1 a little bit broken. I'd ask the Court to allow the
2 interpreter to translate.

3 THE COURT: Any objection?

4 MR. STANTON: No, Your Honor.

5 THE COURT: Come forward.

6 Ladies and gentlemen, this is our interpreter
7 and he'll introduce himself to you.

8 Go ahead and tell the jury your name.

9 THE INTERPRETER: Tui Finau.

10 THE COURT: Go ahead and pull the chair over
11 next to the one -- the one next to the microphone I think
12 will work better.

13 Ladies and gentlemen of the jury, the
14 interpreter has previously been sworn to interpret English
15 into Tongan and then he will interpret the Tongan back into
16 English.

17 Ma'am, what I'm going to ask that you do is
18 speak in your native tongue - Tongan.

19 THE WITNESS: Yes.

20 THE COURT: This gentleman next to you, he's
21 fluent, he speaks very good Tongan and very good English.
22 So I'd like you to go ahead and answer the questions in
23 Tongan and he'll tell us the answer in English. He'll also
24 interpret the question from the lawyers from English into
25 Tongan for you. Okay.

1 You may proceed.

2 (The following answers are interpreted as follows:)

3 BY MR. BOSLER:

4 Q The question was how did she know -- how do you
5 know George Tafuna?

6 A He's the son of my sister.

7 Q How long have you known George Tafuna?

8 A Since he was born.

9 Q Since he was born. Did you live in Tonga when
10 George was born?

11 A Yes, I was. And then I came here to the
12 States.

13 Q If you could, I'd like to talk to you about
14 Tonga, when you lived in Tonga. You know Umu, right?

15 A She's my youngest sister.

16 THE COURT: Mr. Bosler, go ahead and go back to
17 the podium.

18 And the interpreter, pull the microphone closer
19 to you. There we go.

20 Go ahead, Mr. Bosler.

21 BY MR. BOSLER:

22 Q You know Louisa Tafuna?

23 A She's my other sister.

24 Q Was Umu able to have children when she lived in
25 Tonga?

1 A No. She wasn't married.

2 Q She never got married?

3 A No.

4 Q How about Louisa, was she able to have
5 children?

6 A Siaosi.

7 Q How many other children was she able to have?

8 A There are one, two, three, four.

9 Q What happens in Tongan culture, Tongan life,
10 when one sister can have babies but the other one, the other
11 sister can't have babies or isn't married?

12 A Yes, sir.

13 Q Is it okay in Tongan culture for one mother to
14 give a baby to a sister?

15 A Yes, that we live together.

16 Q Is that what happened to Siaosi?

17 A Yes.

18 Q So Louisa gave Siaosi to Umu to care for?

19 A Yes.

20 Q Were you able to see Siaosi and Umu together?

21 A Yes.

22 Q And how did Umu and Siaosi get along?

23 A She dearly loved him, take care really good of
24 him.

25 Q Did there come a time when Umu left for the

1 United States and Siasosi stayed?

2 A Umu came together with me, referring to her, to
3 the States. Siasosi left back in the island.

4 Q So you came to stay with Umu in the United
5 States?

6 A Yes.

7 Q What part of the United States did you guys
8 stay in, did you decide to settle?

9 A San Bruno.

10 Q Did you stay there until you came to the United
11 States?

12 A I had to move to another place, then Umu lived
13 together with our brother in his residence for he was sick.

14 Q Did Siasosi eventually come to the United States
15 also?

16 A Yes. He came and stayed with Umu.

17 Q He came to stay with Umu?

18 A Yes.

19 Q Did you go over to Umu's house while Siasosi and
20 Umu were staying there?

21 A Almost every day.

22 Q What kind of child was Siasosi?

23 A He was very helpful, good manner to his mother.

24 Q You said earlier that there was an uncle
25 staying with Umu.

1 A Yes. He was very ill.

2 Q And how ill?

3 A He had a stroke and was in a coma.

4 Q Did Siaosi help care for this uncle?

5 A Very much.

6 Q In what way would he help?

7 A Food, feeding. Sometimes helped Umu to fix the

8 bed, clean the room, make milk.

9 Q How long did this go on? Did Vanisi stay and

10 care for this older man?

11 A Approximately seven or eight years.

12 Q And the man eventually died?

13 A He just passed away. He died while he was

14 there, Siaosi.

15 Q While Siaosi was staying at the house?

16 A Yes.

17 Q Were you able to watch Siaosi grow up into high

18 school?

19 A Yes.

20 Q And what type of person was he growing up as?

21 A He was honest and listened to us folks and he

22 would do whatever we tell him, to do it right away.

23 Q Respectful?

24 A Yes.

25 Q I know that Tongan families are very close. Do

1 you have a lot of family events where people come and cook
2 and socialize?

3 A Our family lives close and we almost get
4 together every week.

5 Q And how was Siaosi when he came to these family
6 gatherings as a child and into high school?

7 A He was a very good boy. Well respectful.

8 Q Do you remember Siaosi coming to the wedding of
9 his sister?

10 A Yes. I remember that I saw him there, looked
11 like he was changing --

12 Q Was there Tongan --

13 A -- mentally.

14 Q Changing mentally. Was there Tongan royalty
15 present at the wedding?

16 A The Princess of Tonga and aunt.

17 Q How important of an event is it when a royal
18 person comes to a wedding?

19 A For that particular reason, our family that we
20 stayed close with the royals and help, cooperate with them,
21 and also my husband, that he was a person, like a chief
22 person of the princess.

23 Q You said earlier that Siaosi was very
24 respectful to the family.

25 A Yes.

1 Q How did he act when he came to this wedding
2 with the royalty?

3 A For that day that he was mostly talking to
4 himself and not willing to listen or whatever was telling
5 him, he was just talking to himself.

6 Q How did he look?

7 A In the beginning he was wearing a suit. A
8 short while, he changed to a different -- to a skirt, and
9 then three times he changed again later on in a different
10 outfit, not respectful.

11 Q So he changed out of the suit into three
12 different outfits that weren't respectful?

13 A Yes.

14 Q Did you notice him with a camera also?

15 A He was taking pictures on that day. My brother
16 was trying to stop him, but he couldn't listen. That's
17 something new because Siaosi always listened to my brother,
18 but not on this particular day.

19 Q So he didn't show any respect to your brother?

20 A That's something new.

21 Q Did other people try to counsel Siaosi?

22 A Yes. People told him to go to the back. And
23 after a short while, then he shows up again in the same spot
24 taking pictures.

25 Q Did you have a chance to talk to Siaosi at the

1 wedding?

2 A Yes, I was trying to talk to him that day. He
3 was walking the other way, and then he came back and I tried
4 to speak to him again and he just ignored me. And that was
5 something new, too, because he was not the same Siaosi that
6 I know.

7 Q Toa, you know that Siaosi has been convicted of
8 killing a police officer?

9 A I am really sorry and I feel sorry for the
10 family of that officer. For Siaosi, this is not the person
11 that we raised. This is not the one that we know. Later
12 on, he just said, do things that he did on his own. He
13 didn't want to listen to us anymore.

14 Q Your family wanted to bring him back from Los
15 Angeles?

16 A Yes.

17 Q Is that because you knew something was wrong?

18 A Yes.

19 MR. BOSLER: I have no further questions.

20 THE COURT: Cross-examination?

21 MR. STANTON: No questions of this witness.

22 THE COURT: Thank you. She may be excused?

23 MR. BOSLER: May we have one moment?

24 Defense would next call Louisa Tafuna.

25 THE COURT: Mr. Finau, we will need your

1 assistance with this witness also. You will probably need
2 to help when she administers the oath.

3 Ma'am, this gentleman beside you is the
4 interpreter. Go ahead and face the court clerk, raise your
5 right hand.

6 (Witness sworn.)

7 LOUISA FINAU TAFUNA

8 called as a witness on behalf of the Defendant,

9 having been first duly sworn,

10 was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BOSLER:

13 Q Louisa, could you state your full name.

14 A Louisa Finau Tafuna.

15 Q Could you spell the last name for me.

16 A T-a-f-u-n-a.

17 Q Louisa, you gave birth to Siaosi Vanisi?

18 A Yes, sir.

19 Q How many other children did you give birth to?

20 A Seven.

21 Q And you have a sister named Umu?

22 A Yes.

23 Q You have a sister named Toa?

24 A Yes.

25 Q Did Umu get married?

1 A No.

2 Q Did there come a time when you gave Umu a
3 child?

4 A Yes.

5 Q Why would you give away one of your children?

6 THE INTERPRETER: She requested if she can say
7 in English or if she say it in Tongan.

8 MR. BOSLER: If she can understand English.

9 THE COURT: Are you having any difficulty
10 understanding the English?

11 THE WITNESS: Sometimes. Sometimes.

12 THE COURT: Then you need to go ahead and use
13 the interpreter. Can you answer -- do you speak -- do you
14 have any problem understanding the Tongan?

15 THE WITNESS: Sometimes.

16 THE COURT: Do you have trouble understanding
17 what the interpreter is saying in Tongan?

18 THE INTERPRETER: No.

19 THE COURT: And sometimes you do have trouble
20 understanding the English words; is that true?

21 THE INTERPRETER: Yes, sometimes.

22 THE COURT: Then I think it would be better if
23 you answer in Tongan and then let the interpreter tell us in
24 English.

25 THE WITNESS: Okay.

1 THE COURT: Would you repeat your question,
2 please, Mr. Bosler.

3 BY MR. BOSLER:

4 Q Why would you give one of your children away to
5 your sister?

6 A Just for that reason that she didn't have any
7 child.

8 Q Does it mean you don't care for the child when
9 you give it away?

10 A I do love him but I also love my sister at the
11 same time, and she didn't have any kids.

12 Q And why give a child away? What would that do
13 for your sister?

14 A Just for that reason, for the purpose that he
15 might grow up to help Umu, that she didn't bear any
16 children.

17 Q Is that unusual for Tongans, to one Tongan
18 woman to give a relative one of her children to care for?

19 A It is common, just to show love and respect.

20 Q And when you gave Siaosi away to Umu, were you
21 living in the same area in Tonga?

22 A Yes, we all lived together in the same house.

23 Q What did you tell Siaosi about who his mother
24 was when he was young?

25 A I always told him that Umu is his mother.

1 THE COURT: Would you repeat your question,
2 please, Mr. Bosler.

3 BY MR. BOSLER:

4 Q Why would you give one of your children away to
5 your sister?

6 A Just for that reason that she didn't have any
7 child.

8 Q Does it mean you don't care for the child when
9 you give it away?

10 A I do love him but I also love my sister at the
11 same time, and she didn't have any kids.

12 Q And why give a child away? What would that do
13 for your sister?

14 A Just for that reason, for the purpose that he
15 might grow up to help Umu, that she didn't bear any
16 children.

17 Q Is that unusual for Tongans, to one Tongan
18 woman to give a relative one of her children to care for?

19 A It is common, just to show love and respect.

20 Q And when you gave Siaosi away to Umu, were you
21 living in the same area in Tonga?

22 A Yes, we all lived together in the same house.

23 Q What did you tell Siaosi about who his mother
24 was when he was young?

25 A I always told him that Umu is his mother.

1 Q And why would you say Umu was the mother?

2 A For that reason, that he'll love Umu and
3 respect her. I have more, other kids of my own.

4 Q How did Umu and Siaosi get along?

5 A I know that Umu truly love him for he is the
6 only one kid that she has. And at the same time, we lived
7 together and I know how much that she loves him and he loves
8 her too.

9 Q There came a time when Umu left for the United
10 States?

11 A Yes. She came here in 1973 and reside with me
12 in the island with the kids.

13 Q Because Siaosi wasn't her child, did he have to
14 stay in Tonga and wait?

15 A Yes, our permanent residence was in the process
16 through the Immigration.

17 Q So Umu left Siaosi with you in Tonga?

18 A Yes, that's why she left him with me back in
19 the island until we received our permanent residence.

20 Q How did that affect Siaosi having Umu gone?

21 A It came for a time that when we finally
22 arrived, Siaosi didn't almost realize who Umu is. It's been
23 three or four years ever since she left. But then we arrive
24 at our brother's house. That's when the relationship
25 between Siaosi and Umu start all over again. Umu started to

1 bring him back to her and start bathing him and raising him
2 again.

3 Q Were you living with Umu at this time, with
4 Siaosi in the United States?

5 A Umu was staying in another brother's house but
6 I remained in another brother's residence.

7 Q Did you visit Siaosi and Umu?

8 A Yes. We traveled back and forth visiting each
9 other. It was so close.

10 Q If you could, describe what kind of child
11 Siaosi was.

12 A When I gave birth to him, he was raised very
13 well. He was a very respectful little boy. He was honest.
14 He didn't talk back. He was a good boy.

15 Q Did Siaosi have some special responsibilities
16 when he stayed with Umu?

17 A My brother was paralyzed and Siaosi was helping
18 his mother, caregiver, taking good care of him.

19 Q And how did he help, if you could?

20 A He helped in various ways: Feeding, turning
21 him around for he was paralyzed. Not only that, helped Umu
22 in many ways throughout. But I was not staying together
23 with them, I was in another brother's residence.

24 Q Did you ever hear of Siaosi complaining that he
25 couldn't play with his friends because he had to help his

1 uncle?

2 A Never complained. He was loved. And every
3 time he'd come visit me, he asked me whether I loved my
4 brother.

5 Q Eventually do you tell Siaosi that you gave
6 birth to him?

7 A Yes. There come a time where I have to tell
8 him and let him know that I'm the mother, he's my kid. But
9 at the same time he make sure to love my sister as his
10 mother.

11 Q And how did Siaosi react when you told him that
12 you were his real mother?

13 A He moved closer and hugged me, kissed me. For
14 when we were back in the island I had never let him know
15 that.

16 Q What did he say about Umu?

17 A I admonished him to love and take care of Umu.

18 Q And did he object to that?

19 A He accepted it. But I truly let him know to
20 know who his real mother is.

21 Q He continued to stay with Umu after that?

22 A Yes.

23 Q Did he call you mother also?

24 A Yes.

25 Q You had an opportunity to watch Siaosi grow

1 into a teenager?

2 A Could you say that again?

3 Q Did you have an opportunity to watch Siasosi
4 grow into a teenager?

5 A Yes. Many times he always come into my room to
6 watch TV together with me. After that, he would go back to
7 his mom.

8 Q How was Umu supporting herself for money?

9 A I know that for sure that Umu did a good job
10 raising Siasosi than I did for my own kids. For Umu only
11 have to watch one kid who is Siasosi. But I have to take
12 care of the other six.

13 Q So you think because Umu only had one child,
14 she was able to care for him very well?

15 A Yes.

16 Q Do you remember Siasosi leaving for Los Angeles?

17 A I remember he said that he was going to LA to
18 go to school.

19 Q And before he left for LA, what type of child
20 was he? What type of person?

21 A He was the type of a boy that shows me that he
22 can do anything. He can do this, he can do that. But I
23 know that proving from his educational record at school that
24 he can do anything.

25 Q Did he do well in school?

1 A Every time that's what he was telling me, he
2 was doing good at school, and I believed him.

3 Q And do you think he was trying to make you
4 proud?

5 A Yes, most of the time.

6 Q There came a time where Siaosi's sister got
7 married?

8 A Yes. I remember that.

9 Q Were you present at the ceremony?

10 A Yes, I was there.

11 Q They also had royalty at the ceremony?

12 A Yes.

13 Q If you could, tell the jury, how was Siaosi
14 when he showed up at the wedding? How was he acting?

15 A When he first arrived, he was wearing a suit.
16 And after wearing that suit, he went back and changed and
17 came back, but I never think that something is strange.

18 Q Did you think there was something strange about
19 him?

20 A No, I never imagined that there was anything
21 strange.

22 Q Did you try to talk with him at the wedding?

23 A Yes, I talked to him. I tried to speak to him
24 every time, but I never think of any strange behavior.

25 Q Were you able to understand what Siaosi was

1 talking about when he talked to you at the wedding?

2 A I remember he was talking about the wedding,
3 how good it is, how beautiful it is, and taking pictures at
4 the wedding.

5 Q Did you see any of your relatives attempt to
6 keep Siaosi from bothering the royal family?

7 A Yes. My brother -- my older brother was
8 thinking of stopping him for that. He was kind of rowdy.

9 Q Was he being disrespectful to the royal family?

10 A I didn't think that he was but my brother was
11 telling him to go back. Then he went back.

12 Q Did you have a chance to see how many times
13 Siaosi changed clothes at the wedding?

14 A Probably four or three.

15 Q Did you find that strange?

16 A Yes. It's strange because he has never
17 appeared that way before.

18 Q If you could, the Siaosi you watched grow up,
19 the Siaosi you gave birth to, can you imagine him committing
20 such a terrible crime?

21 A I just couldn't believe it. I had never
22 thought that way, never imagined, never come in my mind for
23 Siaosi. He was the best kid in all my kids.

24 Q What do you mean "best kid"?

25 A Mental wise he was the best. For that reason,

1 when you have six kids, you can know the different
2 characters in all of them.

3 MR. BOSLER: If I may have a moment, Your
4 Honor.

5 THE COURT: Cross-examination?

6 MR. BOSLER: No further questions.

7 THE COURT: I'm sorry. I thought you said you
8 were through.

9 MR. BOSLER: No, I said I wanted a moment. No
10 further questions.

11 CROSS-EXAMINATION

12 BY MR. STANTON:

13 Q Whose decision was it to bring Siaosi Vanisi to
14 the United States?

15 A It was my older brother, that he was trying to
16 bring us all.

17 Q And did you ever hear Siaosi Vanisi express
18 anger, in fact hatred, towards the person that brought him
19 to the United States?

20 A No, not that I know of about him.

21 Q The wedding that you were talking about, was he
22 drunk?

23 A There was no alcohol served at the wedding.

24 Q So he wasn't drunk?

25 A Not that I know of.

1 Q Was he using drugs?

2 A I just don't know. He wasn't raised that way.

3 Q But did he appear like he was under the
4 influence of drugs or drunk?

5 A No, none of us in the family knows that he was
6 drunk.

7 Q Did you know Siaosi Vanisi's wife?

8 A Yes, I know his wife.

9 Q Did you ever see Mr. Vanisi when he was married
10 with his wife?

11 A No, I didn't. They got married in Los Angeles,
12 then they came to San Francisco where I was.

13 Q She's testified that he used drugs frequently.
14 Did you ever see Mr. Vanisi use drugs?

15 A No. That can't be brought to home. He
16 understand that we are Mormons and we do not condone that.

17 Q So you never saw him use drugs. Did you ever
18 see him under the influence of drugs?

19 A No. He never showed it at home under the
20 influence.

21 Q Did you ever hear Mr. Vanisi say he hated white
22 people?

23 A No. Maybe but not at home, I never heard him
24 say that, anything at home.

25 Q Same thing about police officers, you never

1 heard him say that he hated police officers?

2 A He never come home and says anything like that.

3 MR. STANTON: Thank you. No further questions.

4 THE COURT: Mr. Bosler?

5 MR. BOSLER: Nothing to follow that up, Your
6 Honor.

7 THE COURT: You may step down.

8 Ladies and gentlemen of the jury, that
9 concludes the testimony that you're going to hear this
10 afternoon. Tomorrow morning you're going to come back and
11 begin hearing more testimony.

12 Counsel approach, please.

13 (Bench conference between Court and counsel off
14 the record.)

15 THE COURT: Ladies and gentlemen of the jury,
16 tomorrow morning I'm back on my regular rotation, so I will
17 be hearing some other matters early in the morning. And so
18 I'm going to ask you return at 10:15. Come a little before
19 that because we'll start actually at 10:15. We started real
20 close this morning. We're getting better. So we'll try for
21 10:15.

22 Now, in addition, tomorrow I anticipate that
23 tomorrow may be another day that you will not be going home,
24 that you'll stay with me most of the day. You may get a
25 lunch hour, I don't know for sure, just depends on how the

1 morning goes. I don't know exactly when you'll begin
2 deliberating, but I anticipate that you will be deliberating
3 tomorrow. So make your arrangements as you did before so
4 that you'll be available to deliberate as long as you need
5 to tomorrow.

6 Now, during this evening's recess, remember the
7 admonition. This matter has not been submitted to you so it
8 is not time for you to begin to form or express any opinions
9 about the ultimate outcome of this case. Furthermore, it is
10 your duty not to discuss the case among yourselves or with
11 anyone else. Do not discuss it in anyone's presence, do not
12 read, look at or listen to any media news accounts of this
13 case. And should any person attempt to influence you in any
14 manner with regard to this case, report it to the bailiff
15 immediately upon returning to the courthouse.

16 Ladies and gentlemen of the jury, you may be
17 excused until 10:15 tomorrow.

18 (Whereupon the jury was excused.)

19 (Whereupon, the following proceedings were held
20 in open court, outside the presence of the
jury.)

21 THE COURT: Counsel, you have a motion?

22 MR. STANTON: Your Honor, the State would pose
23 a standing objection outside of the presence of the jury to
24 any further defense questioning regarding witnesses, family
25 members along the same lines that we already covered. We've

1 now heard, by my count, four or five witnesses testify to
2 the sister's wedding where royalty was present and
3 Mr. Vanisi's behavior. The State would object on the
4 grounds that it's cumulative at this juncture and has been
5 for probably some time period.

6 And in addition, any of the other subject
7 matters that is repeatedly asked of the witnesses time and
8 time again, we object as cumulative and would like not to
9 present that objection in front of the jury.

10 Additionally, the State would object to the use
11 of first names by defense counsel in questioning the
12 witnesses. The formal name is what we think is appropriate
13 both by the State and defense counsel.

14 THE COURT: Counsel, as you indicated to me,
15 you're going to call David Kinikini and Toeumu Tafuna
16 tomorrow; is that correct?

17 MR. BOSLER: Yes, Your Honor. There's always
18 the option based upon our last side bar that we may want to
19 call Crystal Calderon to offer a prior consistent statement
20 for Mrs. Vanacey. But that would be very brief.

21 MR. STANTON: We'd object to the subject
22 matter. That's vouching for their own witness, Your Honor.

23 THE COURT: Let's start with the question of
24 who you're going to call. Do you anticipate going into any
25 of the testimony that we've already heard?

1 MR. BOSLER: Well, Toeumu is the actual person
2 who raised Siaosi Vanisi. So in the sense she has unique
3 information because she actually raised him and took care of
4 him while he was at the house, she has a little bit more
5 knowledge.

6 In essence, each of these people has unique
7 stories. It's been very difficult just culturally to get
8 them to open up about what they know about Siaosi. I'm
9 trying my best. And I think that any particular witness may
10 be a witness that impresses the jury, whether they bring
11 forth relatively the same information or not. And for that
12 reason, and based upon the seriousness of this case, I'd ask
13 the Court not to unduly restrict the testimony since we're
14 almost down to the end of testimony anyways.

15 Regarding the first names, some of the last
16 names are very hard to pronounce, and I'm just trying to
17 figure out a way we can make it easy for the court reporter
18 and the jurors to understand, because once you start
19 throwing the last names in there, it kind of becomes
20 alphabet soup as to who each person is. I'm not doing that
21 to endear myself to the jury, but to make things less
22 complicated and easier to understand.

23 MR. STANTON: I would find that representation
24 to be at least disingenuous. He referred to Mr. McGinn as
25 Matt. Now, I don't know what difficulty Mr. Bosler has in

1 the English language calling Matt, Matt.

2 But ingratiating himself with the jury, the
3 evidence will show we think it's inappropriate, and
4 certainly as the State did, and we're in no great or less
5 difficulty in pronouncing and enunciating Tongan names, but
6 we did that with our witnesses. And I think it only
7 respects the decorum of the court.

8 THE COURT: I'm going to sustain any further --
9 an objection to any further first name references. You can
10 use first and last names if you think that makes it more
11 clear. Or you can use just the last name or sir -- what is
12 that, whatever we call Mr. or Mrs.? I should remember
13 that, my children's English class, but I don't. So you can
14 either use that or use the first and last names together.

15 Now, the question of whether or not you can
16 call these, because of the unique relationship of Ms. Tafuna
17 to the defendant, I will allow you to call her even though
18 it appears it would be somewhat cumulative.

19 As I understand it, Mr. Kinikini is not going
20 to be going into cumulative information; is that correct,
21 Mr. Bosler?

