

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

ALISHA BURNS

Appellant,

vs.

THE STATE OF NEVADA

Respondent

CASE NO. 82686

D.C. CASE NO: 03C191253

APPELLANT'S APPENDIX VOLUME IV

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1 validate a 14 year-old girl getting sex trafficked by a 33 year old man.

2 THE COURT: I know where this is going.

3 MR. ABBATANGELO: And therefore keeping control of her.

4 THE COURT: Okay.

5 MR. ABBATANGELO: Also just to finish up, he did believe
6 she was a victim of the kidnapping and sex assault, which she -- Ms.
7 Burns refused to testify to. When she refused to testify, Mr. Guyman
8 [phonetic] did go get very upset, and that's when she was charged with
9 murder and that's in the time chronological.

10 THE COURT: She testified to that last time we were here.

11 MR. ABBATANGELO: And also that the judge in Ohio who
12 had agreed to the State of Nevada's request to send her out here, was
13 very specific and wanted Alisha, when she was 15, to be sequestered
14 from any law enforcement and communication, and that goes to
15 [indiscernible], what she had to say.

16 THE COURT: But how is Mr. Kohn going to testify to that,
17 because that's a hearsay statement, because I'm assuming he wasn't in
18 Ohio. So how does he know that this person said this and what hearsay
19 exception is bringing this in?

20 MR. ABBATANGELO: He brought it -- it's one of our
21 documents that is a court document that's been provided to us from
22 Ohio, and the State has it.

23 MR. HAMNER: I don't know what this document is.

24 MR. ABBATANGELO: It's the orders of transport, request by
25 Craig Hendricks.

1 THE COURT: No, I've seen that. We saw that when we were
2 here last time. What I'm saying is did the judge make some findings in
3 that order in regards to Ms. Burns being sequestered, because you're
4 saying the judge said this. I don't know how Mr. Kohn knows she said it
5 unless he went to Ohio and without the judge here that's a hearsay
6 statement, and I don't know what exception is going to allow Mr. Kohn
7 to testify.

8 MR. ABBATANGELO: I'll bet he had this, because this was in
9 the file we received.

10 THE COURT: I've seen the order that Mr. Hendricks sent to
11 Ohio requesting to get her back. Is that the order you're talking about?

12 MR. ABBATANGELO: No. This is a separate order from Ohio
13 that was given to us originally --

14 MR. HAMNER: I don't see any orders. Where in the order
15 does it state that the judge specifically says that she can't be around any
16 law enforcement?

17 THE COURT: Because that's my question, because Mr. Kohn
18 can't testify that she said that, because I don't even believe he has any
19 direct knowledge that she said it unless he went -- did he go to Ohio?

20 MR. HAMNER: Not that I'm aware of.

21 THE COURT: Okay. So I don't know how he knows that.
22 Because if she said it, I think it's absolutely -- if the judge said, it's
23 absolutely relevant to these proceedings. But I don't know without the
24 judge being here how Mr. Kohn knows that.

25 MR. ABBATANGELO: This is actually -- this order is actually

1 talking about the transport and let me grab the one that had Mr.
2 Hendricks.

3 THE COURT: Okay. Well Mr. Hamner, do you have a general
4 objection to Mr. Kohn testifying?

5 MR. HAMNER: From a number of things I heard, yes I do.
6 So I think number one, the personal opinion that he thinks she's a sex
7 trafficking victim is irrelevant.

8 THE COURT: Well, my question about that is if this is
9 something she told him, then we've got to have a discussion with her
10 about waiving privilege before he testifies to any of these things. If she
11 said that to him and she's willing to waive privilege, then he can
12 absolutely testify to that.

13 MR. HAMNER: I guess if he's offering -- I guess from my,
14 from what representations were made in the proffer, he said that Mr.
15 Kohn would say I believe she is a sex trafficking victim. His opinion is
16 irrelevant --

17 THE COURT: Well and I mean that's the first thing I got when
18 Mr. Abbatangelo said Mr. Kohn is going to say she's a victim of sex
19 trafficking and a victim of kidnapping, that's what I stated. But then at
20 the same time, because Mr. Kohn was her lawyer, she had some
21 discussions with him that I know we're not privy to, because they're
22 covered under the privilege.

23 So then I immediately went to -- if we're going to bring Mr.
24 Kohn, because if she said that, and I'm not asking Ms. Burns in any way
25 if she said that. But if she told Mr. Kohn that she had been kidnapped

1 and she felt like she had been trafficked, that's absolutely relevant to
2 these proceedings. But she would have to waive privilege in order for
3 him to testify to that, because everything she told him is covered under
4 the attorney client privilege.

5 I don't know if he's going to say based on my observations of
6 her this is what I believe, because I don't know how he's qualified to give
7 that opinion.

8 MR. ABBATANGELO: And let me also clarify a little bit, Your
9 Honor and Mr. Hamner, is that at the time in 2002, sex trafficking wasn't
10 viewed the same way as it is today, and that's why I should have
11 clarified that he believed that Ms. Burn was brought out here by Mr.
12 Kaczmarek. They had sex and that ties into her being an original, the
13 original reason for her to come to Nevada as a witness, not as a
14 defendant. The reason she was brought out here was she was a victim
15 in Kaczmarek's other case.

16 MR. HAMNER: Right.

17 MR. ABBATANGELO: Then she refused to testify, that got
18 dismissed and they both get in a murder case.

19 THE COURT: Right. But I mean is he -- are you intending for
20 Mr. Kohn to testify to what he believes based on the facts that he has
21 witnessed or is he going to testify to something that Ms. Burns told him,
22 because I don't know how Mr. Kohn is qualified to tell us what it is that
23 he believes occurred between his client and Kaczmarek before she got
24 here or after she got here, because he's not qualified to give an opinion
25 on that.

1 But he can absolutely testify to something that she told him,
2 if this is something that she told him. But he can't give an opinion on
3 how she got here unless somehow he knows this, and I don't know what
4 he knows, like I said, because everything that they've discussed is
5 covered under the privilege.

6 MR. HAMNER: And I would, I would submit that none of that
7 -- if they want to bring out the circumstances under how she got from
8 Ohio to here, the witness to do that is Ms. Burns.

9 THE COURT: Well she already did that.

10 MR. HAMNER: Right.

11 THE COURT: She testified to every bit of that on direct.

12 MR. HAMNER: And I understand, you know.

13 THE COURT: Yeah.

14 MR. HAMNER: From my standpoint, I understand that one of
15 their arguments is this concept of sex trafficking in 2002 is viewed
16 differently than in 2020, and somehow that leads into actual innocence. I
17 don't know that they've made a proffer or any showing to show that Mr.
18 Kohn, if he testified, is providing any information to show she's literally
19 actually innocent of the crimes that she committed.

20 THE COURT: Right, and I agree with that. However, I mean
21 he was her trial lawyer. I mean he was the lawyer who was representing
22 her at the time, and a lot of this goes to the circumstances surrounding
23 the situation she was in with the guilty plea that was signed in this case.
24 So I mean he may have some information, although I'm a little
25 concerned Mr. Abbatangelo.

1 It appears to me you haven't had extensive conversations
2 with Mr. Kohn about what it is that he's going to say. So I mean I'm a
3 little concerned with Mr. Kohn opining about things that he's not
4 qualified to opine about. But I think he could have some relevant
5 testimony, because like I said, a lot of this deals with the circumstances
6 under which she entered that plea, which he was her lawyer at that time.

7 MR. ABBATANGELO: And that's the main focus. It's not that
8 he's an expert by any means. It's his opinion of what occurred at that
9 time as the attorney.

10 THE COURT: Well he can testify to facts. He can't give an
11 opinion to something that he's not qualified to give an opinion to. If he
12 wants to come in here and say the day she entered that plea, she was
13 standing in the courtroom, like she was crying, I didn't have any client
14 control, things of that nature. He can absolutely testify to those things.
15 He has direct knowledge of those things, and he was her lawyer at the
16 time.

17 But getting into all of this occurred because Kaczmarek was
18 influencing her. Unless she told him that, he is not qualified to give an
19 opinion on any of those things. And like I said, if you want to bring him
20 in here and talk about the circumstances that occurred the day that that
21 plea was entered, conversations he had with her in the jail, on the phone
22 leading up to that date; conversations, you know, a lot of people enter
23 pleas and may call their lawyer and say hey, I've changed my mind.

24 If that occurred or something along that lines, Mr. Kohn can
25 absolutely testify to those things. But I will have a discussion on the

1 record with your client about the waiver of the privilege before he
2 testifies.

3 MR. ABBATANGELO: And that's fine, and that would be the
4 limited purpose of Mr. Kohn.

5 THE COURT: He can testify to things he has direct
6 knowledge of. But as far as giving an opinion about why things were
7 done, unless you somehow lay a foundation that he's qualified to do
8 this, he's not going to be allowed to do that. But because he was her
9 lawyer at the time her plea was entered, he can testify to things he
10 directly knows.

11 MR. ABBATANGELO: And that's fine, all right.

12 THE COURT: Do you have an email address for him?

13 MR. ABBATANGELO: I have a cell number.

14 MR. ROSE: I have email too.

15 MR. ABBATANGELO: I think Mr. Rose has --

16 THE COURT: Okay. We need an email for him.

17 [Pause]

18 MR. ROSE: It's pretty easy. It's edgardog@cox.net.

19 MR. ABBATANGELO: Yeah, that's why. He's got a dog in the
20 office, a female service dog.

21 THE COURT: edgardog@cox --

22 MR. ROSE: E-D-G-A-R-D-O-G at coxnet.

23 THE COURT: Cox dot net?

24 MR. ROSE: Cox.net, correct. That's his middle name.

25 MR. HAMNER: It's easy to figure out.

1 THE COURT: Hold on.

2 [Pause]

3 THE COURT: We'll send the BlueJeans link, Mr.
4 Abbatangelo.

5 MR. ABBATANGELO: Thank you, Your Honor.

6 [Pause]

7 MR. ABBATANGELO: And Your Honor, we were going to get
8 the letters that Mr. Kaczmarek sent to Ms. Burns, okay?

9 THE COURT: Have those been marked?

10 MR. ABBATANGELO: No. That was my exhibit and you
11 wanted to do it as a whole stack. So --

12 THE COURT: Okay. So you guys are going through them?

13 MR. HAMNER: I've tried to separate them by letters.

14 THE COURT: Okay. The BlueJeans link has been sent to Mr.
15 Kohn. If you guys want to reach out to him and let him know that he has
16 the BlueJeans link, but that you guys will contact him when it's time for
17 him to sign in. But what we'll do is we will take a recess before he signs
18 in, so that you guys can get him on the line.

19 MR. HAMNER: Okay, and I need to -- I need to run down and
20 go get some notes. I spoke with Phil at some point, so I'd like to try to
21 get my notes.

22 THE COURT: Okay. Again, we'll take a recess before he
23 testifies, so he doesn't have to log in right now. We won't even log into
24 BlueJeans, but we'll take a recess before he testifies.

25 [Pause]

1 MR. HAMNER: This is what I have. I'm fine with admitting
2 all of these if you want to admit them. Do you want to do these? Are
3 there more that you want or --

4 MR. ABBATANGELO: No, no. I was asking you, because the
5 message is [indiscernible]. Like you said, it's [indiscernible].

6 MR. HAMNER: Yes.

7 MR. ABBATANGELO: Your Honor, we have agreed on a
8 certain stack of letters that are dated basically from -- that are basically
9 up to the plea of Ms. Burns in April of 2002. There are other letters. We
10 don't need to have them in court. I don't know if you want to do 30
11 exhibits or one big --

12 THE COURT: We want to do one.

13 MR. ABBATANGELO: [Indiscernible].

14 THE COURT: Yes.

15 MR. ABBATANGELO: Just one big one.

16 THE COURT: Yes. That helps everyone, me, you, Mr.
17 Hamner, my lovely clerk over here. That helps us all.

18 MR. ABBATANGELO: That's what I thought. Let's again
19 defer to the Court.

20 MR. HAMNER: It's okay if I at least leave these slides on
21 there for right now?

22 THE CLERK: Oh, yeah.

23 MR. HAMNER: Thank you, sorry.

24 THE COURT: Okay, so that's --

25 MR. HAMNER: That was mine, but they can now become the

1 official --

2 THE COURT: So they're State's next in line?

3 THE CLERK: Oh okay.

4 MR. HAMNER: Sure.

5 THE COURT: So what's State's next in line?

6 THE CLERK: Forty-that's three.

7 THE COURT: 43?

8 [State's Exhibit 43 marked for identification]

9 THE CLERK: Correct.

10 THE COURT: Okay. State's 43 will be admitted by
11 stipulation. State's 43 will be admitted by stipulation of the parties,
12 which is the letters, okay?

13 [State's Exhibit 43 admitted into evidence]

14 THE COURT: Are you guys ready to put on your next
15 witness?

16 MR. HAMNER: Yes, Your Honor.

17 THE COURT: Okay. Mr. Hamner, it's my understanding you
18 now have a witness that you are going to call, but Mr. Abbatangelo, you
19 are reserving the right to come back to your witnesses. But we are
20 taking this witness out of order?

21 MR. ABBATANGELO: Yes, Your Honor.

22 THE COURT: Okay. Mr. Hamner, you may call your first
23 witness?

24 MR. HAMNER: Your Honor, the State would call Dr. Gorniak.

25 THE COURT: Okay. Ma'am, if you could just come on up

1 here to the witness stand.

2 THE MARSHAL: If you could turn around, remain standing
3 and raise your right hand and place it on the book?

4 JAN GORNIAK, STATE'S WITNESS, SWORN

5 THE CLERK: Please be seated, stating your full name,
6 spelling your first and last name for the record?

7 THE WITNESS: My full name is Jan Gorniak, J-A-N, last
8 name Gorniak, G-O-R-N-I-A-K.

9 THE COURT: Okay. Mr. Evans, whenever you're ready.

10 DIRECT EXAMINATION

11 BY MR. EVANS:

12 Q Good morning, Doctor.

13 A Good afternoon.

14 Q I guess it is afternoon. It all runs together after a while.

15 That's probably how long we'll be here. Doctor, could you tell us what
16 you do for your occupation?

17 A I am a medical examiner and forensic pathologist at the Clark
18 County Coroner Office, at the Clark County Office of the Coroner and
19 Medical Examiner.

20 Q And how long have you been employed there?

21 A Six and a half months.

22 Q And prior to working there, where did you work before that?

23 A I was the chief medical examiner in Atlanta, Georgia for
24 Fulton County.

25 Q And before starting these jobs, I assume you had to obtain

1 various academic degrees?

2 A Yes.

3 Q Could you just go through those for the Court?

4 A I graduated from the Lake Erie College of Osteopathic
5 Medicine. I completed a year traditional internship at Metro Osteopathic
6 Hospital in Erie, Pennsylvania. I completed a Pathology residency at the
7 University Hospitals of Cleveland in Cleveland, Ohio, and then I
8 completed a one-year fellowship in Forensic Pathology at the Cuyahoga
9 County Coroner's Office, also in Cleveland.

10 Q And during your employment, have you had any additional
11 training, anything else that qualifies you as an expert witness in this
12 case?

13 A Additional? Well, I've been to many meetings, so yes, and
14 I'm board certified in both Anatomic and Forensic Pathology.

15 Q Perfect. Now as a medical examiner Doctor, what are your
16 general duties on a day-to-day basis?

17 A Generally, our job is to determine cause and manner of
18 death. So it's to investigate deaths and to determine the cause and
19 manner of death, whether doing an external examination or an autopsy.

20 Q Okay, and is one of your duties -- is there ever a reason why
21 you may need to look at an autopsy report prepared by a separate
22 medical examiner?

23 A Yes.

24 Q Is that something that is common within your field?

25 A Yes.

1 Q And is it something that you've done throughout your
2 career?

3 A Yes.

4 Q Approximately how many times would you say you've had to
5 review autopsy reports of other medical examiners, or been asked to
6 come to conclusions about time or cause or manner of death following
7 someone else having done an autopsy?

8 A Many times as a function of my job when I was the chief
9 medical examiner. But for purposes of testifying or being an expert
10 witness, probably about 25-30 times.

11 Q Right. Now when you're doing -- when you're doing that, so
12 if you are being asked to re-review an autopsy someone else conducted,
13 obviously I assume that there's a lot of information that you try to gather
14 before you do that?

15 A Yes.

16 Q And could you just give us an example of generally when
17 you undertake this process, what's the process you go through? What
18 are the things you ask to see before you feel comfortable in making a
19 determination?

20 A So the purpose of reviewing a report in lieu of another
21 pathologist, we have to form our own opinion. We are just not taking
22 and regurgitating the opinion of the doctor that did the autopsy. So the
23 information that the doctor had originally, if that's available.

24 So obviously the autopsy report, investigative reports,
25 photographs, police reports, hospital records, anything that was

1 available to that physician to render their opinion I would have to have.
2 Not all, no, but most of them to also render my own opinion based on
3 what I'm seeing.

4 Q Now in addition to the investigative report, if there's
5 photographs of the scene, photographs of the autopsy, are those also
6 things that you would want to look at?

7 A Absolutely.

8 Q And are those photographs critical to coming to an
9 independent conclusion?

10 A Absolutely.

11 Q And could you just tell us what that is?

12 A Because we have to see for ourselves. So I can look at an
13 autopsy report and see what the pathologist wrote. But I would have to
14 see in correlation with other things. So how do they form their opinion,
15 their documentation, their descriptions of injuries or lack of them, what
16 did that look like? So in order to form my own opinion to see if I agree
17 or disagree with that opinion, I would have to seek for myself.

18 Q And tell me I'm putting words in your mouth. It sounds like
19 you're saying without being able to compare what they wrote to what
20 actually happened, you're just kind of parroting or regurgitating
21 someone else's findings?

22 A That's correct.

23 Q Now you sat in while Dr. Bennett was testifying about what
24 he did when he was writing his report in this case, correct?

25 A Exactly.

1 Q Was there anything that he said about his methodology that
2 concerned you or would give you pause before relying on that report?

3 A Yes.

4 Q And could you go through some of the things that gave you
5 pause, and you were concerned with?

6 A The fact that he did not review any photographs. He was
7 taking at face value what was written in the autopsy report. Especially
8 the photographs are the main thing, looking at not only autopsy
9 photographs, but what did the scene say. So I thought that was the main
10 thing that stuck out to me.

11 Q Okay, and he testified that when he -- his report that he
12 initially didn't have the picture, but then he later found the pictures. If
13 that was a situation you were put in as a medical examiner, where you
14 later gained access to pictures, would you leave your report just as is at
15 that point in time?

16 A No, and that's what we do on a daily basis. So when we
17 form an opinion, it's based on the information we have today. So if we
18 get more information down the line, whether it changes or not our
19 opinion, we can amend the report if we reviewed it. So if I got more
20 pictures and I didn't look at them, that's one thing.

21 But if I got more pictures, I looked at them and I said that my
22 opinion didn't change, I would amend the report to update it to say I
23 reviewed such and such report, such and such a photograph and as
24 stated on such and such a date my opinion stays the same, or based on
25 the new information I have, my opinion has changed to this.

1 Q Now you've reviewed a number of materials prior to coming
2 to this hearing today, correct?

3 A Yes, I did.

4 Q Was one of those materials the report that Dr. Bennett
5 actually wrote?

6 A Yes, it was.

7 Q And in Dr. Bennett's report, he listed the materials that he
8 looked at before he wrote his report?

9 A Correct.

10 Q And I'm just going to read those off. He said he looked at the
11 coroner's and related reports, file information from Kaczmarek the co-
12 defendant, Ms. Burns' statement of Kaczmarek, Ms. Burns or sorry, the
13 statement of Kaczmarek regarding the murder, the statement of a Ave
14 Cruz [phonetic] regarding some things pawned at a pawn shop, and the
15 fact that a notice of intent to seek death penalty was filed.

16 Those five materials, in your mind is that sufficient to come to an
17 independent conclusion about time or manner or cause of death?

18 A Four out of those five materials, reports that he reviewed,
19 have no relevance. We are separate from law enforcement, so those
20 reports had nothing to do with the actual autopsy or discovering or
21 determining cause and manner of death. So out of them, yes very
22 important was the autopsy report, but it did lack viewing the
23 photographs.

24 Q So in your opinion, would it be fair to say that that was not --
25 he did not do a sufficient investigation prior to writing this report?

1 A That would be my opinion, yes.

2 Q Now we went over that you did in fact review a number of
3 materials prior to coming to this hearing today. Was one of the
4 materials you read the autopsy report that Dr. Telgenhoff wrote when he
5 performed the autopsy?

6 A Yes.

7 Q Now do you have a copy of that with you?

8 A I do.

9 MR. EVANS: And Your Honor for the record, this has been
10 previously admitted into evidence as I believe State's Exhibit 12.

11 THE COURT: This is Dr. Bennett's report?

12 MR. EVANS: No. This is Dr. Telgenhoff autopsy report.

13 THE COURT: It's State's 12?

14 MR. EVANS: I believe --

15 THE COURT: Is that State 12.

16 THE CLERK: The autopsy report is 12.

17 THE COURT: Okay. Is it over there, Mr. Evans?

18 MR. EVANS: I don't know if it over there.

19 THE COURT: Can you get it, just so I can look at it while you
20 guys are talking about it?

21 MR. EVANS: Okay. I've actually got an additional copy.

22 THE COURT: Perfect, okay. Then you don't have to do that,
23 Mr. Evans. I can just use this one.

24 MR. EVANS: Yes, Your Honor.

25 THE COURT: No, this is Dr. Bennett's report, Mr. Evans.

1 MR. EVANS: Oh is it? I thought it -- okay. Court's
2 indulgence.

3 [Pause]

4 THE COURT: You can have this back Mr. Evans. I don't want
5 you to misplace this. Give that back to Mr. Evans. Thank you, sir. Okay.

6 MR. EVANS: Now Doctor, just briefly, could you turn to the
7 last page of that report? It's labeled Report of Investigation, and it's got
8 a number of boxes that are filled out as information.

9 THE COURT: You said the last page?

10 BY MR. EVANS:

11 Q Correct. So it should -- oh, the second to last page. It's right
12 before the toxicology report.

13 A Oh it's not my -- it's not my last page.

14 THE COURT: It's not my last page either.

15 MR. EVANS: No, it's not. It would look like this, Your Honor.
16 Oh, it's right under that with that one right there.

17 THE COURT: Yes sir.

18 BY MR. EVANS:

19 Q Perfect. Now Doctor, do you see a box that says, "Date and
20 Time of Death"?

21 A Yes.

22 Q And that says, "September 27th, 2002 at 1510", correct?

23 A Yes.

24 Q Now date of death, is that a term that has a few different
25 meanings within your profession potentially?

1 A Yes.

2 Q And could you just describe for us what those different
3 meanings would be?

4 A So there is date and time of death, so it would be three.

5 Q Okay.

6 A So the first one is the most simple. It's the person who is
7 having CPR performed on them in the hospital setting, and then the
8 doctor calls it and says stop, time of death, 1355 at such and such day,
9 such and such a time. The second one is when somebody is found dead,
10 and a medical professional or a death investigator pronounces them
11 dead at that time. And then the third time of date and time of death is
12 what the pathologist does when they estimate the true date and time of
13 death.

14 Q So it sounds like if someone not -- if there is not a doctor
15 who's actually there at the time the individual physically dies or just
16 ceases to be alive, there's two different potential times of death, the time
17 when they actually passed away and the time that a doctor actually
18 responds to the scene and says yeah, that guy has passed away?

19 A Correct.

20 Q All right. Now when you look at his date and time of death,
21 do you have an opinion in your medical expertise as to which of those
22 two that number is?

23 A Yes, I do.

24 Q And which one -- what would you say that is?

25 A That is the date and time of death that the investigator

1 pronounced him dead.

2 Q And what makes you believe that?

3 A Well one, the call was made. I know from the materials I
4 reviewed that he was found dead, found unresponsive at the time about
5 at noon of that date. So obviously this is three hours later, and so that is
6 one of the job functions of the investigator. The first thing they can do or
7 the first thing they have to do is pronounce someone dead before they
8 can start investigating the death.

9 Q And so it would be fair to say that nothing about this date
10 and time of death actually indicates that that's the time anyone believes
11 that the victim actually passed away?

12 A That's correct, and if I may, I can give you an example.

13 Q Absolutely.

14 A So most decedents are found dead in bed. So if you go
15 through Vital Statistics, you'll find that most people are dead early in the
16 morning, because that's when they're found. So if my cousin was found
17 dead in bed, right, because I wanted to wake them up to get ready for
18 school and they're unresponsive and we called EMS, the medical
19 examiner and they pronounce him dead, that's the time that they will
20 print out.

21 Could they have been dead at two o'clock in the morning?

22 Absolutely. The best known thing is when were they last seen alive?

23 Okay. We saw them at 9:00. They said goodnight, they went to bed and
24 now they're dead. So their time of death is in between, their actual time
25 of death is that. But the pronouncement time is when they're

1 pronounced, and that's their legal date and time of death which goes on
2 a death certificate.

3 Q All right. So that September 27th date is actually the
4 pronouncement of death, not the time of the actual death?

5 A Absolutely.

6 Q So anyone -- so I think I covered this, but just to be clear,
7 anyone relying on this date and time of death for what time the victim
8 died would be a mistake?

9 A Absolutely.

10 Q Now is there any -- you've reviewed this report in its entirety;
11 correct?

12 A Yes, I have.

13 Q Is there anyone else in Dr. Telgenhoff's autopsy report that
14 does speak to any findings he made that might have some bearing on
15 the time of death of the victim?

16 A His external examinations and the post mortem changes that
17 he saw.

18 Q Okay, and could you clarify, what in particular in this report is
19 something that you would rely on in terms of deciding time of death?

20 A The lividity is one and the rigidity or rigor mortis.

21 Q Okay, and what specifically does he say about the rigor
22 mortis?

23 A He said the rigor mortis has receded.

24 Q And what does that -- I know we went into this a little bit with
25 Dr. Bennett, but just to rehash it, what does it mean for rigor mortis to

1 have receded?

2 A So let's go back to rigor mortis. So when someone first dies,
3 their body is flaccid. So as time goes by, in about two to four hours the
4 body starts to stiffen. So it becomes fully fixed about 6 to 12 hours, and
5 then once the body starts to decompose, then the body goes back to
6 flaccid. So the rigidity goes up and then it goes down. So it's very
7 important to know which way it's going.

8 So when we describe rigidity or rigor mortis or just plain old
9 rigor, that's why we use those terms. Some use mild, moderate, full, but
10 then also passing or, you know, or passed. So in this case, Dr.
11 Telgenhoff used the word "receded," not "receding." So to me, that
12 means there was no more rigor left in the body.

13 Q And approximately how long after death will it take for rigor
14 mortis to have completely receded?

15 A About 36 hours.

16 Q And are there any factors that might influence that time line?

17 A Absolutely, there's many factors. Temperature, the body
18 habitus of the person, what kind of clothes they're wearing. If, you
19 know, so if they're naked, they will decompose slower compared if they
20 have a whole bunch of clothes on. Also heat accelerates it and cold
21 slows it down.

22 Q And cold slows it down, perfect. Now you reviewed some
23 photographs in preparation for this hearing that were provided you from
24 Las Vegas Metropolitan Police Department; correct?

25 A Yes.

1 Q And I'm going to attempt to use this overhead, Your Honor. I
2 can make no promises that this will go well.

3 THE COURT: I don't think you warmed it up, Mr. Evans. I'm
4 pretty sure that thing has to warm up. I have no idea how to operate it.

5 MR. EVANS: Is there a way to queue over to the other?

6 THE COURT: Can we log out of Blue Jeans?

7 THE CLERK: Yes.

8 MR. EVANS: That's good. That's perfect. We want to -- now
9 let's see. The blue light is on.

10 THE COURT: I mean you can just click the X at the top right-
11 hand corner and close out.

12 THE CLERK: Yeah.

13 [Pause]

14 MR. EVANS: And I am displaying what has been previously
15 admitted as State's Exhibit 22.

16 THE COURT: 22.

17 BY MR. EVANS:

18 Q And can you see that alright, Doctor?

19 A Yes, I'm good for now.

20 Q All right, and this one of the photographs that you reviewed?

21 A Yes, it is.

22 Q And what does this photograph depict?

23 A The decedent is face down in a bathtub.

24 Q And are his hands tied behind his back?

25 A Yes. His hands are tied behind is back. His feet are ties at

1 the ankles, and he has a multi-colored, what was described as a
2 pillowcase over his head.

3 Q Great. Now you talked about rigor as kind of the locking up
4 of the body. If rigor mortis has fully receded by the time that this
5 individual went in for his autopsy, how would we expect the body to look
6 when it went to the autopsy. Would it be in this same position?

7 A No, it would not. His arms and legs would be down.

8 Q I'm now publishing what has been previously admitted as
9 State's Exhibit 30. Something like this Doctor?

10 A I'm sorry.

11 Q Oh, I'm sorry about that.

12 A There's just a glare in there.

13 THE COURT: Is the screen on?

14 THE WITNESS: No.

15 THE COURT: You can't see it there?

16 THE WITNESS: The screen's not on.

17 THE COURT: Vern, can you turn this on for her?

18 THE MARSHAL: Oh yeah.

19 THE WITNESS: Oh, that's better. I can -- he's face down.

20 Yeah, I can even tell if he's face up or down.

21 THE COURT: Can you see it on that screen now? Or is it

22 THE MARSHAL: She [indiscernible]

23 THE COURT: Okay.

24 THE WITNESS: Thank you. There we go.

25 THE COURT: Okay.

1 BY MR. EVANS:

2 Q You can fully see that?

3 A I can fully see that.

4 Q And just for the record, are his arms still stuck behind his
5 back like they were when he was discovered?

6 A No, they're not.

7 Q Are his legs still back, like pointing up in the air like they
8 were when he was discovered?

9 A No, they're not.

10 Q Is he laying flat down with his arms and legs fully at rest?

11 A Yes.

12 Q What does that indicate to you Doctor?

13 A That without actually touching the body, but he is not -- well,
14 he's no longer in full rigor because if he was, his arms and legs would
15 still be up.

16 Q I'm now showing what has been previously admitted as
17 State's Exhibit 29, and is this another photo that you reviewed prior to
18 the hearing today?

19 A Yes, it is.

20 Q And does this also show the victim once again laying down?

21 A Yes. The difference between State Exhibit 29 and 30 is the
22 decedent is supine or on his back in State Exhibit 29, and then 30 he was
23 face down.

24 Q Now in Exhibit 30 when he was face down, his arms were
25 fully pressed against the table, right? They weren't stuck up in any

1 capacity?

2 A That's correct.

3 Q And the same thing in 29. Even though he's on his back,
4 once again his arms are falling back to rest on the table?

5 A That is correct.

6 Q And so would this also be consistent with a finding that rigor
7 mortis has fully receded at this point?

8 A Yes, it is.

9 Q Doctor, you talked earlier about how it's so important to
10 review these photos to give context to what is in an autopsy report. Are
11 photos like this exactly why it's important, so that one could potentially
12 learn if rigor mortis is receding or receded?

13 A The photographs for us is in addition to the written
14 documentation. So photo documentation is very important for this
15 purpose. If someone else is going to be looking at the report and
16 forming an opinion, and it also correlates what the report says to what
17 the pictures. So if the report said one thing and the pictures said
18 something different, that would tell you something. But in this case, the
19 report and the photographs are saying the same thing.

20 Q Now I believe that covers everything that I have from the
21 autopsy report, and additional material that we provided to you that you
22 reviewed was the trial testimony of Dr. Telgenhoff in Ms. Burns' co-
23 defendant's trial, correct?

24 A That is correct.

25 Q And in that trial testimony, did he speak to his opinion

1 regarding when the victim passed away?

2 A Yes, he did.

3 Q And Your Honor, this has previously been admitted as part of
4 State's Exhibit 40 was it? Exhibit 40, and I'm just going to read out, and
5 you can tell me if this sounds familiar, part of Dr. Telgenhoff's testimony.
6 "The findings on this individual are very consistent with someone that's
7 been, from the time I saw them, dead at least 36 hours." Is that what Dr.
8 Telgenhoff testified to?

9 A Yes, it is.

10 Q If you knew -- if you were trying to figure out what the
11 medical examiner who originally conducted the autopsy, what their
12 opinion on time of death was, and there was a trial transcript out there
13 telling you exactly what their opinions are, would that be an important
14 document to review?

15 A Absolutely.

16 Q And that's because that's where they're actually -- is this the
17 only thing in the exhibits that you've reviewed, where Dr. Telgenhoff
18 gives an actual time line or explicitly states it, rather than just his
19 findings from the autopsy?

20 A That is correct.

21 Q Now I believe that Dr. Bennett testified as to some other
22 findings he had as to why he disagreed that the body, that the victim had
23 not died on the 27th, and one of the things he pointed to was this idea
24 that there should have been more mal air. Is that something that in your
25 expert opinion should be relied on?

1 A No.

2 Q Why not?

3 A Because we each smell different things at different degrees.
4 It's an objective finding. So when I'm in the autopsy room with no
5 decomposed bodies, I don't smell anything. But a layperson might walk
6 into the autopsy room and go oh my God, what's that smell? We
7 normally don't, we don't smell anything. And same thing with the
8 degree of decomposition. So the longer I've been doing this, the less
9 likely it bothers me, or I actually notice it. So it's a subjective, you know.

10 And then autopsy reports, we document what we see or what we
11 smell. So if this was a pertinent finding for Dr. Telgenhoff to note, that
12 the body was malodorous or the organs were discolored, he would have
13 written that. So since it's not written, then my opinion is he didn't smell
14 anything. That does it mean it didn't smell. It just means he didn't smell
15 anything.

16 Q Something else Dr. Bennett pointed to was the presence of
17 water around the victim, that there's three to five inches of water, water
18 kind of consistently falling on him, and that he would have expected
19 more of like this washer man color. In your expert opinion, is that
20 something that should be relied on in coming to kind of a determination
21 on the time he died?

22 A No.

23 Q And why not Doctor?

24 A A couple of things. The decedent had washerwoman's
25 changes of his hands. So three to five inches of water in the tub when

1 you see him would not be covering his hands. So he -- so that is coming
2 from a different water source. Then the reports I read that at the time
3 that he was discovered that there was three to five inches of water in the
4 tub. It doesn't say how long the water was in the tub.

5 So I don't know -- there's nowhere that we know that the water has
6 been in the tub for two, three days or two, three hours. It just says there
7 was three to five inches of water in the tub at that time. So we can't
8 opine about what the body should have looked like if we don't know how
9 long the body had been in that water. So it seems to me that most of the
10 water was on his hands because of the washerwoman's changes that we
11 saw.

12 Q And --

13 MR. ABBATANGELO: Can you repeat that? I might have
14 misunderstood what you said about the hands. I might have
15 misunderstood what you just said.

16 THE WITNESS: You want to read the last portion about the
17 hands?

18 MR. ABBATANGELO: Yeah, just the very last part about the
19 washerwoman on the hands. I might have misunderstood you.

20 THE WITNESS: So he's in -- in the tub face down in three to
21 five inches of water. So the water is not to a level where his hands are in
22 water. The water is being poured over him. So I would not expect the
23 same changes you know, on the rest of his body compared to his hands
24 based on the three to five inches of water that was in the tub.

25 BY MR. HAMNER:

1 Q So it sounds like you're saying because we don't know a lot
2 about the scene, this would be a very dangerous thing to make an
3 assumption based off of. Would that be particularly true if the individual
4 hadn't seen any actual photographs of the scene?

5 A Yes, because you're relying on statements of what the scene
6 looked like. So part of our job is to prove or disprove the circumstances
7 so when the circumstances say that the water is being on top of them,
8 that makes sense because of where the position of the hand and the feet
9 were for them to get the washerwoman changes.

10 Q And finally, Dr. Bennett talked about he would expect to see
11 more skin slippage if the individual had not died on the 27th. In your
12 expert opinion, is that a factor that should be relied on in determining
13 time of death?

