403 (Mo. 1974). In State v. Hooper, 386 N.E.2d 1348 (Ohio 1979), a statute providing that no person "shall insert any instrument, apparatus or other object into the vaginal or anal cavity of another" by force or threat, did not include finger because only inanimate objects were named in the catch-all phrase.

In the necrophilia statute at issue, the catch-all phrase is:

> "...or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living."

The common theme of the specified items, cunnilingus, fellatio, etc., is that they are all acts committed for the purpose of inducing sexual gratification. A person who strikes and injures a dead person's sexual organ in a continuing uncontrolled fit of anger or maddening rage that began when the person was alive, cannot be said to have committed an act on a dead body for sexual gratification. The key here is that there exists no evidence that the person who attacked Bailey before he died was motivated by sexual gratification. Thus, the continuing conduct does not mutate into a sexual crime just because the sexual organs were injured.

This is especially true when, as here, the individual injured sustained several other wounds, not just injury to sexual organs. An individual striking a dead body who also strikes a sexual organ does not necessarily cause a sexual penetration without more. Nor is this the case of an attempted rape completed after the death of the victim.

The definition of sexual penetration in the statute in question, NRS 201.450, was borrowed from NRS 200.364(2), commonly referred to as "the sexual assault statute." This Court has held that the definition of sexual penetration contained in the sexual assault statute is not unconstitutionally vague. Fields v. Nevada, 93 Nev. 640, 572 P.2d 213 (1977). However,"statutes challenged for vagueness are evaluated on an as-applied basis where, as here, First Amendment interests are not implicated." Lyons v. Nevada, 105 Nev. 317, 775 P.2d 219 (1989). Therefore, review of the statute for vagueness is not foreclosed in this case.

Furthermore, and perhaps most importantly, the definition contained in Nevada's necrophilia statute differs in one very significant way from the definition in the sexual assault

statute: the words "without limitation" are inserted in the definition of the necrophilia statute; they are not included in the sexual assault statute. As argued, supra, in the above-stated over breadth challenge, this distinction is very significant. The words "without limitation" necessary render the statute vague and indefinite

Most of the rules of statutory interpretation which are utilized in construing ambiguous criminal statutes are rules which apply as well to civil statutes, but there is one rule which is specifically applicable to criminal cases: criminal statutes must be strictly construed in favor on the defendant. LaFavre & Scott, supra. Felony statutes should be construed more strictly that misdemeanor statutes, those with severe punishments more than those with lighter penalties; those involving morally bad conduct more than those involving conduct not so bad; those involving conduct with drastic public consequences more than those whose consequences to the public are less terrible. Id., at page 110.

This Court has echoed this concern stating that, "(G)enerally speaking, we narrowly construe ambiguous provisions of penal statutes." Mangarella v. State, 117 Nev. 130, 134, 17 P.3d 989, 992 (2001). "Moreover, the rules of statutory interpretation that apply to penal statutes require that provisions which negatively impact a defendant must be strictly construed, while provisions which positively impact a defendant are to be given a more liberal construction." Id. "Statutes providing criminal sanctions must reflect a higher standard of certainty than civil statutes." Lyons v. State, 105 Nev. 317, 775 P.2d 219 (1989) citing Winters v. N.Y., 333 U.S. 507, 515 (1948).

In the alternative, if this Court finds that the necrophilia statute is not unconstitutionally over broad or vague, it is respectfully requested that this Court narrowly construe the statute as applied to Lobato and find that the conduct charged is excluded from the purview of the statute.

I. The sentence imposed by the district court violates Lobato's double jeopardy rights under the state constitution

Following the first trial, Lobato was sentenced to two consecutive 20 to 50 year sentences for first-degree murder with use of a deadly weapon and a ***concurrent term*** 5 to

15 year sentence for sexual penetration of a dead body. 1 App. 11. On appeal, this Court reversed the judgment after finding that the trial court erred in precluding Lobato from introducing extrinsic evidence to impeach the testimony a witness for the State. 1 App. 6; Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Following the second trial, Lobato was convicted of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead body. During the sentencing hearing her trial counsel noted that concurrent time had been imposed following the first trial and asked the district court to impose concurrent time for the two offenses. 9 App. 1759-60. See also 4 App. 781-82 (sentencing memorandum). The district court noted that the sentence imposed for Count One was "significantly" greater in the original judgment than the sentence that count be imposed pursuant to the jury's finding of voluntary manslaughter in the second trial. 9 App. 1760. The court then ordered that Lobato be sentenced to two consecutive terms of 48 months to 120 months for voluntary manslaughter with use of a deadly weapon and a ***consecutive term*** of 60 months to 180 months for use of a deadly weapon. 9 App. 1762. Lobato respectfully submits that pursuant to this Court's recent decision in Wilson v. State, 123 Nev. __, __ P.3d __ (11/21/2007), the district court violated Lobato's state constitutional right against double jeopardy by restructuring the sentences to require that she serve her sentences consecutively, rather than concurrently, as originally ordered by the court.

In Wilson, this Court concluded that a district court violated Nevada's double jeopardy protections by increasing the defendant's sentence after his conviction had been partially vacated on appeal. Id. at __. Specifically, in 2003, the defendant was convicted of four counts of using a minor in production of pornography and four counts of possession of a visual presentation depicting sexual conduct of a person under 16 years of age. He was sentenced to four terms of 24 to 72 months on the possession charges to run concurrently with 4four consecutive terms of 10 to life on the production charges. On direct appeal this Court reversed three of the four production convictions because all four arouse of a single criminal act. It then remanded the case for resentencing. In 2006, the district court modified the sentences on the defendant's remaining convictions by increasing the minimum for each

possession conviction from 24 months to the statutory maximum of 28 months and by ordering the sentences to run consecutively, instead of concurrently, as specified in the original sentencing hearing. This Court found that the district court's action constituted a double jeopardy violation under Article 1, Section 8(1) of the Nevada Constitution and Dolby v. State, 106 Nev. 63, 65, 787 P.2d 388, 389 (1990). It rejected the State's contention that Dolby should be overruled and took "this opportunity to renew [its] commitment to strong double jeopardy protections." Wilson, __ P.3d at __. This Court also rejected that State's proposed alternative rule which would have provided that when a defendant successfully challenges part of a multi-count conviction on direct appeal, the district court may effectuate its original sentencing intent by increasing the sentences associated with the remaining counts without violating double jeopardy, provided that, considered in the aggregate, the duration of the new sentences does not exceed the original punishment. In ruling against the State, the Court rejected the rationale employed by federal courts and focused upon Nevada double jeopardy jurisprudence. Of critical importance to this appeal is this Court's conclusion in Wilson: "Even though the resentencing did not lead to a harsher result than Wilson's original sentence, the district court individually increased the minimum terms on each of the remaining possession counts and restructured the relationship between the possession counts and the lone production count. We conclude that Dolby forbids this sentencing procedure."

Here the district court did that which was expressly found improper in Wilson. The district court restructured the relationship between Count I and Count II by ordering that the sentences be served consecutively rather than concurrently. Accordingly, in the event that this Court does not vacate the convictions entirely based upon the fact that the State did not present sufficient evidence to support the convictions, or does not reverse the convictions and remand for a new trial based upon the issues set forth above, the case must nonetheless be remanded to the district court with instructions to enter a new judgment of conviction which reflects concurrent sentences for the two offenses.

VII. CONCLUSION

Lobato has been imprisoned based upon conviction for substantial offenses even though the State fell far short of its burden of proving beyond a reasonable doubt that she committed these offenses. Her convictions must be immediately vacated based upon this injustice. In the alternative, she must be granted a new trial based upon the numerous errors and constitutional violations that resulted in her conviction. Finally, her sentence must be modified to provide for concurrent time between her two convictions.

DATED this 29th day of November, 2007.

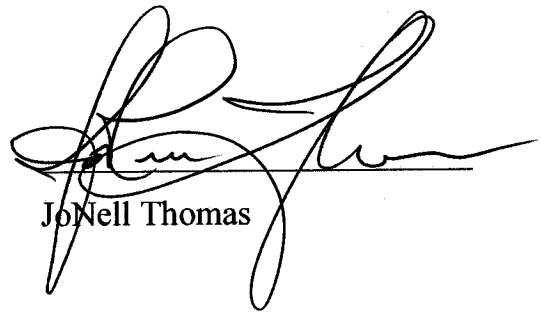
Respectfully submitted:

JoNell Thomas
State Bar No. 4771
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

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

DATED this 21st day of November, 2007.



JoNell Thomas

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2007 I caused to be mailed a true and correct copy of the foregoing Appellant's Opening Brief

David Roger
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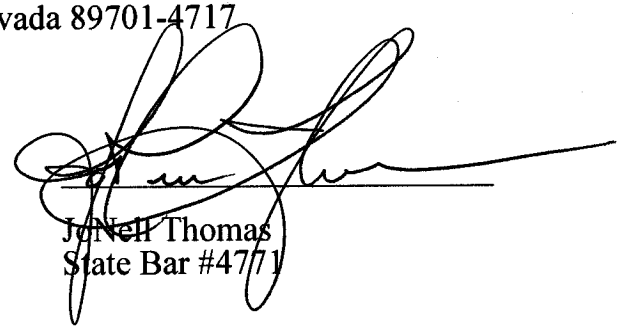

JoNell Thomas
State Bar #4771

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49087

FILED

FEB 05 2009

TRACIE K. LINDEMAN
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BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of voluntary manslaughter with the use of a deadly weapon and sexual penetration of a dead human body. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

In 2002, a jury convicted appellant Kirstin Blaise Lobato of first-degree murder with the use of a deadly weapon and sexual penetration of a dead human body. On appeal, this court reversed and remanded for a new trial on all counts. Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Upon retrial, Lobato was convicted of voluntary manslaughter with the use of a deadly weapon, count one, and sexual penetration of a dead human body, count two. The district court sentenced Lobato on count one to a maximum of 120 months with minimum parole eligibility in 48 months, plus an equal and consecutive term for the deadly weapon enhancement; on count two to a maximum of 180 months with minimum parole eligibility in 60 months, to run consecutively with count one.

Lobato now makes multiple assignments of error regarding the second trial. On appeal, we address whether the district court abused its discretion by admitting evidence of positive initial tests for blood and if the admission of Detective Thomas Thowsen's testimony about reports of

other stabbings around the time of the murder was hearsay and violated Lobato's constitutional right to confrontation.[1] For the reasons set forth below, we conclude that Lobato's contentions fail and, therefore, affirm the judgment of conviction. The parties are familiar with the facts and we do not recount them except as necessary for our disposition.

The positive luminol tests

Lobato argues that the district court abused its discretion when it permitted the State to introduce evidence of positive luminol and phenolphthalein tests for blood when the subsequent confirmatory tests were negative. We disagree.

This court reviews a district court's decision to admit evidence for a manifest abuse of discretion. Tabish v. State, 119 Nev. 293, 310, 72 P.3d 584, 595 (2003). Pursuant to NRS 50.275, "[i]f 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." That evidence must be relevant, which is defined as "evidence having any tendency to make the

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[1]Lobato also argues that: (1) there was insufficient evidence to support her conviction; (2) the detective's testimony was improper opinion testimony; (3) the district court violated her constitutional rights by refusing to allow witnesses to testify about her statements; (4) the district court violated her rights by admitting inflammatory evidence; (5) the district court abused its discretion in denying her motion to dismiss, based on the State's failure to collect potentially exculpatory evidence; (6) this court should reconsider its holding as to issues raised in her first appeal; and (7) the sentence imposed by the district court violates her double jeopardy rights. We have considered these issues and conclude that each of these additional challenges fails.

existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. However, relevant "evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice." NRS 48.035(1).

The district court properly weighed the evidence and determined it was more probative than prejudicial. The experts' specialized knowledge did assist the trier of fact to understand the evidence and determine a fact at issue. Both parties fully explored the meaning of the initial positive tests, as well as the reliability of luminol and phenolphthalein versus the confirmatory test, which were negative. Through direct and cross-examination of multiple experts the State and the defense adequately explained to the jury the significance of the initial positive results. Therefore, we conclude that it was not error for the court to allow the evidence of the initial positive tests for blood to be introduced.

Detective Thowsen's testimony

Lobato argues that Detective Thowsen's testimony regarding reports of other stabbings around the time of the murder was hearsay and violated her constitutional right to confrontation. We agree that the testimony was hearsay; however, we conclude that any error was harmless.

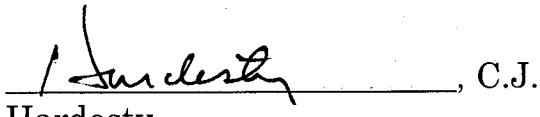
This court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996). Hearsay is an out-of-court statement that is offered to prove "the truth of the matter asserted" in the statement. NRS 51.035. Hearsay is generally inadmissible at trial, unless an exception to the hearsay rule applies. NRS 51.065.

Detective Thowsen's testimony regarding the police records was hearsay. He testified that there were no reports of similar stabbings but he was not the individual who reviewed the police records. In fact, Detective Thowsen was testifying about what he had been told by his secretary and others to whom he had delegated the project. Detective Thowsen's testimony was clearly hearsay; he testified about an out-of-court statement made to him by another, and that statement was offered to prove that there were no other reports of similar stabbings. However, based on Lobato's admission, there was substantial evidence that she committed the murder. Therefore, we conclude that any error in admitting the hearsay testimony was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24 (1967) (establishing that a court need not reverse a conviction if the alleged error is harmless beyond a reasonable doubt).

Additionally, Detective Thowsen's testimony regarding his conversations with urologists and medical providers was also hearsay. In this case, the hearsay was occasioned by defense counsel's questioning during cross-examination. Therefore, it was invited error and we will not reverse. See Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) ("The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit."); see also Taylor v. State, 109 Nev. 849, 856-57, 858 P.2d 843, 848 (1993) (Shearing, J., concurring in part and dissenting in part) (stating that the invited error doctrine establishes that ordinarily inadmissible evidence may be rendered admissible when the complaining party is the party who first broached the issue).

Finally, Lobato contends that because she was not able to confront and cross-examine the urologists and medical providers Detective Thowsen spoke to, her confrontation rights under Crawford v. Washington were violated. 541 U.S. 36, 53-59 (2004). Lobato never objected to the detective's testimony on Confrontation Clause grounds and while "'[f]ailure to object below generally precludes review by this court; however, we may address plain error and constitutional error sua sponte.'" Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 161 (2008) (quoting Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992)). This testimony was occasioned by defense counsel's questioning during cross-examination and thus was invited error. Consequently, we conclude that the admission of the detective's testimony was not plain error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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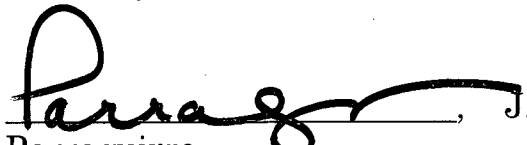

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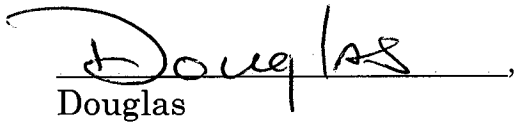

_____, J.
Douglas

cc: Hon. Valorie Vega, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO Appellant, v. STATE OF NEVADA, Respondent.	Docket No. 49087

FILED
FEB 12 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

PETITION FOR REHEARING

Comes now Appellant Kirstin Blaise Lobato, by and through her counsel JoNell Thomas, and respectfully requests rehearing, pursuant to NRAP 40, of this Court's Order of Affirmance, entered on February 5, 2009.

Lobato was convicted, pursuant to a jury verdict, of one count of voluntary manslaughter with the use of a deadly weapon and one count of sexual penetration of a dead human body. Following full briefing and oral argument, this Court entered an Order of Affirmance in which it addressed two of the issues raised by Lobato and summarily rejected seven other issues in a footnote. Lobato respectfully submits that this Court misapprehended the facts and overlooked controlling legal authority and that rehearing should be granted.

<u>This Court Misapprehended The Facts In Finding That There Was Sufficient Evidence To Support The Conviction and In Finding Harmless Error Based Upon "Overwhelming Evidence of Guilt."</u>

In footnote 1 of the Order of Affirmance, this Court summarily rejects Lobato's contention that there was insufficient evidence to support her conviction. Later, in addressing the erroneous admission of hearsay evidence, this Court found that any error was harmless beyond a reasonable doubt: "based on Lobato's admission, there was substantial evidence that she committed the murder." Order at page 4. Lobato respectfully submits that this Court misapprehended the facts in reaching this conclusion.

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There was insufficient evidence for the jury to convict Lobato on the charges of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human body. No rational trier of fact could have found beyond a reasonable doubt that Lobato was present when Bailey was killed or that she was in any other way responsible for his injuries. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); In re Winship, 397 U.S. 358 (1970).

As set forth at length in the briefs, there was absolutely no physical evidence tying Lobato to either Bailey or the crime scene: none of her DNA, no fingerprints or shoe prints, no tire tracks that matched her car, no pieces of hair or clothing, none of Bailey's blood was found on her clothing or in her car, nor any other evidence suggesting that she was ever at that location. 7 App. 1169, 1170; 8 App. 1540. In contrast, physical evidence was found at the scene which may have belonged to the perpetrator, but Lobato was excluded as a source of that evidence: bloody shoe prints were found leading from the dumpster area but they did not match Lobato's shoe size or the shoes of the first responders; fresh tire marks were made over a planter median, but the tire marks did not match Lobato's car; a piece of chewing gum was covered in blood which belonged to Bailey but also contained the DNA of an unknown person who was not Lobato; a pubic hair that was found in Bailey's sexual assault kit had a DNA mixture which included Bailey's DNA and the DNA of an unknown person, who was not Lobato; two cigarette butts were collected from Bailey's body, one contained DNA from an unknown male and the other contained a DNA mixture, the major profile of which was consistent with Bailey and the minor profile of which was from an unknown person who was not Lobato; fingerprints were recovered from the door of the dumpster enclosure, a box and a beer can, but they did not belong to Lobato; 6 App. 1022, 1023, 1062; 7 App. 1228, 1229, 1234, 1240, 1252, 1260, 1264, 1266, 1308, 1309, 1317, 1328; 8 App. 1521, 1541-44. Both the State's medical examiner and the defense expert agreed that Bailey's injuries were typical of a male on male case and were inconsistent with the kind of injuries normally inflicted by a female. 7 App. 1168; 8 App. 1540, 1549.

Just as there is no physical evidence supporting this conviction, there is also no eyewitness who placed Lobato or her distinctive car in the bank parking lot where Bailey's

body was found. No eyewitness placed Lobato or her distinctive car in Las Vegas or on the road between Las Vegas and Panaca at the relevant time. 7 App. 1172. Not a single person testified that Lobato's car was moved from the front of her parent's home between July 2nd until July 20th, when it was seized by the police. 7 App. 1200; 8 App. 1513, 1516. Critically, numerous people from Panaca testified that Lobato was in Panaca on the day that Bailey was killed. 6 App. 1105, 115; 7 App. 1190-91; 8 App. 1473, 1493, 1501-02; 9 App. 1600, 1606, 1610-11, 1623-25, 1650, 1701.

The State's only evidence against Lobato was her statement to the detectives, which was similar in most respects to her statements to friends from Panaca, that she had cut a black man's penis after he tried to attack her. Exhibit 125A at 6. As set forth in detail in the Opening Brief there were numerous and substantial inconsistencies between Lobato's statement and the actual facts concerning Bailey's death. Lobato's cryptic statements alone are insufficient to establish guilt beyond a reasonable doubt.

The State failed to prove beyond a reasonable doubt that Lobato killed Bailey and that she was the person responsible for injuries to his rectum. Accordingly, there is insufficient evidence to support the convictions. Lobato respectfully submits that this Court misapprehended the facts in finding sufficient evidence and in finding overwhelming evidence of guilt and that rehearing should be granted on this basis.

This Court Misapprehended The Facts And Overlooked Controlling Authority in Rejecting Lobato's Claim Concerning a Detective's Opinion Testimony

In the briefs and argument, Lobato presented substantial facts and legal authority concerning the improper opinion testimony by Detective Thowsen as to his beliefs as the reasons why her statement to the detective was inconsistent with the physical evidence concerning Bailey's death. Although this was one of the primary issues raised by Lobato and the issue was preserved at trial, this Court summarily rejects the issue in a footnote without any explanation. Lobato respectfully submits that this Court overlooked material facts and a material question of law in reaching this decision.

Over objection, Thowsen testified about his experience in homicide cases and his belief

that it is very common for people to minimize their involvement in an offense when they give a statement. 8 App. 1387. He further explained, over objection, his experience with suspects who were under the influence of methamphetamine at the time of the offense and his belief that such suspects "jumble things together," forget details, and remember things strangely. 8 App. 1388. He gave his opinion about his belief as to the knowledge someone would have if they had blacked out and noted details of Lobato's statement in which she stated she could not remember certain things. 8 App. 1388.

Lobato contended that admission of this testimony was error as a witness is not entitled to give an opinion as to the guilt of the defendant as it usurps the jury function. Winiarz v. State, 104 Nev. 43, 50-51, 752 P.2d 761, 766 (1988). Likewise, it is improper for a lay witness to give an opinion as to the truthfulness of a defendant's statement to the police. Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000); U.S. v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987); Maurer v. Dept. of Corrections, 32 F.3d 1286, 1287 (8th Cir. 1994). "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions as officers of the law." Bowles v. State, 381 So.2d 326, 328 (Fla. 5th DCA 1980). In addition, Thowsen's testimony as to his belief that Lobato's statements were consistent with other suspects who were involved with methamphetamine and who minimized their involvement in an offense amounts to "profile" evidence and was inadmissible. See U.S. v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983); U.S. v. Beltron-Rios, 878 F.2d 1208, 1210 (9th Cir. 1989). The introduction of unreliable evidence violated Lobato's state and federal constitutional rights to due process, confrontation and cross-examination. See Windham v. Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998); Reiger v. Christensen, 789 F.2d 1425, 1430 (9th Cir. 1986).

Lobato was extremely prejudiced by Thowsen's testimony. He usurped the jury's function by giving his belief as to the believability of Lobato's statement and the reasons for the substantial inconsistencies which existed between the incident described by Lobato and the facts of Bailey's killing. Moreover, this testimony was emphasized during closing

arguments. 9 App. 1725-26. There were substantial differences between the physical evidence and circumstances concerning Bailey's death and the attack described by Lobato in her statement. Thowsen was allowed to summarily gloss over these substantial differences by simply claiming that they were merely the product of minim izing and jumbling. Rehearing should be granted based upon this Court's misapprehension of the facts and law as Lobato is entitled to a reversal of her conviction on these grounds.

This Court Misapprehended the Facts and Overlooked Controlling Law in Rejecting Lobato's Claim That The District Court Erred In Refusing Testimony by Witnesses

Lobato attempted to present testimony from three witnesses about conversations they had with Lobato prior to July 8th (the day Bailey was killed) in which she confided that she had been attacked and cut a man's penis. The district court refused to allow these witnesses to testify, even though their testimony was admissible. Rehearing should be granted based upon this Court's misapprehension of the facts and law in summarily rejecting this issue.

The central issue in this case concerned whether Lobato was describing Bailey or a different person when she made a statement to the police in which she described being attacked and then cutting her attacker's penis. A key point at dispute concerned whether Lobato was attacked on July 8th or whether she was attacked on an earlier date. Lobato repeatedly tried to introduce testimony from witnesses in whom she confided in prior to July 8, 2001, about her attack and her response of cutting her attacker's penis. The district court, however, ruled that this testimony was inadmissible and prohibited Lobato's witnesses from presenting this testimony. See Trans. 9/18/06 at 27 (sustaining objection to proposed testimony of Pyszkowski); 8 App. 1529-31 (prohibiting McBride from testifying that she saw Lobato prior to July 4th, and that Lobato told her at that time that she had been sexually assaulted and had cut a man's penis). The district court's rulings were erroneous and violated Lobato's state and federal constitutional rights to present a defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete

defense.'" Crane v. Kentucky, 476 U.S. 683, 689-90 (1986). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate' to the purposes they are designed to serve." U.S. v. Scheffer, 523 U.S. 303, 308 (1998). See also Abbott v. State, 122 Nev. __, 138 P.3d 462, 476 (2006) (recognizing that an evidentiary rule which renders non-collateral, highly relevant evidence inadmissible must yield to a defendant's constitutional right to present a full defense). Lobato was entitled to present this testimony and the district court violated Lobato's constitutional right to present a defense by prohibiting this testimony. The testimony was also admissible under NRS 51.025 as the proposed testimony here was not offered to prove the truth of Lobato's statement that she was attacked and cut her attacker's penis, but was offered to prove that she made these statements prior to Bailey's death, thus establishing that Lobato was making a statement about a different person. Testimony such as this is admissible as nonhearsay. Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990).

Rehearing should be granted so that this Court may address the merits of this issue as it misapprehended the facts and overlooked controlling authority in rejecting this issue.

Rehearing Should Be Granted Because This Court Misapprehended The Facts and Controlling Authority In Rejecting A Claim About Admission of Prejudicial Evidence

The district court allowed the State introduced evidence that Lobato had a personalized license plate of "4NIK8ER" or "FORNICATOR" even though that evidence was irrelevant and highly prejudicial. Rehearing should be granted based upon this Court's summary rejection of this issue.

Over repeated defense objections, and an offer to stipulate that Lobato's car had a distinctive license plate, the district court ruled that evidence concerning the license plate was admissible, even though not a single witness claimed to have seen Lobato, her car, or the license plate anywhere in the vicinity of the location where Bailey was killed. I App. 21-33. 2 App. 374-78, 4 App. 918-23. This evidence was admitted solely to inflame the jury as the State presented extensive testimony about the personalized license plate. See 6 App. 1095 (photograph of the Fiero with the license plate was shown to the jury, the license plate was

zoomed in upon, and a picture of the car was circulated); 6 App. 1118 (testimony of Paul Brown); 6 App. 1121 (testimony of Jeremy Davis); 8 App. 1496 (testimony of Shayne Kraft); 9 App. 1636 (State asks Lobato's father about the license plate and how it was that Lobato came up with that name).

This evidence was highly prejudicial and irrelevant to the State's case. It was therefore inadmissible under NRS 48.035. See also Old Chief v. U.S., 519 U.S. 172, 180-81 (1997). This evidence was also inadmissible because it constitutes evidence of prior uncharged misconduct and bad character evidence. Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000); Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991); Renderos v. Ryan, 469 F.3d 788, 798 (9th Cir. 2006). Lobato was not on trial for the offense of having a personalized license plate that suggests or promotes fornication. Permitting the State to present this highly prejudicial and inflammatory evidence amounted to nothing more than character assassination of Lobato, which was wholly irrelevant and immaterial to the crimes charged. Rehearing should be granted based upon this Court's misapprehension of the facts and the law concerning this issue.

This Court Misapprehended The Law And The Facts In Rejecting Lobato's Claim Concerning The Destruction And Failure To Preserve Exculpatory Evidence.

Lobato presented a substantial issue concerning the State's failure to preserve evidence and its destruction of evidence that had been collected. She asked that the charges be dismissed because of the State's actions. The district court denied the motion and as a result violated Lobato's state and federal constitutional rights to due process of law and to a fair trial, her right to present a defense, and her right to confront the State's evidence. This Court misapprehended the facts and the law in rejecting this issue.

The district court abused its discretion in denying Lobato's motion to dismiss the case based on the State's failure to preserve and collect potentially exculpatory evidence. As noted above, there was no physical evidence which implicated Lobato in the commission of Bailey's homicide. Several items of potentially exculpatory evidence, however, were present on or with the body at the crime scene that were either not collected or were thrown away

after they were collected. These items included: paper towels that were partially stuffed into the opening where Bailey's penis once was and paper towels that were over Bailey's abdomen, 8 App. 1487-88, 1490-91; 6 App. 1021; 7 App. 1282, 12851 7 App. 1304; extensive evidence from the crime scene that was not documented prior to its destruction, 7 App. 1252, 1262, 1277, 1283, 1302, 8 App. 1390; and reports of investigation that were not made following interviews of potential witnesses and other investigative actions, 8 App. 1398-99, 1400, 1404.

This evidence was material and the failure to collect and preserve this evidence and constituted bad faith, requiring dismissal of the charges, or at the minimum, gross negligence, permitting the inference that the evidence would have been favorable to Lobato. The district court's denial of Lobato's motion to dismiss, and her request for an instruction permitting the inference that the evidence was favorable to her, violated Lobato's state and federal constitutional rights to due process, a fair trial, the right to present a defense, and the right to confront the State's evidence. See U.S. v. Rivera-Relle, 333 F.3d 914, 922 (9th Cir. 2003); Gordon v. State, 121 Nev. __, 117 P.3d 214, 217-218 & n. 9-11 (2005); Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998); Crockett v. State, 95 Nev. 859, 603 P.2d 1078 (1979); Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988); Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1285-86 (1991). Lobato's federal constitutional rights were violated because the State failed to gather critical evidence at the scene, failed to document eviden ce that was gathered, failed to protect crucial evidence from being destroyed, and then threw away other important evidence. Such flagrant and repeated acts and omissions constituted bad faith and violated Lobato's rights under Arizona v. Youngblood, 488 U.S. 51 (1988). See also Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1117 (9th Cir. 2001) (a bad faith failure to collect potentially exculpatory evidence violates the Due Process Clause). The State's suppression of materially exculpatory evidence violates both the Fourteenth Amendment and Nevada law. Brady v. Maryland, 373 U.S. 83, 87 (1963); Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692-93 (1996).

Lobato was prejudiced by the loss of this material evidence because she was unable to

have her own experts examine the paper towels found directly on Bailey's body and the other evidence found near his body. Had she been allowed to examine this evidence there is a reasonable probability that evidence of the actual perpetrator could have been recovered. Likewise, had Thowsen made a record of his investigation concerning reports by healthcare facilities on cut penises and his investigation of the Hispanic men who were potential other suspects, Lobato could have conducted further investigation for the purpose of verifying Thowsen's allegations, identifying the other suspects, and comparing fingerprint and DNA samples of those men. Lobato was also prejudiced by the loss of this evidence because the State was allowed to suggest through cross-examination of a defense expert that Lobato's DNA could have been present at the crime scene but was not discovered because evidence was not collected and preserved. 8 App. 1560. This point was also emphasized repeatedly during closing arguments. 9 App. 1729-30, 1740, 1743.

The facts of this case reveal that investigating officers acted with bad faith and gross negligence in failing to preserve potential exculpatory evidence. Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). Rehearing should be granted as this Court misapprended the facts and failed to apply controlling law in rejecting this issue.

This Court Misapprehended The Facts and The Law In Rejecting The Double Jeopardy Claim

Following the first trial, Lobato was sentenced to two consecutive 20 to 50 year sentences for first-degree murder with use of a deadly weapon and a ***concurrent term*** 5 to 15 year sentence for sexual penetration of a dead body. 1 App. 11. On appeal, this Court reversed the judgment after finding that the trial court erred in precluding Lobato from introducing extrinsic evidence to impeach the testimony a witness for the State. 1 App. 6; Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Following the second trial, Lobato was convicted of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead body. During the sentencing hearing her trial counsel noted that concurrent time had been imposed following the first trial and asked the district court to impose concurrent time for the two offenses. 9 App. 1759-60. The district court noted that the sentence imposed for

Count One was "significantly" greater in the original judgment than the sentence that could be imposed pursuant to the jury's finding of voluntary manslaughter in the second trial. 9 App. 1760. The court then ordered that Lobato be sentenced to two consecutive terms of 48 months to 120 months for voluntary manslaughter with use of a deadly weapon and a ***consecutive term*** of 60 months to 180 months for use of a deadly weapon. 9 App. 1762. Pursuant to this Court's recent decision in Wilson v. State, 123 Nev. __, 170 P.3d 975 (2007), the district court violated Lobato's right against double jeopardy by restructuring the sentences to require that she serve her sentences consecutively, rather than concurrently, as originally ordered by the court.

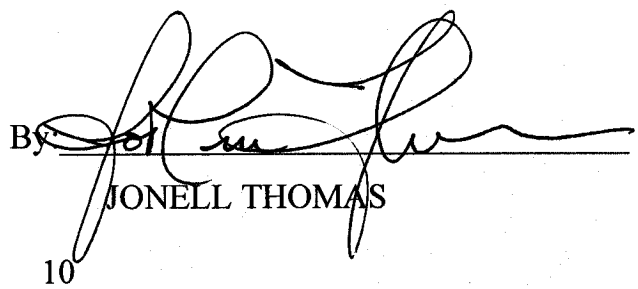
In Wilson, this Court provided an extensive analysis of the Nevada's double jeopardy jurisprudence concluded that a district court violated Nevada's double jeopardy protections by increasing the defendant's sentence after his conviction had been partially vacated on appeal. Id. at 980. Of critical importance is this Court's conclusion in Wilson: "Even though the resentencing did not lead to a harsher result than Wilson's original sentence, the district court individually increased the minimum terms on each of the remaining possession counts and ***restructured the relationship*** between the possession counts and the lone production count. We conclude that Dolby forbids this sentencing procedure." Id.

Here the district court did that which was expressly found improper in Wilson. The district court restructured the relationship between Count I and Count II by ordering that the sentences be served consecutively rather than concurrently. Lobato respectfully submits that Wilson is directly on point and that rehearing should be granted based upon this Court's failure to apply this controlling authority.

Conclusion

For each of the reasons set forth herein, Lobato respectfully submits that rehearing should be granted pursuant to NRAP 40.

Dated this 10th day of February, 2009.

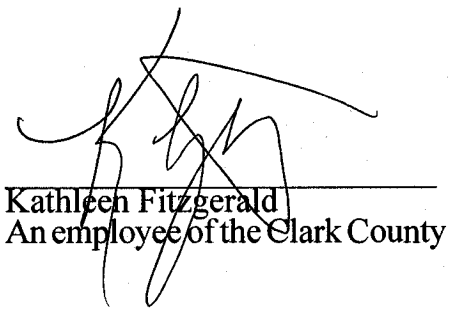


By _____
JONELL THOMAS

CERTIFICATE OF MAILING

I hereby certify that on the 10 day of February, 2009, I duly deposited in the District Attorney's bin at the Regional Justice Center, at Las Vegas, Nevada, a true and correct copy of the above and foregoing **PETITION FOR REHEARING** addressed to the following:

David Roger
Clark County District Attorney
200 Lewis
Las Vegas, NV 89155



Kathleen Fitzgerald
An employee of the Clark County Special Public Defender

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49087

FILED

MAR 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

[signature], C.J.
Hardesty

[signature], J.
Parraguirre

[signature], J.
Douglas

cc: Hon. Valorie Vega, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

ORIGINAL

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Attorney for Kirstin Blaise Lobato

FILED
APR 03 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO Appellant, v. STATE OF NEVADA, Respondent.	Docket No. 49087

PETITION FOR RECONSIDERATION EN BANC

Comes now Appellant Kirstin Blaise Lobato, by and through her counsel JoNell Thomas, and respectfully requests reconsideration en banc, pursuant to NRAP 40A, of the Panel's Order of Affirmance, entered on February 5, 2009. A petition for rehearing to the Panel was denied on March 27, 2009. Lobato was convicted of one count each of voluntary manslaughter with the use of a deadly weapon and sexual penetration of a dead human body. Following briefing and oral argument, the Panel entered an Order of Affirmance in which it addressed two issues raised and summarily rejected seven other issues in a footnote. Lobato respectfully submits that reconsideration by the full court is necessary to secure and maintain uniformity of its decisions and that reconsideration en banc is warranted because of the substantial precedential, constitutional and public policy issues presented.

The Panel Failed To Recognize The Constitutional Violation Created By The Conviction Of A Person Without Sufficient Evidence To Support The Conviction and In Finding Harmless Error Based Upon "Overwhelming Evidence of Guilt."

In footnote 1 of the Order of Affirmance, the Panel summarily rejects Lobato's contention that there was sufficient evidence to support her conviction. Later, in addressing the erroneous admission of hearsay evidence, the Panel found that any error was harmless beyond a reasonable doubt cause "based on Lobato's admission, there was substantial evidence that she committed the murder." Order at page 4. Lobato respectfully submits that the Panel was wrong in reaching this conclusion.

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There was insufficient evidence for the jury to convict Lobato on the charges of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human body. No rational trier of fact could have found beyond a reasonable doubt that Lobato was present when Bailey was killed or that she was in any other way responsible for his injuries. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); In re Winship, 397 U.S. 358 (1970). As set forth at length in the briefs, there was absolutely no physical evidence tying Lobato to either Bailey or the crime scene: none of her DNA, no fingerprints or shoe prints, no tire tracks that matched her car, no pieces of hair or clothing, none of Bailey's blood was found on her clothing or in her car, nor any other evidence suggesting that she was ever at that location. 7 App. 1169, 1170; 8 App. 1540. In contrast, physical evidence was found at the scene which may have belonged to the perpetrator, but Lobato was excluded as a source of that evidence: bloody shoe prints were found leading from the dumpster area but they did not match Lobato's shoe size or the shoes of the first responders; fresh tire marks were made over a planter median, but the tire marks did not match Lobato's car; a piece of chewing gum was covered in blood which belonged to Bailey but also contained the DNA of an unknown person who was not Lobato; a pubic hair that was found in Bailey's sexual assault kit had a DNA mixture which included Bailey's DNA and the DNA of an unknown person, who was not Lobato; two cigarette butts were collected from Bailey's body, one contained DNA from an unknown male and the other contained a DNA mixture, the major profile of which was consistent with Bailey and the minor profile of which was from an unknown person who was not Lobato; fingerprints were recovered from the door of the dumpster enclosure, a box and a beer can, but they did not belong to Lobato; 6 App. 1022, 1023, 1062; 7 App. 1228, 1229, 1234, 1240, 1252, 1260, 1264, 1266, 1308, 1309, 1317, 1328; 8 App. 1521, 1541-44. Both the State's medical examiner and the defense expert agreed that Bailey's injuries were typical of a male on male case and were inconsistent with the kind of injuries normally inflicted by a female. 7 App. 1168; 8 App. 1540, 1549.

Just as there is no physical evidence implicating Lobato, there is also no eyewitness who placed Lobato or her distinctive car in the parking lot where Bailey's body was found.

No eyewitness placed Lobato or her car in Las Vegas or on the road between Las Vegas and Panaca at the relevant time. 7 App. 1172. Not a single person testified that Lobato's car was moved from the front of her parent's home between July 2nd until July 20th, when it was seized by the police. 7 App. 1200; 8 App. 1513, 1516. Critically, numerous people from Panaca testified that Lobato was in Panaca on the day that Bailey was killed. 6 App. 1105, 115; 7 App. 1190-91; 8 App. 1473, 1493, 1501-02; 9 App. 1600-11, 1623-25, 1650, 1701.

The State's only evidence against Lobato was her statement to the detectives, which was similar in most respects to her statements to friends from Panaca, that she had cut a black man's penis after he tried to attack her. Exhibit 125A at 6. As set forth in detail in the Opening Brief there were numerous and substantial inconsistencies between Lobato's statement and the actual facts concerning Bailey's death. Lobato's cryptic statements alone are insufficient to establish guilt beyond a reasonable doubt.

The State failed to prove beyond a reasonable doubt that Lobato killed Bailey and that she was the person responsible for injuries to his rectum. Accordingly, there is insufficient evidence to support the convictions. Lobato's conviction is unconstitutional and public policy is violated by her incarceration for an offense she did not commit. Reconsideration en banc should be granted on this basis.

The Panel's Rejection Of Lobato's Claim Concerning a Detective's Opinion As To Her Truthfulness Ignores The Constitutional Violation Caused By This Testimony

In the briefs and argument, Lobato presented substantial facts and legal authority concerning the improper opinion testimony by Detective Thowsen as to his beliefs about the reasons why Lobato's statement to the detective was inconsistent with the physical evidence concerning Bailey's death. Although this was one of the primary issues raised by Lobato and the issue was preserved at trial, the Panel summarily rejects the issue in a footnote without any explanation. Lobato respectfully submits that her constitutional rights were violated by the admission of this testimony and that reconsideration en banc is warranted to maintain the uniformity of this Court's decisions on this issue.

Over objection, Thowsen testified about his experience in homicide cases and his belief

that it is very common for people to minimize their involvement in an offense when they give a statement. 8 App. 1387. He further explained, over objection, his experience with suspects who were under the influence of methamphetamine at the time of the offense and his belief that such suspects "jumble things together," forget details, and remember things strangely 8 App. 1388. He gave his opinion about his belief as to the knowledge someone would have if they had blacked out and noted details of Lobato's statement in which she stated she could not remember certain things. 8 App. 1388.

Lobato contended that admission of this testimony was error as a witness is not entitled to give an opinion as to the guilt of the defendant as it usurps the jury's function. Winiarz v. State, 104 Nev. 43, 50-51, 752 P.2d 761, 766 (1988). Likewise, it is improper for a lay witness to give an opinion as to the truthfulness of a defendant's statement to the police. Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000); U.S. v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987); Maurer v. Dept. of Corrections, 32 F.3d 1286, 1287 (8th Cir. 1994). "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions as officers of the law." Bowles v. State, 381 So.2d 326, 328 (Fla. 5th DCA 1980). In addition, Thowsen's testimony as to his belief that Lobato's statements were consistent with other suspects who were involved with methamphetamine and who minimized their involvement in an offense amount to "profile" evidence and was inadmissible. U.S. v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983); U.S. v. Beltron-Rios, 878 F.2d 1208, 1210 (9th Cir. 1989). The introduction of unreliable evidence violated Lobato's state and federal constitutional rights to due process, confrontation and cross-examination. See Windham v. Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998).

Lobato was extremely prejudiced by Thowsen's testimony. He usurped the jury's function by giving his belief as to the believability of Lobato's statement and the reasons for the substantial inconsistencies which existed between the incident described by Lobato and the facts of Bailey's killing. This testimony was also emphasized during closing arguments. 9 App. 1725-26. There were substantial differences between the physical evidence and

circumstances concerning Bailey's death and the attack described by Lobato in her statement. Thowsen was allowed to summarily gloss over these substantial differences by simply claiming that they were merely the product of minimizing and jumbling. Reconsideration en banc should be granted to correct this injustice in compliance with the constitution and public policy.

The Panel Failed To Recognize the Constitutional Violation Caused By The District Court's Prohibition on Testimony by Defense Witnesses

Lobato attempted to present testimony from three witnesses about conversations they had with Lobato prior to July 8th (the day Bailey was killed) in which she confided that she had been attacked and cut a man's penis. The district court prohibited these witnesses from testifying, even though their testimony was admissible. Reconsideration en banc should be granted because of the constitutional violation caused by the district court's ruling and to maintain uniformity of this Court's decisions.

The central issue at trial concerned whether Lobato was describing Bailey or a different person when she made a statement to the police in which she described being attacked and then cutting her attacker's penis. A key point at dispute concerned whether Lobato was attacked on July 8th or whether she was attacked on an earlier date. Lobato repeatedly tried to introduce testimony from witnesses in whom she confided in prior to July 8th, about the attack on her and her response of cutting her attacker's penis. The district court, however, ruled that this testimony was inadmissible and prohibited Lobato's witnesses from presenting this testimony. See Trans. 9/18/06 at 27 (sustaining objection to proposed testimony of Pyszkowski); 8 App. 1529-31 (prohibiting McBride from testifying that she saw Lobato prior to July 4th, and that Lobato told her at that time that she had been sexually assaulted and had cut a man's penis). The district court's rulings were erroneous and violated Lobato's state and federal constitutional rights to present a defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete

defense.'" Crane v. Kentucky, 476 U.S. 683, 689-90 (1986). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate' to the purposes they are designed to serve." U.S. v. Scheffer, 523 U.S. 303, 308 (1998). See also Abbott v. State, 138 P.3d 462, 476 (Nev. 2006) (recognizing that an evidentiary rule which renders non-collateral, highly relevant evidence inadmissible must yield to a defendant's constitutional right to present a full defense). Lobato was entitled to present this testimony and the district court violated Lobato's constitutional right to present a defense by prohibiting this testimony. The testimony was also admissible under NRS 51.025 as the proposed testimony here was not offered to prove the truth of Lobato's statement that she was attacked and cut her attacker's penis, but was offered to prove that she made these statements prior to Bailey's death, thus establishing that Lobato was making a statement about a different person. Testimony such as this is admissible as nonhearsay. Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990).

Reconsideration en banc should be granted so that this Court may address the merits of this issue, recognize the constitutional violation that occurred and address the decisions addressing this issue which are at odds with the Panel's decision.

Reconsideration En Banc Should Be Granted Because The Panel Failed To Address the Important Claim Concerning Admission of Prejudicial Evidence

The district court allowed the State introduced evidence that Lobato had a personalized license plate of "4NIK8ER" or "FORNICATOR" even though that evidence was irrelevant and highly prejudicial. Reconsideration en banc should be granted based upon the Panel's summary rejection of this issue.

Over repeated defense objections, and an offer to stipulate that Lobato's car had a distinctive license plate, the district court ruled that evidence concerning the license plate was admissible, even though not a single witness claimed to have seen Lobato, her car, or the license plate anywhere in the vicinity of the location where Bailey was killed. I App. 21-33. 2 App. 374-78, 4 App. 918-23. This evidence was admitted solely to inflame the jury as the State presented extensive testimony about the personalized license plate. See 6 App. 1095

(photograph of the Fiero with the license plate was shown to the jury, the license plate was zoomed in upon, and a picture of the car was circulated); 6 App. 1118 (testimony of Paul Brown); 6 App. 1121 (testimony of Jeremy Davis); 8 App. 1496 (testimony of Shayne Kraft); 9 App. 1636 (State asks Lobato's father about the license plate and how it was that Lobato came up with that name).

This evidence was highly prejudicial and irrelevant to the State's case. It was therefore inadmissible under NRS 48.035. See also Old Chief v. U.S., 519 U.S. 172, 180-81 (1997). This evidence was also inadmissible because it constitutes evidence of prior uncharged misconduct and bad character evidence. Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000); Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991); Renderos v. Ryan, 469 F.3d 788, 798 (9th Cir. 2006). Lobato was not on trial for the offense of having a personalized license plate that suggests or promotes fornication. Permitting the State to present this highly prejudicial and inflammatory evidence amounted to nothing more than character assassination of Lobato, which was wholly irrelevant and immaterial to the crimes charged. Reconsideration en banc should be granted to address the constitution violation caused by the introduction of this evidence and because public policy precludes a conviction that is based upon the presentation of this inflammatory evidence.

Reconsideration En Banc Is Warranted On Lobato's Claim Concerning The Destruction And Failure To Preserve Exculpatory Evidence.

Lobato presented a substantial issue concerning the State's failure to preserve evidence and its destruction of evidence that had been collected. She asked that the charges be dismissed because of the State's actions. The district court denied the motion and as a result violated Lobato's state and federal constitutional rights to due process of law and to a fair trial, her right to present a defense, and her right to confront the State's evidence. Reconsideration en banc is warranted to address the constitutional violation caused by the State's failure to preserve this evidence and to address the public policy issues presented.

The district court abused its discretion in denying Lobato's motion to dismiss based on the State's failure to preserve and collect potentially exculpatory evidence. As noted above,

there was no physical evidence which implicated Lobato in the commission of Bailey's homicide. Several items of potentially exculpatory evidence, however, were present on or with the body at the crime scene that were either not collected or were thrown away after they were collected. These items included: paper towels that were partially stuffed into the opening where Bailey's penis once was and paper towels that were over Bailey's abdomen, 8 App. 1487-88, 1490-91; 6 App. 1021; 7 App. 1282, 1285, 1304; extensive evidence from the crime scene that was not documented prior to its destruction, 7 App. 1252, 1262, 1277, 1283, 1302, 8 App. 1390; and reports of investigation that were not made following interviews of potential witnesses and other investigative actions, 8 App. 1398-1404.

This evidence was material and the failure to collect and preserve this evidence constituted bad faith, requiring dismissal of the charges, or at the minimum, was gross negligence, permitting the inference that the evidence would have been favorable to Lobato. The district court's denial of Lobato's motion to dismiss, and her request for an instruction permitting the inference that the evidence was favorable to her, violated Lobato's state and federal constitutional rights to due process, a fair trial, the right to present a defense, and the right to confront the State's evidence. See U.S. v. Rivera-Relle, 333 F.3d 914, 922 (9th Cir. 2003); Gordon v. State, 117 P.3d 214, 217-218 & n. 9-11 (Nev. 2005); Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998); Crockett v. State, 95 Nev. 859, 603 P.2d 1078 (1979); Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988); Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1285-86 (1991). Lobato's federal constitutional rights were violated because the State failed to gather critical evidence at the scene, failed to document evidence that was gathered, failed to protect crucial evidence from being destroyed, and then threw away other important evidence. Such flagrant and repeated acts and omissions constituted bad faith and violated Lobato's rights under Arizona v. Youngblood, 488 U.S. 51 (1988). See also Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1117 (9th Cir. 2001) (a bad faith failure to collect potentially exculpatory evidence violates the Due Process Clause). The State's suppression of materially exculpatory evidence violates both the Fourteenth Amendment and Nevada law. Brady v. Maryland, 373 U.S. 83, 87 (1963);

Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692-93 (1996).

Lobato was prejudiced by the loss of this material evidence because she was unable to have her own experts examine the paper towels found directly on Bailey's body and the other evidence found near his body. Had she been allowed to examine this evidence there is a reasonable probability that evidence of the actual perpetrator could have been recovered. Likewise, had Thowsen made a record of his investigation concerning reports by healthcare facilities on cut penises and his investigation of the Hispanic men who were potential other suspects, Lobato could have conducted further investigation for the purpose of verifying Thowsen's allegations, identifying the other suspects, and comparing fingerprint and DNA samples of those men. Lobato was also prejudiced by the loss of this evidence because the State was allowed to suggest through cross-examination of a defense expert that Lobato's DNA could have been present at the crime scene but was not discovered because evidence was not collected and preserved. 8 App. 1560. This point was also emphasized repeatedly during closing arguments. 9 App. 1729-30, 1740, 1743. The facts of this case reveal that investigating officers acted with bad faith and gross negligence in failing to preserve potential exculpatory evidence. Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). Reconsideration en banc should be granted to address this issue.

The Panel's Rejection Of Lobato's Double Jeopardy Claim Is Directly Contrary To This Court's Recent Decision In Wilson v. State.

Following the first trial, Lobato was sentenced to two consecutive 20 to 50 year sentences for first-degree murder with use of a deadly weapon and a ***concurrent term*** 5 to 15 year sentence for sexual penetration of a dead body. 1 App. 11. On appeal, this Court reversed the judgment after finding that the trial court erred in precluding Lobato from introducing extrinsic evidence to impeach the testimony a witness for the State. 1 App. 6; Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Following the second trial, Lobato was convicted of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead body. During the sentencing hearing her trial counsel noted that concurrent time had been imposed following the first trial and asked the district court to impose concurrent time

for the two offenses. 9 App. 1759-60. The district court noted that the sentence imposed for Count One was "significantly" greater in the original judgment than the sentence that count be imposed pursuant to the jury's finding of voluntary manslaughter in the second trial. 9 App. 1760. The court then ordered that Lobato be sentenced to two consecutive terms of 48 months to 120 months for voluntary manslaughter with use of a deadly weapon and a ***consecutive term*** of 60 months to 180 months for use of a deadly weapon. 9 App. 1762. Pursuant to this Court's recent decision in Wilson v. State, 170 P.3d 975 (Nev. 2007), the district court violated Lobato's right against double jeopardy by restructuring the sentences to require that she serve her sentences consecutively, rather than concurrently, as originally ordered by the court. In Wilson, this Court provided an extensive analysis of the Nevada's double jeopardy jurisprudence concluded that a district court violated Nevada's double jeopardy protections by increasing the defendant's sentence after his conviction had been partially vacated on appeal. Id. at 980. Of critical importance is this Court's conclusion in Wilson: "Even though the resentencing did not lead to a harsher result than Wilson's original sentence, the district court individually increased the minimum terms on each of the remaining possession counts and ***restructured the relationship*** between the possession counts and the lone production count. We conclude that Dolby forbids this sentencing procedure." Id. Here the district court did that which was expressly found improper in Wilson. The district court restructured the relationship between Count I and Count II by ordering that the sentences be served consecutively rather than concurrently. Lobato respectfully submits that Wilson is directly on point and that reconsideration en banc should be granted based upon the Panel's failure to apply this controlling authority.

Conclusion

For each of the reasons set forth herein, Lobato respectfully submits that reconsideration en banc should be granted pursuant to NRAP 40A.

Dated this 31st day of March, 2009.

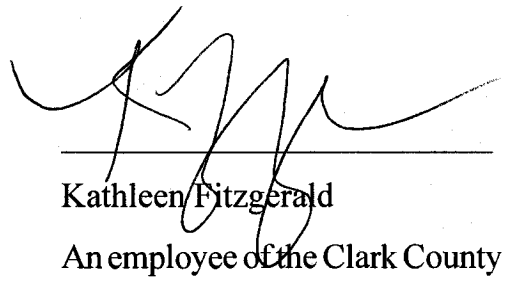
By: _____

JONELL THOMAS

CERTIFICATE OF MAILING

I hereby certify that on the 31 day of March, 2009, I duly deposited in the District Attorney's bin at the Regional Justice Center, at Las Vegas, Nevada, a true and correct copy of the above and foregoing **PETITION FOR RECONSIDERATION EN BANC** addressed to the following:

David Roger
Clark County District Attorney
200 Lewis
Las Vegas, NV 89155



Kathleen Fitzgerald
An employee of the Clark County Special Public Defender

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49087

FILED

MAY 19 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we ORDER the petition DENIED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. Valorie Vega, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

ORIGINAL

JoNell Thomas
NV State Bar #4771
Office of The Clark County Special Public Defender
330 South 3rd Street
Las Vegas, NV 89155
(702) 455-6270
Attorney for Kirstin Blaise Lobato

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO Appellant, v. STATE OF NEVADA, Respondent.	Docket No. 49087

FILED

MAY 26 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

MOTION TO STAY REMITTITUR

Comes now Appellant Kirstin Blaise Lobato, by and through her counsel JoNell Thomas, and respectfully requests this Court stay issuance of the Remittitur pending application to the United States Supreme Court for a Petition for Writ of Certiorari.

The Order Denying En Banc Reconsideration was filed May 19, 2009 and pursuant to the rules of the United States Supreme Court, the petition for writ of certiorari must be filed within 90 days from said date, up to and including August 17, 2009.

NRAP 41(a) states the Remittitur will issue twenty-five (25) days after entry of the order denying the petition unless the time is enlarged by order. Counsel requests that the time to issue the Remittitur be enlarged and respectfully requests this Court enter an Order to Stay Issuance of the Remitittur pending the filing of the Writ of Certiorari by Appellant.

Dated this 20th day of May, 2009.

By: _____
JONELL THOMAS

RECEIVED
MAY 26 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

RECEIVED
Las Vegas Drop Box
2009 MAY 21 PM 1:37
CLERK OF SUPREME COURT

POINTS AND AUTHORITIES

Nevada Rules of Appellate Procedure Rule 41 provides in pertinent part:

> "(b) *Stay of remittitur pending application for certiorari.* A stay of the remittitur pending application to the Supreme Court of the United States for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed sixty (60) days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the Supreme Court of Nevada a notice from the clerk of the Supreme Court of the United States that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court of the United States. Upon the filing of a copy of an order of the Supreme Court of the United States denying the petition for writ of certiorari the remittitur shall issue immediately....."

Good cause exists for stay of Remittitur in this case due to the nature of the issues intended to be raised. As such the propriety of the decision should be scrutinized by the highest Court in the land.

A stay of ninety (90) days in issuance of the remittitur is therefore respectfully requested.

DATED: 5/20/09

BY _____
JONELL THOMAS, ESQ.
Nevada Bar No. 4771
330 S. Third St., Ste. 800
Las Vegas, Nevada 89155
(702)455-6265

CERTIFICATE OF MAILING

I, KATHLEEN FITZGERALD, do hereby certify that on the 21 day of May, 2009, a copy of the foregoing Motion was deposited in the United States Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to the following:

District Attorney
Clark County Courthouse
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155

Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701

_____

KATHLEEN FITZGERALD
an employee of the Special Public Defender

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49087

FILED

MAY 29 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING MOTION AND STAYING REMITTITUR

Appellant has moved to stay issuance of the remittitur pending the filing of a petition for a writ of certiorari with the United States Supreme Court. Cause appearing, we grant the motion. See NRAP 41(b). We hereby stay issuance of the remittitur until August 31, 2009. We have enlarged the requested stay period by 14 days to allow the clerk of the United States Supreme Court sufficient time after the filing of the certiorari petition to prepare and mail written notification to the clerk of this court. If the clerk of this court receives written notice by August 31, 2009, from the clerk of the United States Supreme Court that appellant has filed a petition for a writ of certiorari, the stay shall continue in effect until final disposition of the certiorari proceedings. If such notice is not received by August 31, 2009, the remittitur shall issue on that date.

It is so ORDERED.

_____, C.J.

cc: Hon. Valorie Vega, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

KIRSTEN LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 49087

FILED
AUG 21 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingersoll
DEPUTY CLERK

NOTICE OF FILING OF PETITION FOR A WRIT OF CERTIORARI

PLEASE TAKE NOTICE that the Petition for a Writ of Certiorari was filed on August 5, 2009 in the Supreme Court of the United States and Notice was served on the Clark County District Attorney's Office (see attached).

DATED: 8/19/09

BY _____
JONELL THOMAS, ESQ.
Nevada Bar No.4771
330 S. Third St., Ste. 800
Las Vegas, Nevada 89155
(702)455-6265

CERTIFICATE OF MAILING

I, KATHLEEN FITZGERALD, do hereby certify that on the ~~19~~ 20th day of August, 2009, a copy of the foregoing Notice was deposited in the United States Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to the following:

District Attorney
Clark County Courthouse
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155

Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701

KATHLEEN FITZGERALD
An employee of Special Public Defender

RECEIVED
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CLERK OF SUPREME COURT
2009 AUG 20 AM 10:14

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AUG 21 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

Supreme Court of the United States

Kirstin Blaise Lobato
(Petitioner)

v. No. 09-5909

Nevada
(Respondent)

To NV Attorney General and Clark County District Attorney Counsel for Respondent:

NOTICE IS HEREBY GIVEN pursuant to Rule 12.3 that a petition for a writ of certiorari in the above-entitled case was filed in the Supreme Court of the United States on August 5, 2009, and placed on the docket August 14, 2009. Pursuant to Rule 15.3, the due date for a brief in opposition is Monday, September 14, 2009. If the due date is a Saturday, Sunday, or federal legal holiday, the brief is due on the next day that is not a Saturday, Sunday or federal legal holiday.

Unless the Solicitor General of the United States represents the respondent, a waiver form is enclosed and should be sent to the Clerk only in the event you do not intend to file a response to the petition.

Only counsel of record will receive notification of the Court's action in this case. Counsel of record must be a member of the Bar of this Court.

Ms. Jonell Thomas
330 South Third Street
Suite 800
Las Vegas, NV 89155
(702) 471-6565

NOTE: This notice is for notification purposes only, and neither the original nor a copy should be filed in the Supreme Court.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 5, 2009

FILED
OCT 14 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Clerk
Supreme Court of Nevada
Capitol Complex
Supreme Court Building
Carson City, NV 89710

Re: Kirstin Blaise Lobato
v. Nevada
No. 09-5909
(Your No. 49087)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

RECEIVED
OCT 14 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 49087

District Court Case No. C177394

FILED

OCT 19 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingersoll
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.
Exhibits:Exhibit 125A (a redacted audio tape recording).

DATE: October 14, 2009

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Valorie Vega, District Judge
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Special Public Defender David M. Schieck

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on OCT 16 2009.

Deputy District Court Clerk

RECEIVED
OCT 19 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

RECEIVED
OCT 16 2009
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 49087
District Court Case No. C177394

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie K. Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed as follows: "ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 5th day of February, 2009.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed as follows: "Rehearing denied."

Judgment, as quoted above, entered this 27th day of March, 2009.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed as follows: "ORDER the petition DENIED."

Judgment, as quoted above, entered this 19th day of May, 2009.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 14th day of October, 2009.

Tracie K. Lindeman, Supreme Court Clerk

By: A. Ingersoll
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

***

KIRSTIN BLAISE LOBATO, Appellant, vs. THE STATE OF NEVADA, Respondent.	))))))))))	Case No. 58913

Electronically Filed
Jan 30 2012 04:52 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S APPENDIX

VOLUME 5

APPEAL FROM NOTICE OF ENTRY OF DECISION AND ORDER

IN THE EIGHTH JUDICIAL DISTRICT COURT

TRAVIS BARRICK
NEVADA BAR #9257
GALLIAN, WILCOX, WELKER
OLSON & BECKSTROM, L.C.
540 E. ST. LOUIS AVENUE
LAS VEGAS , NEVADA 89104
(702 892-3500

ATTORNEY FOR APPELLANT

CHRIS OWENS
CLARK COUNTY, NEVADA
DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89155
(702) 671-2500

CATHERINE CORTEZ-MASTO
NEVADA BAR #3926
NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NEVADA 89701
(775) 684-1265

ATTORNEYS FOR RESPONDENT

Docket 58913 Document 2012-03249

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FILED

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

COPY

MAY 15 11 25 AM '07

CLERK OF THE COURT

THE STATE OF NEVADA, Plaintiff, vs. KIRSTIN BLAISE LOBATO, Defendant.	CASE NO. C177394 DEPT. NO. II Transcripts of Proceedings

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT COURT JUDGE

"ROUGH DRAFT"

JURY TRIAL - DAY 18
VOLUME XVIII

WEDNESDAY, OCTOBER 4, 2006

COURT RECORDER:

LISA LIZOTTE
District Court

TRANSCRIPTION BY:

NW TRANSCRIPTS, LLC.
1027 S. RAINBOW BLVD., #148
LAS VEGAS, NEVADA 89145-6232
(702) 373-7457
nwtranscripts@msn.com

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES:

FOR THE STATE:

BILL KEPHART
Chief Deputy District Attorney
200 South Third Street
Las Vegas, Nevada 89101
(702) 455-3482

SANDRA K. DiGIACOMO
Deputy District Attorney
200 South Third Street
Las Vegas, Nevada 89101
(702) 455-6450

FOR THE DEFENDANT:

DAVID M. SCHIECK
Special Public Defender
333 South Third Street, 2nd Floor
Las Vegas, Nevada 89155
(702) 455-6265

SHARI L. GREENBERGER, ESQ.
SARA ZALKIN, ESQ.
506 Broadway
San Francisco, California 94133

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Thomas Thowsen	205	208	211	--
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* * * * *

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* * * * *

LAS VEGAS, NEVADA WEDNESDAY, OCTOBER 4, 2006

PROCEEDINGS

PROCEEDINGS BEGAN AT 10:37:55 A.M.

(Court is called to order)

(Jurors are present)

THE COURT: Good morning. The record shall reflect that we're resuming trial in State versus Lobato under case number C-177394. In the presence of the defendant together with two of her counsel -- I -- it appears that Mr. Schieck is in the anteroom.

MS. GREENBERGER: Bringing in the next witness.

THE COURT: Okay. He is now present, so all three of the defendant's counsel are present. The two prosecuting attorneys are present and the ladies and gentlemen of the jury are present as well.

Mr. Lobato has returned, he may resume his seat on the witness stand. The clerk will be swearing him anew at this time.

LORENZO LOBATO, DEFENDANT'S WITNESS, SWORN

THE CLERK: Thank you. State your name and spell it for the record, please.

THE WITNESS: Lorenzo Lobato, L-O-R-E-N-Z-O L-O-B-A-T-O.

THE COURT: And Ms. Greenberger may resume her

direct examination.

MS. GREENBERGER: Thank you, Your Honor.

DIRECT EXAMINATION (continued)

BY MS. GREENBERGER:

Q Good morning.

A Good morning.

Q When you testified yesterday you were describing your activities on July 7th when you went to work the 4:00 to 12:00 shift, is that correct?

A Yes, ma'am.

Q Do you remember what you did earlier in the day on July 7th?

A Well, in the morning about 9:30, 10:00 o'clock I went up to the Lincoln County Courthouse where the sheriff's office was at and I talked to Sheriff John Wilcox about borrowing a inmate jumpsuit that I could use as I skit when I went a Muscular Dystrophy camp.

Q What is this Muscular Dystrophy camp?

A It's a summer camp for children with Muscular Dystrophy. You go for about a week and spend a week with the kids that are physically challenged.

Q How long have you been affiliated with this organization?

A About seven years.

Q You went on the 7th to talk to Sergeant Wilcox about a costume or what was it?
MR. KEPHART: Your Honor, objection, asked and answered.
THE COURT: Sustained.
BY MS. GREENBERGER:
Q You were going to use what you got from Sergeant Wilcox in a play?
A In a skit, yes.
MR. KEPHART: Objection, leading, Your Honor.
THE COURT: Sustained.
BY MS. GREENBERGER:
Q When did you go Muscular Dystrophy camp that summer?
A On the 22nd of July.
Q Did you use what you had gotten from Sergeant Wilcox?
A No, I thought after what had happened, Blaise being arrested, it would be in bad taste so I did not use the jumpsuit in the skit.
Q Did there come a time when you learned of Blaise's arrest?
A Yes.
Q Tell us about that.

A Well, I was at work and my wife called me pretty frantic of -- about the situation that Blaise had been arrested and that I needed to come home right away.
Q Do you recall what day that was?
A It was the 20th of July, I was at work.
Q 2001?
A Yes, ma'am.
Q Where were you working at the time?
A The Hideaway Club in Caliente, Nevada.
Q What time approximately did you get the call?
A 4:30, 5:00 o'clock in the afternoon.
Q As a result of that phone call did you do anything?
A Yes, I went straight home.
Q Why?
A So that I could see Blaise before she -- they took her away.
Q Did you in fact see her?
A Yes, I did.
Q Were the police present?
A Yes, they were.
Q Did you speak with each other?
A Yes, we did.
Q What did you discuss?
A We really didn't discuss anything. We hugged each

other, we cried quite a bit, and she told me she had done something that she had told me before in June.
Q What happened next?
A They took her away.
MR. KEPHART: Your Honor, may we approach?
THE COURT: Yes.
(Off-record Bench Conference)
MR. KEPHART: Your Honor, I'm moving to strike his answer as nonresponsive. He knows that -- he's trying to put something in that's not --
MR. SCHIECK: Objection, nobody knows, Your Honor.
MR. KEPHART: And he did that, it's obvious what he's doing.
MR. SCHIECK: Objection, he did state his objection and ask to strike.
THE COURT: Would you please state your objection?
MR. KEPHART: My objection is to his answer that he -- that she told him that she had done something and he says that she had told me she had done in June. I'm objecting to that as being nonresponsive to the question and being inappropriate in moving to strike that.
THE COURT: The Court sustains the objection as

nonresponsive and as hearsay and grants the motion to strike accordingly.
MR. KEPHART: Your Honor, I'd also ask that the jury be told to disregard that.
THE COURT: The jury must disregard that last answer.
BY MS. GREENBERGER:
Q Did you talk to the police on July 20, 2001 at the time they were arresting your daughter?
A Briefly, yes, I did.
Q What did you tell them --
A I really --
Q -- if anything?
A -- did tell them anything. They told me what the circumstances were and that, you know, that they were taking Blaise to Las Vegas and that I could come down there and see her and that's basically it.
Q Did they ask you any questions at that time about whether you had knowledge of any prior attack?
MR. KEPHART: Your Honor, I'm going to object.
THE COURT: Sustained.
BY MS. GREENBERGER:
Q Did they ask you any questions at that time?
A No, they didn't ask me.

1 Q After Blaise was arrested did [illegible]e come a time
2 when you read anything about this case?
3 A When I came back from summer camp.
4 Q When would that have been?
5 A The 26th of July.
6 Q So you actually went to the summer Muscular
7 Dystrophy camp?
8 A Yes, I did.
9 Q As a result of information learned in the news article
10 did you contact Detective Thowsen?
11 A I did.
12 Q What did you tell him?
13 A I told him that he had the wrong person because the
14 dates didn't match --
15 Q What --
16 A -- cause Blaise was home on the 8th and that there
17 was no way she could have been in Las Vegas at that time.
18 Q What was his response?
19 MR. KEPHART: I'm going to object as to hearsay.
20 THE COURT: Sustained.
21 BY MS. GREENBERGER:
22 Q Did he initiate any further discussion with you
23 regarding your conversation?
24 A No. He just --

1 MR. KEPHART: Your Honor, objection, that question
2 was answered.
3 THE COURT: The question has answered and you
4 may pose your next question.
5 MS. GREENBERGER: Thank you.
6 BY MS. GREENBERGER:
7 Q Did you ever talk to either of the homicide detectives
8 again after that?
9 A I believe I did in reference to her automobile.
10 Q What did you talk to them about at that time?
11 A Well, after we talked again about the dates being
12 different I asked him if they had found any evidence in her
13 car. He said, no. I said, I guess then you can release to me
14 then.
15 Q Was the car in fact released to you?
16 A Yes, it was.
17 Q And approximately what were the dates of these two
18 conversations?
19 A I would say the 28th and maybe the 30th. Could
20 have been a little later, I'm not really sure of the exact dates.
21 Q Of what month?
22 A July.
23 Q What year?
24 A 2001.

1 Q Did the police ever formally interview you on this
2 case?
3 A No.
4 Q Not at any time?
5 A No, they didn't interview me at all.
6 MS. GREENBERGER: I don't believe I have anything
7 further.
8 THE COURT: Cross.
9 **CROSS-EXAMINATION**
10 BY MR. KEPHART:
11 Q Mr. Lobato, when you left to go to summer camp,
12 when was that?
13 A It was on the 22nd of July, sir.
14 Q Okay. And you indicated you knew nothing about
15 the dates of when this crime had occurred by the time you left
16 to go to summer camp?
17 A No, I didn't know anything about the date that the
18 crime had occurred.
19 Q Okay. So you hadn't talked to your wife about it at
20 all?
21 A No, not as of the 22nd I hadn't.
22 Q And called your daughter? Her daughter hadn't
23 called you?
24 A Yes, I talked to her on the telephone however she

1 didn't know anything about the dates either.
2 Q Well, that's what your testimony here today is that,
3 right?
4 A That's the true of the --
5 Q Do you know why when you talked to her on the
6 phone she snapped at you because she knew it was recorded?
7 Do you know why she would do that?
8 A I have no idea what you're talking about.
9 Q You were even involved in a three-way conversation
10 with a Doug Twining, weren't you?
11 A It's a possibility I was, yes.
12 Q Okay. And your daughter snapped on you on the
13 phone because you were talking about the case and she didn't
14 want it to be recorded? You don't remember that?
15 A I don't believe it was right at that time, I believe it
16 was later on.
17 Q But your testimony that you'd actually contacted the
18 police and said, oh, she couldn't have done this, she was --
19 she wasn't there? That's your testimony?
20 A That was after I came back. That's after I came
21 back from summer camp, yes, sir.
22 Q Okay. And you say that you contacted Tom
23 Thowsen?
24 A Yes.

Q How'd you -- how'd that happen?
A Well, my wife called him. We weren't able to get a hold of him, he called back, talked to her, she handed the phone to me, and then I spoke to him.
Q Okay. Both times?
A Just once.
Q Okay. So it was only one time that you spoke to him?
A No, I spoke to him again separately when I had called and talked to him.
Q Okay. So now it's twice? Is there anymore times?
A There may have been other times that I had spoken to him.
Q And every time you called him he'd answer or he'd call back?
A Pretty much.
Q How many times did that happen?
A I can't recall.
Q But you do remember taking to him, telling him that you -- that there's no way that Blaise could have done this because she was up there?
A Yes.
Q Do you remember saying that?
A I do remember saying that.

Q Okay. And your wife was right there when that happened?
A Yes.
Q Just standing right there? Standing right --
A She was in the room with me.
Q -- next to you?
A She walked out, she had handed me the phone and walked away, yes.
Q Okay.
A She was a little upset from the conversation that she had had when -- with Detective Thowsen.
Q Well, you're saying she had one too?
A Well, she spoke to him before I did.
Q Now how many children do you have?
A Two.
Q Ashley and Blaise?
A Yes, sir.
Q Okay. Blaise is your oldest daughter?
A Yes, sir; she is.
Q Daddy's little girl?
A Yes.
Q Okay. And you've been --
A As is my other daughter, too.
Q You've been with them all your life? They've -- she's

lived with you all your [sic] life?
A For the most part she has. Yes, she's spent some time away with her mother.
Q You watched her grow up?
A Absolutely.
Q You knew about her ordeals when she was a child and when she was older?
A I knew of one, yes.
Q Okay. You knew that she had been involved in some sexual molestations?
A I knew of one, yes, sir, when she was --
Q One. Which one was that?
A When she was five years old.
Q Okay. You don't know about the other ones that --
A The others came to light later on during the course of the first trial.
MS. GREENBERGER: Objection, outside the scope of direct examination.
MR. KEPHART: This is cross.
THE COURT: Overruled.
BY MR. KEPHART:
Q And there came a point in time that you knew she was going to move to Las Vegas?
A Yes.

Q You guys discussed that? Is that a "yes?"
A Yes, sir.
Q Okay. Did you move her down here to Las Vegas?
A No, I didn't move her down to Las Vegas.
Q Okay.
A She wasn't sure if she was going to stay or not. She packed some things, went to Las Vegas.
Q Okay. And when was that?
A Probably May or so of 2001.
Q When did she graduate from high school?
A I believe it was around April, February or April, something like that.
Q 2001?
A Yes, sir.
Q When was it she was living in Caliente for a year?
A It wasn't quite a year that she lived in Caliente. It was during the time that she was going to school. She was working and going to school at the same time.
Q Okay. Now you knew she had a problem with drugs while she was in Caliente, didn't you?
A Yes, I did.
Q Okay. You brought her home to get her -- to help her get off of drugs?
A Yes.

Q Okay. What drugs were you addicted to?
MS. GREENBERGER: Objection, irrelevant.
MR. KEPHART: Judge, he testified he's a recovering addict.
THE COURT: Overruled.
THE WITNESS: I smoked a lot of marijuana and I have done quite a bit of crystal methamphetamine.
BY MR. KEPHART:
Q Okay. And as a -- you said you were addicted to methamphetamine?
A Well, that may have been taken a little out of context. I wasn't addicted but I was a regular user of methamphetamines and marijuana.
Q Okay. Methamphetamine is something that you crave all the time, you want it all the time?
A Not necessarily.
Q And you use methamphetamine to deal with problems often times, like any drug?
MS. GREENBERGER: Objection, vague as to time.
THE COURT: Sustained.
BY MR. KEPHART:
Q When you used methamphetamines did you ever use it to deal with problems you had?
MS. GREENBERGER: Same objection.

THE COURT: Sustained.
BY MR. KEPHART:
Q When were you using methamphetamine? When were --
A Would you repeat the question, please?
Q -- you using methamphetamine? When were you using methamphetamine?
A When was I using it?
Q Mm-hmm.
A Between 1998 and 2002.
Q Were you working as a Ely State Prison guard then when you were using methamphetamine?
A No, that was afterwards.
Q When did you become a Ely State Prison guard?
A In 1995.
Q And how long were you a prison guard?
A Almost two years.
Q They train you in tactical defense, that type of thing while you're there?
A Yes, sir.
Q Okay. Familiar with weapons?
A Yes, sir.
Q As a matter of fact you kind of collect weapons?
A Yes, sir, I do.

Q You have a lot of them that were displayed in your house back in 2001?
A Yes.
Q You're kind of big guy, you work out?
A Yes, I do.
Q Use the heavy bag in the garage?
A The heavy bag didn't hang in the garage, the rafters were a little too shaky. I put the speed bag in the garage. The heavy bag was in the tree in the backyard.
Q Okay. Taught your daughter how to defend herself?
A Yes, I did.
Q Gave her protection, meaning you would help her whenever she needed your help?
A Of course.
Q Okay. And you wanted to help her, protect her anyway you can?
A Yes.
Q You love your daughter?
A Yes, I do.
Q When is it that you started her with her collection of knives?
A I would say she was about 16, 15-16 years old and she always had a fascination with knives. I have a collection of my own so we started her on her's.

Q And you know what a butterfly knife is?
A Yes, I do.
Q And you know the butterfly knife is what is at issue in this case?
A Yes.
Q Okay. Did you teach her how to use the butterfly knife?
A I taught her how to open it, yes.
Q Okay. That's when you flip it and turn it?
A No, I'm --
Q How do you open it?
A -- not -- I'm not proficient in that portion of butterfly knife.
Q Okay.
A I've seen it done, I just know how to roll it to open it up and that's what I showed her to do.
Q Okay. During the time that you were using methamphetamine did you introduce your daughter to methamphetamine?
A No, I didn't.
Q But you knew she was using it at least when she was in Caliente?
A Yes, I did.
Q Okay. Your wife, Rebecca, use methamphetamine

as well?
A Yes, had.
Q Now you said she left to go to Las Vegas, you believe in May?
A It was around May; yes, sir.
Q And had she been to Las Vegas before that?
A She had visited with friends, and, you know, for the weekend and this and that.
Q Did she go --
A Yes, she had.
Q -- with you at all or with your family?
A She had been to Vegas with us. We have family here, too.
Q Okay. Did she know -- did you know where she was going to be staying when she went to Las Vegas?
A Nine out of 10 times, yes.
Q Okay. What do you mean by nine out of 10 times?
A Well, sometimes she would go with a friend and they weren't sure where they were going to stay. If they were going to stay in hotel room or if they were going to stay with a friend.
Q Okay. When she left in May did you know where she was going to be staying?
A Yes.

