

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

vs.

TATIANA LEIBEL,

Respondent,

\_\_\_\_\_ /

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Aug 30 2022 04:19 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No. 2014-CR-00062  
2014-CR-00062BD

RECORD ON APPEAL

VOLUME 28

COPIES OF ORIGINAL PLEADINGS  
PAGES 3540-3654

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

1  
2 INDEX OF PLEADINGS

3	<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
4	ADDENDUM TO NOTICE OF WITNESS (FILED JAN 23 '15)	701-702	(VOL. 5)
5	AFFIDAVIT OF PERSONAL SERVICE (FILED MAY 25 '18)	2424-2426	(VOL. 18)
6	AFFIDAVIT "A" (FILED NOV 9 '20)	3105-3119	(VOL. 23)
7	AFFIDAVIT "B" (FILED NOV 9 '20)	3120-3125	(VOL. 23)
8	AFFIDAVIT "C" (FILED NOV 9 '20)	3126-3132	(VOL. 23)
9	AFFIDAVIT "I" (FILED NOV 9 '20)	3133-3154	(VOL. 23)
10	AFFIDAVIT OF SERVICE BY MAIL (FILED DEC 24 '18)	3005-3006	(VOL. 22)
11	AFFIDAVIT (FILED OCT 6 '16)	1488-1489	(VOL. 11)
12	AFFIDAVIT "C" (FILED JAN 4 '21)	3545-3551	(VOL. 28)
13	AFFIDAVIT "II" (FILED NOV 23 '20)	3376-3386	(VOL. 26)
14	AFFIDAVIT "1" (FILED JAN 4 '21)	3449-3473	(VOL. 27)
15	AFFIDAVIT OF SERVICE BY MAIL (FILED JAN 6 '15)	537-545	(VOL. 3)
16	AFFIDAVIT "2" (FILED JAN 4 '21)	3474-3524	(VOL. 27)
17	AFFIDAVIT "A" (FILED JAN 4 '21)	3525-3539	(VOL. 27)
18	AFFIDAVIT "B" (FILED JAN 4 '21)	3540-3544	(VOL. 28)

1  
2 INDEX OF PLEADINGS

3	<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
4	ALTERNATIVE SENTENCING SUPPLEMENTAL		
5	REPORT		
6	(FILED APRIL 15'14)	84-85	(VOL. 1)
7	AMENDED ORDER FOR PAYMENT (SEALED)		
8	(FILED DEC 18'14)	413	(VOL. 2)
9	APPELLANT'S INFORMAL BRIEF		
10	(FILED APR 19'21)	3920-3928	(VOL. 30)
11	APPLICATION FOR APPOINTMENT OF		
12	INTERPRETER		
13	(FILED APRIL 18'14)	233-238	(VOL. 2)
14	APPLICATION FOR ORDER TO PRODUCE		
15	PRISONER		
16	(FILED SEP 27'18)	2504-2505	(VOL. 18)
17	APPLICATION FOR ORDER TO PRODUCE		
18	PRISONER		
19	(FILED AUG 8'18)	2431-2432	(VOL. 18)
20	BRIEF REGARDING STRUCTURAL		
21	(FILED SEP 17'18)	2494-2499	(VOL. 18)
22	CASE APPEAL STATEMENT		
23	(FILED MAR 8'21)	3915-3916	(VOL. 30)
24	CASE APPEAL STATEMENT		
25	(FILED JAN 18'19)	3009-3012	(VOL. 22)
26	CASE APPEAL STATEMENT		
27	(FILED JUN 22'22)	4036-4037	(VOL. 31)
28	CASE APPEAL STATEMENT		
29	(FILED MAY 11'15)	1085-1087	(VOL. 7)
30	CERTIFICATE OF MAILING		
31	(FILED FEB 1'21)	3858-3859	(VOL. 30)
32	CERTIFICATE OF MAILING		
33	(FILED JAN 11'21)	3785-3786	(VOL. 30)
34	CERTIFICATE OF SERVICE		
35	(FILED APRIL 11'14)	70	(VOL. 1)

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
CERTIFICATE OF SERVICE (FILED MAY 25 '18)	2430	(VOL. 18)
CERTIFICATE OF SERVICE (FILED SEP 29 '14)	280	(VOL. 2)
CERTIFICATE OF SERVICE (FILED APRIL 18 '14)	227	(VOL. 2)
CERTIFICATE OF SERVICE (FILED APRIL 18 '14)	232	(VOL. 2)
CERTIFICATE OF MAILING (FILED NOV 14 '16)	1510	(VOL. 11)
CERTIFICATE PF MAILING (FILED NOV 9 '20)	3366-3367	(VOL. 25)
CERTIFICATE OF MAILING (FILED MAR 21 '22)	4019-4020	(VOL. 31)
CERTIFICATE OF MAILING (FILED FEB 11 '21)	3907-3910	(VOL. 30)
CERTIFICATE OF MAILING (FILED NOV 23 '20)	3372-3375	(VOL. 25)
CERTIFICATE OF SERVICE (FILED AUG 4 '14)	269	(VOL. 2)
CERTIFICATE OF MAILING (FILED APR 21 '21)	3929-3930	(VOL. 30)
CERTIFICATE OF THAT NO TRANSCRIPT IS BEING REQUESTED (FILED JAN 18 '19)	3013-3014	(VOL. 22)
CLERK'S CERTIFICATE (FILED JUL 22 '20)	3049	(VOL. 22)
CLERKS CERTIFICATE(SUPREME COURT) (FILED JAN 14 '16)	1485	(VOL. 11)
EVIDENCE IN MITIGATION (FILED APR 14 '15)	999-1003	(VOL. 6)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
EX PARTE MOTION FOR FUNDS FOR INVESTIGATOR (FILED APRIL 7'17)	1550-1552	(VOL. 11)
EX PARTE MOTION FOR LEAVING TO HIRE INVESTIGATOR (FILED APRIL 14'17)	1553-1556	(VOL. 11)
EX PARTE INVOICE AND REQUEST FOR PAYMENT (FILED APRIL 3'17)	1546-1548	(VOL. 11)
EX PARTE APPLICATION FOR ADDITIONAL INVESTIGATIVE FEES (FILED JAN 2'15)	462-467	(VOL. 3)
EX PARTE INVOICE AND REQUEST FOR PAYMENT (FILED JUL 24'17)	1569-1570	(VOL. 11)
EX PARTE MOTION FOR FUNDS FOR A CRIME SCENE (FILE AUG 8'18)	2441-2443	(VOL. 18)
EX PARTE MOTION FOR INTERPRETER FEES (FILED MAY 16'18)	1971-1974	(VOL. 14)
EX PARTE MOTION FOR FUNDS FOR A PSYCHIATRIC EXPERT (FILED AUG 8'18)	2433-2436	(VOL. 18)
EX PARTE MOTION FOR INVESTIGATION FEES (FILED MAY 16'18)	1984-1986	(VOL. 14)
EX PARTE MOTION FOR POST CONVICTION REPRESENTATION EXPERT (FILED AUG 8'18)	2444-2447	(VOL. 18)
EX PARTE MOTION FOR FUNDS FOR LINGUISTICS EXPERT (FILED OCT 25'18)	2526-2530	(VOL. 18)
EX PARTE APPLICATION FOR FEES (SEALED) (FILED DEC 26'14)	445-447	(VOL. 3)

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
EX PARTE APPLICATION FOR FEES (SEALED) (FILED DEC 26 '14)	442-444	(VOL. 3)
EX PARTE APPLICATION FEES (SEALED) (FILED APRIL 17 '14)	228-231	(VOL. 2)
EX PARTE APPLICATION FOR FUNDS (SEALED) (FILED NOV 17 '14)	282-339	(VOL. 2)
EX PARTE MOTION FOR INTERPRETER (FILED AUG 16 '18)	2454-2456	(VOL. 18)
EX PARTE REQUEST FOR PAYMENT (SEALED) (FILED DEC 5 '14)	347-348	(VOL. 2)
EX PARTE MOTION FOR INVESTIGATION FEES (FILED MAY 16 '18)	1975-1983	(VOL. 14)
EX PARTE APPLICATION FOR FUNDS FOR EXPERT WITNESS (SEALED) (FILED DEC 5 '14)	341-346	(VOL. 2)
EX PARTE REQUEST FOR PAYMENT (FILED FEB 6 '15)	786-787	(VOL. 5)
EX PARTE MOTION FOR EXPERT WITNESS FEES (FILED MAR 7 '19)	3016-3029	(VOL. 22)
EXHIBITS FILED (FILED JAN 4 '21)	3693-3780	(VOL. 29)
EXHIBITS FILED (FILED JAN 4 '21)	3552-3654	(VOL. 28)
EXHIBITS FILED (FILED JAN 4 '21)	3655-3692	(VOL. 29)
FINANCIAL DISCLOSURE FORM (SEALED) (FILED NOV 14 '16)	1502-1507	(VOL. 11)
INDEX OF EXHIBITS (FILED NOV 9 '20)	3155-3256	(VOL. 24)

1  
2 INDEX OF PLEADINGS

3	<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
4	INDEX OF EXHIBIT(S) (FILED NOV 9'20)	3257-3278	(VOL. 24)
5	INDEX OF EXHIBITS (FILED NOV 9'20)	3279-3363	(VOL. 25)
7	INFORMATION (FILED APRIL 8'14)	55-60	(VOL. 1)
8	INSTRUCTION TO THE JURY (FILED FEB 5'15)	719-758	(VOL. 5)
10	ISSUED WRIT OF HABEAS CORPUS (FILED MAY 24'18)	2422-2423	(VOL. 18)
11	JUDGMENT OF CONVICTION (FILED APR 21'15)	1016-1018	(VOL. 7)
13	JURY VENIRE (FILED JAN 5'15)	471	(VOL. 3)
14	JURY VERDICT (FILED FEB 5'15)	710-718	(VOL. 5)
16	LIST OF TRIAL JURORS (FILED JAN 5'15)	470	(VOL. 3)
18	MOTION TO COMPEL COMPLIANCE WITH DISCLOSURE REQUIREMENTS (FILED SEP 4'18)	2475-2478	(VOL. 18)
20	MOTION IN LIMINE REGARDING CRIME SCENE AND AUTOPSY PHOTOGRAPHS (FILED DEC 12'14)	356-360	(VOL. 2)
22	MOTION TO STRIKE BRIEF REGARDING STRUCTURAL ERROR OR, IN THE ALTERNATIVE, MOTION FOR SUFFICIENT TIME TO RESPOND TO BRIEF IN WRITING (FILED SEP 18'18)	2500-2502	(VOL. 18)

25  
26  
27  
28

1  
2 INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
MOTION TO EXCLUDE TESTIMONY OF NATASHA KHARIKOVA (FILED OCT 29'18)	2532-2535	(VOL. 19)
MOTION FOR COURT APPOINTED FEES WITH AFFIDAVIT IN SUPPORT THEREOF (FILED APRIL 17'14)	221-223	(VOL. 2)
MOTION FOR COURT ORDER TO ALLOW DEFENSE INSPECTION OF SCENE OF ALLEGED OFFENSE (FILED DEC 31'14)	455-458	(VOL. 3)
MOTION TO RESPONDENT "MOTION TO DISMISS PRO PER SECOND POST CONVICTION PETITION FOR A WRIT OF HABEAS" (FILED JAN 11'21)	3781-3784	(VOL. 30)
MOTION TO PROCEED IN FORMA PAUPERIS (FILED MAY 11'15)	1078-1079	(VOL. 7)
MOTION TO WITHDRAW COUNSEL (FILED NOV 9'20)	3058-3066	(VOL. 22)
MOTION IN LIMINE REGARDING DEATH CERTIFICATE (FILED DEC 26'14)	424-441	(VOL. 3)
MOTION TO DISMISS PRO PER THIRD POST CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (FILED APRIL 5'22)	4023-4026	(VOL. 31)
MOTION IN LIMINE REGARDING UNCHARGED MISCONDUCT AND COLLATERAL OFFENSES (FILED DEC 29'14)	448-451	(VOL. 3)
MOTION FOR DISMISS PRO PER SECOND POST CONVICTION FOR WRIT OF HABEAS CORPUS (FILED NOV 19'20)	3368-3371	(VOL. 25)

26  
27  
28



INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (FILED JAN 24'18)	1574-1579	(VOL. 11)
MOTION FOR FUNDS FOR INTERPRETER (FILED MAY 9'17)	1561-1564	(VOL. 11)
MOTION FOR PRODUCTION OF JAVS RECORDINGS (FILED MAY 9'17)	1558-1560	(VOL. 11)
MOTION FOR PETITION FOR WRIT OF HABEAS CORPUS (SECOND POST CONVICTION) (FILED JAN 4'21)	3445-3446	(VOL. 27)
MOTION FOR PETITION TO ESTABLISH FACTUAL INNOCENCE (FILED JAN 4'21)	3447-3448	(VOL. 27)
MOTION FOR PETITION FOR EN BANC RECONSIDERATION (FILED JAN 3'22)	3933-3942	(VOL. 31)
MOTION FOR APPOINTMENT OF COUNSEL (FILED NOV 14'16)	1508-1509	(VOL. 11)
MOTION FOR ENLARGEMENT OF TIME (FILED APRIL 11'18)	1493-1497	(VOL. 11)
MOTION IN LIMINE REGARDING JUROR- QUESTIONING OF WITNESSES (FILED DEC 12'14)	351-355	(VOL. 2)
MOTION IN LIMINE REGARDING TESTIMONY CONCERNING CRIME SCENE RECONSTRUCTION BY MATTHEW NOEDEL (FILED JAN 20'15)	588-693	(VOL. 4)
MOTION TO CONTINUE (FILED AUG 4'14)	270-275	(VOL. 2)

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
MOTION TO RECONSIDER DECISION (FILED FEB 11'21)	3864-3906	(VOL. 30)
MOTION TO WITHDRAW REQUEST FOR PAYMENT FIREARM (FILED MAR 6'15)	815	(VOL. 5)
MOTION TO RECONSIDER DECISION (FILED FEB 1'21)	3815-3857	(VOL. 30)
MOTION TO WITHDRAW COUNSEL (FILED OCT 6'16)	1486-1487	(VOL. 11)
NON OPPOSITION TO DEFENDANTS MOTION IN LIMINE RE: UNCHARGED MISCONDUCT AND COLLATERAL OFFENSES (FILED JAN 12'15)	548-549	(VOL. 3)
NOTICE OF APPEAL (FILED JAN 18'18)	3007-3008	(VOL. 22)
NOTICE OF APPEAL (FILED JUN 21'22)	4035	(VOL. 31)
NOTICE OF APPEAL (FILED MAY 11'15)	1083-1084	(VOL. 7)
NOTICE OF APPEAL (FILED FEB 22'21)	3911-3914	(VOL. 30)
NOTICE OF ASSOCIATION OF COUNSEL (FILED SEP 17'18)	2492-2493	(VOL. 18)
NOTICE OF ENTRY OF ORDER (FILED MAY 25'18)	2427-2429	(VOL. 18)
NOTICE OF ENTRY OF ORDER (FILED DEC 24'18)	2986-3004	(VOL. 22)
NOTICE OF ENTRY OF ORDER (FILED JAN'21)	3801-3814	(VOL. 30)

1  
2 INDEX OF PLEADINGS

3	<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
4	NOTICE OF EXPERT WITNESS (FILED DEC 17'14)	369-412	(VOL. 2)
5			
6	NOTICE OF EXPERT WITNESS (FILED JAN 6'15)	472-536	(VOL. 3)
7			
8	NOTICE OF EXPERT WITNESS (FILED AUG'18)	2458-2474	(VOL. 18)
9			
10	NOTICE OF EXPERT WITNESS (FILED OCT 25'18)	2521-2525	(VOL. 18)
11			
12	NOTICE IN LIEU OF REMITTITUR (SUPREME COURT) (FILED MAR 15'22)	3954	(VOL. 31)
13			
14	NOTICE OF MOTION (FILED NOV 9'20)	3050-3052	(VOL. 22)
15			
16	NOTICE OF MOTION (FILED NOV 9'20)	3053-3057	(VOL. 22)
17			
18	NOTICE OF NON-CAPITAL PROCEEDINGS (FILED APRIL 8'14)	68-69	(VOL. 1)
19			
20	NOTICE OF NON-OPPOSITION TO DEFENDANTS MOTION IN LIMINE REGARDING DEATH CERTIFICATE (FILED DEC 29'14)	452-453	(VOL. 3)
21			
22	NOTICE OF PROSECUTION TRIAL WITNESS (FILED DEC 17'14)	361-368	(VOL. 2)
23			
24	NOTICE OF WITNESS (FILED JAN 20'15)	585-587	(VOL. 4)
25			
26	NOTICE OF WITNESSES (FILED SEP 10'18)	2485-2487	(VOL. 18)
27			
28	NOTICE OF WITHDRAWAL OF MOTION FOR COURT ORDER TO ALLOW DEFENSE INSPECTION OF SCENE OF ALLEGED		

1  
2 INDEX OF PLEADINGS

3	<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
4	OFFENSE (FILED JAN 12'15)	546-547	(VOL. 3)
5			
6	OPPOSITION TO STATE'S MOTION TO INCREASE BAIL		
7	(FILED APRIL 11'14)	71-80	(VOL. 1)
8	OPPOSITION TO DEFENDANTS MOTION TO LIMINE RE: CRIME SCENE RECONSTRUCTION		
9	(FILED JAN 22'15)	694-700	(VOL. 5)
10	ORDER OF AFFIRMANCE (FILED FEB 8'22)	3947-3949	(VOL. 31)
11	ORDER FOR PAYMENT (FILED 24'17)	1571	(VOL. 11)
12	ORDER DENYING REHEARING (FILED JAN 14'22)	3943	(VOL. 31)
13	ORDER (FILED SEP 27'17)	1573	(VOL. 11)
14	ORDER OF AFFIRMANCE (FILED DEC 20'21)	3931-3932	(VOL. 31)
15	ORDER TO CONTINUE (FILED AUG 4'14)	276	(VOL. 2)
16	ORDER GRANTING EXTENSION OF TIME (FILED JAN 30'18)	1584	(VOL. 11)
17	ORDER DIRECTING TRANSMISSION OF RECORD AND REGARDING BRIEFING (FILE MAR 23'21)	3918-3919	(VOL. 30)
18	ORDER (FILED MAY 11'17)	1566	(VOL. 11)
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

1  
2 INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
ORDER FOR APPOINTMENT OF CO-COUNSEL (FILED OCT 1'14)	281	(VOL. 2)
ORDER (FILED APRIL 12'18)	1970	(VOL. 14)
ORDER AUTHORIZING FUNDS FOR EMPLOYMENT OF A FORENSIC PATHOLOGIST AND SEALING APPLICATION AND ORDER (SEALED) (FILED NOV 17'14)	340	(VOL. 2)
ORDER (FILED MAY 14'15)	1088-1089	(VOL. 7)
ORDER (FILED MAY 11'17)	1565	(VOL. 11)
ORDER GRANTING EX PARTE MOTION FOR INVESTIGATION FEES (FILED MAY 17'18)	1987	(VOL. 14)
ORDER GRANTING EX PARTE MOTION FOR INTERPRETER FEES (FILED MAY 17'18)	1988	(VOL. 14)
ORDER GRANTING EX PARTE MOTION FOR INVESTIGATION FEES (FILED MAY 17'18)	1989	(VOL. 14)
ORDER (FILED FEB 5'21)	3862-3863	(VOL. 30)
ORDER FOR PAYMENT (SEALED) (FILED DEC 8'14)	349	(VOL. 2)
ORDER AUTHORIZING FUNDS FOR FORENSIC PATHOLOGIST AND SEALING APPLICATION AND ORDER (SEALED) (FILED DEC 9'14)	350	(VOL. 2)
ORDER DENYING PETITION (SUPREME COURT) (FILED FEB 22'22)	3952-3953	(VOL. 31)

26  
27  
28

1  
2 INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
ORDER GRANTING MOTION FOR LEAVE TO HIRE INVESTIGATOR (FILED APRIL 17'17)	1557	(VOL. 11)
ORDER FOR PAYMENT OF ATTORNEY FEES (FILED APRIL 21'14)	241	(VOL. 2)
ORDER FOR ISSUANCE OF WRIT OF HABEAS CORPUS (FILED MAY 24'18)	2421	(VOL. 18)
ORDER (FILED JAN 11'21)	3789-3800	(VOL. 30)
ORDER TRANSFERRING CASE TO DEPARTMENT 1 VACATING THE HEARING SET FOR DECEMBER 22, 2014 AND CONFIRMING THE TRIAL DATE OF JANUARY 27, 2015 AT 9:00AM (FILED DEC 19'14)	414	(VOL. 2)
ORDER SETTING TRIAL (FILED APRIL 21'14)	239-240	(VOL. 2)
ORDER CONFIRMING TRIAL DATES AND SETTING PRE-TRIAL CONFERENCE (FILED DEC 24'14)	415-416	(VOL. 2)
ORDER FOR PAYMENT (FILED APRIL 4'17)	1549	(VOL. 11)
ORDER (FILED JUNE 23'17)	1568	(VOL. 11)
ORDER FOR PAYMENT (FILED MAR 9'15)	998	(VOL. 6)
ORDER (FILED AUG 9'18)	2448-2449	(VOL. 18)
ORDER TO PRODUCE PRISONER (FILED AUG 9'18)	2450	(VOL. 18)

26  
27  
28

1  
2 INDEX OF PLEADINGS

3	<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
4	ORDER (FILED AUG 9'18)	2451	(VOL. 18)
5	ORDER (FILED AUG 9'18)	2452	(VOL. 18)
6	ORDER (FILED AUG 9'18)	2453	(VOL. 18)
7	ORDER (FILED AUG 9'18)	2453	(VOL. 18)
8	ORDER CALLING JURY (FILED JAN 2'15)	459-460	(VOL. 3)
9	ORDER GRANTING EX PARTE MOTION FOR INTERPRETER FEES (FILED AUG 20'18)	2457	(VOL. 18)
10	ORDER (FILED JUN 21'22)	4031-4034	(VOL. 31)
11	ORDER FOR PAYMENT (K. BROWN) (FILED FEB 23'15)	814	(VOL. 5)
12	ORDER SHORTENING TIME TO RESPOND TO MOTION TO COMPEL (FILED AEP 6'18)	2479	(VOL. 18)
13	ORDER AUTHORIZING ADDITIONAL FEES FOR EMPLOYMENT OF AN INVESTIGATOR AND TO SEAL PLEADINGS (SEALED) (FILED JAN 2'15)	461	(VOL. 3)
14	ORDER (FILED JAN 3'17)	1545	(VOL. 11)
15	ORDER (FILED SEP 13'18)	2490-2491	(VOL. 18)
16	ORDER ALLOWING THE DEFENSE TO PURCHASE WEAPON (FILED JAN 5'15)	468	(VOL. 3)
17	ORDER (FILED NOV 28'16)	1540-1541	(VOL. 11)
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
ORDER FOR PAYMENT (FORENSIC TECH) (FILED FEB 23'15)	813	(VOL. 5)
ORDER FOR PAYMENT (NANCY STRAYERN) (FILED FEB 23'15)	812	(VOL. 5)
ORDER SETTING CONTINUES HEARING (FILED SEP 19'18)	2503	(VOL. 18)
ORDER AUTHORIZING FEES FOR EMPLOYMENT OF INVESTIGATOR AND TO SEAL PLEADINGS (SEALED) (FILED APRIL 17'14)	219	(VOL. 1)
ORDER GRANTING MOTION IN LIMINE REGARDING JUROR QUESTIONING OF WITNESS (FILED JAN 12'15)	550	(VOL. 3)
ORDER INCREASING BAIL (FILED APRIL 14'14)	82-83	(VOL. 1)
ORDER TO PRODUCE PRISONER (FILED OCT 1'18)	2520	(VOL. 18)
ORDER (FILED OCT 25'18)	2531	(VOL. 18)
ORDER OF AFFIRMANCE (FILED DEC 21'15)	1479-1480	(VOL. 11)
ORDER (FILED DEC 23'20)	3387-3389	(VOL. 26)
ORDER RE: MOTION IN LIMINE REGARDING DEATH CERTIFICATE (FILED JAN 14'15)	551	(VOL. 4)
ORDER RE: MOTION IN LIMINE REGARDING UNCHARGED MISCONDUCT AND COLLATERAL OFFENSES (FILED JAN 14'15)	552	(VOL. 4)



1  
2 INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
ORDER APPOINTING COUNSEL (FILED APRIL 14'14)	81	(VOL. 1)
ORDER AUTHORIZING FEES FOR EMPLOYMENT OF A FORNSIC INVESTIGATOR (FILED DEC 30'14)	454	(VOL. 3)
ORDER (FILED JAN 26'15)	703-704	(VOL. 5)
ORDER DIRECTING TRANSMISSION OF RECORDS AND REGARDING BRIEFING (FILED AUG 1'22)	1500-1501	(VOL. 11)
ORDER DENYING POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (FILED DEC 20'18)	2969-2985	(VOL. 22)
ORDER DENYING REHEARING (SUPREME COURT) (FILED FEB '8'22)	3945-3946	(VOL. 31)
ORDER SETTING HEARING (FILED MAY 24'18)	2419-2420	(VOL. 18)
ORDER OF AFFIRMANCE (SUPREME COURT) (FILED JUL 22'20)	3040-3048	(VOL. 22)
ORDER OF AFFIRMANCE (SUPREME COURT) (FILED JAN 14'16)	1481-1483	(VOL. 11)
ORDER FOR PAYMENT (FILED FEB 9'15)	788	(VOL. 5)
ORDER OF AFFIRMANCE (FILED JUNE 26'20)	3031-3038	(VOL. 22)
ORDER GRANTING EX PARTE MOTION FOR EXPERT WITNESS FEES (FILED MAR 7'19)	3030	(VOL. 22)
ORDER AND COMMITMENT (FILED APRIL 4'14)	8-54	(VOL. 1)

26  
27  
28

1  
2 INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) (FILED JAN 4'21)	3400-3444	(VOL. 26)
PETITION FOR WRIT OF HABEAS CORPUS (FILED MAR 21'22)	3955-4018	(VOL. 31)
PETITION FOR WRIT OF HABEAS CORPUS (FILED NOV 14'16)	1511-1539	(VOL. 11)
PETITION FOR WRIT OF HABEAS CORPUS 2ND (POST CONVICTION) (FILED NOV 9'20)	3067-3104	(VOL. 23)
PETITIONER'S OPPOSITION TO MOTION TO EXCLUDE (FILED NOV 6'18)	2536-2548	(VOL. 19)
PETITIONER'S RESPONSE TO MOTION TO COMPEL AND COUNTERMOTION FOR WAIVER OF OBLIGATION TO PRODUCE EXPERT REPORTS PURSUANT TO NRCP (FILED SEP 6'18)	2480-2484	(VOL. 18)
PRE-SENT INVESTIGATION-CONFIDENTIAL (SEALED) (FILED APR 17'15)	1-7	(VOL. 1)
PRO PER SECOND POST CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS (FILED JAN 4'21)	3394-3395	(VOL. 26)
RECEIPT OF DOCUMENTS (SUPREME COURT) (FILED JAN 30'19)	3015	(VOL. 22)
RECEIPT FOR DOCUMENTS (SUPREME COURT) (FILED FEB 2'22)	1498	(VOL. 11)
RECEIPT FOR DOCUMENTS (SUPREME COURT) (FILED JUNE 27'22)	1499	(VOL. 11)
RECEIPT FOR DOCUMENTS (SUPREME COURT) (FILED JUNE 4'15)	1091	(VOL. 7)

27  
28

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
RECEIPT FOR DOCUMENTS (FILED MAR 11'21)	3917	(VOL. 30)
REMITTITUR (FILED JUL 22'20)	3039	(VOL. 22)
REMITTITUR (FILED FEB 9'22)	3951	(VOL. 31)
REMITTITUR (SUPREME COURT) (FILED JAN 14'16)	1484	(VOL. 11)
REPLY TO OPPOSITION TO MOTION TO EXCLUDE TESTIMONY OF NATASHA KHARIKOVA (FILED NOV 7'18)	2549-2560	(VOL. 19)
REQUEST FOR SUBMISSION (FILED NOV 9'20)	3364-3365	(VOL. 25)
REQUEST FOR PAYMENT (FILED FEB 18'15)	789-794	(VOL. 5)
REQUEST FOR PAYMENT (FILED FEB 18'15)	798-799	(VOL. 5)
REQUEST FOR PAYMENT (FILED FEB 18'15)	795-797	(VOL. 5)
REQUEST FOR SUBMISSION OF MOTION (FILED MAR 21'22)	4021-4022	(VOL. 31)
REQUEST FOR APPOINTMENT OF CO-COUNSEL (FILED SEP 29'14)	279	(VOL. 2)
REQUEST FOR SUBMISSION OF MOTION (FILED FEB 1'21)	3860-3861	(VOL. 30)
REQUEST FOR SUBMISSION- (SECOND PETITION OF HABEAS CORPUS POST CONVICTION) (FILED JAN 4'21)	3396-3397	(VOL. 26)
REQUEST FOR SUBMISSION OF MOTION (FILED JAN 4'21)	3398-3399	(VOL. 26)

1  
2  
3  
4  
5  
6  
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26  
27  
28

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
REQUEST FOR DISCOVERY (FILED APRIL 17'14)	224-226	(VOL. 2)
REQUEST FOR PAYMENT (FILED FEB 18'15)	803-811	(VOL. 5)
REQUEST FOR SUBMISSION (FILED SEP 13'18)	2487-2489	(VOL. 18)
REQUEST FOR SUBMISSION (FILED APRIL 17'14)	220	(VOL. 2)
REQUEST FOR ROUGH DRAFT TRANSCRIPT (FILED MAY 11'15)	1080-1082	(VOL. 7)
REQUEST FOR PAYMENT (FILED FEB 18'15)	800-802	(VOL. 5)
REQUEST FOR SUBMISSION OF MOTION (FILED JAN 11'21)	3787-3788	(VOL. 30)
RESPONSE TO MOTION IN LIMINE REGARDING JUROR QUESTIONING OF WITNESS (FILED DEC 26'14)	421-423	(VOL. 2)
RESPONSE TO MOTION IN LIMINE REGARDING CRIME SCENE AND AUTOPSY PHOTOGRAPHS (FILED DEC 26'14)	417-420	(VOL. 2)
RESPONSE TO MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (FILED JAN 30'18)	1580-1583	(VOL. 11)
RESPONSE TO MOTION FOR EXTENSION OF TIME (FILED JAN 30'18)	1580-1583	(VOL. 11)
RESPONSE TO POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (PART 1) (FILED MAY 17'18)	1990-2075	(VOL. 14)

