

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
2014-CR-00062BD

RECORD ON APPEAL

VOLUME 25

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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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14-CR-00062B

I

- A C₁ = Amended ^{Douglas County} ~~County~~ Clerk VI, VIII, XIV (Article 1(8)) ^{FILED}
- B C₂ = NRS 199.210-199.250 Falsifying ^{NO} Evidence
- C C₃ = NRS 199.130 False Affidavit to effect ~~Arrest~~ ^{Arrest} 25
- D C₄ = 1st Post-conviction / Appeal
- E C₅ = Dr. Bennet Omalu / trial Feb. 4-2015 ^{BOBBIE R. WILLIAMS}
- F C₆ = Instruction NRS 34.900-34.990 ^{CLERK} BY [Signature] ^{DEPUTY}
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- W
- X
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- Z

*NOTE: highlights are added for ease of reference quotations.

CASE NUMBER _____

EXHIBIT C₁

Amendment IV, V, VI, VIII, XIV

Amendment 4 Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 7 Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment 8 Bail—Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

Article 1 Declaration of Rights

1. Inalienable rights.
2. Purpose of government; paramount allegiance to United States.
3. Trial by jury; waiver in civil cases.
4. Liberty of conscience.
5. Suspension of habeas corpus.
6. Excessive bail and fines; cruel or unusual punishments; detention of witnesses.
7. Bail; exception for capital offenses and certain murders.
8. Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain.

8. Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain.

1. No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney-general of the state, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself.

2. No person shall be deprived of life, liberty, or property, without due process of law.

3. Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.

Amendments.

The 1912 amendment to this section was proposed and passed in Statutes of Nevada 1909, p. 346; agreed to and passed in Statutes of Nevada 1911, p. 454; and ratified at the 1912 general election.

The 1996 amendment to this section was proposed and passed in the Statutes of Nevada 1993, p. 3065; agreed to and passed in Statutes of Nevada 1995, p. 2880; and ratified in the 1996 general election.

The 2018 amendment to this section was proposed and passed in the Statutes of Nevada 2015, p. 4074, to take effect November 27, 2018; and ratified in the November 6, 2018 General Election.

Proposed Amendment.

An amendment to this section was proposed and passed in Statutes of Nevada 2015, p. 4074, to take effect November 27, 2018, if the proposed amendment is agreed to and passed by the 2017 Legislature and approved and ratified at the 2018 General Election.

Rejected Amendment.

An amendment to this section was proposed and passed in Statutes of Nevada 2007, p. 3595. It was further agreed to and passed by the 2009 Legislature, see Statutes of Nevada 2009 p. 3213. The amendment was submitted to a vote at the 2010 general election and disapproved. If approved, this section would have read:

“1. No person shall be tried for a capital or other infamous crime (except in cases of

impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney-general of the state, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself.

"2. The legislature shall provide by law for the rights of victims of crime, personally or through a representative, to be:

(a) Informed, upon written request, of the status or disposition of a criminal proceeding at any stage of the proceeding;

(b) Present at all public hearings involving the critical stages of a criminal proceeding; and

(c) Heard at all proceedings for the sentencing or release of a convicted person after trial.

"3. Except as otherwise provided in subsection 4, no person may maintain an action against the state or any public officer or employee for damages or injunctive, declaratory or other legal or equitable relief on behalf of a victim of a crime as a result of a violation of any statute enacted by the legislature pursuant to subsection 2. No such violation authorizes setting aside a conviction or sentence or continuing or postponing a criminal proceeding.

"4. A person may maintain an action to compel a public officer or employee to carry out any duty required by the legislature pursuant to subsection 2.

"5. No person shall be deprived of life, liberty, or property, without due process of law.

"6. Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.

"7. Except as otherwise provided in paragraphs (a) to (e), inclusive, the public uses for which private property may be taken do not include the direct or indirect transfer of any interest in the property to another private person or entity. A transfer of property taken by the exercise of eminent domain to another private person or entity is a public use in the following circumstances:

(a) The entity that took the property transfers the property to a private person or entity and the private person or entity uses the property primarily to benefit a public service, including,

without limitation, a utility, railroad, public transportation project, pipeline, road, bridge, airport or facility that is owned by a governmental entity.

(b) The entity that took the property leases the property to a private person or entity that occupies an incidental part of an airport or a facility that is owned by a governmental entity and, before leasing the property:

(1) Uses its best efforts to notify the person from whom the property was taken that the property will be leased to a private person or entity that will occupy an incidental part of an airport or a facility that is owned by a governmental entity; and

(2) Provides the person from whom the property was taken with an opportunity to bid or propose on any such lease.

(c) The entity:

(1) Took the property in order to acquire property that was abandoned by the owner, abate an immediate threat to the safety of the public or remediate hazardous waste; and

(2) Grants a right of first refusal to the person from whom the property was taken that allows that person to reacquire the property on the same terms and conditions that are offered to the other private person or entity.

(d) The entity that took the property exchanges it for other property acquired or being acquired by eminent domain or under the threat of eminent domain for roadway or highway purposes, to relocate public or private structures or to avoid payment of excessive compensation or damages.

(e) The person from whom the property is taken consents to the taking.

“8. In all actions in eminent domain:

(a) Before the entity that is taking property obtains possession of the property, the entity shall give to the owner of the property a copy of all appraisals of the property obtained by the entity.

(b) At the occupancy hearing, the owner of the property that is the subject of the action is entitled, at the property owner’s election, to a separate and distinct determination as to whether the property is being taken for a public use.

(c) The entity that is taking property has the burden of proving that the taking is for a public use.

(d) Except as otherwise provided in this paragraph, neither the entity that is taking property nor the owner of the property is liable for the attorney's fees of the other party. This paragraph does not apply in an inverse condemnation action if the owner of the property that is the subject of the action makes a request for attorney's fees from the other party to the action.

"9. Except as otherwise provided in this subsection, if a court determines that a taking of property is for public use, the taken or damaged property must be valued at its highest and best use without considering any future dedication requirements imposed by the entity that is taking the property. If property is taken primarily for a profit-making purpose, the property must be valued at the use to which the entity that is taking the property intends to put the property, if such use results in a higher value for the property.

"10. In all actions in eminent domain, fair market value is the highest price, on the date of valuation, that would be agreed to by a seller, who is willing to sell on the open market and has reasonable time to find a purchaser, and a buyer, who is ready, willing and able to buy, if both the seller and the buyer had full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

"11. In all actions in eminent domain, just compensation is that sum of money necessary to place the property owner in the same position monetarily as if the property had never been taken, excluding any governmental offsets except special benefits. Special benefits may only offset severance damages and may not offset the value for the property. Just compensation for the property taken by the exercise of eminent domain must include, without limitation, interest and reasonable costs and expenses, except attorney's fees, incurred by the owner of the property that is the subject of the action. The district court shall determine, in a posttrial hearing, the award of interest and award as interest the amount of money which will put the person from whom the property is taken in as good a position monetarily as if the property had not been taken. The district court shall enter an order concerning:

(a) The date on which the computation of interest will commence;

(b) The rate of interest to be used to compute the award of interest, which must not be less than the prime rate of interest plus 2 percent; and

(c) Whether the interest will be compounded annually.

"12. Property taken by the exercise of eminent domain must be offered to and reverts to the person from whom the property was taken upon repayment of the original purchase price if, within 15 years after obtaining possession of the property, the entity that took the property:

(a) Fails to use the property for the public use for which the property was taken or for any public use reasonably related to the public use for which the property was taken; or

(b) Seeks to convey any right, title or interest in all or part of the property to any other person and the conveyance is not occurring pursuant to subsection 7.

The entity that has taken the property does not fail to use the property under paragraph (a) if the entity has begun active planning for or design of the public use, the assembling of land in furtherance of planning for or design of the public use or construction related to the public use.

“13. If any provision of subsections 7 to 12, inclusive, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or application of subsections 7 to 12, inclusive, which can be given effect without the invalid provision or application, and to this end the provisions of subsections 7 to 12, inclusive, are declared to be severable.

“14. The provisions of subsections 7 to 12, inclusive, apply to an action in eminent domain that is filed on or after January 1, 2011.”

CASE NUMBER _____

EXHIBIT C2

NAS 199.210-199.250 Falsifying Evidence

Falsifying Evidence

- 199.210. Offering false evidence.
- 199.220. Destroying evidence.
- 199.230. Preventing or dissuading person from testifying or producing evidence.
- 199.235. Repealed.
- 199.240. Bribing or intimidating witness to influence testimony.
- 199.242. Limitations on defenses to prosecution for influencing testimony of witness.
- 199.250. Witness accepting bribe.

199.210. Offering false evidence.

A person who, upon any trial, hearing, inquiry, investigation or other proceeding authorized by law, offers or procures to be offered in evidence, as genuine, any book, paper, document, record or other instrument in writing, knowing the same to have been forged or fraudulently altered, is guilty of a category D felony and shall be punished as provided in NRS 193.130.

HISTORY:

C&P 1911, § 92; RL 1912, § 6357; CL 1929, § 10041; 1971, p. 150; 1979, p. 1421; 1995, ch. 443, § 26, p. 1175.

NOTES TO DECISIONS

Cited in:

Siragusa v. Brown, 114 Nev. 1384, 971 P.2d 801, 1998 Nev. LEXIS 161 (1998).

199.220. Destroying evidence.

Every person who, with intent to conceal the commission of any felony, or to protect or conceal the identity of any person committing the same, or with intent to delay or hinder the administration of the law or to prevent the production thereof at any time, in any court or before any officer, tribunal, judge or magistrate, shall willfully destroy, alter, erase, obliterate or conceal any book, paper, record, writing, instrument or thing shall be guilty of a gross misdemeanor.

HISTORY:

C&P 1911, § 93; RL 1912, § 6358; CL 1929, § 10042.

Research References and Practice Aids

NVCODE

Negligent spoliation of evidence, interfering with prospective civil action, as actionable. 101 A.L.R.5th 61.

199.230. Preventing or dissuading person from testifying or producing evidence.

A person who, by persuasion, force, threat, intimidation, deception or otherwise, and with the intent to obstruct the course of justice, prevents or attempts to prevent another person from appearing before any court, or person authorized to subpoena witnesses, as a witness in any action, investigation or other official proceeding, or causes or induces another person to be absent from such a proceeding or evade the process which requires the person to appear as a witness to testify or produce a record, document or other object, shall be punished:

1. Where physical force or the immediate threat of physical force is used, for a category D felony as provided in NRS 193.130.

2. Where no physical force or immediate threat of physical force is used, for a gross misdemeanor.

HISTORY:

C&P 1911, § 94; RL 1912, § 6359; CL 1929, § 10043; 1967, p. 465; 1979, p. 1421; 1983, p. 1683; 1995, ch. 443, § 27, p. 1175.

NOTES TO DECISIONS

Evidence sufficient.

There was sufficient evidence to show that defendant dissuaded a witness under this statute because he told the baby's mother not to testify, and he also told his girlfriend and mother to guarantee that the baby's mother did not testify. *Anderson v. State*, 132 Nev. 939, 2016 Nev. App. Unpub. LEXIS 109 (Nev. Ct. App. 2016).

Cited in:

Phillips v. State, 121 Nev. 591, 119 P.3d 711, 2005 Nev. LEXIS 66 (Sept. 15, 2005).

Research References and Practice Aids

Cross References

As to injunction to restrain unlawful act against witness or victim of crime, see NRS 33.015.

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Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely. 79 A.L.R.3d 1156.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempt to intimidate or influence witness in civil action. 4 A.L.R.4th 829.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 A.L.R.4th 769.

Construction and application of federal witness tampering statute, § 18 U.S.C.A. 1512(b). 185 A.L.R. Fed. 1.

199.235. Repealed.

Repealed by Acts 1985, ch. 82, § 255, effective April 6, 1985.

199.240. Bribing or intimidating witness to influence testimony.

A person who:

1. Gives, offers or promises directly or indirectly any compensation, gratuity or reward to any witness or person who may be called as a witness in an official proceeding, upon an agreement or understanding that his or her testimony will be thereby influenced; or

2. Uses any force, threat, intimidation or deception with the intent to:

- (a) Influence the testimony of any witness or person who may be called as a witness in an official proceeding;

- (b) Cause or induce him or her to give false testimony or to withhold true testimony; or

- (c) Cause or induce him or her to withhold a record, document or other object from the proceeding,

is guilty of a category C felony and shall be punished as provided in NRS 193.130, and may be further punished by a fine of not more than \$50,000.

HISTORY:

C&P 1911, § 56; RL 1912, § 6321; CL 1929, § 10005; 1967, p. 465; 1979, p. 1421; 1983, p.

NV CODE

1683; 1995, ch. 443, § 28, p. 1176.

NOTES TO DECISIONS

This section includes the bribing of any person who may be called as a witness.

No good reason appears to require that a subpoena shall first have had to be issued before a person can be considered a prospective witness; a witness can be a witness without a subpoena. *Fox v. Sheriff, Clark County*, 86 Nev. 21, 467 P.2d 1022, 1970 Nev. LEXIS 442 (Nev. 1970).

Effect of nonessential error in information.

An information charging the defendant with offering compensation to induce a witness to withhold testimony in a pending criminal case against him was not fatally defective in charging that on April 26, 1969, the defendant offered a witness \$500 not to testify against him at a preliminary hearing scheduled for June 8, 1969, which date was a Sunday on which a preliminary hearing could not have been scheduled, as the allegation that a preliminary hearing was scheduled for June 8 was not essential. *Fox v. Sheriff, Clark County*, 86 Nev. 21, 467 P.2d 1022, 1970 Nev. LEXIS 442 (Nev. 1970).

"Understanding" between the parties.

This section requires an agreement or understanding between the giver of the bribe and the receiver; if the giver makes an offer and he reasonably believes that the receiver has accepted, then there is an "understanding" between the parties. *Fox v. Sheriff, Clark County*, 86 Nev. 21, 467 P.2d 1022, 1970 Nev. LEXIS 442 (Nev. 1970).

Cited in:

Morley v. Walker, 175 F.3d 756, 1999 U.S. App. LEXIS 8409 (9th Cir. 1999).

Research References and Practice Aids

Cross References

As to injunction to restrain unlawful act against witness or victim of crime, see NRS 33.015.

As to protection of victims and witnesses, see NRS 178.569 et seq.

As to immunity of material witnesses from prosecution, see NRS 178.572 et seq.

ALR –

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely. 79 A.L.R.3d 1156.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempt to intimidate or influence witness in civil action. 4 A.L.R.4th 829.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 A.L.R.4th 769.

Construction and application of federal witness tampering statute, § 18 U.S.C.A. 1512(b). 185 A.L.R. Fed. 1.

199.242. Limitations on defenses to prosecution for influencing testimony of witness.

It is not a defense to a prosecution under NRS 199.230 or 199.240 to show that:

1. An official proceeding was not pending or about to be instituted; or
2. The testimony sought or the record, document or other object to have been produced would have been legally privileged or inadmissible in evidence.

HISTORY:

1983, p. 1682; 1985, p. 247.

199.250. Witness accepting bribe.

A person who is or may be a witness upon a trial, hearing, investigation or other proceeding before any court, tribunal or person authorized to hear evidence or take testimony, who asks or receives, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his or her testimony will be influenced thereby, or that the person will be absent from the trial, hearing or other proceeding, is guilty of a category C felony and shall be punished as provided in NRS 193.130.

HISTORY:

C&P 1911, § 57; RL 1912, § 6322; CL 1929, § 10006; 1967, p. 465; 1979, p. 1421; 1995, ch. 443, § 29, p. 1176.

CASE NUMBER _____

EXHIBIT C₃

NRS 199.130 False affidavit to effect arrest

1 information that you extracted from Ms. Leibel's phone?
2 A. Yes, it does.
3 MR. GREGORY: Your Honor, I'd move for admission
4 of Exhibit 60.
5 MS. BROWN: No objection.
6 THE COURT: 60 is admitted.
7 MR. GREGORY: Your Honor, I have a copy of
8 Exhibit 60 for the defense, for your Honor, and for the
9 jurors that I'd like to hand out at this time.
10 THE COURT: Well, first show your copies to the
11 defense and I'll ask if the defense agrees that those are
12 copies of the Exhibit.
13 MS. BROWN: It would be very hard to say without
14 a detailed examination, your Honor. It's 24 pages long.
15 THE COURT: Frankly, Mr. Gregory is an officer of
16 the court and I don't believe in any way that he would
17 perpetrate any kind of fraud. But it is incumbent on the
18 defense if you want to object to him using copies, so that the
19 jury can follow along. So if you want time to compare them,
20 I'll grant you that time. If you decline to exercise that
21 time, I'll take that as a waiver of any objection.
22 MS. BROWN: Your Honor, I have no objection.
23 I'll make any corrections as I --
24 THE COURT: Yes, ma'am.
25 You may now for demonstrative purposes share that

1 with the jury if you'd like. This is not the exhibit. This
2 is what has been represented by Mr. Gregory to be a copy of
3 the exhibit. You won't have this when you go back to
4 deliberate this case. However, you will have the original
5 exhibit.
6 Q. (By Mr. Gregory) Investigator Garren, in looking
7 at that exhibit and reviewing the extraction during the
8 course of your investigation, did you find any text messages
9 that were nearing time to the 911 call in this case?
10 A. There were some before and there were some
11 activity afterwards.
12 Q. Okay. Let's go before.
13 A. On the day of the 23rd?
14 Q. Yes. When you would get there if you would tell
15 us what page.
16 A. Page 21.
17 Q. Is there anything near in time to the time of the
18 911 call?
19 A. That would be on page 22. I was going to start
20 at the beginning of the 23rd, but on page 22 about halfway
21 down the page it's an incoming call.
22 Q. What entry are you looking at?
23 A. Entry -- It's signified by 46 and underneath it's
24 the number 5.
25 Q. And that's an incoming call?

1 A. Yes.
2 Q. And about what time did that call take place?
3 A. 9:13 a.m.
4 Q. And does it indicate who that call was coming
5 from?
6 A. It was from Lana Ramo.
7 Q. Was that call answered?
8 A. It's not printed on here, but according to the
9 call log, it's listed as a missed call with the extraction of
10 the data.
11 Q. And then what is the very next entry?
12 A. The next entry is an incoming text message from
13 Lana Ramo.
14 Q. And what does it state?
15 A. It says, can you please tell me what's going on
16 because I'm packing all of my stuff to the car.
17 Q. And then what are the next one, two, three, four
18 entries?
19 A. They're four incoming calls from Lana, the same
20 individual.
21 Q. And were those calls answered?
22 A. According to the call log extraction, those were
23 four missed calls.
24 Q. And then entry number 47, what is that?
25 A. It's an outgoing text message to Lana.

1 Q. What time?
2 THE COURT: That's 47-1.
3 THE WITNESS: Correct, 47-1.
4 THE COURT: Thank you.
5 Q. (By Mr. Gregory) 47-1 is what?
6 A. It's an incoming, or it's on outgoing text
7 message to Lana.
8 Q. So an outgoing message from Tatiana's phone to
9 Lana?
10 A. Correct.
11 Q. What time did that take place?
12 A. 9:56 a.m.
13 Q. Now, I see there next to the time it says UTC
14 minus eight. What does that mean?
15 A. UTC is coordinated universal time. It's
16 synonymous with Greenwich me time. And using world time
17 server dot com, I entered the date and time to reflect what
18 the time would be in our time zone, the Pacific time zone,
19 and it comes up during daylight savings time as minus eight
20 hours. So there's a feature on the device where you can set
21 all the reports to indicate UTC time minus eight hours, which
22 would give you the accurate time in our time zone.
23 Q. (So that 9:56:27 a.m.) would be our time?
24 A. Correct. Pacific standard time.
25 Q. And what was the content of that text message?

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1 minutes later at 9:50, not yet. Harry go crazy. I need him
2 to calm down. I'll contact you little bit later, kiss.
3 10:16 p.m., Lana text messages to Tatiana. Are
4 you really coming or are you doing this to me and telling me
5 tomorrow?
6 At 11:54 p.m., Lana text messages Tatiana, can
7 you please tell me what's going on. And then at 11:16 p.m.,
8 which was the last text message that evening on Tatiana's
9 phone, I start little bit later. I send you message.
10 Now, there's other information on those
11 extraction reports which includes web history and searches
12 that are conducted. You're free to look at those in the
13 exhibits. I'm going to turn to Sunday, the very next day.
14 The first activity on Tatiana's phone that day was at 5:54 in
15 the morning where there's a Google search conducted on
16 Tatiana's phone, and the search is for gun stores in Reno,
17 Nevada.
18 And at 5:55 a search for the U.S. Firearms
19 Academy. At 5:57 another Google search for gun stores in
20 Reno, Nevada, and then at 5:57 is the booking, the hotel
21 booking.
22 At 7:03 that morning, there's a text message from
23 Lana to Tatiana. Actually, excuse me, Tatiana to Lana.
24 Unfortunately, that text message was deleted. I would love

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1 to know what it said. You'll see when you look at the phone
2 extractions, that deletions on Tatiana's phone are somewhat
3 of an anomaly. In other words, she doesn't always delete
4 text messages right away.
5 Going further into the morning, now at 9:00 is
6 when things start to get interesting. Lana wants to know
7 when her mom is coming, if she's coming at all, and so she
8 starts making repeated attempts to contact her mom.
9 At 9:13 Lana tries to call Tatiana. It's a
10 missed call. Two minutes later at 9:15, she text messages
11 Tatiana, can you please tell me what's going on because I'm
12 packing all my stuff to the car.
13 Five minutes later, she tries calling Tatiana,
14 missed call. Five minutes later, she tries calling Tatiana,
15 missed call. 9:34 calls again, missed call. 9:41 she
16 tries again, missed call, and it's not until 9:56 that she
17 finally gets a response from Tatiana, and it's a text message
18 that I talked about in my opening statement. I'm still home.
19 I have an uncomfortable situation. I'll explain a little bit
20 later.
21 Lana then texts her back at 10:03. I need to
22 know now what is going on. Are you coming or not because I
23 already told her I'm moving out. I'm here with here, and I
24 need to know. Tatiana did not respond to those text messages

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1 or those phone calls.
2 The next thing we know that happens is at 11:03
3 in the morning, Tatiana calls 911. Douglas County Sheriff's
4 Office is on scene shortly thereafter followed by the Tahoe
5 Douglas Fire Protection. At 11:15 Harry is pronounced dead,
6 11 minutes after the 911 call.
7 11:44, Tatiana calls an unidentified person and
8 finally then at 11:58, she finally calls Lana back. At
9 12:13, we have a text message on Harry's cell phone, coming
10 in from Chris Hetrick, I'll be at your house at 3:00. And
11 then at 3:46, Chris to Harry, Harry, are you home? And then
12 finally at 4:47, Harry are you okay? I saw the sheriff at
13 your house. Is everything okay? Please answer.
14 And then as we've already discussed on Tuesday,
15 February 25th, Harry has two entries on his cell phone
16 calendar. One is to call the locksmith and one is to turn on
17 the house alarm. That timeline is important because it shows
18 what's going on first with Harry. He has plans. He has a
19 friend coming over. Second with Tatiana, her daughter, Lana,
20 is absolutely blowing up her phone every five minutes or so,
21 trying to find out what's going on, what's going on, what's
22 going on until at 9:56, you have the uncomfortable situation
23 text.
24 Well, as I indicated in my opening statement

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1 what's uncomfortable is that Harry is dead. What other
2 information do you have in that regard? Well, you have none
3 other than Tatiana's own statements. Remember, Leanne
4 Brooks? Leanne Brooks had Tatiana stay at her house the
5 night of the shooting. It's a place for Tatiana to stay.
6 What did Tatiana tell her? It happened between 9:30 and
7 10:00 in the morning, her own words. That's consistent with
8 the text message that I have an uncomfortable situation.
9 What else is it consistent with, all of the testimony from
10 the first responders. You heard from a battalion chief. You
11 heard from a captain. You heard from a paramedic. You heard
12 from an engineer, and you heard from two sheriff's deputies
13 who responded.
14 What did they see when they responded shortly
15 after the 911 call? They find Harry on the floor. The blood
16 looks to be drying and coagulating. They do not smell
17 gunpowder. Dr. Omalu testified, well, it's kind of like when
18 you wear cologne, you get so used to it, you don't smell it.
19 Okay, but it's doubtful to me that the battalion chief was
20 wearing a cologne that smelled like gunpowder when he went
21 into that residence.
22 He is a bomb tech with years of experience. He
23 did not smell gunpowder. Nobody else smelled gunpowder. One
24 of the guys testified he smelled a slight odor of gunpowder.

1 THE COURT: It's not admitted for evidence as to
2 whether Mr. Leibel committed suicide. It is admitted as to
3 whether Mrs. Leibel was consistent.
4 MS. BROWN: Thank you.
5 THE COURT: And it's for that reason only that
6 the jury may consider that evidence.
7 Q. (By Ms. Brown) And towards the end of this
8 interview, it was clear -- you made it clear to Ms. Leibel
9 that you didn't believe her story; is that correct?
10 A. That's correct.
11 Q. And you basically accused her of killing her
12 husband over and over again?
13 MR. GREGORY: Your Honor, I object to the
14 hearsay.
15 THE COURT: The question is whether he accused
16 her. That's not hearsay. Overruled.
17 THE WITNESS: Yes, I did.
18 Q. (By Ms. Brown) And at -- you told her everything
19 in the investigation pointed to her being the suspect; is
20 that correct?
21 A. That's correct.
22 MR. GREGORY: Objection, your Honor. Hearsay.
23 THE COURT: The question is whether this witness
24 accused her; is that correct? Is that the question?
25 MS. BROWN: Yes.