Q Where was that?
A She was going to stay at, I believe it was Steve and Kathy's. I don't know them very well, I had to think for a second what their names were.
Q Okay. And this -- had she lived in Las Vegas prior to that at all with anyone?
A Yes, she'd lived with us when we lived in Las Vegas until 1993.
Q Did she live in Las Vegas prior to May of 2001 where she moved in with Steve and Kathy, did she live with anyone else in Las Vegas that you know of?
A I believe she stayed for a short period of time with her mother, her natural mother, but that didn't really work out so she came back home.
Q Okay. Any of her friends, any other friends?
A Lived there or --
Q Yeah, did she --
A -- with her?
Q -- live with any other friends in Las Vegas?
A I know that she stayed with Doug for a little while.
Q When was that when she stayed with Doug for a little while?
A It was -- I guess they met right about the same time as she was staying at Steve and Kathy's and I guess between

Steve and Kathy's and Doug she just kind of floated back and forth.
Q And you said you met Steve?
A Briefly, I did; yes.
Q And did you go to his house?
A Yes, I went to his house.
Q Okay. Did he ever provide you with any methamphetamine?
A No.
Q Okay. And you knew that he was using methamphetamine?
A I didn't know him, I just went there to visit my daughter. I only talked to him briefly.
Q And how old was she when she moved to Las Vegas?
A Eighteen.
Q When she left did she have a job? When she left Panaca to go to Las Vegas did she have a job?
A She had a job -- a tentative job with some people that she had met doing some kind of fire extinguisher servicing. I believe that's what it was.
Q And that was before she left Panaca, she had a tentative job as far as you know?
A Right, cause she -- I guess she already was

acquainted with people down there.
Q Okay. When is it you bought her Fiero?
A I didn't buy her Fiero, she bought it herself.
Q When did she get that?
A I think she got it in February. It's around February.
Q Before graduation?
A No, I believe it was after graduation. She was already graduated.
Q February of 2001?
A Yes.
Q Didn't you just testify that you believe that she graduated in April of 2001?
A It's a possibility.
Q Okay.
A My dates are a little off. I'm not really sure what date this was.
Q Okay. And you were familiar with her license plate?
A Yes, I am.
Q Did you get her that license plate?
A I suggested it.
Q You suggested to your 18 year old daughter to have a license plate that says "fornicator" on it?
A It was a joke in the garage. We were playing around, it's one of those things where we're just talking and

1 coming up with funny names for license plates. I didn't think
2 she was really going to, you know, really go for it, and I really
3 didn't think that she'd get it.
4 Q When she went to Las Vegas, moved down to Las
5 Vegas and she took her red Fiero had she come back and forth
6 at all, like on weekends, to see you or anything like that?
7 A Not really.
8 Q Okay.
9 A Because her car was giving her a lot -- she called me
10 pretty frequently and tell me that her car was giving her a lot
11 of gear -- you know, a lot of grief.
12 Q Okay. So how many times did she come back to
13 Panaca since she went home?
14 A I don't recall.
15 Q Okay. You don't know?
16 A I don't know.
17 Q Could she have?
18 A It's a possibility, yes.
19 Q And you just wouldn't know?
20 A I would know if she came to my house.
21 Q But you just don't remember?
22 A Five years is a long time.
23 Q Other than Steve and Kathy and Doug, can you
24 name anybody else that she lived with while she was in Las

1 Vegas?
2 A Yes, I believe that for a while she was trying to
3 make a go of it with a boyfriend from high school named
4 Jeremy Davis.
5 Q Anyone else?
6 A Other than her mother, no.
7 Q Did you ever go down and see Jeremy and Blaise at
8 their place?
9 A Yes, I did.
10 Q And when was that?
11 A I'm not sure what the dates were.
12 Q Okay. You said that you -- in your direct
13 examination you said that you met Doug and just now said
14 that there was a point in time that you believed she was
15 staying with Doug. Where was it that you met Doug?
16 A I met Doug at Doug's house.
17 Q Okay.
18 A Or at Doug's father's house.
19 Q Was the defendant, your daughter, was she staying
20 with Doug when you met him there?
21 A No, actually she was staying at Steve and Kathy's
22 and we went over to Doug's because she wanted to introduce
23 me to him.
24 Q And that was the one trip that you went down and

1 you met Steve and Kathy?
2 A Yes.
3 Q Okay. Did Steve and Kathy ever come to Panaca?
4 Did you ever see them up there?
5 A Not that I know of.
6 Q Okay.
7 A They never came to my house.
8 Q Okay. Now you said that you saw Blaise about a
9 week after you were in Las Vegas when you met Steve and
10 Kathy and now you -- and now Doug, and about a week later
11 she came back up to Panaca, is that right?
12 A Yes.
13 Q Okay. And that you had suggested that she come
14 back up [sic] Panaca?
15 A Yes, I did.
16 Q Because of the things that she was into in Las
17 Vegas?
18 A Yes.
19 Q Okay. And that would include drug use?
20 A Yes.
21 Q And you said that you were in the garage when she
22 pulled up?
23 A I'd just gotten home. Yes, I was in the garage and
24 Ashley and -- I mean Blaise and her mom were also in the

1 garage.
2 Q Okay. And she drove up in her little red Fiero, is
3 that right?
4 A Are you talking about when she came home the --
5 on the 2nd?
6 Q Was that the date that she came home?
7 A Yes.
8 Q Okay. You were in the garage and you saw her pull
9 up in her little Fiero?
10 A Yes. I knew she was coming.
11 Q Yesterday -- is there any reason why yesterday
12 when you testified you said that you didn't know that she was
13 coming and just pulled up and kind of surprised you?
14 A The time surprised me. I knew that she was coming
15 but I didn't know when.
16 Q Okay. Exhibit 179, do you see that on the screen in
17 front of you there, Mr. Lobato? Okay. That's the little red
18 Fiero we're talking about, right?
19 A Yes.
20 Q Okay. And what did she bring back with her when
21 she came home from Las Vegas, do you remember?
22 A Just her luggage.
23 Q Okay. Have anything else, any other personal
24 items?

A As in what? What do you me... Her --
Q Any other personal items?
A -- luggage, it's her personal items.
Q She didn't have -- did she own anything else?
A I don't know what you mean by the question.
Q Did she --
MS. GREENBERGER: Objection, vague.
THE COURT: Overruled.
BY MR. KEPHART:
Q Did she own anything other than luggage?
A The clothes inside the luggage, her personal items inside there, her personal hygiene stuff. It's a very small car, you can't really bring a lot of stuff.
Q Okay. So she didn't own anything other than what would fit in the luggage?
A Pretty much.
Q Okay. And when she moved down to Las Vegas that's what she took with her?
A Yes.
Q And right here where the car's parked is it your testimony that the car never moved from that point until the police got it on the 20th?
A Yes, it is.
Q Okay.

A Unless it was pushed to park another car in front of my house.
Q Okay.
A Other than that I know it wasn't moved.
Q Okay. Did you do any work on the car?
A Actually it was -- smelled pretty bad on the inside and we took the luggage out and we cleaned it out a little bit.
Q Okay. Did you do anything on the -- work on the car, the motor or anything like that?
A Not at that time. No, I did not.
Q Between the time that the car was pulled in there until the police took it, you didn't do any work on the car?
A I don't remember if I did or not, but I don't think I did any mechanical work to it at all.
Q You didn't have the hood up or anything like that on the car? The only thing you remember is that you took some stuff out because it smelled and you cleaned out the car a little bit?
A Yes, that's all I remember.
Q Okay. And now you recall your daughter and your -- and your wife in an argument about Las Vegas during the time that she was at home?
A Yes.
Q You fought quite frequently?

A Well, mother daughter arguments --
Q Okay.
A -- just like anybody else's family I guess.
Q And one of the reasons is that she wanted to go back to Las Vegas?
A And -- yes. And we were opposed to it.
Q Okay. And do you remember talking to an individual by the name of Mr. Paglini? Made a phone call --
MS. GREENBERGER: Objection, outside the scope and irrelevant.
THE COURT: Counsel, approach.
(Off-record Bench Conference)
MR. KEPHART: May I have the Court's indulgence, Your Honor?
THE COURT: Yes.
(Pause in the proceedings)
BY MR. KEPHART:
Q My question to you, sir, was that do you recall speaking to an individual by the name of John Paglini on the 20th of August of 2001?
A I'm not sure of the dates but I remember the name. Yes, I spoke to him.
Q It was a phone call and do you recall what you told him while -- why the defendant had come back to Panaca?

A On the 2nd of July?
Q Yes.
A To straighten out her life and to quit doing drugs and --
Q You never said anything about that the car was broke down or was having problems and that's why she came back like you said yesterday?
A That's part of the reason too, probably.
Q I may have said that. I don't recall exactly what I said to Mr. Paglini.
Q Well, if I was tell you that you told him that she came back to get off of drugs?
A Then I probably did say that.
Q Okay. And you said that every night while you worked at a bar, that was the weekends?
A Yes, sir.
Q While you were working at the bar every night when you'd leave you'd see your daughter and when you'd come back you'd have to probably almost step over her cause she was sleeping out in the --
A No, I wouldn't have to step over her but either entrance, whether coming through the garage and through the door that leads from the garage into my house or my front door --

Q Okay.
A -- both went right into the livingroom and in a portion of that livingroom that was wide open I would see her laying there, yes.
Q Okay. And this was a two bedroom house?
A Yes, it was.
Q And Ashley had her own room and you were in the room that used to be your daughter's?
A Yes.
Q Okay. And so when you'd come in you'd have to go through the livingroom or passed where the defendant was sleeping, is that right?
A Yes.
Q Okay. And what was the normal time that you would come in? It would vary?
A It varied. It, you know, we were -- we were asked to stay open til at least midnight.
Q Okay. However, since it's a gaming establishment if there were people that were gambling we'd stay open sometimes 2:00, 3:00 o'clock in the morning. Not very often but the normal was about 1:00 o'clock in the morning.
Q Okay. So do you remember about what time it was on the weekends between the 2nd and the 8th of when you went home?

A Probably between 12:30 and 1:30 each night. It may have been later on one of the nights.
Q Okay. And it's your testimony that every night that you went home you saw your daughter --
A Yes, I couldn't help but she her --
Q -- the defendant here?
A -- when I came in the house.
Q Okay. And did you -- what was Ashley doing?
A Ashley was sleeping in her bedroom some nights and a lot of nights she was sleeping with Blaise.
Q Okay. And what did you see them doing?
A Laying down and sleeping together.
Q Okay. Was Blaise ever sleeping with Ashley in her bed?
A Not in her room, no.
Q You never saw that?
A I never saw that, no.
Q Okay. When she was -- brought in all these clothes and her belongings that she brought back in the suitcase that we're talking about and her luggage, where did she keep that when she was at your house?
A In the garage.
Q Did she have other belongings in that -- in other portions of her house?

A Yes, she still had stuff there from, you know, that were still in her room. Even though her mother and I had moved into that room there were still belongings there in the house. Some stuff was in Ashley's room, some stuff was in the garage.
Q Okay. Did she put anything from the -- from what she brought home in any of the other rooms?
A I don't know --
MS. GREENBERGER: Objection, vague.
THE WITNESS: -- if she did or not but she -- I believe she put some of her clothes in the hall closet and hung some of her clothes up in there.
BY MR. KEPHART:
Q Okay. Now on the 4th of July you have a party at your house, a big barbeque? Well, a barbeque?
A A get together, yes.
Q And you have people -- you invite people from around Panaca that you're -- that you know?
A Yes.
Q And you did that on this 4th of July?
A Yes.
Q Okay. And who do you remember was at your 4th of July party?
A I remember that my nephew-in-law, John Craft; my

niece, Shane; Marilyn Parker and her little kids; Marilyn's mom stopped by; Ken Hafen and Kendra stopped by. There -- you know, there are a few other people that just popped in but for the most part it was just a little get together and Blaise was not really active. She was still laying on the futon on there and still didn't feel well.
Q You said she got home on the 2nd of July?
A Yes.
Q Okay. And you know that you told that you -- that your wife took her to the doctor on the 5th?
A Yes.
(Off-record colloquy)
Q Mr. Lobato, do you remember coming down and drawing on this board?
A Yes.
Q It's Defense Exhibit -- I think that's JJ.
MR. KEPHART: Your Honor, is that -- do you know, JJ?
THE COURT: Yes.
BY MR. KEPHART:
Q Okay. Do you remember doing that, matter of fact I think you put your initials on here and you put some time frames on that?
A On the 8th, yes.

Q Okay.
A And some on another date.
Q I think you said 4:00 o'clock on the 2nd?
A Right.
Q Okay.
A Approximately.
Q Okay. Now you saw her at 4:00 o'clock in the evening on the 2nd, that's a Monday and then you -- she was taken to the doctor on the 5th by your -- by your wife?
A Right.
Q Okay. And you just now testified that on the 4th she was still sick?
A She wasn't feeling well on the 4th --
Q Okay.
A -- and she wasn't quite feeling very -- she was okay when she came home on the 2nd. She seemed to be all right.
Q Okay.
A Towards the evening of the 3rd, I think that's when it was, she really wasn't feeling well. Also on the 4th --
Q Okay.
A -- and like I had told you before knowing the symptoms and having been there myself I just assumed that she was on the comedown.
Q From the methamphetamine?

A Yes, sir.
Q Okay.
A And that's why, since she wasn't back to normal by the 5th my wife took her to the doctor.
Q Okay. And at your 4th of July party obviously your daughter was there because you've said that. What about Ashley, was she there too?
A Ashley was there, Clint was there, his little brother came up. It wasn't unusual for the kids to pop in when the grill was on.
Q Okay. Okay. And then you said you guys all laid -- well, did you? Were you part of the laying out on the grass watching the fireworks?
A We didn't go watch the fireworks.
Q Okay. Laid on the grass?
A We didn't lay on the grass because it started to rain pretty good.
Q Okay.
A Okay. And I had a swing in front of my house.
Q Okay.
A So from the inside window -- my front door was glass, so from inside because the rain was coming down and John and I were the only ones who were outside on the swing, just watch all heck break loose in the sky. It was --

Q Okay.
A To tell you the truth it was a great light show.
Q Okay. And once it started to rain everybody pretty much run inside?
A Pretty much.
Q Okay. Including your daughter, Blaise, and your daughter, Ashley?
A She was still inside.
Q She didn't come out?
A She stuck her head out and kind of said, hey, to everybody and then --
Q Okay.
A -- kind of had a little grumpiness to her, which is not unusual.
Q Okay.
A And then she went back and laid down.
Q What about Ashley, did she ever come out and sit with you then?
A Ashley and Clint and Kyle were back and forth.
Q Okay.
A They were, you know, 13, 14 years old. They're all over the place.
Q And you said it started to rain?
A Yes, it did.

Q Do you remember about what time it started to rain?
A Well, it was still light out. No, I don't really know what time it started to rain. It was hard to gauge the time because you know the clouds came in pretty quickly and --
Q Okay.
A But it was still light outside.
Q Okay. Okay. Now yesterday when you testified you indicated -- and kind of this morning a little bit before I started cross-examining, you talked a little bit about the 7th. Do you recall that testimony?
A Yes.
Q Okay. And yesterday you said that you were at work on the 7th and Rusty and Michelle brought your daughter to Caliente, because that's where you were working?
A That's not why they brought her there. I didn't even know that they were coming down there. She ended coming to my bar telling me that the others had pretty -- they went in and socialized in another bar and she couldn't get in because she's underage, of course.
Q Okay. Did you see Rusty and Michelle?
A No, I didn't.
Q Okay. And then sometime later, do you remember about what time it was that you said yesterday that your wife ended up picking up your daughter?

LORENZO LOBATO - CF

A I'm not sure. I don't really re... what time I said but I'm assuming it was around 7:00 o'clock-ish, give or take a half an hour.
Q That 7:00 p.m.?
A Yes, sir.
Q Okay. And then on the 8th you said that you saw your daughter -- I believe you said three times. You said 7:00 a.m., noonish, and 3:00 p.m. Is that -- is that about right?
A Approximately, I may have intermittently seen her during the course of the day, too, you know.
Q You said yesterday that you really didn't know what you might have been doing, like --
A Well --
Q Okay.
A The odds are pretty good I was either paying around in my yard or playing around in my garage. Just do-dadding around watching a little TV and, you know, just killing time until I had to go to work in the afternoon.
Q Okay. And you said that at 7:00 o'clock though your nephew-in-law, John?
A In the morning?
Q Yeah.
A Yeah, Shane's husband, mm-hmm.
Q Okay. He came over?

LORENZO LOBATO - CROSS

A It was about 7:00 o'clock in the morning.
Q Okay.
A Blaise woke me up because she was in front.
Q Okay. Then you said that you saw her about noonish. What was she doing noonish?
A I think she came in to get something to eat. I'm not really sure what she was doing but I noticed she'd been out playing around on the four-wheeler.
Q Okay. Who was she with playing around on the four-wheeler?
A Michelle.
Q Did you see them?
A I didn't see Michelle. No, I didn't.
Q Okay. So did you see her driving a four-wheeler?
A No, I didn't see her driving the four-wheeler either, I --
Q Okay.
A -- just talked to her.
Q Okay. So that's something she told you?
A Yes.
Q Okay. And this would have been told to you sometime after she was arrested on the 20th?
A No, that'd been told to me on the same day that we're talking about.

ENZO LOBATO - CROSS

Q Okay. She have to tell you when she went riding on four-wheelers?
A No, she was 18 years old, she could pretty much do whatever she wants but we're pretty close. She told me where she was going to be more or less.
Q What was she doing at 3:00 o'clock?
A I'm not sure what she was doing. I'm not really sure what I was doing other than getting ready for work.
Q Remember testifying yesterday, to use your words, just said there's no telling what you were doing on the 8th. Your words?
A Yeah, okay.
Q Okay.
A That's not an unusual statement for me.
Q Okay. What was -- what was Blaise doing on the 3rd of July 2001?
A To my recollection she was pretty much just laying down.
Q On the 4th?
A Pretty much the same.
Q On the 5th?
A Again, pretty much the same other than having been taken to the doctor by her mom.
Q On the 6th?

LORENZO LOBATO - CROSS

A I believe she was being nursed by her mom who took the day off from work to be with her.
Q It's your testimony that your mom -- I mean that her mom took the day off on the 6th?
A Yes.
Q She work pretty much every day --
A My wife?
Q -- of the week? Yeah.
A Yes.
Q Okay. Monday through Friday?
A You know, she schedule changed. I'm not really sure what her schedule was at that time. I don't think she had weekends off at that time.
Q Okay.
A I know that she worked, you know, in a 24-hour facility and their times fluctuate.
Q Okay. And you're -- but you believe that she took the 6th off?
A Yes, I do believe that she took the 6th off.
Q Okay. What about the 5th?
A I know she didn't take the 5th off. I know that she took Blaise to the doctor and I believe that the 5th was a Thursday so chances are pretty good I was around the house somewhere watching her too and Becky went to work. I think

she worked evenings. I can't --
Q Did you pick her up from the doctor?
A No, I didn't. I don't think I did.
Q What's that?
A I said I don't think I did.
Q Okay. Now you said that on the 9th, early in the morning of the 9th, I mean into the 9th, early in the morning, was that --
A After midnight?
Q Yeah. The 8th to the 9th?
A Yes, sir.
Q That this Doug guy came up to pick her up?
A Right.
Q Okay. And he drove all the way up from Las Vegas in his car to pick her up?
A Yes.
Q And you left her car there?
A Yes.
Q Okay. And you wanted her to stay there in Panaca?
A Yes, I did.
Q And your wife wanted her to stay there?
A Yes.
Q Okay. And you met Doug once before and been to his dad's house where he lived?

A Yes.
Q Okay. And how old was Doug then, do you remember?
A No, he was older. He was older than Blaise.
Q How much older?
A I don't know.
Q Couple of years older?
A I'd say a little older than that.
Q What's a little older?
A Maybe 10 years older than her.
Q Okay. Do you remember whether or not your wife, Becky, was arguing with her about leaving to go back to Las Vegas?
A Well --
MS. GREENBERGER: Asked and answered.
THE WITNESS: -- I know that there was objections going on and the standard, you know, mother-daughter I don't want you to go; but I'm going to go; yes, I do; no, you don't kind of thing.
BY MR. KEPHART:
Q Okay. You wanted her to stay you said?
A Yes.
Q But you let her go anyhow?
A She was 18 years old, sir.

Q Knowing full well that she has trouble with drugs?
A Yes.
Q And you let her go back to Las Vegas without any other transportation back to Panaca?
A That was her choice.
Q Were you talking about selling the car?
A No.
Q You helped to clean it out? Talk about getting it painted?
A Yeah, we'd discussed painting her car. The same color, it's pretty weather beaten. It still is as a matter of fact.
Q You still have the car?
A Yes, I do.
Q Okay. Down in California?
A Yes.
Q Did you trailer it down there or drive it down there?
A I drove it down there.
Q Now you said the next time you spoke to her was on the 13th and you said Friday the 13th, your nephew's birthday?
A I believe I spoke to her prior to that. I think that's what I said when -- to make sure -- to verify that she'd gotten there okay.
Q Okay.
A And then I talked --

Q And when was that?
A -- I talked to her on the 13th of the morning and she wasn't real happy about the circumstance and, you know, wanted -- you know, wanted to come home so I went and picked her up.
Q So you drove down to pick her up?
A Yes, I did.
Q Okay. When did you leave on the 13th pick her up?
A If I remember correctly it was about 9:30, 10:00 o'clock in the morning.
Q Okay. And when did you get to Vegas?
A Noonish, maybe a little after.
Q Okay.
A Takes two and a half hours to get there.
Q Okay. And how long were you in Las Vegas before you came back?
A We might have been in Vegas for a couple of hours.
Q Okay. What did you do?
A Went to -- I don't know exactly what we did. I know I picked her up, we got her stuff, and we may have went to eat which is a pretty good possibility, and, you know, maybe we went to a Wal-Mart cause it's a long ways from Lincoln to any type of, you know, economic shopping.
Q Okay.

A Any place that you have to go. The closest place is Cedar City, Utah and that's 82 miles. So, you know, you take advantage of whenever you go to the city.
Q Okay. What did you drive to get down there?
A I took my truck.
Q What did you bring back besides something you may have picked up at Wal-Mart?
A Blaise.
Q Nothing else?
A Her luggage.
Q Okay. Nothing else?
A I don't think so.
Q Talk to Doug?
A No, actually I didn't talk to Doug. Blaise just wanted to get the heck out of there and got her stuff and we left.
Q And when you -- when you drove back do you remember -- was -- did Blaise have any type of injuries on her at all at that time?
A Not that I know of.
Q Okay.
A And, you know, she would always tell me about that. Dad, look at this, can you, you know --
Q Okay.
A -- cause I was like the neighborhood --

Q You didn't -- you didn't see anything then though, right?
A -- band-aid guy.
Q Okay. You didn't see anything then?
A No, I didn't see anything.
Q Okay. Now she was there on the 14th, 15th, 16th all the way to the 20th when the police came and --
A Yes.
Q -- arrested her? Same sleeping arrangement?
A Yes.
Q So when you came in on a weekend, Friday night, Saturday night, I guess maybe Sunday night you came -- you were working at the bar on those days?
A Yes, sir, I was.
Q So you would have seen her in the room? Is that correct?
A Yes, I would.
Q Okay. And --
A Unless, of course, she was in Ashley's room with Ashley or in my room with my wife.
Q And you don't remember back on the 6th, 7th or 8th whether she was in Ashley's room or with your wife or anything like that? You remember her being out on the floor?
A I remember her being out on the futon, yes. I

remember Ashley being with her some but the majority of the time I had an older dog that was laying with her.
Q Okay. And then the 14th through the 20th before she was arrested did you see any injuries on her then?
A She had some scratch marks on her belly from rock climbing. I did see those.
Q When did she get those?
A I don't have any idea.
Q Well, you said that she talks to you and says, daddy, you know?
A Well, I don't know what the dates were. I know that it was, you know --
Q After you picked her up on the 13th?
A It may have been after. It may have been before, who knows?
Q Now after she was arrested you had contact with Doug, didn't you?
A Yes, I talked to Doug.
Q And that was part of -- was part of that talking to Doug a three-way conversation with the defendant in jail?
A I believe that happened one time, yes.
Q Okay. Now, Mr. Lobato, you indicated that you called the police and you told the police or they got a hold of you somehow and you told Detective Thowsen that, hey, you

know, they got the wrong guy or the wrong person because Blaise was with you on -- that whole week, right? Is that what you're saying?
A Yes.
Q Okay. And for the first time we've heard from your nephew, Mr. John Craft, here about 7:00 in the morning on Saturday the -- on the 8th?
A On the morning of the 8th, yes.
Q Okay.
MS. GREENBERGER: Objection, first time as to what, vague.
THE COURT: Sustained.
MS. GREENBERGER: No foundation.
BY MR. KEPHART:
Q Well, you don't know whether or not he called the police or talked to the police or anything about it or told anybody else other than you, right?
A I don't know if he called the police or anything.
Q Okay.
A He may have.
Q And you're aware of a previous proceeding here where your wife had testified --
A Yes.
Q -- and no discussion was about the morning of the

1 8th?
2 MS. GREENBERGER: Objection, foundation.
3 MR. KEPHART: He'd be aware of it.
4 THE COURT: The Court will sustain the objection.
5 BY MR. KEPHART:
6 Q Well, you knew your wife had testified previously?
7 A Yes, I knew that.
8 Q And you didn't testify at that previous proceeding,
9 did you?
10 A No, I did not.
11 Q Okay. And you never -- so you never told anybody,
12 at least from where you're seated now, about the morning of
13 the 8th?
14 A No.
15 Q Okay. And you want to do what you can to help
16 your daughter?
17 A Of course. I do know that John never really got a
18 chance to talk to me about it again because he left two days
19 later.
20 Q So when did John talk to you about it?
21 A He talked to me about -- he asked me about it from
22 Minnesota when he -- when he -- when I talked to him on the
23 telephone. And this is after the proceedings.
24 Q Was there any reason why his name never

1 materialized until --
2 MS. GREENBERGER: Objection, Your Honor.
3 BY MR. KEPHART:
4 Q -- October of 2005?
5 MS. GREENBERGER: Speculation, lack of
6 foundation.
7 THE WITNESS: To tell you the truth I have no idea
8 why it never came up before.
9 THE COURT: Overruled.
10 BY MR. KEPHART:
11 Q You have no idea?
12 MS. GREENBERGER: Asked and answered.
13 BY MR. KEPHART:
14 Q Wouldn't you have told the defense, I mean the very
15 people that are defending your daughter?
16 A Of course, but the proceeding that we're talking
17 about they -- there was a lot of information that just got
18 misdirected. I'm pretty sure somewhere in the notes that the
19 notes in there. I don't know why they didn't use me, you
20 know, as a -- as a witness. I was here. There was a lot of
21 things I can only speculate to.
22 Q Well, were you just ending or completing your
23 bought with methamphetamine about that time?
24 A Well, I -- to tell you the truth, no one ever fully

1 completes their bought with a drug addiction.
2 Q Okay.
3 A You go day-by-day.
4 Q Okay.
5 A Okay. And --
6 Q Sorry. Are you still using?
7 A -- right around that time I'm sure that that was --
8 Q May of 2002?
9 A Could very much so have been. I don't know exactly
10 what day.
11 Q Okay. And you were here though, right?
12 A Yes, I was.
13 Q Okay. And you -- you're changed a little bit now
14 though, aren't you? I mean you're here now and you're
15 wearing a tie and a nice shirt. You weren't before.
16 A Yes, I was.
17 Q You were here in this trial -- waiting for to testify?
18 A I was outside of -- not this courtroom but the old
19 courtroom --
20 MR. SCHIECK: Object -- may we approach, Your
21 Honor?
22 THE WITNESS: -- and I was wearing a tie every
23 day.
24 THE COURT: Yes.

1 (Off-record Bench Conference until 11:35:22 a.m.)
2 BY MR. KEPHART:
3 Q My question to you is that you were here, ready to
4 come into Court and you never did?
5 A Yes, sir.
6 MS. GREENBERGER: Objection, asked and
7 answered.
8 THE WITNESS: That is true.
9 THE COURT: Sustained.
10 BY MR. KEPHART:
11 Q Did it surprise you to know that the first time we've
12 heard of the time frame of 7 o'clock in the morning on the 8th
13 is in this proceeding?
14 MS. GREENBERGER: Objection, argumentative.
15 THE COURT: Sustained.
16 THE WITNESS: I don't really know what happened
17 in the last proceeding, I was outside.
18 THE COURT: I sustained the objection.
19 THE WITNESS: Oh.
20 THE COURT: You don't need to respond to the
21 question.
22 THE WITNESS: Oh, I'm sorry.
23 THE COURT: You will be asked another question.
24 THE WITNESS: Okay.

BY MR. KEPHART:
Q Talk to your wife after you were done -- after she was done with the last proceeding?
MS. GREENBERGER: Objection, vague as to time.
THE COURT: Sustained.
BY MR. KEPHART:
Q After she was done testifying in the last proceeding, did you speak to your wife?
MS. GREENBERGER: Some objection.
THE COURT: Overruled.
THE WITNESS: I spoke to everyday since then.
BY MR. KEPHART:
Q You spoke about this case?
A To a degree, yes, sir, we did.
Q As a matter of fact, you recall telling Doug that you had everything together for the defense on this -- one of these three way calls?
A No, I don't recall that, but I may have said.
Q Okay. Well, you've had an opportunity to read the transcripts from the last proceeding, haven't you?
A I've read some of them, yes.
Q Okay. Did you read Doug's?
A No, I did not. I only read a few portions of the transcripts, 'cause some of the things upset me and I'd rather

not read the rest.
MR. KEPHART: Court's indulgence, Your Honor.
THE COURT: Yes.
(Pause in the proceedings)
BY MR. KEPHART:
Q Do you recall, Mr. Lobato, that when -- when your daughter came home from Las Vegas and you saw her on the 2nd, do you recall her if you helped her get the -- get her bags out of her car?
A I believe I did, sir.
Q Okay. And who else was there to help?
A My wife.
Q Okay. How many bags did she have in that car?
A Three or four.
Q Okay.
A They were real big bags 'cause it's not a very big car.
Q Put 'em in the trunk in the -- inside the car?
A They have to go inside the car, there's not much trunk space.
Q And is that -- is the trunk in the back or in the front in that car?
A Well, it's kind of a, you know, weird question. 'Cause the front is kinda like the trunk on an old Volkswagen,

you know, where the spare tire and stuff is, and then the motor is in the back but there's a small compartment there, so you can't really put a lot in those.
Q Okay.
A Everything pretty much went inside the car.
Q And it was just a two-seater?
A Yes, sir.
Q So everything had to pretty much had to sit in the passenger seat?
A Yes.
Q Okay.
MR. KEPHART: Nothing further, Your Honor. I'll pass the witness. Thank you, Mr. Lobato.
THE COURT: Redirect.
MS. GREENBERGER: Thank you.

REDIRECT EXAMINATION

BY MS. GREENBERGER:
Q When was the first time you learned about the date of the crime for which your daughter was charged?
A When I came back from summer camp and talked to my wife on the telephone.
Q When would that have been, approximately?
A It would have been around the -- no, actually, I take that back, I believe I -- I had called home from camp and talk

to her.
Q Well, when would that --
A And about the 26th, 25th, 26th, maybe. I'm not really sure, but my wife had -- there's always an emergency number where you can call and I'm pretty sure that a message was left for me to call back home and my wife was really excited and, you know, telling me that, you know, this is dates, and this and this and that the dates were wrong and that she had called and talked to Detective Thowsen and Detective Thowsen told 'em that those were the correct dates and she had -- that's when she informed me of the whole -- the date scenario.
Q Subsequent to that, is that when you had your conversation with Detective Thowsen?
A No, it wasn't until after I got home.
Q And what -- that would have been towards the end of July?
A It was either -- I either came home on the late night of the 28th, because I believe we came back from Lake Tahoe and flew into Vegas on the 28th and then I went to the Clark County Detention Center. It had been arranged for me to visit her late, and so I went and spent an hour with Blaise before I went home. And it was most likely the following morning when we contacted Detective Thowsen.
Q Do you remember when Detective Thowsen released

the vehicle to you?
A I don't know what the date was. No, I don't. I know that he released it to me over the phone when I asked him if they had found any evidence in the vehicle and he told me, no, we kinda had a little -- a little discussion. A little heated discussion actually over the phone. And that's when I sarcastically asked him, well, did you find anything in the car and he told me, no, and I said, well, I guess you can release it to me.
Q When Blaise was staying at Doug's -- and you refer to Doug's, are you referring to Doug's parent's house?
A Yes, I am.
Q Do you know that Doug resides with his parents?
A Yes.
Q Do you know why she called you on the 13th to leave Doug's?
A She was unhappy with the circumstance.
MR. KEPHART: Your Honor, I'm gonna object, that's a yes or no. That calls for a yes or no answer.
THE COURT: Sustained.
BY MS. GREENBERGER:
Q Do you know why she left Doug's?
A Yes.
Q You picked her up from Doug's?

A Yes, I did.
Q You mentioned that Blaise had previously lived in Las Vegas, can you tell us how old she would have been when she previously lived in Las Vegas and what time period that would have been?
A Well, she lived in Las Vegas from the time that she was two years old until she was five and then she lived with her mother for a little less than a year and then again in Vegas until she was about -- I think she was about nine or ten when we moved to Lincoln -- ahhh, yeah, about nine or ten.
Q And from the time period that she was nine or ten until she was 18, she was residing in the Panaca area?
A In the Lincoln County area, yes, ma'am.
Q How do you recall the week of July 2nd through July 9th so clearly?
A Well, there's a -- there's a lot of things that happened during July that's -- you know, like the 4th of July weekend, my dad's birthday, those kinds of things all happen in that weekend.
Q When you learned of the importance of the date of July 8th, did you try very meticulously to reconstruct the events?
A Of course.
Q Did you know, while your daughter was in Las Vegas

in the month of June 2001, the end of May 2001, if she ever stayed at the Budget Suites?
A I vaguely recall her staying there from -- you know, once in awhile with a girl that I don't know. I met her briefly once, I can't remember her name. That, you know, that's where she would go. It was a friend. I don't if she was staying there or if she just visited her or what the circumstance was.
Q Did Blaise ever disclose to you --
MR. KEPHART: Your Honor, I'm gonna object as to hearsay.
THE COURT: Sustained.
BY MS. GREENBERGER:
Q Do you recall, when you testified on cross-examination, that Blaise and her mother were fighting about returning to Vegas, when was that?
A That would have been right on the 8th and it may have even started on the evening of the 7th when her mom came to pick her up, when she was sitting outside.
Q Do you recall Chris Carrington, seeing him at your house the week of the 2nd through the 9th?
A You know I really don't remember if Chris was at the house, but I knew there was something going with his grandfather so he was up and down the street all the time.

Q Did his grandparents live on your same street?
A Yes.
Q You knew --
A Just a few houses down.
Q Was he friends with your daughter?
A Yes.
Q You mentioned quite a light show, are you referring to fireworks?
A No, no, the lightning.
Q Where did Becky work at the time you've talked about her work during that whole --
A She worked at the Caliente Youth Center.
Q What was her job?
A She is a group supervisor for children that have been in trouble.
Q From the time that you picked your vehicle up from Metro, the Fiero, until the present, have you done anything to the vehicle?
A Yes, I've touched every nut, every bolt, every screw on it. It was kind of a therapy for me. I taught myself auto mechanics using that vehicle.
Q Why?
A Mmm --
MR. KEPHART: Judge, I'm gonna object to

relevance.
THE COURT: Overruled.
THE WITNESS: It's really hard to explain, but, you know, it's like the one piece of her that I had 'cause she was locked up. So I spent a lot of time playing around with it. It kind of became an obsession, I think.
BY MS. GREENBERGER:
Q Did the car need mechanical work?
A Yeah, it did.
Q Why?
A Sometimes it wouldn't start. It basically just needed a starter, but from the starter it kinda led to looking at this switch and at that switch, and I just pretty much went to work and stayed in my little cocoon. And that car was kinda my cocoon for quite awhile.
Q When the three way call was made with Doug Twining and your daughter, who initiated the three way call, if you know?
A I'm not sure. It could have been Doug, it could have been me.
Q Was Blaise having trouble making calls to your house, if you know?
A Yes.
MR. KEPHART: Your Honor, I'm gonna object.

THE WITNESS: She was having trouble, you know, making calls to the house.
MR. KEPHART: My objection is, one, it's leading and the other one is, how would he know that unless she told him and that would be hearsay.
THE COURT: Sustained.
MR. KEPHART: And I'm gonna move to strike that.
THE COURT: Granted. So stricken, the jury will disregard it.
BY MS. GREENBERGER:
Q How many times did you tell Detective Thowsen that he had the wrong person?
A I talked to him -- I believe I talked to him twice, maybe three times. I don't know exactly how many times I talked to him.
Q When you were using methamphetamine, did you get it in Lincoln County?
A Yes.
Q Did you have any control on whether you were called as a witness at the last proceeding?
A No, I did not.
Q Do you know if our current defense team was the same defense team that represented your daughter at the last trial?

A It's not the same, no.
Q Did you have any control over whether John Kraft was called as a witness at the last proceeding?
A No.
Q Was methamphetamine highly available in Panaca?
A Yes.
Q During what time period?
A During the time I moved there until now.
MS. GREENBERGER: The Court's indulgence.
(Pause in the proceedings)
MS. GREENBERGER: Nothing further.
THE COURT: Recross?
MR. KEPHART: The Court's indulgence, Your Honor.
THE COURT: Yes.
(Pause in the proceedings)

RECROSS EXAMINATION

BY MR. KEPHART:
Q Mr. Lobato, Ms. Greenberger here had indicated in her questioning, her words were is that -- is that how do you remember the dates between July the 2nd to July the 8th so clearly? Do you remember my cross-examination of you and asking you what was going on on the 2nd, the 3rd, the 4th, the 5th, the 6th, 7th and 8th?
A Yes.

MS. GREENBERGER: Your Honor, I'm gonna object it misstates my question.
THE COURT: Overruled.
BY MR. KEPHART:
Q And you indicated you really don't -- [CD malfunction]?
A Well, a lot of things happen during the course of the day, yeah, I'll accept that.
Q And certainly before the last proceeding you had talked to the defendant's attorney?
A Yes, I had.
MR. KEPHART: Nothing further, Your Honor.
THE COURT: Redirect?
MS. GREENBERGER: One question.

FURTHER REDIRECT EXAMINATION

BY MS. GREENBERGER:
Q Has anyone, other than the defense ever interviewed you on this case?
A Not that I know of. The only person that I actually think was kind of an interview would have been Mr. Paglini.
Q Dr. Paglini.
A Oh, okay. Dr. Paglini.
MS. GREENBERGER: Nothing further.
THE COURT: Recross?

1 MR. KEPHART: Nothing, Your Honor.
2 THE COURT: You may step down from the stand.
3 THE WITNESS: Thank you.
4 THE COURT: Defendant may call defendant's next
5 witness.
6 MR. SCHIECK: Call Rebecca Lobato.
7 THE CLERK: Please come all the way forward.
8 Remain standing and raise your right hand.
9 **REBECCA LOBATO, DEFENDANT'S WITNESS, SWORN**
10 THE CLERK: Thank you. Please be seated. State
11 your name and spell it for the record, please.
12 THE WITNESS: My name is Rebecca Lobato,
13 R-e-b-e-c-c-a L-o-b-a-t-o.
14 THE COURT: You may proceed, Mr. Schieck.
15 MR. SCHIECK: Thank you, Your Honor.
16 **DIRECT EXAMINATION**
17 BY MR. SCHIECK:
18 Q Good morning.
19 A Good morning.
20 Q It's still morning. Do you know Blaise Lobato?
21 A Yes, I do.
22 Q And how is it that you know Blaise?
23 A She's my stepdaughter.
24 Q And is she here in court today?

1 A She is.
2 Q And can you point to where she's seated and identify
3 something she's wearing?
4 A She's wearing a tiger striped dress.
5 Q And is she sitting between two other people?
6 A Yes.
7 MR. SCHIECK: And would the record identification
8 of the defendant, Your Honor?
9 THE COURT: The record shall so reflect.
10 BY MR. SCHIECK:
11 Q Mrs. Lobato, where do you live at this time?
12 A I live in Ontario, California.
13 Q And how long have you lived in Ontario?
14 A It'd be three years, November -- or, three years,
15 September. Excuse me.
16 Q Prior to that where did you live?
17 A Panaca, Nevada.
18 Q And on what street did you live in Panaca?
19 A Callaway.
20 Q And could you spell Callaway for the Court Reporter?
21 A C-a-l-l-a-w-a-y.
22 Q And was there a street address associated with your
23 house on Callaway?
24 A We put one up, 670.

1 Q Is that a mailing addressing?
2 A No, we had to go with a P.O. Box.
3 Q And when you lived in Panaca, did Blaise live with
4 you?
5 A She did.
6 Q Who else lived with you there on Callaway?
7 A My husband Larry and my other daughter Ashley.
8 Q And when, approximately, did you move to Panaca?
9 A We moved -- we were there 10 years so, it was '93.
10 Q 1993?
11 A Yes.
12 Q And Blaise living with you and Larry at the time you
13 moved to Panaca?
14 A She was.
15 Q And Larry, again, is your husband?
16 A Yes.
17 Q Okay. His formal name is Lorenzo but he --
18 A Lorenzo.
19 Q -- but he goes by Larry?
20 A Yes.
21 Q Okay.
22 A I call him Larry.
23 Q And when was it that Blaise came to live with you
24 and Larry?

1 A When she was approximately six.
2 Q And where were you residing at that time?
3 A We were living in Springs Points in Las Vegas,
4 Nevada.
5 Q And how long did she live with you here in Las
6 Vegas before you guys moved to Panaca?
7 A We were up there about a year and a half, two
8 years.
9 Q And why was it that Blaise came to live with you?
10 A Oh, when we -- you mean the whole time we lived
11 in --
12 Q No, why --
13 A -- in Springs Points?
14 Q -- why did she first come to live with you?
15 A She wanted to live with her father.
16 Q Did she have any other problems?
17 A She did.
18 Q And what was that?
19 A She had been abused.
20 Q And that's when she came to live with you and her
21 father?
22 A Yes.
23 Q Were you and Larry married at that time?
24 A We were.

Q So you're technically her step[illegible]ner?
A Yes.
Q But she's lived with you since the age of six until, I guess, the point in time she was arrested?
A Yes.
Q And you have another daughter?
A I do.
Q And her name is?
A Ashley.
Q And how much -- is Ashley younger or older than Blaise?
A Ashley is four years younger.
Q And did Ashley move with you to Panaca also?
A She did.
Q Did Blaise go to school in Panaca?
A She did.
Q Do you know whether she graduated?
A She did.
Q Did she graduate from regular high school?
A No, she graduated from Adult Education.
Q Do you recall approximately when it was she graduated?
A She graduated a year early, in 2000.
Q 2000?

A Yes.
Q Okay. Did there come a point in time when Blaise moved to Las Vegas?
A Well, she went to Las Vegas. She didn't really move to Las Vegas. And, yes, she did.
Q Could you describe what you mean when you say she really didn't move to Las Vegas?
A Well, we still had all of her belongings, except for her -- her clothing. So she hadn't literally moved out yet.
Q Okay, when you say all of her belongings, what type of belongings remained?
A Her whole bedroom. Everything and its contents, minus her clothes.
Q Now when you say her whole bedroom, what type of things are you talking about?
A Her bed, her stereo, her TV, her wall unit. All her stuff animals. You know, everything and its contents. Her whole room.
Q After she moved down to Las Vegas to stay, did you and Larry move into her room?
A We did.
Q Did all of her items remain in the room at that time or were some moved out?
A Pretty much. I mean we -- we got rid of her bed,

but the rest of it pretty much remained. It went into the living room.
Q What went into the living room?
A Her wall unit.
Q Okay. And where had you and Larry been sleeping while Blaise and Ashley both lived there in the house?
A In the living room.
Q So you moved out of the living room into the bedroom?
A Yes.
Q And it's a two bedroom house?
A Yes, it was.
Q Did you know where she was going to be living when she moved out to Las -- when she came to Las Vegas?
A The -- in -- when she first went down she -- yes, I do.
Q And where was that?
A She was staying with a girl named Melissa.
Q And approximately when was this?
A It was February of 2001, I believe.
Q Was she back and forth to Panaca after that?
A A little, yes.
Q Are you familiar with a Jeremy Davis?
A Yes, I am.

Q To your knowledge did she ever stay with Jeremy Davis?
A Oh, she did.
Q Okay. And do you recall when she stayed with Jeremy Davis in Las Vegas?
A She did, you know, off and on. I don't recall exactly, you know, when. I do -- I know that there was a time like in May or be -- just before May that she had been down there.
Q Down with Jeremy?
A Mm-hmm.
Q Is that yes?
A Yes. I'm sorry.
Q Did there come a point in time when Blaise came back to Panaca?
A Yes.
Q And how did she get back?
A She drove her car. Is that the part -- what you're talking about?
Q Yes.
A Okay.
Q What type of car did she have?
A A red Pontiac Fiero.
Q And do you recall when it was she came back Panaca?

A I do.
Q And when was that?
A July 2nd.
Q And you'd mentioned that she came back in the red Fiero?
A Yes.
Q Would you recognize a photograph of the red Fiero?
A I would.
Q Showing you -- it's been admitted as State's 178.
A That's it.
Q And is that the house behind it?
A Yes, it is.
Q When she came back to Panaca -- excuse me -- on July 2nd, where did she park the car?
A Right -- right where it's at.
Q During the entire time until the car was towed away, did the car move?
A No.
Q To your knowledge?
A Not to my knowledge.
Q And --
MR. SCHIECK: I'm gonna take the calendar down if I might, Your Honor.
THE COURT: Yes.

BY MR. SCHIECK:
Q You can see what I can. What's parked directly in front of the red Fiero?
A That's my husband's utility trailer that he carried his tile stuff in.
Q And was that parked there when Blaise came back on July 2nd?
A Yes, sir.
Q Did it remain parked there?
A Yes.
Q Showing you State's Exhibit 181. What is directly in front of the red Fiero there?
A What's in front of it?
Q Yes.
A That's the gooseneck on the utility trailer.
Q So the Fiero is parked fairly close to the --
A Yes, sir, apparently.
Q And that's where you recall it being parked at?
A Yes, sir.
Q How is that you recall it was July 2nd that Blaise came back to Panaca?
A It was just before the 4th of July and it was also my double-back, I'd just gotten home from work and I was suppose to go back into work at midnight and I was suppose

to go to sleep and she had just pulled up.
Q What is a double-back?
A Where I work and 8:00 to 4:00 and then there's eight hours in between and then I go back at midnight and work 'til 8:00 in the morning.
Q Okay. And where were you working?
A Caliente Youth Center.
Q Okay. And so you work 8:00 to 4:00, eight hours off and then eight hours back on?
A Yes.
Q Okay. And you had just gotten home, you said?
A Yes. I was just getting ready to go lay down.
Q Is that what you normally would do on your double-back days?
A Yes.
Q I got here a calendar that's been marked as Defendant's JJ. We've had a number of people put notations on there. I'm gonna hand you a black pen and if you could just put your initials on July 2nd, anyplace you can find, and if you can't find room on the 2nd if you could put it above the 2nd and draw and arrow, and the time that Blaise arrived back in Panaca.
A My initials and the time?
Q Yes.

A Approx -- and this is approximate.
Q Okay.
A Is that it for there?
Q Yes, that's it for now.
MS. DiGIACOMO: Objection, Your Honor, she didn't state what she just wrote on the board.
THE WITNESS: Oh, I'm sorry. My initials, RL and 5:00 p.m.
BY MR. SCHIECK:
Q That's the approximate time?
A Approximately 5:00 p.m.
THE COURT: The objection's overruled.
BY MR. SCHIECK:
Q And did there come a point in time that items were removed from Blaise's car after she arrived back?
A Right when she pulled up.
Q Okay. Who did that?
A Myself and my husband.
Q And did Blaise assist in doing that?
A Oh, I'm sure she carried her purse and stuff like that. We carried her luggage.
Q And where did you take the luggage?
A Into the garage.
Q Okay. Did you notice anything about her car?

A Yes, it was extremely foul.
Q When you say foul could you be more -- what are talking about?
A It stunk to high heaven.
Q What about her clothing or her baggage?
A Her -- well, her luggage had -- had debris on it, vomit debris is what it looked like and pretty much what it smelled like.
Q Why was those items placed in the garage?
A Well, when we were trying to bring it up, we were gonna clean up the luggage for her and -- so she can get her clothing out of 'em.
Q Did -- do you recall where Blaise stayed that July 2nd when she got back?
A She stayed with us.
Q And where did she sleep?
A She slept on the futon in the living room.
Q And can you describe the futon?
A It was just -- well, it wasn't actual futon with the frame, it was just the mattress pad that we would fold up laid out and slept on it.
Q So the night of July 2nd she slept in the living room on the futon?
A Yes, sir.

Q Did you continue to stay there at your house on Callaway?
A She did.
Q Okay. And we'll go quickly through the dates here. Did -- to your recollection did she sleep there at the house in the front room on the futon on the 3rd?
A She did.
Q On the 4th?
A She did.
Q 5th?
A She did.
Q 6th?
A She did.
Q 7th?
A She did.
Q 8th?
A No.
Q Okay. Now let's talk specifically about your work schedule.
A Okay.
Q You told us that the 2nd was a double-back day?
A Yes.
Q Okay. What was the schedule like for you the rest of the week?

A Usually 8:00 to 4:00s on Friday, Saturday, Sunday, Monday and then my double-back. But every once in awhile on Friday would be either an 11:00 to 7:00 or 4:00 to 12:00 whenever I'd return, but usually 8:00 to 4:00s.
Q And that was your schedule during that particular week, between the 2nd and the 9th?
A Yes, it was.
Q And when you would go to work or be scheduled to be to work at 8 o'clock in the morning, what time would you get up?
A 5:45.
Q You'd get up at quarter to 6:00? Why so early?
A It takes me awhile to get ready.
Q And where was the location that you worked at?
A In Caliente.
Q And that takes about how long to drive?
A About 20 minutes.
Q Okay. And did you do anything else before you would go to work, typically?
A Besides get ready, sometimes I'd stop and pick up my friend and bring her to work with me.
Q Now you were sleeping with Larry in Blaise's old bedroom, you've told us.
A Yes.

Q Okay. What would your routine be when you got up in the morning at approximately 5:45 so you could be to work at 8:00 in the morning?
A Well, usually my first thing I'd do is go sit out in the garage and smoke.
Q How would you get to the garage?
A Walk down the hall, through the living room, out the green room door and into the garage.
Q And would you have to go through the living room?
A I would.
Q If you walked from your -- where you were sleeping in Blaise's old bedroom to the garage to smoke, would you have to pass by Blaise?
A I would.
Q Okay. On any of the mornings between the 2nd and the 8th, when you got up to go to work, was Blaise not in her bed --
A She --
Q -- or in the futon?
A -- she was there.
Q Every morning?
A Each morning.
Q Okay, now you indicated that she did not spend the night of the 8th at your house there on Callaway?

A No.
Q Okay. So she wouldn't --
THE COURT: I'm gonna interrupt counsel to take our lunch recess at this time.
You may step down from the stand. We'll be resuming at 1:15.
THE WITNESS: Okay.
THE COURT: Ladies and gentlemen of the jury at 1:15 please be in the hallway, the bailiff will meet you there to return you to your seats in the courtroom.
During the recess you're admonished not to talk or converse amongst yourselves, nor with anyone else on any subject connected with the trial and you're not to read, watch or listen to any report of or commentary on the trial or any person connected with the trial, by any medium of information, including, without limitation, newspaper, television, radio and internet. And you're not to form or express any opinion on any subject connected with the trial until the case is finally submitted to you.
The Court's in recess until 1:15.
THE BAILIFF: All rise.
(Court recessed at 12:06 p.m. until 1:24 p.m.)
(Jurors are present)
THE COURT: The record shall reflect that we're

resuming trial in State versus Lobato under Case Number C177394 in the presence of the defendant, her three counsel, the two prosecuting attorneys, the ladies and gentlemen of the jury, and Rebecca Lobato who has returned to the witness stand. The Court reminds her she remains under oath. And we're proceeding forward with the defendant's case in chief. Counsel may resume questioning of this witness.
MR. SCHIECK: Thank you, Your Honor.
DIRECT EXAMINATION (continued)
BY MR. SCHIECK:
Q Mrs. Lobato, when you were in Panaca in July of 2001 did you have phone service at your house?
A Yes, we did.
Q Would that be what we typically now call a landline?
A Yes.
Q Okay. And did you also have a cell phone that you used?
A Yes, I did.
Q And -- may I approach, Your Honor?
THE COURT: You may.
(Off-record colloquy)
BY MR. SCHIECK:
Q I'm going to hand you what's been marked for identification as Exhibits T-1 --

A Sorry.
Q -- and S-1.
A Okay. Sorry.
MR. SCHIECK: For the record, she spilled a little water and had to wipe it up.
THE COURT: Thank you for your assistance.
THE WITNESS: I had nothing to wipe it up with.
BY MR. SCHIECK:
Q And if you can look at S-1 to begin with?
A Okay, which one -- oh, I see. Okay.
Q And do you recognize what that is?
A This one is my wireless, my cellphone.
Q I'm going to display on our projection device -- actually --
(Pause in the proceedings)
THE COURT: It's not coming up on the screen for some reason.
(Pause in the proceedings)
THE COURT: We're experiencing technical difficulties. We're going to have to call the technician to come in.
MR. SCHIECK: While we're waiting is it okay if I proceed and lay some foundation and then when we can get it up we can refer to the actual --

THE COURT: You might go on with another area of inquiry and then come back to this one.
MR. SCHIECK: If I can, Your Honor.
BY MR. SCHIECK:
Q I'm going to show you what's been marked as Defendant's T, and T -- excuse me, T and S and I just want you to confirm that T-1 is in fact a true and correct copy? T and that S-1 is a copy of S?
A Okay. Yes.
MR. SCHIECK: I'd move for the admission of Exhibits S and T and S-1 and T-1, Your Honor.
(Off-record colloquy)
MR. SCHIECK: S and T are the original, S-1 and T-1 are the copies that she's got up there.
MS. DiGIACOMO: No objection, Your Honor.
THE COURT: All four are admitted.
(Defendants Exhibit Nos S, S-1, T, T-1 admitted)
THE COURT: The record reflect that the technician has arrived and is resetting the screen.
(Pause in the proceedings)
THE COURT: That has now been accomplished so Mr. Schieck may proceed forward with his present --
BY MR. SCHIECK:
Q And we're now showing you on the project device

1 what's been admitted as Exhibit S, is th... your wireless phone
2 bill?
3 A Yes, sir, it is.
4 Q And it reflects your name and address on it?
5 A It does.
6 Q And reflects that the invoice dated July 15 of 2001?
7 A Yes, sir, it does.
8 Q Does -- this is a cellular phone?
9 A Yes, it is.
10 Q The phone that you carry with you to use?
11 A Yes, it is or it was.
12 Q In July of 2001 was it?
13 A Yes, it was.
14 Q This is a typical bill that you would during the course
15 of time that you had that phone?
16 A Each month.
17 Q Do you recall exactly when you received this phone
18 bill?
19 A I believe it was towards the end of month beginning
20 of the next month.
21 Q Is that when you would usually get your phone bill?
22 A Approximately, yes, then I recall.
23 Q I'm now going to turnover several pages of the
24 phone bill and this is what would be page 8 of your phone bill.

1 A Okay.
2 Q Do you have there in front of you?
3 A I do.
4 Q And do you still have the --
5 THE COURT: Is this "S" or S-1?
6 THE WITNESS: This one is S-1.
7 MR. SCHIECK: She has S-1, Your Honor. She's
8 going to mark certain calls on S-1 as opposed to marking on
9 the original document.
10 THE COURT: Okay.
11 MR. SCHIECK: That's the reason why we have an
12 "S."
13 THE COURT: Okay.
14 BY MR. SCHIECK:
15 Q I'm going to ask you about certain phone calls that
16 appear on here and ask you if you recognize the numbers that
17 are on -- we're starting on July 2nd. You can look at Reference
18 Number 131. Do you find that on your --
19 A I do.
20 Q And I'm going to -- is that the call that --
21 A I'm sorry?
22 Q That's 131 there, it's on the -- if you look on the
23 screen in front of you.
24 A 3:18? Yes.

1 Q That number is 775?
2 A 728-4589.
3 Q Do you recognize that number?
4 A I do.
5 Q And what number is that?
6 A That was our home number.
7 Q In Panaca?
8 A Yes.
9 Q Okay. So that would the number that would be
10 reflected on Exhibit T?
11 A Yes.
12 Q And so what would this indicate to you with that
13 reference to that --
14 A That I called home.
15 Q Next to the number of 728-4589 on S-1, can you
16 just indicate that that is your home number? Just write
17 "home," and your initials next to it there.
18 A Next to 1:31 on the outside?
19 Q Yes, that would be fine.
20 A Okay.
21 Q And have you -- have you written "home" and
22 initialed it?
23 A I'll initial it. I have.
24 Q And did the 4589 remain your home number during

1 that entire month of July?
2 A It did.
3 Q Was it unusual during that time period for you to call
4 home with your cellphone?
5 A No.
6 Q Do you have any recollection as to why you would
7 call home on 3:18 on the July 2nd?
8 A Not really but I'm kind of a creature of habit. I
9 would -- whenever I would -- I would call home.
10 Q We have another call from home on the 2nd at 4:16
11 p.m., is that correct?
12 A Yes. And that also that's a little bit after I would get
13 off of work so it's either I'm on my way or I'm running a few
14 minutes late.
15 Q Then we don't see any phone calls listed on your cell
16 number until the 6th, is that correct?
17 A Until the 6th? Oh, yes. I see what you're saying.
18 Q So is -- do you recall whether or not you used your
19 cellphone on either the 3rd or the 4th or the 5th of July?
20 A No, I was at home.
21 Q Do you have a specific recollection that you were
22 home all three days?
23 A On the 3rd, 4th, and 5th? Those were my days off
24 from work, that's --

Q And you'd already told us th laise came home on the 2nd?
A Yes.
Q Was Blaise at home during those days, the 3rd, the 4th, and the 5th when you were home?
A She was home.
Q What was she during the daytime on the 3rd when she was home with you?
A On the 3rd, I wouldn't -- I was -- I was sleeping during the day. That's my first day back after my double -- my double back so I would sleep most of the morning. I know she wasn't feeling well --
Q What about --
A -- and she had been sleeping an awful lot.
Q -- what about on the 4th?
A On the 4th she was -- she was down most of that day in the livingroom and we had our barbeque that day.
Q Do you recall who was at the barbeque?
A Most.
Q Okay. Who?
A Well, there was myself, my husband, my daughter, my niece, her husband, my brother-in-law, a few of Blaise's friends, Marilyn -- I'm having a hard time remembering her name.

Q Just the ones you remember.
A There was a few people that would stop in and out through but basically, you know, family and close personal friends.
Q Now you were scheduled then to go back to work on what day?
A I was scheduled to go back to work on Friday.
Q And that would be July 6th?
A Yes, sir.
Q Did you go back to work on July 6th?
A No, I didn't.
Q And why not?
A I had called off the evening of the 5th and -- because Blaise was sick. I had taken her to the doctor that day and I stayed home with her.
Q On the 6th?
A On the 6th, yes.
Q Now you said had gone to the doctor on the 5th?
A Yes.
Q Do you recall what time you went to the doctor on the 5th?
A It was in the afternoon -- late afternoon.
Q And how long were you at the doctor?
A We were there for a while. I'm not exactly sure.

Q What was Blaise doing on the 5th before you went to the doctor, do you recall?
A She had been laying on the couch -- I mean on the futon most of the -- most of the morning.
Q Do you recall if you stayed home the whole day or did you go anywhere?
A On the 6th?
Q On the 5th.
A On the -- on the 5th I just -- I was home until we -- I took her to the doctor.
Q What about the 6th?
A On the 6th I was with her the whole day.
Q Okay. Now looking at the phone record again on Exhibit S that you have in front of you, let's look at July 6th. Do you see it there?
A The first one?
Q Yes.
A The July 6th it says 800 service.
Q Do you know what that call was about?
A I don't.
Q Then at 11:52, do you know what that call reflects?
A I'm -- I don't recall. Reno.
Q Just an incoming call?
A Mm-hmm.

Q Is that "yes?"
A Yes, I'm sorry.
Q Okay. Now at 9:50 p.m. on the 6th of July, which would be Friday evening there's a number listed, it's 775-726-3890. What number is that?
A That was to the Hide Away, the bar where my husband worked.
Q Where Larry worked at?
A Yes.
Q And where was that bar located?
A Caliente.
Q And why would you be calling or do you recall why you called him at 9:50 p.m. on Friday night?
A On Friday night. I don't really recall.
Q And if you could -- but this is a call from your cellphone?
A Mm-hmm.
Q Is that "yes?"
A Yes, I'm sorry. I apologize.
Q Okay. Why would you use -- why would you be using your cellphone to call if you were home on the 6th?
A Usually that -- it would -- I would be in the garage and it would be the closest to me.
Q What type of plan did you have for your cellphone

do you recall for that period of time?
A I'm not really sure. There wasn't really many to chose from, you know, it was all roaming.
Q Was it free nights and weekends?
A I don't -- I don't think so.
Q But if you were in the garage you would use your cellphone?
A If it was sitting right next to me, yes.
Q Okay. And that's the only call you made on your cellphone on the 6th?
A Yes, sir.
Q Okay. If you could -- I ask you to do this, could you write next to entry 136, which is July 6th the 3890 number, just write "Hide Away" and put your initial?
A Okay.
Q And so any other phone calls that appear on this bill to that number would be to the Hide Away Bar from your cell phone?
A Yes, to that number. Yes, sir.
Q Now we're onto July 7th, correct?
A Yes, sir.
Q And there appears to be a number of incoming calls?
A I see them, yes.
Q And then on July 7th at 8:35 a.m. we have 775 728-

4589 call?
A That's me calling home.
Q And where were you at when you called home?
A At work.
Q So you worked on the 7th?
A Yes, sir.
Q Okay. So you weren't with Blaise during your work hours on the 7th?
A Oh, no.
Q Do you recall when you called home on the 7th at 8:35 who answered the phone?
A I don't.
Q And we have some other phone calls there on the 7th, correct?
A Yes, sir.
Q Okay. I'm going to take you down to -- there's some calls at 10:45 and 10:46 to Ontario, California. Do you have a recollection who those calls would have been made to?
A I know the number and I know who they're to but I don't know why I made the calls.
Q Okay. Whose number is that?
A That's our phone number now in California, it's my father's house.
Q And then there's a call at 4:26 to 728-4614 in

Panaca?
A That's my niece's number.
Q Okay. And your niece's name is?
A Shane Craft.
Q Okay. So you would have called Shane Craft at 4:26 on the 7th?
A That's what it says.
Q Okay. Do you recall what that call was for?
A I don't.
Q Could you just next to entry 143 put "Shane" and your initial? Okay. I want to take you to July 8th. It appears that you got an incoming call at 10:04 a.m.
A Okay, I see it.
Q Would you have been to work on the 8th?
A On the 8th, yes.
Q And then at 10:17 there's a call and that would be to home, is that correct?
A Yes, it is.
Q And the next call at 1:15 p.m., do you recognize that number?
A I don't. I mean it looks familiar but I don't -- I know that's to Pioche.
Q And that would have been while you were at work?
A Yes, sir.

Q And then there's a call on the 8th again to the bar where your husband works?
A Yes.
Q During the period of time there on the 8th do you recall whether or not when you called home Blaise was at home and you spoke with her?
A Did I call home on the 8th? I don't recall.
Q We have at least one call at 10:17 to home.
A 10:17 on the 8th? It would probably be to my husband.
Q He doesn't go to work til later?
A Yes.
Q At any time on the 8th were you informed that Blaise had left town or wasn't there?
A No, sir.
Q And then you went to work the morning of the 8th, what time did you go to work that day?
A I would usually leave approximately around 7:00, a little after, sometimes it was a little before.
Q Same routine you've told us about --
A Pretty much.
Q -- before?
A Pretty much.
Q So on the morning of the 8th would you have seen

Blaise when you got up?
A Yes, sir.
Q And what time would that have been?
A When I woke up in the morning at 5:45.
Q And you go ahead and on the 8th indicate the best you can on the 8th and initial the time you saw Blaise on the morning of July 8th?
A 5:45 a.m.
Q Okay.
A I initialed it.
Q And what -- okay, so you wrote 5:45 a.m.?
A 5:45 a.m. and my initials. Am I done right here?
Q Yes. And do you recall what Blaise was doing when you saw her at 5:45 a.m.?
A Sleeping.
Q Did anything appear out of the ordinary?
A No.
Q You had dogs at your house, is that correct?
A Yes, sir.
Q How many dogs did you have?
A Three.
Q On July 8th of 2001?
A Yes, sir.
Q House dogs, outside dogs?

A They were pretty much indoor dogs. They can go out anytime they wanted.
Q Would they react if people came by?
A Oh, yes. They had a glass door, they reacted to everybody.
Q Okay. What about if someone was leaving the house?
A Yes.
Q In what -- in what fashion?
A As soon as you'd turn at the end of the walkway and they didn't see you they would -- they would bark and out of excitement.
Q And the dogs always were that way?
A Always.
Q During the night of the 7th or the morning of the 8th did you ever hear the dogs barking or making any noise as if someone was coming or going?
A Not that I recall, no.
Q Did you hear any vehicles drive away from your residence during that time?
A Not that I recall.
Q Okay. You would have been asleep?
A My dogs would have woke me up but I don't really recall, it was five years ago.

Q Did the dogs at that point would they make enough noise that they could have awakened you during the night?
A Well, they'd pound -- they pound the glass. They hit the glass when they -- when they bark and everything else so yeah, it makes quite the noise.
Q And that didn't happen on the night of the 7th or the morning of the 8th?
A Not that I recall.
Q What time would you have got off of work on the 8th?
A I'm sorry?
Q What time did you get off of work on the 8th, do you recall?
A 4:00 o'clock, that's my schedule time.
Q And do you recall what you did when you got off of work?
A On the 8th I went home.
Q Who was there when you got home?
A Blaise and Chris Carrington.
Q And where were they at?
A In the garage.
Q And do you recall what you did when you got home?
A Pretty much sat in the garage with them.
Q I'm going to show you what is page 9 of the bill

we've been looking at, "S" bill. And looks like the first entry is on the 8th?
A Yes, sir.
Q 5:53 p.m.?
A Yes, sir.
Q And where is that call to?
A The Hide Away.
Q And who would have made that call?
A That would have been me.
Q And you would have been at home at that time?
A Yes, sir.
Q And was Blaise home at that time?
A Yes, sir.
Q Tell us about the next call.
A The next call was to my sister.
Q What is your sister's name?
A Elizabeth Porter.
Q Where does she live?
A Ft. Collins, Colorado.
Q Okay. And is that her phone number 970 282-0648?
A It was.
Q Okay. And it appears to be a 12-minute phone call?
A Yes, sir.
Q And what did you talk about?

A My nephew --
MS. DiGIACOMO: Objection, relevance.
THE COURT: Sustained.
BY MR. SCHIECK:
Q When you made the call to your sister in Ft. Collins, Colorado at 6:43 p.m. on July 8th, lasting 12 minutes, who else was present when you made that call?
A My niece, Blaise, Chris. We were in the garage when I made the call.
Q And why did you use your cellphone?
A It was right there.
Q And is your niece, Shane, what is your relation to this sister you called?
A That's her mother.
Q And how certain are you that that call was made at the time reflected on your phone bill?
A Oh, I'm very certain.
Q When you received your phone bill did you look for that particular call?
A Yes, I did.
Q Now looks like you received on the 9th an oncoming -- there was no further calls on your cellphone on the 8th, is that correct?
A That's correct.

Q Okay. For reference, Number 151, could you just write your sister's name? What was her name again?
A Elizabeth Porter.
Q Just write --
A I called her Beth.
Q -- just write Beth and initial it.
A Okay.
Q And there were no other calls on your cell phone on the 8th, is that correct?
A No.
Q And the next calls start at 10:02 in the morning, you received a call on your cell phone?
A Apparently.
Q Did you go to work that morning?
A Yes, I did.
Q That would have been --
A Yes, I did.
Q Was that a double back day for you?
A It started my double back.
Q Okay. So --
A I have my 8:00 to 4:00 and then when I come home I go back at midnight for the double back.
Q Okay. Now did you see Blaise when you got up in the morning of the 9th?

A No.
Q When was the last time you had seen her prior to getting up on the morning of the 9th?
A About 1:00 a.m., 1:00-ish a.m. in the morning of the 9th.
Q And what was she doing when you last saw her on that morning of the 9th?
A She was waiting for her ride.
Q Were you still up when the ride arrived?
A Yes, I was.
Q Even though you had a double back coming up?
A Even though I had a double back.
Q And did anyone arrive to pick her up?
A Yes.
Q Who arrived?
A Doug Twining.
Q Had you ever met Doug before?
A Nope, that's why I stayed up. I wanted to meet him.
Q Had you ever talked with him before?
A I'd answer the phone but not, you know, chitchat. I'd answer the phone to him calling.
Q He had called your house before?
A Oh, numerous times.

Q Did he ever call to talk to you?
A No.
Q Who did he call to talk to?
A Blaise.
Q And when was the next time you saw Blaise after about 1:00 a.m. in the morning on July 9th?
A When I came home on Friday the 13th.
Q And where was that at?
A At home.
Q In --
A In Panaca, I'm sorry.
Q So she was gone from 1:00 a.m. on the morning of the 9th until, as far as you know, until you saw her on the 13th?
A I'm not exactly sure what time she got home with her dad. I was at work.
Q Okay. You can "T" -- I mean "S" aside and go to Exhibit T.
A Okay.
Q And is that a copy of your home phone number?
A That's blurry. Yes, it is.
Q Okay. This is your phone bill for your home from June 27th to July 26th?
Q That's what it says, yes.
Q When would you have received this phone bill?

A Oh, the end of the month. I think if I remember correctly the bills ended in, you know, like the 20-something and then we would get it. It didn't go all the way through, you know, like to the 30th or 31st or anything like that. I think there was a few days still that went into the next bill.
Q You can turn what is labeled as page 3 of your AT&T home bill which is Exhibit T.
A Okay.
Q That appears to start with phone calls on the 6th, is that correct?
A Yes, sir.
Q If you could go back one page to the second page? There were also some additional calls on the -- on the 6th?
A Okay.
Q I want to take you to the first call on July 6th --
A Okay.
Q -- which would have been at 13:11 hours, do you see that call?
A 13:11; yes.
Q Okay. And do you see the number?
A Yes, I do.
Q And what is that number?
A That -- do you want me to read the digits?
Q Yes.

A Read -- oh. 702 275-9271.
Q And do you recognize that number?
A I do recognize that number.
Q And what number is that?
A That was Doug's cellphone.
Q Doug Twining?
A Doug Twining, yes.
Q Okay. And this is a call then made from your home landline phone to Doug Twining's cell phone?
A That's what it says, yes.
Q Okay. And if you can -- so any other entries on here that are the 275-9271 would be Doug Twining's cell number?
A Yes, sir.
Q If you can next to that entry put "Doug" and your initials?
A Excuse me.
Q Okay. And going down on the 6th the next entry is 3890, that's the bar, correct?
A Yes.
Q The 962-5463 number, do you recognize that number?
A I don't.
Q And you were home on the 6th, correct? That's the day you called in?

A Yes.
Q So do you know who was making these calls on the 6th?
A To Doug?
Q Well, let's start with to Doug, did you call Doug?
A No.
Q Do you know who called Doug?
A That would be Blaise.
Q And do you know who called the bar?
A I'm not really sure.
Q And what about the Pioche number?
A I'm not sure on that one either.
Q And then there's a number -- another number to a 702 436-5867 number at 2:12 in the afternoon. Do you recognize that number?
A It looks like that's Doug's house phone.
Q Did you call Doug at his house phone?
A No.
Q Do you know who did?
A That would be Blaise.
Q Did you have any reason during this period of time, the 6th, the 7th or the 8th of July 2001 to be calling Doug Twining either on his cell phone or --
A No.

Q -- home phone? Continuing on the next page, the 6th, another call to the bar?
A Yes.
Q What about the next number, do you recognize that?
A That's the cellphone.
Q Okay. That's Doug again?
A Yes.
Q And that's at 4:51 in the afternoon?
A Yes.
Q Did you make that call?
A No.
Q What about 775 962-5151?
A That's one's to the sheriff's department.
Q And where's the sheriff's --
A That's in Pioche.
Q Who made that call?
A I believe it was me.
Q Okay. And why were you calling the sheriff's office in Pioche on July 6th?
A If I remember myself correctly now I called for my husband regarding a jumpsuit.
Q In relation to what did you call about a jumpsuit?
A I'm sorry.

1 Q Why would you call about a jumpsuit.
2 A My husband was planning a skit for the MDA camp.
3 Q Do you recall who you talked to?
4 A Sergeant Wilcox.
5 Q And who is he employed by, do you know?
6 A I'm sorry?
7 Q Who is he employed by?
8 A By the Lincoln County Sheriff's Department.
9 Q And then the next call?
10 A That would be to the -- to the bar, Larry' work.
11 Q Now we're onto the 7th.
12 A Okay.
13 Q And we have a number of 528-6151, do you
14 recognize that number?
15 A That's my cellphone.
16 Q Okay. So someone called your cellphone at -- on
17 July 7th at 8:37 in the morning?
18 A That's what it says.
19 Q Would you have been working on July 7th?
20 A Yes.
21 Q Saturday?
22 A Yes.
23 Q So somebody called you at work on your cellphone?
24 A Yes.

1 Q Did you leave your cellphone at home that day?
2 A No.
3 Q Did anybody else use your cellphone that day?
4 A No, I pretty much used my cellphone.
5 Q You have any recollection of who called you?
6 A I don't. I have no idea.
7 Q Next call appears to be at 9:37 in the morning on
8 July 7th, a Saturday. Do you recognize that number?
9 A I recognize the number, yes.
10 Q And --
11 A That's my husband's parents.
12 Q Okay. And what is your husband's father's name?
13 A Jose Lobato.
14 Q And where does he reside?
15 A El Paso, Texas.
16 Q And -- I mean you recognize that number as a
17 number you've used before?
18 A Oh, yes.
19 Q Okay. You write "Jose L." next to that entry and put
20 your initial?
21 A Okay.
22 Q Did you make that call without telling me what
23 someone else told you, do you know who made that call?
24 A I'm reasonably certain I know who made that call.

1 Q Okay. And then we have a call at 9:39 a.m. and
2 that would be to who?
3 A I'm sorry, where are we at here?
4 Q 7 -- July 7th.
5 A July 7th.
6 Q Just below the El Paso.
7 A 9:39, okay. That's Doug's cell phone again.
8 Q Does Doug's cell phone number continue to appear
9 a number of times on the remainder of that day?
10 A Yes. Oh, this day?
11 Q And into the next day?
12 A Let's see, this day. Let's see. Yes.
13 Q Can you just --
14 A I see one at the end at -- that would be 21:19.
15 Q Did you make that call?
16 A No.
17 Q So at 21:19 hours which is 9:19 in the evening
18 someone called Doug Twining's cell phone number from your
19 house?
20 A Yes, apparently.
21 Q Okay. Any other -- now we're going onto the 8th.
22 Are there other phone calls to Mr. Twining on the -- on the 8th?
23 A I see one.
24 Q And what time is that?

1 A That one was at 11:57 in the morning.
2 Q Any others on the 8th?
3 A Again at 5:06, 17:06:50.
4 Q Okay. Next call?
5 A There's one to him again at 6:38, 18:38.
6 Q Were you making any of these calls to Doug
7 Twining's cellphone number?
8 A No.
9 Q Do you know who was?
10 A I do.
11 Q Who?
12 A Blaise.
13 Q So all of these calls that we see on the 7th and 8th
14 were made by Blaise to Doug Twining?
15 A She's the only one to have a reason to call him.
16 Q And there also appears to be another call to El Paso,
17 Texas on July 7th at 6:09 in the evening. Do you recognize
18 that number?
19 A Let me see. 6:09 in the evening, I'm trying to find
20 it. Here we go. That's my husband's dad's cellphone number.
21 Q Okay. Did you make that call from your home
22 phone?
23 A No, sir.
24 Q Were you present when that phone call was made?

A I do recall, yes.
Q And who made that --
A Oh, wait, no. I was not.
Q Okay.
A I'm sorry. I apologize, I was not home for that call.
Q If you could just write "Jose L. cell" next to that entry and initial it?
A Jose cell, okay.
Q Did -- after you received these phone bills in the mail I assume you received them in Panaca, is that where you were getting --
A Our P.O. Box in Panaca, yes.
Q Did you look at the specific times on the phone bills?
A I did.
Q Did looking at those times in any way help you remember certain dates and events?
A Yes, sir. Yes, sir.
Q Was it only after looking at the phone bills that you were able to specifically recall times and dates --
MS. DiGIACOMO: Objection, leading.
THE COURT: Sustained.
BY MR. SCHIECK:
Q You said they assisted you, how much did they assist you?

A Well, I knew I had placed the calls, I just didn't know exactly what time -- exact time.
Q In addition to the calls that we've seen that Blaise was making to Mr. Twining, were you also --
MS. DiGIACOMO: Objection, assuming facts not in evidence.
THE COURT: Sustained.
BY MR. SCHIECK:
Q Calls that were made to Mr. Twining's cellphone were you also receiving calls at the house from anyone during the early evening of the 8th?
A I'm sorry, I'm --
Q Were you receiving calls at your house on the 8th -- July 8th?
A Other than -- other than Doug?
Q We've talked about the calls that were outgoing, I want to know about incoming calls.
A Okay. Incoming calls, I'm not -- I don't recall.
Q Is there any doubt in your mind that Blaise was home all day on the 7th of July or was in Panaca?
A When I -- when I -- when I was home or I mean when I was at work I assumed she was home, yes.
Q Did you at all ever call home to check if she was home?

A I don't know about that, no. Just calling to check to see if she was home to -- no.
Q What about --
A Usually if she left she would tell -- you know, she would call me and tell me she was leaving.
Q What about on the 8th?
A On the -- what do you mean? She didn't leave, no, not that I was aware of, no.
Q Did you ever see that car moved?
A Not that I'm aware of, no. It was in the same spot until -- from the moment she parked and then 'til the police came and took it.
Q On July 7th did you ever go to Caliente?
A Yes, I did.
Q Why did you go to Caliente on the 7th?
A I had to go pick up Blaise.
Q Where did you pick her up at?
A She was sitting in her father's truck outside of the Hide Away and that's where I picked her up at.
Q Why did you go pick her up?
A She was -- she was stuck there.
Q How did you learn that?
A I got a phone call as soon as I walked in the house.
Q And do you recall what time it was that you got to

Caliente to pick her up?
A Well, at what time I got to Caliente?
Q Yeah.
A I know it was -- it was getting dark. I'm not exactly sure the exact time, 8:00-ish in the evening, around.
Q That's your best recollection?
A That's my best recollection.
Q Did you and Blaise occasionally quarrel?
A Pretty regular.
Q Was there ever any discussion about her going back to Las Vegas with Doug Twining?
A Yes, sir.
Q When did that take place?
A That night.
Q Was that a friendly discussion?
A Not really.
Q Did it -- did it start when you picked her up or when did it start?
A It started the moment I picked her up.
Q And was it still going on when you got home?
A Yes, sir, it was.
Q Was anyone else there when you got home?
A Chris was there.
Q Chris Carrington?

A Yes, sir.
Q He hear parts of that argument?
A He did briefly.
Q Thank you.
MR. SCHIECK: We would pass with witness, Your Honor.
THE WITNESS: Can I close this or?
MS. DiGIACOMO: You can leave those up there with her actually. May I, Your Honor?
THE COURT: Yes.