22 MR. BOSLER: That's correct, Your Honor.

23 THE COURT: Now, we have the interpreter who is
24 here and will return tomorrow morning for us at 10:15. We
25 have the jury instructions to do. In the previous hearings,

1 the defendant has not waived his presence even for
2 preliminary discussion on jury instructions. Is that still
3 the case?

4 MR. BOSLER: Yes, Your Honor.

5 THE COURT: Then because this case is going to
6 go to jury tomorrow, we need to meet on jury instructions.
7 It's now five minutes after 5:00. We'll take a 25-minute
8 recess. We'll be back on the record at 5:30. Get your jury
9 instructions and be ready to go.

10 MR. STANTON: Your Honor, just so the State is
11 absolutely clear, there are a series of witnesses that are
12 listed on this list that the defense is not calling. I'll
13 refer to them by number.

14 They will not be, based upon my indication this
15 morning, calling No. 8, No. 11, and No. 12. Am I correct in
16 that?

17 THE COURT: That's what I've been told also.

18 Counsel, is there a correction to make to that?

19 MR. BOSLER: Not at this time. Unless for some
20 other reason, based upon the testimony that comes out
21 through other witnesses, that they're necessary, I don't
22 anticipate any other witnesses other than the ones I've
23 previously indicated to the Court.

24 THE COURT: Okay. Anything further?

25 MR. GREGORY: No, Your Honor.

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THE COURT: We'll see you all back at 5:30.
Court's in recess.
(Recess taken.)

RENO, NEVADA, MONDAY, OCTOBER 4, 1999, 5:35 P.M.

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(Whereupon, the following proceedings were held in open court, outside the presence of the jury.)

THE COURT: This is the time set for settlement of jury instructions. I have changed the order of the State's set. We'll start there by putting them in the right order, then we can talk about --

MR. STANTON: It was an educated guess.

THE COURT: I don't know. It's always kind of interesting to see the different orders, but I just changed it quite a bit.

So we have: "Ladies and gentlemen of the jury," which is number one. "If in these instructions any rule, direction or idea is repeated or stated in a different way." Then we will go to "There are two kinds of evidence, direct and circumstantial."

"The evidence presented in both the trial and during this hearing."

"The State has the burden of proving beyond a reasonable doubt."

"You have found the defendant in this case to be guilty of murder in the first degree."

1 "A prison term of 50 years."

2 "Any person who uses a firearm."

3 Then we have "The following are the aggravating
4 factors as alleged in this case." And then "The term
5 mutilate means."

6 Then we have "Murder in the first degree may be
7 mitigated."

8 If you happen to have the defense instructions,
9 you can just interleaf the defendant's instruction there.
10 We'll talk about it at that time. The State's instruction
11 was just sort of a blank.

12 MR. STANTON: Yes, for obvious reasons.

13 THE COURT: And then we have "The mitigating
14 circumstances which I have read to you."

15 "The State has alleged aggravating
16 circumstances."

17 "The law never compels."

18 "In reaching your verdict."

19 "In your deliberations."

20 "Although you are to consider."

21 "During your deliberations."

22 And "When all 12 of you."

23 That's not putting the defense instructions in,
24 just changing the basic order a little bit.

25 So counsel for the defendant, what I want you

1 to do is when we get to an instruction of the State's that
2 you want me to use one of yours instead, you have to let me
3 know. Okay?

4 MR. BOSLER: Yes.

5 THE COURT: "Ladies and gentlemen of the jury."
6 "If in these instructions any rule direction or idea."
7 "There are two kinds of evidence, direct and
8 circumstantial." "The evidence presented both during the
9 trial and during this hearing may be considered."

10 "The State has the burden of proving beyond a
11 reasonable doubt."

12 MR. BOSLER: We'll submit our offered
13 reasonable doubt instruction, Your Honor.

14 THE COURT: How does that begin?

15 MR. BOSLER: It is the sample instruction I
16 think we gave to the Court for the guilt phase.

17 THE COURT: Did you give me a new one for this
18 phase?

19 MR. BOSLER: No.

20 THE COURT: So it's the alternative to the
21 definition of reasonable doubt?

22 MR. BOSLER: Yes.

23 THE COURT: For the reasons that it was denied
24 in the guilt phase, it will be denied in this phase.

25 Shall we keep going?

1 MR. BOSLER: Sure.

2 THE COURT: "You have found the defendant in
3 this case to be guilty of murder in the first degree."

4 "A prison term of 50 years with eligibility for
5 parole."

6 "Any person who uses a firearm in the
7 commission."

8 "The following are the aggravating factors as
9 alleged in this case."

10 Did you want an alternative, Mr. Bosler?

11 MR. BOSLER: Give me a moment, Your Honor.

12 MR. GREGORY: Your Honor, we would object to
13 No. 3 being included. In fact, we would strike that.

14 THE COURT: I'm sorry, 3, "The murder involved
15 mutilation of the victim"?

16 MR. GREGORY: Right. There's no evidence
17 before the Court that suggests that mutilation occurred.
18 I'll call the Court's attention to Volume 3 of the trial on
19 September 22nd, 1999, Dr. Clark's testimony.

20 THE COURT: Volume 3?

21 MR. GREGORY: Yes, Your Honor. I might be able
22 to, with the Court's permission, read what I'm --

23 THE COURT: That's okay. We'll get there.
24 Volume 3, I'm there.

25 MR. GREGORY: Page 540, Your Honor, starting

1 with the question at line 14. The Court will read questions
2 and answers from that point through and including line 20 on
3 page 541.

4 THE COURT: Okay. You want me to read to the
5 bottom of page 541?

6 MR. GREGORY: To line 20, Your Honor.

7 THE COURT: Right.

8 MR. GREGORY: I think it's clear that
9 Dr. Clark's testimony, I'd represent to the Court, that's
10 the only reference that we have to anything that could be
11 remotely construed as mutilation, that it did not occur in
12 this case. There was no chopping off, no intentional
13 disfigurement, that the wounds as she indicated were acute,
14 instantaneous, all consistent with one activity of killing.
15 That because of that, and because of the nature of the
16 wounds as described by Dr. Clark, we believe that mutilation
17 should be stricken as an aggravator.

18 MR. STANTON: Well, Your Honor, the authorities
19 that the State has relied and cited to in the next
20 instruction, which I think is necessary to read in
21 conjunction with counsel's objection, that is, the
22 definition of the term "mutilate," citing to four Nevada
23 Supreme Court cases starting in 1979 in *Deutscher v. State*,
24 *Parker v. State* in '93, *Smith vs. State* in 1998, and
25 *Calambro vs. State* in 1998 as well, that definition is

1 gleaned from those four cases; and they impart basically two
2 definitions or two cases that speak to mutilate or speak to
3 define mutilate. First to cut off or permanently destroy a
4 limb or a central part of the body.

5 Now, counsel says that means to cut off.
6 Granted Sergeant Sullivan's digits, at least two, were
7 almost completely severed, but I don't think that we're
8 going to be splitting hairs relative to whether or not a
9 portion of Mr. Sullivan's body was cut off, but it says
10 "permanently destroy an essential part of the body or to cut
11 off or alter radically so as to make imperfect."

12 The testimony is that Sergeant Sullivan's face
13 was so badly disfigured, based upon the force and the number
14 of blows, that he was unrecognizable.

15 In addition, counsel is only citing to the
16 testimony of Dr. Clark, which I believe must be read in
17 conjunction with the testimony of Vainga Kinikini who
18 testified that according to Mr. Vanisi, after striking
19 repeated blows to Sergeant Sullivan with the hatchet, he
20 then proceeded to stomp on his head. And so counsel is
21 selectively editing and citing to Dr. Clark's testimony
22 without putting it in proper context.

23 In addition, Dr. Clark testified that the
24 wounds were all inflicted at the time the blood was coursing
25 through Sergeant Sullivan's body. There's no testimony,

1 because it is medically impossible to testify to, that
2 indeed that he was unconscious or aware of that aspect of
3 his injuries.

4 In addition, the State has alleged but has
5 removed the theory of torture for that reason to comport
6 with the evidence. But mutilation stands as a separate and
7 distinct aggravator.

8 I would submit that the State's Exhibit 4
9 series also needs to be considered by the Court. Those are
10 the autopsy photographs of Sergeant Sullivan himself that
11 reflect the extent and nature of the wounds. I believe a
12 crushed upper mandible. Teeth were shoved down Sergeant
13 Sullivan's throat as well as outside of his body, as Dr.
14 Clark testified, which I think is consistent with being
15 stomped on by Mr. Vanisi.

16 In addition, I would submit that the concurring
17 opinion by Justice Springer in *Calambro*, a case that I
18 happen to be uniquely familiar with, even satisfies Justice
19 Springer's unadopted definition of mutilation and referred
20 to in *Calambro*, that's truly a mutilation case. If that's
21 the case, then both *Calambro* and this case certainly stand
22 for textbook definitions of the aggravator of mutilation.

23 MR. GREGORY: If I might respond?

24 THE COURT: Yes.

25 MR. GREGORY: Justice Springer's concurring

1 opinion in the *Calambro* case, it's 114 Nevada -- I'm sorry,
2 I have the advanced opinion. It's a January '98 case. I'm
3 sure the Court is familiar with it.

4 It says, among other things, that murder,
5 Justice Springer's concurring opinion, murder involving,
6 quote, mutilation of the victim, unquote, has incorrectly
7 become, quote, murder accompanied by great damage to the
8 victim's body, unquote.

9 And the good justice indicates that the acts
10 show me that *Calambro* had, quote, in addition to having the
11 intention to kill -- and see that's the problem. You shoot
12 somebody with a shotgun, under their definition you're going
13 to do great damage.

14 I know this Court was a prosecutor for a long
15 time, has probably seen the autopsy photos of such injuries.
16 That's the intention to kill. But you have to have the
17 added specific intention to mutilate and in fact mutilate
18 the murder victim.

19 The acts proven in this court indicate an
20 intention to kill. And that's all it indicates. And I
21 think we're confusing this jury by suggesting that
22 mutilation occurred, when it did not.

23 MR. STANTON: One --

24 THE COURT: I'll let you talk but let me read
25 the case, too.

1 MR. GREGORY: May I approach?

2 THE COURT: You may.

3 Go ahead, Mr. Stanton.

4 MR. STANTON: I mentioned to Justice Springer's
5 concurring opinion because I was a prosecutor in the
6 *Calambro* case and took great interest because, historically,
7 Justice Springer is the dissenting opinion in the other
8 cases that are cited in *Smith* and also *Parker*, because he
9 does not believe that the definition in this state of
10 mutilation is what he believes it to be. But that as it is
11 in this case, the lone dissenting voice, I'm sure the Court
12 is aware Justice Springer is no longer sitting on the Nevada
13 Supreme Court so his position regarding mutilation outside
14 of the *Calambro* concurring case is not the law in the state
15 of Nevada and has been specifically rejected by the majority
16 repeated times.

17 The operative language in those other cases is
18 serious and depraved physical abuse beyond the act of
19 killing itself.

20 So now Mr. Gregory sits there and says, well,
21 the State would like to have it be if they shot him with a
22 shotgun, presumably by his reference to the shotgun, that
23 there was serious disfigurement by a shotgun blast, that
24 that would constitute mutilation. No. But if you took a
25 12-gauge shotgun and shot 17 times into somebody's head,

1 then that would be mutilation.

2 The same is true of his analogy if somebody ran
3 over somebody in a vehicle to kill them and they were
4 tremendously disfigured by that, that is not mutilation.
5 But if they run that vehicle up and down their body 17
6 times, then it is mutilation. And that's exactly what we
7 have in this case.

8 Remember the physical evidence in this case is
9 not that there was a struggle and Sergeant Sullivan had to
10 be struck 17 times. That photograph of the blood spatter
11 and the testimony appurtenant thereto and by Mr. Vanisi's
12 own rendition of this murder to Vainga Kinikini is he knocks
13 him out. Sergeant Sullivan is down. He's defenseless.

14 And then Dr. Clark said any of those initial
15 wounds would have in and of itself been fatal. And so what
16 we have here is the repeated chopping into his face while
17 he's down and defenseless. That's not to kill, that's to
18 seriously disfigure, to make imperfect, serious depraved
19 physical abuse beyond the act of killing itself. Then
20 Mr. Gregory has got a tough spot here is how does he explain
21 away the conduct that his own client says to his relative
22 that he jumps and stomps on his head after he has killed him
23 with a hatchet?

24 THE COURT: You cite to the *Smith* case. What
25 were the facts of the *Smith* case?

1 MR. STANTON: The facts of mutilation, Your
2 Honor?

3 THE COURT: Right.

4 MR. STANTON: I'm not sure because I blend
5 *Smith* and *Parker* together. So I don't want to mislead the
6 Court.

7 THE COURT: *Parker* was the "smashed the
8 victim's head with a rock, stabbed her once. And then,
9 postmortem, wrapped cords around her neck," according to the
10 Supreme Court.

11 MR. STANTON: Then I think *Smith* is a stabbing
12 case. I'm not sure. I know none of these, or at least
13 *Parker*, *Smith* and *Calambro* are not gunshot wounds. I
14 believe one of them involved multiple stab wounds where the
15 knife was left in the chest, but I'm not sure if that's
16 *Smith* or another Clark County case that comes to mind of the
17 depravity of the mind, mutilation issue.

18 THE COURT: Counsel, you can have your case
19 back.

20 MR. GREGORY: Thank you, Your Honor.

21 THE COURT: The status of the law in the state
22 of Nevada at this time, in my opinion, is that this case
23 does fit the definition of mutilation. Justice Springer is
24 and has been very vocal about that definition. But it is
25 still the definition until the Supreme Court changes it. So

1 mutilation will stand in this instruction.

2 MR. BOSLER: We'd raise an additional objection
3 to aggravating factor number one. Although the Nevada
4 Supreme Court has allowed the use of felony murder and the
5 same felony to be used as an aggravator, that was done under
6 the previous status of the law which was there was a
7 statutory system in place where they would judge the
8 proportionality of the death penalty to each offense. That
9 status, that proportionality study has been removed. That
10 is no longer part of the law in Nevada.

11 Based upon that fact, what you have is a
12 criminal act being used twice, both as felony murder and
13 aggravation. We submit that without the proportionality
14 study amounts to final discretion, the type of violation
15 where we have, where the jury is really confusing the
16 underlying murder with an aggravating circumstance and using
17 it twice, not only double jeopardy but not being proper
18 limiting that is necessary for a constitutional death
19 penalty.

20 So we make an objection to special condition
21 number one.

22 THE COURT: Counsel?

23 MR. STANTON: I'm not sure I even understand
24 the objection, Your Honor. To some extent I'm hearing
25 Mr. Bosler say somehow it's double counting. Our Supreme

1 Court has consistently held that the use of the felony
 2 murder rule or as an aggravator, inherently dangerous felony
 3 that's commonly referred to, incorporated into the felony
 4 rule is entirely appropriate, both on state and federal
 5 constitutional grounds. So is the United States Supreme
 6 Court in attacking, I think it was either a Louisiana -- I
 7 think it was a Louisiana statute that's similar to Nevada's
 8 on the same ground, and I don't have that case with me cited
 9 in the jury instructions. But I can give that to the Court.

10 And specifically they upheld that it indeed
 11 perform the narrowing function because one of the fatal
 12 defects of Mr. Bosler's argument is that the murder can be
 13 committed without the intended robbery, therefore it doesn't
 14 function. To what extent defense counsel thinks it doesn't
 15 has basically been rejected both by our state and the United
 16 States Supreme Court.

17 THE COURT: The motion to delete that from the
 18 instruction is denied.

19 We have: "The term mutilate means to cut off
 20 or permanently destroy."

21 Apart from your arguments already, do you have
 22 any objection?

23 MR. GREGORY: No, as long as our objection is
 24 noted, Your Honor.

25 THE COURT: Objections are so noted.

1 "A murder in the first degree may be mitigated
2 by any of the following circumstances." This is a defense
3 instruction. There are seven. Plus the catchall at the
4 end.

5 Counsel for the State, do you have any
6 objection to this as presented?

7 MR. STANTON: Your Honor, the objection that
8 the State has to it is that it's an exhaustive list of the
9 mitigation. The State requests that the mitigation be
10 listed that is relevant and supported by facts in this case.

11 THE COURT: Specifically which ones would you
12 like to see deleted?

13 MR. STANTON: Well, I'm not sure what the
14 defense is relying on. So that's kind of -- because
15 obviously at some juncture, for example, number seven, any
16 other mitigating circumstances should be included. That's
17 the residual catchall one. But I'm not sure what the
18 defense believes they've proved in the penalty phase.

19 THE COURT: Well, we have "Defendant has no
20 significant history of prior criminal behavior." We have
21 "The murder was committed while the defendant was under the
22 influence of extreme mental or emotional disturbance."
23 Maybe. I don't know where we're at on that.

24 "The victim was a participant in the
25 defendant's criminal conduct," special condition three. Do

1 you think you've shown any evidence of that?

2 MR. BOSLER: Your Honor, I don't have that
3 listed as one of my --

4 THE COURT: The one you gave me, that's where
5 it is. If you've got a different one, give it to me.

6 MR. GREGORY: Apparently we're missing --

7 MR. BOSLER: May I see the Court's?

8 THE COURT: It was the one that was in the
9 packet. Now you saw it.

10 MR. BOSLER: Judge, what that is is a list of
11 all the statutory mitigators. Likewise, I've offered a list
12 of all the statutory aggravators to essentially put the case
13 in context for the jury, let them know what is offered by
14 statute, what's specifically alleged by the defense or the
15 State.

16 THE COURT: Do you have one that's more
17 specific?

18 MR. BOSLER: Yeah. I've offered several that
19 are more specific as to evidence that's been offered by the
20 defense.

21 THE COURT: So your specific mitigation ones
22 are these individual instructions that I have?

23 MR. BOSLER: Yes, Your Honor.

24 THE COURT: Okay. I prefer to give one
25 instruction. That's the format I prefer to use, similar to

1 the statute. I'll let you pick whichever ones under the
2 statute or any additional ones you want to use. And then
3 we'll argue whether or not you've sufficiently shown
4 evidence of them. So what we have is we have one, two,
5 whichever of the statutory ones are available to you.

6 And then under the "any other mitigating
7 circumstance," you convince me that you've shown some
8 evidence of something, and I'll go ahead and list it for you
9 in the instruction I give to the jury. And then we'll use
10 the catchall at the end. But you have to come up with your
11 own list.

12 So of the individual ones I see, we have
13 "evidence that Siaosi Vanisi has been diagnosed with a
14 mental illness."

15 Counsel for the State, do you see that one?

16 MR. STANTON: I do.

17 THE COURT: But I think there's more -- there's
18 two that are very similar that start with the same sentence.

19 MR. BOSLER: Yes, Your Honor.

20 THE COURT: Now, there's a third one that I
21 have that starts with the same sentence.

22 Are those three all different, Mr. Bosler?

23 MR. BOSLER: Yes, Your Honor.

24 THE COURT: One goes to line five, one goes to
25 line six and one goes to line seven.

1 Counsel for the State, do you want to find
2 those?

3 MR. STANTON: I've got four instructions, Your
4 Honor, that start with some reference to mental illness.

5 THE COURT: "Extreme mental disturbance," is
6 that one you're thinking of?

7 MR. STANTON: Yes.

8 THE COURT: Okay. So we have "Evidence that
9 Siaosi Vanisi was under the influence of an extreme mental
10 disturbance." That goes through line five. "Evidence that
11 Mr. Vanisi has been diagnosed with a mental illness," that
12 goes through line five. "Evidence that Siaosi Vanisi has
13 been diagnosed with mental illness," through line six. And,
14 "Evidence that Siaosi Vanisi has been diagnosed with mental
15 illness," through line seven.

16 Now, which one are you asking for? Is this an
17 alternate or what do you want, Mr. Bosler?

18 MR. BOSLER: I'm asking for all the
19 instructions. They all deal with different facts. The
20 first one is the statutory definition that's allowed by law.
21 The second offers a specific diagnosis.

22 THE COURT: Wait. You completely are losing
23 me. Are you talking about the first one is the long one
24 through seven numerically?

25 MR. BOSLER: Extreme mental.

1 THE COURT: You're talking about evidence that
2 Siaoisi Vanisi was under the influence of an extreme mental
3 disturbance?

4 MR. BOSLER: Yes.

5 THE COURT: So we know what we're talking
6 about, let's go ahead, for purposes of the discussion, that
7 will be defendant's -- I started to say A, but I think the
8 clerk will have to give us another number.

9 THE CLERK: D.

10 THE COURT: D. Instructions. And then we'll
11 give "Evidence that Siaoisi Vanisi was diagnosed with a
12 mental illness," one through line five will be marked as
13 Defendant's E. "Evidence that Siaoisi Vanisi had been
14 diagnosed with mental illness" will be marked as Defendant's
15 F. And that was through line six.

16 And "Evidence that Siaoisi Vanisi has been
17 diagnosed with mental illness" that goes through line seven,
18 will be marked as G. And the statutory instruction that
19 you've offered will be marked as Defendant's H, so we can
20 talk about them.

21 So you started to tell me, Mr. Bosler, why you
22 thought you needed D.

23 MR. BOSLER: Your Honor, that's the one through
24 line five, right? We have D as the one that goes through
25 line five?

1 THE COURT: "Extreme mental disturbance"
2 through line five.

3 MR. BOSLER: Your Honor, I believe that's the
4 statutory mitigating definition of that statutory mitigator.
5 He has an extreme mental illness.

6 THE COURT: Are you saying this is a quote from
7 the statute: "You should consider the circumstance as
8 supporting a decision that death is not the appropriate
9 sentence in this case"?

10 MR. BOSLER: The first sentence is the
11 quotation from the statute. The second sentence essentially
12 comports with several constitutional cases, and I'll produce
13 in a moment, that the jury has to consider mitigating
14 evidence; whether they decide to later disregard it, that's
15 fine. But they have to be instructed they should consider
16 it before they render a sentence. And that's why that last
17 line is included.

18 THE COURT: What was the extreme mental
19 disturbance that you've shown?

20 MR. BOSLER: That was brought out through the
21 testimony of Dr. Thienhaus, who also relied, both on direct
22 and cross-examination, on the diagnoses of other doctors of
23 the illness of bipolar disorder, manic depression.

24 THE COURT: What's the difference between that
25 and E then?

1 MR. BOSLER: Your Honor, those are all separate
2 mitigating instructions, because not only do we have the
3 severe mental illness, we have it diagnosed, which conveys
4 to the jury whether he should live or die, because if it's
5 not gross, he can get treatment for it.

6 The other instructions also deal with not only
7 treatment, the availability of treatment in prison, all
8 things that mitigate in favor of something less than the
9 death penalty.

10 THE COURT: Where's your evidence that it's
11 manageable in an institutional setting?

12 MR. BOSLER: Again, Dr. Thienhaus who testified
13 that he's actually given Vanisi medication while in custody
14 and that that's standard operating procedure. He's employed
15 by a custodial facility to provide medication to the
16 inmates.

17 THE COURT: That's G, right?

18 MR. STANTON: Yes.

19 THE COURT: F. What's the difference between G
20 and F?

21 MR. BOSLER: One is that the illness is
22 treatable. Some illnesses are not treatable. Not only is
23 this illness treatable, it's treatable in an institutional
24 setting.

25 THE COURT: Mr. Stanton?

1 MR. STANTON: Your Honor, the defendant's
2 proffered instruction H, subsection (2) at line five and
3 six, the instruction adequately articulates what the statute
4 says verbatim is the mitigating regarding extreme mental or
5 emotional disturbance. That I believe incorporates the
6 evidence of Defendant's D, the second half of the second
7 sentence that Mr. Bosler refers to, the consideration of the
8 mitigation evidence is embraced in other jury instructions,
9 and that would be cumulative in nature.

10 Defendant's E, once again counsel cites as the
11 basis for, as I understand it, E, F and G, the separate and
12 distinct mitigating factor listed in the statute NRS 200.035
13 as the residual section number seven.

14 It is improper to tell the jury in an
15 instruction phrase what mitigating evidence is as relates to
16 the residual instruction. In fact, their offered
17 instruction concludes that "The list of mitigating
18 circumstances is not meant to be exclusive. You may
19 consider any other mitigating circumstances or circumstances
20 you believe is or are appropriate as individual mitigating
21 circumstances."

22 That's the appropriate language to use because
23 it doesn't instruct what mitigation is but how to use it,
24 and I think that comports with the same repeated language in
25 all of E, F and G.