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
RESPONSE TO POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (PART 2) (FILED MAY 17'18)	2076-2210	(VOL. 15)
RESPONSE TO POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (PART 4) (FILED MAY 17'18)	2316-2418	(VOL. 17)
RESPONSE TO POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (PART 3) (FILED MAY 17'18)	2211-2315	(VOL. 16)
RESPONSE TO BRIEF REGARDING ALLEGED STRUCTURAL ERROR IN FAILING TO OBTAIN AN INTERPRETER. (FILED SEP 29'18)	2506-2510	(VOL. 18)
STATE'S MOTION TO INCREASE BAIL (FILED APRIL 8'14)	61-67	(VOL. 1)
STATE'S NON-OPPOSITION TO DEFENDANT'S MOTION TO CONTINUE (FILED AUG 4'14)	277-278	(VOL. 2)
STIPULATION TO EXTEND TIME TO FILE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (FILED JUNE 22'17)	1567	(VOL. 11)
STIPULATION TO EXTEND OF TIME TO FILE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS -SECOND REQUEST (FILED DEC 24'16)	1542	(VOL. 11)
STIPULATION TO WAIVE PENALTY HEARING BY JURY (FILED JAN 16'15)	553-554	(VOL. 4)
STIPULATION TO EXTEND TIME TO FILE PETITION FOR WRIT OF HABEAS CORPUS (FILED SEP 25'17)	1572	(VOL. 11)

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
SUBPOENA FILED (CHRIS HEADRICK) (FILED JAN 28'15)	705	(VOL. 5)
SUBPOENA FILED (JIM ANTE) (FILED JAN 29'15)	709	(VOL. 5)
SUBPOENA FILED (FILED JAN 29'15)	707	(VOL. 5)
SUBPOENA FILED (FILED JAN 29'15)	706	(VOL. 5)
SUBPOENA FILED (FILED JAN 29'15)	708	(VOL. 5)
SUPPLEMENTAL CERTIFICATE OF SERVICE RE: REQUEST FOR ROUGH DRAFT TRANSCRIPT (FILED MAY 27'15)	1090	(VOL. 7)
SUPPLEMENTAL POSTCONVICTION PETITION FOR A WRIT OF HABEAS CORPUS NRS 34.361 ET SEQ. (PART 2) (FILED FEB 26'18)	1778-1969	(VOL. 13)
SUPPLEMENTAL EVIDENCE IN MITIGATOR (FILED APR 20'15)	1011-1015	(VOL. 7)
SUPPLEMENTAL POSTCONVICTION PETITION FOR A WRIT OF HABEAS CORPUS NRS 34.361 ET SEQ. (PART 1) (FILED FEB 26'18)	1585-1777	(VOL. 12)
TRANSCRIPT OF PROCEEDINGS- ARRAIGNMENT 4/14/14 (FILED MAY 19'14)	242-261	(VOL. 2)
TRANSCRIPT OF JURY TRIAL 1/27/2015 ROUGH DRAFT (FILED JUNE 18'15)	1105-1119	(VOL. 8)

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
TRANSCRIPT OF JURY TRIAL 1/28/15 (FILED JUNE 18'15)	1120-1202	(VOL. 8)
TRANSCRIPT OF JURY TRIAL 1/29/15 (FILED JUNE 18'15)	1203-1285	(VOL. 9)
TRANSCRIPT OF PROCEEDINGS (POST CONVICTION HEARING 11/16/18) (FILED NOV 29'18)	2561-2637	(VOL. 19)
TRANSCRIPT OF PROCEEDINGS (SENTENCING HEARING) (FILED MAY 5'15)	1019-1077	(VOL. 7)
TRANSCRIPT OF PROCEEDINGS (POST CONVICTION HEARING 11/15/18) (PART 1) (FILED DEC 5'18)	2638-2796	(VOL. 20)
TRANSCRIPT OF JURY TRIAL 2/2/2015 (FILED JUNE 18'15)	1351-1387	(VOL. 10)
TRANSCRIPT OF JURY TRIAL 2/4/2015 (FILED JUNE 18'15)	1388-1446	(VOL. 11)
TRANSCRIPT OF PROCEEDINGS (MOTIONS HEARING) (FILED JAN 20'15)	555-584	(VOL. 4)
TRANSCRIPT OF JURY TRIAL 1/23/2015 ROUGH DRAFT (FILED JUNE 18'15)	1092-1104	(VOL. 8)
TRANSCRIPT OF PROCEEDINGS (JURY SELECTION) (FILED MAR 9'15)	816-997	(VOL. 6)
TRANSCRIPT OF JURY TRIAL 2/5/2015 (FILED JUNE 18'15)	1447-1478	(VOL. 11)
TRANSCRIPT OF PROCEEDINGS - PRELIMINARY HEARING (FILED APRIL 16'14)	86-218	(VOL. 1)

INDEX OF PLEADINGS

<u>DESCRIPTION</u>	<u>PAGE NO.</u>	<u>VOL. NO.</u>
TRANSCRIPT OF PROCEEDINGS (ARRAIGNMENT) (FILED MAY 21 '14)	262-266	(VOL. 2)
ORDER SETTING TRIAL (FILED AUG 4 '14)	267-268	(VOL. 2)
TRANSCRIPT OF PROCEEDINGS (MOTIONS HRG.) (FILED SEP 28 '18)	2511-2519	(VOL. 18)
TRANSCRIPT OF PROCEEDINGS (POST CONVICTION HEARING 11/15/18) (PART 2) (FILED DEC 5 '18)	2797-2968	(VOL. 21)
TRANSCRIPT OF JURY TRIAL 1/30/2015 (FILED JUNE 18 '15)	1286-1350	(VOL. 10)
TRANSCRIPT OF PROCEEDINGS (MOTION HEARING) (FILED FEB 5 '15)	759-785	(VOL. 5)
VICTIM IMPACT STATEMENTS AND PHOTOGRAPH OF VICTIM (FILED APR 20 '15)	1004-1010	(VOL. 6)



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4370 Smiley Rd.  
Las Vegas, NV 89115

Douglas County  
District Court Clerk

2021 JAN -4 AM 10:58

In The 9th Judicial District Court of the State of Nevada

In and for the County of DOUGLAS

In the matter of:

Tatiana Leibel

Plaintiff/Petitioner

v. The State of Nevada

Defendant/Respondent

Case No: 2014-CR-00062 BD

Dept No.: 1

AFFIDAVIT "B"

STATE OF NEVADA

COUNTY OF Douglas

1. My personal knowledge or personal observations of the situation  
is/are as follows:

I am the Petitioner in the above entitled action. I have  
personal knowledge of the facts contained in the above-entit-  
led case and am competent to testify to these facts.

According of the Nevada Constitution under NRS  
34.900-34.990, I write this Affidavit "B" for support  
of the Petition to Establish Factual Innocence. This  
Affidavit "B" under NRS 176.09117 ("Forensic laboratory"  
means any laboratory designated pursuant to  
NRS 176.0917).

1) Under NRS 171.1239-Electronic recording of coes-  
todial interrogations conducted in place of detention:

a) I was interviewed by three different inves-  
tigators for more than eight hours. This interview  
was all videotaped, but "the time clock start over

1 at 19:00 a couple of times".

2 Trial counsel was question to investigator Mr. Garren:

3 "Q: ...This interview was all videotaped... (A: Correct)

4 "Q: In any event, did you notice the time clock  
5 start over at 19:00 a couple of times, is that correct?  
6

7 b). Also, according testimony Mr. Moffat about recor-  
8 ding all is was damage - FOUR GAPS in the record:

9 Q: Mr. Moffat, did you - did you say that you did  
10 record - that you recorded this call?

11 A: Yes. I assisted in making the recording of the  
12 call, yes.

13 Q: And did you listen to the call before you gave it  
14 to the District Attorneys office? (A: Yes)

15 Q: Okay, and did you hear the gaps in the recor-  
16 ding of this call? (A: Yes)

17 Q: There were approximately FOUR OF THEM, is  
18 that correct? (A: I wasn't counting).

19 Q: Okay. Were those GAPS PART of the actual 911 call?

20 A: NO (trial p. 11, Jan 27, 2015)

21  
22 2) My Harry and I both has modern "Android" phones  
23 from company "Verizon". In 2014 not very comen phone.  
24 I believe that prosecutor knows that investigator Mr.  
25 Garren fraudulently altered phone "TIME" by manual  
26 in part:

27 "...I entered the date and time to reflect what  
28 the time would be in our time zone, the Pacific.

time zone, and it comes up during daylight savings time as minus eight hours." (trial p. 156, Jan 28, 2015)

According prosecutor in closing arguments about search web pages is NO LOGICAL EXPLANATION:

"The first activity on Tatiana's phone that day was at 5:54 in the morning where there's a Google search conducted on Tatiana's phone, and the search is for gun stores in Reno, Nevada. And at 5:55 a search for the U.S. Firearms Academy. And 5:57 another Google search for gun stores in Reno, Nevada, and then at 5:57 is the booking, the hotel booking." (trial p. 5, Feb. 5, 2015)

Well, I'm wondering how physically to search Google same time. Also, it's not time enough to be actually searching web for any particular information. This is beyond my comprehension. If I try to play "real time" the the prosecutor statement, exactly one hour missing;

(10:13) "... 9:13 Lana tries to call Tatiana ..."

(10:15) "... 9:15 she text messages Tatiana ..."

(10:34) "... 9:34 call again ..."

(10:41) "... 9:41 she tries again ..."

(10:56) "... 9:56 that she finally gets response from Tatiana ..."

(11:03) "... Lana then texts her back at 10:03"

(trial p. 6, Feb. 5, 2015)

"The next thing we know that happens is at 11:03 in the morning, Tatiana call 911." (trial p. 7, Feb. 5, 2015)

My and Kassy's phones was not password protected this time. Next day, after interview eight hours, investigator Mr. Warren issued a warrant for my arrest. There was no mention about

1 "locksmith." However, one year later at trial these issues brought  
2 up by prosecutor:

3 "Harry, as you heard from the testimony regarding his cell pho-  
4 ne, had punched in that he was going to call the locksmith  
5 on February 25th." (trial p.2, Feb. 5, 2015)

6 Surprisingly, my family was found from technical depart-  
7 ment phone company "Verizon", this conversion NOT ONLY  
8 unnecessary, but it has ALSO LEFT PLENTY of room for  
9 ALOT ERROR'S because a manual in-put by investigator.

10  
11 3) Additionally, Investigator Carren obtained an arrest warrant  
12 Affidavit for arrest alleging that there were CAMERAS OUT-  
13 SIDE of the house that proved crime. But Harry and I in the  
14 house and crime scene IN THE HOUSE. I was ARRESTED  
15 UNDER FALSE EVIDENCE. (see Exhibit A8) (trial pp 189-192, Jan 28, 2015)

16  
17 4) Photographs was made morning by Deputy and at 4:00  
18 by the evidence technician are very very different (disrupted and  
19 contaminated). In Deputy's photos for example the rifle strap  
20 covers most of the cylinder, hammer and trigger. But in the  
21 photos made by technician, the cylinder hammer and trigger  
22 are clearly visible, and the hammer is cocked. However, the  
23 gun had been moved four times and the scene had been  
24 contaminated. (see Affidavit "2")

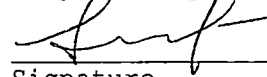
25 Also, had been moved the furniture and many objects.  
26 (see Affidavit "2")

27 In my case the law enforcement made the numerous  
28 mistakes during the initial investigation and the CORRUPT-

1 TION OF THE crime scene and the documents an photographs  
2 when insufficient information. Regarding forensic testing  
3 was largely inconclusive, because have many FALSIF-  
4 FLYING and ALTERING evidences

13 Dated this 28 day of December, 2020.

14 Respectfully submitted,

15 

16 Signature

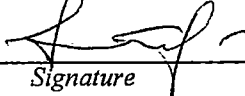
17 Tatiana Leibel  
Printed Name

18 DECLARATION UNDER PENALTY OF PERJURY

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

21 I declare, under the penalty of perjury under the laws of the United States of America,  
22 that the above and/or foregoing information is accurate, correct and true to the best of my knowledge, executed  
23 within the terms of <sup>1</sup>NRS 171.102 and <sup>2</sup>NRS 208.165. See <sup>3</sup>28 U.S.C. 1746 and 18 U.S.C. 1621.

24 Dated this 28 day of December, 2020

25   
Signature

26 Tatiana Leibel  
Nevada Department of Corrections ID #

27 <sup>1</sup> NRS 171.102

28 <sup>2</sup> NRS 208.165

<sup>3</sup> 28 U.S.C.

§1746. Unsworn declarations under penalty of perjury

18 U.S.C.

§ 1621. Perjury generally

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JAN 04 2021

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

2021 JAN -4 AM 10:53

In The 9 Judicial District Court of the State of Nevada  
In and for the County of DOUGLAS

ROBBIE S. WILLIAMS  
CLERK  
BY DSJ DEPUTY

In the matter of:

Tatiana Leibel

Plaintiff/Petitioner

Case No: 2014-CR-00062 BD

The State of Nevada

Defendant/Respondent

Dept No.: 1

AFFIDAVIT "C"

STATE OF NEVADA )

COUNTY OF Douglas )

1. I am the ☒ Plaintiff/Petitioner ☐ Defendant/Respondent in the above entitled action. I have personal knowledge of the facts contained in the above-entitled case and am competent to testify to these facts.
2. My personal knowledge or personal observations of the situation is/are as follows:

According of the Nevada Constitution under NRS 34.900 - 34.990, I write this Affidavit "C" for support of the Petition to Establish Factual Innocence. This Affidavit "C" under NRS 176.09118 ("Genetic marker analysis" means the analytical testing process of a biological specimen that results in a DNA profile).

See "Postconviction Petition Requesting a Genetic Marker Analysis of Evidence within the possession or custody of the State of Nevada" (NRS 176.0918).

CASE NO. 2014-CR-00062

DEPT. NO. 1

IN THE 9 JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR THE COUNTY OF Douglas

Tatiana Leibel,

Petitioner

vs.

STATE OF NEVADA,

Respondent

**POSTCONVICTION PETITION  
REQUESTING A GENETIC MARKER  
ANALYSIS OF EVIDENCE WITHIN  
THE POSSESSION OR CUSTODY  
OF THE STATE OF NEVADA  
(NRS 176.0918)**

TO: THE CLERK OF THE COURT FOR Douglas COUNTY,  
(County Where Petitioner Was Convicted)  
STATE OF NEVADA; THE ATTORNEY GENERAL OF THE STATE OF NEVADA,

AND; THE OFFICE OF THE DISTRICT ATTORNEY FOR THE STATE OF

NEVADA, COUNTY OF Douglas.  
(County of District Attorney Where Petitioner Was Convicted)

1. I, Tatiana Leibel, am the Petitioner in this matter. This  
(Name of Petitioner / Convicted Inmate)  
Petition requests this Court to issue an Order for a Genetic Marker Analysis of evidence  
pursuant to NRS 176.0918.

2. Petitioner is informed and believes, and on the basis of such belief, alleges in good  
faith that the State of Nevada, or a political subdivision of the State of Nevada, has  
possession and control evidence in the form of Genetic Marker Information relating to the  
investigation or prosecution that resulted in Petitioner's Judgment of Conviction.

3. The Petitioner was convicted of committing all of the following Category A or Category B felony / felonies:

<u>200.030</u>	<u>Degrees of murder</u>	<u>B</u>	<u>4-21-2015</u>
Crime's NRS	Title of Crime	Category A or B	Date of Conviction
<u>200.010 (1)</u>	<u>"Murder" defined</u>	<u>B</u>	<u>4-21-2015</u>
Crime's NRS	Title of Crime	Category A or B	Date of Conviction
<u>193.165</u>	<u>Use of deadly weapon</u>	<u>B</u>	<u>4-21-2015</u>
Crime's NRS	Title of Crime	Category A or B	Date of Conviction
<u>      </u>	<u>      </u>	<u>      </u>	<u>      </u>
Crime's NRS	Title of Crime	Category A or B	Date of Conviction

4. (If applicable) The Petitioner was sentenced to death and the date set for the execution is N/A.  
(Date of Execution if known)

5. Pursuant to NRS 176.0918(3)(a), the following information identifies the specific evidence either known or believed by the Petitioner to be in the possession or custody of the State of Nevada that can be subject to Genetic Marker Analysis. (Set forth the identity of such evidence here)

see: Grounds second post-conviction  
affidavits: "1", "2", "A", "B"



6. Pursuant to NRS 176.0918(3)(b), the following is the Petitioner's rationale as to why a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through Genetic Marker Analysis of the evidence identified in paragraph 5. (Set forth your rationale here)

see: Grounds second post-conviction  
Affidavits: "1", "2", "A", "B"

7. Pursuant to NRS 176.0918(3)(c), the type of Genetic Marker Analysis the Petitioner is requesting to be conducted on the evidence identified in paragraph 5 is:

see: Grounds second post-conviction  
Affidavits: "1", "2", "A", "B"

8. [If applicable] Pursuant to NRS 176.0918(3)(d), the following are the results of all prior Genetic Marker Analysis performed on the evidence in the trial which resulted in the Petitioner's conviction. (Set forth all of such evidence here)

see: Grounds second post-conviction  
Affidavits: "1", "2", "A", "B"

9. (If applicable) Pursuant to NRS 176.0918(3)(e), the following is a statement of the Petitioner 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. (Set forth the applicable facts here)

see: Grounds second post-conviction  
Affidavits: "1", "2", "A", "B"

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PRAYER FOR GRANTING OF PETITION**

The petitioner respectfully requests that the Court, pursuant to NRS 176.0918, grant the Petitioner's POSTCONVICTION PETITION REQUESTING A GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION OR CUSTODY OF THE STATE OF NEVADA and the Petitioner requests this Court to issue an Order for a Genetic Marker Analysis of evidence pursuant to NRS 176.0918 (9).

Dated this 28 day of December, 2020

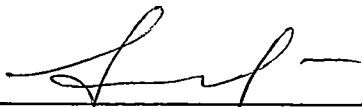


(Petitioner's Signature Here)

**DECLARATION OF PETITIONER**

I, Tatiana Leibel, declare and attest under penalty of perjury  
(Name of Petitioner / Convicted Inmate)  
of the laws of the State of Nevada that the information contained in this Petition does not contain any material misrepresentation of fact and that I have a good faith basis for relying on particular facts for the request.

Dated this 28 day of December, 2020

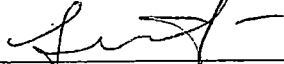


(Petitioner's/Declarant's Signature here)

DOC 2083 (04/10)

Dated this 28 day of December, 2010.

Respectfully submitted,

  
Signature

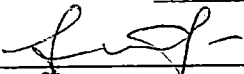
Tatiana Seibel  
Printed Name

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 <sup>1</sup>NRS 171.102 and <sup>2</sup>NRS 208.165. See <sup>3</sup>28 U.S.C. 1746 and 18 U.S.C. 1621.

Dated this 28 day of December, 2010

  
Signature

1137908  
Nevada Department of Corrections ID #

<sup>1</sup> NRS 171.102

<sup>2</sup> NRS 208.165

<sup>3</sup> 28 U.S.C.

§1746. Unsworn declarations under penalty of perjury  
18 U.S.C.

§ 1621. Perjury generally

JAN 9 2021

## INDEX OF EXHIBIT(S)

2014-CR-00062BD

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A  
B  
C  
D  
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F  
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A1 = Supreme Court Appeal-Affirmance

A2 = Court of Appeal - orders of Affirmance

A3 = Transcript - Trial - Errors

A4 = Reporting Professional Misconduct

A5 = Selection Jury peers - nationality

A6 = NRS 171.123 Temporary Detention

A7 = Assertion of Rights

A8 = NRS 171.1232 Electronic Recording

A9 = Ineffective Assistance of Counsel

A10 = Real Time

A11 = Prosecutor Statement

A12 = DNA &amp; Fingerprints

A13 = Experts - not immediately Fatal

A14 = Justice - FAILED

\*Note: highlights are added for ease of reference quotations

CASE NUMBER SC 77989

EXHIBIT A1

Supreme Court - Appeal - Affirmance

IN THE SUPREME COURT OF THE STATE OF NEVADA

TATIANA LEIBEL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 77989

**FILED**

JUN 24 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY [Signature]  
CHIEF DEPUTY CLERK

**ORDER OF AFFIRMANCE**

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Ninth Judicial District Court, Douglas County; Nathan Tod Young, Judge.

Appellant claims that the district court erred in denying her claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant, whose native language is Russian, argues that trial counsel should have used an interpreter for attorney-client meetings because her limited understanding of English did not allow her to make a fully informed decision about whether to testify. Appellant has not demonstrated deficient performance or prejudice. Trial counsel testified at the evidentiary hearing that she was able to communicate with appellant, explained anything appellant did not understand, and appellant declined an interpreter for attorney-client meetings. Trial counsel obtained an interpreter for court proceedings because there would be no opportunity to explain issues appellant did not understand. The district court found trial counsel's testimony credible and that appellant could communicate effectively in English. The record supports the district court's findings. Appellant has lived in the United States for 25 years and graduated from the University of Nevada, Reno, completing courses taught in English. The district court observed appellant's language abilities in her recorded interviews with the police and during court proceedings.<sup>1</sup> Appellant further has not demonstrated a reasonable probability of a different outcome had trial counsel obtained an interpreter for attorney-client meetings. Therefore, the district court did not err in denying this claim.<sup>2</sup>

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<sup>1</sup>The district court canvassed appellant about her right to testify, and she affirmatively indicated she did not want to testify. Trial counsel testified that she advised appellant not to testify because of concerns regarding prior bad acts, and appellant has not demonstrated that she did not understand counsel's advice.

<sup>2</sup>Appellant's related argument that the district court abused its discretion in not allowing a certified Russian-English interpreter to testify as an expert regarding appellant's understanding of English is without merit. The district court determined that the interpreter did not have information that would assist it in evaluating appellant's ability to understand English during attorney-client meetings. NRS 50.275 ("If



2  
v

Next, appellant argues that trial counsel should have objected to S. Oren's testimony that he was afraid for the victim's life and warned the victim that appellant may kill him. Although trial counsel objected several times on the grounds of relevance and speculation, appellant argues that trial counsel should have argued that this testimony constituted prior-bad-act evidence, hearsay, and the evidence had not been disclosed by the State. Appellant also argues that trial counsel should have cross-examined Oren about the statement. Appellant fails to demonstrate deficient performance or prejudice. The district court determined that this testimony did not involve a prior bad act, and appellant has not demonstrated otherwise. See NRS 48.045(2) (describing prior-bad-act evidence). Appellant has not demonstrated any discovery violation regarding this statement. See *Bradley v. Eighth Judicial Dist. Court*, 133 Nev. 754, 759, 405 P.3d 668, 673 (2017) (recognizing that there is not a general constitutional right to discovery); cf. NRS 174.235(1)(a) (providing that the prosecuting attorney shall permit the defendant to inspect and copy any written or recorded statements). Appellant has not made any cogent

scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."). The witness, while qualified as an interpreter, did not perform any testing, only vaguely referred to standards in evaluating language competence, and did not detail any specialized knowledge or training in evaluating a person's language abilities from watching videos, observing interviews, or in making a determination about cultural influences on an interview with a non-English speaker. The district court watched the same videos and observed appellant in the courtroom, including at trial. Therefore, we conclude the district court did not abuse its discretion. *Perez v. State*, 129 Nev. 850, 856, 313 P.3d 862, 866 (2013) ("We review a district court's decision to allow expert testimony for an abuse of discretion.").

argument regarding hearsay, and it is unclear that she made this argument in the proceedings below. See *Maresca v. State*, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987). Appellant has also not shown what testimony cross-examination on this subject would have elicited, let alone that cross-examination would have elicited favorable testimony. Finally, appellant has not demonstrated that there was a reasonable probability of a different outcome had trial counsel further challenged the testimony given the substantial evidence of guilt presented at trial. Therefore, the district court did not err in denying this claim.<sup>3</sup>

Next, appellant argues that trial counsel should have provided proper notice that the defense forensic expert would testify about his trajectory conclusion. Appellant fails to demonstrate deficient performance or prejudice. When the State objected to a question that might elicit the defense expert's conclusion about the trajectory of the projectiles, trial counsel stated that she did not intend to have the expert provide a trajectory conclusion. Rather, trial counsel presented the expert to challenge the methodology and reliability of the State's expert and explain that there was insufficient information to make a trajectory conclusion. Although the same defense expert offered a trajectory conclusion at the postconviction evidentiary hearing, he agreed that trajectory analysis involves some

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<sup>3</sup>Appellant's argument that appellate counsel was ineffective in failing to challenge the admissibility of this testimony as a prior bad act fails for the same reasons discussed above. See *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (requiring a petitioner to demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have had a reasonable probability of success on appeal); see also *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003) (stating that plain error requires a demonstration of error, that the error was plain, and that the error affected the defendant's substantial rights).

measure of subjective interpretation and that he could not testify to his conclusion with any degree of scientific certainty. Given that testimony, appellant has not demonstrated trial counsel's strategy was unreasonable. *Strickland*, 466 U.S. at 690-91 (observing that strategic decisions are virtually unchallengeable). And considering the subjectivity and lack of scientific certainty in the expert's testimony during the evidentiary hearing and the substantial evidence of guilt presented at trial, appellant further fails to demonstrate a reasonable probability of a different outcome at trial had the expert testified about the trajectory of the projectiles. Therefore, the district court did not err in denying this claim.

Next, appellant argues that trial counsel should have introduced evidence of the victim's marijuana use to show how it could affect his mental and physical health. Appellant fails to demonstrate deficient performance or prejudice. Appellant did not provide any expert testimony supporting her statements about the effects of marijuana use on a person's mental and physical health, and thus, she fails to carry her burden of proof. *See Means*, 120 Nev. at 1011-13, 103 P.3d at 32-33 (recognizing that the burden of proof lies with the habeas petitioner). The jury heard testimony about marijuana use and some possible effects from the defense medical expert. Trial counsel testified at the evidentiary hearing that emphasizing the marijuana use could have hurt the case, in part because, to the extent that marijuana may affect coordination, it may have supported the State's theory that the victim could not have shot himself. Appellant fails to demonstrate that there was a reasonable probability of a different outcome had trial counsel engaged an expert and presented additional testimony about the victim's marijuana use. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant argues that trial counsel should have presented expert testimony about suicidal ideation to educate the jury about the complexities of suicide. Appellant notes that trial counsel was aware from multiple sources of the victim's suicidal threats and health issues. Appellant fails to demonstrate deficient performance or prejudice. Again, appellant presented no such testimony at the evidentiary hearing to support this claim. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant argues that trial counsel should have presented testimony to humanize her because she did not testify. Appellant argues that her daughters could have testified that she was a loving wife and mother, supportive partner, and loved member of her community. Appellant has not demonstrated deficient performance or prejudice. Again, at the evidentiary hearing, appellant did not present testimony from any witnesses to support this claim. And trial counsel testified concern with the potential testimony of appellant's daughters regarding prior bad acts and information that would run counter to the close-family defense. At trial, appellant presented testimony from friends about their positive observations of the defendant's relationship with the victim. Appellant has not demonstrated a reasonable probability of a different outcome had trial counsel presented additional evidence given the substantial evidence presented at trial. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant argues that trial counsel should have objected to the testimony of the first responders on the basis that they were not qualified to give expert opinions on how long the victim had been dead, blood clotting, rigor mortis, the smell of gunpowder, the temperature of the victim's body, and observations about the gunshot holes in the couch and

wall. Appellant has not demonstrated deficient performance or prejudice. Testimony about what the first responders observed in responding to the call was admissible. NRS 48.015 ("[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."); NRS 50.025(1)(a) (allowing for testimony based on a witness' personal knowledge); *Burnside v. State*, 131 Nev. 371, 382, 352 P.3d 627, 636 (2015) ("A lay witness may testify to opinions or inferences that are '[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.'" (quoting NRS 50.265)). Trial counsel presented testimony from the defense medical expert calling into question the first responders' testimony about their observations and presented testimony calling into question the integrity of the crime scene. Appellant has not demonstrated a reasonable probability of a different outcome if trial counsel would have further challenged the first responders' testimony. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant argues that trial counsel should have objected to a neighbor's testimony about fights between appellant and the victim months before the victim's death. Appellant fails to demonstrate deficient performance or prejudice. Trial counsel successfully objected to the witness sharing the contents of the argument. The State presented the testimony to rebut the defense witnesses' description of a loving marriage and the evidence was relevant to show that appellant and the victim were having problems in their relationship and the victim was killed after an argument. See NRS 48.015 (describing relevant evidence). Further, the probative value is not substantially outweighed by the danger of unfair prejudice. See

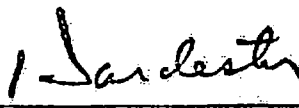
NRS 48.035(1). Appellant has not demonstrated a reasonable probability of a different outcome had trial counsel further objected to the neighbor's testimony. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant argues that any deficiencies in counsel's performance should be cumulated for purposes of determining prejudice. Even assuming multiple instances of deficient performance could be cumulated for purposes of demonstrating prejudice, see *McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009), as appellant has not demonstrated deficient performance, there is nothing to cumulate. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.

Parraguirre

 J.

Hardesty

 J.

