

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

vs.

TATIANA LEIBEL,

Respondent,

_____ /

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Case No. 2014-CR-00062
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RECORD ON APPEAL

VOLUME 21

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TATIANA LEIBEL
INMATE #1137908
FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER
4370 SMILEY ROAD
LAS VEGAS, NEVADA 89115

IN PROPER PERSON

THE STATE OF NEVADA

DOUGLAS COUNTY DISTRICT ATTORNEY

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1 proceeding did you handle? What aspects?

2 A. I was appointed on March the 6th of 2014. And --

3 Q. And, ma'am, you're reading off your notes --

4 THE COURT: Are you reading some notes, ma'am?

5 THE WITNESS: Yes. I -- you want a copy?

6 THE COURT: You're not allowed to review any

7 notes unless you ask me and unless I tell you to do so. So

8 put your notes away.

9 THE WITNESS: All right.

10 THE COURT: And I will tell you if I want you to

11 review them.

12 BY MR. MALONE:

13 Q. You prepared for her preliminary hearing.

14 Correct?

15 A. That's correct.

16 Q. And you participated in that preliminary hearing?

17 A. I did.

18 Q. Did -- in the course of your preparation, did you

19 have opportunity to review the file?

20 A. What was available of it at that time, yes.

21 Q. Okay. Did that interview -- did that include

22 transcripts of her interviews with sheriff's detectives?

23 A. Yes.

24 Q. Okay. Did it include the video?

1 A. I don't think so.

2 Q. Okay. Did you form an opinion based upon your
3 training and experience as to whether an interpreter was
4 needed to speak with your client?

5 A. I did ultimately. I didn't at that moment.

6 Q. From the transcript?

7 A. Yes.

8 MR. JOHNSON: Objection to the foundation, what
9 the basis for the opinion is if she's offering her opinion.

10 THE COURT: It's overruled.

11 BY MR. MALONE:

12 Q. You also spoke to her while she was in custody.
13 Correct?

14 A. One time.

15 Q. Okay. Were you able to speak -- did you consult
16 with -- were draw the -- withdraw the first question.

17 And you did that while she was in custody here at
18 the detention center in Douglas County?

19 A. Yes, downstairs.

20 Q. And did you determine from co-counsel whether or
21 not you needed to bring an interpreter?

22 A. When I reviewed my notes of that interview, I
23 don't have anything specifically that refers to an
24 interpreter, but I did have a note that I had asked

1 Ms. Leibel -- is that how it's pronounced?
2 Q. Yes, Leibel.
3 A. Leibel. I -- I expressed that we had a problems
4 because of her statement that she had already given to the
5 police. And she said, "But they put words in my mouth."
6 Q. Okay.
7 A. And I have that in a quote.
8 Q. Okay. Did -- in your opinion, would have --
9 would have it been necessary for you to have an interpreter
10 had you cons- -- continued in the representation?
11 A. Yes.
12 Q. Okay. And no equivocation there?
13 A. No.
14 Q. And I -- just to be clear, I'm talking about an
15 interpreter who would interpret your attorney-client
16 conversations.
17 A. Correct.
18 Q. Okay.
19 A. And I believe that one would have been necessary.
20 Q. Okay. And are you familiar with the provisions
21 of ADKT 0411?
22 A. Yes.
23 Q. Okay. And to your knowledge, does that set forth
24 standards for attorneys to follow when determining whether an

1 interpreter is needed?

2 A. Yes.

3 Q. Okay. And you would have followed those
4 standards?

5 A. I believe so.

6 Q. Okay. And those standards would have, in your
7 opinion, required an interpreter?

8 A. Yes.

9 Q. Okay. Did -- you did review what was found in
10 the file. Correct?

11 A. Yes.

12 Q. At that time?

13 And what type -- this was a case where the jury
14 might have found that Mr. Leibel committed suicide?

15 A. That was one possibility.

16 MR. JOHNSON: Objection. Leading.

17 MR. MALONE: I didn't --

18 THE COURT: Well --

19 MR. MALONE: "Is this." I'll change it to --

20 THE COURT: I understand that. I sat through the
21 trial. It's not -- the leading part of it isn't persuading
22 me, the finder of fact. Go ahead and ask your questions.
23 Let's try to move on.

24 BY MR. MALONE:

1 Q. And it -- are you aware of the State's theory of
2 the case?

3 A. Uh-huh. Yes.

4 Q. Okay. What did they say had happened or what
5 were they saying had happened?

6 A. That Ms. Leibel had murdered her husband.

7 Q. Okay. So the defense in this case would have
8 been suicide?

9 A. Yes.

10 Q. Okay. Were you familiar with any aspects of the
11 discovery that caused you to question Mr. Leibel's mental
12 state at the time of his death?

13 A. I was aware of some concerns about his mental
14 state, both from the discovery and from talking with
15 Ms. Leibel.

16 Q. Okay. Had you continued with the case, do you
17 think it would -- would it -- would you -- would have you
18 retained a psychological expert to review the file and render
19 an opinion?

20 A. Yes.

21 Q. Okay. And do you think that that would have been
22 the standard of practice in a murder case of this type?

23 A. Yes.

24 MR. MALONE: Thank you, Your Honor.

1 CROSS-EXAMINATION

2 BY MR. JOHNSON:

3 Q. Ms. Armstrong, you were appointed on March 6th of
4 2014. Correct?

5 A. Yes.

6 Q. And the preliminary hearing took place on
7 April 3rd of 2014?

8 A. I think so.

9 Q. So that was approximately -- a little less than a
10 month later?

11 A. Yes.

12 Q. And during that period of time, you met with
13 Ms. Leibel personally one time?

14 A. That's correct.

15 Q. And during the preliminary hearing, Ms. Brown
16 asked all the questions of the witnesses; is that correct?

17 A. Yes.

18 Q. And approximately how long did you meet with
19 Ms. Leibel on that one time that you spoke with her in the --
20 in between?

21 A. I didn't write it down, but I would estimate an
22 hour.

23 Q. Okay. And so -- and when you speak with people,
24 you frequently use idioms; is that correct?

1 A. Yes.

2 Q. And an idiom is a -- is a series of words that
3 doesn't, on their face, mean what they would look like if
4 you're just -- if you're just looking at the words themselves.
5 Correct?

6 A. That's right.

7 Q. And the use of idioms for someone that has
8 English as a second language might be particularly confusing?

9 A. Definitely. I've had that experience many a time
10 with working with Spanish-speaking interpreters, and I have to
11 start over.

12 Q. So it's possible that, during your hour
13 conversation with Ms. Leibel, your use of idioms might have
14 led to some of her confusion with her conversation with you?

15 A. I'm not sure. I'm not sure if I used idioms that
16 day, but I frequently do. I'm an Okie.

17 Q. Okay. And you never told Ms. Brown that, in any
18 further meetings -- attorney-client meetings, she should get
19 an interpreter, did you?

20 A. The only other time we worked together was at the
21 prelim, and there were three interpreters changing out every
22 20 minutes.

23 Q. But you never had a conversation about
24 attorney-client meetings in the future, that she needed an

1 interpreter for those?

2 A. I -- the next time I met with the clerk, I was
3 dismissed from the case.

4 Q. So you never spoke with Ms. Brown between your
5 meeting with Ms. Leibel and the preliminary hearing?

6 A. Well, not according to my notes. I believe there
7 was some e-mail correspondence between my secretary at the
8 time, Donice [phonetic], regarding experts and that type of
9 thing. So there was some communication, but I don't remember
10 meeting with her.

11 Q. So Ms. Brown never had an opportunity to hear
12 your opinion on Ms. Leibel's ability to speak English after
13 you met with her personally for an hour?

14 A. I don't -- I don't have any notes that I said
15 anything. I do have a note from the District Court
16 arraignment the day I was dismissed that said -- I always
17 write down, when I sit down, who is the judge, who are the
18 lawyers, whether the Defendant is present --

19 Q. And, ma'am, I don't -- I don't mean to interrupt
20 and I appreciate all the extra information, but I think you
21 said no in the beginning. So I'll ask any other questions
22 about --

23 THE COURT: I don't know if she finished her
24 answer, sir, so I'm going to allow her to finish.

1 MR. JOHNSON: I guess I object to be unresponsive
2 to the question.

3 THE COURT: Well, your objection is overruled. I
4 just said she's going to get the chance to finish her answer.

5 THE WITNESS: When I wrote those notes, like I
6 always do, I put "no interpreter," and I was surprised that we
7 wouldn't have an interpreter for court.

8 THE COURT: Thank you.

9 BY MR. JOHNSON:

10 Q. So you said your note was about a court
11 proceeding?

12 A. Yes.

13 Q. Now, when Mr. -- when post-conviction counsel
14 approached you about the issue of a psychiatrist or
15 psychologist, did he ever use the term "psychological autopsy"
16 with you?

17 A. I'm not sure if that was the term or "postmortem
18 psych eval."

19 Q. And was that the first time you had ever heard of
20 such a thing?

21 A. And that's what I told you when you asked me.
22 Yes.

23 Q. So even though you're saying that that would be
24 an appropriate thing to do in this case, you personally had

1 never heard of such a thing before?

2 A. I had not. And I had also considered a psych
3 eval for Ms. Leibel. So when I mentioned that earlier, I
4 think that was my thought.

5 Q. Okay. So your thought -- when you said about the
6 psychologist earlier on direct, you weren't referring
7 specifically to the deceased, Mr. Leibel?

8 A. No.

9 Q. Okay. And had you received all of the discovery
10 at this time that you had your conversation with Ms. Leibel?

11 A. I doubt it. I don't think so.

12 Q. And you were still waiting on further discovery
13 at the time of the preliminary hearing, too. Right?

14 A. I believe so.

15 Q. So you didn't even have all the full information
16 to discuss with my -- Ms. Leibel at the time?

17 A. Not the police reports -- or follow-up police
18 reports, I should say.

19 Q. And you'd read the entire transcript from the
20 initial interview before you met with Ms. Leibel?

21 A. Yes.

22 Q. And so is there anything besides the transcript
23 and your hour-long conversation that leads to your opinion
24 here that she needed a translator during her future

1 attorney-client conversations?

2 A. I believe that my opinion is based on both my
3 interaction with her and my years and years of experience.

4 Q. Have you worked with Russian speakers before?

5 A. No. No, sir, but I've worked on many, many cases
6 where the defendant didn't speak English.

7 Q. But you haven't ever worked on it with Russian
8 interpreters before, people that speak Russian as a -- or
9 English as a second language and Russian as a primary
10 language?

11 A. I have not.

12 Q. And you weren't present for any of the
13 attorney-client meetings between Ms. Brown and Ms. Leibel
14 after the preliminary hearing. Correct?

15 A. That's correct.

16 Q. And you don't know whether Ms. Brown was able to
17 understand Ms. Leibel better than you were?

18 A. No, I don't know.

19 Q. So it's possible that, even though you had
20 difficulty during that hour-long conversation, Ms. Brown
21 didn't have the same difficulties you had?

22 A. That's possible.

23 MR. JOHNSON: No further questions, Your Honor.

24 THE COURT: Do you have any redirect, sir?

1 MR. MALONE: Yes.

2

3 REDIRECT EXAMINATION

4 BY MR. MALONE:

5 Q. Ms. Armstrong, after reviewing the transcript of
6 the interview that Ms. Leibel gave to the sheriffs --

7 A. Yes.

8 Q. After you read that, did you have any doubt that
9 there was a language deficiency?

10 A. No.

11 MR. MALONE: Okay. Thank you.

12 THE COURT: On the part of Ms. Leibel or the
13 sheriffs?

14 THE WITNESS: "Communication," I -- would be
15 clearer.

16 BY MR. MALONE:

17 Q. Well, communication takes two parties. Correct?

18 A. (The witness nods.)

19 Q. Okay. And that was a yes?

20 A. Yes. Communication takes two parties.

21 Q. Okay. In your opinion formed on your
22 conversation, review of that transcript -- and I don't know if
23 you testified that you reviewed the video?

24 A. I don't remember seeing it.

1 Q. Okay. But based upon the review of the
2 transcript and your personal interaction with Ms. Leibel and
3 your communication, is there any doubt in your mind that she
4 would require an interpreter for every single interaction with
5 her lawyer?

6 A. There's no doubt in my mind.

7 MR. MALONE: Thank you.

8

9 RECROSS-EXAMINATION

10 BY MR. JOHNSON:

11 Q. You don't know whether that transcript was an
12 accurate recounting of what was contained on the video.
13 Correct?

14 A. No.

15 Q. And you didn't have an opportunity to witness the
16 demeanor on the video between the questioner and the answerer,
17 being the Douglas County Sheriff's Office investigator and
18 Ms. Leibel. Correct?

19 A. I did not witness the demeanor, but I read many
20 an interview.

21 Q. And so you don't think demeanor would be helpful
22 to determine whether one party understood the question being
23 asked and the other part -- so you don't think demeanor is
24 helpful to understand whether there is any understanding?

1 A. Always.

2 Q. Always. So you didn't have all the information
3 to give your opinion when you just read that transcript.
4 Right?

5 A. I could have used more information, but I
6 believed what I said based on the information I had.

7 Q. Assuming it's accurate?

8 A. The transcript?

9 Q. Correct.

10 A. Sure. Yes.

11 MR. JOHNSON: No further questions, Your Honor.

12 THE COURT: Thank you.

13 MR. MALONE: Nothing.

14 Thank you, Ms. Armstrong.

15 THE COURT: Ms. Armstrong, thank you very much
16 for being here now.

17 Now, one moment. Is there any intention to
18 recall this witness, or may she be permanently excused?

19 MR. JOHNSON: She may be excused by the State.

20 MR. MALONE: She can be excused.

21 THE COURT: Ms. Armstrong, thank you for being
22 here.

23 THE WITNESS: Thanks.

24 THE COURT: The Court will confirm she is indeed

1 an Okie.

2 THE WITNESS: She is what?

3 THE COURT: Indeed an Okie.

4 THE WITNESS: Okay.

5 MR. MALONE: Your Honor, the Petitioner will be
6 calling Dave Billau.

7 THE COURT: That's O-K-I-E.

8 Come on up, sir. If you would pause right about
9 there. Thank you.

10 (The witness was sworn.)

11 THE COURT: Come on up, sir.

12 Mr. Malone.

13

14 DAVE C. BILLAU,

15 having been first duly sworn, was examined

16 and testified as follows:

17

18 DIRECT EXAMINATION

19 BY MR. MALONE:

20 Q. Sir, will you state your name?

21 A. David C. Billau. B, as in boy, I-L-L-A-U.

22 Q. Thank you, sir.

23 And, sir, what is your profession?

24 A. I'm a retired forensic investigator.

1 Q. Okay.

2 A. I retired from the county of -- Washoe County in
3 our Crime Laboratory.

4 Q. Did you have any prior employment in law
5 enforcement --

6 A. I did.

7 Q. -- prior to that?

8 A. That was in Southern California beginning in 1975
9 with the City of Glendale Police Department.

10 Q. And what was that job?

11 A. Same capacity as a forensic investigator.

12 Q. Okay. And have you kept educated in the field?

13 THE COURT: Mr. Malone, would you scoot over a
14 little bit. Mr. Johnson seems to want to see these witnesses.
15 BY MR. MALONE:

16 Q. Have you -- have you kept up your education in
17 this field?

18 A. Oh, yes.

19 Q. And you're familiar with recent developments?

20 A. Yes.

21 Q. And you remember what you've learned before?

22 A. Oh, yes.

23 Q. Okay. And are you currently employed in any
24 function that involves that prior employment?

1 A. Oh, yes.

2 Q. What? And what is that?

3 A. I do provide consultation to legal counsel and
4 also law enforcement agencies within certain forensic science
5 disciplines.

6 Q. And when you say "consultation with other law
7 enforcement agencies," would you recount what you do
8 specifically?

9 A. Yes. I assist them with reviewing the crime
10 scene, notes from the Crime Laboratory, also their analysis,
11 and some of the sciences such as the science of fingerprints,
12 also the science of bloodstain pattern interpretation and
13 photography.

14 Q. Is your throat okay?

15 A. I have allergies. I'm sorry.

16 THE COURT: There's some water for you there,
17 sir. Please free to help yourself.

18 BY MR. MALONE:

19 Q. And I do have a lozenge if you...

20 THE COURT: He didn't really come that prepared.
21 I don't want you to think that.

22 Go ahead.

23 THE WITNESS: Thank you.

24 MR. MALONE: The Judge gave that to me earlier.

1 But I can tell your voice has changed or is a little bit
2 different.

3 BY MR. MALONE:

4 Q. Are you currently working on any cases for law
5 enforcement?

6 A. I am, yes.

7 Q. And what types of cases are those?

8 A. These would be with the City of Reno Police
9 Department for their bloodstain pattern analysis. And it's
10 due to the fact that they don't -- the Crime Laboratory does
11 not have any expert -- expertise in that particular science
12 now.

13 Q. Are you also familiar with the study of
14 ballistics?

15 A. Oh, yes, I am.

16 Q. Okay. And you've been trained on that?

17 A. To a degree, yes.

18 Q. Okay. You have experience in tool mark analysis?

19 A. Yes, I do.

20 Q. Okay. And that's a -- that specifically usually
21 refers to firearms?

22 A. Some of it does, yes.

23 Q. Okay. And identification of particular firearms?

24 A. Yes.

1 Q. Are you familiar with trajectory?
2 A. Yes.
3 Q. You have experience with trajectory?
4 A. I have, yes.
5 Q. You've utilized that on cases in the past?
6 A. Yes, I have.
7 Q. Working for the government?
8 A. Working for the Washoe County Sheriff's Office
9 Forensic Science Division.
10 Q. And have you, in the past, been required or been
11 retained -- or been employed by them to determine trajectory
12 of gunshots?
13 A. Both with projectile trajectory and bloodstain
14 pattern trajectory.
15 Q. In the course of your training, have you become
16 familiar with the operation of firearms?
17 A. Oh, absolutely, yes.
18 Q. The general operation?
19 A. Yes.
20 Q. So I'm -- and just to be clear, I'm talking about
21 how they operate. Correct?
22 A. That's correct.
23 Q. The types of actions involved on firearms?
24 A. That is correct.

1 Q. And are you familiar with the process of -- of
2 gunshot residue?

3 A. Yes.

4 Q. Are you familiar with the process for determining
5 distance?

6 A. Yes.

7 Q. Okay.

8 MR. MALONE: Your Honor, I would ask that
9 Mr. Billau be qualified as an expert to address specifically
10 the work done in Mr. Noedel's report in all his aspects of
11 trajectory, ballistics, and gunshot.

12 THE COURT: Well, sir, you really don't need to
13 make that request. You can go forward and ask him whatever
14 questions you want to ask him. And if there are objections as
15 to foundation, I'll rule those as we go forward.

16 MR. MALONE: Thank you.

17 BY MR. MALONE:

18 Q. Were you retained to work -- were you retained by
19 Attorney Kris Brown to work on the Tatan- -- Tatiana Leibel
20 case?

21 A. Yes, I was.

22 Q. Okay. And did you develop information regarding
23 trajectory?

24 A. In that particular case, yes.

1 Q. Okay. Did you develop information and study the
2 weapon that was used?

3 A. When you say "study the weapon," I did not have
4 the weapon.

5 MR. JOHNSON: I just ask for clarification on
6 what the word "develop" means.

7 MR. MALONE: I'll withdraw that question.

8 THE COURT: Well, I think I understand what it
9 means.

10 Go ahead.

11 BY MR. MALONE:

12 Q. Do you understand how the weapon was -- do you --
13 can you tell me what type of weapon was -- or what weapon was
14 involved in the Tatiana Leibel case, brand and type?

15 A. It was -- if I remember correctly, it was an a
16 Taurus model, manufacturer model. It was called, I believe,
17 the Judge at the time -- at that time. It was a revolver type
18 of long gun. When I say "long gun," it had a barrel at least
19 18 inches or longer. It had a cylinder, so it would be also
20 classified as a revolver type of weapon, being that the
21 cylinder revolves. It had a hammer, a visible hammer on that
22 particular firearm and also a rifle-type stock.

23 Q. Is that weapon -- would that weapon commonly be
24 called a carbine?

1 A. It could be. It depends upon the length of the
2 barrel.
3 Q. Okay.
4 A. And, in this case, I believe it was 18 or 18 and
5 a half inches, and that would be considered a carbine.
6 Q. Okay. And was there anything unique about the
7 ammunition that could be fired by this particular weapon?
8 A. Yes. Both types of weapon -- one would be the
9 .45 Colt -- long Colt-caliber pistol. It was also used in
10 rifles, but -- that particular cartridge, which is mostly for
11 pistols or rifles. And it was also in the caliber or gauge of
12 .410 shot shell.
13 Q. And have you been able to examine exemplar of
14 this weapon?
15 A. I have now, yes.
16 Q. Okay. You have?
17 A. Yes.
18 Q. And you did so after being retained by
19 post-conviction counsel?
20 A. That is correct.
21 Q. And you're familiar with this operation?
22 A. Yes.
23 Q. Okay. You said that -- did you testify that the
24 weapon had a hammer?

