

1 MR. STAUDAHER: Correct.
2 THE COURT: Okay.
3 MS. STANISH: No objection.
4 MR. STAUDAHER: And then because we would prefer that
5 over an advisory opinion, or advisory --
6 THE COURT: Instruction?
7 MR. STAUDAHER: -- instruction.
8 THE COURT: Okay.
9 MS. WECKERLY: I think that's four.
10 THE COURT: Okay. So you'll take care of deleting
11 that from --
12 MS. WECKERLY: I think it's four, just so everybody's
13 following along. Yes.
14 THE COURT: So you're going to file an -- well, we
15 can just delete it here, but you need to clean it up in the --
16 MR. STAUDAHER: Instructions?
17 THE COURT: -- in the instructions.
18 MS. WECKERLY: I'll take out -- yeah, but then --
19 THE COURT: So Count 4 --
20 MS. WECKERLY: Do you want everything renumbered?
21 THE COURT: Count 4 is dismissed on motion of the
22 State.
23 MS. WECKERLY: Okay. And so then I can leave
24 everybody else with the same number, or how do you want me to
25 do that? Because that's --

1 MS. STANISH: I think it's easier just to say
2 Number 4 omitted, rather than renumber everything.

3 THE COURT: Omitted. Right. Yeah, because then we
4 have to --

5 MS. WECKERLY: That's fine. And then I'm going to
6 just omit it on the verdict form too, so they'd track it.

7 THE COURT: Right.

8 MS. STANISH: Correct.

9 THE COURT: Okay. All right. Is everyone ready to
10 go through and number together?

11 MS. STANISH: Do it slow, Your Honor.

12 THE COURT: I go fast on this.

13 MS. STANISH: I know you do. I'm already mixed up.

14 THE COURT: All right. Ready? One, it is now my
15 duty as judge. Number 2, if in these instructions. Three, an
16 indictment is but. It'll take me awhile to --

17 MR. SANTACROCE: I'm lost already.

18 MS. STANISH: Yeah, I'm already lost.

19 THE COURT: -- clip through -- what?

20 MR. SANTACROCE: I said I'm behind already.

21 THE COURT: Well, see, you can catch up while I flip
22 through the -- well, I guess you guys have to too. It's a
23 good thing we took today off.

24 MS. STANISH: Yeah.

25 MR. SANTACROCE: You're not kidding.

1 MS. STANISH: Because this is taking --
2 MR. SANTACROCE: Was this a day off?
3 MS. WECKERLY: This doesn't seem off to me.
4 MS. STANISH: Yeah, this doesn't seem like a day off.
5 MS. WECKERLY: But I get it.
6 THE COURT: No, I mean, I knew it would take a long
7 time, but I didn't know -- I didn't foresee this.
8 MS. STANISH: It was not foreseeable.
9 MS. WECKERLY: We didn't either.
10 THE COURT: All right.
11 MR. SANTACROCE: Where are we at?
12 THE COURT: I get it. All right. So that was three.
13 Number 4, is you are here to determine -- you are here only to
14 determine. Number 5, a separate crime is charged. Number 6,
15 a conspiracy is an agreement. Seven, it is not necessary in
16 proving a conspiracy. Eight, each member of a criminal
17 conspiracy. Nine, evidence that a person was. Ten, where two
18 or more persons. Eleven, mere presence at the crime.
19 Twelve, any person who presents or causes to be
20 presented. Thirteen, a person who performs. Fourteen, you
21 have heard testimony. Fifteen, a professional caretaker.
22 Sixteen, a certified registered nurse anesthetist. Seventeen,
23 both the reckless endangerment. Eighteen, if you find.
24 Nineteen, Count 25 charges theft. Twenty, counts --
25 MS. WECKERLY: Did you do the substantial bodily

1 harm?

2 THE COURT: Oh. Gosh, they got stuck together.

3 Thank you.

4 MS. WECKERLY: So that, I think, should be 19.

5 THE COURT: Eighteen, right. Nineteen should be as
6 used in these instructions. And then 20 becomes Count 25
7 charges theft. And 21 is Counts 26 and 27. Is that what
8 everybody has?

9 MS. STANISH: Yes.

10 MS. WECKERLY: That's fine.

11 THE COURT: Is that what you guys have the order?
12 Because that got stuck to one and that's why I missed it.

13 All right. Twenty-two, if you find beyond a
14 reasonable doubt. Twenty-three, the term "intent to defraud."
15 Twenty-four, murder is the unlawful killing. Twenty-five,
16 malice as applied. Twenty-six, murder of the second degree.
17 Twenty-seven, murder in the second degree is a general intent
18 crime. Twenty-eight, the second degree felony murder rule.
19 Twenty-nine, in regard to the crime.

20 Thirty, as to an offense. Thirty-one, as to the
21 element. Thirty-two, to constitute the crime charged.
22 Thirty-three, the defendant is presumed innocent.
23 Thirty-four, it is the constitutional right. Thirty-five, you
24 are here to determine. Thirty-six, the evidence which.
25 Thirty-seven, the credibility or believability. Thirty-eight,

1 you have heard testimony.

2 Thirty-nine, you have heard the testimony of Keith
3 Mathahs. Forty, certain charts and summaries. Forty-one, a
4 witness who. Forty-two, although you are to consider.
5 Forty-three, in your deliberations. Forty-four, when you
6 retire. Forty-five, if during your deliberation. And 46, now
7 you will listen. Is that what everybody else has?

8 MS. STANISH: No, but if you say so, it sounds right.
9 I lost you.

10 THE COURT: You folks are charged with making sure
11 that everything you intend to have in this packet, to the
12 extent I've said it can come in, is in the packet.

13 MR. SANTACROCE: And to the extent that the record
14 doesn't reflect my objections to the jury instructions, I'm
15 going to join in on the objections of Mr. Wright and
16 Ms. Stanish.

17 MS. STANISH: And then on the verdict form, Your
18 Honor, we had requested that the -- with respect to the
19 substantial bodily harm, that you not --

20 MS. WECKERLY: Yeah, I didn't --

21 MS. STANISH: Did you catch that, that the --

22 MS. WECKERLY: Well, no. I mean --

23 MS. STANISH: No?

24 MS. WECKERLY: -- I know that now.

25 MS. STANISH: Okay.

1 MS. WECKERLY: I didn't when I did this. But I'll
2 take it out.

3 MS. STANISH: Okey-doke.

4 MR. WRIGHT: So we're either is simply guilty
5 substantial bodily harm, or not guilty.

6 MS. STANISH: Right.

7 MS. WECKERLY: Right. I'm going to take out the
8 without the substantial, so it's either all or nothing.

9 MR. WRIGHT: Well, why is that a lesser included
10 offense instruction then?

11 MS. WECKERLY: Because it's --

12 MS. STANISH: That was for the theft.

13 MS. WECKERLY: -- a gross misdemeanor.

14 MS. STANISH: Wasn't it --

15 MR. WRIGHT: No. It's in there for the substantial
16 bodily harm instruction, that entire big long thing.

17 MS. WECKERLY: Right.

18 MR. WRIGHT: But we're not getting a lesser included.

19 MS. WECKERLY: Okay. So you want to take that out?

20 MR. WRIGHT: Yeah. But then we have no instruction
21 to them that they need to find proximate cause.

22 MS. WECKERLY: That's in the shorter one.

23 THE COURT: That's in the shorter one. Do we have
24 one defining proximate cause anywhere?

25 MS. STANISH: I don't think so.

1 MR. SANTACROCE: No.

2 MS. STANISH: That's why we thought proximate cause
3 should be an element of the offense.

4 MR. WRIGHT: I thought it's an element of the
5 offense.

6 THE COURT: All right. Well --

7 MS. STANISH: And, you know, I could add, Your Honor,
8 it's just like if we start with tort principle. In civil tort
9 you're going to have proximate cause and you should for a
10 criminal neglect as well.

11 THE COURT: We added proximate cause to substantial
12 bodily harm. Okay.

13 MR. STAUDAHER: And we have the -- we did proffer the
14 proximate cause and then withdrew it because nobody -- I mean,
15 everybody was --

16 THE COURT: Okay. So let's do this again.

17 MR. STAUDAHER: -- more -- that was the Lay v. State.

18 MS. WECKERLY: Well, you could make the definition of
19 proximate cause 18, because that's one we're taking out.

20 THE COURT: Well, wait. We still don't have one
21 about petty theft in here either.

22 MS. WECKERLY: But I didn't think we needed it
23 because we have the one that covers the 250 threshold for all
24 those crimes.

25 MR. STAUDAHER: Right. Because it says if you don't

1 find it, it is petty theft.

2 THE COURT: Okay. So that'll be okay. And then I
3 don't have a verdict form that has a petty theft in it, so
4 just make sure that you send something to the Court that has
5 the petty theft and the petty obtaining.

6 MS. WECKERLY: Okay.

7 THE COURT: There isn't a petty obtaining, isn't
8 there? Maybe there isn't.

9 MS. WECKERLY: I don't think there is.

10 MR. STAUDAHER: No.

11 THE COURT: Okay. I know there's a petty theft.

12 MS. WECKERLY: Yeah. I think there's petty theft or
13 not guilty on the obtaining.

14 THE COURT: On the obtaining? Okay. So if there's
15 not -- there is misdemeanor obtaining. I'm wrong.

16 MS. STANISH: Your Honor.

17 THE COURT: There is a misdemeanor obtaining. Yes,
18 there is.

19 MS. STANISH: I was going to suggest, Your Honor --

20 THE COURT: There absolutely is.

21 MS. STANISH: I was going to suggest it may be easier
22 to just have a special verdict form where you're asking the
23 jury in connection with the theft related charges is the
24 amount of loss 250 or above or no. And then -- no, you don't
25 want to do that?

1 THE COURT: I think, I mean, they're going to choose
2 guilty or not guilty, and it's either going to be -- there's
3 either going to be no lesser included or there is going to be
4 a lesser included.

5 So those are your choices. Either the felony and not
6 guilty, or the felony, a misdemeanor and not guilty. So you
7 could even have, if you don't want to call it petty theft, you
8 could say theft 250 or more, theft less than 250, obtaining
9 money under false pretenses --

10 MR. STAUDAHER: That would be cleaner, I think, to do
11 it that way.

12 THE COURT: -- parentheses, 250 or more obtaining
13 money under false pretenses, less than 250.

14 MS. WECKERLY: I think 22 covers that concept.

15 THE COURT: Okay.

16 MS. WECKERLY: Instruction number --

17 THE COURT: But I'm talking about on the verdict
18 form --

19 MS. WECKERLY: Yeah.

20 THE COURT: -- and then not guilty. So that's the
21 way we're going to do it. They're going to pick one or the
22 other, and if they pick the misdemeanor amount, then that's
23 what it is.

24 MS. WECKERLY: That's why we've been here for ten
25 minutes.

1 THE COURT: Yeah. But, you know, you could count
2 that as a win.

3 MS. WECKERLY: Okay. Explain that to our boss.

4 MS. STANISH: Well, actually, it's a misdemeanor in
5 the reckless disregard statute --

6 THE COURT: There is a misdemeanor obtaining.

7 MS. STANISH: -- if it is not substantial bodily
8 harm.

9 THE COURT: It's a gross.

10 MS. STANISH: Yeah, I know. We're not doing it.

11 THE COURT: You don't want to do that?

12 MR. WRIGHT: So we don't have any lessers in the
13 medical, or in the --

14 THE COURT: You sure you don't want the lesser? On
15 the record -- I want this clear. On the record, have you made
16 a decision that you do not want to have a lesser included
17 gross misdemeanor on any of the medical ones?

18 MR. WRIGHT: Yes.

19 THE COURT: All right.

20 MR. WRIGHT: And on the Fan Man one.

21 THE COURT: All right. So the only ones that I
22 understand you do want a lesser included are the theft and the
23 obtaining?

24 MR. WRIGHT: Right.

25 MR. STAUDAHER: We need to look at the -- can we look

1 at the statute one last time, because I want to make sure that
2 both of those -- because the elements of the crime for like
3 the Fan Man statute does not include substantial or not
4 substantial.

5 THE COURT: It doesn't.

6 MR. STAUDAHER: That's an enhancement. So if they --
7 they have to find the underlying cause first.

8 THE COURT: It's not a lesser included.

9 MR. STAUDAHER: So it's not a lesser included.

10 THE COURT: So the State can charge it -- the State
11 can do, I mean, just like on a robbery with a deadly weapon.
12 You do the robbery, you do the robbery with a deadly weapon,
13 you do the robbery and then you do not guilty.

14 MS. WECKERLY: Well, they don't really have that
15 option.

16 THE COURT: So that's not the defense's election.
17 That's the -- as I understand it, that's the State's election.

18 MR. WRIGHT: They charged it as the substantial
19 bodily harm.

20 MR. STAUDAHER: I know, but that's --

21 THE COURT: It's just like a gang enhancement or a
22 weapon enhancement. On those, let's just say you said robbery
23 gang enhancement. You say robbery with the gang enhancement,
24 robbery without the gang enhancement.

25 MR. WRIGHT: It doesn't say with a gang --

1 THE COURT: Not guilty.

2 MR. WRIGHT: It doesn't --

3 THE COURT: It's the analogy, Mr. Wright. It's the
4 same idea.

5 MR. WRIGHT: I didn't mean gang. It doesn't -- it is
6 charged as Fan Man with substantial bodily harm. It doesn't
7 say --

8 THE COURT: Yeah, but that's how they -- that's done
9 all -- that's how it's done all the time. Robbery with use of
10 a deadly weapon resulting in gang, robbery with use of a
11 deadly weapon and gang, robbery with use of a deadly weapon
12 without gang, robbery --

13 MR. WRIGHT: Okay.

14 MR. STAUDAHER: They're specific findings the jury
15 has to make in order to get there.

16 THE COURT: Right. I mean, that's not the defense's
17 option.

18 MR. WRIGHT: What is it? Is it a misdemeanor or
19 what?

20 MR. STAUDAHER: I'm sorry?

21 MS. WECKERLY: Without the substantial, what's the
22 Fan Man, like what's the -- how much is the enhancement worth?

23 THE COURT: Is it a Category D to a C, or is it a --

24 MS. STANISH: It's a gross --

25 MR. WRIGHT: It's in the statute of limitations.

1 MR. STAUDAHER: The Fan Man, I believe, becomes a
2 gross misdemeanor if there's not a substantial.

3 MR. WRIGHT: The statute of limitations is run.

4 MS. STANISH: Yeah. You can't --

5 MR. STAUDAHER: No, not on the underlying --

6 THE COURT: Okay. Then that's a different issue.

7 MR. STAUDAHER: No. Not on the underlying crime.
8 Then with the enhancement you don't charge them separately.
9 You charge it and then you have the enhancement. If they
10 don't find the enhancement, it's a gross. You don't then go
11 back and say, oh, well, it's past the statute of limitations
12 on the crime that we charged initially in the case.

13 THE COURT: Yeah. That would be the same on the
14 misdemeanors then, because then it's not a misdemeanor. You
15 got a year to charge a misdemeanor.

16 MR. STAUDAHER: Exactly.

17 MR. WRIGHT: As I understand it, it's my option when
18 the time is run on the lesser included offense, if I want it I
19 can get it even though the statute of limitations is run. If
20 it was timely brought, then they can have it. But it wasn't
21 timely brought. Or the lesser. All I'm saying is I don't
22 want the lessers.

23 THE COURT: Yeah. Well, the statute of limitations
24 is a different issue on whether they can have the lesser on
25 the verdict form.

1 MR. WRIGHT: Right.

2 MS. STANISH: Right. It shouldn't be on it.

3 THE COURT: I mean, I don't know. I mean, usually if
4 it's the crime charged they can have it. There's a
5 different -- oh. I'm not sure off the top of my head, because
6 all of the other examples I've given all have the same statute
7 of limitations, so that's never an issue.

8 MR. STAUDAHER: Right. And the --

9 THE COURT: I don't know off the top of my head if
10 it's a gross, if one's a felony and one's a gross. If that
11 changes it, you can include the gross at the State's option
12 then. All of the cases I'm thinking of, like the robberies
13 and the gang, those all are felonies anyway and it's all
14 pretty much the same. So I don't know off the top of my head.

15 MR. STAUDAHER: Could we look at the statutes --

16 MS. WECKERLY: Could you just look up the statute and
17 see.

18 MR. STAUDAHER: -- the statutes on both of those?

19 MS. WECKERLY: I think you had it out. 200.495, and
20 then it will say whether the enhancement --

21 MR. STAUDAHER: Because for both of these, the
22 criminal neglect of patients and the performance of act, the
23 substantial -- the criminal neglect of patients is a good
24 example, because there are three possibilities; substantial
25 bodily harm, or death, or neither. So there's three choices

1 there.

2 THE COURT: All right.

3 MR. STAUDAHER: So for Rodolfo Meana it's death.

4 THE COURT: Excuse me. I'm going to read it to you.

5 "If the neglect results in death, it's a Category B felony.

6 If the neglect results in substantial bodily harm, it's a

7 Category B felony and a one to six. If the neglect does not

8 result in death or substantial bodily harm, it is a gross

9 misdemeanor."

10 MR. STAUDAHER: That's for the criminal neglect of
11 patients one?

12 THE COURT: Right. And then what was the other one?

13 MR. STAUDAHER: Performance of an act in reckless
14 disregard, which is 202.595.

15 (Pause in proceedings)

16 THE COURT: It's 202.5 --

17 MR. STAUDAHER: 595, I believe.

18 THE COURT: Boy, this is the most these books have
19 been used in like a decade. All right. "If the act or
20 neglect does not result in substantial bodily harm or death,
21 it is a gross. If the act results in substantial bodily harm
22 or death, it is a Category C felony."

23 MR. STAUDAHER: So that's the way they're charged
24 initially. It's just an enhancement. Because the substantial
25 bodily harm and death is not an element of the crimes to be

1 charged.

2 THE COURT: It's a -- well --

3 MR. STAUDAHER: It's like you said with the
4 enhancement for a weapon.

5 THE COURT: It's a little different than the
6 enhancements though. I'm not sure frankly, on whether or not
7 if it's a statute of limitations issue for the gross that you
8 can elect to include that on the verdict form if you clearly
9 were outside the statute of limitations when you filed the
10 indictment. So you would have to look that up, because I
11 don't know. I don't know. It's never come up before and off
12 the top of my head, candidly, I don't know.

13 MS. STANISH: And my view is the indictment with
14 respect to the neglect offenses charged --

15 THE COURT: As a felony.

16 MS. STANISH: -- substantial bodily harm, not death.
17 It's an element of the offense. You can't -- it's not a mere
18 sentencing enhancement. Aprende requires a jury determination
19 and it was not charged as death with respect to Mr. Meana.

20 MS. WECKERLY: Right. No, his is substantial --

21 THE COURT: Right. But I'm just saying it's a felony
22 if it's death or substantial. It's a gross if it's not.

23 MS. WECKERLY: Okay. So --

24 THE COURT: I mean, I just -- it's never -- this
25 issue has never come up before.

1 MS. WECKERLY: No, I don't know this one. Yeah.

2 MR. WRIGHT: It's come up before for me.

3 THE COURT: Well, okay, it's come up for you. I
4 mean --

5 MR. WRIGHT: Okay. And the answer was I had to waive
6 to get to the -- to get the lesser, I had to waive the statute
7 of limitations.

8 MR. STAUDAHER: No. He's always entitled to the
9 statute.

10 THE COURT: That was a different situation.

11 MR. STAUDAHER: He's always entitled to the lesser
12 included --

13 THE COURT: Yeah. In this situation the issue is
14 that whether the State can get it when they couldn't have --
15 the idea is you couldn't have charged a gross misdemeanor by
16 way of indictment because the statute had run. That's the
17 point. But you --

18 MR. STAUDAHER: Could we have the clerk just look it
19 up and see when the first indictment was filed in this case?

20 MR. WRIGHT: In July 2010.

21 MS. STANISH: Wasn't it June something 2010?

22 MR. STAUDAHER: July what 2010?

23 THE COURT: Yeah, but this is charged as September of
24 2007, so you would have had to charge this by 2008, right?
25 It's a year for a gross; is that correct?

1 MR. STAUDAHER: No. Well --
2 THE COURT: See, you're on a misdemeanor.
3 MR. WRIGHT: I don't get it. Do you want the less?
4 THE COURT: They want the lesser.
5 MR. WRIGHT: Okay.
6 MR. STAUDAHER: We want them all.
7 MR. WRIGHT: Well, I thought we agreed -- I mean, you
8 asked us and I said, yeah, take them out.
9 MR. STAUDAHER: Yes, but I'm revisiting that.
10 THE COURT: I don't think that's really the issue in
11 this case. I mean, either they're going to think -- I mean,
12 really, do we really think this case, after 10 weeks, is going
13 to boil down to them debating whether or not hepatitis C is
14 serious or not serious?
15 MR. WRIGHT: Right. The last thing I even argue is
16 that hepatitis C --
17 MS. STANISH: Yeah, it's not an issue.
18 MR. WRIGHT: -- is a sliver --
19 MR. STAUDAHER: So we will agree to take that out --
20 THE COURT: Okay.
21 MR. STAUDAHER: And just have not guilty or
22 substantial on those counts related to the criminal neglect.
23 THE COURT: Right. I mean, really, I mean, who
24 knows, but I really don't think that's what this is going to
25 boil down to. Some people say no, hepatitis C, that's a walk

1 in the park, you know.

2 MS. STANISH: Maybe it is when you get \$2 million.

3 THE COURT: Right. You never know though. It could
4 be one person that says, oh, you know --

5 MR. SANTACROCE: I've had it. They're going to say
6 I've had it, it's not that bad.

7 MS. STANISH: Oh, I can have [inaudible] \$5 million.

8 MR. SANTACROCE: I'll take 2 1/2 million bucks.

9 (Pause in proceedings)

10 (Proceeding concluded at 5:10 p.m.)

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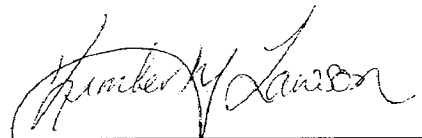
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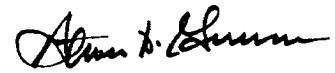
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STATE OF NEVADA,

Plaintiff

vs.

DIPAK KANTILAL DESAI,
RONALD ERNEST LAKEMAN,

Defendants

CASE NO. C265107-1,2
CASE NO. C283381-1,2
DEPT. NO. XXI

**Transcript of
Proceedings**

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 45

THURSDAY, JUNE 27, 2013

APPEARANCES:

FOR THE STATE:

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PAMELA WECKERLY, ESQ.
Chief Deputy District Attorneys

FOR DEFENDANT DESAI:

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MARGARET M. STANISH, ESQ.

FOR DEFENDANT LAKEMAN:

FREDERICK A. SANTACROCE, ESQ.

RECORDED BY: JANIE OLSEN, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

JRP TRANSCRIPTION

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1 LAS VEGAS, NEVADA, THURSDAY, JUNE 27, 2013, 9:06 A.M.

2 (Court was called to order)

3 (Outside the presence of the jury.)

4 THE COURT: All right. Excuse me. We're still
5 missing two jurors. I wanted to finish up on the last
6 remaining matters before we bring the jury in. As I said,
7 there are two jurors who are not here, so we can't start with
8 the jury anyway.

9 Ms. Weckerly, did you make all of the changes to the
10 jury instructions that we talked -- we went over the last copy
11 yesterday?

12 MS. WECKERLY: Yes, and I emailed them to everybody,
13 including the Court.

14 THE COURT: All right. And did Mr. Santacroce, Ms.
15 Stanish, did you both have an opportunity to review the jury
16 instructions with the final revisions that we had discussed?

17 MR. SANTACROCE: Yes, Your Honor.

18 THE COURT: All right.

19 MS. STANISH: Yes, Your Honor. We were just trying
20 to refresh our memory on the ultimate ruling on the
21 instruction dealing with the term petty larceny.

22 THE COURT: I thought we were pulling the grand
23 larceny instruction and we were just going to do theft under
24 250 and obtaining money under false pretenses under 250, and I
25 thought the agreement had been that that's just obvious.

JRP TRANSCRIPTION

1 I had suggested giving a lesser included, but then
2 my understanding was between the attorneys the feeling was
3 that it was just obvious, they either meet the 250 or they
4 don't meet the 250 and they could choose the appropriate
5 verdict on the verdict form. That was my understanding of how
6 we had left it yesterday afternoon.

7 MS. WECKERLY: Okay. Well, that's fine. That can
8 just be pulled out --

9 THE COURT: Okay.

10 MS. WECKERLY: -- that instruction.

11 MS. STANISH: And that was the only thing we saw,
12 Your Honor.

13 THE COURT: And I don't believe we went through and
14 numbered that in our numbering.

15 MS. WECKERLY: No, I just think it's in the -- you
16 know, the blank number. You know, it's just in the packet, so
17 it probably isn't in the Court's packet if you pulled it out.

18 THE COURT: Okay. And then you made the changes
19 onto the verdict form; correct?

20 MS. WECKERLY: I did, and I dropped it off.

21 THE COURT: All right.

22 MR. SANTACROCE: And when you're done with that,
23 there's one other matter.

24 THE COURT: I still have to go over their rights to
25 testify.

1 MR. STAUDAHER: And the State has a couple of other
2 matters, as well, Your Honor.
3 THE COURT: Okay.
4 MR. STAUDAHER: Minor matters.
5 THE COURT: All right. Did the defense receive
6 copies of the revised verdict form?
7 MS. WECKERLY: It should have been on the last email
8 that I sent in the Word format.
9 MR. SANTACROCE: Was it at 6:30 last night or
10 something?
11 MS. WECKERLY: Yes.
12 MR. SANTACROCE: Yes.
13 MS. STANISH: Yes, we received that.
14 THE COURT: Okay. The theft, the one I just was
15 handed, does not have the misdemeanor, the theft under 250,
16 and the obtaining under 250.
17 MS. WECKERLY: I think that --
18 THE COURT: Do you have a different one, Denise?
19 THE CLERK: This is what Sharry gave me.
20 THE COURT: Oh, okay. All right. So this is -- she
21 gave me a different one.
22 All right. And, Defense, your copies have the --
23 yes, okay, this is correct. It reflects what we had discussed
24 yesterday.
25 All right. Just to make sure that everyone has the

1 correct jury instructions from the completed packet that Ms.
2 Weckerly has emailed to everyone and my JEA just printed out,
3 shall we go through and number them again together?
4 MR. WRIGHT: Yes.
5 THE COURT: All right. Instruction No. 1, members
6 of the jury.
7 2, if in these instructions.
8 3, an indictment is but.
9 And, State, you've omitted the count relating to the
10 Veteran's Administration?
11 MS. WECKERLY: Yeah, correct. It just says omitted.
12 THE COURT: Okay. 4, you are here only to
13 determine.
14 5, a separate crime.
15 MR. WRIGHT: Wait. I've got it is the duty.
16 THE COURT: That is part of Instruction 3.
17 MR. WRIGHT: Okay.
18 THE COURT: Just when it was printed out it went to
19 a new page.
20 All right. So 5, a separate crime is charged.
21 6, a conspiracy is an agreement.
22 7, it is not necessary.
23 8, each member of.
24 9, evidence that.
25 10, where two or more persons.

JRP TRANSCRIPTION

1 11, mere presence.
2 12, any person who.
3 13, a person who.
4 14, you have heard.
5 MR. WRIGHT: Just a minute. I'm on 13. 14, you
6 have heard.
7 THE COURT: Everybody on the same page as the Court?
8 15, a professional caretaker.
9 16 -- 15 goes to a second page.
10 Then 16 is a certified registered nurse anesthetist.
11 17, both the reckless endangerment.
12 18, as used in these instructions.
13 19, count 25 charges.
14 20, counts 26 and 27.
15 21, if you find.
16 22, the term intent to defraud.
17 23, murder is.
18 24, malice as.
19 25, murder of the second degree.
20 26, murder in the second degree.
21 27, the second degree felony murder.
22 28, in regard to the crime.
23 29, as to an offense.
24 30, as to the element.
25 31, to constitute the crime charged.

1 32, the defendant is presumed innocent.
2 33, it is a constitutional right.
3 34, you are here to determine.
4 35, the evidence which.
5 36, the credibility or believability.
6 37, you have heard testimony.
7 38, you have heard the testimony of.
8 39, certain charts and summaries.
9 40, a witness who.
10 41, although you are to consider.
11 42, in your deliberation.
12 43, when you retire.
13 44, if during your.
14 And 45, now you will listen.
15 Is that what everyone has?
16 MS. STANISH: Yes, Your Honor. And for the record,
17 I had given your clerk a complete copy of our jury
18 instructions.
19 THE COURT: All right. All right.
20 All right, Mr. Staudaher, you indicated the State
21 had some matters.
22 MR. STAUDAHER: Yes, just a couple of items, Your
23 Honor.
24 THE COURT: All right.
25 MR. STAUDAHER: First of all, the charts that are

1 the -- I know that the charts we're talking about that are in
2 evidence, the smaller versions of those, we have larger
3 versions of those that we wish to -- I know they're not going
4 to be for --

5 THE COURT: To use as demonstrative evidence?

6 MR. STAUDAHER: And that goes back -- can go back to
7 the jury so that they can actually see a larger version of the
8 small chart, those right there, which are mirror copies of
9 them. I'm talking about the large charts that were -- that
10 would be displayed in court, so that they can have those
11 instead of all of them poring around a small version of that.
12 So we're asking --

13 THE COURT: Are you talking about the charts that
14 have the detailed information?

15 MR. STAUDAHER: Yes. Yes.

16 THE COURT: All right. Does the defense have any
17 objection to the large copies of the charts that we've been
18 using throughout the trial going back to the jury? That's the
19 breakdown by the days --

20 MR. WRIGHT: Yes.

21 THE COURT: -- and the rooms?

22 MR. WRIGHT: Yes. I don't want replaced blown-up
23 charts of the State's exhibits after we rest the case. I
24 would have blown up all of my exhibits to big charts that they
25 can carry around and prop up. The evidence is in and closed.

1 THE COURT: All right. The jury will get the
2 smaller evidence. Obviously, you can use whatever blowups,
3 whatever demonstrative evidence you want to use. And however
4 you choose to blow up or enlarge the evidence that's been
5 presented is fine.

6 MR. STAUDAHER: And the ones that the Court has
7 comply with all the orders so far --

8 THE COURT: Okay.

9 MR. STAUDAHER: -- and our corrections.

10 THE COURT: And those are all admitted --

11 MR. STAUDAHER: Yes.

12 THE COURT: -- the graphs and everything that have
13 been revised according to the Court's orders.

14 MR. STAUDAHER: With regard to -- we both, as the
15 Court had ordered earlier with regard to any PowerPoints or
16 whatever, we have lodged as Court's exhibits copies of both
17 presentations as we anticipate providing them today. Also, we
18 have provided as -- and I think those are going to be Court
19 Exhibits 24 and 27.

20 There's also Exhibit 26, Court's Exhibit 26, which
21 is the basis of the location of the seizure document related
22 to the affidavit, which was the center of discussion
23 yesterday. Although, we know that that has been removed as a
24 Court's exhibit, we wanted to have at least a record of where
25 it came from, specifically what computer it came off of, all

1 of that kind of stuff. So that has been lodged and that is
2 Exhibit 26.

3 25 --

4 THE COURT: Right. And just to reiterate so it's
5 clear in this portion of the record, the Court did find that
6 there was nothing to suggest that the police had acted
7 inappropriately or anything like that in obtaining that
8 document.

9 MR. STAUDAHER: Right. And as far as the -- early
10 in the trial there was some discussion about R&R Partners and
11 -- and some meetings and so forth and whether attorneys were
12 present and who had hired them and that kind of thing.

13 We went back through some of those records. We
14 compiled emails and so forth from the -- and this was all
15 discovered and it was provided to defense counsel. And we
16 just want to make this a Court's exhibit, a record of that,
17 which was Exhibit 25 related to the meetings and so forth. No
18 argument about it. I just want it for the appellate record in
19 case they want to review what the basis was on that issue.

20 With regard to -- well, I know that there are a
21 couple of outstanding exhibits that have -- the clerk and I
22 have been working with trying to identify that they are --
23 they're not a major issue. But two of them, I believe, are
24 Court's exhibits, or would be a Court's exhibit. One is
25 actually an admitted exhibit that apparently has gotten lost

1 in the process.

2 THE COURT: Okay. Do we --

3 MR. STAUDAHER: I've tried to reproduce that.

4 THE COURT: Okay. I'm not concerned about the

5 Court's exhibit at this point. I am concerned about the trial

6 exhibit that needs to go back to the jury.

7 MR. STAUDAHER: Yes, it's one single --

8 THE COURT: So are we missing a trial -- I mean, a

9 trial exhibit that would go back to the jury or --

10 MR. STAUDAHER: Yes.

11 THE COURT: Okay.

12 MR. STAUDAHER: There is one page of -- it's one

13 memo related to, I believe, Ms. Rushing's testimony when those

14 documents came in. The clerk has identified it to me. I'm

15 going to try and go back and find a replacement copy of it.

16 It is not something we intended to argue at all today --

17 THE COURT: Okay.

18 MR. STAUDAHER: -- in court. So I just wanted to

19 make sure the Court was aware of that. Also --

20 THE COURT: All right. Just to -- so we all

21 understand, what -- do you know what exhibit number that is?

22 THE CLERK: 202.

23 THE COURT: 202? Okay. And you'll make sure you

24 get that and get with the --

25 MR. STAUDAHER: Correct.

1 THE COURT: -- clerk and obviously show the defense
2 what it is that you're adding or putting in as the exhibit.

3 MR. STAUDAHER: Sure.

4 THE COURT: Okay.

5 MR. STAUDAHER: And it's my understanding it would
6 be a replacement of one that was already shown and admitted --

7 THE COURT: Okay.

8 MR. STAUDAHER: -- at one point. With regard to one
9 other document, there was, and I've shown this counsel, the
10 only witness who did not come in and actually physically
11 testify or present on a video demonstration -- or video
12 deposition was that of Carole Grueskin.