CROSS-EXAMINATION

BY MS. DiGIACOMO:
Q Good afternoon.
A Good afternoon.
Q At the end of your testimony you were talking about when the fight started between you and Blaise regarding I guess going back to Las Vegas with Doug?
A Yes.
Q When was that?
A That was Saturday evening.
Q When you picked her up from the bar?
A Yes, when I picked her up.
Q What time did you get home from work on Saturday?

A It was shortly before I left to go pick her up. I stopped to see my husband at the bar first when I got off of work and then I went home. And it was starting to get dark and as soon as I walked in the door I got the phone call and I turned around and went back and picked up Blaise.
Q So on July 7, 2001 on your way home from work -- and you get off work about 4:00?
A I would get off about 4:00, yes.
Q And you stopped at the bar where your husband works?
A Yes, I did.
Q What time did you get to the bar?
A Somewhere after 4:00.
Q Well, how long would it take to get from where you worked to the bar?
A About five minutes.
Q Okay. So you stopped by the bar?
A Yes.
Q And Blaise wasn't there at that time?
A No.
Q How long did you stay?
A It was a couple of hours.
Q At the bar?
A Yes.

Q What were you doing there?
A Sitting there visiting with my husband.
Q So if you got there let's say 4:15-ish you stayed to about 6:15?
A No, maybe a little longer, yes.
Q Okay. And then --
A I would -- I would say probably about, you know, more about 7:00, 7:30. It was starting to get dark on my way home so -- and this is summer time so it's when the sun just starts to go down. So it was closer to probably 7:30, 7:30 around there I would -- I would think.
Q All right. And you drove home which takes approximately how long?
A About 20 minutes.
Q Twenty minutes to get home. And when you walk in the door there's a phone call?
A There was a message for me to call and I called my husband.
Q Message for you to call the bar?
A Yes.
Q And does your -- did it say the time that the message was left?
A No.
Q And it was your husband on the phone?

A Yes.
Q So you called him back --
A I just left there so it to have -- I -- as soon as I got there the call was there.
Q Okay. You called and spoke to your husband?
A Yes.
Q And then based upon that conversation you went back to the bar?
A I went back and picked Blaise up.
Q Do you know approximately what time you picked her up?
A I would figure about 8:00, 8:00 or so, 8:15. Somewhere around there. It was -- it was getting dark then if it wasn't all the way dark.
Q And you picked her up and she's sitting in your husband's truck.
A Mm-hmm.
Q So he didn't give her the keys to drive the truck home herself?
A No.
Q And you're saying no, like she can't drive his truck?
A No, cause then he couldn't get home.
Q Okay. So nobody would go back and pick him up?
A Well, it would be easy for me just to pick her up

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1 then instead of having to go back after midnight and there's
2 no midnight that there's no guarantee that it's going to be
3 closed right then. So there's no point in me waiting for him.
4 Q How was Blaise feeling on July 7th?
5 A She was -- she was doing a little better. She still
6 wasn't feeling good.
7 Q When you picked her up at the bar?
8 A When I -- when I picked her up she was doing all
9 right.
10 Q Did you talk to her periodically throughout the day
11 to see how she was doing?
12 A No, not really. I was at -- I was at work. No, not
13 really, I don't think so.
14 Q I mean you stayed home from work on July 6th
15 because you were worried about her?
16 A Yes.
17 Q And concerned about how she was doing, correct?
18 A Mm-hmm.
19 Q Is that a "yes?"
20 A Yes. Oh, I'm sorry, I apologize.
21 Q That's okay.
22 A Yes. Yes.
23 Q But you went to work on July 7th cause she was fine
24 to stay home by herself?

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1 A I call home pretty regular but I couldn't tell you
2 exactly. You know, if there was something wrong the family
3 would call me.
4 Q Okay.
5 A That's -- I'm not exactly sure.
6 Q But my -- I'm sorry, my question was she was
7 feeling well enough that you did not feel the need to stay
8 home on July 7th?
9 A No, I had to go back to work.
10 Q Okay.
11 A She was -- she was up moving around, she was
12 eating, she was -- she was doing better than she was.
13 Q Okay. So there wasn't the same concern that you
14 needed to stay home --
15 A No.
16 Q -- and just tend to her?
17 A I don't think so.
18 Q Were you fighting at all with Blaise on July 5th?
19 A I don't believe so.
20 Q Were you fighting at all with Blaise on July 6th?
21 A No, I don't believe so.
22 Q When you were home with her July 5th was Ashley
23 around?
24 A She was always in and out.

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1 Q Okay. Was your husband around?
2 A Yes, he was.
3 Q But he wasn't working that day?
4 A No.
5 Q And was anyone lese around?
6 A Chris Carrington was around.
7 Q Okay. What other dates did Chris Carrington come
8 over?
9 A He was pretty much there on a daily basis while she
10 was there.
11 Q Okay. But can you tell us specifically what days you
12 saw him at the residence?
13 A I saw him on the evening of the 5th, I saw him on
14 the 6th, I saw him on the 7th, I saw him on the 8th. I saw him
15 on all four days.
16 Q And what -- when did you see him on the 7th?
17 A On the 7th would be in the evening.
18 Q When?
19 A After I picked up Blaise.
20 Q Where?
21 A From Caliente at home.
22 Q He came over to the house?
23 A Mm-hmm.
24 Q Is that a "yes" for the record?

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1 A Oh, I'm sorry. Yes. I'm sorry.
2 Q Okay. He came over after you brought Blaise home?
3 A Yes.
4 Q And you said you picked her up at approximately
5 8:00 o'clock-ish --
6 A Yes.
7 Q -- in the evening? Then plus the 20 minute drive
8 home?
9 A Mm-hmm. Oh, yes.
10 Q Okay. So it was about 8:30, let's say, the earliest
11 you got home with Blaise?
12 A About 8:30, yes. Approximately.
13 Q When Blaise came on July 2nd and you helped her
14 take her bags out of the car, do you recall specifically how
15 many bags she had?
16 A She had a purple garment bag and one small
17 wheeled tweed -- what do you call it? Suitcase. Little -- it's
18 one of the smaller luggage.
19 Q Did she have any other bags or --
20 A She had a bunch of little kind of like tote bags.
21 Q Okay. And then what was it that reeked that you
22 took out of the car?
23 A Her garment bag and her tweed bag.
24 Q All right. And you said there was remnants of vomit

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on it?
A On the -- on the tweed bag and on the floor of her car.
Q Well, tell me about what was on the tweed bag, what you saw on that?
A Like dried chunks of I don't know what it is, vomit.
Q How much?
A There wasn't a lot, it was brushed -- you know, kind of knocked off. It was dried.
Q It was dried. So it wasn't stuck to the bag, it just brushed off?
A Yes.
Q And you said you saw it under the seat?
A I saw it on the -- it was on the floorboard like around the floorboard of the passenger seat.
Q All right. And did you do anything to help Blaise to cleanup the vomit that was left in the car?
A Not then.
Q When did you?
A When we got the car back from the police.
Q Right. So at the time that it went to the police there were still the vomit on the passenger floorboard?
A I assume so.
Q All right.

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A I didn't -- I didn't clean it up.
Q You'd know if Larry --
A There was still some there when we got it back.
Q Okay. Did Larry help clean it up at all?
A Not to my knowledge.
Q But you did --
A Are you talking about when we got it back from the police?
Q No, I'm talking about between July 2nd until the police took it on July 20th.
A I'm not sure. I don't know.
Q So it's possible he help clean it?
A It's possible. I know we did when we got the car back.
Q I understand but I'm asking you between July 2nd and July 20th?
A I don't know. I mean I'm sorry, I don't know.
Q But did try and help her clean the luggage?
A We brought the luggage into the garage and that's where we hung out, yes. I knocked the stuff off the luggage.
Q And so that time when she came home on July 2nd the windows were rolled up?
A Couldn't tell you.
Q Well, you looked at the photograph when the police

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got there and the windows were rolled up, is that the same --
A She could have rolled them up when she -- when she pulled up, I don't know.
Q Okay. But the car never moved between July 2nd and July 20th?
A Not that I am aware of. No, I don't believe so. No.
Q Nobody was even in the car trying to fix it or clean it or anything that you saw between July 2nd and July 20th?
A No, not that I'm aware of.
Q So is it fair to say that it was in the same condition when the police found it as it was when she got home on July 2nd?
A I would think so; yes.
Q So the windows -- let me -- you've got to let me finish because --
A I'm sorry.
Q -- we can't talk on -- we can't talk on top of each other. So if the police in the photographs found the car with the windows rolled up and the doors shut is it fair to say that's the way she left it when she got home on July 2nd?
A Yes.
Q Now you said that -- I guess I want to clarify. When did Blaise graduate from her adult education?
A June of 2000.

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Q All right. And then after she graduated did she move out of the house at that time?
A No.
Q She didn't move to Caliente?
A She -- well, she moved out for a little while. That was in February.
Q Of 2000 or --
A No. No, you're right. You're right. It was in end of 2000 she moved to Caliente for a few months.
Q And where did she live when she was in Caliente?
A She lived with Shannon, I think her name was Shannon. I'm having a hard time remembering names. Shannon.
Q And then from where she was living in Caliente -- well, strike that. When she was moved to Caliente is that when you moved back into her bedroom from --
A I believe so, yeah.
Q And then when -- there was a point in time that came -- that came when Larry went and got her in Caliente and brought he back home, correct?
A Yeah.
Q And at that point she was home for a little while and then she went to Vegas?
A Yes.

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Q Okay. Now she was dating Jeremy Davis off and on for a couple of years?
A For many years..
Q And do you recall when she got her red Fiero?
A She got her red Fiero after December of 2000.
Q All right. So beginning in 2001 she had it?
A Around there, yes.
Q And at that point didn't she start going back and forth to Vegas to visit Jeremy?
A A little bit, yes.
Q And -- but it was sometime later that she actually -- I don't want to say moved there but went for an extended period of time to Vegas?
A She went there longer than she normally would, yes.
Q When was that?
A It was the end of February.
Q The end of February --
A Mm-hmm.
Q -- she went down there for how long would you say?
A She was -- she was down there for a few months.
Q And then when was it that she came back?
A Well, she came back once in between. I can't, you know, remember exactly what, you know, what period. It was around Mother's -- around -- after Mother's Day cause she was

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gone for a little period of that.
Q So up until Mother's Day it's fair to say she was gone March and April and then came back sometime --
A Yes.
Q -- around Mother's Day?
A It was after Mother's Day that I recall.
Q After?
A Yes.
Q And Mother's Day is usually the second Sunday in May?
A Something like that.
Q Something like that. All right.
A Around the 10th, 12th.
Q And how long did she stay when she came home that time?
A When -- from May?
Q Yeah, when she came home after Mother's Day back to Panaca, how long did she stay?
A A few -- just couple of weeks, two and a half weeks maybe.
Q And then did she go back to Las Vegas?
A She did.
Q And did she take her car back to Vegas?
A When she went back to Vegas in May, yes.

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Q May. And --
A That's when she took her car, yes.
Q She didn't have her car when she --
A I remember her driving up with a couple of friends, Terry, you know, going -- traveling with them because the car wasn't always so stable. But I couldn't tell you.
Q And that was when she came home after Mother's Day?
A After Mother's Day she did take the car, yes.
Q Okay. No, no. When she came home after Mother's Day she was driving her car back from Vegas or --
A I don't recall her driving her back from when she came home then. Oh, her car -- we found her car. She didn't make it all the way into Vegas.
Q Okay. When she was driving home after Mother's Day?
A After Mother's Day I believe -- that's when I called and reported her missing.
Q Okay. So I'm -- let's go back a little bit. When she was coming home after Mother's Day was she driving her car?
A After Mother's Day she drove her car. It was after Mother's Day, yeah. I don't know if she drove her car home or not. Are you talking about in July?
Q No. We were just talking about she came home

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after Mother's Day in May 2001 and stayed for two weeks.
A I couldn't tell you.
Q You don't --
A I'm not sure. I just know we found her car at one point so I really don't know --
Q Do you know --
A -- how she got home.
Q Okay. Do you know --
A I couldn't tell you.
Q Okay. Do you know when she -- you had to look for her car?
A No, somebody said they saw it. We found her -- but that's how we found her car.
Q When?
A This was in May.
Q In May?
A Mm-hmm.
Q Was that when she came home to Panaca?
A It was -- she came home after that.
Q All right. So before she came home after Mother's Day in May 2001 you couldn't find her for a couple of days?
A For about a week.
Q For a week, okay. At the time you couldn't find her did you believe she was staying down in Vegas during that

1 time?
2 A Yes.
3 Q All right. Were you calling down to Vegas to try and
4 find her?
5 A Yes.
6 Q Who were you calling?
7 A Steve Pyszkowski, I'm not exactly sure through all
8 but we made calls trying to find her.
9 Q Did you try calling Jeremy Davis?
10 A Oh, I'm sure.
11 Q At the time you were looking for her, before
12 Mother's Day 2001, where was she supposed to have been
13 living?
14 A She was in Vegas.
15 Q No, I understand that but who was she supposed to
16 have been living with in Vegas?
17 A With Steve Pyszkowski.
18 Q All right. And so you called him and did you have
19 any luck finding her?
20 A No.
21 Q All right. But later you get a hold of her?
22 A She called.
23 Q Okay. And that's when she came home for a two-
24 week period in 2001?

1 A She came home for a little bit, yes.
2 Q Do you know how she got back to Vegas after she
3 left in May 2001 from your house?
4 A She drove her car to Vegas.
5 Q All right.
6 A Yes.
7 Q So somehow her car did make it to Panaca when she
8 was there in May 2001?
9 A In May -- you mean coming back? We had -- we
10 had it brought back from the corner of 95 and -- or 93 and I-
11 15 when it was found and we had her car.
12 Q Okay. I'm sorry, I'm confused. You found her car
13 after she was home in Panaca?
14 A No, before she was home in Panaca.
15 Q Okay. So the car was found and you still couldn't
16 find Blaise?
17 A I don't know how she got home from -- at that
18 point. It could have been we picked her up, I'm not sure.
19 Q Okay. No, no. My question is did you find the car
20 before you found Blaise when you were looking for her?
21 A Yes.
22 Q So you find the car, you go get the car and bring it
23 back to Panaca?
24 A We brought it back.

1 Q And then Blaise comes to Panaca?
2 A And then Blaise came back to Panaca. I'm not sure
3 how she got back.
4 Q Okay. And that's fair. And then she drives the
5 vehicle back down to Las Vegas?
6 A Yes.
7 Q At the time that -- well, let me strike that. Between
8 when she was home after Mother's Day, May 2001, until July
9 2nd was she in Las Vegas during that time period?
10 A As far as I know, yes.
11 Q Well, she wasn't in Panaca?
12 A She was not in Panaca.
13 Q Did you know where she was living in June 2001?
14 A In June she -- see, it was Steve Pyszkowski.
15 Q Did she stay with anyone else?
16 A With Doug.
17 Q In June 2001?
18 A Mm-hmm. Oh, in 2001? Yes. Yes, 2001. Yes.
19 Q Okay.
20 A The last two and a half weeks she was with Doug
21 before she came home.
22 Q So this girl, Melissa, that she lived with for part of
23 the time she was in Las Vegas, I think you said February
24 2001?

1 A It was somewhere around there, yes.
2 Q Is Melissa the one that lived at the Budget Suites?
3 A Yes.
4 Q Okay.
5 A I never met her but that's where she stayed.
6 Q Did you talk to Blaise on a regular basis between
7 February 2001 once she went down there and May 2001 when
8 she came back?
9 A It was pretty often, yes.
10 Q Do you know was she staying with Jeremy at any
11 point between February 2001 and May 2001?
12 A I don't really recall.
13 Q Do you know when they broke up?
14 A It was around Memorial Day.
15 Q And you're basing that on what Blaise told you,
16 right?
17 A Pretty much, yes.
18 Q You didn't talk to Jeremy about it?
19 A No.
20 Q When you say around Memorial Day could it have
21 been a little bit before, a little after?
22 A Could have been a little bit before, could have been
23 -- I'm not exactly sure.
24 Q Back in July 2001 we know that your husband was

1 working at the Hide Away on Friday, Sa...day, and Sunday
2 nights?
3 A Yes.
4 Q What was he doing the rest of the week?
5 A He did tile, he did jobs for our landlord, worked in
6 the yard, whatever was needed.
7 Q So would he do kind of odd fix it jobs?
8 A Yeah, he did remodels.
9 Q All right. And is that what the purpose of that trailer
10 he had in front of your house --
11 A Yes.
12 Q -- was for?
13 A Yes.
14 Q And that's what he would use for work?
15 A Yes.
16 Q Was he working for a dentist at that time doing
17 remodeling?
18 A That's our landlord.
19 Q Oh, that's your landlord. The reason that Blaise
20 came home to July 2nd was because her car was having
21 mechanical problems, correct?
22 A No, she came home for the 4th of July. We had a
23 family barbeque and we wanted her home.
24 Q Okay. So called and asked her to come home?

1 A She -- I mean, yes. We had talked to her about
2 coming home two, two, three weeks prior.
3 Q Okay. So it had nothing to do with the fact that her
4 car was breaking down again?
5 A Her car was pretty iffy the whole time, you know. I
6 mean if that's why she was bringing it home on her part that's
7 a possibility but she was coming for -- to see the family.
8 Q All right. So well so then she never said to you, my
9 car is not working, that's why I had to come home?
10 A No.
11 Q All right.
12 A Not that I know of.
13 Q Okay. And so when her car was there from July 2dn
14 on there would have been no reason for your husband, Larry,
15 to tinker with it or try and fix it then?
16 A He could have but I never saw him do it.
17 Q Okay. You never saw him actually work on the car?
18 A No, not to my recollection.
19 Q Now were you -- no, strike that. You were aware at
20 least in June of 2001 that Blaise was heavily into drugs in Las
21 Vegas?
22 A Yes.
23 Q And wasn't part of the reason why you wanted her
24 to come home was to try and help her get clean?

1 A Yes.
2 Q Isn't that part of the reason why she still wasn't
3 doing well on the 5th you took her to the doctor?
4 A It was because we thought she was being poisoned.
5 Q Okay. So it had nothing to do with the fact that she
6 was on drugs?
7 A Well, she said she hadn't been doing -- she hadn't
8 done any, she was -- you know, she was clean.
9 Q So is that a no?
10 A No, I'm sorry.
11 Q Or a yes?
12 A No. Yes, I'm sorry.
13 Q Okay. That's fine. How did she look to you at the
14 time when you saw her in July 2002 compared to when you
15 had last seen her in May -- how did she look when you saw
16 her in July 2001 compared to when she looked -- how she
17 looked in May 2001?
18 A She didn't look too healthy.
19 Q All right. Pale?
20 A Pale, yes.
21 Q Skinny?
22 A Very.
23 Q And did she look like she had been on a drug binge?
24 A Looked like she had been, yes.

1 Q All right. Is it -- and are you aware of some of the
2 symptoms when you're coming down and you sleep a lot?
3 A Yes, I am.
4 Q Okay. So you're aware of --
5 A Yes, I'm aware of them.
6 Q And she was kind of acting like that on July 3rd and
7 4th, sleeping a lot, not eating?
8 A Not necessarily, no.
9 Q Okay. Was she sleeping a lot?
10 A She was sleeping a lot.
11 Q Was she eating anything on July 3rd and July 4th?
12 A No, she was sleeping.
13 Q And she wasn't being social was she?
14 A No, not really.
15 Q So aside from the fact that she might have told you
16 she was being poisoned it's also possible that she was in a
17 drug withdrawal?
18 A She could have been. I doubt it.
19 Q You say you doubt it?
20 A I doubt it, I've been there.
21 Q Okay. So she didn't look like she had just come
22 from doing drugs?
23 A Not at that point. She looked very sick.
24 Q Okay. Now on the 4th of July for the barbeque you

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said there was a few of Blaise's friends there?
A They came by to see her, yes, because she was home.
Q What friends?
A Marilyn Parker, one of them -- Kim. Kim was the one who worked for me out there and she stopped by to see her.
Q Anyone else?
A Off the top of the head I'm not exactly sure. Chris.
Q Chris Carrington?
A I believe Chris came by, yes.
Q Okay. Do you know a person by the name of --
A Oh, wait. I don't believe -- I don't -- I don't know if Chris came through on the 4th or if it wasn't the 5th that he came in --
Q Okay. So --
A -- the next day after she went to the doctor. I'm not sure if he came by. I don't think he came by on the 4th. I apologize.
Q That's fine. So was he invited for the 5th or the 4th?
A I don't -- I don't think so. I don't know. It's a -- it's a possibility if she did. I don't know.
Q Well, before July 5th had you seen Chris Carrington around?

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A I don't really recall, no.
Q Not while at least you were home?
A Not while I was home. No.
Q Do you know a person by the name of Kendra Thunstrom?
A I do.
Q Okay. And she's kind of a friend of your's, correct?
A Kind of yes.
Q Okay. And at the time she was living around the corner from you?
A I'm not exactly where she lived -- where she was living. I can't recall.
Q In July 2001?
A I can't recall.
Q All right. Did you talk to her on a regular --
A She's moved to different places, I'm not exactly sure where she was living.
Q She's gone back and forth between Panaca and Caliente, correct?
A Yeah.
Q All right.
A It's been -- it's been a long time so I'm not really sure.
Q Well, the summer of 2001 did you see her?

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A I don't -- I'm sure I have seen her. Yeah, I pretty much see a lot of people pretty regular. I'm not sure.
Q All right. So you don't recall if you saw her the week of July 2nd through July 8th, 2001?
A I really couldn't say.
Q All right. So would she have been invited to the barbeque?
A It's a possibility.
Q Okay. But you don't recall if she was there?
A I don't recall if she was at the barbeque, no.
Q And you don't recall seeing her specifically any point that week?
A No. Not off the top of my head I don't.
Q Now Blaise on I believe you said July 7th when you picked her up from the bar, an argument between the two of you got started?
A Mm-hmm.
Q Is that a "yes?"
A Oh, yes. I'm sorry.
Q And is that -- that argument started because at that time Blaise told you she was going back to Vegas?
A That she wanted to go back to Vegas, yes.
Q Did she tell you why she wanted to go back to Vegas?

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A She wanted to go back and work.
Q Okay. Was she working when she was down in Vegas?
A She was working before, yes.
Q Where was she working?
A She was working doing some kind of fire extinguishers or something with Steve.
Q Okay. And that's what she told you?
A That's what she had told me, yes. I'm sorry.
Q Okay. You don't know that --
A I don't know that to be a fact, I was not there, but that's what I was told. Yes.
Q So she told you on July 7th I want to go back to Vegas, I need to work?
A Yes, she didn't want us supporting her.
Q Okay. And you had concerns. You didn't want her to go back to Vegas at that time because of the whole drug culture?
A Because of everything.
Q Okay.
A Because the -- we thought she was being poisoned, why would she want to go back to them, you know, to the people that possibly could have been poisoning her. Yeah, I was furious.

Q Oh, she told you that she wa...d to go back and live with Steve?
A No, she wanted to go back and work with Steve for, you know, that week. That's what she said.
Q Okay. Did she tell you that -- how she wanted to get back to Vegas at that time?
A Yes.
Q She wanted Doug to come get her?
A Mm-hmm.
Q Is that a "yes?"
A Yes.
Q Okay.
A Sorry.
Q You didn't want her to go back. How long did the fight go on on Saturday night?
A We argued off and on pretty much until I went to bed.
Q What time did you go to bed?
A It was pretty late, I don't know, approximately 11:00, 12:00. Around the time, you know, my husband came home I'm sure.
Q But you don't recall specifically?
A I don't recall exactly specifics, I just know that we argued throughout the whole night.

Q All right. Was that the end of the argument that weekend?
A Yes.
Q All right. So when you went to bed that night did she tell you she had made her firm decision, I'm going back to Vegas?
A She had -- she had talked to them and he was going to come pick her up the next day.
Q Talked to Doug?
A Doug.
Q Okay. But had she talked to Steve?
A I don't know.
Q So you don't know if she called Steve from your house?
A She said he was going to call. She left me a note saying that he was going to call and told me if I answered the phone to be nice.
Q Steve was going to call?
A Yes.
Q Did anyone named Steve call?
A Not that I'm aware of.
Q What was the date she left you this note?
A Saturday.
Q Okay. And when did she leave you the note?

A The note was there when I walked in from work so I knew when I went --
Q Before you picked her up?
A Just before I picked her up.
Q Okay. And you had testified at a prior proceeding back in May 2002, correct?
A Yes.
Q Okay. And what we're talking about regarding what happened on Saturday night regarding the fight and all this, you didn't testify to this back then, correct?
A I don't recall if I did or not.
Q Well, have you been provided a copy of your former testimony?
A Yes, I have been provided and I've looked it over but I don't recall even now if I looked -- if we talked about the fight. I think we did.
Q You think we -- you did?
A Mm-hmm.
Q Do you want to go through your entire testimony and look or would you agree with me that all you talked about was picking her up at the bar on Saturday night?
A Picking her up -- picking her up in the bar and that there was an argument.
Q You say there was an argument. Okay.

MS. DiGIACOMO: Court's indulgence.
THE WITNESS: I believe our words were "fight" instead of argument.
BY MS. DiGIACOMO:
Q Right. But you're saying that you testified when you picked her up on July 7th that there -- that you argued with her about going back to Vegas?
A Yes.
(Off-record colloquy)
MS. DiGIACOMO: Your Honor, may I approach?
THE COURT: Yes.
BY MS. DiGIACOMO:
Q Let me show you page 151 of your prior testimony. I actually want to start with page 150 and if you could read this bottom portion and then this part of the page. Oh, I'm sorry.
A About my truck?
Q No, this part here where it says --
A Okay. Yes.
Q Okay. So what I've shown you is page 150 and 151 of your prior testimony and after reading that, does that refresh your recollection whether or not you testified previously that there was -- that you and Blaise had a fight on Saturday night?

A I recall us saying that we arg
Q Okay. But you had --
A I just don't -- you know, I don't know if it's right here.
Q Well, you would agree with me that on page 150 and 151 nowhere is an argument referenced?
A No, there's not.
Q Okay. Now on July 8th when you got home --
A Yes.
Q -- Blaise was outside, correct?
A Yes.
Q And the fight did not continue on the night of July 8th?
A No, it didn't. I don't believe so, no. I don't recall arguing with her at that point now.
Q Okay. The next time you talked to her was on July 13th.
A 13th.
Q The Friday the 13th?
A Mm-hmm.
Q At what point did you talk to her?
A At what point?
Q Yes.
A She had called in the morning and wanted us to

come get her.
Q All right. Now did you have any other conversation with her other than just come get me?
A Not to -- not to my recollection, no.
Q Did you make another phone call that day regarding Blaise to a medical clinic?
A I do believe so, yes.
Q All right. And what was the purpose of that phone call?
A She was stressed out and to get her something --
Q For anxiety?
A -- for anxiety. Yes.
Q Okay. So she -- so Blaise wasn't herself when you talked to her that morning?
A No.
Q All right. And so did she ask you to call the doctor or did you call based on how she was on the phone?
A You know, I don't recall.
Q All right. But you did call the doctor?
A Yes, I do recall that.
Q Asking for some anxiety medication?
A Yes, because we had talked about it prior, before.
Q Okay. You talked about it before July 2001?
A Yes.

Q All right. You didn't talk about it when you went to the doctor on July 5th, that was just for the poisoning?
A We'd talked -- I do believe we had talked about it but I don't recall the outcome of it. I really don't.
Q Well, let's back up. When you took her to the doctor on July 5th were you in the room with her with -- in with the doctor?
A I usually always was in her -- I mean in the room with her.
Q Okay. So you recall being in the room --
A Yes.
Q -- on July 5th? Is that a "yes?"
A Yes. I said yes.
Q Okay. You said before I finished though.
A Oh.
Q And it's at that point on July 5th you believe you talked to the doctor about her suffering from anxiety?
A From depression anxiety, yes.
Q All right. So on July 13th you call and you tell the doctor she needs some anxiety medication?
A Yes.
Q And the doctor actually gives you a prescription?
A Yes, he did.
Q And you got it filled that afternoon?

A I'm not exactly sure which day -- which day. I know we had when she came back I do believe.
Q Okay. So you got it filled on the 13th?
A Mm-hmm. And I believe we had her appointment with the doctor the following Monday?
Q For the 16th?
A Yes.
Q And you set up that appoint on the 13th for the 16th?
A I'm not sure. I think so.
Q All right. And it -- and so when you went in on the 16th it was a follow up to the call that you had made --
A Yes.
Q -- on the 13th?
A Yes. Because it was -- it was Friday and when she got back it would -- the clinic would already be closed.
Q Okay. On the 16th did you take her to the doctor as well?
A I'm not sure.
Q Okay. You don't recall?
A I can't -- I'm -- I think I did but I'm not -- I can't really be sure. It's been so long. I can't recall if I was actually in there. I know I filled the prescription but I can't recall if I took her.
Q Okay. So on the 16th she went the doctor, she was

given another prescription at this time
A Yes.
Q -- in conjunction with the anxiety medication?
A Yes.
Q And the prescription she was given on the 16th was Prozac?
A Yes.
Q And you go that prescription filled for her on the 16th?
A Yes.
Q And from the time she got those two prescriptions on the 13th and the 16th of July until she was arrested on July 20th, she was taking those medications regularly?
A She was.
Q And in fact you gave those medications to the detective when she was leaving?
A Yes.
Q To make sure she could continue?
A I did. Yes.
Q All right. When you I guess got up to go to work in the morning you were starting your shift at 8:00 a.m., you said your usual schedule was to get up at 5:45?
A Every morning, each morning.
Q Go outside, have a smoke, yes?

A Yes.
Q And then come in and get ready?
A Get ready, go out, and smoke, come in and get ready some more, go out and smoke, come in. You know, it was a pretty regular ritual.
Q Okay.
A I had to have probably four or five cigarettes before I finished getting my hair blow dried.
Q Okay. And you had to be work by 8:00 and you said it took approximately 20 minutes to get there?
A Mm-hmm.
Q Is that a "yes?"
A Yes. I'm sorry.
Q Okay. So it fair to say that you were probably out of the house by 7:15, 7:30 every morning?
A I was usually out by, you know, 7:00, a little after 7:00. That's usually when I left. Sometimes it was a little before.
Q Okay. And if it took --
A I was always there early.
Q You always got to work early?
A Pretty much, yes.
Q Did you have a smoke before you started your shift?
A I could smoke right at the door of my cottage so it --

I didn't have to worry about -- I could smoke on the walks, I could smoke right at the door of the cottage.
Q Oh, so at work you could smoke wherever?
A I could smoke at work, it's just not in the cottage, just outside the cottage at that time, so.
Q Okay. Now the phone numbers you went through with defense counsel and you still have those in front of you.
A Yes, ma'am.
Q If you could go to -- and I have, I'm not sure, I believe it's T-1, your home phone records? The --
A Yes.
Q -- landline?
A Yes.
Q All right. You had marked two phone numbers for Doug? Can you look at --
A Did I mark two?
Q -- where you marked for Doug? I think he asked you to write next to one of them.
A I see the first one.
Q The first one would have been on page 2?
A Yes.
Q All right. Where you marked "Doug," next to the 275-9271 number?
A Mm-hmm. Yes.

Q Can you write cellphone next to it? Write "cell" so we can distinguish which is the cell and which is the home? And then on that same page you wrote next to 436-58 --
A Not on this page.
Q Not on that page, okay. What page did you write his other home number?
A I didn't write on this one.
Q All right. Well, I'm going to refer you then to bottom on page 2.
A On page 2.
Q The last line, it's a phone call on July 6th at --
A 14:12?
Q Yes. And it's a 436 -- well, it's a 7 --
A I have 867.
Q Yeah, 702 number. And I believe you testified before that that's --
A That's house.
Q -- Doug's house? Can you write that next to that phone number, please?
A Okay.
Q The reason that you know that these Doug's cell numbers and Doug's home number is because you got these phone numbers off of your caller ID, correct?
A Yes.

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Q And you later, after Blaise was arrested on the 20th, you talked to Doug, correct?
A I don't recall.
Q Okay. Do you recall making any calls to him?
A After Blaise was arrested?
Q Yes.
A I don't recall.
Q Do you recall getting any three-way calls with him and Blaise from the jail?
A I don't -- I'm not sure. I really don't know. I'm not sure. I don't recall.
Q All right. Well, turn to page 4, please.
A Page 4?
Q Yes. Okay.
MS. DiGIACOMO: Your Honor, may I approach?
THE COURT: You may.
BY MS. DiGIACOMO:
Q On page 4 I'm going to show you -- I'm going to put, Your Honor, Exhibit -- Defense Exhibit T on the DORR equipment.
THE COURT: All right.
BY MS. DiGIACOMO:
Q All right. I'm going to show you -- there's a phone call -- okay. On July 20th at 19:20, do you see that? Oh, not

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-- sorry. July 20th at 19:20?
A I see the call.
Q And 19:20 would be 7:20 p.m.? And who's that call --
A Yes.
Q Okay. Who's that call to?
A That says to Doug's house.
Q All right.
A That's 7:20 in the evening.
Q On July 20th?
A Yes.
Q Okay. And that was after Blaise had been taken away by the detectives?
A Apparently.
Q All right. And then showing you on page 5 on July 24, 19:38 hours? Do you see that phone call?
A The 24th at 19:38, yes.
Q Okay. And who's that phone call to?
A That says Doug's house.
Q July 25th -- July 25th at 9:00 o'clock in the morning, who's that call to?
A That's to Doug's house. I don't recall making any of those calls.
Q Okay. On July 25th, later at 12:49 p.m.?

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A On July 25th at 12:49?
Q Yes, is there another phone call there?
A Yes.
Q And who is that to?
A Also is to his house.
Q The phone bill, the dates on this phone bill and on July 25th, 2001?
A That's what it says.
Q Okay. And we don't have your next bill for July 26th through the end of August, correct?
A No. No.
Q Okay.
A Not that I know of.
Q So somebody from your residence called to Doug's home --
A Apparently so.
Q -- after Blaise was arrested?
A Apparently so.
Q But you don't recall making these calls?
A I don't recall them.
Q You don't recall having conversations with Doug after she was arrested?
A I really don't recall that.
Q Is it possible?

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A It could be very possible, yes.
Q Now you testified today that the phone call on July 6th to the Pioche Police Department -- Sheriff's Department --
A Yes.
Q -- was you were calling regarding a jumpsuit for your husband?
A I recall the call.
Q All right. Now do you recall testifying at a prior proceeding that the reason for the call is you were probably looking for your truck?
A Yes, because I had forgotten about the jumpsuit and at the time that's what I calculated it to be, I thought it was it. That's --
Q Okay. So you --
A -- what came to my mind.
Q That's what came to your mind when you --
A Because we had lost the vehicle and I was looking into it and that was -- that was the month before I recollected it later.
Q Okay. So was it -- is it fair to say after you testified previously you'd talked to your husband and he reminded you, I went to pick up the jumpsuit the next day. You called for me, remember?
A No, I made the call but -- no, I recalled after I left

here. I talked to the lawyers and told them I had made the mistake after I had left out of the courtroom.
Q Okay. So you realized your mistake back then?
A Yes.
Q Okay. And it wasn't that you and your husband realized it together?
A No.
Q All right. Have you discussed this case with your husband?
A Well, I've discussed it, I'm sure.
Q All right. In fact, after Blaise was arrested the next day you talked to a couple of people about what had happened, correct?
A Vaguely.
Q You remember talking to your neighbor, Joe?
A I vaguely remember the -- you know, talking to her. I do recall talking to her, I couldn't tell you exactly what we talked about.
Q Okay. But you do recall talking to --
A I do talking to her, yes.
Q Wait, let me finish. You recall talking to Jo Dennert?
A Dennert.
Q She now has a married name that's different though?

A I don't know.
Q Okay. But you did talk to her about Blaise being arrested?
A Yes.
Q And you also talked to you -- your niece, Shane?
A Yes.
Q You're actually pretty close with Shane, aren't you?
A Yes.
Q Anyone else that you recall talking to the next day?
A After she was arrested, I don't -- I don't recall.
Q Okay. Do you recall talking to Chris Carrington at some point?
A I remember looking for Chris at one point but I couldn't tell you which day it was.
Q When you were looking for Chris is that the time you ran into his grandmother, Diane Allen?
A I remember running into her. I don't remember when that was either.
Q I'm not asking you -- but you did run into Diane Allen and talk to her?
A I recall running in -- running into her, yes.
Q And you talked to her about where Chris was?
A I remember briefly something of that.
Q And there was another time that you -- you did

actually talk to Chris?
A I remember something about I drove by and he flagged me down outside. I couldn't recall exactly what, you know, what day that was either.
Q Okay. But you just talked to him about the July 8th date?
A I recall a little bit of that, yes.
Q All right. And you actually talked to other about the July 8th date, correct?
A My niece, yes, and --
Q And Joe.
A -- Joe Dennert, yes.
Q Okay. Now you didn't talk to Joe more than the one time after Blaise's arrest about it, correct?
A Not that I'm aware. I really couldn't tell you. I didn't really know her all that well. I mean I knew -- I knew her but not that well.
Q Well, if she testified that was the one time that she talked to you would that be fair?
A Probably, if that's what she said I'm sure it was. I really can't recall.
Q Okay. Now you talked about all these calls to -- during the week of July 2nd to Doug's home number and Doug's cell number as being Blaise because she's the only one

that would have reason to?
A She would -- she would be the only one during that time making those calls, yes.
Q But you agree with me, some of the calls were while you were at work?
A Well, why -- I wouldn't --
Q So you -- some of the calls were while you were at work so you wouldn't even know who made those calls?
A It would be an assumption, yes.
Q And on July 7th, 2001 if I -- if this is the Saturday night, you weren't home at 6:00 o'clock in the evening?
A No.
Q And your husband wasn't home at that time?
A No.
Q He was at work?
A Mm-hmm. Yes.
Q You -- okay, yes. Do you know if Ashley was home?
A I couldn't tell you.
Q And you couldn't say if Blaise was home at that time either?
A I really couldn't say if she was home right at that moment, no.
Q You said that Blaise would normally call and tell you if she was leaving?

A Yes.
Q Okay.
A Or she would leave me a note.
Q Or she would leave you a note. Now on July 7th, 2001 that she left you a note about somebody who was going to call. Did she put in that note that she was going to be gone?
A I believe she said she was going to Michelle, Austria, and Rusty to pick up their friend and it was left on the note.
Q All right. And then she lo and behold was in Caliente when you went and picked her up?
A Yes, I received a call from my husband saying that she was sitting in the car waiting.
Q Okay. Did she tell you that she got dropped off by Rusty and Michelle and got into a bar and she couldn't?
A Yes.
Q Okay. And you testified too about another time you couldn't find her --
A Yes.
Q -- and you were looking for her? You were calling everyone, correct?
A I was trying to call anyone I could.
Q In fact, at that time didn't you file a report with the police --

A Yes, I did.
Q -- that she was missing? Yes?
A Yes.
Q And that was the Pioche Police Department?
A Yes, it was.
Q Okay. So if she was gone and she didn't leave you a note or tell you she was leaving that would cause you worry?
A Yes, it would.
MS. DiGIACOMO: Court's indulgence.
(Pause in the proceedings)
BY MS. DiGIACOMO:
Q You talked about that Blaise came to live with you when she was six because she had been sexually abused?
A Yes.
Q And that was by her natural mother's boyfriend?
A Yes.
Q Okay. And actually that had a serious effect on Blaise, didn't it?
A Yes, it did.
Q I mean even til -- even to today it still effects her?
A Yes.
Q And I can tell it effects you as well?
A Yes.
Q And it's fair to say probably a big reason why she

doesn't have much of a relationship with her natural mother even to today?
A I'm sure.
Q And you're aware of some other things that happened to Blaise when she was a little older, too?
A Yes.
Q When she was 13 she was raped by an ex-boyfriend?
A Yes.
Q When she was 17 she was raped by her best friend's father?
A Yes.
Q Those two incidents weren't reported to the police though?
A No.
Q Okay.
A We had talked to Maribah about 13 -- you know, the 13 year old rape and she was just going to put her through a lot for nothing.
Q Okay.
A And then she came back later and wanted her to testify when another person was raped and she said no.
Q And you're saying she said no, Blaise said no?
A Blaise said no.

Q Right. And when you're saying Maribah you're talking about --
A She's the sheriff.
Q So -- yeah, she's Sergeant Maribah Cowley?
A Yeah, Cowley.
Q So the incident when she was 17, it wasn't even reported?
A No.
Q In fact you didn't even tell her dad about it, did you?
A No.
Q But Blaise did confide in you about that?
A Yes.
Q The night of July 8th Shane came over to get Tiger Balm and a skillet?
A Yes, and I --
Q Okay.
A An electric skillet.
Q And Ashley had been in and out all that day?
A Mm-hmm.
Q Yes?
A Yes.
Q All right. And then Ashley did go back with Shane for dinner?
A Yes, she did.

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Q If there's any phone calls to Doug's cell or -- do you need a tissue?
A No. I'm okay. Yes, please.
MS. DiGIACOMO: May I approach, Your Honor?
THE COURT: Yes.
THE WITNESS: I'm sorry. Thank you.
BY MS. DiGIACOMO:
Q Any phone calls made to Doug's numbers from July 13th until July 20th when she was arrested, would those have been from you? Would you have made those phone calls?
A I don't recall making any calls.
Q All right. So you wouldn't have called him, that would have been Blaise?
A I wouldn't have made any calls.
Q Okay.
A I mean I don't know if I made any calls or not. I couldn't tell ya unless it was to Blaise.
Q No, I'm talking about the 13th when she came back, Friday the 13th when she came back until she was arrested on July 20th?
A Oh.
Q If there's calls to Doug at that point would that have been you?
A No, I don't think so.

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Q Okay. When was it that you or did you -- at what point did you learn what Blaise had been arrested for?
A You mean when -- she told me right there and they were getting arrested that -- I mean when she was getting arrested that she had to do what she had to do. That's all, you know, they -- what they said and they took her away so.
Q At the time that --
A That's all that was said to me.
Q So you didn't know she was being arrested for a homicide?
A I did know that from what I gathered, yes.
Q Okay. Did you know when that homicide had occurred?
A Alls [sic] I knew was it was on the 8th.
Q Okay. Why -- how did you know that?
A That's what -- that's all he said was the 8th.
Q Okay. And he didn't say July 8th?
A No.
Q And you didn't know it was July 8th?
A No.
Q Not until when?
A Until I got the newspaper on the 25th and it said that the man had died on the 8th and I called Curtis Brown and he said -- I said there was a misprint in the paper and he told me

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there was no misprint. I said they had the wrong person and he said he could no longer take care of the case because it was a conflict of interest. He had taken care of --
Q Okay, okay. Let's back up a little bit just so the jury is clear. Curtis Brown was the first attorney that your daughter had?
A Yes.
Q All right. So you -- your first thought when you realized in the paper they've got the wrong date you called her attorney?
A Yes, I did.
MR. SCHIECK: Your Honor, could we approach for a second?
THE COURT: Yes.
(Off-record Bench Conference)
THE COURT: We're going to take a 10-minute stretch break, ladies and gentlemen. In 10 minutes please be in the hallway. The bailiff will meet you there to return you to your seats in the courtroom.
During this recess you're admonished not to talk or converse among yourselves nor with anyone else on any subject connected with the trial and you're not to read, watch or listen to any report of or commentary on the trial or any

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person connected with the trial by any medium of information including without limitation newspaper, television, radio, and Internet. And you're not to form or express any opinion on any subject connected with the trial until the case is finally submitted to you.
Court's in recess for 10 minutes.
(Court recessed at 2:57 p.m. until 3:18 p.m.)
(Jurors are present)
THE COURT: The record shall reflect that we're resuming trial in State versus Lobato under Case Number C-177394 in the presence of the defendant together with her three counsel, the two prosecuting attorneys, and ladies and gentlemen of the jury.
And I do not see Becky Lobato. The bailiff is calling the hall and Rebecca Lobato is returning to the courtroom.
MS. DiGIACOMO: Your Honor, may I approach the clerk?
THE COURT: Yes, you may.
Ms. Lobato, you may return to your seat on the witness stand. The Court reminds you that you remain under oath.
THE WITNESS: Yes, Your Honor.
THE COURT: Ms. DiGiacomo, you may resume.
MS. DiGIACOMO: Thank you, Your Honor.

BY MS. DiGIACOMO:
Q Do you remember the week of July 2nd through the 8th? Was the weather kind of the way it normally is in the middle of the summer?
A July 4th was a storm, a major storm.
Q Okay. Was it stormy any other time?
A Not that I recall. I just remember the lightning show on the 4th of July.
Q When was it that Blaise moved in with Steve in Las Vegas? Pyszkowski?
A I'm not exactly sure of the exact time when he -- when she moved in there.
Q But you said before that she was living there May 2001?
A Yeah, she was down -- yes, she was --
Q She was with Steve. Do you know if Steve lived with anyone else?
A I believe he had a girlfriend.
Q Okay. You don't know her name though?
A Kathy, I think. I'm not exactly sure.
Q You never spoke to her?
A No.
Q But you spoke to Steve on the phone?
A I'd answer the phone to him before, I'm sure. I

don't recall any conversations with him or anything but I do recall knowing who he is.
Q Well, when Blaise was living with him how would you get a hold of her?
A She would call or we would call over there.
Q So you would call Steve's house?
A Sure.
Q So it's possible that when you called he answered the phone?
A It's possible, yes. A big possibility.
Q And it's possible his girlfriend answered?
A Possible.
Q Now the last time before July 2nd, 2001 when Blaise came home, before you saw her at the house when was the last time you had spoken to her?
A On July 2nd? I spoke to her on July 2nd.
Q Okay. When did you speak to her on July 2nd?
A Or, no, it wasn't July 2nd, it was before July 2nd saying she was going to come home and we didn't know if she was actually going to actually make it or not.
Q All right. And when was that?
A Earlier in that week, the last week.
Q So was it two weeks before July 2nd?
A That's a possibility, yes.

Q All right. So it's possible that a couple of weeks before she said I'm going to come home?
A Yes.
Q But you didn't know the exact date she was coming home?
A Didn't know the exact date she was going to make it home.
Q But you wanted her home for July 4th?
A We wanted her home for the weekend. She said she was going to make it home for the weekend but we weren't sure.
Q When you say weekend, July 4th was a Wednesday?
A July 4th -- well, the week. The week -- the whole week.
Q All right. And when was the last time that your husband had spoken to her before July 2nd?
A I couldn't tell you.
Q So when you were at work that day you didn't even know she was going to be home until you got home and saw her there?
A Well, we had an idea she was going to be -- she was going to come home but we weren't sure if she was going to make it or not.
Q Okay. What my question is when you got home on

July 2nd and saw her there --
A She --
Q -- you knew that you'd wanted her to come home sometime but you didn't know that she was going to be home waiting for you or when you got up -- when you got home?
A I was home first. She pulled up after I got home.
Q And when you got home and she pulled up you didn't know she was going to pull up at that exact moment?
A We had an idea she was coming but I really didn't know if she was going to make it. And, yes, it was a surprise to see her.
Q That's what I'm asking about.
A Yes.
Q You knew that she was coming home sometime but you didn't know it was on July 2nd?
A I didn't know exactly if she was going to make it or not, no.
Q All right. Now did you also talk with a person named Clint who is Ashley friend's after the defendant was arrested about the July 8th date?
A I don't know. I don't think so.
Q Okay. Is -- if he testified he did speak to you is it possible?
A It's possible. Anything's possible, it's been five

1 years.
2 Q The prescription that the doctor gave you on the 13th
3 for Blaise was that called --
4 A Lorazepam.
5 Q -- Lorazepam but also the generic version Ativan?
6 A Ativan, Ativan.
7 Q Ativan, okay. That was the prescription that you
8 were given?
9 A I think Ativan's the main name and Lorazepam, I
10 think, is the generic.
11 Q The generic, okay. But that's what it was?
12 A I do believe so, yes.
13 Q And that's what you got --
14 A If I recall correctly.
15 Q -- and that's what you got filled for her on the 13th?
16 A I do believe so, yes.
17 Q When you went to the doctor on July 5th, 2001, told
18 the doctor that you thought she was being poisoned, they did
19 some blood tests for her?
20 A They did a complete blood tox, yes.
21 Q And was there also a 24-hour urine sample she was
22 supposed to give?
23 A Yes.
24 Q So she -- they sent you home with --

1 A With a bucket and a hat.
2 Q All right. And so for all of July 6th she was supposed
3 to urinate in that bucket?
4 A Yes, and there wasn't much. She slept most of it.
5 Q All right. But on July 7th, on your way to work that
6 morning, you did drop it off at the doctor's office?
7 A Yes, I did and I woke her up for a final sample.
8 Q On July 7th you woke her up?
9 A Yes, I did.
10 Q You've raised Blaise since she was six?
11 A Yes.
12 Q A baby. And you love her as if she's your own
13 daughter?
14 A I do.
15 Q Okay. And you've done things to help her?
16 A Her whole life.
17 Q Right. In fact, that week you were trying to help her
18 get clean and off of drugs, weren't you, the week of July 2nd?
19 A Yes.
20 Q But --
21 A She was off.
22 Q I'm sorry?
23 A She was already -- she was already on the road.
24 She started.

1 Q Okay. And you were trying to help her stay on that
2 path?
3 A Yes.
4 Q But coming with that as well you had your typical
5 mother daughter relationship, you guys would fight?
6 A We'd argue, yes.
7 Q I mean you'd argue frequently?
8 A It was a pretty regular ritual that we would argue.
9 Q And she actually -- do you know when she started
10 using methamphetamine?
11 A I think she was around 16.
12 Q And at the time she started using it do you recall
13 saying previously that she would use it to hide behind her
14 problems?
15 A Yes.
16 Q So was it kind of a crutch for her or a --
17 A I kind of felt that it was.
18 Q And so is it possible she also would use meth to deal
19 with the family situation and the fighting and being a
20 teenager?
21 A Oh, it's pretty possible. Yes.
22 Q But do you recall saying though when she went to
23 Las Vegas in 2001 for her move down there or extended time
24 down there that she kind of got a little out of control with the

1 drugs?
2 A Yes.
3 Q And that is your opinion, she got out of control?
4 A Yes.
5 Q When she was home July 3rd, July 4th, before you
6 took her to the doctor, July 5th, you said she was sleeping an
7 awful lot. How -- did she have other -- any other symptoms
8 that she wasn't feeling well?
9 A She was very, very weak. She could hardly standup
10 which is a little -- pretty much a lot different than coming
11 down from drugs.
12 Q All right. In fact you actually stated before you had
13 to help her bathe?
14 A Yes, I did.
15 Q Okay. And when you stayed home with her on the
16 6th of July what did you help her do that day or what were you
17 doing that day?
18 A I feed her, I -- you know, I laid with her, watched
19 TV with her, just, you know, cuddled with her.
20 Q Did she have -- did she shower on that date too?
21 A Oh, I'm sure she did.
22 Q All right. And you would have helped her with that?
23 A I know I helped her with her bath on one of the
24 days, it was either the 5th or the -- it was the 5th I think, 5th of

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the evening. But it could have been on the 6th, I'm not sure.
Q Now you recall testifying in a previous proceeding that on July 6th that there was people over, in and out, checking on Blaise?
A Yeah, they came by to see how she was doing.
Q Who else came by besides Chris Carrington?
A I'm not exactly sure if Marilyn -- I know Marilyn had come through. Not real sure. I think it was just Marilyn.
Q And Chris?
A And Chris.
Q Shane didn't come over?
A On -- she came through from time to time. She was in and out. She was there on the 8th.
Q You don't recall her specifically on the 6th?
A No, I really don't but she would -- she would come over anytime she would get out of the house to go to the store she would stop by. So it's possible.
Q All right. But you don't have any specific recollection of her being one of the people that checked in and out that day?
A Not clearly, no.
Q And you said before that you do recall talking to Chris Carrington regarding the incident being on July 8th?
A Yes.

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Q You recall too that you actually wanted to make sure he remembered the July 8th date and he was at your house?
A I -- yes, I did.
Q Now you had stated that you did get Doug's home and cell number off of your caller ID?
A Yes.
Q So you had called Doug's cell or Doug's home looking for Blaise before, hadn't you?
A I don't -- I don't recall. It's possible, yes.
Q You didn't have his cell number or his home number before she came home on July 2nd, did you?
A I don't believe so, no.
Q If --
A It's a -- it's a possibility but I don't think so.
Q Okay. If I was to show you your prior testimony would that refresh your recollection?
A Sure.
Q Okay. I'm going to go to page -- first, page 136. I'm referring to when you testified at a prior proceeding in May of 2002.
MS. DiGIACOMO: May I approach, Your Honor?
THE COURT: Yes.
BY MS. DiGIACOMO:
Q I'm going to ask you to review lines 17 -- well, say

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13 through 20.
A Okay. Ah, geez. And I saw it on the caller ID.
Q Okay. And --
A I mean I still don't quite recall exactly, but, yes, that sounds right.
Q Okay. You don't recall sitting here today whether or not you got Doug's cell number and home number off the caller ID, is that fair?
A No, I recall getting it off the caller ID, I don't know if it was on the 2nd exactly. I recall getting his number.
Q Well, I'm not saying it was on the 2nd but it wouldn't have been on your caller ID before she came on July 2nd, 2001?
A You're probably right, yes.
Q Okay. She hadn't known Doug that long before she came home?
A I don't think so.
Q And do you recall testifying previously -- Court's indulgence. Do you recall testifying previously in May of 2002 that you had dialed Doug's number before looking for her that's why you knew it on your phone bill?
A I don't recall, it's been a long time. It's a possibility if that's what I wrote, I'm sure that's correct.
Q Okay. Well, if I told you you did state -- it says,

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"How are you familiar with his cell phone?" and your answer, "Because I've dialed it before." And I asked you, "Looking for Blaise?" and you said, "Yes?"
A That's -- I'm sure that's pretty accurate after the fact, yes.
Q Okay. So that's how you got it and his --
A I'm sure, yes.
Q Off of your call ID because you called looking for her before?
A Yeah, I'm sure that's -- if that's what it says. I'm not exactly -- I don't recall it exactly.
Q But that is --
A But I'm sure that's what it says, that's probably -- I'm sure that's right.
MR. SCHIECK: What page?
MS. DiGIACOMO: That was page 185, counsel.
BY MS. DiGIACOMO:
Q That's what you testified back in May 2002?
A That's what it says.
Q And that's when it was closer in time to 2001?
A Yes.
Q Okay. So it's possible your memory's a little fresher in May 2002?
A I'm sure it was.

Q All right. So you have no --
A That's a lot to try to remember.
Q I understand that but you have no reason to disagree from what you testified to previously?
A No. Not at this moment, no. I don't quite recall but it sounds right.
MS. DiGIACOMO: Nothing further, Your Honor.
THE COURT: Redirect.
MR. SCHIECK: Just a few, Your Honor.

REDIRECT EXAMINATION

BY MR. SCHIECK:
Q Mrs. Lobato, you were asked about the fact that you called and had gotten some prescriptions for Blaise when she was coming home on the 13th?
A Yes.
Q Do you recall that testimony?
A Yes.
Q You'd previously had situations where you'd had to get prescriptions for Blaise, is that correct?
A When she was ill or anything, yes.
Q In fact since she's been living with you she's had problems with depression and anxiety?
A Yes, she has.
MS. DiGIACOMO: Objection, leading, Your Honor.

THE COURT: Sustained.
MS. DiGIACOMO: Move to strike.
THE COURT: Motion granted.
BY MR. SCHIECK:
Q As a result of what she went through when she was a small child before she came to live with you, did she have problems with her mental health?
A She suffered from types of depression and she was up and down.
Q Okay. So you had seen these in her before?
A Yes.
Q And do you know whether she had taken either of these prescriptions before?
A Not to my knowledge, no.
Q When -- in order to fill those prescriptions what did you have to do on the 13th?
A I had to take them to a pharmacy.
Q Okay. They'd already been written for you?
A I -- yes.
Q When you went on the 5th -- or when were they written for you?
A I believe I got the one on the 13th and then the other one on the 16th. I'm not exactly -- I'm not sure but I believe that's what it is if I remember correctly.

Q And did these relate to symptoms you'd seen before --
A Yes.
Q -- or were they new?
A No, they weren't new. They -- I'd seen it before.
Q Now at some point in time you read a newspaper article regarding Blaise's arrest?
A Yes.
Q Do you recall exactly when it was you read that?
A It was the 25th.
Q After you read that did you make any phone calls?
A Yes, I did.
Q Are you familiar with -- and I won't show you the bill unless you're not, the number 455-5044?
A That would be Curtis Brown.
Q And who was Curtis Brown?
A He was her first attorney that was assigned to her.
Q Where did you call him from?
A From Panaca.
Q Okay. And where did you call him at, where was he?
A It was to his office.
Q And do you recall whether or not you called him on the 25th?

A I'm sorry?
Q Did you call him on the 25th?
A It was either the 25th or the 26th, depending on the time I got the newspaper. I can't exactly remember but it was right away.
Q Was it once or more than once?
A I had talked to him several times before --
Q I just want to talk about the 25th.
A The 25th? I believe it was just the once.
Q If you can look at the home phone bill, Exhibit T -- I believe you have T-1 still in front of you.
A Okay.
Q Go to -- go to page 5 for July 25th.
A Page 5. Oh, that's page 2. Page 5, the 25th. It's two back-to-back.
MR. SCHIECK: For the record I'm putting "T" on the overhead, Your Honor.
THE COURT: The record shall so reflect.
BY MR. SCHIECK:
Q And you indicated that Mr. Brown's number was 455-5044?
A I believe so, yes.
Q So we can just look. It appears to be 9:00 o'clock in the morning, a 17-minute call? Excuse me, wrong one. July

25th at 10:15?
A Seventeen minute call --
Q No, no. I'm looking at --
A On the 25th, 455-5044, is that the one you're talking about?
Q Yes.
A That's at 4:00 in the afternoon.
Q Will you look up at the 25th?
A This says the 25th.
Q Okay. And what time did you call him?
A It says 4:59.
Q Is that the only call on the 25th to that number?
A No, there was several. One-minute calls, I must not have been able to get through to him.
Q So how many times did you try to call Blaise's attorney on the 25th?
A Let's see, one, two, three, four.
Q And would this have been after or before you read the newspaper?
A Well, the fourth one would have been after I read the newspaper for sure.
Q Do you recall if you were able to talk to him?
A I talked to him for the 17 minutes. I remember only talking to him one time.

Q And was it that you called -- or did you call Detective Thowsen to talk to him about the date you saw in the newspaper?
A I remember calling Detective Thowsen around -- during that time but left a message and he had returned our call back the following Monday.
Q So you didn't talk to him when you first called him?
A No. It -- there was a message left.
Q Thank you.
MR. SCHIECK: Nothing further, Your Honor.
THE COURT: Recross?
MS. DiGIACOMO: Yes, thank you, Your Honor.

RECROSS EXAMINATION

BY MS. DiGIACOMO:
Q Now July 25th was not the first time you tried calling Blaise's attorney, correct?
A No.
Q Okay. In fact if you look at July 24th --
A Yes.
Q -- which would have been that Tuesday, there's a call at 14:07 to Curtis Brown, correct?
A Yes.
Q And also -- oh, I'm terrible with those, 4:39, it says 16:39?

A 16:39. 16:39?
Q Yeah, the time?
A Yes.
Q Okay. Which was approximately 4:39 in the afternoon?
A Mm-hmm. Yes.
Q Okay. So you did try and call him the day before the 25th as well?
A Apparently so, yes.
Q And you were actually -- we have as Defense Exhibit T, these are your original phone records, correct?
A The ones you're holding, yes.
Q Okay. Do you normally keep your records?
A No.
Q All right. So we don't have your records for the next month, from July 26th through the end of August, do we?
A No.
Q So we don't have the records that would have shown when you --
A That's -- those are the ones they asked for.
Q Okay. So we don't have the ones that would have shown when you called Detective Thowsen?
A Apparently not.
Q Okay. But you'd agree through the 25th at least,

which these records end with, you had not called Detective Thowsen up until this point?
A No.
Q It was after the 25th?
A Yes.
Q And when you -- when Detective Thowsen, you said, called back the following Monday, which according to the calendar down there would have been -- oh, we don't know. The 30th, would that be the following Monday after -- I'm asking you to look down at defense exhibit down there and I think it's "JJ?"
A Following Monday --
Q The following Monday in July 2001 after the 25th is --
A It says the 30th down there is --
Q -- the 30th?
A -- says that's a Monday.
Q Okay. So that's approximately when Detective Thowsen called you back?
A I believe so. I believe it was that following Monday is when he first called me back.
Q And when he called you back you didn't speak to him, you handed the phone off to your husband?
A I answered the phone and I passed the phone off to

my husband, yes.
Q You never told Detective Thowsen she could have not have committed this crime because she was up here on July 8th, did you?
A You know, I have this memory that I did but I really don't know.
Q When you --
A I believe I passed the phone off to my husband.
Q Okay. Would you agree with me that when you testified in May 2002 you stated or you testified that you never told Detective Thowsen that he had the wrong person?
A I saw that and I -- that's what I said and I -- for some reason I have this -- I believe I talked to him, but I don't know.
Q But you'd agree that when you testified in May 2002 --
A That's what I said.
Q -- that you --
A And I remember saying that.
Q Let me finish, okay?
A I'm sorry.
Q That's okay. So when you talked -- when you testified in May 2002 you stated on the stand that you never told Detective Thowsen that he had the wrong person, that it

couldn't have been July 8th, correct?
A I recall testing -- testifying to that, yes.
MS. DiGIACOMO: Court's indulgence.
BY MS. DiGIACOMO:
Q All right. You said that you had called and left a message for Detective Thowsen and he called you back?
A Yes.
Q Okay. How many times did you leave messages for Detective Thowsen, just the once?
A There was a few.
Q All right. But that's over the course of the whole month?
A From the -- from the -- from the 25th? Yes.
Q Because you were not just trying to get a hold of him for the date but you were trying to get a hold of him to get the car back?
A That [sic] also correct, yes.
Q Okay. And how many times did you actually speak to Detective Thowsen after Blaise was arrested through August 2001?
A I only recalled talking to him once but I couldn't tell you exactly which date that was.
Q Was that the same time that you answered the phone and handed it to your husband?

A I'm -- you know what, I'm not sure. I'm not exactly sure now. It's been a long time but I do recall talking to him.
Q But you don't know what about?
A No, I recall saying that the date was not correct and that they -- he had the wrong person. And he said he didn't have the wrong person, he had the right person.
Q Okay.
A But I don't know what date that was.
Q All right. And that's your memory as you sit here today --
A Yes.
Q -- on the stand?
A Yes.
Q Do you agree that you testified in May 2002 that you never spoke to Detective Thowsen regarding the date?
A Yes. Yes. I don't know what date it was but I did talk to him. I remember that but I don't know -- on that date, no I don't.
Q Okay. So -- I'm sorry. I'm getting confused. When you testified in May 2002 you agree with me you stated you --
A I'm agreeing that that's what in the paper, what it says on the -- on the testimony.
Q Okay. Right, that you never told talked to Detective Thowsen about the date or having the wrong person, correct?

A That's -- I'm agreeing that's what it says.
Q Right. But after you testified May 2002 now -- until the time you sit -- you've testified today, now you have a memory of talking to him?
A I have a memory of talking to him, yes, but I was going through a lot of pain during that testimony too, so.
Q Right, with your tooth.
A Yes.
Q Okay.
MS. DiGIACOMO: Nothing further.
MR. SCHIECK: Just one area, Your Honor.
THE COURT: You may.

FURTHER REDIRECT EXAMINATION

BY MR. SCHIECK:
Q You had said that they had only asked for one month's phone bill. When you say "they" who are you referring to?
A The attorneys, Phil Cohn.
Q The defense attorneys?
A Yes.
Q Did Detective Thowsen ever ask you for your phone bills?
A Not that I'm aware of, no.
Q Did Detective Thowsen ever ask you for the August

phone bill?
A No.
Q Ask you for any phone bill?
A No.
Q Ever come and interview you?
A No.
Q The prosecution serve a subpoena on you for your phone records?
A Not that I'm aware of, no.
MR. SCHIECK: Nothing further, Your Honor.
MS. DiGIACOMO: Just one question.
THE COURT: Anything further?

FURTHER RECROSS EXAMINATION

BY MS. DiGIACOMO:
Q If you had never talked to Detective Thowsen regarding the fact that they had the wrong date or the wrong person, you'd agree with me that he'd have no reason to ask for your phone records back in 2001, correct?
A I don't know.
MS. DiGIACOMO: Nothing further.
MR. SCHIECK: Nothing further, Your Honor.
THE COURT: Mr. Bailiff.
(Pause in the proceedings)
THE COURT: Counsel, approach.

(Off-record Bench Conference)
THE COURT: Mrs. Lobato, the jury has sent out two questions for you. I'm going to read a question and you answer it, then I'll read the next question, you answer that. After both of the questions have been answered the attorneys for each side will have the opportunity to pose follow up questions to you.
Did Blaise graduate in May 2000, June 2000 or May 2001?
THE WITNESS: June 2000.
THE COURT: That will be marked as Court's next in number.
THE CLERK: Number 80.
THE COURT: Why did you wait until the 13th and 16th to get medications when you went to the doctor on the 5th?
THE WITNESS: Blaise was concerned was going into the --
MS. DiGIACOMO: Objection, Your Honor, it's hearsay.
THE WITNESS: I'm sorry.
MS. DiGIACOMO: What she's saying --
THE COURT: Counsel --
MS. DiGIACOMO: -- she's talking about what Blaise

is told her instead of just why she didn't get the prescriptions. It's going into hearsay.
THE COURT: The will sustain the objection. I'm going to read the question again --
THE WITNESS: Okay.
THE COURT: -- list to it, and then answer to the best of your ability. Why did you wait until the 13th and 16th to get medications when you went to the doctor on the 5th?
THE WITNESS: The 13th she was -- she had more anxiety and depression going on and she was coming home so I went and called the doctor, because she was coming home, to get it for her.
THE COURT: That will be marked as the Court's next in number.
THE CLERK: 81.
THE COURT: Any follow up questions by the state?
MS. DiGIACOMO: No, Your Honor.
MR. SCHIECK: No, Your Honor.
THE COURT: None by the defense? You may step down from the stand.
THE WITNESS: Thank you very much.
THE COURT: You're welcome.
THE WITNESS: Do I leave all this up here?
THE COURT: Yes, you may.

THE WITNESS: Okay.
MR. SCHIECK: May I retrieve it, Your Honor?
THE COURT: Yes, you may.
THE COURT: Ladies and gentlemen, due to some scheduling issues the state is going to call out of order at this time the state's first rebuttal witness.
MR. KEPHART: Thank you, Your Honor. We're going to recall Detective Thowsen.

THOMAS THOWSEN, STATE'S REBUTTAL WITNESS, SWORN

THE CLERK: Thank you. Please be seated. State your name and spell it for the record, please.
THE WITNESS: My name is Thomas Thowsen, T-H-O-M-A-S; Thowsen, T-H-O-W-S-E-N.
THE COURT: You may proceed.
MR. KEPHART: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. KEPHART:
Q Detective, you had testified that the defendant -- you arrested the defendant in Panaca on the 20th of July of 2001. Do you recall that testimony?
A Yes, that's correct.
Q And on that day both the defendant's parents, Rebecca Lobato and Lorenzo Larry Lobato, had come home in

1 the process of when you were taking her out to the vehicle?
2 A Yes.
3 Q Other than what was said by them that day did you
4 have any other conversations with the defendant's parents
5 after that date?
6 A I have not.
7 Q No phone conversations at all with them?
8 A No.
9 Q And, Detective, what -- on -- in July or August or
10 September of 2001 do you recall what your work phone
11 number was?
12 A I believe it's the same as it is today which is 289-
13 5612.
14 Q And that would be 702?
15 A 702.
16 Q That's your work number?
17 A That's my work number, a telephone issued by the
18 police department.
19 Q Okay. Work cell number or work office number?
20 A Work cell number.
21 Q Okay. And do you have a -- also a work office
22 number?
23 A The work office number is 702 229-2700.
24 Q And you indicated you had no discussion with them

1 at all by phone. You don't recall any discussion with them
2 about the Fiero, releasing of the Fiero?
3 A I do not.
4 Q Did you have an opportunity to look at the actual
5 release paperwork on that?
6 A Yes, I did.
7 Q And did somebody from your department have a
8 discussion with them or someone talk with them about the
9 vehicle?
10 MR. SCHIECK: Objection, calls for hearsay, Your
11 Honor.
12 THE COURT: Sustained.
13 BY MR. KEPHART:
14 Q Your name doesn't show up on the release form,
15 does it?
16 A No, it does not.
17 Q Okay. Does another name show up on the release
18 form?
19 A Yes.
20 Q And who is that?
21 MR. SCHIECK: Objection, hearsay, Your Honor.
22 THE COURT: Sustained.
23 BY MR. KEPHART:
24 Q If you would have had any discussion with them

1 about the vehicle your name would have been on the release
2 form?
3 A Yes. And I have the actual document if that helps.
4 MR. KEPHART: Court's indulgence, Your Honor.
5 Detective, thank you. I'm going to pass the witness.
6 I have no questions.
7 THE COURT: Very well. Cross.
8 **CROSS-EXAMINATION**
9 BY MR. SCHIECK:
10 Q Detective Thowsen -- oh, thank you, Your Honor.
11 Detective Thowsen, when you arrested Blaise at her house in
12 Panaca did you leave a card or some information like that with
13 your numbers on it?
14 A I don't know if I did or not. I mean we often give
15 people our cards. I don't have a recollection whether I did or
16 not.
17 Q So there's a possibility that you did not give them
18 your direct cell phone Metro number of 289-5612? Is there a
19 possibility you did not give them that number?
20 A It's a possibility.
21 Q And Detective LaRochelle was there with you when
22 they -- when you made the arrest?
23 A Yes.
24 Q Did he leave a card? Did you see him leave a card?

1 A Not that I can recall.
2 Q Do you have a standard procedure with relation to
3 leaving that type of information?
4 A We leave it with -- if we interview a witness that we
5 want the witness to contact us later on, we'll give them a card
6 so they'll have contact numbers because we're wanting them
7 to contact us.
8 Q You've driven to Panaca in Lincoln County and
9 you've arrested a 18-year-old girl and her mom and dad are
10 there, would you expect that you would give them some type
11 of information to call you to ask what's going on, where --
12 anything like that?
13 A I may or may not have given them a card. I've told
14 you I don't recall whether I did or not.
15 Q And the main number, the 229-2700 number that's
16 just like the main switchboard number and then you have to
17 ask for homicide?
18 A No, that's to my desk.
19 Q Okay. That's your direct desk number?
20 A Yes, it is.
21 Q And how would -- is that listed in the phonebook or
22 how would they get that number?
23 A They would get that number from someone telling
24 them or calling the office and someone telling them from the

office.
Q But they call the main number they would give them your direct line number?
A Depending upon who they spoke to.
Q And when -- now Detective LaRochelle was there in the same homicide office space that you were in? Not the same office --
A Same room.
Q All right. Do you -- there's times you're not together with him I take it while you're working during the day?
A That's true.
Q And when you were there and arresting Blaise, you don't recall handing any physical information to the parents to get in touch with you. Did you talk with them or interview them such that like other witnesses you said would give follow up numbers? Did you interview them and give them a follow up number?
A We didn't do what we consider an interview where we're sitting down to talk to them because we're trying to get Blaise in the car and leave before any problems might arise.
Q Thank you.
MR. SCHIECK: Nothing further, Your Honor.
THE COURT: Redirect.
MR. KEPHART: Yes, just one question.

REDIRECT EXAMINATION
BY MR. KEPHART:
Q Detective, during an investigation in a homicide shortly thereafter would you ever tell anybody findings of any type of information involving evidence in a case?
A We'd discuss it with the DA, someone to that but we wouldn't talk with witnesses, victims, suspect families.
Q Parents of the -- parents of the defendant?
A Absolutely not.
Q During this case your function was to interview witnesses and interact with the witnesses in this --
MR. SCHIECK: Objection, leading, Your Honor.
THE COURT: Sustained.
BY MR. KEPHART:
Q Okay. What was your function in this case?
MR. SCHIECK: Objection, beyond the scope of cross, Your Honor.
MR. KEPHART: That's fine then, Your Honor. I don't need to ask any further questions.
THE COURT: Withdrawn?
MR. KEPHART: Yeah, I'll withdraw that.
THE COURT: All right.
MR. KEPHART: Nothing further, Your Honor.
THE COURT: Okay. It appears that we have a

question coming from the jury box.
(Pause in the proceedings)
THE COURT: Counsel, approach.
(Off-record Bench Conference)
THE COURT: I have a note that will be marked as Court's 82. I have a note that will be marked as Court's 83.
Detective Thowsen, I have a question for you from the jury. If you did not have conversation after the arrest was made is it possible your partner did?
THE WITNESS: I would have no knowledge if he made -- had any sort of conversation out of my presence. He never discussed any such conversation with me.
THE COURT: Any follow up by the state?
MS. DiGIACOMO: Court's indulgence.
REDIRECT EXAMINATION (Continued)
BY MR. KEPHART:
Q Detective, the -- it wasn't Detective LaRochelle's name on the tow -- I mean the release sheet either, was it?
A No, it was not.
MR. KEPHART: Nothing further, Your Honor.
MR. SCHIECK: Nothing further, Your Honor.
THE COURT: You may step down from the stand.
THE WITNESS: Thank you, Your Honor.
THE COURT: That question will be marked as

Court's 84. The state may call their second rebuttal witness.
MS. DiGIACOMO: Thank you. The state recalls Dr. Lary Simms. May I approach the clerk?
THE COURT: You may.
LARY SIMMS, STATE'S REBUTTAL WITNESS, SWORN
THE CLERK: Thank you. Please be seated. State your name and spell it for the record, please.
THE WITNESS: My first name is Lary spelled L-A-R-Y, and my last name is Simms, S-I-M-M-S.
THE COURT: State may proceed.
MS. DiGIACOMO: Thank you, Your Honor. May I approach the witness, Your Honor?
THE COURT: Yes.
(Pause in the proceedings)
MS. DiGIACOMO: May I approach, Your Honor?
THE COURT: Yes.
DIRECT EXAMINATION
BY MS. DiGIACOMO:
Q Doctor, I'm going to show you what's been marked for identification as State's Proposed Exhibits 265 through 263. Would you look at those and let me know when you're done? Do you recognize these photographs?
A Yes.
Q Were these all photographs that were taken at the

autopsy that you performed on Duran Bailey?
A Yes.
Q And they fairly and accurately depict the injuries that are shown in each of the photographs that were taken on July 9, 2001?
A Yes.
MS. DiGIACOMO: Your Honor, at this time I'd move for admission of State's Proposed Exhibits 265 through 268. Wait that's wrong.
THE COURT: That was what you had indicated earlier.
MS. DiGIACOMO: Oh, you know what, I'm wrong. They're in the wrong order, Your Honor. Court's indulgence.
THE COURT: Very well.
MS. DiGIACOMO: I apologize, Your Honor, it was State's Proposed Exhibits 263 through 268 that I showed the witness.
BY MS. DiGIACOMO:
Q Do State's Proposed Exhibits 263 through 268 fairly and accurately depict the injuries on the victim that you saw on July 9th, 2001?
A Yes.
MS. DiGIACOMO: Your Honor, I'd move for admission of State's Proposed Exhibits 263 through 268.

MR. SCHIECK: No objection.
THE COURT: Granted.
(State's Exhibit Nos. 263 through 268 admitted)
BY MS. DiGIACOMO:
Q Doctor, were you present for the testimony of a Dr. Michael Laufer?
A Some of it at least, I think.
Q And did you see his opinion regarding whether or not scissors could have caused the injuries on Duran Bailey's body?
A I recall him having that opinion and then substantiating it with a number of different things.
Q Okay. Do you have any opinion regarding whether or not the injuries on Duran Bailey were caused by scissors?
A Yes.
Q What's your opinion?
A No.
Q And why not?
A Well, the -- there would be a number of reasons. One of them is -- do you want me go through the reasons?
Q Please.
A One of them would be that scissors are commonly used as a stabbing tool. They're not opened up, you know. I've never seen -- I've never heard about that.

Q So when you say stabbing tool you mean where the blades are closed and the person's grip is around the top of the blade by the handles?
A Correct.
Q Used almost like a knife?
A Correct.
Q All right. Any other opinions?
A Of course when they -- when they use it that way it leaves a very kind of an odd stab wound. It's kind of a round -- you know, roundish wound instead of a smooth one. Some of the wounds that he spoke of, especially in the neck, was was a snipping wound. Well, the wound was so deep that it went in all the way, you know, the middle of the neck and there's no way that a scissor could cause that. It was -- it's a stab wound.
Q What --
A And also a lot of the wounds -- and I think these pictures show it, they do not have any tissue bridging in the wounds and that indicates that it was a sharp force injury, incise wound or a stab wound. And that also if you look at some of those pictures the contour of the wound is a slit-like with a blunt end on one end and sharp end on the other. It's characteristic of a knife. Those are the reasons I -- that I -- off the top of my head.

Q Now what is tissue bridging?
A Whenever tissue instead of -- instead of it being cleanly cut whenever it -- whenever -- say for instance a fighter gets a cut over his eye is a good example, blunt force injury cause -- that's a laceration caused by blunt force injury. Well, your skin and the subcutaneous tissue under it you can think of it as kind of -- it's net like. It has lots of interlacing little fibrils and lots of things. And when the -- when the skin gets torn some of those fibrils actually stretch, they stay intact and they stretch. And so across the wound, when you look at the wound, you can see these little bridging fibrils. Sometimes they're actually as big as nerves and sometimes they are nerves. That's what happens from blunt force trauma. Now imagine when you get a slice or a stab wound, well, a sharp force cuts all those bridges so that wound is completely clean all the way through. So that's one basic characteristic you could use to differentiate a wound caused by blunt force trauma which would be just a laceration versus a wound caused by sharp force trauma which would be a stab or incise wound.
Q I'm going to show you State's Exhibit Number 264. Do you recognize what's depicted here?
A I believe that's the stab wound to the scrotum.
Q All right. Now you're calling it a stab wound. Can

you explain why you're calling this a "stab wound" instead of a laceration from blunt force trauma?
A Well, just look at the -- look at the contours of the wound.
Q Is the shape consistent with a blunt -- excuse me, a incise wound?
A A stab wound.
Q A stab wound from what?
A From a knife.
Q Okay. Would --
A And --
Q -- go ahead, what were you going to explain?
A So that would be one characteristic. The other characteristic, if you look in the wound there's no little areas of tissue bridging across the wound, it's a clean cut. That's characteristic of a stabbing.
Q When you testified previously regarding the incise wounds that were found all over the body on the face, on the neck, on the abdomen, on the scrotum, on the penis, rectum, were any of those caused by blunt force trauma?
A No, and what I do at autopsy is, you know, I actually look inside the wound to make sure that, you know, I know -- I know the difference between a sharp force injury and a blunt force injury.