1 correct?
2 A. That's correct.
3 Q. And she signed the written consent for you to
4 search her phone; is that correct?
5 A. That's correct.
6 Q. And that phone is not password protected, is it?
7 A. No, it's not.
8 Q. And at that point different clothing was brought
9 to her and the clothes she had been wearing during the day
10 were taken?
11 A. That's correct.
12 Q. She was told to come back the next morning?
13 A. I asked her if she would come back and she
14 agreed.
15 Q. And she did show up the next morning?
16 A. Yes, she did.
17 Q. And again she was -- talked to you about what had
18 happened?
19 A. Correct.
20 Q. And at the end of that interview she was again
21 allowed to leave?
22 A. Correct.
23 Q. And then you obtained a search warrant for her
24 later that day on the 24th? Or I'm sorry. An arrest
25 warrant?

1 THE COURT: It's overruled.
2 MS. BROWN: And she told you repeatedly that you
3 needed to do more investigation?
4 MR. GREGORY: Your Honor, objection. Hearsay.
5 She's asking for content of the interview, statements by her
6 own client. It's hearsay.
7 THE COURT: I think that you're getting beyond
8 simply was she consistent. Now you're getting to the content
9 of what she had to say and I think that that does become
10 hearsay.
11 MS. BROWN: Your Honor, I think her response is
12 not for the truth of the matter asserted, again, but for the
13 fact that she directed these responses towards Investigator
14 Hubkey.
15 THE COURT: You're offering it for that reason?
16 I'll admit it for that reason.
17 Q. (By Ms. Brown) Yes. And at the conclusion --
18 She had earlier allowed Investigator Chrzanowski to go
19 through her phone; is that correct?
20 A. Correct.
21 Q. And then she had signed a consent to search her
22 residence?
23 A. Correct.
24 Q. And at the end of your talk with her, you asked
25 her to sign a written consent to search her phone; is that

1 A. Later that night, yes.
2 Q. And that was done during the day following
3 Mr. Leibel's death?
4 A. I'm sorry. What was that?
5 Q. That was done the day after Mr. Leibel's death?
6 A. Yes. On the 24th.
7 Q. And what is the process of -- or do you prepare
8 documents in support of getting an arrest warrant?
9 A. Yes. An affidavit was prepared and issued by the
10 judge and it's his determination whether he believes there's
11 probable cause for the arrest.
12 MS. BROWN: I need Number 74.
13 MR. GREGORY: Your Honor, I would request a
14 hearing outside the presence of the jury, please?
15 THE COURT: Okay. At this time I'm going to
16 excuse the jury for a few minutes. I'll ask you to go in to
17 the jury room. We're going to hear some arguments of
18 counsel. So while you are out of our presence during this
19 recess, you are not to talk or converse among yourselves or
20 with anyone else in any subject connected with this trial or
21 read, watch or listen to any report of or commentary on the
22 trial or any person connected with this trial by any medium
23 of information, including without limitation, newspapers,
24 television, radio or internet. You're not to form or express
25 any opinion on any subject connected with the trial until the

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1 MS. BROWN: Tubes.
2 THE COURT: Tubes?
3 MS. BROWN: The ventilator tube things.
4 THE WITNESS: From that angle, yeah, it appears
5 that's where the end of the aquarium is.
6 Q. (By Ms. Brown) And in that corner, well, next to
7 the couch on the right-hand side is also a coffee table; is
8 that correct?
9 A. That's correct.
10 Q. And it's a match for the one on the left-hand
11 side; is that correct?
12 A. I don't recall if it's a match or not. It
13 appears to be -- It's a glass top one similar to the one
14 that's on the left-hand side.
15 Q. So the one that we saw here was the one on the
16 left-hand side?
17 A. Facing the front of the couch, yes, that would be
18 the one on the left-hand side.
19 Q. And then showing you Exhibit 123, and again, this
20 is an accurate representation of the scene?
21 A. Yes.
22 Q. And this residence not only were these two rooms
23 open to each other but they had a very, a high cathedral like
24 ceiling; is that correct?
25 A. That's correct.

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1 Q. And then there was it looks like here venting
2 along the beam in the top?
3 A. Some type of ventilation.
4 Q. And then after you entered and saw these items,
5 you left the scene about 1710?
6 A. Correct.
7 Q. So that would be about 5:10?
8 A. Yes, 5:10 p.m.
9 Q. And you left there to go participate in the
10 interview of Mrs. Leibel?
11 A. That's correct.
12 Q. And you entered that interview about 5:35; is
13 that correct, 1735?
14 A. I would have to review the interview. If that's
15 the time, it's probably around that time. It was -- I drove
16 down to the station and got briefed and went in and joined in
17 the interview.
18 Q. And who was present? Was any other officer
19 present when you began -- when you joined in the interview?
20 A. Investigator Hubkey was.
21 Q. And from the time you began questioning
22 Ms. Leibel to the time it was completed was about four hours;
23 is that correct?
24 A. That sounds about right, yeah, that's correct.
25 Q. And there's -- this interview was all videotaped;

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1 is that correct?
2 A. Correct.
3 Q. And there's a time clock on the video -- There's
4 one that keeps track of just the length of time but there's
5 also a clock in the left-hand corner of the video?
6 A. The screen, I believe the time clock is on the
7 right-hand side and the length of the video is on the bottom.
8 The window -- When I watch it, the window is to the left and
9 all the information and time is on the right of the screen.
10 Q. It may be a computer?
11 A. Yeah.
12 Q. In any event, did you notice the time clock
13 starts over at 1900 a couple of times; is that correct?
14 A. I'm not aware of that.
15 Q. And it was Investigator Chrzanowski that first
16 started the interview with Ms. Leibel; is that correct?
17 A. That's correct.
18 Q. And that was about 1:35 in the afternoon?
19 A. Yes.
20 Q. And so this interview continued throughout the
21 day?
22 A. Correct.
23 Q. For about eight hours?
24 A. Correct.
25 Q. And Ms. Leibel throughout this interview

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1 maintained that Mr. Leibel had --
2 MR. GREGORY: Objection, your Honor. Hearsay.
3 THE COURT: I haven't even heard the question
4 yet. Let me hear the question.
5 MS. BROWN: Ms. Leibel maintained throughout this
6 interview that Mr. Leibel had killed himself?
7 MR. GREGORY: Objection. Hearsay. The statement
8 by the --
9 THE COURT: I understand what hearsay is. Thank
10 you.
11 Response.
12 MS. BROWN: Your Honor, I'm just offering it not
13 for the truth of the matter asserted but to show her story
14 remained consistent throughout the time frame.
15 THE COURT: It's admitted for that purpose.
16 THE WITNESS: Can you ask the question again,
17 please?
18 MS. BROWN: That throughout this eight-hour
19 period where she was questioned she maintained during that
20 whole eight hours that Mr. Leibel had committed suicide.
21 THE WITNESS: That's correct.
22 MR. GREGORY: Your Honor, I object if the
23 question is to consistency. That would be what she said she
24 was offering it for. The way she's phrasing the question it
25 goes to the truth of the matter. So I object. Hearsay.

171.1231. Arrest if probable cause appears.

At any time after the onset of the detention pursuant to NRS 171.123, the person so detained shall be arrested if probable cause for an arrest appears. If, after inquiry into the circumstances which prompted the detention, no probable cause for arrest appears, such person shall be released.

HISTORY:

1969, p. 535:

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1 moment to look at those. Have you reviewed those items?
2 A. Yes, I have.
3 Q. Looking at items 3 through 14, were those
4 photographs of the crime scene?
5 A. Yes. One is the outside of the residence.
6 Q. Don't tell me what they are right now. I'm just
7 asking if those are photographs of the crime scene.
8 A. Yes, they are.
9 Q. Okay. And do those photographs accurately depict
10 what you observed at the crime scene on February 23rd?
11 A. Yes.
12 MS. BROWN: I'd object, your Honor, as to a time
13 frame on those.
14 THE COURT: When -- You indicate that they
15 accurately depict what you observed. Give us a time frame.
16 THE WITNESS: Around 4:00 o'clock in the
17 afternoon.
18 THE COURT: On the first day of your visit to the
19 scene?
20 THE WITNESS: Yes. On February 23rd 2014.
21 THE COURT: And are all of them within that time
22 frame?
23 THE WITNESS: Give or take several minutes on
24 either side, but roughly 4:00 o'clock, sir.
25 THE COURT: Okay. Objection is overruled.

1 MR. GREGORY: Move for admission of Exhibit 4.
2 MS. BROWN: Your Honor, if all of these
3 photographs are referred to 4:00 o'clock in the afternoon, I
4 have no objection.
5 THE COURT: So any of them through 20? He's
6 going to go -- He gave him 3 through 20, I believe. So do
7 you stipulate to the admission of 3 through 20?
8 MS. BROWN: Well, some of them aren't of the
9 scene.
10 MR. GREGORY: To clarify, your Honor, 3 through
11 14 he's testified are at the scene.
12 THE COURT: Okay. So 3 through 14?
13 MS. BROWN: With the caveat that they were taken
14 at 4:00 o'clock in the afternoon, I have no objection.
15 THE COURT: Within that time frame. It's not
16 exactly at four.
17 MS. BROWN: Correct.
18 THE COURT: Okay. Then 3 through 14 -- 3 has
19 already been admitted. But 4 through 14 are admitted if you
20 intend to offer them, sir.
21 MR. GREGORY: I do, your Honor.
22 THE COURT: Then they're admitted.
23 Q. (By Mr. Gregory) Investigator Garren, you didn't
24 take the photos; correct?
25 A. No, I did not.

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1 Q. (By Mr. Gregory) So first, Investigator Garren,
2 can you describe the outside of the home?
3 A. It's a two story single family residence, a brown
4 wood covering on the house.
5 Q. And looking at Exhibit Number 3, does that
6 photograph accurately depict the way that the residence
7 looked that day from the outside?
8 A. Yes, it does.
9 MR. GREGORY: I'd move for admission of Exhibit
10 3.
11 THE COURT: Any objection?
12 MS. BROWN: No, your Honor.
13 THE COURT: 3 is admitted.
14 Q. (By Mr. Gregory) While that's coming up,
15 Investigator Garren, if you can look at Exhibit Number 4.
16 A. Yes, sir.
17 Q. What does Exhibit 4 depict?
18 A. The second floor or the top of the stairway, the
19 wall to the left is a wall between the living room and the
20 dining room area of the house. And the living room was off
21 to the right. There's a small hallway and a master bedroom
22 off to the right as well.
23 Q. Does that photograph accurately depict the way
24 that the living room and that hallway looked that day?
25 A. Yes, it does.

1 Q. And what I'm asking if those photos accurately
2 show what you observed when you were on scene?
3 A. Yes.
4 Q. Okay. Thank you. Let's look at Exhibit Number
5 4. That's the hallway that you just described?
6 A. Correct.
7 Q. So what is the vantage point of this photograph?
8 A. At the top of the stairway to the second floor
9 landing the kitchen is immediately to your left. On the
10 other side of that wall you have the living room to your
11 right and the dining room to your left and then the small
12 hallway and master bedroom to the right there through that
13 door.
14 Q. And so the room that we're looking in to with the
15 guns is the living room?
16 A. That's correct.
17 Q. Looking at Exhibit Number 5, what does that
18 photograph depict?
19 A. Looking in to the living room just a little bit
20 further down to the right.
21 Q. The photograph is a little bit dark. Can you
22 indicate where the television set is in the room?
23 A. The television is directly straight across the
24 room above the fireplace. There's a reclining chair to the
25 right.

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1 case is finally submitted to you. I'll have the bailiff
2 escort you to the jury room.
3 We're now outside the presence of the jury. Mr.
4 Gregory.
5 MR. GREGORY: Thank you, your Honor. I
6 appreciate the opportunity. I realize that the next exhibit
7 Ms. Brown was going for is an exhibit that contains the
8 portion of the interview that was conducted by the sheriff's
9 department with Ms. Leibel. My concern is, your Honor, that
10 they are eliciting hearsay. There is a way for Ms. Leibel to
11 get her statements in front of the jury and it's to take the
12 stand if she chooses to do that. I object to the defense
13 continually asking this witness for information regarding the
14 content of that interview. And I asked for this hearing
15 outside the presence because of the next exhibit that was
16 being reached for. So I would ask that your Honor address
17 that issue and direct the defense to quit asking questions
18 that elicit hearsay.
19 THE COURT: Well, I haven't -- I haven't reviewed
20 the exhibit itself. Ms. Brown, if they're within that
21 affidavit if there's information about what Ms. Leibel said
22 happened, it seems to me that it's either hearsay or you're
23 simply trying to do what I've told you already that you could
24 do, which is to provide proof that she was consistent. And
25 it's not going to be allowed for evidence as to proof of her

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1 defense that this was in fact a suicide. So there may be --
2 you may have some other reason for offering it. I don't know
3 what's in it. But I'll tell you that if it is simply -- if
4 you're going to tell me it's simply to demonstrate that she
5 was consistent, I think that there are other ways to do that,
6 other than the admission of this affidavit.
7 MS. BROWN: Actually I wasn't going to offer it.
8 I just wanted it available if in questioning Investigator
9 Garren that I was going to ask about things that are not
10 included in it and if he needed to refresh his memory we
11 would have the document available.
12 THE COURT: Then it may be subject to redaction
13 if in fact it is admitted. So your objection seems to be a
14 little premature but I think it was wise to bring it up
15 outside the presence of the jury. The jury will be returned.
16 MR. GREGORY: Thank you.
17 THE COURT: Bring them back in. Both parties
18 know where I am on this issue.
19 Folks, you barely had time to cut a little corner
20 off one of those doughnuts. Thank you, folks. Have a seat.
21 Stipulate to the presence of the jury,
22 Mr. Gregory?
23 MR. GREGORY: Yes, your Honor.
24 THE COURT: Ms. Brown?
25 MS. BROWN: Yes, your Honor.

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1 THE COURT: Okay. Proceed, please.
2 (Q. (By Ms. Brown) And on February 24th, the day
3 after Mr. Leibel's death, you obtained an arrest warrant for
4 Mrs. Leibel; is that correct?
5 A. That's correct.
6 Q. And as part of that, getting that arrest warrant,
7 you prepared an affidavit that contains facts as you know
8 them to be?
9 A. Correct.
10 Q. And this affidavit contained facts concerning the
11 investigation up to this point?
12 A. Yes.
13 Q. And at this point the crime lab had been to the
14 house the previous evenings but there was no reporting from
15 their -- from their analysis of the scene; is that correct?
16 A. No official reports had come in yet.
17 Q. And there was nothing concerning that reporting
18 included in your affidavit?
19 A. Correct.
20 Q. And there had been no ballistics testing done?
21 A. No.
22 Q. And there had been no fingerprint evidence
23 analyzed at this point?
24 A. No.
25 Q. And there had been no DNA processing done at this

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1 point?
2 A. No.
3 Q. And as I said, there had been even though the
4 crime lab had been at the scene, had done some measurements,
5 there was no trajectory reported yet?
6 A. Correct.
7 Q. And how was Mrs. Leibel's arrest arranged the
8 following day?
9 A. We had spoken to a friend with her and arranged
10 for her to be at the house in the morning. And when she
11 arrived on scene, she stepped out of the car, I asked her to
12 walk over to my car because her daughter was in the car with
13 her. And I walked her over to my car between the house and
14 the car as out of view as I could, I informed her we had a
15 warrant for her arrest, I placed her in handcuffs and sat her
16 in my car.
17 Q. So again, she had been free in her movements up
18 to this point?
19 A. Correct.
20 MS. BROWN: Can we get all the lights on up here?
21 THE COURT: Yeah, we'll get them on.
22 MS. BROWN: I believe I was going blind.
23 Q. (By Ms. Brown) Then you did the forensic
24 examination on Tatiana's phone that you spoke about earlier;
25 is that correct?

47.040. Rulings on evidence: Effect of error.

1. Except as otherwise provided in subsection 2, error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection.

(b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

2. This section does not preclude taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

HISTORY:

1971, p. 775.

NOTES TO DECISIONS

Specific grounds for objection must be stated at the time an objection is made and the Supreme Court will not reverse a ruling admitting evidence on grounds raised for the first time on appeal. *State v. Kallio*, 92 Nev. 665, 557 P.2d 705, 1976 Nev. LEXIS 716 (Nev. 1976).

If a defendant seeks to raise and preserve a claim that admitting a prior felony conviction for impeachment purposes would be outweighed by other considerations, he should bring such considerations to the trial court's attention, stating specific grounds of objection as this section requires. *Edwards v. State*, 90 Nev. 255, 524 P.2d 328, 1974 Nev. LEXIS 374 (Nev. 1974).

Failure to offer substance of excluded evidence.

Where on cross-examination of a prosecution witness the trial court refused to allow the defendant's inquiry into whether the witness had ever been prosecuted for a drug-related offense, but defense counsel made no offer of proof, even assuming the inquiry should have been allowed, the trial court's alleged error was not reviewable since the Supreme Court had no way of determining whether the defendant's substantial rights were prejudiced by the trial court's refusal to allow the witness to respond. *Van Valkenberg v. State*, 95 Nev. 317, 594 P.2d 707, 1979 Nev. LEXIS 611 (Nev. 1979).

Harmless error where proof of guilt overwhelming.

In a prosecution for murder the evidence was so overwhelming that the failure to exclude prejudicial, irrelevant, and hearsay statements by detectives and others was harmless beyond a reasonable doubt. *Abram v. State*, 95 Nev. 352, 594 P.2d 1143, 1979 Nev. LEXIS 620 (Nev. 1979).

Failure to admit evidence affected substantial right warranting new trial.

NVCODE

Perjury and Subornation of Perjury

- 199.120. Definition; penalties.
- 199.125. "Oath" and "swear" defined.
- 199.130. False affidavit or complaint to effect arrest or search.
- 199.140. Use of fictitious name on affidavit or complaint to effect arrest or search.
- 199.145. Statement made in declaration under penalty of perjury.
- 199.150. Attempt to suborn perjury.
- 199.160. Procuring execution of innocent person by perjury or subornation of perjury.
- 199.170. Transferred.
- 199.180. Irregularity in administering oath or incompetency of witness no defense.
- 199.190. Deposition: When deemed to be complete.
- 199.200. Statement of what one does not know to be true.

199.120. Definition; penalties.

A person, having taken a lawful oath or made affirmation in a judicial proceeding or in any other matter where, by law, an oath or affirmation is required and no other penalty is prescribed, who:

1. Willfully makes an unqualified statement of that which the person does not know to be true;
2. Swears or affirms willfully and falsely in a matter material to the issue or point in question;
3. Suborns any other person to make such an unqualified statement or to swear or affirm in such a manner;
4. Executes an affidavit pursuant to NRS 15.010 which contains a false statement, or suborns any other person to do so; or
5. Executes an affidavit or other instrument which contains a false statement before a person authorized to administer oaths or suborns any other person to do so,

is guilty of perjury or subornation of perjury, as the case may be, which is a category D felony and shall be punished as provided in NRS 193.130.

HISTORY:

C&P 1911, § 85; 1949, p. 111; CL 1929 (1949 Supp.), § 10034; 1967, p. 464; 1977, p. 640;

1979, p. 1420; 1985, pp. 129, 788; 1987, ch. 304, § 1, p. 654; 1995, ch. 443, § 21, p. 1174.

NOTES TO DECISIONS

Discrediting witness whose testimony is material.

The willful and corrupt assertion of a falsehood under oath in a matter important enough to shake the credit of a witness whose testimony is material will constitute perjury. *Ex parte Sheldon*, 44 Nev. 268, 193 P. 967, 1920 Nev. LEXIS 32 (Nev. 1920) (decision prior to 1985 amendment deleting the requirement of corruption).

False statement must be made under oath or affirmation.

A perjury charge may be sustained only where the false statement was made in a judicial or other setting where an oath or affirmation is legally required; a voluntary statement taken in an insurance company lawyer's office does not fall within the purview of this section. *Licata v. State*, 99 Nev. 331, 661 P.2d 1306, 1983 Nev. LEXIS 444 (Nev. 1983).

Sufficiency of the allegations.

Allegations of perjury which are set forth in the conclusory language of the relevant statute, without specifying the subject of the testimony or the manner in which it is alleged to be false, are insufficient to state a public offense. *Lemberes v. State*, 97 Nev. 492, 634 P.2d 1219, 1981 Nev. LEXIS 574 (Nev. 1981), overruled, *Funches v. State*, 113 Nev. 916, 944 P.2d 775, 113 Nev. Adv. Rep. 101, 1997 Nev. LEXIS 117 (Nev. 1997).

There is no requirement that an information charging perjury must set forth the particular words alleged to have been falsely stated. *Lemberes v. State*, 97 Nev. 492, 634 P.2d 1219, 1981 Nev. LEXIS 574 (Nev. 1981), overruled, *Funches v. State*, 113 Nev. 916, 944 P.2d 775, 113 Nev. Adv. Rep. 101, 1997 Nev. LEXIS 117 (Nev. 1997).

Evidence of willfulness is admissible.

Since willfulness and a corrupt intent are essential elements of the crime of perjury, evidence to prove such issues goes to the very substance of the offense and is admissible. *State v. Cerfoglio*, 46 Nev. 332, 205 P. 791, 213 P. 102, 1923 Nev. LEXIS 13 (Nev.), different results reached on reh'g, 46 Nev. 332, 213 P. 102 (Nev. 1923) (decision prior to 1985 amendment deleting the requirement of corruption).

Evidence sufficient to support a conviction.

Circumstantial evidence is sufficient to support a conviction for perjury in this state. Prior statements with corroboration are also sufficient to support a conviction for perjury. *Taylor v. Sheriff of Clark County*, 85 Nev. 505, 457 P.2d 961, 1969 Nev. LEXIS 408 (Nev. 1969).

No prima facie presumption arises that an affiant actually made an oath or performed any act that could be deemed the equivalent of an oath. *White v. State*, 102 Nev. 153, 717 P.2d 45, 1986 Nev. LEXIS 1123 (Nev. 1986).

The mere signing of an affidavit before an officer does not constitute the act necessary to constitute an oath for purposes of this perjury statute. *White v. State*, 102 Nev. 153, 717 P.2d 45, 1986 Nev. LEXIS

1123 (Nev. 1986).

Valid oath as essential element.

NRS 199.180 was not intended to excuse the necessity of a valid oath as an essential element of perjury under this section. *White v. State*, 102 Nev. 153, 717 P.2d 45, 1986 Nev. LEXIS 1123 (Nev. 1986).

Oath must be required by law.

A perjury conviction is proper only where an oath is not only authorized or permitted but actually required by law — occasions of such solemnity and gravity that the law demands the administration of an oath as the price of legal recognition of the act; where the statement is accorded the same legal recognition whether it is affirmed or not, it is not required by law and will not serve as a basis for invoking the perjury statute. *White v. State*, 102 Nev. 153, 717 P.2d 45, 1986 Nev. LEXIS 1123 (Nev. 1986).

Because nothing in the statutory scheme governing civil commitment of alcoholics convicted of crime (NRS 458.290 to 458.350) mandates giving a statement under oath as a prerequisite for electing to participate in rehabilitative treatment, the defendant's affidavit, even when attached to the notice of election for treatment and filed in the criminal action against him, was not made in a proceeding where an oath or affirmation is required by law, an essential predicate to a conviction for perjury; therefore, his conviction for perjury was reversed. *White v. State*, 102 Nev. 153, 717 P.2d 45, 1986 Nev. LEXIS 1123 (Nev. 1986).

In determining the materiality of the testimony of a person charged with perjury, the strength or weakness of the evidence available to disprove the accused's false testimony must not be considered; a false statement made under oath is material and perjurious if it concerns an issue essential to the decision of the case and could influence the court if believed. This is true even if the statement may easily be proved false beyond any doubt, and thus, in a practical sense, could not influence the court. *Sheriff, Clark County v. Hecht*, 101 Nev. 779, 710 P.2d 728, 1985 Nev. LEXIS 510 (Nev. 1985).

Testimony at a trial is material if the testimony could have influenced the court on an issue before the court had its falsity been made known to the court during the trial of the case. *Sheriff, Clark County v. Hecht*, 101 Nev. 779, 710 P.2d 728, 1985 Nev. LEXIS 510 (Nev. 1985).

Advice of counsel may be relevant to show defendant's intent.

While reliance on the advice of counsel does not constitute a separate defense, under certain circumstances it may be relevant to show a defendant's intent. *Cosio v. State*, 106 Nev. 327, 793 P.2d 836, 106 Nev. Adv. Rep. 55, 1990 Nev. LEXIS 58 (Nev. 1990).

Proper evidence that defendant's divorce counsel advised other clients that it was not necessary to be a Nevada resident in order to obtain a divorce in this state would have been relevant to show lack of intent with regard to defendant's testimony during divorce proceeding. *Cosio v. State*, 106 Nev. 327, 793 P.2d 836, 106 Nev. Adv. Rep. 55, 1990 Nev. LEXIS 58 (Nev. 1990).

Cited in:

State v. Busscher, 81 Nev. 587, 407 P.2d 715, 1965 Nev. LEXIS 271 (1965); *Colle v. State*, 85 Nev. 404, 455 P.2d 917, 1969 Nev. LEXIS 385 (1969); *Dunphy v. Sheehan*, 92 Nev. 259, 549 P.2d 332, 1976 Nev. LEXIS 583 (1976); *Gardner v. Sheriff, Clark County*, 93 Nev. 556, 571 P.2d 108, 1977 Nev. LEXIS

629 (1977).