14 A No.

15 Q And why not, Doctor?

16 A Once again, there's so many factors that go into when
17 decomposition occurs or how fast it occurs, so skin slippage is part --
18 one thing to look for on decomposition, but it doesn't -- not the only
19 thing. So if you don't see it, it doesn't mean the body is not
20 decomposing.

21 Q So -- and correct me if I'm wrong -- but it sounds like you're
22 saying these other factors that he points to besides the rigor mortis --
23 these are things that are highly contextual and are things that will really
24 depend based on what is happening to the body during the time it hasn't
25 been discovered; is that correct?

1 A That's correct. So he also talked about looking at everything
2 to put it together and you just can't look at one thing or the other. That's
3 the same thing about the compositional changes. You can't just look
4 at one and say it's not decomposition or look at another and say it is. So
5 you have to look at the totality of what the body is presenting.

6 Q And how many things did Dr. Bennett look at when he was
7 making his determination?

8 A He was mainly concerned with the rigidity and lack thereof.

9 Q Oh, sorry, Dr. Bennett.

10 A Dr. Bennett.

11 Q Yeah.

12 A He was --

13 Q He just reviewed the reports, correct?

14 A Correct.

15 Q So he just looked at one thing --

16 MR. ABBATANGELO: Objection. That wasn't his testimony.
17 He also looked at photographs.

18 MR. HAMNER: And Your --

19 MR. ABBATANGELO: To state the evidence correctly.

20 MR. HAMNER: And Your Honor, he said he looked at
21 photographs later but never actually looked at them when he was writing
22 this report. Because this report was written only when he looked at
23 these five things. That was the testimony.

24 THE COURT: That was the testimony, but he also said after
25 he looked at the photographs that didn't change anything.

1 BY MR. HAMNER:

2 Q Now, Doctor, after examining all the photographs, the
3 autopsy reports and everything that you looked at in this case, can you
4 testify with a reasonable degree of medical -- of scientific certainty
5 whether or not you think that this victim died on September 27th?

6 A I can.

7 Q And what is your opinion as to that?

8 A I don't believe he did.

9 Q And can you testify with a reasonable degree of scientific
10 certainty as to when you believe the victim would have passed away?

11 A The estimate -- and I can only at least to be greater based on
12 the time he was discovered, the time the autopsy was performed, I
13 would put it back to 9 p.m. on the 26th.

14 Q And that's 36 hours prior to when the autopsy was
15 performed, correct?

16 A Performed. Correct. The autopsy was performed at 900 --
17 0900 hours, 9 a.m., on the morning of the 28th, so 36 hours from then
18 and that's what Dr. Telgenhoff also testified from the time he saw the
19 body would be at least 36 hours.

20 Q And that's at least 36 hours, correct? Not 36 hours definitely?

21 A At least 36 hours and also we talk about different factors for
22 decomposition. So when we -- a body, it comes to the medical
23 examiner's office, the reason we put them in coolers is because it would
24 slow down the decomposition because -- it doesn't stop it, but it'll slow it
25 down. So once he got to the medical examiner's office, he wasn't laid

1 out in room temperature; he was put in a cooler. So therefore, probably
2 greater than that because the cold temperature slowed it down.

3 MR. HAMNER: Court's indulgence. The State has no further
4 questions on direct examination, Your Honor.

5 THE COURT: Okay. Mr. Abbatangelo, your cross.

6 MR. ABBATANGELO: Just a little bit, Your Honor.

7 THE COURT: Okay.

8 CROSS-EXAMINATION

9 BY MR. ABBATANGELO:

10 Q Doctor, we'll pick up where you guys just left off about
11 putting the body in a pool? So literally you put the body in water?

12 A No. A cooler. Cooler.

13 Q Oh, cooler.

14 A Cooler.

15 Q That's why I was like wait a second --

16 A Not a pool, no.

17 Q Well, there's got to be a lot of water places at the coroner's --

18 A Yeah. No, no, no. I'm sorry.

19 Q I was like, I've been there. I haven't seen any little pools or
20 bathtubs there. Okay.

21 THE COURT: It's in the back, Mr. Abbatangelo.

22 MR. ABBATANGELO: See they don't let me in the back.
23 They pick on short people. You watch out, okay.

24 BY MR. ABBATANGELO:

25 Q All right. So you try to cool down the body to slow down the

1 decomposure -- I'm sorry -- the decomposing of the body; is that what
2 you testified to?

3 A Yes.

4 Q All right. So as we've been -- or you've been testifying and
5 [indiscernible] testify, Mr. Villareal was found in a bathtub, right?

6 A Yes.

7 Q Water was in the bathtub?

8 A Yes.

9 Q So I'm going to be fair to both sides. If he had been in that
10 tub with warm or hot water, what would that do to the time of
11 decomposing the body? Speed up, slow down?

12 A Depending on how hot, it -- probably not much because he's
13 not submerged. He's not underneath the water. So depending on how
14 hot, most likely you would have more of skin changes than actually body
15 temperature changing unless he's actually submerged in hot water.

16 Q And that would only -- I presume that would only affect the
17 one side -- the side that's submerged or would it affect the whole body?
18 This is your area so it's an open question.

19 A Well, the side that's immersed, because he's not submerged
20 would be he's totally under the water. So yeah, it would affect the --

21 Q The three to five inches he's --

22 A Correct.

23 Q Right. So it's just that limited area?

24 A Correct.

25 Q All right. Thank you. Back up to the very beginning, there

1 are some -- I presume, aren't there some basic principles of what occurs
2 to a body when somebody dies? Like basic things that happen to
3 everybody regardless of how they died?

4 A Correct.

5 Q One thing I was -- I've been told is the skin dries out?

6 A It depends. Depends on the climate and I've learned since
7 being in Nevada --

8 Q Uh, oh.

9 A Decomposition body --

10 Q Listen --

11 THE COURT: Well, you can't just move on. You said
12 Nevada. We got to take a break.

13 MR. ABBATANGELO: Yeah, [indiscernible] we're going to
14 have to talk about --

15 THE COURT: Yeah, Nevada. That's like nails on a
16 chalkboard.

17 THE WITNESS: I'm a New Yorker too, so that's where it
18 came from.

19 MR. ABBATANGELO: Oh, okay. Now you're going back
20 down to the book. All right.

21 THE WITNESS: I'm sorry, Nevada?

22 THE COURT: Nevada.

23 THE WITNESS: Nevada. Sorry. So the climate is different.
24 So I've seen bodies decompose differently here than I have in Georgia
25 and Columbus, Ohio. So bodies can dry out, but it just depends. So --

1 and not to be gross but we have wet decomp and dry decomp.

2 BY MR. ABBATANGELO:

3 Q And those places you mentioned, Ohio, and I think you said
4 Georgia, I presume because it's so much more humid there, that would
5 be a wet?

6 A Usually you'll see wet decomp, yes.

7 Q And then out here because it's so dry, it would be the dry?

8 A You see both.

9 Q Oh. And could you please expand on that? Once again,
10 open question.

11 A Okay. That's fine. You'll see both on the same body. So you
12 might see drying of the face or drying of the fingers. So it'd be they're
13 more mummified. But then you'll also see bloating and blisters in the
14 wet stuff.

15 Q Oh, so is bloating related more to wet?

16 A Yes.

17 Q Okay. So that's not a universal thing that when a body dies,
18 they don't bloat necessarily?

19 A It depends on --

20 Q Or the person dies --

21 A -- it depends on the climate. It depends on where they are.

22 Q So like I said, it's not universal. It really depends on the
23 climate?

24 A Yes.

25 Q I mean, to be fair?

1 A Yes.

2 Q All right. And then rigor mortis I presume, is a universal
3 phenomenon for the body?

4 A Yes.

5 Q And when you discussed that earlier, when does the rigor
6 mortis usually set in usually?

7 A What do you mean set in? Where it's full rigor?

8 Q When we start to stiffen. I mean, the body I should say.

9 A It -- it starts -- you can -- you can -- it starts as soon as the
10 person dies but you can perceive it in the smaller muscles first even
11 though it appears in all the muscles. So you can perceive it first in like
12 the jaw, but probably about two hours -- two to four hours you can start
13 seeing the rigor mortis.

14 Q And then muscles start to relax as the person passes away?

15 A Yes. Well, it's -- the body is relaxed after they pass away.

16 Q Oh, it is.

17 A So after a period of time after the rigor has set in -- so you --
18 like I said, you go from no rigor then it goes up to full, and then it passes
19 in the same order it went in.

20 Q And when the body first relaxed, does the body ever release
21 excrement? Like, urine, feces?

22 A It can.

23 Q And is that a universal concept?

24 A Nope.

25 Q It happens sometimes but not all the time; is that fair?

1 A I rarely see it.

2 Q You rarely see it?

3 A Rarely.

4 Q Okay. All right. You've mentioned that you do review other
5 ME reports?

6 A Yes.

7 Q In your course of duty whether it was Georgia, here, were an
8 ME in New York as well?

9 A No, I was just born there.

10 Q Okay. So how often do you review reports that are like this --
11 in this situation that are 15, 16 years ago?

12 A Oh, not -- not often.

13 Q That's what I thought. It would be kind of rare?

14 A Yes, in my experience.

15 Q And you also said when you review those other reports you
16 form your own opinion; is that correct?

17 A That's the purpose of reviewing the report and --

18 Q And you --

19 A -- to form your own opinion.

20 Q -- sometimes disagree with that initial report?

21 A I have.

22 Q And sometimes you agree with it, correct?

23 A Yes.

24 Q It's not always 100 percent you're going to rubberstamp what
25 somebody else said?

1 A No, because I'm being asked for my opinion.

2 Q And medical examiners have opinions that vary; is that
3 correct; is that fair to say?

4 A That's fair.

5 Q All right. And then you also heard -- to lay the foundation,
6 that Dr. Bennett said he had reviewed reports later -- I'm sorry --
7 photographs and actually some other documents a little bit later after he
8 issued his initial report -- because you were in the courtroom, and you
9 heard that; is that correct?

10 A I did hear that.

11 Q And he did not file an addendum -- and you heard that as
12 well? Like he didn't say anything -- I'm not going to update my report?

13 A That's correct. He did say that.

14 Q But your course of action is always to update the report even
15 if your opinion does not change; is that what you testified to?

16 A Yes, because once you review other materials then that
17 needs to be in your report. So your report is now not accurate if you
18 review other information, then your report is no longer accurate the time
19 you signed; now you have to update your report whether your opinion
20 changed or not.

21 Q And that's not -- that's not mandatory by any state laws or
22 regulations is that? And I'll give you this to be fair. It might be a better
23 common practice but it's not mandatory that somebody does that; is that
24 correct?

25 A It's standard.

1 Q It's standard by whose standards?

2 A Our profession.

3 Q And so is there a medical examination board that -- or is it
4 the medical board; which board says you need to do that?

5 A It doesn't say you need to -- so standards guidelines. But
6 anytime, as part of our training -- also it's just how we do our -- our
7 examination. So forget this case. If I have any autopsy case and my
8 opinion on today's date is this, and I get more information that I need to
9 review to see if it's going to change my opinion or not, and I don't
10 document that I reviewed those, then I need to amend my report so it's
11 accurate as a representation of my opinion at this time because it has
12 now changed. So therefore, my report is not accurate anymore if I did
13 not update it.

14 Q Even if your opinion has not changed?

15 A Even if my opinion -- my opinion hasn't changed but what I
16 reviewed to form my opinion has changed and that's not documented.

17 Q Correct. No, and I get it. So --

18 A And you need -- and you need -- and part of what we do is
19 documentation. So --

20 Q If I can interrupt you, and to be fair, it's a good common
21 practice to do is what you're saying?

22 A It's what we do. I'm not sure what your -- you know --

23 Q I'm not trying to trick you --

24 A I'm not -- I'm not trying to be tricked. I'm not tricked. That's
25 okay.

1 Q Yeah. No, I'm just saying --

2 A -- no, what I'm saying is today I give you a report based on
3 an -- and I base my opinion on these five reports that I read. So this is
4 my opinion based on this dated today's date. Now, later I can't -- if I
5 review other things, this report is no longer based on everything I read --
6 or everything I reviewed. So in order for you to have an accurate report,
7 I need to insert the other documents that I reviewed to support my
8 opinion.

9 Q No, I understand that. No, I get it.

10 A So that is -- I mean, so the report that does not have that
11 updated -- so then the updated report, if it's not documented, it didn't
12 happen.

13 Q I understand. I get you.

14 A So that's how -- that's how I'll say it.

15 Q No worries. We'll move on.

16 A Okay.

17 Q To talk about the term sloughing, S-L-O-U-G-H-I-N-G?

18 A Yes.

19 Q Is that a familiar term to you?

20 A Yes.

21 Q And what is that?

22 A It's when some -- the tissue tears or slips off. I don't use that
23 term for skin. I usually use it on hair. Like if someone is so decomposed
24 and their hair sloughs off. So I don't -- I personally don't use that as -- I
25 say skin slippage. I don't say skin --

1 Q And that was going to be my next question. Thank you,
2 Doctor.

3 A You're welcome.

4 Q So you prefer the term skin slippage?

5 A Correct.

6 Q If a body had been laying in water for three to -- three to five
7 inches of water for 48 hours, would you notice that portion of the body
8 being different shaped than the body that's not been in water?

9 A You might.

10 Q And why would you not see it because you said you might?

11 A Well, I don't -- you're asking me to speculate on what I don't
12 know. So I -- if you're just asking me in general if a body is in three to
13 five inches of water for two days or 48 hours, I don't -- what body? This
14 body? A skinny body? On obese body?

15 Q So when you reviewed the reports on Mr. Villareal, there
16 were reports that said his body was emerged I think is the correct term,
17 in three to five inches of water?

18 A Correct.

19 Q Do you recall seeing that?

20 A Correct.

21 Q Which means that his hands, which you talked about on
22 direct, were above that three to five inches and outside of the water; is
23 that correct?

24 A That is correct.

25 Q So would you expect that his back was above the three to

1 five inches?

2 A Correct.

3 Q Would you expect to see his stomach skin slippage in a
4 different condition than his back, if he had been in there for 48 hours?

5 A Possibly.

6 Q Now, why only possibly?

7 A Because the skin on the hands is thinner. The -- compared to
8 the -- to the belly.

9 Q I'm referring -- what about his back? Like the -- I mean --

10 A But his back is not in the water.

11 Q Correct. So would you expect to see the stomach, which is in
12 the water, in a different condition than his back that's not in the water?

13 A Possibly.

14 Q And that's where I was confused --

15 A I thought I answered that.

16 Q Well, you mentioned his hands.

17 A I thought I mentioned --

18 Q Because you said his hands is different texture -- so maybe I
19 misunderstood.

20 A Or I misunderstood your question. So let's -- can we go
21 back?

22 Q Sure. Absolutely. So it's the basic steps. We got Mr.
23 Villareal face down in the tub. Stomach is at the bottom of the tub,
24 right?

25 A Yes.

1 Q Reports indicate that there was three to five inches within the
2 tub?

3 A Correct.

4 Q So therefore, his stomach is being -- is emerged. Am I using
5 that term correctly?

6 A Part of his water -- part of his belly is in the water.

7 Q Thank you --

8 A That's fine.

9 Q -- that's even better.

10 A Keep it simple.

11 Q But his back is literally like where his backbone is, is not in
12 the water; is that fair from the pictures you saw?

13 A That is fair.

14 Q So from there, would you expect to see the skin on the
15 stomach in a different condition than the skin on his back if he had been
16 in the water for 48 hours?

17 A Possibly.

18 Q And then I'm asking for you to expand on that answer of why
19 it's possible?

20 A Because of the different texture of the belly. You know, I
21 mean, the skin is a little thicker on the belly.

22 Q I've noticed that. It's not fun getting older.

23 A Plus, you know --

24 Q Compared to the back. So the back is thinner is what you --
25 I'm just making -- I'm -- this is a sincere question.

1 A No, and I'm answering -- I'm sorry. I'm not being difficult am
2 I?

3 Q No, no. I must not understand.

4 A Okay. I thought I was just answering your question. So but
5 then you also have to notice even though there's three to five inches of
6 water, if his belly is -- and he's faced down, right, actually his belly may
7 not be in the water, right. Because it might be around him because his
8 belly is pressed against the bottom of the tub.

9 So you may not see anything on the front of his belly. You might
10 see some changes on the -- on the side. Right now when I say possibly,
11 because if it's still water, that's one thing. If the water is sloshing
12 around, that's another. So I can't definitively tell you that I'm going to
13 see something different. That's why I use the word possibly.

14 Q Okay. Thank you. Because that explains it. But it's possible
15 that after 48 hours, you would see something different, possibly from the
16 two -- where the water has been touching compared to where it was not
17 touching?

18 A If it was 48 hours, but I don't have --

19 Q Right, right. No, if it was 48 hours?

20 A Right. It's possible you might see some different changes.

21 Q All right. So to be fair, what if it was 24 hours?

22 A My answer is the same. Possibly.

23 Q Okay. What about 12?

24 A Possibly.

25 Q Should I give you an open-ended question about how much

1 time it would take or is it always going to be possible?

2 A I can't predict how each body is going to react. So could it
3 be a half-hour? Sure. You know, if you want to -- you know, yeah. So I
4 don't know. I can't give you an exact time.

5 Q And that's fine. That's fair.

6 MR. ABBATANGELO: Court's indulgence.

7 BY MR. ABBATANGELO:

8 Q One thing I did forget to ask was -- let me see if I can get
9 this --

10 You had mentioned that -- do you recall on direct
11 examination that Mr. Villareal was last seen on the 27th? Does that
12 sound familiar?

13 A No.

14 Q Yeah, I --

15 THE COURT: I didn't hear that, Mr. Abbatangelo.

16 MR. ABBATANGELO: I'm sorry.

17 THE COURT: I didn't hear her say he was last seen on the
18 27th --

19 MR. ABBATANGELO: No, I --

20 MR. HAMNER: I don't recall that either.

21 MR. ABBATANGELO: That's why it was open-ended
22 question.

23 THE COURT: Okay. Okay.

24 MR. ABBATANGELO: All right. I don't have any further
25 questions.

1 MR. HAMNER: State has no questions on redirect --
2 THE COURT: No redirect?
3 MR. HAMNER: -- Your Honor.
4 THE COURT: Okay. This witness may be excused.
5 THE WITNESS: Thank you.
6 THE COURT: Ma'am, thank you very much. Thank you for
7 your testimony here today.
8 THE WITNESS: No worries.
9 THE COURT: Okay. Are we going back to Mr. Abbatangelo's
10 witnesses at this time?
11 MR. ABBATANGELO: Yes, Your Honor.
12 THE COURT: Okay. Mr. Abbatangelo, do you have your next
13 witness?
14 MR. ABBATANGELO: I have not contacted Mr. Kohn. Have
15 you heard back from him?
16 THE COURT: Okay. We can take a recess. We --
17 MR. ABBATANGELO: Actually, he just texted at 2:17, so he'll
18 be up soon.
19 THE COURT: Yeah, he's going to be up soon so we can just
20 take a brief recess and then we'll come back, and we'll put Mr. Kohn on.
21 But we'll take just ten minutes. So it's 2:30. We'll be back at 2:40. So
22 can you let him know my staff did send him the BlueJeans link so can
23 you just confirm that he has that?
24 All right. So we'll be back in ten minutes, Mr. Abbatangelo.
25 MR. ABBATANGELO: Sounds good.

1 [Recess taken from 2:29 p.m. to 2:39 p.m.]

2 MR. ABBATANGELO: And there he is.

3 THE COURT: He's here. All right. Phil, can you hear us?

4 THE WITNESS: Can you hear me? Can you hear me?

5 THE COURT: Yes. Can you hear us?

6 THE WITNESS: Yes, I can.

7 THE COURT: Okay. Perfect. All right. We're going to go

8 back on the record in C-191253, State of Nevada v. Alisha Burns.

9 Ms. Burns is present with her attorney, Mr. Abbatangelo. Mr.
10 Hamner and Ms. Evans are here on behalf of the State.

11 Mr. Abbatangelo, you may call your next witness.

12 MR. ABBATANGELO: And before we proceed, Your Honor,
13 you mentioned admonishing Ms. Burns.

14 THE COURT: Yes, I -- thank you very much, Mr. Abbatangelo.
15 And Ms. Burns, Mr. Kohn was your counsel at the time that you entered
16 your guilty plea in this case so when he was representing you, every
17 discussion that you and him had was covered under the attorney-client
18 privilege. Are you waiving that privilege today with a limited purpose of
19 him testifying to things that you feel are relevant for the purposes of this
20 hearing today?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: Okay. So you are waiving that privilege?

23 THE DEFENDANT: Yes, ma'am, I am.

24 THE COURT: Okay. Okay, so Mr. Kohn, you will be allowed
25 to testify to conversations that you and her had, and things that were

1 covered under the privilege with her limited waiver for the purposes of
2 this hearing.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Okay. Can you please raise your right hand for
5 us?

6
7 PHILIP KOHN, DEFENDANT'S WITNESS, SWORN

8 THE CLERK: Please state your full name spelling your first
9 and last name for the record?

10 THE WITNESS: Philip J. Kohn. Philip, P-H-I-L-I-P K-O-H-N.

11 THE COURT: Okay. Mr. Abbatangelo.

12 DIRECT EXAMINATION

13 BY MR. ABBATANGELO:

14 Q All right. Mr. Kohn, also the -- Judge Jones has limited us in
15 some of our testimony so we're not going to be testifying about opinions
16 that will be discussed off -- before we got on BlueJeans was your
17 opinion if Ms. Burns was a victim of sex traffic. So we don't want to go
18 into if your opinion is she was a victim of sex trafficking; correct, Judge?

19 THE COURT: That is correct.

20 MR. ABBATANGELO: I just want to make sure we don't go
21 down that road, okay, Phil?

22 THE WITNESS: Yes.

23 BY MR. ABBATANGELO:

24 Q All right. I've got -- oh, how did you first -- do you recall first
25 meeting Ms. Burns? Well, let me back that up. I'm sorry, Phil -- Mr.

1 Kohn. How did you first become familiar with the case of Ms. Burns?

2 A I was special public defender, and I was requested to be at
3 Justice Court before a preliminary -- as they were setting up a
4 preliminary hearing involving Ms. Burns and her co-defendant.

5 Q And was Ms. Burns physically there yet?

6 A No.

7 Q I have a transcript which I'm showing Mr. Hamner which is
8 dated --

9 MR. HAMNER: November 26th, 2002.

10 BY MR. ABBATANGELO:

11 Q November 26th, 2002 in front of Judge Bixler; does that ring
12 a bell at all?

13 A Yes, it does. I've read -- I've read it recently.

14 Q Do you recall what occurred at that particular hearing?

15 A I was appointed to handle Ms. Burns. The public defender, I
16 believe, had conflicted out on Mr. Kaczmarek and we requested that we
17 take Ms. Burns.

18 Q And you were representing her in what manner?

19 A The court back in Ohio wanted Ms. Burns to have counsel
20 and so I was going to advise her as -- at that point, my recollection is she
21 was a witness in the preliminary hearing and not a defendant.

22 Q And was that a witness -- witness in what kind of case?

23 A She was alleged to have been the victim of kidnap and
24 statutory sexual seduction.

25 Q So at this time, you're not representing her for a murder

1 case; is that correct?

2 A I'm not.

3 Q Do you recall any representations made by the State
4 regarding if -- and Mr. Kaczmarek's -- that Mr. Kaczmarek had a murder
5 charge?

6 A I certainly knew that. I don't remember how I knew that, but I
7 certainly knew going into it that there was a murder charge pending.

8 Q And do you recall your relationship with Ms. Burns from 18
9 years ago?

10 A Yes.

11 Q As an attorney and client, of course?

12 A I mean, I --

13 Q And please describe that?

14 A Well, we're talking about 18 years ago, but she was only 15
15 years old at the time so I probably spent more time with her than I would
16 with most defendants. And we had an interesting relationship.

17 Q Did there come a time when the relationship went from
18 being an attorney for a witness to an attorney for a defendant?

19 A Yes.

20 Q And please describe that?

21 A After the preliminary hearing where she was alleged to have
22 been a victim, and she refused to testify, the Office of the District
23 Attorney charged murder against her.

24 Q And did she ever -- did she ever go back to another state in
25 that meeting?

1 A She did. Ohio is where she's from.

2 Q And what happened with that; why did she leave and not just
3 stay here?

4 A Because the -- that was the agreement, that she be brought
5 out here only for the purpose of being a witness in the preliminary
6 hearing and then was to return as a ward of the court. And she did.

7 Q And once again, did she or did she not testify at the
8 preliminary hearing for Mr. Kaczmarek when he was charged with sexual
9 assault and kidnapping?

10 A No, she did not testify.

11 Q And is that when things changed with her status as a
12 witness?

13 A Yes.

14 Q And what happened to that case with statutory sexual
15 seduction and kidnapping for Mr. Kaczmarek?

16 A You know, I don't remember. It certainly became you know,
17 on the back burner and Mr. Kaczmarek was charged with capital murder.
18 And Ms. Burns was charged with murder -- first degree murder -- open
19 murder.

20 Q How was Ms. Burns as a client being a 15-year-old and your
21 ability to guide her through the legal process?

22 A Ms. Burns was somewhat resistant to my advice.

23 Q Could you please elaborate on that?

24 A Well, it was very difficult to -- and maybe it never really did --
25 develop much of a trust between counsel -- I mean, between the

1 defendant and counsel. She was a teenager, and she was good at it.
2 She was a difficult client.

3 Q And you said she didn't trust you; was there anybody you
4 know that she did trust?

5 A Yeah, Kaczmarek.

6 Q And what do you mean by that she trusted Kaczmarek? Can
7 you elaborate on why you believe that?

8 A Well, I don't know if it was trust or love or what emotion --
9 I'm not sure I'm qualified to even opine who she trusted or she loved,
10 but clearly she was much more concerned about the wellbeing of Mr.
11 Kaczmarek than she was about her own wellbeing.

12 Q And why do you say that?

13 A Because --

14 MR. HAMNER: It calls for speculation. I'm going to object to
15 this based on his response to the last question I think we're going to
16 reach into a realm of speculation.

17 THE COURT: And Mr. Abbatangelo, can you rephrase the
18 question?

19 BY MR. ABBATANGELO:

20 Q Let me change gears a little bit. Did you know if Mr.
21 Kaczmarek and Ms. Burns were communicating at the jail through mail?

22 A I did -- I did not, no.

23 Q And did I inform you that there were letters going back and
24 forth from the two of them?

25 A Yeah, you did yesterday.

1 Q And you had no knowledge about that information?

2 A Absolutely not.

3 Q So you never knew that -- and they've been admitted into
4 evidence that Ms. Burns was receiving numerous letters throughout your
5 representation from Mr. Kaczmarek; that's just to be clear?

6 A Well, you have advised me of that. I've never seen the
7 letters. I never heard of the letters before yesterday. I don't know how
8 they even became known.

9 Q And in your years of practicing in Clark County were you
10 familiar with the practice of communication between co-defendants at
11 the jail?

12 A It was always my understanding that the detention facility
13 did everything they can to eliminate communication between co-
14 defendants.

15 Q Did you ever have any other cases without Mr. Burns and Mr.
16 Kaczmarek where you had clients mailing each other letters back and
17 forth?

18 A No. We -- to be fair, we certainly -- as we eventually did in
19 this case -- sometimes it was fruitful under the court order to have both
20 counsel and both defendants in the same room to work out a
21 negotiation. But to my knowledge, I don't remember ever having a client
22 who was sending letters back and forth to another co-defendant.

23 Q And speaking of a meeting between Mr. Kaczmarek and Ms.
24 Burns, do you recall there being a court order allowing the two of them
25 to meet?

1 A Yeah, once.

2 Q And were you present for that?

3 A I -- Counsel, honestly, I don't remember the meeting. I've
4 seen the order. I remember talking about the meeting before. I don't -- I
5 apologize. I just do not remember the meeting itself and the tenor of the
6 meeting.

7 Q So you don't recall if you were there or not there? To be fair,
8 you don't recall?

9 A I don't recall.

10 Q Okay. Do you recall on April 1st of 2003, being in front of
11 Judge Oesterle, I believe, where Ms. Burns unconditionally waived her
12 right to a preliminary hearing?

13 A I don't remember what date. I remember her waiving
14 preliminary hearing.

15 Q Do you recall Ms. Burns wanting to accept or not accept the
16 offer?

17 A She did accept -- she did want to accept the offer.

18 Q Do you recall telling the court -- and I have the transcript --
19 that Ms. Burns was wavering?

20 A No, I haven't seen that transcript and I don't recall.

21 Q All right. Since you're not here, I can't show it to you. So --
22 but if it's in the record, you would take it as true because it's in the
23 record -- I mean, in the transcript?

24 A Yes, of course.

25 Q Now in -- how long have you been practicing law in Clark

1 County, Mr. Kohn --

2 A I practice --

3 Q -- when you originally started?

4 A I passed the Nevada bar in 1985. I practiced law up in
5 Douglas County till 1992. I joined the Public Defender's Office in 1992
6 and retired out of that office in 2018. And of course, I represented Ms.
7 Burns as a special public defender, so I had a five-year hiatus at the
8 Special Public Defender's Office.

9 Q Did you ever participate in any legislative actions?

10 A Many of them.

11 Q Could you describe that pertaining to how that would affect
12 this case -- Ms. Burns?

13 MR. HAMNER: I'm going to object. I'm going to proffer what
14 is this witness about to discuss? How is this relevant to an actual
15 innocence claim?

16 MR. ABBATANGELO: The reason actually innocent is what --
17 something that's fundamental to our disagreement from the State and
18 the Defense is that in 2002, sex trafficking wasn't even really
19 acknowledged, and it's changed, and Mr. Kohn was involved with now
20 U.S. Senator Catherine Cortez Masto and helped pass the legislation on
21 sex trafficking.

22 THE COURT: Mr. Hamner?

23 MR. HAMNER: Your Honor --

24 MR. ABBATANGELO: It's for that limited purpose.

25 MR. HAMNER: -- well, it's an irrelevant purpose for an actual

1 innocence claim whether the status of whatever crimes in the future are
2 enumerated by statute have no bearing on what the state of crimes are
3 in 2002. If murder is on the books, and there is a defense to that, that is
4 something that can be delved into.

5 But this idea that he helped basically pass legislation to get
6 some form of sex trafficking as a felony in the future, doesn't have any
7 bearing on the knowingness or the voluntariness of her plea. It doesn't
8 have to do with the fact of -- the heart of this claim is she's actually
9 innocent of either committing robbery, kidnapping, burglary, or murder.
10 The bottom line is it is really an irrelevant line of questioning for the
11 limited scope of this hearing.

12 THE COURT: Well, I mean, but the issue that goes to her
13 actual innocence is the sex trafficking and the influence that she's
14 claiming was exerted over her by Mr. Kaczmarek. So I think this does go
15 to that, so I'll allow him to answer that question.

16 MR. ABBATANGELO: Thank you.

17 BY MR. ABBATANGELO:

18 Q Mr. Kohn, do you need me to restate the question or are you
19 good?

20 THE COURT: I need you to restate the --

21 THE WITNESS: No --

22 BY MR. ABBATANGELO:

23 Q Okay. One second. Apparently the judge wants me --

24 THE COURT: I don't remember.

25 MR. ABBATANGELO: -- and she's the boss. So --

1 BY MR. ABBATANGELO:

2 Q So Mr. Kohn, did there come a time you worked at the
3 legislature with then attorney general Catherine Cortez Masto regarding
4 the issue of sex trafficking?

5 A Well, it -- again, we didn't go together. We were sort of on
6 opposite sides of the issue as to the extent of the law, but during the
7 legislative session, the speaker of the assembly pretty much commanded
8 that General Masto and I meet to try to -- because we had both testified
9 on opposite sides of the bill -- to try to sit down and work out some
10 things together.

11 Q And what was that in relation to?

12 A Just the scope of the law, the punishment that would be
13 prescribed.

14 Q And did eventually in 2013, the legisla -- was that in 2013 I
15 should ask first; does that sound familiar?

16 A Yes, it does.

17 Q And did there become a law passed at that time?

18 A It did.

19 Q And do you recall what the law was?

20 A You mean the entire statute?

21 Q Well, not the entire -- but the general -- generality of the law?

22 A Well, it basically recognized sex trafficking as a serious
23 felony in the state of Nevada.

24 Q And was the state of the law in 2002?

25 A I don't remember ever using the term sex trafficking back in

1 2002 or in that area up until -- or being aware of that concept -- I mean,
2 certainly I understood prostitution, but I can't say that sex trafficking was
3 something that we really discussed back in 2002 -- defense or
4 prosecution.

5 MR. ABBATANGELO: And Your Honor, I have no further
6 questions. I have a few exhibits. I don't know if you want to mark them
7 now or wait until cross-examination is completed.

8 THE COURT: Well, are you going to move them into
9 evidence while you're questioning?

10 MR. ABBATANGELO: I could.

11 THE COURT: Okay. I think you probably should because
12 you're not --

13 MR. HAMNER: I don't have any objections to any of those.

14 THE COURT: All right.

15 MR. ABBATANGELO: I have -- one second.

16 MR. HAMNER: Just to be clear, those are the ones that you
17 did show me previously --

18 MR. ABBATANGELO: Yeah.

19 THE COURT: Those are the letters?

20 MR. ABBATANGELO: No, no, not the letters.

21 THE COURT: Okay.

22 MR. ABBATANGELO: We have April 1st transcript of a
23 preliminary hearing, unconditional waiver in front of Judge Oesterle.

24 THE COURT: That'll be Defense's B.

25 MR. ABBATANGELO: I also have which proposed Exhibit C

1 would be the -- in the Court of the Common Plea Juvenile Division
2 Brown County, Ohio in which Ms. Burns was asked as being transported
3 out here as a witness in the kidnapping and statutory [indiscernible].

4 THE COURT: That'll be Defense's C.

5 MR. HAMNER: No objection to that.

6 MR. ABBATANGELO: Then we also have the certificate of
7 requesting attending witness which is from Clark County signed by -- oh,
8 one second. That's not the right document there. Judge Bixler from
9 Justice of the Peace and then the document pending behind it is
10 certificate requesting attendance of witness by Jim Bixler again,
11 regarding Ms. Burns being the victim in that original case with Mr.
12 Kaczmarek, and the fax paperwork that shows it was sent.

13 THE COURT: Okay. That'll be Defense D.

14 MR. HAMNER: Can I at least see that one? I don't
15 remember --

16 MR. ABBATANGELO: Yeah.

17 [Counsel confer]

18 MR. HAMNER: No objection.

19 THE COURT: Okay. So Defense's B, C, and D will be
20 admitted without objection.

21 [Defendant's Exhibits B, C, and D admitted into evidence]

22 THE COURT: Now, are those the only ones you have, Mr.
23 Abbatangelo?

24 MR. ABBATANGELO: One more. That would be the
25 stipulation order for a contact visit signed by Gary Guymon, Phil Kohn

1 and actually, Greg Denué and signed by Judge McGroarty.

2 THE COURT: Okay. That'll be Defense's E.

3 MR. HAMNER: No objection.

4 THE COURT: That'll be admitted without objection.

5 [Defendant's Exhibit E admitted into evidence]

6 THE COURT: Thank you, Mr. Abbatangelo.

7 MR. ABBATANGELO: And the Court's indulgence for a
8 moment.

9 THE COURT: Okay.

10 [Counsel confer]

11 BY MR. ABBATANGELO:

12 Q Mr. Kohn?

13 A Yes, sir?

14 Q At the time sex trafficking in 2002 was recognized, would you
15 have been able to defend Ms. Burns differently?

16 A That's a good question. I probably would have had to do it
17 without her permission and help, but yes, I certainly would of.

18 Q And then, from your understanding of any mail going
19 between -- any mail going to a defendant, what is your understanding of
20 the Clark County detention center policy of reviewing mail or anything of
21 that nature?

22 A Oh, I don't think anything goes out from a defendant without
23 first being reviewed you know, by the detention officers.

