IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

SEP 26 2008

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	**Court of Criminal Appeals**
	)	**Case No. M2007-02781-CCA-R3-CD**
vs.	)	
	)	
CHRIST KOULIS	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE
WILLIAMSON COUNTY CRIMINAL COURT

BRIEF OF APPELLANT

Appendix in Separate Volume

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

This is an appeal as of right by Dr. Christ Koulis from his Williamson County conviction for the criminally negligent homicide of his fiancé, Lesa Buchanan. Dr. Koulis was sentenced to two years in prison and fined $3,000. The issues presented here concern the legal insufficiency of the evidence, three constitutional suppression issues, three jury instructions claims, and two double jeopardy questions. The defense asserts that this case should be dismissed, or in the alternative, a new trial granted.

A.

The fundamental issue here is that the State's wholly circumstantial case failed to establish any of the necessary elements to convict Dr. Koulis of the offense of criminally negligent homicide. In summary, the proof was that Dr. Koulis – a plastic surgeon – and his fiancé, Lesa Buchanan, had dated for many years, maintaining a long-distance relationship for the majority of that time, he in Chicago, Illinois and she in Franklin, Tennessee. Their relationship was, for the most part, tumultuous. On July 4, 2005, they decided to spend the Independence Day, holiday weekend together. Dr. Koulis flew down from Chicago, and they spent the weekend at Ms. Buchanan's apartment in Franklin. That weekend tragically ended on July 4, 2005 with the death of Ms Buchanan.

The proof established that, during this weekend, the couple engaged in extended periods of sexual activity, and that Lesa Buchanan abused drugs by crushing pills containing controlled substance and injecting them into the veins in her groin area, so that she could experience a rapid "high." She injected herself, at least on three occasions, and this drug abuse subsequently led to her sudden, untimely death.

The police and prosecutors operated on the theory that Dr. Koulis either provided the drugs to Ms. Buchanan or injected her with the drugs, causing her death. Dr. Koulis was eventually indicted for second degree murder by distribution of a Schedule I or II controlled substance in count one, and reckless homicide in count two.

The state alleged that Ms. Buchanan first "overdosed," on the drug, then fell into a lengthy slumber, and then finally died from respiratory failure. On the other hand, the defense established that death was sudden, caused from heart failure from the non-toxic "chalk" used in the manufacture of the drug. The "chalk" clogged the oxygen-blood exchange process in Buchanan's lungs, producing a pulmonary embolism-like effect on her lungs and heart. The time of death was resolved by the videos and timed/dated cell phone photographs taken shortly before her death when she was unquestionably alive and engaging in sexual activity. Dr. Koulis' medical expert pathologist was able to show that Ms Buchanan did not die from the injection of a controlled substance, but died from a blockage of the lung arteries which had developed over a period of months to years.

The state agreed that there was no direct proof that Dr. Koulis acted in any manner to cause Ms Buchanan's death. For example, there was no proof that Dr. Koulis prescribed any controlled substance to her. There was no proof that he injected her with any controlled substance. The state produced no evidence at trial that Dr. Koulis contributed in any way to Ms Buchanan's death. On the contrary, the evidence showed that, since it was her apartment, her medications and her drugs, that Lesa Buchanan had unfortunalty caused her own death by injecting herself with crushed pills.

At the conclusion of the trial, the jury was instructed on second degree murder, reckless homicide, criminally negligent homicide and simple assault – in descending order. The jury acquitted Dr. Koulis of three offenses – including the lesser offense of assault – but inexplicably found him guilty of the greater offense of criminally negligent homicide, yet not guilty of the lesser included offense of assault.

The defense contends that, based on the evidence presented at trial, there was no proof that Dr. Koulis committed any offense against Ms Buchanan. The State conceded that its case against the Defendant was entirely circumstantial. Although a person can be convicted of an offense by circumstantial evidence alone, it is well-settled in Tennessee that, before an accused can be convicted of a criminal offense based exclusively upon circumstantial evidence, the evidence "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." *State v. Crawford,* 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971). In other words, "[a] web of guilt must be woven around the defendant from which he [or she] cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." *Crawford*, 225 Tenn. at 484, 470 S.W.2d, at 613. The state failed to weave such a web of guilt around Dr. Koulis, that only he could have committed the crime. In this case, there were too many equally plausible ways that Ms. Buchanan could have died other than by an act of Dr. Koulis. Stated in another fashion, there was no evidence of any criminal agency on the part of Dr. Koulis. The state failed to prove beyond a reasonable doubt that Dr. Koulis' was guilty of criminally negligent homicide: therefore, his conviction should be reversed and dismissed.

B.

After Dr. Koulis called 911 for help, an ambulance rushed to Lesa Buchanan's apartment. When medical personnel arrived, Dr. Koulis assisted them as much as he could. When Ms Buchanan was taken to the hospital, Dr. Koulis followed in his vehicle. Shortly after treatment began in the emergency room, Lesa Buchanan died. Police arrived on the scene and immediately began their investigation into her death, suspecting foul play at the hands of Dr. Koulis.

Dr. Koulis was taken to a private room in the hospital, where he was held in custody and against his will; where he was interrogated by multiple officers and detectives, without the benefit of his *Miranda* rights. The defense asserts that the statements made by Dr. Koulis during this time of custodial interrogation, were constitutionally inadmissible. Although his responses to the officers' questions may not have been incriminating, this Court should, nevertheless, find that these *Miranda*-poor statements should have been suppressed.

C.

The facts of this case establish that two searches of residences were conducted with defective search warrants. Police searched Ms Buchanan's apartment in Franklin, Tennessee, on July 13, 2005,[1] and Dr. Koulis' apartment in Chicago Illinois, on July 15, 2005.

[1] Although Ms. Buchanan lived in the Franklin residence, Dr. Koulis paid the rent and some of the utilities and he stored some of his possessions there. The trial judge ruled that Dr. Koulis had standing to contest the searches. TR. volume 5, page 641

Since virtually all of the physical evidence in this case was derived from these two searches, the validity of these searches is challenged in this appeal. The defense contends that these search warrants failed to establish probable cause and were the product of admittedly unlawful, warrantless searches of the Franklin, Tennessee apartment conducted on July 4, 5, and 6. The trial judge invoked the inevitable discovery doctrine in an effort to "save" the two warrant searches, by holding that the evidence derived from the previous illegal warrantless searches would inevitably have been discovered through legal means as a result of the search with a "valid" warrant on July 13, 2005. The defense renews its assertion that to permit the resuscitation of the tainted evidence of these warrantless searches was tantamount to rendering the Fourth Amendment meaningless.

Both the Franklin warrant on July 13, 2005 and the later Chicago warrant on July 15, 2005, contained information that was fruit of the poisonous tree: namely, the prior illegal warrantless searches conducted on July 4, 5 and 6, 2005 of the Franklin, Tennessee apartment. In addition, the Chicago affidavit contained intentionally false information. That search should have been suppressed as well.

D.

Dr. Koulis further contests several important jury instructional errors in this appeal. The first contested jury instruction involved the failure to give a defense-requested spoilation instruction. When the government is shown to have been involved in the destruction of evidence, the defense is entitled to an instruction that the jury may infer that the destroyed evidence would have been adverse to the State. In this case, the police took possession of three pill bottles which came from Lesa Buchanan's apartment on the

day of her death. The proof showed that the police turned the pill bottles over to the hospital for safekeeping but "forgot" to retrieve the bottles. After failing to claim the bottles for *eleven* days the hospital disposed of the three pill bottles and their contents. The government also failed to preserve a critical photograph on a cell phone which showed Ms. Buchanan shortly before her death.[2] Thus, the defense was entitled to a failure-to-preserve-evidence jury charge ("a spoilation instruction"). The trial judge erroneously refused the defense special request for such an instruction.

The defense also filed timely special requests regarding a jury charge on a unanimous verdict "as to each and every element of the offense," and asked that the judge instruct the jury as to the provisions of criminally negligent homicide as set forth in Tennessee Pattern Jury Instruction 7.07. Although the judge did instruct the lesser offense of criminally negligent homicide and mentioned that the verdict had to be unanimous, the instructions, as given, were not in accord with the special requests. The criminally negligent homicide instructions were contrary to the Pattern Jury Instructions as dictated by *State v. Page*, 81 S.W.3d 781 (Tenn.Crim.App. 2002). Given that Dr. Koulis was convicted of criminally negligent homicide these constitutionally erroneous instructions are assailed here on appeal.

When it became apparent during the trial that the State was traveling on multiple and alternative legal grounds as to how Dr. Koulis could be convicted, the defense tendered a special unanimity request citing *State v. Forbes*, 918 S.W. 2d 431 (Tenn.

[2] The police became so concerned about the missing photo that the cell phones were first sent to the Secret Service in Washington and then to Scotland Yard in Great Britain. Neither agency was able to say what happened to the photo which was critical to the cause and time of death.

Crim. App.1995) holding that where there is technically one offense, but evidence of multiple acts which would constitute the offense, the trial court must augment the general unanimity instruction to insure that the jury understands its duty to agree unanimously to a particular set of facts. The judge refused. It was apparently too much to ask, as the defense requested, that "the jury must agree unanimously as to each and every element of the offense."

The several instructional errors were not harmless given the marginal, circumstantial evidence presented here. If the Court does not otherwise dismiss this case, Dr. Koulis should be granted a new trial.

E.

The trial judge's jury instructions and the manner in which he accepted the verdict violated Dr. Koulis' Double Jeopardy protections. The trial judge instructed the jury, in descending order, the four offenses for which Dr. Koulis stood trial: beginning with second degree murder, reckless homicide, and the two lesser included offenses of criminally negligent homicide and simple assault. The jury acquitted Dr. Koulis of second degree murder, reckless homicide, **and** simple assault; however, the jury found him guilty of the penultimate offense of criminally negligent homicide which was an offense "greater" than simple assault (for which he was acquitted).

Dr. Koulis asserts here that his conviction for criminally negligent homicide contravened the Double Jeopardy provisions of the Tennessee and United States Constitutions because the jury acquitted him of the lesser included offense of assault – an offense "under" the offense of criminally negligent homicide. As a matter of law, the

acquittal for the lesser crime of assault and battery works as an acquittal of the greater charge of criminally negligent homicide. Accordingly, his criminally negligent homicide conviction should be reversed and dismissed.

ISSUES PRESENTED FOR REVIEW

1 Whether the evidence is insufficient as a matter of law and facts to sustain a conviction for criminally negligent homicide.

2. Whether the Search of the Franklin, Tennessee apartment – in which Dr. Koulis had a possessory interest – violated the Search and Seizure provisions of the Tennessee and United States Constitutions because the affidavit to the search warrant of July 13, 2005 was insufficient to show probable cause and because the July 13, 2005 search was the product of earlier, unconstitutional warrantless searches.

3. Whether the search of Dr. Koulis' apartment in Chicago, Illinois, conducted on or about July 15, 2005, violated the Search and Seizure provisions of the Tennessee and United States Constitutions because the affidavit to the search warrant was insufficient to show probable cause and because the July 15, 2005 search was the product of earlier, unconstitutional warrantless searches.

4. Whether Dr. Koulis' *Miranda*-poor statements to the police were taken in violation of his Fifth Amendment right, his Sixth Amendment right, and the corresponding rights under the Tennessee Constitution since he was under arrest and/or in custody at the hospital when he gave the statement.

5. Whether the trial court erroneously failed to charge the jury as to the law regarding "destruction of evidence" or the "duty of the government to preserve evidence" as more particularly set forth in Tennessee Pattern Jury Instruction 42.23.

6. Whether the trial court erroneously failed to charge the jury as to the requested instruction on the requirement that the jury return a unanimous verdict and that the jury were required to unanimously agree on every element of the offense charged in the indictment and all lesser included offenses.

7 Whether the trial court erroneously failed to strictly charge the requested provisions of the Pattern Jury Instruction regarding criminally negligent homicide which resulted in a disjunctive instruction on elements of the offense and permitted a non-unanimous verdict.

8. Whether the conviction for criminally negligent homicide is barred by Double Jeopardy since the jury had implicitly acquitted Dr. Koulis of that charge by finding him not guilty of the lesser-included offense of assault.

9. Whether a dismissal of the criminally negligent homicide conviction is dictated by the acquittal of assault pursuant to Double jeopardy and Collateral Estoppel provisions of the constitutions of the United States and Tennessee.

STATEMENT OF THE CASE

Dr. Koulis' fiancé, Lesa Buchanan, died on July 4, 2005. Dr. Koulis was indicted for second degree murder and reckless homicide by the Williamson County grand jury on November 14, 2005. (See Vol. XXXI, p. 21).

The trial commenced on September 17, 2007 and continued until September 28, 2007 whereupon the jury convicted Dr. Koulis of criminally negligent homicide. (See Vol. XXXV, p. 625).

On December 5, 2007, the Court imposed a sentence of two years and a $3,000 fine for the criminally negligent homicide conviction. (Vol. XXXV, p. 735).

The written Order denying the judgment of acquittal and motion for new trial was entered on January 28, 2008. (Vol. XXXV, p. 747).

The defendant's Notice of Appeal was filed on December 5, 2007 because the trial judge had earlier, orally denied the post-trial motions but, as noted, the written order denying same was not entered until January 28, 2008. (See Notice of Appeal filed December 5, 2007 at Vol. XXXV, p. 739).

Dr. Koulis is presently on bond pending appeal.

STATEMENT OF THE FACTS AT TRIAL

A. STATE'S PROOF

(Exhibit 1 entered by Stipulation – 911 recording)

MARK SANCHEZ

[DIRECT EXAMINATION]

Mark Sanchez (hereinafter referred to as Sanchez) testified that he was a police officer for the Franklin Police Department, and had been working patrol for six years. As part of his duty, he responds to calls. (Vol. XII, p. 903). On July 4, 2005, he responded to a call at 101 Gillespie Drive in Williamson County, apartment # 17305. When he entered the apartment, he saw a white female lying on her back, on the floor, wearing black pants, and she was topless. Also present was a white male at the kitchen counter, wearing blue jeans and he was also topless. The male was Dr. Koulis. (Vol. XII, p. 903).

EMS, and Fire, and Officer Morton-Chaffin soon arrived at the apartment. (Vol. XII, p. 904). EMS asked Dr. Koulis what medications the female had been taking and he

told them Xanax, Ephedrine, and Norco [as will be noted later, Norco is hydrocodone/apac] . (Vol. XII, p. 904). Sanchez walked around the apartment and saw an air mattress and sex toys. (Vol. XII, pp. 903-904).

When Sanchez went into the bathroom, he saw a black shaving bag, some unused syringes, a used syringe in the sink and an ampule of clear liquid on the bathroom sink. There were also three prescription bottles in the bathroom but EMS took those bottles with them. (Vol. XII, p. 905). Sanchez identified a black shaving kit in a picture shown to him but the shaving kit in the picture was located on the kitchen counter. He testified that he saw a syringe in the black shaving kit. He testified that he did not move the shaving kit. When he asked Dr. Koulis about the syringes, Dr. Koulis told him that he takes Viagra and that the syringes and the ampules were used to terminate a prolonged erection. (Vol. XII, p. 908). Sanchez described Dr. Koulis' demeanor as panicky. Once EMS took Ms. Buchanan away, Dr. Koulis insisted on locking up the apartment. Dr. Koulis left for the hospital with Sanchez, Officer Morton-Chaffin, and the EMS supervisor. (Vol. XII, p. 909).

Sanchez never heard Dr. Koulis tell EMS personnel that Ms. Buchanan was an IV drug user. (Vol. XII, pp. 909-910). Sanchez cannot recall if Dr. Koulis was ever outside his presence while they were in the apartment. Sanchez stayed on the scene till his supervisor, Sergeant Treanor, arrived. At that time, he left for the hospital (hereinafter referred to as WMC), to check on the condition of Ms. Buchanan. When he arrived, he saw Dr. Koulis. (Vol. XII, p. 910).

Sanchez heard Dr. Koulis tell the doctors in the ER that Ms. Buchanan had complained to him about not feeling well, that she had shoulder pain the day before this, July 3, and as well as [July 4]. Sanchez overheard Dr. Koulis tell Sergeant Treanor that Ms. Buchanan had collapsed in the kitchen. At that time, Ms Buchanan was pronounced dead. Dr. Koulis left the ER crying and was very emotionally upset. (Vol. XII, p. 911).

To keep Dr. Koulis from disturbing the other people at WMC, Sanchez testified that he led Dr. Koulis to a private room called a meditation room. He wanted to give Dr. Koulis some privacy. (Vol. XII, p. 912). Sanchez testified that while talking to Dr. Koulis in the meditation room, Dr. Koulis told him that Ms. Buchanan was in the bedroom watching movies and he was in the kitchen. She called for him but he didn't go to her. She called again and this time he went into the bedroom. Dr. Koulis said "Something didn't seem right and her lips started turning blue." He slapped her to try to get a response, but did not get one. When he saw she wasn't breathing, he started CPR. Because he could not get the proper compressions [because she was on an air matress] , he moved her body to the living room and called 911. (Vol. XII, pp 912-913).

Sanchez testified that Dr. Koulis never told him that Ms. Buchanan was an IV drug user but did tell him that he gave her a shot of Epi, .01 milligrams in case she had an allergic reaction to the various medications. The officer also testified that he let Dr. Koulis use his cell phone to call his sister. (Vol. XII, p. 914).

[CROSS EXAMINATION]

Sanchez considered his response to the call at Ms. Buchanan's apartment as a medical call. In addition to him, the EMS personnel also went through the apartment.

Sanchez was looking for medications but testified he did not know anything about medications. (Vol. XII, p. 915). He does not know who moved the black bag. (Vol. XII, p. 916).

Sanchez testified that the three prescriptions bottles were the only drugs he saw. He did not know what they were. He did not know what kind of drugs Xanax, Norco, and Ephedrine were. He did not know what trace evidence is. (Vol. XII, p. 917). He did not see a camera anywhere in that apartment, nor did he recall seeing any cell phones there. (Vol. XII, p. 918). Sanchez believes that Dr. Koulis was cooperative with the EMS personnel. (Vol. XII, pp. 918-919).

Sanchez testified that he was inside Ms. Buchanan's apartment for thirty or forty minutes. At the end of the day, Sanchez believed that he was called to a medical call and not a crime scene. (Vol. XII, p. 921). He was not investigating a suspicious death or a homicide. (Vol. XII, p. 924). He believes he told EMS where the three prescription bottles were located, but he cannot recall if he handed those bottles to the EMS personnel. (Vol. XII, p. 925).

CHRIS FIELDER

[DIRECT EXAMINATION]

Chris Fielder (hereinafter referred to as Fielder) testified that he was the EMS supervisor on July 4, 2005, and had been an EMS paramedic for seventeen years. He was responsible for the EMS operations. On July 4, 2005 he arrived at Ms. Buchanan's apartment, apartment # 17305, in Franklin, Tennessee. The patient, a female, was lying

pretty close to the doorway on the floor. The paramedics were already there. He came in and started talking to Koulis. (Vol. XII, p. 927).

Fielder testified that Dr. Koulis told him that Ms. Buchanan had come back from the pool and had collapsed where they found her. (Vol. XII, p. 928). Dr. Koulis told him that she had taken a Xanax earlier in the day. There were quite a few syringes on the bar in addition to some medicine. Dr. Koulis had told Fielder that he had given Ms. Buchanan some Epinephrine for an allergic reaction. Dr. Koulis thought that she had had an allergic reaction. He did not mention that Ms. Buchanan was an IV drug user. Fielder considered this type of information pertinent because it related to the history of the patient. Ms. Buchanan had on a pair of jogging pants, but she was nude from the waist up. (Vol. XII, p. 929).

Dr. Koulis was wearing some blue jeans. It seemed that Dr. Koulis was not answering his questions fully. Once Ms. Buchanan was out of the apartment, Dr. Koulis took his time getting himself ready to go to the hospital with us. Fielder waited on Dr. Koulis, and Dr. Koulis followed him to the hospital. (Vol. XII, p. 930).

Fielder testified that he found Dr. Koulis' behavior unusual because he was not getting full answers from him. Dr. Koulis was more concerned about what the paramedics were doing, where we were going, and when we were leaving. Fielder expected Dr. Koulis to be in a hurry to get to WMC. Fielder testified that most people ride in the ambulance with them. Fielder didn't remember how long it took Dr. Koulis to get ready. Fielder testified that he saw Dr. Koulis again in the ER, but did not talk to him. Dr. Koulis was with the ER physician. (Vol. XII, p. 931).

Fielder testified that he saw several syringes and one vial of medicine on the kitchen bar. He never went into any other part of the apartment. He did not go into the bathroom. (Vol. XII, p. 932).

[CROSS EXAMINATION]

Fielder did not treat Ms. Buchanan. He described the process of intubation – the passing of a breathing tube and breathing for the patient. Ms. Buchanan was intubated. (Vol. XII, p. 934).

Pulmonary edema is fluid in the lungs. He testified that he would know if an intubated patient had severe pulmonary edema. You can hear severe pulmonary edema on stethoscope. It is also visible. (Vol. XII, p. 935).

Fielder did not make any notes of this event. (Vol. XII, p. 936).

Fielder knew nothing about the three prescription bottles in the apartment, sitting on the bathroom counter. (Vol. XII, p. 938).

[REDIRECT EXAMINATION]

Fielder testified that when he asked Dr. Koulis about Ms. Buchanan's drug use, Dr. Koulis only mentioned her use of Xanax. (Vol. XII, p. 940).

[RECROSS EXAMINATION]

[FURTHER REDIRECT EXAMINATION]

Fielder knew that Xanax was a depressant. (Vol. XII, p. 941).

[FURTHER CROSS EXAMINATION]

Fielder did not know when he first arrived at the apartment, that Dr. Koulis was a physician, but found that information out while they were still there. (Vol. XII, p. 943).

Fielder testified that Dr. Koulis gave him an initial medical history and answered questions. (Vol. XII, p. 943).

Fielder testified that Dr. Koulis told him that that the syringes were on the kitchen counter because he had given Ms. Buchanan an Epi shot. Fielder saw the vial of Epinephrine there. (Vol. XII, p. 944).

Fielder also saw small needles, and although he doesn't know what gauge they were, he could say they were small needles used for subcutaneous injections. (Vol. XII, p. 945).

SERGEANT ERIC TREANOR

[DIRECT EXAMINATION]

Sergeant Eric Treanor (hereinafter referred to as Treanor) testified that he was a sergeant with the Franklin Police Department. He had been with FPD for ten and a half years and is a patrol supervisor. (Vol. XII, p. 953).

On July 4, 2005, Treanor testified that he arrived in the parking lot of Ms. Buchanan's apartment complex as the ambulance was leaving for the hospital. He met with Sanchez and Chaffin and spoke to them. (Vol. XII, p. 954).

He testified that never went inside Ms. Buchanan's apartment. It had already been secured. He had Chaffin stand at the door to make sure no one entered the apartment. Treanor went to WMC. (Vol. XII, p. 955).

He testified that when he arrived at WMC, he spoke with Dr. Koulis who told him that he had been dating Ms. Buchanan for five or five and a half years. This past weekend they were trying to conceive a baby. Dr. Koulis was very distraught. When Treanor asked

him what happened, Dr. Koulis gave him two different accounts: the first was that he was in the kitchen and she was in the bedroom where she fell out. The second was that she fell out when she was in the living room. Dr. Koulis never told Treanor that Ms. Buchanan was an IV drug user. (Vol. XII, p. 956).

Treanor testified that he had the apartment secured because that was standard procedure when a death was involved. (Vol. XII, p. 957).

[CROSS EXAMINATION]

Treanor testified that he made a supplemental report of this incident. (Vol. XII, p. 957).

Treanor testified that initially, he talked to Dr. Koulis while Ms. Buchanan was being attended in the ER. There was a code going on at the time. (Vol. XII, p. 958).

Treanor testified that Dr. Koulis was visibly upset. (Vol. XII, p. 959).

Treanor testified that he never asked Dr. Koulis why there was the discrepancy in his story, because he realized that Dr. Koulis was distraught. (Vol. XII, pp. 9561-962).

[REDIRECT EXAMINATION]

Treanor testified that he was still handling the case as if it were a medical call. (Vol. XII, p. 963).

STEVEN RAGLE

[DIRECT EXAMINATION]

Dr Steven Ragle (hereinafter referred to as “Ragle”) testified that he works at Williamson Medical Center (hereinafter referred as WMC) as an ER physician. (Vol.

XIII, p. 969). He was working in the ER when Ms. Buchanan was brought in on July 4, 2005, in the afternoon. (Vol. XIII, p. 970).

Ragle testified that he had gotten word that a code was en route. A code is when someone is in cardiopulmonary arrest; no respiratory effort, no pulse, no signs of life. Typically, a code means an older person. When the paramedics arrived with Ms. Buchanan, and Ragle entered the ER, he was shocked to find a young, healthy-appearing female. (Vol. XIII, pp. 971-972).

Ragle testified that Ms. Buchanan was transferred to a hospital stretcher, placed on a monitor and evaluated. The code was continued by ACLS protocol. Ragle testified that ACLS stood for Advanced Cardiac Life Support, which is the protocol when you have pulseless rhythms and sudden arrests. (Vol. XIII, p. 972).

Ragle testified that when Ms Buchanan was brought in, she had been intubated by the paramedics, that is, there was a breathing tube in her mouth that extended into her trachea; she did not have a shirt on; she had black running pants on; and there was an IV placed in her left neck. (Vol. XIII, p. 973). He testified that he did not recall if Ms. Buchanan was wet. (Vol. XIII, p. 974).

(Witness shown Exhibit 2 – Photograph/Victim)

Ragle is handed a photograph and he identified it as a photograph of Ms. Buchanan on a hospital stretcher, wearing those black jogging pants. (Vol. XIII, p. 974).

(Exhibit 2 entered – Photograph/Victim on stretcher in ER)

Ragle testified that he was oxygenating her via the endotracheal tube; she was placed on a cardiac monitor, given cardiac medications to try to return her to spontaneous

circulation. She was also receiving CPR. Dr. Koulis was also in the ER. (Vol. XIII, p. 975).

Ragle testified that Dr. Koulis' demeanor was quite distraught and anxious. He was in the room as the code was progressing. Ragle testified that Dr. Koulis told him that he had left the room and upon his return, he found her unresponsive, could not find a pulse so he began CPR. (Vol. XIII, p. 976).

Ragle testified that as an emergency room physician, it is helpful for him to get as much information as he possibly can about what happened to the patient prior to her being brought in. The more information, the better. The purpose of this is to provide directed medical care and to know as much patient history as possible. In other words, if the patient had a known medical problem that we may need to address or had a known injection or something that may be reversible, that information would help with the treatment. (Vol. XIII, p. 977).

When Ragle was asked "what information did Dr. Koulis tell you regarding the medications she was taking," or "what she was using that weekend," he testified that Ms Buchanan intermittently, throughout the weekend, felt unwell and that she had taken medications at some point in the weekend, including Phenergan, Xanax, and a narcotic. She experienced headaches and intermittently locked herself up in the bathroom. They consumed minimal amounts of alcohol, and that she had previously been an IV drug user, but thought she was clean at that time. When Ragle and Dr. Koulis discussed her drug usage, Ragle testified that Dr. Koulis thought Ms. Buchanan was clean and that there was nothing in the house to perform those acts with. Dr. Koulis repeatedly asked why she

would code and told Ragle that they had been having a "sex marathon" that weekend. Ragle did not find the sex marathon information particularly pertinent. (Vol. XIII, pp. 977-978).

Ragle testified that paramedics informed him that Dr. Koulis was a doctor. During the code, Dr. Koulis appeared anxious, pacing about the room, sometimes at bedside, sometimes sitting in the room. He did not interfere with the treatment, although he asked repeatedly for a cardiologist which generally he does not have present during a code. In a state without a pulse, or without a heartbeat, ACLS protocol can be administered by an ER physician. Typically, a cardiologist is no more useful than an ER doctor administering the protocol. Dr. Koulis told Ragle that he was once an ER physician. He asked that Ms. Buchanan be transferred to Vanderbilt but we could not do that due to the fact that Ms. Buchanan was in an unstable condition. (Vol. XIII, pp. 979-980). She was not transferred to Vanderbilt. (Vol. XIII, p. 981).

Ragle testified that Dr. Koulis asked him to use an intra-aortic balloon bump, which is a device to assist the heart in its attempt to generate a blood pressure and a pulse. It's only useful if you have a heartbeat and blood pressure. He testified that he was never able to obtain a blood pressure. When he used escalating doses of Epinephrine, he was able to doppler a carotid pulse, which degenerated as the Epinephrine wore off. In other words, Ragle testified that he was never able to obtain a blood pressure using high doses of Epinephrine. At one point he was able to use ultrasound to hear a carotid pulse that lasted a few seconds and then degenerated to pulseless activity once again. (Vol. XIII, p. 981).

The only reason he was able to hear a heartbeat on ultrasound was due to the high doses of Epinephrine. That is a common reaction to Epinephrine. Dr. Koulis told Ragle that he injected Ms Buchanan with her Epi-pen because he thought she was having an allergic reaction. (Vol. XIII, p. 982).

Ragle testified that Dr. Koulis told him that he tried to inject Ms. Buchanan in the vein, but he could not find a vein so he injected subcutaneously. Injecting an Epi-pen into the vein is not common. (Vol. XIII, p. 983).

Ragle testified that during ACLS protocol, when he attempted to feel for a femoral pulse, there were small wounds in both groin areas. If someone has a femoral pulse, then they have blood pressure. It is easier to feel a femoral pulse because it is a central system, as opposed to a pulse in the arms or in the extremities. The femoral area contains a nerve, artery, and a vein in that area. (Vol. XIII, pp. 983-984).

Ragle testified that, in emergency medicine, he places an IV into the femoral vein to administer fluids and medication. He uses that area to inject medicine and fluids because it administers those items more rapidly than an IV in the peripheral vein, which is a vein in the arms, legs, hands or feet. Injecting in the femoral area can cause pain. (Vol. XIII, pp. 985-986).

Ragle testified that there is pain associated with injections in the femoral area because you have to access veins that are deeper in the skin and have to use a larger needle to access. There are dangers associated with accessing the femoral area. There is a risk of damage to the nerves or vessels or introducing infection. If the femoral artery is

punctured, there may be bleeding. There may be damage to the artery that could result in aneurysm. (Vol. XIII, p. 987).

(Exhibit 3 entered – photograph of Buchanan's groin area)

Ragle explained the photograph of Ms. Buchanan's groin area and the marks she had when she came to the ER. He testified that when he attempted to feel for a femoral pulse, he noticed those marks in that area. He testified that he was somewhat surprised to see those marks because it is not a common site to attempt an IV by a paramedic. Paramedics are not trained to access the central [venous] system, and there had been no attempts by ER personnel to access that area. Ragle does not recall if he brought those marks to anyone's attention, however the nurses noticed it. (Vol. XIII, p. 988).

Detectives Johnson and Cisco were also there but he does not remember if he brought it to their attention or not, or whether they noticed it on their own, but they noticed them. (Vol. XIII, pp. 988-989).

(Witness points out the groin marks on the photograph to the jury)

Ragle testified that those kinds of marks in the ER are not common. He noticed that the marks were placed well, and in an anatomic arrangement over the area of the femoral vein. They are all in a linear fashion. Ragle discussed the marks with the Franklin Police Department. He told the police that it is uncommon to see those types of marks and he was unsure of how they got there. (Vol. XIII, pp. 989-990). The marks appear to be placed well and in an anatomic arrangement over the femoral vein area. (Vol. XIII, p. 990).

When asked if he had an opinion as to whether those marks could have been made through self-injection, Ragle testified that "I felt that those marks were placed by someone who knew the anatomy of the area". (Vol. XIII, p. 992). He testified that he was not concerned with track marks because his primary goal was to resuscitate her medical condition. He specifically testified that "At that time we were treating her for potential overdoses or medical problems, and at that time whether or not there were track marks would not have changed my medical care." He was treating her for overdoses based on the information given to him by the paramedics. They had treated her with Narcan as a part of an altered mental status protocol. Narcan was given to her before she arrived at the ER. (Vol. XIII, p. 993).

When paramedics arrive at a scene and find a patient in an altered status, they are trained to check for certain things and administer certain drugs. Narcan is used to reverse narcotics or opiates. Ragle testified that based on the information he received from these paramedics, he went forward with his treatment of Ms. Buchanan. He tried to stop the code but Dr. Koulis asked him to keep trying to save her life. (Vol. XIII, p. 994). Ultimately, Ragle testified that he stopped the code. (Vol. XIII, pp. 994-995).

(Witness shown Exhibit 4 – Emergency Department Medical Records)

Ragle testified that the records shown to him were the records of Ms. Buchanan's treatment in the ER. (Vol. XIII, p. 996).

(Exhibit 4 entered – Emergency Room Medical Records of Lesa Buchanan)

Ragle testified that Koulis supplied the past medical history for those records. Ragle testified that part of that information given by Dr. Koulis was "otherwise no IV

drug use currently." Ragle testified that Dr. Koulis told him that there was no IV drug use going on at that time. Dr. Koulis also told Ragle that Ms Buchanan recently had a cardiac evaluation that was negative. (Vol. XIII, p. 998).

Ragle testified that, at Dr. Koulis' request, he summoned a cardiologist during the code, but that doctor was unable to do anymore for Ms. Buchanan than what he was already doing for her. (Vol. XIII, p. 999).

Ragle testified as to the dangers of injecting in the femoral area and stated that the result could be damage to the nerves or vessels or introducing infection. (Vol. XIII, pp. 999-1000).

He testified that if someone were self-injecting in the groin area, he would inject in a motion directed towards the head. (Vol. XIII, p. 1001).

(Witness shown Exhibit 5 – a photograph of three prescription bottles)

(Exhibit 5 entered – Photograph of three prescription bottles)

Ragle identified the bottles in the picture as the bottles brought in with Lesa Buchanan. He testified that they are bottles of Alprazolam, Valtrex and Hydrocodone/APAC. The Valtrex prescription was issued to [Lesa Buchanan's daughter] Jessica Buchanan, and the other two were Ms. Buchanan's. (Vol. XIII, p. 1003).

Ragle testified that he had no personal knowledge as to what happened to those pill bottles. He testified that the Xanax or Alprazolam was a medication used to treat anxiety. The Valtrex was used to treat herpes, and the Hydrocodone was used to treat pain. (Vol. XIII, p. 1004). He believes Hydrocodone is a Schedule II controlled substance but he was not certain. (Vol. XIII, p. 1005). [Appellate Counsel note: It is Schedule III]

Ragle testified that injecting in the groin is very different than injecting in a peripheral vein in the emergency department. He stated that a groin area injection is a very sterile process, utilizing sterile towels, sterile equipment and sterile gloves, in order not to introduce infection. After the procedure, he applies pressure to the site to stop any bleeding to prevent bruising or leaking of blood. (Vol. XIII, pp. 1006-1007).

Ragle testified that his role in the Buchanan case was to attempt to resuscitate her or to attempt to identify reversible causes for the sudden arrest, and treat those causes. (Vol. XIII, p. 1009).

[CROSS EXAMINATION]

Ragle testified that when people come to the ER as a code, he is trained to treat them in a specific manner. (Vol. XIII, p. 1010).

He testified that he did not hear any severe pulmonary edema present in Ms. Buchanan's lungs. (Vol. XIII, pp. 1011-1013).

He testified that when he saw Ms. Buchanan in the ER, he was surprised that she was a healthy-appearing person, not that she was a healthy female**.** Had he known she had mitral valve prolapsed, that would not have changed his treatment. (Vol. XIII, pp. 1014-1015).

He testified that Narcan is used to reverse the effects of drugs, like opiates. (Vol. XIII, p. 1015). If given at the appropriate time, it can reverse the sleep a patient goes into when opiates are used. (Vol. XIII, p. 1016).

Ragle testified that if an experienced drug user self-injected, the sites would be anatomically aligned if they followed the vein. (Vol. XIII, p. 1019).

He testified that he would not be surprised to know that there are doctors who believe that drug addicts can self-inject themselves better than the doctor could. (Vol. XIII, p. 1020).

Ragle testified that, on direct examination he stated that Dr. Koulis told him that Ms. Buchanan was clean at this time; however his notes say that Dr. Koulis told him that she was not doing any drugs today. (Vol. XIII, pp. 1021-1022). Ragle stated that Dr. Koulis told him that she was not doing any drugs that day. (Vol. XIII, p. 1022). Dr. Koulis did tell Ragle that Ms. Buchanan was taking a narcotic. (Vol. XIII, p. 1023). Ragle did not ask Dr. Koulis about the injection sites when Ragle noticed them in the ER. (Vol. XIII, p. 1024).

Ragle did not determine that Ms. Buchanan died from the stick marks and he did not know how old they were. (Vol. XIII, p. 1025).

Ragle testified that he did not inquire about the stick marks in the ER when he saw them because it was his place to concentrate on trying to resuscitate her medically, "...and regardless of how those came to happen wasn't going to change what I was doing to try and help her." (Vol. XIII, p. 1026).

Ragle testified it really did not matter what went into those stick marks and at what time they went into those stick marks, it wasn't going to change his treatment because he was following procedure. (Vol. XIII, pp. 1026-1027).

Ragle was under the impression that Ms. Buchanan died a sudden death. (Vol. XIII, p. 1027).

[REDIRECT EXAMINATION]

Ragle testified that the puncture marks appeared to be fairly recent because there was dried blood on the skin. (Vol. XIII, p. 1031).

He testified that Hydrocodone is a narcotic, and it is used to treat pain. (Vol. XIII, p. 1033).

Ragle testified that at the time he gave a statement to police he told them that Dr. Koulis told him that he thought Ms. Buchanan was clean now and she did not have anything in her apartment to inject with. That statement to the police was given on July 21, 2005. (Vol. XIII, p. 1034).

Ragle testified that he could not say who injected Ms. Buchanan six times. He testified that he did not ask Dr. Koulis about those six injection marks because he was focused on the medical resuscitation and the issue as to who injected her or why was irrelevant to that treatment. (Vol. XIII, p. 1035).

[RECROSS EXAMINATION]

Ragle testified as to the age of the injection marks, that "fairly recent" could mean two, three, or four days old. (Vol. XIII, p. 1038).

DETECTIVE STEPHANIE CISCO

[DIRECT EXAMINATION]

Stephanie Cisco (hereinafter referred to as "Cisco") testified that she was a police officer with the Franklin Police Department and had been so for nine years. Currently she was a detective and had been since 2005. (Vol. XIII, pp. 1043-1044). On July 4, 2005, she was a new detective, with one month of experience at that position. She became involved in this case when she received a phone call from Detective Becky Johnson that

she needed to respond to the WMC because there was a suspicious death there. (Vol. XIII, p. 1045).

Cisco testified that upon her arrival at the hospital, she met with Detective Johnson, who had already talked to Dr. Ragle. Cisco was taken to the ER where she photographed everything, including taking pictures of Ms. Buchanan and the three prescription bottles in the room.

(Witness shown Exhibit 6, 7 and 8 – Photographs/Three Prescription Bottles)

Cisco testified that Exhibit 5 was a photograph of the three prescription bottles that she took. She testified that the bottles were brought to the ER along with Ms Buchanan because normally, EMS will transport medication along with the person taking them. (Vol. XIII, p. 1048).

(Exhibits 6, 7, and 8 entered – Photographs/Three Prescription Bottles)

When Cisco entered the emergency room, those bottles were already there. She testified that she lined them up for purposes of taking their pictures. (Vol. XIII, p. 1049).

As to what happened to those bottles, Cisco testified that unfortunately, when they went back to retrieve them, the hospital had disposed of them. (Vol. XIII, p. 1050). Those bottles were never in the possession of the Franklin Police Department. (Vol. XIII, p. 1051).

(Cisco is shown Exhibits 2, 3)

She testified that these exhibits were pictures she had taken of the victim. In one photograph, it shows the victim's groin area with a ruler in the picture to show how large the site was. (Vol. XIII, pp. 1051-1052).

After taking photographs, she testified that Detective Johnson instructed her to go to where Dr. Koulis was and sit with him till she got there. She did that. When Detective Johnson entered the room, they questioned Dr. Koulis about what happened that weekend. It was not a criminal investigation at the time and Dr. Koulis was not in custody. (Vol. XIII, pp. 1052-1053). At that time, Dr. Koulis was not a suspect in any crime, and he was in the meditation room. The meditation room is a room off the emergency room out by the lobby area where family members go for privacy at the WMC. (Vol. XIII, p. 1054).

During questioning of Koulis, Cisco testified that he told them that Ms. Buchanan was suppose to go to Chicago for the Fourth of July weekend, but because she wasn't feeling well, he came down here on Saturday night. Ms. Buchanan picked him up at the airport. They ordered pizza, stayed in and watched movies. Ms. Buchanan was having migraine headaches so she took a Xanax, they made love then went to bed. The next morning, she still had a headache. That day they had a marathon sex session that lasted all day. She had an anxiety attack and chest pains. She took something for it but he didn't know what she took. They went to bed and woke up the next morning, Monday morning, and she still had a headache and was sweaty. They made love during the day in another marathon sex session. While he was in one room and she in the bedroom, he heard moaning noises. When he went into the bedroom to see what the moaning noises were, she asked him if he wanted to join her. He did and they made love again. Ms. Buchanan still wasn't feeling well, and as she was sitting up in the bed, she slumped down. Her eyes were not dilated. He did not know what was wrong with her but she was having difficulty

[stopped] breathing. He slapped her in the face in an attempt to revive her, and then called 911. All this occurred on July 4, 2005. (Vol. XIII, pp. 1056-1058).

Cisco testified that after he slapped her in the face and getting no reaction, he told them that he gave her an Epi injection and pulled her off the bed so he could administer CPR and get better compressions. That is why he put her on the floor. He put Ms. Buchanan in the living room of the apartment [because of limited space in bedroom to administer aid]. (Vol. XIII, pp. 1059-1060).

Cisco testified that Dr. Koulis was not aware of any IV drug usage that weekend, that he did not know what she was taking and that he did not want to know what she was taking. Cisco specifically asked him about IV drug usage because she had seen the injection sites. Dr. Ragle had shown them the injection sites on Ms. Buchanan. (Vol. XIII, p. 1060).

Cisco testified that Dr. Koulis told them that Ms. Buchanan was a recovering drug addict and he did not want to know if she was taking drugs or what she was taking. He told them that they were engaged and were trying to have a baby. Cisco did not observe a ring on Ms. Buchanan's finger. That ended the conversation with Dr. Koulis. (Vol. XIII, p. 1061).

Cisco testified that when she first got the call to go to the hospital, it was a medical call. Once they saw the injection sites, it became a suspicious death. By questioning Dr. Koulis, she had hoped to find out Ms. Buchanan's medical history. After they left Dr. Koulis, they went to Ms. Buchanan's apartment. (Vol. XIII, p. 1063).

(Exhibit 9 entered – Photograph of outside of Buchanan apartment)

Cisco identified Exhibit 9 as a photograph of the outside of Ms. Buchanan's apartment, with police tape across the door. The tape was there to keep the public out. Detective Johnson was the only other person there with her. They entered the apartment and walked through to see if what they observed correlated with Dr. Koulis' account of what happened over the weekend. (Vol. XIII, pp. 1066-1067). Cisco testified that it was getting dark when they first arrived at the apartment and at that time, she started taking pictures of the apartment. (Vol. XIII, p. 1068).

(Cisco is shown Exhibits 11 through 31)

(Exhibits 11-31 entered – photographs of the inside of Ms Buchanan's apartment)

Cisco identified Exhibit 11 as a photograph of a black bag, a shaving kit, belonging to Dr. Koulis, a bottle of Lidocaine, an epi [epinephrine] _ampule, and a needle. (Vol. XIII, p. 1072).

Cisco identified a diagram of the apartment. She pointed out the kitchen counter, the master bedroom, and the kitchen area. (Vol. XIII, p. 1073). On the chart, she pointed out the air mattress represented as a blue square. (Vol. XIII, p. 1074).

She testified that Exhibit 12 is a photograph of a prescription for TriMix. It was found in the black bag. (Vol. XIII, p. 1074).

She identified Exhibit 13 as a photograph of the air mattress that was in the master bedroom. Also in the picture are some sterile gauze pads, alcohol wipes, a sex toy, an ashtray with burnt cigars, cigarettes, and another sex toy. (Vol. XIII, p. 1075).

Exhibit 14 was identified as a photograph of a bottle of Zantrex, for weight loss, a sex device, a clear sex device, a bottle, some Diet Coke cans, some alcohol pads and plastic cups.

Exhibit 15 was identified as a photograph of the kitchen counter area. There are unopened needles on the counter, two boxes of Viagra pills, and a small baggie that contained the needles. All this was inside the black shaving kit. (Vol. XIII, pp. 1076-1077).

Exhibit 16 was identified as a photograph of the black shaving kit and some needles inside. (Vol. XIII, p. 1077).

Exhibit 17 was identified as a photograph of the same thing as Exhibit 16, just closer up. The needles are of different gauges. There are 30 gauge, 30 ½ gauge, and 22 ½ gauge needles. (Vol. XIII, p. 1078).

Exhibit 18 was identified as a photograph of Cisco holding up the black bag with a 22 ½ gauge needle still inside. Cisco is shown wearing gloves. (Vol. XIII, p. 1078).

Exhibit 19 was identified as another photograph of the inside of the black bag. (Vol. XIII, p. 1078).

Exhibit 20 was identified as a photograph of the master bedroom, the TV set, the video camera in front of the TV, Pirates of the Caribbean is playing on the TV, and a blue duffle bag is on the floor. The camera was an 8-millimeter video camera. (Vol. XIII, p. 1078).

Exhibit 21 was identified as a photograph of a black suitcase with some feminine products inside, some clothing and a tennis shoe. (Vol. XIII, p. 1079).

Exhibit 22 was identified as a photograph of a close-up of the TV. (Vol. XIII, p. 1079).

Exhibit 23 was identified a photograph of a needle and syringe in front of a little wicker basket in the master bedroom. The bathroom is also seen. (Vol. XIII, p. 1079).

Exhibit 24 was identified as a photograph of the sink inside the bathroom. There are two needles and syringes, and a broken ampule glass top from the Epinephrine. (Vol. XIII, p. 1079).

Exhibit 25 was identified as a photograph of the bathroom again and the basket. There is the cap of a needle on the countertop, there is some lit candles, and a reflection of Cisco in the mirror. (Vol. XIII, p. 1079).

Exhibit 26 was identified as a photograph of a zoomed-out version of the bathroom. There is a needle in front of a basket with some magazines in it. (Vol. XIII, pp. 1079-1080).

Exhibit 27 was identified as a photograph of the blue duffle bag. There is a pair of blue jeans and an unopened needle. Based on the clothing inside, Cisco believes the duffle bag belonged to Koulis. (Vol. XIII, p. 1080).

Exhibit 28 was identified as another photograph of the blue duffle bag. (Vol. XIII, p. 1080).

Exhibit 29 was identified as a photograph of the DVD player on top of the television. There are some Blockbuster movies including Pirates of the Caribbean. (Vol. XIII, p. 1080).

Exhibit 30 was identified as a photograph of the television with a close-up view of the video camera and some movies. The video camera is a Samsung High 8 Digital. (Vol. XIII, p. 1080).

Exhibit 31 was identified as a photograph of the air mattress and the window. (Vol. XIII, p. 1080).

(Exhibits 32-58 entered – Photographs/ Items in Buchanan Apartment)

Exhibit 32 was identified as a photograph of a Fed-Ex box. The sender is Dr. Koulis and the receiver is Lesa Buchanan in Franklin, Tennessee. It is dated 6/6/2005. This item was found in the closet of the master bathroom. (Vol. XIII, p. 1082).

Exhibit 33 was identified as a photograph of a prescription bottle in front of some Scope mouthwash, inside the master bathroom. The prescription bottle is made out to Lesa Buchanan from Walgreen. It is a prescription for Hydrocodone. (Vol. XIII, p. 1082).

Exhibit 34 was identified as a photograph of a plastic trash bag containing a prescription bottle, three syringes, three needles, and a paper plate. The bag was found on a shelf in the closet of the master bathroom. (Vol. XIII, p. 1083).

Exhibit 35 was identified as a photograph of the inside of that same trash bag. One of the syringes actually has a needle attached. The other syringe does not have a needle attached, just two needles lying next to it. (Vol. XIII, p. 1083).

Exhibit 36 was identified as a photograph of a box of professional samples of Cipro, and a blister pack for Avelox also found in the trash bag. (Vol. XIII, p. 1083).

Exhibit 37 was identified as a photograph of the same trash bag. The needle is a 22 ½ gauge needle. (Vol. XIII, p. 1083).

Exhibit 38 was identified as a zoomed-out photograph of that same trash bag, sitting on the toilet seat in the bathroom. Cisco placed it there for the purpose of the photograph. (Vol. XIII, p. 1083).

Exhibit 39 was identified as a photograph of the inside of the Fed-Ex box. There are some professional samples inside the box. Just below the Fed-Ex box is a cardboard box with numerous professional samples. These items were located in the master bathroom closet. (Vol. XIII, p. 1084).

Exhibit 40 was identified as a photograph of the box next to the Fed-Ex box. It contained professional samples of Bextra, Ketec, and Advair. There are other items in the box as well. This box was located on the ground level in the master bedroom closet. (Vol. XIII, p. 1084).

Exhibit 41 was identified as a photograph of the inside of the master bathroom closet showing where the trash bag was located before Cisco pulled it out. (Vol. XIII, p. 1084).

Exhibit 42 was identified as another photograph of the inside of the closet. (Vol. XIII, p. 1084).

Exhibit 43 was identified as a photograph of the inside of the trash can in the master bathroom. There is a needle and syringe, an empty toilet paper roll, and a red plastic cup in the trash can. (Vol. XIII, p. 1085).

Exhibit 44 was identified as a zoomed out photograph of Exhibit 43. (Vol. XIII, p. 1085).

Exhibit 45 was identified as a photograph of a prescription bottle of Promethazine for Koulis. It's proscribed from Smith's Drug Stores in Las Vegas, and prescribed to Dr. Koulis. This item was found under the sink in the master bathroom. (Vol. XIII, p. 1085).

Exhibit 46 was identified as a photograph of the area under the sink in the master bathroom. (Vol. XIII, p. 1086).

Exhibit 47 was identified as another photograph of the area under the sink showing another prescription bottle. The bottles are of Lexapro. (Vol. XIII, p. 1086).

Exhibit 48 was identified as a photograph of a box of Prozac from Walgreen's for Ms. Buchanan. They were under the master bathroom sink also. (Vol. XIII, p. 1086).

Exhibit 49 was identified as a photograph of the medicine cabinet, with three bottles in it; Valtrex, and two bottles of Promethazine. The Valtrex is prescribed for Jessica Buchanan, and the Promethazine is prescribed, one for Dr. Koulis and one for Ms. Buchanan. (Vol. XIII, p. 1086).

Exhibit 50 was identified as another photograph of the medicine cabinet. It contains two prescription bottles; one for Valtrex made out to Lesa Buchanan and the other for Ambien, made out to Lesa Buchanan. (Vol. XIII, p. 1087).

Exhibit 51 was identified as another photograph of the medicine cabinet. Inside there's medication for Dr. Koulis, namely, Promethazines, and another bottle of Promethazine for Ms. Buchanan. There is another bottle of Cipro from Osco Drug, made out to Dr. Koulis and another bottle with the name Buchanan on it. (Vol. XIII, p. 1087).

Exhibit 52 was identified as a zoomed-out photograph of the medicine cabinet. (Vol. XIII, p. 1087).

Exhibit 53 was identified as a photograph of a cloth bag found on the bottom section in the master bathroom closet with numerous professional samples in it. (Vol. XIII, p. 1087).

Exhibit 54 was identified as a zoomed-in photograph of that bag. (Vol. XIII, p. 1087).

Exhibit 55 was identified as a photograph of the wall in the master bedroom. It shows numerous sex toys, a bottle of Zantrex, a cell phone and alcohol swab pads. (Vol. XIII, pp. 1087-1088).

Exhibit 56 was identified as a photograph of the same scene as in Exhibit 55. (Vol. XIII, p. 1088).

Exhibit 57 was identified as a photograph of the area closer to the top of the bed next to the wall in the master bedroom. In the photograph there is a little cereal bowl, an opened alcohol swab container, a cell phone, and the cell phone charger plugged into the wall. (Vol. XIII, p. 1088).

Exhibit 58 was identified as a photograph of the kitchen area. In the photograph, there is Ms. Buchanan's purse, two cans of Diet Coke, needles at the top of the picture, and the bag lay out along with the Viagra, the black shaving kit, pill bottles and a bottle of alcohol. (Vol. XIII, p. 1088).

(Witness shown Exhibit 59 – Pharmaceutical Samples)

Cisco testified that Exhibit 59 pharmaceutical samples found in the bathroom closet. (Vol. XIII, p. 1091).

(Exhibit 59 entered – Pharmaceutical Samples)

Cisco testified that she was the detective that wrote on the evidence bag, and now wishes she had written in more detail as to where she found each item, but she was a new detective at the time. (Vol. XIII, p. 1092).

(Witness shown Exhibit 60 – Caltrate 600 Calcium Supplements)

Cisco testified that Exhibit 60 was found in the bathroom closet in the master bathroom. (Vol. XIII, p. 1092).

(Exhibit 60 entered - Caltrate 600 Calcium Supplements)

(Witness is shown Exhibit 61 – Blister Packs/Foradil Aerolizer)

Cisco testified that Exhibit 61 was found in the bathroom closet of the master bedroom. (Vol. XIII, p. 1093).

(Exhibit 61 entered - Blister Packs/Foradil Aerolizer)

(Witness shown Exhibit 62 – Physician Samples/Allegra D)

Cisco testified that Exhibit 62 was found in the bathroom closet of the master bathroom. (Vol. XIII, p. 1093).

(Exhibit 62 entered – Physician Samples/Allegra D)

(Witness shown Exhibit 63 – Box of Professional Samples/Vigamox)

Cisco testified that Exhibit 63 was found in the master bathroom closet. (Vol. XIII, p. 1094).

(Exhibit 63 entered - Box of Professional Samples/Vigamox)

(Witness shown Exhibit 64 – Box/Ketek)

Cisco testified that Exhibit 64 was found in the master bathroom closet. (Vol. XIII, p. 1094).

(Exhibit 64 entered – Box/Ketek)

(Witness shown Exhibit 65 –Blister Ppacks/Avelox)

Cisco testified that Exhibit 65 was found in the cardboard box in the closet. (Vol. XIII, pp. 1094-1095).

(Exhibit 65 entered - Blister Ppacks/Avelox)

(Witness shown Exhibit 66 – One Tablet/Levaquin)

Cisco testified that Exhibit 66 was found in the master bathroom closet. (Vol. XIII, p. 1095).

(Exhibit 66 entered - One Tablet/Levaquin)

(Witness shown Exhibit 67 – Sample/Singulair Blister Pack)

Cisco testified that Exhibit 67 was found in the bathroom closet of the master bathroom. (Vol. XIII, p. 1095).

(Exhibit 67 entered - Sample/Singulair Blister Pack)

(Witness shown Exhibit 68 – Clarinex/Blister Packs)

Cisco did not testify as to where she found Exhibit 68. (Vol. XIII, p. 1096).

(Exhibit 68 entered - Clarinex/Blister Packs)

(Witness shown Exhibit 69 – Vioxx)

Cisco testified that Exhibit 69 was found in the bathroom closet of the master bathroom. (Vol. XIII, p. 1096).

(Exhibit 69 entered – Vioxx)

(Witness shown Exhibit 70 – Singulair/5 Milligram Blister Packs)

Cisco testified that Exhibit 70 was found in the bathroom closet of the master bathroom. (Vol. XIII, pp. 1096-1097).

(Exhibit 70 entered – Singulair/5 Milligram Blister Packs)

(Witness shown Exhibit 71 – Professional Samples/Zyrtec)

Cisco testified that Exhibit 71 was found in a box in the bathroom closet of the master bathroom. (Vol. XIII, p. 1097).

(Exhibit 71 entered – Professional Samples/Zyrtec)

(Witness shown Exhibit 72 – Professional Samples/Zyrtec, Box/Zithromax)

Cisco testified that Exhibit 72 was found in the Fed-Ex box in the closet. (Vol. XIII, p. 1097).

(Exhibit 72 entered – Professional Samples/Zyrtec, Box/Zithromax)

(Witness shown Exhibit 73 – Advair Diskus/Two Boxes/Esofex [Aciphex] -10 Tablets/Rhinocort Aqua - a nasal spray)

Cisco testified that she could not remember where she found Exhibit 73. (Vol. XIII, p. 1098).

(Exhibit 73 entered- Advair Diskus/Two Boxes/Esofex [Aciphex] -10 Tablets/ Rhinocort Aqua - a nasal spray)

(Witness shown Exhibit 74 – Bextra/4 Boxes)

Cisco testified that Exhibit 74 was found inside the cardboard box. (Vol. XIII, p. 1098).

(Exhibit 74 entered – Bextra/4 Boxes)

(Witness shown Exhibit 75 – Sodium Chloride IV Drip Bag)

Cisco testified that Exhibit 75 was found in the bathroom closet of the master bathroom. (Vol. XIII, p. 1099).

(Exhibit 75 entered - Sodium Chloride IV Drip Bag)

(Witness shown Exhibit 76 – One Empty Prescription Bottle/Valtrex, One Empty Prescription Bottle/ Ambien, One Bottle/Promethazine-15 ½ pills, One Bottle/Promethazine-3 pills, One Empty Bottle/Valtrex)

Cisco testified Exhibit 76 was found in the medicine cabinet. The Valtrex is prescribed for Lesa Buchanan, and Dr. Ghuneim prescribed it as well as the Ambien. A bottle of Valtrex prescribed to Jessica Buchanan, prescribed by Dr. Koulis; a bottle of Promethazine proscribed for Lesa Buchanan by Dr. Nichols, and another bottle of Promethazine for Lesa Buchanan, prescribed by Dr Koulis. (Vol. XIII, pp. 1099-1100).

(Exhibit 76 entered - One Empty Prescription Bottle/Valtrex, One Empty Prescription Bottle/ Ambien, One Bottle/Promethazine-15 ½ pills, One Bottle/Promethazine-3 pills, One Empty Bottle/Valtrex)

(Witness shown Exhibit 77 – One Empty Bottle/Promethazine, One Bottle/Promethazine-12 ½ pills, One Bottle/Ciprofloxacin-13 pills)

Cisco testified that Exhibit 77 was found in the medicine cabinet of the master bathroom. (Vol. XIII, p. 1101).

(Exhibit 77 entered - One Empty Bottle/Promethazine, One Bottle/Promethazine-12 ½ pills, One Bottle/Ciprofloxacin-13 pills)

(Witness shown Exhibit 78 –Cortisone Tube, Blue-White Inhaler)

Cisco testified that Exhibit 78 was found in the master bathroom closet. (Vol. XIII, p. 1101).

(Exhibit 78 entered - Cortisone Tube, Blue-White Inhaler)

(Witness shown Exhibit 79 –Containers/Two Syringes)

Cisco testified that Exhibit 79 was found in the trash bag in the bathroom closet. She placed the syringes in these containers to protect personnel who handle the evidence. (Vol. XIII, pp. 1102-1103).

(Exhibit 79 entered - Containers/Two Syringes)

(Witness shown Exhibit 80 – Seven Tablet Blister Packs/Lexapro)

Cisco testified that Exhibit 80 was found in the master bathroom, under the sink. (Vol. XIII, p. 1103).

(Exhibit 80 entered - Seven Tablet Blister Packs/Lexapro)

(Witness shown Exhibit 81 – Box/Prozac)

Cisco testified that Exhibit 81 was found under the sink in the master bathroom. It was prescribed by Dr. Ghuneim for Lesa Buchanan. (Vol. XIII, p. 1103).

(Exhibit 81 entered – Box/Prozac)

(Witness shown Exhibit 82 – Prescription Bottle/Hydrocodone)

Cisco testified that Exhibit 82 was found in the master bathroom trash can. The Hydrocodone was prescribed for Lesa Buchanan by Dr. Ghuneim. It was analyzed by the TBI. . (Vol. XIII, pp. 1103-1104).

(Exhibit 82 entered - Prescription Bottle/Hydrocodone)

(Witness shown Exhibit 83 – One millimeter syringe with caps)

Cisco testified that Exhibit 83 was found in the master bathroom trash can. (Vol. XIII, p. 1104).

(Exhibit 83 entered - One millimeter syringe with caps)

(Witness shown Exhibit 84 – Syringe with cap, with white liquid at the tip)

Cisco testified that Exhibit 84 was found in the master bathroom trash can. It was tested by the TBI for latent fingerprints. (Vol. XIII, p. 1104).

(Exhibit 84 entered - Syringe with cap, with white liquid at the tip)

(Witness shown Exhibit 85 – two 22 ½ gauge used needles and three 18 gauge used needles)

Cisco testified that Exhibit 85 was found in the master bathroom trash can. (Vol. XIII, p. 1105).

(Exhibit 85 entered - two 22 ½ gauge used needles and three 18 gauge used needles)

(Witness shown Exhibit 86 – Two unopened B-D syringes)

Cisco testified that Exhibit 86 was found in the master bathroom trash can. (Vol. XIII, p. 1106).

(Exhibit 86 entered - Two unopened B-D syringes)

(Witness shown Exhibit 87 – Professional sample of Viagra)

Cisco testified that Exhibit 87 was found on the kitchen counter in the black bag. (Vol. XIII, p. 1106).

(Exhibit 87 entered - Professional sample of Viagra)

(Witness shown Exhibit 88 – Professional sample of Avelox)

Cisco testified that Exhibit 88 was found on the kitchen counter in the black bag. (Vol. XIII, p. 1107).

(Exhibit 88 entered - Professional sample of Avelox)

(Witness shown Exhibit 89 – One millimeter capped syringe, one 30 ½ gauge sterile needle, 14 alcohol prep pads secured with a rubber band)

Cisco testified that Exhibit 89 was found on the kitchen counter in the black bag. The bag was tested for latent fingerprints. (Vol. XIII, pp. 1107-1108).

(Exhibit 89 entered - One millimeter capped syringe, one 30 ½ gauge sterile needle, 14 alcohol prep pads secured with a rubber band)

(Witness shown Exhibit 90 – The bag which was on the monitor, that was placed on the counter, a TriMix 10 milliliter vial, one vial of Papaverine HCL ventolin mesa la herpetic (ph.), all inside the bag which was in the black shaving kit)

Cisco testified that Exhibit 90 was found in a bag inside the black shaving kit on the kitchen counter. (Vol. XIII, p. 1108).

(Exhibit 90 entered - The bag which was on the monitor, that was placed on the counter, a TriMix 10 milliliter vial, one vial of Papaverine HCL ventolin mesa la herpetic (ph.), all inside the bag which was in the black shaving kit)

(Witness shown Exhibit 91 – Prescription Bottle of Hydrocodone for Lesa Buchanan, proscribed by Dr. Dratler)

Cisco testified that Exhibit 91 was found on the kitchen counter. (Vol. XIII, p. 1108).

(Exhibit 91 entered - Prescription Bottle of Hydrocodone for Lesa Buchanan, proscribed by Dr. Dratler)

(Witness shown Exhibit 92 – Bottle of Sodium Chloride, 10 milliliter, used for injection only)

Cisco testified that Exhibit 92 was found on the kitchen counter. (Vol. XIII, p. 1109).

(Exhibit 92 entered - Bottle of Sodium Chloride, 10 milliliter, used for injection only)

(Witness shown Exhibit 93 – six sterile needles, 22 ½ gauge)

Cisco testified that Exhibit 93 was found in the black bag on the kitchen counter. (Vol. XIII, pp. 1109- 1110).

(Exhibit 93 entered – six sterile needles, 22 ½ gauge)

(Witness shown Exhibit 94 – Four one-millimeter syringes with caps)

Cisco testified that Exhibit 94 was found on the kitchen counter in the black bag. (Vol. XIII, p. 1110).

(Exhibit 94 entered - Four one-millimeter syringes with caps)

(Witness shown Exhibit 95 – Three empty 10 milliliter syringe wrappers, one-milliliter 26 3/8 - gauge syringe wrappers, two 30 – gauge ½ needle wrappers, one 18 – gauge needle wrapper)

Cisco testified that Exhibit 95 was found in the bathroom closet trash bag. (Vol. XIII, p. 1110).

(Exhibit 95 entered - Three empty 10 milliliter syringe wrappers, one-milliliter 26 3/8 - gauge syringe wrappers, two 30 – gauge ½ needle wrappers, one 18 – gauge needle wrapper)

(Witness shown Exhibit 96 – One plastic baggie with one orange tablet of Centrum, two blue capsules with Zoller, four clear capsules with brown filler)

Cisco testified that Exhibit 96 was found in the kitchen cabinet.

(Exhibit 96 entered - One plastic baggie with one orange tablet of Centrum, two blue capsules with Zoller, four clear capsules with brown filler)

(Witness shown Exhibit 97 – one needle with cap, it's a 30 – gauge needle wrapper)

Cisco testified that Exhibit 97 was found in the bathroom closet trash bag. There was a brown discoloration to the hub of the needle. (Vol. XIII, p. 1111).