1 A. Yes.

2 Q. Okay. Are you familiar with single-action?

3 A. I am, yes.

4 Q. Are you familiar with double-action?

5 A. I am.

6 Q. Do you understand what -- how this weapon could
7 be fired?

8 A. Yes.

9 Q. Okay. And could it be fired -- could it be fired
10 in either single-action or double-action?

11 A. That's correct. Both.

12 Q. Okay. Would you explain to the Court what this
13 weapon would operate -- how the weapon would operate if it
14 were fired in double-action?

15 A. The double-action mode was where you just use the
16 trigger itself. It has a heavier pull. What I mean by pull,
17 there's a weight to the spring that's within this firearm; so
18 it takes a stronger pull if it's double action. Double-action
19 meaning that you pull on the trigger, the hammer comes back
20 and releases itself in one motion.

21 In single-action, you visibly have to cock it
22 back, the hammer, and then release it with the trigger pull,
23 which is much lighter than a double -- double-action pull.

24 Q. And trigger pull, is that measured in pounds?

1 A. Normally it is, yes.

2 Q. Okay. Do you recall what the trigger pull for
3 this weapon in both modes of firing was?

4 A. I believe in the double-action mode, which you
5 pull the trigger and the hammer comes back and then releases,
6 that's between -- I think around 12 to 13 pounds on up to 15,
7 16-pound pull. There's a variation in the -- this weapon.

8 And then on a single-action pull, which is much
9 lighter, the hammer is brought back physically. Then release
10 with the trigger pull is around three to four pounds. So it's
11 much lighter.

12 Q. You stated earlier that this weapon has a
13 revolver action?

14 A. Yes.

15 Q. Okay. Based upon that type of operation -- well,
16 I withdraw that question.

17 Were you able, through the evidence you were
18 provided -- well, what evidence were you provided that would
19 have allowed you to determine what type of round was fired
20 first or second, assuming that two rounds were fired from this
21 weapon and the weapon not disturbed?

22 A. There was --

23 Q. Do you understand that question?

24 A. Yes.

1 Q. Okay.

2 A. There was a firearms workup sheet, laboratory
3 firearms workup sheet, which indicates which cylinders had
4 been fired. In this case, there's -- it's a six-cylinder
5 weapon with our -- not -- I'm sorry, six-chambered-cylindrical
6 weapon. First two chambers that were fired showed that these
7 two cartridges -- one was a .45 Colt cartridge the other one
8 was a .410 shotgun cartridge. The rest of the cylinders --
9 the rest of the chambers, I'm sorry, were unfired so the
10 ammunition was still live inside those chambers. So two of
11 them had been fired.

12 Q. And that cylinder only revolves in one direction.
13 Right?

14 A. That's correct.

15 Q. And that doesn't matter whether it's
16 single-action or double-action?

17 A. No, it doesn't.

18 Q. So based on that, are you able to determine which
19 round was fired first?

20 A. During -- from the rotation, yes, you can.

21 Q. From the rotation?

22 A. Yes.

23 Q. So all you have to do -- and when you fire this
24 weapon, does the spent cartridge remain in that cylinder?

1 A. It does. It does not eject. It takes manual
2 operation to remove those cartridges.

3 Q. And were you able to determine, based upon what
4 evidence you had, what round was fired first?

5 A. Yes. It would be -- in this particular case, it
6 was the Colt .45 -- long Colt cartridge that was fired first.

7 Q. Okay. Did that cartridge or projectile have any
8 specific or special qualities? In other -- are you familiar
9 with the term "fragmentary round"?

10 A. Oh, you're talking about the -- the -- yeah --
11 the round itself. Yes. Excuse me.

12 The .45 Colt ammunition is designed, in this
13 particular case, to fragment upon, you know, striking an
14 object; in other words, it comes apart. It does not stay
15 together.

16 Q. And you've stated -- you've testified that the
17 first round fired was that .45?

18 A. That's correct.

19 Q. And the second round was?

20 A. The .410.

21 Q. Okay. And that has a small -- what would you
22 call it? -- a BB type of projectile or shotgun?

23 A. Well, yeah. They had a shotgun -- shotgun rounds
24 normally have -- they do have a solid projectile, which is

1 called a shotgun slug; you'll see a lot of deer hunters use
2 these. Also, law enforcement does use this particular type of
3 rounds. The -- in this particular case, it had, I believe,
4 three .45, .40 -- to .40- to .45-caliber ball, lead balls that
5 are within this cartridge.

6 Q. Okay. And let's go back to a slug type of
7 projectile. You said a lot of deer hunters would use that?

8 A. Deer hunters, yes.

9 Q. Okay. And is there a special place -- why would
10 they use a shotgun slug and fire that instead of a rifle
11 bullet?

12 MR. JOHNSON: Objection. Relevance.

13 MR. MALONE: It's will -- it will become --

14 THE COURT: Why is that relevant? Because that
15 wasn't used here.

16 MR. MALONE: Okay.

17 BY MR. MALONE:

18 Q. Is there a -- okay. I'll withdraw that question,
19 and I'll lay a foundation for the next one.

20 Are you familiar with a term -- and -- of
21 deflection?

22 A. Oh, yes.

23 Q. Okay. Are bullets such as a -- are projectiles
24 such as bullets or -- I don't know what you called it -- a

1 shotgun BB type of -- are they prone to deflection?

2 A. Oh, absolutely.

3 Q. Okay. Did defect- -- deflection figure into any
4 of your opinions that you formed in this case?

5 A. The possibility exists, yes.

6 Q. Okay. Is a shotgun -- so your testimony is that
7 projectiles such as a .45 sl- -- a .45 bullet is prone to
8 deflection. Correct?

9 A. Yes, it is.

10 Q. Okay. And what can it be deflected by?

11 A. Any hard surface would naturally deflect it.

12 And, you know, even some soft tissue. I've seen bullets that
13 have deflected even in soft tissue. They expand too quickly
14 and they will deflect. High velocity cartridges, which are in
15 found that category.

16 Q. And are you familiar with any of the literature
17 showing that leaves or brush can deflect a projectile in that
18 literature?

19 A. Oh, yes. Especially in a high-velocity
20 cartridges. Those are traveling at around 3,400 feet per
21 second and greater. Even a raindrop will deflect them.

22 Q. And you mentioned earlier that hunters will often
23 use a shotgun slug. Correct?

24 A. Not necessarily, but in -- when using a shotgun,

1 they normally do, yes.

2 Q. And is there any reason for that?

3 MR. JOHNSON: Same objection.

4 MR. MALONE: Well, are they -- let me rephrase.

5 THE COURT: All right.

6 BY MR. MALONE:

7 Q. Is a shotgun slug as prone to deflection as a
8 projectile?

9 A. Oh, yes, it would be.

10 Q. It is?

11 A. Yes.

12 Q. Okay.

13 A. Yes. It's a slower-moving projectile.

14 Q. Okay. So it -- it is not better in brush or
15 other cover?

16 A. No. That -- that would still deflect that.

17 Q. Okay. Now, in your previous preparation for
18 testimony, did you have an opportunity to examine a couch that
19 was found at the Leibel residence?

20 A. Yes, I did.

21 Q. I forget or not -- I forget if you went to the
22 Leibel residence?

23 A. I did at one time, yes.

24 Q. Okay. And that was in preparation for your

1 previous testimony at trial?

2 A. That is correct.

3 Q. Okay. At that time, you didn't -- did you
4 observe the couch there?

5 A. No. There was a -- I remember the residence was
6 empty, as far as I remember.

7 Q. Okay. Did that residence have much forensic
8 value for you at that point when it had been stripped of its
9 furnishings?

10 A. No, not really.

11 Q. Have you had an opportunity to review -- have you
12 had an opportunity to review photographs?

13 A. Oh, I have, yes.

14 Q. Okay. And describe the photographs that you
15 found relevant to your -- any opinions you formed.

16 A. The photographs that I viewed were the ones where
17 the forensic investigation section of the Washoe County
18 Sheriff's Office Crime Lab were present. There was an
19 individual who had sat upon this particular -- it was a
20 couch/sofa. And also there was some yellow probes that were
21 being utilized at the time to try and show trajectory to a
22 hole through the sofa to a hole in the wall that was behind
23 it.

24 Q. Okay. And those rods are also called trajectory

1 rods?

2 A. At the time, yes. It comes in a kit.

3 Q. Okay.

4 A. And they call it trajectory kit.

5 Q. Okay. And you may have used, actually, those

6 rods --

7 A. I have yes.

8 Q. -- themself? I mean, those same ones.

9 A. Most likely, yes.

10 Q. Okay. Did you determine -- were you able to

11 determine -- I -- let me withdraw that. Is there anything in

12 a couch that could cause deflection of a projectile -- a gun

13 projectile?

14 A. Yes. There would be wooden frame, metal frames.

15 Even if, depending on the cover itself, was it a flexible

16 cover that could actually deflect the bullet? Was it a hard

17 cover that could deflect, you know, the projectile itself?

18 There are a number of variables.

19 Q. Are you -- are you aware of whether or not

20 springs are located commonly in couches?

21 A. I think in the recliner type of chairs and

22 couches, yes.

23 Q. And what type of couch was this?

24 A. I don't know the brand name. But I do --

1 Q. Is it a recliner? Let me re- --
2 Do you know if this was a recliner couch?
3 A. Yes, it was.
4 Q. And you were able to observe it in photographs?
5 A. Yes.
6 Q. And you were also able to examine it personally?
7 A. Personally, I did ex- -- well, when you say
8 "examine," I didn't take it apart or anything. I just viewed
9 this particular item.
10 Q. You were able to view it, and that was in the
11 Douglas County Sheriff's Office evidentiary locker?
12 A. Yes. The evidence section, yes.
13 Q. Okay. Did you observe whether the couch had been
14 examined in any way to see if anything had deflected off its
15 internal structure?
16 MR. JOHNSON: Objection. Lack of personal
17 knowledge.
18 THE COURT: Overruled. The question was were you
19 able to examine it to determine that.
20 MR. MALONE: He said he --
21 MR. JOHNSON: It's not a question. It's --
22 THE COURT: No. Stop. Stop. It's overruled.
23 The question is appropriate.
24 Go ahead.

1 BY MR. MALONE:

2 Q. So you personally examined this couch?

3 THE COURT: You didn't have him answer that
4 question, either. Do you want have him answer that question?

5 MR. MALONE: Oh, oh. Okay. I thought it did
6 with the --

7 THE COURT: I overruled the objection.

8 BY MR. MALONE:

9 Q. You were able -- you were able to -- were you
10 able to examine this couch?

11 A. Visibly, yes.

12 Q. This same couch?

13 A. Yes.

14 Q. Okay. And when you say "visibly," you did not
15 take it apart or disassemble it?

16 A. That is correct.

17 Q. Actually, did you notice anything broken about
18 the couch?

19 A. One of the -- yeah. Yes. One of the backs was
20 broken. And even when the technician brought it out, it was
21 kind of flopping around. So it was -- you could tell that
22 it -- the back was broken.

23 Q. Okay. You didn't take the back apart?

24 A. No, no, no.

1 Q. But the technician did accidentally or he -- you
2 could see it moving?

3 A. It was -- if I recall, it was a female
4 technician, and I could just see it moving. I don't know. I
5 don't think she took it apart or did anything. I can't
6 recall.

7 Q. Were you able to determine whether the back was
8 broken on it?

9 A. Well, it certainly looked like it, yes.

10 Q. Okay. Were you able to determine whether the
11 couch had been disassembled to check for any evidence of
12 deflection off of its internal structure?

13 A. Not visibly, no.

14 Q. In the -- is it correct to say that it showed no
15 signs of -- of being examined internally?

16 THE COURT: Repeat that question, please.

17 BY MR. MALONE:

18 Q. Would it be fair to say that you saw not -- no
19 signs or evidence that it had been -- that the internal
20 structure had been examined?

21 A. Visibly, I could not tell.

22 Q. Were you -- have you found any reports that show
23 that it was subject to internal examination?

24 A. I have not seen any reports.

1 Q. Okay. And specifically, if you were to examine
2 this couch, would you be looking for evidence of deflection
3 off its internal structure?

4 A. Yes, that is one of the examinations I would have
5 to perform.

6 Q. Okay. That would have been a standard
7 examination?

8 A. It would have.

9 Q. Okay. Based on that, you're familiar with -- I
10 withdraw that question -- that -- that part of the question.

11 Are you familiar with a report generated by the
12 prosecution in this case by Matthew Noedel?

13 A. I have seen Mr. Noedel's report, yes.

14 Q. You -- and you've had an opportunity to review
15 it --

16 A. I have.

17 Q. -- as much as you needed to. Correct?

18 A. Yes.

19 Q. Okay. And you're familiar with -- withdraw that
20 question.

21 Would it be fair to say that he established one
22 trajectory path in that report? Well, let me -- let me --
23 okay. You do know which -- you've testified that the .45
24 projectile was fired first?

1 A. That is correct.

2 Q. Did that ever -- that did have a trajection --

3 trajectory. Correct?

4 A. Yes.

5 Q. Okay. And you have some rods that are off to

6 your side there. Correct?

7 A. That is correct.

8 MR. MALONE: Your Honor, may I get a chair to

9 move out to this area?

10 THE COURT: Yeah. You can slide a chair out.

11 MR. MALONE: Thank you. Can I take your chair?

12 I'll take my chair -- I got it.

13 MR. JOHNSON: You're welcome to use my chair if I

14 take my --

15 THE COURT: We've got one. Thank you, Mr.

16 Johnson. I appreciate it.

17 MR. MALONE: Mr. Mausert, I would like to use you

18 as a dummy.

19 MR. MAUSER: That's not the first time. I'm a

20 professional dummy.

21 THE COURT: Mr. Mausert, you've found your

22 highest, best use.

23 BY MR. MALONE:

24 Q. Did you bring any tape with you?

1 A. Yes.

2 MR. JOHNSON: I suppose before we go further, I
3 would just ask for more foundation to be laid before he offers
4 an opinion.

5 MR. MALONE: Okay. I am --

6 MR. MAUSERT: I can establish --

7 MR. JOHNSON: I object to foundation.

8 MR. MAUSERT: I can establish my foundation as a
9 dummy.

10 MR. MALONE: Your Honor, may we --

11 THE COURT: Mr. Mausert, I apologize for my
12 comments, and I appreciate your service to this Court and to
13 all of the courts. You serve in.

14 MR. MAUSERT: You don't have to apologize, Judge.

15 BY MR. MALONE:

16 Q. Have you been able to examine evidence in this
17 case sufficiently that you've been able to establish a
18 trajectory or possible trajectory through Harry Leibel's body?

19 A. I have, yes.

20 MR. JOHNSON: Same objection as to the foundation
21 for his opinion.

22 MR. MALONE: The foundation being?

23 THE COURT: That -- that -- that objection is
24 sustained. I think you need to ask him some questions about

1 how he came to that opinion.

2 One second. Are you okay?

3 THE COURT CLERK: Yes. She just brought me some

4 work.

5 THE COURT: Okay. All right.

6 I'm sorry, sir. Go ahead.

7 MR. MALONE: Mr. Mausert, you can stay there. It

8 might take me a little while.

9 THE COURT: That's -- you know, I apologize. I

10 think I just recalled something that I need to put on the

11 record here. And it did not occur to me until just this

12 moment. I think that, at one point, Mr. Mausert represented

13 my brother on some financial issues or --

14 MR. MAUSERT: Mortgage, probably foreclosures.

15 THE COURT: A maybe -- a mortgage foreclosure.

16 MR. MAUSERT: I have done that for seven years.

17 THE COURT: I had completely forgotten that, and

18 I have no bias either -- I don't think that that's ongoing,

19 and I think it was resolved many years ago.

20 MR. MAUSERT: I no longer have any mortgage

21 clients. I -- we stopped -- the program, it changed. It

22 morphed at the end of 2016.

23 THE COURT: Well, I don't even know whether you

24 recall my brother or not. But I would say that --

1 MR. MAUSERT: I vaguely -- I just -- I vaguely
2 recall that you may have referred him to me. I'm not sure.

3 THE COURT: I have no bias either for or against
4 the State or Ms. Leibel in this matter as a result of that.
5 But it -- I just remembered it, and I thought I should tell
6 everyone. And I'm going to give -- I'll give you an
7 opportunity to talk to your client about that out of my
8 presence if you want, and I'll give you the opportunity to
9 think about it out of my presence.

10 It was not something that I was involved in, in
11 any discussions and in any way. And I'm not even certain what
12 the ultimate outcome of that was. So, Mr. Johnson, if you
13 need some time to think about that, sir.

14 MR. JOHNSON: No, Your Honor. I have no
15 objection. If you have no bias, I have no objection.

16 MR. MALONE: I think I need to make a record with
17 my client -- or make a record that I've advised -- that
18 I've --

19 THE COURT: That you've spoken --

20 MR. MALONE: -- that I've consulted with my
21 client.

22 THE COURT: Yeah. And I will give you a chance
23 to do that out of my presence.

24 MR. MALONE: Do you want to do that at a normal

1 break?

2 THE COURT: I'll do it whatever you'd like.

3 MR. MALONE: I think we should continue till a
4 normal break occurs.

5 THE COURT: Okay. Well, which will be in about
6 15 minutes. And I'm sorry for interrupting, but it just
7 occurred to me. Go ahead.

8 BY MR. MALONE:

9 Q. In preparation for your testimony were you able
10 to review autopsy reports?

11 A. Yes, I was.

12 Q. Was there -- were you able to interview -- to
13 review an autopsy report prepared by Dr. Bennet Omalu?

14 A. Yes.

15 Q. Okay. Did that help you develop a theory
16 regarding trajectory of the .45 bullet through Harry Leibel's
17 torso?

18 A. In a manner it did, yes.

19 Q. Okay. The -- were you able to review the other
20 autopsy report prepared by Piotr Kubiczek?

21 A. At the Washoe County --

22 Q. Medical examiner?

23 A. -- medical examiner's, yes.

24 Q. I don't know why I would think you would remember

1 the name. I'm sorry. So you reviewed both of those?

2 A. Yes, I did.

3 Q. And you reviewed the Noedel report?

4 A. Yes, I have.

5 Q. Okay.

6 MR. MALONE: And is it correct that we know that

7 there was a bullet defect that entered Mr. Leibel -- can I

8 speak in a -- it will be a compound question, faster?

9 THE COURT: Well, let me just -- go ahead. It's

10 hard for me to rule on a question you haven't asked yet.

11 MR. MALONE: Thank you.

12 BY MR. MALONE:

13 Q. Is it accurate to say that there was a bullet

14 defect transecting the upper portion of Mr. Leibel's chest?

15 A. That's correct.

16 Q. Okay. And if you could hand me one of your rods.

17 Okay. Now this rod is made of wood. Correct?

18 A. That's correct.

19 Q. And the ones that you described earlier are

20 yellow fiberglass?

21 A. Oh, with the exception of one it's what we call

22 the base probe and it's made of metal.

23 Q. Okay. Do you have a preference for this type of

24 rod that's made of wood?

1 A. I do, yes.

2 Q. Okay. And explain -- if you can explain?

3 A. The first probe that is normally utilized in a
4 hole in a wall as such is a metal probe. This is a base probe
5 to where you can screw on a fiberglass probe, which is much
6 lighter than the hea- -- than the metal one.

7 We started -- when I say "we," I've been retired
8 from the Washoe County Crime Lab for, gosh, going on 13,
9 14 years now. And we started the -- the metal probe is too
10 heavy. It enlarged the hole you were actually using the probe
11 in, which is -- is not going to give you a real good reading
12 on a trajectory analysis when that hole has been enlarged. So
13 there's always about a 5 percent leeway that you work with
14 anyway. And it's going to be greater than that, but that
15 hole's been enlarged.

16 So we started using a much lighter probe that is
17 closer to the -- and they come in -- the dowels, and that's
18 what they're called, come in different sizes, diameters. So
19 you try and match that with the hole size. And it's much
20 lighter, and you don't -- you don't distort much of the hole
21 itself using a much, much lighter wooden dowel.

22 Also that's in that kit is a laser. It's what we
23 call like a little bullet laser. It's a small, cylindrical,
24 probably, at the most, a half-inch in diameter. And you get a

1 red laser beam that you can turn it on. That, we would start
2 not in the whole, but we would actually start from the
3 exterior and point that laser at the hole. And this is going
4 to give us a trajectory analysis at a different distances.
5 So -- and it's nondestructive, noninvasive. So if you can use
6 the laser, you should use the laser. And I think now today,
7 when you buy the kit, they provide that type of training.
8 They did not provide that for us when we bought it back in the
9 '90s, the late '90s, turn of the 21st century when we bought
10 those kits.

11 So it was determined by our firearms examiner --
12 and I agreed with him -- that, yeah, we should be using
13 something much lighter than what was being provided in the
14 kit. Because the further out you get, the tendency of the
15 weight factor starts to -- starts to enlarge that hole as
16 gravity takes over. And if you're looking at a long distance,
17 that's when you want to use the laser first.

18 Q. So wooden dowels are better?

19 A. I think they are, yes. And other firearm
20 examiners think so, also.

21 Q. And you'd have the dowels -- when you -- when you
22 would do this, you would use the dowels of the correct
23 diameter for the projectile?