13 THE COURT: Ms. Grueskin.

14 MR. STAUDAHER: I displayed in opening with Court's
15 and with counsels' approval her picture, and I intend -- and
16 it may be coming up, it will come up again in closing here.
17 So I wanted to make sure that we had at least as a Court's
18 exhibit a copy of that -- that picture that would be used so
19 that we're not just displaying things to the jury that are not
20 evidence that didn't come into the case. So I've shown that
21 to both counsel. It's my understanding that they are not --

22 THE COURT: No objection --

23 MR. STAUDAHER: -- have no objection to --

24 THE COURT: -- to him displaying --

25 MR. STAUDAHER: -- it and we can --

1 THE COURT: -- the picture of Ms. Grueskin?
2 MS. STANISH: Correct, as demonstrative evidence.
3 THE COURT: Right. It won't go back to the jury.
4 It's a Court's exhibit as part of the -- a Court's exhibit, as
5 well as part of the PowerPoint that has also been made a
6 Court's exhibit.
7 Is that correct --
8 MR. STAUDAHER: That's correct, Your Honor.
9 THE COURT: -- Mr. Staudaher?
10 MR. STAUDAHER: Yes.
11 THE COURT: All right. Is that all that the state
12 needed to clear up?
13 MR. STAUDAHER: Yes.
14 THE COURT: All right. We're going to go over the
15 right to testify and the right not to testify, which we did
16 not do yesterday. I'm going to begin with Mr. Lakeman.
17 Mr. Lakeman, would you please stand. Mr. Lakeman,
18 do you understand that you have the right to take the stand
19 and testify on your own behalf? Are you aware of that right?
20 THE DEFENDANT LAKEMAN: I do. I understand.
21 THE COURT: All right. Do you understand that if
22 you choose to take the stand and testify on your own behalf,
23 the deputy district attorneys will have the opportunity to
24 cross-examination you and anything you say, whether it be in
25 response to a question on direct examination,

1 cross-examination, or a question from one of the jurors or the
2 Court will be the subject of fair comment by the deputy
3 district attorneys in their closing arguments? Do you
4 understand that?

5 THE DEFENDANT LAKEMAN: I understand.

6 THE COURT: All right. Conversely, you have the
7 right not to take the stand and testify. Should you avail
8 yourself of your right not to testify, the deputy district
9 attorneys are precluded from commenting upon this in their
10 closing arguments. Do you understand that?

11 THE DEFENDANT LAKEMAN: I understand.

12 THE COURT: All right. Also, if you choose not to
13 take the stand and testify, the Court will give an instruction
14 if asked to by your attorneys, and they have requested the
15 instruction.

16 The instruction essentially says it is the
17 constitutional right of a defendant in a criminal trial that
18 he may not be compelled to testify, thus the decision as to
19 whether or not he should testify is left to the defendant on
20 the advice and counsel of his attorney. You must not draw any
21 inference of guilt from the fact that he does not testify, nor
22 should this fact be discussed by you in your deliberations in
23 any way. That will be the instruction, and Mr. Santacroce, I
24 understand, would like that instruction given.

25 Is that correct?

1 MR. SANTACROCE: That is correct.

2 THE COURT: All right. Do you understand all of
3 that?

4 THE DEFENDANT LAKEMAN: Yes, Your Honor.

5 THE COURT: All right. Also, if you choose to take
6 the stand and testify and you've been convicted of a felony
7 crime within the past ten years or you have discharged your
8 sentence of parole, probation, or imprisonment within the past
9 ten years, the deputy district attorneys would be permitted to
10 question you about that.

11 And I don't believe that there are any prior
12 convictions as to Mr. Lakeman that could be used for
13 impeachment; is that correct?

14 MR. SANTACROCE: That's correct, Your Honor.

15 THE COURT: All right. Have you had a full and
16 ample opportunity to discuss your right to testify, as well as
17 your right not to testify with your attorney Mr. Santacroce?

18 THE DEFENDANT LAKEMAN: Yes, Your Honor.

19 THE COURT: All right. Do you have any questions
20 that you would like to ask the Court about either of these
21 rights?

22 THE DEFENDANT LAKEMAN: No, ma'am.

23 THE COURT: All right. And it is my understanding,
24 Mr. Santacroce, that your client does not wish to testify; is
25 that correct?

1 MR. SANTACROCE: That is correct.

2 THE COURT: All right. Did I cover that to your
3 satisfaction?

4 MR. SANTACROCE: Yes.

5 THE COURT: To the State's satisfaction?

6 MR. STAUDAHER: Yes, Your Honor.

7 THE COURT: All right. Thank you.

8 Mr. Lakeman, you may be seated.

9 Dr. Desai, I need you to stand up. I'm going to
10 cover the same rights that I just covered with Mr. Lakeman.
11 All right?

12 You have the right to take the stand and testify on
13 your own behalf. If you choose to take the stand and testify
14 on your own behalf, the deputy district attorneys can
15 cross-examine you and anything you say in response to any
16 questions, regardless of who asked it, whether it's your
17 attorneys, the deputy district attorneys on cross-examination,
18 the Court, or one of the jurors, will be the subject of fair
19 comment by the deputy district attorneys in their closing
20 arguments.

21 Also, if you choose to take the stand and testify
22 and you have been previously convicted of a felony crime
23 within the past ten years or discharged your sentence of
24 parole, probation, or imprisonment within the past ten year,
25 the deputy district attorneys can question you about that.

1 And I don't believe that pertains to Dr. Desai; is
2 that correct?

3 MR. STAUDAHER: That is correct, Your Honor.

4 THE COURT: All right. Conversely, you have the
5 right not to take the stand and testify. And should you
6 choose not to testify, the deputy district attorneys are
7 forbidden from commenting upon that in their closing
8 arguments.

9 Also, and I believe Mr. Wright and Ms. Stanish have
10 asked the Court to give this instruction, and the Court will
11 do it if requested, that tells the jury that it is a
12 constitutional right of a defendant in a criminal trial that
13 he may not be compelled to testify. That's the decision, as
14 to whether he should testify, is left to the defendant on the
15 advice and counsel of his attorney. You must not draw any
16 inference of guilt from the fact that he does not testify, nor
17 should this fact be discussed by you or enter into your
18 deliberations in any way. Do you understand those rights that
19 I've just gone over with you?

20 MR. WRIGHT: Yes.

21 THE COURT: Okay. And Mr. Wright, to the best of
22 your ability, you have discussed those rights with your
23 client, Dr. Desai, along with your co-counsel, Ms. Stanish; is
24 that correct?

25 MR. WRIGHT: That is correct.

1 THE COURT: All right. And I understand that Dr.
2 Desai is not going to be testifying; is that correct?

3 MR. WRIGHT: That's correct.

4 THE COURT: All right.

5 MR. WRIGHT: The [inaudible].

6 THE COURT: That's fine. Just one final thing. And
7 just, I think it's already clear on the record, but to the
8 extent that it may not be, you are requesting that the Court
9 give Instruction No. 33, inform the jury that it's the
10 constitutional right of a defendant in a criminal trial that
11 he may not be compelled to testify; is that correct?

12 MR. WRIGHT: That's correct.

13 THE COURT: All right.

14 MR. WRIGHT: Okay. Do the -- on the determination
15 not to testify, after Monday, maybe it was Tuesday -- yeah,
16 Tuesday noon when you were mentioning the -- right before the
17 noon hour, I started to address Dr. Desai about -- and I told
18 him this morning to look at you and I would like to explain
19 throughout the course of the trial what has transpired, and at
20 my instructions after jury selection commenced.

21 It is clear to me, I'm just telling you my
22 representations from me. I'm not getting into whether it's
23 right, wrong, as the Court says exaggerated or not
24 exaggerated, he has difficulty taking in if he multitasks,
25 look, listen, speak. If you just do one thing, like

1 concentrate on listening and not looking and mixing it up,
2 only listen, it goes in better was my understanding that we
3 worked out during jury selection.

4 And so he would sit either eyes closed, looking
5 down, or whatever. It's not that he can't see or anything.
6 He is simply concentrating exclusively on listening, and then
7 we would discuss it with him. Even with that, and those --
8 those efforts, like at the -- on Tuesday at the noon hour when
9 I discussed with him what had occurred here.

10 He was mixed up as to Dorothy Sims, a witness I had
11 called for the defense, you know, and why she testified that
12 syringes were used patient to patient at the clinic. Well, of
13 course, it wasn't at the endoscopy clinic. The testimony was
14 about a Maryland Parkway clinic. But the -- that didn't get
15 in by -- by -- I mean, that wasn't fully comprehended by Dr.
16 Desai.

17 And then there were discussions in the court about
18 the alternate jurors and who is still available, who may --
19 may -- who have pressing issues that may be a sitting juror,
20 may need to be excused. And all he -- he thought certain
21 jurors had been excused and replacements had taken place and
22 didn't understand. I am pointing that out because that's the
23 most recent efforts of me explaining to him and understanding
24 what was going on.

25 Based upon all of that, in my judgment, he is

1 incapable of testifying. His memory is not good for the five
2 and a half year ago past. He mixes up what has happened here
3 in the courtroom when I've talked with him. I do not have
4 transcripts of the proceedings to go over with him. It
5 probably wouldn't make any difference anyway, to tell you the
6 truth.

7 But his condition in assisting me, he's not able to
8 testify, his assistants, at times he has given me
9 misinformation is the way I would characterize it as opposed
10 to useful information that I am able to use. And essentially
11 his ability to assist has been the equivalent of him being
12 tried in absentee.

13 THE COURT: All right. Well, Mr. Wright, we're not
14 going to, you know, re-litigate the competency --

15 MR. WRIGHT: I understand.

16 THE COURT: -- issue here. More than an ample
17 record has been made on this issue before the case even was
18 transferred into this department. You know, what I noted when
19 we began, the admonishment the other day is that Dr. Desai's
20 posture was markedly different from the posture that I had
21 observed throughout the weeks of this proceeding, meaning, you
22 know, he was stoop shouldered and hanging his head in a manner
23 that I had not seen previously, and that suggested to me that
24 he was exaggerating through a physical manifestation, his
25 ability to comprehend, and that's what I said. And I still

1 believe that.

2 Now, today his posture is good. He is standing up
3 and he's looking at me. I've also, you know, looked over at
4 him in the trial. From time to time, you know, I catch his
5 eye, he catches mine, and then he immediately looks down.
6 Your -- you know, I believe that your representations that
7 you're making here today are well intentioned. But as I've
8 said in the past, your representations are only as good as the
9 information that's being imparted to you by your client.

10 And so you've made your representations on the
11 record. Again, we're not going to re-litigate this whole
12 competency issue. The Court has, in its view, made whatever
13 accommodations have been requested in terms of taking
14 recesses, you know, if we need to break so that you can confer
15 privately with your client, we've made the vestibule room
16 available so that you and Ms. Stanish can confer privately
17 with your client where we can't witness the discussions and
18 whether or not your client is communicating with you. I would
19 note that's not something that's ordinarily done in murder
20 trials or any other kind of criminal trials.

21 So I just -- I think the record is already clear as
22 to the numerous accommodations that the Court has made that
23 the Nevada Supreme Court indicated should be made, and we were
24 happy to make them. So I think -- you know, I just wanted to
25 put that on the record again, but I think that the record

1 already is abundantly clear and beyond what I've already said
2 we're not going to visit the competency issue again. I don't
3 know if the State wants to place anything on the record at
4 this time.

5 MR. STAUDAHER: No, I think I would submit it, Your
6 Honor.

7 THE COURT: All right. Is there any --

8 MR. WRIGHT: I was just -- I was just giving an
9 explanation. He was caught cold Thursday after -- before the
10 noon hour. I had not discussed with him the issue even coming
11 up. So, I mean, when he did get up he was caught by surprise.

12 THE COURT: Okay.

13 MR. WRIGHT: Thank you.

14 THE COURT: All right. The final issue, then,
15 concerns Juror No. 1. And I will give the defense the option
16 because of some of the concerns that were expressed mid-trial
17 by Juror No. 1 that had not been expressed during jury
18 selection. If you would like Juror No. 1 to be made an
19 alternate, as I previously said, the Court is not going to
20 shuffle the alternates. The alternates come in order. So the
21 next alternate would be, I believe, the gal in Chair 14.

22 MR. SANTACROCE: Your Honor, I'm going to -- if I
23 have made an objection to Ms. Pomykal in the past, I'm going
24 to withdraw it. I think her other issues are moot at this
25 point.

1 THE COURT: Right. Her other issues are moot and --
2 the health -- meaning the health issues. And as you know, we
3 made it quite plain to her, and my bailiff has been, I think,
4 attentive not just to her but to all of the jurors to make
5 sure that there were no problems that she would need a break
6 or need to see a physician or anything like that. So there
7 haven't been any further problems in that regard.

8 MR. SANTACROCE: So we will withdraw any objection
9 if we made one. I think she should sit as a regular juror.

10 THE COURT: All right. Is that also true for the
11 defense, Mr. Wright?

12 MR. WRIGHT: Yes. Knowing who the alternate is, I
13 think the medicine is worse than the cure. So --

14 THE COURT: That's your -- that's your decision. As
15 I said, you know, we knew at the outset of jury selection that
16 the alternates would be placed in numerical order and we don't
17 change the order of the alternates, unless there is some new
18 issue with a health issue or something like that with an
19 alternate.

20 Those are the only remaining matters that I can
21 recall. Is there anything that we need to address from the
22 State's perspective?

23 MR. STAUDAHER: No, Your Honor, at this time.

24 THE COURT: Is there anything else we need to
25 address from the defense perspective?

1 MR. WRIGHT: No, Your Honor.

2 THE COURT: Mr. Santacroce?

3 MR. SANTACROCE: No, Your Honor.

4 THE COURT: All right. What we're going to do, as I
5 believe all the jurors are now here, we'll take just a couple
6 of minutes for a break. And then when we come back in Kenny
7 will bring in the jury and the defense can rest, and we'll
8 proceed with reading the jury instructions.

9 (Court recessed at 9:34 a.m., until 9:41 a.m.)

10 (Inside the presence of the jury.)

11 THE COURT: All right. Court is now back in
12 session. The record should reflect the presence of the State
13 through the deputy district attorneys, the presence of the
14 defendants and their counsel, the officers of the court, and
15 the ladies and gentlemen of the jury.

16 Defense, Mr. Wright?

17 MR. WRIGHT: We rest.

18 THE COURT: All right. Thank you.

19 Mr. Santacroce?

20 MR. SANTACROCE: Defense rests.

21 THE COURT: All right. Does the State have any
22 rebuttal evidence?

23 MR. STAUDAHER: No, Your Honor.

24 THE COURT: All right. Ladies and gentlemen, that
25 concludes the presentation of evidence in this case. As I

1 told you at the outset, that is followed by the instructions
2 on the law, which I shall read to you in a few moments. After
3 the instructions on the law are read to you, the attorneys
4 have the opportunity to make their closing arguments. Because
5 the State has the burden of proving this case, they both open
6 and close the closing arguments.

7 It is important that I read to you these written
8 instructions exactly as they are written. I am precluded from
9 trying to expound upon them or clarify them in my own words in
10 any way. You will have a number of copies of these written
11 instructions back in the jury deliberation room with you so
12 that you can refer to the written instructions during your
13 deliberations. You will also have all of the exhibits that
14 were admitted into evidence back in the jury deliberation room
15 with you. The instructions are all numbered for your
16 convenience.

17 (Jury instructions read by The Court.)

18 THE COURT: Ladies and gentlemen, that concludes the
19 instructions on the law.

20 Is the State ready to proceed with their closing
21 argument?

22 MS. WECKERLY: Yes, Yes.

23 MR. WRIGHT: May we approach for a moment?

24 THE COURT: Approach?

25 MR. WRIGHT: Yes, Your Honor.

1 THE COURT: Sure.

2 (Off-record bench conference.)

3 STATE'S CLOSING ARGUMENT

4 MS. WECKERLY: Good morning. The crimes that are
5 charged that relate to patient care in this case, which are
6 performance of an act in reckless disregard of persons or
7 property or criminal neglect of patients, those are crimes
8 that are actually classified under the Nevada revised statutes
9 as crimes against the public health or crimes against public
10 safety because the County or the State has an interest in
11 ensuring that the public doesn't get reckless treatment from
12 the healthcare providers.

13 No one in this courtroom is on trial for not
14 following the highest gold standards of the CDC. The
15 Endoscopy Center of Southern Nevada certainly fell far below
16 that on several fronts. There was bad scheduling, there was
17 bad charting, patients were rushed through that were not here
18 because someone didn't get a blanket in recovery, that are not
19 here because someone had to wait a long time before their
20 procedure happened, and were not even here because of bad
21 charting or bad care overall.

22 We're here because nine people were the victims of a
23 gamble taken by the healthcare providers at the center. And
24 the people that lost the gamble were the seven named victims
25 in this case and the two other individuals that you heard

1 about that contracted hepatitis C on September 21, 2007. The
2 defendants gambled and the victims lost.

3 They fell below the lowest standard of care in
4 providing care to those individuals and they did it knowingly
5 and they did it recklessly. And when that happens the case
6 moves into a criminal realm.

7 Now, when you get into a criminal investigation,
8 things change a little bit. Things open up. With a criminal
9 investigation you no longer have the anonymity that might be
10 available in a Health District investigation. That anonymity
11 veil is pierced and people have more at stake once things are
12 out in the open.

13 Compromises people might have made you know, come to
14 light. Ethical breaches are inquired about. And maybe
15 behavior that people weren't that proud of because --
16 essentially becomes known. And criminal cases are conducted
17 on the record and out in the open, so they're different than a
18 healthcare or a Health District investigation.

19 And there's no doubt that the police were justified
20 in conducting an investigation in this case. We had nine
21 people in our community contract a communicable disease from a
22 healthcare provider, and that never, never should have
23 happened. The police investigation was thorough. It took
24 months and months.

25 They interviewed a bunch of people. They went back

1 and interviewed some if people wanted to offer additional
2 information. And that's to be expected. We shouldn't expect
3 our detectives to do any less than always interview, always
4 try to be collecting information, always be working on the
5 case. And they did that in this -- in this case.

6 Because this case sort of has two facets of
7 investigation, the healthcare investigation by the Southern
8 Nevada Health District, and the investigation conducted by the
9 police department, you will actually kind of see and assess
10 the -- the information that you know as a result of those two
11 investigations. And you're actually in a unique position in
12 this case because you see if there are any differences in what
13 people are willing to say anonymously versus what people are
14 willing to say to the police, if there's any difference at
15 all.

16 You will assess whether people are worried about
17 protecting their professional licenses, and you will be able
18 to assess if that is relevant at all. And you can weigh all
19 these motivations and all these factors of all the witnesses
20 that you heard throughout the presentation of this case.

21 Now, Ronald Lakeman and Keith Mathahs are the only
22 CRNAs who were charged criminally. They were the only CRNAs
23 who each treated a source patient, someone with known
24 hepatitis C, and they are the only CRNAs that perpetuated it
25 to the victims that you've come to know in this case. In that

1 regard they're unique among the CRNAs in terms of the lowest
2 quality of care they provided.

3 Now, Dr. Desai is the only doctor charged in the
4 case, as well. He's not being charged because he was a
5 capitalist or because he made a lot of money through his
6 clinic. He set the standards at the endoscopy center. He
7 made the environment at the endoscopy center what it was. He
8 directly advised to -- advised the CRNAs to engage in risky
9 behavior.

10 All of the treatment was done according to his
11 vision. He was in control. And there was a risk associated
12 in his methods administering healthcare. And that risk, you
13 know, ended up being very costly to nine individuals in 2007.
14 And he has to answer for that. And he's no longer able to
15 duck out of a press conference. He's in criminal court with
16 criminal charges with a jury assessing the charges against
17 him.

18 Now, when you go back to deliberate, you will have
19 all of the evidence that has been admitted in this case, and
20 it's all going to be available to you. You'll have all the
21 propofol log books. You can count up how much propofol was
22 checked out every day for the year. You'll have the procedure
23 log books. You can count up all those procedures. You'll
24 have the patient files of everybody, even the non-named
25 victims you'll have patient files.

1 And you can look at all of that evidence and go
2 through it all and make sure you understand what happened in
3 this case and make sure you understand that the -- that the
4 evidence is what we're all saying it is and you can make your
5 own assessment as to the value you assign each piece of
6 evidence.

7 Now, in terms of the procedure log books there's
8 been some discussion about how many procedures were actually
9 conducted each day, what was the count? And a lot of the
10 employees came in and said, 'wow, there were like 80 procedure
11 that day or there were 70 procedures that day.

12 And whether that is accurate, whether it was 65 and
13 they remember 70, or whether, you know, it was 82 and they
14 remember, you know, 60 really doesn't matter. The point of
15 their recollections and the point of their testimony was they
16 felt really, really busy. They felt really busy at the place.
17 They had to cut corners on their charting. They had to move
18 people through quickly, and they had concerns about how
19 quickly people were being moved throughout the clinic.

20 The second consideration with the -- with the number
21 of patients that were treated each day relates, of course, to
22 the insurance counts. With that type of clinic and that type
23 of busy practice, it seems extremely unlikely that someone is
24 doing some leisurely interview in pre-op before a patient goes
25 under the anesthesia or is spending a particularly long time

1 with a single patient in recovery. So it relates to that, as
2 well.

3 Now, you heard about a lot of poor documentation and
4 poor charting, and that certainly is reflective of the number
5 of patients that were moved through and the inability of the
6 staff to sort of keep up with the case load. And it also sort
7 of coincides with the actual experiences of the victims in
8 this place.

9 Remember Stacy Hutchison? On the -- on the day of
10 her procedure she wakes up in the recovery room and no one is
11 around her and so she gets up and gets herself dressed and
12 gets to her car before someone tells her, hey, you need to
13 come back in here. So no one was watching her terribly
14 closely.

15 Or remember Mr. Sharrieff Ziyad? He was dizzy and
16 put in a chair, you know, moved off of his gurney because
17 apparently it was needed for someone else. And so he was left
18 to sit and let the medication wear off.

19 The overall point of this evidence was to show you
20 or illustrate for you that this was an assembly line where
21 profits were important, and it was volume over patient care.
22 So the question of do the doctors who weren't charged in this
23 case bear some responsibility regarding what happened? And
24 the answer is, yes, they do. But there is limitations and
25 constraints in every type of case and it's an imperfect

1 system. So the bottom line is they will not be prosecuted for
2 their -- their share of the responsibility.

3 Now, you heard from in this case literally the
4 world's expert on hepatitis C transmission, and Dr. Alter had,
5 in my view, a personality consistent with her credentials.
6 She was -- she had a big personality. But this wasn't just a
7 CDC investigation.

8 This case was also investigated by Detective Whitely
9 who was with us during the trial, and he doesn't have
10 necessarily the same personality as Dr. Alter, but both of
11 these investigations were extremely important in terms of what
12 evidence was presented to you during this trial. The case is
13 an epidemiological investigation, but it's coupled with a
14 regular general criminal investigation, as well.

15 And the evidence came to you that way in two forms.
16 Criminal investigations are a little broader. The Metro
17 detectives interviewed all employees, not just nurses, not
18 just doctors. They interviewed GI techs, they interviewed
19 people who were working in the office area to get a broader
20 sense of what was going on at the clinic.

21 And Detective Whitely sort of had to dig through all
22 the documentation, determine what was relevant, and untangle
23 it to a certain extent. And as jurors you'll have that same
24 -- same role, in a sense. You'll be assessing the evidence,
25 fitting it into different pieces, seeing how it corresponds to

1 the crimes that are charged.

2 Another difference is, of course, in a criminal
3 investigation it's sort of presented in a multifaceted way.
4 It's presented witness by witness by witness. It's a little
5 tedious. Each witness has a tiny piece of information, and
6 you hear it sometimes in a little bit of a disjointed manner.
7 And now you're called upon to look at it cohesively, put all
8 the pieces together.

9 Now, the Southern Nevada Health District and the CDC
10 and Miriam Alter explained that their focus when they came out
11 to investigate what happened at the clinic was on public
12 health, and rightly so. That is their responsibility. They
13 are charged with the public health.

14 And they go out, they identify the problem, they try
15 to figure out what's causing, they try to stop it, and they
16 want people to get tested as soon as possible. And all of
17 those people had substantial credentials in terms of disease
18 outbreak investigation. Certainly Dr. Alter did. And the two
19 -- the two doctors from the CDC, in her view, conducted the
20 epidemiological investigation in an appropriate way.

21 So they go out and they make an assessment about the
22 mode of transmission and they get their response together from
23 a public health perspective, and that is to make this
24 notification to people. But their -- their conclusions are
25 drawn very quickly.

1 And Brian Labus from the Southern Nevada Health
2 District, he's the one who was primarily in charge of the
3 investigation locally with the CDC. And this case,
4 interestingly or fortuitously or not fortuitously, sort of
5 plucked Mr. Labus from relative anonymity. Because nine cases
6 from a single clinic is something that wouldn't happen in
7 years. I mean, they could go years without someone getting
8 hepatitis C.

9 So this was an event that was going to garner a lot
10 of media attention one way or another. But the medical
11 attention was focused on Mr. Labus. He had a lot of scrutiny
12 over his results and how he was going to -- or how he did the
13 investigation. But he would have because of that scrutiny no
14 motivation whatsoever other than protecting the public health
15 and getting it right. He knew there was going to be scrutiny.
16 He had every reason to be very careful about the conclusions
17 that he drew during his investigation as to the source of
18 transmission.

19 And all of these years later, after all of the
20 review, his conclusions are the same. And Dr. Alter reviewed
21 his work and his conclusions, and she is -- concurs with his
22 findings that it was the unsafe injection practices with the
23 propofol that caused the transmission. And you all saw Dr.
24 Alter testify. She seemed like kind of a tough grader to me,
25 and if she didn't agree with something she would certainly not

1 hold back her opinion.

2 In fact, when she was testifying on the stand, she
3 did mention one statistic Mr. Labus had in his report that she
4 thought didn't make any sense, and she said so on the stand.
5 But overall she said the investigation was appropriate and
6 that she concurred with the conclusions of the investigation.

7 Now, the -- the sort of concurrent or complimentary,
8 you know, Metro investigation started a little bit after the
9 CDC and the Health District left the clinic in 2008. And some
10 of the premises or some of the aspects of the -- of both of
11 the investigations rely on some common facts or some -- some
12 factual givens that have to be present in order for the -- in
13 order to understand the mode of transmission.

14 And one of these is that the two source patients on
15 each day, on July the 25th and September the 21st both got
16 over 100 milligrams of propofol injected into them. And the
17 reason why that's important, as we all have learned, that only
18 10 cc syringes were used at the clinic. So if those two
19 individuals got more than 100 milligrams, at least another
20 syringe or at least another dose of propofol had to have been
21 given to them from a re-accessed vial.

22 If either of those people, Mr. Rubino or Mr. Ziyad
23 had only received 100 milligrams of propofol, there wouldn't
24 necessarily be any contamination of the vial, would there?
25 Because they would pull it out, it would have all fit in one

1 syringe, it would have been injected into the patient, and
2 there would be no possible means of contamination of the vial
3 because it would never be re-accessed.

4 And this is similar, actually, to -- to saline
5 injections which have been mentioned quite a bit through this
6 trial. There is no reason to ever re-access a saline vial.
7 Once the saline -- once the vein is flushed, no one goes back
8 and reflushes it again. But with the propofol it's different
9 because during the procedures patients need to be redosed as
10 the procedure moves along.

11 The other -- another give of both investigations is
12 how the -- I guess the scientific facts of how the disease
13 itself is transmitted, that it's a blood-borne disease. And
14 so there's a limited number of ways at the endoscopy center
15 that -- that it could have been transmitted. It had to be
16 through some sort of blood transmission.

17 So first, let's talk about the scopes. The scopes
18 were certainly eliminated by the CDC. And they did what they
19 called an epidemiological comparison between different
20 procedures on people and found no distinction between those
21 who got the disease and didn't get the disease based on the
22 scope, so it was eliminated as a factor for the CDC in terms
23 of a mode of transmission.

24 Now, the Metro investigation -- and, well,
25 incidentally, though, the defense expert that you heard from

1 two days ago, he also said a scope would be a really low, low,
2 low chance of causing transmission of hepatitis C. So we may
3 -- we may get agreement on that.

4 Now, the Metro investigation is maybe more fact
5 based, maybe more common sense. If you look at the patient
6 charts on September the 21st, and I'm sure you can all see
7 that really clearly, Mr. Rubino up here is the first patient.
8 The next patient is the Lakota Quannah and he gets infected.
9 We know he gets infected that day.

10 So unless the exact same scope was used, like
11 literally pulled out of Mr. Rubino, not taken to any cleaning
12 room and immediately used on Lakota Quannah, it can't be the
13 scopes. It wouldn't have been enough time to even clean the
14 scope to use it on Mr. Meana because the timing is just so
15 short and their process took so long.

16 So it wasn't effective cleaning of the scopes. They
17 were -- these -- these individuals didn't have the scope and
18 the cleaning wouldn't have been short enough in time to have
19 been used on the same people. So that can be eliminated from
20 sort of a fact based perspective, a little bit different than
21 how the CDC analyzes things.

22 And you also know from the testimony of Jeff
23 Krueger, and the review of the records of the clinic that the
24 Medivator was actually working on the infection days and there
25 was no indication that they were doing the hand washing or any

1 of those things before. So the scopes are pretty much
2 eliminated as a source of transmission.

3 So let's talk about biopsy forceps. This was one
4 thing the CDC also eliminated. And what they did was, of
5 course, compare people who got biopsies and people who didn't
6 get biopsies and see, well, you know, is there any difference
7 in who contracted it and who didn't based on biopsy forceps,
8 which is appropriate for an epidemiological investigation.
9 And they found no connection between the use of the biopsy
10 forceps and someone contracting hepatitis C. So from an
11 epidemiological perspective, that was eliminated.

12 Now, from a police prospective or from a more, I
13 guess, common sense perspective, if you look at -- this is a
14 close up view of July the 25th. We know Mr. Sharrieff Ziyad
15 was the first patient of the day. And Michael Washington
16 isn't the next person who actually got a biopsy. If you pull
17 patient file 3 and 4 you will see and you'll have those in the
18 deliberation room that they also got a biopsy, and they were
19 treated before Michael Washington and they didn't contract
20 hepatitis C. So the biopsy forceps can be eliminated as a
21 source of transmission, as well.

22 This was Dr. Carrol's idea, a rogue employee was
23 responsible, at least it was his theory at one time, for
24 infecting the people at the clinic. This one, this idea, was
25 pretty much eliminated early on because of the genetic link

1 between the source patients on both days and the people that
2 ultimately got infected. It's sort of an impossibility that
3 someone could have gotten Mr. Rubino or Mr. Ziyad's blood and
4 randomly injected people. And the genetic relatedness
5 certainly dispels any idea that this could have been caused by
6 -- by a rogue employee.

7 So then here was the saline flush. Now, for the CDC
8 and the Southern Nevada Health District, their observations of
9 the pre-op area were enough to eliminate that as a source of
10 transmission. Because when they observed the nurses in pre-op
11 they didn't find any breach of aseptic technique. Everything
12 was done appropriately.

13 So what did the police bring to the table? What was
14 the result of the police investigation? Well, you saw and you
15 heard the testimony of Lynette Campbell. She -- the woman who
16 administered the hep-lock on several of the people who ended
17 up getting infected on September the 21st. And you heard her
18 describe step by step by step how it is that she administers
19 the hep-lock and what process she goes through.

20 You also heard her testify that she never breached
21 aseptic technique and that she never flushed the hep-locks
22 twice. And you can take -- you can, I guess, put whatever
23 weight you want as to her testimony. She was a brand new
24 nurse. This was her first job. She had every reason in the
25 world to want to do things correctly. And when she was

1 defraud means to act knowingly and with the -- if you want.

2 MS. WECKERLY: Well -- why are we -- if we're
3 incorporating all those elements into the crimes, why is this
4 instruction necessary?

5 MR. STAUDAHER: We've already defined material
6 misrepresentation in another instruction. I mean, it's
7 redundant to the instructions we have.

8 MS. STANISH: Well, I put this in connection with my
9 description of elements --

10 THE COURT: So you're fine -- you're fine with the
11 changes that have been made then, Ms. Stanish?

12 MS. STANISH: Well, no. I didn't -- you know, we had
13 previously had these intent to defraud element rejected, I
14 thought, because it wasn't in one of the statutes, and my view
15 was all of these property related offenses are fraud based and
16 therefore intent to defraud was a critical element.

17 THE COURT: I mean, here's the thing. Did we have
18 anything with intent to defraud?

19 MS. WECKERLY: In the obtaining -- in obtaining money
20 under false pretenses --

21 THE COURT: Does anyone have an objection to
22 including, To act with the specific intent to defraud means to
23 act knowingly and with the specific intent to deceive or cheat
24 someone?

25 MR. STAUDAHER: We have that.

1 MS. WECKERLY: I think we have that already.

2 THE COURT: Oh, it's already in there?

3 MS. WECKERLY: Yeah.

4 THE COURT: Okay. If it's already in there, then
5 let's not give it.

6 MS. STANISH: Right. And then just my clarification
7 was I applied it to all the --

8 THE COURT: Right. Right.

9 MS. STANISH: -- including insurance fraud.

10 THE COURT: Okay. We'll take that out.

11 You are here only to determine whether the defendants
12 are guilty or not guilty of the charges.

13 MS. WECKERLY: This is fine with the State.

14 THE COURT: Okay. We'll add this one and separate --

15 MR. SANTACROCE: Can you add in there on that, can
16 you add that language about the State must prove what's pled
17 in the indictment?

18 MS. WECKERLY: Well, then we're not okay with it.

19 THE COURT: Well, we're going to have argument about
20 that.

21 MR. SANTACROCE: All right.

22 THE COURT: Let's move on to a separate crime is
23 charged against each defendant.

24 MS. WECKERLY: That's fine. I mean, it's covered at
25 the end of the indictment instruction, but...

1 THE COURT: I think this is fine. We'll give this.

2 Statements by defendants -- oh, you know what else we
3 need in here that I didn't see; a deposition is sworn
4 testimony while the court is not in session. Do you want that
5 one or no? You are to consider the testimony given in a
6 deposition as if it were given in court, or something like
7 that. Nobody wants that? Okay.

8 MS. STANISH: We didn't want the deposition. Why
9 would we want the instruction?

10 MR. SANTACROCE: I don't want it. I didn't want to
11 give it in the first place.

12 THE COURT: Okay. Well, you read your own part of
13 the deposition.

14 Statements by defendants, you have heard testimony
15 that the defendants made certain statements.

16 MS. WECKERLY: That's fine.

17 THE COURT: All right. Testimony of witnesses
18 involving special circumstances.

19 MS. WECKERLY: We object to this one. We've given
20 the defense the one that we normally use in Nevada. Our
21 objection is on lines 16-ish and 17. In Nevada the caselaw
22 doesn't say that you give these witnesses greater caution.

