IN THE SUPREME COURT FOR THE STATE OF NEVADA

ADAM ANTHONY BERNARD,
Appellant,
vs.
STATE OF NEVADA,
Respondent.

No. 83323

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MOTION TO EXCEED TYPE-VOLUME LIMITATION NRAP 32(a)(7)(D)

1. DECLARATION OF COUNSEL

The undersigned counsel of record declares that the portions of this brief, which are included in the type-volume limitation count requirement pursuant to NRAP 32(a)(7)(C) exceed the 14,000 word limit set forth in NRAP 32(a)(7)(A)(ii). Counsel has attempted to remove all irrelevant information, but has been unable to successfully reduce the word count.

Counsel has been diligent and believes that there is good cause for the additional words in the brief, as the issues raised are fact-based. The issues presented are not difficult legal issues, but rather turn entirely on the facts. The issues in this brief focus on the specific facts of the offense, the facts in mitigation offered, and the facts of the sentencing proceeding.

This case did not proceed to trial, but resolved by way of an Alford plea, which incorporated the facts of the preliminary hearing and the contents of a video. That factual information is necessary for this Court to decide the issues presented. Appellant's arguments involve the court's failure to consider

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mitigation information. To evaluate this argument, this Court needs to know the quantum and quality of the mitigation evidence presented to the court at sentencing. Finally, appellant's argument regarding his sentencing hearing involved the behavior of witnesses and of the court. This factual information must need be included in detail in order for this Court to effectively consider this issue. Inclusion of this relevant information has lengthened the Statement of the Facts section of the brief.

For these reasons, counsel is requesting that this Court allow her to file the Opening Brief in excess of 14,000 words, by 922 words.

Attorney of record for Adam Anthony Bernard, Appellant,

Maria Pence, Esq.

2. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: [X] This brief has been prepared in a proportionally spaced typeface using Word processing program in 14 point font size and Times New Roman type style.

This brief does *not* comply with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, but has more than 14,000 words. It contains 14,922words, an excess of 922 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

///

Dated this 1st day of April, 2022,

Maria Pence, Esq.
Nevada Bar No. 9890
Pence & Associates
1662 US Hwy 395, Ste. 203
Minden, Nevada 89423
(775) 392-4084

CERTIFICATE OF SERVICE

I certify that I am an employee of PENCE & ASSOCIATES and that on this date, I served a true and correct copy of the Motion to Exceed Type-Volume Limitation to the following address:

Erik Levin, Chief Criminal Deputy District Attorney
District Attorney's Office
1038 Buckeye Road
Minden, NV 89423

Dated this 1st day of April, 2022.

MARIA PENCE, ESQ.

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OPENING BRIEF

MARIA PENCE
Attorney for Appellant
Bar ID No. 9890
1662 U.S. Highway 395, Suite 203
Minden, NV 89423
(775) 392-4084

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1. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1 to be disclosed.

Attorney of record for Adam Anthony Bernard, Appellant,

Maria Pence, Esq.

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4. JURISDICTIONAL STATEMENT

This is an appeal of the sentence imposed on July 1, 2021, following an Alford plea to voluntary manslaughter. The Judgment of Conviction was filed on July 2, 2021. Adam Bernard filed a timely notice of appeal on July 23, 2021. NRAP 4(b). Adam may appeal his final judgment pursuant to NRS 177.015(3).

5. ROUTING STATEMENT

Adam Bernard's appeal is presumptively assigned to the Court of Appeals because it is a direct appeal from a judgment of conviction, which arose from his plea of nolo contendere (Alford). NRAP 17(b)(1).

6. ISSUES PRESENTED FOR REVIEW

I. THE COURT ABUSED ITS DISCRETION IN SENTENCING ADAM BERNARD TO THE MAXIMUM SENTENCE.

A. The court failed to consider mitigating information in sentencing Adam: Adam's lack of criminal history, the predatory conduct of the victim, the victim's pre-existing medical issues, and Adam's conduct of while on bail.

B. The court failed to keep an open mind regarding expert witness testimony on the issues of the modes of violence and acute stress disorder or reaction and failed to weigh and consider the expert's opinions as they related to Adam's conduct.

C. The court's maximum sentence offends the Legislature's creation of a sentencing range.

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II. THE COURT FAILED TO PROVIDE A FAIR SENTENCING HEARING IN VIOLATION OF ADAM BERNARD'S DUE PROCESS RIGHTS.

A. The court failed to read and consider all documentation submitted for sentencing.

B. The court failed to keep an open mind in considering the issues before it at time of sentencing.

C. The court failed to control witnesses, undermining the judge's independence, integrity, or impartiality.

D. The court failed to maintain decorum in the courtroom, undermining the judge's freedom from influence or controls other than those established by law.

7. STATEMENT OF THE CASE

On the evening of July 8, 2017, Adam was involved in a physical altercation with Brian Cook, which resulted in his hospitalization. After waving down law enforcement and speaking with the officers on scene, Adam was not arrested. In October, 2017, and again in November, 2017, Adam voluntarily spoke with detectives regarding this incident. Four months later, on March 3, 2018, Adam was charged with Open Murder for Brian Cook's death. Adam was released on cash bail on May 2, 2018, and remained at liberty for an additional three plus years, until he was sentenced on July 1, 2021.

A preliminary hearing was held on June 29, 2018, and Adam was bound over into district court and set for jury trial. The September, 2019, trial date was vacated and continued. The case was then set for trial in March, 2020, and trial motions were heard February 3, 2020. At that hearing, the court considered the State's Motion In Limine Regarding Videos, which defense counsel had opposed. On February 14, 2020, the court granted the State's Motion to introduce a video of the physical altercation between the parties that had been digitally enhanced and concatenated (digitally stitching pieces of video files together). On the eve of trial, the trial was vacated due to COVID. The case was again set for trial in June, 2021.

Following a settlement conference conducted pursuant to Supreme Court Rule 252, Adam entered an *Alford* plea to Voluntary Manslaughter, in violation of NRS 200.040, 200.050, and 200.080, a category B felony, on May 5, 2021. On July 1, 2021, Adam was sentenced to the maximum sentence allowed by law.

8. STATEMENT OF THE FACTS

On May 5, 2021, Adam entered an *Alford* plea to Voluntary Manslaughter to reduce the risks of going to trial on a charge of Open Murder. Vol. II, JA 268-287. The plea was pursuant to a written plea agreement, filed on May 5, 2021, in which Adam agreed to plead guilty, pursuant to *North Carolina v. Alford,* 400 U.S. 25 (1970), to Voluntary Manslaughter and the State agreed not to pursue any additional charges against him arising out of Douglas County Sheriff's Office Report 17SO20571. Vol. II, JA 261. Both parties were free to argue for any lawful sentence. Vol. II, JA 261.

At arraignment, the court explained to Adam that the State would "have to prove that you on or about July 9, 2017, here in Douglas County, Nevada, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible to a reasonable person; or an attempt by Brian Cook to commit serious personal injury on you, did willfully and voluntarily kill Cook by repeatedly punching and kicking Cook in the head while Cook was lying on the ground." Vol. II, JA 282.

The court informed Adam that it had reviewed the preliminary hearing transcript and had seen the video of the incident and would incorporate both as part of the factual basis for his Alford plea. Vol. II, JA 284-285.

Facts from the preliminary hearing

The preliminary hearing transcript, from June 29, 2018, contains the testimony of Investigator Jonathan Storke. Vol. I, JA 75-109. Investigator Storke testified: Adam told him that he and Kevin Tholl were at Brian's house earlier that night; they had all been drinking; there was some sort of "verbal altercation" between Adam and Brian, so Kevin and Adam left Brian's house; they returned to Kevin's house; shortly after arriving, Kevin received a phone call from Brian asking about Adam's whereabouts because he was going to come over and "kick his ass;" Kevin told Brian not to come over, but Brian arrived just after that conversation; Adam approached Brian and asked him why he wanted to beat him up. Vol. I, JA 80-82.

Inv. Storke also testified: in a second interview with Adam, this information—about the argument and Brian pursuing him to Kevin's house, remained consistent; the differences in the first and second interviews were Adam's statements about how many times he punched Brian and whether or not he kicked him; after seeing the video of the incident, Adam told him, it must have been a blackout moment; Adam told him he was scared about what happened

during the fight and that was why in his first interview he had just repeated the information that Kevin had previously told Inv. Storke. Vol. I, JA 82-85.

During cross-examination, Inv. Storke testified: Kevin and Adam were drinking light beer, with an alcohol content of between three (3) and five (5) percent; Brian was drinking Peppermint Schnapps, about eighty (80) proof, and contained much more alcohol than beer; an argument broke out between Adam and Brian, and that Brian started to harass Adam about his eye and being blind; Adam and Kevin then left the residence; Adam explained that he worked with Brian and Brian would throw nails at him, poke fun of him and joke about his blind eye and that Brian was a bully; Adam told him about the history he had with Brian teasing him or talking about taking his good eye. Vol. I, JA 92-97.

Inv. Storke continued: Adam told him on the night of the incident, Brian pulled a knife, held it up, and said I could kill you right here; then Brian took the knife and pointed it at Adam's face and told him it would be that easy—lights out; Adam tried to leave but Brian insisted that he stay and try on a float tube; Adam did not want to try on the float tube suit, but he did to appease Brian; Adam told Inv. Storke that Brian started talking about kicking a puppy in the air to make him do flips and that made Adam angry and he wanted to leave Brian's house. Vol. I, JA 98-99.

Inv. Storke testified: Adam told him after he and Kevin returned to Kevin's house, Brian called Kevin's phone and was heard saying that he was coming to "fuck Adam up;" Kevin told Brian not to come over, but Brian showed up at Kevin's house; Adam asked Brian why he wanted to beat him up and Brian said he was going to make him blind in his other eye; when Brian he showed up to fight, he told Adam, "I'm going to kill you, lights out. I'm going to make you blind in your other eye, mother fucker." Vol. I, JA 99-101. Inv. Storke testified that Adam's statement about what Brian said to him upon arriving at Kevin's house to fight, specifically about taking his good eye, was consistent with he had been told by Kevin during Kevin's first interview. Vol. I, JA 102.

Inv. Storke informed: as Adam watched the video of the incident, Adam stated it was like he had blacked out; Adam remembered what he saw on the video, just not to that extent; Adam described the fight as total chaos; Adam was scared Brian was going to get up and shoot him with a shotgun he keeps in the truck or stab him with a knife; and he was scared for his life. Vol. I, JA 102-104.

Inv. Storke concluded: Adam had not been obligated to speak with him; Adam had voluntarily come in on both occasions; he had never requested an attorney; and Adam was cooperative and agreed to turn himself in if a warrant was issued. Vol. I, JA 108-109.

Inv. Storke also testified that Brian, the victim, had a blood alcohol content of .45. Vol. I, JA 105.

The medical examiner, Dr. Ann Bucholtz, also testified at the preliminary hearing: she had reviewed hundreds of pages of medical reports that defense counsel was not provided with; she listed blunt force trauma first in her list of pathological diagnoses as to Brian's death; she agreed when there is blunt force trauma to the head, the resulting death can be due to edema or swelling; Brian had internal bleeding, which causes swelling which caused him to herniate. X.

Dr. Bucholtz testified: another of her final diagnoses regarding Brian's death was acute alcohol intoxication; she could not recall if Brian's blood alcohol was .45; she was aware of his level of intoxication, but just did not know the number. Vol. I, JA 54.

Dr. Bucholtz testified: if Brian's blood alcohol intoxication level was a .45, that could cause coma and death; Brian was in a coma upon arrival at the hospital; acute alcohol intoxication could also cause cerebral edema (swelling); binge drinking can also cause swelling of the brain, even death. Vol. I, JA 55-56.

Dr. Bucholtz did not provide a clear answer when asked whether acute alcohol intoxication had been ruled out as the cause of death in this case; she admitted it was not possible to know how much swelling of the brain was due to

acute alcohol intoxication and how much swelling was due to hemorrhage. Vol. I, JA 57-58.

She admitted: acute liver failure can cause cerebral edema, or swelling of the brain; acute liver failure can be diagnosed by examining the liver; however, Brian's liver was not available for examination because it had been donated, either for study or transplantation; there were no tissue slides of the liver; she was unaware of any photographs of Brian's liver; the same process, of the brain swelling and having nowhere to go that she had described, was also a complication of acute liver failure. Vol. I, JA 63-65.

Dr. Bucholtz testified: Brian had no fractures of his nose; his teeth were in a good state of repair with no damage; he had no skull fractures; there were no orbital fractures; and there was no trauma to the lower portion of his face. Vol. I, JA 45. There were no fractures at all. Vol. I, JA 58. She testified: the majority of the bruises present on Brian during her examination were caused by medical therapy and not Adam. Vol. I, JA 49-53.

She testified: another of her final pathological diagnoses was acute meningitis; Brian had acute meningitis, which if untreated, can cause death; Brian was not tested for meningitis upon admission and the meningitis could have been present prior to admission; and she was unaware of any tests done to rule out that Brian had come into the hospital with meningitis. Vol, I, JA 46-47.

Dr. Bucholtz testified: she might have known that Brian had previously had a heart attack based on his records; she would not doubt he was taking heart medications; his heart was big, he had an enlarged left ventricle, and she believed him to be hypertensive; and she was not surprised Brian appeared to have three separate instances of cardiac arrest while hospitalized. Vol. I, JA 53-54.

Facts from the motion hearing

At the motion hearing on February 3, 2020, the court viewed a concatenated, enhanced video of the physical altercation the State was seeking to introduce. Vol. I, JA 164, 165, 190, 221, 222. Counsel for Adam had filed an opposition. Vol. I, JA 131-140. Video footage of the incident had been captured by a neighbor's surveillance camera. Vol. I, JA 177, 160. Subsequently, between 6 and 8 clips of footage were forensically enhanced and clarified by manipulating brightness and contrast with special filters. Vol. I, JA 200. These clips were then strung together to play as a continuous video. Vol. I, JA 201. Over defense counsel's objections, the court watched the video four or five times as witnesses testified about the video. Vol. I, JA 164, 165, 190. Ultimately, the court granted the State's motion to introduce the video at trial. Vol. II, JA 256-258.

After incorporating all of this information into the factual basis of Adam's plea, the court accepted the Alford plea and set the matter for sentencing. Vol. II, JA 284-285, 286-288.

The court ordered a presentence investigation report (PSI) by the Division of Parole and Probation. Vol. II, JA 289. Then the court advised Adam, "Mr. Bernard, your conduct between now and sentencing will be important to the Court and you will again have an opportunity here to remain at liberty until your sentencing hearing as long as you abide by all the terms and conditions of your release." Vol. II, JA 290.

Facts from the PSI report

On June 17, 2021, the presentence investigation report was received by the court. Vol. II, JA 293. It related among other things, that Adam was 43 years old and had one prior misdemeanor DUI conviction from seven (7) years ago in August of 2014; he had no convictions for any crimes of violence; he had no other criminal history; he had no arrests or reports for any acts of violence; and he had never been to prison or served time in jail. Vol. II, JA 294, 295-296.

The PSI documented: Adam is blind in his left eye after being shot in the eye with a BB gun at age 6; he has no gang ties; he has been employed at least as far back as 2014 as a foreman with New Vista Builders in Gardnerville, Nevada: his father was an alcoholic, who was mentally and verbally abusive to Adam until his mother divorced him; and Adam has taken care of his mother since he was fourteen (14) years old. Vol. II, JA 294-295.

The PSI also included an Offense Synopsis, taken from records provided by the Douglas County District Attorney's Office and the Douglas County Sheriff's Office. The synopsis related: that *the victim,* Brian Cook, was "found to have a blood-alcohol level of .45 percent;" Adam was the individual to waive down the deputy and escort him to where Brian lay; and that both Kevin and Adam's interviews related that Brian was a bully and had previously, and on the night in question, threatened to blind Adam and to physically harm him. Vol. II, JA 296.

The PSI offense synopsis recounts: Brian pursued Adam to another friend's residence, after Adam left Brian's house; Adam does not remember exactly what happened because he was scared for his life and blacked out; and Adam moved Brian out of the road after the altercation. Vol. II, JA 296.

The PSI contains a statement from Adam about why he committed the offense: "I believe Brian was going to blind me with that knife that I was threatened with earlier that day. I was fighting for my life and my vision. I was terrified of him." Vol. II, JA 298. He also acknowledged the severity of what happened, "This incident destroyed both of our lives, Brian died and I will be a convicted felon and I forever carry the guilt of his death although completely unintentional." Vol. II, JA 298. Adam submitted a handwritten statement explaining the events of the day in detail. Vol. II, JA 302-304 .

Facts from Letters in Support and Sentencing Memorandum

On June 29, 2021, counsel filed eight (8) character letters in support of Adam. Vol. II, JA 306. All eight letters, written by individuals who have known him for many years, speak very highly of Adam and his character. Vol. II, 307-314. The letters call for the court to consider their input and for leniency. Vol. II, 307-314.

On June 30, 2021, the State's Documents and Information in Support of Sentencing and the State's Supplemental Documents and Information in Support of Sentencing, as well as counsel's Sentencing Memorandum and Documentation in Support were filed. Vol. II, JA 315, 325, 326.

The sentencing memorandum (memo) included background information on Adam, his childhood and the trauma of losing sight in his left eye: a fourteen-year-old boy put a BB gun to Adam's eye and pulled the trigger; Adam has issues with his sight, including depth perception, a limited field of vision, and glaucoma; and that Adam must be very careful with his right eye, as without it he would be completely blind. Vol. II, JA 327.

The sentencing memo described the history between Adam and Brian Cook: they first met in high school, when Brian was an upperclassman and bullied Adam, a freshman; to avoid Brian, Adam would walk around the outside of the school building; the two did not meet again until 2017, when Brian was hired to

work for the same company that Adam did; the bullying continued at the workplace; Brian would help himself to Adam's lunch, or sodas, and he would throw nails at Adam's good eye; he bullied Adam about taking his good eye and would escalate things when he drank; Adam would just bring extra sodas and turn his back to Brian to avoid conflict; Brian drank a lot and was always messing with Adam at work according to the interviews of Brian's sons, Elijah and Tristan Cook. Vol. II, JA 328-329.

The sentencing memo also provided information about Brian, the victim: "Brian had always been a drinker, but after his wife died of cancer, his drinking became excessive and he started drinking large amounts of whiskey and beer." Vol. II, JA 329. This information came from Brian's step-daughter, Ciara Araiza. Vol. II, JA 329, 344. Brian drank a lot of alcohol, a lot of the time according to law enforcement's interviews with Kevin Tholl and George Mejia. Vol. II, JA 329.

The memo gave a detailed description of what happened on the night of July 8, 2017, prior to the physical altercation between Adam and Brian: Adam and Kevin had gone fishing and had not invited Brian; Brian had been calling Kevin all day and was upset about not being invited; Adam and Kevin were planning on going to Walmart and Brian wanted to come; Adam and Kevin did not want Brian to come to Walmart because Brian was already very intoxicated,

so Kevin told Brian they would stop by his house for a few minutes to visit; Adam had never been to Brian's house; when they arrived, Brian was drinking Peppermint Schnapps and Coors light beer in the garage; Kevin and Adam accepted a beer while Brian bragged about a new knife, which he then lifted to his eye and made a popping sound—"lights out" he told Adam; Adam left the garage because it was clear that Brian was drunk and he was already taunting Adam about his eye; Brian's behavior was predatory and this act was his first act of predation on the night of July 7, 2018. Vol. II, JA 330.

The memo recounts: Brian and Kevin followed Adam into the front yard; Brian insisted that they all go fishing the next day, but Adam did not want to go fishing with him so he said he did not have a float tube or waders; Brian told Adam he had a pair for him and had his son get them for Adam to try on; Adam did not want to try the neoprene waders on, but when Brian yelled profanities and insisted, Adam pulled them on; this was another predatory act by Brian. Vol, II, JA 331.

The memo describes that minutes later, the neighbor's three-week-old puppy came over; without saying anything, Brian reached over and launched the puppy into the air; the puppy flipped several times and landed hard on the ground, crying out; Brian thought it was funny the puppy could do flips. Vol. II, JA 331. This information was taken from the State's interviews with Adam, George Mejia

(the dog owner), and Elijah Cook, Brian's son. Vol. II, JA 331. Adam, shocked at Brian's cruelty asked why he would do that to a puppy; Brian became irate and yelled at Adam, "Don't fucking tell me what to do, you don't fucking tell me what to do;" Brian's aggression was escalating; Kevin and Adam decided it was time to leave as Brian was too drunk and too volatile. Vol. II, JA 331.

The memo states: they went back to Kevin's house about a mile away; Adam was staying the night in Kevin's trailer so he did not have to drive back to South Lake Tahoe; as they were getting the trailer ready, Brian called Kevin and told him he was going "to come fuck Adam up." Vol. II, JA 331.

The memo recounts: Kevin told Brian that they were going to bed and to stay home; Brian hung up; Adam, hearing Brian yelling on the phone, asked Kevin if he was really coming over; Adam is and has been, for a very long time, afraid of Brian; Kevin, not wanting Brian to come over and harm Adam, called Brian back and told him not to come over. Vol. II, JA 331. Brian refused to listen to Kevin; Kevin spent 8 minutes on the phone with Brian trying to talk him out of coming over; Kevin called Brian back two more times and was still holding the phone to his ear when they heard Brian's F 250 diesel truck down the street. This information was taken from the call logs provided by Kevin Tholl to the State. Vol, II, JA 331-332.

As explained in the memo: Brian was actively pursuing Adam now; he ran the stop sign on the corner, and pulled his truck up onto the curb, almost striking the rear of Adam's truck, until coming to a stop in the dirt area in front of Kevin's house. Vol. II, JA 332. With the truck still running, Brian got out and told Adam he was going to kill him; as they square up, Adam asks Brian why he wants to beat him up; Brian tells Adam he is going to make him blind in his other eye; Adam knew what Brian was capable of and he knew how mean he could be when he was drunk; Adam was also very worried about where Brian's new knife was. Vol. II, JA 332.

The sentencing memo states that Adam did not remember much about the fight; Dr. Joseph McEllistrem, a forensic psychologist, will explain at Adam's sentencing the psychological process, called acute stress response, that occurs when someone is forced into a position of fight or be killed, or as in this case, be completely blinded or killed; this autonomic response is sometimes referred to as an amnesia like condition, or Condition Black, like when a police officer involved in a fatal shooting is certain he only fired two shots and then learns he actually emptied his clip and reloaded. Vol. II, JA 332.

The memo informs: Dr. McEllistrem will explain at sentencing why Adam does not remember much of the fight and why Adam fought like he did when Brian came to kill him; and he will explain the psychology and neurobiology of

"fight or flight" and the role that past trauma plays in a person's threat perception, thinking, and reaction. Vol. II, JA 332.

The sentencing memo then describes the physical confrontation that occurred when Brian arrived at Kevin's house, after telegraphing his threats to kill Adam over the phone minutes earlier; the confrontation was recorded by a neighbor's home security system; the video is disturbing to watch; but, if there is an understanding of what is happening in Adam's mind when Brian, his extremely drunk aggressor, who he has already retreated from twice that night, follows him to Kevin's house and is now confronting him, telling him he is going to kill him and make him blind, Adam's physical response can be put into context. Vol. II, JA 332-333.

As explained by Dr. McEllistrem, a chemical reaction toppled the first domino, at which point there was no stopping, until the last domino fell; when Adam observed Brian's truck pull up onto the grass, he was no longer capable of rational thought, as the body's autonomic protection response had been triggered and would not turn off until it was interrupted; in this case, Dr. McEllistrem believed it was when Kevin grabbed Adam's shoulder and interrupted the chemical reaction. Vol. II, JA 333.

The memo describes the video: Adam is seen fighting for his life, fighting for his sight, not to be blinded, and to stay alive; he did not stop defending himself

until Kevin came up to him and grabbed his shoulder; the State believes that Adam struck Brian 30 plus times and kicked him 7 times; almost every punch was identical: the same hand, the same motion, attempting to strike the same area. Vol. II, JA 333. However, because Adam has only one eye to see with, he has no depth perception, and a very limited field of vision; many of the punches did not connect with Brian and this is confirmed by the photograph of Adam's knuckles taken immediately after the altercation and the hospital reports; Exhibit 2 of the sentencing memo depicts Adam's knuckles, which are scraped from hitting the asphalt of the street. Vol. II, JA 333, 347. Brian had an open bleeding cut and swelling on his right brow, and bruises on his left eyelid and socket, as well as a small amount of blood on his nose and lip. Vol. II, JA 319.

The sentencing memo explains: had those punches connected forcefully with Brian's face, one would expect to see multiple broken bones, fractures, tears and cuts; Brian had no facial or orbital fractures—no broken or cracked eye orbits, no broken nose; both ears were uninjured; his jaw was intact and normally aligned; he had no broken or loose teeth. Vol. II, JA 333. Exhibit 3 of the sentencing memo is the HENT exam from the hospital, detailing Brian's head, ears, nose and throat upon admission. Vol. II, JA 349-350.

Brian's actual injuries were found by both the medical examiner and the forensic pathologist to be consistent with being *struck once* and falling to the ground and hitting his head. Vol. II, JA 333.

The memorandum also documents Adam's concerns for Brian when he does not get up after the fight and how he asks Kevin to help him move Brian out of the street so Brian does not get run over; Adam splashes Brian's face with bottled water to try to wake him; Adam waves down a passing police vehicle; Adam and Kevin take the officer to where Brian is lying down; medics are called; Adam is cooperative and remains on scene; a neighbor informs one of the officers he has video surveillance of the incident from his home security system; the officer watched the video, but due to its quality, he is unable to see clearly what happens after Brian pulls up in his truck, as Adam and Brian are lost to darkness in the video. Vol. II, JA 333-334.

The sentencing memorandum also provided information from the hospital about Brian's condition: Douglas County Investigator Rick Koontz drove to Renown Hospital and met with charge nurse, Chris Paul, who informed him "that Brian's blood alcohol results were .45%, which is extremely high;" Nurse Paul explained Brian would remain in a medically induced coma until the swelling in his brain went down and he goes through alcohol withdrawals; Nurse Paul told Inv. Koontz that Brian's vitals were stable and he should recover from the injury.

Vol. II, JA 334. This conversation was documented by Exhibit 1 of the sentencing memorandum, Inv. Rick Koontz's report. Vol. II, JA 343.

However, the sentencing memo also explained Brian's drinking had taken a serious toll on his body: a knee injury, months old, had been unable to heal and was in such bad shape that hospital staff originally believed it had occurred during this incident; Brian's lab work showed problems with his white blood cells and platelets; early blood cultures showed multiple infections; his liver was failing; he ran a constant fever; Brian's lifestyle, especially in the months leading up to his death, had seriously damaged his body. Vol. II, JA 334-335.

Hospital records over the next three weeks show Brian's head injuries went through their normal course and were healing; the neurosurgeon took him off the phenobarbital and planned to bring him out of the coma, as his head CTs were stable and his neurological responses were good. Vol. II, 335. Exhibit 4 of the sentencing memorandum are the Progress Notes from three of Brian's treating doctors and document this information. Vol. II, JA 352-354.

The hospital was not able to get Brian's infections under control; he was on constant antibiotics; they tried several different antibiotics but his fever continued. Vol. II, JA 335. This battle with infection is documented in Exhibit 5 of the sentencing memo, which is the Medical Decision Making/Problem List; Core Measures & Quality Metrics, from the hospital record. Vol. II, JA 356-358.

On July 30, 2017, Brian was on the way to radiology and went into cardiac arrest; hospital staff provided CPR and then took him to CT; on the way back, Brian went into cardiac arrest a second time and was again given CPR and medication; the cause of his cardiac arrests is listed as unknown. Vol. II, JA 335. These instances of cardiac arrest are documented in Exhibit 6, Progress Notes from Dr. Nicholas Spoerke, at Renown. Vol. II, JA 360. Hours after this second instance of cardiac arrest, Brian progressed to a state of brain death and was pronounced dead on July 31, 2017. Vol. II, 335.

The sentencing memo also informed the court: Brian had been suffering from heart issues for several years; medical records provided by Renown Health, pursuant to subpoena, document heart issues related to alcohol consumption in 2014, 2015, and 2016. Vol. II, JA 335. Exhibit 7 contains medical reports from four different clinicians who treated Brian and documented heart related issues. Vol. II, JA 362-372. Most relevant was Dr. Miller's report of December 13, 2014, which related that, "*Brian was strongly cautioned that he absolutely must discontinue his alcohol usage or that he will have a progressive cardiomyopathy leading to his death.*" Vol. II, JA 363. Dr. Miller wrote that two and a half years before July 8, 2017. Vol. II, JA 363. Brian did not cease drinking during those two and a half years and on July 8, 2017, had a blood alcohol content of .45—which alone can be lethal. Vol. II, 335.

The memo also detailed Adam's cooperation with law enforcement following this altercation and the content of his two interviews with Investigator Storke: Adam's responses made clear that he had been very afraid that Brian was going to hurt him; although Inv. Storke tried multiple times to get Adam to admit that he was mad at Brian, or angry with him; Adam never waivers; he was afraid, deathly afraid, that Brian would use his knife, or get a gun out of his truck or ... he had no idea what Brian would do if he got up. Vol. II, JA 336.

Adam is fully cooperative when Inv. Storke asks for his phone in order to conduct a forensic analysis; Adam consents and immediately turns over his phone; Inv. Storke tells Adam he can leave, but criminal charges are going to be filed against him; Inv. Storke explains that he will be charged for Brian's death and he will be arrested and taken to jail. Vol. II, JA 337.

Four months later, Adam is formally charged with Open Murder for the death of Brian Cook; Adam was still living at the same address in South Lake Tahoe with his mother; he had not left the area or gone on the run. Vol. II, JA 337.

The sentencing memorandum reported on Adam's minimal criminal history: Outside of one prior misdemeanor conviction for DUI in August of 2014, Adam has had no other contacts with law enforcement during his 43 years of life. Vol. II, JA 337.

The memo reviewed Adam's conduct while out on bail: Adam was taken into custody on March 16, 2018, and released on bail on May 2, 2018; his bond was secured by money that friends and family pooled together; other than those 48 days, Adam continued to reside in this community, living with his mother and working in construction. Vol. II, JA 337. He was under the supervision of the Department of Alternative Sentencing for *more than three years*; other than consuming a Kombucha Tea drink, prior to his arraignment, he never had an issue with any of his bail conditions; he never failed to call for testing; he never missed a test, nor consumed alcohol; at the end of June of 2021, Adam had over three years of sobriety. Vol. II, JA 337-338.

Even during the COVID, Adam continued to work and to be of assistance to others; he earned significant advancement at his construction job and was in charge of his crew; he is respected and appreciated by his boss and fellow employees; many of them wrote letters on his behalf, which were filed separately with the court. Vol. II, JA 338.

Four years had passed since the altercation with Brian on July 8, 2017; during those four years, Adam lived in our local community; he was law-abiding and never presented a danger to others; his conduct over the last four years, including his cooperation with law enforcement prior to his arrest, should have spoken volumes to the court about who Adam is and his ability to comply with

whatever the court asked of him. Vol. II, JA 338. Adam demonstrated that the tragedy that occurred four years ago was an isolated incident, put into motion by Brian's refusal to simply stay home, rather than pursuing Adam to carry out the threats he made to Adam's life and sight. Vol. II, JA 338.

The memo also had a sentencing recommendation: pursuant to the plea agreement, the parties were free to argue for any lawful sentence; Adam requested that the court sentence him to 12 to 36 months in prison, to suspend that sentence, and to place him on probation for a term not to exceed 36 months; the law allowed the court to sentence Adam to a probationary sentence, as the legislature has determined that there are certain cases of voluntary manslaughter that call for probation rather than prison. Vol. II, JA 338.

Counsel for Adam also listed in the sentencing memo many of the reasons why a probationary sentence was warranted in this case: Adam knew Brian and had no intention of harming him on July 8, 2017; as Brian became increasingly intoxicated and aggressive, Adam retreated on multiple occasions; Adam even left Brian's residence; Brian continued his threats to Adam, calling Kevin multiple times and informing him he was coming—coming to hurt or blind Adam. Vol. II, JA 338.

Had Brian just stayed in the safety of his own home, rather than pursuing Adam to Kevin's house, there is a good possibility he would still be alive today;

counsel was cautious about this statement, as Brian's drinking and heart issues were already being pushed beyond their limits; but Brian did not stay home; he pursued Adam, he cornered him; Adam did everything in his power to protect himself and his sight. Vol. II, JA 339. As soon as Brian was no longer perceived as a threat, the first thing Adam did was to tell Kevin they needed to get him out of the street so he would not be run over by any cars. Vol. II, JA 339.

The memo also included information regarding how Adam is learning to cope with the grief he deals with on a daily basis over his actions and their part in Brian's death; Adam was seeing a counselor in order to work through the depression and guilt over what happened; Adam offered Brian's family and friends his most sincere condolences. Vol. II, JA 339. Although there is nothing he can do to bring Brian back, Adam has chosen to live his life in a way that honors Brian's death—he is sober; continues to be a caregiver to family and friends; and is accountable and productive at work. Vol. II, JA 339.

The sentencing memo concluded with reasons why sending Adam to prison would not serve the interests of justice: Adam, with his gentle nature and blindness, would be an easy target in prison; prison is the place that society has reserved for the worst criminals—those who have demonstrated repeatedly that they cannot and will not follow the law or engage in treatment; based on his 40

plus years of life before this tragedy, and his four years of life following it, Adam is *not* one of those people. Vol. II, JA 339.

Facts from the sentencing hearing:

On July 1, 2021, the court held a sentencing hearing. Vol. III, JA 374. Adam appeared before the court out of custody. Vol. III, JA 376. Also present were friends and family of Adam and friends and family of Brian Cook, the victim.

After reviewing the presentence investigation report and making corrections to that document, the court informed that it was also in receipt of a sentencing memorandum and documentation in support that had been filed by counsel for Adam. Vol. III, JA 381. The State had no objection to the court considering the sentencing memorandum and documentation in support for sentencing purposes. Vol. III, JA 381.

The court stated, "The Court has considered—has reviewed it and now will consider it when the Court sentences Mr. Bernard." Vol. III, JA 381.

The court stated it had received the letters in support of Mr. Bernard filed on June 29th, 2021. Vol. III, JA 381-382. The State had no objection to the court considering the letters in support of Mr. Bernard. Vol. III, JA 382. The court then said, "The Court has received those letters in support. I've reviewed them. I will consider them for purpose of sentencing Mr. Bernard." Vol. III, JA 382.

Counsel was then invited to make her sentencing arguments on behalf of Adam. Aaron McCormick, a character witness, addressed the court prior to counsel's arguments: Mr. McCormick was Adam's friend and employer and he had known Adam for more than ten years; he described Adam as "a kind, warm, and generous person;" Mr. McCormick state that "Beyond his generosity and thoughtfulness, Adam's most important trait is his peaceful nature." Vol. III, JA 389-391. He expressed how much regret and sorrow Adam had over this incident and that he knew Adam had done everything he could do to avoid the conflict with Brian. Vol. III, JA 392.

Counsel then began her remarks in support of Adam. During the first minute or two, counsel began to describe the victim, Brian Cook. Vol. III, JA 393. Counsel stated, "Brian suffered a tremendous loss about I want to say five years before this incident when he lost his wife to cancer and that loss caused Brian to start to drink. Brian drank to cope with that loss, with that sadness." Vol. III, JA 393. The court interrupted and asked, "Ms. Pence, are you referring to your client?" Vol. III, JA 393. Counsel responded she was not. The court said, "Okay." Vol. III, JA 393. Counsel explained, "I'm referring to the victim in this case." Vol. III, JA 393. The court replied, "Thank you." Vol. III, 393.

At one point, counsel requested that Dr. Joseph McEllistrem take the stand for a presentation that would be important for the court to understand what it saw

in the video. Vol. III, JA 404. The presentation included slides prepared by Dr. McEllistrem, and lasted one hour and thirteen minutes.

Dr. McEllistrem was then sworn to testify honestly under oath. Vol. III, 405. He testified he was a forensic psychologist in private practice; that he is a clinical psychologist with a forensics subspecialty, and the cases he deals with involve persons who are interacting with the court system. Vol. III, JA 407-408. Dr. McEllistrem has published peer reviewed articles, and has previously testified at sentencing hearings and as an expert witness in criminal trials. Vol. III, JA 409-411. Many of his cases include some level of violence; he is published on the modes of violence; and he had been retained by the Assistant United States Attorney's Office in the Timothy McVeigh, Terry Nichols, Oklahoma City bombing case because of his specialized knowledge on the modes of violence. Vol. III, JA 410.

Dr. McEllistrem testified that he has been qualified as an expert on cases involving predatory violence. Vol. III, JA 411.

He explained to the court that he had been asked to explain to questions in order to understand Adam's behavior as seen on the video in this case: The first was, "Why did Adam Bernard, a 43-year-old man, with no juvenile criminal history and no known adult history of violent behavior, act in an uncharacteristically aggressive manner on the night of the alleged offense?"; the

second question was, "How can we understand his state of mind at the time of the alleged offense and how it influenced his reaction?" Vol. III, JA 412.

Dr. McEllistrem testified: he had reviewed the investigative materials and interviews in this case; had met personally with Adam; developed a developmental and clinical history; and then turned to the literature he felt could help to understand what was going on that night. Vol. III, JA 413.

In answering the first question, it was Dr. McEllistrem's belief that "at the time of the alleged offense, Adam Bernard believed the threat to his life was imminent. He fled, was pursued and felt trapped." Vol. III, 413. As to the second question, he believed that ". . as a result of the imminent threat, Mr. Bernard experienced an acute stress disorder, also known as an acute stress reaction was induced." Vol. III, JA 413.

Dr. McEllistrem explained that understanding the mode of violence that occurred that night and the available clinical and diagnostic classification systems that captured Adam's reaction was necessary to support his hypotheses. Vol. III, JA 413. He examined Adam's mental state on the evening of the altercation, through conversation, to better understand what was going through Adam's mind. Vol. III, JA 413. His next steps were to study the clinical diagnostic works of acute stress disorder and acute stress reaction; Dr. McEllistrem then looked at the neurobiology of the emergency response system of the brain and, lastly, he looked

for parallels with other individuals in other contexts who have been through similar situations who had reactions similar to Adam. Vol. III, JA 414.

Dr. McEllistrem spent the next hour explaining the bimodal classification of violence, affective violence vs predatory violence, to aid the court in understanding Adam's behavior on the video; Adam displayed affective violence, which is the result of a perceived threat; Brian, the victim, displayed predatory violence. Vol. III, JA 414-418. Brian leveled the threat; Adam retreats multiple times from Brian; Brian pursues him—"that's predatory quality." Vol. III, JA 416. "There was a directed, clear, detailed threat that he was going to come and take his eye, potentially take his life and then he acted on that threat." Vol. III, JA 416. Brian drove his car to Kevin's house, and called a friend for backup; he took the steps to effectuate the assault by getting to Adam. Vol. III, JA 416-417.

Dr. McEllistrem then discussed how Adam's body language in the video supports his expert belief Adam is displaying affective violence: Adam makes himself really big; he is kind of puffed out with his arms out at his side; he is walking with his legs spread out to look bigger; he is advancing in a very square way against the threat in order to make himself look better—basically body language one would expect to see in a cornered cat, big and loud. Vol. III, JA 417.

Dr. McEllistrem testified that there were things that he observed Adam do in the video that led him to believe that his behavior was an act of affective

violence, resulting from a perceived threat: it was defensive in nature; he was swinging, then kicking, at which point the brain has triggered into a save yourself mode...and you just don't stop until you have exhausted all your resources. Vol. III, JA 418.

Asked what triggers this affective response, Dr. McEllistrem testified: being traumatized, being put in a position where you are traumatized by something that is occurring in your life; once that traumatized feeling kicks in, the brain goes into that neurobiological protection mode. Vol. III, JA 418. He explained trauma as defined by the American Psychological Association is exposure to actual threatened death, serious injury or sexual violence. Vol. III, JA 418-419. Dr. McEllistrem explained Adam believed Brian's threat to target his eye or take his life to be real. Vol. III, JA 419. He reviewed the history between Adam and Brian and how Adam's pattern had always been to retreat, retreat, retreat from Brian; although Brian's threats to Adam's eye were numerous, over a very long stretch of time, never once did Brian advance on Adam to enact such a plan until that night. Vol. III, JA 419-420. Adam had never been confronted with Brian following through with his threats until that night when Brian was actually coming to Kevin's house. Vol. III, JA 420.

Dr. McEllistrem reiterated that the trauma, or exposure to exceptional physical and/or mental stress, or to actual or threatened death, serious injury or

sexual violence, has to be present in order to produce an acute stress response. Vol. III, JA 421-422. His opinion is when Adam heard the vehicle approaching, and certainly when he saw Brian's vehicle, was when the threat was perceived and the traumatic response began. Vol. III, JA 422.

According to two clinical classification manuals that define acute stress disorder or acute stress reaction, the reaction to trauma can cause the brain to be in a state of limited consciousness; to narrow attention; an inability to comprehend and being disoriented; the sense of self, reality, and surroundings is highly distorted by the traumatizing sequence of events that is occurring. Vol. III, JA 423. Dr. McEllistrem listed the symptoms that appear after a person has an acute stress response per the classification manuals: partial or complete amnesia; inability to remember an aspect of the traumatic event; spot memory—only remembering certain scenes from the traumatic event, and being unable to tell the complete story of what happened from beginning to end. Vol. III, JA 423.

Dr. McEllistrem detailed what happens in distinct parts of the brain when someone experiences an acute stress reaction; when someone has perceived a threat, there is a rapid escalation of neurobiological responses that cascade through the whole system; when faced with a threat, the brain bypasses higher cortical structures that are responsible for planning, reasoning, judgment, and thought; these parts of the brain are completely bypassed in order to respond

immediately to the threat; included in these brain structures is the hippocampus, which is responsible for memory. Vol. III, JA 425-427. The energy needed for memory is better used by other parts of the brain that are trying to respond to the threat—simply put, "if you don't live through it you don't need to remember it." Vol. III, JA 427.

Neurochemicals, such as norepinephrine and adrenaline, are released to put the brain and body into a physiological hyperarousal; this prepares the body and mind for the coming threat; adrenaline gives a person energy, increases blood pressure and the ability to absorb oxygen so a person can defend his life with every resource available; it puts on bypass every mental resource not helpful with this goal. Vol. III, JA 427-428.

Dr. McEllistrem explained: when Adam saw Brian's truck, he was caught off guard; although Brian had threatened Adam's life and eye over the years, Brian had never advanced on any plan; Adam felt trapped and unable to escape at this point. Vol. III, JA 428-429. In response to the perceived threat, the reaction kicks in and Adam is no longer able to connect to the thinking parts of his brain; he is only reacting; he is trying to save himself. Vol. III, JA 429-430.

Asked if Adam would have been able to control his body's response in this situation, Dr. McEllistrem responded, "He would not have been able to turn that off." Vol. III, JA 430.

Lastly, Dr. McEllistrem walked through Adam's physical behavior on the video: Adam's initial approach with Brian, trying to make himself look big, flailing his arms to look big and menacing, like a trapped cat, in hopes that Brian will retreat. Vol. III, JA 435. He describes the affective violence Adam displaying: flailing his arms, not particularly artful, advancing, pacing because he cannot let Brian strike first, he has to strike first to save himself; Adam's strikes are not well placed, he is just swinging for his life and when his arms get tired, he is kicking; Adam's body is throwing everything into this; he is flailing not carefully placing punches. Vol. III, JA 436.

The repetitive motion of his arm, over and over, is consistent with autonomic triggers that happen when the body and brain take over and it is no longer a cognitive process. Vol. III, JA 437. Dr. McEllistrem testified that at this point, if Adam let's up, if he fails, he may die: "He knows he's in the fight for his life and he just—the body and mind take over and bring every resource to save his life, and there's no ability to like make inferences between punches or look for vital or to look to see how he's doing." Vol. III, JA 437. He explained Adam was focused entirely on the threat; everything else was lost; he had no perception of what was happening around him; he continued to strike Brian with his arm until it tired, then he used his legs; his body was going to use every resource available until the brain was convinced the threat was gone. Vol. III, JA 438.

Adam's autonomic behavior only stopped when Kevin approached and grabbed his shoulder; Kevin interrupted the "tidal wave of arousal that's going on by touching him. It's kind of like a grounding point." Vol. III, JA 438-439. The touch broke the chain reaction of affective violence—someone was coming, saying that it was over. Vol. III, JA 439.

Dr. McEllistrem points that Adam's thinking brain has come back online and he is worried about Brian being in the street; Adam's cognitive function is returning but his mind is still not convinced that he is free from danger. Vol. III, JA 439. Dr. McEllistrem's explained the reason for Adam's last kick—it was a cautionary kick, to ensure before Adam lays hands on Brian to bring him out of the street to safety, Brian is not going to get up and start it all over again. Vol. III, JA 440.

Finally, Dr. McEllistrem explained the analogy of officer involved shootings (officers faced with a threat and their response to the threat). Vol. III, JA 442. Dr. McEllistrem is often called to meet with deputies quickly after the event and to follow them until they are prepared to return to work; the findings in his work with these officers and the large number of studies that have been done on officers involved in shootings were very similar to what happened with Adam on the night of July 8, 2017; the studies revealed similar issues with perception and memory; this explains why Adam told Inv. Storke was not able to remember

how many times he struck or kicked Brian and why he described the incident as chaos or black out. Vol. III, JA 442-445, 441.

Dr. McEllistrem finished with the conclusion to his original questions; based on his expert knowledge, he believed that "Brian pursued Adam in a predatory manner. He communicated a clearly articulated and potentially deadly threat. His verbalized threat was immediately followed by a direct and targeted action that required Brian to drive to Adam's location." Vol. III, JA 447. Dr. McEllistrem believed Adam met the criteria for experiencing exceptional physical and mental stress, which was the exposure to Brian's threat of death or serious injury, and that Adam's behavior was a form of affective violence, *not predatory*. Vol. III, JA 447, emphasis added. Dr. McEllistrem informed there was nothing Adam could have done once he perceived Brian's threat to stop his body from responding in the manner it did in order to survive. Vol. III, JA 447.

The State did not object to any of Dr. McEllistrem's testimony.

Adam's mother, Helen Bernard, then read a letter she had written about her son. Vol. III, JA 452. After taking the oath, she testified about Adam's caring and generous personality; that she was proud of his work ethic; how he had lost his vision in his left eye at 6 years of age; how he played sports even with a visual handicap; how he was targeted by bullies who knew about his loss of vision; that Adam was not an aggressor, but rather sensitive and protective; how she relies on

him as she is disabled and on a fixed-income; and how very sorry they both were for the outcome of the altercation and for Brian's family. Vol. III, JA 452-453.

Counsel concluded her sentencing argument: she asked the court to impose a prison sentence of 12 to 30 months, to suspend that sentence, and to place Adam on probation; she asked the court to rely on the information and the medical reports in the sentencing memorandum to temper Adam's sentence. Vol. III, JA 455-461.

Adam made a statement, apologizing to Brian's family, expressing his remorse and how he wished he could change what happened; he asked for consideration of his good character and his sobriety; and if granted probation, he would continue to live life as the best version of himself. Vol. III, JA462-463.

Then the court took a five-minute recess and informed it would not rush anyone and would go as long as necessary. Vol. III, JA 463. Multiple comments were made by friends or family of Brian, from behind the bar, along the lines of, "you're damn right you won't." There had been other derogatory comments made during Adam's counsel's sentencing arguments, but they are not audible in the JAVS recording and were not transcribed. The court did not respond to the comments.

However, counsel for Adam brought the comments to the court's attention by referring to them prior to James Sonsteng, Brian's godfather, taking the witness

stand; Mr. Sonsteng was not a victim by definition or by Marsy's law; asked if she had any sense of what Mr. Sonsteng was going to say, counsel replied, "Your Honor, I don't. I did hear some of the comments he made during the proceedings so far so I can imagine." Vol. III, JA 491. The court did not address Mr. Sonsteng or anyone else regarding the comments being made from behind the bar during the hearing. The State then made its sentencing arguments and called witnesses to make victim impact statements. Several of them called Adam names: ugly, a despicable human being, a coward, and a murderer. Vol. III, JA 499, 500, 517. The court said nothing.

During the final victim statement, Thomas Nobriga, Brian's stepfather, personally addressed Adam's counsel: ". . . let me start by saying this, Ms. Pence, I did not give you the right nor will I ever to address my family on what Brian would want. You did not know him. You represent a murderer. Your defense is not your life. It's our life. It is your job. You go home and do a, put one in a win column or a lose column." Vol. III, JA 517. The court did not do anything in response to Mr. Nobriga's comments to counsel. Vol. III, JA 517.

Minutes later, Mr. Nobriga again addressed counsel, telling her he had written several things down to reference: counsel's sentencing arguments did not make things better for the family; "You didn't make it better. You made it worse

for him." The court, again, did nothing when Mr. Nobriga addressed counsel directly. Vol. III, JA 519.

Mr. Nobriga looked directly at counsel stating, "You can twist your words just like you did in the preliminary hearing. You can omit the full details of everything you want to say to defend him." Vol. III, JA 519. He continued, "To me that's a lie when you purposely omit something. So let's talk about omitting the first part, what really pissed me off today." Vol. III, JA 519. During this commentary, Mr. Nobriga began gesturing and pointing. The court did not say or do anything in response to Mr. Nobriga's comments or gestures aimed at counsel. Vol. III, JA 519.

Mr. Nobriga then questioned counsel about what she omitted in his son's medical history and if she knew what it said on his son's death certificate. Vol. III, JA 519. The court did not respond to Mr. Nobriga questioning counsel. Vol. III, JA 519. Mr. Nobriga continued his tirade against counsel, "Was it not important to for you to talk and say that. Adam did it." Vol. III, JA 519-520. He went on, pointing at counsel with the pointer fingers of both hands, that his son died from brain bleeds caused by a savage man, "one that you have allowed using your crooked system to believe that he is the victim of a heinous crime." Vol. III, JA 520. The court did not admonish the witness in any way. Vol. III, JA 520.

Mr. Nobriga went on to make derogatory comments about counsel's decision to use an expert witness, Dr. McEllistrem, and then made fun of his testimony. Vol. III, JA 520. Again, the court did nothing. Vol. III, JA 520.

Mr. Nobriga then said to Adam's counsel, "You also said the plea . . ." Vol. III, JA520. He turned, looked at the court and asked what the plea was called. Vol. III, JA 520-521. The court told Mr. Nobriga, "An Alford plea." Vol. III, JA 521. Mr. Nobriga continued how the Alford plea did not give everyone the opportunity to represent the facts, "One person is dead. That person can't speak." Vol. III, JA 521.

Mr. Nobriga continued to address counsel directly about her sentencing arguments; he informed counsel that she had crossed the line with him when she spoke for his son; he had not given her that right. Vol. III, JA 521.

Immediately following Mr. Nobriga's testimony and tirade on counsel, the court imposed Adam's sentence. Vol. III, JA 522. The court spent 2 minutes and 14 seconds imposing his sentence. Vol. III, JA 523-524. The court's only comments were that we cannot know the intent in someone else's mind, but we can judge that by looking at the facts and circumstances. Vol. III, JA 523. The court continued, that in some cases, we have statements from witnesses, defendants, or victims to help us know the facts, but that in this case, "there's one person that can't give their statement and that's Mr. Cook." Vol. III, JA 523.

The court stated that in this case we had a video of the entire event and said to Adam, "And sir, you cannot run from that videotape. That videotape in watching it lends evidence of malice expressed or implied, and a strong sentence is appropriate in this case." Vol. III, JA 523.

The court then sentenced Adam to the maximum sentence allowed by law, maximum prison time, maximum fine, and maximum attorney's fee: ten years in prison, a $10,000 fine, $500 in attorney fees, and $178.00 in assessments. Vol. III, JA 523-524.

9. SUMMARY OF THE ARGUMENT

Adam's first argument focuses on his sentence. By imposing the maximum sentence, the court abused its discretion. (Issue I). The court relied solely on a single piece of suspect evidence, a brief video clip that had been digitally enhanced and formed by piecing smaller separate video files together. The court failed to consider and balance the voluminous mitigating information provided in the Preliminary Hearing transcript, the sworn testimony at the Motions Hearing, and the Sentencing Memorandum and Letters in Support. The court also failed to weigh and consider the expert testimony provided by Dr. McEllistrem at sentencing on the issues of bimodal violence and acute stress response as they related to Adam's state of mind and his behavior as observed on the video. The court offended the Legislature's creation of a range of penalties for the crime of

voluntary manslaughter by sentencing Adam to the maximum sentence, as its decision leaves no available punishment for defendants who have committed the same crime but have less or no mitigation information.

Adam's second argument focuses on the sentencing hearing itself. The court failed to provide Adam with a fair sentencing hearing in violation of his due process rights. (Issue II). The court did not perform its sentencing duties competently or impartially. The court's failure to read the sentencing memorandum, to keep an open mind to the issues before it at sentencing, to control witnesses and to maintain decorum undermined the court's independence, integrity, and impartiality. The sum of the court's failures during Adam's sentencing hearing violated his due process rights and deprived him of fundamental fairness, a neutral and proper setting in keeping with the nature of the proceeding, and an absence of bias and undue influence.

Individually and cumulatively, these court failings and errors require that Adam's sentence to be vacated and his case be remanded for sentencing in another court.

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10. ARGUMENT

I. THE COURT ABUSED ITS DISCRETION IN SENTENCING ADAM BERNARD TO THE MAXIMUM SENTENCE

A. The court failed to consider mitigating information in sentencing Adam: Adam's lack of criminal history, evidence of Adam's character, the predatory conduct of the victim, the victim's pre-existing medical issues, and Adam's conduct while out on bail.

It is true that the district court has wide discretion in its sentencing decision. *Howk v. State*, 103 Nev. 659, 664 (1987). However, in making that decision, the district court must consider information submitted in mitigation of punishment by the defendant. NRS 176.015. In this case, the court failed to consider and properly weigh the voluminous mitigating information presented.

The court did not consider Adam's lack of criminal history and or the complete absence of any reports or arrests for any type of violent behavior. Adam has one prior misdemeanor conviction for Driving Under the Influence, a non-violent offense, approximately seven years ago. He has no gross misdemeanor convictions and no felony convictions. He has never served time in jail or in prison.

It did not consider the eight character letters that described Adam as a gentle, kind, caring, helpful, generous individual. The court never mentioned a single aspect of the letters: not their content, their authors, or their number.

It did not consider the victim, Brian's, conduct of threatening serious bodily harm to Adam, as set forth in the Amended Information. It did not discuss Brian's threats that night to take out Adam's eye and blind him, or to kill him, as documented in numerous witness interviews. Nor did it consider Brian's pursuit of Adam in an aggressive drunken state—from the garage to the front yard, and ultimately, driving over a mile, in pursuit of Adam, to Kevin's house. All of this conduct occurred while Brian was extremely intoxicated as evidenced by his .45 blood alcohol level. The court did not consider that this entire incident would have been avoided had Brian simply stayed home.

The court did not consider Adam's conduct while he remained in the community following this incident for almost *four years*. During those four years, Adam has had no other contact with law enforcement. Although the court specifically informed Adam at the time of his arraignment, that his conduct would be important to the court at sentencing, it was not considered. Vol. II, JA 290. He maintained full-time employment at New Builders Construction Company and advanced in his career there. He had over three years of proven sobriety at the time of his sentencing. He performed exceptionally well under heavy supervision by the Department of Alternative Sentencing—supervision that lasted years, not months. Adam never failed to report; he did not miss any tests; he did not consume any alcohol. His supervision fees were paid in full. The court did not

address why it previously told Adam that his conduct on bail would be important at the time of his sentencing and then failed to consider that conduct or gave that conduct zero weight in mitigation. Had Adam disregarded the terms of his release on bail, been unproductive, or committed new crimes during *the four years* he was out of custody, the court could not have imposed any harsher sentence than it did—rendering his conduct while out on bail meaningless.

The court also failed to consider the extent of the injuries actually inflicted by Adam, although it stated that it would incorporate all of the information from the preliminary hearing as part of the factual basis for Adam's plea. Vol. II, JA 284-285, 286-288. The lack of injuries to Brian's face and head, as documented by hospital records and the testimony of medical examiner, Dr. Ann Bucholtz, provided the court with information it needed to consider when viewing Adam's behavior in the video presented in this case. Had Adam's punches connected forcefully with Brian's face, one would expect multiple broken bones, fractures, tears, and cuts. Brian had not a single facial or orbital fracture—which supported the expert's testimony that many of Adam's swings did not connect with Brian. The court also failed to consider the information from hospital records that showed Brian's head injury, which was attributed to Adam, was healing and stable, and his neurological responses were good enough that his doctors had decided to bring him out of the medically induced coma.

Consideration of this information was crucial as the court relied solely on the video in sentencing Adam. Vol. III, JA 523. It looked bad, so the court deemed it to be bad—"evidence of malice, expressed or implied." Vol. III, JA 523. If Adam's swings were an autonomic response, as explained by Dr. McEllistrem, to "an attempt by Brian to commit a serious personal injury" on Adam (as alleged in the Amended Information), and many of them did not even connect with Brian, as per the hospital's documentation of actual injuries and the photo of Adam's knuckles (Exhibits to the Sentencing Memorandum), where is the evidence of malice? Adam's first thought, after Kevin brought him out of his acute stress response by grabbing his shoulder, was Brian's safety: to get Brian out of the road so he would not be harmed by any passing cars—absolutely contrary to malice, and ignored by the court.

Had Adam been armed and simply shot Brian upon Brian's arrival to blind or harm him, Adam would not have been criminally charged, as his actions would have been a clear case of self-defense. Adam was not armed, so he had to fight for his sight and his life with his hands and feet. The court's absolute refusal to consider the neurobiological changes that occur during a fight for life renders Adam's sentence unjust.

Finally, the court ignored other factors that may have contributed to Brian's death, including his acute alcohol intoxication, which can be fatal; the fact that

Brian was fighting an infection during the entire time he was hospitalized and was ultimately diagnosed with severe meningitis, which can be fatal; and Brian's previous heart health issues, serious enough that one physician warned him, three years before this altercation, that if he did not stop drinking alcohol, he would end up dead from progressive cardiomyopathy. Brian had two cardiac arrests in the hospital and was then pronounced brain dead.

While the court is not required to make findings regarding its sentencing decision, the court did not mention a single factor in mitigation during the two minutes and 14 seconds in which it imposed sentence. It did not explain how it had weighed and accounted for the eight character letters; the two character witnesses' testimony; or any of the information in the presentence investigative report or the sentencing memorandum.

Adam's maximum sentence provides support for his argument that the court failed to consider any of these mitigating factors. Had the court considered any of this information, and given any one part of it any weight at all, his sentence would have been adjusted accordingly. Based on the imposed sentence, it is clear that either the court did not consider the information or the court did not give *any* of the mitigation evidence *any* weight. Regardless, these failures resulted in extreme prejudice to Adam as his maximum sentence did not take into account

the mitigation information in the court's possession and constitute an abuse of discretion.

B. The court failed to keep an open mind regarding the expert witness testimony on the issues of the modes of violence and acute stress disorder or reaction and failed to weigh and consider the expert's opinions as they related to Adam's actions on the video.

In addition to failing to consider the mitigating information in Adam's case, the court also failed to keep an open mind regarding the expert testimony of Dr. Joseph McEllistrem on the issues of the modes of violence and acute stress response. Pursuant to the Nevada Code of Judicial Conduct, judges are required to perform all duties of judicial office fairly and impartially. *NCJC Canon 2, Rule 2.2.* "Impartially" means "the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, *as well as maintenance of an open mind* in considering issues that may come before a judge." *NCJC, Terminology,* emphasis added.

The court's inability to remain neutral and objective interfered with its duty to consider and weigh the expert witness's opinions as they related to Adam's state of mind and his behavior on the video. Even if Dr. McEllistrem is not considered as an expert witness, his knowledge of the modes of violence and the psychology and neurobiology of acute stress response exceeds that of the court, and his opinions warranted consideration. Dr. McEllistrem testified for over an hour. The State had no objections to his testimony. Dr. McEllistrem offered a

completely different analysis of Adam's behavior in the video than the court's own analysis. Dr. McEllistrem opined that Adam had perceived a threat of serious harm from Brian and had entered into an acute stress response, where the brain takes over and responds in an autonomic manner in order to survive that threat. Vol. III, JA 413.

The court stated that Adam's behavior in the video provided evidence of malice. Vol. III, JA 523. Based on the court's comments as it imposed the maximum sentence, that Adam "cannot run from that video," the court either completely disregarded the expert's testimony or substituted its own knowledge in lieu of that of the expert witness. The court abused its discretion when it failed to keep an open mind in considering the modes of violence (predatory vs affective) and the acute stress response as presented at the sentencing hearing.

C. The court's maximum sentence offends the Legislature's creation of a sentencing range.

In sentencing Adam to the maximum sentence available, the court offended the Legislature's creation of a range of criminal penalties for the offense of voluntary manslaughter. It is the function of the Legislature to set penalties and ranges, and the court's job to decide what penalty to impose. *Mendoza-Lobos v. State*, 125 Nev. 634, 644 (2009). The range of punishment as set forth by statute for voluntary manslaughter stretches from a probationary sentence to a maximum term of ten years in prison. Based on this range, the Legislature has determined

that there are cases of voluntary manslaughter that warrant probationary sentences and others, maximum sentences. The court gave Adam the maximum sentence.

If Adam's case warranted a maximum sentence, with all of the mitigation evidence that was presented, that leaves no available punishment for defendants who have committed the same crime but who have multiple prior criminal convictions; or who have a lengthy history of violent conduct; or who refuse to cooperate with law enforcement; or who fail to comply with their bail conditions; or whose victim did not display predatory behavior or pursue or threaten them; or where there is no scientifically accepted explanation for their conduct. Adam had remained in the local community for almost *four years* after this incident with no further issues, living in a sober, productive manner. This factor, among so many others, would have weighed heavily in favor of a probationary sentence. For *forty (40) years*, Adam lived a life free from any sort of violence, and for four (4) after this incident, Adam had no issues with violence. His behavior in this single, isolated incident was an autonomic response to Brian's threat to harm him. A maximum sentence in his case offends the Legislature's creation of a sentencing range in order to account for the specific mitigation and facts of each case.

A sentencing decision is reviewed for an abuse of discretion. *Silks v. State*, 92 Nev. 91 (1976). A sentence that falls within the parameters of relevant sentencing statutes will not be disturbed "[s]o long as the record does not

demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks*, at 94.

The district court abused its discretion in sentencing Adam. The court's comments as it imposed sentence, mention only a single piece of evidence, the video of the event. The video was the same video that counsel had previously formally objected to, as it had been digitally enhanced and clarified, as well as concatenated, rendering it impalpable and suspect. The video clip was also viewed multiple times by the court at the motions hearing, giving it greater weight than other relevant information. Both the digital manipulation of the video and the repetitive viewing of the video, prejudiced Adam.

This prejudice was magnified by the court's refusal to consider any other information presented, including the expert witness's explanation of what was occurring in the video, the hospital records that documented Brian's actual injuries as a result of Adam's conduct on the video, or the reports, interviews, and testimony that explained what had occurred between the parties immediately prior and immediately after the video. Without this information, the court did not have any context for what it observed on the video.

In addition to prejudice resulting from the consideration of information founded on facts based on highly suspect evidence, this Court should also

intervene when there is prejudice resulting from a complete lack of consideration of information. Turning a blind eye to the mitigation information in this case is an abuse of discretion and warrants this Court's intervention. The prejudice to Adam from the district court's failure to consider and weigh mitigation information is equally, if not more harmful, than the court's decision to base Adam's sentence solely on the suspect video clip, especially in light of his *Alford* plea.

II. THE COURT FAILED TO PROVIDE A FAIR SENTENCING HEARING IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS

The court's discretion at sentencing is not boundless and must comply with due process considerations. *Betterman v. Montana*, 578 U.S. 437 (2016) "After conviction, a defendant's due process right . . . is still present. He retains an interest in a sentencing proceeding that is fundamentally fair." *Id.* at 448. The court's multiple failures to act diligently and impartially deprived Adam of a fair sentencing hearing.

A. The Court Failed to Read and Consider all Mitigation Documents Submitted for Sentencing.

As argued above, the court failed to consider and give weight to any of the voluminous mitigation information presented on Adam's behalf. This blatant refusal to balance the evidence in mitigation against Adam's actions that night offends the very notion of fundamental fairness.

Of great concern is the court's lack of knowledge of the specific information contained in the Sentencing Memorandum and Documentation in Support filed on June 30, 2021, at 12:51 p.m. Vol. II, JA 326. Adam's sentencing was scheduled for the following day, July 1, 2021, at 1:30 p.m. That provided the district court approximately eight (8) hours to review the sentencing memorandum and supporting documentation.

At sentencing, the court stated it had received the sentencing memorandum and documentation in support and that it "has reviewed it and will now consider it when the Court sentences Mr. Bernard." Vol. III, JA 381. At no point did the court request additional time to review the memorandum or documentation.

However, minutes later, when defense counsel was making her sentencing argument, the court interrupted with the question, "Ms. Pence, are you referring to your client?" Vol. III, JA 393. Counsel had just described the victim in this case, Brian Cook, not only by name, but by other distinct and pertinent information—the same information that was set forth in the sentencing memorandum. But the court had mistakenly believed that counsel was describing the defendant. Immediately prior to the court's interruption, counsel had stated, "Brian suffered a tremendous loss about I want to say five years before this incident when he lost his wife to cancer and that loss caused Brian to start to drink. Brian drank to cope with that loss with his sadness." Vol. III, JA 393. This

description mentioned "Brian," the victim's name, three separate times and included the pertinent details that he had lost his wife to cancer and was drinking alcohol.

This information was included in the sentencing memorandum: "Brian had always been a drinker, but after his wife died of cancer, his drinking became excessive and he started drinking large amounts of whiskey and beer." Had the court read the sentencing memorandum, there would not have been any confusion regarding the identity of the person counsel was describing. Adam had never been married. The court's confusion between the identities of the victim and the defendant supports counsel's belief that the court did not execute its duty to read the sentencing memorandum *competently* and *diligently* as required. *NCJC Canon 2, Rule 2.5(A).*

Even if the court had read the sentencing memorandum, the court's confusion between the defendant and the victim *at the time of sentencing* in a voluntary manslaughter case absolutely undermines any confidence in the integrity of the proceeding.

B. <u>The Court failed to keep an open mind in considering the issues before it at time of sentencing.</u>

As previously discussed, a court must consider information in mitigation offered by a defendant. NRS 176.015. A judge shall perform this duty, of considering mitigating information, fairly and impartially. *NCJC Canon 2, Rule*

2.2. This necessitates that the court be objective and open minded. *NCJC Canon 2, Rule 2.2, Comment 1.*

Dr. McEllistrem, an expert in forensic psychology, with a specialty in bimodal violence, provided over an hour of unobjected-to, sworn testimony to the court, explaining Adam's conduct that night and what the court would observe in the video. He offered his expert opinion that Adam had been actively pursued and threatened by Brian and had an acute stress response upon perceiving Brian's threat to blind or kill him. Vol. III, JA 447. He explained to the court that Adam's physical response to fight to survive was autonomic and was not something he could have stopped once the neurobiological process in the brain had started. Vol. III, JA 447.

This testimony was not received with an open mind. Dr. McEllistrem's opinions were never even acknowledged by the court and Adam's maximum sentence reflects that his testimony was completely disregarded by the court. The court's statement, that Adam "cannot run from the video," highlights the court's refusal to see anything other than what it observed on the altered video, without explanation or context. The court failed to keep an open mind in considering the expert's testimony as presented at Adam's sentencing. The court's failure to perform its sentencing duties in an objective and open-minded manner rendered Adam's hearing unfair and unjust.

C. The court failed to control witnesses, undermining the judge's independence, integrity, or impartiality.

During defense counsel's sentencing arguments, members of the audience from behind the bar made audible, inappropriate comments in response to counsel's statements. Based on the nature of the statements, they would have probably been made by friends and family of the victim. When the court did not respond to the comments, counsel assumed that the court had not heard them.

However, counsel brought them to the attention of the court prior to the testimony of the State's first witness. The court asked counsel if she knew what the witness was going to say. Vol. III, JA 491. Counsel replied she did not, but "I did hear some of the comments he made during the proceedings so far so I can imagine." Vol. III, JA 491. Following this disclosure by counsel, the court did not admonish the witness or any member of the audience regarding the comments being made from behind the bar.

A judge has the responsibility to maintain decorum in keeping with the nature of the proceeding. *United States v. Young*, 470 U.S.1, 10 (1985); *Parodi v. Washoe Medical Ctr.*, 111 Nev. 365, 367 (1995). "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court official and others . . .and shall require similar conduct of . . . others subject to the judge's direction and control." *NCJC Canon 2, Rule 2.8(B)*. Not only do judges have the right to control their courtrooms, they have a duty to do so. See

Dieudonne v. State, 127 Nev. 1, 10 (2011)(citing *People v. Polite*, 236 Cal. App. 2d 85, 45 Cal. Rptr. 845, 550 (Ct. App. 1965)(the trial judge owes a duty to see that proper demeanor is maintained.)). The court erred when it failed to require dignified, courteous behavior from the persons sitting behind the bar in the courtroom, once aware of said misconduct. This failure to maintain decorum in keeping with the nature of the proceeding violated Adam's due process rights to a fair and proper sentencing hearing. See *United States v. Young*, supra.

The court also failed to control witnesses when it permitted the State's final witness, Mr. Nobriga, the victim's stepfather, to directly address defense counsel and personally attack her and her legal representation as appointed counsel of the defendant, not once but six or more different times. Vol. III, JA 517-521.

NRS 176.015(3)(b) grants victims an opportunity to "[r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." *Dieudonne v. State*, 127 Nev. 1, 8 (2011). The statute is broad in terms of what a victim can express, however "it is not without limitations—racially charged comments, threats, and cursing are not appropriate." *Id.* at 10. Personal attacks on defense counsel and her representation as appointed counsel would fall outside the limits of victim impact statements, as would any other comments directed personally to or at counsel. The judge's duties, to require dignified and courteous behavior from those subject to the

judge's control and to maintain decorum, apply at all times, including during victim impact statements. *Id.* The judge erred in allowing Mr. Nobriga to continually address and personally attack counsel. The court's failure to admonish Mr. Nobriga during his improper statement gives the appearance that the court has either been swayed by public clamor, ie. angry victims, or is in fear of criticism. See *NCJC Canon 2, Rule 2.4(A).*

Finally, the court's failure to maintain decorum and to require dignified and courteous behavior of Mr. Nobriga created an atmosphere of partiality. This partiality, or at a minimum, the appearance of partiality, was strengthened by the court's reiteration of a statement made by the very witness that was permitted by the court to digress from the bounds of a proper victim statement. During sentencing, the court stated, "Here as we know, there's one person that can't give their statement and that's Mr. Cook." Vol. III, JA 523. Mr. Nobriga, had, moments earlier while inappropriately addressing counsel, stated, "At the end of your statement you stood up and you said with him doing an Alford plea it would give everyone the opportunity . . . to represent facts . . . in the case except for one person. One person is dead. That person can't speak." Vol. III, JA 521. The court's use of this particular witness's argument, in the very brief statement made during imposition of sentence, gave the appearance that this individual had some

influence or control over the court, which in turn gave the entire proceeding an appearance of impropriety.

A judge shall act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety. *NCJC Canon 1, Rule 1.2.* "Independence" is defined by the Nevada Code of Judicial Conduct as "a judge's freedom from influence or controls other than those established by law." *NCJC, Terminology.* The Code's definition of "impropriety" includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality. *NCJC, Terminology.* In light of the improper victim statement made by Mr. Nobriga, the court's decision to align itself with his particular sentiment appeared to condone all of Mr. Nobriga's remarks. While the court is not prohibited from adopting the sentiment or argument of a witness, its decision to do so in this case led to the appearance of impropriety.

Defense counsel did not object to the court's apparent lack of knowledge of the information contained in the sentencing memorandum, or to the comments made from behind the bar during her sentencing argument, or during the personal attacks made by the victim's stepfather. Counsel believed that objections to the court's failure to have competently reviewed sentencing materials or to maintain

decorum immediately prior to the prouncement of Adam's sentence was against his best interest. However, because the fairness and integrity of this sentencing hearing was adversely affected by the court's failings, under the exceptional circumstances of this case, the absence of an objection by counsel should not prevent this Court from reviewing the errors caused by the court's breach of its duty to act competently, fairly, and impartially, and to maintain decorum in the courtroom.