Cadish

cc: Hon. Nathan Tod Young, District Judge  
John E. Malone  
Attorney General/Carson City  
Douglas County District Attorney/Minden  
Douglas County Clerk

CASE NUMBER SC 68113

**EXHIBIT** A2

Court of Appeal - order of affirmance -  
direct Appeal

**TATIANA LEIBEL, Appellant, vs. THE STATE OF NEVADA, Respondent.**  
**SUPREME COURT OF NEVADA**

**2015 Nev. Unpub. LEXIS 1510; 131 Nev. 1312**

**No. 68113**

**December 18, 2015, Filed**

**Notice:**

**NOT DESIGNATED FOR PUBLICATION. PLEASE CONSULT THE NEVADA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.**

**Editorial Information: Subsequent History**

Post-conviction relief denied at *Leibel v. State*, 2020 Nev. Unpub. LEXIS 619 (June 24, 2020)

**Judges:** Saitta, J., Gibbons, J., Pickering, J.

**Opinion**

**ORDER OF AFFIRMANCE**

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a firearm. Ninth Judicial District Court, Douglas County; Nathan Tod Young, Judge.

First, appellant contends that the prosecutor committed misconduct during closing argument when he referenced O.J. Simpson's criminal trial, pointing out that the defense in Simpson's case focused on inadequacies in the police investigation. She further argues that this misconduct was exacerbated by the prosecutor's comment that a defense expert had a low opinion of local law enforcement. The district court overruled appellant's objection to the reference to Simpson's trial. To the extent the prosecutor's comments suggested that appellant's argument regarding the allegedly sub-par performance by law enforcement in this case was a ploy used by all defendants to escape liability since the Simpson verdict, they were inappropriate. See *Valdez v. State*, 124 Nev. 1172, 1191, 196 P.3d 465, 478 (2008); *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987). However, any misconduct was harmless. See *Valdez*, 124 Nev. at 1189, 196 P.3d at 476 (describing non-constitutional harmless error). To the extent appellant independently challenges the prosecutor's comment regarding the defense expert, she did not object, and has not demonstrated plain error affecting her substantial rights.<sup>1</sup> See *id.* at 1190, 196 P.3d at 477. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

/s/ Saitta, J.

Saitta

✓ /s/ Gibbons, J.

Gibbons

/s/ Pickering, J.

Pickering



## Footnotes

1

Appellant also contends that the district court erred by "allow[ing] expert testimony on causation that did not rise to a level of reasonable scientific certainty." No relief is warranted because the expert testified at trial that his conclusions were to a reasonable degree of scientific certainty.

CASE NUMBER 14-CR-0062

**EXHIBIT** A3

Transcript - Trial - Errors

Page 1

1 CASE NO. 14-CR-0062  
2 DEPT. NO. 1  
3 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
4 IN AND FOR THE COUNTY OF DOUGLAS  
5 BEFORE THE HONORABLE DISTRICT COURT JUDGE, NATHAN TOD YOUNG  
6  
7 THE STATE OF NEVADA,  
8 Plaintiff,  
9 vs.  
10 TATIANA LEIBEL,  
11 Defendant.  
12  
13 Partial TRANSCRIPT OF PROCEEDINGS  
14 CLOSING ARGUMENTS  
15 THURSDAY, FEBRUARY 5, 2015  
16  
17 APPEARANCES:  
18 For the State: TOM GREGORY  
19 Chief Deputy District Attorney  
Minden, Nevada  
20 For the Defendant: KRIS BROWN  
21 Attorney at Law  
Minden, Nevada  
22 JAMIE HENRY  
23 Attorney at Law  
24 Reported By: Kathy Jackson CSR  
Nevada CCR #402

Page 2

1 THURSDAY, FEBRUARY 5, 2015, MINDEN, NEVADA  
2 -oOo-  
3 MR. GREGORY: Thank you, Your Honor. May it  
4 please the Court, counsel, ladies and gentlemen of the jury,  
5 good morning. Sheron Bardete, he warned his friend Harry  
6 Leibel, not once, not twice, not three times but four times  
7 that his wife was going to kill him, and that he should lock  
8 her out of the house and kick her out. Unfortunately, Mr.  
9 Bardete was correct. Harry, as you heard from the testimony  
10 regarding his cell phone, had punched in that he was going to  
11 call the locksmith on February 25th. Harry was two days too  
12 late.  
13 February 23rd, 2014, was a nice, quiet day here  
14 in Douglas County, like most others that we enjoy here, but  
15 fire raged that morning, the head of Tatiana Leibel. The  
16 night before, you're going to hear or had heard during the  
17 course of the trial and through the text messages, she had  
18 plans to go visit her daughter, Lana, down in Southern  
19 California and booked a hotel room for three nights. She was  
20 going to leave on Saturday at 10:00 p.m. Only Harry told her  
21 no, and you'll see in the text messages again that Lana keeps  
22 asking Tatiana, are you coming. Are you still coming at  
23 10:00? No, I'm not because Harry had gone crazy.  
24 And so Tatiana changes her plans. She's tired of

Page 3

1 Harry controlling her. Her feelings are hurt, and she makes  
2 the decision to go down a path to ultimately kill Harry. The  
3 following morning at 10:00 a.m., Harry is in the living room  
4 on his couch, reclined, watching supports.  
5 Harry loved life, you heard that. Harry had  
6 plans. In fact, a friend of his Chris Hetrick, you'll see in  
7 the text messages was coming to visit him that day and did,  
8 in fact, go to the residence only to find the police there  
9 and the crime scene tape up and he text Harry one last time.  
10 Harry, are you okay?  
11 He had plans with the Joe Rajacic. He had plans  
12 with his son, Justin Leibel, to restore old vehicles. Harry  
13 was a survivor of cancer, but he would not survive the  
14 gunshots inflicted by Tatiana Leibel.  
15 So what is the evidence of murder in this case?  
16 Let's talk first about the overwhelming evidence of delay and  
17 what I mean by delay is the delay in time between when she  
18 shot him and the time that she called 911, which you will  
19 recall occurred at 11:03 in the morning.  
20 To give context to all of this, you need to  
21 understand the timeline and the timeline, the cell phones,  
22 cell phone and the technology and all of the information that  
23 can come from those are so helpful in this case.  
24 You heard evidence and actually got to see the

Page 4

1 evidence of the extractions that were done for both Tatiana's  
2 phone and Harry's phone. On Harry's phone, you see  
3 communications with Chris Hetrick regarding their plans, and  
4 you also see that final text message that Harry sent off to  
5 his friend, Joe Rajacic.  
6 On Tatiana's end, you see the text messages  
7 between her and Lana discussing their plans. And so on  
8 Saturday, February 22nd, in the actual extraction reports,  
9 there is more information that goes beyond what's here in  
10 terms of the dates, so you'll want to refer to those actual  
11 exhibits. It is for demonstrative purposes.  
12 At 4:35 p.m., we have a text message from Harry  
13 to Chris Hetrick. I'll wait to hear from you. Hope to see  
14 guys tonight. It's been too long. I hope you're both well,  
15 and 4:35 Chris text back okay.  
16 At 4:27 p.m., this was the text message from  
17 Harry to Joe Rajacic, we read the text message in its  
18 entirety. He did not include it all here, but it starts out  
19 with hi, pal. Hope you're both well. We're okay, and then  
20 it goes on into the political cartoons and the jokes that you  
21 will recall. Those two communications are Harry's last known  
22 communications that have been presented to you here.  
23 At 9:34 p.m., Lana text messages Tatiana. Are  
24 you still starting to drive, 10:00? Tatiana responds a few

Page 9

1 Dr. Omalu would ask you to disregard that. I would ask you  
2 to consider that as one of many factors. What are the other  
3 factors? There were signs of pooling. His eyes were  
4 dilated. There was absolutely no electrical activity in his  
5 body when they conducted a check in four different leads and  
6 in four different places, no electrical activity.

7 Rigor mortis, they observed the hand on the floor  
8 like this, and when they touched the hand, it goes back,  
9 consistent with rigor mortis. Dr. Omalu wants to talk about  
10 marathon runners in heat and what can happen to them. Harry  
11 had not run a marathon. Dr. Omalu also wanted to talk about  
12 how there was rigor mortis in the hand, but he didn't  
13 initially want to talk about where the rigor really was which  
14 was down in the elbow.

15 If you remember Dr. Omalu first said, well, it  
16 sets first in the hand, in the extremities. I said wait a  
17 minute. The hand was like this, so where would the rigor be?  
18 Oh, well, it traveled downwards, okay. So we're talking  
19 about a death. If you listen to Tatiana, death had occurred  
20 about 11:03 in the morning and the minute those responders  
21 walk in which is minutes later, his hand is like this. Now  
22 all of those first responders found that odd, and they found  
23 it inconsistent with the idea that the death had just  
24 occurred.

Page 10

1 I'm not asking you to take any one of those  
2 factors and find there's delay. I'm asking you to look at  
3 all of those factors and find that there's overwhelming  
4 evidence of delay, including her own statement that it  
5 happened at 9:30 or 10:00 in the morning.

6 Why is delay important in this case? Well, it's  
7 important because she told the police she called right away,  
8 that's the first reason it's important. The second reason  
9 it's important is if you're going to stage a murder as a  
10 suicide, you might need some time to do that. So you just  
11 killed somebody, and the story is going to be suicide. What  
12 are you going to do? You think you might wipe the gun?  
13 Might that be something you do?

14 Do you recall the testimony and evidence in this  
15 case is that gun, which had to be loaded, cocked, shot,  
16 cocked, shot and then cocked again had no Tatiana  
17 fingerprints on it and no Harry fingerprints on it. Even  
18 though the defense, you know, in the suicide theory, he had  
19 both hands on that barrel, no fingerprints of that barrel of  
20 Tatiana or Harry.

21 DNA, okay, here's a gun that's been handled quite  
22 a bit. Jennifer Wrong comes in and tells you the levels of  
23 DNA were too low to even test. Do you think she wiped the  
24 gun? What else might you do? Maybe you take a shower.

Page 11

1 Maybe you wash your hands. Maybe you turn up the thermostat  
2 to keep the body warm, okay, and you have to develop your  
3 story to the police.

4 Tatiana calls 911. You can tell when you listen  
5 to that 911 call, she's not prepared to and does not want to  
6 give details of what happened. She just wants to say my  
7 husband shot himself but when the operator, the dispatcher  
8 keeps asking her more details, you can tell she starts to  
9 equivocate and then starts giving some of the details.

10 Those details are important because later she  
11 gives conflicting statements. In the 911 call, she talks  
12 about being in the kitchen, hearing a shot. She returns to  
13 the living room and is present when the second shot occurs.  
14 She tells 911 that he shot first his hand, and that she  
15 didn't know where the other shot was.

16 Later that same day when she talks with Leanne  
17 Brooks, one shot. It was one shot and it was somewhere here.  
18 What did she tell Captain Lucas? Captain Lucas, she tells I  
19 was outside when I heard two shots. And you'll recall the  
20 defense cross-examined him. They wanted to make sure there  
21 wasn't a language barrier problem or he didn't misunderstand.  
22 No, I took it that she was outside when the two shots  
23 occurred, inconsistent statements.

24 All right. Let's talk a little bit about the two

Page 12

1 shots that were fired, you know, an awful lot about the gun  
2 and those shots that were fired. You heard it from Matt  
3 Noedel. Dr. Omalu said who is Matt Noedel? Matt Noedel, you  
4 heard, is one of 17 people in the country who is qualified to  
5 render opinions that he rendered in this case, that's who  
6 Matt Noedel is.

7 Is Matt Noedel just somebody that sits back and  
8 looks at some photographs, like Dr. Omalu, and make opinions,  
9 no. He considered all of the evidence in the case, went and  
10 got the gun, examined the gun, shot the gun, conducted tests  
11 with the gun. He got the robe out. He examined the robe.  
12 He conducted tests on the robe. He took the blanket. He  
13 examined the blanket. He conducted tests on the blanket. He  
14 went to the house and looked at the house. He looked at the  
15 couch, okay, and it wasn't then until he considered all of  
16 that information that he was able to start rendering his  
17 opinions.

18 He told you a lot about this gun, the way it  
19 functions, including interestingly when he himself shot that  
20 gun, test fired it, he got stippling right here from the  
21 gasses that come out of that cylinder. That's important  
22 because. Dr. Kubiczek testified, remember, if Harry is  
23 shooting himself, where is that cylinder going to be? Where  
24 would he have stippling. Dr Kubiczek --

1 please. Your next witness, Mr. Gregory..  
2 MR. GREGORY: Jennifer Naranjo.  
3 THE COURT: I want to make sure that all of  
4 the exhibits are returned to the clerk, please. Jennifer  
5 Naranjo? Is that correct?  
6 MR. GREGORY: Yes.  
7 THE COURT: I've noted several people going  
8 in and out of the courtroom. I just want to remind  
9 counsel keep an eye back in the courtroom and make sure  
10 none of your witnesses on the other side appear, having  
11 invoked the rule of exclusion.  
12 Ma'am, if you'd come forward, step in front  
13 of the clerk, raise your right hand, please.  
14  
15 JENNIFER NARANJO,  
16 having been first duly sworn, was  
17 examined and testified as follows:  
18  
19 THE COURT: If you'd come up and have a seat  
20 up here, please. There's some water there if you'd like.  
21 THE WITNESS: Thank you.  
22 THE COURT: Mr. Gregory.  
23 MR. GREGORY: Good morning.  
24 THE WITNESS: Good morning.

1 Highlands University.  
2 THE COURT: Ma'am.  
3 THE WITNESS: Yes.  
4 THE COURT: I'm going to ask you to slow  
5 down, please.  
6 THE WITNESS: Okay.  
7 THE COURT: I know that you have a lot of  
8 information to present, but this is all being  
9 interpreted, and it is very difficult for the  
10 interpreters to keep up with you.  
11 THE WITNESS: Okay. Absolutely.  
12 THE COURT: Thank you, ma'am.  
13 MR. GREGORY: You were telling us about your  
14 training and experience in those two areas.  
15 THE WITNESS: Yes. I have 30 graduate credit  
16 hours from the University of Nevada-Reno in the field of  
17 DNA analysis and molecular biology. In addition to that,  
18 I have completed a seven-month training program at Washoe  
19 County Crime Lab under the direct supervision of three  
20 qualified DNA analysts, and that is required prior to  
21 doing any type of casework. During that time, I  
22 processed numerous samples which would be similar to what  
23 I would expect to see in casework.  
24 Additionally, I wrote numerous reports that

1 DIRECT EXAMINATION  
2 BY MR. GREGORY:  
3 Q. Can you please state and spell your last  
4 name.  
5 A. My name is Jennifer Naranjo: N-a-r-a-n-j-o.  
6 Q. What do you do for a living?  
7 A. I'm a criminalist at the Washoe County  
8 Sheriff's Office Crime Lab.  
9 Q. How long have you been so employed?  
10 A. I've been employed for approximately over  
11 nine years.  
12 Q. And what specifically do you do within that  
13 division?  
14 A. I'm a DNA analyst and a primary exam analyst  
15 in the crime lab, and my role is to look at evidence that  
16 are submitted in cases for initially, I can do screening,  
17 which is my role as a primary exam analyst for biological  
18 evidence. And as a DNA analyst, I then process those  
19 samples and generate DNA profiles, which I then make  
20 comparisons to if I can.  
21 Q. What is your training and experience in those  
22 two areas?  
23 A. I have a Bachelor's of Science degree in  
24 environmental science and management from New Mexico

1 would be similar to what I would expect to be writing as  
2 an analyst. Additional type of education that I've  
3 obtained, we have to do eight hours of continuous  
4 education every year, and also we take classes from the  
5 manufacturers that provide our kits for our analysis as  
6 well as the companies that provide our equipment.  
7 Q. (BY MR. GREGORY:) Are the methods that you  
8 employ accepted in the scientific community?  
9 A. Yes, they are.  
10 Q. Were you asked to process a rifle in this  
11 case?  
12 A. Yes, I was.  
13 Q. And did you both -- did you do -- Tell us  
14 what you did with the rifle.  
15 A. Okay. May I refer to my report?  
16 Q. If that will help you refresh your  
17 recollection.  
18 A. Yes, please.  
19 Q. You did two reports in this case. Would you  
20 like to see both of them?  
21 A. Yes.  
22 THE COURT: Ma'am, do you need the report to  
23 refresh your recollection?  
24 THE WITNESS: I do.

CASE NUMBER \_\_\_\_\_

**EXHIBIT** A4

Reporting Professional Misconduct

Tom Gregory

Governor Sandoval appointed Judge Michael P. Gibbons to the Nevada Court of Appeals on 12/17/14.  
Sworn in 1/5/15.

1/29/2015

<https://nvcourts.gov/Supreme/News/38> Applications Received by the Judicial Selection Commission for Vacancies in 8th and 9th Judicial Districts/ Denotes application has been received.

Interviews for position scheduled for 2/23/15

Newspaper on 2/26/15 (13 attorneys submitted applications for the vacancy in the 9<sup>th</sup> district applications only available online for 3 years) Three finalists selected by the Nevada Commission on Judicial Selection submitted to the Governor.

3/19/15 Appointed to Ninth District Court of Nevada by Governor Sandoval. Took office 4/13/15

Ran in Primary election 6/14/16, General election 11/8/16, unopposed elected to 6 year term ends 1/4/21

DISTRICT COURT JUDGES

<u>JUDGE</u>	<u>COURT</u>	<u>APPOINTED/ELECTED</u>	<u>TOOK OFFICE</u>	<u>TERM EXPIRES</u>
Kathleen E. Delaney	Eighth Judicial District Court (Dept. 25)	11/04/08	01/05/09	01/04/2021
Mark R. Denton	Eighth Judicial District Court (Dept. 13)	08/20/98	09/04/98	01/04/2021
Steven Dobrescu	Seventh Judicial District Court (Dept. 1)	03/13/01	03/13/01	01/04/2021
Kathleen Drakulich	Second Judicial District Court (Dept. 1)	06/30/17	08/21/17	01/04/2021
Bryce C. Duckworth	Eighth Judicial District Court (Dept. Q)	11/04/08	01/05/09	01/04/2021
Kerry L. Earley	Eighth Judicial District Court (Dept. 4)	06/25/12	08/06/12	01/04/2021
Carolyn Ellsworth	Eighth Judicial District Court (Dept. 5)	10/17/11	10/17/11	01/04/2021
Adriana Escobar	Eighth Judicial District Court (Dept. 14)	06/25/12	08/06/12	01/04/2021
Gary Fairman	Seventh Judicial District Court (Dept. 2)	02/04/13	02/04/13	01/04/2021
Rhonda Kay Forsberg <sup>6</sup>	Eighth Judicial District Court (Dept. G)	04/15/19	05/06/19	01/04/2021
Scott Freeman	Second Judicial District Court (Dept. 9)	03/26/12	04/02/12	01/04/2021
Denise L. Gentile	Eighth Judicial District Court (Dept. F)	11/04/14	01/05/15	01/04/2021
David Gibson, Jr.	Eighth Judicial District Court (Dept. L)	11/20/18	12/10/18	01/04/2021
Cynthia N. Giuliani	Eighth Judicial District Court (Dept. K)	11/04/08	01/05/09	01/04/2021
Elizabeth Gonzalez	Eighth Judicial District Court (Dept. 11)	07/20/04	07/26/04	01/04/2021
Thomas W. Gregory	Ninth Judicial District Court (Dept. 2)	03/19/15	04/13/15	01/04/2021
Dixie Grossman	Second Judicial District Court (Dept. 2)	03/20/18	03/26/18	01/04/2021
David A. Hardy	Second Judicial District Court (Dept. 15)	11/02/10	01/03/11	01/04/2021
Joe Hardy, Jr	Eighth Judicial District Court (Dept. 15)	04/02/15	05/04/15	01/04/2021
Mathew Harter	Eighth Judicial District Court (Dept. N)	11/04/08	01/05/09	01/04/2021
Bill Henderson	Eighth Judicial District Court (Dept. R)	11/04/08	01/05/09	01/04/2021
Douglas W. Herndon	Eighth Judicial District Court (Dept. 3)	01/18/05	02/14/05	01/04/2021
Mary Kay Holthus	Eighth Judicial District Court (Dept. 18)	11/06/18	01/07/19	01/04/2021
Charles Hoskin	Eighth Judicial District Court (Dept. E)	03/05/09	03/17/09	01/04/2021
Rena G. Hughes	Eighth Judicial District Court (Dept. J)	11/04/14	01/05/15	01/04/2021
Ron Israel	Eighth Judicial District Court (Dept. 28)	11/02/10	01/03/11	01/04/2021
Eric Johnson	Eighth Judicial District Court (Dept. 20)	04/02/15	05/04/15	01/04/2021
Susan Johnson	Eighth Judicial District Court (Dept. 22)	11/07/06	01/01/07	01/04/2021
David M. Jones	Eighth Judicial District Court (Dept. 29)	11/02/10	01/03/11	01/04/2021

<sup>6</sup>Judge Forsberg appointed April 15, 2019 by Governor Steve Sisolak to fill vacancy left when Judge Cynthia (Dianne) Steel retired January 7, 2019 at the end of her term.



### **Rule 3: Reporting Professional Misconduct.**

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program, including but not limited to the Lawyers Concerned for Lawyers program established by Supreme Court Rule 106.5.

(Added eff. 5-1-06)

**Model Rule Comparison - 2006** - Rule 8.3 (formerly Supreme Court Rule 202) is the same as ABA Model Rule 8.3 except that paragraph (c) of the Rule includes a specific reference to the Lawyers Concerned for Lawyers program established by Supreme Court Rule 106.5.

### **Rule 4: Misconduct.**

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official or to

achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(Added eff. 5-1-06; amended and eff. 2-10-2017; Amended and eff. 2-10-2017)

#### **Commentary**

#### **COMMENT TO 8.4(b)-**

[1] Because use, possession, and distribution of marijuana in any form still violates federal law, attorneys are advised that engaging in such conduct may result in federal prosecution and trigger discipline proceedings under SCR 111.

**Model Rule Comparison - 2006** - Rule 8.4 (formerly Supreme Court Rule 203) is the same as ABA Model Rule 8.4.

#### **Rule 5. Jurisdiction.**

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

(Added eff. 5-1-06)

**Model Rule Comparison - 2006** - Rule 8.5 (formerly Supreme Court Rule 203.5) addresses the same subject matter as ABA Model Rule 8.5. The Rule is the same as the first sentence in paragraph (a) of the Model Rule. The Rule does not include the other provisions in paragraph (a) of the Model Rule or paragraph (b) of the Model Rule.

### **178.598. Harmless error.**

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

#### **HISTORY:**

1967, p. 1458.

#### **NOTES TO DECISIONS**

##### **Exclusion of impeachment evidence held not harmless error.**

Appellate court reversed defendant's conviction for first-degree murder with the use of a deadly weapon and sexual penetration of a dead human body where a cellmate testified as to defendant's boasts in jail that she had forcibly amputated a man's penis and placed it down his throat; trial court erred by precluding defendant from introducing extrinsic evidence to impeach the testimony of the cellmate, and the error was not harmless. *Lobato v. State*, 120 Nev. 512, 96 P.3d 765, 120 Nev. Adv. Rep. 57, 2004 Nev. LEXIS 72 (Nev. 2004).

##### **Guidelines for determining harmlessness:**

Although this section does not provide a standard for determining when errors are harmless, guidelines to be followed by the court in exercising its discretion include whether the issue of innocence or guilt is close, the quantity and character of the error and the gravity of the harm charged; underlying each of these factors is the supervisory function of the appellate court in maintaining the standards of the trial bench and bar, to the end that all defendants will be accorded a fair trial. *Weakland v. State*, 96 Nev. 699, 615 P.2d 252, 1980 Nev. LEXIS 685 (Nev. 1980).

No judgment shall be set aside or new trial granted in any case on the ground of misdirection of the jury, unless, in the opinion of the court, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice, or has actually prejudiced the defendant's substantial rights. *State v. Willberg*, 45 Nev. 183, 200 P. 475, 1921 Nev. LEXIS 41 (Nev. 1921) (decision under former similar statute).

**The federal harmless error rule found in 28 U.S.C. § 2111 and this, Nevada's harmless error statute, are very similar.** *Grimaldi v. State*, 90 Nev. 83, 518 P.2d 615, 1974 Nev. LEXIS 318 (Nev. 1974).

##### **Error not objected to.**

Where the evidence of guilt is substantial, the alleged errors are unlikely to have affected the verdict, and the failure to object is unexcused, these competing interests are best served by adhering to the general rule that errors not properly objected to at trial are waived. *Todd v. State*, 113 Nev. 18, 931 P.2d 721, 113 Nev. Adv. Rep. 3, 1997 Nev. LEXIS 14 (Nev. 1997).

##### **Sua sponte review.**

Three factors to help determine whether the court should consider an error's harmlessness when the

State has not argued harmlessness in a death penalty case are the length and complexity of the record, the certainty that the error is harmless, and the futility and costliness of reversal and further litigation. *Belcher v. State*, 136 Nev. Adv. Rep. 31, 2020 Nev. LEXIS 31 (Nev. June 4, 2020).

**The rule of harmless error was inoperative** where the defendant was denied the right of confrontation and cross-examination, through counsel, of a material witness. *Messmore v. Fogliani*, 82 Nev. 153, 413 P.2d 306, 1966 Nev. LEXIS 208 (Nev. 1966) (decision under former similar statute).

It was reasonable for the defendant to believe that the district attorney's office would make available all relevant evidence. The prosecutor knew the defendant was relying on the open file policy when he chose to withhold the photograph. Because the photo was never placed in the file, the defendant had no reason to believe such incriminating evidence existed. The act of withholding the photo and waiting to see if the defendant would testify, and then using the photo to incriminate the defendant was clearly unfair and extremely prejudicial. *McKee v. State*, 112 Nev. 642, 917 P.2d 940, 112 Nev. Adv. Rep. 85, 1996 Nev. LEXIS 90 (Nev. 1996).

The district court erred in prohibiting defense counsel from cross-examining a police detective about statements made by the defendant, but in light of the overwhelming evidence proving the defendant's guilt, the error was harmless. *Domingues v. State*, 112 Nev. 683, 917 P.2d 1364, 112 Nev. Adv. Rep. 89, 1996 Nev. LEXIS 86 (Nev.), cert. denied, 519 U.S. 968, 117 S. Ct. 396, 136 L. Ed. 2d 311, 1996 U.S. LEXIS 6671 (U.S. 1996).

**The Supreme Court is most reluctant to disregard error as harmless in a capital case.** *Walker v. State*, 78 Nev. 463, 376 P.2d 137, 1962 Nev. LEXIS 82 (1962), cert. denied, 375 U.S. 882, 84 S. Ct. 153, 11 L. Ed. 2d 112, 1963 U.S. LEXIS 437 (1963) (decision under former similar statute).

#### **Proposed defense instruction was not harmless.**

District court's failure to accept defendant's proposed defense instruction was not harmless where defendant's proposed instruction was based upon his theory of the case, correctly stated the law, and was not substantially covered by the other instructions; substantial evidence would have supported a finding in defendant's favor based upon the omitted factors. *Barnier v. State*, 119 Nev. 129, 67 P.3d 320, 119 Nev. Adv. Rep. 16, 2003 Nev. LEXIS 19 (Nev. 2003).

#### **Conducting habeas corpus hearing in absence of appellant.**

The district court did abuse its discretion when it conducted the hearing on the writ of habeas corpus without the appellant present. However, the appellant was represented by counsel at the hearing and contentions raised in the petition were without merit. No substantial right of appellant was affected by way of his absence from the hearing; therefore, the error was not reversible. *White v. State*, 105 Nev. 121, 771 P.2d 152, 1989 Nev. LEXIS 26 (Nev. 1989), overruled in part, *Hightower v. State*, 123 Nev. 55, 154 P.3d 639, 123 Nev. Adv. Rep. 7, 2007 Nev. LEXIS 11 (Nev. 2007).

#### **Prior criminal record.**

The very nature of a wrongful reference to the defendant's prior felony convictions and his persistent police record is inherently harmful to the rights of one facing a charge of crime. *Garner v. State*, 78 Nev. 366, 374 P.2d 525, 1962 Nev. LEXIS 139 (Nev. 1962) (decision under former similar statute).

**The trial court's interaction with the jury** regarding the notes the jury sent to the judge during the

guilt phase of the trial were neither ex parte nor prejudicial. *Abeyta v. State*, 113 Nev. 1070, 944 P.2d 849, 113 Nev. Adv. Rep. 119, 1997 Nev. LEXIS 101 (Nev. 1997).

#### **Error cured in argument.**

An error in failing to properly instruct the jury on the consequences of a finding of not guilty by reason of insanity was rendered harmless when defense counsel supplied the missing information during final argument. *Bean v. State*, 81 Nev. 25, 398 P.2d 251, 1965 Nev. LEXIS 197 (1965), cert. denied, 384 U.S. 1012, 86 S. Ct. 1932, 16 L. Ed. 2d 1030 (1966) (decision under former similar statute).

#### **Inadvertent submission of unadmitted evidence.**

In prosecution for robbery the inadvertent submission to the jury of a motor vehicle registration slip which had not been received in evidence as an exhibit, and to which reference never was made during trial, was harmless error. *Boyd v. State*, 92 Nev. 73, 545 P.2d 202, 1976 Nev. LEXIS 519 (Nev. 1976).

#### **Overwhelming evidence.**

Considering that shortly after the robbery the police arrived and arrested the defendants, and property belonging to the victims and the weapons used in the robbery were found on the defendants, the wrongful admission of a police officer's testimony that the pistol used in perpetration of the crime was reported earlier was rendered harmless by the overwhelming evidence of guilt. *Hendee v. State*, 92 Nev. 669, 557 P.2d 275, 1976 Nev. LEXIS 717 (Nev. 1976).

The testimony regarding the condition of the bedroom window at the victim's residence, while irrelevant and therefore inadmissible, was harmless beyond a reasonable doubt in light of the overwhelming evidence of the defendant's guilt. *Domingues v. State*, 112 Nev. 683, 917 P.2d 1364, 112 Nev. Adv. Rep. 89, 1996 Nev. LEXIS 86 (Nev.), cert. denied, 519 U.S. 968, 117 S. Ct. 396, 136 L. Ed. 2d 311, 1996 U.S. LEXIS 6671 (U.S. 1996).