Q And now showing you State's Exhibit Number -- well, strike that. Any of the wounds that you've categorized as incise wounds were -- did any of those have tissue bridging left?
A No.
Q So that all of the tissue bridging was cut?
A Correct.
Q I'm showing you State's Exhibit Number 263, see what's depicted there?
A Yes.
Q Is this the rectum?
A Right.
Q Okay. The photograph that's taken -- and actually I might have it upside down, did you have to do any additional cuts to open up the wound to look at the -- look at the injury?
A No, just had to spread the buttocks.
Q Okay. Was this injury to the rectum caused by a blunt force trauma?
A No.
Q Was there any -- you talked about that it was one long cut wound?
A Correct.
Q All right. And I believe up here there are some little marks, were -- what are those?

A Those are what we can call hesitation wounds, we can call them starter wounds. They're superficial wounds that frequently occur when somebody is starting to do something and they're kind of moving and then -- and then all of a sudden they get to the area they really want to do damage. So it's not uncommon you actually see those kind of superficial associated wounds both in homicides that are -- that a sharp force injury occurs in and also suicides when people do that to themselves.
MS. DiGIACOMO: Court's indulgence.
(Pause in the proceedings)
BY MS. DiGIACOMO:
Q These marks here that you were calling a starter wound or hesitation wounds, that wasn't decomposition of the skin was it?
A If you closely at them they have very sharp edges and --
Q There is that better?
A Yes, you can see -- you can see how sharp the edges are and that's -- no, that's definitively not -- I mean there's no possible way that that would be decomposition.
Q And you -- there are starter wounds here and it looks like there's a point here?
A Yes, there is a --

Q Once the wound got started did it ever start and stop again?
A Can you move the picture?
Q Oh, sorry.
A It looks like to me that it went all the way down to here and then there might have been some extra movement here or something because there is kind of a further splaying. Of course that may just be due to the tissue but it basically looks like one continuous wound to me.
Q How deep was the wound?
A Well, you could judge, you know, just by the picture. It looks like -- it was several inches deep. At least two or three inches deep.
Q Now with regard to the wound on the neck, the wound that cut the carotid artery, was there -- you stated it wasn't possible that it was caused by snipping?
A No, I don't -- there's no way that scissors could cut the carotid artery and cause damage all the way over to -- near the middle of the neck.
Q Okay. And why do you say no way?
A It's just anatomically impossible. It would take a stab wound to go all the way in there to do that. Scissors couldn't do that.
Q If you were going to scissors to do that, how wide

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would the scissors have to start?
A You'd have to -- you'd have to cut half the neck.
Q To get all the way down to the carotid artery?
A Correct.
Q And you said that this wound actually went farther than the carotid artery itself?
A Yes, it went through the carotid artery and went near the, you know, near the midline into the throat area.
Q Let me show you State's Exhibit Number 79, which co-counsel helped me find. Now look right here, it looks as if the skin is touching on either side?
A It looks that way but I think if you compare that to the other picture, you know, there was -- that's just because that wasn't spread wide.
Q Okay. So when you spread it in State's Exhibit Number 263, when the wound was spread open, there was no additional cuts made?
A No, it looked like it was one continuous cut.
Q And there is a -- there appears to be some darker coloration -- oops, sorry, around the wound?
A Correct.
Q What is that?
A That looks like it's a combination of pigmentation and decomposition. You can see this kind of green color that

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extends all the way down the testicular area and then also you can see it over in this area and this area, too. So it's -- I would say, you know, it's a combination of those things.
Q All right. Is it -- is it bruising?
A No.
Q This wound was caused postmortem?
A This -- the wound, the actual incised wound. We're talking about the incised wound now, right?
Q Yes.
A The incised wound in my opinion was postmortem. In the -- in the previous picture there wasn't any hemorrhage in the -- in the sides there or anything.
Q Were there any other wounds to this area that were caused before he died?
A I believe the stab wound in the scrotum, you know, had significant hemorrhage but not in the --
Q Not in the rectal?
A -- rectal area, no.
Q Okay. Now when you see stab wounds on a person, multiple stab wounds, do you expect them to look exactly the same each time?
A No.
Q Why not?
A Well, you'll see a general -- a general kind of picture,

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you know. By that I mean maybe six out of 10 stab wounds will be relatively similar. Although they frequently are different -- slightly different sizes. But then the other 40 percent frequently are, you know, different shapes to some extent. It depends on how when they're -- when they're in there whether they are stabbing again and through the same wound or whether the person -- whether the wound was delivered while they were -- while there was an altercation going on which would cause a irregular wound. It also --
Q Would it cause an irregular wound because you had your hands going back and forth --
A Right.
Q -- because the person might be moving --
A Yes.
Q -- to avoid the cuts?
A Yes.
Q All right. And what else?
A And also there's a -- there's a certain amount of, you know, unfortunately there's a certain amount of frenzy that people -- that I've seen in my experience. You know, some people are very vicious with a knife, you know, and they want to do a lot of damage and they're not just stabbing they're, you know, doing all kinds of things. And other people are more goal oriented with just killing the person, you know. So

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there's so many variables but there is -- out those variables there is kind of a majority that look similar. So I don't want to -- I don't want to say that it's all just a big, you know, different thing. But there is differently variability.
Q Okay. Now showing you 264 and this is the wound we looked at before to the scrotum. Did you do any additional cutting or anything to this wound before you took this picture?
A Before I took the picture?
Q Yes.
A No.
Q And showing you State's Exhibit 268, do you recognize what's depicted here?
A That's the wound right on the front of the neck.
Q All right. Were there -- were there any -- excuse me, wounds on the right side of the neck where the carotid artery on the right side of the neck would be?
A You mean stab wounds?
Q Right.
A No.
Q Were there any -- okay.
A Not that I recall, no.
Q Now after the -- no, strike that. Dr. Laufer testified regarding the absence of hemosiderin staining or serum deposition regarding the pressure marks on the body. Do you

1 recall that?
2 A I don't -- no, I don't have an independent
3 recollection of it but --
4 Q Okay. Well, if he had testified that the histology
5 would have shown the presence or absence of hemosiderin
6 staining and serum deposition regarding the pressure marks to
7 tell if they were pressure marks or something else, do you
8 have any opinion on what this means?
9 A That's that scissor-shaped pressure mark?
10 Q That he called a scissor-shaped pressure mark,
11 correct.
12 A First of all, hemosiderin only appears after about two
13 or three days and appears because your body actually breaks
14 down iron. So that statement is nonsensical.
15 Q Okay. And what about serum deposition?
16 A And in relation to the serum, serum -- what he's
17 talking about, I assume, dried blood serum and that doesn't
18 cause pressure marks first of all. And second of all, to my
19 knowledge it -- there's no specific histologic, which is a
20 microscopic technique, that you would use to ascertain that in
21 forensic pathology. There might be a technique to use in
22 chemistry in some kind of biological chemistry but as far as -- I
23 think what I'm trying to express as far as the daily practice of
24 forensic pathology that's practiced in the United States,

1 checking a pressure mark for serum I'd never heard of it being
2 done. I've never done it and I've never read about it being
3 done.
4 Q Now, you called the marks on the abdomen pressure
5 marks?
6 A Correct.
7 Q And you recall Dr. Laufer's testimony that he called it
8 a patterned injury that looked like scissors with the shape of a
9 hand, do you recall that?
10 A Yes.
11 Q Can you leave a patterned injury on a body like that
12 from just pushing off from the body trying to get up?
13 A No.
14 Q If you're holding the hand -- the scissors in your
15 hand?
16 A Definitively not, no.
17 Q Definitively?
18 A Not.
19 Q Why not?
20 A That kind of changes in the skin only comes from
21 prolonged pressure after death. To my knowledge, I don't
22 know anybody's ever done any studies to actually find out how
23 long it takes but in my experience it would be hours.
24 Q Now showing you State's Exhibit 265, do you

1 recognize what's depicted here?
2 A Oh, that's the mouth area.
3 Q Okay. Showing how there's teeth missing?
4 A Correct.
5 Q There's some dark areas: here, here, here, here,
6 here, on this side, what are those?
7 A A lot of that's hemorrhage and some of looks like it
8 may be dried blood.
9 Q When you're saying a lot of it's hemorrhage, what
10 do you mean by that?
11 A Bruising.
12 Q Okay. So it -- these injuries inflicted before he died
13 would cause some bruising or hemorrhaging?
14 A Yes, that's what the discolorations you're pointing to
15 would be.
16 Q Okay. Now the injuries to Mr. Bailey's head, the --
17 what were they? Subdural hematomas? What were the
18 injuries?
19 A As I recall, I don't -- I don't have the autopsy report
20 with me, but as I recall there was both. There was -- there
21 was -- let me say this. There was subdural hemorrhage and
22 there was subarachnoid hemorrhage.
23 Q What's subdural hemorrhage?
24 A Interestingly enough the space between your skull

1 and your brain it's very thin, but interestingly enough there's --
2 it's actually compartmentalized. There's membrane in it so a
3 subdural means that it's in a specific compartment and then
4 right next door to it subarachnoid is in a different compartment
5 but they're both on the surface of the brain.
6 Q And so can you tell -- can you age those injuries?
7 A You can age them within -- microscopically within
8 several days. You can't age it within hours.
9 Q Okay. So you couldn't say that any of those injuries
10 were caused up to two hours before Duran Bailey's death?
11 A No, that would be beyond the scientific abilities. It
12 would just be my observation that, you know, they looked
13 contemporaneous with the rest of the injuries and that would
14 be the most I could say. But if somebody wanted to say did it
15 happen two hours or three hours or four hours, I don't have
16 the -- there's not a science that exists currently to be able to
17 answer that question.
18 Q All right. What about the one on the left side of the
19 head that was older? Is that the one you're talking about right
20 now or are you talking about the one on the back of the head?
21 A Now you're talking about in the skin?
22 Q Yes.
23 A Okay. In the skin -- starting probably about a
24 hundred years there was -- there was people that would

SIMMS - DIRECT

1 actually study skin wounds and there grew up a literature
2 about how to time skin wounds based the type of cells that
3 come into the wound after blunt force injury or sharp force
4 injury. So you can imagine that once the injury happens that's
5 time zero and then there's actually kind of a cascade of
6 different cell types -- you got more than one cell type in your
7 body, and -- that come into the wound at different time
8 intervals. So you can look at that population at a point in time
9 and say it had to have occurred -- this wound is consistent
10 with it being this old or it's -- this wound being this old. And
11 so that's the technique I used on a lot of the soft tissue
12 injuries. Now not the brain hemorrhage but on the soft tissue
13 injuries and I did feel that the one on the -- there was an area
14 on the left side that appeared to have a much more developed
15 cellular response to it than the others and that's why I thought
16 it was a little bit older.
17 Q All right. I'm going to show you Defense Exhibit
18 DDD, do you recognize what's depicted here?
19 A Those are a set of wounds I believe on the left
20 abdomen, I believe.
21 Q And these were postmortem?
22 A Yes, those -- as I recall one of them went into the
23 liver but there was hardly any hemorrhage associated with any
24 those and there's really no significant hemorrhage that you can

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1 see in some of them in the picture.
2 Q Okay. But one did go down into the liver?
3 A Yes, ma'am.
4 Q Approximately how far down was that?
5 A That would have gone probably at least four inches.
6 Q All right. Now do you have an opinion or not
7 whether these four injuries were caused by stabbing twice with
8 an open pair of scissors?
9 A To me the weight of the evidence and the weight of
10 my experience would say no.
11 Q Okay. Now I want to zoom in on one of these
12 injuries. Okay. Do you see this dark area here inside the
13 wound?
14 A Correct.
15 Q What's that?
16 A That's the wound. That's a wound track.
17 Q Okay. Is that consistent with a knife?
18 A Well, it does have -- if you notice it has a blunt edge
19 at one end and kind of a sharper edge at another end. And,
20 you know, I wouldn't have any problem saying that, that it
21 definitely -- that particular part of the wound would be -- could
22 be consistent with a knife and then if -- then if you moved
23 back outwards and you see a blunt -- oh, not that far.
24 Q Oh, sorry. Okay, is that better?

SIMMS - DIRECT

1 A And you see a blunt -- a blunt -- kind of a blunt area
2 here and then you see this nice sharp area here, you know,
3 but those two things together and I would say it's -- you know,
4 it's a high probability that it's caused by a single edged
5 instrument -- knife.
6 Q And with regard to if scissors were used in an open
7 fashion to cause these two injuries here together, would you
8 expect the scissors to, from the way the wounds are, to go in
9 equal distance each side of the blades?
10 A Yes, I would. There -- if you -- if you look at those
11 individually and this picture is good for three of them. This
12 one you can't see very well, I think there might be some other
13 pictures. But if you study those -- I certainly did not reject
14 that hypothesis of Dr. Laufer outright but if you start studying
15 those and looking at those there's so much dissymmetry and a
16 lack of lining up and you got one wound that's curving, that's
17 kind of going that way. You've got this wound, you have this
18 wound that's kind of going this way, and then this wound is
19 going this way. To me there's enough dissymmetry to them
20 that it doesn't fit. I would expect if they were made by
21 scissors that they would be, you know, fairly well lined up and
22 they would be fairly symmetrical. That would be my opinion.
23 Q Would they also -- they would -- would each blade
24 also go in the same depth?

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1 A Well, one -- probably would -- on a probability would
2 expect it but I could see if we hypothesize this that maybe one
3 was, you know, torqued on further that would actually
4 penetrate further. One, one blade rather than the other one.
5 But --
6 Q Would you expect the other wound to be more
7 elongated if the blade was turned sideways?
8 A Excellent point. You know, you're asking questions
9 that, you know, you just don't see any, you know, open scissor
10 wounds, you know, for me to call on my experience and I
11 would just -- I would -- I would just go back to what I said
12 before is I would expect more symmetry. That would be
13 about -- that would be about the best I could do.
14 Q And the wounds on the face that you talked about
15 that were incised wounds, I believe, on the forehead, on the
16 chin, there weren't any blunt force lacerations on the -- Mr.
17 Bailey's head were there?
18 A Not that I could see, no. No, not -- like I said, I
19 think I already talked about this before is I go -- I open the
20 wounds up and look for tissue bridging and I'm only going to
21 call 'em an incised wound or a stabbed wound if I don't see
22 the tissue bridging.
23 Q What about Mr. Laufer's or Dr. Laufer saying that "It
24 would be easier to cut a penis off with a pair a scissors than a

knife," do you have any opinion on that?

A Well, the only way -- in my opinion the only way that you could cut a penis off with a pair of scissors it'd have to be like a set of garden shears, you know, that are -- you know, that have 14-inch blades or 12-inch blades or something like that. You could probably do it and then you'd have to have help.

Q And why would you need help in --

A Well, you'd have to --

Q -- blades that big?

A -- you'd have to try to cut through this skin and somebody else would have to be elongating the penis in order to do it. But with a knife it's just -- you know, I mean I -- and based on my experience with dealing with sexual mutilation before I've never seen anybody use shears or scissors to do it. It's been basically a knife.

Q Is the -- is the skin hard to cut through?

A Well, it's not easy to cut through. You know, I don't know whether I could quantitate it but -- and unfortunately I may be the only one in the room that's actually, you know, cut through skin -- human skin on a regular basis. And I can just tell you that the moment a scalpel blade gets dull it becomes very very difficult and that's a scalpel blade. You know, when you start getting into thicker blades they have to be -- they

have to be very very sharp in order to cut the skin, so.

Q And you -- when you say "thicker blades" would you call scissors thicker blades?

A Oh, yeah. You know, scissors is thick blades. You know, kitchen knives have thicker blades. You know a scalpel blade is -- it's like a razorblade for -- if you -- may be there's not people old enough to remember razor blades, some people I think might be. But it's actually has the same thickness of a razorblade if you remember the old kind of razor blades. That's what a scalpel is and that cuts through the skin fairly easily except as soon as it gets dull it doesn't. So, you know, a thicker blade is going to be even harder.

Q Would you ever equate trying to cut through penis tissue with the same as cutting through sausage?

A Well, you know, this is -- this to me was the fact is. Is the fact is is that that penis was cut not right through the penis, it was cut on the tissue around the penis and that's -- when you -- when you elongate the penis there's -- that's going to be -- that's going form kind of a paramable [sic]-- paramatable [phonetic] shape. You know there's going to be a tube which is the penis then it's going to be kind of a mound. And I would think that if you cut through the penis it would be more similar to a sausage but actually fact that was cut through a mound of tissues, a mound of skin at the base,

and, you know, that's different than a sausage.

MS. DiGIACOMO: Nothing further.

THE COURT: Cross.

MR. SCHIECK: Thank you.

CROSS-EXAMINATION

BY MR. SCHIECK:

Q You were shown a number of photographs.

MR. KEPHART: Would you like these?

(Off-record colloquy)

BY MR. SCHIECK:

Q And you were asked on Defendant's DDD questions and you indicated that you did not reject the testimony of Dr. Laufer, that it could have been the scissors -- open scissors that caused those wounds?

A Yes, I just want to say that that was an interesting hypothesis and I definitely didn't reject it outright and I don't think in my mind that I can say it's absolutely impossible. But to me, as I think I stated before, it seems to me the probability that it was -- that it was not a pair of open scissors.

Q And that's based in part, if I understand your testimony, on the nature of the wounds not being totally symmetrical?

A That would be probably the major - the major reason.

Q Now this portion of Mr. Bailey's body is on his abdomen, is that correct?

A Well, it's actually kind of on the side so there's a curvature to it.

Q Okay. So there's a curvature to the location where the wounds are inflicted and that could impact on whether or not there's a symmetry to the wounds, the fact that it's a curved surface?

A Excellent point. Yes. If it was flat surface then you'd expect more symmetry but on a curved surface there may be some dissymmetry, yes.

Q And there's other variables that may go into the symmetricalness, if that's a word, of the surface depending on the way the body is positioned at the time is wound is inflicted. Laying on his side as opposed to his back, things of that nature?

A Things of nature, yes.

Q And Dr. Laufer testified to some of the dynamics concerning scissors where not all the time will one blade go in exactly at the same rate the other blade goes in depending upon angle and the -- perhaps the resistence that's hit by one blade as opposed to the other. Those things could impose the symmetry of the wounds, correct?

A Yes, I actually talked about that one on direct. Yes.

SIMM - CROSS

1 Q Okay. Now you don't have any training in injury
2 reconstruction, correct? You're a pathologist?
3 A Well, if -- and I'm not trying to be evasive but if you
4 mean if I'm asked on a regular basis how wounds how
5 occurred I -- on a body, I am asked that on a regular basis.
6 But if you talking about in relation to a motor vehicle accident
7 or something then it becomes -- I haven't had any specific
8 training in that, no.
9 Q Okay. And you indicated that you had limited
10 experience with stab wounds from scissors?
11 A Definitely.
12 Q I mean have you had cases where you've done
13 autopsies where the cause and manner of death was a pair of
14 scissors?
15 A Yes, I was -- I think I was -- I know I was asked
16 that recently. I think it was by one of the prosecutors and I
17 tried to go back over my mind. I've done 5,000 autopsies and
18 I probably say probably about five or six of those had scissor
19 wounds over a period of, you know, a number of years. So it
20 definitely has not been very many.
21 Q So it's fair to say it's limited experience in your
22 autopsy experience?
23 A Oh, I would say five or six is limited experience. Of
24 course I would have say there's probably not a lot of

SIMM - CROSS

1 pathologists that have, you know, extensive experience in
2 scissor wounds cause they're not used that often.
3 Q So it's not a common manner of death that you see?
4 A No.
5 Q At least that you identify?
6 A Not that I see, no. It's very uncommon.
7 Q Okay. You've talked about the fact that you believe
8 that the incised wounds or the lacerations were caused by a
9 knife?
10 A Yes.
11 Q You're not quantifying what knife or what type of
12 knife it was just it appears to be a single-edge knife blade?
13 A I think I was actually asked about that. I don't think
14 I was on the stand but somebody asked about that prior to the
15 trial and actually I remember going back and measuring the
16 wounds and there was actually a little bit of dissymmetry in
17 the size of the wounds. So I would -- I would agree that I
18 think the best thing that I -- you know, that I would want to
19 say is that it's -- it appears to be a single-edged weapon.
20 Q And there's a -- there's a lot of different kinds of
21 knives that could have caused this type of wound if in fact it is
22 a knife wound?
23 A Definitely.
24 Q So you're not -- you're not pinning your opinion

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1 down to any specific type of knife?
2 A No.
3 Q And you would agree that reasonable minds can
4 differ between experts?
5 A In relation to forensic issues?
6 Q Yes.
7 A Definitively, yes, they can.
8 Q Now you were shown some additional photographs
9 of the -- of the mouth opened up so we could see some
10 bruising on the lips. I believe when you testified the first time
11 you'd indicated there really wasn't much of an indication that
12 you could base an opinion that a bat was used to knock the
13 teeth out? Is that still correct?
14 A Yes. I -- just to make sure I understand is it, yeah,
15 I wouldn't look at that mouth injury and say it was caused by a
16 bath -- bat or not caused by a bat. Is that --
17 Q That's sort of where I was going.
18 A Okay.
19 Q And if a bat had caused it you perhaps would expect
20 to see more traumatic injury to the lips area?
21 A In my opinion, you know, if it was swung in a lethal
22 manner to do damage you would expect a significant amount
23 of fracture both on the lower jaw and the upper jaw to go just
24 with the teeth.

SIMM - CROSS

1 Q And you talked today again about the injuries to the
2 head and the -- and the timing of the -- of the wounds or the
3 impacts to the head. Is it still your opinion that there
4 appeared to be one trauma to the head that was older than
5 the other?
6 A Yes, based on -- based on only the microscopic
7 analysis which I -- which I have fairly good confidence in. It
8 did look like it has -- had was older. That it had had time to
9 react.
10 Q Okay. Are you able to quantify that time at all?
11 A I don't -- I don't have my autopsy report but I
12 believe it was something on the other of a few hours and that
13 would be the extent of it. It wouldn't be like 12 hours or 18
14 hours, be just a few hours.
15 Q What can you tell us other than it was a few hours
16 earlier than the injury that caused the fracture?
17 A I don't know when the fracture was caused so
18 unfortunately I took a number of sections and I tried to -- I
19 tried to do the best I could to try to get an idea but that was --
20 that was as far as I could take it.
21 Q And nothing in the photographs that you've looked
22 at here today, the additional photographs you've looked at
23 changed your opinion concerning the fact that it does not
24 appear that a bat would be a likely instrument to cause the

1 injuries that you saw to the head?
2 A Yes. I would have -- I would have -- if somebody
3 would have just showed me that, you know, a bat wouldn't
4 have been on my mind to have caused those injuries. There
5 wasn't any -- a pattern there that would, you know, that would
6 have moved me toward that direction.
7 Q And you indicated you were present during the
8 testimony -- at least part of the testimony of Dr. Laufer?
9 A Yes.
10 Q Okay. And you were called back to testify in rebuttal
11 today?
12 A Correct.
13 Q Did you prepare any additional report or any
14 additional findings?
15 A No, I didn't. No, as a matter of fact the only time
16 I've talked to the prosecutor was last night when she called
17 me.
18 Q Did you talk to them when you were here in Court
19 and watched Dr. Laufer testify?
20 A Yes, at the break I was asked some questions about
21 some of the testimony. Yes.
22 Q Before they began their cross-examination?
23 A Yes, that was after -- that was after direct. Yes.
24 Correct.

1 Q Okay. And I believe that's it.
2 MR. SCHIECK: No further questions, Your Honor.
3 THE COURT: Redirect.
4 MS. DiGIACOMO: Thank you.
5 **REDIRECT EXAMINATION**
6 BY MS. DiGIACOMO:
7 Q With regard to the skull fracture that's on the left
8 side of the head, if I have your testimony right you can't say it
9 was caused when the hemorrhaging on the left side -- the
10 injury to the left side of the head was caused or if it was
11 caused at the time of death?
12 A That's correct. There's no -- there's nothing that ties
13 that older left injury to that skull fracture. I -- it could have --
14 it could have been at the same time, it could have been after.
15 I don't know.
16 Q Okay. And when you're talking about somebody
17 swinging a bat with lethal force what do you mean by that?
18 A I mean if you've ever played baseball that's what I
19 mean. I don't -- I don't mean, you know, tapping them on the
20 head to get their attention. I mean you're swinging it to kill
21 them.
22 Q Okay. So you're swinging it full force as hard as you
23 can do it?
24 A Correct.

1 Q Okay. But if they're swinging it with less than lethal
2 force would it be possible to knock teeth out and not break
3 part of the jaw?
4 A Yes.
5 Q You testified that you don't believe a bat would
6 cause the skull fracture on the left side of the head because
7 there's no indentations with it?
8 A Correct.
9 Q Okay. But it would be possible if somebody hit the
10 person with a bat in the head and knocked them over, that
11 skull fracture could have been caused from falling on a curb or
12 another hard surface?
13 A Correct.
14 Q And you said you've done approximately 5,000
15 autopsies in your career?
16 A Correct.
17 Q And you've seen scissors used to kill those persons
18 in approximately five to six cases?
19 A As I can recall, yes.
20 Q And that's over 13 years?
21 A I started doing forensic cases in '91 so that's 15
22 years.
23 Q Fifteen years. Excuse me. But when you saw these
24 five to six cases over your 15 years when the scissors were

1 used as the weapon was it as you talked about before as a
2 stabbing tool?
3 A Yes. Yeah, I've never seen one used as a weapon
4 with it -- with it being open.
5 Q Okay. So it was the big round, as you said, blunt
6 incised wounds that you saw from the scissors?
7 A Stab wounds, correct.
8 Q Yet you didn't see any stab wounds in any of those
9 five to six cases like we have here on the abdomen?
10 A With them -- with the hypothesis that they were
11 open?
12 Q Correct.
13 A No, not that I recall. No.
14 Q And defense counsel asked you isn't it true
15 reasonable minds can differ with regard to forensic issues --
16 A Yes, it is.
17 Q -- correct?
18 A Yes, it is.
19 Q And they can?
20 A Yes, they can.
21 Q Have you ever known a forensic pathologist to
22 mistake a blunt force laceration for an incised wound or vice
23 versa?
24 A That should be -- that should not happen too often

because that should be in the -- in the basic abilities. I mean because that's a key kind of core issue so to speak of forensic pathologists. So I mean it can happen, I don't -- and I don't think you're trying to say it can't happen at all but it could happen but that should be within the purview of any forensic pathologist to be able to differentiate that.

Q So that's just basics of being a forensic --

A Correct.

Q -- pathologist to know what tissue bridging is and to know the difference between a cut wound and a tear wound?

A I -- right and another way to answer is you don't need to do 20,000 autopsies to be able to tell that. That's something you're trained at from the first autopsy you start. And within a few autopsies you should be able to tell that, you know, with a -- with a fairly accurate ability.

Q And you said with regard to the wounds on the abdomen that you cannot reject it outright that scissors could have caused those wounds, correct?

A That is correct. No, I think that's a reasonable hypothesis to be considered, yes.

Q It's a reasonable hypothesis but it's not probable based on your experience, is it?

A It's a reasonable hypothesis but the conclusion that I would take after considering it as a reasonable hypothesis was

that it doesn't fit the wounds. So my conclusion even though I would have considered that reasonable, it doesn't fit the wounds. I can't exclude it but it doesn't fit the wounds.

Q Would it be a reasonable hypothesis to think that the carotid artery and the wound to the neck was caused from snipping motion of a scissors?

A That would starting to move into the extremely unreasonable hypothesis.

Q Okay. So --

A And I think as I recall, I'm trying to reconstruct my thought process, when I was told that I did reject that outright because that doesn't make any sense.

Q And nothing you've learned or heard since then even remotely gets you to reconsider that?

A No. It's -- it makes -- it doesn't make forensic sense to me and I'm not -- no, I don't -- I don't see it.

Q What about did you reject outright the possibility that a pair of scissors cut off the penis at the base the way you described?

A No, I didn't reject that outright. I looked at that and tried to think through that but that -- it was -- it was easy -- it was a quicker -- a quicker read for me after reviewing the photos and looking at it and looking at the wound that I would say that again the only thing that came to mind would be a

large, you know, hedge shears or something like that that could do that and --

Q Well, it was a pretty clean wound, wasn't it?

A And then -- and then --

MR. SCHIECK: Objection, leading, Your Honor.

THE COURT: Sustained.

BY MS. DiGIACOMO:

Q Okay. Go ahead. You were talking about the conclusion you drew with regard to scissors being used on the wound -- on the penis?

A Right. Is that the only possibility I could think of would be head shears or some large garden shears that could do that as I recall what I thought.

Q The injury or where the penis was amputated, what did the wound look like?

MR. SCHIECK: Objection, asked and answered, Your Honor.

THE COURT: Sustained.

BY MS. DiGIACOMO:

Q With scissors, if scissors were used to attempt to cut off a penis at the base what would you expect that wound to look like?

A Based on again my knowledge of dissecting tissue I would think it would be a very irregular -- a highly irregular

wound where it took -- it took a long -- it took a while to do it.

Q So it'd be --

A Not only to cut through the skin, which is a very tough thing, then you have to go through and cut all -- cut through all the soft tissue. I would think it would be kind of a long process myself personally. Now, I've never -- I want to make it clear I've never -- I've never even in the course of my medical career I've never had to amputate a penis so I don't really know that. But that's just -- that's just my inference.

Q And when you were talking about that you were holding up your left hand as if holding up the penis and making multiple open and shut gestures with your right hand as if it -- you were cutting a piece of paper, not one snip to get it off?

A Yeah, for handheld scissors I mean I -- we're assuming that it's handheld scissors. It's not two-hand scissors, one hand. I mean they could only open so far. Your fingers can only open so far and, you know, that would be the only way that I think you could do it.

Q Now would you -- I know you didn't reject it outright that scissors could have been used to amputate Mr. Bailey's penis, do you have an opinion on that now? Is it a reasonable hypothesis that scissors were used?

A You're asking my opinion about whether it was a

reasonable hypothesis. I would have to go back to what I thought before is that I didn't reject that outright. I thought, okay, let me think about that for a moment but, you know, it took me a shorter period of time to reject that rather than the wounds on the abdomen.

MS. DiGIACOMO: Nothing further.

MR. SCHIECK: Just one, Your Honor.

THE COURT: You may.

RECROSS EXAMINATION

BY MR. SCHIECK:

Q You had talked about a pair of scissors opening. The size of the hands of the individual would determine how far the scissors would open, is that correct?

A Yes. Yeah, my -- right, somebody with a big hand could really open them really wide. Sure.

MR. SCHIECK: Nothing further, Your Honor.

MS. DiGIACOMO: Nothing.

THE COURT: Mr. Bailiff.

(Pause in the proceedings)

THE COURT: Counsel approach.

(Off-record Bench Conference)

THE COURT: Dr. Simms, the Court has two questions that have come from the jury to read to you. Could a kick "s" to the face/mouth cause the damage to the head

and mouth of Duran Bailey?

THE WITNESS: To the mouth it definitely could have knocked the teeth out and everything. And I assume by the head you mean the skull fracture rather than the incised wounds and I would say, yes, that could cause a skull fracture. Sure. And the bleeding on the surface of the brain, that could -- that could all be due to that, yes.

THE COURT: How long would a knife blade have to be to cut the penis off at the base at a single smooth cut?

THE WITNESS: I would probably say that that's going to be at the minimum of four inches and probably it, you know, it would be definitely easier if it was about six inches long. But it would be somewhere in that as a minimum.

THE COURT: Follow up by the state?

FURTHER REDIRECT EXAMINATION

BY MS. DiGIACOMO:

Q In this case was it one smooth single cut to amputate the penis?

A It looked to me like it was. If you -- and of course, I'd leave it to anyone to look at the pictures, it's a -- it's a -- it's a -- the edges are relatively sharp and uniform so I would say it probably was. Or at the most there might have been an readjustment halfway through it or something like that, that would be the extent of it.

MS. DiGIACOMO: Your Honor, may I approach the clerk?

THE COURT: Yes.

(Pause in the proceedings)

MS. DiGIACOMO: Can we approach so we can look together, Your Honor?

THE COURT: Yes.

MS. DiGIACOMO: Too many photos.

THE COURT: What's the Court's next in number?

THE CLERK: 85.

THE COURT: The first question posed will be Court's 85 and the second, Court's 86.

(Pause in the proceedings)

MS. DiGIACOMO: Okay, Your Honor?

THE COURT: Yes.

BY MS. DiGIACOMO:

Q Okay, I've got State's Exhibit -- State's Exhibit 80. Do you recognize what's depicted here?

A Yes, that's the amputation wound at the base of the penis.

Q Okay. Does it look whether or not there's possible another start and stop point on this?

A In this area looks smooth. There -- looks like there might be a --oops.

Q Oh, I'm sorry, it's too high up. Okay, go ahead.

A This area here looks like there might be a little jog here but I would question whether -- well, I just want to leave it at that. Looks like --

Q Okay.

A -- there might a little jog there.

Q So it's possible there was one readjustment?

A Based on that picture, yeah.

Q Okay. But the rest of it look like a fairly clean cut?

A Correct.

MS. DiGIACOMO: Nothing further.

THE COURT: Follow up by defendant's counsel?

MR. SCHIECK: Yes, Your Honor.

FURTHER RECROSS EXAMINATION

BY MR. SCHIECK:

Q Would -- you had indicated earlier that it's your opinion that this probably was a holding up of the penis and a slice was made. You've described the blade as being a minimum of six inches, correct?

A Four would probably be the very minimum but I would think it would more probably at least six inches as a minimum.

Q Would the manner in which the penis being held, the impact, the type of cut could cause what you saw in that last

picture?

A I could be, yes.

MR. SCHIECK: Thank you, nothing further.

THE COURT: Anything further by the state?

MS. DiGIACOMO: I'm sorry, just so I'm clear on this.

FURTHER REDIRECT EXAMINATION

BY MS. DiGIACOMO:

Q The minimum blade that you would expect to be used is four inches?

A The very minimum, correct.

Q Okay. Up to six inches?

A I would -- I would -- I would think it's probably more probable it was a longer blade in the six inch range based on the cleanness of the cut. But, you know, I -- it might be -- it might take a -- down as low as four.

MS. DiGIACOMO: Nothing further.

MR. SCHIECK: Nothing further.

THE COURT: Okay. You may step down from the stand.

MR. SCHIECK: May we approach, Your Honor?

THE COURT: Yes.

(Off-record Bench Conference)

THE COURT: Ladies and gentlemen, we'll be taking

our evening recess and resuming tomorrow at 1:00 o'clock. As I mentioned earlier dependent upon how the jury elects to conduct their deliberations you may wish to plan to be staying late tomorrow.

During the evening recess you're admonished not to talk or converse among yourselves nor with anyone else on any subject connected with the trial and you're not to read, watch or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information including without limitation newspaper, television, radio, and Internet. And you're not to form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

We'll see you tomorrow at 1:00 p.m. in the hallway. The bailiff will meet you there to return you to your seats. The jury may exit.

(Jurors recessed)

THE COURT: And we'll go off the record.

COURT ADJOURNED AT 5:00 P.M. UNTIL THURSDAY, OCTOBER 5, 2006 AT 1:00 P.M.

* * * * * * * * * *

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Transcript filed in District Court, Case No. C177394 does not contain the social security number of any person.

Kay McCrea
Transcriber

4/29/07
Date

* * * * *

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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CLARK COUNTY, NEVADA

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CLERK OF THE COURT

THE STATE OF NEVADA,	)	
	)	
	)	CASE NO. C177394
Plaintiff,	)	
	)	
vs.	)	
	)	DEPT. NO. II
KIRSTIN BLAISE LOBATO,	)	
	)	
Defendant.	)	Transcripts of Proceedings

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT COURT JUDGE

"ROUGH DRAFT"

JURY TRIAL - DAY 19
VOLUME XIX

THURSDAY, OCTOBER 5, 2006

COURT RECORDER:

LISA LIZOTTE
District Court

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INDEX

NAME	DIRECT	CROSS	REDIRECT	RECROSS
DEFENDANT'S WITNESS				
Douglas Twining	29	53	78	82

* * * * * *

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1 LAS VEGAS, NEVADA THURSDAY, OCTOBER 5, 2006
2 **PROCEEDINGS**
3 PROCEEDINGS BEGAN AT 11:08:40 A.M.
4 (Jurors are not present)
5 THE COURT: The record shall reflect that we're
6 convened outside the presence of the jury in State versus
7 Lobato, under C177394. That Mr. Kephart is present for the
8 State and that all three defendant's counsel are present.
9 MR. SCHIECK: We'd ask that you waive the
10 defendant's presence for the settling of instructions, Your
11 Honor.
12 THE COURT: Granted. And it looks like I've got a
13 new set. I had placed a phone call to Mr. Schieck and Ms.
14 DiGiacomo this morning about a couple of typos that were in
15 the draft set from yesterday and it appears that those have
16 been revised.
17 MR. KEPHART: Appears there may be another typo
18 and another one that Mr. Schieck found.
19 (Pause in the proceedings)
20 MR. KEPHART: Your Honor, also with the packet
21 that you have and the old packet, there was two additional
22 ones that we put on the back.
23 THE COURT: Right.
24 MR. KEPHART: And I didn't include them in that

1 packet, so if you have the old ones it'd be --
2 THE COURT: I do.
3 MR. KEPHART: Okay.
4 THE COURT: Those were the ones to -- one of them
5 would be given if the defendant requested it.
6 MR. KEPHART: Correct.
7 THE COURT: It's the Fifth Amendment ones.
8 Okay. Did you find a typo, Mr. Schieck?
9 MR. SCHIECK: Yes, in the deadly weapon
10 instruction that's towards the --
11 MR. KEPHART: Right in the middle?
12 MR. SCHIECK: -- more than halfway through. I
13 don't --
14 THE COURT: The State is not required to recover
15 the deadly -- or the one that defines a deadly weapon?
16 MR. KEPHART: Yeah, it starts out deadly weapon in
17 quotes.
18 THE COURT: Probably be the one right before that
19 then. Deadly weapon means?
20 MR. SCHIECK: It's just about halfway in, second
21 line, do you have it, Your Honor?
22 THE COURT: Yes.
23 MR. SCHIECK: Or is like to cause, I think that's
24 suppose to be or is likely to cause.

1 MR. KEPHART: Likely to cause.
2 THE COURT: Likely to cause.
3 MR. SCHIECK: And the rest -- I'm not sure this is --
4 THE COURT: Let me see if it's right in the other set
5 or if --
6 MR. SCHIECK: No, it's not. I'm looking at the other
7 set.
8 THE COURT: The other one is wrong too? Okay.
9 MR. SCHIECK: I was gonna ask you to look at the
10 statute on that instruction also, Your Honor. And I just know
11 the number of the statute.
12 THE COURT: I think that's actually case law.
13 MR. KEPHART: Well, part of it is, because after the
14 *Zombic* [phonetic] case, there was a lot of issues as to the use
15 of a weapon or in the manner in which it's used. And, so if
16 you look at this instruction there's two different concepts
17 they're talking about. They're talking about one that is
18 designed, the -- the design is contemplated for the use to
19 cause substantial bodily harm or death. And then the other
20 one is device instrument material or substance under the
21 circumstances in which it's used, attempted to use or threaten
22 to use is readily [sic] capable of substantial bodily harm or
23 death. That's contemplating -- there's both statute and case
24 law on that.

1 MR. SCHIECK: The case law that was superceded
2 by the statute, which was designed to alleviate the design
3 issue that came up in *Zombic* and I think that the -- starting on
4 line 4 language with any weapon is actually the language of
5 the statute. Deadly weapon means any instrument which if --
6 any weapon, device, instrument, material and continuing to
7 the end.
8 THE COURT: Do you have -- you have the cite?
9 MR. SCHIECK: I sure don't, Your Honor, I'm sorry.
10 I don't have it off the top of my head.
11 MR. KEPHART: I don't know it either. I know there
12 was some cases after *Zombic*, 'cause they were -- that was the
13 cause of the statute change, but I don't -- I don't know it.
14 MR. SCHIECK: I can check the statute during the
15 break, Your Honor.
16 THE COURT: Okay. So we need to get that typo
17 corrected. I'll have the JEA type it up. Get that corrected and
18 then there's one in the old packet that starts, "the fact that a
19 witness has been convicted of a felony".
20 MR. KEPHART: Mm-hmm. That should be in this
21 one as well. Yeah, it is. It's about 2/3rd of the way in the
22 packet. The reason we offered that, Your Honor, is because
23 Mr. Pyszkowski is felon and he testified that he's a felon.
24 THE COURT: Okay. That's right.

1 MR. KEPHART: I mean it was offered last time
2 because of Katrina Martin, but -- and there was no other felons
3 at the time, but Steve is now, so.
4 THE COURT: Okay. Are there any of the State's
5 proposed instructions that the defense is objecting to?
6 MR. SCHIECK: Your Honor, there's an instruction
7 that's towards the back that indicates -- it talks about not
8 being here to determine the guilt or innocense of anyone other
9 than the defendant. And it's out position that there's no
10 evidence of anyone else involved that's been presented by the
11 State and therefore it would improper to give that instruction
12 implying that there was. It starts with "You are here to
13 determine the guilt or innocense of the defendant". It's pretty
14 close to the end.
15 MR. KEPHART: It's about eight -- eight from the
16 end.
17 THE COURT: Okay. Five, 6, 7, 8. I've got the
18 evidence which you are to consider.
19 MR. KEPHART: Go one more.
20 THE COURT: Okay. There we are.
21 (Pause in the proceedings)
22 MR. KEPHART: Well, Your Honor, first of all the
23 defendant's own expert had testified that this -- this case
24 involved multiple assailants in his --

1 THE COURT: Mr. Turvey.
2 MR. KEPHART: Mr. Turvey did. Second, the jury
3 had asked the question that was objected to as to being
4 outside the scope of rebuttal on Detective Thowsen's about
5 Doug's car being searched. And also there was a question
6 asked by the jury as to Jeremy Davis, whether or not his place
7 was searched. So there is some questioning about whether or
8 not there was anybody else involved here and they're
9 specifically instructed with this instruction they're not to
10 consider that for purposes of guilt and innocense in this case.
11 And it's a stock instruction that we always give because there's
12 always that chance that a jury may thing other people are
13 involved. Even if there isn't any evidence to support that,
14 there's always that chance that they're thinking that, hey,
15 they, you know, he could have done it with someone else or is
16 there somebody else involved here. That's not what we're
17 here for, we're here to determine the guilt or innocense of Ms.
18 Lobato, not anyone else. So they're not to determine that.
19 MR. SCHIECK: Your Honor, I think his argument
20 pretty much concedes there is no evidence. There may have
21 been a couple of inquiries from the jury that they're curious
22 about why certain things weren't done in the investigation of
23 this case. That certainly neither one of those question, which
24 aren't evidence in the case, indicated anything about the guilt

1 of either Mr. Twining or Mr. Davis. In fa[illegible]ney want to know
2 about Mr. Davis' house because of the testimony that the car
3 was left there, according to Blaise's statement and according
4 to Mr. Davis it was left there over Memorial Day weekend. Not
5 because he was involved in anything that happened on July
6 8th. Quite a quantum leap of reasoning that because the car
7 was at his house on May -- or Memorial Day in May that he
8 was involved in something on July 8th. Likewise, with Mr.
9 Twining there's absolutely no evidence of his involvement in
10 anything having to do with the death of Duran Bailey. Mr.
11 Turvey said one or more people could have been involved. He
12 didn't say it was definitely more than one, he said one or
13 more. So I would ask that the Court not give this instruction.
14 It just invites the jury to speculate as to things that there's no
15 evidence of.
16 MR. KEPHART: Well, this -- this tells 'em not to do
17 that, so.
18 MR. SCHIECK: But it's like telling somebody, you
19 know, whatever you do don't look over there, you know, it's
20 like the first thing you want to do is look over there.
21 THE COURT: The questions that Mr. Kephart
22 referenced that came out from the jury came out because of
23 various facts and circumstances that have been put before the
24 jury and I do recall that testimony from Brent Turvey as well,

1 so the Court overrules the objection. The instruction is
2 appropriate to be given in this case.
3 The deadly weapon instruction has been retyped.
4 You know what, the spacing on it is different.
5 MR. KEPHART: I can -- I can have it redone, Judge,
6 on our font.
7 THE COURT: Richard, it looks like she's got it like
8 triple spaced instead of double spaced. See how it --
9 THE COURT: Any other one?
10 MR. SCHIECK: Just double checking, Your Honor. I
11 had a question about the language on the sexual penetration
12 of the human body instruction, there's two of them. One of
13 which gives the definition of sexual penetration and that's
14 somewhere in the middle.
15 MR. KEPHART: It's about four --
16 THE COURT: It's right after the self-defense.
17 MR. SCHIECK: The one after the definition, it starts
18 out with "Plain meaning of the relevant statute. I don't
19 recognize that as being any jury instruction language to begin
20 with. If the intent is to inform the jury that motive is not an
21 element of sexual penetration of a human body -- of dead
22 human body, I think we can phase it in such a way without
23 starting with "Plain meaning of relevant statute", there's no
24 reference to what statute they're talking about. So I would

1 ask that it be changed or amended to just merely indicate that
2 motive is not an element of the act of sexual penetration of
3 dead human body and leave it at that. Of course we've
4 already got the instruction that tells that motive is not an
5 element of murder.
6 (Pause in the proceedings)
7 THE COURT: Motive is not an element of the crime
8 of sexual penetration of a dead human body?
9 MR. SCHIECK: Yes.
10 THE COURT: Does the state agree to that
11 substitution?
12 MR. KEPHART: I'm trying to -- I remember when
13 we discussed this last time. I'm trying to remember what it --
14 MR. SCHIECK: I think last time there was a huge
15 Objection to the entire statute being vague and ambiguous.
16 There was a lot of discussion of it.
17 MR. KEPHART: Well, there was in this area,
18 because, see the -- it's almost like a strict liability type of thing
19 and -- and so, I mean you don't have to prove what her
20 reasons for it were. All you have to do is prove that the -- that
21 it occurred and -- and that's the purpose of the statute, is
22 you're punishing the act versus the reason for it. And so, I
23 mean we argued was the plain meaning of it is to punish the
24 penetration of a dead human body, regardless of what you

1 believe caused her to do it or caused him to do it. And I think
2 that's cleaner than just motive is not an element. I know -- I
3 mean, we don't have to prove motive into anything, you know,
4 it's just -- it's just a -- I thought it was more -- it's understood
5 better by the way it reads now.
6 MR. SCHIECK: I don't think there's any plain
7 meaning to the statute.
8 MR. KEPHART: Well, that's exactly the meaning of
9 the statute.
10 MR. SCHIECK: Maybe that's the objection I've got.
11 MR. KEPHART: Yeah. But that is the --
12 MR. SCHIECK: I agree there's no motive
13 requirement.
14 THE COURT: The purpose of the statute?
15 MR. KEPHART: Yeah, that -- that's --
16 MR. SCHIECK: For purposes of the statute I don't
17 think -- I don't think motive is an element of the crime. I think
18 they're right on that. It's a general intent crime.
19 MR. KEPHART: So if you reads the purpose of the
20 statute is to punish the act of sexual penetration to a dead
21 human regardless of motive says the same thing. I mean, I
22 don't -- I can't remember what Phil and Gloria, and we were
23 arguing about with this, but I remember that there was some -
24 -- quite discussion on that and I'm thinking that we were -- we

1 agreed on the plain meaning of the statute, but I think it reads
2 the same if you say the purpose of the statute is to punish the
3 act of the sexual penetration.
4 THE COURT: Do you like that language better?
5 MR. SCHIECK: Well, I -- I -- I don't think the
6 purpose of any statute is to punish. The purpose of statute is
7 set for our laws to be followed.
8 MR. KEPHART: Well, that's kinda what the
9 argument --
10 MR. SCHIECK: I think it's up to the -- whatever
11 body is in charge of doling out punishment. I mean if you're
12 convicted of a crime, it's the Court's determination of what's
13 punishment is going to be.
14 THE COURT: The purpose of the statute is to deter?
15 MR. SCHIECK: That would -- that's better than
16 punish.
17 MR. KEPHART: That -- okay, plain meaning or the
18 purpose or however you want to say it, that's -- that's -- I
19 guess that's fine.
20 (Pause in the proceedings)
21 THE COURT: And motive is not an element of that
22 crime?
23 MR. SCHIECK: That's fine.
24 (Pause in the proceedings)

1 THE COURT: Okay. We'll have that one typed up.
2 Any others?
3 MR. SCHIECK: Other than the alibi, we had offered
4 an alternative to their alibi instruction. Does the court want to
5 hear argument on that at this time?
6 THE COURT: Do you have that typed up for me?
7 MR. SCHIECK: Yes. With the change as to time and
8 place.
9 THE COURT: Okay. That was a typo we discussed
10 on the phone. Let me just -- I know she typed it up for me,
11 so.
12 (Pause in the proceedings)
13 MR. KEPHART: Okay. Thanks.
14 MR. SCHIECK: It just changed right there.
15 (Pause in the proceedings)
16 THE COURT: and you want this one put in place of
17 the one that the State's got that starts "A, quote, "alibi"
18 unquote, "amounts to".
19 MR. SCHIECK: Yes, Your Honor.
20 THE COURT: Does the State have any opposition?
21 MR. KEPHART: We do, Your Honor. The first
22 sentence in their instruction I believe is argument to the point
23 where they're telling the jury that -- that what they have
24 produced or what they're -- what they have given, because

1 this is what you'd be telling the jury is that there is evidence.
2 They're making an argument that this is evidence and explains
3 to the jury why -- I mean it tells the jury that this is evidence
4 that, yeah, that they gave to you that you have to determine
5 whether or not the defendant was here or not. In the case
6 that we -- I mean in the instruction we give to you, we just
7 basically alibi. We're not going so far as to saying that they
8 have given you evidence or we haven't given you any
9 evidence. I believe it's argument. You could certainly argue
10 that later, but it's not something that you want to be
11 presenting in the jury instruction. Their second sentence they
12 talk about essential elements of the offense, he says including
13 the presence or involvement of the defendant, the second
14 portion of that is wrong as a statement of law. Identity is not
15 an element of the offense. So by making them put that in
16 here like this it is -- it's not the correct statement of the law, so
17 that's incorrect there as well. And I looked at the instruction --
18 I mean in the cases that they have cited and they've cited the
19 *United States v. Roves* [phonetic], saying approved instruction
20 statute same form [sic]. That was instruction that the court
21 rejected and then used a form of their own where they talked
22 -- well, he talks about alibi. But -- and then the *Nester v.*
23 *State* was a -- when they were concluding the two differences
24 between reasonable doubt and the instruction involving the

1 alibi. I think the alibi in our instruction is clearly the statement
2 of the law, defining what alibi is and it doesn't give any kind of
3 insinuation that any type of evidence was presented by -- I
4 mean supported by the Court's reading of the statement to the
5 jury.
6 MR. SCHIECK: If I might, Your Honor? This
7 instruction is very similar to the instruction that we give in self-
8 defense cases where the jury is told that there's been evidence
9 of self-defense proffered by the defendant, which shifts the
10 burden to the state to prove that it was not an act of self-
11 defense. Alibi is the same type of offense. Once a defendant
12 presents any evidence of alibi, the burden is on the state to
13 disprove that there was an alibi. The burden remains with
14 them and that's what this instruction makes clear. It's not
15 intended to change or modify. It's the law in the state of
16 Nevada that this made clear what that burden is. In fact there
17 was -- there was time not too long ago, within the last 30 to
18 40 years where the burden was on the defendant to prove the
19 alibi by a preponderance of the evidence in order to gain an
20 acquittal. And obviously the Supreme Court said you can't do
21 that, you can't put that burden on the defendant, because an
22 alibi negates elements of the defense and that is the person
23 who committed the crime. So, yes, identity is an element of
24 the crime of first degree murder. You can prove that there

was a first degree murder, but you have to prove the identity of the perpetrator. That is an element of convicting someone of first degree murder. So to say identity is not an element it's totally erroneous. And once it's been raise, and I don't care if they say you can't believe a single person that lives within 20 miles of the State of -- or the city of Panaca, there has been evidence offered of an alibi and the burden is now on them to prove that in fact the alibi is not true and the jury is entitled to be instructed to that and I would submit it.

MR. KEPHART: Your Honor, in the instruction that we've offered, that specifically says that. If after a consideration of all the evidence you have reasonable doubt as to whether the defendant was present, the time and place the crime was committed, she is entitled to a verdict of not guilty. There's nothing shifting burdens there. We're telling them, basically this is what an alibi is, and if you believe, after considering all the evidence, you have a doubt as to whether or not the defendant was present at the time and place of the crime, she's entitled to a verdict of not guilty. And that's specifically saying that. But when they go into their position basically they're saying, there is evidence, you'd be saying that. And I'll submit it, Your Honor.

THE COURT: [Sneezing].

MR. KEPHART: Bless you.

THE COURT: Thank you. I think the -- the last sentence of both of 'em is essentially the same. I do agree that the first sentence of the defendant's proposal is more akin to argument than to language that should be in an instruction. But it sounds like the middle sentence, "it's the state's burden to establish beyond a reasonable doubt each of the essential elements of the offense," that if we took out the word "including" and put the word "and" instead -- and the presence of it -- and involvement of the defendant, I think that would be a more accurate statement of the law. And we could put that sentence in the middle of the State's proposed one. Kind of cut and paste 'em.

So I'm gonna step down and have the JEA type that up.

MR. SCHIECK: So the second sentence is gonna be inserted into the middle of the State's instruction?

THE COURT: Right. I think the last sentence is the same on both, isn't it?

MR. SCHIECK: I think our says you must find the defendant not guilty and theirs is slightly different.

THE COURT: It says she is entitled to a verdict of not guilty.

MR. SCHIECK: Right. A slight difference.

THE COURT: They're both correct.

MR. SCHIECK: That's true.

THE COURT: It's the not guilty part that's the important part.

[Laughter]

MR. SCHIECK: No, as we like that "must" though. That's fine, Your Honor.

THE COURT: Well, we can -- we can do that. I don't like your first sentence is my main problem for the argument reason, so I like the State's first sentence. It reads more consistent with language of instructions.

Do you care on the "you must find" or "she is entitled to"?

MR. SCHIECK: Either one is fine with the defense, Your Honor.

MR. KEPHART: Whatever you want to do, Judge. That's fine. We've always given she's entitled -- I mean they're entitled to a verdict of not guilty, it's like you're not ordering them to do something it's just that they're making that determination based on an entitlement of the law, so.

THE COURT: Since Mr. Schieck doesn't care we'll leave it that way then.

Go off the record.

(Court recessed at 11:39:04 a.m. until 11:43:38 a.m.)

(Jurors are not present)

THE COURT: Okay. I had the JEA retype the alibi in accordance with our discussions. Does anybody have any opposition to this one being given?

MR. KEPHART: Let's see.

MR. SCHIECK: No, Your Honor, I think that addresses the concern we had the burden of proof, so that's fine with us.

MR. KEPHART: That's fine, Judge. We've -- I've already addressed our objection to their instruction, but I understand you're giving this one, so.

THE COURT: Okay. Do you want yours marked as State's offered, not given?

MR. KEPHART: Yes, Your Honor.

THE COURT: All right. And here's the one on the statute. Here's the one on the deadly weapon.

(Pause in the proceedings)

THE COURT: Any opposition to the purpose of the statute?

MR. SCHIECK: No, Your Honor.

MR. KEPHART: I don't have any opposition to the -- that either, Judge.

THE COURT: Okay.

MR. KEPHART: I -- I'm just kinda wondering, I mean we're looking at the different types here and they still

appear differently. I mean does -- I don't know. Do you have a concern with that at all, Your Honor?
THE COURT: No.
MR. KEPHART: Okay.
THE COURT: I think they're close enough.
MR. SCHIECK: I don't think it matters when they read the instructions.
THE COURT: And then the deadly weapon with the typo corrected. Deadly weapon means. Will or is likely to. Any opposition to that one?
MR. KEPHART: No, not by the state, no.
MR. SCHIECK: No, Your Honor.
THE COURT: Okay. Any others?
MR. SCHIECK: No, Your Honor, not from the defense.
MR. KEPHART: Not by the state.
THE COURT: Okay. We've got the two at the back - -
MR. SCHIECK: We wanted the second of the two, Your Honor.
THE COURT: The longer one?
MR. SCHIECK: Yes.
THE COURT: "It's the constitutional right of a defendant in a criminal trial that he may not be compelled to

testify. Thus the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way."
MR. SCHIECK: Yes, Your Honor.
THE COURT: Should we change "he" to "she"?
MR. KEPHART: You can if you wanted to.
MR. SCHIECK: I think to be consistent we probably should.
THE COURT: Okay. From "his" to "her". While that's getting typed up, we have one form of verdict, any opposition to the form of verdict?
MR. SCHIECK: No, Your Honor.
THE COURT: That will given backed by the Court -- by the court clerk. And then where did you want me to put the -- the Fifth Amendment.
MR. SCHIECK: Somewhere around the reasonable doubt instruction would be fine.
(Pause in the proceedings)
THE COURT: You want it right after reasonable doubt?
MR. SCHIECK: That's good, Your Honor.
THE COURT: Any opposition?

MR. KEPHART: No, I don't have any objection to that.
THE COURT: Okay. And I'll take us off the record 'til we get that typed up.
(Court recessed at 11:49:52 a.m., until 11:50:35 a.m.)
(Jurors are not present)
THE COURT: We're gonna now number the instructions.
Number 1, It is now my duty as Judge.
Number 2, If, in these instructions.
Number 3, An information is.
Number 4, In this case the defendant is accused in an Information.
Number 5, Murder is.
Number 6, Malice aforethought means.
Number 7, Express malice is.
Number 8, The prosecution is not required.
Number 9, Murder of the first degree.
10, The law does not undertake to measure in units of time.
Number 11, The crime of first degree murder.
Instruction Number 12, Murder of the first degree includes murder which.
Number 13, Manslaughter is.

MR. KEPHART: Your Honor, could you -- probably not have -- hold on. On Number 12, we had -- I think it's 12, is it 12, Dave?
MR. SCHIECK: I think so.
MR. KEPHART: Number 12 we had deleted a portion of that from the original packet that I gave you involving involuntary manslaughter. Does it -- it doesn't say anything on there about involuntary manslaughter, does it, on the one you have?
THE COURT: The Number 12 that I have says "Murder of the first degree includes murder which is any kind of willful, deliberate and premeditated killing.
MR. KEPHART: Okay.
THE COURT: All murder which is not Murder of the First Degree is Murder of the Second Degree. Murder of the Second Degree is murder with malice aforethought, but without the admixture of premeditation and deliberation.
MR. KEPHART: Okay. That's it then.
THE COURT: Okay.
So, Number 13, Manslaughter is.
Number 14, The heat of passion.
Number 15, The crime of murder may include.
Number 16, You are instructed that.
Number 17, Deadly weapon means.

Number 18, The State is not required to have recovered the deadly weapon.
Number 19, The killing or attempted killing.
Number 20, The right of self-defense.
21, Actual danger.
22, If evidence of self-defense is present.
23, If a person kills another in self-defense.
24, A person who commits a sexual penetration.
25, The purpose of the statute is to deter the act of sexual penetration of dead human body.
Number 26, The flight of a person.
27, No act committed by a person while in a state of voluntary intoxication. That's 27.
28, The fact that a witness has been convicted of a felony.
29, An, quote, "alibi", unquote, amounts to.
Number 30, To constitute the crime charged.
31, The defendant is presumed innocent until the contrary is proved.
32 will be the right to remain silent, one that the defense requested.
33, You are here to determine the guilt or innocense.
34, The evidence which you are to consider.

35, The credibility of believability.
36, A witness who.
37, Although you are to consider only the evidence.
38, In arriving at a verdict in this case.
39, If, in your deliberation, you should desire to be further informed.
Number 40, When you retire to consider your verdict.
41, Now you'll listen to arguments of counsel.
(Pause in the proceedings)
THE COURT: 32, we now have is, It is the constitutional right of a defendant in a criminal trial.
(Pause in the proceedings)
THE COURT: Mr. Schieck had advised the Court at the end of the day yesterday at sidebar that Doug Twining would be the defendant's last witness.
MR. SCHIECK: Correct.
THE COURT: So I assumed from that, that the defendant will be taking the Fifth and so that it why it would be appropriate to include this instruction.
MR. SCHIECK: That's correct, Your Honor.
THE COURT: Okay.
MR. SCHIECK: And with respect to Douglas, they just stipulated that he can testify as to some documentation

that his father has concerning dates and times of a trip to Idaho.
MR. KEPHART: That's correct, Your Honor.
THE COURT: Okay. Is there anything further that we need to do with regard to the instructions or the form of verdict?
MR. KEPHART: I -- the State doesn't have anything further.
MR. SCHIECK: No, Your Honor.
THE COURT: Okay. I'm gonna make copies of the instructions to hand out to the jury and we've got 14 of them, right? And you guys have your copies, right?
MR. KEPHART: Yes.
THE COURT: And defendant's counsel nodding their head up and down, so I'm gonna make 15.
And we'll see everybody at 1 o'clock unless there's something further.
MS. GREENBERGER: Thank you, Your Honor.
MR. SCHIECK: Thank you.
MS. GREENBERGER: Have a nice lunch.
THE COURT: Thanks. You too.
(Court recessed at 11:58:01 a.m., until 1:21:22 p.m.)
(Jurors are present)
THE COURT: Good afternoon. Let the record reflect

that resuming trial in State versus Lobato, under C177394, in the presence of the defendant, together with her three counsel. The two prosecuting attorneys are present. And the ladies and gentlemen of the jury are present as well.
We are proceeding forward in the case. We had taken a couple of State's rebuttal witnesses out of order, but we are returning now to the defendant's case in chief and defendant may call their next witness.
MR. SCHIECK: We would call Douglas Twining, Your Honor.
THE CLERK: Please come all the way forward. Remain standing and raise your right hand.

DOUGLAS TWINING, DEFENDANT'S WITNESS SWORN

THE CLERK: Thank you, please be seated. State your name and spell it for the record, please.
THE WITNESS: My name is Douglas Howell Twining, D-o-u-g-l-a-s H-o-w-e-l-l T-w-i-n-i-n-g.
THE COURT: You may proceed, Mr. Schieck.
MR. SCHIECK: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SCHIECK:
Q Mr. Twining, where did you reside in July of 2001?
A At my parents' house at 3899 Montell Avenue.
Q Is that here in Las Vegas?

A Yes, sir.
Q And how long had you been living there in -- as of July 2001?
A Approximately -- since 1996.
Q So about five years?
A Yeah.
Q Are you acquainted with an individual by the name of Kirstin Blaise Lobato?
A Yes, sir.
Q Do you see her here in court today?
A Yes, sir.
Q And where is she seated and what is she wearing?
A She's wearing a light colored dress behind that monitor right there at the defendant's table.
Q Between the two other young ladies?
A Yes, sir.
MR. SCHIECK: Okay. Could the record reflect the identification of the defendant, Your Honor.
THE COURT: The record shall so reflect.
BY MR. SCHIECK:
Q Do you recall when you first met Blaise?
A Yes, sir.
Q When was that?
A It was approximately May to June -- early June, I

believe in 2001.
Q And do you recall where you met her?
A I believe I met her at Steve's -- a guy named Steve's house.
Q Do you know Steve's last name?
A I believe it's like Pyszkowski or actually no, I don't recall. It's like a Polish sounding kinda name.
Q Does Pyszkowski sound familiar?
A Yeah, that -- that could be.
Q And you were still living at Montell at that time?
A Correct, sir.
Q And how well did you get to know Blaise at that time?
A We had, you know, seen each other and hung out for awhile.
Q There -- did there --
A Got to know --
Q I'm sorry, go ahead.
A -- got to know each other. You know, friends.
Q Did there ever come a time where she stayed at your house?
A Yes, sir.
Q And I want to break that down. Were there any times that she would stay for a day or two, for instance?

A I believe she -- she probably spent the night a couple times, you know, during the couple months I hung around with her.
Q During -- when did she first spend a couple of nights at your house, that you recall?
A Probably like in May, June.
Q Now you'd indicated that you -- you met her approximately in June of 2001 and you just say -- said that she may have stayed at your house in May. Are you sure exactly when you met her?
A No, it could have been the end of -- the end of -- it was either the middle to the end of May, or April, right around in there some where. I can't recall exactly.
Q You're not sure of the exact date?
A No.
Q Okay. Now did there come a point in time where Blaise started staying at your house more regular?
A She stayed -- yeah, there was.
Q When was that?
A That would be the end of -- probably the end of June.
Q 2001?
A Yeah.
Q Okay. How long did she stay there during the end

of June at your house? At your parents' house?
A Probably a couple few days at a time and I think actually she stayed there for approximately a week in July.
Q Let's stick with June for right now.
A Okay.
Q We'll get to July. Okay. Did -- and who was living in your house -- in your parents' house, besides yourself at that period of time?
A My mother, my father was in and out on business and myself.
Q And your mother's name?
A Violet Marie Twining.
Q And your father's name?
A Thomas Howell Twining.
Q Did there ever come a time, after Blaise had stayed with you at the June that she went somewhere else?
A She had went to Panaca to her parents' house, I believe.
Q Do you recall when she left to go to Panaca?
A She had -- I think maybe July 2nd, I think sticks out.
Q Are you sure of the date or is that just --
A No, I'm not sure of the date at all.
Q Did you take her to Panaca?
A I took her to Panaca -- no, I did not.

Q On July 2nd, I'm talking about?
A No.
Q What was she driving?
A She was driving her -- okay, it was July 2nd and she was driving her red Fiero -- or I -- I think it's a Fiero, yeah. Mazda Miata or Fiero.
Q Was it a big car?
A No, a little car.
Q Now you're how big? How tall are you?
A I'm '6"6.
Q Did you ever ride in that car?
A No.
Q Why not?
A I don't think I'd fit in there.
Q So did Blaise take her car, to your knowledge, to Panaca on July 2nd when she went?
A Yes.
Q She didn't leave it at your house?
A No.
Q Did you assist her packing to --
MS. DiGIACOMO: Objection, leading.
THE COURT: Sustained.
BY MR. SCHIECK:
Q You said that she left on July 2nd, can you tell us

what happened prior to her leaving on July 2nd?
A Prior -- in the moments prior to her leaving?
Q Yes.
A As I recall, I helped her load up some bags and said goodbye.
Q Do you recall how many bags?
A No. It wasn't' too many. It wasn't a very big car and, you know, there was maybe several.
Q When was the next time you saw Blaise after July 2nd?
A July 2nd would be on the -- the 8th -- late the 8th, early 9th.
Q And where was that?
A In Panaca.
Q And how did you get to Panaca?
A I drove my white Mustang convertible.
Q And what happened when you got to Panaca?
A I met with Blaise and her parents and said hello and -- her dad helped me put my top up on my convertible and we came back to Vegas.
Q Was your top down all the way from Las Vegas to Panaca?
A Yes, sir.
Q Was that comfortable?

A I thought it was gonna be nicer than it was. It was pretty dry, the desert air, you know, blowing in your eyes and stuff, but --
Q How long did --
A -- it was evening, it wasn't too bad.
Q -- do you recall how long it took you to drive up there?
A To the best of my recollection several hours. Like about three hours, I think. Two and a half, three hours. I don't recall.
Q Had you ever been to Panaca before?
A No, sir.
Q During that period of time did you have a cell phone?
A Yes, sir. Actually, I'm sorry, it was my father's cell phone.
Q Okay. Did you have a cell phone that you used?
A Yes, sir.
Q And during the period of time while Blaise was in Panaca between the 2nd and the 9th, were there any phone calls between you and her?
A Yeah, there was numerous phone calls.
Q I'm gonna hand you what's been marked as Defendant's Exhibit EE.

MR. SCHIECK: May I approach, Your Honor.
THE COURT: You may.
BY MR. SCHIECK:
Q I'm gonna show you what's been marked as Defendant's Proposed Exhibit EE and ask you to just look at that briefly and tell me if you recognize what it is?
A It looks to be my father's cell phone bill from Verizon Wireless for July 2001. July 9th, 2001, this page.
Q Have you looked at all the pages?
A Oh, I'm sorry. Oh, it says billing date July 9th. It looks to be the whole month of -- from July 1st to July 9th.
Q And you recognize that as your father's phone bill that -- on the cell phone that you used?
A 275-9271, yes.
Q That was your number?
A Yes, sir.
MR. SCHIECK: And move to admit Defendant's EE, Your Honor.
MS. DiGIACOMO: No objection.
THE COURT: Granted.
(Defendant's Exhibit EE, admitted)
BY MR. SCHIECK:
Q Mr. Twining, I'm going to illustrate this for you on a projection device here that you can actually see on the screen

TWINING - DIRECT

in front of you, okay, when I put it up here. Do you recall testifying at a prior proceeding?
A Yes, sir.
Q Do you recall during that proceeding that you had circled the number of phone calls that you had made to Panaca with your cell phone?
A Yes, sir.
Q And those were circled in red?
A I don't recall the -- I think I highlighted them. I don't recall if I highlighted them or circled them, but I did indicate numerous phone calls.
Q Well, let me show you portions of the phone bill you just identified. This is the document EE that you were just looking at?
A Okay.
Q Appears to be a phone call circled on July 2nd at 9:00 p.m. to Panaca, is that correct?
A I -- you're talking about right in the center?
Q Yes, line 781. And I can zoom in if you need me to.
A I see Panaca, I don't see that it's incoming or outgoing. I don't know how they indicate that.
Q If I show you the top of the page, it says called from and called to, does that help you?
A Okay, yes.

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Q Okay. So that would indicate a call to Panaca at 9:00 p.m. on the 2nd?
A That's correct.
Q Okay. And do you recognize the phone number that was called from your cell phone?
A I don't -- I don't recall the number at all. I don't recall any of the phone numbers.
Q And can you read the phone number though?
A The phone number that's circled is 702-728-4589.
Q And as you sit here today do you know whose phone number that was?
A Like I don't have -- I don't recall any of the phone numbers from back then.
Q And, again, there shows another phone call on the 2nd, 11:40 p.m. to Panaca?
A Line 789?
Q Yes.
A Yeah, 702-728-4589, yes.
Q Other than Blaise, did you know anyone else in Panaca?
A No.
Q And you'd indicated that you'd thought she'd gone to Panaca on July 2nd?
A Correct.

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Q Would you have called her when she got there?
A Yes.
Q Do you recall doing so?
A I don't recall, but I'm sure I called her numerous times, so.
Q Do you have any reason to doubt the accuracy of your phone records?
A No.
Q We're just gonna continue over. Were you calling her a number of times while she was up there?
A Yes.
Q Did you call her almost every day?
A I believe so.
Q There appears to be two calls on July 3rd.
MS. DiGIACOMO: Objection, leading.
THE COURT: Sustained.
BY MR. SCHIECK:
Q How many calls are there on July 3rd to Panaca?
A From what I can see on the screen there's two calls on there so far.
Q There's additional calls on the 3rd. We'll scan down. Do you see any further -- any other calls to Panaca?
A I don't see any other circled ones. And I don't see any other calls to Panaca, no.

TWINING - DIRECT

Q Okay. You were also -- on this phone bill does it reflect calls that you received?
A Yeah, according to the bill.
Q Does it show the number of the person that called you though?
A Yeah, it looks like it does.
Q Or does it just show -- oh, on the -- I'll withdraw that question, Your Honor. Turning to the next page, do you recall whether or not you called Blaise on the 4th of July?
A I believe I did.
Q Would the phone bill reflect that?
A I may have called her from my home phone, but the phone bill probably would reflect it if I called her from my cell phone. It should.
Q On July 4th, can you tell if there's any calls to Panaca?
A Looks like two. Yes, it looks like two that are circled.
Q Do you recall whether or not you called Blaise on the 5th of July?
A I don't recall offhand, but I probably did.
Q You had talked about your house phone. Was there a phone in your house also?
A Yes.
Q Do you recall whether you ever used that to call

Blaise while she was in Panaca during the week?
A I don't recall for sure, but it's quite possible that I did. That would be in the long distance records from that phone.
Q Okay, where -- I'm just gonna show you the 5th real quickly. If you could just -- if I'm going to fast just let me know. Would it be fair to say you're not seeing any calls to Panaca?
A Yeah, I don't see any on here. There's one there.
Q Okay, at 7:34 p.m.?
A Correct, line -- line 931 to Panaca.
Q Do you recall whether you called Blaise in Panaca on the 6th of July?
A I don't recall offhand. I would assume I did.
Q I'm going to scan down the 6th and at the very bottom we've already gone to the 7th, would it be fair to say you don't see any calls to Panaca on the 6th?
A Yeah, no cell phone calls.
Q What about the 7th, do you recall specifically on the 7th?
A I don't recall offhand. I just saw two on the bill there. More than two.
Q Were there any calls on the 7th or the 8th to Panaca?
A I see three on the 7th, one on the 8th.

Q Now you'd indicated that you had traveled to Panaca to pick up Blaise on the night of the 8th, early morning on the 9th.
A Yes, sir.
Q Did you surprise her when you went up there?
A No.
Q To your knowledge did she know you were coming?
A Yes.
Q How would she know that?
A We had arranged, you know, me coming up there and picking her up.
Q Had you -- how had you arranged it?
A Over the phone.
Q During some of these phone calls?
A Yeah.
Q Is that a yes?
A Yes, sir. Sorry.
Q Do you recall what you were doing on Sunday, July 8th, in Las Vegas?
A Sunday the 8th? Early in the morning taking my dad to the airport for business and later that day doing a lot of running around preparing to go pick up Blaise.
Q Now you say taking your dad to the airport, do you recall what time you took him to the airport, approximately?

A It was before noon.
Q Can you -- any closer estimate than that -- than that, or is that the best you can do?
A It was between 9:00 and noon.
Q Okay.
A Probably closer to like 10:00.
Q And do you know where he was going?
A He was going to Boise, Idaho.
Q I'm going to show you what's been marked as proposed BBBB.
MR. SCHIECK: May I approach, Your Honor?
THE COURT: You may.
BY MR. SCHIECK:
Q This is BBBB, do you recognize what that document is?
A A copy of my father's time sheet from July of 2001 for HDR Construction Control Corporation.
Q And do you know, did your father bring that to Court and provide it to us?
A Yes, I got it from his previous employer for her.
Q And that reflects his first day of work in Idaho as being on what day?
A July 9th --
MR. SCHIECK: Move to --

THE WITNESS: -- 2001.
MR. SCHIECK: Move to admit BBBB.
MS. DiGIACOMO: No, objection.
THE COURT: Granted.
(Defendant's Exhibit BBBB, admitted)
BY MR. SCHIECK:
Q So would this have been the trip that you took him to the airport so he can go to work in Idaho?
A Yes, sir.
Q What time did you leave for Panaca on the 8th to go up and pick up Blaise?
A Mmm, somewhere around like 8:00 or 9:00 or something like that, I think, or -- I'm not sure exactly what time. Somewhere after dinner.
Q 8:00 or 9:00 in the evening?
A Yes, sir.
Q After you left for Panaca did you make any other calls to Blaise?
A Several. I believe several.
Q Let me show you what is page -- it shows the July 8th calls from your cell phone. Do you recognize any of those calls?
A Yes. It looks like the same number.
Q And what do those calls reflect?

A Outgoing calls to Panaca to 72[illegible]589.
Q Now, I'm looking at the call at 10:46 p.m., indicates it was called from Alamo, Nevada to -- or incoming while in Alamo, Nevada. Do you recall that call at all?
A Incoming? Line 1024?
Q Yes.
A Offhand, I don't. The -- I know I stopped for gas in Alamo.
Q The next line, 1025, is a call from Alamo to Panaca, do you recall that call?
A Yeah, that looks like when I -- from the time it looks like when I was leaving Alamo and probably letting Blaise know I was leaving Alamo.
Q If you didn't -- if you'd never been to Panaca before, how did you know how to find Blaise's house?
A I had some directions and she was gonna guide me in once I got there, 'cause it -- dark, I guess.
Q How was she gonna guide you in?
A Over the phone.
Q And did she do that?
A Yes.
Q Are these the calls that are reflected on the bill?
A From 12:45 to -- at 12:45?
Q Yes.

A That seems a little bit later than I recall, but it could -- it could've been that time. I thought it was around midnight. It could've been later.
Q After you picked Blaise up in Panaca, where did you go?
A To my parents' house in Vegas.
Q So you drove back to Las Vegas with Blaise?
A Yes, sir.
Q And so you would have got back to Las Vegas on the 9th some --
A Yeah, it would have been early in the morning on the 9th.
Q Did -- where did Blaise stay when you got back on the 9th?
A With me.
Q At your parents' house?
A Yes, sir.
Q How long did she stay there?
A Let me see. It was -- I don't recall offhand. I think it was around a week, I think. Five days, a week, maybe something like that.
Q Do you recall what day she left?
A I don't offhand.
Q Do you recall how she left?

A Yeah, I remember her father picked her up.
Q Picked her up at your parents' house?
A Yes, sir.
Q Did there ever come a time when you were interviewed by the police in connection with this case?
A Yes, sir.
Q Do you recall what date they came out to interview you?
A No, I don't recall the date at all. But there would be -- there was a -- they took a statement though, so.
Q Okay, would the statement reflect the date they came out and talked with you?
A It should.
Q If I showed you the statement would it refresh your recollection as to the date?
A I believe so.
Q I'll show you the first page.
MR. SCHIECK: May I approach, Your Honor?
THE COURT: You may.
BY MR. SCHIECK:
Q Do you recognize this as the first page of your statement?
A Yes, it looks like it.
Q And what date did they interview you?

A It looks -- the day of the statement 8/2/01.
Q So August 2nd, 2001?
A Yes, sir.
Q And when they interviewed you on August 2nd, 2001, did you give them anything?
A I believe I gave them my phone records.
Q The phone records we've just looked at?
A Yes, sir.
Q Did you have those ready for them or not?
A I think -- I think I had them -- I know I had them there, yeah. I believe they were -- they were readily accessible.
Q Do you know Larry Lobato?
A Blaise's father?
Q Yes.
A I've met him.
Q Had you talked to him about -- or prior to the police coming to see you?
A Yes.
Q Had you discussed the date of July 8th?
A Yes.
Q Why did you give the police your phone records on August 2nd when they came to interview you?
A To show them that I was going to pick her up.