24 Q Thank you.

25 MR. ABBATANGELO: No further questions.

1 THE COURT: Okay. Cross?

2 MR. HAMNER: Let me ask something very brief. There is a
3 charging document, I think it may be a criminal complaint against
4 Kaczmarek. I think it's a child trafficking -- I thought I just -- I think I just
5 looked through it. This is 41. It's against Mr. Kaczmarek amongst the
6 stuff he was just trying to have admitted.

7 CROSS-EXAMINATION

8 BY MR. HAMNER:

9 Q Good afternoon, Mr. Kohn.

10 A Good afternoon, Counsel. How are you?

11 Q I'm good, sir. So one of the documents that was admitted
12 was Defense -- I can't even --

13 MR. HAMNER: I can't read that. Is that D?

14 THE CLERK: Correct.

15 BY MR. HAMNER:

16 Q Okay. Defense Exhibit D. And I don't --

17 THE COURT: D or B as in boy?

18 MR. HAMNER: D as in dog.

19 THE COURT: D as in dog. Got it.

20 BY MR. HAMNER:

21 Q And what I have in front of me. I don't know -- can you see
22 the courtroom, Mr. Kohn?

23 A No, Counsel. I can't.

24 Q Okay. So I'm just going to kind of verbally describe it to you.
25 This was a document out of Las Vegas Justice Court. It was a certificate

1 requesting the attendance essentially of Alisha Burns. I think it had been
2 faxed to you and it attached a certificate requesting attendance of
3 witness and it was asking for Alisha Burns attendance and it listed out
4 the crimes that Mr. Kaczmarek was charged in in the sex trafficking case.
5 Do you have a general familiarity of that? There were probably some
6 pleadings that were sent to you asking you know, letting you know that
7 they're going to be bringing out from Ohio?

8 A Yes, sir. I do recall that.

9 Q Okay. You were asked a question at the very end of cross-
10 examination about how you may have prosecuted a case differently if
11 sex trafficking -- that felony had been enumerated on the books, correct?

12 A Yes. And may I expend on my answer? I was --

13 Q Well, no. I -- maybe on redirect they can address it.

14 A Okay.

15 Q Just to be clear, in the case in which Alisha Burns in
16 expected to be a witness, she was named as a victim of the following
17 crimes -- do you remember her being a victim of first degree kidnapping?

18 A Yes, sir.

19 Q Do you remember her being a victim of sexual assault with a
20 minor under the 16 years of age?

21 A I do.

22 Q Okay. I mean, those are extraordinarily serious charges even
23 back in 2002, correct?

24 A Yes.

25 Q And certainly sexual assault of a minor under the age of 16

1 even carries more severe penalties than sex trafficking, correct?

2 A I don't recall. But I'll take your word for it.

3 Q And just to be clear, those two crimes were on the book back
4 in 2002; is that right?

5 A Yes.

6 MR. HAMNER: I have no further questions for the witness.

7 THE COURT: Mr. Abbatangelo, any follow-up?

8 MR. ABBATANGELO: Your Honor, no further questions. Mr.
9 Kohn, thank you for your time. We appreciate you.

10 THE WITNESS: And I thank the Court for allowing me to
11 testify remotely.

12 THE COURT: Thank you so much and thank you for being
13 here today.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: Okay. Mr. Abbatangelo, do you have any other
16 witnesses?

17 MR. ABBATANGELO: I think we need to get Ms. Burns back
18 on the stand so Mr. Hamner can resume his cross-examination.

19 THE COURT: Okay. Ms. Burns, if you could please come up
20 to the witness stand.

21 ALISHA BURNS, DEFENDANT, SWORN

22 THE CLERK: Please be seated stating your full name, spelling
23 your first and last name for the record?

24 THE WITNESS: Alisha Burns. A-L-I-S-H-A B-U-R-N-S.

25 THE COURT: Thank you very much.

1 Mr. Hamner?

2 MR. HAMNER: Thank you very much. I just need to retrieve
3 a couple of exhibits.

4 THE COURT: It appears you were on the guilty plea
5 agreement was the last note that I wrote when we were here months
6 ago.

7 MR. HAMNER: I was.

8 THE COURT: That's the last thing I have in my notes.

9 MR. HAMNER: And I can jump to that question in particular.
10 I just need one second.

11 CROSS-EXAMINATION CONTINUED

12 BY MR. HAMNER:

13 Q And I don't know if you recall, Ms. Burns, way back when,
14 when we were talking last time, we were in the midst of a discussion
15 about whether or not you knew as a 16 year-old what you were signing
16 up for. Do you remember roughly that was kind of what we were talking
17 about at the end of that day?

18 A I don't.

19 Q Okay. And I think what you had said to me -- and I would
20 refer you if you have the record in front of you, around 156 of that
21 transcript, I think you had said definitively that -- you had said to me on
22 cross regarding entering the plea, at that time, you wanted to go to trial?
23 Do you remember saying that to me --

24 A Yes.

25 Q -- back then? Okay. And I think at that point, I said oh, where

1 is Ms. Daka's statement; where's that pesky little statement, something
2 along those lines and then we kind of got -- time out had hit. So I want
3 to turn to that statement. And [indiscernible] grab it. There's a lot over
4 there.

5 MR. ABBATANGELO: Is this docket a statement --

6 MR. HAMNER: I'm referring to Ms. Daka's statement.

7 MR. ABBATANGELO: All right. Thank you.

8 BY MR. HAMNER:

9 Q Do you recall we talked a lot about Ms. Daka's statement. I
10 know you've reviewed it before. I know you don't remember saying
11 anything, but do you recall in that statement, Ms. Daka stating the
12 following: "I asked her if she had any thoughts. She said that she didn't
13 want to go to a women's prison because she just wanted to be
14 addressed as a delinquent and go back to Ohio and do her time so she
15 could be at home." Do you recall that quotation being in Ms. Daka's
16 statement?

17 A Which statement, sir, because she did two separate
18 statements, so I just want to be clear.

19 Q The statement -- sure. This is State's Exhibit 11. It's a
20 recorded interview from December 3rd, 2002 and it is in relation to a
21 conversation she held with you on November 27, 2002.

22 A The recorded statement. Okay.

23 Q Yes.

24 A Thank you.

25 MR. ABBATANGELO: Mr. Hamner, what page again?

1 MR. HAMNER: Page 5.

2 MR. ABBATANGELO: Thank you.

3 BY MR. HAMNER:

4 Q Would you like me to repeat that excerpt for you or do you
5 recall whether or not it was present in that statement?

6 A No. I'm sorry. I was trying to figure out which statement
7 first. If you could just repeat. Thank you.

8 Q It's okay. And I can even show you now that I have the
9 statement.

10 A I'm familiar with them individually so I just wanted to --

11 Q Okay. In that statement, do you recall that she said -- one
12 second. Yeah, on page 5, states the following: "I asked her if she had
13 any other thoughts. And she said that she didn't want to go to a
14 women's prison because she just wants to be addressed as a delinquent
15 and go back to Ohio to do her time so she can be at home." Do you
16 remember Ms. Daka putting that in her voluntary statement to the
17 police?

18 A I do remember the statement saying that, yes.

19 Q Okay. You would agree that that statement -- I know you
20 don't remember saying it to her and you're not saying you did, but you
21 would agree that that statement is very different than a statement that
22 would say I want to go to trial, correct?

23 A Those are two very different statements.

24 Q Okay. Thank you. Let's talk a little bit about these jail letters,
25 okay? Your counsel provided the State a litany of letters, many of them

1 leading up to the time that you ultimately pled guilty in this case. Have
2 you reviewed those letters?

3 A I have.

4 Q Okay. And you remember receiving these obviously, in real
5 time as they were being delivered to you, correct?

6 A I do.

7 Q Okay.

8 THE COURT: And Mr. Hamner, just so I'm clear, because I
9 haven't had an opportunity to review all of the letters because you guys
10 admitted them today, did Ms. Burns write some of these letters or are all
11 of the letters written by Kaczmarek to her?

12 MR. HAMNER: Every single letter that we have in our
13 possession are letters Steven Kaczmarek wrote to Ms. Alisha Burns.

14 THE COURT: Okay. Just wanted to be clear about that.

15 MR. ABBATANGELO: And Your Honor --

16 THE COURT: And I will review them, but I haven't reviewed
17 them today.

18 MR. ABBATANGELO: Two things. I think Ms. Burns is
19 indicating some water. I don't know if the pitcher is behind her.

20 THE MARSHAL: Oh, I'm sorry.

21 THE COURT: Do we have any water?

22 MR. ABBATANGELO: That's number one. But --

23 THE COURT: Sorry. We're remote now. I apologize, Ms.
24 Burns. We're remote so we don't fill up the water pitchers every day like
25 we did. Did you have your own?

1 THE WITNESS: I have water over there. I do, yeah.

2 THE COURT: Mr. Abbatangelo, could you bring your client
3 her water?

4 MR. ABBATANGELO: Is this you?

5 THE WITNESS: It is.

6 MR. ABBATANGELO: Oh, okay. May I approach, Your
7 Honor?

8 THE COURT: Yes.

9 THE WITNESS: Thank you.

10 THE COURT: And I apologize. Normally, we have water in
11 that pitcher. But everything is remote now so --

12 THE WITNESS: I understand.

13 THE COURT: -- we just don't have people here every day.

14 MR. ABBATANGELO: And Your Honor, the second thing is
15 Mr. Hamner is correct. The only letters we have are from Kaczmarek to
16 Ms. Burns. I presume the letters she wrote to him he either has or
17 destroyed.

18 THE COURT: Okay. I just wanted to make sure because I'm
19 going to review them before I make any decisions in this case. I just
20 haven't reviewed them because you guys brought them today. So I just
21 wanted to make sure when the questions are being asked of her about
22 the letters, I understand the letters. Mr. Hamner.

23 BY MR. HAMNER:

24 Q You had -- when we first -- when you were previously up on
25 the stand on cross-examination, even on direct, you talked about the

1 letters Steven was sending you; do you recall doing that?

2 A A specific letter are you referring to?

3 Q No, just in general that Steven was writing you letters?

4 A Yes.

5 Q And you gave an answer that was as follows on direct
6 examination. You were asked: "What were those letters saying, and you
7 answered that he loved me, that I had the power to save us both, that if I
8 did what he said, and took responsibility for everything, I wouldn't get
9 much time because I was a kid and I would be saving him, and he
10 wouldn't get much time either. And then we'd both -- we would both get
11 out around the same time, and we could be together." Do you
12 remember giving an answer like that on direct examination?

13 MR. ABBATANGELO: And Your Honor -- which page, Mr.
14 Hamner?

15 MR. HAMNER: It was page 34.

16 MR. ABBATANGELO: Thank you.

17 THE COURT: You guys are referring to the transcript from
18 the last hearing?

19 MR. HAMNER: That is correct.

20 THE COURT: Okay.

21 BY MR. HAMNER:

22 Q Do you recall giving that answer?

23 A I do.

24 Q Okay. On cross-examination, I had asked you somewhat
25 about those letters and it was in conjunction to the letter you wrote to

1 Detective Mikalonis, and you had said to me on cross-examination, "The
2 details I put in the letter to Detective Mikalonis is word for word what
3 Steven Kaczmarek told me to write." Do you remember saying that on
4 cross-examination?

5 A Yes, I do.

6 Q Okay. Now, we're looking here at Exhibit 43. Just so the
7 record is clear, these letters start back in December 18th of 2002 and they
8 go all the way to Friday, April 18th of 2003.

9 THE COURT: April 18th of 2003?

10 MR. HAMNER: Yes.

11 THE COURT: Okay.

12 MR. HAMNER: And so the Court is clear, by April 22nd, that
13 is the date Ms. Burns entered her plea of guilty. April 1st or April 3rd,
14 she unconditionally waives her preliminary hearing.

15 THE COURT: Okay.

16 MR. HAMNER: Just to give you an idea.

17 BY MR. HAMNER:

18 Q So these are letters that lead up to you waiving your
19 preliminary hearing and lead up all the way to the day you that you enter
20 your plea of guilty?

21 THE COURT: You said April 20th is the enter of plea?

22 MR. HAMNER: 22nd.

23 THE COURT: 22nd. Okay.

24 BY MR. HAMNER:

25 Q Now, I have reviewed -- I have identified 1, 2, 3, 4, 5, 6, 7, 8, 9,

1 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 letters during this
2 window of time.

3 THE COURT: 24 letters?

4 MR. HAMNER: 24 letters during that window.

5 THE COURT: And Ms. Burns, did you save all these letters?

6 THE WITNESS: I don't believe I saved every single one of
7 them, no.

8 THE COURT: No, I mean, the ones he has in his hand, you
9 saved all those?

10 THE WITNESS: Oh, yes.

11 THE COURT: Okay.

12 MR. ABBATANGELO: Eventually, for the record, we did
13 retrieve them from Attorney Randall Roske --

14 THE COURT: Okay.

15 MR. ABBATANGELO: -- who did a pardons board very
16 thorough amazing memorandum --

17 THE COURT: Okay.

18 MR. ABBATANGELO: -- and I presume he got those from
19 [indiscernible], but I'm not sure. But that's how -- Mr. Rose picked them
20 up from Mr. Roske. Just so that everybody knows where they came
21 from.

22 THE COURT: Okay.

23 BY MR. HAMNER:

24 Q Ms. Burns, in the 24 letters that your defense lawyer
25 provided the State, isn't it true that in none of the 24 letters, is there

1 anything resembling a word for word recitation or repeating of what you
2 wrote in your letter to Detective Mikalonis?

3 A That particular letter is not in there.

4 Q Okay. Now, you had said on direct examination that the gist
5 or what he was saying in these letters was that you had the power to
6 save both of them and he needed you take responsibility for everything,
7 right?

8 A I'm -- what's the question? Sorry.

9 Q You had told us on direct examination on day one of this
10 evidentiary hearing that the letters said to you that you had the power to
11 save both he and you, and that if you said -- if you had taken
12 responsibility for everything, the two of you essentially, could be saved,
13 right?

14 A Yes. That -- yes.

15 Q Okay.

16 MR. ABBATANGELO: What page, Mr. Hamner, on the
17 previous transcript?

18 MR. HAMNER: Page 34.

19 MR. ABBATANGELO: Thank you again.

20 BY MR. HAMNER:

21 Q Now, I'd like to turn your attention to --

22 THE COURT: And Mr. Hamner, when you reference the
23 letters, can you just reference them by date?

24 MR. HAMNER: I will.

25 THE COURT: Okay.

1 MR. HAMNER: And I can even -- could I put this on an
2 overhead?

3 THE COURT: You can. Can you switch it back over for him?

4 BY MR. HAMNER:

5 Q Let me ask you one more little question before we start
6 getting into specifics. Isn't it true that in these 24 some-odd letters that
7 we have, Mr. Kaczmarek never says to you, I need you to take
8 responsibility for everything; isn't that true?

9 A I -- to be honest, I'm not sure. It's not -- it wasn't my job -- I
10 did review the letters as you asked me if I did. But I didn't comb through
11 them. That's my attorney's job.

12 Q Okay. So as you sit here today, you don't recall any of these
13 particular letters saying what you told us the last time you were here on
14 direct examination, correct?

15 A As I just said, I didn't comb through those letters so I can't
16 say for certain if it's in any of those or not.

17 Q Okay. So I want to turn your attention to February 28th,
18 2003. I'm going to look at the first page. Isn't it --

19 THE COURT: What date is this, Mr. Hamner?

20 MR. HAMNER: February 28th, 2003.

21 THE COURT: Okay.

22 BY MR. HAMNER:

23 Q And if I zoom in -- isn't it true in this letter it says, "Baby, you
24 already know this but baby, don't sign shit. No papers at all?"

25 A It does say that.

1 Q Isn't that in reference to -- contextually when you read it he's
2 referring to like, don't sign any guilty plea papers, correct?

3 A Well, without reading the rest of the letter, I can't put context
4 to it.

5 Q Okay. I'll give you time to read this letter.

6 A Thank you.

7 Q And you tell me if you think it could potentially refer to
8 anything else because both of you were in custody at that point.

9 [Witness reviews document]

10 A Can I give my opinion on what it's in --

11 THE COURT: No.

12 THE WITNESS: -- context to?

13 THE COURT: There's no question pending. You need to
14 answer Mr. Hamner's question.

15 Mr. Hamner, can you restate the question?

16 MR. HAMNER: Sure.

17 BY MR. HAMNER:

18 Q Yes or no; isn't -- based on your reading of the letter, isn't he
19 referring to potentially signing a plea deal at that point?

20 A Based on my reading of the letter, it's a plea deal and
21 testifying against him.

22 Q Okay. And that says on the following page, again, "Baby,
23 don't sign shit until after we can talk face-to-face. Baby, don't take any
24 deals until we can talk face-to-face, Baby." Sorry. This one slid over. I
25 apologize. And then it -- he's talking about your lawyer. "Baby, if he

1 says no, you say no about that. Baby, don't sign anything until after we
2 get to see each other." That's what it said, correct?

3 A It does say that, yes.

4 Q Okay. And then again at the end here, he even says a third
5 time, "Baby, I love you. Baby, write me back right away. Baby, please
6 talk to your lawyer about what I said. Don't sign shit until we talk face-
7 to-face."

8 Now, this letter is dated February 28, 2003. And I think the
9 parties have stipulated that Mr. Kaczmarek's jury trial starts on March 10,
10 2003. So this is 12 days before he goes to trial, correct?

11 A Yes.

12 Q Okay. I want to turn to the next letter. March 3rd, 2003.
13 We're getting a little closer to his trial.

14 THE COURT: This is the March 3rd letter?

15 MR. HAMNER: Yes, Your Honor.

16 BY MR. HAMNER:

17 Q On page 2 he says the following --

18 THE COURT: Mr. Hamner, can you move that over to --

19 MR. HAMNER: I apologize.

20 THE COURT: -- the right a little bit?

21 MR. HAMNER: Yes.

22 THE COURT: Okay. Thank you.

23 BY MR. HAMNER:

24 Q "My lawyer said that he would also talk to your lawyer, but
25 he also told me to tell you don't sign them until we four meet, and to tell

1 your lawyer that you won't take no deals until the four of us have a
2 meeting. Baby, remember what I said. You've got to be strong about it."
3 Correct?

4 A Yes, that's what it says.

5 Q Okay. And, again, there's nothing in this letter that's saying
6 you need to take responsibility for everything; he just keeps repeating --
7 aside from "I love you" and "I miss you," things like "don't sign any deals
8 until we can all meet in person," correct?

9 A That is what that says.

10 Q Okay. Again, on page 4 it says, "I said we'll get to see each
11 other face-to-face, but don't sign shit until we see each other." So, again,
12 like the third time he's bringing it up in this letter, correct?

13 A Yes.

14 Q Okay. Let's move to March 6th. This is four days away from
15 his trial.

16 Now, again, your position has been the letters that he wrote to you
17 were saying something to the effect that you have the power to save
18 them both and that if you took responsibility for everything, you could
19 save him, correct?

20 A Yes.

21 Q I want to turn your attention to March 6, 2003. This is four
22 days before he goes to trial. "Alisha, save yourself. And if testifying
23 against me will get you a little less time, then do it." Underlined with an
24 exclamation point. "Alisha, you are all that matters to me, baby. Stop
25 listening to these people. All they are doing is try to tear us apart."

1 You would agree that that is the complete opposite of asking you
2 to take responsibility for everything, correct?

3 A Yes.

4 Q Okay. I want to turn your attention to March 7. This is three
5 days before he goes to trial. This is about -- one, two, three -- four, this is
6 the fourth page. He is three days away from facing a potential death
7 penalty case. And this is what he writes to you, isn't it true, he says the
8 following:

9 "Baby, I don't want you to go to prison. Baby, I don't want you to
10 lose the best years of your life in prison like I did. That's why I told you
11 to take a deal even if it meant testifying against me. I knew that the only
12 way that you would take a deal is if I asked you to. That's why I told you
13 to tell Phil" -- meaning Phil Kohn -- "that you would take that deal after
14 we talked face-to-face. Plus we'd get to see each other, we get to look in
15 each other's eyes and say I love you. Alisha baby, I love and care about
16 you even if you don't believe me. Baby, you are my world and
17 everything that's in it."

18 I did read that correctly; didn't I?

19 A It sounded like you're reading this on point.

20 Q Okay. That statement that's gives context to why
21 Mr. Kaczmarek wanted to meet with you face-to-face, correct?

22 A Is that -- is --

23 Q Let me -- let me phrase it another way. Does Mr. Kaczmarek
24 offer you an explanation in the passage I read to you about why he
25 wanted to meet face-to-face?

1 A It does say that, yes.

2 Q Okay. And does Mr. Kaczmarek say the reason he wanted to
3 meet you face-to-face was to make sure you took a plea deal even if it
4 went testifying against him?

5 A That's what he wrote, yes.

6 Q You would agree that is the exact opposite of asking
7 someone to take full responsibility for everything?

8 A It would be the exact opposite.

9 Q Now, his trial starts on March 10th, 2003. And there is -- he
10 writes you on letter on March 10th, March 13th, March 17th, March 18th,
11 and March 19th. This is all during the window of his trial. Isn't it true he
12 never asks you in these letters to take responsibility to save him even
13 while trial is going on?

14 A I've not combed through the letters again --

15 Q Okay.

16 A -- so.

17 Q But you don't have any independent recollection that they
18 do; is that correct?

19 A Do I have any independent recollection of what, sir?

20 Q That any of these letters during the window he's in trial he's
21 begging you to do something to save him?

22 A During that period of time?

23 Q Yes.

24 A I can't say for sure.

25 Q Okay. I'm sure -- and, look, you'll have a chance on redirect;

1 maybe your -- your lawyer can find it. But you don't have any memory
2 of that, correct?

3 A I do have memory of him telling me --

4 Q But in --

5 A -- that I could save us both.

6 Q -- and I mean specifically with respect to the window time
7 that he's in trial. There's no mention of anything like that in these letters,
8 correct?

9 A I can't say for certain.

10 Q Okay. Would you like to take the time and read them?

11 A If you would like me to, I would be happy --

12 THE COURT: Do you want her to read them all, Mr. Hamner?

13 MR. HAMNER: Well, I'll -- I'll move on. It sounds like --

14 THE COURT: Yeah. She's not going to agree with you.
15 She's already said four times that she hasn't read the letters in their
16 entirety.

17 MR. HAMNER: Okay.

18 THE COURT: The Court is going to read the letters --

19 MR. HAMNER: Okay.

20 THE COURT: -- before I issue any decisions on this case.

21 MR. HAMNER: Okay.

22 BY MR. HAMNER:

23 Q I want to turn your attention to March 25th. Now, this is after
24 Mr. Kaczmarek has lost his trial and was found guilty on all counts,
25 including first degree murder. March 25th, 2003.

1 "Baby, I will say that if the DA comes to you with a good deal when
2 you go to your pre-trial on April 1st, you take it. And tell your lawyer,
3 Phil, right then that they're" -- "that you want to talk to me first to call my
4 lawyer and set up a meeting between us. If Phil says no and you still
5 want to take the deal, tell Phil that you want to be" -- "want to be
6 sentenced on May 7. That's the day I get to get sentenced. If you don't
7 take the deal, tell Phil that you want me to be put on your witness
8 because I will get on the stand and tell the jury that I did everything."

9 Did I read you that correct?

10 A You did.

11 Q And he continues to say, "But, baby, if the DA offers you a
12 deal and you think it's good, take it. But do like I said a minute ago about
13 the meeting. Sentencing set on May 7, 2003."

14 So in this case, he's -- he's been found guilty on everything but
15 now he's offering to testify for you; is that correct?

16 A It would appear so, yes.

17 Q Okay.

18 A I'm sorry. I'm --

19 Q It's okay. I want to turn your attention to March 29th. Now,
20 the deal that you ultimately accepted was a second degree murder offer
21 or it was a ten to life; is that correct?

22 A Yes.

23 Q Okay. On March 29th -- and ultimately -- if we look at the
24 timing on all this, ultimately you take your deal, you waive your
25 preliminary hearing on April 3rd, and enter your plea on April 22nd,

1 correct?

2 A I thought the waiver of preliminary was April 1st.

3 Q Okay. I have -- see, my notes say April 1st and then for some
4 reason I have April 3rd. I don't know why. But anyways, regardless,
5 early -- early April you waive your preliminary hearing, April 22nd you
6 enter your plea, correct?

7 A That sounds about right, yes.

8 Q So I'm going to turn your attention to March -- a letter dated
9 March 29th and March 30th. And it -- tell me if I'm reading this correctly.
10 "Baby, I guess ten years might be an okay deal. If you go to trial, a
11 jury might give you more because of the robbery. That's one way they
12 found me guilty of murder also."

13 So I don't know if you wrote him, but it sound like he might have
14 been aware that there was a ten to life offer on the table, correct?

15 A Oh, he was aware.

16 Q And he was communicating to you of the danger of going to
17 trial, essentially if there's a felony murder theory, right, because he
18 believed one of the ways he was found guilty of murder was because
19 someone found him guilty of the robbery, right?

20 A Yes.

21 Q Okay. So that is information he was communicating to you
22 before you took this negotiation. You would agree with that?

23 A I don't think I got those letters -- that letter before I went to
24 court. If he wrote it the day before my court hearing, I wouldn't have
25 received it yet.

1 Q Oh, no, no. The date on this letter is March 29.

2 A Right. And I went --

3 Q It's --

4 A -- on the 1st.

5 Q It's approximately a month before you take your deal.

6 A Oh. If it's --

7 Q You enter a plea --

8 A -- March 29th and I went to -- if I waived prelim on the -- on
9 the -- April 1st, I don't think I --

10 Q If --

11 A -- would have gotten that letter yet.

12 Q I know, ma'am. But you don't actually enter a guilty plea
13 until April 22nd. You can still waive your preliminary hearing, but you
14 wouldn't be tied to a negotiation.

15 A Oh, okay.

16 Q You -- subsequent to all of this, there are a number of times
17 that you appeared before the parole board; is that correct?

18 A I have been to the parole board, yes.

19 Q Okay. And it's happened a few times over the years, and
20 you've given statements and spoke to the parole board about things that
21 you've been doing and maybe why you should be kind of reinstated and
22 kind of let out, things of that nature; is that correct?

23 A Yes.

24 Q Okay. We have those videos admitted. I'm not going to get
25 into any of it right now. But you would agree at no point in any of those

1 parole hearings did you communicate to the parole board that you are
2 actually innocent of those crimes?

3 A Absolutely not.

4 Q Okay. Now, I know -- I know -- I can see that you're kind of
5 chuckling about that. But I mean this is a tribunal and they're evaluating
6 you and I would assume essentially they're expecting you to tell the
7 truth. So were you not telling them the truth at that time?

8 A Sir, I saw a woman do 25 years when she was supposed to
9 do ten because she told them she wasn't guilty.

10 Q Okay. So what you're saying --

11 A They gave --

12 Q -- without --

13 A Like they made her do --

14 THE COURT: Hold on, Mr. Hamner.

15 THE WITNESS: -- 15 extra years than what she was
16 supposed to do simply because she told them she wasn't guilty. And do
17 you know what happened? Eventually her case got overturned because
18 they found her not guilty years later. She could have been out after
19 ten years if she would have just said, "Yes, I did it. I'm sorry for what I
20 did." But because she told them the truth, they kept her in there for 15
21 more years of her life.

22 BY MR. HAMNER:

23 Q So, Ms. Burns, what you're saying to us without actually
24 saying it is you did lie to the parole board?

25 A Did I lie? I did not lie to the parole board.

1 Q Did you ever take responsibility before the parole board for
2 what you did to Mr. Villareal?

3 A I took responsibility for what I was told I was responsible for.

4 Q Yes or no; did you ever say to the parole board that, "I'm
5 sorry for what I did to Mr. Villareal"?

6 A I did say that to them, yes.

7 Q Okay. But that's not true? Is it true?

8 A It's absolutely true that I'm sorry for my involvement in what
9 happened to Mr. Villareal.

10 Q Because you --

11 A I'm sorry that I ran into him that day. I'm sorry for all of it
12 that happened. I really am. And I did say that to them. I spent 16 years
13 of my life thinking that I was responsible for someone's death. That
14 tortured me for 16 years. So, yes, when I saw them, I did tell them that I
15 was sorry.

16 Q Okay.

17 THE COURT: Mr. Hamner, are you still using the overhead?

18 MR. HAMNER: No.

19 THE COURT: Okay. Can you shut that down, please?

20 MR. HAMNER: Sure.

21 THE COURT: Thank you.

22 MR. HAMNER: Let me just --

23 THE CLERK: I [indiscernible] that.

24 THE COURT: Okay. Thanks. Or you can just switch it back
25 over.

1 MR. HAMNER: I don't have anything further at this time.

2 THE COURT: Okay. Mr. Abbatangelo, do you have any
3 redirect?

4 MR. ABBATANGELO: Yes, Your Honor, I do.

5 THE COURT: Okay.

6 REDIRECT EXAMINATION

7 BY MR. ABBATANGELO:

8 Q Let's start off with where Mr. Hamner picked up. You were
9 talking about Ms. Daca. And as we -- you recall who Ms. Daca is,
10 correct?

11 A Yes.

12 Q And she was who?

13 A She was a juvenile probation officer that worked at the
14 detention center.

15 Q And you also stated you reviewed her statement; is that true?

16 A I reviewed both of her statements.

17 Q One is a handwritten incident report, correct?

18 A It is.

19 Q And the other one is a -- at least a statement -- well, an
20 interview to police?

21 A It is.

22 Q Okay. And she says you met with her and talked to her,
23 correct?

24 A She did say that.

25 Q What is your position on that?

1 A The conversation never happened.

2 Q And how can you say that with confidence?

3 A I didn't even trust Phil. I trusted no one. There's no way I
4 spoke to this woman. There's no way I told her I was there to testify in a
5 murder case because that's not what I was there to testify for --

6 Q And to --

7 A -- because --

8 Q -- back up, when did you -- just to refresh everybody's
9 recollection, when did you first get to the juvenile detention center in
10 Las Vegas approximately?

11 A I very first went there October 11th of 2002.

12 Q And why were you there?

13 A I was waiting to be transported back to Ohio because that's
14 when we had both been picked up at the Stardust, Kaczmarek and I had
15 both been picked up out here at the Stardust. And I was being sent back
16 to Ohio because I was considered a runaway from foster care in Ohio.

17 Q So at that time, you don't think you're a victim of a crime,
18 that Kaczmarek's going to be charged with it, that Phil talked about,
19 correct? I mean at that stage, you're -- you're not aware you're being
20 named as a witness slash victim of kidnapping, sex assault?

21 A No. No, no.

22 Q And you're obviously not aware of being a Defendant in a
23 murder charge?

24 A No.

25 Q So in early October you get to the juvenile detention center,

1 you go to -- when -- do you recall when you went to Ohio?

2 A Honestly, I don't remember the exact date. I wasn't even
3 here a week though before they sent me back to Ohio.

4 Q Did there become a time where you eventually returned back
5 to Las Vegas?

6 A Yes.

7 Q And how do you get here?

8 A Nevada petitioned Ohio that I would come as a victim
9 witness in the -- it's statutory sexual seduction and kidnapping charges
10 against Kaczmarek.

11 Q And do you recall the date of that, the transport, roughly?

12 A November 20 something.

13 Q And, once again, why do you think you're coming back to
14 Las Vegas?

15 A To testify as a victim witness.

16 Q Do you think you're going to be testifying against Kaczmarek
17 in a murder charge?

18 A No. That wasn't even brought up yet.

19 Q And -- but that's what Daca told police, correct?

20 A That is what Daca told the police, yes.

21 Q Do you recall reading that -- how the communication started
22 between you and Daca in her statement, what she said?

23 A I -- yeah, I do remember in her statement she said that I had
24 called her over to my room and she basically said -- or tried to talk to her
25 and she said, not right now, and came back the next day. Something or

1 other of that effect.

2 Q And did she say that this occurred at a shift change?

3 A She did say that it occurred during shift change.

4 Q And what was your recollection about what occurred at shift
5 changes?

6 A Shift change, especially in juvenile facilities, it -- sometimes
7 they would do it at the -- at the women's prison too. I know when CCA
8 owned it, they did it. During shift change, all the inmates are on
9 lockdown while the staff exchange information from the previous shift
10 before, and obviously they just -- they don't want the inmates running
11 around doing whatever while they're trying to do what they need to do
12 to come on shift.

13 Q And do you recall what she said either in her incident report
14 or in her statement to the police about the juveniles talking to other
15 people about their charges?

16 A In her statement she said that it -- I don't remember which
17 statement it was in, but in one of her statements she said that talking
18 about cases was forbidden.

19 Q And what would happen to a juvenile inmate that talked
20 about their charges?

21 A They would get in trouble. They'd be disciplined.

22 Q So, therefore, did you ever talk to anybody -- inmates -- other
23 inmates about your charges?

24 A I didn't have any charges at the time.

25 Q Did you ever talk -- did other inmates ever talk to you about

1 their charges?

2 A No. They weren't allowed.

3 THE COURT: What did you say?

4 THE WITNESS: They weren't allowed. It wasn't allowed.

5 BY MR. ABBATANGELO:

6 Q And at that time -- you just stated -- I think you said you were
7 still a witness; you weren't a defendant?

8 A Right. I didn't have any charges. I was -- I was there as a
9 victim witness.

10 Q Did there come a time when you were supposed to testify
11 against Mr. Kaczmarek?

12 A Yes.

13 Q And when was that, if you recall?

14 A He had a hearing at the end of November. That's what I was
15 brought out for.

16 Q And did you testify?

17 A I did not.

18 Q Why not?

19 A Because I was in love, and I wasn't going to testify against
20 him.

21 Q Did you have communication with anybody saying, "Hey, I'm
22 not going to testify"?

23 A Yes. I told Phil Kohn.

24 Q And what did he -- well, excuse me. So let me ask you this:
25 You did not testify is the ultimate answer, right?

1 A Correct.

2 Q Shortly thereafter -- that was the end of November --

3 A Yes.

4 Q -- correct? And shortly thereafter, does your circumstance --
5 do your circumstances change as being a witness and why you're here?

6 A Yes. Instead of being sent back to Ohio after the preliminary
7 hearing, like I was supposed to, I was charged with murder and taken to
8 CCDC.

9 Q And did you have a co-defendant?

10 A I did.

11 Q Do you recall the date of the criminal complaint charging you
12 with murder?

13 A Yes. December 5th.

14 Q And were you supposed to have been here or in Las -- or in
15 Ohio at that time?

16 A December 5th was the deadline to have my sent back to
17 Ohio --

18 Q And had you --

19 A -- per the agreement --

20 Q -- gone back to -- oh, I'm sorry.

21 A -- per the agreement that Nevada and Ohio had made prior to
22 me coming out here as a victim witness.

23 Q And had you gone back to Ohio by December 5th?

24 A I had not.

25 Q Did you ever go to court for that murder charge in December,

1 I should say, of 2002?

2 A No.

3 THE COURT: You never went to court for the murder?

4 THE WITNESS: No, ma'am.

5 MR. ABBATANGELO: Your Honor, this is in December.

6 THE COURT: Right. In December of 2002.

7 THE WITNESS: No.

8 THE COURT: But you said the complaint was filed
9 December 5th, right?

10 THE WITNESS: Yes. I was housed at CCDC for 13 days.
11 During that time, my social worker in Ohio and the judge in Ohio had
12 been contacting the DA's office out here telling them, "We had an
13 agreement." She was sending -- my social worker in Ohio was sending
14 copies of the agreement, faxing them over, telling them, "We had an
15 agreement." And, "She was free from prosecution. She wasn't
16 supposed to be arrested. She was supposed to be returned to us." And
17 after 13 days, they finally gave in and released me back to Ohio.

18 THE COURT: Okay.

19 BY MR. ABBATANGELO:

20 Q But you had not gone to court on the murder charge and
21 pled not guilty or guilty, you just were sitting in CCDC --

22 A I was --

23 Q -- is that what you testified?

24 A -- in CCDC, yes.

25 Q And describe the conditions you were housed in while you

1 were at CCDC.

2 A I was in solitary confinement. I wasn't allowed to talk to any
3 of the other inmates because they were adults, and I was a juvenile. I
4 came out one hour every two or three days to shower by myself. I
5 couldn't use the phone. And the only I had any contact with outside of
6 officers was Kaczmarek.