24 A. Yes.

1 Q. And did you observe any distortion of the
2 substrate -- I mean, in here I'm saying drywall and/or fabric
3 covering -- in your observations of the photographs in this
4 case?

5 A. Yes.

6 Q. Okay. So it looked like they've been damaged by
7 the measuring instrument?

8 A. It did, potentially.

9 MR. JOHNSON: Objection. Leading. This is
10 definitely not a hostile witness.

11 THE COURT: Try to avoid leading. Okay?

12 MR. MALONE: Okay. Sorry. Hard. I fall back
13 onto it.

14 BY MR. MALONE:

15 Q. Were you -- were you able to observe any
16 distortion that you would attribute to improper rodding?

17 A. Excuse me. Yes. In the -- both photograph and
18 then looking at the hole in the couch back, in the -- it
19 looked like it was distorted.

20 Q. And I'm just going to go back and finish this
21 section of this inquiry after that. You testified already
22 that you don't know if there was deflection and -- from the
23 shot that you observed in the couch. Correct?

24 A. That's correct.

1 Q. And is it -- did that describe the path of that
2 bullet? Not the -- not the -- for accuracy purposes. But
3 where did the bullet enter? Where was actually a shotgun --
4 shotgun round enter?
5 A. It entered the sofa cushion back.
6 Q. And that would have been the second shot?
7 A. Yes.
8 Q. Okay. And then where did it --
9 MR. JOHNSON: Objection. Foundation for whether
10 that was the second or the first shot.
11 THE COURT: Well, he's already testified that the
12 first shot --
13 MR. JOHNSON: The defect.
14 THE COURT: Pardon?
15 MR. JOHNSON: Whether the defect was the first or
16 second shot.
17 MR. MALONE: That's fair. We can do that.
18 THE COURT: Well, I think I understand that he's
19 talking about the second shot right now.
20 MR. MALONE: The first shot --
21 THE COURT: You can clarify that if you want.
22 BY MR. MALONE:
23 Q. The first shot never exited, in large form,
24 Mr. Leibel's body?

1 A. That's correct.

2 Q. Okay. There was one small part of a fragmentary
3 round that ended up in his left bicep. Correct?

4 A. Yeah.

5 Q. That they had found in his robe or something like
6 that?

7 THE COURT: And, Counsel, I recall that evidence
8 from the trial.

9 MR. JOHNSON: Thank you, Your Honor.

10 THE COURT: So I knew what he was talking about.

11 BY MR. MALONE:

12 Q. So the second shot is the shotgun round?

13 A. That's correct.

14 THE INTERPRETER: Is the shot --

15 MR. MALONE: Shotgun round, the .410 shotgun
16 shell.

17 BY MR. MALONE:

18 Q. Now that did -- that did -- can you describe,
19 sort of, in rough terms where that shot went?

20 A. The shotgun shell?

21 Q. Yes.

22 A. That one had deflected on the back of
23 Mr. Leibel's hand, left hand.

24 Q. Left hand?

1 A. Left hand.

2 Also, it deflected off the shoulder of Mr. Leibel
3 and then into the cushion and then through the cushion and
4 into the wall behind.

5 Q. Based on the examination that was performed at
6 the scene, is any trajectory based upon -- is any trajectory
7 conclusion, based upon that evidence, possible when you take
8 into account deflection?

9 MR. JOHNSON: Just want to confirm the
10 foundation. I didn't hear the --

11 MR. MALONE: This is the shotgun round.

12 THE COURT: Okay.

13 MR. JOHNSON: He said it wasn't -- it wasn't
14 clear from the question what he's basing his opinion on.

15 MR. MALONE: It -- can you think --

16 THE COURT: Well, I think it's -- I think he's
17 already testified that it was based on his -- his --

18 MR. JOHNSON: Just want to make sure there's
19 nothing else. Okay.

20 THE COURT: Yeah, he's got a foundation there.

21 Go ahead.

22 BY MR. MALONE:

23 Q. Mr. Billau, is it possible that that second shot
24 was deflected by the couch or some other structure?

1 A. Oh, yes.

2 Q. Okay.

3 A. If it entered the couch and exited the couch,

4 that's -- there is a high probability that some deflection

5 could have occurred.

6 Q. And that's high probability?

7 A. I would say so, yes.

8 Q. Okay. So any analysis of gun position and bullet

9 track would be suspect?

10 A. Yes.

11 Q. Okay. Now, the first shot, as we said -- would

12 you say that that shot exited the body or...

13 A. No. It was still -- it had fragmented, and from

14 the X-rays that I were given, and these are just copies of the

15 X-rays, that the bullet had fragmented and the fragments were

16 still inside Mr. Leibel.

17 Q. Okay. What -- was any fragment outside the body?

18 A. There was one. They found, I believe, one that

19 was in, as you had noted, in his left bicep area in his

20 bathrobe.

21 Q. Now, you're aware -- you observed the X-rays or

22 the photographs of X-rays. Right?

23 A. Photograph of the X-rays, that's correct.

24 Q. And if I -- would you tell me where to point

1 this -- well, I'm -- is this where they ended up in this area
2 here?

3 MR. JOHNSON: Meaning?

4 THE COURT: Wait, wait, wait, wait, wait. That
5 question is objectionable.

6 MR. MALONE: I know. I know.

7 THE COURT: Okay. Let's try again.

8 BY MR. MALONE:

9 Q. Would you like to take the point -- would you
10 please take the pointer and point to the Judge where those
11 fragments ended up. And you can use Mr. Mausert's body.

12 THE COURT: This is based on the testimony that
13 you reviewed of Dr. Omalu and of the medical examiner?

14 THE WITNESS: That's correct. And their reports.

15 THE COURT: And their reports?

16 THE WITNESS: And their reports. That is
17 correct.

18 BY MR. MALONE:

19 Q. And, Mr. Billau, the X-rays, as well? Did you
20 use that as a basis of reference?

21 A. I observed the X-rays -- they were photostat
22 copies of the X-rays.

23 Q. In those X-rays, you can observe fragmented --
24 bullet fragments?

1 A. That's correct.

2 Q. And there were roughly how many -- that -- this
3 you explained earlier that this round, this .45 pistol round
4 is meant to fragment. Right?

5 A. That is correct. That's the way that the
6 manufacturer actually makes these particular bullets.

7 Q. And why do they make them like that?

8 THE COURT: To kill people. Go ahead.

9 THE WITNESS: Same thing. Yes, thank you, Your
10 Honor.

11 BY MR. MALONE:

12 Q. Would you point to the section of Mr. Mausert's
13 body corresponding to where the fragments were found in
14 Mr. Leibel?

15 MR. JOHNSON: To be clear, we are talking about
16 the first bullet now, not the second bullet?

17 THE WITNESS: Yeah, the second bullet.

18 THE COURT: I think the first bullet. That's
19 exactly correct, sir.

20 BY MR. MALONE:

21 Q. And our position is that the second bullet
22 doesn't matter because the evidence is basically not developed
23 enough --

24 MR. JOHNSON: Objection. Argument -- we're not

1 arguing.

2 THE COURT: Yeah, well --

3 (Multiple speakers.)

4 (Interruption by the court reporter.)

5 MR. MALONE: I'll withdraw my question.

6 THE COURT: Here is what will go on the record:

7 This question relates only to the first shot. Go ahead.

8 BY MR. MALONE:

9 Q. And let me -- from your understanding of the

10 other reports and the information you had, what shot killed

11 Mr. Leibel? Was that not clear?

12 Is it true that the first shot was the

13 basically --

14 A. Yes.

15 Q. -- mortal shot?

16 A. It was the fatal shot.

17 MR. JOHNSON: Objection. Lack of expertise of

18 this witness to determine how he died.

19 MR. MALONE: I --

20 THE COURT: Well, here is the thing. I remember

21 the testimony from the trial very well, and it was very clear

22 from the testimony of the trial, the first shot -- which is

23 the .45 shot -- was fatal and was not survivable. And that's

24 the status of the trial record.

1 MR. JOHNSON: Correct. I thought he was making
2 an opinion about whether the second shot could have killed him
3 if the first one didn't.

4 THE COURT: Well, right now, all we are going to
5 talk about is the first shot, and we've made that clear.

6 Now, you've got a little demonstration that
7 you're going to do here for a few minutes. Right?

8 MR. MALONE: Yes.

9 THE COURT: Okay. We are going to take the
10 afternoon break.

11 MR. MALONE: Thank you.

12 THE COURT: You'll talk with your client.

13 MR. MALONE: Yes.

14 THE COURT: Which you may do out of my presence.
15 We'll take 15 minutes. If you need longer than that for that
16 discussion, please, sir, let me know.

17 Mr. Billau, you are advised that the rule of
18 exclusion has been invoked. I believe you know what that
19 means.

20 THE WITNESS: Yes, I do.

21 THE COURT: I believe you know what that means,
22 but I have instructed you previously: Do not talk with anyone
23 other than the attorneys in this case --

24 THE WITNESS: I understand.

1 THE COURT: -- until we come back.

2 Thank you very much.

3 (A break was taken.)

4 THE COURT: Thank you. Everyone please have a
5 seat. I appreciate it.

6 We are all back in session. All the attorneys
7 are here. Ms. Leibel is here. The interpreter is here. The
8 witness has returned to the witness stand.

9 And, Mr. Malone, did you have an opportunity to
10 talk to your client about what I raised before?

11 MR. MALONE: Yes, I did, Your Honor. I was able
12 to speak to her -- with Tatiana, the interpreter. Based
13 upon -- it's my understanding based upon my consultation with
14 her -- or after my consultation with her that she wishes to
15 waive any conflict and have you proceed as the judge.

16 THE COURT: Okay. And -- and, so, Ms. Leibel --
17 you may have a seat, ma'am. Thank you very much. I
18 appreciate it.

19 Did you have an adequate opportunity to talk to
20 your attorney about the issue that I raised that apparently,
21 at one point, Mr. Mausert represented my brother on -- in some
22 issue.

23 THE DEFENDANT (In English): Yeah. Issue.

24 THE DEFENDANT (Through the Interpreter): Yes,

1 Your Honor.

2 THE COURT: And Mr. Malone tells me that --
3 although I don't believe that there is any conflict, that
4 you're willing to go forward without that being an issue?

5 THE DEFENDANT (Through the Interpreter): I
6 believe we should go forward.

7 THE COURT: With me being the judge?

8 DEFENDANT (Through the Interpreter): It's not a
9 problem.

10 Correct.

11 THE COURT: Okay. Thank you.

12 THE DEFENDANT (In English): Thank you.

13 THE COURT: And have you had enough time to talk
14 to your lawyer about that?

15 THE DEFENDANT (In English): Yes.

16 THE DEFENDANT (Through the Interpreter): Yes.

17 THE COURT: Again, for the record, I'm not privy
18 to any details. I love my brother more than anything in the
19 world, but it's not a factor in this case and I have no bias
20 for or against either side as a result of that or as a result
21 of anything else. And I have a duty to hear cases, and, in
22 conformance with that duty, I'm going to hear this one. And
23 we will move forward. Thank you very much. I appreciate the
24 time.

1 MR. MALONE: Thank you very much.
2 THE DEFENDANT (In English): Thank you.
3 BY MR. MALONE:
4 Q. Mr. Billau, will you please approach Mr. Mausert?
5 A. (The witness complies.) Left side -- the right
6 side.
7 Q. Using your rod, would you please demonstrate for
8 us what you believe the path of the second -- the first bullet
9 was?
10 A. That's correct. The projectile had entered the
11 right-side upper torso area.
12 THE COURT: Mr. Johnson, you are free to move
13 about the courtroom as you need, sir.
14 MR. JOHNSON: Wanted to make sure.
15 THE WITNESS: And this is from my review of the
16 autopsy report. And the projectile transected through the
17 upper torso towards his left shoulder/armpit area, which
18 fragments were within this area of his torso.
19 THE COURT: And so, for the record, you are --
20 you are entering under his right arm --
21 THE WITNESS: That's correct.
22 THE COURT: -- going in a slightly upward
23 direction so that the end of your dowel or your rod --
24 THE WITNESS: Yes.

1 THE COURT: -- is just --
2 THE WITNESS: In this area.
3 THE COURT: -- below his shoulder on -- below his
4 left shoulder; is that correct, sir?
5 THE WITNESS: That is correct.
6 THE COURT: Okay. Thank you.
7 BY MR. MALONE:
8 Q. And do you know the name of this bone right here?
9 THE COURT: Well, the one that you're pointing to
10 is the bone on his upper left arm; is that correct?
11 MR. MALONE: Correct. Upper left arm.
12 THE WITNESS: I'm sorry, I don't.
13 MR. MALONE: Can I lead? With -- well --
14 THE COURT: He doesn't know, so...
15 MR. MALONE: You're good. We are good.
16 BY MR. MALONE:
17 Q. So did you demonstrate that the fragments were
18 located on the inner aspect of his upper arm?
19 A. That's correct.
20 Q. And now would you please place Mr. Mausert's
21 certificates hand where you think that Mr. Leibel's right arm
22 was?
23 A. (The witness complies.)
24 Q. At -- at the time --

1 THE COURT: Put his hand where he thinks his
2 right arm was.

3 BY MR. MALONE:

4 Q. Would you please place Mr. Mausert's right arm in
5 the position you -- that represents your understanding or
6 determination of Mr. Leibel's right arm? In other words, just
7 describe what you think happened here.

8 A. In this particular case, if he's holding the
9 weapon, he would be cradling the weapon such as this to
10 discharge the weapon. And I don't -- this is where I come in
11 disagreement with some of the analysis. We don't really know
12 what position Mr. Leibel was in because he's a moving -- he's
13 moving. And when you're looking at trajectory, the only time
14 you can be absolutely sure of your trajectory, it has to be a
15 stationary object. So you have a sofa that's movable, and you
16 have the victim, which is movable. But to understand how this
17 trajectory works and how they've demonstrated and also from
18 the autopsy reports that this projectile had entered --

19 THE COURT: Can I interrupt? When you say "they
20 demonstrated," please define that, please.

21 THE WITNESS: Oh, I'm sorry. In Mr. Noedel's
22 report. That's what I mean by "they." I'm sorry.

23 THE COURT: Okay.

24 THE WITNESS: From his report, he even indicates

1 that he's in a --

2 MR. JOHNSON: At this point, I'm going to object
3 to narrative. There has to be, like, questions asked of the
4 witness.

5 BY MR. MALONE:

6 Q. What did you see next?

7 THE COURT: Well, no. The question -- I
8 appreciate that, Mr. Johnson, but the question was what, in
9 your opinion, do you believe happened. And he can --

10 MR. JOHNSON: He said he didn't know for sure is
11 what I recall the testimony being. And then he went on his
12 long narrative.

13 THE COURT: Thank you. Your objection is
14 overruled.

15 You can say.

16 THE WITNESS: Okay. I believe what had
17 happened -- and this is one of -- just one of the scenarios.
18 There are -- because there's so many variables in movement
19 here. One of the scenarios Mr. Noedel had explained in his
20 report; I present another scenario, and this is where the arm
21 is elevated, the weapon is -- the stock of the weapon is out
22 here. He's not even touching that. You have the barrel of
23 the weapon 18 and a half inches long. And so you have a
24 21-inch -- including to reach the trigger, a 21-inch traj- --

1 distance is what Mr. Noedel's report indicates. And I can't
2 dispute that.

3 BY MR. MALONE:

4 Q. From -- from where, please.

5 THE COURT: And I'm sorry to interrupt. I
6 apologize. But from where?

7 THE WITNESS: 21 inches.

8 MR. MALONE: Muzzle to barrel.

9 THE WITNESS: Twenty-one inches from the muzzle
10 of the weapon, the end of the barrel, to the trigger, where
11 he's able to reach that trigger.

12 THE COURT: Can you make this an imaginary weapon
13 and --

14 MR. MAUSER: The barrel is here.

15 MR. MALONE: So now we're not describing
16 trajectory?

17 THE WITNESS: No. I had marked 21 inches on
18 this.

19 THE COURT: Only one person speak at a time,
20 please.

21 MR. MALONE: Let me move Mr. Mausert's arm -- you
22 want to move somewhere? Where do you want me to put
23 Mr. Mausert's arm?

24 THE WITNESS: Okay. I want you to sit right

1 there. Okay. The weapon is here. Now --

2 THE COURT: Mr. Billau, do you know what end you
3 marked your 21 inches from?

4 THE WITNESS: Yes. I do. Right here. It has
5 the little red on it.

6 THE COURT: Okay.

7 THE WITNESS: So we have 21 inches,
8 18-and-a-half-inch barrel so we can offset that according to
9 Mr. Noedel's report, which is, he says, the distance
10 patterning that he examined, that he provided, was an offset
11 of two to -- anywhere from two to six inches offset. So the
12 barrel is not -- it's not a contact wound. It's offset. So
13 you get this soot pattern. That's what he's basing it on.

14 All right. So if we take -- and this is where my
15 analysis comes in.

16 BY MR. MALONE:

17 Q. I can hold that.

18 A. Yeah. Let's offset it approximately three
19 inches. Yeah, see, about three inches. Right about there.
20 Now, they take -- he's taken his measurements from the
21 victim's thumb, and the hand is bent. And it shows this in an
22 autopsy photograph. Well, if the hand is bent, the arm is
23 slightly bent at the elbow slightly. Well, with the thumb,
24 it's -- it becomes difficult to pull the trigger. But if we

1 look, the index and the middle fingers reach that extension.
2 So -- and that was never brought out, and there's no
3 photographs or anything in the reports that I read that
4 indicate that -- they're just using the thumb.

5 And, again, it's being measured in autopsy with
6 the hand down. If you extend the hand, the thumb can still
7 reach the trigger.

8 Q. You -- Mr. Billau, let's move -- in actuality --
9 THE COURT: Well, wait a minute. So -- okay.
10 All right. No. Go ahead. Please go ahead. I'm not going to
11 go there.

12 BY MR. MALONE:

13 Q. But you testified previously that the trigger
14 pull in single-action is three pounds?

15 A. That is correct.

16 Q. In this case, would it be fair to say this is
17 trigger push?

18 A. Yes, it is.

19 Q. Push. And did you bring a digital scale?

20 A. There is. I do have a scale.

21 THE WITNESS: I think you can relax.

22 MR. MALONE: And, Your Honor, at this point, I am
23 going to ask the Court -- you're the trier of fact -- to exert
24 three pounds of pressure with your finger to determine how

1 difficult that is. And we can have the prosecutor do the same
2 thing.

3 THE COURT: As -- all right. Do you have an
4 objection to that?

5 MR. JOHNSON: Yes. Your finger is not the same
6 as Harry Leibel's, and, therefore, it's not relevant to the
7 determination of this Court.

8 THE COURT: Three pounds is still three pounds,
9 isn't it?

10 MR. JOHNSON: It is, but how difficult it is for
11 you is not necessarily how difficult it was for Harry Leibel
12 three years ago; so it's not -- it doesn't help you with
13 anything for your determination of the facts.

14 THE COURT: My -- well, here's -- here's the --
15 here is what you're doing, is you're demonstrating, again,
16 that, in fact, under your theory, Mr. Leibel may have taken
17 his own life. There was a great deal of testimony and
18 evidence about that at the time of trial. Now, I don't recall
19 a scale, and I don't recall the -- anybody mentioning or
20 testing three pounds of push. But the problem is that that
21 evidence was presented at trial.

22 And tell me what me pushing on a scale is going
23 to demonstrate, sir.

24 MR. MALONE: Your Honor, the evidence that was

1 produced by the defense was incomplete. The Court ruled that
2 Mr. Billau's testimony regarding trajectory was inadmissible
3 and basically all of his testimony at that point in time was
4 shut down and did not proceed. What my demon- -- what this --
5 the purpose of calling him is to have the same witness and
6 have a demon- -- have an -- information to the Court as to
7 what information and testimony would have been produced, had
8 the notice been proper, had the notice from defense counsel
9 been proper and his opinion not have been truncated and cut
10 off prematurely. That's all it is.

11 THE COURT: Okay. I don't think I need to weigh
12 three pounds on the scale --

13 MR. MALONE: Okay.

14 THE COURT: -- in order to make that
15 determination.

16 MR. MALONE: We are good.

17 THE COURT: Okay.

18 BY MR. MALONE:

19 Q. Mr. Billau, have you been able to exert three
20 pounds of pressure using this scale?

21 A. Not this particular scale, but another scale,
22 yes.

23 Q. Okay. With your index finger?

24 A. Yes.

1 Q. And is that possible for you to do? . .
2 A. Oh, yes.
3 Q. Whether you -- how difficult was that?
4 A. Not difficult at all.
5 Q. And the action in the -- the action of this
6 weapon in double-action, you testified previously that the
7 trigger pull or push in this case would be 13 to 16 points?
8 A. That's correct.
9 Q. You may have said 12. I forgot.
10 A. Yeah. I think it was 12 to 16.
11 Q. Thank you. So with --
12 MR. MAUSER: May I go?
13 BY MR. MALONE:
14 Q. Oh. How do you, you know -- your testimony was
15 that -- I think your trajectory was in this direction?
16 A. That's correct.
17 Q. So towards the -- the projectile would have
18 impacted on the upper part of Mr. --
19 MR. JOHNSON: Objection. Leading.
20 MR. MALONE: It's been -- it's already been
21 testified to.
22 THE COURT: It's already -- well, he's just
23 recounting the testimony. So, overruled.
24 MR. MALONE: I'm going to have a question based

1 upon this.