(Exhibit 97 entered - one needle with cap, it's a 30 – gauge needle wrapper)

(Witness shown Exhibit 98 – One Professional sample of Relpax, one 500 milligram tablet of Zithromax, one plastic bag with 8 orange tablets, and three clear capsules with brown filler, and one empty blister pack)

Cisco testified that Exhibit 98 was found in the kitchen cabinet. (Vol. XIII, p. 1111).

(Exhibit 98 entered - One Professional sample of Relpax, one 500 milligram tablet of Zithromax, one plastic bag with 8 orange tablets, and three clear capsules with brown filler, and one empty blister pack)

(Witness shown Exhibit 99 – One 10 - milliliter syringe with cap and needle and syringe)

Cisco testified that Exhibit 99 was found in the bathroom closet trash bag. There was a pink colored hub of needle and some gray-white substance in the syringe. This item was analyzed by TBI. (Vol. XIII, p. 1112).

(Exhibit 99 entered - One 10 - milliliter syringe with cap and needle and syringe)

(Witness shown Exhibit 100 – One prescription bottle of Metronidazole, 250 milligrams, 19 tablets; prescribed by Dr. Ghuneim for Lesa Buchanan; Eight unopened professional samples of Singulair; one unopened professional pack of Singulair with one missing tablet, three remaining; one professional sample of Zyrtec D, 320 milligram, one remaining)

Cisco testified that Exhibit 100 was found in the kitchen cabinet. (Vol. XIII, pp. 1112-1113).

(Exhibit 100 entered - One prescription bottle of Metronidazole, 250 milligrams, 19 tablets; prescribed by Dr. Ghuneim for Lesa Buchanan; eight unopened professional samples of Singulair; one unopened professional pack of Singulair with one missing tablet, three remaining; one professional sample of Zyrtec D, 320 milligram, one remaining)

(Witness shown Exhibit 101 – 12 18-gauge unopened needles; 9 20-gauge sterile needles)

Cisco testified that Exhibit 101 was found in the kitchen counter, under Ms. Buchanan's purse. (Vol. XIII, p. 1113).

(Exhibit 101 entered - 12 18-gauge unopened needles; 9 20-gauge sterile needles)

(Witness shown Exhibit 102 – one milliliter syringe)

Cisco testified that Exhibit 102 was found in the bathroom closet trash bag. (Vol. XIII, p. 1113).

(Exhibit 102 entered - one milliliter syringe)

(Witness shown Exhibit 103 – Three 1 – milliliter syringes with needle cap)

Cisco testified that Exhibit 103 was found in the bathroom closet trash bag. (Vol. XIII, pp. 1113-1114).

(Exhibit 103 entered - Three 1 – milliliter syringes with needle cap)

(Witness shown Exhibit 104 – Top of a glass vial; a white plastic needle cap)

Cisco testified that Exhibit 104 was wrapped in a paper towel to protect the broken glass from the Epinephrine. (Vol. XIII, p. 1114).

(Exhibit 104 entered - Top of a glass vial; a white plastic needle cap)

(Witness shown Exhibit 105 – Broken glass vial bottle of Adrenalin [Epinephrine])

Cisco testified that Exhibit 105 was found on the kitchen counter top. (Vol. XIII, p. 1115).

(Exhibit 105 entered - Broken glass vial bottle of Adrenalin [Epinephrine])

(Witness shown Exhibit 106 – Eight millimeter videotape)

Cisco testified that Exhibit 106 was taken from the video camera in the master bedroom. The Regional Organized Crime Information Center analyzed the tape and enhanced it. (Vol. XIII, p. 1115).

(Exhibit 106 entered - Eight millimeter videotape)

(Witness shown Exhibit 107 – Prescription bottle of Promethazine for Koulis)

Cisco testified that she wasn't sure where Exhibit 107 was found. (Vol. XIII, p. 1116).

(Exhibit 107 entered - Prescription bottle of Promethazine for Koulis)

(Witness shown Exhibit 108 – Five 10 milligram bottles of professional samples of Lexapro)

Cisco testified that Exhibit 108 was found in the master bathroom closet. (Vol. XIII, pp. 1116-1117).

(Exhibit 108 entered - Five 10 milligram bottles of professional samples of Lexapro)

(Witness shown Exhibit 109 – Blister pack of Sam-E 200 milligram)

Cisco testified that Exhibit 109 was found in the master bathroom, under the sink. (Vol. XIII, pp. 1117).

(Exhibit 109 entered - Blister pack of Sam-E 200 milligram)

(Witness shown Exhibit 110 – Fed-Ex box)

Cisco testified that Exhibit 110 was found in the master bathroom closet. (Vol. XIII, pp. 1117-1118).

(Exhibit 110 entered - Fed-Ex box)

Cisco testified that Exhibit 110 was the last item found in the search of July 4, 2005. All these items were taken to the Franklin Police Department and logged into evidence in an evidence locker. (Vol. XIII, pp. 1118).

Cisco testified that when they were through with the search on July 4, 2005, they contacted the apartment manager and asked the maintenance personnel to change the lock so that no one could get in. Cisco wanted to make sure the apartment was secure for the Buchanan family who were out of the country at the time. (Vol. XIII, pp. 1119).

Cisco testified that she and Johnson went back to the apartment another time when they received a panicked call from Ms. Buchanan's sister who told them that Dr. Koulis had gotten some items out of the apartment. The detectives went back to the apartment, got the key from the manager and went inside. They conducted a walk-thru to make sure everything was in place. It was at this time that they saw the cell phones. Cisco tried to email a picture on one of the cell phones, believed to be a picture of Ms. Buchanan in her final hours alive, to her email account, but was unable to do so. Cisco wanted that picture because it showed Ms. Buchanan alive at approximately 12:30 pm and she did not look good in the picture. She was pale. That time was within the last hours that she was alive. Cisco tried to erase her email address from the cell phone because she did not want Dr. Koulis to retrieve her email address, but she could not delete it. (Vol. XIII, p. 1119-1122).

Cisco testified that she did not erase any photos that were on that cell phone. She did not go through the prompts you need to go through to erase a picture. Subsequent to this event, the cell phones were taken into evidence. (Vol. XIII, p. 1123).

Cisco testified that they did go back and look at the cell phone pictures. (Vol. XIII, pp. 1123-1125).

(Cisco shows cell phone photographs to jury and explains them)

12:29 pm – July 4, 2005 – A photograph was the last photo taken of Ms. Buchanan while she was alive. It shows Ms. Buchanan holding her right breast and kissing it. (Vol. XIII, p. 1128).

12:28 pm – July 4, 2005 - Another photograph of Ms. Buchanan cupping her right breast, doing the same motion, but her eyes are closed in this picture. (Vol. XIII, p. 1129).

12:28 pm – July 4, 2005 – a photograph believed to be the genitalia of Dr. Koulis', and a hand, believed to be Ms. Buchanan's, touching his penis. (Vol. XIII, p. 1129).

12:27 pm – July 4, 2005 – A photograph of a penis, believed to be that of Dr. Koulis', being inserted into a vagina, believed to be Ms. Buchanan's. (Vol. XIII, pp. 1129-1130).

12:26 pm – July 4, 2005 – A photograph of sexual devices being inserted into Ms. Buchanan. (Vol. XIII, p. 1130).

12:26 pm – July 4, 2005 – A photograph of Ms Buchanan's genitalia and a clear sexual device being inserted. (Vol. XIII, p. 1130).

12:24 pm – July 4, 2005 – A photograph of Ms. Buchanan's genitalia. (Vol. XIII, p. 1130).

12:23 pm – July 4, 2005 – A photograph of Ms. Buchanan again with another sexual device. (Vol. XIII, p. 1130).

12:22 pm – July 4, 2005 – A photograph of Ms. Buchanan's genitalia. (Vol. XIII, p. 1130).

5:22 pm – July 3, 2005 – A photograph of Ms. Buchanan in the red top and black stockings. (Vol. XIII, p. 1130).

7:18 am – June 29, 2005 – A photograph of Dr. Koulis. (Vol. XIII, p. 1130).

1:56 am – June 28, 2005 – A photograph of what appears to be a truck stop. (Vol. XIII, p. 1131).

1:32 am – June 28, 2005 – A photograph of Dr. Koulis. (Vol. XIII, p. 1131).

1:32 am – June 28, 2005 – A photograph that cannot be detected. (Vol. XIII, p. 1131).

1:47 pm – April 25, 2005 – No photograph. (Vol. XIII, pp. 1131-1132).

Cisco testified that the cell phone from where all the photographs came, belonged to Dr. Koulis. (Vol. XIV, p. 1143). When Cisco looked for pictures on Ms. Buchanan's cell phone, she only saw one or two pictures taken from that weekend. (Vol.XIV, p. 1148). Cisco testified that she did not erase any pictures from the cell phones. Cisco stated that she viewed the pictures on the cell phones on Tuesday, July 5, 2005. (Vol. XIV, p. 1149).

(Cisco describes photograph shown on television monitor)

The first picture on Ms. Buchanan's cell phone is dated 7-3-05, at 5:01 pm. Cisco describes this picture of Ms. Buchanan as being a happy picture of her where she looks normal. (Vol.XIV, p. 1150). Cisco testified that she did not see a picture on that cell phone that was taken on July 4, at 1:30 pm. (Vol. XIV, p. 1151).

(Exhibits 111-121 marked for identification-photographs of Ms Buchanan's kitchen counter and items thereon)

(Cisco shown Exhibit 111 – Photograph/Two Bottles)

Cisco testified that Exhibit 111 was a photograph of a bottle of alcohol and a prescription bottle of Hydrocodone, made out to Lesa Buchanan, on the kitchen counter. (Vol. XIV, p. 1152).

(Cisco shown Exhibit 112 – Photograph/Black Shaving Kit)

Cisco testified that Exhibit 112 was a close-up photograph of the black shaving kit with needles inside. There are also some razors inside. (Vol. XIV, pp. 1152-1153). Cisco testified that she removed the contents of the shaving kit so that she could photograph the contents for evidentiary purposes. (Vol. XIV, p. 1153).

(Cisco shown Exhibit 113 – Photograph/Kitchen Counter)

Cisco testified that Exhibit 113 was another photograph of the kitchen counter, and located thereon were a few needles, the glass vial of Adrenaline [Epinephrine], and a bottle of sodium chloride. (Vol. XIV, p. 1153).

(Cisco shown Exhibit 114 – Photograph/Kitchen Counter)

Cisco testified that Exhibit 114 is another picture of items on the kitchen counter, such as a syringe or two, two yellow caps and a remote control. . (Vol. XIV, p. 1153).

(Cisco shown Exhibit 115 – Photograph/Sodium Chloride)

Cisco testified that Exhibit 115 is a close-up picture of the sodium chloride, 10 milliliter, injection only. . (Vol.XIV, p. 1153).

(Cisco shown Exhibit 116 – Photograph/Adrenaline [Epinephrine])

Cisco testified that Exhibit 116 is a close-up photograph of the glass vial of Adrenaline, also known as Epinephrine that Koulis gave to Ms. Buchanan. (Vol. XIV, pp. 1153-1154).

(Cisco shown Exhibit 117 – Photograph/Blister Pack-Avelox, Needles and Syringes)

Cisco testified that Exhibit 117 is a close-up picture of a blister pack of Avelox, 400 milligrams, and a needle and syringe on the kitchen counter. (Vol. XIV, p. 1154).

(Cisco shown Exhibit 118 – Photograph/Kitchen Counter-Medications)

Cisco testified that Exhibit 118 is a photograph of the kitchen counter with these items thereon: a glass vial of Papavertine HCL, Tolamine, and Alprostadil which is injected. There's a bag next to it which was for the Trimix. She believes the Trimix was the Papavertine, Tolamine and the Alprostadil. (Vol. XIV, p. 1154).

(Cisco shown Exhibit 119 – Photograph/Contents-Black Shaving Kit)

Cisco testified that Exhibit 119 is a photograph of the contents of the black shaving kit on the kitchen counter, which consisted of the syringes, two boxes of Viagra, and alcohol prep pads. In the background was the prescription bottle of Hydrocodone prescribed to Lesa Buchanan. (Vol. XIV, p. 1154).

(Cisco shown Exhibit 120 – Photograph/Hydrocodone Bottle)

Cisco testified that Exhibit 120 is another photograph of the bottle of Hydrocodone next to the bottle of alcohol. (Vol. XIV, pp. 1154-1155).

(Cisco shown Exhibit 121 – Photograph/Hydrocodone Bottle-prescribed to Lesa Buchanan)

Cisco testified that Exhibit 121 is close-up photograph of the Hydrocodone bottle prescribed to Lesa Buchanan, and coming from Crown Point Pharmacy, sitting on the kitchen counter. (Vol. XIV, p. 1155).

(Exhibits 111-121 entered - Photographs of Prescription bottles and Medicine, syringes, vials, alcohol preps, on the kitchen counter)

Cisco testified that she went back to the apartment, this time with a search warrant, on July 13, 2005 and collected additional evidence. (Vol. XIV, p. 1155). At that time, they also conducted a search of Ms Buchanan's garage, but did not find any evidence therein. (Vol. XIV, p. 1156).

(Cisco shown Exhibit 157 – Gym Bag)

Cisco testified that Exhibit 157 is a gym bag, belonging to Dr. Koulis, found in the master bedroom. When this exhibit was collected, the contents were left inside. Those contents consisted of a hair brush, blue jeans, deodorant, a Volkswagen car key, miscellaneous papers which were two receipts, documents from Physician Care Limited, a box of Levitra; two pills, a Visa credit card, a Bally's gym card, Levaquin with one pill, four tubes of Testim, 50 milligrams of testosterone, prescription only, a glass drops bottle, and one 18-gauge needle in a package. (Vol. XIV, pp. 1157-1158).

(Cisco shows contents of bag to jury)

(Cisco shows 18-gauge needle to jury)

(Exhibit 157 entered – Gym bag/Contents)

(Cisco shown Exhibit 158 – Package/Alcohol Swabs)

Cisco testified that Exhibit 158 is alcohol swabs and packaging found in the master bedroom. One swab package is unopened and the other is opened. (Vol.XIV, pp. 1160-1161).

(Exhibit 158 entered - Package/Alcohol Swabs)

(Cisco shown Exhibit 159 - Tissue with Blood Stain)

Cisco testified that Exhibit 159 is tissue with dried blood stain, found in the master bedroom. The bloodstain was never tested, and Cisco has no answer for why it wasn't tested. She testified that there was no need to test the blood because, based on the injection sites on Ms. Buchanan, we believed the blood on the tissue belonged to her. (Vol. XIV, pp. 1161-1162).

(Exhibit 159 entered - Tissue with Blood Stain)

(Cisco showed Exhibit 160 - Delivery Document/Hydrocodone)

Cisco testified that Exhibit 160 is a document for Rx home delivery of a bottle of Hydrocodone, which was found in a desk drawer in the living room. It is a computer printout of an order dated March 16, 2005, for Hydrocodone, 10 milligrams, in the amount of $236.28. The order does not say who the Hydrocodone is for. (Vol. XIV, pp. 1164-1165).

(Exhibit 160 entered - Delivery Document/Hydrocodone)

(Cisco shown Exhibit 161 – Box/Proctofoam)

Cisco testified that Exhibit 161 is a box of Proctofoam found in the cabinet to the left of the stove, in the kitchen. The Proctofoam was prescribed on February 24, 2005, to Jessica Buchanan by Dr. Christ Koulis. (Vol. XIV, pp. 1165-1166).

(Exhibit 161 entered - Box/Proctofoam)

(Cisco shown Exhibit 162 – Sample/Alcortozone[Alcortin]))

Cisco testified that Exhibit 162 is a professional sample of Alcortin, found between the monitor and the tower of the computer, on the desk in the living room. It is one percent Iodoquinol and two percent Hydrocortisone. (Vol. XIV, pp. 1166-1167).

(Exhibit 162 entered – Sample/Alcortozone [Alcortin])

(Cisco shown Exhibit 163 - Online Prescription Document)

Cisco testified that Exhibit 163 is a document regarding an online prescription, dated 5-17-05, and found in the cabinet above the desk in the living room. (Vol. XIV, p. 1167).

(Exhibit 163 entered - Online Prescription Document)

(Cisco shown Exhibit 164 –Sample/Lexapro)

Cisco testified that Exhibit 164 is a professional sample of Lexapro found in the cabinet above the desk in the living room. (Vol. XIV, pp. 1167-1168).

(Exhibit 164 entered – Sample/Lexapro)

The state announced that this was all the items it intended to introduce that came from the victim's apartment in Franklin, Tennessee. (Vol. XIV, p. 1170).

Cisco testified that there was no cash recovered from the apartment but they did recover three rings that were returned to the family. (Vol. XIV, p. 1170).

Cisco further testified that, as part of their investigation, they traveled to Chicago. They had a search warrant for Dr. Koulis' Chicago apartment, which was executed after the search of Ms. Buchanan's apartment. (Vol. XIV, pp. 1170-1171).

(Exhibits 122 - 156 entered – Photographs/Items in Dr. Koulis' Apartment)

(Cisco shown Exhibit 122 – Photograph/Outside of Building of Dr. Koulis' Chicago Apartment)

Cisco testified that Exhibit 122 is a photograph of the outside of the building of Dr. Koulis' Chicago apartment. (Vol. XIV, p. 1172).

(Cisco showed Exhibit 123 – Photograph/Front Door of Dr. Koulis' Building on Canal Street.)

Cisco testified that Exhibit 123 is a photograph of the front door of Dr. Koulis' building on Canal Street. (Vol. XIV, p. 1172).

(Cisco shown Exhibit 124 – Photograph/Door Number 1113, Dr. Koulis' Door Number to his Apartment in Chicago)

Cisco testified that Exhibit 124 is a photograph of the door number 1113, which is Dr. Koulis' door number to his apartment in Chicago. (Vol. XIV, p. 1172).

(Cisco shown Exhibit 125 - Photograph - Miscellaneous Papers, a Sample Pack of Valtex, and another blister pack underneath a piece of paper)

Cisco testified that Exhibit 125 is a photograph of miscellaneous papers, a sample pack of Valtrex, and a blister pack under a piece of paper. Cisco cannot identify as to where in the apartment this photograph was taken. (Vol. XIV, p. 1172).

(Cisco shown Exhibit 126 - Photograph - Prescription Pad for Physicians Care in Illinois, Miscellaneous Mail, Box of Alcortin, McDonald's Cup)

Cisco testified that Exhibit 126 is a photograph of items on a table in the apartment. Those items were identified as a prescription pad from Physicians Care in

Illinois, some miscellaneous mail, a box of professional samples of Alcortin, and a McDonald's cup. (Vol. XIV, p. 1173).

(Cisco shown Exhibit 127 - Close-up/Photograph - Alcortin and Miscellaneous Papers)

Cisco testified that Exhibit 127 is a close-up photograph of the Alcortin and the miscellaneous papers. (Vol. XIV, p. 1173).

(Cisco shown Exhibit 128 – Photograph/Trash Can)

Cisco testified that Exhibit 128 is a photograph of a trash can with items of trash in it. It appears that an item in the trash can is a bottle of some kind of injectable fluid. (Vol. XIV, p. 1173).

(Cisco shown Exhibit 129 - Photograph – Sample/Fosamax)

Cisco testified that Exhibit 129 is a photograph of samples of Fosamax, some other professional sample some bubble wraps, toilet paper and some batteries next to a phone. (Vol. XIV, p. 1174).

(Cisco shown Exhibit 130 - Photograph – Cialis/Levitra/Stamps)

Cisco testified that Exhibit 130 is a photograph of professional samples of Cialis, Levitra, and some stamps, laying on what appears to be an end table. (Vol. XIV, p. 1174).

(Cisco shown Exhibit 131 - Photograph – Vials/Injectable Fluids/Other Miscellaneous Stuff)

Cisco testified that Exhibit 131 is a photograph of several vials of injectable fluids and other miscellaneous stuff, found on the counter in the master bathroom. (Vol. XIV, p. 1174).

(Cisco shown Exhibit 132 - Photograph - Needle and Syringe, Alcohol prep pad and Hair Solution)

Cisco testified that Exhibit 132 is a photograph of a needle and syringe, an alcohol prep pad and some hair solution next to the sink in the master bathroom. (Vol. XIV, p. 1174).

(Cisco shown Exhibit 133 - Photograph - Same as Exhibit 132)

Cisco testified that Exhibit 133 is a photograph just like Exhibit 132. (Vol. XIV, p. 1174).

(Cisco shown Exhibit 134 - Photograph - Sample of Alcortin, Hair Brush, Toothpaste, and Deodorant).

Cisco testified that Exhibit 134 is a photograph of the Alcortin, hair brush, toothpaste and deodorant that is on the bathroom sink. (Vol. XIV, p. 1174).

(Cisco shown Exhibit 135 - Photograph - Partially-Opened Drawer with Contents Inside).

Cisco testified that Exhibit 135 is a photograph of a partially-opened drawer to the counter with some miscellaneous professional samples inside the drawer. (Vol. XIV, pp. 1174-1175).

(Cisco shown Exhibit 136 - Photograph - Clothing and Clear Bag)

Cisco testified that Exhibit 136 is a photograph of clothing and a clear bag containing professional samples. (Vol. XIV, p. 1175).

(Cisco shown Exhibit 137 – Photograph/Bed/Sample Packs)

Cisco testified that Exhibit 137 is a photograph of a bed and some sample packs on the floor. (Vol. XIV, p. 1175).

(Cisco shown Exhibit 138 – Photograph/Telfa Adhesive Pads)

Cisco testified that Exhibit 138 is a photograph of two or three packages of Telfa Ouchless Non-Adhesive Pads laying on some books, along with a picture of an end table. (Vol. XIV, p. 1175).

(Cisco shown Exhibit 139 - Photograph - Open Drawer/End table)

Cisco testified that Exhibit 139 is a photograph of an open drawer and an end table with numerous samples of Levitra, Cialis, and a box of Lexapro lying on top of this table. (Vol. XIV, pp. 1175-1176).

(Cisco shown Exhibit 140 – Photograph/Open Drawer)

Cisco testified that Exhibit 140 is a photograph of another open drawer and inside the drawer are professional samples of Viagra, Lipitor and other unreadable samples. (Vol. XIV, p. 1176).

(Cisco shown Exhibit 141 – Photograph/Clear Organizer with Contents)

Cisco testified that Exhibit 141 is a photograph of a clear organizer located in the master closet. The opened first drawer contains two bottles of Zomig nasal spray, some alcohol swabs, needles and syringes, and more professional samples. (Vol. XIV, p. 1176).

(Cisco shown Exhibit 142 – Photograph/Greeting Card)

Cisco testified that Exhibit 142 is a photograph of a greeting card addressed to Ms. Buchanan, and under it is a sample pack of Levaquin. The greeting card is signed “Love, me”. (Vol. XIV, p. 1176).

(Cisco shown Exhibit 143 - Photograph - Professional Samples/Backside of Greeting Card)

Cisco testified that Exhibit 143 is a photograph in the master closet, of more professional samples, the backside of that greeting card, a needle and syringe, and a suitcase. (Vol. XIV, p. 1176).

(Cisco shown Exhibit 144 - Photograph - Lesa Buchanan/Proctocuse/Greeting Cards)

Cisco testified that Exhibit 144 is a photograph of several photographs of Ms Buchanan, a professional sample of Proctocuse [Proctofoam], and more greeting cards. (Vol. XIV, p. 1177).

(Cisco shown Exhibit 145 – Photograph/Dr.'s Handwritten Note)

Cisco testified that Exhibit 145 is a photograph of a handwritten note by Dr. Sewell to Koulis, dated 6-13-02. (Vol. XIV, p. 1177).

(Exhibit 145 - for Identification only)

(Cisco shown Exhibit 146 – Photograph/Plastic Bag)

Cisco testified that Exhibit 146 is a photograph of a plastic bag containing needles and syringes with a rubber band wrapped around it. There's also a glass vial of Cefazolin for self-injection. There's a prescription bottle made out to a Buchanan, but cannot make out the first name. There's another injection bottle, and some miscellaneous papers. (Vol. XIV, p. 1178).

(Cisco shown Exhibit 147 – Photograph/Bottles in Exhibit 146)

Cisco testified that Exhibit 147 is a photograph of the bottles seen in Exhibit 146, which include a bottle of Lidocaine HCL, for injection, Cefzolin, a bottle for Ms. Buchanan which is unreadable, and some miscellaneous papers. (Vol. XIV, p. 1178).

(Cisco shown Exhibit 148 – Photograph/Needles)

Cisco testified that Exhibit 148 is a photograph of some miscellaneous sterile needles still inside their packaging, two prescription bottles and several glass vial bottles of self-injection. (Vol. XIV, p. 1180).

(Cisco shown Exhibit 149 – Photograph/Close-Up of Exhibit 148)

Cisco testified that Exhibit 149 is a close-up photograph of the items in Exhibit 148. There are numerous 30 ½ needles, six bottles of self-injectable fluids, a syringe, three prescription bottles consisting of a bottle for Alexander Nichols, one for Lesa Buchanan, and the last bottle is for a person with the last name of Koulis. (Vol. XIV, p. 1180).

(Cisco shown Exhibit 150 – Photograph/Close-Up of Exhibit 149)

Cisco testified that Exhibit 150 is a close-up photograph of Exhibit 149. (Vol. XIV, p. 1181).

(Cisco shown Exhibit 151 – Photograph/Close-Up of Exhibit 149)

Cisco testified that Exhibit 151 is a close-up photograph of Exhibit 149. (Vol. XIV, p. 1181).

(Cisco shown Exhibit 152 – Photograph/Prescription Bottle)

Cisco testified that Exhibit 152 is a close-up photograph of a prescription bottle from Osco Drug for Christ Koulis. Cisco cannot read the prescription. (Vol. XIV, p. 1181).

(Cisco shown Exhibit 153 – Photograph/Prescription Bottle/Needle)

Cisco testified that Exhibit 153 is a photograph of another side of the close-up with the bottles and the needle. (Vol. XIV, p. 1181).

(Cisco shown Exhibit 154 - Photograph - Close-Up)

Cisco testified that Exhibit 154 is a close-up photograph again. (Vol. XIV, p. 1181).

(Cisco shown Exhibit 155 – Photograph/Plastic Bag)

Cisco testified that Exhibit 155 is a close-up photograph of a plastic bag with needles and syringes wrapped with a rubber band. (Vol. XIV, p. 1181).

(Cisco shown Exhibit 156 – Photograph/Prescription Bottle)

Cisco testified that Exhibit 156 is a close-up photograph of a prescription bottle from Walgreen's, prescribed by Dr. C. Koulis, and prescribed to a Buchanan. The date is shown only as 6-13. (Vol. XIV, pp. 1181-1182).

(Exhibits 122-144 entered - Photographs)

(Exhibit 145 entered for Identification)

(Exhibits 146-156 entered - Photographs)

Cisco testified that when they arrived at the Chicago apartment to conduct the search, Dr. Koulis was there. . (Vol. XIV, p. 1182).

(Cisco shown Exhibit 166 - Injectable Vial/Chicago)

Cisco testified that Exhibit 166 is a prescription for an injectable vial for Trimix, 10 millimeters, dated 6-16-05, by John Hall, pharmacist, made out to Mr. Koulis from Dr. Sewell, and found on the entry hall table. (Vol. XIV, p. 1183).

(Exhibit 166 entered - Injectable Vial/Chicago)

(Cisco shown Exhibit 167 - Greeting Card/Chicago)

Cisco testified that Exhibit 167 is a card to Ms. Buchanan, found in the master bedroom. (Vol. XIV, p. 1184).

(Exhibit 167 entered - Greeting Card/Chicago)

(Cisco shown Exhibit 168 - Two Glass Vials)

Cisco testified that Exhibit 168 consists of two glass vials, one for Lincocin, 300 milligrams, self-injection, and the other for Kenalog, 40 milligrams. These items were found on the bedroom nightstand. (Vol. XIV, p. 1185).

(Exhibit 168 entered - Two Glass Vials)

(Cisco shown Exhibit 169 - Three Needles/Syringes/ Pads)

Cisco testified that Exhibit 169 consists of three needles and syringes and five sterile pads, all found in the master bedroom, (Vol. XIV, p. 1186).

(Exhibit 169 entered - Three Needles/Syringes/ Pads)

(Cisco shown Exhibit 170 - Driver's License/Lesa Buchanan)

Cisco testified that Exhibit 170 is Lesa Buchanan's Tennessee driver's license found on the kitchen counter. (Vol. XIV, p. 1186).

(Exhibit 170 entered - Driver's License/Lesa Buchanan)

(Cisco shown Exhibit 171 - Greeting Cards)

Cisco testified that Exhibit 171 consists of miscellaneous greeting cards, exchanged between Dr. Koulis and Ms. Buchanan, found in the living room of Dr. Koulis' apartment. (Vol. XIV, p. 1187).

(Exhibit 171 entered - Greeting Cards)

(Cisco shown Exhibit 172 - Prednisone Prescription)

Cisco testified that Exhibit 172 is a prescription for Prednisone, 15 ½ pills, prescribed by Dr. Koulis, for Lesa Buchanan, and filled on 8-27-2000. (Vol. XIV, p. 1188).

(Exhibit 172 entered - Prednisone Prescription)

(Cisco shown Exhibit 173 - Prescription Pad)

Cisco testified that Exhibit 173 is a prescription pad for Advanced Plastic Surgery, Nashville, Tennessee, for Dr. Koulis. This pad was found in the room we called the Storage room. (Vol. XIV, p. 1189).

(Exhibit 173 entered - Prescription Pad)

(Cisco shown Exhibit 174 - Box of Narcan)

Cisco testified that Exhibit 174 is a box of Narcan injectables with nine ampules of four milligrams per millimeter, found in the storage room. (Vol. XIV, p. 1189).

(Exhibit 174 entered - Box of Narcan)

(Cisco shown Exhibit 175 – Vial/Polidocanol)

Cisco testified that Exhibit 175 is a vial of Polidocanol, found in the second bedroom. It is dated 6-2-03, and it has Dr Alexander Nichols written at the top of the bottle and Alexander Nichols written at the bottom. (Vol. XIV, p. 1191).

(Exhibit 175 entered – Vial/Polidocanol)

(Cisco shown Exhibit 176 - Three Vials)

Cisco testified that Exhibit 176 consists of three vials of Lidocaine, two percent, Lidocaine, one percent, and another vial of Lidocaine, one per cent. All are self-injectables. All found in the master bathroom. (Vol. XIV, p. 1192).

(Exhibit 176 entered - Three Vials)

(Cisco shown Exhibit 177 - Sterile Needles)

Cisco testified that Exhibit 177 consists of miscellaneous needles, some 30 ½ gauge, some 22 gauge, and two pink ones, 18 gauge. All needles are sterile. Also found was one syringe. The needles and the syringe were in their packages, and all were found in what we called Jessie's room. The needles came in different colored packages, pink, light brown, and black. (Vol. XIV, p. 1193).

(Exhibit 177 entered - Sterile Needles)

(Cisco shown Exhibit 178 - Two Vials)

Cisco testified that Exhibit 178 consists of a vial of Ketorolac and a vial of Adrenaline, both found in Jessie's room. (Vol. XIV, p. 1194).

(Exhibit 178 entered - Two Vials)

(Cisco shown Exhibit 179 - Two Vials)

Cisco testified that Exhibit 179 consists of a vial of Lidocaine and a vial of Sedinol, both found in Jessie's room. (Vol. XIV, p. 1195).

(Exhibit 179 entered - Two Vials)

(Cisco shown Exhibit 180 – Prescription/L. Buchanan)

Cisco testified that Exhibit 180 consists of a prescription of NitroQuick, for Lesa Buchanan, by Dr. C. Koulis, dated 8-13-01, and found in Jessie's room.

(Exhibit 180 entered – Prescription/L. Buchanan)

(Cisco shown Exhibit 181 – Prescription/L. Buchanan)

Cisco testified that Exhibit 181 consists of a prescription of Cipro, for Lesa Buchanan, by Dr. C. Koulis, dated on 10-23-01, found in Jessie's room. (Vol. XIV, p. 1197).

(Exhibit 181 entered – Prescription/L. Buchanan)

(Cisco shown Exhibit 182 - Athletic Bag/Contents)

Cisco testified that Exhibit 182 consists of an athletic bag containing syringes, medicine, and prescription bottles, found in the storage room. There's a Physician Care prescription pad, several alcohol prep pads, an empty bag for insulin syringes, numerous sealed needles and syringes, professional samples of Vioxx, 3 ml. SubQ 26 gauge, 26 5/8 gauge, numerous alcohol pads, a Telfla ouchless adhesive pad, a pair of socks, and Oxyfresh toothpaste, some Icy Hot, some palmetto, and mineral supplement pills. (Vol.XIV, pp. 1198-1199).

(Exhibit 182 entered - Athletic Bag/Contents)

(Cisco shown Exhibit 183 - Two Boxes/Vials, Etc.)

Cisco testified that Exhibit 183 consists of two boxes of Phenergan, a vial of sodium chloride and a prescription bottle of Surflaxin (ph.), dated 9-13 of either 01 or 04, all found in the duffle bag. (Vol. XIV, pp. 1199-1200).

(Exhibit 183 entered - Two Boxes/Vials, Etc)

(Cisco shown Exhibit 184 – Two Brown Glass Vials, Etc.)

Cisco testified that Exhibit 184 consists of two brown glass vials with liquid marked Adrenaline and Epinephrine. These items were found in a box in the storage room. (Vol. XIV, p. 1200).

(Exhibit 184 entered – Two Brown Glass Vials, Etc.)

The state announced that this concluded all the exhibits from the Chicago search. (Vol. XIV, pp. 1200-1201).

(Exhibit 145 entered – Photograph/Note)

Cisco testified that Dr. Koulis was very nervous and a little bit scared while he was being questioned in the meditation room by the detectives. At no point did the defendant cry. She did not search Dr. Koulis at that time because he was not a suspect. (Vol. XIV, pp. 1206-1207).

[CROSS EXAMINATION]

Cisco admitted that she never saw Dr. Koulis in the ER. (Vol. XIV, p. 1207).

Cisco testified that she never saw Dr. Koulis distraught, or crying. She did know if someone from the police department asked that Dr. Koulis be detained until Cisco arrived at WMC. (Vol. XIV, pp. 1208-1209).

Cisco admitted that Johnson told her to go sit with Dr. Koulis until she got there, and that is what Cisco did. (Vol. XIV, p. 1210).

During this time, Cisco was in training. (Vol. XIV, p. 1211).

Cisco testified that the cell phones were not taken into evidence during the search on July 4, because, at that time, they were looking for all the prescriptions and the injection materials and that is what was taken that day. (Vol. XIV, p. 1215).

Cisco testified that on the day Ms. Buchanan died, they went into her apartment looking for drugs and they found drugs such as Hydrocodone. (Vol. XIV, p. 1217). She testified that they were looking for anything you could inject, including the drugs, and narcotics. Cisco admitted, that in her dealings with addicts, she knows an addict will lie, cheat and steal. (Vol. XIV, p. 1218).

Cisco testified that the hospital destroyed those three bottles. She and Anderson went looking for those bottles a couple of weeks or two months after Ms. Buchanan's death. (Vol. XIV, p. 1219).

She found a bottle of Hydrocodone on the kitchen counter. That prescription was made by Dr. Dratler, filled at Crown Pharmacy and made to Lesa Buchanan. She doesn't dispute that Crown Pharmacy is in Colorado and Dr. Dratler is from Florida. (Vol. XIV, pp. 1220-1221).

(Witness shown Exhibit 34 – Bottle/Hydrocodone)

Cisco identified Exhibit 34 as the bottle of Hydrocodone found in the trash bag in the closet. That bag also contained needles with stuff in them. That stuff was Oxycodone. (Vol. XIV, p. 1225).

Cisco testified that the bottle of Hydrocodone with the half pill inside, sat in the evidence room since July 4, 2005, without ever being tested. Upon defense counsel's request to have the pill tested a month ago, the pill was sent to the lab for testing and the

results of that test was the pill turned out to be Oxycodone. It is Oxycodone that the State alleges killed Ms Buchanan. (Vol. XIV, pp. 1225-1228).

Cisco testified that the State's theory is that Dr. Koulis either injected or gave Ms. Buchanan the pill that killed her. Cisco testified that the State has introduced over 150 pieces of evidence, but the one pill that is part of their theory of death, the State did not test. The State did not find any Oxycodone in that apartment except for that one pill. (Vol. XIV, p. 1228).

When asked what evidence, beside the Oxycodone pill, that she found, did she believe was relevant to the case, she did not know. (Vol. XIV, p. 1230).

(Witness opens bottle - ½ pill of Oxycodone)

(Witness shows pill to jury)

Cisco testifies that the ½ pill looks as if someone broke it off. She says that the person who broke the pill might have come into contact with the pill on his fingers, which in turn might have touched other objects such as a shaving bag or a toothbrush, which in turn could have led to the identity of the person who broke the pill in half. That is possibly called trace evidence. Trace evidence transfers from one thing to another. That is why police look for trace evidence. However in this case they did not look for trace evidence of Oxycodone. The police had Dr. Koulis' shaving bag, his medications, his toothbrush, his hairbrush, but never tested any of his personal articles for trace evidence. (Vol. XIV, pp. 1237-1239).

The police did not test Ms Buchanan's fingers for trace evidence of anything either, even though they were aware and looking for that type of evidence. Cisco found

the broken pill in a prescription bottle located in a bag in the bathroom closet which also contained the used needles that were filled with some kind of substances. She also knew that Ms. Buchanan had six groin needle stick marks. She sent the needles off to be tested but failed to test the half pill in the Hydrocodone bottle. (Vol. XIV, p. 1240).

Cisco testified that Dr Ragle never told her that he thought that Dr. Koulis was responsible for Ms. Buchanan's death. Dr. Koulis described a sudden death when describing Ms. Buchanan's death. (Vol. XIV, p. 1245-1246).

Cisco testified that the police found online prescriptions on Lesa Buchanan's computer. When Cisco talked to Dr. Koulis about Ms. Buchanan's drug use, he said you he did not want to know about it. He also told Cisco that when Ms. Buchanan told Dr. Koulis that she was going to take something because she didn't feel well, he told her to be careful. (Vol. XIV, p. 1246).

(Witness shown Exhibit 185 - Dr. Sewell's Note)

Cisco testified that Exhibit 185 was a note the police found in Dr. Koulis' Chicago apartment during the search conducted on July 15, 2005. That note, written by Dr. Robert Sewell, an urologist with [Nephrology] Associates, stated that Dr. Koulis carries needles and syringes with him because he has to self-inject his medication due to his medical condition. (Vol. XIV, pp. 1248-1249).

(Exhibit 185 entered - Dr. Sewell's Note)

Cisco testified that she failed to take trace evidence from the black shaving bag, his toothbrush, his personal toiletries, his blue duffel bag with items in it, his medications,

and her theory is that the defendant is guilty of murder by the use of Oxycodone, the pill she did not test. (Vol. XIV, p. 1251).

[REDIRECT EXAMINATION]

When Cisco interviewed the family and made recordings of their statements, it was done at the Franklin Police Department where there cameras and video capabilities in the interview rooms. That is why the family members' statements were recorded. Koulis was interviewed in the meditation room, at the WMC [Williamson County Medical Center]. He was not a suspect at the time, so there was no need to record his statement. They were investigating a suspicious death at the time, not a crime. When she interviewed the family, that was after the fourth of July and by then her investigation had turned criminal. (Vol. XIV, pp. 1252-1253).

As to the medication brought to the WMC with Ms. Buchanan, it is normally placed in a safe in the security room, for safe keeping. (Vol. XIV, p. 1254).

Cisco testified that she is familiar with gunshot residue due to her training at the forensic academy, and where that type of trace evidence is involved; you need to test the subject immediately, before he has a chance to wash his hands and wash away the trace evidence. At the time she was interviewing Dr. Koulis in the meditation room, she had no idea that trace evidence from half a pill was involved in this case. She had met with Dr. Koulis at the hospital before she went to the apartment, so she had no idea that Dr.Koulis might have had some trace evidence of a pill somewhere on his body. (Vol. XIV, pp. 1254-1255).

At the time when she first searched the apartment, she was looking for needles, syringes, and anything that could be injected. She had no information at that time that Oxycodone was involved in Ms. Buchanan's death, and Dr. Koulis never mentioned that drug. When she searched the apartment, she was looking for needles, syringes, vials of liquid, and prescription medications. (Vol. XIV, pp. 1255-1257).

[RECROSS EXAMINATION]

Cisco testified that the police do carry portable tape recorders for recording people in the field, so all their recordings are not always done at the Franklin Police Department. However, at the time they interviewed Dr. Koulis, he was not a suspect so they did not record him. (Vol. XIV, p. 1259).

Cisco testified that she had no answer as to why they did not test the half pill of Oxycodone. She and Johnson saw two controlled substances in the emergency room that was brought in with Ms. Buchanan. They were Hydrocodone and Xanax. (Vol. XIV, p. 1260).

Cisco testified that the charge against Dr. Koulis was that he either gave Ms. Buchanan the Oxycodone, or he injected her with the drug. (Vol. XIV, p. 1261).

As to the prescription drugs that came to the hospital with Ms. Buchanan, Cisco testified that the hospital was going to hold the drugs until after she and Johnson interviewed Dr. Koulis. However, they did not get the drugs after their interview, but instead, left the hospital and went straight to the apartment. It slipped their minds that they did not retrieve those drugs until it was too late. By the time they remembered to

retrieve those drugs, days later, the hospital had already destroyed the medications. (Vol. XIV, pp. 1262-1263).

Cisco testified that she knew she had a broken pill, and that the broken pill was found together with syringes filled with stuff, and she knew that Dr. Koulis and Ms. Buchanan were the only two people involved during that weekend, but she did not put together that Dr. Koulis might have injected Ms Buchanan and thus was responsible for her death because Cisco was a new detective and she had never seen anything like this before. (Vol. XIV, pp. 1265-1266).

Cisco testified that she did not have a lot of experience with injecting drugs. Johnson and Anderson had more experience with detective work than she did, and despite Anderson's being brought up to speed on the case when he got involved, the Oxycodone still sat in the evidence room for two years without being tested. (Vol. XIV, pp. 1269-1270).

BECKY JOHNSON

[DIRECT EXAMINATION]

Becky Johnson testified that she has been a detective for the Franklin Police Department for eleven years, and prior to that, she had been a patrol officer for the department for ten years. She had a total of twenty-one years experience in law enforcement. She has had training in basic criminal investigation, crime scene technician training, interviewing and interrogation training, and since this case, homicide investigation training. She has had a lot of training in child abuse and child sex abuse as well as sexual assault investigations. Presently she is assigned to the special victims unit

where she investigates any crimes that involve family, child abuse, and domestic violence. (Vol. XIV, pp. 1277-1278).

On July 4, 2005, while being assigned general assignment duties, she received a call from the patrol sergeant that there had been a call from an apartment complex in town concerning a victim that was not expected to live. In response to that call, she contacted detective Cisco and asked her to Johnson at the WMC. They met at the ER of WMC, at approximately five o'clock in the afternoon, where they spoke to Dr. Ragle, then took photographs of the victim, who had already died. The photographs were taken for their file and for the medical examiner. They noticed track marks in the victim's groin area, which gave her concern about the use of drugs. However, at that time she viewed Ms. Buchanan's death as an unexplained death. (Vol. XIV, pp. 1278-1283).

After conducting their investigation in the ER and talking to Dr. Ragle, they met with Dr. Koulis in the meditation room of the hospital. Both Cisco and she arrived at that room together. Dr. Koulis had been waiting there alone. At that time, Dr. Koulis was not in custody and they wanted to talk to him because he was the only witness present at the time of death. (Vol. XIV, pp. 1283-1284).

Dr. Koulis was anxious and he was not in tears. He told them that he and Ms. Buchanan were engaged and that he loved her very much. That is why she was surprised to see no tears. Dr. Koulis told her that Ms. Buchanan was supposed to fly to Chicago to be with him over the holidays, but since she was not feeling well, he flew down to see her in Franklin. He came in on a Saturday night, and she picked him up at the airport. Since

she wasn't feeling well, they picked up some pizza, went to the apartment, stayed in that night, and watched movies. (Vol. XIV, pp. 1284-1285).

The next morning, she woke up with a headache and was feeling nauseous. She took some medicine, maybe an aspirin, for her headache. They made love numerous times throughout the day. (Vol. XIV, p. 1285).

Johnson testified that Dr. Koulis characterized their love making as marathon sex. (Vol. XIV, p. 1285, Vol. XV, p. 1289). Throughout the day, which was Sunday, July 3, 2005, even though Ms. Buchanan did not feel well, they watched movies and made love. On Monday, they made love even though she still wasn't feeling well, feeling nauseous, having anxiety attacks, and having bad headaches. One time he went into the living room while she stayed in the bedroom. A short time later, she came out and she had a burst of energy, during which time they made love again. After that, she felt bad again, so he went back into the living room and she stayed in the bedroom alone. She was playing [with herself]. A short time later, she called for him. When he went back there, she looked strange and wasn't breathing. He began CPR, gave her a shot of Epinephrine. He could not perform CPR well on the mattress in the bedroom so he took her to the living room and performed CPR there. (Vol. XV, pp. 1289-1290).

Johnson testified that at the time she spoke to Dr. Koulis at WMC, she was conducting a criminal investigation, because anytime she has an unexplained or unexpected death, they handle it like a homicide. (Vol. XV, pp. 1290-1291).

Johnson testified that Dr. Koulis wanted to notify the family of Ms. Buchanan's death, but Johnson did not want the notification to come through him, but rather, wanted it to come through the Franklin Police Department. (Vol. XIV, p. 1291).

After Johnson was finished questioning Dr. Koulis at the hospital, she went to the apartment and conducted a search. We went there to try to find evidence of a crime. The apartment was a crime scene. The apartment manager let us in and conducted a search. She testified that the apartment had lots of furniture and there were medications and syringes. The apartment was photographed by Cisco. (Vol. XIV, p. 1293).

Johnson testified that she collected syringes, numerous prescription bottles, medicine, samples, and a Fed-Ex box. When they left the apartment they secured it by having the lock changed by a maintenance person at the apartment complex. (Vol. XIV, p. 1294).

Based on information they received, they went back to the apartment the next day to make sure no one had entered it. At that time, she located some cell phones with pictures on them. (Vol. XV, p. 1295).

(Witness shown Exhibits 186-202)

Johnson testified that those exhibits were the photographs they saw on the phones. Cisco tried to email one picture to her email address but was unable to do so. Johnson saw no evidence that Cisco erased any of the photographs. In her summary, Johnson referred to one of the photographs of Ms. Buchanan, as a risqué picture of her in red and black. Johnson identifies Exhibits 197, 198, and 200, as the pictures of Ms. Buchanan dressed in red and black. (Vol. XV, p. 1296).

Johnson testified that when she made reference to these photographs in her report, she stated that the risqué photograph of Ms. Buchanan on July 4, was taken at 1330 hours. That is 1:30 pm. Johnson testified that the time of 1330 was a typographical error on her part. There was just no other way to explain a time on a picture when no picture had that time on it. (Vol. XV, pp. 1298-1299).

Johnson testified that she did not erase any pictures on that phone. She testified that she did not know which picture Cisco tried to send by email. (Vol. XIV, pp. 1299-1300).

Johnson testified that after they left the apartment, they went back to the Franklin Police Department. At some later time, she believes July 7th, she was asked to type her account of what had transpired. It was during that typing that she believes she committed her typographical error. She also did not look for trace evidence. (Vol. XV, pp. 1300-1301).

Johnson has remained on this case but she is no longer the lead detective. (Vol. XV, p. 1303).

[CROSS EXAMINATION]

Johnson testified that while she and Cisco were in the ER with Dr. Ragle, he told them that one of the stick marks in Ms. Buchanan's groin was made by hospital personnel. (Vol. XV, p. 1303).

Johnson testified that prior to this case, she had never gone to homicide school. (Vol. XV, p. 1304).

Johnson does not recall sending Cisco to sit with Dr. Koulis in the meditation room till she got there. (Vol. XV, p. 1306).

Johnson testified that she could not remember what kind of pills were in the three bottles in the emergency room with Ms. Buchanan. (Vol. XV, p. 1307).

Johnson testified that she does not remember if she asked Dr. Koulis what drugs Ms. Buchanan was using, when they questioned him in the meditation room. (Vol. XV, p. 1309).

Johnson testified that she has not looked at the evidence since it was placed in the evidence room. (Vol. XV, p. 1310).

Johnson testified that she did not remember a pill bottle of Hydrocodone, with one pill inside. (Vol. XV, p. 1313).

She testified that she did not ask Dr. Koulis why Ms. Buchanan died, and she doesn't know why she did not ask him that. (Vol. XV, pp. 1315-1316).

As to her testimony about making a typo on the time stamped on one of the cell phones pictures of Ms. Buchanan, Johnson testified that she realized she had made a typo on her July 7, 2005 notation, days ago. Johnson does not remember who brought the typo to her attention. (Vol. XV, p. 1320).

Johnson testified that there were only two pictures of Ms. Buchanan wearing red and black and one was stamped with a time of 12:17, and the other had a time of 12:18. (Vol. XV, p. 1321).

Johnson testified that she uses approximate times. Therefore, she would round off the time of 12:17 to 12:30. (Vol. XV, p. 1322).

Johnson testified that she is no longer on the case. (Vol. XV, p. 1323).

[RECROSS EXAMINATION]

Johnson testified that she was not experienced in investigating homicides at the time of this case. She could not remember how many bottles of Hydrocodone she collected from the apartment on that first night. The detective admitted that in a prior hearing she said that Dr. Koulis "very upset"when she questioned him at the hospital. 1326-1327 (Vol. XV, p. 1336-1337).

ERIC ANDERSON

[DIRECT EXAMINATION]

Eric Anderson (hereinafter referred to as "Anderson") testified that he is a detective for the Franklin Police Department. He is a detective sergeant. (Vol. XV, p. 1357).

(Witness shown Exhibit 106 – Videotape/8 millimeter)

Anderson testified that Exhibit 106 was an eight millimeter video tape. It is the tape containing video of Dr.Koulis and Ms. Buchanan engaged in sex. The tape was found in the camera located in the master bedroom of Ms. Buchanan's apartment. Anderson made a true and exact copy of that tape. (Vol. XV, p. 1357).

(Witness shown Exhibit 203 - Copy of Sex Tape)

Anderson testified that the DVD was a true and exact copy of the sex tape found in the apartment. (Vol. XV, p. 1358).

(Exhibit 203 entered – Copy/Sex Tape)

(Exhibit 203 shown to jury)

Anderson testified that the glitch on his DVD was a glitch on the original tape. (Vol. XV, p. 1359).

DR. RONNIE GHUNEIM

[DIRECT EXAMINATION]

Dr Ghuneim (hereinafter referred to as "Ghuneim") testified that he was an internal medicine physician, working for Physician Care in Arlington Heights, Illinois, for 5 ½ to 6 years. Physician Care is an urgent care walk-in setting. (Vol. XVI, p. 1370).

Ghuneim testified that Dr Koulis was a colleague of his at Physician Care. That is where he came to know Dr.Koulis. (Vol. XVI, p. 1371).

(Witness shown Exhibit 204 - Medical Records/Lesa Buchanan)

Ghuneim testified that Exhibit 204 were the medical records of Lesa Buchanan, a patient of his. (Vol. XVI, p. 1372).

(Exhibit 204 entered - Medical Records/Lesa Buchanan)

Ghuneim testified that he first treated her on April 21, 2004. She complained of anxiety and depression. He prescribed Lexapro for depression, and Xanax for anxiety. (Vol. XVI, p. 1373).

(Ghuneim asked to show jury his symbol for the word "no").

Ghuneim testified that he symbolizes the word "no" in his chart by drawing a zero and a line through it. (Vol. XVI, p. 1375).

(Witness shown piece of paper and draws a zero with a line through it)

(Exhibit 205 entered - Zero with line drawn through it)

Ghuneim testified that his next visit with Ms. Buchanan was on 6-26-04. He received a phone call from her on 3-4-05. He also prescribed Norco for her, he testified that Norco was Hydrocodone used for pain. On 3-15-05, he called in a prescription for her for Vicodin, a medication similar to Norco. Ghuneim talked to the pharmacist because he wanted to make sure Ms. Buchanan wasn't engaging in poly-pharmacy. Poly-pharmacy is doctor shopping where a person fills multiple prescriptions at different pharmacies. The pharmacist told him that there was no evidence of poly-pharmacy. Ghuneim did eventually prescribe Vicodin for Ms. Buchanan. (Vol. XVI, pp. 1377-1381).

His next contact with Lesa was on 5-26-05. His notes indicated that she was given 30 Norco pills on 5-10-05. She had half the pills left. (Vol. XVI, p. 1382).

On 6-11-05 Ghuneim received a phone call from Ms. Buchanan with a complaint of migraines. He called in a prescription for 60 pills of Norco, with one refill. (Vol. XVI, p. 1384).

Ghuneim listed the dates he had contact with Ms. Buchanan and the medications he prescribed. On 4-21-04, he prescribed Lexapro and Xanax. On 6-4-04, the Xanax was refilled. On 7-3-04, Dr Nichols gave her Bextra, an anti-inflammatory medication. On 12-2-04, she was given Ambien, a sleep medication. On 12-14-04, she was given Prozac and Xanax, for depression and anxiety. On 3-4-04, she was given Norco. On 3-11-05, she was given Vicodin. On 5-10-05, she was given more Norco. On 6-11-05, she was given more Norco. (Vol. XVI, pp. 1385-1386).

Ghuneim testified that he never prescribed Oxycodone for Ms. Buchanan. Oxycodone cannot be called into a pharmacy and you cannot write a prescription for it with a refill. (Vol. XVI, p. 1387).

Ghuneim testified that the relationship between Dr. Koulis and Ms. Buchanan was up and down. Both parties called each other all the time. Dr. Koulis talked a lot about her and said that he loved her. (Vol. XVI, p. 1388).

While treating Ms. Buchanan as a patient, Ghuneim testified that he did not see any signs on her that she was an IV drug user. He did not see any needle or track marks on her. He testified that it would be something he would notice. (Vol. XVI, p. 1390).

Ghuneim testified that he never examined Ms. Buchanan in the nude. (Vol. XVI, p. 1391).

Ghuneim told police that groin injections are dangerous and that it is close to impossible for a person to self-inject in the groin area. (Vol. XVI, p. 1392).

After making that statement to the police, he did some further medical research and found that some of the studies suggested that self-injections into the groin area was not uncommon (Vol. XVI, p. 1393).

Ghuneim testified that most doctors take sample medications home with them. Most doctors take needles home also, but not large amounts. (Vol. XVI, pp. 1397-1398).

(Witness shown Exhibit 101 - Needles in Packages)

Ghuneim testified that Exhibit 101 is how needles are packaged. The packages are color-coded for different size needles. The 18-gauge needles are pink and the 20-gauge

needles are yellow. The 18-gauge needle is the larger one. The smaller the number, the larger the needle. (Vol. XVI, pp. 1399-1400).

(Witness shown Exhibit 206 – Page/Ghuneim/Medical Record/Lesa Buchanan)

Ghuneim testified that the Exhibit 206 was a part of his medical record that he identified as Exhibit 204, but it is part of Ms. Buchanan's medical record at his office. (Vol. XVI, pp. 1400-1401).

(Exhibit 206 entered – Page/Ghuneim/Medical Record/Lesa Buchanan)

[CROSS EXAMINATION]

Ghuneim testified that when he gave his statement to the police, he did not have Ms. Buchanan's medical record with him. (Vol. XVI, p. 1403).

Ghuneim testified that there were no controlled substances kept at his office. (Vol. XVI, p. 1404).

Ghuneim testified that at no time did he ever see Ms. Buchanan's inner thighs. (Vol. XVI, p. 1408).

Ghuneim agreed that if an addict was trying to hide his drug use from others, even doctors, he would inject in places that people would not normally see. He agrees that drug addicts engage in deceptive behavior. They will lie and cheat (Vol. XVI, p. 1409).

Ghuneim testified that he only saw Ms. Buchanan twice. The rest of his contact with her was by way of call-ins. (Vol. XVI, p. 1411).

(Witness shown Exhibit 207 - Computer Print-Out/Prescription/Dr Dratler)

(Exhibit 207 entered - Computer Print-Out/Prescription/Dr Dratler)

(Witness shown Exhibit 160 - RX Home Delivery Prescription)

Ghuneim testified that the date on the prescription in Exhibit 160 is March 17, 2005, for Hydrocodone. The Pharmacy is named RXHomeDelivery.Com Pharmacy. Ghuneim testified that this prescription was written just two days after she received a prescription from Ghuneim on March 15, for Hydrocodone. Ghuneim did not know Ms Buchanan was getting additional prescriptions for Hydrocodone. Ms. Buchanan did not tell Ghuneim that she was looking for Hydrocodone on the internet. On May 10, 2005, Ghuneim prescribes her more Hydrocodone. On May 17, she obtained another prescription for Hydrocodone from a Franklin pharmacy, but the prescription did not come from him. Ghuneim testified that what Ms. Buchanan was doing was called poly-pharmacy. (Vol. XVI, pp. 1416-1418).

Ghuneim testified that Dr. Koulis would call Ms Buchanan a lot but she would also call him a lot. (Vol. XVI, p. 1419).

Ghuneim testified that addicts crush pills, mix them into a solution and inject them. (Vol. XVI, p. 1421).

[REDIRECT EXAMINATION]

(Witness shown Exhibit 160 - RX Home Delivery Prescription)

Ghuneim testified that Exhibit 160 had no name on it. He does not know who that prescription was written for. (Vol. XVI, pp. 1429-1430).

(Witness returns Exhibit 160)

(Exhibit 208 entered by Stipulation - Walgreen Prescription Records/Lesa Buchanan)

(Witness shown Exhibit 208)

During Ghuneim's treatment of Ms Buchanan, Dr. Koulis never told him that she was addicted to Hydrocodone. That would have been valuable information in treating her. (Vol. XVI, p. 1441).

Ghuneim testified that it is less likely now that Ms Buchanan was poly-shopping. (Vol. XVI, p. 1443).

[RECROSS EXAMINATION]

Ghuneim testified that if Ms Buchanan ordered a prescription for 30 pills of Hydrocodone, then two days later she gets a prescription for 90 pills of Hydrocodone, he would not have given her a prescription for 30 more pills had she called him. (Vol. XVI, pp. 1445-1446).

GREG JOHNSON

[DIREC EXAMINATION]

Greg Johnson (hereinafter referred to as "Greg") testified that he was a paramedic and an EMS supervisor and that he had been a paramedic since 1992. (Vol. XVI, p. 1450).

On July 4, 2005, he was working as an EMS for WMC. He responded to the call at 101 Gillespie Drive, apartment 17305. When he entered the apartment he saw a female lying on the floor, and appeared to be unresponsive. Michael Shay, his partner, was with him. A police officer came in also. His supervisor was Chris Fielder. (Vol. XVI, p. 1451).

Greg testified that the female was lying on the floor with her feet facing toward the door. The victim's boyfriend was also in the apartment. (Vol. XVI, p. 1452).

(Witness identified Defendant as boyfriend)

Greg testified that they gave the victim advanced life support. Dr. Koulis told them that she had taken some Phenergan and Xanax earlier, then later he found her unresponsive. He told them that he had given the victim a shot of Epinephrine because she was having an allergic reaction to her medication. Greg found that comment strange because the victim did not look like she had an allergic reaction that would warrant subcutaneous Epinephrine. A person warranting an Epi shot for an allergic reaction would be a person with swollen extremities, swollen eyes, swollen tongue, red-flushed skin, and Greg did not see any of those signs on Ms. Buchanan. Dr. Koulis appeared nervous. (Vol. XVI, pp. 1453-1454).

Ms. Buchanan was treated by the paramedics with Epinephrine, Atropine, and Narcan. Narcan is a narcotic antagonist; so if someone had overdosed on a narcotic, it helps reverse the narcotic's effects. He used Narcan on her because it is protocol and if she had used a narcotic that caused the cardiac arrest, it is helpful. Dr. Koulis never told them that she was an IV drug user. He never told them that he suspected that Ms. Buchanan overdosed on some type of drug. (Vol. XVI, p. 1456).

Ms. Buchanan did not show any physical signs that she was an IV drug abuser. Greg also testified that he never went into the master bedroom. Greg noted on his report as to medication history, that she had used Xanax, Valtrex, and Hydrocodone. He got that information from the bottles brought to the hospital with her. Dr. Koulis never told him that she used Hydrocodone. (Vol. XVI, pp. 1457-1458).

[CROSS EXAMINATION]

Greg testified that he did CPR in the apartment. (Vol. XVI, p. 1459).

Greg testified that had Ms. Buchanan had severe pulmonary edema, he would have heard it. He listened to her airways by stethoscope. He did not hear any pulmonary edema. (Vol. XVI, pp. 1460-1461).

Greg testified that he did not see any needles. Greg testified that he gave Ms Buchanan an epi shot just like Dr. Koulis did; he gave her CPR, just like Dr. Koulis did. Greg never asked Dr. Koulis why he thought Ms. Buchanan was having an allergic reaction. Greg did not pursue the reason why Dr. Koulis thought she was having an allergic reaction because his primary concern was for the care of the patient. (Vol. XVI, pp. 1463-1466).

STEVEN C. PRUTER

[DIRECT EXAMINATION]

Steven C. Pruter (hereinafter referred to as "Steve") is an employee of the William Medical Center pharmacy. He is the assistant director of pharmacy. Steve testified that his responsibilities included overseeing the daily operations of the pharmacy. He further testified that when a patient at the hospital expires, then all medications brought with them to the hospital are wasted. By wasted he means that the medications are placed in the destruction bin and incinerated. (Vol. XVI, pp. 1467-1468).

As to the medication that came to the hospital with Ms. Buchanan, he testified that he was familiar with that incident and related that on July 4, between 8:00 and 11:00 pm, the staff pharmacist, Shane Moore, received the medications from a security guard in the ER. Mr. Moore placed the medications in our secured control cabinet which only our pharmacists have access to. Eleven days later, and because our destruction bin was full,

those medications were destroyed. Had the bin not been full at that time, the medications might not have been destroyed. There was no intent to destroy evidence. (Vol. XVI, pp. 1469-1471).

[CROSS EXAMINATION]

Steve testified that the only proof of the destruction of those medications that he brought with him were his own personal notes. (Vol. XVI, p. 1472).

Steve testified that the hospital does not have a record of the destruction of those medications. (Vol. XVI, p. 1473).

SPECIAL AGENT DONNA FLOWERS

[DIRECT EXAMINATION]

Donna Flowers (hereinafter referred to as "Flowers") testified that she was employed by the Tennessee Bureau of Investigations Crime Laboratory in Nashville, as a forensic chemist. As part of her job, she analyzes substances that are submitted by various law enforcement agencies. These items might include tablets, capsules, powders or plant materials. She analyzes these items for the presence of controlled substances or drugs. (Vol. XVI, p. 1494).

Flowers testified that when evidence is received at the crime lab in a sealed condition, it is assigned a unique lab number. She brought with her, the file folder of the items tested in this case, which includes the official forensic chemistry report. (Vol. XVI, pp. 1495-1496).

(Witness shown Exhibit 91-Plastic Amber Bottle with Tablets)

Flowers testified that the TBI number for Exhibit 91 is Exhibit number 33. This exhibit consists of a plastic amber bottle which contains tablets. The patient's name on the bottle is Lesa Buchanan, and the bottle is listed as containing Hydrocodone with Acetaminophen. Upon receipt of this evidence, the bottle contained 10 and a half tablets which she identified as containing Hydrocodone. She used different instruments to determine that the pills were Hydrocodone. Hydrocodone is a Schedule III controlled substance, not a Schedule II. (Vol. XVI, pp. 1497-1498).

(Witness shown Exhibit 79 – Two Syringes)

Flowers identified this Exhibit as a bag with contents in it that she analyzed. This bag contained two syringes. Within each syringe there was a substance which she identified as Oxycodone and Acetaminophen. Oxycodone is a Schedule II controlled substance. (Vol. XVI, p. 1499).

(Witness shown Exhibit 84 - Syringe)

Flowers testified that this Exhibit, her exhibit number 4, identified the substance in this syringe as containing Oxycodone and Acetaminophen. (Vol. XVI, p. 1500).

(Witness shown Exhibit 99 – Syringe)

Flowers testified that the substance in this syringe, her exhibit number 14, as containing Oxycodone and Acetaminophen also. (Vol. XVI, pp. 1500-1501).

Flowers testified that the substances in all these syringes was an off-white substance with a wet-powder appearance. (Vol. XVI, p. 1501).

(Witness shown Exhibit 82 – Plastic Bottle/Half Pill)

Flowers testified that Exhibit 82 is a plastic bottle containing a half-pill inside. That half-pill was identified as containing Oxycodone and Acetaminophen. The bottle is labeled as being prescribed to Lesa Buchanan, and reads that it contains Hydrocodone and Acetaminophen tablets. The pill bottle labeled Exhibit 82 came to the crime lab without a request to have the bottle tested for latent fingerprints, so when she handled the bottle in the lab, she did so without wearing rubber gloves. (Vol. XVI, pp. 1501-1503).

Flowers testified that the crime lab received 14 bottles for testing, 13 of those bottles containing tablets and one bottle containing capsules. There were two bottles that contained tablets that did not match the outside description of the tablets on the bottles. One was the Oxycodone pill found in the Hydrocodone bottle, State's Exhibit 82, and lab exhibit number 26, the bottle was labeled Cipro but the tablets inside were Promethazine. That tablet is prescribed as an antiemetic for nausea or vomiting. That bottle is Exhibit 181. Exhibit 181 was submitted to the lab on August 9, 2005. (Vol. XVI, pp. 1504-1506).