Research References and Practice Aids

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199.125. "Oath" and "swear" defined.

1. The term "oath" shall include an affirmation and every other mode authorized by law of attesting the truth of that which is stated.

2. A person who shall state any matter under oath shall be deemed to "swear" thereto.

HISTORY:

C&P 1911, § 88; RL 1912, § 6353; CL 1929, § 10037.

Editor's note.

This section was formerly compiled as NRS 199.170.

Research References and Practice Aids

Review of Selected Nevada Legislation, Crimes, 1987 Pac. L.J. Rev. Nev. Legis. 59.

199.130. False affidavit or complaint to effect arrest or search.

1. A person who makes, executes or signs or causes to be made, executed or signed, any false or fictitious affidavit, complaint, deposition, or other instrument in writing before any officer or person authorized to administer oaths, for the purpose or with the intent of securing a warrant for the arrest of any other person, or for the purpose of securing a warrant for the searching of the premises, goods, chattels or effects, or of seizing the goods, chattels or effects, or of seizing anything in the possession of any other person, is guilty of perjury which is a category D felony.

2. A person who commits any of the acts or offenses defined or set out in subsection 1 shall be punished as provided in NRS 193.130.

HISTORY:

1925, p. 16; CL 1929, §§ 10526, 10528; 1967, p. 464; 1979, p. 1420; 1995, ch. 443, § 22, p. 1174.

Research References and Practice Aids

Cross References

As to affidavits generally, see NRS 53.010 to 53.040.

As to search warrants generally, see NRS 179.015 et seq.

199.140. Use of fictitious name on affidavit or complaint to effect arrest or search.

1. A person who makes, executes or signs, or causes to be made, executed or signed, any affidavit, complaint or other instrument, in writing, before any United States officer or person, or before any state officer or person, authorized to administer oaths, for the purpose or with the intent of securing a warrant for the arrest of any other person, or for the purpose of securing a warrant for the searching of the premises, goods, chattels or effects, or of seizing the goods, chattels or effects, or of seizing anything in the possession of any other person, and signs the same by any other name than his or her true name, is guilty of perjury which is a category D felony.

2. A person who commits any of the acts or offenses defined or set out in subsection 1 shall be punished as provided in NRS 193.130.

HISTORY:

1925, p. 16; CL 1929, §§ 10527, 10528; 1967, p. 465; 1979, p. 1420; 1995, ch. 443, § 23, p. 1175.

Research References and Practice Aids

Cross References

As to affidavits generally, see NRS 53.010 to 53.040.

199.145. Statement made in declaration under penalty of perjury.

A person who, in a declaration made under penalty of perjury:

1. Makes a willful and false statement in a matter material to the issue or point in question; or

2. Willfully makes an unqualified statement of that which the person does not know to be true,

or who suborns another to make in such a declaration a statement of the kind described in subsection 1 or 2, is guilty of perjury or subornation of perjury, as the case may be, which is a category D felony and shall be punished as provided in NRS 193.130.

HISTORY:

1993, ch. 641, § 2, p. 2742; 1995, ch. 443, § 24, p. 1175.

199.150. Attempt to suborn perjury.

Every person who, without giving, offering or promising a bribe, shall incite or attempt to procure another to commit perjury, or to offer any false evidence, or to withhold true testimony, though no perjury be committed or false evidence offered or true testimony withheld, shall be guilty of a gross misdemeanor.

HISTORY:

C&P 1911, § 86; RL 1912, § 6351; CL 1929, § 10035.

199.160. Procuring execution of innocent person by perjury or subornation of perjury.

A person who, by willful and corrupt perjury or subornation of perjury, procures the conviction and execution of any innocent person is guilty of murder which is a category A felony and, upon conviction thereof, shall be punished by imprisonment in the state prison:

1. For life without the possibility of parole;
2. For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or
3. For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

HISTORY:

C&P 1911, § 87; RL 1912, § 6352; CL 1929, § 10036; 1961, p. 66; 1973, p. 1803; 1995, ch. 443, § 25, p. 1175.

199.170. Transferred.

Editor's note.

This section is now compiled as NRS 199.125.

199.180. Irregularity in administering oath or incompetency of witness no defense.

It shall be no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner or that the defendant was not competent to give the testimony, deposition, certificate or affidavit of which falsehood is alleged. It shall be sufficient that the defendant actually gave such testimony or made such deposition, certificate or affidavit.

HISTORY:

C&P 1911, § 89; RL 1912, § 6354; CL 1929, § 10038.

NOTES TO DECISIONS

Valid oath as essential element of perjury.

This section was not intended to excuse the necessity of a valid oath as an essential element of perjury under NRS 199.120. *White v. State*, 102 Nev. 153, 717 P.2d 45, 1986 Nev. LEXIS 1123 (Nev. 1986).

199.190. Deposition: When deemed to be complete.

The making of a deposition, certificate or affidavit shall be deemed to be complete when it is subscribed and sworn to or affirmed by the defendant with intent that it be uttered or published as true.

HISTORY:

C&P 1911, § 90; RL 1912, § 6355; CL 1929, § 10039.

199.200. Statement of what one does not know to be true.

Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which the person knows to be false.

HISTORY:

C&P 1911, § 91; RL 1912, § 6356; CL 1929, § 10040.

NOTES TO DECISIONS

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1st Post-conviction / Appeal

1 the left upper arm. These injuries caused extensive internal bleeding, but death
2 would not have been immediate. *Trial Transcript p. 38.* Dr. Kubiczek stated that
3 based on the trajectory of the fragments, he believed Harry's left arm was elevated
4 at the time the shot was fired. He did concede the possibility that the arm could
5 have been down. The other injuries were caused by the second shot, a shotgun
6 round, but would not have been life threatening. The second shot entered on the
7 back of the left hand and exited on the inner part of the wrist. Wadding from the
8 shell was present in the wound. The pellets then grazed the left shoulder. (The rifle
9 found at the scene is capable of firing both .45 rounds and .410 shotgun shells.) No
10 tissue samples were preserved during the autopsy; however, a blood sample taken
11 from Harry showed 20 nanograms per milliliter of active THC in his blood –
12 effectively ten times the legal minimum marijuana metabolite allowed in DUI
13 cases prior to his death. *AA Vol. 6 p. 1047*

14 On the day of Harry's death, three forensic investigators from the Washoe
15 County Crime Lab were called to the residence. When they arrived at the house,
16 multiple Douglas County investigators and the evidence technician were already
17 inside the house. Crime Lab Investigator Joey Lear took measurements in the room
18 where Harry's body was found so as to later diagram the scene. Lear photographed
19 the location of the furniture in the living room when they arrived. On the right side

1 of the sofa was a coffee table. Lear testified that in order to photograph behind the
2 couch, the coffee table had to be moved out of the way. He also documented the
3 use of trajectory rods to align the holes in the front of the couch, the back of the
4 couch and the sheetrock behind the couch. He had been advised that Harry had
5 been moved from the couch after he was injured, but Lear was unaware of the
6 position Harry had been in before he was moved. He only knew that Harry was
7 sitting on the couch and that it was reclined at the time the shots were fired. *AA*
8 *Vol. 6 pp. 1008-1018.*

9 When investigators first documented the scene, the left side of the couch,
10 where Harry had been sitting, was in an upright position and the right half was
11 reclined. However, in order to align the trajectory rod going through the couch
12 with the defect in the sheetrock, the investigators had to move the couch – Lear
13 said the couch had to be partially reclined and, instead of on the left where Harry
14 had supposedly been sitting, Lear's supervisor had to sit in the center of the couch
15 almost on the split between the right and left side of the couch in order to make the
16 trajectories line up. *AA Vol. 6 p. 1010.* Lear conceded that changing the location of
17 the person on the couch would alter the angle of the trajectory rods and he admitted
18 that they simulated the trajectories, rather than taking the evidence the way they
19 found it. *AA Vol. 6 pp. 1008-1018.*

1 The following day, Sergeant Halsey went to the residence and cut out the
2 piece of sheetrock with the defect. *AA Vol. 6 p. 1030*. Behind that he found two
3 pellets lying on the sill plate at the base of the wall and two pellets lodged in the
4 floor joist. *AA Vol. 6 p. 1031*. The pellets appeared to be shotgun pellets. However,
5 again, no measurements were taken to document the position of the embedded
6 pellets. *AA Vol. 6 p. 1032*.

7 Mathew Noedel testified as a ballistics expert concerning his examination
8 and test firing of the rifle. He also testified as the State's expert in crime scene
9 reconstruction. *AA Vol. 7 pp. 1075-1076*. With regard to the ballistics testing,
10 Noedel testified that the documentation submitted from when the gun was
11 unloaded showed the .45 Colt was the first round fired. *AA Vol. 7 pp. 1079-1083*.
12 The x-ray of Harry's chest showed fragments of a bullet that would be consistent
13 with a .45 round. *Id.* Fragments of the bullet recovered during the autopsy were
14 examined microscopically and determined to be from a .45 round. *Id.*

15 The rifle was also test fired at known distances through fabric panels. *Id.* At
16 different distances, the soot and residue from the gun leave different patterns.
17 These panels were then compared to the evidence and photographs taken at the
18 autopsy. *Id.* Harry was wearing a bathrobe at the time of his death. The test pattern
19 from the 45 Colt suggested that the muzzle of the gun was between two and six
20

1 inches away from the robe when it was fired. *AA Vol. 7 pp. 1084-1085*. The test
2 patterns from the 410 showed that the shot to the wrist was fired when the muzzle
3 of the gun was three inches away from the wrist. *Id.*

4 Mr. Noedel also testified concerning the scene reconstruction he performed.
5 *AA Vol. 7 pp. 1086-1090*. In reaching his conclusions, he relied on original police
6 reports, the autopsy reports, original scene photographs and scene documentation.
7 He specifically noted that he relied on information, the measurements and
8 photographs provided by Joey Lear in determining the bullet trajectory. *Id.* He also
9 conceded that any reconstruction is only as good as the scene documentation. *Id.*;
10 *AA Vol. 7 pp. 1075-1094*.

11 The defense called two experts during their case in chief. The first was Dave
12 Billau. *AA Vol. 7 pp. 1117-1130*. He testified concerning the numerous mistakes
13 made during the initial investigation and the corruption of the crime scene. Mr.
14 Billau also testified as to his expertise in analyzing trajectory, and trial counsel
15 clearly then expected to go on and have Mr. Billau testify regarding the bullet
16 trajectories, measurements, and the staging of the couch in the room, as consistent
17 with Harry having fired the gun himself. But counsel failed procedurally to notice
18 Billau as a trajectory witness, and therefore, the court barred his testimony on
19

1 trajectory. He was therefore limited him to review of the crime scene photographs
2 from which he was unable to draw conclusions, and the jury had no forensic
3 information from which to draw a conclusion of suicide. *See AA Vol. 7 pp. 1127,*
4 *1129-1130.*

5 Defense: Based on your review of the reports and evidence
6 available in this case, were you able to reach and conclusions
7 concerning trajectory?

8 State: Objection, Your Honor, as we discussed.

9 Court: Ms. Brown, I think that's outside the scope of the
10 notice.

11 Defense: I don't think so, Your Honor. If there's . . .

12 Court: It's not allowed.

13 Defense: Excuse me?

14 Court: It's not allowed. You may be able to rephrase that
15 question but that question is not allowed.

16 *Id. at p.1129.*

17 Mr. Billau finally simply testified that based on his review of the documents
18 and photographs prepared by the Washoe County Crime Lab, there was
19 insufficient information to form a conclusion concerning the trajectories in this
20 case. This was in part because the investigators failed to document how the sofa

1 was manipulated to establish the trajectory at the crime scene. There was also no
2 record of whether or not objects at the scene had been moved as in-court testimony
3 indicated.

4 Dr. Bennet Omalu, a forensic pathologist, is a medical examiner in San
5 Joaquin County and an assistant clinical professor of pathology at the University of
6 California Davis Medical Center. He is also the president of Bennet Omalu
7 Pathology, a widely respected private consulting firm. *AA Vol. 7 pp. 1135-1164.*
8 Dr. Omalu has performed over 8,000 autopsies, and roughly one hundred of those
9 have involved what he calls "atypical suicides." *AA Vol. 7 p. 1136.* Atypical
10 suicide is also included in the curriculum of the pathology courses he teaches at
11 UC Davis. Dr. Omalu is also recognized as one of the leading experts in brain
12 disease.

13 Dr. Omalu classified "atypical suicides" as those that are often mistaken for
14 homicides. *AA Vol. 7 pp. 1318-1145.* They may include suicides involving multiple
15 gunshots, the victim moving about after a fatal injury, or even suicides staged to
16 look like homicide. Omalu opined that Harry died as the result of a single gunshot
17 wound, the one to the chest. He explained that the wound would not have been
18 immediately fatal; Harry could have lived up to 5-10 minutes and could have
19 engaged in activities – such as shooting himself again. He testified the second shot
20

1 was most likely a misfire. He proposed that Harry was trying to position himself
2 for a second shot when his strength failed.

3 Dr. Omalu also noted that Harry had a fracture in his left shoulder joint. This
4 key injury was not even mentioned in Dr. Kubiczek's autopsy protocol. *AA Vol. 7 p.*
5 *1159.* Dr. Omalu testified that his analysis showed that Harry's arm was not
6 extended when he was shot, but was flexed or bent. He testified that the force of
7 the bullet entering the body would have caused the fracture. He also testified that
8 this fracture could have caused the inflexibility in the left arm that was mistaken by
9 the first responders for rigor mortis.

10 Dr. Omalu also testified that the photograph of Harry's liver taken during the
11 autopsy showed that Harry was suffering from liver disease. The liver was
12 yellowish instead of a healthy reddish brown. When the liver malfunctions, levels
13 of ammonia in the blood increase, which can effectively poison the brain, leading
14 to episodes of irrationality. However, again, no tissue slides were taken during the
15 autopsy, so this diagnosis could not be confirmed.

16 Finally, Dr. Omalu testified that the levels of THC in Harry's blood showed
17 he had smoked a substantial amount of marijuana within two hours of his death.
18 The metabolite levels were 10 times the legal level. This could have exacerbated
19 the tendency toward irrational behavior, including suicide.

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1 it's just part of the normal process that we do this once the
2 evidence is concluded.
3 So I'll be meeting with the attorneys once we're
4 done today, and then I anticipate that tomorrow morning, I
5 will instruct you, and the attorneys will argue their cases,
6 and the case will probably be submitted to you then. We
7 could push through tonight and get to that point, but I think
8 that you probably would not have the case submitted to you
9 until some time around 5:00 or later, and it seems to me
10 that's not fair to the State. It's not fair to Ms. Leibel,
11 and it's not fair to you to make you go back and start a
12 deliberation at that hour. So now you kind of have a roadmap
13 of where we'll be going and what the timeframes are.
14 Any comment that you want to make on that,
15 Mr. Gregory?
16 MR. GREGORY: No, Your Honor.
17 THE COURT: Ms. Brown, or, Ms. Henry?
18 MS. BROWN: No, Your Honor.
19 MS. HENRY: No.
20 THE COURT: Will counsel stipulate to the
21 presence of the jury while I made those comments?
22 MR. GREGORY: Yes, Your Honor.
23 MS. BROWN: Yes, Your Honor.
24 THE COURT: Thank you. And please excuse me for

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1 for sniffing and blowing my nose and such up here.
2 Ms. Brown, your witness.
3 MS. BROWN: The defense would call Dr. Bennet
4 Omalu.
5 THE COURT: Doctor, if you would come in right in
6 front of the clerk and raise your right hand.
7
8 DR. BENNET OMALU,
9 called as a witness on behalf of the
10 Defendant having been first duly sworn,
11 was examined and testified as follows:
12
13 THE COURT: If you would come up, please, and
14 have a seat. You can help yourself to some water if you
15 want. Sir, if you want to place your coat back over here.
16 You don't have to put it on the floor.
17 THE WITNESS: That's fine. Thank you.
18 THE COURT: Ms. Brown?
19 DIRECT EXAMINATION
20 BY MS. BROWN:
21 Q. Could you state your name, and spell your last
22 name, please.
23 A. My name Bennet Omalu, B-e-n-n-e-t Omalu,
24 O-m-a-l-u.

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1 Q. I'm going to give you a second to get that water
2 because it can be complicated.
3 THE COURT: We never thought it was but a couple
4 of witnesses have had trouble with it.
5 MS. BROWN: I'm always spilling it.
6 THE WITNESS: Okay.
7 Q. (BY MS. BROWN:) How are you currently employed?
8 A. I'm a medical examiner San Joaquin County in
9 California, president of Bennet Omalu Pathology, my
10 consulting company, and I'm also an assistant clinical
11 professor of pathology at University of California Davis
12 Medical Center. I'm also a staff physician at San Joaquin
13 General Hospital and a Contra Costa Regional Hospital.
14 THE INTERPRETER: A contractor?
15 THE COURT: Contra Costa Hospital.
16 Q. (BY MS. BROWN:) Sorry, could you repeat that
17 last.
18 A. Contra Costa Regional Hospital.
19 Q. And as part of your duties as chief medical
20 examiner at San Joaquin County, do you perform autopsies?
21 A. Yes, ma'am.
22 Q. Can you briefly describe your medical or
23 educational background?
24 A. I went to medical school in Nigeria in West

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1 Africa. It's a seven-year medical school curriculum
2 fashioned after the British, six years of training and one
3 year of clinical internship.
4 During clinical internship, I worked as physician
5 but under supervision in the department of internal medicine,
6 general surgery, obstetrics and could not /TKPWAOEUL and
7 pediatrics. I performed surgeries and delivered over 400
8 babies, completed that, went to a university hospital in
9 Nigeria to work as an emergency room physician for five
10 years.
11 Again, I worked as a physician attending to live
12 patients. While I was doing that, I secured a world health
13 of physician scholarship to come to the United States in
14 1994. I went to the University of Washington in Seattle,
15 Washington. I was a visiting research scholar for eight
16 months.
17 I moved from Seattle to New York to Columbia
18 University at Harlem Hospital Center until 1995 to do a
19 five-year residency training program focused in anatomic and
20 clinical pathology.
21 Because of my special scholarship, five years or
22 regents and four years for me, I completed residency training
23 in anatomic and clinical pathology in four years.
24 I then moved to Pittsburgh Pennsylvania to the

1 University of Pittsburgh in 1999 to do a one-year fellowship
2 training in forensic pathology. Upon completing that, I
3 again went to the University of Pittsburgh, Pittsburgh,
4 Pennsylvania to complete a two-year fellowship training in
5 neuropathology.

6 I completed that, went to the graduate school of
7 Public Health University of Pittsburgh, Pittsburgh,
8 Pennsylvania to do a three-year masters in public health a
9 peeled /KWROPL/OLG I. I completed that, went to Carnegie
10 Mellon University in Tepper, T-e-p-p-e-r School of Business
11 to do a three-year masters in business administration with a
12 focus in medical management.

13 After completing my training, I sat for five
14 board certification examination in five subspecialties of
15 medicine which I passed, some boards certified in five
16 subspecialties atomic pathology clinical pathology, forensic
17 pathology, neuropathology and medical management.

18 In addition to that, I hold a masters in public
19 health in pathology and a masters in business administration.

20 I was certified in 2008 by the American Association of
21 Physician Leadership as a certified physician executive.

22 After my training on board certifications, I
23 worked as an academic pathologist. I was associated
24 professor of pathology at University of Pittsburgh,

1 Pittsburgh, Pennsylvania. As professor of physiology
2 University of Pittsburgh, Pittsburgh, Pennsylvania, visited
3 professor of University of West Virginia University,
4 associate professor of pathology at University of California
5 at Davis. I became a full professor in to 2012, stepped down
6 after one year because the work was getting too much for me.

7 I published extensively in the medical
8 literature. I published two books and I published several
9 books chapters medical experts. I've been invited twice to
10 advise the United States congressional judicial committee on
11 matters relating to traumatic brain injury.

12 Q. Thank you. And you stated at present, you also
13 have private business in modern pathology?

14 A. Yes.

15 Q. And who do you consult with?

16 A. I consult with government agencies, a variety of
17 state, numerous counties across the country, nongovernmental
18 agencies and nonprofit organizations, corporations, attorneys
19 working for families, working for the state, for different
20 counties.

21 I have also consulted with the United States
2 Government of matters relating to death, causation of death,
23 mechanisms of death, matters relating to injuries.

24 Q. And have you consulted with prosecutors or law

1 enforcement in cases?

2 A. Yes, I have worked for all sides for law
3 enforcement, for district attorneys. I also work for
4 difference attorneys in both criminal and civil matters.

5 Q. And do you have any professional associations or
6 memberships pertinent to today's testimony?

7 A. Yes, I belong to about 18 professional
8 organizations.

9 Q. Could you tell us the number of autopsies you
10 have performed?

11 A. My first autopsy was in 1984 while I was in
12 medical. School since then, I've performed over 8,000
13 autopsies.

14 Q. 8,000?

15 A. Yes, ma'am, and I have examined over 10,000
16 brains.

17 Q. And have you been the attending physician or
18 present deaths?

19 A. Yes, I have witnessed and attended to hundreds of
20 deaths of people dying, from new born child who is several
21 hours old to the 99-year-old grandma and grandpa, and I've
22 satisfied 1,000's of deaths.

23 Q. Have you previously given testimony in your
24 forensic pathology?

1 A. Yes. I have retained as an expert witness and
2 testified in court and in depositions over 600 times. I
3 testify on the average about 60 times a year.

4 Q. Are there specific jurisdictions that you testify
5 in or numerous?

6 A. I testify across the United States from Olympia
7 in Washington State to Buffalo, New York to Florida, all
8 across the United States.

9 Q. And in those cases, you have been certified as an
10 expert in the field of forensic pathology?

11 A. Forensic pathology, neuropathology, all my
12 specialties, yes.

13 Q. Have you testified both as a prosecution and a
14 defense witness?

15 A. Yes.

16 Q. And have you testified as well in civil matters?

17 A. Yes.

18 Q. Has any of your testimony involved atypical
19 suicide?

20 A. Yes. I have performed over 100 autopsies in
21 about 15 years I've been doing this in cases relating to what
22 we call an atypical suicide.

23 Q. What is forensic pathology?

24 A. Forensic pathology is a subspecialty of medicine

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1 that deals with the study of injuries, how do human beings
2 sustain injuries and how could injuries result in death or
3 result in any type of impairment of the human function.
4 Forensic pathology also deals with the phenomenon of death,
5 why do people die and how do people die, what causes death.
6 Q. And in studying -- testifying concerning forensic
7 pathology as it relates to criminal cases, what do --
8 criminal cases where there's a criminal charge, what would
9 you be testifying concerning?
10 A. Could you repeat the question again.
11 Q. I'm sorry, for example, criminal cases when
12 you're doing autopsies?
13 A. Yes, ma'am.
14 Q. Or preparing to testify, what are you looking for
15 in those situations?
16 A. When I perform an autopsy on any case, I come in
17 as independent participant, and I apply established and
18 generally accepted methods of medicine and science to
19 generate evidence, medical evidence upon which I base my
20 opinions or conclusions on.
21 When I say emphasize independent participant in
22 the investigation of death, my opinions and conclusions
23 should not be based on what law enforcement thinks or what
24 any other party thinks. I need to perform a scientific

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1 method of autopsy on tissue analysis to generate scientific
2 evidence and build on the scientific evidence, I would make
3 my conclusions and provide my opinions.
4 Q. If -- also as a forensic pathologist in looking,
5 do you determine cause of death?
6 A. Yes.
7 Q. And do you determine manner of death?
8 A. Yes, ma'am.
9 Q. In looking at manner of death, what then would
10 you look at?
11 A. In looking at manner of death, you would
12 establish the forensic scenario, forensic scenario,
13 modalities of death over the centuries, scientists that can
14 be found established that human beings die within specific
15 circumstances. So that investigation report usually
16 generated by the medical examiner or the coroner's office
17 would summarize a circumstances surrounding the death.
18 Then based on the circumstances, I would then
19 come determine the type of autopsy to perform because there
20 are different types of autopsies. When I'm performing the
21 autopsy, I keep a clear mind, and objective non-bias mind. I
22 don't have any presumptions.
23 At the end of the autopsy, I have my preliminary
24 findings. Then I perform additional tissue analysis,

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1 additional scientific analysis to generate more evidence to
2 help me develop scientific opinion. For example, I would
3 take microscopic sections of the tissues and organs and
4 examine them microscopically. I would also take samples of
5 the body fluids and perform toxicology analysis.
6 When all of the results come back, I would put
7 them together, analyze them and then derive -- make a
8 diagnosis, derive a cause of death with a reasonable degree
9 of medical certainty. What does that mean? If you apply all
10 of the scientific matters and you still cannot determine a
11 cause of death with a reasonable degree of medical certainty
12 and that means greater than 90 percent certainty, I would
13 make the cause and manner on the time.
14 Cause of death simply means the disease or trauma
15 that resulted in death. Manner of death would comprise five
16 categories of death in relation to the cause of death. Those
17 five categories are natural death, accidental death, suicide,
18 homicide or undetermined, and this classification will be
19 based on the evidence no matter what any other party or law
20 enforcement or the family or defendant will think. My
21 opinion will be limited to the science, not to any other
22 proposition or assumption.
23 Q. And in forensic science or forensic pathology,
24 does that involve both true sciences and applied sciences?