In *Parodi v. State*, this Court held that the trial judge's conduct was inappropriate and potentially prejudicial. 111 Nev. 365, 368 (1995). However, counsel had failed to preserve the error for review. *Id.* This Court explained that "[a]lthough appellant's counsel failed to adequately object to the trial court's conduct at the time it occurred, we nevertheless conclude that the errant conduct is reviewable under the plain error doctrine." *Id.* The Court relied upon the reasoning set forth in *Agee v. Lofton*, 287 F.2d 709 (8th Cir. 1961):

> Exceptions should, no doubt, have been taken at the trial to the objectionable remarks of the judge, but counsel, in a trial such as this, are, understandably loath to challenge the propriety of a trial judge's utterances, for fear of antagonizing him and thereby prejudicing a client's case. This Court, regardless of the absence of objections or exceptions, may notice plain error, and is under an obligation to see that trials in the district courts are conducted impartially and that they are not without some measure of dignity and decorum. *Id.* at 710.

Under the plain error doctrine, the court's conduct is error if it had a prejudicial impact on the verdict when viewed in context of the whole trial or if it

"seriously affects the integrity . . . of the judicial proceedings." *Id.* at 368 citing *Libby v. State*, 109 Nev. 905, 911 (1993). This Court held that the failure to object will not always preclude review in cases "where the judicial deportment is of an inappropriate but non-egregious and repetitive nature that becomes prejudicial when considered in its entirety." *Parodi,* 111 Nev. at 370; *Oade v. State*, 114 Nev. 619 (1998). The Parodi court found that while the court's offenses may have been slight, and alone may not have been sufficient to warrant a mistrial or other action, they did create a cumulative impact the effect of which this Court was unable to calculate. *Id.* at 369. Accordingly, the verdict was reversed and the case was remanded for a new trial before a different district court judge. *Id.* at 370.

In the instant case, the sentencing court's failures: not reading, or appearing not to have read, the sentencing memorandum; not considering or failing to give any weight to the voluminous mitigation information; not keeping an open mind with regard to the expert witness testimony; and not maintaining decorum by failing to quell the comments from behind the bar or to admonish the victim's stepfather during his multiple attacks on defense counsel, were inappropriate and cumulatively created an impact that deprived Adam of a fair and impartial sentencing hearing. The court's conduct, when considered in its entirety, seriously affected the integrity of the proceeding. See *Libby*, supra.

11. CONCLUSION AND RELIEF SOUGHT

The court abused its discretion in sentencing Adam to the maximum sentence and failed to provide a fair sentencing hearing in violation of his due process rights. Accordingly, Adam's sentence should be vacated and the case remanded for resentencing before a different district court judge.

12. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: [X] This brief has been prepared in a proportionally spaced typeface using Word processing program in 14 point font size and Times New Roman type style.

This brief does *not* comply with the page- or typevolume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, but has more than 14,000 words. It contains 14,922 words in total and exceeds the limit by 922 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which

requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of April, 2022,

Maria Pence, Esq.
Nevada Bar No. 9890
Pence & Associates
1662 US Hwy 395, Ste. 203
Minden, Nevada 89423
(775) 392-4084

CERTIFICATE OF SERVICE

I certify that I am an employee of PENCE & ASSOCIATES and that on this date, I electronically served a true and correct copy of Appellant's Opening Brief to the following address:

Erik Levin, Chief Criminal Deputy District Attorney
District Attorney's Office
1038 Buckeye Road
Minden, NV 89423

Dated this 1st day of April, 2022.

MARIA PENCE, ESQ.

IN THE SUPREME COURT FOR THE STATE OF NEVADA

ADAM ANTHONY BERNARD,
Appellant,
vs.
STATE OF NEVADA,
Respondent.

No. 83323

JOINT APPENDIX

Volume I

MARIA PENCE
Attorney for Appellant
Bar ID No. 9890
1662 U.S. Highway 395, Suite 203
Minden, NV 89423
(775) 392-4084

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IN THE EAST FORK JUSTICE COURT FOR THE STATE OF NEVADA

BEFORE THOMAS PERKINS, JUSTICE OF THE PEACE, PRESIDING

THE STATE OF NEVADA,

Plaintiff,

v

ADAM ANTHONY BERNARD,

Defendant.

18 CR 0104
II

TRANSCRIPT OF PROCEEDINGS

PRELIMINARY EXAMINATION

JUNE 29, 2018

MINDEN, NEVADA

APPEARANCES:

For the State: PETER HANDY
Deputy District Attorney
Minden, Nevada

For the Defendant: MARIA PENCE
Attorney at Law
Minden, Nevada

Reported By: Kathy Jackson, Nevada CSR 402

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FRIDAY, JUNE 29, 2018, MINDEN, NEVADA

-oOo-

THE COURT: 18CR251, State against Adam Bernard. Mr. Bernard is here with Ms. Pence. The State is represented by Mr. Handy. This is the time set for the preliminary hearing.

Are the parties ready to proceed?

MR. HANDY: Yes, Your Honor.

THE COURT: Ms. Pence?

MS. PENCE: We are, Your Honor.

THE COURT: Okay. I'm going to order exclusion of witnesses. Anybody that's going to testify will have to be in the hallway except when you're testifying, and you can't discuss your testimony among yourselves or with anyone else except the attorneys in the case.

Go ahead, Mr. Handy.

MR. HANDY: And the State's first witness would be Deputy Mark Brown, Your Honor.

THE COURT: Okay. Come on up, Deputy Brown.

Is everybody outside already?

MR. HANDY: All the State witnesses are, Your Honor, yes.

DEPUTY MARK BROWN,

called as a witness on behalf of the State having been first duly sworn, was examined and testified as follows:

THE WITNESS: Good morning, sir.

THE COURT: Good morning.

DIRECT EXAMINATION

BY MR. HANDY:

Q. Can you please state your name, and spell your last name.

A. Mark Brown, B-r-o-w-n.

Q. And how are you employed?

A. I'm employed as a deputy sheriff with the Douglas County Sheriff's Office.

Q. And how long have you been employed as a deputy sheriff with the Douglas County Sheriff's Office?

A. Five years.

Q. And were you so employed on July 8, 2017?

A. Yes.

Q. On that day, did you respond to a call about 9:40 at night?

A. I did.

Q. And what was that call for?

A. It was a report of a body being dragged out of the roadway.

Q. And do you know about what time you got there?

A. Five to ten minutes after the call had come out.

Q. Was it night out?

A. It was nighttime, correct.

Q. And what did you see when you got there?

THE COURT: Where?

Q. (BY MR. HANDY:) Sure, where were you dispatched to?

A. I can't recall the address but it was on Manhattan Drive I believe in the Gardnerville Ranchos.

Q. And what did you find when you got there at Manhattan?

A. Once I got there, I observed a male subject lying on the ground who was unconscious.

Q. And did you walk onto the scene?

A. I initially drove there in my patrol vehicle but once I arrived, I walked onto the scene.

Q. And where was this male subject that was lying on the ground located in reference to some other objects?

A. There was a large red pickup truck that was pulled off on the side of the road. He was located just in front of that red truck.

Q. And do you remember what happened to that individual that was laying in the road?

A. He was taken to the hospital by paramedics or transported away from the scene by paramedics.

Q. And is there anyone else here in this courtroom that you remember from seeing that night?

A. I do, the gentleman sitting at the defendant's table in the purple shirt.

Q. I'm going to show you a portion of a video.

THE COURT: What -- what video are we talking about?

MR. HANDY: I have what's been previously marked as State's Exhibit 1, I'm sorry, which is a thumb drive.

THE COURT: Exhibit 1, Ms. Pence, have you had a chance to look at that?

Neither one of you is asking me for time to discuss it between yourselves. If you need that time, I'm willing to give it to you. I'm not going to sit here and watch you talk to each other without knowing what's going on.

Mr. Handy?

MR. HANDY: And, Your Honor, again, State's Exhibit 1 contains concatenated video. There's some surveillance video taken at the scene, that, just for Your Honor's understanding of what the exhibit is.

THE COURT: Right. And, Ms. Pence, are there issues regarding authentication or admission of evidence in this proceeding?

MS. PENCE: At this point, Your Honor, I don't know. I don't know what's on that. My understanding just based on that brief discussion was that they have pieced together certain portions of video, and I just was trying to find out exactly what it was.

THE COURT: Right.

MS. PENCE: I haven't been provided with it. I don't know what it is.

THE COURT: Well, is that accurate, Mr. Handy?

MR. HANDY: It is, Your Honor, and my thoughts were I play the video and have Mr. Brown authenticate it as to what he saw on the scene versus what's shown on the video.

THE COURT: Well, if you want to try to lay a proper foundation or if you want to continue your discussions with Ms. Pence, you may do so, one or the other. What do you want to do? You know, I don't need to -- I would have expected it to be handled before it started.

MR. HANDY: If I might have a minute with Ms. Pence, Your Honor.

THE COURT: Pardon me?

MR. HANDY: If I might have a minute to discuss

this, Your Honor.

THE COURT: I think that's a good idea. We're going to take a short recess, and then we'll be back. If it's more than five minutes, you're going to have to come and let me know what the status is.

MR. HANDY: Thank you, Your Honor.

(Whereupon, a brief recess was taken.)

THE COURT: We're back in session on Case 18CR251. Everyone is here that was here before.

And, Mr. Handy, go ahead?

MR. HANDY: And, Your Honor, the State and Ms. Pence have stipulated for admission of this video for purposes of preliminary hearing only.

THE COURT: Okay. Exhibit 1 you're talking about?

MR. HANDY: Yeah, it's State's Exhibit 1, Your Honor.

THE COURT: Okay. Now, Mr. Handy, just for the benefit of the record, the reporter is not going to report any words that are contained in the video but for -- it might be important for us to know what -- if you can give us some reference on the -- on the -- on the video so that if somebody is trying to piece together what the officer is talking about in the future, they will be able to do so.

MR. HANDY: Okay.

THE COURT: So when you play something, just tell us what you're playing.

MR. HANDY: I will, Your Honor. And so, Your Honor, just to clarify, State's Exhibit 1 contains a compressed holder zip file. Inside that there's two videos. We stipulated to the first video admission, not the second. We can't remove it at this time, but we can remove it in-between, after it being shown and completion of this hearing.

If I can play that video at this time. This video is time stamped 9:46 a.m., July 8, 2017. It indicates camera one in the lower left hand corner.

THE COURT: Okay. Go ahead.

MR. HANDY: And I think it's playing. It's just playing slowly.

THE COURT: Okay.

MR. HANDY: Your Honor, I apologize again. For whatever reason, the video seems to be lagging. I'm going to try pausing it and see if it will buffer out so we can get it at normal speed.

THE COURT: Just so I understand what you're trying to do, Mr. Handy, are you trying to show us what happened when the officer arrived at the scene?

MR. HANDY: And, Your Honor, what I'm going do is have the deputy describe the scene as it appeared to him at the end of this video as closest to what he saw when he arrived on scene. He's just connecting the video to approximate time of his arrival.

THE COURT: Okay.

(Whereupon, a video was played.)

MR. HANDY: That's the end of the video, Your Honor.

THE COURT: Okay.

Q. (BY MR. HANDY:) Deputy Brown, were there -- was there anything in that video that you were able to observe when you arrived on scene?

A. Yes, that red pickup was parked in the same or that pickup that arrived on scene at the beginning of the video was parked in the same position.

Q. And you said the pickup was red. It wasn't in the video; is that correct?

A. Correct, the video is black and white, but I do recall the pickup being red.

Q. And was there anything else that you remember that's similar between the video and what you saw?

A. Not specifically. It looked as if when the video ended, the victim was laying about where I first observed

him.

Q. And did you observe the victim being transported by paramedics away from that scene?

A. I do recall him being placed in the ambulance at some point, but I didn't make any interaction that I recall with paramedics or the victim while he was being transported.

Q. And do you know approximately what time you were -- you got on scene?

A. It would have been, like I said, within five to ten minutes being dispatched to the call, just -- just after Deputy Tre had arrived on the scene.

THE COURT: Deputy who?

THE WITNESS: Tre, I'm not sure how to pronounce his last name.

THE COURT: That's all right.

THE WITNESS: Okay, thank you.

Q. (BY MR. HANDY:) And what was your role on scene that night?

A. I was -- Deputy Tre was the responsible officer, the lead officer on that incident. I was a cover unit so scene security, any requests that Deputy Tre may have made to me, so on and so forth.

Q. Did you take any photographs at the scene?

A. I did not.

Q. Interview any of the people present on the scene?

A. I don't recall interviewing anybody, no.

MR. HANDY: I pass this witness, Your Honor.

THE COURT: Ms. Pence?

CROSS-EXAMINATION

BY MS. PENCE:

Q. Did you later learn who the driver of the red pickup was?

A. I don't recall who the driver of the red pickup was.

Q. Are you aware after watching the video whether the driver of the red pickup truck was the person who was carried off the roadway or if he was one of the other two gentlemen that moved him?

A. At some point it was determined that the driver of the red pickup seen in that video was the gentleman laying on the ground. However, I've only just observed this video within the last week. I did not observe that video at the time of the incident.

Q. And you're familiar with this area of Manhattan?

A. Yes.

Q. And we saw the truck come around the corner and park where it ultimately came to a stop; is that right?

A. Uh-huh, yes.

Q. And that truck did not stop at the stop sign on Manhattan when it first turned onto the street; is that right?

A. I -- honestly, the beginning of that video is so skippy that I wasn't able to tell whether or not he made a legal stop at the stop sign.

Q. Okay. You said it was parked sort of on the side of the road. It was actually parked in sort of a dirt and grass area; is that correct?

A. I recall the victim laying on dirt. Like I said, he was right in front of the -- right in front of the pickup. So if it was a dirt grass area, I don't specifically recall grass but, yes, I recall dirt.

Q. And the driver exited the truck without turning off the headlights; is that right?

A. I believe the video depicted that the headlights were on on the truck.

Q. Okay. And you've identified Mr. Bernard. Mr. Bernard was on scene before the arrival of that pickup truck; is that right?

A. Again, I recognize him from the scene. I don't recognize him from what capacity, why he was at the scene. I just recognize him from being there.

Q. Okay. And in this video, we actually see

Mr. Bernard present from when it begins to play; is that correct?

A. Again, I'm not sure who Mr. Bernard is in the -- in the video.

Q. Okay. But there are no other vehicles that arrive on scene during the time of the clip that we just watched?

A. There was vehicles that drove by the residence in that clip, but no vehicles arrived and stopped at the scene, I don't believe.

Q. I'm sorry, in the clip that we watched, you believe that there were vehicles that drove by the residence?

A. It appears that there are at the beginning.

THE COURT: So, Ms. Pence, are you having the officer tell me what I saw in the video, is that what you're doing here?

MS. PENCE: No, I'm trying to --

THE COURT: Let's check his perception of what happened, what he saw at the scene instead of what he saw in the video because I can watch the video myself.

MS. PENCE: Okay.

THE COURT: Do you see what I'm saying? I don't mean to criticize you, I'm just saying.

MS. PENCE: I understand, Your Honor.

I don't have any other questions of this witness.

THE COURT: Mr. Handy?

MR. HANDY: Nothing further from this witness, Your Honor.

THE COURT: Can he be excused?

MR. HANDY: Yes, Your Honor.

MS. PENCE: Yes.

THE COURT: Okay. You're excused.

THE WITNESS: Thank you very much, sir. Have a good morning.

(Witness excused.)

THE COURT: Go ahead, Mr. Handy.

MR. HANDY: The State would call Dr. Bucholtz, Your Honor.

DR. ANN BUCHOLTZ,

called as a witness on behalf of the State having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANDY:

Q. Good morning.

A. Good morning.

Q. Can you please state your name, and spell your last name for the record.

A. My name is Dr. Ann Bucholtz, B-u-c-h-o-l-t-z.

Q. And how are you employed, Ms. Bucholtz, or doctor?

A. I'm the medical examiner for Yavapai County, Arizona.

Q. And --

THE COURT: What's the name of the county?

THE WITNESS: Yavapai, Y-a-v-a-p-a-i.

Q. (BY MR. HANDY:) And who was your previous employer?

A. It was the Washoe County Medical Examiner's Office.

Q. And what was your capacity as an employee of the Washoe County Medical Examiner's Office?

A. I was one of the medical examiners there.

Q. And were you a medical examiner there during the months of July and August of 2017?

A. I was.

Q. And what do you do as a medical examiner?

A. Basically, our job is to certify the cause and manner of death in people who come under our jurisdiction which is outlined in state law. We do autopsies. We examine

bodies, both externally and internally and establish pathologic findings.

Q. And did you in 2017 perform an autopsy or an examination of Brian Eugene Cook?

A. I did.

Q. And when did you perform that examination?

A. It was -- he died like July 31st, and I think I did the autopsy on August 5th.

Q. And did you confirm his identity in any way?

A. Yes, we did.

Q. And how did you do that?

A. It was done by fingerprint comparison to the FBI database.

Q. And, Dr. Bucholtz, let's get a little bit into your background, if I could. Did you attend undergraduate studies?

A. I did.

Q. Where did you go?

A. I received my bachelor of science in nursing from Bowling Green State University in Bowling Green, Ohio.

Q. And did you attend graduate school?

A. I did.

Q. And where did you attend graduate school?

A. I went to medical school at Indiana University in

Indianapolis, Indiana where I received my medical degree.

Q. And did you become employed after that time?

A. Actually, I went into it what is our usual path which is an internship. I did that at Tucson Medical Center in Tucson, Arizona followed by a four-year anatomical clinical pathology residency at the University of Arizona.

I then did a year of subspecialty training in forensic pathology at the University of Arizona, and I'm board certified by the American Board of Pathology and Anatomic Clinical and Forensic Pathology.

Q. And do you remember when you first received that certification?

A. I received -- you get them in two steps. I got the first one in I think it was 1990 and the other was in 1991.

Q. And have you maintained that certification since that time?

A. I have.

Q. And after the examination of Brian Cook, did you come to a conclusion as to the cause of his death?

A. I did.

Q. And in your opinion what was the cause of Mr. Cook's death?

A. I certified his death as blunt force trauma to

the head.

Q. And on what did you base that opinion?

A. It was an examination of the body, including an internal examination of the organs I had available, including the brain.

Q. And your conclusion that his death was caused by blunt force trauma, is that to a reasonable degree of medical certainty?

A. It is.

Q. Was any additional testing done by any other physicians regarding Mr. Cook that led to your ultimate opinion?

A. Yes. We -- I examined the brain grossly, and then we submitted it to a subspecialist who examined the brain. He's a neuropathologist, Holmer School of Medicine in Michigan. We mailed the brain to him, and he examined the brain more extensively as a specialist, and he also concluded that he had blunt force injuries of the brain.

MS. PENCE: Your Honor, I'm going -- going to object, hearsay.

THE COURT: Overruled. Go ahead.

Q. (BY MR. HANDY:) And did you perform any tests to rule out any particular kind of types of cause of death for Mr. Cook?

A. Yes, I did sub-special dissections and X-ray comparisons or X-ray procedures, if you will. One of them being basically isolating the vessels of the neck and injecting it with die as well as removing the spinous processes and examining the spinal cord of the cervical neck and the junction with the brain.

Q. And what did that -- what result does that give you?

A. Basically, we looked at the vessels of the neck with the die injection to see if there was any, we call it extravasation or leakage of the die around the vertebral artery. The vertebral artery is a delicate artery that can be torn with sudden twisting of the head and that die -- the die study showed no extravasation of the blood consistent with that no tear in the vertebral artery.

Q. And --

THE COURT: So the court reporter is a lot smarter than I am, but I don't know how to spell extravasation.

THE WITNESS: No worries, e-x-t-r-a-v-a-s-a-t-i-o-n.

THE COURT: Thank you. Just like it sounds.

THE WITNESS: Yes, thank you.

Q. (BY MR. HANDY:) And you said that the vertebral

artery is easily torn through a twisting motion. What kind of trauma does that rule out as the cause of death?

A. It's a -- it's a funny tear. It's almost like a boxing injury. It usually happens with a single blow on the side of the face, on the jaw with an upward motion, and what that does is it separates the skull from the spine just a little bit and as the vessel is coming around from the spine into the skull, it gets overstretched and can tear right there with that upward motion, so it rules out that kind of thing, and typically the history we get with that is they receive a single blow, they collapse right there. They might make one or two steps but they really don't go very far, and I've seen it in boxers and usually those kind of situations. It leads to certain internal findings, usually not what we call subdural hemorrhages but just blood over the surface of the meninges of the brain in a special layer.

This gentleman had other findings than just the subarachnoid hemorrhage which we would see with that vertebral artery tear. He not only had subarachnoid, he had subdural hemorrhages, and that is not one of the findings we typically see with vertebral artery tear of the subdurals.

Q. Could you please describe what a subdural hemorrhage is.

A. The -- the brain is encased in this rigid skull.

Lining the inside of the skull is what we call the dura. It's a tough membrane. That membrane is stuck to the surface of the skull. It can become separated either from the skull or blood, by blood or fluid, really difficult to do. It is stuck really tight.

More commonly we see blood accumulate between the -- the internal dura and the surface of the brain, and we call that subdural because it's below the dura and on top of the brain and it's a potential space where the spinal fluid is.

Another layer is the meninges, the membrane directly adherent to the surface of the brain. Below that blood can accumulate between the brain and these meninges and that's called subarachnoid so it's a layered area, and each layer tells us a little bit different about how the brain injury may have occurred.

Q. And did Mr. Cook have both subdural and subarachnoid hematoma?

A. He did.

Q. And are those kind of injuries consistent with blunt force trauma to the head?

A. Yes.

Q. Are you aware of the investigation related in this case by the Douglas County Sheriff's Office?

A. Yes.

Q. And are you aware of surveillance video obtained during the course of that investigation?

A. Yes.

Q. And have you seen that surveillance video?

A. Yes.

Q. I won't replay it. Could you observe the victim in this case in that video?

A. He is visible, yes.

Q. And in the video you saw, could you observe him sustaining injuries of the type that could be consistent with blunt force trauma to the head?

A. Yes.

Q. Did you have an opportunity to review the medical reporting from the paramedics and from the hospital that Mr. Cook was in?

A. Yes.

Q. And did any of that reporting indicate some other cause of death of Mr. Cook?

A. No. There really were no other findings other than the severe head injuries.

Q. And based on your understanding of the medical reporting, was Mr. Cook released from the hospital?

A. He was not.

MR. HANDY: Your Honor, I pass this witness at this time.

THE COURT: Okay. Go ahead, Ms. Pence.

CROSS-EXAMINATION

BY MS. PENCE:

Q. You testified that there were subarachnoid hemorrhages as well as subdural hemorrhages; is that correct?

A. Yes.

Q. But you don't list subarachnoid hemorrhaging anywhere in your pathological finding diagnoses; is that correct?

A. May I see my report?

MS. PENCE: Your Honor, I don't know if you want to have that marked.

THE COURT: It's up to you, Ms. Pence.

MS. PENCE: I would ask that it be marked as Exhibit 1 for identification. She may need to refer to it on other occasions.

THE COURT: Okay. Doctor, hand me up that report, will you, please.

THE WITNESS: Sure.

THE COURT: Let's mark it Defendant's A.

Here, you go. Doctor, would you identify what this document that's been marked as Exhibit A, and then

Ms. Pence will ask you some other questions. Just tell us what it is.

THE WITNESS: It's the autopsy report from our office, as well as the attached consultation report from Dr. Costalonee (phonetic) at the Western Michigan University of School of Medicine.

THE COURT: Thank you.

Go ahead, Ms. Pence.

Q. (BY MS. PENCE:) Doctor, in your report, I believe it's page two, can you take a look at that and see if it helps you remember if you included subarachnoid hemorrhaging in your final diagnoses?

A. I did not put it in there. I described it under -- on page five.

Q. Okay. So subarachnoid hemorrhages is not included as one of your final pathological diagnoses; is that correct?

A. I did not include it there, no.

Q. Thank you. Okay. Did you review the medical reports in this case prior to writing your report?

A. Yes.

Q. What medical reports did you have?

A. Hundreds of pages.

Q. Hundreds of pages?

A. There are many pages.

MS. PENCE: Okay. Your Honor, at this point --

Q. Where did you obtain the hundreds of pages of medical records?

A. They are at the hospital.

Q. Okay.

A. I reviewed the ones --

Q. I'm sorry, so you obtained hundreds of pages of medical records from the hospital?

A. We have a huge stack of medical records.

Q. Okay.

A. I don't know the exact number, but we've had a huge stack of them.

Q. And who provided those to you?

A. The hospital and the donor group.

MS. PENCE: Your Honor, at this point I'm going to ask that we take a break. I have a total of 59 pages of medical records that include only two doctors' notes. If there are hundreds of pages of medical records, I have not been given any of them, and I'm not able to cross-examine this witness effectively.

THE COURT: Mr. Handy, your response?

MR. HANDY: And, Your Honor, the State is not in possession of those medical records either. We did send a

subpoena to Renown for their medical records. Those were disclosed resulting in 57 pages of documents and two pages, including our request of e-mails to Renown. Those were discovered to Ms. Pence back in March. We later obtained the REMSA Care Flight and the East Fork Fire Protection District records, those were also disclosed. The State doesn't have hundreds of pages from Renown. I don't know if that's because of what Renown chose to give to us is different somehow, but the State is not in possession of any additional records.

THE COURT: Ms. Pence?

MS. PENCE: Your Honor, my -- of these 59 pages, 56 of them are medical records and only about six pages include doctors' notes. I have a single doctor's note from the date of admission and a single doctor's note from almost three weeks later, July 30th, that dealt with getting a CT scan and cardiac arrest.

If this witness has reviewed hundreds of medical records in order to come up with these pathological diagnoses, I'm going to ask the Court to continue this matter because I have no way to cross-examine her about any of her findings if I don't have any of those records, Your Honor.

THE COURT: Okay. The request for continuance is denied. You can go ahead with your examination.

MS. PENCE: Your Honor, may I have a recess?

THE COURT: No. I'll explain my ruling but no, I'm not going to take a recess. This is a preliminary examination. It's not a trial on the merit and I -- I believe that you are entitled to examine those records in advance of trial, but I don't believe that it impedes this proceeding, and I want to proceed at this time.

MS. PENCE: Your Honor, I -- it absolutely impedes this proceeding. This proceeding is --

THE COURT: No, I already made my ruling. I'm just explaining it. Now, what do you want --

MS. PENCE: And I need to make my record for habeas, Your Honor.

THE COURT: Well, you already did, Ms. Pence.

MS. PENCE: I did not, the Court has not let me speak yet.

THE COURT: You spoke before I made the ruling, Ms. Pence.

MS. PENCE: Your Honor, the State has to prove corpus delicti. They have to prove that the agency of death here was criminal. I have been given two doctors' notes. This witness has stated she reviewed hundreds of medical reports. I am not able, and the law says I am entitled to effective cross-examination. I cannot be effective at this

point without any of those medical records.

There is no way that I'm able to decide whether -- I can't even ask her anything because I don't know what she looked at to arrive at these conclusions. That leaves me in the dark and in the blind. It was up to the State to provide me with the medical records that were reviewed in this case by the pathologist. I don't have those, and at this point I'm going to be ineffective.

I can't cross-examine her because I don't know what she's looked at. I don't have any of the reports. I can't exclude other possible causes of death that would be noncriminal and, Your Honor, in this case there are several. We have acute alcohol intoxication. We have the possibility of acute liver failure. We have heart issues. I have no records to use to cross-examine her, and it is ridiculous for the Court to order me to go forward.

THE COURT: Excuse me, Ms. Pence, there's no need for you to say ridiculous in the context of this proceeding, and I realize you feel very strongly about what you're saying, and I will take a recess, but it is my intention to order you to proceed, and we'll reconvene at 10:00 o'clock.

(Whereupon, a brief recess was taken.)

THE COURT: Okay. We're back in session.

Ms. Pence, I'm not going to order you to proceed.

As far as I know, my choice is now to proceed -- to go ahead with this proceeding over your objection, to research, to give you a chance to investigate and do what you think is necessary to educate yourself in advance of continuing the cross-examination.

Mr. Handy, what do you want to do?

MR. HANDY: Your Honor, it's the State's preference that we proceed with the preliminary examination.

THE COURT: So, Ms. Pence, I'm either going to proceed over your objection or I'm going to take a recess and let you investigate it. I'm not going to require the State to produce what you need, what you think you need to examine this witness. I'll let you do that yourself. It would only be for a few days, and I won't require Dr. Bucholtz to return to appear in court in person. I guess we could have her examined over some kind of audio visual system if we do that. I haven't really decided I want to do that.

My preference, as I indicated before we recessed, would be for us to proceed. I do agree that you have a right to examine those things, but I'm not so sure that you have a right to examine them in advance of preliminary examination.

Go ahead.

MS. PENCE: Your Honor, Nevada state law, specifically with preliminary hearings says that I have the

right as counsel to not only cross-examine the witness but to have effective cross-examination. This witness has stated that she relied on hundreds of pages of medical reports in order to make her diagnoses. Without those hundreds of pages, I have been placed in a position that I cannot be effective in my cross-examination.

My understanding based on the disclosure made by the State pursuant to their subpoena was that there was a total of 56 pages of medical records in this case. I have had an opportunity to speak with the witness. It's my understanding she did not bring a copy of those medical records with her today nor does she have access to them as they are in a file at Washoe County.

It has been explained to me that I will not have access to those records because I will have to get them someway else for some reason. If they cannot be produced pursuant to a subpoena and they cannot be provided by the witness or by the medical examiner's office, that puts me in a position where I am simply unable to be effective.

I would ask to continue this. I do want the opportunity to cross-examine this witness in court in order to be effective. And if the Court is making the decision that if I request the -- if I obtain the documents I need to be effective, she will not be ordered to return, I have no

other choice but then to proceed today. I don't believe that that's lawful. I don't believe it will allow me to be effective.

THE COURT: Let me ask you something, Ms. Pence, before I make my ruling. What exactly was it that prevented you from communicating with this witness or availing yourself of access to medical records in advance of this proceeding?

MS. PENCE: Your Honor, nothing. I was told I was provided with a complete copy of all of the medical records that existed in this case. I was given specific assurance as recently as an e-mail yesterday evening that I had all of the medical reports that existed in this matter.

THE COURT: That existed or that were in the possession of the District Attorney?

MS. PENCE: That existed.

MR. HANDY: That's false, Your Honor. The State acknowledged they provided 59 pages of medical records from the Renown Hospital that was by e-mail this morning, indicating that pages one through 57 were enumerated as such. They are enumerated as such. There are two additional pages. One was the letter from John Storke, requesting them and another e-mail from Renown about the authorization.

THE COURT: Okay. All right. I understand your position.

Go ahead, Ms. Pence.

MS. PENCE: And that was in my response to are there any other medical records. There doesn't seem to be anything more than two doctors' notes. I have nothing that even has the doctor note from the day of death which was extremely unusual in this case.

THE COURT: Well, and now -- I don't want to start asking you what is in your file, but I know that this case has been pending for at least three months and that was what precipitated my question about whether anything impaired you from communicating with the witness in advance of this proceeding?

MS. PENCE: Your Honor -- I guess, Your Honor, because I had been provided with the subpoena for all medical records regarding this case with a response from the District Attorney was that this was, were the medical records. There is no notation anywhere in the report that was prepared by this witness that she relied on other materials, that she read extensive records, that she drew her conclusions from other things.

In fact, it simply says at one point that all further details are pending medical records. It doesn't appear that she relied on any other details for medical records and that's very different from what we have just

heard here today.

THE COURT: Okay, thank you. I'm prepared to rule now. The request for a recess and continuance is denied. We're going to proceed with, and you may proceed. It's over your objection. The record is quite clear.

Go ahead with your examination if you wish to do so.

Q. (BY MS. PENCE:) Okay. Number one in your final pathological diagnoses states blunt force trauma to the head; is that right?

A. Yes.

Q. And when we have blunt force trauma to the head, the resulting death is due to basically edema or swelling; is that correct?

A. It can be.

Q. In this case, Brian Cook died basically when the injuries that he had caused swelling; is that right?

A. That's an oversimplification.

Q. Okay. I don't want to oversimplify. In this case, cerebral edema ultimately caused Mr. Cook to be declared brain dead; is that right?

A. He had multiple injuries to the brain, bruising to the brain parenchyma. He had bleeding inside the brain.

Q. But my question to you was --

MR. HANDY: Objection, can we let the witness answer the question.

MS. PENCE: I would like -- that would be great.

THE WITNESS: What do you want me to do? Do you want me to answer?

Q. (BY MS. PENCE:) I want you to answer my question, if ultimately Mr. Cook died from cerebral edema or the swelling of his brain?

A. Okay. He has internal bleeding which causes swelling which causes him to herniate. So we have a rigid structure with nowhere to expand. He has bleeding that's making the head -- the brain swell. The bleeding itself causes the brain to swell even more and because it's swelling inside a tight compartment, it has nowhere to go but down through the bottom of the skull and shut off breathing.

Q. And in this case, there was cerebral edema present, correct?

A. There was.

Q. That's listed as your findings under 1D, cerebral edema; is that right?

A. Yes.

Q. And the process you just described where we often see brain swelling and then that swelling result in fluids being pushed down and out through the base of the skull was

not found in this case; is that correct?

A. I don't know what you're talking about.

Q. When you were explaining brain swelling, you were talking about how the brain continues to swell and there's no place to go and then it goes down through the base of the skull, correct?

A. Yes.

Q. And often you would see then in the spinal cord basically the continued -- there would be evidence of the swelling and sometimes that would be in the form of blood pooling or other hemorrhaging and that sort of thing; is that correct?

A. It's not really correct.

Q. Okay. The spinal cord in this case did not have any injury, is that correct?

A. That's correct, but he has herniation. Herniation means impingement on the brain stem which is not part of the spinal cord.

Q. So in this case we didn't see that type of swelling go down through the base of the skull, correct?

A. That is not correct.

Q. There was no damage to the spinal cord?

A. That's correct.

Q. Okay.

THE COURT: Dr. Bucholtz, let me make it a little easier for you. You're not -- you're not required to argue with the attorney.

THE WITNESS: Okay, that's fine.

THE COURT: And you're not -- you're not one of the attorneys or parties to this proceeding. You're a witness. Even though you're being -- testifying as an expert witness, as we say in the law, you don't have a dog in this fight.

THE WITNESS: I don't have a dog.

THE COURT: Okay. So just answer the questions the best you can.

THE WITNESS: Okay.

THE COURT: If you find you can't answer it with a yes or no answer, go ahead and tell me that.

THE WITNESS: Okay, that's fair.

THE COURT: But I don't want you to argue --

THE WITNESS: Okay.

THE COURT: -- with the lawyers, with either Ms. Pence or Mr. Handy.

THE WITNESS: Okay.

THE COURT: That's not your job.

THE WITNESS: Okay, thank you.

THE COURT: Go ahead, Ms. Pence.

Q. (BY MS. PENCE:) So under your diagnoses on -- under blunt force trauma, the first thing that you listed that you found were subdural hemorrhages; is that right?

A. Yes.

Q. Okay. And then you said they were bilateral, correct?

A. Yes.

Q. And that they were organizing; is that right?

A. Yes.

Q. And basically organizing is something that's used to date hemorrhages, is that a fair statement?

A. It can be, yes.

Q. Okay. Basically, what happens with subdural hemorrhages is five or six days after trauma, there starts to be I think it's called fiberglass but basically they start to grow from the layer you refer to as the dura into this area of hemorrhage; is that correct?

A. Yes.

Q. And then at about ten to 20 days, they actually kind of form like a membrane around the hemorrhage, correct?

A. It can vary.

Q. Okay. And then weeks or months after that, the actual hemorrhage becomes fully basically encapsulated with this fibrous tissue; is that correct?

A. It can.

Q. Okay. And so in this case when you say there's organizing, what stage of organization were the subdural hemorrhages that you observed?

A. It had a gross appearance of organizing and that was submitted to Dr. Castalonee and as part of his report, and he did not date it.

Q. Okay. And specifically when you say gross organizing, can you tell me what you mean by that?

A. The early stages, it's semi-liquid and then it becomes clotted, and then it has kind of a gray fibrinous appearance to the surface and becomes sticky to the brain or the dura. It -- it just looks different.

Q. So the hemorrhages that you observed, where were they along the spectrum that you just stated to the Court?

A. The gray part.

Q. So they were gray, so this is after they have become sticky and then begun to encapsulate?

A. Yes.

Q. Were they fully encapsulated?

A. I don't recall.

Q. Would it help you to review your report to remember?

A. I probably didn't make a note whether it was

fully encapsulated.

Q. Okay. So we aren't able to tell from your report or from your description how old these subdural hemorrhages were; is that correct?

A. I cannot tell you.

Q. You are not able to tell me how old the subdural hemorrhages were?

A. That's correct.

MR. HANDY: Objection, asked and answered.

THE COURT: Overruled. Go ahead.

THE WITNESS: That's correct, I do not know.

Q. (BY MS. PENCE:) The next thing you describe was diffuse scalp hemorrhage and that's under 1B.

A. Correct.

Q. Basically, that is a description of some generalized bleeding on the scalp?

A. Yes.

Q. And that would be the outer tissue of the scalp or was that underneath what we would use lay terms as far as skin?

A. It's the underpart next to the skull.

Q. And was there any way to date or to document approximately when this type of bleeding had occurred?

A. No.

Q. 1C is listed as bilateral frontal contusion; is that right?

A. Yes.

Q. Okay. Contusions are bruises?

A. Yes.

Q. Okay. When you say bilateral frontal, can you tell me specifically to what area you're referring to?

A. The front part of the brain.

Q. Okay. So these bruises that you're speaking of were actually bruising on the brain itself?

A. Yes.

Q. And could you just using your own head, can you tell me approximately when you say bilateral frontal contusions where on the head that would be relative to?

A. Front, right here.

THE COURT: Okay. The witness pointed to her forehead.

Q. (BY MS. PENCE:) And while Mr. Cook was at the hospital, he was there approximately three weeks, from July 7th until July 31st?

A. He was admitted July 8th. He was admitted to Renown, and he died and became brain dead on July 31st.

Q. And during that time he received medical therapy; is that correct?

A. Yes.

Q. And, in fact, he had several procedures done to relieve the pressure from the swelling of the brain; is that right?

A. He had procedures done, yes, to his head.

Q. Okay. And, in fact, he had burr holes drilled into the skull in order to relieve that pressure; is that right?

A. And to insert monitoring, yes.

Q. Okay.

THE COURT: What was the other thing you just said?

THE WITNESS: Insert monitors inside.

THE COURT: Okay.

Q. (BY MS. PENCE:) These bilateral frontal contusions could very well have been caused by the medical therapy he received during those three weeks; is that right?

A. No.

Q. Okay. Why not?

A. They are not consistent with that.

Q. They are not consistent with medical therapy?

A. That's correct.

Q. And, again, to be specific, you pointed, when I asked you to, the forehead area above each eye, about an inch

above each eye; is that correct?

A. The description in my report says they are bibasilar frontal contusions. Basilar meaning the bottom sided brain, right over the eyeballs.

Q. Okay. On page three of your report, under the topic head, there are several different incisions noted that have been closed by sutures; is that correct?

A. Yes.

Q. There is one on the right temporal scalp; is that correct?

A. Yes.

Q. There is another on the right forehead near the temple; is that correct?

A. Yes.

Q. And the right forehead near the temple, that would be somewhere on the front -- in the area that you just pointed to, is that right, when you were referring to the part --

A. It would be here on the right side somewhere over in here.

Q. Okay.

A. It would be in our photographs.

Q. Okay. And that would be the right temporal?

A. Yes.

Q. Okay. And so if it's the right temporal scalp, this would be the area of the scalp that you're referring to which would be above your right ear?

A. Yes.

Q. Okay. So on the right forehead, near the temple, where would that location be?

A. In the general area over here.

Q. Okay. This would be the right forehead, so I'm assuming it would be on the same side as the right temporal; is that right?

A. Yes.

Q. Okay. So and the forehead would be the part of the skull or the head that's above the eyes?

A. Yes.

Q. Okay. So somewhere above his right eye, he has an incision that's been closed by sutures, correct?

A. Yes.

Q. Okay. And that would have been for medical therapy?

A. I don't know. It's not in a usual place.

Q. When you reviewed the medical records in this case, when Mr. Cook was brought in, the description was that he had normal -- that he was normal cephalic. It doesn't mention any sort of cut or incision; is that right?

A. That's correct.

Q. Okay. And you stated he hadn't left the hospital, correct?

A. True.

Q. So those incisions were made at some point during his stay in the hospital?

A. More than likely, yes.

Q. You noted under that same section under head that there were no fractures of the nose; is that correct?

A. Correct.

Q. You also noted that the teeth were in a good state of repair; is that correct?

A. Yes.

Q. Meaning there was no damage to the teeth as they presented to you?

A. Correct.

Q. There were no skull fractures at all; is that correct?

A. Correct.

Q. There were no orbital fractures; is that right?

A. Correct.

Q. And there were no trauma to the lower portion of Mr. Cook's face, correct?

A. Correct.

Q. And we talked about intracranial pressure just a little bit, but that pressure in the brain can exacerbate hemorrhages; is that correct?

A. In a way, yes.

Q. And, in fact, increased intracranial pressure can cause additional bleeding?

A. It can.

Q. Mr. Cook, you also listed acute meningitis under your final pathological diagnoses; is that right?

A. Yes.

Q. And acute meningitis is basically very simply put would be an infection but it's an inflammation of the membranes that cover the brain and the spinal cord; is that right?

A. Yes.

THE COURT: Help me understand, doctor, infection and inflammation mean different things to me. So would you clarify that for me.

THE WITNESS: The inflammation is the body's response to the infection. So he has meningitis, meaning there's inflammation. The body is trying to fight a bacterial infection.

THE COURT: All right. Thank you.

Q. (BY MS. PENCE:) Acute meningitis -- what are the

causes of acute meningitis?

A. Anybody can get it, from community is one way. You can also get it when there's loss of integrity to the skull enclosure, a fracture, medical treatment. Insertion of medical appliances can cause the infection.

Q. And if untreated can acute meningitis cause death?

A. Yes.

Q. And upon admission, Mr. Cook was not tested for meningitis; is that correct?

A. Not as far as I know.

Q. So meningitis could very well have been present prior to the date of July 7th?

A. It might have been.

Q. It's possible it was present; is that right?

A. Anything is possible.

Q. And there were no tests run to rule that out in the medical records that you reviewed?

A. Not that I saw.

Q. Under 1F, you note in your diagnoses that the vertebral arteries were in tact; is that right?

A. Yes.

Q. And I think you talked about that a little bit on direct examination?

A. Yes.

Q. And typically those are -- first of all, can you tell us what the vertebral arteries are?

A. They are blood supplied to the brain.

Q. What is it?

A. They supply blood to the brain.

Q. So they are the main arteries on each side of the neck?

A. They are more in the spinal column themselves, the branches of the carotid artery.

Q. Okay. So -- okay. So the vertebral arteries that you described as being in tact are not the ones that would run along each side of the neck?

A. They are in the neck but they are not -- I think the ones you're referring to, they are not carotid. They are different.

Q. Okay. So and you said they are located in the spinal cord?

A. They are located in the spine.

Q. Okay. And so are they -- at some point the vertebral arteries connect and become one; is that correct?

A. Yes.

Q. Before entering the brain?

A. No.

Q. Okay. And I'm just confused. So when you said that those vertebral arteries were in tact, why was that relevant to you?

A. I explained that earlier.

THE COURT: Well, you can explain it again. I remember what you said the first time but if Ms. Pence didn't hear it, you can go tell her again.

THE WITNESS: The vertebral arteries are unique in that they enter the skull from the spine and the junction of the spine with the skull, they make a right hand turn. In sudden upward motions, you can overstretch one and cause it to rip.

Q. (BY MS. PENCE:) So when you included that as one of your pathological diagnoses, that actually was to rule out a specific type of injury; is that correct?

A. It was to aid the information as to the mechanism of the bleeding in the brain.

Q. Okay. Under that same paragraph on page three, head, I believe that you note that there was some bruising on the left ear; is that correct?

A. Yes.

Q. Okay. However, in -- and that bruise would have been from some sort of medical therapy; is that right?

A. Unknown.

Q. So it could have been caused by medical therapy or it could have been caused by something else, we don't know?

A. I don't know.

Q. And there are no injuries to the ears noted on the doctor's note dated 7-8 to the ears; is that correct?

A. They may not have noted it. It doesn't mean it wasn't there.

Q. Okay. But if the report says bilateral external ears normal, it would appear that there was no bruising at the time of the admission to the hospital; is that correct?

A. That's assuming that it wasn't visible at that point in time.

Q. And that the doctor that observed Mr. Cook at that time did not note any bruises; is that right?

A. That was his opinion.

Q. You also note in that same page but under the entry of neck that there is a purple bruise on the right side of Mr. Cook's neck; is that right?

A. Yes.

Q. And that there is also a bruise on the left side of his neck; is that right?

A. Yes.

Q. And Mr. Cook was in a neck brace upon arrival to

the hospital; is that correct?

A. That would be typical, yes.

Q. And that neck brace remained in place at least until July 31st?

A. He did not arrive to my office with that so I do not know.

Q. But he was on life support and an artificial respirator during the time he spent in the hospital; is that correct?

A. He was.

Q. Okay. And would it be typical that he would remain in a neck brace while on life support and on artificial respirator?

A. Not necessarily.

Q. Okay. On the chest, you noted that over the midsternal area there was a pink five by four-inch contusion or bruise; is that right?

A. Yes.

Q. And you list -- well, let's talk about that one first. Mr. Cook's sternum had been dissected; is that correct?

A. It had.

Q. It would be most probable that this bruise was a result of that medical therapy; is that correct?

A. That would not necessarily be my conclusion.

Q. Okay. You noted that it was a pink bruise?

A. Correct.

Q. Based on the coloration, can you estimate the time that that bruise was sustained?

A. We cannot judge a date. We can only say that they are in a continuum so I could not give you an exact date of that pink contusion.

Q. And if there were no bruises noted in the medical notes from the hospital, is it possible that that bruise was a result of having his chest cut open?

A. Again, that would not necessarily be my conclusion.

Q. Okay. My question is is it possible that the bruise is from when they dissected his sternum?

A. I would say that is less likely than CPR.

Q. Both of which would be medical therapy, correct?

A. True.

Q. Okay. And, again, you note that there are two green yellow bruises on his right upper chest three quarters of an inch in diameter. Again, those bruises may very well be the result of medical therapy, correct?

A. I would agree.

Q. Okay. As the three purple green contusions on

the upper left chest, correct?

A. Yes.

Q. You also note on page four, under upper extremities, there are some scattered half inch bruises. Again, these would most likely have been caused by medical therapy such as injections, correct?

A. They are consistent with that, yes.

Q. On page four, under cardiovascular system, you noted that the right ventricle of Mr. Cook's heart was .3 centimeters. Is that a normal range?

A. Yes, it can be.

Q. Okay. For an adult grown male, .3, you believe that's within the normal range?

A. It's close enough, yes. They vary .2 to maybe .3 is what I would consider normal. Anything like .4, .5 is starting to get enlarged.

Q. And the left ventricle was two centimeters; is that correct?

A. Yes.

Q. Were you made aware in the records that you reviewed, which I don't know their contents, that Mr. Cook had previously had a heart attack?

A. I may know that. I don't remember. I have not seen the record since I completed this report back ages ago.

Q. Okay. Were you aware he was taking heart medications?

A. I would not doubt it. His heart is big, and he has an enlarged left ventricle so I would think he was hypertensive of some sort.

Q. And, in fact, during the time that he was at the hospital based on the limited notes that I have, he appears to have suffered from three separate instances of cardiac arrest?

A. That would not surprise me.

Q. The bottom of page four under liver, it states that the liver was not present; is that correct?

A. That's correct.

Q. You were not able to examine the liver; is that right?

A. That's correct.

Q. But one of your final diagnoses, number two, is acute alcohol intoxication; is that correct?

A. Correct.

Q. And Mr. Cook's blood alcohol upon arrival at the hospital was a .45; is that correct?

A. I don't recall the number. I know it was elevated.

Q. What did you base your final pathological

diagnoses of acute alcohol intoxication on?

A. That line has a coma clinical records. So it was based on the clinical records. I have no independent knowledge, and we had no specimen to evaluate. So it's based on those medical records that you're citing.

Q. Okay. And those would be the records I don't have at this point; is that correct?

A. You have a blood alcohol I don't have so I guess you have more information than I have right now.

Q. At some point do you believe that you were made aware of Mr. Cook's level of intoxication?

A. I recall, yes. I just don't know the number.

Q. Okay. If his blood alcohol intoxication level was a .45, that can cause coma and death; is that right?

A. In some, yes.

Q. In fact, anything over about a .37 is lethal?

A. In some people.

Q. So at the time that he arrived at the hospital, he was unconscious; is that right?

A. Yes.

Q. He was in basically a coma?

A. That's what's described in the records, yes.

Q. And acute alcohol intoxication can also cause cerebral edema, correct?

A. It can, yes.

Q. As well as what they call binge drinking; is that correct?

A. Binge drinking can. Depending on how high it is can be high enough to kill you, yes.

Q. Okay. Acute alcohol intoxication was not ruled out as the cause of death in this case?

A. Because he has blood in the brain, that's a problem. He had -- the more proximal problem is he has blood within the brain parenchyma.

Q. But we also know that acute alcohol intoxication can cause cerebral edema which can actually cause bleeding in the brain, correct?

A. Okay. There's bleeding in the brain, and then there's bleeding in the brain. I think you need to make some distinctions here. He has bruises on the brain which will not come from cerebral edema. Blood in the brain that you might be referring to is blood in the brain stem from the herniation, you can get that. You can get bleeding in the brain from hypertension. Those are in different areas. They are not in areas that are bruises.

Q. But ultimately he did not die from his bruises. He died from brain swelling. And my question to you is that what tests were run to conclude that the swelling he finally

succumbed to was not caused by acute alcohol intoxication? Was treatment ever started in the hospital for acute alcohol intoxication?

MR. HANDY: Objection, compound question at this point.

MS. PENCE: I'll ask them one at a time.

Q. How do we rule out that the swelling that ultimately caused his death was not caused by acute alcohol intoxication?

A. Okay. I'm trying to word this that you might understand. The way alcohol kills you is a respiratory depressant. As you start to slow down your breathing, the brain swells. It's not usually that we herniate with that. You usually just quit breathing. He's on a respirator. Yes, he's acutely intoxicated. We still have all of these brain injuries, contusions on the face while described by the physicians with a subdural hemorrhage. He had their diagnosis with a closed head injury.

The alcohol may -- may have contributed some to swelling, but his respiratory component of that is being supported by a machine. The way alcohol kills you is to shut off your breathing. Yes, you will get swelling as you sit there on a ventilator for days if no other reason then you become brain dead, but I can't dissect out how much the

alcohol might have made his brain swell versus the amount of hemorrhage, which was huge. It's not possible. I can't distinguish.

Q. When -- I'm sorry.

THE COURT: So, excuse me, just for my edification, the subdural hemorrhage, is that -- is there any way that could be caused by acute intoxication?

THE WITNESS: No.

THE COURT: Okay. Go ahead, Ms. Pence.

Q. (BY MS. PENCE:) Okay. So I just want to be clear, there were no fractures at all in this case, correct?

A. No fractures.

Q. Nothing near the area of the actual contusion that you talked about which would be on the forehead, the right forehead area, correct?

A. The contusion that I'm talking about are those basil or frontal confusions. He also has a right temporal.

Q. Right, which may or may not have been caused by medical therapy and the burr holes, but I want to just back up a little. You described the hemorrhaging in this case as huge; is that correct?

A. Yes.

Q. Okay. My understanding is that based on your report, there was diffuse cortical subarachnoid hemorrhages

and dusky red meringes. No epidural hemorrhages were seen. There was some diffused yellow green hemorrhage in the scalp. Let me back up.

You've described the effects of how you believe that alcohol kills a person, and you described respiratory failure, correct?

A. Yes.

Q. And then ultimately there can be some swelling, correct?

A. Yes.

Q. Okay. In this case we have a victim who was acutely intoxicated, a .45?

MR. HANDY: Objection, assumes facts not in evidence.

THE COURT: I don't think it does.

Go ahead, Ms. Pence.

Q. (BY MS. PENCE:) He had a blood alcohol of .45?

A. Okay.

Q. He is on a respirator, correct?

A. Yes.

Q. Meaning he's having difficulty breathing, correct?

A. Yes.

Q. There is no way to know based on the information

that we have whether or not the reason he needed to be placed on an artificial respirator was due to a sustained head injury or to acute alcohol intoxication, correct?

A. I think head injury probably trump the alcohol intoxication when you have subdurals and intracranial hemorrhage. He -- he has a pretty extensive brain injury.

Q. But you can't rule out whether or not acute alcohol intoxication actually caused the same issues that were seen other than the bruising and the hemorrhages on that particular area of the head, correct? His respirator failure was --

THE COURT: Wait, wait, wait. Ms. Pence, you're argument is for the Court.

MS. PENCE: Sorry.

THE COURT: If you have a question for the witness, then let her answer it.

Q. (BY MS. PENCE:) You cannot rule out acute alcohol intoxication as the reason he needed to be placed on a respirator?

A. I think that's not a fair assessment of his injuries. I think the amount of alcohol does play a factor here for a lot of reasons, but the alcohol does not cause subdurals. It does not cause frontal contusions. It does not cause intraparenchymal hemorrhage, intraventricular

hemorrhage. And I think with all of that and facial contusions that are documented at the time of admission that, yes, an alcohol level of .4, if that's what we're going to say, .44, that is very high. Did it necessitate one-tenth of him needing to be put on a respirator, maybe, probably. Did it necessitate 90 percent of the reason why he's on the respirator, I would say not as likely.

Q. When Mr. Cook presented at the hospital, he was diagnosed with having a left lateral subconjunctival hemorrhage. Would you agree with me that during the three weeks that Mr. Cook was on life support and had continued increased intracranial pressure, the extent of the hemorrhaging could have become exacerbated and he could have, in fact, suffered new bleeds?

THE COURT: First of all, conjunctival hemorrhage is an eye hemorrhage. That has nothing to do with the head, the inside. Two, you're not quoting the CT scan that they had at the time of admission.

Q. And, unfortunately, I don't have any of the records you've been provided.

THE COURT: No, ask -- Ms. Pence, you made your record. Ask a question.

MS. PENCE: Well --

THE COURT: You know -- I'm not going -- stop.

I'm not going to allow you to argue with the witness. Ask questions. Don't argue with the witness.

Q. (BY MS. PENCE:) Okay. In the doctor's note that I was provided, under HENT, the only hemorrhage that was listed was the one to the eye that we've just talked about. I understand there's more records, but isn't it true that any type of brain injury whether -- any type of hemorrhage is going to be made worse by increased intercranial pressure?

A. I -- I guess. The other part I think we're missing here is perhaps the EMT's note where it talks about injuries on the man. And, yes, intercranial pressure, I guess if you extend it out there, had it not been for the initial bleeding site, increasing the pressure inside, it might make it bleed more but the injury to start with is the start of the whole circle.

Q. Okay. So let's go there then. Let's say in this case, Mr. Cook had not sustained any direct trauma to his head.

A. Okay.

Q. And he simply presented with acute alcohol intoxication, acute alcohol intoxication can cause cerebral edema, correct?

A. In and of itself it, yes, it could.

Q. Okay. And cerebral edema causes bleeding in the

brain, correct?

A. Again, I tell you, again, it's not in the locations of this. If he has bleeding, it's a different area. It's in the brain stem only.

Q. Okay.

A. It is not in these areas that are described from the internal examination of the brain.

Q. Okay. And so had he not suffered from trauma, it's your testimony that he would not have died from acute alcohol intoxication?

A. That is why I certified him as blunt force trauma of head, yes.

Q. Okay. You were not able to study the liver in this case; is that correct?

A. Correct.

Q. So we don't know what type of condition that organ was in, correct?

A. It was donated.

Q. Okay. And based on the method of donation, it was most likely donated for the purpose of study?

A. It could have been study or it could have been transplanted into someone. They take many livers in lots of conditions.

Q. Okay. If Mr. Cook was an alcoholic, generally

that's not the type of organ that would be used for a donation other than study, correct?

A. That's incorrect.

Q. Okay. Do you know whether or not his liver was in the condition to be used in another person?

A. I have no idea.

Q. You weren't able to examine it, correct?

MR. HANDY: Objection, asked and answered.

THE COURT: It's accumulative. The objection is sustained.

Q. (BY MS. PENCE:) Okay. Were there any slides or tissue slides taken from any of the organs that were donated?

A. No.

Q. Any photographs taken of any of the organs that were donated?

A. Hard to say.

Q. Are you aware of any?

A. No.

Q. Are you familiar with acute kidney failure?

A. Yes.

Q. Okay. Acute -- excuse me, and I meant to say acute liver failure. Are you familiar with acute liver failure?

A. Yes.

Q. Okay. That also causes cerebral edema, correct?

A. Yes.

Q. And that basically is a sudden onset of -- you can tell if someone suffered from acute liver failure by being able to examine their liver, correct?

A. It's one factor. Usually they're jaundiced. Liver failure, they accumulate bile and they get yellow.

Q. But often it's not accompanied with jaundice; is that correct?

A. That's rare.

Q. With -- in acute liver failure, the same process that you've described as far as that the brain begins to swell and there's nowhere for it to go, that -- that process is something that is one of the complications of acute liver failure, correct?

A. It can be.

Q. At no time during his stay at the hospital was Mr. Cook examined or treated for acute liver failure; is that right?

A. Not that I know of.

Q. And at this time there's no way to examine his liver, correct?

A. It might be in somebody then we would know how well it worked.

Q. It's not available for us to examine; is that right?

A. You can ask them how well the liver is working if it was transplanted. You can always ask, you know, the people that --

THE COURT: How would you know? Now, really, doctor, how can you under HIPAA, how would I know who would have it?

THE WITNESS: They can release a status of transplanted organs.

THE COURT: Okay. Go ahead, Ms. Pence.

THE WITNESS: They won't tell you who it went to.

THE COURT: No, I'm asking -- I'm telling her to go ahead.

Q. (BY MS. PENCE:) On page five, under I don't know how to say this, genitourinary tract, it states that the kidneys were absent; is that right?

A. Yes.

Q. Those were not able to be examined by yourself?

A. Correct.

Q. No slides or photos were taken of the kidneys?

A. As far as I know, correct.

Q. Continuing under the endocrine system, the adrenal glands and pancreas were also absent?

A. Correct.

Q. There are no tissue samples or photographs of those either?

A. Correct.

Q. How did you learn about the brain death in this case?

A. Donor, they called.

Q. A donor called your office?

A. The donation agency. They call our office and say they have a brain death patient and they want to retrieve organs.

Q. So in this case, a person from the donation office called the medical examiner's office?

A. Yes.

Q. Okay. Do you recall who that person was?

A. No. That was what you were quoting from the narrative on the first page. That is not authored by me. That narrative that you were quoting earlier about further details or pending medical records, that was from one of our investigative agents, Nicole Franklin.

Q. And is she somehow connected with the donation office?

A. She's an investigator in the medical examiner's office. And there's -- here it says on 7-31 2017, at

1436 hours, Jessica Mulsavie (phonetic) a registered nurse with Renown Regional Medical Center telephoned to report brain death.

Q. Okay.

A. So it's -- they are working in conjunction. Basically, the nurse and the donor people, they are called.

Q. So you didn't receive any sort of medical record from a doctor regarding this pronounced brain death?

A. Yes, we are -- we do get records at that point.

Q. Okay. So -- so do you believe you had a medical record regarding the brain death?

A. Yes.

Q. Do you know whether or not the brain death was pronounced during another episode of cardiac arrest?

A. That would be unusual because there are certain parameters they must meet to call someone brain dead and it's not just cardiac arrest. It has to be a flat EEG. They do certain neurological exams, and it has to be done by a doctor, a certain period of time twice to make sure they really do have a flat EEG. That is a different test than what occurs during a CPR.

Q. How many -- do you know how many times Mr. Cook coded or required intervention due to heart failure while he was in the hospital?

A. No.

MS. PENCE: One moment, Your Honor.

Q. When you received Mr. Cook's body -- let me rephrase. When you examined Mr. Cook's body on August 5th, it was in significantly different condition than it had been in during the time he was in the hospital from the 7th to the 31st?

A. Definitely by the 7th, a lot of things change.

Q. Okay.

A. Between the time of the initial presentation and I see him basically a month later and even if you go back to the 31st, on the date of his pronouncement, it is a significant period of time for the body to have a lot of changes happen to it.

Q. So many of the things that you've notated and observed could very well have happened during that time that Mr. Cook was in the hospital, correct?

A. I think we distinguished the ones that we thought related to medical, and I'm still of the opinion that the head injuries are not related from the edema. The edema is a consequence of the head injury, that the head injury was the initial issue.

Q. But you -- you would agree with me that the initial head trauma didn't result in any sort of fracture,

correct?

A. It's a closed head injury so you are correct.

Q. There were no hairline fractures?

THE COURT: Ms. Pence, I don't want to impede your work but this has been covered by you on cross-examination. If there's something new, go ahead with it, but you already covered the status of it.

MS. PENCE: I do have just one more question. Well, it could be more than one.

Q. In the report that you referred to, the neuropathology report that was attached to your report, about halfway down under gross examination, it says interpretation of these areas of apparent contusion is hampered by the extent of the autolysis. What does that mean?

A. The brain was very soft and mushy, difficult to have a lot of structure left because of the extent of the edema and the following necrosis because of the edema. Basically, because the brain is so dead, it becomes liquid. So our structural part is difficult to identify to define exactly. It doesn't negate even in a decomposed body, we can still tell hemorrhage, and he outlines that well.

Q. Right.

THE COURT: So can I ask -- Ms. Pence, excuse me. The autolysis system and the necrosis you're

talking about, is there any way to tell whether that occurred prior or before his death or after his death?

THE WITNESS: Autolysis is a word we use to talk about after death.

THE COURT: Uh-huh.

THE WITNESS: You have to understand how this donation thing works. They are pronounced brain dead.

THE COURT: Right.

THE WITNESS: Dead, they are maintained on a respirator, and I don't know what day of the week August 5th was when I did this exam.

THE COURT: Well, it's about -- yeah, go ahead.

THE WITNESS: But in that interval, they're still on a respirator.

THE COURT: Right, so the tissues in the brain --

THE WITNESS: They start to die.

THE COURT: Okay. That's what I wanted to know.

THE WITNESS: Yeah, the brain is dead so the tissues are dying as well.

THE COURT: Okay.

Q. (BY MS. PENCE:) And that process actually starts at some point after there's been a brain injury; is that right?

A. Necrosis starts with brain injury. Autolysis

starts with death.

THE COURT: Okay.

THE WITNESS: So it's a distinction of words.

Q. (BY MS. PENCE:) And the longer someone is on life support and has increased intracranial pressure the more changes that you might expect to see over time, is that fair?

A. It changes of cell death and ability to evaluate things are always hampered with time and the swelling.

Q. And we know the swelling can exacerbate current hemorrhages as well as create new bleeds; is that right?

A. We've discussed that, yes. It might, yes.

Q. I don't have any other questions.

MR. HANDY: I'll be brief if I can.

REDIRECT EXAMINATION

BY MR. HANDY:

Q. I'm sorry, Dr. Bucholtz, what was your opinions to cause of death in --

THE COURT: Well, wait a minute, Mr. Handy. Don't try to remind me of everything she said in direct examination because I already heard it.

MR. HANDY: I don't intend to, Your Honor.

THE COURT: Okay. Well, then if there's something new, go ahead and address it.

Q. (BY MR. HANDY:) It wasn't your opinion Mr. Cook

died of liver failure; is that correct?

A. Correct.

Q. And it wasn't your opinion that Mr. Cook died of kidney failure; is that correct?

A. Correct.

Q. And it's not your opinion that he died of acute alcohol intoxication; is that correct?

A. Correct.

Q. Nothing further, Your Honor.

THE COURT: Okay. Before --

MS. PENCE: Your Honor?

THE COURT: Go ahead.

MS. PENCE: I'm sorry.

RECROSS-EXAMINATION

BY MS. PENCE:

Q. But you weren't able to examine the liver to look for any signs of acute liver failure; is that correct?

THE COURT: Wait a minute, stop. I'm going to take a break. I don't -- Ms. Pence, before you continue, just -- I just want to remind you that your record is very clear and thorough with the tools that you had so there's no need to ask the same questions over again. There was no need for Mr. Handy's redirect either, but we're going to take a short recess.

(Whereupon, a brief recess was taken.)

THE COURT: Case 17CR251, State of Nevada against Bernard. Everybody is here that was here before.

Go ahead, Ms. Pence.

Q. (BY MS. PENCE:) I don't have any -- actually, I do have one other question. Other than the video that you were shown by the State, do you have any knowledge of whether or not Mr. Cook sustained any sort of head injury prior to what you saw on the video?

A. I do not.

Q. How long does it take someone who is six feet tall and approximately 200 and or, excuse me, approximately 200 pounds to reach a .45 blood alcohol?

A. I don't know.

MS. PENCE: I have no further questions.

(Witness excused.)

THE COURT: Okay. So who is your next witness, Mr. Handy?

MR. HANDY: It's Investigator Storke, Your Honor.

THE COURT: Okay. Why don't you get Investigator Storke.

I don't want anyone to think anything improper is going on. I want to have a word with Dr. Bucholtz. I never met her in my life. We have a mutual friend who worked --

who she worked with at the coroner's office, and I want to give her some news about that in private. So we're just going to -- if you guys want to sit and listen to me and talk to her, we're going to take a minute and do that.

(Whereupon, a brief recess was taken.)

THE COURT: Go ahead, Mr. Handy.

MR. HANDY: The State will be calling Investigator Storke.

THE COURT: Turn around and face the clerk and she'll swear you in.

INVESTIGATOR JONATHAN STORKE,
called as a witness on behalf of the
State having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANDY:

Q. Can you please state your name, and spell your last name for the record.

A. Jonathan Storke, S-t-o-r-k-e.

Q. And how are you employed?

A. I am employed with the Douglas County Sheriff's Office.

Q. And how long have you been employed by the Douglas County Sheriff's Office?

A. 16 years and ten as a detective.

Q. And are you currently a detective?

A. Correct.

Q. How long have you been a detective for?

A. Ten years.

Q. And were you working as a detective in the months of July and August of 2017?

A. Yes.

Q. And had you been assigned to investigate a case regarding a suspect named Adam Bernard?

A. Yes, October 10th of '17 I was assigned the case.

Q. And what was your role in that case?

A. My role was to conduct follow-up investigation that came into the sheriff's office.

Q. And did you conduct some follow-up investigation?

A. I did.

Q. And what did you do as follow-up investigation?

A. Received information of a possible -- more information regarding the case, some different information that was portrayed to the initial investigator and so conducted some further interviews, collection of evidence and such.

Q. Okay. And did you collect any video of your investigation?

A. Yes, I did.

Q. And where did you obtain that video?

A. I obtained it from a male subject by the name of James Bell, who lives on Manhattan Way.

Q. And how did he provide it to you?

A. He provided a thumb drive with the video clips on it.

Q. And did you have a chance to review those videos on the thumb drive?

A. Yes, I did.

Q. And are you familiar with that portion of Manhattan Way?

A. Yes, I am.

Q. Did those videos portray that area of Manhattan Way?

A. Correct, yes.

Q. Do you know Mr. Bell's address on Manhattan Way?

A. I know it was across the street from the targeted address, which is 1294. Can I look in my report and give you the address?

Q. That's fine. Is 1294 Manhattan Way in Douglas County?

A. Yes, it is.

Q. And who resided at that time at 1294 Manhattan?

A. Kevin Tholl.

THE COURT: Last name again?

THE WITNESS: Tholl.

THE COURT: All right.

THE WITNESS: T-h-o-l-l.

Q. (BY MR. HANDY:) And what other investigation did you conduct in this case?

A. I interviewed Mr. Tholl. I interviewed a George Maeha (phonetic). I interviewed an Adam Bernard.

Q. And who is Adam Bernard?

A. Adam Bernard is the suspect in the case.

Q. And is he present here in the courtroom today?

A. He is.

Q. And could you please point out to us and identify him for us.

A. Sitting at the defendant table, black tie, glasses.

THE COURT: The witness --

Q. (BY MR. HANDY:) And how did you come to know Mr. Bernard?

A. Through the course of the investigation, the initial investigation before I received it had identified

Kevin Tholl and Adam Bernard as two subjects contacted at the residence the night of the incident.

Q. And did you make subsequent contact with him?

A. I did.

Q. And when was that?

A. That was on October 11th.

Q. And what was the nature of your contact?

A. To do a follow-up interview regarding -- I recontacted Kevin Tholl and Adam Bernard to do follow-up interviews regarding the incident that took place.

Q. And did you meet with Mr. Bernard for an interview?

A. Yes, I did.

Q. And when and where was that?

A. The interview was at the Stateline Subdivision, Stateline, Nevada in our investigation division interview room.

Q. And what day and what time did that occur?

A. If I can refer to my report to give you the exact time.

Q. Would that refresh your recollection?

A. Yes, it would. That was on October 11, 2017, at approximately 1500 hours.

Q. And did you obtain identifying information from

Mr. Bernard at that time?

A. He obviously identified himself to me. I don't recall if I asked for a driver's license or that nature, but he did identify himself as Adam Bernard, and he matched the description from the previous photographs taken at the scene of him.

Q. Okay. And that's the same Adam Bernard that's in court today that you previously identified?

A. Correct.

Q. And what did you learn during the course of that interview?

A. I started off the interview and questioned Mr. Bernard on the circumstances of the incident that took place from the night of the incident. His -- back it up. So I referred to the regular reports on the first incident, the same he gave patrol deputies and then coincided with my questioning with him.

He initially stated that Mr. Bernard and Kevin Tholl were at the victim's residence earlier in the night. They had been drinking. They were drinking. Mr. Bernard and Kevin Tholl were drinking Coors Light and the victim was -- Brian Cook was drinking Peppermint Schnapps. They were all quote unquote hanging out in the garage area and continued to consume alcohol.

During the night, there was an incident that occurred where they got into a verbal argument, some indications of just some verbal interaction of altercations between the two of them is what Kevin Tholl described as tension between Mr. Bernard and Mr. Cook. Mr. Bernard and Mr. Tholl then decided to leave the residence and head back to Kevin Tholl's residence that night.

Q. And that night, do you know which night we're talking about, the particular day -- date?

A. Yeah, it was July 8th, I believe.

Q. And did Mr. Bernard explain to you during that first interview what he believed happened that night at Mr. Tholl's residence?

A. Yes. So he described once Mr. Tholl and Mr. Bernard got back to the residence, Mr. Tholl's residence at 1294 Manhattan that Mr. Tholl received a telephone call from Mr. Cook stating that he was coming over, and there was some type of discrepancy of what was actually said during the phone conversation. He was either asking where Mr. Bernard was or whether or not he was asking where Mr. Bernard was so he was going to come over to quote unquote kick his ass.

During that phone conversation, I was told -- Kevin Tholl stated that he told Mr. Cook not to come over but about that subsequent same time, Mr. Cook arrived at the

residence at 1294 Manhattan. Upon the arrival, Mr. Bernard stated that he -- that Mr. Cook got out of the driver's vehicle. Mr. Bernard walked up with his hands up in the air, basically questioned him why he was there, why he wanted to beat him up, quote unquote.

After that incident, the two of them began to get into a physical altercation, and Mr. Bernard stated that he -- there was a couple of different statements. One that he --

Q. What was the statement at the first interview?

A. At the first interview was that he punched Mr. Cook. He fell to the ground or that he punched him. They both kind of the went to the ground. He punched him once or twice more while they are on the ground and that was the incident. He got up and walked away.

Q. And did you discuss the incident further with him on the first interview as to what happened?

A. The first interview?

Q. Yes.

A. Yeah. My first interview with him was basically, yeah, that fight, it was a one punch. Well, let me back up. It was a one punch and that was it. The subject went down, and he was knocked out.

Q. And did you have a subsequent interview with

Mr. Bernard?

A. Correct.

Q. And what led to you having a second interview with Mr. Bernard?

A. So what led to the second interview was the discovery of the video surveillance at James Bell's residence which depicted a different scenario that was described to me.