(Witness shown collective Exhibit 210 – Official Forensic Chemistry Report)

Flowers testified that the documents just handed to her were copies of her report. (Vol. XVI, p. 1506).

(Exhibit 210 entered - Official Forensic Chemistry Report)

[CROSS EXAMINATION]

Flowers testified that in her 18-year career with the TBI, Hydrocodone has always been a Schedule III controlled substance. Controlled substances are scheduled in order of their danger. (Vol. XVI, pp. 1507-1508).

Flowers testified that the request for testing the bottle of Hydrocodone with the Oxycodone tablet inside was made on August 28, 2007. The analysis of the syringes was submitted on July 18, 2005. The bottle with the one pill of Oxycodone contained only a half tablet. (Vol. XVI, p. 1509).

Flowers testified that when she broke a little part of the pill for testing, she got a portion of that tablet on her fingers. (Vol. XVI, p. 1510).

As to the syringes that were analyzed, Flowers testified that one syringe with Oxycodone inside was a 10-millimeter syringe. She tested nine other smaller syringes, 1-millimeter in size, and those syringes did not have any drugs inside. (Vol. XVI, p. 1512).

There were four syringes with the drug Oxycodone inside. She described the solution inside the syringes as being pasty. (Vol. XVI, pp. 1512-1514).

[REDIRECT EXAMINATION]

Flowers testified that the powder on her fingers would have washed away had she washed her hands. (Vol. XVI, p. 1515).

(Defense counsel asks the court to take judicial notice that that the two drugs, Hydrocodone and Oxycodone are both Schedule II controlled substances)

(Court instructs jury that Tenn. Code Ann. § 39-17-408 provides that both Hydrocodone and Oxycodone are Schedule II controlled substances)

[DIRECT EXAMINATION]

Flowers testified that she reported the Hydrocodone as Dihydrocodeinone, a Schedule III controlled substance. She stated that Dihydrocodeinone is more commonly referred to as Hydrocodone. Flowers testified that in the code, Hydrocodone is listed as a

schedule II controlled substance, and the difference may be that when Hydrocodone is mixed with Acetaminophen, it is a Schedule III. (Vol. XVI, p. 1518).

Flowers stated that her analysis that the Dihydrocodeinone was a Schedule III controlled substance was correct. (Vol. XVI, p. 1519).

[CROSS EXAMINATION]

Flowers testified that Hydrocodone unmixed was a Schedule II controlled substance. In her report she listed Hydrocodone alone as being a Schedule III controlled substance. (Vol. XVI, p. 1521).

[REDIRECT EXAMINATION]

Flowers testified that that the drug was reported as a Schedule III because it was mixed with Acetaminophen. In her report she referred to the drug as Dihydrocodeinone. (Vol. XVI, p. 1521).

OAKLEY McKINNEY

[DIRECT EXAMINATION]

Oakley W. McKinney (hereinafter referred to as "Oakley") testified that he is employed by the TBI as a special agent forensic scientist, with a specialty in latent prints. (Vol. XVII, p. 1525). He tests for fingerprints on objects. (Vol. XVII, p. 1526). Oakley testified that he had "known fingerprints" of Dr. Koulis on file for purposes of comparison. (Vol. XVII, p. 1531).

(Witness shown Exhibit 75 – Sodium Chloride Bag)

Oakley testified that this exhibit was submitted for fingerprint analysis. (Vol. XVII, p. 1538).

Oakley testified that his examination of this exhibit failed to reveal the presence of identifiable prints. (Vol. XVII, p. 1539).

(Witness shown Exhibit 79 – Bag /Syringes)

Oakley testified that Exhibit 79 is a bag of syringes. One syringe tested no identifiable prints and the other syringe tested no latent prints. (Vol. XVII, pp. 1540-1541).

(Witness shown Exhibit 83 – Four Syringes)

Oakley testified that Exhibit 83 consisted of four syringes and he failed to find any identifiable prints on those items. (Vol. XVII, p. 1542).

(Witness shown Exhibit 84 – Syringe)

Oakley testified that Exhibit 84 is a syringe, but could not find any identifiable prints. (Vol. XVII, pp. 1542-1544).

(Witness shown Exhibit 89 – Syringes/Plastic bags)

Oakley testified that Exhibit 89 consisted of plastic bags, syringes and packages. He found an identifiable print on a plastic insulin bag was unable to mach it to the print of Dr. Koulis. (Vol. XVII, pp. 1544-1545).

Oakley testified that he tested other items sent him but was unable to make a match to Dr. Koulis' fingerprints. (Vol. XVII, pp. 1546-1547).

(Exhibit 211 entered – TBI Fingerprint Analysis)

[CROSS EXAMINATION]

Oakley testified that he did not test a bottle of Hydrocodone with one pill in it, for prints. (Vol. XVII, p. 1548).

JOSHUA CARDER

[DIRECT EXAMINATION]

Joshua Carder (hereinafter referred to as "Carder") testified that he is employed by the Regional Organized Crime Information Center (ROCIC), a not-for-profit organization under a grant to the Agency under the Department of Justice Assistance. His agency provides assistance to law enforcement agencies on the local, state and federal levels. He is a forensic video specialist, and has been with this agency for four years. (Vol. XVII, pp. 1553-1554).

Carder testified that detectives from the Franklin Police Department brought him an 8-millimeter cassette. They were looking at one short segment of that video in addition to taking some stills off the video. (Vol. XVII, p. 1555).

Carder testified that he performed the function requested of him. The part of the video he was looking at was where Lesa Buchanan appeared to be holding gauze to her groin area. He captured 15 screen shots of that video segment. From the original segments, he blurred out some graphic areas on Ms Buchanan, but he kept the original unblurred segments. (Vol. XVII, pp. 1556-1557).

Carder testified that he also prepared a DVD of the still shots and a short clip from the video where there was a focus on the words spoken by the people in the video. The DVD of the still shots has three sets, one of which is the blurred version of the photographs. The other DVD segment is a portion of the original video that he lifted off to brighten up. The content of the video and the still images were not altered. On the video clip that was lifted from the original cassette, he enhanced the audio of that clip by

amplifying it so that it could be better heard. The video itself was not changed. All that was done was turn up the volume. He testified that he was shown the two separate disks he created, one, a CD of the stills, and the other a video clip. (Vol. XVII, pp. 1557-1558).

(Exhibits 212 and 213 entered – CD /Stills/, DVD/Video Clip)

(Witness explains video capture to jury)

Carder testified that the video clip focused in on the parts where Ms. Buchanan appeared to be holding gauze or some type of cloth to the groin area. He raised the brightness level on this clip. (Vol. XVII, p. 1560).

Carder explained that the photographs were captured during different times during the video. All he did was raise the brightness of these pictures. (Vol. XVII, pp. 1560-1562).

Carder testified that he also pulled a video clip off the original video. (Vol. XVII, p. 1563).

[CROSS EXAMINATION]

Carder testified that Anderson told him which sections of the video he wanted pulled for still photographs and for video clips. The images on the video were a little jerky due to the compression of the video. He did not examine the video camera that took the original video. (Vol. XVII, pp. 1564-1565).

SERGEANT ERIC ANDERSON

[DIRECT EXAMINATION]

Eric Anderson (hereinafter referred to as “Anderson”) testified that that he was a detective sergeant with the Franklin Police Department and has held that position since earlier this year. (Vol. XVII, p. 1566).

As a sergeant, he is responsible for overseeing the criminal investigations division. In July of 2005, he was a detective and had been since 1999. Prior to becoming a detective, he was an elementary school teacher. (Vol. XVII, pp. 1567-1568).

Anderson testified that he actively became involved in this case on July 11, 2005. The first thing he did was review documents and speak to the other investigators involved. He then conducted interviews with different individuals. (Vol. XVII, pp. 1570-1571).

Anderson testified that he executed a search warrant on Ms. Buchanan’s apartment on July 13, 2005. He searched the apartment and the detached garage. Several detectives were present during this search. The police made a video of the apartment prior to the search, as they walked through the apartment, so as to document the locations of items at the time of entry and at the time of exit. Detective Charles Warner created the video in this case. (Vol. XVII, pp. 1572-1574).

(Witness shown Exhibit 214 – DVD/Video/Apartment)

Anderson testified that the DVD handed to him as Exhibit 214 is an exact copy of the original video made of the apartment prior to the search of July 13, 2005. (Vol. XVII, p. 1575).

(Exhibit 214 entered - DVD/Video/Apartment)

Anderson testified that there was nothing of evidentiary value located in the garage. (Vol. XVII, p. 1576).

(Witness shown Exhibit 215 – Layout / Apartment)

Anderson identifies Exhibit 215 as a layout of the apartment. (Vol. XVII, p. 1578).

(Exhibit 215 entered – Layout / Apartment)

Anderson testified that during this search, they wore gloves and booties. During this search, he had the task of logging and documenting each item found and collected. Items were brought to him by the detectives; they found and photographed the item at its location. The cell phones were taken into evidence at that time. They were bagged, secured, sealed and placed in an evidence locker. At some point, the evidence was taken to the Tennessee Bureau of Investigation after the detectives told him what evidence to send there. Cisco sent most of the evidence to the crime lab. She sent items such as medicine bottles, pill bottles, syringes, needles, and other items. (Vol. XVII, pp. 1579-1581).

Anderson testified that within the past month, it came to his attention that other items needed to be sent to the lab, such as a particular pill bottle that needed to be examined. He has no explanation as to why that pill bottle was not sent earlier. It may have been overlooked. He was also involved in trying to retrieve the medicine that was sent to the hospital with Lesa Buchanan. When Cisco and I went back to retrieve that medication from where we assumed they would be, on the 25th, we were informed that the medication had been destroyed. There was no attempt by the Franklin Police Department to destroy that evidence. That half pill of Hydrocodone was not an attempt

by the Franklin Police Department not to have that item analyzed. It was purely an oversight. (Vol. XVII, pp. 1582-1583).

Anderson testified that he was also involved in the search of Dr. Koulis' apartment in Chicago. He personally went up to Chicago to conduct the search. The apartment appeared to be in disarray. He found medical samples, syringes, personal items, and items that belonged to Ms. Buchanan. We labeled rooms by name in order to identify the rooms. The storage room was called Jessie's room, however no one was living in that room. (Vol. XVII, pp. 1586).

(Exhibits 216-219 for identification – Photographs/Stills from the Sex Video)

(Witness shown Exhibits 216-219 – Photographs/Stills from the Sex Video)

Anderson testified that these exhibits, Exhibits 216-219, are a few of the of the screen captures that he made. Screen capture means that he put the video on pause on particular scenes, captured that scene and pasted it onto a Word Document and saved it. There was no enhancement done to these photographs. (Vol. XVII, pp. 1599-1600).

(Witness shown Exhibit 216 – Photograph/Ms. Buchanan)

Anderson testified that this photograph showed Ms. Buchanan dressed in the red top with the black necklace and earrings. There are various devices in the background and a syringe laying on the floor. There's a white piece of material at the edge of the bed. (Vol. XVII, pp. 1586).

(Exhibit 216 entered – Photograph/Ms. Buchanan)

(Witness shown Exhibit 217 – Photograph/Ms. Buchanan)

Anderson testified that exhibit 217 shows Ms Buchanan in the red top, positioned on the air mattress, what appears to be a bottle of rubbing alcohol at the wall. (Vol. XVII, p. 1600).

(Exhibit 217 entered – Photograph/Ms. Buchanan)

(Witness shown Exhibit 218 – Photograph/Ms. Buchanan)

Anderson testified that Exhibit 218 is a photograph of Ms. Buchanan, with a red plastic cup and a syringe on the floor, along with various sexual devices. (Vol. XVII, pp. 1600-1601).

(Exhibit 218 entered – Photograph/Ms. Buchanan)

(Witness shown Exhibit 219 – Photograph/Ms. Buchanan)

Anderson testified that Exhibit 219 is a photograph of Ms Buchanan laying on the air mattress, in her red top and black stockings, with her hand on the gauze on her left groin area. (Vol. XVII, p. 1601).

(Exhibit 219 entered – Photograph/Ms. Buchanan)

(Exhibits 216-219 passed to jury)

Anderson testified that the cell phone pictures show the same outfits worn by Ms. Buchanan as she wore in the video. (Vol. XVII, p. 1602).

(Video tape of walkthrough played for jury)

Anderson testified that he went into Ms. Buchanan's apartment on July 13, 2005, nine days after Ms. Buchanan died. The apartment was sealed. (Vol. XVII, p. 1603).

[CROSS EXAMINATION]

Anderson testified that he was wearing gloves during the search of the apartment on July 13, but that he was aware that on July 6, two of his detectives were in that apartment without gloves, messing with the cell phones. He was also aware that the apartment had already been searched on July 4th. Anderson stated that he was hoping to find more evidence with the search on the 13th. (Vol. XVII, pp. 1604-1605).

When asked what evidence of evidentiary value he found during the search of the 13th, Anderson testified that since he did not have the list of items found committed to memory; he could not tell me what he found. When asked if there was one item that was found, that stood out in his mind, he testified that all items recovered were of evidentiary value. (Vol. XVII, p. 1605).

Anderson testified that one of the items found, with evidentiary value, was the Defendant's blue duffle bag. Anderson testified that the bag contained needles. However, when the actual contents of the bag were inspected, there was only one needle found in the bag. Anderson testified that apparently the bag did not have all the things in it that Anderson thought it had. That one needle was an 18-gauge needle sterile and sealed. (Vol. XVII, pp. 1607-1609).

Anderson testified that the items found in the duffle bag indicated that the bag belonged to Koulis, just like the Oxycodone pill found in the pill bottle with Ms. Buchanan's name on it very well could have meant that the pill belonged to her. (Vol. XVII, p. 1610).

Anderson testified that he was aware that Cisco tried to email a picture with a time of 1330 hours on it, to her email address, but nothing was done about that. Only in the

past few months did Anderson notice that his own detective claimed that there was a picture on the cell phone with a time of 1330 hours. It was brought to his attention by the defense's computer forensic experts' analysis. (Vol. XVII, pp. 1611-1612).

Anderson testified that the photograph with a time date of 1330 hours came to his attention when he reviewed the documents. That document had been reviewed several times but more scrutiny had been place on it as of late. (Vol. XVII, p. 1613).

Anderson testified, that in an effort to see if the photograph supposedly taken at 1330 hours existed, he sent the cell phone to the Secret Service for an analysis. He does not recall when he sent the cell phone to the Secret Service. He sent it there because they are the foremost in cell phone forensics in this country. He wanted to refute the defense contention that a photograph with a time of 1330 hours actually existed. The Secret Service had the capacity to do cell phone forensics, which is the scientific removal of data and media-data from cell phones. The deletion of pictures is stored within the cell phone. However, the Secret Service did not have the capacity to do that particular action, so the cell phones were sent to the foremost forensic experts in the world, and even they have not been able to determine whether or not that picture was on that phone. (Vol. XVII, pp. 1617-1619).

When asked if the apartment had been secured since July 4th, Anderson testified that it had not. It was his understanding that there's some totally unrelated people living there. (Vol. XVII, p. 1621).

Anderson testified that the apartment was secured after the initial entry by Johnson and Cisco the key and locks were changed. The apartment was secured from that point on

unless the defendant broke in. Anderson was aware that in the investigative summary of one of his detectives, there was a notation that the apartment manager of the complex allowed a maintenance man to go inside the front door, and made sure the sliding glass door in the back was secured so that no one could access the apartment on the third floor. Anderson was not with this maintenance man when he went in. (Vol. XVII, pp. 1622-1623).

Anderson testified that he did not know how the black shaving kit got from the bathroom to the kitchen. (Vol. XVII, pp. 1623-1624).

Anderson testified that he did not find any sex videos during the search of Koulis' Chicago apartment. (Vol. XVII, p. 1626).

When Anderson was asked what narcotic drugs were found in the apartment that belonged to Dr. Koulis, Anderson testified that he did not recall. (Vol. XVII, p. 1627).

Anderson testified that the only narcotics he found in the apartment were Hydrocodone and Oxycodone. (Vol. XVII, p. 1628).

Anderson testified that he can't explain why the Oxycodone was found two years later, and he doesn't know why the bottle with the Oxycodone inside wasn't tested for finger prints. (Vol. XVII, p. 1629).

Anderson testified that he was not aware as to how Koulis got from the airport to Ms. Buchanan's apartment when he came in for the Fourth of July. He stated that he did not scrutinize the other detective's reports that closely. (Vol. XVII, p. 1632).

Anderson testified that it never occurred to him to test any of Dr. Koulis' personal belongings for trace evidence, at the time, it was irrelevant and the fact that trace evidence is extremely perishable. (Vol. XVII, p. 1634).

Anderson testified that he first became aware that the Oxycodone pill was a broken pill when he saw it for the first time in court the other day. (Vol. XVII, p. 1637).

(Witness shown Exhibit 220 – Video Camera)

Anderson testified that exhibit 220 is a picture of the video camera on the kitchen counter. (Vol. XVII, p. 1643).

(Exhibit 220 entered – Video Camera)

Anderson testified that someone moved the video camera from the bedroom to the kitchen counter; however, Anderson does not know who moved it. (Vol. XVII, p. 1643).

[REDIRECT EXAMINATION]

Anderson testified that when he searched the apartment on July 13th, he had no knowledge that a pill had been broken. (Vol. XVII, p. 1647).

Anderson testified that he understood that the photograph Cisco was trying to email herself was a different photograph than the one Johnson observed. (Vol. XVII, p. 1649).

[RECROSS EXAMINATION]

(Witness shown Exhibit 221 – Photograph/Ms. Buchanan)

Anderson testified that it was a photograph of Ms. Buchanan lying on a bed in black stockings, drinking from a red plastic cup. That picture came from the video. (Vol. XVII, pp. 1650-1651).

(Exhibit 221 entered – Photograph/Ms. Buchanan)

[FURTHER DIRECT EXAMINATION]

Anderson testified that he did not prepare that screen capture. (Vol. XVII, p. 1651).

[FURTHER CROSS EXAMINATION]

Anderson is not saying the photograph is not accurate, he's only saying that he does not know who made it. (Vol. XVII, p. 1652).

STEPHANIE CISCO

[DIRECT EXAMINATION]

(Witness shown exhibits 22, 111, 220)

Cisco testified that she removed the 8-millimeter tape during the search on July 4, 2005. The camera was found in the master bedroom. Exhibit 22 shows that the camera was located in the master bedroom. Exhibit 111 shows the kitchen counter. The camera was not on the kitchen counter. Exhibit 220 is a photograph of the camera on the counter top. The camera got moved during the search. She and Johnson were discussing taking the camera, but decided to leave it and just take the film inside it. As far as she knows, nothing else was moved in the apartment. (Vol. XVIII, pp. 1686-1687).

[RECROSS EXAMINATION]

THOMAS DEERING, M.D.

[DIRECT EXAMINATION]

Thomas Deering (hereinafter referred to as "Deering") testified that he is employed by Forensic medical Management Services. He works out of the office of the

State Medical Examiner. He provides forensic services to the medical examiner and to Metro Nashville. His employer is a private corporation. His boss is both president and CEO as well as the appointed State Medical Examiner. (Vol. XVIII, pp. 1690-1691).

As an assistant medical examiner, he has to answer two questions: What is the cause of death, and what is the manner of death. [Appellate *counsel note: throughout his testimony Dr. Deering kept referring to himself as "we." So as to as accurately as possible reflect his testimony, counsel will use Dr. Deering's "we' terminology.*] We begin by doing an external exam of the body. We have a history of the body as to what happened, where they were found, and why they are here. If an autopsy is necessary, we do one. After cutting the body open, we look at the organs right where they are. We look at the brain. We remove, weigh, and dissect the organs. We look for injury. We look for illness and different kinds of diseases. Blood is sent to the toxicology lab for analysis. We look at tissue under the microscope. We can perform DNA testing. When all the test results come back and we can look at all that we have done in the case, we reach a conclusion as to the cause of death and the manner of death, which is recorded in the autopsy report. (Vol. XVIII, pp. 1693-1695).

Deering testified that any case which involves an unnatural death, needs the medical examiner to look at it. Another type of medical examiner's case is where a young person is dead and no one knows why. (Vol. XVIII, pp. 1695-1696).

Deering testified that the difference between cause of death and manner of death is that the cause of death involves a series of events, that once started, results in death. The

manner of death is a statistical tool. It is determined by the facts as to why the person died. (Vol. XVIII, p. 1696).

Deering testified that he was the doctor that performed the autopsy on Lesa Buchanan. Her case originated in Williamson County. Law enforcement there felt that her death was under suspicious circumstances, so it was turned over to the medical examiner. We took pictures of the body, looked at her clothing, conducted an external exam, made photographs and diagrams as necessary, then performed the autopsy on July 5th, 2005. Ms Buchanan was clothed in black pants. (Vol. XVIII, pp. 1697-1698).

Deering testified that the external exam revealed that she had evidence of recent medical intervention, meaning it was evident that they tried to shock her heart. He listed multiple puncture marks in the groin area, on both sides. (Vol. XVIII, pp. 1698-1699).

Deering testified that that the femoral artery is a large artery, then there is a large vein and large nerve, all coming down to supply the leg. Because IV drug use was a part of the patient's history, he asked if medical personnel stuck her in the groin area, which is not uncommon. He was told they did not. We try to find out if someone witnessed the patient go down, and we try to find a the medical records, talk to law enforcement officers and get reports from EMT's. (Vol. XVIII, pp. 1700-1701).

Deering testified that he found some things that were significant. One such finding was the severe pulmonary edema. Her lung weight was massive and that was unusual because you don't see severe pulmonary edema in a sudden death as reported here. The urine drug screen, just a qualitative test, was positive for drugs. The histology showed numerous and quite remarkable foreign body granulomas under the microscope. Her

heart was mildly big. She had thickened ventricles by history. She had mitral valve prolapse meaning she had redundant material in the mitral valve. She had some black material in her lungs that usually indicates she was a smoker. (Vol. XVIII, pp. 1702-1703).

Deering testified that the foreign body granulomas are insoluble material has gotten into the bloodstream and gets filtered out by the lungs, but gets stuck in the capillaries. White cells surround this material. She had a tremendous number of foreign body granulomas. It is commonly seen when the person uses filler material of capsules that are crushed up and injected into their veins. The drug of the capsule is absorbed into the body, but the filler, designed to be ingested, does not dissolve, and typically end up in the lungs. She had many granulomas. Her granulomas are at least six weeks old, but they could be six months old or six years old. They could be 16 years old. Once they are old, they are old. There is no way to date them after they had gotten to their final state, which takes from six to eight weeks. (Vol. XVIII, pp. 1703-1706).

Deering testified that she also had granulomas that had not yet been surrounded by white blood cells, indicating that these are fresh. The dating of those granulomas is minutes, hours, maybe a day. The puncture marks in the groin area looked to be one to three days old. They could have been hours old. It takes three to five days for a puncture mark that size in the groin area to heal (Vol. XVIII, pp. 1706-1708).

When Deering was asked if he could tell who made those puncture marks in the groin area, he testified that he could not tell. (Vol. XVIII, p. 1708).

Deering testified that the severe pulmonary edema usually indicates an overdose of drugs. This indicates a mechanism of a slow narcotic respiratory death. It means that they have accidentally taken too much narcotics, then went into a slow respiratory depression, usually over a number of hours, breathing slows down till the person goes to sleep, then gets comatose and there is heart failure, then death. In this scenario, He sees as much pulmonary edema as he saw in her. (Vol. XVIII, p. 1709-1710).

(Witness steps down and draws a diagram)

Deering draws a heart and calls it a pump. He also draws the lungs. This diagram shows the direction of blood flow. Blood goes out the right side of the heart, into the lungs, and comes back to the heart on the left side. (Vol. XVIII, pp. 1713-1715).

Deering testified that pulmonary edema is fluid that gets into the lungs. Two things cause pulmonary edema. The first is heart failure, and the second is the permeability problem in the lungs. (Vol. XVIII, pp. 1715-1718).

Deering testified that pulmonary edema can be detected if you see someone froth at the mouth. You can hear pulmonary edema on stethoscope. It sounds like crackling sounds. The problem in detecting pulmonary edema comes with a person that is not breathing. Here, you stick a tube down the person's airway, pump air in for them and listen to the air passages. If froth comes out of the air tube, then you know you have pulmonary edema. Otherwise you would not know the person had pulmonary edema unless they start to breathe and you hear it, or they die and you cut the lungs open and see it. If the person has severe pulmonary edema, you will not see any froth come out.

Therefore, in a non-breathing person, unless you actually see the froth, you cannot rule pulmonary edema in or out. (Vol. XVIII, p. 1720).

Deering testified that this death is a drug overdose death. He calls this death an acute combined multiple drug intoxication. He testified that his urine screen indicated positive for opiates and the toxicology indicated a narcotic in the blood, plus a narcotic in the urine which led me to believe that she died a slow respiratory death which is a magmatism of an acute combined multiple drug overdose to toxicity. (Vol. XVIII, pp. 1725-1726).

Deering testified that the mechanism of death changed in this case. He thought that the mechanism of death was a slow respiratory death up until a month ago. After seeing other evidence, he was convinced the slow death did not happen. Now he believes there are several mechanisms of cause of death at play in this case. He found information on the internet that suggested that long term IV drug users could get severe pulmonary edema Even the general public was aware of this. (Vol. XVIII, pp. 1726-1729).

(Deering steps down to a diagram)

Deering testified that he will attempt to answer the question as to whether or not the fluids she received during treatment could have caused the pulmonary edema. He testified that he will draw only one side of the heart on this diagram. Ms. Buchanan had two IV's in her. One was in the left neck and the other one was in the subclavian area. (Vol. XVIII, p. 1729).

Deering testified that there is no reason why the fluids should go specifically to the lungs. Ms. Buchanan did not get the pulmonary edema from the IV fluids given her because she had no pulse. (Vol. XVIII, p. 1737).

(Exhibit 225 entered – Physiological Diagram)

(Exhibit 226 entered – Anatomical Diagram)

Deering testified that pulmonary hypertension is a disease and it occurs from primary and secondary reasons. This case is one of secondary pulmonary hypertension. This involves low blood pressure. It is hypertension in the pulmonary artery. Ms. Buchanan can have pulmonary hypertension because of her granulomas. Deering testified that injecting crushed pills is a form of drug overdose. The issue in this case is whether she has so many granulomas that she has restricted blood flow, causing pulmonary artery hypertension. People can die suddenly from a heart arrhythmia. Since he sees that the right ventricle is not acutely dilated. but rather mildly dilated. However the heart is a little enlarged. Deering did not make a finding of acute pulmonary hypertension. (Vol. XVIII, pp. 1739-1746).

Deering testified that he did a toxicology on Ms Buchanan. The phenomenon of post mortem distribution can cause a false reading as to the amount of drug in the body because at death, the drug may redistribute itself to other parts of the body, and if you take a sample from where the drug has concentrated, it will give you a false high amount of that drug; therefore we take blood from two different areas. He stated that he used femoral blood in this case to send off for testing. He sent the blood to Aegis Labs for

testing, and received their results, which is now a part of the autopsy findings. (Vol. XVIII, pp. 1746-1749).

Deering testified that the blood test showed three findings. The first showed that there were 428 nanograms per milliliter of Oxycodone-free in her blood. The second finding showed the presence of 54 micrograms per milliliter of Acetaminophen in her blood. The third finding showed 16 milligrams per liter of Salicylate in her blood. (Vol. XVIII, p. 1750).

As to the Oxycodone-free, Deering testified that narcotics are very difficult to interpret, because a certain value of a drug is toxic to an individual depends on that individual's tolerance. This patient fits into the potentially tolerant class of people who are tolerant to opiates. There has been an exposure to Oxycodone prior to this exposure, and another narcotic was found but not in her blood. Because she may have been a tolerant person, she fits into that gray zone. (Vol. XVIII, pp. 1750-1753).

Deering testified that a narcotic like Oxycodone has three functions. It is a pain killer. It is a sedative, meaning, it helps you sleep. Last, it is a respiratory depressant, meaning it slows down your breathing. (Vol. XVIII, p. 1753).

Deering testified that, although she had Acetaminophen in her system, this is not a case of aspirin overdose. Oxycodone is combined with aspirin or Tylenol to make a tablet, and that may be what we have here. We are talking about crushing up a pill and injecting it. (Vol. XVIII, pp. 1754-1755).

Deering testified that he also had a urine analysis performed and that test result was also made a part of his autopsy report. The urine results showed that she had 18,000

nanograms per milliliter of Oxycodone-free in the urine. She also had 831 nanograms per milliliter of Hydrocodone-free in her urine. She also had 224 nanograms per milliliter of Alpha-Hydroxy-Alprazolam, a metabolite of Alprazolam, in her urine. (Vol. XVIII, pp. 1755-1756).

There was no Hydrocodone active in her blood. It just means that at one time she was exposed to that drug in her blood. The Oxycodone in her urine is also not biologically active. The Alprazolam also has no current effect on her because it too was found in the urine. (Vol. XVIII, pp. 1756-1757).

Deering testified that the cause of death is acute combined multiple drug overdose or acute combined multiple drug intoxication. (Vol. XVIII, p. 1757).

(Witness is shown Exhibit 223 – Death Certificate/Ms. Buchanan)

Deering testified that the death certificate is a two page report. The first page states that this certificate is pending, because at the time he issued this certificate, he did not have the blood test results yet. The second page is called the Delayed Report of Diagnosis of death. That page is filled in when he gets his blood test results back. (Vol. XVIII, pp. 1758-1759).

Deering testified that the death certificate shows that the cause of death is an acute combined multiple drug overdoses, and he listed Oxycodone, Hydrocodone, and Alprazolam. (Vol. XVIII, p. 1759).

Deering testified that the manner of death could not be determined. The manner of death has five choices: homicide, accident, natural, suicide, and undetermined. (Vol. XVIII, pp. 1759-1760).

(Exhibit 223 entered - Death Certificate/Ms. Buchanan)

Deering testified that he issued only one death certificate, but it was delayed. The delayed death certificate was issued on September 22, 2005. His diagnosis of acute combined multiple drug overdose was his cause of death when he issued the death certificate in September of 2005, and it is his opinion as to the cause of death today. (Vol. XVIII, pp. 1760-1762).

Deering testified as to the meaning of mechanism of death. He gave an example to explain its meaning. A gunshot wound may be the cause of death, but the bleeding to death as a result of that wound, is the mechanism of death. Someone may get a gunshot wound and later get an infection from which they die. The infection is a mechanism of death. The cause of death hasn't changed, but the mechanism has. (Vol. XVIII, p. 1762).

Deering testified that in the instant case, he originally thought that the death was a slow respiratory depressive death. There are a number of features that make him think that she died a slow death. The severe pulmonary edema made him think she died a slow death. The level of the drug that's present is another feature. The drugs in the urine are another feature of a slow respiratory depressive death. Narcotics have a combined effect so if one narcotic causes respiratory depression, two narcotics cause twice as much respiratory depression. If you add in the factors of the muscle relaxers and the benzodiazepines, then you get a combined effect. If you take too much of these drugs, the person can go to sleep and die. That is what he originally happened to Ms. Buchanan. After viewing some cell phone photographs with a certain time given for those

photographs, he realized that Ms. Buchanan was actually alive during the time he thought she would have been dead. (Vol. XVIII, pp. 1762-1765).

(Witness shown Exhibits 186 and 187 – Cell Phone Photographs/Ms. Buchanan)

Deering testified that those photographs were taken two hours prior to her death. That meant that his mechanism had to be re-evaluated. He re-evaluated the entire case again. He testified that he has re-evaluated the case just over the past few weeks. (Vol. XVIII, pp. 1765-1768).

Deering testified that he found several mechanisms for the cause of death. First, he stated that there was also a natural cause of death, that being mitral valve prolapse. This condition can rarely be associated with sudden death. Most people with mitral valve prolapse die of something else. This finding is an incidental finding. It is not the cause of death. Pulmonary hypertension is a potential cause of death however. That condition is usually accompanied by a thickness of the heart, which she didn't have. She did not have a vastly dilated right ventricle which usually accompanies this condition. Therefore he concluded that pulmonary hypertension was not a cause of death. He didn't feel that she died a sudden death of the heart...However, pulmonary hypertension "rules out" a sudden death of the heart. (Vol. XVIII, pp. 1769-1773).

Deering opined that the mechanism of death in this case is the pulmonary edema. She did not have a slow respiratory death. The IV use of narcotics is associated with massive pulmonary edema the literature is unclear as to what can cause it. He does not know what dose of the Oxycodone was injected into her. He does not know if the level of Oxycodone found in her at death was a usual level for her or a high level for her. He does

not know whether the amount of Oxycodone found in her was an elevated level for her. (Vol. XVIII, pp. 1773-1775).

Deering testified as to the filler. Every time she is injected with a crushed pill, the filler of that pill blocks her vessels. If enough vessels are blocked, you can get acute pulmonary hypertension. Because Deering does not see a dilated right ventricle, he does not think she died from pulmonary hypertension. However, it is still an acute multiple overdose because there is Oxycodone and Hydrocodone. Multiple drugs were used and multiple injections were given until the lung was simply blocked. (Vol. XVIII, pp. 1775-1776).

Deering testified that a second scenario involved too many doses of the filler material that caused a leaky lung. The process of the granulomas forming could injure the lungs and cause it to leak. That could lead to significant pulmonary edema. Therefore, the two mechanisms involve the Oxycodone and the filler materials. (Vol. XVIII, pp. 1776-1777).

Deering has asked himself if the filler material alone could have caused the death. He concluded that the drug and the filler could have caused her death. However he cannot prove it. Even if the main mechanism of death was the filler, the Oxycodone could not be incidental. Because he thinks that both the filler and the Oxycodone caused her death. He still believes she died of an acute combined multiple drug overdose or multiple drug intoxication. (Vol. XVIII, pp. 1777-1779).

Deering testified that he does not know if the level of Oxycodone found in her at autopsy was a normal or high level for her. He does not know how tolerant she was to the

Oxycodone. What he does have is the severe pulmonary edema. She did not die of any kind of natural cause of sudden death. (Vol. XVIII, p. 1780).

Deering did not see any track marks on Ms. Buchanan, only the groin marks. He testified that he has seen a lot of puncture marks in the femoral area, because of the emergency room personnel sticking the patient there to draw blood. However, Ms. Buchanan was the first person he has seen that has chosen that site to be injected. (Vol. XVIII, pp. 1781-1783).

Deering opined that if not for the injection of opiates and Oxycodone, she would not have died. (Vol. XVIII, p. 1783).

(Exhibit 222 entered – Autopsy Report)

[CROSS EXAMINATION]

Deering testified that he was a partner and part-owner in Forensic Medical. (Vol. XVIII, p. 1788).

(Attorney reads from Prosecutor's opening statement)

> Now Dr. Deering is honest and frank. And he has reviewed some of the evidence as it has progressed during this investigation, and he will tell you his findings have been changed a bit. That he is not entirely sure that it was a multiple drug overdose**.** (Vol. XVIII, p. 1792).

Deering testified that he had no idea whether that part of the opening statement was correct. He stated that she has not expressed those views to him. He testified that in getting his information together for his opinions, he did not talk to the ER doctor, or to EMS personnel. It is his opinion that Ms. Buchanan does have heart disease. (Vol. XVIII, pp. 1792-1793).

Deering opined that the filler is the stuff that a pill is made of, less the medication in it. The filler is not a narcotic. He testified that, as to the role Oxycodone played in her death, he opined that it could have killed her alone, or in combination with the filler, or the filler could have killed her alone. (Vol. XVIII, p. 1794).

Deering opined that if the Oxycodone alone killed her, then dosage of Oxycodone found in her blood at time of death, the 428 nanograms per milliliter, would have been a lethal dosage. He opined hat for tolerant persons, such as Ms. Buchanan, that level could be lethal. Toxicity from narcotics is severe pulmonary edema. The amount of pulmonary edema present in her, could have killed her. He testified that he formulated his cause of death based on all the information available at the time, and he did not have the information from the cell phone pictures at that time. (Vol. XVIII, pp. 1795-1798).

Deering testified that he knew the death was witnessed by Dr. Koulis as a sudden death, but even though he had never talked to Dr. Koulis, he made the determination that the defendant was a biased witness. (Vol. XVIII, pp. 1799-1800).

When he originally looked at the slides of the lungs and saw the granulomas, he did not think that finding was significant as to the cause of death. After meeting with defense counsel on August 22, 2007, and shown those cell phone pictures of Ms. Buchanan alive at a time two hours before her death, he changed his time line of death from eight to ten hours that it took her to die, to a minimum of two hours for a slow respiratory death. (Vol. XVIII, pp. 1801-1803).

Deering testified that he was also shown an affidavit from a person who swore that on July 4, 2005, he was on the phone with Ms. Buchanan at around 11:22 am. He talked

to her for approximately 35 minutes. In addition to that information, Deering was shown eleven cell phone pictures of Ms. Buchanan which showed that she was alive from 12:22 pm on July 4, 2005, until 12:29 pm. Deering was also shown an excerpt from Detective Johnson's Investigative Summary, which mentioned another cell phone picture taken of Ms. Buchanan at 1330 hours, or 1:30 pm. Deering testified that those pictures and that timeline gave him a real problem. At that time, Deering stated that there was no way his slow death theory could work [because the 911 call made by Dr. Koulis occurred only 50 minutes later at 2:18 p.m.]. Deering told defense counsel that he had to go back and re-work the case. (Vol. XVIII, pp. 1803-1805).

Deering testified that prior to the meeting with defense counsel, he would not let the defense attorney record the meeting. (Vol. XVIII, p. 1806).

Deering testified that the filler in her lungs could have been there for weeks, months or years. He could not give an opinion as to who made the injection marks in Ms. Buchanan's groin area. He also opined that there are a number of things that can lead to pulmonary edema. (Vol. XVIII, p. 1807).

Deering testified that the use of Narcan intervention during a narcotic drug overdose can reverse the effects of the narcotic, and may stop the progression of the drug. Ms. Buchanan was treated with Narcan but she did not wake up. Deering testified that that could be a sign that it was not a narcotic overdose. It could also mean that she did not get enough Narcan. It could mean that she did not get the Narcan in time. It could also mean that the Narcan could have made the pulmonary edema worse, because Narcan can cause pulmonary edema. (Vol. XVIII, pp. 1808-1809).

Deering testified that when a drug is found in the urine, it has no biological effect on the central nervous system. It is basically trash waiting to be taken out. Deering testified that the Hydrocodone, Oxycodone, and Alprazolam in the urine, had no effect at the time of death. He also testified that the slow death from narcotics never happened. (Vol. XVIII, pp. 1809-1811).

Deering was asked if he could state with reasonable medical and scientific certainty as to whether or not the Hydrocodone and Alprazolam in the urine combined with the Oxycodone in the blood to start the death process and Deering responded that it was two answers. He stated that at one time, all three drugs were in the blood. But although they might have combined, they did not combine in a way that passed the threshold for respiratory depression. When he was asked whether he could state within reasonable medical certainty as to whether the Alprazolam and Hydrocodone, found in the urine, ever combined with the Oxycodone in the blood prior to death, he answered the question with an "I don't know". Deering testified that when he believed that Ms. Buchanan died a slow respiratory death, his theory was that, since there were two drugs in her urine at the time of death, that meant that one or both of those drugs had to have combined with the Oxycodone in the blood to have killed her. (Vol. XVIII, pp. 1818-1821).

(Exhibit 227 entered – Triple Lumen Catheter)

(Exhibit 228 entered – Ambu Bag)

(Exhibit 229 ID only – Triple Lumen Catheter Box)

(Witness shown Exhibit 230 – Sodium Chloride Bag for identification)

Deering testified that because he does not know what role the Oxycodone played in Ms. Buchanan's death, he cannot state within reasonable medical certainty that the Oxycodone killed her. He testified that it is just as likely that the filler killed her. (Vol. XVIII, p. 1854).

Deering testified that the pulmonary edema could not have come from the resuscitation efforts by EMS and ER personnel. He also opined that he could not state with reasonable medical certainty that the Hydrocodone was injected. (Vol. XVIII, p. 1855).

[REDIRECT EXAMINATION]

(Witness shown Toxicology Textbook/Randall C. Baselt)

Deering testified that he uses that text very commonly. He has looked up the levels of toxicity of Oxycodone in that book. The range of toxicity is from 400 to 2700 nanograms per milliliter, but in each case there was at least one other depressant drug. The range of toxicity in the instant case falls within the range of toxicity found in this book. (Vol. XVIII, p. 1856).

Deering testified that Koulis never called him to discuss Ms. Buchanan's case, and he never saw the Photograph of Ms. Buchanan supposedly taken at 1330 hours. He does not know if any such photograph exists. (Vol. XVIII, p. 1859).

As to the use of Narcan, Deering testified that it is used to reverse the effects of narcotics. Narcan is used to see if the subject can be awaken. It is typically carried by EMS in resuscitation packages of drugs. When someone is found in an unresponsive condition, giving them Narcan is a reasonable thing to do just in case there has been a

narcotic overdose. However, Narcan can make the pulmonary edema worse. It should be used judiciously when dealing with a narcotic overdose. He had no evidence that the Narcan made the pulmonary edema worse. Sometimes, the Narcan does no good if the person has taken too much of the narcotic. (Vol. XVIII, pp. 1860-1861).

When asked what Deering was saying when he talked about a multiple combined drug overdose, Deering testified that injecting a crushed pill is by his definition, a drug overdose, and when that happens with multiple drugs, that can be a multiple drug overdose. The mechanisms are multiple in this case. One is the filler material that may involve several different kinds of pills. Another mechanism is the filler causing an acute lung injury, a leaky lung, in addition to the narcotic process of sedation and respiratory depression. He testified that someone could inject filler without the narcotic that goes with it, but he is not aware of a case like that. (Vol. XVIII, pp. 1861-1863).

Deering testified that even if someone pumped six bags worth of solution into Ms. Buchanan, that would not have caused the pulmonary edema he saw. Without any back pressure, without any pump failure, there will be no producing of pulmonary edema. From what he saw in this case, Ms. Buchanan came to the ER with the pulmonary edema, and did not get it in the ER as a result of IV fluids being pumped into her. He testified that the ER records of WMC is part of his file. (Vol. XVIII, pp. 1863-1865).

[RECROSS EXAMINATION]

Deering testified that Baselt's textbook states that when there's an opiate death, and Oxycodone is the drug involved, that generally you need another brain depressant

before death occurs. However in this case, there was no other brain depressant. (Vol. XVIII, p. 1867).

Deering testified that he remembered counsel showing him the excerpt from the investigative report that talked about the photograph of Ms. Buchanan being taken at 1:30 and how that time period gave him great concern. Deering also testified that he did not know how much Narcan was given in this case, and even if he knew, he still would not know the extent to which it might have caused permanent pulmonary edema. (Vol. XVIII, pp. 1867-1868).

When asked if he considered Ms. Buchanan's death to be a multiple drug overdose due to the different injections of different drugs, he testified that he had Hydrocodone, Alprazolam, and Oxycodone, so he had different drugs with the assumption that they are both being crushed up and injected. (Vol. XVIII, p. 1868).

He testified that whether we are talking filler or Oxycodone induced pulmonary edema, it would be the filler from the Oxycodone that would produce that final straw, if that is what happened. It could also be the Oxycodone that produced the pulmonary edema. If the filler killed her, then it may be that there was multiple rounds of the filler throughout the several days of this happening. One of the mechanisms that could have killed her was the Oxycodone at that lethal level. Deering testified that if it were just the Oxycodone that killed her, it would not be a multiple drug overdose. (Vol. XVIII, pp. 1869-1871).

Deering testified that the term “drug” included the filler too. When asked if Ms. Buchanan died from multiple controlled substances, Deering testified she did not. (Vol. XVIII, pp. 1872-1874).

[FURTHER REDIRECT EXAMINATION]

Deering testified that she died from the Oxycodone. (Vol. XVIII, p. 1874).

JUAN MORALES

[DIRECT EXAMINATION]

(STIPULATION – KOULIS’ LICENSE TO PRACTICE MEDICINE IN TENNESSEE HAD BEEN REVOKED AT THE TIME OF MS. BUCHANAN’S DEATH. IN ILLINOIS, HE PRACTICED UNDER A PROBATIONARY MEDICAL LICENSE AND AT THE TIME OF MS. BUCHANAN’S DEATH, DID NOT HAVE AUTHORIZATION TO PRESCRIBE CONTROLLED SUBSTANCES.)

Juan Morales (hereinafter referred to as “Morales”) testified that he was employed by the Federal Drug Enforcement Administration, out of the Chicago office for 16 years. He is a Diversion Investigator for this agency. He investigates the abuse and diversion of controlled substances. Oxycodone is a Schedule II controlled substance. It is one of the most dangerous drugs and has the most potential for abuse. Oxycodone has a generic name of Oxycotin. Percocet is a Schedule II controlled substance. The DEA deemed Oxycodone a Schedule II because of its potency and high potential for abuse. The sale of that drug is monitored very carefully. It is difficult, but not impossible, to buy Oxycodone online. (Vol. XVIII, p. 1877).

[CROSS EXAMINATION]

Morales testified that Oxycodone is increasingly publicized and a known drug to the general public. That drug, because of its popularity, has led to a significant underground market. People will employ different ways to get the drug, like doctor shopping, and fake prescriptions. Some of those ways have been successful. Oxycodone can be acquired by means other than the internet. This drug is a means of making money for some people. The drug is part of the drug trade and people can get it illicitly from friends or on the street. (Vol. XVIII, pp. 1888-1891).

(Witness shown Exhibit 82 – Pill Bottle/Oxycodone)

Morales testified that the bottle is from Wal-Mart, and it is a pill bottle for Hydrocodone. (Vol. XVIII, p. 1892).

[REDIRECT EXAMINATION]

Morales testified that some of the smaller pharmacies might overlook the prescription for a drug like Oxycodone just to make a sale. (Vol. XVIII, pp. 1895-1896).

[RECROSS EXAMINATION]

Morales testified that Oxycodone is not the type of drug that a drug salesman leaves samples of at doctor's offices. (Vol. XVIII, pp. 1896-1897).

STEVEN P. RAGLE, M.D.

[DIRECT EXAMINATION]

Ragle testified that when Ms. Buchanan was brought to the ER on July 4, 2005, he did not see any signs of massive pulmonary edema. (Vol. XIX, p. 1934).

(Witness shown Exhibit 229 for ID only)

Ragle identified Exhibit 229 as the type of catheter system used in the ER when Ms. Buchanan was there. (Vol. XIX, p. 1935).

(Exhibit 229 entered – Multi-Lumen CVC Super Kit)

(Witness shown Exhibit 227)

Ragle testified that Exhibit 227 is the catheter from the triple-lumen kit. (Vol. XIX, p. 1935).

(Witness shown Exhibit 230 for ID only)

Ragle testified that Exhibit 230 is a one liter bag of saline, which is the same type of bag used on Ms. Buchanan when she was brought into the ER. (Vol. XIX, pp. 1935-1936).

(Witness demonstrates where the catheter is placed)

Ragle testified that the fluid from the bag goes into the superior vena cava, and from there, into the right atrium, and from there, into the right ventricle. All of this is in the heart. Once the fluid is in the heart, and in this case he used CPR, to try to push the fluids and medication into the pulmonary artery, or the lungs. (Vol. XIX, pp. 1936-1937).

Ragle testified that she did not have any blood pressure but pressure was supplied by CPR. (Vol. XIX, p. 1938).

Ragle testified that the bag contained one liter of fluids. He further testified that, according to the triple-lumen box, 3,000 CCs of fluid could go through the catheter in one hour. The triple lumen catheter was placed in her at 15:11 and taken out at 15:57. (Vol. XIX, p. 1938).

(Exhibit 230 entered – Saline Bag)

[CROSS EXAMINATION]

Ragle testified that Ms. Buchanan got very little fluid from the IV she had in place when she arrived in the ER because it was not infusing. She got very little fluid in the site that EMS put in. As to the triple-lumen catheter, one of its ports was running wide open. That means that the saline bag is hung on a pole and saline is allowed to flow freely through the tubing. The second port was used only for Epinephrine, and not saline. There was minimal epi put through this port. The third port was used to run medications through, and not saline. The medication port was allowing minimal medication flow. Although there were three ports, only one was utilized for saline. Ragle testified that one port was capable of running 3000 CCs per hour. That would be three liters per hour. That statistic applied to a person with a blood pressure. Ragle testified that Ms. Buchanan was dead when she came into the ER...because Ms. Buchanan did not have a pulse, her intake of fluids would be far less than what is written on the box. There is no documentation that states how many bags of saline were used on Ms. Buchanan. Ragle believes one bag was used on her. He also testified that when CPR is forcing the blood through the body, that is not as effective as if the heart were doing it. (Vol. XIX, pp. 1940-1944).

[REDIRECT EXAMINATION]

Ragle testified that CPR does keep the blood circulating through the body. He testified that just because the nurses did not chart that a second bag of saline was used, does not mean that a second bag of saline was not used. During CPR, the blood travels to the same places as it would if the heart was beating. Most of the fluids would go through the heart, through the lungs and then to the rest of the body. (Vol. XIX, pp. 1944-1946).

[RECROSS EXAMINATION]

Ragle testified that in the medical field, it is generally accepted that if it is not document, it didn't happen. (Vol. XIX, p. 1947).

[FURTHER REDIRECT EXAMINATION]

Ragle testified that he does not have any documentation that the fluids given to Ms. Buchanan, went other than into the heart, then the lungs, then to the rest of the body. (Vol. XIX, p. 1948).

MICHAEL GRAHAM, M.D. [defense witness taken out of order]

[DIRECT EXAMINATION]

Michael Graham (hereinafter referred to as "Graham") testified that he is a forensic pathologist, and a professor of pathology at St Louis University. He is also Chief Medical Examiner for the city of St. Louis. (Vol. XIX, p. 1949).

(Exhibit 232 entered - CV/Dr. Graham)

Graham testified that he was sent certain documents by the defense, which included the records from the Emergency Medical Services, from the Emergency Department at the hospital, a variety of police interviews, medical examiner's records. number of photographs of the autopsy and from cell phones, testimony from Dr. Deering and Dr. Ragle, notes from discussions with other doctors, an affidavit from someone who Ms. Buchanan was doing business with and talked on the phone. (Vol. XIX, pp. 1951-1952).

Graham testified that based on the records he had reviewed, he formed the opinion that Ms. Buchanan was a drug user. (Vol. XIX, p. 1952).

Graham testified that he looked at microscopic slides in order to better assess Ms. Buchanan in terms of what type of drug user she was. Graham looked at a variety of Ms. Buchanan's tissue, including her lungs, under the microscope. He brought with him some photographs that he took under the microscope along with other photographs. They are some diagrams of what a normal lung looks like, some pictures of a normal lung. He also brought a series of photographs of Ms. Buchanan's lungs. (Vol. XIX, pp. 1952-1954).

(Witness shows schematic)

Graham testified that this diagram is a schematic of a man. The issue is the injecting of crushed pills into the vein and what happens when that occurs. This diagram shows where the blood goes, then show you what it looks like in the lungs, then get into some real pictures of what real lungs look like. (Vol. XIX, pp. 1954-1955).

(Witness shows jury what happens when injecting in groin area)

Graham testified that the first thing that these particles of filler run into that is smaller than themselves, are the little blood vessels in the lungs. These particles get stuck there.

(Witness shows diagram of lung)

Graham testified that the lung is designed to bring air into the body, get oxygen out into the blood, take the waste gases out of the blood, and back into the air. Blood vessels get smaller and smaller as they get further from the heart and lungs. (Vol. XIX, pp. 1955-1956).

(Witness shows photograph of real lung)

Graham testified that it shows how the blood vessels get smaller and smaller as they get further from the heart. (Vol. XIX, p. 1957).

(Witness shows photograph of a normal lung)

Graham testified that this next photograph is a picture of a normal lung. He pointed out the tiny pulmonary arteries. The other picture is a photograph of Ms. Buchanan's lung under the microscope, and it shows little nodules scattered throughout. These are the granulomas in her lungs, and they are all over her lungs. (Vol. XIX, pp. 1957-1958).

(Witness shows photographs of Ms. Buchanan's granulomas)

Graham testified that all this brightly lit up grayish white materials are the foreign Materials from the pills that have been injected. Some of her granulomas are actually in her blood vessels. This stuff is the filler in the pill. (Vol. XIX, p. 1959).

(Witness shows photograph of Buchanan lung under polarized light)

Graham testified that, under the polarized light, all the glowing material is the filler material from the pill. She has a tremendous amount of filler all over her lungs. (Vol. XIX, p. 1959).

(Witness shows blood vessels in the lungs)

Graham testified that normally, a blood vessel is like a little hose. It is not a rigid pipe. It expands and contracts. It's got muscle in the walls. This photograph shows that this vessel has been blocked by the filler material. (Vol. XIX, pp. 1959-1960).

(Witness shows another slide of the lung)

Graham testified that this slide shows long term obstruction of blood flow and damage to the blood vessel. If the blood cannot get through the vessel, it seeks another way through. If it cannot find another way through, it will back up and the pressure goes up and you get pulmonary hypertension in the arteries and in the lungs, or it can start a clot. (Vol. XIX, p. 1961).

(Witness shows another slide of Ms. Buchanan's lung)

Graham testified that this slide shows the effects of her using intravenous injected pills over a long period of time. Her blood vessel walls are much thicker than they should be. It also shows that she had injected recently. None of these foreign body materials should be here. The granulomas have caused irritation or inflammation, and that has caused scarring, and that is why the walls are thick. (Vol. XIX, pp. 1961-1963).

(Witness shows last Photograph)

Graham testified that this picture shows an abnormally thick pulmonary artery. The filler material can plug up a vessel. It can also make the blood clot. This picture shows a blood clot in the vessel. The filler can keep going and causing damage even when one is not injecting a crushed pill. (Vol. XIX, pp. 1963-1964).

Graham testified that the signs of recent injections could be as recent as minutes to hours. (Vol. XIX, p. 1965).

(Exhibit 233 entered - Graham's PowerPoint Presentation)

Graham testified that the toxicological findings are not consistent with an opiate intoxication. You cannot just look at numbers. You have to look at the context in which the numbers are given. Ms Buchanan was a chronic intravenous drug abuser. Graham

opined that he would expect her to have a significant amount of tolerance to opiates. The proof indicates that she was alive and well for at least 50 minutes before EMS was called to the scene. The amount of Oxycodone in her blood would not have been enough to kill her, and there was nothing else in the blood. There was aspirin and Acetaminophen, but that would not have killed her. There were drugs in the urine, but once a drug is in the urine, it doesn't do anything. A drug in the urine is a drug out of your system. (Vol. XIX, p. 1966-1967).

When asked if Graham agreed with Deering's diagnosis of an acute combined multiple drug overdose, he stated that at the time Deering made his diagnosis, he had an open-ended time line that she could have been alive. However, in this case Graham testified that it was not an acute combined multiple drug overdose. (Vol. XIX, pp.1968-1969).

When asked if, based on the fact that there was only one drug in her blood, that being Oxycodone, and two drugs in the urine, Alprazolam and Hydrocodone, was there any way to conclude that Ms. Buchanan's death was due to a multiple drug overdose, Graham said "no". (Vol. XIX, p. 1969).

Graham explained tolerance as the body conditioning itself to take more and more drugs with use. To get the same effect next time the user uses the drug, she will have to take more of the drug. That is called tolerance. It is very characteristic of opiates. Someone like Ms. Buchanan, who has taken the drug over time, would need more to kill her than a person with no experience with drugs. When you're looking at numbers, Graham would expect much higher a number for the Oxycodone she had. Her number

was on the low end of experienced users anyway. To get that much filler and scarring into the lungs as Ms. Buchanan had, it would be expected that she has been using for months if not years. (Vol. XIX, pp. 1969-1970).

Graham testified that the average dosage of Oxycodone that kills is 1000 nanograms per milliliter. Her dosage was much lower, at 428 nanograms per milliliter. (Vol. XIX, pp. 1970-1971).

Graham testified that the filler is not a controlled substance. (Vol. XIX, pp. 1972-1973).

Graham testified that in his opinion, Ms Buchanan died from her intravenously injecting crushed-up pills over a long period of time that caused the damage to her lungs, and what pushed her over the edge, was that the final injection of a pill, probably containing Oxycodone, and the filler material participated some of the acute changes which caused her to die suddenly. (Vol. XIX, p. 1973).

Graham specifically stated that the Oxycodone played no role in Ms. Buchanan's death. This answer is based on reasonable medical certainty. (Vol. XIX, p. 1973).

When Graham was asked if he occasionally saw drug users inject in the groin area, he said yes. He testified that people inject in the groin area to conceal their activity from others. (Vol. XIX, pp. 1975-1976).

Graham opined that since the paramedics reported clear lungs at Ms. Buchanan's apartment, and since Dr. Ragle reported clear lungs in the ER, then, within reasonable medical certainty, the massive pulmonary edema seen by Dr Deering at autopsy was due

to the CPR for an hour and a half and the administration of a huge amount of fluids. (Vol. XIX, p. 1976).

[CROSS EXAMINATION]

Graham testified that Ms. Buchanan was a chronic drug abuser from looking at the lung. She had all that foreign body materials with the inflammation and scarring and that has to be repeated long-term use, probably months or even years. It could go back many years. There is no way to tell. He does not know who injected her. He cannot say who injected her, but most intravenous drug users inject themselves. The groin area is an uncommon site for injection, but not rare. He may see it a few times a year. As to tolerance, Graham testified that if you're tolerant to one opiate, you're tolerant to all of them. (Vol. XIX, pp. 1978-1981).

Graham testified that when one ingests a pill, the pill breaks down over time. The body absorbs the chemicals. The opiate has got to get to the brain, so the effect of the pill is delayed. When someone injects a pill, the effect is rapid. (Vol. XIX, p. 1981).

Graham testified that opiates are given for pain relief. They sedate you. The breathing slows down, your pupils get pin-point, and you get constipated. (Vol. XIX, p. 1983).

Graham testified that the filler material in Ms. Buchanan is talc. There are other substances that filler is composed of. Filler materials are generally inert, so from a chemical standpoint, they are not toxic. They can cause blood clots due to their ability to irritate the body. Since Dr. Koulis is a physician, he knows better than to crush up a pill and inject it. He also stated that as a physician it is important to tell a caregiver

everything relevant that you know about the person he is treating. That includes the fact that the person is an IV drug user. If a caregiver were told that there had not been any drug use, that statement would be false based on Graham's findings. (Vol. XIX, pp. 1983-1987).

Graham testified that he did not see any evidence that the opiate decreased her respiration. He stated that the final injection tipped her over the edge. Graham also believes that Ms. Buchanan was given more than a liter of fluids, despite what Dr. Ragle testified to. He stated that according to their own records EMS also injected a liter, so there is two liters right there. The line placed by EMS might not have been working when they brought her to the emergency room, but it looked like it was working earlier. (Vol. XIX, pp. 1988-1990).

Graham testified that an experienced IV user could align his needle marks because he or she would know where the vein is. (Vol. XIX, p. 1990).

Graham testified that his opinion as to the cause and mechanism of death supports Dr. Koulis' account of what happened because he said that she was awake, volitionally carrying on activity, and effectively died suddenly. Sudden death is recognized as a complication of the pulmonary changes that he has shown. He cannot account for her death based on the Oxycodone alone, therefore, he sees a cause of death indicated by advanced pulmonary disease. The concentration of Oxycodone in her blood at time of death would not be enough to kill an experienced drug user. When you consider the time frame, then her death fits with a sudden death occurrence. He stated that the last time she was alive was 50 minutes before EMS was called. He would not expect a concentration

of 400 of Oxycodone to kill her. Dr. Koulis' account of how she died fit what Graham believed happened. Dr. Koulis was there when it happened. (Vol. XIX, pp. 1991-1992).

Graham testified that even if there was no photograph of Ms. Buchanan at 1:30 p.m.. that this would not change his opinion because that would only push back the time-line another hour, and that would not change his opinion. (Vol. XIX, p. 1993).

(Witness shown Baselt Textbook)

Graham testified that he recognized the book. Baselt talks about two different series on deaths involving Oxycodone. The first series involved 24 deaths attributed solely to Oxycodone. The average blood concentration there was 1200. The range was 100 through 800. The amount of Oxycodone in Ms. Buchanan's blood at the time of death, 428, would fit in there. (Vol. XIX, p. 1995).

[REDIRECT EXAMINATION]

Graham testified that it would be inappropriate to interpret the amount of Oxycodone, the .428, as to whether or not it was a lethal dosage, just standing alone. (Vol. XIX, p. 1997).

As far as showing signs of sedation after injecting Oxycodone, Graham cannot say how soon after injection there would be signs of sedation. To an experienced drug user, there may not be any signs of sedation. (Vol. XIX, p. 1998).

Graham testified that the filler is not chemically reactive with the body, although it does cause damage to the body when it elicits irritation, inflammation and scarring. When forming his opinion about the cause of death, he looked at it from two different perspectives. He looked at the objective findings, and the other way was to listen to the

defendant's account of the events leading up to her death to see if it fit the objective findings, and it did. The fact that Dr Ragle does not know how much fluid was pumped into Ms Buchanan in the ER, does not change his opinion. When he opined that the final injection tipped her over, he was not referring to the dosage of Oxycodone as the substance that killed her. He was referring to the filler and the reaction to that filler. That is what tipped her over. The science behind the disease of pulmonary hypertension fits the way Ms. Buchanan died. (Vol. XIX, pp. 1999-2000).

Graham testified that the study in Baselt's text, of 24 deaths due to Oxycodone alone, indicated that the average dosage at time of death was 1200, three times the amount found in Ms. Buchanan at the time of her death. There was no evidence that Graham found to lead him to believe that the dosage of Oxycodone in Ms. Buchanan at the time of her death was higher. (Vol. XIX, p. 2001).

[RECROSS EXAMINATION]

Graham testified that you don't always see an enlarged right side of the heart when someone has pulmonary hypertension. Dr. Deering described mild ventricular hypertrophy and dilation. Dr. Koulis told Graham that he saw Lesa use IV drugs on that weekend. (Vol. XIX, p. 2004).

Graham testified that he doesn't think that, the fact that Dr. Koulis had voiced that she had used drugs a couple of days earlier or a day or two earlier, in general, he doesn't believe, a specific date would have made a difference. It's more important to be aware that Ms. Buchanan was an opiate abuser. (Vol. XIX, p. 2004).

The information that she did not use any drugs today is not that important. (Vol. XIX, p. 2004).

Dr. Koulis told Graham that he did not think she injected herself on the day she died. (Vol. XIX, p. 2005).

[REDIRECT EXAMINATION]

Graham testified that he would not characterize the stick marks in her groin as track marks because there was no scarring of the skin involved. Track marks involves scarring. Graham testified that if Koulis told Dr. Ragle that he did not see Lesa use drugs on the day she died, it would be consistent with what Koulis told him. (Vol. XIX, pp. 2005-2006).

BRUCE GOLDBERGER, M.D. [defense witness taken out of order]

[DIRECT EXAMINATION]

Bruce Goldberger (hereinafter referred to as "Goldberger") testified that he is a Professor of toxicology at the University of Florida in the College of Medicine he works in the department of pathology and psychiatry. He is also president of the American Academy of Forensic Scientists, and editor-in-Chief of The Journal of Analytical Toxicology. (Vol. XIX, pp. 2009-2011).

(Exhibit 234 entered – Goldberger's Curriculum Vitae)

Goldberger testified that as a basis for his opinions in court, he reviewed pre-hospital care records, that is, the EMS records, the hospital records, the autopsy report, the toxicology reports, autopsy photographs, comments from Dr. Deering's interviews from July and September of 2005, and comments from Dr. Ragle from July, twice in that

month, of 2005, the hand-written statement of Dr. Ragle, an affidavit from Dr. Javan Boutros, and the documents from Aegis Analytical Laboratories, which were the documents that he requested. (Vol. XIX, pp. 2012-2013).

Goldberger testified that he was familiar with the drug Oxycodone, which is a synthetic opioid drug. It is used to treat moderate to severe pain. It is also called Oxycontin, Percocet, or Percodan. (Vol. XIX, p. 2014).

Goldberger testified that Oxycodone was found in the decedent's blood, at the time of death, and Hydrocodone and Alprazplam was found in her urine at time of death. He testified that only a drug in the blood can affect the brain. Urine only documents past usage of drugs. You cannot look at drugs in the urine and make conclusions based on findings of the drug in the urine. The numbers attached to the drugs found in the urine from Aegis Lab, are absolutely meaningless. They document the use of the drug in the past. You cannot use the findings of drugs in the urine to make any kind of toxicological conclusion based on that finding. (Vol. XIX, pp. 2015-2016).

Goldberger testified that he was aware that the Oxycodone concentration in the blood of Ms. Buchanan, at the time of death was 428 nanograms per milliliter. In order to determine whether or not that concentration was lethal for her, you must take the circumstances surrounding her death into consideration, including the reports of investigators, the findings of the pathologist at autopsy, and the microscopic examination. It is not correct to say that the concentration level of 248 nanograms per milliliter is lethal in and of itself. Goldberger has seen levels twice and three times higher that the level in Ms. Buchanan which were not lethal. The amount she had in her could kill, even if it

were the only drug in her system. However, when you consider the factor of tolerance, it may not kill. There is evidence that Ms. Buchanan was a chronic drug abuser. (Vol. XIX, pp. 2016-2017).