Where defendant was operating his vehicle under the influence with a blood alcohol content almost twice the legal limit when the rollover accident occurred, the evidence of his guilt of the offense of driving under the influence causing death was overwhelming. Therefore, the district court's procedural error in permitting jurors to ask witnesses a number of questions in unrecorded bench conferences where the parties had no opportunity to object was harmless as none of the questions elicited testimony that prejudicially impacted the jury's verdict. *Knipes v. State*, 124 Nev. 927, 192 P.3d 1178, 124 Nev. Adv. Rep. 79, 2008 Nev. LEXIS 89 (Nev. 2008).

Error in admitting a capital murder defendant's pre-Miranda statements was harmless because at most they supported an inference of consciousness of guilt and there was other, significantly more compelling evidence, including an identification from a surviving victim. *Belcher v. State*, 136 Nev. Adv. Rep. 31, 2020 Nev. LEXIS 31 (Nev. June 4, 2020).

#### **Cautionary instructions.**

Where the results of an out-of-court experiment were never admitted into evidence the fact that the court allowed certain foundational testimony admitted before excusing the jury did not prejudice the defendant since the court carefully instructed the jury not to speculate what the witness might have testified to, and the foundational testimony by itself was substantially without meaning. *Bishop v. State*, 91 Nev. 465, 537 P.2d 1202, 1975 Nev. LEXIS 672 (Nev. 1975).

### **Uncharged bad acts evidence.**

Because the defendant no longer has the burden of requesting a limiting instruction on the use of uncharged bad act evidence, the Nevada Supreme Court will no longer review cases involving the absence of the limiting instruction for plain error; instead, the court will review future cases for error under Nev. Rev. Stat. § 178.598. *Tavares v. State*, 117 Nev. 725, 30 P.3d 1128, 117 Nev. Adv. Rep. 61, 2001 Nev. LEXIS 62 (Nev. 2001).

Because the failure to give a limiting instruction on the use of uncharged bad act evidence is a nonconstitutional error, the Nevada Supreme Court will not apply the stricter *Chapman v. California*, standard the court uses to evaluate the harmlessness of constitutional error. Instead, the court will use the *Kotteakos v. United States* standard utilized by federal courts reviewing nonconstitutional error under the federal harmless-error statute, which is identical to this section. *Tavares v. State*, 117 Nev. 725, 30 P.3d 1128, 117 Nev. Adv. Rep. 61, 2001 Nev. LEXIS 62 (Nev. 2001).

In a murder case, the trial court erred in admitting evidence of a prior bad act in the form of a prior uncharged conspiracy because the prior conspiracy was not similar enough to the charged crime to be relevant as proof of a common plan or scheme. New trial was warranted because the admission of the bad act evidence was not harmless. *Fields v. State*, 125 Nev. 776, 220 P.3d 724, 125 Nev. Adv. Rep. 57, 2009 Nev. LEXIS 75 (Nev. 2009), app. dismissed, 2010 Nev. Unpub. LEXIS 164 (Nev. Dec. 30, 2010).

### **Death penalty instructions.**

A defendant not sentenced to death cannot, on appeal, claim that he has suffered any prejudice as a result of jury instructions on aggravating circumstances; those instructions relate only to the determination of whether to impose the death penalty and they bear no relevance to other decisions regarding sentencing. Therefore, any error committed in instructing the jury on aggravating circumstances where the defendant was not sentenced to death was necessarily harmless. *Phenix v. State*, 114 Nev. 116, 954 P.2d 739, 114 Nev. Adv. Rep. 13, 1998 Nev. LEXIS 27 (Nev.), cert. denied, 524 U.S. 958, 118 S. Ct. 2381, 141 L. Ed. 2d 747, 1998 U.S. LEXIS 4373 (U.S. 1998).

### **Psychological examination warranted.**

Defendant's convictions for two counts of lewdness with a minor under the age of 14 were improper where defendant was entitled to an independent psychological examination of the victim; when coupled with a detective's testimony and the lack of corroborating evidence, defendant demonstrated a compelling need for a psychological examination, the district court abused its discretion by denying his request, and the supreme court was unable to conclude that the error was harmless. *Abbott v. State*, 122 Nev. 715, 138 P.3d 462, 122 Nev. Adv. Rep. 62, 2006 Nev. LEXIS 79 (Nev. 2006).

### **Judicial involvement.**

Off-the-record discussions between the judge and the parties relating to a potential plea agreement is prohibited; however, judicial involvement in the plea negotiations may constitute harmless error. *Cripps v. State*, 122 Nev. 764, 137 P.3d 1187, 122 Nev. Adv. Rep. 66, 2006 Nev. LEXIS 92 (Nev. 2006).

### **Untimely request to record sentencing hearing.**

Although the district court did not err by granting a media outlet's untimely request to record the

sentencing hearing, it did err in not making particularized findings on the record regarding all of the factors set forth in Nev. Sup. Ct. R. 230(2) or issuing a written order granting the request. Nonetheless, the district court's error was harmless under this section because it did not contribute to the sentencing determination. *Quisano v. State*, 368 P.3d 415, 132 Nev. Adv. Rep. 9, 2016 Nev. App. LEXIS 11 (Nev. Ct. App. 2016).

CASE NUMBER \_\_\_\_\_

**EXHIBIT** A5

Selection Jury peers-nationality



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BY *[Signature]* DEPUTY

CASE NO. 14-CR-0062

DEPT. NO. 1

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

BEFORE THE HONORABLE DISTRICT COURT JUDGE, NATHAN TOD YOUNG

THE STATE OF NEVADA,

Plaintiff,

vs.

TATIANA LEIBEL,

Defendant.

TRANSCRIPT OF PROCEEDINGS

JURY SELECTION

TUESDAY, JANUARY 27, 2015

APPEARANCES:

For the State:

TOM GREGORY

Chief Deputy District Attorney  
Minden, Nevada

For the Defendant:

KRIS BROWN

Attorney at Law  
Minden, Nevada

JAMIE HENRY

Attorney at Law

Reported By:

Kathy Jackson CSR

Nevada CCR #402

California CCR #10465

CAPITOL REPORTERS (775) 882-5322

Page 57

1 everything, not just this is a homicide, so we'll find, track  
2 the bullet. What else do we have that could have contributed  
3 to this situation?

4 Several questions have been raised concerning the  
5 handling of the evidence. Again, I showed you that gun. It  
6 looks like it's laying on the floor. Those photographs are  
7 taken late in the afternoon. Movement of furniture, there's  
8 lack of documentation, what was at the scene, what was moved.  
9 That trajectory comes from the couch itself that is movable,  
10 could have been moved. There's testimony of witnesses who  
11 indicate they saw that couch being moved. So, again, we  
12 don't have reliable basis for the science that follows.

13 The measurement of the arm, positioning something  
14 against a static arm does not tell you reach. They use that  
15 and call it science and then go in to make other conclusions.  
16 The ballistics even is a subjective test, where you're doing  
17 the testing, looking at the object, but it's your subjective  
18 interpretation of it that makes those ranges.

19 I told you back on February 23rd that there was a  
20 life changing decision made for Tatiana. It's made by  
21 others, and now she's back with others, and you guys are  
22 going to be asked in a few minutes to make another life  
23 changing decision for her.

24 As I said in the beginning, our job of Tatiana

Page 58

1 Leibel is not to prove that she is innocent. She's presumed  
2 guilty. She could sit there, not come forward with any  
3 evidence. The State has the burden of coming forward with  
4 the evidence to prove her guilt beyond a reasonable doubt.  
5 It's not our job to prove this is a suicide. It's the  
6 State's job to prove this is a murder and only based on the  
7 evidence you see and the questions that have been raised  
8 concerning the reliability, only when you say we have enough  
9 evidence that we trust that it convinces us beyond a  
10 reasonable doubt that we have an abiding conviction of the  
11 truth of these charges can you make a finding of guilty.  
12 Thank you.

13 THE COURT: Mr. Gregory, do you need a minute?

14 MR. GREGORY: I'm ready, Your Honor.

15 Have you ever had a couple that you knew that you  
16 were friends with, you thought they had a great marriage,  
17 ideal marriage from what you saw of them. Then you hear they  
18 are getting a divorce. Man, I just thought they were a great  
19 couple, and you think to yourself, it just goes to show you  
20 you don't know what is going on behind closed doors, you  
21 never do.

22 So I can sit here and speculate like Ms. Brown  
23 did regarding Harry's status and whether he was suicidal or  
24 not or I can speculate about the marriage. I can point to

Page 59

1 things like the fact that Harry reached out to his former  
2 wife, it might indicate that his current marriage isn't all  
3 that great or the fact that he was going to call the  
4 locksmith on the 25th and indicated that he was going to  
5 divorce Tatiana.

6 We can speculate about those things, and we can  
7 bring our emotions into it or we can consider the facts and  
8 the science of the case, and that's what I'm asking you to do  
9 here.

10 Even though I'm an attorney, I don't watch too  
11 many CSI shows or even the real crime shows, but over the  
12 weekend a case caught my attention, a show that I watched.  
13 It was about the OJ Simpson case, and I watched it because  
14 when I was in law school, 20 plus years ago, that case was  
15 going on. And you recall in that case what the defense  
16 really hammered on is that the police messed up. They  
17 planted evidence. All of this DNA and everything they found  
18 associated with the OJ and his possessions all police screwed  
19 that up.

20 MS. BROWN: Your Honor, I would object.

21 MR. GREGORY: What was interesting --

22 MS. BROWN: Comparison with that case.

23 THE COURT: Well, the objection is overruled. I  
24 don't know what the point is yet, but it's consistent with

Page 60

1 argument that you were making.

2 MR. GREGORY: Here's the point --

3 THE COURT: I'm going to allow him to continue.

4 MR. GREGORY: Thank you. The point I was going  
5 to make was what happened as a result of that OJ case is that  
6 every case, almost every case that went to trial after that,  
7 a component of the defense is that the police messed up and  
8 that's what we're seeing here. It's a component of the  
9 defense. And do police mess up? Yeah, they do. Sometimes  
10 it's a small screw up. Sometimes it's a big one. Sometimes  
11 it's so big the case can't go forward, but it's up to you to  
12 evaluate their conduct in this case and really ask yourself  
13 if the issues, the mistakes that were made were of such that  
14 it detracts from the evidence in the case.

15 You had two sheriff's deputies responding in a  
16 very timely manner to this and when they got there, they then  
17 let the fire guys in to see if Harry could be resuscitated.  
18 When that couldn't happen, they seized the scene. They  
19 stopped, and they called the investigator, Ed Garren.

20 Mr. Garren who was down here in the valley  
21 traveled up there as quickly as he could. When he gets  
22 there, he makes an initial assessment of the scene and, yeah,  
23 he sees some things that are suspicious to him, a suicide  
24 with a rifle, that's two shots, and you got this weird thing

Page 61

1 going on with the hand.  
2 He made the decision to back up and to do the  
3 right thing. Isn't that what we want our investigators to  
4 do? He sealed the scene. He called the crime lab to come in  
5 and they did. Everybody that -- yeah, they did a scene log.  
6 They did that. You saw in the picture Ed Garren when he's  
7 collecting that firearm. He's got gloves on. Everybody that  
8 went into that scene had a purpose for being in that scene,  
9 and they processed the scene to the best of their abilities.  
10 Is there some things they might do different,  
11 maybe. In every case I've tried, win or lose, we sit down  
12 when the case is over, and we talk about things we can do  
13 better. Are there things we can do better, sure. But are  
14 those things such in this case that the police just blew it  
15 and the paramedics just blew it, and so you folks should just  
16 disregard all of the evidence in this case?  
17 The judge gave you two different jury  
18 instructions and I think are important. One being you get to  
19 bring your common sense to the table. So when you go back in  
20 there to deliberate, don't forget your common sense. He also  
21 told you, you can accept the reasonable explanations, and you  
22 can reject the unreasonable explanations. Again, don't  
23 forget those instructions when you go back to deliberate.  
24 I'm going to hit on just some points that

Page 62

1 Ms. Brown brought up. These aren't necessarily in any order.  
2 During the 911 call just now, something struck me and, that  
3 is that when asked by 911 is he breathing, the answer was no,  
4 he's not breathing. Remember, Dr. Omalu testified death is  
5 not instantaneous. It just kind of struck me that if he's  
6 not breathing, one other piece of the puzzle as far as  
7 evidence of the delay.  
8 Another thing that struck me when Ms. Brown was  
9 talking is that this idea and the text messages that Lana  
10 says to her mom, are you going to flake on me again? Doesn't  
11 that suggest it had happened before where she has these plans  
12 to go to L.A. to see her daughter and Harry controls the  
13 situation and tells her no was Ms. Leibel cooperative, yeah.  
14 If you're going to stage a suicide, don't you cooperate with  
15 the police? You're not going to call it suicide and then not  
16 cooperate, so that's all part of the plan.  
17 If you struggle with this case at all, come back  
18 to the science and the facts, the facts about what happened  
19 with the shooting itself. And when you do that, consider  
20 Dr. Omalu, a huge part of the defense case. It was most of  
21 what Ms. Brown just talked about.  
22 Let's think about what Dr. Omalu said as he  
23 testified up here. Basically, nobody's opinion is as  
24 important as his. When asked about opinions of paramedics

Page 63

1 and police officers, you'll recall he sat down here and said  
2 way down here, that's what he thinks of our local battalion  
3 chief, captains, Sergeant Halsey, all of these people that  
4 came to testify to, they are way down here.  
5 Another person that's way down here is a  
6 90-year-old pathologist who has studied atypical suicides but  
7 to Dr. Omalu, he's just a 90-year-old guy who doesn't know  
8 what he's talking about anymore. Well, his studies of  
9 atypical suicides are very important. His studies, as I  
10 discussed with Dr. Omalu indicate that in a two-shot or  
11 multiple shot suicide case, you expect to see the shot go in  
12 the same area.  
13 So as I talked to Dr. Omalu, if it's a gunshot to  
14 the head and he kind of misses, the second shot is going to  
15 go to the head, okay? In this case, the first shot to the  
16 torso didn't do the damage. The second shot is going to go  
17 to the torso. That's not what you have here.  
18 You also found in suicides it's rare for people  
19 to shoot through clothing. For whatever reason, that's what  
20 his studies show. Here, of course, we have the shot being in  
21 the clothing but to Dr. Omalu, ah, 90-year-old guy doesn't  
22 know what he's talking about.  
23 I brought up Dr. Omalu's prior case not to  
24 embarrass him but because I felt that he made the same

Page 64

1 mistakes in that case that he made in this case. He was  
2 criticized in that case for making conclusory statements that  
3 were not backed up by science without any kind of testing  
4 being done and without any kind of backup in studies or  
5 whatnot. He owned that mistake, I'll give him that, and he  
6 said he quit making that mistake but you know what, he did it  
7 here again.  
8 In his two-page conclusory report, where he cites  
9 no studies or anything, he comes up with these opinions, and  
10 he came up with more new ones as he sat up there on the  
11 stand. Every time I would ask him something, he seemed to  
12 more of his responses.  
13 I'm going to read the quote to you again that I  
14 discussed with Dr. Omalu the prior case with the Court struck  
15 his testimony. It said, the Court has carefully considered  
16 the parties' respective positions and based on the present --  
17 THE COURT: Sir, you're going a little bit fast  
18 for the interpreter.  
19 MR. GREGORY: I'm sorry. I will start over. The  
20 Court has carefully considered the parties' respective  
21 positions and based on the present record finds the  
22 methodology used by Dr. Omalu in reaching his opinions in  
23 this case is not reliable. And even if it was found to be  
24 reliable, his opinions are too speculative to fit the facts

Page 57

1 everything, not just this is a homicide, so we'll find, track  
2 the bullet. What else do we have that could have contributed  
3 to this situation?

4 Several questions have been raised concerning the  
5 handling of the evidence. Again, I showed you that gun. It  
6 looks like it's laying on the floor. Those photographs are  
7 taken late in the afternoon. Movement of furniture, there's  
8 lack of documentation, what was at the scene, what was moved.  
9 That trajectory comes from the couch itself that is movable,  
10 could have been moved. There's testimony of witnesses who  
11 indicate they saw that couch being moved. So, again, we  
12 don't have reliable basis for the science that follows.

13 The measurement of the arm, positioning something  
14 against a static arm does not tell you reach. They use that  
15 and call it science and then go in to make other conclusions.  
16 The ballistics even is a subjective test, where you're doing  
17 the testing, looking at the object, but it's your subjective  
18 interpretation of it that makes those ranges.

19 I told you back on February 23rd that there was a  
20 life changing decision made for Tatiana. It's made by  
21 others, and now she's back with others, and you guys are  
22 going to be asked in a few minutes to make another life  
23 changing decision for her.

24 As I said in the beginning, our job of Tatiana

Page 59

1 things like the fact that Harry reached out to his former  
2 wife, it might indicate that his current marriage isn't all  
3 that great or the fact that he was going to call the  
4 locksmith on the 25th and indicated that he was going to  
5 divorce Tatiana.

6 We can speculate about those things, and we can  
7 bring our emotions into it or we can consider the facts and  
8 the science of the case, and that's what I'm asking you to do  
9 here.

10 Even though I'm an attorney, I don't watch too  
11 many CSI shows or even the real crime shows, but over the  
12 weekend a case caught my attention, a show that I watched.  
13 It was about the OJ Simpson case, and I watched it because  
14 when I was in law school, 20 plus years ago, that case was  
15 going on. And you recall in that case what the defense  
16 really hammered on is that the police messed up. They  
17 planted evidence. All of this DNA and everything they found  
18 associated with the OJ and his possessions all police screwed  
19 that up.

20 MS. BROWN: Your Honor, I would object.

21 MR. GREGORY: What was interesting --

22 MS. BROWN: Comparison with that case.

23 THE COURT: Well, the objection is overruled. I  
24 don't know what the point is yet, but it's consistent with

Page 58

1 Leibel is not to prove that she is innocent. She's presumed  
2 guilty. She could sit there, not come forward with any  
3 evidence. The State has the burden of coming forward with  
4 the evidence to prove her guilt beyond a reasonable doubt.  
5 It's not our job to prove this is a suicide. It's the  
6 State's job to prove this is a murder and only based on the  
7 evidence you see and the questions that have been raised  
8 concerning the reliability, only when you say we have enough  
9 evidence that we trust that it convinces us beyond a  
10 reasonable doubt that we have an abiding conviction of the  
11 truth of these charges can you make a finding of guilty.  
12 Thank you.

13 THE COURT: Mr. Gregory, do you need a minute?

14 MR. GREGORY: I'm ready, Your Honor.

15 Have you ever had a couple that you knew that you  
16 were friends with, you thought they had a great marriage,  
17 ideal marriage from what you saw of them. Then you hear they  
18 are getting a divorce. Man, I just thought they were a great  
19 couple, and you think to yourself, it just goes to show you  
20 you don't know what is going on behind closed doors, you  
21 never do.

22 So I can sit here and speculate like Ms. Brown  
23 did regarding Harry's status and whether he was suicidal or  
24 not or I can speculate about the marriage. I can point to

Page 60

1 argument that you were making.

2 MR. GREGORY: Here's the point --

3 THE COURT: I'm going to allow him to continue.

4 MR. GREGORY: Thank you. The point I was going  
5 to make was what happened as a result of that OJ case is that  
6 every case, almost every case that went to trial after that,  
7 a component of the defense is that the police messed up and  
8 that's what we're seeing here. It's a component of the  
9 defense. And do police mess up? Yeah, they do. Sometimes  
10 it's a small screw up. Sometimes it's a big one. Sometimes  
11 it's so big the case can't go forward, but it's up to you to  
12 evaluate their conduct in this case and really ask yourself  
13 if the issues, the mistakes that were made were of such that  
14 it detracts from the evidence in the case.

15 You had two sheriff's deputies responding in a  
16 very timely manner to this and when they got there, they then  
17 let the fire guys in to see if Harry could be resuscitated.  
18 When that couldn't happen, they seized the scene. They  
19 stopped, and they called the investigator, Ed Garren.

20 Mr. Garren who was down here in the valley  
21 traveled up there as quickly as he could. When he gets  
22 there, he makes an initial assessment of the scene and, yeah,  
23 he sees some things that are suspicious to him, a suicide  
24 with a rifle, that's two shots, and you got this weird thing

## **Trial by Jury or Court**

- 175.011. Trial by jury.
- 175.021. Formation of jury; number of jurors.
- 175.031. Examination of trial jurors.
- 175.036. Challenges for cause for individual jurors: Grounds; trial of challenge.
- 175.041. Limitation of defendants' right to sever in challenges.
- 175.051. Number of peremptory challenges.
- 175.061. Alternate jurors.
- 175.071. Discharge of juror where juror dies or unable to perform duty.
- 175.081. Discharge of jury after retirement upon accident or cause.
- 175.091. Disability of judge during trial.
- 175.101. Disability of judge after verdict or finding of guilty or guilty but mentally ill.

### **175.011. Trial by jury.**

1. In a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State. A defendant who pleads not guilty to the charge of a capital offense must be tried by jury.

2. In a justice court, a case must be tried by jury only if the defendant so demands in writing not less than 30 days before trial. Except as otherwise provided in NRS 4.390 and 4.400, if a case is tried by jury, a reporter must be present who is a certified court reporter and shall report the trial.

### **HISTORY:**

1967, p. 1424; 1983, p. 749; 1987, ch. 281, § 1, p. 614; 1993, ch. 437, § 28, p. 1412.

### **Editor's Notes**

In 2019, the Legislative Counsel made a stylistic change.

### **NOTES TO DECISIONS**

**Requiring the consent of the prosecutor and the court,** or both, before a waiver of a jury trial becomes effective is a reasonable protective condition, as society has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result. *Rains v. State*, 83 Nev. 58, 422 P.2d 541, 1967 Nev. LEXIS 223 (Nev. 1967).

**Defendant cannot be relieved of his waiver of a jury on appeal.**

Where all the parties in a trial for the taking of a vehicle without the consent of its owner consented to the trial proceeding without a jury, the defendant would not be allowed on appeal to be relieved of his choice. *Rains v. State*, 83 Nev. 58, 422 P.2d 541, 1967 Nev. LEXIS 223 (Nev. 1967).

**Subsection 2 of this section is intended to have only a procedural impact**, and if the Legislature intended to grant a substantive right to jury trial in every case, it would have said so in plain, explicit language. *State v. Smith*, 99 Nev. 806, 672 P.2d 631, 1983 Nev. LEXIS 549 (Nev. 1983).

**Subsection 2 of this section does not create a statutory right to a jury trial in all cases.** *State v. Smith*, 99 Nev. 806, 672 P.2d 631, 1983 Nev. LEXIS 549 (Nev. 1983).

#### **Right to a jury trial.**

Subsection 2 of this section grants a right to a jury trial upon timely demand in cases where a jury trial is otherwise required or appropriate. *State v. Smith*, 99 Nev. 806, 672 P.2d 631, 1983 Nev. LEXIS 549 (Nev. 1983).

#### **Time for demanding a jury trial in a Justice Court.**

In light of the public policy in favor of the orderly processing of misdemeanor trials through Justice Courts, the Legislature intended that jury trials be demanded at the earliest possible time under the language of the statute. *Carrell v. Justice's Court of Reno Township*, 99 Nev. 402, 663 P.2d 697, 1983 Nev. LEXIS 462 (Nev. 1983).

#### **Waiver in writing requirement analogous to federal rule.**

Nevada's requirement that waiver of constitutional right to a jury trial be in writing is analogous to the requirement in Federal Rule of Criminal Procedure 23(a), which does not establish a constitutional minimum, but rather is intended to provide the best record evidence of a defendant's express consent, therefore, absent such writing a waiver may still be valid. *Brown v. Burns*, 996 F.2d 219, 1993 U.S. App. LEXIS 14764 (9th Cir. Nev. 1993).

#### **Where written waiver lacks signature, oral waiver on the record sufficient.**

Extended colloquy where defendant stated, "It's my basic right, I understand that, and I understand what you explained to me of the bench trial, as opposed to a jury trial" and the record of his express waiver of his right to a jury trial was sufficient to satisfy the constitutional requirement of a knowing, intelligent, and voluntary waiver of his right to a jury trial despite the lack of a signed waiver. *Brown v. Burns*, 996 F.2d 219, 1993 U.S. App. LEXIS 14764 (9th Cir. Nev. 1993); *Gallimort v. State*, 116 Nev. 315, 997 P.2d 796, 116 Nev. Adv. Rep. 32, 2000 Nev. LEXIS 32 (Nev. 2000), dismissed, 395 P.3d 852, 2017 Nev. Unpub. LEXIS 431 (Nev. 2017).

#### **Failure to make a timely demand constitutes a waiver.**

A statutory, nonconstitutional right to a trial by jury in a Justice Court is waived by the failure to make a timely demand as required by this section. *Carrell v. Justice's Court of Reno Township*, 99 Nev. 402, 663 P.2d 697, 1983 Nev. LEXIS 462 (Nev. 1983).

#### **Informing defendant of right to trial by jury.**

3585

When discussing their right to trial by a jury, district court judges should inform defendants of; (1) the number of members of the community composing a jury; (2) the defendant's ability to take part in jury selections; (3) the requirement that jury verdicts must be unanimous; and (4) that the court alone decides guilt or innocence if the defendant waives a jury trial. *Gallimort v. State*, 116 Nev. 315, 997 P.2d 796, 116 Nev. Adv. Rep. 32, 2000 Nev. LEXIS 32 (Nev. 2000), dismissed, 395 P.3d 852, 2017 Nev. Unpub. LEXIS 431 (Nev. 2017).

**Cited in:**

*Goldstein v. Pavlikowski*, 87 Nev. 512, 489 P.2d 1159, 1971 Nev. LEXIS 463 (1971); *Turner v. State*, 98 Nev. 103, 641 P.2d 1062, 1982 Nev. LEXIS 399 (1982).

**OPINIONS OF ATTORNEY GENERAL**

**Right to a jury trial where the penalty is enhanced.**

There is a substantive right to a jury trial where the punishment for a misdemeanor may be enhanced by an additional six month sentence. AGO 85-16 (10-2-1985).

Where the maximum possible penalty through enhancement would be one year, the criminal defendant would have a right to a jury trial which is available in justice court. AGO 85-16 (10-2-1985).

**Research References and Practice Aids**

**Constitution.**

As to right to trial by jury, see Const., Art. 1, § 3. As to rights of accused, see Const., Art. 1, § 8.

**Cross References**

As to definition of "trial," see NRS 169.195.

As to trials in municipal courts generally, see NRS 266.550.

**ALR**

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense. 16 A.L.R.3d 1362.

Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial. 3 A.L.R.4th 592.

Waiver after not guilty plea of jury trial in felony case. 9 A.L.R.4th 689.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury. 37 A.L.R.4th 293.

**175.021. Formation of jury; number of jurors.**

1. Trial juries for criminal actions are formed in the same manner as trial juries in civil actions.

2. Except as provided in subsection 3, juries must consist of 12 jurors, but at any time before verdict, the parties may stipulate in writing with the approval of the court that the jury consist of any number less than 12 but not less than six.

3. Juries must consist of six jurors for the trial of a criminal action in a Justice Court.

**HISTORY:**

1967, p. 1424; 1983, p. 749.

**NOTES TO DECISIONS**

**Effect of consent to trial by less than twelve jurors.**

While the defendant, indicted for a misdemeanor in the office of public administrator, was entitled to be tried by a jury of twelve if he had demanded it, where he consented to be tried by eleven jurors he was estopped from attacking his conviction on this ground. *State v. Borowsky*, 11 Nev. 119, 1876 Nev. LEXIS 16 (Nev. 1876) (decision under former similar statute).

**Correcting verdict after jury has been discharged.**

Where, after the jury's verdict of not guilty had been read in open court and the jury had been discharged, and the jury foreperson later informed the court that he had accidentally mismarked the verdict form, the Double Jeopardy Clause prohibited the court from changing the jury's verdict from not guilty to guilty, and this section prohibited the court from changing the verdict without the presence of all twelve jurors unanimously agreeing to the purported error. *Davidson v. State*, 124 Nev. 892, 192 P.3d 1185, 124 Nev. Adv. Rep. 76, 2008 Nev. LEXIS 87 (Nev. 2008).

**Research References and Practice Aids**

**Cross References**

As to qualifications of jurors, see NRS 6.010.

As to exemptions from jury service, see NRS 6.020.

As to grounds for excuse from jury duty, see NRS 6.030.

As to penalty for failure to attend and serve on jury, see NRS 6.040.

As to formation of panel of trial jurors, see NRS 6.090.

**ALR**

Validity and application of computerized jury selection practice or procedure. 110 A.L.R.5th 213.



### **175.031. Examination of trial jurors.**

The court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted.

#### **HISTORY:**

1967, p. 1424; 1971, p. 246; 1979, p. 213.

### **NOTES TO DECISIONS**

#### **Method of voir dire.**

Both the scope of voir dire and the method by which voir dire is pursued are within the discretion of the district court; absent a showing that the district court abused its discretion or that the defendant was prejudiced, the Supreme Court shall not disturb a district court's determination to conduct a collective voir dire of prospective jurors. *Summers v. State*, 102 Nev. 195, 718 P.2d 676, 1986 Nev. LEXIS 1128 (Nev. 1986).

#### **Collective voir dire.**

Absent a showing that the district court abused its discretion or that the defendant was prejudiced, the Supreme Court shall not disturb a district court's determination to conduct a collective voir dire of prospective jurors. *Haynes v. State*, 103 Nev. 309, 739 P.2d 497, 1987 Nev. LEXIS 1641 (Nev. 1987).

Where the defense counsel could have asked the trial court during collective voir dire for independent, sequestered voir dire as to any prospective jurors suspected of holding back on their exposure to and impressions of mental illness, the district court did not abuse its discretion in denying the defendant's motion for individual voir dire. *Haynes v. State*, 103 Nev. 309, 739 P.2d 497, 1987 Nev. LEXIS 1641 (Nev. 1987).