7 THE COURT: And how did you have contact with him?

8 THE WITNESS: Through the letters. He was --

9 THE COURT: How were you getting the letters? Were they
10 coming in the inmate mail, or how did you get the letters?

11 THE WITNESS: Through the mail, yes.

12 THE COURT: So when they would bring the in- -- like if they
13 were -- if your sister or somebody had written you letter, they came with
14 the inmate mail like that?

15 THE WITNESS: Yes, ma'am, through the --

16 THE COURT: Okay.

17 THE WITNESS: -- mail every day.

18 BY MR. ABBATANGELO:

19 Q And to shift into that topic, before you left for Ohio, had you
20 received any letters from Kaczmarek?

21 A I did, yes.

22 Q And I'm just kind of do chronological order here. When you
23 went back to Ohio, were you released to the streets or were you
24 remaining in custody in Ohio once you arrived?

25 A I remained in custody in Ohio.

1 Q And why is that?

2 A Because I was being charged with delinquency for running
3 away and -- running away from my foster parents' house.

4 Q Did you ever receive any letters in Ohio from Kaczmarek?

5 A I did.

6 Q Did he know -- was he sending them directly to Ohio or was
7 he sending them to CCDC, and they were being forwarded, if you know?

8 A I don't know.

9 Q But you just received them?

10 A I did.

11 Q Did you ever hit the streets in Ohio?

12 A No.

13 Q So how long were you in custody in Ohio?

14 A I remained in custody from the time they sent me back to
15 Ohio, probably around December 18th or so, until I was returned back to
16 Las Vegas, I don't know, in February or so, whenever -- whenever I was
17 rebooked. Because they -- they issued a second warrant for my arrest on
18 the murder charge, the same -- the same charge. So they reissued the
19 warrant so that they could arrest me again and rebook me since they had
20 to let me go after the first detainment.

21 Q From the point of your return, did you receive letters?

22 A I did.

23 Q I want to stay focused on that topic for now. And
24 Mr. Hamner cross-examined you and asked you questions about the
25 letters you received just today.

1 MR. HAMNER: Do you -- do you want these letters or --

2 MR. ABBATANGELO: I [indiscernible], but --

3 MR. HAMNER: I was going to -- I was going to look at them,
4 but I don't want to interrupt your examination.

5 MR. ABBATANGELO: No. Go ahead and look at them.

6 MR. HAMNER: Okay.

7 BY MR. ABBATANGELO:

8 Q Do you recall that?

9 A Yes.

10 Q And --

11 THE COURT: I'm just going to interrupt. I'm sorry.

12 I have one question for you. So you said when you went to
13 CCDC originally, Kaczmarek was sending you letters?

14 THE WITNESS: He was.

15 THE COURT: And then they sent you to Ohio. And you
16 received letters from him while you were in Ohio?

17 THE WITNESS: Yes.

18 THE COURT: And then they brought you back here, and you
19 were receiving letters from him when you got back here?

20 THE WITNESS: Yes.

21 THE COURT: Were you responding to these letters?

22 THE WITNESS: Yes.

23 THE COURT: Okay.

24 BY MR. ABBATANGELO:

25 Q And we -- as Mr. Hamner referenced, we'll start off with the

1 easy stuff, basically as the State will see and the Judge will see,
2 Kaczmarek is talking about love and staying together, right?

3 A Yes.

4 Q He even sends like big kissy, smiley faces and draws all kinds
5 of -- can you describe the letters just like that just in general?

6 A Yeah. I mean in general the letters were "I love you" and all
7 of that kind of stuff.

8 Q And as Mr. Hamner showed you, the letters said, "Don't sign
9 shit"; right?

10 A Yes.

11 Q Then it changed?

12 A Yes. I saw -- yeah. He showed me.

13 Q It went from, "Hey, don't take any deals," to, "You better save
14 yourself because I lost at trial," or, "Trial is coming up. It's pretty heavy"?

15 A Right.

16 Q And do you recall writing a statement December 18th, '02 to
17 Detective Mikalonis?

18 A I did write a statement, yes.

19 Q And please elaborate upon that regarding what that letter
20 contained. And I believe --

21 MR. ABBATANGELO: Is that the [indiscernible]?

22 MR. HAMNER: [Indiscernible]

23 MR. ABBATANGELO: Her -- her statement?

24 MR. HAMNER: It's been admitted.

25 UNIDENTIFIED SPEAKER: It has been admitted, the

1 Mikalonis --

2 MR. ABBATANGELO: That's what I thought.

3 UNIDENTIFIED SPEAKER: -- [indiscernible].

4 MR. ABBATANGELO: I'm just double-checking.

5 [Counsel confer]

6 BY MR. ABBATANGELO:

7 Q Now, do you recall what was in that letter or would you like
8 to review it?

9 A I do -- I do recall, you know, basically what was in that letter.
10 But I wrote that letter the first time that I was in CCDC before they let me
11 go.

12 Q And that's what I was going to ask you. Was this the first trip
13 to CCDC --

14 A Yeah.

15 Q -- or the second?

16 A Yeah, it was -- it was during the first time I was in CCDC
17 before they released me back to Ohio and reissued the warrant for arrest
18 that I ultimately got this on.

19 Q And you had been housed in solitary confinement when you
20 wrote that letter. Is that what you're saying?

21 A Yes. Yes, I was in solitary.

22 Q And you're not disputing that you were present at the time
23 of --

24 MR. ABBATANGELO: This one.

25 THE CLERK: 2 is what you're looking for?

1 MR. ABBATANGELO: Yeah. This is it.

2 THE CLERK: Okay. Yeah. Exhibit --

3 BY MR. ABBATANGELO:

4 Q You're not disputing you were present when Mr. Villareal
5 was choked out by Kaczmarek and cleaned up the room because you
6 testified to that, right?

7 A Correct. I've never disputed that.

8 Q You're -- you were present?

9 A Yes, I was.

10 Q So you saw what happened?

11 A I did.

12 Q And Kaczmarek had been sending you letters that have been
13 admitted saying, "This will be over soon"?

14 A He did.

15 Q What did they -- what did you infer, even to this day, or what
16 did you infer at that time, I should say, that, "This will be over soon,"
17 what did that mean to you?

18 A I think I testified before that I honestly thought that it was like
19 some type of program, or they were going to release me back to Ohio
20 again.

21 Q So at the early stages, you're under the impression you're
22 going to get out soon?

23 A Yes.

24 Q And did you anticipate in December, before you went back to
25 Ohio, you were going to be doing ten years in prison?

1 A No. I mean I -- they -- when they -- before they sent me back
2 to Ohio, after the -- at -- the first time that they had arrested me and put
3 me in CCDC, nobody was talking about sentence and, you know, you're
4 going to get this much time and all of that. I never even went to court on
5 it. They had scheduled for a prelim, but like I said, my social worker in
6 Ohio and the judge in Ohio were like freaking out about it and contacting
7 the DA's office out here and telling them, "We had an agreement. She
8 was free from prosecution. You have to return her to us." And so they --
9 they ended up releasing me back.

10 But, yeah -- no, they didn't -- they weren't like talking to me about
11 possible sentences and things like that. I was just getting letters from
12 Steve, and that's when he was telling me I could save us both, that -- and
13 he had wrote me the letter and told me what to tell them.

14 Q And you also thought you guys were going to stay together
15 at this time?

16 A Of course.

17 Q Meaning, did you think he was going to do a bunch of time?

18 A No, I didn't.

19 Q Now, also, prior to this Daca statement, to back up, as well as
20 your handwritten statement, so when you're first out here as a witness,
21 your only involvement in this murder at that time, as far as everybody
22 knew, was Kaczmarek's statement; is that correct?

23 A Correct.

24 Q Because you did testify earlier -- months ago about the
25 fingerprints?

1 A Yes.

2 Q And you described that as wiping down the room real good?

3 A Yes.

4 Q Did you also describe cleaning up the room and what
5 condition you guys left it in?

6 A Yeah. We cleaned up the room. It was -- did everything.
7 Made the bed, wiped everything down, put everything in its place, in
8 order, we even kind of like left the blinds and the curtains open a little bit
9 because Steve had said so that people could look in the window and see
10 that everything was --

11 Q And you --

12 A -- normal.

13 Q And you were in the courtroom earlier today when the
14 medical examiners testified; is that correct?

15 A Yes.

16 Q And you recall me asking questions about ashtrays being left
17 on the bed?

18 A Yes.

19 Q And do you recall me asking questions about ashes or
20 cigarette butts being on the floor?

21 A Yes.

22 Q Was any of that in place when you left?

23 A Was it in place?

24 Q Correct. For example, was there -- was it messy like that?

25 A Oh, no, it wasn't messy at all. Everything was wiped down

1 and clean.

2 Q Now, part of the questioning that you had received earlier
3 was you had mentioned -- or Daka had mentioned you were concerned
4 and Kaczmarek were concerned about D being DNA. Does that sound
5 familiar?

6 A Yes, I do remember that.

7 Q What is your position on that, how she knew that
8 information?

9 A How she knew the information? Honestly, my position is
10 someone very obviously gave her details on Kaczmarek's statement.

11 Q Had -- had Kaczmarek made a statement about the murder
12 prior to November 25th? I have it --

13 A Kaczmarek had made his statement prior to me being
14 requested to come out as a victim witness.

15 Q So when he -- you're out in Ohio? Is that what you're
16 saying?

17 A Yes.

18 Q Kaczmarek's confessing?

19 A Yes.

20 Q And talking about a murder with Villareal?

21 A Well, he was talking about the robbery with Villareal and
22 they, you know, obviously told him that Villareal was dead, and they told
23 him, you know, you killed him and -- so -- but, yes, he gave that
24 statement while I was in Ohio before they even requested for me to
25 come out here as a victim witness. They did the fingerprint analysis

1 against my prints even before that. So their investigation had already
2 started prior to my being transported as a victim witness.

3 Q And in the one letter that Mr. Hamner had you examine was
4 a February 28th, '03 letter. Once again, the famous, "Don't sign shit until
5 we can all meet." What was he -- what was the message on
6 February 28th, as far as you recall, once you reread that letter and your
7 memory refreshed?

8 A So when I read the letter and Mr. Hamner had asked me if it
9 was referring to don't sign a deal, he -- this -- the line actually right
10 before that, he was saying, "They told me you might sign a deal and
11 testify against me. Don't do that. Don't do anything. Don't sign
12 anything." So, to me, when I read it, he was concerned with me
13 testifying against him and didn't want me making any deals to testify
14 against him.

15 Q And then to be fair to the State, in those letters that come
16 basically a week later, March 3rd, March 6th, March 7th, those letters
17 have a different tone from Kaczmarek; is that correct?

18 A Yeah. They said, "Take a deal. Sign a deal."

19 Q "Save yourself"?

20 A Yeah. And I laughed because the letter that Mr. Hamner had
21 me read where he had just gotten sentenced and he was saying, "I will
22 come and testify on your behalf," he literally just sat on the stand at his
23 own trial putting the blame on me. So that's why I started laughing
24 because I hadn't -- I hadn't read that letter in years, so it was just --
25 it was just funny to me. I didn't mean to like laugh in the court, but it

1 was funny to me that he just sat there on the stand in his trial putting the
2 blame on me and then wrote me a letter right afterwards saying, "I'll
3 come and take the blame for everything." That's -- that's why I laughed.
4 Sorry.

5 Q So you're familiar enough with Mr. Kaczmarek's testimony at
6 his trial?

7 A Oh, yes, I am.

8 Q Did he take full responsibility?

9 A No. He put everything --

10 Q Wait, wait, wait. So he didn't take full responsibility?

11 A He did not, no.

12 Q And he didn't try to "save you baby, I don't want you in
13 prison" like it says in the letter?

14 A No --

15 Q And, "I'm" --

16 A -- he didn't.

17 Q -- "going to take all the blame"?

18 A He didn't, yes.

19 Q He didn't do that at trial, did he?

20 A No, he did not.

21 Q But did he keep sending you letters after that and saying how
22 much he loves you?

23 A Yes.

24 Q "We're going to get married"?

25 A Yes.

1 Q Big heart shapes, that Alisha and Steven, right?

2 A Right.

3 Q And --

4 A I didn't attend his trial, so I wasn't any part of it. So I didn't
5 even know at the time that --

6 THE COURT: Well, that was --

7 THE WITNESS: -- he had --

8 THE COURT: -- going to be my next question. How do you
9 know what he testified to at his trial?

10 THE WITNESS: I've read the transcripts.

11 THE COURT: When did you read that transcript?

12 THE WITNESS: A couple weeks ago I guess --

13 THE COURT: For the --

14 THE WITNESS: -- for the first time.

15 THE COURT: -- first time?

16 THE WITNESS: Yes, ma'am.

17 THE COURT: Okay.

18 THE WITNESS: Yeah. I had read his appeal. He had done a
19 Supreme Court appeal or Ninth Circuit appeal, something like that, years
20 ago to get the death penalty off of him and get it converted to a life
21 without charge [sic]. And I had read that while I was incarcerated still,
22 and I did note in it that one of the justices or one of the judges or
23 whoever that prescribes over it had made mention to the fact that he
24 changed his story and put all the blame on me during his trial. But I
25 honestly didn't know to the extent until I read the transcript.

1 THE COURT: So the whole time that you're in custody, you
2 don't know what he said in his trial? When you first read the transcripts
3 was a couple weeks ago?

4 THE WITNESS: Yes.

5 THE COURT: Okay.

6 BY MR. ABBATANGELO:

7 Q But that's why you know now that's what made you, in a
8 sense, laugh?

9 A Yeah. It's still kind of like new to -- it's like still kind of fresh
10 for me. Like you went to trial and put everything on me, everything, and
11 then a day later wrote me a letter, I love you. I'll take the blame for
12 everything at your court. Like -- sorry.

13 Q It's not a proud time in your life I presume?

14 A This is all kind of -- screws up my head I guess.

15 Q Well, we also heard today the medical examiners testify
16 about time of death and whether it was at the 27th, through the 25th,
17 et cetera?

18 A Which medical examiner?

19 Q Well, the -- you heard the general testimony?

20 A Oh, yeah. Okay.

21 Q When was the last time you were at the Uptown Motel where
22 Mr. Villareal was found?

23 A On the 25th of September 2002.

24 Q And, once again, what kind of shape did you leave -- or
25 condition did you leave the room in when you left?

1 A Everything was clean, everything was wiped down, the bed
2 was made, the dresser was neat, every -- everything was nice and neat,
3 and everything was put in place.

4 Q And when you left the room, who all left?

5 A I did, Kaczmarek did, and Tommy [phonetic] did.

6 Q Was anybody besides Mr. Villareal inside the room?

7 A No.

8 Q So the chain lock was off the door when you left?

9 A It was.

10 Q Nobody climbed out the window?

11 A No.

12 Q And, you know, chained -- put the chain on and climbed out
13 the window --

14 A No.

15 Q -- that didn't happen? There was also a discussion on your
16 direct testimony that you told people you left and went to the store
17 without Tommy or Kaczmarek. Do you recall that?

18 A I --

19 Q I mean that it was --

20 A I told one person that, yes.

21 Q Who did you tell that to?

22 A Shawn Gunter [phonetic]. She was my social worker in Ohio.

23 Q Why would you tell her that?

24 A Because -- because she was like a mom. Like she was like
25 the only mom I had, you know. So what kid doesn't lie to their mom.

1 Like I lied to her. I didn't want her to know that I was present when
2 somebody got robbed, like --

3 Q Did you tell Dacia that?

4 A No.

5 Q When you guys left the Uptown Motel, where -- who went
6 where? Well, let me ask you this: Where did you go?

7 A I went with Steve and Tommy to the pawnshop.

8 Q And what happened at the pawnshop?

9 A Steve pawned items that we had taken out of the room, and
10 Tommy and I sat on the bench.

11 Q When you say you sat on the bench, was the bench inside or
12 outside the pawn place?

13 A Outside. The place was locked. It was like 10:30 at night. So
14 it was after hours. So Steve went to the window. And we just sat on the
15 bench as -- like a bus stop bench or whatever.

16 Q And there are pawn tickets that reflect this? It happened on
17 the 25th?

18 A Yes.

19 Q And the three of you divided up the money, according to
20 Kaczmarek?

21 A Yes.

22 Q Did you guys have any other source of income -- well, let me
23 rephrase that because there's a lot of -- there's three of you now. One
24 thing that was touched on or cross-examined was how your relationship
25 started with Mr. Kaczmarek. Do you recall what you testified to?

1 A Yes, I do recall.

2 Q What did you say?

3 A We had met at the beach.

4 Q Hold on. You met. Was it a good or bad relationship?

5 A Well, it started out very good. It started out very good to me.

6 I mean he was very affectionate, very caring, very thoughtful.

7 Q Did this come a time where you decided to go to Las Vegas?

8 A Yes.

9 Q Describe what happened, I mean, about deciding to leave.

10 A When we decided to leave for Las Vegas?

11 Q Yes.

12 A We took my foster mother's car and whatever Kaczmarek of

13 hers we could find around the house, and we started driving.

14 Q Well, basically you stole her car and money?

15 A Yeah.

16 Q And you left?

17 A Yes.

18 Q Did there come a time when that money ran out?

19 A Yes. Of course.

20 Q Did Kaczmarek have a job?

21 A No.

22 Q Did you have a job?

23 A No. I was 15.

24 Q All right. And you're -- so did money become an issue?

25 A It did.

1 Q And how did that have an effect on your relationship with
2 Kaczmarek?

3 A It changed things.

4 Q Could you elaborate on that? Well, did there come a time
5 when the two of you decided to try to earn some money?

6 A Yes.

7 Q Okay.

8 A So -- I don't know. Some state somewhere between Ohio
9 and here was the first time that he had approached me with like alternate
10 ways to make money. He had said -- we were at a motel, and he was
11 like, "Hey, there's this guy. He's like a couple rooms down. He" -- "he
12 just wants to touch you. Like he just wants to touch on you over your
13 clothes. He's not gonna do anything else. And I'll be there the whole
14 time. He's just gonna give us some cash for it."

15 So I was like, "Okay." And --

16 Q And did that occur?

17 A Yes, it occurred. And then it probably happened like once or
18 twice after that on the way towards Vegas. And then the first time he --

19 Q Well, let me interrupt. When you got to Vegas, did you guys
20 put any job applications in or anything anywhere?

21 A No.

22 Q How did you earn money once you got here?

23 A The same way.

24 Q Well, let me ask you this. I recall reading -- did you sell the
25 car?

1 A Yes. Yes. We sold the car --

2 Q How much money did you get for that, if you recall?

3 A Well, probably -- I think it was like 300 or 350. Something like
4 that.

5 Q So this wasn't like a \$5,000 transaction?

6 A No.

7 Q It was a few hundred bucks?

8 A Yeah.

9 Q I presume that money runs out?

10 A Very quickly.

11 Q So how did you guys earn money?

12 A Sometimes pan handling and then --

13 Q And when you say pan handling --

14 A Just --

15 Q -- who would do the pan handling? Both of you, you, him?

16 A I would. He tried a couple of times and got nothing and told
17 me, you know, "I'm a grown man. People aren't going to give me
18 money. They'll give you money before they'll give me money." So it
19 was mostly me. And then the first time he asked me to do something
20 sexual with someone, he -- he told me that this guy wanted --

21 THE WITNESS: Can I say blow job?

22 THE COURT: Uh-huh.

23 THE WITNESS: -- he just wanted me -- a guy wanted a blow
24 job and would give us money for it. And I told him I didn't want to. And
25 at first he like tried to like guilt me into it. And when that wasn't working,

1 he slapped me. So --

2 BY MR. ABBATANGELO:

3 Q And then what did you do after he slapped you?

4 A I gave a blow job.

5 Q Did this ever occur again?

6 A Yes.

7 Q The prostitution?

8 A Not the exact same situation, no, but similar situations, yes.

9 Q Is that something you wanted to do?

10 A No. But I also didn't want to get hit either. He never like
11 punched me, but he would slap me and push me and spit on me.

12 Q And you also said you reviewed Kaczmarek's statement at
13 trial. Have you reviewed his interviews with the police?

14 A Yes, I have.

15 Q Because this was asked about on cross-examination about if
16 the robbing ever happened in advance -- I mean --

17 THE COURT: If the what?

18 BY MR. ABBATANGELO:

19 Q -- I'm sorry -- robbing people like Villareal had ever happened
20 prior.

21 A Oh, yes.

22 Q Do you recall -- do you recall --

23 A I do remember Mr. Hamner asking me that.

24 Q Yeah. Do you recall what Mr. Kaczmarek said in his interview
25 with the police?

1 A Mr. Kaczmarek in his interview with the police said no, that it
2 had never happened before.

3 Q And had that ever happened before?

4 A No, it had not ever happened before.

5 Q It sounds like you would just perform the sex acts, get paid,
6 and away we go?

7 A Yes.

8 MR. ABBATANGELO: The Court's indulgence for a moment,
9 please.

10 [Counsel confer]

11 MR. ABBATANGELO: I have no further questions.

12 THE COURT: Mr. Hamner, do you have any recross?

13 MR. HAMNER: Yes, I do.

14 RECROSS-EXAMINATION

15 BY MR. HAMNER:

16 Q I want to go to the part of redirect examination where you
17 discussed the things that you did inside the room with Mr. Villareal. I
18 think you had said to Mr. Abbatangelo that one of the things you did was
19 wipe things down; is that correct?

20 A Yes, that's correct.

21 Q Okay. But you did more things than that; isn't that true?

22 A In relation to what, sir?

23 Q Well, you previously testified that you cut the cord that was
24 used to tie and restrain Mr. Villareal; isn't that right?

25 A I -- yes. I cut the cord off the back of a fan.

1 Q Okay. You also acknowledged on day 1 of evidentiary
2 hearing that you actually engaged in choking Mr. Villareal. You do
3 remember saying that, don't you,

4 A I do, yes.

5 Q Okay. You also admitted on day 1 of this evidentiary hearing
6 that you also stepped on his neck while all of this was going on, correct?

7 A Yes, I did.

8 Q You would agree that exerting force, such as choking or
9 stepping on one -- someone's neck, is a violent act, isn't it?

10 A I would agree with that, yes.

11 Q Okay. These things were done to this person, Mr. Villareal, in
12 order to kind of restrain him or to incapacitate him, correct?

13 A That's incorrect.

14 Q Okay. It was -- was it -- was it a game you guys were
15 playing?

16 A I weighed less than 90 pounds. I wasn't able to restrain him
17 in any way.

18 Q So it was play choking?

19 A Play, sir?

20 Q Well, you were trying to choke him, right?

21 A I did try to, yes.

22 Q Okay. And you did put your hands on his neck, correct?

23 A I did, yes.

24 Q And you did --

25 A Actually, I put my arm, my forearm, on his --

1 Q Okay.

2 A -- neck.

3 Q So let's be clear. You were intentionally trying to choke him,
4 correct?

5 A I did try, yes.

6 Q Your arm made contact with his neck, correct?

7 A I said yes.

8 Q You heard Mr. -- Dr. Bennett testify about how strangulation
9 or throttling or suffocation were the things that, in his opinion, caused
10 this person to die, correct?

11 A I did hear that, yes.

12 Q And you sit here today on day 2 and on day 1 admitting that
13 you did those things to his neck, correct?

14 A Sir, I --

15 Q Yes or no?

16 A -- not able --

17 Q Yes or --

18 A -- to strangle him.

19 Q Ma'am, yes or no; you have admitted on this day, you have
20 admitted on day 1 of this evidentiary hearing that you point your arm or
21 your hands on his throat and also put your foot on his neck; isn't that
22 true?

23 A Yes, I did attempt to choke him.

24 Q And your very own defense expert testified that, in his
25 opinion, strangulation and suffocation were part of the contributing

1 causes as to why he died; isn't that right?

2 A I answered yes the first time you asked me.

3 Q And Dr. Telgenhoff also testified that, in his opinion,
4 suffocation, asphyxiation -- well, asphyxiation contributed by
5 strangulation, suffocation, as well as potentially drowning were all
6 contributing causes to him dying; isn't that right?

7 A Yes, he did.

8 Q Okay. Additionally, the -- the cords that you cut were used to
9 bind his hands and/or his feet; isn't that right?

10 A I don't know what the cord from the fan was used for.

11 Q Okay. But we do know unequivocally that his hands were
12 tied up, correct?

13 A Yes.

14 Q And we do know from looking at the photos, his legs were
15 tied up, correct?

16 A Yes.

17 Q And that would certainly prevent someone from trying to
18 escape, correct?

19 A Yes.

20 Q Trying to free themselves, correct?

21 A Yes.

22 Q Prevents them from saving their own lives, correct?

23 A Yes.

24 MR. ABBATANGELO: Objection. Speculation on her part
25 that would save his own life.

1 MR. HAMNER: I'm not -- I'm not asking about her role.

2 We're just talking about what cords could do to someone who is being
3 restrained.

4 MR. ABBATANGELO: Right. And it's speculative what would
5 happen. It doesn't necessarily mean he can't save his --

6 MR. HAMNER: I don't --

7 MR. ABBATANGELO: -- own life.

8 MR. HAMNER: I don't think it's --

9 MR. ABBATANGELO: It doesn't mean he --

10 MR. HAMNER: -- speculation.

11 MR. ABBATANGELO: -- can't get up.

12 MR. HAMNER: I think it impedes someone's ability to save
13 their own life.

14 THE COURT: Well, I think someone's hands being bound
15 behind their back and someone's feets being -- feet being bound is very
16 indicative they don't have a lot of ability to do much of anything.

17 Is that fair?

18 MR. ABBATANGELO: To a certain extent. I mean he can
19 move, roll over on his back because his -- the legs and hands are not tied
20 together, so he could try to push himself up.

21 THE COURT: But it's fair he doesn't have the ability -- the
22 Court will take it as he doesn't have the ability to do anything with his
23 legs and he doesn't have the ability to do anything with his feet or with
24 his hands.

25 MR. ABBATANGELO: And I'm not being sarcastic, Judge,

1 but --

2 THE COURT: Yeah.

3 MR. ABBATANGELO: -- he can -- he has limited movement
4 and he can hop, move, try to get out. I mean --

5 THE COURT: Well, the Court will take --

6 MR. ABBATANGELO: -- but his movement is --

7 THE COURT: The Court --

8 MR. ABBATANGELO: -- limited, absolutely.

9 THE COURT: Right. The Court will take it as he no ability to
10 do anything with his hands and he has no ability to do anything with his
11 feet if they're bound.

12 BY MR. HAMNER:

13 Q And let's be clear. When you left him with Tommy, with
14 Steven, he was in that tub, wasn't he?

15 A He was in the bathtub, yes.

16 Q Tied up?

17 A Yes.

18 Q And when the police found him two days later, he was still in
19 that bathtub, correct?

20 A Yes.

21 Q Tied up? Yes?

22 A Yes.

23 Q And dead?

24 A He was dead, yes.

25 Q It's pretty clear from those photos he wasn't able to get out

1 of the cords, right?

2 A I can't speculate to what happened from the time I left to the
3 time he was found.

4 Q Well, you've seen the pictures, ma'am.

5 A I have seen the pictures.

6 Q He didn't get out of them, did he?

7 A I don't know that.

8 Q Would you like to see the picture again?

9 A I would not.

10 Q Okay. So you know his arms are still bound, correct --

11 A I do know --

12 Q -- because you've seen the pictures?

13 A -- that his arms were bound and his --

14 Q Okay.

15 A -- legs were bound when he was found, yes.

16 Q Correct. And one of those cords was one of the cords that
17 you cut, and it went on his body? You don't know exactly if it's his arms
18 or his legs, but you cut that cord that ended up binding him in some way
19 that remains on him until he was found two days later dead in a bathtub,
20 correct?

21 A Okay.

22 Q Now, I want to turn to the comments about Ms. Daca, Officer
23 Daca. You had said that the environment at the facility was you weren't
24 talking to anyone, correct, about your case or anything like that, right?

25 A I said that that was the rules at the facility.

1 Q Right. The rules were no one was to talk; isn't that right?

2 A Yes.

3 Q And -- and as far as you know, you didn't notice anyone else
4 talking about anything, correct? Everyone kept their cases to
5 themselves, correct?

6 A Yes.

7 Q But you would agree that the information that Ms. Daka knew
8 was pretty darn specific about what happened in your case?

9 A I would definitely agree to that.

10 Q And the only person held in your facility that had any
11 knowledge about that murder was you, correct?

12 A Are you asking me if I was the only person --

13 Q How many other people that were suspects in the murder of
14 Pedro Villareal were housed in that facility?

15 A There were no people housed in that facility that were
16 suspects. Not even myself.

17 Q Well --

18 A I wasn't --

19 Q -- you eventually became a suspect. Let me rephrase. How
20 many people who were inside that room? Was Tom -- let me put it this
21 way: Was Steven Kaczmarek in that facility with you?

22 A It was a juvenile facility, sir.

23 Q So the answer is no. Was Tommy in that facility with you?

24 A Are you asking me was an adult --

25 Q Was Tommy --

1 A -- man --

2 Q -- in that --

3 A -- inside of a juvenile facility?

4 Q Yes, I am. Was --

5 A No. An adult man was not housed inside a juvenile facility.

6 Q Thank you. So the only person inside that apartment
7 building with Mr. Villareal on that night that was in that room that was in
8 that facility was you, correct?

9 A That only person that was in that room was me?

10 Q Yes.

11 A No. I was not --

12 Q Well, let me --

13 A -- the only person in that room.

14 Q Okay.

15 MR. ABBATANGELO: If he could rephrase the question.

16 MR. HAMNER: I --

17 THE COURT: Yeah. Mr. Hamner, I was very confused.

18 BY MR. HAMNER:

19 Q The only person in the facility that you were housed at that
20 was in the room on September 25th, 2002 when you were there in that
21 facility was you? Tommy wasn't there and neither was Steve, correct?

22 A That's correct.

23 Q Thank you.

24 A Wow.

25 Q And let's be clear. You said on day 1, "I have absolutely no

1 idea how Ms. Daga could have known that. I just simply have to
2 speculate"; isn't that right?

3 A Yes.

4 Q And you're still speculating today, correct?

5 A I'm not going to waste my time speculating on who gave her
6 that information, sir.

7 Q Okay. Well, one possible source could be you? You just --

8 A No.

9 Q -- don't remember? Okay.

10 A No.

11 Q So let's move on. Let's move on to your thoughts about
12 Steven Kaczmarek and his testimony at trial. You said from what you
13 read of his trial testimony he threw you under the bus, correct?

14 A He did.

15 Q He put all the blame on you, correct?

16 A He did.

17 Q He put all the responsibility on you, correct?

18 A He did.

19 Q But didn't you say that about your letter to
20 Detective Mikalonis, that that was what the letter was supposed to do
21 that he told you to write?

22 A No, that's not what I said.

23 Q Oh, I think it is. Isn't it true that said on day 1, "Steven
24 Kaczmarek told me basically word for word what to write to
25 Detective Mikalonis"?

1 A Yes, he did tell me --

2 Q Okay.

3 A -- word for word what to write to Detective Mikalonis.

4 Q And it was a confession letter that he wanted you to write so
5 you would take responsibility for everything; isn't that right?

6 A No. What I said was Steve was telling me if I took the blame
7 for everything, I would save us both.

8 Q And then you also added he told you exactly what to put
9 down --

10 A He did tell me exactly what to put down.

11 Q -- because it was in apparently a mystery letter that you don't
12 have but you copied it word for word, right?

13 A Mr. Hamner, you're trying to mash up two different
14 statements that I made and make it into one statement.

15 Q You claim that you were provided a letter from Steven
16 Kaczmarek that word for word told you what to write to
17 Detective Mikalonis?

18 A Yes, I was.

19 Q Thank you. We don't have that letter, do we?

20 A We do not.

21 Q Okay. Now, the letter that was the confession that you wrote
22 to Detective Mikalonis, if you're to be believed, and it was written by
23 Steven Kaczmarek, you would agree the confession letter to
24 Detective Mikalonis is not what Steven Kaczmarek said at trial; isn't that
25 right?

1 A That's absolutely right.

2 Q Okay. Because in your confession letter, you don't put all the
3 blame on yourself, it's spread out, correct?

4 A That is correct.

5 Q Tommy did things, you did things, he did things, right?

6 A Yes.

7 Q Okay. But now we're dealing in theory with the author of the
8 same -- right? They're both the same person? He authored the letter
9 and he also testified at trial, and yet they're different?

10 A They were months apart, sir.

11 Q Okay.

12 A And in all fairness, one week he was telling me, "Don't sign
13 anything," and two days later, he wrote me telling, "Sign and take a
14 deal."

15 Q Okay.

16 A Obviously the man didn't know what he wanted exactly.

17 Q Well, we don't want to speculate, do we?

18 A We sure don't.

19 Q Okay. So let's talk a little bit about things that he said. You
20 testified on redirect examination that Steven put all of the blame on you;
21 is that correct?

22 A At his trial?

23 Q Yes.

24 A He did attempt to put a lot on me, yes.

25 Q No, no. You said he put it all on you, right?

1 A Oh, we're being very, very literal about --
2 Q Uh-huh.
3 A -- what all and everything means?
4 Q Yes.
5 A Oh, okay.
6 Q So --
7 A Well, I can't say that he didn't take --
8 Q Right.
9 A -- responsibility for anything --
10 Q Because isn't it true --
11 A -- at all during --
12 Q Because isn't it true --
13 A -- his trial.
14 Q -- Steven testified --
15 THE COURT: Okay. When you both are talking, we're not
16 recording anyone.
17 Ms. -- I'm so sorry.
18 THE WITNESS: Burns.
19 THE COURT: Ms. Burns, you need to let him finish his
20 question.
21 Mr. Hamner, you need to her finish her answer.
22 You two are not going to talk at the same time.
23 THE WITNESS: Yes, ma'am.
24 THE COURT: Mr. Hamner, answer -- ask the question.
25 MR. HAMNER: I understand, Your Honor.

1 BY MR. HAMNER:

2 Q Ms. Burns, isn't it true that on page 88 of Steven Kaczmarek's
3 trial testimony he admitted he was fine with robbing Pedro Villareal?

4 THE COURT: He admitted what, Mr. Hamner?

5 MR. HAMNER: That he was fine with robbing Pedro --

6 THE COURT: Fine? Is that what you're --

7 MR. HAMNER: -- fine with doing it.

8 THE COURT: Go ahead.

9 BY MR. HAMNER:

10 Q Do you remember that he said that?

11 A I don't remember that he said that, no. But if it's there, then
12 sure.

13 Q You have no reason to dispute if I'm citing to a particular
14 page; is that correct?

15 A No.

16 Q Okay. He also stated at that trial that, "I grabbed him and put
17 Mr. Villareal in a choke hold." Do you remember him saying that at his
18 trial?

19 A Yes.

20 Q Okay. Do you remember that Steven Kaczmarek said, "I also
21 bound Pedro Villareal's hands in that room"? Do you remember him
22 saying that at the trial?

23 A Yes.

24 Q Now, he did say that you cut cord from the fan, right?

25 A Yes.

1 Q But you even admit that you did that, correct?

2 A Yes, I did.

3 Q He also said that you stomped on his neck and choked him at
4 his trial, correct?

5 A He did.

6 Q But you admit that you did that as well, correct?

7 A Yes.

8 Q He admits that you guys pawned the VCR and the bracelet,
9 correct?

10 A Yes.

11 Q And that is true, isn't it?

12 A It is.

13 Q He admits that the water -- well, he turned on the water or
14 the water got turned on, correct? That he did it, correct?

15 A He did say that, yes.

16 Q Now, he did say it was at your direction, but he did say he
17 did it, correct?

18 A Yes, he did say that he did that.

19 Q Okay. Do you remember -- and so is that how it went down
20 with the water?

21 A I don't remember the water being turned on, and it definitely
22 wasn't at my direction.

23 Q Okay. So he admitted he was fine with robbing him, he
24 admitted that he put him in a choke hold, he admitted that he bound his
25 hands, he admitted he turned on the water when he was in the bathtub.