Q After August 2nd, did there come a time that you talked to the police again?
A Yes, sir.
Q And, as a result of that conversation, do you know whether the police went to your house?
MS. DiGIACOMO: Objection, vague.
THE COURT: Overruled.
MS. DiGIACOMO: As to time.
THE COURT: Withdrawn.
BY MR. SCHIECK:
Q Did you -- as a result of that conversation do you know whether or not -- do you know, first, did the police go to your house and, second, if they did, when that was?
A I don't recall exactly what date it was, but there was -- homicide detectives came to my house and served a warrant for a previous -- I had broken a window from before that I didn't pay restitution on.
MS. DiGIACOMO: Objection, relevance.
THE COURT: Counsel approach.
(Off-record Bench Conference at 1:47:04, until 1:50:07)
THE COURT: The objection is overruled.
BY MR. SCHIECK:
Q Do you remember the question?
A The question was, did Metro police come to my

house and the other question was --
Q When?
A Okay.
Q Do you recall when they came to your house?
A When would be on my -- the date I was arrested. I don't recall what date it was exactly. There should be a record of that.
Q Do you recall what month it was?
A Was it December? I mean I don't -- no, I don't. I don't recall actually. I mean if you have the paperwork. I don't have the paperwork with me.
Q Did -- you indicated you were -- when they came to your house you were arrested because you had an outstanding warrant?
A That's correct.
Q Okay. Did you have contact with the homicide officers at the jail?
A Yes, sir.
Q Did you provide them with something?
A Yeah, I gave 'em information for a DNA test and they confiscated my shoes.
Q What type of shoes?
A Nike tennis shoes.
Q And what size shoes?

A 15s, I think or something like that.
Q Okay. And did you get out of jail?
A Yes.
Q Did you ever know whether or not your house had been searched or your room had been searched at your parents' house?
A Yes. When I was in jail for that day, the homicide detectives came to the house and searched the house.
MS. DiGIACOMO: Objection, Your Honor, foundation
THE COURT: Sustained.
MS. DiGIACOMO: Move to strike.
THE COURT: Granted.
BY MR. SCHIECK:
Q Were you ever served with an inventory of items seized from your house?
A Yes, sir. It was at my house when I got -- when I returned there from jail.
Q Were items of yours on that list?
A Yes, sir.
Q Did it include shoes?
A Yes, sir.
Q Okay. What size were those shoes?
A Somewhere between 14s and 15s.
Q You've got large feet?

A Yes, sir.

MR. SCHIECK: Thank you. That's all I have, Your Honor.
THE COURT: Cross?
MS. DiGIACOMO: Thank you.

CROSS-EXAMINATION

BY MS. DiGIACOMO:
Q Good afternoon.
A Good afternoon, Ms. DiGiacomo.
Q How old were you in 2001?
A 2001, would have been 38.
Q How long had you known Steve and Kathy by the end of June 2001?
A I've know Kathy for a couple of years I think, and Steven I'd just met through Kathy.
Q When they were living together?
A Yes, ma'am.
Q And are you sure when you met Blaise?
A Mmm, within -- within several weeks, yeah. Within several weeks.
Q Okay. So when did you meet her?
A I think it was -- I'm gonna say the end of May.
Q The end of May?

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A Yeah.
Q All right. Well, let's approach it a different way. When she went home on July 2nd to Panaca.
A Mm-hmm.
Q Do you know approximately how long you had known her at that point?
A A couple months, I believe.
Q Okay. So a couple months. So possibly it was the end of April when you met her?
A Yes, it's possible.
Q Okay. So you would have know her the entire month of May and the entire month of July?
A Yeah --
Q I mean, excuse me, June?
A -- June. Yes.
Q Okay. And in fact when you first met her she wasn't living with Steve and Kathy, she was just hanging out there, correct?
A Oh, I -- I believe so.
Q Okay. And she would hang out there and she would do drugs, correct?
A Yes.
Q Did you do drugs with Steve and Kathy as well?
A Yes.

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Q Did you do drugs with Blaise, as well?
A Yes.
Q Methamphetamine?
A Yes, ma'am.
Q Do you know who supplied the methamphetamine when you did it with either Blaise or Blaise, Steve and Kathy?
A Offhand, no. It was -- people had it around.
Q Okay. So there's times when you brought the methamphetamine to the party?
A Yes, ma'am.
Q And times when Steve or Kathy brought the methamphetamine?
A Yes, ma'am.
Q And times when Blaise even had the methamphetamine.
A If I recall, I would assume that. I don't recall offhand, but I would assume so. We were all -- we were all doing it.
Q And do you recall testifying at the prior proceeding that Blaise did know how to get drugs without help from you?
A Yes, ma'am.
Q Or Steve or Kathy?
A Yes, ma'am.
Q Okay. So she didn't need you or Steve or Kathy to

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supply her the drugs?
A No.
Q When she stayed with you at the end of June until she went home July 2nd, how long did she stay with you?
A I think it was less than a week. It was -- like I said before I'm not sure exactly.
Q The time that she stayed with you the end of June, what was your relationship with her?
A Trying to boyfriend -- trying to be boyfriend and girlfriend. I liked her.
Q And so it's fair to say you liked her and you wanted a relationship with her?
A Yes, ma'am.
Q At that time were you intimate with her?
A Yes, ma'am.
Q You start -- you said that you had started out as friends with her through Steven and Kathy, at what point did it become a more intimate relationship between the two of you?
A Probably the first time we fooled around.
Q Okay. But I mean when --
A I don't what -- I don't know what time -- I mean --
Q What time period?
A Well, yeah.
Q Was it before she moved in with Steve and Kathy?

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A I'm not exactly clear when -- when that transition was, you know, the --
Q Oh. It is possible then, before she actually moved in with Steve and Kathy that she would have stayed over for the night?
A Yeah, it's possible.
Q And she, at times, would stay with you at your place as well?
A As I recall, yes.
Q And the times that she started to stay with you, is that when the relationship or the intimacy began?
A Yeah, I would say so.
Q Okay. The bags that you helped Blaise load up on July 2nd, were those the same bags she brought with her from Steve and Kathy's to your house?
A For the most part. There might have been like a -- you know, I think there was some plastic bags.
Q Okay. Do you recall if she had any like luggage pieces?
A Offhand I don't recall. I remember what sticks out is some leopard bags, I think.
Q Like shopping bags?
A Yeah, I believe so.
Q Okay, but it's possible she did have some luggage?

A Yeah, I think. Possible.
Q And when she was staying with you for that week or so, did she bring her belongings inside your residence?
A Yes, I believe so.
Q Well, you helped her pack 'em into the car, correct?
A Right.
Q So is it fair to say that she did bring them in your house?
A Yes, I believe so.
Q Do you remember anything unusual about her belongings?
A No, ma'am.
Q When you drove up there on July 9th and got to Blaise's residence, that was the first time you had met her parents?
A I may have met them briefly before, like when -- at Steve and Kathy's the -- but I don't recall for sure.
Q And you said that when you were driving the top was down on your Mustang convertible?
A Yes, ma'am.
Q I missed it, was that the way up or the way back?
A That was the way up there.
Q All right. Did you drive with it down on the way back?

A No, ma'am.
Q Okay. And so when you got to Blaise's house is that when you put it up, or did you do it when you were at the gas station in Alamo?
A I believe Blaise's dad helped me do it at her house. The motor was broken on so it took two people.
Q Have you reviewed your prior statement and prior testimony before coming to court today?
A I've not today, I did previously.
Q Within the last couple of weeks?
A Yes.
Q And would you agree with me that nowhere previously did you state that you drove with the top up or down?
A That I didn't -- I don't recall if that was in there or not.
Q Okay, is it possible it was in there?
A It's possible it was in there, yes.
Q Is it -- would you like to review your statement and testimony?
A That I -- that I did mention before, or?
Q Correct.
A Sure. If you'd like me to.
MS. DiGIACOMO: May I approach, Your Honor?

THE COURT: Yes.
MS. DiGIACOMO: First, counsel, it's going to be page 4 of his trans -- or voluntary statement to the police.
BY MS. DiGIACOMO:
Q I'm showing you a 39 page statement, voluntary statement, does that look familiar to you?
A Yes, ma'am.
Q Okay. Is this a transcribed copy of the statement you gave to the police?
A On -- yes. Yes, ma'am.
Q On August 2nd, 2001?
A Yes, ma'am.
Q If you could read page 4 to yourself and let me know when you're done reading that.
(Pause in the proceedings)
Q Did you discuss on page 4, in your statement, regarding whether or not -- anything more than other you drove the white Mustang to Panaca?
A There's nothing else on there -- well, it mentions my convertible, they didn't need the VIN number, about Steve and Jeremy.
Q Okay, but nothing else about the car, whether the top was up or down when you drove it?
A No, ma'am.

Q Would you trust me that it's not mentioned in the rest of the statement either?
A Yes, ma'am, I trust you.
Q And I show you page 160, counsel, of your prior testimony.
A If you say it's not in there I believe you.
Q I'm gonna show you -- counsel, I was wrong, page 156. If you could read from 156 to the end of 160 and let me know when you're done.
(Pause in the proceedings)
A This is my --
Q Prior testimony.
A -- previous proceedings?
Q Yes.
A Okay.
(Pause in the proceedings)
A And what was the question?
Q Keep reading all the way through to 160.
(Pause in the proceedings)
A This looks like the highlighting of that phone bill that defense --
Q Keep going, there's going to be more about the car.
(Pause in the proceedings)
A Okay, the question again?

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Q Okay. Let me just make sure that you [unintelligible] to 160. All right, that looks like -- the phone call.
A It says that -- about me -- when I was -- the police officer in Alamo.
Q Oh, that's the --
A Right here.
Q Okay. But within pages 156 to 160, 161 of your testimony you're discussing your drive up to Panaca and picking up Blaise, correct?
A That's correct, ma'am.
Q All right. Anywhere in these pages did you mention about your top being down, the need to put it up or anything like that?
A No, I didn't see that in there.
Q Okay. And with regard to --
MS. DiGIACOMO: Do you have EE, counsel?
MR. SCHIECK: Do I have it or do I know what it is? I think I do.
MS. DiGIACOMO: May I approach, Your Honor.
THE COURT: Yes.
BY MS. DiGIACOMO:
Q I'm going to show you Defense Exhibit EE that you looked at previously. This was your cell phone bill.

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A Okay.
Q Now -- or your father's cell phone bill.
A Correct.
Q This is not the entire bill, correct?
A Correct. This looks like to be from the 1st to the 8th, I believe I said before. The 1st to the 9th.
Q 1st to the 9th. Okay.
A Yes, ma'am.
Q And we don't have home records or your land line records from that time period, correct?
A I don't know if you have them or not.
Q Well, they weren't shown to you in court today, were they?
A No, they weren't.
Q You weren't asked to provide them, were you?
A No, ma'am.
Q Okay. What time was it that you left to take Blaise back to Las Vegas on the early morning hours of July 9th?
A It looks from the -- it must have been around 1 o'clock in the morning, it looks like.
Q Are you gathering that from the phone calls?
A Yeah, from the best of -- 'cause I recall -- I thought it was a little bit earlier than that, but it must have been around 1:00 it looks like, quarter to 1:00, something like that.

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Q And how long did you stay when you got there?
A Less than half an hour.
Q So you would have gotten there a little bit around 12:45, a little before 1:00 and left by 1:20'ish?
A I would say that's a good time frame.
Q How long did it take you to get back to Las Vegas?
A I think like -- I think it's like three hours. I don't recall for sure.
Q Did you have any problems with your car on the way home?
A On the way home, no, ma'am. On the way -- no, ma'am.
Q Okay. You did have problems on the way up, correct?
A Yes, ma'am.
Q When you spoke to the police on August 2, 2001, you were prepared to discuss what you knew about the case, correct?
A Yes, ma'am.
Q In fact, you had spoken to Becky Lobato numerous times before you talked to the police on August 2nd?
A Yes, ma'am. On August 2nd?
Q Right. Between the time that Blaise was arrested on July 20th --

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A Okay.
Q -- until you gave the statement on August 2, 2001, you had spoken to the defendant's mom Becky numerous times?
A Yes.
Q And you'd spoken to her father as well?
A Correct.
Q How many times would you say you spoke to Becky?
A I don't recall for sure. Probably between the two of them, maybe a dozen times.
Q All right. And do you recall making any three-way calls?
A Yes, ma'am.
Q What were those about?
A When -- you mean -- you're talking about when Blaise was incarcerated?
Q Right.
A The --
Q After she was arrested July 20th?
A As I recall, she was unable to -- I'm sorry. They were unable to receive collect calls in Panaca at their phone, so Blaise would call me from CCDC and I would make the call up there so that her parents could talk.
Q When she would do this she'd call your home phone,

1 correct?
2 A Yes, ma'am.
3 Q And then you would call her parent's home in
4 Panaca?
5 A Yes, ma'am.
6 Q And then that way she can talk to her parents?
7 A Yes, ma'am.
8 Q Did you stay on the line when they were talking?
9 A Yeah, I pretty much had to.
10 Q All right. But you weren't taking place in the
11 conversation?
12 A I probably was, yeah. I know I was actually.
13 Q When you did these three-ways, do you recall a time
14 when Blaise snapped at her father for discussing the case
15 because the calls were recorded?
16 A I recall -- somewhat, yeah.
17 Q Yes or no, do you recall it or not?
18 A Yes, ma'am.
19 Q Okay. There was at least one time she did snap at
20 her father for discussing the case on the phone?
21 A Yes, ma'am.
22 Q Now you said you talked to Becky and/or Larry
23 approximately a half a dozen times between the time of her
24 arrest and the time you talked to the police?

1 A Actually I said I think it was probably a dozen, I
2 estimated.
3 Q Oh, a dozen. I'm sorry. Okay. So approximately
4 that many times in between those two dates?
5 A Yeah. Yes, ma'am.
6 Q During those conversations you were talking about
7 the case, correct?
8 A Yes, ma'am.
9 Q And you actually had discussed the date of July 8th,
10 correct?
11 A Yes, ma'am.
12 Q And that's why when the police came and talked to
13 you you had your phone records ready?
14 A Yeah. Yes, ma'am.
15 Q And you also had your information regarding your
16 Mustang with the VIN number ready, correct?
17 A Oh, I had that -- I think it was in my insurance -- my
18 insurance card I think I was looking at.
19 Q Okay. But you had all that documentation together
20 before you were interviewed by the police?
21 A Yes, ma'am.
22 Q In fact, you had spoken to the defendant's father
23 earlier in that day, correct?
24 A As I recall, yes, ma'am.

1 Q And you had spoken with Becky several times about
2 talking to the police as well, correct?
3 A As I recall, yes.
4 Q Now the reason that you went to pick up Blaise and
5 brought her back to Las Vegas, I believe you told the police
6 was so that the both of you could lay low, stay away from
7 Steve and Cathy during that time period, correct?
8 A I believe that's what I said, yeah. I believe I said
9 lay low and hang out.
10 Q In fact, when she was there between the 9th and
11 when her father picked her up, you didn't go out or do
12 anything other than go out for food, correct?
13 A As I recall, we were pretty much kicking back.
14 Q So you didn't leave the house other than when you
15 went to get food?
16 A I don't recall that for sure.
17 Q Okay. If I was to show you your statement that you
18 gave to the police, would that refresh your recollection?
19 A Yes, ma'am.
20 Q Okay.
21 MS. DiGIACOMO: Page 10, counsel.
22 BY MS. DiGIACOMO:
23 Q I'm gonna show you page 10 of your statement.
24 A Okay. I did say other than go out and get food. I

1 didn't recall.
2 Q You didn't recall leaving the house other than just to
3 go out and get food?
4 A Correct.
5 Q While you were there, do you recall watching a news
6 report regarding a homicide?
7 A Yeah, I believe so.
8 Q Do you recall what date that was on?
9 A I think it was maybe the 9th or the 10th.
10 Q All right. It was shortly after you brought Blaise
11 back from Panaca, correct?
12 A Yes, ma'am.
13 Q And Blaise was present with you when you watched
14 this news report, correct?
15 A She was at my house, yes.
16 Q She was watching the news report with you?
17 A I don't recall for sure, but I think that's -- I think she
18 was.
19 Q Would it refresh your recollection if you looked at
20 your prior statement that you gave to the police?
21 A Yes, ma'am.
22 Q Okay.
23 MS. DiGIACOMO: Page 11 and 12.
24 ///

BY MS. DiGIACOMO:
Q I'm gonna ask you to read this page from here down and then the next page.
A Okay. Yeah, Monday or Tuesday would've been the 10th or 11th, is that correct?
Q The 9th or the 10th.
A 9th or the 10th. Yes, Monday or Tuesday. And I said Blaise --
Q Well, does this refresh your recollection after looking at your statement as to whether or not Blaise was watching that report with you?
A It refreshes -- well, while I'm reading it I said she was there, so -- and I never did finish the sentence.
Q Okay.
A I know she was there with me. I don't recall, she might've been sleeping.
Q Well, do you recall them asking you next, was anything said about it, meaning did the two of you talk about it, and you said no?
A Yes.
Q Okay.
A Yes, ma'am.
Q So it's possible she was there then watching the report with you?

A Yes, ma'am.
Q 'Cause the police asked you, well, did she -- was there anything said about it, correct?
A Yes, ma'am.
Q How many times did you talk to the defendant from jail after she was arrested on July 20th until you spoke to the police on August 2nd?
A I couldn't even estimate.
Q Numerous times?
A Yes, ma'am.
Q And she would always have to call your home phone to make those collect calls, correct?
A As I recall, yes. I don't think my cell phone would accept those either.
Q The time that she was there between the 9th of July and when her father picked her up, she talked to you about going into rehab and getting cleaned up, correct?
A Yes, ma'am, that is correct.
Q When her father came to pick her up, do you recall what time of the day it was?
A For some reason right after lunch stands out.
Q Yet do you recall telling the police sometimes between 1:00 and 4:00, it was mid-afternoon?
A If that's what my statement says then that sounds

about right.
Q Okay. And do you recall telling the police as well that her father was in town so he went ahead and picked her up?
A I know that he picked her up. I don't recall if he was in town or --
Q Well, do you --
A -- he was coming to town or something.
Q Do you recall telling the police that you had planned on taking her back either at the end of the weekend or on Monday to Panaca, but her dad happened to be in town so he went ahead a picked her up on Friday?
A That sounds familiar.
Q Okay. Is that -- that's what you told the police?
A If that's what's in my statement. I don't recall, to tell you the truth.
Q Do you want to look at your statement again?
A Yes, please.
Q Okay. Let me show you page 11 and then page 15.
A Okay.
Q Maybe it's just page 15.
MS. DiGIACOMO: Court's indulgence. Okay. May I approach again, Your Honor?
THE COURT: You may.

MS. DiGIACOMO: Okay.
BY MS. DiGIACOMO:
Q I am gonna show you the top of page 11 right here, and then I'm gonna show you page 15.
A Okay.
Q Yeah. If you'd mark that and read that to yourself and let me know if that refreshes your recollection.
A Yes, ma'am.
Q Okay. That refreshes your recollection?
A Yes, ma'am.
Q Okay. And so you actually had planned on taking her home at the end of the weekend or on Monday, but her father happened to be down there and went ahead and picked her up?
A Yeah, we had a -- her and I had a little conflict and he picked her up.
Q You had a fight before she left?
A Not a fight, just --
Q Disagreement?
A Yes, ma'am.
Q Okay. And do you recall what day of the week it was? Was it the -- before the weekend that her father just happened to come pick her up?
A Yes, ma'am.

Q Possibly Friday?
A I'm sorry, I -- can I see that again?
Q Sure.
A I don't recall what day it was at all, 'cause possibly it was Wednesday or Friday -- Wednesday to Friday.
Q Let me see. Okay. I'm gonna show you page 10.
MS. DiGIACOMO: May I approach, Your Honor?
THE COURT: Yes.
BY MS. DiGIACOMO:
Q I'm gonna show you page 10 of your statement. Look at that and let me know if that refreshes your recollection when she got to your house and then when she left?
A Yes, ma'am.
Q Okay. When was it that she left your house?
A The 13th.
Q And so if Monday was the 9th, Friday would've been the 13th?
A Yes, ma'am.
THE COURT: Has his statement been marked?
MS. DiGIACOMO: No, it has not.
THE COURT: Okay. We should do that.
MS. DiGIACOMO: You didn't make the defense do it.
(Off-record colloquy)

MS. DiGIACOMO: Your Honor, for the record, the statement -- or the voluntary statement by Mr. Twining is -- has been marked as State's Proposed Exhibit 272. It's the same copy of what I have been discussing with Mr. Twining and showing him, as well as the front page is the same as what defense counsel showed him.
THE COURT: The record shall so reflect.
MS. DiGIACOMO: Thank you.
BY MS. DiGIACOMO:
Q Do you recall a time when somebody defecated or urinated inside the interior of Blaise's car?
A Only from hearsay.
Q Okay. Did you learn it from Blaise?
A Yes, ma'am.
Q Did you learn it when she was still living at Steve and Cathy's?
A Yes, ma'am.
Q Okay. And did she also tell you that she had to clean the car to get rid of what was in there?
A Yes, ma'am. She had it cleaned, I believe.
Q And that would've been before she came to stay with your at the end of June, 2001?
A That's correct.
MS. DiGIACOMO: Court's indulgence.

BY MS. DiGIACOMO:
Q When you picked up Blaise at her house on the early morning hours of July 9th, she brought back just a few belongings, not as much as she had left with when she came home July 2nd, correct?
A Yeah, I believe so.
Q Okay. She just brought like one bag?
A Probably something like that.
Q Okay. It wasn't all the belongings that you helped her load up on July 2nd?
A No, ma'am.
Q That week between July 9th and July 13th, 2001 when she was at your house, you had talked -- or she had talked about going into rehab and getting cleaned up off of drugs, correct?
A Yes, ma'am.
Q But doing that week the two of you were also doing drugs as well?
A As I recall we weren't -- we were doing marijuana, we weren't doing meth.
Q You were doing what?
A Marijuana.
Q Marijuana not meth?
A I believe so.

Q But you did tell the police you were doing drugs?
A Probably, yeah. I'm sure I did.
Q When she went up on July 2nd to go up to her parents, you were talking to her, 'cause at this point you're still kind of having a relationship with her, correct?
A Yes, ma'am.
Q And the two of you had talked about her coming back down to see you on July 4th and spending that together, correct?
A I believe so, yes.
Q Okay. But she ended up not coming back down?
A Correct.
Q Okay. But you did want her to?
A Yes, ma'am.
Q And when she was gonna come back down on July 4th she was gonna drive herself down in her car, correct?
A I think she had car problems and was unable to do that.
Q Well, you didn't talk about going up and picking her up at that time, correct?
A I don't recall, actually.
Q Okay. But you did talk about her coming down to Las Vegas for the 4th of July?
A Yes, ma'am.

MS. DiGIACOMO: Pass the witness.
THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. SCHIECK:
Q It's your recollection she didn't come down 'cause of car problems?
A No, I don't think that's why she didn't come down. I think she had -- I think she had other engagements up there with her parents and stuff, but I believe her car wasn't running then.
Q You were asked about your phone bill. The phone bill that was shown to you, Exhibit EE, that ended on July 9th, that was the last day of the billing cycle?
A The phone bill we were looking at?
Q Yes.
A Yes, sir. Actually I'm not sure of the end of the billing cycle, but that was the end of the -- that was the last date on that particular set of pages.
Q If I could show you EE.
MR. SCHIECK: If I may approach, Your Honor?
THE COURT: You may.
BY MR. SCHIECK:
Q Tell us what the bill request is the billing date?
A Billing date, July 9, 2001, it says up here.

Q That's -- the last day reflected is July 9th?
A Yes, sir.
Q Is this what you would've -- or a copy of this what you gave to Detective Thowsen?
A That's correct, sir.
Q And Detective Thowsen came back and talked with you after that?
MS. DiGIACOMO: Objection, leading.
THE COURT: Sustained.
BY MR. SCHIECK:
Q How many times did Detective Thowsen ask you for the next bill?
A I'm sorry, the question?
Q How many times did Detective Thowsen ask you for the bill that follows that one?
MS. DiGIACOMO: Objection, leading, and assumes facts not in evidence.
THE WITNESS: I was never asked --
THE COURT: Overruled.
THE WITNESS: I was never asked. I offered him that. I was never asked for those.
BY MR. SCHIECK:
Q Were you ever asked for any other bills?
A Never asked for bills. I offered those.

Q You told us about the police coming to your house, and this was after they had interviewed you on August 2nd sometime? You don't remember the date?
A No, I don't remember the date.
Q Okay. When they came to your house then did they say by the way, do you got the phone bill for August?
MS. DiGIACOMO: Objection, Your Honor, leading.
THE WITNESS: I wasn't at my house, I was in jail when they were at my house.
THE COURT: Sustained.
MS. DiGIACOMO: And Your Honor, I'd move to strike the answer.
THE COURT: Granted.
BY MR. SCHIECK:
Q You've talked with the district attorney in this case?
A Yes, sir.
Q Did you talk to them back in 2002 before the prior proceeding?
A I believe I did.
Q Did you talk to them before this proceeding?
A Yes, sir.
Q Did they ever ask you for the phone bill?
A No. I would've provided it if they asked me for it. I would've tried to. That's a long time ago. Not if they have

records of --
Q Have you ever gotten a subpoena for those bills?
A No, sir.
Q You were asked about the top on your Mustang being down when you drove up to Panaca on July 8th. Had anyone ever asked you before about your -- whether it was up or down when you drove up there?
A No, sir.
Q Who was the first person that asked you that?
A I believe it was Ms. DiGiacomo.
Q Okay. And when was that?
A I think it was at our meeting prior to these proceedings.
Q And prior to that no one had ever bothered to ask you that before?
A No. I don't know if she just asked me now, or I don't recall if it was brought up when I went to their -- I should clarify. I don't recall if it was brought up when we had our meeting, but I -- she did just bring it up now for sure.
Q You mean here in court?
A Yes, sir.
MR. SCHIECK: Thank you. That's all I have, Your Honor.
THE COURT: Recross.

MS. DiGIACOMO: Yes. Thank you.

RECROSS EXAMINATION

BY MS. DiGIACOMO:

Q Just so we're clear, the defense asked you about whether or not the top was up or down during the direct examination, and then I followed up on my cross, correct?

A If you say he did. I don't recall actually, the -- I know he -- I just recall for sure, I know we were just talking about it now --

Q Okay. But --

A -- 'cause we looked back through the records.

Q Yeah. The records would indicate that the defense brought it up first.

A Okay.

Q Now you said that first you thought we had discussed it in a prior meeting that we had a couple weeks ago, but then you said you don't recall that?

A Let me think about it. The -- I think we did talk about it -- Blaise's dad helping me put it up.

Q Okay. So that's your recollection?

A Yes, ma'am.

Q Okay. You also recollect that you talked to us before the last proceeding, correct?

A I don't recall for sure. I think we did.

Q Okay. Well, you tell me, how long before the last proceeding did we meet?

A I don't recall. I thought I met with both sides last time. Subpoenaed by you guys, I know that.

Q Right. But it's possible that you were subpoenaed but you never met with us?

A It's possible, yes.

Q Okay. 'Cause do you recall what office you were sitting in when you met with us?

A No, I don't recall.

Q Did you recall where you met with us just a couple of weeks ago?

A Yes, ma'am.

Q Okay. So it's possible that you're wrong that you met with us before the last proceeding?

A Yes, ma'am, it's possible. It's true.

Q It's also possible you're wrong that you brought up the fact that the top was up or down when you talked to us a couple weeks ago in that meeting?

A Now that I think about it, I'm pretty sure we did talk about Blaise's dad helping me put it up.

Q Okay. But you don't know for sure, do you?

MR. SCHIECK: Objection, asked and answered, Your Honor.

MS. DiGIACOMO: That's fine. I'll withdraw.

BY MS. DiGIACOMO:

Q When --

A I'm pretty sure. I'm pretty sure. Yeah, I'm pretty sure.

Q Okay. When you spoke to us a couple weeks ago, it was after you had already spoken to the defense, correct?

A I've spoken to them several times on the -- you know, on the phone briefly.

Q Okay. But you do recall telling us that you'd already met with the defense when he met with us, correct?

A Yes, ma'am.

Q All right. Now you said that the police never asked for any other phone bills from you, correct?

A Correct.

Q Okay. They didn't even ask for these, you volunteered them, correct?

A I believe so, yes.

Q The ones that are marked EE?

A Correct.

Q All right. The defense never asked you for any other phone records, did they?

A I don't believe so. I think they were already -- they'd already been turned in as evidence.

Q Okay. Just the cell phone records, but no one ever asked you for other cell phone records, correct?

A Not to my knowledge.

Q Okay.

A Not that I recall.

Q The State nor the defense asked you?

A Yes, ma'am, I don't believe they -- that I've been asked for them or I would've provided them.

Q When -- now you said that Blaise told you that she was having car problems on the 4th and that's why she couldn't come down? Is that your testimony now?

THE WITNESS: I believe my --

MR. SCHIECK: Objection, Your Honor, that misstates the evidence.

THE COURT: Sustained.

BY MS. DiGIACOMO:

Q Okay. You said that Blaise was having car trouble so she couldn't come down on the 4th, correct?

A I believe what I said was she -- she had been having car troubles, but I think they had previous engagements with her parents. They were going to some party or some 4th of July event or something.

Q And that information that you're testifying to you had to have learned from Blaise?

A Yes, ma'am.
Q You didn't talk to anybody else in Panaca, correct?
A Not about 4th of July party, no, ma'am.
MS. DiGIACOMO: Nothing further.
THE COURT: Redirect.
MR. SCHIECK: None, Your Honor.
THE COURT: Mr. Bailiff.
Counsel approach.
(Off-record bench conference from 2:30:59-2:31:47 p.m.)
THE COURT: Mr. Twining, the jury has a question for you, which I am going to read to you. After I have read you the question, please answer it. After you've answered it the attorneys will have an opportunity to pose any followup questions to you which they deem appropriate.
"Would Blaise often call home to her family while she was staying at your home from July 9th to July 13th?"
THE WITNESS: I don't believe so.
THE COURT: Any followup by the State?
MS. DiGIACOMO: No, Your Honor.
THE COURT: Any by the defense?
MR. SCHIECK: No, Your Honor.
THE COURT: This will be marked as Court's 87.
You may step down from the stand.
THE WITNESS: Thank you, Your Honor.

THE COURT: Would counsel approach?
(Off-record bench conference from 2:33:07-2:34:33 p.m.)
THE COURT: Ladies and gentlemen of the jury, we're gonna take a 15 minute stretch break. In 15 minutes please be in the hallway. The bailiff will meet you there to return you to your seats in the courtroom.
During this evening recess you are admonished not to talk or converse among yourselves nor with anyone else on any subject connected with the trial. And you're not to read, watch, or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information, including without limitation, newspaper, television, radio, and internet. And you're not to form or express any opinion on any subject connected with the trial until the case is finally submitted to you.
The jury may exit at this time.
(Jurors are not present)
THE COURT: The record shall reflect that the jury has exited.
Ms. Lobato, have you had the opportunity to discuss with your counsel your right to remain silent? I'm gonna cover that with you at this time.
Under the constitution of the United States and under the constitution of the State of Nevada you cannot be

compelled or required -- be required to testify in this case. Do you understand that?
DEFENDANT LOBATO: Yes, Your Honor.
THE COURT: You may at your own request waive and give us this right and then take the witness stand, be placed under oath, and testify. If you do, you would be subject to cross-examination by the prosecution and anything that you may say, whether it be on direct examination by your counsel or on cross-examination by the prosecution, would be the subject of fair comment when the prosecution speaks to the jury in final closing arguments. Do you understand that?
DEFENDANT LOBATO: Yes, Your Honor.
THE COURT: If you choose not to testify then the Court will not permit the prosecution to make any comments to the jury because you've not testified. Do you understand that?
DEFENDANT LOBATO: Yes, Your Honor.
THE COURT: If you elect not to testify and your counsel requests of the Court, the Court would then instruct the jury that the law doesn't compel a defendant in a criminal case to take the stand and testify, and no presumption may be raised and no inference of any kind can be drawn from the failure of a defendant to testify. Do you understand this as well?

DEFENDANT LOBATO: Yes, Your Honor.
THE COURT: Do you have any questions about any of these rights?
DEFENDANT LOBATO: No, I do not.
THE COURT: The Court further advises you that if you have a felony conviction and more than 10 years has not elapsed from the date that you were convicted or discharged from prison, parole, or probation, whichever was the latter, and the defense has not sought to preclude that from coming before the jury and you elect to take the stand and testify, the prosecution in the presence of the jury would be permitted to ask you if you'd ever been convicted of a felony, what the felony was, and when it happened, but not further details could be gone into. Do you understand this as well?
MR. SCHIECK: Court's indulgence for one second.
THE COURT: Yes, Mr. Schieck.
MR. SCHIECK: Her question was whether or not they would be allowed to refer to prior conviction in this case, which obviously the answer is no because that conviction was set aside by the Supreme Court.
THE COURT: That is correct.
Did you have any other questions?
DEFENDANT LOBATO: No, Your Honor.
THE COURT: Very well.

1 Have you made the decision a_ _ whether you are
2 going to waive your Fifth Amendment rights and testify, or
3 whether you are going to take the Fifth at this time?
4 DEFENDANT LOBATO: May I be permitted a little
5 time to consider that during this break?
6 THE COURT: I will take us off the record for about
7 5 minutes and you can confer with counsel. That decision has
8 to be placed on the record outside the presence of the jury.
9 DEFENDANT LOBATO: Okay.
10 THE COURT: So we will reconvene in 5 minutes --
11 DEFENDANT LOBATO: Okay.
12 THE COURT: -- and go off the record 'till that time.
13 (Off-record at 2:38:52 p.m. until 2:54:32 p.m.)
14 (Jurors are not present)
15 THE BAILIFF: Department 2 is back in session.
16 THE COURT: The record shall reflect that we are
17 reconvened outside the presence of the jury in State versus
18 Kirstin Blaise Lobato under C177394 in the presence of the
19 defendant, her three counsel, and the two prosecuting
20 attorneys.
21 Ms. Lobato, have you made your decision?
22 DEFENDANT LOBATO: Yes, I have.
23 THE COURT: What are you going to do?
24 DEFENDANT LOBATO: I'm going to choose not to

1 take the stand.
2 THE COURT: You're gonna take the Fifth and use
3 your right to remain silent at this time?
4 DEFENDANT LOBATO: Yes, Your Honor.
5 THE COURT: Very well.
6 We'll go off the record for a few more minutes until
7 the bailiff returns the jury to the courtroom.
8 (Off-record at 2:55:22 p.m. until 2:55:26 p.m.)
9 (Jurors are not present)
10 THE CLERK: On the record.
11 THE COURT: Mr. Schieck's asking to go back on.
12 The same parties and counsel are present.
13 MR. SCHIECK: I object that we have admitted those
14 things that [unintelligible] to be admitted or were admissible,
15 and we are ready to rest.
16 THE COURT: Okay. Thank you.
17 (Off-record at 2:55:49 p.m. until 2:57:25 p.m.)
18 (Jurors are present)
19 (Off-record at 2:59:06 p.m. until 3:02:27 p.m.)
20 (Jurors are present)
21 THE BAILIFF: Department 2 is back in session.
22 Please be seated.
23 THE COURT: The record shall reflect that we're
24 resuming the trial in State versus Lobato under C177394, in

1 the presence of the defendant, her three counsel, the two
2 prosecuting attorneys, and the ladies and gentlemen of the
3 jury.
4 Mr. Schieck.
5 MR. SCHIECK: The defense would rest, Your Honor.
6 THE COURT: Would counsel please approach?
7 (Off-record bench conference from 3:02:57-3:04:08 p.m.)
8 (Jurors are present)
9 THE COURT: The record shall reflect that we
10 received a juror's note that Court and counsel have reviewed
11 at the bench. In the evening hours when the Court is in
12 recess there is a janitorial crew that comes in and goes
13 through the courtroom and cleans it up. And they -- they are
14 the only ones who are in here when we are not.
15 This will be marked as the Court's next in number.
16 THE CLERK: 88.
17 THE COURT: Thank you.
18 The defense has rested case in chief.
19 State?
20 MR. KEPHART: We have nothing further, Your
21 Honor.
22 THE COURT: Ladies and gentlemen, with both sides
23 resting their cases in chief, that concludes the presentation of
24 evidence and testimony for the purposes of this trial. It is now

1 the time for the Court to instruct you on the law that applies to
2 this case.
3 The Court has prepared written instructions for you.
4 Some of them are long, some of them are a little complicated,
5 and some of them contain exact quotations from various
6 statutes or from Supreme Court decisions, both U.S. Supreme
7 Court and State of Nevada Supreme Court decisions. So to
8 make sure that I don't omit or misstate anything, I will be
9 reading through them to you.
10 The instructions are all numbered in the upper right
11 and corner. I will first give you the number of the instruction
12 and then I will give you the body of law. To assist you I have
13 prepared copies of the instructions, which the bailiff will now
14 hand out to you.
15 (Pause in the proceedings)
16 THE COURT: The original instructions, which I am
17 going to read through, are signed on the back page. The
18 copies which you have are not signed. That is one way that
19 you can always tell the difference between the original for the
20 file and your own.
21 Also this is a form of verdict that's been prepared for
22 your convenience. The clerk has done what we call blue
23 backing to it. It's stapled to a blue backing. The Court's
24 instructions will also be blue backed after I complete reading

1 them.
2 Please do not write on the original instructions that
3 are blue backed, as they are to be maintained in the official file
4 kept in the clerk's office. The copies which have been just
5 distributed to you, those you may write on if you find that
6 helpful. I would ask that you please write your name across
7 the top of the front page so that when you get back into the
8 jury deliberation room and you have them all spread out
9 across the table you'll be able to find your own.
10 As I go through them you can circle things,
11 underline things. Sometimes I see the ladies and gentlemen
12 of the jury kinda dog earring certain pages that they want to
13 go back and refer back to, and you can do that as well.
14 Others will listen to the Court read through the instructions
15 and on the front page write down a couple of numbers of
16 certain instructions that they want to go back and refer to.
17 Both the original copy -- or the original of the instructions and
18 the copies that you have with you, you may take with you into
19 the jury deliberation room and refer back to.
20 **JURY INSTRUCTIONS**
21 THE COURT: Instruction Number 1. It is now my
22 duty as Judge to instruct you in the law that applies to this
23 case. It is your duty as jurors to follow these instructions and
24 to apply the rules of law to the facts as you find them from the

1 evidence. You must not be concerned with the wisdom of any
2 rule of law stated in these instructions. Regardless of any
3 opinion you may have as to what the law ought to be, it would
4 be a violation of your oath to base a verdict upon any other
5 view of the law than that given in the instructions of the Court.
6 Instruction Number 2. If in these instructions any
7 rule, direction, or idea is repeated or stated in different ways,
8 no emphasis thereon is intended by me and none may be
9 inferred by you. For that reason you are not to single out any
10 certain sentence or any individual point or instruction and
11 ignore the others. But you are to consider all the instructions
12 as a whole and regard each in the light of all the others. The
13 order in which the instructions are given has no significance as
14 to their relative importance.
15 Instruction Number 3. An information is but a
16 formal method of accusing a person of a crime and is not of
17 itself any evidence of her guilt.
18 In this case it is charged in an information that on or
19 about the 8th day of July, 2001, the defendant committed the
20 offenses of, murder with use of a deadly weapon and sexual
21 penetration of a dead human body, felony Nevada Revised
22 Statute Section 201.450, within the County of Clark, State of
23 Nevada, contrary to the form, force and effect of statutes in
24 such cases made and provided and against the peace and

1 dignity of the State of Nevada.
2 Count 1, murder with use of a deadly weapon, did
3 then and there willfully, feloniously, without authority of law
4 and with premeditation and deliberation and with malice
5 aforethought, kill Duran Bailey, a human being, by the said
6 defendant, beating the said Duran Bailey with a blunt object
7 and/or by stabbing and/or by cutting the said Duran Bailey
8 with a deadly weapon, to-wit: a knife.
9 Count 2, sexual penetration of a dead human body,
10 did then and there willfully, feloniously, and without authority
11 of law, sexually penetrate a dead human body, to-wit: Duran
12 Bailey, in the following manner, by inserting a knife into and/or
13 cutting the anal opening of the said Duran Bailey.
14 It is the duty of the jury to apply the rules of law
15 contained in these instructions to the facts of the case and
16 determine whether or not the defendant is guilty of one or
17 more of the offenses charged. Each charge and the evidence
18 pertaining to it should be considered separately. The fact that
19 you may find a defendant guilty or not guilty as to one of the
20 offenses charged should not control your verdict as to any
21 other offense charged.
22 Instruction Number 4. In this case the defendant is
23 accused in an information alleging a open charge of murder.
24 This charge may include, murder of the first degree, murder of

1 the second degree, and voluntary manslaughter. The just
2 must decide if the defendant is guilty of any offense, and if so,
3 of which offense.
4 Instruction Number 5. Murder is the unlawful killing
5 of a human being with malice aforethought, either express or
6 implied. The unlawful killing may be effected by any of the
7 various means by which death may be occasioned.
8 Instruction Number 6. Malice aforethought means
9 the intentional doing of a wrongful act without legal cause or
10 excuse, or what the law considers adequate provocation. The
11 condition of mind described as malice aforethought may arise
12 from anger, hatred, revenge, or from particular ill will, spite or
13 grudge towards the person killed. It may also arise from any
14 unjustifiable or unlawful motive or purpose to injure another,
15 or with reckless disregard of consequences and social duty.
16 Malice aforethought does not imply deliberation of
17 the lapse of any considerable time between the malicious
18 intention to injure another and the actual execution of the
19 intent. But denotes an unlawful purpose and design as
20 opposed to accident and mischance.
21 Instruction Number 7. Express malice is that
22 deliberate intention unlawfully to take away the life of a human
23 being, which is manifested by external circumstances capable
24 of proof. Malice may be implied when no considerable

provocation appears or when all the circumstances of the killing show an abandoned and malignant heart.

Instruction Number 8. The prosecution is not required to present direct evidence of a defendant's state of mind as it existed during the commission of a crime. The jury may infer the existence of a particular state of mind of a party or a witness from the circumstances disclosed by the evidence.

Instruction Number 9. Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements, willfulness, deliberation, and premeditation must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder.

Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing. Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the actions.

A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and a deliberation to occur.

A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill. Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing. Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been proceeded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

Instruction Number 10. The law does not undertake to measure in units of time the length of a period -- strike that. The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill, which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

Instruction Number 11. The crime of first degree

murder includes the crime of second degree murder. You are instructed that if you find that the State has established that the defendant has committed first degree murder, you shall select first degree murder as your verdict.

You may find the defendant guilty of second degree murder if, one, some of you are not convinced beyond a reasonable doubt that the defendant is guilty of murder of the first degree. And two, all 12 of you are convinced beyond a reasonable doubt the defendant is guilty of the crime of second degree murder.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by the defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict of murder of the second degree.

Instruction Number 12. Murder of the first degree includes murder which is any kind of willful, deliberate, and premeditated killing. All murder which is not murder of the first degree is murder of the second degree. Murder of the second degree is murder with malice aforethought, but without the add mixture of premeditation and deliberation.

Instruction Number 13. Manslaughter is the unlawful killing of a human being without malice, express or

implied, and without any mixture of deliberation. Voluntary manslaughter is a voluntary killing upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible.

The provocation required for voluntary manslaughter must either consist of a series and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion any reasonable person, or an attempt by the person killed to commit a serious person injury on the person killing. The serious and highly provoking injury which causes the sudden heat of passion can occur without direct physical contact.

For the sudden violent impulsive passion to be irresistible resulting in a killing, which is voluntary manslaughter, there must not have been an interval between the assault or provocation and the killing, sufficient for the voice of reason and humanity to be heard; for if there should appear to have been an interval between the assault or provocation given for the killing, sufficient for the voice and reason of humanity to be heard, then the killing shall be determined by you to be murder. The law assigns no fixed period of time for such an interval, but leaves its determination to the jury under the facts and circumstances of the case.

Instruction Number 14. The heat of passion which

1 will reduce a homicide to voluntary manslaughter must be
2 such, an irresistible passion as naturally would be aroused in
3 the mind of an ordinarily reasonable person in the same
4 circumstances. A defendant is not permitted to set up her own
5 standard of conduct and to justify or excuse herself because
6 her passions were aroused, unless the circumstances in which
7 she was placed and the facts that confronted her were such as
8 would have aroused the irresistible passion of the ordinarily
9 reasonable person if likewise situated. The basic inquiry is
10 whether or not at the time of the killing the reason of the
11 accused was obscured or disturbed by passion to such an
12 extent as would cause the ordinarily reasonable person of
13 average disposition to act rationally and without deliberation
14 and reflection, and from such passion rather than from
15 judgment.
16 Instruction Number 15. The crime of murder may
17 include the crime of voluntary manslaughter. If you find the
18 State has established that the defendant has committed
19 murder, you shall select the appropriate degree of murder as
20 your verdict.
21 You may find the defendant guilty of voluntary
22 manslaughter if, one, some of you are not convinced beyond a
23 reasonable doubt that the defendant is guilty of murder of
24 either the first or second degree, and all 12 of you are

1 convinced beyond a reasonable doubt the defendant is guilty
2 of the crime of voluntary manslaughter.
3 If you are satisfied beyond a reasonable doubt that
4 the killing was unlawful, but you have a reasonable doubt
5 whether the crime is murder or voluntary manslaughter, you
6 must give the defendant the benefit of that doubt and return a
7 verdict of voluntary manslaughter.
8 Instruction Number 16. You are instructed that if
9 you find the defendant guilty of murder or voluntary
10 manslaughter, you must also determine whether or not a
11 deadly weapon was used in the commission of this crime. If
12 you find beyond a reasonable doubt that a deadly weapon was
13 used in the commission of such an offense, then you shall
14 return the appropriate guilty verdict reflect quote "with use of
15 a deadly weapon", unquote.
16 If, however, you find that a deadly weapon was not
17 used in the commission of such an offense, but you find that it
18 was committed, then you shall return the appropriate guilty
19 verdict reflecting that a deadly weapon was not used.
20 Instruction Number 17. Quote "deadly weapon",
21 unquote, means any instrument which if used in the ordinary
22 manner contemplated by its design and construction will, or is
23 likely to, cause substantial bodily harm or death, any weapon,
24 device, instrument, material, or substance which under the

1 circumstances in which it is used, attempted to be used, or
2 threatened to be used, is readily capable of causing substantial
3 bodily harm or death.
4 Instruction Number 18. The State is not required to
5 have recovered the deadly weapon used in an alleged crime,
6 or to produce the deadly weapon in court at trial to establish
7 that a deadly weapon was used in the commission of the
8 crime.
9 Instruction Number 19. The killing or attempting
10 killing of another person in self defense is justified and not
11 unlawful when the person who kills or attempts to kills actually
12 and reasonably believes one, that there is immanent danger
13 that the assailant will either kill her or cause her great bodily
14 injury, and two, that it is absolutely necessary under the
15 circumstances for her to use in self defense force or means
16 that might cause the death of the other person for the purpose
17 of avoiding death or great bodily injury to herself.
18 A bare fear of death or great bodily injury is not
19 sufficient to justify a killing. To justify taking the life of
20 another in self defense, the circumstances must be sufficient to
21 excite the fears of a reasonable person placed in a similar
22 situation. The person killing must act under the influence of
23 those fears alone and not in revenge. An honest but
24 unreasonable belief and the necessity for self defense does not

1 negate malice and does not reduce the offense from murder to
2 manslaughter.
3 Instruction Number 20. The right of self defense is
4 not generally available to an original aggressor. That is a
5 person who has sought a quarrel with the design to force a
6 deadly issue, and thus, through her fraud, contrivance or fault,
7 to create a real or apparent necessity for making a felonious
8 assault.
9 The original aggressor is only entitled to exercise self
10 defense if she makes a good faith endeavor to decline any
11 further struggle before the mortal blow is given. Where a
12 person without voluntarily seeking, provoking, inviting, or
13 willingly engaging in a difficulty of her own free will is attacked
14 by an assailant. She has the right to stand her ground and
15 need not retreat when faced with a threat of deadly force.
16 Instruction Number 21. Actual danger is not
17 necessary to justify a killing in self defense. A person has a
18 right to defend from apparent danger to the same extent as
19 she would from actual danger.
20 The person killing is justified if, one, she is
21 confronted by the appearance of immanent danger which
22 arouses in her mind an honest belief and fear that she is about
23 to be killed or suffer great bodily injury, and two, she acts
24 solely upon these appearances and her fear and actual beliefs,

1 and three, a reasonable person in a sim situation would
2 believe herself to be in like danger.
3 The killing is justified even if it develops afterward,
4 that the person killing was mistaken about the extent of the
5 danger.
6 Instruction Number 22. If evidence of self defense
7 is present, the State must prove beyond a reasonable doubt
8 that the defendant did not act in self defense. If you find that
9 the State has failed to prove beyond a reasonable doubt that
10 the defendant did not act in self defense, you must find the
11 defendant not guilty.
12 Instruction Number 23. If a person kills another in
13 self defense, it must appear that the danger was so urgent
14 and pressing that in order to save her own life or to prevent
15 her receiving great bodily harm, the killing of the other was
16 absolutely necessary and the person killed was the assailant,
17 or that the slayer had really and in good faith endeavored to
18 decline any further struggle before the mortal blow was given.
19 Instruction Number 24. A person who commits a
20 sexual penetration of the dead body of a human being is guilty
21 of sexual penetration of a dead human body. Quote, "sexual
22 penetration", unquote, is defined as any intrusion, however
23 slight, of any part of a person's body, or any object
24 manipulated or inserted by a person into the genital or anal

1 openings of the body of another.
2 Instruction Number 25. The purpose of the statute
3 is to deter the act of sexual penetration of a dead human
4 body, and motive is not an element of that crime.
5 Instruction Number 26. The flight of a person
6 immediately after the commission of a crime, or after she is
7 accused of a crime, is not sufficient in itself to establish her
8 guilt, but is a fact which if proved may be considered by you in
9 light of all other proved facts in deciding the question of her
10 guilt or innocence.
11 Whether or not evidence of flight shows a
12 consciousness of guilt and the significance to be attached to
13 such a circumstance are matters for your deliberation.
14 Instruction Number 27. No act committed by a
15 person while in a state of voluntary intoxication shall be
16 deemed less criminal by reason of his condition. But whatever
17 the actual existence of any particular purpose, motive, or
18 intent is, a necessary element to constitute a particular species
19 or degree of crime, evidence of intoxication may be taken into
20 consideration in determining such purpose, motive, or intent.
21 Intoxication alone cannot reduce murder to voluntary
22 manslaughter.
23 Instruction Number 28. The fact that a witness had
24 been convicted of a felony, if such be a fact, may be

1 considered by you only for the purpose of determining the
2 credibility of that witness. The fact of such a conviction down
3 not necessarily destroy or impair the witness' credibility. It is
4 one of the circumstances that you may take into consideration
5 in weighing the testimony of such a witness.
6 Instruction Number 29. An quote, "alibi", unquote,
7 amounts to contention that the defendant was not present at
8 the time and place where she is alleged to have committed the
9 offense charged in the information. It is the State's burden to
10 establish beyond a reasonable doubt each of the essential
11 elements of the offense and the presence and involvement of
12 the defendant.
13 If after a consideration of all the evidence you have
14 a reasonable doubt as to whether the defendant was present
15 at the time and place the crime was committed, she is entitled
16 to a verdict of not guilty.
17 Instruction Number 30. To constitute the crime
18 charged there must exist a union or joint operation of a act
19 forbidden by law and an intent to do the act. The intent with
20 which an act is done is shown by the facts and circumstances
21 surrounding the case.
22 Do not confuse intent with motive. Motive is what
23 prompts a person to act. Intent refers only to the state of
24 mind with which the act is done. Motive is not an element of

1 the crime charged, and the State is not required to prove a
2 motive on the part of the defendant in order to convict.
3 However, you may consider evidence of motive, or lack of
4 motive, as a circumstance in the case.
5 Instruction Number 31. The defendant is presumed
6 innocent until the contrary is proved. This presumption places
7 upon the State the burden of proving beyond a reasonable
8 doubt every material element of the crime charged and that
9 the defendant is the person who committed the offense.
10 A reasonable doubt is one based on reason. It is
11 not mere possible doubt, but is such a doubt as would govern
12 or control a person in the more weighty affairs of life. If the
13 minds of the jurors after the entire comparison and
14 consideration of all the evidence are in such a condition that
15 they can say they feel an abiding conviction of the truth of the
16 charge, there is not a reasonable doubt. Doubt to be
17 reasonable must be actual, not mere possibility or speculation.
18 If you have a reasonable doubt as to the guilt of the
19 defendant, she is entitled to a verdict of not guilty.
20 Instruction Number 32. It is a constitutional right of
21 the defendant in a criminal trial that she may not be compelled
22 to testify. Thus, the decision as to whether she should testify
23 is left to the defendant on the advice and counsel of her
24 attorney.

1 You must not draw any infere[illegible] of guilt from the
2 fact that she does not testify. Nor should this be -- nor should
3 this fact be discussed by you or enter into your deliberations in
4 any way.
5 Instruction Number 33. You are here to determine
6 the guilt or innocence of the defendant from the evidence in
7 the case. You are not called upon to return a verdict as to the
8 guilt or innocence of any other person. So if the evidence in
9 the case convinces you beyond a reasonable doubt of the guilt
10 of the defendant, you should so find, even though you may
11 believe one or more persons are also guilty.
12 Instruction Number 34. The evidence which you are
13 to consider in this case consists of, the testimony of the
14 witnesses, the exhibits, and any facts admitted or agreed to by
15 counsel.
16 There are two types of evidence, direct and
17 circumstantial. Direct evidence is the testimony of a person
18 who claims to have personal knowledge of the commission of
19 the crime which has been charged, such as an eye witness.
20 Circumstantial evidence is the proof of a chain of facts and
21 circumstances which tend to show whether the defendant is
22 guilty or not guilty.
23 The law makes no distinction between the weight be
24 given either direct or circumstantial evidence. Therefore, all of

1 the evidence in the case, including the circumstantial evidence,
2 should be considered by you in arriving at your verdict.
3 Statements, arguments, and opinions of counsel are
4 not evidence in the case. However, if the attorneys stipulate
5 to the existence of a fact, you must accept the stipulation as
6 evidence and regard that fact as proved.
7 You must not speculate to be true any insinuations
8 suggested by a question asked a witness. A question is not
9 evidence and may be considered only as it supplies meaning to
10 the answer.
11 You must disregard any evidence to which an
12 objection was sustained by the Court, and any evidence
13 ordered stricken by the Court. Anything you may have seen or
14 heard outside the courtroom is not evidence and must also be
15 disregarded.
16 Instruction Number 35. The credibility or
17 believability of a witness should be determined by their
18 manner upon the stand, their relationship to the parties, their
19 fears, motives, interests, or feelings. their opportunity to have
20 observed the matter to which they testified, their
21 reasonableness of their statements, and the strength or
22 weakness of their recollections.
23 If you believe that a witness has lied about any
24 material fact in the case, you may disregard the entire

1 testimony of that witness, or any portion of their testimony,
2 which is not proved by other evidence.
3 Instruction Number 36. A witness who has special
4 knowledge, skill, experience, training, or education in a
5 particular science, profession, or occupation is an expert
6 witness. An expert witness may give his or her opinion as to
7 any matter in which he is skilled. You should consider such
8 expert opinion and weigh the reasons, if any given for it.
9 You are not bound, however, by such an opinion.
10 Give it the weight to which you deem it entitled, whether that
11 be great or slight, and you may reject it if in your judgment
12 the reasons given for it are unsound.
13 Instruction Number 37. Although you are to
14 consider only the evidence in the case in reaching a verdict,
15 you must bring to the consideration of the evidence your
16 everyday commonsense and judgment as reasonable men and
17 women. Thus, you are not limited solely to what you see and
18 hear as the witnesses testify. You may draw reasonable
19 inferences from the evidence which you feel are justified in the
20 light of common experience, keeping in mind that such
21 inferences should not be based on speculation or guess.
22 A verdict may never be influenced by sympathy,
23 prejudice, or public opinion. Your decision should be the
24 product of sincere judgment and sound discretion in

1 accordance with these rules of law.
2 Instruction Number 38. In arriving at a verdict in
3 this case as to whether the defendant is guilty or not guilty,
4 the subject of penalty or punishment is not to be discussed or
5 considered by you and should in no way influence your verdict.
6 If the jury's verdict is murder of the first degree, you will at a
7 later hearing consider the subject of penalty or punishment.
8 Instruction Number 39. If during your deliberation
9 you should desire to be further informed on any point of law or
10 hear again portions of the testimony, you must reduce your
11 request to writing signed by the foreperson. The officer will
12 then return you to court where the information sought will be
13 given you in the presence of and after notice to the district
14 attorney and the defendant and her counsel.
15 Play backs of testimony are time consuming and are
16 not encouraged, unless you deem it a necessity. Should you
17 require a play back, you must carefully describe the testimony
18 to be played back so that the court recorder can arrange her
19 notes. Remember, the Court is not at liberty to supplement
20 the evidence.
21 Instruction Number 40. When you retire to consider
22 your verdict you must select one of your number to act as
23 foreperson who will preside over your deliberation and will be
24 your spokesperson here in court. During your deliberation you

will have all of the exhibits that were admitted into evidence, these written instructions and a form of verdict which has been prepared for your convenience.

Your verdict must be unanimous. As soon as you have a agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

Instruction number 41. Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law. But whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be, and by the laws given you in these instructions, with the sole fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada.

Mr. Schieck, you had no surrebuttal, is that correct?

MR. SCHIECK: Correct, Your Honor.

MR. SCHIECK: Well, the State had no rebuttal so I didn't think I could --

MS. DiGIACOMO: The State did have rebuttal.

THE COURT: Well, they had the --

MR. SCHIECK: Oh, I'm sorry. That's right.

THE COURT: That's right. We had discussed that at

the bench at sidebar, but we hadn't put it on the record, so I wanted to do that now.

Proceeding with the closing arguments. State may proceed.

MS. DiGIACOMO: Thank you, Your Honor.

STATE'S CLOSING ARGUMENT

MS. DiGIACOMO: Good afternoon, ladies and gentlemen.

It has been four long weeks and you've gotten a lot of information thrown at you in that time. Now it's your job to go back there and try and piece everything together. And the way you should look at this is like it's a puzzle. But I submit to you it is not a three-year-old's puzzle that only has six pieces in the box and it's really easy to figure out how they go together. This is one of those complicated puzzles where you have to dump it out, there's tons of pieces, you have to flip it over and start to figure out how you can even go about putting it together.

And keep in mind sometimes in boxes there's pieces of puzzles from another puzzle, and sometimes you might be missing a piece. But when you put together what you have it does give you the big picture. What I intend to do with my argument here today is give you that big picture so that you know when you're looking at all the pieces how they're gonna

fit together.

This big picture here is that the defendant committed murder and she killed Duran Bailey on July 8, 2001. This is not about how somebody killed Duran Bailey in retaliation for a rape of Diane Parker. This is not about somebody killing the victim with scissors. And this case is not about the defendant having to fend off an attacker and use self defense. You're not gonna find any pieces of the puzzle that are gonna put together that picture for you, because that's not what this case is about. It's about how the defendant took out her anger and her rage on the defendant -- or excuse me, on the victim, Duran Bailey, on July 8, 2001.

What I'm gonna do for you first is we're gonna go through a time line, what did the evidence show the time line to be.

First, you know from Jeremy Davis' testimony May 23, 2001, that's when the defendant left her car at Jeremy Davis' house. That's when he was -- he left on that Friday the 25th to go to Caliente for a softball tournament, he returned on May 28th, and the car was gone.

At this point, you know, next, June 26, 2001, that's when her car was being towed down the street at the apartment complex, a Steve Pyszkowski -- I cannot say that word -- Pyszkowski's house. And then you next know July 2,

2001 is when the defendant goes back to Panaca. And sometime in the month of June 2001 she's living with either Steve and Cathy or she goes to stay with Doug. But on June [sic] 2, 2001 she goes back to Panaca. She drives her own red Fiero to get there.

What do we know from the evidence next? July 5, 2001, the defendant goes to the doctor. And how do you know that, because you have State's Exhibit 133. These were admitted into evidence without the custodian of records testifying. And you're gonna have these when you go back there.

And when you look at these records and you see the handwritten notes from the doctor on the 5th of July that's one full page, and then he even flips over to a back page. You're gonna notice that nowhere, nowhere in these handwritten notes by the doctor regarding the exam, regarding while she was there, said she claims she was depressed or suffering from any anxiety. She strictly went there because she was suffering or she thought she was being poisoned with phelantin [sic] sulfate.

And in fact, there's followup notes on the back where after he got the results back, which are in here as well, called mom and talked to her about it and said that because patient is doing well at present with unremarkable physical

1 exam, there's really no need for a follow
2 And then your next notes you're gonna have are for
3 July 13, 2001. And you're gonna see there's a telephone call
4 from mom. Patient is having restlessness and anxiety. Has
5 appointment for 7/16/01 on Monday. Told to start Alevium
6 [sic] as directed. If you remember, she testified she got the
7 prescription from the doctor that day and went and got it
8 filled, and to visit the ER if symptoms worsen.
9 We know July 5th she goes to the doctor strictly for
10 poisoning. She's not having any problems with anxiety or
11 depression. And also you know on this date, July 5th, from
12 Chris Carrington through his grandmother, the defendant's
13 mom and the defendant are fighting, and that's why Chris
14 Carrington came home and told his grandmother I'm coming
15 home 'cause they're fighting down there.
16 July 6, 2001. Defendant's mother testified that she
17 took off that day to stay home with her daughter. And you
18 know Chris Carrington was down there again that day, and
19 they were fighting again over the defendant going back to Las
20 Vegas. And he came back and he told his grandmother that
21 they're fighting over her going back to Las Vegas. And if you
22 recall, the grandmother didn't believe he went back down
23 there because she wasn't there, she was back in Las Vegas.
24 MR. SCHIECK: Objection, Your Honor, that

1 misstates the evidence. There was no testimony to that.
2 THE COURT: The jury shall use their collective
3 recollections. The Court will overrule.
4 MS. DiGIACOMO: And at this point the defendant
5 has been off of drugs since she's come home July 2nd. And
6 you'll notice when she did the blood work up for her July 5th
7 office visit, there's no methamphetamine in her system. So at
8 this point she's needing drugs again. And you know that from
9 the testimony of Jeremy Davis as well because when she was
10 doing drugs she wanted to do it all the time. She'd been a
11 couple of days without, she's fighting with her mom, she's
12 used drugs in the past to deal with her family problems, deal
13 with her issues, and so she's craving it and she wanted to go
14 back to Las Vegas.
15 And there's a lot of talk in this case about phone
16 records, but look at the phone records. There's another way
17 that you can interpret those phone records, other than what
18 you heard from the witnesses on the stand, it was Blaise and
19 Doug talking to each other. If you look at the phone records
20 for Friday afternoon, it could also be that mom is home and
21 she's looking for Blaise calling Doug, calling the police, calling
22 her father at work. Looking not for Doug, looking for her
23 daughter.
24 On July 7, 2001, the defendant's down in Las Vegas

1 and mom doesn't know where she's at, so mom goes back to
2 work on that Saturday. Now Chris Carrington says that he was
3 down there and saw her on that Sunday, but if you recall, he
4 testified he would've gone over there after he had finished
5 with his yard work. It was about that time that his
6 grandfather had the heat stroke and he ended up driving his
7 grandmother to the hospital, was with her the rest of the day,
8 or was going to pick up the sister -- her sister at the lake and
9 bring her back. Chris Carrington could not have been there on
10 July 7th.
11 And also look at who he said was present on July 7th.
12 He says that when he would've been there in the afternoon
13 that mom would've been home. No, she was at work that day.
14 Chris Carrington was not down there on the 7th. He was down
15 there on the 6th but not the 7th.
16 On this morning of the 7th on her way to work she
17 did drop off the urine sample that was collected on the 6th,
18 what she had of it. She testified that there wasn't a lot and so
19 she woke up her daughter to get one last sample. State
20 submits to you, the reason there wasn't a lot in that urine
21 sample is 'cause Blaise took off the day before, so she only
22 completed part of the urine sample, the 24 hour urine sample,
23 when she was there the morning of the 6th, or possibly in the
24 afternoon of the 6th.

1 And again, look at the phone records on the 7th as
2 well. Be interpretive that not only is mom looking --
3 MR. SCHIECK: Objection to what they interpreted,
4 Your Honor.
5 THE COURT: Sustained.
6 MS. DiGIACOMO: But it can be interpreted. I'm
7 sorry, I couldn't hear you?
8 THE COURT: You may rephrase.
9 MS. DiGIACOMO: When you look at the phone
10 records, those -- when you look at them there's phone calls
11 back and forth, but it could be again Doug and the parents
12 looking for Blaise.
13 On July 8, 2001, time of death. The big window
14 comfort of comfort for the coroner is between 8 and 24 hours
15 before the body was pronounced dead, which was at 3:50
16 a.m. So the State submits to you, because of the fact that the
17 defendant was down there partying since 7/6, the night of the
18 7/7, she says her attack occurred early morning hours, late
19 evening -- or late night hours, that it was sometime before
20 sunup on July 8th that she killed Duran Bailey.
21 We know from the defense witness and Diane Parker
22 that Duran Bailey had sold drugs before and he had traded sex
23 for drugs before. He traded sex before with Diane Parker.
24 This murder was committed by the defendant.

1 Again, you have the testimony of Jeremy Parker [sic] that she
2 liked to do drugs and she wanted to do it over and over again.
3 She never had to buy drugs, but she always knew where to
4 get it. And she told Jeremy I have a source, but she never
5 knew -- he never knew who that was. But she even tells the
6 detectives, in Las Vegas I know where to get drugs.
7 So she's down there and somehow she comes into
8 contact with Duran Bailey. And somehow they end up back at
9 his place, the trash dumpster where he would stay sometimes
10 on the weekend.
11 The first stab wound to Duran Bailey was to the
12 scrotum, and how do you know that? Because his pants were
13 down around his ankles when he was found. But also think
14 about it, that's a stab wound that was before he died, it
15 would've bled. If you look at his pants, there's no stab wound
16 through the pants, there's no blood in the groin or crotch area.
17 State submits to you that what happened was
18 somehow the defendant hooked up with Duran Bailey for
19 drugs, but he obviously wasn't gonna want money in exchange
20 for it, he's gonna want sex in exchange for drugs. But the
21 defendant's not gonna have anything to do with this smelly old
22 guy. He goes back there, drops his pants, she probably acted
23 like she was gonna go down and give him fellatio, boom, first
24 stab wound was to the scrotum.

1 At that point what's any guy gonna do that's in pain
2 here? Cup themselves. They're vulnerable, they're gonna be
3 crouched over. But she doesn't stop stabbing him at that
4 point. And think about it. You have the injuries to the left
5 palm, and there's only on the right hand one on the back, as if
6 he's cupping himself here, she's still stabbing. He's got this
7 hand up because now she's stabbing at his face. She stops
8 and somehow she goes back to her car and she gets a bat.
9 And think about it. She told Dixie that she left --
10 told the police she left after she stabbed him or tried to cut his
11 dick, and saw him stumbling or laying on the ground crying.
12 She saw that vision because that's when she went back to the
13 car and she got a bat and she came back, and that's when the
14 blunt force trauma occurred. She probably hit him in the
15 mouth, kicked him over, punched him with the bat, punched
16 him with her fist. We know she can knock out a guy who's
17 6'6" from Chris Carrington.
18 MR. SCHIECK: Objection. There was no evidence
19 the guy was 6'6", Your Honor.
20 MS. DiGIACOMO: 6 foot, excuse me.
21 THE COURT: Sustained.
22 MS. DiGIACOMO: We know that she can knock over
23 a guy that's 6'6" from a punch in the mouth.
24 He goes down. The skull fracture occurs when he

1 falls. And Doc Simms told you that the head trauma itself, the
2 blunt force trauma to the head is gonna render him
3 unconscious. And at that point it's very easy to go for the
4 calculated stab wound to the carotid artery.
5 But she's not done at that point. After he bleeds
6 out, and Doc Simms told you it would've been within a matter
7 of minutes. What did she do, stabs him a couple of times in
8 the abdomen, makes sure he's dead. Stabbing him, just to
9 see is he moving. He's not. And at that point she, after he is
10 dead, she takes her knife and rips through his rectal area and
11 his anus, and then she pulls up that penis and amputates it at
12 the base. If you see the pictures, the pubic hair, everything is
13 still attached to the penis.
14 And also too, keep in mind that that stab to the
15 carotid artery, it went down approximately inches to get to the
16 carotid artery. I believe it was two inches to get down there.
17 And he finally expires.
18 At this point, what does she do? We know there's
19 drag marks on the curb away from the big pool of blood.
20 MR. SCHIECK: I'm gonna object, Your Honor.
21 There was no testimony they were drag marks. They were
22 transfer marks.
23 MS. DiGIACOMO: Actually there was several
24 witnesses --

1 THE COURT: Overruled.
2 MS. DiGIACOMO: Thank you.
3 On the curb where all the blood spatter is, if you
4 keep in mind it's all low as if he was down on the ground when
5 he was getting these blows or the final stab wound that he
6 probably bled down. There's no arterial spurting up high. And
7 you can see the drag mark of the blood on the curb where he
8 was probably pulled by his right arm -- 'cause it's found like
9 this and his left arm is found down by his side -- towards the
10 dumpster. But she's not strong enough to get him in the
11 dumpster, so then she just throws trash over on top of him.
12 And then what does she do? She gets in her car
13 and she high tails it out of there and she gets back to Panaca,
14 and the freeway's right there. And she even told Dixie that
15 she didn't think anyone saw her with her attacker, if you want
16 to call it that. She knew no one saw her commit this crime.
17 She was only worried about somebody seeing her very
18 distinctive car. Because think about it, her license plate,
19 something out of the normal, it's not usual. It's not, you
20 know, "I sell for you" like a real estate person, it's something
21 very unusual that would stick in somebody's mind 'cause it's
22 not a license plate that you see often in that kind of sexual
23 context.
24 Defendant says that -- to the police that I

1 committed, I did this, but it was in a dih...nt area of town.
2 But it's very possible she was just jumbling her two different
3 stories, the story of the car was to Jeremy getting defecated,
4 and this alleged attack.
5 Just think about it. When they first tell you look,
6 your car is very distinctive, is that it outside? Her first thought
7 is somebody borrowed my car. And this isn't about these
8 Mexicans that live in Diane Parker's apartment complex either.
9 Think about that. She doesn't know their names, knows what
10 apartment they live in, but they're gonna go and attack this
11 person with scissors and in revenge for this rape of Diane
12 Parker, a person that they don't know that well. When the
13 police told you that they tried to followed up with these
14 people, they learned from the apartment complex they were
15 hard working people, and when they ran them they had no
16 criminal history whatsoever. That doesn't make sense. It was
17 the defendant.
18 And her attack did not happen in May 2001, it didn't
19 happen a couple of months before. If it did, why on July 18th
20 are they -- with Dixie are they checking the Internet then?
21 Because Dixie had the frame of mind it had just happened,
22 based upon how upset the defendant was. Why was she
23 going to the Y to get a paper right after she talked to Laura if
24 it wasn't recent? Why would she want that day's paper?

1 And also look at why would the defendant be
2 suffering from anxiety and depression on the 13th after the
3 murder and not on the 5th unless, as she told Michele Austria,
4 her conscious is getting to her.
5 And also too, you have no security reports from the
6 Budget Suites for May, June, or July regarding any sort of
7 attack by the office or by the fountain on in that parking area,
8 no blood found on the ground, no penises severed, no penises
9 slashed. You have Duran Bailey in July that was found with his
10 penis severed.
11 And again. look at her statement to the police. Go
12 through it carefully. Detective Thowsen told you it is not
13 uncommon for somebody who's been on drugs to jumble their
14 stories around, not uncommon at all. And she's jumbling the
15 incident with Jeremy and the incident with Duran Bailey.
16 And think about too, Dixie made clear, as the one
17 thing she definitely made clear when she was on the stand,
18 when she talked to the defendant on July 18th that it was two
19 separate incidents. There was the attack incident and then
20 there was this thing that happened with her car where
21 somebody defecated, urinated, and vomited in it, and they
22 were two completely separate incidents. It's not until she gets
23 to the police two days later where the defendant is jumbling
24 these. She made clear two days before they were not the

1 same incident.
2 Now there's been a little bit of testimony too about a
3 crime like this where there's sexual mutilation postmortem,
4 that this is usually male on male. That doesn't mean a woman
5 couldn't have done this. Think about it, defendant carried a
6 knife for her protection, for protection. Even though she had a
7 knife collection, she did carry it for protection.
8 When Dixie talked to her for those first couple hours,
9 do you recall what she said that they did? They did the first
10 part of one of her anger management classes. The defendant
11 needed anger management when she talked to Dixie.
12 She knew the area where this crime occurred,
13 because you know that from Steve Pyszkowski, because that
14 was within his territory. Tropicana to Rainbow, I believe it was
15 Sahara and I-15, right smack in the middle of his territory.
16 And also Jeremy Davis told you when she was on
17 drugs she was not the same person. In fact, that was what
18 led to their breakup, because drugs were number 1 to the
19 defendant and Jeremy was number 2.
20 And think about her conversation with the police on
21 the ride home. She's still talking about the horror that she
22 went through when she was 5 years old when she was
23 sexually molested, and she's still upset because nothing really
24 happened. She still has this anger 12 years later, 13 years

1 later. And when the police ask her, what about her past would
2 make her particularly emotional about the situation, she tells
3 them in her statement about being tortured every day for a
4 year when she was 5 years old by her mother's boyfriend, and
5 that her mother knew about it and let it happen. She has
6 some deep seeded issues and anger, not only from this, but
7 then she was raped again at 13, and the police were no help
8 apparently, told her don't worry about even reporting it, raped
9 again when she was 18 by her -- or excuse me, 17 by her best
10 friend's father.
11 It's very clear the defendant's someone who
12 committed this murder. No proof of any prior attack, no
13 evidence that Diane Parker, her neighbors committed it. And
14 when you listen to her statement, listen to all the times she
15 uses past tense in it. She knew she killed her victim.
16 But you know what she's gonna have to do? She's
17 gonna have to minimize when she wants to get this off her
18 chest. Think about it. She has a lot of guilt, her conscious is
19 getting to her, she's suffering from anxiety and restlessness by
20 the 13th, 5 days after or 6 days after this happened. She
21 needs to talk, she needs to get it off her chest. So what is she
22 gonna do to do that? She's gonna minimize. She's gonna
23 make the listener have some sympathy for her. That's why
24 she's gonna say I was attacked, I defended myself, just so she

can start to get it off her chest, but that's not what happened.

Dixie even told you, if she had come to me and told me yeah, I killed this guy and then I cut off his penis, she would've called the police. But she had concern for Blaise because she thought Blaise had been attacked. In order for Blaise to talk about this and start to get it off her chest, like she did with even Michele Austria, she's gotta minimize her own actions. And Detective Thowsen told you that's very common even when giving confessions. They want to talk about what they did but they need to kinda justify it in their own mind, and that's what she was doing.

Now after the murder -- back to the time line -- she high tails it back to Panaca. And people see her from 11:30 a.m. through the night. You have multiple witnesses that came in and marked on the little calendar. And look too, the phone call from the house to her mother to her cell phone 'cause she's at work is about 10:00 a.m. That's probably when the defendant got home.

Later that night she goes back to Las Vegas with Doug. Early in the night to, I believe he said to lay low so that Steve and Cathy wouldn't bother them. But I submit to you that it was to lay low to see is this being reported? Because you remember she told Dixie that she'd been looking in the paper? Doug told you that they did watch a news report the

next day or the following day regarding a murder, but nothing was said about it.

And she's leaving her car behind because she doesn't want it to be seen. It's a unique car. Yes, it's sitting in front of her parent's house 'cause she's not driving it, she's not taking it back to Las Vegas. She doesn't want any connection to it and that's why she's going to Doug's for the weekend, she's gonna lay low. And look, there are no phone calls from her parent's house to Doug's where they knew she was. There's no contact with even her parents 'cause she's laying low.

July 13th, this is when her father comes to pick her back up and takes her back to Panaca. It's when her mom calls the doctor and we have those medical records because she's more anxious. And this is when she's getting on her medication as well. She gets on Lorazepam.

Now on July 14th and 15th, that's probably when the defendant went four-wheeling with Michele and got the injuries to her abdomen. Because you remember Michele testified it's very possible we went that weekend too. And her father when he picked her up on the 13th, there was no injuries on her. And I don't -- I believe Chris Carrington even when he says he saw her on the 13th there was no injuries on her as well.

July 16th, this is when the defendant goes back to the doctor and gets Prozac prescribed to her. Her mother went and got this prescription filled as well. This was for the depression. The Lorazepam was for anxiety from the 13th.

Then you have between -- sometime between July 16th and the 20th, that's when the defendant's conscious is really weighing heavy on her about what she did. And if you remember when she talked to Michele about cutting a guy's dick or cutting it off, which is what Paul Brown heard, she told her I've already been going to a doctor because of how I'm feeling about this. My conscious is weighing on me. When she goes to see Dixie as well, it's weighing on her. And she tells Michele that she's gone to the doctor and she's on medication for it, for her depression and her anxiety.

So her conversation with Michele, even though she says it was before July 4th, it had to have been after the 13th and/or the 16th because she had been to the doctor regarding it and was on medication. She didn't get on medication until the 13th.

Then July 18th, this is when the defendant goes to her safe house. She goes, she wakes up Dixie, she gives her a hug and she says I did something bad. And she also tells Dixie at that time she's not driving a new car, and I believe she said something to the effect that I'm not driving it again, I don't

want to even be near that car or I don't want anyone seeing me driving that car. And she's driving her dad's truck at that time. And she also tells Dixie, I swear this time I'm getting off drugs because she did get out of control. She's getting off drugs.

Now Dixie, keep in mind she wasn't a pro-prosecution witness. I think that was clear. But the State did not reverse that testimony, and I think that's pretty apparent because she was not very cooperative with the State. But the conversation that she had with Dixie is crucial in this case because before they even knew up there that this body had been found with a severed penis, a homeless guy that, as the defendant said, smelled like old socks that hadn't been washed in two weeks. She goes to Dixie and she tells her that it was on a hotel street just went of I-15. She tells her it happened between buildings or in an alley or something like that. She tells her that she cut the guy's penis off and tossed it. Do you remember Dixie making that motion, tossed it. And the penis is found right next to the body.