23 THE COURT: What exact -- I didn't -- I don't
24 remember seeing that instruction.

25 MS. WECKERLY: It wasn't in our pack -- we brought it

1 this morning because when we saw theirs --

2 THE COURT: What is that normally? What does the
3 instruction normally say?

4 MS. WECKERLY: You've got our copy.

5 MS. STANISH: I have your only copy?

6 MS. WECKERLY: Yeah.

7 MS. STANISH: Okay. The fact that a witness was
8 given an inducement in exchange for his cooperation may be
9 considered by you only for the purpose of determining the
10 credibility of that witness. The existence of such an
11 inducement does not necessarily destroy or impair the
12 credibility of the witness. It is one of the circumstances
13 that you may take into consideration in weighing the testimony
14 of such witnesses, and it comes from James v. State.

15 MS. WECKERLY: And we didn't -- we don't have an
16 objection to listing the witnesses as they did, but --

17 THE COURT: You just want -- okay. Here's what I'm
18 willing to do, to give the defense's instruction, but with the
19 stock language that we use for the State typically. So can
20 you combine those, Ms. Weckerly?

21 MR. WRIGHT: What's an inducement?

22 THE COURT: An inducement is like a promise or a
23 benefit or something like that.

24 MR. WRIGHT: He gets a witness fee, that's an
25 inducement.

1 THE COURT: Well, and if you want to -- right.

2 MR. WRIGHT: How does that point out how you look at
3 an immunized witness? An inducement? Why don't we call them
4 what they are?

5 THE COURT: Well, if you use the language you have
6 heard testimony, received promises from the government, I
7 mean, if you list them, they know what the inducements are.
8 They know you're not talking about a witness fee.

9 MR. WRIGHT: Well, at least simply, I mean, state it
10 as it is. I mean, received promises from the government
11 they'd be immune from prosecution for their testimony.

12 MS. WECKERLY: But they didn't all get the same.

13 MR. WRIGHT: Well, call it troffer [phonetic]. Call
14 it use immunity. I don't care how you want to lipstick the
15 pig.

16 MS. STANISH: And I gave it in the disjunctive that
17 they -- that the government, that they would be immune from
18 prosecution or their testimony would not be used in any case
19 against them. And then of course Keith Mathahs is a different
20 story, so I have a separate paragraph relating to his guilty
21 plea, which I think is very important to have and not address
22 then the government's proposed instruction.

23 THE COURT: Can someone give me the government, the
24 State's proposed instruction?

25 MS. STANISH: [Complies.]

1 THE COURT: All right. Here is what the instruction
2 will be. You've heard the testimony of Keith Mathahs, who
3 pleaded guilty to offenses arising out of the same. You have
4 also heard -- second paragraph -- the first paragraph will
5 read as written by Ms. Stanish. Second paragraph will read as
6 written by Ms. Stanish.

7 Third paragraph will be the State's instruction, the
8 fact that a witness was given an inducement in exchange for
9 his cooperation may be considered by you. The existence of
10 such an inducement does not necessarily destroy or impair the
11 credibility of the witness. It is one of the circumstances
12 which you may -- so the first two paragraphs from the
13 defense's instruction, third paragraph from the State. Okay?

14 MR. WRIGHT: Yes.

15 THE COURT: Charts and summaries.

16 MS. WECKERLY: This is fine.

17 THE COURT: All right. And do defendants' --

18 MR. STAUDAHER: We're making these whichever one they
19 want.

20 THE COURT: -- decision not to testify.

21 MS. WECKERLY: Whichever one they want is fine.

22 MR. STAUDAHER: Yeah. We provided one that --

23 THE COURT: Do you want this one, or do you want the
24 right not to testify from the State?

25 MR. WRIGHT: I like ours.

1 THE COURT: You do?

2 MS. WECKERLY: That's fine.

3 MS. STANISH: I don't remember what theirs says.

4 MR. WRIGHT: So what's the State one say?

5 THE COURT: It is a constitutional right of a
6 defendant that he not be compelled to testify in a criminal
7 case, thus the decision as to whether or not he should testify
8 is left to the defendant on the advice of his attorney. You
9 should not draw any inference of guilt from the fact that he
10 does not testify, nor should this --

11 MS. STANISH: Yeah, we like that --

12 MR. SANTACROCE: I like that one.

13 MS. STANISH: Yeah, that's --

14 MR. WRIGHT: I'm glad you said --

15 MS. STANISH: That's fussier.

16 MR. WRIGHT: -- you do.

17 THE COURT: Right. I know. It's --

18 Okay. Is that everything?

19 MS. STANISH: Thank you, Your Honor.

20 THE COURT: Ah, that was so easy.

21 MS. STANISH: Yeah, it's a breeze. It only took
22 three hours.

23 MR. SANTACROCE: Just I'm not going to belabor the
24 record about the directed advisement.

25 THE COURT: Oh, yeah. You can make your record. I

1 apologize.

2 MR. SANTACROCE: But I --

3 MS. WECKERLY: I'm going to start on these, because
4 when we get an approved packet that today --

5 THE COURT: Basically what I would like you to do is
6 make all of the changes and email them to Shari, and --

7 MS. STANISH: Judge, I have a copy of mine. Can I
8 just file mine --

9 THE COURT: Sure.

10 MS. STANISH: -- for the record?

11 THE COURT: What -- there were a couple we kind of
12 held in abeyance.

13 MS. WECKERLY: Right. I'm just hoping we have a
14 final version tonight.

15 THE COURT: So does that mean we have to meet again?

16 MS. WECKERLY: Or the Court can just make the edits
17 as you want on what I give you.

18 THE COURT: It's not what I want. I'm just trying to
19 do it --

20 MS. WECKERLY: Or whatever the ruling is.

21 MR. STAUDAHER: But argument will definitely
22 need to --

23 MS. WECKERLY: We need to know kind of now what -- or
24 ahead of time what it is.

25 THE COURT: Then I'm going to make you guys come back

1 and we're going to do it in here, because there may be
2 confusion or questions, and I don't want to --

3 MR. SANTACROCE: [Inaudible.]

4 THE COURT: What's that?

5 MS. WECKERLY: All these changes.

6 THE COURT: She has a million changes to make, so.

7 MS. WECKERLY: Actually, I'm going to go while he
8 does his argument --

9 THE COURT: Go and do it, and then we'll have to
10 reconvene and number them together.

11 MR. SANTACROCE: Okay.

12 (Ms. Weckerly exits the courtroom.)

13 MR. WRIGHT: You'll just email us or call us what
14 time we're doing it.

15 THE COURT: I was just going to say, why don't we --
16 how long do you think that's going to take Ms. Weckerly, or
17 your secretary?

18 MR. STAUDAHER: It's probably going to take -- she
19 will be doing it. It will probably be, I would say a couple
20 of hours probably.

21 THE COURT: I was going to say maybe an hour.

22 MR. STAUDAHER: She may be faster than I would. Good
23 thing she's doing it, because it would be longer for me.

24 THE COURT: Because I could do it in maybe -- it's
25 not that much. Just the reason I don't want to do it myself

1 is I don't want to make a mistake or put something in there
2 that, oh, that wasn't agreed that we were going to put that in
3 there or something like that.

4 So that's why I'm reluctant to just do it myself,
5 because I want to make sure that the final packet is what
6 everybody understands the final packet to be, not what I
7 understand it to be, and then you guys get in here and say
8 after everything's all over with, ch, I thought we were
9 getting that instruction, but it wasn't in the final packet.

10 So Mr. Santacroce, you may argue.

11 MR. SANTACROCE: Well, I'm not going to argue. I'm
12 just going to set forth my position 175.381(1) allows the
13 Court to issue an advisory directive to the jury to acquit
14 defendant on certain charges. I've already made the record as
15 to what charges I wanted this instruction given; one, two,
16 five, eight, nine, ten, 11, 14, 16, 17, 18, 21, 22, 23, 24,
17 25, 26, 27, 28.

18 As to Count 1, I already talked to you about that,
19 Ziyad Sharrieff. There was no defrauding an insurance company
20 on that. It was a base plus one unit. They were entitled to
21 that. They didn't exceed what is customary. The same with
22 Michael Washington was a hundred -- this is Count 2, \$100 VA
23 payment, flat fee, everybody got it.

24 THE COURT: And the VA isn't an insurance company.
25 There's that.

1 MS. STANISH: Entitlement, good point.

2 THE COURT: What's that?

3 MS. STANISH: You're absolutely right, Your Honor.

4 It's an entitlement, it's not an insurance company. So we
5 moved to dismiss it on the grounds that it doesn't -- it's not
6 an insurance company.

7 MR. SANTACROCE: I join in that. As Carole Grueskin,
8 that's Count 21, she got 90 bucks flat fee. Count 8, Stacy
9 Hutchinson, 90 bucks, flat fee. With regard to Count 5 -- and
10 I guess I can just make a blanket argument in that all of the
11 insurance fraud claims against Mr. Mathahs should be dismissed
12 as to Mr. Lakeman. I know that the State is arguing some sort
13 of conspiracy.

14 I don't believe there was any evidence of a
15 conspiracy between Mr. Mathahs, Mr. Lakeman to defraud these
16 insurance companies with patients that Mr. Lakeman didn't even
17 see or treat. So I guess a blanket argument would be I'm
18 going to ask you to advise to acquit on all of those insurance
19 claims.

20 As well as lumping together all of Mr. Mathahs's
21 patients that were infected with hepatitis C, again, there's
22 been no offering of any proof whatsoever that Mr. Lakeman
23 conspired with Mr. Mathahs or anyone else, for that matter, to
24 inject these people and then somehow they got hepatitis C.
25 And I think that pretty much covers, in an abbreviated format,

1 the counts that I'm asking for that advisement.

2 THE COURT: Don't you think -- just I'm throwing this
3 out there. I think you make some good points, and an advisory
4 verdict can count in your favor in some ways, but it just
5 occurred to me. But in other ways, don't you think it's kind
6 of bad to get an advisory verdict on some counts, because then
7 it's like the Court is saying, well, these are wrong, but
8 these other ones, I don't know, they've got some merit here?

9 MR. SANTACROCE: Yeah, I thought about that.

10 THE COURT: Do you see what I'm saying? So on the
11 one hand it looks like, well, the Court doesn't agree with the
12 State and what they've charged, but then on the other hand it
13 looks like, well, hey, the Court is saying, yeah, maybe these
14 are good counts, these other ones.

15 MR. SANTACROCE: No. I think it's a point well
16 taken, but I would take my chances and have what I can get
17 dismissed, dismissed, and take my chances in closing argument
18 on the other ones. So rather than face 28 counts, I'd rather
19 be facing five or six. So, you know, I thought about that too
20 and I'd just take my chances.

21 I think, look, you know, some of these things there's
22 an argument to be made for, but where there's no argument,
23 come on. Why is my guy being charged with this stuff?
24 There's no proof of anything. And to be lumped together, it's
25 just not fair. He needs the advisement, Your Honor, on some

1 of those.

2 THE COURT: Mr. Staudaher.

3 MR. STAUDAHER: Well, even though the Court has ruled
4 that we don't get to count the whole part as far as the --
5 when we have to parse it out, that's what the Court's ruling
6 is essentially. With regard to the theft counts, the State
7 proceeded and asked all of these witnesses the same question.

8 If -- I think whether the jury believes it or not,
9 based on our limited ability to go forward on that portion,
10 the fact of the matter is that they wouldn't have had to pay
11 anything at all if they had been aware of the falsity of the
12 claim that was presented to them. So in that regard, at least
13 there is a -- there is evidence that's out there, a factual
14 determination that can be made by the jury as to whether or
15 not they believed that the insurance company would have been
16 obligated to pay that amount.

17 Now, this isn't talking about anything that might
18 have been resubmitted if there was some sort of dispute. This
19 is something where the false claim was paid, and if there had
20 been any falsity known by the entity, VA or otherwise, they
21 would not have paid the claim.

22 So whether the State prevails in that regard, I think
23 that's part of the argument that we're going to be made, and
24 then the jury can decide whether or not to give that credence
25 or weight, and what weight to give it as far as determination

1 of value for the theft counts.

2 The same thing goes for the two counts regarding the
3 obtaining money under false pretenses. I mean, those clearly,
4 unless the entire dollar amount is considered, they don't meet
5 the statutory requirement. The State doesn't dispute that,
6 especially in light of the Court's ruling. But if they are
7 not obligated to pay anything if there's a false -- a falsity
8 in the misrepresentation, then the entire amount could be
9 considered by the jury for determination as to guilt or
10 innocence on those charges.

11 With regard to the insurance fraud counts, even the
12 Mr. Washington count with regard to the VA, it doesn't just
13 say a private insurance company, or it has a whole listing,
14 insurer, re-insurer, producer, broker or any agent thereof, I
15 would submit to the Court that Medicare or the VA, they act in
16 that capacity.

17 THE COURT: Well, Medicare and the VA are two
18 different types of thing. Medicare/Medicaid is an insurer.

19 MS. STANISH: And I think it --

20 THE COURT: And a re-insurer, that's like a -- that's
21 complicated, but that's a term for insurance. Insurance
22 broker is somebody who sells or is authorized to sell
23 insurance. Producer could be a provider of insurance. I
24 mean, I think those are all terms that deal with insurance,
25 whether it's government funded insurance or privately funded

1 insurance.

2 MS. STANISH: And Your Honor, I think the insurance
3 fraud, the penal portion of that references Chapter 57,
4 insurance insurers. VA is not an insurer. VA is an
5 entitlement, a federal entitlement. The State of Nevada
6 doesn't have jurisdiction over that, nor does it on Medicare.
7 Medicaid's a different issue.

8 So I agree there is no -- you have the -- you
9 don't -- the State hasn't satisfied the element of a Chapter
10 57 insurer with respect to the VA.

11 MR. STAUDAHER: Your Honor, I'm going to submit on
12 that. It's -- you've heard my argument.

13 THE COURT: I just don't think by the definition it
14 fits under an -- I mean, that's my concern, which actually I
15 hadn't even thought of until Ms. Stanish brought it out when
16 she asked the person from the VA and they said by their own
17 testimony, oh, no, we're not an insurance company, we're an
18 entitlement program for veterans and we hire people to perform
19 services for us.

20 MS. STANISH: Correct.

21 THE COURT: So really the scam there, I mean, it
22 still may be in obtaining or something, because they're
23 getting more compensate -- like any worker who puts in a false
24 claim, that's really what happened. It wasn't really
25 insurance. It's more like as I said, a worker who puts in a

1 false claim saying I worked ten hours when I only worked one
2 hour or whatever.

3 MR. STAUDAHER: But still and yet, even -- I
4 understand the Court's ruling. I'm not arguing that portion
5 anymore. But as far as even the theft related to him, that
6 was included in the theft related count, at least Mr.
7 Washington.

8 Now, regardless of whether or not they're entitled to
9 more money, less money or whatever, they filed a false claim
10 to -- and it was a HCFA form just like the others, to that
11 entity and they received money as a result of that, which they
12 would not have received had the Veteran's Administration known
13 of the false information in the claim.

14 So I think that from that's -- that aspect, the jury
15 should be able to get that information and make a
16 determination factually as to whether or not they believe that
17 they were entitled to any money or a portion, and if so, what
18 portion they were entitled to and if we met our burden as far
19 as the statutory requirements are concerned. So I know the
20 Court's ruling on that.

21 With regard to the aiding and abetting, there's been
22 ample evidence that there -- in this case that there was
23 collusion, coercion -- oh, not coercion, but interaction
24 between the parties. I mean, even the testimony of Mr.
25 Lakeman sitting there trying to maneuver PacificCare patients,

1 directing the 31 minutes, all of that stuff has come out that
2 they were working together, that was the plan, that was the
3 process that took place within the organization.

4 So I think there's ample support to go to a jury on
5 both conspiracy and aiding and abetting on all of the charges,
6 because they're all liable for the same acts that they're
7 committing. Even though it may be a different person
8 committing it with a different patient, they all did it
9 together.

10 So from that standpoint, I don't believe that there's
11 any reason to have an advisory verdict, or that there's any
12 support to dismiss a charge based on a lack of aiding and
13 abetting as a theory of a liability for Mr. Lakeman regarding
14 the counts pertaining to Mr. Mathahs.

15 And I don't know if there was another issue or not.
16 I can't remember.

17 THE COURT: I think that was it. All right. Well,
18 I'm trying to figure -- I'm not sure. I mean, I think like I
19 said, yeah, you could still have a theft from the VA, but do
20 you have an insurance fraud when they're not an insurer or a
21 statutorily defined insurer? I don't know how you can on that
22 one. That's --

23 MR. STAUDAHNER: That's why I submitted on that one,
24 Your Honor.

25 THE COURT: Yeah. On the -- I mean, I think, you

1 know, on this whole conspiracy idea, regardless of how weak I
2 may consider it, I still think that's something that ought to
3 go to the jury. On the issue of, well, it's not really 250
4 and their theory that, oh, you know, well, they wouldn't have
5 paid anything --

6 You know, Mr. Staudaher, the way I remember it is
7 none of the witnesses said that, or maybe only one said it.
8 The rest of them said, oh, yeah, well, we just make them
9 refill it out, or we bounced it back --

10 MR. SANTACROCE: Exactly.

11 MR. STAUDAHER: No.

12 THE COURT: -- or we just pay it, because we have no
13 way of knowing or -- you know, I think one gal said, yeah, we
14 wouldn't pay it, but...

15 MR. STAUDAHER: Well, no, they all said if it was --
16 and I -- because we asked this question of virtually every
17 single one of them, Your Honor. That if the claim had come in
18 and they had -- and they knew that it was false would they
19 have processed, paid the claim if they knew it was false, and
20 they said no.

21 Now, they pay the claim based on their reliance in
22 good faith. Everybody has said that they relied in good
23 faith, which is the elements of obtaining money in theft, that
24 there is a representation that's false, that the entity relies
25 on that, that they are defrauded, they pay money as a result

1 of that.

2 THE COURT: The way I remember it is one came right
3 out and said it. One that Ms. Weckerly had she never asked
4 it, because my staff pointed that out at lunchtime, that oh,
5 Ms. Weckerly never asked. One gal, I can't remember which
6 gal, you asked her like five times and she just --

7 MS. STANISH: Ms. Gonzalez.

8 THE COURT: -- hung right in there and said, No, we
9 would pay that claim, we would pay that claim. I don't
10 remember who she was.

11 MR. STAUDAHER: But her basis for even saying that --

12 MS. STANISH: We're obligated to, Ms. Gonzalez.

13 MR. STAUDAHER: -- was her reliance on the good faith
14 claim that they have to rely on.

15 THE COURT: Right. But then you said, What if it was
16 false; well, we would have no way to know.

17 MR. STAUDAHER: She then came back and said that if
18 they found out there was a problem, they would have to come
19 back and revisit that, that it would trigger an audit on that
20 claim.

21 THE COURT: No. She said, well, if there was an
22 audit, but we believe them and we just pay it. And what if
23 it's false; well, we give them a chance to do it again. I
24 mean, she just wouldn't --

25 MR. SANTACROCE: Every one of them said they'd send

1 it back to resubmit it.

2 MS. STANISH: She said they're obligated to pay it.

3 THE COURT: She just wouldn't go there. I mean, I
4 almost laughed out loud because you kept trying and she just
5 wasn't getting it, you know, like where the question was
6 going, and she just hung right in there. So I'll think about
7 that issue, and I think that's it.

8 And I'm trying to figure out what to do about
9 numbering these. If we come back at like 4:00, 4:30, or I
10 don't want the Court -- I mean, I just -- something this
11 important, I don't want -- if there's a mistake in what
12 Ms. Weckerly sends me and I don't catch it, I don't want it to
13 be on the Court's shoulders that there was a mistake made and
14 somehow the Court was complicit unintentionally. I don't
15 think anyone would say -- in not catching Ms. Weckerly's
16 mistake.

17 I want the defense to be responsible to catch any
18 errors or mistakes. That's why I'm doing it this way. You
19 know, in something this significant that has been a ten-week
20 trial, we don't want there to be an error in the instructions
21 [unintelligible] two-day trial. So that's why I don't feel
22 comfortable.

23 Normally I would just do it, but as I said, I
24 don't -- if she misses something because there was so many
25 changes, I just don't want to be the one who has to catch it,

1 because I may not.

2 MR. STAUDAHER: Well, I'm going to go back and work
3 with her to the extent I can.

4 THE COURT: Okay. Do you want to come back at --

5 MR. STAUDAHER: Make sure the verdict form is
6 correct, make sure that we have everything done at least to
7 the best that we can, and then we'll forward that to counsel.
8 They can review all parts of it. Clearly the order is not
9 what we -- I mean, it's just the stuff is there.

10 THE COURT: Right.

11 MR. STAUDAHER: So we don't really have a dog in the
12 race as to how it gets ordered. I really don't care. But
13 regarding that, if they will go through what we believe is now
14 the worked-out instructions and verdict and so forth, then we
15 can make sure that we have everything to them, then we come
16 back at 4:30. Did the Court want to come back?

17 THE COURT: Yeah. 4:00 or 4:30. What gives
18 everybody enough time?

19 MR. SANTACROCE: 4:00 o'clock.

20 MS. STANISH: Let's --

21 THE COURT: Why, the bar opens at 5:00?

22 MR. SANTACROCE: Happy hour.

23 MS. STANISH: Let's wait until we get the
24 instructions, because who knows --

25 MR. STAUDAHER: Maybe we could just call. If we

1 ballpark 4:00, 4:30, what we'll do is if all the sudden
2 miraculously I get back over there and she's made all the
3 corrections, then we will let the Court know that we've got
4 them.

5 THE COURT: And then finally, one last thing before
6 we break. Is the defense fine with the proposed verdict form?

7 MS. STANISH: Oh, that's right. It looked to me
8 like --

9 MR. STAUDAHER: There are no lesser includeds in it,
10 I believe.

11 MS. STANISH: You did put a lesser included in it.

12 MR. STAUDAHER: Did we put lesser includeds?

13 THE COURT: I was surprised that they -- well.

14 MR. SANTACROCE: There was one lesser included, I
15 think.

16 THE COURT: On a misdemeanor theft?

17 MR. SANTACROCE: I think it was for gross, wasn't it?

18 MR. STAUDAHER: Well, the criminal neglect charges,
19 if they aren't substantial bodily harm, are -- the criminal
20 neglect charges is a unique animal, that if it results in
21 substantial bodily harm it's one thing, if it results in death
22 it's another thing, if it results in neither of those things
23 then it's a gross misdemeanor. So all those choices would be
24 on the verdict form as it will be brought to the jury.

25 THE COURT: And no other lesser includeds are

1 being --

2 MR. STAUDAHER: Well, we were talking about that, but
3 with regard --

4 THE COURT: Requests like theft or anything, no?

5 MR. STAUDAHER: I don't know what they're planning
6 for that. We had originally thought about that for the
7 thefts, but they've indicated to us that they're not
8 interested.

9 THE COURT: So you don't want to ask for misdemeanors
10 on those?

11 MR. WRIGHT: It's only on the theft and the
12 obtaining --

13 THE COURT: Right. Because the insurance fraud
14 doesn't allege an amount, so.

15 MR. STAUDAHER: But the criminal neglects do, because
16 the degree of what happens to the person varies on what
17 they're liable for.

18 THE COURT: So does that need to be changed, or are
19 we fine with --

20 MS. STANISH: I would take or property out. It just
21 bugs me. It's not applicable.

22 MR. STAUDAHER: On which count? On which?

23 MS. STANISH: On all of them. You guys just
24 regurgitate the statute. What property are we talking about?

25 MR. STAUDAHER: I'll see if we can do that. I

1 understand. It's just the way --

2 So anyway, we will -- the only one that would have
3 any difference on the criminal -- well, I don't -- I mean,
4 that's what we'll have as far as the criminal neglects are
5 concerned. There's only the one difference is on Mr. Meana,
6 so.

7 THE COURT: Okay. So that change can be made and --

8 MR. STAUDAHER: We'll get it to everybody.

9 THE COURT: All right. So she won't blue-back this
10 yet.

11 THE CLERK: Can I say something?

12 THE COURT: No. Yeah, go ahead.

13 THE CLERK: There's some exhibits that need to be
14 stipulated, put on the record. There's some other things. We
15 don't have to do it right now, but it has to be done before
16 [inaudible].

17 THE COURT: Let's do it now, because let's finish
18 everything but numbering the instructions, unless people are
19 just dying.

20 (Clerk confers with attorneys.)

21 MS. STANISH: Judge, we do want the misdemeanor on
22 the property offenses.

23 THE COURT: You do?

24 MS. STANISH: Yes, ma'am.

25 THE COURT: All right. Then it needs to be

1 incorporated into the instructions, if it isn't already. And
2 then there needs to be a change on the verdict form.

3 MR. STAUDAHER: So we want lesser included on
4 everything if there is a lesser included; is that what I
5 understand?

6 MR. SANTACROCE: What do we have to stipulate to?

7 MR. STAUDAHER: So that would include the criminal
8 neglect charges if they don't find the substantial bodily
9 harm, you want a lesser included on that?

10 MR. WRIGHT: No, we don't want that. Substantial
11 bodily harm we don't.

12 MS. STANISH: Well, that's what I was showing you. I
13 just didn't think that was --

14 MR. SANTACROCE: Yeah, we don't want that lesser
15 included, do we?

16 MS. STANISH: No. Correct.

17 MR. WRIGHT: Correct.

18 MR. STAUDAHER: Okay. So that was the only one, the
19 lesser included on theft related charges.

20 MR. WRIGHT: Correct.

21 MR. STAUDAHER: Okay. And she wants to ask us some
22 stuff.

23 MR. SANTACROCE: Okay. What do you need?

24 THE CLERK: [Inaudible] stipulated to these, 217,

25 214 --

1 MR. SANTACROCE: What are they?

2 THE CLERK: I'll show you after I say it on the
3 record.

4 MR. SANTACROCE: Oh, I'm sorry.

5 THE CLERK: 214A, 216, 216A, and 80R. I think
6 Mr. Staudaher and Mr. Wright stipulated, and if you do, then
7 they'll be on the list.

8 MR. STAUDAHER: These, as far as I'm concerned, I
9 don't -- this one was we traded out. That was [inaudible].

10 THE CLERK: [Inaudible] the number?

11 MR. STAUDAHER: 229, that will be a court's exhibit,
12 because that was the one we [inaudible] I think it was the
13 custodian of records, the new production that we had that came
14 from [inaudible] Minnesota. These were at the request of
15 defense. We never --

16 THE COURT RECORDER: Mr. Staudaher, I need you to
17 speak up.

18 MR. STAUDAHER: I'm sorry. These were at the request
19 of the defense. We didn't move them in, but if the defense
20 wants them in, it's fine with me.

21 THE COURT: Which ones are they?

22 MR. STAUDAHER: These would be 230, 232 and 233.
23 These were some of the amendments and contracts related to
24 some of the insurance carriers.

25 MR. WRIGHT: Do you want those in, Margaret?

1 THE COURT: Do you want those in?
2 MR. STAUDAHER: I'm not using them [inaudible].
3 THE COURT: Right.
4 MS. STANISH: What? I don't even know what we're
5 talking about.
6 THE COURT: They were introduced by the State, but
7 they're not moving them in.
8 MR. WRIGHT: 232, 3.
9 MR. STAUDAHER: Those were some of the documents that
10 you requested.
11 MS. STANISH: These?
12 MR. STAUDAHER: Yeah, these three here.
13 MS. STANISH: Oh, yeah. I think after we saw it we
14 didn't need it.
15 THE COURT: Okay. So those will be withdrawn.
16 MR. STAUDAHER: There's actually another one here. I
17 didn't see that one, 234 and 235 also.
18 MS. STANISH: Right. Because a lot of these were
19 inapplicable even.
20 THE CLERK: So these are withdrawn --
21 MS. STANISH: Mm-hmm.
22 THE CLERK: -- 233 --
23 MR. STAUDAHER: Or they can be court's exhibits, all
24 of them.
25 THE COURT: Okay.

1 THE CLERK: All right. You want court's exhibits
2 then.
3 MR. STAUDAHER: Right.
4 THE CLERK: Okay. That needs to be -- we have to
5 have a clean copy. It can't have highlighter on it, so.
6 MS. STANISH: All right. Are you going to take all
7 those things off?
8 THE CLERK: Sure. It's no problem. You've already
9 looked at those, Ms. Stanish.
10 MS. STANISH: I did. Okay.
11 MR. SANTACROCE: I'll stipulate.
12 THE CLERK: It was you. [Inaudible.]
13 MR. SANTACROCE: Santacroce stipulates to whatever
14 this is, 217.
15 MR. STAUDAHER: Do you have discrepancies anyplace
16 then?
17 THE COURT: Do you know what I like about
18 Mr. Santacroce?
19 MR. SANTACROCE: What?
20 THE COURT: You can hear him.
21 MR. SANTACROCE: I don't think if you lived with me
22 you'd like that.
23 THE CLERK: So what happened to these, 230 and 232?
24 MS. STANISH: I don't remember what they said.
25 THE COURT: Those are court's exhibits. So is that

1 everything on the exhibits?

2 MR. STAUDAHER: 202 is a memo dated 2/12 -- or 12/6
3 of '04. That was one of the Tonya Rushing documents. So let
4 me look back and see if I can find another copy of that.
5 12/6/04.

6 (Pause in proceedings)

7 MR. STAUDAHER: Veterans Affair policy payment for
8 non-VA physician and other healthcare professional services.

9 MS. STANISH: Is that the one we just saw that
10 [inaudible]?

11 MR. STAUDAHER: Veterans --

12 THE CLERK: That was 230, the Veterans Affairs
13 contract, that's the one that you saw.

14 MR. STAUDAHER: Yeah, the 231, that's this one.
15 That's that one. This one here.

16 MS. STANISH: Oh, yeah. Is that the one that's
17 [inaudible]?

18 MR. STAUDAHER: It must be.

19 MS. STANISH: Well, I don't -- I don't know because
20 the -- I don't know, is it?

21 MR. STAUDAHER: I will see if I can find that, find
22 an extra one. It's not admitted? Oh, well, then --

23 MR. SANTACROCE: Did I stipulate to what I needed to
24 stipulate to?

25 THE CLERK: You've done fine.

1 MR. STAUDAHER: I'll go look and see if I can
2 find it.
3 THE CLERK: Do you want to go to lunch?
4 MR. SANTACROCE: I've got to go to the restroom.
5 THE CLERK: Well, I didn't mean to be personal, but
6 go ahead.
7 MS. STANISH: What we're missing is this should have
8 been Exhibit [inaudible], that should have been admitted.
9 [Inaudible.] It was that stack of documents that we used to
10 Dr. Olsen.
11 MR. STAUDAHER: Yeah, I'm okay with that. Yeah,
12 that's fine.
13 MS. STANISH: So we stipulate to that being entered,
14 AA1.
15 MR. STAUDAHER: Yeah, State's okay with that.
16 MS. STANISH: Thank you. And then I thought we had
17 stipulated to this one I had taken back --
18 MR. STAUDAHER: Procedure chart, what is that?
19 MS. STANISH: That's the one that I extracted from
20 yours and we --
21 MR. STAUDAHER: Oh, yeah, we're okay.
22 MS. STANISH: -- redid it [inaudible], it's
23 [inaudible].
24 THE CLERK: We've got that one. That one's admitted.
25 MS. STANISH: And the statement of deficiency for

1 [inaudible] come in through that woman who was --

2 THE CLERK: There was an objection --

3 MS. STANISH: -- couldn't remember anything.

4 MR. STAUDAHER: Yeah. I think she -- did she
5 admit it? We objected to it, but the judge admitted it.

6 MS. STANISH: Yeah, that's admitted.

7 THE CLERK: But you say it's in?

8 MS. STANISH: Yes.

9 THE CLERK: Everybody says it's in?

10 MS. STANISH: Yep.

11 MR. WRIGHT: Yes.

12 MR. STAUDAHER: It's my belief that the judge ruled
13 it in.

14 (Pause in proceedings)

15 MR. WRIGHT: [Inaudible] did not come in.

16 MS. STANISH: 165, the State's?

17 MR. STAUDAHER: Hold on. That one did come in. That
18 was the major article.

19 MR. WRIGHT: Okay. This is in.

20 MR. STAUDAHER: That's in.

21 MR. WRIGHT: This didn't have it [inaudible].

22 MR. STAUDAHER: No, it didn't.

23 MS. STANISH: Right.

24 MR. WRIGHT: Okay.

25 MR. STAUDAHER: It was in and then you were wanting

1 it out, and then you said that didn't have it, so.

2 MR. WRIGHT: Oh, right. Right. So it's in. Okay.

3 We're all squared --

4 MS. STANISH: We're squared away now?

5 MR. WRIGHT: Yep.

6 THE CLERK: Except for that clean copy.

7 MR. STAUDAHER: It's in?

8 MS. STANISH: Yeah, we need to get that.

9 THE CLERK: Are you going to bring one in?

10 MR. WRIGHT: I'm going to bring a clean one, yeah.

11 THE CLERK: You guys and your highlighters. Just
12 trying to help the jury out.

13 MS. STANISH: We're just trying to move it along
14 [inaudible] remember all this stuff.

15 (Pause in proceedings)

16 MS. STANISH: And we're missing a chart for you. Are
17 we missing something still? I think we are. I think I have a
18 chart on my desk and --

19 THE CLERK: Bring it in.

20 MS. STANISH: I will. I'll make sure to do it.

21 MR. SANTACROCE: Are we done stipulating?

22 MS. STANISH: I'll see you this afternoon.

23 THE CLERK: Anything on your desk that looks
24 suspiciously belonging to this trial, bring it in.

25 MS. STANISH: My -- yeah, possibly. You got it. See

1 you later.

2 MR. STAUDAHER: So we got a lesser included
3 instruction for the misdemeanor.

4 MS. STANISH: Okay.

5 MR. STAUDAHER: Do you want to just look at this now?

6 ** (Court recessed at 2:06 p.m. until 3:59 p.m.)

7 (Pause in proceeding.)

8 THE COURT: All right. Has everyone had time to
9 review their packet?

10 MS. STANISH: Yes.

11 MR. WRIGHT: Yes.

12 THE COURT: All right. Oh, goodness, I left part of
13 them on my table.

14 (The Court exits the courtroom.)