2 THE COURT: I recall his testimony. Go ahead.

3 MR. MALONE: So the impact point would have been
4 roughly here.

5 A. Yes, that's correct.

6 THE COURT: The impact point?

7 THE WITNESS: The terminus point.

8 THE COURT: That's different than the impact
9 point.

10 THE WITNESS: That's correct.

11 BY MR. MALONE:

12 Q. And I am referring to an internal impact point
13 against the bone.

14 A. Correct.

15 MR. JOHNSON: [Indiscernible.]

16 MR. MALONE: What?

17 MR. JOHNSON: So -- nothing.

18 BY MR. MALONE:

19 Q. So do you believe -- you believe that the -- is
20 it correct that the -- you've already testified that your
21 understanding is the bullet remained in Mr. Leibel's body for
22 the most part?

23 A. For the most part, that's correct.

24 Q. How did the fragments end up a little bit lower?

1 A. They are fragments. They go in different
2 directions.

3 Q. Okay. Would they tend to go in a different
4 direction if they impact a hard bod- -- object in Mr. Leibel's
5 body?

6 A. Yes.

7 Q. Okay. Were you able to review any medical
8 opinions that enhanced your knowledge of this physiology and
9 the physics of the impact?

10 A. Well, not that I can recall at this time.

11 Q. Well, do you remember reading Dr. Omalu's report?

12 A. Yes, I did.

13 Q. Did he describe any broken bones or anything that
14 allows you to determine the impact point?

15 A. Well, part of the report, I recall, was where --
16 I believe the clavicle was also broken. So that would be a
17 fragment that had struck the back part of the shoulder area,
18 the clavicle area. And then there's another bone up here.
19 And I can't remember the name of it, that was damaged
20 considerably. And that was up in the shoulder area.

21 MR. MALONE: Your Honor, I think --

22 THE COURT: The witness is pointing at his upper
23 left shoulder.

24 MR. MALONE: And, Your Honor, I think I can

1 refresh the witness's recollection with almost anything. And
2 if I'm allowed to say the name of the joint, would that be
3 appropriate?

4 MR. JOHNSON: Objection. Leading.

5 MR. MALONE: I -- that is why I've asked.

6 THE COURT: Well, first of all, I don't think you
7 can refresh his recollection by just telling him the answer.
8 He could review a document or something.

9 MR. MALONE: Oh. Okay.

10 THE COURT: But I don't think you can give him
11 the answer and say, "Do you remember that now?" So
12 Mr. Johnson is right. That is just...

13 MR. MALONE: I'm trying to be really fast.

14 THE COURT: I understand, sir.

15 BY MR. MALONE:

16 Q. Were you able to determine, from the review of
17 the medical evidence, whether any force was applied to the top
18 part of Mr. -- portion of Mr. Leibel's upper arm?

19 A. Of any force that was applied?

20 Q. Force by the projectile.

21 A. Oh, yes.

22 MR. JOHNSON: Your Honor, I'm going to object to
23 any further interpretation of a medical examiner's autopsy. I
24 don't believe that the -- there's any foundation laid that the

1 witness is an expert on interpreting autopsy reports or
2 anything related to inside the body, the name of the joints;
3 he doesn't even know the name of the body part. And I don't
4 think he's an expert nor does he have -- a foundation been
5 laid to provide an opinion on what's going on inside the
6 person's body.

7 THE COURT: I believe that the question was,
8 essentially, did your review of the autopsy reports indicate
9 some force, not whether you could determine what that force
10 was. If there's something in the autopsy report that you
11 reviewed that says "the bullet was found here," or "it went
12 here," or "a fragment was found there," you could say that.

13 But I don't -- I don't believe this witness can
14 even testify that the -- that the force of the wound caused a
15 broken bone or anything like that. He doesn't have that
16 expertise.

17 MR. MALONE: No, he certainly doesn't,
18 Your Honor.

19 THE COURT: Okay.

20 MR. MALONE: But he does -- but we -- he --
21 we're -- we've called him as an expert. We've demonstrated
22 specialized knowledge in ballistics, trajectory. And he's
23 able to then rely upon the opinion of otherwise -- he can use
24 otherwise inadmissible evidence. In other words, the previous

1 trial transcript -- the previous trial -- in the previous
2 trial, Dr. Bennet Omalu testified regarding his opinion about
3 the projectile impact and its impact on Mr. Leibel's body. In
4 that evidence -- it's already in evidence.

5 THE COURT: I understand that. So the question
6 has to be tailored so that the question is whether he's
7 relying -- there was something that he's relying on from
8 Dr. Omalu's report or testimony that leads him to draw a
9 conclusion about trajectory.

10 MR. MALONE: Okay.

11 BY MR. MALONE:

12 Q. In Dr. Omalu's report, did you learn anything
13 about damage to Mr. Leibel's left shoulder?

14 A. Yes, there was.

15 Q. Okay. Describe, please.

16 A. That the bullet had transected from the right in
17 an upward direction and terminated at the upper shoulder --
18 left shoulder area -- excuse me -- and there was damage caused
19 to the bones up in that area.

20 Q. Did --

21 A. And the X-rays also showed that.

22 THE COURT: Thank you.

23 BY MR. MALONE:

24 Q. And you viewed the X-rays?

1 A. Yes, I have.

2 Q. And you as a -- do you use -- are you used to

3 using that as part of your analysis in gunshot wounds?

4 A. Oh, yes.

5 Q. Viewing X-rays?

6 A. For a human, yes.

7 Q. And it's used -- what do you use them for?

8 A. The trajectory.

9 Q. What do you look at the X-rays for? What do you

10 determine?

11 A. Oh, you have a visual documentation now of what

12 occurred to that particular individual or that particular

13 wound.

14 Q. You -- is it right to say you can tell where the

15 bullet ended up in the human body if --

16 A. If you see it in the X-ray, yes.

17 Q. Okay. And did you see that here?

18 A. We saw quite a bit of fragmentation, and you saw

19 the projectile itself. That's correct.

20 Q. Are you familiar with the effects of bullet

21 wounds?

22 A. Oh, yes.

23 Q. Okay. In your opinion, would this arm be used --

24 Harry Leibel's arm be usable after that point?

1 MR. JOHNSON: Objection. Outside of this
2 witness's --
3 THE COURT: Sustained.
4 MR. JOHNSON: -- knowledge.
5 BY MR. MALONE:
6 Q. Okay. So you can't answer.
7 A. No.
8 Q. Okay. So it's your testimony that Harry Leibel
9 could have fired the first --
10 MR. JOHNSON: Objection to leading. If he wants
11 to ask his opinion, he should ask what his opinion is.
12 MR. MALONE: I'm not --
13 THE COURT: Sustained.
14 MR. MALONE: I am just restating the opinion.
15 THE COURT: Ask him his opinion. You don't have
16 to state it.
17 MR. MALONE: I don't even think I need to do
18 that, Your Honor. Thank you.
19 THE COURT: I've heard his opinion.
20 BY MR. MALONE:
21 Q. Is there any -- okay. So this -- Harry was
22 sitting on a couch; is that correct?
23 A. That's correct.
24 Q. Okay. This is a chair?

1 A. That's correct.

2 Q. Okay. The -- you're familiar with the
3 photographs of the couch?

4 A. Yes.

5 Q. And was the arm -- the leg rest up on the couch
6 where Harry was sitting?

7 A. It appears to be, yes.

8 Q. If I can refresh your recollection maybe by
9 the --

10 THE COURT: Well, wait a minute. He doesn't have
11 a faulty recollection. He said it appeared to be.

12 MR. MALONE: If I can show you a photograph of
13 the couch, would that help?

14 BY MR. MALONE:

15 Q. Okay. On what side of the couch was Harry Leibel
16 sitting?

17 MR. JOHNSON: Objection. Lack of personal
18 knowledge.

19 BY MR. MALONE:

20 Q. To your understanding from the -- okay.

21 Did you see anything in any photographs that
22 would lead you to believe that he was sitting on one side of
23 the couch or the other?

24 A. It appears that -- my -- my experience and my

1 visual knowledge just looking at the photographs, it appears
2 that he was -- as you're facing the couch, he was on the left
3 side.

4 THE COURT: Okay. Thank you.

5 BY MR. MALONE:

6 Q. And did you see any -- so withdraw that -- that
7 premature question.

8 Was there anything on the looker's left -- that
9 would be I'm looking left -- that obstructed the right side of
10 Harry Leibel's body?

11 A. There it was an end table, I believe, with a lamp
12 on it. And there were several other items on that end table,
13 and that was right next to that sofa. That end table was wide
14 enough to where there was a space. If you take the table out,
15 there's about a two-and-a-half-foot space, and it was almost
16 touching the wall, that end table. So there's -- you have an
17 obstruction there. In other words, you can't get around that
18 sofa on Harry Leibel's right side. It would be the left side
19 as you're facing. So if you're facing the sofa, there is an
20 end table on the left side next to the sofa. And that's what
21 I saw in the photographs. I -- it wasn't at the scene when I
22 was there.

23 THE INTERPRETER: Otherwise?

24 THE WITNESS: It wasn't at the scene when I was

1 there.

2 BY MR. MALONE:

3 Q. Were you able to view any diagrams that were
4 performed by law enforcement?

5 A. Yes.

6 MR. MALONE: Okay. If I could have this marked
7 as next. And mine consists of two pages.

8 THE COURT CLERK: Okay.

9 (Exhibit 15 marked for identification.)

10 MR. MALONE: Are these the diagrams that you're
11 able to review?

12 A. Yes. Yes, they are.

13 Q. And is it -- do they show the -- what has been
14 represented as location of the end table?

15 A. Yes, there is.

16 Q. Okay. So in your opinion, would that end table
17 make it very difficult for a person to approach Mr. Leibel in
18 a -- that killing shot? The first shot?

19 THE INTERPRETER: I'm sorry. And take what?

20 THE COURT: Make that killing shot, the first
21 shot.

22 THE WITNESS: I'm -- excuse me. I'm referring to
23 this particular item of evidence within the crime scene. It
24 would be evidentiary --

1 THE COURT: Wait a minute. Wait a minute.
2 MR. MALONE: It's not evidence yet.
3 THE COURT: Well --
4 MR. MALONE: I'm sorry.
5 THE COURT: That's right. It's the Exhibit
6 Number --
7 THE COURT CLERK: 15.
8 THE COURT: -- 15.
9 MR. JOHNSON: No objection to -- sorry. I
10 interrupted you, Your Honor.
11 THE COURT: That's okay.
12 MR. JOHNSON: No objection to the two crime scene
13 photographs. I don't remember the exhibit number.
14 THE COURT: Okay. 15, it is. And do you have
15 others marked?
16 MR. MALONE: I do.
17 THE COURT CLERK: No.
18 THE COURT: Are you going to mark them?
19 MR. MALONE: No. This -- these are copies,
20 Your Honor.
21 THE COURT: Okay. 15. No objection. It's in.
22 Go ahead and have him testify.
23 (Exhibit 15 admitted into evidence.)
24 ///

1 BY MR. MALONE:

2 Q. What can you learn about -- from that diagram?

3 A. Well, that the end table is next to the sofa.

4 Q. And why is that relevant?

5 A. Is it relevant?

6 Q. Why is it relevant?

7 A. Oh, that you can't get around it.

8 Q. Okay. And your first -- your opinion is that the

9 first shot was right to left in an upward trajectory.

10 Correct?

11 A. That is correct.

12 Q. In a sitting position, what, the rifle would be

13 inclined; is that correct?

14 A. No. It would be down.

15 Q. Down?

16 A. If a person is sitting upright, the weapon would

17 be in a downward angel.

18 Q. And, in your opinion, would the table obstruct

19 the angle of the weapon as well?

20 A. Yes.

21 Q. Okay. And was there anything on the table that

22 would cause you to believe that -- that it looked disturbed

23 or -- in any way?

24 A. In the photographs that I viewed, it didn't

1 appear that anything was disturbed.

2 Q. Did you notice anything on the table that was
3 subject to disturbance? In other words --

4 A. I think there was a glass of water.

5 THE COURT: Just a minute. Just a minute.

6 THE COURT CLERK: Are we marking those?

7 THE COURT: I don't know. I -- we -- he doesn't
8 get to look at photos here.

9 MR. MALONE: Okay. Until I mark it.

10 THE COURT: Yeah. Until you --

11 MR. MALONE: I just pulled it out.

12 THE COURT: -- for the record. And Mr. Johnson
13 gets to look at them first.

14 MR. MALONE: So we've admitted Exhibit Number 15.

15 This is my only copy of the Crime Lab's
16 photographic evidence.

17 MR. JOHNSON: No objection to that photograph.
18 It has already been admitted at trial.

19 THE COURT: Okay. So it's 16. Mark it, and it's
20 admitted.

21 (Exhibit 16 marked and admitted into evidence.)

22 THE COURT: Are the interpreters doing okay?

23 THE INTERPRETER: (Affirmative responses.)

24 THE COURT: Okay. All right.

1 At this point, I need to know, are you able to go
2 past 5:00?

3 THE INTERPRETER: Yes, Your Honor. We notified
4 your assistant that if we do go past 5:00, we'll have to stay
5 here and change our flights, which is perfectly fine with us.

6 THE COURT: Okay. All right. Well, your
7 courtesy to the Court is greatly appreciated. So thank you.
8 Ms. Clerk, if we do go past 5:00 and you need to make a
9 arrangements or someone needs to come in for you, all you need
10 to do is tell me.

11 THE COURT CLERK: I appreciate it. I'll be fine.

12 THE COURT: Ms. Reporter, same thing.

13 Please proceed.

14 BY MR. MALONE:

15 Q. Do you recognize this photograph from just
16 previously viewing the photograph?

17 A. I -- I have seen this photograph.

18 THE COURT: Which is Exhibit 16?

19 MR. MALONE: Exhibit 16.

20 THE COURT: Thank you.

21 BY MR. MALONE:

22 Q. So, in other words, have you -- have you
23 previously reviewed Exhibit 16?

24 A. Yes, I have.

1 Q. Are you able to locate it using -- with the
2 assistance of the diagram, Exhibit 15?

3 A. Yes.

4 Q. Okay. And describe, if anything, the relevance
5 of that photograph.

6 A. Again, this photograph shows the end table next
7 to the sofa. This is the end table. And there's a lamp
8 that's present. A few items they look like paper items,
9 possibly a remote control or something. And then a drinking
10 glass with some orange liquid substance at the bottom of it.

11 THE COURT: I see it. Thank you.

12 BY MR. MALONE:

13 Q. In your training and experience in -- we ask --

14 MR. MALONE: Did we admit --

15 THE COURT: We did admit. Thank you.

16 BY MR. MALONE:

17 Q. In your training and experience in crime scene
18 documentation, would the forensic -- the crime scene
19 documenters move anything before they photograph it?

20 A. They shouldn't.

21 Q. Shouldn't. Okay.

22 So, there was a second shot here, and we
23 discussed it partially. Correct?

24 A. That's correct.

1 Q. Okay. So what can you tell us about the second
2 shot? Is there a way that Harry Leibel could have inflicted
3 that shot on himself?

4 A. I believe there is, yes.

5 Q. Please let us know what that is.

6 A. If the first shot enabled Mr. Leibel -- and he's
7 still alive; he's lying on his left side now. He has a wound.
8 He has an injury to the left shoulder. Now anatomically, I
9 don't know if -- from the elbow down to the hand, if that left
10 portion of the arm is disabled. I have no idea; however, if
11 it isn't -- it's possible and Mr. Noedel has also documented
12 this. It's possible that he went for a second shot, raised
13 the weapon up again, and held the muzzle the end -- toward the
14 end of the barrel with his left hand still operable and able
15 to reach up and try for a second shot.

16 The indication that there's damage and soot
17 pattern and also part of the wadding that's inside this
18 cartridge is on the back of his hand kind of leads me to
19 believe that Mr. Leibel had attempted a second shot. And
20 where it was even deflected because he couldn't properly raise
21 that arm because of the damage to the shoulder, the weapon
22 slipped out, it discharged because it only has -- it's -- you
23 have to cock that weapon. It discharges with a three-pound
24 pull, and that's where we get this deflection from the back of

1 the hand to the shoulder and then into the sofa. The
2 reason -- that leads me to believe -- in my experience of
3 investigating a number of gunshot wounds, suicides and
4 homicides -- that this is not a defensive action. Defensive
5 action would be somebody raising their hand and going like
6 this if somebody was pointing the gun at them.

7 THE COURT: So the distinction you've made is you
8 define a defensive action as palm outward?

9 THE WITNESS: That's correct.

10 THE COURT: And you're indicating that the palm
11 was inward --

12 THE WITNESS: That is right.

13 THE COURT: -- on this occasion?

14 THE WITNESS: Yes.

15 THE COURT: Thank you. I just want the record to
16 reflect what the witness was showing.

17 BY MR. MALONE:

18 Q. And why was the palm inward? Well -- well, then
19 what leads you to believe?

20 A. I -- I -- I --

21 Q. Well, were you able -- were you able -- I'm
22 sorry. I interrupted there.

23 Were you able to determine from the evidence that
24 you've reviewed where the entry wound was? On the hand?

1 A. On the hand. Yes, it was on top of -- on top of
2 the back of the left hand. There are photographs that clearly
3 showed this. And with the wadding, the white plastic wadding
4 sticking out.

5 Q. And the wadding is something inside the shotgun
6 shell?

7 A. That's correct.

8 Q. And did you discern -- did you see any evidence
9 of gunshot residue on the hand?

10 A. Oh, yes.

11 Q. So that's additional evidence?

12 A. That is additional evidence.

13 Q. Okay. Of a back -- back-handed entry?

14 A. Yes. Yes.

15 Q. Did -- in your opinion, did Harry Leibel have to
16 be particularly coordinated to do these actions with this gun?

17 MR. JOHNSON: Objection. Outside of his
18 expertise.

19 MR. MALONE: Well, if you had -- okay.

20 THE COURT: Sustained.

21 BY MR. MALONE:

22 Q. Does -- have you had experience in investigating
23 many suicides?

24 A. A number of them, yes.

1 Q. Okay. Have you ever come across anyone of the
2 Jewish faith who has committed suicide?

3 A. Oh, that, I don't know.

4 Q. I'm wondering about any experience that you've
5 had previously, say, in Los Angeles about people who are
6 Jewish committing suicide.

7 MR. JOHNSON: Objection. He already answered he
8 doesn't know.

9 THE COURT: Yeah. He indicated he doesn't know.

10 THE WITNESS: Right.

11 BY MR. MALONE:

12 Q. Okay. Now, when this gun is fired in a
13 single-action, the hammer -- is it correct that the hammer
14 needs to be cocked back?

15 A. That's correct.

16 Q. Okay.

17 A. What -- I'm sorry. I need to -- I need to
18 clarify that. You don't have to put it in single-action. You
19 can leave it in double-action.

20 Q. Sure.

21 A. So there are two methods of this weapon being
22 discharged.

23 Q. Are you aware --

24 THE COURT: Which you already explained it: It

1 requires a greater trigger pull?

2 THE WITNESS: That's correct.

3 THE COURT: Thank you.

4 BY MR. MALONE:

5 Q. Are you aware of the condition that -- whether
6 that -- the hammer --

7 Are you aware of whether the weapon was found
8 with the hammer cocked back or not?

9 A. Yes. According to the reports and also a view in
10 one of the photographs, the hammer is back.

11 Q. Okay. If someone is a trained -- trained
12 shooter, do they leave a weapon of this type with a hammer
13 cocked back?

14 MR. JOHNSON: Objection. Speculation. Outside
15 of his expertise and training.

16 MR. MALONE: He has training --

17 THE COURT: Sustained.

18 MR. MALONE: Sustained?

19 THE COURT: You know, that's just -- that's just
20 supposition. It would be just as easy to argue if someone has
21 shot themselves twice, would they cock the weapon again, and
22 I'm not going to allow that, either. So that's supposition.

23 MR. MALONE: I agree. I -- I'm fine with it.
24 We'll withdraw that question.

1 BY MR. MALONE:

2 Q. Mr. Billau, is there anything that I haven't
3 asked that is relevant to the case in your opinion from what
4 you've seen?

5 MR. JOHNSON: Objection. Vague.

6 THE COURT: Repeat it, please.

7 BY MR. MALONE:

8 Q. Is there anything of relevance that you could add
9 to your testimony here today?

10 THE COURT: That is very vague.

11 MR. MALONE: Correct.

12 THE COURT: So -- so he wants to know is there
13 anything that the two of you discussed that you were going to
14 testify about that he's forgotten to ask you. That's more
15 specific.