The defendant was so upset, she gave the impression to Dixie it had just happened. She thought within a couple of days, but recently. And the defendant was afraid that somebody had seen her very distinctive car license plate, and she told Dixie I'm not driving that car, I don't want

1 anybody to see it.
2 She told Dixie I'm afraid I may have killed him,
3 that's why her conscious was weighing on her. She needed to
4 talk to somebody, she needed to get this off her chest that she
5 had killed somebody. And Dixie then got on the computer and
6 tried to help her look to see if there was anything reported in
7 the news agencies. And remember what Dixie told you she
8 put in for that search? Severed penis. Not got penis, not
9 slashed penis, severed penis was the search engine -- or the
10 search terms that they used. And that's why Dixie went to her
11 friend Laura because she was concerned and she wanted to
12 find out if this really happened and to help Blaise.
13 But there are a few points that Dixie was trying to
14 minimize. First of all, she tried to expand the time line. She
15 tried to deny that she thought it had just happened. And
16 throughout direct examination she brought up that she had
17 looked in the papers back to July 1st.
18 MS. GREENBERGER: Misstates the evidence, June
19 1st.
20 MS. DiGIACOMO: No, Your Honor, it doesn't. I said
21 direct. It wasn't until cross-examination she changed that.
22 THE COURT: Overruled.
23 MS. DiGIACOMO: During the State's direct
24 examination it was July 1st. Three separate times, pointed out

1 to her, you never said that before. Not in her statement to the
2 police, not the two times she had previous testified.
3 On cross-examination the first time it was July 1st.
4 The second time defense counsel said don't you mean June
5 1st? And that when Dixie goes oh, yeah, yeah, you're right, it
6 was June 1st. And now it goes back to June 1st, which again
7 was never told previously to the police. There were not parts
8 where it was stopped, the tape was stopped and turned off.
9 She never testified to it before.
10 Also she said that the attacker that Blaise described
11 was very, very big, and compared it to some other students.
12 Again, this was new information that we heard for the first
13 time. It was not in her prior testimonies, it was not in her
14 statement to the police. And in fact, Laura even told you that
15 a couple of days before they came down to testify Dixie was
16 trying to convince her that I did tell you she said it was big --
17 he was big.
18 But keep in mind too, something else Dixie added,
19 which again was knew, was that first all she remembered is
20 the defendant saying that she stabbed up, and she thought
21 into the stomach. State submits to you that first stab up was
22 to the testicle, to the scrotum.
23 And again, Laura told the detectives, don't go talk to
24 Dixie before you go talk to Blaise because she will tip her off.

1 It's very clear that Dixie cares a lot about Blaise, the
2 defendant, and wants to help her. However, she got pulled
3 into this because that's who the defendant confessed to and
4 that's what got this ball rolling.
5 Now on July 20th, that's when Laura finally gets a
6 hold of somebody in homicide down in Metro, gets a hold of
7 Tom Thowsen. And she told you that within talking to them
8 three hours later they were at her door taking a statement.
9 They interviewed her, she warned them not to go
10 see Dixie first, and then they go to the defendant's house.
11 They take a statement from her, and that was fairly quick.
12 They arrested her, they take her outside. She's allowed to say
13 goodbye to her parents, tells her dad I told you I did
14 something awful, tells mom I did it and I gotta do what I gotta
15 do, and she leaves.
16 July 21st, this is when Becky starts creating this alibi.
17 You have the witnesses that told you that they talked to her
18 the day after Blaise's arrest about the date July 8th and how
19 important it was. Jo Dennert, the next door neighbor came
20 over and talked to Becky the day after she was arrested. She
21 talked to her cousin -- or her niece Shayne the next day after
22 about the July 8th date. She talked to other people. She tried
23 to go to find Chris Carrington in the supermarket and found his
24 grandmother and told her you're not talking to my son -- or

1 my grandson, you're not gonna confuse him about these
2 dates. She ends of talking to Chris anyway. She talks to Doug
3 multiple times, she talks to Clint, Ashley's friend, she talks to
4 all the witnesses in this case. And now we have an alibi. Even
5 though she claims she didn't know about the July 8th date until
6 after it came out in the paper July 25th.
7 Keep in mind that the only people that really see
8 Blaise between July 5th and July 8th are related to her. You
9 have her mother, you have her father, you have her sister who
10 basically tells you I don't remember not seeing her, but none
11 of them can specifically tell you until the 8th.
12 And then you have John Kraft. John and Ashley and
13 her father are all new. They did not testify previously. The
14 come in here and they say that she was there the morning of
15 July 8th at 7:00 a.m. That's new.
16 And keep in mind too that the witnesses that talked
17 about her car not being moved, recall that? Everyone says no,
18 it stayed there from July 2nd 'till the police got it on July 20th.
19 Well, Mrs. McCroskey thought that it was closer to the property
20 line, a little bit over, and so did Ashley as well. When you look
21 at the photographs from the police you'll see it's dead smack in
22 the middle of their yard. It's not even close to the McCroskey's
23 property line. That car was moved.
24 Now these are the two things that the State has to

1 prove. We have to prove every materia[illegible]ment of the
2 offense as charged and what crime was committed, and we
3 also have to tell you who committed it. Well, that's been
4 established, it was Blaise Lobato.
5 So now your instructions on murder. Murder is the
6 unlawful killing of a human being with malice of forethought,
7 either expressed or implied. It's gotta be an unlawful killing,
8 which means it can't be self defense, which would be not
9 justified, not excusable. Killing must be with malice of
10 forethought, and that can be either express or implied.
11 In this case it's not justified, meaning this is not self
12 defense. And when you look at the instructions on self
13 defense you'll see it's a reasonable person standard. It has to
14 be somebody, a reasonable person in that situation would've
15 reacted in that way. And also the person killing must act
16 under the influence of those fears alone and not in revenge.
17 Look at the photographs in this case of the body.
18 This is revenge. This is anger. Even the defense expert said it
19 was directed anger.
20 Defendant's actions again are inconsistent with self
21 defense. If you look at Instruction Number 26, that's your --
22 what we call the flight instruction, and that tells you that, first
23 of all, somebody fleeing the scene. That can be viewed, if you
24 interpret it that way, as consciousness of guilt. Somebody

1 who has just been attacked and reacting in self defense
2 doesn't normally flee the scene. She didn't call the police in
3 this case either.
4 She told the detectives that she drove off because
5 she didn't think anyone would care. It wasn't because she was
6 afraid of her attacker, it was because she didn't think anyone
7 would care. She knew that there was no fear about her
8 attacker seeing her because she knew that he was dead, and
9 that's all the past tense that you have in your -- in her
10 statement.
11 Also what did she do after her self defense? She
12 ditched the car, she got rid of the evidence, she got rid of the
13 clothes she was wearing that she said had blood on them, she
14 got rid of the knife that she used. It's not something that
15 somebody who's just been attacked and reacted in self
16 defense does. Why would you worry about somebody seeing
17 your car if you had just been attacked?
18 You had to protect yourself. Why do you go to Dixie
19 and say I did something bad? Why did you tell your mom I
20 did it and need to do what I gotta do? Why leaving a note for
21 Jeremy that says that I've gotta leave -- oh, sorry. Not
22 Jeremy. Why when the police tell you that they've got a
23 distinctive car, do you say somebody borrowed the car if you
24 acted in self defense and you were truly attacked?

1 Now manslaughter. Again, it's a reasonable person
2 standard. It's your average everyday person. It's not
3 somebody who's on a methamphetamine binge when you look
4 at the reaction. It's gotta be an irresistible impulse. Well, in
5 this case you've got multiple instrumentalities of death, you've
6 got the blunt force trauma, you've got all the incised wounds,
7 and you've got a calculated infliction of injury. After he was
8 down you have the carotid artery. This is more in line with
9 malice of forethought, which is murder. That injury right there
10 to the carotid artery, that was calculated.
11 Malice of forethought, expressed malice, it's the
12 deliberate intention which is unlawfully to take away the life of
13 a fellow creature which is manifested by external
14 circumstances capable of proof. There's also implied malice,
15 which can be implied when no considerable provocation
16 appears or when all the circumstances of the killing show an
17 abandon and malignant heart.
18 First degree murder. There are three things that the
19 State has to prove beyond a reasonable doubt. That it was
20 willful, that it was with deliberation, and it was with
21 premeditation and deliberation.
22 Second degree murder is all murder which is not first
23 degree murder. So if we don't prove those three things, then
24 it falls down to second degree.

1 Willful, this is the intent to kill. In this case you have
2 multiple stab wounds, with the last one being a very calculated
3 injury. You also have a lot of blunt force trauma used. That
4 suggests to you her intent to kill. Wasn't to wound him. She
5 wounded him with the stab to the scrotum when she knocked
6 him vulnerable. It was an intent to kill.
7 You have to have expressed malice, which we talked
8 about. There needn't be no appreciable space and time before
9 forming the intent to kill and the act of killing.
10 Deliberation, the process of determining upon a
11 force of action to kill. Here you get two different
12 instrumentalities of death, a blunt force trauma and the knife
13 wounds. This is when you have a chance to reflect upon your
14 decision to use such force. And it can be done fairly quickly.
15 All you have to do is weigh the consequences for and against.
16 And when I say it could be done quickly, the easiest
17 example is when you're driving your car and you're doing
18 about 50 in a 45 and you're getting close to a light that's
19 green. As you get about 100 feet from the intersection the
20 light turns yellow. At that point what do you do? You go
21 through the thought process in your mind in a matter of
22 seconds to decide, do I stop at the light or do I try and
23 accelerate and run through it? And in that matter of seconds
24 you'll think, okay, are there other cars around me that are

1 going? If I slam on my brakes right now, can I stop in time?
2 Does it look like there's any traffic coming from the other
3 direction? Within a matter of seconds you make the decision,
4 weighing th consequences for and against, to either slam on
5 the brakes and stop for that red light or to accelerate and go
6 through it.
7 It doesn't have to be a long period of time. It can
8 be a very short period of time. You don't have to go home
9 and make a list. Here's the list for using this force, here's the
10 list against. No, it's just a matter of going through in your
11 mind, considering your actions and weighing them.
12 But the key here is it must not be formed in passion.
13 If it's formed in passion it must be carried out after there's
14 been time for the passion to subside and deliberation to occur.
15 It can't be like with voluntary manslaughter, the -- when we
16 talk about the heat of passion. The basic example is husband
17 comes home, finds wife in bed with another man and just
18 doesn't react, just you know, kills him. Doesn't have time to
19 think, just does it. And that's what this means. You've gotta
20 have that time to deliberate. It can't just be a reaction, you
21 have to actually weigh the consequences.
22 Premeditation. This is the determination to kill
23 formed in the mind by the time of the killing. And this again
24 doesn't have to be a very long period of time. When she first

1 shoves the knife into his scrotal sack, she's made her plan, her
2 determination, she's started. And again, it may not be for a
3 day, an hour, or even a minute. It may be as instantaneous as
4 successive thoughts of the mind. And there's the injury to the
5 scrotal sack, the first one the State submits to you. Again, if
6 any one of these elements of willfulness to premeditation or to
7 deliberation are missing, then you're at second degree murder.
8 And then you've got sexual penetration of a dead
9 human body. That's Count 2. This is a little simpler. Your
10 elements are any intrusion, however slight, into the anal
11 opening of the victim, and here you have the stab wound that
12 goes all the way through and into the rectum, then you're
13 guilty. That's it. It doesn't matter what the motive was or if it
14 was sexually motivated, it doesn't. If you penetrate a sexual
15 organ after the person's dead, however slight, you're guilty of
16 the crime. And right there you had, you can see that the cut
17 wound went all the way into the rectum.
18 Now in opening, defense counsel argued all physical
19 evidence excludes the defendant in this case. And that's very
20 misleading. It doesn't exclude the defendant. It doesn't mean
21 she could not have killed this crime. No, all it means is there
22 was no evidence found at the scene that she left behind that's
23 physically tied to her. Her DNA is not at the scene.
24 Think about it in the reverse. If like one of those

1 coffee cups had her DNA on it, would that mean she was the
2 killer? No, because there's probably hundreds of people's DNA
3 at that crime scene. What does it mean? It means she was
4 there. That's all it means.
5 So the reverse or the inverse doesn't mean it
6 excludes her because her DNA was not on the chewing gum,
7 because her DNA was not on the cigarette butt, does that
8 mean she didn't do it? No, it doesn't. It just means we didn't
9 find her DNA there.
10 The tire impressions, because they didn't match her
11 car, does that mean she didn't do it? No. We don't even
12 know when those tire impressions were left. It just means
13 that those tire impressions weren't left by her car.
14 Think about the garbage at the scene and the white
15 paper towels. Is her DNA -- you know, we didn't test every
16 piece, which probably wasn't physically possible anywhere with
17 the resources that the police department have, does it mean
18 that she didn't do it because we didn't find anything? No. Just
19 like if we have found a hundred different people's DNA there,
20 does that mean they're all the killer? No. All it can tell you is
21 that somebody left their biological matter there.
22 The footwear impressions, does that mean she
23 wasn't the killer? No. The CSAs told you that the footprints
24 were partially wet. The thicker ones in the back were partially

1 wet and then they walked off. Well, that body had been there
2 for quite some time, it had decomposition on it, it had been
3 there for a matter of hours. If the killer had left those
4 footprints, wouldn't they have been dry?
5 It's more consistent with the dumpster diver, like we
6 had Richard Shott that came after the fact. He didn't even
7 report for a couple of hours because he was afraid that they
8 were gonna think it was him or, you know, then he was more
9 afraid after he didn't report that oh, what if somebody saw me,
10 then I could really be in trouble. No. It's very possible there
11 were other people in and out of that dumpster and that they
12 could've stepped in the blood that was wet in the back and left
13 it.
14 Think about it. The footprint that's on the cardboard
15 box, it was flipped over, it was facing the victim's body. I
16 mean the defense wants you to believe, yeah, that had to
17 have been the killer because it was flipped over. But we don't
18 know when all that trash was put there. We don't know when
19 that cardboard was flipped over. If you look at it, what you
20 can see in the picture, there's blood pooled in the corner as if
21 it had been sitting in the pool of blood on the other piece of
22 cardboard. So we don't know when that happened.
23 None of these things exclude her, they don't. If we
24 had any of these things that matched her, all it would do is

1 confirm for us that she's the one that d[illegible]. She told us she
2 did, it would just confirm yes, she was there. It does not
3 exclude her. It does not mean she didn't do this.
4 Look at all that trash. Tons of people's DNA there.
5 Doesn't mean whoever's DNA was found there was the killer.
6 Even with the things closest to the body, we don't know how
7 they got there. Don't know that that's the killer either. That's
8 trash. The plastic bag that's found around the victim looks just
9 like the other plastic bags that you see in this picture. It
10 would've been nice to have her DNA there, but we don't need
11 it because we know she was there because she told us she
12 was there.
13 Also the scissors theory that their doctor testified to,
14 it's not plausible in this case. First of all, there's no blunt force
15 lacerations on the body to the face and everything as the
16 doctor testified. Clearly, according to Doc Simms, those were
17 incised wounds, there was no tissue bridging. It's impossible
18 to snip the carotid artery without taking out half the neck. It's
19 too far down in there. It's impossible to like stick the scissors
20 in there and snip it or whatever his theory was. It's not
21 plausible.
22 And think about it. If somebody's gonna -- to do
23 this kind of crime or murder, are they gonna bring scissors to
24 that fight? No. And if they are they're gonna use it like a

1 stabbing weapon. They're not gonna use -- they're not gonna
2 change their hand three different ways to a certain possible
3 where the handles are between these two fingers and stabbing
4 and then turning it around into blunt force where -- think
5 about that. When the handles are like this and the blades are
6 facing the wrist, would somebody -- if you're gonna punch
7 somebody, you don't punch with a straight arm, you punch
8 curving, and the scissors would've cut the person. And then
9 they're gonna switch it around again to be able to snip, it
10 doesn't make sense. It's not plausible.
11 You do have physical evidence that links the
12 defendant to that crime scene. You have it with her car. The
13 positive luminol test and the positive phenolphthalein test tell
14 you there was blood in that car. And it wasn't a false positive
15 because you heard Dan Ford and you heard Louise Renhard
16 testify that it causes a flashing, kind of like a sparkle when you
17 get a false positive, not like what you got on this car door.
18 These are clearly finger marks. And look at where
19 they are. You have finger marks here, you have a drag mark
20 here. And if you remember, the emergency brake is right
21 here, right next to that seat where this drag mark is, and
22 there's some more here. There's a very faint spot right here,
23 but it stops right here where there's this pore -- excuse me, a
24 nonporous material for the top part of the door where you've

1 got the porous on the bottom, and it's harder to clean blood
2 out of a porous surface than a nonporous surface.
3 That does give you some physical evidence that links
4 her to the crime, that's blood. The fact that they couldn't
5 confirm the DNA doesn't matter. You're not gonna get both of
6 those positive tests with presumptive tests for luminol and
7 phenolphthalein without there have been clean blood there.
8 It's not --
9 MR. SCHIECK: Objection, Your Honor, that
10 misstates the testimony. They said they both could be false
11 positives.
12 THE COURT: Sustained.
13 MS. DiGIACOMO: It's not reasonable that you're
14 gonna get a positive for luminol, a positive reaction for
15 phenolphthalein where it's not sparkly, it's like what you see
16 here, a constant illumination and have a false positive. It's not
17 copper salts. If it was copper salts, why isn't it everywhere if
18 Panaca is so inundated with copper salts?
19 In this case keep in mind you have a real insight into
20 whether or not defendant really was the one there. Look at
21 what she says. Look closely at her statements. And think
22 about this. She knew the street location, she knew the area
23 where the crime was committed when she told Dixie, not what
24 she told the officers, by then she was jumbling her stories.

1 But she told Dixie she knew the area. She was able to tell her
2 it was some sort of parking lot or alley, you know, some more
3 secluded place. She had a good idea what the victim smelled
4 like, odor of alcohol and dirty diapers. That's a pretty distinct
5 smell. And even Detective Thowsen told you that this victim
6 had a distinct smell.
7 She knew what major injury that this victim had. It
8 had not been released to the public that his penis had been
9 severed, but she knew. And she also knew that somebody
10 had moved the body, trying to possibly put him in the
11 dumpster. She told that to the police when they said, well, is
12 there a dumpster nearby? She's like well, no, well I don't think
13 I could've put him in the dumpster. I don't think I could have
14 done that. That's what she says. She knew that somebody
15 had tried to move that body.
16 And the only person -- and think about too, she
17 knew what the dumpster enclosure looked like. When she got
18 to that jail cell at CCDC when she's being booked in, she's like
19 yeah, it was just like this except for I could see through the
20 roof --
21 MR. SCHIECK: Objection, misstates the testimony.
22 She said it was uncovered, according to Detective Thowsen.
23 THE COURT: Overruled.
24 MS. DiGIACOMO: She said that she could see

1 through and see the car awning. And you saw the trash
2 dumpster enclosure. Three concrete walls, curbing around the
3 side, chainlink fence on the top that you could see through and
4 see the car awning right there.
5 The only way that she was able to describe the
6 place, the body, the injuries, the you know, where it
7 happened, how it looked, the only way she knew that, 'cause
8 she was there. That's not coincidence, not coincidence at all.
9 Is it coincidence that the only recorded penis severing or
10 cutting of a penis was this man? There's no other reported for
11 that year. Is that coincidence? No.
12 The reason she could describe all those things to
13 Dixie and even the police, 'cause she was there. And we're
14 gonna ask you to convict her because she's guilty of the
15 charges.
16 THE COURT: Who will be doing the closing
17 argument for the defendant?
18 MR. SCHIECK: I will, Your Honor.
19 THE COURT: Mr. Schieck, you may proceed.
20 **DEFENDANT'S CLOSING ARGUMENT**
21 MR. SCHIECK: Good afternoon, ladies and
22 gentlemen. I'm gonna try not to be too long up here. But I'm
23 sure you can understand the importance --
24 MS. DiGIACOMO: Sorry.

1 MR. SCHIECK: -- of making whatever points need to
2 be made in this case. And after listening to that closing
3 argument you can be assured there are a number of points
4 that need to be made in this case.
5 However, rather than go directly into those, rest
6 assured I will get to those. I'm going to focus on what my
7 argument was planned to be before we listened to that story.
8 As I was sitting there I was counting some
9 interesting language used by the prosecutor in her closing.
10 And quite frankly I lost track after awhile of how many times
11 she said it's possible it happened this way. Somehow this
12 came to pass. Somehow Blaise came into contact with Mr.
13 Bailey. Somehow they ended up at the dumpster. Somehow
14 they think Mr. Bailey had drugs when he was a homeless
15 person. Somehow they believe there's evidence that there
16 was a sex for drugs thing going on. Somehow, somehow,
17 somehow, somehow. It goes on and on and on.
18 And then there's a switch later on, and it's sort of
19 like well, look at this, there's nothing to disprove this, therefore
20 it must be true.
21 You have to remember when we come into a
22 criminal case, any criminal case, whether it's a murder case,
23 whether it is a drug case, whatever type of criminal case in the
24 United States, the State has the burden. And in this case their

1 burden is to convince you beyond a reasonable doubt of every
2 element of the crime charged.
3 This case has been sort of different than a lot of
4 cases in that it seems like it's been presented in such a fashion
5 that the prosecution is actually defending themselves from the
6 lack of evidence and trying to convince you that somehow
7 they've proven anything in this case.
8 The theory of this case --
9 MR. KEPHART: Your Honor, I'm gonna object to
10 that. There is absolutely nothing to suggest that except for I
11 know it's argument, but when he's doing that he's disparaging
12 the State with regards to that type of argument. That's
13 inappropriate and he knows better than that.
14 THE COURT: The Court's gonna overrule the
15 objection.
16 MR. SCHIECK: How many times in this case are
17 examination of witnesses, whether it was their witness, Dr.
18 Simms, the expert, the coroner that came in, or Dr. Laufer or
19 Mr. Turvey, how many times were questions posed with this,
20 isn't it possible it happened this way? Isn't it possible that
21 Blaise was there? Isn't it possible that it was a 4 inch knife?
22 Well, actually it's much more likely it's a 6 inch blade. Well
23 wait a minute, that doesn't fit our facts in this case. Isn't it
24 possible it was a 4 inch knife? And the doctor, Dr. Simms was,

1 well, it's more likely it was a 6 inch blade to do this damage.
2 And then they showed him the picture and said well maybe it
3 was two cuts. You see where there's kind of a little thing up
4 there at the top of the cut, maybe it was two cuts with a 4
5 inch knife. And on cross he said well, the way that the penis
6 was being held could very well account for that mark, not the
7 fact that it was a 4 inch blade.
8 And if you do go back and listen to Blaise's
9 statement, which I urge you to do because there's no evidence
10 in that statement that's gonna convict her in this case, she
11 indicates to the detective how large -- or how long the blade
12 was on her knife. And Detective Thowsen said you're holding
13 up your fingers, about 3 and a half inches. So she didn't even
14 say it was a 4 inch blade. Detective Thowsen estimated she
15 was showing him a 3 and a half inch blade. Which again, their
16 expert says wasn't used in this case.
17 Well, isn't it possible? I suppose anything's possible.
18 That's their case against Blaise Lobato. Isn't it possible, and
19 somehow this happened.
20 Sometimes you have to wonder why we're here in a
21 case like this. And if you think about it and you've had, lord
22 knows, almost four full weeks now to think about why we're
23 here with the evidence that doesn't exist in this case. And the
24 answer will come to you if you sit back and take a look at the

1 way this case went from the very begin[illegible].
2 State wants you to focus in on a couple of things
3 that happened at the beginning and then forget everything
4 else in the case as if it doesn't matter, it's not important. The
5 lack of physical evidence, not important. The last of
6 corroboration, not important. The fact that there's an alibi, not
7 important. Why isn't it important? Well, it's important
8 because it was never investigated in this case by the people
9 that were assigned to investigate homicide cases in Clark
10 County.
11 What happened in this case is that snap judgment
12 was made to arrest Blaise Lobato in Panaca, Nevada and for
13 the next 5 years the State and the detectives have attempted
14 to prove their case after they made the arrest, instead of doing
15 it the right way and getting your facts right before you arrest
16 someone and charge them with murder.
17 Let's look at some of the things that happened at
18 the beginning of this case. There's a body found by Mr. Shott,
19 and it's found sometime on the evening of July 8th. He's not
20 sure exactly what time he found it. He says he didn't call the
21 police right away. He didn't want to get blamed for this. But
22 indeed, he did call the police and Officer Testa responded at
23 10:36 p.m. on the 8th of July, 2001.
24 Detective -- excuse me. Officer Testa determines

1 that, in fact, he has a dead body here and does the correct
2 thing, backs out of the scene. He's positive the footprints were
3 there. At least Officer Testa is able to tell us that so we don't
4 have to listen to, isn't it possible that one of the many crime
5 scene analysts or officers or other people that were inside the
6 crime scene tracked blood around in there? Officer Testa was
7 clear, those prints at 10:36 were there when I got there.
8 It's not clear when they finally got around to
9 photographing those footprints because they were at the
10 scene for an awful long period of time doing a variety of
11 things, collecting evidence, discarding evidence, things of that
12 nature.
13 Crime scene analysts arrived. We heard from Crime
14 Scene Analyst Ford. We heard from Crime Scene Analyst
15 Renhard testified. They get there and their job is now to
16 preserve the crime scene, to collect evidence. And what do we
17 hear from Mr. Ford about how they collected evidence,
18 because there was a lot of garbage there at the scene. He
19 says decisions were being made to put things in bags and that
20 those bags were later transported and looked at back at the
21 lab, and if they felt it wasn't important they discarded it.
22 You'll recall that we got into that on cross-
23 examination. And I asked him, I said did you log in even what
24 you impounded? No, there's no record of what we

1 impounded. Did you log in what tests you did on those items
2 that you discarded? No, there's no record of that. Did you
3 make a list of the things you threw away? No, we didn't make
4 a list of anything that we threw away. What you have are the
5 few things that we decided to collect that might have some
6 value in this case.
7 While they were at the scene they obviously saw the
8 footprints. We've seen the photographs where they came in
9 and put the camera with the tripod over the top of the
10 footprint in order to take a one on one photograph. Which
11 while I was talking to Mr. Geller, cross-examining him, he
12 referred to is how we did it in the olden days. So at least in
13 2001 we were still in the olden days and that's how they did it.
14 Because they felt of all the evidence that they discarded in the
15 case, that those footprints had evidentiary value. Why else
16 would they have photographed that? Why else would they
17 have gone to Mr. Shott and said, could we take a look at your
18 feet, at your shoes to see whether or not it's you that left
19 those footprints, and they eliminated him as being the person
20 that left the footprint.
21 So in this case of the one person other than police
22 officers that has been shown to have been in the dumpster,
23 we know it wasn't him that left those footprints, because he
24 was eliminated when they examined his feet.

1 From that the State gets back to their isn't it possible
2 that it was someone else? Well, it's possible someone beamed
3 in there, left those footprints and beamed out too. But there's
4 no evidence of that. And what the State has to do in a
5 criminal case to convict someone is to prove the facts, to prove
6 it happened, not come in here and say isn't it possible. Isn't it
7 possible that they're prosecuting an innocent person? Isn't
8 that a possibility in this case if they want to talk about
9 possibilities?
10 So they're at the scene for a long time. Coroner
11 Investigator Shelley Pierce-Stauffer is called from the coroner's
12 office because the coroner's office is the one that makes the
13 declaration of death and then transports the body to the
14 morgue -- or to the medical examiner's office for the autopsy.
15 And she declares death, according to Detective Thowsen's
16 testimony, at 3:50 a.m. on the 9th of July, so the next morning.
17 So we know the police are there from 10:36 when Officer
18 Testa arrives until at least 3:50 when Shelley Pierce-Stauffer
19 declares death, indicating full rigor mortis, which we'll get back
20 to the importance of that declaration at 3:50 a.m.
21 Shelley Pierce-Stauffer tells us that when she's there
22 she actually is in the crime scene helping remove some of the
23 debris from the body. She's not a crime scene analyst, she's a
24 coroner investigator, but she's helping out apparently. And

1 she physically sees these paper towels stuffed in the opening
2 of where the penis was removed from. She is clear on that.
3 She didn't even want to see her report when she testified to
4 refresh her recollection, because she said that's not gonna
5 refresh my recollection. If it's in my report, it's in my report.
6 That doesn't refresh what I remember. But I remember those
7 towels and I remember them taking those paper towels and
8 putting them into a paper bag. And I held up one of the bags,
9 and you'll get all of this evidence when you got back into the
10 jury room to deliberate.
11 But you'll see these bags are designed to document
12 items that you take so that you can take them back to the lab
13 with the name of the person who impounded the evidence and
14 sealed it and they put their number on there. And that way
15 we know what evidence is impounded in the case.
16 The evidence of paper towels that are stuffed into
17 the wound, it's fair to assume would've been put there by
18 someone that was involved in the death. What a ripe source
19 of information to have to test to see if there's fingerprints.
20 Someone would've had to touch those towels to put them in
21 there, for DNA, for hair, for other materials that might've been
22 on those, yet those disappear. Those were discarded at the --
23 apparently at Metro they were looked at and discarded, one of
24 the things that Mr. Ford talked about.

1 And she recalled that they were under the plastic.
2 And you've got the photographs. You look at those
3 photographs and decide whether or not you can see that the
4 plastic that is wrapped around the sides, and you can see that
5 in the photographs, is not over those paper towels.
6 Now that plastic you'll see in the picture gets pulled
7 back, and the papers towels are gone. There's no more paper
8 towels. You see a picture over, pulled back, towels gone. You
9 can see the penis has been amputated, which means the
10 towels had to be moved in order to see the penis was
11 amputated because they were shoved in the holes. Those
12 towels are lost. The plastic is put back on the body because
13 we see it. It appears at the morgue, along with some loose
14 cigarettes that were on the body, according to the pictures at
15 the scene, that were just laying in the body bag.
16 Now that plastic is in evidence. The plastic that
17 you'll see was molded, as if with hands, around the body of
18 the deceased person. To this day has never been tested by
19 anyone. It's in evidence. Look at the bag. We had testimony
20 on it. I had them look and said is there any tape on here
21 showing that any of this has been tested? Never tested.
22 Something that in all likelihood had to be touched by the
23 perpetrator, never tested.
24 They finish up at the crime scene, collecting

1 whatever they decided they were gonna collect and not
2 discard. They take some fingerprints. And we had testimony
3 that they found one on the beer can and one on the surge
4 suppressor. If those fingerprints had come back to Blaise
5 Lobato, you can be sure that the State would be standing up
6 and saying slam dunk guilty, she was there, she did it, case
7 over, case closed.
8 But because it's not hers, don't worry about that.
9 That's not important, that someone else was there and
10 touched the beer can and touched the surge suppressor that's
11 over the body. Don't worry about that, because it's possible
12 that she was there and didn't leave any fingerprints, didn't
13 touch a thing in there.
14 Or then again, isn't it possible that they wasn't there
15 and that's why they have no evidence? Isn't that more likely
16 from a scientific standpoint to say the lack of evidence speaks
17 volumes in this case. The lack of physical connection to the
18 scene speaks volumes that they've got the wrong person and
19 haven't proven their case?
20 But it's possible that she was there and that she did
21 this, didn't touch anything, didn't get blood on her hands and
22 touch anything, didn't leave a single fingerprint behind
23 anywhere. They've talked about Mr. Ford getting into the
24 dumpster and looking around and there was a lot of garbage

1 in the back, and it appeared that maybe someone had gotten
2 in the dumpster and thrown the garbage out to cover the
3 body. There's no prints inside the dumpster. There's no prints
4 on anything that match to Blaise Lobato. But it's possible
5 under the State's burden of proof in this case that she did.
6 Well, the burden of proof is beyond a reasonable doubt. It's
7 not it's possible.
8 The detectives get finished up and they return to the
9 homicide department, and apparently there's still police
10 officers on the scene with the tape up and Mr. Ford is still
11 there. Because low and behold, on that Sunday morning --
12 excuse me, that Monday morning, Diane Parker walks up and
13 says, you know, I might know who that guy is. I was a victim
14 of a rape a week ago and that's the guy that did it, and I want
15 to know if it's the guy.
16 Well, Mr. Ford, according to Detective Thowsen, calls
17 him and gives him this information. And homicide Detective
18 Thowsen gets his partner LaRochelle, who we didn't hear from
19 in this case, and I think he said Sergeant Manning went with
20 him and they went out and talked to Diane Parker at her
21 apartment. Now her apartment is fairly close to the scene.
22 You heard him describe that. It's over the wall in the next
23 apartment complex. Not quite on the aerial photograph but
24 very close. He said it's easily within walking distance. And he

1 goes over there and he talks to her to h... out, you know,
2 what she knows. He's invited in apparently and they look
3 around. They see some knives in the kitchen, they ask to look
4 at the footwear and they look at the footwear. Thank you very
5 much, and they leave. They don't take a taped statement and
6 they leave.
7 In fact, at one point in his testimony I think there
8 was a question from the jury that talked about well, why didn't
9 you do more checking into the other people that were there in
10 the apartment complex that had witnessed the altercation
11 between Mr. Bailey and Ms. Parker. And he said well, it was a
12 long day and we were getting tired and at some point you just
13 gotta, you know, call it a day.
14 MR. KEPHART: Your Honor, objection. And may we
15 approach, please?
16 THE COURT: Yes.
17 (Off-record bench conference from 4:54:02-4:56:35 p.m.)
18 MR. KEPHART: Judge, I'm gonna withdraw that
19 objection.
20 THE COURT: All right.
21 MR. SCHIECK: I think we were talking about Diane
22 Parker and that Detective Thowsen had been over there and
23 talked with her and gotten some preliminary information from
24 her. He further testified that he went back and took a taped

1 statement from her on July 23rd and showed her a photograph
2 of Mr. Bailey and Mr. Bailey -- excuse me, Ms. Parker was able
3 to identify Mr. Bailey, and that's when she gave her taped
4 statement.
5 Now let's just contrast that scenario. You have an
6 individual at the crime scene who lives in the neighborhood,
7 who says she knows or thinks she knows the person that's
8 been killed, and that she's been a victim within the last week
9 of a sexual assault by this person. That's the information that
10 Detective Thowsen gets when he goes over to talk to her the
11 first time. Doesn't take a crime scene analyst, doesn't record a
12 statement, doesn't spray luminol around and look for any
13 blood evidence at that point in time. And this is still -- the
14 blood is still fresh. Doesn't do anything other than look
15 around, kick the tires in the apartment and say I'm moving on,
16 and goes back to the homicide office.
17 Contrast that now, someone who knows the victim,
18 has a motive, lives in the area, and is at the scene asking
19 about it, to the next information he gets on the case, which is
20 two weeks later because nothing happens during the next two
21 weeks. He gets a phone call from Laura Johnson in Panaca,
22 Nevada, 170 miles away, who tells him that someone told her
23 what someone else told the other person. So we have third
24 hand hearsay now. Someone told Dixie who told Laura, and

1 this information now comes to Detective Thowsen. What does
2 he do? He gets a crime scene analyst, and Maria Thomas
3 testified when she got the assignment to go up there, she
4 thought that she was going to impound a car. She takes all of
5 her crime scene analyst materials with her, apparently
6 including a camera, because we have photographs that she
7 took when she got there.
8 And Detective Thowsen grabs his partner and they
9 immediately rush up to Panaca 170 miles away, talk to Laura
10 Johnson, go and talk to 18 year old Blaise Lobato at her house.
11 And in the very first parts of the conversation reveal to her
12 that he knows that she's been the victim of a sexual assault as
13 a small child, that she'd been hurt in the past, causing her to
14 break into tears because he had checked that out when he
15 was back in Las Vegas and had the reports -- or had the
16 information that she had been a victim in the past. Uses that
17 to get her emotional, takes a 30 minute statement from her,
18 gets a consent to search and impounds a pair of black high
19 heel shoes, and you've seen photographs of those. Ask
20 yourself whether those shoes match the footprints you see at
21 the scene of the crime.
22 But he impounds them, he takes them, and they
23 have a small spot of Blaise's blood on the big toe area, as I
24 recall the testimony. No blood from the scene, nothing to tie

1 those shoes to the scene. Takes photographs of Blaise, takes
2 photographs of her hands, takes photographs of her car, seals
3 her car up, puts it on a tow truck that's already been arranged,
4 and loads her in the car and zips her back to Las Vegas. Just
5 based on the thirdhand hearsay from Laura Johnson and the
6 contents of the interview he does with her.
7 He does not get a statement from the parents, he
8 does not ask Larry Lobato, who is called and does come home
9 and sees Blaise before she's taken away, does not say, you
10 know, where was she at on the 8th, you know? Was she in Las
11 Vegas, was she here? No questions. Doesn't ask Rebecca
12 Lobato, the step-mother, any questions. Doesn't talk to Ashley
13 who lives there in the house, doesn't ask her any questions,
14 doesn't go next door and knock on the door and say, you
15 know, we're investing a homicide and we have a suspect who's
16 Blaise, what can you tell us? It happened on July 8th. Maybe
17 we should check this out and do some investigation before we
18 arrest someone.
19 No, they arrest her, load her in the car, drive her
20 170 miles back to Las Vegas. Don't put the tape recorder back
21 on, have further conversations with her, during which she
22 volunteers that now she remembers that her father had given
23 her that -- the particular knife that she was talking about.
24 At her house she had signed a consent to search

card, had waived her Miranda Rights. At the jail she gives up her shoes. They take a buccal swab from her. She's cooperating with them every step of the way.

Now they have the 18 year old girl down from Panaca without her parents at the jail, in a holding cell. Do they take another interview with her? Maybe she's calmed down now. Maybe they could get more information. Maybe they're gonna followup on her statement that this happened over 30 days ago. Gee, Detective Thowsen, might that not be a fact you want to ask about, is that she's talking about something that happened more than 30 days ago, which would've put it way before July 8th?

No further questions. Click, machine goes off, no further questioning. We solved our case. We have someone in custody. We submitted to the DA to prosecute. Well, maybe we should do some investigation now. Now that we've already made up our minds, let's do the investigation to justify the arrest we've made. And that's what happens throughout the rest of the investigation. It's pointed in one direction and one direction only. What could we do to come up with something to convict Blaise Lobato? Because we've made up our mind, because she said the magic word penis, that this is the same case that she's talking about. Let's ignore everything else.

Well, okay, let's not ignore it, let's call it something else. Let's say, oh, if it doesn't fit she's minimizing, okay, because she said she was attacked by an old -- or excuse me, by a smelly black man, and that she defended herself and that she cut his penis or tried to cut his penis off. Listen to the statement for the exact words. That's all that has to match in his mind to make this case. Forget everything else, that's enough in his mind.

Well, she said it was at the Budget Suites on Boulder Highway, and that she could see the fountain. She doesn't say it was behind a dumpster, she said she had just gotten out of her car, it was next to her car. Well, she must be minimizing those facts because they don't fit. If it doesn't fit it's minimization. If it kinda sounds like something we can use, now she's telling the truth.

They want you to convict Blaise solely on what's in that statement, and want you to ignore everything else that exists in this case. And that's why they have to go, isn't is possible, and somehow, maybe it happened this way, ignore everything else, because she said penis when she was interviewed by Detective Thowsen.

Why didn't Metro investigate other suspects in this case? They talk about well, we talked to the manager of the apartment complex and we got some names and we ran

scopes and we didn't -- we didn't see anything in there that would give us an indication that we need to investigate any further. Well, they ran Blaise and all they found out is she'd been a victim in the past. But they sure ran up there real quick to arrest her.

Do they go knock on a door and say, you know, guy got killed over here behind a bank and it's the same guy that raped Diane Parker, and we understand maybe you witnessed, you know, some of that situation. Could you tell us what you know? Where were you at on July 8th, by the way? Those tennis shoes you're wearing, do you mind if we look at your tennis shoes? That would've been real easy to do, wouldn't it?

No, because they've already got Blaise in custody. They've made their case. Let's forget looking at anything else that happens in this case. Let's forget about talking to anybody up in Panaca that wants to talk about the case and tell us what happened.

Now Mr. and Mrs. Lobato's daughter has just be arrested in Panaca, whisked away in a car, and the detective doesn't even remember if he left his name and his card as to where he was taking their daughter. Panaca's a small town, and you can pretty much guess that when the out of town police rolled in in front of the Lobato house and the tow truck is hauling away Blaise's car, and Sheriff -- Deputy Sheriff Cary

Lee and Maribah Cowley are running around in their marked cars, that everybody in Panaca at one time was out watering their lawn to see what was going on. On July 20th, the very day she was arrested, you could bet that spread through the entire town in minutes. Over the fence, over the phone, down at the grocery store, you know that was the topic of conversation, that Blaise had been arrested and her red Fiero with her "fornicator" license plate had been towed away by homicide out of Las Vegas.

What are reasonable parents to do? Just do nothing and sit there and wonder what's going on, or do you try to figure out what happened? Do you talk to people? They knew Blaise had been there from the 2nd to the 9th. At that point it's the 20th, it's just a matter of going back and doing things to refresh your recollection as to where you were and what you did. Things such as phone records, things such as medical bills, you know. We took her to the doctor, what day was that? Let's look at the bill, it's July 5th. You don't make that up. You don't make up phone calls. You don't make phone calls during that week trying to set up an alibi for Blaise.

But Mr. Bailey wasn't killed until the 8th, so why would anything that happened on the 2nd, 3rd, 4th, 5th, 6th, or 7th have any relation with trying to set up this alibi? These witnesses came in and recollected to the best of their ability as

1 to what was transpiring that week. We gave them a calendar
2 and had them write their names, put their initials down as to
3 what they could remember. If they didn't remember we didn't
4 have them mark it down on there. Nobody wants them to
5 make things up in this case.
6 Jo Anne Dennert, the next door neighbor, doesn't
7 really even socialize with the Lobatos. But she remembers it's
8 her -- it was her long time friend Dale Towery's birthday on
9 the 8th, and that when she was doing her dishes, looking out
10 into her front yard, that Blaise whipped a big turn in the
11 middle of the street in front of her house riding a four-wheeler.
12 She must've been doing her dishes because that's where the
13 window's at that she saw her through. And she recalls that
14 she sent her friend an e-mail that day because it was his
15 birthday and she knows his birthday is July 8th.
16 Those are facts you can't make up. You can't make
17 up somebody's birthday. It was her breakfast dishes and she
18 indicated she's not sure of the exact time, but she knows when
19 she does her dishes, it's when the kids are taking their nap,
20 and she knows when the kids take their nap, it's usually
21 between 11:00 and 1:00. It's not a fact that Becky Lobato
22 went over there and said Jo Anne, don't you remember you
23 were doing your dishes looking out and saw this, and it just
24 happened to be Dale's birthday? That's not a made up --

1 Becky Lobato forced her to say that? Is that the State's
2 position? I suppose that's possible, but it doesn't fit. There's
3 too much corroboration for everything else in this case to say
4 Jo Anne Dennert is making that up.
5 You saw Mr. and Mrs. McCroskey. Is it reasonable
6 for you to believe that Becky Lobato is putting the strong arms
7 on the McCroskeys to say, Mrs. McCroskey, I know you've lived
8 here for 75 years, but could you go ahead and give an alibi for
9 Blaise and say that car never moved when she came back?
10 Could you do that for me? Do you think Mrs. McCroskey would
11 do that for her? Or Mr. McCroskey, who every morning would
12 go for a walk and the car was right there on the street, and if
13 it wasn't there he would've noticed it wasn't there?
14 Yet the State in their closing argument come up here
15 and put a slide up that says on July 6th Blaise Lobato got in her
16 red Fiero with "fornicator" plates, went to Las Vegas and got
17 on a three day binge, culminating in the death of Mr. Bailey,
18 and then high tailed it back to Panaca. But somehow no one
19 ever saw that car move.
20 And you've seen the photographs of where the car
21 was located at. And Mr. and Mrs. McCroskey sat right there
22 and the State asked them well, couldn't it have been a little bit
23 further the other direction? And both of them, to my
24 recollection, and it's your recollection that counts, said no, that

1 looks about where it was at the whole time, it didn't move,
2 was parked right there.
3 Well, if it was parked there how did Blaise drive it to
4 Las Vegas? And if she didn't drive it to Las Vegas then why
5 would all this stuff about cleaning the car have any relevance
6 at all in this case because the car wouldn't have been a the
7 Nevada State Bank because it didn't move. And so if the car's
8 not there, there's no reason to need to hide the car. There's
9 no reason to clean the car out, the car wasn't even there at
10 Nevada State Bank.
11 Now we could probably expect this, it's possible that
12 she took someone else's car and went to Las Vegas for those
13 three days. I don't remember where my car was at back then,
14 maybe she took my car too. But there's no evidence of that.
15 There's no one that came in here and said she took my car,
16 she ever drove my car, my car was missing, my car was gone.
17 That's not even their theory. Their theory is it was the red
18 Fiero. The problem is they can't get past the point that the car
19 never moved. All the witnesses that came in here, not one
20 said that car moved, and certainly not for three days.
21 Well, they hadn't made the left on July 6th argument
22 at the point in time when they asked Mrs. McCroskey. But
23 they said Mrs. McCroskey, what time do you go to bed? Well,
24 I go to bed at, 11 o'clock I think she said, whatever you recall.

1 And then I get up the next morning at 7:00 or 7:00'ish. Well,
2 isn't it possible the car left, you know, while you were asleep?
3 She said yeah, it's possible, I was asleep. How would I know
4 the car left? All I know is every time I looked out my window
5 the car was there, and every time during that time period the
6 car was there.
7 On cross-examination I asked her well, do you
8 usually sleep between 9:50 in the morning and 3:50 in the
9 afternoon on a Sunday? She gave me a little look like what
10 the heck is that? She said no.
11 Well, why did that question have any relevance at
12 all? It's because Dr. Simms, the State's doctor, came in here
13 and told you the time of death, to his best estimation. And
14 doctors can pinpoint the exact second someone died without a
15 stopwatch and being there and observing it happen, so he can
16 only give you a range of time. And his testimony was, to a
17 reasonable medical certainty, it was 12 to 18 hours. It
18 could've been longer and it could've been shorter. And he said
19 he would be more certain if you went to 10 to 24 or 8 to 24,
20 because that's a wider range of time. But to a reasonable
21 medical certainty, it was 12 to 18 hours, which is 3:50 in the
22 afternoon to 9:50 in the morning, or 9:50 in the morning to
23 3:50 in the afternoon.
24 For the car to have been gone and Ms. McCroskey

not see it, she would've had to have been taking a nap. She wasn't taking a nap and the car wasn't gone when Mr. Bailey was killed to a reasonable medical certainty.

Now a reasonable medical certainty is a different standard than a reasonable doubt. But you have to take that testimony and decide whether or not reasonable medical certainly, Blaise was in Panaca between 9:50 in the morning on Sunday until 3:50 in the afternoon. She could not have committed this crime.

The State wants you to go back to the 24 hour time frame, which is not -- which is to a greater probability. But as the doctor described, it's a bell curve. This is the bigger probability. As you get out toward the edges it flattens out. I'm sure you're all familiar with bell curves.

I tried to draw one, sort of like that, a bell curve. And the greater probability is the major portion of it. And if she -- if you believe she was there during that period of time which the death occurred to a reasonable medical certainty, you must equip.

Now I thought it would be great if I tried to put all the other testimony in that related to the alibi in order to cover the reasonable medical certainty time, as you can see, it's a little bit difficult to do. I'm gonna try to do that by arguing with you.

We know that -- we have testimony from Mr. Kraft that he went over to the Lobato house at 7:00 a.m. in the morning, and that Mr. Kraft had an assignment that he was gonna be taken away to Minnesota, away from his family and his pregnant wife, and he was sure it was that day because it was that day he fell asleep on the couch and got the crick in his neck and had to go to the doctor the next day, and we had the medical bills that show, in fact he did go to the doctor on the 9th. Corroborates his recollection that it was the 8th that he went and saw Larry, went home, fell asleep, got the crick.

And we know from his wife that she was over there later that evening at 6 o'clock, and he remembers that day too because he had to go get his wife to come home to make dinner and that the chicken fried steak that she made wasn't so good. You know, whether that had anything to do with the fact that he was in pain from his neck, we know that the next day he went to the doctor 'cause we had the medical bills.

Larry Lobato remembered that Mr. Kraft came over and saw him at 7 o'clock in the morning. Now the 7 o'clock in the morning time relates to the further out time period, the 24 hours that is absolute comfort as the time frame of possibility for the time of death. But you have to remember also that you've got the drive time from Las Vegas back to Panaca.

If John Kraft knocks on the door at 7 o'clock in the

morning in Sunday morning and Blaise answers the doors and appears that she was asleep, it's a two and a half to three hour drive from, according to the witnesses that testified and were asked those questions, from Las Vegas back to Panaca, because it's 170 miles with three speed zones in there. You have to slow down when you go through Alamo, and you have to slow down when you go through Caliente, and you have to slow down to make the turn as you're coming into Panaca.

We heard that from Mr. Boucher who has no ax to grind in this case. Worked for the Department of Transportation for how many ever years he said, a long time, lived in the area for a long time. He knows how long the drive is. So you have to go back from 7 o'clock back even earlier than that for her to drive back, get her jammies on and get into the futon. Takes us back -- if you take a three hour drive to 7 o'clock, it takes you back to 4 o'clock in the morning, which is only 10 minutes away from the time frame the doctor said is the outside of the possibility of time of death.

And you have testimony from Rebecca Lobato who has a routine that she follows when she goes to work in the morning. She gets up at 5:45, walks out of the bedroom they sleep in, past where Blaise was sleeping during that week, goes out, starts the coffee, goes to the garage and has a cigarette, 'cause that's the first thing that she does in the

morning is have that cigarette. And that Blaise was there at 5:45 a.m. on Sunday morning, because she worked on that Sunday. That was the last day before she does her double back on Mondays.

She says Blaise was there, Blaise was asleep. That corroborates John Kraft saying at 7 o'clock when he knocked on the door he woke her up. Mrs. Lobato says she usually leaves a little bit after 7:00 to go to work to make it to Caliente for her 8 o'clock shift, and she's usually early.

So now you've got 5:45 Blaise is at home in bed asleep. Three hours to drive to Las Vegas from 5:45 in the morning, now we're back to 2 o'clock in the morning. This is outside the possible range given to us by the State's doctor, Dr. Simms. So Blaise couldn't be there to kill Duran Bailey, and perhaps that explains why there's no physical evidence at the scene that ties her to Duran Bailey's death. That's why there's no blood on her shoes. That's why her feet don't match the footprints. That's why her fingers don't match the fingerprints. That's why her car doesn't match the tire tracks at the scene because it wasn't her car.

Well, we already knew it wasn't her car because everybody in Panaca, including the McCroskeys, say the car was in Panaca. How could it leave the skid marks?

MR. KEPHART: Your Honor, I'm gonna object to the

1 term "everybody in Panaca".
2 THE COURT: Sustained.
3 MR. SCHIECK: I'll rephrase, Your Honor. That's
4 incorrect.
5 Everybody in Panaca that testified in this case said
6 the car was there.
7 MR. KEPHART: Your Honor, I'm gonna object to
8 that too. McCroskeys never said that they remember seeing it
9 on specific days.
10 THE COURT: Sustained.
11 MR. SCHIECK: Now the McCroskeys -- and I'm not
12 gonna go over this in detail, but they said the car never
13 moved.
14 If the tire tracks didn't look fresh, the skid marks
15 that went up over the curb didn't look fresh, why did they take
16 the time to document them, to photograph them so that they
17 could compare it to other tires? Did they have so much time
18 on their hands that they said let's check out these tire tracks?
19 Or is it because they looked fresh and could be associated with
20 the crime, and was important enough to document, important
21 enough to check against the red Fiero and get a negative
22 result that excluded her car as leaving those.
23 Is it possible that those tire tracks weren't related to
24 Duran Bailey's death? Yes. Is it possible they were? Yes.

1 And if they were, it excludes Blaise's red Fiero, which shoots
2 down that she drove the car to back to Las Vegas for a quicky
3 trip to do drugs and buy drugs or whatever else theory we're
4 going to hear about. Is it possible? Anything's possible in this
5 case.
6 When the framers of the constitution got together
7 and put together the Bill of Rights that apply to criminal cases,
8 to every citizen in America, they didn't say, you know what, we
9 think the prosecutors in order to convict have to prove that it's
10 possible that someone committed a crime. They don't -- they
11 didn't say well, let's say that if they can come up with a
12 somehow she might've committed this crime, you should
13 convict her. They didn't say if it's probable, they said beyond
14 a reasonable doubt they have to prove their case. And in this
15 case they haven't proven anything, other than they did a poor
16 investigation, they discarded evidence, they didn't test
17 evidence, they're still testing evidence. As of last week they
18 were still testing the cigarette butts, trying to find that piece of
19 evidence that they can come into court and say ah hah,
20 physical evidence is important because now we've got some.
21 Unfortunately, it came out the other way. If the trial would've
22 lasted longer, maybe there would've been more testing done,
23 but there hasn't been. And they haven't proven Blaise Lobato
24 is guilty of anything in this case.

1 You heard the testimony, I'm not gonna reiterate all
2 of it. I've talked more than enough time on this. The gum
3 that was someone else's DNA mixed with Bailey's, it excludes
4 Blaise. The fingerprints, the ones they could match, exclude
5 Blaise. The cigarettes exclude Blaise. The hair, which was
6 tested just on the verge of trial, excludes Blaise. The hair from
7 the pubic combing that has the DNA of another person in a
8 crime that their doctor testified appeared to be sexually
9 motivated. It includes an amputation of the penis and they
10 find a hair someone's DNA that doesn't belong to the
11 defendant. And the State wants you to think that that's not
12 important, that it's possible it someone else's. They wouldn't
13 be saying that if it came back to Blaise.
14 And it's interesting to recall back to the testimony
15 that even some of this evidence that was collected in the rape
16 kit was sent to a Myriad Labs, and they did some additional
17 testing on the penal and anal swabs where they detective
18 spermatozoa. But they had the entire kit and didn't test that
19 hair, the hair that was in the pubic combings. And I believe it
20 was Mr. Wall that testified is because it costs too much money,
21 and that's why they didn't test it with Myriad Labs. Well, they
22 did test it before the trial actually started, but it excludes Blaise
23 Lobato.
24 And so perhaps we wouldn't even be here if

1 Detective Thowsen had bothered to investigate this case
2 before he made his arrest and charged the wrong person, and
3 then tried to justify his arrest through piece by piece
4 investigation and testing over a period of years.
5 They've talked about well, you've -- you know,
6 witnesses were listed in October of 2005 and that's the last
7 time -- the first time they were listed. Well, that's a year ago.
8 Go out and interview them. Detective Thowsen, go out and
9 talk to them. Why are you listed as a witness? What do you
10 got to say? Not one ounce of effort to check out anything in
11 this case that was told to him by Blaise Lobato.
12 He did swing by the Budget Suites and look around
13 a little bit. Didn't take a crime scene analyst then. Really
14 didn't care too much apparently because he had already made
15 up his mind.
16 They did call someone from Budget Suites to come
17 in and testify, Zachary Robinson, which is kind of interesting
18 because he didn't even work there at the time. I think they
19 would've found someone to come in that actually had some
20 knowledge of what was going on at Budget Suites during that
21 period of time instead of somebody that was hired after the
22 fact. That's the investigation they did on the Budget Suites.
23 And listen to that tape. Blaise is telling them about
24 an incident that happened at Budget Suites. And after it

happened I took my car to Jeremy's, and Jeremy says yes, the car was here. Jeremy denies that he did anything to the car, but he verifies the car was there. It corroborates that Blaise was talking about something at Budget Suites more than a month ago when she talked to the detective. He didn't want to hear that. He wanted to hear that he had solved Duran Bailey's death, and that's all he focused on. Nothing else in this case.

And they come in and criticize Dixie because she recalls that Blaise told her it was a larger man. And she was very specific about that, that in talking to Blaise for the three hours that she talked to her, that she said was he as big as -- and I forget the name -- so and so? But finally he got to her grandson, as big as him? And Blaise said bigger, and she described how big he was.

And when Blaise talked to Detective Thowsen back on July 20th, she said the guy towered over her, that he was much bigger than she was. Doesn't fit. It doesn't fit Duran Bailey in this case. And I questioned Detective Thowsen about that, she said it was a much bigger guy, and he said well, to her he probably seemed much bigger. He was 160 pounds. And I said well, at the autopsy he was hundred and something else, 136. Well, that was due to blood loss. And I said 24 pounds of blood loss, and he kinda wavered on that.

Duran Bailey was 70 inches tall and 133 pounds at the time of his death, according to the autopsy report. And we got that from Detective -- excuse me, from Dr. Simms. Is that someone that towers over you, someone who is much larger? Someone that matches the description told to Dixie?

Blaise was talking about a different incident. And they say well, people that have done meth, when we take statements from them they jumble things up and they can't get things right and they -- and they're basically irreliable in what they tell you when you take their interview. But if they tell you something that we're interested in then, well, you gotta believe that, don't you, because that matches because a penis was involved. This must be the right person. Let's just arrest her and figure out the facts later, and that's what happened in this case.

The State has not proven that Blaise committed any crime in this case. And the witnesses and evidence presented by the defense establish that she couldn't have committed this crime. And the defendant doesn't have the burden of establishing their alibi. The constitution says that if a person claims alibi and presents evidence of an alibi, an element of the offense is at issue, and that is who committed the crime. And the State has the burden of disproving the alibi.

Have they presented any evidence, other than

speculation, conjecture, and is it possible to disprove that Blaise was in Panaca at the time Duran Bailey was killed? And the overwhelming answer has to be no, they have not done that. And you must, therefore, acquit in this case. Thank you.

THE COURT: I'm gonna give the jury a 10 minute stretch break at this time.

Ladies and gentlemen, in 10 minutes please be in the hallway, the bailiff will meet you there to return you to your seats in the courtroom.

During the recess you're admonished not to talk or converse among yourselves nor with anyone else on any subject connected with the trial. And you're not to read, watch, or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information, including without limitation, newspaper, television, radio, and internet. And you're not to form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Court's in recess for 10 minutes.

(Jurors are not present)

(Court recessed at 5:35:07 p.m. until 6:00:40 p.m.)

(Jurors are present)

THE BAILIFF: All rise, please.

Department 2 is back in session. Please be seated.

THE COURT: The record shall reflect we're resuming trial in State versus Kirstin Blaise Lobato under case number C177394 in the presence of the defendant, together with her three counsel, the two prosecuting attorneys are present, and the ladies and gentlemen of the jury have been returned to their seats by the bailiff.

I apologize that that 10 minute recess took a little bit longer than we thought, but I think it will all work out in the long run.

We're proceeding forward with the closing arguments. The State now has the opportunity to make a rebuttal closing.

MR. KEPHART: Thank you, Your Honor.

THE COURT: Mr. Kephart, you may proceed.

MR. KEPHART: Thank you.

STATE'S REBUTTAL ARGUMENT

MR. KEPHART: Ladies and gentlemen, this case has been long. You've spent a long time here. Maybe some of you might think that there wasn't a lot of evidence presented during the time frame that we've been here. Maybe some of you might think that there was too much evidence, too much just statements that are being made and no corroborated, whatever.

But let me tell you something. The State is in a

1 situation where you get to look at direct evidence and
2 circumstantial evidence. Circumstantial evidence is evidence
3 which you learn basically from circumstances that happen
4 where people tell you what you hear, commonsense that you
5 may have. Direct evidence is something that the defense is
6 talking about with whether or not you can directly say that
7 Blaise Lobato was in that dumpster area.
8 Spent a lot of time with that. They spent $12,000
9 on an expert to come in here and tell us what we already
10 knew. Tell us that we didn't have anything that said that she
11 was in that dumpster in the form of blood, fingerprints, or
12 anything in that -- hair or whatever.
13 But we have her words, ladies and gentlemen, her
14 words. We're here -- they said why are we here? We're here
15 because of her mouth, because of what she said. There's no
16 one else, you heard no one else has said anything about
17 cutting a man's penis off in the same vicinity and same time
18 when -- from her -- other than her.
19 And what's interesting, Mr. Schieck spent over an
20 hour talking about what he thought how the detectives just
21 bundled the case, the detectives didn't do anything here,
22 detectives didn't find anything here. And didn't talk about
23 Dixie at all, except for the fact, the one time when Dixie came
24 in here and changed her story about what was said about how

1 big this man was. It was never said before, never heard
2 before until she comes in here after the defense had provided
3 her with an autopsy report, and they had the audacity to ask
4 her whether or not the State has rehearsed the statements
5 with her.
6 Sometimes it gets pretty offensive, ladies and
7 gentlemen, when we're in a situation what we have, what we
8 gotta deal with. We're dealing with the evidence that is
9 presented to us and we're presenting it to you. Do you think
10 for a minute that if we wouldn't have tested any of those items
11 that we'd be in here, be applauded? 'Cause what they'd be
12 saying is just what they argued here, isn't it possible that if
13 you would've tested those items it would've came back that
14 our client didn't touch this item or didn't leave more hair or
15 anything?
16 And they want to -- and there he is in the same type
17 of argument and throwing it against us and saying, you know
18 what, possibility is not reasonable doubt -- or is reasonable
19 doubt. Well, ladies and gentlemen, you have to completely
20 throw out all of the statements that the defendant made, let
21 alone her own statement and what she told other people.
22 And you have to, I guess, just accept, just accept
23 their word. Kinda like their expert says, those blood drops that
24 I see in a photograph is blood is what he says. Even though

1 our experts were right out there, looked at it, took samples of
2 the footprints, and says it was not blood. You know, and then
3 in the same breath says the luminol test in the car is not
4 blood, even though we had two tests, presumptive tests that
5 said that it's blood.
6 But he can look at a photo, kinda like the other
7 expert with the scissors, just look at a photo. And you know
8 what's interesting, you know why you heard that, you know
9 why you heard that information, ladies and gentlemen? You
10 know why they found that man to say that, is because they
11 want you to believe that a person used scissors to kill him and
12 not a knife. Because Blaise -- Blaise, herself, her words, told
13 the detective she used a knife to cut the man's penis off.
14 You know, she told Michele she's depressed because
15 she thought she'd killed him. She told -- Rusty heard the word
16 "cut the penis off". She told Dixie. And you know, it just -- it's
17 interesting that they want to basically tell you to completely
18 disregard circumstantial evidence. There's an instruction that
19 specifically tells you you can look at it, and you give it the
20 same degree of weight you would give direct evidence. The
21 law does not recognize a difference in them other than the
22 way you get 'em. There's no difference in the value.
23 And it's interesting also when they talk to you and
24 tell you well, we've proven an alibi, we've proven that she

1 wasn't here. Well, it's interest -- the interest in that is that
2 when Dixie comes in here, you saw her, you saw what was
3 going on with her. She did not want to be here, she did not
4 want to point the finger at that lady right there. She changed
5 her story, she fought with the State. And where's she from?
6 She's from Panaca where Mrs. Lobato, who was in here earlier,
7 was going around telling people, remember the 8th.
8 Well, you know what's also interesting, ladies and
9 gentlemen, in a previous proceeding, the 8th was all that was
10 testified about.
11 MR. SCHIECK: Objection, Your Honor.
12 THE COURT: Sustained.
13 MR. SCHIECK: There's no evidence of what was and
14 wasn't.
15 MR. KEPHART: Oh, well, Ms. Lobato, I'll tell you.
16 Ms. Lobato, when she testified before in her testimony here --
17 MR. SCHIECK: Objection, Your Honor.
18 THE COURT: Would counsel please approach?
19 (Off-record bench conference from 6:07:23-6:08:10 p.m.)
20 MR. KEPHART: And I want to apologize, I need to
21 clear it up. I'm talking about Rebecca Lobato. Rebecca
22 Lobata in her previous testimony --
23 THE COURT: Overruled.
24 MR. KEPHART: Thanks Judge.

-- told -- testified before that at the times that she remembered seeing the defendant and testified about the day on the 8th, in the afternoon on the 8th, she went to work that day. She never said anything about seeing her before she went to work, getting up and seeing her laying on the floor or laying on the futon or whatever. She went to work, saw her in the afternoon.

And for the first time -- and also we hear from Mr. Lobato. He comes in here and now he tells you that at 7 o'clock in the morning John, who we hear from the first time, came over and woke me up and asked me on that particular day, when he was leaving a week later, to help out with checking with my family when I'm gone, the first time.

And what's interesting as well is that Ashley Lobato, if you look at the time frame. The time frame is clear that what we're talking about with reference to when this occurred and how the defendant fits this story about driving back to Las Vegas and getting on her methamphetamine, she's -- she's in Panaca, ladies and gentlemen, for a weekend or a week with her family over the 4th of July. What is she doing? She's fighting with her mom. Her mom admits to that, that they're fighting. Her mom admits that she uses methamphetamine, her daughter, to get away from the problems that she has with her family, and the arguments that she has with her mom.

And she leaves Panaca and goes back to Las Vegas, to do what? We're talking about a methamphetamine addict that has problems with methamphetamine, can't control her methamphetamine, wants to get it any time she can, breaks her boyfriend and girlfriend relationships up, can't -- says she's out of control, and she's just gonna sit around in beautiful Panaca and do nothing.

Medical records say she didn't have any methamphetamine in her on the 5th. So what is she doing, just sitting around doing nothing. She just got a new boyfriend. You heard from Doug. She just moved in with him and she went -- Doug said they wanted to get together but there was a barbeque on the 4th. She went to the doctor the next day because apparently there was some kind of appointment. They went and made that.

She left, came back to Las Vegas, according to her statement, and spent three days on a binge. You look at the phone records. You can see from the phone records that there's a lot of activity going on around that time where the mom's calling work, mom's calling Doug, mom's calling the sheriff's department, for what she says in a previous statement -- previous testimony, looking for a truck. Now she remembers because Larry Lobato came in here for the first time and says it was 'cause she was wearing a jumpsuit, or

getting a jumpsuit.

Well, there's another phone call later. Remember Larry said he went to summer camp like on the 22nd? Well, there's a phone call to the sheriff's on the 21st. Isn't it reasonable that's when he got called to get the jumpsuit?

Well, it's interesting is that you have all these people come in here. And you know what's so cool about this is that her own sister, her own sister, when they asked about whether or not she saw her on the dates of the 5th, 6th and 7th in that area, I don't remember not seeing her. This is this young lady who's just starting her own career, and she's sitting in here under oath to tell the truth, and says I don't -- I can't remember not seeing her. Did she say oh, I saw her, we did this, this, this and this. No. The only ones you have marked in this area is Chris Carrington, Chris Carrington, Chris Carrington and Michele Austria. And you heard from Michele Austria that she didn't know if it was this weekend or this weekend.

And Chris Carrington, I mean ladies and gentlemen, you saw his testimony, you saw him up here telling you what he believe had occurred. And you heard his grandma specifically come in here and tell you that she remembered it, she remembered the 5th because her sister was supposed to be there on the 4th but she was late and she came on the 5th.

She remembers the 5th. She remembers Chris coming home and saying I can't deal with the turmoil, they're fighting. Then she got a phone call and he went back up there.

Then on the 6th he came home and said they're fighting 'cause she's going to Las Vegas. And he got in here and said no, that's not what was said. But grandma came in and said this is my grandson who's kinda brain dead, and told you about the defendant's --

MR. SCHIECK: I'm gonna object, Your Honor. She didn't call him brain dead.

MR. KEPHART: Oh, yes she did.

MR. SCHIECK: She said lame brain.

THE COURT: Sustained.

MR. KEPHART: Okay.

Anyway, and says I remember on the 7th he was with me because I had to have him take me to the hospital and he doesn't even remember that. But yet he remembers sitting with the defendant, working out, didn't seem like she was even -- anything wrong with her. But yet she's supposed to be going to the doctor and everyone else is saying oh, she's tired and she -- she's not herself and she's staying out of company with everybody else. And she says on the 7th he had to take me to the doctor. And then he had to drive to the lake and get my sister who was there and bring her to the doctor

1 so we could all be at the hospital.
2 And it just -- and what's interesting about their
3 exhibit is no one else talks about that. The 4th, I mean I guess
4 you could -- would give that to them. The 2nd everybody kinda
5 put that -- it was also funny, you know, Chris Carrington says
6 yeah, the 2nd, I was there on the 2nd. I got up on cross and I
7 said well, you know, Chris, after the defense said you haven't
8 changed anything and you've been consistent all along, and he
9 said yes, and I got up and he goes oh, I gotta change it, I
10 made a mistake, it was the 3rd.
11 Who's talking about the dates of the 2nd? Who's
12 rehearsing what? So he changed it, he said the 3rd. Well,
13 that's fine. We don't deny that. I mean we've heard that from
14 a lot of people that she was up there. And it's reasonable to
15 believe that she went up there to see her parents on the 4th of
16 July.
17 But it's also reasonable to believe, ladies and
18 gentlemen, that she went -- a person that's wanting
19 methamphetamine, that would jeopardize relationships, would
20 fight with her parents, would use methamphetamine to cope
21 with her problems is just gonna sit out that week. She went
22 back to Las Vegas, ladies and gentlemen, and did exactly what
23 she told the police, a three day binge. You have the 6th, 7th,
24 and 8th. And on the 8th day she killed Duran Bailey.

1 Now let's talk a little bit about Duran Bailey. We're
2 not here telling you that Duran Bailey is a saint. We've never
3 denied that. Did he -- was he convicted of a sexual assault?
4 No. He didn't have the opportunity to sit here and listen and -
5 - sit here and listen to the State presenting a case against him.
6 But for all intensive purposes, I guess we could accept that he
7 raped Diane Parker. Did he take sex from her? Okay, he took
8 sex from her. Did he trade sex for dope? Yes. Did he provide
9 dope to her? Yes.
10 Defendant -- you heard the defendant has been
11 raped multiple times herself. Matter of fact, to the point where
12 her dad has provided her with teaching her how to fight,
13 giving her a weapon, teaching her how to use the weapon.
14 He's a -- used to be a correction officer, knows tactical
15 defense, is interested in weapons, and this is daddy's little girl
16 that he wants to protect, that he cares about, and yes, he
17 loves her.
18 And he wants -- he knows she's going down to Las
19 Vegas to do methamphetamine. He knows what the lifestyle is
20 himself. She's going to Las Vegas to do that. Give her a knife.
21 She said I got the knife Christmas from my dad. This knife
22 that she no longer has, that she just happened to get rid of
23 this present from my dad, that she threw her own clothes
24 away. And she -- it's reasonable to believe that she knows

1 how to use it.
2 And let me give you a scenario of what happened
3 behind that dumpster. Ladies and gentlemen, she went there,
4 she knew where her connects were, she knew where to get
5 dope. And I'm not even telling you that Duran Bailey was
6 selling her dope. But he knew that he -- he was known to sell
7 dope in the past, he was known to trade dope for sex in the
8 past, and she is on her three day binge and she's out looking
9 for dope. She finds him, believability that she had met him
10 before.
11 They got back into the back of this dumpster area,
12 and is it unreasonable to believe, ladies and gentlemen, that
13 he decided -- kinda like the scenario we pose their expert
14 about being on the pier, where she wanted the dope, he
15 decided he didn't want to trade it or sell -- I mean he didn't
16 want to give her the dope, or he wanted sex for the dope.
17 Well -- and then his pants are down around his
18 ankles, and the blood stops after she gets down to the point
19 where she's gonna give him fellatio, and she doesn't like the
20 smell of dirty diapers. How else do you smell that unless
21 you're right next to the person? Smells like dirty diapers, right
22 there. And she doesn't want to do it anymore.
23 But he's at the point he's got his pants down
24 crumpled down below his knees, and he's standing there with

1 his Johnson out and she doesn't want to do it now. She says
2 in her statement the man's towering over me. Well, if she's on
3 her knees he would be towering over her.
4 And she's right there and he tries to now make her
5 do it when she's not. That smell, that awful smell, no. You
6 know, no one is gonna do this to me. No one. It's happened
7 to me before, that's why I have a knife. She stabs him in the
8 bottom of his scrotum and he bleeds. And what does he do?
9 What's a manly man gonna do? They're gonna grab themself.
10 Continues to stab at him, fights at him.
11 Well, you know what, what she told Dixie is what
12 happened. She walked away and she looked back and saw
13 him crying. Well, you know what's interesting about that, is
14 she wasn't concerned about anything but her car because she
15 went back and killed him. She got her bat and she went back
16 in there.
17 Now listen to the testimony with this. There was a
18 question about kicking, whether or not a kick could do this as
19 well. Remember the testimony? Doc Simms never said that
20 she -- that he received that skull fracture with the bat. He
21 never said that. He said that it was consistent with getting hit
22 in the mouth that a bat would bust your teeth out. And he did
23 say other trauma he would expect, and that would be on the
24 side here and the head, that he would expect to see an

1 indention. We never presented that.
2 But we did present if he's standing there in a
3 position where he's been stabbed at, he's been cut, he's
4 defending himself off and he's crying, and he can identify her,
5 she goes back -- and this is where you get to the first degree
6 murder. She had that opportunity to leave, she had that
7 opportunity to go for help, and she didn't exercise that
8 opportunity. She went back 'cause no one's gonna do this to
9 her, no one. Not anybody like this, especially somebody that
10 she didn't think anybody would remember or anybody would
11 miss. And when she went back and smacked him in the
12 mouth with the bat where his teeth busted out, he fell back
13 and he hit his head on that curb, and that's consistent with
14 busting his skull.
15 Now he's down and he's out and what does she do?
16 She stabs him in the neck, and that's how you see all the
17 blood on the side of the -- go about a foot up on the side of
18 the wall there. And that's where all that blood collected in the
19 one area right in the back. That's why his shirt's all covered.
20 His pants wouldn't have been there because they were down
21 out of where the blood collected.
22 And then what does she do? What does she do
23 then, ladies and gentlemen, she cuts his penis off and she cuts
24 into his rectum, because no one's gonna do that -- that's from

1 somebody that's been through that themselves. She can't
2 come in here and tell you, give me some pity and let -- and
3 find me not guilty of this murder because of self defense
4 because this man attacked me, because you read the
5 instructions, you'd have to find her guilty of the penetration of
6 a dead human body. And that's from somebody -- a sexual
7 penetration of a dead human body. That's from somebody
8 herself that's been raped herself. She's not gonna accept that.
9 So what happens? An alibi starts getting created
10 about the 21st by her mom. And you don't tell me for a minute
11 that her parents weren't talking to her from jail right away.
12 And it's interesting, why does she tell her parents on a
13 recorded statement -- don't say anything because we're
14 getting recorded, snap at your father, we're getting recorded
15 -- if she didn't do anything wrong?
16 Now when you look at what they claim as an alibi,
17 you have to also look at Jury Instruction Number 35 where it
18 talks about -- it talks about the credibility and the believability
19 of witnesses. And you have to determine whether or not you
20 believe them is basically what it's telling you. And you look at
21 -- one of the factors you look at is the relationships to the
22 parties. And it's interesting, is the only people that came in
23 here and talked about anything happening in this area,
24 especially on the 7th, were family members, except for Chris,

1 and you've heard about Chris' testimony. You have to
2 determine the believability of that as well.
3 Family members, the only people. I mean other
4 people put her -- it's interesting that other people put her in
5 Panaca in the afternoon or maybe noonish on the 8th, and
6 that's not -- that's not outside the line of what Dr. Simms is
7 talking about. And if she did exactly what she told Dixie, that
8 all she wanted to do was get cleaned up and get the hell back
9 to her dad's house, that's exactly what she did. And that puts
10 her right back here on the 8th where you see all these people
11 that are seeing her on the 8th coming back. And who's house
12 did she go clean up at? Doug's?
13 They talk about the lack of physical evidence of her
14 at the scene, yet there's so much evidence with regards to
15 what had occurred. You will never forget this trial. The
16 reason why you'll never forget this trial is because of the
17 circumstances that came under it. A man's penis was cut off.
18 You heard about it once before probably with Lorena Bobbitt,
19 a man's penis was cut off. You'll never forget that. That's a
20 circumstance that they want you to stretch so far and say that
21 this is a coincidence, that she happens to be talking about it
22 right after it occurs, when after she is worried that the man is
23 probably dead, knows that she cut a man's penis off, is taking
24 Prozac because of the anxiety and depression she's under,

1 because it's causing her conscious -- she's having trouble with
2 her conscious.
3 Talk about the physical evidence and a time frame
4 of when things were tested. It comes to a point where you
5 have to just stop testing. Other times you will never stop
6 testing. You've heard of cases even after people have went to
7 prison, they continue doing testing. You've heard of some
8 where they've been exonerated based on the testing and
9 you've not heard of the ones where they're not exonerated.
10 And so, you know, to point the finger at the State or
11 the police officers and say you know what, you just didn't quit
12 -- you quit testing and you tested right up to the last minute
13 on that. It's like if we don't test, I mean they threw the plastic
14 bag in our face on that. And you know what their words were,
15 their words were conclusionary, just like their expert that they
16 hired, that the evidence of the perpetrator was beyond that
17 bag, on the bag, in the trash can.
18 Where do you stop? What if you find the body in
19 the dump? Where do you stop? Don't you give some
20 credence to the people that are out there looking and trying to
21 do what they can? They say that they -- they made -- they
22 jumped to conclusions and they made the decision and they
23 arrested Blaise and that was the end of it and they didn't do
24 anything else.