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1 A. Yes.
2 Q. Could you explain the difference between those
3 two?
4 A. There are two types of science. There's the
5 absolute science and there's the applied science. The
6 absolute sciences are like mathematics and physics. They are
7 absolutes. What does that mean? One plus one is always two
8 no matter what. If you don't agree with it, you can only be
9 wrong. It is either white or black. Two times two is four.
10 Even if you don't agree with it, there's something wrong with
11 you.
12 Physics is like that too. Physics, if you have
13 light, light is light. If you're traveling at a speed of
14 70 miles an hour, there is only one speed of 70 miles an
15 hour. There is no other speed that is not 70 miles an hour.
16 They are absolutes.
17 But when you're dealing with the applied
18 sciences, like mets and like forensic sciences, they are not
19 absolutes. We all are human beings, but we are not all of
20 the same height. We are not all the same color, but it does
21 not stop us from being all human beings.
22 Q. Okay.
23 A. So the applied science, it's you can make
24 absolute assumptions. You can provide an opinion based on

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1 one piece of evidence. We as scientists recognize in
2 medicine which is an applied science. You must always
3 concede the weakness of the applied science. If the evidence
4 is inadequate or insufficient, you do not make a conclusion.

5 In the field of science gives us that
6 opportunity, category of manner of death that is called
7 anatomic. Meaning that given the weaknesses of forensic
8 science, given the weaknesses of medical science, you can do
9 everything you can do, and yet there is inadequate evidence.
10 You must respect that, and conclude that your case is
11 undetermined. You do not ignore that because of what you
12 feel or believe and go against the science.

13 Q. Thank you. Do you currently teach pathology at
14 UC Davis?

15 A. Yes, ma'am.

16 Q. And do you include in that curriculum subject of
17 atypical suicides?

18 A. Yes, it's very important when I teach other
19 doctors, medical students forensic pathology.

20 Q. Could you explain what atypical suicide is?

21 A. Atypical suicide is a suicide that looks
22 irregular. Frequently a suicide that would resemble a
23 homicide. A suicide is an irrational act that could only be
24 explained by the irrational mind. We as normal people can

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1 never explain the irrationality of suicide.

2 So there are certain types of suicide that would
3 resemble a homicide and if you're not well trained and
4 experienced, you can erroneously interpret it to be a
5 suicide. You can erroneously interpret atypical suicide to
6 be a homicide, and I can give you for the most strangest
7 cases that I've had in my experience.

8 There was a case of an elderly man. At autopsy,
9 I found three bullets inside his head and everybody around
10 me, I remember, oh, it must be a homicide. A man cannot
11 shoot himself three times in the head but no, that was an
12 atypical suicide. He actually shot himself three times in
13 the head.

14 Q. Could you give us other examples of atypical
15 suicide?

16 A. There was another atypical suicide, a woman that
17 shot herself in the chest with her 22 caliber gun on the
18 dining table. She left the gun on the dining table and
19 walked to the living room and sat in the sofa and died, and
20 at the scene everybody said this must be a homicide. Nobody
21 could shoot herself in the chest and walk almost 20 yards.

22 At the end of the autopsy, based on the science, it was a
23 suicide and not a homicide.

24 I have had another case of a man who shot himself

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1 with a rifle and in the head and set the house on fire. At
2 the end of the autopsy, we confirmed that it was a suicide,
3 atypical suicide and not a homicide.

4 And then another very interesting case I had was
5 a young man about 27 years old. He was in his boat, and he
6 hung a big slab of concrete around his neck and fell into the
7 river and got submerged. At the scene, everybody assumed it
8 was a homicide. There was no way he could have done that and
9 submerged himself. At the end of the autopsy, it was a
10 suicide.

11 So this case is suicide, atypical that resembles
12 homicide and the medical literature that the cases of
13 atypical suicide were erroneously classified as homicides and
14 prosecuted.

15 Q. So it's also important then for law enforcement
16 to be aware of atypical suicide?

17 A. Yes, ma'am, most definitely.

18 Q. Why is it important to know about?

19 A. It's important -- like I had said, I testified
20 across the country. I have actually testified in cases that
21 were ruled homicides and later changed to suicides. Even
22 just yesterday when the District Attorney in San Joaquin
23 County, there was a case of a baby that was ruled a homicide.
24 I reviewed it and just yesterday about 9:00 a.m. in the

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1 morning, I did analysis and I said to the D.A. we cannot move
2 ahead. There is not great evidence to make this a homicide.

3 In fact, tissue analysis reveals that it was an accident.

4 There was another case in September of last year,
5 a retired fire serviceman in my county was found dead in a
6 park. At the scene, it was assumed it was a homicide because
7 the gun was not close to him, that somebody must have shot
8 him. At the end, I came to the scene. It turned out that he
9 shot himself but somebody stole the gun because it was a park
10 visited by drug addicts. So it's important to know about
11 atypical suicide so that you don't make erroneous conclusions
12 or misinterpret a case as a homicide when actually it is an
13 atypical suicide.

14 Q. In dealing with suicides, is the use of a rifle
15 in a suicide, does that automatically rule it out as suicide?

16 A. No, that is another assumption what we make that
17 people cannot use rifles to kill themselves, that is
18 inaccurate. It is erroneous. If you read the literature,
19 from my case, I published a case of suicide. I looked at
20 suicides in Pittsburgh, Pennsylvania over ten years. People
21 frequently commit suicide with rifles, and sometimes they
22 commit suicide in very complex mechanisms that you and I as
23 rational people would never understand, but you must
24 recognize that it's a category of suicides called atypical

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1 familiar with those?

2 A. Yes, ma'am.

3 Q. In those type of opinions from paramedics, would
4 that lead to any conclusion on your part?

5 A. No. If I'm doing a case like I had said earlier,
6 I should not and would not base my opinion on what someone
7 else said. There's a rule in -- we as doctors, we have
8 standards of factors set by the government and the agents
9 that monitor what we do.

10 As a rule of forensic pathology that when you are
11 investigating a death as a forensic pathologist, you are
12 responsible for that case. Even if it goes wrong, you're
13 responsible and because you are responsible, you should not
14 be basing your opinion on some of the party, like a
15 paramedic. Yes, you need to be aware of what they said in
16 the medical reports or what that doctor said but at the end
17 of the day, the autopsy is the gold standard, and this is the
18 established standard of medicine all over the world. So I
19 would only rely or base my opinion on what the paramedics
20 said, no.

21 Q. And the paramedics described what they thought
22 appeared to be rigor mortis in his left hand. Are you
23 familiar with that?

24 A. Yes, ma'am.

1 and the actin myosin will bind together. Once they bind
2 together, the muscle becomes rigid so it becomes typically on
3 the small joints of the fingers and toes, and many times it
4 begins on one side. It begins on one side, even the TMJ,
5 temporomandibular joint, because it's a small joint.

6 A good example, if you have a marathon runner who
7 is running, his body is active under the sun, and then he
8 suffers a heart attack and dies before paramedics will get to
9 him, he is in rigor. Why, because he was physically active
10 and depleting his ATP.

11 So in a case like after I started this case, it
12 was not unusual based on the over 8,000 cases I have done for
13 a paramedic to describe that when he got to the scene, he or
14 she got to the scene, there was rigor mortis in the small
15 joints of the fingers and hand and maybe the wrist because
16 the wrist is made up of many small joints, okay, on one side.

17 And on the side, he said -- he or she said there was rigor
18 mortis, but the side Mr. Leibel had the gunshot wound.

19 Q. What effect would a gunshot wound have?

20 A. That gunshot wound was a close -- loose contact
21 or close gunshot -- close range gunshot wound. So the fire
22 ball behind the bullet must have touched the hand, and that
23 temperature sometimes is about 100 degrees of Fahrenheit that
24 would warm up the hand, and the heat of the fire would

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1 Q. Could you describe what rigor mortis is?

2 A. Rigor mortis is a first modern event. It is
3 changes of the body following death. If I may explain the
4 science?

5 Q. Yes, please.

6 A. There are two parts in the human muscle called
7 actin myosin, a-c-t-i-n m-y-o-s-i-n. Actin Myosin are like a
8 man and woman that are in love. They can't keep away from
9 each other. So what the human body does, there is another
10 protein called ATP for adenosine triphosphate. ATP is like
11 the policeman of the body. It has so much energy. So the
12 ATP comes in-between them and keeps them apart. ATP is
13 generated from the food we eat.

14 So when you die, your body has a reserve of ATP
15 that will keep the actin myosin apart. Depending on the
16 activity of your muscles and depending on the temperature of
17 other factors, you could suffer immediate depletion of your
18 ATP beginning the moment you die to about 12 hours later for
19 most human beings. After 12 hours of death, you would have
20 rigor mortis all over your body. But soon after your death,
21 the small joints and muscles of the extremities immediately
22 after death lose ATP sooner.

23 So from the moment of death to about 12 hours
24 later, you will begin to have rigor mortis, depletion of ATP

1 deplete the ATP, and there would be immediate onset, so it
2 was not unusual when I read the reports that when the
3 paramedics got to the scene minutes after death that there
4 was rigor mortis only on the small joints of the fingers and
5 the hand and in the hand that received a loose contact wound.

6 Q. And you said rigor can start almost immediately?

7 A. Yes, it could start almost immediately. In some
8 literature, it is called cadaveric spasm.

9 Q. And what is cadaveric spasm?

10 A. Its terminology some exotic doctor decades ago
11 just to get some recognition for himself, he named rigor
12 mortis that starts immediately after death. He says rigor
13 mortis immediately after death, and typically it's in the
14 small joints of the fingers, could be on one side. Even with
15 rigor mortis, one is fully formed. It's not symmetrical.
16 It's not equal on both sides. It's usually greater on one
17 side, and these are some of the things we still don't know in
18 medicine. There's so many things we don't know in medicine,
19 but we respect it and take it as fact.

20 Q. The paramedics also described lack of electrical
21 activity in the heart after measuring by EKG. If a person is
22 dead, would you expect to see electrical activity in the
23 heart?

24 A. No, no. When a person is dead, there is no

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1 electrical activity in the brain or in the heart. A good
2 example, I've done hundreds of person who died. My father
3 died on May 5th, last year, and in the hospital when did we
4 know he was dead? You're watching the EKG, then suddenly it
5 goes flat. He was dead, and that is flat. He's dead.

6 But if you suffer a cardiac arrest, like a heart
7 attack, a heart attack you fall down on the ground because
8 actually while you fall down on the ground from a heart
9 attack is the brain notices blood is not coming to it, so it
10 makes you fall. So you lie flat on the ground so gravity
11 pulls blood to the brain. So although you're on the ground,
12 not responsive, but you're not dead.

13 If we monitor the EKG, you have an irregular EKG,
14 which is called an arrhythmia, so you could have that for
15 minutes, sometimes up to hours, that is why you need
16 defibrillator to shock that person and shock the person again
17 so that is not death.

18 Once you die, the definition of death is complete
19 cessation of all bodily functions. So it is not medically
20 physical -- it is not possible for somebody to die and still
21 have electrical activity, that is a no no.

22 Q. And so lack of electrical activity is actually
23 indicative of death?

24 A. It's the definition of death. A lack of

1 that.

2 Q. I think one of the paramedics described the blood
3 as being gel like?

4 A. Yes, thank you so much. Viscid it means gel
5 like. It's part of the injury process. Blood has moved into
6 the tissues. The proteins in the blood are not reacting with
7 the proteins in tissues and are becoming more viscid, and
8 there's a reason for that. Assuming you cut your skin, if we
9 don't have that process, you continue to bleed. So the
10 gelling actually controls when you apply pressure, it
11 actually stimulates and encourages the protein interaction.

12 Q. And blood begins this process as soon as it hits
13 the air; is that correct?

14 A. As soon as it extricates, you know, this is
15 science, some of this is very exotic, but we're dealing with
16 sub cell analysis. The moment it leaves the vessels, it
17 begins within seconds, within seconds, one second divided
18 into 1,000 times.

19 Q. And once if blood is outside the body, does
20 temperature affect the rate at which it would -- its
21 appearance would change?

22 A. Yes, yes. The warmer the room, the weaker and
23 then if, you know, you have some drugs in your system,
24 including alcohol, you're take something medications, if

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1 electrical activity of the brain and the heart.

2 Q. And if you have some electrical activity in the
3 heart, you should be doing something to try to revive this
4 person?

5 A. Yes.

6 Q. Paramedics also gave a description that the blood
7 appeared to be coagulated around the chest wound and pooling
8 around the injury?

9 A. No, no, I wouldn't use the word coagulate.

10 Remember, the human blood contains thousands of proteins, and
11 the human blood is meant to stay within the blood vessels,
12 and there's a reason for that. Once the human blood comes
13 outside the blood vessel, maybe from trauma, the proteins in
14 the blood react with the proteins in the tissues.

15 A good example is what we call tissue, thrombin
16 blaster. So what happens, once you have injury, blood goes
17 into the tissue within minutes. The proteins, like the
18 thrombin, t-h-r-o-m-b-i-n will react with the tissue to blast
19 and make the blood more viscid. I wouldn't use the words
20 coagulate. It is all part of the injury process.

21 Again, once you have blood excrete into the
22 tissues, you could try it at home, wait a minute, it starts
23 looking like it's caked or scabbing. When you use the word
24 coagulate, it's more specific for clotting. I wouldn't use

1 you're suffering from certain diseases, like Mr. Leibel had
2 liver disease, it will all affect the weight of all changes.
3 It's more factorial. That is why you cannot be absolute just
4 because you see one thing, you make assumption from that, no,
5 no.

6 Q. Okay. And if these observations were made, even
7 in this group, would that -- would you -- would that lead you
8 to any conclusion that Mr. Leibel had been deceased at any
9 period of time prior to the paramedics arriving?

10 A. No, no, no, the presence of what you just told
11 me, the rigor on one side and the small and blood, viscid
12 blood outside, actually, maybe the parts of -- some part of
13 the body may still be warm, that actually indicates somebody
14 who has just died. It doesn't exclude a wrong person of --
15 and autopsy was done in this case, the autopsy indicated --
16 it does not indicate Mr. Leibel had been dead for a long time
17 before he was taken to the refrigerator, no, we don't have
18 evidence of that.

19 Q. And there's reporting that Mr. Leibel was on the
20 couch or when he passed away and then was pulled from the
21 couch by Ms. Leibel at the instructions of paramedics or at
22 the instruction of 911. Would that movement affect any
23 anything within this interpretation?

24 A. Yes. Like I had said earlier, Mr. Leibel, before

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1 A. That's a nonfatal wound. It's a survivable
2 wound. Not every injury would kill you. So that should not
3 be considered in the cause of death. That was not what
4 killed him, no.

5 Q. Okay. And in this injury, it basically started
6 at the back of the hand or at the base of the wrist, were you
7 able to make any determination as to the distance that wound
8 was made at?

9 A. Yes.

10 Q. And what was that?

11 (A) It was a loose contact to close range and by
12 close range, I'm looking at maybe one or two inches to the
13 muzzle actually touching the skin because there are large
14 amounts of soot accentrual, and there are born artifacts,
15 the ball of fire behind a bullet. So this muzzle was -- the
16 hand was in intimate contact with the muzzle, and the wound
17 on the chest too was a contact wound.

18 But you if you notice in the autopsy, it says it
19 was not a contact wound, that there was no soot but if you
20 look at the pictures of the autopsy, there is soot.

21 Q. Okay. I want to start with the wrist injury. A
22 previous witness circled, showing on this, I guess, it's the
23 wadding from the shotgun shell. This is the wound you're
24 talking about?

1 fashion on close range of about half an inch, one inch to two
2 inches at most.

3 Q. Do you want to stay up here because we're going
4 to look at these other.

5 THE COURT: Mr. Brown, what I've asked Mr. Seddon
6 to do is get a Sharpie of a different color than blue.

7 MS. BROWN: Okay.

8 THE COURT: So there is a permanent record of
9 what this witness is testifying to. What you've just
10 displayed the jury can see, now it's been taken off, and they
11 won't have that to take back to the jury room with them, so
12 I'm going to ask the witness to actually use -- there's some
13 writing on this exhibit with the blue that was done by
14 another witness. And so, Seddon will be back in just a
15 moment with a different color marker, and we'll have him
16 repeat this so that there's a permanent record of his
17 testimony.

18 MS. BROWN: Your Honor, we do have a green
19 Sharpie.

20 THE COURT: Green will do. Thank you.

21 Q. (BY MS. BROWN:) Just on the actual photo itself,
22 you can explain what you were saying?

23 A. This is the circumference of the eccentric soot
24 and this is an accentuation of the soot giving you the

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1 THE COURT: Would you identify that exhibit for
2 the record, please.

3 MS. BROWN: I'm sorry, Your Honor.

4 Q. This would be Exhibit Number 51. Exhibit Number
5 51, that circled injury, is that the injury you saw soot and
6 other items on?

7 A. Yes, ma'am. If you can lower -- dim the light, I
8 will show you the soot.

9 Q. If you would. I don't believe we have a pointer.

10 THE WITNESS: Could I use this?

11 THE COURT: I don't think you can actually draw
12 on that one, but you can walk up to where Ms. Brown is, and I
13 think that you can display up there, can't he?

14 MS. BROWN: Yes, Ms. Henry can assist us in audio
15 visual.

16 THE COURT: Sir, you may.

17 THE WITNESS: So where I have circled the
18 circumference of the soot deposits and if you notice, it is
19 eccentric, telling you the muzzle was closer to one side and
20 if you notice around the emergence of the wound here are born
21 artifacts, the ball of fire that were in the bullet. Even
22 here, you can see the accentuation of the soot in a pinpoint
23 fashion. So this is a typical pattern of wound you would see
24 in a muzzle of the gun that is touching the skin in a loose

1 punctate soot stippling and then the margins of the wound you
2 have the born artifacts of the wound, and you notice it's all
3 eccentric. So you have the soot. The soot is stippling and
4 the bond so this is what you want to see -- what you see in
5 the loose contact or very close range muzzle. The hand was
6 in intimate in tactical association with the muzzle of the
7 rifle.

8 THE COURT: Ms. Brown, put that back up there.
9 The record will reflect that the first example

10 that the doctor gave was the outer green circle and when you
11 mentioned his second example was the green circle that's in
12 about the middle and in his final example was a green outline
13 of the wound itself. Is that accurate, doctor?

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: Thank you. Now the record is clear
16 as to what --

17 MS. BROWN: Thank you, Your Honor.

18 THE COURT: -- we're talking about.

19 Do you agree with that, Mr. Gregory?

20 MR. GREGORY: Yes, Your Honor.

21 THE COURT: Thank you.

22 Q. (BY MS. BROWN:) I'm now putting up Exhibit 41
23 which would be the 45 wound to the chest area. And then
24 Exhibit Number 42 would be a close-up of that same injury?

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1 A. That's a close-up, Your Honor. Can I come down
2 to --

3 THE COURT: You may, sir.

4 THE WITNESS: Thank you.

5 THE COURT: This witness will only use a green
6 Sharpie if he makes any marks on this.

7 THE WITNESS: So, again, this is an entrance
8 wound which was describing the autopsy report of not having
9 soot, but you can see a gate, an eccentric marginal soot and
10 then an artifact of the wound margins.

11 And in this one, you will actually see splaying
12 of the wound margin, indicating the bowl of gas coming behind
13 the bullet. So, actually, this one, I examined the autopsy
14 report, Harry was wearing a thick winter housecoat, winter
15 housecoat and a t-shirt.

16 So if you have the muzzle contacting his body,
17 that will be about one, two or three inches of clothing
18 between the between the muzzle and the skin. So although it
19 is a contact wound on the clothing, you will see eccentric
20 soot because the clothing will take some of the soot from the
21 skin but remember, the autopsy said there was no soot.

22 Q. Go ahead and have a seat.

23 THE COURT: Now, before he goes any further, I
24 want you to identify each of the marks he made on this

1 margins.

2 THE COURT: The splaying of the margins of the
3 wounds.

4 Would you agree with me that's what he's marked,
5 Mr. Gregory?

6 MR. GREGORY: Yes, Your Honor.

7 THE COURT: Would you agree, Ms. Brown?

8 MS. BROWN: Yes, Your Honor.

9 THE COURT: Okay. Thank you.

10 Q. (BY MS. BROWN:) Since Mr. Leibel was wearing
11 clothing, how would the soot get in through the clothing?

12 A. You know, when we see this suit I'm wearing, with
13 our naked eye, the resolution, it looks smooth and clean.
14 But if you -- if you place it under a microscope, you see big
15 holes in it because it's fabric that is knitted together.
16 All of our clothes, including leather, they have big holes in
17 it.

18 Now, soot from the muzzle of a gun is particular
19 matter. It's very fine. It's like fine sand, even finer
20 than fine sand. There are still particles. The particles of
21 soot are smaller than the holes in the clothing. Soot is
22 probably about 1,200 feet per second and it is hot. So soot,
23 if it's closer to the clothing than one foot and it's fired
24 from a muzzle of a gun can pass through layers of clothing in

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1 example.

2 MS. BROWN: I'm going to, Your Honor.

3 THE COURT: Thank you, ma'am.

4 Q. (BY MS. BROWN:) The first circle you made was
5 concerning the soot; is that correct?

6 A. Yes.

7 Q. And the second?

8 THE COURT: Wait. Wait. That doesn't identify
9 it because the record will have no identify what the first
10 circle he made was. So what you just marked is a circle that
11 is towards the bottom part of the picture. It comes off of
12 another circle that is around the wound. Would you agree
13 with that?

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: Okay. So that -- that circle
16 identifies somewhat you've identified as soot. Then there's
17 a circle that goes -- there's a partial circle because it's
18 not a closed circle that goes around the wound.

19 THE WITNESS: Yes, Your Honor.

20 THE COURT: And then you made some marks that are
21 lines.

22 THE WITNESS: Yes, Your Honor.

23 THE COURT: And those were to identify what?

24 THE WITNESS: The splaying, the splaying of the

1 which the skin.

2 Q. But in your opinion based on the injury you're
3 seeing, you're seeing a not skin to barrel contact but a
4 contact with clothing over the skin; is that correct?

5 A. Yes, the muzzle was contacting his body but
6 because he had clothing on his body, the muzzle was touching
7 the clothing, so this will qualify also as a contact wound,
8 loose contact because mets is not absolute science. If you
9 ask me, I can stretch it back maybe half an inch, one inch
10 but the half an inch one, inch to two inches will account for
11 the thickness of the clothing. So essentially, it is a
12 contact wound.

13 Q. And in a case involving a contact wound, if a
14 person is awake and conscious, would they be aware at some
15 point there's something closer in contact with them?

16 A. You mean if he was placed himself or someone else
17 placed him?

18 Q. Someone else placing it?

19 A. Okay. The human brain has the ability to respond
20 to stimulus in one over 10,000 of a second. That is why if
21 somebody touches you, the moment that person touches you, you
22 know he touched you. So the muzzle of a gun, if an
23 individual nudges you with the muzzle of a gun, you don't
24 even have to think. You will respond, and the response is to

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1 knock it out. It's primitive relief we, as human beings,
2 have. Something, not just response to hit it out to look.
3 So if somebody had nudged him with a muzzle of a gun, he
4 would have responded in a matter of milliseconds.
5 Q. I'm going to show you what been marked or
6 admitted as Exhibit 49. Do you recognize that?
7 A. Yes, ma'am.
8 Q. And what is that?
9 A. This is Harry's left arm, inner surface, showing
10 the gunshot wound of exit and showing contusions of the inner
11 aspect of the left arm.
12 Q. And could you put a circle around contusion.
13 A. This is the focal contusion and the outer part to
14 laceration or exit wound.
15 Q. So this area within the large circle is what
16 you're calling a contusion?
17 A. Yes, ma'am.
18 Q. And the arrow points to basically the --
19 A. Exit, yes.
20 Q. Thank you. Would this -- the chest injury that
21 you viewed both the photographs and the autopsy or the x-rays
22 concerning, would that be immediately fatal or would it take
23 time to pass from that?
24 (A) No. The gunshot wound of his trunk will not --

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1 will not be immediately fatal. He could have survived that
2 wound for up to five to ten minutes, and he would have been
3 able to engage in activities.
4 Remember, the famous Ronald Regan was shot in the
5 chest. He did not even know he was shot until they were
6 driving him back to the White House. He began to cough out
7 blood, that was when he changed over to go to the naval
8 hospital. So he was shot in the chest and was not even aware
9 and was engaged in activities, that is a very good example.
10 Q. And I'm showing you now Exhibit 134. Do you
11 recognize that photograph?
12 A. Yes, ma'am.
13 Q. And what is that?
14 A. This is the X-ray of Harry after death, and it
15 shows splintered fragments of a metal projectile, rarely
16 projectiles inside the chest and extending into the left
17 shoulder and the left inner, this is important, inner aspect
18 of the left arm.
19 Q. And showing you now Exhibit Number 140.
20 A. This is, again, an X-ray of the left arm on the
21 left shoulder. You could actually see a fracture of the left
22 shoulder joint. You see the space up above the space between
23 the scapula and the clavicle.
24 THE COURT: Why don't you identify that for us.

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1 MS. BROWN: I was going to go to him, Your Honor.
2 THE COURT: All right. Have a seat, sir. She'll
3 bring it to you.
4 THE WITNESS: This is a fracture of the acromio
5 clavicle joint.
6 Q. And so that green circle is --
7 A. Is a fracture, and such a pattern of trauma, you
8 would see if his arm received such a kinetic energy with it,
9 factually extended close to the body, like in this position
10 I'm placing it. His hand was not fully extended because the
11 force of the bullet pushed away the arm and fractured the
12 acromio clavicle joint.
13 So given the pattern I just see here, I can tell
14 you reasonably that his hand was not fully extended when he
15 was shot. His hand was flexed, slightly extended, like
16 somebody manipulating something. His hand was in this way.
17 So when the bullet -- the force of the bullet, the bullet
18 traveled at about 1,200 feet per second. It had a force. So
19 he moved the hand within millisecond and caused a fracture.
20 Q. Again, this bullet or this Exhibit Number 140,
21 this is a break in which it's the circled in green, that's a
22 break in?
23 A. Joint, the acromio, a-c-r-o-m-i-o clavicle joint,
24 meaning the joint between the clavicle and scapula.