15 (Pause in proceeding.)

16 THE COURT: All right. I don't know if the defense
17 had a chance to see where they wanted to put their
18 instructions, or as we go through these if we come upon a
19 place where we should put them, we'll just try to remember to
20 sneak it in. Does that work?

21 MS. WECKERLY: Sure.

22 MR. WRIGHT: Yep.

23 MS. STANISH: Yes.

24 THE COURT: All right. Before we number them, let's
25 get them all in order, and then we'll go through and number

1 them again. So one is fine. The next one, if in these
2 instructions.

3 MR. WRIGHT: I have objections to some. I mean, they
4 didn't get corrected the way we --

5 THE COURT: All right. That's what we're -- that's
6 why I made you come back.

7 MR. WRIGHT: I know. No, I'm just --

8 THE COURT: Because I didn't want --

9 MR. WRIGHT: -- telling you I didn't know how --

10 THE COURT: -- to be the one that had to find the
11 errors and remember and...

12 Okay. The second one was fine. The third one is the
13 indictment. FYI, as you probably know, these are like 90
14 pages. So thankfully, I won't be reading the indictment.

15 All right. After that we get to a conspiracy is an
16 agreement. A person -- and I'm assuming when you guys do your
17 final you're not going to have the bold lettering, that was
18 just for our convenience?

19 (No audible response.)

20 THE COURT: Okay. Does this one look fine?

21 MR. WRIGHT: Yes.

22 MS. STANISH: Yes.

23 THE COURT: Okay. It is not necessary in proving a
24 conspiracy.

25 MS. WECKERLY: There was no objection to that one

1 before.

2 THE COURT: The next one is each member of a criminal
3 conspiracy.

4 MS. WECKERLY: This one had a change.

5 THE COURT: Right. Are we fine?

6 (No audible response.)

7 THE COURT: I'm just going to turn if no one
8 jumps up. Evidence that a person --

9 MR. WRIGHT: Hang on. I'm just reading it. It's
10 just the same specific intent.

11 THE COURT: Are we fine with this one?

12 MR. WRIGHT: Same.

13 MS. STANISH: I think the word "same" should be in --

14 MR. WRIGHT: On line 7.

15 MS. STANISH: Line 7, the end of the line there, that
16 both co-conspirators must have the same specific intent to
17 commit the crime.

18 MS. WECKERLY: That wasn't in the change before, and
19 when you write commit the crime --

20 THE COURT: I think it's clear.

21 MR. WRIGHT: Or you could have different intents.
22 Object.

23 THE COURT: All right. The next one, evidence that a
24 person was in the company, are we fine with this one?

25 MS. WECKERLY: That had a change at the end.

1 THE COURT: Right.

2 MS. STANISH: That's fine.

3 THE COURT: Okay. Where two or more persons, there
4 were no changes.

5 MS. STANISH: Right.

6 THE COURT: The insurance fraud one was objected to.
7 I'm giving the statute, so I'm going to give this one.

8 MS. STANISH: I'm sorry, Your Honor. I'm wondering
9 if we need to define policy of insurance, since we have the
10 problem with the VA entitlement.

11 THE COURT: Well, I'm willing to give you were
12 advised that the Veterans Administration is not an insurer.

13 MS. STANISH: All right. That's good.

14 THE COURT: Do you want to do a separate one like
15 that?

16 MS. STANISH: That's probably a good idea.

17 THE COURT: Okay. We'll put that in after it. But
18 we're giving the statute.

19 So the next one is a person who performs, and then
20 Ms. Weckerly has added the definition of willful and wanton.

21 MS. WECKERLY: I did not add that. They wanted
22 that in.

23 THE COURT: No, no. I meant you typed it.

24 MS. WECKERLY: Yes. I meant it was their request.

25 MR. WRIGHT: I don't see --

1 THE COURT: In her administerial function of typist,
2 she...
3 MS. WECKERLY: I just wanted, you know.
4 THE COURT: Right. Okay.
5 MR. WRIGHT: Reckless was going to be added,
6 definition.
7 MS. WECKERLY: That is what the last sentence is.
8 THE COURT: The defendant must have been aware of the
9 risk of harm and disregarded it.
10 MR. WRIGHT: Okay. That's the definition of
11 reckless. Okay.
12 THE COURT: Okay. The next --
13 MS. WECKERLY: That's what we said.
14 MR. WRIGHT: Okay. I'm just asking.
15 MS. STANISH: Well, you know, my -- I thought we were
16 going to integrate --
17 THE COURT: The defense's?
18 MS. STANISH: We had reviewed for an hour before
19 meeting with you, Your Honor, my instructions, and I thought
20 we were going to merge the elements that I set forth on the
21 reckless endangerment, as well as the neglect of patient.
22 That's why we were having that discussion about where to put
23 the modifier of substantial, and I don't see --
24 MR. STAUDAHER: But not in this one. It was just
25 adding willful and wanton.

1 MR. WRIGHT: That's the next one.

2 MS. STANISH: Well, both of them, I thought. Well,
3 not to jump around though, to stay with the reckless
4 endangerment statute, I thought my page 5 was going to be
5 integrated in here.

6 THE COURT: Okay.

7 MS. WECKERLY: Well, when is...

8 THE COURT: How were we -- I don't remember.

9 MS. WECKERLY: I don't remember -- I mean, maybe I
10 missed it. But I thought our complaint was that it appeared
11 that page 5 adds elements that weren't there, but we were
12 going to define --

13 THE COURT: Right.

14 MS. WECKERLY: -- willful and wanton, and also add
15 reckless. So that's what I did. I didn't incorporate on this
16 one. I did on some of the other ones, but I mean, maybe I
17 misunderstood the direction of the Court.

18 THE COURT: Ms. Stanish, what did you think the
19 Court's --

20 MS. STANISH: You know, my understanding was that we
21 agreed with the basic proposition that criminal neglect, we
22 start with tort principles of foreseeability and the -- and
23 then add a layer of conscious awareness, consciousness of the
24 risk of what Your Honor modified to be an awareness and a
25 substantial risk, and then a conscious disregard.

1 THE COURT: I think that was in another one. I
2 think --

3 MS. WECKERLY: Our objection was that what she is
4 saying now isn't in the statute, and so that was our objection
5 to add elements.

6 MS. STANISH: Well, hardly anything is in the
7 statute.

8 MS. WECKERLY: Well, that's why we agreed to define
9 willful and wanton and put in reckless.

10 MR. WRIGHT: Okay. Well, we just -- I mean,
11 whatever. We think our Number 3 is correct. We think every
12 element in it is required and we think proximate cause is
13 required, and none of that's in the instruction. And we've
14 written an indict -- we've gone to trial in this case on an
15 indictment that is incomprehensible and mangles this little
16 tiny statute.

17 And then why we insist on obfuscation as opposed to
18 laying out the elements of an offense after eight weeks of
19 trial over evidence and everything, when we have a chance to
20 clearly correctly instruct the jury as to what the law is,
21 this just blows my mind. But I understand it's Nevada style.

22 So our objection is our instruction's correct on
23 Number 3, and the instruction of the State omits necessary
24 elements.

25 THE COURT: Well, okay. A person who performs an act

1 or neglects a duty imposed by law, okay, and it has to be a
2 willful or wanton disregard of the safety. I mean, what else
3 do you want in the instruction?

4 MR. WRIGHT: Does it hurt anybody, did it proximately
5 cause anything.

6 THE COURT: I mean --

7 MS. STANISH: The foreseeability issue.

8 MR. WRIGHT: Jeez. This is just a stupid little one
9 sentence statute that we have to flush out what the crime is.
10 I think causation is an element. That's why we spend days
11 writing our instructions to submit to the Court, and then all
12 we do is come in and grab this package submitted by the State
13 from other cases or something, and then this just becomes the
14 format that we go forward on.

15 THE COURT: Well, first of all, it comes directly
16 from the statute. And if you don't think the statute was well
17 written, well, then you don't think the statute was well
18 written. When we refer to other cases, that may mean that the
19 Supreme Court has said that this is an appropriate instruction
20 to give in other cases, which to me, I think, has some value
21 if they've said you can give the instruction.

22 So I don't really, you know, to me then to start
23 writing in new things that aren't part of the statute, I don't
24 really know why we have to do that.

25 MR. WRIGHT: Causation isn't an element then.

1 MS. STANISH: I didn't find any Nevada authority on
2 the Fan Man statute, Your Honor. That's why I had to reach
3 into other jurisdictions and just use common principles of
4 criminal law and mens rea and actus reus to come up with what
5 I proposed in Instruction No. 3. Both -- and I don't know
6 that I can explain it any more than we did for three hours
7 this morning.

8 MR. WRIGHT: So if I do a reckless act, regardless of
9 whether it proximately causes injury to anyone, I'm guilty of
10 a crime.

11 THE COURT: Well, if you do it in wanton disregard of
12 the safety of persons or property.

13 MR. WRIGHT: I can do that --

14 THE COURT: I mean, if you're doing it in your living
15 room, then no --

16 MR. WRIGHT: I committed a crime.

17 THE COURT: -- it's not a crime, because there's
18 nobody else in your living room. Unless it's, you know,
19 you're exposing your children or your family or something like
20 that, then maybe it would be a crime.

21 MR. WRIGHT: Okay. If -- I get it.

22 THE COURT: I mean, that's the crime.

23 MR. WRIGHT: There's no proximate causation.

24 MR. STAUDAHER: The portion where we have to prove
25 any damage or harm is if there is substantial bodily harm,

1 which is separate and apart from actual -- it's a separate
2 part that we have to prove, and it changes what the liability
3 is for the person if in fact there's harm that's considered
4 substantial. If no harm is considered substantial as a result
5 of it, they're still guilty of the crime by doing this and
6 putting people at risk.

7 THE COURT: For putting people in harm's way, that's
8 the point. You're putting people in harm's way. The point of
9 the legislature is to discourage the conduct. So I mean,
10 they're discouraging the conduct by criminalizing it, because
11 you don't want to have to be in the situation where people are
12 harmed to find criminal liability. So I think that it speaks
13 for itself. I think it's clear. We've defined the terms and
14 that's the instruction that we're giving.

15 Now, the next --

16 MR. WRIGHT: Okay. Can I just finish my record. So
17 the proximate causation is simply an element of the grade of
18 the offense and it's not an element of the crime?

19 THE COURT: That's how I read it.

20 MR. WRIGHT: Okay.

21 THE COURT: And then we go to the next one, which
22 goes to that part of it, which is substantial bodily harm
23 instruction.

24 MS. WECKERLY: Now, earlier you wanted, I think, the
25 substantial bodily harm and the criminal neglect before this

1 enhancement instruction?

2 THE COURT: Right. So the next one will go, go a
3 couple back, and a professional caretaker who fails to provide
4 such service should be the next instruction, correct?

5 MS. WECKERLY: Yes.

6 MR. WRIGHT: Okay. And it's --

7 THE COURT: And then Ms. Weckerly, it looks like,
8 made the corrections.

9 MS. WECKERLY: Well, that was -- I mean, that was the
10 one where you said try to piece together, so.

11 THE COURT: Oh, okay. We'll read it then.

12 MR. WRIGHT: And so it's fine that the substantial
13 bodily harm simply resulted, and so -- resulted. Not
14 proximate cause, just result, which is defined where?

15 THE COURT: In the -- all right. Well, you might
16 then get a proximate cause instruction on whether or not
17 substantial bodily harm has occurred, you must find that --

18 MS. WECKERLY: Do you want that as Number 3, on
19 substantial bodily harm?

20 THE COURT: Right. I mean --

21 MS. WECKERLY: You must determine --

22 THE COURT: Whether or not the act was the proximate
23 cause of substantial bodily harm.

24 MS. WECKERLY: Is it all right if I put criminal act,
25 because by then we've defined it?

1 THE COURT: Yes. All right. Moving on. A
2 professional caretaker, let's all read this to ourselves.

3 All right. I'm satisfied with the changes
4 Ms. Weckerly has made on the professional caretaker
5 instruction.

6 MR. WRIGHT: Okay. We object. They were going to
7 put in --

8 THE COURT: What's the objection?

9 MR. WRIGHT: They were going to put in the third,
10 fourth --

11 MS. STANISH: It was supposed to be the conscious
12 disregard.

13 MR. WRIGHT: They were going to put in the third,
14 fourth, fifth and sixth of our elements. They put in the
15 third and the fourth and left out the fifth and the sixth.

16 THE COURT: All right. How do you --

17 MS. STANISH: I think the way it's set forth in our
18 Proposed 3 is what we discussed. This is the one where Your
19 Honor moved the term substantial to modify the term harm.

20 THE COURT: Harm, as opposed to substantial risk.

21 MS. STANISH: Yes. But and, you know, to us it's
22 a -- the mental element is an awareness of the risk and a
23 conscious disregard of it, and what I'm not seeing in the
24 government's revision is that conscious disregard.

25 THE COURT: It is, because the substantial harm

1 created as a result of the negligent act or omission could
2 have been foreseen. It has to be foreseeable.

3 MS. STANISH: I don't see that as a statement of
4 conscious disregard. I see, I realize, I recognize the risk,
5 but I consciously disregard it.

6 MS. WECKERLY: Well, isn't that the danger to human
7 life was not the result of inattention, mistaken judgment,
8 misadventure?

9 MS. STANISH: I don't see -- I mean, you don't use
10 the term "conscious disregard" anywhere in here. I just, I
11 feel like it's important to flush out the mens rea, that's
12 all.

13 MR. WRIGHT: We wrote out our fifth element, the
14 defendant must have acted in conscious disregard of the --
15 conscious disregard of the risk of substantial harm and must
16 not have acted a result of inattention, mistaken judgment or
17 misadventure. You picked up our third element in your A. You
18 picked up our --

19 THE COURT: What is the statute number?

20 MS. WECKERLY: It's 202.495.

21 THE COURT: Are you sure?

22 MS. WECKERLY: Sorry.

23 MR. STAUDAHER: No.

24 MS. WECKERLY: Sorry. It's 200, sorry.

25 MS. STANISH: 202.595.

1 MS. WECKERLY: 200.495.

2 THE COURT: I think -- I mean, I think -- I don't
3 think we need to flush it out more. I think this is adequate.

4 All right. The next one, if you find beyond a --

5 MR. WRIGHT: I object. And our Number 2 is correct,
6 and two hours ago we agreed to the fifth and sixth element.

7 MS. WECKERLY: We did not agree to add that in.

8 MR. WRIGHT: We wrote them out. I wrote it out and
9 edit it as you read it out, Judge. And so don't say we
10 didn't. I don't mind that you change your mind because
11 half --

12 THE COURT: No, I'm not changing my mind. But that's
13 what I understood the changes were. Now, what are you looking
14 at that you say was changed that we didn't include in this?

15 MR. WRIGHT: The fifth -- what I called our fifth
16 element. Their --

17 THE COURT: Oh, I see what you're --

18 MR. WRIGHT: My third was put into their A. My
19 fourth was put into their C. The fifth, which they were going
20 to write in, they didn't write in.

21 MS. WECKERLY: No -- well, my -- we did not agree to
22 put in conscious disregard. My recollection is you told me to
23 try to incorporate their elements.

24 MS. STANISH: And I had an understanding, because we
25 met for an hour this morning before meeting with Your Honor,

1 that the State had agreed with us on the mens rea being an
2 awareness of a risk, and then a conscious disregard of the
3 risk with respect to both criminal neglect statutes. I
4 thought we had that fundamental agreement before we walked in
5 the court in the morning.

6 MS. WECKERLY: Well, that's what A and B cover.

7 MS. STANISH: I didn't see the conscious disregard
8 language.

9 MS. WECKERLY: Well, it's not in the statute.

10 THE COURT: Okay. What if we do this. The act or
11 omission is aggravated, reckless or gross, the defendant must
12 have been aware of the risk of the substantial harm presented
13 by his act or omission and acted with conscious disregard
14 any -- I mean, and acted despite that, or acted --

15 MR. STAUDAHER: If one says that they're aware of the
16 risk, does not that mean that they were conscious of the risk?
17 I mean --

18 MS. STANISH: But it's also kind of the election the
19 consciousness to disregard it as well.

20 MR. WRIGHT: I'm fine with the way you changed --

21 THE COURT: Well, okay. The defendant must have been
22 aware of the risk of the substantial harm presented by his act
23 or omission and acted anyway. I mean --

24 MS. STANISH: And acted in conscious disregard of it.

25 THE COURT: Is everyone fine with that? I mean,

1 that's the point, right? He acted anyway. He knew and he
2 acted. So can you make that change, Ms. Weckerly?

3 MS. WECKERLY: Yes. You want it under A?

4 THE COURT: Yeah. Just add that.

5 All right. If you find --

6 MR. STAUDAHER: Can we make sure we know what it is,
7 the wording that you want to add?

8 MS. WECKERLY: Acted in conscious disregard of it.

9 THE COURT: Right.

10 MS. WECKERLY: Okay.

11 THE COURT: All right. If you find beyond a
12 reasonable doubt, is everyone fine with this? This is the
13 substantial bodily harm one, but we were considering adding
14 proximate cause.

15 MS. WECKERLY: I thought we were adding proximate
16 cause to -- or maybe I misunderstood, of the substantial
17 bodily harm. Or we can add it here to this one too, that's
18 fine.

19 THE COURT: Well, I -- oh, maybe I'm confused. I
20 thought this was the one.

21 MR. STAUDAHER: No, this one goes through and talks
22 about what if -- they need to find beyond a reasonable doubt.

23 THE COURT: Okay. So everybody fine with this one?

24 MS. STANISH: I think I've lost you.

25 MR. WRIGHT: Me too. I'm lost.

1 MS. STANISH: Are you going to one of the ones that
2 were in the back of the --

3 THE COURT: No. I'm going straight through.

4 MR. WRIGHT: Okay. Are we talking -- is proximate
5 cause going to be an element of criminal neglect of patient,
6 or not?

7 THE COURT: No. I'm not re-writing the statute any
8 further.

9 MR. WRIGHT: Okay. And that's where we were, right?

10 THE COURT: Right.

11 MR. WRIGHT: Okay.

12 THE COURT: And then if you find beyond a reasonable
13 doubt that the defendant has committed the offense of
14 performance of an act, is everyone fine with that?

15 MS. STANISH: Yes.

16 THE COURT: Okay. The next one is the definition of
17 substantial bodily harm. The next one is theft, and --

18 MS. WECKERLY: Just on clarification, I thought on
19 the definition of substantial bodily harm you wanted us to add
20 Number 3, you must determine whether the criminal act was the
21 proximate cause of the substantial bodily harm.

22 THE COURT: Yeah, let's add that. Does that satisfy
23 the defense?

24 MR. WRIGHT: You're writing it on which, both?

25 MR. STAUDAHNER: Substantial bodily harm.

1 THE COURT: On the next, on the if you find beyond a
2 reasonable doubt that the defendant has committed the offense
3 of performance of an act in reckless disregard of persons or
4 property and/or criminal neglect of patients, you must also
5 determine whether substantial bodily harm resulted. It's the
6 long one. It's two pages.

7 MS. WECKERLY: I thought we were going to put on the
8 short one of just substantial.

9 THE COURT: Oh, okay. We can do it on the short one.

10 MS. WECKERLY: It's more room.

11 THE COURT: So how do you want to phrase that then?

12 MS. WECKERLY: You must determine whether the
13 criminal act was a proximate cause of the substantial bodily
14 harm. If you determine it was not the proximate cause, then
15 you can't find this enhancement essentially.

16 THE COURT: Okay. Something, that's fine.

17 Theft, she made the changes we agreed on. Obtaining
18 money under false pretenses, it looks like she made the
19 changes we agreed on. Intent to defraud is defined. Murder
20 is the unlawful killing, malice. What was the change on
21 murder of the second degree?

22 MR. WRIGHT: We took out that disjunctive --

23 MS. WECKERLY: They wanted the last little phrase out
24 of there.

25 THE COURT: Okay. So that changes the meaning.

1 MS. WECKERLY: You're talking about murder -- just
2 the straight murder in the second degree?

3 THE COURT: Right. And then the next one, murder in
4 the second degree is a general intent crime. The defendant
5 may be liable.

6 MS. WECKERLY: They wanted --

7 THE COURT: If the killing is understood by the
8 defendant, that's a -- I don't know that that was our change.
9 It doesn't make sense. I may have said that and it may have
10 sounded good at the time.

11 MS. WECKERLY: That's what, I think, the defense
12 wanted.

13 MR. WRIGHT: Right.

14 MS. STANISH: Yes.

15 THE COURT: Oh, I know what the mistake is. It
16 should be by a co-conspirator -- as understood by the
17 defendant should be at the end of the sentence. If the object
18 of the conspiracy is understood by the defendant. Do you see
19 what I mean?

20 MS. WECKERLY: Okay.

21 THE COURT: It's not the killing, it's the object of
22 the conspiracy that they have to understand.

23 MS. STANISH: Right.

24 MS. WECKERLY: Okay.

25 THE COURT: So that makes sense now. So if you can

1 move that to the end of line 6.

2 MS. WECKERLY: Sure. Okay. So that was the change.
3 Now that makes sense the way -- it doesn't make sense.

4 THE COURT: Then the second degree felony murder
5 rule, she's made the change. It looks fine. And then in
6 regard to the crime of second degree felony murder, it looks
7 like the changes have been made correctly.

8 And the next one, as --

9 MS. WECKERLY: I don't know how to change that one,
10 because --

11 MR. WRIGHT: Which one?

12 MS. WECKERLY: As to an offense of second degree
13 murder, because Number 1 is just a straight second degree
14 theory and Number 2 is second degree felony murder. So I
15 didn't make any change to it. I know they objected to it. I
16 just --

17 THE COURT: I don't know how to change it either, so.

18 MR. WRIGHT: Number 2 -- number 2 -- the Number 1
19 reads correct. The Number 2 there should read, The
20 involuntary killing occurs in the commission of an unlawful
21 act which in its consequences naturally tends to take the life
22 of a human being.

23 MS. WECKERLY: Well, I don't mind switching 2 to like
24 a second degree felony murder theory, because this is the
25 unanimity essentially. So that would clearly define for the

1 jury what --

2 MR. WRIGHT: Well, we took out this unintentional
3 killing with a felonious intent component and left in --

4 THE COURT: Well, I think we did because I -- I
5 didn't know what you wanted. I can't figure out how to write
6 it, and I said maybe to Ms. Weckerly -- well. So what is it
7 that I don't --

8 MR. WRIGHT: Well, isn't the Number 1 in this
9 instruction, isn't that felony murder?

10 MS. WECKERLY: No, that's -- that's second.

11 THE COURT: That's second.

12 MR. WRIGHT: Okay.

13 MS. WECKERLY: And two is supposed to be felony
14 murder. I don't mind labeling it as second degree felony
15 murder so it's simpler.

16 MR. WRIGHT: Well, then, I mean, if --

17 MS. WECKERLY: I mean, all this is, is the unanimity,
18 so.

19 MR. WRIGHT: Okay. But it's throwing back in this
20 felonious intent.

21 THE COURT: Well, that's --

22 MR. WRIGHT: An unintentional killing with felonious
23 intent. I could do a CTR violation and there's a killing, and
24 I'm -- it's second degree murder. This is preposterous.

25 MR. STAUDAHER: But the second degree murder we then

1 define with the specific elements that are required, which is
2 the causal connection, the inherently dangerous felony.

3 THE COURT: All right. How about this. You know,
4 well, it's clear. How about just taking them both out? As to
5 an offense of second degree murder, although your verdict must
6 be unanimous as to the offense, you do not have to agree on
7 the theory. Therefore even if you cannot agree on the theory,
8 so long as all of you agree that the evidence establishes
9 defendant's guilt beyond a reasonable doubt of murder in the
10 second degree.

11 MS. WECKERLY: That's fine.

12 THE COURT: Is everyone fine with just taking the two
13 subparts out?

14 MS. WECKERLY: Sure.

15 THE COURT: I think that's clearer than --

16 MS. STANISH: Yeah, that's better.

17 MR. WRIGHT: Yep. Yes.

18 THE COURT: Okay.

19 MS. STANISH: It's correct.

20 THE COURT: So that change will be made.

21 Then the next are kind of the stocks. Constitute the
22 crime charged, defendant's presumed innocent. I like to put
23 the Fifth Amendment instruction at that point. It is a
24 constitutional right, I usually put that by the reasonable
25 doubt instruction. Is everyone fine with that?

1 MS. WECKERLY: Yes.

2 MR. WRIGHT: Yes.

3 MS. WECKERLY: But is it before or after?

4 THE COURT: Either way.

5 MS. WECKERLY: Okay. I just didn't know where the
6 order.

7 THE COURT: I don't care. I mean, put it after.

8 All right. The next is you are here to determine
9 whether each of the defendants is guilty or not guilty, so
10 that change was made. The direct and circumstantial, that's
11 fine. Credibility or believability of a witness. A witness
12 who has special knowledge. Although you are to consider.

13 The next one, in your deliberation you may not
14 discuss or consider the subject of punishment. Is everyone
15 fine with this instruction as changed? I would just add of
16 whether each defendant is guilty or not guilty of the crimes
17 charged.

18 MR. WRIGHT: Yep.

19 THE COURT: Okay. So when you retire to consider
20 your verdict. It's fine. If during your deliberation. Now
21 you will listen.

22 All right. Now we're going to insert the defendant's
23 instructions. All right. The first one is mere presence at
24 the scene of a crime. I would suggest after the conspiracy
25 instructions.

1 MS. WECKERLY: Okay. Yeah, I didn't know if they
2 still wanted that or not, but that's fine, so.

3 THE COURT: All right. I would, if I were them. Do
4 you want the mere presence is --

5 MR. SANTACROCE: Absolutely.

6 MR. WRIGHT: Yes.

7 THE COURT: All right.

8 MS. WECKERLY: So is that after where two or more
9 persons, or --

10 THE COURT: I would put --

11 MS. STANISH: I think it's applicable to all the
12 offenses, so right at the end of that --

13 MS. WECKERLY: But that's right before -- if you put
14 it right after that, that's right before we --

15 MS. STANISH: Right. Right.

16 MS. WECKERLY: -- go into the --

17 THE COURT: Yeah. I would put it after where two or
18 more persons, I'd put the mere presence.

19 Okay. And then as to the element of the cause of
20 death, I would obviously put at the end of the murder
21 instruction.

22 MS. WECKERLY: This was the one they objected to. We
23 had two paragraphs before. And these are changes that you
24 told me to make, so it was only the first paragraph
25 essentially. I'm just letting them know that that was one

1 they objected to before.

2 MS. STANISH: See, I think you're adding to the
3 statute. You're rewriting the statute.

4 THE COURT: I would put -- just put that at -- I'm
5 suggesting placing that at the end of all of the murder
6 instructions.

7 MS. WECKERLY: That's fine. I just have to find
8 that.

9 THE COURT: Is the defense fine with that?

10 MR. SANTACROCE: Yes.

11 THE COURT: All right. The next one is you have
12 heard testimony about civil litigation stemming from the facts
13 of this case. I would put that before --

14 MS. STANISH: Just for the record, we had objected
15 and continue to object to the element of the cause of death
16 with the at least materially contributed and accelerated the
17 death. Just, you know, we already discussed our objection.
18 We just want to reaffirm it.

19 THE COURT: Okay. I'm on the you have heard
20 testimony about civil litigation. I would put that in front
21 of the stock instructions to constitute the crime charged.

22 MS. STANISH: I thought it might be appropriate to
23 put this in front of the criminal neglect statutes, because I
24 have this real concern --

25 THE COURT: Okay. We can do that. I'm --

1 MS. STANISH: -- that they're going to get --
2 THE COURT: I'm fine with --
3 MS. STANISH: -- get mixed up with tort concepts.
4 THE COURT: So you want this one to go in front of a
5 professional caretaker?
6 MS. STANISH: Yes.
7 THE COURT: Okay. And then the next one is both the
8 reckless endangerment and criminal neglect of patient charges.
9 MS. STANISH: That should probably go --
10 THE COURT: At the end of these.
11 MS. STANISH: -- with the neglect as well, at the end
12 of the two neglect.
13 THE COURT: All right. I would put that before the
14 substantial bodily harm. Are you fine with that?
15 MS. WECKERLY: Yeah. Do you mean the definition one
16 or the finding of the enhancement one? The long one or the
17 short one?
18 THE COURT: Either one. I mean, I'd say both.
19 Defense, where do you want it?
20 MS. STANISH: I can't even keep up with this because
21 these pages aren't numbered. I think it's appropriate that it
22 goes behind whatever the last neglect instruction may be.
23 THE COURT: Okay. I was going to suggest putting it
24 behind a professional caretaker and the four elements, then
25 put both the reckless endangerment, and then it goes to if you

1 find beyond a reasonable doubt that the defendant has
2 committed, and then the substantial bodily harm instructions.
3 Is everyone fine with that placement?

4 MR. SANTACROCE: Yes.

5 MS. STANISH: Yes.

6 THE COURT: All right. The next one is you are here
7 only to determine whether the defendants are guilty or not
8 guilty of the charges in the indictment. The defendants are
9 not on trial for any other conduct or offenses not charged in
10 the indictment. Do you want that towards the end, or do you
11 want that in the beginning?

12 MS. STANISH: I think all that stuff goes more
13 appropriately in the beginning.

14 MS. WECKERLY: It could be after --

15 MS. STANISH: Because don't -- it could go wherever
16 your --

17 THE COURT: After the indictment?

18 MS. WECKERLY: Yeah, because in the -- the very end
19 of the indictment says, you know --

20 THE COURT: It is the duty of the jury to apply the
21 rules of law to the facts as contained in this indictment, and
22 from that, that --

23 MS. WECKERLY: Well, and it also says, you know, each
24 defendant separately in each count.

25 THE COURT: Right. So I think then a separate crime

1 is charged should be next. Oh, okay. Let's do these two
2 together. You are only here to determine whether the
3 defendants are guilty or not guilty, and then the next one
4 should be a separate crime is charged against each defendant.
5 The charges have been joined for trial. You must consider and
6 decide the case of each defendant.

7 MS. WECKERLY: Okay.

8 THE COURT: Where would you like the one you have
9 heard testimony that the defendants made certain statements?

10 MS. STANISH: I think that one, the following one and
11 the one we have on Nancy Sampson --

12 THE COURT: Keith Mathahs?

13 MS. STANISH: -- and the -- those next three, those
14 all deal with witness credibility issues.

15 THE COURT: Right.

16 MS. STANISH: So I would plop it in with those.

17 THE COURT: The credibility or believability of a
18 witness?

19 MS. STANISH: Right.

20 THE COURT: Is that towards the end?

21 MS. STANISH: I think it is.

22 THE COURT: I don't remember that one.

23 MS. STANISH: Oh, here. I --

24 MS. WECKERLY: It's there.

25 MS. STANISH: Yeah. I see the -- it should go right

1 after that.

2 MS. WECKERLY: It's like five after the union of, you
3 know, joint operation.

4 MS. STANISH: I -- put it right after your the
5 credibility and believability of witnesses.

6 THE COURT: Where is that in the front of that?

7 MS. STANISH: You know, I -- it's towards the end.

8 MS. WECKERLY: It's towards the back. It's probably
9 like the fifth one from the verdict form.

10 MS. STANISH: It's right -- yeah.

11 THE COURT: Okay. So we'll put after the credibility
12 or believability of a witness, we'll go with the you have
13 heard testimony the defendants made certain statements, then
14 you have heard the testimony of Keith Mathahs, then certain
15 charts and summaries, then the expert witness instruction.

16 MS. STANISH: Correct.

17 THE COURT: Where do you want a certified registered
18 nurse anesthetist?

19 MR. SANTACROCE: In the beginning.

20 THE COURT: Let's do that by the professional
21 negligence ones.

22 MS. STANISH: Makes sense.

23 THE COURT: All right. We'll put it after the
24 professional caretaker one, how's that?

25 MR. SANTACROCE: Good.

1 THE COURT: And then if you find beyond a reasonable
2 doubt that the defendant committed theft and/or obtaining
3 money under false pretenses, then you must make a
4 determination, so that will go right after the theft and
5 obtaining instructions. So that will go after -- that will go
6 before intent to defraud and after the theft in obtaining.
7 And why do we have a larceny instruction?

8 MS. WECKERLY: Because that's the lesser.

9 MR. STAUDAHER: The lesser included that was
10 requested.

11 MS. WECKERLY: I thought they wanted that.

12 THE COURT: Okay. They didn't want a petty theft?

13 MS. STANISH: Yeah, I wouldn't have called it --

14 MR. STAUDAHER: That's what it is. It's --

15 MS. STANISH: -- larceny.

16 MR. STAUDAHER: It defines that in -- if you read the
17 whole thing, it defines that the value of the goods with grand
18 larceny are --

19 THE COURT: Yeah, but you could have just a petty
20 theft.

21 MS. STANISH: I think that's clearer for the jury,
22 what Your Honor is suggesting.

23 MR. SANTACROCE: Yes, because this has language of
24 grand larceny.

25 MS. STANISH: It had larceny.

1 THE COURT: Shouldn't it just be, you know, just a
2 regular lesser included, the crime of -- the crime of felony
3 theft includes the lesser included theft of petty theft. If
4 you find beyond a reasonable doubt that the value of the money
5 or property taken is \$250 or more, then the appropriate
6 verdict is theft, parentheses, felony. If -- or, you know, if
7 12 or more of you -- if 12 of you cannot agree that that is
8 the appropriate verdict, but 12 of you can agree that the
9 crime of theft was committed, but the value of the property
10 taken was less than \$250, then the appropriate verdict is
11 petty theft, or something like that?

12 MS. STANISH: Yeah. I think you should use the
13 theft, because it's theft by misrepresentation.

14 THE COURT: So can you just do the --

15 MS. WECKERLY: Okay.

16 THE COURT: And that should also be for the obtaining
17 money.

18 MS. WECKERLY: Right. That's what that other one
19 says.

20 THE COURT: Okay.

21 MR. STAUDAHNER: The other one was just saying that
22 they have to make a value determination.

23 THE COURT: Right. Basically the idea is, you know,
24 if 12 or more -- I keep saying or more. If 12 of you
25 unanimously agree that theft, the crime of -- you know, theft

1 was committed and the value of the property taken was \$250 or
2 more, then the appropriate verdict is theft. If -- you
3 know --

4 MR. STAUDAHER: Do we even need that instruction?

5 MS. WECKERLY: Do we need this one?

6 MS. STANISH: Yeah, I was going to say maybe we
7 just --

8 THE COURT: Yeah. No, I would take this out, but if,
9 you know, 12 of you agree that theft was not committed, was
10 committed but 12 don't agree that it was over 250, but 12 do
11 agree that it was theft less than 250, then you are instructed
12 that the appropriate verdict is petty theft.