16 THE WITNESS: Not in particular, Your Honor.

17 THE COURT: Thank you.

18 THE WITNESS: According to the reports, though,
19 that I read, I had several questions of my own.

20 THE COURT: Well, that's not the question. So
21 thank you.

22 THE WITNESS: No, I agree.

23 THE COURT: I appreciate it.

24 ///

1 BY MR. MALONE:

2 Q. Could you tell me one of -- the first question
3 that you had.

4 MR. JOHNSON: Objection. Relevance to his
5 questions of his own.

6 THE COURT: Yeah, I'm not sure, you know, why
7 that's relevant and where that may take us. He may have
8 questions about, you know, what happens in the afterlife. So
9 you need to narrow that, sir.

10 And you may have a seat, sir.

11 THE WITNESS: Thank you.

12 THE COURT: Thank you.

13 MR. MALONE: Your Honor, I think I'm going to --
14 I think I'm going to fold my tent --

15 THE COURT: Thank you.

16 MR. MALONE: -- with Mr. Billau.

17 THE COURT: Sir.

18 THE WITNESS: Yes.

19 THE COURT: We are back to you sir, Mr. Johnson.
20

21 CROSS-EXAMINATION

22 BY MR. JOHNSON:

23 Q. Mr. Billau, what training have you -- what
24 courses have you taken on trajectory?

1 A. Bloodstain pattern interpretation. Education --
2 Q. Let me be more specific. What training have you
3 had on the trajectory of bullets?
4 A. I'm trying to remember here. There was
5 on-the-job training through the Washoe County Sheriff's Office
6 Crime Laboratory firearms division.
7 Q. Who trained you on trajectory of bullets?
8 A. That would be Mr. Kevin Laddick.
9 Q. Was that an actual, formal course?
10 A. It -- well, for the Crime Lab, it was, yes. You
11 mean formal, as like college credits?
12 Q. Was it an actual class, or was it just
13 conversations with someone else?
14 A. Oh, no. It was actual. I had to use
15 instruments, especially the comparative instruments that are
16 there -- excuse me -- within the Crime Laboratory that we
17 utilized at the time.
18 Q. And how long was that class?
19 A. Oh, gosh. It was -- it was over a week.
20 Q. Okay. And did that class involve projectiles
21 bouncing off of bones and going through human flesh?
22 A. No.
23 Q. Did that class involve projectiles going through
24 couches?

1 A. Gosh, I'm trying to remember. We did shoot at
2 objects. I can't remember if we shot at a sofa or not. But
3 it did include shooting at -- such as vehicle doors.

4 Q. Sorry. That wasn't the -- the question was
5 whether you had a class on projectiles going through sofas.

6 A. No, not that I can remember. It may have been,
7 but I can't remember.

8 Q. And during that class, what were the tools that
9 you used to do that projectile analysis?

10 A. Various firearms.

11 Q. Any other tools besides firearms?

12 A. Oh, also analyzing the projectiles themselves.
13 With comparative microscopes to see if we could match up
14 the -- which weapon that came from, from test fire -- test
15 fire cartridges utilizing the same weapons.

16 Q. Did you do that here?

17 A. At Washoe County Crime Lab.

18 Q. Did you do that here in this case? Did you
19 utilize a microscope to look at the projectile in this case?

20 A. No.

21 Q. What other tools did you use in your training in
22 that class?

23 A. There it was the entry, and -- that was quite an
24 extensive course -- the entry into the DRUGFIRE.

1 THE INTERPRETER: I'm sorry. Into what?

2 THE WITNESS: The DRUGFIRE national computer
3 system. That was an 80-hour course.

4 THE COURT: Would you spell that, please.

5 THE WITNESS: D-R-U-G-F-I-R-E. And that's all
6 one word.

7 THE COURT: So that's not shooting a
8 pharmaceutical?

9 THE WITNESS: No.

10 THE COURT: Okay.

11 THE WITNESS: No.

12 THE COURT: So DRUG is some acronym for
13 something?

14 THE WITNESS: Yes. I don't know what it was.
15 The company nicknamed it that.

16 BY MR. JOHNSON:

17 Q. So DRUG- -- is the DRUGFIRE 80-hour course a
18 tool?

19 A. Well, yes, because we had to use the tool. We
20 had to use the microscopes. We had to use the computer
21 systems.

22 Q. Okay. And did you utilize that DRUGFIRE computer
23 system in this case?

24 A. Oh, I did not, no.

1 Q. Okay. What other tools did you learn how to use
2 to do your trajectory analysis in this training?

3 A. Different gunsmithing tools, one of which is a
4 trigger pound test instrument in determining what the -- the
5 weight of the trigger is, the pull of the trigger.

6 Q. And did you use that on the actual weapon in this
7 case?

8 A. Oh, no.

9 Q. How about some -- any other tools that you used
10 in your training to determine trajectory?

11 A. The -- the trajectory kit.

12 Q. And what was in the trajectory kit?

13 A. There's a laser; that's in the trajectory kit.
14 That's like a tube laser. You know, it's only about a half
15 inch much in diameter and only about maybe two inches, two and
16 a half inches long.

17 Q. And did you utilize that laser in this case?

18 A. Oh, no.

19 Q. Okay. Any other tools that are in that kit?

20 A. Yes. There's the -- the rods. The trajectory
21 rods themselves.

22 Q. And what are those? Just like this (indicating)?

23 A. No. They are made out of different materials.

24 The -- there -- there's a metal one, which is the base that

1 a -- you're supposed to use first.

2 Q. And did you utilize that in this case?

3 A. Oh, no.

4 Q. The ones that attach to it, did you utilize that
5 in this case?

6 A. No.

7 Q. Did you utilize this rod on the actual couch?

8 A. I did not, no.

9 Q. Okay. Any other tools that you used in any of
10 your training? You said you had an 80-hour course and this
11 one by your -- someone else that worked there. Any other
12 tools that you've utilized in the --

13 A. For fire- -- for, specifically, firearms, that's
14 what you're asking?

15 Q. Uh-huh. Yeah.

16 A. Not that I can recall.

17 Q. Any other training on trajectory that you've
18 received over your career involving firearms and trajectory?

19 A. Just -- no.

20 Q. Okay. And then you testified during the trial
21 that, at some point, trajectory just becomes a subjective
22 interpretation; isn't that correct?

23 A. That's correct.

24 Q. So you didn't -- you didn't utilize any

1 scientific tools to form your opinion here today. Correct?

2 A. No.

3 Q. So your testimony here today was just your
4 subjective interpretation of what you believed happened.
5 Correct?

6 A. That's correct.

7 Q. So that wouldn't be something that you could
8 testify to a degree of scientific certainty. Correct?

9 A. Oh, that's correct.

10 Q. Okay. And do you recall reviewing the testimony
11 of Matthew Noedel?

12 A. Not --

13 Q. Or Mr. Noedel. I'm not sure of his first name.
14 Did you recall reviewing the testimony of Mr. Noedel?

15 A. I've reviewed it, but not in its entirety. I
16 mean, I reviewed it in its entirety, but I don't know if I can
17 remember all of it.

18 Q. Do you recall him offering opinion to a degree of
19 scientific certainty during the trial?

20 A. No, I can't recall.

21 Q. Okay. Other than the testimony of the witnesses
22 at the trial, is there any document or information that you
23 reviewed in preparation for this testimony that you hadn't
24 previously reviewed in preparation for your testimony at

1 trial -- at the original trial in this case?

2 A. The -- what I can remember is the -- the
3 testimony of the witness -- prior witnesses, I had not seen
4 that before.

5 Q. And other than that, the testimony of the prior
6 witnesses, is there anything, any document or anything else
7 that you reviewed in preparation for your testimony today that
8 you hadn't previously reviewed in preparation for your
9 testimony at the actual trial for Ms. Leibel?

10 A. Not that I can recall in -- I do recall that, you
11 know, the testimonies, I hadn't seen before.

12 Q. And before that trial, did you ever tell
13 Ms. Brown that they should have used a wood dowel rod and not
14 a metal dowel rod?

15 A. No.

16 Q. Okay. And before the trial, did you ever inform
17 her of any of the things that took place here that you
18 believed took place?

19 A. No.

20 Q. And before the trial, did you ever tell her that
21 you believed that the index or middle finger was used to pull
22 the trigger and not the -- the thumb?

23 A. No.

24 Q. Okay. And you never told her that you believed

1 that the hole might be bigger than it was originally?

2 A. You know, I may have.

3 Q. Do you know for sure?

4 A. I may have made the comment, and I'm not sure.

5 Q. Okay. Thanks.

6 And you have no idea whether this -- any
7 projectile bounced off a spring or anything else inside the
8 couch, do you?

9 A. I have no idea.

10 Q. And you don't know for certain that the chair
11 was -- the recliner was broken; it just appeared that way to
12 you. Correct?

13 A. It did.

14 Q. And did you ever measure the end table in that
15 picture -- sorry. It was Exhibit 16 is the -- do you recall
16 the picture?

17 A. The photograph, I believe, was 16.

18 Q. Exhibit 16. Showing you Exhibit 16. Did you
19 ever measure that end table?

20 A. No. And it wasn't at the scene when I was there.

21 Q. So your opinion that this was blocking the shot
22 isn't based on any measurements. Correct?

23 A. No, that's correct.

24 Q. It's just based on your subjective

1 interpretation. Correct?

2 A. Based on my decision, and that was based upon the
3 photograph and that drawing, the crime scene drawing.

4 Q. But you didn't utilize any tools to make that --

5 A. Oh, I didn't, no.

6 Q. Okay. And you didn't base it on anyone else
7 who'd used tools on that end table. Correct?

8 A. The only thing I based it on was the measurements
9 that the Washoe County Crime Lab had taken.

10 Q. And they had taken measurements of that table?

11 A. That is correct.

12 Q. And you were asked a question by Ms. Brown during
13 the trial about whether you believe that there was sufficient
14 information to form an opinion about trajectory. Correct? At
15 trial?

16 THE COURT: Would you repeat that for me, please.

17 BY MR. JOHNSON:

18 Q. You were asked a question --

19 THE COURT: I might have lost the second part of
20 that.

21 MR. JOHNSON: Sure.

22 BY MR. JOHNSON:

23 Q. You were asked the question at the original trial
24 by Ms. Brown about whether you believed there was sufficient

1 information to make a -- form an opinion about trajectory;
2 isn't that correct?

3 MR. MALONE: Your Honor, objection. We have an
4 actual transcript. The question is vague and ambiguous.

5 THE COURT: Overruled. Overruled.

6 BY MR. JOHNSON:

7 Q. Would you like me to repeat the question?

8 A. No. I understand, but I can't recall --

9 ^ CK > THE COURT: Okay.

10 THE WITNESS: -- at this time.

11 BY MR. JOHNSON:

12 Q. Would looking at the transcript refresh your
13 recollection?

14 A. It would.

15 MR. MALONE: Sir --

16 THE COURT: You might want to show it there.

17 MR. JOHNSON: I apologize.

18 MR. MALONE: Do you have a copy for me?

19 MR. JOHNSON: I do not.

20 MR. MALONE: Thank you. I found it.

21 THE COURT: Okay. Thank you.

22 MR. MALONE: Your Honor, I'm going to object to
23 the question. The Court -- the Court should, I think, review
24 the actual question asked by Ms. Brown. There are numerous

1 objections. It's very difficult to understand, in
2 specificity, what the question is and attempt to answer it.

3 THE COURT: And -- well, here is the thing. The
4 question was, looking at the transcript, would it refresh your
5 recollection. So it might refresh your recollection; it might
6 not.

7 MR. MALONE: Correct.

8 THE COURT: But he said he thought it might.

9 MR. MALONE: I withdraw my objection.

10 THE COURT: So he gets to look at it. You don't
11 need to mark it because it doesn't go into evidence, but he
12 reads it to himself. And you can ask him when he's done
13 reading it if that refreshed his recollection.

14 BY MR. JOHNSON:

15 Q. I'm showing you page 81, and it goes on to
16 page 82, the bottom corner transcript.

17 THE COURT: Let us know when you're done reading
18 it.

19 Oh, I'm sorry.

20 THE WITNESS: I'm reading -- I just want to
21 clarify. I am reading the lower right-hand corner.

22 BY MR. JOHNSON:

23 Q. Sure. On to the next page.

24 A. Oh, okay.

1 THE WITNESS: Okay. I'm finished, Your Honor.
2 THE COURT: You're finished?
3 THE WITNESS: Yes.
4 THE COURT: Okay.
5 THE WITNESS: So could you ask -- reask the
6 question again.
7 MR. JOHNSON: Yes, I can.
8 THE COURT: Well, the first question he's going
9 to ask you is whether that refreshed your recollection.
10 THE WITNESS: Oh, yes, it did.
11 THE COURT: Then you may go ahead.
12 MR. JOHNSON: I'll repeat the question.
13 BY MR. JOHNSON:
14 Q. Were you asked a question by Ms. Brown at trial
15 about whether the information that you were provided at the
16 time was sufficient for you to draw a conclusion concerning
17 trajectory?
18 A. And I testified I cannot.
19 Q. Were you asked -- you were asked that question.
20 Correct?
21 A. Yes.
22 Q. And you testified that you could not?
23 A. That's correct.
24 Q. But today you drew a conclusion about trajectory.

1 Correct?

2 A. From the information.

3 MR. MALONE: Vague. Vague and ambiguous
4 question. We're not talking -- we don't know what shot is
5 being spoken about.

6 THE COURT: It's an inflection that you've made,
7 so which shot are you speaking about or are you speaking --
8 why don't you talk about one at a time.

9 BY MR. JOHNSON:

10 Q. Today, you drew a conclusion about the trajectory
11 of the first shot. Correct?

12 A. In -- in my opinion, that is correct.

13 Q. But back on the trial date, you said you didn't
14 have enough information to draw a conclusion about trajectory.
15 Correct?

16 A. That's correct.

17 Q. And do you recall -- what was the information
18 that you believed at the time was necessary for you to make a
19 conclusion about trajectory? Do you recall your testimony?

20 MR. MALONE: Referring to which shot, Your Honor,
21 please?

22 MR. JOHNSON: I'm referring to --

23 THE COURT: Are you still talking being Number 1?

24 MR. JOHNSON: I'm -- I'm referring to the --

1 the -- either one.

2 THE COURT: Either one.

3 THE WITNESS: Either one.

4 MR. MALONE: Your Honor, since the question by
5 Ms. Brown doesn't specify which shot she's questioning, I
6 think this line of -- what we have is a question by Ms. Brown
7 concerning his opinion about one particular trajectory, which
8 is not specified.

9 THE COURT: Why don't you clear that up just so.

10 MR. JOHNSON: It seems to be a question -- I
11 mean, I can do it, Your Honor, but that's a question for
12 recross, not a question -- not a --

13 THE COURT: I'm not going to argue with you. Why
14 don't you clear it up.

15 BY MR. JOHNSON:

16 Q. So, my question is, on the day of trial, when you
17 were asked a question about what information you needed to
18 draw a conclusion about trajectory, whether or not it was the
19 trajectory of 1 or 2 or both, what is the information that you
20 said was lacking that you needed to draw a conclusion?

21 MR. MALONE: Same objection, Your Honor. He
22 can't speculate as to what question -- what shot or
23 trajectory --

24 THE COURT: Overruled. Overruled. He can say

1 why he felt that he did not have enough information.

2 THE WITNESS: The only thing I can think about is
3 maybe I didn't review the reports given to me at the time
4 really.

5 BY MR. JOHNSON:

6 Q. Maybe you misunderstood my question. I'm not
7 asking for your hindsight opinion; I'm asking whether you
8 recall what the reason you testified to in court -- what the
9 information you testified to in court was what you needed to
10 draw a trajectory-related conclusion.

11 A. I can't remember.

12 Q. Would it refresh with your recollection to read
13 your testimony from back then?

14 MR. MALONE: Your Honor, he's already done
15 testimony.

16 THE WITNESS: Additional testimony?

17 MR. JOHNSON: Yes. Correct.

18 MR. MALONE: Well, I --

19 THE COURT: Wait. Wait. Stop. Stop. What is
20 the objection?

21 MR. MALONE: He -- Mr. --

22 THE COURT: Johnson.

23 MR. MALONE: Mr. Johnson already asked if it
24 would refresh his recollection to read the testimony. The

1 witness read the testimony.

2 THE COURT: Now he's asked him a different
3 question.

4 MR. MALONE: No, he's actually asked --

5 THE COURT: Sir, I'm not going to argue with you,
6 either.

7 MR. MALONE: Thank you.

8 THE COURT: So if he believes that it would
9 refresh his recollection he can look at the transcript. If he
10 believes it would refresh his recollection. If he believes it
11 would not, then there's no point in it.

12 Sir, would it refresh your recollection.

13 THE WITNESS: It would.

14 THE COURT: Then show him the transcript.

15 MR. MALONE: And can I --

16 THE COURT: But you certainly should advise
17 counsel as to exactly what you're showing him.

18 MR. JOHNSON: Sure.

19 MR. MALONE: You should have copies for me.

20 Oh. Thank you.

21 THE COURT: Now, you should tell me what part of
22 the record you're going to show this witness.

23 MR. JOHNSON: Yes, Your Honor.

24 BY MR. JOHNSON:

1 Q. Mr. Billau, I'M showing you the same transcripts,
2 but instead of page 84, can you please refer to page 85 and
3 see if the highlighted portion refreshes your recollection?
4 Which is the first two to three questions.

5 THE COURT: Have you finished reading it, sir?

6 THE WITNESS: I have, Your Honor.

7 THE COURT: Does it refresh your recollection?

8 THE WITNESS: It does.

9 BY MR. JOHNSON:

10 Q. And so isn't it true that you testified that
11 information you needed was from the initial investigators on
12 the scene to draw your trajectory-related conclusion.
13 Correct?

14 A. Yes, I did answer that.

15 Q. And then you testified that that documentation
16 was lacking in this case. Correct?

17 A. At the time, yes.

18 Q. And you just -- you previously testified that,
19 when you prepared for this testimony, the only additional
20 thing that you had to draw your trajectory-related conclusions
21 today was the testimony of the witnesses at the trial.
22 Correct?

23 A. That's correct.

24 MR. MALONE: If we could have specification which

1 trajectory we are talking about.

2 MR. JOHNSON: I'm talking about both, Your Honor.

3 THE COURT: Okay. Thank you.

4 MR. MALONE: Well --

5 THE COURT: You can cross him on that.

6 BY MR. JOHNSON:

7 Q. And today?

8 THE COURT: Or redirect. I'm sorry, sir.

9 BY MR. JOHNSON:

10 Q. And today you still don't have that information
11 from the original investigators to draw a conclusion.

12 Correct?

13 A. No additional -- is that what you're asking? Is
14 it --

15 Q. Information that you previously testified --

16 THE COURT: Wait. Wait. Wait. You cannot talk
17 at the same time because the court reporter can't get that.

18 MR. JOHNSON: I apologize, Your Honor.

19 THE COURT: So the witness is trying to clar- --
20 clarify what it is you're requesting him. So why don't you
21 ask your question and let's see if he understands it.

22 MR. JOHNSON: Sure.

23 BY MR. JOHNSON:

24 Q. Previously you testified that the information

1 that was lacking that you needed to draw a trajectory-related
2 conclusion was information from the initial investigators on
3 the scene.

4 A. That's correct.

5 Q. Since then, you have not reviewed that
6 information to perform your opinion in this case; isn't that
7 correct?

8 A. I used the same information as the previous trial
9 and reviewed that information again. That's what I'm basing
10 is my review now.

11 Q. Sure. Was the missing information found between
12 the day of trial and today?

13 A. I don't understand the question. If it was
14 found?

15 MR. MALONE: Your Honor, there's the answer.

16 BY MR. JOHNSON:

17 Q. You previously testified that there was
18 information --

19 THE COURT: That's not an objection; that's a
20 comment.

21 MR. MALONE: Objection, Your Honor. Objection.
22 He's testified that he doesn't understand the question.

23 MR. JOHNSON: And I'm clarifying with another
24 question, Your Honor.

1 THE COURT: Go ahead and clarify it. I'm not
2 getting a lot of information yet.

3 MR. JOHNSON: Sure.

4 THE COURT: So...

5 BY MR. JOHNSON:

6 Q. You previously testified that there was
7 information that the initial investigators did not collect
8 that you needed to make your trajectory-related conclusion.
9 Correct?

10 A. That is --

11 MR. MALONE: Objection, Your Honor. He's
12 testified: Once at the trial and once today.

13 THE COURT: So what's the legal objection?

14 MR. MALONE: Which testimony are we talking
15 about?

16 MR. JOHNSON: I use the word "previously,"
17 Your Honor.

18 MR. MALONE: Well, he --

19 THE COURT: Wait. Stop. I'm not going to have
20 that petty argument. He is referring to testimony at the time
21 of trial. That's what the question refers to. Is that right?

22 MR. JOHNSON: Correct.

23 THE COURT: That's how I understand it.
24 Do you understand it that way, sir?

1 THE WITNESS: I do, sir.

2 THE COURT: Okay. Let us move forward.

3 BY MR. JOHNSON:

4 Q. That information that you testified to at the
5 trial that you said was missing from the initial
6 investigators, have you reviewed that information to draw your
7 conclusion today?