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1 Q. And showing you now what's been marked as or
2 admitted as Exhibit 45.
3 THE COURT: Ms. Brown?
4 MS. BROWN: Yes.
5 THE COURT: How much longer are you going to go
6 with this witness?
7 MS. BROWN: It's going to be a little while
8 longer.
9 THE COURT: We're going to take our break right
10 now.
11 MS. BROWN: Thank you.
12 THE COURT: We've been in session for an hour and
13 a half, and I'm going to give the court reporter a break.
14 She doesn't feel very well, and we're going to take a
15 15-minute break.
16 (Whereupon, the admonishment was given to the
17 jury by the Court not to talk about the case with anyone
18 until the case is submitted to the jury for deliberation.)
19 THE COURT: We'll be in recess until a quarter
20 'til. Thank you very much.
21 Doctor, during the recess, you're admonished not
22 to talk to anyone associated with this case except the three
23 attorneys.
24 THE WITNESS: Yes, Your Honor.

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1 THE COURT: Thank you, sir.
2 (Whereupon, a brief recess was taken.)
3 THE COURT: We're back in session in State of
4 Nevada versus Tatiana Leibel. Mr. Gregory is present for the
5 State. Ms. Brown, Ms. Henry are both here. Ms. Leibel is
6 here, as is the interpreter, one of our interpreters.
7 Doctor, you're still on the stand. You're still
8 under oath, sir. Let's bring the jury in.
9 Thank you, folks. Have a seat, please.
10 Attorneys stipulate to the presence of the jury?
11 MR. GREGORY: Yes, Your Honor.
12 MS. BROWN: Yes, Your Honor.
13 THE COURT: Ms. Brown, would you continue.
14 MS. BROWN: Thank you, Your Honor.
15 Q. Going back to Exhibit Number 140, where you
16 identified a broken bone in the shoulder by that green
17 circle, would that break in the shoulder affect flexibility
18 in the arm after it was inflicted?
19 A. The fracture dislocation of a joint would in a
20 big motion but if you try to move, you may hear what we call
21 crepitus, c-r-e-p-i-t-u-s, and I've actually done cases
22 whereby at the scene, law enforcement interpreted a fractured
23 shoulder to be rigor mortis because you try to move the
24 shoulder, the fracture in the base, the motion, soon after,

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1 death, fracture, spasm. If you've ever had a fracture, spasm
2 of the muscle, it's pain. So the muscle is spastic. If you
3 die, the spasm of the muscles with time will relate slowly.
4 So this is such a fracture could simulate rigor mortis and
5 misinterpreted as rigor mortis, and I've actually seen it in
6 several cases of mine.
7 Q. Showing you what's been marked Exhibit 45 for
8 identification, do you recognize this?
9 A. Yes.
10 Q. What is that?
11 A. Can you lower the light? There's a reflection.
12 THE COURT: It actually I think it's the light
13 from the projector. You may be able to adjust one of those
14 side lights that may help you.
15 THE WITNESS: Wonderful, wonderful. Thank you so
16 much. This is a picture of the liver. The human liver and
17 the liver of all mammals has a red, brown color-like muscle.
18 But if you notice, this liver is yellow. It's yellowish, and
19 it's diffusely yellowish. This is a specific disease we call
20 steato, s-t-e-a-t-o, steato, hepatitis.
21 What this simply means is a group of diseases
22 where you start having accumulation of fat in the liver and a
23 specific type of fat is what we call a triglyceride fat.
24 There are so many things that could cause hepatitis. It

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1 could kill you suddenly. Many people who suffer it do not
2 know they suffer from it until they do a liver enzyme panel.
3 Common causes of it, alcohol, drugs of all types and
4 sometimes even drugs of abuse. It depends on your genetic
5 makeup. Even drugs as common as marijuana can cause
6 hepatitis. Some people, it's something you may be able to --
7 it's a very very ubiquitous disease.
8 In this case, what you should do if you don't
9 believe it, it is to take microscopic section and look at it
10 in the microscope. You will see the large globules of fat in
11 the liver. What is the significance of this? The liver is
12 the organ, it's the largest organ in the body only second to
13 the skin. Why is it a large organ? It supplies -- it's the
14 only organ that has three independent sources of blood
15 because it's a big organ that plays a very important function
16 in the human body.
17 It is the organ that detoxifies your blood. It
18 removes toxins and chemicals from your blood to clean it up.
19 Why does it do that? The human brain is a very sensitive
20 organ. The brain does not do well if specific chemicals in
21 the body are elevated, specifically ammonia, and your body
22 turns out large amounts of ammonia, that is why you have
23 large amounts of ammonia in the urine. That is actually what
24 gives urine the smell. So the liver takes it out and it

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1 becomes excreted in the urine.
2 When you have a disease, if you see, this is
3 diffuse. There is impairment of detoxification of the liver.
4 Ammonia levels will be high. If I did this autopsy myself, I
5 would have performed all of the analysis. What is the
6 significance? When ammonia levels are high in the blood, it
7 causes a specific disease. We'll call hepatic
8 encephalopathy. Hepatic encephalopathy will make it to
9 manifest episodes of irrationality.
10 Q. Irrationality?
11 A. Yes. Sometimes you could have a liver episodes
12 of irrationality, where you act out of character and some
13 people that even engage in activities that are simply
14 irrational that you and I as rational beings would never
15 understand why.
16 And in doing my review, having this, I look at
17 the toxicology which, again, showed us a very significant
18 finding that further confirms that this case is not a
19 homicide.
20 Q. And in -- you said earlier that you needed what
21 would need slides of the tissue to make further diagnosis?
22 A. If you have doubt, assuming if I'm training, you
23 know, younger doctors, medical students, I would tell them to
24 take a historical section, you should in a homicide like

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1 THE COURT: Thank you, sir.

2 (Whereupon, a brief recess was taken.)

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4 Nevada versus Tatiana Leibel. Mr. Gregory is present for the
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2 know they suffer from it until they do a liver enzyme panel.
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5 makeup. Even drugs as common as marijuana can cause
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18 removes toxins and chemicals from your blood to clean it up.
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20 organ. The brain does not do well if specific chemicals in
21 the body are elevated, specifically ammonia, and your body
22 turns out large amounts of ammonia, that is why you have
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24 gives urine the smell. So the liver takes it out and it

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16 And in doing my review, having this, I look at
17 the toxicology which, again, showed us a very significant
18 finding that further confirms that this case is not a
19 homicide.

20 Q. And in -- you said earlier that you needed what
21 would need slides of the tissue to make further diagnosis?

22 A. If you have doubt, assuming if I'm training, you
23 know, younger doctors, medical students, I would tell them to
24 take a histological section, you should in a homicide like

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1 this. An alleged homicide case, you should and must
2 according to the standard.
3 Q. And as to the brain, should tissue be take from
4 the brain?
5 A. Tissue from the brain and from every organ from
6 the body.
7 Q. And to your knowledge, were any tissue samples
8 taken in this case?
9 A. I was surprised. I requested tissues. I was
10 told there was none taken. And the brain, you should see if
11 you take microscopic sections of the brain, you should see a
12 specific change in the brain cells that would explain the
13 irrationality. It affects a specific type of self in the
14 human brain, we will call astrocytes. They will become
15 balloon because of ammonia toxicity and it affects the
16 functioning of your different regions of your brain that
17 would manifest with irrationality.
18 Q. Okay. And you mentioned also in the toxicology
19 report that there was -- it was shown that cannabis was used?
20 A. Yes. In the toxicology report, it showed that
21 Harry used marijuana less than two hours before he died. Why
22 do I know it's less than two hours, because of the types of
23 cannabinoid found in his blood and the levels.
24 If you smoke marijuana, your Delta-9 THC which is

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1 the active component of marijuana Delta-9 THC after two hours
2 should drop less than two micrograms, but Harry's THC level
3 was 20. So it tells you will he used marijuana within two
4 hours of his death. Unfortunately, marijuana is a
5 psychedelic drug. It's a hallucinogen. So if you're
6 suffering from a disease like hat hepatic encephalopathy and
7 then you smoke marijuana, you are at the much greater risk of
8 engaging in irrational behavior, including suicidal behavior.
9 Q. And you're one of leading brain experts in the or
10 experts in brain disease; is that correct?
11 A. Could you repeat.
12 Q. You're one of the leading experts in brain
13 disease?
14 A. I wouldn't say myself, but I have I have been
15 recognized as one of the leading experts. That was why the
16 U.S. Congress invited me on two occasions to advise them in
17 matters related to brain disease, yes, ma'am.
18 Q. In fact, that's a matter of a lot of your
19 publications; is that correct?
20 A. Yes, ma'am.
21 Q. Showing you what's been marked Exhibit 140 for
22 identification, do you recognize that?
23 A. Yes, ma'am.
24 Q. Is this one of the photos that was taken at the

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1 autopsy that you were shown?
2 A. Yes, ma'am.
3 Q. And Exhibit 149, do you recognize that?
4 A. Yes, ma'am.
5 Q. And is this also one of the photographs you were
6 shown?
7 A. Yes, ma'am.
8 Q. These photographs then have been since used to
9 show Harry's reach as to whether or not he could use the
10 weapon. Would this be a correct way to determine that?
11 A. No.
12 Q. And why not?
13 A. Actually, the measurement, the way they measure
14 it from the axilla to the tip of the finger is inaccurate.
15 If you want to measure range, you start from the neck to the
16 tip of the finger, not from the axilla. Why, because if I'm
17 manipulating a gun or any object, I'm using my whole body. I
18 can put my body in different concoctions and different
19 convolutions. I can -- I can do things that when I'm
20 standing stationery, someone watching me will assume I cannot
21 do.
22 So, again, this is one of the patterns of
23 erroneous assumption of things in this case. Measuring the
24 ridge from the axilla is wrong. If you want to measure the

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1 ridge, you start from the neck, actually from the midline of
2 the body and then meaning that somebody cannot perform a
3 specific act because of the length of the upper extremity is
4 erroneous, it's wrong, it's a wrong determination because
5 human beings can concoct your body and twist your body in
6 unimaginable ways. Even some of us who have the talent can
7 roll your body into a ball. So this is totally wrong, and so
8 assumptions remaining in this based on such an erroneous
9 scientific methodology.
10 Q. And have we discussed possible scenarios or
11 examples in which we could possibly demonstrate if Mr. Leibel
12 shot himself, that could be done with that 24-inch arm and
13 sofa?
14 A. Yes, ma'am. Yes, ma'am.
15 MS. BROWN: And, Your Honor, may the record
16 reflect that Dr. Kubiczek did measure my arm when he was
17 testifying it was between 24 and 25 in length.
18 THE COURT: He did measure it, and I don't recall
19 exactly. The jury will recall what the measurement was and
20 it's their memory that counts.
21 MS. BROWN: Okay.
22 THE COURT: Mr. Gregory, if you want to stipulate
23 to what you believe the evidence was, you can do that or
24 leave it up to the jury.

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1 MR. GREGORY: I would leave it up to the jury.
2 MS. BROWN: And Exhibit Number 119 is the dummy
3 gun?
4 THE COURT: I'm sorry, I couldn't hear you.
5 MS. BROWN: That's okay. I was just asking if
6 Exhibit 119 was the dummy gun.
7 THE COURT: Yes, ma'am.
8 THE WITNESS: There's no bullet in it, right?
9 MS. BROWN: Excuse me?
10 THE WITNESS: There's no bullet in it?
11 MS. BROWN: There's no bullet. Actually, the
12 firing pin has been removed. We're safe.
13 THE WITNESS: Okay.
14 THE COURT: Good question though, doctor.
15 MS. BROWN: And I'm going to be sitting on
16 Exhibit 120, the couch.
17 THE COURT: Any of you in the jury are welcome to
18 stand if you want to see.
19 Q. (BY MS. BROWN:) Could you step down, doctor.
20 A. Your Honor, may I?
21 THE COURT: You may, yes.
22 Q. (BY MS. BROWN:) We talked about arm position in
23 this example, so with the same length?
24 A. This will give you -- this was -- move this arm.

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1 Q. Okay.
2 A. So your hand -- that's to be -- okay.
3 Q. Okay.
4 A. To the side more.
5 Q. Okay.
6 A. This will give you, yes, hold that.
7 Q. Okay.
8 A. That will give you classic pattern. Depending on
9 your height and that but if you were his height, this will be
10 on a higher level, and you could and it could give you
11 exactly what we have there.
12 Q. That's what we're talking about with this?
13 A. Which is taller height.
14 Q. Yes.
15 A. He could higher and this would go shoo.
16 Q. Okay. And then as to the second shot?
17 A. He shoots himself in the chest. He's not yet
18 dead and just like some very famous people, they try cyanide,
19 they are not yet dead. They are waiting for minutes and then
20 they use secondary mechanism.
21 Q. I accidentally shot myself.
22 A. Exactly, you're trying to hold this right as
23 you're moving around.
24 Q. Uh-huh.

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1 A. Okay. Bring in your hand, okay, and erroneously
2 and that will cause exactly that. And wait, wait, wait, you
3 see, it goes to here.
4 Q. Uh-huh.
5 A. Raises the shoulder. This illustration shows
6 that atypical suicide was actually what happened here.
7 Q. Okay. But I'm not trying to shoot myself in the
8 shoulder and wrist, correct?
9 A. No, the second shot, he was trying to position
10 it. Remember, he is beginning to bleed inside.
11 Q. Uh-huh.
12 A. He's becoming a bit confused because he is
13 bleeding, and he's trying to shoot himself again, trying to
14 manipulate and he is confused and, I mean, he fell backwards.
15 Q. Okay.
16 A. Okay.
17 Q. Okay. Thank you. And, again, these are possible
18 scenarios?
19 A. Yes. That will tie everything together. The
20 evidence of hepatic encephalopathy combined with the
21 psychedelic hallucinogenic effect of the marijuana, the
22 cannabinoids, there is no reasonable degree of certainty to
23 rule this a homicide. This is a suicide. The most you can
24 stretch it is atypical suicide.

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1 Q. And so your opinion in this matter based on a
2 reasonable degree of medical certainty is?
3 A. That Tatiana did not shoot Harry. Harry is a
4 65-year-old white male, died as a result of a single gunshot
5 wound of his chest. The manner of death is suicide. What
6 type of suicide, an atypical suicide.
7 MS. BROWN: Thank you. I have nothing further.
8 THE COURT: Mr. Gregory?
9 MR. GREGORY: Thank you, Your Honor.
10 CROSS-EXAMINATION
11 BY MR. GREGORY:
12 Q. Doctor, you are a pathologist, correct?
13 A. Yes.
14 Q. Much like Dr. Kubiczek?
15 A. Yes, Dr. Kubiczek is a very good friend of mine.
16 Q. Yeah, and you actually work with Dr. Kubiczek
17 sometimes, don't you?
18 A. Yes.
19 Q. As well, as the Washoe County Medical Examiner's
20 Office?
21 A. Yes.
22 Q. There's cases you actually work together,
23 correct?
24 A. Yes, I examine brains for the Washoe County

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1 Medical Examiner's Office.
2 Q. All right. You're not a certified gun expert,
3 are you?
4 A. No, sir.
5 Q. And you're not a physicist, are you?
6 A. No, sir.
7 Q. Okay. You are not a toxicologist, are you?
8 A. I am. I'm board certified in clinical pathology.
9 Toxicology is part of clinical pathology.
10 Q. Oh, okay.
11 A. Yes.
12 Q. Are you a reconstruction expert?
13 A. No, sir.
14 Q. Are you crime scene expert?
15 A. I'm a crime scene expert in relation to the
16 medical aspect of a crime scene.
17 Q. Do you go out to the crime scenes?
18 A. Yes. In fact, the standard of forensic pathology
19 is that for every suspicious case or homicide, the
20 pathologist must, must go out to the scene.
21 Q. You understand there's a certification for crime
22 scene experts?
23 A. Yes. Part of our board certification includes
24 crime scene examination but the medical aspect of a crime

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1 scene examination, we don't go to take trace evidence at the
2 scene, no, but we will go to examine the body in relation to
3 the scene to see the relationship of the body with the scene
4 and also to advise law enforcement so that they don't make
5 erroneous assumptions like we have in this case.
6 Q. I want to talk a little bit about what things you
7 considered in rendering your opinion in this case?
8 A. Yes.
9 Q. You indicated you saw some photographs. We know
10 you saw the x-rays, right?
11 A. Yes.
12 Q. Did you see all of the autopsy photographs?
13 A. Yes.
14 Q. Did you see all of the photographs of the scene
15 taken by the Douglas County Sheriff's Office?
16 A. I don't know if it's all, but I've seen
17 photographs sent to me, and I saw all of the same photographs
18 sent to me.
19 Q. So you were provided with reports or photographs
20 by the defense, correct?
21 A. Yes.
22 Q. You have no idea if those were all of the
23 photographs in the case?
24 A. I don't know, sir.

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1 Q. Okay. Do you know that there were over 600
2 photographs taken in this case?
3 A. I don't know. Photographs were sent to me. I've
4 seen photographs sent to me.
5 Q. Okay. Did you review 600 and some photographs?
6 A. I don't recall. I didn't count them. I could
7 check in my laptop. I have it here with me, but all of the
8 same pictures sent to me, I reviewed.
9 Q. Did you review all of the laboratory reports in
10 this case?
11 A. Yes.
12 Q. So you reviewed the DNA report, correct?
13 A. Yes, I reviewed in November.
14 Q. Okay. You reviewed the fingerprint analysis,
15 correct?
16 A. Sorry?
17 Q. The fingerprint analysis, you reviewed that?
18 A. Yeah, I reviewed that in November when the case
19 was sent to me. In preparing for testimony the other day, I
20 don't typically review such reports because I don't testify
21 to them.
22 Q. And as I understand, at the time you prepared
23 your report, you did not have the measurements of the crime
24 scene that were taken by the Washoe County Crime Lab,

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1 correct?
2 A. I don't know. I don't recall, but there are the
3 measurements that were sent to me, and I've reviewed them,
4 and I do not agree with majority of your assumptions. Based
5 on the measurement, there were a pattern of --
6 Q. Doctor, my question was, at the time you wrote
7 your report, did you have those measurements?
8 A. I had measurements of the crime scene that were
9 provided to me, yes.
10 Q. Okay. Who provided those to you?
11 A. The defense attorney.
12 Q. And how is it they provided those to you before I
13 even had them?
14 A. I don't know. I don't know because I'm not
15 involved in the case that -- my team forwarded it to me.
16 What I reviewed in November, I saw pictures of the scene. I
17 saw some cartoon demonstrations. Then about last week or two
18 weeks ago, there was another formal report, a crime scene
19 report.
20 MR. GREGORY: Your Honor, I would ask you to
21 direct to the witness to answer the question.
22 THE COURT: He is answering it. You asked him
23 how he got them before you did. He's telling you when he got
24 them.

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1 MR. GREGORY: Okay.
2 THE WITNESS: There was another report, a more
3 comprehensive report with pictures, diagrams that were sent
4 to me weeks a couple of weeks ago.
5 Q. (BY MR. GREGORY:) Did you review all of the
6 police reports in this case?
7 A. Yes, in November, when I got the case, yes.
8 Q. About how many reports did you review?
9 A. There were PDF files, I would say about seven or
10 eight PDF files.
11 Q. Okay. You did not review the 58 reports that
12 were done in this case?
13 A. I don't know if the 58 were part of the several
14 PDF's but if 58 police reports, remember what I told you, I
15 don't base my opinion on police reports. Since there are 58
16 police reports, you don't expect me to give 58 opinions of
17 the 58 police reports.
18 Q. Well, if you don't consider police reports, why
19 did you look at any of them?
20 A. I look at them because as an expert witness, if I
21 did not look at them, you will criticize me that I did not
22 look at them.
23 Q. So you choose to look at some of them but not all
24 of them?

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1 A. I looked at all of the police reports that were
2 forwarded to me.
3 Q. Okay. Did you review the evidence that was
4 obtained from the cell phones in this case?
5 A. No, no.
6 Q. Did you listen to the tape recorded interviews of
7 all of the witnesses in this case?
8 A. Yes, yes.
9 Q. All of the witnesses?
10 A. It was quite long. There were two of them.
11 Q. Oh, just two?
12 A. Two videotapes.
13 Q. Okay.
14 A. That took me almost one night. I woke up at,
15 like, 2:00 o'clock. By noon, I was still looking at them.
16 They were very long.
17 Q. There were some 60 witnesses listed on the board
18 when we started this trial. You reviewed two of those
19 witness statements?
20 A. No, of Tatiana.
21 Q. Okay.
22 A. In a case like this, I don't need to review all
23 of the material. Remember my expertise, I'm not law
24 enforcement expert.

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1 Q. But so you reviewed Tatiana's statements,
2 correct?
3 A. Yes, and there's reason why I did that as a
4 physician. I want to know if her story changed. You know,
5 remember, I do this so many times. What is one of the things
6 you want to change? You want to find out is the defendant,
7 the person been accused of shooting somebody, did her story
8 change.
9 Q. Okay. So you listened to her statements,
10 correct?
11 A. Sorry?
12 Q. You listened to her statements, correct?
13 A. To her interview by the police.
14 Q. You didn't listen to any other interviews from
15 any other witnesses?
16 A. No, no. Remember -- remember --
17 Q. It's a yes or no question.
18 A. I said no.
19 Q. Thank you. Thank you. Did you discuss the case
20 with any of the witnesses at all?
21 A. No. Remember, I'm not a witness expert. I'm not
22 here to testify.
23 Q. Sir, it's a yes or no question.
24 A. Could you repeat it?

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1 Q. Did you discuss the case with any of the
2 witnesses?
3 A. No, sir.
4 Q. Did you discuss the case with any of the police
5 officers?
6 A. No, sir.
7 Q. Did you discuss the case with Dr. Kubiczek?
8 A. Yes, sir.
9 Q. Did you discuss the case with Tatiana?
10 A. No.
11 Q. But you listened to her statements?
12 A. Yes.
13 Q. Since you listen to all of her statements, you
14 are familiar with some of the discrepancies in those
15 statements, correct?
16 A. Essentially, I wouldn't categorize them as
17 discrepancies because like today if you bring me back
18 tomorrow to ask me the same questions, I wouldn't testify to
19 them exactly the same but essential call, the essence of her
20 testimony of what transpired that this was a suicide did not
21 change.
22 Q. Okay.
23 A. Now, minutia, we're human beings. Nobody has 100
24 percent recall memory that might not -- which I would dismiss

1 says, that you will review it. Review the other evidence
2 because all we have here is not just witness statements.
3 The good example is the Ferguson, remember, he
4 was shot.
5 MR. GREGORY: Your Honor, I didn't ask for an
6 example. I would ask for the witness to respond to the
7 questions.
8 THE COURT: All right. Well, I think he's given
9 you a response. Why don't you ask your next question.
10 Q. (BY MR. GREGORY:) Sir, did you examine this
11 couch before you rendered your opinion?
12 A. Yes, pictures of the couch.
13 Q. Pictures of the couch. Did you actually come and
14 observe the couch?
15 A. No, I did not think it was necessary for me.
16 Q. Okay. Did you go to the house and inspect the
17 house?
18 A. No, sir, it wasn't necessary for me.
19 Q. Did you inspect the gun?
20 A. No, sir, I'm not a gun expert.
21 Q. Okay. And yet you've testified today about
22 distances and whatnot with sooting.
23 A. Yeah, that's what we call the medical aspects of
24 ballistics, so medical aspects of ballistics. I don't need

1 to examine a gun.
2 Q. Okay.
3 A. All I need to do is skeletal examinations. Like
4 today, I saw the gun earlier today. When I came this
5 morning, I examined the gun and the replica of the gun, and I
6 saw it. They could not have shipped it to me in California,
7 and I did my medical analysis. I'm not a ballistics expert
8 but as a forensic pathologist, I'm expert in the medical
9 aspect of ballistics, that is why I know the type of bullet.
10 That is why I know the distance.
11 Q. So you didn't shoot the gun?
12 A. Oh, no, I've never shot a gun in my life, really,
13 I've never.
14 Q. All right, interesting. Your report in this case
15 was two pages long; is that right?
16 A. Yes.
17 Q. And you would agree with me that it's a very
18 conclusory report. You gave conclusions, but you don't state
19 how you arrived at those conclusions?
20 A. When I was asked to write a report, I was given
21 the guidelines because each state has its own guideline, that
22 my report should be a summary of my conclusions.
23 Q. So your two-page report was a summary, correct?
24 A. Yes.

1 Q. Okay. And in that report, you didn't cite any
2 kind of authority for your -- the science that you're talking
3 about here today, right?
4 A. No, no, it depends. Remember, I've done this so
5 many many times, many times, depending on the jurisdiction
6 and some states is different. As an expert, they don't want
7 you to cite other authorities because you're coming as an
8 authority yourself.
9 Now, if a Court would ask me to provide the basis
10 to provide published literature, I would provide that. But
11 as I'm sitting here today, nobody has asked me to provide
12 such literature.
13 Q. Okay. How long did it take you to prepare that
14 two-page report?
15 A. It took me weeks. It took me several weeks. I
16 didn't just -- I reviewed the case first. I spent time with
17 it. I thought about it. I did some reading. One day I woke
18 up early. It took me about four or five hours to write it.
19 Q. Okay. Are you familiar with the term cut and
20 paste as it refers to word processing?
21 A. Yes, I know cut and paste and somebody like me
22 who does -- I write over 100, 200 reports every year.
23 Sometimes some power in the report, things like definition of
24 a forensic pathologist.