1 Well, you heard they talked to Jane Parker, they
2 went over to her house, they looked at her clothes, they
3 looked at her shoes, they looked at her knives, they discussed
4 it with a roommate. There was nothing they gave a detective
5 that's done over 400 homicides any kind of clue that she was
6 even a suspect, knowing full well that she was a rape victim of
7 the very man that was killed.
8 And he looked at the -- he talked to the
9 management, he investigated the individuals that didn't even
10 know her. And that -- you know, Ms. DiGiacomo talked about
11 that earlier. Do you think it's reasonable for somebody to see,
12 maybe see somebody get slapped, another woman, and then
13 you go out and kill 'em and you do that kinda stuff to them?
14 That makes no sense.
15 And then what do we -- what do we make of this?
16 What are we supposed to do? I mean she said in her
17 statement she'd gotten her car bloody. And they spent almost
18 a day disputing that, talking about copper salts and things like
19 that up in Panaca or the mine field of Pioche. She talked
20 about taking her clothes off in the car because they were
21 bloody and she threw them away. Her dad kind of admitted
22 that he wiped the car out.
23 And they don't tell you -- did they remind you of the
24 fact that Dixie talks about -- remember Dixie when she was up

1 there and the questions were posed to her about what she told
2 Laura about the defendant telling her she went back to hide
3 her car out. And that's super consistent with the fact that
4 when she leaves and goes back on the 9th she doesn't take her
5 car. I mean she goes back down there to do what, you know,
6 make a run at it and not have her own transportation to get
7 away from that? Well, she has to later call her down. No,
8 they're laying low, the car's not around her, they're down there
9 watching TV to see if there's any other information about this.
10 And she tells Dixie, she's up there hiding her car, her
11 parents are gonna help her get it cleaned or maybe paint it
12 and get rid of it. Dixie wouldn't tell you that. Dixie kept I
13 didn't say that, I didn't say that, I didn't say that. When Laura
14 came in, she said no, that's what she told me. Dixie said get it
15 cleaned. Do you remember that? She said that like get it
16 clean. And she wanted -- I think if she said it louder and
17 louder and louder we'd believe it more. Get it clean.
18 Well, what are they cleaning, something that
19 happened on Memorial Day? This car with this compulsory
20 clean person here, they drive the car back, the parents say
21 that it reeked, but yet they leave the car rolled up -- the
22 windows rolled up and parked in the July sun in Panaca and it
23 reeked, and he just wiped it out.
24 What did it reek from, the Memorial Day vomit and

1 stuff that's in the car. Doug Twining -- I mean not Doug, Mr.
2 McCroskey says that he believed that she'd cleaned it before
3 she brought it back over to the house.
4 He talks about there's no physical evidence at the
5 scene, no fingerprints, nothing. There wasn't a single
6 fingerprint of hers in her own car. Are we supposed to just
7 say then well, she was never in her car? It excludes her from
8 being in her car, ladies and gentlemen, because she -- no
9 fingerprints in there.
10 They bring her back to Las Vegas -- oh, what about
11 this, ladies and gentlemen, we're just supposed to ignore that?
12 Are we just to ignore what's on these freshly laundered seat
13 covers as the crime scene investigator talked about? Just
14 ignore that? Well, that's not blood, but those spots on the
15 ground in the photograph are.
16 And when they bring her back to the jail cell and she
17 talks about the inside of the jail cell looking like where this
18 occurred. Well, the defense presented you this cave, and you
19 have -- you can look at that too, that happened from the
20 Budget Suites. Which, you know, the detective did go over
21 there and tried to see whether or not -- you know, how do you
22 investigate something that didn't happen? How do you do
23 that?
24 He talks about how he could look out of the inside of

1 something that looked like the inside of the jail cell and see
2 the carport next door next to it. I mean unless you're out
3 there and you're doing this, it's a pretty good imagination that
4 you're making it up. It fits perfectly in the crime.
5 You know what's interesting as well is that what she
6 does say in her statement as we're talking about the past
7 tense, how she talks about I didn't think anybody would miss
8 him, I don't -- I didn't think I could put him in -- I didn't put
9 him in and I don't think I could have, she's talking about the
10 dumpster. Why do you need to say I don't think I could put
11 him in it if he was alive? If he's dead, it'd be maybe throwing
12 him in the garbage can, just throw him away. And you see
13 that he's moved towards the dumpster. Somebody tried, she
14 tried to put him in the dumpster, couldn't pick him up.
15 And they ask, did you hit him with anything other
16 than the knife? And her response was well, it's possible, I
17 have a bat in the car. But you know, when I was on my
18 flutters of the third day of my meth binge, everything went
19 black.
20 She tells Dixie that it was on north of I -- I mean
21 west of -- east of I-15, and she gives hotel names of the
22 streets, Flamingo and Tropicana. She didn't say anything
23 about it being down at Budget Suites or anything.
24 But are we supposed to just ignore that? Are we

1 supposed to just ignore that huge coincidence? She tells Dixie
2 that she severed a man's penis in Las Vegas. She said the
3 man tried to proposition her. The man put his penis in her --
4 tried to put his penis in her mouth. Does that sound like what
5 I was describing to you earlier, that she cut his penis off and
6 threw it. She got ick all over her. Those are the words that
7 Dixie used for what the defendant said. She said that he was
8 old, smelly man, nothing else about size or anything.
9 Happened on West Tropicana and West Flamingo.
10 They were looking in the paper to see if any news
11 about it at the time when they were there. As she was
12 researching it, she had been researching it before. She
13 believed it happened just recently. Wasn't talking about
14 something earlier. And you kinda seen the exchange there
15 when talking about the June and July.
16 She said she was extremely upset and crying. She
17 said after it was all done all she wanted to do was get back
18 home to her dad's. She said she used her car and she was
19 worried about her car being seen.
20 And that gets me back to the point I was talking
21 about earlier, that if she left after she killed him, he's certainly
22 not gonna see her. And if she's in an enclosed area, like what
23 you've seen in this, no one's gonna see that, see into there,
24 unless you're up above or the doors are open. And -- but her

1 car would be seen, and that's what she was worried about.
2 She wasn't worried about herself being seen, she was worried
3 about her car being seen. A little red car. You'd have to
4 disregard what Michele says, you'd have to disregard what
5 Paul Rusty -- Rusty Brown says.
6 And take a look at their phone records, ladies and
7 gentlemen. And look at the time frames of when they are
8 talking about when the phone calls are going from the mom to
9 Doug's house or to Doug's cell, and when Doug is returning
10 those calls. And look at the same time about when they're
11 calling the highway looking for -- they're calling the sheriff's
12 department. And then at a point in time when they know
13 where she's at, when she's in Las Vegas, there's no phone calls
14 going on anymore. There's a big amount of phone calls
15 around -- on the early morning of the 8th into the 9th -- I mean
16 late evening of the 8th into the 9th, because that's when Doug's
17 coming up there to get her. And you don't see Doug really
18 picking up on the phone calls again until after about 9 o'clock
19 in the morning on the 8th.
20 Well, in the realm of Mr. Schieck's bell curve, there's
21 still that reality of the 24 hours. I mean you ask these experts
22 to come in and say what they believe would fit, and they want
23 - -and it's so interesting. They want to fit in the 18 to -- 10 to
24 18 hours. The doc says that it's more reasonable -- I mean it's

1 more probable that it happened in the 24 hour span. But to a
2 reasonable degree of medical certainty they'll give you the 10
3 to 18 hours.
4 And it's interesting that the defense is arguing that
5 that's where we want it to be, when often times you find
6 bodies in that interval and they want the doctors to spread it
7 out to the outside of that time frame.
8 And I -- you know, when we talked to you guys like
9 four weeks ago and we're asking you to be jurors on this case,
10 both sides was trying to get the fairest jurors that we could
11 find. And part of that is because of the system of justice that
12 the defense and the State are operating under and what all of
13 you are entitled to. And part of that tells us that we want
14 people that are -- have a stake in the community, people that
15 have been around, people that care what happens in their
16 community, people that care what the prosecutions are doing
17 or what the defendants are doing.
18 And we want people to realize that you don't come
19 in here with blinders on. You don't leave your commonsense
20 outside the door. You use your common everyday
21 experiences to judge what you heard here and what you
22 believe the verdict ought to be.
23 And I ask you, using your commonsense, is it
24 reasonable to believe that we have a pure coincidence here?

1 Is that reasonable to believe? And that's that step you have to
2 get over as to reasonable doubt. Is it just a mere coincidence,
3 probably one of the biggest ones you've ever heard, that this
4 defendant just happened to be talking about the very thing
5 that happened just days before she started talking about it?
6 The defense started their closing argument talking
7 about we were saying in our argument, well, it's possible, or
8 it's possible it happened like that. You know what, ladies and
9 gentlemen, that's because you, the jury, are the ones that
10 make the reasonable inference and draw those inferences to
11 determine the guilt or innocence of the defendant. You do
12 that. You don't base it on sympathy, you don't -- it has --
13 can't be influenced by sympathy. You make that decision as a
14 sincere judgment, sound discretion that you're using in
15 accordance with the law that you've been given.
16 When the defense talks about possible, well my
17 question to you is is it possible the defendant was confessing
18 to a crime that happened in May of 2001? Is that possible,
19 based on all the information that you heard what occurred
20 here, that there wasn't any crime that happened in May of
21 2001? No evidence of that. Is that possible? Is that
22 something that you're really gonna pick up from that
23 statement? I suggest that you won't.
24 In this case, ladies and gentlemen, there's nothing

1 to support a self defense. And the reason why, as I explained
2 earlier, is because there was a cooling down period. There
3 was a point in time where the defendant had to make a choice
4 as to whether or not to walk away from what she started or to
5 finish it. She decided to finish it because she was gonna be
6 identified.
7 That there is your premeditation, your deliberation.
8 It went to a point where there was a directed wound to the
9 carotid artery. There was a blunt force trauma to the head
10 that knocks him down. Directed wound to the liver area.
11 And then what happened with the penis later, that's
12 evidence of rage, that's evidence of anger, that's evidence of
13 premeditation and deliberation. That's first degree. Defense
14 didn't even argue that, didn't even argue that, that she's
15 entitled to self defense.
16 Now when you look at the verdict you're gonna --
17 this is what you're gonna get back there. I don't know if it's
18 with those instructions that you have now. I think the Court
19 gives you like in a little blue packet or something. But you
20 have a series of things to determine. Can you all see that?
21 You have a series of things you have to look at, and all the
22 instructions will walk you through that.
23 You have to look at whether or not it was guilty of
24 first degree murder with the use of a deadly weapon. Well, I

1 submit to you a knife is a deadly weapon, and the manner it
2 was used here is a deadly weapon. So you don't have to even
3 look at any other crime that doesn't have a deadly weapon
4 involved.
5 The argument here, what I just explained to you,
6 supports the guilty of first degree with use of a deadly weapon
7 because of the premeditation. Because of the multiple
8 mechanisms of injury, the multiple mechanisms of -- you can't
9 see?
10 THE COURT: My view of the jury was blocked.
11 MR. KEPHART: Oh, I'm sorry, Judge. Okay.
12 THE COURT: Thank you.
13 MR. KEPHART: And -- I'm gonna need that again.
14 THE BAILIFF: You're gonna need it?
15 MR. KEPHART: Yeah.
16 And you don't need to go any further with that. I
17 mean your decision can't be one based on sympathy. You
18 have to make the determination if you feel in this case that
19 there's self defense there. But then there's arguments talking
20 about at a point where she has an opportunity to abandon that
21 and didn't do that.
22 And then the second one is pretty obvious, ladies
23 and gentlemen, as to -- I mean there's certainly evidence that
24 she's guilty of sexual penetration of a dead human body by the

1 injury to his rectum.
2 Now it's interesting when -- like real quickly when
3 you talk about like the McCroskeys and the other individuals
4 who talk about the car being moved or not being moved. And
5 you heard te McCroskeys talk about how they -- they may not
6 even have been there. But they do know when they were
7 there and they saw the car that it hadn't been moved. And
8 that's highly consistent with her coming up there after the --
9 after the 8th, 'cause they were gone potentially the 4th of July
10 where they drive to Fallon, Nevada and stay for just a couple
11 days. They go there for a period of time and spend time with
12 their family.
13 Now we showed you this in the beginning, Exhibit
14 258. And this, ladies and gentlemen, is who we're talking
15 about. We're not talking about this young lady that's sitting
16 here now and has come in here with her dresses on and her
17 hair back and a little longer than that. Matter of fact it's
18 interesting, the very people that supposedly saw her up there
19 that time could not say that she looked any different, other
20 than older, than the way she looks right now. Well, you take a
21 look at it and tell me if she looks any different. That's pretty
22 distinct, wouldn't you say? And if they supposedly had seen
23 her all this time when they're up there with her, you would
24 expect that they'd seen that. And that's what we're talking

1 about in this case, ladies and gentlemen.
2 Happened in 2001 when she killed Duran Bailey.
3 When she was the meth addict, when she was the knife toting
4 individual, when she's the one that's moving around Las Vegas
5 and getting out of control, when she's the one that would do
6 anything for methamphetamine. That was in 2001, ladies and
7 gentlemen. It's been long enough. It's long enough, that
8 about time the jury says something about it. It's long enough.
9 It's time to finish it. It's time to put an end to this. It's time to
10 put an end to what happened to Duran Bailey.
11 He's entitled to a degree of respect from the State
12 and from the people who represent the State and from this
13 system. He didn't have an opportunity to go through deciding
14 whether or not he was guilty or not, but did he deserve to die?
15 Did he deserve to die at the hands of somebody that just
16 made that decision?
17 And that's why we're here, ladies and gentlemen. In
18 the beginning he asked why are we here. We're here because
19 of what she did in July of 2001, what she did to Duran Bailey,
20 that's why we're here. And it's about time we put a stop to it
21 now, and it's time for you to mark it as I did, guilty of first
22 degree murder with the use of a deadly weapon, and guilty of
23 sexual penetration of a dead human body.
24 When you go back in there and you deliberate,

ladies and gentlemen, look at the evidence. Look at what you have in there. Fumble through it if you want. Look and see if there's any stab wounds to the pants. Look if there's any blood in there if you want to do that. You can do that.

But if you want to say that she's not guilty, consider that with regards to everybody that came in here and testified about what she said to them, what she said, came out of her mouth, and what was corroborated in the sense of she said she cut a man's penis off, corroborated. She said it was on West Tropicana or Flamingo. Corroborated. She said it was near a dumpster. Corroborated. She said she couldn't put him in the dumpster. Corroborated. Said that she was bloody and got in her car. Corroborated. Said she wanted to leave and get back -- her car back to her dad's house. Corroborated.

If you don't think she did it, ladies and gentlemen, find her not guilty.

MR. SCHIECK: I'm gonna object, Your Honor, that's not the burden of proof. The burden of proof is that they proved it beyond a reasonable doubt.

THE COURT: Sustained.

MR. KEPHART: If you don't think we've proved it beyond a reasonable doubt, find her not guilty.

Thank you, ladies and gentlemen.

Thank you, Your Honor.

THE COURT: Okay.

Ladies and gentlemen, alternate jurors are needed at trial who are prepared to assume a juror's seat should a juror become unable to or become disqualified from the performance of their duties. Before the time that the trial began it was stipulated that whomever became seated in the 13th and 14th chairs would constitute the alternates for the purposes of this trial. That turned out to be Lacey Valdez as Alternate 1, and Joan McCormick as Alternate 2.

In the event that a vacancy does occur on the jury during deliberation, the alternates will then be taken to the room to fill that vacancy.

Dee Grimm has just entered the courtroom. She's the judicial executive assistant for Department 2 who works with the Court in the Court's offices and chambers. She, the bailiff, and the court recorder are going to be placed under oath to take charge of the alternates and the jury.

DEE GRIMM, BAILIFF & COURT RECORDER ARE SWORN

THE CLERK: Thank you.

THE COURT: Shortly Ms. Valdez and Ms. McCormick will be going with Ms. Grimm and providing her with the phone numbers where they can be reached. You will be notified telephonically either to advise you that you need to return to

the courthouse to assume a seat in deliberations, or to advise you that you are relieved of jury services. So you will receive a phone call updating you and advising you of one of those two things.

Until such time as you either go into the jury deliberation room or you are advised that you are relieved of services, you remain under the admonishment of the Court that you cannot talk or converse with anyone on any subject connected with the trial, nor read, watch, or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information, including without limitation, newspaper, television, radio, and internet. And you cannot form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

If we do not see you back again, we thank both of you most sincerely for all of your time and your efforts here with this trial in doing this service for your community.

If you would come out the gate and come around the front of the courtroom. Bring your stuff with you.

We had arranged for dinner delivery at 5:30, and that was when we took our 10 minute recess. The rest of you will be taking -- will be taken into the jury deliberation room by the bailiff at this time. Would those of you in the front row please exit and go with Officer Burns, and then those of you in

the back row follow the front row.

(Jurors are not present)

THE COURT: Lisa, can you shut the door? Thank you.

The record shall reflect that the jury has exited the courtroom, the Court's gonna ask that counsel approach the clerk to leave the numbers where you can all be reached. And we will go off the record at this time.

Court Adjourned at 6:54:28 p.m., until the following day, October 6, 2006)

* * * * * * * * * *

AFFIRMATION
Pursuant to C177394

The undersigned does hereby affirm that the preceding Transcript filed in District Court, Case No. A528457 does not contain the social security number of any person.

Kari Riley
Transcriber

5/10/07
Date

* * * * *

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

CLERK OF THE COURT

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	CASE NO. C177394
	)	
vs.	)	
	)	DEPT. NO. II
KIRSTIN BLAISE LOBATO,	)	
	)	
Defendant.	)	Transcripts of Proceedings

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT COURT JUDGE

"ROUGH DRAFT"

JURY TRIAL - DAY 20
VOLUME XX

FRIDAY, OCTOBER 6, 2006

COURT RECORDER:

LISA LIZOTTE
District Court

TRANSCRIPTION BY:

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LAS VEGAS, NEVADA FRIDAY, OCTOBER 6, 2006

PROCEEDINGS

(THE PROCEEDINGS BEGAN AT 2:57:53 P.M.)

(Jurors are not present)

THE COURT: The record shall reflect that we're convened outside the presence in State versus Kirstin Blaise Lobato, under Case Number C177394, in the presence of the defendant, together with all three of her counsel. The two Prosecuting Attorneys are present.

And the Court's been advised that the bailiff will shortly be returning the jury to the courtroom. The record shall reflect that we've received various notes from the ladies and gentlemen of the jury since they went out to deliberate and with each note the Court was able to conference call counsel for both sides and counsel was able to agree upon a response to go into the jury. We had four notes that came out last night, which will be marked collectively as the Court's next in number.

THE CLERK: 89, 90, 91, 92.

THE COURT: And then this morning we had one note that was just apprising us of a scheduling issue with one of the jurors and that will be marked as the Court's next in number thereafter.

THE CLERK: 93.

THE COURT: The jury deliberated until approximately midnight. They then elected to go home and return this morning at 8:30 to resume deliberations. They were given dinner last night after they went out to deliberate a little after 7:00 p.m. and they were given lunch this afternoon around 1:00 p.m. And since we got that scheduling note early this morning, they have not sent out any further notes.

(Pause in the proceedings)

THE BAILIFF: The jury is now present.

(Jurors reconvened at 3:00:53 p.m.)

THE COURT: The record shall reflect that the ladies and gentlemen of the jury have been returned to the courtroom and reseated in the jury box by the bailiff.

Ladies and gentlemen, please answer out loud, yes or no, have you selected a foreperson?

JURORS: Yes.

THE COURT: Would the foreperson please raise their hand and state their name for the record.

JUROR DOBYNE: Douglas Dobyne.

THE COURT: Thank you. Mr. Dobyne, have you returned to Court at this time with the form of verdict?

JUROR DOBYNE: Yes, we have.

THE COURT: The Bailiff will approach you, please turn it over to him.

THE BAILIFF: Thank you.

THE COURT: Thank you, Mr. Bailiff.

Would the defendant and her counsel please stand. The Clerk will read the verdict aloud.

THE CLERK: District Court, Clark County Nevada, The State of Nevada, Plaintiff, versus Kirstin Blaise Lobato, Defendant. Case Number C177394. Department II. Verdict.

We, the jury, in the above entitled case find the defendant, Kirstin Blaise Lobato as follows:

Count One, Murder with use of a deadly weapon. Guilty of voluntary manslaughter with use of a deadly weapon.

Count Two, Sexual Penetration of a dead human body. Guilty of Sexual Penetration of a dead human body.

Dated this 6th day of October, 2006. Signed by foreperson Doug Dobyne.

Ladies and gentlemen of the jury, are these your verdicts as read, so say you one, so say you all?

JURORS: Yes.

THE CLERK: Thank you.

THE COURT: Thank you, Ms. Clerk.

Does the State desire to have the jury polled?

MR. KEPHART: No, Your Honor.

THE COURT: Does the defense desire to have the jury polled?

1 MR. SCHIECK: Yes, Your Ho.
2 THE COURT: Ladies and gentlemen of the jury, the
3 Clerk is now going to make inquiry of you individually as to
4 your verdict.
5 THE CLERK: Frank Arieno, is this your verdict as
6 read?
7 JUROR ARIENO: Yes.
8 THE CLERK: Tai Anderson, is this your verdict as
9 read?
10 JUROR ANDERSON: Yes.
11 THE CLERK: Paul LaChance, is this your verdict as
12 read?
13 JUROR LaCHANCE: Yes.
14 THE CLERK: Robert Sharpe, is this your verdict as
15 read?
16 JUROR SHARPE: Yes.
17 THE CLERK: Randall Froschheuser, is this your
18 verdict as read?
19 JUROR FROSCHHEUSER: Yes.
20 THE CLERK: Thomas Ciciliano, is this your verdict as
21 read?
22 JUROR CICILIANO: Yes.
23 THE CLERK: Michelle Moir, is this your verdict as
24 read?

1 JUROR MOIR: Yes.
2 THE CLERK: Janel Torgerson, is this your verdict as
3 read?
4 JUROR TORGERSON: Yes.
5 THE CLERK: Doug Dobyne, is this your verdict as
6 read?
7 JUROR DOBYNE: Yes.
8 THE CLERK: Lloyd Taylor, is this your verdict as
9 read?
10 JUROR TAYLOR: Yes.
11 THE CLERK: Anthony Vergot, is this your verdict as
12 read?
13 JUROR VERGOT: Yes.
14 THE CLERK: Anush Benham, is this your verdict as
15 read?
16 JUROR BENHAM: Yes.
17 THE COURT: Thank you, Ms. Clerk. The Clerk will
18 now record that verdict in the official minutes of the court
19 record to be maintained in the office of the clerk.
20 Ladies and gentlemen, those of us involved in this
21 trail wish to wholeheartedly commend you on your efforts.
22 This has been a much longer process than you were originally
23 advised of and I know you have had to undertake significant
24 efforts to rearrange your schedules and other commitments

1 that you had in lite to continue through with this process and
2 we're most appreciative of you for all of those efforts. I know
3 too that this was a very difficult trial sometimes, in terms of
4 the nature of the testimony and the volume of the evidence
5 and you have done above and beyond the call of duty coming
6 in from the community to provide this essential service. As
7 you know without individuals such as yourselves coming into
8 the courtroom to provide this service our criminal justice would
9 grind to a halt and could not function.
10 I get a little upset sometimes when I hear people
11 criticize our system, for while it may not be 100 percent free of
12 error, I do far and way believe that it is the best system that
13 exist on the face of the planet and that's why so many people
14 from countries all around the globe come here to learn from
15 our system to incorporate a lot of the positive aspects of it into
16 their own systems back in their home countries.
17 As you are concluding your jury service, the question
18 may arise as to whether or not you can discuss the case, the
19 court advises you that yes, you may. But it is entirely up to
20 you. You're under no obligation to discuss it with anyone. I
21 know that frequently at the conclusion of the case the
22 attorneys for each side like to speak with the ladies and
23 gentlemen of the jury to glean some insights and you may be
24 approached for that reason. But as I said it's up to you

1 whether you wish to talk about the case or not. Should
2 somebody approach you to talk to you about the case and you
3 indicate to them that you don't want to talk about it and they
4 persist, please contact my chambers so that I can address that
5 on your behalf.
6 I believe that the bailiff will have -- would have
7 given you instructions, as he generally does, with regard to
8 jury services and what you need to do there to finalize your
9 service. The Court's gonna ask that you please remove your
10 blue badges and leave them behind in your chairs, as those
11 will be recycled for the group coming in on Monday. The
12 notes which you have taken and your copy of the jury
13 instructions you may take with you if you wish. If you prefer,
14 you may leave them behind in your seat in which case the
15 bailiff will shred them on your behalf.
16 As you are concluding your jury services at this time,
17 the Court does not need to read you the admonishment. Once
18 again we thank you wholeheartedly for all your efforts and
19 your service. You may exit at this time. Good luck to all of
20 you.
21 (Jurors are Excused at 3:07:52 p.m.)
22 THE COURT: The record shall reflect that the jury
23 has exited the courtroom.
24 With the decision of the jury the matter will now be

1 referred to the Division of Parole & Pro. .on for presentence
2 investigation and report and set over for sentencing.
3 THE CLERK: November 28, 9:00 a.m.
4 MR. KEPHART: Your Honor, I'd ask the court to
5 remand the defendant to custody based on this conviction --
6 based on the fact that the Count Two is a non-probationable
7 offense.
8 MR. SCHIECK: Your Honor, she is currently out on
9 bail and has made all court appearances and has made all
10 appearances throughout the course of these proceedings. She
11 has already served over four years -- or right at four years for
12 credit for time served. And she was convicted previously.
13 Given the fact that the jury found a reduced verdict, we would
14 ask -- and given the fact that she has been doing everything
15 that she needed to do while she was out of custody and
16 complied with all requirements the Court asked, that she be
17 allowed to remain on bond pending her sentencing date.
18 If the Court has any inquiries concerning her living
19 situation or anything else we can provide that, if the Court
20 requires.
21 THE COURT: She has diligently made all of her
22 court appearances since she's been out on bond.
23 MR. SCHIECK: She's also stayed in constant contact
24 with her attorneys.

1 THE COURT: What's the range of punishment on
2 Count Two?
3 MR. KEPHART: It's a 5 to 15 or 5 to life.
4 THE COURT: So she hasn't even served the
5 minimum and it's a mandatory.
6 MR. KEPHART: Correct.
7 MR. SCHIECK: However, Your Honor, it's a -- it's a
8 short additional period of time on the mandatory five. Clearly
9 it would be very foolish on her part to even consider not
10 continuing to come to court and stay in touch with her
11 attorneys while she's waiting for sentencing. I mean it's not
12 like she's as she was before, convicted of First Degree Murder.
13 And the bond is quite high. It's $500,000 bond, Your Honor,
14 that's been posted.
15 MR. KEPHART: Judge, that's -- it's my
16 understanding that's not her money that's posted anyhow, so I
17 mean --
18 MR. SCHIECK: That is not relevant, the fact is --
19 MR. KEPHART: Well, it's certainly relevant.
20 MR. SCHIECK: -- bond has been posted and she has
21 abided by all conditions of that bond.
22 THE COURT: Well, it appears that some additional
23 time is gonna be required on Count Two and that that
24 increases a potential for flight risk, so the Court's gonna grant

1 the State's reques.
2 MR. SCHIECK: Would the Court consider a house
3 arrest type situation to assure that nothing does happen?
4 She's been on house arrest before, in fact she was on house
5 arrest before the first trial when she was still facing murder
6 charges she was on house arrest and complied with all the
7 conditions at that time, at the time she was into custody and
8 so would the court consider house arrest as an additional
9 condition of probation or whatever other conditions the court
10 would wish to impose upon her. But, again, she's not flight
11 risk. She hasn't gone anywhere over all this period of time.
12 THE COURT: That house arrest was a pre-
13 adjudication back in 2002 and we're now in a different set of
14 circumstances so the Court declines that request. The
15 sentencing date that had been set ordinary course will be
16 vacated and the Clerk will set a new sentencing date.
17 THE CLERK: November 21, 9:00 a.m.
18 (Off-record colloquy)
19 THE COURT: That concludes these proceedings and
20 we'll go off the record.
21 PROCEEDINGS CONCLUDED AT 3:12:40 P.M.
22 * * * * * *
23
24

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Transcript filed in District Court, Case No. C177394 does not contain the social security number of any person.

Gayle Lutz
Transcriber

4/29/07
Date

* * * * *

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A **"ROUGH DRAFT"** TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

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CLERK OF THE COURT

THE STATE OF NEVADA, Plaintiff, vs. KIRSTIN BLAISE LOBATO, Defendant.	CASE NO. C177394 DEPT. NO. II Transcripts of Proceedings

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT COURT JUDGE

"ROUGH DRAFT"

SENTENCING

TUESDAY, NOVEMBER 21, 2006

COURT RECORDER:

LISA LIZOTTE
District Court

TRANSCRIPTION BY:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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LAS VEGAS, NEVADA TUESDAY, NOVEMBER 21, 2006

PROCEEDINGS

PROCEEDINGS BEGAN AT 10:48:42 A.M.

THE COURT: Would Corrections bring Ms. Lobato in please.

(Pause in the proceedings)

THE COURT: On the bottom of page 7, State versus Kirstin Blaise Lobato, case number C177394. The record shall reflect Defendant present, in custody, together with her three counsel, Mr. Schieck, Ms. Greenberger, Ms. Zalkin. And Ms. DiGiacomo and Mr. Kephart present on behalf of the State.

When I took the recess, counsel contacted the bailiff and asked to address the Court in chambers. All counsel came into the Court's chambers and brought to the Court's attention some deficiencies with regard to the current presentence report.

Mr. Kephart you may be heard.

MR. KEPHART: Yes, Your Honor. Initially when we -- when the Defendant was convicted we had represented to the Court that under the current statute of 201.450, that it was a non-probationable offense. And the way the statute reads, it tells the Court that the Court shall punish, by imprisonment in a State prison and this particular statute says life sentence and eligibility of parole after five years. There's certain statutes

that, even though they direct the Court that way, they fit within -- because of the technical sexual review of the statute, they fit within another statute, which is 176A.110, and in that particular statute it says that the Court shall not grant probation to or suspend the sentences of a person convicted of an offense under subsection (3), which is this --one of the subsections -- one of the conviction would be this particular crime, sexual penetration of a dead human body, pursuant to the Statute of 201.450.

So it tells the Court that you can give her probation, provided that there's certain things that happen before then and, that is, that she has to undergo a psychosexual evaluation. And that that psychosexual evaluation has to be favorable. And then the Court then could consider giving her probation. So the -- and the PSI that was prepared by the Department of Parole & Probation does not inform the Court of that. A matter of fact, it tells the Court that it -- that based on the statute, the reading of the statute that you must give her a sentence of imprisonment.

And its interesting, Judge, I just noticed myself, just reading it, that in 2005, 201.450 was changed itself, to where it deletes the term of years of 5 to 15. So now the only statute available now -- I'm not saying under the current, because when the crime was committed would have been

under the old statute. There would be a term of years or a 5 to life, but now they delete it. And it seems to be one of those confusions that we have, in light of the fact that you have to give a person a 5 to life, but is eligible for probation. So I could see where the mistake was made, why you wouldn't accept -- or expect it to be within that statute.

But without the Defendant having a psychosexual evaluation, then the Court could not consider probation. If the Defendant wishes to waive that we could go forward today with the sentencing, but I think in her best interest is that she would have the psychosexual evaluation performed. So in that respect, I think that, unless she's willing to waive that, we need to continue today's proceedings.

THE COURT: There's a second issue with regard to Count Two.

MR. KEPHART: Oh, yeah. Yes, Judge. The Department of Parole & Probation incorrectly, for some reason enhanced Count Two. The charge that she was convicted of, besides the manslaughter with use of a deadly weapon, was sexual penetration of a dead human body, but for whatever reason, they enhanced it to sexual penetration of a dead human body with use of a deadly weapon. And that -- you can't do that. That's incorrect. It's a complete mistake and that needs to be corrected as well, so.

1 MR. SCHIECK: Those repres dions are correct,
2 Your Honor. Ms. Lobato does not wish to waive her right to
3 have the psychosexual evaluation performed.
4 THE COURT: Is that correct?
5 DEFENDANT LOBATO: Yes, Your Honor.
6 THE COURT: The matter will be re-referred to the
7 Division of Parole & Probation for an amended presentence
8 report to be prepared. The Court will ask that the District
9 Attorney's Office annotate their file to reflect what the
10 problems with the current presentence report are, so that they
11 be corrected. And the Court will order that a psychosexual
12 evaluation be performed.
13 (Off-record colloquy of the Court and Clerk)
14 THE COURT: The Clerk will set the new sentencing
15 date in accordance with our discussion in chambers.
16 MS. CLERK: February 2, 9:00 a.m.
17 MR. KEPHART: Your Honor, there's also another
18 mistake that -- just so we're aware of it now, that at time of
19 PSI -- it's gonna change the PSI itself is, with respect to a new
20 offense the Defendant is currently being prosecuted on. They
21 did not present that in the PSI. And I've been in contact with
22 the Attorney General's office, they were supposed to be
23 sending me information on it, but for whatever reason the
24 Department of Parole & Probation didn't pick up on that.

1 THE COURT: So you should annotate your file on
2 that regard as well.
3 MR. KEPHART: Yes.
4 THE COURT: Very well. We'll see everybody in
5 February then.
6 DEFENDANT LOBATO: Thank you, Your Honor.
7 MS. GREENBERGER: Thank you very much, Your
8 Honor.
9 MR. KEPHART: Thanks, Judge.
10 PROCEEDINGS ARE CONCLUDED AT 10:55:07 A.M.
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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Transcript filed in District Court, Case No. C177394 does not contain the social security number of any person.

Mandi Garcia
Transcriber

4/29/07
Date

* * * * *

CERTIFICATION

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EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

COPY

CLERK OF THE COURT

THE STATE OF NEVADA, Plaintiff, vs. KIRSTIN BLAISE LOBATO, Defendant.	CASE NO. C177394 DEPT. NO. II Transcripts of Proceedings

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT COURT JUDGE

"ROUGH DRAFT"

SENTENCING

FRIDAY, FEBRUARY 02, 2007

COURT RECORDER:

LISA LIZOTTE
District Court

TRANSCRIPTION BY:

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506 Broadway
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LAS VEGAS, NEVADA FRIDAY, FEBRUARY 02, 2007

PROCEEDINGS

PROCEEDINGS BEGAN 9:11:49 A.M.

(Court's Called to Order)

THE COURT: The record shall reflect that this is the time set for sentencing under case number C177394, State versus Lobato.

Ms. DiGiacomo is present for the State, along with Mr. Kephart. The Defendant is present, in custodial status, together with her three counsel.

Good morning, everyone.

ALL COUNSEL: Good morning, Your Honor.

THE COURT: I have had a number of things presented to the Court to review in preparation for today's sentencing. The Court had received, subsequent to the first Jury verdict, a presentence report dated June 27th, 2002. Now subsequent to the most recent Jury verdict on the second trial, the Court received the original presentence report from November 6th of 2006, which had some legal errors. And the Court has, since the last time the case was on calendar, now received a third presentence report, which is entitled "Amended Presentence Report", dated January 17th of 2007. Attached to it is a psychosexual evaluation that was done through Family & Child Treatment, Joan Lujan, L-u-j-a-n, a

licensed Clinical Social Worker.

The Court received from the prosecution a memorandum dated November 17th of 2006, with a CD attached in an envelope.

The Court has received from Mr. Schieck, Ms. Greenberger, and Ms. Zalkin a number of items. A grouping of letters in aid of sentencing, filed November 17th of 2006. A defendant's statement in aid of sentencing, filed November 20th of 2006. And a Defendant Lobato sentencing memorandum, filed January 30th 2007. The Court also received from defendant's counsel a cover letter, dated January 22nd 2007, with a psycho-social risk assessment report, done by licensed clinical psychologist, John Paglini, P-a-g-l-i-n-I. The Court has reviewed all of these things in preparation for today.

Is there anything further that either side wishes to submit that the Court has not already reviewed?

MR. KEPHART: Yes, Your Honor. I didn't hear you mention that you received the copy of the disc. Okay. Did you?

THE COURT: Yes.

MR. KEPHART: All right. Also I --

THE COURT: The one that's in the little envelope that's attached to your memorandum of November 17th of

2006?

MR. KEPHART: Yes.

THE COURT: Yes.

MR. KEPHART: And I've prepared to -- I'm gonna play one of those today. Also --

THE COURT: It contains tape recordings of telephone calls made from custodial status with the defendant.

MR. KEPHART: Correct.

THE COURT: Okay.

MR. KEPHART: Also, I gave a copy of three different letters that we want the Court to consider. One letter is from an inmate by the name of Mark Harpersberg [phonetic], written to the defendant. Both of them are housed here in the Clark County Detention Center. One of them is from the Defendant back to Mark Harpersberg. And the third one is from the defendant to Viva Knight [phonetic], whose in the Women's Correctional Facility.

THE COURT: Have copies of those been provided to Ms. Lobato and her counsel?

MR. SCHIECK: We received those this morning while we were back talking to Ms. Lobato. I haven't had a chance to read them.

THE COURT: I'm going to take a moment to do that at this time. So you may do the same.

1 MS. GREENBERGER: Your H. , we --- may we -- I
2 have never seen the memorandum filed by the government
3 with regard to any sentencing issue in this case dated
4 November --
5 THE COURT: No. It's just a cover sheet. It's
6 entitled "Memorandum", but it's not a points and authorities
7 per se, it's just a cover sheet that says these CD's attached
8 hereto.
9 MS. GREENBERGER: We're gonna be objecting to
10 any admission in front of this Court with these two items into
11 evidence without a proffer by the government, why they
12 believe it's relevant, because we believe they are absolutely
13 irrelevant with regard to the present proceedings and there is
14 no basis for them to be presented before this Court.
15 MR. KEPHART: You want one?
16 THE COURT: She's making an objection on
17 relevancy. I mean nobody is--
18 MR. KEPHART: Well, Judge, it --
19 THE COURT: -- moving them into evidence. It's not
20 a motion to admit into evidence, but they are intending to
21 present these things and have the court consider them in
22 conjunction with this sentencing here today.
23 MR. KEPHART: Judge, this is sentencing. The rules
24 with regard to sentencing are quite a bit more lax than an

1 actual trial. But with respect to some of the stuff that's said by
2 the defense and their own sentencing memorandum that
3 they've provided, I think it -- it shows an insight in what we're
4 really dealing with when we're talking about the Defendant
5 Blaise Lobato. I mean, after all, this whole trial -- it seems like
6 the whole process has kind of lost Mr. Bailey in the dust here
7 and we're talking now about somebody that they kind of
8 portray as this real innocent, sweet little thing. And it's
9 interesting, from her own mouth you'll be able to see how this
10 sweet, little, innocent thing handles her own affairs. And
11 that's why those letters are presented to you. And that's why
12 we're gonna present these telephone calls from the defendant.
13 THE COURT: Well, the Court's received many, many
14 letters in support of Ms. Lobato. And, additionally, some
15 certificates of completion that the defense wishes the Court to
16 consider. And some of the letters also have photographs
17 attached of her as a young child. I don't see that what the
18 State is intending to proffer to the Court is any different than
19 what the defense has proffered to the Court. The Court will --
20 overrules the objection.
21 MS. GREENBERGER: Well, Your Honor, for the
22 record it's post-jury verdict information that's being submitted
23 in an attempt to smear her character, to defame her. And
24 with regard to the audio that's been provided to the Court,

1 based on the fact that it was submitted to the Court in
2 November of 2006, it doesn't seem germane for that audio
3 portion to be aired in front of the Court at sentencing.
4 THE COURT: This just seems to be a continuation of
5 the prior argument. The ruling stands.
6 (Pause in the Proceedings)
7 THE COURT: The Court has finished reviewing the
8 letters. When defendant's counsel has completed reviewing
9 them please let me know.
10 MR. SCHIECK: We're almost done, Your Honor.
11 THE COURT: Okay.
12 (Pause in the proceedings)
13 MR. SCHIECK: I think we've finished reading, Your
14 Honor.
15 THE COURT: Okay.
16 Ms. Lobato, by virtue of the jury's decision and
17 verdict entered in this Court on the 6th day of October of 2006,
18 a finding and adjudication of guilt is hereby entered under
19 both Count One, as to voluntary manslaughter with use of a
20 deadly weapon, and Count Two, sexual penetration of a dead
21 human body.
22 You may all be seated.
23 The State may be heard.
24 MR. KEPHART: Thank you, Your Honor.

1 Your Honor, like I kind of started to say earlier,
2 through all of this proceeding from the very beginning, the first
3 trial where she was found guilty of the First Degree Murder
4 and the second trial where she's found guilty of the
5 manslaughter as well as the other count. You know, 24 jurors
6 heard her defense, none of them believed it.
7 MR. SCHIECK: Your Honor, I want to object
8 referring to the first verdict, which was set aside, there's no
9 [unintelligible] --
10 MR. KEPHART: Well, it was referred to in a
11 sentencing memorandum by the defense, so I just figured I
12 could refer to it as well.
13 THE COURT: Overruled.
14 MR. KEPHART: And, you know, with her alibi, no
15 one bought that. There's certainly -- with respect to the
16 second trial when the defense had realized that she was
17 caught lying in the first trial, she didn't testify and the -- the
18 whole time she's been put in a dress and dressed up and
19 portrayed as a sweet, little, innocent person that was just
20 caught in the wrong place. A victim of her own -- in her own
21 -- in her own right, from her family and her past. And
22 everyone has kind of forgot the fact that a man was killed
23 here. Duran Bailey was killed. The defense even went so far
24 in both trials of assassinating him, without any due process,

1 just basically claiming he's a rapist. An ou know, every --
2 regardless of whether he was a homeless man or had a lot of
3 family. He was still a human being that was just brutally
4 murdered. And then what's interesting was that, with respect
5 to the defense and their portraying Ms. Lobato as this innocent
6 person and sweet, I think the words they even use in their
7 sentencing memorandum is that she's a compassionate young
8 woman with a warm spirit consistently noted by her friends,
9 family and supporters. Using leniency in this sentence is what
10 they're asking for.
11 When you look at the letters that I gave to you,
12 where she describes herself as an individual that when she
13 gets pissed off she's a total bitch. She's completely
14 unreasonable and pig headed. When you read through the
15 letters and they talk -- they're replete with sexual
16 connotations. When I play this tape and let you listen to that,
17 and you've heard -- if you've listened to the other ones they're
18 replete with sexual connotations. Her actions about wanting to
19 beat people up. Her quick judgment of people, calling you a
20 stupid woman. Talking about popping her roommates head
21 off like a zit. Talking about how she wants drugs and she
22 wants to get more drugs. That in itself is what she's really all
23 about, Judge. And what's interesting is, all of the connotation
24 you get from that is what this crime was about. It had every

1 bit of her un -- not able to control her anger or control her
2 temper when she gets pissed off. The sexual connotation of
3 the crime itself, after she murdered him. You know, and it just
4 -- you -- when you look at what had occurred, what we -- from
5 the State, what we ask the Court to do is considered
6 punishment.
7 Some of the letters that are written by Ms. Lobato's
8 supporters believe that punishment is for Blaise to learn a
9 lesson and grow up and they felt that she's done that.
10 Some of them call what happen to Duran Bailey a
11 mistake.
12 And all the themes in the letters, if you read them
13 together, all seem to be the same and seem to just dismiss the
14 fact that two different juries did convict her. Just dismiss it.
15 And it just it fails to show you -- the letters fail to show you
16 however though, and what we tried to present here is how
17 manipulative she is. How she has used people for her own
18 benefit. She has used some of these people right here for her
19 own benefit.
20 The defense did a good job in this case as
21 presenting her as a sweet, mistreated, young girl. However,
22 the reality of what's behind her is very clear from what you see
23 in the letters that are written by her friends, in the letters that
24 she has written. I mean she's in jail, she's been charged with

1 a new offense of ual contact between prisoners. She's
2 been bound over on that to District Court. While she's in jail
3 she's creating a new relationship with this individual by the
4 name of Mark Harpersberg, where she's actually in the jail
5 showing him her kitty is what she calls it. She's supposedly
6 got a fiancé that she's supposed to be -- gonna support her
7 and has been supporting her through out all of this. And the
8 last letter that I gave to the Court is the victim of the sexual
9 contact, which she calls her wife. And it's interesting this was
10 written on October 15th of 2006, after she'd been charged with
11 this crime and before any preliminary hearing was presented.
12 And she talks about wanting to get back with her and seeing
13 her again and doing probably exactly what she's charged with
14 again.
15 And, you know, they talk about that she -- while she
16 was out of custody she followed all the Court's rules. Well,
17 yeah, because she knew very well that in this pos -- in this
18 Court she'd be going back to jail if she violated those court
19 rules. However, she doesn't follow all the rules. I mean, you
20 hear from it how she is charged with a the new crime while
21 she's in custody and it's a sexual crime.
22 Judge, I'm gonna play this tape that was -- is made
23 of a phone call from October 26th of 2006. I got it cued up
24 here and it's in the system here, let's see if I can get it to go.

1 (State's CD Recording is Played in open court)
2 MR. KEPHART: Stop it. Now, there's another tape
3 that is the next one --
4 MS. DiGIACOMO: Track 6?
5 MR. KEPHART: -- it's track 6 that we want -- want
6 to play as well.
7 (Another State's CD recording is played in Open Court)
8 MR. KEPHART: You want to stop it --
9 MS. DiGIACOMO: I'm trying.
10 MR. KEPHART: Your Honor, I played those two. We
11 had actually five that we were interested in. We were listening
12 -- six that we listened to and you have those. I played those
13 two because I wanted to show you the hot and cold of the
14 defendant. And when she's in a situation where she, in her
15 own mind feels, in her words this is fucked up, she lashes out.
16 She accuses somebody that's trying to assist her, of not being
17 there for her. She berates the Court. She certainly has not, at
18 all, taken any responsibility for what she's done or what her
19 path in her life has led her too. Now that her sentencing
20 memorandum that they've prepared says that she's aware of
21 the poor decisions she's previously made in her life which led
22 her to her present disposition and she's greatly remorseful for
23 her past lifestyle choices. Is there any remorse at all that you
24 can hear from her conversations that, in the light of her not

1 being in here and showing her as her [illegible] person, there's
2 absolutely no remorse. She doesn't feel that she did anything
3 wrong. She's never taken responsibility for this. She only
4 believes that what you do, in line of her sentence is, to her
5 word -- I'm not even going to repeat it. But simply she's not
6 ready to accept what you've sentenced her to.
7 So in light of that -- in light of her supporter's
8 position I would say if punishment was for her to learn a
9 lesson and grow up, she certainly hasn't learned a lesson. And
10 maybe growing up she has in age-wise, but she hasn't grown
11 up in the sense that she's realized what she has done to
12 another person. And punishment is for what she has done to
13 a victim in this matter and for what crime that she's
14 committed. And in this regard she's been convicted of
15 manslaughter with use of a deadly weapon, as well as sexual
16 penetration of a dead human body.
17 The Department of Parole & Probation has prepared
18 a presentence investigation report, submitted it to the Court.
19 Told the Court, and the defense has talked about this as well,
20 is how much time she's already spent in jail. Basically the
21 State held the position of the break that she got with regards
22 to the man -- voluntary manslaughter. But in our position
23 here, we would ask you to follow the recommendation of the
24 Department of Parole & Probation.

1 We believe that -- that based on the differences of
2 what the sentences were before and your range that you are
3 allowed to sentence in, certainly would be consistent with what
4 we're asking for here now. I mean you've heard this trial
5 twice, Judge, and you've seen the evidence that was
6 presented in both cases and I'm asking you to follow the
7 Department's recommendation. It's appropriate. It certainly
8 serves the community here for what she has done to Mr.
9 Bailey and --
10 (Off-record colloquy of State's counsel)
11 MR. KEPHART: Yes. The Department is
12 recommending consecutive time. That's what -- Sandy just
13 reminded me of that and that's what our recommendation is.
14 And so I'll submit it on that, Your Honor. And, thank you.
15 THE COURT: Who will be addressing the Court for
16 Ms. Lobato? I assume she wishes to address the Court and
17 then which counsel will address?
18 MR. SCHIECK: I believe that if we could, Your
19 Honor, if more than one of us could address the Court.
20 THE COURT: As long as you cover different areas
21 and not overlap.
22 MR. SCHIECK: I don't believe we will, Your Honor.
23 THE COURT: All right. Ms. Lobato, what, if
24 anything, do you wish to tell the Court here today?

1 DEFENDANT LOBATO: There are a lot of things that
2 I've thought about over the last several days that I wanted to
3 talk to you about, a lot of which have already been covered. I
4 want to apologize for us even having to be here. And let you
5 know that I've tried really, really hard to change who I am and
6 I think that I have made progress. I'm human and I'm still
7 gonna make mistakes. I'm emotional and I say things out of
8 anger, just like anybody else. But I don't mean -- I don't
9 mean to harm anybody.
10 I just ask that you take those things into
11 consideration. Give me a chance. Please don't send me back
12 to prison. Let me prove that I'm not a waste. Thank you.
13 THE COURT: Ms. Greenberger will speak first.
14 MS. GREENBERGER: Thank you, Judge.
15 This case was continued from the last sentencing
16 date because a psychosexual risk assessment was brought to
17 everyone's attention, that we wanted to have conducted and
18 that was my understanding of why the continuance was
19 granted and we would come back here today. And --
20 THE COURT: That was one of the reasons. The
21 second reason was that they had done a deadly weapon
22 enhancement on Count Two, which was legally erroneous.
23 MS. GREENBERGER: And with regard to that
24 component, Your Honor, my understanding with regard to the

1 amended report on Count Two, sexual penetration of a dead
2 human body, from my understanding, and correct me if I'm
3 wrong, appears to still be in error, in that the minimum term
4 says not applicable and the probation term indicates not
5 applicable. And my understanding was that probation indeed
6 was an option in this case, so I wanted the record to reflect
7 that that error existed and be clarified at this juncture.
8 THE COURT: Legally she -- she is not precluded
9 from seeking probation and the Court is not precluded from
10 granting it. I think what the report's referencing is that that is
11 not their recommendation. That P&P's recommendation is for
12 prison time and, therefore, the probation section doesn't apply.
13 MS. GREENBERGER: So when they're saying not
14 applicable it doesn't mean not permissible. It just means they
15 don't deem it applicable?
16 THE COURT: They don't deem it appropriate. Yes.
17 MS. GREENBERGER: Right. Okay. Thank you for
18 that clarification.
19 So going back to the first prong, which involves a
20 psychosexual evaluation. In listening to the prosecution argue
21 to the Court about why Ms. Lobato shouldn't be given a
22 chance, one thing in my mind, that came to my attention was,
23 that the reason why the prosecution is playing these calls and
24 submitting these letters, which we believe aren't relevant and

1 are character assassination, is to defle[illegible]e Court's attention
2 away from the primary reason we're here, which is, what do
3 the medical experts have to say about Ms. Lobato's condition.
4 And interestingly enough, not only have Dr. Paglini, who has
5 prepared a very extensive report, who has consulted with Dr.
6 Cairo, and rendered an opinion that Ms. Lobato is -- has great
7 potential, has made profound progress, is in dire need of
8 continued counseling. Her ability to be rehabilitated is
9 exceptionally positive. That she is a low risk to sexually re-
10 offend. Also, the prosecution's Dr./Social Worker/L.S.C.W., Dr.
11 Joan Lujan, has concurred with the other medical experts
12 finding and there was no discussion of that brought to the
13 Court's attention.
14 So I wanted to bring it to the Court's attention and
15 just reiterate for the Court that based on the prosecution's own
16 evaluation, they describe that my client has the following
17 strengths. No previous history of legal problems prior to this
18 offense. And for the Court's edification, I'm reading from page
19 8 of Ms. Lujan's report. Has the support of her fiancé, her
20 fiance's mother. And notes that this type of support has been
21 lacking in Ms. Lobato's life. That she's been in therapy for four
22 years to address her abuse history and her offense. That she's
23 willing and motivated to continue individual therapy. She has
24 contacted Dr. Cairo, who has agreed to continue treating her.

1 While awaiting a new trial, she was out of custody 10 months
2 and had no new criminal violations. And most importantly is
3 the fact that she agrees that Ms. Lobato presents a low risk to
4 the community for sexual re-offending. And her only primary
5 clinical concerns are based on Ms. Lobato's past. Being raised
6 by drug addicted parents. Began using at an early age. And
7 she states living without substances will require a great deal of
8 therapeutic support. And then the other factor she raises is
9 the extent of violence perpetrated on the victim.
10 And what this --
11 THE COURT: I found in the Lujan report some
12 vocabulary errors, some typographical errors. But one factual
13 error under the assessment section on page 7, in about the
14 middle of the assessment section. There's a second paragraph
15 and the third line down says, "Bailey's reported physical and
16 sexual attack on Ms. Lobato". That is incorrect. There was
17 never a reported attack on the defendant perpetrated by the
18 victim.
19 MR. KEPHART: Judge, I'd also ask the record reflect
20 that this is -- even though they're referring to it as our --
21 Prosecution's -- it's not made by us. It's done at the request
22 of the Department of Parole & Probation. We --
23 THE COURT: That's correct.
24 MS. GREENBERGER: And in that same paragraph,

1 Your Honor, at th[illegible]nd of that paragraph it notes again, it is
2 the evaluator's opinion that Ms. Lobato presents a low risk of
3 sexual re-offending behavior, based on her history and
4 treatment for Post Traumatic Stress Disorder, as long as she
5 continues counseling and avoids any use of mind altering
6 substances.
7 This Court has all of the discretion to make this
8 decision today. And as the prosecution noted, the Court is
9 very familiar with the evidence. Has heard two trials. And
10 now the question remains is what is the appropriate
11 punishment for her and what are the goals in retribution and
12 society. If our objective is to rehabilitate, which I hope is a
13 component of -- in punishment, then what all the doctors are
14 saying is five years continued therapy, low risk of recidivism.
15 Look at her lack of criminal history. A terrible crime was
16 committed. And we believe she has paid. She is not a danger
17 to society. She appeared at every court appearance. As
18 noted, 10 months out on bail. Respected all of the conditions
19 to abstain and live a life free of crime. And to her credit she,
20 as evidenced in the letters and the probation report, at this
21 juncture in her life feels a part of her continued therapy is
22 going to be giving something back to society and working
23 either with street teens or the women's resource center, where
24 she could give something back. Where she could advise

1 people who come from broken families, drug abuse, and have
2 major problems, that she could keep them from ever rendering
3 into a downward spiral where they would put themselves in a
4 position to commit crime. So if she could give something back
5 to the community -- and these doctors the words that they
6 used were so telling, exceptionally favorable, during pretrial
7 release she has grown tremendously, says Dr. Cairo involved in
8 therapy since 2001. All of the doctors are recommending
9 continued treatment, dire need. And saying she's not a
10 sexually violent risk.
11 And so we ask this Court to please exercise
12 consideration and leniency. Acknowledge that she has
13 accepted remorse. She has been punished. And give her an
14 opportunity to be a productive member of society.
15 THE COURT: Mr. Schieck.
16 MR. SCHIECK: Thank you, Your Honor.
17 Your Honor, basically our request isn't -- and I'll get
18 right to the point of what we're asking this Court to do
19 specifically and that is, number one, with respect to Count One
20 and Count Two, to run those concurrently. At the previous
21 sentencing, Your Honor, did run Count One and Count Two
22 sentence -- sentences concurrent. So we're asking no more
23 than what happened at the first sentencing. Although we
24 recognize the sentence on Count One, previously, was greater

1 than it is going to be today.
2 THE COURT: Significantly.
3 MR. SCHIECK: I understand that, Your Honor, but
4 the Court did see fit to run them concurrently at the first
5 sentencing. And at the first sentencing did impose a 5 to 15
6 on Count Two, not the 5 to life sentence. We're also asking
7 the Court to sentence equally as the first time on Count Two,
8 and that is 5 to 15. So our request is Count One, up to the
9 Court to determine the term of years to impose on the
10 sentence. And Count Two, 5 to 15, concurrent with Count
11 One.
12 With respect to why the Court should run the Counts
13 concurrent, it's our position, I think the evidence showed and I
14 think to some extent the jury's verdict indicates that this was
15 really one, in the Jury's mind, and certainly the evidence came
16 forward just one single event that transpired. It wasn't two
17 separate -- two criminal acts as opposed to two different
18 things that she's been convicted of in one sequence of acts
19 that occurred with Mr. Bailey. And so that it would be
20 appropriate to consider running those two charges concurrent,
21 because they arise really out of one course of conduct. Not
22 two separate courses of conduct.
23 And second of all, and the Court did correctly point
24 out that there was no report ever filed that Duran Bailey had

1 then Dr. Paglini was asked again to see Blaise because of his
2 knowledge of Blaise and his treatment of her. He's seen her
3 back, before she went to prison, before she had done all this
4 time in jail. And so that he could, in fact, comment on the
5 differences he sees during that period of time. And I think his
6 report does reflect those changes in Blaise in making his
7 recommendations in his report. In fact, consulting with Dr.
8 Cairo and indicating that she should continue to see Dr. Cairo.
9 And Dr. Cairo has said she would be more than happy to
10 continue seeing Blaise. In fact, she has seen Blaise 66 times,
11 according to the letter she submitted to the Court, which I
12 think of -- of anyone, that's the most that anyone has seen
13 Blaise and talked to her about her life and these events. And I
14 think we should put a great deal of weight on what Dr. Cairo
15 says. And basically that is, that under the right conditions,
16 Blaise can in fact be out of custody and function. She just
17 needs to continue her counseling and avoid the behavior
18 patterns that we've seen. And we're not trying to hide those
19 behavior patterns. We submitted the reports. We had Dr.
20 Paglini, who we tried to keep out before, we had him see her
21 again and we submitted those reports to the Court. So we're
22 not trying to hide that behavior.
23 The last point I need to make concerns the fact that
24 we are now facing sentencing with Blaise having done over

1 attacked Blaise as part of this incident. But if we look at what
2 the jury found and at this stage we have to accept what the
3 jury found. The jury didn't find that this was a murder. The
4 jury found this was a voluntary manslaughter. In order for the
5 jury to make that determination, by the instructions they're
6 given, they had to find that there was a provocation that led to
7 the actual killing of Mr. Bailey. And by that provocation, the
8 only reasoning that makes sense is this jury believed that Mr.
9 Bailey had in fact attacked Ms. Lobato under some set of
10 circumstances and that she reacted to that attack.
11 We recognize that the testimony at the first trial and
12 her statement to the police talked about an attack that
13 happened at the Budget Suites. And certainly this jury
14 apparently believed that those events were confused in Blaise's
15 mind and that she was really talking about what transpired
16 with Mr. Bailey and believed there was an attack on her. And
17 so we're not dealing with what we were dealing with -- with
18 having found before. We're dealing with the jury believing
19 that she reacted.
20 And when looking at how she reacted we have to
21 look at the reports that we have, Dr. Paglini's report, and he's
22 been seeing her -- or first saw her in 2001, right after this case
23 was charged, as part of the defense at that time and that
24 report has been given to the Court prior to the first trial. And

1 four years in custody. Four flat years -- four and a quarter flat
2 years in custody, both in department of prisons and in jail. So
3 it's not like we're deciding whether or not to grant probation to
4 someone that we don't -- that we haven't punished, that hasn't
5 done a considerable time in jail. This is more like a parole
6 hearing as far as I can see, because we've already
7 incarcerated the individual.
8 Now we're deciding whether or not we should deem
9 her street ready. Ready to give her that first chance, because
10 she hasn't had that first chance yet, because of what her prior
11 conviction was. And in deciding whether or not she fits those
12 factors, we have the fact that she's now 24 years old, five
13 years older than when all this started and a pretty significant
14 five years in the maturity process of any individual. We have
15 the fact that she's been out of custody and has behaved
16 herself out of custody since she was released by this Court on
17 bail.
18 I need to address the case that is pending against
19 her out at of the situation at the Department of Prisons. That
20 incident arose prior to her ever being released from prison.
21 That pre-dates her ever coming back to this Court, ever being
22 released, ever spending the time that she has on the street
23 waiting to go to trial. Those events that -- and the State has
24 referred to the other individual as the victim in the case. As a

1 matter of fact the other individual is a .efendant in the
2 case. That case involves a consensual relationship between
3 Blaise and another inmate. There is no victim, so to speak, in
4 that case. There -- the evidence is clear that there was no --
5 anything other than a consensual situation existing between
6 two individuals residing in the same cell and violated the
7 disciplinary rules of the Women's Prison. That they disapprove
8 of that type of conduct. But for some reason in this case they
9 have decided to file it as a criminal prosecution. A fact that we
10 are litigating and litigated in Justice Court. In fact, we waived
11 the preliminary hearing and she was bound over in that case,
12 only because Judge Dahl indicated he did not believe that he
13 had the constitutional jurisdiction to dismiss the charges,
14 because he found they were in fact unconstitutional under our
15 statute. That matter is still to be litigated here in District
16 Court. But that incident and that individual predate and go
17 back to a time when Blaise was still under a sentence of
18 imprisonment from her original conviction and has nothing to
19 do with her more recent conduct. They do bring in the
20 recordings from the jail. And I would -- I would --
21 THE COURT: Before you -- before you move on to
22 that, I would just like to say that since the new charge that
23 arose from her being in custody after the first jury verdict, has
24 not yet gone to trial and there's not been an adjudication on it,

1 so the Court's not going to consider anything surrounding that
2 particular event.
3 MR. SCHIECK: But I wanted to make clear what the
4 nature of that offense was. That it wasn't a crime of violence
5 and there's a victim. This was more of a crime of passion than
6 of violence and that's the way it's charged. I can -- we were
7 talking about the jail recordings and we've heard snippets of
8 two and I think they provided a total of six. I can assure this
9 Court that Blaise Lobato, during the period of time since the
10 jury convicted her and she was remanded to custody til now,
11 has spent more than six times on the telephone. It's only a
12 very few selected moments of phone conversations that we're
13 hearing. And I don't think it's fair to come in and characterize
14 her based on those very brief phone calls. Very limited phone
15 calls. I don't know if the State's listened to every phone call
16 she's made, but I can assure this Court just from the calls I've
17 received from Blaise Lobato, there are numerous, numerous,
18 numerous, numerous other phone calls that we're not hearing,
19 where she probably didn't say any of the things that the State
20 now wants to focus in on, very limited things. And in my
21 experience the language that you hear in jail phone calls is not
22 indicative of anything other than the environment that you're
23 housed in. And I think we all, to some extent, have suffered
24 that. When you're in the locker room you talk a little bit

1 different than yo ..o in the courtroom. And I think that the
2 language that is used during those phone calls is nothing more
3 than a reflection of the environment and not a reflection of her
4 character.
5 And as to comments concerning the Court, I think
6 that if we polled every inmate that came in here, that we
7 would probably hear worse language than that about any
8 Judge in this courthouse that is hearing their case or getting
9 ready to sentence them. That is just the way the system
10 works and the way individuals view the system when --
11 certainly they're being charged and in this case feel they're
12 being unduly charged and vindictively prosecuted.
13 Our request is, based on the totality of the reports,
14 the totality of her behavior since the first conviction, her lack
15 of prior criminal history, the fact that the jury did find there
16 was provocation, the fact that she has done over four years in
17 custody, flat time, that the Court impose concurrent sentences
18 and grant probation on both sentences. Holding whatever
19 time and whatever conditions the Court deems appropriate
20 over her head imposing that sentence.
21 Thank you.
22 THE COURT: With this case there were many,
23 many, many photographs taken at the crime scene. And of
24 the nearly 30 years that I've been working in the criminal

1 justice system this case and two others I think -- that I recall
2 vividly were this bloody and violent. And all three of the cases
3 involved methamphetamine.
4 If you take a snapshot of the crime scene and you
5 take a snapshot of this young women's face and you put them
6 side by side, it's difficult for a lot of people to reconcile the
7 two. How could this attractive young woman have this
8 reaction that's evidenced in the snapshot from the crime
9 scene? I learned long ago that you can't judge a book by its
10 cover. And on the night that Duran Bailey died, he was a man
11 who had issues. And Ms. Lobato has issues. And those issues
12 collided head on.
13 Ms. Lobato, throughout your childhood the number
14 of the adults that you relied on failed you. You are now an
15 adult. When you're released from custody you will be an
16 adult. You will be self-reliant. And you alone will be in charge
17 of your future. You cannot change the past, but you can
18 determine what your future will be. Your personal history has
19 left you with a multitude of issues that you need to deal with
20 and Dr. Paglini laid them out in the diagnosis, in the middle of
21 page 19 of his report and under the diagnostic impression
22 section on page 20 of his report. They are many, but they are
23 not insurmountable.
24 In the therapy that you have undertaken since the

1 time of your initial arrest you have ma[illegible]ood progress. But
2 you have a lot more work to do and a lot more progress to
3 make. Your history may elicit sympathy but it does not excuse
4 the taking of a life and it does not excuse the mutilation and
5 the degrading of the corpse of Duran Bailey, a fellow human
6 being.
7 The Court has considered all of the goals that jurists
8 try to achieve with sentencing and in reviewing the
9 recommendation of the Division of Parole & Probation it seems
10 to be appropriate here.
11 In accordance with the laws of the State of Nevada
12 the Court does hereby sentence you as follows: An addition to
13 the $25 administrative assessment fee, $150 DNA analysis fee,
14 an $800 psychosexual evaluation fee -- please stand.
15 Under Count One, to a maximum term of 120
16 months, the minimum parole eligibility of 48 months in the
17 Nevada Department of Corrections, plus an even consecutive
18 maximum term of 120 months, with a minimum parole
19 eligibility of 48 months in the Nevada Department of
20 Corrections for the deadly weapon enhancement.
21 Under Count Two, to a maximum term of 180
22 months, minimum parole eligibility 60 months, Nevada
23 Department of Corrections, and a fine of $1000 consecutive to
24 Count One.

1 Towards the sentence the Court grants you 1544
2 days credit for time served.
3 Included in this sentence is lifetime supervision to
4 commence upon the release from parole or imprisonment and
5 upon that release she shall register as a sex offender within 48
6 hours.
7 The Defendant's remanded thereto.
8 MR. SCHIECK: Your Honor, if I might. This -- is the
9 Court not imposing a life sentence just because of fast track of
10 appeal so we need fast track transcripts according to Supreme
11 Court Rule [unintelligible] court order that [unintelligible].
12 THE COURT: Please send over an order forthwith.
13 MR. SCHIECK: Yes, we will, Your Honor.
14 THE COURT: Very good.
15 Court's in recess.
16 PROCEEDINGS CONCLUDE AT 10:23:38 A.M.
17 * * * * * *
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24

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Transcript filed in District Court, Case No. C177394 does not contain the social security number of any person.

Mandi Garcia
Transcriber

4/29/07
Date

* * * * *

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A **"ROUGH DRAFT"** TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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No. 49087

KIRSTIN BLAISE LOBATO

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

FILED
DEC 26 2007
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Valorie Vega, District Judge

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Kirstin Lobato was convicted of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human body, despite the fact that there was absolutely no physical evidence implicating her in those offenses, the fact that no eyewitness or informant testimony suggested that she was guilty, and the fact that there were substantial differences between an incident described by Lobato to police officers and the facts surrounding the death at issue here. Moreover, substantial alibi evidence existed which established that Lobato was not the perpetrator of the crime at issue. Her conviction must be vacated because the State failed to present sufficient evidence to support her conviction. In the alternative, she is entitled to a new trial because of the substantial errors and constitutional violations committed by the district court. Finally, the sentence imposed by the district court violated Lobato's double jeopardy rights and must be modified.

II. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of voluntary manslaughter with use of a deadly weapon and one count of penetration of a dead human body.

III. STATEMENT OF THE ISSUES

A. The State failed to present any physical evidence suggesting that Lobato killed Bailey. It also failed to present any eyewitness identification of her or her car, failed to establish that her numerous alibi witnesses were not credible, and failed to establish that Bailey was the person that Lobato admitted slashing. Given the incredible inconsistencies between details provided by Lobato about the man who attacked her and the details concerning Bailey's death and the complete lack of other evidence, is there insufficient evidence to support Lobato's conviction?

B. Detective Thowsen was allowed to testify that there were no incidents of any other penis stabbings based upon telephone calls allegedly made by his secretary to unnamed persons at unnamed medical facilities. WereLobato's constitutional right of Confrontation and her statutory right against use of hearsay testimony violated as a result?

C. Detective Thowsen was allowed to give his opinion as to why Lobato's statements to the police were inconsistent with the physical evidence and was permitted to testify that Lobato was minimizing her involvement based upon her methamphetamine use. Was this testimony improper and did it usurp the jury's role?

D. The district court refused to allow Lobato's witnesses to testify that Lobato confided in them regarding her cutting of a man's penis prior to the date of Bailey's death. In doing so, did the district court prohibited Lobato from presenting her defense and violate her constitutional rights?

E. The district court allowed the State to introduce highly prejudicial evidence that Lobato's car had the license plate, "4NIK8ER." Did the court violate Lobato's rights admitting this inflammatory evidence?

F. The district court allowed the State to introduce evidence of positive luminol tests on Lobato's car, even though there was no confirmatory tests that established the presence of blood. Did the district court abused its discretion in admitting this evidence?

G. The State threw away important evidence and failed to make reports about crucial matters. Did the district court abused its discretion in denying Lobato's motion to dismiss charges based on the State's bad faith and gross negligence in failing to preserve and collect potentially exculpatory evidence?

H. Should this Court reconsider its holdings as to issues raised in Lobato's first appeal?

I. Did the sentence imposed by the district court violates Lobato's double jeopardy rights under the state constitution.

IV. PROCEDURAL HISTORY

On August 9, 2001, the State charged Appellant Kirstin Blaise Lobato with one count of murder with use of a deadly weapon and one count of sexual penetration of a dead human body. 1 App. 1. The State alleged that Lobato killed Duran Bailey with a blunt object and/or by stabbing and/or by cutting him with a knife and that she then inserted a knife into and/or cut Bailey's anal opening. 1 App. 1-2. She entered a plea of not guilty and received a jury trial on the charges. The first jury returned a guilty verdict on both charges. 1 App. 5. She was sentenced to consecutive 20 to 50 year sentences for first-degree murder with use of a deadly weapon and a concurrent 5 to 15 year sentence for sexual penetration of a dead body. 1 App. 11. On appeal, this Court reversed the judgment after finding that the trial court erred in precluding Lobato from introducing extrinsic evidence to impeach the testimony a witness for the State. 1 App. 6; Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004).

Following the remand from this Court, several motions were filed which are relevant to this appeal. Lobato filed a motion in limine to exclude the contents of her license plate. 1 App. 21-33. The State opposed the motion. 2 App. 374-78. Lobato replied to the State's opposition. 2 App. 480-83. Following argument from counsel, the district court ruled that

the probative value of the license plate outweighed the prejudicial impact of the evidence and that the State could therefore introduce the evidence. 4 App. 918-23.

Lobato filed a motion in limine to exclude statements she made during the course of the July 20, 2001, interrogation. 1 App. 91-123. The State opposed the motion. 2 App. 462-65. Lobato replied to the State's opposition. 3 App. 501-04. Following argument from counsel, the district court denied the motion. 4 App. 926-29.

Lobato filed a motion in limine to exclude testimony of Laura Johnson based on double hearsay. 1 App. 124-42. The State opposed the motion. 2 App. 466-69. Lobato replied to the opposition. 3 App. 505-08. Following argument from counsel, the district court ruled that the motion was premature and should be raised at trial. 4 App. 913-18.

Lobato filed a motion to admit the former testimony of deceased witness Diane Parker. 2 App. 239-94. The State did not oppose the motion but did indicate its intent to present the testimony during its case in chief. 2 App. 477-79. The district court ruled that the testimony would be admitted, either in the defense case or as a joint witness in which defense counsel conducted the direct examination. 4 App. 902-05.

Lobato filed a motion in limine to exclude evidence of presumptive blood tests. 2 App. 298-333. The State opposed the motion. 2 App. 379-438. Lobato replied to the State's opposition. 2 App. 485-90. Following argument from counsel, the district court denied the motion. 4 App. 932-35.

Lobato filed a motion to dismiss based on State's failure to preserve and collect exculpatory evidence. 2 App. 334-73. The State opposed the motion. 2 App. 470-76. Lobato replied to the State's opposition. 3 ROA 509-19. Following argument from counsel, the district court denied the motion. 4 App. 935-39.

The second trial began on September 11, 2006. Following selection of the jury, testimony began on September 14, 2006. 6 App. 986A. Jury instructions were provided to the jury on October 6, 2006. 4 App. 720-60. That same day, the jury returned a verdict of guilty of voluntary manslaughter with use of a deadly weapon and a verdict of guilty of sexual penetration of a dead human body. 4 App. 761-62.

Prior to the sentencing hearing, Lobato submitted to the court a sentencing memorandum which set forth her personal history and the support she has from family members and friends. 4 App. 763-99. She urged the court to impose concurrent time based upon the fact that she received concurrent sentences for his first judgment of conviction that was reversed on direct appeal. 4 App. 781-82.

The district court entered its judgment of conviction on February 14, 2007. 4 App. 800. The court sentenced her to serve two consecutive terms of 48 to 120 months for the conviction of voluntary manslaughter with use of a deadly weapon and a consecutive term of 60 to 180 months of sexual penetration of a dead human body. 4 App. 801. A timely notice of appeal was filed on March 12, 2007. 4 App. 803. This Opening Brief now follows.

V. STATEMENT OF FACTS

Kirstin Blaise Lobato was charged via Information with first-degree murder with the use of a deadly weapon and sexual penetration of a dead human body in connection with the death of Duran Bailey. Bailey was found dead in a bank parking lot on the west side of Las Vegas on July 8, 2001 at around 10:00 p.m., next to a dumpster where he was known to sleep. 6 App. 1000, 1003. He had been severely beaten, he had been stabbed numerous time, and he suffered a fracture to his skull. 6 App. 1145-46. His pants were pulled down and his penis was severed. 6 App. 1017. His rectal area was slashed. 6 App. 1146. Stab wounds to the front of the neck (which cut the carotid artery), the left side, abdomen, rectum and penis were postmortem. 6 App. 1149. The coroner believed that many of the wounds were inflicted with a sharp instrument, such as a knife, but it was possible that they were caused by scissors.[1] 6 App. 1146, 1155. The blunt force trauma on the head was more consistent with Bailey falling down and hitting his head on a curb than being hit by a bat as there was no depressed skull fracture. 6 App. 1160. The coroner estimated that the death occurred 8 to 24 hours prior to an examination of the body, which took place on July 9th at 3:50 a.m.

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[1]A defense expert opined that injuries were inflicted with scissors. 7 App. 1347-62. No weapon was ever recovered.

6 App. 1163. Bailey had a blood alcohol level of .11 and his blood also included a breakdown product of cocaine. 6 App. 1165. There was semen in his rectum. 7 App. 1177. Dr. Simms testified that this crime was not characteristic of a female crime and that none of the other murders with similar characteristics were committed by women. 7 App. 1168.

A woman named Diane Parker arrived at the crime scene on foot from her home and asked whether the man was Bailey and whether he was dead. 7 App. 1328, 8 App. 1403. She had previously reported to police that Bailey repeatedly raped her a week prior to his death, on July 1, 2001. 7 App. 1328, 8 App. 1410, 1418. Even though Bailey's attack of her happened a week prior to his death, Parker still had injuries. 7 App. 1328. Parker lived in an apartment complex that was a short distance from where Bailey's body was found. 8 App. 1403. She testified that on the day Bailey raped her, some Hispanic men who lived in Parker's apartment complex saw Bailey slap Parker. 8 App. 1419. They told Bailey to leave and said some other things that Parker did not hear, and then Bailey left. 8 App. 1419. Bailey later returned, pushed himself into her apartment and then raped her. 8 App. 1419-20. She ran outside to get help but he grabbed her and threw her back into the apartment. 8 App. 1420. During the attack he kicked her, beat her, held a knife against her throat and tried to rape her anally but was unable to do so. 8 App. 1420, 1425. He tried to sodomize her three or four times and told her that he was going to kill her. 8 App. 1420. She did not immediately report the rape to the police, but did make a report on July 4th, after he banged on her door and window. 8 App. 1420. Police officers came to her apartment on July 5th and she gave a statement at that time. 8 App. 1420. They took her to UMC and they took photographs, including a photograph of her neck wound which was inflicted with his knife. 8 App. 1421. Photographs of injuries to her shoulder, leg arm, eyes and face were also shown to the jury. 8 App. 1421. He made a puncture would on the right side of her carotid artery. 8 App. 1422. Parker informed the police that Bailey usually stayed behind Nevada State Bank near Flamingo and Arville. 8 App. 1422. She offered to take the police to that area and they said "later." 8 App. 1422. The police did not ever take her to the place where he stayed. 8 App. 1422.

Parker had known Bailey for four or five months and previously had a consensual sexual relationship with him. 8 App. 1424. Bailey used crack cocaine, marijuana and alcohol, but she did not ever know him to use methamphetamine. 8 App. 1423. The two Hispanic men watched out for Parker after Bailey's attack, but she did not know their names and did not know if they ever did anything to Bailey. 8 App. 1423-24. Although she did not tell the men that Bailey had raped her, they knew what happened. 8 App. 1424. Parker told the police that reporting Bailey to them was going to get her killed and that if they did not catch him that she would be dead. 8 App. 1428. The police officer told her "you gotta do what you gotta do to protect yourself." 8 App. 1428. She also told them that she was scared to walk outside of her home, but she acknowledge that she walked to the scene where Bailey was killed. 8 App. 1428. When she reported Bailey for rape, she asked the police officers for protection but they did not give her any. 8 App. 1430.[2]

Lobato, a resident of Panaca, was an 18 year old girl who had just graduated high school and worked for a couple of months with a friend in Las Vegas. 6 App. 1042; 9 App. 1622. She sometimes stayed at the Budget Suites on Nellis and Flamingo, near Boulder Highway and sometimes stayed with friends. 6 App. 1084; Exhibit 125A at 3.[3] She was

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[2]Dective Thowsen testified that he met with Parker and her roommate and based upon their demeanors concluded that they were not suspects in Bailey's death. 7 App. 1328. He admitted that he did not take a crime scene analyst to her apartment, as he had done when he arrested Lobato, and he did not inspect Parker's shoes or apartment with Luminal. 8 App. 1403. The manager of Parker's apartment complex told Thowsen about some Hispanic individuals who lived in the complex who might have known about Bailey being rough with Parker. 8 App. 1404. Thowsen ran their names, learned that they did not have criminal histories, and decided not to talk with them or inspect their footwear. 8 App. 1404, 1410. He did not keep a record on the names of the men. 8 App. 1404.

[3]Filed contemporaneously with this brief is a motion for transmission of Exhibit 125A, which is an audio tape of the interrogation. It appears that the transcript of the tape was not admitted at trial, but was presented to the jury by video display. 8 App. 1376. For the Court's convenience, a transcript of the audiotape is attached to the motion for transmission of Exhibit 125A and the page numbers above refer to that transcript.

using methamphetamine while in Las Vegas when she was sexually attacked. 6 App. 1086; 9 App. 1707; Exhibit 125A at 3-5. While in Las Vegas she sometimes worked with a friend on the west side of Las Vegas. 6 App. 1084.

She returned to Panaca and sought help with her drug problem confiding to her friends in Panaca that she had used a knife to defend herself from her attacker. She sought help from her Panaca high school counselor, Dixie Teinken, but she did not report the attack to the police because in the past she had reported being raped but the police did nothing until her attacker victimized another girl. Lobato told Teinken that the man who attacked her was similar in size to Teinken's grandson, who was 6 foot tall and over 200 pounds.[4] 6 App. 1043. Lobato stated that she stabbed the man in the abdomen and penis, but did not state that she had punched him, used a baseball bat, knocked his teeth out, or cut off his penis after he was dead. 6 App. 1044. She did not ever state that the man who attacked her was homeless. 6 App. 1049. Lobato and Tienken reviewed newspapers back to June 1 to see if there were any articles about the matter. 6 App. 1047. Tienken later contacted her friend Lara Johnson, a Panaca Probation Officer, who called the Las Vegas Metropolitan Police Department ("LVMPD") inquiring whether they had any cases where a man suffered an injury to his penis. 6 App. 1038, 1129, 1137, 1138; 7 App. 1331. At no time did Johnson personally speak with Lobato, so she had only second hand information. 6 App. 1142.