1 All of those things are not putting the blame on you; isn't that correct?

2 A I'm sorry? Because --

3 Q All of the --

4 A No, because --

5 Q All of --

6 A -- actually it was putting the blame on me because he was
7 saying that it was all under my direction, that it was my idea, that I
8 directed him to do those things.

9 Q Okay.

10 A So you're only saying part of --

11 Q Sure.

12 A -- what he said.

13 Q But there is aiding someone to do something, there's
14 factually doing things. He admitting he's physically doing things to this
15 person?

16 A He's saying that he did what I told him to do. That's what he
17 said during his testimony is that I directed him to do these things.

18 Q Okay. Now, you do recall that at trial he also talked about
19 that the two of you talked about robbing people before? You do
20 remember him saying that at trial, right?

21 A I do not.

22 Q Okay.

23 MR. HAMNER: And I am referring to page 107, Counsel, of
24 Steven Kaczmarek's trial transcript,

25 BY MR. HAMNER:

1 Q And it was relation to the question of,

2 "Q Well, didn't you say that to the detective on the 29th of
3 October?

4 "A Yes. I told him that me and Alisha had talked about, you
5 know, robbing people before. Yes, I did.

6 "Q About how many times have you talked with Alisha about
7 robbing people?

8 "A I never really took count about it. I mean a few times. We
9 talked about it a few times. I don't -- I don't have an exact number. I
10 mean it wasn't over five, I mean, times that we talked about it. But we
11 were -- we were always -- we were always trying to hustle money before
12 we would even try to hurt anyone because that's just" --

13 And it gets cut off. So he does kind of talk about previously the
14 two of you discussing trying to rob people, and he did acknowledge that
15 he told that to the detective at his trial; isn't that correct?

16 A You just read it.

17 Q Okay. And that's actually something that Ms. Daca also
18 relayed in her statement, that you had shared with her that you guys had
19 kind of tried this thing before, this -- this kind of trick-rolling kind of thing,
20 right? Isn't that what Ms. Daca says in her voluntary statement as well?

21 A I know in Kaczmarek's statement he specifically said that it
22 had never happened before. I don't recall that Daca said that it had
23 happened before.

24 MR. HAMNER: The Court's indulgence.

25 [Counsel confer]

1 THE WITNESS: And which one of Daka's statement are we
2 going off of?

3 MR. HAMNER: It would be the recorded --

4 THE WITNESS: Okay.

5 MR. HAMNER: -- statement. The --

6 BY MR. HAMNER:

7 Q I mean now that I've -- I know you had mentioned before
8 there's two statements. Does that give you context about her recalling
9 you talking about that happening before?

10 A I just wanted to be sure of which statement we were referring
11 to.

12 Q Okay.

13 A They're a little different.

14 MR. HAMNER: Give me one second, Your Honor. I
15 apologize.

16 BY MR. HAMNER:

17 Q Referring to page 6. So if we go back to page 5 on the
18 bottom, there's a question.

19 "Q Did she go into further details at all as far as how they tie
20 them up or what they use to tie them up or anything like that?

21 "A No, she didn't. And it wasn't clear if there was another party
22 with them. She said that they had done things like that, in reference to
23 tying this guy up with her boyfriend and stuffing the sock in the mouth,
24 she had done things like that numerous times before, and that's how
25 they obtained money. Because I asked her, um, did she work out there

1 at a store or a job, and she said no. Her boyfriend would hustle and that
2 they would -- they would, um, pose at prostitute and pimp and then rob
3 people. She never had to do anything sexually."

4 Do you recall Officer Daca relaying that in her recorded statement?

5 A I do remember reading that in the statement.

6 Q Okay. So, again, that is consistent similarly with what Steven
7 is saying at trial, correct?

8 A I wouldn't say it's consistent.

9 Q There are similarities? You would agree there are some
10 similarities then, right?

11 A I would say it's similar, yes.

12 Q Okay.

13 MR. HAMNER: I have no further questions for this witness.

14 THE COURT: Any follow-up, Mr. Abbatangelo?

15 MR. ABBATANGELO: I think maybe if we were in front of a
16 jury, but I think, Judge, you were paying attention to taking notes, and --

17 THE COURT: I am.

18 MR. ABBATANGELO: -- we can get Ms. Burns off the stand.

19 THE COURT: Okay. Thank you, Ms. Burns. Thank you very
20 much for your testimony. You can go have a seat next to your lawyer.

21 THE WITNESS: Thank you.

22 THE COURT: Mr. Abbatangelo, do you have any further
23 witnesses?

24 MR. ABBATANGELO: Just like we said earlier, the cupcake
25 girls, and she's unavailable today.

1 THE COURT: Okay. And she's unavailable today.
2 Mr. Hamner, does the State have any other witnesses you
3 intend to present?
4 MR. HAMNER: No we don't, Your Honor.
5 THE COURT: Okay. All right. Mr. Abbatangelo, did you have
6 any discussion with your other witness as to when she would be
7 available?
8 MR. ABBATANGELO: Honestly, I did not. But if we want to
9 reach out and call her right now since we're all here -- what's the Court's
10 schedule like --
11 THE COURT: Well, I mean this is the deal: So before we do
12 that, this is -- let me just ask you guys this: Are you guys going to want a
13 transcript of this proceeding before you argue the writ?
14 MR. ABBATANGELO: It depends on --
15 MR. HAMNER: I --
16 MR. ABBATANGELO: -- how long [indiscernible] to view it.
17 MR. HAMNER: Well, listen, I have enough information. I've
18 tried my best for my presentation to take citations to the record all from
19 day 1. I won't have that obviously for day 2. It's okay if I don't.
20 THE COURT: Okay.
21 MR. HAMNER: I'm okay with it if I don't have it.
22 THE COURT: Okay.
23 MR. HAMNER: I'd much rather just be --
24 THE COURT: Ending?
25 MR. HAMNER: -- done with it.

1 THE COURT: Okay. Mr. Abbatangelo, are you okay to go
2 forward with your argument without a transcript of what transpired
3 today?

4 MR. ABBATANGELO: Yes, Your Honor.

5 THE COURT: Okay. So what I can do is -- Mr. Abbatangelo,
6 yeah, you need to get your witness because I intend to let her testify, and
7 then have argument on this. Can you guys --

8 MR. ABBATANGELO: Let's look at the Court's schedule.

9 THE COURT: Well, how long is it going to take her --

10 MR. ABBATANGELO: I think --

11 THE COURT: -- to testify?

12 MR. ABBATANGELO: -- she's going to be like the length of
13 Mr. Kohn. You know, 30 minutes.

14 THE COURT: All right.

15 MR. ABBATANGELO: I'm thinking that, Alisha, we could do
16 BlueJeans for you next time where you don't have to fly back.

17 THE DEFENDANT: Okay. That would be fine.

18 MR. ABBATANGELO: And --

19 THE COURT: Well, because I'm not -- I'm not going to issue a
20 decision on -- on that day because I'm going to still need to review all the
21 exhibits and everything. So I'm going to have to issue a written
22 decision. I'm just going to let you guys argue.

23 So just in case you were wondering, if you don't -- in you're
24 not here and you're in BlueJeans, you're not going to miss a decision.
25 Okay?

1 THE DEFENDANT: That's fine with me. Thank you.

2 THE COURT: Yeah. I will not be issuing a decision on that
3 day. Because what I can do is I can let you guys -- well, I courtroom
4 share on Tuesdays now to employees of the Eighth Judicial District
5 Court. So I can do it Monday afternoon, Wednesday afternoon, or I can
6 do it Thursday.

7 MR. HAMNER: This is of next week; is that right?

8 THE COURT: Yeah.

9 THE DEFENDANT: Do you -- do you mind if I call
10 [indiscernible] brief -- real quick and --

11 THE COURT: Please. And if you need her in BlueJeans,
12 Mr. Abbatangelo, we can get her on BlueJeans, but --

13 MR. ABBATANGELO: And let her know that as well.

14 [Pause]

15 MR. ABBATANGELO: We're leaving a voicemail.

16 THE DEFENDANT: I'm just going to text her.

17 THE COURT: So I'm going to set a date, Mr. Abbatangelo,
18 based on --

19 MR. ABBATANGELO: Can we do -- looking at my schedule,
20 can we do Friday?

21 THE COURT: You're not available until next Friday?

22 MR. ABBATANGELO: Well, Wednesday afternoon I -- I do
23 have a sentencing, but it was through a settlement conference with a
24 stipulated sentence --

25 THE COURT: Uh-huh.

1 MR. ABBATANGELO: -- at 3:30 for District Court 3 unless
2 that's changed. I could rearrange other things and Wednesday could
3 actually work.

4 THE COURT: What about Thursday?

5 MR. ABBATANGELO: Oh, I misunderstood. I didn't hear
6 Thursday.

7 THE COURT: Yeah. I can do Monday afternoon, Wednesday
8 afternoon, or Thursday. I could do --

9 MR. ABBATANGELO: Thursday's excellent.

10 THE COURT: I could do all day Thursday.

11 MR. ABBATANGELO: And I've got -- for some reason, that
12 stipulated sentence is set on my Thursday and calendar, but --

13 THE COURT: So basically you don't -- well, let's --

14 MR. ABBATANGELO: Yes.

15 THE COURT: What's the --

16 MR. ABBATANGELO: So basically --

17 THE COURT: -- case number?

18 MR. ABBATANGELO: -- it [indiscernible] as usual.

19 THE COURT: Do you have a case number, Mr. Abbatangelo?

20 MR. ABBATANGELO: I've got a name. Let's see if we've got
21 a case number here.

22 THE COURT: Well, what's the name, Mr. Abbatangelo?

23 MR. ABBATANGELO: Macklin is the last name.

24 THE COURT: M-A-C-K-L-I-N?

25 MR. ABBATANGELO: Yep. Kelvin. And I do have a case

1 number.

2 THE COURT: That's all right. I can get it.

3 MR. ABBATANGELO: Because that one my assistant put it
4 in, not me obviously.

5 THE COURT: It's a 2019 case in front of Judge Johnson?
6 January 28th. So that's Thursday.

7 MR. ABBATANGELO: At what time?

8 THE COURT: You have it at 8:30 in the morning.

9 MR. ABBATANGELO: Beautiful. That's --

10 THE COURT: So please update your calendar according --

11 MR. ABBATANGELO: No. It's updated. She's got it on
12 Thursday and a Friday. It's --

13 THE COURT: Yeah. It's at 8:30 in the morning on the 28th,
14 sentencing.

15 MR. ABBATANGELO: Otherwise, after that, that's my --

16 THE COURT: Okay. Well, that's --

17 MR. ABBATANGELO: -- last hearing of the day.

18 THE COURT: Well, that's stipulated. How long is that going
19 to take in Department 20?

20 MR. ABBATANGELO: Get the case called and out the door
21 we go.

22 THE COURT: All right. So can you guys do it at like 10 on
23 Thursday?

24 MR. ABBATANGELO: I can, Your Honor.

25 MR. HAMNER: I can as well. I mean I have an appearance in

1 17, but someone can cover for me.

2 THE CLERK: And it can be in person or through BlueJeans?

3 MR. HAMNER: I'll be here --

4 THE COURT: Please make sure you --

5 MR. HAMNER: I'll be here for you, Judge.

6 THE COURT: Why thank you. Please say that three more
7 times.

8 MR. HAMNER: I'll --

9 THE COURT: Okay. So Thursday at 10. January 28th at 10.

10 So, Mr. Abbatangelo, I need you to contact your witness and
11 make sure that your witness is available.

12 We will set up a BlueJeans meeting and we will forward the
13 BlueJeans link for the meeting. And then I -- we'll be prepared to take
14 testimony from her, and I'll be prepared to take argument from you guys.

15 MR. HAMNER: Yes, Your Honor.

16 THE COURT: Okay? So we will back here on Thursday at 10.

17 MR. HAMNER: Yes, Your Honor.

18 MR. ABBATANGELO: Thank you very much, Your Honor.

19 [Court and Clerk confer]

20 THE COURT: Thank you, guys.

21 MR. ABBATANGELO: Thank you, Your Honor, very much.

22 THE COURT: Thank you.

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MR. HAMNER: Thank you.

THE COURT: Have a good weekend, guys.

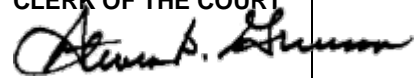
MR. HAMNER: Have a good weekend, Judge.

[Proceedings adjourned at 4:32 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 STATE OF NEVADA,
9 Plaintiff,

10 vs.

11 ALISHA BURNS,

12 Defendant.

) CASE#: 03-C-191253

) DEPT. X

13 BEFORE THE HONORABLE TIERRA JONES
14 DISTRICT COURT JUDGE
THURSDAY, JANUARY 28, 2021

15 **RECORDER'S TRANSCRIPT OF EVIDENTIARY HEARING**

16 APPEARANCES VIA BLUEJEANS:

17 For the Plaintiff:

ANTHONY L. ABBATANGELO, ESQ.

18 For the Defendant:

19 CHRISTOPHER S. HAMMER, ESQ.

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25 RECORDED BY: VICTORIA BOYD, COURT RECORDER

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None		
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1 Las Vegas, Nevada, Thursday, January 28, 2021

2

3 [Case called at 9:58 a.m.]

4 THE COURT: Okay. We're going to go on the record in C-
5 191253; State of Nevada v. Alisha Burns. Ms. Burns, are you present on
6 BlueJeans?

7 THE DEFENDANT: Yes, ma'am, I'm here.

8 THE COURT: Okay. Ms. Burns is present. Mr. Abbatangelo
9 is here on her behalf. Mr. Hamner is here on behalf of the State.

10 Mr. Abbatangelo, it's my understanding you have your next
11 witness ready.

12 MR. ABBATANGELO: Yes. Bri Alex, are you on BlueJeans?

13 THE COURT: Ms. Alex, are you on?

14 MS. ALEX: Yes.

15 UNIDENTIFIED SPEAKER: We're on.

16 THE COURT: Okay.

17 MR. ABBATANGELO: I think it is they answered yes.

18 THE COURT: I think I heard, "I'm on." Okay. Ma'am, do you
19 have a video that --

20 MS. ALEX: Yeah. Let me turn it on. One sec.

21 THE COURT: Yes. Can you just -- so we can swear you in?
22 Thank you.

23 MR. ABBATANGELO: Yeah.

24 THE COURT: Okay.

25 MR. ABBATANGELO: Perfect.

1 THE COURT: And, ma'am, if you could just please raise your
2 right hand for me, and the clerk will swear you in.

3 BRIRONNI ALEX, DEFENDANT'S WITNESS, SWORN

4 THE CLERK: Thank you. Can you please state and spell both
5 your first and last name for the record?

6 THE WITNESS: Yes. My first name is Brironni, B-R-I-R-O-N-
7 N-I; last name is Alex, A-L-E-X.

8 THE COURT: Okay. Mr. Abbatangelo, whenever you're
9 ready.

10 DIRECT EXAMINATION

11 BY MR. ABBATANGELO:

12 Q Ms. Alex, where are you currently employed?

13 A At the Cupcake Girls Org.

14 Q And what is your role there?

15 A Program manager.

16 Q And before we get into -- well, actually, what does a program
17 manager at the Cupcake Girls do?

18 A I oversee all of the direct care for our clients. So anything
19 from our advocacy perhaps or Outreach programs, as well as facilitating
20 our support groups.

21 Q All right. And let's back up a little bit. What's your
22 educational background?

23 A I went to school at UNLV for undergrad and -- as well as
24 graduate school. In psychology for undergrad and educational
25 psychology for grad school.

1 Q And what did you obtain from grad school? What kind of
2 degree?

3 A A master's in science -- a master of science psychology.

4 Q And how long have you been employed at the Cupcake
5 Girls?

6 A Since 2019.

7 THE COURT: Okay. Just one second, Mr. Abbatangelo.
8 Ms. Burns, if you could please mute your microphone.

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: Okay. Thank you. Okay. Go ahead,
11 Mr. Abbatangelo.

12 BY MR. ABBATANGELO:

13 Q All right. So Bri, you stated that you're in charge of advocacy
14 programs and Outreach programs. Who do you --

15 A Uh-huh.

16 Q -- cater to? Who does -- like who do the Cupcake Girls focus
17 their attention to?

18 A We provide services for folks involved in the adult industry
19 as well as aftercare for survivors of sex trafficking.

20 Q And when you say advocacy programs, could you give us
21 some examples of advocacy programs?

22 A Sure. Our advocacy mostly -- we have a couple. Actually,
23 we just added a few -- or a new one. So now we have three. But we
24 have a referral program. So that's referring our clients to resources.
25 That's a pretty short-term program. So if someone comes to us in need

1 of one or two resources, we can connect them with a partner or a
2 community resource. Our intensive case management program is where
3 we see the most of our clients, especially the ones who arrive as a sex
4 trafficking. That's a longer term relationship. Those are folks who meet
5 with our advocates on a one-on-one basis either weekly or biweekly and
6 work toward longer term goals and just receiving support from their
7 advocate. Our mentorship program is more for people who want a
8 support system. So same client base but folks who want a support
9 system or someone to check in with them if they don't have anyone else.

10 Q So when a client meets once a week or twice a week, as you
11 were saying, what are they discussing? What is -- what is being offered
12 to them?

13 A Basically it's an -- we work on an empowerment model, and
14 it's very client centered. So whatever the client feels that they want to
15 work toward, whatever their personal goals are or whatever they want to
16 discuss, it's up to the client to bring that up and the advocate to support
17 and try to help them in reaching their goals or connecting them to
18 necessary resources.

19 Q And what would be an example of a goal? Not necessarily,
20 you know, for Alisha Burns, but just in general. What would a goal be
21 for some of these people?

22 A A lot of folks come to us in need of, say, maybe legal services
23 or a counselor or a therapist to work through trauma. It could be any
24 number of things. It could be a dentist; it could be one of our tattoo
25 partners for a tattoo cover-up. We have a lot of things that we offer to

1 our clients.

2 Q So a big variety of programs are available for your clients is
3 what you're saying --

4 A Yeah.

5 Q -- is that my understanding?

6 A Yes.

7 Q And what is your role or area, involvement in sex trafficking,
8 as you mentioned earlier?

9 A We -- so we assist in aftercare for sex trafficking survivors.
10 So we -- again, an advocacy. We hear out their stories, we listen to their
11 experiences. Our org has existed for about ten years now. I think this is
12 our tenth year actually being a 501(c)(3). And so we've seen a lot of
13 victims or survivors of sex trafficking come through our doors. And
14 that's -- just basically we offer the same services that we would to
15 anyone who's in the industry of their own volition.

16 Q And when you said industry, you mentioned earlier sex
17 industry. What are common --

18 A Yeah.

19 Q -- I guess street language or terms of the community for
20 somebody in the sex industry? What would be a -- like what's an
21 example of --

22 A Oh, what are examples of -- okay. Like dancers, for example,
23 people who do street-based sex work, again, trafficking survivors would
24 be part of the adult industry, but they are not doing it of their volition.
25 So we do kind of consider that separate. It could be anything; camming,

1 porn, anybody who's involved in the adult industry at all.

2 Q And your organization provides assistance for those people
3 trying to get out of those -- the sex industry; is that correct?

4 A Not necessarily. Not if they don't want to. If they do want to,
5 that is something that we offer. But it's -- again, it's client centered. So if
6 that's the client's goal, then we would absolutely help them with that. If
7 they, you know, are thriving in the industry, for example, and they just
8 want to see a dentist, that's fine as well.

9 Q And since you said you're involved with the victims or the
10 people involved in the sex trafficking and sex industry, are you familiar
11 with patterns of behavior of those people?

12 A From what we've seen out of our clients and what we can
13 speak to as an organization, there are definitely a lot of parallels in what
14 we see in people who self-identify as trafficking survivors as well as
15 people who kind of have the symptoms of sex trafficking. So what we
16 do as the Cupcake Girls, our simple definition of sex trafficking is anyone
17 who's in the sex industry under coercion, deception, manipulation, or
18 threat, and a pretty big, important part of that is they're not in control of
19 their wages.

20 So there is a lot of behavior that we have seen from our clients
21 that, you know, people are doing things they don't necessarily want to
22 do, or they're being forced to do things or their money's being
23 controlled, things of that nature.

24 Q And what are some of those exact behavioral patterns that
25 they exhibit?

1 A Really it could be anything depending on the trafficker and
2 what the trafficker is asking them to do.

3 Q Could you give us some examples of those?

4 A Sure. That could be performing sex acts they don't want to
5 perform, maybe even escorting with people they don't want to --
6 basically any behavior. But there are crimes that have been committed
7 that sex trafficking victims or survivors don't necessarily want to be
8 doing but they feel like they have to because they're under threat or
9 manipulation. So that's a pretty big part of what we've seen in our
10 clients thus far.

11 Q And then are you familiar with the roles or pattern of
12 behavior of the trafficker?

13 A Yes. So the word trafficker is pretty interchangeable with -- I
14 feel like probably the most common word we see is pimp. But there is --
15 there are a lot of common behaviors that we see out of our clients or
16 described by our clients as well that otherwise well-documented as far as
17 the -- for example, there's the Romeo trafficker who uses love to get
18 what they want out of their -- out of the victim.

19 So, you know, using words like, "I love you," for building a
20 relationship initially under the guise of really caring about this person
21 and then kind of isolating them and making them, you know, their only
22 support system until they don't have anything else, and then they have
23 to rely on that person and do what that person says. There are also
24 people who use threats of violence or actually abuse to get what they
25 want out of the victim. Controlling of money. And there also are a lot of

1 overlaps. These aren't like mutually exclusive, but there is a lot of
2 overlap in some of these behaviors. So just because someone exhibits
3 one behavior doesn't mean they don't exhibit any of the other ones.

4 Q And then have you received -- well, let me strike that. Are
5 you familiar with the fact pattern of this case involving Alisha Burns?

6 A Yes.

7 Q And did you receive any information from myself or Mr. Rose
8 [phonetic]?

9 A Yes.

10 THE COURT: Or who?

11 THE WITNESS: We had a call the other day about the --

12 MR. ABBATANGELO: [Indiscernible] Perry.

13 THE WITNESS: -- facts of the case.

14 BY MR. ABBATANGELO:

15 Q All right. And we just talked about the general overview
16 about the case; is that correct?

17 A Yes.

18 Q But you didn't review case materials, like the statements that
19 Alisha made; is that correct?

20 A No. Not at all.

21 Q Did you get a chance to review any of the love letters from
22 Mr. Kaczmarek to Alisha Burns?

23 A I read through some of it.

24 Q And -- but you didn't receive also from me like court minutes
25 or anything of that nature, correct?

1 A No.

2 Q So what is -- why don't you state to the Court and
3 Mr. Hamner, the prosecutor, what your summation and understanding of
4 the case is.

5 THE COURT: And just one second, Mr. Abbatangelo.

6 MR. ABBATANGELO: Yeah.

7 THE COURT: So she --

8 MR. ABBATANGELO: If that's appropriate.

9 THE COURT: She reviewed some letters.

10 Ma'am, what other information did you review?

11 THE WITNESS: That's about it. So basically the letters and
12 Mr. Abbatangelo sent me the facts of the case. But not necessarily
13 anyone's statements or anything to that effect.

14 THE COURT: So like a police report?

15 THE WITNESS: Similar, but I don't even know if I would call
16 it that because it wasn't official. It was like a summary of what
17 happened.

18 THE COURT: Okay. Well, then who did the summary?

19 MR. ABBATANGELO: I did.

20 THE COURT: Okay. Okay. And, Mr. Abbatangelo, you were
21 asking her to give us a summary of what she believes?

22 BY MR. ABBATANGELO:

23 Q So you understand then Ms. Burns made confessions, a
24 letter or statement to the police?

25 A Yes.

1 Q And your understanding of the -- entering a plea and getting
2 a ten to life sentence?

3 A Yes.

4 Q And are you aware that she came out here to Las Vegas with
5 Mr. Kaczmarek back in 2002?

6 A Yes.

7 Q And her age at the time?

8 A Yes. I believe she was 15.

9 Q Yes. And that there was an individual that was robbed, and
10 he ended up dying?

11 A Yes.

12 Q And that's involved in her underlying sentence; is that
13 correct?

14 A Correct.

15 Q When you read the -- after our discussion and the letters you
16 read, what is your opinion and thoughts towards Ms. Burns in this case?

17 MR. HAMNER: I'm going to object at this point on the
18 grounds of relevance.

19 MR. ABBATANGELO: I think it's very relevant because it
20 goes into her basis of her knowledge understanding sex trafficking and
21 the roles a trafficker plays and what a victim plays.

22 THE COURT: But you said what is her opinion of Ms. Burns.
23 What specifically are you eliciting as a --

24 MR. ABBATANGELO: Well, she's already admitted about this
25 case, what -- her age. Can we just lay that foundation?

1 THE COURT: Whose? Ms. Burns' age?

2 MR. ABBATANGELO: Yeah. At the time of the events that
3 occurred back in 2002.

4 THE COURT: And what is her opinions of Ms. Burns at that
5 time?

6 MR. ABBATANGELO: Yes.

7 THE COURT: Okay. Mr. Hamner.

8 MR. HAMNER: I'm going to object. I think this is -- this is an
9 improper opinion being -- attempted to be elicited by the Defense. I
10 mean her opinion as to this woman is really irrelevant. Now, I
11 understand if he wants to elicit testimony about behaviors of sex
12 trafficking victims, behavior of pimps based on her training and
13 experience.

14 But for her to offer an opinion -- it almost feels akin to asking
15 a psychiatrist to please give us an opinion as to the mind of the victim at
16 the time that this has happened, or, please give us an opinion as to the
17 mind of the defendant at the time that this crime is happening. That's
18 completely improper. Whether it's an evidentiary hearing or trial, that's
19 not allowed.

20 So I'm not going to sit here and object that she doesn't have
21 experience in the -- in the realm of dealing with victims of self -- sex
22 trafficking or perpetrators of sex trafficking and the tactics that they use,
23 but to ask her to offer an opinion potentially about the mind-set or the
24 willingness or, you know, the voluntariness of someone's actions,
25 something from 20 years ago, it is improper.

1 THE COURT: Mr. Abbatangelo?

2 MR. ABBATANGELO: I would disagree with -- regardless if
3 it's 20 years ago or 20 days ago because this is her experience based
4 exactly on what Mr. Hamner said, her being Bri Alex, opinion of
5 watching, talking to, advocating, and being involved within the sex
6 trafficking industry and her role in that --

7 THE COURT: Well, my --

8 MR. ABBATANGELO: -- and if these patterns are typical of a
9 victim or a trafficker.

10 THE COURT: And I mean I understand that,
11 Mr. Abbatangelo. But my concern is in witness -- and I agree with the
12 State that this witness can absolutely talk about everything -- her
13 expertise and all the experience she has dealing with victims of sex
14 trafficking. But she's never even met your client. She has never met
15 your client, she's not had any interactions with her, she's --

16 MR. ABBATANGELO: Well, Your Honor -- Your Honor --

17 THE COURT: -- reviewing some --

18 MR. ABBATANGELO: -- if I could interrupt that. I didn't -- I
19 did not ask the questions. But they've met before. Ms. Burns and
20 Ms. Alex have talked before.

21 THE COURT: Okay. Well, you didn't get that from her. So I
22 didn't know that.

23 MR. ABBATANGELO: All right. So how about we try to lay
24 some more foundation and maybe --

25 THE COURT: Yeah. Because I --

1 MR. ABBATANGELO: -- rephrase.

2 THE COURT: -- what I have right now is she's basing this
3 opinion on a summary that was prepared by you that I've never seen.
4 So I don't know what's in the summary. And she said she reviewed
5 some letters. I know when we have here on Friday you guys admitted a
6 stack of letters. Which ones did she review? Did she review all of them,
7 did she review -- I mean she said some letters. And so I don't know what
8 she reviewed. I was under the impression she had never even met your
9 client.

10 MR. ABBATANGELO: All right.

11 BY MR. ABBATANGELO:

12 Q Ms. Alex --

13 MR. ABBATANGELO: Let me pick up, please.

14 THE COURT: Okay.

15 BY MR. ABBATANGELO:

16 Q Have you met Ms. Burns?

17 A Yes.

18 Q And when did you meet with her, if you recall?

19 A I don't remember exactly when, but I know it was at some
20 point last year. I believe it was in the summer. She was one of our
21 clients briefly.

22 Q And when you met with her, what did -- was your role, what
23 was your -- what was your role or what were you doing during the times
24 you interacted with Alisha?

25 A She came to one of our support groups and she was also

1 connected with one of our advocates.

2 Q And did you ever interact with her in a professional manner?

3 A Yes. At the support group.

4 Q Did she ever -- did Alisha ever explain to you her situation
5 from 2002?

6 A Not the particulars of this case.

7 Q I'm sorry. From 2003?

8 A Not really.

9 THE COURT: I'm sorry. And I'm sorry, Ms. Alex, can you
10 repeat your response?

11 THE WITNESS: Yes. I'm sorry. Which question am I
12 responding to just so I --

13 MR. ABBATANGELO: Yeah. There's a delay. There's a delay
14 in --

15 THE COURT: There's a delay. Yeah.

16 BY MR. ABBATANGELO:

17 Q Did you ever discuss with Ms. Burns what had occurred with
18 her in 2002?

19 A No. Not that day.

20 Q I'm sorry. Not that day?

21 A No [indiscernible]. Nope.

22 Q Not at all?

23 A No.

24 Q Did you come to court when we were here in court, I believe
25 it was, September?

1 A Yes.

2 Q Had you had any discussions with Ms. Burns at that time?

3 A Briefly when we were briefing about the case. But not an
4 overall -- like I didn't have an overall summary. I basically didn't know
5 the facts of the case until we had our call the other day.

6 Q Okay. And from there, are you able to state what the typical
7 trafficker does in relationship to Ms. Burns' case?

8 MR. HAMNER: I'm going to reraise my objection. I think
9 based on -- especially on that last kind of clause at the end, "as it relates
10 to Mrs. Burns' case" -- "Ms. Burns' case." One of the things that we just
11 got from there additional foundation was sometime last year there was a
12 brief meeting, the witness stated that she absolutely didn't speak to her
13 about the case. She then followed up and said, "we met briefly in 2002,"
14 and then she said, "honestly, I didn't know anything about the facts of
15 the case until our call," and the "our" is in reference to Mr. Abbatangelo
16 and her talking.

17 So I mean the bottom line is kind the predicate information that I
18 think the Court was looking for previously was not laid by this
19 foundation, and therefore asking this opinion -- this witness about her
20 opinion as to this particular individual, Ms. Burns in relation to kind of
21 the sex trafficking I think is, again, an improper opinion, particularly
22 based on the foundation that was laid.

23 THE COURT: Mr. Abbatangelo?

24 MR. ABBATANGELO: Your Honor, it's the same argument
25 that she is familiar with the facts, with -- that I had given her, which are --

1 I have the letter here in email. I could actually -- I haven't shown it to
2 Mr. Hamner or the Court. But, to me, it is a summation based upon facts
3 I learned from the discovery. It's not slanted favorably to Alisha or to the
4 State. It's taking the facts I've gotten from Kaczmarek's statements to the
5 police, to the trial. Like I said, I have it right here in front of me. It's not
6 confidential information or work product. I'm happy to share it. I can let
7 the State and the Court review it. It's --

8 THE COURT: Well, I mean I still have the same concerns,
9 Mr. Abbatangelo. And I have to agree with the State; the foundation you
10 just laid is -- if this witness is testifying truthfully, this witness says she's
11 never talked to your client about this incident. So everything that this
12 witness only knows about this incident is something that came from the
13 summary that was provided from you.

14 Based upon that, she cannot give an opinion as to your
15 client's state of mind back in 2002. This witness can absolutely talk her
16 expertise in sex trafficking, go through all of that, and then when we get
17 ready to argue, if you want to argue the similarities between what she
18 has seen and what's going on with your client, you can do that. But she
19 can't give an opinion on your client without ever talking to her about this
20 incident.

21 MR. ABBATANGELO: All right. Then I will ask her about the
22 general terms of sex trafficking.

23 THE COURT: Okay.

24 MR. ABBATANGELO: Okay.

25 BY MR. ABBATANGELO:

1 Q So, Ms. Alex, with your understanding of sex trafficking, is it
2 common for the victim -- is it -- well, actually, is the -- is the term victim?
3 What is the proper term for the person that is working in the sex
4 industry? I presume the main person is the trafficker. That's their --
5 that's a term of art, correct?

6 A Yes. In a trafficking situation, that would be true. It really
7 depends upon how the person self-identifies. If they identify as a victim,
8 then we use that term as well. If they identify as a survivor, we use that
9 term as well. It totally just depends upon -- for us, it's totally dependent
10 upon how the client identifies.

11 Q All right. So --

12 A So in this case, you could use victim or survivor, depending.

13 Q All right. Would it be common for a victim to follow the
14 commands and orders of a sex trafficker?

15 A Yes. From what we've seen, yes, that is a very, very
16 common behavior. If someone doesn't feel safe or they feel threatened I
17 a trafficker or someone who's controlling their money or manipulating
18 them or whatever the case, that is very common for them to do whatever
19 they say.

20 Q Would it be common for a victim to commit crime at the
21 direction of a sex trafficker?

22 A It's possible.

23 Q Does it happen all the time? Is that fair?

24 A Based on what we've seen with our clients, a -- some
25 traffickers are capable of getting their victims to do just about anything

1 because they are in fear for their safety, their family members' safety.

2 There could be a number of things at play there.

3 Q So if a trafficker told a victim, "Hey, wipe this room down for
4 fingerprints," is that something a victim would do?

5 A That's possible.

6 Q And if they -- the trafficker said, "Hey, cut a cord off, give me
7 this so I can tie somebody up," is that something a victim would do?

8 A That is also possible depending on the situation.

9 Q And if that trafficker said, "Hey, put your foot on the back of
10 this guy's neck, keep him" -- "hold him down," is that something a
11 trafficker [sic] would do?

12 A I would say the same of that as well.

13 Q And in the same situation, a trafficker was to tell the victim to
14 go find a sock and put it in his -- "help me so I can put it in a victim" --
15 "another person's mouth," is that something they would do?

16 A Possibly.

17 Q And what about age difference, have you ever been familiar
18 with any age difference in sex trafficking?

19 A Commonly we've seen younger people be more susceptible
20 to trafficking, especially grooming as it relates to trafficking. If someone
21 is in a relationship or believes they're in a relationship with the trafficker,
22 then it's a lot easier for the trafficker to groom them for trafficking.

23 Q And define the term grooming.

24 A Grooming -- actually, I have the definition from the NSPCC --
25 is, "when someone builds a relationship, trust, and emotional connection

1 with a child or young person so they could manipulate, exploit, and
2 abuse them."

3 Q Thank you. And if there's somebody grooming -- or a
4 trafficker grooming a victim and the victim is 15 years old and calls the
5 trafficker a boyfriend that's much older, for example, of 33 years of age,
6 is that commonplace?

7 A It could be. Based on what we've seen with our clients, we
8 have had people who have been trafficked in their teens or who had
9 been with their traffickers since their teens. In this case, a 15-year-old is
10 below the age of consent. So that's concerning. But, yeah, that's my
11 general thought.

12 Q And this is kind of a redundant question, but do victims feel
13 victimized during this trafficking?

14 MR. HAMNER: I think it calls for speculation.

15 THE WITNESS: Can you rephrase that?

16 MR. HAMNER: I'm going to object on speculation grounds.

17 THE COURT: Okay. Mr. Abbatangelo, how does she know
18 how victims feel?

19 MR. ABBATANGELO: It's up to the Court if you're going to
20 sustain it or overrule.

21 THE COURT: Well, I need you to respond. How would she
22 know that?

23 MR. ABBATANGELO: Well, from her experience of -- and this
24 is a general question. I'm not asking about Alisha. I'm asking about her
25 experience of victims; how do they feel or how do they communicate to

1 the Cupcake Girls in her professional capacity.