Q. And what happened at that interview?

A. So the second interview, again, was at the Stateline Sheriff's Office. We sat down. We talked. I asked him to tell me the --

THE COURT: Is this the same date or a different date?

THE WITNESS: This is a different date. This was on -- if I can look in my report, I can give you the exact date. It was this November I believe.

Q. (BY MR. HANDY:) Would that refresh your recollection to look at your report?

A. It will. So the second interview was on November 3rd, 2017, at approximately 1440 hours, and what led to that interview was the discovery of the video surveillance that depicted a different scenario than what was described to me in the initial interviews.

Mr. Bernard and I sat down. We discussed it. I

asked him to tell me the scenario again what had occurred. At this time, same situation for the most part, that they were over at Mr. Cook's house drinking, consuming alcohol. They subsequently left and subsequently the same telephone call that I described before occurred and with Mr. Cook subsequently arriving at the residence at Manhattan, basically, same type of interaction between the two of them, some verbal altercation between the two of them.

When Mr. Cook exits his vehicle, Mr. Bernard told me that Mr. Cook stated that he was going -- he was there. He was going to -- he was going to take his one good eye is one of the comments that was made to him. From that incident, he said that the two of them began wrestling around, kind of grappling standing up, where the two of them fell to the ground and at that point, he punched Mr. Cook two to three times in the face and that was the subsequent end of the fight per se to his initial statement in that second interview to me.

I went through the interview a little bit more with him, asked him if he ever kicked Mr. Cook at all. He -- and we went through that. He said he stood up, and Mr. Bernard said he was concerned for Mr. Cook and was kind of nudging him with his foot, telling him to get up, get up, kind of inquired more about the kicking situation and

basically stated I never booted him. And him and -- then Mr. Bernard and Kevin Tholl subsequently picked up Mr. Cook and drug him off to the side of the road over to where the truck was parked at the residence.

Q. And during the course of the interview, did you show Mr. Bernard the surveillance video?

A. Yes. So once I got through that initial kind of statement about what happened of the fight, I again showed him the video surveillance that I obtained which depicted the fight. After watching that video surveillance, Mr. Bernard stated something, you know, that was, must have been a blackout moment.

So we kind of questioned -- questioned him more about the incident, mainly to obtain the first interview I conducted with him and Mr. Tholl. The two interviews were pretty exact. The two statements were pretty exact which is abnormal for an investigation. Usually the statements are usually somewhat different, but they were pretty exact between Mr. Tholl's and Mr. Bernard's first interviews with me in October. So I questioned them, you know, why he -- why he lied to me during the first interview and subsequent to the first part of the interview and the second one, and he subsequently told me that he was scared about what happened during the fight, and that he took Mr. Tholl's interview

because they had talked at some point and used that as his own statement and that's why he gave me a watered down version of the incident.

Q. And when you reviewed the video surveillance with Mr. Bernard, did he identify any of the persons you can see in the surveillance video?

A. Yes, we talked about it. We identified Kevin Tholl in the video surveillance, Mr. Cook and Mr. Bernard, himself.

Q. And do you remember which individuals from the video he identified as being each?

A. I'm sorry, what's that?

Q. If I showed you a portion of the video, can you identify the persons that Mr. Bernard identified as being himself, Mr. Tholl and Mr. Cook?

A. Correct.

MR. HANDY: Your Honor, if I might show or even stipulate for admission of Exhibit 1.

Q. This looks like it's time stamped at 9:46:43 p.m. and date stamped July 2017, cam one. Now, we see three individuals toward the top left of the screen standing roughly camera side of what appears to be a pickup with a camper shell on it. Did Mr. Bernard identify those three individuals for you?

A. Yes. During the course of the interview, looking at the video surveillance, the subject to the right, the taller individual would be Mr. Cook and --

THE COURT: I can't see it from here. Mr. -- can you -- can somebody show me what we're looking at.

THE WITNESS: I can go up and point.

THE COURT: Mr. Handy, I'm going to allow Investigator Storke to go up and point out the persons that he's identifying.

MR. HANDY: Thank you, Your Honor.

Q. Mr. Storke, if you could.

A. So at this point, the subject on the right, right here, the taller individual would be Mr. Cook.

THE COURT: Okay. These are people that are standing between the pickup and the camera. So they are standing up against the pickup in the upper center portion, upper left center portion of the video.

THE WITNESS: Yeah, so this residence right here would be Mr. Tholl's residence at 1294. This residence where the camera is at is at Mr. Bell's residence.

THE COURT: Okay.

THE WITNESS: I don't recall the exact address offhand. He had a camera he pointed out across the street.

THE COURT: Okay. I got it.

Okay. So go ahead. In response to Mr. Handy's question, you identified one of those people as Mr. Tholl.

THE WITNESS: So subsequently this person, the taller person right here, was identified as Mr. Cook. He's the one that showed up in his vehicle. And the stockier, shorter male is identified as Mr. Bernard. And you can't really see it right here until you move it forward, Mr. Tholl standing between the two vehicles.

THE COURT: Okay. Thank you.

Q. (BY MR. HANDY:) You can have a seat. Thank you, Investigator Storke.

THE COURT: That information you received from talking to Mr. Bernard?

THE WITNESS: Correct, talking with Mr. Bernard and subsequently interviews with Mr. Tholl as well.

THE COURT: Go ahead.

Q. (BY MR. HANDY:) And I was going to ask, Investigator Storke, had you already met Mr. Tholl in person?

A. I had, yes.

Q. And did he appear to be substantially similar to the person identified -- as Mr. Bernard identified as Mr. Tholl in this surveillance video?

A. Correct.

Q. And when Mr. Bernard identified himself in this

video, does he look substantially similar to the person he identified as being himself in this video?

A. He does.

Q. And had you observed Mr. Cook or photographs of Mr. Cook similar at the same time?

A. Yes, I have.

Q. And does your -- to your understanding and knowledge of Mr. Cook, did he accurately depict here in the video as the person who identified -- as the person that Mr. Bernard identified as Mr. Cook?

A. He does, yes.

Q. Thank you.

THE COURT: Why don't you play that again, Mr. Handy.

MR. HANDY: I could, Your Honor, yes.

Q. Now, Investigator Storke, you said you obtained a series of clips of surveillance video from Mr. Bell's backyard?

A. That's correct.

Q. And did you view all of those clips?

A. Yes, I did. There was numerous amount of individual clips. Mr. Bell told me when he downloaded the video surveillance, just the way that the DVR downloaded the stuff on to a thumb drive, it broke it into several movie

clips. Some were shorter. Some were longer.

Q. Okay. I'm going to play this video again for you again. It starts at, let me see, the time stamped 9:46:20 p.m., the same date and same cam one in the lower left hand corner. I'm going to play this really quickly. Maintain the question in your mind, Investigator Storke, does this fairly and accurately reflect a portion of those video clips that you viewed just strung together?

MS. PENCE: Your Honor, if it's simply for the question that was proposed whether it's fair and accurate, I don't have any objection to that.

THE COURT: Okay.

MS. PENCE: If there's another reason that we're playing, I don't -- I'm not sure so I would object as to the accumulative unless there's another reason.

THE COURT: It's already in evidence. I asked him to play it again so I could watch it.

MS. PENCE: Okay.

MR. HANDY: It ended about time stamp 9:42.

THE COURT: Okay.

Q. (BY MR. HANDY:) Investigator Storke, did that accurately reflect the video clips that you were able to review off of Mr. Bell's video system?

A. It does.

Q. And, Investigator Storke, during the course of your investigation, did you ever find out who made the originating 911 call?

A. Yes.

Q. And do you remember who that was?

A. Subject by the name of Phillip I believe.

Q. And do you know Phillip's address by any chance?

A. I can -- it is -- his address was one house to the east of 1294. I can look in my report to give you the exact address.

Q. So next door?

A. Next door, yeah, and his residence sat right on the corner of Tillman Lane and Manhattan.

Q. And do you know about when that phone call was made?

A. It was made about the same time that the video stamp is around the 21 -- I can refer to my report and give you the exact time, but it was about the same time that the fight occurred or around that time.

Q. Okay. And do you know about how long it took deputies to respond to the scene?

A. It took them -- if you go off the video surveillance that's depicted, by the time that Mr. Cook is drug off to the side of the road, it's about approximately

ten minutes.

Q. And do you know whether any other 911 calls were made regarding this incident?

A. I'm not aware of any other ones. Just to clarify -- to clarify, there wasn't any other 911 calls made. This is the only one that was on document that I have from dispatch.

MR. HANDY: Okay. I'll pass the witness at this time, Your Honor.

THE COURT: Go ahead. Well, Ms. Pence, do you anticipate a lengthy examination?

MS. PENCE: More than five minutes.

THE COURT: Okay. Do you have other witnesses, Mr. Handy?

MR. HANDY: No other witnesses, Your Honor.

THE COURT: Okay. Why don't we just keep working then. Go ahead.

CROSS-EXAMINATION

BY MS. PENCE:

Q. When you interviewed Mr. Tholl, the first interview that was referenced in October of 2017, he told you that Brian was a bully and liked to make fun of Mr. Bernard because he was blind in one eye; is that right?

MR. HANDY: Objection, hearsay.

THE COURT: Ms. Pence?

MS. PENCE: I believe he opened the door to that interview on direct.

THE COURT: Objection sustained.

Q. (BY MS. PENCE:) Okay. You learned from your interview with Mr. Tholl that Mr. Cook was an alcoholic?

A. Well, there was drinking. I don't want -- I can't make the determination whether he was an alcoholic or not.

Q. Mr. Cook consumes alcohol?

A. That was stated by Mr. Tholl and Mr. Bernard that they were over there drinking at the residence, correct.

Q. And you were informed that Mr. Bernard and Mr. Tholl were drinking Coors Light; is that right?

A. Correct.

Q. And the alcohol content of Coors Light is probably somewhere between three and five percent alcohol?

A. Fair enough, yes.

Q. Okay. And that Mr. Cook was drinking Peppermint Schnapps; is that right?

A. That's what was told to me, yes.

Q. And Peppermint Schnapps, I don't know if that's 100 proof?

A. 80.

Q. 80 proof, okay. So contains much more alcohol than beer; is that right?

A. Correct.

Q. Okay. And you learned that he had been drinking for most of the day?

A. Who?

Q. I'm sorry, Mr. Cook.

A. That I'm unaware. I mean, that is what was speculated by Mr. Tholl and Mr. Bernard that he had been drinking most of the day. I can't testify that he was or he wasn't.

Q. Okay. You testified that Mr. Tholl received a phone call -- well, according to your investigation, these three individuals were hanging out at Mr. Cook's residence; is that right?

A. Correct.

Q. And an argument broke out between Mr. Bernard and Mr. Cook?

A. Yes.

Q. Mr. Cook started to harass Mr. Bernard about his eye and being blind?

A. That was one of the statements that was made to me, correct.

Q. Okay. And at some point Mr. Bernard and Mr.

Tholl left that residence; is that right?

A. Correct.

Q. And they -- there had been no physical altercation at the residence that was reported?

A. Correct.

Q. You later interviewed Mr. Bernard about the confrontation at Mr. Cook's house; is that right?

A. Yes, that was part of it.

Q. And during that interview, he explained to you that Mr. Cook talked about how he could blind him in his eye; is that right?

MR. HANDY: Objection, hearsay.

THE COURT: That's not -- well, in a sense it is but I think, Mr. Handy, since you asked him about his interview with Mr. Bernard that his interview with Mr. Bernard is admissible.

MR. HANDY: Maybe but not the statements of Mr. Cook to Mr. Bernard. It's secondhand hearsay I'm concerned with.

THE COURT: No, these are statements made by Mr. Bernard to Investigator Storke. They are admissible because you asked what Mr. Bernard said. I made a decision what Mr. Tholl told Mr. Storke is inadmissible but what Mr. Bernard told him whether -- whether Mr. Cook said it or

not, if he -- if that's what Mr. Bernard said, then it's going to be admissible, at least in this proceeding.

So do you understand the parameters? You can't tell me what Mr. Tholl said but if she asks -- she's just now asked you what Mr. Bernard told you Mr. Cook was saying.

THE WITNESS: Okay.

THE COURT: Go ahead, Ms. Pence.

Q. (BY MS. PENCE:) Mr. -- you asked -- let me rephrase. Adam -- excuse me, Mr. Bernard told you that he worked with Mr. Cook?

A. Correct.

Q. And that there were times at work that he -- Mr. Cook actually would throw nails at Mr. Bernard?

A. That's what Mr. Bernard told me, yes.

Q. And that he had always poked fun at him and joked about his blind eye?

A. That's what Mr. Bernard told me, yes.

Q. And he described Mr. Cook as a bully?

A. That's what he told me, yes.

Q. Mr. Bernard talked to you about Memorial holiday weekend; is that right?

A. Correct.

Q. And he explained that they had all gone camping and that would be Mr. Cook's family and Mr. Tholl's family

and Mr. Bernard?

A. Yes, that's the sense that I got from the statement.

Q. And on that occasion, again, Adam told you that after drinking alcohol, Mr. Cook started to make fun of his eye again?

A. Yes, there was kind of a bunch of statements there made during I guess that incident, that being one of them.

Q. Okay. And Mr. Bernard told him he had enough and to stop?

A. Yeah, at some point they got into a verbal argument about the comments being made. Actually, I believe the argument started because there was an indication or Mr. Cook and Mr. Tholl -- Mr. Tholl was sleeping and Mr. Cook was messing with Mr. Tholl. I think that's how the argument started between Mr. Bernard and Mr. Cook is how I took those statements.

Q. Okay. And now I know that you don't have the whole what I have in front of me, but I'm talking specifically about the Memorial holiday weekend. But, anyways, Mr. Bernard told you that he had a history with Mr. Cook of him wanting -- teasing him or talking about taking his good eye?

A. That's correct, that's what he told me.

Q. And on the night in question while they were at the house drinking, Mr. Bernard told you that Mr. Cook pulled out a knife and held up the knife and said I could kill you right here; is that right?

A. That's the statement he told me, yes.

Q. And that he took the knife and pointed it at -- Mr. Cook took the knife and pointed it at Mr. Bernard's face and told him it would be that easy, lights out; is that correct?

A. That's correct.

Q. And Brian -- excuse me, at that point, Mr. Bernard was ready to leave but Mr. Cook was insistent that he try on a float tube that he had?

A. Yeah, it was between the float tube incident and knife, there's an unknown amount of time of how long they were there. Neither could describe how long the incident was there but, yes, there was an incident where a float tube, he wanted him to try -- Mr. Cook wanted Mr. Bernard to try on a float tube.

Q. And Mr. Bernard didn't want to do it; is that correct?

A. That's what he told me.

Q. But Mr. Cook was insistent that he put on the

float tube?

A. That's what he stated.

Q. Okay. And so ultimately Mr. Bernard put on this plastic floating tube suit in order to appease Mr. Cook?

A. Correct.

Q. Shortly after that, Mr. Cook -- well, Mr. Cook made statements that made Mr. Bernard want to leave the residence?

A. I believe kind of the whole --

MR. HANDY: Objection, calls for speculation.

THE COURT: Well, if it -- if it relates to a statement made by Mr. Bernard at that point -- during the context of the interview, I'll allow it.

Q. (BY MS. PENCE:) Adam told you -- excuse me, Mr. Bernard told you that Mr. Cook started telling him about how he would like to kick his puppy in the air to make him do flips; is that right?

A. Yes, I think it was portrayed as one incident.

Q. And that made Mr. Bernard angry and want to leave the residence?

A. That's what he told me, yes.

Q. Mr. Bernard told you that once they arrived back at Mr. Tholl's house, he decided to stay at that residence because he had been drinking and didn't want to leave the

residence?

A. Correct.

Q. And that shortly after they had arrived, Mr. Tholl received the phone call from Mr. Cook?

A. Correct, that's what Mr. Bernard told me.

Q. And Mr. Bernard told you that he was able to hear Brian over the phone say I'm going to come fuck Adam up?

A. That's what he told me, yes.

Q. And that the phone call then ended?

A. Yes.

Q. Okay. And at that point, Mr. Cook -- excuse me, Mr. Tholl attempted to call Mr. Cook back?

A. Yes.

Q. And that he was able to get him on the phone?

A. That's what he told me, yes.

Q. And he told him not to come over?

A. Correct. To add to that, I think it was at the same time that he said basically the same time that Mr. Cook was showing up.

Q. So Mr. Cook would have been on his phone as he was driving up?

A. That's my assumption.

Q. And Adam told you that as soon as -- excuse me, Mr. Bernard told you as soon as Mr. Cook pulled up, he exited

the vehicle and came over to him?

A. I believe it was kind of a mutually -- I mean, Mr. Bernard and Mr. Tholl were already out in the street or in the yard when Mr. Cook pulled up, so it was kind of -- Mr. Cook rolls up, gets out of his car and Mr. Bernard and Mr. Cook subsequently meet in the street.

Q. Okay. And Mr. Bernard told you he asked Brian why do you want to beat me up, why don't you like me?

A. That's what he told me, yes.

Q. And then Adam told you that Brian said to him, I'm going to make you blind in your other eye?

A. Correct.

Q. You had a second interview with Mr. Bernard after you received the videotape that we've watched; is that right?

A. Yes.

Q. And, again, you asked Adam what it was specifically that Brian said when he showed up to fight him. Do you remember asking him that?

A. Yes.

Q. Okay. And Mr. Bernard said to you that Brian said I'm going to kill you, lights out. I'm going to make you blind in your other eye, mother fucker?

A. That's what Mr. Bernard told me that Mr. Cook said.

Q. And that was consistent with what Mr. Tholl told you in his first report, correct, or excuse me, his first interview?

A. Not the kill you part but the I'm going to take your good eye comment.

Q. When you -- after you showed Mr. Bernard the video, he told you that it was like he had blacked out at that moment?

A. He told me several different things. That was one of the statements, but he also stated that he remembered the fight more vividly than what he told the deputies on scene than what he told me in the initial interview with him more than what he admitted to.

Q. And but my question to you was that as he watched the video, he said it was like he had blacked out?

A. That's his comment, yes.

Q. Okay. And then when you asked him about why the fight that he originally described wasn't consistent, what you asked him whether he thought it was consistent or not and he basically shook his head up and down and said it wasn't consistent; is that true?

A. Can you --

Q. I'm sorry.

A. -- ask that again.

Q. You asked him whether he thought his original description was consistent with the video; is that right?

A. I believe I asked him after he watched the video, is that what -- is that what he recalls as being depicted in the fight, if that's what happened in the fight. He initially told me yes, and we gone on throughout the interview and he stated what he saw on the video was what he remembers, just not to that extent.

Q. Okay. And he told you, like I said, I was scared for my life. I just blacked out; is that right?

A. That was the statement to me, yes.

Q. Okay. You asked him after watching the video whether he recalled anything more about the fight; is that right?

A. I'm sure I did, yes.

Q. And he told you that it was just total chaos; is that correct?

A. I remember that comment, yes.

Q. And then he stated he was scared that Brian was going to get up and shoot him with a shotgun that he keeps in his truck or stab him with a knife?

A. Which we went over.

Q. Is that the statements he made to you when you asked?

A. Yes, coupled with he never saw a knife in his hand. There was never a knife brandished.

Q. My question is after he saw that video, his response to you was that he was scared for his life. He was concerned he could get a shotgun out of the truck or that he would stab him with a knife?

A. Speculation by Mr. Bernard.

Q. My question is that what Mr. Bernard told you?

THE COURT: Just answer the question about what he said to you.

THE WITNESS: Ask it again.

Q. (BY MS. PENCE:) After watching the video, did Mr. Bernard tell you that he was scared for his life that he was -- I apologize, I lost my place. He was scared that Brian would get up and shoot him with a shotgun that he keeps in his truck or stab him with a knife?

A. That's what Mr. Bernard stated, yes.

Q. And then when you asked him what knife, Adam told you that when he and Mr. Tholl were at Mr. Cook's residence that night, Mr. Cook had pulled a knife while he was there saying I could have killed you both; is that correct?

A. That's what he told me, yes.

Q. You asked Adam if he was just really mad at Mr. Cook, excuse me, for picking on him all day long, and he

told you he wasn't angry; is that right?

A. That's what he told me.

Q. He told you he was afraid that Mr. Cook was going to hurt him?

A. That was his statement, yes.

Q. That he didn't know if Mr. Cook would get up and go to his truck to get his gun and then he just didn't know what would happen?

A. That's what he stated.

Q. At some point you collected Mr. Bernard's phone in order to look for electronic communications between he and Mr. Tholl regarding what had happened that night; is that right?

A. Correct.

Q. And there were no messages or texts or e-mails or phone calls as far as you were able to discover?

A. Yeah, I didn't do the forensic search of the phone. That was done by Investigator Garren but there was no -- what I was told, there was no dump -- the extraction of the phone did not date back to that time frame.

Q. On the night of this incident, Mr. Cook had a blood alcohol content of .45; is that correct?

A. That was noted in Investigator Koontz's report, I believe, yes.

Q. And you included that information in your report?

A. Correct.

Q. And that was based on the results from the Renown Regional Medical Center?

A. That was the results of Investigator Koontz's investigation while he was on scene at the Renown Medical Center.

Q. Okay. So if in your report it states results from Regional Renown Medical Center as documented by Investigator Koontz, that would be accurate?

A. Correct.

Q. Both Mr. Bernard and Mr. Tholl's blood alcohol level were significantly lower; is that right?

A. Well, they were high if you want to talk about that. They were lower --

Q. I meant if they were lower than Mr. Cook's?

A. They were lower than Mr. Cook's.

Q. Specifically, Mr. Bernard's blood alcohol content was a .182; is that right?

A. Correct.

Q. And Mr. Tholl's blood alcohol content was a .226, correct?

A. I know it was a two but if that's what you're saying is in my report, then yes.

Q. Okay. So of the three individuals, Mr. Bernard had the lowest blood alcohol content; is that right?

A. Yes, but all intoxicated.

Q. But my question is simply he had the lowest blood alcohol content?

A. Sure.

Q. And as far as level of intoxication, obviously, we would need more information, correct?

A. To his level of intoxication, I mean?

Q. Perhaps level of impairment would be a better way to phrase that.

A. Sure, my opinion would be he would be impaired with a .189.

Q. Certainly all of them were impaired?

A. Sure.

Q. And of the three of them, the most impaired is Mr. Cook, correct?

A. Correct.

Q. And you're familiar with blood alcohol?

A. Correct.

Q. And pretty much anything over a .37 can result in death, correct?

MR. HANDY: Objection, calls for speculation, expert opinion.

THE COURT: You know, yeah, this is -- this is outside the purview of this witness' -- I mean, it's all hearsay, and it's already in the record from the pathologist so why don't you ask him something that he --

MS. PENCE: Okay.

THE COURT: -- that he -- is in his perception.

Q. (BY MS. PENCE:) On both incidents when you interviewed Mr. Bernard, he didn't have to speak with you; is that right?

A. No, he did not.

Q. You made the request and he voluntarily came in and talked to you about the event?

A. Correct.

Q. And neither time did he ask for an attorney or any other sort of a protection?

A. No.

Q. After your second interview, you informed him that he was not under arrest at that point?

A. Yes.

Q. And that he was free to go?

A. Yes.

Q. And Mr. Bernard told you that he would return if you wanted any information?

A. Yes.

Q. And that he agreed to be cooperative?

A. Correct.

Q. Okay. And that if a warrant was issued or filed, he would turn himself in?

A. Correct.

Q. I have no other questions.

THE COURT: Anything else, Mr. Handy? Mr. Handy, I want to just remind you that I didn't like that last redirect you did. I don't want to hear another one like that in the context of this proceeding. We can do that in trial cases but not in preliminary hearings.

MR. HANDY: Understood, Your Honor.

Your Honor, I have nothing further of this witness.

THE COURT: Okay. You can step down.

Can he be excused?

MR. HANDY: Yes, Your Honor.

MS. PENCE: Yes.

THE COURT: You're excused.

THE WITNESS: Thanks.

(Witness excused.)

THE COURT: Okay. Anything else, Mr. Handy?

MR. HANDY: Nothing further, Your Honor.

THE COURT: Do you want to put on any evidence,

Ms. Pence?

MS. PENCE: No, Your Honor.

THE COURT: Mr. Handy, do you have any closing remarks?

MR. HANDY: I'll be brief, Your Honor. In this case, the evidence has shown by at least slight or marginal evidence by the quantum of probable cause that the defendant, Mr. Bernard, was the cause of Mr. Cook's death.

You heard from the pathologist that Mr. Cook did die. He died of blunt force trauma to the head, and that the injuries that you can see in the video that speak for itself would cause that blunt force trauma and, in fact, did in this case.

You heard from the first witness that Mr. Cook was immediately from the scene taken by ambulance. You heard from the pathologist that Mr. Cook remained in the hospital the entirety of that time between the injuries sustained in Mr. Bernard's death. As such, Your Honor, the State would recommend the Court does bind this over for trial in district court.

THE COURT: Okay. Ms. Pence?

MS. PENCE: Your Honor, I -- the State has not met its burden to demonstrate corpus delicti. I -- while I think we would concede there's a death, I don't believe the

State has demonstrated that that death was caused by criminal agency. They have not been able to eliminate any other possible causes of death that in this case certainly could have easily been the ultimate cause of Mr. Cook's death.

And I'm relying on the cases of Azbill and Frutiger, specifically where there was other evidence that connected the defendant to a death but just like in this case, basically the coroner was not able to give any exclusion for meningitis, for whether or not Mr. Cook simply died because he consumed enough alcohol to have a .45 blood alcohol.

In fact, Mr. Cook may have been, and I don't think it's a light expression but it's certainly applicable in this case, a dead man walking. What we know in this case is that he achieved the level of a .45. And after a .37, as agreed to by the State's witness, death is often the result.

We don't know whether or not in part because of the absence of records but this -- their own witness was not able to say how many times Mr. Cook suffered from cardiac arrest while he was at the hospital. It was clear that his heart was already enlarged and that he had suffered prior heart problems.

Acute liver failure which this witness agreed could cause cerebral edema which ultimately is what caused

Mr. Cook's death was not able to be ruled out because it couldn't even be examined.

In this case, Mr. Bernard is at a disadvantage because specifically the organs that would allow for examination, the kidneys, the liver were all donated prior to examination, and we have a medical examiner who was given a body that was in a greatly altered state. She testified to this Court that, yes, there was head trauma. She could not date any of the hemorrhaging, and that's specifically why I asked her to describe for me where along the organizational process she believed those hemorrhages were and she was unable to do that.

As the Court heard, the longer someone is on life support and the longer there's intracranial pressure, the greater those hemorrhages can become both in extent and in number because new bleeds are also possible.

This witness agreed, although she disputed whether or not they were ultimately the causes of death, acute alcohol intoxication, acute liver failure and meningitis all have the same -- cause the same problems that someone with cerebral edema would suffer from which is ultimately death.

And what the case law says is that when the coroner's opinions are too speculative, meaning she assumed

that it wasn't caused by acute liver failure because she told the Court she never could really look at that because she didn't have an organ, that's a speculative opinion. When she said she didn't believe it was caused by acute alcohol intoxication --

THE COURT: Ms. Pence, I -- I want to hear your argument, but I want you to have a little more fidelity to the evidence. So I didn't hear the pathologist testify to what you just said, and I want to make sure that you don't mischaracterize her testimony, so.

MS. PENCE: I believe the witness said that the liver was not available to perform any sort of examination. And I asked whether or not if we would have been able to examine the liver, for that we would be able to know whether or not he had, in fact, had acute liver failure.

THE COURT: Okay. Go ahead.

MS. PENCE: And because that wasn't available, she said she did not believe that he had but also admitted she was not able to perform that examination. She did not know because she could not date any of the hemorrhaging or the bruises which were caused from the incident that Mr. Bernard was responsible for or if he had hurt himself prior to that event because there was no way to age what she was seeing.

We do know the trauma that Mr. Bernard inflicted was of the type that it didn't cause a single fracture and I'm asking this Court to use the knowledge that it has based on everyday experience, as well as the evidence that was presented. So the trauma that allegedly was caused by Mr. Bernard did not fracture either the orbital sockets or the nose, as this Court knows are fragile and easily broken.

Yes, there was trauma on the forehead but Mr. Cook's presentation was normal cephalic, meaning when he was first reviewed by doctors, he didn't even have lumps or bumps on his head.

So while, Your Honor, there is evidence that there was trauma caused by Mr. Bernard, the ultimate cause of death which is swelling of the brain and ultimately the body's inability to move forward because of brain impairment, we didn't hear any testimony that it had to have come specifically from that. She said she thought it did, but she didn't know if he had any injuries beforehand. She didn't know about the other possibilities, and the law says the Court or a grand injury can't speculate as to what it could be.

And in this case, the witness was not able to rule out those other things, specifically the meningitis, which she said, you're right, we don't know and for those

reasons, Your Honor, I don't believe they have met the burden as far as the corpus delicti, and I don't think the Court should bind him over.

I do want to -- well, I think the objection about the records is already there.

THE COURT: All right. Mr. Handy, anything else?

MR. HANDY: No, Your Honor.

THE COURT: Okay. Based upon all of the evidence and the controlling principles of law, the Court finds there is probable cause to believe that the crime was committed and the crime charged in the complaint was committed and that Mr. Bernard committed it, and he's ordered to stand trial in the district court.

I will say -- I will say that I have had -- I have seen homicide cases or intracranial injuries without -- without fractures of the skull that resulted in death that amount to an involuntary manslaughter because like the one punch thing that the witness, that was suggested today to the investigator in the first interview, and I have seen other cases where murder is appropriate.

Although, I'm ordering Mr. Bernard to stand trial for open murder, and I think it's appropriate in this case, I also think that the parties would be wise to explore other alternatives. I'll just leave it at that, but I -- there's

plenty of probable cause.

Just so it's clear, what my ruling is, in case there's a habeas, the pathologist's opinion was very clear that -- that the death was a result of blunt force trauma and -- and that's -- so I don't think that the witness is required to exclude all of the other possibilities when the evidence is so clear and her opinion is so direct and strong. So that's -- now you may interpret it different than I did but that's the way I interpret her testimony.

Anyway, we're going to have to pick a district court to go to. It goes to Department Two.

Mr. Bernard, your attorney is doing a great job for you, and she's developed your defense in a way that educates not only me but also Mr. Handy, and I also want to tell you that I appreciate the respect that you've shown to law enforcement and to the Court ever since this transpired.

THE DEFENDANT: Of course.

THE COURT: And so I don't know what's going to happen in your case next but I will tell you that.

THE DEFENDANT: Thank you, sir.

THE COURT: Okay. Mr. -- Ms. Pence, we're looking at Department Two.

MS. PENCE: July 16th.

THE COURT: Okay. 7-16 at 9:00. Good luck to you. All of the bail conditions will remain in effect.

I, THOMAS PERKINS, Justice of the Peace of East Fork Township, sitting as Committing Magistrate in Minden, Nevada, hereby certify;

That KATHY JACKSON, a Certified Court Reporter, was duly appointed and sworn by me to report the proceedings had in the Preliminary Hearing in the case of The State of Nevada, Plaintiff, versus ADAM ANTHONY BERNARD, Defendant; that the witnesses were first duly sworn and their testimony taken in stenotype notes and thereafter transcribed into longhand typewriting as herein appears;

That when the examination of the witnesses and the presentation of evidence was closed, it appearing from the evidence adduced at said preliminary hearing that there was reasonable cause and sufficient grounds to believe that said defendant probably committed such crime as charged, the said ADAD ANTHONY BERNARD, was therefore bound over to the District Court for trial.

THOMAS PERKINS
JUSTICE OF THE PEACE
EAST FORK TOWNSHIP, STATE OF NEVADA

STATE OF NEVADA,)
) ss.
CARSON CITY.)

I, KATHY JACKSON, Nevada Certified Court Reporter Number 402, do hereby certify:

That I was present in the Justice Court of East Fork Township, in and for the State of Nevada, on Friday, June 29, 2018, for the purpose of reporting in verbatim stenotype notes the within-entitled preliminary examination;

That the foregoing transcript, consisting of pages 1 through 118, is a full, true and correct transcription of said preliminary examination.

Dated at Carson City, Nevada, this 9th day of July, 2018.

Kathy Jackson

KATHY JACKSON, CCR
Nevada CCR #402

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Case No. 18-CR- 0104

Dept. No. II

DA Case No. 17-1299H

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

ADAM ANTHONY BERNARD,

Defendant.

/

INFORMATION

Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

Peter P. Handy, Deputy District Attorney, within and for the County of Douglas, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court that Adam Anthony Bernard has committed the crime of OPEN MURDER, a violation of NRS 200.010(1) through 200.090, a category A felony.

The defendant, on or between July 8, 2017, and July 31, 2017, and before the filing of this Information, at and within the County of Douglas, State of Nevada,

> did willfully, unlawfully and with malice aforethought, kill a human being, to-wit: did kill Brian Cook by punching and/or kicking him in the head one or more times, all of which occurred at or near 1294 Manhattan Way, all of which occurred in the County of Douglas, State of Nevada.

against the peace and dignity of the State of Nevada. Complainant prays the defendant be dealt with according to law.

Peter P. Handy
Deputy District Attorney

The following are the names of such witnesses as are known to me at the time of filing the within Information:

Investigator Jon Storke	Douglas County Sheriff's Office 1038 Buckeye Road Minden, Nevada 89423
Sergeant Rick Koontz	Douglas County Sheriff's Office 1038 Buckeye Road Minden, Nevada 89423
Deputy Matthew Sampson	Douglas County Sheriff's Office 1038 Buckeye Road Minden, Nevada 89423
Deputy Mark Brown	Douglas County Sheriff's Office 1038 Buckeye Road Minden, Nevada 89423
Deputy Ignatius Kyeremeh	Douglas County Sheriff's Office 1038 Buckeye Road Minden, Nevada 89423
George Michael Mejia	1341 Victoria Drive Gardnerville, Nevada 89460
Kevin Tholl	1294 Manhattan Way Gardnerville, Nevada 89460
James Michael Bell	1295 Manhattan Way Gardnerville, Nevada 89460
Phillip Ruffo	1298 Manhattan Way Gardnerville, Nevada 89460
Dr. Ann L. Bucholtz	7100 North County Fair Trail Prescott Valley, Arizona 86314

Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

Dr. Rudolph Castellani	Western Michigan University Homer Stryker M.D. School of Medicine 300 Portage Street Kalamazoo, Michigan 49007
Aaron Leising	East Fork Fire Protection District 1694 County Road Minden, Nevada 89423
Robert Kirk	East Fork Fire Protection District 1694 County Road Minden, Nevada 89423
Jeff James	East Fork Fire Protection District 1694 County Road Minden, Nevada 89423
Peter Lindley	Care Flight 400 Edison Way Reno, Nevada 89502
Bill Landon	Care Flight 400 Edison Way Reno, Nevada 89502
Jeff Horonzy	Care Flight 400 Edison Way Reno, Nevada 89502
Gina Gomez	REMSA/Care Flight 400 Edison Way Reno, Nevada 89502
Dr. Myron Gomez	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502

///

Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

Dr. Jennifer Horan	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Dr. Robert Darzynkiewicz	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Shannon Miller	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Dawn Osterman	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Dr. John Watson	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Dr. Martin Bain	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Dr. Chad Cole	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Jonathon Role	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Maili Nelson	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502

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Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

Dr. Alvaro Devia	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Alyssa Nishihira	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Dr. Joseph Uccelli	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Dr. Nicholas Spoerke	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Trevor Ahrendt	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Angela Guy	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Christopher Paul	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Lynn Cameron	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502
Charlie Linnell	Renown Regional Medical Center 1155 Mill Street Reno, Nevada 89502

///

Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

Michael Dunlap

Renown Regional Medical Center
1155 Mill Street
Reno, Nevada 89502

Peter P. Handy
Deputy District Attorney

Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

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Case No. 18-CR-0104

Dept. No. II

DA 17-1299L

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

ADAM ANTHONY BERNARD,

Defendant.

MOTION IN LIMINE REGARDING VIDEOS

The State of Nevada, by and through Deputy District Attorney Erik A. Levin, hereby moves this Court for a pretrial determination of the admissibility of videos of the defendant striking the victim, Brian Cook, taken at the scene from a home surveillance camera. The State also seeks a pretrial determination of the admissibility. This motion is made for the purpose of avoiding undue delays during the prosecution's case in chief.

MEMORANDUM OF POINTS AND AUTHORITIES

The State intends on pre-marking two videos, without audio, and will seek admission of the same into evidence at the trial in the above-captioned case. The videos that the State will seek to introduce at trial include the victim, Brian Cook, arriving at the location of the defendant and Kevin Tholl, their initial encounter, and the physical confrontation in which the defendant is seen repeatedly striking the victim with his fist and foot. The video has been enhanced by stitching together multiple concatenated videos to create a single video, by lightening the image, and on one video by slowing the speed by fifty percent. The videos are

being submitted under seal for the Court's *in camera* review. Copies of the videos were provided to defense counsel on July 19, 2019.

It is the State's position that the submitted videos are relevant and admissible. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. In many murder cases, defense attorneys object to the introduction of some of the submitted photographs by arguing that the relevancy of the photographs is substantially outweighed by the danger of undue prejudice if the jury were allowed to view the photographs. *See* NRS 48.035. However, in murder trials, the objection to graphic crime scene and autopsy photographs has routinely been rejected by the Nevada Supreme Court.

It is well established doctrine in Nevada that the prosecution is entitled to present a full and accurate account of the circumstances of the commission of the crime(s). *See*, e.g., *Dutton v. State*, 94 Nev. 461, 581 P.2d 856 (1978); *Shults v. State*, 96 Nev. 742, 616 P.2d 388 (1980); *Brackeen v. State*, 104 Nev. 547, 763 P.2d 59 (1988); *Bletcher v. State*, 111 Nev. 1477, 907 P.2d 978 (1995); *Leonard v. State*, 114 Nev. 1196, 969 P.2d 288 (1998). In murder cases, the crime scene and autopsy photographs, by their very nature, can appear gruesome due to the injuries, trauma and blood generally associated with the crime. However, this does not mean that a defendant's claim of undue prejudice overcomes the relevancy of such photographs. In *Libby v. State*, 109 Nev. 905, 859 P.2d 1050 (1993), the defendant objected to color photographs of the victims' bodies submitted by the State during the murder trial. The State used the photographs to demonstrate the manner in which the bodies were found at the crime scene, the location of the gunshot wounds, the proximity of the barrel of the firearm to the victims' heads, and the slit in one of the victim's throat. *Id.* at 910. The Nevada Supreme Court rejected the defendant's argument that the photographs were unduly prejudicial and held that the photographs depicted exactly what the expert described and were helpful in assisting the jury in understanding the nature of the murders and the circumstances of the crime. *Id.* at 910-11.

Similarly, in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), the defendant argued that six photographs of the victim's body showing the victim several weeks after the murder and depicting maggots found on the body were properly admissible. *Id.* at 231. The State argued that the photographs were admissible to portray the crime scene, to aid a witness in describing the cause of death, to corroborate testimony as to how the murder occurred, and to show the extent of damage to the body. *Id.* The Court reiterated that gruesome photos are admissible if they aid in ascertaining the truth. *Id.*, citing *Scott v. State*, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). The Court further held that "[d]espite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime or when utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction." *Id.*; *see also*, *Sonner v. State*, 112 Nev. 1328, 930 P.2d 707 (1996); *Browne v. State*, 113 Nev. 305, 933 P.2d 187 (1997); *Williams v. State*, 113 Nev. 1008, 945 P.2d 438 (1997); *Castillo v. State*, 114 Nev. 271, 956 P.2d 103 (1998); *Thomas v. State*, 114 Nev. 1127, 967 P.2d 1111 (1998); *Meegan v. State*, 114 Nev. 1150, 968 P.2d 292 (1998).

Similarly, photographs of the defendant showing nature and locations of injuries are relevant and admissible. Relevant evidence is admissible if its probative value is not substantially outweighed by the danger of unfair prejudice, NRS 48.035(1), and the decision to admit or exclude evidence lies within the sound discretion of the district court, *Daly v. State*, 99 Nev. 564, 567, (1983).

In this case the videos are highly relevant as they depict the infliction if Brian Cook's injuries by the defendant. Not only are the videos admissible for the above stated purposes, but the display of videos through projection systems is also proper. *Doyle v. State*, 116 Nev. 148, 161, 995 P.2d 465 (2000). In *Doyle*, the State projected autopsy photographs which had been admitted into evidence to aid the medical examiner in explaining his findings related to the cause of death and the manner of injury to the jury. *Id.* The Nevada Supreme Court noted that other state courts have approved this method of facilitating the testimony of a medical examiner. *Id.*, citing *People v. Harris*, 633 P.2d 1095, 1098 (Colo. Ct. App. 1981)(no error in permitting autopsy photographs to be displayed to jury via projected color slides); *Keperling v.*

State, 699 A.2d 317, 319 (Del. 1997)(where photographic slides are admissible in evidence, allowing their projection before jury does not constitute error); *Ottis v. State*, 496 S.E.2d 264, 269 (Ga. 1998)(projection method of presenting photographs of murder victim is permissible absent distortion or disproportion of what is depicted).

The Court in *Doyle* reasoned that the Court had long recognized the generally sanctioned rule that images properly admissible as photographs "may be projected to illustrate the testimony of witnesses." *Id.*, citing *State v. Kuhl*, 42 Nev. 185, 204, 175 P. 190, 196 (1918). The Court then held that where autopsy photographs are admissible, it is permissible to project the same images onto a screen as a means of assisting a medical examiner in explaining his or her findings relevant to the issues before the jury. *Id.* In the present case, the State intends to project, among other things, crime scene and autopsy photographs to illustrate the testimony of the witnesses.

Based upon the foregoing, the State respectfully requests this Court to make pretrial rulings on the admissibility of all of the videos submitted under seal and the display of such photograph by means of projection.

DATED this 22 day of July, 2019.

ERIK A. LEVIN
Douglas County Deputy District Attorney

ATTACHED IS A FLASH DRIVE AND NOT SCANNED

Case No. 18-CR-0104

Dept No. II

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

CERTIFICATE OF SERVICE

ADAM ANTHONY BERNARD,

Defendant.

_____/

Pursuant to NRCP 5(b), I certify that I am an employee of the District Attorney for Douglas County, Nevada, and that I deposited for delivery a true copy of **Motion In Limine Regarding Videos**, addressed to:

Maria Pence, Esq.
1662 Highway 395 North, Suite 203
Minden, Nevada 89423

☐ U.S. Mail
☐ Reno/Carson Messenger
☐ Hand Delivery
☒ By placing a copy in the pick-up folder in the District Attorney's Office.

DATED this 22 day of July, 2019.

Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

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District Court Clerk

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CLERK
BY [illegible] DEPUTY

CASE NO. 18-CR-0104

DEPT. NO. II

This document does not contain personal information of any person.

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,
Plaintiff,

vs.

ADAM ANTHONY BERNARD,
Defendant. /

OPPOSITION TO MOTION IN LIMINE REGARDING VIDEOS

The defendant, Adam Bernard, by and through his counsel, Maria Pence, Esq. and Brian Filter, Esq., hereby submits this Opposition to the State's Motion in Limine regarding Videos. This Motion is based on all pleadings and papers previously filed in this case, the following points and authorities, and any argument the Court may grant on these matters.

Dated this 6th day of January, 2020.

By: Maria Pence

MARIA PENCE
1662 U.S. Hwy 395, Suite 203
Minden, Nevada 89423
(775)392-4084
Attorney for Bernard

POINTS AND AUTHORITIES

The State has requested that this Court allow the introduction of two videos of the incident that occurred between Adam Bernard and Brian Cook on July 8, 2017. The two videos the State is seeking to admit were professionally created by Steve Buller, with Stutchman Forensic Laboratory. It is unknown whether Mr. Buller made the videos from the original video surveillance footage from a home surveillance camera that recorded the incident or from copies of said surveillance recording provided by the State. The videos have been forensically enhanced. They have been clarified. The videos have also been also been enlarged. The videos have been created by isolating the still frames of the original video footage and stitching or linking them together in a different manner than that of the original footage frames. One of the videos has been manipulated to play at a speed slowed to half of real time speed.

The resulting digitally enhanced, clarified, enlarged, concatenated, and speed-manipulated videos are not a fair and accurate representation of the incident that occurred on July 8, 2017. While the State is certainly allowed to present relevant evidence, it may not present evidence that is unfair and inaccurate.

Mr. Bernard has very little information as to what exactly was done to the original footage of the incident. Counsel has received a copy of correspondence between Chief Investigator Mike Marty and Steve Buller dated February 21, 2018. (Exhibit 1). This document refers to the videos in question but does not discuss what was done to the surveillance footage received by Mr. Buller.

By digitally enhancing the original, actual footage, the State has chosen to manipulate the true recording of this incident. The Oxford Dictionary defines the word "enhance" as a verb meaning "intensify, increase, or further improve the quality, value, or extent of." It provides the following synonyms for the word "enhance": increase, add to, intensify, magnify, amplify, inflate, strengthen, build up, supplement, augment, boost, upgrade, raise, lift, escalate, elevate, exalt, aggrandize, swell, improve, enrich, reinforce, underline, emphasize, jack up. The State should not be allowed to introduce evidence that has been enhanced in any way. Magnifying, augmenting, and emphasizing any portion of the video of the physical altercation is improper and should not be allowed by this Court.

Under NRS 52.235, also known as the best evidence rule, "[t]o prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in this title." Admission of a duplicate of the original is allowed unless "[a] genuine question is raised as to the authenticity of the original" or "[i]n the circumstances it would be unfair to admit the duplicate in lieu of the original." NRS 52.245(1). In this case, the original surveillance recording is available for the State's use at Mr. Bernard's trial. The State is not attempting to introduce a duplicate of the original recording. The State has created two new pieces of "evidence" and is now trying to introduce modified, enhanced, amplified versions of the original recording, which is not permissible.

In *Archanian v. State*, 122 Nev. 1019 (2006), the Nevada Supreme Court held that the district court did not abuse its discretion in admitting a composite videotape that contained images from four cameras located in the jewelry store. In that case, a technician was given a videotape of the surveillance footage and then produced a composite of the footage to produce a one-plex view from the original four-plex view. At trial, Detective Rosgen testified that the substance of the composite videotape was *identical* to the images he originally viewed on the monitor downloaded from the digital surveillance system. The court based its finding on the fact that the defendant agreed that the composite video was not inaccurate and "[t]here is no evidence suggesting that the composite video was inaccurate, that any relevant or exculpatory information had been deleted from it, or that the modifications made to it adversely affected or obscured content." *Id.* at 1029.

In the case now before the Court, the same cannot be said to be true. The videos are not simply composite videos of the segments of original video surveillance; they have been digitally altered, frame by frame. To what extent each frame has been modified and enhanced, Mr. Bernard has no knowledge. But they have been created to highlight and emphasize the physical altercation in a manner that is prejudicial to Mr. Bernard. They are clearly inaccurate, as they do not represent a fair and accurate recording of Mr. Bernard or Mr. Cook's movements as recorded on the home surveillance footage. Mr. Bernard's movements have been digitally enhanced. They have been enlarged. Their speed has been manipulated. The center of focus has been changed,

both by enlargement and the use of light. Defense counsel believes that relevant and exculpatory frames may have been deleted or that inculpatory frames may have been created by enhancing certain portions and manipulating the timing.

For example, in the slowed version of the enhanced concatenated video, the speed and recklessness of the manner in which Mr. Cook drove his truck through the stop sign and then up onto the grass has been eliminated by the reducing the speed to half time and cutting out the frames that recorded him driving straight through the stop sign without slowing or stopping. In the other normal speed version, Mr. Bernard's actions in striking Mr. Cook have been enlarged and lightened, both of which enhance Mr. Bernard's true actions in a prejudicial manner. In the slow-motion creation, Mr. Bernard's motions as he strikes Mr. Cook are exaggerated and lengthened and do not accurately depict what Mr. Bernard what physically doing. The jury should not be misled as to what really happened. Slow-motion, by its very nature, distorts reality.

The admission of these two manipulated videos violates the best evidence rule, as the original is available and the admission of the "duplicates" being offered by the State create circumstances that would be unfair to Mr. Bernard. Showing a jury the State's digitally enhanced, clarified, concatenated, enlarged, and time-altered versions of this incident is extremely unfair and prejudicial. Mr. Bernard would not be allowed to introduce a similar piece of evidence, wherein he manipulated the original recording to his benefit, by minimizing the size of the frames, omitting portions of the footage, changing the speed of either his or Mr. Cook's physical movements, modifying the lighting, diverting the focus of the video, or in any way altering the images of the original recording. That is exactly what the State is attempting to do and should not be permitted by this Court.

Under NRS 52.015(1), the requirement of authentication is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims. The State is claiming that these two videos, created by Stutchman Forensic Laboratory, are a fair and accurate account of the physical altercation between Mr. Bernard and Mr. Cook on July 8, 2017. Unlike the videotape in *Archanian*, the images in the videos created by Stutchman Laboratory are not "identical" to the original surveillance recording. As the videos are not

duplicates or composites of the actual video surveillance footage that recorded this incident, they are not what the State is purporting them to be.

Every authentication or identification is rebuttable by evidence or other showing sufficient to support a contrary finding. NRS 52.015(3). Evidence offered by the State to authenticate these video creations can be easily rebutted. Defense counsel would simply have this Court compare them to the original recording, which the State has in its possession. This also begs the question as to why the State has sought to enhance the original video recording, rather than simply having the different segments joined together in a composite video? Additionally, defense counsel is unaware of whether Steve Buller ever viewed the original recording taken from the home surveillance system and compared them to the images he received from the State or whether he has any knowledge of whether the images were accurately transferred from the home surveillance system to the copy of video surveillance that he received. At the time of this writing, it is unknown whether the original images were stored on a hard drive or were downloaded to an off-site home security facility or recorded on some other media for viewing.

Before any attempt is made to introduce these videos, the State should be required to authenticate these videos under NRS 52.015(1) and further required to meet their burden of introducing these videos as alleged "duplicates" under NRS 52.235 and NRS 52.245(1). See also *Archanian* at 1029-1030.

CONCLUSION

These two videos are both inaccurate and digitally enhanced to Mr. Bernard's detriment. Allowing these modified accounts of the physical altercation between Mr. Bernard and Mr. Cook to be shown to the jury would be unfair and highly prejudicial. For all of the above reasons, Mr.

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Bernard respectfully requests that this Court exclude the two videos created by Stutchman Forensic Laboratory.

Dated this 6th day of January, 2020.

By: _____

MARIA PENCE
1662 U.S. Hwy 395, Suite 203
Minden, Nevada 89423
(775)392-4084
Attorney for Bernard

EXHIBIT 1

STUTCHMAN
FORENSIC LABORATORY
• AUDIO, VIDEO, & IMAGE FORENSICS
• FORENSIC PHOTOGRAPHY, PHOTOGRAMMETRY
• ANALYSIS OF GUNSHOTS

421 Walnut Street, Suite 120
Napa, CA 94559

Phone: 707 257-0828
Fax: 707 257-3240
StutchmanForensic.com
Info@StutchmanForensic.com

Gregg M. Stutchman | Stephen C. Buller | Keither S. Alvord

CASE: **State of Nevada v. Adam Bernard**

TO: Michael Marty
Chief Investigator
Douglas County DA's Office

FROM: Steve Buller
Forensic Analyst

SUBJECT: Digital Video & Still Image Enhancement/Clarification

DATE: February 21, 2018

Enclosed, please find the Hightail link containing forensically enhanced/clarified video and still images in an uncompressed format. Once you open the Hightail link from your email, click, "View Files," click on the "ZIP" icon and select "Download." When the zipped file has downloaded to your computer, right click and select "Extract All." Once this is completed, you will be able to view the video and still images contained in the folder.

The enhanced/clarified videos have been prepared from the video files labeled:
- LHV2008_ch1_main_20170708214621_20170708214705
- LHV2008_ch1_main_20170708214706_20170708214708
- LHV2008_ch1_main_20170708214708_20170708214723
- LHV2008_ch1_main_20170708214723_20170708214803
- LHV2008_ch1_main_20170708214803_20170708214818
- LHV2008_ch1_main_20170708214819_20170708214903

The enhanced/clarified and enlarged videos have been exported in uncompressed AVI format and joined into one file labeled, "LHV2008_ch1_main_20170708214621_20170708214705_Ikena1280x720_Concatenated." A second copy of the enhanced and concatenated video has been slowed to 50% of real-time and labeled accordingly. The enhanced and concatenated videos can be played on a PC using Windows Media Player or another capable video player software program.

Every still image from the enhanced and concatenated video has been exported in uncompressed format and are provided in a separate folder. The still images may be viewed on a PC utilizing a photo viewing software program. I recommend clicking on each still image to gain as much detail as possible.

It has been a pleasure working with you on this case. Our lab will keep copies of all case material in the event you need anything additional. Please feel free to contact me if you have any questions.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PENCE & ASSOCIATES and that on this date, I hand-delivered a true and correct copy of this Opposition to Motion In Limine regarding Videos to the following address:

Erik Levin, Deputy District Attorney
District Attorney's Office
1038 Buckeye Road
Minden, NV 89423
(Hand Delivered)

Dated this 6th day of January, 2020.

MARIA PENCE, ESQ.

FILED
2020 FEB 26 AM 9:35
WILLIAMS
CLERK
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FEB 26 2020
Douglas County
District Court Clerk

Case No. 2018-CR-00104

Dept. No. II

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE HONORABLE THOMAS W. GREGORY, DISTRICT JUDGE

--o0o--

THE STATE OF NEVADA, Plaintiff, vs. ADAM A. BERNARD, Defendant.	Case No. 2018-CR-00104 Dept. No. II

TRANSCRIPT OF PROCEEDINGS
PRE-TRIAL CONFERENCE/MOTION HEARING
MONDAY, FEBRUARY 3, 2020

APPEARANCES:

For the Plaintiff: ERIK A. LEVIN, ESQ.
Deputy District Attorney

For the Defendant: MARIA PENCE, ESQ.
BRIAN G. FILTER, ESQ.
Attorneys at Law

Reported by: EVELYN J. STUBBS, CCR #356

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MINDEN, NEVADA; MONDAY, FEBRUARY 3, 2020; 2:15 P.M.

--o0o--

THE COURT: Thank you. Please be seated.

This is Case No. 2018-CR-00104 State of Nevada versus Adam Anthony Bernard.

Show the appearance of Eric Levin on behalf of the State. Good afternoon, Mr. Levin.

MR. LEVIN: Good afternoon.

THE COURT: Maria Pence and Brian Filter are appearing on behalf of the defendant, who is also appearing out of lawful custody.

Good afternoon to each of you.

THE DEFENDANT: Good afternoon.

MS. PENCE: Good afternoon, Your Honor.

THE COURT: We're here today for a motion hearing.

Mr. Levin, are you going to be calling witnesses here today?

MR. LEVIN: Yes.

THE COURT: How many do you anticipate?

MR. LEVIN: Five.

THE COURT: And, Ms. Pence, do you anticipate calling witnesses here today?

MS. PENCE: No, Your Honor.

THE COURT: Mr. Levin, is the nature of your witnesses such that we will get through each of them today?

MR. LEVIN: Well, I was hopeful.

THE COURT: Okay. The reason I'm asking is I'm mindful of everybody's time. We've got several motions to get through here today. Are the witnesses in reference to one particular motion that we might be able to take first?

MR. LEVIN: They're all in reference to two motions; the video and the statements of the defendant.

THE COURT: Okay. Well, why don't we go ahead and take up the video motion, then, first, unless you prefer --

MR. LEVIN: Well, yeah, I was going to go the other order, only because I've only got the one witness on that one. And maybe I can get him out of here.

THE COURT: Makes sense.

MR. LEVIN: And there's several witnesses in the courtroom right now. Due to the same reasons that the Court sealed the pleadings, I would think that the other witnesses should probably be excused for this witness.

THE COURT: All right. Ms. Pence, any objection to that?

MS. PENCE: No, Your Honor.

THE COURT: The rule of exclusion has been invoked. What that means is when one witness is testifying other potential witnesses cannot be in the courtroom.

Mr. Levin, who's going to be your first witness?

MR. LEVIN: Mr. Ruffo.

THE COURT: All right. Mr. Ruffo, you can stay.

Anybody else who is here as a witness in the case needs to be excused from the courtroom. And I'll ask counsel to make sure. I don't know who all those folks are. If they're all witnesses, they need to exit.

MR. LEVIN: Two of them are.

THE COURT: If you're not a witness, you're welcome to stay.

MS. PENCE: Your Honor, could I have --

MR. LEVIN: Three of them.

THE COURT: All right. So then we're going to take up the -- I take it, Mr. Levin, this is going to be the motion in limine regarding witness testimony of defendant statements.

MR. LEVIN: Yes.

THE COURT: Okay. Let's go ahead with that one.

Mr. Ruffo is your witness?

MR. LEVIN: Yes.

THE COURT: Mr. Ruffo, please step forward.

Go ahead and have you stop there for a moment. Raise your right hand, face the court clerk to be sworn.

(Witness sworn.)

THE COURT: All right. Sir, come on up to the witness stand. Make yourself comfortable. Once you're seated Mr. Levin is going to have some questions for you, and then Ms. Pence and/or -- one of the attorneys for the defense, Mr. Filter or Ms. Pence, will have questions.

Go ahead, Mr. Levin.

PHILIP RUFFO,

being first duly sworn, was examined

and testified as follows:

DIRECT EXAMINATION

BY MR. LEVIN:

Q. Would you state and spell your name.

A. Philip Ruffo, P-H-I-L-I-P, R-U-F-F-O.

Q. What's your current address?

A. 1298 Manhattan Way, Gardnerville, Nevada.

Q. Was that your address in July of 2017?

A. Yes.

Q. Does anyone else at that -- in July of 2017 was anyone else living with you at that time?

A. My wife and kids.

Q. How long had you lived there at that time?

A. Just over a month.

Q. Okay. Did you make a call to the 911 emergency system that day -- well, on July 8th 2017?

A. Yes.

Q. What did you observe that made you make that call?

A. I heard a commotion first, and then I looked out the window that's to the right of my front door. And I heard a commotion coming from -- seemed like it was coming from the neighbor's house, but as I focused, it was across the street. And I noticed there was someone kicking someone or something on the ground and heard a bunch of commotion, cursing and vulgar language.

Q. What was the lighting like in the front of your house that day?

A. I'm sorry?

Q. What was the lighting like in front of your house that day?

A. It was dark, but there was a streetlight that would have been to the right of the incident. So all I could really see is silhouettes.

Q. Okay. You say you couldn't see really well. How

well could you hear?

A. Very well.

Q. Tell me what you heard?

A. I heard the word "nigger," "bitch," "FU."

Q. When you say "FU," do you mean "fuck you"?

A. Yes.

Q. And can you tell where those words or those phrases were coming from?

A. Yes, because I could see the silhouettes.

Q. Okay. And so where were they coming from?

A. My neighbor's house across the street from our house.

Q. When you say "silhouettes," what were those silhouettes doing to the extent you could see when you were hearing those words and phrase?

A. I could see there was two people. I could see one was kicking something or someone on the ground.

Q. And did you observe anything after that?

A. Yes. I went to grab my phone. I called 911 when I saw two men pick up a body off the ground and carry it back to my side of the street, my neighbor's house.

MR. LEVIN: Okay. I'll pass the witness, Your Honor.

THE COURT: Thank you.

Go ahead, Ms. Pence or Mr. Filter, either.

MS. PENCE: Your Honor, because I think it would facilitate things, I'm going to ask to play -- let me have it marked.

MR. LEVIN: I have no objection. I believe it's the 911 call.

MS. PENCE: This is the 911 call.

THE COURT: It will be marked as Defense Exhibit A, and it will be admitted.

(Exhibit A was marked for identification and admitted into evidence.)

CROSS EXAMINATION

BY MS. PENCE:

Q. Mr. Ruffo, I'm going to play the 911 call that you were just discussing, and then I'll have some questions.

(911 call playing.)

BY MS. PENCE:

Q. So Mr. Ruffo, was that your voice that we heard on that 911 call?

A. Yes.

Q. Okay. The 911 operator asked you to describe the purpose of your call; is that right?

A. Yes.

Q. And you explained that there were two men carrying a guy that looked limp?

A. Correct.

Q. And that was at the very beginning of your call, correct?

A. I believe so, yes.

Q. And at no time during that phone call did you describe seeing anyone being hit?

A. No, I did not.

Q. At no time during that phone call did you describe anyone being struck?

A. No.

Q. You never reported to the 911 officer that you saw anyone kick or struck?

A. Right.

Q. And that was made immediately following the incident?

A. Correct.

Q. You were asked for a description of the suspects; is that right?

A. Yes.

Q. And you told him it was totally dark?

A. Yes.

Q. And that you could not see anything?

A. I couldn't see faces, is what I meant.

Q. What you told the 911 operator is that you couldn't see anything.

A. That's what I said, but not what I meant.

Q. You first stated to the 911 officer that they carried him to a house; is that right?

A. Yes.

Q. And at the end of that call you told them they got into a vehicle; is that right?

A. Yes.

Q. That vehicle was a Ford truck, correct?

A. As far as I know, yes.

Q. And it was parked between your house and the street where this incident took place; is that right?

A. I honestly don't remember the truck part very well. I don't know. I don't remember where it was parked.

Q. At the time that you reported this to the 911 operator, you said they were cursing; is that right?

A. Yes.

Q. And you said you heard "nigger" a few times; is that correct?

A. Yes.

Q. At no time did you attribute the cursing or those words to any of the individuals present; is that right?

A. I didn't understand your question.

Q. At no time when you were speaking to the 911 operator did you inform the operator who of the individuals that you observed said any of those things?

A. Correct.

Q. You stated you had just recently moved into the neighborhood?

A. Yes.

Q. And you stated that there was a streetlight that was giving you some illumination; is that right?

A. Yes.

Q. And that was in your testimony here today in court?

A. Yes.

Q. But there was no mention of a streetlight when you were speaking to the 911 officer?

A. Correct.

Q. Where exactly is that streetlight located?

A. I believe it's to the complete right end of the house that the incident happened in. So the men that I saw were here, or women, the streetlight would have been over here.

Q. And your house -- and for the record, Mr. Ruffo's left hand was used to signify the group of individuals and his

right hand was placed to the right of his left hand and that signified the streetlight?

A. Correct.

Q. And where was your place of observation in relation to those two things you just described?

A. I was, I guess you could say, kitty-corner to them. I was looking out a window and I could see them at an angle.

Q. And where is your house in relation to these two landmarks, the group of individuals and the streetlight?

A. The very edge -- if I'm looking at the street, the very edge of my property to the right, I guess the fence line you would say, I think they were across the street, maybe just five feet over from that.

Q. And the pickup truck that you saw them getting into, where was that in relation to your property line that you just described?

A. I don't remember. Don't know if it was partially on my side and partially on my neighbor's side. I really don't remember.

Q. Was it in front of the group of individuals you were observing?

A. I guess it would have been, yes.

Q. And you were interviewed just recently on

January 29th by an investigator for the Douglas County District Attorney's Office; is that right?

A. Yes.

Q. And this interview was conducted about -- so this would be almost a year and a half after the incident?

A. I don't remember. I've been approached a few times.

Q. You've been approached?

A. A few times.

Q. How many different times have you been approached about this incident?

A. Mostly three different subpoenas due to date changes, and then two times I think I've actually took communicating.

Q. So two different times you were interviewed?

A. I believe so.

Q. Do you remember if the first interview was before this interview on January 29th that just happened last week?

A. It was before that.

Q. And do you recall approximately when that was?

A. No, I don't.

Q. You were asked in that interview if you had -- if you could recognize a picture of Mr. Bernard; is that right?

A. Yes.

Q. And you stated that you were able to do that because of seeing him in the newspaper; is that correct?

A. Correct.

Q. So you have seen the different articles in the newspaper regarding Mr. Bernard?

A. I seen one.

Q. And it was that particular one that you were able to recognize the photo?

A. That was the first time I ever seen the person.

Q. I'm sorry?

A. When I looked it up, I received my first subpoena. And the -- I don't know, the plaintiff or whatever's name was on there. I looked up that name, and that's when I found the article, because I didn't even know that it was a murder case. I didn't know someone had died that night or after that.

Q. So after you received the subpoena, you Googled Mr. Bernard and were able to pull up a newspaper article?

A. Correct.

Q. And that was prior to your interview on the 29th?

A. Correct.

MS. PENCE: No further questions.

THE COURT: Redirect?

MR. LEVIN: Just one.

REDIRECT EXAMINATION

BY MR. LEVIN:

Q. And just to be sure, were those the only three individuals you saw out in the street that day, the three that you have been talking about --

A. Out on the street, yes.

Q. -- at that time?

A. No. I could see that my neighbor was having a party.

Q. Inside the house or outside?

A. Outside.

Q. Which neighbor would that be?

A. Kevin.

Q. Okay. And are you sure that the voice or voices that you heard were coming from the street and not from the house?

A. Yes.

MR. LEVIN: Nothing further.

MS. PENCE: One moment, Your Honor.

Nothing further, Your Honor.

THE COURT: May Mr. Ruffo be excused?

MR. LEVIN: He may.

THE COURT: Ms. Pence?

MS. PENCE: He may, Your Honor.

THE COURT: Sir, thank you. You are excused.

I'm going to ask that you not discuss your testimony with anyone with the exception of the attorneys and the investigators in this case.

You understand that?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

MR. LEVIN: Your Honor, my next witness will be Kevin Tholl, but in addition I've got an expert witness out there who created the video that's subject to one of the motions. He's got the technology and the hardware and whatnot to get it to play clearly for the Court. I'd ask that he be allowed to sit in for the proceeding and get that playing for the Court at the appropriate time.

THE COURT: All right. I would like to first, before we get to that next motion, just take argument on the motion for which Mr. Ruffo just testified.

MR. LEVIN: The problem is I need Kevin Tholl for both the motions.

THE COURT: So you're ready to call Mr. Tholl, but you would like the other witness to also be in the courtroom while that happens?

MR. LEVIN: Correct.

THE COURT: Ms. Pence, do you have any objection

to that?

MS. PENCE: No, Your Honor.

THE COURT: All right. Thank you.

You may go ahead, Mr. Levin.

Of assistance to counsel, I did prior to today's hearing attempt to view exhibits that were attached to motions. So I was able to pull up the photographs that are the subject of one of the motions. I was able to listen to the 911 call that we just heard a few moments. I attempted to bring up the video, was unable to do so.

MR. LEVIN: And I'll address that when Mr. Stutchman testifies.

THE COURT: Mr. Stutchman, do you want to go ahead and get set up and be prepared to play the video?

MR. STUTCHMAN: Sure.

THE COURT: Is it easier just to take a moment to do that?

MR. LEVIN: How long do you think that will take you to get it --

MR. STUTCHMAN: Five minutes.

THE COURT: Why don't we go ahead and do that. I'm going to recess. Take five minutes to get set up and we will come back into session.

(Recess taken.)

THE COURT: Back in session on Case No. 18-CR-104. Show the appearance of counsel for both parties. Also appearing is Mr. Bernard.

Mr. Levin, you may proceed.

MR. LEVIN: Okay. For the record I have Mr. Gregg Stutchman.

THE COURT: Could you spell his last name, please.

MR. LEVIN: I'm sure he can.

MR. STUTCHMAN: S-T-U-T-C-M-A-N.

THE COURT: Thank you.

MR. LEVIN: And we'd call Kevin Tholl.

THE COURT: All right. Mr. Tholl.

Mr. Tholl, please raise your right hand. Face the clerk to be sworn.

(Witness sworn.)

THE COURT: Thank you, sir. Come on up here. Go ahead and have a seat, sir.

Mr. Levin, you may proceed.

KEVIN THOLL,

being first duly sworn, was examined

and testified as follows:

DIRECT EXAMINATION

BY MR. LEVIN:

Q. Will you state your name and spell your last name.

A. Kevin Tholl, T-H-O-L-L.

Q. What's your address?

A. 1294 Manhattan Way.

Q. Was that your address in July of 2017?

A. Yes, sir.

Q. Did you know somebody named Brian Cook?

A. Yes, sir.

Q. How did you know Brian?

A. Through work.

Q. And did you know someone named Adam Bernard?

A. Yes, sir.

Q. How did you know Mr. Bernard?

A. Through work as well.

Q. So did you know them both fairly well?

A. Yes, absolutely.

Q. On July 8th of 2017 did you witness a physical fight between Mr. Bernard and Mr. Cook?

A. Yes, sir.

Q. Have you viewed a video recording of that fight?

A. Yes, sir.

Q. Okay. I'm going to play a video for you, and ask you if that's the video you viewed.

THE COURT: Mr. Levin, has this video been marked?

MR. LEVIN: It has not. What I can do is I can mark a thumb drive.

THE COURT: Okay.

MR. LEVIN: As an offer of proof, I think what you're going to hear is that the file on the thumb drive was copied onto the hard drive, that they're identical, and that allows the video to play without starting and stopping as you might have experienced, if you had tried to look at it.

THE COURT: Okay. If you're going to be showing the witness something, it needs to be marked.

MR. LEVIN: Yeah.

THE COURT: Thank you.

MS. PENCE: I'm sorry, Your Honor. I think I have to object, because I think -- my objection is that it's my understanding that this is one of the pieces of evidence that we are having a hearing over. And it's been brought to my attention that what we're seeing on the monitor is something that's a second step removed from the original enhanced videos.

My understanding is that this is actually on a

hard drive, but it's not something that -- I don't think the Court's made a decision on. And my concern is, if this witness testifies regarding this particular video without any sort of ruling as to its admissibility, I don't know how that would work for even purposes of the motion hearing.

THE COURT: Is this the video, Mr. Levin, that you were asking the Court to render admissible at trial or what is this video here?

MR. LEVIN: It is the one that's the subject of the motion.

THE COURT: And has Ms. Pence seen it?

MR. LEVIN: Well, it's been provided.

MS. PENCE: I think, Your Honor.

MR. LEVIN: Well, I've got her signature on the receipt.

MS. PENCE: I don't know what's on Mr. Stutchman's hard drive.

THE COURT: All right. So where I was starting here, is if you're going to show a witness anything, it needs to be marked. I'm taking the objections as they come. But right now nothing has been marked.

MR. LEVIN: I've got a thumb drive I'm going to ask be marked as Exhibit 1.

(Exhibit 1 was marked for identification.)

MR. LEVIN: And as I indicated in my offer of proof, Your Honor, what I'm going to play is from the hard drive. I believe you'll have testimony from which you'll eventually be able to make a decision that it's identical to Exhibit 1, which has been marked.

THE COURT: Go ahead.

MR. LEVIN: But you'll make that determination at a different time.

BY MR. LEVIN:

Q. Mr. Tholl, will you take a look at this video and --

MS. PENCE: Your Honor, the same objection. If he's seen this prior to this moment is not what I'm objecting to. I'm objecting to it being referenced or being used for any purpose at this point, because it's something that we're objecting to.

It's my understanding -- and certainly at this point, if we have something that's been marked that's in evidence, I don't know why we're still on the hard drive. But it's my understanding that -- and obviously if we need to speak with Mr. Stutchman, but I don't believe he's even the creator of the digitally enhanced and clarified video that then this was made from.

So at this point I think we're about four steps

removed from the original video. And I don't think there's anyone here that can testify as to what happened to the original video and how it got to this stage.

THE COURT: Well, all I've heard so far is Mr. Levin has this marked and wants the witness to look at it.

What is the legal objection to that?

MS. PENCE: Foundation. Authentication.

THE COURT: That he can't look at an exhibit that somebody has proffered to him?

MS. PENCE: I think he can look at it. I don't --

THE COURT: That's all that Mr. Levin has asked for so far.

MS. PENCE: Okay.

THE COURT: I get where you're going, and I think all of those things are probably going to become important as this hearing goes on. But simply from the standpoint the witness is shown a video, the State can show it to him. So the objection is overruled.

Mr. Levin, you may continue.

(Video playing.)

THE COURT: Mr. Levin, my apologies. When you started it, the witness video was not on. I notice the witness was craning to try to see the video here.

If you would like to restart it, you may. I just turned his monitor on.

MR. LEVIN: Okay. Thank you.

MS. PENCE: So, Your Honor -- and again as far as evidence -- so he's asking him to -- if he's seen this video or not. And I just mean the Court is watching it, but it hasn't been introduced into evidence yet. I don't know if we're going to have -- at some point there's going to be a question about it other than have you seen this before. But it seems like --

THE COURT: I'm guessing, it's like showing a photograph to a witness and then he's going to ask him something about it.