1 THE COURT: Mr. Bosler?

2 MR. BOSLER: Your Honor, this Court is going to
3 give an instruction I believe that says anything I say is
4 not evidence. We also have the Nevada Supreme Court saying
5 on many occasions that my argument is no substitute for a
6 jury instruction, because that carries the weight of law.
7 These separate instructions are on individual mitigating
8 circumstances that I can't simply just be told you can argue
9 them because then I lose the force of law behind them.

10 We're offering these in addition to the
11 catchall instruction that if there's things that I haven't
12 talked about, I haven't offered, the jury can still consider
13 other factors when they make their decision.

14 But these are separate individual mitigating
15 circumstances we're offering under the catchall exception
16 that if they're not put into the form of instruction they
17 lose their force. And I'm left with my argument, which the
18 Court is going to say is not evidence. So nothing I say is
19 going to have the weight of evidence.

20 THE COURT: Your testimony or argument is not
21 something that has weight of evidence. However, your expert
22 who did testify can be considered by the jury as evidence.
23 Your expert is who testifies to the facts and circumstances
24 about whether or not the illness that Mr. Vanisi is
25 suffering under is an extreme mental emotional disturbance.

1 It's not for the Court to instruct the jury
2 that specifically manic depression is such an extreme or
3 emotional disturbance. You're asking me to reach a
4 conclusion that agrees with your expert. And I think that
5 certainly you can argue that your expert says that
6 Mr. Vanisi is a manic depressant and that that's an extreme
7 mental disturbance. You can argue that.

8 The statute says an extreme mental disturbance
9 is something that the jury can consider. It's up to the
10 jury whether or not they want to believe your expert. It's
11 for the jury to determine what weight or force to give to
12 the mitigating circumstance, not for me to tell the jury
13 what those circumstances are or are not.

14 And I think it would be error for me to
15 instruct them as to what could possibly be an extreme mental
16 or emotional disturbance. It could be many things. So I'm
17 not going to give specific instructions in that regard which
18 would be Defendant's Exhibit D is covered in H. And E is
19 covered in H, when coupled with your expert witness'
20 testimony.

21 My concern is that you want me to make a
22 statement that the particular illness that your client has
23 is treatable.

24 MR. BOSLER: I'm saying it's offered. I'm not
25 saying it's concluded by the Court that's it's treatable.

1 It's being what's offered as evidence. The jury has a right
2 to disregard it. It's only being offered. I'm not asking
3 you to conclude it has been proven.

4 THE COURT: You want "manic depression is a
5 treatable illness as a mitigating circumstance."

6 MR. BOSLER: That it's offered as a mitigating
7 circumstance.

8 THE COURT: And you want that "it's manageable
9 in an institutional setting as a mitigating circumstance."

10 MR. BOSLER: Yes.

11 THE COURT: That's G. G is denied.

12 MR. BOSLER: Objection noted for the record.

13 THE COURT: Right. And we're marking them.

14 Mr. Stanton, what's your position with regard
15 to the aspect of "manic depression is an illness that is
16 treatable"? That would be F as we currently have them
17 marked. It won't be given in this form.

18 MR. STANTON: I have an objection to the
19 entirety. First of all, evidence that Siaosi Vanisi has
20 been diagnosed with a mental illness, specifically manic
21 depression, and the illness is treatable, has been offered
22 as mitigating evidence. That's a jury instruction, once
23 again as the Court's pointed out, telling them what
24 mitigating evidence is. I think that's improper.

25 And it doesn't use the language, as I

1 understand it, Mr. Bosler's argument, he's not offering
2 Defense F to support the mitigator listed in NRS 200.035
3 subsection (2); therefore it's an improper articulation of
4 what is mitigation. And the second part of that, the second
5 sentence, is once again improper because it already is
6 included in another jury instruction.

7 THE COURT: Well, his point is that he should
8 be allowed to argue that manic depression is treatable, and
9 because it's treatable, that's a mitigating circumstance.

10 MR. STANTON: Well, he can argue whatever he
11 wants to from the facts as presented at the penalty phase
12 and argue that it's under the residual exception of number
13 seven, because obviously that doesn't fit into any of the
14 definitions listed in one through six. There's nothing that
15 prohibits Mr. Bosler from doing that.

16 As far as his argument, saying his argument is
17 not evidence, therefore they won't consider it, is
18 circuitous. It's like a hamster on a wheel. He's arguing
19 the law. And the instruction of Defendant's H says anything
20 that you consider is mitigating evidence. Then he can list
21 whatever he thinks the defense has exhibited as evidence for
22 them to be considered as mitigating evidence. In other
23 words, it's proper argument for him to use the instructions
24 and then point the jury to what the evidence is. But it's
25 not proper to instruct the jury about what has been received

1 as evidence.

2 THE COURT: Do you have any statutory
3 authority? The Las Vegas courts in their death penalty
4 cases are, in fact, instructing the jury. I think I gave
5 you all a copy of the instructions that were used in Babb,
6 Hart and Sirex. You didn't get them?

7 MR. STANTON: No.

8 THE COURT: The Las Vegas courts are in fact
9 expanding on the statutory list allowing for other
10 circumstances to be enumerated at the request of the
11 defense, and that's not an exhaustive list. They still are
12 instructing similar to this saying it is not an exhaustive
13 list but other circumstances may be considered. And we can
14 take a short recess and I can give you a copy of what I have
15 that we utilized in formatting the Babb, Hart and Sirex
16 instructions so it did allow for some deviation from the
17 seven statutory listings. But not certainly in the format
18 that Mr. Bosler is offering them.

19 MR. STANTON: The problem I have is once you
20 get into that area, you become on a slippery slope. The
21 fact that the Court cannot make the decision in the
22 instruction, in my opinion on an appellate review,
23 correctly -- because once you go down that road, once you
24 start instructing about what is the residual mitigating
25 evidence, you're describing to the jury what mitigating

1 evidence is, how does the statutes define mitigating
2 evidence, once you start doing that, I think you run into
3 problems about what is the defense arguing is mitigating
4 evidence. What are you going to include in the
5 instructions, what are you going to exclude. By defining,
6 you're by necessity limiting it in your instruction to what
7 it is. And it could be --

8 THE COURT: Not necessarily. Not if you say
9 "or any other thing that the jury finds as mitigation," we
10 haven't limited it.

11 MR. STANTON: Then I don't understand the legal
12 logic of articulating anything outside that would encompass
13 the residual exception.

14 I can certainly see that in this case, defense
15 counsel could seek to convince this jury that Mr. Vanisi led
16 a large number of years of his life as a law-abiding, nice
17 relative that was nonviolent, that he was church-going, that
18 he was whatever. Do you instruct on that? When do you draw
19 the line about what is the Court going to instruct when it
20 comes to residual mitigating evidence?

21 THE COURT: In Las Vegas they're instructing on
22 anything that the defense shows that can be reasonably
23 mitigating. That's what they're instructing on right now.

24 MR. STANTON: I understand that. I understand
25 the Court has indicated that Clark County has. I haven't

1 seen any of their instructions. Assuming that to be a fact,
2 I don't think Clark County's instruction addresses the
3 problem that they're setting themselves up for on appellate
4 review.

5 THE COURT: Have you seen anything coming out?
6 That's why I started the conversation with: Do you have any
7 authority.

8 MR. STANTON: I haven't seen anything from
9 Clark County. I'm aware of attempts to do that in proffered
10 instructions here in the Second Judicial District Court in
11 capital cases.

12 THE COURT: Counsel approach.

13 (Bench conference between Court and counsel of
14 the record.)

15 THE COURT: You've had an opportunity to see
16 this different instruction. Do you want to think about it
17 for a second, Mr. Stanton?

18 MR. STANTON: No. My objection stands as
19 before, because I don't believe it addresses the answer, and
20 that is it is improper to instruct a jury about what
21 mitigating evidence is. And once again, I'm referring only
22 to the residual subsection (7) of 200.035.

23 You can tell them how to treat mitigating
24 evidence and you can instruct them about how to consider
25 mitigating evidence and what mitigating evidence is, that

1 is, anything that they believe in mitigation, but to list
2 that is improper.

3 THE COURT: What's the authority for that?

4 MR. STANTON: NRS 200.035 and also the capital
5 litigation seminar by Professor Sundby given by the National
6 Judicial College where he lectured in his materials that
7 stated the what-how test relative to defining mitigation.

8 THE COURT: I have that information and I took
9 that. But he didn't say you couldn't do this. He didn't
10 say it would be improper to do this the way this has been
11 done.

12 MR. STANTON: I don't know what other way you
13 could do it without telling them what mitigating evidence
14 is.

15 MR. BOSLER: Your Honor, I think we just do
16 that. We already do that by statute. We tell them at least
17 seven things that are mitigating.

18 THE COURT: We'll take a short recess. I'll
19 pull up Mr. Sundby's information. Court's in recess.

20 (Recess taken.)

21 THE COURT: Thank you. Please be seated.
22 We're going to kind of discuss this a little bit more, but
23 I've pulled up my notes from Professor Sundby, and I think
24 it's a classic example of hearing whatever you hear. My
25 notes indicate that Professor Sundby made it very clear that

1 it's my job as the judge to communicate to the jury their
2 right to consider anything in mitigation. On the other
3 hand, the judge cannot decide what is mitigating but may
4 tell the jury how to consider the mitigation.

5 From a prosecution standpoint, I can see how a
6 certain interpretation could be put on these notes and the
7 information I have. I know that in the discussions that
8 were held in my small group, we ultimately got the
9 instructions from Justice Rose that they were using in Clark
10 County because of a discrepancy in this and how we were
11 going to do it in Nevada. Nobody has given me any cases in
12 Nevada to tell me how the Supreme Court is going to go on
13 this.

14 I can see the argument that if I utilize the
15 instruction that we utilized in the Babb, Hart and Sirex
16 case, that I have told them specific things are mitigating
17 and therefore may be inherently limiting what they can
18 consider for mitigation. But I also understand the argument
19 that if I don't tell them something, that they can consider
20 something at the request of the defense, I may be limiting
21 what the jury is allowed to consider. I don't know which
22 way the Nevada Supreme Court is going to go on this.

23 So we'll have the clerk mark D, E, F, G and H.
24 And I will say, to start, I will not give them in the format
25 that they are presented, number one. H will not be given,

1 including the statutory issues, unless you want me to give
2 them, that you've shown no evidence of. If you want me to
3 give the statutory definition, I will do it but I will
4 include the NRS says this or something.

5 I'm very concerned. I've never had anybody
6 request the victim was a participant in the defendant's
7 criminal conduct or consented to the act if there was no
8 evidence of that.

9 MR. BOSLER: Your Honor, I'm not offering those
10 as offered by the defense, I just wanted to give the jury a
11 context that they know that because I was offering as an
12 instruction all the aggravating circumstances so the jury
13 can put into context which ones are being alleged by the
14 State and how that fits into our statutory scheme. I
15 thought it only fair that I offer the other side which is
16 all the statutory mitigators, and then separately list the
17 ones that are actually being offered by the defense.

18 THE COURT: Okay. So we need to mark your
19 offered instruction "the only circumstance" as I. I'm not
20 going to give the instruction that I've now marked as
21 Defendant's I which is the entire statute. That would be
22 extremely confusing and prejudicial, I believe, to the
23 defense. I'm not going to give that one. And for the same
24 reason, I'm not going to give H. You're not offering that
25 Defendant's I, as I understand it. So the record will be

1 clear on that.

2 Then we have E, F and G. They boil down to
3 arguing that the defendant was under an extreme mental
4 disturbance. That's clear in the statutory definition that
5 we've just talked about which is special condition two.
6 Which I don't have one typed yet because neither of you have
7 given it to me. But it would be special condition two.

8 And then manic depression is offered as a
9 mitigating circumstance. Clearly that's E. It can be
10 argued under extreme mental and emotional disturbance. It's
11 not necessary to instruct the jury separately on that.

12 And then mental illness, specifically manic
13 depression and that the illness is treatable, I will give
14 you -- I will modify seven if you want, but you have to
15 specifically request it, to add manic depression -- let me
16 think about whether I'll give it to you or not. I'm sitting
17 here trying to think of how I can give a neutral statement
18 on that without telling the jury one way or another.

19 And your instruction F is not neutral and I
20 can't think of a way to give a neutral statement on that
21 without commenting on the expert's testimony.

22 MR. BOSLER: I don't know whether it solves the
23 problem. Would the Court consider letting me offer my
24 specific nonstatutory mitigators in a laundry list as
25 reflected in the pleadings the Court showed us from, I

1 believe Sirex, whatever case that is?

2 THE COURT: Well, not all of them, because
3 they're duplicative. And you've already got them in the one
4 that you put in. You've already got, D and E are completely
5 covered under the statutory one. The only two that even
6 remotely could be considered would be F and G, which is the
7 issue of whether or not manic depression is manageable in
8 the institutional setting and whether manic depression is
9 treatable, which I think are duplicative also. If it's
10 manageable, it's treatable. That's the only one really that
11 you're talking about here.

12 And you want to argue that it's a mitigating
13 circumstance that your client can be managed and/or treated
14 while in prison. You want to argue that that's mitigation,
15 correct?

16 MR. BOSLER: Yes.

17 THE COURT: You don't think you can argue that
18 under seven, any other mitigating circumstance?

19 MR. BOSLER: I think I can, but I think I'm
20 deprived of the authority of the Court that it's offered as
21 mitigating evidence as opposed to just offered as argument,
22 which the Court's going to instruct the jury what I argue is
23 not evidence.

24 MR. STANTON: Your Honor, Mr. Bosler in fact
25 makes the State's argument for it, and that is, he wants the

1 authority of the Court behind the instruction. It's
2 improper for any number of reasons. Number one, the
3 Legislature has specifically articulated what it recognizes
4 as mitigating factors. It's clearly appropriate to instruct
5 the jury on that which the defense believes and has offered
6 some evidence in mitigation.

7 When you get to defining the residual
8 mitigating evidence, you run into two problems. Number one
9 is what is it that the defense claims in a laundry list as
10 Mr. Bosler says that they want to be presented to this jury.

11 First of all, the fact that he's been
12 diagnosed. That's a question of fact for this jury to
13 determine whether or not indeed Mr. Vanisi has been
14 diagnosed with a mental illness. Contrary to what defense
15 counsel is going to say to this jury, the State is not in
16 agreement that that's what the evidence says in this case.

17 So to laundry-list it I think is inappropriate
18 for the reasons that Mr. Bosler says is he wants to get the
19 authority of the Court. There's nothing that Mr. Bosler has
20 offered yet that explains why he's circumvented from arguing
21 in Defendant's H, line 16 through 19 or actually lines 15
22 through 19, about what mitigating evidence is according to
23 the defense theory. And citing specifically "you ladies and
24 gentlemen of the jury determine what mitigating evidence is.
25 The following is evidence" that's mitigating evidence in

1 this case.

2 And the United States Supreme Court I think has
3 held that all that the Constitution requires is that the
4 State or the jury be advised that they should consider
5 mitigating evidence if any exists and that's it. They've
6 never required a specialized laundry list and that's
7 *Buchanan v. Angelo*, 118 Supreme Court 757, specifically at
8 page --

9 THE COURT: I have the *Angelo* case.

10 MR. STANTON: It would be Supreme Court
11 Reporter after 761 in the West publication. So there has
12 been nothing, and I agree with the Court, at least my
13 recollection and my research and involvement in cases like
14 this, I have not seen the Nevada Supreme Court conclusively
15 speak to this issue and answer it for us. But I think what
16 the Constitution requires is how to treat mitigation
17 evidence, not what.

18 The final comment I'd like to make on it, Your
19 Honor, is one for appellate review.

20 Whatever these gentlemen do and argue about
21 mitigating evidence in this case, I'm going to guarantee you
22 that that is not what appellate counsel is going to say;
23 that they're going to say there's other mitigating evidence
24 that they didn't highlight or instruct on. And that's where
25 I think you run into the problem where you cannot make the

1 right answer when you begin to define what mitigating
2 evidence is or attempt to assist the jury in opening their
3 eyes to it. That's why I think the residual exception and
4 the language in Defendant's H at lines 16 through 19 is
5 exactly what should happen, because it doesn't limit defense
6 counsel and, more importantly, it doesn't limit the jury's
7 mind.

8 THE COURT: Okay. Given the fact that I am not
9 inclined to give I, what do you want your modified H to say,
10 Mr. Bosler?

11 MR. BOSLER: I will offer an instruction
12 similar to the one you've cited that we already have a
13 separate instruction on, the extreme mental illness: One
14 that the bipolar disorder is a treatable illness and, two,
15 it's treatable in an institutional setting.

16 THE COURT: Okay. You should -- we don't have
17 that. We have them in separate instructions that have been
18 marked. I'm disinclined to give that instruction in this
19 case. I am very concerned about in any way limiting the
20 jury's consideration of mitigation. So I'm kind of inclined
21 to go with the statutory and let you argue it.

22 Of course you have absolutely free reign to
23 argue that it has been established by the proof that you've
24 put on that there is a mental illness, what it is, how it's
25 been treated and how treatable it is. That will all come

1 in. You can refer back to the instruction that I give,
2 which is "any other mitigating circumstance." You can refer
3 back to it by number. "Judge told you you could consider
4 any other."

5 So that's where I'm at. But I need to know
6 which of the statutory instruction parts of H you want to
7 give. That's "the defendant has no significant history of
8 prior criminal behavior," "the murder was committed while
9 the defendant was under the influence of extreme mental or
10 emotional disturbance."

11 Then we have three, "the victim was a
12 participant." Four, "the defendant was an accomplice in a
13 murder committed by another person." Five, "the defendant
14 acted under duress or under the domination of another
15 person." Six, "the youth of the defendant at the time of
16 the crime." And then seven is any other mitigating.

17 MR. BOSLER: Well, the Court's decision limits
18 me to four, including the catchall.

19 THE COURT: If you want to give the statute the
20 way it is and argue that statute, is that what you want?

21 MR. BOSLER: No, I want to offer similar
22 instructions.

23 THE COURT: I know what you want. I'm -- I'm
24 letting you offer -- I'm denying your offer for D, E, F, G
25 and H and I. Now, I'm asking you: Do you want to offer H

1 or not? If you want to offer one like H, do you want to
2 modify it?

3 MR. BOSLER: I'll offer a modified H reflecting
4 three special, the mental illness, age, the catchall and no
5 prior criminal history. And I'll delete the remainder of
6 that statute.

7 THE COURT: Okay.

8 Mr. Stanton, any objection to that?

9 MR. STANTON: So that we're clear, I'm not sure
10 how Mr. Bosler is doing that, but if I can go from
11 Defendant's H, it's my understanding that he wants one, two,
12 six and seven. Am I in accord with the Court's
13 understanding?

14 THE COURT: Yes.

15 MR. STANTON: Therefore, three, four and five
16 are specifically being requested to be withdrawn since
17 there's no facts to support those?

18 MR. BOSLER: That's correct, Your Honor.

19 MR. STANTON: No objection.

20 THE COURT: Are you going to prepare that,
21 Mr. Bosler?

22 MR. BOSLER: Yes, Your Honor.

23 THE COURT: The clerk will mark Defendant's, as
24 we've been talking about them, E, F, G, H, I, D and G.

25 MR. BOSLER: Does that also include the special

1 instruction "evidence has been offered that Siaosi Vanisi
2 has demonstrated a character for peacefulness"?

3 THE COURT: We haven't even gotten there yet.
4 Do you want to do that one next?

5 MR. BOSLER: Whatever is good for the Court.

6 THE COURT: In your packet was "evidence that
7 Siaosi Vanisi has no significant prior criminal history,"
8 has been covered. Do you need another separate instruction
9 marked for the record?

10 MR. BOSLER: Yes.

11 THE COURT: The clerk will mark it next in
12 order.

13 THE CLERK: Defendant's offered J.

14 THE COURT: On the basis that I'll get a
15 modified instruction comporting with what you've told me
16 pursuant to our discussions with regard to H, I will not be
17 giving J.

18 MR. BOSLER: Note our objection, Your Honor.

19 THE COURT: "Evidence that Siaosi Vanisi
20 committed this offense while under the influence of a
21 controlled substance."

22 MR. BOSLER: Your Honor, may I have a moment?

23 THE COURT: Sure.

24 MR. BOSLER: Your Honor, we'll offer that also
25 as a separate instruction.

1 THE COURT: Mr. Stanton, the clerk will mark it
2 next in order.

3 THE CLERK: Defendant's offered Instruction K.

4 THE COURT: Mr. Stanton?

5 MR. STANTON: Your Honor, I would object to it
6 on two grounds: Number one, there's no evidence to support
7 this instruction that has been presented, nor am I, unless
8 someone can cite me to some evidence in this case that one
9 could reasonably infer factually that this has been proven;
10 and second, once again, it seeks to define mitigation.

11 MR. BOSLER: To the first part, there has been
12 testimony from the doctors who spoke to Mr. Vanisi at the
13 jail that he's been using controlled substance. And we
14 think an inference can be raised that based upon his
15 diagnosis and those statements that what happened on that
16 evening was done under the influence of controlled
17 substance. And we've already argued about number two. I'll
18 submit that.

19 MR. STANTON: Your Honor, by now Judge, I'd
20 just say if somebody came in and said the defendant was an
21 addict, according to defense counsel's theory, that's enough
22 evidence to argue, even inferentially, that at the time of
23 the murder, which is specifically what this instruction
24 states, once again, evidence that Siaosi Vanisi committed
25 this offense while under the influence of controlled

1 substance has been offered as mitigating circumstances. I
2 don't know how the doctor's testimony that Mr. Vanisi had
3 used drugs previously, that was history that was related by
4 Mr. Vanisi to a doctor in a clinical interview, but no way
5 can it be interpreted that he was under the influence at the
6 time of the murder.

7 THE COURT: Anything further, Mr. Bosler?

8 MR. BOSLER: I don't know how many times we get
9 to argue, Judge.

10 THE COURT: You don't have to. I don't want
11 you to feel like you have to, but if you want to make more
12 of a record, you should do so now.

13 MR. BOSLER: The evidence from the doctor is
14 that people with bipolar disorder have manic episodes and
15 that can happen more frequently when they're on drugs.
16 That's the inference.

17 We also have Ms. Martinez indicating when he
18 was walking through the parking lot, he seems like he's
19 under the influence of some substance, staggering gait.

20 All those things together at least raises an
21 inference, it may not be a substantial one, but it only has
22 to be a slight one to satisfy the defendant getting the
23 instruction.

24 THE COURT: I'm going to allow you to argue it
25 in spite of Mr. Stanton's argument that there's no testimony

1 based on Ms. Martinez' testimony. I'll allow you to argue
2 it was either controlled substance or alcohol. I'll not
3 give a specific instruction. I'll let you argue it under
4 seven which is going to be a different number under the
5 instruction that allows for any other mitigating evidence.

6 "Evidence that Siasosi Vanisi was 27 years old
7 at the time of the offense," do you want that marked or do
8 you want to withdraw it, based upon -- do you want this one
9 marked?

10 MR. BOSLER: Yes, Your Honor.

11 THE COURT: The clerk will mark it next in
12 order.

13 THE CLERK: Defendant's offered Instruction L.

14 THE COURT: In light of the fact that I'm going
15 to give the defendant's instruction with regard to the
16 statutory mitigators, Mr. Stanton, do you have an objection
17 to me giving this instruction also?

18 MR. STANTON: Yes, Your Honor. It's
19 cumulative.

20 THE COURT: I'm not going to give it for that
21 reason.

22 "The mitigating circumstances which I have read
23 to you for your consideration are given as examples of some
24 of the factors you may take into account as a reason for
25 deciding not to sentence Siasosi Vanisi to death. Any one of

1 them may be sufficient standing alone to support a decision
2 that death is not an appropriate punishment in this case."
3 That's offered by the defense.

4 MR. BOSLER: As I said previously, we didn't
5 receive instructions from one another so we need to --

6 THE COURT: So I had previously looked at the
7 one from the State and it has a second paragraph. So do you
8 want yours? Are you saying you'd like yours instead or do
9 you want to look at that?

10 MR. BOSLER: Yes, Your Honor.

11 THE COURT: We also have a couple more here
12 which we need to mark, "under the influence of alcohol at
13 the time of the offense."