13 MR. STAUDAHER: Well, we do have -- we don't have
14 the 12 member, but we have that instruction actually.

15 THE COURT: Okay. So we may not need this at all.

16 MS. WECKERLY: Right.

17 MR. STAUDAHER: Correct.

18 THE COURT: Okay. Now, shall we -- shall we number
19 and make sure we're all on the same -- the same order.

20 MR. STAUDAHER: As far as the indictment and so
21 forth, has the Court ruled yet on what the Court's going to do
22 as far as counts and what counts we are going to be arguing
23 and not arguing?

24 THE COURT: You can argue all of them, and the only
25 advisory verdict that they're going to get, it is your advice

1 that the Veterans Administration is not an insurance provider
2 or an insurer --

3 MS. STANISH: Under Nevada law.

4 THE COURT: -- as -- under Nevada law, or as defined
5 by Nevada statutes, or something like that.

6 MR. STAUDAHER: So it's okay to argue as I argued
7 earlier then?

8 THE COURT: Yeah. Do whatever. That's fine. That's
9 all -- so they all stay in. I'm not just -- I don't have the
10 authority to dismiss any count, so that's the best of an
11 advisory verdict you're going to get. So Mr. Staudaher,
12 you're free to argue whatever you want.

13 MR. STAUDAHER: I just wanted to be clear on that.

14 THE COURT: Right.

15 MR. STAUDAHER: Because I didn't want to do something
16 that's wrong.

17 THE COURT: You're still free to argue whatever.
18 It's just I'm telling them it's not an insurer. The rest of
19 your theft stuff, you can argue whatever. Assuming, you know,
20 conforming to the evidence and the instructions.

21 MR. STAUDAHER: Your Honor, based on that ruling, I
22 think we're going to withdraw the insurance count related to
23 Michael Washington then, because that's the VA --

24 THE COURT: Okay. So you just want to delete that
25 from the indictment?

1 good with this?

2 MS. STANISH: I'm still -- I wish these were
3 numbered. I'm trying to find where we are.

4 MS. WECKERLY: You can't number them because they may
5 not be in this one.

6 MS. STANISH: I'm not finding it.

7 THE COURT: Just stay with me and then just turn your
8 pages as I turn them.

9 MS. STANISH: You read faster than me.
10 Where are we, do you know?

11 MR. WRIGHT: Theft, I --

12 MS. WECKERLY: Any person who without authority --

13 MR. WRIGHT: The --

14 MS. STANISH: Got it.

15 MR. WRIGHT: I have problems with the aggregation of
16 the amounts.

17 THE COURT: Well, and they're allowed to do it, so.

18 MR. WRIGHT: Not between counts.

19 THE COURT: Not between counts, but within a single
20 count.

21 MR. WRIGHT: Well, there isn't anything to aggregate.

22 THE COURT: Yeah, there is. There's the one count
23 where they --

24 MR. STAUDAHER: The theft count.

25 THE COURT: Yeah, and they put everybody in together.

1 MR. WRIGHT: Oh, does this apply only to theft?
2 THE COURT: Yeah.
3 MS. STANISH: Yeah, that's not clear.
4 MS. WECKERLY: Well, it's in the theft instruction.
5 MR. WRIGHT: Okay. Well, I want it to say --
6 THE COURT: Is guilty of --
7 MR. WRIGHT: -- this applies only to count...
8 MS. STANISH: Yeah. That's how I like doing my
9 instructions, to specify to the jury --
10 MR. WRIGHT: This only applies to one count.
11 MS. STANISH: -- what count we're talking about.
12 Because there's so many counts here and you've taken, you
13 know, the conduct of larceny and charged half a dozen
14 different ways what have you. But let them know what we're
15 talking about, what count.
16 THE COURT: What if we just put -- I mean, it says,
17 Is guilty of theft. If we capitalize it or put it in block
18 lettering or something like that, I think that that makes it
19 clear.
20 MS. WECKERLY: Sure.
21 MR. WRIGHT: I want them to know they can't aggregate
22 the amounts in the other count.
23 MS. WECKERLY: There is no aggregation in the others
24 alleged. This is the only one where it's aggregated.
25 MR. WRIGHT: We act like the jury's smart.

1 MS. WECKERLY: But I'm just saying like they couldn't
2 aggregate in the other ones because it's only one claim.

3 MR. WRIGHT: Well, they could total up all of it and
4 then convict on each individual one.

5 MR. SANTACROCE: And I don't like highlighting or
6 bolding the word "theft."

7 THE COURT: Oh, all right. I was trying to help you.

8 MR. WRIGHT: Well, what's the theft --

9 MR. SANTACROCE: Can't we just put it -- reference
10 the count?

11 MR. WRIGHT: What's the theft count?

12 THE MARSHAL: Can we talk one at a time, please.

13 MR. WRIGHT: I'll tell you the number regarding the
14 theft count.

15 MR. STAUDAHER: Twenty-five.

16 MR. SANTACROCE: The theft count is --

17 MR. WRIGHT: Twenty-five.

18 MR. SANTACROCE: Of the criminal indictment.

19 THE COURT: Count 25 of the criminal indictment
20 charges theft, period. Any person who without lawful
21 authority knowingly obtains, blah, blah, blah, is guilty of
22 theft. Then, Amounts involved in thefts committed pursuant to
23 a scheme or continuing course of conduct, whether from one or
24 more persons, may be aggregated in determining if the offense
25 has been committed.

1 MR. WRIGHT: Okay. And that's true only for the ones
2 named in the indictment in the theft count.

3 THE COURT: Right.

4 MR. WRIGHT: You can't aggregate --

5 THE COURT: Right. Maybe aggregated within a single
6 count, do you want that?

7 MR. SANTACROCE: Sure.

8 THE COURT: Is that what you want, Mr. Wright?

9 MR. WRIGHT: Yes. I don't want them --

10 THE COURT: Okay. That's fine.

11 MR. WRIGHT: -- adding --

12 THE COURT: Okay. We'll add, may be aggregated
13 within a single count.

14 MR. SANTACROCE: And I like the beginning language
15 that you added too.

16 THE COURT: All right. Then that's fine.

17 MS. STANISH: Sorry, Judge. On my draft, page 10, I
18 know it's not in the statute, but the caselaw refers to
19 detrimental reliance as an element. So I cited the Watson
20 case there and broke down -- I mean, this is theft by
21 misrepresentation as it's charged. And so I broke it down
22 according to what's set forth in Watson. And I did add that,
23 you know, to wit description, which I know you've already
24 rejected, but --

25 THE COURT: No. I never rejected the to wit.

1 MS. STANISH: Oh, okay.

2 THE COURT: I don't know what you're talking about.

3 MS. STANISH: Okay.

4 THE COURT: I never said that.

5 MS. STANISH: Okay. I misunderstood you.

6 THE COURT: If I said it, I didn't intend to mean
7 that. I don't believe I said it. State.

8 MS. WECKERLY: I'm not sure what they're trying to
9 add now.

10 THE COURT: They're trying to add --

11 MS. STANISH: The fourth element.

12 THE COURT: Well, it says, Is instrumental.

13 MS. STANISH: A person relied on the material
14 misrepresentation, materiality being one element and
15 detrimental reliance being the fourth.

16 THE COURT: You've already got --

17 MS. STANISH: I didn't think it was in the
18 government's instruction.

19 MS. WECKERLY: Well, we object to that. It's not in
20 the statute.

21 MS. STANISH: It's caselaw. You can have judicially
22 created elements, and I think we do.

23 THE COURT: Well, no. It says, Is instrumental in
24 causing the transfer, which means that they had to have relied
25 on the representation. I think you can argue this,

1 Ms. Stanish, from is instrumental. It has to have been
2 instrumental.

3 MS. STANISH: You know, I just took the elements from
4 Watson, Your Honor.

5 THE COURT: So you want to use -- I don't care.
6 State, do you care?

7 MS. WECKERLY: Well, so it will read when made, or
8 material representation means any representation or statement
9 made past, present or future which is false and which is
10 relied upon in causing the transfer, instead of how the
11 statute reads?

12 MS. STANISH: Is material misrepresentation a
13 statutorily defined term?

14 MS. WECKERLY: Yes.

15 THE COURT: Yeah. I mean, it says, Is instrumental,
16 which means you had to have relied on it.

17 MS. WECKERLY: Right. So --

18 MS. STANISH: You know, I'll defer to Your Honor.

19 THE COURT: So I mean, you can argue that and they
20 can't argue that they didn't rely on it and you can say
21 instrumental. That means they relied on it. So I think we're
22 fine there.

23 Every person who knowingly and designedly by any
24 false pretenses. This is the obtaining money under false
25 pretenses. Do you want to also add whatever we added for the

1 theft statute?

2 MR. SANTACROCE: The count.

3 THE COURT: Yeah. What did I say before?

4 MR. SANTACROCE: You said count whatever it is of the
5 criminal indictment --

6 THE COURT: Of the criminal indictment charged the
7 crime of obtaining money under false pretenses.

8 MR. STAUDAHER: Counts 26 and 27.

9 THE COURT: All right. Every person who knowingly
10 and designedly. Okay. So we're fine with that.

11 MS. STANISH: The obtaining money has to have a
12 materiality element.

13 THE COURT: Where's my -- oh, you hid them from me.

14 THE MARSHAL: I'm sorry, Judge.

15 MR. STAUDAHER: This is straight out of the statute
16 and it's the elements are listed specifically. Intent to
17 defraud, false representation, a reliance on representation
18 and defrauding, actual defrauding. Those have to be in there.
19 I know that.

20 THE COURT: Is this really the day, Ms. Stanish, that
21 I have to rewrite all of the criminal law in Nevada because
22 it's poorly written?

23 MS. STANISH: Yes. I think materiality --

24 MR. WRIGHT: Hopefully, because once we do it, it
25 will all be good.

1 THE COURT: Nobody else will use it.

2 MS. STANISH: I mean, I think it's -- I think a
3 false -- the false pretense must be material. Materiality is
4 important to larceny and theft, and I -- you know, I know the
5 Nevada law doesn't -- statutes don't say a lot of things, but
6 I believe materiality is when you're dealing with obtaining
7 money by way of false pretenses, the false pretense must be
8 material.

9 THE COURT: State.

10 MS. STANISH: And it's common law.

11 MS. WECKERLY: We like the instruction as written --

12 MS. STANISH: And I don't.

13 MS. WECKERLY: -- because it tracks the statute. And
14 it contains the elements clearly that have to be shown.

15 THE COURT: Well, it has to be reliance, so it kind
16 of incorporates materiality.

17 MS. STANISH: You know, it's funny, Your Honor,
18 because when I asked for reliance on the previous statute, I
19 don't get it. When it happens to be in the statute --

20 MR. STAUDAHER: Well, they're different statutes.

21 MS. STANISH: -- on obtaining --

22 MR. STAUDAHER: And they're different elements in
23 these statutes.

24 THE COURT: It's a different statute. To me it's the
25 same thing and they can only convict him of one thing, but...

1 MS. STANISH: I know it's [inaudible].
2 THE COURT: They're allowed to charge alternatively.
3 MR. STAUDAHER: No. This isn't an alternative
4 charge. The individuals in these counts are not included in
5 the theft count.
6 THE COURT: Oh, okay. So it's -- it is different.
7 MR. STAUDAHER: Yes, it is.
8 MS. STANISH: Correct. And we did request that Your
9 Honor do an advisory acquittal on this, because these two do
10 not meet the threshold by any standard of the 250.
11 THE COURT: All right. Well, we're going to give the
12 instruction as written with the addition of counts blah, blah,
13 blah and blah, blah, blah of the indictment charge, obtaining
14 money under false pretenses.
15 MR. WRIGHT: Materiality is still an element.
16 Scalia's right.
17 THE COURT: Well, don't you think that's contained
18 in --
19 MR. WRIGHT: No. I think --
20 THE COURT: -- reliance?
21 MR. WRIGHT: No.
22 MS. WECKERLY: The next instruction on intent to
23 defraud --
24 THE COURT: Right.
25 MS. WECKERLY: -- says, By gaining some material

1 advantage over him or to induce him or such a person to part
2 with property. I think that covers the concept.

3 THE COURT: Do you -- everybody good with the term
4 "intent to defraud"?

5 MS. STANISH: Where in your body of instruction is --
6 are you using the term intent to defraud? Is it in all of
7 them?

8 MS. WECKERLY: That's how you define Number 1, for
9 obtaining money under false pretenses.

10 MS. STANISH: Okay. I see it in the obtaining, and I
11 see it -- I don't see it --

12 THE COURT: Are we fine with this definition?

13 MR. SANTACROCE: This comes out of caselaw
14 [inaudible]. Is that what I understand?

15 MS. STANISH: Yeah, we're fine with it.

16 THE COURT: Okay. How about a false pretense is
17 defined as a representation of some fact or circumstances?

18 MR. WRIGHT: I don't like that representation may be
19 implied from a conduct.

20 MS. STANISH: Yeah, you know, we have -- this is
21 really a false statement on the insurance claim 1500.

22 THE COURT: Do you want to just delete this then?

23 MS. STANISH: Yes. It's so -- it has -- it has
24 things that are totally inapplicable.

25 MR. STAUDAHER: Delete the whole instruction?

1 THE COURT: Are you fine deleting this? I don't know
2 that we need it.

3 MR. STAUDAHER: Okay.

4 MS. WECKERLY: That's fine.

5 THE COURT: Okay. It shall be no defense to a
6 prosecution for theft or obtaining that the accused was
7 entitled to a commission.

8 MS. WECKERLY: This is the one we just don't agree on
9 and --

10 MS. STANISH: We did not agree on this.

11 MR. SANTACROCE: Yeah. I object to this.

12 THE COURT: I don't think this -- I mean, I read the
13 statute and I read the caselaw that was submitted. Obviously
14 the Nevada case is embezzlement, then you had the corporate
15 case that was submitted. I don't think it applies to theft or
16 obtaining, so in my view it does not apply and I'm not going
17 to give the instruction.

18 All right. Murder is the unlawful killing. It's a
19 standard instruction. Malice as applied to murder. Looks
20 fine to me.

21 MR. WRIGHT: I guess.

22 THE COURT: Murder of the second degree, everybody
23 fine?

24 MR. WRIGHT: What is -- I don't do murders, but tell
25 me, what is prosecution -- committed in the prosecution of a

1 felonious intent?

2 MS. WECKERLY: In the commission of a crime.

3 MR. WRIGHT: Oh. Just committed in the prosecution
4 of a crime?

5 MS. WECKERLY: Or in a -- well, this is --

6 MR. WRIGHT: I've never seen such gibberish.

7 MS. WECKERLY: It's the statute.

8 THE COURT: Well, welcome to state court. I mean,
9 hello.

10 MR. WRIGHT: Okay. Well, just because there's
11 gibberish, that doesn't mean we just keep rubber stamping it.
12 I mean, we're talking about murder in the --

13 THE COURT: Well, I'm just saying this is the -- they
14 had committees and stuff that came up with -- I don't
15 remember. I know Chris Owens years ago --

16 MR. WRIGHT: What were they smoking?

17 THE COURT: -- was on a committee and they came up
18 with instructions that were stock instructions, and they've
19 been approved and that's what we're using.

20 MR. SANTACROCE: And I --

21 MR. WRIGHT: Okay. But you're just -- just tell me,
22 what is --

23 MS. WECKERLY: In the commission of a --

24 MR. WRIGHT: This is in the alternative.

25 THE MARSHAL: One at a time, Counsel.

1 MS. WECKERLY: What do you want it to say?

2 MR. WRIGHT: I'm -- what -- I want to knock out or is
3 committed in the prosecution of a felonious intent as an
4 alternative way, unless we define felonious intent, what that
5 means. I can be --

6 THE COURT: Criminal intent. It's felony criminal
7 intent, like if you --

8 MR. WRIGHT: Where is that defined? I've never even
9 heard -- looked that up in Black's. I've never even seen
10 felonious intent --

11 THE COURT: You've never seen it?

12 MR. WRIGHT: -- in mens rea, in the definitions of
13 intent.

14 THE COURT: Okay. If you would like to propose an
15 alternative, then please propose an alternative.

16 MR. SANTACROCE: My objection to the instruction is
17 what unlawful act, or at least some clarification that the
18 unlawful act is pled in the indictment. Because there's many
19 unlawful acts. Is the obtaining money under the false
20 pretenses, if they had the intent to do that, does that go to
21 the murder charge?

22 THE COURT: Yeah. Well, which in its consequences
23 naturally tends to take the life. So theft doesn't naturally
24 tend to take the life.

25 MR. SANTACROCE: But --

1 MR. WRIGHT: But --

2 MR. STAUDAHER: And Your Honor, I will --

3 MR. SANTACROCE: -- I think the jury's going to be
4 confused about this, because commission of unlawful act is not
5 defining which act is unlawful as it relates to this
6 instruction.

7 MS. WECKERLY: So how do you want it written?

8 MR. SANTACROCE: Well, I'm not sure. What is your
9 unlawful act that you're alleging?

10 MS. WECKERLY: It's charged as second degree murder,
11 and then under second degree felony murder, which is described
12 in ensuing instructions. So tell me how you want this one
13 edited.

14 MR. STAUDAHER: And I will say for the record that
15 under involuntary manslaughter, NRS 200.070, that is exactly
16 how it's defined in the prosecution of a felonious intent.
17 That's what it says in the statute.

18 MS. STANISH: And I think -- yeah, the statute says
19 that. I think maybe the issue is how do you define felonious
20 intent. I do think the caselaw, you know, the recent caselaw,
21 Ramaris [phonetic] and all that, that had those judicially
22 created elements --

23 MS. WECKERLY: Right. Those are in the --

24 MS. STANISH: Those -- yeah, and those elements --

25 MS. WECKERLY: They're in here.

1 MS. STANISH: -- get applied and I think your
2 subsequent instructions do cover. They apply to both the
3 felony murder and the felonious intent.

4 THE COURT: Okay. I don't know how you want this
5 rewritten. So --

6 MR. WRIGHT: I want out -- I want out or -- it's in
7 the disjunctive. This says I can be guilty of second degree
8 murder even if I -- my act doesn't naturally tend to take a
9 life of a human being if I'm simply acting with felonious
10 intent, like I was shoplifting 300 bucks. That's
11 preposterous.

12 THE COURT: State.

13 MR. STAUDAHER: It's the law. I mean, you can -- if
14 you're committing a felony crime, if you have the intent to
15 commit that crime and you kill somebody, I mean --

16 THE COURT: It's the felony murder rule. I mean --

17 MR. WRIGHT: Okay. Even if I'm shoplifting --

18 THE COURT: Well, that's a first degree.

19 MR. WRIGHT: -- and the sales clerk falls down --

20 THE COURT: Because you were shoplifting?

21 MR. WRIGHT: Yeah.

22 THE COURT: How is your shoplifting going to -- well,
23 I'm just saying, I mean --

24 MR. WRIGHT: This is in the disjunctive. I don't
25 mind the first part, unlawful act which in its consequence

1 naturally tends to take the life of a human being.

2 THE COURT: All right. To short circuit this, State,
3 do you care, State, if we take out --

4 MR. STAUDAHER: We can take it out.

5 MS. WECKERLY: Just take it out.

6 THE COURT: Because it doesn't apply in this case
7 anyway. They're going to argue that when you're injecting
8 people with hepatitis blood, it's -- I mean, we're fighting --
9 you know, they're not going to stand up there and argue they
10 were committing insurance fraud and so they killed people. I
11 mean, so it doesn't apply anyway.

12 MR. SANTACROCE: Are we taking the whole instruction
13 out?

14 THE COURT: Yeah. We'll take it out because it
15 doesn't even apply. And, you know, either think that
16 injecting people with, you know, hepatitis blood is dangerous
17 or they don't. So I don't think it's going to be an issue in
18 this case.

19 MR. STAUDAHER: Well, just because Mr. Santacroce
20 said, we're not taking the entire instruction out. Just from
21 or is committed.

22 THE COURT: No. Just or is committed.

23 MR. SANTACROCE: And I would like to add the language
24 under commission of an unlawful act as it's pled in the
25 indictment by introducing hepatitis C virus into the body of

1 Rodolfo Meana.

2 MS. WECKERLY: We don't -- none of these crimes are
3 specific to the factual averments.

4 THE COURT: Yeah. I don't do the factual ones. A
5 lot of defense attorneys want to make it fact specific. My
6 general rule is no. And I think it says, Naturally tends to
7 take the life of a human being. So I mean, they either think
8 it does or it doesn't.

9 Murder in the second degree is a general intent
10 crime. Are we fine with that?

11 MR. SANTACROCE: Well, my objection is noted. I'm
12 not --

13 THE COURT: Well, I mean, how did you want that to
14 read?

15 MR. SANTACROCE: In the commission of the unlawful
16 act by injecting, whatever the indictment said, hepatitis C
17 into the body of Rodolfo Meana.

18 THE COURT: All right. Murder in the second degree,
19 we're fine with that?

20 MR. WRIGHT: No.

21 THE COURT: Oh.

22 MR. WRIGHT: As such, defendant may be liable under
23 conspiracy theory and/or aiding or abetting or murder of the
24 second degree for acts committed by any co-conspirator. The
25 killing is one of the reasonably foreseeable, probable and

1 natural consequences of the object of the conspiracy. As
2 reasonably and foreseeably seen by who, which co-conspirator?

3 THE COURT: So what do you want it to --

4 MR. STAUDAHER: Where are you at?

5 THE COURT: What do you want it to say?

6 MR. WRIGHT: As such, defendant may be liable under
7 conspiracy or aiding and abetting for second degree murder
8 committed by someone else if the killing committed by someone
9 else is one of the reasonably foreseeable, probable and
10 consequences of the conspiracy known by the defendant. That's
11 just so much gobbledygook I can't follow it.

12 THE COURT: I think it's -- I mean, I think it means
13 what it says. I mean, you know, you're free in argument and
14 that's, as you know, what a lot of people do in argument.
15 They go over the statutes, the instructions, what does this
16 mean. Well, that means that Dr. Desai had to have foreseen
17 the natural consequences of any conspiracy, which, you know,
18 there wasn't a -- or however you want to do it.

19 All right. Second degree felony --

20 MR. WRIGHT: But this is putting liability for what a
21 co-conspirator is doing.

22 THE COURT: No. As such, defendant may be liable
23 under conspiracy theory and/or aiding and abetting for acts
24 committed by a co-conspirator if the killing is a one, there's
25 a typo -- is one of the reasonably foreseeable, probable and

1 natural consequences of the object of the conspiracy, as
2 understood by the defendant. Do you want that in there?

3 MR. WRIGHT: Yes.

4 THE COURT: All right. Everybody fine with that
5 proposed change?

6 MS. WECKERLY: Yes.

7 MR. SANTACROCE: Yes.

8 THE COURT: The second degree felony murder rule only
9 applies when the following two elements are satisfied.

10 MR. WRIGHT: I disagree with the first -- it isn't
11 the crime of criminal neglect of patients. It's the conduct
12 which constitutes the offense -- it's the conduct which
13 constitutes the crime of criminal neglect.

14 THE COURT: Where the conduct constituting the crime
15 of criminal neglect of patients and/or performance of an
16 unlawful act in reckless disregard of persons or properties is
17 inherently dangerous. Is everyone fine with that proposed
18 change?

19 MR. STAUDAHER: Yes, Your Honor.

20 MR. SANTACROCE: Yes.

21 THE COURT: All right. And then the other is the
22 intervening agency. Everyone fine with Part 2?

23 MR. WRIGHT: Yes.

24 THE COURT: Ms. Weckerly, are you getting all this,
25 since --

1 MS. WECKERLY: Yes.

2 THE COURT: All right. Moving along. Moving right
3 along. In regard to the crime of second degree felony murder
4 by criminal neglect of patients.

5 MR. SANTACROCE: Number one, by the State proving
6 each and every -- each of the following five elements beyond a
7 reasonable doubt.

8 THE COURT: Everyone fine with that?

9 MR. WRIGHT: I guess -- well, I -- Element B isn't an
10 element. I mean, cause -- it shouldn't be caused Rodolfo
11 Meana to die as the second element.

12 THE COURT: All right. Let's make B and C a single
13 element. Cause Rodolfo Meana to die as a result of criminal
14 neglect of patients, making C, D.

15 So it should read, Number 1, by the State proving
16 each of the following five elements -- or four elements beyond
17 a reasonable doubt: A, that the defendant did willfully and
18 lawfully cause Rodolfo Meana to die as a result of criminal
19 neglect of patients; that Rodolfo Meana died as a directly
20 foreseeable consequence of the conduct constituting criminal
21 neglect of patients; and C, that there was an immediate and
22 direct causal connection without the intervention of some
23 other source or agency between the actions of the defendant
24 and the victim's death. Is everyone fine with those proposed
25 changes?

1 MR. WRIGHT: Yes.

2 MR. SANTACROCE: Yes.

3 THE COURT: State, are you fine with that?

4 MR. STAUDAHER: Yes.

5 MS. STANISH: Rodolfo's misspelled.

6 THE COURT: All right. Four, by the State proving
7 each of the following four elements beyond a reasonable doubt:
8 A, that the defendant did willfully and lawfully; B, cause
9 Rodolfo Meana to die as a result of performance of an unlawful
10 act and reckless disregard of persons or property; C, that
11 Rodolfo Meana died as a directly foreseeable consequence of
12 the conduct constituting performance of an unlawful act and
13 reckless disregard of persons or property; and D, that there
14 was an immediate and direct causal connection without the
15 intervention of some other source or agency between the
16 actions of the defendant and the victim's death. Is everyone
17 fine with those proposed changes?

18 MS. STANISH: I would just point out, Rodolfo's
19 misspelled, number one. And I don't know that it's necessary
20 to put or property, because we're really dealing with the harm
21 to an individual, just to shorten it up a bit.

22 THE COURT: Do you care, State, to delete property?

23 MS. STANISH: And that's throughout the instruction.

24 MS. WECKERLY: No, but I mean, do we want these done
25 tonight?

1 MS. STANISH: I was just trying to clean it up and
2 see what all the --

3 THE COURT: That's why I wanted you guys to come in
4 at 10:30.

5 MS. STANISH: We here at -- we were here earlier.

6 THE COURT: I just want the -- I don't know what you
7 folks were doing. The proposed changes were made by the Court
8 in direct response to the objections voiced by Mr. Santacroce,
9 because I'm fine with them as written. Correct,
10 Mr. Santacroce?

11 MR. SANTACROCE: If you say so, Your Honor.

12 THE COURT: Well, I mean, if you wanted it the way it
13 was I wouldn't have made the changes you were complaining.

14 MR. SANTACROCE: No, I -- no, it's right.

15 THE COURT: All right. Next up --

16 MR. WRIGHT: No, we agree.

17 THE COURT: -- as a defense to second degree murder,
18 is everyone fine with this?

19 MR. WRIGHT: No. Number 2.

20 THE COURT: What are you proposing?

21 MR. WRIGHT: Take it out.

22 MS. STANISH: Delete it.

23 MR. STAUDAHER: That's not --

24 THE COURT: Well, that's wrong. It's wrong if you
25 take it out.

1 MR. WRIGHT: Well, we deleted it right back to three
2 instructions ago because it leaves you could get convicted for
3 something --

4 MS. WECKERLY: Well, we can put second degree felony
5 murder there.

6 THE COURT: Okay. Let's do that. Ms. Weckerly, will
7 you make that change?

8 MR. STAUDAHER: No, no, no. One is second degree
9 felony murder. This is second degree murder.

10 MS. WECKERLY: Second degree murder, I mean.

11 MR. SANTACROCE: And if the evidence establishes the
12 defendant's guilt beyond a reasonable doubt.

13 MR. STAUDAHER: Inherently dangerous act. Your
14 Honor, we -- just a second.

15 THE COURT: Okay.

16 MR. STAUDAHER: Let's just make sure we got this
17 right, because this is...

18 MR. WRIGHT: We don't even need this.

19 THE COURT: We don't even need this if we're only
20 proceeding under one theory.

21 MR. WRIGHT: Right.

22 MS. STANISH: Right. Right.

23 MR. STAUDAHER: We're not proceeding under one
24 theory. We're proceeding under two theories.

25 MR. WRIGHT: No, no.

1 THE COURT: What are your two theories?

2 MR. STAUDAHER: Recklessness as one, inherently
3 dangerous felony -- second degree felony murder as the second.
4 They don't have to be unanimous as to whether which, you know.

5 THE COURT: Okay. This then isn't clear. I have to
6 unfortunately agree with Mr. Wright. This isn't clear, so
7 maybe if you can make that clearer. And I'm fine with
8 Mr. Santacroce's change, that the evidence establishes
9 defendant's guilt beyond a reasonable doubt of murder in the
10 second degree. So I'm fine inserting the beyond a reasonable
11 doubt. All right. I'm not sure what the change on that is,
12 but I'm going to rely on Ms. Weckerly to figure it out.

13 To constitute the crime charged, is everyone fine
14 with this?

15 MR. WRIGHT: Well, it should be forbidden by law, and
16 it's not an intent to do the act.

17 THE COURT: This one's fine. I don't --

18 MR. WRIGHT: Oh, it's intention. That comes out of
19 193.190 of NRS.

20 THE COURT: All it's saying is they don't have to
21 prove a motive, that motive and intent are different.

22 MR. WRIGHT: Okay. But they have to prove more than
23 forbidden by law and an intent to do the act. I can do an act
24 and not be guilty of something, because it has a mental
25 component.

1 THE COURT: Yeah, but that's not what this
2 instruction's about. All they're saying is they don't have to
3 prove motive. That's the point of the instruction.

4 MR. WRIGHT: Okay. Well, take out the first sentence
5 then, because that's an incorrect statement of the law.

6 THE COURT: State, help me.

7 MR. STAUDAHER: To constitute the crime charged,
8 there must be -- exist a union or a joint operation of an act
9 forbidden by the law and an intent to do that act; that's
10 absolutely got to be in there.

11 MS. WECKERLY: That's true.

12 MR. WRIGHT: It is not. 193.190 says, To constitute
13 the crime, there must be a unity of act and intent, in every
14 crime and public offense there must be a union, a joint
15 operation of act and intention, intention.

16 MR. STAUDAHER: Does that not say that? An act --

17 MR. WRIGHT: No. It says an intent --

18 MR. STAUDAHER: -- forbidden by law and an intent --

19 MR. WRIGHT: -- to do the act.

20 MR. STAUDAHER: -- to do the act. The act which is
21 forbidden by law. It's just defined in the same sentence. An
22 operation of an act forbidden by law and an intent to do the
23 law forbidden by -- do we need to add forbidden by law? I
24 don't really have a problem with that.

25 MR. WRIGHT: No. Because the statute's saying an

1 intention, a mental component with an act. You can't --

2 THE COURT: I'm not -- I mean, I'm not grasping the
3 difference between intent and intention.

4 MR. WRIGHT: Okay. Well, I'm just reading right from
5 the statute.

6 THE COURT: I mean, I don't care if it says and an
7 intention to do the act. Do you care, State? I mean, to me
8 it's the same --

9 MR. WRIGHT: No, an intention, period.

10 THE COURT: An intention to what?

11 MR. WRIGHT: Just an intention. I'm reading from the
12 statute. It's a mental component. The requisite intention
13 for each of the offenses, whether it's specific intent,
14 general intent, culpable negligence, recklessness. All this
15 is, is saying for a crime in Nevada you have to have both
16 components; a mental and doing the act forbidden by law.

17 THE COURT: Right.

18 MS. STANISH: I think I see what he's saying. The
19 way it's written it really talks about like knowingly doing
20 the act as --

21 MR. WRIGHT: Right.

22 MS. STANISH: -- opposed to the criminal --

23 MR. WRIGHT: That misstates --

24 MS. STANISH: It's mens rea, actus reus.

25 MR. WRIGHT: -- the mental component.

1 THE COURT: Okay.

2 MS. STANISH: I see what you're saying.

3 MR. STAUDAHER: This is one of the stocks given in
4 every one of the criminal cases I've ever tried.

5 THE COURT: First of all, I think that the point, the
6 main point of this instruction is to say to lay people that
7 the State doesn't need to prove motive. To me that's the
8 point of it. Because people think about, well, what's the
9 motive, especially murder cases. There's no element of that.
10 I think the instruction is a correct statement of the law and
11 I do not believe that the instruction is unduly confusing, so
12 I'm going to give the instruction as written.

13 Now --

14 MR. WRIGHT: I object.

15 THE COURT: All right. The next one, the defendant
16 is presumed innocent until the contrary is proved. This is
17 the reasonable doubt instruction which I am not inclined to
18 rewrite.

19 You are here to determine the guilt or innocence.
20 Now, sometimes lawyers want it to say whether the defendants
21 are guilty or not guilty. I'd make that change if requested.
22 Otherwise, if you like it the way it's written, we can keep
23 it.

24 MR. SANTACROCE: I like guilty or not guilty.

25 MR. WRIGHT: Fine.

1 THE COURT: State, can you make that change?

2 MS. WECKERLY: Yes.

3 THE COURT: It should read, You are here to determine
4 whether the defendants are guilty or not guilty from the
5 evidence in the case. You are not --

6 MR. WRIGHT: I object.

7 THE COURT: Whether each defendant is guilty or not
8 guilty from the evidence in the case. You are not called upon
9 to return a verdict as to the guilt or innocence of any other
10 person. So if the evidence in this case convinces you beyond
11 a reasonable doubt of a guilt -- of the guilt of a defendant,
12 you should so find even though you may believe one or more
13 persons are also guilty. Is everyone fine with that?

14 MR. WRIGHT: Yes.

15 MR. SANTACROCE: Yes.

16 MR. WRIGHT: I object --

17 THE COURT: The evidence which you are to consider --

18 MR. WRIGHT: Just for the record, I object to the
19 reasonable doubt instruction that you don't rewrite.

20 THE COURT: What's your objection, for the record?

21 MR. WRIGHT: I don't -- I'm not -- I don't like the
22 way it reads. I'm not entitled to a verdict of not guilty.
23 I'm -- it is mandated as a matter of law.