2 THE COURT: Can you rephrase the question more generally?

3 BY MR. ABBATANGELO:

4 Q Bri, so if --

5 MR. ABBATANGELO: Let me just see the best way to do this.

6 BY MR. ABBATANGELO:

7 Q So if a victim communicates with the Cupcake Girls or
8 yourself, what emotions, what are they generally -- in general are they
9 explaining to you how they are feeling with the trafficker?

10 A Many are our clients who have been sex-trafficked express a
11 feeling of hopelessness, a lack of control over their own lives, and their
12 money as well. Many of them don't have a support system or have been
13 isolated from their families or friends, if they even had families or friends
14 to that begin with.

15 Q And from your familiarity, how long has sex trafficking been
16 a concept, as far as you're aware?

17 A I might need you to rephrase that, but I'm going to try to
18 answer it.

19 Q Okay. The term sex trafficking --

20 A As far as --

21 Q -- how long has --

22 A Okay.

23 Q -- that been the concept, as far as you're aware?

24 A Our organization has existed for ten years. There was
25 definitely research and discourse about sex trafficking at that time. The

1 first legislation about sex trafficking didn't happen until 2000. But sex
2 trafficking has been happening for thousands of years. It may not have
3 been called that, but it's something that's been happening for a very long
4 time. But it's just relatively recently gotten recognition as far as
5 legislation and popular discourse.

6 Q And you said the Cupcake Girls have been around the last
7 ten years?

8 A Uh-huh.

9 Q All right.

10 MR. ABBATANGELO: I have no further questions.

11 THE COURT: Mr. Hamner, your cross.

12 MR. HAMNER: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. HAMNER:

15 Q Good morning, Ms. Alex. How are you?

16 A I'm good. How are you?

17 Q Good. Just let me know if you can't hear me. Okay?

18 A Okay. Thank you.

19 Q So I kind of want to just cover a couple of things. One is it
20 sounds like the scope of the materials that you reviewed was essentially
21 a summary written by Defense counsel; is that correct?

22 A Correct.

23 Q Okay. So you didn't read any of the police reports related to
24 this murder; is that right?

25 A No.

1 Q You did not read --

2 A That is right.

3 Q Okay. You didn't read a voluntary statement by an officer by
4 the name of Theresa Daca, correct?

5 A Correct.

6 Q You also didn't read a letter that Ms. Burns prepared and
7 wrote to a Detective Mikalonis; is that correct?

8 A That's correct.

9 Q And you didn't happen to see any of the photographs related
10 to the case; is that correct?

11 A Correct.

12 Q And you didn't review any of the trial testimony in relation to
13 an individual by the name of Steven Kaczmarek; is that correct?

14 A That's correct.

15 Q All right. Additionally, it sounds as if your interactions with
16 Ms. Burns, to some extent, was limited; is that correct?

17 A Yes, I would say so.

18 Q Okay. Because I think you had indicated that prior to this,
19 you never really spoke to her about the case. And really the wealth of
20 your knowledge primarily comes from that summary letter from Defense
21 counsel; is that right?

22 A You mean the wealth of my knowledge about the case --

23 Q Yes.

24 A -- specifically?

25 Q Yes.

1 A Yes.

2 Q Okay. And you did not do any sort of clinical psychological
3 interview with Ms. Burns at any point in time; isn't that right?

4 A That's correct. She came to one of our support groups.

5 Q Okay.

6 A But, yeah, beyond that --

7 Q And --

8 A -- no.

9 Q And that was kind of more along the lines of she was taking
10 advantage of some of the resources that you provide women in the
11 community or potentially even men; is that correct?

12 A Correct.

13 Q Okay. Let's talk a little bit about some of these questions that
14 Defense counsel had asked you. One of the things -- there -- they were
15 kind of spoken in generalities, but they said things like, "Isn't it true
16 that" -- do you remember being asked something along the lines of,
17 "Isn't it true that sometimes victims of sex traffickers will do what their
18 sex traffickers tell them what to do"; is that correct? Do you remember
19 being asked that?

20 A Yes.

21 Q And I think you said, you know, it is a possibility; isn't that
22 right?

23 A Uh-huh.

24 Q And, conversely, in some instances victims of sex traffickers
25 sometimes don't go along with what they're being asked to do, or is it

1 automatically 100 percent they do it every single time?

2 A I wouldn't say it's 100 percent --

3 Q Okay.

4 A -- but it -- it's common and, in fact, [indiscernible] situation,
5 it's actually more uncommon than common, if that makes sense, in a
6 trafficking situation to be controlled by a trafficker out of fear.

7 Q I get that. And I think more -- what you're saying is it's more
8 often they do go along, but there are some instances where they don't?

9 A Possible.

10 Q Okay. And all of those kind of questions, you've kind of
11 described it as being -- they were being [indiscernible], you kind of kept
12 answering with -- along the lines of like "it's possible." So there are
13 some instances where maybe whatever was being asked you, the
14 opposite may be true, but maybe more often than not, it does go -- it
15 does happen; is that correct?

16 A Yes.

17 Q Okay. And then near the end of your -- the direct
18 examination you were asked about how long the term sex trafficking has
19 kind of been around. And I think you said something to the effect of,
20 well, listen this concept -- you know, these actions have been taking
21 place for thousands of years but maybe that official title had maybe been
22 something a little more recent; is that correct?

23 A Yes.

24 Q Okay. But to be clear, if we're talking about terms, and I'm
25 putting my fingers in quotes, if you can't see me, kidnapping has been

1 around -- that term's been around for a long time, hasn't it?

2 A Yes.

3 Q Okay. Sexually assaulting children is a term that's been
4 around for quite some time, correct?

5 A Uh-huh.

6 Q Okay. Far longer than the term sex trafficking; is that right?

7 A Yes, but I would also include that just because there weren't
8 a name for it doesn't mean that there's not a lot of overlap in those -- like
9 especially with kidnapping, sex trafficking, that sort of thing.

10 Q And I wholeheartedly agree with you, because a lot of times
11 when you're dealing with sex traffickers and their actions, their actions
12 overlap into things like kidnapping children, sexually assaulting children
13 over the course of their relationship with their victim, correct?

14 A Yes.

15 Q Okay. So I'm glad we are actually in agreement as to that.
16 And as you acknowledge as well, you know the kind of kidnapping -- and
17 I know you're not a lawyer, but the crime of kidnapping and sexually
18 assaulting children, those are crimes that have been around for decades,
19 correct?

20 A Yes.

21 Q Okay. And you're not familiar with any particular charges
22 that Steven Kaczmarek faced -- I don't know if you were or not. I haven't
23 read the letter. But were you aware that Steven Kaczmarek had been
24 charged with crimes of kidnapping and sex -- sexually assaulting a minor
25 under the age of 16 as it related to Alisha Burns? Were you -- were you

1 aware of that?

2 A Only on the basis of Mr. Abbatangelo's briefing.

3 Q Okay. So you were aware that even back, you know, almost
4 20 years ago those types of crimes had been charged against
5 Mr. Kaczmarek in relation to any connection to his relationship with
6 Ms. Burns; is that right?

7 A Yes.

8 Q Okay. Thank you.

9 MR. HAMNER: I have no further questions.

10 THE COURT: Any follow-up, Mr. Abbatangelo?

11 MR. ABBATANGELO: Well, to be fair to the Court, it's -- since
12 we're dealing with you, the Judge, not the jury, I think you have an
13 understanding of Ms. Alex's testimony --

14 THE COURT: I do.

15 MR. ABBATANGELO: -- from both sides?

16 THE COURT: I do.

17 MR. ABBATANGELO: I don't think we need to follow up and
18 go back and forth and back and forth then, because I think we've
19 addressed our issues, I think Mr. Hamner has issues --

20 THE COURT: Okay.

21 MR. ABBATANGELO: -- and like I said, it's a bench situation
22 as opposed --

23 THE COURT: Right.

24 MR. ABBATANGELO: -- to a jury.

25 THE COURT: Right.

1 MR. ABBATANGELO: So, Ms. Alex, thank you again for
2 taking time and testifying.

3 THE WITNESS: Thank you.

4 THE COURT: It's been a pleasure meeting you, ma'am.

5 THE WITNESS: Thank you.

6 THE COURT: Mr. Abbatangelo, do you have any further
7 witnesses you would like to present?

8 MR. ABBATANGELO: We do not. The Defense rests.

9 THE COURT: Okay.

10 MR. ABBATANGELO: Or the Petitioner rests.

11 THE COURT: Okay.

12 DEFENDANT RESTS

13 THE COURT: Okay. Mr. Hamner, do you have any evidence
14 or witnesses that the State would like to put on?

15 MR. HAMNER: Not at this time. Nothing further.

16 THE COURT: Okay. Have all the exhibits been admitted?

17 MR. HAMNER: My understanding is yes.

18 MR. ABBATANGELO: Oh, that's a good question. We were
19 scrambling with some electronic stuff yesterday.

20 THE COURT: Okay. Is everything in, Madam Clerk?

21 THE CLERK: I have A -- I only have A on the Defense.

22 MR. ABBATANGELO: Oh. My staff had emailed yesterday
23 afternoon -- or like [indiscernible] email we received and some of these
24 might be duplicates. I'll show Mr. Hamner what we sent. We've got the -
25 - do you have the Daca incident report? Is that in evidence from the

1 State? Some of this might be duplicate.

2 MR. HAMNER: Well, I did not -- I hadn't seen this, and I
3 hadn't -- I hadn't seen Defense A I believe.

4 MR. ABBATANGELO: And I also know there's one --

5 THE COURT: Defense A is the report, and we admitted that,
6 and we struck a portion of it. But Defense's B, C, D, and E is supposed to
7 be in as well.

8 MR. HAMNER: Your --

9 MR. ABBATANGELO: Hang on one second. Which -- what
10 was the report that -- oh, that was Dr. Bennett.

11 THE COURT: That was -- Dr. Bennett's report is Defense A.

12 MR. ABBATANGELO: That was Dr. Bennett's. So what's --

13 THE COURT: And I struck opinion number 5. But the rest of
14 it is in.

15 MR. ABBATANGELO: Right.

16 MR. HAMNER: Right. And Mr. Abbatangelo is showing me
17 what appears to be a typewritten report from Theresa Daca. He had --
18 when he was standing next to me, he was describing it as Exhibit A. And
19 my understanding was A was what you had --

20 THE COURT: It is.

21 MR. HAMNER: -- recalled, Dr. Bennett's report. So I didn't
22 know if Mr. Abbatangelo was saying when we emailed things to the
23 court, we emailed the Theresa Daca report as Exhibit A. Is that what you
24 were saying?

25 MR. ABBATANGELO: Yeah. That -- just so we're clear.

1 That -- because --

2 THE COURT: But it can't be A because you --

3 MR. ABBATANGELO: I understand.

4 THE COURT: -- already admitted A.

5 MR. ABBATANGELO: I'm just saying that's why I wanted to
6 make it clear.

7 THE COURT: Okay. Well, hold on. Before we get to that,
8 there is B's -- Defense's B, C, D, and E were admitted when Phil Kohn
9 was testifying.

10 MR. HAMNER: Right.

11 THE COURT: So what are those?

12 MR. HAMNER: I think the -- I think the issue that we're
13 having is the Defense submitted a series of emails labeling Exhibits A
14 through I, but they are not in conjunction with what has been admitted
15 during the course of our evidentiary hearing. So their numbering system
16 for their electronic documents are incorrect because we already have a
17 series of in-court admitted exhibits.

18 THE COURT: Okay.

19 MR. ABBATANGELO: That's the first thing.

20 MR. HAMNER: Okay.

21 THE COURT: Okay. So what was admitted in court on Friday
22 when Phil Kohn was testifying, it's Defense's B, C, D, and E is what I
23 wrote down.

24 MR. HAMNER: Yes. So --

25 THE CLERK: It looks like it's their -- the stickers are actually

1 done.

2 THE COURT: Okay. Can I see those?

3 THE CLERK: Yeah.

4 THE COURT: Okay. So I have Defense's --

5 THE CLERK: This was done. So I'm going to go ahead and
6 fill in the --

7 THE COURT: Okay. Perfect.

8 Defense's A is Dr. Bennett's report.

9 MR. ABBATANGELO: Correct.

10 THE COURT: Defense's B is the Unconditional Waiver of the
11 Preliminary Hearing from April 1st of 2003, State of Nevada versus
12 Alisha Burns.

13 MR. ABBATANGELO: Which is State's --

14 MR. HAMNER: That's Defense. No. That's --

15 THE COURT: This is Defense's B.

16 MR. ABBATANGELO: Right. Which is State's --

17 MR. HAMNER: No, no, no. We should give you this.

18 MR. ABBATANGELO: Okay.

19 THE COURT: Okay. That's Defense's B.

20 MR. HAMNER: Correct.

21 THE COURT: Defense's C is this in the Court of Common
22 Pleas Juvenile Division from Ohio, the interim and order of -- for her to
23 appear, the order from -- ordering Ohio to bring her.

24 MR. HAMNER: It's dated November 22nd, 2002?

25 THE COURT: Yes.

1 MR. HAMNER: Okay.

2 THE COURT: That's C.

3 MR. HAMNER: That's what she's talking about. So that --

4 MR. ABBATANGELO: Okay.

5 MR. HAMNER: -- [indiscernible]. Yep.

6 THE COURT: D -- Defense's D is Justice Court, the Certificate

7 requesting her attendance --

8 MR. HAMNER: Okay.

9 THE COURT: -- against Kaczmarek.

10 MR. HAMNER: That's correct. That's what that is.

11 THE COURT: Okay. And then Defense's E is the stip and

12 order for the contact visit signed by Gary Vaughn [phonetic] and Bill

13 Kohn.

14 MR. HAMNER: Okay.

15 THE COURT: Dated August -- April 16th of 2003.

16 MR. HAMNER: That's correct.

17 THE COURT: Okay. So those are in evidence right now. And

18 that's all I have admitted by the Defense is all the way up to E.

19 [Counsel confer]

20 MR. ABBATANGELO: So we have -- just to back up. F is

21 Theresa Daca's interview.

22 MR. HAMNER: It's already in evidence.

23 MR. ABBATANGELO: It's --

24 THE CLERK: Is that Daca's statement, Number 11 in the

25 State's?

1 MR. ABBATANGELO: Correct.

2 MR. HAMNER: Hold on one second.

3 MR. ABBATANGELO: Yes.

4 MR. HAMNER: Mr. Abbatangelo, why don't we do this: Can
5 we name this as your next proposed exhibit? Because I know that's not
6 amongst the State's exhibits.

7 MR. ABBATANGELO: Okay.

8 MR. HAMNER: Okay. What's our next letter in the Defense's
9 exhibit?

10 THE COURT: F.

11 THE CLERK: F.

12 MR. HAMNER: So the -- by stipulation of the parties, we'll
13 admit to Defense proposed F, is an information report authored by
14 Theresa Daca.

15 THE COURT: Okay.

16 [Counsel confer]

17 MR. HAMNER: By stipulation we are now onto Defense
18 proposed G. By stipulation of the parties, we'll admit to what appears to
19 be a photocopy of the two gold and silver pawn receipts taken out by
20 Steven Kaczmarek

21 THE COURT: And that's going to be G?

22 MR. HAMNER: Yes.

23 THE COURT: Okay.

24 MR. HAMNER: By stipulation the parties will agree to
25 Defense exhibit -- proposed Exhibit H. It is a -- another certificate

1 request --

2 MR. ABBATANGELO: G. G.

3 THE COURT: No. We just did G.

4 THE CLERK: Oh, this is G, right?

5 MR. HAMNER: Yes, that's G.

6 THE CLERK: Okay.

7 MR. HAMNER: Whenever you're ready, I'll --

8 THE CLERK: Sorry.

9 MR. HAMNER: I don't want to go too far ahead of you.

10 THE CLERK: Okay.

11 MR. HAMNER: So this will be H. It is Justice Court of
12 Las Vegas certificate requesting the attendance of a witness.

13 THE COURT: That's already in.

14 MR. HAMNER: It is a little bit different, Your Honor. It's
15 entitled this. There appear to be almost like fax confirmations that
16 Phil Kohn received.

17 THE COURT: Okay. Okay.

18 MR. HAMNER: So, I mean, substantively you're right,
19 Your Honor, they're the same, but --

20 THE COURT: Okay. So that will come in as H.

21 MR. HAMNER: And there's one last proposed exhibit. So
22 that's going to be -- that will be H, and then we have one last one. It's
23 Defense proposed I. It is a written voluntary statement of an individual
24 by the name of Thomas Riddle [phonetic]. And by stipulation, we'll
25 agree to its admittance.

1 THE COURT: So did we do I?

2 MR. HAMNER: I was Mr. Riddle's statement.

3 THE COURT: Okay. And that's all you have from the
4 Defense?

5 MR. ABBATANGELO: Yes, Your Honor.

6 THE COURT: Okay. So F, G, H and I is admitted pursuant to
7 stipulation.

8 [Defendant's Exhibits F, G, H and I admitted into evidence]

9 THE COURT: And is that all of the exhibits?

10 MR. HAMNER: Yes, for the State. And I would assume --

11 THE COURT: Mr. Abbatangelo?

12 MR. ABBATANGELO: And with respect to the Defense as
13 well.

14 THE COURT: Okay. All right. So you guys prepared to
15 argue?

16 MR. ABBATANGELO: Yes, Your Honor.

17 THE COURT: Okay. Mr. Abbatangelo, it's your motion, you
18 get to go first.

19 MR. ABBATANGELO: Yes, Your Honor. We do not have a
20 PowerPoint on the arguments. However, I do have my notes here and
21 outline.

22 When we were here back in September, I believe it was
23 September, it was our first part of the hearing, the Court said the
24 Petitioner needs to get over the timeliness issue first, and then we would
25 -- if we do that, then we would need to jump into the Barry arguments,

1 meaning the actual innocence.

2 So I will start off with the timeliness that the law that was
3 cited in both briefs was NRS 34.726, which is limitations on time to file
4 the stay and the writ. And in that, 1(a), so once again, Nevada Revised
5 Statute 34.726 1(a), states that the delay is not the fault of the petitioner
6 and (b), the dismissal of the petition as untimely will unduly prejudice
7 the petitioner.

8 As you are aware, the essence of this case is at that time, in
9 2002, Ms. Burns was 15 years of age, a product of foster care, is brought
10 here to Las Vegas by a 33-year-old sex offender, convicted felon
11 Steven Kaczmarek.

12 And he's also not even supposed to be permitted around
13 children from his other felony convictions that -- it's the transcript on
14 which he has warrants, being wanted in other states for skipping parole.

15 Ms. Burns initially filed two writs. One in which we heard
16 extensive discussion about was filed by an inmate, and Ms. Burns was
17 15, maybe at the time 16, and she gave the discovery to this individual,
18 and basically just followed whatever the discovery stated.

19 The second one was a writ that was filed by the appointed
20 attorney, Mr. Longabaugh, who has since passed away and is no longer
21 alive, and we are unable to elicit any testimony as to what his opinion
22 was at the time. That petition was withdrawn by Ms. Burns, as she
23 testified to, on the advice of her attorney, Mr. Longabaugh. And that
24 advice was for him -- was given to him -- I'm sorry -- given by him to Ms.
25 Burns was, hey, you have all these health issues, you're a ward of the

1 warden down at Smiley Road and she would need medical attention, and
2 she would have to get that approval from the director of the prison,
3 Jackie Crawford [phonetic] back in 2003.

4 She had had medical issues since she got here, including
5 seizures, as well as once she was here originally and having health
6 issues, when she's here as a victim of the sex trafficking, which wasn't
7 called that in 2002, but as a victim of kidnapping and sex assault on
8 somebody under the age of 16, she had cysts and she would have -- her
9 blood pressure would bottom out and she would be needing to go to the
10 hospital.

11 But the problem was at the prison they were unable to
12 provide medical care because she was not an adult until they got the
13 approval of Ms. Crawford. She was unaware and she -- Ms. Burns
14 testified that she was not informed by Mr. Longabaugh what the
15 ramifications were of withdrawing the writ. Because, to me, what
16 doesn't make sense is why can't you do both; one, get the emancipation,
17 as well as two -- because that's a petition down in Family Court, and two,
18 why can't you let the writ at the time that's filed continue and proceed.

19 Ms. Burns is out here without family. She is a product of the
20 foster care, and she has no longer has family friends or anybody to give
21 her support. As the letters reflect, Kaczmarek is still sending her letters
22 through 2003. Those have all been submitted and admitted into
23 evidence. That is our -- those are our arguments to the timeliness.

24 Now, the new evidence and under Barry, we base that upon
25 new evidence and advances in sex trafficking, and this is reflected by

1 laws that have been passed since 2002. And Phil Kohn testified that he
2 worked with Catherine Masto at Attorney General -- when she was
3 Attorney General up in the legislature in 2013.

4 NRS 201.300 was passed, which provides specific legislation
5 on pandering and sex trafficking, definitions, penalties, exceptions. And
6 under NRS 201.300, Subsection 2(a)(2) and (3) defines what trafficking is.
7 A person is guilty of sex trafficking if the person, in Subsection 2 states,
8 induces, recruits, harbors, transports, provides, obtained or maintains a
9 person by any means, knowing or in reckless disregard of the fact that
10 threats, violence, force, intimidation, fraud, duress or coercion, will be
11 used to cause the person to engage in prostitution or to enter anyplace
12 within the state in which prostitution is practiced, encouraged or allowed
13 for the purposes of sexual conduct of prostitution.

14 And that's what Ms. Burns testified was occurring. She was
15 here with a person she called her boyfriend, but the guy's 17 years older
16 than her. They're coming out to Vegas. It starts with finding a person
17 that will give them money, as long as he feels her, touches her over her
18 clothing.

19 Then once they get here, Ms. Burns testified they do some
20 panhandling, they do some prostitution related issues. There's
21 conflicting testimony, which, when I'll get to is -- in Kaczmarek's
22 statement about that they would rob people, they wouldn't rob people,
23 and that is reflective of NRS 201.300. And once again, the statute of
24 (2)(b), Subsection 2, is that's a ten to life sentence. So, yes, it is a very
25 harsh sentence. I also get sex assault on somebody under the age of 16

1 is even a more serious criminal charge in the sense of the time. But the
2 issue is back in 2002 and 2003 the State was not operating under the
3 same beliefs as they are today when it comes to a victim of sex
4 trafficking. And that's why we had Bri Alex testify regarding the
5 advances that have occurred.

6 And the State has now caught up, in a sense, with the federal
7 laws that have been in effect for a long time. The Federal U.S.
8 Sentencing Guidelines have actual enhancements under subsection -- or
9 Codified 2G1.3, in which a person promotes commercial sex act or
10 prohibited sex conduct with a minor.

11 And in the federal system you get extra -- it's based on
12 points. Well, you are entitled, in a bad way, to get more points assigned
13 to your sentencing, which gives you a higher sentence when you're
14 having a minor involved in a sex act, or having them perform sex on
15 your behalf, as in a sex trafficker.

16 This is supported by a few cases. *U.S. v. George Anderson*,
17 560 Fed 3 275 in 2009, in which the federal court, circuit court, had
18 upheld enhanced prison time for Mr. Anderson. That case is important
19 for two reasons. One, it states, yes, we can do this as a court, enhance
20 your sentence if you're involved in sex trafficking. Specifically sex
21 trafficking, you get more points, you get more time.

22 The second thing is regarding undue influence enhancement,
23 in which they state, of 2G1.3, provides a rebuttal presumption of undue
24 influence in a case in which a participant is at least ten years older than
25 the minor, which we have here.

1 The District Court stated at sentencing *Anderson* was 29
2 years old, his victims were minors under 18, though at trial they were --
3 suggested they were considerably younger, thus undue influence was
4 presumed and supported by evidence. That is all reflective of how sex
5 trafficking is viewed today, as opposed -- and this was a 2009 case, as
6 opposed to 2002. The second aspect for *Anderson* is he contended that
7 the District Court abused admitting expert testimony by the government,
8 a witness who testified to typical characteristics of adolescent prostitutes
9 and the behavior of pimps. This was denied.

10 Other cases that have gone in the federal system, dating back
11 to 2010 and, as well as, I believe, 2016 is *U.S. v. Chang*, 817 Fed 3d 662,
12 in which -- on pages 670 and 671, it's a very similar fact pattern, that the
13 girl was 15 and had no family. The one difference is this lady -- this
14 young girl had been brought out here from the Philippines.

15 So she had an extra issue where she didn't speak the
16 language, but she's -- like Ms. Burns, she's in a place, she has no family,
17 no support, and Alisha Burns is in Vegas with no family, no support.

18 And this sex trafficking expertise and enhancements is
19 permitted, and that goes to our argument that the testimony -- I'm sorry
20 -- that if this case was viewed the same way, that the new evidence of
21 the understanding and concept of sex trafficking would change what --
22 how this case had then happened, had occurred procedurally. And also,
23 they did not have, as far as I'm aware, experts testifying in 2002. And as
24 Phil Kohn testified to, they didn't have them. It was not really a common
25 term. It was not common to have -- it was not a -- I guess a defense or a

1 -- even for the State to prosecute and use sex trafficking experts in 2002.
2 And that, once again, came from Phil Kohn's testimony.

3 Kaczmarek's statement to the police, as well as his trial
4 testimony, reflects the control and undue influence that he had upon
5 Ms. Burns. On his statement to the police Kaczmarek said him and
6 Alisha never before did this robbery, did this, referring to robbery. Page
7 14, Kaczmarek told Tommy to punch Villareal after Kaczmarek would
8 grab Villareal. Kaczmarek calls Villareal over to the bathroom area and
9 grabs him. Kaczmarek tells them, meaning Tommy and Alisha, to wipe
10 off fingerprints. Kaczmarek tells them both to look for the wallet.
11 Kaczmarek then tells Tommy, hey, hold Pete down. Then he goes on in
12 the statement where Kaczmarek says, hey, Alisha, push your foot against
13 the back of the neck of Villareal.

14 Kaczmarek tells Tommy to place Pete in the tub. Kaczmarek
15 tells Alisha to cut the cord and hand it to me so we can tie him up.
16 Kaczmarek ties up Pete's hands. Kaczmarek tells Tommy and Alisha,
17 hey, go get the sock -- go get a sock so I can shove it in Villareal's mouth.
18 Kaczmarek cuts off Pete's shirt.

19 Kaczmarek pawns the stolen items and is the only one to go
20 in the pawn shop, or actually is seen, and this is supported by Ave Cruz's
21 testimony, as well as Kaczmarek's testimony.

22 And this ties in to what Ms. Alex just testified to from
23 The Cupcake Girls; that Kaczmarek is complete control of the situation,
24 he has complete control of Alisha, she is 17, 18 years, you know, his
25 younger. She's a minor. He's not a boyfriend. He's a trafficker. And the

1 reason we know he's a sex trafficker is not only because of their age
2 difference, but because of the original complaint why Alisha was brought
3 out here. She was brought out here under different terms of art at the
4 time, common knowledge -- I mean, common terms of the art used
5 within the law, in 2002. She's the named victim in the criminal complaint
6 of Kaczmarek where he's charged with kidnapping and sex assault of a
7 person under 16 years of age. The classic traits that were testified to by
8 Ms. Alex all were based on manipulation and control.

9 It's the Petitioner's position that she was preyed upon. She
10 grew up in a dysfunctional family, which -- and had a dysfunctional
11 childhood, which was testified to. Alisha feared Kaczmarek because
12 everything started off wonderful, lovey-dovey, they were all happy, and
13 then as they start driving out here and the stresses of life, meaning no
14 money comes around, hey, you better give this guy a blow job for 200
15 bucks, and he slaps her. He being Kaczmarek, slaps Alisha, and that's
16 when things started changing.

17 And this control and manipulation and fear led Alisha to
18 follow Kaczmarek and his orders, including on September 25th; we're
19 going to have sex with Pete for 200 bucks, look for the wallet, wipe down
20 the fingerprints, put your foot on the back of Pete's neck, cut the cord
21 from the fan, find a sock to shove in Pete's mouth. This domination is
22 occurring not only pre-arrest but post-arrest, and that is reflective of the
23 letters that have been admitted. As the State brought up on the letters,
24 some of the letters state don't do shit, Alisha, do not do anything, don't
25 take a deal.

1 And those letters are admitted into evidence. And those
2 letters were coming in for the purpose of showing the manipulation and
3 control Kaczmarek is still maintaining over her because the letters
4 eventually come to the point where, hey, better switch course, you better
5 take a deal. So what does she do? There's a meeting at CCDC and
6 Alisha ends up taking a deal.

7 So this is the new evidence that a 15-year-old is completely
8 dependent on her trafficker would be a defense, even Phil Kohn testified
9 to that, as well as an opportunity for the State to take a different look at
10 the way they would prosecute this case. She was completely dependent
11 on Kaczmarek, as Bri Alex testified to, financially, emotionally, no
12 transportation. Alisha looked to him for all the decisions that were being
13 made, including committing crime, and that's where these letters reflect
14 potentially two issues.

15 One is continued manipulation of Alisha, but potentially a
16 Brady violation because the correction officers have to screen all these
17 letters, and that still goes on today, and the State was -- because of the
18 correction officers, reviewing these statements, the State is aware that
19 she's receiving the letters, as well as sending letters. And that's where
20 Phil Kohn's testimony is very important; that he said he had minimum
21 control over Ms. Burns, she was a 15-year-old teenager in love, and he
22 would have handled things differently if he had known that she had
23 possession of these letters and was communicating with her
24 codefendant, which, as we've touched on before, is -- I've never even
25 heard of letters going back and forth between inmates, let alone

1 codefendants. I never heard of a meeting signed off by a judge in which
2 they could meet. And I just -- I mean, that's where I'll tie that back in
3 with Daca's statement.

4 The second issue we have on new evidence is Dr. Bennett's
5 testimony. My opinion of experts is they can say whatever they want,
6 and they do, and they come up with opposite opinions all the time.

7 In this case the Defense, we're contending, that both sides
8 had good experts, both sides had their opinions expressed. Dr. Bennett
9 testified there would be significant difference in the portions of the body
10 that were in the water for one or two days, compared to portions of the
11 body that were not in the water.

12 The State's medical examiner, in my opinion, was a little bit
13 dodgy on that issue. One of the things she said, well, maybe the
14 stomach could have been so pressed against the bottom of the tub that
15 the water was pushed out and the stomach would not have been
16 submerged -- or emerged, I think is the proper term, under the water, but
17 maybe it would be reflective of the sides. And there was never any
18 evidence presented that where the water had been on Mr. Villareal's
19 body for, under the State's theory, two or three -- two days, there was
20 never any difference between that portion in the water compared to the
21 water -- the part of the body that was not in the water.

22 The other issue that came up with Dr. Bennett, as well as the
23 State's ME, was the rigor mortis having occurred. Dr. Bennett said it
24 could occur 18 to 24 hours, classic times, et cetera. So from the time he
25 recorded of the -- and that's from the autopsy because apparently from

1 the doctor -- the paperwork, rigor mortis had receded. That was on
2 Monday. Eighteen to 24 hours earlier would place the time of death on
3 Sunday. The State's expert stated 36 hours. This would place the time
4 of death on Saturday. And it could have been longer, to be fair. It could
5 have been longer.

6 The significance of that time frame in that it ties into
7 something very important. That is the last exhibit from the Defense,
8 Thomas Riddle's statement, and I believe he did testify at the trial. The
9 State also referenced Lewis Morse, M-O-R-S-E, who testified at the trial,
10 as well as Delores Cramer [phonetic], who testified at Kaczmarek's trial.
11 They all three said the same thing.

12 Thomas Riddle's the maintenance man. Lewis Morse, I
13 believe, lived there at the Uptown. And Lewis was with Thomas, in his
14 testimony, that they went up to Unit 25, which is Villareal's unit. The AC
15 was on, and the chain was locked on the door. Lewis Morse said that in
16 testimony on page 8. Eventually, on page 9, he says the AC's off and the
17 chain lock is off the door, which tells us somebody's going in and out of
18 that room because the chain lock can only be removed by a person
19 inside. Ms. Burns testified there was no -- they didn't climb out the
20 window, they didn't put the chain lock on.

21 Now, one of the things that the State was trying to use was
22 when did the hot water cease at the Uptown Motel. Lewis Morse states,
23 on page 6, there was no hot water on the 27th. Well, this robbery
24 occurred on the 25th. The 25th is the date of the pawn tickets. Delores
25 Cramer, who's the manager of the Uptown, she says she went to the unit

1 with Riddle. Water started going into adjacent Unit 26 on the 27th, which
2 is two days after the pawn tickets. That's stated on page 34, lines 13
3 through 17. And there's no hot water in the Uptown probably the 26th,
4 but more complaints came in on the 27th, and that's on page 32 and 9.
5 This ties in to then the police are called. They come out. They start their
6 investigation. They find fingerprints. Fingerprints are found, but they
7 come back not matching either Kaczmarek or Alisha.

8 So this corroborates what had happened in that room after
9 Alisha, Tommy had wiped down the room, that other people were going
10 in and out of the room. In and out of the room because of the chain lock,
11 as well as fingerprints being found.

12 The other thing the State has been bringing up and we've
13 discussed is the statements made by Alisha Burns. Ms. Daca's statement
14 gives me four areas of concern.

15 Number one is Ms. Daca is a correction officer down at
16 juvenile probation -- I'm sorry -- juvenile hall, and she's violating
17 NRS 432B.220 4(h), that states any officer or employee of law
18 enforcement or an adult -- law enforcement agency, or an adult or
19 juvenile probation officer, has a mandatory duty to report sex abuse.
20 Well, she didn't do that within 24 hours per that statute.

21 Another concern I have is that Daca's statement -- and there's
22 two different ones. There's an incident report, and then there's also the
23 police interview, and those have been admitted into evidence, that it
24 comes into existence at the time Alisha refuses to testify against
25 Kaczmarek in his kidnapping and sex assault case.

1 The preliminary hearing is November 27th, where Burns -- or
2 Alisha refuses to testify. The information report is dated November 28th,
3 but says, hey, this really -- this conversation took place on the 25th. And
4 the police interviewed Daga December 2nd, and all this is in 2002. Well,
5 that's when everything flips, and all of a sudden Ms. Burns becomes a
6 defendant in a murder case. She's no longer a victim in a sex assault
7 case. And at that time all the evidence, from what I've seen, that they --
8 that the State has against Burns is Kaczmarek's statement. So that's a --
9 that's not going to come in under Brady. That's the only evidence. But
10 once Daga has her statement, that gives me pause and concern.

11 The third issue I have of concern of Daga's statement is in the
12 police interview Daga states the girls are not permitted to talk about their
13 cases, their charges; otherwise, they get punished. I'm about to break
14 down, which I did the fourth one, the inconsistencies within Daga's
15 statements, compared to what Daga told Detective Wilson, compared to
16 what's mentioned in her report.

17 And the first thing is, and we heard this on cross-
18 examination of Ms. Burns by the State, is what Daga says to the police is
19 please check the incident report because that was more fresh in my mind
20 at the time and at that time, you know, which was just a few days earlier,
21 it's more specific. Well, then I started looking at the police interview, as
22 well as the incident report, and I have listed out numerous
23 inconsistencies that don't make sense, and it comes up to about 14 or 15
24 of them. The interview with Detective Wilson on December 2nd,
25 Ms. Daga states that the discussion took place November 27th. Well, the

1 incident report that the conversation took place November 25th.

2 The second issue is Burns had requested to speak with Daga
3 that day, but was too busy. Well, the incident report doesn't mention
4 any of that. That incident report says Alisha motioned from her window
5 to come talk to me. I observed her request a second time and I went
6 over and talked to her. There's no mention of being too busy. The
7 incident -- the interview says A, we talked for 15 minutes, meaning
8 Alisha and Daga. What the incident report states is they talked through
9 the doorway, and there's no mention of time, and they're whispering.

10 Burns, in the interview, is supposedly there in Las Vegas at
11 juvenile detention to give testimony in a murder case. Well, that's not
12 true. She's there to give testimony in a sex assault case. On these days,
13 that's -- on the date of the incidents, whether it's November 25th,
14 November 28th or December 2nd, that's not even a true statement.