14 THE CLERK: Defendant's offered Instruction M.

15 THE COURT: The reasons articulated in the
16 controlled substance one, and with the same holding, I will
17 not be giving M. Then we have "demonstrate a character for
18 peacefulness."

19 THE CLERK: Defendant's offered Instruction N.

20 THE COURT: Mr. Stanton, any objection to N as
21 offered?

22 MR. STANTON: Yes, for the previously noted
23 objections defining what mitigation evidence is, I think
24 we're now even more with a record of how all these small
25 things can thus add to separate and distinct instructions

1 and believe the proposed modified H of the defense outlining
2 mitigation is appropriate.

3 MR. BOSLER: I'll offer to the Court my
4 previous statements, Your Honor.

5 THE COURT: N will be denied for the reasons
6 previously stated.

7 Now we're back, Mr. Bosler, with the mitigating
8 circumstances as compared to the State's mitigating
9 circumstances.

10 MR. BOSLER: Since the Court is limiting my
11 ability to give separate instructions, I'll go with the
12 State's offered instruction in this regard.

13 THE COURT: Do you have another -- I'm sorry,
14 did you have one that encompassed the second paragraph?

15 MR. BOSLER: Not the same paragraph as is
16 listed by the State.

17 THE COURT: So we'll go with the one offered by
18 the State. You're withdrawing the one you had previously
19 offered?

20 MR. BOSLER: Yes, Your Honor.

21 THE COURT: Then we have "The State has alleged
22 aggravating circumstances are present. The defendant has
23 alleged certain mitigating circumstances are present. It
24 shall be your duty to determine based upon these findings
25 the jury may impose a sentence of death only if." That's

1 the instruction that goes through line 16. Any objection to
2 that?

3 MR. BOSLER: No, Your Honor. Only my previous
4 objections about aggravating circumstances.

5 THE COURT: Your objection saying you'd rather
6 have more mitigating circumstances listed?

7 MR. BOSLER: Yes.

8 THE COURT: For the reasons stated in this
9 particular case on this record, I think the ones that are
10 offered and the ability to argue under the catchall phrase
11 any other mitigating circumstance will be sufficient to
12 allow the jury to understand that.

13 During argument, if you want to talk about what
14 other mitigating circumstances you are alleging, those that
15 I will allow you to argue you may argue under this
16 instruction, as well as the modified H.

17 Then we have, "The law never compels the
18 imposition of the death penalty." Any objection to that?

19 MR. BOSLER: No, Your Honor.

20 THE COURT: Then we have, "In reaching your
21 verdict, you may consider only the testimony of witnesses.
22 In your deliberation you may not discuss or consider the
23 subject of guilt or innocence."

24 Any objection?

25 MR. BOSLER: No objection.

1 THE COURT: "Although you are to consider only
2 the evidence."

3 MR. BOSLER: Objection to the second paragraph,
4 Your Honor.

5 THE COURT: You have one that says "A verdict
6 may never be influenced by sympathy, passion, prejudice;
7 however, mercy is a valid consideration."

8 MR. BOSLER: Yes, Your Honor.

9 THE COURT: That's what you're offering?

10 MR. BOSLER: Yes, Your Honor.

11 THE COURT: In lieu of the second paragraph?

12 MR. BOSLER: Yes, Your Honor.

13 THE COURT: Mr. Stanton?

14 MR. STANTON: Your Honor, my objection, the
15 citation, I don't know if the Court was provided with the
16 authority --

17 THE COURT: No, I wasn't.

18 MR. STANTON: The authority that counsel cites
19 to you for that is a case called *Spivey*, S-p-i-v-e-y, v.
20 *Zant*, Z-a-n-t, 661 F.2d 464 at 471, Fifth Circuit 1981 case;
21 and *Evans v. State*, 112 Nevada 1172.

22 The only language that is not contained in
23 another instruction is the second sentence, line two to
24 three, reads, in its entirety, "However, mercy is a valid
25 consideration in any penalty hearing." I have read *Evans*

1 and the portion of *Evans* says that "the penalty phase
2 instruction in a Clark County murder case read in its
3 entirety," instead of reading it I can provide it to the
4 Court, if you --

5 THE COURT: That's fine.

6 MR. STANTON: It's on the right-hand column,
7 about two-thirds of the way down.

8 THE COURT: Was that instruction upheld?

9 MR. STANTON: It was -- oddly enough the
10 defense objected to the instruction and the rejecting of the
11 or the taking that instruction --

12 THE COURT: You mean they objected in appeal,
13 because they didn't apparently object in trial.

14 MR. STANTON: I don't recall, Your Honor,
15 without actually looking at that section, but I remember
16 that the interesting thing to me was that they objected to
17 that instruction or that instruction in combination with
18 their proffered ones. I don't read anything in that
19 language or in the *Spivey* case that stands for the
20 proposition that mercy is a valid consideration in any
21 penalty hearing, nor that that should be instructed upon.

22 THE COURT: Well, do you have the second page?

23 MR. STANTON: No, I didn't bring it up with me,
24 Your Honor.

25 THE COURT: All it says is "*Evans* never

1 objected to the adequacy of these instructions and we..." So
2 I don't know what their holding was.

3 MR. STANTON: That's the only portion of the --

4 THE COURT: Do you want to get that for me,
5 Mr. Anderson? 112 Nevada 1172.

6 MR. STANTON: I don't read that instruction to
7 stand for the proposition of the sentence that is squeezed
8 in between there, between the first and the third that is
9 contained in the State's stocks.

10 THE COURT: Well, I don't know. It depends.
11 If they upheld this instruction, if they upheld the giving
12 of an instruction that says "Any desire you, the jury, may
13 have to extend mercy to the defendant, which a jury believes
14 is a basis for imposing sentence less than death, may be
15 considered a mitigating factor."

16 I don't think there's anything wrong in telling
17 them mercy is a valid consideration.

18 MR. STANTON: Once again, I think we get back
19 to the point of how you do it, where you do it. And first
20 of all, do you say mercy in the mitigating instruction?

21 THE COURT: I guess it depends on what the
22 Supreme Court -- in this case it seems to imply that they
23 did do a little bit more of a laundry list. I'd like to
24 find that. It's a Clark County case out of 1996. It says
25 the jury was instructed concerning mitigating circumstances

1 presented by *Evans*, the defendant. Additionally, the judge
 2 said, "The mitigating circumstances, what I've read for your
 3 consideration, are given only as examples of some of the
 4 factors you may take into account."

5 Sounds like they did do that format that we
 6 talked about earlier.

7 MR. STANTON: I don't recall reading it when I
 8 read before and after that whether they articulated, because
 9 our Supreme Court very rarely does add as exhibits to the
 10 actual instructions. It's my guess, I guess, that the
 11 instructions were on the designated mitigating evidence.
 12 But I don't recall them specifying.

13 THE COURT: Well, we're off that. I've already
 14 moved on. But the question is whether or not we're going to
 15 allow for an instruction with regard to the mercy.

16 MR. STANTON: Right. When you get away from
 17 sentence one and three on their proposed instruction, those
 18 are drawn directly from the State's instructions. What
 19 difference is this injection of the mercy instruction as
 20 mitigation evidence in the sentence number two?

21 THE COURT: Of course you agree they can argue
 22 mercy.

23 MR. STANTON: Absolutely they can argue mercy.
 24 I would think that in a death penalty case, that that would
 25 be incumbent upon counsel to do. The State certainly won't

1 address the topic.

2 THE COURT: I'm going to allow for a
3 modification of the second paragraph to include the mercy
4 language.

5 MR. BOSLER: Thank you, Your Honor. Do you
6 want to wait for the *Evans* case?

7 THE COURT: Well, unless they -- if they didn't
8 uphold the mercy language, I'll change my mind.

9 *Evans* has 49 headnotes.

10 MR. BOSLER: How many?

11 THE COURT: Forty-nine.

12 MR. BOSLER: Specific mitigators?

13 THE COURT: Headnotes.

14 Counsel approach, please.

15 (Bench conference between Court and counsel off
16 the record.)

17 MR. BOSLER: The reason I offered that
18 instruction, Your Honor, is because I think *Evans* stands for
19 the proposition that mercy is a valid consideration. I
20 offered it in this instruction because I think it's most
21 appropriate in the context of what we term an antisympathy
22 instruction, because I think if that's a valid statement of
23 law, it really needs to be put up very closely to this
24 antisympathy instruction, because I think Nevada is really
25 an antisympathy state. So that's why I inject the sentence

1 there.

2 THE COURT: Mr. Stanton?

3 MR. STANTON: Well, Your Honor, I'm a little
4 confused. The mercy instruction counsel says is he wants to
5 get it next to an antisympathy instruction. The
6 antisympathy instruction has been repeatedly upheld by the
7 Nevada Supreme Court, and the rulings regarding the
8 antisympathy doesn't mean that it has to have some sort of
9 modification.

10 What it says is that the antisympathy
11 instruction must be read in conjunction with all others.
12 And the jury must be properly instructed. And they cite to
13 the language of they can use any factors they consider as
14 mitigation. And that they're instructed into the proper
15 process of the deliberation. What I would call the double
16 weighing process that exists in the state of Nevada.

17 If the jury is instructed in that fashion
18 properly so, the antisympathy jury instruction is proper in
19 and of itself, it doesn't need any mercy instruction
20 appurtenant to it to soften it in any way to make it legal.

21 The problem with the mercy instruction, at
22 least in relying on the authority of *Evans*, is that it was a
23 jury confronted with a question of what is mitigation. We
24 haven't reached that point with this jury. That definition
25 may be very easily ascertained by this jury in the

1 instructions already given. So I think *Evans* and the
2 instruction which was a supplemental instruction isn't
3 necessary to give at this point because it's adequately
4 contained in other instructions.

5 THE COURT: Well, the instruction in *Evans* that
6 included the language with regard to mercy was Jury
7 Instruction No. 16, which was in the issued packet of
8 instructions. The jury requested a further definition of
9 what was mitigation. And that mitigation instruction was
10 given as a supplemental instruction. But mercy was in the
11 original packet.

12 I don't think that where it is sandwiched in
13 between these is necessarily the best place for the
14 definition. The Supreme Court has placed it and approved of
15 its placement with mitigation evidence. And so if the
16 defense wants the mercy instruction and if they're relying
17 on *Evans*, I think we should give the instruction that was
18 given in *Evans* that was approved, and I think that's a
19 cleaner way than modifying the stock instruction.

20 So, Mr. Bosler, do you have the *Evans* case in
21 front of you and do you have the instruction in front of
22 you?

23 MR. BOSLER: Excuse me? Counsel was talking to
24 me.

25 THE COURT: Do you have the *Evans* case in front

1 of you and the instruction?

2 MR. BOSLER: Yes.

3 THE COURT: So do you want that instruction?

4 MR. BOSLER: Yes, Your Honor.

5 THE COURT: Then the instruction as it's
6 provided by the State will be given without mercy, and we
7 will add another mitigation instruction pursuant to *Evans*.
8 Right?

9 MR. BOSLER: Yes.

10 THE COURT: "When you retire to consider your
11 verdict, you first must determine." Okay. That's offered
12 by the State. The defense has offered two alternate
13 instructions. "In order to find that an aggravating
14 circumstance exists, your verdict must be unanimous." And,
15 "In order to impose the sentence of death, all jurors must
16 agree on that sentence."

17 "If they disagree it must be discharged in a
18 panel of judges."

19 While you're looking at those two as
20 alternatives, does the defense want your mercy instruction
21 marked or are you happy with the *Evans* instruction?

22 MR. BOSLER: As long as the Court is willing to
23 give that statement, "mercy is a valid consideration," we're
24 satisfied, Your Honor.

25 THE COURT: Okay. So we have three possible

1 ending instructions and that is, "When you retire, in order
2 to find and in order to impose."

3 Do you have all those, Mr. Stanton?

4 MR. STANTON: I've got the three "in order to
5 find," "in order to impose." And then "when you retire,"
6 yes.

7 THE COURT: "When you retire to consider your
8 verdict."

9 MR. STANTON: Yes, I have those three.

10 THE COURT: I think the first two were offered
11 by the defense.

12 MR. STANTON: The shorter versions are the
13 defense offered. The "when you retire" was the State's, I
14 believe.

15 THE COURT: Mr. Bosler, are you asking for
16 these instructions in addition to the longer version by the
17 State or in lieu of the longer version?

18 MR. BOSLER: Both, Your Honor.

19 THE COURT: It's either in addition to or
20 instead of.

21 MR. BOSLER: Your Honor, I think that unless
22 there's a separate instruction indicating a single juror can
23 establish the existence of the mitigating circumstance, I
24 think that should be included in the longer instruction
25 offered by the State.

1 I'll withdraw the instruction that says "if
2 they can't be unanimous, a panel of judges will decide the
3 case."

4 THE COURT: We have "When you retire to
5 consider your verdict, you first must determine whether the
6 State has proven beyond a reasonable doubt that an
7 aggravating circumstance or circumstances exist in this
8 case, and whether a mitigating circumstance or circumstances
9 exists in this case. A verdict form has been provided to
10 you for this purpose."

11 Counsel, I think you need a period there. It
12 isn't really for the State, for them to determine if the
13 State has proven beyond a reasonable doubt whether a
14 mitigating circumstance or circumstances exist in this case.

15 MR. BOSLER: Also I think it confuses the
16 burden of proof, Your Honor, because we list separate
17 burdens of proof for those two things. Now it's run
18 together.

19 MR. STANTON: I don't have any problem breaking
20 that sentence up, Your Honor. Just tell me the language the
21 Court wants.

22 THE COURT: I'd kind of like the defense to
23 choose it. You know what you want to say?

24 MR. BOSLER: I would put after line three the
25 word "exist," I would insert my instruction and add a

1 separate paragraph for mitigating instructions. And then go
2 to line seven.

3 THE COURT: Mr. Stanton, I have, "During
4 deliberations you will have all the exhibits. Your verdict
5 must be unanimous." I got that, but it's also contained in
6 the longer version. So I think that was from you, from the
7 State, the shorter version. So do you want to withdraw that
8 one?

9 MR. STANTON: How does it start?

10 THE COURT: "During the deliberations you will
11 have all the exhibits which were admitted into evidence
12 during the trial and during this hearing. These written
13 instructions and forms of verdict."

14 MR. STANTON: Okay, I have that one.

15 THE COURT: I don't think we need that one and
16 the long one. Seems to be duplicative.

17 MR. STANTON: I agree, Your Honor.

18 THE COURT: So now we're down to Mr. Bosler's
19 one instruction and the State's long version. Mr. Bosler's
20 requesting that we read it as follows: "When you retire to
21 consider your verdict, you must first determine whether the
22 State has proven beyond a reasonable doubt that an
23 aggravating circumstance or circumstances exist in this
24 case." Insert, "In order to find that an aggravating
25 circumstance exists, your verdict must be unanimous. In

1 other words, all jurors must agree that an aggravating
2 circumstance has been proven beyond a reasonable doubt.

3 "However, a single juror may establish the
4 existence of a mitigating circumstance. Mitigating
5 circumstances can be established if any juror finds that
6 some evidence has been provided as to their existence."

7 I'm not sure the word "their" is right. "A
8 verdict form has been provided to you for this purpose."

9 New paragraph: "Based upon your findings and
10 the verdict, you must then determine whether the defendant
11 should be sentenced to death," et cetera.

12 Next paragraph: "During your deliberations,
13 you will have all the exhibits which were admitted. Your
14 verdict must be unanimous. As soon as you agree upon a
15 verdict, have it signed by your presiding juror."

16 I think we can delete that from this. We also
17 have, "When all 12 of you have agreed upon a verdict, the
18 foreperson should sign and date the same and request the
19 bailiff to return you to court."

20 I don't know which one you really want for that
21 last sentence.

22 MR. GREGORY: We would change the word "their"
23 to "its existence." That's on the insert.

24 THE COURT: Okay.

25 MR. STANTON: My problem with the defense's

1 proposed paragraph, Your Honor, is it's cumulative. First
2 of all, the sentence, "However, a single juror may establish
3 the existence of a mitigating circumstance" is already
4 contained on that lengthier instruction, line 15, saying,
5 stating "your verdict must be unanimous."

6 THE COURT: Wait. You lost me.

7 MR. STANTON: A single juror.

8 THE COURT: If you tell them their verdict has
9 to be unanimous, why is it cumulative to -- isn't it true
10 that any one juror can find a mitigating circumstance?

11 MR. STANTON: Can find a mitigating
12 circumstance?

13 THE COURT: Right.

14 MR. STANTON: Sure.

15 THE COURT: And then they have to weigh it.
16 And then they all have to agree if they want to find the
17 aggravator outweighing the mitigator.

18 MR. STANTON: The direction to the jury about
19 how to consider aggravating and mitigating circumstances is
20 already contained in another instruction. We don't have
21 them numbered yet, but I can use it by --

22 THE COURT: Want to go with, "The State has
23 alleged aggravating circumstances"?

24 MR. STANTON: I have that instruction. But --

25 MR. BOSLER: I don't it offered in any other

1 instructions.

2 THE COURT: What?

3 MR. BOSLER: I don't have it in any of the
4 other instructions we've agreed upon.

5 MR. STANTON: The instruction that says "The
6 mitigating circumstances which I have read for you."

7 THE COURT: That's Evans.

8 MR. STANTON: No, Your Honor. It reads, "The
9 mitigating circumstances which I have read to you for your
10 consideration are given as examples of some of the factors
11 you may take into account as reasons for deciding not to
12 impose a death sentence on the defendant.

13 THE COURT: Right. That's exactly Evans.

14 I had it paperclipped. I missed that. That's
15 the cite we were talking about in Evans. It's the exact
16 same first line.

17 MR. STANTON: Correct. But when you said
18 that's Evans, it's not the instructions as you were stating
19 in Evans in its entirety.

20 THE COURT: Right, in its entirety.

21 MR. STANTON: Any one of them may be sufficient
22 standing alone to support a decision that death is not the
23 appropriate punishment in this case.

24 THE COURT: Which is the non-italicized part of
25 Evans.

1 MR. STANTON: Correct. So I don't understand
2 what "however a single juror may establish the existence of
3 a mitigating circumstance" as to the instruction they're
4 just giving. Not only that, but in consideration of the
5 entirety of the next paragraph at line seven through 12,
6 that is, "you're not supposed to just merely weigh."

7 MR. BOSLER: Your Honor, it's a separate
8 instruction on burden of proof and whether it has to be
9 unanimous. It's a totally different instruction. It's
10 necessary in a capital case.

11 MR. STANTON: We already explained to them the
12 burden of proof. That's explained in two instructions: the
13 definition of reasonable doubt and that the State has the
14 burden of proving the aggravating circumstances. So why
15 it's -- now the explanation is that it's a separate
16 instruction regarding the burden of proof, so what? We
17 already have them.

18 THE COURT: Okay. Let's look at this, see if
19 it will work. "When you retire to consider your verdict,
20 you must first determine whether the State has proven beyond
21 a reasonable doubt that an aggravating circumstance or
22 circumstances exist in this case. Then the jury must
23 determine whether a mitigating circumstance or circumstances
24 exist in this case. A single juror may establish the
25 existence of a mitigating circumstance. Mitigating

1 circumstances can be established if any juror finds its
2 existence. A verdict form has been provided to you for this
3 purpose.

4 "Based upon your findings and the verdict, you
5 must then determine whether the defendant should be
6 sentenced to death, life," et cetera.

7 "During your deliberations you will have all
8 the exhibits," et cetera, and then the last sentence, rather
9 than "your verdict must be unanimous," because that gets a
10 little confusing with the first paragraph, we revert to the
11 original format which is "When all 12 of you have agreed
12 upon a verdict, the foreperson should sign and date the
13 same."

14 MR. BOSLER: Your Honor, has the Court deleted
15 the language that "the mitigating evidence can be found if
16 some evidence has been provided"?

17 THE COURT: Right. I'm using the language "a
18 single juror may establish the existence of a mitigating
19 circumstance," which is true. And for the verdict form,
20 that's true. "Mitigating circumstances can be established
21 if any juror finds its existence." It doesn't have to -- it
22 isn't an issue -- the juror can find its existence and say I
23 think it's a mitigating factor that he has black hair and
24 that has to be considered by the jury. It may not make a
25 difference, but I think that's the state of the law.

1 MR. STANTON: Your Honor, if that's the case,
2 if the Court wants to instruct it, the State would request
3 that the previous instruction that I was citing to, the
4 mitigating circumstances, that that first paragraph be taken
5 out, then.

6 THE COURT: I'm sorry, which one was that?

7 MR. STANTON: Instruction begins "the
8 mitigating circumstances which I have read for you."

9 THE COURT: That's the *Evans* instruction?

10 MR. STANTON: What you're calling the *Evans*
11 instruction, I guess.

12 THE COURT: I do call it that, because although
13 you have *Bishop*, it's the first line and the last line of
14 the instruction that was approved in *Evans*.

15 MR. STANTON: It's the one from *Bishop* as well.
16 So they may have modified it. And it is not the instruction
17 in its entirety as given in *Evans*.

18 THE COURT: Do you know, *Bishop* of course was
19 before *Evans*?

20 MR. STANTON: Correct.

21 THE COURT: And so *Evans*, you think the
22 italicized language in *Evans* is a modification of the *Bishop*
23 instruction?

24 MR. STANTON: I don't know whether they did
25 that in Clark County, whether they consider that a

1 modification of the *Bishop* instruction. I know this
2 instruction was approved in *Bishop*.

3 THE COURT: Are you sure this instruction is
4 verbatim from *Bishop*?

5 MR. STANTON: I don't know if it's the verbatim
6 one from *Bishop*. All that I'm saying, Your Honor, is that
7 that first paragraph is duplicitous from what you've just
8 added in the instruction that we just gave.

9 THE COURT: Well, not really. What we're
10 talking about here is the procedure the jury needs to go
11 through, not the weight of evidence or what can be
12 considered. And it's very difficult to go through the
13 procedure and indicate to the jury that when any one of them
14 finds a mitigating circumstance, they need to consider it
15 unless -- it's very difficult without getting bogged down in
16 the language. The jury will become confused about what
17 we're really trying to tell them. The instruction that
18 you've offered, you start with "you must first determine --"

19 MR. STANTON: Correct.

20 THE COURT: "-- whether the State has proven."
21 Certainly that's duplicative. We've already told them
22 before that they have to decide beyond a reasonable doubt
23 that an aggravating circumstance exists. We've told them
24 that in other instructions. So it is duplicative, but the
25 purpose of doing it is to give them a format of what

1 procedure, which steps to go through. At least that's why I
2 thought this instruction was being offered.

3 MR. STANTON: I agree with the Court that it's
4 indeed outlined the deliberative process in the second
5 weighing process that occurs in the state of Nevada.

6 I don't agree with the Court that the
7 modifications via the defense has offered adds anything to
8 the deliberative process in outline form. It merely
9 restates what's previously contained in other instructions.
10 I mean, the deliberative process is simple. Aggravation is
11 beyond a reasonable doubt. Do you find any mitigators?

12 THE COURT: But the question is, who finds
13 mitigators? Does the jury have to find the mitigators?
14 Does the entire jury have to agree on those mitigators or
15 can only one juror say, I find this mitigator? And I think
16 it may be in the instructions, but that is such a
17 significant issue in this, in all death penalty cases, that
18 if the defense is asking me to give it, I will give that
19 portion of it. I'm not going to give all the rest of it but
20 I will give that portion of it.

21 MR. STANTON: I would just submit that if we
22 were doing this final instruction as the deliberative
23 process, it should remain as that. If counsel wants to add
24 or the Court wants to add a sentence back into the
25 instruction that speaks of mitigating evidence, that's

1 properly where it should be.

2 THE COURT: Why are we putting "you have to
3 find beyond a reasonable doubt unanimously that an
4 aggravator exists"? If we've already told them that once,
5 why do we have to tell them about it again?

6 I agree we do. But why would we? If your
7 logic were correct, we should only tell them once and only
8 one place; why would we have to tell them again here?

9 MR. STANTON: Well, because like I'm saying
10 before, Your Honor, you're outlining the deliberative
11 process. The finding that you have that "one juror alone is
12 sufficient enough to find a mitigator" is not part of the
13 deliberative process. That is part of how they analyzed
14 mitigating evidence. If that's the case, that's where it
15 should go.