#### **Counsel cannot interrogate the jurors on their individual verdicts in previous jury service.**

Where the court allowed extensive questioning regarding prior jury service, e.g., how many times the jurors had previously served, where they served, how long ago they served, whether it was a civil or criminal matter, and whether the jury had arrived at a verdict, the district court did not unreasonably restrict the voir dire examination by refusing to allow defense counsel to ask each juror what his or her individual verdict was in previous jury service. *Rogers v. State*, 101 Nev. 457, 705 P.2d 664, 1985 Nev. LEXIS 446 (Nev. 1985), cert. denied, 476 U.S. 1130, 106 S. Ct. 1999, 90 L. Ed. 2d 679, 1986 U.S. LEXIS 3176 (U.S. 1986).

#### **Counsel cannot interrogate the jury on issues of law.**

The proper place in the trial to discuss the legal issues is during the closing argument to the jury,

NV CODE

where counsel can again remind them of their sworn oath to follow the court's instructions on the law; the trial court not only may, but should, preclude counsel from interrogating the jury during voir dire on issues of law. *Oliver v. State*, 85 Nev. 418, 456 P.2d 431, 1969 Nev. LEXIS 390 (Nev. 1969).

#### **Death-qualified jury.**

A death-qualified jury is not presumed to be biased in favor of the prosecution; rather, the accused has the burden of establishing the nonneutrality of the jury. *Summers v. State*, 102 Nev. 195, 718 P.2d 676, 1986 Nev. LEXIS 1128 (Nev. 1986); *Aesoph v. State*, 102 Nev. 316, 721 P.2d 379, 1986 Nev. LEXIS 1297 (Nev. 1986).

A person's constitutional rights to a fair trial and an impartial jury are not violated by the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of trial. *Aesoph v. State*, 102 Nev. 316, 721 P.2d 379, 1986 Nev. LEXIS 1297 (Nev. 1986).

#### **Insufficient proof of nonneutrality.**

Where the defendant attempted to establish the nonneutrality of the jury by merely citing a number of journal articles that she alleged demonstrate that death-qualified juries are conviction-prone, the district court's denial of the defendant's motion opposing death-qualification of the jury did not violate her constitutional right to a fair trial. *Summers v. State*, 102 Nev. 195, 718 P.2d 676, 1986 Nev. LEXIS 1128 (Nev. 1986).

**Limitation of defense counsel's voir dire to 30 minutes abuse of discretion** where limitation was completely arbitrary, having no relation to the circumstances of the case, and where it resulted in defense counsel being deprived of the opportunity to examine 11 of the prospective jurors. *Salazar v. State*, 107 Nev. 982, 823 P.2d 273, 107 Nev. Adv. Rep. 157, 1991 Nev. LEXIS 208 (Nev. 1991).

#### **Cited in:**

*Cunningham v. State*, 94 Nev. 128, 575 P.2d 936, 1978 Nev. LEXIS 502 (1978); *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210, 1988 Nev. LEXIS 5 (1988).

#### **Research References and Practice Aids**

##### **Cross References**

As to selection of trial jurors, see NRS 6.050 to 6.080.

##### **ALR**

Claustrophobia or other neurosis of juror as subject of inquiry on voir dire or of disqualification of juror. 20 A.L.R.3d 1409.

Propriety, on voir dire in criminal case, of inquiry as to juror's possible prejudice if informed of defendant's prior convictions. 43 A.L.R.3d 1062.

Membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. 63 A.L.R.3d 1034.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial. 64 A.L.R.3d 121.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 A.L.R.3d 1.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 A.L.R.3d 165.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case. 33 A.L.R.4th 409.

Validity and application of computerized jury selection practice or procedure. 110 A.L.R.5th 213.

### **175.036. Challenges for cause for individual jurors: Grounds; trial of challenge.**

1. Either side may challenge an individual juror for disqualification or for any cause or favor which would prevent the juror from adjudicating the facts fairly.

2. Challenges for cause shall be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

#### **HISTORY:**

1968, p. 45.

#### **Editor's note**

Many of the following cases were decided under former similar statutes.

#### **NOTES TO DECISIONS**

**The right to reject does not include the right to select jurors.** If the defendant was tried by an impartial jury, that is all he has the right to demand; he has no vested right to be tried by some particular juror. *State v. Vaughan*, 22 Nev. 285, 39 P. 733, 1895 Nev. LEXIS 5 (Nev. 1895); *State v. Buralli*, 27 Nev. 41, 71 P. 532, 1903 Nev. LEXIS 2 (Nev. 1903).

#### **Disqualification must be based upon the merits of the case.**

As a general rule, the opinion of the juror, in order to disqualify him must be upon the merits; that is, whether the prisoner is guilty or not guilty of the offense charged, and not upon some one particular fact or feature of the case. *State v. Carrick*, 16 Nev. 120, 1881 Nev. LEXIS 21 (Nev. 1881).

#### **Circumstances indicating cause for disqualification.**

A defendant in a criminal action has the right to challenge a juror for cause, for having formed or

expressed an opinion of the defendant's guilt, or to challenge a juror for actual bias, for entertaining a prejudice against the defendant. *State v. McClear*, 11 Nev. 39, 1876 Nev. LEXIS 8 (Nev. 1876).

**Juror must be free from bias or prejudice.**

It is not to be expected, nor does the law require, that a juror will come into court without any opinion whatever; the defendant has only the right to demand that each juror will be free from prejudice and bias, and have no deliberate, fixed or settled opinion as to his guilt. *State v. Carrick*, 16 Nev. 120, 1881 Nev. LEXIS 21 (Nev. 1881).

**Juror's fixed opinion on the death penalty.**

Whenever a prospective juror answers that he has a religious conviction or personal scruple or opinion concerning capital punishment which would render him unable to return a verdict carrying a death penalty, he must be questioned further on the nature of his beliefs and then be confronted with the question whether his views are so firm or fixed that he is unable to return the death penalty under any case; if he then says he is unable to do so he may be excused for cause, so also must a juror who is so firmly of the view that a murderer should die. *Bean v. State*, 86 Nev. 80, 465 P.2d 133, 1970 Nev. LEXIS 460 (Nev.), cert. denied, 400 U.S. 844, 91 S. Ct. 89, 27 L. Ed. 2d 81, 1970 U.S. LEXIS 1145 (U.S. 1970).

A person's constitutional rights to a fair trial and an impartial jury are not violated by the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of trial. *Aesoph v. State*, 102 Nev. 316, 721 P.2d 379, 1986 Nev. LEXIS 1297 (Nev. 1986).

**Before a juror can be excluded for opposition to the death penalty,** he must make "unmistakably clear" (1) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (2) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt. *Bean v. State*, 86 Nev. 80, 465 P.2d 133, 1970 Nev. LEXIS 460 (Nev.), cert. denied, 400 U.S. 844, 91 S. Ct. 89, 27 L. Ed. 2d 81, 1970 U.S. LEXIS 1145 (U.S. 1970).

**A death-qualified jury is not presumed to be biased** in favor of the prosecution; rather, the accused has the burden of establishing the nonneutrality of the jury. *Summers v. State*, 102 Nev. 195, 718 P.2d 676, 1986 Nev. LEXIS 1128 (Nev. 1986).

**Acquaintance with the district attorney.**

The fact that a prospective juror knows or is acquainted with the district attorney is not grounds for disqualifying that juror. *Peoples v. State*, 83 Nev. 115, 423 P.2d 883, 1967 Nev. LEXIS 235 (Nev.), cert. denied, 389 U.S. 866, 88 S. Ct. 132, 19 L. Ed. 2d 138, 1967 U.S. LEXIS 864 (U.S. 1967).

**Waiver of objection to a juror.**

Under the common law and the statute existing at the time the Constitution was adopted, a defendant could waive an objection to a juror, and did waive it unless the challenge was taken prior to the jury being completed; this was especially true when the ground of challenge was then known. It was the right of trial by jury as it then existed that the framers of the Constitution provided should remain inviolate forever, and there is no reason to suppose that they intended any change in the rule as to waiver. *State v. Hartley*, 22

Nev. 342, 40 P. 372, 1895 Nev. LEXIS 12 (Nev. 1895).

**Incompetency of juror not discovered until after the jury was sworn.**

Even though the incompetency of a particular juror was not discovered until after the jury was sworn, the court had a duty to disqualify that juror, and the fact that the incompetency was not discovered until after the jury was sworn did not create a necessity for the discharge of the eleven remaining competent jurors. *State v. Pritchard*, 16 Nev. 101, 1881 Nev. LEXIS 20 (Nev. 1881).

**Court's allowance of a challenge is not reviewable.**

The action of the court in allowing challenges for implied bias is not subject to review. *State v. Larkin*, 11 Nev. 314, 1876 Nev. LEXIS 40 (Nev. 1876); *State v. Buralli*, 27 Nev. 41, 71 P. 532, 1903 Nev. LEXIS 2 (Nev. 1903).

**Overruling of challenge.**

If a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured; an injury can only arise in case the challenging party was compelled to exhaust all his peremptory challenges, and afterwards had an objectionable juror placed on the panel for the want of another challenge. *State v. Raymond*, 11 Nev. 98, 1876 Nev. LEXIS 14 (Nev. 1876).

**Party cannot appeal overruling of a challenge if peremptory challenges were not exhausted.**

A party cannot, on appeal, complain of a ruling of the court in overruling a challenge for cause if it appears that, when the jury was completed, his peremptory challenges were not exhausted, since he might have excluded the obnoxious juror by a peremptory challenge. *State v. Hartley*, 22 Nev. 342, 40 P. 372, 1895 Nev. LEXIS 12 (Nev. 1895).

**The trial court erred in denying defendant's challenge for cause** of a juror whose answers indicated that she might have come in contact with newspaper articles or remarks and had formed an opinion or opinions which it would have been difficult for her to put aside, especially where the defendant used all of his peremptory challenges. *State v. Teeter*, 65 Nev. 584, 200 P.2d 657, 1948 Nev. LEXIS 73 (Nev. 1948).

The court erred in overruling the challenge to a juror who stated in his testimony that he had formed and expressed an unqualified opinion with reference to the guilt or innocence of the prisoners. *State v. Roberts*, 27 Nev. 449, 77 P. 598, 1904 Nev. LEXIS 11 (Nev. 1904).

**Error denying challenge for cause was harmless.**

Though a trial court erroneously denied two of defendant's challenges for cause under NRS 175.036(1) because both prospective jurors espoused prejudices that could be reasonably understood as preventing them from adjudicating the facts fairly, the error was harmless because he used peremptory challenges on both jurors and neither was impaneled. *Romero v. State*, 132 Nev. 1024, 2016 Nev. LEXIS 512 (Nev. 2016).

Defendant waived his objections to two empaneled jurors by failing to pursue his challenges for cause after traverse; the district court erred by denying a challenge as to a juror who was the victim of a very

similar theft and who expressed anger and inability to be impartial, but this error was harmless because defendant used a peremptory strike to remove the juror. *Sayedzada v. State*, 419 P.3d 184, 134 Nev. Adv. Rep. 38, 2018 Nev. App. LEXIS 2 (Nev. Ct. App. 2018).

#### **Insufficient proof of nonneutrality.**

Where the defendant attempted to establish the nonneutrality of the jury by merely citing a number of journal articles that she alleged demonstrate that death-qualified juries are conviction-prone, the district court's denial of the defendant's motion opposing death-qualification of the jury did not violate her constitutional right to a fair trial. *Summers v. State*, 102 Nev. 195, 718 P.2d 676, 1986 Nev. LEXIS 1128 (Nev. 1986).

#### **Cited in:**

*Oliver v. State*, 85 Nev. 418, 456 P.2d 431, 1969 Nev. LEXIS 390 (1969).

#### **Research References and Practice Aids**

##### **ALR**

Religious belief as ground for exemption or excuse from jury service. 2 A.L.R.3d 1389.

Juror's presence at or participation in trial of criminal case (or related hearings) as ground of disqualification in subsequent criminal case involving same defendant. 6 A.L.R.3d 513.

Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror. 11 A.L.R.3d 841.

Claustrophobia or other neurosis of juror as subject of inquiry on voir dire or of disqualification of juror. 20 A.L.R.3d 1409.

Prior service on grand jury which considered indictment against accused as disqualification for service on petit jury. 24 A.L.R.3d 1208.

Comment note on beliefs regarding capital punishment as disqualifying juror in capital case — Post-Witherspoon cases. 39 A.L.R.3d 541.

Membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. 63 A.L.R.3d 1034.

Similarity of occupation between proposed juror and alleged victim of crime as affecting juror's competency. 71 A.L.R.3d 974.

Law enforcement officers as qualified jurors in criminal cases. 72 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases. 72 A.L.R.3d 958.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors. 86 A.L.R.3d 571.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 A.L.R.3d 1.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 A.L.R.3d 165.

Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case, as ground of complaint by accused. 99 A.L.R.3d 1261.

Examination and challenge of state case jurors on basis of attitudes toward homosexuality. 80 A.L.R.5th 469.

#### **175.041. Limitation of defendants' right to sever in challenges.**

When several defendants are tried together, they cannot sever their peremptory challenges, but must join therein.

#### **HISTORY:**

1967, p. 1425.

#### **NOTES TO DECISIONS**

**This section is constitutional and mandatory** rather than directory. Doyle v. State, 82 Nev. 242, 415 P.2d 323, 1966 Nev. LEXIS 223 (Nev. 1966) (decision under former similar statute).

#### **No constitutional right to peremptory challenges.**

There is nothing in either the Constitution of the United States or the Nevada Constitution which requires Congress or the Legislature to grant peremptory challenges to defendants in criminal cases; peremptory challenges arise from the exercise of a privilege granted by the legislative authority. The Legislature has seen fit to treat several defendants, for this purpose, as one party; the privilege must be taken with the limitations placed upon the manner of its exercise. Anderson v. State, 81 Nev. 477, 406 P.2d 532, 1965 Nev. LEXIS 258 (Nev. 1965) (decision under former similar statute).

#### **Cited in:**

White v. State, 83 Nev. 292, 429 P.2d 55, 1967 Nev. LEXIS 278 (1967).

#### **175.051. Number of peremptory challenges.**

1. If the offense charged is punishable by death or by imprisonment for life, each side is entitled to eight peremptory challenges.

2. If the offense charged is punishable by imprisonment for any other term or by fine or by both fine and imprisonment, each side is entitled to four peremptory challenges.

3. The State and the defendant shall exercise their challenges alternately, in that order. Any challenge not exercised in its proper order is waived.

**HISTORY:**

1967, p. 1425.

**Notes To Decisions**

**Allowance of a peremptory challenge after a juror has been accepted and sworn** is not a matter of right; it may be permitted, for good cause. *State v. Anderson*, 4 Nev. 265, 1868 Nev. LEXIS 36 (Nev. 1868) (decision under former similar statute).

**Lose or use method.**

Only qualified individuals were selected to sit in the jury box, and the court replaced any juror who was removed with another who was also previously qualified, and the court agreed to ask certain questions that the parties requested before each side was allowed to individually voir dire the remaining panel members; therefore, the district court did not unreasonably restrict supplemental examination and, thus, did not abuse its discretion by employing the use or lose method of peremptory challenges. *Morgan v. State*, 416 P.3d 212, 134 Nev. Adv. Rep. 27, 2018 Nev. LEXIS 31 (Nev. 2018).

**Eight peremptory challenges allowed for a possible life sentence.**

The court in overruling *Nootenboom v. State*, 82 Nev. 329, 418 P.2d 490, 1966 Nev. LEXIS 239 (1966) which held that a defendant is entitled to eight peremptory challenges only when no shorter sentence than life may be imposed, determined that public policy is better served by allowing eight peremptory challenges whenever a life sentence may be imposed upon conviction of the offense. *Morales v. State*, 116 Nev. 19, 992 P.2d 252, 116 Nev. Adv. Rep. 2, 2000 Nev. LEXIS 3 (Nev. 2000).

**Defendant not entitled to eight peremptory challenges.**

Defendant was not entitled to eight peremptory challenges because none of the offenses charged--conspiracy to commit robbery, robbery, and felony failure to stop--carried the possibility of a life sentence. *Nelson v. State*, 123 Nev. 534, 170 P.3d 517, 123 Nev. Adv. Rep. 50, 2007 Nev. LEXIS 63 (Nev. 2007).

**Cited in:**

*Oliver v. State*, 85 Nev. 418, 456 P.2d 431, 1969 Nev. LEXIS 390 (1969); *Schneider v. State*, 97 Nev. 573, 635 P.2d 304, 1981 Nev. LEXIS 589 (1981).

**Research References and Practice Aids**

**ALR**



Additional peremptory challenges because of multiple criminal charges. 5 A.L.R.4th 533.

Validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent of punishment. 8 A.L.R.4th 149.

**175.061. Alternate jurors.**

1. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.

2. Alternate jurors, in the order in which they were called, shall replace jurors who become unable or disqualified to perform their duties.

3. Alternate jurors shall:

- (a) Be drawn in the same manner;
- (b) Have the same qualifications;
- (c) Be subject to the same examination and challenges;
- (d) Take the same oath; and
- (e) Have the same functions, powers, facilities and privileges,

as the regular jurors.

4. If an alternate juror is required to replace a regular juror after the jury has retired to consider its verdict, the judge shall recall the jury, seat the alternate and resubmit the case to the jury.

5. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by statute may not be used against an alternate juror.

**HISTORY:**

1967, p. 1425; 2005, ch. 110, § 1, p. 306.

## NOTES TO DECISIONS

**A juror who will not weigh and consider all the facts** and circumstances shown by the evidence for the purpose of doing equal and exact justice between the state and the accused should not be allowed to decide the case. McKenna v. State, 96 Nev. 811, 618 P.2d 348, 1980 Nev. LEXIS 709 (Nev. 1980).

### **Deliberations started a new.**

The district court's instruction properly informed the jury that they were to begin the deliberations anew with the alternate juror. The court instructed the jury that they had to redo all of their work from the previous evening with the new juror and begin their deliberations anew. The court also told the jury that they must start anew so that the substitute juror could be part of the deliberations from the beginning. Therefore, the instruction clearly informed the jury that the case had been resubmitted to them and that deliberations had to be started anew, not just resumed. Brake v. State, 113 Nev. 579, 939 P.2d 1029, 113 Nev. Adv. Rep. 59, 1997 Nev. LEXIS 68 (Nev. 1997).

Failure to instruct a jury to restart deliberations, when an alternate juror replaces an original juror, is an error of constitutional dimension, because it impairs the right to a trial by an impartial jury and is subject to plain error review. However, failure to so instruct a reconstituted jury was not plain error when over 75 percent of the jury's deliberation time occurred after the alternate juror joined the jury. Martinorellan v. State, 131 Nev. 43, 343 P.3d 590, 131 Nev. Adv. Rep. 6, 2015 Nev. LEXIS 11 (Nev. 2015).

### **Substitution of alternate after jury retires.**

Jury deliberations must begin anew when an alternate juror is substituted after the jury has retired. Carroll v. State, 111 Nev. 371, 892 P.2d 586, 111 Nev. Adv. Rep. 25, 1995 Nev. LEXIS 28 (Nev. 1995).

### **Selection of alternates improper.**

District court's process to select alternate jurors violated this section by not allowing peremptory challenges of the alternates; however, defendant failed to object, and the failure to follow the procedures outlined in this section did not affect defendant's substantial rights. Moore v. State, 122 Nev. 27, 126 P.3d 508, 122 Nev. Adv. Rep. 4, 2006 Nev. LEXIS 1 (Nev. 2006).

## **Research References and Practice Aids**

### **ALR**

Presence of alternate juror in jury room as ground for reversal of state criminal conviction. 15 A.L.R.4th 1127.

Alternate juror, propriety under state statute or court rule, of substituting state trial juror with alternate after case has been submitted to jury. 88 A.L.R.4th 711.

### **175.071. Discharge of juror where juror dies or unable to perform duty.**

3597

If, before the conclusion of the trial, and there being no alternate juror called or available, a juror dies, or becomes disqualified or unable to perform the juror's duty, the court may duly order the juror to be discharged and a new juror may be sworn and the trial begun anew, or the jury may be discharged and a new jury then or afterward impaneled.

**HISTORY:**

1967, p. 1425.

**NOTES TO DECISIONS**

**The fact a juror was the victim of a burglary committed on the first day of a burglary trial** does not, as a matter of law, disqualify her as a juror; whether or not the incident disqualified her for cause became a question of fact to be determined by the trial judge; only if her answers on voir dire had disclosed that she was prejudiced and as a result could not render a fair and impartial verdict would the defendant have been entitled to have her disqualified. Hall v. State, 89 Nev. 366, 513 P.2d 1244, 1973 Nev. LEXIS 525 (Nev. 1973).

**Research References and Practice Aids**

**Cross References**

As to bribery of jurors, see NRS 199.010 to 199.050.

As to prohibition of jurors from receiving communications, see NRS 199.050.

**ALR**

Dismissal of juror, threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror. 3 A.L.R.5th 963.

**175.081. Discharge of jury after retirement upon accident or cause.**

If, after the retirement of the jury, any accident or cause occurs to prevent their being kept for deliberation, the jury may be discharged.

**HISTORY:**

1967, p. 1425.

**NOTES TO DECISIONS**

**Discharge is in the discretion of the court.**

Although the trial courts are invested with power, in the exercise of a sound legal discretion, to discharge a jury after the cause has been submitted to them, without the consent of the defendant and

CASE NUMBER \_\_\_\_\_

**EXHIBIT** A6

NRS 171.123 Temporary detention

Page 185

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.

Page 186

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;

Page 187

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

Page 188

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.

**171.123. Temporary detention by peace officer of person suspected of criminal behavior or of violating conditions of parole or probation: Limitations.**

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

2. Any peace officer may detain any person the officer encounters under circumstances which reasonably indicate that the person has violated or is violating the conditions of the person's parole or probation.

3. The officer may detain the person pursuant to this section only to ascertain the person's identity and the suspicious circumstances surrounding the person's presence abroad. Any person so detained shall identify himself or herself, but may not be compelled to answer any other inquiry of any peace officer.

4. A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

**HISTORY:**

1969, p. 535; 1973, p. 597; 1975, p. 1200; 1987, ch. 512, § 1, p. 1172; 1995, ch. 584, § 6, p. 2068.

**NOTES TO DECISIONS**

**Unreasonable detention.**

Grant of summary judgment in favor of the animal control officer in the owner's action under 42 U.S.C.S. § 1983 was proper because the officer was entitled to qualified immunity since the owner failed to make a substantial showing that the officer included a false statement in the search warrant affidavit supporting the search warrant for the owner's address. And, although the owner was not detained based on suspicion of criminal behavior, the 20 to 30 minute period during which she was removed from her residence, but not restrained, was within the one-hour limit for temporary detentions. *Palmieri v. Clark Cnty.*, 131 Nev. 1028, 367 P.3d 442, 131 Nev. Adv. Rep. 102, 2015 Nev. App. LEXIS 16 (Nev. Ct. App. 2015).

Officer's continued detention of defendant, after he dispelled any suspicion that defendant was drinking underage or out past curfew by producing an ID card, constituted an illegal seizure in violation of the Fourth Amendment, and the fruits of that illegal seizure should have been suppressed. The officer's retention of defendant's ID constituted a detention without reasonable suspicion, and the officer's discovery of outstanding warrants was not an intervening circumstance that rendered the discovery of a

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3601

Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

HUBKEY Harry is dead.

GARREN ...(unintelligible) today.

HUBKEY Harry is dead. D-E-A-D. You understand that?

LEIBEL I know ...

HUBKEY Okay?

LEIBEL ... I know Harry dead.

HUBKEY And ...

GARREN Could you not calm him down today?

LEIBEL What?

GARREN Because ... because you said you've always been able to calm him down. Could you not calm him down today?

LEIBEL I am not even he know ... I am even thinking he do this. I am not even thinking one second.

GARREN But ...

LEIBEL I think ...

GARREN ... he didn't do it.

LEIBEL ... I think ...

GARREN He didn't do it.

LEIBEL You think I do it but I am not do it. You make more investigation your science. Because sometimes wrong. I am not do it. I am not kill my husband. I am not even think kill my husband. I am not even thinking kill ...

GARREN I don't think you did think you'd kill him. I think it just happened.

LEIBEL I am not kill my husband.

Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

GARREN I think it just happened. I don't think you planned it. I don't think you ... it was something you meant to do. I think it was something that just happened.

LEIBEL Okay. I am not kill my husband. I am innocent. I am not kill my husband.

HUBKEY Then who killed him?

LEIBEL He kill himself. I don't know how this happen because Bo maybe push him. I don't know. I am not have idea what happen inside because I am kitchen this time.

HUBKEY Well you understand he has a bullet wound right here, right? You saw it.

LEIBEL I saw it ...

HUBKEY Okay.

LEIBEL ... but I pull him already down.

HUBKEY Okay. So you understand that there's a big powder burn right?

LEIBEL Okay.

HUBKEY Okay? So you understand that the bullet ... the barrel was this far away from his hand ...

LEIBEL Okay.

HUBKEY ... when the gun went off, right?

LEIBEL Okay.

HUBKEY So how do you explain a bullet going through his hand ...

LEIBEL Okay.

HUBKEY ... into his shoulder ...

LEIBEL Okay.



Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

HUBKEY ... across the top of his shoulder ... 3

LEIBEL Okay. 4

HUBKEY ... and into the couch? Okay? It's physically impossible to do that.  
You understand that? Okay, do you understand ...

LEIBEL I don't know ...

HUBKEY ... what I'm saying?

GARREN His arm is not long enough.

LEIBEL Maybe he ...

HUBKEY No, his arm is not long enough.

GARREN His arm is not long enough. The gun's ...

HUBKEY It is physically ...

GARREN ... too long.

HUBKEY ... it is physically impossible.

LEIBEL I don't know. Check ... check this rifle because when you pulling ... I remember you only click and already bullet coming.

HUBKEY Yeah, you have to cock the hammer and pull the trigger.

LEIBEL Yeah.

HUBKEY You already told me you know how to do that because you've shot the gun, right?

LEIBEL Yeah, I ... I have this one from ... Harry have and I have and other friend have license.

HUBKEY Yeah.

LEIBEL Yeah.

HUBKEY Yeah.

Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

LEIBEL            Yeah.

HUBKEY            Okay. But do you understand ...

LEIBEL            A license ...

HUBKEY            ... we're saying ...

LEIBEL            ... (unintelligible) ...

HUBKEY            ... that it's impossible for the barrel to be way back here, the bullet to go through here, hit here, and go through? Do you understand that?

LEIBEL            I understand this.

HUBKEY            Okay, do you under ...

LEIBEL            Because ... because he ...

HUBKEY            Hold on, hold on.

LEIBEL            Yeah.

HUBKEY            Do you understand that there's been thousands of studies on these different things, right? And do you understand that a person cannot hold this gun like this and make this shot, okay? It's impossible. It is ...

LEIBEL            How ...

HUBKEY            ... scientifically ...

LEIBEL            ... scientifically how he not make shot this?

HUBKEY            Okay ...

GARREN            It's physically impossible.

HUBKEY            ... it's physically impossible. He ... from here he couldn't even reach the trigger, okay? He couldn't do it. It's impossible.

Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

LEIBEL

But maybe he have hand more close. Why you said you have hand ... he have hand like this?

HUBKEY

Okay, even if he put it here ...

LEIBEL

Yeah.

HUBKEY

... he ... the barrel couldn't be touching his hand.

LEIBEL

Okay.

HUBKEY

It had to have been this far away, okay? Because the powder burns ...

GARREN

The wound is ...

HUBKEY

... so ...

GARREN

... on the top of his shoulder.

HUBKEY

... so it ... it's ... there's ...

LEIBEL

Okay, maybe have like this. I don't know. Yeah.

HUBKEY

Okay, and then you have this one. You have one way back here in the armpit.

LEIBEL

Because I told you Bo sit together with him.

GARREN

Okay, you can't blame ...

HUBKEY

No.

LEIBEL

Doggie maybe he make like this.

GARREN

... you can't blame the dog.

LEIBEL

I am not blame him.

GARREN

The dog had nothing to do with it.

LEIBEL

I am not blame him.

Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

GARREN

I believe you did. I believe it ... I ... I don't believe you did it on purpose. I think it was probably an accident. I think it was something that just happened.

HUBKEY

I think you got tired of his shit myself.

LEIBEL

No.

GARREN

With ... we either have to look at it ... either you did it and you meant to do it ... like he said you were tired of his shit. Or it just happened. It just happened at that moment.

LEIBEL

No.

GARREN

Those are basically the only ... the two theories to look at.

LEIBEL

No, I am not shot him. I am not shot him. Make more investigation. I am not shot him.

GARREN

But that's not going to change what we already know.

LEIBEL

Okay.

GARREN

By ... by repeating make more investigation is not going to change that fact that he could not have been holding the gun when it went off.

HUBKEY

Listen, ultimately what this boils down to is ...

LEIBEL

Yeah.

HUBKEY

... the science says that you did it, okay?

LEIBEL

Okay.

HUBKEY

At the end of the day we have to present the science to a judge, a jury, a district attorney, okay?

LEIBEL

Okay.

HUBKEY

Um ...

Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

LEIBEL Uh-huh.

GARREN ... located at the Douglas County Sheriff's Office by me ...

LEIBEL Uh-huh.

GARREN Duly authorize law enforcement officers within the County of Douglas, State of Nevada.

LEIBEL Uh-huh.

GARREN If you could sign ...

LEIBEL I sign.

GARREN ... if you agree to that right there.

LEIBEL Yes.

GARREN Okay. And then we have a gal going to ... I'll fill all of that in.

LEIBEL Okay.

GARREN Thanks. She's going to ...

LEIBEL Who?

GARREN ... there's a gal that works for us. She's going to take you across the hall. We've got some clothes for you.

LEIBEL Okay.

GARREN They're going to have to take some pictures.

LEIBEL Okay.