We're not here in the front of the jury. This is a motion in limine for me to decide what's admissible.

Mr. Levin, you can go ahead and show the video. We'll take the questions as they come.

(Video playing.)

BY MR. LEVIN:

Q. Mr. Tholl, did that video accurately represent the fight that you witnessed on July 8th, 2017?

A. Yeah. For the most part, yeah.

Q. And what do you mean "for the most part"?

A. Yeah. I mean, yeah.

Q. Does it appear that there's been anything added or deleted to make it seem different than what you recall?

A. No. Just I don't think that's the original though.

Q. Okay.

A. I mean, I know it's been like brought -- brightened up.

Q. Have you seen a darker version in the past?

A. Yeah.

Q. Okay. Was anyone else present outside in that immediate area other than you, Mr. Bernard, and Brian Cook?

A. No.

Q. At any time during those -- the events that you just looked at and identified, did you ever say "fuck you"?

A. Did I?

Q. Yes.

A. No.

Q. Did you ever call anyone a bitch?

A. No.

Q. Did you ever call anyone a nigger?

A. No, absolutely not.

Q. Was Mr. Bernard cursing during the incident?

A. Yes.

Q. Do you remember exactly what he was saying?

A. Just F bombs and just arguemental cuss words.

Q. Okay.

MR. LEVIN: I'll pass the witness, Your Honor.

THE COURT: All right.

Go ahead, Ms. Pence.

CROSS-EXAMINATION

BY MS. PENCE:

Q. In the video that you just saw, does that -- was it light outside?

A. No, it was dark.

Q. And --

A. That white, whatever that is, that's just a piece of facia.

Q. And you're referring to the white --

A. Above the vehicle.

Q. The white triangle shape above the white vehicle. So it would be the white triangle in the upper left-hand corner?

A. Yeah.

Q. That's, you said, facia?

A. Yeah.

Q. And is that --

A. It's part of his house.

Q. Okay. So you said it was dark outside. How dark was it?

A. Other than his headlights, it was, for the most part, practically pitch black.

Q. Okay. So when you said "practically pitch black," were you able to see exactly what was going on in the street in front of you?

A. Oh, yeah.

Q. And how far -- how far away do you think you could see in the darkness?

A. Oh, well, there's a street lamp that's like two houses down. So I mean with that illumination, I mean, I could see -- it's hard to say. I mean, to put a number or a yardage on something, it's -- I mean, it's not black right now, so --

Q. Did it look like that outside?

A. No.

Q. Okay. On the night that this happened -- well, in this video we see a pickup truck, is that right, with its lights on?

A. Yes.

Q. And do you know where that pickup truck came from?

A. The one with the headlights on?

Q. Um-hum.

A. From the corner, from down Tillman, a left onto my street, and parked right in my driveway, dirt lot.

Q. And in the video clip that you saw, did you see the truck down by Tillman?

A. Did I see it turn the corner?

Q. Yeah.

A. Yes.

Q. In the video you just watched?

A. No, no, no. Not in that video.

Q. Have you ever seen the original video?

A. Yes.

Q. Okay. And in the original video are you able to see where that truck comes from?

A. Not that I'm aware of.

Q. Okay. That truck, do you know what make and model of truck that is?

A. It's a 2004 red Ford F250 turbo diesel.

Q. And we saw the truck pull up on the video. Do you know was the truck running or was the truck turned off?

A. It was running.

Q. And did it remain running during the entire incident?

A. Yes.

Q. And how do you know that?

A. Because I didn't want to shut it off.

Q. And in the original videotape did you see yourself doing that?

A. Shut it down?

Q. Um-hum.

A. Yeah.

Q. And that wasn't included in this clip; is that right?

A. Right.

Q. The original video that you observed was made up of many short pieces of video; is that right?

A. Yeah.

Q. Okay. And do you know whether or not this video contains all of the images that were on all of the shorter pieces of original pieces of video footage?

A. That I'm not too aware of.

Q. In the still that we have up on the screen -- do you know Philip Ruffo?

A. Not -- only that he's my neighbor.

Q. Do you know where he lives?

A. Yeah, he lives right next door to me.

Q. Is his house visible in that video?

A. Yes.

Q. Where is his house?

A. Back on that corner. This screen is like super black on mine. So it's that corner house back behind Brian's truck.

Q. So it's the house on the other side of the truck that was running?

A. Um-hum.

Q. And you say -- just so we have a reference point, there's a date in the upper-right-hand corner of this still. Can you tell me where the house is in relation to the time and date stamp?

A. It's right below like the 07-08.

Q. So to clarify, the night of this incident, what we see in this photograph would not have been visible, say for example, to Mr. Ruffo?

MR. LEVIN: Objection. Speculation.

MS. PENCE: I can rephrase.

BY MS. PENCE:

Q. On the night of this incident the street was not digitally enhanced and bright like this; is that correct?

A. No.

Q. It was dark outside?

A. Yes.

MS. PENCE: Nothing further.

REDIRECT EXAMINATION

BY MR. LEVIN:

Q. Mr. Tholl, in relation to the video you just watched, when did you shut off your truck?

A. After we got him safely out of the street, noticed that his truck was still running, walked over and shut it down.

Q. Is that after the video?

A. It's after this video, yeah.

MR. LEVIN: Okay. Thank you.

MS. PENCE: And I do have a couple other questions, I apologize.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MS. PENCE:

Q. You said that you didn't say the cuss words that you were asked by the State; is that right?

A. Right.

Q. Did you hear Adam say the word "nigger" on the night in question?

A. No, I did not.

Q. Did you hear the victim say the word "nigger" on the night in question?

A. No, I did not.

Q. During the time that you were present, did you ever hear anyone use that word on that night?

A. No.

Q. Have you ever heard Mr. Bernard -- well, let me rephrase.

Is Adam or Brian or yourself African American or black?

A. No.

Q. Was there anyone present that was not Caucasian?

A. No.

Q. In that video at one point you and Adam go back into the street to where Brian is laying. Why did you go back into the street?

MR. LEVIN: Objection. Relevance.

THE COURT: Ms. Pence.

MS. PENCE: Your Honor, I believe the State's motion is -- as far as the defendant's statements -- is to -- specifically towards Mr. Bernard's animus and his anger and his state of mind. And the reason they're in the street, I believe, is directly relevant to his state of mind.

THE COURT: Overruled.

BY MS. PENCE:

Q. Why did you and Adam go back out into the street?

MR. LEVIN: Objection as to Mr. Bernard. There's no foundation that he was -- how he can testify why Mr. Bernard would do something?

If you want to ask him if anything was said, but to ask him why somebody else did something, I think that's speculation and no foundation for it.

THE COURT: Ms. Pence, you can rephrase.

BY MS. PENCE:

Q. Why did you go back to get Brian?

A. Because he was in the street.

Q. And who wanted to go and move Brian?

A. Mr. Bernard.

Q. And did Mr. Bernard make that sentiment known to you somehow?

A. Yeah. He asked me to help him move him out of the street.

Q. And is that what you did in that video?

A. Yes.

Q. Did Mr. Bernard make an expression as to why he did not want Brian in the street?

A. So he wouldn't get ran over.

MS. PENCE: No further questions.

THE COURT: Mr. Levin, anything further?

MR. LEVIN: No, Your Honor.

THE COURT: May this witness be excused, Mr. Levin?

MR. LEVIN: He may.

THE COURT: Ms. Pence?

MS. PENCE: No, Your Honor. Thank you.

THE COURT: All right. Mr. Tholl, thank you. You are excused.

Please do not discuss this case with anyone except for the attorneys in this case or their investigators.

THE WITNESS: You got it.

THE COURT: Thank you.

Mr. Levin, you may call your next witness.

MR. LEVIN: James Bell.

Can we mark these as 2A and 2B?

THE COURT: Yes.

(Discussion held off the record.)

MR. LEVIN: Well, for right now let me mark one. That's Exhibit 2.

(Exhibit 2 was marked for identification.)

THE COURT: Counsel, I denote Mr. Tholl has remained in the courtroom. I know he's been excused from this hearing, but he's a trial witness. So I'd like to know what you think about having him being excused from the courtroom.

MR. LEVIN: I don't think it really matters for

the purposes of the rest of the testimony.

THE COURT: Okay. Ms. Pence?

MS. PENCE: Your Honor, I don't have an issue. And he certainly could be excused, but I would like him not to leave, to be subject to recall regarding the video, if need be.

THE COURT: So, Mr. Tholl, you are held subject to recall, which means you might be called back to the stand. It also sounds like neither party has a problem with you remaining in the courtroom right now, so you may remain.

All right. Sir, please raise your right hand. Face the clerk to be sworn.

(Witness sworn.)

THE COURT: All right. Sir, come on up to the witness stand, please.

JAMES MICHAEL BELL,

being first duly sworn, was examined

and testified as follows:

DIRECT EXAMINATION

BY MR. LEVIN:

Q. Would you state your name for the record.

A. James Michael Bell.

Q. Common spelling?

A. Yes.

Q. Mr. Bell, what's your address?

A. 1295 Manhattan way.

Q. And was that your address on July 8th, 2017?

A. Yes, it was.

Q. Do you have a video surveillance system with your house?

A. I do.

Q. Can you describe what that is and where the cameras point?

A. It's a Lorex system that I purchased. And it has -- at the time it had seven cameras, and it was capable of eight. And since that date I've added the final camera.

Q. Okay.

A. So it basically shows all the way around my house.

Q. Okay.

A. And the driveway.

Q. Waiting for this computer to boot up.

To your recollection, did you have one of your cameras that recorded some events on the evening of July 8th, 2017, in front of your house?

A. Yes.

Q. Did you provide files from that camera to anybody?

A. I did.

Q. Do you recall who you provided them to?

A. An Inspector Storke.

Q. Okay. Did you do anything to alter or change what your system recorded that night?

A. No.

MR. LEVIN: Your Honor, is the IT officer for the court available? Would it be possible --

MS. PENCE: We can play it on mine.

MR. LEVIN: I appreciate that.

THE COURT: What is the difficulty, Mr. Levin?

MR. LEVIN: I'm not getting power to the CD drive, so I can't even open the door. I'm handing Exhibit 2 to Ms. Pence.

BY MR. LEVIN:

Q. Can you see those file names in front of you now from the CD?

A. I do.

Q. Do they look familiar to you?

A. They do.

Q. What do they appear to be?

A. They appear to be the files that my system

recorded on the thumb drive.

Q. And would those be the ones you previously stated you gave to Investigator Storke?

A. Yes.

MR. LEVIN: I'll pass the witness, Your Honor.

THE COURT: Okay.

Ms. Pence.

CROSS-EXAMINATION

BY MS. PENCE:

Q. This grouping of recordings, did -- were you asked to provide some video to the State or how did it come about that you met with Investigator Storke and gave him these things?

A. The night of the incident, I had gone out front of my house after I had seen all the lights through the blinds, and I met with some officers out front and told them that I may have a recording of this. And at that point in time we looked at my -- we did a playback. And it was difficult to see in the small boxes on the screen at the time. And so we didn't go any further at the time.

So the officer -- I told the officer that I'd try to make a recording off of it, and maybe it would be more visual. And so -- and I knew that my system overrode itself

about once a week. So I looked up in my book on my system and found out how to record. It's the only thing I've ever recorded off my system.

And it took me quite a while, but two or three days later I rerecorded what had happened that night. And I just took a time frame from around 9:30 to 10:00, and just recorded it on the thumb drive. And that's what I got, because I knew I would lose it if they came back later.

Q. And so did you yourself actually do the recording from the electronic or the digital portion of your surveillance system?

A. Yes.

Q. What did you record it onto?

A. Thumb drive.

Q. Okay. And did you give that thumb drive to Investigator Storke?

A. Yes.

Q. So and I just want to make sure, because we use the word "record" sometimes to mean a lot of things. When you took these images off your home surveillance system, did you actually push "record" on another device to absorb them and record them onto the thumb drive or did you simply just transfer files from the digital media onto your thumb drive?

A. I went into the main menu of my system. And

picked the time frame and told it to write to the recording device. And it just came out on my thumb drive.

I'm not -- my system has a 175 page book and --

Q. Understood. I just want to make sure we know how exactly these little clips that we've been talking about came from your house to be on the thumb drive.

A. I was surprised when they came out in these little clips also.

Q. Okay.

A. It was difficult to read from one to the other to follow it.

Q. So did you have to request each piece separately or you said you selected from like 9:00 to 10:00. Was that an automatic procedure? It just then somehow took all of the video from that time frame?

A. I picked the cameras, because I had -- at the time I had seven cameras. I knew what camera I wanted to record or copy from. So I picked the camera number, and then I -- there's a graph, a chart, and told it to record everything between this time and this time. And it just went to the thumb drive.

Q. Okay. So just to be sure, you said that you had seven cameras; is that right?

A. Yes.

Q. And all of this footage came from just one of those cameras; is that right?

A. Yes.

Q. Nothing from the other six cameras was saved; is that right?

A. Right.

Q. And I want to play just one of these clips to ask you if you recognize it as what you saw on your camera at your home.

Do you know how many different clips you provided to Investigator Storke?

A. No, I don't.

Q. Okay.

A. I just gave him the thumb drive, and that was the end of it at the time for me.

Q. We're up on the screen, and I think it's in front of you as well. It says -- there's a date on them and there's a date modified. Do you know what that represents?

A. Well, it looks like July 12, 2017, at 8:19.

If you go through these files one at a time and you start studying them, you can determine the exact number of seconds each one of those files --

Q. Covers or --

A. -- displays.

Q. Okay. So I'm going to just pick this one that we're on. It says 7-12 at 8:19 p.m., and it says it's 5,082 kilobytes.

A. Okay.

Q. So is this one of the recordings that you observed on your home surveillance system?

A. Probably is, because that's my car and my truck in the driveway.

Q. And is that how -- so is your system a black and white system or a color system?

A. It's a color system, but it goes into night display.

Q. Okay. And when it's on night display is that when it turns to the black and white images that we're seeing on the screen?

A. Yes.

Q. And is that an accurate display of what your camera observed on -- well, this says 7-8 of 2017 at 9:42 p.m. Is that what your camera saw that day?

A. Well, it must have, because that's the -- that's the video from that particular camera.

Q. And sort of that lighting and that ambient, as far as nighttime, is that what you would normally observe on that camera?

A. Yes. I found that once I looked at it repeatedly, the more I looked at it, the more I could make out what was going on in the background.

Q. Because it's very hard to see, because it's nighttime; is that --

A. Right.

Q. So you earlier stated that your system at nighttime switched from color to black and white; is that right?

A. Yes.

Q. Okay. That's not the same thing as infrared; is that correct?

A. Well, it will has these little infrared LEDs on the lens of the camera. Whether they're actually considered infrared, I'm not sure.

Q. So is it your belief that this would be an infrared recording or that it's a black and white recording?

A. I think it's infrared.

Q. Okay. And again, this -- I'm going to close this. This list, and it starts with -- and the one thing I guess we could identify it with is there's -- the first clip is 13,453 kilobytes. And then there seem to be 30 or 40 clips. And the last clip is one that is 1,000 -- 134,209 kilobytes; is that right?

A. That's what it says.

Q. And those are all of the clips that you sent on the thumb drive to Investigator Storke?

A. Yes.

Q. Nothing further -- one more.

And so each one of these small files has the initials LHB and then 2008. Do you know what that is?

A. Not right offhand. But if you take the number after "main," and you look at it, you can decipher what it means if you study it awhile, like 2017 would be the year 2017. 07-08, and that I don't remember what that is, but it makes sense after a while as far as it will tell you how much time is on each clip. And you can --

Q. And is your system set to record in actual time or at a different rate of time?

A. Real time.

Q. Okay. And is it possible -- do you know the make or the model of your recording -- your surveillance system at home?

A. I have the book on it at home.

Q. No worries. I thought maybe that was --

A. I just know it's a Lorex.

MS. PENCE: I don't have any other questions at this time.

THE COURT: Redirect?

MR. LEVIN: No, Your Honor.

THE COURT: May this witness be excused?

MR. LEVIN: He may.

THE COURT: Ms. Pence.

MS. PENCE: Yes, Your Honor.

THE COURT: Mr. Bell, thank you.

Please do not discuss the case except with the attorneys or their investigators.

Thank you.

THE WITNESS: You bet.

THE COURT: All right.

Sir, please step forward. Face the clerk. Raise your right hand. Prepare to be sworn.

JONATHAN STORKE,

being first duly sworn, was examined

and testified as follows:

DIRECT EXAMINATION

BY MR. LEVIN:

Q. Would you state your name and spell your last name.

A. It's Jon Storke, S-T-O-R-K-E.

Q. And Jon, J-O-N?

A. J-O-N. It's Jonathan, but I go by Jon.

Q. Okay. Thank you.

What's your occupation?

A. I'm a patrol sergeant with the Douglas County Sheriff's Office.

Q. And were you at the Douglas County Sheriff's Office in July of 2017?

A. Yes, I was.

Q. What was your assignment then?

A. My assignment then, I was an investigator in the investigation department.

Q. Were you involved in the investigation of the death of a Brian Cook?

A. Yes, I was.

Q. At some point in that investigation did you meet with James Bell?

A. That's correct.

Q. Do you recall where you met him?

A. At his home at 12 -- or --

Q. Did you collect any evidence from him?

A. I did.

Q. What was that?

A. A thumb drive that had video surveillance on it.

Q. Okay. I'm going to ask to display Exhibit 2 again.

Some data files have been displayed on the screen. Do you recognize those?

A. I do.

Q. What are they?

A. Each -- basically they're video files from his video surveillance that's attached to his house. And they're broken down into little clusters of video surveillance. That's how it was downloaded from his DVR.

Q. Okay. What did you do with -- in what format was that video provided to you?

A. Like on a thumb drive?

Q. Yeah.

A. Yeah, it was provided to me on a thumb drive.

Q. And what did you do with that thumb drive?

A. So initially when I met with Mr. Bell at his residence, I reviewed the video surveillance there on his laptop. And then from that point I collected a thumb drive, drove back the Sheriff's office, reviewed it more here at the sheriff's office, and then subsequently booked it into evidence.

Q. When you reviewed it at Mr. Bell's residence were

you able to see activity on it?

A. I was.

Q. And once you booked it into the evidence at the sheriff's office was it available for copying and use by the district attorney's office?

A. It was.

Q. Are you familiar with Mike Marty and Peter Handy?

A. I am.

Q. Who are they?

A. Peter Handy at the time was an assistant district attorney at the district attorney's office here for Douglas County, and Mike Marty was the district attorney's investigator.

Q. I'm just going to switch this real quick. This isn't working.

Did you review what I'll call an enhanced video of the events of that night?

A. I did.

Q. I'm going to ask -- we're going to start playing Exhibit 1 for you to take a look at.

MS. PENCE: Your Honor, could I just ask, which enhanced video, for clarification?

MR. LEVIN: The second one that was provided in August of I believe last year.

MR. STUTCHMAN: I'm going to have to reload it.

BY MR. LEVIN:

Q. Have you viewed that video before?

A. I have.

Q. Does it appear different from the original that you viewed at Mr. Bell's house?

A. The video contains the same -- so the video at Mr. Bell's house, obviously it was broken up, so you'd have to click on individual files to get the video play. But this was done, it brought all those videos and made it one continuous video. But all the contexts are the same.

Q. And what about visually, does it look any different?

A. Other than being a little lightened up, it's obviously enhanced, but the same video as I collected.

MR. LEVIN: Okay. I'll pass the witness, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MS. PENCE:

Q. I'd like to play you the original video. If we can switch back. This is Exhibit 2. These would be the original video snippets that you referred to.

And I'm going to start with, for identification purposes, because there are 72 different files that were turned over by Mr. Bell -- the first one I'm going to play is -- has the date modified as 7-12-2017, 8:21 p.m. And it's a video file that is 5,100 kilobytes long.

I'm going to start with that one, and then I will play the ones that cover the incident that we've just seen in the other visually enhanced video.

MS. PENCE: And, Your Honor, it may be easier to see the originals if we can dim the lights.

THE COURT: Ms. Dominguez, will you dim the lights, please.

BY MS. PENCE:

Q. The next one in that sequence is also time stamped same date at 8-21, it's 7,329 kilobytes. And I'm going to play them consecutively.

That was the second one.

This is the third one. Time stamped again 8-21, 12,615 kilobytes.

This is the fourth one. Again, just going consecutively. 754 kilobytes.

This one is very brief. I apologize. I'll play it again.

This is now the fifth at 5,174 kilobytes.

The sixth, which is 11,879 kilobytes.

The seventh, which 5,190 kilobytes.

This is the eighth, which is 12,886 kilobytes.

And I believe those eight different clips were what -- the content was what we saw in the modified and enhanced version; is that right?

A. That's correct.

Q. And after you collected the thumb drive from Mr. Bell, did you yourself do anything with any of the clips on that thumb drive?

A. No. You mean besides playing them?

Q. Yes.

A. Just played them.

Q. Okay. And were the eight clips that we just watched exact duplicates of what you observed on the laptop at Mr. Bell's house?

A. Yes. So the clips that you just showed are the ones that I reviewed at Mr. Bell's house. Which I went through a lot more of them at Mr. Bell's house until it got to the part, you know, where the substance is in there.

Q. And you would agree there's 72 files on this on State's Exhibit 2; is that right?

A. Yeah, it says 72 there at the bottom left.

Q. And the eight that we just watched are a small

portion of those 72, correct?

A. Correct.

Q. And the eight that we saw were what you observed on the actual recording at Mr. Bell's home?

A. Correct.

MS. PENCE: I have no other questions.

THE COURT: Redirect?

MR. LEVIN: No, Your Honor.

THE COURT: May this witness be excused?

MR. LEVIN: He may.

THE COURT: Ms. Pence.

MS. PENCE: He may.

THE COURT: Thank you, Investigator Storke, Sergeant Storke.

Please do not discuss your testimony with anyone except for the attorneys in this case and the investigators.

MR. LEVIN: And we'll call Mr. Gregg Stutchman.

THE COURT: Let's go ahead and turn the lights back on. Thank you.

All right. Sir, please face the Court clerk. Raise your right hand to be sworn.

GREGG STUTCHMAN,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEVIN:

Q. Would you state your name?

A. Yes. My name is Gregg Stutchman, G-R-E-G-G, S-T-U-T-C-H-M-A-N.

Q. What is your profession?

A. I'm a chief forensic analyst and owner of Stutchman Forensic Lab.

Q. As a forensic analyst, what does your work involve?

A. My area of expertise is audio and video image forensics. So in that capacity my work involves the scientific examination and clarification and evaluation of recorded evidence of audio and video and the like.

Q. Is it that will your full time --

THE REPORTER: I'm sorry. Can I have him scoot forward closer to the mic.

BY MR. LEVIN:

Q. Is that your full-time profession?

A. That is my full-time profession.

Q. What does the term forensic mean?

A. Where law meets science.

Q. How many years have you been working in the criminal justice system?

A. 47 years.

Q. Can you tell me about your background and experience?

A. Yes. I started as a police officer in 1973. That's a long time ago. And the first ten years of my career were spent as a police officer. And in 1983 I entered the private sector as a state licensed investigator doing work for attorneys on criminal and civil cases.

I started the lab originally in 1992 as part of my investigation agency, because of the need for clarification of recorded evidence. And it took on a life of its own, so I opted to phase out the investigation side and put my time and resources in building the lab and technology and training and so forth.

Q. Do you have any kind of specialized training in the forensic analysis of audio and video recording?

A. Yes. I have 500 hours of formal training, including New York -- excuse me. I need a glass of water here -- including the New York Institute of Forensic Audio, which is the university accredited training center that is both audio and video forensic training; the National Center for Media forensics, which is part of the University of Colorado at Denver; Digital Summit International in conjunction with the Las Vegas Metropolitan Police Department;

Evidence Photographers International School of Evidence Photography; Resolution Video, which is a company founded and trains former U.S. Postal Inspector forensic video person and also for the department of defense; also the LEVA, which is Law Enforcement and Emergency Video Association; Ikena Forensic Video System; Salient Stills, also a video technology forensic company; also Copy-Tech Incorporated; Audio Engineering Society; the American Board of Recorded Evidence; National Association of Broadcasters.

And those are just some of them.

Q. Okay. Have you ever presented lectures on forensic audio and video matters?

A. I have, on approximately 29 occasions throughout the United States.

Q. Okay. Have you ever prepared a paper on the subject of audio and video forensics?

A. I have on seven occasions.

Q. Over the past 27 years how many recordings would you estimate that you have conducted some type of analysis on?

A. Between 8- and 9,000.

Q. Have you testified as an expert witness in your area of forensics?

A. I have, on approximately 270 times, and throughout the United States, state and federal court, and

also in Canada.

Q. Do you belong to any professional associations?

A. Yes, I do. The American Board of Recorded Evidence, the Audio Engineering Society, Evidence Photographers International Council, the American Society for Photogrammetry, the National Association of Photoshop Professionals, and the California Association of Licensed Investigators.

Q. What type of clients do you provide forensic services for?

A. Our -- we don't do any private work for private individuals.

Q. So you're --

A. We don't do any private individual work. It's all attorneys or law enforcement, which would be defense attorneys, public defenders, district attorneys, private attorneys, and insurance fraud investigators.

Q. Okay. Was your lab retained by my office to have perform forensic services in this case?

A. Yes, it was.

Q. Will you describe the work that you were asked to perform?

A. Yes. We received six video clips from Investigator Mike Marty to, first of all, review and evaluate.

I did that immediately, and then subsequent request for service after that.

Q. And I'm sympathizing with the court reporter, so I'm going to ask you to lean forward.

Will you explain what you were able to determine from the file names that were provided to you?

A. Yes, I was -- I am. And I have some exhibits here that might be helpful in that regard.

MR. LEVIN: And I'm going to ask this be marked as Exhibit 3.

BY MR. LEVIN:

Q. Did you retain a copy for yourself?

A. Yes, I did.

Q. Okay.

(Exhibit 3 was marked for identification.)

BY MR. LEVIN:

Q. So you were about to explain about the six files and what you were able to determine from them?

A. Yes. There are four columns. The first one is "System." The second one describes the camera view. This one is Channel 1 Main.

The third one is the file name. That part of the file name is the date and time that that file was started.

The fourth one is the date and time that file

ended. And so forth through the six.

Q. What forensic services were requested with regard to those files?

A. The forensic services were to forensically clarify the six videos received. And then to concatenate them, which means connect them all together so they play as a continuous video.

Q. And I'm sorry you said to clarify them?

A. Yes, right. Enhancement/clarification.

Q. And what does that mean in this regard?

A. It means to improve the viewability of what can be seen, the detail of what can be seen.

Q. Okay. So what had you done to facilitate that?

A. Use a dedicated forensic program called Ikena Forensics to -- which has clarification filters, including highlights and shadows and contrast.

Q. And that system, can you spell that?

A. Yes. Ikena Forensics is a highly accepted, highly --

Q. Just so we know what you're talking about, can you spell it.

A. Oh, yes. I'm sorry. I didn't hear you. I-K-E-N-A.

Q. Okay. So you were about to tell us what that is.

A. Yes. It's dedicated forensic video clarification system. It's not a production. It's not anything to do with making movies like you would see in Hollywood.

And depends on the need of the video, it has filters that can be adjusted to improve the clarification of the detail that you're looking -- in the video that you're looking at.

Q. Are you aware of what kinds of agencies would use that program?

A. Federal, state, local law enforcement, in addition, the intelligence services, the military. It's widely used and widely accepted.

Q. With respect to the six files that you've identified, what filters were used on them?

A. The brightness and the contrast.

Q. Will you start by explaining the brightness adjustment filter.

A. Yes. Images of the video or still images have shades. The dark ones are called shadows, the light ones are called highlights. By adjusting those shadows and highlights you can achieve a clearer video or a clearer image.

Q. And what is contrast?

A. Contrast makes the lights lighter and the darks darker. So it's contrasting the light and the dark to give

you additional charity.

Q. Did any of the enhancements or clarification or filters used change, add or remove any material content of the video?

A. No. It's like walking into a darkened room and turning on the lights. Everything that is there was always there; turning on the lights makes it clearer.

Q. Did you do anything else with the six videos?

A. Yes. After they were concatenated, meaning strung together to become one, then a slowed-to-50-percent version was made, and the still images were exported from the clarified videos.

Q. Okay. In preparation for doing all that was anything else necessary?

A. Yes. Three of the videos had a different resolution -- talking about length and width -- than the others. So the three that had a different resolution were conformed to the same resolution as the others so that they could be concatenated and played without any problem.

Q. And what do you do or how do you concatenate them?

A. It's just a tool with the Ikena to change the resolution.

Q. Is there a different program that -- no, I'm

sorry. Is there a different program you used to stitch them all together?

A. Yes. That would be Virtual Dub. Virtual Dub is a very versatile program that we use in the forensic arena. And the appendage tool is used. You take the first video, and you put it -- you bring it up in the system. Then you add the second one, and the third one, and so forth, until you've got all six of them connected together.

And then we saved it as an uncompressed AVI file. So it plays continually from the first part of the first video until the end of the last video.

Q. And do you save those results?

A. Yes, as an uncompressed AVI file.

Q. And then what's done next?

A. And then what was done next was after the still images were -- a slowed-to-50-percent version was exported, and then the still images were exported also with Visual Dub.

Q. Are the methods that you've described, are those in guidelines and standards accepted in the video forensics community?

A. Yes.

Q. Was any time missing between the sequence of videos?

A. No.

Q. Can you describe, there was -- did you provide my office with two different versions of that enhanced video?

A. Yes. Back in September when it was anticipated this would go, I would be testifying, in my preparation for that testimony, in retracing everything that had been done, I lightened the concatenated video a little more so you could see more of the details of the body movements and provided that to your office.

Q. And is that the video that we watched today?

A. That is.

Q. Did you do the same thing to that slowed version?

A. I did.

Q. Earlier you heard some discussion about transferring the contents of Exhibit 1 to a hard drive. Exhibit 1, is that -- was that a -- you call that a thumb drive or do you call it --

A. It was a thumb drive, USB thumb drive.

Q. And that's one that you prepared?

A. Yes.

Q. The file on there, is that a digital file?

A. Yes.

Q. And can you explain to the Court why that was transferred onto a hard drive and whether or not there was any difference between the two files?

A. There's no difference between the two files. The reason is because that's a large file. It's uncompressed. And so when it's on a thumb drive and it's trying to communicate with the computer, it can get choppy and slow down. But when it's actually on the hard drive of a computer it plays smoothly, as you saw.

Q. But are the files themselves identical?

A. Absolutely.

MR. LEVIN: I'll pass the witness.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MS. PENCE:

Q. Did you perform the enhancement and clarification on the video clips that we've been talking about?

A. I -- my colleague Steve Bowler and I worked on the project together. He did some of it and I did some of it. Everything that he did, I audited and confirmed.

Q. So I just want to be clear. There was a report sent to the district attorney's office from Steve Bowler, and you're not mentioned in that report.

A. Right. That was to Mike Marty.

Q. Right. So it's your testimony here today that you were actually the individual that performed all of the

work that you've been describing on these particular segments of video?

A. No. He did part of it, I did part of.

Q. Okay.

A. Everything that he did I oversaw and audited.

Q. So when you say you oversaw what he did, you were actually present at the time that he was enhancing and clarifying and doing the processes you just described?

A. We have a program called Team Viewer. He actually currently is working out of Tennessee. He was in my office for 16 years and he's been with me for 18 years.

So we can see each other's screens. And he can see what I'm doing, and I can see what he's doing. We did that.

Q. So at the time that he was working on these particular video files, you were simultaneously working on them as well?

A. Correct.

Q. So there was never a time that he was doing work and that you were doing work separately?

A. Correct.

Q. It was always together?

A. Yes.

Q. And you -- each time he did anything, you

reviewed what he had done. And how is it that you did that?

So if let's say he had gone ahead and done some contrasting or some highlighting, how is it that you reviewed what he had done?

A. Because I received the files that -- the files that he worked on. I then conducted my own evaluation and examination of those files.

In addition, the Ikena Forensic keeps detailed records of what methods have been used. And I keep those as well. When it was time to -- I was involved in everything from the time the files first came to Mike Marty to the time that I prepared for testimony back in August and then currently.

Q. So you had received a copy of a file that he had run through Ikena or one of the other enhancing programs, and then you would approve his use of a certain level of highlighting or disapprove his certain use?

A. I would evaluate it.

Q. Okay. And what was it exactly that you were looking for when you were reviewing his work?

A. I was looking for clarity, of being able to see the detail of what was going on in the video with the event, and looking for the right mixture of the filters.

We don't want to wash it out so, you know, it's

worthless, yet we don't want to have it so dark that you still can't see anything.

Q. And at the same time are you comparing the video files that you were creating to the originals to see how far off they are?

A. How far off they are?

Q. As far as the highlights, the contrasts, the shadows, all the things you've talked about. Like, obviously -- you've seen the original video files, correct?

A. Yes.

Q. And they look significantly different than the video that you've created?

A. They are darker.

Q. They have more highlighted areas, correct?

A. What does?

Q. Your video.

A. Yes. The highlight filters have been used. So that you can lighten it up and see the movement that's taking place versus just darkness.

Q. And, in fact, you have used certain filters to highlight the movement in each of those clips, correct?

A. To lighten the video so the movements can be more easily seen.

Q. Right. And one of the ways you do that is what

you call highlighting, correct?

A. Right.

Q. You add light to a certain area to make it more apparent or easier to see?

A. Correct.

Q. And you've done that to these video files that you've received?

A. Correct.

Q. You've also removed what you call shadows; is that right?

A. A shadow is just making the darker -- using the shadow filters so that you're lightening it and turning on the lights basically.

Q. So something that you wouldn't be able to see previously, you can allow to be seen?

A. Oh, it's there. The movement is there, but by doing the clarification, it makes it easier to see, more visible to see. It's not created by any filters, it's just turning on the lights.

Q. Right. But what -- but what you displayed and created is not what would have been observed by the naked eye at the time this took place; is that right?

A. Well, cameras, video cameras or otherwise, cannot be compared to the naked eye. There's just a world of

difference.

Q. You're video took out the element of night; is that right?

A. Well, it's still obviously night, but it just lightened it up so you could see the details.

Q. So in your video you removed the elements of darkness; is that right?

A. We lightened it up. We you can still tell it's night.

Q. Because you've added artificial light and highlighting to the areas that you wanted to?

A. No. You're not adding artificial light, you're just adjusting the tones in the highlight so that you, basically, like I said, turn on the lights.

Q. So I'm not understanding, because you said no, you didn't add light. So when you say you turned on the lights, can you tell me specifically that process?

A. Yes. As I explained, the highlight and contrast filters where you are adjusting the tones, the highlight tones so that they are lighter, and you're adjusting the shadow tone so they're not as dark. So a happy meeting point between the two, so it makes it more clear to see.

Q. So, for example, in the video that you created there is a very bright object in the upper-left-hand corner;

is that correct?

A. Well, I'm not sure what you're talking to -- talking about. Is it the archway, the fascia?

Q. Right. And in the video that you've created, you can no longer tell what that -- it's just a bright light, correct?

A. That wasn't the focus. And so I actually have to see it to evaluate that. The focus was what was going on in the street.

Q. So you actually focused in on a certain portion of that video footage, correct?

A. That's correct.

Q. And your efforts to highlight were based on the incident itself, correct?

A. That's correct.

Q. So, for example, you've taken out the wood grain on the fascia, for example; is that right?

A. Without looking at the facia, I can't say, but the facia was not the focus of the clarification, it was what was happening in the street.

Q. So your efforts at removing shadow and adding lights were to highlight the incident that was caught on the home surveillance footage?

A. That's correct.

Q. Okay. You were explaining this process, and I had some questions. You received six different video files; is that right?

A. That's correct.

Q. And those six video files were provided by whom?

A. Mike Marty, investigator for the district attorney's office.

Q. Okay. Were you aware that there were other video files involved in this incident?

A. No, I was not.

Q. And so the six files you were given, you broke them down to still images; is that correct?

A. The -- after the clarification and concatenation was done, the still images were extracted from the finished product.

You look confused. How can I help?

Q. Yeah. So you did your highlighting and contrasting to the actual video, not to the stills?

A. Oh, no. The stills were the extraction from the video. First of all, the individual videos were clarified, then they were concatenated to make one continuous playing video. And then the still images were extracted from that video.

Q. Okay. So all -- so there were

6325000000000000-4,744 stills; is that correct?

A. I didn't count them.

Q. Does that sound approximately right?

A. Probably.

Q. Okay. And so all of those stills are contained in the concatenated version?

A. Yes.

Q. Because that simply means the pieces that you joined together; is that right?

A. Correct.

Q. When you joined those six video files, was anything deleted or added at any point?

A. No.

Q. So they were just seen together?

A. Correct.

Q. Okay. And in order to do that, how did you account for the added second, so to speak? For example, the third video file -- or the second video file starts -- in the third column, if you look at the last two digits, it's 08.

A. Yes.

Q. And the second video file ends in 08.

A. Yes.

Q. So if they were added together, we should have two 08s, as far as segments of time, correct?

A. Let me explain how it works. This shows the file in hours, minutes and seconds. There are actually milliseconds involved in every -- every second has a thousand milliseconds. So with this there can be milliseconds on the end and milliseconds on the beginning which looks like it's the same, but it's the -- accounting for the milliseconds, which this does not show the milliseconds.

Q. Okay. So when you concatenated file two with file three, there would have been some sort of a duplicate; is that right?

A. No. What we're talking about here is milliseconds versus seconds.

If all we have is seconds, and you get to the end of one second, and you start the next second, it doesn't give you the milliseconds or where those milliseconds are at the end of -- say at the end of 08 or 23.

So there's milliseconds that cross between the end of one and the beginning of another.

Q. And so did you fuse those together or did you delete them or what happened to them?

A. All that was done was the appendage of the filter was used to concatenate -- add the first one, add the second one, end to beginning, end to beginning, and beginning to end, so that there is just straight one video that includes all of

the six.

Q. So it's your testimony nothing was dropped, nothing was added in these six files?

A. Correct.

Q. Okay. You mentioned that three of these videos were in a different resolution.

A. Yes.

Q. And can you explain what you mean that they were in a different resolution?

A. Yeah. The resolution refers to the width and the height. The width -- it's a landscape format, so the width and the height. And it's measured in pixels. So the three had a resolution of 1280 by 720, 1280 pixels by 720. And the other ones had a larger resolution.

But you need to take the smallest denominator, because if you take, say, the 1280 by 720 and you make it larger, you actually lose quality, because you've only got so many pixels. If you make a bigger landscape, you're only going to have the same number of pixels, but you're going to have a reduced image quality.

Q. And you're aware that all of these were from the same camera, right?

A. I am.

Q. Can you explain to me what ratio is, as far as

when you're doing the enhancement and clarification?

A. I'm not sure what you're referring to.

Q. What about aspect ratio?

A. That's the relationship between width and height of the image.

Q. Okay. So in the still images that were provided by your company, each of the 4,744 pictures has a ratio listed.

A. An aspect ratio.

Q. And those ratios go from 79 percent all the way up to 80 -- or 99 percent. So about a 20 percent difference. Can you explain what that is?

A. Do you know, I can't. I haven't -- I don't -- I dont -- haven't observed that. My focus was the video. I've reviewed them, but I can't comment on that.

Q. When you were first talking about highlighting the other -- one was the brightness, the other was contrast?

A. Right.

Q. And you talked about shadows and highlights, and in the same way that you can add light to an area, you can also remove a shadow; is that correct?

A. It depends on the quality, the quality of the video. This, as you know, is not a great quality video.

So the shadows just talks -- is referring to the

lightening of the dark, dark, dark places in the video. The highlight means that you are lightening the light part, or the happy medium in between.

Q. The videos that were provided to you originally, the six were in original time is that -- or in actual time; is that correct?

A. Yes.

Q. And the concatenated video, the first version is also in original time?

A. Correct.

Q. But you also produced a slowed-down version of that?

A. Yes, 50 percent of normal speed.

Q. And how is it done that you actually slow down? Did you do that on the original files and then rejoin them --

A. No.

Q. -- or did you do that on the already enhanced version?

A. You finish the enhancement, the clarification. And then you make a copy of that. And then you use the filters to slow it to 50 percent. So you're not doing anything with the product that you've done. But then you take the copy of that, and you slow it to 50 percent.

Q. So in the first -- in the -- we'll call it the

enhanced and clarified version, you have added and subtracted light; is that right?

A. You've adjusted the shadows and highlights, not -- kind of like turning on a flashlight. There are tools in imaging software that I have where you actually had fill light. You actually are adding a synthetic light. Not so when you're just adjusting the highlights and the shadows.

Q. So when you were able to take the element of darkness out of the actual video, you did that by adding light, correct?

MR. LEVIN: Objection, Your Honor. This is cumulative. We've been over it numerous times.

THE WITNESS: By adjusting the shadows and the highlights -- the tones that constitute the shadows and the highlights -- by adjusting those, we make it seem more clear, because we're adjusting those for maximum visibility of what was going on.

MS. PENCE: Court's indulgence, Your Honor.

BY MS. PENCE:

Q. When we watched the version of the video that you created, a couple different times you see the date and the time jump and either become bigger or smaller, depending on where that is. What -- what is that?

A. That is because those files that you see that

change in were the ones that were originally a different resolution. And when they were resized, the date and time stamp stays the same. So that date and time stamp on the ones of a different size will stay the same, even though the image is adjusted in the resolution.

Q. And so when you're talking about the resolution, you're talking about actually increasing the size of things that are visible?

A. No. In this, we actually reduced the resolution in three, because they were a larger resolution than the other three. And you lose quality if you try to make the resolution of the three smaller ones. So we reduced all of them to the same size, which is the 1280 by 720.

Q. So when we see the larger date stamp and time, what resolution is that?

A. I can't say.

Q. Well, it goes back and forth from tiny and then big.

A. Right, right.

Q. So when it's tiny, is that the smaller resolution or --

A. That should be the smaller resolution.

Q. And then when it goes to the bigger one, that's when --

A. Larger resolution.

Q. -- it would have been a larger resolution?

A. Correct, I believe.

Q. But the rest of the photo, other than the date, has been modified or the resolution has been changed?

A. It's been conformed to the other three.

Q. And then when you were describing how each of these files, the six files were joined, that, you know, nothing was added, nothing was deleted --

A. Correct.

Q. -- but your version is -- appears to be much, much, much, much larger as far as file size than these six video files.

A. Yes. That's because once we do the forensic clarification, we say there is an uncompressed AVI file.

Are you familiar with compression? I can explain it to you if you need.

Q. If it helps explain why yours is so much longer and bigger, yes.

A. Compression is a system that's used to reduce the file size. And all security videos use compression. There's lossy compression and lossless compression and there's a real high compression that degrades the video.

In forensics the standard is once you've done

your work, you don't recompress it. What it's kind of like is, is taking a piece of paper, wadding it up, a nice pristine piece of paper, wadding it up and then throwing in a waste basket and stomping on it. Then you take that paper out and you open it up. It's never going to look like it did before it was compressed.

So when we've done the work, we always save it in an uncompressed AVI file, and that makes large files.

Q. What you have created in the enhanced video that we've all watched --

A. Yes.

Q. -- would not have been seen by someone who was present on that date and time in that location; is that correct?

A. Again, I can't say, because the difference between what the human eye and see and what a camera sees can be vastly different.

Q. But like we talked about the element of darkness that was removed from your version, for example.

A. Is that a question?

Q. It's going to be.

A. Okay.

Q. That is no longer present in your video?

A. The video has been lightened, correct.

Q. So you cannot see that darkness that was present in the original video, correct?

A. You can see that it's night, but it's been lightened so you can see the detail of the event.

Q. Similar to the wood grain on the fascia of the house, that's been removed from your version, correct?

A. I don't -- I can't say, because I haven't looked at that.

MS. PENCE: Can we play it, so we can clarify that it's disappeared. Sorry.

Can you play Exhibit 1 or Exhibit 2.

MR. LEVIN: Is it okay for him to step down to play it?

THE COURT: Yes.

Is it going to be from the plaintiff's table?

MR. LEVIN: Yes.

BY MS. PENCE:

Q. So the white object that we're seeing in the upper-left-hand corner, you've removed the good grain and the color and the paint and the texture from that; is that right?

A. That's a result of the clarification to focus on what was going on in the street.

Q. And again, so when you did your highlighting and contrasting and clarifying, you made choices as to which

portion of the video you are affecting, correct?

A. Correct.

Q. Okay. And so, for example, the light that we see in different parts of your video are much brighter than the lights in the original files, correct?

A. Depends on what you're talking about, like the headlights and the taillights of the vehicle that is driven up, and that is about like it was on the original.

THE COURT: Mr. Stutchman, will you come back up to the witness stand please.

THE WITNESS: Sure.

THE COURT: Thank you.

MS. PENCE: And, Your Honor, I'd just like to play a portion of the original so we can see the difference.

THE COURT: Is this going to be from your computer, Ms. Pence?

MS. PENCE: Yes, sir, please. And this is State's Exhibit 2. I'll try and get clip one of the video files.

BY MS. PENCE:

Q. Mr. Stutchman, do you recognize which of these -- and I've highlighted the first one with the time of 8:21, which appears to be the time on this, but I don't -- the numbers that are on the document that you have provided are

different or maybe they're just not all --

A. That's because you're looking at the beginning, the beginning date/time stamp of the file, and I'm looking at the end. And we can certainly go through --

Q. I think this one will work.

So in this picture we can see the fascia in the upper-left-hand corner; is that correct?

A. Yes, we can.

Q. And in that we can actually see the shadows of textures, and you get an idea of what it is; is that correct?

A. That's correct.

Q. We also see some headlights on a car that's coming up; is that correct?

A. Correct.

Q. And then immediately below the fascia, we have a white car. And that car is -- in this video -- in what we would call darkness?

A. In the shadows.

Q. Yeah. And all of that has been removed in your video, correct, the darkness and the shadows?

A. It's been lightened up with the highlight tool.

Q. So we no longer see this, correct? The darkness and the shadows.

A. Not entirely. I mean, you can compare the two,

and everything that's here is still here. You just see it better with the clarified version.

Q. Well, we don't see the shadows, we don't see the fascia, we don't see the darkness of night.

A. And again, that's the focus of the clarification. The focus is what's going on in the street.

Q. So you modified this video based on your own decision as to what should be highlighted and enhanced?

A. Again, the focus --

MS. PENCE: I'll withdraw the question.

Nothing further.

THE COURT: Thank you.

Mr. Levin, redirect?

MR. LEVIN: No, Your Honor.

THE COURT: May this witness be excused?

MR. LEVIN: He may.

THE COURT: All right. Ms. Pence?

MS. PENCE: Yes, Your Honor.

THE COURT: Thank you, sir. You are excused.

MR. LEVIN: I'll ask him to remain in case we need his services again.

THE WITNESS: I'll stay until the end of the day.

THE COURT: Mr. Levin, do you have other witnesses?

IN THE SUPREME COURT FOR THE STATE OF NEVADA

ADAM ANTHONY BERNARD,
Appellant,
vs.
STATE OF NEVADA,
Respondent.

No. 83323

JOINT APPENDIX

Volume II

MARIA PENCE
Attorney for Appellant
Bar ID No. 9890
1662 U.S. Highway 395, Suite 203
Minden, NV 89423
(775) 392-4084

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MR. LEVIN: No, Your Honor. I'm desirous of a quick break, however.

THE COURT: Good idea. We're going to go ahead and take a break.

MR. LEVIN: I just need like two minutes.

THE COURT: I want know where we're at. I imagine now we can argue motions that are pending. Are we at that point?

MR. LEVIN: State is.

THE COURT: Ms. Pence?

MS. PENCE: (Nods head.)

THE COURT: Okay. Let's take a five-minute break. Thank you.

(Recess taken.)

THE COURT: Please be seated. Back in session on Case No. 18-CR-104.

Counsel are appearing for both parties. Also appearing is Mr. Bernard.

Mr. Levin, if you would like to go ahead and present argument, you may.

MR. LEVIN: Do you want argument on everything or one at a time?

THE COURT: Actually, let's take a moment to take some inventory of the motions that are pending.

The State's motion in limine regarding photographs: Ms. Pence, is there any opposition to that?

MS. PENCE: No, Your Honor. I did have a chance to go through the exhibit that was attached that had the photographs that he was seeking to introduce. And I have no objection to those photographs.

THE COURT: Okay. Very good.

And I did have a chance to look at those as well.

The motion in limine is granted without objection.

There was also the State's motion in limine regarding interviews conducted with the defendant, out-of-custody interviews.

Ms. Pence, do you have any objection to those?

MS. PENCE: No, Your Honor.

THE COURT: So that motion in limine is granted without objection.

We then have the motion in limine regarding the video and motion in limine regarding statements made -- allegedly made by the defendant that were overheard by Mr. Ruffo. We have those for argument and we also have pending the victim's -- excuse me, the defendant's request for the victim's criminal history. And so that's pending as well.

Let's just start with the State's motions regarding the video and statements made by the defendant that

Mr. Ruffo testified to.

Mr. Levin.

MR. LEVIN: Starting with the statements that Mr. Ruffo testified to. He testified that he could clearly hear those statements. He knew they were coming from the two people that were near the body on the ground, which we now know was Mr. Cook.

He did not know -- couldn't identify the people at the time, and did not know who made the statements. But Mr. Tholl testified that he did not make them. He also testified that the defendant was cursing. And he also testified that he could not recall everything that the defendant was saying.

So that leaves only one person who could have made those statements, and that is the defendant.

So we would ask that that motion be granted.

Want me to go to the video next?

THE COURT: Yes, please.

MR. LEVIN: With respect to the video, one of the cases I cited was Dolan. And they talk about the two methods in which an enhanced video can be -- the foundation can be established to admit those videos.

One is the pictorial testimony method. And that's where you have the testimony of a witness with personal

knowledge testify that it fairly and accurately reflects the events that occurred. In this case that testimony was provided by Kevin Tholl.

And based on that alone, the video should be admitted at trial. We provided the entire foundation for it.

But there's a second method, which is the silent witness method. And that's where you have proof of reliability of the process which produced the media. And we've got that as well, a start. And we've gone through the entire -- even though we don't have to, we've gone through the entire chain of custody, starting with Mr. Bell, his system, that you have to identify that those are views from his system. He testified how he downloaded those files onto a thumb drive and provided them to Investigator Storke.

Investigator Storke testified how he watched the originals, how he watched the enhancement, that you can see it better on the enhancement. It depicted the same events, just that you could see them better. He took those files and he put them into evidence in the Douglas County Sheriff's evidence room. Testified that Mike Marty, investigator for the Douglas County District Attorney's Office, then would have access to it.

You heard the testimony then from Mr. Stutchman, how he got the six files from Mike Marty. Testified to all

the processes that you use to enhance those videos. He testified that no material events were added or deleted. He didn't add or delete any frames. All he did was stitch the various videos together, adjust the brightness and the contrast to produce a video where you could see the events more clearly, but he did nothing to affect those actual events.

So as a sum: The witness method alone, also we believe that video comes in. We've proven it by both of those methods. We ask that the video be admitted.

With respect to the half-speed video, I think you've heard all the foundation for it. I think at this time I'm not going to ask you to make a ruling on it. I haven't admitted it. I haven't played it. I'm not sure I'm going to play it at trial, but we've got the foundation. So if I decide I want to, I think we have a much quicker process in determining that at that time.

But as I sit here right now, I'm kind of -- I'm not going to be taking up the Court's time determining that, because I don't know if I'm going to be playing it.

THE COURT: Okay. Mr. Levin, none of the exhibits that were marked today have been admitted.

MR. LEVIN: I would ask that all three -- I think there was three exhibits. I'd ask that all of them be

admitted for the purposes of this hearing. Well, and then two of them I'm asking that they be admitted for purposes of trial.

THE COURT: Ms. Pence, first on that, do you have any objection to the Court considering any of the exhibits for the purpose of this hearing?

MS. PENCE: Not -- no. Not at this time, no.

THE COURT: So they are admitted for the purpose of this hearing. Of course the Court will be making assessments whether any of them will be admitted at the time of trial.

(Exhibit 1, 2, and 3 were admitted into evidence.)

THE COURT: Ms. Pence, your argument regarding the video and the statements.

MS. PENCE: Your Honor, I'm going to start with the video first. I did go over the four cases that were offered by the State in support of introducing this type of video evidence. And again, to be clear this is not being offered as a duplicate, because it's clearly not a duplicate, it is basically a created piece of evidence.

I think that's important for the Court to consider. The Court has seen that there is actual original recording of the incident. That's available. The Court has seen it. It's even easier to see on this monitor than our

small monitors. It was played in court today, and it exists.

So the first question is if we have what was actually recorded at the time and on the date of the offense, why are they have trying to introduce a newly created piece of evidence. And, Your Honor, it's pretty much for what we were getting to at the end of the testimony. The State wanted to highlight and enhance and basically to make better and bigger -- and a lot of this was argued in my motion -- what it is not allowed to do.

It is not the case where they have taken the exact original and then, as for example, in the Dolan case, and I think also in English, where they're adding pixels and making a better clarification.

As the Court's seen they have actually removed portions of the original. You can't see part of the roof. The car is in a totally different light. The eye is drawn to a totally different portion. The headlights, the streetlights, it's all been manipulated to now reflect something that was not actually what was present on the date and you time.

And to show that version to a jury is extremely misleading. It looks like it's daylight. I don't know, out of those 4,744 stills, how many of those -- like he said, he couldn't explain why some of the resolution was only at 76 and

some was the 99. Were the ones where we actually see Mr. Bernard going back to strike in greater resolution so it highlights that? It looks worse?

What about the ones where the victim was coming after Mr. Bernard. Were those darkened and reduced in size. I don't know.

But what we have here is someone whom, at the State's request to highlight and enhance this altercation, is creating something. That's very different than a duplicate or a fair and accurate representation, because we don't have an original.

All four of the cases that were submitted by the State make exceptions. For example, in Prater, one of the problems was that the original was not available, because it was from the transit authority's audiovisual system. That's one of the only reasons the Court considered introducing a sort of created version of the original, because it wasn't available. We have the original. You can see what happened. So Prater doesn't give him any of that leave.

English v. State, that was about the still photographs. And one of the reasons it says the enlarged photographs were allowed was because there was no distortion of any of the objects shown in those photos.

There is huge distortion. We have light

distortion. We have shadow distortion. We have size distortion. We have basically the erasure of different things. And I don't know beyond just the fascia, which, of course, is not super relevant as far as the incident, but when you start removing what was actually present and visible and you draw in, it's like emphasizing a piece of evidence that by law you're not allowed to do.

It would be the same argument if we said we'd like to have this edited so it's a little darker, some of the shadows softened so you don't see them quite so clearly and they don't look quite as rough. And we want to remove anything else that would have been present so that all you can focus in on is what we've created. We couldn't do that as defense, and the State shouldn't be able to do it either. We have the originals.

The last thing, Your Honor, is any sort of alteration -- I absolutely feel that light is a part of this as well. And Mr. Stutchman's testimony, I understand he wasn't adding light, he was just somehow subtracting darkness, but it paints a picture for the jury that really wasn't what was present that night.

And when you start messing with speed, as well, for example, slow motion -- and I'm just going to refer the Court to cartoons. You know, the big pow, pow, pow, pow.

Pow. We do that for emphasis. Under the law it says you cannot do that to specific pieces of evidence.

You can't over-highlight them. The Court isn't -- you can play what there is. And we have that video in this case. And that's what should come in.

My last objection to the video, Your Honor, would be I don't know how much -- Mr. Stutchman said he altered the portions that he wanted and left other portions. I don't know what Mr. Mueller did, who's the one that wrote the memo that he referred to as his partner. So I don't know what enhancements or additions or subtractions he made.

And I don't believe that allowing something that is not an accurate replication of the original recording should be allowed. It's extremely prejudicial. It doesn't add any relevance. You can see the altercation between the two individuals on the original. And but for that the State wanted to give a different picture to the jury, there's no relevant reason to do that.

So I would ask that the Court exclude that and that we go forth with the original, which we do have.

As far as the statements, the first thing that I want to point out is that the statements that were highlighted in the State's Request to Submit the witness's testimony were basically Mr. Ruffo's statements that Mr. Bernard had used the

word "nigger."

And I want to start by saying in all of the cases that I reviewed, and in Quartermaine, and I think common sense tells us, that word is one of the few words that rouses passion, furies, emotions, no matter when it's used. Whether when I just said is it, when Mr. Ruffo said it, that's the type of word that is. He didn't ask in his original motion to have any testimony regarding Adam saying, "fuck you," or "bitch," or anything. It's the word "nigger."

And the reason the State wants that word to come in is because it highly inflames a jury. And if jury is led to believe that even for a minute that Mr. Bernard uttered that word, any probative value it would have in this instance is outweighed by the prejudice to Adam.

This Court heard the 911 call, which was made at the time of the event. He said in the 911 call that he heard what he heard about just a few seconds before he called. He said they were cursing and he heard the word "nigger" a few times. That's it. He couldn't -- it was totally dark. He couldn't see anything. The only thing he observed, and he said it twice to the operator, was two men carrying a body.

And his words, "It was totally dark outside. I couldn't see anything." He couldn't even give a description of the subjects. None of the subjects present, none of the

persons present are African American.

Even in Quartermaine, the State -- there was an argument about whether or not they should let that come in. And that court finally held racial animus can come in as far as motive, that it's highly prejudicial, and normally would not be allowed, but because the victim in that case was African American, he believed it was admissible, because it had relevance outside of just inflaming the jury.

There is no African American person involved in this case. There is no racial animus in this case. None of the people are African American. It doesn't serve any relevance other than to inflame this jury.

This Court also heard Mr. Ruffo's testimony today in court, which was in great conflict with what he told the 911 operator on that night. And I would submit to the Court that when he was given his first subpoena and he pulled up the newspapers, he then read much of the information which he testified to and which was involved in his interview on January 29th.

He was not aware of the pickup truck, which was a diesel truck running during this entire incident and which was turned off after Brian was moved out of the road. He didn't report any of the that to the 911 operator.

I guess my final comment on -- and I'm speaking

specifically to the word "nigger." It has no value in this case. I have -- obviously at this time, during the motions hearing, the Court has a different analysis as to whether it actually ever even occurred. When the State summarized Mr. Tholl's testimony it omitted that Mr. Tholl also stated that he never heard Adam say the word "nigger" during that incident.

So I would ask the Court to exclude specifically that word from coming in front of the jury in this case.

THE COURT: Thank you. Ms. Pence.

We do also have pending the defendant's motion for an Inmates Request for the Victim's Criminal History. I believe that was filed by Mr. Filter.

MR. FILTER: It was, Your Honor.

THE COURT: Would you like to argue that one?

MR. FILTER: Your Honor, just fairly briefly. It's pretty well briefed.

It's clear, Your Honor, from both Nevada case law and the United States court case law that the State needs to provide exculpatory material to the defense and that even materials of which they are not personally aware of or in possession of, but they are still are constructively aware of they also need to produce those.

The State has produced a -- it is attached as

Exhibit A to our motion -- a synopsis or abstract of Brian Cook's known criminal history. And I would suggest to the Court that that is a tacit admission that that is relevant material, that his history is relevant material and potentially exculpatory.

Counsel, in his opposition to our motion, noted that we don't specifically allege that there is exculpatory material. That's perhaps technically true, as far as the words that we put in, but again, it was somewhat tacitly presented and certainly is clear.

One of the defenses in this case, at least potentially, is self-defense, that Mr. Bernard was defending himself, that the alleged victim was intoxicated and/or belligerent, violent or otherwise provoking and challenging and threatening to our client. Even within the synopsis that's been provided, there's alcohol use that's referenced in a 2008 case of DUI, the trespass case, there are things here that potentially would go to those issues, and certainly there could be. And again, it's within the State's constructive possession, if you will, constructive knowledge, in his broader criminal history that's been produced since 2013.

Your Honor, as far as the State, correctly, directs us to NRS 179A100, respectfully I disagree with the construction that the State puts on it. It does not say, at

least to my reading -- Counsel, please correct me if I'm missing it -- but it does not say that it cannot be provided to a victim -- or excuse me -- history cannot be provided of a victim to a defendant.

Actually I would aver somewhat the opposite, Your Honor. Subsection 1 of that statute -- and the wording here is interesting, Your Honor. Subsection 1, "the following records of criminal history maybe be disseminated by an agency of the criminal justice."

I'm going to point out that counsel in his opposition refers to a repository. That's not the repository. The Douglas County District Attorney's Office is an agency of criminal justice.

And it goes on to say, "Without any restriction reserved in this chapter, any which would reflect records of conviction only." So they can edit it to provide us just with convictions.

And, "Any which pertain to an incident for which a person is currently within the system of criminal justice, including parole and probation."

It's not saying the person, as in the person who is the subject of the criminal history, it says a person. Mr. Bernard is clearly within the criminal justice system, and a history that is relevant to that inquiry is applicable.

Also, Your Honor, under Subsection 4 it indicates that records of criminal history must be disseminated by an agency of criminal justice upon request to the following persons or governmental entities.

Then under Sub J, "Persons or agencies authorized by statute, ordinance, executive order, court rule, court decision or court order, as construed by appropriate state or local officers or agencies."

Your Honor, we're asking the Court to issue just such an order, directing a criminal justice agency, i.e., the Douglas County District Attorney's Office to provide those records to us.

And I also want to address, Your Honor, the synopsis or abstract, whatever you want to call it, that was provided. It does not provide -- even what is there does not provide sufficient information for it to be even follow up on. There's no location given, no case number given. It's just a date of offense, the offense, nature, the disposition date, the category, and disposition. No idea even what state it is in, let alone what court it is in. So there's no way for the defense to follow up on those and determine what information may be available.

And just to expand a little bit on that. It would allow us to go and we could subpoena or otherwise obtain

police reports as to those cases and determine what a blood alcohol content level was or, if there are violent offenses, what the nature of those were, what statements were made.

Your Honor, it's all relevant and potentially exculpatory information, which is appropriately -- should be appropriately available to the defense in this case. And we ask the Court to issue such an order.

THE COURT: Thank you, Mr. Filter.

Mr. Levin, your response.

MR. LEVIN: Response and reply or just want the response.

THE COURT: And reply.

MR. LEVIN: Okay. The defense, if they want that information, the State has provided a procedure to them to get it. They have decided not to avail themselves of that, and have attempted instead to go through a more rigorous procedure of trying to force the district attorney's office to perform their investigation for them, that all they had to do was apply to the Court for an order and take it to the repository and get the information they're seeking. But they continue to try to avoid the procedures that have been set up to provide them the very information they're requesting, and do it a different way.

They are entitled to exculpatory information.

And they have provided nothing of what they are seeking as exculpatory information. And pretty sure the case law says they're not entitled to go on a fishing expedition through the discovery process like that.

With respect to things that they are alleging, I'm not even sure how they're exculpatory. If the victim had a DUI ten years ago, a misdemeanor DUI, how on Earth is that exculpatory? How is that going to show that this defendant didn't commit this crime?

I don't even think it would be admissible to the Court, but if they think it is and there's an argument to be made, they should go through the procedure. I don't even know that I need to be aware of it. They could probably ex-parte apply to the Court for an order, get it, go down to the repository and get the information that they're seeking.

Going next to the statements of the defendant. I think you heard a number of red herrings. Well, you know, Mr. Ruffo didn't even mention to the 911 operator that the truck was running. Think about that statement, Your Honor. This guy is on a 911 call, not in an interview or an interrogation, just reporting immediately what's going on at the time, which was, as he testified, the two individuals carrying a limp body out of the street.

That's what he reported to 911. He explained

that on the stand. He explained that were other things that happened, but that's being brought up as a red herring.

Now to the meat of the matter, which is, you know, the word that we're talking about, which is "nigger," for the record. The very reason that the defense is telling you that this rouses passions and fury of the jury and -- and that very reason is why the probative value is so high in this case, because for the same thing that it arouses in the jury, it's coming out of the defendant's mouth, and that is an expression of the fury and the passions that he's experiencing at the time, his mental state; one of the elements that the State needs to prove in this case.

For that reason, the probative value is as high as it can be. And it's prejudicial only in the sense that it seems to -- it is evidence of the defendant's intent and tends to inculpate him in the crime. So we're asking that that statement be admitted.

The reason -- the other two phrases, "fuck you" and "bitch," for the record, because of the nature of that particular word -- and I agree about what it invokes in people -- I felt that was important to have the Court hear that first, rather than just to have it come out right in the middle of a trial and elicit some testimony like that. But it is the State's intent to elicit all that testimony.

Going back to the video. You heard a lot of argument, again a lot of red herrings. What you didn't hear was any legal authority whatsoever in that argument. None.

The basis of the argument is the defense doesn't like the fact that it shows in better detail what the defendant did. That was the basis of the whole argument. An original exists. So what? An original exists in all kinds of things where we still -- you know, you might put something up on a screen and blow it up, and it's going to reduce the resolution a little bit. That doesn't mean that you can't display something in that manner.

They talk about what's the State's motive. Well, I'm not sure that the State's motive is relevant to anything. It's again a red herring, just casting aspersions. But the reality is that that video, as you can see, shows the events better than the original video. And that's what we want to do for jurors. We want them to have the evidence to review it. The defense tried to claim that the video looked like daylight, that it happened in the daytime.

And the Court saw the video, and you can judge for yourself. It looks like a nighttime video that's been lightened. You can still see the cars and the headlights and the darkness. It's just that portions are lightened so you can see it better. It does not in any way, shape, or form

look like daylight.

Defense said they don't know what Mr. Bowler did to this. We had testimony on the stand, and if you had any more questions, there's a guy right on the stand who was testifying. He testified that he could tell you anything that Mr. Bowler did. So to the extent they wanted to know, they certainly could have asked. He was aware of it all.

All the things that the defense is arguing, these are things that go to the weighing that the jurors will do. It's certainly relevant. It's certainly things that the jury gets to consider; whether or not you can see grain on the fascia of the house, that's fair for the jurors to consider, if the defense thinks that kind of thing is important, or whether a headlight might be lighter or darker, but it doesn't affect the admissibility whatsoever. Those videos are admissible, and we're going to ask for a ruling on that in that regard.

THE COURT: Thank you, Mr. Levin.

Mr. Filter, you can reply.

MR. FILTER: Just briefly, Your Honor.

The State conceivably could review the criminal history and determine that certain things aren't relevant. But it's within their control. It's within their exclusive control.

Counsel's argument that somehow we have to go through the repository is not reflected in statute. It talks about any criminal justice agency. And certainly the Douglas County District Attorney's Office is one of those.

We are seeking such an order through this motion, Your Honor. And we'd ask the Court to grant that.

THE COURT: Counsel, thank you. Appreciate your arguments. I will be taking the motions under submission.

We have a trial coming up here. Mr. Levin, are you prepared to confirm the trial set to begin on March 17th?

MR. LEVIN: I am, Your Honor.

Ms. Pence?

MS. PENCE: March 17th?

THE COURT: Yes.

MS. PENCE: Yes, Your Honor.

THE COURT: All right. And also the parties were to have supplied the Court with jury instructions by January 31st. I haven't seen those from either party yet.

Mr. Levin?

MR. LEVIN: My apologies, Your Honor. I haven't yet. I know it's not an excuse, but I know the Court is aware we were down about a third of our staff. It's been very hectic. By next Monday we should be fully staffed.

THE COURT: When would you like to have those

submitted?

MR. LEVIN: Can I check?

THE COURT: Why don't you check. And my --

MR. LEVIN: We both haven't done them, might as well --

Your Honor, would March 2nd be acceptable to the Court?

THE COURT: That is fine with the Court.

Ms. Pence, does that work for you?

MS. PENCE: It does, Your Honor.

THE COURT: All right. So March 2nd for submission of jury instructions.

Mr. Levin, anything else for today's purpose?

MR. LEVIN: No.

THE COURT: All right.

Ms. Pence?

MS. PENCE: Your Honor, I did just have a few things. I did file a third discovery motion back in August. And one of the issues in that case was the slides from the brain tissue. And I have received information from the State that production of those slides is not possible at the current -- at the hospital, but they can be made. And I believe it's depending upon the type of slide, it's $1.50 to $11 per slide.

I don't know how many of those slides there are. I don't know what this Court's preference would be as far as getting an estimate to the Court of what will be needed for that. They are just listed as slides, like A, B, G, and D in the reports. I don't know that the State is withholding. I don't think they know how many slides either.

So I don't know as far as financial constraints what we need to do with that. But it is something that's important that we need to get done and clarified.

And then other than the sides, Your Honor, there is also a request for the physical evidence that the State had collected. And I -- at one time, I do know Mr. Levin was going to get that to me. I still don't have that.

The other one --

MR. LEVIN: What physical evidence?

MS. PENCE: A list of the physical evidence.

MR. LEVIN: Oh, list. I'm sorry.

MS. PENCE: Whatever evidence was collected and put away.

MR. LEVIN: Sorry.

MS. PENCE: There was -- so that was on the third discovery request, those two things were still outstanding.

The second request for discovery filed back in August also listed -- there was information reviewed by the

medical examiner in this case at the time of the prelim that she referred to as hundreds of pages of records that she refused to turn over to myself, and I think also to the State at that time. But I still don't know what those hundreds of pages of medical records are. And I do believe that perhaps a court order that she or her Washoe County Medical Examiner's Office be ordered to turn over the medical records that she received and reviewed in this case.

THE COURT: All right. Let me stop on that.

I thought -- now I'm going to have to go back and look. I thought we had already addressed that, and I thought she was ordered to produce that a long time ago. I could be wrong, but I thought that issue had been remedied.

Mr. Levin, it sounds like it has not.

MR. LEVIN: I don't recall. It's my belief and understanding that all medical records, even beyond those that she reviewed have been turned over to the defense, and that they've got all the medical records. But I can go back and look.

THE COURT: All right. I'm going to ask counsel work with each other on that. If there's still something outstanding, Ms. Pence, the Court would entertain a motion to produce.

I feel pretty confident saying we discussed it

before. I guess I'm just not recollecting exactly what came of that, but I'm aware of this issue. It's been out there for a long time, and I thought it had been granted.

MS. PENCE: And, Your Honor, I have since -- at the time we did the request to continue trial -- received all medical records, but one of the issues that stems from the preliminary hearing was that she -- she testified that she had reviewed hundreds of pages of medical record when she made her findings in this case. And I have yet to be provided with what those records were. And, of course, it's very important and relevant to this case what she actually reviewed and then made her finding on.

The fact that I now have all of the medical records in this case doesn't change that I don't know what the medical examiner reviewed before she made her findings.

THE COURT: So it might be you have, you just don't know what it was she --

MS. PENCE: I don't know any of what she -- because she refused to tell us on the stand. And I think she refused to disclose to the State.

THE COURT: Seems this is something counsel could discuss and hopefully get resolved.

Again, if there's a need for a court order, I would certainly consider that at that time.

Regarding the slides and the amount of money, to make a request for the funds, Mr. Levin, the defense has to have an idea of how much it's going to cost. And so I think that's what Ms. Pence is getting at. If she had some sense of how many slides there were, she could then approximate to the Court the cost.

Do you have any idea of how many slides we're talking about here?

MR. LEVIN: I've got no clue, but I can contact the medical examiner's office tomorrow. I think that's the kind of thing they could tell me pretty readily.

THE COURT: All right. I think that's important here, just in an attempt to try to avoid any further delays in the case.

Mr. Levin, I appreciate you offering that. And if you wouldn't mind at least making that request.

MR. LEVIN: Sure.

THE COURT: Again, Ms. Pence just needs some kind of general idea so she can make her request to the Court for the funds. That sounds, Ms. Pence, like an appropriate use of funds. I just kind of need to have an idea of how much it's going to cost.

Okay. Anything else?

MS. PENCE: There was just one other request that

was in the second discovery request. I did receive in discovery a number of cell phone extractions, some of which are in a format that's not able to be -- I don't want to say used, because you can see some things. But I don't have any reports or information on where some of those came from or who did them.

Any kind of a clarification or statement regarding -- I think there's three different phone extractions, would be -- I think, at a bare minimum, just so I know what they're supposed to represent.

THE COURT: All right. Mr. Levin, have all reports been turned over?

MR. LEVIN: I believe so, but I'll double-check.

THE COURT: So it could be there weren't reports done for certain things. Were there reports for the extractions?

MR. LEVIN: Yeah, I recall -- I don't know if it's the one we're talking about. There was one extraction that the program was able to get. And it's just like a -- my recollection, it's just like a two or three sentence report basically saying we didn't get any usable data out of it.

So that might be the one they're talking about, but I definitely have to go back and look.