16 THE COURT: I disagree. I think it is part of
17 the deliberative process, because unless the jury knows
18 during their deliberative process that any one juror's
19 position on a mitigator can be considered by the entire
20 jury, then they aren't going through the deliberative
21 process appropriately.

22 MR. STANTON: Okay.

23 MR. GAMMICK: May I raise one other concern
24 here, Your Honor?

25 THE COURT: Sure.

1 MR. GAMMICK: It comes down to semantics.
 2 You're not saying what this instruction says. I was sitting
 3 here trying to figure out why it was bothering me. The way
 4 this instruction is written, it says "a single juror may
 5 establish the existence of a mitigating circumstance." That
 6 sounds pretty solid. That sounds like one juror says this
 7 is a mitigator, that's it. It's a mitigator.

8 What you're saying and what the state of the
 9 law is is that they may present one for consideration by the
 10 rest of the jury. So I think language here definitely needs
 11 to be changed, because even in the next sentence we come
 12 right back and say mitigating circumstances can be
 13 established if any juror finds that evidence has been
 14 provided as to its existence. So again we're coming in very
 15 solid that these are established. They're there and there
 16 is no discussion or weighing or deliberation or anything
 17 else. And I think the language needs to be changed, and
 18 then I see what the Court is saying.

19 THE COURT: Do you have some ideas on how we
 20 can do that?

21 MR. GAMMICK: I'm sorry, I couldn't hear you.
 22 Mr. Gregory was saying something.

23 THE COURT: Do you have some ideas on how we
 24 could do that?

25 MR. GAMMICK: I think we come up using language

1 that "a single juror may present a mitigating circumstance
2 for consideration by the jury" or something along that line.
3 "Mitigating circumstances can be considered if any juror
4 finds that the evidence has been provided as to its
5 existence." I think that's the state of the law.

6 Any juror can say his hair is black, that's a
7 mitigator, all of them consider it. But the way we say it
8 here, if anyone brings it up, in fact, it's in existence,
9 they have to weigh it.

10 THE COURT: I understand your position. I see
11 it can be misread. That's not what I intended. I'm trying
12 to take the language you gave me. You're suggesting a
13 single juror --

14 MR. GAMMICK: May present a mitigating
15 circumstance for consideration -- for consideration I
16 believe is the language I've presented.

17 THE COURT: Mitigating circumstance can be
18 considered if any juror finds that the evidence has been
19 provided as to its existence.

20 MR. GAMMICK: That would be for the last
21 sentence, Your Honor. I think both sentences need to be
22 reworked to take the absoluteness -- I can throw that word
23 out here this time of night -- take the absoluteness out of
24 what these say. A single juror may present the existence of
25 a mitigating circumstance for consideration. Mitigating

1 circumstances can be considered if any juror finds some
2 evidence has been provided as to its existence.

3 MR. BOSLER: I think what that's going to do is
4 confuse things. If a juror believes they can present it to
5 the rest of the jury, and the rest of the jurors don't
6 agree, then it doesn't exist. Juror A says, I think this
7 evidence exists, what do you guys think? No, it doesn't.
8 No, it doesn't.

9 THE COURT: Be careful, Mr. Bosler, because
10 Mr. Stanton is going to stand up and say exactly that,
11 that's why, Judge, I don't want you to give me anything like
12 that. So you don't want that.

13 MR. BOSLER: No.

14 MR. GAMMICK: They object to doing it that way,
15 this way. They object to both, so we scrap it. We don't do
16 it. We get on with the instructions the way they've been
17 for years.

18 MR. BOSLER: This is my offered instruction,
19 Your Honor. I'm agreeing to this.

20 THE COURT: We're kind of off the path, because
21 I've modified the one you offered.

22 MR. BOSLER: You put it in the other
23 instruction.

24 THE COURT: And I tried to modify it. But I
25 agree with Mr. Gammick now that he's called my attention to

1 the wording. I agree that it could be misinterpreted. So I
2 will give an instruction if you request it that allows for
3 the state of the law to be considered by the jury, and that
4 is that any one juror can present a mitigating circumstance
5 for consideration by the jury.

6 But if you don't want that, you want it just in
7 the format that you've offered it, then I'm not going to
8 give it to you, the format, because it's kind of confusing
9 the way we've got it.

10 MR. BOSLER: For the reason I stated, I
11 think I've made an offer to the Court the way I put it down.
12 I think if the Court adopts the District Attorney's
13 position, then you could have a majority of the jurors
14 negating what one juror thinks is mitigating evidence.

15 THE COURT: Do you have a copy of what you want
16 to offer? It's okay if it has markings on it.

17 MR. BOSLER: It starts "In order to find --"

18 THE COURT: Mine is really marked up. We
19 better mark yours, unless the State has one that isn't
20 marked up.

21 MR. STANTON: Mr. Gammick is marking it up as
22 we speak, Your Honor.

23 MR. GAMMICK: Part way through the process
24 already here, Your Honor.

25 THE COURT: So you want me to mark the

1 instruction "In order to find," and I'm going to consider
2 that you're offering it without any of the blue marks as
3 though it had been typed in its original format?

4 MR. BOSLER: One was a typographical error.

5 THE COURT: "Its." With the "its" change.

6 Okay, we'll mark it next in order for the defense.

7 THE CLERK: Defense Offered Instruction O.

8 THE COURT: Now, we still have a problem with
9 this last instruction, gentlemen. We have O in its format,
10 I said I won't give O the way it's offered. We've got the
11 State's instruction which has not been numbered or marked,
12 which begins, "When you retire to consider your verdict."
13 And we have the State's offered instruction, "When all 12 of
14 you."

15 Maybe we'll get further if we start at the back
16 end and work our way up. Does anybody have a problem with
17 changing the last paragraph of the State's offered
18 instruction to be "When all 12 of you have agreed upon a
19 verdict"?

20 MR. GAMMICK: May I offer a suggestion?

21 THE COURT: Yes.

22 MR. GAMMICK: That maybe now that we have an
23 idea -- first of all, the first paragraph we already know
24 mixing the two aggravators and mitigators together in one
25 sentence doesn't work, so we know we're going to have to

1 separate those out. There's been a suggestion made to put
2 those in separate paragraphs. We know that the Court wants
3 to give some language that's embodied in the rejected
4 Defendant's O, not that instruction, but some of that
5 language in there.

6 Can we, since we're not meeting until 10:15 in
7 the morning, how would it be, since this seems to be the one
8 last hang-up instruction, to rework this and then present it
9 to the Court? I don't know, both parties can rework it,
10 present both versions. I think we'll be a lot closer than
11 we are right now.

12 THE COURT: Sounds good to me. I'd like to
13 use, "When all 12 of you have agreed" rather than
14 "unanimous" as the last paragraph. The State gave me two.
15 You gave me the traditional "When all 12 of you have agreed
16 upon a verdict."

17 MR. GAMMICK: Make that the last paragraph of
18 this instruction we're talking about.

19 THE COURT: Or take the last paragraph out and
20 use that one. I don't care which one. I was just worried
21 about using the verdict "must be unanimous" while we're also
22 telling them about some other things that they can do.

23 MR. GAMMICK: So the Court wants to take what's
24 normally the last one, "When all 12 of you," and just
25 replace the last paragraph of the one we're talking about

1 now with that instruction?

2 THE COURT: Or delete the last paragraph on the
3 one you're talking about now and use the last instruction as
4 we normally do.

5 I don't care which way you do it.

6 Okay. Good. Thank you, Mr. Gammick.

7 The defense has offered -- we do have one
8 other: "Mitigating evidence is not offered as a defense."
9 The defense has offered that.

10 MR. STANTON: I didn't get any authority for
11 this instruction.

12 THE COURT: I don't have any authority either.
13 But I do have *Evans* and I have *Evans*, the Supreme Court
14 supporting the instruction in *Evans*, which defined
15 mitigating evidence as well as the extra language with
16 regard to mercy. And I've indicated I'm going to give the
17 *Evans* instruction. So do you want me to mark this,
18 Mr. Bosler, or do you want to withdraw?

19 MR. BOSLER: I believe there's language in
20 *Evans* that indicates that mitigation isn't offered to lessen
21 the offense. If you're going to give some instruction that
22 reflects that language --

23 THE COURT: "Mitigating circumstances are
24 things that do not constitute a justification or excuse of
25 the offense in question but which in fairness and mercy may

1 be considered as extenuating or reducing the degree of moral
2 culpability."

3 MR. BOSLER: If the Court is willing to give
4 that instruction, I'll withdraw mine.

5 THE COURT: The Supreme Court said that's okay.
6 So -- all right. Have you looked at the verdict forms?

7 MR. STANTON: I'm sorry, Your Honor?

8 THE COURT: It's late, I know it is. This is
9 as painful for me as it is for counsel, not to mention the
10 court reporter.

11 Verdict forms. Any objection to the proposed
12 verdict forms?

13 MR. BOSLER: May I have a moment?

14 THE COURT: Yes.

15 MR. BOSLER: Your Honor, we'll submit a
16 separate instruction indicating that the statutory
17 aggravators the Court has allowed us to offer in individual
18 instructions and a catchall one that says the jury, yes or
19 no, they found other evidence in mitigation, and then I
20 think they can come to the ultimate point, the weighing
21 question offered by the State.

22 THE COURT: So you want a different verdict
23 form?

24 MR. BOSLER: Yes. We'll offer -- it's probably
25 better to offer the mitigators on the same verdict form

1 rather than a separate verdict form.

2 THE COURT: So you want -- are you thinking
3 about putting the verdict form that finds aggravators?

4 MR. BOSLER: Yes.

5 THE COURT: Then instead of "The jury further
6 finds that any mitigating circumstances do not outweigh,"
7 you want me to actually delineate the mitigating ones they
8 found, is that what you're saying?

9 MR. BOSLER: I don't know how you could have
10 effective appellate review if the Court doesn't know what
11 type of mitigation they considered. And I could put it just
12 as a box, if they find other mitigating evidence, that's the
13 way the Court wants me to present the specific instruction.

14 THE COURT: Do you have one? Do you have what
15 you're talking about or is this just something that you're
16 going to prepare tonight?

17 MR. BOSLER: This will all be prepared.

18 THE COURT: Counsel approach.

19 (Bench conference between Court and counsel.)

20 THE COURT: Counsel, go ahead and put together
21 your proposed format for jury instructions for the verdict
22 forms and the proposed H that needs to be retyped.

23 We'll be in recess until tomorrow morning.

24 (Recess taken at 7:55 p.m.)

25

STATE OF NEVADA,)
)
COUNTY OF WASHOE.)

WE, DENISE PHIPPS and KAREN YATES, Certified Shorthand Reporters of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That we were present in Department No. 4 of the above-entitled Court and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of our stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 4th day of October, 1999.

Denise Phipps

CERTIFIED DENISE PHIPPS, CCR No. 234
I, _____, Clerk of the Court, do hereby certify that the foregoing is a true and correct transcription of the stenotype notes of the proceedings entitled herein, and that the same were taken by the said Denise Phipps, a Certified Shorthand Reporter of the Court, in and for the County of Washoe, State of Nevada, on the 4th day of October, 1999.

Karen Yates

CERTIFIED KAREN YATES, CCR No. 195
I, _____, Clerk of the Court, do hereby certify that the foregoing is a true and correct transcription of the stenotype notes of the proceedings entitled herein, and that the same were taken by the said Karen Yates, a Certified Shorthand Reporter of the Court, in and for the County of Washoe, State of Nevada, on the 4th day of October, 1999.

FILED

Code 4185

OCT 06 1999

AMY HARVEY
By: *M. Stone*
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-oOo-

THE STATE OF NEVADA,

Plaintiff,

vs.

SIAOSI VANISI,

Defendant.

Case No. CR98-0516
Dept. No. 4

ORIGINAL

TRIAL - VOLUME 11
October 5, 1999
Reno, Nevada

APPEARANCES:

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The Defendant:

SIAOSI VANISI

Reported by:

DENISE PHIPPS, CCR No. 234
KAREN YATES, CCR No. 195

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RENO, NEVADA, TUESDAY, OCTOBER 5, 1999, 10:40 A.M.

-oOo-

(Whereupon, the following proceedings were held in open court, in the presence of the jury.)

THE COURT: Counsel stipulate to the presence of the jury?

MR. STANTON: The State will so stipulate.

MR. GREGORY: So will the defense, Your Honor.

THE COURT: You may call your next witness.

MR. GREGORY: Kathy Peaua.

(One Witness sworn.)

KATHLEEN PEAUA

called as a witness on behalf of the Defendant,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

Q Could you state your name.

A Kathleen Peaua.

Q Is it Kathleen, did you say?

A Kathleen.

Q With a K?

A Yes.

Q Spell your last name.

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1 A P as in Paul, e-a-u-a.

2 Q Ms. Peaua, you're not Polynesian, are you?

3 A No.

4 Q Caucasian?

5 A Yes.

6 Q I'm going to call your attention to January of

7 1998. First of all, do you know a person named George

8 Tafuna or Siaosi Vanisi?

9 A Yes.

10 Q Is he present in the courtroom today?

11 A Yes.

12 Q Would you point to where he's seated and

13 describe what he's wearing.

14 A I can't see. Greenish blue jacket and an-off

15 white shirt and a tie.

16 MR. GREGORY: May the record reflect the

17 identification?

18 THE COURT: The record will so reflect.

19 BY MR. GREGORY:

20 Q Where were you living in January of 1998?

21 A At 1645 Sterling Way in Reno, Nevada.

22 Q Did there come a time when Siaosi Vanisi came

23 to your home?

24 A Yes.

25 Q Approximately, if you could give us a time

1 frame, how long before the murder of Sergeant Sullivan?

2 A I'd say about a week.

3 Q Had you known Siaosi Vanisi prior to his coming
4 to visit your home?

5 A Yes.

6 Q Did he strike you -- how did he strike you when
7 you saw him?

8 A The first time?

9 Q Yes, ma'am.

10 A That was in the summer of '95. And he came
11 with his wife and his only one son was born at that time.
12 And I thought he was the funniest person I had ever met in
13 my life.

14 Q Was he unhygienic?

15 A Not at all.

16 Q Unkempt?

17 A Not at all.

18 Q Did he pay particular attention to the way he
19 dressed, the way he presented himself to people?

20 A Definitely.

21 Q How about when you saw him in January of 1998,
22 was there a difference?

23 A Two completely different people.

24 Q Describe the person you saw in January 1998.

25 A He was almost a recluse -- he was very

1 withdrawn. Very to himself.

2 I'd say almost antisocial.

3 Q Let me ask you this: Were drugs being used in
4 your home at that time?

5 A Yes.

6 Q And were they being used by Mr. Vanisi?

7 A Yes.

8 Q What kind of drugs were being used?

9 A On Sterling Way, I watched him smoke marijuana
10 and he was taking an abundance of small white pills that he
11 carried in a plastic bag.

12 Q Do you know whether the marijuana was laced or
13 not?

14 A I wouldn't know that.

15 Q You would know what laced means, don't you?

16 A Yes.

17 Q Tell the jury what laced marijuana means.

18 A From what I understand is that laced marijuana
19 would mean that there was another substance involved or used
20 with the marijuana; that it's not just marijuana, that
21 there's something else involved with it, some other -- from
22 what I understand, it's a chemical.

23 Q Angel dust, speed?

24 A Anything, yeah.

25 Q How about his sleeping habits, what were his

1 sleeping habits like?

2 A I never saw him sleeping for that entire week.
3 For the entire time he was ever in my presence or in the
4 evenings that he was at our home, I never once saw him
5 sleep.

6 Q Did you find him bizarre?

7 A Very.

8 MR. GREGORY: Pass the witness.

9 THE COURT: Mr. Stanton?

10 CROSS-EXAMINATION

11 BY MR. STANTON:

12 Q Did you marry into the Peaua family?

13 A Yes.

14 Q And who did you marry?

15 A I married Tavake Peaua.

16 Q And can you tell me who was living at 1645
17 Sterling in January of 1998?

18 A Myself, Tavake Peaua. My daughter, Fuka Peaua;
19 my son Vea Peaua; my father-in-law, Mani Peaua; my
20 mother-in-law, Alisi Peaua; my brother-in-law, Moa Peaua; my
21 other brother-in-law, Mana Peaua; Niola Manu, Folau Manu,
22 Paosi Manu, Pula Manu, Saili Manu and their uncle; I don't
23 know how to pronounce his name.

24 Q Out of all these people, how many are children?

25 A Five.

1 Q What are their ages?

2 A At the time two, four, 10, 11 and 12, or 10, 11
3 and 13, something around there.

4 Q Who was using the drugs in the home besides
5 Mr. Vanisi?

6 A No one.

7 Q Just him?

8 A Yes.

9 Q And he was openly doing it in the home?

10 A He was doing it right outside the home in a
11 vehicle.

12 Q And you saw this?

13 A Yes.

14 Q Do you remember how many times you saw him use
15 drugs?

16 A Every moment he had a chance to go outside, it
17 seemed.

18 Q How many times is that, that you saw?

19 A On an average of two to three times a day.

20 Q You saw him two to three times a day do this?

21 A Yes.

22 Q And each time you saw him use marijuana and
23 take pills?

24 A Yes. And there was also alcohol.

25 Q Saw him drink alcohol?

1 A Yes.

2 Q Is that in the home or outside the home?

3 A That was outside the home.

4 Q Do you remember when Sergeant Sullivan was

5 murdered?

6 A Yes, I do.

7 Q Do you know what day it was?

8 A I believe it was, I apologize, January 12th.

9 Q Did you see Mr. Vanisi use drugs that day?

10 A Yes.

11 Q What time that day did you see him use drugs?

12 A About 10:30 in the evening.

13 Q 10:30 in the evening?

14 A Yes.

15 Q And this is outside?

16 A Yes.

17 Q Do you know who Manaoui is?

18 A Yes.

19 Q Would it surprise you that Manaoui has

20 testified that he saw the defendant on Monday evening at

21 10:30 sleeping?

22 A No.

23 Q It wouldn't surprise you?

24 A No.

25 Q But you never saw him sleep?

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A No.

MR. STANTON: Nothing further.

MR. GREGORY: I have no questions.

THE COURT: You may step down.

MR. GREGORY: Renee Peaua.

THE COURT: You've been sworn previously.
You're still under oath. Go ahead and take the stand.

RENEE NANCY PEAUA

called as a witness on behalf of the Defendant,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

Q State your name.

A Renee Nancy Peaua.

Q Are you the same Renee Nancy Peaua that's
previously testified in these proceedings?

A Yes.

Q Ms. Peaua, I'm going to call your attention to
the testimony that you gave where you indicated that there
was no drug use when Mr. Vanisi was present with you. Was
that the truth?

A No.

Q Were you doing drugs?

A Yes. He was.

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1 MR. GREGORY: I have nothing further from
2 Ms. Peaua. No, I do have one other.

3 BY MR. GREGORY:

4 Q Were you afraid you were going to get in
5 trouble, Ms. Peaua?

6 A Yes.

7 MR. GREGORY: I have nothing further.

8 THE COURT: Cross?

9 CROSS-EXAMINATION

10 BY MR. STANTON:

11 Q Ms. Peaua, do you remember the oath you took in
12 this case? I guess you've taken it at least once in this
13 case, correct?

14 A Uh-huh.

15 Q Do you understand what that means?

16 A Yes, I do.

17 Q It means when you sit in that chair in a court
18 of law, you have to tell the truth. Do you understand that?

19 A Uh-huh.

20 Q So what you're telling me is that you haven't
21 told the truth in this courtroom?

22 A I probably didn't understand the question.

23 Q You didn't understand the question?

24 A Hu-huh.

25 Q Can you tell me when I can tell you're telling

1 the truth or not?

2 A When I'm in the courtroom. Because what he
3 specifically asked me was, "Did you know anyone on Sterling
4 Way, Rock Boulevard?" I thought he was meaning my family.
5 And the family on Rock Boulevard. He didn't specifically
6 say Pe. And that's when I said no.

7 Q So now your testimony is that Mr. Vanisi used
8 drugs?

9 A Yes.

10 Q You know that?

11 A Yes, because I saw him.

12 MR. STANTON: Nothing further.

13 MR. GREGORY: Court's brief indulgence.

14 REDIRECT EXAMINATION

15 BY MR. GREGORY:

16 Q Your fiancée is Teki Taukiuvea?

17 A Taukiuvea.

18 Q Did Mr. Taukiuvea indicate to you that he
19 didn't want to use Mr. Vanisi's marijuana?

20 A Uh-huh.

21 Q Why?

22 MR. STANTON: I'm going to object to that as
23 hearsay, Your Honor.

24 MR. GREGORY: Mr. Taukiuvea is outside, Your
25 Honor, and hearsay is admissible.

1 THE COURT: Then call Mr. Taukiueva.
 2 Sustained.
 3 MR. GREGORY: That's fine.
 4 THE COURT: Anything further, Mr. Stanton?
 5 MR. STANTON: No, Your Honor.
 6 THE COURT: You may step down.
 7 MR. GREGORY: Call Sateki Taukiueva.
 8 THE COURT: You're still under oath. Please
 9 retake the stand.

10 SATEKI TAUKIUEVA
 11 called as a witness on behalf of the Defendant,
 12 having been first duly sworn,
 13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. GREGORY:

16 Q Would you state your name for the record.

17 A Sateki Taukiueva.

18 Q Are you the same Sateki Taukiueva that's
 19 previously testified in these proceedings?

20 A Yes.

21 Q Mr. Taukiueva, you already identified
 22 Mr. Vanisi. The week before Sergeant Sullivan was killed,
 23 did you observe Mr. Vanisi using drugs?

24 A Yes.

25 Q What kind of drugs was he using?

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1 A Marijuana and speed.

2 Q It's my understanding you didn't want to share
3 his marijuana with him; is that correct?

4 A Yes.

5 Q Why is that?

6 A Because it was laced.

7 Q Did you know what it was laced with?

8 A Speed.

9 MR. GREGORY: I have nothing further.

10 THE COURT: Cross?

11 CROSS-EXAMINATION

12 BY MR. STANTON:

13 Q Mr. Taukiuvea, when you indicated that
14 Mr. Vanisi had marijuana that was laced with speed, how did
15 you know it was laced with speed?

16 A He told me.

17 Q Mr. Vanisi told you?

18 A Yes.

19 Q During all the times after he had used
20 marijuana and speed, did he know who you were?

21 A After he was using?

22 Q Yes.

23 A Yes.

24 Q He knew what he was doing?

25 A I don't know.

1 Q Well, did you see him after the times he used
2 drugs?

3 A Yes. Once.

4 Q Just one time?

5 A Yeah.

6 Q Did he know what he was doing afterwards?

7 MR. GREGORY: He's asking this witness to
8 speculate on what's going in the mind of another human
9 being.

10 MR. STANTON: I'm asking just this witness'
11 perception.

12 THE COURT: You can ask for specific
13 perceptions without --

14 BY MR. STANTON:

15 Q Did it appear that Mr. Vanisi knew what he was
16 doing?

17 A Not really.

18 Q What made you think that he didn't know what he
19 was doing?

20 A Just wasn't thinking straight.

21 Q What gave you the impression he wasn't thinking
22 straight?

23 A Just the way he was acting.

24 Q How was he acting?

25 A He was just acting weird.

1 Q How was he acting weird?

2 A Whatever weird means.

3 Q What was he doing that made you think he was
4 acting weird?

5 A He would like have a split personality. When
6 he was smoking, he'd just be a different person.

7 Q When he was out driving around with you Sunday
8 night wanting to kill a cop in Sparks --

9 MR. GREGORY: This is way beyond direct, Your
10 Honor. We're dealing with matters that were dealt with
11 during the guilt phase.

12 THE COURT: I don't know where exactly you're
13 going with that question. Why don't you finish the question
14 and I'll decide if it's objectionable.

15 BY MR. STANTON:

16 Q When you were out Sunday night driving around
17 looking for a cop to kill in Sparks, is that the time he was
18 under the influence?