Goldberger testified that Dr. Deering's cause of death, acute combined multiple drug overdose, is not correct. The Alprazolam and the Hydrocodone cannot be used to establish the cause of death. (Vol. XIX, p. 2018).

Goldberger testified that IV drug users can, and do die suddenly when injecting crushed pills, when that filler reaches the lungs. He opined that when a crushed pill of Oxycodone is used, and the filler causes the death, he would not call that death a multiple drug overdose due to the filler and the Oxycodone. Goldberger testified that he does not know what role the Oxycodone played in Ms. Buchanan's death. He does not agree with Dr. Deering's conclusion that the Oxycodone killed her. In this case, one must look to the totality of the facts, and not to just the level of concentration of the drug. (Vol. XIX, pp. 2019-2021).

Goldberger testified that all his answers have been made within reasonable toxicological certainty. (Vol. XIX, p. 2021).

[CROSS EXAMINATION]

Goldberger testified that he is here on behalf of Dr. Koulis. (Vol. XIX, p. 2025).

Goldberger testified that IV fluids may or may not have an impact on the concentration of the drug. (Vol. XIX, p. 2027).

Goldberger testified that he opined that the classification of a multiple drug overdose is incorrect when only Oxycodone is involved. He testified that there would be no reason to inject just filler. (Vol. XIX, pp. 2028-2029).

Goldberger testified that he has seen sudden deaths due to injection of drugs, but the deaths were not due to the drug itself, it was due to the filler in the drug. Which deposited itself in the lungs. Sudden death means that someone is speaking to you one minute, and they are dead the next minute. (Vol. XIX, p. 2030).

There is a distinction between taking and a pill orally and injecting that same pill. If you take a drug through IV, the drug reaches the brain almost instantaneously. If you take a drug orally, the drug has to reach the stomach and the small intestine for it to be absorbed, therefore, it's a slower process in terms of the effect of the drug, if you take the pill orally. The evidence found at the scene, the four syringes with Oxycodone in them, tells Goldberger that the drugs were administered via injection, but it does not tell him who injected Ms. Buchanan. Goldberger also opined that he did not know what role the Oxycodone played in the death. He could not disagree with Dr. Deering's statement that but for the injection of the Oxycodone she would not have died. (Vol. XIX, pp. 2031-2032).

[REDIRECT EXAMINATION]

Goldberger testified that Hydrocodone and Oxycodone have similar potencies. As a toxicologist, Goldberger testified that he is looking to find what role the drug played in Ms. Buchanan's death. The concentration of the Oxycodone was 428 nanograms per milliliter, which may or may not be a lethal concentration. In order to make a finding one

way or the other, he needs to look at the totality of the circumstances. He can only say that Oxycodone at this level may not be lethal. Based on his totality examination of the case, he cannot say that death was due to a multiple drug overdose. (Vol. XIX, pp. 2033-2035).

Goldberger testified that the autopsy report did not say that the death was caused by a pill, or a crushed pill, or by the filler. It said that death was caused by the Oxycodone. (Vol. XIX, p. 2036).

[RECROSS EXAMINATION]

Goldberger testified that the Aegis lab test showed that Hydrocodone was only in the urine, not in the blood. Vicodin is a Hydrocodone. (Vol. XIX, p. 2037).

HOWARD PATTERSON [state's witness]

[DIRECT EXAMINATION]

Howard Patterson (hereinafter referred to as "Patterson") testified that he is employed as a special agent of the Tennessee Bureau of Investigation, assigned to the Technical Services Unit which deals with computer forensics. He has been so employed for 22 years. (Vol. XX, p. 2070).

Patterson testified that, in this case, he was asked to examine some computers provided by the Franklin Police Department. He was asked to look for correspondence between Dr. Koulis and the subject, and to look for any references to drugs or narcotics. He has 5 years experience in Technical Services. He first makes a forensic copy of the entire hard drive, including deleted items. He works off the copy he made. This is what

he did in this case. He had to work on seven computers in this case. He came across emails on these computers. (Vol. XX, pp. 2070-2073).

(Witness shown Exhibits 236 and 238)

Patterson testified that they were printouts of e-mails he found on two different computers. The dates on these e-mails, which are Exhibit 236, are 11-30-04. (Vol. XX, pp. 2074-2075).

(Witness reads first e-mail)

(Witness reads second e-mail)

(Witness reads from the e-mail – Exhibit 238)

(Exhibit 236 entered – Email/11-30-04)

(Exhibit 238 entered – E-mail/12-15-04)

Patterson testified that he was able to determine what sites was visited by the user. (Vol. XX, p. 2083).

Patterson testified that he makes his report of his findings on a disk (CD). (Vol. XX, p. 2086).

(Witness opens Internet History from Koulis' computer)

Patterson testified that the user performed a search on July 14, 2005, at 21:52, on a Thursday, searching for a particular urine detection. The user made other searches as can be seen as Patterson scrolls down the list of sites. It shows, amongst other searches, that the user was searching for drug detection periods. (Vol. XX, pp. 2088-2089).

Patterson testified that the second computer analyzed, the victim's computer, was also searched with certain key words in the Internet history. This user was, on May 10,

2005, searching for prescriptions online. One site she visited was pharmacyprescriptions.com. Another site was drugstore.com/pharmacy/drug index, searching for Hydrocodone. There was also a search conducted on May 11, 2005, for Hydrocodone. The user's name was Lesa Buchanan. (Vol. XX, pp. 2092-2093).

Patterson testified that on May 17, there was a search conducted for medication online. Also, there was a search conducted for prescriptions online. During this same date, there was a search conducted for Xanax. A search was conducted for pain medication. There was a search conducted for DirectRx. These were all the sites that Patterson found pertinent to his search. (Vol. XX, pp. 2094-2095).

(Witness sown Exhibit 239 – Printout of Report)

Patterson identifies Exhibit 239 as a printout of his report. (Vol. XX, p. 2096).

(Exhibit 239 entered - Printout of Report)

Patterson testified that you cannot identify the person sitting at the computer doing the search. (Vol. XX, p. 2097).

[CROSS EXAMINATION]

Patterson testified that, based on his examination of Ms. Buchanan's computer, it appeared that she was the exclusive user of that computer. (Vol. XX, p. 2098).

Patterson testified that on Dr. Koulis' computer, most of the searches there dealt with alcoholism, and alcohol testing. There was no search performed on Dr. Koulis' computer for Oxycodone or Percocet. (Vol. XX, p. 2102).

[REDIRECT EXAMINATION]

(Witness shown Exhibit 239)

Patterson testified that one search on AOL was for drugs of abuse, detection times, and urine metabolites. There were several more similar searches like this one performed by the user. There's also a telephone number to call if you want to pass a drug test. (Vol. XX, p. 2108).

Patterson testified that he did not notice, on Lesa Buchanan's computer, any searches for Oxycodone or Percocet. (Vol. XX, p. 2111).

[RECROSS EXAMINATION]

BOBBY PATE

(MOTION IN LIMINE; raised on appeal here as issue 5 concerning proof of the 2002 incident in Kentucky)

(JURY OUT)

[DIRECT EXAMINATION]

Bobby Pate (hereinafter referred to as "Pate") testified that he is a deputy for the Boone County Sheriff's Department. However, in May of 2002 he was a detective who was working a case involving Ms. Lesa Buchanan and Mr. Koulis. (Vol. XX, pp. 2117-2118).

Pate testified that on May 1, 2002 he was called to St. Elizabeth Hospital in response to a call from Ms. Buchanan's mother, Peggy Roberts, who told him that Mr. Koulis had been shooting her daughter up with medication. Koulis and Ms. Buchanan lived together and Mrs. Roberts found drugs in the basement of their home. She handed Pate a box containing needles, syringes, Demerol, and Morphine. Her daughter had told Mrs. Roberts that Koulis was drinking a lot of alcohol, taking drugs, and becoming

violent towards her daughter. Ms. Buchanan had injection sites on her body, including her hands, feet and groin area. (Vol. XX, pp. 2118-2120).

Pate testified that the initial officer that came to the hospital, took pictures of the injection sites on Ms. Buchanan, which were in her hands, her groin area, and her feet. (Vol. XX, p. 2120). He testified that she had injection sites in her arms also. He testified that her hands and feet were twice their normal size at the time. He tried to interview Ms. Buchanan at the time, but he could not because she was incoherent. He was not sure if Ms. Buchanan even knew where she was. (Vol. XX, p. 2121).

On May 2nd, he went back to the hospital and interviewed her in her room. She told him that she and Dr. Koulis had dated for a couple of years and that "he just recently started shooting her up two to three months prior to this incident. At first it was to - - apparently he done a lot of procedures on her; plastic surgery type things." Later it was "to make her nice and keep her naked in the house..." (Vol. XX, p. 2122). She told him that at first, Dr. Koulis would shoot her up periodically, but then it became more frequent "and eventually she - - he taught her how to shoot up - -" (Vol. XX, pp. 2122-2123). She told Pate that the first time Dr. Koulis shot himself up, she knew that he was hooked from then on. (Vol. XX, p. 2123). Ms. Buchanan told Defective Pate that on May 1, 2002, she was hurting pretty badly due to the infections that she was complaining about to Dr. Koulis. He called her a hypochondriac and gave her a couple of shots and wrote her five prescriptions. He then left her in the basement of their house and he for Tennessee. She began feeling sick and called her friend, Dale Fogazzi. When he came over and saw the condition she was in, he called her mother and she called the police, then took her

daughter to the hospital. Detective Pate testified that he contacted the medical board in Tennessee. Pate said he learned that Dr. Koulis surrendered his medical license, and according to some documents Pate recovered, Dr. Koulis was still getting Demerol in Tennessee even after he surrendered his license. (Vol. XX, pp. 2123-2124).

Pate identified Exhibit 240 for ID only as a letter written by Dr Koulis to Ms. Buchanan, during the time he was in drug treatment in Cottonwood, calling those letters "apology letters". (Vol. XX, pp. 2124-2125). Pate interviewed Ms. Buchanan a second time, once she got out of the hospital. She told him the same things as she did earlier. She also told him that Dr. Koulis would doctor up bottles of Demerol by pouring out the Demerol into other bottles and filling the empty bottles with a saline solution, then recapping that bottle with super glue and placing an asterisk on it to tell him that there was no Demerol in the bottle. Ms. Buchanan told Pate that Dr. Koulis was giving her shots almost daily, with Demerol, Morphine and Ketamine, because it kept her a nice girl. Detective Pate testified that his contact with the case involved his contact with the medical boards in Tennessee and Illinois, "and work with our Commonwealth attorney's office...". It was after they checked out all the doctored bottles that they issued their warrants for his arrest. (Vol. XX, pp. 2126-2127).

Pate testified that Dr. Koulis prescribed drugs for Ms. Buchanan in Kentucky on ten occasions. Those drugs included Valtrex, Claritin, Zithromax, Meperidine, and Alprazolam. According to the Kentucky medical board, Dr. Koulis did not authority to write those prescriptions, which were written on Tennessee prescription pads, where he had already surrendered his license. ..." (Vol. XX, p. 2128).

In Kentucky, Dr. Koulis was charged with:

> Three counts of trafficking controlled substance, first; three counts of trafficking controlled substance, second; four counts unlawful prescribing and administering and dispensing and distributing a controlled substance; one count of possession of drug paraphernalia; six counts unlawful dispensing alleged drugs; two counts of possession of a controlled substance not in original containers. (Vol. XX, p. 2129).

Dr. Koulis was subsequently arrested on those charges. ...” When asked if he knew what happened with the criminal case, he testified that:

> Originally I was told one thing, but it turned out if it was - - he was given diversion. (Vol. XX, p. 2130).

[CROSS EXAMINATION]

Detective Pate testified that on May 1, 2002, Dr. Koulis was abusing drugs, for which he admitted himself into Cottonwood for drug treatment. (Vol. XX, p. 2131). Pate testified that Exhibit 241 for ID only was his report of the incident and the pictures of Ms. Buchanan’s injection sites. (Vol. XX, p. 2132). When Detective Pate was asked whether she was admitted to St. Elizabeth Hospital for withdrawal symptoms and not for overdosing, which the medical records of St. Elizabeth Hospital states, he responded “I couldn’t tell you. I mean I’m not a doctor.” (Vol. XX, p. 2133).

When Pate was asked if Ms. Buchanan was admitted to St. Elizabeth Hospital, not in the ER but in the Behavioral Health wing where they were treating her for withdrawal symptoms, Pate testified that: “She was in another wing - - a wing of the hospital, I’m not sure what wing it was.” (Vol. XX, pp. 2134-2135). The medical toxicology on her stated that she was taking liquid Morphine and Ketamine. (Vol. XX, p. 2135).

She told Pate on May 2nd, that Koulis would inject her with Morphine and Demerol, and at first, he would inject her, but later, "he taught her how to do it, but he still did most of them." (Vol. XX, p. 2136).

(Pate's Police Report marked as Exhibit 242 for ID only)

Pate testified that when he testified that Dr. Koulis did not have a Tennessee license, he did have his DEA license from Illinois. He testified that a doctor who has a license in one state cannot prescribe medicine in another state, according to the Kentucky medical board. He also testified that the letter Koulis sent Buchanan was while Koulis was in Cottonwood. (Vol. XX, p. 2137). At that time, Ms. Buchanan had a daughter. Pate stated that he did not know if Ms. Buchanan was involved in the crimes with Koulis. He was not familiar with the portion of the pre-trial diversion agreement that stated that the Commonwealth of Kentucky will not prosecute Ms. Buchanan unless the Commonwealth has to prosecute Mr. Koulis for the charges. (Vol. XX, pp. 2137-2138).

(Exhibit 243 for ID only – Pre-trial Agreement)

Pate testified that he was not familiar with Ms. Buchanan's filed affidavit in which she swore that Mr. Koulis did nothing wrong. Pate testified that during his investigation, Ms. Buchanan disappeared on him. (Vol. XX, pp. 2139-2140).

(Exhibit 244 for ID – Affidavit/Buchanan)

Pate testified that he interviewed Ms. Buchanan again, this time using a tape recorder to tape the interview. He does not recall Buchanan stating that she was the one that injected herself and that it was all her fault. Pate testified that it was after the taped

statement she gave him that she disappeared and refused to cooperate with him. He has heard rumors that Ms. Buchanan went back to Koulis. (Vol. XX, pp. 2140-2143).

(Exhibit 245 for ID – First Page/Medical Record/Buchanan)

(Exhibit 246 for ID – Second Page/Medical Record/Buchanan)

[REDIRECT EXAMINATION]

Pate testified that Ms. Buchanan was intimidated by Dr. Koulis because he told her the Commonwealth would take away her child if it knew she was a drug addict. Ms. Buchanan was very concerned about that. However, when Pate was asked if Koulis told her that, he testified that "She told him that or he told her that and she told me that." (Vol. XX, pp. 2146).

(END TESTIMONY ON MOTION IN LIMINE out of presence of jury)

REBECCA MELTON (in presence of jury)

[DIRECT EXAMINATION]

Rebecca Melton (hereinafter referred to as "Melton") testified that she is employed as a senior pharmacy technician at Walgreen in Williamson County. She fills prescriptions. Take them in from patients, verify them and prepare them for the pharmacist's final review. She has been at that position for approximately two years. People come into Walgreen's to buy needles and syringes. If they have a prescription for it, we handle like all prescriptions. If they come in without a prescription, we find out their need for them. They would not sell those items without proof of some necessity. Walgreen does not sell 10-milliliter syringes, because they are not commonly used. We

do not carry 18-gauge needles for the same reason. Walgreen would need a prescription for that because she would have to special order it. (Vol. XXI, pp. 2241-2143).

(Witness shown Exhibit 101 – 18-gauge needle)

Melton testified that Exhibit 101 is an 18-gauge needle and Walgreen does not carry that needle.

[CROSS EXAMINATION]

Melton testified that Walgreen's not carrying those needles and syringes is a matter of Walgreen's policy, not a matter of state law. If a different chain store had a different policy from Walgreen, then a person might be able to buy those items from that drugstore. Melton has no idea what different stores or wholesale companies, or the internet might do in terms of selling those items. She has never heard of Crown Pharmacy, but she has heard of pharmacies on the internet. (Vol. XXI, pp. 2245-2146).

(Exhibit 249 entered– Pharmacy Prescription on 5-10-05/Hydrocodone/Buchanan)

DEPUTY BOBBY PATE

[DIRECT EXAMINATION]

Bobby Pate (hereinafter referred to as "Pate") testified that he is currently employed as a deputy with the Boone County Sheriff's Department in Kentucky. He testified that in May of 2002, he was employed as a detective with that agency, and he became involved with an incident involving Lesa Buchanan. (Vol. XXI, p. 2248)

On May 1st, another officer responded to St. Elizabeth Hospital as part of a domestic violence report. Pate was called to respond to the residence of that domestic violence call. When he got there, he was asked to go to St. Elizabeth Hospital, which he

did. Pate testified that he was unable to talk to Ms. Buchanan that day, but did talk to her the next day. Ms. Buchanan told Pate that she and Koulis had been together for a couple of years, but over the past few months, he started injecting her with Morphine, Demerol, and Ketamine. Buchanan related that the injections got more and more frequent, and that Dr. Koulis was doing it "to keep her nice and naked". She told Pate that she trusted him not to hurt her. She was afraid to leave him because he threatened her, that if she ever left him, he would tell the police that she was a drug addict and she would lose custody of her daughter. She was terrified of losing her daughter. Pate saw injection marks on Ms. Buchanan, located on her left palm, right hand, both sides of her groin area, upper right foot, right thumb, right hand near her wrist, multiple injection wounds on both feet, the left area of her foot, and injection marks in her right arm. She told Pate that Koulis would do all the injections, and eventually, he taught her how to self-inject; however, he still injected her the majority of the time. Ms. Buchanan told the ER doctor that she had been using Demerol against her will, and that her fiancé had been injecting her. (Vol. XXI, pp. 2249-2152).

Pate testified that on May 6, he had another conversation with Ms. Buchanan. At that time, Ms. Buchanan told Pate that she had been feeling sick and told Koulis about it. He called her a hypochondriac and injected her again. He also wrote five prescriptions for her and told her to get them filled. He then left for Tennessee with his parents. (Vol. XXI, p. 2252)

(Witness shown Exhibit 240 – Letter/from Buchanan to Koulis)

Pate testified that Exhibit 240 was a letter written by Koulis to Buchanan

(Vol. XX, pp. 2252-2253).

(Exhibit 240 entered – Letter from Koulis to Buchanan)

(Witness reads letter)

To whom it may concern:

I, Christ P. Koulis, M.D., first met Lesa Renee Buchanan in March 2000.At that time Lesa Renee Buchanan (LRB) was not using any sort of narcotics, sedatives, or mind-altering substances. She had no prior history of any such use prior to my meeting her.

In fact, LRB would, to my personal experience, decline even Tylenol, plain Tylenol, for headaches for fear of liver damage.

Over the next two and a half years, LRB underwent to my office numerous major and minor elective plastic surgery procedures. I was the surgeon for all procedures performed. According to the nurse anesthetist's records, LRB was noted to have unusually high requirements of anesthetic to achieve as she does not have any history of sufficient alcohol consumption or prior drug use.

This represented a normal...not uncommon in the general population.

This, as mentioned, and reflects the fact that she may offer certain procedures required higher doses or larger lengths of treatment to obtain adequate post-operative analgesic.

Again, I confirm that to my knowledge, both as the operating surgeon and her fiancé, all prescriptions given to her for analgesic and/or...were issued by me alone, Christ P. Koulis.

I also confirm that LRB was prescribed varying quantities of Morphine, Fortis and antibiotics, Lortab-10, 4, through my office for legitimate medical reasons. I attest and confirm all prescription meds written for LRB was utilized for appropriate reasons of post-operative, prior for anxiety, and note for...use for treatment of any prescribed addictions.

I attest and affirm that at no time prior to march 2002 did Lesa, LSB, ever receive intravenous medication without specific, legitimate and occasion therapeutic intent.

I attest and affirm that beginning March, 2002, through May, 1, 2002, LSB was administered varying doses of intravenous Demerol, Morphine, Ketamine, were administered solely by me, Christ P. Koulis, to

achieve sleep and anxiety relief, and subsequently primarily for recreational use.

I attest and affirm that at no time did LRB personally acquire and store IV medication of Demerol, Morphine or Ketamine. All the intravenous medication utilized were acquired and stored solely by CPK.

I attest and affirm that LRB at no time, while under the influence of oral mind-altering medication, or intravenous Demerol, Morphine or Ketamine, operated a motor vehicle.

I attest and affirm that LSRB at no time, while under the influence of oral or intravenous mind-altering medications, allow herself to be the sole caretaker of her daughter Jessica Buchanan, JCB.

At all times, and without exception, LRB's daughter, JCB was in the presence of one entirely unimpaired adult, that being LRB, whenever JCB was present.

I attest and affirm that any and all injuries and infections suffered by LRB, secondary to intravenous or intravenous injections of Demerol, Morphine, Ketamine, administered solely by CPK, are the sole responsibility of CPK. The injections are not self-afflicted, nor were they prior existing conditions.

Sincerely,

(Signed by CPK) (Vol. XX, pp. 2254-2257).

Eventually, Ms Buchanan stopped communicating with him, stopped returning phone calls, and he was contacted by an attorney who said that any further contact with Ms. Buchanan would have to be done through him. That was the last time Pate talked to her. At some point after this, in May of 03, he found out that Ms. Buchanan had filed an affidavit. She had already gotten an attorney. The affidavit stated that she did not want to hold him responsible for anything, and she did not want to pursue charges. (Vol. XX, pp. 2257-2259).

[CROSS EXAMINATION]

(Witness shown Exhibit 244 – Affidavit/Buchanan)

Pate identifies the document as the affidavit of Lesa Buchanan. (Vol. XX, pp. 2259-22--).

(Exhibit 244 entered – Affidavit/Buchanan)

Pate testified that, although he originally got involved in a domestic call to Ms. Buchanan's residence, there was no evidence of hitting or assaulting anyone. There were no crushed pills involved in the injections at that time. All the narcotics used were in liquid form. (Vol. XX, pp. 2262-2266).

(Exhibit 244 is read to jury)

> My name is Lesa Buchanan, September 5, 2003.
>
> I do not want Dr. Christ Koulis to be prosecuted by the Commonwealth of Kentucky. I refuse to participate in any prosecution of Dr. Koulis because Dr. Koulis did not anything wrong.
>
> If compelled to testify, I will assert my Fifth Amendment right against self-incrimination.
>
> If forced to testify despite my assertion of the Fifth Amendment, I will testify contrary to the statement attributed to me in medical records, dentist statements, dental assistant statements and police reports, as those are untrue.
>
> Signed – Lesa Buchanan **(**Vol. XX, pp. 2266-2267).

Pate testified that Ms. Buchanan learned how to inject herself from Dr. Koulis. (Vol. XXI, p. 2268)

[REDIRECT EXAMINATION]

Pate testified that by 2003, Koulis and Ms. Buchanan were back together again. Ms Buchanan told Pate that Dr. Koulis gave her the drugs to keep her nice and naked. (Vol. XX, pp. 2269-2270).

[RECROSS EXAMINATION]

Pate testified that Ms. Buchanan was the one that wanted the letter she got from Dr. Koulis while he was in Cottonwood. Pate testified that after all the things Ms. Buchanan had gone through with Dr. Koulis, she went back to him again. (Vol. XXI, p. 2270)

PEGGY ROBERTS

[DIRECT EXAMINATION]

Peggy Roberts (hereinafter referred to as "Roberts") testified that she is the mother of Lesa Buchanan. (Vol. XXI, p. 2273)

(Witness shown Exhibit 250 for ID only – Picture/Ms Buchanan)

Roberts testified that Exhibit 250 is a picture of Lesa Buchanan. The photo was taken within the week before she died. (Vol. XXI, p. 2274).

(Exhibit 250 entered – Picture/Lesa Buchanan)

Roberts testified that Lesa and Christ started dating about five years ago. When she first met him, it was love at first sight. The relationship went through good and bad times; however it was escalating more toward the bad side. There were arguments, distrust, constant phone calls. She had no time alone with her family because of her constant phone calls. In 2005, there were many arguments. (Vol. XXI, pp. 2275-2276).

In May of 2002, Lesa was living with her daughter in the Triple Crown Condominiums, in Kentucky. Christ visited her. After receiving a phone call from a friend, Roberts went to Lesa's condo and saw, downstairs in the basement, a mattress on the floor, blood stains and vomit and syringes and bottles. Lesa said "Mommy" and then her eyes rolled back in her head. Roberts and Mr. Fugazzi took Lesa to the ER of St.

Elizabeth Hospital. Dr. Koulis was not present during this time. After Lesa got out of the hospital, she lived with Roberts. During that time, she received a fax letter from Christ. (Vol. XXI, p. 2276-2280).

(Witness shown Exhibit 240 – Letter/ Koulis to Buchanan)

Roberts identified the letter. Lesa was surprised to get the letter. He had promised to do this for her, taking all the guilt and releasing her from any responsibility for what had happened. Christ had told Lesa that if the investigation against him continued, he would have to implicate her, and if she got charged, she would lose her daughter. Lesa eventually got an attorney that was hired by Christ. Christ took Lesa away so that the detectives in Boone County could not locate her. Lesa went to Cottonwood in Arizona, for drug rehab. (Vol. XXI, p. 2280-2282).

Roberts testified that there were numerous phone calls between Lesa and Christ. She did not get to spend any time with her family due to these calls. If she did not answer her phone, there would be more calls. Roberts got a phone call from Christ one time telling her that Lesa was threatening to ruin his career and that Roberts better get Lesa under control. (Vol. XXI, pp. 2284-2285).

Roberts testified that in the last part of June, 2005, she was moving and Lesa came up to help her move. Lesa was very alert and helped her with some painting on the new house. During the time Lesa stayed with Roberts, Roberts did not see any signs of Lesa injecting herself. When Roberts visited Lesa at her apartment in Franklin, Tennessee, she never saw any needles or drug use. (Vol. XXI, pp. 2286-2288).

On July 4, 2005, Roberts received a phone call from Christ, and he was in a panic. He told her that she had to get down to Franklin immediately, but would not tell her why. Christ told her that Lesa was in the hospital. That's when an officer came to her door and notified her that Lesa was dead. Christ continued to call every 15 minutes, half hour. (Vol. XXI, pp. 2288-2291).

(Witness shown Exhibit 251 – Photograph/Lesa's Purse)

Roberts identified the Photograph as a picture of Lesa's purse.

(Exhibit 251 entered – Photograph/Lesa's Purse)

(Witness shown Exhibit 252 – Fifth/Third Account/Lesa & Roberts)

Roberts identified Exhibit 252 as the joint account she had with Lesa at Fifth/Third. (Vol. XXI, p. 2293).

(Exhibit 252 entered – Fifth/Third Account)

(Exhibit 253 entered – Records/Capital One Account)

Roberts testified that Dr. Koulis did finally tell her what happened to her daughter that weekend. He told her that Lesa had gone into cardiac arrest. He said that Lesa said that she was tired and was going to lay down, then had a heart attack. He told her that he would not let them, the doctors, quit on Lesa. (Vol. XXI, pp. 2294-2295).

Roberts testified that during the week that Lesa came to Kentucky to help her move, Christ also came there. Christ took Lesa away from the rest of the family. He told Lesa she looked tired and that she should lay down. (Vol. XXI, pp. 2295-2296).

(Exhibit 254 entered by stipulation – Cottonwood Records/Buchanan)

[CROSS EXAMINATION]

Roberts testified that prior to Koulis, Lesa was a normal happy person. She testified that Lesa divorced Steve Buchanan several years after marrying him, and moved to LA. Lesa left for LA alone. Lesa took off for LA to see if there were any career opportunities out there. She left her daughter with Roberts and Jessica's father. Lesa went to LA after she divorced Steve Buchanan. She divorced Steve because they got along better living separately. (Vol. XXI, pp. 2303-2305).

(Witness shown Exhibit 255 – Nude photograph/Lesa Buchanan)

(Witness shown Exhibit 256 – Photograph/Buchanan & Spats)

Roberts testified that the man in the picture with Lesa looks like Spats. (Vol. XXI, p. 2311)

Exhibit 256 entered - Photograph/Buchanan & Spats)

Roberts testified that she was aware that Lesa modeled in the nude with Ron Spats. (Vol. XXI, pp. 2312).

Roberts testified that in 2002, when she found Lesa in that condition in the basement of her condo, that she doubted that Lesa's daughter was there. Roberts testified that she wasn't there either. She testified that she got a call from Lesa the night she went over to the condo, but does not recall a phone call from her that day. She testified that she does not know how the five prescriptions for Lesa, left by Dr. Koulis, got filled. Lesa was not working during this time. Roberts was in the massage business back in 2002. People would come to her house for massages from time to time after she retired from her office. Roberts testified that Koulis used his money as a carrot to dangle in front of Lesa. Roberts knew Lesa was taking money from Koulis and did not advise her not to do so.

There were times when Lesa and Christ got along. Roberts admitted that Lesa never had a full time job. She was a full time mother. However, when Lesa first moved to Nashville in 2004, Jessica did not live with her mother. All of Lesa's money came either from Steve Buchanan, as child support, and from Christ Koulis. Other than seeing Dr. Koulis give Lesa an IV for dehydration at Roberts' house, Roberts has never seen Dr. Koulis inject Lesa with drugs. She knows that her daughter has had breast augmentation twice, liposuction, and implants in her lips. She hoped that those procedures required injections of some type. Roberts told Lesa that she did not like Christ but that she would honor Lesa's decision even though she did not agree with it. Roberts herself was treated by Dr. Koulis. Koulis treated Lesa with Valtrex. (Vol. XXI, pp. 2316-2326).

Valtrex was ordered in the name of Roberts but was really for Lesa, but Roberts had insurance. Roberts testified that she did not remember when that bottle was ordered for her. She still had a bottle of it at her house. Roberts had her insurance pay for a prescription made out to her but was really for her daughter. Roberts knew what she was doing. When asked if she knew that wasn't truthful, Roberts replied "I guess it wasn't". (Vol. XXI, pp. 2328-2329).

[REDIRECT EXAMINATION]

Roberts testified that it was her understanding that those nude photos of her were done in a professional studio. The family was aware that Lesa was making these photos. When Roberts had a problem with the veins in her leg, Lesa suggested she go to the defendant. Lesa often referred family members to Koulis. Lesa trusted Dr. Koulis as a medical doctor. As to the Valtrex prescription, Roberts was aware that the Valtrex was

being prescribed to her before it was prescribed to her. She understood the Valtrex to be for genital herpes. Roberts testified that she knew there were prescriptions for Jessica, but did not know what for. (Vol. XXI, pp. 2330-2332).

[RECROSS EXAMINATION]

Roberts is aware of one time, of the many times that Dr. Koulis came to visit Lesa in 2004-2005, that Jessica would not stay there. Roberts testified that she let Lesa make her own choices. Lesa was 35 years old at the time, a grown woman. (Vol. XXI, pp. 2334).

TARA BENTLEY

[DIRECT EXAMINATION]

Tara Bentley (hereinafter referred to as "Tara") testified that she was Lesa Buchanan's older sister. She is a stay-at-home mom, and does not work outside the home. Lesa first moved to the Nashville area around 1999, 2000. When she first arrived, she was really enjoying music and songwriting. She was always involved in artistic things. (Vol. XXII, pp. 2340-2341).

Lesa started dating Dr. Koulis around Thanksgiving of 2000. In June of 2001, Lesa, mom and she went to a teddy bear convention in Gettysburg, Pennsylvania. The phone reception was bad and Christ could not get in touch with Lesa. She saw this and became very anxious. She finally called him from a payphone. He was very angry with her. I grabbed the phone from her and told him to leave us alone, then hung up. (Vol. XXII, pp. 2341-2342).

In 2001, Lesa came back to Kentucky, from Tennessee. Lesa and Christ had supposedly broken up. We were suppose to move Lesa in two days, but she called Tara in a panic and insisted she and her mother come now. She and her mother came down early to get her, but Christ arrived and talked her out of leaving at that time. Lesa and Christ had gone into another room, and when Lesa came out, she had a glazed look on her, and she was subdued and quiet. (Vol. XXII, pp. 2342-2345).

In an earlier situation, Tara testified that she had a blood clot in her finger, and Lesa suggested that Tara have Dr. Koulis take a look at it, which he did. Dr. Koulis told Tara that her finger was fine. Dr. Koulis and Lesa had been broken up, but after that event, they were back together again. (Vol. XXII, pp. 2347).

In late 2003, Lesa and Jessie moved to Chicago with Christ. At that time, Lesa decided to home-school Jessie. However, in September or August, Lesa and Jessie moved to Franklin, Tennessee. Lesa had left Chicago with nothing. She had no furniture to furnish the Franklin apartment. During this time, Dr. Koulis bought Lesa things like her computer and a couch. (Vol. XXII, pp. 2348-2348).

Tara testified that it was the last week in June that she saw her sister alive. Lesa had come to Kentucky with the rest of the family, to help their mother move. She was in perfect health. Koulis came to Kentucky during the move and kept telling Lesa that she looked tired and needed to lay down with him, however Lesa kept putting him off. Tara testified that she never saw needles or drugs with Lesa. Tara testified that she never had gone to visit her sister in the Franklin apartment. (Vol. XXII, pp. 2349-2352).

Tara testified that Dr. Koulis called her mother on the day Lesa died. He told her that he and Lesa had a great weekend, making love and trying to have a baby, He told her that Lesa had gone to the bathroom because she wasn't feeling well, then came out and collapsed on the floor. The next day Dr. Koulis' story changed about what happened. He told her that they had argued that weekend, and that she was using drugs; that she had track marks all over her body. That was the first time Tara had heard Dr. Koulis mention track marks on Lesa. Prior to that day, Dr. Koulis never mentioned that Lesa had been using IV drugs. (Vol. XXII, pp. 2353-2354).

[CROSS EXAMINATION]

Tara testified that when Lesa first moved to Nashville, she had a friend, a country artist named Chad Brock. Lesa dated people in the music business. (Vol. XXII, pp. 2356).

Tara testified that Lesa stayed a year when she moved to California. Lesa held different jobs and took small parts in "B" movies. Lesa did not have a college education. She went a year to the Art Academy in Cincinnati. Lesa lived in California, Kentucky, Illinois, and Tennessee. Her daughter split equal time staying with her father, then her mother. Lesa and Jessie moved to Chicago with Chris, but they did not stay there long because they were not happy there. Lesa's money came from her ex-husband, Steve Buchanan, in the form of child support. She never really made money on her own. (Vol. XXII, pp. 2358-2363).

Tara testified that Lesa was a grown woman who had a daughter, knew what she was doing. Lesa took money from Dr. Koulis. Tara testified that "she wasn't going to turn it away". (Vol. XXII, pp. 2363-2366).

[REDIRECT EXAMINATION]

Tara testified that at no time did the conversation come up about Lesa using IV drugs when the sisters were in Kentucky helping their mother move. Had it come up, they would have done something about it. (Vol. XXII, p. 2367).

RECROSS EXAMINATION]

Tara testified that Lesa never told her that she used drugs. Tara testified that she was aware of the incident in 2002 where Lesa had all kinds of track marks all over her body. Tara was also aware that Lesa went back with Dr. Koulis after that incident. (Vol. XXII, pp. 2368-2369).

STEVE BUCHANAN

[DIRECT EXAMINATION]

Steve Buchanan (hereinafter referred to as "Steve") testified that he is the ex-husband of Lesa Buchanan, the father of Jessica, and his present wife is Tonya Buchanan. He is the president of "Jack of All Games", a video game company. He married Lesa in 1989 and divorced her in 1996. He still provides financial support for Lesa. He is also on the lease on her Franklin apartment. He testified that he and Lesa had remained good friends. He stated that Koulis was very jealous of him and his relationship with Lesa. Lesa had a low tolerance for feeling bad, and Koulis was very attentive to her needs. Koulis did provide medical care to everyone in the family, including Steve. (Vol. XXII, pp. 2371-2378).

Steve testified that in the year or two leading up to Lesa's death, he never saw any evidence that Lesa was using IV drugs. He did not see signs of drug abuse of her

prescription medications. He went to her Franklin apartment, had been in her bathroom, and never saw needles or syringes. He never saw trash bags in the closet with medications there. Steve testified that he did see prescribed medications for Lesa in her medicine cabinet, but there was nothing about that that caused him concern. There was nothing about Lesa's behavior that caused him concern regarding any kind of IV or abusive drugs. (Vol. XXII, pp. 2378-2382).

[CROSS EXAMINATION]

Steve testified that he could state what prescription drugs he saw in Lesa's medicine cabinet. Steve stated that he and Lesa got married when Lesa was young, and she did not get a chance to pursue her career, so she divorced him and left for California to pursue her career. Her daughter stayed with Steve during that time. He was working and the daughter was in school. Steve worked out of his house so he could care for Jessie. Lesa used her divorce settlement money to fund her California trip, and still continued to pay her child support although his daughter was living with him during that time. Lesa never sent any money home during that time, although her money was not needed. (Vol. XXII, pp. 2384-2386).

Steve testified that Lesa had no furniture in her Franklin apartment. She moved back to Franklin, from Chicago, with almost nothing. (Vol. XXII, p. 2388).

[REDIRECT EXAMINATION]

Jessica often slept on the air mattress with her mom. (Vol. XXII, p. 2394).

[RECROSS EXAMINATION]

Steve testified that he was not aware of any drug use by Lesa in the last year or two of her life. (Vol. XXII, p. 2395).

TONYA BUCHANAN

[DIREC EXAMINATION]

Tonya Buchanan (hereinafter referred to as "Tonya") testified that she is the wife of Steve Buchanan, living in Union, Kentucky, and she is a Mary Kay consultant. In 2005, she and Steve were separated, and she had her own apartment, however, because of Lesa's death, Steve and she had put their differences aside because of Jessica. Tonya met Lesa through a mutual friend before Tonya met Steve. Tonya and Lesa were very close. They spoke everyday if they didn't see each other every day. They were best friends. Tonya was also on Lesa's lease at the Franklin apartment. Tonya would spend two and three weeks at a time in Franklin with Lesa. (Vol. XXII, pp. 2408-2410).

Tonya testified that Lesa and Christ fought a lot. It was a volatile relationship. Koulis would always try to isolate Lesa from her family and friends. There were a lot of phone calls between them, especially if they were fighting. He would call her right back, and if he could not get her, he'd call on Jessie's phone and if he couldn't get Jessie, he'd call her phone, till he reached someone. (Vol. XXII, pp. 2410-2412).

Tonya testified that Lesa was sick a lot whenever Chris was around. In April of 2005, Tonya, Lesa and Jessica went to Las Vegas for Jessica's birthday. Steve joined us the next day, then Chris showed up. Chris and Lesa got a separate room and Jessie and her friend stayed with Steve and Tonya. The next day, Tonya and Lesa were suppose to get their hair fixed, but when she went to get Lesa, Lesa came to the room door, not

looking very well, and said she wasn't feeling well and could not go. She was feeling fine till Chris arrived. Lesa trusted Chris when it came to his medical ability. (Vol. XXII, pp. 2411-2412).

Tonya testified that she lived on and off with Lesa in Franklin, and never saw any signs of IV drug use. During her stays, Tonya stated that she had access to the entire apartment. Lesa was not secretive about anything she never saw any signs of abuse of controlled substances or prescription drugs. When Tonya and Lesa got a spray tan, Tonya was able to see Lesa naked, and never saw any track marks or indication of any needle injections on Lesa's body. Even though Tonya stated that she never had any experience with Lesa receiving any kind of injections, she testified that Dr. Koulis gave them both Botox injections. At the time Chris injected Botox into Lesa, she was afraid of the needle. (Vol. XXII, pp. 2414-2416).

Tonya testified that she never saw Lesa put trash bags in her closet. Tonya testified that Lesa's email address was littlesoulseries@AOL.com. Lesa had a computer in her apartment. (Vol. XXII, pp. 2417-2418).

(Witness shown Exhibits 255 and 256)

Tonya identified the nude photographs of Lesa as being modeling pictures taken by Gart Kessler. Tonya testified that she drove Lesa to Gary's office to pick up those photographs. Lesa told Tonya that she was upset with Koulis because he had taken those pictures and would not give them back. (Vol. XXII, pp. 2419-2420).

[CROSS EXAMINATION]

Tonya gave Franklin police a statement that said whenever Christ came down to visit her Lesa said “it’s time to pay the rent.” That statement was talking about Lesa’s Bellevue apartment. Tonya stated that she could not remember the year that Lesa lived in Bellevue. Chris lived in Chicago at the time. Tonya stated that when Lesa made that comment, she was making a joke about sex. When asked if Lesa and Chris had a relationship whereby he used her for sex and she used him for money, Tonya stated that she never asked Lesa about their relationship. Tonya never heard Lesa tell her that Lesa loved Koulis. (Vol. XXII, pp. 2422-2424).

Tonya testified that, in 2005, she did not work. She stated that when Steve and Jessica went to the Bahamas for a vacation, she did not go because she and Steve were separated. Steve paid for her apartment in Florence, Kentucky. (Vol. XXII, pp. 2424-2426).

Tonya testified that she did not go through Lesa’s apartment looking for things. Tonya could not remember the last time she looked at Lesa’s closet and observed what was in it. The spray-on tan they both got cost $40.00. Tonya thinks she might have paid for that once or twice. When Tonya put the extender cream on Lesa, Lesa was naked and she never saw injection marks. Tonya testified that Botox is injected into the forehead. Neither Tonya nor Lesa paid for that treatment, and Tonya was unaware of what a Botox treatment cost. They wanted Botox treatment because no one wants to look old.
(Vol. XXII, pp. 2426-2429).

Tonya testified that she had a prescription for Hydrocodone also. She took it for her migraine headaches. She did not know what kind of narcotic it was. It was prescribed by her doctor back home. (Vol. XXII, p. 2429)

Tonya testified that she had never been around an alcoholic or drug addict; therefore she would not know how either one would act. When asked when Lesa took the pictures marked as Exhibits 255 and 256, Tonya stated that she did not know. Tonya did not know why Lesa posed in the nude for those pictures, and she did not ask Lesa why. Lesa never told Tonya what those pictures were going to be used for and Tonya did not ask her. (Vol. XXII, pp. 2430-2431).

(Witness shown an exhibit - Photograph)

Tonya testified that the photograph handed her was a picture of Lesa and a man named Ron Spats. Tonya met him once in passing but never talked to him. Tonya knew that Lesa use to date him before Tonya knew Lesa. (Vol. XXII, pp. 2431-2432).

[PROFFER EXAMINATION]

(Witness handed document)

Tonya testifies that the document she was handed is an online conversation between Tonya and a man whose screen name is KYYank. Tonya testified that Lesa and Steve knew about this conversation. Tonya did not know how long Lesa knew about KYYank before she told Steve about it. Tonya testified that she did not know if Lesa told Steve about this conversation but Tonya told Steve about it. Lesa sent the conversation to Dr. Koulis, while Tonya's affair with KYYang was going on. Tonya does not know if

Lesa told Steve that Tonya was cheating on him. Tonya knew that Lesa knew about the affair. (Vol. XXII, pp. 2435-2438).

(Exhibit 257 for ID only – Document/Internet Conversation between Tonya and KYYank)

[REDIRECT EXAMINATION]

Tonya testified that Dr. Koulis did give Lesa an engagement ring. Tonya viewed that ring as a commitment between the two. (Vol. XXII, p. 2444).

[RECROSS EXAMINATION]

Tonya testified that of the many weekends she spent in Franklin with Lesa, she only saw Dr. Koulis there one time, and he did not spend the night at that time.

(Vol. XXII, pp. 2446).

[REDIRECT EXAMINATION]

Tonya testified that when Chris came in that one time, they went to the mall, and while there, Koulis got into a fight with a McDonald employee and Tonya tried to get him to calm down. Dr. Koulis did not spend the night because he and Lesa got into a big fight and he left. (Vol. XXII, pp. 2447-2448).

[FURTHER RECROSS EXAMINATION]

Tonya testified that all this happened at a time when Tonya and Steve were separated. She was living in a separate apartment in Florence, Kentucky at that time. (Vol. XXII, pp. 2448).

JESSICA BUCHANAN

[DIRECT EXAMINATION]

Jessica Buchanan (hereinafter referred to as "Jessie") testified that she is 16 years old, lives with her dad in Kentucky, born in 1991, and is in the 11th grade, at Rile High School. Lesa Buchanan is her mother. She testified that her mother was a lot of fun, never a dull moment in the house. Lesa was her best friend. She made everyday a special day. She encouraged her to follow her dreams. She was the best mom and she loved her. In Franklin, she went to Woodland Middle School. In Franklin, her apartment was the hangout place for her friends. Jessie testified that there was no private place in her house. (Vol. XXII, pp. 2461-2464).

Jessie testified that she never saw any needles or syringes in the apartment. She said that she did not like Chris because he took her mom away from her. She also noticed changes in her mother when Koulis came around. She was never as happy as she was before he came to the apartment. After he left, she was very weak, or tired. She was not her normal self. Jessie never saw her mother put trash bags in the closet. When she came down to clean the apartment after her mother died, she noticed a few trash bags in her closet with food in them. She testified that she had never seen that kind of behavior from her mother before. She said that she and her mom were messy, but there were girls at the apartment all the time, and they had a lot of clothes. However, they always cleaned up the mess, eventually. Jessie would sleep many times, with her mother on the air mattress. She never saw any needle marks on her mother. (Vol. XXII, pp. 2465-2469).

(Witness shown Exhibits 258 and 259)

Jessie identified the exhibits as books her mother had written. (Vol. XXII, pp. 2469).

(Exhibits 258 and 259 entered – Books/by Lesa)

Jessie testified that she had never had a prescription for Proctofoam. Jessie testified that she had never seen her mother using IV drugs or abusing drugs. (Vol. XXII, pp. 2471).

[CROSS EXAMINATION]

Jessie testified that she had given a statement earlier that although her mother accepted an engagement ring from Dr. Koulis, she did not intend to marry him. Jessie stated that her mom said that she could manipulate Chris because she had information that could damage him. Jessie told police that her mother was working on a logo for a man named Rowe. This was a project coordinated by Koulis. She was going to make $5000 from this project. She told police that Lesa and Chris would watch a lot of movies together so that Lesa would not have to talk to Chris. Jessie believes she told police that, when Lesa received the $5000, she felt safe from separating herself from him. (Vol. XXII, pp. 2472-2476).

FERNANDO SOLER

[DIRECT EXAMINATION]

Fernando Soler (hereinafter referred to as "Soler") testified that he is a medical doctor located in Chicago, and employed by Physicians Care in Arlington Heights, Illinois, a walk-in clinic. He works with Dr. Koulis at the clinic. He stated that Dr. Koulis was an excellent doctor. He stated that he met Lesa Buchanan once when she came to the office. Dr Koulis' cell phone would ring all the time. That cell phone could also take pictures. There were occasions, five to ten, over a period of seven or eight months, when

he and Dr. Koulis would have their picture taken together on that cell phone. He would then email that picture to Ms. Buchanan to confirm Dr. Koulis was with him to dispel her jealousy. (Vol. XXIII, pp. 2490-2495).

Soler testified that there were no controlled substances kept in the clinic. (Vol. XIII, p. 2495).

Soler testified that he was familiar with needles and syringes, and that they come in all different sizes. He stated that the lower the gauge, the bigger the needle. He said that the clinic had ten to fifteen different gauges and sizes of needles, anywhere from half an inch to an inch and a half in length. The clinic also had different size gauges the bigger gauges were used to draw out fluid in a knee or if a shoulder needed injecting. Soler testified that he brought home needles and medicines all the time. When you wear a lab coat and you treat 30 to 40 patients a day, you keep needles in your pocket, prefilled with medication, because you know you will need to use it. It would not surprise him to know that Dr. Koulis had sample medications at home. Free samples of medication and needles are a perk of being a doctor. (Vol. XXIII, pp. 2495-2500).

[CROSS EXAMINATION]

Soler testified that it would be inappropriate to prescribe medication under someone else's name just to get the insurance benefits. (Vol. XXIII, pp. 2505-2506).

[REDIRECT EXAMINATION]

Soler testified that an epi pen was for someone who had severe allergic reactions. (Vol. XXIII, pp. 2506-2507).

DEFENSE PROOF

CHRIST KOULIS

[DIRECT EXAMINATION]

Dr. Koulis (hereinafter referred to as "Koulis") testified that he started dating Lesa Buchanan in March of 2000, in Nashville Tennessee. They began living together in March of 2001, when he lease-purchased a house in Brentwood, Tennessee. Jessie was living with us at the time. Koulis had his own private practice at the time. He was a plastic and reconstructive surgeon, and he had his own office and surgical center. 92 percent of his practice was cosmetic surgery and 8 percent was reconstructive. Cosmetic surgery is elective surgery. When September 11 hit, everyone cancelled their cosmetic surgeries. This was catastrophic for his business. In December of 2001, he declared bankruptcy because he lost everything. He lost the home he was living in and Lesa went home to Kentucky, where he rented her a condo. Dr. Koulis had an apartment in Nashville. (Vol. XXIII, pp. 2510-2513).

In March of 2002, Dr. Koulis had Demerol in the office, a pain medication, used for pain medication in surgery. One day, he saw a bottle of Demerol left out and he decided to take it home. He had been depressed and he could not sleep. So he thought he would try it. He had never tried drugs before, and the feeling was incredible. All of a sudden, his worries went away. He was instantly hooked. (Vol. XXIII, pp. 2513-2514).

Lesa was unaware of the first time that he injected himself with Demerol, but she saw him inject on the second night asked if he would inject her, and like an idiot, he injected her. He was already high when he injected her. (Vol. XXIII, pp. 2516-2517).

Lesa's reaction to the Demerol was the same as his. All of a sudden, it made her euphoric, as if there was no trouble in the world and life was wonderful. Both of them continued injecting Demerol for about six to eight weeks, from the beginning of March of 2002, until the end of April, 2002, when he went into rehab. Dr. Koulis went to work daily while Lesa remained at home with access to the Demerol kept at home. (Vol. XXIII, pp. 2515-2519).

Koulis was aware of the dangers of injecting the drug on many levels. When he injected himself in his left arm, he got phlebitis, an infection or inflammation of the vein. He destroyed his left arm vein. (Vol. XXIII, pp. 2515-2516). He knew the drug was very powerful and very addictive. (Vol. XXIII, p. 2519). Demerol causes pain if it is not injected into the vein. It also causes ulcers in the tissue, and can actually kill tissue. (Vol. XXIII, p. 2521).

Koulis testified that from that point forward, he began using the controlled substance, more and more. At first, he would inject Lesa with the drug, but over time, she learned how to do it because he taught her how to inject herself. (Vol. XXIII, p. 2520). She had injected herself before and missed the vein, and it caused her a great deal of pain. He explained the anatomy in the groin area and how to hit the vein every time. Lesa began injecting in the groin area and it became a "sure shot" for her. Since she was

injecting a liquid, she was able to inject herself with a small gauge needle, making the injection painless for her. (Vol. XXIII, p. 2522).

Koulis testified that as a doctor, he knew better than to teach her how to inject herself, but he did it anyway. (Vol. XXIII, p. 2522).

Koulis testified that he was clearly wrong for injecting himself and getting Lesa involved with IV drugs. As a result of this activity, Koulis lost his Tennessee medical license in April of 2002. At that time, he was an impaired physician. At the end of April of 2002, Koulis packed everything up and moved to Kentucky with Lesa. Koulis rented the apartment. (Vol. XXIII, pp. 2522-2524).

(Witness shown Collective Exhibit 261 – Apartment Lease/Kentucky)

Koulis identified Collective Exhibit 261 as the lease he had on the Kentucky apartment. The lease stated that Jessie could live there also. (Vol. XXIII, pp. 2524-2525).

(Collective Exhibit 261 entered – Apartment Lease/Kentucky)

Koulis testified that he was still doing drugs during this time. In April, he was scheduled to go to treatment at Cottonwood. Cottonwood is a rehabilitation facility in Arizona. His parents were going to take him there. (Vol. XXIII, pp. 2526-2527). He was living with Lesa and her daughter in a condo in Kentucky at that time. On Saturday, April 27, 2002, his parents, who lived in Chicago, drove to Kentucky to help him move his things from Nashville to Kentucky. (Vol. XXIII, pp. 2527-2528).

(Witness shown Exhibit 262 – Credit Card Records)

Koulis identified Exhibit 262 as his father's credit card records which their travel in and around their apartment in Kentucky and Cottonwood in Arizona. (Vol. XXIII, p. 2528).

(Exhibit 262 entered – Credit card Records)

Koulis testified that when his parents arrived in Kentucky, and because they are elderly, they slept in the master bedroom upstairs, while Lesa and he slept in a room next to Jessie's bedroom downstairs. This extra room was a bedroom/office. They slept there on a mattress. While his parents were there, his mother cooked and fed all of them. On the day he was scheduled to leave, he and Lesa had run out of Demerol. Both of them were going to go through withdrawals, so he left her some prescriptions: an antibiotic, a decongestant, and an anxiety medication, Xanax. The idea behind the prescriptions was that, since there would be no more injections, she could take a pill or two a day to help taper off the Demerol. One of those prescriptions was for Hydrocodone. She was going to take the Hydrocodone pill orally to help detox her more gently. At the time he wrote those prescriptions, he had a valid Illinois medical license and valid DEA license. (Vol. XXIII, pp. 2529-2531).

Dr. Koulis testified that before he left, he called Lesa's mother to come over and take care of her. Koulis' mother offered to stay with Lesa, but Lesa did not want her to stay. That is why he called Lesa's mother. Lesa's mother told Koulis that she could not come when he called but that she would try to come over later. She came over later that evening, but he had already left for Nashville. On the day he left, he, his parents, and Lesa had breakfast, kissed goodbye and left. He and Lesa were both addicted but from

what he saw of Lesa on that day, she looked fine. Jessie had spent the last couple of days with them, but at the time Koulis left, she was in school. On that day, May 1, 2002, Lesa was walking about, talking fine and eating fine. Koulis and his father left for Nashville in a moving van they had rented, while his mother followed them in his parent's vehicle. (Vol. XXIII, pp. 2532-2534).

When they arrived in Nashville, Koulis made an appointment at the Hair Club for Men. Afterwards, he and his parents went to dinner. At around 10:00 pm, Koulis received a phone call from Lesa. She was crying and upset. She asked him not to be upset with her but she had used the Morphine and was about to inject the Ketamine. Morphine is a controlled substance that can get you high. Ketamine is a dissociative anesthetic. It is used in humans and animals. For animals, it is a tranquilizer. It knocks them out. It also knocks out humans. It does not make you high. It is used in surgery in certain circumstances. If a person on Ketamine is not awakened properly, it causes horrible hallucinations and nightmares. Koulis told Lesa not to take Ketamine and told her why. Koulis testified that he was trained to use Ketamine at Vanderbilt, so it was part of his medical supply in his office in Nashville. When he moved in with Lesa in Kentucky, he brought his office supplies there. (Vol. XXIII, p. 2535-2539).

Koulis testified that when Lesa mentioned Ketamine, he convinced his parents to turn around and head back to Kentucky, which they did. It took them 6 hours to get back. He went back to Kentucky because he loved Lesa and knew she was in trouble. Lesa's mother was not there at that time. When Koulis talked to Lesa, it was around 10:00 pm. They arrived in Kentucky around 5:00 am [the next day]. Lesa was not home. Koulis did

not know where she was. He called everyone he knew to call, including her mother, her ex-husband, and Tonya. He went to her mother's house. Dr. Koulis was very upset because he did not know whether she was alive or dead. He saw Lesa's car at her mother's house, but he still did not know what happened to her. He wanted to stay in Kentucky till he found her but parents and his attorney in Nashville told him that he had to be on a plane to Arizona. His father made sure he caught that flight to Arizona while his mother stayed behind in Kentucky, attempting to locate Lesa. Koulis stayed in the Cottonwood treatment facility for 29 days. During that time, and while he was in the middle of his rehab, Lesa called him from St. Elizabeth Hospital either on May 2, or 3. She was very upset. She called many times but he could only call her back once a day [because of facility restruictions]. Koulis learned that Lesa had gotten out of the hospital. Lesa asked Koulis to write a letter. (Vol. XXIII, pp. 2539-2546).

Koulis testified that he wrote two letters both addressed "to whom it may concern". (Vol. XXIII, p. 2546). Lesa did not think the first letter was adequate. In the letter he stated that Lesa never drove a vehicle while under the influence and that Jessica was never left unattended or unsupervised. The letter said that Lesa never gave the medication to any other person. Koulis wrote the letter because Lesa was being threatened by the police to cooperate with them or they would take her daughter away from her because of her drug activity with Koulis. The letter was going to be her proof that the drug activity with Koulis was Koulis' fault. The appellant acknowledged in this letter that it was all his fault, since he was the one who brought the medication home. The letter was sent to Lesa. (Vol. XXIII, pp. 2552-2554).

After he was released from rehab, he went back to Lesa in Kentucky. Lesa stayed with her mother for a few days after she got out of the hospital, but then she went back to the apartment. At that time, Koulis did not have a job. Lesa and Koulis began their relationship all over again for the next couple of weeks. Koulis did not see Lesa's mother or sister during that time. Jessie was with her father. Dr. Koulis wrote letters to Lesa's family, apologizing for what he had done. Cottonwood wanted Koulis to enter an intensive outpatient rehab program. Koulis spent his time trying to convince Lesa to go to rehab at his expense. She did not want to go for fear of losing her daughter. Lesa was still getting drugs and getting high. Finally she agreed to go, in June of 2002. She was to stay for 29 days, but she left early. Koulis left for Chicago where he joined the Rush University Behavioral Health advocacy program for impaired physicians. There are multiple random drug tests, there are meetings to attend and an intensive six to eight week outpatient program which required attendance from 8 am to 5 pm every day. That is what Koulis did during that time. (Vol. XXIII, pp. 2554-2560).

Koulis testified that he was on a probationary status with regard to his medical license, and was required to have frequent drug and alcohol testing till June of 2007. (Vol. XXIII, p. 2560).

(Witness shown Exhibit 247 - Medical Records)

Koulis identified Exhibit 247 as being the medical records from his advocacy group. (Vol. XXIII, p. 2561).

(Exhibit 247 entered - Medical Records)

As a result of his criminal activity with Lesa in Kentucky, and in particular, the prescription he left for her when he went to Arizona, he was charged with multiple counts for drug crimes, pled to one charge, writing a bad prescription for Hydrocodone, and placed on pre-trial diversion. (Vol. XXIII, pp. 2561-62)

(Witness shown Exhibit 243 for ID - Pre-Trial Diversion Agreement)

Koulis testified that Exhibit 243 for ID is the diversion agreement. (Vol. XXIII, p. 2562).

(Exhibit 243 entered - Pre-Trial Diversion Agreement)

While on probation, Dr. Koulis had to report to a probation officer and had to comply with all the conditions of probation. On the second page of his diversion agreement, there was a provision that stated that the Commonwealth of Kentucky would not pursue any charges against Lesa Buchanan unless it has to try Dr. Koulis on the underlying charges. Koulis testified that he wanted this provision in the agreement to protect Lesa. (Vol. XXIII, pp. 2562- 2564).

(Witness shown Exhibit 244 - Affidavit/Lesa Buchanan)

Koulis testified that Exhibit 244 is an affidavit signed by Lesa stating that it was all her fault and not Koulis'. Lesa asked him to provide her with an attorney to draft this affidavit, and he did. Koulis testified that Lesa swore out the affidavit to protect him, just as he wrote the "To whom it may concern" letter to protect her. He testified that he did not threaten Lesa with losing her daughter. He told Lesa that she was likely to lose her daughter if she did not get drug treatment. (Vol. XXIII, pp. 2565- 2567).

Koulis testified that in the weeks before September, 2002, he was in Chicago, while Lesa was in Kentucky when she called him. Jessie was living with her father. Lesa and Koulis were broken up at the time, but she called him to tell him that she was selling her furniture to get some money. She did not want to sell anymore of her belongings, so she called him for financial help. Dr. Koulis gave her the money. Soon after that phone call, they got back together. She moved to Chicago in December, but Lesa hated it there, so Koulis got her an apartment in Bellevue, Nashville, Tennessee, and she lived there in either December or January, 2003. (Vol. XXIII, pp. 2568-2572).

Koulis testified that in March or April of 2004, he got his medical license back and began building his life all over again. Lesa and Jessie moved to Chicago on March 30, 2004. They lived with Dr. Koulis in Chicago from April of 2004, until August of 2004. (Vol. XXIII, pp. 2572-2573).

Koulis testified that his relationship with Lesa was always tumultuous. In addition, Jessica did not want to stay in Chicago. She went back to Kentucky in the summer. (Vol. XXIII, pp. 2573-2574).

In August of 2004, Koulis came home one Saturday and found Lesa in the bedroom, on the bed, sitting on a towel, trying to inject herself in the groin area with a syringe. There was blood splattered against the back wall. Lesa told him she was trying to inject a crushed pill, her Vicodin. She found the needles and syringes around the house. An argument ensued because Dr. Koulis had just gotten his medical license back and was trying to rebuild his life. He did not want this type of activity bringing him down again. Lesa told him that she just wanted a “whoosh” [which would be an “instananous high”

produced by an intravenous injection as opposed to taking a narcotic pill orally.]. (Vol. XXIII, pp. 2574-2577).

Koulis told her that crushing pills and injecting them was a whole different ballgame from injecting liquid Demerol. He told her that injecting a crushed pill could kill her. In addition, the appellant was on probation, and he could go to prison just being around this drug activity. Koulis gave her a choice between stopping the taking of drugs or leaving. Lesa left the next day, taking nothing with her. Subsequently, Dr. Koulis learned that Lesa now lived in an apartment in Franklin, Tennessee. (Vol. XXIII, pp. 2578).

Koulis testified that, at this time, they were broken up. (Vol. XXIII, p. 2579).

(Witness shown Exhibits 236, and 237)

Koulis testified that he recognized Exhibits 236 and 237 as emails between him and Lesa. Koulis testified that on November 30, 2004, Lesa called him eight times. She called him at other times also. She called five times on December 1, and five more times on December 2, then twelve more calls on December 10. In mid-December, they had been fighting, so she changed her number. The day after the number change, Lesa called him fourteen times, and the day after that, seventeen times. Dr. Koulis did not answer every call. By the end of January, 2005, they were back together again as a couple. There were little phone calls between them after January because they spend their time together in places such as Hawaii, L.A., and Vegas; however she was still living in Franklin and he was still living in Chicago. There were forty-two phone placed by Lesa to Koulis on April 8. There were 44 phone calls placed by Lesa to Koulis on June 15, and 40 phone

calls on June 24. The next month of July was the month in which Lesa died. (Vol. XXIII, pp. 2580-2586).

(Exhibit 263 entered - Calendars)

Dr. Koulis testified that all the drug tests he took as part of the conditions of his probation, came back negative. He testified that the reason he and Lesa did not go to Cottonwood together was because Lesa did not want to go for fear of losing her daughter. (Vol. XXIII, p. 2591).

In January of 2005, Dr. Koulis and Lesa agree to get back as a couple and try to make their relationship work. Dr. Koulis had a special engagement ring made for her. (Vol. XXIII, pp. 2592-2593).

(Witness shown Exhibit 264 - Jewelry Receipts)

Koulis identified Exhibit 264 as documents pertaining to the ring he had made for Lesa. The ring setting cost $8,700.00. He could not get the stone she wanted, which cost $8,000.00; so he got her a cubic zirconia until he could afford the stone she wanted. (Vol. XXIII, pp. 2593- 2594).

(Exhibit 264 entered - Jewelry Receipts)

Koulis testified that he got Lesa together with his friend, podiatrist Dr, Rowe, who hired Lesa to design a logo for his business. She received $5,000.00 for that. (Vol. XXIII, pp. 2595-2597).

Koulis testified that the reason he had to take cell phone pictures with Dr. Soler was because Lesa and Koulis did not trust each another, so Lesa wanted to see a picture of the person he claimed he was with. (Vol. XXIII, pp. 2597- 2598).

Dr. Koulis testified that he and Lesa, in addition to calling each other on their cell phones, also text messaged each other in the ensuing months of March, April, May, and June of 2005. In June, one text message said that Koulis was going to a Caduceus meeting. Caduceus is a professional meeting he attended every Tuesday as part of his five-year ongoing contract that he had to fulfill as part of his probation. (Vol. XXIII, pp. 2598- 2602).

On June 29, 2005, Koulis sent Lesa a text message wishing Lesa a happy birthday. On July 2, 2005, there's a text message at 7:03 pm stating that Koulis had just landed in Nashville and was still on the plane. That was the night he came in for the Fourth of July weekend. (Vol. XXIII, pp. 2604- 2605).

(Witness shown Exhibits 265 and 266 - Text Messages/Koulis-Lesa)

Koulis testified that Exhibit 265 are the text messages from Koulis to Buchanan, and Exhibit 266 are the text messages from Buchanan to Koulis. (Vol. XXIII, pp. 2608).