8 A. I have.

9 Q. And what information is that?

10 A. It would be their trajectory analysis. Is that
11 what we are talking about?

12 Q. I don't know. You just -- you just said that you
13 reviewed information that you hadn't previously reviewed from
14 the initial investigators. I want to know what information
15 that was. What was it?

16 A. It would be their -- their analysis of the
17 trajectory.

18 Q. Whose analysis?

19 A. That would be both Mr. Noedel's, who came up with
20 it. And he's reviewing -- or he's -- I'm trying to make this
21 clear. He's using data that was provided by him from the
22 measurements that the Washoe County Sheriff's Office had made.

23 BY MR. JOHNSON:

24 Q. You're telling me today that Mr. Noedel was the

1 initial investigator on the scene?

2 A. No, he wasn't. He's reviewing their report.

3 Q. But you testified that you needed additional
4 information from the initial investigator on the scene to draw
5 your conclusion about trajectories at the day -- on the day of
6 trial. Correct?

7 A. That's correct.

8 Q. And you didn't review that information to form
9 your opinion today. Correct? The missing information that
10 you didn't have on trial.

11 A. No. The information, I believe, was still in the
12 same report. So it could have been my error.

13 Q. So you're saying your error was that you just
14 didn't review the initial -- initial invest- -- information
15 from the investigators, not that it wasn't available on the
16 day of trial?

17 A. It was -- it was available on the day of trial.
18 I had copies of the report. I just didn't remember what was
19 in that -- totally what was in that report. I didn't have any
20 notes with me at that time, and I hadn't -- I hadn't performed
21 a report. It wasn't requested.

22 THE COURT: Okay. What's your next question?

23 BY MR. JOHNSON:

24 Q. Anytime after your testimony on the trial date,

1 did you tell Ms. Brown about your mistake in not remembering
2 part of the investigative report?

3 A. Not that I recall.

4 Q. So she would have no idea that you mistakenly
5 didn't review part of the information?

6 A. That would be -- yeah, that would be correct.

7 MR. JOHNSON: No further questions for this
8 witness, Your Honor.

9 THE COURT: Redirect, sir.

10

11 REDIRECT EXAMINATION

12 BY MR. MALONE:

13 Q. So, you read from page 84?

14 A. -4.

15 Q. Lines 12 through 20- -- well, lines 12 through
16 20?

17 A. You mean the --

18 THE COURT: Of the trial transcript to refresh
19 his recollection.

20 MR. MALONE: Of the trial transcript. Yes. To
21 refresh your recollection. And if I may read that into the
22 record, Your Honor.

23 THE COURT: Why?

24 MR. MALONE: Because I think -- did you -- okay.

1 I don't.

2 BY MR. MALONE:

3 Q. Did you truly understand what this question asked
4 by Ms. Brown was?

5 A. I may not have.

6 Q. Well, I mean, do you now?

7 A. Oh, I do now, yes.

8 Q. Well, do you know which trajectory she's talking
9 about?

10 A. No.

11 Q. Okay. So --

12 THE COURT: At the time of trial --

13 MR. MALONE: That's --

14 THE COURT: -- in the transcript?

15 THE WITNESS: That's correct.

16 BY MR. MALONE:

17 Q. Do you know now?

18 A. I do now, yes.

19 Q. Now, how do you know from reading this which
20 trajectory she's talking about?

21 A. Oh, I don't know.

22 Q. Okay. Okay. Did you find the prosecutor's
23 questions confusing?

24 THE COURT: At the time of trial or today?

1 MR. MALONE: Thank you. I'm hoisted on my own
2 petard.

3 THE COURT: Okay. Well, try to get off it.

4 BY MR. MALONE:

5 Q. Today, did you find this -- did you find this
6 line of questioning confusing?

7 THE COURT: Today?

8 MR. MALONE: Today. Did you -- yes.

9 A. In a way, I did, yes.

10 BY MR. MALONE:

11 Q. Okay. Now, it's been your testimony here today
12 that you cannot determine a trajectory for the second shot.
13 Correct?

14 A. That's correct.

15 Q. Okay. And that is because there was a
16 possibility of deflection by numerous objects. Correct?

17 A. Just not deflection by objects.

18 Q. Well, if you can answer the first question.

19 A. Oh, I'm sorry. Yes.

20 Q. Could have been deflected by the hand?

21 A. Yes.

22 Q. Could have been deflected by the shoulder?

23 A. Yes.

24 Q. Could have been deflected by the -- any part of

1 the couch?

2 A. Oh, yes.

3 Q. And it -- yes?

4 A. Yes.

5 Q. Okay. So when you're asked if you had enough
6 information to make a determination about deflection for that
7 second shot, you still don't. Right?

8 A. I have no idea.

9 Q. Well, no. You still -- do you have enough
10 information, still? Do you still -- right now, today?

11 MR. JOHNSON: Can't --

12 MR. MALONE: What?

13 THE COURT: Nothing. It's nothing. Go ahead.

14 BY MR. MALONE:

15 Q. Right now, do you have enough information --

16 MR. JOHNSON: Objection. Asked and answered.

17 THE COURT: Overruled.

18 Finish your question so that he can answer. I
19 overruled the objection.

20 MR. MALONE: Thank you. Okay.

21 BY MR. MALONE:

22 Q. It's your testimony that you cannot determine a
23 trajectory for the second shot based on any available
24 information. Correct?

1 A. That is correct.

2 Q. And that's information you had at the first
3 trial. Correct?

4 A. That's correct.

5 Q. And information you had at the second trial?

6 THE COURT: First trial and second trial?

7 MR. MALONE: Sec- -- I mean, sorry. And at this
8 hearing today. I -- Your Honor, I apologize. I'm...

9 THE COURT: Wearing down.

10 MR. MALONE: Wearing down.

11 THE WITNESS: That's correct.

12 BY MR. MALONE:

13 Q. Okay. And so you do have an opinion about the
14 second shot?

15 A. I do.

16 Q. That opinion is that any opinion really is not
17 terribly reliable for the second shot?

18 MR. JOHNSON: Objection. Leading.

19 THE COURT: Sustained.

20 BY MR. MALONE:

21 Q. Okay. Well, I'm going to -- I'm going to clarify
22 this. The first shot, the .45-shot. Correct?

23 A. Correct.

24 Q. Okay. You've given a possible explanation for

1 that, how that shot could have occurred. Correct?

2 A. Yes.

3 Q. Okay. And were you asked that at the first
4 trial, do you recall?

5 A. Not that I recall.

6 Q. Okay. And did you talk about the second shot at
7 trial?

8 A. Not that I recall.

9 Q. Well, the trajectory of the second shot?

10 A. You know, again, I'm wearing down. I can't -- I
11 can't recall.

12 Q. Okay. Well, your testimony here today is that
13 there is not enough inf- -- it is still that there is not
14 enough information to determine a trajectory for the second
15 shot?

16 A. Yes, I agree with that.

17 Q. Okay. So we are clear on that?

18 A. Yes.

19 Q. Okay. And would you agree that Ms. Brown did not
20 designate which trajectory she was referring to?

21 A. I agree with that, yes.

22 Q. Okay. And the question becomes very difficult to
23 answer at that point. Correct?

24 A. It does.

1 Q. Okay. Now, you did review some additional
2 information in preparation for this hearing. Correct?

3 A. Yes.

4 Q. Okay. And you testified earlier that that would
5 be the testimony from other witnesses at trial?

6 A. That's correct.

7 Q. Okay. Mr. Johnson asked you a series of
8 questions about whether or not you did the measurements you've
9 based your opinions on.

10 A. Yes, he did.

11 Q. Do you remember those?

12 A. Yes.

13 Q. Okay. Is it common in your profession in crime
14 scene analysis to rely on the measurements made by other
15 people in the field?

16 A. For my own testimony?

17 Q. If you're going to -- let me rephrase.

18 Crime scene investigation is somewhat -- is
19 usually a team exercise. Correct?

20 A. Absolutely.

21 Q. Okay. Are you familiar with the people that did
22 the measurements at the Leibel residence?

23 A. Am I familiar with them?

24 Q. Do you remember their names?

1 A. I remember Marci Margritier, she was working at
2 the lab when I was there. The other gentleman wasn't.
3 Q. Okay. Joey Lear?
4 A. Lear.
5 Q. Okay. So Lear and Margritier did the initial
6 investigation?
7 A. That's correct.
8 Q. And the initial investigation consisted of
9 measurements?
10 A. That's correct.
11 Q. And diagramming?
12 A. Yes.
13 Q. Is it normal to rely upon the reports generated
14 by people doing those jobs that Lear and Margritier did here?
15 Is it normal for a person doing the analysis to rely on those
16 measurements made by other people?
17 A. Knowing that those individuals are trained for
18 that, that's correct.
19 Q. Okay. And are these individuals trained?
20 A. From my review. I know that Ms. Margritier was.
21 And I have to go by Mr. Lear's CV.
22 Q. Okay. To your knowledge, was Mr. Noedel -- did
23 Mr. Noedel make any of those initial measurements?
24 A. Not that I'm aware of.

1 Q. So my question really is it's standard procedure
2 to rely on the work of others in forming opinions in crime
3 scene investigation?
4 A. Normally, it is.
5 Q. Okay.
6 A. Working within the team effort.
7 Q. Okay. And everyone has to be vetted and trained?
8 A. Yeah, absolutely.
9 Q. Okay. Regarding your -- regarding the training
10 to be a detective -- do you know any detectives -- no, do you
11 know any forensic analysis -- never mind. Dumb it down.
12 Sorry. Withdraw the question.
13 You testified earlier that you worked with Kevin
14 Laddick --
15 A. I did.
16 Q. -- in learning aspects of firearm operation,
17 trajectory, tool mark analysis. Correct?
18 A. That's correct.
19 Q. Okay. And Kevin Laddick taught the course that
20 you talked about before?
21 A. Yes.
22 Q. Okay. One of the things that I think that
23 Mr. Johnson was talking about, about what scientific evidence
24 did you -- or tools did you use to formulate your opinions

1 here today. And you -- you basically -- you know, you
2 answered really none. Correct?

3 Well, let me rephrase that question. You had no
4 access to this scene. Correct? In unmolested fashion.

5 A. No.

6 Q. Okay. Is the scene terribly informative once all
7 the furniture and surround- -- and evidence has been destroyed
8 or removed?

9 A. No. You will be lacking some information.

10 Q. How much information?

11 A. Quite a few. Quite a bit.

12 Q. Okay. Pretty -- would it be fair to say most of
13 it?

14 A. I would say yes, most of it.

15 Q. Okay. So you looked at an empty house?

16 A. Yes.

17 Q. And you saw a hole in the wall?

18 A. That's correct.

19 Q. And you were able to watch -- you were able to
20 match that hole in the wall up with photographs that were
21 taken on the scene that showed penetration by projectiles.
22 Right?

23 A. Yes. Excuse me.

24 Q. And I think your previous testimony was there

1 were too many things to move in that couch area. Correct?

2 A. There -- there were an awful lot of things that

3 could be movable in that area.

4 Q. Okay. Body?

5 A. Yes.

6 Q. Couch?

7 A. That's correct.

8 Q. Position?

9 And there was insufficient -- was there

10 sufficient documentation as to the potential for deflection in

11 the couch or anything else?

12 A. No.

13 Q. Okay. So when you refer to needing more

14 information, does that refer to some of those things we just

15 talked about?

16 A. Oh, yes.

17 Q. Okay. Now, do you have -- is it a case where you

18 can postulate an opinion regarding trajectory through --

19 regarding the trajectory of the first shot?

20 A. Based upon the reports.

21 Q. Okay. Which reports, sir?

22 A. It would be the autopsy report.

23 Q. Okay.

24 A. Based upon that, yes.

1 Q. Okay. And you have photographs?
2 A. Not only do you have the autopsy photographs, you
3 also have the X-rays -- the photographs of the X-rays, which
4 are important.
5 Q. And you have -- can see two photographs show the
6 entry wound --
7 A. Yes.
8 Q. -- on the body?
9 A. Yes.
10 Q. On the -- and we are talking first shot here
11 still?
12 A. That is correct.
13 Q. And there's no exit, so we don't have an exit
14 wound photograph?
15 A. That is correct.
16 Q. Okay. But we do have the X-ray photographs?
17 A. We do, yes.
18 Q. And we have the anatomical knowledge of
19 Dr. Omalu?
20 A. Yes.
21 Q. In other words, he expressed --
22 A. Yes.
23 Q. Okay. Did he express an opinion about the
24 gunshot path in this case?

1 A. He did, yes.

2 Q. Okay. And his -- his analysis was basically to

3 refer to anatomical -- to certain bones, joints, et cetera.

4 Correct?

5 A. That's correct.

6 Q. And that's outside your wheelhouse?

7 A. It is.

8 Q. Outside your training?

9 A. Yes.

10 Q. But you know how bullets act? You know how

11 bullets act. Correct?

12 A. I do.

13 Q. Did you understand that -- that wasn't the best

14 question, but --

15 THE COURT: Mr. Malone, I don't mean to interrupt

16 you, but it's now 4:35.

17 MR. MALONE: Okay.

18 THE COURT: Once a horse passes to the great

19 pasture in the sky, it's best to quit farming.

20 MR. MALONE: Thank you.

21 THE COURT: Are you done with this witness?

22 MR. MALONE: I am.

23 THE COURT: Do you have recross?

24 MR. JOHNSON: Just a final question -- two final

1 questions, Your Honor.

2 THE WITNESS: May I ask a question, sir?

3 THE COURT: What would you like to ask?

4 THE WITNESS: It -- would it be improper if I
5 used one of these now?

6 MR. JOHNSON: I certainly don't object.

7 THE COURT: Used one of what's now, sir?

8 THE WITNESS: The lozenge.

9 THE COURT: No, you -- please, go ahead. Yes,
10 absolutely.

11 MR. MALONE: Please, please. Just don't break
12 your crown.

13 THE COURT: Yeah. Just don't break your tooth.

14

15 RECROSS-EXAMINATION

16 BY MR. JOHNSON:

17 Q. You testified in trial back in 2015 that there
18 wasn't anything to report concerning trajectory and your
19 review of it. Correct?

20 A. Excuse me. At the time, yes.

21 Q. And that you couldn't reach any conclusions.
22 Correct?

23 A. That's correct.

24 MR. JOHNSON: No further questions.

1 THE COURT: Thank you.

2 FURTHER REDIRECT EXAMINATION

3 BY MR. MALONE:

4 Q. And you still can't reach a conclusion regarding

5 the first shot -- the second shot. Correct?

6 THE COURT: That has been made so perfectly

7 clear.

8 MR. MALONE: Thank you. Thank you.

9 THE COURT: Sir, thank you for being here today.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: You are excused.

12 THE WITNESS: Thank you.

13 THE COURT: There's an extra candy on the counter

14 there. You may have it.

15 THE WITNESS: Thank you.

16 THE COURT: Do you have another witness?

17 MR. MALONE: I do, Your Honor. Natasha

18 Kharikova.

19 THE COURT: You doing okay down there?

20 THE COURT REPORTER: Yes. Thank you.

21 THE COURT: How many witnesses do you have after

22 this one?

23 MR. MALONE: Let me -- give me a moment to think.

24 If I can have a moment to think.

1 THE COURT: Sure. While you think, we'll swear
2 this witness.

3 Ma'am, would you come forward? Thank you.

4 (The witness was sworn.)

5 THE COURT: Please come up to the witness stand.
6 There's some water there if you would like.

7 THE WITNESS: Thank you.

8 MR. JOHNSON: Your Honor, just for the record, I
9 know you're aware of a motion I filed and my objections.

10 THE COURT: I am. And you're also aware that I
11 indicated I would rule when you object at the appropriate
12 time, sir.

13 MR. JOHNSON: Okay.

14 THE COURT: And the testimony --

15 MR. JOHNSON: I wasn't sure if I needed to --
16 so -- okay.

17 THE COURT: You get to object once they get to
18 those questions, sir. Thank you very much. I appreciate it,
19 Mr. Johnson.

20 Mr. Malone, sir.

21 NATALIYA KHARIKOVA,

22 having been first duly sworn, was examined

23 and testified as follows:
24

1 DIRECT EXAMINATION

2 BY MR. MALONE:

3 Q. Ma'am, would you state your name.

4 A. Nataliya Kharikova. I go by Natasha.

5 Q. Will you go ahead and spell both your names for
6 the court reporter.

7 A. It's N-A-T-A-L-I-Y-A, K-H-A-R-I-K-O-V-A. And
8 Natasha is N-A-T-A-S-H-A.

9 Q. And, ma'am, what is your profession?

10 A. I am a professional Russian interpreter.

11 Q. And are you certified -- how many -- where are
12 you certified to interpret?

13 A. I am certified by the Judicial Council of the
14 State of California to interpret in courts of California. But
15 there's also a reciprocity between a number of states in the
16 United States; so I can also interpret in other states. And
17 I'm also qualified to interpret in Federal Court.

18 Q. And do you have training to -- in order to
19 perform that job?

20 A. Yes.

21 Q. And would you please describe, very quickly, that
22 training?

23 A. Do you mean training specifically for court
24 interpretation --

1 Q. For interpretation.

2 A. -- or just interpreting in general?

3 Q. Inter- -- well, let's -- I think interpreting in

4 general. Thank you. Do you have specific classroom training

5 for being an interpreter?

6 A. I do. My bachelor's degree is from a Russian

7 University where I specifically had interpreting courses and

8 translation courses. Then I also took some courses to take a

9 State Court interpreting exam in California; I then did take

10 this exam. And I also have a master's degree in conference

11 interpretation with distinction from the Middlebury Institute

12 of International Studies in Monterey.

13 Q. And conference interpreting is a subset of

14 interpreting?

15 A. Yes.

16 Q. And when we talk about interpreting, all of that

17 refers to your ability to translate from Russian to English

18 and English to Russian?

19 A. Correct.

20 Q. Do you have any other degrees?

21 A. I am also a translator certified by the American

22 Translators Association to translate specifically from English

23 into Russian.

24 Q. I'm specifically asking about other undergraduate

1 degrees and other aspects of language study.

2 A. I also have a -- well, it's a B.A. and an M.A.
3 from Russia in philology.

4 Q. And what is philology?

5 A. It's a study of literature, linguistics, and
6 history.

7 Q. And how much experience do you have in reporting
8 in all those -- excuse me.

9 How much experience -- what is your experience --
10 what is the level of your experience in translation in general
11 in all of those venues?

12 A. I've been a professional interpreter and
13 translator for 20 years.

14 Q. Did you have an opportunity to review a
15 transcript -- let me ask you what materials you reviewed or
16 investigation you did in preparation for testifying today at
17 this hearing.

18 A. I had an opportunity to review Ms. Leibel's
19 interview or the transcript of her interview with law
20 enforcement on February 23rd. And then I also watched the
21 video of that same interview several times. I also watched
22 video of her interview that happened on the next day,
23 February 24th, when a Russian speaker was present to help her.
24 I also read the transcript of her 911 call. And -- well, I

1 visited Ms. Leibel together with you to assess her ability to
2 not just speak English but also to communicate with another
3 English speaker.

4 Q. Okay. Did you observe discussions about legal
5 concepts between Ms. Leibel and myself?

6 A. Yes.

7 Q. Okay. Did you observe a discussion regarding her
8 right to testify at her trial?

9 A. Yes.

10 Q. Or today's hearing?

11 A. Yes.

12 Q. Okay. And how long did you spend in that
13 observation?

14 A. You mean the personal meeting?

15 Q. The meet -- yeah, the personal meeting with the
16 three of us.

17 A. About two hours.

18 Q. Okay. And that took place at Florence McClure --

19 A. Yes.

20 Q. -- in Las Vegas?

21 A. (The witness nods.)

22 Q. Okay. You flew to Las Vegas, and that was both
23 of us?

24 A. I did.

1 THE COURT: That's the women's prison, so that
2 the record is clear.

3 MR. MALONE: Yeah.

4 BY MR. MALONE:

5 Q. And regarding the necessity for Ms. Leibel to
6 have an interpreter when speaking to an English-speaking
7 attorney, do you have an opinion?

8 MR. JOHNSON: Objection.

9 THE WITNESS: Yes, I do.

10 MR. JOHNSON: Repeat all the same objections that
11 I had in my motion. I -- do you want me to orally object
12 to --

13 THE COURT: No, I don't want you to. I
14 understand your objection, and the objection is sustained.

15 MR. MALONE: Sustained?

16 THE COURT: Yes.

17 MR. MALONE: May I continue to ask questions?

18 THE COURT: You can ask another question. We'll
19 see if there's an objection to the next question.

20 MR. MALONE: Okay.

21 BY MR. MALONE:

22 Q. Did you observe any miscommunication between
23 Ms. Leibel and myself when I was speaking to her in English?

24 MR. JOHNSON: Objection. Same reasons in

1 addition to relevance. This is something that happened two
2 years after or three years after.

3 THE COURT: Sustained.

4 BY MR. MALONE:

5 Q. Are you familiar with -- in part -- is it part of
6 your training to determine whether interpretation services are
7 necessary when -- in a courtroom setting?