1 Q. Okay.
2 A. The College of American Pathologist, such things
3 are copied and pasted on general terminology, general
4 concepts.
5 Q. So you might cut and past some general
6 principles, but you don't cut and paste things that are
7 specific to a case, do you?
8 A. No, I don't.
9 Q. Did you cut and paste when you prepared the
10 report in this case?
11 A. Yes. This case, I described the College of
12 American pathologists. I defined what forensic pathology
13 was. I described the general concepts of reasonable degree
14 of medical certainty. So such general concepts, I don't
15 doubt. I actually have a templet. I'll go and pick it out
16 of my templet and put it on there.
17 Q. But the opinion in this case, you wouldn't
18 certainly have cut and pasted?
19 A. No, the opinion, I wouldn't copy and paste
20 because it's unique to the case.
21 Q. So one of your opinions in this case was, quote,
22 the experts are scientifically invalid and are grossly
23 outside the established and generally accepted guidelines and
24 principles of forensic pathology. Is that one of the quotes

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1 from your report?
2 A. I don't know if you're reading it, yes.
3 Q. Would you like to see your report?
4 A. If you don't mind.
5 THE COURT: Are you refreshing his recollection?
6 MR. GREGORY: I'm refreshing his recollection.
7 At page two, you'll see an asterisk.
8 THE COURT: Why don't you have it marked so the
9 record is clear.
10 MR. GREGORY: Yes.
11 Q. I'm handing you State's Exhibit or excuse me,
12 Exhibit 148. Would you take a look at that and review it?
13 A. Thank you.
14 Q. And then let me know if it refreshes your
15 recollection.
16 A. Yes, yes.
17 Q. Okay. So you would agree that one of your
18 conclusions is that that Douglas County Sheriff's Office and
19 experts --
20 A. What page, sorry?
21 Q. Page two.
22 A. Page two, what paragraph?
23 Q. Scientifically invalid and are grossly outside
24 the established and generally accepted guidelines and

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1 principles of forensic pathology?
2 A. Yes, sir.
3 Q. In the materials that you submitted regarding
4 your expertise, you referred to a case Scanlon versus Life
5 Insurance Company of America. Do you remember working on
6 that case?
7 A. You lost me. I don't understand the question.
8 THE COURT: Well, repeat it and listen carefully.
9 Q. (BY MR. GREGORY:) Okay. In your materials you
10 gave us and you listed all of cases you've been involved
11 with.
12 A. In my CV.
13 Q. Your CV.
14 A. Okay.
15 Q. And in one of the cases you indicated you were
16 involved in was a case called Scanlon versus Life Insurance
17 Company of America. Do you remember that case?
18 A. That was in a U.S. -- United States Court in
19 Seattle. The summary judgment was rendered in that case, and
20 the federal judge actually referenced me numerous times in
21 his summary judgment.
22 Q. Okay. Would it surprise you in the report you
23 authored in that case, you put the exact same conclusion?
24 A. It would not surprise me. These are not my

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1 phraseology. It is how I speak. If you watch me in another
2 case testify, you will hear me using the same terminology as
3 I do here. This is my style. There's nothing wrong with it,
4 the same language, and I may not have copied it. This is
5 just what I write. So if you review on my reports, you see
6 some commonalities which is not unusual.
7 Q. Okay. Have you ever had your testimony deemed to
8 be unreliable?
9 A. I would not say I was deemed unreliable. This
10 was a case eight years ago, a case in Pennsylvania, a man had
11 Hodgkin lymphoma from walking with --
12 Q. It's a yes or no question.
13 A. Yes, yes. I'm trying to explain what happened.
14 Q. No.
15 A. The outcome of that case --
16 Q. Sir, listen.
17 THE COURT: Doctor, doctor, give him the answer
18 and then if he wants an explanation, he'll ask for it.
19 THE WITNESS: Yes.
20 THE COURT: If Ms. Brown wants an explanation,
21 she'll ask for it, but just answer his question, please.
22 Q. (BY MR. GREGORY:) So the question is have you
23 ever been found -- has a Court ever found your testimony to
24 be unreliable?

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1 A. Yes, once, once eight years ago, and I'm trying
2 to explain the basis for that, which in my opinion looking
3 back now --
4 THE COURT: Sir, we didn't ask you for the basis.
5 Q. (BY MR. GREGORY:) You're aware of the Court's
6 findings in that case?
7 A. Yes.
8 Q. And you're familiar then that the Court concluded
9 and I quote, this Court has carefully considered the parties
10 respective positions and based on the present record, finds
11 that the methodology used by Dr. Omalu in reaching his
12 opinions in this case is not reliable and even if it was
13 found to be reliable, his opinions are too speculative to,
14 quote, fit the facts of this case. End of quote. Do you
15 recall that?
16 A. Yes in fact --
17 Q. Do you recall that?
18 A. Yes.
19 Q. Okay.
20 A. The mistake --
21 Q. Sir?
22 THE COURT: Sir, he didn't ask you a question.
23 Q. (BY MR. GREGORY:) Did the Court also quote his
24 opinions are also not grounded in science, end of quote?

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1 drying?

2 A. I'm not saying you should ignore it. You should
3 weigh it. Given, it's like --

4 Q. It's a factor, right?

5 THE COURT: Wait a minute. He's not done
6 answering.

7 THE WITNESS: Hierarchy. I'm a forensic
8 pathologist, years of education, and I give an opinion, a
9 paramedic has six months of medical training, advanced
10 cardiac life support. You may not like what I say but
11 objectively, you weigh, who do you believe? Do you believe
12 me, even with all my experiences, will you believe me or what
13 he said?

14 THE COURT: You answered the question.

15 THE WITNESS: What I always say --

16 Q. (BY MR. GREGORY:) So do you just disregard?

17 A. I didn't say disregard. I said you evaluate it.

18 You evaluate it, that is why you have me. You didn't stop at
19 the paramedic. You brought a doctor. You evaluate it. You
20 consider the totality, the totality.

21 Q. Are we supposed to ignore that there were two
22 shots fired in this case?

23 A. No. If there was no autopsy, the number of shots
24 fired will be paramount, but there was an autopsy performed

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1 that shows the only medic forensically significant and
2 forensically concentration shot, was only one shot that
3 killed him. The second shot is what we call incidental
4 findings because he would have still died from the single
5 gunshot wound of the chest. The one to his hand and to the
6 graze wound were of no significant forensic consequence, end
7 of story.

8 Q. Are we supposed to ignore the fact that this was
9 a long gun that was used instead of a handgun?

10 A. No, you should not ignore the fact, but you
11 shouldn't make some assumptions that are not supported by
12 science.

13 Q. Should we ignore the fact that the gun was cocked
14 for a third shot?

15 A. You shouldn't ignore it. Can somebody shoot
16 himself in the chest and still cock the gun at that time,
17 yes, and the body, yes.

18 Q. You've talked about cases where investigators
19 look at a scene and think it's a homicide initially but after
20 further investigation, they realize it's a suicide, correct?

21 A. No, they thought it was a homicide and they
22 called me to the scene.

23 Q. And you set them straight?

24 A. No, I didn't set them straight, no. Everybody

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1 recognized this is my professional view of expertise. Like
2 you, you're an expert in the law, I'm not. So if I need
3 legal advice, I'll come to somebody like you. So if law
4 enforcement in my county needs the expert to make such
5 conclusions, they will call me, so I came. I told them, no,
6 no, this is why it's not a homicide. I was shot that down
7 immediately. That was not done in this case.

8 Q. Had you had the flip be true where they thought
9 it was a suicide and you thought it was a homicide?

10 A. No, because most times my opinion is based on the
11 autopsy findings and assuming the case we went to yesterday
12 in my county, sometimes I do an autopsy. I rule it on the
13 command. I have a meeting with the D.A. The D.A. tells me
14 we really think this case is a homicide but since you voted
15 on coming, we will charge for something less, maybe for blunt
16 force trauma, seriously bodily harm.

17 But the science, remember, I'm a messenger of the
18 science because of my training, not me as an individual. So
19 if I explain the science to the best of my ability, we
20 wouldn't be arguing with the science. We respect what the
21 science says. If you don't agree with it and, okay, you seek
22 a second opinion.

23 Q. Should we ignore that there was a lack of
24 gunpowder smell when the first responders went on scene?

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1 A. The smell is a very subjective under scientific
2 variable. Again, the smell, how can you determine that a
3 case is a homicide and not a homicide based on the smell of
4 gunpowder? That is almost bordering on Voodoo.

5 Q. Well, if the battalion chief with 20 something
6 years of experience as a bomb tech says he can't smell
7 gunpowder, do you take issue with that?

8 A. Well, as an expert, I can provide a scientific
9 opinion.

10 Q. So you do take issue with his opinion?

11 A. That is below the limit which the law sets.
12 There has to be a reasonable degree of medical certainty, the
13 threshold.

14 Q. So you do take issue with that battalion chief's
15 opinion?

16 THE COURT: Wait a minute. Would you repeat the
17 question, please.

18 MR. GREGORY: I asked him if he takes issue with
19 the battalion chief's opinion that he did not smell gunpowder
20 in the room.

21 MS. BROWN: Your Honor, that doesn't relate to
22 the issue of whether it's a homicide or a suicide. It
23 relates to an issue of reporting.

24 THE COURT: The reason I asked him to repeat it

1 because I didn't understand the question. Is the question
2 suggesting that the witness believes the -- believes that the
3 battalion chief did smell gunpowder?

4 MR. GREGORY: Can I ask a different question?

5 THE COURT: Would you, please, or rephrase that
6 one.

7 Q. (BY MR. GREGORY) Should this jury disregard the
8 battalion chief's opinion regarding gunpowder?

9 A. Yes, that should be disregarded because of
10 scientific. If you smell gunpowder -- there's a test.

11 There's a scientific test to confirm what you're subjective
12 feeling is.

13 I could come as you're wearing a Cologne and I'm
14 used to smelling my own Cologne and I come to you and I tell
15 you I smell my Cologne on you, you wouldn't disregard it.
16 Just, you know what, that is a scientific test. So in a
17 court like this, we could use personal discussion but in a
18 court of law, you cannot use such a subjective interpretation
19 of scientific evidence.

20 Q. Should we ignore the paramedics' found pooling?

21 A. Again, I've said you don't ignore anything. You
22 put everything together and you look at the totality because
23 what I'm saying now, the paramedic notice pooling, pooling of
24 what? What significance does that have with the patterns of

1 Q. And did you take the blanket and inspect it and
2 do any kind of testing on the blanket?

3 A. It was not indicated.

4 Q. Did you take the robe and do any kind of testing
5 with the robe?

6 A. It was not indicated.

7 Q. And you've told me that you didn't take the gun
8 and test fire the gun, correct?

9 A. No, sir.

10 Q. You gave an example of rigor mortis mindset in
11 quicker than normal, and your example was a marathon runner?

12 A. That was one example I gave. That way you have
13 generalized onset of his whole body. In fact, within minutes
14 they go into generalized vital, especially if it's hot.

15 Q. And so, yeah, because you added heat to that
16 equation, I heard that in your --

17 A. Yes.

18 Q. -- running in the heat, right?

19 A. Yes, sir.

20 Q. Okay. And the combination of those two things,
21 it might bring on a quicker onset of rigor?

22 A. Generalized.

23 Q. Okay. Is there any evidence in this case that

24 Harry Leibel was doing anything as aggressive as running a

1 injury on him at autopsy?

2 Q. So now you're saying we should consider
3 everything, right?

4 A. I said in a case like this, you look at the
5 entirety of the case. The first time you look at it, you
6 strike out the things you shouldn't evaluate. That shouldn't
7 be a foundation for my scientific opinion.

8 Q. But you didn't review the entirety of the case?

9 A. Sorry?

10 Q. You didn't review the entirety of the case?

11 A. I reviewed the case that was pertinent to my
12 opinion. I've never reviewed or witnessed statements in any
13 case and over 8,000 cases I have done in my career, I've
14 never reviewed all of the witness' statements. I review
15 material that are pertinent to my role in this case as an
16 expert in forensic pathology and neuropathology. I'm not a
17 paramedic expert. Am I making sense?

18 Q. So you indicated how important it is to do
19 testing. Did you do any testing of the wound in the hand,
20 the residues?

21 A. I did what is called a visual analysis, visual
22 inspection.

23 Q. Visual of the photo, correct?

24 A. Yes.

1 marathon?

2 A. He was using his digits, manipulating a gun when
3 he was in an adrenaline state.

4 Q. While he's setting on the couch?

5 A. Committing suicide, yes. It's an adrenalin
6 state. People who commit suicide, it's an abnormal mental
7 state from start and done. It's actually a mental, like
8 mental agitation. That is why it's always compulsive.
9 Suicide is part of the compulsive behavior.

10 Q. You indicated that the concept of an average
11 spasm was created by an exotic doctor who wanted to get
12 attention for himself.

13 A. That wasn't -- some doctor -- some doctor many
14 years ago chose to name it cadaveric spasm. Why he gave it
15 that name, why cadaveric spasm, the cadaver to have spasms,
16 it's not a very accurate name, but it is in place. That's
17 why I said it's some people call it or you look at
18 literature, it's called cadaveric so the body is rigor
19 mortis.

20 Q. Okay. You've indicated you're not a gun or
21 ballistics expert, right?

22 A. Yes.

23 Q. Okay. And yet you given have an opinion

24 regarding the distance that the muzzle was to Harry Leibel's

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1 body, correct?
2 A. Yes, as a forensic pathologist, we're trained in
3 the medical aspect of ballistics, just like we're trained in
4 the medical aspect of biomechanical body because to
5 understand gunshot wounds, you need to understand the
6 fundamentals of gun. Why does a gun fire? Why is a gun
7 lethal?
8 Q. Now, a ballistics expert is going to take that
9 robe that the bullet went through and look at the gasses and
10 come up with some conclusions based on science as far as how
11 far away the gun was; is that right?
12 A. Ballistics does not do tissue. We doctors are
13 the one that do that.
14 Q. I didn't talk about tissue. I mean the robe.
15 A. Yes, he may do that. He may do that, but we take
16 the tissue to do the analysis. Photographic inspection is
17 adequate but if you want actually to take the tissue itself
18 and do analysis of the tissue to confirm but photographic
19 documentation is accurate.
20 Q. So what test did you perform in coming up with
21 your analysis that it was one to two inches away?
22 A. This is something that I want to establish is
23 common knowledge. If there's any forensic pathologist that
24 doesn't know that, his license should be taken away from.

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1 This is elementary. The range of shot of a gunshot wound,
2 it's something very basic for us as forensic pathologist. I
3 can tell you even when he's 18 inches, specific changes you
4 can see. I can tell you when it's one foot. It is all part
5 of our training.
6 Q. Okay. But you didn't perform any tests before
7 you arrived at that conclusion?
8 A. Visual inspection.
9 Q. You looked at the photos and you made your
10 opinions from that?
11 A. Yes, sir.
12 Q. What was the circumference of that sooting that
13 we saw on the back of Harry's left hand?
14 A. I cannot measure it. They should have measured
15 on autopsy. It was not measured.
16 Q. Okay. So you have no idea what the circumference
17 was?
18 A. No.
19 Q. Does that impact the distance?
20 A. No, we don't use circumference typically because
21 of what is called multi variable regression analysis. There
22 are multiple factors involved, including the size of the
23 hand, so many factors, so we don't typically use second
24 forensic of difference to make decision just like we don't

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1 use temperature of the body to determine when somebody died.
2 We don't do that because of multiple variables involved.
3 Q. If a ballistics expert testified differently than
4 you just did, would you defer him to because he's an expert?
5 A. No, because I deal with the human body. A
6 ballistics expert is not an expert on the human body, the
7 doctor is. So if it comes to opinion relating to findings on
8 a human body, I wouldn't defer to a ballistics expert, no.
9 Q. Okay. You know more than they do about that?
10 A. It's not about knowing more. This is my area of
11 expertise and training, and it's not about one person knowing
12 or not knowing. It's not about that at all.
13 Q. I've never heard the term loose contact, a loose
14 contact wound. Is that a scientific term?
15 A. Yes.
16 Q. Okay. What does that mean?
17 A. Loose contact, have contact, what it means is
18 that the muzzle of the gun is not completely, is not tight on
19 the skin. When you have the muzzle, circumference muzzling,
20 that is indeed the tight contact or hot contact.
21 Q. You agree with me that the second shot, there was
22 no way that Harry Leibel was holding the muzzle with his left
23 hand?
24 A. No, I didn't say that. I said he was

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1 manipulating the gun. Remember, he was lying on the sofa.
2 As he's losing blood, going more into act of confusion of
3 state and while he was manipulate it, maybe even trying to
4 rest it on him to die, oh, I'm not dying yet, let me shoot
5 myself again. It was a misfire.
6 Q. Let me ask my question a little more directly.
7 At the time of the second shot, was Harry Leibel's left hand
8 in any way holding onto the muzzle?
9 A. He was trying to hold onto it, yes. His hand
10 was, like I said, in intimate contact or in contact with the
11 muzzle and that was when there was a misfire. The hand went
12 on the shoulder.
13 Q. My question wasn't whether he was trying to hold
14 onto it. My question was whether he was holding onto it.
15 A. Yes, he was trying to manipulate it, trying
16 holding, the gun, the barrel. He did not mean to shoot
17 himself, that is what a misfire is.
18 Q. So is it your opinion that he was holding the
19 barrel of the gun?
20 A. He was manipulating the barrel, close to the
21 muzzle, trying to locate, maybe again to shoot himself but
22 remember, this is a rifle. So he was trying to -- this is
23 why it's atypical.
24 Q. You said something about the human brain that I

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1 just wanted to ask you about. So you said if somebody came
2 up behind Harry and actually touched him with the muzzle, he
3 would have known it immediately, right?
4 A. Yes, as primitive reflex located in the brain
5 stem and it's not trying to be defensive.
6 Q. Even if he was sleeping, would that be true?
7 A. Haven't you like you're sleeping and then a fly
8 is on your face and you slap it?
9 Q. Okay. So then you gave an example of a president
10 getting shot and not even knowing he had been shot. Help me
11 understand how that works?
12 A. Why I answered that was to explain that you can
13 be shot in the chest and not die instantaneously.
14 Q. Wasn't it your testimony he didn't even know he
15 had been shot?
16 A. Ronald Regan?
17 Q. Yes.
18 A. Yeah, he was shot. They pushed him into the car.
19 He didn't know then. He even told the secret service you
20 shoved me too hard. Get off me. Then suddenly he started
21 coughing. So what why I give that example was, yes, you can
22 be shot in the chest and don't die immediately and still be
23 engaged in other activities.
24 Q. And you would still have electricity in you?

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1 A. In your heart?
2 Q. Yes.
3 A. Yes, sir. Yes, sir.
4 Q. I wanted to make sure I understood your testimony
5 regarding the first shot, and what was the path it traveled
6 of the projectile?
7 A. The projectile was upward, backward and leftward.
8 Q. Okay. What type of ammunition was used?
9 A. It used a type of ammunition I saw was the type I
10 would splinter upon entrance of soft tissue. Again, this is
11 now you're going into ballistics. I'm not an expert in that,
12 yeah.
13 Q. Okay, great. If I understood correctly, you're
14 saying when his body takes that shot, it dislocated or
15 fractured his clavicle?
16 A. No.
17 Q. Okay. Tell me.
18 A. His hand was not extended because if the hand is
19 extended, the force of the impact wouldn't dislocate the
20 clavicle. So when it's such a pattern, not because of this,
21 this is what we study. When it's such a pattern of clavicle
22 acromial fracture dislocation, like you saw in the X-ray,
23 that was not mentioned in the autopsy report. What it shows
24 the arm was forcefully moved while it was still flexed.

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1 Q. But what made the arm forcefully move?
2 A. The -- remember, the gun went through. The
3 bullet was able to go through the entirety of the chest into
4 the arm because it still had kinetic energy?
5 Q. So it was the force of the fragments coming up
6 through his body that --
7 A. The force of the shot.
8 Q. The force of the shot?
9 A. Yeah, and, remember, because it's close range.
10 The momentum of the shot emptied completely into his body and
11 that was why the bullet passed through and through, and it
12 was also a rifle shot. Rifle -- the bullet of rifles
13 sometimes could travel up to 300 feet per second. Handguns
14 is about 1,200. So the force of the shot because it was a
15 rifle pushed because the shoulder joint was slightly flexed,
16 not fully extended, shoved the shoulder outwards and caused
17 fracture.
18 Q. Do you agree with the ballistics expert that as
19 those fragments traveled through those body, they would lose
20 kinetic energy?
21 A. Yes, they would lose energy that is why they
22 settled in the body. But as they continue because it's a
23 rifle shot, it will continue traveling, the bullet if it goes
24 through the entirety. By the time it entered the arm, it

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1 still had energy. And, remember, it still had energy to
2 cause the contusion so this is a high velocity wound because
3 it's a rifle?
4 Q. So understanding your opinion in that first shot,
5 your opinion is that Harry Leibel's arm -- left arm was down,
6 correct?
7 A. No, I thought his left upper extremity was
8 manipulating the rifle, and it wasn't extended. It wasn't
9 like --
10 Q. Where was it?
11 A. Sorry?
12 Q. Where was it?
13 A. It was close to his body and reaching out close,
14 trying to control the reaching out of the barrel of the gun
15 to support it to shoot himself, and he's a taller guy. The
16 attorney who made the demonstration is shorter, so his trunk
17 would be higher than the attorney's.
18 Q. Okay. So his arm is like this when he shot?
19 A. His arm -- all I could say, they were not there
20 when it happened. All I can say is his hand was not extended
21 out.
22 Q. Okay. And what is your opinion as to how all
23 that shrapnel traveled down his arm and exited right here,
24 how did that happen?

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1 A. That happens when it's -- if you notice, you're
2 axilla when you slightly flex comes down, okay? Why it
3 happens, you have blood vessels and nerves going to your
4 upper extremities, so you need some lactic. Otherwise, you
5 tear your blood vessels. So whenever you move your arm
6 slightly, it could travel through the chest, through the
7 axilla without exiting the skin into the arm.
8 Q. Okay. So how did those fragments -- what causes
9 fragments to turn?
10 A. The fragment, remember, when we take x-rays, we
11 take it anatomic position. So when you set down anatomic
12 position, you think the fragment is turned downwards, am I
13 making sense?
14 Q. I don't know.
15 A. The picture was taken with his hands by his side.
16 When you see like it looks like he's turned downward, he
17 didn't. If you raise your hand slightly above, it's actually
18 a leaning trajectory and that was what Dr. Kubiczek in his
19 report did not say it went leftward, backwards and upwards
20 and then downward. He didn't say that. He actually agrees
21 with me that it was backwards, leftward and upward.
22 Q. Dr. Kubiczek testified that the arm was up like
23 this at the time of the shot?
24 A. Dr. Kubiczek did not mention the fracture.

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1 Dr. Kubiczek said it was multiple gunshot wounds,
2 Dr. Kubiczek did not describe the soot that was around the
3 wound. So there was so many things wrong with his report.
4 He did not take any section of the liver, any sections of the
5 brain. He did not even describe the fatty liver. So, yes,
6 he is a very good friend of mine. I respect him but in this
7 case, there was things wrong with this. I discussed it with
8 him personally before I came here.
9 Q. You talked about the measurements of the arm
10 being done incorrectly, right?
11 A. Yes, sir.
12 Q. Do you dispute that the tape measure or the
13 accuracy of the tape measure that was depicted in that
14 photograph?
15 A. No. Remember, the -- yes, I dispute it.
16 Remember, the --
17 Q. You dispute the accuracy of the tape measurement?
18 A. Yes, I dispute it. Remember, the judge's opinion
19 you read, that if your methodology is lacking or wanting,
20 your results are inaccurate. So methodology is insufficient,
21 is inadequate, is wrong. And so the outcome of that
22 methodology, scientific issue would be dismissed.
23 Q. A few minutes ago you did a demonstration with
24 Ms. Brown and she told you that Dr. Kubiczek measured her arm

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1 in front of the jury?
2 A. Why she said that was because she said that where
3 he measured was similar to -- what he measured was similar to
4 Harry's upper arm length.
5 Q. The way they measured Ms. Brown's arm was similar
6 to the way it was measured by Dr. Kubiczek when he looked at
7 Harry Leibel.
8 A. Yes. When he brought up the measurement of the
9 expert is because of legal issues.
10 Q. So the measurements of her arm was inaccurate
11 also?
12 A. It's not scientifically valid. It's not to
13 measure reach because that is why you're measuring your
14 extremity. To measure somebody's reach, you need to start
15 from the midline of the body. If you don't want to start
16 from the midline, you start from the neck and then go, and
17 you don't go inwards because you're measuring reach. Reach,
18 you go outwards, outwards to the tip but if you notice in
19 that case, it's not inward. From the axilla inward.
20 Q. So this demonstration was inaccurate because
21 Ms. Brown's arm wasn't measured?
22 A. The demonstration was not about the length of her
23 arm. The demonstration was just to show that assuming this
24 case was a homicide was inaccurate.