GARREN Okay? It's all part of the protocol that we have to do ...

LEIBEL Yes.

GARREN ... in a case like this.

LEIBEL Of course.

CASE NUMBER \_\_\_\_\_

**EXHIBIT** A7

Assertion of rights

Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

GARREN My partner is going to talk to them.

LEIBEL Okay.

GARREN And we're going to make arrangements to have you back up here at 11:00.

LEIBEL Okay.

GARREN Brian?

(Garren exits to talk to Hubkey)

(Garren enters)

GARREN Leann is going to have my card.

LEIBEL Okay.

GARREN Okay? And ... with my desk number on it.

LEIBEL Okay.

GARREN But yeah just come right back up here at 11:00.

LEIBEL Okay.

GARREN And ...

LEIBEL And where I going?

GARREN Huh? Right here to the station.

LEIBEL No, I understand but ... what number ... no ... how ... how ... how I go inside?

GARREN Just walk in through the front door.

LEIBEL Yeah.

GARREN And we'll ... they'll ... they'll let me know you're here.

3610

355

418

CASE NUMBER \_\_\_\_\_

**EXHIBIT** A 8

NRS 171.1239 Electronic recording



Page 185

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.

Page 186

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,

Page 187

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

Page 188

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.

Page 9

1 Your Honor, I move for admission of State's or of  
2 Exhibit 56.  
3 THE COURT: Any objection?  
4 MS. HENRY: No, Your Honor.  
5 THE COURT: 56 is admitted.  
6 MR. GREGORY: And, Your Honor, I would like to  
7 publish it at the time to the jury.  
8 THE COURT: Go ahead, sir.  
9 I'm not going to require that the recording be  
10 reported unless you're requesting me specifically to do so.  
11 MR. GREGORY: No, Your Honor. I do have a  
12 transcript of the recording, if that is of assistance, that's  
13 been marked as an exhibit.  
14 THE COURT: Okay. Ms. Brown, before this gets  
15 played, or, Ms. Henry, are you asking the interpreter to  
16 interpret this call, this recording as it goes along?  
17 MS. BROWN: No, Your Honor.  
18 MS. HENRY: No, Your Honor.  
19 THE COURT: Okay. Thank you.  
20 (Whereupon, a CD 911 recording was played.)  
21 MR. GREGORY: Your Honor, I'm going to return  
22 Exhibit 56 to the clerk.  
23 THE COURT: Thank you, sir.  
24 Q. (BY MR. GREGORY:) Mr. Moffat, are you familiar

Page 10

1 with the term call for services?  
2 A. Yes.  
3 Q. What exactly is that?  
4 A. It's the call that we create when a 911 call is  
5 received so it can be processed by the dispatchers in  
6 dispatch.  
7 Q. Is it a written transmission?  
8 A. It is, it's in our computer in dispatch.  
9 Q. And would it accurately track when a call came in  
10 and when officers arrived on scene?  
11 A. Yes.  
12 Q. I'm handing you Exhibit Number 57. Can you  
13 please take a look at that. What does that appear to be?  
14 A. It's a call for service for that call.  
15 Q. Does it appear to be an accurate record of that  
16 call for services log?  
17 A. Yes.  
18 Q. Thank you.  
19 Your Honor, I move for admission of Exhibit  
20 Number 57.  
21 MS. HENRY: No objection.  
22 THE COURT: 57 is admitted.  
23 MR. GREGORY: Return that to the clerk, and I  
24 have no further questions.

Page 11

1 THE COURT: Questions, Ms. Henry?  
2 MS. HENRY: Yes, thank you, Your Honor.  
3 CROSS-EXAMINATION  
4 BY MS. HENRY:  
5 Q. Mr. Moffat, did you -- did you say that you did  
6 record -- that you recorded this call?  
7 A. Yes, I assisted in making the recording of the  
8 call, yes.  
9 Q. And did you listen to the call before you gave it  
10 to the District Attorney's office?  
11 A. Yes.  
12 Q. Okay. And did you hear the gaps in the recording  
13 of this call?  
14 A. Yes.  
15 Q. There were approximately four of them, is that  
16 correct?  
17 A. I wasn't counting but.  
18 Q. Okay. Were those gaps part of the actual 911  
19 call?  
20 A. No.  
21 Q. Okay. And why were those gaps in that recording?  
22 A. On the recording process, if there is nothing  
23 said between the two people on the phone, the recorder  
24 actually stops and then as soon as another noise is made,

Page 12

1 somebody starts talking, it starts recording again. So there  
2 were probably a couple of different recordings on there but  
3 all of the same call in the same order.  
4 Q. Okay. And would the time sequence change when it  
5 stops recording?  
6 A. No.  
7 MS. HENRY: Okay. No further questions, Your  
8 Honor.  
9 THE COURT: Any redirect?  
10 REDIRECT EXAMINATION  
11 BY MR. GREGORY:  
12 Q. Well, so those gaps, as I understand it, if both  
13 parties quit talking, then the recording stops?  
14 A. Correct.  
15 Q. And then it reinitiates when somebody makes a  
16 sound, correct?  
17 A. Correct.  
18 Q. So when we heard those gaps in the 911 call,  
19 there should not be any missing dialogue, correct?  
20 A. Correct.  
21 Q. All right. Thank you.  
22 THE COURT: Anything else?  
23 MS. HENRY: No, Your Honor.  
24 THE COURT: Is this witness excused?

Page 13

Page

1 MR. GREGORY: For the State, yes, Your Honor.  
2 THE COURT: Permanently excused?  
3 MR. GREGORY: Yes.  
4 THE COURT: Sir, thank you for your appearance  
5 today. You may leave.  
6 THE WITNESS: Thank you.  
7 (Witness excused.)  
8 THE COURT: Your next witness?  
9 MR. GREGORY: The State calls Deputy Haley.  
10 THE COURT: Deputy Haley, come on in, please,  
11 sir. Sir, if you would pause right in front of the clerk  
12 raise your right hand.  
13  
14 DEPUTY STEVEN HALEY,  
15 called as a witness on behalf of the  
16 State having been first duly sworn,  
17 was examined and testified as follows:  
18  
19 THE COURT: Deputy Haley, come on up and have a  
20 seat, please. There's water if you would like. I'm going to  
21 ask you to speak in a loud, clear voice so that the jury,  
22 everyone in the courtroom and the court reporter can hear  
23 you. Thank you.  
24

Page 14

1 DIRECT EXAMINATION  
2 BY MR. GREGORY:  
3 Q. Sir, please state your name, and spell your last  
4 name.  
5 A. Steven Haley, H-a-l-e-y.  
6 Q. What do you do for a living?  
7 A. I'm a deputy with Douglas County Sheriff's  
8 Office.  
9 Q. And how long have you been so employed?  
10 A. About six and a half years.  
11 Q. All right. All with the Douglas County Sheriff's  
12 Office?  
13 A. Yes.  
14 Q. Okay. And you're currently assigned to the  
15 patrol division?  
16 A. I am.  
17 Q. Were you so employed on February 23rd of 2014?  
18 A. I was.  
19 Q. What shift were you working?  
20 A. I believe I was on day shift.  
21 Q. Which would mean what hours?  
22 A. 6:00 a.m. to 4:00 p.m.  
23 Q. And so you were on -- on duty at approximately  
24 11:00 o'clock that morning?

1 A. Yes, I was.  
2 Q. On that date and approximately time, did you have  
3 occasion to respond to 452 Kent Way in Zephyr Cove?  
4 A. I did.  
5 Q. What was your purpose in responding to that  
6 location?  
7 A. Responded to what I saw on my mobile computer  
8 that was a self-inflicted gunshot.  
9 Q. When you say you saw it on your computer, tell us  
10 a little bit about what does your computer communicate to  
11 you, what types of things?  
12 A. It's tied in to the dispatch center that can  
13 enter calls and as they are taking the calls, they can add  
14 them to their computer which shows up on our mobile terminals  
15 in our car.  
16 Q. Okay. So the 911 call comes in and the  
17 dispatcher can dispatch units to that location, correct?  
18 A. Yes.  
19 Q. And so you got something transcribed to you on  
20 the your computer consul?  
21 A. That showed up --  
22 Q. Some information?  
23 A. It showed up as an entry for a stab or a gunshot,  
24 and then there were no call notes initially because the

Page 16

1 dispatchers were particular taking the 911 call.  
2 Q. So at that point in time, you know very little,  
3 correct?  
4 A. Yes.  
5 Q. And it's not like you sat and listened to the 911  
6 call. So you were given information that there was a gunshot  
7 or a stab?  
8 A. The classification that came up on the computer,  
9 they only have certain amount to choose from and it came out  
10 as a stab or a gunshot.  
11 Q. Okay. And do you recall about what time you got  
12 or received that information?  
13 A. Around 11:03.  
14 Q. Okay. A.m or p.m.?  
15 A. In the morning a.m.  
16 Q. Where were when you received that information?  
17 A. Around -- it's on Highway 50 around what we call  
18 Sewer Plant Road, which is west of Elks Point Road.  
19 Q. And approximately how long in traveling distance  
20 would it take you to get from there to the residence at 452  
21 Kent?  
22 A. Approximately two minutes.  
23 Q. Did you, in fact, respond as soon as you received  
24 that information?

**171.1239. Electronic recording of custodial interrogations conducted in place of detention; adoption of policies by law enforcement agency.**

1. Each law enforcement agency in this State shall adopt detailed, written policies regarding the electronic recording of custodial interrogations that are conducted in a place of detention.

2. Any policies adopted by a law enforcement agency pursuant to this section must be made available:

(a) To all law enforcement officers employed by the law enforcement agency; and

(b) For public inspection during normal business hours.

3. Any policies adopted by a law enforcement agency pursuant to this section must include, without limitation:

(a) A requirement that, except as otherwise provided in any policy adopted pursuant to paragraph (c), an electronic recording must be made of an entire custodial interrogation which is conducted in a place of detention if the person being interrogated is suspected of committing homicide as described in NRS 200.010 to 200.260, inclusive, or sexual assault as defined in NRS 200.366.

(b) A requirement that, except as otherwise provided in any policy adopted pursuant to paragraph (c), if a person being interrogated chooses to make or sign a written statement during the course of a custodial interrogation concerning a homicide as described in NRS 200.010 to 200.260, inclusive, or sexual assault as defined in NRS 200.366, the making and signing of the statement must be electronically recorded.

(c) The circumstances in which all or a portion of a custodial interrogation is not required to be electronically recorded, including, without limitation, when:

(1) An equipment malfunction prevents the electronic recording of the custodial interrogation in its entirety and replacement equipment is not immediately available.

(2) The law enforcement officer conducting the custodial interrogation fails, in good faith, to record the interrogation because:

(I) He or she inadvertently fails to operate the recording equipment properly; or

(II) The recording equipment malfunctions or stops recording without the

law enforcement officer's knowledge.

(3) More than one custodial interrogation is being conducted simultaneously, thereby exceeding the available electronic recording capacity of the recording equipment.

(4) The person who is being or will be interrogated:

(I) Affirmatively asserts his or her desire to speak with law enforcement officers without being recorded;

(II) Makes a statement spontaneously and not in response to a question asked during the custodial interrogation;

(III) Makes a statement during routine questioning during the process of his or her arrest; or

(IV) Makes a statement at a time when the law enforcement officer conducting the interrogation is, in good faith, unaware of the person's involvement in a homicide as described in NRS 200.010 to 200.060, inclusive, a sexual assault as defined in NRS 200.366 or an offense for which a custodial interrogation is otherwise required to be electronically recorded in accordance with the policies adopted pursuant to this section.

(5) At the time of the custodial interrogation, the law enforcement officer conducting the interrogation is, in good faith, unaware that the type of offense involved is a homicide as described in NRS 200.010 to 200.060, inclusive, a sexual assault as defined in NRS 200.366 or an offense for which a custodial interrogation is otherwise required to be electronically recorded in accordance with the policies adopted pursuant to this section.

(6) Exigent circumstances make recording impractical.

(d) Requirements pertaining to the retention and storage of electronic recordings made pursuant to this section.

(e) The circumstances in which all or a portion of an electronic recording is not required to be retained, including, without limitation, when the electronic recording is damaged or destroyed, without bad faith on the part of any person or entity in control of the electronic recording.

4. Each law enforcement agency in this State shall collaborate with the district attorney of the county in which the law enforcement agency is located regarding the contents of the policies required to be adopted pursuant to this section.

5. As used in this section:

NV CODE

2

3616

(a) "Custodial interrogation" means any interrogation of a person who is required to be advised of his or her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

(b) "Electronic recording" means an audio or audiovisual recording.

(c) "Interrogation" means questioning which is initiated by a law enforcement officer or any words or actions on the part of a law enforcement officer, other than those which are ordinarily attendant to arrest and custody, that the officer should know are reasonably likely to elicit an incriminating response from the person who is being questioned.

(d) "Law enforcement agency" means:

- (1) The sheriff's office of a county;
- (2) A metropolitan police department; or
- (3) A police department of an incorporated city.

(e) "Place of detention" means a fixed location under the control of a law enforcement agency of this State where persons are questioned about alleged crimes.

**History.**

2019, ch. 142, § 1, p. 794.

**Effective Dates**

This section is effective October 1, 2019.

CASE NUMBER \_\_\_\_\_

**EXHIBIT** A9

Ineffective assistance of counsel

Page 21

1 this case.

2 Now, what is murder? Murder, as the judge has  
3 instructed you, is intentionally taking someone's life. What  
4 is the proof of intent in this case? As the instruction  
5 said, we rarely can determine intent except by looking at the  
6 circumstantial evidence. Usually people don't announce what  
7 they are going to do, sometimes they do.

8 So what is the evidence in this case of intent?

9 Shot number one, it's a kill shot, extreme shock, ammunition,  
10 fired at a range of two to 18 inches into Harry. Any  
11 question what the intent is there? If there is any question,  
12 you have a second shot fired at Harry, and then you've got  
13 preparation of a third shot to Harry. All of these things  
14 strongly indicative of an intent to kill. What other intent  
15 could there be?

16 Dr. Omalu talked about the second shot was a  
17 misfire. Matt Noedel tested that gun and said it was working  
18 just fine, no indications of any misfire.

19 First degree murder as distinguished between  
20 second degree murder is in addition to that intent,  
21 willfulness element, you have premeditation and deliberation,  
22 and the judge read you a very important instruction on that.  
23 It talks about how premeditation and deliberation. We don't  
24 look at time, okay, whether it's a day, an hour or a minute,

Page 22

1 instruction set, we don't look at that.

2 We look at did the person with design commit this  
3 offense? What information do you have that Tatiana  
4 premeditated and deliberated? Think of just the basic thing  
5 she would have had to have done to commit this offense. You  
6 have to get the gun. You have to load the gun. You have to  
7 wait for an opportune time. You have to approach and then  
8 commit the crime. And then what do you have to do? You have  
9 to stage it. You have to delay, do all of the things she did  
10 after.

11 She didn't call for 911 right away. She didn't  
12 call for help right away. She didn't call friends and  
13 family. She was delaying to put forth the falsity that Harry  
14 had killed himself. All of these things indicate  
15 premeditation and deliberation, and it's why when we're done  
16 here today, I'm going to ask that you return the verdict of  
17 murder in the first degree with the use of a deadly weapon.  
18 Thank you.

19 THE COURT: Thank you. We're going to give  
20 Mr. Gregory a moment just to return any exhibits that he has  
21 to the clerk. We'll let them her put them in order, let  
22 Ms. Brown or Ms. Henry grab any exhibits.

23 MS. BROWN: Can we do that, Your Honor? There's  
24 going to be quite a few. I only get one chance.

Page 23

1 THE COURT: Do you know the numbers that you  
2 need?

3 MS. BROWN: Yes, I do.

4 THE COURT: Go ahead. We'll give you all of the  
5 time you need.

6 MS. BROWN: Thank you, Your Honor.

7 THE COURT: Folks, as we do this, we're going to  
8 continue working through lunch and until the attorneys are  
9 done and the case is finally handed to you. The Court will  
10 purchase lunch for you, give you some options of where you  
11 would like. You're going to have to agree on one spot,  
12 unanimous verdict on the restaurant, and we'll go out and  
13 we'll get lunch for you. We've got some menus. We'll pick  
14 up lunch for you. I know we're approaching noon, and some of  
15 you may have been thinking about that, so we're going to keep  
16 working though.

17 MS. BROWN: May it please the Court.

18 THE COURT: Yes, ma'am.

19 MS. BROWN: Ladies and gentlemen of the jury,  
20 Mr. Gregory. One of the instructions that I want to, again,  
21 bring to your attention is presumption of innocence.  
22 Ms. Leibel is presumed innocent until the contrary is proved  
23 by evidence beyond a reasonable doubt. This is one of the  
24 jury or one instruction that I called to your attention when

Page 24

1 we first talked both in voir dire and at the beginning of the  
2 case.

3 And because Ms. Leibel comes in front of you, she  
4 does not have to prove anything. It's not our burden to  
5 prove this is suicide. It's the State's burden to come  
6 forward with enough evidence to convince you that this is  
7 murder.

8 Yesterday you heard Dr. Omalu testify and even  
9 though he concluded to a reasonable degree of medical  
10 certainty that this was suicide, that we presented that  
11 evidence to you, that is not our burden. It's the State's  
12 burden to bring forward evidence to show that this is murder.

13 But that statement of Dr. Omalu, if nothing else,  
14 provides a reasonable doubt in this case. You heard his  
15 qualifications, and you know he relied on scientific  
16 evidence, on medical evidence that he's an expert in. He  
17 then applies what he knows and the wounds he sees on the body  
18 to the evidence he's familiar with and the crime scene, and  
19 he makes that determination, and he told you that this is a  
20 suicide.

21 But probably one of the most important things he  
22 said was on cross-examination, when he's being questioned  
23 concerning the Pritchard case, at that point, he said, yes,  
24 on that occasion I made a mistake. I made an assumption I



1 A. Now you're reading, that was almost a five page  
2 ruling. You're reading a paragraph. If you read farther,  
3 you'll see where the judge said Dr. Omalu is highly  
4 qualified. He is fully trained. He can give the opinion but  
5 in this case, some mistakes were made, and I agree with the  
6 judge because in that case, the outcome on the case --  
7 MR. GREGORY: Your Honor, I'm asking --  
8 THE COURT: You answered the question.  
9 MR. GREGORY: Thank you.  
10 Q. In that case, the judge criticized you for citing  
11 opinions without giving any authority; is that correct?  
12 A. That is inaccurate. You see, which is not fair.  
13 In that case, what happened --  
14 Q. Sir, there's no question in front of you.  
15 A. The judge --  
16 THE COURT: Wait a minute. Wait a minute. Now  
17 he is answering you.  
18 MR. GREGORY: Okay.  
19 THE COURT: Go ahead.  
20 THE WITNESS: The outcome of that case lied to me  
21 that there were no medical records, okay. This is how it all  
22 started. I was not aware there were medical records. It was  
23 only in a deposition that the medical records were shown to  
24 me. I did not review any medical records because the

1 attorney in the case told me there were no medical records.  
2 THE COURT: Okay. You've answered the question.  
3 Q. (BY MR. GREGORY:) And the Court also said,  
4 quote, you failed to properly consider all of the relevant  
5 material, end of quote.  
6 A. Exactly, and I completely agree with that judge.  
7 After the single case eight years ago --  
8 THE COURT: Sir?  
9 Q. (BY MR. GREGORY:) And lastly, the Court --  
10 THE COURT: Listen to the question.  
11 Q. (BY MR. GREGORY:) -- quoted, there's no record  
12 of the method used by Dr. Omalu in making the actual  
13 calculations referenced in his declaration, end of quote.  
14 A. Yes, I agree with that judge. I agree and after  
15 that case, I learned my lesson after that case. I've done  
16 thousands of cases --  
17 THE COURT: Sir.  
18 THE WITNESS: Sorry.  
19 Q. (BY MR. GREGORY:) The end result in that case  
20 though, the judge did not allow you to testify in front of  
21 the jury?  
22 A. No, the case was thrown out. It was not -- it  
23 wasn't just me. The attorney was --  
24 THE COURT: Sir?

1 Q. (BY MR. GREGORY:) Sir, how much were you paid to  
2 generate your two-page report?  
3 A. I was not paid to generate. I'm paid a fee for  
4 the time I spend on a case. I'm not paid to do anything  
5 specifically as illegal. They pay me to give a report, to  
6 testify. When I work for public defenders, the public  
7 defender tells me what he will pay me.  
8 So in this case, they sent me to my office to  
9 review to see if it was something I could help out. When I  
10 reviewed it, I felt strongly about the case. I told them  
11 okay. I can review the case for you. They told me all they  
12 have to pay me is \$3,000, even if I work for 1,000 hours.  
13 Q. Okay.  
14 A. So I said it is going -- I don't do this for the  
15 money. Send me whatever you have. It's taxpayers money. I  
16 will work on this to establish the truth because the truth  
17 will set you free.  
18 Q. So how much are you getting paid then?  
19 A. \$3,000.  
20 Q. \$3,000 and earlier you testified that that  
21 creates a conflict of interest when you're getting paid by  
22 the person that you're rendering an opinion for?  
23 A. No, it doesn't create conflict. It's like saying  
24 the county paying you creates a conflict of interest, I need

1 to feed my seven-year-old daughter and my five-year-old son.  
2 I'm a professional. I need to be paid for innocent work I  
3 do --  
4 Q. When Ms. Brown was asking you questions though,  
5 you were critical of the Washoe County Medical Examiner's  
6 Office and --  
7 THE COURT: Are you okay?  
8 THE COURT REPORTER: I need a drink of water.  
9 THE COURT: Hang on. We need a break.  
10 THE COURT REPORTER: Can you repeat your question  
11 too, Mr. Gregory?  
12 MR. GREGORY: Yes.  
13 THE COURT: Let's give her a moment.  
14 Q. (BY MR. GREGORY:) On direct examination, you  
15 voiced that you were somewhat critical of entities like the  
16 Washoe County Medical Examiner's Office because they are  
17 county employees that work along side of police officers; is  
18 that?  
19 A. That wasn't what I said.  
20 Q. Okay.  
21 A. What I said was that when law enforcement tells a  
22 pathologist what a case is, that is the homicide, and you're  
23 working with this law enforcement, if you continue going  
24 against what they want, case after case, you're jeopardizing

1 your job, that's a fact.  
2 So, like I said, because a doctor should be  
3 independent of law enforcement, this is the guideline, when  
4 you have law enforcement concluding that a case is a homicide  
5 before an autopsy is even done, that's something critically  
6 wrong.  
7 Q. So let me ask you, if you were going to be truly  
8 independent, you wouldn't have considered Ms. Leibel's  
9 statements, would you?  
10 A. No. As an expert, like I said, my opinion today,  
11 my opinion are based on the scientific episodes, the autopsy,  
12 delivered medicine, my opinions are based on medicine, not  
13 based on hearsay or what someone else said. I have never  
14 said I base my opinion on what someone else said. All of the  
15 opinions are given based on science not because of the  
16 protocol.  
17 THE COURT: Ladies and gentlemen, we're going to  
18 take just a short break for the court reporter, and she's  
19 having a difficult time. We're going to give her a break and  
20 we'll just take a ten-minute break.  
21 (Whereupon, the admonishment was given to the  
22 jury by the Court not to talk about the case with anyone  
23 until the case is submitted to the jury for deliberation.)  
24 THE COURT: We'll just take a quick ten-minute

1 break.  
2 (Whereupon, a brief recess was taken.)  
3 THE COURT: Doctor, you're still under oath.  
4 Thank you, ladies and gentlemen. Have a seat.  
5 Thank you. Will the parties stipulate the presence of the  
6 jury?  
7 MS. BROWN: Yes, Your Honor.  
8 MR. GREGORY: Yes, Your Honor.  
9 THE COURT: Thank you.  
10 Mr. Gregory, please go ahead, sir.  
11 Q. (BY MR. GREGORY:) Doctor, page two of your  
12 report, in the third paragraph, the last sentence, you  
13 indicate he did not sustain multiple gunshot wounds to his  
14 body as has been alleged in the autopsy report?  
15 A. Yes.  
16 Q. Is that an accurate statement?  
17 A. Yes. I mean, I did -- I have an MBA. It was  
18 multiple, the lowest multiple you could have an injury. It's  
19 two times two, four. One is single, two double, three  
20 several, from four upwards is multiple. So if he had only  
21 one gunshot wound, possibly one here, this is a graze wound,  
22 so two.  
23 Saying he had multiple gunshot wounds, it's my  
24 interpretation of a pattern to corroborate with the law

1 enforcement alleging that this is a homicide. Because if you  
2 put multiple gunshots wounds, it makes it look like this  
3 individual was shot multiple times, which is inaccurate.  
4 Q. Well, how many times was he shot?  
5 A. He shot himself. He wasn't shot. He was --  
6 Q. How many times?  
7 A. Once, the second one in my opinion was a misfire.  
8 Q. Ah, okay. So you think that this statement is  
9 correct, he did not sustain multiple gunshot wounds of his  
10 body, that's a correct statement?  
11 A. Yes, absolutely correct, sir, yes, sir.  
12 Q. All right. You talked a lot about atypical  
13 suicides. Are you familiar with the doctor named Warner  
14 Spitz?  
15 A. Warner Spitz is a pioneer of forensic science is  
16 now, I believe, he's almost 90 years old.  
17 Q. Pretty reputable?  
18 A. He's old school.  
19 Q. Anything wrong with being old school?  
20 A. Yes, science -- because science evolves at the  
21 very fast pace, especially with molecule biology, molecule  
22 biology, even for me now, some of the interventions, two,  
23 three, four years ago I defer to the newly trained doctors  
24 because they know it better than me.

1 Q. You have worked with Dr. Spitz, haven't you, on  
2 cases before?  
3 A. I've not worked with him. I may have testified  
4 against him.  
5 Q. So same case where you both were involved?  
6 A. I don't remember, to be honest with you, because  
7 of something. I may have. I may not have. I don't  
8 remember.  
9 Q. Are you familiar with his studies regarding  
10 atypical suicides?  
11 A. I'm familiar with his studies, but his studies  
12 are very old. Some of his papers were in the '50s and '60s.  
13 In fact, his peer, Dr. DeMayo, last year a judge stopped him  
14 from testifying on the case. I mean, there's a limit to if  
15 you're like almost 90 years old, there's a limit to what you  
16 can do. We are human.  
17 Q. Have you -- have you read about his studies  
18 regarding atypical suicide?  
19 A. Not just his study. I've read so many studies I  
20 myself have published. I've published many times on suicide  
21 too.  
22 Q. Are you familiar with Dr. Spitz's opinion that  
23 usually in a case if it's a suicide and there's multiple  
24 shots that the shots go into the same general area typically.

1 anyone else got to the scene was moved, like he should have.  
2 To resuscitate people, you need to lie them on the floor.  
3 Now what that does is once the body has been moved for  
4 whatever reason, you need to be extremely careful about the  
5 interpretations because the body is no longer as it was when  
6 the injury was sustained. So assuming you find blood or  
7 other fluids, based on the fact that you cannot make any  
8 assumption, why, because the body has been moved.  
9 Q. Okay. Have you had a chance to recall -- review  
10 the autopsy protocol in this case?  
11 A. Yes, ma'am.  
12 Q. And you've had a chance to review the  
13 photographs?  
14 A. Yes, ma'am.  
15 Q. And the x-rays?  
16 A. Yes, ma'am.  
17 Q. What is an autopsy?  
18 A. An autopsy is systematic examination of the human  
19 body.  
20 Q. And are there specific protocols that are  
21 followed?  
22 A. Yes, ma'am, different types of autopsies, and  
23 there are so many other analysis you can perform depending on  
24 what type of cases it is.

1 Q. And you said when you -- you perform an autopsy,  
2 you don't look at facts of the case. You look at what is in  
3 front of you; is that correct?  
4 A. You look at circumstances surrounding the death  
5 and what does that mean. Where was this individual found.  
6 It was found at home. What was -- if he was witnessed to  
7 shot himself, somebody was present, that is all we need.  
8 Now, once we start going, okay, law enforcement  
9 believes that one of the instances, he jumped down and hit  
10 his head and then ran out again and shot him again, then  
11 you're moving away from your area of expertise.  
12 Q. Okay.  
13 A. That is outside the autopsy.  
14 Q. And would be -- if you were being provided that  
15 type of information through seeing photographs or information  
16 from officers, could that affect your view of the autopsy?  
17 A. No. After the autopsy, like now, assuming I did  
18 an autopsy and a law enforcement come and ask me questions,  
19 your autopsy findings, are they consistent with this  
20 proposition? I'll say yes or no. What we believe is a  
21 homicide, does the autopsy support a homicide? I'll say yes  
22 or no. If your autopsy does not support the homicide, end of  
23 story, let's go home.  
24 Q. Okay. But this would be a review afterwards?

1 A. At the end, afterwards, after the toxicology is  
2 back, the microscope is back, we reviewed the folders of the  
3 medical records at the end.  
4 Q. And about going into the autopsy, you don't want  
5 these type of details concerning what police officers think  
6 happened?  
7 A. No, and it's a matter of protocol and my office,  
8 we do not request for police reports before we do an autopsy.  
9 Q. And could a pathologist change their position or  
10 their method of doing an autopsy if they had a belief that  
11 law enforcement thought this was a specific type of case,  
12 like a homicide?  
13 A. Yes. Like I said earlier, if law enforcement  
14 comes a pathologist, and I've seen this many times in my  
15 experience, that would be labeled as a homicide. Especially,  
16 this is a doctor hired by the same county who has hired, who  
17 is paid, you don't want to bite the finger, unless it is a  
18 prominent pathologist who has his confidence.  
19 My experience from cases I've reviewed and  
20 advised counties, it influences that pathologist no matter  
21 how much you want to deny it and also if the police is  
22 present with the pathologist, watching him do it and telling  
23 him, there's no way no matter how we want to deny it, we are  
24 human beings, it will influence your opinion. In fact, it

1 will influence your autopsy and may make you do things  
2 subconsciously that you should not do or subconsciously avoid  
3 to do things you should do to prove law enforcement wrong.  
4 Q. And in reviewing the photographs and information  
5 in Mr. Leibel's autopsy, were you able to make any  
6 determinations concerning your opinion of the distances of  
7 the shots were fired at?  
8 A. Yes, I have opinions. The autopsy said  
9 Mr. Leibel died as a result of multiple gunshot wounds. I  
10 strongly disagree with that. Mr. Leibel, Harry died as a  
11 result of a single gunshot wound. And this is an example of  
12 the bias I have told you earlier, stating that Harry died as  
13 a result of multiple gunshot wounds subconsciously is to  
14 support the allegation as a homicide.  
15 Q. Okay. So your opinion then is that the chest  
16 injury was the fatal shot?  
17 A. The chest injury was the single and only fatal  
18 shot. It was only one, so the cause of death is not multiple  
19 gunshot wounds. The cause of death is a gunshot wound of the  
20 chest.  
21 Q. Okay. And this injury to the hand and wrist that  
22 subsequently caused an injury to the shoulder with shotgun --  
23 a shotgun pellet, this would be not involved in a cause of  
24 death?