Lobato also confided in Michele Austria about an incident that happened in Las Vegas. 6 App. 1098. Lobato did not tell Austria a specific date as to when she was attacked and slashed a man's penis, but Austria believed that it happened within the first couple of weeks before Lobato returned to Panaca. 6 App. 1100. Austria understood the attack to have happened sometime in June 2001. 6 App. 1104. Lobato stated only that she slashed the man's penis and did not say that she repeatedly stabbed him in other locations, beat him, gave him two black eyes, cut off his penis or beat him with a baseball bat. 6 App. 1104.

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[4]At the time of the autopsy, Bailey was 5 foot 10 inches tall and weighed 133 pounds. 7 App. 1177.

On July 20, 2001, LVMPD detectives and a crime scene analyst drove to Panaca and interrogated Lobato. 7 App. 1330-31. They advised her they were aware she had been a victim of a sexual assault as a 6 year old child. 7 App. 1333, 8 App. 1393-94. Lobato began to sob and cry. 7 App. 1333. She continued crying while she described her attack in Las Vegas which occurred at the Budget Suites water fountain on the east side of Las Vegas and her attempt to defend herself with her knife. 8 App. 1393; 8 App. 1407; Exhibit 125A at 2.

Many of the details included within Lobato's statement to the police were inconsistent with the evidence concerning Bailey's death. The coroner testified that the victim continued to be attacked even after he was dead and that several injuries were post-mortem. 6 App. 1148, 1153; 8 App. 1396. However, Lobato consistently said she left her assailant alive and crying. Exhibit 125A at 7; 8 App. 1396. Lobato told officers that she did not move her assailant and that she did not cover him up with anything. Exhibit 125A at 7-8. The testimony at trial was clear that Bailey had been moved and had been covered up with trash and a cardboard box. 6 App. 1015; 7 App. 1326. Lobato stated that she used a butterfly knife when she stabbed a man. Exhibit 125A at 5, 11; 8 App. 1387, 1396. A butterfly knife is sharp on both edges. 8 App. 1387. Bailey's wounds were made with a single edged knife or weapon. 6 App. 1148, 9 App. 1689. She told the police that she cut the man's penis and tried to cut it off, but did not know if she actually did. Exhibit 125 A at 6. Bailey's penis, however, was clearly severed and was found away from his body. 7 App. 1226. Lobato told the police that she did not remember hitting the man who attacked her with anything, Exhibit 125A at 6, while it was clear that Bailey was severely beaten. 6 App. 1145-46, 1148. In her statement to the police Lobato stated that the person who attacked her smelled of alcohol and dirty diapers, while Detective Thowsen concluded that this meant that he smelled like old socks that had not been changed. Exhibit 125A at 4; 8 App. 1388. There was no testimony suggesting that Bailey smelled of either alcohol or dirty diapers. Lobato described the man who attacked her as being really big and a giant, while Bailey weighed only 136 pounds. Exhibit 125A at 5; 8 App. 1395. Lobato stated that she was attacked in a parking lot and that there was a dumpster not far from where it happened. Exhibit 125A at 7, 16; 8 App. 1395.

This was consistent with the Budget Suites property. 8 App. 1462. She stated that it happened near the fountain at the Budget Suites on Boulder Highway, and did not mention Nevada State Bank or West Flamingo.[5] Exhibit 125A at 20; 8 App. 1395. There was no fountain anywhere near the bank parking lot dumpster enclosure where Bailey was found. 8 App. 1396. Lobato stated that she discussed the attack with a person called Mumblelina and that the conversation took place over a month prior to her interrogation by the detective on July 20, 2001. Exhibit 125A at 27; 8 App. 1397. Bailey had been killed only 12 days prior to the interrogation. 8 App. 1397. Lobato stated that the attack was late at night, or probably more into the early morning, but the coroner testified to a reasonable degree of medical certainty that the time of death was between 9:30 a.m. and 3:50 p.m. Exhibit 125A at 4; 7 App. 1173. Lobato stated to the police that after the attack she left her car at Jeremy Davis' house for about a week. Exhibit 125A at 8. Davis testified that Lobato left her car at his house in May of 2001. 6 App. 1122. Likewise, Stephen Psyzkowski testified that Lobato hid her car at an apartment complex near his house, because she was afraid that someone might recognize her car, and that her car was towed from that apartment complex on June 6, 2001. 6 App. 1089, 1092-93. As set forth below, numerous witnesses stated that Lobato's car was in Panaca from July 2nd through her arrest on July 20th. Finally, Lobato was abusing methamphetamine, not crack cocaine, in Las Vegas during the time that she was attacked, however, Bailey did not use methamphetamine, only crack cocaine, marijuana and alcohol. 6 App. 1165, 7 App. 1202, 8 App. 1423. There was no evidence that Bailey sold methamphetamine and no methamphetamine was found in Bailey's blood or at the scene.

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[5]An assistant general manager of the Budget Suites reported that he security officer reports from May, June and July 2001 and did not see any reports regarding a man with an injured penis. 8 App. 1459. There were no reports regarding blood being found on the ground near the fountain area. 8 App. 1459. On cross-examination Robinson acknowledged that he did not who was the general manager in 2001 and he did not have conversations with that person about events in 2001. 8 App. 1461. He also did not know what policies were in place in 2001. 8 App. 1461. He did not know what many security officers were employed in 2001 and did not know information about their shifts. 8 App. 1461.

Even though the crime they were investigating occurred less than two weeks earlier on the west side of town in a bank parking lot, detectives did not conduct additional questioning of Lobato about these discrepancies and instead took her into custody on the murder charges in which Bailey was identified as the victim.[6] 7 App. 1330, 8 App. 1394-95. The police stopped looking for any other suspects. Lobato was then charged with Murder with the Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body.

During trial, there was no physical evidence presented linking Lobato to either the murder scene or the victim. No eyewitness placed Lobato in the area near the bank on the west side of Las Vegas. In fact, not a single person testified as to seeing Lobato in Las Vegas during the relevant time period and no one testified as to seeing Lobato or her car on the road between Las Vegas and Panaca. Tire prints were left in the parking lot and over a planter median in the immediate vicinity of the scene, but they did not match Lobato's car. 7 App. 1229, 1309. Bloody footwear impressions were left from the dumpster out to the parking lot, but they were two and a half sizes larger than Lobato's shoe size and the print did not match any of her shoes. 7 App. 1170, 1228, 1263-64, 1295-96; 8 App. 1505. The coroner testified that it was probable that the person who killed Bailey would have left bloody footprints at the scene based upon the amount of blood loss caused by Bailey's injuries. 7 App. 1169. Fingerprints were identified on the edge of the dumpster enclosure and on garbage found near Bailey, but they did not match Lobato's prints. 7 App. 1234, 1252, 1267, 1308. DNA was found on a piece of gum that was covered with Bailey's blood, but Lobato was excluded as the source. 6 App. 1062. Two cigarette butts which were found near Bailey's body contained DNA but Lobato was excluded as a source: one butt contained DNA from an unknown male and the other contained a mixture in which the major profile

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[6]Detective Thowsen testified, over a defense objection, that it was very common for people to minimize their involvement in an offense when they give a statement and that several suspects he interviewed, who were under the influence of methamphetamine when they committed their crimes, jumbled things together when they gave him statements. 8 App. 1387-88.

was consistent with Bailey and the minor profile was from an unknown person. 8 App. 1521. No blood was found on a bat that was kept in Lobato's car and the coroner testified that it was unlikely that a baseball bat caused the injury to Bailey's head. 6 App. 1063; 7 App. 1174, 1244. Fingernail clippings and swabbings from Bailey's hands did not reveal any foreign DNA. 6 App. 1069. A pubic hair from Bailey's sexual assault kit showed a DNA mixture: the major portion was from Bailey and the minor portion was from an unknown person. 7 App. 1317. Lobato was not the source of the minor portion. 7 App. 1317. Lobato's car was impounded but no evidence tying the car to Bailey's crime scene was found.[7] 7 App. 1235. Simply stated, there was no physical evidence of any type associating Lobato with the crime or the crime scene. 8 App. 1540-46.

Indeed, other than her statement to the police, the primary evidence admitted against Lobato was the hearsay testimony of Detective Thowsen that his secretary had contacted unknown persons at Las Vegas hospitals and was told that no one had reported the stabbing or severing of a penis during the months of May, June and July of 2001. 8 App. 1385-86, 8 App. 1398-1400.

The coroner testified that he believed to a reasonable medical certainty that the time of death was 12 to 18 hours prior to the examination of the body, or in other words, between 9:30 a.m. and 3:50 p.m. on July 8, 2001. 7 App. 1171, 72. Substantial evidence was presented in support of Lobato's contention that she was in Panaca from July 2nd through the early morning of July 9th.[8] Stephen Pyszkowski testified that he hoped to celebrate July 4th with Lobato, but she cancelled their plans because she wanted to return home before that

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[7]As set forth in detail below, the car was tested with Luminol, which can detect the presence of blood and other reactives such as copper salts and some household cleaners, and there were a few areas which showed a positive reaction, but tests which would have proved the presence of blood did not confirm the presence of blood and no DNA or other evidence related to Bailey was present. 7 App. 1238-41, 1246, 1285.

[8]The route from Las Vegas to Panaca is 165 miles and takes approximately three hours to travel. 8 App. 1483.

day. 6 App. 1088. Michelle Austria testified that she saw Lobato in Panaca on July 4th, which was on a Wednesday, and that they went four-wheeling together the weekends before and after July 4th. 6 App. 1098. She specifically recalled going four wheeling with Lobato in Panaca on July 8th. 6 App. 1105. Paul Brown, another Panaca resident, recalled seeing Lobato on July 7th and 8th. 6 App. 1115. Christopher Carrington testified that he saw Lobato in Panaca on July 5th, 6th, 7th and in the afternoon and evening of July 8th. 7 App. 1190-91, 1194, 1195. His testimony was corroborated by the testimony of his grandmother. 7 App. 1203-05. Jo Wouri testified that she lived next door to Lobato in Pananca. 8 App. 1473. They were acquaintances, but not friends. 8 App. 1475. She recalled seeing Lobato between 11:00 a.m. and 1:00 p.m. on July 8th. 8 App. 1473. Lobato was on a 4-wheeler and was with a tall man. 8 App. 1474. Shayne Kraft, Lobato's step-cousin, recalled that Lobato returned to Panaca from Las Vegas a couple of days before the 4th of July, they spent time together at Lobato's house on July 4th, and she saw her again on July 8th from about 6:30 p.m. until 8:00 p.m. 8 App. 1493. Shayne's husband, John Kraft, testified that he saw Lobato on July 8th at around 7:00 a.m. and later that day around 8:00 p.m. 8 App. 1501, 1502. Clint Hohman recalled seeing Lobato around July 2nd and again on July 8th at around 11:30 a.m. 9 App. 1600. Lobato was four-wheeling with Austria when he saw her. 9 App. 1601. Kendre Thunstrom saw Lobato on July 8th right before sunset. 9 App. 1606.

Lobato's sister, Ashley, testified that Lobato returned to Panaca from Las Vegas a couple of days before the 4th of July. 9 App. 1609. She recalled that Lobato was sick, slept a lot, and did not eat well. 9 App. 1609. She saw Lobato around 3:00 p.m. or 4:00 p.m. on July 8th and stayed with her for a couple of hours. 9 App. 1611. Ashley returned home about midnight and saw that Lobato was getting ready to go to Las Vegas and learned that Lobato's friend Doug was picking her up. 9 App. 1611. She last saw Lobato at about 12:20 a.m. on July 9th. 9 App. 1611. Lobato's father, Lorenzo, testified that Lobato returned to Panaca on July 2nd and stayed until July 9th at about 1:00 a.m. 9 App. 1623, 1627. He saw Lobato every night when he came home from work and every morning when he awoke. 9 App. 1625. Lobato was tired and ill most of that week and stayed in best most of the time.

9 App. 1624. Lobato's step-mother, Rebecca, testified that Lobato returned to Panaca from Las Vegas on July 2nd. 9 App. 1649. Rebecca saw her at their house every day through July 8th. On July 5th she took Lobato to the doctor and then stayed home with her on July 6th. 9 App. 1653. During the doctor visit on July 5th, Lobato discussed the fact that she suffered from depression and anxiety. 9 App. 1668. Lobato was picked up by Doug Twining on July 9th at around 1:00 a.m. 9 App. 1656. She stayed with Doug in Las Vegas on July 13th, when she returned to Panaca. 9 App. 1656. Rebecca reviewed telephone bills which were admitted as exhibits. 9 App. 1657. The bills reflected telephone calls from her home phone to Twining on July 6, 7 and 8. 9 App. 1657. Lobato was the person who called Twining. 9 App. 1657. The last two calls were on July 8th at 5:06 pm and 6:38 p.m. 9 App. 1665. Twining testified that Lobato left Las Vegas on July 2nd and that he picked her up in Panaca late on July 8th or early on July 9th. 9 App. 1702. His cell phone record was introduced as an exhibit and it reflected calls that he made to Lobato in Panaca on July 2, 3, 4, 5, 7 and 8. 9 App. 1704.

Several Panaca residents testified that Lobato's car was parked in the same position after her return to Panaca in early July and that it did not ever move until it was seized by the police. 7 App. 1200 (Carrington); 8 App. 1512-13 (next door neighbor Robert McCrosky); 8 App. 1516 (next door neighbor Jeanette McCrosky); 9 App. 1623 (Lorenzo Lobato).

Despite the complete lack of physical evidence, the incredible inconsistencies between details provided by Lobato about the man who attacked her and the details concerning Bailey's death, the lack of any eyewitness, and the numerous alibi witnesses who testified on Lobato's behalf, the jury convicted Lobato of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human body. Lobato respectfully submits that the jury's verdict is not supported by the evidence and that she was convicted based upon numerous errors committed by the district court.

VI. ARGUMENT

A. The State failed to present any physical evidence suggesting that Lobato killed Bailey. It also failed to present any eyewitness identification of her or her car, failed to establish that her numerous alibi witnesses were not credible, and failed to establish that Bailey was the person that Lobato admitted slashing. Given the incredible inconsistencies between details provided by Lobato about the man who attacked her and the details concerning Bailey's death and the complete lack of other evidence, there is insufficient evidence to support Lobato's conviction.

There was insufficient evidence for the jury to convict Lobato on the charges of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human body. Her right to a fair trial and due process were denied as a result. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Lobato's conviction is infirm and unconstitutional because of the absence of constitutionally sufficient evidence to support a finding that she attacked and killed Bailey. No rational trier of fact could have found beyond a reasonable doubt that Lobato was present when Bailey was killed or that she was in any other way responsible for his injuries.

The constitutional standard for sufficiency of the evidence established by the Supreme Court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Smith v. Mitchell, 437 F.3d 884, 889 (9th Cir. 2006) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). When reviewing the sufficiency of the evidence, this Court considers "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). See also In re Winship, 397 U.S. 358 (1970). While it is possible for a conviction to be sustained based solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence. Woodall v. State, 97 Nev. 235, 627 P.2d 402 (1981); State v. Weaver, 371 P.2d 1006 (Wash. 1962); State v. Jones, 373 P.2d 116 (Wash. 1961). This Court held in Woodall, that a jury is obligated to afford the defendant the benefit of all reasonable doubt. The

standard enunciated in Woodall, was whether a rational trier of fact could reject a plausible explanation consistent with the defendant's innocence. Additionally, it must be determined whether the defendant was inferred to be guilty based upon evidence from which only uncertain inferences may be drawn. Conald v. Sheriff, 94 Nev. 289, 579 P.2d 768 (1968); State v. Luchette, 87 Nev. 343, 486 P.2d 1189 (1979).

The evidence presented here failed to establish beyond a reasonable doubt that Lobato was guilty of either offense. As noted in the Statement of Facts above, there was absolutely no physical evidence tying Lobato to either Bailey or the crime scene: none of her DNA, no evidence of her fingerprints or shoe prints, no tire tracks that matched her car, no pieces of hair or clothing, none of Bailey's blood was found on her clothing or in her car, nothing. 7 App. 1169, 1170; 8 App. 1540.

In contrast, physical evidence was found at the scene which may have belonged to the perpetrator, but Lobato was excluded as a source of that evidence: bloody shoe prints were found leading from the dumpster area but they did not match Lobato's shoe size or the shoes of the first responders; fresh tire marks were made over a planter median near the dumpster enclosure, but the tire marks did not match Lobato's car; a piece of chewing gum was covered in blood which belonged to Bailey but also contained the DNA of an unknown person who was not Lobato; a pubic hair that was found in Bailey's sexual assault kit had a DNA mixture which included Bailey's DNA and the DNA of an unknown person, who was not Lobato; two cigarette butts were collected from Bailey's body, one contained DNA from an unknown male and the other contained a DNA mixture, the major profile of which was consistent with Bailey and the minor profile of which was from an unknown person who was not Lobato; fingerprints were recovered from the door of the dumpster enclosure, a box and a beer can, but they did not belong to Lobato; 6 App. 1022, 1023, 1062; 7 App. 1228, 1229, 1234, 1240, 1252, 1260, 1264, 1266, 1308, 1309, 1317, 1328; 8 App. 1521, 1541-44. Both the State's medical examiner and the defense expert agreed that the Bailey's injuries were typical of a male on male case and were inconsistent with the kind of injuries normally inflicted by a female. 7 App. 1168; 8 App. 1540, 1549.

No eyewitness placed Lobato or her distinctive car in the bank parking lot where Bailey's body was found. Likewise, no eyewitness placed Lobato or her distinctive car in Las Vegas, on the road between Las Vegas and Panaca on the day the offense was committed. 7 App. 1172. For that matter, not a single person testified that Lobato's car was moved from the front of her parent's home between July 2nd until July 20th, when it was seized by the police. 7 App. 1200; 8 App. 1513, 1516. Critically, numerous people from Panaca testified that Lobato was in Panaca on the day that Bailey was killed. 6 App. 1105 (Austria); 6 App. 1115 (Brown); 7 App. 1190-91 (Carrington); 8 App. 1473 (Wouri); 8 App. 1493 (Shayne Kraft); 8 App. 1501-02 (John Kraft); 9 App. 1600 (Hohman); 9 App. 1606 (Thunstrom); 9 App. 1610-11 (Ashley Lobato); 9 App. 1623-25 (Lorenzo Lobato); 9 App. 1650 (Rebecca Lobato); 9 App. 1701 (Twining).

The State's only evidence against Lobato was her statement to the detectives, which was similar in most respects to her statement to Dixie Thienken, that she had cut a black man's penis after he tried to attack her. Exhibit 125A at 6. As set forth above, however, there were numerous and substantial inconsistencies between Lobato's statement and the actual facts concerning Bailey's death. Under these circumstances, Lobato's cryptic statements are insufficient to establish guilt beyond a reasonable doubt.

The State failed to prove beyond a reasonable doubt that Lobato killed Bailey and that she was the person responsible for injuries to his rectum. There is insufficient evidence to support the convictions for voluntary manslaughter and sexual penetration of a dead human body. Accordingly, Lobato's judgments must be vacated.

B. Detective Thowsen was allowed to testify that there were no incidents of any other penis stabbings based upon telephone calls allegedly made by his secretary to unnamed persons at unnamed medical facilities. Lobato's constitutional right of Confrontation and her statutory right against use of hearsay testimony were violated as a result.

Detective Thowsen was allowed to testify as to the absence of records from medical facilities concerning knife wounds to penises from May through July 2001. This testimony should not have been admitted as it violated Lobato's state and federal constitutional rights of confrontation and cross-examination and her right of due process, and because this hearsay

testimony was not admissible under the Nevada Rules of Evidence. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Detective Thowsen was permitted to testify, over repeated objection by defense counsel, that no Clark County hospitals or emergency rooms reported any instances of a slashed or severed penis during May, June and July of 2001. 8 App. 1385-86, 1414-15. The State informed the jury of NRS 629.041, which provides:

> Every provider of healthcare to whom any person comes or is brought for treatment of an injury which appears to be inflicted by means of a firearm or knife, not under accidental circumstances, shall promptly report the person's name if known, his location, and the character and extent of the injury to an appropriate law enforcement agency.

8 App. 1385. Thowsen stated that he reviewed police records to see if reports had been filed in compliance with NRS 629.041 and found none. 8 App. 1385-86. This testimony was based upon information alleged gathered by his secretary after she allegedly telephoned unnamed medical care facilities. 8 App. 1398. Thowsen acknowledged that he did not personally go to each individual hospital in Clark County and did not review all of the relevant records, but he instead delegated that job to other people who reported back to him. 8 App. 1398. His secretary performed part of the research by placing telephone calls to various hospitals. 8 App. 1399. Thowsen called various locations in Clark County and asked whether their record bureaus had reports of stab wounds to the groin area. 8 App. 1400. They did not report to him in writing, but just called him. He did not write any reports about this investigation and did not know the names of the persons who gave him this information. 8 App. 1400. The district court denied a defense motion to strike Thowsen's testimony after finding that because defense counsel elicited the fact that Thowsen's research was based upon hearsay, that defense counsel could not object to the testimony.[9] 8 App. 1415.

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[9]Thowsen also testified that he based his information upon conversations with some urologists because he believed that they would have been involved in any reconstructive surgery and that none of them reported any severed penises. 8 App. 1399. He acknowledged that he did not talk with all urologists in the valley, but did talk with several of them and believed that they would communicate amongst themselves at their various conferences and

The district court's ruling was clearly erroneous and admission of this testimony violated Lobato's state and federal constitutional rights to confrontation, cross-examination, due process, and a fair trial were violated as a result. Moreover, admission of this testimony violated her statutory rights which prohibit the admission of hearsay evidence.

NRS 51.135 provides the following:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

NRS 51.145 provides the following:

> Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity is not inadmissible under the hearsay rule to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data compilation was regularly made and preserved.

There appear to be no published cases in Nevada which address NRS 51.145, but it is similar to its counterpart provisions in the Federal Rules of Evidence.[10] FRE 803 (6) and (7) provide:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule

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discuss matters such as severed penises. 8 App. 1399. He did not know the number of urologists in Las Vegas and did not document this portion of his investigation. 8 App. 1399.

[10]In Flores v. State, 121 Nev. __, 120 P.3d 1170 n.33 (2005), this Court noted in dicta that it did not appear that Crawford v. Washington, 541 U.S. 36 (2004) would affect the admissibility of evidence concerning the absence of entry in records of regularly conducted activity, but this Court did not address the standards for admissibility of evidence under this rule and did not explore the implications of Crawford under the facts presented here.

902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. (7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness."

Evidence under the business records exception to the hearsay rule is not admissible unless the custodian of records or other qualified witness identifies the records. Hamm v. Sheriff, Clark County, 90 Nev. 252, 254, 523 P.2d 1301, 1302 (1974). A witness is a qualified if he has acquired knowledge of how the records are kept and can testify that they are kept in the ordinary course of business activity. United States v. Child, 5 F.3d 1328, 1334 (9th Cir. 1993). See also United States v. Riley, 236 F.3d 982, 984-85 (8th Cir. 2001) (police officer was not qualified to testify about a crime lab report because he had no personal knowledge as to how lab reports were prepared or maintained); Tongil Co. v. The Vessel "Hyundia Innovator", 968 F.2d 999, 1000 (9th Cir. 1992) (hearsay evidence may not be used to lay foundation for admission of business records). The proponent of the record must produce a witness with personal knowledge of how the records were kept. United States v. Pelullo, 964 F.2d 193, 200 (3rd Cir. 1992). The proponent must also show that the information recorded is the type of information that is recorded in the ordinary course of a regularly conducted activity, and that it is the regular practice of the business to record such an event. If the event recorded is an isolated incident, or if it is a recurring event that is not recorded as a matter of regular practice, the guarantees of reliability supporting the business records exception do not exist. Waddell v. Commissioner, 841 F.2d 264, 267 (9th Cir. 1988). The requirements of "ordinary course" and "regular practice" are important guarantees of the trustworthiness of the record. Pierce v. Atchison T. & S.F. Ry., 110 F.3d 431, 444 (7th Cir. 1997). Also be noted that documentary hearsay evidence generally provides greater indicia of reliability than oral hearsay." United States v. Redd, 318 F.3d 778, 784 (8th Cir. 2003).

Here, Thowsen's testimony failed the standards for admissibility on every ground. First, he testified based upon information provided by his secretary and other unnamed persons. This is classic hearsay, which violated both NRS 51.065 and Crawford, 541 U.S. 36. Second, Thowsen was not a custodian of records or qualified witness as he had no personal knowledge of how the hospitals or other medical facilities kept their records and no ability to testify that these records were kept in the ordinary course of business activity. Third, the State failed to establish that the reports mandated by NRS 629.041 are in fact recorded in the ordinary course of a regularly conducted activity, and that it is the regular practice of the business to record such an event. Fourth, the State failed to establish that such records are not isolated incidents of non-reoccurring events. In short, none of the guarantees of reliability supporting the business records exception exist under the facts presented here and the testimony should not have been admitted through Thowsen's testimony. Likewise, Thowsen's secretary would also have not been a qualified witness. If the State wished to present this testimony, it needed to do so from appropriate representatives of each of the healthcare providers and urologists at issue. Its failure to present these witnesses rendered the testimony inadmissible.

This testimony was also inadmissible under Crawford v. Washington, 544 U.S. 36 (2004), as Lobato was not able to cross-examine and confront either Thowsen's secretary or the unnamed sources from the unnamed healthcare facilities. It was clear here that Thowsen requested that this information be gathered for the purpose of litigation as it was part of his preparation of this case, thus rendering the reports testimonial in nature. Lobato's Sixth and Fourteenth Amendment rights were violated as a result of the district court's decision to admit this testimony over objection from Lobato's counsel.

Lobato was extremely prejudiced by Thowsen's testimony about the lack of medical records of other cases of a penis being severed or cut. As noted above, there was no physical evidence tying Lobato to Bailey's killing. There also was no eyewitness testimony, testimony of a jailhouse informant, or other similar evidence suggesting that Lobato was guilty of this offense. The State's primary evidence was Lobato's statement that she had cut

a man's penis. Under these circumstances, Thowsen's testimony that no healthcare providers in the Las Vegas valley had any cases in which a penis was cut or severed was highly prejudicial. This testimony was also emphasized during closing arguments. 9 App. 1731, 1740, 1745. Thowsen's testimony contributed to the jury's verdict and it is highly unlikely that the jury would have found Lobato guilty without this testimony. Accordingly, Lobato's conviction should be reversed.

C. Detective Thowsen was allowed to give his opinion as to why Lobato's statements to the police were inconsistent with the physical evidence and was permitted to testify that Lobato was minimizing her involvement based upon her methamphetamine use. This testimony was improper and usurped the jury's role.

Detective Thowsen was allowed to testify as to his beliefs as the reasons why Lobato's statement to the detective was inconsistent with the physical evidence concerning Bailey's death. This testimony should not have been admitted as it violated Lobato's state and federal constitutional rights of due process and a fair trial and because this hearsay testimony was not admissible under the Nevada Rules of Evidence. U.S. Const. amend. V, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Over a defense objection, Thowsen testified that he has investigated 400 to 500 homicides and has taken hundreds of statements from suspects. 8 App. 1387. He finds that it is very common for people to minimize their involvement in an offense when they give a statement. 8 App. 1387. Also over objection, Thowsen testified that several suspects have claimed that they were under the influence of methamphetamine when they committed their crime. 8 App. 1388. Over further objection he testified that "it's not uncommon that they'll jumble things together and take something over it and put it together with something completely unrelated and especially if it's a situation where an individual has been on a binge for several days which is pretty common. That it's not uncommon for them not to be able to remember certain things and to remember things strangely sometimes." 8 App. 1388. He recalled that Lobato said she blacked out and then after was able to give some details regarding the fact that she did not recall putting anyone in a dumpster and did not think she could. 7 ROA 1388. He did not believe that this would be knowledge that somebody would

have if they truly blacked out. 8 App. 1388. He asked her if she remembered what she did with the knife and she said she did not remember if she had thrown it away or sold it for drugs. 8 App. 1388. She also said she did not know the location of her bat. 8 App. 1388. In her statement she said that she got into her car, took off all of her clothes and was basically naked while she drove to her friend's house so she could clean up. 8 App. 1388. He found it significant that she described a smell of alcohol and dirty diapers, which he interpreted to mean a smell like old socks that had not been changed. He concluded that her statement concerned Bailey's attack because she knew the person's penis was severed, he was a black man and older, and there was a strong odor. 8 App. 1389.

On cross-examination he clarified his opinion that by telling the detectives a different place, a different time, a different description and a different location that Lobato was minimizing what she was telling the officers. 8 App. 1397.

It is reversible error for an expert witness to give an opinion as to the guilt of the defendant as it usurps the jury function. Winiarz v. State, 104 Nev. 43, 50-51, 752 P.2d 761, 766 (1988); Lickey v. State, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992). Likewise, it is improper for a lay witness to give an opinion as to the truthfulness of a defendant's statement to the police. Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000) (citing Flynn v. State, 847 P.2d 1073, 1075-76 (Alaska Ct. App. 1993)). See also State v. Jones, 68 P.3d 1153, 1155 (Wash. Ct. App. 2003) (noting that "a witness may not testify about the credibility of another witness" and reversing a conviction based upon a statement by a police officer that he believed the defendant was lying and did not believe his story); State v. Elnicki, 105 P.3d 1222 (Kan. 2005) (reversing judgment based upon admission of videotapes in which detectives stated that they did not believe the defendant). Federal law is in accord. A witness may not give a direct opinion on the defendant's guilt or innocence. United States v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987). A police officer's opinion as to the defendant's guilt is irrelevant. United States v. Moore, 936 F.2d 1508, 1522 (7th Cir. 1991). See also United States v. Windfelder, 790 F.2d 576, 582 (7th Cir. 1986) (agent testimony on mental state prohibited under Fed. Rules of Evidence 704(b)); Maurer v. Dept. of

Corrections, 32 F.3d 1286, 1287 (8th Cir. 1994) (denial of due process of law to admit testimony from witnesses, including two police officers, labeling the victim as "sincere"); Cooper v. Sowders, 837 F.2d 284, 287-88 (6th Cir. 1988) (officer improperly allowed to testify as expert on credibility which helped produce a "fundamentally unafair" trial). "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions as officers of the law." Bowles v. State, 381 So.2d 326, 328 (Fla. 5th DCA 1980).

Thowsen's testimony as to his belief that Lobato's statements were consistent with other suspects who were involved with methamphetamine and who minimized their involvement in an offense amount to "profile" evidence and was inadmissible. See United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983); United States v. Beltron-Rios, 878 F.2d 1208, 1210 (9th Cir. 1989); United States v. Lui, 941 F.2d 844, 848 (9th Cir. 1991). Every defendant "has the right to be tried based on evidence tying [her] to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile." People v. Castaneda, 55 Cal.App.4th 1067, 1072 (1977).

The introduction of unreliable evidence violated Lobato's state and federal constitutional rights to due process, confrontation and cross-examination. See Windham v. Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998); Reiger v. Christensen, 789 F.2d 1425, 1430 (9th Cir. 1986). The absence of fairness fatally infected the trial and prevented a fair trial. Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986).

Lobato was extremely prejudiced by Thowsen's testimony. He usurped the jury's function by giving his belief as to the believability of Lobato's statement and the reasons for the substantial inconsistencies which existed between the incident described by Lobato and the facts of Bailey's killing. Moreover, this testimony was emphasized during closing arguments:

> And again. Look at her statement to the police. Go through it carefully. Detective Thowsen told you it is not uncommon for somebody who's been on drugs to jumble their stories around, not uncommon at all. And she's jumbling the incident with Jeremy and the incident with Duran Bailey.

9 App. 1725.

> But you know what she's gonna have to do? She's gonna have to minimize when she wants to get this off of her chest. Think about it. She has a lot of guilt, her conscious is getting to her, she's suffering from anxiety and restlessness by the 13th, 5 days after or 6 days after this happened. She needs to talk, she needs to get it off of her chest. So what is she gonna do to do that? She's gonna minimize. . . .

9 App. 1725.

> And Detective Thowsen told you that's very common even when giving confessions. They want to talk about what they did but they need to kinda justify it in their own mind, and that's what she was doing.

9 App. 1726.

As noted at length above, there were substantial differences between the physical evidence and circumstances concerning Bailey's death and the attack described by Lobato in her statement to the detectives. Detective Thowsen was allowed to summarily gloss over these substantial differences by simply claiming that they were merely the product of minimizing and jumbling. The district court erred in admitting this testimony and Lobato is entitled to a new trial as a result of this erroneous decision and violation of her rights to due process and a fair trial.

D. The district court refused to allow Lobato's witnesses to testify that Lobato confided in them regarding her cutting of a man's penis prior to the date of Bailey's death. In doing so, the district court prohibited Lobato from presenting her defense and violated her constitutional rights.

Lobato attempted to present testimony from three witnesses about conversations they had with Lobato prior to July 8th, which was the day Bailey was killed, in which Lobato confided that she had been attacked and cut a man's penis. The district court's refusal to permit introduction of this testimony violated Lobato's state and federal constitutional rights to present a defense, to due process of law, and to a fair trial. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

The central issue in this case concerned whether Lobato was describing Bailey or a different person when she made a statement to the police in which she described being attacked and then cutting her attacker's penis. A key point at dispute within this central issue concerned whether Lobato was attacked on July 8th or whether she was attacked on an earlier

date. Lobato repeatedly tried to introduce testimony from witnesses in whom she confided in prior to July 8, 2001, about her attack and her response of cutting her attacker's penis. The district court, however, ruled that this testimony was inadmissible and prohibited Lobato's witnesses from presenting this testimony. Trans. 9/18/06 at 27 (sustaining objection to proposed testimony of Stephen Pyszkowski that he told the police she heard about the attack on Lobato the month before July 9, 2001); 8 App. 1529-31 (district court prohibits Heather McBride from testifying that she saw Lobato prior to July 4, 2001, and that Lobato told her at that time that she had been sexually assaulted and had cut a man's penis). The district court's rulings were erroneous and violated Lobato's state and federal constitutional rights to present a defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 689-90 (1986) (quoting California v. Trombetta, 467 U. S. 479, 485 (1984) (citations omitted)). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate' to the purposes they are designed to serve." United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Rock v. Arkansas, 483 U. S. 44, 58, 56 (1987)). See also Abbott v. State, 122 Nev. __, 138 P.3d 462, 476 (2006) (recognizing that an evidentiary rule which renders non-collateral, highly relevant evidence inadmissible must yield to a defendant's constitutional right to present a full defense) (quoting State v. Long, 140 S.W.3d 27, 30, 31 (Mo. 2004)); Williams v. State, 110 Nev. 1182, 1184-85, 885 P.2d 536, 537-38 (1994) (recognizing that the due process clauses in our constitutions assure an accused the right to introduce into evidence any testimony or documentation which would tend to prove the defendant's case) (citing Vipperman v. State, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980); United States v. Nixon, 418 U.S. 683, 711 (1974)). Lobato was entitled to present testimony that she had told her friends that she had been attacked and cut her attacker's penis prior because these statements were made prior to July 8, 2001, which was the date of

Bailey's death, as they supported her defense that she was not referring to Bailey when she described her attacker. The district court violated Lobato's constitutional right to present a defense by prohibiting this testimony.

The district court also erred in prohibiting this testimony under Nevada's rules of evidence. NRS 51.035 limits hearsay to statements offered in evidence to prove the truth of the matter asserted. The proposed testimony here was not offered to prove the truth of Lobato's statement that she was attacked and cut her attacker's penis, but was offered to prove that she made these statements prior to Bailey's death, thus establishing that Lobato was making a statement about a different person. Testimony such as this is admissible as nonhearsay. Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990).

Lobato's conviction must be reversed because of the district court's erroneous and unconstitutional limitation on her right to present her defense.

E. The district court allowed the State to introduce highly prejudicial evidence that Lobato's car had the license plate, "4NIK8ER." The court violated Lobato's rights admitting this inflammatory evidence.

The district court allowed the State introduced evidence that Lobato had a personalized license plate of "4NIK8ER" or "FORNICATOR" even though that evidence was irrelevant and highly prejudicial. Admission of this evidence violated Lobato's state and federal constitutional rights to due process of law, and to a fair trial. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Lobato's counsel filed a pretrial motion in which they sought exclusion of the fact that her 1984 red Fiero had a personalized license plate of "4NIK8ER." I App. 21-33. They offered to stipulate that Lobato's car had a distinctive personalized plate which identified the vehicle as hers. The State opposed the motion and the district court ruled that evidence concerning the license plate was admissible, even though not a single witness claimed to have seen Lobato, her car, or the license plate anywhere in the vicinity of the location where Bailey was killed. 2 App. 374-78, 4 App. 918-23. Likewise, there was no testimony that anyone identified Lobato based upon her license plate in Las Vegas or on the road to Panaca at the relevant times. Instead, this evidence was admitted solely to inflame the jury.

Extensive evidence about the fact that Lobato's personalized license plate was "4NIK8ER" was introduced at trial. 6 App. 1095 (photograph of the Fiero with the license plate was shown to the jury, the license plate was zoomed in upon, and a picture of the car was circulated); 6 App. 1118 (testimony of Paul Brown); 6 App. 1121 (testimony of Jeremy Davis); 8 App. 1496 (testimony of Shayne Kraft); 9 App. 1636 (State asks Lobato's father about the license plate and how it was that Lobato came up with that name).

Given the fact that Lobato's trial counsel conceded that the license plate was distinctive and clearly identified her fairly unique vehicle, any probative value of testimony or argument of the particular contents of the license plate, "4NIK8ER," was clearly outweighed by the unduly prejudicial effect, as well as the substantial likelihood of confusing the issues and misleading the jury. The presentation of the particular contents of this license plate had the effect of presenting unsubstantiated bad character evidence against. Lobato, which was highly inflammatory, wholly irrelevant, and unduly prejudicial.

This evidence was irrelevant and therefore inadmissible under NRS 48.025. The evidence was also inadmissible under NRS 48.035 as any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. "'Unfair prejudice'" in this context "speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180-81 (1997). That ground is "'commonly, though not necessarily, an emotional one.'" Id. (quoting Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C. App., p. 860). Inclusion of such irrelevant and prejudicial evidence violates a defendant's rights to due process, equal protection and a fair trial under both the United States and Nevada Constitutions.

This evidence also constitutes evidence of prior uncharged misconduct and bad character evidence. The use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges. Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000) (citing Berner v. State, 104 Nev. 695, 696-97,

765 P.2d 1144, 1145-46 (1988)) The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person. Id. Where the jury cannot draw any permissible inferences from the evidence, its admission is a violation of due process. Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991); Renderos v. Ryan, 469 F.3d 788, 798 (9th Cir. 2006) (recognizing claims but finding no prejudice under the facts of that case); Spencer v. Texas, 385 U.S. 554, 558 (1967) (finding no due process violation based upon evidence of other crimes, but only because the jury was given a proper limiting instruction). But see Alberni v. McDaniel, 458 F.3d 860, 866-67 (9th Cir. 2006) (recognizing that every federal circuit has found that introduction of such evidence can violate due process, but finding that because the United States Supreme Court reserved this question in Estelle v. McGuire, 502 U.S. 62 (1991), it has not been clearly established by the Supreme Court, as required by AEDPA, 28 U.S.C. 22544).

Lobato was not on trial for the offense of having a personalized license plate that suggests or promotes fornication. Permitting the State to present this highly prejudicial and inflammatory evidence amounted to nothing more than character assassination of Lobato, which was wholly irrelevant and immaterial to the crimes charged. Her conviction must be reversed as a result.

F. The district court allowed the State to introduce evidence of positive luminol tests on Lobato's car, even though there was no confirmatory tests that established the presence of blood. The district court abused its discretion in admitting this evidence.

The district court allowed the State to introduce evidence of positive luminol tests on Lobato's car, despite the fact that confirmatory tests did not establish the presence of blood. Admission of this evidence violated Lobato's state and federal constitutional rights to due process of law and to a fair trial. U.S. Const. amend. V, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Prior to trial, Lobato filed a motion to exclude all evidence relating to the presumptive or preliminary blood tests, luminol and phenolphthalin, on the ground that this evidence had

no nexus or relevance to the charges against her.[11] 2 App. 298-333. Moreover, any probative value of these tests was substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury. The State opposed the motion. 2 App. 470-76. The district court denied the motion and permitted the State to introduce this evidence, despite the fact that no tests confirmed the presence of blood. 4 App. 932-35.

This evidence comprised a significant portion of the State's case. The State elicited testimony from two forensic examiners from the Las Vegas Metro Police Department, Louise Renhard and Tom Wahl about these presumptive tests. In essence, the testimony established that there was a luminol reaction on the driver's seat slipcover but the phenolphthalin test result was negative, and no further testing was done. 7 App. 1238, 1245. There was a luminol reaction and weak positive with phenolphthalin on both the underlying driver's seat

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[11]The types of tests used to detect the presence of blood may be divided into two categories:

> [One,] preliminary, or presumptive tests, and [two] confirmatory, or conclusive, tests. Preliminary tests are generally quick, easy to do, and very sensitive. But they are not specific for blood. These tests are useful as searching devices to locate spots and stains that require further, more involved testing .... A positive result indicates that it is worthwhile to continue with further tests; a negative test strongly suggests (but does not absolutely prove) that blood is absent.
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> A number of compounds have been used for the [presumptive] tests, and in particular the test is often named after the chemical compound that is used. Some of the compounds are Benzedrine, phenolphthalin, leucomalachite green, orthtolidine, tetramethylbenzidene, orthdianisidine, and luminol.
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> ***
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> Most authorities agree that positive presumptive tests alone should not be taken to mean that blood is definitely present. A positive test suggests that the sample could be blood and indicates [the need for] confirmatory testing. On the other hand, a negative presumptive test is a reasonably certain indication that blood is absent, although in rare circumstances an inhibiting chemical could be present.

DeForest, Gaensslen & Lee (1983) Forensic Science: An Introduction to Criminalistics, New York: McGraw-Hill, pp. 246-248.

cover (upholstery) and on the left door panel. 6 App. 1067; 7 App. 1238-40. There was also a faint, fleeting positive reaction on the front floorboard. 7 App. 1240. However, subsequent confirmatory testing failed to find any blood on those items. 6 App. 1068; 7 App. 1285.

The State greatly emphasized these presumptive tests and repeatedly insinuated that the failure of the confirmatory test to reveal the existence of any human blood could be due to the use or application of cleaning agents, such as detergent.[12] 6 App. 1068 (testimony of forensic analyst Wahl); 7 App. 1238, 1245 (testimony of Louise Renhard); 7 App. 1284 (testimony of Dan Ford that his experience is that the reaction for luminol with cleaning agents is like a flash and it dissipates immediately, and that the luminol reaction on the seat covers and door panel were consistent with a positive reaction for blood). The prosecution also emphasized the presumptive tests in closing argument:

> You do have physical evidence that links the defendant to that crime scene. You have it with her car. The positive luminol test and the positive phenolphthalein test tell you there was blood in that car. And it wasn't a false positive because you heard Dan Ford and you heard Loise Renhard testify that it causes a flashing, kind of like a sparkle when you get a false positive, not like what you got on this car door.

9 App. 1730.

> That does give you some physical evidence that links her to the crime, that's blood. The fact that they couldn't confirm the DNA doesn't matter. You're not gonna get both of those positive tests with presumptive tests for luminol and phenolphthalein without there hav[ing] been clean blood there. It's not -

9 App. 1730. Defense counsel objected that this misstated the evidence. The objection was sustained. The prosecutor continued:

> It's not reasonable that you're gonna get a positive for luminol, a positive reaction for phenolphthalein where it's not sparkly, it's like what you see here, a constant illumination and have a false positive. It's not copper salts. If it was copper salts, why isn't it everywhere if Panaca is so inundated with copper salts?

9 App. 1730.

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[12]This argument was made despite the fact that it was acknowledged by the State's witness that old mining towns, such as Panaca and Pioche, could have copper or a variety of salts on the ground which could result in false positive luminol tests. 6 App. 1076; 7 App. 1246. A positive luminol reaction could have also been caused by iron, vegetative materials, and some household cleaners. 7 App. 1238, 1245.

NRS 48.025 states that all relevant evidence is generally admissible, except as otherwise limited, while irrelevant evidence is inadmissible. "Relevant evidence" is that having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. When a piece of evidence has no "clear connection" to the alleged crime, it is irrelevant and must be excluded. Beck v. State, 105 Nev. 910, 912, 784 P.2d 983, 985 (1989). Here, the confirmatory tests failed to reveal the presence of blood on the items that tested presumptively positive. Thus, there is no "clear connection" between the presumptive test results and the crime of homicide for which Lobato stands charged.

There is a lack of consensus among state courts regarding the proper standard to apply to the admission of expert testimony regarding presumptive blood tests. See 82 A.L.R. 5th 67, "Admissibility of Results of Presumptive Tests Indicating Presence of Blood on Object." There appear to be no published decision in Nevada addressing the admissibility of results of presumptive blood tests.[13]

Other courts have determined that luminol is not admissible without other factors that related the evidence to the crime because the luminol tests provided too many false positives and the test is not time specific.[14] Houston v. Arkansas, 906 S.W.2d 286, 287 (Ark. 1995);

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[13]In Jimenez v. State, 112 Nev. 610, 614, 918 P.2d 687, 690 (1996), this Court noted that a luminol test indicated blood on a pair of pants, but it also noted that the blood was later identified as human. This suggests that further confirmatory testing was conducted. The admissibility of this testimony did not appear to be an issue in Jimenez.

[14]In other jurisdictions, some courts look at the reliability of these under the Frye standard of "general acceptance" in the "relevant scientific community." See id., citing Frye v. United States, 293 F. 1013 (App. D.C. 1923). Other courts rely on the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993). Daubert held that Frye was superseded by Federal Rules of Evidence Rule 702, allowing the introduction of scientific, technical or otherwise specialized knowledge by an expert witness is such knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." Nevada has not adopted the Daubert standard, but instead holds that scientific evidence is admissible if it will assist the trier of fact in understanding the

Palmer v. Arkansas, 870 S.W.2d 385 (Ark. 1994)[15]; Brenk v. State, 847 S.W.2d 1, 9 (Ark. 1993)[16]; United States v. Hill, 41 M.J. 596, 599-602 (1994)[17]; Hawaii v. Fukusaku, 946 P.2d 32, 66 (Ha. 1997)[18]; State v. Moody, 573 A.2d 716, 722 (Conn. 1990). But see State v.

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evidence or determining a fact in issue. Krause Inc. v. Little, 117 Nev. 929, 934, 34 P.3d 566, 569 (2001). Lobato submits that the luminol test results, without positive confirmatory tests, should not have been admitted any under standard. She also urges this Court, however, to adopt the Daubert standard as Nevada's current standard for admission of expert testimony is so low that it constitutes a violation of the state and federal constitutional guarantees of due process and a fair trial.

[15]Noting that luminol is not conclusive because it can register positive for bleach, copper, nickel, cobalt and some plant enzymes.

[16]Finding that luminol is only a preliminary test, it is unable to indicate the definite presence of blood, much less determine whether any blood present is human or animal. It reacts with certain metals and vegetable matter, as well as blood. "It is impossible to tell without follow up testing which of the possible reactants is causing the reaction. . . . Luminol testing, without any additional testing, is unreliable to indicate the presence of human blood. Additionally, luminol is not time specific. That is, a reaction will occur even many years after a reacting substance has been in place, so it is impossible to tell how long the substance that is causing the reaction has been in place." Id. "Since we have determined that luminol tests done without follow-up procedures are unreliable to prove the presence of human blood or that the substance causing the reaction was related to the alleged crime, we find it was error to admit the evidence[.]" Id.

[17]Finding that a luminol test did not meet the Daubert reliability test because it is no more than just a presumptive test which could not confirm presence or absence of blood.

[18]The Hawaii Supreme Court affirmed a district court's finding that positive luminol and phenolphthalein results, without confirmatory tests that conclusively determine the test sample to be human blood, were irrelevant and unduly prejudicial based upon the fact that an expert "explained that luminol and phenolphthalein are used as presumptive tests in the field to identify potential blood stains. However, she also testified that the two tests can generate false positive reactions. The tests can react to metal surfaces, cleansers containing iron-based substances, horseradish, and rust. Neither test can distinguish between animal blood and human blood, and they cannot determine how long the substance has been at the scene. When a positive reaction occurs, a criminalist must do a confirmatory test in order to conclusively determine that the test sample is human blood." Id. at 66.

Stenson, 940 P.2d 1239, 1263 (Wn. 1997) and cases cited therein.

The court erred in admitting the presumptive blood test evidence. The State failed to establish the existence of blood in Lobato's car generally and failed to establish the existence of Bailey's blood in particular. Without confirmatory tests, the luminol and phenolphthalin testing was misleading, confusing and improperly set forth before the jury. Any probative value of the presumptive tests was substantially outweighed by its prejudicial effect given the danger of unfair prejudice, confusion of issues, and misleading the jury. NRS 48.035. "'Unfair prejudice" refers to an 'undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one' or 'evidence designed to elicit a response from the jurors that is not justified by the evidence.'" United States v. Ellis, 147 F.3d 1131, 1135 (9th Cir. 1998) (internal quotations omitted) (citing Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 403.04[1][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997)). The district court abused its discretion in finding the preliminary tests admissible as the prejudicial effect of the evidence substantially outweighed any probative value. The district court abused its discretion in refusing to exclude evidence as to presumptive blood tests, without conclusive confirmatory tests, because the presumptive tests lack probative value and had an inherently prejudicial effect. Lobato's conviction must be reversed as a result of the introduction of this highly prejudicial testimony.

G. The State threw away important evidence and failed to make reports about crucial matters. The district court abused its discretion in denying Lobato's motion to dismiss charges based on the State's bad faith and gross negligence in failing to preserve and collect potentially exculpatory evidence.

The State threw away critical evidence and failed to gather other important evidence. Lobato asked that the State's charges be dismissed based upon this destruction of potentially exculpatory evidence. The district court denied the motion and as a result violated Lobato's state and federal constitutional rights to due process of law and to a fair trial, her right to present a defense, and her right to confront the State's evidence. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

The district court abused its discretion in denying Lobato's motion to dismiss the case based on the State's failure to preserve and collect potentially exculpatory evidence. As noted above, there was no physical evidence which implicated Lobato in the commission of Bailey's homicide. Several items of potentially exculpatory evidence, however, were present on or with the body at the crime scene that were either not collected or were thrown away after they were collected.

First, white paper towels, that were partially stuffed into the opening where Bailey's penis once was, were not preserved and were therefore unavailable for fingerprint tests, DNA tests, and other examinations which likely would have revealed information as to the identity of the person who killed Bailey. Shelly Pierce-Stauffer, an investigator with the Clark County Coroner's Office, testified that she saw that paper towels were partially stuffed into the opening where Bailey's penis once was. 8 App. 1487-88, 1490. Once the paper towels were removed she could see that his penis was not there. 8 App. 1488. The towels at issue were visible in the photo marked State's Exhibit 9. 8 App. 1489. She saw the LVMPD crime scene analysts collect the white paper towels and place them in brown paper bags. 8 App. 1489, 1491. She did not know whether they processed the towels or discarded them. 8 App. 1490. Likewise, police officer James Testa, who was the first officer to respond to the scene, testified that he saw a number of white towel-like items over the abdomen area of Bailey's body. 6 App. 1021.. Crime scene analyst Dan Ford also testified that there were white paper towels over the lower abdomen and groin areas of Bailey's body, but he did not believe that they were underneath the plastic that was found over Bailey's body. 7 App. 1282. Ford testified that he did not impound the towels that were found on Bailey's body. 7 App. 1285. Maria Thomas, a LVMPD investigator who was assigned the task of impounding evidence from the morgue, testified that no white paper towels were transported with the body and they were not impounded. 7 App. 1304.

Brent Turvey, a forensic scientist, testified on Lobato's behalf as to the importance of the paper towels that were found against Bailey's groin area, under the plastic wrap. 8 App. 1546. Had this evidence been formally collected and preserved, the paper towels could

have been examined for the presence of bloody or latent fingerprints, transfer evidence such as fibers or hairs, and other physical evidence. 8 App. 1546.

Second, police officers threw away a substantial amount of potential evidence at the scene without documenting in any fashion the evidence that they discarded. Crime scene analyst Renhard acknowledged that items found inside the dumpster near Bailey's body were not processed for fingerprints. 7 App. 1252. Crime scene analyst Dan Ford testified that various items from the scene were processed at the lab, but if they did not have fingerprints they were tossed in the garbage for lack of evidentiary value. 7 App. 1262. No record was kept of items that were collected from the scene, transported back to the lab and then discarded. 7 App. 1277. Items were not preserved for further testing if they tested negative for fingerprints. 7 App. 1277. Other trash found near Bailey's body was not collected at all if the officers decided that the items did not appear to be related to the incident at issue. 7 App. 1283. Maria Thomas testified that she and the detectives decided not to preserve a sample of a silver substance that was found on Bailey's bare upper right buttock because they believed the same substance was on Bailey's shirt, which had already been impounded. 7 App. 1302. Detective Thosen also testified that officers did not collect every piece of evidence at the scene. 8 App. 1390. He opined that it was possible that the officers missed something that had Lobato's DNA on it, although it was also possible that no DNA was present. 8 App. 1390. He further added that he has investigated many crimes and solved them without anything that connected the defendant to the crime, and that many crimes were solved by words that were spoken by the defendants themselves. 8 App. 1390.

Third, substantial evidence was lost based upon Detective Thowsen's failure to make reports of his investigation and failure to record crucial information. For example, as noted above, Thowsen testified that he asked other people to contact Las Vegas area hospital for a review of records concerning cut penises in May, June and July of 2001. 8 App. 1398. He also testified that he telephoned some hospitals and talked to some urologists, 8 App. 1398-99, but he did not prepare a report on any of this investigation. 8 App. 1399. At the time of trial he did not know the names of the people who gave him this information. 8 App. 1400.

Without such documentation it was impossible for Lobato and her counsel to contact any of these potential witnesses to verify the information that was allegedly given to Thowsen and his secretary. Likewise, Thowsen testified that he talked with the apartment manager of the complex where Diane Parker lived, and asked about some Hispanic individuals who he had reason to believe might have known about Bailey's attack on Parker, and that he ran their names to determine if they had a criminal record, but he did not make a record of this investigation, did not talk with the Hispanic men, and did not look at the men or their footwear. 8 App. 1404. Without a record of this information it was impossible for Lobato's counsel to conduct a proper investigation concerning these alternative suspects and impossible for her counsel to ask that their fingerprints and DNA be tested to see if they were the sources of the unidentified fingerprints and DNA that were found at the scene.

This evidence was material and the failure to collect and preserve this evidence and constituted bad faith, requiring dismissal of the charges, or at the minimum, gross negligence, permitting the inference that the evidence would have been favorable to Lobato. The district court's denial of Lobato's motion to dismiss, and her request for an instruction permitting the inference that the evidence was favorable to her, violated Lobato's state and federal constitutional rights to due process, a fair trial, the right to present a defense, and the right to confront the State's evidence.

"When potentially exculpatory evidence is destroyed, the government violates a defendant's right to due process if the unavailable evidence possessed 'exculpatory value that was apparent before the evidence was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" United States v. Rivera-Relle, 333 F.3d 914, 922 (9th Cir. 2003) (quoting United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993)). See also ABA Crim. Just. Stand. 11-3.2 (if the State intends to destroy evidence, it must give notice to the defense so that the defense has an opportunity to take appropriate actions, such as testing the evidence).

This Court draws a distinction between the failure to gather evidence and the destruction and loss of evidence after it has been gathered. Gordon v. State, 121 Nev. __,

117 P.3d 214, 217-218 & n. 9-11 (2005). The Court has held that "'[i]n a criminal investigation, police officers generally have no duty to collect all potential evidence.'" Id. (quoting Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001)). "However, "'this rule is not absolute.'" Id. (quoting Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998) (in turn quoting State v. Ware, 881 P.2d 679, 684 (N.M. 1994))). This Court "has adopted a two-part test to determine when dismissal of charges is warranted due to the State's failure to gather evidence." Id. (citing Daniels, 114 Nev. at 268, 956 P.2d at 115).

> The defense must first show that the evidence was material, i.e., that there is a reasonable probability that the result of the proceedings would have been different if the evidence had been available. Second, if the evidence was material, the court must determine whether the failure to gather it resulted from negligence, gross negligence, or bad faith. In the case of mere negligence, no sanctions are imposed, but the defendant can examine the State's witnesses about the investigative deficiencies; in the case of gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the State; and in the case of bad faith, depending on the case as a whole, dismissal of the charges may be warranted.

Id. (citing Randolph, 117 Nev. at 987, 36 P.3d at 435 (citing Daniels, 114 Nev. at 267, 956 P.2d at 115)).

In contrast, in cases where the State destroys or loses evidence after it has been gathered, the standard of Crockett v. State, 95 Nev. 859, 603 P.2d 1078 (1979), applies:

> Of course, when evidence is lost as a result of inadequate governmental handling, a conviction may be reversed. Howard v. State, 95 Nev. 580, 600 P.2d 214 (1979); Williams v. State, 95 Nev. 527, 598 P.2d 1144 (1979); United States v. Heiden, 508 F.2d 898 (9th Cir. 1974). As stated in our prior decisions, the test for reversal on the basis of lost evidence requires appellant to show either 1) bad faith or connivance on the part of the government, or 2) prejudice from its loss.

Id. at 865, 603 P.2d at 1081. "We cannot permit speculative inferences adverse to [the defendant] to be derived from the absence of evidence which the State should have preserved." Id. at 865, 603 P.3d 1092. The State may not profit from its own fault and may not raise inferences adverse to the defendant from its own loss of evidence. Id. See also Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988) (conviction reversed because of the State's loss of evidence that was prejudicial to the defendant); Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1285-86 (1991) (defendant was entitled to a jury instruction

that a firearm, which was gathered and then mishandled by a police officer, was irrebuttably presumed to have been held and fired by the victim); Cook v. State, 114 Nev. 120, 125-26, 953 P.2d 712 (1998) (reversing conviction based upon the State's failure to preserve evidence after it was gathered).

Lobato's federal constitutional rights were violated because the State failed to gather critical evidence at the scene, failed to document evidence that was gathered, failed to protect crucial evidence from being destroyed, and then threw away other important evidence. Such flagrant and repeated acts and omissions constituted bad faith and violated Lobato's rights under Arizona v. Youngblood, 488 U.S. 51 (1988). See also Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1117 (9th Cir. 2001) (a bad faith failure to collect potentially exculpatory evidence violates the Due Process Clause); Miller v. Vasquez, 868 F.2d 1116, 1120 (9th Cir. 1989) (same). Moreover, Lobato's right to due process under the Fourteenth Amendment to the United States Constitution was violated by the arbitrary deprivation of his rights under Nevada law. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); Hewitt v. Helms, 459 U.S. 460, 466 (1983); Ford v. Wainwright, 477 U.S. 399, 428 (1986). Also, the application of state rules to other similarly situated defendants and not to Lobato violates the Equal Protection Clause of the Fourteenth Amendment. Myers, 897 F.2d at 421.

The State's suppression of materially exculpatory evidence violates both the Fourteenth Amendment and Nevada law. See Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692-93 (1996) (explaining that the affirmative duty to disclose favorable evidence imposed by Nevada law is coextensive with the due process requirements of the 14th Amendment). In granting habeas relief based on the State's Brady violations in Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000), this Court summarized the elements to a Brady violation as follows: " the evidence at issue is favorable to the accused; the evidence was withheld by the state either intentionally or inadvertently; and prejudice ensued,

i.e., the evidence was material." Id. at 67. Evidence is favorable, and thus subject to Brady, if it is exculpatory or if it "provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses." Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000) (citing Kyles v. Whitney, 514 U.S. 419, 442 n.13 (1995)). Courts recognize that a prosecutor's failure to allow a defendant to "examine a piece of critical evidence whose nature is subject to varying expert opinion" can constitute a due process violation. Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975) (a defendant has a due process right to inspect physical evidence). See also State v. Thomas, 421 S.E.2d 227, 235 (W.Va. 1992) (reversing a conviction based partly on molecular tests that consumed all of the blood evidence because "the State must put the defendant in as nearly identical a position as he would have been in had he been able to perform an independent test"); State v. Schwartz, 447 N.W.2d 422, 427 (Minn. 1989) (fair trial and due process rights are implicated when data relied upon are not available for review and cross-examination); State v. Hall, 105 Nev. 7, 9, 768 P.2d 349 (1989) (holding that the State's spoliation of evidence violates adue process rights if the defendant is prejudiced as a result of the destruction of material evidence or if the evidence was destroyed in bad faith).

Lobato was prejudiced by the loss of this material evidence because she was unable to have her own experts examine the paper towels found directly on Bailey's body and the other evidence found near his body. Had she been allowed to examine this evidence there is a reasonable probability that evidence of the actual perpetrator could have been recovered. Likewise, had Detective Thowsen made a record of his investigation concerning reports by healthcare facilities on cut penises and his investigation of the Hispanic men who were associates of Diane Parker, Lobato could have conducted further investigation for the purpose of verifying Thowsen's allegations. She also could have identified the Hispanic men and asked that they give fingerprint and DNA samples for the purpose of comparing those samples to the unidentified fingerprints and DNA that were found at the crime scene.

Lobato was also prejudiced by the loss of this evidence because the State was allowed to suggest through cross-examination of a defense expert that Lobato's DNA could have

been present at the crime scene but was not discovered because evidence was not collected and preserved. 8 App. 1560. This point was also emphasized during closing arguments:

> Now in opening, defense counsel argued all physical evidence excludes the defendant in this case. And that's very misleading. It doesn't exclude the defendant. It doesn't mean she could not have killed [sic] this crime. No, all it means is there was no evidence found at the scene that she left behind that's physically tied to her. Her DNA is not at the scene.

9 App. 1729.

> So the reverse or the inverse doesn't mean it excludes her because her DNA was not on the chewing gum, because her DNA was not on thecigarette butt, does that mean she didn't do it? No, it doesn't. It just means we didn't find her DNA there.

9 App. 1729.

> Think about the garbage at the scene and the white paper towels. Is her DNA – you know, we didn't test every piece, which probably wasn't possible anywhere with the resources that the police department [has], does it mean that she didn't do it because we didn't find anything? No. Just like if we have found a hundred different people's DNA there, does that mean they're all the killer? No. All if can tell you is that somebody left their biological matter there.

9 App. 1729.

> Look at all that trash. Tons of people's DNA there. Doesn't mean whoever's DNA was there was the killer. Even with the things closest to the body, we don't know how they got there. Don't know that that's the killer either. That's trash. The plastic bag that's found around the victim looks just like the other plastic bags that you see in this picture. It would've been nice to have her DNA there, but we don't need it because we know she was there because she told us she was there.

9 App. 1730.

> Sometimes it gets pretty offensive, ladies and gentlemen, when we're in a situation what we have, what we gotta deal with. We're dealing with the evidence that is presented to us and we're presenting it to you. Do you think for a minute that if we wouldn't have tested any of those items that we'd be in here, be applauded? 'Cause what they'd be saying is just what they argued here, isn't it possible that if you would've tested those items it would've came back that our client didn't tough this item or didn't leave more hair or anything?

9 App. 1740.

> Talk about the physical evidence and a time frame of when things were tested. It comes to a point where you have to just stop testing. Other times you will never stop testing. You've heard of cases even after people have went to prison, they continue doing testing. You've heard of some where they've been exonerated based on the testing and you've not heard of the ones where

> they're not exonerated.
>
> And so, you know, to point the finger at the State or the police officers and say you know what, you just didn't quit –you quit testing and you tested right up to the last minuted on that. It's like if we didn't test, I mean they threw the plastic bag in our face on that. And you know what their words were, their words were conclusory, just like their expert that they hired, that the evidence of the perpetrator was beyond that bag, on the bad, in the trash can.
>
> Where do you stop? What if you find the body in the dump? Where do you stop? Don't you give some credence to the people that are out there looking and trying to do what they can?

9 App. 1743. The prosecutors committed misconduct in their arguments by taking advantage of the fact that significant evidence was missing, thereby minimizing the State's burden of proof at trial. Rivera-Relle, 333 F.3d at 922; Crockett, 95 Nev. 859, 603 P.2d 1078 (State may not profit from its own fault and may not raise inferences adverse to the defendant from its own loss of evidence). See also ABA Crim. Just. Stand. 3-5.8 (prosecutor may not mislead the jury as to inferences it may draw from the evidence).

The facts of this case reveal that investigating officers acted with bad faith and gross negligence in failing to preserve potential exculpatory evidence. Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). The evidence at issue was material as there is a reasonable probability that the result of the trial would have been different if the evidence had been available. The failure to gather and preserve this evidence resulted from gross negligence and/or bad faith. Accordingly Lobato was entitled to a presumption that the evidence would have been unfavorable to the State. In the alternative, dismissal of the charges was warranted.

H. This Court should reconsider its holdings as to issues raised in Lobato's first appeal

In ruling on Lobato's first appeal, this Court addressed several issues which are relevant to her second trial and this appeal:

> Lobato also contends that the district court erred in admitting her statements to police in violation of Miranda, allowing the State to obtain and use privileged material from her medical files, restricting use of her expert on blood and crime-scene analysis based upon her failure to timely designate the expert before trial, excluding her alibi evidence for lack of timely pretrial notice, and allowing prosecutorial misconduct during final argument. We have considered these assignments of error and find them without merit. We note in passing that the failures to timely designate experts and alibi witnesses may

> be cured upon remand. We also reject Lobato's remaining claims of error, including the assertion that NRS 201.450 [defining sexual penetration] was unconstitutionally applied and is void for vagueness."

1 App. 18-19 (footnotes omitted).

Lobato respectfully submits that this Court's decisions on her first direct appeal concerning the admission of her statements to detectives and the constitutionality of NRS 201.450, as applied to the facts of this case, are erroneous and should be reconsidered. See Bejarano v. State, 122 Nev. __, 146 P.3d 265, 271 (2006) (noting that the doctrine of law of the case is not absolute and this Court has the discretion to revisit the wisdom of its legal conclusions if it determines that such action is warranted).

1. Lobato's statements to detectives on July 20, 2001 were not voluntary and should have been suppressed from use as evidence.

Lobato filed a motion to exclude all evidence relating to the July 20, 2001 interrogation at her home by Detectives Thowsen and LaRochelle and Sergeant Lee. 1 App. 91-123. The State opposed the motion and argued that the statements made to police officers were voluntary. 2 App. 462-65. The district court found evidence of the statements to be admissible. 4 App. 926-29. The information derived from that interrogation should not have been admitted at trial because Lobato's statements were not voluntary. Her statements made before a Miranda waiver was obtained were the result of interrogation as they are the product of psychological ploy utilized by the detectives. Second, the alleged Miranda waiver Lobato was not voluntarily given, as the officer's psychological ploy combined with her existing mental state rendered her incapable to give a voluntary waiver.

Detective Thowsen testified that he became aware of Lobato following a telephone call by Lincoln County Probation Officer Laura Johnson. 7 App. 1330. According to Thowsen, Johnson reported that Lobato contacted one of her former teachers and said that she had cut off a person's penis in Las Vegas. 7 App. 1331. Based upon this information, he went with his partner and a crime scene analyst to Pioche and met with Johnson. 7 App. 1332. A sheriff's deputy then took the Las Vegas officers to Lobato's house in Panaca. 7 App. 1332. Detective Thowsen testified that after he provided Lobato with Miranda

warnings that he told her they knew she had been hurt in the past. 7 App. 1333. At that point she lowered her head and began crying. 7 App. 1333. Lobato was 18 years old at the time of her interrogation, her parents were not home when the officers obtained their Miranda waiver and the officers hastily conducted their interview to avoid interaction with the Lobato's parents. Lobato submits that the psychological ploy used by the officers, combined with her already fragile mental state, was enough to invalidate any such waiver of her constitutional rights and that evidence of her statements to the police should have been excluded at trial.

Prior to the first trial, he trial court conducted a voluntariness hearing outside the presence of the jury to determine if the Appellant's pre-Mirandized statements were admissible. 4 App. 821. During the hearing, Det. Thowsen admitted that he intentionally brought up Appellant's 1989 molestation at the age of 6 and that her reaction was that she burst into tears. She then stated the incriminating statement, "I didn't think anyone would miss someone like him."

Before statements made during a custodial police interrogation are admissible, defendant must make a knowing, intelligent and voluntary waiver of her Fifth Amendment rights. Miranda v. Arizona, 384 U.S. 436 (1966). "[I]f a suspect is subject to abusive police practices and actually or overtly compelled to speak, it is reasonable to infer both an unwillingness to speak and a perceptible assertion of the privilege." New York v. Quarles, 467 U.S. 649, 672 (1984) [Justice O'Conner, concurring in part and dissenting in part.] Police interrogation of a suspect threatens the exercise of the Fifth Amendment privilege because of the danger that officers might overtly or passively compel confessions. New York v. Quarles, 567 U.S. at 654. Therefore, before questioning, Miranda warnings must be given. Miranda v. Arizona, 384 U.S. 436 (1966).

The defense argued that her will was overborne when the detective intentionally used this emotionally traumatic recollection to begin the interview, however, the trial court determined that the statement was voluntary in response to a statement, not a question and that Lobato's will was not overborne. However, while it is true that Miranda only protects

those subject to interrogation, there need not be an actual question posed for a response to be considered a result of interrogation; "psychological ploys" designed to elicit incriminating responses may also constitute interrogation. Holyfield v. Nevada, 101 Nev. 793, 799; 711 P.2d 834 (1985) ("Interrogation" under Miranda need not amount to actual questioning and may instead be the "functional equivalent" of such questioning). Interrogation includes "any words or actions on the part of police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. Id. Therefore, the detective's "psychological ploy" inciting the Lobato's emotional response regarding her molestation at the age of 6 was an interrogation and her provoked pre-Miranda response "I didn't think anyone would miss someone like him," should have been suppressed.

Likewise, the district court erred in allowing evidence of statements made after Lobato was provided with her Miranda warnings because the psychological coercion employed by the detective rendered her statements involuntary.

Lobato's will was overborne when the detective used the emotionally traumatic recollection of her molestation at age 6 to begin the interview. Accordingly her Mirandized statement was not given freely. Exhibit 125A is an audio tape which reflects Lobato's tone of voice, demeanor and psychological state. This exhibit supports a finding that Lobato's statement was not voluntarily made. Even if Miranda warnings are given, evidence deemed to have been coerced is a violation of the Due Process Clause of Fifth and Fourteenth Amendments and must be excluded. Colorado v Connelly, 479 U.S. 157, 163 (1986). To determine whether a statement was voluntary, a court must consider whether, in the totality of the circumstances, officials obtained the evidence by overbearing the will of the accused. Allan v. State, 118 Nev. 19, 38 P.3d 175 (2002), overruled on other grounds in Rosky v. State, 121 Nev. __, 111 P.3d 690, 694 (2005); Passama v. State, 103 Nev. 212, 214;735 P.2d 321, 323 (1987). A trial court's voluntariness determination presents a mixed question of law and fact, subject to this Court's de novo review. Rosky, 111 P.3d at 694 (citing

Thompson v. Keohane, 516 U.S. 99 (1995) and Miller v. Fenton, 474 U.S. 104 (1985).[19] "In order to satisfy due process requirements, a confession must be 'made freely and voluntarily, without compulsion or inducement.' When a defendant waives Miranda rights and makes a statement, the State bears the burden of proving voluntariness, based on the totality of the circumstances, by a preponderance of the evidence." Dewey v. State, 123 Nev. __, __, __ P.3d __ (2007) (citing Passama, 103 Nev. at 213, 735 P.2d at 322; Quiriconi v. State, 96 Nev. 766, 772, 616 P.2d 1111, 1114 (1980); Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

DetectiveThowsen admitted that before he administered the Miranda warnings, he told Lobato that he knew about her molestation at the age of 6 and that her reaction was that she burst into tears. In Allan, this Court noted that the Appellant displayed "unusual outbursts during the interrogation as he was crying." Allan, 118 Nev. at 12; 38 P.3d at 179. Lobato was sexually assaulted by her mother's boyfriend when she was 6 years old and this attack had a big impact on her life. 8 App. 1394, 9 App. 1633, 1672. She was also raped by an ex-boyfriend when she was 13 and by her best friend's father when she was 17. 9 App. 1672; 7 App. 1201. Lobato's will was overborne when the detective used the emotionally traumatic recollection of her molestation at age 6 to begin the interview such that her Mirandized statement was not given freely and this error was not harmless. Furthermore, there were two detectives, a sergeant, a crime scene analyst, and a local sheriff present at Lobato's house when Thowsen began his interrogation of Lobato. Other relevant facts bearing on the voluntariness of her statement include the fact that she was only 18 years old, she had no prior involvement in the criminal justice system, she had previously used methamphetamine,

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[19]Rosky presents further justification for this Court's consideration of this issue, despite its holding on the first direct appeal. At the time that Lobato's first appeal was decided, in September, this Court reviewed a district court's determination that a confession was voluntary under the highly deferential "substantial evidence" standard. Rosky, 111 P.3d at 694 & n.4 (citing Allan). This Court now recognizes that the deferential standard was not consistent with pronouncements by the United States Supreme Court and holds that voluntariness issues should be reviewed de novo. Id. This Court should address this issue now under the de novo standard.

she had recently been prescribed anti-depressants, and her parents were not present.

Based on the foregoing, the totality of the circumstances in the instant case indicate that Lobato's statement to the detectives was not voluntary for the Fifth and Fourteenth Amendment rights embodied in Miranda v. Arizona. See also Mincey v. Arizona, 437 U.S. 385, 401-402 (1978). The admission of this coerced statement was not harmless error. Arizona v. Fulminante, 499 U.S. 279, 296, 306-12 (1991). Accordingly, Lobato's judgment must be reversed.

2. NRS 201.450 is unconstitutionally overbroad and vague was applied here.

In her prior direct appeal Lobato contended that her conviction for sexual penetration of a dead human body in violation of NRS 201.450 by "inserting a knife into and/or cutting the anal opening of the said Duran Bailey," was unconstitutional because the injuries inflicted here were not consistent with sexual gratification, but rather reflected an act of rage. As noted above, this Court found this argument to be without merit. Lobato respectfully submits that this Court should reconsider this holding because Nevada's necrophilia statute, NRS 201.450 is unconstitutionally over broad as applied in this case.

Sexual penetration is defined within the statute, in subsection 2, as:

> "[C]unnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living."

NRS 201.450(2).

This definition suggests that "...any intrusion, however slight, of any part of a person's body..." constitutes sexual penetration. Therefore, the statute criminalizes penetration that is not for sexual gratification and unnecessarily sweeps broadly into activity which has not been ordinarily viewed as being sexual in nature. This language is so overly inclusive and sweeping, that it is ambiguously vague and over broad in violation of Article 1, Section 8 of the Nevada Constitution and the First and Fourteenth Amendment of the U.S. Constitution.

The definition of sexual penetration in NRS 201.450, is borrowed from NRS 200.364(2), the sexual assault statute. The definition contained in Nevada's necrophilia

statute differs in one very significant way from the definition in the sexual assault statute: the words "without limitation" are inserted in the definition of the necrophilia statute. In an over breadth challenge, this distinction is significant. The words "without limitation" renders the definition meaningless. The result is that the definition of sexual penetration is without restriction. It is boundless. As a result, the language of the statute is overly broad and, therefore, unconstitutional as applied to Lobato.

The statute is also void for vagueness. This Court has stated that the due process clause of the Fourteenth Amendment requires that criminal statute be declared void when it is so vague that it "fails to provide persons of ordinary intelligence with fair notice of what conduct is prohibited and also fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement." State v. Richard, 108 Nev. 626, 836 P.2d 622 (1992). The first part of the test for vagueness is whether the terms of the statute are "so vague that people of common intelligence must necessarily guess as to their meaning." Sereika v. State, 114 Nev. 142, 955 P.2d 175 (1998). The second part of the test is whether the law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and substantive basis. Williams v. State, 110 Nev. 1182, 885 P.2d 536 (1994).

In this case, the statute challenged, NRS 201.450, produces uncertainty is not very specific and suggests alternative interpretations. Therefore, ordinary persons cannot anticipate whether their actions violate the statute. The fact that "...any intrusion, however slight, of any part of a person's body..." constitutes sexual penetration alone is so indistinct and indefinite that the forbidden conduct proscribed remains so ambiguous that it is as if it had never been defined at all. Furthermore, there exists no limitation as to what can be adjudged to be sexual intercourse with the insertion by the legislature of the words "without limitation." The fact that sexual intercourse is further defined as "what would be its ordinary meaning," also leaves the matter unresolved.

Sometimes, a statute's title sheds some light on the meaning of the ambiguous statute. State v. Miller, 87 P. 723 (Kan. 1906). Literally interpreted, the wording of the title of this

statute is explicitly sexual. The title of the statute in question is Sexual Penetration of a Dead Human Body. Therefore, implicit in the title is the fact that the injury is of a sexual nature, that is, it is committed for sexual gratification. Finally, the statute in this case, NRS 201.450, is ambiguous in view of the heavy penalty imposed for its violation.

Lobato's theory that the injury to Bailey was not committed for sexual gratification was not rebutted by the evidence adduced at the Trial. Therefore, as applied to Lobato, the statute is void-for-vagueness.

Among the rules of statutory construction is that of ejusdem generis (of the same kind). LaFavre & Scott, Substantive Criminal Law, § 2.2, pp. 118-119 (1986). This rule applies when a statute, such as this one, lists some specific items followed by a general catch-all phrase, usually introduced by the phrase "or other..." According to the rule of ejusdem generis, the general catch-all phrase is construed to be limited to things of the same kind as those specific items listed. Id.

For example, a federal criminal statute made it a felony for one to transport in interstate commerce an "automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails" which he knows to be stolen. In a case which explored this issue, the defendant flew an airplane he knew to be stolen from one state to another and was charged under this statute. The issue was whether the airplane was included in the catch-all phrase, "any other self-propelled vehicle not designed for running on rails" Literally, it would seem to be. However, the Supreme Court held that it was not covered by the phrase. The theme of the catch-all phrase was that all the specific items listed (automobile, automobile truck, automobile wagon, motorcycle) were vehicles that run on land, so that, "self-propelled vehicles was limited to land vehicles and the airplane was excluded from the statute." McBoyle v. U.S., 283 U.S. 25 (1931). Similarly, a statute forbidding the destruction of property by "use of bombs, dynamite, nitroglycerine or other kinds of explosives" was held not to cover igniting a firecracker in a telephone coin return slot because the listed items were distinguishable from the fireworks by being designed to produce an explosion of extreme effect. State v. Lancaster, 506 S.W.2d