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1 Q. Are we supposed to disregard then the length of
2 Mr. Leibel's are?
3 A. Sorry?
4 Q. Should we disregard the length of Mr. Leibel's
5 arm?
6 A. Again, we shouldn't disregard it. We put
7 totality of the story. You look at the methodology. It was
8 inadequate. They measured it wrongly. So you can see that
9 you give it weight, like the evidentiary weight. The weight
10 I will give it would be low because of the methodology that
11 is inadequate. So I'll give it a low score, push it down.
12 This process is called differential diagnosis, so I'll score
13 it low, not that I would disregard it, no.
14 Q. In the demonstration for the first shot, the gun
15 -- the butt of the gun was on the floor; is that right?
16 A. I don't know where it was. Nobody can tell you
17 exactly where it was.
18 Q. No, I'm asking in the demonstration, the butt of
19 the gun was on the floor; is that correct?
20 A. It could have been on the floor or we want to
21 demonstrate that it is probable that a man like Harry could
22 kill himself with a rifle.
23 THE COURT: Sir, what I'm asking you to do is to
24 listen to his question. The question was during the

1 demonstration, was the butt of the gun on the floor. He
2 didn't ask you during the shooting.

3 THE WITNESS: Okay.

4 THE COURT: He asked you about the demonstration.
5 That's the only question you're asked right now. There may
6 be other questions later but during the demonstration, was
7 the butt of the gun on the floor, that's yes or no.

8 THE WITNESS: I don't recall if it was on the
9 floor.

10 THE COURT: He doesn't recall.

11 Q. (BY MR. GREGORY:) You don't know?

12 A. I wasn't paying attention because that wasn't
13 what the demonstration was for.

14 Q. Since you're not a ballistics expert, you
15 couldn't tell us what the kick of the gun would do if it was
16 against the floor, can you?

17 A. What?

18 Q. What the kick of the gun would do?

19 A. We don't call it kick, backfire.

20 Q. Backfire?

21 A. It recoil, the recoil. Could you repeat the
22 question?

23 Q. Yeah. You're not a ballistics expert so you
24 can't testify what would happen if you put the butt of the

1 back reclined on the couch, correct?

2 A. Yes, because the human body, when you're shot,
3 you're bleeding, you're going to fall back.

4 Q. And it's your testimony, again, I just want to
5 make sure I understand, when that second shot was fired,
6 Harry was manipulating the barrel of the gun with his left
7 hand?

8 A. With both hands.

9 Q. Both hands?

10 A. He was manipulating the gun.

11 Q. Okay.

12 A. It was a misfire.

13 Q. How do you know it was a misfire?

14 A. Because of my education and training, cases I've
15 seen, experience. Misfires happen a lot. In fact, sometimes
16 you actually see the misfire before the fatal shot or
17 sometimes they actually do it intentionally. We call it
18 hesitation, hesitation wounds. They test the gun first on
19 themselves and actually shoot your hand sometimes before they
20 now give the fatal shot.

21 Q. You were talking about rigor mortis. You talked
22 about heat from a bullet can cause rigor?

23 A. No. In this case, on the side of the gunshot
24 wound, and I was saying in addition to the rigor starting in

1 gun on the floor and shot it, what would happen to the gun?

2 A. Every gun has a recoil capability, every gun so
3 there would be recoil.

4 Q. Did you test the trigger pull of the gun?

5 A. No, that is ballistics, that is above my pay
6 grad.

7 THE COURT REPORTER: That is what?

8 THE WITNESS: Above my pay grade. Above my pay
9 grade.

10 Q. (BY MR. GREGORY:) You didn't weigh the gun?

11 A. No, that is true.

12 Q. And when you did the demonstration for shot
13 number one, Ms. Brown had both of her hands on that gun,
14 didn't she?

15 A. Yes.

16 Q. Okay. And the muzzle of the gun was touching her
17 torso, correct?

18 A. Yes.

19 Q. And she was seated at the front, the very front
20 edge of the couch; is that right?

21 A. Possibly, yes.

22 Q. Right here?

23 A. Yes.

24 Q. Okay. And then for shot number two, now she's

1 the small extremities, the heat of the gun could also
2 contribute why it was only a one side.

3 Q. So the same thing would be said of this wound
4 then, wouldn't the heat cause rigor mortis over on this side
5 of his body?

6 A. Rigor mortis is over joint. Side of the body,
7 the chest, abdomen, heart. Soft tissue does not activate
8 rigor mortis. Rigor mortis is inability to move a joint
9 because of the rigidity of the muscles.

10 Q. So, doctor, you disagree with the opinions of the
11 paramedics in this case?

12 A. I wouldn't -- I don't disagree with people
13 because that is not my role. I can't play God. All I'm
14 saying is the evidence in this case --

15 Q. You disagree --
16 A. -- does not support the allegation that this is a
17 homicide. The paramedics has the constitutional right and
18 the professional right to say whatever he wants to say. I'm
19 not here to agree or disagree with anybody. I'm simply here
20 with my training, expertise and experience. I looked at
21 scientific evidence, and I'm telling you this is not a
22 homicide. Tatiana did not kill Harry. This is suicide.

23 Q. You don't give much weight to what the paramedics
24 said?

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1 A. I think I said this before.
2 THE COURT: Well, wait a minute. If you're going
3 to make that statement, ask him about a particular statement
4 that one or more paramedics would have said. The question is
5 too vague for him to even pose an answer to it.
6 Q. (BY MR. GREGORY:) Well, the paramedics indicated
7 that they thought it didn't look like the shooting had just
8 occurred.
9 A. I said what you just said, the paramedics talked.
10 You're free to think whatever you want to think, but you're
11 not to try to interpret evidence of how to interpret it. The
12 paramedics is free to think whatever he wants and support his
13 right to do that, but he does not have the right to interpret
14 the scientific evidence anyway he wants, that is a point I'm
15 making.
16 Q. And the police officers in this case, you
17 disregard what they have stated?
18 A. The police officers are going to --
19 MS. BROWN: Again, that's too general.
20 THE COURT: Sustained. You're welcome to ask him
21 those questions but you have to be more specific about what
22 he disagrees with.
23 Q. (BY MR. GREGORY:) In concluding or coming to
24 your conclusion, did you give any weight to statements made

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1 by police officers?
2 A. The weight, like I have said in my differential
3 diagnosis process, in this case, my methodology, the weight
4 of what a police officer said in terms of the cause of death
5 is down. The weight -- my foundational purpose of that is
6 weighed down. The police is free to assume and say whatever
7 they want to say. They have that right.
8 But in a case like this, the cause of death is
9 scientific and medical, and I completely and totally disagree
10 with the interpretation of medical evidence.
11 Q. Okay. So what about Dr. Kubiczek's opinion, do
12 you disregard his opinion?
13 A. His opinion, like I have said, he said multiple
14 gunshot wounds. I told you personally this is not the case
15 of multiple gunshot wounds. Dr. Kubiczek was not the one who
16 determined this to be a homicide. In fact, in the report, it
17 says the manner of death would be determined by the Douglas
18 County Sheriff's Coroner. Why did do that, I don't know.
19 He's pretty much deferring a medical duty to a police
20 officer.
21 Q. Are you aware that that's the law in the State of
22 Nevada?
23 MS. BROWN: I would object, Your Honor. That's
24 not the law.

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1 MR. GREGORY: It is the law.
2 THE COURT: Sustained.
3 Q. (BY MR. GREGORY:) So you disregard
4 Dr. Kubiczek's opinion?
5 A. Sorry.
6 Q. You disregard Dr. Kubiczek's opinions?
7 A. I don't --
8 MS. BROWN: Objection, Your Honor. Again, he's
9 asking for opinions, if he disagrees with one.
10 THE COURT: Overruled. Well, again, though, you
11 do need to be fairly specific so remember that, sir. So I
12 understand the question, but it's almost like a compound
13 question and so it's -- unless you want a narrative answer,
14 then you need to ask about specific opinion, sir.
15 Q. (BY MR. GREGORY:) You read Matt Noedel's report
16 in this case?
17 A. Sorry?
18 Q. You read Matt Noedel's report; is that correct?
19 A. Who is Matt Noedel, I'm sorry?
20 Q. Maybe you didn't read his report. He's the
21 ballistics expert.
22 A. I perused through it. I did not read it because
23 I was not coming in here as a ballistics expert.
24 Q. Okay. You would know if you read his report that

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1 he gave conclusions regarding the distances of the shots that
2 were fired?
3 A. The distance I think that I remember vividly but
4 I think he may have said that the wound on the chest was
5 about two or three inches, am I correct? Help me out,
6 please.
7 Q. I'm just asking if you read the report?
8 A. Yes, I perused through it. I didn't spend time
9 on the report as I spent with the autopsy report.
10 Q. Because you are not an expert in that area, you
11 would defer to his opinions in that regard?
12 A. Not in matters relating to medical determination
13 of cause and manner of death, no.
14 Q. What about distance of shots fired?
15 A. Shot on the body, no.
16 Q. All right. Thank you. I have nothing further.
17 THE COURT: Ms. Brown?
18 MS. BROWN: Thank you, Your Honor.
19 THE COURT: Ms. Jackson, are you ok?
20 THE COURT REPORTER: Yes.
21 REDIRECT EXAMINATION
22 BY MS. BROWN:
23 Q. I'm showing you what has been marked as
24 (Exhibit 54) If we are looking for the measurement from just

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1 the general measurement from the armpit to the end of the
2 fingers, this would be an accurate way to measure that?
3 A. Yes.
4 Q. But it's not an accurate way to measure reach?
5 A. Reach, yes, it's not.
6 Q. Okay. And when you're talking about the marathon
7 runner and you said that can lead to basically set an onset
8 of generalized rigor mortis if they die in the sun?
9 A. Yes, ma'am.
10 Q. And generalized would be more all over the body
11 as opposed to an isolated?
12 A. Yes, ma'am.
13 Q. Okay. You did not have access to Mr. Leibel to
14 do any testing on him; is that correct?
15 A. Could you repeat that?
16 Q. You didn't have access to the body of Mr. Leibel
17 to do any testing at all on him; is that correct?
18 A. No, ma'am, I did not.
19 Q. And the one thing that you were specifically
20 looking at, the liver and the brain, you requested
21 microscopic slides on those tissues; is that correct?
22 A. Yes, ma'am.
23 Q. And those weren't available?
24 A. Yes, ma'am.

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1 Q. Showing you what's been marked as Exhibit 149 for
2 identification, can you go ahead and read through that.
3 A. Yes, I remember that e-mail.
4 Q. What is that e-mail?
5 A. It was an e-mail you sent me instructing me on
6 how to write my report that the law states.
7 THE COURT: Don't -- sir, don't say what it says.
8 THE WITNESS: Sorry.
9 THE COURT: It's not in evidence. Lay a
10 foundation.
11 Q. (BY MS. BROWN:) So do you -- you recognize this
12 e-mail?
13 A. Yes, ma'am.
14 Q. And it was one I sent to you back in November?
15 A. Yes, ma'am.
16 Q. And is it a fair and accurate copy of that e-mail
17 I sent to you?
18 A. Yes, ma'am.
19 MS. BROWN: Your Honor, I would offer Exhibit
20 141.
21 THE COURT: Objection, Mr. Gregory?
22 MR. GREGORY: No objection.
23 THE COURT: Then it's admitted.
24 Q. (BY MS. BROWN:) And this e-mail I sent you a

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1 copy of our discovery statute and the requirement of the
2 brief summary I needed for purposes of listing you as an
3 expert in our notice of experts; is that correct?
4 A. Yes, ma'am.
5 Q. And so that request from me for a brief statement
6 regarding the subject matter of which the expert testimony is
7 expected to testify was what you responded to with the report
8 that Mr. Gregory was referring to?
9 A. Yes, ma'am.
10 Q. And showing you what's been admitted as
11 Exhibit 73, you recognize this scene as the one you were
12 shown? Do you recognize this scene?
13 A. Yes, ma'am.
14 Q. And what is that?
15 A. The scene of the house with the sofa and Harry
16 lying on the couch.
17 Q. And in this photograph, there's several places
18 where there's blood, including smeared on the couch; is that
19 correct?
20 THE COURT: Do you want to display it so that
21 people can see what you're talking about?
22 Doctor, you can see it up there. You can see it
23 right in front of you also I believe.
24 THE WITNESS: Essentially, smears of blood

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1 indicating where he was moved from the sofa.
2 Q. (BY MS. BROWN:) Let me just ask, there's
3 different areas of blood, including there's Mr. Leibel in the
4 foreground, there's smears of blood on the couch and pools of
5 blood on the couch?
6 A. It's a small amount. Well, yes, yes.
7 Q. Okay. And they are different consistencies and
8 thickness?
9 A. Yes.
10 Q. In listening to the taped interviews of
11 Ms. Leibel, you could tell she had a heavy Russian accent; is
12 that correct?
13 A. Yes, I remember I called you to ask you what her
14 ethnicity was. I have an accent. You know, she has an
15 accent. You told me she was Russian.
16 Q. And Mr. Gregory was questioning you about a case
17 called Pritchard v. Dow?
18 A. Yes, ma'am.
19 Q. When did that judgment he was reading from occur?
20 A. That was about -- this is 2015, about eight years
21 ago.
22 Q. And what was the issue that came up in Pritchard
23 V. Dow?
24 A. The issue was Mr. Pritchard had Hodgkin lymphoma.

1 He had walked for Dow Chemicals, a big corporation for 25
2 years where he was exposed to some chemicals. He was also
3 adding onto that after the fact he was an alcoholic, that was
4 not revealed to me. So they wanted me to do a medical legal
5 report, what we call a causation report. It's not a criminal
6 case. It's a civil case. So that Dow Chemicals would pay
7 Mr. Pritchard compensation for his cancer.

8 So Dow Chemicals being a corporation hired a very
9 big law firm, and their strategy was to exclude me because if
10 they exclude me, the case was closed. So I was deposed. It
11 was during the deposition, I realized there was some
12 information that the attorney, Mr. Pritchard's attorney kept
13 from me but by then, it was already too late.

14 And the judge requested for papers to support my
15 opinion. I provided papers. The judge arbitrarily decided
16 that she needed a paper to show technical terminology, we
17 call odds ratio.

18 THE COURT: Would you spell that, please.

19 THE WITNESS: Odds, o-d-d-s, odds ratio.

20 THE COURT: Odds ratio.

21 THE WITNESS: If you're odds ratio is greater
22 than one, even if it's 1.1, your ratio cause the disease, but
23 the judge said in her court, we have to use an odd ratio of
24 two. Of course, there was no paper of mine that had an odds

1 ratio of two, so she ruled I was very qualified but my
2 methodology was flawed.

3 And looking back now, I agree with her, but she
4 said I was highly qualified though, but a good thing is I
5 learned from that mistake. I've done over 8,000 -- thousands
6 of cases. I have not repeated such a mistake, and I think
7 the mistake I made in the previous case is making an
8 assumption is the case we're making in this case.

9 Q. Thank you. I have nothing further.

10 THE COURT: Mr. Gregory?

11 RE-CROSS-EXAMINATION

12 BY MR. GREGORY:

13 Q. Harry's left shoulder, the X-ray you talked
14 about, there was two different things you said. You called
15 it a fracture, and I think you called it something different.
16 How do you characterize that?

17 A. The one on the skin is a graze wound from the
18 wound, the shot trajectory grazed the shoulder. This is on
19 the skin. But inside the body in the skeleton, that was a
20 fracture dislocation of a specific if joint. The acromial
21 clavicle joint collecting the scapula to the clavicle.

22 Q. The autopsy is done at a time when the person is
23 in full rigor, does the pathologist have to break anything?

24 A. No, not the shoulder Yu break the ribs, not the

1 shoulder, and I checked and the autopsy pictures to see if
2 Dr. Kubiczek dissected it to expose it, he did not.

3 Q. You can't tell from that photograph or that X-ray
4 whether that's a post mortem wound or pre?

5 A. It's pre mortem because the x-rays were taken
6 before the autopsy.

7 Q. Well, he's dead at the time of the autopsy,
8 right?

9 A. Yes, dead or a fracture after -- before you die,
10 the fracture will remain the same. The acromio clavicle
11 joint is one of the smaller --

12 MS. BROWN: Your Honor, I would object because
13 we're going way beyond the scope of my questioning.

14 THE COURT: That's sustained.

15 MR. GREGORY: Your Honor, I may recall him then.
16 Then we'll go to a different subject and that is rigor
17 mortis.

18 Q. You testified about --

19 MS. BROWN: Your Honor, again, we're going beyond
20 the scope, if it's about the marathon runner.

21 THE COURT: Go ahead.

22 MR. GREGORY: I was going --

23 THE COURT: The objection was withdrawn.

24 Q. (BY MR. GREGORY:) Where was the rigor mortis in

1 Harry's arm?

2 A. The rigor mortis, to the best of my
3 understanding, in the small joints of the upper extremity,
4 the fingers, the hand, the wrist joint. I don't remember
5 exactly, maybe in the elbow. I don't remember exactly.

6 Q. So if the arm is on the floor in the upward
7 position, would that indicate rigor in the elbow?

8 A. Not exactly.

9 Q. Okay. What would it indicate?

10 A. It indicates so many things. It could indicate
11 what we call a subluxation. It could indicate a post mortem,
12 what is it called, hyperactivity state. It could mean so
13 many things, and that is why you don't have to make
14 assumptions on anything because there are so many things that
15 could cause one single thing. You can't make an assumption
16 just based on one thing.

17 Q. Thank you. I have nothing further.

18 THE COURT: Okay. Thank you.

19 Doctor, thank you for being here. You may step
20 down.

21 THE WITNESS: Thank you, sir.

22 THE COURT: You may be subject to being recalled
23 so I don't want you to leave the building. Don't leave the
24 building.

CASE NUMBER _____

EXHIBIT CB

Instruction NRS 34.900 - 34.990

Petition to Establish Factual Innocence

34.900. Definitions.

- 34.910. “Bona fide issue of factual innocence” defined.
- 34.920. “Factual innocence” defined.
- 34.930. “Newly discovered evidence” defined.
- 34.940. Determination of when evidence is “material.”
- 34.950. Claim of factual innocence is separate from state habeas claim.
- 34.960. Filing of petition; notice and copy of petition to be served on district attorney and Attorney General; contents; review by court; grounds for dismissal; explanation of decision by court; preservation of evidence; proceedings governed by Nevada Rules of Civil Procedure.
- 34.970. Order by court requiring response to petition; contents of order; time for response; reply; consideration of petition by court; hearing on petition; stipulation of factual innocence of petitioner; issuance of order of factual innocence; explanation by court; appeal.
- 34.980. Appointment of counsel.
- 34.990. Notice to victim.

34.900. Definitions.

As used in NRS 34.900 to 34.990, inclusive, unless the context otherwise requires, the words and terms defined in NRS 34.910, 34.920 and 34.930 have the meanings ascribed to them in those sections.

History.

2019, ch. 495, § 2, p. 2976.

Effective Dates

This section is effective July 1, 2019.

34.910. “Bona fide issue of factual innocence” defined.

“Bona fide issue of factual innocence” means that newly discovered evidence presented by the petitioner, if credible, would clearly establish the factual innocence of the petitioner.

History.

2019, ch. 495, § 3, p. 2977.

Effective Dates

This section is effective July 1, 2019.

34.920. “Factual innocence” defined.

“Factual innocence” means that a person did not:

1. Engage in the conduct for which he or she was convicted;
2. Engage in conduct constituting a lesser included or inchoate offense of the crime for which he or she was convicted;
3. Commit any other crime arising out of or reasonably connected to the facts supporting the indictment or information upon which he or she was convicted; and
4. Commit the conduct charged by the State under any theory of criminal liability alleged in the indictment or information.

History.

2019, ch. 495, § 4, p. 2977.

Effective Dates

This section is effective July 1, 2019.

34.930. “Newly discovered evidence” defined.

“Newly discovered evidence” means evidence that was not available to a petitioner at trial or during the resolution by the trial court of any motion to withdraw a guilty plea or motion for new trial and which is material to the determination of the issue of factual innocence, including, without limitation:

1. Evidence that was discovered before or during the applicable period for any direct appeal or postconviction petition for a writ of habeas corpus pursuant to this chapter that served in whole or in part as the basis to vacate or reverse the petitioner’s conviction;
2. Evidence that supports the claims within a postconviction petition for a writ of habeas corpus that is pending at the time of the court’s determination of factual innocence pursuant to

176.0918. Petition requesting genetic marker analysis by person convicted of felony; procedure; notice to victim.

1. A person convicted of a felony who otherwise meets the requirements of this section may file a postconviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment of conviction. If the case involves a sentence of death, the petition must include, without limitation, the date scheduled for the execution, if it has been scheduled.

2. Such a petition must be filed with the clerk of the district court for the county in which the petitioner was convicted on a form prescribed by the Department of Corrections. A copy of the petition must be served by registered mail upon:

(a) The Attorney General; and

(b) The district attorney in the county in which the petitioner was convicted.

3. A petition filed pursuant to this section must be accompanied by a declaration under penalty of perjury attesting that the information contained in the petition does not contain any material misrepresentation of fact and that the petitioner has a good faith basis relying on particular facts for the request. The petition must include, without limitation:

(a) Information identifying specific evidence either known or believed to be in the possession or custody of the State that can be subject to genetic marker analysis;

(b) The rationale for why a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in paragraph (a);

(c) An identification of the type of genetic marker analysis the petitioner is requesting to be conducted on the evidence identified in paragraph (a);

(d) If applicable, the results of all prior genetic marker analysis performed on evidence in the trial which resulted in the petitioner's conviction; and

(e) A statement that the type of genetic marker analysis the petitioner is requesting was not available at the time of trial or, if it was available, that the failure to request genetic marker analysis before the petitioner was convicted was not a result of a strategic or tactical decision as part of the representation of the petitioner at the trial.

4. If a petition is filed pursuant to this section, the court may:

(a) Enter an order dismissing the petition without a hearing if the court determines, based on the information contained in the petition, that the petitioner does not meet the requirements set forth in this section;

(b) After determining whether the petitioner is indigent pursuant to NRS 171.188 and whether counsel was appointed in the case which resulted in the conviction, appoint counsel for the limited purpose of reviewing, supplementing and presenting the petition to the court; or

(c) Schedule a hearing on the petition. If the court schedules a hearing on the petition, the court shall determine which person or agency has possession or custody of the evidence and shall immediately issue an order requiring, during the pendency of the proceeding, each person or agency in possession or custody of the evidence to:

(1) Preserve all evidence within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section;

(2) Within 90 days, prepare an inventory of all evidence relevant to the claims in the petition within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section; and

(3) Within 90 days, submit a copy of the inventory to the petitioner, the prosecuting attorney and the court.

5. Within 90 days after the inventory of all evidence is prepared pursuant to subsection 4, the prosecuting attorney may file a written response to the petition with the court.

6. If the court holds a hearing on a petition filed pursuant to this section, the hearing must be presided over by the judge who conducted the trial that resulted in the conviction of the petitioner, unless that judge is unavailable. Any evidence presented at the hearing by affidavit must be served on the opposing party at least 15 days before the hearing.

7. If a petitioner files a petition pursuant to this section, the court schedules a hearing on the petition and a victim of the crime for which the petitioner was convicted has requested notice pursuant to NRS 178.5698, the district attorney in the county in which the petitioner was convicted shall provide to the victim notice of:

(a) The fact that the petitioner filed a petition pursuant to this section;

(b) The time and place of the hearing scheduled by the court as a result of the petition;
and

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(c) The outcome of any hearing on the petition.

HISTORY:

2003, ch. 335, § 2, p. 1892; 2009, ch. 283, § 1, p. 1197; 2013, ch. 300, § 1, p. 1409.

Editor's note.

Following the amendment of NRS 176.0918 by Acts 2013, ch. 300, § 1, the Legislative Counsel Bureau, under the authority of NRS 220.120, divided that section into NRS 176.0918, 176.09183, and 176.09187.

Amendment Notes

The 2009 amendment, effective October 1, 2009, rewrote the section.

The 2013 amendment, effective October 1, 2013, rewrote the section.

176.09183. Grounds for granting or dismissing petition; appeal.

1. The court shall order a genetic marker analysis, after considering the information contained in the petition pursuant to subsection 3 of NRS 176.0918 and any other evidence, if the court finds that:

(a) The evidence to be analyzed exists;

(b) Except as otherwise provided in subsection 2, the evidence was not previously subjected to a genetic marker analysis, including, without limitation, because such an analysis was not available at the time of trial; and

(c) One or more of the following situations applies:

(1) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;

(2) The petitioner alleges and supports with facts that he or she asked his or her attorney to request to have a genetic marker analysis conducted, but the attorney refused or neglected to do so; or

(3) The court previously ordered a genetic marker analysis to be conducted, but an analysis was never conducted.

2. If the evidence was previously subjected to a genetic marker analysis, the court shall order a genetic marker analysis pursuant to subsection 1 if the court finds that:

(a) The result of the previous analysis was inconclusive;

(b) The evidence was not subjected to the type of analysis that is now requested and the requested analysis may resolve an issue not resolved by the previous analysis; or

(c) The requested analysis would provide results that are significantly more accurate and probative of the identity of the perpetrator than the previous analysis.

3. If the court orders a genetic marker analysis pursuant to subsection 1 or 2, the court shall:

(a) Order the analysis to be conducted promptly under reasonable conditions designed to protect the interest of the State and the petitioner in the integrity of the evidence and the analysis process.

(b) Select a forensic laboratory to conduct or oversee the analysis. The forensic laboratory selected by the court must:

(1) Be operated by this state or one of its political subdivisions, when possible; and

(2) Satisfy the standards for quality assurance that are established for forensic laboratories by the Federal Bureau of Investigation.