24 MS. WECKERLY: The statute says that is the
25 instruction you give on reasonable doubt.

1 MR. WRIGHT: I understand. I'm just making a record.
2 I'm not expecting it to be modified.

3 THE COURT: Okay. The evidence which you are to
4 consider in this case, this is the direct and circumstantial
5 instruction. Is everyone fine with that?

6 MR. WRIGHT: Yes.

7 THE COURT: Credibility or believability. Expert
8 witness instruction.

9 MR. WRIGHT: Yes.

10 THE COURT: Common sense instruction. Can't consider
11 a punishment. Everybody fine with that? Do you want me to
12 change to determination of whether each defendant is guilty or
13 not guilty --

14 MR. SANTACROCE: Yes.

15 THE COURT: -- of the charges alleged?

16 MS. STANISH: I have some of these -- some of those
17 kind of instructions in mind too.

18 THE COURT: Okay. I make that change if people ask,
19 if defense asks for it. Are you requesting that?

20 MR. SANTACROCE: Yes.

21 THE COURT: All right. Ms. Weckerly, can you make
22 that change?

23 MS. WECKERLY: Yes.

24 THE COURT: Just make sure it's also separated, each
25 defendant of each charge. And I didn't see the instruction in

1 here that you have to consider the evidence as to each
2 defendant, as to each charge.

3 MS. WECKERLY: That's usually at the end of the
4 indictment.

5 MR. SANTACROCE: Yeah. There's one in here.

6 THE COURT: All right. When you retire to consider
7 your verdict, is anyone objecting to the choosing the
8 foreperson instruction?

9 MR. SANTACROCE: Only if it's the lady that gasps and
10 sighs.

11 THE COURT: Does anyone want the choosing the
12 foreperson instruction rewritten?

13 MR. SANTACROCE: Not me.

14 THE COURT: The playback instruction, everyone fine?

15 MR. SANTACROCE: Yeah.

16 THE COURT: All right. Are you going -- I haven't
17 done the Fifth Amendment admonishment, but are you requesting
18 it as a constitutional right of a defendant in a criminal
19 trial, that he not be compelled to testify?

20 MR. SANTACROCE: I thought I saw that in here.

21 THE COURT: It is.

22 MS. STANISH: I think it's in there.

23 THE COURT: I'm asking if you want it.

24 MR. SANTACROCE: Yeah.

25 MR. WRIGHT: Yes.

1 MS. STANISH: Yes.

2 THE COURT: Okay. It has to be requested by the
3 defense, as you know.

4 MS. STANISH: It's in my proposed.

5 THE COURT: Huh? Oh, well, I'm doing theirs.

6 MS. STANISH: Okay.

7 THE COURT: All right. Mere presence at the scene of
8 a crime.

9 MR. SANTACROCE: Where is that?

10 THE COURT: Do you want that?

11 MR. SANTACROCE: I don't have that.

12 MS. STANISH: I don't know that I have that either.

13 THE COURT: It's in my packet.

14 MS. WECKERLY: It's in your packet. It's in the
15 email.

16 MR. SANTACROCE: I printed the email. I don't
17 have it.

18 MS. WECKERLY: It was after the verdict form.

19 MS. STANISH: Oh, it's after the verdict form? I
20 didn't --

21 MR. WRIGHT: Wait, wait.

22 MR. SANTACROCE: Oh, okay.

23 MS. STANISH: Oh, yeah. There it is.

24 MR. SANTACROCE: There it is. Okay. Where are we
25 at --

1 MR. WRIGHT: After the verdict, no wonder.
2 MR. SANTACROCE: Are you on mere presence?
3 THE COURT: Huh?
4 MS. STANISH: Yeah. It's the last page.
5 THE COURT: Denise says this should be on YouTube.
6 It's like loading the dishwasher. I'm sorry. I have to make
7 a sexist comment here. It's like men can't print stuff out
8 and follow along in order. I mean...
9 MR. WRIGHT: Two instructions that are at the end of
10 the verdict?
11 MS. STANISH: Yeah, I didn't see these.
12 MS. WECKERLY: Yeah, because you'd have to request
13 those. Yes, that's why.
14 MR. WRIGHT: Boy, Nevada is weird.
15 THE COURT: All right. Mere presence at the scene of
16 the crime or knowledge that a crime is being committed is not
17 sufficient to establish that a defendant is guilty of an
18 offense. Do you want this?
19 MR. SANTACROCE: Yes.
20 MS. STANISH: Yes.
21 THE COURT: It's usually benefiting the defense.
22 MR. SANTACROCE: I want it.
23 THE COURT: Okay.
24 MR. WRIGHT: Sure.
25 MR. SANTACROCE: And I also want -- is there more,

1 because --

2 THE COURT: Yeah. I've got more. Do you have it
3 shall be no defense to a prosecution for larceny?

4 MR. SANTACROCE: Hm-mm.

5 MS. STANISH: Is that at the end too?

6 MS. WECKERLY: These are -- these are the --

7 MR. SANTACROCE: Oh, this is the -- this is the one
8 that -- this is the Babcock one.

9 MS. STANISH: Oh, this here.

10 MR. SANTACROCE: And I think you've already said you
11 weren't going to include that.

12 THE COURT: Right. I think that's embezzlement.
13 Okay. The next, the --

14 MR. STAUDAHER: And just for the record, the State
15 objects to that. That's one of the ones we proffered, so.

16 THE COURT: Okay. And these will all be court's
17 exhibits, what's not given. The term "criminal negligence" as
18 used in these instructions.

19 MS. WECKERLY: We can withdraw this, because the
20 other ones are so --

21 THE COURT: Okay. Proximate cause is that cause, do
22 we want -- still want this?

23 MS. WECKERLY: Yes.

24 THE COURT: All right. If a person unlawfully
25 inflicts upon another person a physical injury.

1 MR. SANTACROCE: I don't have that instruction. I'm
2 sorry.

3 MS. STANISH: Judge --

4 MS. WECKERLY: It's not in the -- it was sent this
5 morning.

6 MS. STANISH: -- on the proximate --

7 MR. STAUDAHER: That was with your Babcock.

8 MS. STANISH: Yeah. We just got these this morning.
9 But on the proximate cause instruction, I thought the last
10 paragraph should be stricken on contributory negligence.

11 THE COURT: Yeah. That comes from civil --

12 MS. WECKERLY: Right. But it explains that if he
13 chose not to get medical treatment, if they find -- like
14 Meana, he didn't have to.

15 MS. STANISH: I think it's too confusing, especially
16 in light of the caselaw that has those judicially created
17 elements that we discussed some time ago about the immediate
18 direct cause, no intervening cause, and then to throw
19 something like this in, it really creates jury confusion in my
20 mind.

21 MR. STAUDAHER: But that's what the argument will be,
22 so that's why it's important for us to have this, is that he
23 committed suicide in a sense, is what we've heard before, by
24 not getting medical attention or taking the treatment. We
25 went on and on and on in questioning and cross-examination

1 about that very issue. So it's important and it's basically
2 supported by the case that we've cited, so.

3 MR. WRIGHT: It conflicts with the second degree
4 murder, that it had to be a direct cause with nothing
5 intervening.

6 MS. STANISH: Right.

7 MR. STAUDAHER: Yes.

8 MR. WRIGHT: I'm paraphrasing.

9 MR. STAUDAHER: But his lack of getting medical
10 treatment is not an intervene -- or his determination not
11 to --

12 MS. STANISH: It's for the jury to decide.

13 MR. SANTACROCE: Oh, yeah, I think it is.

14 MR. STAUDAHER: -- not to treat.

15 THE COURT: That's for the jury to determine. That's
16 the jury's -- to me, that's up to the jury to decide, just
17 like they decide if it's negligence or, you know, whatever.
18 They are going to decide whether or not that it's an
19 intervening cause or not. You folks can argue it isn't, they
20 can argue it is. That's a jury question. So I'm not
21 instructing them one way or the other. Now --

22 MS. STANISH: So I think that last paragraph needs to
23 be deleted.

24 THE COURT: What about though for criminal neglect?
25 Isn't Mr. Meana -- there's also a count, isn't there, for

1 criminal neglect relating to Mr. Meana?

2 MR. STAUDAHER: Yes. Mr. Meana -- the verdict form
3 needs to reflect that change as well, because he has -- I'm
4 sorry, Your Honor.

5 THE COURT: So are you charging, I'm assuming,
6 alternatively --

7 MR. STAUDAHER: Yes.

8 THE COURT: -- criminal neglect?

9 MR. STAUDAHER: Right.

10 THE COURT: So this does pertain to the criminal
11 neglect.

12 MS. STANISH: I don't know what this -- maybe if
13 Mr. Staudaher could tell us what this --

14 THE COURT: Why don't we write --

15 MS. STANISH: -- case is. It certainly is
16 inapplicable to the murder.

17 THE COURT: I have a proposition. Why don't we write
18 the contributory negligence of another does not exonerate a
19 defendant for, you know, reckless endangerment, criminal
20 neglect, all of those other statutes, unless the other's
21 negligence was the sole cause of injury?

22 MS. STANISH: I think it's incredibly confusing.

23 THE COURT: I don't think it's confusing. Look, we
24 can keep it the way it is or we can add that to clarify for
25 the defense's purposes.

1 MS. STANISH: I think where I see the confusion, I
2 didn't think of this as Your Honor just raised it in
3 connection with the criminal neglect. That to me makes it
4 even more confusing when you have two defendants. Whose --
5 does that mean that somehow Mr. Lakeman's contributory
6 neglect --

7 THE COURT: Yeah, but his -- that would be only
8 Mr. Meana's contributory negligence, that he didn't get
9 treated, so. Although contributory negligence actually refers
10 to the accident, not to the injury. So the idea would be more
11 like --

12 MR. STAUDAHER: To the accident?

13 THE COURT: Yeah. Typically that's contributory
14 negligence, not to the damages.

15 MR. STAUDAHER: Right. But it would be --

16 THE COURT: Meaning, you know, like --

17 MR. STAUDAHER: -- Meana's contributory negligence in
18 not following the advice of one doctor.

19 THE COURT: Right.

20 MR. STAUDAHER: I assume that's where they're going
21 to go.

22 THE COURT: I'm assuming that's where they're going
23 to go too.

24 MR. STAUDAHER: So I mean, and we have to change the
25 verdict form to reflect the three possibilities for Mr. Meana,

1 the death, the substantial --

2 THE COURT: Right. I mean, I think it doesn't apply
3 in the second degree murder, but it does apply to the other
4 charges. But you need to -- can you pull this case?

5 MR. WRIGHT: Why is it -- what other charges?

6 THE COURT: The -- I think that Mr. Meana is charged
7 as a victim --

8 MR. WRIGHT: Why is this -- this only applies to
9 Mr. Meana?

10 MS. STANISH: Yeah. He's not charged in the criminal
11 neglect with death. It's substantial bodily harm.

12 THE COURT: Right. But they -- but you could -- I
13 guess what they're afraid of is you could still argue, well,
14 he would have been -- I don't know if -- you're probably not
15 even going to go here. I mean, he would have been fine had he
16 gotten the treatment, but I --

17 MS. WECKERLY: That's what their expert said.

18 THE COURT: Well, he would be alive. I don't think
19 they're going to argue that in their criminal neglect defense,
20 that, oh, well, these people are basically okay.

21 MS. STANISH: And just too, I guess I have an issue
22 with -- I'm not understanding this proximate cause
23 instruction.

24 THE COURT: Okay. State --

25 MS. STANISH: If it relates to the murder, does it

1 relate to the negligence because --

2 THE COURT: No. It relates to the negligence.

3 MS. STANISH: All right.

4 MR. WRIGHT: Fan Man or medical negligence?

5 THE COURT: Where do we have proximate cause in one
6 of the definitions?

7 MS. STANISH: It would --

8 MR. STAUDAHER: Well, yeah -- well, I'd have to go
9 back and look that up.

10 THE COURT: We only need to define proximate cause if
11 it's already a term that's used in a prior instruction.

12 MS. STANISH: It wasn't clear to me what they were
13 applying this to, because it talked about it being applied for
14 murder, and I think it conflicts with the caselaw.

15 MR. WRIGHT: What is Lay vs. State?

16 THE COURT: I'm sorry?

17 MR. WRIGHT: Lay vs. State, is that what kind of
18 case?

19 MR. STAUDAHER: I don't -- I haven't read Lay vs.
20 State. This is from our --

21 THE COURT: Here are a couple of suggestions.
22 Proximate cause, as that term is used in instructions blah,
23 blah, blah, blah, blah, means blah, blah, blah. Then
24 it's taken away from the second degree murder and that's
25 clear, so we can do it that way. In the meantime, find the

1 citation and give it to everybody so we can look at that.

2 MR. STAUDAHER: Well, they've got the citation here,
3 so.

4 MR. WRIGHT: Right. Right. I just didn't -- we got
5 this and I don't have the case. I just didn't know.

6 THE COURT: What's the citation?

7 MR. STAUDAHER: It's Lay v. State, 110 Nev. 1189,
8 1994 decision.

9 MS. STANISH: And so I'm clear, this was intended to
10 define proximate cause in the criminal neglect charges, not
11 the murder?

12 MR. STAUDAHER: No. The murder has its own specific.

13 MS. STANISH: Right. Okay.

14 MR. STAUDAHER: We have to define that.

15 THE COURT: So let's change this as follows.
16 Proximate cause, as that term is used in instruction, and then
17 put this right next to the criminal neglect instruction. And
18 that way it'll be clear. Are -- you guys want to do that?

19 MS. STANISH: You know, I still object to the
20 contributory negligent concept because it's just too civil.
21 It's too confusing, and that should be a matter of argument.

22 MR. WRIGHT: I don't see proximate cause in the
23 criminal neglect of patients count that I'm reading.

24 THE COURT: I don't know. I'll have to...

25 MR. STAUDAHER: Okay. Well, we'll take it out if

1 that's the case.

2 THE COURT: Do you want to take the whole thing out?

3 MS. WECKERLY: Sure.

4 THE COURT: If a person unlawfully -- oh, here it is.
5 If a person unlawfully inflicts upon another person a physical
6 injury which is a proximate cause of the latter's death, such
7 conduct of the former constitutes an unlawful homicide even
8 though the injury thus inflicted was not the only cause of the
9 death, and although the person thus injured has already been
10 enfeebled by disease, injury, physical condition.

11 MS. STANISH: I think it's confusing, Your Honor,
12 because it conflicts with the judicially created elements of
13 proximate cause.

14 MS. WECKERLY: We'll withdraw it.

15 THE COURT: You want to withdraw this?

16 MR. STAUDAHER: Take that out.

17 THE COURT: Okay.

18 MR. STAUDAHER: But the next one we want in. And
19 this is taken directly out of State v. Sala [phonetic] with
20 the addition of the name of the defendant -- or the victim in
21 this case, since it's specific to him.

22 THE COURT: This is wrong in the first paragraph and
23 I'll tell you why, because it has to say it did materially
24 contribute to and cause his death, not that it could have. I
25 mean, if he'd been shot in the head, then you can't convict

1 him. So you have to rewrite this as to the element --

2 MR. STAUDAHER: I'll just say that this is the
3 language directly out of that case.

4 THE COURT: Yeah, but I mean, as the wise jurist,
5 Mark Gibbon [phonetic], said, just because it's in a case does
6 not mean you need to make it an instruction. The point being,
7 you know, the case is read in context. These have to stand
8 alone.

9 As to the element of the cause of death, it is
10 sufficient if from the evidence it is proven that Rodolfo
11 Meana's hepatitis C infection was of such a nature that in its
12 natural probable consequence produced death, or at least
13 materially contributed to and accelerated death.

14 MS. STANISH: I disagree.

15 MR. WRIGHT: That conflicts with the second element
16 of the -- of our murder definition about the -- there has to
17 be direct and -- direct and -- what is it?

18 MR. STAUDAHER: That's under the second degree felony
19 murder. We're proceeding under two theories of murder. This
20 relates to the first, not to the second. The second is
21 defined.

22 MS. STANISH: It doesn't matter. The caselaw, Your
23 Honor, when we briefed this, this 1946 case is inapplicable in
24 light of the recent caselaw on second degree murder, which was
25 held to be applicable to the felonious intent statute. You

1 know, we briefed this extensively in our challenge to the
2 murder count.

3 MR. STAUDAHER: But that was related to the second
4 degree felony murder. That's -- she's talking about Lavasteed
5 [phonetic] and Ramirez and the like.

6 MS. STANISH: Mm-hmm.

7 MR. STAUDAHER: Those cases deal specifically with
8 second degree felony murder, not second degree murder as it is
9 in a reckless environment. So that's what this relates to.
10 The second degree felony murder has specific -- has specific
11 elements which the inherently dangerousness has to be part of
12 it, and there has to be the direct causal connection that's
13 unbroken to the -- by a chain of other events or whatever lead
14 to the actual death.

15 This is saying that if you have a recklessness
16 situation and the person gets essentially no treatment, or
17 there's some negligence in the treatment they received or
18 something, that that does not intervene to eliminate the
19 causal link in second degree murder. Plain second degree
20 murder.

21 MS. STANISH: And I disagree with that, Your Honor.
22 I think the line of cases, and it's one of the -- and it's not
23 any of the ones that Mr. Staudaher cited. It was the first
24 case. It started with an M. I just can't remember it. We
25 briefed it though, and that Supreme Court case applied the --

1 those judicially created elements to both aspects of the
2 second degree murder.

3 MR. STAUDAHHER: Actually, I -- oh, I'm sorry. Go
4 ahead.

5 MS. WECKERLY: How about this. I'll make the changes
6 that you said. I'll put it in the packet, and then the Court
7 can remove -- it's a standalone instruction. The Court can
8 make a ruling on it and remove it or keep it in.

9 THE COURT: All right. I mean, here's the thing.
10 The way it's written is wrong. I don't like the way it's
11 written, because that -- it has to be clear that that's
12 actually what caused his death.

13 I think what they want to get at is the idea that
14 even if he also had kidney failure or something like that,
15 that if the hepatitis, you know, exacerbated the kidney
16 failure or otherwise caused his death, that they can be
17 responsible for second degree murder, which I think -- and
18 you're saying you don't think that's a correct statement of
19 the law.

20 MS. STANISH: I think the --

21 THE COURT: That's what this instruction means and
22 that's why they want to give it, because the whole argument
23 is, well, he would have died anyway, he had high blood
24 pressure, he had this, he had that, you know.

25 MS. STANISH: And as we said before, Your Honor, I

1 think it's a matter of argument to the jury what constitutes
2 an intervening cause. And I --

3 THE COURT: Well, now -- because an intervening cause
4 to me is he didn't get treatment, if he'd stayed on the
5 interferon his hepatitis would be resolved. This goes to the
6 fact that, well, he died of two things; he died of kidney
7 failure and he died of liver failure, so he would have died
8 anyway.

9 MS. STANISH: Maybe it relates more to the proximate
10 cause element then and it's, you know, it's --

11 THE COURT: Well, that's how I read this as going to
12 that issue, and I think they're entitled to some instruction.
13 Now, if you want to modify this, that's fine. But I think
14 that that's the point of this, which is different. To me the
15 intervening cause is his own negligence in not receiving
16 treatment.

17 MS. STANISH: Well, then it deals with the proximate
18 cause. The -- I'm just saying this 1946 case is trumped by
19 the line of cases that create judicial elements that have
20 enhanced, I think, proximate cause, as well as the --

21 MR. STAUDAHER: I actually looked at this case this
22 morning, and according -- and the only grounds that it was
23 overruled on were related to robbery issue -- a robbery
24 component. It had nothing to do with this particular portion
25 of the case. It's still good law to my knowledge based on my

1 review of the case today in Nevada. I've got the case if the
2 Court would like to see it.

3 THE COURT: All right. Ms. Weckerly, make the
4 changes that I said so that it shows that it was --

5 MS. STANISH: We object.

6 THE COURT: -- it has to have been the cause of
7 death.

8 MR. WRIGHT: Right. And we object, and the first
9 sentence of the second paragraph is also incorrect. The law
10 doesn't declare one who inflicts an injury and accelerates
11 death must be criminally held responsible. May or may not.
12 It depends on what -- how I inflicted the injury and what my
13 intent was. This is just -- it isn't a correct statement. I
14 can accidentally inflict an injury on someone that causes
15 their death.

16 THE COURT: You're right. Right. It could be
17 negligence. What if we take out that line and said -- and
18 just put it is said in this -- if just -- and then just have
19 if any life at all is left in the human body, even the least
20 spark, the extinguishment of it is as much homicide as the
21 killing of the most vital being.

22 MR. WRIGHT: Well, if that isn't argument, I never
23 heard of it.

24 MS. STANISH: We want the whole thing stricken.

25 MR. WRIGHT: Let me write some arguments.

1 THE COURT: Well --

2 MR. STAUDAHER: We can just change the one word shall
3 to may and that would correct that issue.

4 MR. WRIGHT: What's -- change what?

5 MR. STAUDAHER: That he may be criminally -- may be
6 held criminally liable instead of shall be held criminally
7 liable.

8 MS. STANISH: No, we object to that.

9 MR. WRIGHT: No. He still may not. It was an
10 accident because the jury feels like it?

11 THE COURT: Wait. Okay. Let's take out the second
12 paragraph, but I think they're entitled to the first paragraph
13 with the modification suggested by the Court to show that it
14 couldn't at some time, you know, remote time cause death, it
15 has to actually be the cause of death, and I'll give the first
16 paragraph as modified. Because I think it goes to the issue
17 of whether he also had kidney disease.

18 MR. WRIGHT: We'll look at it.

19 THE COURT: So it should read, As to the element of
20 the cause of death, it is sufficient if from the evidence it
21 is proven beyond a reasonable doubt that Rodolfo Meana's
22 hepatitis C infection was of such a nature that in its natural
23 and probable consequence produced death or at least material
24 contributed to and accelerated death.

25 MR. WRIGHT: Yeah. I mean, you're saying that it

1 factually did that.

2 THE COURT: Yeah. It has to have factually done it,
3 not could have maybe. They have to prove that that was what
4 happened. So I think with those changes it's fine.

5 Now you will listen, I think we don't need to rewrite
6 that.

7 You missed all the fun, Mr. German [phonetic].

8 MR. GERMAN: Gareman, Gareman [phonetic]. What'd I
9 miss?

10 MS. STANISH: So I have a few more instructions.

11 THE COURT: All right. Let's go now through yours.
12 The alleged act of criminal neglect.

13 MS. WECKERLY: Well, is this on page 3?

14 THE COURT: I'm on six. I thought we already went
15 through the other ones.

16 MS. WECKERLY: Oh, okay. I just wanted to get --

17 MS. STANISH: We had agreed to rewrite this, Your
18 Honor, beginning at line 10, instead -- to delete the language
19 after to wit down to line 14. So beginning -- do you see
20 where I am?

21 THE COURT: Yeah. So delete from the back of 10 all
22 the way to the end of 14.

23 MS. STANISH: And then insert after the unsafe
24 injection practices, In connection with the administration of
25 propofol.

1 THE COURT: Okay. And State, you're fine with that?

2 MS. WECKERLY: Yes.

3 THE COURT: Okay. And you'll make those changes?

4 MS. WECKERLY: Yes.

5 MS. STANISH: And then seven, I think the only
6 objection the State had was the -- on lines 9 and 12, the word
7 "substantial" before the term "risk."

8 THE COURT: That's the same thing.

9 MS. STANISH: It's the same issue that we discussed
10 earlier, I suppose.

11 THE COURT: Well, no, no. This is a little
12 different.

13 MS. WECKERLY: Our objection is if we're putting all
14 this in the substantive crimes, there doesn't need to be a
15 separate instruction again, because then it -- I mean, if I'm
16 including those pieces of theirs in the crimes, then I don't
17 think we need to say it again, and then the substance we
18 disagree with as well.

19 MS. STANISH: All right. Well, we did certainly want
20 to make sure that the alleged negligent act was defined.

21 THE COURT: Why don't we just hold this off. When
22 the changes are made into the corrected version of the
23 State's, then we can see if that's inclusive enough.

24 MS. WECKERLY: Okay.

25 THE COURT: If it's not inclusive enough, we can give

1 Ms. Stanish's instruction as well, deleting substantial risk.

2 All right. Number 9, I think we've already discussed
3 this. This is the advisory verdict.

4 MS. STANISH: Page 9, you're going by pages?

5 THE COURT: I'm sorry. Yeah, page 9.

6 MS. STANISH: Okay. We did discuss this.

7 THE COURT: We already discussed this, and then the
8 bottom paragraph is the advisory verdict, which I'm not going
9 to give. Any argue -- anything we need to put on the record?

10 MR. WRIGHT: Well, we object. We think it should be
11 given and it correctly states materiality and the elements,
12 and the advisory verdict is warranted.

13 THE COURT: Okay. We already discussed that in the
14 prior argument.

15 MR. WRIGHT: Right.

16 THE COURT: Eleven is pertaining to insurance fraud.

17 MS. WECKERLY: Yeah, I think we already discussed
18 that.

19 THE COURT: I think this one's fine. I mean, does
20 the State object?

21 MS. WECKERLY: What page are you on?

22 THE COURT: I'm on page 11. With respect to all the
23 remaining counts pertaining to insurance fraud, obtaining
24 money under false pretenses, I would just take out the first
25 paragraph and then say, To act with the specific intent to

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

DIPAK KANTILAL DESAI,	)	CASE NO. 64591
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
_____	)	

APPELLANT'S APPENDIX VOLUME 39

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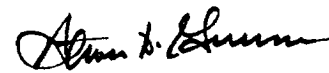
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	CASE NO. C265107-1,2
	)	CASE NO. C283381-1,2
vs.	)	DEPT NO. XXI
	)	
DIPAK KANTILAL DESAI, RONALD	)	
E. LAKEMAN,	)	
	)	
Defendants.	)	TRANSCRIPT OF
	)	PROCEEDING

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 44

WEDNESDAY, JUNE 26, 2013

APPEARANCES:

FOR THE STATE:	MICHAEL V. STAUDAHER, ESQ. PAMELA WECKERLY, ESQ. Chief Deputy District Attorneys
FOR DEFENDANT DESAI:	RICHARD A. WRIGHT, ESQ.
	MARGARET M. STANISH, ESQ.
FOR DEFENDANT LAKEMAN:	FREDERICK A. SANTACROCE, ESQ.

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TRANSCRIBED BY: KARR Reporting, Inc.

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009018

1 LAS VEGAS, NEVADA, WEDNESDAY, JUNE 26, 2013, 11:14 A.M.

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: Are we ready to go on the record
5 regarding the jury instructions?

6 MS. STANISH: Yes.

7 THE COURT: All right.

8 MR. WRIGHT: Yeah. Before we do it, can I take up --
9 I want to give the Court --

10 THE COURT: Sure.

11 MR. WRIGHT: -- something in camera regarding
12 exhibit -- the affidavit, Exhibit 87.

13 THE COURT: Okay.

14 MR. WRIGHT: That's the unexecuted affidavit for a
15 CRNA. And what I'm providing the Court is Lewis and Roca
16 email of -- two versions of that to Drs. Mason, Carrol and
17 Desai, and I'm raising attorney-client privilege on it. That
18 affidavit was never executed --

19 THE COURT: Right.

20 MR. WRIGHT: -- Exhibit 87. I didn't know. I agreed
21 to it, where it came from. I wasn't even cognizant of it with
22 a batch of things.

23 THE COURT: So you're saying you kind of looked at
24 the batch of things, but --

25 MR. WRIGHT: Right. I --

1 THE COURT: -- you didn't really see it in the batch
2 of things; is that what you're saying?

3 MR. WRIGHT: Correct. And now I have traced it,
4 traced back by contacting all counsel. [Unintelligible] for
5 Lewis and Roca was counsel for the entities at the time. And
6 so I am asking that Exhibit 87 be stricken.

7 THE COURT: Okay. And where did you get this email
8 from Lewis and Roca? I mean, did they --

9 MR. WRIGHT: No. I actually got that from one of the
10 Desai doctors --

11 THE COURT: Okay.

12 MR. WRIGHT: -- who went back on emails. At the time
13 she was getting email for her father. I can tell you which
14 one, I think, on the email.

15 THE COURT: So you didn't -- you're just showing this
16 to me, correct?

17 MR. WRIGHT: Correct. I mean, because it's
18 privileged and I --

19 THE COURT: No, I understand. Basically -- okay. So
20 what this is, as I understand it, is an email from an attorney
21 at Lewis and Roca attaching the affidavit that is in question,
22 which apparently was printed out by somebody at the Desai
23 clinic and separated from the cover sheet of the affidavit.

24 MR. WRIGHT: Correct. I think --

25 MS. STANISH: I'm not --

1 THE COURT: Because they got it, right? How did you
2 get it? I mean, the detective --

3 MR. WRIGHT: Bob Whitely.

4 THE COURT: Whitely isn't here.

5 MR. STAUDAHER: Bob Whitely. Right.

6 THE COURT: But where exactly was this?

7 MR. STAUDAHER: He actually got the material and can
8 tell you exactly where. But he went back. It was a single
9 document on a computer in one of the back rooms. I think it
10 was Room 3 of the clinic. He can pinpoint the exact room, the
11 exact computer that it was pulled off of. There were no other
12 documents attached to it. It was a single naked document on
13 the computer. So that's where it was in part of the search.

14 So there wasn't something was an attached email, as
15 the Court has that, or any indication it was attorney-client
16 privileged. It was just a document on the computer in the
17 clinic at the time.

18 THE COURT: Was it in like Word or Word Perfect, or
19 where was it?

20 MR. STAUDAHER: I don't know if it was a PDF or --

21 THE COURT: I mean, did he do like a search through
22 their Word Perfect or -- I mean, sometimes, as you know, if
23 you open something --

24 MR. STAUDAHER: If the Court can reserve on that, we
25 can bring over Mr. Whitely.

1 THE COURT: Okay. As you know, I think, you know how
2 when you open an attachment, and let's say it's in Word
3 format, you can go to like enable editing or sometimes enable
4 printing, and then it can actually be put in your own Word
5 documents. And I'm assuming the same thing works for Word
6 Perfect. So that could have happened.

7 But I'm interested to know like where this was on the
8 computer. Because in the form it is here, what's been
9 presented to me by Mr. Wright, it does appear to be part of a
10 privileged communication from the attorneys.

11 MR. STAUDAHER: But this went to the daughter, is
12 that what I understand?

13 MR. WRIGHT: Yes.

14 MR. STAUDAHER: Okay. I'm failing to see how that
15 makes it a privileged communication if it went to the
16 daughter, who's not a represented client, even though he's
17 related, so.

18 THE COURT: All right.

19 MR. WRIGHT: Because it was her email account was
20 being used by her father. I mean --

21 MR. STAUDAHER: Okay. She still has access to it and
22 it's not even his email account, so I mean --

23 MR. WRIGHT: She is a --

24 MR. STAUDAHER: There's no privilege that extends to
25 that situation that I'm aware of.

1 THE COURT: And not if the daughter --

2 MR. WRIGHT: The family member of the client?

3 MR. STAUDAHER: No, absolutely not.

4 THE COURT: No. That's why -- well, you know,
5 Mr. Wright, when you talk to your clients a lot of times, you
6 talk to them privately.

7 MR. WRIGHT: No. I make it -- I bring them in and I
8 make them my agent. I do it all the time.

9 THE COURT: Well, I'm still interested to know where
10 this was on the computer. Because it does appear to be, you
11 know, attached -- whoever opened it, it does appear to be
12 attached to an email from the attorney.

13 And as I said before, it's clearly not something --
14 if you look at Dr. Desai's writing skills and style from other
15 memoranda that we know he wrote, according to the witnesses,
16 he does not seem to have the English ability or the writing
17 skills to have written this affidavit. And I think just the
18 format of it suggests and the fact that, you know, appears
19 that it would be written from a lawyer. I mean, that's just
20 the kind of thing.

21 So if this is something the lawyer wrote and sent to
22 him or other doctors, then I don't think it should be admitted
23 as an exhibit. But I would be interested, you know, to know
24 how that was done. Now, if it's written, you know, by
25 somebody there, you know, Dr. Desai's writing it or Mr.

1 Lakeman's writing it or something like that, that's different.

2 I mean, I think, just by the form and the content, it
3 is suggestive of an affidavit that was prepared by an attorney
4 and sent to them, which then begs the question of what's the
5 evidentiary value of it if it's something their attorney is
6 telling them to do.

7 Now, we can all hypothesize that of course Dr. Desai
8 would have told his attorneys, hey, we better not have been
9 reusing the syringes, because we can be spreading an infection
10 and that's not aseptic technique, but we don't -- you know
11 what I'm saying. That's kind of conjecture.

12 So what would be the evidentiary value of this if it
13 is what we believe, or what I think is certainly suggested,
14 that this was prepared by the attorney in anticipation
15 probably of the civil litigation because it's Lewis and Roca?

16 MS. STANISH: It had something to do with a CRNA --

17 THE COURT: Right. No, no.

18 MS. STANISH: -- on its face. Right.

19 THE COURT: But I'm saying it had to do with a civil
20 litigation, because why else is Lewis and Roca doing it.
21 Now it -- was Lewis and Roca their defense attorneys, the
22 clinic's defense attorneys?

23 MS. STANISH: Yes.

24 MR. WRIGHT: Yes. Whether they were -- they were the
25 clinic's attorneys, whether defense or what at the time --

1 THE COURT: Well, they're not plaintiffs' attorneys,
2 so I know --

3 MR. WRIGHT: Oh, correct. Right.

4 THE COURT: I'm talking about they're civil defense
5 attorneys.

6 MR. WRIGHT: I mean they were the clinic's attorneys.

7 THE COURT: As opposed to defending maybe another
8 defendant who asked the clinic, hey, execute this affidavit.
9 For example, the pharmaceutical maker, they may have wanted an
10 affidavit saying, well, it wasn't the reuse of the syringes,
11 which would have benefited the pharmaceutical defendant. So
12 that's all I'm saying. It could have been another related
13 defendant in the same case. That was my point --

14 MR. WRIGHT: You're correct. The --

15 THE COURT: -- to make that consistent.

16 So my understanding is Lewis and Roca actually is
17 their lawyers, as opposed to, like I said, another defendant
18 who wants cooperation because that would help everybody.

19 MR. WRIGHT: The affidavit itself in the last
20 paragraph states, you know, this is for a proposed CRNA, "I
21 make this affidavit voluntarily on my own free will with the
22 hope that I can help to stop the widespread confusion and
23 panic surrounding ECSN."