(Exhibit 265 entered - Text Messages/Koulis-Buchanan)

(Exhibit 266 entered - Text Messages/Buchanan-Koulis)

(Witness shown Collective Exhibit 267 - Itineraries)

Koulis testified that Exhibit 267 were the itineraries of his flights back and forth to Nashville from Chicago. He flew into Nashville on October 3, 2004, March 1, 2005, March 20, 2005, March 28, 2005, April 3, 2005, May 29, 2005, June 15, 2005, and July 2, 2005. On this last date, he was scheduled to fly out on July 4, 2005, but, because of Lesa's death, he did not leave for Chicago until a later date. (Vol. XXIII, p. 2608- 2611).

(Exhibit 267 entered - Itineraries)

When Koulis came to Franklin to visit Lesa in 2005, Jessie was present most of the time. On June 29, 2005, the so-called moving day for Lesa's mother in Kentucky, Koulis was not supposed to go to Kentucky at that time. However, Lesa called him, feeling upset because no one wished her a happy birthday, so he drove down from Chicago to be with her. He did not help in the move, but he did spend time with her. He also had a conversation with Lesa's sister, Tara, about the injection marks he saw on Lesa when they made love. He told Tara that Lesa was using drugs again, but Tara did not believe him. Tara did nothing. (Vol. XXIII, p. 2614-2615).

Koulis talked to Lesa about her drug usage and learned she had been injecting crushed pills. (Vol. XXIII, pp. 2615- 2616).

He had seen injection marks in December, and when the two got engaged. Lesa knew the dangers of injecting crushed pills and had promised to stop doing it. She had injection marks on her after their trip to Vegas, when he went to see her in March, and saw injection marks on her again on her birthday in June [29th]. Koulis threatened to tell Lesa's family if she did not stop. That is why he told Tara that Lesa was using again. Lesa tried to conceal her drug usage from Koulis by tanning and putting make-up on the injection sites, but she could not conceal it from him. (Vol. XXIII, pp. 2612-2620).

Koulis next testified about the events over the Fourth of July weekend Originally, Lesa was to come to Chicago for the Fourth of July, but because she was not feeling well, he flew down to Franklin. He took his medical bag with him on that trip. Inside that bag were injectable items such as vials, needles and syringes and a letter from his urologist. The medication, Viagra and Cialis, was for his erectile dysfunction. When Viagra and

Cialis did not work, he would inject himself to cause an erection. If the erection lasted too long, he would have to inject himself with Epinephrine to end the erection. He carried a letter from his urologist with him so that the airport security would let him board the plane. (Vol. XXIII, pp. 2620- 2623).

(Witness shown a needle)

Koulis identified the needle as a 30-gauge needle, a needle used to inject insulin. It is a very small needle. He testified that it was this needle that he carried in his bag, in addition to the Epinephrine and Saline. He also had a larger syringe, 3 CC. so that he could transfer one solution to another. (Vol. XXIII, pp. 2624-2625).

Koulis next testified to the events of July Fourth, 2005. He testified that he landed at 7:15 p.m., and got off the plane with his carry-on. (Vol. XXIII, p. 2625). Lesa picked him up but he drove back to her apartment. Because Lesa did not feel well they stopped at the mini-mart for a drink. Lesa had a migraine headache and wanted a drink so she could take a pill. They went back to her apartment, and because she was feeling better when they got there, they made love. Lesa had dressed up for Koulis by putting make-up on, wearing earrings and a top. Koulis told her that she looked so beautiful that she should be in movies. Lesa asked if he wanted to video their love-making, and he consented. The video camera belonged to Lesa and she suggested that they film their love-making. After taping a segment, they would watch it. Sometimes they would make love while watching themselves make love. (Vol. XXIII, pp. 2625-2630).

Dr. Koulis testified that he saw Lesa preparing to inject herself in the bathroom on their first night together. He had gone out to get the pizza they ordered, returned and they

ate some of it. Lesa then disappeared into the bedroom. He went looking for her, and when he walked into the bathroom, Lesa was on the toilet seat preparing to inject herself. They talked about it. He told her that he did not want her injecting herself. She told him that she wanted to inject herself. He responded “I know you want to, but I don’t want you to. You’re going to kill yourself. And we’ve talked about this”. (Vol. XXIII, p. 2632).

She was using a big needle and Koulis believed she was injecting a crushed pill. (Vol. XXIII, p. 2632).

Koulis testified that he was given a choice to either leave if he did not like her injecting, or stay, because it was her apartment and she was going to do what she wanted to do. Dr. Koulis was upset with her because he was on probation and he could get in trouble for just being around that. This whole conversation took place while she was stretched out on the toilet seat. (Vol. XXIII, p. 2634).

Dr. Koulis testified that Lesa was sitting on the edge of the toilet seat, maneuvering her body in preparation for the injection. (Vol. XXIV, p. 2637).

(Witness demonstrates to jury how Lesa was sitting on the toilet seat)

When asked why he did not leave her, he testified that, aside from being an idiot, he loved her and wanted to be with her. He stated that he should have stopped her, but he didn’t. Instead, they made love, then they went to sleep. (Vol. XXIV, p. 2638).

Dr. Koulis next testified to the events on Sunday, July 3, 2005. Lesa got up that morning but wasn’t feeling well, complaining of left arm and shoulder pain. She thought she had an anxiety episode and took a Xanax. Lesa was preparing the bed so that they could make love. When he went back there, he saw that she had already injected herself.

She was holding pressure on her right groin area because she had punctured herself. There was a syringe next to her. There was a video clip of Lesa holding gauze on her groin area while Koulis was telling her to keep pressure on it. She had already injected herself and he was telling her to keep pressure on it, although she knew what she was doing. She continued to hold pressure to the puncture sight for a long time. This incident occurred around 11 or 12 noon of the second day. Koulis knew the time because later that day, around 5 pm, he went to Kroger to get food for dinner. (Vol. XXIV, p. 2639).

When he returned, Lesa had changed into a red outfit with black stocking and high black heels. She had put make-up on and fixed her hair. Koulis took some cell phone pictures of her in that outfit. (Vol. XXIV, p. 2639).

He testified that he had to leave the room when he saw her about to inject. Lesa called him back into the bedroom and they made love. While he cooked dinner, Lesa remained in the bedroom, masturbating. (Vol. XXIV, pp. 2639 -2644).

After dinner and after they made love, Koulis took a shower, but used that time to look for her needles and syringes. He found new and used needles and syringes along with a bottle of Vicodin in a trash bag in the closet. He also found three big new syringes. He left the old needles with the liquid goo in them because she would not be able to use those again. He threw away all the new needles and syringes in the dumpster at the apartments. He threw them away so that she could not self-inject crushed pills anymore. He did not throw away the Vicodin tablets because he did not mind her taking the tablets orally, but he did not want her injecting them. Koulis did not see any more drug usage

that day. After they made love, they watched movies and went to sleep. (Vol. XXIV, pp. 2645 -2652).

Dr. Koulis testified about the activities on July 4, 2005. They woke up around 8 am. Lesa had a terrible headache, palpations, and complained that her shoulder and right arm was hurting. Her headache was so severe, Koulis could not brush her hair like he usually did when she complained of a headache. She got up and went to take something for her headache while he went back to sleep. He woke up again around 9:30 am. They made love, and at 11:30 am, Dr. Rowe called and talked to Lesa for about 35 minutes, concerning his logo. After the phone conversation, Lesa and he went back to the bedroom and made love, and took some photographs of each other. They videoed their love making in the bed and on a chair. After the sex, Koulis went into the front room while Lesa stayed in the bedroom and played with herself. He took a picture of her around 1:30 pm. After that, Lesa was in the bedroom supposedly getting ready to take him to the airport. He was in the front room watching the history channel. Lesa called for him to come to the bedroom because she wasn't feeling well. She called again and this time he went in there. (Vol. XXIV, pp. 2652-2656).

When he walked into the bedroom, he saw Lesa sitting on the air mattress. She was on the edge of the mattress on the right-hand side sitting up against the pillows that were propped up behind her. He sat next to her, on her right, and placed his hand through her hair. He asked: "Honey, what's wrong?". Lesa was just looking. She did not respond. She was looking straight ahead, with a fixated look. Koulis knew something was wrong. She was not responding. She had literally just stopped. He slapped her and she went

backwards, and started turning blue. He realized she wasn't breathing and she had no pulse. He started CPR and called 911. (Vol. XXIV, p. 2656).

While Dr. Koulis was doing compressions on the air mattress, he realized he needed a firm ground to effectively do those compressions, so he carried her body to the front room and lay her on the floor. He also gave her a shot of Epinephrine because he knew that the Epi could not hurt her, it could only help her. He gave her the shot under her skin. (Vol. XXIV, pp. 2657-2658).

Koulis testified that he did not remember the exact time of when he took that cell phone photograph, but it was taken around 1:30 pm. He does remember that it was taken after they made love in the chair. The 911 call was made at 2:18 pm. Koulis is sure that Lesa injected herself with crushed pills on the 2nd and 3rd of July. (Vol. XXIV, pp. 2659-2663).

Koulis testified that he did not see Lesa use drugs on July 4, 2005. Koulis testified that he did not see Lesa use drugs on July 4, 2005. Koulis testified that he did not bring any narcotics with him from Chicago. He did testify that he brought his own non narcotic medications with him. Koulis testified that other than giving Lesa the epi **[**Epinephrine] **injection**, he did not inject her with anything else. (Vol. XXIV, p. 2664).

Koulis testified that he did not remember how his medical bag got transferred from one place to another. The three bottles that were transported with Lesa to the hospital, was given to the EMS personnel by him. He went into the bathroom and retrieved the prescription bottles for them. The three bottles were Vicodin, which is Hydrocodone, Xanax and Valtrex. He told them that Lesa was also taking Ephedra for

weight loss. Koulis thinks he gave the bottles to a paramedic. He drove the car and followed the ambulance to the hospital ER. (Vol. XXIV, pp. 2665-67).

When Koulis got to WMC, he went straight to the ER. He talked to Dr. Ragle while they were in the ER with Lesa. Dr. Koulis had worked in the ER himself, for many years. He told Dr. Ragle that he was a physician. It was traumatic for Koulis to watch Lesa being worked on. He told Dr. Ragle that Lesa had not had any intravenous drugs that day. To his knowledge, that information was true. Koulis testified that he did not tell Dr. Ragle that Lesa used IV drugs on the prior two days. Koulis testified that he should have told Dr. Ragle about Lesa's prior intravenous drug use, but because he was on probation and believed he might get in trouble or go to jail if he exposed her drug use, he did not tell Dr. Ragle that Lesa had been injecting crushed pills. Koulis testified that at the time, he was thinking only of himself. He remembers that the paramedics treated Lesa with Narcan at the apartment, and she was also treated with Narcan in the ER. She was being treated for a possible overdose anyway because Narcan is given to counteract the effects of a narcotic overdose. (Vol. XXIV, pp. 2667-2671).

Dr. Koulis testified that he was crying in the ER. When Dr. Ragle asked if he could terminate the code, Koulis wanted him to continue trying to save her life. Koulis insisted on the presence of a cardiologist, but eventually Koulis agreed with Dr. Ragle that it was useless, and the code was terminated. Koulis stayed in the ER with Lesa for a little while, then he was taken to the meditation room. Once there, two officers came in to talk to him. He does not recall what he told them but he attempted to answer their questions. He did not have his cell phone with him. He was in the hospital after Lesa

died, for approximately an hour to an hour and a half. He called Lesa's mother with a calling card he bought from Kroger after he left the hospital. He had called his sister in Chicago earlier, asking her to come down to Franklin and be with him because he was not thinking clearly, so flew in from Chicago. Later that evening, they went by the apartment, but saw the police there, so they did not stay. They went to a hotel and got a room. The next day, Koulis went by the apartment to pay that month's rent and to drop off Lesa's car. He also called Lesa's mother and told her where the car was and where Lesa's wallet was in the car. He and his sister flew back to Chicago. (Vol. XXIV, pp. 2672-2675).

[CROSS EXAMINATION]

Koulis testified that in February of 2001, he was sued by two former patients and that was another reason why things started going downhill in September. (Vol. XXIV, pp. 2702).

He testified that the vial of Demerol that he first took home from the office, was a vial almost full of Demerol. He testified that he took the vial home and injected himself with needles and syringes from the office, to escape the stress of a failing business. (Vol. XXIV, pp. 2703-2705).

When Lesa saw him inject the second time, she asked if she could try it and he did not say "no". He injected Lesa in the arm. Koulis continued to inject himself and Lesa. (Vol. XXIV, pp. 2706-2707).

After the vial of Demerol ran out, he used other controlled substances that he took from his office. He did not have a prescription to take those drugs. The Ketamine also

came from his office, but he did not inject himself with it. He did inject himself with Morphine and it came from his office as well. Shortly after injecting himself with Demerol, he became addicted, but did not seek help at that time. Koulis closed his Nashville office and came to Kentucky. (Vol. XXIV, pp. 2707-2710).

He testified that even though he knew all the risks of injecting himself with Demerol, he ignored those risks just to feel good. Koulis testified that he injected Lesa in the very beginning for only a couple of weeks. Koulis testified that, even though he loved Lesa, he knew it was wrong to inject her with Demerol, and he knew he was risking her health. He also taught Lesa how to inject herself. (Vol. XXIV, pp. 2711-2713).

Koulis testified that the letter he wrote to Lesa during his Cottonwood stay, said that he had taken IV Versed and small doses of Ketamine, but that statement was not true. He also lied when he wrote that he took the Ketamine and Versed with him. (Vol. XXIV, pp. 2715-2718).

(Exhibit 269 entered - Letter)

Koulis testified that he lied to his parents when he told them that he was not able to purchase a plane ticket to Arizona. When Koulis left Lesa in Kentucky to go to Cottonwood, Lesa was walking, talking, and lucid but she and him were not fine because they were both drug addicts and needed care. Koulis asked his mother to stay with Lesa in Kentucky when he left for Arizona, but Lesa did not want that, so Koulis asked Lesa's mother to stay with her, her mother said that she would come over later. Koulis and his parents then left Lesa in Kentucky and headed for Nashville. Lesa was not left in the basement of that condo. She was able to walk upstairs, eat breakfast, and say goodbye

when we left. He left Lesa alone, knowing she was facing withdrawals. Koulis would agree that by the time Lesa's mother found Lesa, the condo was in a bit of a mess. The used needles were placed inside a little sharp box. (Vol. XXIV, pp. 2723-2726).

Koulis testified that the surrender of his medical license went beyond the events in Kentucky in 2002. (Vol. XXIV, p. 2727).

(Witness shown Exhibit 261)

Koulis testified that his mother, Athena Koulis, had the locks changed on the condo door, on May 2, 2002. She cleaned the condo as she normally did and she changed the locks at his request. The lock was changed because Steve Buchanan had spoken to his mother in a hostile manner, so for her safety, he had the locks changed till his father returned from Arizona. (Vol. XXIV, pp. 2728-2729).

Koulis testified that he was charged in Kentucky with trafficking a controlled substance, wanton endangerment, four counts of unlawful prescribing, administering, dispensing, or distributing a controlled substance, six counts of unlawful dispensing of a legend drug, and two counts of possession of a controlled substance not in its original container. He entered a no-contest plea and was placed on pre-trial diversion. He testified that he had to abide by all the conditions of probation. One of those conditions was that he not use alcohol. He did not drink any alcohol that weekend of the Fourth of July. He testified that he did not have the legal authority to write Lesa those prescriptions he wrote for her because Lesa was not his patient at that time. (Vol. XXIV, pp. 2730-2733).

(Witness shown Exhibit 270 – Letter/travel Agent)

Koulis identified Exhibit 270 as a letter from a travel agency indicating his dates of travel to Jamaica. Those dates were June 14 through June 18, 2002. He stayed at the Super Clubs Resort Property. (Vol. XXIV, pp. 2738-2739).

(Exhibit 270 entered - Letter/Travel Agent)

(Witness shown Exhibit 247 – Toxicology Test)

Koulis testified that he recognized that document and stated that Russ Romano is a case manager. Romano called Koulis on 7-14 and asked him to do a toxicology for EtG. This is a newer test that can detect alcohol for five days out. Koulis responded that he would be happy to take the test. The test result came back negative on 7-15-05. (Vol. XXIV, pp. 2740-2741).

(Witness shown Exhibit 239 – Computer Documents)

Koulis testified that Exhibit 239 is documents taken from his computer showing what sites he visited. On 7-14-05, he visited a site called Pass the Test.com. That site tells you how to pass a test if you have a drug in your system. He testified that none of those work. However, he did look at those sites on 7-14. Koulis stated that he was trying to find out what kind of test the EtG test was. (Vol. XXIV, p. 2741).

Koulis testified that Lesa would not go to meetings with him when she lived in Chicago with him. She would not follow the aftercare program that had been prescribed for her. She never went to a single meeting and she never got a sponsor. She was a 35-year old woman, not a teenager. She was a mother of a teenager. Koulis could not make her go to a meeting. When she left Chicago, she took very few things with her. (Vol. XXIV, p. 2753).

Koulis testified that although he made a chart showing how many phone calls Lesa made to him, he did not make a chart of how many phone calls he made to her. (Vol. XXIV, p. 2754).

Koulis testified that, at the time Lesa was seeing Dr. Ghuneim, he never called him and told him that she might have a problem with Hydrocodone, so that he would not prescribe that drug for her. It is important for a medical provider to know if someone is abusing drugs, but Koulis never told Dr. Ghuneim about Lesa's Hydrocodone problem. (Vol. XXIV, p. 2755).

Koulis testified that on June 29, 2005, he told Tara that Lesa was using drugs. Tara turned on him when he told her about Lesa. He did not tell her Lesa's mother. He did not call Dr. Ghuneim and tell him that Lesa was abusing drugs. (Vol. XXIV, pp. 2771-2774).

Koulis testified that even though he caught Lesa getting ready to inject herself, and even though he knew that injecting crushed pills could kill her, he still had sex with her. (Vol. XXIV, pp. 2779-2780).

He testified that the incident where Lesa was holding the gauze to the groin area occurred when she was in the bedroom and he was in the kitchen. When he walked in on her, she had already injected herself and all he saw was that she was holding the gauze to the groin area, and applying pressure. That was the incident captured on the video clip where he told her to hold pressure to the injection site. Lesa was not frightened at that time. He stated that he had sex with her after she had injected herself. (Vol. XXV, pp. 2787-2789).

Koulis testified that at the time Lesa injected herself for a second time in the day, on July 3, she was wearing a red top, black stockings, high heels, earrings, make-up, and she had fixed her hair. That was the same outfit she was wearing when Koulis took pictures of her on his cell phone around 5:00 or 5:30 pm. (Vol. XXV, p. 2789).

Koulis testified that Lesa knew he was upset with her for injecting herself, but she made it crystal clear to him that it was her house and she was not a teenager. She was a 35 year old woman and she was doing what she wanted to do. She wanted to have sex and she wanted to be high during sex. (Vol. XXV, p. 2790).

When asked if Koulis had taken any action to stop her from injecting herself after he became aware for the third time that Lesa had injected herself, he testified that he threw her new syringes away. He first had sex with her then he threw the syringes away. (Vol. XXV, p. 2791).

Koulis testified as to how he managed to get the free time away from her to look for her needles and syringes. He testified that after they had sex, he went into the bathroom to fix his hair and take a shower. It was at that time that he looked in the closet and found the trash bag on a shelf. Inside the bag were three used syringes, some used needles, a paper plate, and a bottle of Hydrocodone. He put the trash bag back in the back of the closet and looked for other syringes and needles. He found some big 10cc syringes and some needles. The needles were of different sizes. There were a couple of the pink 18-gauge needles, and a couple of the yellow 20-gauge needles. He wrapped them up in a towel to keep Lesa from getting suspicious. He opened up a new trash bag and threw the needles and syringes in that bag, along with the leftovers from their meal. He made the

steaks around 6:30 pm. Lesa had injected herself around 5:30 pm., which was after he had taken her pictures on his cell phone. (Vol. XXV, pp. 2792-2794).

Koulis testified that needles found in the kitchen under Lesa's purse were not the same needles that he threw away. Those needles on the kitchen counter were not there on July 3. After he threw the needles and syringes in the dumpster, he came back to the apartment where he and Lesa watched movies and made love. The love making was not videotaped at that time. (Vol. XXV, pp. 2795-2796).

Koulis testified about the events that occurred on July 4, 2004. He stated that Lesa woke up around 8:00 am with a very bad headache, and left shoulder and arm pain. Her heart was beating rapidly. He tried to massage her neck and brush her hair, but she could not tolerate that. Lesa said she was going to take something for her ailments, and then he went back to sleep. Koulis had asked Lesa whether she had gotten the needles and syringes from his Chicago apartment, because she had been there in May. As far as his seeing goo in the syringes, he testified that he could see the goo in the syringe, and it was pasty. He stated that he had seen the goo before, when Lesa crushed a pill in his Chicago apartment in August of 2004. He testified that despite the fact that Lesa told him that she had a bad headache, he still made love to her, because she told him that she was feeling better. At that time, Lesa appeared to have three groin stick marks on each side of her groin. (Vol. XXV, pp. 2797-2799).

(Witness shown Exhibit 271 – Photograph/Chair)

The appellant identified Exhibit 271 as the chair that he and Lesa made love in. It was the last time that he and Lesa made love. The incident was videotaped. (Vol. XXV, p. 2801).

(Exhibit 271 entered - Photograph/Chair)

Koulis testified that he and Lesa talked to someone in Chicago around 11:30 a.m.. At 12:30 p.m. , Koulis took additional cell phone pictures of Lesa. One of those pictures was of Lesa holding her breast. The picture was taken at the time shown on the photograph. The other photographs, showing various private areas on the body, were all taken around 12:30 p.m. . They were taken at the time stamped on the photograph. Koulis had already spoken to Rowe at the time he took those photographs. After the photographs were taken, he and Lesa made love in the chair. Koulis testified that one other photograph was taken of Lesa, but he did not know if it was taken at 1:30 p.m. Lesa was wearing a low-cut gold top and heels. He does not know if that was the picture taken at 1:30 p.m.. He did not recall if Lesa was wearing earrings in that picture. He took only one picture. (Vol. XXV, pp. 2801-2804).

After taking that picture, Koulis testified that he went into the front room and Lesa stayed in the bedroom where she was masturbating. Lesa was modeling the very expensive clothes he bought her in Vegas. She was proud of that outfit. She took the clothes off after modeling it for him, and he went into the front room, where he ate yogurt and watched TV. He was standing at the kitchen counter and he did not see Lesa's purse and the needles near it. Lesa was supposed to be getting ready to take him to the airport because he was leaving that day, to go back to Chicago. Lesa had gone to the bathroom,

and she was wearing his black pants. She hadn't changed clothes yet. He heard her say:" Honey, come here. I don't feel good." He did not respond then, telling her that he would be there in a minute. Lesa called for him a second time, and this time he went to her. (Vol. XXV, pp. 2804-2808).

Lesa never said a word to him when he walked into the bedroom. He sat down next to her and asked her what was wrong. She was fixated, just looking straight ahead and just "stopped."He knew something was wrong so he slapped her. She did not respond, but instead, she fell backwards, turned blue and her eyes went up. Koulis realized that Lesa had arrested. He testified that slapping her was not a medical procedure, but it was the first thing that came to his mind. He was trying to jar her awake. She had just "stopped" and he did not know what was wrong with her. He began CPR and called 911. He could not tell the 911 operator the address of her apartment because he was too upset, and could not focus. He realized he could not do effective CPR on the air mattress, so he half-carried and half- dragged her 5'10'' body into the other room and collapsed with her on the floor. He had to take her to another room because there was no room in the bedroom to work on her. He told the paramedics that he gave her an Epi shot because that is what he had available and Lesa was in full arrest. He does not recall telling anyone that he gave her the Epi shot for an allergic reaction. If he told someone that, it wasn't the reason he gave her the Epi shot. He had brought the Epi with him, and it was in his little black bag in the bathroom at that time. (Vol. XXV, pp. 2808-2811).

Koulis testified that he carried 30-gauge needles, vials and solutions with him in case he had an erection that lasted too long. Sometimes Viagra and Cialis work for him,

and sometimes they do not. The Viagra was not working for him that weekend. Koulis gave himself an injection every time they made love, which was about six or seven times. He testified that the needles he used on himself were either thrown away or put back in his bag. He threw his needles in the bathroom trashcan. He used the small 1cc. needles. He also carried the larger 22-gauge needles. He also had a 3cc gauge needle which he used to pull up liquids. When he was trying to treat Lesa, he was frantic and grabbed the epi and some needles. (Vol. XXV, pp. 2811-2814).

Koulis testified that he handed the paramedics the three bottles in the bathroom. He did not give them the items in the bathroom trash can. He did hand them a bottle labeled Hydrocodone, same as the label on the bottle in the trash can. He knew the bottle in the trash can was Hydrocodone because he looked at it. The three bottles were labeled Hydrocodone, prescribed by Dr. Ghuneim, Alprazolam, and Valtrex for Jessica Buchanan. He gave them that bottle because, at the time, he was just grabbing bottles to hand to the paramedics. He knew Lesa had taken Valtrex. He also knew that she had taken Zantrex that weekend, for weight loss. Koulis testified that he prescribed Valtrex for Jessica because she had sores on the inside of her mouth from her braces, and the Valtrex were tablets so they could be broken. Valtrex is expensive and it was cheaper to break them than buying the one-gram tablet. Lesa also used the Valtrex. (Vol. XXV, pp. 2814-2816).

Koulis testified that he used Lesa's car to follow the ambulance to the hospital. He stated that he got in her car, pulled in behind the ambulance in the apartment parking lot and waited for the ambulance to take off for the hospital. He testified that he must have

grabbed Lesa's wallet at some point before he left for the hospital. He did not have a specific memory of what he grabbed on the way out the door. He does not recall moving his black bag from the bathroom to the counter. He remembers looking for the epi in the bathroom, and throwing things around, and he may have carried the bag into the kitchen. Lesa was in the front room at the time. (Vol. XXV, pp. 2816-2818).

Koulis testified that he was not truthful with Lesa's medical providers. He told Dr. Ragle that he saw no evidence of Lesa injecting on the Fourth of July. He did not tell Dr. Ragle that he saw no evidence of drug paraphernalia in the house. What he told the doctor was that he did not think she had anything to do it with, because he threw away all her usable needles and syringes. He did not think she had any paraphernalia left. He should have told Dr. Ragle that Lesa had injected herself, but he did not. Koulis said that the needles found on the kitchen counter were needles that he obviously did not throw away, and that maybe Lesa was protecting her stash. The reason Koulis wanted Lesa transported to Vanderbilt was because whatever was being done for her at WMC was not working, and he did not want her to die. (Vol. XXV, pp. 2818-2820).

Koulis testified that by the time Lesa was transported to WMC, her chances of survival were very low. He told Dr. Ragle about their sex activities because he wanted Ragle to know that Lesa was exerting herself. She had been complaining of shoulder, chest and left arm pain. That was the reason Koulis wanted the cardiologist there. He testified that they had sex an hour before she collapsed. He told all the treatment providers about how she collapsed. The providers asked him what happened during chaotic times. CPR was going on, and people were running in and out of the apartment,

but he told them the same story he told the jury. He did not tell them that Lesa had injected herself the day before. He gave them the drug she was taking, but he should have told them that she was injecting. He was thinking only of himself, that day and the whole weekend. (Vol. XXV, pp. 2820-2824).

Koulis testified that he carried all his belongings from Chicago in that blue duffle bag. He and his sister went by the apartment the night of July 4, but did not go in because the police were there and his sister got scared and wanted to leave. Koulis also testified that he called Peggy that evening in a frantic state of mind. His sister brought cash with her and Koulis took some of that cash and paid Lesa's rent. (Vol. XXV, pp. 2825-2826).

Koulis testified that in 2002, he was using liquid Demerol. Koulis injected Lesa only in 2002. (Vol. XXV, p. 2826).

Koulis testified that he should have prevented Lesa from using. (Vol. XXV, p. 2828).

STATE'S REBUTTAL PROOF

DR. BRUCE P. LEVY

[DIRECT EXAMINATION]

Dr. Bruce Levy (hereinafter referred to as "Levy") testified that he is a physician licensed to practice in the State of Tennessee. He is board certified in pathology and forensic pathology. He is currently the chief medical examiner for the State of Tennessee, and the County medical examiner for Davidson County. He is also partial owner of a private business that deals with forensic pathology. Dr Deering is a co-owner and works with Levy. (Vol. XXVI, p. 2861-2862).

(Exhibit 272 entered - CV/Levy)

Levy testified that he is familiar with Lesa Buchanan's autopsy. He got involved several months ago when Dr. Deering became aware of new information about the hours prior to Ms. Buchanan's death. He had some questions about how this information would impact his opinion as to cause of death. He consulted with him and other colleagues in the office. Levy reviewed the entire file. He was present when Dr Graham testified before this jury, and he reviewed a DVD of Dr. Goldberger's testimony after he testified before this jury. Based on all these reviews, he has prepared a short presentation to the jury. (Vol. XXVI, pp. 2863-2865).

(Witness shows Presentation to jury)

Levy testified that Dr. Graham and Goldberger opined that Oxycodone played no role in the death, and at the level present, could not have contributed to her death. Levy disagreed. After hearing their testimony, he dug into the literature and brought a couple of those papers with him in summary form. These articles that he brought, have been peer-reviewed by experts in the field before being published in journals. (Vol. XXVI, pp. 2865-2866).

Dr. Levy testified that the first study, a study conducted in Australia and reported in the Therapeutic Drug Monitoring, a toxicology journal, shows the blood levels of Oxycodone in people who take the drug in various forms. The study included 48 patients, broken into four groups, and gave them either intravenous Oxycodone, Oxycodone pill, Oxycodone liquid orally, or a rectal suppository of Oxycodone. Levy testified that he was interested in the group given intravenous Oxycodone. This group of 12 patients got an

average of just under six milligrams of IV Oxycodone, blood samples were taken from them over a period of time, measuring the blood levels of Oxycodone. The findings showed that the peak or highest blood levels in these patients ranged from 28 to 108 micrograms per liter and that occurred somewhere between two and 30 minutes after the injection was given. (Vol. XXVI, pp. 2866-2867).

Levy testified that the other point of this study was, as referred to by Dr. Goldberger, is that when you give a drug in IV form rather than orally, you're going to get a higher peak drug level than with the oral pill. Lesa Buchanan's blood level was more than four times the level of the blood level of the patients in the study, so she must have gotten maybe 25 or more grams of Oxycodone. (Vol. XXVI, pp. 2867-2868).

Levy testified that Lesa had 428 micrograms per liter in her body at the time of death, and that she injected the drug intravenously. Her level prior to her death had to be higher than 428. The chart suggests that her level prior to death could have been two to three times the level at death, but this would be speculating. The question becomes; what does that level of Oxycodone do to your breathing? For the answer, Levy reviewed a Finland study. (Vol. XXVI, pp. 2869).

Levy testified that the Finland study examined the effects of Oxycodone on breathing. The dose of Oxycodone was administered according to the person's weight, and the study showed that Oxycodone, given to a person who weighed 70 kilograms, at a dosage of .04 milliliters for every kilogram of that person's weight, had a significant respiratory depressive effect on their breathing. Lesa, at 137 pounds, would weigh 62 kilograms. Levy concluded that there is no way that the Oxycodone did not affect her

breathing, did not decrease her respiratory rate, and didn't contribute to her death. However, the filler material had a role in her death also, as Dr Graham and Goldberger told the jury. But Levy opined that that it wasn't the filler material alone that killed Ms. Buchanan. The Oxycodone played a significant role in her death. That opinion is based on reasonable medical certainty. (Vol. XXVI, pp. 2869-2873).

Levy does not believe that Ms. Buchanan had pulmonary hypertension. She had some of it, and it is related to her IV drug use, but she did not have a dilated right side of the heart, and Lesa did not have a big right heart. It was mildly big, but not big enough to be the product of the condition known as pulmonary hypertension. Lesa did not have an acute death from right side heart failure due to pulmonary hypertension. (Vol. XXVI, pp. 2873-2875). Levy further testified that people addicted to drugs will access any veins they can. (Vol. XXVI, pp. 2876). Levy testified that the Oxycodone absolutely played a role in Ms. Buchanan's death. (Vol. XXVI, pp. 2877).

[CROSS EXAMINATION]

Levy testified that eye-witnesses to the event "are not always necessarily the best reporters". People interpret things through their own eyes and it may or may not be consistent. Levy testified that Koulis' statements and his testimony at trial were consistent with the findings at autopsy and the cause of death in Levy's opinion. (Vol. XXVI, pp. 2887-2888).

Levy was asked if it would have been valuable for Dr. Deering to interview Dr. Koulis, given that Koulis was an eye-witness to the cardiac event and the fact that Koulis is a physician, and Levy testified not necessarily. He said that even though Koulis was a

doctor, he was still personally involved, and may not have had a clear recollection of what took place, as did Dr. Levy when his grandmother collapsed with a stroke while all of the family was having dinner. Levy did not have a clear recollection of the events because of his personal involvement. (Vol. XXVI, pp. 2889-2890).

Levy testified that he was not surprised that when the police interviewed the Defendant, he told them that he did not understand what happened. (Vol. XXVI, pp. 2889). Levy testified that he did not perform the autopsy on Ms. Buchanan. (Vol. XXVI, pp. 2893).

As to the Australian study, Levy testified that they gave Oxycodone to forty-eight people. He does not know how many of those patients were 35 years old, and since all the participants were healthy adults, none had granulomas, and probably none had mitral valve prolapse. He does not know how many of them had enlarged right ventricles. Probably none had heart disease. None were given a fatal dosage, and none were opiate tolerant. That study excluded anyone similar to Lesa Buchanan. It is partially correct to say that an opiate-tolerant person would not have had any breathing problems with the levels reported in the study. Someone like Lesa would have a lesser reaction to the dosage given those patients. (Vol. XXVI, pp. 2894-2897).

Levy essentially agreed that when you're talking about someone dying from a pill containing Oxycodone, that in terms of the granulomas, you're really talking about the blood vessels being plugged up by the filler which causes the heart to stop. It has nothing to do with the Oxycodone. (Vol. XXVI, pp. 2898-2899).

Levy testified that Dr. DiMaio's text, a text used by Levy, claims that the lethality of Oxycodone starts at 430. Levy testified that if that is what DiMaio says, he will accept that, and in that case, and in Lesa Buchanan's case, especially in an opiate-tolerant person such as her, the level of 428 would not be expected to be lethal. But that level in addition to the filler combination was lethal. (Vol. XXVI, pp. 2899-2900).

(Witness shown DiMaio's text - Forensic Pathology, Second Edition/Page 541)

Levy testified that the text begins the lethal level of Oxycodone at a dosage of 430. Lesa's level was 428. Levy agrees that Lesa's level is than the textbook claim of what is a lethal level. Dimaio's text claims that a lethal level can go as high as 1400. Levy testified that Lesa's level of Oxycodone was at the low end of a lethal level. (Vol. XXVI, pp. 2900-2902).

Levy testified that Deering came to him about changing something about the theory he had held for two years. However, when Deering was asked if the Oxycodone alone caused her death within reasonable medical certainty, he replied that he did not know if it did or did not. When Levy was asked if he agreed with Deering, Levy said that it was very unlikely that the just the Oxycodone caused her death. Levy's answer was slightly different than Deering's, according to Levy. When Deering was asked whether the Oxycodone played some role in her death, Deering responded that it could have played a role in her death. When Levy was asked whether he agreed or disagreed with Deering, Levy responded that the Oxycodone had to play some role in her death. When Levy was told that Deering opined that the death could have all been due to the Oxycodone, then asked if he agreed, Levy said that it could have happened that way.

When asked how this death was labeled an acute multiple drug overdose, he stated that the name was not the best name for this cause of death, but they decided to leave the diagnosis alone and explain it when they were asked the question as to what killed Lesa. (Vol. XXVI, pp. 2903-2912).

Levy testified that the filler is not a drug. He stated that this death is not a typical drug overdose. It is a complicated series of events that involved both acute changes from acute drug intoxication as well as chronic changes from chronic intravenous drug abuse. (Vol. XXVI, pp. 2912-2913).

Levy testified that clearly neither the Hydrocodone or the Alprazolam united with the Oxycodone to kill Lesa. Levy testified that homicide from a physician's point of view is a death at the hands of another. He cannot state whether Lesa Buchanan was murdered. Levy testified that he has never had a case like this that he can recall. He called it a very unusual case. He cannot tell the jury who injected Lesa. She is certainly physically capable of injecting herself as it is certainly capable for someone else to have injected her. (Vol. XXVI, pp. 2914-2918).

[RECROSS EXAMINATION]

Levy testified that Lesa Buchanan died a sudden death. He stated that there is clearly objective evidence to support Koulis' eyewitness account of the events. (Vol. XXVI, p. 2922).

DETECTIVE STEPHANIE CISCO

[DIRECT EXAMINATION]

(Witness shown Exhibit 37 and 273 for ID only)

Cisco testified that Exhibit 37 is a trash bag liner and inside there is a 22-gauge needle, and one and a half wrapper. There are two needles and two paper plates, and you can see the prescription bottle. Cisco determined that on the top plate with the flowers, there was cottage cheese and on the second plate there was a yogurt like substance. Cisco identified exhibit 273 for ID as a picture of the top plate. You could see the chunks of cottage cheese. (Vol. XXVI, pp. 2935-2936).

(Exhibit 273 entered - Trash Bag)

[CROSS EXAMINATION]

Cisco testified that she did not know who put the yogurt and cottage cheese in the trash bag or when they were put there. She doesn't know who ate the cottage cheese or the yogurt, or when either was eaten. (Vol. XXVI, pp. 2937-2938).

JESSICA BUCHANAN

[DIRECT EXAMINATION]

Jessie testified about the events which occurred in the summer of 2004. At the end of July, or early August, she and her mother lived in Chicago with Koulis. She testified that at the end of July, she and her mother would slowly take things out of the Chicago apartment when they went up there because they did not want Koulis to know they were moving out of the Chicago apartment. If he knew, he would get angry. She and her mother stayed at the Red Roof Inn till they could find an apartment in Franklin. They did find an apartment and Jessie started school on August 16, in Franklin, Tennessee. The apartment in Chicago was furnished and set up. (Vol. XXVI, pp. 2941-2943).

(Witness shown Exhibit 274)

Jessie identified Exhibit 274 as a photograph of the bed that her mother and Koulis slept in, in the master bedroom. (Vol. XXVI, pp. 2943).

(Exhibit 274 entered – Photograph/ Bed)

Jessie testified that she never took Valtrex for her braces. She was not having a problem or sores with her braces. If she did, she used over-the-counter medication. She never crushed up a pill and put it in her food. She testified that she heard Koulis come home and ask her mother if he could have a glass of wine. At the time, he was on probation and was being tested. She testified that the headboard on the bed was assembled the entire time they were there in Chicago. (Vol. XXVI, pp. 2944-2945).

[CROSS EXAMINATION]

Jessie testified that she was in the courtroom when Koulis testified. She did not remember the day in July that she and her mother came to Franklin, but she is certain that they were in Franklin in August of 2004 [and not in Chicago as Koulis testified concerning his testimony that Lesa registered to vote in Chicago on August 8]. She discussed this topic with the District Attorney yesterday and probably the day before. She told them that she and her mother moved to Franklin in August of 2004 after Koulis testified. She heard Koulis testify that they were in Chicago in August of 2004. Jessie testified that she didn't know whether her mother was in Chicago in early August of 2004, because she was not with her mother 24/7. (Vol. XXVI, pp. 2945-2948).

(Witness shown a document)

Jessie identified the document as being the lease on the Franklin apartment and identified her mother's signature on that lease. She testified that the lease was signed on August 12, 2004. Her father was listed as a guarantor on the lease. Her mother had to be in Franklin, Tennessee on August 12, 2004 because her signature is on that lease which is dated on that day. (Vol. XXVI, pp. 2951-2952).

(Exhibit 275 entered – Lease)

Jessie testified that she did not remember Koulis testifying that he and her mother signed voter registration cards in Chicago, in early August of 2004. No one mentioned the voter registration card to her. She knew that 165 North Canal Street was the address of their apartment in Chicago. (Vol. XXVI, pp. 2953-2954).

(Witness shown document – Voter Registration Card Copy)

Jessie testified that her mother's signature was on that document, and the date of the document was in 8-8-04. Jessie testified that the document is a voter's registration card dated August 8, 2004. Jessie testified that she guesses that her mother was in Chicago Illinois on August 8, 2004. She testified that her mother was in Chicago when she signed that piece of paper. (Vol. XXVI, pp. 2955-2956).

(Exhibit 276 entered – Voter Registration Card Copy)

[REDIRECT EXAMINATION]

Jessie testified that when she heard Koulis testify that her mother was in Chicago in August of 2004, she went to the district attorney with a concern that her mother was in Chicago at that time. Her concern was that her mother was not living with him at the time

testified to by Koulis. However, she never said anything about her mother not visiting Koulis. (Vol. XXVI, pp. 2957-2958).

STEVE BUCHANAN

[DIRECT EXAMINATION]

Steve Buchanan testified that in August of 2004, he was living in Florence, Kentucky. He testified that Lesa and Jessie were in Franklin during the month of August getting Jessie ready to register for school. They stayed at the Red Roof Inn, and he came down to Franklin to visit them. (Vol. XXVI, pp. 2961-2962).

(Witness shown Exhibit 277 - Cell Phone Records)

Steve identified the cell phone records as being those of his cell phone. Lesa made 12 calls to him. Steve stated that just because something was signed doesn't mean you were physically there. (Vol. XXVI, pp. 2964-2966).

(Exhibit 277 entered – Cell Phone Records)

[CROSS EXAMINATION]

Steve testified that his cell phone does not reflect where he was located at the time of a call. Steve testified that he has never mailed in a voter registration card because he has never voted. (Vol. XXVI, pp. 2966-2967).

END TRIAL TESTIMONY

ARGUMENT

1. The evidence is insufficient as a matter of law and facts to sustain a conviction for criminally negligent homicide.

A.

Dr. Koulis was convicted of criminally negligent homicide. The standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Certainly this Court does not reweigh the evidence but must presume that the jury resolved all conflicts in the testimony and drew all reasonable inferences from the evidence in favor of the state. See *State v. Sheffield,* 676 S.W.2d 542, 547 (Tenn.1984). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Brewer,* 932 S.W.2d 1, 18 (Tenn.Crim.App.1996). In Tennessee it is also the law that, because a verdict of guilt "removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden of illustrating why the evidence is insufficient to support the verdict returned by the jury." *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982). The defense can demonstrate here that the evidence is insufficient as a matter of law to sustain the criminally negligent homicide conviction. Accordingly, the conviction should be vacated and dismissed.

Dr. Koulis moved for judgment of acquittal pursuant to Rule 29 Tenn.R.Crim.P., at the end of the State's proof. The trial court denied that motion. (Vol. XXII, p 2481). Koulis then moved for judgment of acquittal on all counts at the end of all the proof. The

court overruled that motion. (Vol. XXVII, p 3088). The trial court erred in denying these defense motions before the matter was submitted to the jury. The jury's later acquittal of second degree murder does not remedy the error. The same is true for reckless homicide and all the lesser included offenses. None of these offenses should have gone to the jury. The trial judge should have granted the defendant's motion for judgment of acquittal on all counts. Such a review of all the charges is of value when we arrive at the penultimate offense – the offense for which Dr. Koulis was convicted – given that the defense has the "burden" here to show why the evidence was insufficient to convict him of criminally negligent homicide.

B.

The evidence was insufficient at the end of all the proof to establish that Dr. Koulis committed second degree murder. To convict him of that offense, the State was required to show that Koulis unlawfully distributed a schedule I or II drug, that this drug was the proximate cause of the victim's death, and that Koulis acted either intentionally, knowingly or recklessly. Tenn. Code Ann. § 39-13-210(a) (2). "Distribute" means to deliver other than by administering or dispensing a controlled substance. Tenn. Code Ann. § 39-17-402(a) (9). The State's theory was that Koulis either supplied Ms. Buchanan with the Oxycodone that killed her, or injected her with that drug and she died as a result of the injection. (Vol. XIV, p. 1261).

There was no direct proof that Dr. Koulis injected Lesa Buchanan. Even the State's own assistant State medical examiner, Dr. Thomas Deering, the physician who performed the autopsy, could not say who made the injection marks in Ms. Buchanan's

groin area. (Vol. XVIII, p. 1708). Dr. Deering could not even testify that the manner of death was a homicide. (Vol. XVIII, pp. 1759-1760). Further, the State had no fingerprint evidence nor any "trace" evidence connecting Dr. Koulis to Ms. Buchanan's death. In short, there was no direct proof that Koulis injected Ms. Buchanan with a controlled substance.

There was also no circumstantial proof that Dr.Koulis injected Lesa Buchanan. The State attempted to show circumstantially that Dr. Koulis had to be the one who injected her because there were only the two of them in the apartment and it would have been "very difficult" for Ms Buchanan to have injected herself in the groin area. However, Dr. Bruce Levy, the State Medical Examiner, testified that Ms. Buchanan was certainly physically capable of injecting herself just as it was certainly plausible for someone else to have injected her. (Vol. XXVI, pp. 2914-2918). Even Dr. Ragle testified that he would not have been surprised to know that there are doctors who believe that drug addicts can self-inject themselves better than a doctor could. (Vol. XIII, p. 1020).

To conclude from the evidence that it had to be Dr. Koulis who injected her, would be a far stretch of the imagination and reasoning if the same evidence also showed, which the defendant contends that it did, that Ms Buchanan could well have injected herself which she had done on many prior occasions. How do we know this? During the autopsy the medical examiner obtained Ms. Buchanan's lung tissue sample. This was examined by Dr. Graham and he prepared photographs of the slides. These and other pictures demonstrated the long-term effects of injecting crushed pills. This visual presentation is so dramatic the photographs from exhibit 233 *are reproduced at pages 34-*

46 in the Appendix to this brief. Dr. Graham testified that, under the polarized light, one can observe all the glowing material in Ms. Buchanan's blood vessels. This is the filler material from the pill. She has a tremendous amount of filler all over her lungs. (Vol. XIX, p. 1959). Dr.Graham testified that the photographs show that Ms. Buchanan's vessels have been blocked by the filler material, demonstrating *long term* obstruction of blood flow and damage to the blood vessels. (Vol. XIX, pp. 1961-1963).

Dr. Levy stated could not tell the jury who injected Lesa. She was certainly physically capable of injecting herself as it was certainly possible for someone else to have injected her. (Vol. XXVI, pp. 2914-2918). A review of the medical literature by the state's witness, Dr. Ghuneim revealed that self-injection in the groin is not uncommon in experienced intravenous drug addicts/abusers. (Vol. XVI, p. 1421). The State's experts were of the view that there was clearly objective evidence to support Dr. Koulis' eyewitness account of the events. (Vol. XXVI, p. 2922).

The State's evidence was insufficient to establish even circumstantially, and beyond a reasonable doubt that Dr. Koulis had to be the one who injected Ms. Buchanan. Alternatively, the State claimed that Dr. Koulis supplied Ms. Buchanan with the drug. However, there was no evidence, either direct or circumstantial, that he supplied Ms. Buchanan with the Oxycodone, or, for that matter, any other controlled substance. The State never proved that Dr.Koulis brought any drugs with him from Chicago. Even though the police confiscated Dr. Koulis' duffle bag, his shaving kit, (Vol. XIII, p. 1108-1110), and his personal belongings from Ms Buchanan's apartment, they never found any link between his personal items and any controlled substances. (Vol. XVIII, p. 1783).

The police never found any controlled substances when they searched his Chicago apartment on July 15, 2005. (Vol. XIV, pp. 1248-1249). The proof showed that the only controlled substances found anywhere, were found in Ms Buchanan's apartment, with *her* name on the pill bottles. For example, a half-pill of Oxycodone was found in a prescription bottle of Hydrocodone with the prescription made to Lesa Buchanan from a physician other than Dr. Koulis. The bottle was found in Ms. Buchanan's bathroom. (Vol. XIII, pp. 1103-1104).

There were several syringes containing Oxycodone, found in Ms Buchanan's bathroom. Two of those syringes were found in a trash bag in her bathroom closet. (Vol. XIII, pp. 1102-1103). Those syringes contained Oxycodone. (Vol. XVI, p. 1499). Another syringe was found in the bathroom trashcan, (Vol. XIII, p. 1104), and it contained Oxycodone. (Vol. XVI, p. 1500). A 10-milliliter syringe with a cap was found in a trash bag in her master bathroom closet. (Vol. XIII, p. 1112). That syringe contained Oxycodone. (Vol. XVI, pp. 1500-1501).

Clearly, the evidence showed that Lesa Buchanan was in possession of the Oxycodone, and not Dr. Koulis. It was *her* apartment, *her* medications, and *her* prescription bottles.

Under the second degree murder statute for which Dr. Koulis was charged, the State was required to prove that the defendant distributed the drug, and that because of that distribution, Lesa Buchanan died. The state failed to prove that Ms Buchanan died because of the defendant's distribution of the Oxycodone. Even Dr. Deering testified that he did not know what role the Oxycodone played in Lesa Buchanan's death, nor could he

state with reasonable medical certainty that the Oxycodone killed her. (Vol. XVIII, p. 1854). He could not even give his opinion as to what dosage of Oxycodone was injected into her body, nor could he opine as to whether the level of Oxycodone in her at the time of death, was a usual level for her, or whether it was a high level for her. (Vol. XVIII, pp. 1773-1775). The defendant asserts here that Dr. Deering's chaotic and equivocal testimony of proximate cause was simply insufficient to establish that Ms. Buchanan died from a drug overdose of Oxycodone.

The trial judge further erred in failing to sustain Koulis' motion for judgment of acquittal at the close of all the proof, because, by that time, Koulis had tendered proof from his expert witnesses that the proximate cause of death was not the Oxycodone, but rather, it was the filler in the pill that killed Ms Buchanan. The two defense experts, Dr. Graham and Dr. Goldberger, essentially testified that the Oxycodone did not kill Ms. Buchanan.

Dr Graham, a forensic pathologist, and a professor of pathology at St Louis University, and Chief Medical Examiner for the city of St. Louis, (Vol. XIX, p. 1949), opined that Ms. Buchanan's death was not consistent with a death due to the overdose of Oxycodone. (Vol. XIX, p. 1966-1967). Graham testified that in his opinion, Ms. Buchanan died from her intravenous injections of crushed-up pills over a long period of time, which caused damage to her lungs. He testified that what "pushed her over the edge," was that final injection of a pill, probably containing Oxycodone. The filler material precipitated some of the acute changes which caused her to die suddenly. He specifically opined that the Oxycodone itself played no role in Ms. Buchanan's death.

(Vol. XIX, p. 1973). Further, Dr. Graham did not agree with Dr. Deering's opinion that the cause of death was from an acute combined multiple drug overdose. (Vol. XIX, p. 1969).

Dr. Goldberger, Professor of toxicology at the University of Florida in the College of Medicine, president of the American Academy of Forensic Scientists, and Editor-in-Chief of *The Journal of Analytical Toxicology*, (Vol. XIX, pp. 2009-2011), opined that Dr. Deering's opinion of the cause of death, an acute combined multiple drug overdose, was incorrect. The Alprazolam and the Hydrocodone could not have been a factor to establish the cause of death because it was found only in the urine and not in Ms. Buchanan's blood. (Vol. XIX, p. 2018). Dr. Graham also disagreed with Dr. Deering's opinion that Ms. Buchanan died from an acute combined multiple drug overdose. (Vol. XIX, p. 1969).

The evidence was insufficient to establish that Koulis distributed Oxycodone. *State v. Cribbs*, 967 S.W.2d 773, 782-783 (Tenn.,1998). Thus when we get to an analysis of the lesser offenses, the same "factual predicates" cannot aid the state in establishing the elements of criminally negligent homicide.

C.

Count two of the indictment charged Dr. Koulis with reckless homicide. Reckless homicide is a reckless killing of another. Tenn. Code Ann. § 39-13-215 (1997). To prove reckless homicide, the State was required to show that Koulis recklessly killed Ms. Buchanan. Tenn. Code Ann. § 39-13-215(a). Recklessly means that a person acts recklessly when the person is aware of, but consciously disregards, a substantial and

unjustifiable risk that the alleged victim will be killed. (emphasis added) The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint. *State v. Page*, 81 S.W.3d 781, 790-93 (Tenn.Crim.App. 2002); Tenn. Code Ann. § 39-11-106(a)(31). "A person is reckless when he is aware of but consciously disregards a substantial and unjustifiable risk that …. a certain result will occur." *See* Tenn. Code Ann. § 39-11-302(c) (1997).

Initially, the State was required to prove that Koulis acted recklessly. As addressed earlier, since there was no proof by the State that Koulis acted with any criminal agency, there could be no proof that he acted recklessly. There was no evidence presented by the State, in its case-in-chief, or at the end of all the proof, that Koulis gave Lesa Buchanan the Oxycodone or injected her with it. Because there was no proof of any act on the part of Koulis, there could be no conviction of reckless homicide or, for that matter, any crime.

The definition of "reckless" refers to a person who acts recklessly. Tenn. Code Ann. § 39-11-302(c). Further, in Tennessee, a defendant would be guilty of reckless homicide if "he consciously created and consciously disregarded a substantial and unjustifiable risk that [the victim's] death would be the result of his conduct." (emphasis added). *State v. Carlos Demetrius Harris*, 2001 WL 9927, filed at Knoxville on Jan. 4, 2001, unpublished. There was no evidence presented by the State that Koulis consciously created a substantial risk of death.

Simply put, there was insufficient evidence at the conclusion of all the proof to sustain a conviction for second degree murder and reckless homicide. When the evidence is insufficient to support a conviction, the trial judge has no alternative but to direct a verdict of acquittal. *Mathis v. State*, 590 S.W.2d 449 (Tenn. 1979) Therefore, Koulis asserts that the trial court should have granted his motion for judgment of acquittal at the end of all the proof.

D.

The jury convicted Dr. Koulis of criminally negligent homicide. As noted earlier the appropriate inquiry here on appeal is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 2789 (1979). Because the State's case lacked any proof that Koulis supplied Ms. Buchanan with the controlled substance, or injected her with the drug, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The judgment must be reversed and, because of evidentiary insufficiency, dismissed.

In order to convict Koulis of criminally negligent homicide, the State was required to prove that Koulis was guilty of criminal negligence as defined in Tenn. Code Ann. § 39-11-302, and was required to prove that it was *his* criminally negligent acts or omissions, which were the proximate cause of death. State v. Owens, 820 S.W.2d 757, 760 (Tenn.Crim. App.1991).The State failed as to all the requirements.

1. THE STATE FAILED TO PROVE CRIMINAL NEGLIGENCE

As to the elements of the offense the judge instructed the jury:

CRIMINALLY NEGLIGENT HOMICIDE

Any person who commits criminally negligent homicide is guilty of a crime.
For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:
(1) that the defendant's conduct resulted in the death of the alleged victim; and
(2) that the defendant acted with criminal negligence.
T.R. Volume 5, page 620

It is now well settled that criminally negligent homicide is a "result-of-conduct offense." *State v. Page*, 81 S.W.3d 781, 790-92 (Tenn. Crim.App.2002). Criminal negligence is defined as follows:

> "Criminal negligence" refers to a person who acts with criminal negligence with respect to … the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that …. the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint. Tenn. Code Ann. § 39-11-302(d) (1997).[3]

[3] This passage properly focuses only on the "result-of-conduct" definition of criminal negligence as it relates to the offense of criminally negligent homicide. As will be addressed in issues 6 and 7 the judge erroneously charged the jury that Koulis could also be convicted if he were aware "of a substantial and unjustifiable risk that the circumstances exist." Criminally negligent homicide has no "circumstances-surrounding-conduct" element. *State v. Page*, 81 S.W.3d 781, 790-92 (Tenn. Crim.App.2002). For all we know the verdict could have rested on this erroneous portion of the instruction. We cannot be certain, because the *mens rea* elements were charged in the disjunctive and the judge refused the defendant's unanimity instruction.

In order to prove criminal negligence, the State was required to show that Dr. Koulis *caused* some risk that resulted in Ms. Buchanan's death and that Dr. Koulis lacked the awareness of the risk that caused harm to her, but that he should have been aware of it. *State v. Butler*, 880 S.W.2d 395, 398 (Tenn.Crim.App. 1994).

The risk involved in the instant case was either the supplying of Oxycodone to Ms. Buchanan, or the injection of Oxycodone into Ms. Buchanan's vein. If the State could show that Dr. Koulis failed to perceive the dangers of supplying Ms. Buchanan with Oxycodone, or injecting Ms. Buchanan with the Oxycodone, when he should have been aware of that danger, and that his failure to perceive the risk was a gross deviation from the standard of care of the ordinary person, then the evidence would have been sufficient to sustain a conviction for criminally negligent homicide.

It is important that we address what risk Dr. Koulis failed to perceive since it must be a risk that he created so as to render him criminally responsible. The evidence at trial clearly showed that Dr. Koulis perceived the risk that injecting crushed pills could cause death. He told Ms. Buchanan on at least two separate occasions that injecting crushed pills could kill her; once, in August of 2004, when he caught her injecting a crushed pill in Chicago, (Vol. XXIII, pp. 2578), and again in July of 2005, when he caught her injecting crushed pills in her apartment in Franklin, Tennessee. (Vol. XXIII, p. 2632).

In order to sustain a conviction for criminally negligent homicide, the State was required to prove that Dr. Koulis failed to perceive a risk that he should have perceived. Tenn. Code Ann. § 39-11-106(a)(4); see also *State v. Owens*, 820 S.W.2d 757, 760 (Tenn.Crim.App.1991); *State v. Jones*, 151 S.W.3d 494, 499 (Tenn.,2004.). Here while

he was certainly aware of the risk, Dr. Koulis did not create the risk and indeed, took steps to caution Ms. Buchanan against the risks she was creating herself. Because the evidence in the instant case was insufficient to meet the perception-of-risk criteria under Tenn. Code Ann. § 39-11-106(a) (4) the conviction for criminally negligent homicide must be dismissed.

2. THE STATE FAILED TO PROVE THE DEFENDANT'S ACTS OR OMISSIONS WERE NEGLIGENT

Dr. Koulis asserts that his conduct was not negligent, and that the State failed to prove that he *acted* in any manner to constitute negligence. In Tennessee cases of criminally negligent homicide, a defendant must have acted in some way to cause the victim's death. For example, in *State v. Gillon*, 15 S.W.3d 492 (Tenn. Crim. App. 1997) the defendant-driver was convicted of criminally negligent homicide by disregarding a stop sign, crossing three lanes of traffic, and crashing into another vehicle, killing a passenger in his vehicle.

Conversely, in the leading case of *State v. Owens*, 820 S.W.2d 757, 760 (Tenn. Crim.App.1991), the defendant-mother of a seriously handicapped child was accused of not following the instructions of the child's primary care physician, which allegedly led to the death of the infant child. The Court held this was not criminally negligent conduct.

Tennessee courts have sustained convictions for criminally negligent homicide only where a "risk is of such a nature and degree that injury or death is likely and foreseeable." *State v. Gillon,* 15 S.W.3d 492, 498 (Tenn.Crim.App.1997). For example, in *State v. Goodwin,* 143 S.W.3d 771, 775 (Tenn.2004) a jury found the defendant guilty

of criminally negligent homicide where the defendant had left a cocked shotgun in the woods fifty feet behind a house in a crowded neighborhood. Two children found the gun; it accidentally discharged, killing one child and severely injuring the other. Concluding that the defendant had "exercised extremely poor judgment in his handling of an inherently dangerous weapon," the Tennessee Supreme Court affirmed the judgment. 143 S.W.3d at 779; see also *State v. Clifton*, 880 S.W.2d 737, 743 (Tenn.Crim.App.1994) (defendant guilty of criminal negligence in firing a gun in the general direction of another person); *State v. Butler*, 880 S.W.2d 395, 396-97 (Tenn.Crim.App.1994) (defendant guilty of criminal negligence in accidental shooting).

In *State v. Owens*, 820 S.W.2d 757, 760-61 (Tenn.Crim.App.1991), this Court stated that criminal negligence would exist only if a person failed to perceive that his or her conduct presented a substantial and unjustifiable risk to another and such failure constituted a gross deviation from the standard of care that an ordinary person would exercise under the circumstances. In *State v. Slater*, 841 S.W.2d 841, 842 (Tenn.Crim.App.1992), this court emphasized that the statutory definition specifies that the issue of whether the risk should have been perceived or was perceived and then ignored must be viewed from "the accused person's standpoint." In *State v. Jones*, 151 S.W.3d 494, 499 (Tenn.,2004) the defendant-mother of an infant child was accused of negligently holding her child on her lap instead of properly restraining the child in a child safety seat. The child was killed in a crash when the airbag came out and struck the child. The Court held this was not criminally negligent conduct and the conviction was vacated.

In our case, there was no evidence that Koulis did anything other than being present in the apartment with Ms. Buchanan. There was no direct or circumstantial evidence that he acted in some manner, either by supplying Ms. Buchanan with the Oxycodone or by injecting her with crushed Oxycodone.

On the supply side, there was no proof presented at trial that Dr. Koulis supplied Ms. Buchanan with the Oxycodone. When he flew down from Chicago for that fatal Fourth of July weekend, he brought with him, a blue gym bag and his shaving kit. Those items were confiscated in Ms. Buchanan's apartment by the police. Both items were searched. There was no Oxycodone found in his blue gym bag, which was his carry-on luggage which he brought with him on the airplane from Chicago. (Vol. XVIII, p. 1783).

The police also searched Koulis' apartment in Chicago on July 15, 2005. (Vol. XIV, pp. 1248-1249). No Oxycodone was found there either.

Conversely, the police did find a half pill of Oxycodone in a prescription bottle of Hydrocodone in Ms. Buchanan's bathroom trash can. THAT prescription bottle was prescribed to Lesa Buchanan by someone other than Koulis. (Vol. XIII, pp. 1103-1104). Two syringes containing Oxycodone were found on a closet shelve in a trash bag in Ms. Buchanan's bathroom. (Vol. XIII, pp. 1102-1103). Another syringe containing Oxycodone was found in Ms. Buchanan's bathroom trashcan. (Vol. XIII, p. 1104). In short, none of the Oxycodone found in this case was connected in any way with Koulis. All of it was found in Ms. Buchanan's apartment and there was no evidence that any of it was supplied by Dr. Koulis.

On the injection side, there was no evidence that Koulis injected Ms. Buchanan with crushed Oxycodone. In fact, the only evidence of Ms. Buchanan being injected with Oxycodone came from Koulis who testified that *she* injected the drug herself. He testified that, on their first night together over that Fourth of July weekend, he walked in on Ms. Buchanan as she was sitting on the toilet seat, preparing to inject herself. (Vol. XXIII, p. 2632). Dr. Koulis testified that she was sitting on the edge of the toilet seat, maneuvering her body in preparation for the injection. (Vol. XXIV, p. 2637). Koulis testified that she self-injected a second time on the morning of Sunday, July 3, 2005 when he walked in on her in the bathroom after she had already given herself a shot. (Vol. XXIV, p. 2639). The third time she self-injected was later that same day. (Vol. XXIV, pp. 2639 - 2644).

The State attempted to prove circumstantially, through the testimony of Dr. Bruce Levy and Dr. Thomas Deering, that the injections had to be done by Koulis because it would have "been very difficult" for Ms. Buchanan to have self-injected in an alignment of three shots on each side of her groin area. However, Dr. Levy, the State Medical Examiner, testified that "People addicted to drugs will access any veins they can." (Vol. XXVI, pp. 2876).

The defense introduced the testimony of its own expert pathologist, Dr. Michael Graham, on the issue of whether Ms. Buchanan could have self-injected in the groin area. When asked if he occasionally saw drug users inject in the groin area, Dr. Graham said yes. He testified that people inject in the groin area to conceal their activity from others. (Vol. XIX, pp. 1975-1976).

Dr. Koulis asserts here that the testimony of the State experts did not prove that Dr. Koulis injected her, or, for that matter that she injected herself. It could have been either way. But "could have been" is not the test. Where a case is entirely circumstantial, as is this case here, then before the jury would be justified in finding Koulis guilty, the jury must find that all the essential facts are consistent with the hypothesis of guilt, as that is to be compared with all the facts proved; the facts must exclude every other reasonable theory or hypothesis except that of guilt and the facts must establish such a certainty of Koulis' guilt as to convince the mind beyond a reasonable doubt that Koulis is the one who committed the offense. *Hardin v. State*, 355 S.W.2d 105 (1962).

The facts here do not exclude the possibility that Ms. Buchanan injected herself. The trial testimony was that she certainly knew how to inject herself because Koulis taught her how to do it several years earlier when they both were experimenting with drugs. (Vol. XXIII, p. 2522). Even the State's own witness agreed that Ms. Buchanan self-injected intravenously for years as far back as 2002 including bilateral groin areas: see the testimony of Detective Bobby Pate:

> Q. [by Mr. Raybin] I understand that. But some of [these injections] she did herself?
>
> A. [Detective Bobby Pate] I assume, yes.
>
> Q. There's no assumption; that's what [Ms. Buchanan] told you?
>
> A. Yes.
>
> (Vol. XXI, p. 2268)

The proof also showed that Ms. Buchanan self-injected crushed pills in Chicago a year earlier. (Vol. XXIII, pp. 2574-2577). Finally, as stated above, she self-injected in her groin area three times over the Fourth of July, 2005. From this testimony, it cannot be concluded that the facts have excluded every other reasonable theory or hypothesis except that of guilt. Because the evidence was insufficient to show that Koulis' conduct (his act) was criminally negligent, this Court must reverse and dismiss the conviction.