15 Daga gets more specific in her police interview, even though
16 it's not as fresh as her incident report, when she says Pete stayed on
17 Freemont. That's not mentioned in the incident report. She also -- Daga
18 says Alisha knows the right things to say, in her interview, but that's not
19 mentioned in the report. There's a mention of Kaczmarek trying to
20 restrain Pete again. That's not mentioned in the incident report.
21 Kaczmarek decided to put Pete in the tub, versus in the incident report it
22 says they, meaning Alisha and Kaczmarek put him -- Pete in the tub.

23 The police interview, Daga says Alisha did not like the idea of
24 putting in Pete in the tub, so she left. But in the incident report the youth
25 added she left for a little while just to go to the store. I mean, that's a

1 significant difference. Alisha told Kaczmarek to stop washing the victim,
2 compared to Alisha told the victim to stop fussing over him. There's no
3 mention of washing him as in the incident report. Then this is another
4 one in which Daga says it wasn't clear if another person or another party
5 was with them. Then stated, my boyfriend and his friend during some
6 parts of the conversation. So what Daga is saying to the police is there
7 might have been another person, but it's not clear.

8 The incident report says -- just straight up says it's unclear if
9 another party was present in the room with her boyfriend and boyfriend
10 victim. But in the police interview once again, it says my boyfriend and
11 his friend is specifically mentioned. It mentions that -- in the police
12 report -- I'm sorry -- police interview, Daga throws in Alisha used cocaine,
13 crack, speed and marijuana. None of that's mentioned in the incident
14 report. Alisha said like Daga -- oh, she liked Daga because their accents
15 were alike. Well, Daga says she's from New York and Alisha's from
16 Ohio. I never heard anybody confusing a New York accent with a
17 Midwest accent.

18 Girls, once again, are not permitted to talk about their
19 charges. They usually get punished. That's directly out of Daga's mouth,
20 and she's the one that's supposed to report talking about charges, and
21 she doesn't. So she never even reported that. She also violated, as I
22 stated earlier, abuse of a child under state statute.

23 Now, this ties in to the next argument of the handwritten
24 confessions, and this is exactly what Bri testified to. This is what victims
25 of sex trafficking do. They do what their captors say to do. Kaczmarek

1 eventually states, hey, you need to testify -- or, I mean, I'm sorry -- take
2 the deal.

3 Phil Kohn testified he could not control Alisha. She was a
4 teenager in love and the consistent love letters are the classic example of
5 a trafficker controlling the victim, according to Ms. Alex. And that comes
6 into the GPA, in which the State had argued originally that, you know,
7 typical judge, you do them all the time, when you enter your plea, and I
8 won't go through Candace, that -- why that is not a valid situation, and
9 this is why Alisha entered into the negotiations.

10 One of our exhibits states on April 1st, 2003, Mr. Kohn stated,
11 and it's in the record from the transcript, at the waiving of the
12 preliminary hearing, Alisha is seriously considering it, and then in
13 parentheses, ten to life, and is sort of wavering a little bit, but is still
14 prepared to waive her preliminary hearing. April 8th, Mr. Kohn is in
15 District Court with Alisha and the court minutes state, on April 8th, 2003,
16 and this is a quote from the court minutes, Mr. Kohn stated the
17 Defendant is a ward of the juvenile court in Ohio. She has been trying to
18 get some advice from them before proceeding.

19 Well, in the meantime, Kaczmarek is saying to -- let's get a
20 meeting together with the two of us. The court signs, on April 16, 2003,
21 an exhibit which states for Kaczmarek and Alisha to meet.

22 So what happens is they meet at CCDC, and guess what
23 Alisha is told to do; take the deal. So Ohio doesn't tell Alisha to take the
24 deal, or her guardians back there. Kaczmarek does. Once again,
25 showing the control that he has as a trafficker over his victim.

1 Then she enters her guilty plea April 22nd, 2003. Kaczmarek
2 tells Alisha take the deal. She does. So this is exactly what a victim of
3 sex trafficking does. She's a 15-year-old young girl, with no family here,
4 no means of transportation, no finances. The order from Ohio states, in
5 the third paragraph -- I'm sorry, not the third paragraph -- the last
6 paragraph. It states that Ms. Burns is to be -- let me just grab that --
7 appointed an attorney.

8 It states they shall afford protection from arrest and service
9 of civil and criminal -- thank you -- and criminal process to and from the
10 court where such protection is pending, that it will not cause undue
11 hardship to the witness. The final paragraph states, It is further ordered,
12 due to Alisha Burns being a minor child, the Las Vegas Justice Court of
13 the State of Nevada shall appoint an attorney or guardian ad litem to act
14 on behalf of counsel on behalf of Alisha Burns while she is in custody of
15 Jerry Luna [phonetic] and -- it looks like Jerry Sullivan [phonetic], in
16 Las Vegas, Nevada.

17 That order is violated because she is charged with the
18 murder. She is charged with the crime, when she was supposed to be
19 afforded protection from arrest and service of criminal and civil process
20 to and from the court where such protection is pending.

21 And, Your Honor, we'll submit it on that. Thank you for your
22 time.

23 THE COURT: Okay. And, Mr. Hamner, before you start I
24 need to take five minutes. I need to take a brief recess, so we'll be back
25 in five minutes at 11:25.

1 [Recess taken from 11:16 a.m. to 11:24 a.m.]

2 THE COURT: 191253, State of Nevada v. Alisha Burns. Ms.
3 Burns is present via BlueJeans. Mr. Abbatangelo is here on her behalf.
4 Mr. Hamner's here on behalf of the State. Mr. Hamner, are you prepared
5 for your argument?

6 MR. HAMNER: I am. I'm just trying to wait until the -- I have
7 a PowerPoint, Your Honor.

8 THE COURT: Oh, you do?

9 MR. HAMNER: I do, Your Honor.

10 THE COURT: I don't know --

11 THE CLERK: I don't know -- yeah, I'm not --

12 THE COURT: I don't know if we can do that with BlueJeans.

13 THE CLERK: I may be able to turn on the switches.

14 THE COURT: Can you? Do you know?

15 THE CLERK: Well, it's in my dialogue like we're responding.

16 MR. HAMNER: I mean, Your Honor, at a minimum, I can
17 simply -- well --

18 THE CLERK: Let's see. Oh, maybe not because when I try to
19 switch --

20 UNIDENTIFIED MALE SPEAKER: Come on, Victoria.

21 THE CLERK: No, it won't, when I just tried to switch to --

22 THE COURT: Ms. Burns, can you hear us?

23 Yeah. Because I don't think we can use both systems. I don't
24 think we've done that, Mr. Hamner.

25 THE CLERK: Okay. There he's at, but I don't know if she can

1 hear --

2 THE COURT: She can't.

3 THE CLERK: I don't know if she can hear or see this.

4 THE COURT: Mr. Abbatangelo?

5 MR. ABBATANGELO: Yes, Your Honor.

6 THE COURT: Can you confirm with your client that she's
7 okay with us just proceeding with the PowerPoint because it cuts off
8 BlueJeans?

9 MR. ABBATANGELO: I'll text her and ask.

10 THE CLERK: Like I see her still in the room, but I don't know
11 what she sees.

12 MR. ABBATANGELO: She says I don't hear anything, it cut
13 off, I'm still on the line

14 THE COURT: Yeah. So just let her know we're going to have
15 to do the PowerPoint without her because we can't do BlueJeans and the
16 PowerPoint at the same time.

17 THE CLERK: And she can stay -- I won't cut off BlueJeans.
18 I'll leave her in there.

19 THE COURT: No. Just leave it on, but she can't hear us.

20 MR. HAMNER: Okay.

21 THE COURT: But I'm glad we tested it out so that when
22 we're --

23 MR. HAMNER: Now we know.

24 THE COURT: -- in the middle of a jury trial, we'll know how it
25 works.

1 MR. HAMNER: Now we know.

2 THE CLERK: Right.

3 MR. ABBATANGELO: You know what, should I put her on --
4 like because she wants to listen. She's been so involved.

5 THE COURT: Can you call her on your phone and just put it
6 on speaker?

7 MR. ABBATANGELO: That's what I was going to ask.

8 THE COURT: Yeah, just call her on your phone. Tell her to --
9 well, I don't know if she can answer you and stay -- just -- if she needs to
10 log off BlueJeans, that's fine, she can log back in, but leave BlueJeans
11 up.

12 THE CLERK: Okay.

13 THE COURT: And then just call her on your phone and put
14 her on speaker.

15 [Pause]

16 MR. ABBATANGELO: Alisha, can you hear me?

17 THE DEFENDANT: Yes, I can.

18 MR. ABBATANGELO: Okay. Because I've got the phone, my
19 phone right by the lectern or the podium, and Chris Hamner's right there.

20 THE COURT: Okay.

21 MR. HAMNER: Okay.

22 THE COURT: Thank you, Mr. Abbatangelo. Okay. Mr.
23 Hamner, whenever you're ready.

24 MR. HAMNER: Thank you very much. When we examined
25 the limited circumstance in which we had this hearing, the determination

1 essentially was made that listen, this is clearly untimely, and unless the
2 petitioner has established some way to overcome the untimeliness of
3 waiting well over a decade to bring this second successive petition.

4 You know, all the other claims can't even be considered, and
5 when you look at the basis as to why the petitioner is claiming that they
6 should have a right to overcome the procedural bars, the claim is that
7 she's actually innocent. That is the claim.

8 It's not anything else, because that is the only one that would
9 be able to kind of get over this hump, and if that is the case, *Berry v State*
10 is the construct with which we evaluate this entire hearing to determine
11 whether or not, A, they can overcome the procedural bars on this based
12 on the undue delay, and number 2, considering the actual evidence in
13 determining whether or not that would actually change the outcome,
14 essentially, of the case, if the new evidence of actual innocence was
15 presented.

16 So what is -- what do they say? You know, this is kind of a
17 language that lays out, you know, listen, you can overcome time bars
18 and get a review on the merits if you can show that if you haven't
19 considered this petition there's going to be a miscarriage of justice, and
20 the standard is met when, quote, "A petitioner makes a colorable
21 showing that he," and in this case she, "is actually innocent of the crime,
22 and those words, "actually innocent" should never be kind of sloughed
23 over because I think when we get to it, when we heard just the very
24 words out of Ms. Burns' mouth, she's not actually innocent of any of the
25 crimes she was originally charged with, just based on her testimony

1 alone.

2 But let's look at what *Berry v State* says, what does it mean
3 to be actually innocent? It means that they must show that it is more
4 likely than not that no reasonable juror would have convicted her in light
5 of the new evidence. So they laid out to us what this new evidence is,
6 and then they need to make a showing, and listen, once the jury hears
7 these new things, they're definitely not going to find guilty.

8 The standard is met when they made a colorable showing
9 and that he is/she is actually innocent of the crime. So what type of
10 elements must this Court consider? Well, when you take from *Berry*,
11 what does it say? It quotes from *Schlup*, and it says, "makes plain that
12 the habeas court must consider all the evidence, old and new,
13 incriminating and exculpatory without regard to whether it would
14 necessarily be admitted under the rules of admissibility that would
15 govern trial."

16 And this Court, based on a total record's, got to make a
17 probabilistic determination about what reasonable, properly instructed
18 jurors would do, and still, quote, "The Court's function is not to make an
19 independent factual determination about what likely occurred, but rather
20 to assess the likely impact of the evidence on the reasonable jurors."

21 And *Berry* talks a lot about credibility. It matters. This Court
22 gets to make credibility determinations based on the new evidence, and
23 that is particularly important when you start considering the credibility of
24 Dr. Bennett, and the credibility of Alisha Burns based off of what they
25 said during this evidentiary hearing.

1 You know, the example they cite in *Berry* is they kind of
2 compare, hey, listen, if you had an affidavit from someone on death row,
3 kind of confessing to the crime, that might be less probative than maybe
4 a disinterested victim, so you really have to consider the motivations of
5 the people who are testifying, and obviously, in Mrs. Burns -- Ms. Burns
6 case, her interest in this is enormous, obviously. Her whole life changes
7 if her whole conviction can be lifted at this point and force a new trial.

8 But *Berry v State* talks about unreasonable delay, and here's
9 the thing, what's so clear in *Berry*, unreasonable delay on behalf of
10 petitioner can bar an actual innocence claim. Quote, "Unexpected --
11 unexplained delay in presenting new evidence bears on the
12 determination whether the petitioner has made the requisite showing."

13 And in *McQuiggen*, they talked about, like, people kind of
14 lying in wait and using stale evidence and then bringing it later to kind of
15 collaterally attack someone. They said they don't want to reward people
16 from holding back after too much prejudice has kind of unfolded.

17 And in this case, Burns' unreasonable decision to delay this
18 second petition, it's second successful petition, procedurally bars us
19 from even kind of considering the merits of it. I'm going to go through
20 the merits, but here's some other thing, because there is a presumption
21 that when this much time has passed there is a presumption of a burden,
22 of a prejudice against the State.

23 In this case, Detective Mikalonis, the very person who Alisha
24 Burns writes a confessional letter to, and Dr. Telgenhoff, who is critical
25 for time of death as they've been alleging is part of their new evidence,

1 the actual innocence claim because the date of death is different, they're
2 dead. They're not alive anymore.

3 So we know unquestionably, we [indiscernible], and we
4 haven't gone through a vetting to figure out how many other people are
5 not alive. Mr. Riddle, who they [indiscernible], at the date of Kaczmarek
6 trial was in the hospital, was unavailable to testify because he was so
7 sick. So the State would assume at this point there's probably
8 potentially more witnesses that may not be around.

9 But let's talk about unreasonable delay with respect to Ms.
10 Burns. There is nothing -- if you think about what she has claimed today,
11 there is nothing impeding Alisha Burns from bringing a claim saying I'm
12 a victim of sex trafficking, because that's one of the claims how they've
13 kind of morphed this thing. Listen, we would have been treated
14 differently if I'm not a sex trafficking victim.

15 What you actually heard from Ms. Burns on the stand is she
16 says, "I didn't commit murder, I didn't, I didn't do these crimes." She got
17 up there and said that. What has been preventing her for the last near 20
18 years to say that? Nothing.

19 And when we look at *Berry, Berry*, the facts of *Berry* are so
20 starkly different in terms of delay. In *Berry* what happens is this guy
21 goes to trial and he loses, and there are witnesses that testify saying Mr.
22 Berry is the guy who shot and killed this person. What happens is many
23 years go by and the star witness for the State, who points the finger and
24 says Mr. Berry is the shooter, basically finds God and becomes a
25 Jehovah Witness, and he says I got to repent, this was wrong, and so he

1 provides this statement.

2 And in that case the court said listen, Mr. Berry, the delay in
3 hearing this claim has nothing to do with you. We had to wait for the
4 other witness to find Jesus for you to bring this evidence to it. That is
5 not what we're dealing with here. Mrs. Burns, Ms. Burns has all along
6 believed she didn't do these crimes, she's actually innocent, so why has
7 she waited more than a decade to bring this up? That was never
8 sufficiently explained by the petitioner, on direct, on cross, on redirect.
9 This is not something new. She claims all along in her gut she has felt I
10 didn't do anything. I didn't kill this guy; it was Steven and Steven only.

11 She even admitted when we talked about the parole hearing,
12 she said you know, I would just say anything I could at that point. If I
13 was actually honest with them, they would have thrown me in for 10, 15,
14 20 years more, so I wasn't going to say that, absolutely was never going
15 to say I was actually innocent. What that means is when you look at her
16 parole hearing which happened many, many years ago, she's admitting
17 that I was possessed with the knowledge that I was actually innocent,
18 even when I was up for parole many years ago, which means she
19 possessed the information that she was actually innocent, and yet she
20 never brought the claim.

21 We also know that she was aware of being actually innocent
22 because she filed a petition in a timely manner claiming she was actually
23 innocent. That is a big problem when you are claiming decades later I'm
24 actually innocent now, when you file one with the court and then you
25 voluntarily withdraw it, and let's talk about the reason why she did that.

1 She admitted on the stand that the reason why she did it was
2 to purpose emancipation, presumably in Ohio to emancipate herself
3 from her family. How in the world is that mutually exclusive with respect
4 to arguing a petition? It is unquestionably not. She wasn't going
5 anywhere because she was sitting in prison serving a prison sentence
6 because your petition needs to be filed within one year of either entering
7 your plea or the objection of your appeal, right? So she doesn't have
8 anywhere to go, and she elected, I'm not going to focus on that. Well,
9 that's simply not good enough. The law does not work that way. You
10 don't just get to willy-nilly decide, you know what, I don't feel like doing
11 this now, I'm going to do it later.

12 And the other interesting thing is when you look at what she
13 testified to, and I've got a slide about this, she even admitted on the
14 stand, Longabaugh, her lawyer never told her hey, listen, this is an either
15 or proposition. What he said was listen, if I was your dad, I'd tell you to
16 take this because this is a pretty good deal. I would take this and then
17 work on your health and work on getting emancipated. It wasn't, you
18 can only do one or the other. The lawyer gave his advice and said by her
19 own admission, hey, I just think this is not the best course for you
20 because when you look at the evidence in this case, she absolutely was
21 going to get hit guilty on all counts. So it makes sense why Longabaugh
22 would say that.

23 So her decision to withdraw it was not because she was
24 uneducated about it, it was not because she was given the wrong
25 information from Mr. Longabaugh, by her admission he just simply said

1 look, the more pressing issue for you is to go get your health affairs in
2 order. Why don't you just work on that? Don't unwind this deal, and
3 that's what she chose to do. So based on all of that, she can't even
4 overcome the presumption of prejudice. And so it's a threshold matter.

5 This petition should be denied on this basis alone, and I'd ask
6 the Court to make that finding, but also, ultimately address it on the
7 merits, as well, because when you look at all the merits she's not going
8 to succeed either because she's not actually innocent.

9 So we know that she's procedurally barred. There was
10 nothing impeding her, she was aware of her -- well, her alibi. Oh, that's
11 the other thing. When you think about her original actual innocence
12 position, her argument was actually different. She went with "I went to
13 the store." And remember, she and I kind of got into it on cross because
14 coincidentally, when she wasn't charged with murder she gave -- she
15 talked to Theresa Dacca, and Theresa Dacca, coincidentally, said the very
16 same thing that found its way into the petition, a year after she entered
17 her plea, because she says, "I know just what to say if they talk about the
18 murder thing; I'll just say I went to the store." What a curious detail for
19 Theresa Dacca to know.

20 And how in the world is it that the law clerk in the CCDC or in
21 the -- I'm sorry, not CCDC, in prison, would have the very same
22 information as Theresa Dacca? What is the common thread between
23 those two people? I'm presuming that the law clerk was a female at this
24 facility. It's Alisha Burns. Alisha Burns had come up with a fake alibi
25 way back when she was there, potentially as a State's witness in the

1 child sexual assault kidnapping case, and she told that to Theresa Daca
2 and is memorialized in this voluntary statement.

3 And long after she decided, you know what? I don't really
4 want this deal anymore, when she got buyer's remorse, she concocted
5 that same alibi and put it in her actual innocence petition, and that is
6 critical because the reason why she claims she's actually innocent now
7 which is simply "I didn't do it," if that was the real reason, that shouldn't
8 have been in there, and then she gave this incredible -- right. Here's the
9 quote, from voluntary statement on page 4, she said, quote, "She knows
10 the right thing to say, and then she can say she went to the store."

11 And that petition, Your Honor, is amongst these exhibits, and
12 I'd encourage you to compare the two because they're identical. So the
13 bottom line is she had already concocted a fake, incredible excuse about
14 why she was actually innocent a year ago, she chose not to do that
15 because she wanted to focus on emancipation, so the bottom line is
16 there was nothing impeding her to bring these claims sooner.

17 And she has no explanation as to why both of these people
18 knew this alibi. She admitted, I'm just simply speculating. That's not
19 good enough. Not at this stage, not when there's this much at stake.

20 So she wanted to focus, right, oh, here it is. This is the
21 quote. "He told me that, he said if I were your parent, I'd tell you not to
22 risk it. Don't even. Don't even both with it. You got a good deal. Just
23 keep your deal." That's from the evidentiary hearing when she was on
24 the stand. Those are her words at page 48. This also contradicts her
25 claim that she need to file the writ to seek emancipation. Longabaugh

1 never tells her it's either or.

2 So let's talk about what the original charges are. Burglary.
3 Robbery that was Barron pled, claiming that she aided and abetted
4 Kaczmarek. The kidnapping charge, where she's aiding and abetting
5 Steven Kaczmarek, and the murder charge suggests that she aids and
6 abets Steven Kaczmarek.

7 Now assuming she could overcome prejudice, her new
8 evidence has to demonstrate she's actually innocent of these charges.
9 So what does their petition actually say? The first thing that they claim is
10 being the new actual evidence is there's new evidence. Dr. Thomas
11 Bennett, a forensic medical examiner pathologist has presented a report
12 that Petitioner is actually innocent, and I love this part, based on the
13 review of the voluminous evidence provided by both the State and
14 Petitioner's counsel.

15 And when we listen to Dr. Bennett's actual testimony, that
16 comment, that claim is just belied because we know he barely reviewed
17 anything. This new evidence further underscores that a manifest
18 miscarriage of injustice -- so that's actual innocence argument number 1.

19 The next thing that they argue is about the fingerprints. They
20 say the fingerprints taken from the scene don't match Petitioner, and we
21 think if you test and get a positive, maybe, essentially, you can come up
22 with maybe another suspect. That's point number 2.

23 And then the last thing she says is she withdrew her first
24 petition in order to seek emancipation from her family. Emancipation
25 was necessary to assist her taking care of her -- again, the Petitioner has

1 not established how legally a first petition and an emancipation
2 proceeding in Ohio could not coexist. There has been no evidence. No
3 testimony to suggest you could not do one without the other, and
4 therefore, that is not new evidence. That's not new evidence. And
5 number 2, that is not sufficient to overcome the time bar.

6 So let's talk about what did she provide during this hearing?
7 It's Bennett's testimony, it's her testimony, it's the jail letters, and
8 additionally, you have the woman from the Cupcake Girls, and I
9 apologize, this hadn't updated at this point. Let's talk about Dr. Bennett.
10 His opinions are unsound, they're based on an incomplete review of the
11 fact, and they are repelled by the trial testimony, trial evidence, as well
12 as the testimony of Telgenhoff and Gorniak.

13 Let's talk about the Six Blind Men in the evidence. First of all,
14 his past record of offering medical opinions are highly dubious. This is
15 an individual whose medical opinions have led to convictions that were
16 wrong, that have exonerated people in Ohio, that have caused him to be
17 forced out of Montana. That is troubling, to say the least.

18 But what's even more troubling is when you first listen to Dr.
19 -- and I just wanted to see what he'd have to say, and so I asked him on
20 purpose, tell me about the importance of going through autopsies, and
21 he went on and on about you've got to be thorough, you've got to
22 review photos, you've got to do this, sometimes they do second
23 autopsies.

24 He went on and on, and he gave us -- because, I mean, look,
25 if you can't see what you're examining, it's like the Six Blind Men And

1 The Elephant. It's important, he said this, "It's important not to parrot
2 another pathologist's report." But then he admits, and he even admitted,
3 he said, "Look, there have been times where if I didn't feel like I had
4 enough information, I wouldn't make the call because I didn't have
5 enough."

6 So we knew it's within his ability to say thank you, no thank
7 you, I'm not rendering an opinion, and yet a fellow -- Gorniak agrees,
8 she's, like, you're right, you shouldn't regurgitate, you want to look at
9 photos from an autopsy, if you need to see it for [indiscernible]. And yet
10 he offers a medical opinion as to time of death and calls it without ever
11 seeing a single autopsy photo.

12 How in the world can a self-respecting medical examiner
13 write a report when you've never seen a photograph? And you're being
14 asked to tell us how they died, tell us when they died; how in the world
15 can you tell me about the sloughing of skin if you can't even see the
16 skin? How can you tell me, "Oh, he's definitely strangled," if you haven't
17 seen the restraints that are on his body? He is the epitome of Six Blind
18 Men And The Elephant.

19 So here are all these things he didn't look at; autopsy photos,
20 trial testimony of Telgenhoff, I mean, how do you not review the ME's
21 trial testimony where he talked about time of death? So we had all these
22 things that we've covered that he didn't review which would have been
23 critical in forming his opinion, but he didn't do it. He just went ahead
24 and wrote the opinion anyways.

25 And Gorniak was pretty concerned about these for the

1 reasons that I just kind of laid out to you. And when you compare
2 Gorniak's review, it's far more thorough, and they make sense, and when
3 you think about the materials that he reviewed, things like a charging
4 document from Kaczmarek's case, how is that relevant to determine
5 cause of death or how you die or when someone dies? It doesn't. It
6 doesn't. The work of Dr. Bennett was poor, to say the least.

7 And when you get to the opinion, they are fatally flawed.
8 The critical lynchpin for them in this new evidence claim is all about time
9 of deal, because what the Petitioner's trying to suggest to you, and it ties
10 into the chain lock argument, that essentially, their theory is Pedro
11 Villareal on September 27th is somehow alive, I guess by her own
12 admission, still hogtied in the bathroom but alive, and so some mystery
13 person, somewhere in the morning, has the chain lock on, kills him, extra
14 kills him, wrecks the apartment a little bit, and then somehow slips out
15 and undoes the chain lock.

16 That's their big thing, but in order to get there, in order to get
17 that he's actually been killed on 9/27 because they don't have any
18 witnesses to suggest they saw anyone running out of the apartment
19 doing any of this, is you need an expert to say the victim dies on the
20 27th, and that's where Bennett comes in.

21 But here's the problem, Bennett did such a poor job, he
22 simply parroted the coroner, like, I agree, this is his quote, "I agree with
23 the coroner medical examiner that his death occurred on 9/27." The
24 problem is how do you do that without a photo, but the coroner never
25 concluded that. He mistakenly cites to an investigator's report regarding

1 pronouncement of death. This is an unforgiveable mistake.

2 And when you actually look at Dr. Telgenhoff's trial
3 testimony, he specifically talks about time of death, and he says, and I
4 quote, "The findings on this individual," meaning Mr. Villareal, "are very
5 consistent with someone that's been -- from the time that I saw them,"
6 which was September 28th, "dead at least 36 hours," end quote.

7 Dr. Gorniak points out this is a pronouncement of death.
8 This has nothing to do with an estimate of when he died. This is simply
9 a legal date and time when you're preparing a death cert. It's textbook.
10 Quote, "Anyone who claims this is when they actually died is mistaken."
11 And even on cross, Bennett, when I kind of push him on, he admits, oh,
12 right, pronouncement of death, I [indiscernible]. He messed up. He
13 really messed up.

14 What are the other errors? He cites the medical evidence
15 that he admitted that would have been -- he -- that would have been
16 scientifically impossible for Mr. Villareal to be dead on the 27th, and this
17 is what I'm talking about. In his report it says, and I quote, "By the time
18 of the autopsy, the day after he was found, the rigor mortis was
19 described as receded and the lividity fixed over the front of the body."
20 He is quoting Dr. Telgenhoff's autopsy report and putting it in his own
21 report.

22 The fatal flaw in all of that is rigor mortis, to receded, it takes
23 36 hours. I got an admission from Dr. Bennett, Dr. Gorniak's testimony
24 establishes that 36-hour window and you had Telgenhoff's trial
25 testimony that I just quoted that suggests the exact same thing. How

1 can you be dead on the 27th, how can that man have run out with the
2 chain lock right before he's found by the residents of the Uptown, and
3 rigor mortis is fully receded by the next morning, you know, it's 4:00 he's
4 found or so, and then he's on the table at 9 in the morning, and he's full
5 receded at a rigor mortis?

6 That don't work. That does not scientifically work, and Dr.
7 Bennett was so careless, he couldn't even catch that. He probably
8 shouldn't have even quoted it. So the bottom line is this mystery
9 person, the mystery murder, medically cannot happen. It cannot happen
10 because all three experts say that this body was in full receded rigor
11 mortis, and therefore, he could not have been killed on the 27th. It is far
12 more consistent with the 25th.

13 And this is Dr. Gorniak kind of covering this, we're not going
14 to go over it, because I think the Court's well-aware of what this is, but
15 when you start to look at the other evidence in this case, and you start
16 comparing the timeline, you can see that the 25th is really the date of
17 death. Why is that?

18 Burns admits under -- on the evidentiary hearing that she
19 choked him, she stepped on his neck, she hogtied him, help hogtie him
20 on the 25th. She confesses to Mikalonis and Officer Daca to explain that
21 that robbery-murder happens on the 25th. Kaczmarek's trial testimony,
22 in his own confession, in his own voluntary statement admit this robbery
23 and murder are occurring in the late hours of the 25th.

24 You have the pawn tickets that have been admitted by the
25 Defense that show that these individuals were in possession of his

1 private things on the 25th. And the testimony of the Uptown residents,
2 and we'll get to those quotes in a second, but what they say is, in their
3 trial testimony, and there's two residents that testified at the trial, they
4 specifically say that they start having issues of water in the building on
5 the 26th, and that is consistent with Burns and Kaczmarek leaving the
6 shower running on that victim in the late hours of the 25th. And the
7 way we know that they left in the late hours of the 25th is the pawn ticket
8 tells us, about 10:30 at night.

9 There is absolutely no evidence to suggest that Villareal is
10 placed in that condition on the 27th, only from the 25th. But Dr. Bennett
11 didn't reveal any of this, so it's not -- I guess it's understandable why he
12 didn't catch it, because he didn't really review the right evidence. So we
13 know that it's medically not possible to be dead on the 27th. He talked
14 about an opinion about the floor being wet. That's not the reason why
15 the floor was wet.

16 If he reviewed the evidence and the trial testimony and the
17 statements, he would have learned that, because what they talk about is
18 the shower's running and it's kind of spraying, and the water is kind of
19 piling up on the tile, and it's leaking through to other units. But he
20 wouldn't know that because he didn't review enough stuff. If he had
21 seen the state of the body it would be clear that he wasn't immersed in
22 water. There are photographs, Your Honor, there's a couple of them in
23 here, take a look at them. The body is not sitting in a tub of water, but he
24 would have needed to look at those photos, you know, regarding
25 malodor. Gorniak talks about why that's just totally subjective. It really

1 just depends on the doctor.

2 They talk about the presence of water, of the washerman
3 conditions. He disagrees with that opinion. There was only apparently
4 three to five inches of water in the tub at the time of discovery, and she
5 says no idea how long the body had been in that water, and she said I
6 would expect his hands to be in the same condition as the rest of his
7 body based on positioning, as well as how much water was in the tub.

8 He talked about skin slippage as a factor. She says that
9 decomposition is affected by a lot of factors. She said just because there
10 isn't skin slippage doesn't mean the body isn't decomposing. And Gorniak's
11 opinion on time of death is consistent with he's not dead on the 27th, it's
12 at least 36 hours, at a minimum 9/26, and the other thing she points out
13 is, look, he got refrigerated, and that would also be a factor in delaying
14 the receding of rigor, so it's possibly he's even dead longer than the
15 25th, but when you think about all the testimony of Ms. Burns and
16 Kaczmarek and the residents and the pawn tickets, we know, and a
17 reasonable jury would conclude under this *Berry* standard that Burns
18 and Kaczmarek killed Villareal on 9/25.

19 So then you have Bennett's opinion regarding causation, and
20 this is devastating for their actual innocence claim which is, remember, I
21 didn't do the killing? He opines that suffocating and strangling and
22 throttling injuries were the major cause of death. Burns confessed on
23 Day One and Day Two of this evidentiary hearing of choking the victim
24 and stepping on the neck of the victim. She confessed to cutting the
25 cords they used to hogtie the victim to prevent him from escaping. She

1 confess -- her confessions to Mikalonis and Daga also admit to doing
2 these very same acts that her experts say are contributing factors in his
3 death. Kaczmarek's trial testimony and confessions parallels what she is
4 saying. So the bottom line is Kaczmarek, and Burns are admitting we did
5 the things that Dr. Bennett is saying killed this guy.

6 So at the end of the day no reasonable jury is going to find
7 Burns not guilty based on the work of Dr. Bennett. That is not
8 happening. That is not happening.

9 And then let's talk about the fingerprints. They didn't
10 provide any credible fingerprints to establish that she's actually innocent.
11 All they said about the fingerprints is there's other fingerprints present,
12 but what did Alisha Burns tell you repeatedly on Day One and Day Two
13 of the hearing? I wiped down everyplace I touched. Of course her
14 fingerprints aren't going to be there because she wiped them down and
15 she doesn't deny it. That is a nonissue. And it is not uncommon in a
16 personal residence to have fingerprints of multiple people because
17 human beings invite other people into their residence from time to time.

18 So they have not established anything on the fingerprint
19 angle to try and show there really was someone else. So we know that
20 Dr. Bennett's new evidence doesn't help on that line. And so what's left?
21 Her testimony during the hearing and the jail letters. Her testimony
22 destroyed her actual innocence claim, and what do I mean by that?

23 Well, she confessed to felony murder during direct
24 examination just on its own. What do I mean by that? Well, she
25 admitted on direct she aided in abetting in the felony predicates for

1 felony murder, robbery, kidnapping and burglary. She said, "I was with
2 Steven Kaczmarek and friend on Freemont Street," and you can see the
3 page cites, Your Honor, I've left them for the record. "Steven had said he
4 needed to get some money. I went to walk off by myself and wait for
5 someone," and a little bit later she gives an answer, "for the purpose of
6 sex. Mr. Villareal approaches me." She's admitting to being a lure.
7 She's admitting to inveigling the victim. She is the bait.

8 Then what does she say on direct? "Mr. Villareal offers to
9 buy me a drink, we go to the Fitz. He offers me 200 bucks. Steven steps
10 in to chat with him. They talk. Then Kaczmarek says okay, we're going
11 to hang out at his place at the Uptown."

12 So again, they're inveigling this victim. She is a key role in
13 this. Then what does she say on direct? Quote, "Kaczmarek grabbed
14 him from behind and started choking him, and he was kind of like
15 fighting with him, and Tommy got up and went over and started
16 punching him in the stomach, and then eventually Villareal fell to the
17 floor unconscious, and he reached behind him," meaning Steven,
18 "grabbed a knife off the top of the dresser and handed it to me and told
19 me to cut the cord off the back of the fan. The Question: And did you do
20 that? I did. I cut off the cord and handed it to Steven, and he used it up
21 to tie Mr. Villareal?"

22 At this point you have admitted to aiding and abetting using
23 force and restraint, and that ties to the robbery, it ties to the kidnapping,
24 it explains the underlying intent as to why you went into the burglary,
25 and it's all coming out of his mouth, her mouth on direct examination.

1 All three of us took Mr. Villareal's belonging, all three, her words, not
2 mine, hers. Mr. Villareal was breathing but asleep, he's out cold,
3 unconscious, his hands are tied behind, he's on his stomach. She admits
4 to taking his personal property by use of force. That is a robbery.
5 Steven and Tommy picked him up, put him in the bathtub. Steven said
6 okay, you guys start wiping everything down, you know, start wiping
7 everything down, clean up any trash, make the bed, make the place look
8 neat, so that's what Tommy and I started doing.

9 What did she wipe down? She said any fingerprints. Every --
10 all the stuff that's in there, anything that we had touched. No wonder
11 there were none of her fingerprints in the apartment when they dusted,
12 because she wiped them all, and then they went to the pawn shop. So
13 she admits to destroying identifying evidence and profiting off of the
14 robbery. These are her words, unsolicited, on direct examination.

15 So here's the thing. When you confess to kidnapping,
16 robbery, and burglary where the person ultimately dies after being left to
17 drown in a bathtub, hogtied, with a sock stuffed in his mouth, that is not
18 evidence you're actually innocent. And after hearing just this testimony,
19 it's more likely that any reasonable jury would have still convicted her on
20 this. She is done on felony murder. This is not a quote, "colorable
21 showing", she's actually innocent.