THE COURT: All right. Mr. Levin, do you have

anything further for today's purpose?

MR. LEVIN: No, Your Honor.

THE COURT: All right. Counsel, again, thank you. We don't have any other hearings scheduled.

MR. LEVIN: I'm sorry?

THE COURT: I don't think we have any other hearings scheduled between now and the trial. If we need to have one, you can make an appropriate request, otherwise the Court stands in recess. Thank you.

(Proceedings concluded at 5:28 p.m.)

--o0o--

STATE OF NEVADA)
) ss.
DOUGLAS COUNTY)

I, EVELYN J. STUBBS, Nevada Certified Court Reporter No. 356, do hereby certify:

That I was present in the Ninth Judicial District Court for the State of Nevada, in and for the County of Douglas, on Monday, February 3, 2020, for the purposes of reporting in stenotype notes the within-entitled Pre-Trial Conference/Motion Hearing in the STATE OF NEVADA, Plaintiff, versus ADAM A. BERNARD, Defendant, Case No. 2018-CR-00104.

That the foregoing transcript, consisting of pages 1 through 113 is a full, true and correct transcript of said hearing.

Dated at Carson City, Nevada, this 25th day of February, 2020.

/s/ Evelyn J. Stubbs

EVELYN J. STUBBS, CCR #356

EVELYN STUBBS
CAPITOL REPORTERS
123 W. Nye Lane, Suite 107
Carson City, Nevada, 89706
(775) 882-5322

THE NINTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF DOUGLAS, STATE OF NEVADA

THE STATE OF NEVADA,
Plaintiff,
v.
ADAM A. BERNARD,
Defendant.
_____/

Case No. 2018-CR-00104
Dept. No. II

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the following document **DOES NOT** contain the Social Security number of any person: (List of document(s) attached below)

1) Pre-Trial Conference/Motion Hearing - Monday, February 3, 2020

/s/ Evelyn J. Stubbs
EVELYN J. STUBBS

2-25-2020
DATE

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Case No. 2018-CR-00104
Dept. No. II

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

ADAM BERNARD,

Defendant.
_____/

ORDER GRANTING STATE'S MOTION IN LIMINE REGARDING VIDEOS

THIS MATTER comes before the Court on the State's *Motion in Limine Regarding Videos*, filed July 22, 2020. After full briefing, the motion came before the Court for an evidentiary hearing on February 3, 2020. Good cause appearing, the Court finds and orders as follows:

Defendant is charged with open murder. The State alleges Defendant killed Brian Cook by punching and/or kicking him in the head one or more times. The incident occurred on a street/sidewalk in a residential neighborhood. The sky was dark at the time. A neighbor's video surveillance system captured the incident. The State seeks a pre-trial ruling on the admissibility of a forensically enhanced/clarified version of surveillance video.[1]

[1] The State withdrew its request to admit a slow-motion version of the forensically enhanced/clarified video.

THOMAS W. GREGORY
DISTRICT JUDGE
NINTH JUDICIAL
DISTRICT COURT
P.O. BOX 218
MINDEN, NV 89423

Defendant argues the forensically clarified/enhanced video lacks foundation, is an inadmissible duplicate of the original, and is unfairly prejudicial. "Defense counsel believes that relevant and exculpatory frames may have been deleted or that inculpatory frames may have been created by enhancing certain portions and manipulating the timing." Defendant's *Opposition*, p. 4.

James Bell is the neighbor/owner of the home surveillance system. Bell testified that one of his cameras is angled at the street. Bell downloaded successive video clips captured by the camera on the date and time in question to a thumb drive and provided it to the State.

The State sent the video to Gregg Stuchman, a forensic audio/video expert. Stuchman testified that he forensically stitched and clarified/enhanced six successive video clips pursuant to accepted standards. In stitching the six successive video clips together, Stuchman did not delete or add content. In clarifying/enhancing the six successive clips, Stuchman utilized brightness and contrast filters to improve what can be seen. Stuchman described this as being analogous to "turning the lights on."

Kevin Tholl was present with Defendant and Cook during the incident. Tholl watched the clarified/enhanced video and testified that it accurately depicts the incident.

The evidence presented sufficiently authenticates the forensically clarified/enhanced video. No evidence indicates the State removed exculpatory evidence from the video or "created" inculpatory evidence, a claim Defendant seemingly abandoned at

THOMAS W. GREGORY
DISTRICT JUDGE
NINTH JUDICIAL
DISTRICT COURT
P.O. BOX 218
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the hearing.

The video is of obvious and significant probative value. The video is not "unfairly" prejudicial nor is there any danger of "unfair" prejudice. Turning the lights on, and thereby improving what can be seen, is not unfair prejudice.

Defendant inconsistently argues both that the video is an inadmissible duplicate and that "The State is not attempting to introduce a duplicate of the original recording." Defendant's *Opposition*, p. 3. As to the former, Defendant does not raise a genuine question as to the authenticity of the original, NRS 52.545(1)(a), claiming only that the forensically clarified/enhanced video is unfair, NRS 52.545(1)(b). Specifically, since the unenhanced video is available, it would be "unfair" to allow introduction of the enhanced video. For the reasons already stated, the Court disagrees. *See, e.g., Archanian v. State*, 122 Nev. 1019, 1029-30 (2006).

IT IS HEREBY ORDERED that the State's *Motion in Limine Regarding Videos* is **GRANTED**.

DATED this 13th day of February, 2020.

THOMAS W. GREGORY
DISTRICT JUDGE

Copies served by hand delivery on February 14th, 2020, addressed to: Erik A. Levin, Deputy District Attorney; Maria Pence, Esq.; Brian G. Filter, Esq.

Erin C. Plante

THOMAS W. GREGORY
DISTRICT JUDGE
NINTH JUDICIAL
DISTRICT COURT
P.O. BOX 218
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Case No. 18-CR-0104

Dept. No. II

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

v.

ADAM ANTHONY BERNARD,

Defendant.

AMENDED INFORMATION

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

Erik A. Levin, Chief Deputy District Attorney, within and for the County of Douglas, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court that Adam Anthony Bernard has committed the crime(s) of VOLUNTARY MANSLAUGHTER, a violation of NRS 200.040, NRS 200.050 and 200.080, a category B Felony.

The defendant, on or about July 9, 2017, and before the filing of this Amended Information, at and within the County of Douglas, State of Nevada,

> upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible to a reasonable person, or an attempt by Brian Cook to commit a serious personal injury on the defendant, did willfully and voluntarily kill Cook by repeatedly punching and kicking Cook in the head while Cook was lying on the ground, all of which occurred at or near 1294 Manhattan Way in the County of Douglas, State of Nevada.

against the peace and dignity of the State of Nevada. Complainant prays the Defendant be dealt with according to law.

Erik A. Levin
Chief Deputy District Attorney

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

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Case No. 18-CR-0104

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

v.

ADAM ANTHONY BERNARD,

Defendant.

GUILTY PLEA AGREEMENT

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

I hereby agree to plead guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to: VOLUNTARY MANSLAUGHTER, a violation of NRS 200.040, NRS 200.050 and NRS 200.080, as more fully alleged in the Amended Information which I have read and reviewed with my attorney.

My decision to plead guilty is based upon the plea agreement in this case which is as follows: In exchange for my plea of guilty to VOLUNTARY MANSLAUGHTER, a violation of NRS 200.040, NRS 200.050 and NRS 200.080 the State has agreed not to pursue any additional charges against me arising out of Douglas County Sheriff's Office case number 17SO20571. The parties are free to argue for any lawful sentence. The parties mutually request that the defendant remain at liberty on current bail conditions until his sentencing date. I understand that, at the time of sentencing, the State may present arguments, facts, and/or witnesses in support of the plea agreement.

///

I understand that the State also reserves the right at sentencing to provide the court with relevant information that may not be in the court's possession; to call victims to make a victim impact statement; to question my character witnesses; to comment on the circumstances of the crime and my criminal history; and to correct factual misstatements made by me or my character witnesses.

CONSEQUENCES OF THE PLEA

I understand that, by pleading guilty, I acknowledge that the State possesses sufficient evidence to prove all the elements of the offense to which I now plead as more fully alleged in the Amended Information, a copy of which I have received and the contents of which I have reviewed with my attorney. I admit that the State possesses sufficient evidence which would result in my conviction.

I understand that, as a consequence of my plea of guilty, I may be imprisoned in the state prison for a minimum term of not less than one (1) year and a maximum term of not more than ten (10) years. I also understand that I may be fined up to $10,000.00. I understand that the law requires me to pay an administrative assessment fee.

I understand that, if appropriate, I will be ordered to make restitution to the victims of the offense to which I am pleading guilty and to the victims of any related offenses which are being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for expenses related to my extradition, if any.

I understand that I am eligible for probation for the offense to which I am pleading guilty. I understand that, except as otherwise provided by statute, the question of whether I receive probation is in the discretion of the sentencing judge.

I understand that, except as otherwise provided by statute, if more than one sentence of imprisonment is imposed, the sentencing judge has the discretion to order the sentences to be served concurrently or consecutively. My attorney has explained the terms concurrent and consecutive and I understand their meaning as it relates to sentencing.

I understand that this plea and resulting conviction may have adverse effects upon my residency in this country if I am not a United States citizen.

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

I understand and agree that the State, at its discretion, is entitled to either withdraw from this agreement and proceed with the prosecution of the original offenses or be free to argue for an appropriate sentence at the time of the sentencing hearing if I: (1) fail to appear at any scheduled court proceeding in this matter; (2) am arrested for a violation of law in any jurisdiction prior to my sentencing hearing; (3) violate any of my bail conditions; (4) fail to cooperate fully with the Division of Parole and Probation in the preparation of the presentence investigation report in this case if said report is ordered by the court; or (5) fail to comply with any other condition stated herein. I understand and agree that the occurrence of any of these acts constitutes a material breach of my guilty plea agreement with the State. I further agree to waive any right I may have to remand this matter to Justice Court should this agreement be set aside for any reason.

I understand that information regarding offenses not filed, dismissed offenses or offenses to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the court within the limits prescribed by statute. I understand that if my attorney, the State of Nevada, or both recommend any specific punishment to the court, the court is not obligated to accept the recommendation.

I understand that the Division of Parole and Probation of the Department of Public Safety may or will prepare a report for the sentencing judge before sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. I understand that this report may contain hearsay information regarding my criminal history and the facts and circumstances related to the offense. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing.

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Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I have waived the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial, the State would bear the burden of proving beyond a reasonable doubt each element of the offense charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035.

VOLUNTARINESS OF PLEA

I have discussed the elements of all the original offenses against me with my attorney and I understand the nature of these offenses against me.

I understand that the State would have to prove each element of the offenses against me at trial.

I have discussed with my attorney any possible defenses and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights and waiver of rights have been thoroughly explained to me by my attorney.

///

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

I believe that pleading guilty and accepting this plea bargain is in my best interest and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction, and I am satisfied with the services provided by my attorney.

Dated this 5 day of May, 2021.

Adam Anthony Bernard,
Defendant

Agreed to this 7 day of May, 2021.

Erik A. Levin
Chief Deputy District Attorney

CERTIFICATE OF COUNSEL

I, the undersigned, as the attorney for the defendant named herein and as an officer of the court hereby certify:

1. I have fully explained to the defendant the allegations contained in the charges to which guilty or guilty but mentally ill pleas are being entered.

///

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

2. I have advised the defendant of the penalties for each charge and the restitution that the defendant may be ordered to pay.

3. All pleas of guilty or guilty but mentally ill offered by the defendant pursuant to this agreement are consistent with all the facts known to me and are made with my advice to the defendant and are in the best interest of the defendant.

4. To the best of my knowledge and belief, the defendant:

a. Is competent and understands the charges and the consequences of pleading guilty or guilty but mentally ill as provided in this agreement.

b. Executed this agreement and will enter all guilty or guilty but mentally ill pleas pursuant hereto voluntarily.

c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time of the execution of this agreement.

Dated this 5 day of May, 2021.

MARIA PENCE,
Attorney for Defendant

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

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Case No. 18-CR-0104

Department No. II

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE HONORABLE THOMAS W. GREGORY

-oOo-

STATE OF NEVADA,

Plaintiff,

vs.

ADAM ANTHONY BERNARD,

Defendant.

TRANSCRIPT OF PROCEEDINGS

ARRAIGNMENT HEARING

WEDNESDAY, MAY 5, 2021

MINDEN, NEVADA

For the State: Patrick Ferguson,
Deputy District Attorney

For the Defendant: Maria Pence, Esq.
Public Defender
-and-
Brian Filter, Esq.

Reported by: Shellie Loomis, RPR
Nevada CCR #228

MINDEN, NEVADA, WEDNESDAY, MAY 5, 2021, A.M. SESSION

-oOo-

THE COURT: This is Case Number 18-CR-104, State of Nevada versus Adam Anthony Bernard. Show the appearance of Patrick Ferguson on behalf of the State.

Good morning, Mr. Ferguson.

MR. FERGUSON: Good morning, Your Honor.

THE COURT: Maria Pence is appearing on behalf of the Defendant as is Brian Filter.

Good morning to both of you counsel.

MR. FILTER: Good morning, Your Honor.

MS. PENCE: Good morning, Your Honor.

THE COURT: And also appearing out of lawful custody is the Defendant, Adam Bernard.

Good morning, Mr. Bernard.

THE DEFENDANT: Good morning, sir.

THE COURT: There has been an Amended Information filed in this case. We are here today for the purpose of an arraignment on that Amended Information.

Miss Pence and Mr. Filter, have you received a copy of the Amended Information?

MS. PENCE: Yes, Your Honor.

THE COURT: Have you had a chance to review that

with Mr. Bernard.

THE DEFENDANT: Yes, sir, I have.

MS. PENCE: And I have, Your Honor. His name is correctly set forth at line 12 and a half. He is prepared this morning to be entering a guilty plea pursuant to Alford pursuant to that Information.

THE COURT: Mr. Bernard, is all that correct?

THE DEFENDANT: Yes.

THE COURT: Mr. Bernard, do you have a copy of the Amended Information in front of you?

THE DEFENDANT: Yes, I do.

THE COURT: In that document, you are formally charged with the criminal offense of voluntary manslaughter, a category B felony.

To that offense, how do you plead?

THE DEFENDANT: Guilty pursuant to Alford.

THE COURT: All right. Thank you, Mr. Bernard. Mr. Bernard, please stand, raise your right hand, face the court clerk to be sworn.

(Defendant sworn.)

THE COURT: Thank you. Please be seated.

Mr. Bernard, I'm going to be asking you a series of questions and the purpose of my questioning is not to talk you into entering a plea of guilty today or to talk you out of

that plea. That decision is entirely yours to make.

The purpose of my questioning is for the Court to ascertain whether or not you understand your constitutional rights and whether you are making a voluntary decision here today.

Should you have any questions at any point in time, please stop me and you may ask those questions of either myself or your attorneys.

Mr. Bernard, I want to start by having a conversation with you about a plea pursuant to Alford. Have you had a discussion with your attorneys regarding what that means?

THE DEFENDANT: Yes, I have.

THE COURT: Can you tell me in your own words what that means to you?

THE DEFENDANT: It's a plea to come to an agreement to avoid a trial and a possible more severe punishment.

THE COURT: Okay. And is that what motivates you here to enter a plea here today?

THE DEFENDANT: Yes, sir.

THE COURT: The possibility or the avoidance of the possibility of a greater penalty if the case were to go to trial?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Bernard, do you understand if you enter a plea of guilty pursuant to Alford, in the eyes of the law it is viewed the same as a guilty plea.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And so what that means is if you were to enter this plea today, ultimately a judgment of conviction would be entered against you and that would be put on your record.

And the penalty is, the potential penalty is the same as it would be as if you had entered a plea of guilty or you had gone to trial and been found guilty on this offense.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Knowing all of that, is it still your desire to enter a plea of guilty pursuant to Alford?

THE DEFENDANT: Yes, it is.

THE COURT: Miss Pence or Mr. Filter, would one you have please lay a record in terms of your, that you had a conversation with him about what an Alford plea is and whether or not you believe he understands that.

MS. PENCE: Your Honor, I have spoken with Mr. Bernard on two separate occasions at length, including

just again this morning to confirm his understanding. I do believe he understands the difference between the types of pleas and specifically what it means to plead pursuant to Alford.

He was facing the charge of open murder which as the Court knows carries a much greater penalty. This case was set for a trial and is always a risk in going to trial.

It was Mr. Bernard's decision to reduce that risk by accepting the negotiations as set forward in the plea agreement and by entering the plea pursuant to Alford.

THE COURT: Thank you, Miss Pence.

Mr. Bernard, do you agree with all of that?

THE DEFENDANT: Yes, I do.

THE COURT: Mr. Ferguson, is there anything you would like to add to the record in terms of the Alford plea?

MR. FERGUSON: No, Your Honor.

THE COURT: All right. Thank you.

Mr. Filter, how about you?

MR. FILTER: No, Your Honor.

THE COURT: Very good. Mr. Bernard, do you understand -- well, let's pack up a little bit.

How old are you Mr. Bernard.

THE DEFENDANT: 43.

THE COURT: What is your level of formal

education.

THE DEFENDANT: Some college.

THE COURT: Do you read, write and understand the English language?

THE DEFENDANT: Yes, sir.

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: Yes, sir.

THE COURT: As you appear here today, are you under the influence of any alcohol, controlled substances or prescription medication?

THE DEFENDANT: No, I am not.

THE COURT: And do you understand you don't have to plead guilty here today?

THE DEFENDANT: Yes, I do.

THE COURT: Instead, you could enter a plea of not guilty, thereby reserving all of your constitutional rights.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In fact, in this case, after the Information was filed, you entered a plea of not guilty and we would set this matter for a trial to begin on June 1st.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand if you were to maintain a plea of not guilty in this case, you would be entitled to have a public jury trial, and we would have that trial as scheduled here in June.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand if you enter a plea of guilty today, you would be waiving or giving up your right to have a trial in this case?

THE DEFENDANT: Yes, I understand that.

THE COURT: Do you waive your right to have a trial?

THE DEFENDANT: Yes, I do.

THE COURT: Mr. Bernard, by pleading guilty, and waiving your right to have a trial, you would be waiving or giving up other important constitutional rights as well.

If you were to enter a plea of not guilty, you would be entitled to the right to remain silent. What that means is that at the time of trial, nobody could compel you to take the witness stand and testify.

Do you understand the right to remain silent?

THE DEFENDANT: Yes, I do.

THE COURT: Further, if you decided to remain

silent, nobody, including the Court, could penalize you in any way for that decision.

Do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand if you plead guilty here today, you would be waiving or giving up your right to remain silent?

THE DEFENDANT: Yes, sir, I understand.

THE COURT: Do you waive that right?

THE DEFENDANT: Yes, I do.

THE COURT: If we were to have a trial in this case, you would have a decision to make whether to remain silent as we've discussed or whether you instead desire to take the witness stand and testify in your own defense.

In other words, whether or not you testified would be entirely your decision to make.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand if you plead guilty here today you would giving up your right to testify in your own defense at trial?

THE DEFENDANT: I understand that.

THE COURT: Do you waive that right?

THE DEFENDANT: Yes, I do.

THE COURT: Also at the time of trial, you would enjoy what is called the right of confrontation. That means that you through your attorneys would have an opportunity at trial to ask questions or otherwise cross-examine any of the witnesses.

Do you understand that right of confrontation?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand you waive that right by entering a guilty plea?

THE DEFENDANT: Yes, sir.

THE COURT: Do you waive your right of confrontation?

THE DEFENDANT: Yes, I do.

THE COURT: Also at the time of trial, you would have a right to compel the attendance of witnesses. That means that if there were witnesses that you and your counsel thought were important to your case, they would cause a subpoena to be issued which is a court order compelling those folks to come in and testify.

Do you understand the right to compel the attendance of witnesses?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand you waive that right by entering a guilty plea?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you waive the right to compel the attendance of witnesses?

THE DEFENDANT: Yes, I do.

THE COURT: By entering a guilty plea, you greatly reduce those issues from which can you file an appeal.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Also you would be giving up, in this case there has been certain pretrial motions that is court has ruled on. There's also I believe a couple of motions that haven't opinion ruled on yet.

Do you understand that if you enter a plea of guilty, you would be waiving your right to challenge?

THE DEFENDANT: Yes.

THE COURT: On any of those motions, or to have those motions decided?

THE DEFENDANT: Yes.

THE COURT: And is that what would you like to have happen here?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Bernard, at the time of trial in this case, you would have the opportunity to present the Court or the jury with any legal defenses that you might have in

case.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: Do you understand if you plead guilty, you would be waiving or giving up of your detenses?

THE DEFENDANT: I understand.

THE COURT: Do you waive your defenses?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Bernard, have you discussed each of these rights with your attorneys.

THE DEFENDANT: Yes, I have.

THE COURT: And are you satisfied with the representations?

THE DEFENDANT: Yes, I am.

THE COURT: Do you have any questions for myself or your attorneys regarding your constitutional rights?

THE DEFENDANT: No, sir.

THE COURT: Do you waive each of the rights we've discussed?

THE DEFENDANT: Yes, I do.

THE COURT: The Court is in receipt of a document entitled Guilty Plea Agreement.

Do you have a copy of that document in front of you?

THE DEFENDANT: Yes.

THE COURT: At page 5 of that agreement, at about line 15 there's a signature line with your name printed underneath it.

Is that your signature that appears on the line?

THE DEFENDANT: Yes, sir.

THE COURT: Did you place that signature there only after you had an opportunity to read the Guilty Plea Agreement?

THE DEFENDANT: Yes.

THE COURT: Did you discuss the Guilty Plea Agreement with your attorneys?

THE DEFENDANT: Yes, sir.

THE COURT: You understand the terms of the Guilty Plea Agreement?

THE DEFENDANT: Yes.

THE COURT: Does the Guilty Plea Agreement accurately reflect the agreement you are entering into with the State of Nevada?

THE DEFENDANT: Yes.

THE COURT: Has anybody made any other promises or inducements to get you to enter a plea today other than those that are contained in the Guilty Plea Agreement.

THE DEFENDANT: No, sir.

THE COURT: Do you agree to be bound by the terms of the Guilty Plea Agreement?

THE DEFENDANT: Yes.

THE COURT: Mr. Bernard, what is your understanding of the maximum penalty that you could receive for this offense?

THE DEFENDANT: A $10,000 fine, up to ten years in prison.

THE COURT: All right. Thank you, Mr. Bernard.

Also, do you understand you could be ordered to pay restitution?

THE DEFENDANT: Yes, sir.

THE COURT: So the maximum penalty is ten years in prison, a $10,000 fine and restitution.

Do you also understand that there is a minimum prison sentence of no less than one year?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Bernard, has anybody made any promises to you regarding what your sentence all right in this case?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you understand what sentence you will receive is entirely up to the Court?

THE DEFENDANT: Yes, sir.

THE COURT: Also, Mr. Bernard, while you are eligible for probation for this offense, do you understand whether or not you receive probation is also entirely up to the Court?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So at the time of sentencing, the Court could if the Court deemed it appropriate, deny your request for probation, sentence you to serve ten years in prison, fine you $10,000, and/or order you to pay restitution.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: Knowing that, do you still desire to plead guilty?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Mr. Bernard, if you were to enter a plea of not guilty and we were to have the trial in this case, at that trial, you would be presumed to be innocent. And the State would have the burden of proving the elements of the offense beyond a reasonable doubt.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand if you plead guilty, you would be waiving your right to make the State attempt to prove this case at trial?

THE DEFENDANT: I do.

THE COURT: Do you waive that right?

THE DEFENDANT: Yes, sir.

THE COURT: The elements of the offense that the State would have to prove at trial appear in the Amended Information.

Do you still have a copy of that in front of you?

THE DEFENDANT: Yes, sir.

THE COURT: Specifically, the State would have to prove that you on or about July 9, 2017, here in Douglas County, Nevada, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible to a reasonable person; or an attempt by Brian Cook to commit a serious personal injury on you, did willfully and voluntarily kill Cook by repeatedly punching and kicking Cook in the head while Cook was lying on the ground. And all that occurred at or near 1294 Manhattan Way in Douglas County, Nevada.

Mr. Bernard, do you understand what the State would have to prove at the time of trial in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Do you believe that if we were to have a trial in this case, that the state would have sufficient evidence to prove those elements beyond a

reasonable doubt?

THE DEFENDANT: Yes.

THE COURT: And if this were a straight guilty plea, the next question would be whether you committed the offense as stated in the Amended Information.

Because this is an Alford plea, Ms. Pence, my thought that I not ask that question.

Is that your request?

MS. PENCE: Yes, Your Honor.

THE COURT: Mr. Ferguson, because of the this being an Alford plea, do you agree with that as well?

MR. FERGUSON: Yes, Your Honor.

Would you like the State to make a factual record?

THE COURT: Yes. Let's go ahead and do that at this time. Please proceed, Mr. Ferguson.

MR. FERGUSON: Had this matter proceeded to trial, the State would have proven on or about, or on about or between July 8, 2017 and July 9th, 2017, it was the evening hours, so it might have been before or after midnight, but -- and I will point out the Amended Information alleges July 9th, 2017. I don't want there to be some hang up on that.

It may have been in the evening hours immediately preceding midnight on July 8, 2017. We're clearly talking

about the same incident.

There was an altercation between the Defendant and Brian Cook in the area of 1294 Manhattan Way here in Douglas County, Nevada.

During the altercation, Mr. Bernard quickly -- it turned from verbal to physical relatively quickly and Mr. Bernard immediately got the upper hand and knocked Mr. Cook to the ground.

After Mr. Cook was on the ground, Mr. Bernard delivered additional punches in upwards of 20 additional punches and more than a half dozen kicks to Mr. Cook, all while he was on the ground. All of which appeared to be to the head or upper body area and Mr. Cook succumbed to those injuries and passed away.

THE COURT: Thank you, Mr. Ferguson.

MR. FERGUSON: Your Honor, in addition, I would point out that there was a preliminary hearing conducted in this case, so for purposes of a factual predicate for the plea, I would ask to incorporate the evidence adduced at the preliminary hearing to include the surveillance video of this incident captured by neighbors' surveillance cameras.

THE COURT: Ms. Pence, any objection to that?

MS. PENCE: No, Your Honor.

THE COURT: That request is granted. In

preparing for the trial, the Court has had an opportunity to review that preliminary hearing transcript. The Court also had an opportunity during the course of motion work in this case to review the video footage, and so the Court will incorporate that as part of the factual basis in this case.

Mr. Bernard, I'm not going to ask you whether you agree with those facts that are stated. I am going to ask whether you agree that the police reports are consistent with what Mr. Ferguson just stated?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Miss Pence or Mr. Filter, any further areas of inquiry?

MR. FILTER: No, Your Honor.

MS. PENCE: No, Your Honor.

THE COURT: Mr. Ferguson?

MR. FERGUSON: No, Your Honor. Thank you.

THE COURT: Mr. Bernard, have you understood everything we've discussed here today?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions for myself or your attorneys?

THE DEFENDANT: No, I don't.

THE COURT: And just to be clear, as I've indicated, we currently have a trial scheduled for June 1st.

If this plea is accepted by the Court, that trial will be vacated and not rescheduled. We will instead be setting this matter for sentencing hearing.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And is that consistent with what you are asking the Court to do today?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Bernard, given our conversation here today, is it your intention to maintain your plea of guilty pursuant to Alford?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Or would you prefer to maintain your previously entered plea of not guilty and proceed to trial?

THE DEFENDANT: Guilty by Alford.

THE COURT: Okay. The Court makes the finding that Mr. Bernard has entered a guilty plea pursuant to Alford to the Amended Information.

He's done so freely and voluntarily with the assistance of counsel. He understands his constitutional rights and he's waived those rights in order to enter the plea.

The Court finds that there is a sufficient factual basis for the plea and the plea is accepted by the

Court.

Counsel, is this a case where you prefer to have a standalone sentencing date?

MR. FERGUSON: It is, Your Honor.

THE COURT: I do have some dates available to offer to you. The first would be Monday, June 14th at 2:30 in the afternoon.

Mr. Ferguson, that date acceptable to you and the victims?

MR. FERGUSON: Your Honor, I believe that's fine with the State. Is Monday, June 14th a date that you can make?

That date would be fine.

THE COURT: All right. Miss Pence.

MS. PENCE: Your Honor, can I just inquire, the Court mentioned 2:30. How much time is the Court setting aside for that?

THE COURT: That would be for the remainder of the day, so from 2:30 to 5. Is that a sufficient amount of time?

MS. PENCE: If I could have just one moment?

THE COURT: Yes.

MR. FERGUSON: So, Your Honor, I think we're concerned that two and a half hours might be enough and it

also might not be enough.

There may be a fair amount of evidence presented at the sentencing hearing of victim impact statements, that sort of thing, and we don't want to run short, or cut it short or have to run long past 5:00 p.m.

THE COURT: Okay. So, counsel, do you think I can offer a secondary date that would give you an additional hour, so it would be from 1:30 to 5.

Would that be sufficient?

MR. FERGUSON: I believe so.

THE COURT: Miss Pence.

MS. PENCE: Your Honor, I believe so as well. I do believe we'll have some lengthier presentations based on some of the evidence in mitigation and I don't want to be stuck where we don't have sufficient time.

THE COURT: And, definitely, I don't want either party to be rushed here at all. So, the secondary date I would offer is Thursday, July 1st at 1:30. That, again, would be from 1:30 to 5:00 p.m.

Mr. Ferguson, does that date work for you and the victim's family.

MR. FERGUSON: That will be fine, Your Honor.

THE COURT: Miss Pence, and Mr. Filter?

MS. PENCE: That works, Your Honor.

MR. FILTER: That's acceptable, Your Honor.

THE COURT: Great. So sentencing in this case is set for Thursday, July 1st, 2021. Sentencing will be at 1:30 in the afternoon.

The Defendant is ordered to be here at that time and date. The Court orders the preparation of a presentence investigation report, and Mr. Bernard, you are ordered to cooperate with the Division as they prepare that report.

The Court vacates all other hearings scheduled in this case which include the jury trial which was set to begin on June 1st, and a pretrial conference and motions hearing that was scheduled for May 13th, 2021.

Given the negotiations in this case, it's my understanding neither party is asking for a change in bail.

Mr. Ferguson, is that right?

MR. FERGUSON: That's correct at this time, Your Honor.

THE COURT: Miss Pence; is that correct?

MS. PENCE: It is, Your Honor.

THE COURT: Bail will stand as previously ordered. I'm not going to issue a new order to that effect.

Mr. Bernard, I believe you fully understand all those conditions, you've been on them for a while.

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about any of the conditions of your release?

THE DEFENDANT: No, I don't.

THE COURT: Mr. Bernard, your conduct between now and sentencing will be important to the Court and you will again have an opportunity here to remain at liberty until your sentencing hearing as long as you abide by all the terms and conditions of your release.

Mr. Ferguson, anything else for today's purpose?

MR. FERGUSON: No. Thank you, Your Honor.

THE COURT: Miss Pence or Mr. Filter, anything else?

MR. FILTER: No, Your Honor.

MS. PENCE: No, Your Honor.

THE COURT: All right. Thank you, folks. We'll see you back for sentencing on July 1st and the Court stands in recess.

(Proceedings concluded at 9:22 a.m.)

STATE OF NEVADA)
)
COUNTY OF DOUGLAS)

I, Michel Loomis, Certified Shorthand Reporter of the Ninth Judicial District Court of the State of Nevada, in and for the County of Douglas, do hereby certify:

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

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

DATED: At Carson City, Nevada, this 17th day of May, 2021.

//SHELLIE LOOMIS
Shellie Loomis, CCR No. 228

Shellie Loomis
Capitol Reporters
628 East John Street #3
Carson City, NV, 89706
(775) 882-5322

IN THE NINTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF DOUGLAS, STATE OF NEVADA

STATE OF NEVADA,
Plaintiff,
vs.
ADAM ANTHONY BERNARD,
Defendant.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the following document **DOES NOT** contain the social security number of any person?

//SHELLIE LOOMIS
SHELLIE LOOMIS, RPR
NV CCR #228

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Public Safety
Parole and Probation

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PRESENTENCE INVESTIGATION REPORT

The Honorable Thomas W. Gregory
Department II, Douglas County
Ninth Judicial District Court

Date Report Prepared: June 14, 2021

Prosecutor: Erik Levin, Chief Deputy District Attorney
Defense Attorney: Maria Pence, Appointed

PSI: 618030

I. CASE INFORMATION

Defendant:	Adam Anthony Bernard	**PCN:**	DCSO4001637C
Case:	18-CR-00104	**Offense Date:**	7/9/17
ID:	N/A	**Arrest Date:**	3/17/18
P&P Bin:	1005456993	**Plea Date:**	5/5/21; Guilty Pursuant to Alford/No Contest
		Sentencing Date:	7/1/21

II. CHARGE INFORMATION

Offense: Voluntary Manslaughter (F)
NRS: 200.040, 200.050 and 200.080 **Category:** B
NOC: 50020
Penalty: By a minimum term of not less than 1 year and a maximum term of not more than 10 years in the Nevada Department of Corrections and may be further punished by a fine of not more than $10,000.00.

III. DEFENDANT INFORMATION

Address: 592 Tahoe Island Drive
City/State/Zip: South Lake Tahoe, CA 96150
NV Resident: No
SSN: 549-57-8987
POB: Sacramento, California
Date of Birth: 1/6/1978
Age: 43
Phone: 530-545-0265
Driver's License: B5283372
State: California
Status: Valid

FBI: 778524AE7
SID: NV04605565
CA34441404
Aliases: None reported
Additional SSNs: None reported
Additional DOBs: None reported
Additional POB: None reported
Alien Registration: N/A
US Citizen: Yes
Notification Required per NRS 630.307: No

Identifiers:
Sex: M **Race:** W **Height:** 6'0" **Weight:** 240
Hair: Brown **Eyes:** Black
Scars: None reported
Tattoos (type and location): Eagle on Chest; Skull on Left Shoulder; Tiki God on Left Forearm; Skull on Right Elbow; Family Crest on Right Calf (all unverified)

Social History: The following social history is as related by the defendant and is unverified unless otherwise noted:

Childhood/Family: The defendant reported the following: " I had a fairly normal childhood. I was shot in the left eye with a BB Gun when I was six. It was difficult dealing with that and having to learn everything with one eye and being blind, but I had to deal with what I have been dealt and played sports and excelled. My father was verbally abusive as well as mentally, also an alcoholic with eventually caused my mom to divorce him and get her and myself out of that toxic situation. I have been taking care of my mom ever since I was 14." Additionally, the defendant reported that his father passed away when he was 21 years old, and that he maintains contact with his mother.

Marital Status: Single

Children: None reported

Custody Status of Children: N/A

Monthly Child Support Obligation: N/A

Employment Status: Employed. The defendant has been employed with New Vista Builders in Gardnerville, Nevada since 2014 as a foreman. He also has work experience with MB Construction in Gardnerville, Nevada from 2016 until 2018.

Number of Months Employed Full Time in 12 months Prior to Commission of Instant Offense: 12

Age at first arrest: 19 or younger ☐ 20- 23 ☐ 24 or older ☒

Income: Employment: $2,800.00 **Other Sources:** None reported

Assets: 2004 Ford F250: $6,000.00

Debts: Credit Cards: $1,800.00

Education: The defendant completed the 11th grade of high school, and later obtained his General Education Development certificate. Additionally, he has certifications Hi Job 1 Class, Journeyman, Carpentry, and Installation.

Military Service: The defendant has never served in the United States Armed Forces.

Health and Medical History: The defendant suffers blindness and Glaucoma in his left eye due to a BB Gunshot injury when he was six. He takes eye drops, Dorzolamide-Timolol Ophthalmic for the pressure and glaucoma.

Mental Health History: The defendant reported good mental health, citing he has not been diagnosed with a mental health disorder, nor has he participated in mental health counseling.

Gambling History: None reported

Substance Abuse History: The defendant reported the following:
Alcohol: First consumed at the age of 18, drinking socially until July 8, 2017.
Marijuana: The defendant reported experimenting with marijuana from the age of 18 until 1998.

The defendant does not believe drugs or alcohol are problematic for him.

Gang Activity/Affiliation: The defendant denies any past or present gang association.

IV. CRIMINAL RECORD

Records of Federal Bureau of Investigation (FBI), National Crime Information Center (NCIC), and any other applicable sources reflect the following information:

CONVICTIONS- **FEL:** 0 **GM:** 0 **MISD:** 1

INCARCERATIONS- **PRISON:** 0 **JAIL:** 0

SUPERVISION HISTORY:

CURRENT- **Probation Terms:** 0 **Parole Terms:** 0

PRIOR TERMS:

Probation-	**Revoked:** 0	**Discharged:**	**Honorable:** 0	**Other:** 0
Parole-	**Revoked:** 0	**Discharged:**	**Honorable:** 0	**Other:** 0

Adult:

Arrest Date:	Offense:	Disposition:
6/21/14 El Dorado County, CA SO	DUI: Alcohol/Drugs (M)	**S14CRM0467** 8/28/14: Convicted of DUI Alcohol/0.08 Percent (M), 10 days jail, suspended, 48 months' probation
3/17/18 Douglas County, NV SO	Open Murder (F)	**Instant Offense, 18-CR-00104**

* Kevin Tholl is not a co-defendant. Any reference to co-defendant herein is taken as a reference to Mr. Thell.

V. OFFENSE SYNOPSIS

Records provided by the Douglas County Sheriff's Office and the Douglas County District Attorney's Office reflect that the instant offense occurred substantially as follows:

On July 9, 2017, a deputy with the Douglas County Sheriff's department was dispatched to a residence in Douglas County, Nevada regarding two people dragging a lifeless body out of the street. The deputy arrived on the scene and observed two white males, one of which was later identified as Adam Bernard, the defendant, and Kevin Tholl, the co-defendant walking towards an open garage. The defendant waived down the deputy and escorted the deputy to the victim. The victim was without a shirt or shoes, lying on his back in the dirt and a large amount of blood was seen on his forehead running back into his hair. Blood was additionally seen on his lip and right nostril. The victim was unconscious, however, breathing and responding to pain stimulus.

The victim was transported via care flight to Renown Regional Medical Center. Deputies later learned that the victim was placed into a medically induced coma due to brain swelling and was found to have a blood-alcohol level of .45 percent. On July 31, 2017, the victim ~~was determined to be "brain dead"~~ had two cardiac arrests, and passed away.

During the investigation, the deputies learned that the co-defendant is the defendant and victim's boss and that the three were friends. The deputy contacted the defendant who stated that the co-defendant and victim had spent the evening drinking at the victim's residence. The two defendants were returning to the co-defendant's residence when the victim called the co-defendant on the phone and proceeded to argue with the defendant. The defendant stated that the victim "wanted to come over to kick my ass and make me blind in my other eye." He stated the victim arrived in his truck and wanted to fight. He stated the victim attempted to grab his neck while he pushed him, and then approached the defendant again. At that point, the defendant punched the victim once and the victim fell to the ground. The defendant and co-defendant walked away, and then returned to drag him onto the dirt out of the road.

On October 10, 2017, an investigator with the Douglas County Sheriff's Office conducted an interview with a witness who stated that the co-defendant told him he and the defendant were drinking at the victim's residence. The victim became "belligerent," so the defendant and co-defendant decided to leave. After the two returned to the co-defendant's residence the victim called the defendant and stated that he was coming to "kick Adam's ass." The victim arrived at the residence and confronted the defendant and a fight ensued. The defendant hit the victim and the victim fell to the ground. He stated that when the victim fell, he hit his head on the road, and the co-defendant grabbed the defendant to stop the fight. The two then grabbed the victim and dragged him from the road. The witness further stated the co-defendant told him that the defendant was angry after the victim fell

and continued to punch him when he was not moving, and that's why the co-defendant grabbed him. The investigator contacted the co-defendant who stated that the defendant and the victim knew each other from high school and worked together. He stated the victim was more of a "bully" and made fun of the defendant because he was blind in one eye. Recently the victim was injured during a camping trip and was out of work for approximately 45 days and began drinking excessively. On the date of the incident the three were hanging out and everything was fine between them. The victim then began to "make fun" of the defendant and told the defendant that "One of these days we are going to go at it." The defendant and co-defendant left the residence and a short time later the victim arrived and told the defendant "I'm going to make you blind in your other eye." The defendant punched the victim twice causing the victim to fall to the ground. He stated the defendant punched the victim one or two more times after he fell to the ground.

The investigator conducted an interview with the defendant on October 10, 2017. The defendant stated that he first met the victim camping a few months prior to Memorial Day. He stated that during the camping trip the victim was kicking the co-defendant while he was sleeping, and the defendant told him to stop. The victim then asked the defendant if he should kick him. He stated after the trip the victim began to work with the defendant and co-defendant doing construction. He stated that the victim would shoulder check him, throw nails at him, and "bully" him about his blind eye. He stated that on the date of the incident the three were drinking, and the victim pulled out a knife and stated, "See, I could have killed you right there." The victim pointed the knife at his face and stated, "It would be that easy, lights out." The defendant stated that the victim was upset because the defendant did not want to go fishing., After the defendant and co-defendant left, the victim called the co-defendant stating "I'm gonna come fuck Adam up." The victim arrived at the co-defendant's residence and the defendant asked the victim "why do you want to beat me up, why don't you like me?" The victim told the defendant, "I'm going to make you blind in your other eye." He stated the victim came towards him with his hands raised and thumbs out, and the defendant believed he was going to try and poke out his eye. The two began to wrestle, and the defendant punched the victim twice, and on the second hit, the victim began to fall backwards. As the victim was falling, he grabbed the defendant's shirt and they both fell to the ground and began to wrestle again. He stated that he then punched the victim again, and "knocked him out." He stated that he got up and stated, "Oh my god, Oh my god." He stated that he and the co-defendant had to get him out of the street, so they picked him up and carried him over to the side of the road.

The investigator contacted a neighbor who had video surveillance from the night of the incident. The surveillance showed the victim arriving at the co-defendant's residence and the defendant approaches the victim in the street. The two began to fight, punching and wrestling one another. The defendant punches the victim and the victim falls to the ground. The defendant kneels and begins to punch the victim in the head, face, and upper torso area approximately 23 times. The victim is not seen fighting back and appears to be unconscious. The defendant punches the victim more times than kicks the defendant around his face/head/upper torso area before the co-defendant pulls the defendant away. A few seconds later the defendant walks back to the victim and kicks the victim one more time. The defendant is then observed picking up an unknown object and throwing it down onto the victim's body. The victim is motionless during this entire period. The defendant and co-defendant then pick up the victim's legs and arms and carry him across the street laying him in front of his truck.

On November 3, 2017, the investigator met again with the defendant. The defendant stated that when the two fell to the ground the victim was on top of him and he was telling the victim to get off of him and swinging his arms and punched the victim. He stated no punches were thrown while the two were standing. He denied the victim was knocked out when he hit the ground, he stated after he hit the victim he was rolling around and moaning. The defendant stated that he was "freaking out" and used his foot to "nudge" the victim. He stated, "I wasn't booting him." The defendant was asked if he knew there was video surveillance from across the street to which he stated that he knew. He was asked if he wanted to change his statement. He stated, "I punched him a few times on the ground." He was asked if he kicked the victim in the head to which he stated, "I don't think so,

no." The defendant was shown the video, as he watched he stated, "It's like a blacked-out moment then." The defendant was again asked if he wanted to change his statement to which he responded, "Like I said, I was scared for my life, I just blacked out."

The above information was forwarded to the Douglas County District Attorney's Office for review. A warrant was requested and issued for the defendant's arrest. On March 17, 2018, the defendant turned himself in to the Douglas County Jail.

~~**Co-Defendant/Offender Information:** Kevin Tholl - It is unclear to the Division if charges were filed on the co-defendant in this case.~~

VI. DEFENDANT'S STATEMENT

☒ See Attached ☐ Defendant interviewed, no statement submitted ☐ Defendant not interviewed

On June 14, 2021, the defendant was interviewed via telephone. The defendant reports that he committed the offense stating, "I believe Brian was going to blind me with the knife that I was threatened with earlier that day. I was fighting for my life and my vision. I was terrified of him." The defendant further states, "This incident destroyed both of our lives, Brian died and I will be a convicted felon and I forever carry the guilt of his death although completely unintentional." The defendant has submitted a handwritten statement for Your Honor's review.

VII. VICTIM INFORMATION/STATEMENT

On June 14, 2021, the Division made contact with the victim's father (VC2278945) via telephone. The victim's father stated that he is not requesting restitution in this case and stated that he will be submitting statements to the District Attorney's Office.

VIII. CUSTODY STATUS/CREDIT FOR TIME SERVED

Custody Status: Out of Custody
CTS: 49 DAYS:
March 16, 2018 to May 2, 2018 (DCJ)
January 27, 2020 to January 27, 2020 (DCJ)

IX. PLEA NEGOTIATIONS

pursuant to Alford/No Contest

In exchange for the defendant's plea of guilty, the State, the defense, and the defendant have agreed to recommend the following: The State has agreed not to pursue any additional charges against the defendant arising out of Douglas County Sheriff's Office case number 17SO20571. The parties are free to argue for any lawful sentence. The parties mutually request that the defendant remain at liberty on current bail conditions until his sentencing date. The defendant understands that, at the time of sentencing, the State may present arguments, facts, and/or witnesses in support of the plea agreement.

X. FEES AND NEVADA REVISED STATUTE REQUIREMENTS

Administrative Assessment: $25.00	**Chemical/Drug Analysis:** N/A	**DNA:** $150.00
DNA Admin Assessment: $3.00	**Attorney Fee:** $500.00	
Domestic Violence Fee: N/A	**Extradition:** N/A	**Psychosexual Fee:** N/A
Mandatory Fine: No	**Mandatory Probation:** No	

☒ Pursuant to NRS 239B.030, the undersigned hereby affirms this document contains the social security number of a person as required by NRS 176.145.

☐ Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

Pursuant to NRS 176.156 (1)(b), the Division shall afford an opportunity to each party to object to factual errors in the presentence investigation report. Any perceived factual errors should be immediately reported, in writing, to defense counsel, the prosecuting attorney, and the Division of Parole and Probation. The Court may order the Division to correct the contents of the report following sentencing if, within 180 days after the date on which the judgement of conviction was entered, the prosecuting attorney and the defendant stipulate to correcting the contents of the report. This presentence investigation report may be considered during future proceedings, including those held by the Nevada Board of Parole Commissioners, in accordance with NRS 176.156 (2),(3), and (4).

The information used in the Presentence Investigation Report may be utilized reviewed by federal, state and/or local agencies for the purpose of prison classification, program eligibility and parole consideration.

Should the court consider granting probation pursuant to a program of intensive supervision pursuant to NRS 176A.440, the Division requests the court to consider the following factors in making that determination:

- Intensive supervision with electronic monitoring may only be utilized if the defendant is capable of paying the daily fee for the electronic monitoring.
  - The monitoring fee ranges from $9.00 to $18.50 per day depending on factors such as alcohol monitoring, GPS, or radio frequency versus cellular connectivity.
  - This fee is payable from the defendant directly to the electronic monitoring vendor.
- Placement of the defendant on a term of intensive supervision may conflict with the level of supervision established by the risk assessment required under NRS 213.1078, which states:
  - Section 7: *"Upon finding that a term or condition of probation ordered pursuant to subsection 1 of NRS 176A.400 or the level of supervision set pursuant to this section does not align with the results of a risk and needs assessment administered pursuant to section 1 or 2, the supervising officer shall seek a modification of the terms and conditions from the court pursuant to subsection 1 of NRS 176A.450".*

In accordance with current Interstate Commission for Adult Offender Supervision rules and requirements, all felony convictions and certain [gross] misdemeanants are offense eligible for compact consideration. Due to Interstate Compact standards, this conviction may or may not be offense eligible for courtesy supervision in the defendant's state of residence. If not offense eligible, the Division may still authorize the offender to relocate to their home state and report by mail until the term of probation is complete and/or the case has been completely resolved.

Respectfully Submitted,

Tom Lawson, Chief

Report prepared by: Jennifer Pongasi
DPS Parole and Probation, Specialist III
jpongasi@dps.state.nv.us

Approved by:

Heather Hardy

Heather Hardy, DPS Parole and Probation Specialist IV
Northern Command, Carson City
hhardy@dps.state.nv.us

Offence Committed

#1 Kevin and I went fishing that day. On the way back Brian was calling Kevin telling us to go to his house to hang out and drink with him. I dident want to go to his house because He was already really drunk. But I listend to Kevin and went over there anyway. When I walked in to his garage First thing brian did was Show us his new knife. He pulled it out and Said that how easy it would be to kill yaguy's that when Kevin was walking out of the garage and I was left alone with brian, Then He put the knife up to my Right temple and Said he could blind me with one Swipe. I asked him not to Say that and he Said to go outSide to the front lawn So I did. He was mad about not getting Invited to go fishing and pulled out a float Tube For fishing and told me to put it on. I Said I did not want to because it was 100 Degree's out. He Said put it on now So I did avoiding confrontation. I Then took it off and his Neighbor came over from next door.

Then he Said that's the puppy that does backs Flip's I dident understand. Then Brian kicked the Neighbor's puppy in the face and Flipped Him over from His kick. I then asked him "brian" why would you kick a Tiny Puppy like that.

Brian then asked me If I wanted him to kick me Instead I said No. Then I told Kevin I wanted to leave So we did. And we went to Kevin house, That's when Brian Stated calling Kevin's phone asking If I was still there. Kevin said I was going to stay the night. So Brian told Kevin He was going to come over and Blind me and mess me up. Kevin told him to stay Home and go to Sleep. Then I asked Kevin if he was coming and Kevin said No. But a few minutes later Brian came around the corner in his truck driving through the Stop Sign over the grass and behind my truck parking blocking me in and leaving his truck Running. He then got out coming Toward's me grabbing his pocket where earlier he had His knife. I dont know why you wanna mess me up and blind me I said. He said It's time to blind your ass light's out he said. I dont Remember what happed next. The next thing I Remember brian was on the ground In the Street. I saw Kevin come over and I told him to help me get Brian out of the Street because I did not want him to get Hit by a car. We moved him out of the Street over by his truck. Then I got a bottle of water Pouring It on Brian Telling him please wake up.

Then the police showed up then the paramedic's. I did not understand why I didn't remember much from that night. It has been explained to me that I was acting under acute stress and that the body's natural survival instinct kick's in when faced with a serious threat.

Defendant Statement

#2 I truly wish that this had never happened. I liked Brian and never wish him any harm. I knew he was an angry person. He had lost his wife to cancer and used alcahol on a daily basis because of that. I tried to ignore his threating behavior but was terrified of him and knew what he was capible of due to his size and temperment.

Everyday he was in the Hospital I hoped and was praying he would get better. When He passed away I was devastated and never wanted that to happen to him or his family. I was so afraid of him. And was fighting for my life and my sight. No word will fix what happend that night nore will it bring him back. I have alot of work in front of me to come to term's of what happened and my responsibility in Brian's death. I feel horrible and always will.

Now that my case has been Resolved. I Can openly talks about it and see my therapist again.

I Hope I can Contibute to Society in a positive, Sober way that Have and do now. Working Taking Care of my eldery mother and being a positive, caring, generous Helpful person as I Truly am and Strive to Be.

x [signature] 6-10-21

RECEIVED
JUN 29 2021
Douglas County
District Court Clerk

FILED
2021 JUN 29 PM 3:33
DEPUTY

Case No. 2018-CR-0104
Dept. No. II

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

ADAM A. BERNARD,

Defendant.
/

LETTERS
IN SUPPORT

Dated this 29th day of June, 2021.

Submitted by,

Maria Pence, Esq.

June 27, 2021

Judge Gregory,

My name is Michael Bailey. I am a general contractor that works primarily in South Lake Tahoe and Northern California. I have been in business for approximately 20 years and I have also been in construction for over 35 years in both employee and supervisor positions.

With that said I have been around many different personalities over the years. I have known Adam Bernard for over 13 years and as an employee Adam was a significant asset to my company and my clients and coworkers. He was a very dependable, considerate , loyal and talented employee everyday he worked for me. He was absolutely a team player and was always there to assist his fellow employees with his knowledge and work ethics.

On a personal level we also interacted in off-work activities such as camping , barbecues day trips and such around my family and his coworkers many times.

This is a very tragic situation for everyone involved but I know Adam in no way provoked this situation or the outcome because that is not Adam's temperament or nature ever. He always took instructions and typical construction trade directions and guidance from me with some of the most respect I've ever encountered in my career.

I know there are some very serious decisions coming his way but please know this statement is the true person Adam is.

Sincerely,

Mike Bailey

June 27, 2021

To whom it may concern:

I'm writing this letter with a heavy heart but hoping it will fall on the ears of those with understanding and compassion.

I have known Adam for several years now and it was rather an unusual circumstance that brought us together at a much later date.

I met Adam at a garage sale where I bought a small flashlight and a coat. I didn't have the $40 that he was asking for a heavy winter coat but left $10 for a deposit and said I would be back to pick it up in a few hours. I completely forgot about it until a few weeks later and went back to the location and found that he had relocated and the current tenants had no idea where.

I figured that the coat had been resold and I had lost it. Fast forward several years and Diana Peticolas my current partner asked me to fix a leak at friend of hers Helen Bernard. I'm a professional surface repair and refinishing specialist doing bathtubs, showers and other surfaces for many years so this type of repair was common for me. I recaulked the tub shower enclosure and when I was ready to leave Adam showed up and Helen introduced me to her son. I felt like we had met somewhere before and said so. Adam asked me to wait for a minute and left. When he returned he was holding the same Cabellas camo coat I had left a deposit on. I was caught a bit off guard and asked if I could finish paying for it and he handed me the coat and thanked me for helping his mom.

Adam and His mother have since become one of our "family" of friends and have spent Christmas, Thanksgiving and other holidays with us as well as hanging out frequently at our house. He has a very soft giving deameanor and willing to step up and help out whenever he can. I believe with all my heart that a probationary term would serve the public better than prison. I hope and pray his peers see that too.

Sincerely

Rick William Madden

June 24, 2021

To Whom It May Concern,

My name is Omotayo Logan. I have known Adam Bernard for 35 plus years. We have been friends in grammar school, junior and high school in South Lake Tahoe, California. I have had classes with him as a kid, and have worked with him in the past in professional settings.

He is dependable, thoughtful and compassionate to those around him. He has been known to help those who are homeless, friends in need of food or money if needed, despite being teased and bullied throughout grade and middle school for having disabled eye, he still had a good, positive attitude.

Additionally, I trust him and value his friendship and I know many in the community support him during this difficult time. He is respected by local contractors. He has a large circle of friends which includes the late Mr. Woods and their mutual friendships. It is my hope that those who don't know him know - he is remorseful of the pain he has caused in this situation. I hope this has shed some light on his character.

Respectfully,

Omotayo Logan

June 28, 2021

My name is Samuel McCormick, I'm 23 years old, and I've known Adam since I was 5 or 6 years old. When I would first go to work at construction jobs with my father, Adam would often be a mentor to me, and regardless of my inexperience and naivety he would take his time teaching me things in a way that only a parent or teacher can. In my entire time knowing Adam, I can say surely that he's one of the most caring people I've ever met.

Ever since the first time I met him, he's gone out of his way to make sure everyone around him is taken care of and healthy. He's known for being the kind of guy who's always checking up on the well-being of people around him, and I've always admired that. On a morning when your having a bad day, he's the friend that makes sure you ate breakfast and talks about whatever you've got on your mind, the kind of friend to help you out with any problem that presents itself, and a friend you can trust. I've noticed he takes his probation very seriously and is extremely responsible about attending every appointment on time, and makes sure to inform the boss beforehand if he has any testing that day. He works everyday to try and put his past behind him, and I'll continue to pray that justice is served, and the court comes to realize that alcohol is the true enemy in this situation.

I myself have been dealing with very serious medical complications recently, which in effect have caused me to lose 75% of my vision in my right eye. (Which has always had better vision than my left) I had such an immense realization, that I was completely and totally terrified of being blind. The mere thought of waking up in the morning to the sounds of birds and realizing you'd never see that nature again, or the face of people you love. That fear has compelled me to think very clearly about my vision in the future and it's something that I take very seriously now that I only have one fully operable eye. I've put myself in Adam's shoes before, but now I truly feel where Adam's fear came from, and why that is such a huge threat to someone who is already disabled. I feel the question needs to be asked; how would anyone else react? I cannot speak for everyone but with my renewed appreciation for vision I would have reacted similarly.

At the end of the day this is not a position that anyone wanted to be in. No one comes out on top in an accident like this, but that's what it was: an accident. No one could have predicted the events of that night because alcohol led both parties to act wildly and out of character. Adam is a very docile person and everyone around him can attest to that. He's often referred to a teddy bear because he's truly that nice. I hope my points have caused you to further examine Adam's character, and give him a chance to continue his livelihood and helping those around him.

Sincerely,

Samuel Boyer McCormick
Sent from my iPhone

Scott & Yolanda Pearce
2586 S Sumpter Pl
Boise, ID 83709
530-318-1030
Scott-Pearce@live.com

6/25/2021

To: Douglas County Court,

RE: Adam Bernard character reference

We have known Adam for 8+ years. We lived next door to Adam's mom Helen from 2009 to December 2020. Over the past few years, we have gotten to know Adam. Adam is friendly, respectful, kind, humble, committed and a hard worker. Overall, he has always been there when we needed him to either help with projects around the house or just sit down and have dinner. On several occasions, Adam stayed at our home to dog sit our Chocolate Labrador. Adam took good care of our dog Abacus and was very respectful of our home.

We can confirm that Adam is a man of great integrity, extremely dedicated to his mom and work. Adam is well liked and is always willing to help others.

Sincerely,

Scott and Yolanda Pearce

June 25th, 2021

To: The Honorable Judge,

My name is Chris Mossontte and I have known Adam Barnard for over 30 years. We have been friends since we were kids and grew up together. Over the years we have created many good memories. Once I became a father and husband, Adam has been good to my family. We have taken vacations together, worked together, and done countless activities and there has never been any type of confrontation.

I can write that he has always shown respect for others and is always willing to help out anybody at any time.

Through this tragic event, I believe Adam has taken responsibility for his actions. Hopefully, this letter can help relay what an overall great human being Adam is. I'm proud to call him my friend and he will be as long as we are both around.

Thank you.

Sincerely,

Chris Mossontte

June 27, 2021

To the Honorable Judge Gregory;

Hi, Adam is a gentle and sweet level headed young man. I met Adam when he was volunteering to cook meals at the Moose Lodge in South Lake Tahoe many times. Yummy good cook. I then met his mother Helen doing other volunteering work in/for the community and became friends with her and Adam. I've had him over with my family and friends for Christmas, and we all love him.

When my dog Lizzy went missing in the middle of the night I would be talking to Helen on the phone and Adam would be in his truck searching my neighborhood. He cares about people and he could not harm anything on purpose. If he was put in a fight or flight situation which is unfortunate he would have to defend himself otherwise I'm sure he would do everything in his power to abstain from hurting someone. I sincerely believe that knowing Adam the way I do that it would be an injustice to condemn him to prison and not allow him to be on probation. I believe that with all my heart.

Sincerely

Diana Loraine Peticolas

Sent from Yahoo Mail on Android

6/24/21

To whom it may concern:

Having to do with Adam Bernard and Probation

My name is Melissa Patton and I now live at 2605 Clapham Lane, Minden, Nevada. I use to live in South Lake Tahoe and was the HR Director at Mont Bleu Resort at Stateline, Nevada. I worked with his mother, Helen Bernard, for many years. I knew Adam Bernard from him doing handyman work for me at our previous home in South Lake Tahoe. He was always and is always a very responsible person, always on time and very caring. He is always welcome in our home, we know a lot of the same friends, spanning at least 10 years. He also moved in with his mother about 4 years ago and he acquired a queen bed from us. He is a great golfer and my husband and Adam visit about golf on occasion. I trust Adam completely and would allow him to visit us anytime. I can't be at the hearing due to my grandson visiting us from Colorado, otherwise I would be in the courtroom to support him. I support probation for Adam, he has done very well the last 4 years and I wish him well.

Thank you for your time.

Melissa Patton

Friend of Adam Bernard

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JUN 30 2021
Douglas County
District Court Clerk

FILED
2021 JUN 30 AM 8:32
BY DEPUTY

Case No. 18-CR-0104

DA 0007518

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

v.

ADAM ANTHONY BERNARD.

Defendant.

STATE'S DOCUMENTS AND INFORMATION IN SUPPORT OF SENTENCING

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

State of Nevada, by and through the Douglas County District Attorney's Office, hereby gives notice of the following documents and information in support of sentencing.

The State will seek to introduce the following at the sentencing hearing in the above captioned-matter:

1. DCSO case 17so20571 report of Deputy Ignatius Kyeremeh
2. Photograph of Brian Cook with injuries
3. Photograph of Brian Cook
4. Photograph of Brian Cook with family
5. Written statement of Amy Boggs
6. Written statement of Heather Newman
7. Written statement of Mathew Moody
8. Incident video (previously provided).

In addition, the State expects that some or all of the following people will testify or provide victim impact statements at the sentencing hearing:

Thomas Nobriga, Susan Nobriga, James Sonsteng, Ciara Ariaza, Tristan Cook, Elijah Cook.

DATED this 7th day of June, 2021.

MARK B. JACKSON
DISTRICT ATTORNEY

By: _____
Erik A. Levin
Chief Deputy District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

Narrative

Douglas County Sheriff's Department
Investigation Narrative
Case#: 17SO20571

CLASSIFICATION:

Assault

EVIDENCE:

Thirty-Eight (38) Digital Photos

ATTACHMENTS:

DCSO Statement Form

DETAILS:

On Saturday, July 09, 2017 at approximately 2146 hours, I was dispatched to 1294 Manhattan Way regarding two people dragging a lifeless body out of the street. Upon arrival I observed two white males (Adam Bernard and Kevin Tholl) walking toward the open garage at the residence. Adam looked at my vehicle and waived me down. Adam escorted me to Brian Cook. East Fork Fire Paramedic District was requested to respond to the scene.

Brian was wearing a pair of shorts. He was not wearing a shirt or shoes. Brian was lying on his back in the dirt in front of a red Ford pickup truck. A large amount of blood was present on his forehead mainly to the right side of his face running back through his hair. Brian also had blood present on the exterior and interior of the right nostril and the lower right lip.

Brian was unconscious but breathing. Brian responded to pain stimulus (sternum rub) but continued to snore. Inspection of Brian's pupils showed his left pupil fully dilated and the right pupil pin point and constricted. Brian never regained consciousness prior to East Fork Fire Paramedic District Paramedics transporting him to Carson Valley Medical Center to be transported to Renown Reginal Medical Center by Care Flight.

I contacted Adam:

Adam was wearing a shirt, shorts, socks, shoes and a pair of glasses. He had blood present on his right knuckles. He smelled of alcohol and admitted to drinking. Adam voluntarily gave a breath test. Adam BrAC was .182%.

Adam stated he Kevin and Brian spent the evening together drinking at Brian's residence. Adam and Kevin walked to Kevin's residence located on Manhattan Way. Kevin began receiving phone calls from Brian. An argument ensued on the phone. When asked what the argument was about, Adam stated Brian "wanted to come over to kick my ass and make me blind in my other eye. " (Adam is fully blind in his left eye).

Adam stated shortly after the phone calls Brain pulled up in his truck they went over to talk to Brian. Brian wanted to fight as Adam was trying to calm Brian down. Adam stated Brian pushed him and attempted to grab for his neck as he pushed away. Adam stated Brian approached him a second time and he punched Brian once. Brian fell to the ground and Adam and Kevin both walked away. Adam stated Brian is their friend and they couldn't just leave him in the road way so they went over, grabbed him and dragged him to the dirt. Adam stated he was going to

call 911 but saw my vehicle and waved me down.

I contacted Kevin:

Kevin was wearing shorts, socks, and had no shirt on. He had blood present on palms oh his hands. He smelled of alcohol and admitted to drinking. Kevin voluntarily gave a breath test. Kevin's BrAC was .226%.

Kevin stated Brian drove over to his residence and wanted to fight. Brian got out of the vehicle and went after Adam. Kevin stated Adam did not want to fight but they were yelling at each other. Kevin stated Brian tried to grab Adam by the neck and Adam punch Brian. Kevin stated Adam fell in the street and they dragged Brian out of the street.

While on scene I was contacted by James Bell. James resides at 1295 Manhattan Way and has an external video system that captured footage of the incident. James is unsure how to transfer the footage to disk but states the DVR holds the footage for at least a week. James is willing to allow a knowledgeable person transfer all footage of the incident.

Upon reviewing the footage (marked time 2146), footage is dark and grainy. Brian's truck can be seen driving down the street and on to the side walk. You see Adam and Kevin go to the truck. All persons are lost to the darkness. You can make out Brian falling to the ground, Adam and Kevin walking away then returning to drag him to the side of the road.

Based on Adam and Kevin's statement, it would appear as Brian is the primary aggressor. Due to Brian's physical stated he was not interviewed therefor I could not determine a primary aggressor and therefor no arrest was made. Thirty eight digital photos were taken of the scene which was later booked into evidence.

Investigator Koontz was contacted and dispatched to Renown Regional Medical Center for further investigation.

Brian's vehicle was secured on scene and keys left with Kevin.

Disposition:

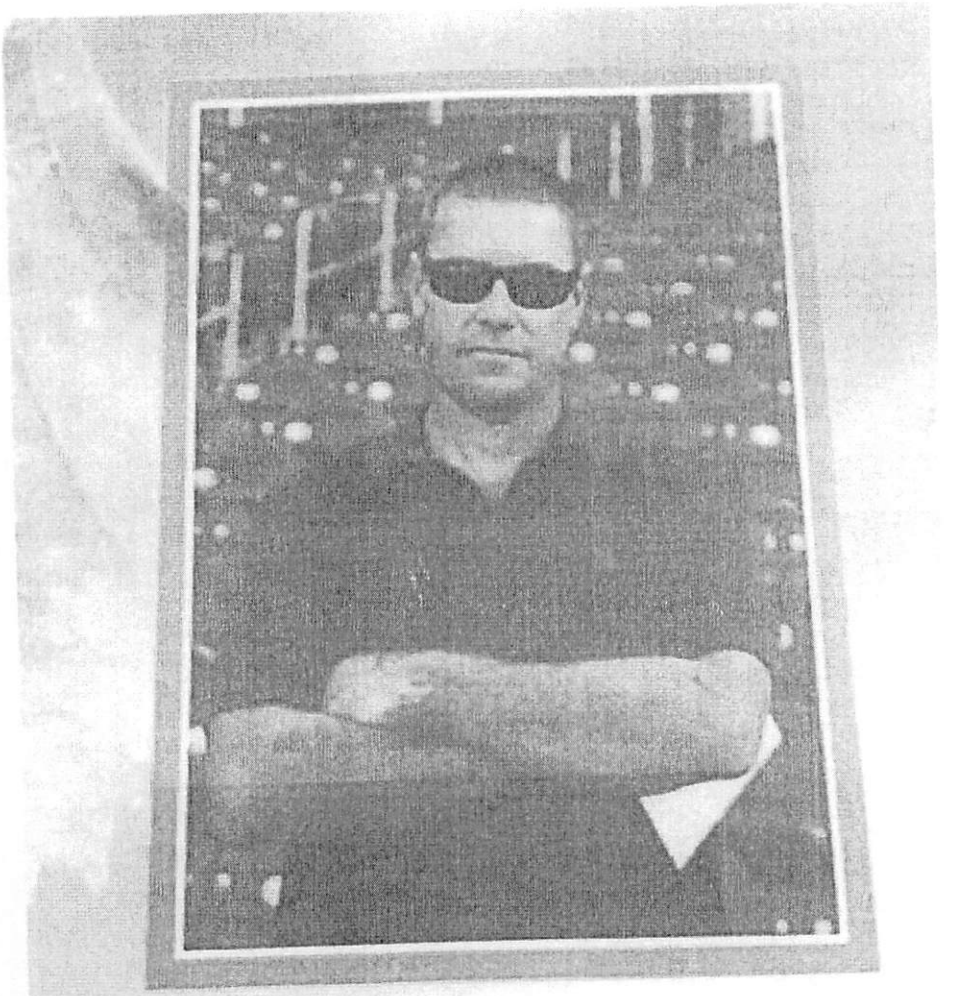
Closed by Report.
Forward to Investigations .
Forward to the Douglas County District Attorney's Office for prosecution.

Date, Time, Reporting Officer:
Sun Jul 09 07:46:53 PDT 2017

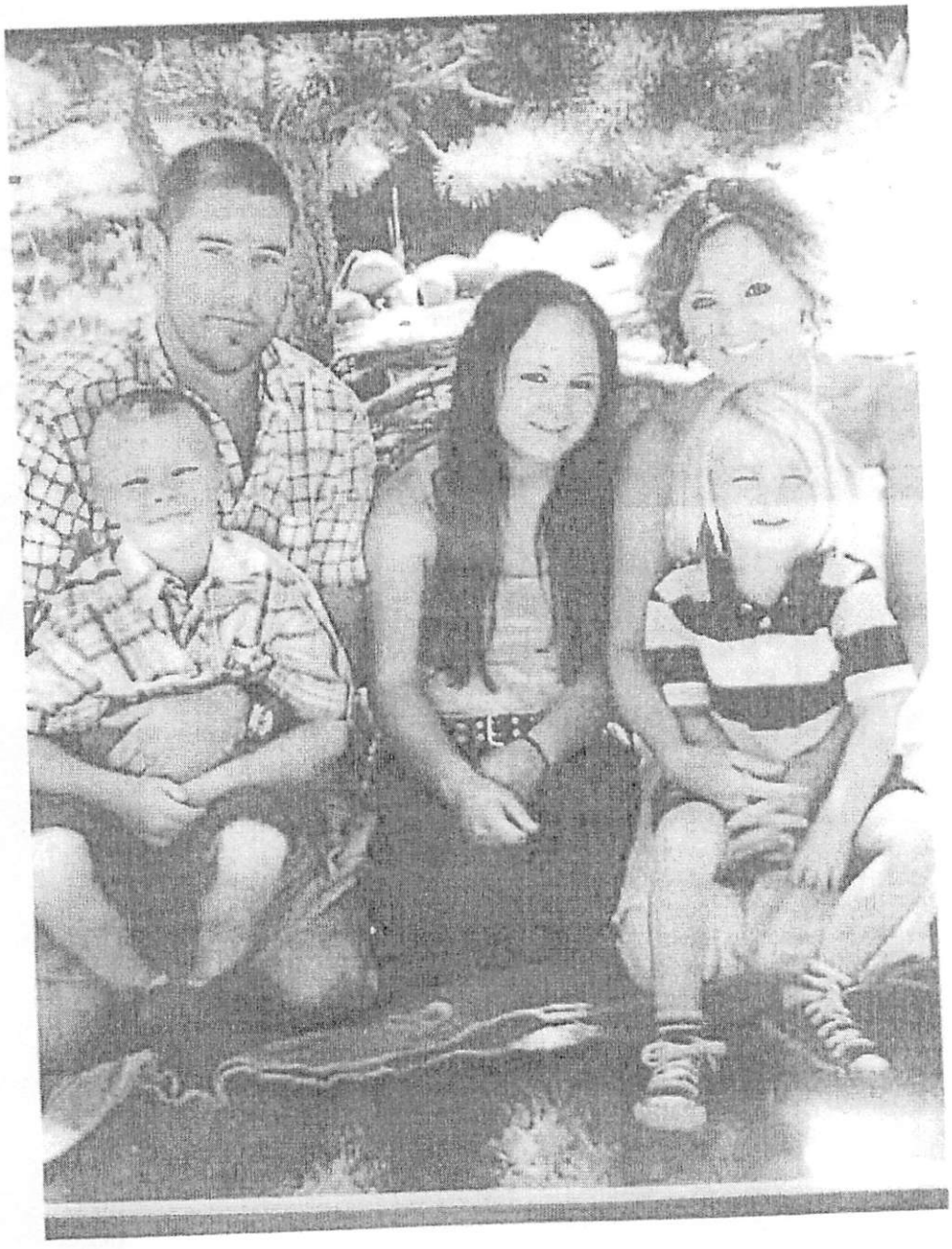
Deputy I. Kyeremeh #561

_____
Reporting Officer

_____
Responsible LEO:



Brian E. Cook



From: amy boggs <amyboggs777@yahoo.com>
Date: June 17, 2021 at 9:28:21 AM PDT
To: thomasnobriga@yahoo.com
Subject: Brian -i love you
Reply-To: amy boggs <amyboggs777@yahoo.com>

To whom it may concern

Im suppose to write a letter to show how much my cousin Brian was loved and how much his death has affected our family. This morning I watched a video my aunt sent me and I have saved it. I miss his voice so much. He was so funny, sweet and kind. And now the only time i get to hear him isnt over the phone or at family get togethers. Its over a saved video. I hope nothing happens to it cause that and photos is all we have left. Over something that didnt have to happen. All because someone couldnt control his anger.