## VIII. Hearsay

### Rule

- 801. Definitions That Apply to This Article; Exclusions from Hearsay.
- 802. The Rule Against Hearsay.
- 803. Exceptions to the Rule Against Hearsay - Regardless of Whether the Declarant Is Available as a Witness.
- 804. Exceptions to the Rule Against Hearsay - When the Declarant Is Unavailable as a Witness.
- 805. Hearsay Within Hearsay.
- 806. Attacking and Supporting the Declarant's Credibility.
- 807. Residual Exception.

### **Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay.**

(a) *Statement*. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) *Declarant*. "Declarant" means the person who made the statement.

(c) *Hearsay*. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in **evidence** to prove the truth of the matter asserted in the statement.

(d) *Statements That Are Not Hearsay*. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a

trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

**History:** Amended by order adopted October 16, 1975, effective October 31, 1975, and by order adopted March 2, 1987, effective October 1, 1987, by order adopted April 11, 1997,

effective December 1, 1997, by order adopted April 26, 2011, effective December 1, 2011; by order adopted April 25, 2014, effective December 1, 2014.

## COMMENT

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense - a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended. [12/1/11]

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness - such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As

CASE NUMBER \_\_\_\_\_

**EXHIBIT** A10

Real TIME (11.03)

3626

Page 93

1 So for instance, if a person is trying to shoot themselves in  
2 the head and it grazes and they take another shot, it's also  
3 going to be directed towards the head. Are you familiar with  
4 that part of the study?

5 A. I'm very familiar with it but like I've told you,  
6 this is not a case of multiple gunshot wounds.

7 Q. And are you also familiar with his study that  
8 indicates that in most suicide cases, subjects do not shoot  
9 themselves through clothing. Are you familiar with that part  
10 of his statement?

11 A. I'm familiar with it. In fact, I think this case  
12 was to me having that as a result of multiple gunshot wounds  
13 because of what that people said to make it look more like a  
14 homicide because we don't have multiple gunshot wounds in  
15 this case.

16 I have refused with sides in other counties for  
17 over ten years, and I looked at over 1,000 suicides. I  
18 reviewed suicides in the state of Pennsylvania over 17 years.

19 MR. GREGORY: Your Honor, this is unresponsive to  
20 the question.

21 THE COURT: Okay. Well, doctor, please listen to  
22 the question, and I'm going to remind you again to answer the  
23 question.

24 THE WITNESS: All right.

Page 94

1 THE COURT: You have a lot of information in your  
2 head and you want to get it out there.

3 THE WITNESS: Yes.

4 THE COURT: But right now, there are specific  
5 questions being asked of you, and I want you to answer those  
6 specific questions, okay?

7 THE WITNESS: All right.

8 Q. (BY MR. GREGORY:) So your opinion is that the  
9 second shot here was a misfire?

10 A. Yes.

11 Q. Meaning, he didn't mean to pull the trigger?

12 A. He was manipulating the gun while progressively  
13 becoming confused. He was -- possibly was confused in  
14 addition to the fact of the marijuana combined with the  
15 effect of his hepatic encephalopathy was getting into what we  
16 call acute confusional state. While he's trying to  
17 manipulate the gun and then misfired, that is why he cocked  
18 it and grazed.

19 Q. And that's why he cocked the gun for a third  
20 shot?

21 A. I don't know why but cocking the gun at that  
22 time nobody really knows that. Because if you remember, the  
23 gun was moved at the scene, and the gun was moved at the  
24 scene and somebody who shot himself in the chest, confused.

Page 95

1 Q. So, doctor, it sounds to me like you choose to  
2 acknowledge some facts while disregarding other facts; is  
3 that correct?

4 A. No, no. I am acknowledging facts that within a  
5 reasonable degree of medical certainty, like a physician  
6 should do, things, assumptions in this case that are not  
7 above the reasonable degree of medical certainty, I ignore by  
8 the standards, I should as a physician.

9 Q. I want to make sure I understand some testimony  
10 you gave before.

11 A. Yes.

12 Q. Death never occurs instantaneously, was that your  
13 statement?

14 A. Let me qualify. The only time death occurs  
15 instantaneously is when you have an explosion, when your body  
16 is splintered. That is the only instance that will cause  
17 instantaneously.

18 Q. So you're qualifying your statement that it never  
19 occurs instantaneously?

20 A. I don't know if I said never. If that was what I  
21 said, I didn't mean to. What I would say, maybe I said death  
22 almost never. I qualify because this is not the first time  
23 I'm testifying in court. I always qualify it as death almost  
24 never, and the only time and it's very well documented in

Page 96

1 literature is when there's an explosion, like somebody  
2 wearing an explosive vest, the moment of the explosion, his  
3 body is splintered, that is when you die instantaneously.

4 Q. So your opinion in this case is that Harry did  
5 not die instantaneously?

6 A. No way from it. There was no way he -- the  
7 gunshot wound of the chest would have killed him  
8 instantaneously. It is not medically feasible.

9 Q. So let me give a hypothetical and it's based on  
10 testimony in this case. Tatiana shoots Harry Leibel at  
11 approximately 11:03. She immediately goes to the phone and  
12 calls 911. They are on scene within minutes and within  
13 approximately 13 minutes, the paramedics pronounce him dead.  
14 How does that work given your opinion that he didn't die  
15 instantaneously?

16 A. Instantaneously means he died within a  
17 millisecond. Immediately means he died without any other  
18 factors. Immediately could mean from minutes to hours to  
19 days. It takes even weeks and years. It takes some people  
20 years to die. So instantaneously means he died within a  
21 millisecond of sustaining the gunshot wound, that is what  
22 instantaneous means.

23 Q. Are we supposed to ignore the testimony of the  
24 paramedics that the blood was coagulating and looked to be



Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

LEIBEL Okay. So I sleep in (unintelligible) and have (unintelligible) ... I have (unintelligible) in this dining room.

HUBKEY Okay.

LEIBEL Dining room have balcony. So ... and have table, chairs, balcony. So Harry and I always ... if I going to sit this chair, open balcony. Or he open balcony, sit chairs and smoke.

HUBKEY Okay.

LEIBEL (unintelligible) smoke. So ... yeah I smoke. He finish breakfast and he said oh, they want watch ... have pool ... pool table.

HUBKEY Okay.

LEIBEL Final Canada guy and American guy play pool table like very crazy ... shooting.

HUBKEY Okay.

LEIBEL Shooting. So he ... he like this because our house have pool table ... table.

HUBKEY Okay.

LEIBEL This is my daughter when she three years ago going to San Diego, he said well she not coming to us anymore. Last year she coming only two times. And spring and winter (unintelligible). Yeah, so he said she not need this room and he make this room pool room. He make beautiful pool room. If you put ... he make T.V., pictures, guns, pool tables. Beautiful. See picture ...

HUBKEY Okay, after you guys ... did you watch pool with him?

LEIBEL I watch what?

HUBKEY Did you watch T.V. with him?

LEIBEL Yes.

HUBKEY And what time did that start?

Douglas County Sheriff's Department  
Interview Transcripts  
14SO05132

LEIBEL I think 9:00 ... between 9:00, 10:00.

HUBKEY Okay.

LEIBEL Sometime like this.

HUBKEY So you guys are sitting on the couch watching pool?

LEIBEL How should I ... okay ... here couch (unintelligible) ...

HUBKEY Okay.

LEIBEL ... couch ... small tables ...

HUBKEY Okay.

LEIBEL Glass tables. Glass table ... glass table here.

HUBKEY Okay.

LEIBEL Couch here. Separate couch ... and separate couch here. And he have (unintelligible) fire place and T.V.

HUBKEY Okay.

LEIBEL Okay. So now you have picture. So he sit here couch. Doggie always together here. And I sit couch here. Okay. So when become ... I remember when become commercial I sit couch here and I put my phone ... where my phone?

CHRZANOWSKI It's out there.

LEIBEL Okay. I put my phone here. So when start commercial I open my mouth again. I said Harry I think I going. No tough (unintelligible) I think I going. He said no you're not going anywhere. So I stand up ... I stand up. He sit couch here. I stand up and look at him. I say Harry ... this is what I make statement ... I said Harry no I am going because Lana sent me message again. And I said no I am going. He said no ... no you're not going anywhere. (unintelligible) and I go in kitchen this time. And I'm so tired ... I don't know ...

HUBKEY What were you trying to show when you were just standing there?

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

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

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

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 supposedly had booked on Saturday, and on Sunday morning,  
2 she told him that she was going to go anyway. And she  
3 left the room, went into the kitchen and she heard a gun  
4 go off.  
5 Q. And did she tell you what she did after that?  
6 A. She ran to Harry and I guess called 911 and  
7 tried to resuscitate him.  
8 Q. So she just heard the one shot?  
9 A. Correct.  
10 Q. And did she describe for you at all where he  
11 was shot?  
12 A. Yes. She said somewhere in here with this  
13 motion.  
14 Q. You're making a motion with your right hand  
15 kind of across?  
16 A. Somewhere like in the stomach, chest area.  
17 Q. Okay. And did she tell you when it had  
18 occurred?  
19 A. Well, I'd asked her, "What time did this  
20 happen?" She said, "In the morning around 9:30 or 10:00."  
21 MR. GREGORY: Okay. Thank you. Nothing  
22 further.  
23 THE COURT: Cross?  
24

1 UNR; correct?  
2 A. Yes, that is correct.  
3 Q. And she was now getting her master's degree  
4 after that?  
5 A. Yes.  
6 Q. Didn't you say that you believe that the  
7 Leibels were a great couple?  
8 A. Yes.  
9 Q. And you never saw them fight?  
10 A. No.  
11 Q. And that Ms. Leibel was very in love with  
12 Mr. Leibel?  
13 A. Yes.  
14 Q. And didn't you say that Ms. Leibel  
15 continuously maintained that Harry had shot himself,  
16 Mr. Leibel had shot himself?  
17 A. That is correct.  
18 Q. Do you recall what time you picked up  
19 Ms. Leibel from the Douglas County Sheriff's Office?  
20 A. Approximately 8:30, 8:45 in the evening.  
21 Q. Do you remember what time she called you or  
22 was that what time she called you, or is that what time  
23 you picked her up?  
24 A. The detectives called me. That's when I

1  
2  
3 CROSS-EXAMINATION  
4 BY MS. HENRY:  
5 Q. Ms. Brooks, you and Ms. Leibel shared each  
6 other's company frequently; correct?  
7 A. Yes.  
8 Q. And you invited her to your home on occasion?  
9 A. Correct.  
10 Q. You guys were friends?  
11 A. Yes.  
12 Q. And you had indicated that in your interview  
13 with the police officers who interviewed you that she was  
14 also really close with her daughters; correct?  
15 A. Correct.  
16 Q. And she tried to visit them?  
17 A. Yes.  
18 Q. As often, as much as she could?  
19 A. That is correct.  
20 Q. And also that she was going to school at UNR?  
21 A. Yes.  
22 Q. Do you know what she was studying?  
23 A. Political science.  
24 Q. And she actually graduated with a degree from

1 picked her up.  
2 Q. Okay. And so you picked her up from the  
3 station at 8:30 or 8:45?  
4 A. Approximately.  
5 MS. HENRY: Okay. Nothing further.  
6 THE COURT: Mr. Gregory?  
7 MR. GREGORY: No, thank you.  
8 THE COURT: Ma'am, thank you for being here  
9 today. You're excused.  
10 THE WITNESS: Okay. Thank you.  
11 MR. GREGORY: Your Honor, may I have a recess  
12 to review what evidence has been marked?  
13 THE COURT: Want to come here for a minute?  
14 Want a cough drop?  
15 MR. GREGORY: Thank you.  
16 THE COURT: Now you can have a recess. How  
17 long do you need?  
18 MR. GREGORY: Fifteen minutes should be  
19 sufficient.  
20 THE COURT: Okay. I'll advise you as I'm  
21 sure that you know, the clerk is keeping an ongoing  
22 exhibit list, has been, but if you want to check to see  
23 what's admitted and what's not admitted, she will share  
24 that with you. We're going to give the State about a

# Chris Heanrick Interview

10-07-2014

brother, Igor, and would do things with him and Harry. I asked Chris what he knew about Tatiana from before she came to the United States. Chris said Tatiana was very quiet and he never got into any conversations with her regarding her past.

Chris said he and Harry talked a lot and it was usually about how things are going with Chris and the work he does. Chris said that Harry would always try to steer him into another line of work other than cutting firewood and delivering it. Chris said Harry never talked about his personal life or his financial status with him. Chris said when you were at Harry's house 95% of the time Harry "had the floor".

I asked Chris if Tatiana worked. Chris said Tatiana was working on some type of high-tech software. Chris added that Harry really helped Tatiana on this venture. Chris said that Tatiana was working in Reno and possibly through the Gov.'s office or with a State Senator, and added that she was working some really strange hours. Chris said the past six months before the incident he would come over and visit Harry and Tatiana would not be at home. Chris said he'd ask Harry were Tatiana was and he would tell her that she worked all night and was sleeping. Chris said that Harry was putting a lot of money into the business that Tatiana was running and seemed to be stressed about it. Chris said the last year he seemed more and more stressed and edgy about it. Chris added that he had conversations with Harry where he believed Harry was irritated about the business that Tatiana was running.

Chris said that Harry was irritated by the late hours that Tatiana was working, but added at the same time he was happy that she was doing the business. Chris added that previously Tatiana got ripped off by the Russians. Chris said he was told that she had a multimillion dollar business deal with the Russian government because she worked for the Russians. Chris was told that Tatiana had a software program that she was trying to sell to the Russians through Oracle, but Oracle took her idea and cut her out of the deal. Chris said he believed the new company Tatiana was running was to get back at Oracle and develop new software.

Chris said at one point he thought Harry was about to talk to him about some financial issues, but then he would smoke marijuana and the subject changed. Chris said that if Harry didn't have his marijuana every day he is extremely irritable.

Chris said there was a time he provided Harry with marijuana and added that Harry talked him into being a grower in California. Chris said Harry had some serious digestive issues and that's why he smoked marijuana.

I told Chris that after reviewing the text messages between him and Harry it appeared that Harry was very demanding. I told Chris that it also appeared that he would not respond to Harry's texts. Chris said at times he didn't respond because with Harry it was always about Harry and added that he drives a lot and that's also why he wouldn't respond to Harry's messages.

Chris said when their opportunities to go to San Diego or Los Angeles that Harry would never go, it was always Tatiana. Chris said when Tatiana would go she would be gone for three or four days. I asked Chris how Harry dealt with that. Chris told me that Harry didn't like it. Chris said that Harry was capable of taking care of himself but he would rather have Tatiana there to take care of things for him. Chris added that sometimes he got the feeling that Harry liked

3632

1 MR. GREGORY: Your Honor, I'd move for admission  
2 of Exhibit Number 19.  
3 MS. BROWN: No objection.  
4 THE COURT: 19 is admitted.  
5 MR. GREGORY: And I'm going to return 19 as well  
6 as 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 16.  
7 And Investigator Garren -- Your Honor, may I  
8 publish that photograph to the jurors, Exhibit Number --  
9 Exhibit Number 20, please?  
10 Q. (By Mr. Gregory) What does that photograph  
11 depict?  
12 A. Facing the couch, the left-hand side there's a  
13 blanket with some staining on it as well as --  
14 THE COURT: Wait a minute. Instead of having him  
15 testify as to what it is, let's see if it comes in to  
16 evidence first.  
17 Q. (By Mr. Gregory) If you can just tell me  
18 generally what does the photograph depict generally.  
19 A. Facing the couch, it's a left-hand seat of the  
20 couch.  
21 Q. Does that photograph accurately depict the way it  
22 looked that evening?  
23 A. Yes.  
24 Q. That day when you entered?  
25 A. Yes, it does.

1 MR. GREGORY: I would move for admission of  
2 State's 20.  
3 MS. BROWN: No objection.  
4 THE COURT: 20 is admitted.  
5 MR. GREGORY: May I publish it?  
6 THE COURT: You may, sir.  
7 Q. (By Mr. Gregory) Investigator Garren, we're  
8 going to talk about cell phones a little bit. Did Ms. Leibel  
9 give consent to have her cellular phone searched?  
10 A. Yes, she did.  
11 Q. And did you have an opportunity -- did the  
12 sheriff's office have an opportunity to get her cell phone  
13 from her?  
14 A. Yes, we did.  
15 Q. And did you have an opportunity to retrieve  
16 information from that phone?  
17 A. Yes, I did.  
18 Q. How did you go about doing that?  
19 A. We have extraction device for cell phones. It's  
20 called a cell write. The name of the device is a UFED, which  
21 is an acronym for universal forensic extraction device. You  
22 hook the phone up, it extracts the data through the device to  
23 the program on the computer and then it generates a report of  
24 the data that it extracts.  
25 Q. So basically you're making a duplicate of what's

1 on the phone?  
2 A. I guess you could say that, yes. I don't  
3 understand the entire process of what it takes and doesn't  
4 take. There's software involved and it extracts the data  
5 that it's capable of extracting and then puts it in a report  
6 form that we can go through and evaluate.  
7 Q. And you've been trained in that process?  
8 A. Yes, I have.  
9 Q. Did you perform that process on Ms. Leibel's  
10 phone?  
11 A. Yes, I did.  
12 Q. And in that did you obtain information from the  
13 phone indicating what type of activity was going on with the  
14 phone from February 21st 2014 through February -- Excuse me.  
15 February 21st 2014 through February 24th?  
16 A. Yes, I did.  
17 Q. Thank you. What type of information were you  
18 able to extract from the phone?  
19 A. A series of multiple categories, call logs, text  
20 messages, web history, things of that nature, things that  
21 people typically do on their cell phones.  
22 Q. Were you able to ascertain or compile a timeline  
23 of activity on her phone?  
24 A. Yes. One of the things that it does do is it  
25 produces a timeline report that shows in chronological order

1 the entire history of data that it extracts in a  
2 chronological in one format. Instead of going to just call  
3 logs and text messages, it puts it all in a timeline in  
4 chronological order of what was done on that phone in a  
5 certain time frame.  
6 MR. GREGORY: May I have State's Exhibit 60 or  
7 Exhibit 60.  
8 THE COURT: While she's looking at that,  
9 Mr. Gregory, would you like to retrieve your exhibit?  
10 MR. GREGORY: Thank you, yes.  
11 THE COURT: Thank you, sir. It's been returned  
12 to the clerk.  
13 Mr. Gregory.  
14 Q. (By Mr. Gregory) Investigator Garren, I'm  
15 handing you Exhibit Number 60. Can you please take a look at  
16 that and tell us what it is.  
17 A. It's one of the extraction reports that I was  
18 able to print from the software.  
19 Q. From Ms. Leibel's phone?  
20 A. Yes.  
21 Q. Did you prepare that report from the extraction?  
22 A. Yes, I did.  
23 Q. And what dates did you ask it to cover?  
24 A. From February 21st through February 24th.  
25 Q. And does that timeline accurately depict the

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 an 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 mean 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?

CASE NUMBER \_\_\_\_\_

**EXHIBIT** Au

post-conviction prosecutes statement

3635



Respondent submits this Answering Brief pursuant to Nevada Rule of Appellate Procedure (NRAP) 28(b).

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal pursuant to NRS 34.575.

### **ISSUES PRESENTED FOR REVIEW**

1. Did the district court commit reversible error by precluding the testimony of Natasha Kharikova at Appellant's post-conviction evidentiary hearing?
2. Did the district court commit reversible error by denying Ground 10 in Appellant's Supplemental Post-Conviction Petition?
3. Did the district court commit reversible error by denying Ground 13 in Appellant's Supplemental Post-Conviction Petition?

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Appellant Tatiana Leibel (Leibel) shot her husband to death with a Taurus "Circuit Judge" rifle while he sat on his couch in his family room on the morning of February 23, 2014. Leibel told her friend later that night that the victim was shot between 9:30 a.m. and 10:00 a.m. Appellant's Appendix (AA) 1104 at 157.<sup>1</sup> At 9:56 a.m. on the morning of the victim's death she texted her daughter and told her, "I'm still home. I have on confotable(sic) situation. I explain little bit later, from

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<sup>1</sup>Page numbers are added for ease of reference with respect to the trial transcript.

CASE NUMBER \_\_\_\_\_

**EXHIBIT** A12

DNA & Fingerprints

Page 49

1 THE COURT: And by reviewing the report,  
2 would it refresh your recollection?  
3 THE WITNESS: Yes, it will.  
4 THE COURT: Are you going to mark those as  
5 exhibits?  
6 (Whereupon, Exhibit Nos. 131-132 were marked for  
7 identification.)  
8 THE CLERK: 131, 132.  
9 THE COURT: Thank you, ma'am.  
10 Q. (BY MR. GREGORY:) I'm showing you 131 and  
11 132. Are those your reports?  
12 A. Yes, they are.  
13 Q. Take a moment to look at those reports and  
14 let me know if it refreshes your recollection.  
15 A. Okay.  
16 Q. So tell us first what you did with the gun.  
17 What was the first step?  
18 A. So the initial screening of the rifle would  
19 include I would take the rifle and use illuminated  
20 magnification to look over the entire front and back on  
21 both sides of the rifle to determine if there was any  
22 biological fluids present, and then at that point, I  
23 would do any testing if necessary. For this particular  
24 case, I found none of that, so what I did was --

Page 50

1 Q. When you say "None of that," so none of what?  
2 A. No biological staining.  
3 THE COURT: Wait. You're a little fast.  
4 Please slow down. And, Mr. Gregory, do you intend to  
5 offer these reports?  
6 MR. GREGORY: No, Your Honor.  
7 THE COURT: Because if you don't, then I'm  
8 going to ask you to withdraw them from the witness.  
9 MR. GREGORY: Yes.  
10 THE COURT: Because I don't want her to  
11 testify from them if she's just using them to refresh her  
12 recollection.  
13 MR. GREGORY: And, ma'am, if you need them  
14 again to refresh your recollection, just let me know.  
15 THE WITNESS: Okay.  
16 THE COURT: Mr. Gregory, thank you.  
17 Q. (BY MR. GREGORY:) And, Your Honor, I'm going  
18 to hold onto these during her testimony.  
19 So you said no indication of biological  
20 evidence. What do you mean by that?  
21 A. There was no blood observed on the rifle.  
22 Q. And then what was your next step?  
23 A. The request was to swab the trigger and  
24 hammer of the rifle. Therefore, I swabbed those together

Page 51

1 with one wet, one dry swab, and I swabbed them as A-1  
2 life. I just gave them a designation. Additionally, I  
3 swabbed the strap of the rifle on both sides, front and  
4 back of that, as A-2 Rifle, and then those were forwarded  
5 onto the DNA section, which I processed for DNA analysis.  
6 Q. So just briefly, what does "swabbing" mean?  
7 Tell us what you're doing when you're swabbing.  
8 A. Okay. So I would take two sterile swabs.  
9 One would be wet and would be would be dry, and I would  
10 take those on the hammer area, and I swab first with the  
11 wet followed by the dry, and then go to the trigger and  
12 do the same, one wet, one dry. Those would go into a  
13 box, and of course they would be labeled A-1 rifle. And  
14 I would then collect a water control that is associated  
15 with the same water that I used to collect the possible  
16 DNA that may be on the item.  
17 Q. So the areas swabbed again were the strap,  
18 the leather strap; correct?  
19 A. Correct, as A-2.  
20 Q. And then the hammer and the trigger?  
21 A. Correct, as A-1.  
22 Q. And then what did you do with items A-1 and  
23 A-2?  
24 A. Those were processed through the entire DNA

Page 52

1 process for -- I would need to refer to my report. I  
2 don't want to confuse item one and item two, please.  
3 Q. Handing you both of those exhibits back, 131  
4 and 132. So in reference to A-1, and A-1 is the swab  
5 from the hammer and the trigger. Did you perform an  
6 analysis of those swabs?  
7 A. I did. So I initially took half of each swab  
8 and carried those through to DNA. That is our protocol.  
9 When I processed it through the State, the point where I  
10 would determine if there's any DNA present for Item A-1,  
11 I determined that it was insufficient to move forward, so  
12 I had to stop and request to utilize the other half.  
13 For Item A-2, I was able to process that  
14 through the whole entire DNA process, and I determined  
15 after completing the process that there were at least  
16 four individuals who their DNA would be associated with  
17 that, and that I could make no conclusions for that mixed  
18 DNA profile due to a low level of DNA as well as the  
19 number of contributors. So I have no conclusions for  
20 that.  
21 Q. So that's on the strap?  
22 A. That is on the strap.  
23 Q. And then going back to the trigger and the  
24 hammer, you found that there was low levels of DNA on

Page 53

1 that as well?  
2 A. So for the trigger and the hammer, which is  
3 A-1, I had to go back and take the over half of the  
4 sample and combine them together to get a sufficient  
5 amount of DNA to attempt to get a profile. At that  
6 point, I was able to generate a profile that was too low  
7 to make any conclusions, so due to a low level of DNA, I  
8 could offer no conclusions on that item.  
9 MR. GREGORY: Thank you. I have nothing  
10 further.  
11 THE COURT: Ms. Brown?  
12 MR. GREGORY: Your Honor, I'm going to return  
13 the exhibit to the clerk.  
14 THE COURT: Thank you, sir.  
15 MS. BROWN: Ms. Brown or Ms. Henry?  
16  
17 CROSS-EXAMINATION  
18 BY MS. HENRY:  
19 Q. Ms. Naranjo, you indicated that you have a  
20 Bachelor's of Science in environmental science. Was that  
21 right?  
22 A. Yes, ma'am.  
23 Q. And then beyond that, did you say you had 30  
24 graduate credit hours in DNA analysis?

Page 54

1 A. Correct.  
2 Q. And that 30 hours is your training for what  
3 you're doing now?  
4 A. No. That's from the University of Nevada-  
5 Reno.  
6 Q. Right. But is that -- That's for the  
7 specific field and what you do now in your employ?  
8 A. It's related to the field. Yes.  
9 Q. Okay. And then beyond those 30 hours, you  
10 then have a seven-month training program?  
11 A. That is correct.  
12 Q. And you said that you have written numerous  
13 reports. Are you talking about reports like you wrote in  
14 this instance?  
15 A. Yes. During my training, we are required to  
16 write a minimum of 20 reports that we have to utilize the  
17 information that was previously generated and reports  
18 written, and then our reports have to basically be the  
19 same near identical to what the previous analyst wrote to  
20 demonstrate that we can in fact get the same results and  
21 give a report that is correct.  
22 Q. And do you belong to any professional  
23 organizations?  
24 A. I do not.

Page 55

1 Q. And have you ever published anything in your  
2 field?  
3 A. No.  
4 Q. So I just want to make sure that I'm clear.  
5 You took -- You originally took a DNA reference sample  
6 from Mr. Leibel, correct, or a DNA reference sample was  
7 given to you?  
8 A. That's correct.  
9 Q. For Mr. Leibel, right?  
10 A. Correct.  
11 Q. And a DNA reference sample was also given to  
12 you for Mrs. Leibel?  
13 A. That's correct.  
14 Q. And then the trigger and the hammer of the  
15 rifle were both swabbed together for possible residual  
16 DNA for any person that handled the gun --  
17 A. That's correct.  
18 Q. -- correct? And both sides of the strap of  
19 the rifle were swabbed for the possible residual DNA from  
20 a person that handled the gun?  
21 A. That's correct. Yes.  
22 Q. And then a portion of the trigger and hammer  
23 were swabbed for the reference samples for Mr. and  
24 Mrs. Leibel as well; correct?

Page 56

1 A. No.  
2 Q. So -- I'm sorry. A portion of the trigger  
3 and the hamper were also swabbed alongside the strap;  
4 correct?  
5 A. The initial -- so A-1 was the trigger and the  
6 hammer swabbed together. A-2 was the front and back of  
7 the strap swabbed together.  
8 Q. Okay. And then at that point, is that when  
9 -- because you said you also did DNA profiles. Is that  
10 the point when the DNA profiles are created?  
11 A. The DNA profiles are not created. They are  
12 either on the item or they're not. So the DNA exists  
13 there. I collect it, what possible DNA, moved it through  
14 the DNA process, and that could -- you know, that's  
15 extracting the DNA from the cells, finding out how much  
16 DNA is there, and then finally generating the profile.  
17 Q. Okay. And then with regard to the DNA from  
18 the strap of the rifle, you said that there was a low  
19 level of DNA. Is that correct?  
20 A. No. On the strap of the rifle, that was the  
21 item that was both a low level and a mixture that I could  
22 make no conclusions from.  
23 Q. So there was a low level of DNA?  
24 A. There is.