19 A No.

20 Q So that was him normal, not under the influence
21 of drugs?

22 A Well, I didn't see him smoke it, but he could
23 have been smoking it.

24 Q But he wasn't acting like the split personality
25 that he was when you saw him that one time; is that correct?

1 A I don't know. It was very hard to tell.

2 MR. STANTON: I have nothing further of this
3 witness.

4 MR. GREGORY: No questions.

5 THE COURT: You may step down.

6 MR. GREGORY: Mele Maveni.

7 THE COURT: You've previously testified. You
8 may retake the stand. You're still under oath.

9 MELE MAVENI

10 called as a witness on behalf of the Defendant,

11 having been first duly sworn,

12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. GREGORY:

15 Q Could you state your name for the record.

16 A Mele Maveni.

17 Q Are you the same Mele Maveni that previously
18 testified in this courtroom?

19 A Yeah.

20 Q Ms. Maveni, I call your attention to my
21 cross-examination of you earlier last week. I asked you
22 about the fact that you made a statement that you testified
23 at the preliminary hearing and you testified at the first
24 trial and you never mentioned that the cop that Mr. Vanisi
25 wanted to kill was a white cop.

1 Do you remember me asking you those things?

2 A Yeah.

3 Q Why did you say it was a white cop?

4 A Because --

5 Q You're not going to get in trouble. Just tell
6 the truth. Tell the truth, ma'am. Somebody in this
7 courtroom tell you to say that?

8 A Yes.

9 Q Where is that person seated, point to him,
10 describe what he's wearing.

11 A He's -- (pointing).

12 Q Mr. Stanton?

13 A Stanton.

14 MR. GREGORY: I have nothing further.

15 MR. GAMMICK: May we approach, Your Honor?

16 THE COURT: Yes. Actually, I think it would be
17 better if you just stayed where you are.

18 Ladies and gentlemen of the jury, I'm going to
19 ask you to step out. We're going to have a hearing outside
20 your presence. During this hearing remember the advisement
21 that I've given you at all other breaks. It's your duty not
22 to discuss among yourselves or with anyone else any matter
23 having to do with this case. It is your further duty not to
24 form or express any opinion about the ultimate outcome of
25 this matter. You're not to read, look at or listen to any

1 news media accounts regarding this case and do not allow
2 anyone to attempt to influence you in any manner with regard
3 to it. If anyone should try to do so, please notify me
4 immediately. Go ahead and await us in the jury room.

5 (Whereupon the jury was excused.)

6 (Whereupon, the following proceedings were held
7 in open court, outside the presence of the
8 jury.)

8 THE COURT: Counsel, would you like me to have
9 the witness step outside?

10 MR. GAMMICK: No, Your Honor, I have numerous
11 questions for her.

12 THE COURT: Okay. Why don't you tell me what
13 you wanted to do. I don't know if you want to question her
14 outside the presence of the jury, take her on voir dire.

15 MR. GAMMICK: Yes. Right now the State has
16 been accused of suborning perjury and interfering with a
17 witness. So I have numerous questions to ask this young
18 lady, and then we'll talk about it, Your Honor, if you don't
19 mind.

20 THE COURT: You may proceed.

21 MR. GAMMICK: Thank you.

22 VOIR DIRE EXAMINATION

23 BY MR. GAMMICK:

24 Q Ms. Mavani, you've just testified in this court
25 that Mr. Stanton told you to say it was a white cop in this

1 courtroom. Didn't you just testify to that, ma'am?

2 A Yes.

3 Q And is that the truth?

4 Ms. Maveni, you're under oath to tell the
5 truth. You've taken that oath to God. Are you saying that
6 that's the truth?

7 A It wasn't like he told me to say it, but it was
8 like they didn't -- he didn't like -- to me it was like they
9 just said that he killed a white cop, he killed a white cop.
10 And I just said yes.

11 Q Ms. Maveni, you have testified in this
12 courtroom that Mr. Stanton told you to come into this
13 courtroom and say that you were told by Mr. Vanisi that he
14 wanted to kill a white cop; is that true or not?

15 MR. GREGORY: No, that's not what she said.
16 She didn't say he told her to come into the courtroom. She
17 said he told her that it was a white cop.

18 THE COURT: I know what she's just said. Now,
19 I think the question Mr. Gammick was relating was back to
20 the original testimony.

21 MR. GAMMICK: Is there an objection, to start
22 with?

23 MR. GREGORY: You bet. He's misleading this
24 witness.

25 MR. GAMMICK: Your Honor, I'm not talking to

1 Mr. Gregory. He's done this throughout the trial. I am
2 talking to the Court. If there's an objection, I would like
3 to have it stated so I know how to address it.

4 THE COURT: He said "misleading the witness."

5 MR. GAMMICK: Your Honor, if you will check,
6 I'll stand on the transcript of what she testified to at the
7 questioning of Mr. Gregory.

8 THE COURT: The question was, "Somebody in this
9 courtroom tell you to say that," by Mr. Gregory. The
10 witness said, "Yes." The question was, "Where is that
11 person seated? Point to him. Describe what he's wearing."
12 "He's -- (pointing)."

13 MR. GAMMICK: I believe it was right before
14 that line of questioning, Your Honor, when she actually made
15 the statement that somebody told her to say that.

16 It may have been afterwards, what did he tell
17 you to say.

18 THE COURT: Where we were, "He's," and she
19 pointed. Mr. Gregory said, "Mr. Stanton?" And she said,
20 "Stanton, ." "I have nothing further," is what Mr. Gregory
21 said.

22 MR. GAMMICK: There was some point in time
23 there, Your Honor, where she stated what she was told to
24 say.

25 THE COURT: Want to come look at it?

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1 MR. GAMMICK: It may have been when Mr. Gregory
2 started his question and he asked if she was told to say it
3 was a white cop.

4 The question I just asked -- Mr. Gregory just
5 talked about testifying at preliminary hearing and
6 testifying in this court and whether or not she was told to
7 say it was a white cop. I believe that's the question I
8 just asked.

9 THE COURT: I'm going to sustain the objection
10 on the grounds it's a compound question. I don't know which
11 part he's claiming that you were misleading, so it was a
12 compound question. There was a part about coming into the
13 courtroom, someone telling her to say something. So start
14 over.

15 MR. GREGORY: Your Honor, I can clarify my
16 objection. He's trying --

17 THE COURT: I found the reason. I sustained it
18 on the grounds it's compound because I don't understand it.
19 He can ask another question. You want another objection,
20 you make it contemporaneous.

21 BY MR. GAMMICK:

22 Q Did somebody tell you to come into this
23 courtroom and say that Mr. Vanisi said he was going to kill
24 a white cop? And that's yes or no, please.

25 A Just now, like asked me right now?

1 Q Did somebody tell you to come into this
2 courtroom and say that Mr. Vanisi said he was going to kill
3 a white cop? Yes or no, Ms. Maveni?

4 A No.

5 Q Didn't you just testify that someone did tell
6 you to come in and say he said he was going to kill a white
7 cop -- may I finish before I'm interrupted?

8 MR. GREGORY: I have a right to object.

9 THE COURT: Yes. What was your objection?

10 MR. GREGORY: He's again misleading this
11 witness. Nobody suggested that she was told to come in here
12 into the courtroom.

13 THE COURT: Overruled.

14 BY MR. GAMMICK:

15 Q Didn't you just testify that someone told you
16 to come into this courtroom and say that Mr. Vanisi stated
17 he wanted to kill a white cop?

18 A Yes.

19 Q So now you've said that you've said that, and
20 it's not true; it's a fact that that is not true, isn't it?
21 No one ever told you to say that?

22 A He said he wanted to kill a cop.

23 Q No one ever told you to come into this
24 courtroom and say that Mr. Vanisi said he wanted to kill a
25 white cop?

1 A Yes.

2 Q That's the truth?

3 A (Witness nodded head affirmatively).

4 THE COURT: Answer the question.

5 Excuse me, Mr. Gammick. What was the answer?

6 THE WITNESS: Yes.

7 BY MR. GAMMICK:

8 Q Did you ever meet with Mr. Stanton alone?

9 A Yes.

10 Q When did you meet with Mr. Stanton alone?

11 A Before I came to testify the last time.

12 Q Before you testified the last time, the last

13 time you saw Mr. Stanton, Ms. Mavani, isn't it true that

14 Mr. Crosby was there, investigator from the District

15 Attorney's Office?

16 A No.

17 Q Isn't it true Mr. Covington was there?

18 MR. GREGORY: I'm going to ask she be allowed

19 to answer.

20 THE COURT: Sustained.

21 Mr. Gammick, slow down. Let her finish the

22 answer.

23 THE WITNESS: He was there by himself in a room

24 with me.

25 ///

1 BY MR. GAMMICK:

2 Q What office were you in with Mr. Stanton?

3 A The witness room on the second floor, I think.

4 Q What date was that, Ms. Mavani?

5 A The last time I came to testify. I don't

6 remember what date that was.

7 Q Two weeks ago, three weeks ago?

8 A I think when it first -- the week where we

9 first started.

10 Q It's your testimony that Mr. Stanton saw you by

11 yourself?

12 A Yeah. He came in the office by himself.

13 Q Okay. Did Mr. Vanisi ever state in your

14 presence that he wanted to kill a cop?

15 A Yes.

16 Q Did Mr. Vanisi ever state in your presence that

17 he wanted to kill a white cop?

18 A I don't remember him saying white cop. But he

19 would say cop.

20 Q Did Mr. Vanisi in your presence state that he

21 hated white people?

22 A Yes.

23 Q And was that at the same conversation or at the

24 same time he said he wanted to kill a cop?

25 A Excuse me?

1 Q Was that during the same time that he said he
2 wanted to kill a cop?

3 A Yes.

4 Q What exactly did Mr. Stanton tell you to do in
5 this courtroom?

6 A When he came into the room and we were
7 talking --

8 Q I can't understand you, you're talking way too
9 low.

10 MR. GREGORY: He's interrupting this witness.
11 She's trying to answer.

12 MR. GAMMICK: I can't hear her, Your Honor.
13 That's all I'm telling her.

14 MR. GREGORY: Oh, give me a break.

15 THE COURT: Wait. Stop it. Mr. Gregory, one
16 more outburst like that and you and I are going to have a
17 problem. Do not talk back to me.

18 MR. GREGORY: I'm not going to --

19 THE COURT: Just sit down and calm down.

20 MR. GREGORY: I am calm, Your Honor. I just
21 want to make sure when he takes a shot at me that the Court
22 reacts in the same way.

23 THE COURT: I will react the same. I'm telling
24 him to slow down, too.

25 Now, Mr. Gammick, I heard the answer. If you

1 don't hear it, the proper method is to ask me, as you've
2 already indicated, tell me, "Your Honor, I'm sorry, I can't
3 hear the witness."

4 MR. GAMMICK: Very well, Your Honor. I
5 couldn't hear her.

6 THE COURT: The clerk will read back the answer
7 for you.

8 (Record read.)

9 THE COURT: Did you have any more to say?

10 THE WITNESS: Yeah.

11 THE COURT: Go ahead and answer the question.

12 THE WITNESS: I felt as if he didn't ask me.
13 He just like pointed it out. He said he wanted to kill a
14 white cop.

15 THE COURT: Could you hear that, Mr. Gammick?

16 MR. GAMMICK: Yes, I did hear that answer.

17 THE WITNESS: And I just said yes.

18 BY MR. GAMMICK:

19 Q So now you're also saying that Mr. Stanton
20 didn't ask you what you remembered or what you were going to
21 testify to?

22 A Yeah.

23 Q That's what you're saying?

24 A (Witness nodded head affirmatively).

25 Q Okay. Mr. Stanton ever tell you to tell the

1 truth in this courtroom?

2 A Yes.

3 Q And I've also told you that, too, to always
4 tell the truth, true?

5 A Yes.

6 Q What room did you meet in, Ms. Mavani?

7 A With Stanton?

8 Q Yes.

9 A In the witness room.

10 Q Is that the room with the long table, the
11 conference room?

12 A No. I think it's on the third floor. I'm not
13 sure.

14 Q Where did you go when you came to the District
15 Attorney's Office? Are you familiar with the main office,
16 the main desk?

17 A Is that with the long table?

18 Q The main desk, the place where you go up to the
19 ladies, where the main door is, where it says District
20 Attorney on the door.

21 A Yes.

22 Q Did you go to that room and then behind that,
23 or did you go to Victim Witness Center?

24 A Yeah, that's it.

25 Q Victim Witness Center?

1 A Yeah.

2 Q And you met with Mr. Stanton at the Victim
3 Witness Center?

4 A Yes.

5 Q Are you sure?

6 A I'm not sure which room. It's in the victim
7 witness, whatever.

8 MR. GAMMICK: May I have just a moment, Your
9 Honor?

10 THE COURT: Yes.

11 BY MR. GAMMICK:

12 Q Do you recall being in the conference room in
13 the main office, the District Attorney's Office, the one
14 with the long table?

15 A Yes.

16 Q And do you recall doing pretrials there?

17 A Yes.

18 Q And isn't it a fact that the first time you
19 ever mentioned white cop was in that room, during a
20 pretrial?

21 A I can't remember. You guys asked me so many
22 questions. I can't remember.

23 THE COURT: I couldn't hear that answer.

24 (Record read.)

25 BY MR. GAMMICK:

1 Q Do you want to think about it for just a
2 minute, see if you do recall?

3 A Nope.

4 Q No, meaning you can't remember?

5 A Yeah.

6 Q You can't remember being in the conference
7 room --

8 A I can remember that. But I can't remember all
9 of what I said. You guys asked me so many questions.

10 Q And you were asked questions about what
11 happened?

12 A Yeah.

13 Q And you were asked questions about any
14 statements you may have given before?

15 A Uh-huh.

16 Q I'm sorry, you have to answer yes or no.

17 A Yes.

18 Q And you were asked questions about what
19 Mr. Vanisi said?

20 A Yes.

21 Q And one of the questions you were asked was
22 whether or not Mr. Vanisi had said anything about killing a
23 cop?

24 A Uh-huh.

25 Q And it's a fact that you're the first one that

1 ever mentioned white cop; isn't that true?

2 A Yes.

3 MR. GAMMICK: That's all the questions I have
4 at this time, Your Honor.

5 THE COURT: Yes, you may inquire.

6 VOIR DIRE EXAMINATION

7 BY MR. GREGORY:

8 Q That meeting in the conference room, that's
9 after the meeting that you had had with Mr. Stanton
10 privately, isn't it?

11 A No, it's before.

12 Q Then after the meeting in the conference room
13 is when you talked to Mr. Stanton privately?

14 A Yes.

15 Q Again, why did you use the word "white,"
16 Ms. Mavani?

17 A I was telling them that when he would talk
18 about that white people should be killed for taking a lot
19 from the Polynesians, he would just go to killing of the cop
20 and then right there I was thinking white cop. And as they
21 were asking me the question, I just said white cop,
22 because --

23 Q But Mr. Vanisi, just so it's clear, never said
24 he wanted to kill a white cop?

25 MR. GAMMICK: Objection.

1 THE WITNESS: He never said.

2 MR. GAMMICK: To her knowledge.

3 THE COURT: Okay. That's fine.

4 THE WITNESS: He never said white cop. But as
5 he would talk about not liking the white people, then he
6 would just go on --

7 BY MR. GREGORY:

8 Q So you were putting the two together?

9 A Yeah, because he was saying it, you know. But
10 I never really remembered him say white cop. But talk about
11 killing a cop.

12 Q Ms. Mavani, did Mr. Stanton show you your
13 transcripts?

14 A I have my transcripts at home.

15 Q And you reviewed those and no place in those
16 transcripts do you mention white cop, do you?

17 A No..

18 MR. GREGORY: I have nothing further.

19 THE COURT: This is for purposes of voir dire
20 examination outside the presence of the jury.

21 Did you have more questions, Mr. Gammick, at
22 this stage?

23 MR. GAMMICK: At this stage, I don't believe I
24 do, Your Honor. We have the transcript. I am going to want
25 to clear -- I'm going to want to do my cross-examination, if

1 I may, in front of the jury to clarify this accusation that
2 was made by this person. And then we'll go from there.

3 MR. STANTON: Your Honor, I've got a bigger
4 problem with this. Number one, it's me. Number two, it's
5 in front of this jury. Number three is, what basis did he
6 have to elicit this testimony? In fact, what he's found out
7 today is he hasn't spent any time with this witness to find
8 out the content of her testimony.

9 The way he phrased the question and the context
10 is grossly misleading and it's attempting to suborn perjury
11 in front of this jury.

12 THE COURT: Counsel, at this stage in the
13 proceedings, I'm going to ask the witness to step out for a
14 few minutes.

15 Ma'am, you're going to be right back on the
16 stand in just a minute, but would you please await us
17 outside the courtroom.

18 MR. GAMMICK: Would you please instruct this
19 witness that she's not to have a conversation with anyone
20 about anything at this time?

21 THE COURT: Yes. Do we have Mr. Anderson?

22 Mr. Anderson, would you await with the witness
23 outside and be sure there's no conversations.

24 Ma'am, you're not going to talk about this with
25 anyone, no attorneys, no investigators, nobody. You stay

1 with Mr. Anderson. Don't talk about your testimony.

2 MR. GAMMICK: Your Honor, I join totally with
3 Mr. Stanton. I think this was highly inappropriate. This
4 information, if in fact it was some type of accusation to be
5 made at our office, could have been done outside the
6 presence of the jury and brought to this Court. To
7 grandstand in this courtroom like was done in front of this
8 jury on this case was totally unethical. It was totally
9 inappropriate, and I am going to ask for sanctions by this
10 Court on Mr. Gregory.

11 Secondly, we would like to be back in front of
12 the jury so that we can question this witness as I just did.

13 Thirdly, I would like an admonishment from the
14 Court to the jury that they're to disregard that evidence
15 and that this office was not involved in any inappropriate
16 conduct and we're not out to get this man with unethical
17 conduct. As I said, that was totally unethical, totally
18 inappropriate to be done in this courtroom.

19 THE COURT: What is the sanction you want me to
20 impose?

21 MR. GAMMICK: Your Honor, I don't believe we
22 can -- right at this moment, probably the same sanction I'm
23 asking on Mr. Vanisi, but I would like to have some time to
24 think about that, let the Court think about it. It's not
25 something that has to be done at this moment.

1 I've made my motion and my request and I think
2 it's something we can discuss once we get the more important
3 matter out of the way of finishing this trial.

4 THE COURT: Mr. Gregory, I'm inclined to leave
5 further argument on the motion to a time after this matter
6 is resolved, at least in terms of the jury deliberations.
7 Do you have any objection to that?

8 MR. GREGORY: I have no objections, Your Honor.

9 THE COURT: Now, counsel, with regard to your
10 motion -- that's the motion for holding either contempt or
11 sanctions or some sort of action against Mr. Gregory, right?

12 MR. GAMMICK: Yes, Your Honor. That can be
13 reserved until the end of the trial.

14 THE COURT: Now we need to deal with the issue
15 of your request for an admonishment or special instruction
16 to the jury. Do you have language, specific language you
17 want to utilize?

18 MR. GAMMICK: Not at this moment, Your Honor.
19 I believe maybe the first step will be to have the jury
20 listen to the testimony of Ms. Mavani, that she was not
21 correct when she made those statements; and then if we need
22 to, we can draft some language that needs to be given to the
23 jury.

24 I think they need to be admonished on this.
25 Obviously it's not true and just the manner it was handled,

1 as I've already stated, was totally inappropriate and it
2 should have never been done and could very well put the
3 State in a very bad position in this case. I'm not going to
4 request a mistrial because of this, because we're not going
5 to do this again, but I think the jury should be admonished
6 with respect to the conduct that was just done here and what
7 they were told.

8 MR. GREGORY: Wait a minute. I hear the
9 righteous indignation over here and I hear the accusations
10 against me. The only thing that this jury was told is that
11 Mr. Stanton led this witness to the point where she used the
12 term "white." That's the accusation.

13 THE COURT: We need to talk about --

14 MR. GREGORY: We previously --

15 THE COURT: We need to talk about what her
16 initial testimony was and I need to review that testimony
17 completely. That would come into a determination of whether
18 or not a special instruction should be given to the jury.

19 Mr. Gammick's motion now is to continue with
20 the testimony and he will provide a requested special
21 instruction in writing to the Court, and then we'll have a
22 hearing and you'll have an opportunity to review it.

23 MR. GREGORY: I'm going to make part of my
24 record here.

25 The Court will remember she testified in their

1 case in chief, out of the blue, she comes with "white cop."
 2 There's no record to reflect that she's ever used that term.
 3 No discovery that's been given to us to indicate. So maybe
 4 we should have sanctions and a contempt hearing for them on
 5 that issue.

6 Now let me finish.

7 MR. GAMMICK: Your Honor, if he's directing his
 8 comments at me again, again I'm going to be -- the comments,
 9 the proper way to conduct yourself in a courtroom is to
 10 address the Court. I am real tired of Mr. Gregory making
 11 direct comments to me and Mr. Stanton and making smart
 12 comments. Again, if he has something to say, I would ask
 13 the Court admonish him to the proper technique to be used in
 14 this courtroom.

15 THE COURT: Overruled. He was using the proper
 16 technique. He was addressing me. Sit down, please,
 17 Mr. Gammick.

18 MR. GREGORY: And the technique of attorneys is
 19 to try to turn the situation back onto the other side. And
 20 it seems that that's what's happening here.

21 She had testified in front of this jury,
 22 indicated that she had previously given statements and
 23 testimony but didn't use the term "white." And I think it's
 24 incumbent upon us when we find out that the reason she used
 25 the term "white," nobody suggested that she come in, that

1 they had told her to come in and perjure herself, that she
2 had used the term "white" because that had been used during
3 the interviews with her. It had been suggested to her, not
4 that she come in and perjure herself. But the word "white
5 cop" came up during the interviews with Mr. Stanton.

6 THE COURT: Mr. Gregory, I've already said
7 we're going to have a hearing on that issue. This is not
8 the proper time for it.

9 MR. GREGORY: I'm getting the bricks thrown at
10 me and I just want to make a record.

11 THE COURT: So the special jury instruction
12 that will be provided by the State will be provided in
13 writing. We'll have a hearing outside the presence of the
14 jury, make a determination as to what that instruction will
15 be. That will take place sometime this afternoon. With all
16 of this, I'm not sure we'll actually go to the jury today,
17 but we'll see. We will have to have that hearing before the
18 instructions are given.

19 At this time -- were those your only motions,
20 Mr. Gammick, the two?

21 MR. GAMMICK: I'm sorry, Your Honor.

22 THE COURT: I want to make sure I'm
23 addressing -- I turned off my mike. I didn't want the jury
24 to hear us. I wanted to be sure that I was addressing
25 everything that you had asked me to address. One is for

1 sanctions, two is for the special instruction. Was there a
2 third thing that you wanted?

3 MR. GAMMICK: Yes, I would like to do the
4 cross-examination of Ms. Maveni. I'd also ask, since
5 Mr. Gregory seems to continually try to diffuse the comments
6 that were made and the statements, that we take a short
7 recess at this time and that we be furnished in writing all
8 of the testimony of Mele Maveni in this courtroom today,
9 please, if that's at all possible. Before we resume.

10 THE COURT: Okay. Thank you. Would you just
11 give us a moment, please.

12 Counsel, the court reporter can prepare
13 Ms. Maveni's testimony in certified form, final form. It
14 will only take a few minutes, a few minutes, relatively few
15 minutes. I'm talking probably 15 or 20 minutes. I don't
16 know for sure. She has it. She has the ability to print it
17 out. But because of the nature of this case, I don't want
18 to use a rough draft of the transcript. So it has to be a
19 certified copy of the transcript. She will prepare it.
20 It's like an instantaneous transcript but it may take as
21 much as 15 to 20 minutes.

22 MR. GAMMICK: All I'm requesting is
23 Ms. Maveni's testimony, Your Honor.

24 THE COURT: Right. I just want to warn you it
25 could take a while. It may not.

I have admonished the jury. They know to be awaiting us. We can take our recess now. The court reporter will prepare the transcript.

MR. GAMMICK: Thank you.

THE COURT: Anything else?

MR. GREGORY: I would suggest maybe we go to an early lunch, Your Honor.

THE COURT: I think we can probably -- it's not going to take that long. It's very short and she has it. It's on my computer. It can be transferred onto my printer. It should be very quick.

Don't disappear. If you leave the floor, don't be gone longer than 15 minutes. Court's in recess.

(Recess taken.)

(Whereupon, the following proceedings were held in open court, in the presence of the jury.)

THE COURT: Counsel stipulate to the presence of the jury?

MR. GAMMICK: Yes, Your Honor.

MR. GREGORY: The defense would so stipulate, Your Honor.