This was not an accident. This was something that was done over and over again. There is a video showing it if you all forgot. My cousin was taken from his family on purpose and in a violent way.

My cousins boys wont see their dads face out in the crowd during high school graduation, college graduation, their weddings. My cousin wont ever get to hold his grandchildren. All because someone couldnt control his anger. That person should serve the maximum sentence. That is the least that he could do for a family who has to serve a lifetime without Brian.

Thank you for your time.

Amy - cousin and friend.

From: HEATHER NEWMAN <natrlyred1@gmail.com>
Date: June 15, 2021 at 5:00:05 PM PDT
To: thomasnobriga@yahoo.com
Subject: Letter from Heather Newman, childhood friend of Brian Cook

Presiding judge of our Brian Cook case.

I've known Brian since grade school, he was a Really sweet kid. We continued to middle school and high school and stayed friends. We had a class or two together and he was always who I wanted to sit by. Funny, smart, silly & good hearted. He was always liked by so many people had lots of friends and pretty easy-going.

After high school he married my best friend and they had two boys. He was a good husband and a good dad to his boys and to his adopted Jessikas daughter Ciara. A few years into their marriage my best friend ended up having a brain tumor and passing away at 37 years old. Brian was left picking up the pieces running his own business I'm trying to keep food on the table and a roof over the kids heads. Heartbreaking to say the least!

Brian had to be both parents to the three kids overnight. I think that was very difficult for him. Although I had not spoken much to him during that time we did connect again shortly before his passing. I believe he faced some difficult times with the life he found himself in which may have manifested into a drinking problem.

I have read through the case, Mr Bernard was identified and arrested after Brian passed away as the perpetrator of this horrible crime!
I understand there's a neighborhood video showing Bernard hitting Brian once as he fell to the ground.

What happens after that is complete and total brutality and it deserves the harshest punishment. This so called friend of Brian's who ended up taking his life must've known his situation since they both had been drinking together prior to the fight at Brian's home that he shared with his three children. Nothing Brian could have said or done should have resulted in how the night ended. I realize it everybody was pretty intoxicated but if Brian was really A threat then why did he continue to hit him after he had already hit the ground? He wasn't a threat lying flat on his back.

Because of this extremely brutal & violent crime I am asking you as the presiding judge to hand down the harshest punishment to Mr Bernard. Please for the remaining three children have to live without BOTH of their parents for the rest of their lives! This is a life sentence for them. The least we can ask if the court is that they sentenced him to the maximum!

Thank you
Heather Newman

From: Mathew E Moody <moody.m@sbcglobal.net>
Date: June 25, 2021 at 7:31:04 AM PDT
To: thomasnobriga@yahoo.com
Subject: Brian

Good morning.

My name is Shelby Moody. I am a life long friend of Brian Cook. Brian was an amazing husband, father, son and friend to so many people.
I miss and think about Brian every day. He was the most caring and loving person that I knew. He would always bring a smile to me, every time I spoke to him or saw him. For me he was bigger than life. I miss his hugs and his positive out look. Brian had a way of always making me laugh.Something about him made me feel safe and loved.
Jessica, Brian's wife and the mother to Ciara, Tristin and Elija was taken from us to soon. The good lord had different plans for her. Brian's death was taken from someones hands. For someone to take Brian's life is inexcusable. No one has the right to make that choice for anyone. Brian no longer has the ability to be a father, son, grandfather or friend. Someone besides the lord took that in their own hands. He should get the maximum sentence.
I love Brian so much. Ever day he inspires me to be a better person and keep going when times get rough. That is something the killer can never take away from me. I know he is not here fiscally but I know he is still with me.
Thank you for your time.
Shelby Moody

Sent from my iPhone

RECEIVED
JUN 30 2021
Douglas County
District Court Clerk

30 AM 9:05

Case No. 18-CR-0104

DA 0007518

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

v.

ADAM ANTHONY BERNARD,

Defendant.

STATE'S SUPPLEMENTAL DOCUMENTS AND INFORMATION IN SUPPORT OF SENTENCING

The State of Nevada, by and through the Douglas County District Attorney's Office, hereby gives notice of the following documents and information in support of sentencing.

In addition, to the names previously provided, the State expects that Brittany Martinez and Tim Loustedt will also provide victim impact statements at the sentencing hearing.

DATED this 29 day of June, 2021.

MARK B. JACKSON
DISTRICT ATTORNEY

By: _____
Erik A. Levin
Chief Deputy District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800

Douglas County District Attorney
1038 Buckeye Road
Minden, NV 89423
(775) 782-9800 Fax (775) 782-9807

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Case No. 18-CR-0104

Dept. No. II

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,
Plaintiff,

vs.

ADAM BERNARD,
Defendant./

FILE UNDER SEAL

SENTENCING MEMORANDUM AND DOCUMENTATION IN SUPPORT

The defendant, ADAM BERNARD, by and through his attorney, Maria Pence, Esq., presents the following information and supporting documentation for this Court to consider prior to sentencing.

The defendant is requesting that this memorandum and documentation be filed under seal as both contain sensitive medical and treatment information.

Respectfully submitted this 30 day of June, 2020.

MARIA PENCE, ESQ.
Nevada State Bar No. 9890
1662 US Highway 395, Str. 203
(775) 392-4084
Attorney for Defendant

BACKGROUND INFORMATION

Adam Bernard was six years old when he lost sight in his left eye. Adam remembers the day he was blinded. He was in first grade. He was sitting on a bench in his backyard with a family friend. The boy was fourteen years old and he put a BB gun to Adam's left eye, point blank range, and pulled the trigger—just because.

The BB shattered the lens—permanently blinding him in that eye. He was taken to a specialist in Sacramento, who performed the first of five extensive surgeries to remove the shattered lens and save the eyeball itself, so that he would not have to have a glass eye.

He spent much of his elementary school years wearing eye patches between the surgeries, and learning how to compensate for his blindness. His teachers knew him well, as he needed to sit up front to see the chalkboard. As a result of this injury, Adam has no depth perception, a very limited visual field, and complications from the shooting, including glaucoma.

Adam is the only child of Bill and Helen Bernard. They worked hard with Adam to help him regain confidence and to participate in life as fully as he could. With only one eye, Adam had to be extremely cautious in a way most of us would never think about—he needed to be very careful, very protective of his right eye—his seeing eye. Without that eye, Adam would be completely blind.

His family lived in South Lake Tahoe and Adam and his mother, Helen, continue to reside there today. Adam's dad would take him fishing and camping and kept him involved in sports. His participation was often limited and required special glasses to protect his seeing eye. In 8th grade he played football, as a blocker...but could only play on the left side of the line—he had to be positioned on the left side of the football, so he could see the ball being hiked with his right eye. By high school, the game was too rough to play, as Adam could not risk harming his sighted eye.

But his father was an alcoholic and was often verbally and mentally abusive to Adam and his mom. Helen was finally able to leave Adam's father and divorced him when Adam was 15. As he grew older, Adam was often teased by kids...lots of name calling: one-eyed willy, or cyclops, but he did not let it get him down. He had a big circle of friends and a loving mother.

As a freshman at South Tahoe High School, he was subject to the same sort of hazing by upper classman that other kids were. But "ping-pong" as it was called, was extremely frightening for him....seniors would line the hallway and shove their target back and forth down the hall, until the person fell or one of them moved and the person would go flying into the metal lockers. Or, if the person made it to the end, he might only be targeted with chewing tobacco spit. Adam did not have the depth perception to avoid falling or slamming into the lockers and became an easy target. This was Adam's first contact with Brian Eugene Cook. Brian was an upperclassman when Adam was a freshman. Brian was tall even in high school, over 6 feet. Brian was one of the older students that would grab Adam as he was walking down the hall to send him flying, ping-ponging, to the next senior classmate lined up against the lockers. Adam quickly learned that it was easier, to simply walk outside, and go around the entire building to get to class, than to walk down the hall and risk being ping-ponged.

He graduated from South Tahoe High School in 1996 and went to work on the Tahoe Queen, the big paddle wheel boat on Lake Tahoe. He worked his way up from shipping and receiving to working on top of the boat selling pretzels and hotdogs.

He started working construction, his father's trade, when he was 20. Adam was good at carpentry and learned to compensate for his loss of vision to become a skilled craftsman. His boss, Aaron McCormick, felt lucky to have Adam as an employee—many of his clients grew fond of Adam because of friendly, easy going nature, and outstanding work.

When Adam was just 22 years old, his father died of a sudden heart attack. Just as he had done as a teenager, Adam continued to care for his mother, helping her financially and taking care of her and the house. That is the kind of person Adam is. He is kind and generous. The letters provided to this Court by his friends, filed separately, repeatedly acknowledge that Adam is the guy that will give you the shirt off his back or go out of his way to help someone in need. He is shy and quiet, and often described as a "teddy-bear" for his size and gentle nature.

Fast forward ten years...Adam was 32 when he met Kevin Tholl. Kevin also worked construction and they met on a job in the Tahoe Keys. Over the next several years, they would

run into each other on a job site, but it was not until about five years ago, that he and Kevin became co-workers and friends.

Kevin was working for Mike Bailey Construction. Kevin invited Adam to come and work for Mike Bailey as they were extremely busy. They were doing the construction work for all the new restaurants up at the lake in the area we know as Heavenly Village. Kevin was the foreman and Adam worked under Kevin. They started hanging out together after work and went fishing and camping together on weekends.

Adam worked for Kevin for about two and half years before Kevin hired Brian Cook sometime in early 2017. Adam immediately recognized Brian from high school ping-pong and kept out of his way.

But Brian picked up right where he had left off in high school with Adam. He knew Adam was afraid of him. He would help himself to Adam's lunch box on the job site. He would take Adam's soda and walk over to where Adam was working and drink it in front of him. Adam just packed more sodas. Brian would throw nails at Adam's good eye. Adam would turn his back and keep on working. But Brian could not let it go. He was always bullying Adam about taking his good eye. (This information was taken from the interview of TRISTAN?ELIJAH Cook, Brian's son). Especially when he was drunk and the unfortunate truth is, that Brian drank a lot of alcohol, a lot of the time. (This information was taken from the interviews of Kevin Tholl and George Mejia).

Brian had always been a drinker, but after his wife died of cancer, his drinking became excessive and he started drinking large amounts of whiskey and beer. (See interview with Ciara Araiza, Brian's daughter, in Supplemental Narrative, Sequence 1, attached as Exhibit 1). He drank on a daily basis. And Brian was not a nice drunk; when Brian drank, he was mean. He looked for fights, and when there was not one, he would work to create one.

Even before hiring him, Kevin tried hard to include Brian in an effort to get him involved in something other than drinking at home. Kevin knew how badly he was doing. Brian was not an easy person to begin with, and when he drank, he was angry and out of control. In an effort

to help Brian, Kevin invited him to go fishing a few times and once camping at Lake Almanor with he and Adam.

Adam was apprehensive about camping with Brian, but being the person he was, he agreed to go. The weather had been extremely warm, and they had fished all morning. Afterwards, in the heat, Kevin laid down for a nap and started snoring. Brian walked over and began kicking Kevin in the chest and back. Shocked, that Brian would be kicking his own friend, Adam asked, why are you kicking him? Brian shot back, "want me to kick you then?" Adam walked away. He knew Brian was serious.

Brian had only worked for Kevin for a few months when he fell down and hurt his knee during a camping trip over Memorial Day weekend. Unable to work, he spent much of that time drinking.

As of July of 2017, Brian still had not returned to work. For some reason, his knee was not healing—even though it had been more than a month.

On July 8, Adam and Kevin went fishing. It was Saturday and they took their dogs and poles and went to Indian Creek Reservoir near Markleeville. They spent the morning fishing and then returned to Kevin's house to drop off the dogs. They were next headed to Walmart to check out a new version of the Yeti cooler that Walmart had.

Brian had been calling Kevin all day. He was upset that he had not been invited to go fishing. He wanted to go to Walmart with them. But it was clear he was already pretty drunk. Neither Kevin nor Adam wanted him to go to Walmart with them if he was drunk. So Kevin told Brian they would come by his house and visit for a few minutes. Adam had never been to Brian's house. When they arrived, Brian was in the garage, drinking 100 proof peppermint schnapps and Coors light beer.

Kevin and Adam accepted a beer while Brian bragged about his new knife. He lifted the knife to his eye and made a popping sound with his mouth. "Lights out," he said to Adam, "It would be that easy." Adam walked out of the garage as it was clear Brian had had too much to drink and was already taunting Adam about his eye. This is predatory behavior and this act was Brian's first act of predation of the night of July 7, 2018.

Kevin and Brian followed Adam out into the front yard. Brian was insisting that they all go fishing the next day, Sunday. Adam did not want to go fishing with Brian. He told Brian he did not have a float tube or waders so he could not go. Brian told Adam he had a pair for him. He had his son go and get them for Adam to try on. Adam did not want to try on the neoprene waders...it was hot, it was July. But when Brian got up and yelled "try on the fucking waders now," Adam, not wanting any problems, pulled on the neoprene waders. Another predatory act.

A few minutes later, the neighbor's three-week-old puppy came over. Not an 8-week-old puppy, weaned from its mother, but a three-week-old puppy that was still being bottle fed. Without saying anything, Brian reached over and launched the tiny puppy up into the air. The puppy flipped several times and landed, hard on the ground—on its side-crying out. Brian thought it was funny that the puppy could do flips. (This information was taken from the interviews of Adam, George Mejia, and Elijah Cook). Adam, shocked at Brian's cruelty, asked "Why would you do that to a puppy?" Brian became irate and yelled at Adam, "Don't fucking tell me what to do, you don't fucking tell me what to do." His aggression was escalating. Adam and Kevin decided it was time to leave as Brian was too drunk and too volatile.

They drove back to Kevin's house, which was about a mile away. Adam did not want to drive home to South Lake Tahoe as he had been drinking, so Kevin offered to let him stay the night. Kevin's wife and daughters were sleeping inside and Adam had his dog, so they decided he would stay in Kevin's trailer.

As they were getting the trailer ready, Brian called Kevin. He was coming over. He was going "to come fuck Adam up." Kevin told him they were going to bed and to stay home. Brian hung up. Adam, who could hear Brian yelling about coming over to fuck him up asked Kevin if he was really going to come over.

Adam is, and has been for a long time, very afraid of Brian.

Kevin, not wanting Brian to come over and harm Adam, called him back and told him do not, do not come over. But Brian was beyond reason...Kevin spent 8 minutes trying to talk Brian out of coming over before Brian hung up again. Kevin called Brian back two more times, as he

could hear how out of control Brian was. (This information was taken from the call logs provided by Kevin Tholl to the State).

Kevin was still holding the phone in his ear when they heard Brian's Ford F 250 diesel down the street. Brian was actively pursuing Adam now. He ran the stop sign on the corner and pulled his truck up onto curb, almost striking the rear of Adam's truck, until coming to a stop in the dirt area in front of Kevin's house.

With the truck still running, Brian got out and told Adam he is going to fucking kill him. As they square up, Adam pleads with him, "why do you want to beat me up?" Brian tells Adam he is going to make him blind in his other eye—"lights out, mother fucker."

Adam knew what Brian was capable of doing—he was well over 6' and mean as hell, especially when he was drunk. And armed with a knife...Adam had no idea where the knife was at that moment.

Later, in the hospital, Brian's blood alcohol content was a .45. He was more than *five* times the legal limit when he drove to Kevin's house to, as he put it, fuck Adam up.

Adam does not remember much about the fight. Dr. Joseph McEllistrem, a forensic psychologist, will present a brief presentation at Adam's sentencing that explains the psychological process, acute stress response, that occurs when someone is forced into a position of fight or be killed or, as in this case, to be completely blinded or killed. This autonomic response is referred sometimes to as an amnesia like condition, or Condition Black, like when a police officer involved in a fatal shooting is certain that he only fired two shots...and then learns that he actually emptied his clip and reloaded. Dr. McEllistrem will also explain why Adam does not remember much of the fight and why Adam fought the way he did when Brian came to kill him. He will explain the psychology and neurobiology of "fight or flight" and the role that past trauma plays in a person's threat perception, thinking, and reaction.

The physical confrontation that occurred when Brian arrived at Kevin's, after telegraphing his threat to kill Adam over the phone minutes earlier, was recorded by a neighbor's home security system. It is a very disturbing video to watch. But when you understand what was happening in Adam's mind when Brian, his aggressor, who he had already retreated from

twice that night, follows him to Kevin's house and is now confronting him, telling him he's going to fucking kill him and make him blind, Adam's physical response can be put into context.

As Dr. McEllistrem will explain, a chemical reaction toppled the first domino, at which point there was no stopping, until the last domino fell. When Adam observed Brian's car pull up onto the grass, he was no longer capable of rational thought—the body's autonomic protection response had been triggered...and would not turn off, until it was interrupted...in this case, when Kevin ultimately grabs Adam's shoulder, interrupting the chemical reaction.

What the Court will see on that video is a man fighting for his life, fighting for his sight, not to be blind, and to stay alive. He did not stop defending himself until Kevin came up to him and grabbed his shoulder.

The State will tell you that Adam struck Brian 30 plus times and kicked him 7 times. As the Court will observe, almost every punch was identical, the same hand, the same motion, attempting to strike the same area. However, Adam has no depth perception at all and a very limited field of vision. Many of those punches did not connect with Brian and this is confirmed by the photograph of Adam's knuckles immediately after the incident and the hospital reports. Adam's knuckles are scraped from hitting the asphalt of the street. (Exhibit 2). Brian had an open bleeding cut and swelling on his right brown, and bruises on his left eyelid and socket. There was also a small amount of blood coming from his nose and on his lip. (See photograph of Brian Cook, submitted by the State for sentencing).

Had all of those punches connected forcefully with Brian's face, one would expect to see multiple broken bones, fractures, tears and cuts. But Brian had no facial or orbital fractures—no broken or cracked eye orbits, no broken nose. Both ears were uninjured. His jaw was intact and normally aligned. He had no broken or loose teeth. (See HENT exam, Exhibit 3). In fact, his actual injuries were found by the medical examiner and the forensic neuropathologist to be consistent with being *struck once* and falling to the ground and hitting his head.

Immediately after the fight, Adam's first thought was that Brian could get run over by a car and that they need to get him out of the street. He tells Kevin that he does not want Brian to get run over and that he needs Kevin to help move him. Whether Brian is passed out from alcohol

or knocked unconscious during the fight, Adam does not want him to be run over. (Information taken from interviews of Adam and Kevin Tholl). His first thought after the altercation is to make sure Brian is not killed by a passing car.

Adam and Kevin drag-carry Brian to the dirt area near Brian's truck. Kevin turns off Brian's truck, which has been running the whole time. They splash some water on his face in an attempt to wake him. Brian is moving but not talking.

Minutes later, Adam waves down a passing police vehicle. Unknown to either of them, a neighbor had called 911 when he saw them carrying Brian out of the street. They take the officer to where Brian is lying down. The officer calls for medics. Adam and Kevin inform the officer what happened and stay on-scene. They are cooperative and help in any way they can.

Another neighbor informs a deputy that he has video surveillance of the incident from his home security system. The officer watches the video surveillance, but due to its quality, he is unable to see what happens clearly after Brian pulls up in his truck, as Adam and Brian are lost to darkness in the video.

Medics stabilize Brian and he is taken by Life Flight to Renown Hospital in Reno. His truck is left on-scene with Kevin, who offers to call Brian's girlfriend and have her pick it up in the morning.

At the hospital, Brian's blood alcohol content is found to be a .45, which is extremely high. A blood alcohol content over a .4 can be lethal and cause death. He is put into a medically induced coma to go through acute alcohol withdrawal and for his head injuries.

Sgt. Koontz drove to Renown that night and was informed by the charge nurse, Chris Paul, that Brian would remain in the coma until the swelling in his brain went down and he goes through alcohol withdrawals. Chris told Sgt. Koontz that all of Brian's vitals were stable and that he should recover from the injury. (See Exhibit 1, Visit to Renown).

However, Brian's drinking had taken a serious toll on his body. His knee injury, months old, had been unable to heal and was in such bad shape, hospital staff originally believed that it had occurred during this incident. His lab work showed problems with his white blood cells and platelets. Early blood cultures showed multiple infections. His liver was failing. He ran a

constant fever. Brian's lifestyle, especially in the months leading up to his death, had seriously damaged his body.

Over the next three weeks, hospital medical records show that Brian's head injuries went through their normal course and were healing. The neurosurgeon took him off the phenobarbital and planned to bring him out of the coma, as his head CTs were stable and his neurological responses were good. (Exhibit 4, Progress Notes 7/29/2017, by Alyssa Nishihira; Progress Notes 7/29/2017, by Michael Song; Progress Notes 7/31/2017-entry for Cerebral Contusion on 7/24/2017 by Nicholas Spoerke). But the hospital was not able to get Brian's infections under control. He was on constant anti-biotics. They tried several different anti-biotics, but his fever continued. (Exhibit 5, Medical Decision Making/Problem List; Core Measures & Quality Metrics).

On July 30, 2017, Brian was going to have another CT and on the way to get the CT, he went into cardiac arrest. Hospital staff provided CPR and then took him to get the CT. On the way back, Brian went into cardiac arrest for a second time, and was again given CPR and medication. The cause of his cardiac arrest was listed as unknown. (Exhibit 6). Hours after this second episode of cardiac arrest, Brian progressed to a state of brain death and was pronounced dead on July 31, 2017.

However, Brian had been suffering from heart issues for several years. Medical records provided by Renown Health, pursuant to subpoena, document heart issues related to alcohol consumption in 2014, 2015, and 2016. (Exhibit 7). In Dr. Miller's report of 12/13/2014, *Brian "was strongly cautioned that he absolutely must discontinue his alcohol usage or that he will have a progressive cardiomyopathy leading to his death."* (Exhibit 7, page 2 of Dr. David Miller's report). That was two and a half years prior to July 8, 2017. Brian did not cease drinking during those two and a half years, and on July 8, 2017, had a blood alcohol level of .45—which can be lethal, in and of itself.

Sgt. Koontz notified the Washoe County medical examiner's office and asked that a homicide protocol be put in place when the autopsy was conducted. The Medical Examiner's office informed him that they would perform an autopsy, but did not feel that a homicide protocol

was necessary as Brian had been in the hospital since July 8. Their plan was to focus on the head and brain, as that was where the trauma occurred. The medical examiner's office received Brian's body after any salvageable organs and other tissue had been donated. Unfortunately, they were not able to examine those organs to determine other possible causes of death.

During the autopsy, it was also discovered by the neuropathologist that Brian had meningitis—not only in his brain tissue, but up and down his entire spinal cord. This may have been the cause of the infection and fever that the hospital was unable to treat successfully. Even his donated organs may have been infected; in fact, several organs harvested were unable to be transplanted because of medical issues. Meningitis is also fatal and can cause death.

Three months later in October, Sgt. Storke called Adam and asked him to come in and meet with law enforcement for an interview. Adam did. He was asked to come in a second time the following month, in early November. He again cooperated and drove down to the Douglas county sheriff's office to be interviewed.

During his second interview, Adam was pressured by Sgt. Storke about why his explanation about what happened, on the night of July 8th, did not match the video surveillance. After showing Adam the video, Sgt. Storke tells him he punched Brian 27 times. Adam is astonished. He tells Sgt. Storke it must have been like a blackout moment. That he was scared for his life and must have blacked out. He describes it as being a big blur, total chaos. That he was scared that Brian was going to get up and shoot him or stab him. That he had been afraid that Brian was going to really, really hurt him and that he was deathly afraid of him. As will be explained by Dr. McEllistrem, lethal threat affects your memory, your perception, and your ability to judge or think about anything other than saving your life.

Although Sgt. Storke, a seasoned investigator, tries multiple times to get Adam to say he was mad at Brian, that he was angry at him, Adam never waivers. He was afraid, deathly afraid—that Brian would use his knife, or get a gun out of his truck, or ....he had no idea what Brian would do, if he got up. Adam was aware of the efforts Brian made to pursue him. Brian had also time to think, to plan his attack and had just driven over a mile to carry it out. It was later

learned during the interview of his son Elijah, that Brian had also attempted to elicit the aid of a friend in the attack on Adam.

When Sgt. Storke asks Adam for his phone, to check and see if he and Kevin have been in contact via text or phone since the night of the incident, Adam consents and immediately turns over his phone to be forensically analyzed. Adam is then told that he can leave but that criminal charges are going to filed against him soon. Investigator Storke is clear that he will be charged for Brian's death and he will be arrested and taken to jail.

Four months later, Adam is formally charged with Open Murder for the death of Brian Cook in a criminal complaint filed on March 3, 2018. Adam was still residing at the same address in South Lake Tahoe with his mom, Helen. He did not leave the area or go on the run. He stayed here, so that he could have his day in court, and let this Court and the rest of this community hear all of the real facts and evidence in this case, not just what the newspaper sensationalized.

Adam has entered a guilty plea pursuant to *Alford*, to voluntary manslaughter, as part of a plea agreement in order to avoid the risk of a trial on the charge of Open Murder. When Adam appears before this Court on July 1, 2021, he will have been waiting for almost four years to explain his actions that night and to accept responsibility for his part in the tragic loss of Brian's life.

CRIMINAL HISTORY

Adam has almost no criminal history. He has one prior misdemeanor conviction for DUI from August, 2014. That is the only other contact with law enforcement that Adam has had during his 43 years of life, outside of the instant offense. He received a probationary sentence in that case and successfully completed his probation.

CONDUCT WHILE OUT ON BAIL

Adam was taken into custody on March 16, 2018, and released on bail on May 2, 2018. Friends and family pooled the money necessary to secure his release on bond. Outside of those 48 days, Adam continued to reside in this community, living with his mother, Helen, and working in construction. Adam has been under the supervision of the Department of Alternative

Sentencing and other than an issue that occurred when he consumed a Kombucha Tea drink, he has never had an issue with any of his conditions. He has never failed to call in for testing. He has never missed a test. He has never consumed alcohol. As of the writing of this document, Adam has over three years of sobriety.

During the stressful time of COVID, Adam continued to work and to be of assistance to others. He has earned significant advancement at his current construction job and is often in charge of the construction crew. He is respected and appreciated by his boss and fellow employees. (See letters, filed separately).

This event occurred on July 8, 2017—almost four years ago. During that entire time, Adam has been living outside of jail, here in our local community. He has been law abiding and has never presented a danger to others. His conduct over the last four years, including his cooperation with law enforcement prior to his arrest, should speak volumes to this Court about the type of individual Adam is and his ability to comply with whatever this Court asks of him. He has demonstrated to this Court that the tragedy that occurred four years ago was an isolated incident, unfortunately put into motion by Brian's refusal to simply stay home, rather than pursuing Adam in order to carry out the threats he made to Adam's life and sight.

SENTENCING RECOMMENDATION

Pursuant to the terms of his plea agreement, the parties are free to argue for any lawful sentence.. Adam is respectfully requesting that this Court sentence him to 12 to 36 months in prison, and to suspend that sentence and place him on probation for a term not to exceed 36 months. The law allows this Court to sentence Adam to a probationary sentence, as the legislature has determined that there are certain cases of voluntary manslaughter that call for probation rather than prison. This case is one of those cases.

Adam knew Brian Cook and had no intention of ever harming him on July 7, 2017. As Brian became increasingly intoxicated and aggressive, Adam retreated on multiple occasions. Adam even left Brian's residence. Brian continued his threats to Adam, calling Kevin multiple times and informing him that he was coming—coming to hurt Adam, coming to blind him. Even as Kevin was still on the phone, trying to dissuade him from coming, Brian pulled his truck up

in front of Kevin and Brian, having driven the mile or so distance with a blood alcohol level around .45.

Had Brian just stayed in the safety of his own home, there is a good chance that he would still be here today. Counsel states this cautiously, as Brian's drinking and heart issues were already being pushed to past their limits. (See Exhibit 7). But Brian did not. He pursued Adam and cornered him, and Adam did everything in his power to protect himself and his sight. As soon as Brian was no longer perceived as a threat, the very first thing Adam did was to tell Kevin they needed to get him out of the street so he would not be run over and hurt by any cars. Adam never wanted to hurt Brian. Adam only wanted to protect himself.

Adam is learning how to cope with the grief he deals with on a daily basis over his actions and their part in Brian's death. He has been working with a counselor in order to work through his depression and guilt, as it is often overwhelming. Regardless of Brian's actions that night, Adam never wanted and deeply regrets his death.

His heart goes out to Brian's family, his father, his daughter and his two sons. He is aware of the hole that Brian's passing left in each of their lives, and he lives with the burden of their grief as well as his own. Adam offers all of Brian's family and friends his most sincere condolences. There is nothing he can do to bring Brian back, but Adam has chosen to live his life in a way that honors Brian's death. He has become sober. He continues to be a caregiver to family and friends. He is accountable and productive at work.

Sending Adam to prison would put an end to that. It would create another tragedy, that can be avoided. Adam, with his gentle nature and blindness, would be an easy target. Prison is the place that society has reserved for the worst criminals—those who have demonstrated, repeatedly, that they cannot and will not follow the law or engage in treatment. Adam is not one of those people. In his 43 years of life, he has done far more good than most and even after this tragedy, he has demonstrated the strength and determination to right his wrongs and to live in a way that positively impacts those around him. This Court has the information it needs to justly sentence Adam for his actions that night. He is respectfully requesting that this Court, with

wisdom and mercy, impose a probationary sentence and allow all of those persons so tragically affected by this case to being to heal.

Respectfully submitted this 30th day of June, 2021,

MARIA PENCE, ESQ.
Attorney for Bernard

EXHIBIT 1

Details
Incident Number 17SO20571 Name Koontz R Jr
Sequence Number 1 Date 14:51:18 07/10/17

Narrative
(See below)

= = = =

As Kevin and Adam continued walking to Kevin's residence, Brian pulled up in his truck. Kevin and Adam walked up to Brian to see what he was doing. Brian exited his truck and grabbed Adam by his neck. Adam was able to push Brian away from him. As Brian went after him a second time, Adam punched Brian on the left side of the his face, which made him unconscious. As Brian was falling to the ground, he landed on cement with the right side of his face, causing several scrapes and his face to swell. Kevin and Adam pulled Brian out of the road as the Sheriff's Office arrived.

After a briefing of the incident I told Sgt. Miller I would drive to Renown Hospital and take photographs of the victim. I told Sgt. Miller I would also try to get an interview completed if he was conscious and alert. I asked Sgt. Miller if he needed any other help at the scene. Sgt. Miller advised the interviews were complete and the scene was photographed, so nothing else was needed. At that time I ended my phone call with Sgt. Miller.

VISIT TO RENOWN:

At approximately 0030 hours I arrived at the Renown Intensive Care Unit and met with the charge nurse, Chris Paul. I introduced myself to Chris and explained to him why I was there. I told Chris I needed to get photographs taken of Brian Cook and get an interview attempted. Chris said Brian was located in room S-117 and was in a medical induced coma. Chris and I walked over to Brian's location and I noticed there were a lot of injuries to his face, especially on the right side of Brian's head and face.

Chris said they put Brian in a medical induced coma because his brain was swollen from a traumatic injury. Chris also said Brian's blood alcohol results were a .45%, which is extremely high. Chris said Brian will be in a medical induced coma until the swelling goes down in Brian's brain and he goes through alcohol withdrawals. Chris said Brian could be in the hospital anywhere from one to three weeks. Chris said all of Brian's vitals were stable and he should recover from the injury.

I told Chris I needed to take photographs of Brian's injuries. Chris assisted me with my photographs. I took approximately 20 photographs of Brian's injuries, and they were booked as evidence in the "R" drive.

After the photographs were taken, Chris told me Brian was assigned an Emergency Room Social Worker, and she wanted to talk to me. At that time Chris contacted the social worker, Angela Ortiz, and she met with me in the ICU.

Angela introduced herself to me and told me she was assigned to Brian. Angela requested a quick briefing of the incident that led to Brian being admitted to the ICU. I provided Angela with a briefing of the incident and all of Brian's personal information, at her request. Angela asked me if anyone had contacted Brian's family, to let them know he was in the hospital. I contacted Deputy Kyeremeh, who advised he was in the process of notifying his mother. Deputy Kyeremeh provided me with all of Brian's mother's information, which I provided to Angela. I asked Angela if she needed anything else from the Sheriff's Office. Angela advised she did not. I provided Angela with my contact information and left the hospital.

INTERVIEW WITH CIARA ARAIZA:

On 07/10/17 at approximately 1300 hours, I received a phone call from Brian Cook's daughter, Ciara Araiza. Ciara told me she just left Renown and was visiting her father. Ciara asked me what happened to Brian. I gave Ciara a brief rundown of the incident, and asked her for a little bit of information in return. I asked Ciara if she knew Adam Bernard or Kevin Tholl. Ciara advised she did. Ciara said Brian currently works construction and Kevin is his boss. Ciara said Adam works with Brian, and they are all friends.

I asked Ciara if Brian had a problem with alcohol. Ciara told me the following:

Ciara's father, Brian Cook, was married to Ciara's mother (Unknown name) for many years, and they were a happy family. Approximately five years ago, Ciara's mother passed away from Lung cancer. The cancer started in her lungs, then moved to her brain and into her spine. After Ciara's mother passed away, Brian changed. Brian drank alcohol on occasion when her mother was alive, but after she passed away he started drinking large amounts of whiskey and beer. Ciara has been worried about her father for the last few years, and can't help but feel sorry for him. Ciara currently lives in Reno, but tries to visit her father from time to time to see if he needs help with anything.

Ciara is hoping this event will help Brian get sober and get his life together. Ciara knows Brian is friends with Kevin and Adam, and is sad this happened. I asked Ciara if Brian was awake when she visited him. Ciara said Brian was still in a medical induced coma, and they expect him to be that way for at least another week. I asked Ciara if there was anything she needed help with. Ciara advised there was not. At that time I ended my phone call with Ciara.

MEDICAL CHECK ON BRIAN:

On 07/10/17 at approximately 1630 hours, I contacted Renown ICU and spoke to the charge nurse where Brian is being treated. I told the charge nurse I needed to get an interview completed with Brian and asked if she knew when they would be waking him from his medically induced coma. The charge nurse said Brian was still in medical induced coma and they didn't expect to bring him out of it for at least another week. I told the charge nurse I would contact them next week for an update. The charge nurse said even when they wake Brian up, he will still be in the hospital for at least another week following that. I thanked the charge nurse for the assistance and ended my phone call with her.

CONCLUSION:

Interviews with Adam Bernard and Kevin Tholl were completed by Deputy Kyeremeh the night of the incident. See attached statements and original report by Deputy Kyeremeh for information about those interviews. All of the scene photographs and initial photographs of Brian's injuries were also photographed by Deputy Kyeremeh the night of the incident.

I took multiple photographs of Brian at Renown ICU, and those are booked as evidence. I have also interviewed Brian's daughter, Ciara Araiza, who provided

a little insight into Brian's life and relationship with Adam and Kevin. I have been unable to interview Brian due to his medical induced coma. I will get an interview completed in the future when he is brought out of the coma and in stable enough condition for an interview. I will complete a supplemental report when that interview is complete.

DISPOSITION:

OPEN - PENDING INTERVIEW WITH BRIAN COOK
FORWARD TO THE DA'S OFFICE FOR REVIEW

INVESTIGATIVE HOURS: (7)

INV. R.KOONTZ #463
07/10/17

EXHIBIT 2

EXHIBIT 3

ED Provider Notes (continued)

ED Provider Notes by Jennifer H Horan, D.O. at 7/8/2017 11:14 PM (continued)

Allergies not on file
Unknown

PHYSICAL EXAM
VITAL SIGNS: BP 122/93 mmHg | Pulse 97 | Resp 18 | Ht 1.88 m (6' 2.02") | Wt 86.183 kg (190 lb) | BMI 24.38 kg/m2 | SpO2 100%
Pulse ox interpretation: I interpret this pulse ox as norma with mechanical ventilation I.
Constitutional: Obtunded, intubated, sedated, paralyzed (rocuronium at 2245)
HENT: Normocephalic. Multiple cephalo-hematoma, boggy scalp, large right brow hematoma, left periorbital edema with early ecchymosis. Left lateral subconjunctival hemorrhage. No chemosis or hyphema bilaterally. Bilateral external ears normal,No hemotympanum. Nose normal. Blood in mouth, no obvious oral trauma, however poor visualization with equipment in mouth.
Eyes: Pupils are fixed at 3, recent paralytic. See exam above
Neck: No midline step-off. Cervical collar remains in place.
Cardiovascular: Regular rate and rhythm, no murmurs. Distal pulses intact, 2+ radial, femoral, DP bilaterally
Thorax & Lungs: Diminished bilaterally with bad/mechanical ventilation, otherwise equal. Right anterior low rib abrasion, early ecchymosis without hematoma, crepitus or flail segment.
Abdomen: Soft, non-distended. No abdominal wall trauma, hematoma. Pelvis stable. No diastases. No blood at meatus. Circumcised, 2 descended testicles without scrotal edema or bruising.
Skin: Warm, Dry. Few scattered abrasions
Back: No midline thoracic or lumbar step-offs. Superficial midline thoracic abrasion without hematomas
Extremities: No deformities. No tenderness. No cyanosis.
Musculoskeletal: No major deformities noted.
Neurologic: GCS 3T, intubated, sedated and paralyzed prior to arrival. Mechanically ventilated.
Psychiatric: Unable to assess.

DIAGNOSTIC STUDIES / PROCEDURES

LABS
Level 1 pending

RADIOLOGY
3 chest x-rays reviewed at bedside in trauma room by ERP and trauma surgeon for tube placement. 2 poorly visualized even after advancement 2 cm. However good compliance with mechanical ventilation, solid and normal pulse oximetry oxygenation. Lung fields normal bilaterally, no obvious pneumothorax, hemothorax.

COURSE & MEDICAL DECISION MAKING
Trauma surgeon at bedside on arrival for trauma red.

Intubated after sedation and paralytics prior to arrival. GCS 3 T4 our exam. Head and facial trauma obvious. Chest x-ray within normal limits. Abdominal exam appears benign although difficult to assess. No extremity deformity. Patient without tachycardia, hypotension or hypoxia. Stable for transfer to CT and then to the intensive care unit.

2315 - care transferred to trauma services on way to CT.

FINAL IMPRESSION
(R41.82) Altered mental status, unspecified altered mental status type (primary encounter diagnosis)

ED Provider Notes (continued)

ED Provider Notes by Jennifer H Horan, D.O. at 7/8/2017 11:14 PM (continued)

(Y09) Assault
(S09.90XA) Closed head injury, initial encounter
(S00.83XA) Facial contusion, initial encounter

Electronically signed by: Jennifer H Horan, 7/8/2017 11:14 PM

This dictation was created using voice recognition software. The accuracy of the dictation is limited to the abilities of the software. I expect there may be some errors of grammar and possibly content. The nursing notes were reviewed and certain aspects of this information were incorporated into this note.

Electronically Signed by Jennifer H Horan, D.O. on 7/8/2017 11:24 PM

EXHIBIT 4

Progress Notes (continued)

Progress Notes by Alyssa K. Nishihira, P.A.-C. at 7/29/2017 9:45 AM (continued)

Neuro exam stable
EVD drains removed this AM
Reinforced with suture
Pt tolerated well

Continue care per primary team

Family meeting for 7/31

Case discussed with Dr. Song.

Electronically Signed by Michael H Song, M.D. on 7/30/2017 7:35 AM

Progress Notes by Michael H Song, M.D. at 7/29/2017 6:56 AM

Author: Michael H Song, M.D.
Filed: 7/29/2017 6:57 AM
Editor: Michael H Song, M.D. (Physician)
Service: Surgery Neurosurgery
Date of Service: 7/29/2017 6:56 AM
Author Type: Physician
Status: Signed

Head CT 7/29/17 am looks much improved. There is no mass lesion. Clinically, also, patient has come off pentobarb and ICP's have been stable throughout a ventriculostomy challenge. ICP's have been less than 20 x 24 hours with drains clamped.

Will DC bilateral EVD.

Full note to follow.

Electronically Signed by Michael H Song, M.D. on 7/29/2017 6:57 AM

Progress Notes by Annie Joy Domingo, R.N. at 7/29/2017 6:37 AM

Author: Annie Joy Domingo, R.N.
Filed: 7/29/2017 6:37 AM
Editor: Annie Joy Domingo, R.N. (Registered Nurse)
Cosigner: (none)
Service: (none)
Date of Service: 7/29/2017 6:37 AM
Author Type: Registered Nurse
Status: Cosign Needed
Cosign Required: Yes

12 hour chart check

Electronically Signed by Annie Joy Domingo, R.N. on 7/29/2017 6:37 AM

Progress Notes by Annie Joy Domingo, R.N. at 7/28/2017 9:56 PM

Author: Annie Joy Domingo, R.N.
Filed: 7/28/2017 9:57 PM
Editor: Annie Joy Domingo, R.N. (Registered Nurse)
Service: (none)
Date of Service: 7/28/2017 9:56 PM
Author Type: Registered Nurse
Status: Signed

Cortrak Placement

Tube Team verified patient name and medical record number prior to tube placement. Cortrak tube (43 inches, 12 French) placed at 95 cm in right nare. Per Cortrak picture, tube appears to be in the small bowel. Nursing Instructions: Awaiting KUB to confirm placement before use for medications or feeding. Once placement confirmed, flush tube with 30 ml of water, and then remove and save stylet, in patient medication drawer.

Progress Notes (continued)

Progress Notes by Nicholas J Spoerke, M.D. at 7/31/2017 1:28 PM (continued)

Nursing note and vitals reviewed.

Medical Decision Making/Problem List:

Active Hospital Problems

Diagnosis

- Cardiac arrest (CMS-HCC) [I46.9]
  Priority: High
  PEA arrest during CT head 7/31 - CPR and epinephrine with ROSC
  2nd PEA arrest upon return to ICU - again ROSC after CPR and epinephrine
  Max epinephrine and levophed infusions
  Echo unrevealing, troponins negative; cardiology without answer

- Fever [R50.9]
  Priority: High
  7/13 - Bronchoscopy with BAL and blood cultures for purulent secretions, fever and leukocytosis. Empiric vancomycin and cefepime initiated.
  7/14 - Antibiotic changed to cefuroxime and vancomycin. New right subclavian central line
  7/16 - Bronchoalveolar lavage cultures remarkable for methicillin sensitive Staphylococcus aureus and Streptococcus agalactiae. Blood cultures positive for Streptococcus agalactiae. Antibiotic therapy de-escalated to cefuroxime monotherapy.
  7/22 - Antibiotic day 10 of 10
  Re-culture and empiric antibiotics as clinically warranted

- Respiratory failure after trauma (CMS-HCC) [J95.821]
  Priority: High
  Intubated in the field.
  Continue full mechanical ventilatory support.
  Perc trach 7/13
  Ventilator bundle and Trauma weaning protocol.

- Cerebral contusion (CMS-HCC) [S06.339A]
  Priority: High
  Admission CT imaging demonstrated bilateral frontal, interhemispheric and left parieto-occipital small subdural hematomas. Bilateral frontal and right temporal hemorrhagic contusions. Diffuse subarachnoid hemorrhage.
  Serial interval imaging demonstrated blossoming of multifocal hemorrhagic contusions. Mass effect without midline shift.
  Prophylactic Keppra for 1 week.

Progress Notes (continued)

Progress Notes by Nicholas J Spoerke, M.D. at 7/31/2017 1:28 PM (continued)

Bilateral EVD/ICP for increasing mass effect and intraventricular blood
7/16 - increasing ICP - initiate HSS / paralytics
7/17 - CT stable
7/19 - No 23% NaCl needed for high ICPs in 48 hr
7/21-ICPs spiking intermittently-pentobarbital coma initiated.
7/24 - CT reviewed during family meeting, Stop Pentobarb, transition back to propofol and allow to wake up
Worsening mental status 7/30 - PEA arrest in CT scanner
Progressed to brain death 7/31
Chad Cole, MD. Neurosurgery

- Inadequate anticoagulation [Z51.81, Z79.01]
  Priority: Medium
  Systemic anticoagulation contraindicated secondary to elevated bleeding risk.
  Lovenox when cleared by neurosurgery, last commend 7/28 still no prophylaxis allowed
  7/9, 7/16, 7/23, 7/30 - Trauma screening bilateral lower extremity venous duplex negative for above knee DVT.

- Knee swelling [M25.469]
  Priority: Low
  Left knee edema
  7/9 Imaging negative

- Assault [Y09]
  Priority: Low
  Assault, GCS 5.

Core Measures & Quality Metrics:
Labs reviewed, Medications reviewed and Radiology images reviewed
Foley catheter: Critically Ill - Requiring Accurate Measurement of Urinary Output
Central line in place: Need for access

DVT Prophylaxis: Enoxaparin (Lovenox)
DVT prophylaxis - mechanical: SCDs
Ulcer prophylaxis: Yes

Plan:
Apnea test completed - starting CO2 40, ending CO2 70. No breaths initiated. O2 sats remained in 90s.
Time of death: 12:42 pm

EXHIBIT 5

Progress Notes (continued)

Progress Notes by Joseph R Uccelli, M.D. at 7/25/2017 3:57 PM (continued)

Constitutional: He appears well-developed and well-nourished.
HENT:
Monitors in place
Nasoenteric tube in place
ICP monitor in place
Eyes: No scleral icterus.
Neck: No JVD present. No tracheal deviation present.
Trach in place, site clean
Cardiovascular: Normal rate, regular rhythm and intact distal pulses. Exam reveals no gallop and no friction rub.
No murmur heard.
Pulmonary/Chest: Effort normal. He has decreased breath sounds in the right lower field and the left lower field. He has no wheezes. He has no rales.
CXR with stable bilateral peri-hilar congestion
Abdominal: Soft. He exhibits no distension.
Genitourinary:
Foley in place draining clear yellow urine.
Musculoskeletal: He exhibits edema.
Neurological: He is unresponsive. GCS eye subscore is 1. GCS verbal subscore is 1. GCS motor subscore is 1.
Appears to be shivering
Skin: Skin is warm and dry. No rash noted. No erythema. No pallor.
Psychiatric:
Unable to assess

Medical Decision Making/Problem List:

Active Hospital Problems

Diagnosis

- Fever [R50.9]
  Priority: High
  7/13 - Bronchoscopy with BAL and blood cultures for purulent secretions, fever and leukocytosis. Empiric vancomycin and cefepime initiated.
  7/14 - Antibiotic changed to cefuroxime and vancomycin. New right subclavian central line
  7/16 - Bronchoalveolar lavage cultures remarkable for methicillin sensitive Staphylococcus aureus and Streptococcus agalactiae. Blood cultures positive for Streptococcus agalactiae. Antibiotic therapy de-escalated to cefuroxime monotherapy.
  7/22 - Antibiotic day 10 of 10, duration extended due to lack of clinical response.

- Respiratory failure after trauma (CMS-HCC) [J95.821]
  Priority: High
  Intubated in the field.
  Continue full mechanical ventilatory support.
  Ventilator bundle and Trauma weaning protocol.
  Not candidate for vent weaning at this time

Progress Notes (continued)

Progress Notes by Joseph R Uccelli, M.D. at 7/25/2017 3:57 PM (continued)

- Cerebral contusion (CMS-HCC) [S06.339A]
  Priority: High
  Admission CT imaging demonstrated bilateral frontal, interhemispheric and left parieto-occipital small subdural hematomas. Bilateral frontal and right temporal hemorrhagic contusions. Diffuse subarachnoid hemorrhage.
  Serial interval imaging demonstrated blossoming of multifocal hemorrhagic contusions. Mass effect without midline shift.
  Prophylactic Keppra for 1 week.
  Bilateral EVD/ICP for increasing mass effect and intraventricular blood
  7/16 - increasing ICP - initiate HSS / paralytics
  7/17 - CT stable
  7/19 - No 23% NaCl needed for high ICPs in 48 hr
  7/21-ICPs spiking intermittently-pentobarbital coma initiated.
  7/24 - CT reviewed during family meeting, Stop Pentobarb, transition back to propofol and allow to wake up
  Chad Cole, MD. Neurosurgery

- Inadequate anticoagulation [Z51.81, Z79.01]
  Priority: Medium
  Systemic anticoagulation contraindicated secondary to elevated bleeding risk.
  Lovenox when cleared by neurosurgery.
  7/9 - Trauma screening bilateral lower extremity venous duplex negative for above knee DVT.
  7/16 - Trauma screening bilateral lower extremity venous duplex negative for above knee DVT.
  7/23 - Trauma screening bilateral lower extremity venous duplex negative for above knee DVT.

- Alcohol intoxication [F10.129]
  Priority: Low
  Admission blood alcohol level of 0.45.
  Trauma alcohol withdrawal protocol initiated.
  Alcohol withdrawal surveillance.

- Platelet dysfunction (CMS-HCC) [D69.1]
  Priority: Low
  Relative thrombocytopenia and persistent AA platelet inhibition on serial TEG assays in the setting of closed head injury with extensive areas of intracranial hemorrhage.
  7/9 Transfused 1 platelet pheresis pack.

Progress Notes (continued)

Progress Notes by Joseph R Uccelli, M.D. at 7/25/2017 3:57 PM (continued)

7/11 Transfused 1 platelet pheresis pack.
7/14 Platelet transfusion

- Hypokalemia [E87.6]
  Priority: Low
  Replace and trend.
  Empiric magnesium replacement.

- Knee swelling [M25.469]
  Priority: Low
  Left knee edema
  7/9 Imaging negative

- Assault [Y09]
  Priority: Low
  Assault, GCS 5.

Core Measures & Quality Metrics:
Labs reviewed, Radiology images reviewed and Medications reviewed
Foley catheter: Critically Ill - Requiring Accurate Measurement of Urinary Output

DVT Prophylaxis: Contraindicated - High bleeding risk
DVT prophylaxis - mechanical: SCDs
Ulcer prophylaxis: Yes
Antibiotics: Treating active infection/contamination beyond 24 hours perioperative coverage

RAPP Score

I personally discussed the patient condition and daily plan with available nursing staff, dieticians, social workers, pharmacists on rounds.

I provided the following critical care services: Ventilator management.

Critical care time spent exclusive of procedures :45 minutes

Joe R. Uccelli MD

DATE OF SERVICE: 7/25/2017

Electronically Signed by Joseph R Uccelli, M.D. on 7/25/2017 4:00 PM

Progress Notes by Alison J Bohlander, R.N. at 7/25/2017 1:40 PM

Author: Alison J Bohlander, R.N. | Service: (none) | Author Type: Registered Nurse
Filed: 7/25/2017 1:41 PM | Date of Service: 7/25/2017 1:40 PM | Status: Signed
Editor: Alison J Bohlander, R.N. (Registered Nurse)

Tech from Lab called with critical result of Na at 156. Critical lab result read back to Margo.
This critical lab result is within parameters established by Dr. Uccelli for this patient.

EXHIBIT 6

Progress Notes (continued)

Progress Notes by Michael H Song, M.D. at 7/31/2017 7:41 AM (continued)

Plan withdrawal of care most likely after Sue and Allison have a chance to spend some time with him.

Electronically Signed by Michael H Song, M.D. on 7/31/2017 7:44 AM

Progress Notes by Nicholas J Spoerke, M.D. at 7/30/2017 8:21 PM

Author: Nicholas J Spoerke, M.D. | Service: Surgery General | Author Type: Physician
Filed: 7/30/2017 8:29 PM | Date of Service: 7/30/2017 8:21 PM | Status: Signed
Editor: Nicholas J Spoerke, M.D. (Physician)

Trauma / Critical Care

Unfortunately eventful afternoon. PEA arrest while in CT scan - ROSC with CPR and epinephrine. 2nd episode of PEA arrest upon return to ICU - again ROSC with epinephrine and CPR. Profound hypotension subsequently requiring max dose epinephrine and norepinephrine. Troponins negative, CXR unrevealing, exact cause unknown.
Cardiology consulted, STAT echo unrevealing without evidence of right heart strain to suggest pulmonary embolus.
Spoke with Dr. Song of neurosurgery, who has a longer relationship with the family. Family decided on DNR status, considering withdrawal of care.
I contacted Donor Services, who indicate the patient is a registered donor. Patient continues to require max dose epinephrine and norepinephrine without any meaningful neurologic function (though CT head from earlier was largely unchanged).
Will proceed with pressors and fluid resuscitation, serial labs but patient is now DNR status. He may be a DCD candidate as clinical condition worsens.

Nicholas Spoerke, MD
775-323-7500

Electronically Signed by Nicholas J Spoerke, M.D. on 7/30/2017 8:29 PM

Progress Notes by Jonathan King, R.N. at 7/30/2017 2:15 PM

Author: Jonathan King, R.N. | Service: (none) | Author Type: Registered Nurse
Filed: 7/30/2017 6:51 PM | Date of Service: 7/30/2017 2:15 PM | Status: Signed
Editor: Jonathan King, R.N. (Registered Nurse)

Upon arrival to CT scanner, patient was noted to have an irregular wide complex rhythm via transport monitor; pulse check was performed, no pulse was present, CPR was initiated and code blue was activated.

Electronically Signed by Jonathan King, R.N. on 7/30/2017 6:51 PM

Progress Notes by Jessica D Moiseyev, R.N. at 7/30/2017 4:10 PM

Author: Jessica D Moiseyev, R.N. | Service: (none) | Author Type: Registered Nurse
Filed: 7/30/2017 4:10 PM | Date of Service: 7/30/2017 4:10 PM | Status: Signed
Editor: Jessica D Moiseyev, R.N. (Registered Nurse)

Called and updated Donor Network west regarding patients status, awaiting donor team to call back.

Electronically Signed by Jessica D Moiseyev, R.N. on 7/30/2017 4:10 PM

Progress Notes by Nicholas J Spoerke, M.D. at 7/30/2017 12:57 PM

Author: Nicholas J Spoerke, M.D. | Service: Surgery General | Author Type: Physician
Filed: 7/30/2017 1:00 PM | Date of Service: 7/30/2017 12:57 PM | Status: Signed
Editor: Nicholas J Spoerke, M.D. (Physician)

EXHIBIT 7

CARSON TAHOE REGIONAL HEALTHCARE P.O. Box 2168, Carson City, NV 89702-2168

MR#: 020230241 **ACCT#:** 1434700176
NAME: COOK, BRIAN

Clinician: MILLER, DAVID

DATE OF ADMISSION:
12/13/14

DATE OF DISCHARGE:
12/18/14

TIME SEEN:
10:10 a.m.

CONSULTATIONS:
Cardiology service.

PROCEDURES:
Nuclear medicine stress test.

DISCHARGE DIAGNOSES:
PRINCIPAL DIAGNOSIS: Cardiomyopathy, likely alcohol induced.

SECONDARY DIAGNOSES:
1. Paroxysmal supraventricular tachycardia.
2. Ventricular tachycardia versus aberrant paroxysmal supraventricular tachycardia-- resolved.
3. History of chronic alcohol abuse.
4. Upper respiratory infection/viral syndrome.
5. Hypertension.
6. Anxiety.
7. Alcohol-induced thrombocytopenia.

PRESENTING HISTORY AND PHYSICAL:
This patient is a 38-year-old male with hypertension. He has heavy alcohol abuse. He has had a chest cold for a couple of weeks with cough that is nonproductive. He presented with lightheadedness, dizziness and palpitations. He went to Minden Medical Facility for these complaints, was found to have supraventricular tachycardia with heart rates greater than 200. He was treated ____ with improvement. There was also question of episode of paroxysmal atrial fibrillation that resolved spontaneously. He was referred here and admitted for further evaluation and treatment. For full details of his past medical history, please refer to the history and physical as dictated by the hospitalist on the date of admission.

PERTINENT PHYSICAL EXAMINATION FINDINGS:
VITAL SIGNS: On admission, he had a temperature of 99.8, his blood pressure is 144/88, his heart rate was 92, he is saturating at 93% on nasal cannula.
HEENT: He had some nasal congestion.
CHEST: Showed some rhonchi, but was otherwise clear.
CARDIOVASCULAR: Regular, tachycardia, in the 100s on admit.
ABDOMEN: Supple, nontender.
NEUROLOGIC: Intact.

DIAGNOSTIC STUDIES:
Chest x-ray showed no acute findings. His urinalysis was negative. His CBC was normal except for platelet count of 87,000. His chemistries showed normal BUN and creatinine. His electrolytes were normal, but his magnesium was 1.4.

Clinician: MILLER, DAVID

HOSPITAL COURSE AND THERAPY:
The patient was admitted to telemetry. On telemetry, he had nonsustained runs of supraventricular tachycardia. He also had nonsustained runs of a wide complex tachycardia. His magnesium was repleted. Subsequent followup labs, he had a mildly depressed potassium, but this was also repleted. He had an echocardiogram done which showed an EF of 35%. Cardiology was consulted. He underwent a nuclear medicine stress test, which showed no evidence of ischemia, but confirmed the decreased ejection fraction of 35%. It was cardiology's feeling that this was likely an alcohol-induced cardiomyopathy, certainly cannot rule out a viral cardiomyopathy, but it will be much more common to have an alcohol-induced cardiomyopathy. He was started on treatment with beta-blockers. Continue his ACE inhibitors. He was started on aspirin and spironolactone. With this treatment, he had no further episodes of the wide complex tachycardia and his episodes of nonsustained PSVT markedly decreased. He was having perhaps 1 per day, ten seconds of asymptomatic paroxysmal supraventricular tachycardia.

For treatment of his URI viral syndrome, he had influenza swabs, which were negative, but he did undergo a 5-day course empirically treated with oseltamivir. He was also started on doxycycline at his request and on antitussives.

The patient is presently feeling much better. He still has some URI symptoms, but he is not having any weakness, dizziness. No palpitations, no chest pain. He is adamant that he wants to go home. Cardiology feels that he is stable for discharge.

His discharge condition then is stable and improved. He was strongly cautioned that he absolutely must discontinue his alcohol usage or that he will have a progressive cardiomyopathy leading to his death. He understands this and will work on such.

His discharge condition is stable and improved. His diet will be as tolerated. His activity will be as tolerated. His followup is going to be with cardiology within the week. We will also arrange for PCP within the week. He did have repeat chemistries the day of discharge with potassium of 1.1 and magnesium of 2.2. His electrolytes were also normal.

DISCHARGE MEDICATIONS:
1. Acetaminophen 650 mg every 4 hours as needed for mild pain or fever.
2. Acetaminophen/hydrocodone 325 mg/5 mg 1 every 6 hours as needed for moderate pain.
3. Aspirin 81 mg a day.
4. Tessalon Perles 200 mg t.i.d. p.r.n. cough.
5. Carvedilol 6.25 mg twice a day.
6. Codeine and guaifenesin 10 mL every 4 hours as needed for cough 8 ounces.
7. Doxycycline 100 mg twice a day for an additional week.
8. Folic acid 1 mg a day (over the counter).
9. Lisinopril 5 mg a day.
10. Lorazepam 1 mg a day as needed. He has this at home.
11. Magnesium oxide 800 mg twice a day.
12. Spironolactone 200 mg a day.
13. Multivitamin 1 per day.
14. Thiamine 100 mg a day.

MR#: 020230241 **ACCT#:** 1434700176
NAME: COOK, BRIAN

Clinician: MILLER, DAVID

He should have BMP and magnesium with his follow up with Cardiology. Total care time spent on this discharge is 45 minutes.

CPT code is 99239.

DMM:hn
DD: 12/18/2014 10:21:43
DT: 12/18/2014 22:53:36

cc:

Signed: David M Miller, MD
12/25/2014 14:41:00

MR#: 020230241 **ACCT#:** 1434700176
NAME: COOK, BRIAN

Clinician: DAPRA, GINA

TIME SEEN:
1500 hours.

CHIEF COMPLAINT:
Palpitations, cough and shortness of breath.

HISTORY OF PRESENT ILLNESS:
The patient is a 38-year-old Caucasian male with history of alcohol abuse, fatty liver and intermittent palpitations with no confirmed diagnosis of arrhythmia who presents to the ER today from the Minden Urgent Care after he was seen there earlier in the afternoon for complaint of shortness of breath and palpitations. Per the transfer report, the patient was reportedly in SVT with a rate of 200. He was given adenosine and converted to atrial fibrillation with RVR. EKG that was sent with the patient shows a sinus tachycardia with PACs and PVCs and possible paroxysmal atrial tachycardia, but no obvious atrial fibrillation. Currently, the patient states that he just feels short of breath and has a cough. He reports that over the last year or so he has had intermittent episodes of palpitations. He has never seen a doctor or cardiologist for his palpitations. He states they usually come and go, and they have not caused him much concern until the last couple of weeks, and they seem to be coming more frequently. Over the last 2 weeks, he has had a cough. The cough is predominantly dry, but occasionally he will bring up some clear phlegm. No hemoptysis. He does not have any chest pain. The patient is febrile here today in the Emergency Department at 101.6. He states that he knew he did not feel well, but did note that he had a fever. He has a little bit of a sore throat. He states that he coughed so hard that sometimes he gets nauseated and gags. No vomiting or diarrhea. No dizziness or lightheadedness. No headache. No stiff neck. The patient admits to drinking alcohol. His last drink was today. He states he is "trying to cut down" and drinks about 2-3 beers per day at this time. He chews tobacco, but does not smoke any cigarettes. Here in the Emergency Department, the patient is not complaining of any palpitations at this time. His main complaint at this time is shortness of breath. He has not had any pain or swelling in his legs. No recent surgeries. No recent long plane rides or car trips. No exposure to ill contacts.

PAST SURGICAL HISTORY:
The patient has had a lumbar fusion and a knee surgery. He has also had a right hand surgery.

FAMILY HISTORY:
Noncontributory.

SOCIAL HISTORY:
The patient chews tobacco. He drinks alcohol every day and reports that he drinks 2-3 beers a day. Drugs, no illicit drugs.

MEDICATIONS:
The patient is on lisinopril.

PAST MEDICAL HISTORY:
Hypertension and anxiety. He also states he has a "fatty liver."

ALLERGIES:

Clinician: DAPRA, GINA

No known drug allergies.

REVIEW OF SYSTEMS:
As follows: All review of systems are negative except for as stated above in the HPI.

PHYSICAL EXAMINATION:
GENERAL: The patient is a well-developed, well-nourished male who appears slightly anxious and is in mild distress secondary to coughing.
VITAL SIGNS: Blood pressure 161/103, heart rate of 112, respirations of 24, temperature of 101.6, oxygen saturation 97% on 3 L.
SKIN: Hot and dry. No diaphoresis. No rash. No petechiae.
HEENT: Head is atraumatic and normocephalic. Pupils equal, round and reactive to light. Extraocular movements are intact. Conjunctivae are clear. Oral mucosa is slightly dry. There is mild erythema and posterior oropharynx. No exudate. Tympanic membranes have some streaky erythema bilaterally.
NECK: There is bilateral anterior cervical lymphadenopathy. Neck is supple without nuchal rigidity.
CHEST: Clear to auscultation bilaterally. I do not hear any wheezes, rales or rhonchi.
HEART: Tachycardic, but regular. There is no ectopy on the monitor.
ABDOMEN: Soft and nontender. Bowel sounds are present.
BACK: There is no tenderness to the back. No CVA tenderness.
EXTREMITIES: Calves are nontender. No pretibial edema. 2+ DP and PT pulses equal bilaterally.
PSYCHIATRIC: The patient is cooperative. He is slightly tremulous and anxious.
NEUROLOGIC: The patient is alert. His speech is clear. He is moving all extremities normally.

DIAGNOSTIC STUDIES:
As follows: Urinalysis reveals 1+ ketone, but otherwise is negative. White blood cell count is normal. Platelets are low at 87,000. There is no left shift. INR is slightly high at 1.1. Troponin is undetectable at less than 0.01. Sodium is low at 135. Potassium is low at 3.3. Anion gap is slightly high at 14. ALT and AST are slightly high at 84 and 161 respectively. Total bilirubin is high at 2.2. Magnesium is low at 1.4. Lipase is normal at 34. The patient is flu negative. Chest x-ray was read as negative by the radiologist.

EKG reveals a sinus tachycardia with a rate of 104. No atrial fibrillations. There is no ST elevation or depression. There is no ectopy on the EKG. Normal axis. Normal intervals.

MEDICAL DECISION MAKING:
This is a 38-year-old male who presents with complaints of shortness of breath, palpitations and cough. The patient is febrile here in the Emergency Department to 101.6. He is flu negative. Chest x-ray is negative for infiltrates. He has a rhonchorous cough and feels short of air. He is not hypoxic. I will treat him for a possible pneumonia, which is just not declaring itself on x-ray here today. With respect to his palpitations, this is something that has been going on for the last year or so. He has never seen a physician for this complaint. Over the last couple of weeks, palpitations have become more frequent. When he presented to the Minden

MR#: 020230241 **ACCT#:** 1434700176
NAME: COOK, BRIAN

Clinician: DAPRA, GINA

Urgent Care for his cough and shortness of breath and palpitations, he was found to be in a reported SVT. The patient states his heart rate was in the 200s. Unfortunately, Minden Urgent Care did not send any physician notes, telemetry strips or EKG showing this heart rate of 200 and SVT. Reportedly; however, the patient was given adenosine and converted into an atrial fibrillation with RVR. The EKG that was sent reveals a sinus tachycardia with PACs, PVCs and possibly a PAT type of rhythm, but I do not see any atrial fibrillation on his EKG.

He does have electrolyte abnormalities including low magnesium and low potassium. The patient is an alcoholic. Clearly, he has risk factors for cardiac irritability with his alcohol abuse and his electrolyte abnormalities. Unfortunately, I do not have any telemetry strips or EKGs revealing abnormal heart rhythm in the 200s at the Minden Urgent Care. For all I know, this could have been a V-tach versus SVT, and for that reason, I think the patient warrants admission to the hospital overnight telemetry monitoring. He will need magnesium and potassium supplementation. With respect to his alcohol abuse, he will probably be withdrawing soon. He is going to need Ativan for his alcohol withdrawals. The patient overall has been hemodynamically stable here in the ER throughout the time I have been caring for him.

I have discussed the case with the nurse practitioner who will be seeing the patient here in the hospital. She will admit him to her service for telemetry monitoring, treatment of his fever and cough (presumed pneumonia) and alcohol withdrawal.

IMPRESSION:
1. Dyspnea.
2. Bronchitis versus pneumonia.
3. Palpitations with reported history of supraventricular tachycardia and possible atrial fibrillation.
4. Sinus tachycardia here in the ER.
5. Hypomagnesemia.
6. Hypokalemia.
7. Alcohol withdrawal.

DISPOSITION:
Will be to the telemetry floor.

GRD:in
DD: 12/13/2014 18:36:41
DT: 12/13/2014 22:37:53

cc:

Signed: Gina R. Dapra, MD
12/14/2014 02:08:00

MR#: 020230241 **ACCT#:** 1523000607
NAME: COOK, BRIAN

Clinician: MAYER, MAURICE

TIME SEEN:
1604 hours.

HISTORY:
Taken per patient and old records.

MODE OF ARRIVAL:
POV.

IDENTIFICATION:
A 39-year-old male.

CHIEF COMPLAINT:
Dehydrated, decreased urine output.

HISTORY OF PRESENT ILLNESS:
The patient states he is daily alcohol drinking. He states for the last 2 days, he has had decreased urine output according to him for the last 2 days. States he only had dribbles of urine output with some nausea and vomiting, although he did not threw up today. He since yesterday, threw up 1-2 times. He has had some prior diarrhea, resolved. No blood or black appearance in it. Denies abdominal pain. __

REVIEW OF SYSTEMS:
CONSTITUTIONAL: No fever or ill contacts.
HEENT: No sore throat, ear pain, nasal discharge or sinus pain.
CARDIOVASCULAR: No pain, pressure or palpitations.
RESPIRATORY: No shortness of breath, no cough.
GASTROINTESTINAL: Nausea and vomiting, prior diarrhea. No pain. No blood in the vomit. No bloody stool or black tarry stool.
NEUROLOGIC: Generalized malaise without headache, focal weakness or numbness, loss of coordination.
MUSCULOSKELETAL: No new joint or muscle pains.
DERMATOLOGIC: No rashes.
UROGENITAL: See HPI.
All other systems are reviewed and are negative.

PAST MEDICAL HISTORY:
Arrhythmias, alcohol abuse, anxiety, chronic renal disease, and bronchitis.

PAST SURGICAL HISTORY:
Right knee, right hand, and lower back surgery.

ALLERGIES:
None.

MEDICATIONS:
List is reviewed. Spironolactone, lisinopril, and Coreg.

SOCIAL HISTORY:
Nonsmoker, daily drinker as above. The patient, per chart is widowed.

PRIVATE MDS:
Carson Medical Group.

PHYSICAL EXAMINATION:
VITAL SIGNS: Temperature 98.1, blood pressure 131/93, pulse rate 113, respiratory rate 16, and O2 sats on room air 94%.
GENERAL APPEARANCE: Mild distress due to above symptoms, medium build male.
HEENT: NCAT. EOMI, PERRL. Not pale or jaundiced. Nose, no purulent discharge.
OROPHARYNX: No redness, swelling, exudate, viral change or thrush. Uvula midline, posterior oropharynx clear. Speech is full and clear. No drooling or trismus.
NECK: Supple; no LAD, goiter or JVD.
CARDIOVASCULAR: Tachycardic, but regular. There is no murmur, friction rub, or gallop.
LUNGS: Clear to auscultation bilaterally. Speaking in full sentences.
ABDOMEN: Positive bowel sounds, soft, nontender x4 quadrants.
BACK: Nontender, no palpable defect.
EXTREMITIES: Nontender, normal passive range of motion x4.
NEUROLOGIC: Alert and oriented x3. Speech clear and coherent, no facial droop. Light touch intact in face and forehead. Motor strength is 5/5 x4. Light touch intact x4 and fine motor skills intact.
SKIN: No rashes, diaphoresis, petechiae or purpura.
HYDRATION: Positive saliva. Capillary refill <2 seconds.
VASCULAR: No pitting edema.

DIAGNOSTIC STUDIES:
White count 4.9, H&H of 19 and 55, MCV 99.8, segs 56%, lymphocytes 28%, glucose 132, BUN of 3, and creatinine 0.96. Sodium 136, potassium 2.9, chloride 98, CO2 of 24, anion gap of 14, ALT 112, AST 244, total bilirubin 1.8, lipase 27. Alcohol level 0.259. INR 1.2. Urinalysis: Specific gravity 1.018, pH is 6.5, 1+ bilirubin, trace ketones, trace leukocyte, nitrite negative, whites 3-5, reds 3-5, negative bacteria, squamous negative. Bladder scan, volume 114 mL.

OLD RECORDS:
On December 2014, admission for arrhythmia.

EMERGENCY ROOM COURSE:
Vital signs per protocol. Cardiac monitor shows sinus tachycardia, improved with therapy, no arrhythmia, pulse oximetry, peripheral IV, banana bag per protocol, normal saline 250 mL an hour, potassium 40 mEq orally, potassium 20 mEq IV run over 2 hours, diazepam 2.5 mg IV. The patient has improved with the above therapy. At the time of dictation, he is awaiting BHS consultation.

CONSULTATION:
BHS pending.

MEDICAL DECISION MAKING:
The patient's presentation is consistent with alcohol abuse/intoxication. There may be some volume depletion due to his alcohol abuse. There is no evidence of acute renal failure. There is no evidence of urinary retention. The patient's potassium is slightly low, most likely related to his p.o. intake and alcohol abuse.

IMPRESSION:
1. Acute alcohol abuse.

Clinician: MAYER, MAURICE

2. Hypokalemia.
3. Elevated liver test, most likely related to alcohol abuse.

PLAN:
Further treatment and care as per the pending BHS consultation.

MAM:in
DD: 08/18/2015 18:57:25
DT: 08/19/2015 02:19:25

cc:

Signed: Maurice A Mayer, MD
08/20/2015 01:25:00

MR#: 020230241 **ACCT#:** 1609700757
NAME: COOK, BRIAN

Clinician: KENNEY, GREGORY

CHIEF COMPLAINT:
Nausea and shortness of breath.