8 A. I wouldn't say it's part of my training, but it's
9 part of my everyday work.

10 Q. Okay. Are there times when you find that an
11 interpreter is not necessary for a native Russian speaker?

12 A. Yes.

13 Q. Are there times when you find that an interpreter
14 is necessary for a native Russian speaker?

15 A. Yes.

16 Q. Okay. And how do you form those opinions?

17 A. Observing their ability to communicate and be
18 understood and also by how well they can express themselves in
19 English.

20 MR. MALONE: And, Your Honor, if I could have
21 some guidance from the Court as to what foundational
22 information the Court would like to assess Ms. Kharikova's
23 ability to testify.

24 THE COURT: Well, Mr. Malone, I appreciate your

1 question, but I don't intend to try the case for you. And --
2 and so the...

3 MR. MALONE: Okay.

4 THE COURT: I think you're going to have a hard
5 time with the foundation for this witness, but maybe you'll be
6 able to make it. And it's no offense to this witness;
7 however, you're asking her to testify about Ms. Leibel's
8 ability to understand and having her testify as to what she
9 has witnessed Ms. Leibel engage in conversation with you a
10 couple of years past the trial seems, to me, to be a stretch.

11 You asked her about the -- observing the
12 interviews and the tape or the disk that has been admitted,
13 and I don't know that she can provide any expert opinion on
14 what someone else's understanding is. And I don't know that
15 there's a foundation for her to be able to give -- to testify
16 as to what someone else's understanding of the English
17 language is. I can watch that just as well as she can, and I
18 can make that determination from observing it and see the same
19 foibles as she can observe. And so it does not seem, to me,
20 to be of assistance to the finder of fact to have this witness
21 testify to those things. And I don't know that it requires
22 any particular expertise to observe a conversation and to
23 determine whether someone is understanding that conversation
24 which ultimately is a question of fact that I have to

1 conclude.

2 MR. MALONE: Thank you.

3 THE COURT: Thank you, sir.

4 BY MR. MALONE:

5 Q. So, Ms. Kharikova, you were able to read the
6 transcript of her interview with sheriff's officers. Correct?

7 A. Yes.

8 Q. Okay. You were able to view the video of her
9 interview with those same officers?

10 A. Yes.

11 Q. And then on the next day with different officers.
12 Correct?

13 A. Correct.

14 Q. Is there a method that you're aware of or is
15 there experience that you have in determining whether or not
16 there's understanding between a speaker and a listener? Well,
17 wait. One -- let me withdraw that question.

18 Did you observe in any -- on the videotape for
19 the first day without a Russian speaker -- and by the way,
20 that Russian speaker, was that an interpreter?

21 A. I don't think so.

22 Q. A professional interpreter?

23 A. I don't think so.

24 MR. JOHNSON: Objection. Lack of personal

1 knowledge.

2 THE COURT: Well, she can say whether she knows.
3 We don't know whether she knows.

4 BY MR. MALONE:

5 Q. Do -- and in your opinion, given your training
6 and what you've experienced --

7 THE COURT: Ask her -- ask her if she knows.

8 BY MR. MALONE:

9 Q. Do you know whether or not --

10 THE COURT: Because she doesn't get an opinion on
11 that.

12 BY MR. MALONE:

13 Q. -- was?

14 A. I have no personal knowledge of that.

15 Q. Okay. Did you see problems with interpretation?

16 A. Yes.

17 Q. And were they significant?

18 MR. JOHNSON: Objection. Vague.

19 THE COURT: Well, that's -- that's sustained
20 because what is significant to one may not be to another.

21 BY MR. MALONE:

22 Q. Okay. Did you find important mistakes?

23 A. I found that this Russian speaker's Russian was
24 very lacking.

1 Q. Okay. And is there a difference between a
2 Russian speaker and a Russian interpreter?

3 A. Yes.

4 Q. And that's training and experience; is that
5 correct?

6 A. And also the level of command of the language.

7 Q. Okay. In viewing the videotape, were you able to
8 see clear -- oh, I'll ask this.

9 You have spoken to Ms. Leibell in both English and
10 Russian. Correct?

11 A. Correct.

12 Q. Okay. At Florence -- at the women's prison?

13 A. Yes.

14 Q. And then you observed her speaking in English,
15 for the most part, on video?

16 A. Yes.

17 Q. Has her English improved based upon your training
18 and experience?

19 MR. JOHNSON: Objection. Same objection.

20 MR. MALONE: Of?

21 THE COURT: Well, it --

22 MR. JOHNSON: I believe your command of the
23 English is --

24 THE COURT: Thank you.

1 MR. JOHNSON: -- just as good.

2 THE COURT: Thank you.

3 I'm going to allow her to answer that question,
4 but I'm not too sure that that's going to be really relevant.

5 MR. MALONE: Well, Your Honor, the -- and if I
6 can give background to the question.

7 THE COURT: No. It's -- I told you she can
8 answer?

9 MR. MALONE: Okay. Thank you.

10 THE COURT: So give your background through your
11 witness.

12 THE WITNESS: And, I'm sorry, the question was?
13 BY MR. MALONE:

14 Q. Have you -- you were able to see Ms. Leibel
15 speak -- now remember, I'm -- several years --

16 THE COURT: Has her English improved, ma'am?

17 THE WITNESS: I would say that not by much.

18 THE COURT: Okay. Thank you.

19 MR. MALONE: Thank you.

20 Your Honor, the only -- my response to the
21 objection is that I think that any defects in -- in foundation
22 should go to the weight of the evidence, not its
23 admissibility.

24 THE COURT: Thank you. And?

1 MR. MALONE: Your Honor, I would be prepared to
2 give an offer of proof of what Ms. Kharikova's testimony would
3 be here at today's hearing.

4 THE COURT: Well, you're certainly entitled to
5 give an offer of proof.

6 MR. MALONE: Your Honor, the offer of proof would
7 be that Ms. Kharikova has had extensive graduate and
8 postgraduate training, both in linguistics and in
9 interpretation; that she has formed an opinion that Ms. Leibel
10 presents as a person that does need an interpreter to fully
11 understand conversations in the English language.

12 And I agree -- I would agree, as well, that that
13 can be an opinion that could be addressed by lay witnesses. I
14 agree with that formulation. But I think it would be
15 helpful -- I present that it would be helpful to the trier of
16 fact to have a trained professional give their opinion about
17 the same thing. She would be able to testify regarding the
18 misinterpretation of certain words. She would be -- she would
19 testify to the Court that certain phraseology used by
20 Ms. Leibel is of -- is based upon the Russian language. In
21 other words, she would testify something -- that Ms. Leibel
22 thinks in Russian, and, when she attempts to speak in English,
23 it isn't the same. The concepts cannot be expressed clearly
24 because of language and cultural differences.

1 THE COURT: Well, sir, that may all be true. But
2 you need to be far more specific than that and be able to
3 point out to me, I believe, where during the course of this
4 trial those failures interfered, one, with the attorney-client
5 relationship; and, two, with Ms. Leibel's ability to
6 understand the process specifically and not in general terms
7 that an idiom is used or whatever. Because --

8 MR. MALONE: Okay.

9 THE COURT: -- there's already a great deal of
10 evidence that Ms. Leibel did understand.

11 MR. MALONE: Your Honor --

12 THE COURT: And I don't know that this witness
13 can testify to any particular attorney-client conversation or
14 thing that happened during the trial that Ms. Leibel didn't
15 understand.

16 MR. MALONE: Your Honor, the rules promulgated by
17 the Nevada Supreme Court in ADKT 0411 require the attorney to
18 make an initial assessment regarding any various
19 communication, and they include language specifically in that.
20 They also require that -- that the attorney continually
21 reevaluate that. So, we have a situation here in which I've
22 never seen where an interpreter is necessary in court but not
23 used by the -- by counsel.

24 THE COURT: The interpreters are provided in

1 court. I haven't made a finding that they are necessary, but
2 they've been provided.

3 MR. MALONE: Well, Your Honor, I think what
4 Ms. Kharikova would testify to is that a lot of time -- what
5 she observed in the video would be long questions asked by law
6 enforcement and very short and almost nonresponsive answers
7 given by Ms. Leibel indicating a lack of knowledge or ability
8 to communicate. What we have is we have, I think, a very
9 difficult --

10 THE COURT: I don't know that she gets to testify
11 that it indicates a lack of knowledge or inability to
12 communicate.

13 MR. MALONE: Lack of understanding would be a
14 more appropriate word. Lack of understanding is --

15 THE COURT: And certainly she has to testify to
16 that.

17 MR. MALONE: Your Honor, but that is part of her
18 general job description is to make those assessments as well.
19 And, Your Honor, in order to make any kind of knowledgeable
20 assessment regarding a person's ability to communicate in a
21 second language, the assessor really does need to be somebody
22 who speaks both languages.

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

24 MR. MALONE: Well, it's com- -- it's common

1 sense, Your Honor. Because if you -- if -- if somebody says a
2 word that you don't know, you have no idea what that is being
3 put together. Well, I can ask Ms. Kharikova the authority in
4 determining what the importance of interpretation is and
5 whether or not one language speaker -- a single unilateral --
6 I don't know what we call it, a, you know, a person that
7 speaks one language, what their ability --

8 THE WITNESS: Monolingual.

9 THE COURT: You can go on with your offer of
10 proof, sir?

11 MR. MALONE: A monolingual.

12 THE COURT: Are you done with your offer of
13 proof?

14 MR. MALONE: I mean -- if I can ask her that
15 question?

16 THE COURT: You can ask her that as part of your
17 next question --

18 MR. MALONE: If --

19 THE COURT: -- assuming your offer of proof is
20 done.

21 MR. MALONE: Well, Your Honor, my offer of proof
22 that she would be -- she would be able to give you -- provide
23 you testimony on how you do go about assessing someone's
24 competence in a language and their understanding in a foreign

1 language.

2 THE COURT: You can ask her that.

3 BY MR. MALONE:

4 Q. How do you go about assessing someone's
5 competency in a language that is not their own and their
6 ability to understand and express themselves in that language?

7 A. And are you talking about how I would do it when
8 I have to do it for work, or --

9 Q. Yes. Well, with all that you have training in
10 many disciplines, you can give whatever infor- -- specialized
11 knowledge you have in answering that question.

12 A. In my professional experience, normally, you're
13 just able to make this foundation by observing somebody use
14 their second language, which would be English in this case.
15 And you make the decision by evaluating both their
16 comprehension and production. Basically, how well they are
17 able to understand including some complicated concepts, toward
18 legal and so on. And then production is how much they are
19 able to express in foreign language.

20 Q. Okay. Is it possible to tell -- to form some
21 opinion about understanding and comprehension based upon the
22 answers to questions?

23 A. Yes.

24 Q. Okay.

1 MR. MALONE: Your Honor, as part of my offer of
2 proof as well, attorneys aren't supposed to testify in their
3 own cases. But I've had an interpreter for every meeting that
4 I've had for Ms. Leibel other than the first one.

5 THE COURT: I know that you have because I
6 have --

7 MR. MALONE: Paid for it.

8 THE COURT: -- paid for it. But tell me why that
9 requires some expert testimony as opposed to -- you know,
10 you're asking this witness what she's observed during of the
11 course of those interviews. Why does that require any expert
12 testimony as opposed to my observation of it?

13 MR. MALONE: Your Honor, because you can't speak
14 to her. The Court -- you don't have the ability, given the
15 rules of our system, to spend time with Ms. Leibel and ask her
16 about her case.

17 THE COURT: Right. But this witness has said
18 reviewing the disk, the interview. I can do those things.

19 MR. MALONE: I -- you certainly can, and I think
20 you will learn information from the disk and the interviews
21 and the transcript. She's also said -- she's also testified
22 that she learned details from the transcript. I can make an
23 offer of proof from the interpreters here --

24 THE COURT: So why do you need the witness?

1 MR. MALONE: I'm trying to do it -- honestly,
2 Your Honor -- well, I hate it when people say "honestly." I'm
3 trying to do a good job. I'm really trying to do a good job.

4 MR. MAUSER: Your Honor, can I have just a
5 moment with my co-counsel?

6 THE COURT: Yeah.

7 MR. MALONE: Your Honor, I think that Mr. Mausert
8 has made a very good point that there is no actual record of
9 communication between Ms. Brown and Ms. Leibel. We don't have
10 that. It's a vacuum. It went into the void, and it's gone.
11 So all we can do is really work backwards. I can make an
12 offer of proof that every court interpreter that I've utilized
13 in this case have said, "Oh, yeah, she needs an interpreter."
14 They --

15 MR. JOHNSON: I object to that offer of proof.

16 THE COURT: That --

17 MR. MALONE: That's an offer of proof.

18 THE COURT: That objection is sustained.

19 MR. MALONE: Okay. So that's what we had. I
20 know that the Court -- I -- I know what the Court is thinking.
21 The Court is thinking that I'm flogging -- the Court knows I'm
22 nothing a dead horse. I know I'm flogging a dead horse.

23 THE COURT: No, sir. I realize that this is
24 important to your case. The language issue is important to

1 your case. And, quite frankly, it's very important to me, and
2 I'm sure it's important to Mr. Johnson. It's important to the
3 concept of justice here, which is supposed to be my job.

4 But I will tell you, it has to be evidence that
5 is something more than just common sense. And if it is just a
6 matter of any lay-person -- either this witness or someone who
7 is down at the Raley's grocery store or myself -- looking at
8 the evidence and making a determination, you don't need an
9 expert to make that determination as to whether there is some
10 confusion in the conversation. Then we don't need an expert.

11 And you're right: There is not a record of the
12 conversations between Ms. Brown and Ms. Leibel. There is
13 testimony within the record about those conversations that
14 this witness cannot testify to because she wasn't there. So,
15 again, the objection from counsel goes to whether this
16 witness, as an expert, can supply something that would assist
17 a finder of fact -- me -- as to Ms. Leibel's lack of
18 understanding.

19 And frankly, she doesn't have to, but Ms. Leibel
20 has not testified -- maybe she will -- that she didn't
21 understand. And -- and so I'm not certain that this witness
22 can testify that she did not understand those conversations
23 with counsel because she wasn't there. And she -- you know,
24 that's where we are.

1 MR. MALONE: I -- Your Honor, I would say that --

2 THE COURT: And you are right, though, about
3 Ms. Brown's obligation to assess her client's need for
4 language assistance and to continue to make an ongoing
5 assessment.

6 MR. MAUSER: Your Honor, could I -- could I
7 supplement counsel's argument?

8 THE COURT: No. One of you can argue at a time.
9 If you need to tell your counsel something --

10 MR. MAUSER: Can I just have a -- have a moment
11 here?

12 THE COURT: -- tell it to him.

13 Go ahead. I'm not going to have you both arguing
14 the same issue.

15 Sir?

16 MR. MALONE: Your Honor, we have interpreters for
17 the purpose of giving us complete information that relates to
18 the communication between individuals -- between individuals.
19 A person who is monolingual doesn't have the tools to assess
20 the other side of the conversation. And other people don't
21 have the other part of the tool. It would be like a set of
22 pliers -- I don't know if the Court is familiar with, like, a
23 set of --

24 THE COURT: I know how a pair of pliers works,

1 sir.

2 MR. MALONE: Some people don't. But you can take
3 a pair of slip-joint pliers, the kind -- the cheap kind,
4 usually, that people have. And you take the one side off, and
5 it's no longer a set of pliers, and it's no longer useful.

6 So, when we have a situation where people are
7 from different cultures and speak different languages, if we
8 only have that one language involved, that -- only that one
9 language, we don't have a complete understanding of things.
10 Or it is suspect. It is suspect. This is the complete set of
11 pliers. This is what I'm trying to give to you. I'm trying
12 to give you the tool that you need to understand the situation
13 that my client is in. There -- you've stated that there's
14 plenty of information that you have regarding her
15 comprehension of English. If you haven't looked at the
16 video --

17 THE COURT: I said that there's a lot of it.

18 MR. MALONE: A lot of it.

19 Well --

20 THE COURT: Within the record that Ms. Brown
21 testified to. How much "a lot" is, I'm not going to try to
22 quantify it.

23 MR. MALONE: I think -- and I'm sorry. I think
24 this is a situation in which the system requires erring on the

1 side of the criminal defendant. It's their Sixth Amendment
2 right to counsel that is implicated here. Theirs. They
3 possess it. The -- our government -- our form of government,
4 our very system of justice takes that and makes it sacred. It
5 makes it sacred so I can't disclose things that she tells me
6 that aren't in the furtherance of her case. That applies to
7 the interpreter as well. So this is going to a very
8 foundational level. And as I said, it requires both sides of
9 the tool. You can't just -- one half of a set of pliers is
10 not a set of pliers. One being able to assess this requires a
11 facility with both languages, which these ladies have, which
12 Ms. Kharikova has, which I assume you do not have. I do not
13 have. I need their help. I need their help.

14 And that's our position. I think I've -- I think
15 I've done my best in trying to get the testimony in. But I do
16 believe she has already testified that she has training in
17 determining somebody's level of comprehension in a language
18 that is not their birth -- language of birth. So...

19 THE COURT: Well, I don't know that the record
20 indicates that she has some specialized training in that. If
21 you want to go on and make an offer of proof by questioning
22 her, you can do that and make your record.

23 BY MR. MALONE:

24 Q. Do you have tools that you use in determining

1 whether or not somebody has -- can comprehend their second
2 language?

3 THE COURT: Ms. Brown is asking if she can be
4 released for the day and go home.

5 MR. MALONE: Yes. Yes, we are done.

6 THE COURT: She may go home.

7 THE COURT CLERK: Thank you.

8 THE COURT: Thank you.

9 Did you hear that question?

10 THE WITNESS: Yes.

11 THE COURT: I'm sorry. Go ahead.

12 THE WITNESS: There are different ways to make
13 official, I guess, what I would call assessment of somebody's
14 language proficiency.

15 BY MR. MALONE:

16 Q. Will you please explain those to the Judge?

17 A. For example, the United States government has
18 developed a system called ILR, which stands for Interagency
19 Language Roundtable. And it's a scale where, I think, five
20 numerical levels are used to evaluate somebody's proficiency.
21 And each level corresponds to certain ability to speak,
22 listen, and read and write in a foreign language. So this
23 would be one way to evaluate somebody's ability.

24 And then there are also other matrixes that, if

1 an actual official evaluation is required, it would more or
2 less work the same way. You evaluate somebody's listening
3 ability, comprehension, writing and reading, according to a
4 certain set of criteria.

5 THE COURT: Okay.

6 BY MR. MALONE:

7 Q. Were you able to use any of those tools in your
8 evaluation of Ms. Leibel's ability to communicate in English?
9 Or similar -- or anything that you've learned from your
10 knowledge of --

11 A. Well, I -- I've used the criteria. I didn't use
12 the specific tools because I didn't think that we need to
13 place her on a certain language of language knowledge. I
14 thought it was more whether she's able to have a communication
15 in English or not and how far she's able to -- how much she's
16 able to express herself.

17 Q. And your testimony has been that you've used the
18 L -- you've used those tools from those assessment measures?

19 MR. JOHNSON: I'd ask him to rephrase the
20 question.

21 THE COURT: Yeah. That was that was fairly
22 leading, and I don't think the witness understands it based on
23 her response.

24 ///

1 BY MR. MALONE:

2 Q. Have you used -- have you used some of -- you're
3 familiar with the nature of those testing implements.
4 Correct?

5 A. Yes.

6 Q. Okay. Did they -- did your knowledge of those
7 proced- -- those testing instruments help you assess
8 Ms. Leibel's ability to communicate in English?

9 A. Yes. I used pretty much the same criteria.

10 Q. Okay. Were you able to -- when -- so you have
11 been able to use somewhat of a standardized form or format to
12 assess her competence in speaking and --

13 MR. JOHNSON: Objection. Leading.

14 MR. MALONE: -- understanding English?

15 THE COURT: That is sustained.

16 MR. MALONE: Have you.

17 BY MR. MALONE:

18 Q. Have you been able to use somewhat of a
19 standardized format, based on your training --

20 MR. JOHNSON: Objection to "somewhat."

21 THE COURT: Well, the witness has already
22 described that she didn't use the exact test but she used some
23 of the tools within it. So I understand what "somewhat"
24 means, and the question will be completed, please. Thank you.

1 BY MR. MALONE:

2 Q. In your -- in your profession, is constant
3 assessment of understanding between you and the person you're
4 interpreting for necessary?

5 Let me ask that question. Is it something that
6 you reassess in your mind, "Is this working or is this not
7 working?"

8 A. You mean communicating with the person I'm
9 interpreting for?

10 Q. Yeah.

11 A. Yes.

12 Q. Okay. Do you have specialized knowledge about
13 Russian culture and habits?

14 A. Yes.

15 Q. Okay. Is that useful in assessing somebody's
16 ability to communicate and understand in English for a native
17 Russian speaker?

18 A. Yes. I mean interpreting -- yes.

19 Q. Did you find portions of the video that you
20 viewed where you saw basically compliant behavior by -- that
21 you were able to recognize as standard and form -- standard
22 compliant behavior?