3. THE STATE FAILED TO PROVE ANY CRIMINAL OMMISSION

Dr. Koulis contends that the proof showed that he did nothing to "act" negligently. However, he is mindful that one can still be convicted of criminally negligent homicide for his omissions as well as his acts, if that omission is the proximate cause of death. *State v. Owens,* 820 S.W.2d 757 (Tenn.Cr.App.1991). To be the proximate cause of death, the defendant's omission has to be that cause which, in natural and continuous sequence, unbroken by any independent intervening cause, produces the death and without which the death would not have occurred. *State v. Farner,* 66 S.W.3d 188, 203 (Tenn., 2001.). No rational trier of fact could find beyond a reasonable doubt that, had Koulis not failed to stop her from injecting herself, she would not have died. She could have made him leave, then injected herself, or she could have gone elsewhere and injected herself. The opportunities for her to inject herself, even had Koulis stopped her, were endless.

4. THE STATE FAILED TO PROVE ANY CRIMINAL CAUSATION

Causation is an element of every homicide offense. *State v. Farner,* 66 S.W.3d 188, 203 (Tenn.,2001) In other words, the cause of death must be the proximate result of

the defendant's acts or omissions. The defendant's unlawful act or omission need not be the sole or immediate cause of the victim's death. *Letner v. State*, 156 Tenn. 68, 299 S.W. 1049, 1051 (1927). A defendant is responsible for the death of a victim if the direct cause of death results naturally from his or her conduct. The same is true if the direct cause is an act of the deceased himself reasonably due to defendant's unlawful conduct. *State v. Farner*, 66 S.W.3d 188, 203 (Tenn.,2001.)

If the direct cause of the death is an act of the victim or third party, the defendant may still be liable if the act of the victim or third party is a natural and probable result of the defendant's conduct. See *Letner*, 299 S.W. at 1051 (upholding a conviction where the defendant shot into the river near a small boat which so frightened the deceased that he jumped overboard and was drowned); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App.1974) (upholding a conviction of defendant who was drag-racing a second automobile and that second automobile collided with the victim's car, killing the victim). There is no proof that Koulis caused Ms. Buchanan's death by act or omission.

Recall that theirs was a long-distance relationship. Ms. Buchanan's cause of death flowed naturally from long-term self-injection of crushed pills containing oxycodone and/or hydrocodone which she acquired herself. This caused severe, documented lung and heart damage over a long period of time prior to her death. The *State's* assistant medical examiner, Dr. Deering said, "We have somebody, who by definition is abusing drugs. They are crushing up a tablet and they are injecting whatever dose of that tablet is into the blood stream directly with whatever effects that it can have." (Vol. XVIII, pp. 1773). Deering testified that the filler in her lungs could have been there for weeks,

months or years. He could not give an opinion as to who made the injection marks in Ms. Buchanan's groin area. (Vol. XVIII, p. 1807).

The *State's* medical examiner, Dr. Levy, said he could not state whether Lesa Buchanan was murdered. Dr. Levy testified that he has never had a case like this that he could recall. Dr. Levy said he could not tell the jury who injected Ms. Buchanan. She was certainly physically capable of injecting herself as was certainly possible for someone else to have injected her. (Vol. XXVI, pp. 2914-2918).

Dr. Levy testified that Lesa Buchanan died a sudden death. He stated that there was clearly objective evidence to support Koulis' eyewitness account of the events. (Vol. XXVI, p. 2922).

5. THE STATE FAILED TO PROVE DUTY OF CARE

Lastly, Koulis contends that he had no duty of care to stop Ms. Buchanan from injecting herself. The general duty of care does not include an affirmative duty to act for the protection of another, "unless the defendant 'stands in some special relationship to either the person who is the source of the danger, or to the person who is foreseeably at risk from the danger." *Turner,* 957 S.W.2d at 818 (citing *Bradshaw,* 854 S.W.2d at 871); *Biscan v. Brown*, 160 S.W.3d 462, 496-497, (Tenn., 2005).

Some examples of special relationships include parent and child, employer and employee, and innkeeper and guest. *Biscan, supra* at 497. However, not all of these "socially recognized relations" are always held to be a special relationship where the law imposes a legal duty on one for the benefit of the other. For example, the parent-child

relationship usually is one such special relationship because the parent has control over the actions of the child.

The issue of control by one over the other, under Tennessee law, may give rise to a legal duty by one for the other. *See, e.g., Lett v. Collis Foods, Inc.,* 60 S.W.3d 95 (Tenn.Ct.App.2001); *Marr v. Montgomery Elevator Co.,* 922 S.W.2d 526 (Tenn.Ct.App.1996). *Puckett v. Roberson,* 183 S.W.3d 643 (Tenn.Crim.App. 2005). In *Nichols v. Atnip,* 844 S.W.2d 655 (Tenn.App.,1992), a case involving the parents of an adult teenage driver son, the parents and their son were sued by the parents of a boy who was hit and killed by the alleged negligent driving of the adult teenage driver. The Court held that the parents of the teenage driver were not liable and had no duty to protect the public from the negligent driving of their son because they had no right of control over their son's car or his driving after he became an adult. The fact that the teenager's parents might have prevented their son from driving on prior occasions did not give rise to a continuing duty to control their adult son's driving.

In our case, Koulis and Ms. Buchanan were engaged to be married but that relationship is not recognized as a special relationship for which the law would impose a duty of care on Koulis, to protect Ms. Buchanan from harm. Clearly, Koulis had no right of control over her actions, one criterion in Tennessee for imposing such a legal duty. In other words, the special relationship doctrine does not recognize the relationship between Dr. Koulis and Lesa Buchanan as a relationship which constitute the basis for the imposition of a legal duty to protect her from harming herself. Because Koulis was under

no legal duty to prevent Ms. Buchanan from injecting herself, he cannot be held criminally liable for her actions.

In *People v. Beardsley*, 150 Mich. 206, 213-214, 113 N.W. 1128 (Mich. 1907), the defendant spent a few days with another woman while his wife was away. This woman drank liquor to excess, consumed morphine pills, and then she died. The defendant was convicted of manslaughter. The Supreme Court of Michigan, in reversing the trial court held that the relationship between the defendant and this woman did not create a legal duty of care for the defendant to protect the woman from harm. The man may have had a moral obligation to help her, but he was under no legal duty to keep her from harm.

The same rule applied to Dr. Koulis in his relationship with Ms. Buchanan. As pointed out in *Beardsley* – in a now quaint analysis – had the defendant and the woman been two men spending a drunken weekend together, the one would have had no legal duty to protect the other from harm. Why then should the defendant have a legal duty to protect the woman from harm just because she was a female? Since Dr. Koulis was under no legal duty to protect Ms. Buchanan from harm, his omission to stop her from injecting herself may have been a moral obligation, but it was not a legal duty. His conviction should be dismissed.

6. THE STATE FAILED TO PROVE A "WEB OF GUILT"

It is a well-established rule of law that a criminal offense may be established exclusively by circumstantial evidence. *Marable v. State*, 203 Tenn. 440, 451-54, 313 S.W.2d 451, 456-57 (1958); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App.),

per. app. denied (Tenn.1990); *State v. McAfee*, 737 S.W.2d 304, 306 (Tenn.Crim.App.1987); *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App.1987. However, before an accused can be convicted of a criminal offense based exclusively upon circumstantial evidence, the evidence "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." *State v. Crawford*, 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971). In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." *Crawford*, 225 Tenn. at 484, 470 S.W.2d at 613; *Cooper*, 736 S.W.2d at 129.

While there is no accounting for why a jury may convict where there are only "suspicious facts," our courts have not hesitated to reverse and dismiss convictions where the proof did not measure up to the constitutionally mandated standard. See, *State v. Hix*, 696 S.W.2d 22 (Tenn. Crim. App. 1984) (overruled on other grounds by, *State v. Messamore*, 937 S.W.2d 916 (Tenn. 1996)) (convictions dismissed where it could not be determined which parent caused the injury); *State v. Laster*, 748 S.W.2d 437 (Tenn. Crim. App. 1987) (the defendant's conviction for arson was dismissed where the only proof was that the fire commenced in cups in the jail and that the defendant was within five feet of the fire; there is no evidence to show what caused the fire); *State v. Cooper*, 736 S.W.2d 125 (Tenn. Crim. App. 1987) (evidence was insufficient to sustain female defendant's conviction for possession of controlled substances based on the fact that she appeared to be a guest at the co-defendant's trailer where the drugs were seized); *State v.*

Anderson, 738 S.W.2d 200 (Tenn. Crim. App. 1987) (evidence that the defendant was in possession of a stolen chainsaw one year after the theft, standing alone, was insufficient to support a conviction for concealing stolen property); *State v. Davis*, 798 S.W.2d 268 (Tenn. Crim. App. 1990) (evidence was insufficient to convict a defendant of involuntary manslaughter where defendant had neglected child on other occasions, but there was no evidence of mother's neglect on the occasion when the child drowned in a pool a short time after having been left in the care of the child's grandmother; extensive discussion of involuntary manslaughter and intent); *State v. Bordis*, 905 S.W.2d 214 (Tenn. Crim. App. 1995) (evidence insufficient to support first degree murder conviction in connection with death of three year old child as a result of malnutrition and dehydration); *State v. Wilson*, 924 S.W.2d 648 (Tenn. 1996) (evidence that the defendant fired shots into a house two days after having a confrontation with the owner was insufficient to establish aggravated assault absent evidence that the defendant knew that the house was occupied at the time); *State v. Transou*, 928 S.W.2d 949 (Tenn. Crim. App. 1996) (insufficient evidence that the defendants were in possession of drugs; mere presence of person in area where drugs are discovered is not, alone, sufficient to support a finding that the person possessed the drugs).

In every homicide prosecution, "it is settled law in all jurisdictions that criminal agency must be shown beyond a reasonable doubt; it cannot rest upon conjecture or speculation." *Fine v. State*, 422, 246 S.W.2d 70 (Tenn. 1952). Here there is nothing in the proof that Dr. Koulis *did* anything by act or omission which proximately caused death, or

in the words of the statute, that any unlawful conduct on Dr. Koulis' part "resulted" in Lesa Buchanan's death.

In our case, the facts and circumstances contained in the record are not "so closely interwoven and connected that the finger of guilt is pointed unerringly at the defendant." Here, no rational trier of fact could have found the elements of criminally negligent homicide beyond a reasonable doubt. Accordingly Dr. Koulis respectfully requests this Court reverse his conviction and dismiss the case.

2. The Search of the Franklin, Tennessee apartment – in which Dr. Koulis had a possessory interest – violated the Search and Seizure provisions of the Tennessee and United States Constitutions because the affidavit to the search warrant of July 13, 2005 was insufficient to show probable cause and because the July 13, 2005 search was the product of earlier, unconstitutional warrantless searches.

There were multiple searches conducted in this case. The detectives searched Ms. Buchanan's residence,[4] in Franklin on numerous occasions between July 4 and July 13, 2005 and searched Dr. Koulis' residence in Chicago, Illinois, once on July15, 2005.[5] Virtually all of the physical evidence in this case was derived from these searches. Thus, the validity of searches is contested here on appeal.

[4] Although Ms. Buchanan lived in the Franklin residence, Dr. Koulis paid the rent and some of the utilities and he stored some of his possessions there. The trial judge ruled Dr. Koulis had standing to contest the searches. . TR. volume 5, page 641.

[5] The July 15, 2005 search of the Chicago apartment is the subject of the next argument.

A.

Shortly after Ms. Buchanan's death on July 4, 2005, two Franklin detectives, Johnson and Cisco, conducted a warrantless search and seizure of the Buchanan's apartment at approximately 8:30 pm that same evening. (Vol. III, p. 156). Detective Johnson testified that they were able to enter the apartment when " *I contacted security and they opened the apartment , yes, sir.* " (Vol. III, p. 152). Detective Johnson believed just the two of them entered the apartment to conduct the search. (Vol. III, p. 152-153). Detective Johnson and Cisco conducted a room–by-room search at that time. (Vol. III, p. 153). They gathered the evidence and marked it as to where they found it. (Vol. III, p. 158).

It is undisputed that there was no warrant for the search on July 4, 2005 because the prosecutor advised the police that "since Dr. Koulis didn't live there," no warrant was necessary. (Vol. III, p. 165).

A second warrantless search of Ms. Buchanan's apartment was conducted two days later, on July 6, 2005. Detective Johnson and Cisco went back to the apartment, entered it without a search warrant, and tampered with the two cell phones contained in the apartment. (Vol. III, p. 371, Exhibit #2). The Trial Court held that this search was invalid because there were no exigent circumstances and because there were competing interests on the issue of consent, the defendant refusing consent, and Tonya Buchanan – Ms. Buchanan's sister – granting consent. (T.R. Vol. 3 pp. 361-363).

A third search of the Franklin apartment occurred on July 13, 2006, this time, with a warrant. Although there was very little found of evidentiary value during this search,

the Trial Court held that this search was valid because the affidavit to this search warrant, after excluding the tainted portions, still established probable cause to search. The judge held that evidence obtained by the unlawful warrantless searches would have been "inevitably" found during the warrant search of July 13, 2006 and thus all the evidence was admissible. T.R.. Volume 5, page 641.

B.

At the suppression hearing, Koulis moved to suppress evidence found on July 4, 5, and 6, and 13, 2005 as a result of unlawful searches. Koulis argued that the searches of the apartment on July 4 and 6 were illegal because they were warrantless searches conducted on a residence without probable cause. *Horton v. California*, 496 U.S. 128, 133 n. 4, 110 S.Ct. 2301, 2306, n. 4, 110 L.Ed.2d 112 (1990). The search on July 5 was a search, or a viewing, of a sex tape held in evidence at the Franklin police Department. That viewing was unlawful because the police did not have a search warrant to view the tape and the tape itself was the fruit of the earlier illegal search on July 4. *Stanley v. Georgia*, 394 U.S. 557, 569, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969); *Walter v. U.S.*, 447 U.S. 469, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980); *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Finally, Koulis alleged that the search conducted on the apartment on July 13, 2005, was unlawful because the affidavit lacked probable cause and that much of the information contained in the affidavit was derived from the prior illegal searches of July 4, 5 and 6. *State v. Henning*, 975 S.W.2d 290, 297 (Tenn. 1998); *United States v. Acklen*, 690 F.2d 70 (6th Cir. 1982).

A written order was entered on October 9, 2007. T.R. volume 5, page 641 *and appears in the appendix at page 56.* As to the warrantless searches, the trial judge held that, because they were conducted without a warrant, the searches on July 4, 5, and 6, were illegal. (Vol. VII, pp. 510-514.). Because much of the information in the affidavit was derived from these earlier, unlawful warrantless searches the trial judge redacted the search warrant of July 13, 2005: specifically, paragraphs seven, eight, nine and ten, and the following phrase in paragraph thirteen, as follows:

> …and the variety of controlled substances and medications observed in Buchanan's apartment.

However, even after the redactions, the trial judge held that the search warrant affidavit was still sufficient to establish probable cause and that the evidence secured by the warrant was admissible. (Vol. VII, pp. 510-515; TR. volume 5, page 641; appendix page 56). The judge invoked the inevitable discovery doctrine and allowed evidence from the July 4, 5, and 6 warrantless searches to be admitted. Dr. Koulis respectfully disagrees and asserts here that the search warrant affidavit was insufficient to establish probable cause after the redactions and that to apply the inevitable discovery doctrine here would render the Fourth Amendment meaningless.

C.

It might be helpful to the Court if the Order were reviewed at this time since it also contains the full and redacted portions of the affidavit at issue. See TR. volume 5, page 641. The full search warrant is at page 45 in the appendix to this brief; the judge's order and the redacted portions of the affidavit appear in the appendix at page 56. Dr. Koulis

asserts two arguments as to why the evidence was improperly admitted as a result of the July 13, 2005 search warrant: (1) the affidavit to the search warrant lacked probable cause; and (2) the search was the product of earlier, illegal searches conducted without a warrant which is not salvaged by the inevitable discovery doctrine.

Probable cause for the issuance of a search warrant exists when facts and circumstances demonstrated by an underlying affidavit are sufficient to warrant a person of reasonable caution to believe that certain items are the fruits of illegal activity and are to be found at a certain place. *State v. Norris*, 47 S.W.3d 457, 468 (Tenn.Crim.App.,2000.). The Franklin affidavit does not meet that criteria.

When looking at the affidavit as a whole, it is clear that many of the remaining paragraphs were only informational as to the events that took place during the investigation of this case. However, they lacked any probative value as to probable cause to search the apartment for illicit drugs. For example, the first paragraph merely established the affiant's experience as a police officer, and had nothing to do with probable cause. The next three paragraphs referred to the activities conducted by Officer Mark Sanchez of the Franklin Police Department, on July 4, 2005, after he responded to Koulis' 911 call. These paragraphs do not relate any facts and circumstances from which a magistrate could reasonably determine that drugs would be found in Ms. Buchanan's apartment. Sanchez testified at the suppression hearing that he was on a medical call, which by his own words meant "No crime at all". (Vol. X, pp. 832-833).

The next two paragraphs also contained no information of probative value as to probable cause. For example, paragraph five states as follows:

> Detective Cisco observed several marks on the body of Buchanan immediately following the incident consistent with injection sites on the left and right groin areas. Dr. Ragle at the Williamson Medical Center Emergency Room told Detectives Cisco and Becky Johnson that the observed marks were needle marks. Lesa Buchanan was subsequently pronounced dead at the Williamson Medical Center.

Detective Cisco's observation of needle marks was not probative of probable cause given her lack of experience as a law enforcement officer at the time. She testified that on July 4, 2005, she had only one month's experience as a detective, (Vol. XIII, p. 1045), and did not have a lot of experience with injecting drugs; she testified that Detectives Johnson and Anderson had more experience with detective work than she did. (Vol. XIV, pp. 1269-1270).

Detective Cisco testified that because she was a new detective, she had never seen a case like this before. (Vol. XIV, pp. 1265-1266). A court must consider the rational inferences and deductions that a trained officer may draw from the facts and circumstances known to him-inferences and deductions that might well elude an untrained person, *State v. Yeargan*, 958 S.W.2d 626,at 632 (Tenn.1997). However, Koulis argues that when an officer lacks experience, a court may consider that lack of experience when evaluating that officer's observation. Koulis asserts that because Detective Cisco had very limited experience as a detective at the time, her observations were peripherally probative.

Dr. Ragle's information – mentioned in the affidavit – also lacked probative value for probable cause to search the apartment. His observation was conclusory. The affiant did not explain why his observation was probative of probable cause to search the

apartment. There was no explanation as to whether the needle marks were indicative of a crime. When an affidavit provides conclusory statements without stating facts as to why there is a substantial basis for concluding that a search warrant would uncover evidence of wrongdoing, the warrant fails to establish probable cause and thus is void. *State v. Norris,* 47 S.W.3d 457, 469 (Tenn.Crim.App.,2000.).

Paragraph six states as follows:

> Initial toxicology reports following the autopsy of Lesa Buchanan by State of Tennessee Medical Examiner, Dr. Thomas Deering, indicated the presence of methadone, barbiturates, opiates and benzo in her body.

This paragraph is the conclusion of an initial toxicology report. The affiant offers no explanation as to why this report is probative of probable cause to search Ms. Buchanan's apartment. It does not state whether the drugs in the report are illicit, nor does it not state whether any of these drugs were the cause of death. There is nothing in the remainder of the Franklin affidavit that follows up on this finding. Probable cause is defined as "a reasonable ground for suspicion, supported by circumstances indicative of an illegal act." *State v. Henning,* 975 S.W.2d 290, 294 (Tenn.1998). There is no information here that would raise a reasonable suspicion that illicit drugs would be found in Ms. Buchanan's apartment.

The next four paragraphs were redacted by the Trial Court as fruit of the poisonous tree. (Vol. VII, pp. 510-515).

Paragraph eleven –which was not redacted – states as follows:

> Lesa Buchanan's mother, Peggy Roberts, Lesa Buchanan's biological sister, Tara Bentley, and Tonya Buchanan, now married to Steve

> Buchanan (Lesa Buchanan's ex-husband) have all been interviewed by your affiant. During the course of these interviews, your affiant learned that Koulis and Buchanan have been involved in a long distance relationship for more than five years. Koulis told Detective Cisco that he currently resides in Chicago. According to statements made by the family members, Lesa Buchanan's habit was to document and retain any communication between Lesa Buchanan and Koulis. Roberts and Bentley advised your affiant that Koulis gave Buchanan a large diamond engagement ring prior to Mother's Day 2005. Koulis also told Detective Cisco that he recently purchased a ring for Buchanan. Dr. Ragle at the Williamson County Medical Center did not observe the ring at the hospital, nor did Detective Johnson who was at the hospital.

This paragraph is typical of the paragraphs surviving the redaction in the Franklin affidavit. It is purely informational and has no probative value as to probable cause. For example, the affiant does not state which family members told him this, or how these family members knew this information. The affiant does not explain whether these family members had documentation of such communications, and if they did, whether the information in these documents contained evidence of a crime or that contraband would be found in the apartment. The affiant does not state why her documents and retained communications would lead to a reasonable suspicion that illicit drugs would be found in her apartment. The affidavit does not state whether other documents have been found in that apartment that are probative of probable cause. There is no explanation as to why the victim's habit of documenting communications between herself and Koulis was probative of illicit drugs in the apartment. Many women document communications between themselves and their significant other without revealing evidence of a crime. Without

more, this information has no probative value as to probable cause and is simply irrelevant.

Koulis contends that the mention of the engagement ring in this paragraph is nothing more than a red herring, and is simply irrelevant. It has absolutely nothing to do with the search for drugs in Ms. Buchanan's apartment. The fact that neither Dr. Ragle nor Detective Johnson noticed the ring at the hospital is meaningless as to probable cause for a search. There is no explanation as to how or why the ring's absence in the emergency room is probative of illicit drugs being found in the apartment. This entire paragraph is strictly informational without any substantive or probative value as to probable cause for a search.

Paragraph twelve states as follows:

> According to Detective Bobby Pate of the Boone County, Kentucky Sheriff's Office, Christ P. Koulis is a convicted felon in Kentucky. Koulis was convicted of possession of a controlled substance, possession of drug paraphernalia, first and second degree possession of a controlled substance, and second degree wanton endangerment following an incident in which Lesa Buchanan was hospitalized in intensive care in 2002 after being injected with various controlled substances. Koulis is a medical doctor by profession; however, according to the disciplinary Action Report from the State of Tennessee Department of Health, Koulis permanently surrendered his Tennessee medical license in April 2002.

There are two reasons why this paragraph should not have been used in determining probable cause to search Ms. Buchanan's apartment: (1) the information is not reliable, and (2) the information is stale.

The information is not reliable because Deputy Pate was not an officer engaged in the common investigation of Koulis. Generally, an officer's hearsay information in an affidavit is deemed reliable. *State v. Smotherman*, 201 S.W.3d 657, 663 (Tenn.,2006.). However, Koulis asserts that the presumption of reliability is given only when the officer is actively working or engaged with the affiant in the common investigation. In the leading case of *United States v. Ventresca*, 380 U.S. 102, 110, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), hearsay information was provided to the affiant/officer by investigators of the Alcohol and Tobacco Division of the Internal Revenue Service. They, along with the affiant, had been investigating the defendant's possession and operation of an illegal distillery in his home. These members of the IRS supplied information in the affidavit that they smelled the odor of fermenting mash on two occasions when they walked in front of the house, that they saw large amounts of sugar being taken to the defendant's house on several occasions, and that they saw five-gallon cans being taken from an automobile to the defendant's house.

The Supreme Court held that this hearsay information from these police officers was deemed reliable because it came from officers "who have been assigned to this investigation" and made reports orally to the affiant "of their observations and investigation". From this case came the now often-quoted phrase, "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *Ventresca*, 380 U.S. at 111.

Tennessee follows the ruling in *Ventresca,* but the defendant contends that it still requires that the officer supplying the hearsay information be an officer engaged in the present investigation of the defendant. For example, in *State v. Wine,* the Tennessee affiant/officer was investigating the defendant for being a suspected drug dealer. An out-of-state Florida investigator telephonically contacted the Tennessee officer to let him know that a shipment of cocaine was about to enter Tennessee from Florida. That information was deemed reliable because, "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *United States v. Ventresca,* 380 U.S. 102, 111, 85 S.Ct. 741, 747, 13 L.Ed.2d 684 (1965); *State v. Wine,* 787 S.W.2d 31, 33 (Tenn.Cr.App.,1990.). The same rule applies to information from out-of-state officers. *See Vermilye v. State,* 584 S.W.2d 226, 230 (Tenn.Crim.App.1979).

In *State v. Brown,* the informant officers were members of the Metro Narcotics Squad who were working with the affiant in a "common investigation". The *Brown* court held that the information from the Metro Narcotics Squad was deemed reliable, specifically ruling that members of the Metro Narcotics Squad were fellow officers working with the affiant in a common investigation. *State v. Brown,* 638 S.W.2d 436, 437 (Tenn.Cr.App.,1982.) (*emphasis added*). In each of these Tennessee cases, the magistrate was legally able to presume the reliability of the hearsay information because the officer supplying that information was engaged in the common investigation, and in each case, the officer was presently active in that common investigation.

However, in the instant case, Deputy Bobby Pate was not an officer presently engaged or active in the common investigation of Koulis; therefore, his reliability could not be presumed reliable. *Smotherman, supra* at 663. Deputy Pate was not a citizen informant, one who is a "witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety" and who "does not expect any gain or concession in exchange for his information". *State v. Williams*, 193 S.W.3d 502, 507 (Tenn.,2006.).

If Deputy Pate had been a citizen informant, his information would have been presumed reliable under the *Melson* test. *State v. Melson*, 638 S.W.2d 342, 356 (Tenn.1982). Because Deputy Pate was not an officer engaged in the common investigation of Koulis, and because he was not a citizen informant, the issue then became whether his information was sufficient for probable cause under the two-prong test of *Jacumin.* Under *Jacumin*, a magistrate issuing a search warrant must be informed of both (1) the basis for the informant's knowledge, and either (2)(a) a basis establishing the informant's credibility or (2)(b) a basis establishing that the informant's information is reliable. *State v. Jacumin*, 778 S.W.2d 430 (Tenn.1989); *State v. Stevens*, 989 S.W.2d 290, 293-294 (Tenn.,1999.). Probable cause may not be found until both prongs are independently considered and satisfied. *State v. Ballard*, 836 S.W.2d 560, 562 (Tenn.1992).

Koulis insists that Deputy Pate's information did not satisfy the "basis of knowledge" prong of *Jacumin*. In other words, the affidavit did not state how Pate knew about the information in this paragraph. It does not state whether Pate's basis of

knowledge was derived from the fact that he was the investigating officer in Kentucky in 2002, assigned to the case involving the same Defendant and victim as is involved in the present case, or whether Deputy Pate derived his knowledge by hanging around the police station or courthouse and listening to other officers talk about the case. Since Deputy Pate's basis of knowledge was never established, his information never satisfied the basis of knowledge prong under *Jacumin*; therefore, a determination was never made as to whether his information was sufficient to establish probable cause for the search. Hearsay information in an affidavit is constitutionally required to be reliable; otherwise, it cannot be used to establish probable cause. *State v. Jacumin,* 778 S.W.2d 430 (Tenn.1989); *State v. Henning*, 975 S.W.2d 290, 294 (Tenn.,1998.). It was error to consider Deputy Pate's information for a determination of probable cause in the Franklin affidavit.

Koulis would also assert that Deputy Pate's information was stale and should not have been considered in the evaluation of probable cause. An affidavit must allege that the contraband sought to be seized or the illegal activity in question exists at the moment the search warrant is to be issued. *State v. Curtis,* 964 S.W.2d 604, 616 (Tenn.Crim. App.1997). Pate's information was over three years old, and too old for a consideration that his information would be probative of finding illegal drugs in Ms. Buchanan's apartment on July 13, 2005. Although there is no statute to fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Deputy Pate's information did not meet

that test. Whether the proof meets this test must be determined by the circumstances of each case. *State v. Thomas*, 818 S.W.2d 350, 357 (Tenn.Cr.App.,1991.). Pate's information did not state that either Ms. Buchanan or Koulis kept contraband drugs in their residence, or that Koulis was the one who injected Ms. Buchanan, or that Ms. Buchanan was injected with a controlled substance. It did not state whether Koulis was supplying Ms. Buchanan with illicit drugs. There was nothing in Pate's information that was probative of illicit drugs being found in the victim's apartment or that the illegal activity in question existed at the moment the search warrant was to be issued, as required under *Curtis*. *Curtis*, *supra* at 616.

Further, Pate's information was too old to have any probative value here. Tennessee courts have held affidavits too old when they contained information that was two months old, *State v. Starks*, 658 S.W.2d 544 (Tenn. Crim. App. 1983, between two and three months old, *State v. Stephenson*, 15 S.W.3d 898 (Tenn. Crim. App. 1999), and six months and eighteen months, *State v. Curtis*, 963 S.W.2d 604 (Tenn. Crim. App. 1997), The time period in the instant paragraph, over three years old, was older than any reported Tennessee case holding an affidavit stale. Based on that factor alone, this information should not have been considered in establishing probable cause.

The last paragraph of the surviving portions of the affidavit states as follows:

> Your affiant believes that based on Koulis' past history, including the prior hospitalization of Buchanan under similar circumstances, the suspicious nature of Lesa Buchanan's death, and the variety of controlled substances and medications observed in Buchanan's apartment and found during initial toxicology tests on Buchanan's body, that property and other evidence of a crime will be found in the above-referenced apartment, garage and vehicle.

This paragraph is wholly conclusory. The affiant does not explain why he believes that Koulis' past history or the prior hospitalization of Buchanan would lead to a finding of illicit drugs in Buchanan's apartment on July 13, 2005. He does not explain how the prior hospitalization of Buchanan is similar to her hospitalization in Franklin, or why he considers Ms. Buchanan's death as suspicious, especially in light of the testimony of the detectives that they were investigating a medical call. This paragraph contains the redacted phrase, and without it, the phrase, "and found during initial toxicology tests on Buchanan's body." makes no sense and has no probative value as to probable cause. The affiant does not explain how he determined that, "that property and other evidence of a crime will be found in the above-referenced apartment, garage and vehicle ". He simply concludes that they will be found. When an affidavit provides conclusory statements without stating facts as to why there is a substantial basis for concluding that a search warrant would uncover evidence of wrongdoing, the warrant fails to establish probable cause and thus is void. *State v. Norris*, 47 S.W.3d 457, 469 (Tenn.Crim.App.,2000.).

"The sufficiency of a search warrant affidavit is to be determined from the allegations contained in the affidavit alone." *State v. Henning*, 975 S.W.2d 290, 297 (Tenn.1998). Probable cause for the issuance of a search warrant exists when facts and circumstances demonstrated by an underlying affidavit are sufficient in themselves to warrant a person of reasonable caution to believe that certain items are the fruits of illegal activity and are to be found at a certain place. *State v. Melson*, 638 S.W.2d 342, 357 (Tenn.1982). The reviewing standard is whether the magistrate had a substantial basis for

concluding that a search warrant would uncover evidence of wrongdoing. *State v. Jacumin*, 778 S.W.2d 430, 432 (Tenn.1989). In the instant case, a magistrate reviewing the remaining paragraphs of this affidavit cannot make a determination that a substantial basis exists for concluding that a search warrant would uncover evidence of wrongdoing in Lesa Buchanan's apartment. *State v. Norris*, 47 S.W.3d 457, 468 (Tenn. Crim. App.,2000.); therefore, this affidavit is insufficient as to probable cause, and all items found as a result of this search and all prior searches, should have been suppressed.

D.

As noted earlier, although the judge found that the warrantless searches of the apartment on July 4 and 6 and the July 5 examination items removed from the apartment were illegal because they were warrantless searches conducted on a residence without probable cause. However, the judge allowed the evidence to be introduced at the trial because of the inevitable discovery doctrine. Koulis argues that the inevitable discovery doctrine did not apply to this case for two reasons: (1) the compelling fact as found by the trial court, namely, the "sealing" of the apartment, was actually an illegal seizure itself, and (2) contrary to the Trial Court's ruling that the apartment was sealed during the relevant period from July 4, 2005 through July 13, 2005, Koulis contends that it was not sealed during that period.

The inevitable discovery doctrine is an exception to the exclusionary rule which allows unlawfully obtained evidence to be admitted at trial if the government can prove by a preponderance that the evidence inevitably would have been acquired through lawful means. *United States v. Kennedy*, 61 F.3d 494, 497 (6th Cir. 1995). The Trial Court held

that the State was able to prove that the illegally obtained evidence from the prior three illegal searches would have been admissible due to the compelling fact that the apartment was sealed during the relevant times from July 4, 2005, until July 13, 2005, and would have been inevitably discovered on that date via the "otherwise" valid search warrant. (Vol. VII, pp. 517-518). Specifically, the Court held:

> The factual record in the case before the Court here today establishes that the apartment was sealed, was locked and sealed when Ms. Buchanan was taken to the hospital on July the 4th of 2005. The record further establishes that the apartment remained sealed during the additional days. The record further states that Dr Koulis was specifically informed that he could not return to the apartment.
>
> Accordingly, based upon that information and that testimony, the Court finds that there are compelling facts establishing that disputed evidence would have inevitably been discovered. The requirements set forth in the United States vs. Kennedy had been satisfied based upon the factual record in this case. (Vol. VII, pp. 517-518).

The Trial Court's ruling is erroneous. The fact that the apartment "was locked and sealed" *and* "remained sealed during the additional days..." and that... "Dr Koulis was specifically informed that he could not return to the apartment," was not proof of a compelling fact, but rather, was proof of an illegal seizure. See *Revis v. Meldrum*, 489 F.3d 273, 287 (6th Cir. 2007), and *Soldal v. Cook County, Ill.*, 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (citing *Katz,* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of

privacy in the involved place. *Rakas*, 439 U.S. at 143.). Recall that the Trial Court held that Dr. Koulis had an expectation of privacy in the apartment. (Vol. VII, p. 509).

The proof in the instant case demonstrated a seizure of the apartment. That proof consisted of armed guards stationed at the door to the apartment with orders not to allow anyone inside, (Vol. III, pp. 137-139), alleged changing of the lock on the front door, (Vol. IV, pp. 264-265), and Dr. Koulis being ordered by the detectives to stay away from the apartment, without being told when he could return, (Vol. III, pp. 180-181). This proof was similar to the proof in *Revis* and *Soldal*, which held that a seizure of the residence took place. The issue here then is not whether a seizure took place, but rather, whether that seizure was reasonable, since the Fourth Amendment forbids only "unreasonable" searches and seizures. *Segura v. U.S.*, 468 U.S. 796, 806 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984).

The leading case on the reasonableness of a seizure of a residence is *United States v. McArthur*. This case enumerated four criteria for a reasonable seizure: (1) police must have probable cause to believe that the residence contains evidence of a crime; (2) police must have exigent circumstances; (3) police must make reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and (4) the police must impose the restraint for a limited period. *United States v. McArthur*, 531 U.S, 326-327, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001).

McArthur involved a fight between a husband and wife which resulted in the wife calling the police for assistance at the residence while she packed to leave. After she packed and came back outside the residence to where the police were standing, she told

the police that her husband had drugs inside the residence. One of the officers immediately left to obtain a search warrant. When the other officers saw the defendant step out onto his porch, they asked him for his consent to search the residence. When he refused, they would not allow him to go back inside unless one of the officers accompanied him. It was this police action that the defendant claimed was an illegal seizure, and that the drugs were found as a result thereof.

The *McArthur* Court held that, although a seizure of the residence did take place, as the defendant alleged, it was not an unreasonable seizure because the police had probable cause to search the residence, had exigent circumstances that the defendant might destroy evidence, made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy by not entering the residence and searching it until they obtained a warrant, and imposed their restraint for a limited period of time, two hours, the time it took to obtain a warrant with diligence. *McArthur*, 531 U.S. at 331-333. Therefore, the Court held that the police seizure of the residence was reasonable and the evidence found as a result thereof was admissible. *McArthur*, 531 U.S. at 333.

However, in light of the criteria if *McArthur*, the seizure of the apartment by the Franklin police was unreasonable. First, the police did not have probable cause to seize the apartment. There was no testimony at the suppression hearing by the police that they had a reasonable suspicion that illicit drugs could be found in the apartment. To the contrary, the police testified that they were not investigating a criminal matter, but rather, a medical call. For example, Officer Sanchez testified that there was nothing said between him and Dr. Koulis at the apartment during the officer's response to the 911 call,

that would have led him to believe that the victim's death was a homicide. (Vol. X, pp. 845-846). Sanchez testified that he responded to the 911 call as a medical call. (Vol. X, p. 832). When asked what he meant by a medical call he testified: "No crime at all". (Vol. X, p. 833).

Detective Johnson testified that during her interview with Dr. Koulis at the hospital, she was just gathering information for the medical examiner. (Vol. X, p. 760). She testified that the only reason the apartment was designated a crime scene was not that she believed a crime had been committed there, but was only because it was routine practice for the Franklin Police Department to handle an unexplained or unexpected death as a homicide until proven otherwise. (Vol. X, pp. 790-791). Whereas the police in *McArthur* had probable cause to believe drugs were inside the residence prior to the seizure, the Franklin police did not. The first criterion under *McArthur* for reasonableness of a seizure was not met in the instant case.

The second criterion was the existence of exigent circumstances. In the instant case, there were no exigent circumstances. The Trial Court noted in its ruling on the suppression motion that, as to the search on July 4, 2005, "The State has conceded that there are no exigent circumstances for this particular search". (Vol. VII, p. 512). Unlike *McArthur*, where the police had exigent circumstances, namely, that if they allowed the defendant back into the residence alone, he would attempt to destroy the evidence, *McArthur*, 531 U.S. at 332, the Franklin detectives did not have any exigent circumstances. The second criteria under *McArthur* for reasonableness of a seizure was not met in the instant case.

The third criterion was that the police make reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy. The Franklin detectives, however, made no effort whatsoever to reconcile their law enforcement needs with the demands of personal privacy. In fact, these two detectives displayed their strong-arm tactics immediately upon first contact with Dr. Koulis at the hospital, by ordering him to stay away from the apartment. (Vol. III, pp. 180-181). Not only was he told to stay away, the detectives did not tell him for how long he was to stay away. Their restraint was indefinite. Their complete disregard for his privacy rights was further evidenced when they would not allow him to even retrieve any of his personal belongings from inside the apartment.

Dr. Koulis testified that, at that time, all his personal belongings, his credit cards, his cell phone, his suitcase, his shaving kit, his medications, his clothes and his airline ticket were inside the apartment. (Vol. V, p. 314). The detectives' "stay away" order came at great monetary and emotional expense to Dr. Koulis. He testified that once he was dispossessed from the apartment, he had to call his sister in Chicago to fly to Franklin and bring him some money. (Vol. XXV, pp. 2825-2826). She flew down to Franklin because she could tell how upset he was. (Vol. X, p. 727). When she met with him, he did not have his cell phone or any clothing other than the clothing he was wearing. (Vol. III, pp. 191- 192). Dr. Koulis and his sister had to stay in a hotel room because he was not allowed to return to the apartment. (Vol. III, p. 193).

Whereas the *McArthur* police showed reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy, by not searching the residence

until a warrant was obtained, by not arresting the defendant, and by not evicting him from his residence, but only accompanying him inside when he wanted to go inside, the Franklin police showed utter contempt for law and order and Dr. Koulis 's privacy rights by evicting him indefinitely from the apartment without probable cause, by not allowing him to take his personal belongings so that he could have money with him and a cell phone to take care of his business, by posting an armed guard at the apartment door so as not to allow anyone inside, (Vol. III, p. 174), and by entering the apartment without a warrant and without probable cause. (Vol. III, p. 165-167), The third criteria under *McArthur* for reasonableness of a seizure was not met in the instant case.

The fourth criterion was that the police impose their restraint for a limited period of time. In *McArthur*, the restraint was for a two-hour period, long enough for an officer at the scene, to leave the scene, diligently obtain a search warrant, and return to the scene for the search of the residence. *McArthur*, 531 U.S. at 332-334. The Supreme Court held:

> We have found no case in which this Court has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time.
> *McArthur*, 531 U.S. at 334.

However, in the instant case, the Franklin police imposed their restraint indefinitely, without probable cause, and without a search warrant. For a warrantless search to stand, law enforcement officers must be responding to an unanticipated exigency rather than simply creating the exigency for themselves. *U.S. v. Chambers*, 395 F.3d 563, 566 (6th Cir. 2005). As stated earlier, there were no exigent circumstances in this case, therefore, the warrantless seizure of the apartment by the Franklin police was

unreasonable. When evidence is uncovered in violation of the Fourth Amendment, that evidence should be suppressed. *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 E.Ed.2d 599 (1984).

Koulis next contends that the inevitable discovery doctrine did not apply to the instant case because there was no proof that the apartment was sealed on July 4, 2005, and remained sealed for the additional days. In fact, the only proof of sealing, was that the apartment was closed to everyone on July 4, until 4:00 pm. After that time, there was no proof that the apartment was sealed.

On July 4, 2005, Officer Chaffin of the Franklin Police Department testified that he was ordered to stand guard at the door of the apartment to make sure no one entered the apartment. (Vol. III, pp. 137-138). He stood guard for thirty minutes to an hour, until 4:00 pm. At that time, he was relieved by Officer Steve Small. (Vol. III, pp. 138-139). Officer Small never testified. There was no further proof in the record that a guard was posted at the door, or that police tape was present during the relevant times from July 4 until July 13, 2005, or that a lock was changed by the Franklin police. There was no proof that any other security measure was taken by the Franklin police to ensure that no one entered the apartment or tampered with the evidence.

There was no proof offered by the State to support the Court's ruling that the apartment was sealed during the relevant times. In fact, the proof showed that the apartment was not sealed. For example, when Detectives Johnson and Cisco entered the apartment on July 4 and 6, there was no testimony from either that an armed guard stood at the door, or that they had to go through police tape in order to get inside. Johnson's

investigative summary also fails to mention any of these security measures when they went inside. (T.R. Vol. III, p. 370). As to the lock on the door, Tonya Buchanan testified that she was told that the Franklin police had the lock on the door changed, (Vol. IV, pp. 264-265), but no one from the police department confirmed that on the record. In short, there was no proof that the apartment was sealed and locked from July 4, 2005 after 4:00 pm, through July 13, 2005.

However, there was proof that the apartment was not sealed during the relevant times. Clearly, the apartment seal was broken when these two detectives re-entered the apartment on July 6, 2005. At that time, Detective Johnson located some cell phones with pictures on them. (Vol. XV, p. 1295). She wrote in her Investigative Summary as to what happened next:

> On entering the apartment, we examined it and nothing looked out of place. We then picked up the cell phone in the living room and the cell phone in the bedroom. Both phones had a pornographic photo as the screen saver. We then looked at both phones and determined that the phone in the bedroom belonged to Koulis. We then looked at the photos on the phone. There was one photo of Ms Buchanan in risqué clothing and dated 07-04 at approximately 1330 hrs. We attempted to forward the photos to Detective Cisco's email address but were unable to due to the lines being overloaded. We attempted to reset the phone but could not get it to work. We then contacted Officer Grant and he explained how to reset the phone. We then left the phone and left the apartment.
> (Vol. III, p. 371, Exhibit #2)

If the purpose of sealing the apartment was to keep people from disturbing the crime scene and tampering with the evidence, that purpose was defeated when Cisco tampered with the cell phones.

A second entry occurred when, at some point in time prior to July 13, 2005, the Alara Apartment's manager allowed a maintenance man to go inside the apartment front door, and make sure the sliding glass door in the back was secured so that no one could access the apartment on the third floor. (Vol. XVII, pp. 1622-1623) (T.R. Vol. III, p. 373). There was no proof that he was an agent of the police, or how long he was inside, or what he did when he was inside. Clearly, the seal to the apartment was broken at that time.

Because there were at least two separate entries into the apartment after July 4, 2005, the ruling of the Trial Court that the apartment had been sealed from July 4, and remained sealed during the additional days, (Vol. VII, p. 518), was erroneous. The State has the burden of proving by a preponderance, that the apartment was sealed during the relevant times. *Kennedy, supra* at 497. Based on the evidence presented as to the "sealing" of the apartment, the State failed to meet its burden, therefore, the inevitable discovery doctrine did not apply to the instant case

Finally, Koulis argues that the Trial Court misapplied the inevitable discovery doctrine. The *Kennedy* court instructed that, for the inevitable discovery doctrine to apply, the actions of the police must be viewed at the instant before the illegal search, and then determine what would have happened had the police acted lawfully. *United States v. Kennedy*, 61 F 3d 494, 498 (6th Cir. 1995). There, the court determined that the instant before the unlawful search was the instant just before the police opened the black suitcase. The court next determined that, had the police acted lawfully, they would have sought a search warrant to open the suitcase; however, the Government conceded that it

was unlike that a search warrant would have been obtained. In that event, the police would have been required to return the suitcase to Northwest Airlines unopened. Northwest would then have opened the suitcase pursuant to its lost luggage policy in an effort to locate its owner. During this process, the airlines would have discovered the cocaine. The Fourth Amendment would not have been violated at that instant because it did not apply to the search by a private entity such as the airlines. The airlines would have turned the cocaine over to the police, who would have inevitably discovered the illicit drug. *Kennedy*, 61 F 3d at 500.

Using the *Kennedy* rationale in the instant case, the trial court was required to view the police activity at the instant before the unlawful search, then determine what the police would have done had they acted lawfully. Here, the Franklin police would have tried to obtain a search warrant, however, just as in Kennedy; it was unlikely that a search warrant could have been obtained. Therefore, the police would have been required to return possession of the apartment back to Koulis and the lessees on the apartment lease agreement.[6] At that point, there was nothing in the nature of a historical fact, such as a routine police procedure that would have led to the discovery of a drug, *United States v.*

[6] What the government neglects to confront is that by having "standing" to contest the searches, Dr. Koulis had a continuing constitutional interest in the apartment. In *R. D. S. v. State*, 245 S.W.3d 356 (Tenn. 2008) our Supreme Court said that the basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The reasonableness of a search centers around the context within which it takes place: "Reviewing courts should balance the need to search against the invasion which the search entails, thereby weighing an individual's legitimate expectations of privacy and personal security on one hand and the government's need for effective methods to deal with breaches of public order on the other." It is not difficult to strike the balance in this case since we are dealing with the home. Dr. Koulis' expectation of privacy and use of the apartment were being violated for over a week while the police conducted endless warrantless searches; it is difficult to reconcile the ineveitable discovery doctrine with the duration of the violations here.

Bowden, 240 F. App'x 56 (6th Cir. Aug. 24, 2007), or such as was present in *Kennedy* with the lost luggage policy of the airlines, that could inevitably demonstrate in such a compelling way that operation of the exclusionary rule would be a mechanical and entirely unrealistic bar, preventing the trier of fact from learning what would have come to light in any case. *United States v Kennedy*, 61 F 3d 494, 499 (6th Cir. 1995). Without such a historical fact, the inevitable discovery doctrine would not have applied to the instant case.

E.

The Fourth Amendment is intended to protect people against unreasonable searches or seizures *U.S. v. Leon*, 468 U.S. 897, 935, 104 S.Ct. 3430, 82 L.Ed.2d 677 (1984). "In their zeal to preserve and protect, however, our police officers must respect the fundamental constitutional rights of those they are sworn to serve." *State v. Hayes*, 188 S.W.3d 505, 518 (Tenn. 2006).

Under both the United States and the Tennessee Constitutions, a search or seizure conducted without a warrant, as was done in the instant case, is presumed unreasonable. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Simpson*, 968 S.W.2d at 780; *State v. Watkins*, 827 S.W.2d 293, 295 (Tenn.1992). Evidence seized as a result of a search or seizure conducted without a warrant must be suppressed unless that search or seizure was conducted pursuant to one of the recognized exceptions to the warrant requirement. *State v. McClure*, 74 S.W.3d 362, 370 (Tenn.Crim.App.,2001). There were no exceptions in this case.

If the State fails to establish that it adhered to the constitutional mandate of the Fourth Amendment and Article I, Section 7, the resulting search warrant of July 13 is invalid since it constitutes fruits of the initial unlawful search. *State v. Wert*, 550 S.W.2d 1 (Tenn. Crim. App. 1977). Therefore, the evidence found as a result of the illegal seizures of the apartment by the Franklin police should have been suppressed. Given that virtually all of the state's physical evidence was the product of the unlawful searches there could be no suggestion that the search was harmless. Accordingly a new trial should be granted.

3. The search of Dr. Koulis' apartment in Chicago, Illinois, conducted on or about July 15, 2005 violated the Search and Seizure provisions of the Tennessee and United States Constitutions because the affidavit to the search warrant was insufficient to show probable cause and because the July 15, 2005 search was the product of earlier, unconstitutional warrantless searches.

A.

Dr. Koulis filed a motion to suppress evidence seized during the July 15, 2005search of his Chicago apartment. T.R. 3, page 332. Dr. Koulis alleged that the Chicago affidavit lacked probable cause for the search and was the product of the earlier unlawful Tennessee searches. During his argument here, Dr. Koulis will refer to two separate affidavits: (1) the Franklin affidavit, sworn out in support of the search warrant for Ms. Buchanan's apartment in Franklin, Tennessee, on July 13, 2005, (hereinafter referred to as the "Franklin affidavit"), and (2) the Chicago affidavit, sworn out in support of the search warrant for Koulis' apartment in Chicago, Illinois, on July 15, 2005, (hereinafter referred to as the "Chicago affidavit") A copy of the Chicago search warrant

appears as exhibits 1 and 10 to the hearing of February 12, 2007 *and also appears in the Appendix to this brief at page 64. The Franklin affidavit is at page 45 in the Appendix.* Both affidavits were sworn to by Detective Eric Anderson of the Franklin Police Department.

The testimony from the suppression hearing begins at Vol. VIII, p. 543 and establishes the following facts. Subsequent to the July 13, 2005 search of the Franklin apartment, Detective Anderson and Cisco traveled to Chicago, Illinois on July 15, 2005, in order to conduct a search of Dr. Koulis' apartment. The Chicago search warrant was issued on July 15, 2005, at approximately 6:45 pm. (Vol. VIII p. 545).

Anderson admitted during the suppression hearing on the Chicago search, that there was information in the Chicago affidavit that related to the illegal search of the Franklin apartment on July 4, 2005, (Vol. VIII, pp. 550-551), and he also admitted that the list of 53 items marked as exhibit 1 was actually recovered from the illegal July 4th search and not from the July 13, 2005 search, as claimed in the affidavit. (Vol. VIII, pp. 553), Although Anderson called the error an oversight on his part, he could not give the name of one prescription controlled substance found during the July 4th search, that had the name Dr. Koulis on it which he had falsely asserted in his affidavit. (Vol. VIII, pp. 553-557).

Despite such glaring inconsistencies in the testimony of Detective Anderson regarding the search of Dr. Koulis' apartment, and the evidence found as a result of prior searches, the trial judge upheld the Chicago search. See written order appearing at TR Vol. 4, page 450 and at page 76 of the Appendix. The judge ruled that all information

derived from the prior illegal searches on July 4, 5, and 6, 2005, was fruit of the poisonous tree and must be redacted but that the surviving portions still established probable cause. (Vol. X. p. 707). In addition, he ruled that Detective Anderson never intended to deceive the magistrate when obtaining the Chicago warrant in information contained in the Franklin warrant . (Vol. X. p. 708). Koulis respectfully disagrees.

It might be helpful to the Court if the affidavit to the Chicago warrant were reviewed again at this time; *it appears in the appendix to this brief at page 64*. Koulis argues here that there are four reasons as to why this affidavit lacked probable cause: (1) the affidavit contained information that was fruit of the poisonous tree; (2) the affidavit contained intentionally false information; (3) the affidavit contained stale information; and (4) the affidavit contained conclusory information.

B.

Information contained in a search warrant affidavit which itself was discovered illegally, is the fruit of the poisonous tree and cannot be considered in determining probable cause for the issuance of a search warrant. *Bewley v. State*, 208 Tenn. 518, 347 S.W.2d 40 (1961); *State v. Bowling,* 867 S.W.2d 338 (Tenn.Crim.App.1993). *See United States v. Reyes,* 922 F.Supp. 818 (S.D.N.Y., 1996); *State v. Curtis*, 964 S.W.2d 604, 615 (Tenn.Crim. App. 1997). Paragraph 13 of the affidavit to the Chicago warrant contains information which itself constitutes fruit of the poisonous tree. In pertinent part, this paragraph states as follows:

> Among the items seized during the execution of that search warrant were numerous containers of professional samples of drugs, and prescription bottles containing controlled substances, such as Hydrocodone.

> A list of the items seized during the execution of that search warrant is attached hereto as Exhibit # 1. Many of the seized prescription vials that contained controlled substances had labels that identified Christ Pete Koulis as the prescribing physician.

All of this information was derived from the illegal search in Tennessee conducted on July 4, 2005. For example, the 53 items listed in Exhibit 1 was actually found during the July 4 search. Detective Anderson admitted that during his testimony at the suppression hearing. (Vol.VIII, p. 553). The Trial Court redacted this information from the Franklin affidavit because it was the fruit of that prior illegal search. (Vol. VII, p. 514-516). This Court must do the same in reviewing the validity of the remaining portions of the Chicago warrant.

Paragraph 14 also contains information that is fruit of the poisonous tree. In pertinent part, this paragraph states as follows:

> ... it has been established that Koulis and Buchanan engaged in sexual activities including sado-masochistic practices, use of sexual paraphernalia, and narcissism, with the use of videotaping and still photography. During the execution of the search warrant on July 13, 2005, several 8 mm videotapes were uncovered from the apartment. I spoke to my partner Detective Stephanie Cisco who viewed one of the tapes. Det. Cisco told me that the tape that she viewed clearly showed Buchanan engaging in sadomasochistic sexual activities with Christ Pete Koulis. During these acts, Buchanan is seen holding a gauze pad on an injection site on her inner thigh. During the tape, Buchanan appeared to be in a narcotic-induced stupor as if she was under the influence of a barbiturate or opiate.

Koulis argues that this paragraph in its entirety is the product of the illegal search of July 4, 2005. The information contained herein was gained by Detective Cisco when

she viewed the sex tape shortly after it was found on July 4. The Trial Court ruled that, since the tape itself was a product of an invalid search, the viewing of the tape by Detective Cisco was also invalid. (Vol. VII, p. 512). *Wong Sun v. United States*, 371 US 471 ,488, 83 S.Ct.407, 9 L.Ed.2d 441 (1963).

Paragraph 16 also contained information derived from the same illegal search. The objectionable portion of that paragraph states as follows:

> A bag belonging to Koulis was recovered that contained drug samples, a Visa credit card belonging to Koulis, and a receipt/stub from a Hertz rental car from the Nashville airport dated 06/15/05.

Koulis argues that this bag was first discovered and inspected by Johnson and Cisco during the illegal search on July 4, 2005. At the suppression hearing, Cisco testified that after she and Detective Johnson entered the apartment on that day, they saw a duffle bag with clothing for maybe two days. Detective Cisco described it as being "like a sport duffel bag." (Vol. III, p. 180). This bag was the fruit of the poisonous tree. *Wong Sun, supra,* 371 U.S. at 488.

Paragraph 19 is the last paragraph containing illegally obtained information. The objectionable portion of this paragraph states as follows:

> Based upon the foregoing, your affiant believes that probable cause exists for the search of Koulis' residence which is located at 165 N. Canal Street, Apt. 1113, Chicago Illinois, and that narcotics, drug paraphernalia, and mediums for delivery of such drugs, digital, audio, and video recordings and devises with which to make such recordings,

Koulis argues that the items Anderson expected to find in Koulis' Chicago apartment, namely the narcotics, drug paraphernalia, and mediums for delivery of such drugs, digital, audio, and video recordings and devises with which to make such recordings, were all discovered during the illegal search on July 4. There was no proof that the search on July 13, 2005 uncovered any narcotic drugs or sex tapes. (*See* log for search warrant on July 13, 2005. T.R. Vol. I, p. 9-10). The information in paragraph 19 was clearly gained as the result of an illegal search. *Wong Sun*, supra, 371 U.S. at 488. Without the challenged information the affidavit is devoid of probable cause and the warrant is void.

C.

Koulis asserts as well that the Chicago affidavit lacked probable cause since the affidavit contained intentionally false information. An affidavit, sufficient on its face, may be impeached only by showing "(1) a false statement made with intent to deceive the Court, whether material or immaterial to the issue of probable cause," or "(2) a false statement, essential to the establishment of probable cause, recklessly made." *State v. Little*, 560 S.W.2d 403, 407 (Tenn.1978). In the instant case, Detective Anderson made a false statement with intent to deceive the Court.

Detective Anderson swore out two affidavits, the Franklin affidavit and the Chicago affidavit. Both documents illustrate his intent to willfully deceive the court, because in neither, does he mention the warrantless search conducted on July 4, 2005. This was the initial warrantless search of the apartment which produced the the so-called sex video and related drugs and needles and a host of other physical items.

Anderson, being an experienced law enforcement officer (see paragraph 2 of Complaint for Search Warrant), knew or should have known that a magistrate would not consider information which was itself the fruit of the poisonous tree, for a determination of probable cause to search a residence. Therefore, he omitted the fact that his crucial evidence was found during an illegal search, thereby assuring that he would obtain the search warrant with this illegal information. The fact that he omitted the date of the illegal search twice, in two separate affidavits, was proof of his willful intent.

The record showed that Anderson reviewed the investigative summary of Detective Johnson on Tuesday, July 12, 2005, the day before he sought and obtained the search warrant for the Franklin apartment. (T.R. Vol. III, p. 372). The information in that summary told him that, upon the advice of assistant district attorney Derek Smith, the police could enter and search the apartment without obtaining a search warrant. The officers made a warrantless entry and illegally conducted a complete search and seizure of the Franklin apartment on July 4. (T.R. Vol. III, p. 370).

That search uncovered the needles and syringes, which contained the crushed Oxycodone that allegedly killed Ms. Buchanan, the cell phone which contained the most recent pictures of Ms. Buchanan prior to her death, and the sex videotape. Yet when one reads either affidavit, Anderson omits the date of the illegal search on July 4, 2005. Anderson was asked about this omission at the suppression hearing:

> Q: Is there anywhere in the search warrant, affidavit, that you mention that police seized, actually took away from the apartment in Franklin on or about the 4th of July, that they actually took property to the police department?

A: In the Chicago search warrant?

Q: Yes. Do you mention that at all?

A: Not specifically.

Q: And so that's an omission?

A: An omission in what regard?

Q: Omitted, it's not mentioned; is it?

A: Okay.

Q: Is that true?

A: I suppose.

(Vol. VIII, p. 551).

Anderson admitted that he failed to mention the date of the illegal search, yet did mention the search of July 13, 2005, the search in which he procured a search warrant in Tennessee. Koulis argues that this omission was intentional, and the fact that he omitted that information twice, under oath, was proof of his intent to deceive.

Paragraph 13 of the Chicago affidavit contains false statements as follows:

> Among the items seized during the execution of that search warrant were numerous containers of professional samples of drugs and prescription bottles containing controlled substances, such as Hydrocodone. A list of the items seized during the execution of that search warrant is attached hereto as Exhibit 1. Many of the seized prescription vials that contained controlled substances had labels that identified Christ Pete Koulis as the prescribing physician.

At the suppression hearing, Anderson admitted that this paragraph was false. He testified that, even though this paragraph states that the 53 items in Exhibit 1 were found during the search on July 13, 2005, (Vol. VIII, p. 550-552), in actuality, they were found during the illegal search on July 4, 2005. (Vol. VIII, p. 553). More importantly, Anderson knew that those 53 items were not found on July 13, because that search uncovered only 42 items, and Anderson was the officer who prepared the return for that evidence. (Vol. VIII, p. 554). Anderson claims that the reason for this mistake was an "error in documentation". (Vol. VIII, p. 555). He claims that the wrong list (Exhibit 1) got attached to the wrong affidavit.

However, Dr. Koulis submits that this "mistake" was unlikely because Anderson and Detective Cisco were both present in Chicago when they applied for the search warrant. (Vol. VIII, pp. 591-592). Detective Cisco was present when the 53 items in Exhibit 1 were found on July 4. Anderson was present when the 42 items were found on July 13. Each detective knew which items were found during each search. If Anderson failed to notice that the 53 items in Exhibit 1 were attached to the wrong warrant, surely Detective Cisco would have noticed, because she was also there when the warrant was obtained. Koulis asserts that the only reason that this "error in documentation" got past both detectives was because both detectives allowed it to occur. The deceit was intentional.

Koulis asserts here that paragraph 13 of the Chicago warrant contains several intentionally false statements. One such statement is as follows:

> Many of the seized prescription vials that contained controlled substances had labels that identified Christ Pete Koulis as the prescribing physician.

This statement says that the police found prescription vials with controlled substances in them, and that these vials named Koulis as the prescribing physician. At the suppression hearing, Anderson was asked to name just one controlled substance with Koulis' name on it. Anderson could not do it because in fact no controlled substances found anywhere contained Dr. Koulis' name. (Vol. VIII, pp. 555-556). Anderson "knew" that there were no vials found on July 13, 2005, which contained controlled substances with Koulis' name on it. He "knew" that because he was the officer that made the return on that search warrant. (Vol. VIII, p. 554). Therefore, he was the officer that listed those 42 items in the evidence log for that search. Anderson knew what evidence was found during that search. An inspection of the evidence log for that search shows that no controlled substances were found during that search. (T.R. Vol. I, pp. 9-10). This statement under oath was intentional and it was false.

Another false statement in paragraph 13 states:

> Among the items seized during the execution of that search warrant were numerous containers of professional samples of drugs and prescription bottles containing controlled substances, such a[s] Hydrocodone.

Once again, an inspection of the evidence log for that search shows that no prescription bottles containing controlled substances such a[s] Hydrocodone were found. This statement under oath was also made with intent to deceive.

Paragraph 14 contains false statements as to the date of discovery of the sex tape. That paragraph states, in pertinent part, as follows:

> During the execution of the search warrant on July 13, 2005, several 8 mm videotapes were recovered from the apartment. I spoke to my partner Detective Stephanie Cisco who viewed one of the tapes. Det. Cisco told me that the tape that she viewed clearly showed Buchanan engaging in sadomasochistic sexual activities with Christ Pete Koulis. During these acts, Buchanan is seen holding a gauze pad on an injection site on her inner thigh. During the tape, Buchanan appeared to be in a narcotic-induced stupor as if she was under the influence of a barbiturate or opiate

As stated earlier, that "sex tape" was found during the illegal search on July 4, 2005. Anderson admitted this during his examination at the suppression hearing. (Vol. VIII, p. 561-564). Koulis argues that Anderson intentionally made this false statement in order to procure the Chicago search warrant.

Paragraph 16 contains information regarding the so-called "pro/con" list. That paragraph states in pertinent part:

> Buchanan was known to keep correspondence (written and digital) that corroborated her relationship and activities with Koulis. A written document found in the Franklin apartment listed pros and cons of Lesa Buchanan's relationship with Koulis which said "he gives me drugs" as a con.

Detective Anderson claims that this so-called pro/con list contains the phrase "he gives me drugs". (see Exhibit 3, Motion to Suppress, 2/12/07). He testified at the suppression hearing that those words were so important to him that he put them in quotes to highlight them. (Vol. VIII, p. 567). However, those are not the correct words. The actual phrase states, "You Bought Drugs". Anderson's quote has a different meaning

than the actual quote. In Anderson's quote, the writer states that someone gives him/her drugs, which is consistent with the State's theory that Koulis supplied Ms. Buchanan with the drug that killed her. In the correct phrase, "You Bought Drugs", there is no reference that anyone gave someone drugs. In fact, in this phrase, there is no reference to who "you". It is simply an innocuous statement. When Anderson was asked to explain the discrepancy in the two phrases he said:

> I'm just -- what I'm saying is I'm afraid that information may have been conjoined from other sources. That's the only -- the only explanation that I can give. (Vol. VIII, p. 570).

Koulis argues that Anderson's explanation makes no sense. There is no explanation for misquoting three simple words other than making an intentional misquote.

The false statements in the Chicago affidavit were material. The law is well settled in Tennessee that a fraudulent misrepresentation of a material fact will invalidate a search warrant. *State v. Little*, 560 S.W.2d 403, 406-407 (Tenn. 1978). For this reason, the Chicago affidavit should be held invalid and the evidence found in that search should have been suppressed.

D.

Koulis argues that the Chicago affidavit contained information which dissipated probable cause. Paragraph 11, in its entirety, contains stale information:

> According to Detective Bobby Pate of the Boone County, Kentucky Sheriff's Office, Christ P. Koulis is a convicted felon in Kentucky. Koulis was convicted of possession of a controlled substance, possession of drug paraphernalia, first and second-degree possession of a controlled substance,

> and second degree wanton endangerment following an incident in which Lesa Buchanan was hospitalized in intensive care in 2002 after being injected with various controlled substances. Koulis is a medical doctor by profession; however, according to the Disciplinary Action Report from the State of Tennessee Department of Health, Koulis' license to practice medicine was suspended in April 2002.