HISTORY OF PRESENT ILLNESS:
The patient is a 40-year-old male with long history of alcohol and substance abuse disorder who comes in with nausea and vomiting. He says that he is trying to get into an outpatient rehabilitation center, but this is quite difficult in our area. He says that he has nausea and decreased fluid intake. His urine output is very scant. There is no abdominal pain, no fever.

PAST MEDICAL HISTORY:
1. Alcohol and substance abuse:
2. Anxiety.
3. Hypertension.
4. History of renal insufficiency due to prerenal azotemia this. This resolved with inpatient IV and fluid resuscitation.
5. Fatty liver.

CURRENT MEDICATIONS:
Lisinopril and spironolactone.

ALLERGIES:
None known.

SOCIAL HISTORY:
He says that he is drinking nearly fifth of whiskey per day. He says that he has only had 2 shots today. He also smokes marijuana.

REVIEW OF SYSTEMS:
CONSTITUTIONAL: No fever, chills, night sweats or weight loss.
PSYCHIATRIC: History of substance abuse disorder. No hallucination or delusion. No suicidal ideation.
CARDIOVASCULAR: No chest pain, no orthopnea, no peripheral edema.
RESPIRATORY: No cough, shortness of breath or sputum production.
GASTROINTESTINAL: Nausea, but no localized pain, vomiting, but no hematemesis.
GENITOURINARY: Decreased urine output, but no dysuria, frequency or urgency.
All of the systems are negative.

PHYSICAL EXAMINATION:
VITAL SIGNS: Temperature 98.8, heart rate 133, respirations 18, blood pressure 158/101, oxygen saturation 93% on room air.
GENERAL: Well-nourished, but anxious male in no respiratory distress.
HEENT: Tympanic membranes white bilaterally. Mouth moist and pink. No erythema, exudate or tonsillar enlargement.
NECK: Supple, no adenopathy.
LUNGS: Full and equal expansion. No rales, rhonchi or wheeze.
ABDOMEN: Flat, soft, nontender. There is no distention, no fluid wave.
SKIN: Warm and dry. No rash.

DIAGNOSTIC STUDIES:
All of his lab is surprisingly normal. White blood cell count is mildly elevated, but with a normal differential. White blood cell count 17,000, hemoglobin 19.2. Alcohol less than 0.01. Lipase 31. Sodium 133, chloride

Clinician: KENNEY, GREGORY

98, anion gap 13, glucose 119, BUN 7, creatinine 0.8. Liver function tests are mildly elevated with an ALT of 144 and AST of 156.

URGENT CARE COURSE:
He was admitted and evaluated. A saline lock was started and lab was drawn. He was treated with 2 liters of normal saline. Nausea was treated with Zofran 8 mg IV. His alcohol level is 0, so anxiety and hypertension was treated with metoprolol. After these interventions, he is feeling much better. There is no evidence for acute renal insufficiency. He says that he is feeling better, so I will respect his decision to be discharged home. Given the fact that his alcohol level is 0 and there is no other significant metabolic disorder, I do not think that he meets criteria for hospital admission. He has several lab abnormalities that could be attributed to hemoconcentration. These should improve with oral fluids.

FINAL DIAGNOSES:
1. Substance abuse disorder, alcohol.
2. Nausea, acute.
3. Vomiting, acute.

PLAN:
He is discharged home in stable condition. He would like assistance with alcohol cessation. I wrote prescriptions for promethazine 25 mg #30, metoprolol 50 mg #30 and diazepam 10 mg #30. He will continue to work on outpatient treatment. The medications should give him some symptom relief for over the next week. After that it will come down to motivation and external support.

GK:hn
DD: 04/07/2016 21:18:31
DT: 04/08/2016 09:47:08

cc:

Signed: Gregory J Kenney, MD
04/29/2016 17:18:00

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PENCE & ASSOCIATES and that on this date, I hand-delivered a true and correct copy of the Sentencing Memorandum and Documentation in Support to the following address:

Erik Levin, Chief Criminal Deputy District Attorney
District Attorney's Office
1038 Buckeye Road
Minden, NV 89423
(Emailed)

Dated this 30th day of June, 2021,

MARIA PENCE, ESQ.

IN THE SUPREME COURT FOR THE STATE OF NEVADA

ADAM ANTHONY BERNARD,
Appellant,
vs.
STATE OF NEVADA,
Respondent.

No. 83323

JOINT APPENDIX

Volume III

MARIA PENCE
Attorney for Appellant
Bar ID No. 9890
1662 U.S. Highway 395, Suite 203
Minden, NV 89423
(775) 392-4084

Docket 83323 Document 2022-10251

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District Court Clerk

CASE NO. 18-CR-00104

DEPT. NO. 2

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

BEFORE THE HONORABLE DISTRICT COURT JUDGE, THOMAS GREGORY

THE STATE OF NEVADA,

Plaintiff,

vs.

ADAM BERNARD,

Defendant.
_____/

TRANSCRIPT OF PROCEEDINGS

SENTENCING

THURSDAY, JULY 1, 2021

APPEARANCES:

For the State: ERIK LEVIN
Deputy District Attorney
Minden, Nevada

For the Defendant: MARIA PENCE
Attorney at Law
Minden, Nevada

Reported By: Kathy Jackson CSR
Nevada CCR #402
California CCR #10465

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THURSDAY, JULY 1, 2021, MINDEN, NEVADA

-oOo-

THE COURT: Court is in session on Case Number 18CR104, State of Nevada versus Adam Anthony Bernard. Show the appearance of Erik Levin, chief deputy district attorney for Douglas County.

Good afternoon, Mr. Levin.

MR. LEVIN: Good afternoon.

THE COURT: Maria Pence and Brian Filter are appearing on behalf of the defendant. Good afternoon, Ms. Pence and Mr. Filter.

MS. PENCE: Good afternoon.

MR. FILTER: Good afternoon, Your Honor.

THE COURT: Also appearing is the defendant, Mr. Bernard, who is appearing before the Court out of lawful custody. Good afternoon, Mr. Bernard.

THE DEFENDANT: Good afternoon, sir.

THE COURT: We are here today for a sentencing hearing. The Court is in receipt of a presentence investigation report dated June 14th, 2021.

Mr. Levin, have you received a copy?

MR. LEVIN: Yes.

THE COURT: Any factual corrections to offer?

MR. LEVIN: Yes. I think we have an agreement on

a number of them.

MS. PENCE: That's correct, Your Honor.

THE COURT: Go ahead.

MR. LEVIN: The first one that I have is on page one as well as page six which I won't -- it talks about a plea of guilty, and my belief that that should either say guilty pursuant to Alford or no contest.

THE COURT: Ms. Pence?

MS. PENCE: And, Your Honor, because of the nature of the PSI and it's purposes I would ask that it read no contest. I'm not sure that people who rely on these would understand what a plea pursuant to Alford meant.

THE COURT: The guilty plea agreement that was entered in this case indicates the plea was entered pursuant to Alford and the Court agrees though with Ms. Pence's statements that not everybody fully appreciates that. I think it might be best here to indicate in parenthesis next to the guilty plea that it was pursuant to Alford slash no contest. That I think covers everything.

Mr. Levin, do you have any issue with that?

MR. LEVIN: No. The Supreme Court has treated them as one in the same so either is -- either or both is fine with me.

THE COURT: All right. Ms. Pence?

MS. PENCE: And, Your Honor, it would just be my request that it read guilty pursuant to Alford slash no contest and not with a parenthesis.

THE COURT: I'm fine with that.

Mr. Levin, is that okay with you?

MR. LEVIN: Yes.

THE COURT: Give me a moment to take those notes. Okay. At page one where it indicates plea date and next to that the word guilty I have added the words pursuant to Alford slash no contest, and I placed my initials next to that addition.

Go ahead, Mr. Levin.

MR. LEVIN: Next one --

MS. PENCE: Your Honor, I apologize. I believe it's also the same correction on page six.

MR. LEVIN: Yes.

MS. PENCE: Under the plea negotiations, paragraph in the first line.

THE COURT: Mr. Levin, do you agree?

MR. LEVIN: I do.

THE COURT: Okay.

MR. LEVIN: While you're on page six I'll go to the next one.

THE COURT: All right. So at page six under plea

negotiations, first line, after the word guilty I have inserted the words pursuant to Alford slash no contest, and I've placed my initials next to that addition.

Go ahead, Mr. Levin.

MR. LEVIN: Then towards the top of page six, the last section before defendant's statement, Kevin Tholl was not charged in this case.

MS. PENCE: And, Your Honor, it may be most appropriate simply to strike the line that starts with co-defendant and ends with case.

MR. LEVIN: And I have no objection to that.

THE COURT: So really just get rid of that entire section.

Mr. Tholl was never charged, Mr. Levin?

MR. LEVIN: Correct.

THE COURT: All right. Okay. So the Court at page six, under co-defendant offender information is going to strike that entire section as being inapplicable, and I placed my initials next to that change.

Go ahead, Mr. Levin.

MR. LEVIN: Next one which ties into that in the offense synopsis there's 22, I counted 22 references to co-defendant which he was never charged. I don't know that he would be considered a co-defendant. So I don't know if we

need to go through each one or if you could just add something that is saying that -- that there was no co-defendant and that actually should be read as referring to Kevin Tholl.

THE COURT: Ms. Pence, would you be comfortable with a statement by the Court that anywhere referencing co-defendant that it is a reference to Mr. Tholl and who was never a co-defendant in the case?

MS. PENCE: Yes, Your Honor.

THE COURT: Okay. All right. Up at page four, right by offense synopsis I placed an asterisk. I've indicated Kevin Tholl is not a co-defendant. Any reference to co-defendant herein is taken as a reference to Mr. Tholl, and I placed my initials next to that notation.

Go ahead, Mr. Levin.

MR. LEVIN: Lastly, on page four, offense synopsis, the second paragraph in that section, the second to last word says pail and that should be pain.

THE COURT: Second paragraph.

MR. LEVIN: Yeah. First paragraph is one sentence.

THE COURT: Yes.

MR. LEVIN: So the next -- next paragraph is second to last word.

THE COURT: Okay. Ms. Pence, do you agree?

MS. PENCE: Yes, Your Honor.

THE COURT: All right. At page four under offense synopsis, second paragraph, second to last word the Court has amended the word from pail to pain, and I've placed my initials next to that change.

Go ahead, Mr. Levin.

MR. LEVIN: That's all the State had.

THE COURT: All right. Mr. Levin, the Court is also in receipt of a sentencing memorandum and documentation in support that was filed by Ms. Pence on behalf of Mr. Bernard. Has the State received that information?

MR. LEVIN: Yes.

THE COURT: Do you have any objection to the Court considering that information for the purpose of sentencing Mr. Bernard?

MR. LEVIN: No, but I do have an objection to placing the entirety of it under seal.

THE COURT: Okay. Well, I'll give you a chance in a moment to make that argument. The Court has received the sentencing memorandum and documentation in support. The Court has considered -- has reviewed it and now will consider it when the Court sentences Mr. Bernard.

Mr. Levin, the Court also received filed on

June 29th, 2021 letters in support of Mr. Bernard. Did you receive those letters?

MR. LEVIN: I did and I have no objection to the Court considering them.

THE COURT: The Court has received those letters in support. I've reviewed them. I will consider them for purpose of sentencing Mr. Bernard.

Before I move to the defense, Mr. Levin, you would like to be heard regarding whether the sentencing memorandum and documentation in support should be filed under seal.

MR. LEVIN: I have no objection to Exhibits 3 through 7 being filed under seal. Those are the actual medical records.

THE COURT: Ms. Pence?

MS. PENCE: And, Your Honor, I did ask for it to be placed under seal because those were medical records that are personal and private to Brian Cook and it was out of that respect I felt it was most appropriate.

I would submit to the Court what Your Honor deems is most appropriate. There is information in that memo that I believe is important, and there is no need to keep the entire memo under seal. However, there is reference to those records throughout the information in the memo itself.

THE COURT: Okay. Mr. Levin, your position is well taken but so is Ms. Pence's in that her memo refers to those documents. Would you like to make any counter-argument to what Ms. Pence has stated?

MR. LEVIN: Well, there are significant portions of the -- of the memorandum that are very relevant to the sentencing decision that have nothing to do with any kind of confidential information. And to place all of that under seal because there might be a few references to medical records does not seem appropriate to me. It seems that that should be open to the public.

MS. PENCE: Could I have just one moment, Your Honor?

THE COURT: Yes.

MS. PENCE: Your Honor, I'm comfortable withdrawing my request that the memo be under seal. But I would ask that the medical records remain under seal.

THE COURT: Thank you, Ms. Pence.

So exhibits, it would be three through seven would be under seal?

MR. LEVIN: Yes.

THE COURT: Ms. Pence has supplied the Court with a proposed order. The proposed order would have sealed the entirety of the sentencing memorandum. I've interlineated to

the proposed order by indicating that the Court is ordering that Exhibits 3 through 7 of the sentencing memorandum and documentation in support shall be filed under seal and that will be filed by the Court clerk. Thank you, counsel.

All right. Turning to the defense, Ms. Pence, have you received a copy of the presentence investigation report?

MS. PENCE: I have, Your Honor.

THE COURT: Does the defense -- and you've had a chance to review that with Mr. Bernard?

MS. PENCE: I have.

THE COURT: Do you have any factual corrections to offer?

MS. PENCE: I do, Your Honor. If we could return to page four, under offense synopsis.

THE COURT: Okay.

MS. PENCE: It would be the third paragraph that begins with the words the victim. The last sentence of that paragraph I'm asking that the statement on July 31st, 2017 comma the victim, and at this point I'm asking the Court to insert had two cardiac arrests comma and then the sentence would continue. And, Your Honor, I don't believe the State has an objection to that. It was in the medical records.

THE COURT: Mr. Levin, any objection?

MR. LEVIN: No.

THE COURT: At page four of the presentence investigation report under offense synopsis, third full paragraph or excuse me, third paragraph, last sentence after the word victim the Court is adding the words had two cardiac arrests comma and then the sentence will conclude and passed away. I've stricken the -- the other language that appears in the presentence report and I've placed my initials next to that change.

MR. LEVIN: I don't think we were asking the Court to strike anything, just to make the insertion.

THE COURT: Oh, in addition to.

MS. PENCE: So it would just go in-between the word victim and was determined.

THE COURT: Okay. Thank you for correcting me. Okay. I've made that change. Thank you.

Go ahead, Ms. Pence.

MS. PENCE: Your Honor, on page five, first paragraph, line three, the beginning of the first full sentence it says he stated the victim was. I'm asking the Court to strike the words more of a, that more accurately reflects the statements that were made in this interview.

THE COURT: Was more of a?

MS. PENCE: Just the words more of a. So the

sentence reads was ably.

THE COURT: Get rid of the words more and of.

MS. PENCE: Oh, yes, I apologize, Your Honor, exactly.

THE COURT: Okay. Mr. Levin, any objection?

MR. LEVIN: No.

THE COURT: That request is granted. I've stricken those two words at the top of page five, in the first paragraph, placed my initials next to that.

Go ahead, Ms. Pence.

MS. PENCE: Your Honor, in the same page, page five, third paragraph, line six, beginning with defendant punches, that sentence should read defendant punches the victim nine more times, not 14.

THE COURT: Mr. Levin?

MR. LEVIN: I agree.

THE COURT: Page five, third paragraph, line six, after the word victim, stricken the number 14 and replaced it with nine. I placed my initials next to that change.

Go ahead, Ms. Pence.

MS. PENCE: Your Honor, that same sentence continues, and at the end of that same line the word area is the last word. After that word I would request that the words and then punches the victim nine more times. Actually

you know what, Your Honor, I apologize. I think by making the previous change we've taken care of that. No, yeah, I think that's the same one.

THE COURT: Okay.

MS. PENCE: And, Your Honor, the only other factual correction that I had is the very same paragraph, two lines down, begins with and kicks the victim. The first full sentence that reads the defendant is then observed picking up and it reads an unknown object, I would ask that that be stricken, the words an an unknown object and that the words the victim's hat be inserted.

THE COURT: Mr. Levin?

MR. LEVIN: I don't have an objection.

MS. PENCE: Those are the only factual corrections I have, Your Honor.

THE COURT: All right. At page five, third paragraph, eighth line, the sentence beginning the defendant is then observed picking up, it will now read picking up the victim's hat and then the sentence continues. I've stricken the words an unknown object.

Ms. Pence, did you say there were no others?

MS. PENCE: That's correct, Your Honor.

THE COURT: Okay. Ms. Pence, the Court has received from the State a document entitled State

Supplemental Documents and Information in Support of Sentencing. It was filed June 30th, 2021. Have you received that?

MS. PENCE: I have, Your Honor, and I have no objection.

THE COURT: The Court has received the State supplemental documents and information in support of sentencing. The Court has reviewed those items and will consider them for purpose of sentencing today.

The Court also received State's documents and -- excuse me, State's documents and information in support of sentencing.

Ms. Pence, have you received those documents?

MS. PENCE: I have, Your Honor, and I have no objection to the Court considering them.

THE COURT: All right. The Court has received the State's documents and information in support of sentencing, and the Court will consider those for the purpose of sentencing Mr. Bernard.

Ms. Pence, are you prepared to go forward or, Mr. Filter, go forward with your recommendations and/or presentation of any evidence?

MS. PENCE: I am, Your Honor. I do have two individuals that are going to be giving, that would like to

read a letter on Adam's behalf to the Court. One of those individuals has a plane to catch at, very quickly and needs to leave, close to 2:00 o'clock. Normally I would ask the Court for that to happen after I made my comments, but I'm hoping that the Court would have him be able to do that now so that he can leave.

THE COURT: Mr. Levin, any objection?

MR. LEVIN: No.

THE COURT: All right. Ms. Pence, that is fine with the Court. You may proceed with that witness.

MS. PENCE: So, Your Honor, I am asking Aaron McCormick, who has known Adam for over ten years to read the letter that he wrote and would like Your Honor to consider.

THE COURT: Very good. Please step forward, Mr. McCormick. I'm going to have you sworn as a witness. So go ahead and raise your right hand. Face the court clerk to be sworn.

AARON MCCORMICK,

called as a witness on behalf of the

Defendant having been first duly sworn,

testified as follows:

THE COURT: All right. Mr. McCormick, come on up

to the witness stand, please. Go ahead and have a seat, sir. What is your name?

THE WITNESS: My name is Aaron McCormick.

THE COURT: Spell the first name.

THE WITNESS: A-a-r-o-n.

THE COURT: And the last name?

THE WITNESS: M-c-C-o-r-m-i-c-k.

THE COURT: All right. Thank you, sir.

Ms. Pence, would you like him simply to read or would you like to ask him questions?

MS. PENCE: Your Honor, I believe he prepared a letter he would like to read.

THE COURT: Go ahead, Mr. McCormick.

THE WITNESS: Thank you, sir. My name is Aaron McCormick, and I've been Adam's employer and friend for many years. I'm proud to speak on Adam's behalf today. I have known him for over ten years. Excuse me.

THE COURT: Take your time, sir.

THE WITNESS: I've known all of these men in the working place here in this area for many years too. So it's very close to home for me. As I said, I've known him for over ten years and we've worked together daily for most of the time.

He has proven himself as an excellent employee

and friend over the past decade. I consider myself fortunate to have a skilled, hardworking and kind employee. He is a reliable, organized and precise carpenter and interacts with the clients that I have in such a way that they are always happy to have him at their homes. They ask for him personally.

Beyond his professional abilities he is overall a kind, warm and generous person. He uses his personal money to buy and bring snacks for all of the people at work, and he's always done this ever since I've known him. He brings gifts to us at Christmastime in the middle of the year for no reason, little knives or little backpacks, just a very generous person.

He caters to each person's snack needs, their dietary preferences, maybe little snacks that they like. He's very attentive to that, and he's done that for every crew, every guy for many guys who have been through my crew.

He's on many occasions gone out of his way to buy thoughtful gifts for guys on the jobs. Beyond his generosity and thoughtfulness Adam's most important trait is his kind peaceful nature. He is always the first to recognize a need to lend a helping hand or offer a few words of advice. He is truly the peacemaker and the diplomat on the crew. We often get into arguments and he is always there to stop it.

He has worked very often with my two sons, now 20 and 23, and he has in many ways helped me raise them. When they are troubled with work or life he talks to them and guides them to take the right course of action. Even my 17-year-old daughter thinks highly of him. In fact, she would have been here to make a statement if she could have. She was adamant about that.

Anyhow, I know Adam has had much regret and sorrow over this incident. I know he did everything he could do to avoid the conflict and had been for a very long time. Over the past three years since this incident he has been nothing but patient and cooperative, and in my opinion Adam has already served his sentence.

THE COURT: Thank you, sir.

Ms. Pence, do you have any questions for Mr. McCormick?

MS. PENCE: No, Your Honor.

THE COURT: Mr. Levin?

MR. LEVIN: No.

THE COURT: Mr. McCormick, thank you for coming. You can go ahead and have a seat in the back or leave if you need to do that.

THE WITNESS: Thank you.

THE COURT: Ms. Pence, you may proceed.

MS. PENCE: I want to start by offering first to all of Brian's family and to his friends my sincere condolences. I know that each of you have suffered a great loss. In the last three years I've come to learn a lot about Brian, and I know that he was a good dad and a good son and a good friend. I want to apologize ahead of time for some of the things that you're going to have to hear today in court. It's always painful, but I think those of you who truly knew Brian already knew most of the things that I'm going to share.

Brian suffered a tremendous loss about I want to say five years before this incident when he lost his wife to cancer and that loss caused Brian to start to drink. Brian drank to cope with that loss with his sadness.

THE COURT: Ms. Pence, are you referring to your client?

MS. PENCE: No, Your Honor.

THE COURT: Okay.

MS. PENCE: I'm referring to the victim in this case.

THE COURT: Thank you.

MS. PENCE: And Brian drank to cope with that loss with his sadness, with his frustration and his anger, and over the last five years his alcoholism continued to

grow. And on July 8th of 2017 Brian was not the best version of himself. As his friends know when Brian drank he was not a nice drunk. It brought out his anger and aggression. In interviews conducted by Sergeant Storke with Brian's friends he was described as a mean drunk, hot headed. He would provoke fights at Jethro's, and when he drank whatever anger he was holding on came out. Those are the words of Brian's friends.

Brian's family was also concerned about his drinking. His daughter told Investigator Koontz at the hospital that Brian's drinking had gotten worse. That he was drinking large amounts of Whiskey and beer and that she had been really worried about her dad for the last few years.

Her words to Investigator Koontz that night were that she knew Brian was friends with Kevin and Adam and that she was sad this had happened. She hoped that this incident would help her father get sober and get his life together.

His son when asked about what and how much alcohol had been consumed that night candidly told Mr. Levin knowing my dad, probably drank a lot.

His other son was also honest in answering the same question about what Brian had been drinking that night. I know my dad always has a lot of beer and a lot of Whiskey. That's my dad, and then he just had that all of the time.

Many of the people in the courtroom today, Your Honor, had contact with Brian and with Adam that afternoon and that night. His girlfriend at the time told Kevin the next morning that when Brian told her he was going after Adam she tried to talk him out of it. She begged him not to go.

Tristian remembers his dad asking him to start up his truck for him. And Elijah remembered his dad calling his friend Jimmy Halipoth (phonetic) for backup. His dad wanted backup for when he went to go and fight Adam.

Regardless of Brian's demons, what happened that night could have been avoided. Had Brian not consumed enough alcohol to put his blood alcohol level at a .45 he would not have been in such an irrational state of mind. Had he just decided it was time to call it a night and stayed home and gone to bed he would have never put Adam in the position that he did.

But Brian on that night was extremely drunk and as those closest to him know when he drinks he is mean. He is aggressive. However, when he was sober Brian was a different person, the good dad, son and friend. And the loss of his life is a tragedy.

But sending Adam to prison would also be a tragedy. And that too is also an avoidable tragedy. Locking Adam up will not bring Brian back. It will only take away

another life. During the three years that I have had this case and read the interviews with friends and family I learned a lot about Brian and the person he was before he started drinking. His drinking changed him, but I don't believe for a minute that if Brian was here he would want Adam to go to prison.

On July 8th of 2017, which is almost four years ago to the day, we're on July 1st, Kevin and Adam had gone fishing. They hadn't invited Brian. And when he learned they had gone without him he was mad. Kevin told him they would come by and that the three of them could go to Walmart to look at a Yetti cooler that Kevin wanted to buy.

But when Kevin and Adam arrived at Brian's house he was already drunk. He was drinking Peppermint Schnapps that day, 100 proof, and then chasing it with Coors Light. They decided not to go to Walmart because Brian was already loud and not in any shape to go anywhere out in public.

They visited in the garage where Brian showed them a new knife. Turning to Adam Brian said it would be so easy. Lights out. Brian always bullied Adam about his eye. His family and his co-workers have seen it many times. Elijah mentioned it when he spoke to Mr. Levin. Kevin recounted Brian throwing nails at work and taunting him.

At that point Adam left the garage. He walked

away and went out front where Tristian was hanging out. Shortly after Kevin and Brian joined, and there was talk about fishing the next day, but Adam didn't want to go. He didn't have waders or a tube and he used it as an excuse not to go, but Brian insisted. He gave Adam a pair of waders or a float tube to try on and this was July. It was hot. Adam is a large man. They are made out of neoprene. He did not want to put them on, but Brian insisted. In order to avoid the conflict Adam starts putting on these waders. Tristian remembered his dad handing them to Adam to put on in the front yard. And Brian continued to drink.

At some point after the waders, the neighbor's puppy came over. They were out in the front yard just enjoying, and this puppy was just a few weeks old, and it was clear that Brian was under the influence and he was not thinking clearly. And he thought it would be fun to make the puppy do some flips, and so he tossed that little puppy up into the air and it did do some flips in the air and then it hit the ground and it yelped. And Adam asked why would you do that to a puppy. And Brian by this time, as intoxicated as he was, got in Adam's face and told him don't tell me what to do. Don't fucking tell me what to do.

Adam told Kevin he wanted to leave. And, again, for the second time that night, actually that would be the

third time that night he left. He left the house. He left the garage. He left the front yard. Now he's leaving the house.

Adam and Kevin left Brian's house and went to Kevin's house, and Adam had also been drinking. His breath alcohol content was a .18. He was a third of the amount that Brian's blood alcohol was. Adam was actually the most sober person there. He didn't want to drive home because he had been drinking. So Kevin offered to let him stay in the trailer that he had in the driveway and Adam had done that before on several occasions when they went to fish or to hunt.

And as they were getting ready, getting the trailer opened up, Kevin got a call on his cell phone and it was Brian, and he was coming over, in his own words to fuck Adam up and to blind him. Kevin told him to go to bed and hung up the phone, but Brian called back. And Kevin again told him stay home. Go to bed.

The third time Brian called he was yelling over the phone that he was on his way and going to fuck Adam up and he was taking his good eye, and Adam heard him. He was yelling. And he asked Kevin if Brian was really coming over. The answer was immediate. Brian blew through the stop sign at the end of the block, drove his truck up onto the grass in

front of Kevin's house, almost striking Adam's car. Leaving the car running he got out and started talking about what he was going to do.

And as soon as Adam saw the truck he knew he was in trouble. Brian was making good on the threats. He was going to take his eye or he was going to take his life. And from that instant on Adam's brain and body's only purpose was to protect his eye and defend his life.

Brian's threat triggered what's known as an acute stress reaction. It is a bio neurological condition that is triggered when we are faced with immediate harm or death. Sometimes it's called condition black or fight or flight. And on that night Adam fought for his life.

All of the investigations in this case were clear about two things. Brian when deemed by Deputy Kyeremeh, Investigator Koontz and Sergeant Storke to be the primary aggressor. Meaning that Brian started this fight, that he was the instigator, the person who was aggressive first. All three also agreed that Adam responded in self-defense which is allowable under the law. Adam had every right to defend himself, his sight and his life.

But the question remained did Adam's actions that night in defending his life go too far. And before I answer that question I want to pose two scenarios for the Court to

consider. Had Adam had the time or the opportunity to get a gun when he learned that Brian was coming over to fuck him up or blind him and had he simply shot Brian in self-defense when Brian got out of that truck after pursuing him to Kevin's house and telling him I'm coming for ya, I'm taking that eye, would we be here today? I don't believe we would because Adam had every right to defend himself and that included lethal force.

He did not need to wait to see if Brian was going to do it or to see if he still had had the knife from the garage or one of the guns in his truck for hunting. He was allowed to protect himself.

The second scenario, Your Honor, what if Adam had only struck Kevin ten times and that those blows resulted in the same result. I don't believe we would be here today in that scenario either. We know that Brian was the primary aggressor and that Adam acted in self-defense. The reason that we are here in this courtroom four years later is because of a lack of understanding of what was seen on a video. Because Adam strikes Brian more than five times or ten times or whatever number is someone else's determination as the right number. That's why we're here. But there is a very simple explanation for Adam's repetitive striking and his response to the threat that Brian presented.

I would ask the Court to think for a moment about police officers, law enforcement with special training who are experienced with being in life or death situations on a daily basis. Think of the stories and the cases you have seen or heard where an officer responds to a threat and recounts how he is sure he is adamant he only fired his gun twice. And later we learn, in fact, that the officer actually emptied his clip and reloaded and emptied the second one with no recollection of what he had done in that moment.

Clearly in that instance the threat had been eliminated with the first few shots, but the officer was unable to stop firing and loading and defending although the threat was gone.

I have asked an expert forensic psychologist to speak to the Court and to all of the people who are here in the hope of providing some context to the video and the scientific rational explanation of Adam's response that night.

I am hopeful that his words can provide the information to the Court so that Your Honor is able to tell that Adam did not do anything that night that warrants a prison sentence.

That same information, Your Honor, is important to offer an explanation to the family and friends of both

Brian and Adam that can bring them peace and healing. I've read the letters submitted by Brian's family, and I know that much of the desire to have Adam sentenced to the maximum allowed is based on misunderstanding. There are allegations that this was an act of revenge by Adam. And as will be explained revenge is a cognitive act. It's thoughtful and planned.

Had Adam wanted revenge he would have had time to plan. Adam had only seconds from the time he learned Brian was coming to kill him or blind him until the actual confrontation. This was not revenge.

Another misunderstanding is that Adam took his self-defense too far. It will be explained that when someone is under acute stress reaction there is no cognitive process happening in the brain. What that means is you're no longer processing thought. The brain's emergency response system takes over and the response is purely sensory and emotionally driven. It is the body's natural survival mode.

As we're going to see in the video, Adam's punches were not like those of a boxer, planned out, moving from place to place on the body, evaluating in-between to see if they were landing. Actions -- Adam's actions became autonomic, meaning automatic in the sense that they were driven by emotional response. They were not cognitive, and

he was unable to stop, much like the police officer until Kevin actually comes up and touches his shoulder and interrupts that acute stress response.

Adam has no depth perception. Adam is legally blind in one eye. He lost that eye at the age of five when it was shot out almost point blank by a neighbor. So he does not see things, and he does not have the visual acuity that most of us do. That night those punches we see in the video, most of those punches I would submit did not land.

I did submit a photo of Adam's hands so that the Court could see the scrapes from the street, but even more telling are the medical reports. And this is information that is important because often when we see something and we don't know the context or the result we make conclusions and assumptions, and I want this information to be understood and known to the family and friends.

Had those punches landed, Adam is a large man. He was fighting for his life. We would expect to see broken bones and trauma. But what the medical records state is that Brian had no broken facial bones. He had no broken orbital fractures or orbital bones or fractures. He had no broken nose. He had no broken jaw, not even misalignment. None of his teeth were loose or broken. And based on what we see in a snippet of the video that's not what you would expect.

But when you understand why those punches are being thrown and how they are landing and their actual result it's much more informative. Did some of the blows land, absolutely, but Adam was not cognitively addressing whether each punch landed. He was fighting for his life.

I know another issue that has upset many of the people involved in this case were Adam's statements to law enforcement about not knowing how many times he struck Brian, not remembering that he kicked him. Again, I would submit, Your Honor, the police officer, it's the same thing. And Dr. McEllistrem will be able to explain to this Court how memory is affected by trauma.

Simply put, when the body is fighting for its life every unnecessary system is turned off in order to allow the body and brain function all to go towards elimination of threat and survival, and memory is not needed for that. So when Adam told Sergeant Storke it was like he blacked out, that he couldn't remember all that had happened it was the truth.

And, Your Honor, at this time I would like to call Dr. Joseph McEllistrem, and we have a brief presentation. It's not very brief. It's a shorter version of a presentation that I think would be important for the Court to understand what its going to see in the video.

THE COURT: You may call Dr. McEllistrem.

Doctor, please step forward. Raise your right hand and face the court clerk to be sworn.

JOSEPH MCELLISTREM,

called as a witness on behalf of the Defendant having been first duly sworn, was examined and testified as follows:

THE COURT: Sir, please come up to the witness stand.

Please state your name and spell your last name.

THE WITNESS: Joseph McEllistrem. It's spelled M-c-E-l-l-i-s-t-r-e-m.

THE COURT: Thank you.

Go ahead, Ms. Pence.

MS. PENCE: Your Honor, if I could just as a housekeeping, I've been informed that there is no way to have Dr. McEllistrem to control the computer, take the laptop there because there's not a table. So I'm going to try a remote mouse to see if that will help him.

THE COURT: Okay.

MS. PENCE: If I may have just one minute.

THE COURT: Absolutely. Take your time.

MS. PENCE: I don't know if it will reach my computer or not.

THE WITNESS: I don't see anything on this screen. Is that?

THE COURT: Give me a moment, here.

THE WITNESS: Okay.

MS. PENCE: I'm thinking we -- all right. Joe, are you able to use that mouse to just try advancing a slide. Are you able to?

THE WITNESS: Yep.

MS. PENCE: Okay. Can you see what's up there but not what's on the laptop?

THE WITNESS: Just now. I can see what's up there and I can see it on this screen now. Is that?

DIRECT EXAMINATION

BY MS. PENCE:

Q. Okay. Okay. So, Dr. McEllistrem, I've asked you to come today on Adam's behalf to explain some of the, for lack of a better term unseen components of Adam's behavior that was caught on a video. I know the Court and Mr. Levin are familiar with you but other people are not. So I am going to ask just a couple of questions. First if you could state your name and spell it for the record.

A. I've done that.

Q. Oh, did you. Sorry.

All right. And then can you tell us what do you do for a living?

A. I'm a forensic psychologist in private practice.

Q. And what is a forensic psychologist?

A. It's a subspecialty of clinical psychology. I think an easy analogy is there's many medical doctors. You might be a general practitioner, but some of those go into a specialty, like oncology but they are still a medical doctor. So I'm still a clinical psychologist with a subspecialty of forensics which means the cases I'm presented with aren't clinical. They are therapeutic. They are questions that arise from their psychology that involve someone that is interacting with the court system.

Q. Okay. And did you receive training for forensic psychology?

A. I did.

Q. And where was that?

A. There's two locations. My first year was at the U.S. Medical Center for Federal Prisoners in Springfield, Missouri. That was a year long training program. And then the next year was at the, what was the name of that place, the Neuropsychological Associates of Southwest Missouri and it was a neuropsychology forensically based trained. So all

of the cases had a neurological component.

Q. Okay. And where did you go to school to get your, I guess your, I don't want to call it your doctorate. But where did you actually go to school to do your forensic studies?

A. So the universe -- so the U.S. Medical Center was probably my first introduction to a forensic training program followed by the neuropsychological one. That was followed by a two-year training program at the Karl Menninger School of Psychiatry in that Topeka, Kansas.

Q. Okay. And just to provide a little bit of detail about the Karl Menninger School of Psychiatry, I would guess the Court does not have familiarity with that particular school. Can you tell me about how many slots or opportunities there are each year for people to study forensic psychology there?

A. Well, it was a general studies program, but I was able to pick up a slot that had a forensic component. But it's usually several hundred people internationally and nationally apply and they take four slots and there's one forensic.

Q. And you were given one of the four slots?

A. Correct.

Q. After you finished your formal education what

type of work did you do?

A. Once I moved to Carson City back in 2001 I opened up a private practice and then within several months became the director of forensic health services for the Carson City Jail. Approximately two to three years later, a similar role here at the Douglas County Jail.

Q. Okay. Have you had the opportunity to write or to publish any papers?

A. I have.

Q. And are those papers what we call peer review articles?

A. They are.

Q. And could you just describe briefly what it means to have an article that's been peer reviewed?

A. Just stands up to scientific rigor that it's reviewed by other experts in the field before it's granted publication. Most or often you get rejected.

Q. And so when something is peer reviewed it's not simply taken at face value, but it's actually challenged and then goes through a process where others would I guess validate or invalidate what you've written about?

A. Correct.

Q. In addition to having published peer review articles have you worked before as an expert in court cases,

either in a capacity like you're doing here today at sentencing to provide information or as an expert witness?

A. Yes, I have.

Q. And can you tell us some of the more prominent cases you've had experiences with.

A. Well, you know, part of my reason for being here today is to discuss one element which is the mode of violence and that's what I published on, and it also is what was incorporated into some other cases.

So I was retained by the AUSA in the Timothy McVeigh, Terry Nichols, the case or the Oklahoma City Bombing case because of that specialty. Erin Kuhn case and Lisa Montgomery out of Missouri which was predatory behavior involving taking the life of a pregnant mother and performing a cesarian section to extract the baby. So that Erin Kuhn case was local, at least in Montgomery, Kansas. So a lot of my cases involve some level of violence.

Q. So, and your work on different classifications of violence, what you've said basically, effective and predatory is something that you've done or that you've worked on for quite a while?

A. Yes.

Q. Did you ever publish on that topic?

A. Yes.

Q. And what year was that?

A. Maybe 2003 or '04.

Q. Okay. And you said that in the Timothy McVey case you actually testified for the State?

A. No. I was -- it was a federal case, and I was consulting with them for about a year and a half and was at the death penalty trial but did not take the stand.

Q. So with that experience you have then been qualified as an expert on cases involving predatory violence?

A. I have.

Q. And could you just briefly explain to the Court how you became involved in this case?

A. I think it was well over a year ago now, but you had contacted me and kind of laid out the particular facets of the case and the behavior and your concern, about does this make a lot of sense to you. And so you asked if I would join in preparation for trial to see if I could make sense of what was the driving force behind the behavior.

Q. And is the presentation that you're about to present to the Court a product of that contact and request?

A. It is.

Q. Okay. So if we could start with what I'm going to refer to as a referral question. A referral question is basically a starting point, and in this instance I had asked

you to try and explain what I had seen on a video that was provided to me in discovery. And did you, in fact, come up with this referral question?

A. I did. Basically after we spoke I wanted to pen to paper and figure out what it exactly was going to frame the boundaries of my work.

Q. Okay. And if you wouldn't mind could you read that question to, the referral question out loud.

A. First, why did Adam Bernard, a 43-year-old man with no juvenile criminal history and no known adult history of violent behavior act in an uncharacteristically aggressive manner on the night of the alleged offense.

Second, how can we understand his state of mind at the time of the alleged offense and how it influenced his reaction.

And finally what is psychological and/or neurobiological understanding of his behavior.

Q. And were you -- did you -- were you able to form any sort of hypotheses based on the information that you were provided that would help to answer some of these questions?

A. So after going through the discovery material you gave me at the time I did form a couple of hypotheses that I thought should be explored.

Q. Okay. And what were those hypotheses?

A. First it was my belief that at the time of the alleged offense Adam Bernard believed the threat to his life was imminent. He fled, was pursued and felt trapped. And secondly at the time of the alleged offense, as a result of the imminent threat Mr. Bernard experienced an acute stress disorder, also known as an acute stress reaction was induced.

Q. And after you had developed these hypotheses where did you turn to find support for your thoughts?

A. So the methodology that I followed to answer or address the hypotheses first was to review the investigative materials and witness interviews you offered to me. I met with Adam Bernard personally and developed a developmental and clinical history. And then I turned to the literature and I felt that these areas in the literature could help us understand what was going on that night.

First, understanding the mode of violence that was occurring on the evening in question, understanding the available clinical and diagnostic classification systems that I believe capture some of his reaction. I examined his mental state on the evening through our conversation to better understand what was going through his mind. And then I studied more closely through those clinical diagnostic works what is known as acute stress disorders and acute stress reaction.

Further looked at the neurobiology of the emergency response system of the brain. And then I was looking for parallels that might help us appreciate people in other context who have been through similar situations who had similar reactions to Mr. Bernard.

Q. And in order to explain the aggression that was recorded on a video that you did, in fact, get to watch the video of the actual altercation between Adam and Brian; is that right?

A. I did.

Q. Okay. And in order to understand that could you explain the classifications of what you referred to as predatory violence and effective violence?

A. So it's sometimes known as a bimodal classification of violence. It has over a 100-year history in the literature with tens of thousands of articles written on this reaction.

When I often discuss this I use the analogy of the cat. So affective violence is the result of a perceived threat. And so if you think about a cat, who a lot of us have that kind of experience, maybe cornered by a dog, what does the cat do in response now that it's cornered and now that it's trapped and relatively defenseless against the dog. It makes itself as big as possible. It raises its hair on

end, known as piloerection of the midline. It's a fancy word for the hair standing up like a Mohawk. It arches its back. The claws come out and it is screaming and hissing and making advances on the dog until a point at which it finally strikes out, usually at the face in kind of widely uncontrolled chaotic attack in the hopes to escape the aggressive dog.

The same cat the very next day might be in a field looking for dinner, and so now it's the predator side of the cat. It does everything the opposite. It makes itself very small. It makes itself very quiet. The claws are sheath, and it takes and waits for that moment when it can direct the bite in the back of the neck of the mouse to kill its pray. So you have kind of sort of a cold instrumental violence in the case versus the affective violence which is response to imminent threat.

Q. Based on what you observed on that video can you tell us which types of violence are being displayed?

A. Both.

Q. Can you explain that.

A. Well, I think in this case Mr. Cook was the aggressor and Adam was the one defending himself, and so he was in the position of being that cat backed into the corner by the dog.

Q. Okay. And how can you -- what factors or what

information are you using to determine that Brian was displaying predatory violence that night?

A. Well, you know, he leveled the threat. I mean it was sort of an escalation over time. He had -- first there's some contradictory information in the records but there's at least this allegation that he had been showing Adam a knife that evening. Adam was uncomfortable. He leaves the scene. He had come out to the front yard. He's humiliated with the waders incident that you mentioned but he acquiesces. Then there's the puppy incident and Adam feels this is just escalating. It's time to go. So he retreats now for a third time and goes home.

Mr. Cook pursued him. That's predatory quality. Usually Adam and all of his history, just leaving the scene was enough to end this kind of threatening confrontation. But this time he was pursued so the threat was communicated to him by following through Eric in terms of Kevin Tholl. And then they can hear the car coming. They can see the car coming, and then the car lands into the front yard. So you can see the approach behavior. There was a directed, clear, detailed threat that he was going to come and take his eye, potentially take his life and then he acted on that threat. He actually made the effort to secure a friend in support of this action, and he took the steps to effectuate the assault

by getting to Adam.

Q. So in that scenario, and I'm going to go back to your analogy, he is the hunting cat?

A. Correct.

Q. Okay. Now, you said you see both. Can you tell us about who you believe is displaying the affective or responsive violence?

A. I think in this case Adam felt he was the trapped one, and he had lost any further chances to retreat, and you can see it in terms of his body language on scene. He makes himself really big. If anyone has seen somebody after a workout with weights you can see how they are just kind of puffed out and their arms are out at their side. Like you can't even bring them into the sides of their body. They walk with spread legs to make themselves look bigger. They advance in a very square way against the threat to make themselves look better. They typically are loud. I think the neighbor that reported it to 911 heard them yelling which prompted the call. So it's that, it's being big, loud.

Q. The cornered cat?

A. The cornered cat.

Q. How about the actual -- you described the cat once it was faced with the threat biting and scratching and doing whatever possible. Were there things in the video that

you observed Adam do that led you to believe that this was an act of affective violence?

A. Well, because it was defensive in nature and I think when you see it get physical you just see him swinging and kicking for the fences, and at that point the brain is triggered into a save yourself mode. And you, just like the cat you just don't stop until you have exhausted all your resources.

Q. Okay. In addition to the modes of violence that you've been able to explain and how they appeared in the video could you explain to the Court because obviously all of us have situations that arise daily and don't cause this type of behavior but what does that take to go into this, like the cornered cat? What triggers this affective response?

A. Being traumatized is probably the best way to put it. Being put in a position where you're traumatized by something that is occurring in your life. And I think once that trauma kicks in, once that traumatized feeling kicks in that's when the brain starts going into that neurobiological protection mode.

Q. And so did you then research trauma and how it plays into the acute stress response or reaction?

A. Yes. Let's see. So just as an overview, trauma is defined by the AP or the American Psychological

Association exposure to actual threatened death, serious injury or sexual violence. So that becomes the trigger point. That's the threshold that is met to produce not for all but for some traumatized response. Yeah, traumatized response which is much more clearly sort of articulated through diagnostic nomenclature and that's what we mentioned in the opening about acute stress disorder and acute stress reaction.

Q. So I'm going to -- if you could go back --

A. Uh-huh.

Q. -- just one slide. Your last entry there it states that Mr. Bernard believed the threat was real and that Brian intended to target his eye or take his life, what led you to come to that conclusion?

A. So it's interesting. You know, there's a long history between the two and it began back in high school. And so I think Adam was an underclassman and maybe Mr. Cook was a senior, but he had lost his eye as a young man, and he was often taunted and teased but particularly by Mr. Cook in a variety of ways, so much so that he would take great pains to avoid him. He would go outside the doors of the school, walk around the grounds to another door closest to the classroom in hopes to avoid Mr. Cook. That's always been his pattern, retreat, retreat, retreat.

When they met up again in the workforce, it all started again and as his son mentioned and as Mr. Bernard mentioned and another witness, talked about him flicking nails and screws at his one good eye, and Adam would just deflect them or turn his back and walk away. When he stole his lunch he brought more food. When he stole his sodas he brought more sodas. He just always seemed to acquiesce or retreat.

The threats to his eye were numerous, over a very long stretch of time, but never once did Mr. Cook advance on him to enact such a plan until that night. Never once was Mr. Bernard confronted with Mr. Cook actually following through with what he had been threatening for so many years, and I think that became the real trigger. He said is he really coming because in the past all he had to do was retreat. And he was really coming.

Q. I apologize. If you want to go ahead to the next slide, I think it's slide eight. When faced with trauma the body has certain responses. And in your research if you could explain to the Court what type of response you believe you perceived that night in Adam based on the literature.

A. There's actually two well known and often used clinical resources. One is called the DSM5 and one is called the ICD in its tenth revision and its classification manuals

of mental and physical diseases.

So under the trauma related disorders of the DSM5 you have an acute stress disorder. Now, you can see there's four other conditions below that, but those are the long-term affects that trauma has a potential of creating. So I'm just focusing on acute stress disorder but know it's part of that full classification system under traumatic responses.

The next slide that I bring in, this is an international perspective. These manuals are completely independent of each other and independent research, but they have a very similar finding. And you can see the acute stress reaction is listed there instead of disorder, like the DSM. But you can see how similar those outcomes can be and that's how predictable trauma is in producing these kinds of outcomes but, again, we're focusing on the stress reaction.

Q. And can you explain what exactly an acute stress reaction or disorder is.

A. I've got a slide here. So, again, this is just a side by side view of the two classification manuals. You can see the overlap even though these are independent publications.

The next slide gets into more of a better description. So the international classification manual describes it as the trauma is described as an exposure to

exceptional, physical and/or mental stress. The DSM likewise, and I think we mentioned this earlier, it's an exposure to actual or threatened death, serious injury or sexual violence. So that's the trauma piece that has to be present to elicit or produce a response.

Now, the timing of this is listed below under duration. Once that threat is perceived and I think in Mr. Bernard's case, once he heard that vehicle that's when he started. Possibly the threat made over the phone calls, but Adam was used to the threats and Mr. Cook usually didn't follow through. But I think once he heard the vehicle and certainly once he saw the vehicle there is the beginning, the start of traumatic response.

And so you can see that the ICD talks about being a transient disorder. It usually develops within minutes of the stressful event and disappears within two to three days but often more likely in hours. DSM has it slightly different, begins immediately after the trauma that persists for three days to one month. So some differences there in duration. But point is the cascade begins at the point of being traumatized.

Q. How does this particular reaction to trauma affect someone's body or brain?

A. So we talked about the definition. We've talked

about the onset and now the impact. And so the ICD-10 talks about the impact as being somewhat sort of an initial state of days with some constriction of the field of consciousness, narrowing of attention, inability to comprehend and being disoriented.

DSM talks about it slightly differently again, and they divide it in deep personalization and derealization. But basically what is describing there is that your sense of self, your reality, your surrounding of oneself is highly distorted by the traumatizing sequence of events that is occurring.

Q. And the second part of that slide that seems to be one of the symptoms that follows having suffered an episode of acute stress reaction or disorder?

A. Yeah. It's an -- definitely an outcome. Speaking primarily to memory they talk about the ICD-10 partial or complete amnesia for event may be present and the DSM likewise, an inability to remember or aspect of the traumatic event, typically deemed to social amnesia, so basically what some describe as spot memory, that I remember this scene and that scene and this item. But to put together a nice chronological map of beginning to end of a traumatic story is very difficult because the impact is on the memory.

Q. And can you describe some of the other symptoms

or maybe better said, the conditions that occur afterwards.

A. Are you on to this?

Q. One back. I apologize. Yeah, and I apologize. So these are additional emotional symptoms; is that correct?

A. Correct.

Q. Okay.

A. These are usually long after that if these persists that's when you get into diagnostic nomenclature around PTSD and trauma. We're looking much more closely at the event and it -- to use the word disorder, like reactive acute stress disorder is a bit of a misnomer to us clinically because it's actually very adaptive. Your acute stress reaction is exactly what you need in that moment to save yourself because your mind and body are taking over to grab every resource that you can to bring to bear to save your life. So we really think it's an adaptive response.

Q. And I want to continue that explanation about the brain. I think if we could go to slide 15.

A. Yeah.

Q. Can you tell us, you've discussed the symptoms and what happens. What I would like you try to explain is why certain things happen once someone enters into this acute stress response. As far as their ability to think and react, what is going on in their brain once they have perceived the

threat and are in the trauma?

A. Well, to kind of summarize this slide. Once confronted with the threat, there's sort of an internal threat radar that kind of snaps off in the moment. So it's a rapid escalation of a neurobiological response that starts to cascade through the whole system and it's doing all of these things I'm about to talk about at the same time.

Because an acute emergency leads to a number of systems in the body and the brain to mobilize and deal with this active threat, and first it's perception. So in this case I think perception was sight and sound. He heard the phone call. He heard the vehicle. He saw the vehicle approach, block his car in. So those are the senses that come to bear.

And then that data, that threat data is immediately sent to the amygdala. You can kind of see the amygdala is in the center of the picture. Its descriptors in the lower left corner. It's two almond shape structures in the interior of the brain, deep brain structures that is responding and instantaneously assessing the level of threat in these two structures.

Now, if we were in any kind of situation in life that was nonlife threatening, just an event that happens in your life what happens is your senses and perceptions, they

come through and frontal lobe and the front part of the brain and the temporal lobes because that's where planning, reasoning, judgment, thought, reaction comes to bear.

And so you have that luxury of time to think through how am I going to react to this threatening situation and you come up with a response and you can think through the consequences, you can put the dots together but that doesn't happen under threat.

The threat scenario amygdala has to completely bypass these higher cortical structures. And you can see the neocortex is up at the top. The frontal lobe is listed there. Those systems or the neuro parts of the brain that give the ability of the amygdala to think through something, so to speak, through the senses and perceptions that are coming this way, and it has to completely bypass that to respond to the threat.

So if you look on the right-hand side, well, no, it's listed -- go to the brain steps, near the bottom of that slide, it says the reticular front lobe because that is also what is being activated in the moment and it's really a complex mesh work of neurons and fibers that connect sensory modalities, the hearing, and seeing, visual stuff to arousal, to emotion to motivation to thinking centers of the brain.

But then what it does is it channels, very

carefully selectively channels the sensory perceptual input to those aspects of this very rapidly unfolding scene to respond to everything moment to moment.

And so just as much as the higher ordered thinking structures are offline so is hippocampus. The hippocampus is responsible for memory. It's responsible for code. It's responsible to integrate memory to retrieval and for storage. That is energies that would be broad of other parts of the brain that are trying to respond to the threat. Because if you don't live through it you don't need to remember it.

So the hippocampus takes kind of a backseat. It's put on standby for the moment to fully integrate memory for what's going on around you. So now you've got this highly emotional scene, highly emotional individual norepinephrine, a neurochemical is released to the brain to put the brain and body into a physiological hyperarousal. This body and mind has to be ready for whatever is coming its way.

And with that norepinephrine dump comes a huge dose of adrenaline, and that adrenaline gives you the energy, increases your blood pressure. It increases your ability to absorb oxygen. It's putting you ready to defend your life with every resource you need and it puts on bypass every

mental resource you do not.

Q. And that would include what you've explained as like the thoughtful processing parts of the brain and the memory portions of the brain?

A. Correct.

Q. All of that is --

A. We're talking basic limbic system, deep burning structures, not the high order structures in the gray matter as we sometimes say.

Q. So in your opinion you stated earlier that Adam perceived the threat either when he heard Brian through the phone or when he heard the truck or saw the truck coming. At that point do you believe that Adam was in a position to consider alternate possibilities or other plans to do something different?

A. I believe he was really caught off guard. I mean, as I mentioned before, Mr. Cook, as much as he threatened his life and his eye over the years, never advanced on any plan. He did not -- Adam did not see this scenario coming forward. And when Mr. Cook came up with his vehicle nearly hitting his, now his vehicle is blocked. I don't even know if there's time to get to it, but he sees himself as trapped. The guy is coming my way, blasted through a stop sign, blasted up onto the curb onto the

sidewalk. He's right in front of the house in which he is staying in. He is just, feels there's no escape at this point. So that flight or fight response when he always fled triggered a flight response that day.

Q. And your opinion, and I think you stated this earlier, is that this reaction kicks in almost immediately after the threat is perceived; is that right?

A. Correct. That whole cascading, it occurs within a millisecond to millisecond, moment to moment are these alterations. So you lose yourself, so to speak. You lose that connection to your thinking part. You're reacting.

Q. Okay. So if -- I think the next slide specifically talks about what is, I want to use layman's term but still turned on and what gets turned off, and I know you touched on those things. But I think it helps to explain what you just said about not being able to think of something else.

A. Right. The activated systems in the brain really evolve around perception which is guided and particular formation that we discussed and emotion, limbic system and amygdala and it alerts locus coeruleus, not to get too far into the weeds, but it really is a fast alarm system for preparing yourself and that adrenaline dump then gives you the energy to protect yourselves.

And then what's turned off is thinking, evaluation, integration, conceptualizing, planning, reasoning. You're just not there to do that. You're there to save yourself.

I often talk about this with deputies that if you jump into a frozen water, body of water you don't do anything but your mind does and your body does. It immediately robs all your limbs of blood, and it puts it where it needs the heart, brain and lungs, but you didn't do that. The body took on that role to save the organ at all cost, and the body knows it can lose a limb. You can't lose the heart.

Q. Is -- so that being said is this response something that had -- were there any way that Adam could have controlled his body's response? Like could he say, nope, I'm going to turn this off or, no, I'm going to stay focused or based on what you just said?

A. We believe today he was traumatized. That the threat to his life was imminent and he believed that it would set off a chain reaction in him and anyone else.

Q. That he would have no control over.

A. He would not be able to turn that off. And I think sometimes I've used the analogy when I taught some of this that if you've ever been in a near miss car accident where it was just paper thin that you avoided a miserable

accident, think of what happened. You barely remember exactly what went down. Your heart is racing. Your eyes are wide open. You can't believe -- you feel like you're in a daze. You can't believe what just happened. The near miss allows you to leave the scene. But as you drive away all you do is think about what just almost happened.

And some people have the experience I got to work. I don't remember the rest of the drive. It's because you elicited that acute stress reaction in the moment of nearly going into a head-on collision. And so sometimes people have these senses in life that they can relate to, just that pounding of the heart and they weren't thinking. It was all visual to them. Based on the headlights they saw, you know, the windshield, that's all they saw. They weren't thinking. They couldn't even have time to turn the steering wheel. So that's something people can connect to. That is the acute stress reaction. That is set off in, you know, that moment.

Q. Okay. All right. At this point what I would like to do is to turn to the video, and I believe the Court has a copy of the video that was submitted by the State?

THE COURT: Which video are you talking about?

MS. PENCE: The video of the incident.

THE COURT: It was submitted as an exhibit.

MS. PENCE: I have a copy. I just --

THE COURT: Years ago.

MS. PENCE: I wanted to -- okay. I wanted to make sure.

MR. LEVIN: On my paper, when I say previously submitted at the motions hearing. I have marked another one for today because I think we need to have one marked for today.

MS. PENCE: For sentencing.

MR. LEVIN: And it's the blue one, Marilyn. I can't remember which number it is.

THE CLERK: That's Exhibit 2.

MR. LEVIN: I'm sorry?

THE CLERK: Exhibit 2.

MS. PENCE: Are you okay?

MR. LEVIN: Yes.

THE COURT: So is it Exhibit 2?

MS. PENCE: And so if we're able, our technical crew, if we could turn off my screen and then turn on Mr. Levin's screen.

THE COURT: What is going to be played is representative of Exhibit 2?

MR. LEVIN: Yeah. It's a copy as we discussed at the motions hearing, the reason for that, that the file size

and the date of transfer rates make it impractical to play from the actual thumb drive. It plays a lot better off of the hard drive.

THE COURT: Go ahead.

MS. PENCE: And I'm -- I believe this is the video that was produced from the shorter pieces of video that were initially turned over and it's been strung together so that it's easy to play in one piece; is that right?

MR. LEVIN: Correct.

MS. PENCE: Okay. And so if we could just -- and this is State's Exhibit 2 for the record. If we could share this screen.

THE COURT: Do you have it? Mr. Levin, do you have your computer plugged in?

Q. (BY MS. PENCE:) Before I play this I'm going to ask if you've seen this video.

A. I have.

Q. On more than one occasion?

A. I have.

Q. Have you had a chance to study it?

A. Yes.

Q. And I'm going to play the video and I -- I don't believe many people present today have seen this video and I don't know if --

MR. LEVIN: I would just like to pause and give anyone who wants to a chance to step out if they want to, Your Honor. Apparently nobody wants to.

MS. PENCE: And I want to apologize for the affect that this will have on people who are present. It's not an easy thing to watch, but it's my hope that with this information it will allow everyone to have a better understanding.

THE COURT: The Court can turn off the gallery video. Is that something counsel wants done?

MR. LEVIN: Nobody has requested it.

THE COURT: Okay.

Q. (BY MS. PENCE:) So, Dr. McEllistrem, I'm going to start this video and then we've been talking about different points in this process. For example, the point of perception of the threat and then where we see certain types of violence.

And to start with I would like you if you're able to just sort of once I start playing this to let me know at which point based on your interviews and information and experience do you believe that we are seeing the threat.

A. So that's the initial I think, oh, my God. I can't believe it moment for Mr. Bernard. He actually drove miles to get to him and in his lifetime, as I mentioned,

he's retreat, retreat, always worked. Mr. Cook always backed off. So I think this is what really began this process.

Q. So at this point Adam has perceived the threat and Brian is present. And then at what point is Adam going to demonstrate or provide information to you that you can tell he is under the acute stress reaction. I'm going to go ahead and just play it.

(Whereupon, a video was played)

A. I think if we see the approach behavior. See the arms up in the air, kind of flailing, what are you doing.

Q. And for those who have not seen this, which of those individuals is Mr. Bernard?

A. On the left.

Q. On the left, okay. And Brian is the individual on the right?

A. Right.

Q. So you described his body language. So by having the swinging arms and the big shoulders what is it in your opinion that he is displaying?

A. At this point he feels trapped. So now he's this cat. He's just trying to make himself look big and he's flailing his arms to make himself look big and menacing in hopes I suppose the dog will back down in our old analogy.

Q. Okay. I'm now going to play the video until a

point in the altercation and when I have some more questions. I want to ask you about what is being displayed right now. What is it that you perceive in this video?

A. Well, I think the section kind of captures the kind of affective quality, the violence being displayed. You know, it's not particularly artful. He's flailing his arms around. They are walking. They are pacing, and he continues to advance because he can't let -- that cat can't let the dog advance. That cat has to strike first to save itself. That's why you see him keep approaching, keep approaching, making himself look big, flailing his arms out.

Q. And at this point we see that Brian is on the ground and Adam is striking him and the strikes that we see, can you describe the strikes to the best of your ability, what motions Adam is making?

A. I mean they are not very well placed. I mean he's just swinging. He's just swinging for his life.

Q. Okay.

A. When his arms get tired he's kicking. I mean, the body is throwing everything into this but it's a bit chaotic. It's a bit fumbly. He's just throwing punches in the hope that he'll --

Q. As we see he's continuing to punch. In order to go back to some of what you explained what is different about

how Adam is punching versus someone who like a boxer or someone who is using the cognitive part of their brain would be doing?

A. Well, like in the predatory cat it's a very directive planful attack to the back of the neck. So the punches tend to be a little bit more carefully landed or struck. This is flailing now.

Q. At any point in your observation of the video does Adam stop and punch somewhere different or change what the action that his arm is doing over and over again?

A. No. It just -- it's to the -- it looks like to the head and neck and just kind of repetitive motions.

Q. Okay. And that repetitive motion, is that consistent with the autonomic triggers that start to happen where you described the body and brain take over and it is no longer a cognitive process?

A. That's absolutely true. At this point in the scenario, if he let's up, if he fails he may die. He knows he's in the fight for his life and he just -- the body and mind take over and bring every resource to save his life, and there's no ability to like make inferences between punches or look for vitals or to look to see how he's doing. He's probably seeing very little because of his eye and because of what kind of social qualities of being in this intense

emotional situation so he's just swinging.

Q. And that focus solely on survival, that goes back to what you were talking about early with the tunnel vision, the inability to have any perception what is around you other than the threat; is that correct?

A. They are focused entirely on the threat.

Q. Okay.

A. Your hearing is focused on that threat. Your vision is focused on that threat. Peripheral details are lost.

Q. So I'm going to continue to play this and then I'm going to pause when you see a change in Adam's behavior. At this point can you describe what transition we are watching.

A. He didn't really know but from my experience it's just exhaustion. You saw the repetitive. It's just almost identical, identical and then he gets up and uses his legs. And, like I said, the body is going to use every resource it can until that threat is -- the brain is convinced that threat is gone.

Q. If you could describe what we just watched on the video from when Adam is continuing after kicking to strike again and again and then is approached by Kevin.

A. So Kevin now interrupts this kind of tidal wave

of arousal that's going on by touching him. It's kind of like a grounding point. So Kevin becomes kind of his external brain and grabs I think by the shoulder and touches him and then he immediately sort of stops what he's doing and backs off. So I think that broke that chain reaction of effective violence when someone is coming, saying it's over.

You can still see he's puffed out. His arms are out. He's still reacting as he's trying to calm down. He's pacing and agitated in my estimation.

Q. Now, at this point I believe that you're aware of what's going on after speaking with Adam and reading reports, but can you just tell us what is happening with Adam and Kevin at this point?

A. So they discuss that it's, you know, the thinking brain has come back on line I think for Adam because now he's thinking what do we do? And they are worried about him and they were worried about him being in the street. So they both discussed with each other why don't we get him out of the street and get him help.

Q. Can you describe what you just saw Adam do?

A. What I think I saw because this last kick was one time and one time only, unlike the previous series of kicks, and it's very different in both his approach and intensity and it's a cautionary kick.

Adam is not sure the threat is over despite all of the punching and the kicking and all of that. He is still not convinced this man does not pose a threat. Sometimes hunters have to approach their prey and do kind of a cautionary touching, you know, with the gun to the animal to make sure there's no movement of the deer for example. This was a cautionary kick to ensure before he lays hands on him to bring him off the street and to safety he really wanted to make sure this man was not going to get up and start it all over again.

Q. And this kick then had some thought; is that right? They were starting to actually have this cognition because clearly the kick looks different than what we see earlier.

A. That's what I believe is going on because they had a chance to talk and it was very logical. Let's get him to safety. Let's get him out of the street. So now they have to effectuate that plan, but he's not convinced or his mind is not convinced that he's free from danger. So you get that one cautionary kick.

Q. Okay. I want to go back to the slides now if we could. The last thing I just want to touch on with the Court is one of the biggest concerns with law enforcement with Adam himself, with family and friends is why didn't Adam remember.

Why did he say I don't know. I hit him once or twice. I don't know how many times. I don't know.

A. I think it's a couple of things really. I think that he was minimizing. I think he got afraid once he was approached by authorities and was questioned. So I think there's a level of minimization in there. But when he went and saw the video and it was shown to him I think his shock and dismay was genuine.

So I think he knew what was going on that night with him landing punches or kicks than he told the officer. That memorization was just that. But when he saw that video and the shock, the intensity, the level of intensity I think that was genuine and I think that's part of that model where you're not encoding all this very well. You're just on survival mode. So you have memories are going to be very spotty at best.

Q. So when he was asked by Sergeant Storke don't you remember how many times you hit him or don't you remember that you kicked him, based on and Adam responded no. It was like I blacked out. No, I don't remember. I know it was more than once. Based on what you know about what happens to the brain during this acute stress reaction is that what you would have expected?

A. You would -- I would definitely expect memory

impairments and ability to count the number of punches or kicks you have to throw, but there was also some level memorization according to what went down.

Q. And I want to wrap this up now and we had a number of other slides. But because of the time I think what I would like you to do is just, I tried to touch on it earlier with law enforcement, and I know that you are familiar with a number of studies with law enforcement and if you could maybe just advance to the slides.

Okay. Perception and memory, again, this is, and I just want to summarize. These were studies where there were large groups of law enforcement or agencies that had been through a traumatic experience or exposure to a danger and had similar experiences as far as what the brain and body does. And then if you could just kind of give us a summary of those findings.

A. I brought this analogy up, I'm often called when there's an officer involved shooting to meet with the deputies really quickly after the event and then I follow them until they are prepared to go back to work. So this is some of the information I know from having to teach myself about what to expect when I meet with these officers.

So what I did, this is just a really tiny sampling but the reason why we came up with the sampling is

for the jury trial. And each one of these studies had a tremendous amount of redundancy and also something unique, and we're not going to go through all of them, but this is just an example from '86 to '98 that covers some of the better studies that we know in the field of officer involved shootings.

Q. And then if we could advance to, yeah, 24. So in this, for example, can you highlight to the Court the similarities and the actual I guess the study results.

A. Yeah. This is one of the earlier studies, and you're going to see as we go through just two more the amount of the overlap and redundancy. I guess what I'm asking from this slide is these are the dimensions that are often evaluated by the researchers.

So for example, this was a sample of 86 officers involved in shootings. 67 percent of them recounted the event and is occurring in very slow motion, like time slowed down and the mind does that to allow you to respond. If everything is going in slow motion you can respond much better than if everybody is going at a very rapid pace.

Diminished sound, it's an auditory exclusion. Deputies tell me I felt the recoil of my gun, but I didn't hear the shots. I didn't hear my fellow officers shooting. I saw, you know, muzzle fire, but I heard nothing. It's this

auditory exclusion. About half of the sample reported that.

Over a third of the sample reports this tunnel vision experience where they are highly fixated on the target. It's usually the weapon and not the face of the assailant. About a third of them cannot remember some aspects of that experience.

And the last three are the things that typically were not occurring from most of the officers. They didn't have a heightened acuity, a visual detail. Sounds were not intensive but rather muted, and a few of them described it as happening very quickly or rapidly motion.

Q. All right. And then if we could just skip to, I want to say slide, this one.

A. Okay.

Q. And I don't want you to go through each of them.

A. Right.

Q. But if you could focus on the observations on the right-hand column, those are -- obviously a lot of the other ones from the prior study were present but these are different.

A. I think it's important to point out that the amount of overlap. This was a study done many years done by Klinger in 2001. It's a nice set. It's 113 separate cases over the 80 municipal and county police officers. So, again,

slow motion. This time heightened visual detail comes on line much better than it did before but, again, tunnel vision. Very few people saw it fast. Very few people have experienced identified sounds or other distortions, but the uniqueness of this case was the recall accuracy of how many times they shot their weapon. And the recall accuracy decreased as the number of shots increased. So five or fewer shots from the officer, about -- there's about an 81 percent accuracy. You jump up a few more shots, six to nine it diminishes considerably down to less than a third were able to accurately recount the number and then 13 shots or more there was zero accuracy.

Q. And just to put that into common knowledge so when we, and I talked about it when I was addressing the Court earlier, when an officer says, no, I only -- I think I fired twice, and the rest of the world is aware it wasn't twice. It was, you know, the first clip and part of a second. Is -- is that part of what of this information transferred into real life?

A. That's what I believe. I mean, the more times you engage to highly potentially lethal act you've lost count. You're just -- you just can't take in that information because the impairment is to memory and perception.

Q. And when those officers are firing again and again and again that is not a cognitive act. That would be what you discussed as the autonomic response?

A. Right.

Q. Survival.

A. It's survival at that point. They are -- they are not hearing anything in the periphery. They are not seeing anything in the periphery. They are tunnel focused on the threat. They typically can't hear their fellow officers. They can typically only describe hearing verbalizations coming from the perpetrator coming from the weapon. Everything else is excluded.

Q. Okay. And if we could go to I think the final, it is similar. I'm going to go ahead and pass on that in the interest of time.

A. So Klinger in 2008, seven years later, tries to replicate the study. He's now going into 157 multiple law enforcement agencies, 113 separate cases. And, again, not to belabor the point, but you can see they're still tracking the same kinds of autonomic responses and in the mind and body, diminished sound, tunnel vision.

Q. Yeah.

A. Automatic pilot.

Q. All right. So after you read through all of

these studies which the numbers support it. We've all heard the stories, and you as an expert I think with your knowledge in this, did you come up with a conclusion about your original referral question?

A. I did.

Q. Okay. And can you share that with the Court.

A. So at the end I believe Brian pursued Adam in a predatory manner. He communicated a clearly articulated and potentially deadly threat. His verbalized threat was immediately followed by a direct and targeted action that required Brian to drive to Adam's location.

Q. And I think that should be Adam's location.

A. Adam's location, yes. And I believe he met the criteria for experiencing exceptional physical and mental stress which is the ICD-10 classification or exposure to actual threat or death, serious injury which is the DSM5. This was a form of affective violence on Adam's part, not predatory.

Q. And I have one final question for you. At the time of this fight in that moment was there anything Adam could have done to stop his body from responding with survival instinct?

A. It's same as if you're in a frozen lake. There's nothing you can do to control blood flow. The body takes

over.

Q. Thank you.

THE COURT: All right. Mr. Levin, do you have questions?

MR. LEVIN: I do.

CROSS-EXAMINATION

BY MR. LEVIN:

Q. You mentioned that you had reviewed investigative materials and interviews. What investigative materials and interviews had you reviewed?

A. I was given deputy report for incident 17S02051, a supplement, narrative supplement again. There's several supplemental narratives that I was given regarding that initial report.

Then I was given, there's an interview for Tristian Cook, Kevin Tholl, George Mejia, Adam Bernard, Kevin Tholl and Adam Bernard. They are transcripts I think of interviews.

Q. And you interviewed the defendant as well?

A. I did.

Q. And, of course, you didn't have the ability to interview Brian Cook, correct?

A. Correct.

Q. It's true, isn't it, that some people can get in

experienced trauma, get in violent fights and be fully cognizant of what they are doing, even when it's life threatening?

A. Fully cognizant, I don't know that that is true. I don't think you can keep all of your faculties. If you're in the fight of your life it goes against the biology of the body and mind that brings to bear the resources to save yourself. It's portrayed that way in the movies I think sometimes but I don't -- I have not experienced that in any of my officer involved shootings or any cases like this.

Q. And people get in bar fights all the time with bottles, weapons, and it's your testimony that they are never fully cognizant and in control of what they are doing?

A. Bar fights is actually one of the examples using literature to describe affective violence.

Q. Okay.

A. And so, yes, I think, I mean, they are inebriated often but it's that highly emotional arousal. It's quick. It's usually over quickly. But, you know, full control of your thinking, and reactions I don't think is there. It's just this violent outburst that occurs between two.

MR. LEVIN: Nothing further.

THE COURT: Thank you.

Ms. Pence, any follow-up?

MS. PENCE: No.

THE COURT: All right. Doctor, thank you for your testimony. You are excused.