23 And do you understand that question?

24 MR. JOHNSON: Objection. Leading.

1 MR. MALONE: Well, I said "Did you." I'm sorry.
2 THE COURT: Yeah, I know. "Did you," which leads
3 to a yes or no answer, which is a leading question. And it's
4 also -- you have not put any -- well, I'm not going to say
5 anything, tell you what to do.
6 But that objection is sustained.
7 BY MR. MALONE:
8 Q. When you did your work to assess Ms. Leibel's
9 ability to communicate and -- communicate in English, were you
10 able to utilize the standardized approach?
11 A. Yes.
12 Q. Does your training and education make that
13 possible?
14 A. I believe so, yes.
15 Q. Okay. Would it be possible -- well, and that's
16 what -- that's one of the things you've learned?
17 A. Yes.
18 MR. MALONE: Your Honor, I think she has
19 specialized training that would assist the trier of fact in
20 making a determination regarding Ms. Leibel's language skills
21 in English.
22 THE COURT: Response?
23 MR. JOHNSON: The testimony I heard is she is
24 able, not that she did perform. But the question was what was

1 she able.

2 THE COURT: I heard that she did. I heard that
3 she did. She's already said that she did. So do you have
4 some other objection?

5 MR. JOHNSON: Same objections in -- before. If
6 this Court is considering allowing her to testify, then I ask
7 to take her on voir dire.

8 THE COURT: You can voir dire. Have a seat.
9

10 VOIR DIRE EXAMINATION

11 BY MR. JOHNSON:

12 Q. You said that the -- one of the tests was the
13 ILR?

14 A. -R. Yes.

15 Q. Did you perform that exact test?

16 A. No.

17 Q. What was the names of some other similar tests
18 that you are referring to? You just kind of said there were
19 other tests.

20 A. Yes. There's also -- if I'm not mistaken, the
21 acronym is ACFTL, which I'd be a little pressed right now to
22 explain what the acronym stands for, but it's the American
23 council's test to ask -- to evaluate foreign language ability.

24 Q. And did you administer that test?

1 A. No.

2 Q. Any other similar tests?

3 A. No. But, as I said, there are also matrixes that

4 you can use, with -- and they are not formalized in a test,

5 but it's just a matrix that you can use.

6 Q. And what's one of those matrixes?

7 A. It -- I mean, it might not have a specific name.

8 But basically it was -- like I was saying, a reading,

9 speaking, writing, and listening test.

10 Q. And you performed that test while you were

11 watching the video?

12 A. I was making notes when I was watching the video.

13 Q. Did you administer that test while you were

14 watching that video?

15 A. No. No.

16 Q. When did you administer that test?

17 A. I never did.

18 Q. Did you perform any test -- do you know what the

19 word "malingering" means?

20 A. No, I don't think so.

21 Q. Did you perform any tests to determine whether,

22 when you spoke with Ms. Leibel at the women's prison, that she

23 was using -- feigning to speak English poorly?

24 A. And, I'm sorry, the question is, did I perform

1 any test to assess --

2 Q. Did you perform any tests to assess whether she
3 was --

4 A. Oh, no.

5 Q. So you don't know whether your observation of her
6 at the women's prison was her faking speaking English poorly?

7 A. I have an opinion on that, but...

8 Q. But you don't know whether?

9 A. No.

10 Q. And you didn't perform any tests to determine
11 whether that was the case?

12 A. No.

13 Q. And you didn't --

14 THE COURT: Are there tests for that?

15 THE WITNESS: I would not know.

16 THE COURT: Okay.

17 BY MR. JOHNSON:

18 Q. And when you say "matrix," you said there was
19 five levels: Listening, comprehension, writing and reading?

20 A. No. There are five levels in each of these
21 categories: Comprehension, reading, writing. Five levels of
22 language proficiency, zero --

23 Q. That's in the ILR test --

24 A. Yes --

1 Q. -- or this unnamed matrix?

2 A. No, no, no. But these matrixes are pretty
3 much -- it's the same standard. Sometimes it could be --
4 like, in Europe, for example, there's three-level -- there's a
5 three-level designation, I guess. It goes A, B and C. But
6 it's the same idea.

7 Q. And are those based on questions you ask the
8 person you're evaluating?

9 A. Yes. And also written examples.

10 Q. Okay. So when you're watching this video, you
11 couldn't ask her any of those questions. Correct?

12 A. No.

13 Q. And when you're watching the video, you couldn't
14 look at any of her written work. Correct?

15 A. No.

16 Q. And what was the other part?

17 A. Speaking and listening.

18 Q. Those are in response to questions that you ask.
19 Correct?

20 A. Yes.

21 Q. And you didn't ask questions of the video; it's
22 only at the prison?

23 A. I -- yes.

24 MR. JOHNSON: Same objections, Your Honor. I

1 don't believe she has specialized knowledge performed that
2 will assist the trier of fact in this case.

3 THE COURT: It sounds to me, ma'am, like you
4 didn't perform any testing of Ms. Leibel; is that correct?

5 THE WITNESS: Yes.

6 THE COURT: And what you did do with Ms. Leibel
7 is you, one, you reviewed an interview that she had had, and
8 you made some notes and drew some conclusions about whether it
9 appeared to you that she comprehended the question; is that
10 correct?.

11 THE WITNESS: That's correct.

12 THE COURT: And the statements that were made to
13 her from the questions.

14 THE WITNESS: Correct.

15 THE COURT: And you reviewed whether you thought
16 that her responses were appropriate responses to the
17 questions.

18 THE WITNESS: Correct.

19 THE COURT: Is that a fair statement?

20 THE WITNESS: Yes.

21 THE COURT: And then, when you met with her, you
22 had a conversation with her. Correct?

23 THE WITNESS: Yes.

24 THE COURT: And did that conversation occur in

1 English or in Russian?

2 THE WITNESS: Both.

3 THE COURT: Okay. And at the time that the --
4 that part of the conversation was in English, you were making
5 an assessment of whether she understood you in English?

6 THE WITNESS: Yes.

7 THE COURT: And whether she could respond to you
8 in English?

9 THE WITNESS: For the most part, I did not speak
10 English with her. For the most part, I spoke Russian, but I
11 also observed Ms. Leibell and Mr. Malone speak in English with
12 each other.

13 THE COURT: For how long? How long were they
14 actually speaking to each other?

15 MR. MALONE: Most of that time. Well, I don't
16 know. I would say probably over an hour.

17 THE COURT: Okay. And --

18 THE WITNESS: I believe an hour and a half, I
19 guess.

20 THE COURT: And so you were -- you were observing
21 their conversation, and you were making a judgment as to
22 whether they were effectively communicating?

23 THE WITNESS: Yes. And I was making specific
24 notes on where the communication failures were occurring and

1 for what reason linguistically, I guess.

2 THE COURT: Did you interject in that
3 conversation?

4 THE WITNESS: Yes.

5 THE COURT: Okay. How many times did you
6 interject?

7 THE WITNESS: I couldn't -- I couldn't give you a
8 number. But it was -- it was quite a lot. And also part of
9 this conversation, what we did was Mr. Malone and Ms. Leibel
10 spoke to each other just in English. And from the very
11 beginning when I was introduced to Ms. Leibel, she didn't
12 understand what my role was going to be. And this is when --

13 THE COURT: How do you know that?

14 THE WITNESS: Well, because she started asking
15 questions that made me understand that she didn't understand.

16 THE COURT: Had you ever met her before?

17 THE WITNESS: No.

18 THE COURT: Do you know if Mr. Malone had had a
19 conversation with her to explain what your role would be?

20 THE WITNESS: Yes, and this is what happened. So
21 when we were first there --

22 THE COURT: How do you know that?

23 THE WITNESS: I was there when Mr. Malone was
24 explaining to Ms. Leibel why I was there and who I was.

1 THE COURT: Okay. And did -- that conversation
2 is part of the evaluation that you're using, that you're
3 making?

4 THE WITNESS: Yes.

5 THE COURT: So then tell me what that
6 conversation was and what part she didn't understand.

7 THE WITNESS: Well, from the very beginning.

8 THE COURT: Did she know who Mr. Malone was?

9 THE WITNESS: Yes. So he said, "This is Natasha
10 Kharikova, and she's here to assess your ability to
11 communicate in English with me, and she will also interpret
12 part of our conversation, and she will also speak to you in
13 Russian and ask you certain questions."

14 And Ms. Leibel said, "How many interpreters do I
15 need? I already have interpreters."

16 THE COURT: Okay.

17 THE WITNESS: Which led me to believe that she
18 didn't understand this whole introduction that Mr. Malone did.

19 THE COURT: So you don't know whether he really
20 explained to her what the end assessment was going to be
21 because he also introduced you as an interpreter.

22 THE WITNESS: Well, that is true, yes.

23 THE COURT: Okay. And you were not privy to
24 conversations that he had with her before you actually arrived

1 to the Frances McClure [sic] prison. Right?

2 THE WITNESS: Right.

3 THE COURT: And so you don't know whether he
4 explained that to her, that there would be an assessment; is
5 that right?

6 THE WITNESS: I assumed that he did. That was my
7 understanding.

8 THE COURT: But you don't know that?

9 THE WITNESS: I do not know that.

10 THE COURT: Okay. And so it may be that the
11 first that she heard that there would be an assessment was
12 when the two of you came through the door?

13 THE WITNESS: Possibly.

14 THE COURT: Okay. Thank you.

15 Do you have questions based on my questions, sir?

16 CONTINUED DIRECT EXAMINATION

17 BY MR. MALONE:

18 Q. You observed Ms. Leibel communicating in English
19 in two different time periods. Correct?

20 A. Correct.

21 Q. Over three years ago and then several weeks ago?

22 A. Yes.

23 Q. Does a comparison of those two situations allow
24 you to form an opinion about malingering?

1 A. To be honest, I didn't think about it. But right
2 now, I've -- I think I have an opinion.

3 Q. And what is that?

4 MR. JOHNSON: Objection to her opinion about
5 whether they were malingering.

6 MR. MALONE: She's -- may I respond?

7 THE COURT: Yeah.

8 MR. MALONE: She's responded that she's basing
9 her opinion upon her observations of two different time
10 periods, and so she does have data points from years apart.
11 And so I -- I can go into what I think she's going to say, but
12 it would be a really leading narrative.

13 THE COURT: Well, I -- I don't think that this
14 witness has an expertise on malingering and whether there's
15 some faking going on.

16 MR. MALONE: Well --

17 THE COURT: And so I'm not going to allow that.

18 MR. MALONE: Your Honor, I think by the way of
19 argument, I think it would take a very sophisticated plan and
20 a very nefarious mind to decide to malingering three or four
21 years ago when she was facing ultimate consequences -- the
22 death penalty, perhaps -- and to act in a way where she
23 couldn't tell her story. And then it would take an incredible
24 amount of fortitude and planning to continue that plan through

1 the next three years, five -- four years. That is information
2 I think the Court can have to make a common sense decision
3 about there's -- whether or not there's any form of
4 malingering here or any evidence of malingering.

5 I think that one thing that would be important
6 would be, I think, when people malingering, one way to find out
7 if they're malingering is if their story hangs together, if
8 they say different things in response to similar situations.
9 And I believe that's information that Ms. Kharikova would have
10 from her experience and training and from her experience in
11 this case.

12 THE COURT: Okay. I've ruled.

13 MR. MALONE: Thank you.

14 THE COURT: Anything else of this witness?

15 MR. MALONE: I don't believe I can -- I have any
16 other questions.

17 MR. JOHNSON: No questions from the State,
18 Your Honor.

19 THE COURT: Thank you, ma'am.

20 Do you have another witness?

21 MR. MALONE: Court's indulgence.

22 THE COURT: Sure.

23 MR. MALONE: Your Honor, may I have some time to
24 speak to my client?

1 THE COURT: Absolutely. We are at 5:25.
2 MR. MALONE: I understand, Your Honor.
3 THE COURT: And I'm not going to keep the staff
4 here all night.
5 MR. MALONE: I understand.
6 THE COURT: And I don't --
7 MR. MALONE: I do have an important duty to --
8 THE COURT: I know you do.
9 MR. MALONE: -- consult with her requiring her --
10 THE COURT: I'm familiar with your duties, sir.
11 MR. MALONE: Thank you, Your Honor. I just --
12 THE COURT: If you would like to go back and have
13 a private conversation with her back here, you can.
14 MR. MALONE: Thank you, Your Honor.
15 THE COURT: You'll need an interpreter.
16 THE INTERPRETER: Do you need my services?
17 MR. MALONE: Yes.
18 THE COURT: No, the other room, I believe.
19 (A brief interruption in the proceeding occurred.)
20 MR. MALONE: Your Honor, based upon our
21 conversation with counsel, Ms. Leibel has decided to testify.
22 THE COURT: Okay. How long do you think you
23 need?
24 MR. MALONE: I'm going to ask the bare minimum of

1 questions, Your Honor. I understand the Court's position.

2 THE COURT: No. It's -- it's fine. But if we
3 are going to be quite a while, I -- my calendar is clear in
4 the morning now. I had something that just went off, and I
5 can do it in the morning if you need, if you're going to be,
6 you know, another couple of hours.

7 MR. MALONE: Oh, no.

8 THE COURT: Okay.

9 MR. MALONE: I anticipate 20 minutes of my
10 portion of this.

11 THE COURT: How long would you cross?

12 MR. JOHNSON: I may be longer, maybe 30 minutes.
13 I can't say for sure, Your Honor. I'm not as good at
14 estimating, as you saw at the lunch break.

15 THE COURT: And are you staying here tonight
16 also, ma'am?

17 INTERPRETER IACONA: Yes.

18 THE COURT: What time are you leaving?

19 INTERPRETER IACONA: At 4:00.

20 THE COURT: Tomorrow morning?

21 INTERPRETER IACONA: I can be here at the
22 pleasure of the Court. My schedule is clear in the morning.
23 I know my that colleague --

24 Tatiana?

1 THE COURT: She can -- she's not flying out until
2 9:00 tomorrow night, I think.

3 INTERPRETER SPIVAKOVSY: No, tonight.

4 THE COURT: Tonight?

5 INTERPRETER IACONA: At this point -- yeah.
6 Because we might -- it might change because, at this point, it
7 canceled, but they are waiting for their --

8 INTERPRETER SPIVAKOVSY: Wait, wait. You need to
9 be part of this discussion right now. If the entire
10 hearing -- if need be --

11 I know that my colleague has a morning job.

12 INTERPRETER IACONA: But I will cancel it.

13 INTERPRETER SPIVAKOVSKY: You will cancel it?
14 Okay. Because I'm totally okay as long as, you know -- and if
15 needed, I mean, if you can do that.

16 INTERPRETER IACONA: Yeah, I can do that.

17 Because I have to stay late here anyway at this point.

18 INTERPRETER SPIVAKOVSKY: Right. And you -- and
19 the Court has kindly provided us with hotel accommodations, so
20 we are all set.

21 THE COURT: Counsel's pleasure.

22 MR. JOHNSON: I prefer to do it in the morning,
23 but...

24 MR. MALONE: I'm ready to put her up now. I

1 don't know if -- but --

2 THE COURT: What's your schedule tomorrow
3 morning?

4 MR. MALONE: I'm clear. But, as I said, I think
5 that I've just got a couple of different questions to ask her.
6 But I can -- we -- I'm going to leave it to the Court, and I'm
7 going to read minds and say let's do it tomorrow morning.

8 THE COURT: Well, here is my concern: I don't
9 want the interpreters to be fatigued, and I don't want the
10 court staff to be too fatigued. I'm willing to go on. But I
11 know that -- I just don't tend to believe lawyers when they
12 say they only have 20 minutes. You know, I've never met a
13 lawyer who didn't stand up and say "Just a couple questions
14 Your Honor," and a couple meaning two, and you just never hear
15 two questions. So my preference is to reconvene at 9:00
16 tomorrow morning.

17 MR. MALONE: Thank you, Your Honor.

18 THE COURT: Because I think that gives you more
19 time. And, quite frankly, it gives me time to make certain
20 that I listen to the disk before ruling, which I will do this
21 evening or tomorrow morning.

22 MR. MALONE: Before ruling on the petition?

23 THE COURT: Before ruling on the petition,
24 absolutely, yeah. I'm going to listen to it.

1 Okay. Is -- sir, do you have an issue?

2 THE BAILIFF: I have to check with the Nevada

3 Department of Corrections on her housing.

4 THE COURT: Are they supposed to pick her up

5 tonight?

6 THE BAILIFF: We are supposed to call them when

7 she's ready tonight.

8 THE COURT: She'll be ready tomorrow morning.

9 And --

10 THE BAILIFF: I just don't know the requirements

11 for head count overnight and such.

12 THE COURT: Well, why don't you give them a call

13 and tell them that the Court has ordered that she stay here

14 tonight.

15 THE BAILIFF: Yes, sir.

16 THE COURT: See how that goes.

17 THE BAILIFF: I am sure they won't have a problem

18 with it. I just need to make sure their protocol is okay with

19 that.

20 THE COURT: I, again, fully appreciate you, sir.

21 You don't have to make that call in front of us, if you don't

22 want.

23 THE BAILIFF: Text message, Your Honor.

24 MR. MALONE: Your Honor, at this time, can I move

1 for admission of the transcript of the 23rd interview,
2 February 23rd interview?

3 THE COURT: Is there an objection thereto?

4 MR. JOHNSON: I believe it was sustained and was
5 not admitted in evidence. So I don't believe it's admitted in
6 -- yes, there's an objection.

7 THE COURT: Why do I need the transcripts? I'm
8 going to -- I told you, I'm going to listen to the actual
9 conversation.

10 MR. MALONE: I'm good. I'm -- sometimes -- I --
11 well -- if I can answer why, it would be that I won't do it.

12 THE COURT: All right.

13 MR. MALONE: A couple of questions, Your Honor.
14 Do you want materials removed from the courtroom overnight?

15 THE COURT: Well, we are going to lock the
16 courtroom tonight. And you may leave your materials here.

17 MR. MALONE: Thank you.

18 And can we excuse Mr. Mausert's presence
19 tomorrow? I don't believe --

20 MR. MAUSER: I have stuff on the calendar
21 tomorrow morning, Your Honor. I don't think my presence is
22 necessary tomorrow. John has got it under control, I think.

23 THE COURT: I believe he does, sir. Thanks.
24 You're excused.

1 MR. MAUSERT: Thank you.
2 Did you get an answer?
3 THE BAILIFF: No, Your Honor, but we'll figure it
4 out.
5 THE COURT: Thank you, sir. We are in recess
6 until 9:00 tomorrow morning.
7 What time is the detention hearing, 9:00?
8 THE COURT CLERK: I believe it was at 9:00.
9 THE COURT: What time is the detention hearing?
10 MS. KIRSHNER: 9:00 a.m. tomorrow morning.
11 THE COURT: Okay. We are going to start at
12 10:00.
13 INTERPRETER SPIVAKOVSKY: Is it okay to leave
14 equipment here, Your Honor?
15 THE COURT: Pardon?
16 INTERPRETER SPIVAKOVSKY: Equipment here? Or
17 will there be other hearings here?
18 THE COURT: I have a hearing at 9:00 --
19 INTERPRETER SPIVAKOVSKY: Okay. We will --
20 THE COURT: I have a hearing at 9:00, but I will
21 not allow them to touch any of your materials. You can leave
22 it here.
23 INTERPRETER SPIVAKOVSKY: Leave everything here?
24 THE COURT: And we'll be fine. I promise you.

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Thank you. We were in recess until 10:00
tomorrow morning.

(Proceedings concluded.)

--000--

1 STATE OF NEVADA)
2 DOUGLAS COUNTY) ss.
3)

4 I, SUSAN KIGER, a certified court reporter in the
5 State of Nevada, DO HEREBY CERTIFY:

6 That I am not a relative, employee or
7 independent contractor of counsel to any of the parties, or a
8 relative, employee or independent contractor of the parties
9 involved in the proceeding, or a person financially interested
10 in the proceedings;

11 That I was present in Department No. One of the
12 above-entitled Court on November 15, 2018, and took verbatim
13 stenotype notes of the proceedings had upon the matter
14 captioned within, and thereafter transcribed them into
15 typewriting as herein appears;

16 That the foregoing transcript, consisting of
17 pages 1 through 330, is a full, true and correct transcription
18 of my stenotype notes of said proceedings.

19 DATED: At, Carson City, Nevada, this 4th day of
20 December, 2018.

21 
22 SUSAN KIGER, CCR No. 343

23
24

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4 THE NINTH JUDICIAL DISTRICT COURT
5 IN AND FOR THE COUNTY OF DOUGLAS
6
7

8 STATE OF NEVADA, Case No. 14-CR-62B
Plaintiff,
9 v. Dept. No. One
10 Tatiana Leibel,
Defendant.
11

12 **AFFIRMATION**
Pursuant to NRS 239B.030

13 The Undersigned does hereby affirm that the following
document **DOES NOT** contain the social security number of any
14 person: (List of document(s) attached below)

15 1) Post-Conviction Hearing -- November 15, 2018

16 -or-

17 The undersigned does hereby affirm that the document
named below **DOES** contain the social security number of a
18 person as required by state or federal law or for the
administration of a public program or for an application for a
19 federal or state grant: (List of document(s) attached
containing social security number information below)

20 1) _____
21 2) _____

22
23 *Susan Kiger*
24 SUSAN KIGER _____

December 4, 2018