Bobby Pate testified that in May of 2002 he was a detective who was working a case involving Buchanan and Koulis in Kentucky. (Vol. XX, pp. 2117-2118). It is the information from that investigation that Pate supplied to Anderson who used it in paragraph 11. This information was three years old, from a Kentucky investigation when Anderson used it in this affidavit to apply for his search warrant in Chicago in July of 2005.

An affidavit must contain information which will allow a magistrate to determine whether the facts are too stale to establish probable cause at the time issuance of the warrant is sought. State v. *Longstreet*, 619 S.W.2d 97, at 99 (Tenn 1981). In *Sgro v. United States*, 287 U.S. 206, 210-211, 53 S.Ct. 138, 85 A.L.R. 108, 77 L.Ed. 260., our high court held that, when a magistrate is considering the time element of the information in the affidavit as to whether or not there is probable cause to search a particular place, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case.

In the instant case, the Defendant argues that it is not reasonable for a magistrate in Chicago to believe that information from a Kentucky case three years old, concerning the

same two people, would furnish probable cause to believe that illicit drugs would be found in Koulis' Chicago apartment on July 15, 2005.

The fact that the information was three years old was enough to keep from using it. Tennessee courts have held affidavits stale when the information was two months old, *State v. Starks*, 658 S.W.2d 544 (Tenn. Crim. App. 1983 , and six and eighteen months old, *State v. Curtis*, 963 S.W.2d 604 (Tenn. Crim. App. 1997), and approximately one month old, *State v. Stephenson*, 15 S.W.3d 898 (Tenn. Crim. App. 1999). In the instant case, the information was older than any reported Tennessee case holding an affidavit stale. For this reason, paragraph twelve should have been redacted and be ignored for the probable cause determination.

E.

Finally**,** Koulis argues that there are several paragraphs containing conclusory statements. Those paragraphs are paragraphs 12, 14, 16 and 19.

Paragraph 12 is entirely conclusory. It states as follows:

> Based upon the foregoing, as well as based on Koulis' past history, including the prior hospitalization of Buchanan under similar circumstances, the suspicious nature of Lesa Buchanan's death, and the variety of controlled substances and medications observed in Buchanan's body, your affiant sought and obtained a judicially authorized warrant to search the premises at 101 Gillespie drive, Apartment 17305, Franklin, TN, as well as a white 199 Acura belonging to Lesa Buchanan. That search warrant was executed on July 13, 2005.

In the first statement, Detective Anderson concludes that there is probable cause for the search because of Koulis' past history; however, he does not state what that past

history is, nor does he state how it relates to probable cause to search his Chicago apartment. He merely concludes that it does.

In the second statement, Anderson concludes that Ms. Buchanan's hospitalization in 2002 was under similar circumstances as that of her present hospitalization, yet he does not state what circumstances he is talking about nor does he state how the two hospitalizations are similar. He just concludes that they are.

In the third statement, Anderson calls Buchanan's death a suspicious death, but never gives an explanation as to why he considers her death suspicious. He merely concludes that it is. In *State v Norris*, 47 S.W.3d 457, 469 (Tenn.Crim.App.,2000.) this Court held that there must be an explanation as to why the observed activity indicates an illegal act. There is no such explanation here.

Paragraph 14 contains the following conclusory statements:

> (1) Koulis and Buchanan engaged in sexual activities including sado-masochistic practices, use of sexual paraphernalia, and narcissism, with the use of videotaping and still photography.
>
> (2) Det. Cisco told me that the tape that she viewed clearly showed Buchanan engaging in sadomasochistic sexual activities with Christ Pete Koulis.
>
> (3) During these acts, Buchanan is seen holding a gauze pad on an injection site on her inner thigh.
>
> (4) During the tape, Buchanan appeared to be in a narcotic-induced stupor as if she was under the influence of a barbiturate or opiate.

None of these conclusions give an explanation as to how the affiant arrived at his conclusion, or why the activity is illegal. For example, in sentence (1), Anderson does not

state how he concludes that the sexual activities of Dr. Koulis and Ms. Buchanan are sado-masochistic, why he makes that conclusion or why this activity is indicative of criminal activity. In sentence (2), the affiant does not explain how or why Cisco concluded that the couple was engaging in "sadomasochistic sexual activities", or how that activity relates to illegal activity in the place to be searched. In sentence (3), he does not explain how he determined that Ms. Buchanan was holding a gauze pad to an "injection site" as opposed to a mosquito bite. In sentence (4), he concludes that Ms. Buchanan appeared to be in a narcotic-induced stupor as if she was under the influence of a barbiturate or opiate as opposed to simple being worn out or having stayed up all night. Simply put, the affiant never explains why he concludes what he does, nor does he explain how his statements are relevant to probable cause to search Dr. Koulis' apartment in Chicago.

An affidavit must contain more than mere conclusory allegations by the affiant. *Jacumin,* 778 S.W.2d at 432; *State v. Moon,* 841 S.W.2d 336, 337 (Tenn. Crim. App.1992). This entire paragraph should not have been considered in a probable cause determination.

Paragraph 16 contains the following conclusory statement:

> A written document found in the Franklin apartment listed pros and cons of Lesa Buchanan's relationship with Koulis which said "he gives me drugs" as a con.

[Vol. VIII, p. 593]

Koulis argues that designating this list a “pro/con” list is a conclusion. There is nothing within the four corners of this document that suggests that it is a so-called “pro/con” list. There is nothing to suggest that this is a list of any kind. There is nothing within the four corners of this document to suggest that Lesa Buchanan wrote those words or that she was referring to herself and Koulis in that document. If that document does contain a “pro/con’ list, Anderson never explains how he arrived at that conclusion. It certainly is not stated in the affidavit.

Tennessee law provides that, in determining whether or not probable cause supported issuance of a search warrant, only the information contained within the four corners of the affidavit may be considered. *State v. Jacumin,* 778 S.W.2d 430, 432 (Tenn.1989). This information should not have been considered as probable cause to issue a search warrant.

Paragraph 19 contains the following conclusory statement:

> Based upon the foregoing, your affiant believes that probable cause exists for the search of Koulis’ residence which is located at 165 N. Canal Street, Apt. 1113, Chicago Illinois, and that narcotics, drug paraphernalia, and mediums for delivery of such drugs, digital audio, and video recordings and devices with which to make such recordings computers that contain digital files and/or documents of communications between Koulis and Buchanan Written letters, notes, or any other documents related to Koulis and Buchanan’s relationship and activities.

This entire paragraph is conclusory. There is nothing in this paragraph that explains why the affiant believes that illicit controlled substances will be found in the Defendant’s apartment in Chicago. The paragraph starts off by saying, “Based upon the

foregoing," which means he is basing his conclusions on any of the previous statements.

Paragraph 18 states that "Documents that were located at the Franklin apartment that showed Koulis communicated via email and sent digital information to various websites", states absolutely nothing about any criminal activity. The type of documents sent out by Koulis are not described so there is no way of knowing whether they relate to criminal activity or not. The information about narcotics, drug paraphernalia, and mediums for delivery of such drugs, digital audio, and video recordings and devices with which to make such recordings is information derived from illegal searches and thus is itself fruit of the poisonous tree and should not be considered in a probable cause determination. *State v. Curtis*, 964 S.W.2d 604, 615 (Tenn.Crim.App.,1997.).

Further, it is important to remember that the phrase "the variety of controlled substances and medications observed *in Buchanan's apartment,"* was redacted from the Franklin affidavit as fruit of the poisonous tree, in addition to the phrase "narcotics, drug paraphernalia, and mediums for delivery of such drugs, digital, audio, and video recordings and devices with which to make such recordings", which was also considered as fruit of the poisonous tree. Because paragraph 19 is entirely conclusory, it should not be used in a determination of probable cause. As stated in *State v Norris*, 47 S.W.3d 457, 469 (Tenn.Crim.App.,2000.), there must be an explanation as to why the observed activity indicates an illegal act. *Norris*, *supra* at 469. There is no such explanation here.

In short, this affidavit provided conclusory statements without stating facts as to why the conclusions were valid. The net result is that the affiant requested a warrant because Dr. Koulis had a prior criminal background. This is not a substantial basis for

concluding that a search warrant would uncover evidence of wrongdoing. *Norris*, *supra* at 470.

In conclusion, Dr. Koulis asserts that the Chicago search warrant affidavit lacked probable cause because: (1) the affidavit contained information that was fruit of the poisonous tree; (2) the affidavit contained intentionally false information; (3) the affidavit contained stale information; and (4) the affidavit contained conclusory information. Accordingly, the Chicago warrant must fail for lack of probable cause, and the items seized during that search should have been suppressed.

4. The Defendant's *Miranda*-poor statements to the police were taken since he was under arrest and/or in custody at the hospital when he gave the statement.

After Dr. Koulis summoned an ambulance to aid his stricken girlfriend, he remained at the apartment to assist the medical personnel. Dr. Koulis followed the ambulance to the hospital. After it was determined that Lesa Buchanan had expired the police arrived to investigate the medical emergency. The police became convinced that foul play was afoot and detained Dr. Koulis. They questioned him extensively but did not administer *Miranda* rights. After some hours Koulis invoked his right to counsel and the authorities allowed him to leave.

A.

Dr. Koulis filed a motion to suppress contending that the *Miranda*-poor statements, made while he was in custody, were taken in violation of his Fifth Amendment right, his Sixth Amendment right, and the corresponding rights under the

Tennessee Constitution. The testimony at the suppression hearing established that, once Ms Buchanan died, Dr Koulis had planned to leave the hospital and go back to the apartment. Instead, Officer Sanchez took Dr Koulis, against his will, to a private room in the hospital, where another police officer was posted inside the room with Dr. Koulis. One or two officers were posted outside the room, by the door. (Vol. X, pp. 731-734). Once inside the room, Dr. Koulis was told by the police guarding him that he could not leave. (Vol. X, pp. 743-745). Further, Officer Sanchez told Dr. Koulis that he had to speak to the detectives before he would be allowed to leave that room. (Vol. X, pp. 747-748).

Dr. Koulis was never left alone the entire time he was in that private room. He attempted to leave on several occasions but the police would not allow him to do so. Each time he tried to leave, Sanchez blocked his path and was told he could not leave. Dr. Koulis testified that "Officer Sanchez stood up with me, placed himself in front of me and said, you can't go."

Dr. Koulis tried to leave that room because he wanted to make a phone call to Ms Buchanan's family so that he could notify them of her death. Dr. Koulis was told that he could not leave that room to make the phone call. On another occasion, Dr. Koulis tried to leave the private room so that he could return to the apartment to retrieve his cell phone so that he could call his own family, and once again he was prevented from leaving. Dr Koulis asked Sanchez if he could call his attorney, but Officer Sanchez refused that request. (Vol. X, p. 737).

Dr. Koulis did not want to answer any of the officer's questions but believed he was compelled to do so because he was told that he had to answer their questions and had to stay in the room until additional detectives arrived to talk to Dr. Koulis.

When Detectives Johnson and Cisco arrived at the hospital and eventually made their way to the private room, they began their interrogation of Dr. Koulis without reading him his *Miranda* rights. (Vol. X, pp. 731-734). The detectives questioned him about how long he had known Ms. Buchanan, the circumstances as to how he came down for the weekend, what they did during the weekend and where they went. Dr Koulis told the detectives that they stayed at the apartment all weekend, watched movies and made love. (Vol. X. pp. 734-737).

During this entire time, police officers were questioning Dr. Koulis about Ms. Buchanan's death without the benefit of his *Miranda* warnings. These detectives also disallowed Dr Koulis the right to call his attorney when he asked them. In fact, it was Detective Johnson who made a joke of his request for an attorney by replying, "Why, did you do something wrong?"

Although the detectives did not seriously consider his request for an attorney, Dr. Koulis made it clear to them that he needed to call his attorney because he was not thinking clearly, was very upset, and needed his attorney present in the room to think clearly for him. The detectives still refused his request for counsel. In fact, the detectives told him that when they were through questioning him, he could make his "one phone call." It was at this point that Dr. Koulis became very upset with the attitude and demeanor of the detectives, and told them that they could either arrest him or let him

leave the room. The detectives decided to let him leave rather than arrest him. (Vol. X, pp. 738-739).

The judge ruled that *Miranda* was not required because Koulis ostensibly was not in custody, and thus his statements were admissible. T.R. Volume 4, page 564. *The Order also appears at page 81 of the Appendix.*This ruling is clearly erroneous because the facts establish that Dr. Koulis was detained. Because he was not given his *Miranda* warnings during the time he was in custody, the statements Dr. Koulis made to the police were constitutionally inadmissible. On appeal here, this Court should hold that Dr Koulis' *Miranda*-poor statements should have been suppressed.

B.

The issue of custodial interrogation involves the constitutional protection against compelled self-incrimination, which "is protected by both the federal and state constitutions." *State v. Blackstock,* 19 S.W.3d 200, 207 (Tenn.2000). The United States Supreme Court held in *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that "*the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.*" As part of these safeguards, the police are required to inform persons being questioned while in custody of the following rights: (1) that they have the right to remain silent; (2) that any statement made may be used as evidence against them; (3) that they have the right to the presence of an attorney during questioning; and (4) that if they cannot afford an attorney, one will be appointed for them prior to questioning, if so

desired. *See id.* at 444, 86 S.Ct. 1602; *see also State v. Bush*, 942 S.W.2d 489, 499 (Tenn.1997). In short, "Miranda and its progeny ... govern the admissibility of statements made during custodial interrogation in both state and federal courts." *Dickerson v. United States*, 530 U.S. 428, 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

Custody, as defined in *Miranda*, is when a defendant is placed under formal arrest or is "*otherwise deprived of his freedom of action in any significant way*." 384 U.S. at 444, 86 S.Ct. 1602; *see also Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) ("The ultimate inquiry is simply whether there was a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."). This definition has been expanded to mean "under the totality of the circumstances, whether a reasonable person in the suspect's position would consider himself deprived of freedom of movement to a degree associated with a formal arrest." *State v. Anderson*, 937 S.W.2d 851, 855 (Tenn.1996). The *Anderson* Court considered a variety of factors signifying custodial interrogation including the following:

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will. *Anderson*, 937 S.W.2d at 855.

Almost all of these factors are present in our case. First, the location of the questioning indicates strongly that Dr. Koulis was in custody. Dr. Koulis was interrogated in a so-called meditation room within the hospital, which, for purposes of this case, was a private area segregated from the general public. Officer Sanchez of the Franklin Police Department took him there because Dr. Koulis *seemed distraught, and...his crying was kind of loud. So...we moved him to the meditation room.*" (This is to be contrasted with the detective's testimony that Dr. Koulis did not so much as "shed a single tear.") Sanchez further testified that he wanted Dr. Koulis to have some "*privacy*" and "*time to himself."* (Vol. X, p. 830).

Dr. Koulis argues that Sanchez took him there so that he could interrogate him. Sanchez admitted that he did "speak" to the Dr. Koulis while in the room. (Vol. X, p. 831). This so-called "speaking" was actually an interrogation. When Sanchez was asked what they spoke about, he testified that he wanted Dr. Koulis *"to clarify his statements at the scene."* (Vol. X, p. 831). In other words, Sanchez wanted Dr. Koulis to make a statement about *"what happened to her"*. (Vol. X, p. 832). Clearly, Sanchez's purpose for taking Dr. Koulis to the room was to isolate him and interrogate him about Buchanan's death. Keeping a defendant isolated from others is a factor indicative of custodial interrogation. *United States v. Beraun-Panez,* 812 F.2d 578, *modified* 830 F.2d 127 (9th Cir. 1987); *State v .Furlough*, 797 S.W.2d 631, 639 (Tenn.Crim.App. 1990).

Another *Anderson* factor of custodial interrogation is the limitation on movement or other form of restraint imposed on the suspect during the interrogation. In the instant case, Dr. Koulis was prevented from leaving the meditation room once he was escorted

inside. Dr. Koulis testified that he did not want to go there. (Vol. X, p. 731). He tried to leave the room several times, but each time he tried to leave, his path was blocked and was told that he could not leave. For example, he testified regarding one instance when he asked Sanchez if he could view Ms. Buchanan's body again, Sanchez refused to let him. Sanchez stood up when Dr. Koulis stood up, placed himself in front of Dr. Koulis and told him that he could not go. (Vol. X, pp. 731-734). Although Sanchez testified that he could not recall if he prevented Dr. Koulis from leaving that room, (Vol. X, pp. 830-835), Dr. Koulis clearly recalled being prevented from leaving.

The phone incident was another restraint on movement associated with arrest. Both Sanchez and Dr. Koulis testified that Dr. Koulis asked to use the phone so that he could call Buchanan's family and his family. (Vol. X, p. 734). Dr. Koulis said that, since he did not have his cell phone with him, he wanted to go back to the apartment, retrieve his cell phone, and make his calls; however, he was prevented from leaving the room. (Vol. X, p. 733). Sanchez testified that he allowed Dr. Koulis to use his cell phone to call his sister. (Vol. X, p. 834). Dr. Koulis argues that the only reason Sanchez allowed Dr. Koulis to use his cell phone was because Dr. Koulis was not allowed to leave the room to make his calls. This restraint on Dr. Koulis'movements was a restraint associated with arrest, therefore, he was in custody. *Anderson, supra* at 855.

Another factor of custodial interrogation is the number of police officers present during questioning. *Anderson*, supra at 855. Dr. Koulis testified that during the entire time he was in the meditation room, there was at least one uniformed officer sitting in the room with him and at least one or two uniformed officers standing outside the door. (Vol.

X, p. 732). Detective Johnson testified that as many as five officers could have been outside the meditation room. She named Officer Prather, Officer Grandy, and possibly Officer Barnwell as well. (Vol. X, p. 770). Officer Sanchez was there because he was the officer who took Dr. Koulis to the meditation room. (Vol. X, p. 830).

Sergeant Eric Treanor testified that he also talked to Dr. Koulis at the hospital. (Vol. III, p. 131). When one totals the number of law enforcement officers present in and outside the meditation room, including the two detectives, there are seven officers present. When Detective Johnson was asked what all those officers were doing there, she responded: "*Standing around talking*". When asked why they were needed there, Johnson responded: "*I don't know*." (Vol. X, pp. 770-771).

Dr. Koulis asserts that the reason so many officers were present, was because he was in custody, *State v. Walton*, 41 S.W.3d 75, 82 (Tenn.,2001), and because he was questioned at the same time. *Miranda* warnings should have been given. *see Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

Another factor of custody is the time of the interrogation. Dr. Koulis was kept isolated for two hours before he was allowed to leave. Dr. Koulis testified that he waited in that room for an hour before the detectives arrived. (Vol. X, p. 736). Detective Cisco testified that Detective Johnson questioned Dr. Koulis for about an hour. (Vol. X, p. 817). The total time Dr. Koulis spent in the isolated room was two hours. Considering that Dr. Koulis was emotionally and mentally distraught, the police action of keeping him isolated for that long a period of time, surrounded by that many officers, and not allowing him to leave the room, was an act of psychological pressure. The behavior of the Franklin

police officers gave rise to a psychological coercion beyond that inherent in a typical noncustodial interrogation. *See Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977).

Another factor of custody was the tone of voice of the detectives. Dr. Koulis testified that during the course of questioning, the detective's tone of voice caused him to feel "*increasingly threatened"*. He felt so threatened that he asked the detective if he needed an attorney, to which she replied in a sarcastic manner, *"why, did you do something wrong?"* (Vol. X, p. 738). Detective Johnson's threatening tone of voice and attitude was another indicia of custody. *Anderson*, 937 S.W.2d at 855.

Another factor of custody was the extent to which Dr. Koulis was confronted with the law enforcement officer's suspicions of guilt. Although these law enforcement officers stated that they were on a "medical call" and not a criminal matter, their actions indicated otherwise. Officer Sanchez began the interrogation process and did not allow Dr. Koulis to leave that room to make phone calls or for any reason. The detectives took over and also kept him isolated and restrained. Detective Cisco describes her first encounter with Dr. Koulis in the meditation room as follows:

> *There was an officer standing outside the door, and I went in and - - and announced who I was to Mr. Koulis, and told him that Detective Johnson was going to be coming in, we're going to be asking him a couple of questions as to what happened with Ms. Buchanan.* (Vol.X, p. 799).

In *United States v. Hall*, Judge Friendly said that a person was in custody when "*in the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates*

that they would not have heeded a request to depart or to allow the suspect to do so." *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969), *cert. denied*, 397 U.S. 990, 90 S.Ct. 1123, 25 L.Ed.2d 398 (1970); *U.S. v. Beraun-Panez*, 812 F.2d 578,580 (9th cir. 1987). In the instant case, the Franklin police officers had already shown through their manner of approach, that they would not allow Dr. Koulis to leave the room until he had spoken to the detectives. Even though they never handcuffed Dr. Koulis, they never let him leave the room. This was a restraint on his freedom of movement which amounted to his being placed in custody.

Dr. Koulis was also confronted with the suspicions of the detectives. Dr. Koulis argues that these two detectives were suspicious of Dr. Koulis from the moment they arrived at the hospital. For example, when Johnson was asked if she told any police officers to tell Dr. Koulis not to leave, she did not respond with a direct "yes" or "no" answer. Instead she testified that she did not recall telling any police officers to tell Dr. Koulis not to leave the hospital. (Vol. X, p. 768). On the other hand, Dr. Koulis was positive in his response. He testified that he was told he could not leave until he talked to the detectives. (Vol. X, p. 738).

Another example of custody was a phone-call incident between Dr. Koulis and the two detectives. When Dr. Koulis asked them to allow him to call Lesa's family so that he could notify them of her death, Johnson had an officer try to locate the family and make that announcement. When asked why she did not let Dr. Koulis get his cell phone from the apartment, she testified that " I wanted to get as much information as I could, and then let him go do whatever he needed to do." (Vol. X, p. 773). In other words,

Detective Johnson was going to "let him go do whatever he needed to do" only when she decided that she was through interrogating him. Her own words indicated that Dr. Koulis was in custody.

Finally, Dr. Koulis asserts that one other *Anderson* custody factor was present in the instant case: the extent to which the person being questioned was aware that he or she was free to refrain from answering questions or free to end the interview at will. *Anderson,* 937 S.W.2d at 855. Dr. Koulis made it clear that he did not want to answer any police questions, (Vol. X, p. 735), however, the only reason he stayed in the room and answered their questions was because " *I was told I had to answer the questions and I had to stay there until detectives came and talk to them* ". (Vol. X, p. 736). That is exactly what he did.

"Custodial interrogation" was defined by the *Miranda* Court as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444, 86 S.Ct. at 1612. In *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) the Supreme Court reiterated that "the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." In evaluating that inquiry, courts must consider the totality of the objective circumstances surrounding the interrogation, "not the subjective views harbored by either the interrogating officers or the person being questioned." *Id.*, 511 U.S. at 322-23, 114 S.Ct. at 1529. The *Anderson* Court has delineated some factors,

although not an exclusive list, that are pertinent to a determination of when a suspect is in custody. Virtually all those factors are present in the instant case.

When examining the totality of the circumstances surrounding the instant interrogation, it is apparent that Dr. Koulis was deprived of his freedom of action; the proof showed that he was not free to leave that private room although he attempted to do so several times. He was segregated from the general population and surrounded by a large number of uniformed police officers. He was not allowed to leave the room for any reason. He was questioned by Officer Sanchez and the two detectives for a period of two hours, at a time when he was mentally and emotionally distraught. He was told that he could not leave until he had talked to the detectives. The detectives told him that he could go make his calls once they were through with him. Under Judge Friendly's articulation of the inquiry and given the *Anderson* factors Dr. Koulis was in custody. Because he was not given his *Miranda* warnings during the time he was in custody, the statements Dr. Koulis made to the police should have been suppressed.

5. The trial court erroneously failed to charge the jury as to the law regarding "destruction of evidence" or the "duty of the government to preserve evidence" as more particularly set forth in Tennessee Pattern Jury Instruction 42.23.

In this case the police were in control of the three pill bottles retrieved from Ms. Buchanan's apartment. They turned the bottles over to the hospital for safekeeping and after failing to retrieve them after eleven days (!) the hospital disposed of same. The government also failed to preserve a critical photo on a cell phone. Thus, the defense was entitled to a failure-to-preserve-evidence jury charge which is called a spoilation

instruction. The trial judge erroneously refused the defense special request for such an instruction. Thus, this Court should grant Dr. Koulis a new trial.

A.

The proof established that medication from the apartment was brought to the hospital by the emergency crew who also transported Ms. Buchanan. Detectives arrived at the hospital shortly after Ms. Buchanan's death. Detective Johnson testified that at that time she was conducting a criminal investigation, because "anytime she has an unexplained or unexpected death, they handle it like a homicide." (Vol. XV, pp. 1290-1291).

As to the medication brought to the hospital with Ms. Buchanan, it is normally placed in a safe in the security room, for safe-keeping. (Vol. XIV, p. 1254). Detective Cisco testified that the hospital was going to hold the drugs until after she and Detective Johnson interviewed Dr. Koulis. However, they did not get the drugs after their interview, but instead, left the hospital and went straight to the apartment. It "slipped their minds" that they did not retrieve those drugs until it was too late. By the time they remembered to retrieve those drugs, days later, the hospital had already destroyed the medications. (Vol. XIV, pp. 1262-1263).

Recall that the entire case centered on the state's allegation that Koulis had "killed his girlfriend" with controlled substances. The missing bottles and contents were critical to Koulis' defense but his lawyers were denied the opportunity to conduct any tests on these items.

The proof also established that when the officers went back to the apartment the next day they located some cell phones with pictures on them. (Vol. XV, p. 1295). Detective Johnson's report of that event reflects:

> We then picked up the cell phone in the living room and the cell phone in the bedroom. Both phones had a pornographic photo as the screen saver. We then looked at the phones and determined that the phone in the bedroom belonged to Koulis. We then looked at the photos on the phone. There was one photo of Ms. Buchanan in risqué clothing and dated 07-04 at approx. 1330 hrs. We attempted to forward the photos to Det. Cisco's e-mail address but were unable to due to the lines being overloaded. We attempted to reset the phone but could not get it to work. We then contacted Officer Grant and he explained how to reset the phone. We then left the phone and left the apartment. TR Vol. 3, page 400.

The police were never able to produce the 1330 hour photo. The defense argued that the officer's fumbling attempt to email the photo to herself resulted in its deletion. The State spent what seemed like hours explaining away the missing photo.

Detective Cisco testified that the cell phone from where all the photographs came belonged to Dr. Koulis. (Vol. XIV, p. 1143). When Cisco looked for pictures on Ms. Buchanan's cell phone, she only saw one or two pictures taken from that weekend. (Vol.XIV, p. 1148). Cisco testified that she did not erase any pictures from the cell phones. Cisco stated that she viewed the pictures on the cell phones on Tuesday, July 5, 2005. (Vol. XIV, p. 1149). The first picture on Ms. Buchanan's cell phone is dated 7-3-05, at 5:01 pm. Cisco described this picture of Ms. Buchanan as being a happy picture of her where she looks normal. (Vol.XIV, p. 1150). Cisco testified that she did not see a picture on that cell phone that was taken on July 4, at 1:30 pm. (Vol. XIV, p. 1151).

Detective Johnson identified the photographs she and Cisco saw on the phones. (Exhibits 186-202) Cisco tried to email one picture to her own email address but was unable to do so. Johnson admitted that when she made reference to these photographs in her report, she stated that the risqué photograph of Ms. Buchanan on July 4 was taken at 1330 hours. (1:30 pm.) Johnson testified that the time of 1330 was "a typographical error on her part." There was just no other way to explain a time on a picture when no picture had that time on it. (Vol. XV, pp. 1298-1299).

Detective Johnson testified that there were only two pictures of Ms. Buchanan wearing red and black and one was stamped with a time of 12:17, and the other had a time of 12:18. (Vol. XV, p. 1321). Johnson testified that she uses "approximate times." Therefore, she would "round off" the time of 12:17 to 12:30. (Vol. XV, p. 1322). Johnson testified that she is no longer on the case. (Vol. XV, p. 1323).

The now-chief investigating officer in the case, Detective Anderson, testified that he was aware there was a problem with the 1330 hours photo since it was brought to his attention by the defendant's computer forensic experts. (Vol. XVII, pp. 1611-1612). Detective Anderson testified that he sent the cell phone to the Secret Service for analysis so as to refute the defense contention that a photograph with a time of 1330 hours actually existed. The Secret Service had the capacity to do cell phone forensics, which is the scientific removal of data and media-data from cell phones. However, the Secret Service did not have the capacity to do that particular examination, so the cell phones were sent to Scotland Yard, the foremost forensic experts in the world, and even they had

not been able to determine whether or not that picture was on that phone. (Vol. XVII, pp. 1617-1619).

Recall that the entire case centered on the state's allegation that Koulis had "killed his girlfriend" with controlled substances and that her death was the result of some lingering overdose lasting all all morning and in to the early afternoon. A photograph taken less than an hour before the ambulance arrived would have demolished that theory. Thus, that the State may have destroyed the photo and – unquestionably disposed of important pill bottles and their contents – was a matter that was hotly contested at the trial.

B.

It is well settled that the trial court may properly instruct the jury that any attempt to suppress, destroy, or conceal evidence is relevant as a circumstance from which the jury may infer that the evidence is adverse to the party. In most instances it is the defendant who is on the receiving end of this instruction. *State v. West*, 844 S.W.2d 144 (Tenn. 1992) (concealment of evidence here contradicted the defendant's self-defense story by illustrating his fear of detection). What is good for the goose is good for the gander and thus Dr. Koulis's lawyers sought such an instruction because the state had lost, mislaid and destroyed evidence:

> The State has a duty to gather, preserve, and produce at trial evidence which may possess exculpatory value. Such evidence must be of such a nature that the defendant would be unable to obtain comparable evidence through reasonably available means. The State has no duty to gather or indefinitely preserve evidence considered by a qualified person to have no exculpatory value, so that an as yet unknown defendant may later examine the evidence.

> If, after considering all of the proof, you find that the State failed to gather or preserve evidence, the contents or qualities of which are an issue and the production of which would more probably than not be of benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant
> Tennessee Pattern Jury Instruction 42.23

Procedurally, the defense filed a timely special request on the adverse inference which the jury can draw by the destruction of evidence by the opposing party, T.R. Volume 4, page 577, (*Appendix page, 91; see Appendix page 97 for authorities in support*) and the issue was renewed in the motion for a new trial. Volume 5, page 629. The trial judge erroneously declined to charge the jury as to this important legal doctrine (*See Jury Instructions at page 101 of the Appendix*) and, in light of the magnitude of the error, the defendant is entitled to a new trial.

C.

The spoilation and the destruction or withholding of evidence which a party ought to preserve gives rise to a presumption unfavorable to the party, as this conduct may properly be attributed to the party's knowledge that the truth would operate against the party. Usually the doctrine is applied against a criminal defendant since defendants often hide the truth. See *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir.1986) (spoilation evidence, including evidence that the defendant attempted to bribe or threaten a witness, is admissible to show consciousness of guilt). The doctrine applies in many different cases. Spoilation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably

foreseeable litigation. *West v. Goodyear Tire & Rubber Company*, 167 F.3d 776, 778 (2d Cir. 1999).

The term "spoilation" encompasses a party's intentional *or* negligent destruction or loss of tangible evidence, which destruction or loss impairs a person's ability to prove or defend a prospective action. *Bush v. Thomas*, 888 P.2d 936, 939 (N.M.Ct.App.1994) (collecting cases).Where the facts associated with spoilation of evidence and its alleged prejudicial effect are unclear, referral of the spoilation issue to a jury with accompanying instructions is the proper and advisable course of action. *McHugh v. McHugh*, 186 Pa. 197, 40 A. 410)(1898); *Wills v. Hardcastle*, 19 Pa.Super. 525 (1902); *Equitable Trust Co. v. Gallagher*, 34 Del.Ch. 249, 102 A.2d 538 (1954).

A party may be entitled to a jury instruction explaining that destroyed documents are presumed to be damaging to the party responsible for destruction. Such an "adverse inference charge" serves two purposes – remediation and punishment. The remedial purpose of the sanction serves to place the prejudiced party in the same position with regard to its ability to prove its case as it would have been if the evidence had not been destroyed. The punitive purpose both deters parties from destruction of relevant evidence and directly punishes the party responsible for spoilation.

The strength of the adverse inference instruction given to the jury "will vary according to the facts and evidentiary posture of a given case." *Welsh v. United States*, 844 F.2d 1239, 1247 (6th Cir.1988). To the extent that relevant documents that were destroyed cannot or have not be reproduced, the jury will be permitted to infer from the unavailability of these documents that they would have been unfavorable to the party. See

e.g., *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148 (1st Cir.1996); *Donato v. Fitzgibbons*, 172 F.R.D. 75; *Shaffer v. RWP Group*, 169 F.R.D. 19 (E.D.N.Y.1996); *Alliance to End Repression v. Rochford*, 75 F.R.D. 438 (N.D.Ill.1976); *General Atomic Co. v. Exxon Nuclear Co., Inc*., 90 F.R.D. 290 (S.D.Cal.1981).

A showing of bad faith is *not* a prerequisite for drawing a negative inference against the spoliator. See, for example, *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir.1995) (Niemeyer, J.); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir.1993); *Nation-Wide Check Corp. v. Forest Hills Dist*., 692 F.2d 214 (1st Cir.1982); *Rhode Island Hosp. Trust Nat'l Bank v. Eastern General Contractors, Inc.*, 674 A.2d 1227 (1996).

D.

Without doubt if Dr. Koulis had destroyed the evidence in question, the state would have been quick to obtain such an instruction. Indeed, the case law which permits such instructions when used against the defense, should compel the conclusion that such an instruction should have been given here against the state. Our Supreme Court has held that "[a] flight instruction is not prohibited when there are multiple motives for flight" and that "[a] defendant's specific intent for fleeing a scene is a jury question." *State v. Berry*, 141 S.W.3d 549, 588 (Tenn.2004) *Berry*, 141 S.W.3d at 588.

The State's loss and destruction of the evidence here was also a jury question and thus the defense was entitled to the adverse-inference jury charge which the judge was apparently reluctant to instruct. The trial court has a duty "to give a complete charge of the law applicable to the facts of a case." *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn.

1986). Because the state clearly was in possession of *critical* evidence and may well have discarded or failed to preserve it, the defendant was entitled to the requested jury instruction and thus this Court should reverse this wholly circumstantial evidence conviction, and grant Dr. Koulis a new trial.

6. The trial court erroneously failed to charge the jury as to the requested instruction on the requirement that the jury return a unanimous verdict and that the jury were required to unanimously agree on every element of the offense charged in the indictment and all lesser included offenses.

7. The trial court erroneously failed to strictly charge the requested provisions of the Pattern Jury Instruction regarding criminally negligent homicide which resulted in a disjunctive instruction on elements of the offense and permitted a non-unanimous verdict.

The defense filed a timely special request regarding a jury charge on a unanimous verdict "as to each and every element of the offense," T.R. Volume 4, page 574, (*Appendix page 86*) and that the judge instruct the jury as to the provisions of criminally negligent homicide as set forth in Tennessee Pattern Jury Instruction 7.07. T.R. Volume 4, page 576. (*Appendix page 90*) Although the judge did instruct the lesser offense of criminally negligent homicide and mentioned that the verdict had to be unanimous the instructions, as given, were not in accord with the special requests. (*See the actual jury instructions as given at page 101 of the Appendix*). Given that Dr. Koulis was convicted of criminally negligent homicide the constitutionally erroneous instructions are assailed here on appeal.[7]

[7] These issues were renewed in the motion for a new trial. T.R. Volume 5, pages 629-630.

A.

The defense filed a special request that: "Given that reckless homicide is a charged offense the defense here specifically requests that this Court instruct the jury as a lesser included offense the crime of criminal neglect homicide as set forth in pattern jury instruction 7.07." T.R. Volume 4, page 576. *Appendix, page 90.* Pattern jury instruction 7.07 provides:

> Any person who commits criminally negligent homicide is guilty of a crime.
> For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:
> (1) that the defendant's conduct resulted in the death of the alleged victim; and
> (2) that the defendant acted with criminal negligence.
>
> "Criminal negligence" means that a person acts with criminal negligence when the person ought to be aware of a substantial and unjustifiable risk that the alleged victim will be killed. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.
>
> The requirement of criminal negligence is also established if it is shown that the defendant acted intentionally, knowingly or recklessly.
>
> "Intentionally" means that a person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.
>
> "Knowingly" means that a person acts with an awareness that [his][her] conduct is reasonably certain to cause the death of the alleged victim.

> "Recklessly" means that a person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the alleged victim will be killed. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

The judge declined this special request and came up with his own "composite" instruction for criminally negligent homicide. As to the elements of the offense the judge instructed the jury:

> **CRIMINALLY NEGLIGENT HOMICIDE**
>
> Any person who commits criminally negligent homicide is guilty of a crime.
> For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:
> (1) that the defendant's conduct resulted in the death of the alleged victim; and
> (2) that the defendant acted with criminal negligence.
> T.R. Volume 5, page 620 *Appendix, page 116.*

As to the elements of "criminal negligence," the judge instructed as follows:

> **DEFINITONS**
> "Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.
>
> "Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

> The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.
>
> "Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct, or the result of the conduct, when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes" a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused 'person's standpoint.
>
> "Criminal negligence" means that a person acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur.
>
> The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the, circumstances as viewed from the accused person's standpoint.
>
> The requirement of criminal negligence is also established if it is shown that the defendant acted knowingly or recklessly.
> T.R. Volume 5, page 622, *Appendix, page 118*

As noted, the defense filed a special request asking for a more detailed unanimity instruction:

> *The Defense requests that the Court instruct the jury that the jury must agree unanimously as to each and every element of the offense.* The Defense asserts that it is not adequate, in this case, to simply advise the jury that the verdict must be unanimous. Rather, because each element of the offense is contested here the jury must vote unanimously as to each and

> every element. To that extent, the pattern jury instruction is deficient because it does not specify the unanimous requirement within the elements of the crime itself.
>
> Pattern jury instruction 2.04 provides that "the State must have proven without a reasonable doubt all of the elements of the crime charged, and that it was committed before the finding and returning of the indictment in this case." The Defense asserts that this sentence is inadequate. Rather, the Defense would request that this Court instruct the jury that "the State must prove beyond a reasonable doubt each and every element of the crime charged. Further, the State must prove beyond a reasonable doubt that the crime was committed before the finding and returning of the indictment in this case."
>
> This instruction separates the almost irrelevant factor concerning the time of the commission of the offense which of course is not a contested issue in this case at all. At minimum, these concepts should be separated. See generally *State v. Forbes* 918 S.W. 2d 431 (Tenn. Criminal Appeals 1995). T.R. Volume 4, page 574. *Appendix, page 86.*

As to unanimity, the judge said only:

> Your verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous. T.R. Volume 5, page 624 *Appendix, page 120.*

B.

Some specialty species of homicide have multiple conduct elements and thus the *mens rea* definitions must define the various elements. See generally, *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn.2000). Other specialty homicides may have no required mental states. *State v. Page*, 81 S.W.3d 781 (Tenn.Crim.App.,2002) ("second degree murder can be committed by either a "knowing killing of another," Tenn. Code Ann. § 39-13-210(a)(1), or by the killing of another which results from the unlawful distribution of certain drugs, id. at (2). The killing relating to the distribution of drugs portion of the

statute does not specify a particular culpable mental state. However, a "knowing killing" obviously requires the culpable mental state of "knowing.").

Generally, an offense may be classified as only a "result-of-conduct offense" when the result of the conduct is the only element contained in the offense. Thus, a knowing second degree murder is strictly a "result-of-conduct" offense. See *Ducker*, 27 S.W.3d at 896. The result of the conduct is the only conduct element of the offense; the "nature of the conduct" that causes death is inconsequential. *Id.*

It is now well settled that first degree premeditated murder, a knowing second degree murder, voluntary manslaughter, reckless homicide and criminally negligent homicide are all "result-of-conduct offenses"; *State v. Page*, 81 S.W.3d 781, 790-92 (Tenn.Crim.App.2002). The requested pattern jury instruction was in accord with *Page* and limited criminally negligent homicide to its singular result-of-conduct element: " 'Criminal negligence' means that a person acts with criminal negligence when the person ought to be aware of a substantial and unjustifiable risk that the alleged victim will be killed." That straightforward instruction focuses on the necessary risk of death caused by the defendant's behavior which produces the death.

What did the judge tell the jury here? The judge said that Koulis could be convicted if he acted intentionally, or knowingly or recklessly or with criminal negligence. As it relates the offense of criminally negligent homicide, intentional was defined to Koulis' jury as: "'Intentionally' means that a person acts intentionally with respect to the nature of the conduct *or* to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." Compare that

to the pattern instruction which provides: *"'Intentionally' means that a person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim."* There is, of course, no "nature of the conduct" *mens rea* definition in the pattern instruction because criminally negligent homicide is exclusively a result-of-conduct crime. To tell the jury that Dr. Koulis can be convicted based on the "nature of his conduct" is to allow him to be convicted on elements which are not proscribed by the criminally negligent homicide, thus lessening the state's burden of proof.

An identical analysis can be conducted for the "knowingly" instruction which allowed a conviction for "the nature of the conduct," OR "the result of conduct," OR if Koulis was "aware ….. that the circumstances exist." What circumstances? What nature of conduct? The instructions offer not a clue. The Pattern instructions correctly provide: "'Knowingly" means that a person acts with an awareness that [his][her] conduct is reasonably certain to cause the death of the alleged victim.' "

Similarly, the instructions for recklessness given here provide: "that a person acts recklessly with respect to circumstances surrounding the conduct, OR the result of the conduct, when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." What "circumstances" surrounding what "conduct?" The Pattern instruction correctly provides that: "'Recklessly *means that a person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the alleged victim will be killed.*"

The error was repeated for a fourth time in the instructions for the definition of criminal negligence: "that a person acts with criminal negligence with respect to the circumstances surrounding that person's conduct OR the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist OR the result will occur." What "circumstances" surrounding what "conduct?" The Pattern instruction correctly provides that: "*Criminal negligence" means that a person acts with criminal negligence when the person ought to be aware of a substantial and unjustifiable risk that the alleged victim will be killed*." It is THIS passage which is the test: given that the government must prove: (1) that the defendant's conduct <u>resulted</u> in the death of the alleged victim; AND (2) that the defendant acted with criminal negligence.

Criminally negligent homicide does not allow a conviction for "the nature" of Koulis' "conduct." There is no nature of conduct element in criminally negligent homicide. Criminally negligent homicide does not allow a conviction if Koulis was "aware of," or "recklessly indifferent," OR if he should have known "that circumstances existed." There is no circumstance-surrounding-conduct element in criminally negligent homicide.

The defense filed the requisite special requests. However, the judge went ahead and charged the jury with what he deemed proper. It was not. Allowing Koulis to be convicted on elements which are not contained in the criminal offense comprised Koulis' right to a trial by jury and allowed for a conviction on something other than proof beyond a reasonable doubt of the statutory elements of the offense. Moreover, the instructions

violated T.C.A. § 39-11-301(a)(1) since the judge must instruct the jury as to the elements of the mental state "as the definition of the offense requires, with respect to each element of the offense." There are no "circumstances surrounding conduct" in criminally negligent homicide. There is no "nature of conduct" in criminally negligent homicide. In addition, the jury instruction, as given, violated the defendant's right to a unanimous jury verdict since the mental state definitions were given in the disjunctive. *State v. Page*, 81 S.W.3d 781 (Tenn.Crim.App. 2002). Accordingly, the instructions as given violated the right of the defendant to a unanimous verdict in violation of Articles I, Sections 7 and 9 of the Tennessee Constitution, the Due Process provisions of the Tennessee Constitution and the Sixth and Fourteenth Amendments to the Constitution to the Constitution of the United States.

B.

State v. Page, 81 S.W.3d 781 (Tenn.Crim.App.2002) held that "an erroneous jury instruction, which misstates the applicable conduct element of an offense and lessens the state's burden of proof, is … subject to constitutional harmless error analysis." Presumably, a disjunctive jury instruction which compromises a defendant's right to a unanimous verdict is analyzed in the same fashion.[8] In such a review we must be mindful that, " 'Once a constitutional error has been established ... the burden is upon the State to

[8] *State v. Faulkner*, 154 S.W.3d 48, 59 (Tenn.2005), limited the holding in *Page*, concluding that "[t]he superfluous language in the 'knowingly' definition did not lessen the burden of proof because it did not relieve the State of proving beyond a reasonable doubt that the defendant acted knowingly." Even if that were so, which Koulis does not concede, *Faulkner* says nothing about a disjunctive jury instruction which compromises a defendant's right to a unanimous verdict.

prove that the constitutional right violation is harmless beyond a reasonable doubt.'" *State v. Sayles*, 49 S.W.3d 275, 279 (Tenn.2001). It is not possible for the State to demonstrate harmlessness given that the government's meager proof.

When it became apparent during the trial that the State was traveling on multiple and alternative legal grounds as to how Dr. Koulis could be convicted, the defense tendered a special unanimity request citing *State v. Forbes*, 918 S.W. 2d 431 (Tenn. Crim. App.1995) holding that where there is technically one offense, but evidence of multiple acts which would constitute the offense, the trial court must augment the general unanimity instruction to insure that the jury understands its duty to agree unanimously to a particular set of facts. In our case the judge's instruction permitted a conviction on alternative theories of conduct. Whether the state still had to prove the one that was the law is beside the point. There was no assurance that the jury unanimously agreed on the correct element given the disjunctive instructions. It was for this reason that the defense requested "that the Court instruct the jury that the jury must agree unanimously as to each and every element of the offense." T.R. Volume 4, page 574.

It was the State that sought a circumstantial evidence conviction on alternative theories of Dr. Koulis' conduct and it was the judge whose instructions allowed for alternative *mens rea* for these alternative conducts whether it was "the nature of the conduct," OR "the result of conduct," OR if Koulis was "aware …..that the circumstances existed." It was not too much to ask, as the defense requested, that "the jury must agree unanimously as to each and every element of the offense." Accordingly the error was not harmless given the marginal, circumstantial evidence presented here.

See, e.g., *Delk v. State,* 590 S.W.3d 435, 442 (Tenn.1979) ("[T]he line between harmless and prejudicial error is in direct proportion to the degree of the margin by which the proof exceeds the standard required to convict, beyond a reasonable doubt.").

8. The conviction for criminally negligent homicide is barred by Double Jeopardy since the jury had implicitly acquitted Dr. Koulis of that charge by finding him not guilty of the lesser included offense of assault.

Dr Koulis was charged with second-degree murder and the lesser included offense of reckless homicide. See indictment at T.R. volume1 page 21; See Vol. XXXI, p. 21. See also *Appendix, page 29.* The judge instructed the jury on the lesser offenses of criminally negligent homicide and simple assault. The full jury instructions appear at T.R. page 605. *Appendix, page 101.* The jury acquitted Dr Koulis of murder and reckless homicide **and** simple assault. The jury found him guilty of the offense of criminally negligent homicide which is an offense "greater" than simple assault. See the return of the verdict at Vol. XXVIII , Page 3114-3115. However, the verdict form specified that Dr.Koulis was also found not quilty of simple assault. *Appendix, page 121.*

Dr. Koulis asserts here that his conviction for criminally negligent homicide should be reversed and dismissed as a matter of law because the jury acquitted him of the lesser included offense of assault – an offense "under" the offense of criminally negligent homicide. As a matter of law, the acquittal for the lesser crime of assault and battery, works as an acquittal of the greater charge of criminally negligent homicide.

The verdict form clearly indicates that the defendant was found not guilty of assault and battery which is a lesser included offense of criminally negligent homicide.

As will be addressed in more detail below, the special verdict of not guilty of the assault removed the necessary element for the greater charge of criminally negligent homicide. See *Whitwell v. State*, 520 S.W.2d 338 (Tenn. 1975) ("the jury's finding a lack of intent to steal clearly exonerates defendant of an essential element of petit larceny.") Therefore, Dr. Koulis could not be guilty of negligent homicide as a matter of law.

If the verdict was inconsistent with the instructions the judge should have corrected same while the jury was still empanelled. The trial judge has both the power and duty to require that the jury correct or amend an improper or incomplete verdict. *Meade v. State*, 530 S.W.2d 784 (Tenn. Crim. App.1975). The judge took no corrective action, and did not report the error to the attorneys before dismissing the jury, giving the attorneys no chance to object to the verdict form or attempt to correct it; thus the assault acquittal stands and has a preclusive effect on the greater offense for which Dr. Koulis was convicted. Given the sequence of the verdict, Double jeopardy precludes a conviction for negligent homicide.

A.

The jury verdict form, in pertinent part reads as follows:

VERDICT FORM

As to Count 1 of the indictment, we, the jury, unanimously find the defendant Christ P. Koulis

(___) Guilty of Second Degree Murder

(_X_) Not guilty

OR

As to Count 2 of the indictment, we, the jury, unanimously find the defendant Christ P. Koulis

(___) Guilty of Reckless Homicide

(_X_) Not guilty

OR

(_X_) Guilty of Criminally Negligent Homicide

(___) Not Guilty

OR

(___) Guilty of Assault

(_X_) Not Guilty

(T.R. Vol. V, p. 625) (*a copy appears in the appendix at page 121*)

The verdict form lists, in descending order, the offenses for which Dr. Koulis was charged; second degree murder in Count 1, reckless homicide in Count 2, criminally negligent homicide as a lesser-included offense of second degree murder or reckless homicide, and assault as a lesser-included offense of the above offenses. In returning its verdict, the jury showed by placement of the "X" that it found Koulis guilty of the greater offense of criminally negligent homicide but not guilty of the lesser included offense of assault.

It has long been the law in Tennessee that a conviction for a lesser offense works an implied acquittal of greater offenses. *King v. State,* 391 S.W.2d 637 (Tenn. 1965). [9] An acquittal of the lesser offense has the same effect on the greater offense. See, *State v. Likens,* 1986 WL 3992, Tenn.Crim.App.at Nashville, April 3, 1986, unpublished. There, the jury found the defendant guilty of the greater offense of rape but not guilty of the lesser included offense of sexual battery. The Court of Criminal Appeals held:

> Since the verdict of not guilty of sexual battery meant that one or more of the elements necessary for the offense was not present, it follows that one or more of the elements of rape was missing. Hence, the defendant's conviction for rape must be reversed. *Cf. Whitwell v. State***,** 520 S.W.2d 338, 344 (Tenn.1975).

Likens cited to *Whitwell,* a case where Whitwell and his co-defendant were charged with grand larceny of cattle, as well as receiving and concealing the stolen cattle. When the jury reported that they were deadlocked, the foreperson announced that it had found the defendants not guilty of grand larceny. The court entered a not guilty as to the charge of grand larceny and ordered a mistrial on the remaining charges. When the state attempted to retry the defendants for petit larceny and receiving and concealing stolen property, the Tennessee Supreme Court ruled that the remaining charges should have been dismissed because the jury had found a failure to prove guilty knowledge, an element of all the original offenses. The *Likens* court made it clear that the distinction

[9] The only exception is that a defendant who has already been convicted of a lesser offense may be prosecuted on the greater offense if an element of the greater offense had not occurred at the time of prosecution for the lesser offense. *Jeffers v. United States,* 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); *State v. Mitchell,* 682 S.W.2d 918, 919 (Tenn.1984).

between its facts and those in *Whitwell* had no bearing on the outcome and the result: dismissal of the charge-must be the same. *Likens*, supra at p.5.

So too must the conviction against Dr. Koulis be reversed and dismissed. Just as the *Likens* Court pointed out that the distinction between its facts and those of *Whitwell* had no bearing on the outcome, the distinction between *Likens* and the instant case has no bearing on the outcome. The net result is the same: if an element of the lesser-included offense is missing, then that element is also missing from the greater offense, which means that the State has failed to prove all the elements of the greater offense. Even if the elements are not entirely congruous, a lesser offense may exist as a matter of law if there is a less serious harm or risk of harm to same person. *See State v. Burns,* 6 S.W.3d 453, 466-67, (Tenn.1999).

In the instant case, since the State failed to prove all the elements of the lesser included offense by virtue of its verdict of not guilty, therefore, it has failed to prove some or all of the elements of the greater offense. As this Court did in *Likens*, it must do here by virtue of the Double Jeopardy provisions of the state and federal constitutions; that is, reverse and dismiss the conviction for the greater offense of criminally negligent homicide.

B.

The "problem" here could have been avoided by the judge not accepting the verdict in form reported. Under the "Order of Consideration" section of the judge's jury instructions, the Court instructed the jury on the charge of Criminally Negligent Homicide as follows:

> *If you find the defendant guilty beyond a reasonable doubt of this offense you will convict him and your verdict will be "We the jury, find the defendant guilty of Criminally Negligent Homicide." Such finding would end your deliberation.*
> (Court's jury charge T.R. volume 5, page 617).

The jury in the instant case did not follow that instruction. Instead of ending its deliberation upon the finding of guilt on Criminally Negligent Homicide, it proceeded to the lesser included offense of Assault and made a finding of "not guilty", in violation of the Court's instruction. This verdict was ambiguous, confusing and incorrect.

When the jury reports an incorrect or imperfect verdict, the trial court has both the power and the duty to redirect the jury's attention to the law and return them to the jury room with directions to reconsider their verdict. *State v. Mounce*, 859 S.W.2d 319, 322 (Tenn. 1993). However, in the instant case, the judge did not return the jury to the jury room for further deliberations as the judge should have done. *State v. Stephenson*, 878 S.W.2d 530, 554 (Tenn. 1994). Here, the trial judge abdicated his responsibility to have the jury render a verdict that unquestionably reflected its findings. The Court's failure to see that the jury returned an intelligible verdict was error. <u>*See*</u> *State v. Henley*, 774 S.W.2d 908, 915 (Tenn.1989) ("Since the reception of a verdict is not solely a ministerial as distinct from a judicial act, when the jury return (sic) into court with a verdict, it is not a matter of course to receive it in the form in which it is rendered. It is the duty of the Court ... to look after its form and substance, so far as to prevent an unintelligible, or a doubtful, or an insufficient verdict from passing into the records of the court.").

Once the Court accepted the jury verdict, it was without authority to covertly and substantially revise the jury's verdict. *Cf. State v. Morris*, 788 S.W.2d 820, 825 (Tenn. Crim. App. 1990) (trial judge has duty to mold judgment to conform with verdict, but Court does not have the authority to substitute a judgment that is substantially different). Since the judge, in this case, cannot change or revise the verdict on its own, the only recourse for the Court here is to dismiss since Double Jeopardy precludes a conviction for criminally negligent homicide conviction in light of the acquittal of the lesser included offense of assault.

9. A dismissal of the criminally negligent homicide conviction is dictated by the acquittal of assault pursuant to Double jeopardy and Collateral Estoppel provisions of the constitutions of the United States and Tennessee.

This Court should dismiss the criminally negligent homicide conviction since the jury, having acquitted the defendant of assault and battery, removed any possibility that the negligent homicide verdict rested on the (state's) theory that Dr. Koulis injected Lesa Buchanan with a controlled substance. There is of course not a shred of evidence that Dr. Koulis provided the drugs. Therefore there is no basis for the negligent homicide conviction. See, *Fine v. State*, 422, 246 S.W.2d 70 (Tenn. 1952), "It is settled law in all homicide cases that the collateral crime, i. e. the alleged unlawful act antedating death, must be so integrated with and related to the homicide that it can be said to have proximately caused or contributed to it." In *State v. Jones*, 151 S.W.3d 494 (Tenn.2004) the Court held:

> To establish criminally negligent homicide, the State must prove three elements beyond a reasonable doubt: (1) criminally negligent conduct on the part of the accused; (2) that proximately causes; (3) a person's death. *State v. Farner*, 66 S.W.3d 188, 199 (Tenn.2001) (citing Tenn.Code Ann. '39-13-212(a) (defining criminally negligent homicide as "[c]riminally negligent conduct which results in death....")). ....Criminally negligent conduct that "results in death constitutes criminally negligent homicide." Tenn.Code Ann. '39-13-212(a). ....
>
> To be criminally negligent, a defendant must fail to perceive a substantial and unjustifiable risk. Tenn.Code Ann. '39-11-106 (a)(4); see also *State v. Owens*, 820 S.W.2d 757, 760 (Tenn.Crim.App.1991). Whether the defendant failed to perceive the risk must be determined using a subjective standard; we must view the circumstances "from the accused person's standpoint." Tenn.Code Ann. ' 39-11-106(a)(4); see also *State v. Slater*, 841 S.W.2d 841, 842 (Tenn.Crim.App.1992) ("[The criminally negligent homicide statute] views the situation through the eyes of the [defendant] and whether [s]he could have perceived and then chosen to ignore a 'substantial and unjustifiable risk.' "). The defendant's failure to perceive the risk must be "a gross deviation from the standard of care." Tenn.Code Ann. '39-11-106(a)(4).

It is not enough for the government to allege that Dr. Koulis must have done "something." Certainly there is no proof that he gave Buchanan any drugs and no proof that he injected her. The "injection" theory is "off the table" in any event because of the acquittal of simple assault as a matter of collateral estoppel. Based on these authorities there is no evidence that Dr. Koulis is guilty of criminally negligent homicide. This Court should dismiss the criminally negligent homicide conviction.

CONCLUSION

The conviction for criminally negligent homicide should be dismissed, or in the alternative, a new trial granted.

September 26, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief and Appendix has been furnished via United States Mail, postage prepaid, to State Attorney General Robert E. Cooper, Jr., 425 Fifth Avenue North, Second Floor, Nashville, Tennessee 37243-0493 this the 26th day of September, 2008.

David L. Raybin

Appendix contained in Separate Volume

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	**Court of Criminal Appeals**
	)	**Case No. M2007-02781-CCA-R3-CD**
vs.	)	
	)	
CHRIST KOULIS	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE
WILLIAMSON COUNTY CRIMINAL COURT

APPENDIX TO APPELLANT'S BRIEF

Brief in Separate Volume

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ORAL ARGUMENT REQUESTED

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	**)**	
	)	
Appellee,	**)**	**Court of Criminal Appeals**
	)	**Case No. M2007-02781-CCA-R3-CD**
vs.	**)**	
	)	
CHRIST KOULIS	**)**	
	)	
Appellant.	**)**	

APPENDIX TO BRIEF

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T.R. 750

[1] Appellate Counsel Note: The Court reporter typed the transcript as one continuous, page-numbered document so all transcript page numbers are unique.

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1 BOX: EXHIBITS – 240 SENT (79 RETAINED IN CLERK'S OFFICE)

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EXHIBITS

One (1) Exhibit from Motions heard and filed on May 31, 2006 and automatically authenticated under T.R.A.P. Rule 24(f)

Exhibit 1: Table of Contents (For Discovery)

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Exhibit 2: Evidence Log of Lab Items
Exhibit 3: Copy of Envelopes of Two Bills (Collective)
Exhibit 4: Copy / Consent Form for Search Warrant
Exhibit 5: Copy / Page from Def's Report w/ Tonya Buchanan (ID only)
Exhibit 6: 2 Receipts / Money Orders for Utilities (Coll.)
Exhibit 7: 2 Receipts / Money Orders for Comcast (Coll.)
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Exhibit 15: Lesa Buchanan's Lease Agreement Alara Apts.
Exhibit 16: Copy of Checks for Rent Payments
Exhibit 17: Copy of Last Rent Payment Check
Exhibit 18: 911 Tape

One (1) Exhibit from Motion to Suppress, Amended Motion to Suppress, Motion to Compel and Motion for Hard Drives heard and filed on November 30, 2006 and automatically authenticated under T.R.A.P. Rule 24(f)

Exhibit 1: Affidavit

Ten (10) Exhibits from Motions heard and filed on February 12, 2007 and automatically authenticated under T.R.A.P. Rule 24(f)

Exhibit 1: Search Warrant (Chicago – Cook County)
Exhibit 2: Total Investigative Report
Exhibit 3: Pros & Cons List
Exhibit 4: Walgreens – Prescription ready to be picked up for Ms. Roberts for Valtrex
Exhibit 5: Walgreens – Prescription ready to be picked up for Jessica Buchanan
Exhibit 6: Photos – Bottles (prescription) (3)
Exhibit 7: Det. Cisco's Investigative Report
Exhibit 8: List of Evidence
Exhibit 9: Complete Search Warrant (Cook County, Illinois)
Exhibit 10: Det. Becky Johnson's Investigative Summary

Two (2) Sealed Envelopes from Motions filed on August 31, 2007 and automatically authenticated under T.R.A.P. Rule 24(f).