THE WITNESS: Thank you.

MS. PENCE: Thank you.

THE WITNESS: Thank you.

(Witness excused.)

MS. PENCE: So, Your Honor, I have a two-minute slide show that I would like to present and the reason that I want to offer it to the Court is that Adam sits before you today to be judged for his actions on that one night in July, and I do think it's important for the Court to balance or at least consider the other 43 years of that life. And so I do have, I want to say it's less than 20 pictures, they are stills. There's no music. There's no audio, but that I do believe it's important for the Court to consider.

THE COURT: Has that been marked as an exhibit?

MS. PENCE: No. And I made this for the Court. It is the exact same thing that I was going to play from the laptop.

THE COURT: Well, go ahead and have it marked as defense exhibit.

Madam Clerk, which exhibit will it be?

THE CLERK: Exhibit A.

THE COURT: Exhibit A. Mr. Levin, any objection?

MR. LEVIN: I haven't seen it.

THE COURT: Ms. Pence, do you have a hard copy you can show Mr. Levin?

MS. PENCE: I don't have a hard copy, but I can show it to him. Like I said, it's about two minutes. And I can do that just very briefly.

MR. LEVIN: I have no objection, Your Honor.

THE COURT: All right. Defendant's Exhibit A is admitted and you may publish it.

MS. PENCE: I think the mouse that was being used during the presentation is causing some.

(Whereupon, a slide show was played.)

MS. PENCE: That's the end of that, Your Honor.

At this time I am going to ask that Adam's mother Helen Bernard be allowed to read her letter.

THE COURT: She may.

Ms. Bernard, where are you at?

All right. Step forward, please. Please raise your right hand. Face the court clerk to be sworn.

HELEN BERNARD,

called as a witness on behalf of the

Defendant having been first duly sworn,

and testified as follows:

THE COURT: Thank you. Please come on up to the witness stand.

Go ahead and have a seat.

THE WITNESS: Okay. I do need a sip of water.

THE COURT: Take your time. When you are ready please give us your name.

THE WITNESS: My name is Helen Bernard.

THE COURT: All right. And how are you related to Adam?

THE WITNESS: I am Adam's mother.

THE COURT: All right. Thank you.

Go ahead, Ms. Pence.

THE WITNESS: Thank you, judge.

THE COURT: I'm sorry.

MS. PENCE: She did write this letter, and I think she would be more comfortable reading what she wrote.

THE COURT: Go ahead, Ms. Bernard.

MS. BERNARD: I appreciate being given the opportunity to speak about my son, Adam Bernard. Adam is my

only child. His father was out of his life at the age of 15 and passed away when he was 22. I'm proud of Adam's work ethic, caring and generous personality. Growing up several of my friends and parents of his friends said he always had such good manners and he was so polite growing up.

At the age of six he lost his vision in his left eye after five surgeries caused by being shot with a BB gun by a 12-year-old boy.

Adam excelled in baseball through the Majors in high school and the golf team. Coaches were amazed knowing of his visual handicap. As he got older he was muscular and was a target by bullies who assumed his vulnerability because of his lack of vision. Adam is not an aggressor. He is sensitive and protective.

Adam deserves a chance at probation. I'm afraid of him being seen as an aggressor in a prison environment due to the charges and his size. Adam is my rock. We've been living together for three years now. I'm on a fixed income and disabled and we need each other. We have no other family. Adam loves his dog Izzie. He has financial obligations of his truck payment and credit cards which he wants to fulfill.

We are both so sorry for the outcome of this altercation for the Cook Family.

Sincerely, Helen Bernard.

THE COURT: Thank you.

Ms. Pence, any questions?

MS. PENCE: No, Your Honor.

THE COURT: Mr. Levin?

MR. LEVIN: No.

THE COURT: All right. Ms. Bernard, thank you for coming today.

THE WITNESS: Thank you.

THE COURT: Go ahead and have a seat in the back.

(Witness excused.)

MS. PENCE: Your Honor, Adam entered an Alford plea in this case to manslaughter to avoid the risk of a trial for murder. And he also did that because it gave everyone in this case the opportunity to accept responsibility and understanding of what had happened and define some peace in that.

Adam was very aware that a public trial would have been extremely painful for Brian's family. What the Court heard today, what's been in the papers is not something that we want to remember about Brian, what we wanted to remember and to leave in the public was that, yes, Brian had issues with alcohol, and he had those demons, but he was a very very loved individual.

A trial would have brought out a lot of facts about Brian, a lot of details that would only be hurtful and harmful, and Adam was aware of that, and he was aware of the anguish and the grief that the family would be spared if he entered that plea.

So I am asking this Court to impose a prison sentence. I believe that a minimal prison sentence of 12 to 36 months is appropriate, but I'm also asking the Court to suspend that sentence and to place him on probation, and there are a lot of reasons for that and many of them were set forth in my sentencing memorandum. But one of the most important reasons for that and one of the things that I think the family and friends of both of these young men need to know were the information that came out in the hospital records because they help explain Brian's death, and I think that they will help everyone process their own loss.

Brian did suffer a head injury that night, one that the charge nurse who was on duty, Chris Paul, explained to Brian's daughter and to Investigator Koontz, that was stable and that he would recover from. The images and the progress notes informed that the hemorrhages in Brian's brain had gone through their normal course of injury. They had swelled and blossomed is what it's called, and then they had begun to heal.

The doctor's notes and these are included in the memo that was submitted noted that his CT looked much better. That was on July 29th. Actually, I think it was on July 24th. After that there was a family meeting and Brian's family and the doctor conferred and it was explained to them that they were going to take Brian off of some of the medications that kept him in a comma and they were going to wake him up. His neurological responses were good. His response to pain stimuli was good, and they were going to ween him off and wake him up out of his comma.

However, there were a few other things that were going on while Brian was in the hospital. His entire stay at the hospital Brian was fighting a fever and infection, an infection that was so stout and so strong that even antibiotic after antibiotic after infusion the hospital was not able to control that infection.

And the notes that I have submitted to the Court highlight how that was a high priority as far as medical decision-making because it was an infection that no matter what they gave him they could not get under control.

And what we learned in the autopsy was that Brian had meningitis, severe meningitis, not just in his brain cells but all along his spinal cord which meant it was systemic. And as this Court knows meningitis is lethal in

and of itself.

Additionally, Brian was treated for acute alcohol withdrawal. By the time Brian had arrived at the hospital and they took a blood sample his alcohol content was a .4%. I'm sure this Court is aware at about a .4 for most individuals it would be fatal. But Brian was an alcoholic and he drank a lot, but his body could not tolerate that. And one of the reasons he remained in a comma was to go through acute alcohol withdrawal because at a .45 the body shuts down.

After he had gone through the acute alcohol withdrawal and after the decision was made to take out the drains and to stop the chemicals and to wake him up, Brian suffered two separate cardiac arrests, one on the way to a CT in which medical staff was able to revive him and a second one after he had the CT from which he was not able to recover.

The cause of those cardiac arrests was deemed unknown in the documents from the hospital I submitted to the Court. But there were other medical records that did offer an explanation for those cardiac arrests. Brian had had issues with his heart caused by his alcoholism for at least three years prior to this incident.

In 2014, in 2015 and in 2016 he had gone to the

hospital for heart issues, tachycardia, brachycardia, myocardiopathy. I have submitted those records to Your Honor in order to better explain what may have happened during Brian's time at the hospital.

And there is one quote that I think is especially telling from a report that was done by a Dr. David Miller. When he saw Brian on December 18th of 2014 what Dr. Miller told Brian was that, and I am going to quote, he absolutely must discontinue his alcohol usage or that he will have a progressive cardiomyopathy leading to his death, end quote.

Brian did not stop drinking alcohol in December of 2014. And over the next three years as you heard both in the words of family and friends and the investigators, he continued to drink heavily. That took quite a toll on him. And I would offer to the Court that the reason that Brian had two cardiac arrests and was not able to recover, that reason was given to us all the way back in 2014.

I don't offer this information as an excuse or as an alternative theory. I offer this information because I think it's absolutely necessary for Brian's family, for his friends, for Adam's friends and family, for all of the people who got bits and pieces out of the newspaper about what happened that night and what caused Brian's death. And I think the information in the medical reports is the

information that we need to rely on and that this Court needs to use when it tempers the sentence for Adam.

The other reasons I'm asking the Court to consider a probationary sentence in this case is Adam's complete lack of violence. He has absolutely no prior history of physical violence. I'm asking the Court to look at his lifestyle. I know you read the letters. I -- every single one of them, kind, caring, helpful, giving, generous. The one thing you don't see anywhere in any of those letters is that he was aggressive or hostile or mean.

Another reason I want you to consider a probationary sentence is his behavior over the last four years. On the night of this incident Adam was interviewed by law enforcement, and he was allowed to return to his home. It was deemed that Brian was the primary aggressor and he acted in self-defense. Adam didn't leave. He didn't run away. He didn't believe he had done anything wrong or committed a crime and he got up the next morning just like everyone else.

He felt absolutely decimated at the loss of life. But as far as a crime in criminal, he had no reason to run and three months later when he was called in and asked if he would talk to law enforcement freely he did. He did not lawyer up. He did not request counsel. He went in and he

told them.

Four months later when he was asked to come in again, he cooperated and came in. When they said, you know, we don't believe you. You must have called him. There was some idea that maybe perhaps Adam had actually called and had some part in that conversation. They asked him to turn over his cell phone. He immediately consented and provided that phone. He had nothing to hide.

Since that time, Your Honor, he has lived in this community for almost four years now as a law-abiding, productive citizen.

He has been on stringent restrictions as far as his travel, his ability to consume any intoxicant. I know the Court is aware, other than Kombucha tea, Adam has never missed a test. He's never missed a call in. He has demonstrated to this Court for four years without fail, well, three years on D.A.S. supervision that he can follow anything this Court desires of him. He has no issues following any conditions.

Finally, I am going to have you consider what was mentioned in one of the letters about punishment enough. This Court is aware because of my sentencing memorandum that Adam has also paid a huge price and I don't mean because of the publicity and the negative in the newspaper.

He never wanted ever to harm Brian. And the way that we can know that and the way that the family and friends can come to believe that is to look at what his first thought was and what is written in multiple reports. As soon as he was interrupted with that reaction by Kevin and they walked to the curb, it was not Kevin and Adam talking about it and I would submit it's in the reports, it was Adam who said we got to move him out of the street. He could get hurt. First cognitive thought when his brain turned back on was to get him out of the street, the same man he had just fought for his life and his eye he wanted to protect.

Adam has done his very best to cope with the loss that he caused. He is in counseling. Now that he has entered a plea he is able to speak more freely about that night. Many of the friends and people who did not understand what happened have been made aware, and he is beginning to build a life. He works hard at his job. And his mother needs him at home.

Putting him back into custody, sending him to prison is not going to bring Brian back. And, in fact, I would submit again if Brian were here he would not wish that for Adam.

Your Honor, I would simply ask that the sentence imposed by the Court be one of wisdom, understanding and

compassion for both of the individuals that were involved that night and for their families.

Adam does have a very small statement he would like to read.

THE COURT: Thank you, Ms. Pence.

Mr. Filter, is there anything you would like to say?

MR. FILTER: No, Your Honor.

THE COURT: Mr. Bernard, the law affords you an opportunity to personally address the Court and offer any evidence in mitigation. Would you like to address the Court?

THE DEFENDANT: I would like to read a letter, if I could.

THE COURT: You may do so. I would ask that you stand.

THE DEFENDANT: First I want to apologize to Brian's family. I'm sincerely sorry and remorseful for what happened that night. Not a day goes by I don't mourn his death, and I wish I could change what happened. I'm genuinely sorry. I really am a good, caring person. I love my mom, my dog, my job, my friends and family.

I often volunteer. I have many times, I help my neighbors. You can always count on me if you need help moving or building something. I'm very generous and easy

going and give everyone respect.

I've been sober and living a clean, healthy lifestyle for over three years now, and I wouldn't have it any other way. What happened that night has changed my life. If I was granted with probation with a suspended prison sentence I would continue and live my life being a very best version of myself.

THE COURT: Thank you, sir.

We're going to take a five-minute recess. It appears to the Court it's possible we might be going past 5:00 tonight.

Mr. Levin, do you have thoughts about that?

MR. LEVIN: I think it will be close.

THE COURT: Okay. The reason I'm bringing that up is I'm not going to rush anyone here. We'll go as long as we need to. But I want to make sure court staff is aware we're probably going past 5:00 and to make arrangements, and I would appreciate that from staff. So we will be in recess for five minutes.

(Whereupon, a brief recess was taken.)

THE COURT: Court is back in session on Case 18CR104. Show the appearance of counsel for the State and counsel for the defendant and also the defendant.

Mr. Levin, you may proceed.

MR. LEVIN: Your Honor, first I just want to acknowledge that Brian Cook has a number of family members and friends here. I'm not going to mention them all, but in particular his parents are here and his three children. Having said that the State is going to present a very different view of this case than what you just heard.

The State's recommendation for sentencing in this case is for a maximum sentence of ten years in prison with a minimum parole eligibility of four years with the fines -- fines, fees and assessments -- fine of $10,000 and fees and assessments that are listed in the presentence investigation.

And the reason the State is asking for that maximum -- maximum penalty are as follows, the defendant in this case from, has failed to really accept responsibility or acknowledge any wrongdoing whatsoever on his part. There's been a chronology of lies and false statements from July 8th, 2017 through his completing his statement for the presentence investigation. And what I would like to do is go through that for the Court.

On July 8th, at the crime scene, almost immediately after this happened, the defendant told Deputy Treyna (phonetic) that Brian had wanted to come kick his ass and make him blind in his other eye. He told Deputy Treyna that Brian pushed him and grabbed for his neck. He then said

that he pushed Brian away and Brian approached him for a second time and he punched Brian one time and Brian fell to the ground.

Then on October 11th, 2017 the defendant was interviewed by Sergeant Storke, and I would like to play a few clips from that interview.

(Whereupon, a video was played.)

MR. LEVIN: I don't know if we can turn up the volume for a bit.

THE COURT: Hold on a second. That's as loud as it is on my end.

MR. LEVIN: Okay. This will be easier.

(Whereupon, a video was played.)

MR. LEVIN: And then the next clip.

(Whereupon, a video was played.)

MR. LEVIN: And then that clip what -- what you saw was the defendant actually demonstrating how he alleges that Brian was coming at him. The defendant had his arms raised with his hand out about eye level, like he was going to poke his eyes out and then demonstrated what he did which is two punches, a right and then a left.

(Whereupon, a video was played.)

MR. LEVIN: So the other thing you see in that same clip is now that he's got to have another interview, now

instead of punching him one time he's punched him three times. And on top of that he -- he describes in detail how Brian grabbed his shirt and pulled him down.

(Whereupon, a video clip was played.)

MR. LEVIN: So what he describes there is actually he -- he ceases the encounter and he calls Kevin Tholl over to him.

And the last clip from that October interview.

(Whereupon, a video clip was played.)

MR. LEVIN: So, again, he describes and he demonstrates the defendant or that Brian is grabbing him by the shirt and pulling him down and then he says they're actually wrestling down on the ground a little bit and then he hits him one time.

Then on -- on November 3rd, at this point Brian has succumbed and has passed on. And so another interview is conducted and this one yet another, more changes in the story.

(Whereupon, a video clip was played.)

MR. LEVIN: So now that Brian is dead now he comes up with, well, Brian said he was going to kill me. I'm going to kill you, a version, a statement that was not meant, a very serious statement but one that's not mentioned either to Deputy Treyna or Sergeant Storke in the October interview.

(Whereupon, a video clip was played.)

MR. LEVIN: Again, now that Brian is dead he didn't throw any punches now while standing and it's no longer one punch and Brian fell to the ground. Now -- now they are on the ground and wrestling around and he punches Brian.

(Whereupon, a video clip was played.)

MR. LEVIN: So he claims that Brian was wrestling him on the ground now rather than the right and the left he demonstrates just three jabs, what I would describe as a jab with his right hand.

(Whereupon, a video clip was played.)

MR. LEVIN: And you'll notice he said that with quite a bit of certainty.

(Whereupon, a video clip was played.)

MR. LEVIN: So you can see there this is before Kevin Tholl comes over and he describes just nudging him with his foot. Specifically says he wasn't booting him and he kind of describes doing it with the side of his foot versus earlier when he said -- when he stopped hitting him he said, oh, my God. Oh my God. Dude, did you see that. Now he's showing more concern for Brian claiming that he's trying to revive him.

(Whereupon, a video clip was played.)

MR. LEVIN: So he nudged him with his foot, but he doesn't think he ever kicked him in the head. At that point the defendant was shown a copy of the video of the event and asked what happened.

(Whereupon, a video clip was played.)

MR. LEVIN: So now he's blacked out. He didn't tell Deputy Treyna that he had blacked out. In fact, he told him that he hit him one time. Then he had another interview and he made some very specific statements in this interview. He gave very specific, certain statements and now when he's confronted with a video that shows what actually happened now for the first time, gee, I must have blacked out.

(Whereupon, a video clip was played.)

MR. LEVIN: So he never mentioned a gun or a knife at the fight before which would seem to be two pertinent facts. He says he blacked out but he remembers he was afraid for those things. Now for the first time, one, Brian is dead and, two, now he's confronted with a video, he has to come up with a reason to justify what he did and he comes up now with a knife and a shotgun.

(Whereupon, a video clip was played.)

MR. LEVIN: So he's been drinking all day. He claims he blacked out. Well, if he blacked out then how does he give the story to Deputy Treyna. How does he give that

October interview to Sergeant Storke. It's just -- it's just not true.

He gave that -- one story to Deputy Treyna immediately after this happened. He seemed to be able to remember all of the details that were favorable to him. But when you black out now he's -- and yet he comes up with all of these other additional facts that are favorable to him. He remembers Brian, he says, coming at him with the thumbs like he's going to poke his eyes out. Now he remembers a gun. He remembers a knife. He remembers that he was scared for his life. He remembers that Brian pulled him to the ground by his shirt and remembers trying to get Brian out of the street. He remembers all of the details that are favorable to him.

And then in his presentence investigation statement after that, now for the first time not only did Brian have the knife he says in there that Brian grabbed his pocket knife after earlier saying that he just had it on him and before that not saying anything about it.

Oh, then after he grabs the knife then he doesn't remember anything after that. But the video that you saw and you're going to see again doesn't show him grabbing a knife, in fact, throughout most or Brian coming at him with his thumbs like he's going to poke his eyes out. In fact,

through most of the video you're going to see Brian's arms and hands down by his side, and you're not going to see the thumbs coming at the defendant's eyes or Brian grabbing a knife.

He does remember going to move Brian out of the street but conveniently doesn't remember what he did moving Brian out of the street which was kick him again in the head.

So what else does the defendant say in his presentence investigation? He says he liked Brian. Were those the actions of something that -- somebody that he liked. In fact, what he told Investigator Storke in his interview was we were never buddies. I was forced to interact with him. He's a crazy guy. So what he said in the statement, the things that he's saying that are favorable to him are just not credible because the actual evidence indicates otherwise.

And then along with not accepting responsibility for his actions or acknowledging any wrongdoing, let's not forget that what he did was he entered an Alford plea. An Alford plea is, well, as the Nevada Supreme Court stated in Gomes, an Alford plea constitutes one of nolo contendere. It's when somebody maintains his or her innocence but pleads guilty pursuant to Alford. He hasn't accepted responsibility. He hasn't admitted any wrongdoing in either

his plea or his presentence investigation statement.

He mentions in his PSI statement having to come to terms with his responsibility in Brian's death, but he doesn't acknowledge any responsibility. He never acknowledged that he did anything wrong.

So now at this point I would like to go through the video again and highlight a number of things. So what you see in approximately the first 30 seconds is you'll see Brian pull up in his vehicle and it's the defendant who advances towards Brian. He squares up against Brian, and Brian did not grab a pocket knife as the defendant said.

(Whereupon, a video was played.)

MR. LEVIN: So the defendant doesn't appear to be panicked. He doesn't appear to be in some sort of fight or flight mode. He calmly walks towards Brian when Brian pulls up, and he covers actually a pretty good distance to get there.

And then continuing on, you'll see that it's actually Brian retreating and the defendant pursuing him. And you'll see that it's not Brian grabbing the defendant's shirt and pulling him down. It's actually Brian retreating and the defendant coming up from the behind him and pulling Brian to the ground.

(Whereupon, a video clip was played.)

MR. LEVIN: And the next segment I'm going to play after Brian is pulled to the ground from behind, not when he's actually trying to retreat, you'll see 29 brutal punches to Brian's head. You'll see that Brian is clearly unconscious. He's not moving except from the force of the blows. He's not defending himself, much less posing any further risk to the defendant, and it's clearly not the two to three jabs that the defendant had earlier demonstrated.

(Whereupon, a video clip was played.)

MR. LEVIN: And I think you can see from looking at, I'll talk about it in a little bit, those are not flailing punches. Those are very accurate punches.

(Whereupon, a video clip was played.)

MR. LEVIN: And then the defendant gets up and he's not nudging him. He's not nudging him with the side of his foot. Those are seven brutal kicks to the head. In no iteration of his story did he ever describe actually kicking Brian other than those nudges that he tried to demonstrate in his November interview.

(Whereupon, a video clip was played.)

MR. LEVIN: And then he goes back down, and there's nine more punches and one more kick to his head in this relentless attack until Kevin Tholl finally decides to come over and try to stop the defendant. So he didn't stop

after knocking him unconscious as he tried to have everyone believe going, oh, my God. Oh, my God. Kevin, did you see that or, dude, did you see that. It didn't happen that way.

(Whereupon, a video clip was played.)

MR. LEVIN: Then they go off to the side of the road. There's a break in the action, and you'll see then the defendant returned for one more cowardly kick to Brian's unconscious body, hard enough that when you look you'll see Brian's body heave from the force of it.

(Whereupon, a video was played.)

MR. LEVIN: So this was not the act of trying to nudge Brian away or showing any concern for Brian lying in the street as the defendant would have you believe, and that's why he came over. And you can see the anger even when he threw the hat down on Brian's body as well. It was not a toss. It was throwing it down with anger.

And then a photograph of Brian at the scene. So that's what the defendant would have you believe that he claims he had to do to Brian Cook to save his own life.

I want to talk about the sentencing memorandum that was filed with the Court, not all but much of the defense's factual assertions in that memorandum don't reference any testimony, reports or evidence, and those factual allegations argued should be given little to no

weight. They're argument. It's argument that's not based on anything just -- just provided to the Court.

In there the defendant says that Brian picked on him in high school. He spoke with Dr. McEllistrem and talked about being picked on by Brian in high school, and I think those claims are suspect. On October 11th, 2017, in his interview with Sergeant Storke he acknowledged that he went to the same high school as Brian but Brian was four to five years older. And he said he had met Brian for the first time on a camping trip in 2017.

In the sentencing memorandum he said he accepted a beer at Brian's house that day. I believe in his interview with Sergeant Storke he said about four beers at Brian's house. And then he talks in there about Kevin having spent about eight minutes trying to talk Brian out of coming over.

And in support of that statement they reference the call logs. Well, the call logs might show an eight-minute phone call, but they sure don't show what the contents of that phone call were. In fact, in Tristian's interview, the interview where the defense argued that he candidly acknowledged certain things about his father, what they don't say and what Dr. McEllistrem never mentioned is that in that interview Tristian said that he was in his dad's bedroom. He could hear his dad on the speaker phone with

Adam Bernard, the defendant, and heard Adam say come on over or come on over then. This was not a surprise that he was coming over. He actually invited him.

He says he wanted -- that he cooperated and wanted to help in any way he could except by telling the truth. The defense says in the memorandum that the medical examiner found injuries consistent with one punch or stated there was injuries consistent with one punch. I would like to introduce a copy of the autopsy report.

THE COURT: That will be marked as State's exhibit next in order.

MR. LEVIN: Three.

THE COURT: It's already marked as three.

MR. LEVIN: No. No, it will be marked three.

THE COURT: Any objection to three?

MS. PENCE: No, Your Honor.

THE COURT: Three is admitted.

MR. LEVIN: I think when you look at the report, what it says is it was reported that Brian was hit one time and fell to the ground. It was reported that way because Kevin Tholl and the defendant lied about it that way. But I don't think you're going to find in that report that it says that the injuries were consistent with one punch.

There was a photo submitted by the defense in

their sentencing memorandum of the defendant's hands. My copy was black and white because I have the original. Is the Court's copy black and white or color?

THE COURT: It's black and white. I would like to submit a colored copy of that photograph.

MS. PENCE: The color copy of the photograph, and that's fine, was also submitted with the originals that were filed with the Court.

THE COURT: Okay.

MR. LEVIN: Okay.

MS. PENCE: I think the judge had a courtesy copy but I do have the original in color.

THE COURT: I do have a courtesy copy.

MR. LEVIN: You know, whatever is most convenient for the Court.

MS. PENCE: But I did submit a color photograph.

MR. LEVIN: I didn't want to assume.

THE COURT: I do have the color copy, yes.

MR. LEVIN: Okay. So the defense wants to claim that the defendant, lack of depth perception and all kinds of things and in this hyper state of -- of trauma that the punches didn't hit Brian's head, that he struck the street, and you saw over 30 punches. And I think when you look at those hands common sense will tell you that is not a hand.

You saw the force that those punches were coming down with. That's not a hand that struck asphalt or concrete. I'm not sure what the street is there or even dirt that hard that many times and suffered that very minor injury.

The other thing that's in that memorandum and that was argued is there's various medical documents from Brian's medical history. But then the defense takes those documents and speculates and tries to conclude on how those issues contributed to Brian's death, and that's entitled to in no way. It's speculation unsupported by anyone with any kind of medical training or medical knowledge.

In fact, what you have is an autopsy report that doesn't acknowledge any of those things as a contributing factor and says Brian Cook died from blunt force trauma. In fact, they did examine Brian's heart, and it doesn't mention any concern with it or that it was a contributing factor in his death. It doesn't indicate that alcohol was a contributing factor in his death.

The fact of the matter is that Brian Cook died from the beating that Adam Bernard put on him to blunt force trauma. So the State is going to ask that you accept the medical examiner's opinion as to the cause of death as opposed to the defense's opinion as to the cause of death. And, again, nowhere does the defendant accept responsibility

or acknowledge doing anything wrong.

Brian Cook was not a crazy mean guy, and the defendant had no justification for killing him. Brian Cook did not deserve to die. The State can't adequately sum up Brian's Cook life in an afternoon, but you're going -- some statements were submitted. I would ask the Court to read them from some friends. The Court I think will read those. You'll hear from his family as well and that will provide you a bit of a window into Brian and who he is. But I think you deserve also to see who Brian was. There's Brian Cook. He's not a crazy mean guy. And there's Brian Cook and the fam -- and his family before tragedy struck. So that's -- that's who Brian Cook was, not what the defense would have you believe.

And with that I would ask that the written statements previously submitted by the State be admitted.

THE COURT: Any objection?

MS. PENCE: No, Your Honor.

THE COURT: They will be admitted and considered by the Court.

MR. LEVIN: So now to summarize why the defendant deserves this maximum sentence for all of that, the defendant knew Brian was intoxicated, and he gave no consideration to either avoiding the confrontation or curtailing his violent

response. You've received letters from people that knew the defendant, talking about his integrity, his character, his respect for others, that he would do everything in his power to avoid hurting somebody, but in this case he demonstrated none of those qualities.

He pursued that physical confrontation. It's on video. He beat an obviously unconscious Brian Cook who had no ability to defend himself, and he has failed at any stage in these proceedings to provide an honest account of the events.

The defense has -- excuse me, the defense has opined to you what Brian would have wanted, what the family is thinking and feeling, and I think you're going to hear from some of them that that's not accurate.

The defense talked about law enforcement allowing the defendant to go home on July 8th. Well, the reason they did that I submit was because the defendant lied about what happened and had they known the truth of what happened the results might have been very different.

The defense talked about the defendant coming back for two interviews voluntarily. Sure, he did so he could tell them more lies and so that he could try to prevent law enforcement from finding out the truth.

Dr. McEllistrem talked a little bit about this

condition. But we've got four months of false statements from the defense, from the defendant changing his story, adding details. I think we can -- whether you're -- whether you're suffering from a trauma induced condition or not, I think we all know that you're not going to remember everything and -- and I think it's important to distinguish between things you don't remember and things that you make up. We don't expect everyone to remember everything, but the defendant was making things up.

Dr. McEllistrem based his interview in large part on his interview with the defendant who is clearly a highest -- highly biased historian of these events. Dr. McEllistrem doesn't have access to Brian Cook. He can't tell a different story.

The defendant was not really caught off guard. As I stated, he was on one of those phone calls with Brian and said come on. Come on over or come over. Your Honor, the defendant is not a cat and Brian Cook is not a dog. What you saw in those videos were not flailing about. It was not a defendant flailing about. Those were well placed strikes. The video shows they are very consistent strikes. They were repetitive and they are consistent with somebody who's engaged in a vengeful attack. Somebody -- they are very consistent with somebody with good coordination, a high level

of coordination. They are highly consistent with somebody contrary to what they would have you believe who does have good depth perception.

The loss of an eye doesn't prevent you from having depth perception. A lot of the depth perception is learned behavior, and you can see that even from the defense's own statement. He was a great golfer. He was an excellent baseball player. He played football. And you saw in the video how accurate those strikes were.

Even after the break in the action the defendant came back to the body and it wasn't a nudge. That was a brutal kick to an unconscious man. This is after the break in action. The -- actually the slide that you were presented or slides that you were presented -- presented with I think are very telling. Those were the slides on the effects on perception and memory of this condition. You see things like, you know, hearing, recollection.

What you -- one of the results of this condition that you don't see on any of those slides is the fabrication and the making up of numerous exculpatory factual allegations which is what happened in this case. Everything from a gun, a knife, thumbs coming at his eye. Brian pulling him down, all sorts of things.

Your Honor, pursuant to the PSI, presentence

investigation on August 28th, 2014 the defendant was placed on probation for 48 months for a DUI. This crime also involved alcohol, quite a bit. The defendant said he was drinking all day and this was committed according to the PSI while the defendant was on probation within that 48 months. This is not a case where he should be given another chance at probation. The defendant's repeated fabricated stories, failure to ever acknowledge what he actually committed and failure to accept responsibility for those acts demand a maximum sentence.

The defendant's statements in the PSI and today aren't supported by the evidence and frankly they are made to secure leniency from the Court. He was the aggressor throughout the encounter you saw. Even though Brian may have come over there, what you see on the video is the defendant going for -- covering quite a bit of ground to get to Brian and then pursuing him even when Brian tried to retreat. I don't believe you will see anywhere on that video Brian throwing a single punch or grabbing a knife or grabbing a shotgun, any of those things.

The sheer viciousness and brutality, repeatedly hitting and kicking an unconscious man in the head over 40 times is such an aggravated and cruel attack. It demands a maximum sentence. That's what the State is asking for. The

harm the defendant caused, it didn't end with Brian's death. It goes beyond that. It continued to Brian's family, to his friends. He took Brian from his three children, from Brian's mother, from Brian's father. He knew that Brian's wife had passed away. So he knew that in doing this he's leaving those children without a mother or a father. That's what the defendant did. That's the harm that he's caused. It's Brian's death and it goes well beyond that.

For all of those reasons the defendant earned nothing less than the maximum sentence and that's what the State is going to recommend.

And with that I would like to call James Sonsteng to the stand.

MS. PENCE: Your Honor, before we start the victim impact portion I do have a couple of corrections that I believe are important because they went to the integrity of the information that I submitted in my report to the Court. Page seven of the interview with George Mejia, who is Brian's friend --

MR. LEVIN: Are we now back in --

MS. PENCE: I'm just simply making the corrections.

THE COURT: Corrections to facts or?

MS. PENCE: Yes. The statement that there was no

support that Adam was bullied and that Mr. McEllistrem may have been grasping at straws. It actually is documented in the report that he said he referred to and it was not something we made up, and I do have -- I don't believe it's appropriate that that would stand before the Court as being made up information.

THE COURT: So take a moment. I want you to talk to Mr. Levin and let him know what factual disputes you have.

MR. LEVIN: Well, I don't believe that I ever argued that he wasn't bullied. I don't think I mentioned it one way or the other.

MS. PENCE: I think you said in high school he didn't know him and had been bullied by him.

MR. LEVIN: I said -- I said he claimed that he didn't know him in high school. I didn't talk about the bullying. I just simply talked about when they had met.

THE COURT: Okay. That's the way I took it.

MR. LEVIN: Okay. I'm talking about what the defendant said.

MS. PENCE: That's fine.

MR. LEVIN: But --

MS. PENCE: That's fine, Your Honor. And the only other --

MR. LEVIN: -- I think for a clean record,

there's another individual that claimed that they did know each other in high school.

THE COURT: Okay. Thank you.

Go ahead, Ms. Pence.

MS. PENCE: Your Honor, the other is that Mr. Bernard was on probation at the time of this incident. I'm going to ask P and P to double check that. The misdemeanor conviction date was August of 2014. He was given ten days in jail which was suspended. It is requesting a four-year period of supervision which I don't believe is something that is possible in El Dorado. I don't believe that to be accurate.

THE COURT: I did have a question about that. So even if Ms. Pence hadn't brought that up I was going to ask the same of the division.

So, Ms. Pongasi, what we're looking at, there was a question on whether he was on probation or not at the time of this offense.

THE PROBATION OFFICER: His conviction shows August 28th of 2014 and the sentence was 48 months probation, a fine and ten days jail.

THE COURT: Is there any indication that he was -- had been removed from probation or?

THE PROBATION OFFICER: No, Your Honor.

THE COURT: Okay. Thank you.

If counsel has any additional evidence I'm happy to hear it. Obviously both of you made argument regarding your positions. Is there any additional evidence you would like?

MR. LEVIN: I'll state though the State is relying entirely on the presentence investigation. I don't have any information beyond that.

THE COURT: Thank you.

MS. PENCE: Does P and P have a judgment or simply the information that's entered into the database?

THE PROBATION OFFICER: It's simply his criminal history.

MS. PENCE: So not the actual judgment itself?

THE PROBATION OFFICER: No.

MS. PENCE: I don't have anything else.

THE COURT: In the absence of clarity on that fact I will be proceeding to sentencing with the assumption that he was not on probation at the time he committed this offense. That's too important of a fact here, and I'm not going to assume.

That being said, Mr. Levin, I get where your argument is coming from. But I think we also all know that on a 48-month probation a lot of things can happen in that

48 months. A person can be found to have honorably fulfilled their conditions a year into the probation. Perhaps they were terminated a year into the probation. There's just things here that I'm not going to assume, and I appreciate and respect the argument you're making.

But I'm not going to assume that Mr. Bernard was on probation unless you have some evidence.

MR. LEVIN: I'm not asking you to assume it. That's what the information that was presented to the Court, a different historian for the record. He's sitting here and doesn't have to say anything.

THE COURT: The information does not say he was on probation emphatically. He was given a sentence back in 2014.

MR. LEVIN: Correct.

THE COURT: That if he stayed on probation for his entire term. He may be on probation.

MR. LEVIN: Okay.

THE COURT: Often times we learn through the division of what happened afterwards, how did he do on probation. I have no idea here, and so I'm not going to assume the worst.

MR. LEVIN: I understand.

THE COURT: All right. Ms. Pence, were there any

other factual issues?

MS. PENCE: No, Your Honor.

THE COURT: All right. With that let's turn to Mr. Sonsteng. Sir, please step forward. All right. Sir, please raise your right hand and be sworn.

JAMES SONSTENG,

called as a witness on behalf of the State having been first duly sworn, and testified as follows:

THE COURT: All right. Sir, please come on up to the witness stand. Go ahead and have a seat, sir.

THE WITNESS: Okay. Thank you.

THE COURT: Please state your name.

THE WITNESS: James Martin Sonsteng.

THE COURT: Spell your last name.

THE WITNESS: S as in Sam o-n-s as in Sam t as in Tom e-n-g.

THE COURT: Thank you, sir. Sir, are you related to Brian Cook?

THE WITNESS: I'm his Godfather.

THE COURT: All right. And are you here today -- Mr. Levin, is he here offering victim impact testimony?

MR. LEVIN: I believe so.

THE COURT: As a relative of the victim you get an opportunity to present the Court with information as to how this case has impacted your family, make any recommendations that you might have. The attorneys might ask you questions when you're done.

THE WITNESS: Okay.

THE COURT: Go ahead, sir.

THE WITNESS: Okay. I'm going to introduce myself. My name is James Sonsteng. In my life I have been a United States Marine, a fire captain, a law enforcement officer and a free Mason. I am the Godfather of the deceased.

THE COURT: Sir, I'm going to rudely stop you for a moment.

And, counsel, I would like to have a discussion with regard to whether he falls within the definition of relative by statute, and I just want to make sure of that before we go any further.

MR. LEVIN: No, he does not. But you will also see in 176.015 that that doesn't limit the Court's ability to take the statement. It's just there are certain people that are mandatory that the Court has no discretion over, and then there's everybody else that this Court would have discretion

over.

THE COURT: So here's the difference as I see it. If he is a relative by definition he can give victim impact testimony whether you want him to or not at the end of your statements and he gets to make his statement. If he is not a relative but a side wants me to consider it, they can offer it and that would be under the provision that you are talking about. In which case though you would do it as part of your case, Mr. Levin, and tell me that you are offering this witness for the purpose of sentencing, that it's relevant and, of course, I would entertain any objections that defense might have.

So it sounds like there might be an agreement here that he is not a relative by definition from the statute. Is that accurate?

MR. LEVIN: The definition of relative by statute includes people a certain distance from the victim. In addition to being Godfather, Mr. Sonsteng is also his great uncle if I have that correct --

THE WITNESS: The consanguinity --

MR. LEVIN: -- that is outside the definition in the statute. But as I argue as I believe and the reason I called him and, in fact, I actually have him separate on my notes today from the remaining family members.

THE COURT: So you are calling him not as a victim to give victim impact testimony but to give relevant information for the Court to base its decision on?

MR. LEVIN: Well, and I think its decision can still be based on, well, impact. It would be impact testimony. It's still impact on him, on the family, on the friends and I think that is relevant.

THE COURT: All right.

MR. LEVIN: It's relevant for the same reasons that it's relevant for a mother or father, a son, a brother or a sister. It's just not within those mandatory statement provisions.

THE COURT: Ms. Pence, do you have any sense of what this witness is going to say? I'm just trying to find out if you know what his proffered testimony is.

MS. PENCE: Your Honor, I don't. I did hear some of the comments he made during the proceedings so far so I can imagine. But I do want this Court to know I don't object to having him provide testimony. This is a time that everyone should be heard.

THE COURT: Okay. And Mr. Bernard is okay with that?

THE DEFENDANT: Yes, sir.

MS. PENCE: He is, Your Honor.

THE COURT: So thank you, sir, for letting me digress a little bit.

THE WITNESS: Absolutely.

THE COURT: I'm going to allow you to proceed.

THE WITNESS: Thank you. I have witnessed Brian being a tender and loving dad with his children and very much in love with his wife who has passed on. I never knew him to be a fighter or a bully. I've never -- I've never knew him to hurt anyone physically. That is why when I heard -- I heard of the fight with a couple of other guys that left Brian in the hospital with brain damage I wondered, I wanted to find out the circumstances what they were.

After receiving information of what happened I was not told how the fight started, but Brian was knocked to the ground, appeared unconscious and defenseless with a man kicking him in the head. Brian -- Brian's family must live with the fact of not having him there as -- as a son, a husband, a father and a grandfather. I will not have the opportunity to tell Brian that I loved him or I love him but I'm sure he knew that automatically.

There's been a lot of things said, if this happened and that happened, it would be nice if Brian didn't drink that much that day and it would also I believe would have been nice and I would have felt the same way if somebody

said there's a drunk crazy man coming over to cut your eye out, I would say I'm going to call 911. I don't -- I don't need that -- I don't need that myself. So I think there was a lot of decisions that could have been made that weren't.

And I just hope -- and it appears to me, I never knew this before, but there was, I'm not going to say hatred, there was a feud going for many years between the two which I believe brought a lot of emotions to the surface, and I think at that point in time they exploded and that's my feeling on it. I'm sorry it happened.

THE COURT: Thank you, sir.

Mr. Levin, do you have any questions?

MR. LEVIN: No.

THE COURT: Ms. Pence?

MS. PENCE: No, Your Honor.

THE COURT: All right. Sir, thank you for coming today.

THE WITNESS: Absolutely. Thank you.

THE COURT: Go ahead and have a seat in the back.

(Witness excused.)

MR. LEVIN: And I believe the rest of the statements will be from people that fall within that definition.

THE COURT: Okay. Thank you. Who would the next

one be?

MR. LEVIN: Tim Lovestedt.

THE COURT: Sir, step forward. Please raise your right hand and face the court clerk to be sworn.

TIM LOVESTEDT,

called as a witness on behalf of the State having been first duly sworn, and testified as follows:

THE COURT: Thank you, sir. Please come on up. Please say your name.

THE WITNESS: Tim, last name Lovestedt, L-o-v-e-s-t-e-d-t.

THE COURT: Mr. Lovestedt, are you related to Brian Cook?

THE WITNESS: Brian is my -- Brian is my brother.

THE COURT: He's your brother.

THE WITNESS: Well, he's my step brother.

THE COURT: He's your step brother, okay. Thank you. In that capacity would you like to give a victim impact statement to the Court?

THE WITNESS: I don't know what I'm going to say. I will say that, yeah, it would be something in that regard,

yeah.

THE COURT: Okay. Bottom line here is whether or not you talk is entirely up to you. You can choose not to talk or you can give a statement. If you give a statement you can tell how this case has impacted the family and make any recommendations. Would you like to go ahead and make a statement?

THE WITNESS: Yeah.

THE COURT: Okay. You may proceed.

THE WITNESS: So, Adam, I don't know you. I met a lot of Brian's friends. I don't live up here. If it were someone in my position there's a pull towards vengeance and it's a very strong pull where in my heart I would -- I would entertain better or a dark angels or whatever they say.

But as I've been sitting there with my nephews and my family and people I love, there's no good in vengeance. And that this cycle of, that has happened to my nephews, this trauma, the damage it's affecting your family. It's terrible that they have to be here. It's terrible that we have to be here.

On that night I think you and I would both agree a lot of bad choices that night, a lot of bad choices, stacked up, drinking that much. I mean, we could go into them but we don't need to do that. We know what happened.

For me, in the absence of vengeance we're brought here for justice and justice is tricky. It's a tricky thing because what justice seeks to do is deliver hope that all of us among evil situations, among the most dire circumstances, the kind of pain and trauma you can't imagine, justice offers hope. It offers a way out for my nephews so that they can see we as a society there are certain things that cannot go and in that hopefully hope and peace can substitute those things because we all agree they don't happen.

I've never seen that videotape. I've heard about it. I keep thinking about consent. It's a big thing in other circumstances of law. When someone says no that's no. And we see movie stars and politicians and powerful people losing everything over not hearing consent, by not gaining consent, by taking advantage of someone because of the power or their position or their money.

On the videotape for me, when he's out and you're flailing on him and punching, I watch a lot of boxing. I watch a lot of MMA. I'm not a fighter myself, but you're in the most dominant position you can be in. His body is flat on the ground and you're over him this way, and you're taking advantage of someone who no longer can give you consent for a fight.

If I decide that he and I are going to fight and

we both agree on it the chips fall where they may because we both have consented today is the day we're going to fight. Brian couldn't give you that consent.

I don't believe you're some dangerous psychopathic person, but those choices stacked up that night and we all do it. We all do it. We make a left-hand turn too fast. We got away with that choice but there are days that you don't. The kick at the end. You didn't kick him to see if he was awake. I've seen that kick. That's the part that hurt me as his brother the most. That's where Brian had turned from some guy you knew to a piece of trash that no longer mattered, and you could kick him because he's not going to kick back because he's out.

I'm just going to end by saying whatever time you do, at the end of that there can be hope for you, that this is not the end. I truly wish that all of the things that were said about how sorry you were true. I don't believe them to be true. They might be one day but there's been four years. You could have wrote a letter. You could have said, listen, I blacked out. Something crazy happened. If I had blacked out and someone died like what -- there would have been something going on, written a letter, done something. There was no effort made over four years. You know friends of the family.

I've talked too long. I just -- I just think that -- I hope for justice and I hope that whatever happens there can be light and that all this darkness that my family has had for years that some light can emerge. That's all.

THE COURT: Mr. Lovestedt, thank you. Hold on one second. I'm going to see if the attorneys have any questions.

Mr. Levin, any questions?

MR. LEVIN: No.

THE COURT: Ms. Pence?

MS. PENCE: No, Your Honor.

THE COURT: All right. Thank you, sir.

(Witness excused.)

MR. LEVIN: Brittney Martinez.

THE COURT: All right. Ms. Martinez, please raise your right hand. Face the court clerk to be sworn.

BRITTNEY MARTINEZ,
called as a witness on behalf of the
State having been first duly sworn,
and testified as follows:

THE COURT: Thank you. Please come on up to the witness stand. Please state your name.

THE WITNESS: Brittney Martinez.

THE COURT: Spell your first name.

THE WITNESS: B-r-i-t-t-n-e-y.

THE COURT: Thank you. Your last name.

THE WITNESS: Martinez with a Z.

THE COURT: Thank you. And are you related to Brian Cook?

THE WITNESS: I am. Brian is my brother.

THE COURT: Okay. Would you like to give a victim impact statement?

THE WITNESS: I would.

THE COURT: You may do so.

THE WITNESS: Okay. So ugly is a word defined as unpleasant or repulsive or morally repugnant. You, Adam, to me are the true definition of ugly. You are a truly ugly individual that not only took the life of another human being but also made the inhuman decision to coward out of taking responsibility for your own actions in which you demonstrated the ugliest kind of behavior humanly possible.

I utterly hate sitting here today addressing and even saying your name, but for the duration of my statement I will address you by your name because I want you to know and to feel the direct burden you have solely created in this world by the crime that you committed.

There was a statement read today by Ms. Pence that you told -- that was told about the events during the day of the incident. It was said that Brian previously bullied you and was aggressive towards you. My question is if that was true why would you continue to spend the day with him? Why would you continue to drink with him? It is not consistent human nature to have an outside of work relationship with another individual that one is factually afraid of. This story is not a defense. It's an excuse, and there's no merit in any excuse.

Regardless of what anyone here today has alleged about Brian, he's not the one on trial here and he did not commit an act that killed someone. Brian did not hit anyone else, and when seeing them down and unconscious, make the decision to continue to hit them. Brian didn't while anyone was unconscious kneel down while they were on the ground and hit them again. Brian didn't while someone was unconscious kick them several times.

Brian didn't while someone was unconscious leave them in the street to die. Brian didn't kill anyone. He didn't -- he didn't hurt anyone and claim self-defense. Only a despicable human being would do such things. Only a coward would do such things. And you, Adam Bernard, you did things. You hit him and when he fell unconscious you beat him when he

was unable to defend himself and then you left him there to die.

You say that you believe Brian was a threat to either take your eye or your life, but when Brian arrived and approached, you disabled the threat. There was no -- it was no longer there. However, you continued to beat him and he was an unconscious man and you beat him into a coma where he later then died.

You were -- you were interviewed multiple times and allowed a chance to respond and tell your side of the story. And, Adam, it kills me because you couldn't even tell the same story twice. You gave excuses and when presented with video you cowarded out and said you blacked out.

I wish that I could say that your punishment for this truly heinous act would allow you never again to have the chance to devastate another family. But because of your plea and the maximum amount of time in which you can potentially be sentenced you unfortunately will be given that chance again, a chance that is undeserved because for me you deserve to be locked up and have the key intentionally thrown away. I had a friend of over a decade write me the other day and said, quote, I never had the privilege of meeting Brian, but I have witnessed firsthand the affect his death has had on you.

And to speak just about how your actions have personally affected me by you taking Brian's life, I was given medication to pull me out of a depression that was so deep I didn't know which way was up. I wasn't able to communicate with my family, not my parents, my siblings, my friends, not my husband, not my children because of the darkness that was taking over. I had to be directed and guided because I wasn't able to articulate the feelings and emotions that were controlling me. I was directed to a therapist, directed to medication. And your senseless act now causes me to even have to take a pill to be able to sleep through the night.

Your act caused me to forget how to be me, how to instill self-care in which in effect caused me to not be there in a way I should have been able to be there for my family.

Well, my family and I have been trying to find our way without Brian in this world. You have been free and it sickens me to the core. Since the day that your actions killed Brian you have been free, free to celebrate holidays and birthdays, free to create memories, free to laugh, free to experience life and it's disgusting. Disgusting that while being the sole individual responsible for turning our world completely upsidedown and being free our family instead

are the ones who have been jailed and in constant restraints.

Brian and my birthday are one day apart. And being siblings it's well known that because of that it is interpreted that we have the same birthday. Since you have taken Brian from this world I haven't had a birthday. I haven't been able to celebrate my birth nor his because you created his death.

Your actions have affected the lives of three children in a way that you could never understand. Ciara, Tristian and Elijah lost their mother and because of you lost their father. Your actions left three children parentless. Tristian didn't have his father at his high school graduation and now neither will Elijah. Ciara will never be able to have Brian walk her down the aisle at her wedding. These three children will forever mourn what you have done to them.

You have stripped so many experiences from these children that they should have had the chance to experience with their father, taken away so many opportunities that could have been lasting him memories. You killed their souls. You killed their spirit. You killed their father.

The defense today had a forensic psychologist come in to speak about the state of mind that you were in on the night of the incident. You gave a hypothesis which is defined as an educated guess and that by definition is not a

fact. There is no misunderstanding here. There's only facts. And while it may not have been your intent to kill Brian the law should be upheld by the intent of the action. The law should be upheld not by the intent of the action but by the laws that were broken, and you have broken the law. You -- you took the life of another individual after he was eliminated as a threat.

I loathe every breath that you're able to take and Brian is not. I loathe every holiday that you're able to have and Brian isn't. I loathe every memory that you are able to make and Brian can't. I loathe that your punishment, whatever it is, is not equal or fair to the deliberate and intended infliction of the murder you committed.

As you -- you may never be able to see the full extent of the pain that you have endured upon us. It exists and we will carry forever. So I ask wholeheartedly for the life that you took, for the murder that you committed that you are given the maximum sentence allowed by law given your accepted plea deal.

And with that I also ask, beg and plead to the judge that you are not only sentenced to the maximum time possible but that you are also held accountable serving that time in its entirety. You, Adam, you deserve a life sentence. You deserve to feel the pain and the trauma that

you've inflicted on so many with your heinous act. I hope with every part of my being that the judge and the judicial system make the right decision based on your actions and that your sentence is that. No early release, no probation, no lesser time for good behavior because your behavior is not good.

You came in today with a slide show of pictures of your past 43 years and we could have done the same for Brian because the past 41 years that he was alive that time mattered as well before you took it.

The forensic psychologist also today alleged that you suffered trauma from Brian's previous threats and violence. To be in a state of trauma one is disoriented, uncomfortable. And from the video that we watched your actions did not support that you suffered any trauma from Brian. You were clear, concise and knew exactly what you were doing. You had intentions and you followed through with them.

So Brian Eugene Cook, I want you to hear his name, Adam. Brian Eugene Cook. I want his name to be burned into you. I hope that you're waking from the sound slumbers in the middle of the night because his name is so loud in your head that you feel like you're losing your sanity. Brian Eugene Cook, I hope that you lose who you are over his

name. Brian Eugene Cook, I hope his name haunts you. I hope that you never find peace and solidarity because his name is so loud in your head. Brian Eugene Cook, and I hope when the day comes, whenever that may be that you take your last breath that his name is the last thing you hear in your mind because it's too loud to ignore. Brian Eugene Cook.

THE COURT: Thank you, Ms. Martinez.

Mr. Levin, do you have any questions?

MR. LEVIN: No.

THE COURT: Ms. Pence?

MS. PENCE: No.

THE COURT: All right. Thank you.

Ms. Martinez, thank you.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Mr. Levin, are there others?

MR. LEVIN: Tristian Cook.

THE COURT: Sir, please stand. Raise your right hand and face the court clerk to be sworn.

TRISTIAN COOK,

called as a witness on behalf of the State having been first duly sworn, and testified as follows:

THE COURT: All right. Thank you. Please come on up to the witness stand. State your name.

THE WITNESS: Tristian Cook.

THE COURT: Spell your first name.

THE WITNESS: T-r-i-s-t-i-a-n.

THE COURT: And how are you related to Brian Cook?

THE WITNESS: His son.

THE COURT: Would you like to give a victim impact statement.

THE WITNESS: Sure.

THE COURT: You may do so. Go ahead.

THE WITNESS: First of all, I would like to thank the Court and you for giving me the chance to be up here and let my voice be out.

The way that it has impacted my life was I didn't get to learn how to drive, sports, graduation. None of it happened because of you. The things that you did and the choices you made were wrong. And I hope you suffer for it. That will be it.

THE COURT: Thank you.

Mr. Levin, do you have any questions?

MR. LEVIN: No.

THE COURT: Ms. Pence?

MS. PENCE: No.

THE COURT: All right. Thank you, sir. Go ahead and have a seat in the back.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Mr. Levin?

MR. LEVIN: Ciara Cook.

THE COURT: Please raise your right hand and face the court clerk to be sworn.

CIARA ARAIZ,

called as a witness on behalf of the State having been first duly sworn, and testified as follows:

THE COURT: Thank you. Please come on up to the witness stand. Please state your name.

THE WITNESS: Ciara Araiz.

THE COURT: Spell your first name.

THE WITNESS: C-i-a-r-a.

THE COURT: And your last name?

THE WITNESS: A-r-a-i-z.

THE COURT: Thank you. And you are related to

Brian Cook?

THE WITNESS: Yeah.

THE COURT: How so?

THE WITNESS: Daughter, stepdaughter.

THE COURT: Stepdaughter?

THE WITNESS: Yeah.

THE COURT: Would you like to give a victim impact statement?

THE WITNESS: Yes.

THE COURT: You may do so.

THE WITNESS: Okay. So Brian Cook, step dad, even though I don't consider that, but I do have -- I carry a lot of my mom's attributes too and a lot of her -- a lot of what was in her was forgiveness. And these past four years I -- I have been so just torn because I don't want to live with hate in my heart, I really don't. I don't want to hold a grudge which that it runs in my brothers. I mean that runs, my mom complete opposite.

So this whole time I have just been kind of -- I need that. I needed more than a day because now I only have this day to analyze you, to see if I heard or could see remorse in you. Anyone can lie in a day, especially with the miniscule, in my opinion, pathetic probation, whatever you want to call it, with that on the line, anyone can lie in a

day knowing in the back of their mind, oh, I mean may be getting probation or even, you know, one to two years. It's only one to two years. We've suffered for four.

And then after seeing that video, like I said, I don't want to live with that darkness, I really don't. I wanted nothing more honestly to hear the remorse and see it. But when you stood and I don't know if it's court, you know, rules that you cannot turn around and make eye contact with us. I don't know if that's a thing but the fact that we have, one, we haven't heard anything from you in those four years.

Two, that you did not turn around and just look at us in the eye and apologize. And the apology you did give, I started to get that feeling of remorse at first. But then you know what, it turned into me, me, me, me, me, what you've been doing the last four years and how good you've been doing.

You're forcing me to live with the hate in my heart and what the -- you've majorly impacted, you have no idea because you know what, my brothers, they do -- they will forever live with that hate. They will -- they -- they want what happened to my dad to happen to you, 100 percent. And they have no -- they are not on my -- they don't see it how I see it, how that is a darkness. You know, it's -- it's -- so

I -- I have to carry that. I don't want them to feel that.

And then Tristian not having his dad to teach him how to drive, to any of that. Elijah, having to live in a completely different way that Tristian and I grew. Tristian and I grew up in which in, you know, in the Ranchos. And, yes, Elijah has been fortunate enough to go to the grandparents but it's just different. It's different. It's not how -- it's not how it was supposed to be, it's really not.

I'm not who I'm supposed to be anymore. I'm losing myself and I'm not going -- I'm not going to blame it fully on that. I know I take accountability for my actions, but you'll have no idea how much you have changed the lives of us. But I was hoping -- I mean, I was hoping that I was going to walk away today knowing what I was going to decide but I can't. I can't because I don't know you. I don't know you. This is the first time I've ever seen you. I've seen pictures, and so I just need more time.

So with probation, I'm asking like there's got to be some form of -- something much more than that, and that's just my, you know -- yeah. Thank you.

THE COURT: You're welcome.

Mr. Levin, do you have any questions?

MR. LEVIN: No.

THE COURT: Ms. Pence?

MS. PENCE: Nope.

THE COURT: All right. Thank you.

(Witness excused.)

MR. LEVIN: Thomas Nobriga.

THE COURT: Please raise your right hand.

THOMAS NOBRIGA,

called as a witness on behalf of the State having been first duly sworn, and testified as follows:

THE COURT: All right. Thank you, sir. Come on up, please. Please state your name.

THE WITNESS: Thomas Cooper Nobriga.

THE COURT: Spell it.

THE WITNESS: N as in Nancy o-b as in boy r-i-g-a.

THE COURT: Are you related to Brian Cook?

THE WITNESS: I am Brian Cook's stepfather.

THE COURT: Thank you. Would you like to provide a victim impact statement?

THE WITNESS: I would.

THE COURT: You may do so.

THE WITNESS: Your Honor, first what I'm going to read what I wrote and then I would like to address some of the things that I heard today as well.

THE COURT: Go ahead.

THE WITNESS: Okay. I met Brian on March 3rd, 1990. It was my first date with his mother. Soon after I moved in. I married his mother and we became a blended family. We have been in this family for 31 years now. There was Eric, the oldest and 11th grade, and Sue's two sons, Brian who was in eighth grade. And my two children, Brittney, who was five and Sevron, who was ten months old. It was a smaller three-bedroom house. So we had to adjust the room we had.

Brian first gift of generosity at such an early age is when his mother made his bedroom closet into bunk beds for my two young children. He wasn't upset and welcomed the move. My children have always and still look up to Brian as their protective older brother. I raised all my children the same way.

On July 8th, 2017 you changed our family life forever with a cowardly act of savagely beating an unconscious man to his death. Hold on. That man was a son, a father, a grandson, a brother, uncle and cousin and so much more to everyone that knew him. That was our son Brian Cook.

We first went to Renown Hospital on July 9th before we got to see him. We were escorted into a private room where the doctor spoke to us by phone. His words pressed us. He said the man I saw this morning is not the same one I saw last night and gave him a five percent chance of survival. Soon after he was rendered brain dead, and we knew it was time to let go because Brian knew how precious a life was, he was an organ donor. So we waited for them to arrange the removal of his organs to help other people that might have passed as well. That was our Brian.

After learning of this I called Douglas County Detectives and they upgraded your charge to murder. On the night of the savage beating they separated you and your accomplice, Kevin, into two police vehicles. You wrote I hit him once. Kevin simply wrote self-defense. The officer even looked at him and said really, that's all you're going to write. He just looked up and said yep. From there I had to investigate why it was taking so long to get any action against you and Kevin.

I soon learned that the detective that was handling the case happened to be given a promotion and placed your case on an unmanned desk. There it sat for nearly a month until I started making calls. I first spoke to the lieutenant. And when he did not call me back the next day as

promised I went to the chief's office and that's when the ball started rolling.

They assigned a new detective to the case and he came over to discuss where they were. They called you and Kevin back in for a second interview separately. The detective said in your preliminary hearing that your stories were exactly the same, right down to the last detail. And that when he asked you why that was you replied, well, we work together. You know, we talk.

During this time there was a -- there was a mutual friend that was working on our house. He called me the day before Brian's memorial and stated he went over to Kevin's house and asked him straight up what the hell happened that night. He said Kevin started to cry and said he just wouldn't stop. He just wouldn't stop hitting him. He just wouldn't stop kicking him. I was yelling at him to stop and he just wouldn't.

I called the D.A. the same day and gave him this information to which they called you in for a third interview. In this interview again you stated I only hit him three times. Then they show the video, thank God for this video, and you changed your story to I must have blacked out. Really, Adam, really? You can black out when it's convenient for your own defense.

In your preliminary hearing I heard through your court appointed attorney your words that were spoken the night of that savage beating. You said when Brian got out of his truck you walked up to him and asked him why do you hate me so much. And he replied that he was going to take your good eye first and then kill you. Adam, I watched this video several times during that trial, during that hearing. And from what I can see there was pointing of the finger. There's no bobbing of the head. There's no body movement as you would see if two men were going to get into a fight.

In fact, what I saw was that it was Brian, it was Brian that tried to diffuse the situation by walking away from you, not through you but exactly walking around you. You then proceeded to follow him about 15 feet down the road at which time he felt your presence over his left shoulder and looked at you and then again tried to walk away from you or walk in another ten feet into the road. That is where you threw your first punch to the back of his head, not seeing that this was coming you knocked a defenseless, non-moving man to the ground and started your savage attack. Again, a nonresponsive human being hit over 25 times and kicking numerous times in the head, really, this from a blacked out individual.

And then while still blacked out you and Kevin

picked him up off the street and drug hip to the side of the road. During one of my conversations with the D.A. I asked him for a favor. I asked him no matter how many times this video is played if we go to a jury trial, if he would in his closing arguments again play the video and ask the jury to watch a silent movie and you, Adam, the murderer will be the narrator. And see, ask the jury, does Adam's words match up to what you watched on that screen. Adam, not even close.

When your grandmother posted bail for you you were given bail under conditions. One being that you would not consume any alcohol. Your attorney represented you today as being an honorable student on probation which she failed to mention to the Court was that you failed two pee tests while you were on -- out on bail for murder.

How serious did you ever take your actions to be, Adam? If the roles were reversed, let me start by saying this, Ms. Pence, I did not give you the right nor will I ever to address my family on what Brian would want. You did not know him. You represent a murderer. Your defense is not your life. It's our life. It is your job. You go home and do a, put one in a win column or a lose column. We go home to a life without our loved one.

If the roles were reversed and it was our son sitting in your chair today, Adam, I can without hesitation

tell you that you would not be dead. You see, I taught all my kids that sometimes in their life that they may find themselves in situations where they might need to fight but there are rules. Number one, you never ever throw the first punch, which Brian did not do this night. Number two, you only fight if you were attacked and if you do so you stop when the threat is no longer there. Brian died because he lived a life I taught him. He's a better man for doing so.

Your defense was that Brian, he was a bully and he had threatened you numerous times so that you feared for your life. So my question to you, Adam, why then in the early hours of this day were you and Kevin at his house and he was loaning you fishing equipment to go fishing in the morning. In fact, after you left you were on speaker phone with him and both of his kids heard you telling him come on over so I can kick your ass. Does this sound like someone that feared for their life. No, no way at all.

What a feared for their life person would have done is stay in the house and when the other person showed up you would have called the police. It was clearly you looking for a fight this night, Adam. You were waiting for him outside when he drove up.

For our family there has been no justice served yet. You have walked nearly four years as a free man since

the heinous crime. You are a murderer, Adam. And as such, we are asking the judge for the maximum of ten years and for today to be your last day as a free man. You need no time to get your affairs in order. You have had four years to do so, and the last six weeks since your plea deal should have certainly opened your eyes.

I just wrote a couple of things down with reference. Ms. Pence addressed my family before she started her speaking about the case and said she knew it was going to hurt but it had to be heard, and she hoped that it would help us ease the pain and understand in so many words why our son was dead. You didn't make it better. You made it worse for him.

You can twist your words just like you did in the preliminary hearing. You can omit the full details of everything you want to say to defend him. To me that's a lie when you purposely omit something. So let's talk about omitting the first part, what really pissed me off today. You talked about my son's medical history as he was one of your best friends. You didn't know my son.

What did you omit in that detail of my son's medical history. What does it say on my son's death certificate, cause of death, do you know? It says homicide, blunt force trauma. Was that not important for you to talk

and say that. Adam did it.

There may have been a lot of things wrong with my son medically but what killed him was not one brain bleed, not two brain bleeds but three caused by a savage man, one that you have allowed using your crooked system to believe that he is the victim of a heinous crime.

You brought a professional up here, a professional. I'm not buying his story. You can't be either. Are you the cat or are you the dog. You can't be both. But in Adam's case, Adam, you're lucky. You get to be both, whatever is convenient to fit your crime.

I kept, when he was talking I kept thinking to myself, wait a minute, is Brian the dog or Adam is the cat? Which way is he going. Let me see. Let's just take Adam and Brian out of the equation. If there was a dog and there was a cat and the dog is obviously going to win because that's what happens and the dog addresses the cat and then the dog walks away from the cat is the cat going to turn around and follow the dog. I think not. And then the dog is supposed to look over his shoulder and see the cat following and then walk farther away and yet the cat is still going to follow the dog. That's not real life. That's not how it works.

You also said the plea, what was the plea? What was the plea called? What kind of plea?

THE COURT: An Alford plea.

THE WITNESS: Alford plea. At the end of your statement you stood up and you said with him doing an Alford plea it gave everybody the opportunity, I can't remember her exact words but something like everybody the opportunity to represent the facts or them in the case except for one person. One person is dead. That person can't speak. I can't speak on his behalf and neither should have you ever. You crossed the line with me when you talked for my son. I did not give you that right.

The last thing, judge, I want to say is during his last trial when he pleaded, you asked him two specific questions and nothing has been burning a hole in the back of my head more since that. You told him since you took the Alford plea that you were unable to ask him specific questions about the trial. However, I could ask you two questions. Number one, did you take the plea because you thought that the D.A. had enough evidence to charge you with a harsher crime and your answer was yes.

Number two, did you take the plea because you thought if it went to a jury trial that the jury would find you with a harsher crime and maybe can give you up to a maximum life in prison. And your answer was yes. I agree with Ciara, your -- your statements to us, that wasn't an

apology. That was a cry for help saying please don't send me to prison. I'm a good guy. I'm not saying you're not a good guy but you did something terrible and you need to pay for it.

And that's about all I have.

THE COURT: Thank you, sir.

Mr. Levin, do you have any questions?

MR. LEVIN: No.

THE COURT: Ms. Pence?

MS. PENCE: No.

THE COURT: All right. Thank you, sir.

(Witness excused.)

MR. LEVIN: Are you the last one?

THE COURT: Any others?

MR. LEVIN: No, Your Honor.

THE COURT: Ms. Pence, do you agree credit for time served is 49 days?

MS. PENCE: Yes, Your Honor.

THE COURT: Mr. Levin?

MR. LEVIN: Yes.

THE COURT: Ms. Pence, any reason why judgment should not now be imposed?

MS. PENCE: No, Your Honor.

THE COURT: Mr. Bernard, please stand.

Mr. Bernard, the Court now adjudicates you guilty of the crime contained within the amended information for which you previously entered a plea of guilty, specifically voluntary manslaughter, a violation of NRS 200.040, NRS 200.050 and NRS 200.080, a category B felony, for which the Court is now prepared to impose sentence.

Had this case gone to trial the jury would have been given an instruction regarding intent, and it goes something like none of us ever know what is in somebody's else's mind. The only way we can judge that is by looking at the facts and circumstances. And in a lot of cases all we have are witness statements or statements of defendants or victims to be able to help us know what the facts and circumstances are.

Here as we know, there's one person that can't give their statement and that's Mr. Cook. But we also know something else. Here a neighbor's surveillance camera videotaped the entire event. And, sir, you cannot run from that videotape. That videotape in watching it lends evidence of malice expressed or implied, and a strong sentence is appropriate in this case.

The Court sentences you as follows. You are ordered to pay a 25 dollar administrative assessment fee, a 150 dollar DNA fee, a three dollar DNA assessment fee, a 500

dollar attorney's fee reimbursement and a 10,000 dollar fine.

You are sentenced to the maximum term of ten years in the Nevada State Prison with a minimum term of four years. That plays out as 120-month sentence with minimum parole eligibility of 48 months. You are granted 49 days credit for time served. Your request for probation is denied. The defendant is remanded to the custody of the sheriff to begin serving his term.

Mr. Levin, anything further for today's purpose?

MR. LEVIN: I think we need to exonerate bond.

THE COURT: All right. That bond is exonerated.

THE CLERK: Judge, there's a cash bail. Do you want it forfeited?

THE COURT: All right. The cash bail can go towards the fines, fees and assessments in this case. So it is exonerated for that purpose. Any remaining monies can be returned to whoever posted it.

Mr. Levin, anything further?

MR. LEVIN: No, Your Honor.

THE COURT: Ms. Pence?

MS. PENCE: No, Your Honor.

THE COURT: All right. Thank you. That is the Court's order.

Court stands in recess.

STATE OF NEVADA,)
) ss.
CARSON CITY.)

I, KATHY JACKSON, Nevada Certified Court Reporter Number 402, do hereby certify:

That I was present in the District Court in Minden, in and for the State of Nevada, on Thursday, July 1, 2021, for the purpose of reporting in verbatim stenotype notes the within-entitled Sentencing Hearing;

That the foregoing transcript, consisting of pages 1 through 152, is a full, true and correct transcription of said Sentencing Hearing.

Dated at Carson City, Nevada, this 26th day of July, 2021.

/s/ Kathy Jackson
KATHY JACKSON, CCR
Nevada CCR #402

CAPITOL REPORTERS
628 E. John Street #3
Carson City, Nevada 89706
775-882-5322

THE NINTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF DOUGLAS

STATE OF NEVADA,
Plaintiff,
v.
ADAM BERNARD,
Defendant.

Case No. 2018-CR-00104
Dept. No. 2

AFFIRMATION
Pursuant to NRS 239B.030

The Undersigned does hereby affirm that the following document **DOES NOT** contain the social security number of any person: (List of document(s) attached below)

1) Sentencing -- 7/1/21

-or-

The undersigned does hereby affirm that the document named below **DOES** contain the social security number of a person as required by state or federal law or for the administration of a public program or for an application for a federal or state grant: (List of document(s) attached containing social security number information below)

1) _____

2) _____

(Your signature) Kathy Jackson Kathy Jackson (Date) 7/25/21

Case No. 2018-CR-00104

Dept. No. II

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

JUDGMENT OF CONVICTION

ADAM ANTHONY BERNARD,

Defendant.

_____/

On the 5th day of May, 2021, Defendant entered a plea of guilty pursuant to North Carolina v. Alford, 400 U.S. 25 to the following offense contained within the Amended Information: Voluntary Manslaughter, a violation of NRS 200.040, 200.050, and 200.080, a category B felony.

On the 1st day of July, 2021, Defendant appeared for sentencing. Finding no legal cause why judgment should not be pronounced, judgment was rendered as follows: Voluntary Manslaughter, a violation of NRS 200.040, 200.050, and 200.080, a category B felony, imprisonment in the state prison for a maximum term of one hundred twenty (120) months and a minimum term of forty-eight (48) months, and a fine in the amount of ten thousand dollars ($10,000.00). Defendant shall pay statutory fees and assessments of $25.00 (NRS 176.062), $3.00 (NRS 176.0623),

THOMAS W. GREGORY
DISTRICT JUDGE
NINTH JUDICIAL
DISTRICT COURT
P.O. BOX 218
MINDEN, NV 89423

$150.00 (NRS 176.0915), and reimbursement of appointed counsel fees of five hundred dollars ($500.00).

Defendant is granted forty-nine (49) days credit for time served.

This judgment constitutes a lien in like manner as a judgment rendered in a civil action. NRS 176.275.

Dated this 2nd day of July, 2021.

Thomas W. Gregory
DISTRICT JUDGE

THOMAS W. GREGORY
DISTRICT JUDGE
NINTH JUDICIAL
DISTRICT COURT
P.O. BOX 218
MINDEN, NV 89423

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Case No. 18-CR-00104

Department No. II

This document does not contain personal information of any person

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

STATE OF NEVADA,

Plaintiff,

vs.

ADAM ANTHONY BERNARD,

Defendant.

NOTICE OF APPEAL

Notice is given that Adam Anthony Bernard, defendant, hereby appeals to the Supreme Court of Nevada from the Judgment of Conviction entered in this matter on July 2, 2021.

Dated this 23rd day of July, 2021.

Maria Pence, Esq.
Bar No. 9890
1662 US Hwy 395, Ste 203
Minden, Nevada 89423
(775)392-4084
Attorney for defendant Bernard

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PENCE & ASSOCIATES and that on this date, I delivered a true and correct copy of the Notice of Appeal to the following address:

Erik Levin, Chief Criminal Deputy District Attorney
District Attorney's Office
1038 Buckeye Road
Minden, NV 89423
(emailed)

Dated this 23rd day of July, 2021.

MARIA PENCE, ESQ.