THE COURT: Thank you. Ladies and gentlemen of the jury, our hearing outside your presence is requiring that we also prepare a transcript so the lawyers can review some things that have occurred. And we've been trying to

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get that done. We thought we could get it done pretty quickly. But we don't have the transcript ready and it's getting close to the noon hour, so I'm going to go ahead and let you leave for lunch. The lawyers will be working through lunch. So they will be prepared to go forward with the case at 1:30 when you get back. But I want to go ahead and let you leave the courthouse now. You'll be back in the courtroom at 1:30 hearing continued testimony in this case.

During the break, remember the admonition that you've received at all other breaks. It is your duty not to discuss this case among yourselves or with anyone else. It's your further duty not to form or express any opinion about the ultimate result in this case until the matter is finally submitted to you for decision. You're not to read, look at, listen to any news media accounts regarding the case. You're not to allow anyone else to attempt to influence you in any manner with regard to anything to do with this case. If anyone should make such an attempt to you, you should report it immediately upon returning to the courthouse to the bailiff.

Ladies and gentlemen of the jury, you may go now to lunch.

(Whereupon, the following proceedings were held in open court, outside the presence of the jury.)

THE COURT: Counsel, we were just having a problem with the formatting and getting it printed out between the court reporter's computer and my computer. So she's now -- she'll have it in just a few minutes. So if you want to hang around, she can give you the transcript very soon and then you can look at it over the lunch hour. And also I've ordered that the witness be held. She's in a jury room sequestered and we have provided lunch for her. So no one is talking to her and she's just in one of the other jury rooms down the hall.

MR. GAMMICK: Thank you.

THE COURT: That's the process we're utilizing and we'll have you all back. You might want to come -- I'm going to be here through lunch. You might, if you have anything you want to talk about outside the presence of the jury after you review the transcript, or anything else that you all think about, be sure you come back in plenty of time before the 1:30 time. I'd like to be on the record at 1:30 with the jury, with the witness. I'm here, find each other and get back to me before 1:30 if you want to put something on the record outside the presence.

MR. GREGORY: Heads up as far as time is concerned. We have two witnesses left. David Kinikini, shouldn't be too long, and Umu Tafuna, and there are some areas I don't think I have to go into with her. I can

probably foundationally indicate that she received a baby from Tonga and that sort of thing.

THE COURT: I still think we're going to be pushing it to try to get this to the jury today. I've got three witnesses at least and I'm not sure there aren't going to be more in rebuttal now. If it's too late in the day I'm not going to have you arguing this case at 5:00. So I don't know, we still have to talk about the jury instructions and we still have to deal with Mr. Vanisi's determination, we have to have a hearing outside the presence of the jury his determination with regard to testifying or not.

MR. GREGORY: I was just giving you a heads up.

THE COURT: I'm giving you all a heads up. I don't know if we'll go to the jury today after all. We'll be here through lunch if you need something.

Court's in recess.

(Noon recess taken at 12:00 p.m.)

RENO, NEVADA, TUESDAY, OCTOBER 5, 1999, 1:40 P.M.

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(Whereupon, the following proceedings were held in open court, outside the presence of the jury.)

THE COURT: Thank you. Please be seated.

Counsel, have you had an opportunity to review the partial transcript prepared?

MR. GAMMICK: Yes, Your Honor.

THE COURT: You have it?

MR. GAMMICK: Yes, Your Honor.

THE COURT: Are you ready to proceed?

MR. GAMMICK: Yes, Your Honor.

THE COURT: Mr. Gregory, are you ready to proceed?

MR. GREGORY: Yes, Your Honor.

THE COURT: Please bring the jury in.

(Whereupon, the following proceedings were held in open court, in the presence of the jury.)

THE COURT: Counsel stipulate to the presence of the jury?

MR. GAMMICK: Yes, Your Honor.

MR. GREGORY: The defense would so stipulate, Your Honor.

THE COURT: You may proceed with

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cross-examination.

MR. GAMMICK: Thank you.

CROSS-EXAMINATION

BY MR. GAMMICK:

Q Ms. Mavani, I would like to take you back to August 5, 1999, during Hot August Nights. Did you come to the District Attorney's office on that date?

A Yes.

Q And that was for a pretrial conference to talk about what you knew about this case?

A (The witness nods her head.)

THE COURT: You have to answer yes or no.

THE WITNESS: Yes.

BY MR. GAMMICK:

Q Do you recall going into the conference room at the District Attorney's office? The one with the long table?

A Yes.

Q Present in that conference room were Mr. Stanton and two other gentlemen?

A Yes.

Q That would be Mr. Crosby and Mr. Covington, sitting in the Court?

A Yes.

Q You recognize them?

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A Yes.

Q Had you been furnished with previous statements that you had made to police by Mr. Stanton?

A Yes.

Q And he gave those to you before you came to the District Attorney's office on that date?

A Yes.

Q You had a chance to review those to see what you had said a year-and-a-half before?

A Yes.

Q And at the time that you met in the conference room, did the four of you discuss your statement and what you were going to say in court?

A Yes.

Q Isn't it true that you were told during that time and other times that you met by several people in our office to tell the truth when you were in the courtroom?

A Yes.

Q Now, at that time you got talking about statements that Mr. Vanisi had made?

A Yes.

Q And when you talked about those statements, one of the statements you talked about was that he said he wanted to kill a cop?

A Yes.

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Q And then during that discussion the term "white cop" came up?

A Yes.

Q You are the first one to ever have said that term, aren't you?

A Yes.

Q So you said that, not Mr. Stanton or Mr. Crosby or Mr. Covington?

A Yes.

Q It was that Mr. Vanisi had stated that he wanted to kill a white cop?

A Yes.

Q A little later on, you went from that conference room to an area known as our victim witness area where a television set was at?

A Yes.

Q You were watching T.V. there? Did Mr. Stanton come in and talk to you at that time?

A Yes.

Q Didn't he tell you what areas he wanted to cover in the courtroom?

A Yes.

Q And he told you he wanted to cover the purchase of the hatchet, correct?

A Yes.

Q He wanted to cover being in the van and stopping so that Mr. Vanisi could kill a cop?

A Yes.

Q And he wanted to cover the fact that Mr. Vanisi said he wanted to kill a white cop?

A Yes.

Q And other things that you've testified to?

A Yes.

Q So it's true that at any time -- let me change that.

It's true that no one from the District Attorney's office ever told you what to say in this courtroom?

A Yes.

Q That's true?

A Yes.

Q Do you recall what you said when you testified in this courtroom on September 22? Do you recall exactly what you said? Again, you have to say yes or no, please.

A No.

MR. GAMMICK: May I approach, Your Honor?

THE COURT: You may.

BY MR. GAMMICK:

Q I would like to show you the transcript and ask you to read to yourself -- actually, I'm going to ask you,

start at line 13 and read through line 21, please. That's the September 22 transcript on page 663.

A Read it out loud?

Q Please.

A "Finally during the two-week time period --"

Q Could I interrupt you? Start with line 13, please.

A "By Mr. Stanton: Finally, during the two-week time period that you know Siaosi Vanisi, how many times did he tell you that he wanted to kill a white cop?

"He said it like practically every time we were together.

"How many times do you think that was over that two-week period?

"Practically every day."

Q That was your testimony in this courtroom on September 22, correct?

A Yes.

MR. GAMMICK: That's all the questions I have at this time, Your Honor. Thank you.

THE COURT: Redirect?

MR. GREGORY: Thank you, Your Honor.

///

///

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REDIRECT EXAMINATION

BY MR. GREGORY:

Q So in response, during the trial, to Mr. Stanton's question of, "How many times did Mr. Vanisi say he wanted to kill a white cop?" then you answered several times, right?

A Yes.

Q But the truth is, he never -- Mr. Vanisi never said he wanted to kill a white cop, did he?

A He didn't say "white cop."

Q All right. He said he hated white people?

A Yes.

Q And he wanted to kill a cop?

A Yes.

Q Two different things? And you put them together, didn't you?

A Yes.

MR. GREGORY: I have nothing further.

MR. GAMMICK: If I may, Your Honor?

THE COURT: You may.

Are you still referring to the September 22 transcript?

MR. GAMMICK: Yes, I am, on page 663 still, please. We need to clarify one point there.

///

RECROSS-EXAMINATION

BY MR. GAMMICK:

Q Mr. Stanton, according to the transcript, and if you recall, here in court was asking you the questions, correct?

A Yes.

Q And in the first sentence, he said, "Finally, during the two-week time period that you know Siao Si Vanisi, how many times did he tell you that he wanted to kill a white cop?"

A Yes.

MR. GREGORY: Exact same question, asked and answered.

MR. GAMMICK: The question is coming based on what Mr. Gregory just asked.

THE COURT: You didn't want to ask that question?

MR. GAMMICK: I was setting the foundation, Your Honor.

THE COURT: Overruled.

BY MR. GAMMICK:

Q Right there after the comma where it says, "How many times did he tell you that," "he" referring to Mr. Vanisi?

A Yes.

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Q Not to Mr. Stanton?

A Yes.

Q Yes. So it doesn't mean -- "he" doesn't mean Mr. Stanton; "he" means Mr. Vanisi?

A Yes.

MR. GAMMICK: Thank you. That's all I have.

FURTHER REDIRECT EXAMINATION

BY MR. GREGORY:

Q Mr. Vanisi never told you that, did he?

A No.

MR. GREGORY: Thank you.

MR. GAMMICK: That's all I have, Your Honor.

Thank you.

THE COURT: May this witness be excused?

MR. GREGORY: Yes, Your Honor.

THE COURT: Any objection from the State?

MR. STANTON: No, Your Honor.

THE COURT: You may step down. You are excused.

(The witness was excused.)

THE COURT: You may call your next witness.

MR. GREGORY: David Kinikini.

THE COURT: You are still under oath, sir. Go ahead and retake the stand.

///

DAVID KINIKINI

called as a witness on behalf of the Defendant,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

Q Would you state your name?

A David Muli Suliafu Kinikini.

Q Are you the same David Kinikini that previously testified in this matter?

A Yes.

Q Mr. Kinikini, I would like to ask you about your impressions of Mr. Vanisi when you saw him in Salt Lake City right before the police came to your house.

A His appearance to me seemed out of ordinary. His grooming, his hygiene, his clothing he was wearing. It's not the Pe that I was used to seeing.

Q Tell the jury the Pe that you were used to seeing.

A I was used to seeing a very clean-cut, well-dressed, clean, no facial hair.

Q Does the Pe that you knew, was he a religious man?

A When we was growing up, yes, I did know him at that point. Pe came to Salt Lake City for only two reasons.

One of them were for family, birthdays or funerals, weddings. The other was for general conference for the LDS church.

Q Would you consider him a devout member of your church?

A Yes, as we were growing up, I can say that.

Q Would you consider yourself, Mr. Kinikini, as a devout member of the church?

A Myself?

Q Yes.

A I think so.

Q The truth is, you love your church, do you not?

A I do.

Q I show you what has been marked as Exhibit 33-A. And I'm going to call your attention --

MR. GREGORY: I'm sorry, Your Honor. May I approach?

THE COURT: Yes.

BY MR. GREGORY:

Q Call your attention to the upper left-hand-side corner. Do you know the people displayed in the pictures?

A First Presidency of the LDS church.

Q What are their names?

A President Hinkley, President Monson, and President Faust.

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Q Who is this gentleman?

A It's a picture of Jesus Christ.

Q What does the First Presidency of the LDS church mean to you and other devout members of your church?

A First Presidency of the church meaning to me and other members of the church, they are the spokesmen here on earth. We believe President Hinkley to have the keys and authority to operate the functions and the other ordinances of the church.

His two counsels, President Monson and President Faust, are to assist him in the calling that he does have.

Q Does the church consider that they have some divine relationship with God?

A Yes.

Q If I was to tell you, Mr. Kinikini, that the Siaosi Vanisi that you knew pointed a gun at these people, including Jesus the Christ, and said that he wanted to kill all of them, how would that affect your recollection of the Siaosi, the devout Siaosi Vanisi that you knew?

A It would offend me quite a bit.

Q Was that the person you knew?

A No.

Q Inconsistent with that Siaosi Vanisi that you knew?

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A Excuse me?

Q Was that different from the Siaosi Vanisi that you knew?

A Yes.

MR. GREGORY: I have nothing further from the witness.

THE COURT: Cross-examination?

MR. STANTON: Thank you, Your Honor.

Court's indulgence for just a moment.

THE COURT: Certainly.

CROSS-EXAMINATION

BY MR. STANTON:

Q Mr. Kinikini, Exhibit 33-A, where is that photograph taken?

A That's in my living room.

Q In the home that you were living at the time the defendant arrived on January 14, 1998?

A Yes.

Q You don't live in that home anymore, do you?

A No, I don't.

Q The home was significantly destroyed by the fire he set in your home; is that correct?

A And by the sheriffs.

Q Tear gas?

A The sheriffs and everything, yes.

Q In fact, in that window in the center of the photograph is a hole where a tear gas canister was sent through your window; is that right?

A Yes.

Q At the time this man came to your home on January 14, 1998, did he know how you felt about the Mormon church?

A He did.

Q It was pretty well-known within your family how you feel?

A How I feel?

Q How you feel. Everybody knows how you feel about the church?

A Yes.

Q How about your brother, Vainga? In January of 1998, did he have the same beliefs that you do?

A He does have the same beliefs, but he was not as active.

Q Did anytime Mr. Vanisi, Siaosi Vanisi say to you while pointing a gun at Jesus Christ and at the Presidents of the Mormon church, saying, "I want to kill this white motherfucker, I want to kill this white motherfucker"? Did he ever say that to you?

A He never said that to me.

Q What would your reaction have been if he had

said that to you?

A Anything that came out of his mouth at that time, I didn't really take it too personal because of the way he was acting at the time. And so, if he did say it with me there, which he didn't, I think I wouldn't have taken it too personal just because of the condition that he was in.

Q But if one didn't know that, one wouldn't say that to you to offend you, correct?

A Excuse me?

Q If someone didn't know how you were going to react, they wouldn't say that to you because they would be afraid to offend you because of your beliefs in the church, correct?

A Yes.

MR. STANTON: Nothing further.

THE COURT: Anything further?

MR. GREGORY: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. GREGORY:

Q You were in a car with Mr. Vanisi when he started disparaging the Mormon church, were you not?

A I was not.

Q You were not in that car?

A No.

Q Who was in that car with him?

A On what occasion are you talking about?

Q In Salt Lake City, right before he was arrested.

MR. STANTON: Your Honor, object, unless Counsel can lay further foundation that the witness would know.

THE COURT: Sustained.

BY MR. GREGORY:

Q Were you ever in an automobile with Mr. Vanisi in Salt Lake City?

A I was, yes.

Q When was this?

A We drove from my place to an uncle of mine.

Q On January 14?

A Yes.

Q Who else was in the car?

A My brother, Vainga.

Q Anyone else?

A No.

Q Did he make any disparaging remarks towards the church at that time?

A Not while we were in the car.

Q When he got out of the car?

A When he got out of the car, he got into another

car.

Q And who was in the other car?

A My other cousin and his wife.

Q Did it come to your attention that he did indeed make those remarks?

A There were remarks made.

MR. STANTON: I would object and move to strike as hearsay.

THE COURT: Sustained. Stricken.

MR. GREGORY: That's enough. Thank you, nothing further.

THE COURT: Anything further?

MR. STANTON: Nothing further.

THE COURT: May this gentleman be excused?

MR. GREGORY: He may indeed.

MR. STANTON: Yes, sir.

THE COURT: You may be excused.

(The witness was excused.)

THE COURT: Call your next witness.

MR. GREGORY: Toeumu Tafuna.

THE COURT: Will the interpreter please come forward?

Ma'am, we have been told that you might need an interpreter to speak from Tongan into English for you.

THE WITNESS: I think I can do it, Your Honor.

THE COURT: Okay.

(One witness sworn.)

THE CLERK: Thank you. Please be seated at the witness stand.

TOEUMU TAFUNA

called as a witness on behalf of the Defendant,
having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

Q Would you state your name and spell your first and last name for the record, ma'am?

A My name is Toeumu Tafuna, T-o-e-u-m-u and T-a-f-u-n-a.

Q What relationship are you to Siaosi Vanisi?

A My relationship for him is my son.

Q You were actually, though, his blood aunt; is that correct?

A Yes.

Q And your sister gave you Siaosi in Tonga?

A Yes.

Q And she gave him to you because you could not have children; is that correct?

A No. Yes.

Q You have a skin condition and I asked you

earlier --

A Yes. You asked, it was happen over here. It didn't happen at the island. It was happen over here when I came to America.

Q There is no cure for it, is there?

A No.

Q Now, you came to America and you brought your son, eventually you brought your son Siaosi with you, did you not?

A No, I came here first to America. After about three years agos, then my son came back here to America. When the first time he came here, he don't even recognize me because it's a long time, years ago. When I come here, my sister tell me I have to take him, give him a bath, so he recognize me.

When I take him, I take him a bath. I felt that he feel he recognize me and my voice. Then she give me a hug. "Mom, I'm going to go with you, I'm not going to go --" she call her mom, the one she give it to me, Louisa. "I'm not going to stay, Louisa. I'm going to go with you" to his auntie's house.

Q So, he has two moms, a birth mom and yourself?

A Yes.

Q You're the one that raised him here in the United States?

A Yes, I'm raised him. I raise him since he was four months. Her mother give to me when he was four months.

Q Let me stop you there.

A Okay.

Q You've already indicated to the jury that your last name is Tafuna.

A Yes.

Q How did Siaosi Vanisi get the name George Tafuna?

A I give my name so he will realize I'm the one her mother. That's why I give it to him.

Q And he used that name in school?

A Yes.

Q And you were listed as Toeume Tafuna, mother of George Tafuna?

A Yes.

Q What kind of a son was George Tafuna growing up?

A He was grow up, he was a nice son.

(There was a pause in the proceedings.)

BY MR. GREGORY:

Q I'll ask again. What kind of a son was George Tafuna?

A The kind of son I know, he was real nice son for me. He never do anything problem for me at school or at

home. He try to help me at home. Because when I came here, my sister-in-law brought me over here so I can take care of my brother, because really sick. He's in a coma. Then I take care of my brother over here. Then I, after few years ago, then Siaosi bring -- Siaosi came over here to America and stay with me.

Q Did he help you take care of your brother?

A Yes, he help me a lot. When uncle was sick, when she was sick, she always ask me, "Mom, can I help you before I go to school?"

I say, "No, you have to go to school. Whenever you finish, you have to come and help me take care of uncle."

Sometimes he stay with me, if I'm busy. She was -- my brother having a feeding tube. Since he helped me, I teach her how to feed the feeding tube and she help me a lot to take care.

Q Mrs. Tafuna, did he ever refuse to help you?

A No, he didn't.

Q Did he ever get angry about helping you?

A No, he didn't. Sometimes he says, said he's kind of busy, he's got to do something. I said, "Okay, you have to do something. After that you have to come help me before you do something."

Q And he would help you?

A Yes.

Q He was a member of the Mormon church; is that correct?

A Yes, he does.

Q What is seminary, Ms. Tafuna?

A Seminary is like a Bible study. They have to go there like 5:00 o'clock. Auntie, usually in the mornings, he used to take her to the Bible study. Seminary is like a Bible study. Like one hours before they go to school.

Q So, Mormon kids that attend seminary get up very early to do that before they go to school; is that correct?

A Yeah. She have to wake up like 5:30 or 5:00 o'clock and get dressed. And after that, my auntie used to take her and lots of times up there. She take him to seminary. After that, don't have any right, see her to just walk there to the seminary. Or if he knows he was going to his uncle or one of the cousins, she drive so she can pick him up from at home.

Q Did he always go to seminary?

A Sometimes he oversleep and then she would call. Before -- before that, she was sleeping with his grandpa. And if his grandpa sometimes he wake him up, she cannot wake up, she could go to sleep and the time for the seminary is

late. Then I say, you know, "You're not going to go, stay home, then just go to school."

Q How was he as a student?

A Oh, he was a nice at school. He never have any problem for me to go to school or cut the school. She always go to school. I never have anything they call to have any problem for them.

Q Did you attend church with him --

A I do.

Q -- Ms. Tafuna? You did?

A Yes.

Q Was this a respectful boy that you were raising, Ms. Tafuna?

A Yeah, he does. Like I say before, he never do anything to make me angry of him and he make any problem for me because sometime, I tell, "If you don't agree with what I told you, you have to tell me you don't like that," what I teach him. But he want, before I start over here, I say you not going believe me because you can see him, how he is. But he is a real nice son for me.

I think all the mothers over here, sometimes my son, sometimes he have something, he don't do what I tell him, I think all the moms over here, they do. But after that, if he cannot do it, what I tell him to do, he say to me, "Mom, I'm sorry I don't do what you tell me to do, but

I'm going to do it for you." He always say something, if he did not do what I tell him to do, she have to come and say to me, "I'm sorry, I don't do what you tell me."

Q And so he made it up to you?

A Yes, he always make up to me.

Q Was he -- throughout his school years, on through high school, was he neat and well dressed at all times?

A Yeah. He was well dressed sometimes, everything time. When she grew up, she wear a suit, something. When he grow up there, she like to dress up himself. Sometimes when he was grow up, later on I see him, he don't dress up.

I said, "You know, if somebody, a friend of the family saw you not dressed up like that, I think they say, 'Oh,' if you are not dressing nice." But he always, when he was small, he like dress himself nicely.

Q Thank you. Did there come a time when you started noticing a change in Siaosi? Like 1997? '96?

A Yeah, I do.

Q Did that shock you?

A When I saw him say, I thought he just only like he says to me, his sayings but before one of my uncle, my brothers call me and said to me, I had to be watch out my son. When she keeps talking to him, he says do the same

thing. And I say to him, "Okay, I'm going to talk to my son." I say she came, you know, Siasosi -- I call him Pe. You know, "My brother call and tell me he keep telling you something, but you just do just the same things he stop you. Don't do it."

Q Did that cause you concern, that he wasn't minding his uncle?

A Yeah, he mind his uncle. Before he never -- my uncle says for his sayings, but before when he talk to him, when Siasosi before when he was good, he never talk back. He never talk back to my uncle. But he do what his uncle tell him to do.

Q So you saw him changing? He was getting disrespectful? Is that what you're trying to say, Ms. Tafuna?

A Not respectful, but something like he kind of talking the way he dressing, something like that. It's make to me is, because I don't see him do it when he grow --

Q He was dressing a lot differently than you remembered?

A Yes, there was something I don't know. That's what I saw how he's dressing. It's not the Pe I raised. I saw him, she always dressed up nicely.

Q He would say things to you that didn't make sense?

A No, he never said anything to me that make sense. He just like the way I saw like he talking and --

Q Just chattering?

A Yes.

Q Okay. Was he disrespectful to members of the royal Tongan family?

A Yes, he was respect -- when he was moving to L.A. and then he have his first son, his second son and he called his auntie and said to auntie, "I'm going to name my son Moleni." And his auntie said, "Why you name your son to my father?"

And he said, "Because I remember my grandpa that his --" his auntie's father, "how he teach me to be with the Tongan Bible, he teaching me to do the nice thing.

I think that's a good thing he remember, something he do nice thing that he name his second son to his grandpa.

MR. GREGORY: I'm going to pass the witness at this point.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. STANTON:

Q Ms. Tafuna, when did your son, Siaosi Vanisi, leave to Los Angeles?

A He was leaving after the high school.

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Q After he graduated from high school?

A No.

Q What year was it?

A About one years ago, then he said he want to move to L.A.

Q About a year ago?

A Yeah.

Q Okay. You live in the Bay Area?

A Over here in Reno.

Q No, you live in San Francisco?

A Yes.

Q Prior to January 1998, when was the last time you saw Siao Si Vanisi?

A I saw Siao Si when she came to my niece wedding.

Q We've heard testimony that that was in July of 1997. Does that seem right to you?

A No.

Q When do you think it was?

A The only thing, I saw his kind of sayings when he come to my -- he's kind of sane, kind of run this way, go this way and he's talking. The way he's dressing, this the thing I saw him, his kind of things.

THE COURT: Ms. Tafuna? I'm not sure you understand the English words.

THE WITNESS: Oh, excuse me, Your Honor.

THE COURT: I'm going to ask the interpreter to come forward and ask the question in Tongan --

MR. STANTON: Thank you.

THE COURT: -- for the witness.

(The interpreter, Tui Finau, sworn.)

THE COURT: The court reporter will read back Mr. Stanton's last question.