24 The date of these emails and this affidavit was after
25 February 27 notification and before any closing of the clinics

1 or search warrant. And so what was happening at that time was
2 the City of Las Vegas had alleged reuse of syringes between
3 patients and taking the license away, and got that information
4 from Brian Labus. And -- because I dealt with them over that.

5 And so at the time, just from reading that proposed
6 affidavit, that's what I contemplate it was in response to and
7 was never executed, because the dominoes were falling.

8 THE COURT: All right. I think that there's enough
9 here to suggest that this was generated by an attorney. I
10 don't know who, upon what information, if it was information
11 from Dr. Desai, from Dr. Carrol, from Linda Hubbard, from who.
12 So I don't know that this really can be used, although it was
13 properly and lawfully seized, it appears, pursuant to the
14 search warrant.

15 I trust the State's representations that it was
16 lawfully and appropriately seized. I think that it was
17 generated by an attorney as part of a privilege, or what was
18 intended at least to be a privileged communication on the part
19 of the attorney, and we don't know the source of the
20 information for the affidavit. And so for that reason I'm
21 going to exclude the exhibit.

22 All right. Moving along to the jury instructions.
23 Where are we?

24 MS. STANISH: Well, we spent about an hour, Your
25 Honor ---

1 THE COURT: I noticed.

2 MS. STANISH: -- talking about --

3 MS. WECKERLY: Ms. Stanish, can we do

4 Mr. Santacroce's first? Because he submitted two.

5 THE COURT: Okay. Yeah, I was going to -- I'm not --

6 MR. SANTACROCE: The one you already had included

7 [inaudible].

8 THE COURT: I'm not sure the best way to do this. So

9 Ms. Weckerly, whatever you think.

10 MS. WECKERLY: Okay. Well --

11 THE COURT: Because I'm not sure what exactly we're

12 going to be arguing about, so.

13 MS. WECKERLY: Okay. Well, this should be the

14 easiest one. He submitted two instructions. The first one is

15 defining what a CRNA is.

16 MR. WRIGHT: We didn't get them.

17 MS. WECKERLY: We don't have an objection to that.

18 THE COURT: I don't have them either. Do I have

19 them?

20 MR. SANTACROCE: I don't think so.

21 MS. STANISH: I don't have them either.

22 THE COURT: Do you have a copy for anybody else?

23 MR. WRIGHT: Do you have a copy?

24 MS. WECKERLY: The second one.

25 THE COURT: So the first one that no one has a

1 copy of --

2 MS. WECKERLY: It's a certified registered nurse
3 anesthetist is certified by the board to administer anesthetic
4 agents to a person under the care of a licensed physician, a
5 licensed dentist, or a --

6 THE COURT: Or a licensed podiatrist.

7 MS. WECKERLY: We don't have an objection.

8 THE COURT: Okay. So that can come in. And then,
9 Ms. Weckerly, since you guys will be in charge of preparing
10 the master packet, would you just make sure that's formatted
11 correctly and included?

12 MS. WECKERLY: Yes.

13 THE COURT: Since I don't have a copy.

14 MS. WECKERLY: Okay. And then the second one is
15 about conspiracy, but that sentence is actually covered in
16 ours.

17 MR. SANTACROCE: Yes. I saw that and I withdraw
18 that.

19 THE COURT: So you'll withdraw that one. All right.
20 That was easy.

21 MS. WECKERLY: That one was easy.

22 THE COURT: So Kenny's going to --

23 MR. SANTACROCE: Well, it's not so easy, because I
24 have another global one that I just --

25 MS. WECKERLY: Okay. I didn't know about that one,

1 the global.

2 MR. SANTACROCE: No, you didn't, but it's -- what do
3 you need?

4 THE MARSHAL: The ones that you want me to make
5 copies of.

6 THE COURT: Do we have copies for people? Kenny, get
7 the copy of the CRNA one from Ms. Weckerly.

8 MR. SANTACROCE: Here, I have one.

9 THE COURT: Okay.

10 THE MARSHAL: Is that the only one, Judge?

11 THE COURT: Yeah. Make copies for Wright and
12 Stanish.

13 And then what was the global one?

14 MR. SANTACROCE: Well, the global one is actually
15 under NRS 175.381(1), where I'm going to ask the Court to
16 instruct the jury to acquit Mr. Lakeman on Counts 1, 2, 5, 8,
17 9, 10, 11, 14, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28.

18 THE COURT: So you're asking for an advisory verdict?

19 MR. SANTACROCE: Yes. And I can go through each one
20 of those and give you the basis for it, and I'd like to do
21 that and put it on the record.

22 THE COURT: Go ahead.

23 MR. SANTACROCE: As to Count 1, this is insurance
24 fraud against Mr. Ziyad. And the way it's pled, the language
25 in it says, Which exceeded that which would have normally been

1 allowed for said procedure. And you'll recall on Mr. Ziyad's
2 procedure, he was billed the base plus one unit. That was
3 where they had the eight minutes. He was billed base one
4 unit.

5 So everybody gets the base, and one unit does not
6 exceed that which would have normally been allowed for said
7 procedure. And so based on that, that alone, they haven't met
8 their burden. They haven't showed a crime was committed as to
9 Mr. Ziyad vis-a-vis Mr. Lakeman, and for that reason I'd ask
10 that that advisory instruction be given on Count 1.

11 Do you want me to continue?

12 THE COURT: If you want to. I mean, here's the
13 thing. Why -- I think maybe it would be better to settle the
14 jury instructions. I mean, I'll just tell you outright, I
15 think there's some problems here, but I'm not inclined to give
16 an advisory verdict. But there are obviously post trial
17 things that you can do.

18 MR. SANTACROCE: Well, just for the record, that
19 statute says at the close of either side's evidence you can
20 make that, so.

21 THE COURT: Right. No, I know. No. I mean I
22 anticipated that you would be moving for an advisory verdict.

23 MR. SANTACROCE: Okay.

24 THE COURT: I mean, if you want to continue, that's
25 fine, or we can do the jury instructions.

1 MR. SANTACROCE: Whatever you'd like. I just want to
2 put it on the record.

3 THE COURT: And you will be permitted to put it on
4 the record.

5 MR. SANTACROCE: So whatever you want me to do.

6 THE COURT: Let's do the -- do you mind? Let's do
7 the jury instructions and then you'll be allowed to, because I
8 think some of this, Mr. Santacroce, we're going to be
9 discussing as part of settling the jury instructions. Okay.
10 So that's why I'd rather do it that way.

11 And is -- on behalf of Dr. Desai, will you folks be
12 moving for an advisory verdict as well, or no?

13 MR. WRIGHT: Yes.

14 THE COURT: All right.

15 MR. WRIGHT: On some counts.

16 THE COURT: Okay. We can do that later. All right.
17 Turning to the jury instructions, how would you like to do
18 this? Do you want to go through the State's that you
19 object to, or do you object to any of the ones in the State's
20 packet, or Ms. Stanish, how do you think the most expedient
21 way would be to do this?

22 MS. STANISH: I think the best way is to categorize
23 the instructions and starting with the most esoteric ones, the
24 criminal neglect offenses, then let's address the theft, and
25 then we can talk about the more general instructions which I

1 don't think there's much disagreement on. And so --

2 THE COURT: Okay. Well, here's how I normally do it.

3 MS. STANISH: Sure.

4 THE COURT: I just start with the State's packet and
5 blah, this one's fine, this one's fine. Then if we get to one
6 where you have an alternate one or you have one that you don't
7 want at all, you don't think even belongs in there, then we'll
8 discuss it.

9 MS. STANISH: That's fine. My complaint about the
10 organization of the State is it seems to go in the order of
11 the indictment. So it starts with insurance and then you go
12 to criminal neglect. And just to me it's better to categorize
13 them. But either way works. You hit them all.

14 THE COURT: I mean, it's just easier.

15 MS. STANISH: Sure.

16 THE COURT: I don't know what's easier for me. We
17 can start with yours and go through your packet. I think it's
18 easier to go with the State. So Number 1 is fine. Two, if in
19 these instructions --

20 MR. WRIGHT: What's Number 1?

21 THE COURT: Number 1 is members of the jury. I'm
22 just going in order.

23 MR. WRIGHT: Oh.

24 THE COURT: I'm not numbering them. We can sort them
25 out later.

1 MR. WRIGHT: Okay.

2 THE COURT: In terms of the numbers, I'm not
3 numbering. I'm just saying that's the third one according to
4 theirs. Then the next is the whole long indictment, which is
5 numerous pages. Okay. All right. Then the next one in the
6 State's packet is, a conspiracy is an agreement between two or
7 more persons. Any objection to that one?

8 MR. WRIGHT: Yes. There is no conspiracy count.
9 That's a substantive conspiracy instruction that's given when
10 it says the crime is the agreement to do something unlawful it
11 does not matter whether it's successful or not.

12 THE COURT: So you're fine with the conspiracy as a
13 theory of liability, but not as to a substantive offense?

14 MR. WRIGHT: Correct.

15 MR. SANTACROCE: I join that.

16 THE COURT: State, do you have another one that is
17 just conspiracy -- I mean, clearly they're entitled to an
18 instruction on what a conspiracy is. Do you offer one,
19 defense or State? Do you have something else that --

20 MS. WECKERLY: Well, I would think they'd want part
21 of this instruction. Maybe they just want to take out the
22 last line of --

23 THE COURT: Yeah. We can maybe just rewrite it.

24 MS. WECKERLY: -- for paragraph 1.

25 MR. WRIGHT: Well, and the first -- I mean, it says,

1 To be guilty of a conspiracy, a defendant must intend to
2 commit the crime. I mean, there is no conspiracy crime here.

3 THE COURT: Right. How about this. Just take out
4 lines 3 through 5, a conspiracy is an agreement between two or
5 more persons for an unlawful purpose. I'm just thinking out
6 loud here. Take out, to be guilty of conspiracy, and then a
7 person who knowingly does any act to further the object of a
8 conspiracy is criminally -- well, liable as a conspirator, so
9 that's the theory --

10 MS. WECKERLY: That's fine.

11 THE COURT: However, mere knowledge, blah, blah,
12 blah. A conspiracy --

13 MR. SANTACROCE: That's not blah, blah, blah.
14 That's --

15 THE COURT: What?

16 MR. SANTACROCE: I'm just editorializing.

17 THE COURT: Well, no. I'm just saying do you object
18 to the next language?

19 MR. SANTACROCE: No. I'm in favor of it.

20 THE COURT: Do you want me to read it all?

21 MR. SANTACROCE: Yeah. Tickle my ears.

22 THE COURT: Blah, blah, blah. It's faster.

23 MS. WECKERLY: That's fine with the State if you want
24 us to take out those lines.

25 THE COURT: Okay. How about a conspiracy to commit a

1 crime, the conspiracy continues. So I think the rest of it's
2 fine. We'll edit it that way. Everybody okay with that?

3 MR. WRIGHT: If --

4 THE COURT: Mr. Santacroce, notwithstanding the blah,
5 blah, blahs, are you fine with that?

6 MR. SANTACROCE: Yes, except for the conspiracy to
7 commit a crime, the last paragraph.

8 THE COURT: That is what it is, they're conspiring to
9 commit a crime, a different crime.

10 MR. SANTACROCE: It's okay.

11 MS. WECKERLY: I think that's actually really
12 required to have that.

13 THE COURT: Okay. The next one, it is not necessary
14 in proving a conspiracy, is everyone fine with this?

15 Okay. And then each member of a criminal conspiracy?

16 MR. WRIGHT: I have problems with it.

17 THE COURT: What are your problems?

18 MR. WRIGHT: Line 6, every conspirator is legally
19 responsible for a specific intent crime of a co-conspirator
20 that so long as the specific intent crime was intended by the
21 defendant.

22 THE COURT: Right.

23 MR. WRIGHT: I don't even know what the hell that
24 means.

25 MR. STAUDAHER: You have to have a specific intent

1 [unintelligible].

2 THE COURT: Right.

3 MS. STANISH: It's difficult.

4 MR. WRIGHT: That so long -- it doesn't even read
5 to me.

6 MS. WECKERLY: Well, that should be taken out, but --

7 MR. WRIGHT: What?

8 MS. WECKERLY: That should be.

9 MR. WRIGHT: That? Oh, the word "that."

10 MS. WECKERLY: The word that.

11 MR. WRIGHT: Okay.

12 THE COURT: Right. That's a typo.

13 MR. WRIGHT: Okay.

14 THE COURT: All right. So we'll delete the word --

15 MR. WRIGHT: Well, I object to it, I mean, even with
16 the word that out. I -- if I am in a conspiracy and you're
17 going to use Pinkerton analysis to make me a co-conspirator on
18 a specific intent crime just because the other one doing it
19 has the specific intent --

20 THE COURT: No. It says so long as the specific
21 intent crime was intended by the defendant, meaning that
22 defendant.

23 MR. WRIGHT: What defendant?

24 THE COURT: So we could rewrite it and make it
25 cleaner if you want. This is a correct statement of the law.

1 How about every conspirator is legally responsible for a
2 specific intent crime of a co-conspirator so long as the
3 specific intent crime was intended by the conspirator, or I
4 mean by the defendant?

5 MS. WECKERLY: I think it has to be defendant.

6 Otherwise --

7 THE COURT: Right. Because otherwise it's too --

8 MS. WECKERLY: -- you're saying that he -- it has to
9 be intended by the person you are charging.

10 MR. WRIGHT: It doesn't look clear to me.

11 THE COURT: Well, how -- I mean, I can rewrite it if
12 someone comes up with a clearer way to do it. But I don't --
13 I mean, we could say by the defendant charged with conspiracy,
14 or I don't know that that makes sense.

15 MR. STAUDAHER: No. There's no charge of conspiracy.

16 MR. SANTACROCE: There's no charge of conspiracy.

17 THE COURT: Oh, by -- right.

18 MR. WRIGHT: I guess it's for a conspirator to be
19 legally responsible for a specific crime of a co-conspirator,
20 he must have the specific intent...

21 THE COURT: Okay. So you want for a conspirator to
22 be legally responsible, or to be guilty under a -- the -- or
23 to be -- okay. We'll use legally responsible. Or a specific
24 intent crime --

25 MR. WRIGHT: Of, what are we saying?

1 THE COURT: -- of a co-conspirator.

2 MR. WRIGHT: Of a co-conspirator.

3 THE COURT: The first conspirator or...

4 MS. WECKERLY: I think it's easier to use defendant,
5 because then you're, you know, the sentence is more parallel.

6 MR. WRIGHT: Well, which defendant are we talking
7 about?

8 MS. WECKERLY: You put --

9 MR. WRIGHT: I mean, my problem is we have two
10 defendants here and I don't want them thinking --

11 THE COURT: Okay. How about this. For a conspirator
12 to be legally responsible for a specific intent crime of a
13 co-conspirator, the conspirator must have intended --

14 MR. WRIGHT: Must have the specific intent.

15 THE COURT: I don't know that that makes it any
16 clearer. The conspirator must have the requisite specific
17 intent, do you like that?

18 MS. STANISH: The conspirators have to share the same
19 intent, the same criminal intent.

20 THE COURT: No, but that's not right either.

21 MR. WRIGHT: Yes, it -- yes, it is for --

22 THE COURT: Well, I mean, because yours was --

23 MR. WRIGHT: -- a specific intent crime.

24 THE COURT: Because what does that mean, share the
25 specific intent? I mean, you can both have specific intent,

1 but I think that's more confusing.

2 MR. WRIGHT: Well, you have to both, if I'm under
3 Pinkerton theory of liability and I'm responsible for a
4 co-conspirator's crime, I must have the same specific intent
5 the other fellow had. So we both must have it.

6 MS. STANISH: I think this is like the Solomon case
7 or something like that, and then --

8 THE COURT: How about this. Oh, I had a good idea, I
9 think, which generally means no one likes it. Okay. How
10 about for a conspirator to be legally responsible for a
11 specific intent crime of a co-conspirator, both conspirators
12 must have the requisite specific intent?

13 MR. WRIGHT: Yeah.

14 MS. STANISH: That's a good idea.

15 MR. SANTACROCE: Yay.

16 MR. WRIGHT: Yay. That's it.

17 THE COURT: Does that work for the State?

18 MS. STANISH: I like it.

19 THE COURT: State, does that work for you?

20 MR. STAUDAHER: Could you read it one more time, Your
21 Honor?

22 THE COURT: For a conspirator to be legally
23 responsible for a specific intent crime of a co-conspirator,
24 both conspirators must have the requisite specific intent.

25 MS. STANISH: That's perfect.

1 MR. STAUDAHER: I think that's okay.

2 THE COURT: Okay. And then we'll take out the more
3 confusing language of lines 6 through 8.

4 MR. WRIGHT: Good.

5 THE COURT: Okay. And then the other is fine, the
6 last lines, 8 through 11.

7 MR. WRIGHT: Yep.

8 THE COURT: Evidence that a person was in the company
9 or associated with one or more other persons, is everyone fine
10 with that instruction?

11 MR. WRIGHT: Hang on one sec. The last sentence I
12 don't understand, however you are instructed that presence,
13 companionship and conduct before, during or after the offense
14 are circumstances for which one's participation in the
15 criminal intent may be inferred. I don't even know what the
16 hell that means. How the hell do you participate in the
17 criminal intent? You're either committing the --
18 participating in the crime or you're not.

19 THE COURT: Well, if we're going to try to make these
20 clear to an ordinary person we're going to be here days and
21 days, because these are the instructions that have been
22 accepted and they're terribly written. They're -- I mean, I
23 shouldn't say that, because members of the Supreme Court that
24 may be reviewing this may have been involved in writing them.

25 The truth is they're really confusing and they're

1 poorly written. But as long as it's a correct statement of
2 the law and in this particular case is not going to mislead
3 the jury like the last one could have, then I don't think we
4 need to rewrite everything to make it what we all think is --
5 or what I think is better writing. So, you know, this one I
6 think is clear enough. I don't think it's prejudicial to
7 either defendant. So I mean, it's true.

8 MS. WECKERLY: [Inaudible.]

9 THE COURT: Yeah. I mean, it's a correct statement
10 and it's been accepted, so I'm fine.

11 MS. STANISH: I was just going to suggest instead of
12 one -- that last sentence in the inferring is, however you are
13 instructed that the presence, companionship, blah, blah,
14 blah --

15 THE COURT: Oh, don't say that. Mr. Santacroce might
16 object.

17 MR. SANTACROCE: Objection.

18 MS. STANISH: Bleep, bleep, bleep, bleep. From which
19 one's participation in the conspiracy may be inferred.

20 THE COURT: Is that fine?

21 MR. WRIGHT: Well, it's logical. I mean, I don't
22 care if they're approved. When you scratch your head and say
23 what the hell does that even mean, how's the jury supposed to
24 know?

25 THE COURT: All right. In the conspiracy may be

1 inferred. I'm fine. State, are you fine with that change?

2 MS. WECKERLY: Yes.

3 THE COURT: All right. Where two or more persons are
4 accused of committing a crime together, their guilt must be --
5 or I'm sorry, their guilt may be established, is everyone fine
6 with that?

7 MR. WRIGHT: I object to the last sentence, that the
8 State is not required to prove which, whether the guy's an
9 aider or abettor or a principal.

10 THE COURT: It's a correct statement of the law.
11 State.

12 MS. WECKERLY: That is the law, so --

13 MR. WRIGHT: I disagree it's a correct statement of
14 the law.

15 THE COURT: Well, without additional --

16 MR. WRIGHT: It's you're not required to prove it
17 precisely so that they can imprecisely prove that we don't
18 know which -- we don't know who's the aider and abettor and
19 who's the principal.

20 THE COURT: Well, it happens all the time in -- I
21 mean, take the murder case. Two guys go in, it's a robbery
22 murder, the victim's dead, that was the only other person
23 there. I mean, that happens all the time. We don't -- you
24 know, the State, two people may have firearms that are later
25 lost. You know they know they went in together, they know

1 they aided and abetted, you know. Beyond that, I mean,
2 that's --

3 MR. WRIGHT: You don't just throw it up on the wall
4 as mud and see what sticks. This was pled. We argued about
5 it and it was finally pled that Mr. Lakeman was the principal
6 and the aider and abettor was Dr. Desai for being stingy and
7 nyeh, nyeh, nyeh, nyeh. No blah, blah. But this just throws
8 all that out the window.

9 MS. WECKERLY: You know, we're agreeing to an
10 instruction of yours that says that Desai is the aider and
11 abettor, so I don't know why we're debating about this line of
12 the instruction, because we're going to cover it in their
13 instructions where we say that's the theory.

14 MR. WRIGHT: Oh.

15 THE COURT: Okay. Move on. Any person who presents
16 or causes to be presented any statement as part of or in
17 support of a claim for payment or other benefits under a
18 policy of insurance, is this one fine?

19 MS. STANISH: I have an alternative, Your Honor.

20 THE COURT: Okay. Elements of insurance fraud.

21 MS. STANISH: Yes.

22 MR. SANTACROCE: And I object to it because it
23 doesn't -- it doesn't mirror what was pled in the indictment.

24 MS. STANISH: And I tried to in my draft integrate
25 the falsity in the first element.

1 THE COURT: All right. What's your objection,
2 Ms. Stanish, to the one offered by the State?

3 MS. STANISH: Well, you know, first off, just
4 generally speaking, I prefer to have elements broken down so
5 that it's easier for the jury to follow for a second third.

6 And I did think it was important because this has
7 obviously been an issue throughout the insurance, the
8 insurance related offenses, this issue of -- that I think is a
9 real sticking point on all the insurance offenses as to
10 whether or not the jury has to consider the value of the
11 services rendered and ding him for the overpayment, or whether
12 it's the amount of that's ultimately on the check.

13 And so it's what we've been discussing at the bench
14 on this subject, that the indictment itself puts this
15 limitation on it, and I just generally speaking, you know,
16 we're not --

17 THE COURT: I'm not turning my back on you.

18 MS. STANISH: That's all right.

19 THE COURT: Although I'm literally turning my back on
20 you, I'm not figuratively or --

21 MS. STANISH: You're not the first one.

22 THE COURT: -- metaphorically turning my back on you.
23 What I am looking for is NRS 686, so I can read directly from
24 the statute which I have now found here on my bookshelf. So
25 Ms. Stanish, I heard you. I'm going to go -- here's what my

1 plan is. I'm going to read -- I'm going to take it directly
2 from the statute.

3 MS. WECKERLY: Okay.

4 MR. SANTACROCE: And my objection for the record is
5 that the indictment alleges which -- which exceeded that which
6 would have been normal for said procedure.

7 THE COURT: Right. Well, that's what I said before,
8 they have to prove what they've alleged.

9 MR. SANTACROCE: But that's not in the instruction.

10 MR. STAUDAHER: That's not an element of insurance
11 fraud as it's defined.

12 THE COURT: Yeah, but you guys chose to plead it --
13 the royal you. I don't know if Mr. Mitchell pled -- who pled
14 this case?

15 MR. STAUDAHER: It was a combination effort, but I
16 was primarily involved.

17 THE COURT: Okay. So you are -- you are taking
18 responsibility?

19 MR. STAUDAHER: I am taking responsibility, yes.

20 THE COURT: All right. I mean, you know --

21 MR. STAUDAHER: Factual averments are factual
22 averments. But the elements of the crimes are the elements of
23 the crimes and that's what we're entitled to.

24 THE COURT: Right. I'm going to take it directly
25 from the statute. The statute says what the statute says, and

1 if that's what the statute says, then that's the law and
2 that's what you're going to get, so.

3 MR. WRIGHT: Well, how do we articulate --

4 THE COURT: Well, would you give me a second to look
5 up the statute? I mean, I'm assuming this language came from
6 the statute. Do you know offhand, State?

7 MS. WECKERLY: Oh, yeah. It's a cut and paste of the
8 statute.

9 THE COURT: All right. Well, we're going to give
10 them -- if the defense asks for it, we're going to give them a
11 complete statute. If they don't ask for that, then we won't
12 have --

13 MR. SANTACROCE: Well, I would like to have that
14 language inserted in the instruction. We have spent all this
15 time defending on that, exceeding that which would normally
16 have been allowed for said procedure. We have cross-examined
17 ad nauseam these billing people about that and that's what our
18 defense is. And now to exclude the language from the
19 indictment in the instruction is unfair at best, at least.

20 THE COURT: Yeah. I mean, this pretty much comes
21 directly from the statute.

22 MR. WRIGHT: They didn't just file a copy of the
23 statute as the indictment. We have noticed the --

24 THE COURT: Yeah, but I instruct -- I mean, State.

25 MS. WECKERLY: This is the -- I mean, this is the

1 statute. This is the crime. If we say in the factual
2 averment something that's not an element of the crime, it is
3 not something we have to prove to convict someone beyond a
4 reasonable doubt of the crime.

5 In addition, by statute we are allowed to amend the
6 allegation to fit the evidence that's adduced at trial.
7 There's no substantial prejudice to them. The claim is false.
8 There's no other element that's required in insurance fraud.
9 I understand the Court's still going to have to make a ruling
10 on the theft and obtaining money under false pretenses, but
11 insurance fraud is simply a false claim.

12 THE COURT: Here's the deal. I mean --

13 MR. WRIGHT: Regardless of they can just change it
14 right in the middle of a trial as to what we were put on
15 notice for.

16 THE COURT: That's a separate issue in my mind. I am
17 not aware of any requirement that the Court rewrite the law or
18 rewrite the instructions based upon what has been pled in the
19 indictment or in the information. So to me, you know, the
20 obligation is to instruct them on the law that applies to this
21 case, and if you go directly from the statute, that is the
22 law.

23 So this seems to pretty closely or exactly mirror --
24 you know, this -- I mean, I just looked at it quickly, but
25 mirrors the statute. And so to me, that is the instruction on

1 the law which I'm going to give them. Like I said, I'm not
2 aware of any requirement that the Court then say but it's pled
3 this way and so to rewrite the statute, which it sounds kind
4 of like what you're asking me to do.

5 MR. WRIGHT: I'm asking if you give an instruction
6 that they have to approve what they alleged in the indictment.
7 If they say I murdered Bill Jones and they come in and prove
8 Sam Smith, you can't just say the murder statute says murder,
9 tough luck, Mr. Wright. This --

10 THE COURT: Mr. Wright, that's a separate issue as
11 opposed to the instruction I'm going to give. Right now we're
12 on the instructions. I'm telling you I'm not going to rewrite
13 the instruction to conform to the pleading. I'm going to give
14 the instruction on the law, which is my understanding of what
15 I have to do. This is the instruction that comes directly
16 from the statute and that is the instruction I'm going to
17 give.

18 Now, there is another issue, and that is their
19 obligation to prove what has been pled. We will get to that
20 other issue, but I don't think the appropriate time to debate
21 that is whether or not this is the statute. Now, I don't have
22 a proposed alternative other than the one that's been provided
23 by Ms. Stanish. I think that that -- basically what you've
24 done is you've taken what they've pled and you've made it into
25 an element of the crime of insurance fraud.

1 MS. STANISH: Correct. And separate and apart from
2 my first element, which I understand Your Honor is saying you
3 don't want to put the to wit part in it, but I wanted to
4 clarify the materiality element, as well as the reliance
5 element, which I think is implicit in the statute itself.

6 MS. WECKERLY: Our instruction says material.

7 THE COURT: It says material.

8 MS. STANISH: As well as my fourth in -- you know, I
9 fetter out the specific intent element. I just -- I like -- I
10 think it's clearer to the jury to break down the elements
11 rather than put it in paragraph form. I just wanted to make
12 sure the jury was aware of the specific intent element, and
13 that's why I put in the -- broke it down in those three latter
14 elements which I think are accurate, but just more clearly
15 stated for the jury.

16 THE COURT: Well, you can break it out in your
17 argument if you choose to do it that way. But I'm going to go
18 with the statute.

19 MR. WRIGHT: So that's denied because it's an
20 incorrect statement of the law?

21 THE COURT: Well, it's denied because it changes the
22 language of the statute. And to me, obviously if we rely on
23 the statute, that's a correct statement of the law. So --

24 MR. WRIGHT: Okay. What is this instruction that's
25 the State's? Is that simply --

1 THE COURT: It comes directly from --

2 MR. WRIGHT: Well, I want the entire statute. If all
3 you're doing is giving them the statute, just read them the
4 statute.

5 THE COURT: Well, there's a lot in the statute that's
6 not necessarily relevant.

7 MR. WRIGHT: I don't care. If all we're doing is
8 telling them what the law is and ignoring the elements, then
9 put in the whole statute.

10 MR. STAUDAHER: We're not ignoring the elements. The
11 elements are part of what --

12 MR. WRIGHT: Right.

13 MR. STAUDAHER: -- is in the actual submitted
14 instruction.

15 MS. WECKERLY: The statute's pretty long. I mean, we
16 can put in the whole thing, but it doesn't all apply.

17 THE COURT: Well, I don't know what --

18 MR. WRIGHT: Well, read the indictment too.

19 THE COURT: Yeah. I'm not reading the indictment
20 too. We've already said that you don't want the indictment
21 read.

22 MR. WRIGHT: I'm going to take it back if now I'm
23 finding out -- now I'm finding out all we're going to do is
24 tell them the law and the only way I'm going to get what was
25 alleged out is through the indictment. I've never been in a

1 case where you don't plead -- where you don't tell the jury
2 the elements of what the offense are as pled. If it's
3 murdered Bill Jones, you put Bill Jones.

4 THE COURT: Really --

5 MR. WRIGHT: If it's intent to defraud Bank --

6 THE COURT: -- that's very interesting to me.

7 MR. WRIGHT: -- of America --

8 THE COURT: Because in the dozens of dozens of murder
9 trials that I have done, it never says murder is the unlawful
10 killing of Bill Jones or Sam Smith or whoever it is. It's
11 just a regular murder instruction, these are the elements of
12 murder. So, you know, I --

13 MR. WRIGHT: You guys do it different.

14 THE COURT: I mean, do it different than what? I
15 mean, I was a DA, as you well know, and appeared in front of,
16 you know, numerous judges, and we never wrote it out specific
17 to that. So to suggest that I'm doing some isolated thing
18 that's totally, you know, rogue from what everybody else in
19 the Eighth is doing is not accurate based on my experience as
20 a lawyer appearing in front of numerous judges. Not just one
21 or two, but numerous judges.

22 So, you know, I don't know what they do in the
23 federal system, but we're in the State court now.

24 MS. STANISH: I don't see, Your Honor, that there's a
25 statement, a clear statement in this regurgitation of the

1 statute that reflects the intent to defraud clearly.

2 MR. STAUDAHER: Third line, the statement, Knows that
3 the state -- or the presentation of the statement knows that
4 the statement conceals or admits facts or contains false or
5 misleading information concerning any material fact of that
6 claim.

7 MS. STANISH: That doesn't address the intent to
8 defraud.

9 THE COURT: Well, it's not in there.

10 MS. WECKERLY: It's not in the statute.

11 MR. WRIGHT: Right. That's what Scalia said in his
12 dissent, where I can say materially something wrong, like I
13 tell the loan officer that the -- I think your children are
14 beautiful there and I'm a lyin' to him and I don't, because
15 they're ugly kids.

16 THE COURT: Yeah. But that's not material to your
17 loan application, whether his kid is fat or skinny or ugly or
18 pretty or, you know, looks like the mailman or looks like him
19 or whatever. That's not material.

20 MR. WRIGHT: That isn't -- they said that was the
21 intent to defraud element, that I have to be doing it. I have
22 to be making the false statement with the intent to defraud.

23 THE COURT: Yeah. But if you read from the statute,
24 where is that in the statute? So give me some caselaw then
25 that tells me to give another instruction. Other than just

1 you two saying that we want another instruction, give me some
2 authority. If you give me some good authority that this is
3 not a good instruction or that it's something needs additional
4 explanation, then I'll give you another instruction.

5 MS. STANISH: To me fraud is fraud and fraud
6 require -- is a specific intent crime that requires intent to
7 defraud. It's just that fundamental to me. And I
8 understand --

9 MR. WRIGHT: We'll find cases that say intent to
10 defraud [unintelligible].

11 THE COURT: No. I mean it has to be insurance fraud,
12 Mr. Wright. While you think it's all so silly, but you know
13 that's the purpose of submitting annotated jury instructions
14 when we settle jury instructions. That's the purpose of it.
15 And your annotation is to the statute. Well, fine, I looked
16 up the statute and it says exactly what the State said.

17 MR. WRIGHT: Okay. Well, if your ruling is there is
18 no intent to defraud element, fine. Leave it the way it is.

19 THE COURT: No, I'm not ruling that. I'm saying that
20 if you read the --

21 MR. WRIGHT: Okay. Then where is it?

22 MS. STANISH: I don't think, Your Honor, that the
23 statutes in general always define the mens rea that's
24 necessary to convict someone, and I just think it's so
25 fundamental that when you deal with fraud you must have an

1 intent to defraud. It's, you know, common law. It is
2 specific intent off -- is a specific intent offense. And I
3 know that the statute may not say it, but it's implicit in
4 fraud.

5 And I do believe that somewhere, maybe it is in the
6 State's theft or larceny, somewhere in here you do have -- the
7 State does have the definition of intent to defraud. But I
8 just -- it's certainly not absent from the insurance fraud
9 statute, even though it's not -- the LCD didn't put it in the
10 statute itself.

11 THE COURT: Does the State want to be heard on this?
12 I mean...

13 MS. WECKERLY: We tracked the statute. Barring other
14 authority, I don't know what else we can put in. There isn't
15 a lot of deviation from exactly what we wrote. It's a
16 knowing. It's knowingly, I mean, that's what it says,
17 submitting something false and misleading on any fact material
18 to an insurance claim basically. That's this. I mean, that
19 is what it says and I think we tracked the language of the
20 statute in the instruction.

21 THE COURT: Well, I mean, obviously on the ones where
22 you get paid the same thing it wouldn't be material. That's
23 your argument. It's not material if they're getting the same
24 amount of money, whether it's 31 minutes or 15 minutes or 32
25 minutes or whatever. How is it then that's not material, so.

1 All right. You know, if you want to rehash this one
2 with, you know, additional argument, we'll let you. But for
3 right now the one that mirrors the statute is going to be the
4 instruction.

5 MR. WRIGHT: Okay. And is --

6 THE COURT: Let's move on. A person who performs any
7 act or neglects any duty.

8 MR. WRIGHT: On the last, where do we lock them into
9 what's pled?

10 MR. SANTACROCE: We're going to ask -- I'm going to
11 ask for an instruction that says that the State must prove
12 what's pled in the indictment.