22 But she confesses to murder on cross. What do I mean by
23 that? Mikalonis' letter said she choked Pete Villareal, and she agreed.
24 The letter from -- that she wrote to Detective Mikalonis said she stepped
25 on the back of his neck. She agreed on cross. We know the cause of

1 death is asphyxia contributed by strangulation and suffocation. He even
2 pointed to the petechial hemorrhages as well as the contusions in the
3 deep muscles of the neck. This is in the trial testimony, as well as the
4 autopsy report, both of which have been admitted in exhibits. Burns
5 admits on the stand to the contributing causes that caused this guy
6 death on Day One of this hearing, but she did it again on Day Two.

7 On redirect, she tried to minimize her involvement by simply
8 saying oh, all I did was wipe stuff down, and I got up and said well, that
9 wasn't really true, and she admitted the following. She cut the cords to
10 restrain him, help collect the stolen items, choked the victim in the neck
11 in order to restrain him, and stepped on his -- victim's neck in order to
12 restrain him, so she did it twice. And she admitted that her own expert,
13 as well as Dr. T. opined that strangling someone and suffocating
14 someone was the actual cause of death.

15 And she admitted that choking and stepping on the neck of
16 the victims -- of the victim was an act that could strangle someone. And
17 she admitted that choking someone and stepping on one's neck are
18 forms of strangling someone. And she admitted that these actions are
19 acts of violence towards Mr. Villareal. And she admitted that after they
20 used those cords that she cut up to tie him up, Mr. Villareal was never
21 able to escape those restraints. That the way he looked in that bathtub is
22 basically how he looked when he left them.

23 THE COURT: Hold on. Mr. Abbatangelo, are you having
24 some audio difficulty?

25 MR. ABBATANGELO: Yes, and that's why we're just --

1 MR. HAMNER: Sure, that's okay.

2 MR. ABBATANGELO: I didn't want to interrupt Mr. Hamner's

3 flow.

4 THE COURT: Yeah.

5 MR. ABBATANGELO: But Alisha's texting Mr. Rose while the

6 speaker's on.

7 THE COURT: Is your battery dead?

8 MR. ABBATANGELO: No, no, it's fine.

9 THE COURT: Okay.

10 MR. ABBATANGELO: Not yet.

11 THE COURT: Okay. I was -- thought you were putting up

12 your power cord. Want to hang up and call her back, Mr. Abbatangelo?

13 MR. ABBATANGELO: I'm going to have Mr. Rose call her, so

14 text her, say you're going to call her, and I'm going to hang up.

15 [Pause]

16 MR. ABBATANGELO: Alisha, can you hear us?

17 THE DEFENDANT: Yes, I can now. Thank you.

18 MR. ABBATANGELO: All right.

19 MR. HAMNER: Okay.

20 MR. ABBATANGELO: Go ahead, Mr. Hamner.

21 MR. HAMNER: Sorry. So again, listen, it is impossible to be

22 quote, unquote, "actually innocent" under Berry if you've admitted to

23 aiding and abetting murder, and then you've also admitted to felony

24 murder via burglary, kidnapping, or robbery. You cannot do it.

25 So then the last chunk of new evidence, and again, this is

1 excluding the Cupcake Girl testimony from Ms. Alex is the jail letters
2 from Kaczmarek and Burns. Why were these important? Now these
3 weren't really raised as much in the petition itself, but as this argument
4 kind of went on, the claim is essentially this. She got up and said
5 Kaczmarek told me in the letters, the following, quote, "that he loved me,
6 that I had the power to save us both, that as I did -- that if I did what he
7 said and took responsibility for everything that we wouldn't get much
8 time because I was kid, and I'd be saving him, and he wouldn't get much
9 time either, and then we could both get out around the same time and
10 we could be together," and that's from Day One.

11 And she also said, you know, the confession letter that she
12 wrote to Detective Mikalonis, she stated that Kaczmarek wrote that in
13 another letter to her, and for word-for-word, told her what to say. She
14 said that on Day One on two different occasions during that proceeding.
15 And then she said it again on Day Two, word-for-word, that's what the
16 letter said. Well, we looked at all of those letters, there were more that
17 were, like, post her plea, but there were 34 letters admitted for your
18 review. And wait for it, not one of those letters mirrors the Burns
19 confession letter to Detective Mikalonis, not one. That is stunning.

20 For someone who has been collecting these letters, whether
21 they were back earlier in the days, like a memorial because you really
22 cared about the guy, and then later on maybe it's just a look, I'm
23 collecting and keeping these things because I've got to build my case, it
24 is stunning that the word-for-word instructions from Steven Kaczmarek
25 is nowhere to be found.

1 And here's the other thing, none of those 34 letters ever tell
2 her to take full responsibility of all the crimes. None. They say the
3 opposite. He is telling her early on in these initial letters, don't sign any
4 deals. Not you need to take a deal, or you need to admit stuff. Nothing.
5 Just hold off, hold off. And then by March 6th, this is so interesting, it's
6 the exact opposite. Alisha, save yourself and if testifying against me will
7 get you a little less time, then do it. Alisha, you are all that matters to
8 me.

9 I don't know what reasonable jury would look at that letter
10 and suggest, you know what, he's manipulating her to do something
11 that's no in her best interest. That is not telling her to take responsibility.
12 She admits, you're right, these are the exact opposite of what I was
13 claiming the letter said. She admitted it.

14 And then we get to the March 7th letter, and this one's just a
15 killer. Baby, I don't want you to go to prison. Baby, I don't want you to
16 lose the best years of your life in prison like I did. That's why I told you
17 to take a deal, even if it meant testifying against me, which is consistent
18 from the last letter. I knew that the only way that you could take a deal is
19 if I asked you to. That's why I told you to tell Phil that we -- that you
20 would take a deal after we talked face-to-face. Plus we could see each
21 other, get to look into each other's eyes, say I love you.

22 This letter literally gives context to the mystery meeting. It's
23 the very reason he's explaining they -- that the Defense has provided us
24 with evidence from Steven Kaczmarek which explained his motivation
25 for the one-on-one meeting. It is for her to limit her criminal exposure,

1 not to save him. It is stunning what these letters say because it is the
2 exact opposite of what she suggests, and this bears on her credibility.

3 Then you look at all the letters that he wrote from jail, and
4 encourage the Court to just skim through them, read every one line-by-
5 line, none of them ask her to take responsibility, even when he's in the
6 throngs of the actual murder trial. You would think that would be the
7 moment when he's super-desperate, right? Never happens. And after
8 conviction he's, like, hey, baby, I guess ten years might be an okay deal.
9 If you go to trial by jury, if you go to trial, the jury might give you more
10 because of the robbery. That's one way they found me guilty of murder,
11 also. He literally told her about the felony murder theory before she
12 entered her plea, which is what I was -- the State was just talking about.

13 And he -- that is what is so damning about these letters,
14 because it's actually giving realistic context as to why this woman, or
15 back when she was 16, why she took the deal. He's literally telling her;
16 you're going to get rung up. She knew that he was going to get rung up
17 on all charges because that happened before she entered plea. He's
18 explaining felony murder is a way you could go down for all of this so
19 take it.

20 And when you think about Phil Kohn's statement, Phil Kohn
21 went -- when he was asked that question by Defense counsel, hey, what
22 were your thoughts, what do you remember Alisha's thoughts were on a
23 deal? He was, like, oh, she definitely wanted to take it. That's what Phil
24 Kohn said, the public defender, the former public defender is admitting
25 his client wanted this deal, and it makes sense because Kaczmarek got

1 crushed at trial. So she knew what was at stake, which explains why you
2 take a deal that lops 30 years off the front end. It's a no-brainer.

3 So again, the Court's got to consider old and new and
4 incriminating evidence, and you've got to make a decision based on this
5 total record, which is so what's the additional incriminating evidence?
6 Well, you have Burns' two confessions, the voluntary statement to
7 Theresa Daga, as well as to Detective Mikalona [sic]. That's something
8 the jury's going to get to hear, and that's what this Court should look at.

9 Then you had every single witness who testified at the
10 Kaczmarek trial, and you have the evidence admitted at that trial. So you
11 have these confessions. Again, she's confessing to all of the crimes to
12 Officer Daga, and it was -- and the timing on this is so critical, she was
13 not charged with murder when she's saying these things, but she is
14 clearly laying out all the stuff that she did. And then you have Mikalonis'
15 confession which happens afterwards, after she's charged with murder.

16 So this is the went-to-the-store claim. She admits to posing
17 as a prostitute. She talks about how she -- the details that Daga knows
18 could only have come from Ms. Burns. He was staying on Freemont, we
19 tied him up with her boyfriend, we were just going to rob him, which
20 coincidentally is what Steven Kaczmarek essentially says at his own trial.
21 It's like look, it -- Kaczmarek's position, and really, when you read these
22 confessions letters too, are it just got out of hand for them. They didn't
23 really want to -- they wanted to rob him, they just didn't want him to die,
24 but that doesn't work under a felony murder theory.

25 She confessed, look, the DNA got on him, so we had to tie

1 him up, and we washed him off, and we decided to put him in the
2 bathtub. How in the worlds does Officer Daca know this? She's like, she
3 didn't know how he died but that sock in his mouth must have
4 suffocated him, and sure enough, there's a sock stuck right in his mouth.
5 It's amazing how Theresa Daca knew any of that, when working in a
6 facility whereby the Defense claims no one talks about their cases. How
7 in the world? Because the only person who told Officer Daca about this
8 was Alisha Burns.

9 They cleaned the prints as much as they could around the
10 apartment. That is consistent with what she told us at the hearing. She
11 said she didn't know he died about the sock, and then I asked her if she
12 had any other thoughts, and she said she didn't want to go to a women's
13 prison because she just wants to be addressed as a delinquent and go
14 back to Ohio and do her time.

15 I think that's really important when you compare her
16 credibility at the evidentiary hearing, because she said at the time she
17 entered her plea, she said, quote, "I wanted to go to trial." This
18 statement is contrary to that, and that statement, "I wanted to go to trial,"
19 is contradicted by her own lawyer, who I would submit Phil Kohn is not
20 going to make that necessarily up. In fact, that was one of the only
21 things he could really remember when recalling these details.

22 She was conscious of what time was, and how much time
23 was, and how much time she's facing as a 16-year-old, no matter how
24 much she tries to just -- I knew nothing at 16; she absolutely knew. She
25 had said they had done things like that numerous times before, and

1 that's how they obtained money, because I said do you have a job or
2 something? She's, like, no, we would pose as a prostitute and pimp and
3 then rob people, and that bears similarity to what Kaczmarek says at his
4 own trial. He says something similar.

5 And Your Honor, just -- you have Ms. Burns' criminal history
6 amongst stuff that you can review, her subsequent conviction where she
7 went up on another parole hearing stems from a trick roll situation with a
8 trick roll undercover cop. I mean, the bottom line is even when she 10,
9 10, 12 years removed from Steven Kaczmarek, she did engage in acts
10 like this. So the bottom line is this claim of "I've never done anything
11 like this before" is simply not true, and her own admissions belie that,
12 and her subsequent actions to some extent belie that, and took money
13 and a VCR.

14 Then you go through, you know, this is the whole thing
15 about the "I know what to say the whole time," Daga describes Burns as
16 a loner who never spoke to anyone else, so the likelihood that someone
17 else knew about this, these details, it's just not -- it's not true. She talked
18 about being -- she knew that she would hang out, out by the Stardust,
19 and that was where they were arrested, ultimately.

20 And this is her explanation on direct. It was like, "Well,
21 what's your position regarding knowing these facts about your case?
22 How would she know this sort of stuff?" And she says, "Well, I just
23 assume people talk. People talk to each other, and rumors get around.
24 I'm not sure."

25 And Defense counsel pressed her further on it, and she said,

1 "I don't recall telling her that so I'm not sure. I'm not sure how to answer
2 that." Because there isn't a good explanation for it other than the truth,
3 which is she told Officer Daga these things that were going on at that
4 time, and Daga memorialized it.

5 So then you start to get to the jail letters, and again, she said
6 after she received this letter, she wanted to confess, but then she added
7 her confession was word-for-word what he said to write. Well, again, if
8 the position of her has been like, Steven wrote this thing, you've got to
9 take all the responsibility. The problem with this letter is that's not what
10 gets bared out. Steve and Tommy are repeatedly inculpated by this
11 letter. It's things like we all agreed to rob him. There are points in here
12 where it talks about how Steve and Tom are discussing prices.

13 They talk about how Steve grabbed Villareal around the neck
14 and choked him out. It talks about how, I mean, that's what's so great,
15 why would Steve have her write a letter where she's saying Steve
16 choked him around the neck and is the first person who unleashes any
17 physical violence. How is that going to save him at trial? It's not.

18 She cuts the cord, but then it's Steven who ties the arm
19 around the back. Steve ties the legs. I mean, none of this stuff is
20 exculpating Steven Kaczmarek. What is sounds more like is something
21 that parallels the confession to Daga. It sounds like literally; Alisha Burns
22 is just coming clean with her conscience. That's what these letters really
23 are.

24 The letter admits all the things that they take, so we're not
25 going to go through all of that. The pawn tickets match the stuff that

1 they took. She talks about how Steve cut off the shirt which is consistent
2 with the photos. I mean, everything kind of ticks off with the physical
3 evidence when you read this confession. You know, she denies putting
4 the sock in his mouth, but the letter talks about, like, I made sure that he
5 had a sock in his mouth, and that they put a pillowcase on. She denies it
6 but says he did it. I mean she admitted that the pillowcase was there,
7 but I was the one who did it.

8 And the State would submit the reason why Ms. Burns in the
9 evidentiary hearing is saying, like, I didn't put the sock in his mouth, I'm
10 not the one who put the pillowcase on, I'm not the one who physically
11 had any role in tying up; I would submit one of the reason is maybe in
12 her mind she thinks those things make her look more guilty. Maybe.
13 Doesn't mean when you're shoving a sock in a guy who's hogtied's
14 mouth, that's not a good look if you're claiming you're actually innocent
15 of any of these crimes, but this letter acknowledges that she's the one
16 who did it.

17 So what other evidence is there? This is Louis Morse. He
18 was the first witness who testified at this trial, and on March 12, 2003, he
19 said by its -- and I missed, that statement is not correct. He says by 9, by
20 9/27, the day the body is found, the apartment is totally out of water.
21 And he says the symptoms of the water had been going on for two days,
22 and the water kept getting colder and colder and colder, and that is really
23 critical because it really critically attacks the argument that the time of
24 death is on the 27th.

25 And then you have Delores Kramer, who gives us a lot of

1 important information. She's the manager. One thing she gives us is
2 that that apartment has a locked security gate that only residents can go
3 through. Why is that important? Because it minimizes the likelihood
4 that someone in the early morning hours on 9/27 like somehow got in
5 the apartment and then hid in there and then fled. That probably didn't
6 happen.

7 She said that she saw Villareal every day go to work, he
8 never missed work, and that 9/25 was a workday. She said she saw him
9 the morning of the 25th, but after that, never saw him again, and he
10 never missed a day of work. Why is that important? Because it is
11 consistent with him being hogtied on 10:30 at night on September 25th
12 by Ms. Burns and Mr. Kaczmarek. He went missing afterwards.

13 And what did she start saying as the manager? All the
14 residents are complaining about not having hot water, and by 9/26, the
15 very next day, after they left in the early morning hour, that is when this
16 manager is getting complaints about the water, which is consistent with
17 the hogtied situation, leave water on to get rid of the DNA. Even
18 apartment 26 was complaining that water from unit 25, that's Mr.
19 Villareal's, was leaking into apartment 26, that is significant because if
20 the mystery killer with the chain lock somehow snuck in in that little
21 window of time to do this murder, how exactly was he able to get that
22 shower to generate enough water to flood the floor and leak into another
23 apartment? That's not possible, that's not credible, and that defies
24 common sense.

25 This water was running for two days. That's why it got into

1 apartment 26, and this is what a reasonable jury, a jury would hear at an
2 upcoming trial, and we had to do it all over again. This date of death on
3 the 27th is not going to, pun intended, hold any water based off of the
4 testimony of these unbiased, disinterested witnesses.

5 Then you have Officer Rumery who says the shower's going
6 on, and he's bound tightly like that. Here's the interesting thing. Alisha
7 Burns is admitting that's how they left him, bound in that way. It wasn't
8 the mystery killer. She's admitting when we left, we're leaving him in
9 the bathtub in the very position that he's found.

10 Why is that significant? Are we to suggest that the mystery
11 killer had just the good fortune of picking the one apartment where
12 there's a guy hogtied on his stomach in a bathtub, just waiting to be
13 extra-killed, because that's what they're arguing, because Burns doesn't
14 deny that's how they -- that's not the condition they left him in. The
15 bottom line is there never was a mystery killer.

16 The pillowcase is right where Alisha and Steven left it, he's
17 hogtied in just the way that Steven and Alisha left him, and the floor is
18 completely flooded. That would have been a nice nugget for, I don't
19 know, Dr. Bennett to review when evaluating things. The AMR
20 employee, the CSA also talked about the running shower and the floor
21 being soaked.

22 At the trial you had witnesses talking about belongings being
23 missing from the apartment such as Mr. Villareal's daughter was one of
24 these people. These witnesses also testified that the belongings
25 belonged, that were pawned by Kaczmarek belonged to the victim, so

1 the jury would get to hear about that. The very things that they, Alisha
2 and Steven admitted they took, are the very things that his loved ones
3 say belonged to him.

4 You had Dr. Telgenhoff, I won't go through this because
5 we've covered it, but all of the injuries are consistent with the ways he
6 was treated at the hands of Ms. Burns and Mr. Kaczmarek, and that date
7 of death being at least 26 hours from the 28th.

8 You had two jailhouse informants. Oh, not Mr. Cook. Mr.
9 Cook talked about DNA. Kaczmarek's DNA is found on a cigarette butt
10 inside Villareal's apartment. The daughter is there. We talked about
11 what she would say. Mr. Lewis and Mr. Pryor are informants that talked
12 about the confessions Kaczmarek made.

13 You have Mr. Cruz who's from the pawnshop. He talked
14 about how Kaczmarek came to the window, and he couldn't see anyone
15 else, and here's the interesting thing about that. Alisha Burns
16 acknowledged the reason why Mr. Cruz couldn't see her is that she never
17 walked up to the walk-up window, she stood off to the side, which we
18 explain that, but he brings in our pawn ticket. Kaczmarek basically
19 confesses to everything that's been covered up to this point in these
20 hearings. All he says that's different is we didn't intend for him to die.

21 So the trial evidence, overwhelming support for the
22 reasonable jury would convict her in light of the new evidence. They
23 certainly did Mr. Kaczmarek. I would imagine a reasonable jury would
24 do the exact same thing based on these witnesses.

25 Then we start talking about the waiver of her plea. She

1 claims that it was -- this was a knowing and voluntary plea. She claimed
2 it -- she didn't understand, but that's really belied by the record. It's
3 belied by Phil Kohn who said she did want the offer. She -- Kaczmarek's
4 meeting with her was to take the negotiation due to the fact that he got
5 hammered at trial. He had nothing to benefit by her taking a deal at that
6 point. Even Longabaugh, proposed conviction attorney suggests the
7 deal was really good and she should keep it.

8 The deal was absolutely in her best interest. She had just
9 seen her boyfriend basically get sent to death row on the exact same
10 evidence. It is no surprise that you would take a deal that would
11 eliminate three of the four felonies, take 30 years off the front, at a
12 minimum.

13 So let's talk about some miscellaneous issues. The sex
14 trafficking issue. One of the things that they've argued, it wasn't in their
15 petition, but you've heard it more and more as the evidence you're going
16 to hear now was about how sex trafficking is not a enumerated felony,
17 but here's the thing; kidnapping and sexual assault of a minor were, and
18 these felonies are far more severe. And I asked Phil Kohn that, because
19 here's the thing; if the suggestion is I would have gone to trial, they
20 didn't make this argument, but I have to assume this is potentially one of
21 the arguments for this; if the argument is we didn't have sex trafficking
22 on the book, therefore, I didn't have this defense available to me, you
23 had kidnapping and sexual assault as crimes that you're a victim of that
24 you could have raised. You chose not to. And here's the thing, sex
25 trafficking, even today, is not an affirmative defense to murder. You

1 don't get to just raise sex trafficking and somehow you're not guilty of
2 murder.

3 And here's the other thing, there is no witness that has
4 testified that stated that if Burns would not have been charged for
5 murder if sex trafficking was a enumerated felony. It is one of the
6 suggestions that's being made by the defense. She would have been
7 treated differently. What witness has said that? None. None. No one
8 has said that.

9 And when you think about the circumstances, she was
10 electing not to testify in one case where she is a victim, and when you
11 review all the evidence, it's abundantly clear she participated in this
12 murder, it is not surprising that the State charged her with murder
13 because at no point is she even eliciting she's under duress. Even in the
14 evidentiary hearing I asked her, was he threatening you in your
15 relationship from the trip to Ohio from Las Vegas? The answer was no.
16 Were you being threatened in the room with any physical harm if you
17 didn't comply? She said no, he was too busy hurting Mr. Villareal.

18 She was never under duress, ever, and she admitted that,
19 and that, Your Honor, would be a defense to these crimes, and was
20 available to her back in the day. But the bottom line is that didn't exist.
21 She wasn't being threatened by him.

22 And then we get to Ms. Alex, and one of the problems with
23 Ms. Alex is she never spoke to Ms. Burns about the case, she didn't
24 conduct a psychological evaluation, she didn't review any other
25 materials other than a summary written by defense counsel. And, you

1 know, what did she offer? She says, look, in a number of circumstances,
2 victims may go along with their sex traffickers, that they don't feel safe,
3 but there's the thing, for this claim to work, Burns needed to say
4 something like that, and she didn't.

5 She never testified that I tied him up because I didn't feel
6 safe. She didn't say I wiped things down because I thought I was going
7 to get choked or killed. She never said anything like that. That is not
8 what she said. And so for the purposes of this hearing, the Petitioner
9 has failed to present any evidence to suggest that, and she's had almost
10 20 years now to come up with that description of duress, but it -- she
11 never offered it.

12 And we talked about the chain lock. It's not new -- and that's
13 one thing I didn't bring up. The chain lock isn't new evidence. If you
14 were to review the testimony of those two neighbors, Mr. -- I think it's -- I
15 can't remember, it's a -- Mr. Lewis? I think it's Mr. Lewis, and if it's not,
16 it's Ms. Kramer. One of them is present with the manager, one of the
17 janitor of the facility when they find the body and they talk about the
18 chain lock. Why is that significant? It's significant because the
19 Kaczmarek jury heard testimony about the chain lock and still convicted
20 Kaczmarek. So this is not quote, unquote, "new evidence." It's been
21 around for 18 years and was in the first trial.

22 And here's the thing, which is more compelling for what a
23 probable jury would do where they'd be more likely than not to do, all of
24 the injuries and the state of Mr. Villareal's body is 100 percent consistent
25 with what Burns admitted she did, even what Kaczmarek admitted she

1 did. It doesn't matter if you look at her evidentiary hearing or any of the
2 confessions she wrote or the voluntary statement of Ms. -- Officer Daca.
3 It all matches up with exactly how he looked and exactly how they left
4 him. There was no mystery person, it was her and Kaczmarek that did
5 this.

6 And again, scientifically it makes no sense. If the mystery
7 killer came in and Mr. Villareal -- while Mr. Tomhill [phonetic] stepped
8 away from the door for that hour window or and a half, he should have
9 been in the process of rigor mortis, but he wasn't. He was receded, so
10 that doesn't work.

11 And the last thing I want to get to is the parole board
12 hearings. Admitted in evidence are video snippets from that parole. I
13 didn't get into much with Ms. Burns about it, but I think it's really
14 significant, and we talked about someone who's actually innocent. One
15 of the things that was interesting was she had indicated to this Court that
16 she was absolutely -- I said to her, "did you kind of make -- acknowledge
17 into what things that you did, and I'm just going to bring the computer to
18 Your Honor so you can at least hear --

19 THE COURT: Okay.

20 MR. HAMNER: -- the audio because I don't know that I have
21 it patched in. I asked, her, I said, you know, what sort of things did you
22 say there, and I think it's very telling to listen to what she said to the
23 parole board, because she is claiming she is someone who is actually
24 innocent who did not do anything wrong or didn't commit a crime
25 against Mr. Villareal, so let's hear what she had to say.

1 [Whereupon, a video recording, Defendant's Exhibit was played in
2 open court at 12:28 p.m., and not transcribed]

3 [Audio paused at 12:30 p.m.]

4 MR. HAMNER: I want to get to this other clip from this exact
5 same hearing.

6 [Video resumed at 12:30 p.m., and ends at 12:30 p.m.]

7 MR. HAMNER: Now one of the takeaways, one of the
8 takeaways that the State takes from this statement was when you think
9 about -- I didn't want to show her the video, I wanted to just ask her, you
10 know, what did you say up there? Were you being truthful with the
11 parole board? And she looked me in the face and said, what are you,
12 crazy? Of course I didn't tell the truth to the parole board. I needed to
13 tell them what they wanted to hear, because If I said I didn't actually do
14 this they would have sent me away forever.

15 Now one of the things that she said in there that troubles me
16 is she opened with saying it's definitely been a challenge, it's been
17 difficult to try and develop into a woman of integrity and morals, but I've
18 been able to do it. Even though by her own admission at the evidentiary,
19 she's saying I'm lying to their face, if she's to be believed at this year.
20 That is not someone whose developed integrity and morals if you're
21 strategically going in there to look the parole board in the face and flat-
22 out lie to them just to get what you want.

23 But I'd submit to you this, when the State watches that video,
24 the State believes that she was being honest, when she said the most
25 difficult part has been coming to terms with my actions, there is not a

1 day that goes by that I don't think about what I did to him and his family.
2 I truly beat myself up and wonder what would have happened if I tried to
3 stop the situation. The State believes that she was being honest at that
4 moment. She expressed genuine remorse for what she did because she
5 knew she actually participated actively in the robbery, kidnapping,
6 burglary, and murder of Mr. Villareal, and you can see it on her face. I
7 don't think that's being made up, but the problem for her in an actual
8 innocent hearing when she's sitting on the stand years later as she can't
9 admit to the truth of what she said in that hearing because if she did, it
10 means she's not actually innocent.

11 The State would submit that gives you a window into a
12 moment of clarity where she has true remorse. She knows exactly what
13 she did, and it's reflected in that video, it is reflected in the confessions, it
14 is reflected in the admissions she's made on direct examination and
15 cross examination, and it's also reflected on the mountain of evidence
16 that was presented at trial, as well as during this evidentiary hearing.

17 Reversing this woman's conviction under the auspices of
18 *Berry* is a significant, significant decision. There is absolutely not a
19 shred of evidence under the *Berry* standard that would cause a
20 reasonable jury to be more likely than not to find her not guilty on all of
21 these charges.

22 We are respectfully asking to make a finding that number 1,
23 the unreasonable delay in bringing this new actual innocence petition
24 now did not constitute -- it constituted an unreasonable delay and so it
25 should be procedurally barred, but even if considered on the merits, the

1 new evidence being the jail letters, Dr. Bennett's court testimony, as well
2 as her own in the evidentiary hearing, none of these things collectively
3 when viewed and all of the evidence would cause a reasonable jury to
4 convict her, and with that, the State would submit.

5 THE COURT: Okay. Thank you, Mr. Hamner. Mr.
6 Abbatangelo, do you have 30 minutes or less?

7 MR. ABBATANGELO: Oh, yeah.

8 THE COURT: Okay. Just checking because I'm getting
9 hangry.

10 MR. HAMNER: Sorry, Your Honor.

11 MR. ABBATANGELO: And it's obviously will be for me, as
12 well.

13 THE COURT: Yes, I'm getting hungry, so I mean, I was just
14 going to make a lunch break. I'm not going to cut you off so --

15 MR. ABBATANGELO: Yeah, we'll need 10, 15 minutes tops.

16 THE COURT: Okay.

17 MR. ABBATANGELO: Tops.

18 THE COURT: Whenever you are ready.

19 MR. ABBATANGELO: All right. Your Honor, one thing the
20 State has completely either discounted or ignored, and this was through
21 the statement, through the closing argument, is the reality of what a
22 victim of sex trafficking will do or not do. The parole board hearing
23 reflects what Ms. Burns testified to. In jury trials nowadays, because
24 we've seen it on appeal with the cases we quoted, the State brings an
25 expert witness in on the patterns of behavior of pimps and victims and

1 sex trafficking. Should the Court grant this petition, that's what the
2 Defense is going to do. We're going to bring in an expert, certified
3 expert that's going to testify about sex trafficking and what a victim
4 would do.

5 Phil Kohn did confirm that he would have changed his
6 opinion in the case management of the situation if he had known about
7 the letters. So what the State has said that she testified, that Alisha
8 testified whatever Kaz said, that's exactly what we talked about on our
9 opening or closing. She would do whatever Kaczmarek said.

10 So at the very end when you say Alisha says to the parole
11 board, I wonder what I could have done if I could have stopped this, well,
12 there's nothing we know she could have done because that was testified
13 to. She was six -- well, 15 at the time and weighed less than 100 pounds,
14 and she even said they even talked about her jumping on this guy's back,
15 and he couldn't -- she wasn't even doing anything to that person. It was
16 Tommy and it was Kaczmarek.

17 So what we have is a completely different view between the
18 Petitioner and the State regarding what would happen with the
19 reasonable jury. We would be able to now present an expert witness on
20 the patterns of behavior of sex trafficking that was not available in 2002,
21 and that ties in the letters that were presented by the State. The March
22 7th letter says the only way you, meaning Alisha, will take a deal is if I,
23 meaning Kaczmarek, ask you to testify against me. Well, here's the
24 thing, number 1, she didn't testify against him because she's not going
25 to do that.

1 She didn't testify against him in the sex assault and
2 kidnapping case, she did not testify at the jury trial, so that wasn't getting
3 her a better deal. But what it reflects is them manipulation and control of
4 Kaczmarek over Alisha through the entire system, and that once again
5 was supported by Phil Kohn.

6 What I would like to do now is talk about the doctor
7 statements. You have two exact opposite positions of Daka. The State
8 had just said he's not surprised about the statement, that's a good
9 explanation as to what happened, completely believable, and let me tell
10 you something, what I completely believe and I'm not surprised about,
11 and a good explanation is that the police could contact Daka because her
12 statement is so inconsistent about the day of this, especially because
13 Daka states, and it is in her report, that Alisha's here to testify in a
14 murder case.

15 She's not there to testify on a murder case. She's there to
16 testify to a sex assault case. So once she refuses to testify, all of the
17 sudden new evidence pops up against Burns about murder, because
18 before that, the only thing they had was Kaczmarek's statement. I'm not
19 going to overly emphasize that because we've already had these
20 arguments.

21 So I completely believe that all of the sudden, the State of
22 Nevada is upset that they're not getting this guy on some serious
23 charges, who's a convicted felon out of two other states, bringing a 15
24 year old girl to Vegas, and commit a robbery and potentially a -- well,
25 and a potential murder, they can't get him on the sex assault which of a

1 minor under 16 which has a higher minimum sentence than a second
2 degree murder for sure, because I can't remember what the statutes
3 were back in 2002. So it's absolutely believable that the State and police
4 or someone else contacted Daka because of the inconsistencies of her
5 statement.

6 Date of incident, and I went through those so I'm not going
7 to hammer those out again, Judge. We -- it's completely believable from
8 the defense side of what occurred, because everything changed once
9 Alisha refused to testify against Kaczmarek.

10 One thing that was brought up was the fingerprints. Well,
11 her testimony was we wiped down everything. This is from the State's
12 line, as well as everything we found. Well, that could be taken in two
13 ways. The way I took the testimony was we wiped everything down,
14 which includes everything we touched, and she, once again, is doing
15 what her trafficker told her to do, and that then segued into Ms. Burns
16 collecting these letters and saving them. Well, that's not what happened.

17 What happened was we didn't even get the letters until a
18 month or two ago when Mr. Rose contacted Attorney Roske's [phonetic]
19 office, and that's where the letters were. And Alisha wanted to start
20 going through them and couldn't take it and broke down and she didn't
21 read them all. So what she's saying is a whole different ballgame of how
22 that went down compared to what the State has said.

23 Now another big thing we're talking about from the State is,
24 which we addressed originally on our closing, was Dr. Bennett versus
25 the ME from the State, and they never wrote her name down, that's why

1 I keep calling her the ME as opposed to her -- Gorniak?

2 MR. HAMNER: What?

3 MR. ABBATANGELO: How do you say the last name?

4 MR. HAMNER: Which one?

5 MR. ABBATANGELO: Your ME.

6 MR. HAMNER: Telgenhoff.

7 MR. ABBATANGELO: No, no, the one --

8 MR. HAMNER: Gorniak.

9 MR. ABBATANGELO: Gorniak. Okay. Once again what it
10 comes down to, and it was pointed out to the State about the odor of a
11 deceased body, and that is a subjective position. That's the same thing
12 here where you have both ME's testifying that they have disagreed with
13 prior autopsy reports. Professionals disagree. They're not always going
14 to say the exact same thing, and what happened was the death, the rigor
15 mortis being talked about, being receded, was 36 hours what Gorniak
16 stated.

17 Dr. Bennett, I thought, was very truthful, his position was 12
18 to 18 hours, and yes, it could be 36 hours for rescission, and once again,
19 everything depends on certain factors. Dr. Gorniak didn't review the
20 body, and one thing that was brought up was on redirect of Dr. Bennett
21 was we -- he did not need to change his opinion, we or I did not ask for
22 an addendum once he received the autopsy photos, so he did see them,
23 and he saw the other information that we'd sent to him which was after
24 his report. So I think on redirect he was very well rehabilitated because
25 he had seen more information that was relevant, especially the

1 photographs, and his opinion did not change.

2 So what this really comes down to, Your Honor, is a question
3 of fact being determined by the jury and the ME for the Defense, and the
4 ME for the State, battle of conflicting testimony, and this ties directly into
5 our position of the new evidence, which is that the Defense would be
6 able to present a sex trafficking expert, and Mr. Hamner's not 100
7 percent right, just like I'm not 100 percent right, because we don't know
8 what a jury would do when they heard that a 15-year-old brought to Las
9 Vegas by a 33-year-old felon is involved in a robbery.

10 I believe that they would never convict Ms. Burns because
11 she was not acting under her own free will. She was acting under the
12 duress, influence, and coercion of Kaczmarek. She was not a voluntary --
13 volunteer participant in this. She had no choice. She had no family out
14 here. There was nowhere to run. She wasn't doing anything that was
15 going to give her some freedom. She had no money, no job, and she is
16 going to do whatever Kaczmarek said.

17 And lastly, I cannot emphasize that the State of Nevada back
18 in 2002 broke the contract, broke the court order with Ohio when she
19 was charged with murder, she had an appointed attorney per the
20 murder, and that ties it to the Daka statement, and that's why it's
21 inconsistent, and once again, the Ohio order states, the State of Nevada
22 shall, or Ms. Burns shall be afforded protection from arrest and service of
23 civil and criminal process to and from the court where such protection is
24 pending, that it will not cause undue hardship to the witness.

25 And everybody knows being charged with murder is an

1 undue hardship, and if she hadn't been brought back here to testify, and
2 then they flipped it around her with this Daca statement, then nothing
3 she may never have been charged because at that time there's no
4 evidence, but Kaczmarek's statement which could not come in against
5 Ms. Burns.

6 With that, we'll submit it to Your Honor.

7 THE COURT: Okay. All right. Thank you very much, and
8 thank you very much, everyone, for your presentation. The Court is
9 going to review all of the documents that have been admitted into
10 evidence, and the Court will issue a written findings in regards to this.

11 MR. HAMNER: Does the Court want an electronic copy or a
12 paper copy of the --

13 THE COURT: Can you give me a paper copy of your
14 PowerPoint that we'll admit as a Court's Exhibit?

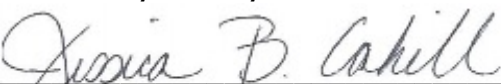
15 MR. HAMNER: Yes, Your Honor.

16 THE COURT: Okay. Thank you guys. Go to lunch.

17 MR. ABBATANGELO: Thank you for all your time.

18 [Proceedings adjourned at 12:45 p.m.]
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20

21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

23 

24 Maukele Transcribers, LLC

25 Jessica B. Cahill, Transcriber, CER/CET-708