(c) Order the forensic laboratory selected pursuant to paragraph (b) to perform a genetic marker analysis of evidence. The analysis to be performed and evidence to be analyzed must:

(1) Be specified in the order; and

(2) Include such analysis, testing and comparison of genetic marker information contained in the evidence and the genetic marker information of the petitioner as the court determines appropriate under the circumstances.

(d) Order the production of any reports that are prepared by a forensic laboratory in connection with the analysis and any data and notes upon which the report is based.

(e) Order the preservation of evidence used in a genetic marker analysis performed pursuant to this section and NRS 176.0918 and 176.09187 for purposes of a subsequent proceeding or analysis, if any.

(f) Order the results of the genetic marker analysis performed pursuant to this section and NRS 176.0918 and 176.09187 to be sent to the State Board of Parole Commissioners if the results of the genetic marker analysis are not favorable to the petitioner.

4. If the court orders a genetic marker analysis pursuant to subsection 1 or 2, the State may appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution within 30 days after the notice of the entry of the order by filing a notice of appeal with the clerk of the district court.

5. The court shall enter an order dismissing a petition filed pursuant to NRS 176.0918 if:

(a) The requirements for ordering a genetic marker analysis pursuant to this section and NRS 176.0918 and 176.09187 are not satisfied; or

(b) The results of a genetic marker analysis performed pursuant to this section and NRS 176.0918 and 176.09187 are not favorable to the petitioner.

6. If the court enters an order dismissing a petition filed pursuant to NRS 176.0918, the person aggrieved by the order may appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution within 30 days after the notice of the entry of the order by filing a notice of appeal with the clerk of the district court.

HISTORY:

2003, ch. 335, § 2, p. 1892; 2009, ch. 283, § 1, p. 1197; 2013, ch. 300, § 1, p. 1409; 2017, ch. 478, § 5.7, p. 2988.

Editor's Notes

Following the amendment of NRS 176.0918 by Acts 2013, ch. 300, § 1, the Legislative Counsel under the authority of NRS 220.120, divided that section into NRS 176.0918, 176.09183, and 176.09187.

Amendment Notes

The 2009 amendment, effective October 1, 2009, rewrote the section.

The 2013 amendment, effective October 1, 2013, rewrote the section.

The 2017 amendment by ch. 478, effective July 1, 2017, deleted former (1)(a), which read: "A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition"; redesignated former (1)(b) and (1)(c) as (1)(a) and (1)(b); added "including, without limitation, because such an analysis was not available at the time of trial" in (1)(b); added (1)(c); and made a related change.

176.09117. “Forensic laboratory” defined.

“Forensic laboratory” means any laboratory designated pursuant to NRS 176.0917.

HISTORY:

2013, ch. 252, § 8, p. 1057.

Effective date.

This section is effective July 1, 2013.

176.09118. “Genetic marker analysis” defined.

“Genetic marker analysis” means the analytical testing process of a biological specimen that results in a DNA profile.

HISTORY:

2013, ch. 252, § 9, p. 1057.

Effective date.

This section is effective July 1, 2013.

176.09112. "Biological specimen" defined.

"Biological specimen" means a biological sample, tissue, fluid or other bodily sample suitable for genetic marker analysis, obtained from a person or from physical evidence.

HISTORY:

2013, ch. 252, § 3, p. 1056.

Effective date.

This section is effective July 1, 2013.

NRS 34.900 to 34.990, inclusive; or

3. Relevant forensic scientific evidence, other than the expert opinion of a psychologist, psychiatrist or other mental health professional, that was not available at the time of trial or during the resolution by the trial court of any motion to withdraw a guilty plea or motion for new trial, or that undermines materially forensic scientific evidence presented at trial. Forensic scientific evidence is considered to be undermined if new research or information exists that repudiates the foundational validity of scientific evidence or testimony or the applied validity of a scientific method or technique. As used in this subsection:

(a) “Applied validity” means the reliability of a scientific method or technique in practice.

(b) “Foundational validity” means the reliability of a scientific method to be repeatable, reproducible and accurate in a scientific setting.

History.

2019, ch. 495, § 5, p. 2977.

Effective Dates

This section is effective July 1, 2019.

34.940. Determination of when evidence is “material.”

For the purposes of NRS 34.900 to 34.990, inclusive, evidence is “material” if the evidence establishes a reasonable probability of a different outcome.

History.

2019, ch. 495, § 5.5, p. 2977.

Effective Dates

This section is effective July 1, 2019.

34.950. Claim of factual innocence is separate from state habeas claim.

Any claim of factual innocence that is made pursuant to NRS 34.900 to 34.990, inclusive, is separate from any state habeas claim that alleges a fundamental miscarriage of justice to excuse

procedural or time limitations pursuant to NRS 34.726 or 34.810.

History.

2019, ch. 495, § 5.7, p. 2977.

Effective Dates

This section is effective July 1, 2019.

34.960. Filing of petition; notice and copy of petition to be served on district attorney and Attorney General; contents; review by court; grounds for dismissal; explanation of decision by court; preservation of evidence; proceedings governed by Nevada Rules of Civil Procedure.

1. At any time after the expiration of the period during which a motion for a new trial based on newly discovered evidence may be made pursuant to NRS 176.515, a person who has been convicted of a felony may petition the district court in the county in which the person was convicted for a hearing to establish the factual innocence of the person based on newly discovered evidence. A person who files a petition pursuant to this subsection shall serve notice and a copy of the petition upon the district attorney of the county in which the conviction was obtained and the Attorney General.

2. A petition filed pursuant to subsection 1 must contain an assertion of factual innocence under oath by the petitioner and must aver, with supporting affidavits or other credible documents, that:

(a) Newly discovered evidence exists that is specifically identified and, if credible, establishes a bona fide issue of factual innocence;

(b) The newly discovered evidence identified by the petitioner:

(1) Establishes innocence and is material to the case and the determination of factual innocence;

(2) Is not merely cumulative of evidence that was known, is not reliant solely upon recantation of testimony by a witness against the petitioner and is not merely impeachment evidence; and

(3) Is distinguishable from any claims made in any previous petitions;

(c) If some or all of the newly discovered evidence alleged in the petition is a biological specimen, that a genetic marker analysis was performed pursuant to NRS 176.0918, 176.09183 and 176.09187 and the results were favorable to the petitioner; and

(d) When viewed with all other evidence in the case, regardless of whether such evidence was admitted during trial, the newly discovered evidence demonstrates the factual innocence of the petitioner.

3. In addition to the requirements set forth in subsection 2, a petition filed pursuant to subsection 1 must also assert that:

(a) Neither the petitioner nor the petitioner's counsel knew of the newly discovered evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction petition, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence; or

(b) A court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the newly discovered evidence.

4. The court shall review the petition and determine whether the petition satisfies the requirements of subsection 2. If the court determines that the petition:

(a) Does not meet the requirements of subsection 2, the court shall dismiss the petition without prejudice, state the basis for the dismissal and send notice of the dismissal to the petitioner, the district attorney and the Attorney General.

(b) Meets the requirements of subsection 2, the court shall determine whether the petition satisfies the requirements of subsection 3. If the court determines that the petition does not meet the requirements of subsection 3, the court may:

(1) Dismiss the petition without prejudice, state the basis for the dismissal and send notice of the dismissal to the petitioner, the district attorney and the Attorney General; or

(2) Waive the requirements of subsection 3 if the court finds the petition should proceed to a hearing and that there is other evidence that could have been discovered through the exercise of reasonable diligence by the petitioner or the petitioner's counsel at trial, and the other evidence:

(I) Was not discovered by the petitioner or the petitioner's counsel;

(II) Is material upon the issue of factual innocence; and

(III) Has never been presented to a court.

5. Any second or subsequent petition filed by a person must be dismissed if the court determines that the petition fails to identify new or different evidence in support of the factual innocence claim or, if new and different grounds are alleged, the court finds that the failure of the petitioner to assert those grounds in a prior petition filed pursuant to this section constituted an abuse of the writ.

6. The court shall provide a written explanation of its order to dismiss or not to dismiss the petition based on the requirements set forth in subsections 2 and 3.

7. A person who has already obtained postconviction relief that vacated or reversed the person's conviction or sentence may also file a petition pursuant to subsection 1 in the same manner and form as described in this section if no retrial or appeal regarding the offense is pending.

8. After a petition is filed pursuant to subsection 1, any prosecuting attorney, law enforcement agency or forensic laboratory that is in possession of any evidence that is the subject of the petition shall preserve such evidence and any information necessary to determine the sufficiency of the chain of custody of such evidence.

9. A petition filed pursuant to subsection 1 must include the underlying criminal case number.

10. Except as otherwise provided in NRS 34.900 to 34.990, inclusive, the Nevada Rules of Civil Procedure govern all proceedings concerning a petition filed pursuant to subsection 1.

11. As used in this section:

(a) "Biological specimen" has the meaning ascribed to it in NRS 176.09112.

(b) "Forensic laboratory" has the meaning ascribed to it in NRS 176.09117.

(c) "Genetic marker analysis" has the meaning ascribed to it in NRS 176.09118.

History.

2019, ch. 495, § 6, p. 2977.

Effective Dates

This section is effective July 1, 2019.

34.970. Order by court requiring response to petition; contents of order; time for response; reply; consideration of petition by court; hearing on petition; stipulation of factual innocence of petitioner; issuance of order of factual innocence; explanation by court; appeal.

1. If the court does not dismiss a petition after reviewing the petition in accordance with NRS 34.960, the court shall order the district attorney or the Attorney General to file a response to the petition. The court's order must:

(a) Specify which claims identified in the petition warrant a response from the district attorney or the Attorney General; and

(b) Specify which newly discovered evidence identified in the petition, if credible, might establish a bona fide issue of factual innocence.

2. The district attorney or the Attorney General shall, not later than 120 days after receipt of the court's order requiring a response, or within any additional period the court allows, respond to the petition and serve a copy upon the petitioner and, if the district attorney is responding to the petition, the Attorney General.

3. Not later than 30 days after the date the district attorney or the Attorney General responds to the petition, the petitioner may reply to the response. Not later than 30 days after the expiration of the period during which the petitioner may reply to the response, the court shall consider the petition, any response by the district attorney or the Attorney General and any reply by the petitioner. If the court determines that the petition meets the requirements of NRS 34.960 and that there is a bona fide issue of factual innocence regarding the charges of which the petitioner was convicted, the court shall order a hearing on the petition. If the court does not make such a determination, the court shall enter an order denying the petition. For the purposes of this subsection, a bona fide issue of factual innocence does not exist if the petitioner is merely relitigating facts, issues or evidence presented in a previous proceeding or if the petitioner is unable to identify with sufficient specificity the nature and reliability of the newly discovered evidence that establishes the factual innocence of the petitioner. Unless stipulated to by the parties, the court may not grant a hearing on the petition during any period in which criminal proceedings in the matter are pending before any trial or appellate court.

4. If the court grants a hearing on the petition, the hearing must be held and the final order must be entered not later than 150 days after the expiration of the period during which the petitioner may reply to the response to the petition by the district attorney or the Attorney General pursuant to subsection 3 unless the court determines that additional time is required for

good cause shown.

5. If the court grants a hearing on the petition, the court shall, upon the request of the petitioner, order the preservation of all material and relevant evidence in the possession or control of this State or any agent thereof during the pendency of the proceeding.

6. If the parties stipulate that the evidence establishes the factual innocence of the petitioner, the court may affirm the factual innocence of the petitioner without holding a hearing. If the prosecuting attorney does not stipulate that the evidence establishes the factual innocence of the petitioner, a determination of factual innocence must not be made by the court without a hearing.

7. If the parties stipulate that the evidence establishes the factual innocence of the petitioner, the prosecuting attorney makes a motion to dismiss the original charges against the petitioner or, after a hearing, the court determines that the petitioner has proven his or her factual innocence by clear and convincing evidence, the court shall:

(a) Vacate the petitioner's conviction and issue an order of factual innocence and exoneration; and

(b) Order the sealing of all documents, papers and exhibits in the person's record, minute book entries and entries on dockets and other documents relating to the case in the custody of such other agencies and officers as are named in the court's order.

8. The court shall provide a written explanation of its determination that the petitioner proved or failed to prove his or her factual innocence by clear and convincing evidence.

9. Any order granting or denying a hearing on a petition pursuant to this section may be appealed by either party.

History.

2019, ch. 495, § 7, p. 2979.

Effective Dates

This section is effective July 1, 2019.

34.980. Appointment of counsel.

If the court grants a hearing on the petition pursuant to NRS 34.970, the court may, after determining whether the petitioner is indigent pursuant to NRS 171.188 and whether counsel was

appointed in the case which resulted in the conviction, appoint counsel for the petitioner.

History.

2019, ch. 495, § 8, p. 2981.

Effective Dates

This section is effective July 1, 2019.

34.990. Notice to victim.

After a petition is filed pursuant to NRS 34.960, if any victim of the crime for which the petitioner was convicted has indicated a desire to be notified regarding any postconviction proceedings, the district attorney shall make reasonable efforts to provide notice to such a victim that the petition has been filed and that indicates the time and place for any hearing that may be held as a result of the petition and the disposition thereof.

History.

2019, ch. 495, § 9, p. 2981.

Effective Dates

This section is effective July 1, 2019.

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FILED

Florence McClure Women's Correctional Center
4370 Smiley Rd.
Las Vegas, NV 89115

Douglas County
District Court Clerk NO

In The 9 Judicial District Court of the State of Nevada
In and for the County of Douglas 20 NOV 9 P1:26

In the matter of:

Tatiana Leibel)
Plaintiff/Petitioner)
The State of Nevada)
Defendant/Respondent)

BOBBIE R. WILLIAMS
CLERK
Case No: 14 CR 00618-D
Dept No.: _____

REQUEST FOR SUBMISSION OF MOTION

It is requested that the Motion for
Petition for Writ of Habeas Corpus (post-conviction)
which was filed on the 27 day of October, 2020, in the above-entitled matter be submitted
to the Court for decision.

The undersigned certifies that a copy of this request has been mailed to all counsel of record.

Dated this 27 day of October, 2020

Respectfully submitted,

[Signature]
Signature
Tatiana Leibel
Print Name

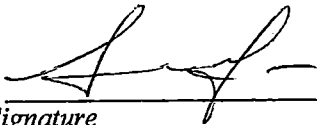
3364

DECLARATION UNDER PENALTY OF PERJURY

I, the undersigned, understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury.

I declare, under the penalty of perjury under the laws of the United States of America, that the above and/or foregoing information is accurate, correct and true to the best of my knowledge, executed within the terms of ¹NRS 171.102 and ²NRS 208.165. See ³28 U.S.C. 1746 and 18 U.S.C. 1621.

Dated this 27 day of October, 2020


Signature

1137908
Nevada Department of Corrections ID #

¹ NRS 171.102

² NRS 208.165

³ 28 U.S.C.

§1746. Unsworn declarations under penalty of perjury

18 U.S.C.

§ 1621. Perjury generally

33657

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NOV 09 2020

FILED

Douglas County
CERTIFICATE OF MAILING Clerk 40

STATE OF NEVADA
COUNTY OF Douglas

20 NOV 9 P1:26

I am the ☒ Plaintiff/Petitioner ☐ Defendant/Respondent

TATIANA LEIBEL for Case No: 14-CR-0062 BD/SC 77983

BOBBIE R. WILLIAMS
CLERK

On this 27 day of October, 2020, I mailed a copy of the

Following document(s):

1. Motion to withdraw counsel
2. Notice/Motion/Sub.Motion/2nd Petition for Habeas Corp. Post-Convic.
3. Notice/Motion/Sub.Motion/Petition to Establish Factual Innocence
4. Affidavits "A"; "B"; "C"; "I"
5. Exhibits A; B; C

By United States First Class Mail, to the following addresses:

1. Clerk of Court & DA
Douglas County District Court
P.O. Box 218
Minden, NV 89423

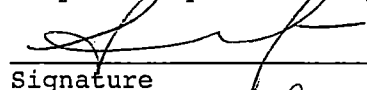
2. Attorney General - Nevada
100 N. Carson St.
Carson City, NV 89701

3. * Clerk of Court
Supreme Court of Nevada
201 S. Carson Street, Suite 201
Carson City, NV 89701

4. John E. Malone, ESQ
Nevada Bar No. 5706
209 N. Pratt Ave.
Carson City, NV 89701

Dated this 27 day of October, 2020.

Respectfully submitted,


Signature

Tatiana Leibel
Printed Name

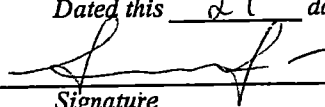
*NOTE - page 2 of 2

DECLARATION UNDER PENALTY OF PERJURY

I, the undersigned, understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury.

I declare, under the penalty of perjury under the laws of the United States of America, that the above and/or foregoing information is accurate, correct and true to the best of my knowledge, executed within the terms of ¹NRS 171.102 and ²NRS 208.165. See ³28 U.S.C. 1746 and 18 U.S.C. 1621.

Dated this 27 day of October, 2020


Signature

1137908
Nevada Department of Corrections ID #

*NOTE: "NRS 34.724 (Persons who may FILE PETITION) REQUIRES A POST-CONVICTION PETITION FOR WRIT OF Habeas Corpus to be filed in the proper STATE District Court, such a writ may ALSO BE FILED WITH THE NEVADA SUPREME Court AS THE NEVADA CONSTITUTION GRANTS THE Nevada Supreme Court THE AUTHORITY TO ISSUE WRITS."

¹ NRS 171.102

² NRS 208.165

³ 28 U.S.C.

§1746. Unsworn declarations under penalty of perjury

18 U.S.C.

§ 1621. Perjury generally

Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

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NOV 19 2020

FILED

NO _____

20 NOV 19 10:53

Case No. 14-CR-0062

Dept. No. II

Douglas County
District Court Clerk

DA 14-343M

BOBBIE R. WILLIAMS
CLERK

BY ANOMIE DEPUTY

This document does not contain personal information of any person

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

TATIANA LEIBEL,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

**MOTION TO DISMISS PRO PER
SECOND POST-CONVICTION
PETITION FOR A WRIT OF
HABEAS CORPUS**

Respondent, by and through, the Douglas County District Attorney's Office, moves this Court to dismiss Tatiana Leibel's (Leibel) second post-conviction petition for a writ of habeas corpus filed in the above-entitled matter. This response is based on the following memorandum of points and authorities, as well as all other pleadings, documents, and exhibits on file.

Following the jury trial, Liebel was found guilty of second-degree murder with the use of a deadly weapon, and a judgment of conviction was entered on April 21, 2015. Leibel appealed and her conviction was affirmed on December 18, 2015. Remittitur issued on January 12, 2016. Less than a year later Leibel filed a hand-written *pro se* post-conviction petition for a writ of habeas corpus raising four grounds for relief and a motion for appointment of counsel. This Court appointed post-conviction counsel on November 28, 2016 and a counseled post-

1 conviction supplemental petition was filed on February 26, 2018. This appointment was
2 discretionary. NRS 34.750(1). An order denying all of the claims in Leibel's post-conviction
3 petition for a writ of habeas corpus was issued on December 20, 2018. A timely appeal was
4 filed in the district court on January 18, 2019. An Order of Affirmance was issued on June, 24,
5 2020. Remittitur was received by this Court on July 22, 2020.

6
7 Leibel now files a Second Post-Conviction Petition for a Writ of Habeas Corpus pro se.
8 The petition is second or successive and it plainly appears from the face of the petition that the
9 petitioner is not entitled to relief and it should be summarily dismissed. NRS 34.745(4).
10 "Nevada's post-conviction statutes contemplate the filing of one post-conviction petition to
11 challenge a conviction or sentence." *Brown v. McDaniel*, 130 Nev. 565, 572, 331 P.3d 867,
12 872 (2014)

13
14 Leibel filed this petition more than four years after the Nevada Supreme Court issued
15 remittitur from her direct appeal. Thus, Leibel's petition is untimely filed. *See* NRS 34.726(1).
16 Moreover, Leibel's petition is successive and/or contains grounds that could have been raised
17 in a different prior proceeding. *See* NRS 34.810(1)(b) and (2). Nevada's procedural bars are
18 mandatory. *See, e.g., Clem v. State*, 119 Nev. 615, 623 n. 43, 81 P.3d 521, 527 n.43 (2003).
19 Leibel's petition is procedurally barred absent a demonstration of good cause and
20 prejudice. *See* NRS 34.726(1); NRS 34.810(3). She failed to demonstrate good cause or
21 prejudice in her petition. *See, e.g., Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870
22 (2014) ("We have consistently held that the ineffective assistance of post-conviction counsel in
23 a noncapital case may not constitute 'good cause' to excuse procedural defaults."); (*State v.*
24 *Haberstroh*, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003) (recognizing that NRS chapter
25 34 requires a demonstration of good cause on the face of the petition). She also failed to
26
27
28

1 demonstrate actual innocence. Where, as here, Leibel does not provide any "new" evidence,
2 she cannot demonstrate that "it is more likely than not that no reasonable juror would have
3 convicted him in light of ... new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559, 118
4 S.Ct. 1489 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851 (1995)); see
5 also *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112
6 Nev. 838, 842, 921 P.2d 920, 922 (1996). The petition should also be dismissed based on
7 statutory laches as the State would be prejudiced in its ability to conduct a retrial and petitioner
8 has failed to demonstrate that a fundamental miscarriage of justice has occurred. NRS 34.800.

10 This Court lacks jurisdiction to consider any other motion or petition attached to the
11 second post-conviction petition for a writ of habeas corpus.

12 Dated this 19 day of November, 2020.

14 MARK B. JACKSON
15 DISTRICT ATTORNEY

16 By: 

17 Matthew Johnson
18 Deputy District Attorney
19 P. O. Box 218
20 Minden, Nevada 89423
21 (775)782-9800

Case No. 14-CR-0062

Dept. No. II

DA 14-343M

This document does not contain personal information of any person

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

v.

TATIANA LEIBEL,

Defendant.

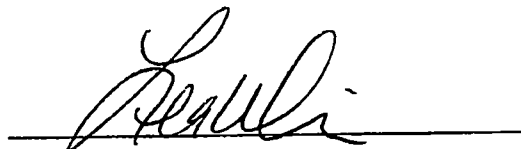
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the District Attorney for Douglas County, Nevada, and that I deposited for delivery a true copy of Motion to Dismiss, addressed to:

John E. Malone, Esq.
1662 Us Highway 395 N, Suite 202
Minden, Nevada 89423

- ☒ ~~U.S. Mail~~ E-mail
☐ Reno/Carson Messenger
☐ Hand Delivery
☐ By placing a copy in the pick-up folder in the District Attorney's Office.

DATED this 19th day of November, 2020.



RECEIVED

NOV 23 2020

FILED

Douglas County
District Court Clerk

CERTIFICATE OF MAILING

NO _____

STATE OF NEVADA
COUNTY OF ~~CLARK~~ DOUGLAS

20 NOV 23 11:50

I am the ☒ Plaintiff/Petitioner ☐ Defendant/Respondent

Tatiana Leibel for Case No: 14-CR-0062 BD/SC 101989

On this 16 day of November, 20 20, I mailed a copy of the

Following document(s):

1. Affidavit "I"

2. Copy certificate of mail, filed on 11-9-20

3. _____

4. _____

5. _____

By United States First Class Mail, to the following addresses:

1. Clerk of Court
Douglas County District Court
P.O. BOX 218
Minden, NV 89423

2. Attorney General - Nevada
100 N. Carson St.
Carson City, NV 89701

3. District Attorney
Douglas County District Court
P.O. BOX 218
Minden, NV 89423

4. * Clerk of Court
Supreme Court of Nevada
201 S. Carson Street, Suite 201
Carson City, NV 89701

Dated this 16 day of November, 20 20.

Respectfully submitted,

Signature

Printed Name

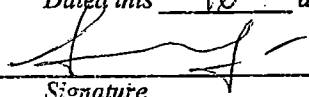
Tatiana Leibel

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Dated this 16 day of November, 2010


Signature

1137908
Nevada Department of Corrections ID #

¹ NRS 171.102

² NRS 208.165

³ 28 U.S.C.

§1746. Unsworn declarations under penalty of perjury

18 U.S.C.

§ 1621. Perjury generally

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NOV 09 2020

FILED

Douglas County
CERTIFICATE OF MAILING Clerk NO _____

STATE OF NEVADA
COUNTY OF

Douglas

20 NOV 9 P1 26

I am the ☒ Plaintiff/Petitioner ☐ Defendant/Respondent

TATIANA LEIBEL

for Case No: 14-CR-0062 BD/SC 7798

BOBBIE R. WILLIAMS
CLERK

On this 27 day of October, 2020, I mailed a copy of the

Following document(s):

1. Motion to withdraw counsel
2. Notice/Motion/Sub.Motion/2nd Petition for Habeas Corp. Post-Convic.
3. Notice/Motion/Sub.Motion/Petition to Establish Factual Innocence
4. Affidavits "A"; "B"; "C"; "I"
5. Exhibits A; B; C

By United States First Class Mail, to the following addresses:

1. Clerk of Court & DA
Douglas County District Court
P.O. Box 218
Minden, NV 89423

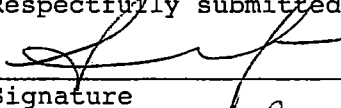
2. Attorney General - Nevada
100 N. Carson St.
Carson City, NV 89701

3. * Clerk of Court
Supreme Court of Nevada
201 S. Carson Street, Suite 201
Carson City, NV 89701

4. John E. Malone, ESQ
Nevada Bar No. 5706
209 N. Pratt Ave.
Carson City, NV 89701

Dated this 27 day of October, 2020.

Respectfully submitted,


Signature

Tatiana Leibel
Printed Name

* NOTE - page 2 of 2

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