13 MR. WRIGHT: I mean, I'm not arguing with you on the
14 last one. I'm just saying, I mean, you said, We're not there
15 yet, Mr. Wright, and so I never saw it in theirs. Like they
16 pled willfulness for the -- willfully and knowingly in the
17 indictment. Okay. On the insurance fraud. If they don't
18 want to call it intent to defraud, we'll give a definition of
19 willfulness then.

20 I mean, then I have to -- I'll get the intent to
21 defraud in through what they pled through willfully. What you
22 plead you're locked into, and we're just ignoring what they
23 pled. There's no willfulness instruction in here.

24 THE COURT: Well, then submit a willfulness
25 instruction.

1 MR. WRIGHT: Well, I submitted one that I thought
2 are -- correctly stated the elements and components of the
3 offense, including an intent to defraud, which is necessary
4 for any fraud case. So what we proposed is a -- I don't see a
5 single thing in our proposed instruction that is in error or
6 wrong.

7 MS. STANISH: And I can't -- I'm strapped to cite
8 additional authority, because I don't believe there's a lot of
9 Nevada law that interprets this statute at all, and that's
10 going to, you'll see, Your Honor, become even more of an issue
11 when we get into the criminal neglect statute, so.

12 THE COURT: All right. Well, let's just move on. I
13 mean, we'll hold this, you know, in abeyance, but for right
14 now I'm giving the one that mirrors the statute.

15 All right. A person who performs any act or neglects
16 any duty imposed by law, is everyone fine with this? Okay.

17 MS. STANISH: Now, this is --

18 THE COURT: What's your objection?

19 MS. STANISH: Well, you know, I know it regurgitates
20 the statute, but, you know, as we have briefed in the past
21 when we dealt with the validity of the indictment, we must
22 make sure we define these terms for the jury so that they are
23 not convicting our clients of ordinary negligence. And we
24 discussed at length before coming here, Your Honor, these --

25 THE COURT: Do you want a definition of reckless --

1 MS. STANISH: Well, what I'd suggest we --

2 THE COURT: -- as opposed to ordinary negligence?

3 MR. WRIGHT: We proposed --

4 THE COURT: I'm happy to give that.

5 MS. STANISH: I don't think we're that far apart. We
6 spent about an hour talking about our proposed instructions.
7 Both parties agree that we must define for the jury's benefit
8 the appropriate mens rea, which we both agree is a
9 consciousness, an awareness of a risk. We have a dispute
10 whether that needs to be a substantial risk.

11 But just to get to what we agree on, Your Honor, we
12 agree that to distinguish criminal neglect from ordinary
13 neglect it's necessary to define the mens rea as an awareness
14 or consciousness of a risk and the conscious disregard of that
15 risk.

16 THE COURT: Regard of that risk and an act taken
17 anyway.

18 MS. STANISH: So we started -- what we did, Your
19 Honor, if you could maybe jump to our instructions, because --

20 THE COURT: Is this elements of reckless
21 endangerment?

22 MS. STANISH: First we started, just to be --

23 MR. WRIGHT: What number?

24 THE COURT: What do you want me to look at?

25 MS. STANISH: I guess let's just start with Number 1,

1 because the State agrees --

2 THE COURT: Cases -- civil cases distinguished?

3 MS. STANISH: Correct. The parties are in agreement
4 with the exception that the State would like to see deleted,
5 and we don't have an objection to this, delete the sentence
6 that ends at line 9 through 11, In a civil case, for example,
7 the plaintiff need only prove the case by a preponderance
8 of --

9 THE COURT: Yeah. I've never heard one -- well,
10 actually, I have.

11 MS. STANISH: It's from Michigan.

12 THE COURT: But more likely than not is the way we
13 define it. So we'll -- State, you're fine with giving civil
14 cases distinguished, deleting the sentence beginning on line 9
15 and ending at line 12?

16 MS. WECKERLY: I think we wanted to keep in, In a
17 criminal case the defense --

18 MS. STANISH: Right.

19 MS. WECKERLY: -- has no burden of proof at all and
20 the prosecution must prove its case beyond a reasonable doubt.
21 That can stay in. It's just the civil.

22 THE COURT: I don't see that.

23 MS. STANISH: It's that one phrase. Can I approach?
24 I'll just show you.

25 THE COURT: Oh, I see.

1 MS. STANISH: Okay. You got it?

2 THE COURT: So you want, In a criminal case -- I see
3 it -- the defense has no burden of proof?

4 MS. WECKERLY: Right.

5 THE COURT: That's fine.

6 MS. STANISH: Okay. Now, I think we were --

7 THE COURT: I like -- do you like no burden of proof
8 at all, or just no burden of proof?

9 MS. STANISH: At all.

10 THE COURT: At all. Okay.

11 MS. STANISH: Never, ever. I think we are in
12 agreement on our Instruction 2, which basically does take from
13 the statute which is much more detailed than the Fan Man
14 statute.

15 THE COURT: Okay. This is elements of criminal
16 neglect.

17 MS. STANISH: Of patient.

18 THE COURT: I'm sorry?

19 MS. STANISH: Criminal neglect of patient.

20 THE COURT: Right.

21 MS. STANISH: And what we did here was integrate the
22 various paragraphs from the statute and added the mens rea
23 element in -- you see it present in the fourth element.

24 THE COURT: Defendant must have been aware or
25 cognizant of the substantial risk of harm presented by his act

1 or admission.

2 MS. STANISH: Yeah. And that should probably be
3 conscious rather than cognizant.

4 THE COURT: Because you're afraid they won't know
5 what cognizant means?

6 MS. STANISH: I don't know. I don't know. I'm not
7 cognizant of what the jury is thinking at any given time.

8 MS. WECKERLY: Our objection with that is the statute
9 doesn't say substantial, so --

10 THE COURT: So you just want the defendant must have
11 been aware or conscious of the risk of harm presented by his
12 act or omissions?

13 MR. STAUDAHER: Of a risk of harm presented by his
14 actions, and that would be lines 12, 14 and 17.

15 THE COURT: Defense.

16 MS. STANISH: Do you want to address that,
17 because I --

18 MR. WRIGHT: Go ahead.

19 MS. STANISH: I guess I -- I -- Your Honor, this was
20 really difficult to figure out, especially the Fan Man
21 statute, and I relied significantly on the State of Maryland,
22 which has a more developed body of law on reckless
23 endangerment. And I think it's important to keep substantial
24 in there, because we want to avoid prosecuting people for
25 mistakes, ordinary negligence and things that are not

1 foreseeable, or things that are freak results. And --

2 THE COURT: Then why don't you, instead of taking --
3 doing substantial, you could add a foreseeability element?
4 Like you would have --

5 MS. STANISH: Well, and I have that.

6 MS. WECKERLY: That's in that statute.

7 MS. STANISH: And you know, I --

8 THE COURT: What's that?

9 MS. STANISH: That's in the actual statute.

10 THE COURT: I mean like you would have in a civil
11 case, like that the risk of harm had to be foreseeable.

12 MS. STANISH: And I agree that needs to be --

13 MR. STAUDAHNER: It's in there, the third line, or the
14 third element already.

15 MS. STANISH: -- in there because, you know, we had a
16 discussion -- this issue is going to come up --

17 THE COURT: Yeah. It is on the third, that it is
18 foreseeable.

19 MS. STANISH: Right. And just to kind of address as
20 we speak about this, the Fan Man statute, the State has an
21 objection with me including the foreseeability element in
22 there, and I think --

23 THE COURT: No, they don't seem to. They were fine
24 with that.

25 MS. WECKERLY: No.

1 MS. STANISH: Yeah, they do.
2 MS. WECKERLY: We're on criminal neglect right now.
3 THE COURT: Oh, okay. I see.
4 MS. STANISH: I just kind of to --
5 MR. STAUDAHER: Could we just stay with this one
6 and --
7 MS. STANISH: All right.
8 THE COURT: Yeah, I think that's easier. Let's go
9 one by one. You two keep --
10 MS. STANISH: Judge, I --
11 THE COURT: -- keep trying to go from one -- I mean,
12 it's too confusing. Let's go one by one and then, you know,
13 global principles we'll argue later, because otherwise...
14 MS. STANISH: I understand.
15 MR. STAUDAHER: But the statute does not -- it only
16 says a risk. I mean, it doesn't say -- it doesn't qualify the
17 amount of risk.
18 THE COURT: And you already have a foreseeability.
19 MR. STAUDAHER: Correct.
20 MS. WECKERLY: Right. That's from the statute.
21 MS. STANISH: Your Honor, if I could --
22 MR. STAUDAHER: So we need a risk upon.
23 MS. STANISH: -- draw your attention --
24 MR. WRIGHT: Where does it say a risk?
25 MR. STAUDAHER: That's what I'm proposing --

1 MR. WRIGHT: Where does it say that in the statute?
2 MR. STAUDAHER: -- based on that. In your thing --
3 MS. WECKERLY: In your proposed.
4 MR. STAUDAHER: -- or your substantial risk.
5 MR. WRIGHT: Oh.
6 THE COURT: They say, The risk.
7 MR. WRIGHT: Okay. Well, I thought he said a.
8 THE COURT: He did. I like the.
9 MR. WRIGHT: I agree.
10 THE COURT: What's that?
11 MR. WRIGHT: I agree, the.
12 THE COURT: Because then a -- well, then --
13 MS. STANISH: No. They're fussing about the
14 substantial risk.
15 MR. WRIGHT: I understand. Right.
16 MR. STAUDAHER: I'm okay with changing a to they --
17 or the rather.
18 THE COURT: The.
19 MS. STANISH: Here's where I...
20 THE COURT: Although it says, A proper regard for
21 danger to human life or indifference. So to me that suggests
22 substantial even though it doesn't say substantial. I mean,
23 your disregard has to be for human life, not giving somebody a
24 paper cut. Now, here we can just mirror the language of the
25 statute.

1 MS. WECKERLY: I'm fine with that.

2 THE COURT: But I mean, I think if it's a danger to
3 human life, that is substantial.

4 MS. WECKERLY: No. No. The risk doesn't have to be
5 substantial. The chance --

6 THE COURT: Oh, right. The --

7 MR. STAUDAHER: The harm.

8 THE COURT: The harm has to be.

9 MS. WECKERLY: The harm has to be substantial.

10 THE COURT: Right.

11 MS. WECKERLY: The chances of something bad happening
12 does not have to be substantial.

13 MR. WRIGHT: Well, it can just be --

14 THE COURT: Why don't we put --

15 MR. WRIGHT: -- one in a million.

16 THE COURT: -- of the risk of substantial harm? I
17 mean, if we move substantial.

18 MR. STAUDAHER: No. That's --

19 THE COURT: Because you want to say it's of
20 substantial risk. It doesn't say that. I wasn't reading it
21 right. The harm has to be substantial, or the risk of the
22 harm -- it has to be a risk of substantial harm, not a
23 substantial risk of any harm.

24 MS. WECKERLY: Right.

25 MR. STAUDAHER: Right.

1 MS. WECKERLY: And then --

2 THE COURT: So basically the problem as I see it is
3 with the placement of the word "substantial." The risk of
4 harm has -- it has to be a risk of substantial harm, not a
5 substantial risk of any harm.

6 MS. STANISH: I think --

7 THE COURT: Do you see the difference? I mean, it
8 doesn't have to be a substantial risk of causing a paper cut.
9 It has to be a risk of causing substantial harm, serious harm.

10 MR. STAUDAHER: Right. But that is -- that's
11 actually a separate part of what we have to prove. It's
12 almost two elements combined in one, that there's a risk that
13 they have to perceive. They operate in disregard of that
14 risk, it causes harm, and then we have to prove that that harm
15 was substantial.

16 THE COURT: Right.

17 MR. STAUDAHER: So that would be combining two
18 elements if we do it that way. Because the sixth element that
19 she has listed there is the act or omission proximately caused
20 substantial bodily harm to another person. And they've asked
21 that that not be in a lesser included, which would not include
22 that particular element.

23 THE COURT: So what do you want, State?

24 MS. WECKERLY: Well, we --

25 THE COURT: What are you asking for?

1 MS. WECKERLY: We're asking to track the statute. I
2 don't mind adding pieces of it, but I don't think substantial
3 needs to -- I don't mind adding some pieces of their
4 instruction, but I don't think substantial risk is really
5 their statute.

6 THE COURT: What about if we say the defendant's act
7 or omission must have presented a risk of substantial harm
8 that is foreseeable to a reasonable person. Four, the
9 defendant must have been aware or conscious of the risk of
10 substantial harm presented by his act or omissions. Fifth,
11 the defendant must have acted in conscious disregard to the
12 risk of harm and must not have acted as a result of
13 inattention, mistaken judgment or misadventure.

14 MS. WECKERLY: Okay.

15 MR. SANTACROCE: I'm good with that.

16 THE COURT: Mr. Santacroce's good.

17 MS. WECKERLY: You're saying three, four and five on
18 theirs?

19 THE COURT: Right.

20 MS. WECKERLY: Okay.

21 THE COURT: If you want to use theirs.

22 MS. WECKERLY: I would rather use the statute and add
23 in than -- because the statute's the statute, and so I think
24 we're safer adding in what they want added into the statute.

25 THE COURT: We're safe doing whatever the defense

1 wants.

2 MR. WRIGHT: Right.

3 THE COURT: But I mean, I don't -- I can give it
4 that, the way I've just modified it, or I can give the statute
5 and add something.

6 MR. SANTACROCE: I'd prefer the way you just did it.

7 MR. WRIGHT: I do too, but I still think it has to be
8 a substantial risk.

9 THE COURT: It doesn't say that in the statute
10 though.

11 MR. WRIGHT: It's -- I risk if I'm going 36 in a 35,
12 but that's a trivial risk. This is a criminal negligence.

13 THE COURT: Yeah, but it's a risk of substantial
14 harm.

15 MR. WRIGHT: No.

16 THE COURT: So if you're go -- well, that's how I --

17 MR. WRIGHT: I have to be cognizant of a --

18 THE COURT: Yeah, but it was except --

19 MR. WRIGHT: -- a genuine risk --

20 THE COURT: Excuse me.

21 MR. WRIGHT: -- as --

22 THE COURT: Excuse me. If you go to the second
23 element, if you're driving 36 in a 35 mile per hour zone, that
24 is not aggravated, reckless or gross. So if you include the
25 whole thing, then your example doesn't fit under subpart 2,

1 because how is going 36? But going 70, you have a risk of
2 substantial harm to somebody.

3 I mean, it's just like, okay, you know, if I cross
4 against the light and I'm a pedestrian, I'm risking my own
5 safety, and even though I'm acting maybe in reckless disregard
6 for my own safety, I'm not creating a substantial -- a risk of
7 substantial harm to anybody else. I mean, if I was a cow or a
8 deer or something that would not be the case.

9 MS. STANISH: It's better than just tracking a
10 statute that doesn't contain mens rea. I mean, if you go --

11 MR. WRIGHT: I'd go with the way you said it.

12 MS. STANISH: If you go with the argument that you
13 have to regurgitate the statute, when you get to the Fan Man
14 statute forget about it, because it's so poorly written.

15 THE COURT: Okay. Well, Ms. Stanish, can we please
16 stick --

17 MS. STANISH: We'll take it, Your Honor.

18 THE COURT: Okay. I'm about to leave the bench and
19 make you folks work it out, because I've already said let's go
20 one by one.

21 MS. STANISH: No. I appreciate what you're doing,
22 Your Honor. I think your modification is better than what the
23 State was suggesting.

24 MR. WRIGHT: Yes. We'll take what you said.

25 MS. STANISH: Yes.

1 THE COURT: Okay. Let's go one by one and stop
2 saying, oh, well, if you do this --

3 MS. STANISH: All right. Okay.

4 THE COURT: -- in 19 ones ahead that we haven't even
5 looked at yet, then there's a problem there. Let's do it one
6 by one. What?

7 MS. WECKERLY: I just need to understand what the
8 edit is.

9 THE COURT: Okay. If you're fine with this, the
10 defendant must -- Number 4. Well, it starts with three.

11 MR. STAUDAHER: Number 3.

12 THE COURT: The defendant's act or omission must have
13 presented a risk of substantial harm that is foreseeable.
14 Four, the defendant must have been aware or conscious of the
15 risk of substantial harm. The defendant must have acted in
16 conscious disregard to the risk of substantial harm and must
17 not have acted as a result of inattention, mistaken judgment
18 or misadventure.

19 MR. SANTACROCE: I'm good with that.

20 MS. STANISH: Yeah, we are too.

21 MR. SANTACROCE: Does that replace --

22 MS. WECKERLY: But where are we putting that?

23 Like --

24 THE COURT: Where I just said to do it. What's
25 your -- I don't understand you.

1 MS. STANISH: Instead of modifying risk it is
2 modifying harm.

3 THE COURT: Modifying harm. What's your question,
4 Ms. Weckerly?

5 MS. WECKERLY: How is the beginning of the
6 instruction going to read?

7 THE COURT: I -- how -- what do you want it to read?

8 MS. WECKERLY: I would put the three, four and five
9 of theirs under our A, because I think that's all the mental
10 state explanation.

11 THE COURT: Okay.

12 MS. WECKERLY: Or I'd put four and five there,
13 because the third one is the foreseeability, which we covered.

14 THE COURT: Okay. I have -- of yours. Well, I don't
15 have yours in the same order. I'm going --

16 MS. WECKERLY: Yes. Ours starts, A professional
17 caretaker.

18 THE COURT: All right.

19 MS. WECKERLY: Okay. So a professional caretaker who
20 fails to provide such service or care, okay. And then we have
21 A, the act or omission is aggravated, reckless or gross. We
22 could put like a comma, meaning, and then go to their Number
23 4, the defendant must have been aware of the risk of
24 substantial harm committed by his act or omission, and then
25 their Number 5.

1 THE COURT: All right. Here's what you're going to
2 do. You're going to prepare the one off yours the way you
3 want it with the changes.

4 MS. WECKERLY: Okay.

5 THE COURT: And then we'll have this. And then we'll
6 decide at some future time which one we're going to give.

7 MS. WECKERLY: All right.

8 THE COURT: Because we're not going to sit here, you
9 know, finessing where a period goes. Okay. So Ms. Weckerly,
10 you do what you think it should be, and then we have
11 Ms. Stanish's.

12 MS. WECKERLY: All right.

13 THE COURT: Let's move on.

14 MR. SANTACROCE: Did we leave off that a person who
15 performs any act?

16 THE COURT: We're on that now. A person who performs
17 any act or neglects any duty imposed by law in willful or
18 wanton disregard.

19 MS. WECKERLY: They want to add in the reckless
20 mental state, and that's fine with us.

21 MR. WRIGHT: Where are you?

22 MS. STANISH: I've lost our place. Where are we?

23 MR. WRIGHT: Are we on ours?

24 THE COURT: No.

25 MR. WRIGHT: Where are we?

1 THE COURT: We're using the State's as our guide.
2 Then as ones come up from the defense packet that are
3 alternative to that or in addition to those, we go to the
4 defense packet. So right now we're on the three line
5 instruction. A person who performs any act or neglects any
6 duty imposed by law in willful or wanton disregard of the
7 safety of persons or property is guilty of.

8 MS. STANISH: Is that your fan -- is that the Fan Man
9 statute?

10 MS. WECKERLY: Yes.

11 MR. STAUDAHER: Yes.

12 THE COURT: And they're fine with that in the mental
13 element. So which one from the defense packet is that?

14 MS. STANISH: That is our number --

15 MS. WECKERLY: The defendant must have been aware or
16 conscious of, and see, we have a disagreement. They want
17 substantial risk of harm and I think that that is not required
18 under this statute. But I have no problem with putting that
19 they must be aware of conscious -- aware or conscious of the
20 risk of harm presented by that.

21 THE COURT: I don't have that one. It's --

22 MS. WECKERLY: Theirs is --

23 MS. STANISH: Ours is page 5.

24 MS. WECKERLY: They have elements of reckless and
25 danger.

1 MR. WRIGHT: It's Number 3, isn't it?
2 MS. STANISH: Yeah. On page 5.
3 THE COURT: Okay. Page 5. And you're fine with
4 adding --
5 MS. WECKERLY: Or the defendant must have been aware
6 or conscious of, but I don't want it to say substantial risk.
7 THE COURT: Of the risk of substantial harm, or is
8 that not --
9 MR. STAUDAHER: There's no substantial --
10 MS. WECKERLY: I don't think that's required in this
11 statute.
12 MR. STAUDAHER: -- in this statute.
13 THE COURT: Okay.
14 MR. STAUDAHER: That's one of the differences between
15 the two.
16 THE COURT: Ms. Stanish, would you be fine with that
17 change?
18 MS. STANISH: No. I think -- you know, the way I
19 look at this, Your Honor, is we are -- we start with basic
20 tort negligent --
21 THE COURT: Right. That's right.
22 MS. STANISH: -- concepts, and then we bump it up a
23 notch.
24 THE COURT: It's -- right.
25 MS. STANISH: And that notch gets bumped up obviously

1 with the mens rea being added, but it also gets bumped up with
2 the extent of the negligence gross aggravated, and that the --
3 you know, we don't criminally prosecute someone for engaging
4 in conduct that does not present -- that presents a minor risk
5 of a sort, or maybe an unforeseeable risk.

6 I just -- I -- I think it's -- I look at these two
7 offenses, quite frankly, as being in the same family, as
8 they're criminal neglect offenses. And it doesn't make sense
9 to me that just because the criminal neglect of patient
10 statute LCD put more work into defining it than the casino
11 attorney who drafted the Fan Man statute. I think we should
12 educate the jury on --

13 THE COURT: So basically what you're seeking to do is
14 to sort of insert the tort elements.

15 MS. STANISH: And I think it makes sense, Your Honor,
16 to have it comparable to the neglect of patient statute that,
17 you know, when we're talking criminal neglect in the Fan Man
18 statute, it should be in the same -- it should have the same
19 basic elements that are maybe better defined in the criminal
20 neglect of patient statute.

21 I just -- it doesn't make sense to me to say that
22 somehow the Fan Man statute is a different degree of criminal
23 neglect between the -- between civil tort and criminal neglect
24 of patient, there's yet another degree of criminal negligence.
25 It's so confusing as it is that I think it's important not to

1 confuse the jury and to -- you know, and obviously we're
2 treading new trails here, as we often do.

3 But I just feel like the two criminal neglect
4 statutes should share the same degree of risk that we've
5 already discussed in the previous statute.

6 THE COURT: State.

7 MS. WECKERLY: I just don't think those are elements.
8 I don't think the risk has to be substantial. It doesn't say
9 it has to be foreseeable. But there is a recklessness
10 standard and we don't have a problem with that. It's adding
11 these other elements that don't seem to be present in the
12 statute.

13 THE COURT: All right.

14 MR. STAUDAHER: And we are talking about two
15 different felonies. One is a B felony, one's a C felony. But
16 there's a reason why there's a difference between the two
17 statutes. One is a lesser penalty than the other.

18 THE COURT: All right. Ms. Weckerly, put together
19 same as I said as the last one, using yours, what you're
20 willing to include from the defense's proposed, and then we'll
21 look at that when you get that done.

22 MR. SANTACROCE: Can I get a definition of willful
23 and wanton?

24 MR. WRIGHT: And reckless.

25 MS. WECKERLY: Well, that's -- that is -- I mean,

1 that's what the recklessness is going to be, right. I mean,
2 that's willful and the defendant must have been aware or
3 conscious of the risk --

4 MR. WRIGHT: No.

5 MR. SANTACROCE: No.

6 MS. WECKERLY: -- of harm and disregard.

7 MR. WRIGHT: What does wanton mean and what does
8 reckless mean.

9 MR. SANTACROCE: There's a stock instruction about
10 that.

11 THE COURT: Why don't you pull it.

12 MR. SANTACROCE: Oh, gosh.

13 THE COURT: Well, that's what you're supposed to do
14 when we settle jury instructions, look at what they have and
15 look at what we have. So now we have to find it.

16 MR. SANTACROCE: Well, you don't have to find it.
17 Usually we go through this process, we make the additions, the
18 State makes the amendment and correction and we all get a
19 copy. That's my experience of the process.

20 THE COURT: Which is what I'm telling them to do
21 right now.

22 MR. SANTACROCE: Okay.

23 THE COURT: But usually it's not everybody's trying
24 to rewrite every single --

25 MR. SANTACROCE: I understand that.

1 THE COURT: -- every single instruction, which so far
2 is what we've had is you folks rewriting every single one.
3 You know, usually there's a few minor changes and a couple of
4 major disputes.

5 MR. SANTACROCE: Right. I agree with that.

6 THE COURT: But so far, you know, collectively --

7 MR. SANTACROCE: But something as simple as the
8 definition of willful and wanton, I don't think is making a
9 burden on you, is it?

10 MS. WECKERLY: Well --

11 MR. SANTACROCE: If you want me to pull it, I'll
12 pull it.

13 MS. WECKERLY: -- I mean, I don't know what you want.

14 THE COURT: First of all, they may not have it.

15 MR. SANTACROCE: Okay.

16 THE COURT: It's not -- I don't know if it's part of
17 what they have. The Court can check what it has, but that
18 would probably be from -- I don't even know if we have any
19 from civil cases. That's your obligation when you're supposed
20 to prepare.

21 MR. SANTACROCE: Okay.

22 THE COURT: I don't know what all these other cases
23 you're talking about where, you know, everybody else is doing
24 your work for you. I'd really love to know what other courts
25 that is.

1 MR. SANTACROCE: Okay. I'll pull it.

2 THE COURT: I mean, happily I'll hear whatever it is,

3 Mr. Santacroce.

4 MR. SANTACROCE: [Unintelligible.]

5 THE COURT: No, I mean, really. Where is all this

6 other work --

7 MR. SANTACROCE: I mean, you can go to Black's. You

8 can go to Black's Law Dictionary and get that definition.

9 THE COURT: Well, why do I have to do that?

10 MR. SANTACROCE: I'm not asking you to do it. I'm

11 just asking you can we put the definition in the instruction.

12 THE COURT: I'm fine with putting the definition in

13 the instruction, number one. Number two, now let's agree on

14 the definition.

15 MR. SANTACROCE: Whatever Black's Law says I will

16 agree to, Black's Law Dictionary.

17 THE COURT: Oh, okay. Let me get up and go get my

18 Black's Law Dictionary --

19 MR. SANTACROCE: Well, I don't have one.

20 THE COURT: -- because nobody else did it.

21 (Pause in proceeding.)

22 THE COURT: "Willful, voluntary and intentional, but

23 not necessarily malicious."

24 MR. SANTACROCE: Perfect.

25 THE COURT: Does anyone have an objection to

1 including that?

2 MS. STANISH: I was going to suggest, because I -- I
3 thought I cited this and I was just looking for it. Roby
4 [phonetic], a Nevada statute, has a definition of willfulness.

5 THE COURT: Okay.

6 MS. STANISH: And I cited it.

7 MR. WRIGHT: You cited it and I saw it.

8 MS. STANISH: I'm just trying to find it and I don't
9 know that I -- it's in the -- let me look and see if I got it
10 in my notes here.

11 MR. WRIGHT: It's in the first one we were
12 looking at.

13 MS. STANISH: Yeah. I -- and I think at one point I
14 did define it, and then I integrated it into the element, and
15 now I don't have it in here. But I did cite the Roby case.
16 There's actually a Nevada definition of willfulness in Roby.

17 THE COURT: What about wanton?

18 MS. STANISH: Now, actually, I think I did quote that
19 from a civil case in page -- let's see. Yeah, page 4. Let's
20 see. And I was looking too, I have attached the jury
21 instructions from Maryland on reckless endangerment, and I
22 think there might be some language there. But I just -- here
23 it is. Yeah. "Plus we see that wanton misconduct
24 involves --"

25 THE COURT: Yeah, I see that. Involves an intention.

1 MS. WECKERLY: Willful and wanton is reckless. It's
2 the same thing.

3 MS. STANISH: I think probably it's kind of captured,
4 isn't it, you know.

5 MR. WRIGHT: Willful, wanton, reckless, how do you
6 even read that and determine what --

7 MS. WECKERLY: That's what -- your brief says that.
8 "A conscious disregard of substantial risk is similar to a
9 civil tort definition of wanton misconduct in Nevada." That's
10 what you guys cite.

11 MS. STANISH: Yep.

12 THE COURT: Do you want to use that?

13 MR. SANTACROCE: I like what you just read on
14 willful. Can you read wanton?

15 THE COURT: Well, except that when you read wanton,
16 then it gets worse for you. Oh, no. It gets better for you
17 actually. Yes, wanton is reckless.

18 MS. WECKERLY: Right.

19 THE COURT: "Wanton, unreasonably or maliciously
20 risking harm while being utterly indifferent to the
21 consequences."

22 MR. SANTACROCE: I like it.

23 THE COURT: Willful is voluntary and intentional, but
24 not necessarily malicious.

25 MR. SANTACROCE: I'm good with both those.

1 MS. WECKERLY: Can you please read wanton again.

2 THE COURT: Okay. Wanton, according to Black's Law
3 Dictionary, is unreasonably or maliciously risking harm while
4 being utterly indifferent to the consequences.

5 MR. WRIGHT: Good.

6 THE COURT: The first time I think I've opened this
7 book --

8 MR. SANTACROCE: Can I use it in my closing?

9 MS. WECKERLY: While being utterly indifferent to the
10 consequences?

11 THE COURT: Right.

12 MS. WECKERLY: Okay. So if we define those two in
13 the instruction, that's what everybody wants?

14 THE COURT: I'm fine with that.

15 MR. SANTACROCE: That's what I want.

16 MR. WRIGHT: Did we define -- did we define reckless?
17 Is an element of this offense that I have to be conscious of
18 that?

19 MS. WECKERLY: Isn't that wanton?

20 MR. WRIGHT: I don't know. I mean, I have to know
21 that I am engaging in an act that -- I mean, there is a mental
22 component which isn't in the --

23 MS. WECKERLY: That's what wanton is.

24 THE COURT: Does anyone want to order a pizza?
25 That's kind of a joke. It's a joke, but not really.

1 (Court confers with the clerk.)

2 THE COURT: Okay. Reckless, according to Black's Law
3 Dictionary, is characterized by the creation of a substantial
4 and unjustifiable risk of harm to others, and by a conscious
5 and sometimes deliberate disregard for or indifference to that
6 risk.

7 MR. SANTACROCE: I accept that.

8 MR. WRIGHT: I want it.

9 THE COURT: All right. Reckless disregard, conscious
10 indifference to the consequences of an act.

11 MR. WRIGHT: Conscious indifference. I have to
12 know it.

13 THE COURT: All right. So, Ms. Weckerly, would you
14 try to incorporate the changes we've discussed into the jury
15 instruction and then submit that, and then from that working
16 copy, if we need to tweak it a little bit we can. But I think
17 that that would be easier than trying to work off these two
18 things plus definitions and everything. So will you be in
19 charge of trying to incorporate that --

20 MS. WECKERLY: Yes.

21 THE COURT: -- into a format that we can then, if we
22 want to make a few minor changes we can work off of?

23 MS. WECKERLY: Okay.

24 THE COURT: Okay.

25 MS. STANISH: You've just created new law. You've

1 just clarified the law in Nevada.

2 THE COURT: Not necessarily.

3 MS. STANISH: We're blazing a new trail, Judge.
4 That's why we need pizza.

5 THE COURT: Like I said, you're only wrong if it's
6 the State's instruction. Well, it's, you know, unless they
7 decide, oh, by the way.

8 MS. STANISH: All right.

9 THE COURT: All right. The next one, if you find
10 beyond a reasonable doubt that the defendant has committed the
11 offense of performance of an unlawful act, is everyone fine
12 with that?

13 MS. STANISH: I wish you'd numbered the pages. I've
14 lost where --

15 THE COURT: This is substantially bodily harm.

16 MS. WECKERLY: Yes. Sorry. Yes.

17 MS. STANISH: This very long thing?

18 THE COURT: Once we --

19 MS. STANISH: I crossed this all out.

20 THE COURT: Once we organize these, this should
21 probably go after the criminal neglect definitions, but for
22 right now --

23 MS. WECKERLY: That's fine. We -- you know.

24 THE COURT: Everyone fine. Then the shorter one, as
25 used in these instructions substantial bodily harm means.

1 MS. STANISH: Well, I'm sorry. You know, I had
2 crossed out the entirety practically of that instruction that
3 begins with if you find beyond a reasonable doubt -- you are
4 instructed...

5 THE COURT: This shouldn't go in this place in the
6 packet --

7 MS. WECKERLY: I know.

8 THE COURT: -- but I think the instruction is
9 correct.

10 MS. WECKERLY: It is.

11 MR. WRIGHT: What's it saying?

12 THE COURT: It's basically saying, you know, if you
13 find this, then you have to see if you find that, but if you
14 don't find that but you found this, then it's this. If you
15 find this and that, then it's this and that. It's
16 essentially --

17 MS. WECKERLY: It's the same with a weapon.

18 THE COURT: Right. Essentially what it is.

19 MR. WRIGHT: This is distinguished and substantial
20 from what, unsubstantial?

21 MS. WECKERLY: Right.

22 THE COURT: No. It's just -- right. It's just to
23 say it's this --

24 MS. WECKERLY: And then you give the benefit of the
25 doubt.

1 THE COURT: -- if it's this but not that it's this,
2 but if it's this and that then it's this and that. Like a
3 weapon or a --

4 MS. WECKERLY: You can have this for both
5 instructions separately. The reason why it's long is because
6 the substantial's on both, so it's easier just to put it in
7 one.

8 THE COURT: Right. Okay. That's fine. And then the
9 definition of substantial bodily harm, are we fine with that?

10 MS. STANISH: I can't read this because I crossed
11 that all out.

12 MR. WRIGHT: It's just distinguishing the substantial
13 from not substantial.

14 MS. STANISH: Okay. All right.

15 MR. WRIGHT: It's like a lesser greater offense.

16 MS. STANISH: All righty. Then that's fine, the
17 definition.

18 THE COURT: Would anyone like a cookie?

19 (Pause in proceeding.)

20 THE COURT: Any person who without lawful authority,
21 the theft statute. Or this looks like theft by
22 misrepresentation.

23 MS. WECKERLY: No. This is straight theft, and I
24 understand there's arguments. But this is the theft statute.

25 THE COURT: Right. Yeah, this is the -- everybody