Page 57

1 Q. Okay. And you couldn't make any conclusions  
2 with regard to whose DNA was on the strap of the rifle?  
3 A. That's correct.  
4 Q. And then the same with regard to the DNA from  
5 the trigger and the hammer. You also determined that  
6 there was a low level of DNA present there as well?  
7 A. That's correct.  
8 Q. And because of that, you couldn't match that  
9 to any -- you couldn't match to Mr. Leibel or  
10 Mrs. Leibel?  
11 A. That's correct. I could make no comparisons.  
12 MS. HENRY: No further questions.  
13 THE COURT: Mr. Gregory?  
14 MR. GREGORY: Nothing further.  
15 THE COURT: Ma'am, thank you for your  
16 appearance today. You're excused. Mr. Gregory, we find  
17 ourselves at the morning break, so we're going to take a  
18 15-minute break.  
19 Ladies and Gentlemen, we'll take a 15-minute  
20 recess. And during this recess, you are admonished not  
21 to talk or converse among yourselves or with anyone else  
22 on any subject connected with this trial or read, watch,  
23 or listen to any report of or commentary on the trial or  
24 any person connected with this trial by any medium of

Page 58

1 information including, without limitation: Newspaper,  
2 television, radio or Internet.  
3 You're not to form or express any opinion on  
4 any subject connected with the trial until the case is  
5 finally submitted to you. Thank you. We're in recess.  
6 We'll be back at a quarter till. So give you a chance to  
7 take a bit of a break. Thank you very much.  
8 (Recess was taken.)  
9 THE COURT: We're back in session in 14DI62,  
10 State of Nevada versus Tatiana Leibel. Mr. Gregory is  
11 here. Ms. Brown and Ms. Henry here. Ms. Liebel is here.  
12 The interpreters are here. Please bring the jury in.  
13 Thank you, Ladies and Gentlemen. Have a seat  
14 please. Relax. Counsel stipulate to the presence of the  
15 jury?  
16 MR. GREGORY: Yes, Your Honor.  
17 MS. HENRY: Yes, Your Honor.  
18 THE COURT: Thank you. Your next witness,  
19 please.  
20 MR. GREGORY: Kevin Byrne.  
21 THE COURT: Come on up, sir. If you'd pause  
22 about right there and sworn.  
23  
24

Page 59

1 KEVIN BYRNE,  
2 having been first duly sworn, was  
3 examined and testified as follows:  
4  
5 THE COURT: Come on up and have a seat  
6 please, sir. There's some water there, if you'd like.  
7 THE WITNESS: Thank you.  
8  
9 DIRECT EXAMINATION  
10 BY MR. GREGORY:  
11 Q. Sir, please state your name and spell your  
12 last name.  
13 A. Kevin Byrne. B-y-r-n-e.  
14 Q. What do you do for a living, Mr. Byrne?  
15 A. I'm a latent fingerprint analyst at the  
16 Washoe County Sheriff's Office.  
17 Q. How long have you been so employed?  
18 A. Nearly seven years.  
19 Q. What does a latent fingerprint analyst do?  
20 A. A latent fingerprint examiner is basically a  
21 person who takes fingerprints from a crime scene and  
22 compares them to known fingerprints to determine if they  
23 came from the same source.  
24 Q. What training and experience do you have that

Page 60

1 enable you to be an analyst?  
2 A. Specialized training in latent comparison,  
3 crime scene investigation, latent print processing.  
4 Q. Do you have any certification for fingerprint  
5 analyst?  
6 A. Yeah. I'm certified as a latent fingerprint  
7 examiner through the IAI, which is the International  
8 Association for Identification.  
9 Q. Thank you. And is the methodology that  
10 you've been employed or that you use, is it accepted  
11 within your scientific community?  
12 A. Yeah, for fingerprint examinations, we use a  
13 methodology called Ace V. It's an industry standard we  
14 use on all of the fingerprint identification.  
15 Q. In this particular case, were you given for  
16 analysis a fingerprint that had been pulled off of a  
17 rifle in question?  
18 A. Yes.  
19 Q. And did you have an opportunity to analyze  
20 that fingerprint and compare it to other known  
21 fingerprints?  
22 A. Yes, I did.  
23 Q. Tell us a little bit about how you go about  
24 conducting your analysis.

1 A. Basically, what we do when we have a latent  
2 print that we don't know the source of, we compare levels  
3 of detail within that fingerprint to details within our  
4 known fingerprints to determine if there are any  
5 corresponding areas.  
6 Q. So in this particular case, you took the  
7 unknown fingerprint, which was from the rifle; correct?  
8 A. Correct.  
9 Q. And then you compared it to many other known  
10 fingerprints?  
11 A. Yes, I did.  
12 Q. And were there many fingerprints that were  
13 submitted to you to compare to the unknown print?  
14 A. Yes. I compared it to several subjects in  
15 this case.  
16 Q. Did you receive a fingerprint from Tatiana  
17 Leibel?  
18 A. Yes.  
19 Q. Harry Leibel?  
20 A. Yes.  
21 Q. Deborah Schrambra?  
22 A. Yes.  
23 Q. John Barden?  
24 A. Yes.

1 Q. John Milby?  
2 A. Yes.  
3 Q. Jeff Schemenauer?  
4 A. Yes.  
5 Q. Brian Hubkey?  
6 A. Yes.  
7 Q. Ed Garren?  
8 A. Yes.  
9 Q. Bernadette Smith?  
10 A. Yes.  
11 Q. Geoff Marshal?  
12 A. Yes.  
13 Q. Steven Haley?  
14 A. Yes.  
15 Q. Brandon Williamson?  
16 A. Yes.  
17 Q. Justin Reddig?  
18 A. Yes.  
19 Q. Nick Robidart?  
20 A. Yes.  
21 Q. Fred Parson?  
22 A. Yes.  
23 Q. Jim Ante?  
24 A. Yes.

1 Q. And Chris Lucas?  
2 A. Yes.  
3 Q. Did you have an opportunity to compare those  
4 known prints with the unknown prints that were found on  
5 the rifle?  
6 A. Yes, I did.  
7 Q. What did your analysis reveal?  
8 A. I determined --  
9 MS. HENRY: Objection, Your Honor. We  
10 would object.  
11 THE COURT: What's your objection?  
12 MS. HENRY: We don't believe that there's a  
13 chain of custody on this.  
14 THE COURT: Do you have a response?  
15 MR. GREGORY: Your Honor, I believe a few of  
16 these witnesses have already testified that they did  
17 provide latent prints. I believe the defense also talked  
18 about and asked whether Miss Leibel had provided prints,  
19 and the pathologist who will be testifying will talk  
20 about getting the prints off of Mr. Leibel. So I believe  
21 the foundation is there for this testimony.  
22 MS. HENRY: I believe that only two of the  
23 paramedics, Your Honor, have testified that they have the  
24 exclusion, the prints taken for the exclusionary purpose.

1 I don't believe that there's a chain of custody on  
2 anybody else that was just mentioned.  
3 THE COURT: The objection is sustained.  
4 Q. (BY MR. GREGORY:) Did you -- If I could go  
5 through the ones that are known. You did say you  
6 received one from Tatiana Leibel?  
7 A. Yes.  
8 Q. And what was your conclusion with regarding  
9 that?  
10 A. I determined that she was not the source of  
11 the latent impression.  
12 Q. Okay. And how about Harry Leibel?  
13 A. I determined he was not the source of the  
14 latent impression.  
15 Q. And how about Chris Lucas?  
16 A. I determined that he was not the source of  
17 the latent impression.  
18 Q. And how about Justin Reddick?  
19 A. I determined he was not the source of the  
20 latent impression.  
21 MR. GREGORY: Thank you. Nothing further.  
22 THE COURT: Questions?  
23 MS. HENRY: No questions.  
24 THE COURT: You're excused, sir. Thank you

Douglas County District Attorney  
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Minden, Nevada 89423  
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The following are the names of such witnesses as are known to me at the time of  
filing the within Information:

Eric Schinzing Douglas County Sheriff's Office  
1038 Buckeye Road  
Minden, NV 89423

Brian Hubkey ✓ Douglas County Sheriff's Office  
1038 Buckeye Road  
Minden, NV 89423

Steven Haley ✓ Douglas County Sheriff's Office  
1038 Buckeye Road  
Minden, NV 89423

Ted Jaspersen Douglas County Sheriff's Office  
1038 Buckeye Road  
Minden, NV 89423

Nadine Chrzanowski Douglas County Sheriff's Office  
1038 Buckeye Road  
Minden, NV 89423

Ed Garren ✓ Douglas County Sheriff's Office  
1038 Buckeye Road  
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Adam Windsor Douglas County Sheriff's Office  
1038 Buckeye Road  
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Bernadette Smith ✓ Douglas County Sheriff's Office  
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Ron Skibinski Douglas County Sheriff's Office  
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3642

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1		
2	Geoff Marshall ✓	Douglas County Sheriff's Office
3		1038 Buckeye Road
4		Minden, NV 89423
5		
6	Brandon Williamson ✓	Douglas County Sheriff's Office
7		1038 Buckeye Road
8		Minden, NV 89423
9		
10	John Milby ✓	Douglas County Sheriff's Office
11		1038 Buckeye Road
12		Minden, NV 89423
13	Matthew Saylo	Douglas County Sheriff's Office
14		1038 Buckeye Road
15		Minden, NV 89423
16	Jeff Schemenauer ✓	Douglas County Sheriff's Office
17		1038 Buckeye Road
18		Minden, NV 89423
19	James Halsey	Douglas County Sheriff's Office
20		1038 Buckeye Road
21		Minden, NV 89423
22		
23	Brian Wisneski	Douglas County Sheriff's Office
24		1038 Buckeye Road
25		Minden, NV 89423
26	Justin Williams	Douglas County Sheriff's Office
27		1038 Buckeye Road
28		Minden, NV 89423



1	John Preston	Douglas County Sheriff's Office 1038 Buckeye Road Minden, NV 89423
2		
3	Leland Love	Douglas County Sheriff's Office 1038 Buckeye Road Minden, NV 89423
4		
5	Stacy Chambers	Douglas County Sheriff's Office 1038 Buckeye Road Minden, NV 89423
6		
7		
8	Johns Barden	Douglas County Sheriff's Office 1038 Buckeye Road Minden, NV 89423
9		
10	Debra Schamra	Douglas County Sheriff's Office 1038 Buckeye Road Minden, NV 89423
11		
12	Nick Robidart	East Fork Fire and Paramedic District 1694 County Road Minden, NV 89423
13		
14		
15	Chris Lucas	East Fork Fire and Paramedic District 1694 County Road Minden, NV 89423
16		
17	Fred Parson	East Fork Fire and Paramedic District 1694 County Road Minden, NV 89423
18		
19		
20	Justin Redigg	East Fork Fire and Paramedic District 1694 County Road Minden, NV 89423
21		
22	Michael Lyford	Washoe County Sheriff's Office Forensic Science Division 911 Parr Boulevard Reno, NV 89512
23		
24		
25	Marci Margritier	Washoe County Sheriff's Office Forensic Science Division 911 Parr Boulevard Reno, NV 89512
26		
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Joey Lear

Washoe County Sheriff's Office  
Forensic Science Division  
911 Parr Boulevard  
Reno, NV 89512

Sharon Barte  
???

"CONFLICT OF INTEREST"  
(EXECUTOR OF THE ESTATE)  
ET CETERA

2015 W. Dogwood  
Anaheim, CA 92871

Piotr Kubiczek, M.D.

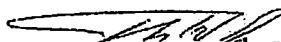
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Criminalists, T.B.D.

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Reno, NV 89512

Devin Moffat

Dispatcher  
911 Communications



Thomas W. Gregory  
Chief Criminal Deputy District Attorney

CASE NUMBER \_\_\_\_\_

**EXHIBIT** A13

not immediately fatal

3646

1 arguing.

2 THE COURT: Yeah, well --

3 (Multiple speakers.)

4 (Interruption by the court reporter.)

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

6 THE COURT: Here is what will go on the record:  
7 This question relates only to the first shot. Go ahead.

8 BY MR. MALONE:

9 Q. And let me -- from your understanding of the  
10 other reports and the information you had, what shot killed  
11 Mr. Leibel? Was that not clear?

12 Is it true that the first shot was the  
13 basically --

14 A. Yes.

15 Q. -- mortal shot?

16 A. It was the fatal shot.

17 MR. JOHNSON: Objection. Lack of expertise of  
18 this witness to determine how he died.

19 MR. MALONE: I --

20 ~~THE~~ THE COURT: Well, here is the thing. I remember  
21 the testimony from the trial very well, and it was very clear  
22 from the testimony of the trial, the first shot -- which is  
23 the .45 shot -- was fatal and was not survivable. And that's  
24 the status of the trial record.

Page 145

1 MS. BROWN: Your Honor, I'd offer Exhibit  
2 138.  
3 MR. GREGORY: No objection.  
4 THE COURT: Then 138 is admitted, and you now  
5 may ask that question, ma'am.  
6 (Exhibit No. 138 was admitted into evidence.)  
7 Q. (BY MS. BROWN:) And is that a photograph of  
8 the plastic wadding that was located in the back?  
9 A. There was a plastic object like transparent  
10 present on this part of the body bag.  
11 Q. Okay. And you noted in your autopsy protocol  
12 that there was a piece of plastic wadding found in the  
13 body bag; is that correct?  
14 A. That is correct.  
15 Q. And you noted in your report that at this  
16 point, Mr. Leibel was in full rigor mortis; is that  
17 correct?  
18 A. That is correct.  
19 Q. And again, this was 24 hours since his death?  
20 A. Yes.  
21 Q. And on the timeframe of rigor mortis, you  
22 said generally around two hours. This is a rather large  
23 timeframe when rigor mortis can either start or cease;  
24 isn't that correct?

Page 146

1 A. Could you repeat the question?  
2 Q. The timeframe in which rigor mortis either  
3 develops or ceases is a very large timeframe?  
4 A. Yes, it is a very large timeframe, and it's  
5 approximation.  
6 Q. And as to the cadaveric spasms, you listed  
7 several considerations or several conditions that you  
8 believe had to exist in order for cadaveric spasms to  
9 occur: the heat, and extreme exercise?  
10 A. It's not I believe this, but this is  
11 information that is presented by the forensic pathology  
12 literature.  
13 Q. And is there another condition where there's  
14 traumatic injury that can cause cadaveric spasms?  
15 A. If it is associated with exertion, extreme  
16 exertion, yes, it may be associated cadaveric spasm, but  
17 again, we have to understand the mechanisms of it.  
18 Q. And when we spoke back I believe it was like  
19 December 23rd, and at that time, you even brought out an  
20 example of people from the plane wreck in Southeast Asia  
21 that were being brought out of the ocean with cadaveric  
22 spasms; is that correct?  
23 A. No, I don't recall giving that information.  
24 Q. Now, you'd noted multiple gunshot wounds on

Page 147

1 Mr. Leibel, but two distinct -- from two distinct  
2 injuries; is that correct? Sorry. We talked about an  
3 entrance wound, an exit wound, and then another wound on  
4 his shoulder. Was that a pattern, so that would be  
5 consistent with one shot?  
6 A. Yes. I mean, there are two gunshot wounds on  
7 the decedent's body.  
8 Q. Okay. I was going to ask you about the other  
9 one too. And then the other one is on the right hands  
10 underneath the armpit; is that correct?  
11 A. That's the entrance gunshot wound.  
12 Q. And that wound to the trunk would not have  
13 been immediately fatal; is that correct?  
14 A. No. It would take few minutes for a person  
15 to die.  
16 Q. And the gunshot wound to the left wrist and  
17 shoulder was not in and of itself fatal in any way?  
18 A. It was not immediately fatal, but if left  
19 untreated, it would cause death by loss of blood or shock  
20 or infection.  
21 Q. And in discussing the wound to the right side  
22 of the chest, you called it a middle -- you stated it was  
23 in the middle axillary line. What's that?  
24 A. It's basically the left or right aspect of

Page 148

1 the chest. It can be -- We can draw imaginary lines that  
2 serve to orient the injuries or other findings better.  
3 And so the line starts from the armpit and continues down  
4 the middle of the side aspect of the chest. That's the  
5 middle line. And then you have anterior line, which is  
6 frontal to the middle axillary line, and then you have  
7 posterior line, which is in the back of the middle line.  
8 And those are just imaginary lines used for better  
9 orientation of position of the injury or other findings  
10 on decedent's body.  
11 Q. And so being on the middle axillary line  
12 means it's basically in the middle of that zone  
13 underneath the armpit?  
14 A. Yes, as we saw it on the photograph.  
15 Q. And when you give the wound path is from back  
16 to front, it doesn't mean somewhere in the back coming  
17 out the front. It means the entrance wound was more back  
18 from the exit wound; is that correct?  
19 A. Yes, that indicates just how the bullet  
20 traveled inside the decedent's body.  
21 Q. But back-to-front does not mean the wound  
22 itself, entrance wound itself was anywhere towards the  
23 back of the body?  
24 A. I mean, this way closer to the -- it is, you

Page 49

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 --

Page 50

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.

Page 51

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.

Page 52

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.

Page 25

1 suicide that would resemble homicide and frequently  
2 misinterpreted as homicides.  
3 Q. And you previously talked about an individual  
4 that shot himself three times in the head so more than one  
5 shot does not necessarily rule out suicide?  
6 A. No. In spite of what we hear on TV, when  
7 somebody is shot, he dies immediately. Death, as an expert  
8 of death, death almost never a cause instantaneously. Even  
9 when you shoot yourself in the head, it takes you minutes to  
10 die. People who shoot themselves in the chest or even if  
11 you're shot in the chest, you don't die immediately because  
12 the mechanism of death is bleeding. You need time to bleed  
13 out, and the human brain has a reserve of about five to  
14 45 minutes.

15 I have personally seen a case where an individual  
16 was shot by cops. This was in Pittsburgh, Pennsylvania, and  
17 he was able to run down a flight of two stairs and run for  
18 about 50 more yards before he fell, and the bullet passed  
19 through his heart.

20 There's a famous case, again, in our forensic  
21 textbook of a man that was shot in his heart in a rural area.  
22 He was able to run out to the road and run again for one mile  
23 before he finally dropped and died.

24 So people frequently when they are shot in the

Page 26

1 chest or even in the head can live longer for three to five  
2 minutes sometimes. There have been a documented case of a  
3 15-year-old girl who fell into a swimming pool. It was a  
4 cold swimming pool. She was pulled out 45 minutes later and  
5 she survived.

6 Q. And even in a case where there are two shots  
7 fired and possibly like a rifle -- the rifle is left cocked,  
8 would that necessarily rule out suicide?

9 A. Could you repeat that again, sorry.

10 Q. In a case involving a rifle where there's two  
11 shots and at the end the rifle is left with the hammer back  
12 or cocked, would that necessarily rule out suicide?

13 A. No, ma'am, it doesn't rule out a suicide. All it  
14 simply means is that a rifle was fired twice and cocked. It  
15 has no direct relationship to whether this was suicide or  
16 not.

17 Q. And does adrenaline play any role in the  
18 activities that take place once somebody has received a fatal  
19 injury?

20 A. Yes, not just adrenaline. When somebody is shot,  
21 whenever you go as a human being, you identify any impending  
22 danger, there's a part of your brain called the locus  
23 coeruleus, l-o-c-u-s c-o-e-r-u-l-e-u-s. It's a part of your  
24 brain. It is in the lower part of the brain stem that

Page 27

1 releases no adrenaline that almost puts you into a zombie,  
2 and you can assume superhuman ability. You can be shot and  
3 assuming you wanted to get to your door to alert people, you  
4 will get to the door and alert people. Assuming you're hell  
5 bent, suicide is an irrational act, a person is hell bent in  
6 killing himself. Even if you put handcuffs on his hand and  
7 hold him, he could bring up all superhuman ways to take that  
8 gun and to shoot himself with his handcuffed behind him.

9 Q. Can assumptions made early on in an investigation  
10 of a suspicious death affect the investigation?

11 A. Not for me because of my broad experience and  
12 training but when I've been called upon by different counties  
13 to review cases, I have noticed a pattern whereby a  
14 pathologist walks with law enforcement. We are not law  
15 enforcement, but I've noticed a pattern where pathologists  
16 corroborate with law enforcement. And law enforcement makes  
17 an assumption at the scene, convey their assumption to the  
18 pathologist, even before the autopsy is done, it influences  
19 the pathologist to look for findings. Remember, medicine is  
20 not an absolute science.

21 Q. Yes.

22 A. To support what law enforcement told him. So,  
23 yes, an assumption made before the autopsy by law enforcement  
24 should not be conveyed to the pathologist because, remember,

Page 28

1 the pathologist should be independent, and law enforcement  
2 should not be present while the autopsy is being done because  
3 that destroys the independence of a pathologist who is  
4 performing the autopsy. That should be independent of what  
5 law enforcement believes.

6 Q. And were you asked to review materials in State  
7 versus Tatiana Leibel?

8 A. Yes, ma'am.

9 Q. And did that include the autopsy, toxicology  
10 reports, crime lab reports and police reports?

11 A. Yes, ma'am, autopsy pictures and scene pictures,  
12 yes, ma'am.

13 Q. And I'm showing you now what's been admitted as  
14 Exhibit 1. Are you familiar with that photograph?

15 A. Yes, ma'am.

16 Q. And is this the photograph of Mr. Leibel at the  
17 scene?

18 A. Yes, ma'am.

19 Q. You're aware there were various reports made at  
20 the scene by paramedics concerning Mr. Leibel's condition; is  
21 that correct?

22 A. Yes, ma'am.

23 Q. Some of those opinions included his complexion  
24 and he was pale, ash and gray, blue light to jaundice. Are

CASE NUMBER \_\_\_\_\_

**EXHIBIT** 14

Justice - FAILED



Dear Honorable Judge Young,

On the morning of Sunday, February 23, 2014, I received a phone call that scarred me for a lifetime. My mother called me hysterically crying, unable to make out any words that I could understand. After continuously asking her what had happened, but not being able to understand what she was saying, a deputy took over and told me that my father had taken his life and was found dead on the scene. I dropped to the floor, unable to comprehend what was just said to me. After hearing that I had lost my father, I came home to Lake Tahoe the next day to be with my mother. I arrived early the next morning and I was surprised to find my mother still being questioned at the sheriff's station. When she was finally released from questioning, for the first time since that horrific phone call, I was able to finally hug my mother. I was finally able to cry with her from the terrible loss of my father. We both could not understand how my father's death happened and were just in shock. For the rest of the day, my mother tried to make arrangements for his funeral since in the Jewish faith, my father's body needed to be buried within a certain time frame. Her actions did not mirror those of someone who had just shot her husband. Her actions were those of a loving wife who had just witnessed her husband committing suicide.

After being able to be in my mother's arms for that entire day, the next morning we were told to go to our home by Deputy Garren. We were told that our home was going to be released to us. However, Deputy Garren lied and tricked us in order to get us there. Once we arrived at the house, Garren pulled my mother out of the car and put her in handcuffs. Deputy Garren was taking my mother away after I had just lost my father two mornings before. Now both of my parents had been stripped from my life, and the second time, I actually had to witness it happen. At that moment, I had become an orphan. I was a child at 19 years old who had not only lost her father, but had witnessed her mother being ripped away from her life.

Since that day, I have had to grieve my father's death on my own. Since that day, I have had to cry myself to sleep without having my mother's arms wrapped around me. It has been terrible and torturous enough that my father has not been in my life, but my mother has been held in jail and I have not been able to grieve with her. I have been alone through the loss of my dad and my mom too. My parents and I were extremely close. Even though I left for college and live in San Diego, I visited home every break and holiday. I talked to my parents on the phone everyday or every other day. Unfortunately for the past year I have had no one to visit, and no one to call. Somehow I have managed to stay in school, but after every good grade I get on a test, there has been no one to tell. My mom calls me from jail every day, but I can't call her, it is not even close to being the same. We get a fifteen-minute time limit a day and then I am left alone again till the next phone call.

The loss of both my parents from my life has been extremely hard, but what has made it even harder are the lies and facades that Cheron Bartee and Justin Liebel have painted for the court. I have read both of their letters and although there are no direct lies, there are definitely misconceptions that I would like the court to be aware of. To begin, both of their letters have pictures of my father with them, however those pictures were taken many years ago. As much as Cheron and Justin

would have liked to have been close with their father, they were not, especially Cheron. Just so you are aware, Harry was initially my stepfather. Before him, there was no man who I ever considered calling my dad. He came into my life when I was eight years old and married my mother a year later. After that, I considered him to be my daddy as I was his little girl. Together, he and my mother raised me from a young girl to an adult. Cheron however stopped speaking to her father five years before his death. She sent him a hateful and mean letter telling him that she no longer considered him her father and that he was not part of her life anymore. It hurt him dearly, but they did not speak even once since that letter was given to him which would now be six years ago. In Cheron's letter, she stated Harry would not be a part of his grandchildren's lives. The only reason my father knew that Cheron had her first child was because I saw a picture on Facebook. After telling him that she gave birth to a little girl, he said that he did not care to even know his granddaughter's name because Cheron was not her daughter and that was not his grandchild. As sad as that was, Cheron should not be painting this picture of her and Harry being close at all since they were the exact opposite.

Since my father's death, Cheron has given away or sold all of his personal things. She had no care for any of his things that are sentimental to me, they were just tossed away to strangers, I wasn't even asked. Cheron may have been close to her father when she was younger, but the truth is that they had not spoken one word to each other for over five years. Cheron definitely has the right to be emotional about her father's death, but she does not have the right to be able to paint these misconceptions to the courtroom. In regards to Justin Leibel, he was still occasionally present in Harry's life even though Cheron was not. Once a year, twice if stretching it, he would visit our home in Lake Tahoe and stay for a short period of time. In court, he told the courtroom that they spoke about once a month. To me this does not resemble a close child and parent relationship, definitely not like the one I had with my parents. The last time I remember seeing Cheron was when I was in middle school, I am now a junior in college. As for Justin, I saw him twice when I was in high school and when he visited after Cheron gave birth to her first child, he tried telling my father about it but my dad refused to listen. Cheron and Justin are asking to have my mother, the only parent I have left, to be sentenced to life because they believe she took their father's life even though they barely spoke to each other. Instead of acting like my siblings, they have shut me out completely, turning everyone against my mother, and have tossed away all of my parents things. My mom's jewelry, her fur coats, all are gone. These were Mom's personal things not part of "Harry's estate." Cheron was appointed the executor of the estate without the court knowing the truth about her nonexistent relationship with her father and she chose to give away all of our family's possessions. Even though she took away my parents things, she cannot take away the memories I have with my father, the memories that she never made with him. On top of losing both my parents, Cheron and Justin have made this past year unbearable for me.

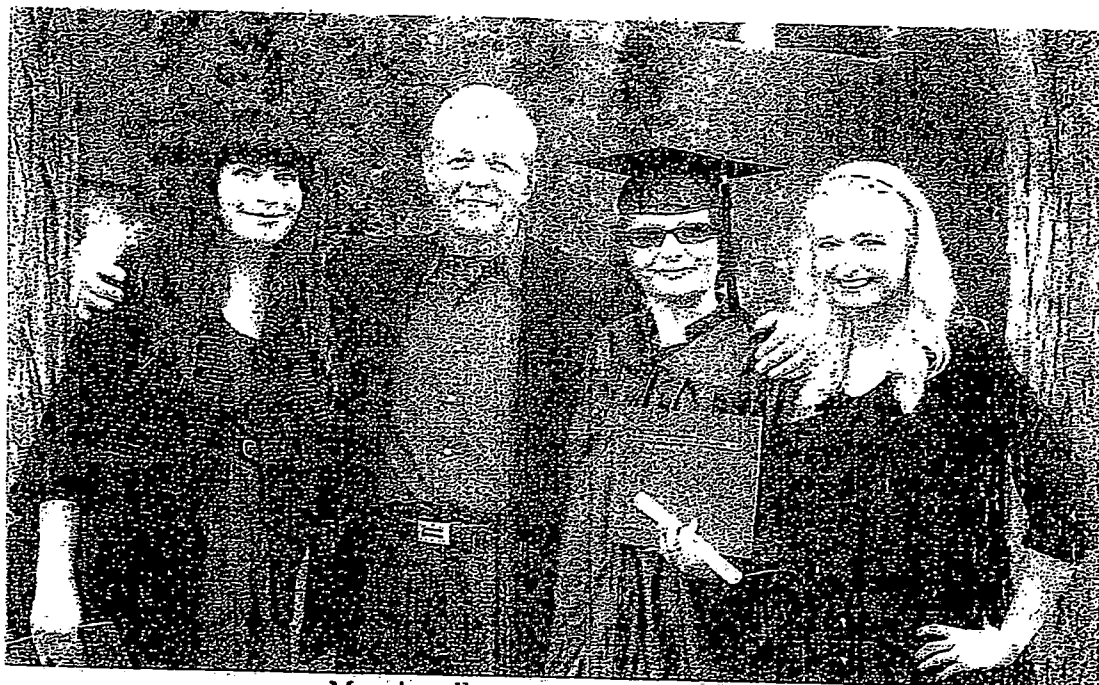
My mother is the most loving, sweet, kind-hearted woman that I have been so lucky enough to have in my life. Unfortunately this nurturing mother has been wrongly accused and has been sentenced to prison. I cannot even put into words on how terrible this makes me feel. My mom did not kill my dad!

This past year, I lost my father, my mother was been taken away from me, and my home has been left an empty place of memories, so I beg you Judge Young, please do not leave me with a life of feeling like an orphan. Do not sentence my mother with the highest sentencing. I already bear the hard loss of not ever having my father be at my college graduation, or my wedding, or seeing him hold his future grandchildren. Please do not let those moments be left without my mother being there as well. My mother already has three grandchildren that she will miss years of seeing them grow older, please do not take away from her being a part of their lives too. Please do not leave me with the absent memories of my mother not being a part of my adulthood. I haven't even turned 21 yet and I already have to deal with losing them both, please do not let me go on living my life without my mother. I beg of you to please give my mother the lowest sentencing possible. Since day one she has claimed her innocence because she has been wrongly accused of my father's murder. My parents loved each other. This has been the hardest year for me; please do not have me keep living through terrible ones for the rest of my life alone. Please let me know what it feels like again to be in my mother's arms and to at least have one parents present in my life.

Thank you for your consideration,

*Chaya Anna Leibel*

Chaya-Anna Leibel



Mom's college graduation - UNR

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