(The record was read.)

(Through the Tongan interpreter.)

THE WITNESS: (Following translation.) Yes.

BY MR. STANTON:

Q How often did you see Siaosi Vanisi in 1996 through 1997?

A (Following translation.) She came like once a year on Christmas.

THE COURT: Ms. Tafuna, I will ask that you use the interpreter. I want to be sure that your answer is accurate. So, please let the interpreter interpret for you.

BY MR. STANTON:

Q How many times in 1996 to 1997 did she see Siaosi Vanisi.

A (Following translation.) I think one.

Q Did you ever see Siaosi Vanisi under the influence of alcohol?

A (Following translation.) No.

Q Did you ever see Siaosi Vanisi under the influence of drugs?

A (Following translation.) No.

Q Did you ever see Siaosi Vanisi use drugs.

A (Following translation.) No.

MR. STANTON: No further questions.

THE COURT: Mr. Gregory, do you have any further questions with the use of the interpreter?

MR. GREGORY: I think I will excuse Ms. Tafuna.

THE COURT: Thank you, ma'am. You may be excused.

THE WITNESS: Your Honor, can I talk to my lawyer, please? Over here?

THE COURT: Your son's lawyer?

THE WITNESS: Yes.

THE COURT: Yes, we will take a break in a few minutes and you can talk to him.

THE WITNESS: Okay.

(The witness was excused.)

MR. GREGORY: Your Honor, may we approach?

(Whereupon, a bench conference was held among Court and counsel as follows:)

MR. GREGORY: Your Honor, we are thinking about call Ms. Calderon for a prior consistent statement under 51.035 regarding the testimony, the cross, if you will, of

Deanne, that which suggested and implied to this jury that she may have fabricated her testimony regarding the wearing of superhero costumes or whatever it was.

Ms. Calderon, I make the offer of proof, Ms. Calderon talked to Ms. Vanacey in the spring of 1998 and elicited this same information. We feel that under NRS 51.035, we have the right to present a prior consistent statement to refute the implication that the prosecutor has left with this jury.

MR. STANTON: I don't know if the Court remembers the examination of Ms. Vanacey in this regard. The contention that the State cross-examined or elicited on cross-examination is merely the fact that she had never mentioned that to police during the entirety of the time that they had attempted to contact her and that she indeed confirmed that they had contacted her in an attempt to get her statement. It is improper to have a prior inconsistent statement intending to vouch with the Public Defender investigator.

It's not that the State suggested that she gave a prior inconsistent statement. It's that she never made a statement.

THE COURT: Are you going to argue that she made the statement up on the stand or is the argument of the State that she avoided telling the prosecution and the

police officers any of this?

MR. STANTON: That she failed to inform police officers and specifically detectives from the Reno Police Department when they went to her home and asked her to give her version of events.

MR. GREGORY: Well, the prosecutor misspoke when he said prior inconsistent. We are offering under 51.035 a prior consistent statement to refute the impression that he has left with this jury that Deanne Vanacey has just sprung this information on all of us.

MR. STANTON: I didn't leave the impression --

THE COURT: I can hear you.

MR. STANTON: -- that Ms. Vanacey sprung this on everyone. Obviously they didn't spring it on defense counsel.

MR. GREGORY: If he's not going to argue that that information is not true, it won't be necessary, Your Honor, to waste the Court's time.

MR. STANTON: I am certainly going to argue and call witnesses in rebuttal to reaffirm the fact that Ms. Vanacey had every opportunity in the world to speak to the police about her version of events and she elected not to.

MR. GREGORY: Then he's creating the situation that the statute contemplates.

THE COURT: Okay. 2(b).

MR. STANTON: It's not a recent -- counsel once again is going back to a recent fabrication. The State is not going to argue that it's a fabrication. It's merely the argument to this jury as to what weight to give that testimony of the witness.

I don't think it's adding anything to say that she said it to a Public Defender investigator sometime prior to trial. The testimony and the uncontroverted testimony from the witness herself is that she was given an opportunity to talk to the police and she rejected that opportunity.

THE COURT: Who do you want to call as a witness?

MR. STANTON: It would be David Jenkins. He will be testifying about a number of things in rebuttal. One of them is I'm going to ask him, because he is the one that personally went to Ms. Vanacey's home, what he told her he was there for and what Ms. Vanacey's response was to him.

MR. GREGORY: That implies --

THE COURT: I will let you call him. It goes to improper influence and motive, not recent fabrication. And the statute refers to improper influence or motive. I think you're going to argue motive.

MR. STANTON: Okay.

MR. GREGORY: So --

THE COURT: You can call her.

MR. GREGORY: I can call her.

Strategically I think I would like to bring Ms. Calderon on surrebuttal if they are going to do what they are going to do. I think she's more properly presented at that time.

MR. STANTON: Come on, Judge. If he's going to call a witness, he calls the witness.

THE COURT: Let's call her now. I don't want to play ping-pong.

(Whereupon, the following proceedings were held in open court, in the presence of the jury.)

MR. GREGORY: We call Ms. Calderon.

(One Witness sworn.)

THE CLERK: Thank you. Please be seated at the witness stand.

CRYSTAL CALDERON

called as a witness on behalf of the Defendant,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

Q Would you state your name and spell your first and last name for the record?

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A Crystal Calderon, C-r-y-s-t-a-l. Last name is spelled C-a-l-d-e-r-o-n.

Q You are the lead investigator for Siao Si Vanisi?

A Yes.

Q You work for me; is that correct?

A I work for -- yes.

Q You work for the Public Defender's office?

A Yes.

Q I call your attention to the spring of 1998. Were you the lead investigator on this case at that time?

A Yes.

Q Did you have an occasion to contact Deanne Vanacey, the wife of Siao Si Vanisi?

A Yes, Deanne Vanacey.

Q At that time did you have a conversation regarding Mr. Vanisi?

A Yes.

Q Did Deanne Vanacey indicate to you whether Mr. Vanisi had been wearing superhero costumes and that sort of thing at that time?

A Yes.

Q Exactly what did she say, Ms. Calderon, if you can remember?

A She was recounting an event or an incident when

they were taking the children to, I believe it was a Chuck E Cheese. He was wearing tights and some kind of superhero shirt and actually had a cape on. They had gone to Chuck E Cheese and he was entertaining the children. Actually, not just his own children. He was entertaining the other kids at Chuck E Cheese. She thought that he really had a -- I don't know, a high from that, almost.

Q Did she also indicate to you that he had been putting on women's leggings in the house?

A Yes, and outside of the house as well.

Q This is the spring of 1998?

A Yes, early spring.

Q Spring of last year?

A Yes.

MR. GREGORY: I have nothing further.

THE COURT: Mr. Stanton?

CROSS-EXAMINATION

BY MR. STANTON:

Q Did you dedicate your interview with Ms. Vanacey to a report, written report?

A You know, it's been so long and I have talked to her so many times, I don't recall.

Q That information was never provided to the police or to the prosecution in this case, correct?

A No, my reports go to my attorneys.

Q And those aren't given to the prosecution or to police?

A What our attorneys do with the reports, I do not know.

Q How about this report in this case? It was not given to the prosecution or the police.

A I do not know what has happened to that. I don't know if you receive it or what our attorneys do with that information.

Q Who would know that information?

A I believe our attorneys would know.

Q Mr. Gregory and Mr. Bosler?

A Uh-huh.

MR. STANTON: Nothing further.

REDIRECT EXAMINATION

BY MR. GREGORY:

Q Actually, Mr. Specchio was the attorney?

A Yes, I'm sorry. Mr. Specchio was the attorney at that time.

MR. GREGORY: I have nothing nothing further.

MR. STANTON: I have no further questions of this witness.

THE COURT: You may step down.

(The witness was excused.)

MR. GREGORY: Your Honor, that concludes our

witnesses.

THE COURT: Ladies and gentlemen of the jury, I would like you to excuse us for a few minutes in the jury room. During this break, remember the admonition I've given you at all of the breaks. I don't think it's going to turn out to be our afternoon recess. I would like to keep going, if at all possible. I have a little bit of work to do with the attorneys. It may turn out to be just a few minutes and you will be right back in the courtroom.

During the break, do not discuss among yourselves or with anyone else any matter having to do with this case. It is your further duty not to express or form any opinion regarding the guilt or innocence and the potential penalty in this case until it is finally submitted to you.

You are not to read, look at, or listen to any news media accounts regarding this case, and do not allow anyone to attempt to influence you with regard to it.

Please await us in the jury room.

(Whereupon, the following proceedings were held in open court, outside the presence of the jury.)

THE COURT: Mr. Vanisi, I previously told you about your right against self-incrimination and the fact that you may assert that right and not testify at your trial. You asserted that right in your guilt phase.

But I will allow you an opportunity to determine whether or not you wish to testify in this phase of the trial or not.

THE DEFENDANT: I want to make a statement. I do not want to testify.

THE COURT: Okay. By way of a statement, have your attorneys discussed with you the right of allocution? Is that what you are talking about?

THE DEFENDANT: One second, please? May I have a moment, please?

THE COURT: Certainly.

(The defendant conferred with his counsel.)

THE DEFENDANT: Yes, they have discussed the right of allocution.

THE COURT: So that is the kind of statement you would like to make? One that is not made under oath; is that correct?

THE DEFENDANT: That is correct.

THE COURT: Thank you, Mr. Vanisi. You may be seated.

The right of allocution will be afforded the defendant in this case. It will take place at the conclusion of all the evidence. So once you all have finished with your rebuttal and surrebuttal or whatever else is going on, there will be another hearing outside of the

presence of the jury, at which time the Court will go over the right of allocution with Mr. Vanisi and assure myself that he understands the ramifications of going outside of the parameters allowed by law. Once that has taken place, I will allow him to make a statement to the jury before they determine penalty.

I think it is appropriate that he make that statement before closing arguments. Does counsel have any objection to that procedure?

MR. STANTON: No, Your Honor.

MR. BOSLER: No, Your Honor.

MR. GREGORY: No.

THE COURT: Now, you have approximately three witnesses, Mr. Stanton?

MR. STANTON: One witness.

THE COURT: One witness?

MR. STANTON: Yes, Your Honor.

THE COURT: The defense have any witnesses? You don't know if you'll have any surrebuttal?

MR. GREGORY: Could have dozens. No, Your Honor.

THE COURT: Okay. I'm trying to get a timetable here about where we are going to go. We still have not finalized the jury instructions or the verdict forms.

Counsel have any estimate of how much time you would like to argue with regard to the instructions and the verdict forms?

MR. STANTON: I would say we are now at the point where we covered last evening, Your Honor. We are down to very little argument from the State. The State has argument regarding the one instruction that we were trying to massage last night and the argument relative to the request of defense counsel regarding the interrogatories on mitigation and the verdict forms.

MR. BOSLER: I think less than a half hour, Your Honor.

THE COURT: In looking at what we have left, I think it would be realistic to think that we can't begin closing arguments until 4:15, I would suspect. Because we have to do a lot of things outside of the presence of the jury. 4:15 is kind of late to start closing arguments on this kind of a case.

Counsel have a preference?

MR. BOSLER: We defer to the Court.

THE COURT: I couldn't hear that.

MR. BOSLER: We will defer to the Court, Your Honor.

MR. STANTON: State has no preference.

THE COURT: I'll give some thought and decide

what I'm going to do. Right now we need to move right into the prosecution case. I think we started late with the computer problems this afternoon. We can go forward into the prosecution case. How long do you think that will take, Mr. Stanton?

MR. STANTON: As far as the rebuttal case?

THE COURT: Yes.

MR. STANTON: It would be one witness. I imagine that the extent of the testimony will be around 15 minutes, 20 minutes.

THE COURT: Okay. We will do that before we take our afternoon recess.

Please bring the jury back in.

(Whereupon, the following proceedings were held in open court, in the presence of the jury.)

THE COURT: Counsel stipulate to the presence of the jury?

MR. STANTON: State will so stipulate.

MR. GREGORY: So stipulated, Your Honor.

THE COURT: The defense has rested. State have a rebuttal case?

MR. STANTON: Yes.

THE COURT: You may proceed.

MR. STANTON: State would call David Jenkins to the stand.

(One witness sworn.)

THE CLERK: Please be seated at the witness stand.

DAVID PHILIP JENKINS

called as a witness on behalf of the Plaintiff,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANTON:

Q Could you please state your name for the record?

A David Philip Jenkins, J-e-n-k-i-n-s.

Q Sir, how are you employed?

A I work for the City of Reno Police Department as a police officer.

Q And how many years have you been employed as a police officer?

A Twenty-three and a half.

Q And directing your attention to January of 1998, did you have occasion to be one of the primary detectives in the case that ultimately became State versus Siaosi Vanisi?

A Yes, sir, I did.

Q And the other primary detective was who?

A Detective Jim Duncan.

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Q Now, Detective Jenkins, approximately how many murder, homicide, and death investigations have you been involved in either as a primary detective or in a detective capacity?

A I can't provide an exact number, but roughly, I would imagine it's got to be between 80 and 100.

Q During the course of those investigations, do you have occasion frequently to interview people that are suspects in the crime of murder?

A Yes, sir.

Q Is part of your evaluation their state of mind and their ability to comprehend the interview process?

A Yes, sir.

Q I would like to draw your attention, Detective Jenkins, to a trip that you made to Los Angeles after the murder of Sergeant Sullivan. Do you recall going to Los Angeles in the investigation of this case?

A Yes, sir, I do.

Q Did you have occasion to contact the -- what had been represented to you to have been the wife of the defendant, Siaosi Vanisi, Deanne?

A Deanne Vanacey, yes, I did.

Q Where did you contact Ms. Vinisi, or Vanacey?

A In a suburb community that would actually have been northeast of Los Angeles proper.

Q And do you remember what month and year that was?

A It would have been a couple of months after January of 1998.

Q And did you advise her who you are and who you were with, employed with?

A Yes, I did.

Q Did you advise her as to why you wished to speak to her?

A Yes.

Q What did you tell her?

A Essentially I explained to her that as part of a thorough and complete investigation, I wanted to afford her the opportunity to provide input or background information regarding her relationship and knowledge of Mr. Vanisi and the circumstances involving his shared life and activities with her in the Southern California area.

Q When you went to Los Angeles, were you armed with the information that on January 29, 1998, Ms. Vanacey had telephoned Reno Police Department and talked to Sergeant Jeff Partyka?

A Yes, I was.

Q Can you tell the ladies and gentlemen of this jury what Ms. Vanacey's response was in Los Angeles when you advised her of the information you just testified to?

A She adamantly declined to participate in an interview or speak with me in any kind of official setting at all and requested that I leave her property.

Q Ms. Vanacey has testified in this proceeding that she did not speak to the police because she was afraid her words would be twisted around.

Are you aware of any communication that the Reno Police Department had had with Ms. Vanacey other than the January 28, 1998 telephone call that she made to Sergeant Partyka?

A No, sir, I am not.

Q Are you aware of any information whatsoever that would cause Ms. Vanacey any concern relative to this investigation and the contact of Reno Police Department with her that would give her concern about, quote, twisting her words around?

A I don't know what persons outside of law enforcement may have conveyed to her.

Q You weren't aware of any?

A No, I was not.

Q Detective Jenkins, I want to now fast-forward to what is commonly referred to in your parlance as an extradition proceeding or extradition of a person in custody. Were you involved in the physical extradition of Siaosi Vanisi from Salt Lake City, Utah, to Reno, Nevada?

A Yes, sir, I was.

Q Did there come a time, Detective Jenkins, that you had or were present when Mr. Vanisi made a series of statements to you at or near the airport in Salt Lake City?

A Yes. Yes, sir, I was.

Q What did Mr. Vanisi tell you during that time period?

A Well, he made a number of statements, a couple of which come to mind immediately.

Q Let me be more specific, since he made a number of them. Let me start off with, how was Mr. Vanisi physically at that time? Was he in custody?

A Yes, he was.

Q What items, if anything, were attached to his body that would indicate that he was indeed in custody?

A He was wearing leg manacles and essentially handcuffs with a longer chain that are worn around the ankles. A set of handcuffs or shackles around his wrists that were affixed to a belly chain to allow him to keep his hands in front but which would restrict his movement.

Q Did there come a time when Mr. Vanisi made a statement where he gestured and referred to the handcuffs that were around his wrists?

A Yes, he did.

Q What did he say?

A He motioned to his handcuffs by holding them up and said words very similar to, "My mother should be wearing these." And then he offered an explanation as to why he thought that she should have been wearing the shackles.

Q What was his explanation about why his mother should be wearing shackles along with him?

A He stated that he was unhappy that she had brought him from his native land of Tonga to this country. He stated that in Tonga, he would have had everything he needed. He explained that in Tonga, he would have had canoes for transportation, mangoes and all the food he needed, and essentially everything he needed for a complete and happy life.

And then he contrasted that with our society in this country, by stating that this was a capitalistic and competitive society, and went on to say that he had been held down by white people and that the only way to acquire wealth in our society was to either have been born into wealth, to have married into wealth, or to have stolen wealth. As he put it, as Cortez had done to the Incas.

Q Did he also make a statement about his life? Specifically a reference to his life as a teenager and what life he was living currently as a Tongan?

A Yes, sir.

Q What was that statement?

A He described his life as having been inverted. And went on to say that as a teenager and younger person, he had led a very straight and normal life. And that now in his later years, he was doing things differently. I think the words he used were, running around and having the time of his life.

Q Did there come a time, Detective Jenkins, while you were in Salt Lake City that you conducted an interview with Vainga Kinikini?

A Yes, sir. It was actually the evening preceding my contact with Mr. Vanisi and the extradition.

Q I would like to direct your attention to the transcript of that. Do you have a copy of that with you?

A Yes, sir, I do.

Q Sir, if you can refer to page 16 of that transcript.

A Yes, sir.

MR. STANTON: Court's indulgence for one moment?

THE COURT: Yes.

(There was a discussion between counsel.)

BY MR. STANTON:

Q Did there come a time when Mr. Kinikini described a series of events, gestures and statements made by Mr. Vanisi in his presence inside the Kinikini home?

A Yes, sir. You are specifically referring to Vainga Kinikini.

Q Yes. What Vainga Kinikini told you was done in his presence?

A Yes, sir.

MR. GREGORY: Your Honor, the prosecutor objected because I tried to elicit hearsay. Mr. Kinikini has been here several times. The prosecutor can put Mr. Kinikini up and talk about his own statement.

MR. STANTON: That's not an accurate statement to this Court, and Counsel should know better that it's not. May we approach?

THE COURT: Yes.

(Whereupon, a bench conference was held among Court and counsel as follows:)

MR. STANTON: Counsel has made the statement that if Mr. Kinikini was on the stand, I should have asked him the question. I would have been more than happy to ask him the question at that time, but Counsel objected. We have previously laid the record about that, that Mr. Gregory has no objection because he believes the underlying basis of the transcript is true and accurate. Now he said that right in front of the jury.

THE COURT: Is this the statement about pointing the gun?

MR. STANTON: Yes.

MR. GREGORY: Oh, I misunderstood. I don't have the transcript in front of me. I won't have any objections to that at all.

THE COURT: Okay.

(Whereupon, the following proceedings were held in open court, in the presence of the jury.)

MR. GREGORY: I apologize to the Court. I withdraw the objection.

THE COURT: Objection is withdrawn. You may proceed.

BY MR. STANTON:

Q Detective Jenkins, specifically the portion of the interview that you had with Vainga Kinikini regarding Mr. Vanisi's behavior, demeanor and statements at a certain time inside the Kinikini home, do you recall that? Basically it begins on page 16 of your transcript.

A Yes, sir, I do.

Q Prior to me asking you specific questions about what Mr. Vanisi did in the home, is there certain things about the content of what Mr. Kinikini told you that you are uniquely familiar with?

A I don't know that I'm uniquely familiar with, but there were certain references to a specific Christian religion with which I have some familiarity. I was raised

LDS. There was some references made to that specific Christian religion.

Q You said LDS. That would be -- is that an acronym for what?

A Commonly referred to as Mormon.

Q And there were references made by the defendant to Vainga Kinikini, that you knew some historical background as far as the terms that were used; is that correct?

A Yes, sir.

Q I would like to start specifically with a photograph that has been admitted in this case as Exhibit 33-A. I ask you to take a moment and look at that photograph.

A Yes, sir.

Q Do you remember the contents of that photograph?

A Essentially, sir, yes, I do.

Q And could you describe to the ladies and gentlemen of this jury what Mr. Vanisi did inside that home relative to the photographs that are on that wall and a weapon?

A Mr. Kinikini described Mr. Siaosi having in his possession and holding a firearm, a pistol, and described Mr. Vanisi making specific gestures with that firearm, specifically pointing the gun at some of the photographs or

pictures depicted in this photograph, which is a photograph of the interior wall of the living room of the Kinikini home.

Specifically, he claimed that Mr. Vanisi had pointed the gun at the picture or likeness of Christ and had stated that he hated all white people and that, in specific, he -- would you like a direct quote, sir?

Q Yes, if you would.

A He totally hated Jesus Christ. He said, you know, "Fuck Jesus Christ," you know. He pointed the gun at him. You know, "I'm going to kill him. I'm going to kill --" and then he indicated that Mr. Vanisi had pointed the gun at the photograph of the hierarchy, the current hierarchy of the Mormon church, including the president of the church who is often referred to in that religion as the modern day prophet.

He continued by saying, while pointing the gun at the prophet, "I'm going to kill --" And he pointed the gun at the prophets. "I'm going to kill that white man and that white man and that white man." And finally he got over to the picture of the Lamanite warrior and he stops and he goes, "That's my picture. That's who I want to be. That's who I want us to be, us Tongans. That's what we are. We are Lamanite warriors, you know. We need to take over. These people come to take our land. We belong here and, you

know, that's all these, you know, white people do is hold us down."

Q Now, the term "Lamanite warrior," are you familiar with that term?

A Yes, sir, in general terms.

Q Could you in general terms tell the ladies and gentlemen of this jury what a Lamanite warrior is historically?

A It makes reference to the beliefs held by members of the Mormon church that there had been a second coming of Christ to the Americas after the appearance described in the New Testament, and that during that visit to the Americas there had been native inhabitants of the Americas who were strong and righteous and they were referred to as the Lamanite people.

Q And how are the Lamanite warriors generally depicted in either -- I'm assuming it's probably only drawings or renditions. Can you describe that?

A Typically the ones I'm most familiar with show a dark-complected, strong, large in stature male, generally with long, flowing, dark hair and generally dressed in battle attire, armor and weapons.

Q At the bottom of page 16 of the transcript, does Mr. Vanisi indicate that he has put some time and effort into the thought process of this?

A Yes, sir.

Q How long did Mr. Vanisi tell Vainga Kinikini he had been thinking about his hatred of whites?

A He described doing research prior to that time and said that -- or described having done nine months of research on his roots and about the Lamanites and how they became, you know, what they are today and how they evolved.

Q If you would turn to page 17 of the transcript? If you could reference just generally the content, lines one through 21?

A He went on to say that --

MR. GREGORY: I object. He is not responding to the question.

MR. STANTON: I'll rephrase my question.

BY MR. STANTON:

Q If you could read to yourself generally the contents of lines one through 21, the subject matter. Tell me when you're finished.

Detective Jenkins, was the content or the subject matter at this juncture with Mr. Vanisi, he talked about his feeling towards his parents?

A Yes.

Q What was that?

A He made reference to how in doing this research, it had confirmed that he in fact hated all white

people and that they were responsible for the oppression, although I think the specific word was suppression as provided by Mr. Kinikini, and that his parents should have left him in Tonga and that way he would have known his roots better and would have grown up in a better environment, and contrasted that with having grown up in the suburbs of San Francisco where his deep hatred for white people had begun.

Q In fact, during that portion, just the portion I asked you to review, he makes repeated reference about how many times that he totally hates white people. It was done on numerous occasions?

A Several times.

Q Detective Jenkins, as a result of your investigation in this case, did you ever receive any information at any time from anyone that the defendant, Siaosi Vanisi, had at one time pretended or projected himself as being some sort of cartoon superhero?

A A cartoon superhero? Absolutely not. I do recall a reference being made allegedly by Mr. Vanisi that he wanted to hold himself up as the modern-day Tongan Robin Hood and that he wanted to rob from the white people and give to his Tongan people, and wanted to enlist other Tongans to aid him and that he would be the leader of that group.

Q Besides the Robin Hood reference and the