Two Hundred Seventy Seven (277) Exhibits from Trial heard September 17 thru September 28, 2007 and authenticated by the Trial Judge or automatically authenticated under T.R.A.P. Rule 24(f) listed as follows:

**ID ONLY

EXHIBIT #	DESCRIPTION
1	AFFIDAVIT & 911 RECORDING
2	PHOTOGRAPH: VICTIM ON STRETCHER W/BLACK PANTS
3	PHOTOGRAPH: VICTIM'S GROIN AREA
4	ER MEDICAL RECORDS
5	PHOTOGRAPH: MEDICATIONS (3 PRESCRIPTION BOTTLES)
6	PHOTOGRAPH: PRESCRIPTION BOTTLE / ALPRAZDAM
7	PHOTOGRAPH: PRESCRIPTION BOTTLE / HYDROCODONE /APAP
8	PHOTOGRAPH: PRESCRIPTION BOTTLE / VALTREX
9	PHOTOGRAPH: FRONT OF APARTMENT
10	PHOTOGRAPH: DOORS OF APARTMENT
11	PHOTOGRAPH: BLACK BAG ON COUNTER, BOTTLES
12	PHOTOGRAPH: PRESCRIPTION FOUND IN BLACK BAG
13	PHOTOGRAPH: AIR MATTRESS, ETC
14	PHOTOGRAPH: BOTTLES, ETC ON FLOOR BY BED
15	PHOTOGRAPH: UNOPENED NEEDLES, VIAGRA, BAGGIE
16	PHOTOGRAPH: BAG, NEEDLES
17	PHOTOGRAPH: NEEDLES (DIFFERENT GAUGES)
18	PHOTOGRAPH: 22 ½ GAUGE NEEDLE, LATEX GLOVES
19	PHOTOGRAPH: CONTENTS INSIDE OF BAG
20	PHOTOGRAPH: INSIDE MASTER BEDROOM
21	PHOTOGRAPH: BLACK SUITCASE & CONTENTS
22	PHOTOGRAPH: TELEVISION IN BEDROOM
23	PHOTOGRAPH: NEEDLE, SYRINGE IN MASTER BEDROOM
24	PHOTOGRAPH: NEEDLES IN MASTER BATHROOM SINK, ETC
25	PHOTOGRAPH: ITEMS ON COUNTER IN MASTER BATHROOM
26	PHOTOGRAPH: BASKET IN MASTER BATHROOM
27	PHOTOGRAPH: BLUE DUFFLE BAG, NEEDLE, JEANS
28	PHOTOGRAPH: BAG & CONTENTS
29	PHOTOGRAPH: DVD PLAYER ON TOP TV

30	PHOTOGRAPH: TV W/CLOSE UP OF VIDEO CAMERA
31	PHOTOGRAPH: AIR MATTRESS
32	PHOTOGRAPH: FED EX BOX
33	PHO TOGRAPH: SCOPE MOUTHWASH, HYDROCODONE PRESCRIPTION
34	PHOTOGRAPH: PLASTIC BAG, SYRINGES, NEEDLES
35	PHOTOGRAPH: INSIDE OF PLASTIC BAG
36	PHOTOGRAPH: BOX OF CIPRO & AVELOX
37	PHOTOGRAPH: TRASH BAG, NEEDLES, SYRINGE IN MASTER BATH TRASH CAN
38	PHOTOGRAPH: TRASH BAG
39	PHOTOGRAPH: INSIDE OF FED EX BOX
40	PHOTOGRAPH: BOX NEXT TO FED EX BOX W/SAMPLES
41	PHOTOGRAPH: INSIDE OF BATHROOM CLOSET
42	PHOTOGRAPH: CLOSET W/BOXES
43	PHOTOGRAPH: INSIDE OF BATHROOM TRASH CAN
44	PHOTOGRAPH: ZOOM OF INSIDE OF TRASH CAN
45	PHOTOGRAPH: PROMETHAZINE PRESCRIPTION BOTTLE FOR DR. KOULIS
46	PHOTOGRAPH: PRESCRIPTION BOTTLE UNDER SINK
47	PHOTOGRAPH: BOTTLES OF LEXAPRO
48	PHOTOGRAPH: BOX PROZAC FOR MS. BUCHANAN
49	PHOTOGRAPH: CONTENTS OF MEDICINE CABINET
50	PHOTOGRAPH: CONTENTS OF MEDICINE CABINET
51	PHOTOGRAPH: BOTTLES IN MEDICINE CABINET
52	PHOTOGRAPH: ZOOM OF MEDICINE CABINET CONTENTS
53	PHOTOGRAPH: CLOTH BAG W/SAMPLES
54	PHOTOGRAPH: ZOOM OF BAG
55	PHOTOGRAPH: SEXUAL DEVICES, ETC IN MASTER BEDROOM
56	PHOTOGRAPH: SEXUAL DEVICES, ETC IN MASTER BEDROOM
57	PHOTOGRAPH: BOWL W/ALCOHOL SWAB, ETC
58	PHOTOGRAPH: KITCHEN W/PURSE, NEEDLES, VIAGRA
59	BLISTER PACKS OF LEXAPRO IN MASTER BATH (FPD 1)
60	PACKETS OF CALTRATE PLUS IN MASTER BATH (FPD 2)
61	PACKETS OF FORADIL AEROLIZER / MASTER BATH (FPD 3)
62	SAMPLE PACKETS ALLEGRA D / MASTER BATH (FPD 4)
63	BOX OF VIGAMOX / MASTER BATH CLOSET (FPD 5)
64	BOX KETEK PACK / MASTER BATH CLOSET (FPD 6)
65	BOX AVELOX / MASTER BATH CLOSET (FPD 7)

66 BOX LEVAQUIN / MASTER BATH CLOSET (FPD 8)
67 SINGULAIR / MASTER BATH CLOSET (FPD 9)
68 CLARINEX / MASTER BATH CLOSET (FPD 10)
69 VIOXX SAMPLE / MASTER BATH CLOSET (FPD 11)
70 SINGULAIR / MASTER BATH CLOSET (FPD 12)
71 ZYRTEC BROWN BOX / MASTER BATH CLOSET (FPD 13)
72 ZYRTEC (12HR) FED EX BOX IN CLOSET (FPD 14)
73 RHINOCORT, ADVAIR, ETC / MASTER BATH CLOSET (FPD 15)
74 BEXTRA SAMPLES / MASTER BATH CLOSET (FPD 16)
75 IV BAGS/MASTER BATH CLOSET (FPD 17)
76 BAG OF PRESCRIPTION BOTTLES / MEDICINE CABINET (FPD 18)
77 BAG OF PRESCRIPTION BOTTLE /MEDICINE CABINET (FPD 19)
78 CORTIZONE 10 & INHALER / MASTER BATH CLOSET (FPD 20)
79 2 SYRINGES IN CONTAINERS / TRASH BAG IN CLOSET (FPD 21)
80 LEXAPRO / MASTER BATH (FPD 22)
81 PROZAC / MASTER BATH UNDER SINK (FPD 23)
82 PRESCRIPTION BOTTLE HYDROCODONE / MASTER BATH TRASH CAN (FPD 24)
83 SYRINGE & CAPS / MASTER BATH TRASH CAN (FPD 25)
84 SYRINGE W/CAP / MASTER BATH TRASH CAN (FPD 26)
85 NEEDLES / MASTER BATH TRASH CAN (FPD 27)
86 UNOPENED SYRINGE / MASTER BATH TRASH CAN (FPD 28)
87 VIAGRA IN BLACK BAG / KITCHEN COUNTER (FPD 29)
88 AVELOX / KITCHEN COUNTER (FPD 30)
89 CAPPED SYRINGE, NEEDLE, ETC / KITCHEN COUNTER (FPD 31)
90 BAG W/TRI MIX VIAL / KITCHEN COUNTER (FPD 32)
91 PRESCRIPTION BOTTLE HYDROCODONE / KITCHEN COUNTER (FPD 33)
92 SODIUM CHLORIDE VIAL / KITCHEN COUNTER (FPD 34)
93 NEEDLES / KITCHEN COUNTER (FPD 35)
94 SYRINGES / KITCHEN COUNTER (FPD 36)
95 SYRINGE WRAPPERS / BATHROOM CLOSET TRASH BAG (FPD 37)
96 ORANGE TABLET (CENTRUM, ETC) / KITCHEN CABINET (FPD 38)
97 NEEDLE / BATHROOM CLOSET TRASH BAG (FPD 39)
98 SAMPLES, ETC / KITCHEN CABINETS (FPD 40)

99	SYRINGE / BATHROOM CLOSET IN TRASH BAG (FPD 41)
100	PRESCRIPTION BOTTLES, ETC / KITCHEN CABINET (FPD 42)
101	NEEDLES UNDER DECEDENT'S PURSE / KITCHEN (FPD 43)
102	SYRINGE / BATHROOM CLOSET TRASH BAG (FPD 44)
103	SYRINGE & NEEDLES / BATHROOM CLOSET TRASH BAG (FPD 45)
104	VIAL, NEEDLE, CAP / BATHROOM SINK (FPD 46)
105	GLASS VIAL / KITCHEN COUNTER (FPD 48)
106	8 MM VIDEOTAPE / VIDEO CAMERA IN MASTER BEDRM (FPD 49)
107	PRESCRIPTION BOTTLE / CARDBOARD BOX BATHRM (FPD 50)
108	SAMPLES LEXAPRO / MASTER BATH CLOSET (FPD 51)
109	SAM-E 10 TABLETS / MASTER BATH UNDER SINK (FPD 52)
110	FEX EX BOX / MASTER BATH CLOSET (FPD 53)
111	PHOTO METAVA / HYDROCODONE PRESCRIPTION BOTTLE TAKEN ON 7/4/05 ON KITCHEN COUNTER
112	PHOTOGRAPH: CLOSEUP BLACK BAG & CONTENTS
113	PHOTOGRAPH: BLACK BAG, AVELOX, VIAL, ETC / KITCHEN COUNTER
114	PHOTOGRAPH: SYRINGE / KITCHEN COUNTER
115	PHOTOGRAPH: VIAL SODIUM CHLORIDE / KITCHEN COUNTER
116	PHOTOGRAPH: CLOSEUP OF VIAL ADRENALIN (EPINEPHRINE) / KITCHEN COUNTER
117	PHOTOGRAPH: CLOSEUP SYRINGE, AVELOX / KITCHEN COUNTER
118	PHOTOGRAPH: PAPAVERINE HCL VIAL (CLOSEUP) / KITCHEN COUNTER
119	PHOTOGRAPH: BOXES VIAGRA, SYRINGES, ALCOHOL PREP PADS IN BLACK BAG
120	PHOTOGRAPH: PRESCRIPTION BOTTLE HYDROCODONE / APAP FOR LESA BUCHANAN
121	PHOTOGRA PH: CLOSEUP OF PRESCRIPTION BOTTLE HYDROCODONE / APAP FOR LESA BUCHANAN
122	PHOTOGRAPH: CHICAGO APARTMENT BLDG.
123	PHOTOGRAPH: FRONT DOOR 165
124	PHOTOGRAPH: APARTMENT #1113
125	PHOTOGRAPH: MISC PAPERS, VALTREX, ETC INSIDE APT.
126	PHOTOGRAPH: PRESCRIPTION PAD, ETC

127	PHOTOGRAPH: CLOSEUP OF ALFORTIN, ETC
128	PHOTOGRAPH: TRASHCAN AND CONTENTS
129	PHOTOGRAPH: FOSAMAX SAMPLES & OTHER SAMPLES, ETC
130	PHOTOGRAPH: PROFESSIONAL SAMPLES
131	PHOTOGRAPH: VIALS ON COUNTER, BAG IN SINK / MASTER BATH
132	PHOTOGRAPH: NEEDLE, SYRINGE, ALCOHOL PREP PAD ON SINK
133	PHOTOGRAPH: MASTER BATH
134	PHOTOGRAPH: ALCORTIN SAMPLE, BRUSH, TOOTHPASTE
135	PHOTOGRAPH: OPEN COUNTER DRAWER W / PROFESSIONAL SAMPLES
136	PHOTOGRAPH: CLOTHING, CLEAR BAG W / SAMPLES
137	PHOTOGRAPH: BED, SAMPLE PACKS ON FLOOR
138	PHOTOGRAPH: ITEMS ON END TABLE (CLOSEUP)
139	PHOTOGRAPH: OPEN DRAWER END TABLE W/SAMPLES
140	PHOTOGRAPH: ANOTHER OPEN DRAWER SAMPLES OF VIAGRA & LIPITOR
141	PHOTOGRAPH: CLEAR ORGANIZER, BOTTLES NASAL SPRAY, NEEDLES / MASTER CLOSET
142	PHOTOGRAPH: CARD TO MS. BUCHANAN
143	PHOTOGRAPH: SAMPLES, BACKSIDE OF CARD / MASTER CLOSET
144	PHOTOGRAPH: PHOTOS OF MS. BUCHANAN, CARDS, SAMPLE
145	PHOTOGRAPH: HANDWRITTEN NOTE FROM DR. SEWELL – RE: DR. KOULIS DATED 6/13/02
146	PHOTOGRAPH: PLASTIC BAG SYRINGES, NEEDLES, GLASS BOTTLE, ETC
147	PHOTOGRAPH: PRESCRIBED BOTTLES, MISC PAPER
148	PHOTOGRAPH: NEEDLES IN PACKAGES, VIALS, BOTTLES
149	PHOTOGRAPH: CLOSEUP OF ITEMS IN EXHIBIT 148
150	PHOTOGRAPH: CLOSEUP OF ITEMS IN EXHIBIT 148
151	PHOTOGRAPH: CLOSEUP OF ITEMS IN EXHIBIT 148
152	PHOTOGRAPH: CLOSEUP OF PRESCRIPTION BOTTLE FOR DR. KOULIS
153	PHOTOGRAPH: CLOSEUP OF PRESCRIPTION BOTTLE FOR DR. KOULIS
154	PHOTOGRAPH: CLOSEUP OF EXHIBIT 152

155	PHOTOGRAPH: PLASTIC BAG, NEEDLES, SYRINGE
156	PHOTOGRAPH: CLOSEUP OF PRESCRIPTION BOTTLE FOR MS. BUCHANAN
157	BLUE DUFFLE BAG W/CONTENTS / CHICAGO APT (FPD 68)
158	ALCOHOL SWABS PACKAGE / MASTER BEDROOM (FPD 72)
159	TISSUES WITH BLOOD / MASTER BEDROOM (FPD 73)
160	DOCUMENT FOR HYDROCODONE DELIVERY (3/16/05) / LIVING ROOM DESK (FPD 75)
161	BOX OF PROCTOFOAM / KITCHEN (FPD 76)
162	SAMPLE ALCORTOZONE / DESK IN LIVINGROOM (FPD 88)
163	DOCUMENT ONLINE PRESCRIPTION / ABOVE LIVINGROOM DESK (FPD 91)
164	LEXAPRO SAMPLE / CABINET IN LIVINGROOM (FPD 93)
165	LEXAPRO SAMPLE / LIVINGROOM BY COMPUTER DESK (FPD 94)
166	INJECTABLE VIAL / CHICAGO (FPD 101)
167	CARD TO LESA FROM CHRIST / MASTER BEDROOM IN CHICAGO (FPD 103)
168	2 GLASS VIALS / BEDROOM NIGHTSTAND (FPD 104)
169	3 NEEDLES, SYRINGES, PADS / MASTER CLOSET (FPD 105)
170	TN DRIVER'S LICENSE FOR LESA BUCHANAN / KITCHEN COUNTER (FPD 106)
171	MISC GREETING CARDS / LIVINGROOM (FPD 109)
172	PRESCRIPTION FOR PREDNISONE FOR LESA BUCHANAN DATED 8/27/00 (FPD 116)
173	PRESCRIPTION PAD / STORAGE ROOM (FPD 117)
174	BOX OF NARCAN / STORAGE ROOM (FPD 120)
175	VIAL POLIDOCANOL / JESSIE'S ROOM (FPD 124)
176	3 VIALS / MASTER BATH (FPD 125)
177	STERILE NEEDLES DIFFERENT GAUGES / JESSIE'S ROOM (FPD 126)
178	2 VIALS/JESSIE'S ROOM (FPD 127)
179	2 VIALS/JESSIE'S ROOM (FPD 128)
180	PRESCRIPTION FOR LESA BUCHANAN DATED 8/13/01/JESSIE'S ROOM (FPD 131)
181	PRESCRIPTION OF CIPRO FOR LESA BUCHANAN/JESSIE'S ROOM (FPD 132)
182	ATHLETIC BAG & CONTENTS / STORAGE ROOM (FPD 135)

183	2 BOXES, VIAL, ETC FOUND IN EXHIBIT 182 (FPD 144)
184	2 BROWN GLASS VIALS/STORAGE BOX (FPD 145)
185	COLLECTIVE: UROLOGY ASSOCIATES / DR. SEWELL'S NOTES (2 PAGES)
186	COLLECTIVE: CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:29 P.M.
187	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:29 P.M.
188	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:28 P.M.
189	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:27 P.M.
190	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:26 P.M.
191	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:26 P.M.
192	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:24 P.M.
193	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:23 P.M.
194	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:23 P.M.
195	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:22 P.M.
196	CELL PHONE PHOTO & DOCUMENTATION 7/04/05 12:22 P.M.
197	LESA BUCHANAN – RED & BLACK 7/03/05 5:22 P.M.
198	LESA BUCHANAN – RED & BLACK 7/03/05 5:22 P.M.
199	LESA BUCHANAN – RED & BLACK 7/04/05 12:18 P.M.
200	LESA BUCHANAN – RED & BLACK 7/04/05 12:17 P.M.
201	LESA BUCHANAN THUMBPRINTS 7/03/05
202	LESA BUCHANAN CLOSEUP OF FACE 7/03/05 5:01 P.M. (DIFFERENT PHONE)
203	DVD
204	DR. GHUNEIM'S MEDICAL RECORDS FOR LESA BUCHANAN
205	MARK DR. GHUNEIM USES FOR "NO" ON YELLOW SHEET OF LEGAL PAPER
206	PATIENT INFORMATION SHEET FOR LESA BUCHANAN
207	PRESCRIPTION FOR HYDROCODONE (GENERIC) DATED 5/17/05
208	WALGREEN PRESCRIPTION RECORD FOR LESA BUCHANAN
209	STIPULATION
210	OFFICIAL FORENSIC CHEMISTRY REPORT
211	LATENT FINGERPRING REPORT
212	ENHANCED CLIPS OF VIDEO OF EXHIBIT 203
213	ENHANCED AUDIO OF VIDEO OF EXHIBIT 203
214	WALKTHROUGH VIDEO OF ALARA APARTMENT 7/13/05
215	LARGE DIAGRAM WITH MARKINGS OF LAYOUT OF ALARA APARTMENT

216	STILL PHOTO TAKEN FROM THE VIDEO (EXHIBIT 203)
217	STILL PHOTO TAKEN FROM THE VIDEO (EXHIBIT 203)
218	STILL PHOTO TAKEN FROM THE VIDEO (EXHIBIT 203)
219	STILL PHOTO TAKEN FROM THE VIDEO (EXHIBIT 203)
220	PHOTOGRAPH: VIDEO CAMERA
221	PHOTOGRAPH: LESA LYING ON BED
222	AUTOPSY REPORT
223	2 PAGE CERTIFICATE OF DEATH
224	**1 PAGE CERTIFICATE OF DEATH
225	DR. DEERING'S PHYSIOLOGICAL CHART
226	DR. DEERING'S ANATOMICAL CHART
227	TRIPLE LUMEN CATHETER
228	AMBU BAG
229	MULTI-LUMEN CVC SUPER KIT
230	SODIUM CHLORIDE BAG
231	MEMO FROM MR. OFMAN'S SECRETARY RE: EXPERT WITNESSES
232	CURRICULUM VITAE OF DR. GRAHAM
233	SLIDE PRESENTATION CD
234	CURRICULUM VITAE OF DR. GOLDBERGER
235	**11/22/04 EMAIL FROM BUCHANAN TO KOULIS (2 PGS)
236	11/30/04 2 EMAILS (1) BUCHANAN TO KOULIS & (1) KOULIS TO BUCHANAN (COLLECTIVE)
237	**1/29/05 EMAIL FROM BUCHANAN TO KOULIS
238	12/15/04 EMAIL FROM KOULIS TO BUCHANAN
239	FORENSIC INTERNET HISTORY REPORT
240	5/11/02 LETTER TO WHOM IT MAY CONCERN FROM KOULIS
241	**POLICE REPORT / LIST OF 11 PICTURES OF INJECTION WOUNDS
242	**POLICE REPORT 5/1/02
243	PRE TRIAL DIVERSION AGREEMENT
244	AFFIDAVIT
245	**MEDICAL RECORD (1 PAGE)
246	**MEDICAL RECORD (PAGE 1 OF THE RECORD)
247	RESULTS OF DRUG TESTS ON DR. KOULIS, LETTER ATTACHED 4/03/07
248	**COTTONWOOD RECORDS-LESA BUCHANAN
249	CVS PHARMACY RECORD FOR LESA BUCHANAN
250	PHOTOGRAPH OF LESA BUCHANAN

251	PHOTOGRAPH OF LESA BUCHANAN'S PURSE
252	FIFTH THIRD BANK RECORDS
253	CAPITAL ONE RECORDS
254	STIPULATION
255	PHOTOGRAPH LESA BUCHANAN FOR BOOK ON HUMAN SEXUALITY
256	SHEET OF PHOTOGRAPHS-VICTIM & MALE
257	**DOCUMENTED INTERNET CONVERSATION-10/20/03
258	POEM "JUST BE" WRITTEN BY VICTIM (2000)
259	POEM "EGO" WRITTEN BY VICTIM (2004)
260	NOV 2004-JULY 2005 CELLPHONE RECORDS OF LESA BUCHANAN
261	DOCUMENTS RE: KENTUCKY APARTMENT
262	PETER KOULIS' CREDIT CARD RECORD (DEF'S FATHER)
263	RECORDS OF PHONE CALLS-VICTIM TO DEFENDANT
264	RECEIPT FOR JEWEL & CERTIFICATE OF AUTHENTICITY & PHOTO OF MOUNTING
265	TEXT MESSAGES - KOULIS TO BUCHANAN
266	TEXT MESSAGES - BUCHANAN TO KOULIS
267	SOUTHWEST AIRLINE ITINERARY FOR KOULIS
268	**ORDER GRANTING PRE TRIAL DIVERSION & CONDITIONS OF DIVERSION
269	5/08/02 LETTER KOULIS TO BUCHANAN
270	LETTER FROM TRAVEL AGENT FOR JAMAICA TRIP
271	PHOTO OF BUCHANAN IN CHAIR
272	DR. LEVY'S CURRICULUM VITAE
273	PHOTOGRAPH: PLATE W/COTTAGE CHEESE/MASTER BATH TRASH CAN
274	PHOTOGRAPH: BED IN MASTER BEDROOM IN CHICAGO APT.
275	8/12/04 LEASE FOR ALARA APT.
276	CHICAGO VOTER REGISTRATION CARD FOR LESA BUCHANAN DATED 8-08-04
277	LESA BUCHANAN'S CELL PHONE RECORD

LIST OF ID EXHIBITS FROM TRIAL:

# 224	1 PAGE CERTIFICATE OF DEATH
# 235	11/22/04 E MAIL BUCHANAN TO KOULIS (2 PAGES)
# 237	1/29/05 E MAIL (BUCHANAN TO KOULIS)
# 241	POLICE REPORT / LIST OF 11 PICTURES OF INJECTION WOUNDS
# 242	POLICE REPORT 5/1/02
# 245	MEDICAL RECORD (1 PAGE)
# 246	MEDICAL RECORD (PAGE 1 OF THE RECORD)
# 248	COTTONWOOD RECORDS – LESA BUCHANAN
# 257	DOCUMENTED INTERNET CONVERSATION – 10/20/03
# 268	ORDER GRANTING PRE TRIAL DIVERSION & CONDITIONS OF DIVERSION

NOTE: THE FOLLOWING EXHIBITS WILL REMAIN IN CLERK'S OFFICE DUE TO SIZE OR NATURE. TOTAL OF 79 RETAINED.

EXHIBIT: 59 THRU 110
EXHIBIT: 157 THRU 159
EXHIBIT: 161 AND 162
EXHIBIT: 164 THRU 166
EXHIBIT: 168 AND 169
EXHIBIT: 172
EXHIBIT: 174 THRU 184
EXHIBIT: 215
EXHIBIT: 227 THRU 230

Twelve (12) Exhibits from Motion for New Trial & Bond Hearing heard and filed on December 5, 2007 and authenticated by the Trial Judge or automatically authenticated under T.R.A.P. Rule 24(f)

Exhibit 1: Pre –Sentence Report
Exhibit 2: Civil Complaint (2001 Filed by Robin N. Williams)
Exhibit 3: Notice of Charge Filed by the Tn. Dept. of Health
Exhibit 4: Statement of Tara Bentley
Exhibit 5: Statement of Peggy Roberts
Exhibit 6: Statement of Humoni Nuta (Best Friend of Jessica Buchanan, Victim's Daughter)
Exhibit 7: Letter to Christ Koulis from Jessica Buchanan
Exhibit 8: Statement of Jessica Buchanan
Exhibit 9: Collective - Letters
Exhibit 10: Review of Computer Records (Match.com)
Exhibit 11: E-Mail From Mr. Stephens (Kentucky Probation Officer)
Exhibit 12: Letter from Mr. Travis (Attorney in Kentucky)

This _____ day of _____, 2008.

Debbie McMillan Barrett
Circuit Court Clerk, Williamson County

Indictment

CIRCUIT COURT NUMBER I-CR111479

STATE OF TENNESSEE, WILLIAMSON COUNTY
CIRCUIT COURT

on all counts

COUNT 1
MURDER – 2ND DEGREE

The Grand Jurors for Williamson County, Tennessee, duly impaneled and sworn, upon their oath, present that **CHRIST P. KOULIS**, heretofore, to-wit, on July 4, 2005, before the finding of this indictment, in said County and State, did unlawfully kill another, to-wit: Lesa R. Buchanan, as a result of the unlawful distribution of a Schedule I or Schedule II drug, when the drug(s) proximately caused the death, in violation of Tennessee Code Annotated 39-13-210(a)(2), a class A felony and against the peace and dignity of the State of Tennessee.

COUNT 2
RECKLESS HOMICIDE

The Grand Jurors for Williamson County, Tennessee, duly impaneled and sworn, upon their oath, present that **CHRIST P. KOULIS**, heretofore, to-wit, on July 4, 2005, before the finding of this indictment, in said County and State, did unlawfully, recklessly and feloniously kill another, to-wit: Lesa R. Buchanan, in violation of Tennessee Code Annotated 39-13-215 a class D felony, and against the peace and dignity of the State of Tennessee.

FILED 11-14 20 05
DEBBIE McMILLAN BARRETT

RONALD L. DAVIS
District Attorney General

Detective Johnson’s Report about the Cell Phones

Detective's Investigative Report:

Please see highlighted areas for the time a cell phone photo was noted by Detective Johnson: Lesa posing in risqué clothing circa 1:30 pm 7/4/05. This photo was apparently erased by the police in their fumbling with the phone.

to the apartment, had gone in the apartment and taken "a few things." He stated he left the keys to the car at the Leasing Office.

At approx. 1615 hrs., Det. Cisco and I went to Alara of Cool Springs. We spoke with Tammy, the Leasing Manager. After explaining our concerns that Koulis may have entered the apartment without consent, Tammy gave us the key to Apt. #17305. On entering the apartment we examined it and nothing looked out of place. We then picked up the cell phone in the living room and the cell phone in the bedroom. Both phones had a pornographic photo as the screen saver. We then looked at both phones and determined that the phone in the bedroom belonged to Koulis. We then looked at the photos on the phone. There was one photo of Ms. Buchanan in risqué clothing and dated 07-04 at approx. 1330 hrs. We attempted to forward the photos to Det. Cisco's e-mail address but were unable to due to the lines being overloaded. We attempted to reset the phone but could not get it to work. We then contacted Officer Grant and he explained how to reset the phone. We then left the phone and left the apartment.

Later in the evening, I spoke with Det. Pate of the Boone County Sheriff's Office. He advised that he worked the case concerning Ms. Buchanan being very drugged and having to be in ICU in their hospital for three to four days. Det. Pate stated he would make copies of his entire file and mail it to me.

This investigation continues.

INVESTIGATIVE SUMMARY by Detective S. Cisco:

On July 4,2005 I was first called out for an unexpected death, which later became a suspicious death. I arrived at Williamson Medical Center and met with Det. Johnson. I then photographed the deceased, Lesa Buchanan, who was pronounced at 1600 hours. EMS had brought in three prescription bottles and those were photographed also.

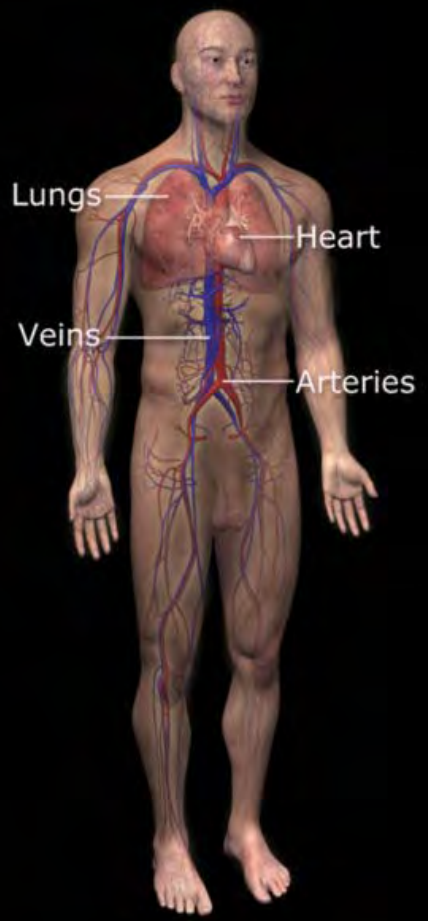
3 prescription ← Bottles

We spoke with the doctor who worked on Buchanan, and he was Dr. Steven Ragle. Dr. Ragle advised that Buchanan was brought in by EMS and that the "husband" (Christ Koulis), who is a doctor, performed CPR at her apartment and CPR was still being done on her. Koulis advised that he had given Buchanan an Epi injection at the apartment. An IV line was started in the left jugular and was not able to locate a pulse. Dr. Ragle then checked the groin area for a femoral pulse, and noticed several fresh injection marks on Buchanan's body, which were in her groin area. Dr. Ragle asked Koulis if Buchanan was using drugs and he stated that she was clean. Koulis went on to say that he did not believe there was anything in the house.

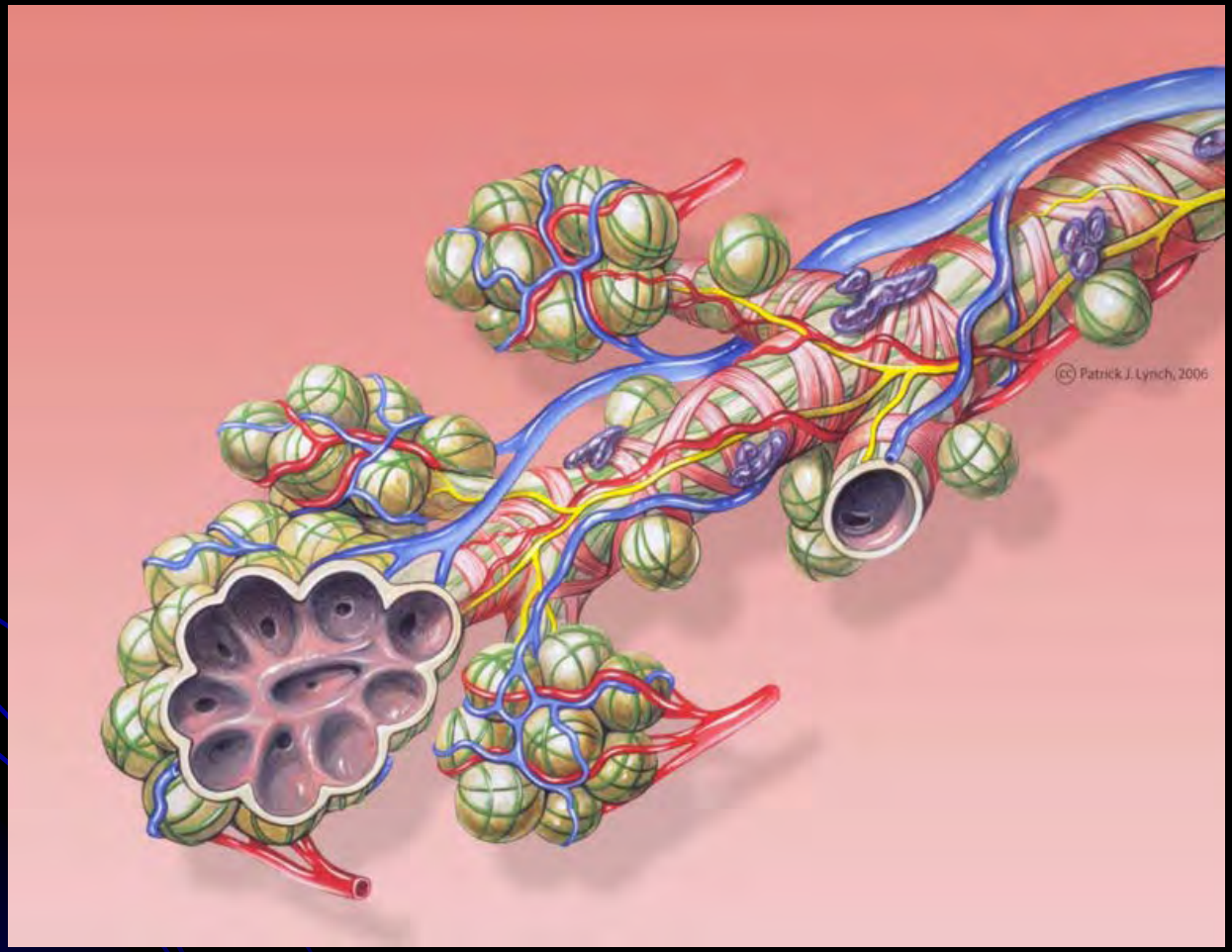
Dr. Ragle advised that during that time, her husband (later found out to be her boyfriend) was present in the room and was demanding they work on her for 30 minutes and also wanted a cardiologist called. Dr. Ragle advised that Koulis had stated that "Why would she code, we were having a sex marathon all weekend?"

Exhibit 233: Slide Presentation of Dr. Michael Graham; forensic pathologist and professor of pathology at St Louis University

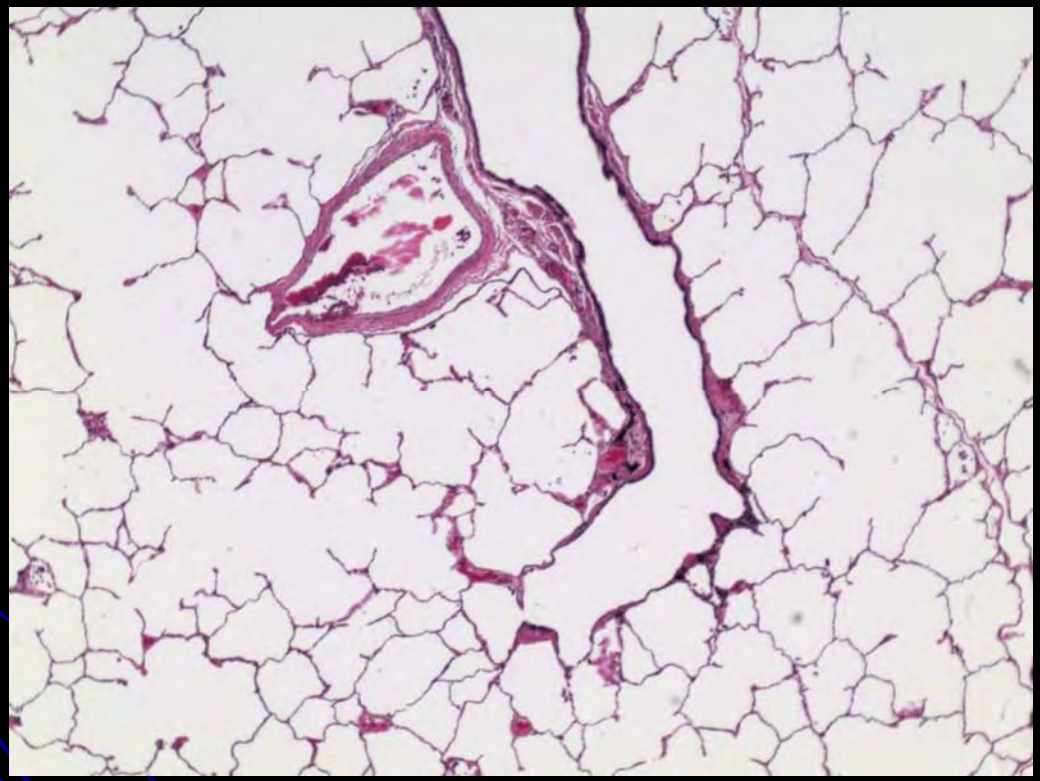
Normal Circulation

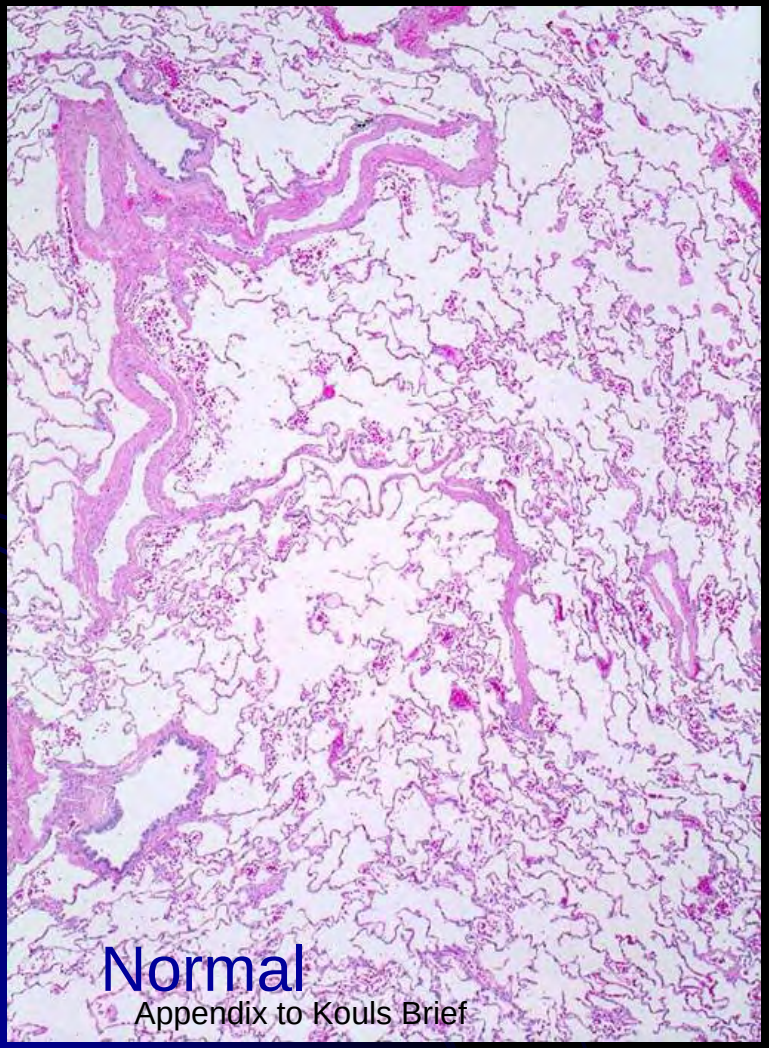


Normal Lung



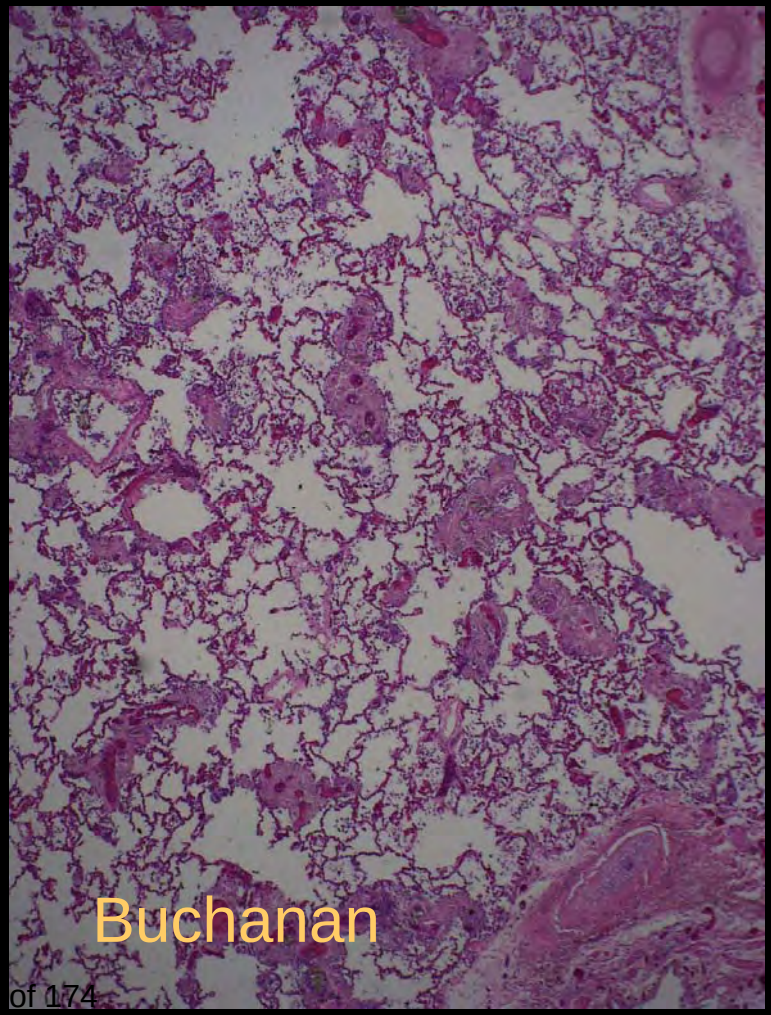
Normal Lung



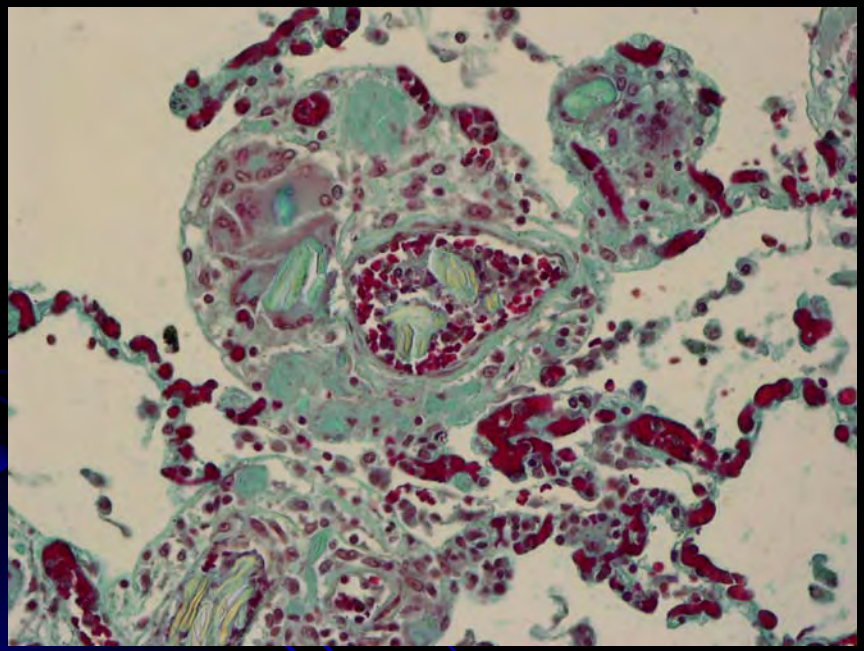


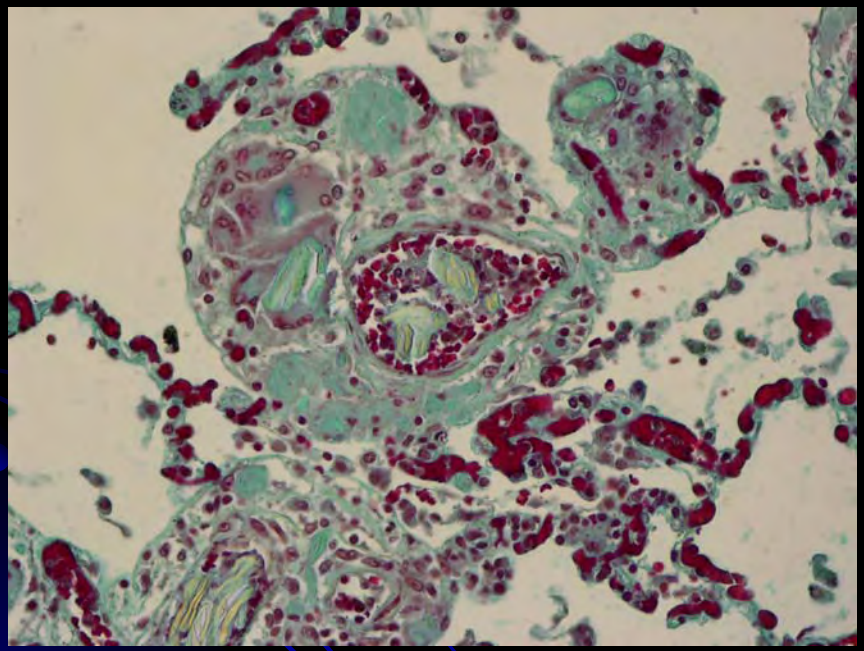
Normal

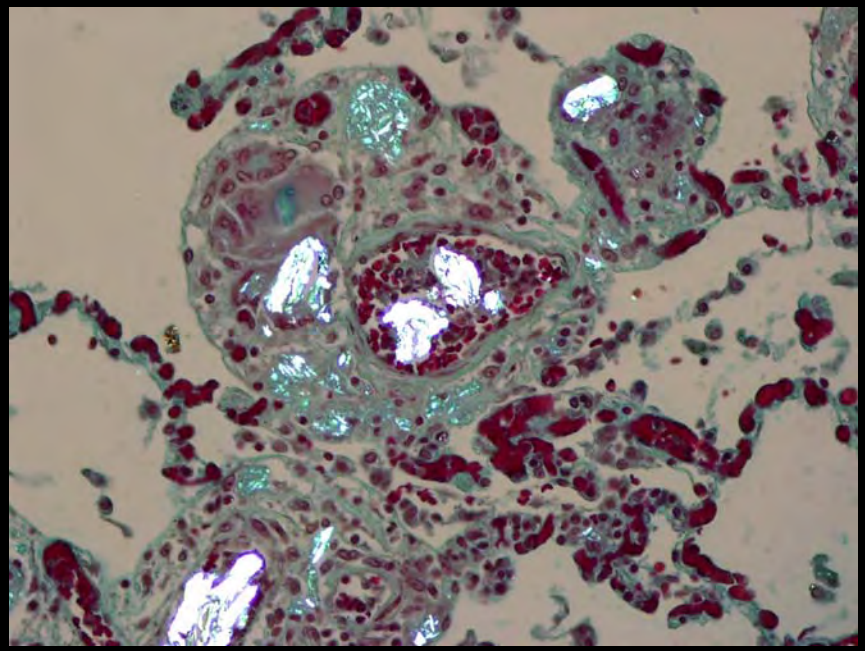
Appendix to Kouls Brief

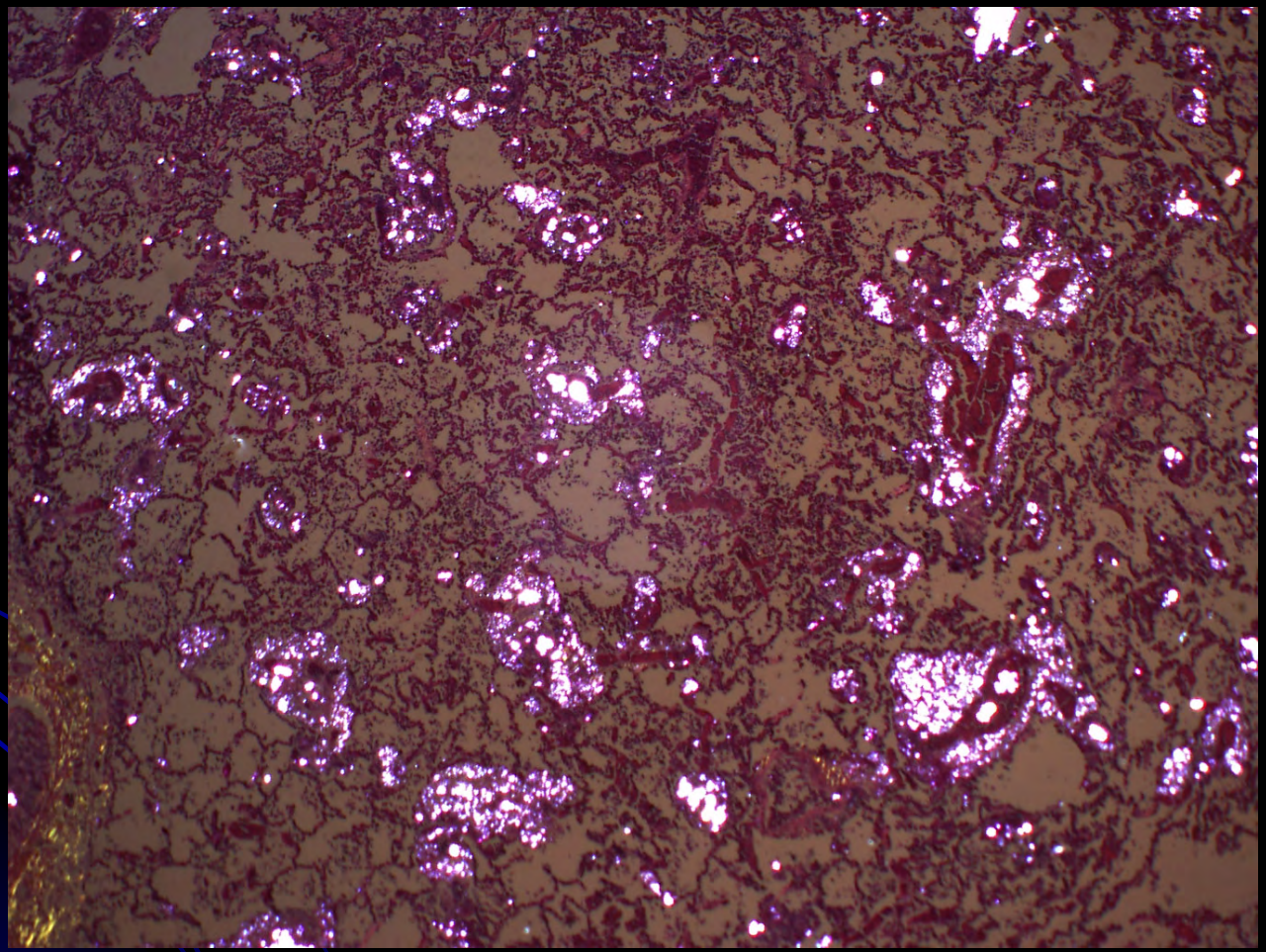


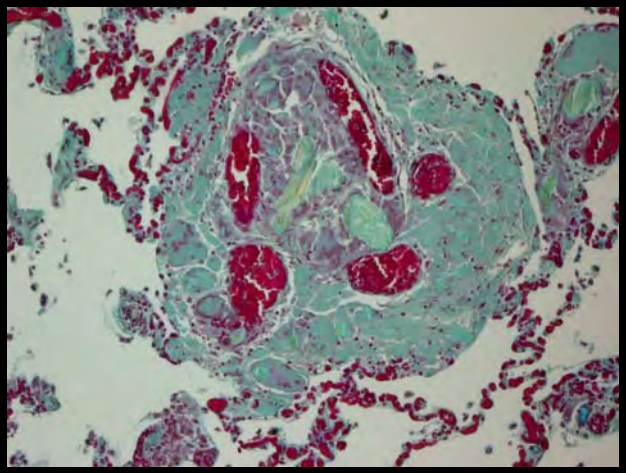
Buchanan

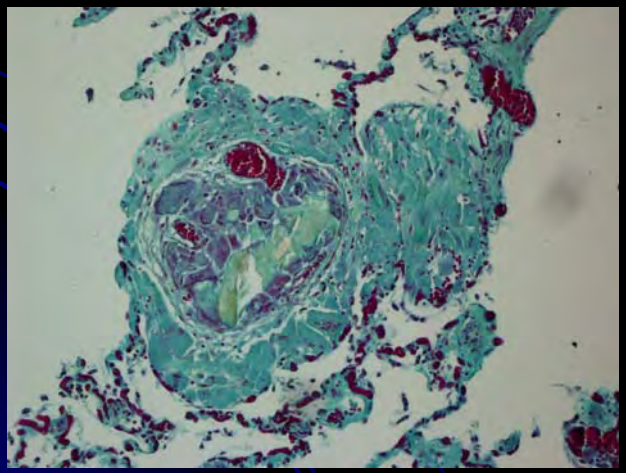


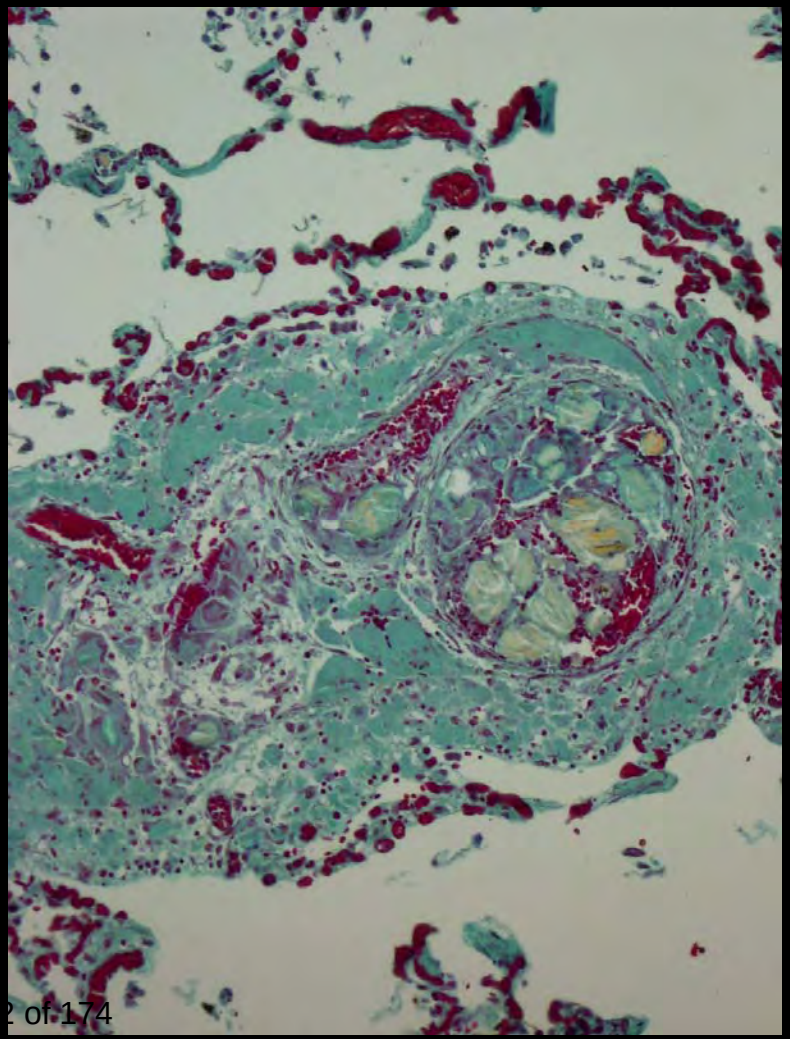


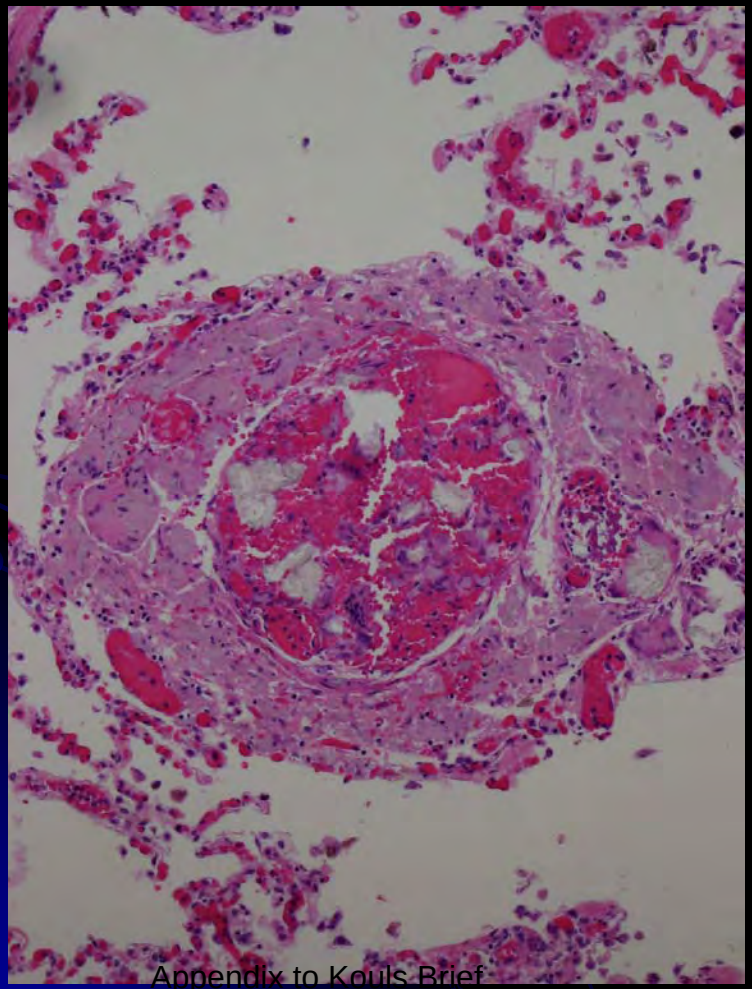


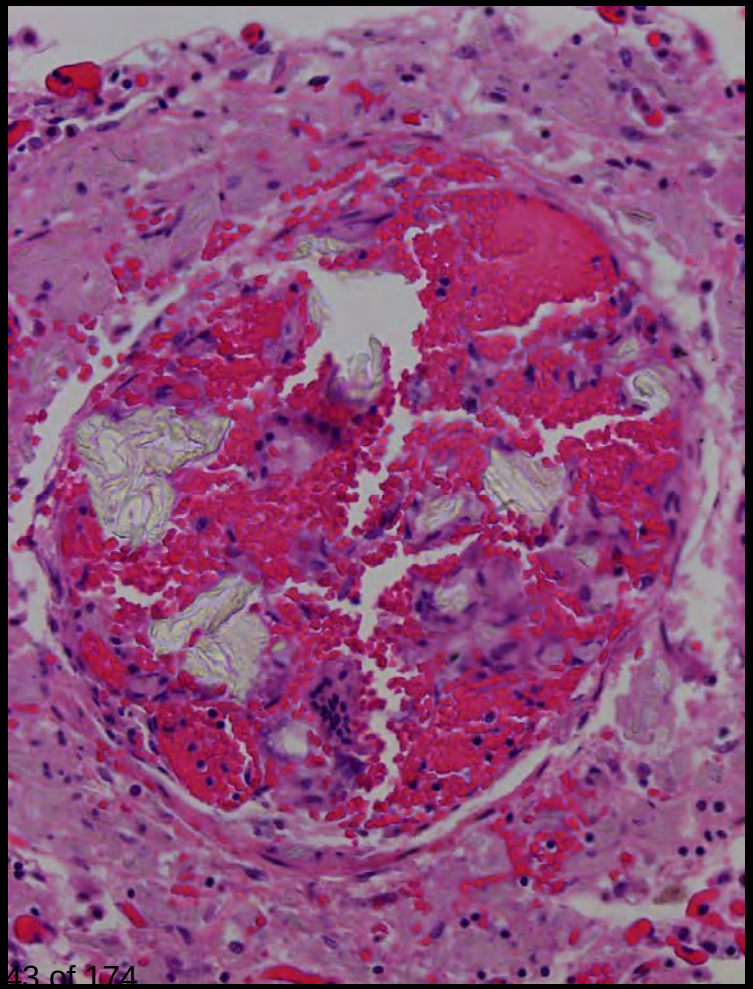


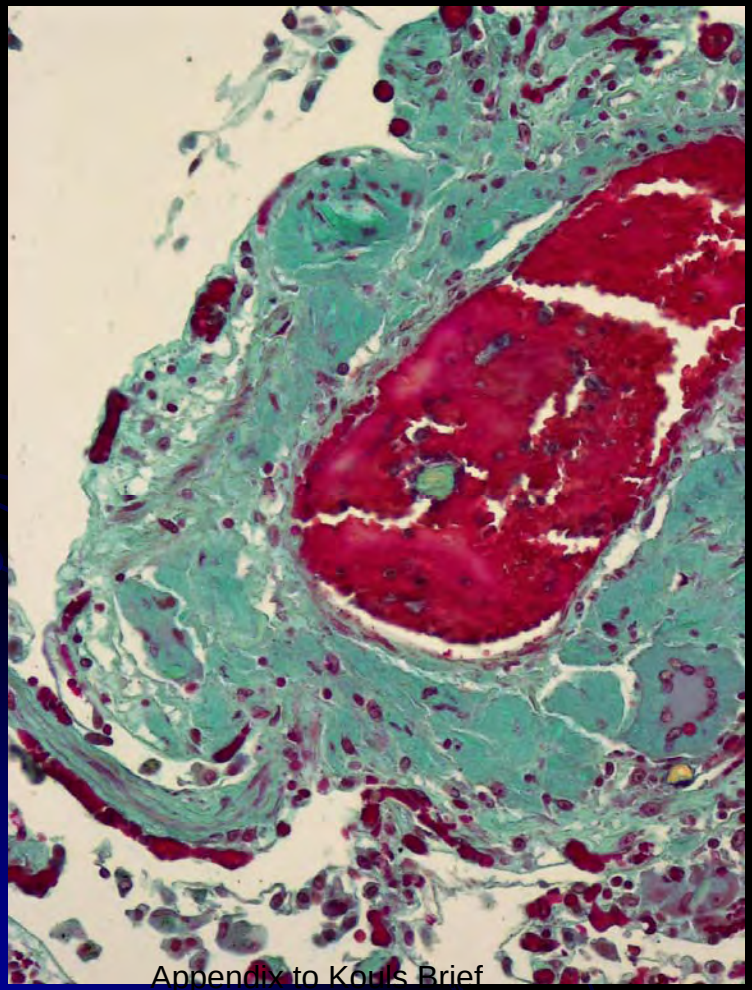


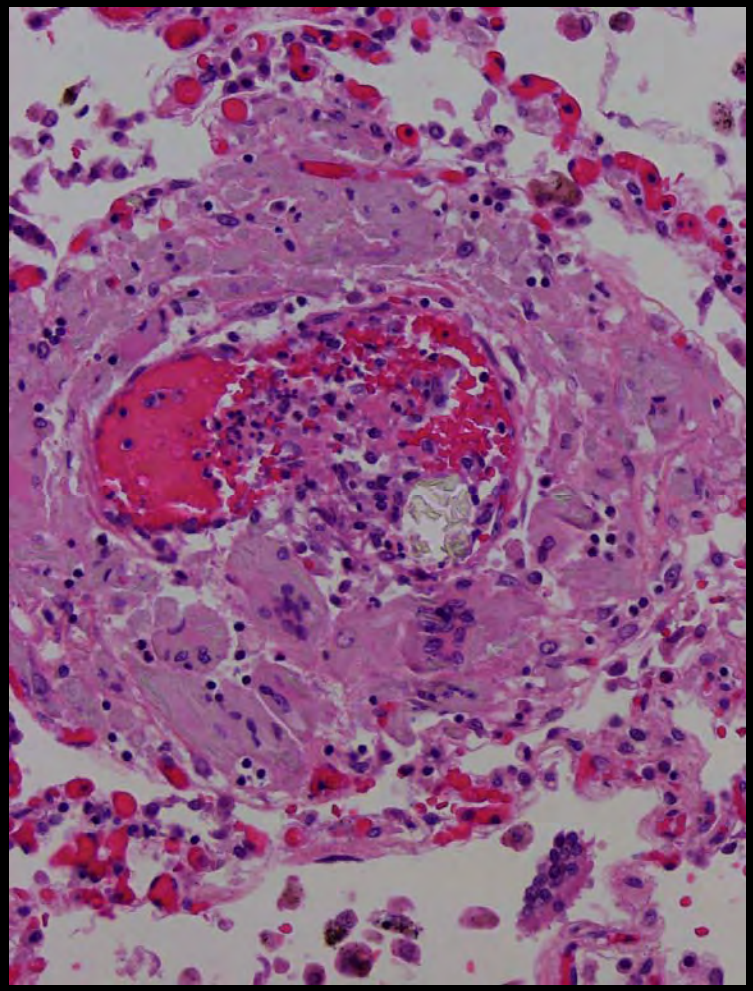












Franklin, Tennessee Search Warrant

ORIGINAL ORIGINAL

STATE OF TENNESSEE
WILLIAMSON COUNTY

FILED

JUL 14 2005

Debbie McMillan Barrett
Circuit Court

SEARCH WARRANT

TO THE SHERIFF, ANY CONSTABLE, OR ANY PEACE OFFICER OF SAID COUNTY: Proof by affidavit having been made before me by **DETECTIVE ERIC ANDERSON, FRANKLIN POLICE DEPARTMENT,** that there is probable cause for believing that the following described property, is located at 101 Gillespie Drive, Apt. 17305, Franklin, Tennessee, to-wit:

One large carat diamond (or similar) gemstone ring, diary/day planner/any written documentation evidencing the relationship and/or drug use between Christ Pete Koulis and Lesa Buchanan, controlled substances/narcotics/drug paraphernalia, cellular telephones, computers, luggage, and recorded materials documenting Koulis administering drugs to Buchanan or engaged in any illegal activity.

to be searched for in accordance with the Laws of the State of Tennessee, upon the following described property, namely:

101 Gillespie Drive, Apt. 17305. Traveling from the Square in Franklin, travel north on Main Street until it becomes Franklin Road. Continue on Franklin Road to Mack Hatcher Pkwy. Turn right on Mack Hatcher Pkwy to Cool Springs Blvd. Turn left on Cool Springs Blvd. and travel to Carothers Pkwy. Turn left onto Carouthers Pkwy to Gillespie Drive. Turn right onto Gillespie Drive. The first apartment complex on the right is Alara of Cool Springs. The address is 101 Gillespie Drive. The building containing the above referenced apartment is the first building on the left adjacent to the Clubhouse/Leasing Office.

The building including the apartment is marked with the number 17. The apartment is located on the third floor of this building. Take the center stairwell to the third floor. The apartment door is prominently marked with a placard above the door with the number 17305.

To be included in the search is the apartment described above, the accompanying garage, and Lesa Buchanan's white 1999 Acura parked outside the building at the bottom of the stairwell. The vehicle has a Kentucky license plate number 568-HHN and is registered to Buchanan. The VIN number is 19UUA5642XA004577.

situated in WILLIAMSON County, Tennessee;

you are, therefore, commanded to make immediate search of the property, including curtilage, and vehicle herein above described for the following property:

One large carat diamond (or similar) gemstone ring, diary/day planner/any written documentation evidencing the relationship and/or drug use between Christ Pete Koulis and Lesa Buchanan, controlled substances/narcotics/drug paraphernalia, cellular telephones, computers, luggage, and recorded materials documenting Koulis administering drugs to Buchanan or engaged in any illegal activity.

and if you find the same or any part thereof, to bring it forthwith before me, at my office in Franklin, Tennessee, of said County and State.

This the 13th day of July, 2005.

Jeffrey S. Bivins Title: JUDGE Court: WILLIAMSON COUNTY CIRCUIT COURT, PART III
(Signature of Judge or Magistrate)

Issued on 11:15 A.M. P.M. To: DEP. ERIC ANDERSON Deputy or Executing Officer

ORIGINAL

STATE OF TENNESSEE
WILLIAMSON COUNTY

STATE OF TENNESSEE

vs.

101 GILLESPIE DRIVE #17305/
CHRIST PETE KOULIS

OFFICER'S RETURN

The within warrant came to hand; I executed it on this 13TH day of JULY, 2005, by searching the apartment, garage, and vehicle herein described, by taking therefrom and bringing before JEFFREY S. BIVINS; Title: JUDGE; Court: CIRCUIT, PART III the following: (Here described property seized)

< SEE ATTACHED LOG >

Signed: _____
(Sheriff) (Or Constable) (Or Officer)
Williamson County, Tennessee

JUDGMENT ON WARRANT

Due and proper return having been made of the within warrant, the property seized as described in the said return shall be retained, subject to the orders of the Circuit Court of Williamson County, and the within warrant, affidavit, and return shall be filed in the office of the Clerk of said Court.

This 14th day of July, 2005.

Signed: Jeffrey S. Bivins; Title: JUDGE
Court: CIRCUIT, PART III

_____'s COPY

STATE OF TENNESSEE
WILLIAMSON COUNTY

ORIGINAL

AFFIDAVIT

Personally appeared before me, ***DET. ERIC ANDERSON, FRANKLIN POLICE DEPARTMENT***, and made oath that he has good ground and belief, and does believe the following described property is located within the apartment located at 101 Gillespie Drive, #17305, Franklin, Tennessee, and the accompanying garage, namely:

One large carat diamond (or similar) gemstone ring, diary/day planner/any written documentation evidencing the relationship and/or drug use between Christ Pete Koulis and Lesa Buchanan, controlled substances/narcotics/drug paraphernalia, cellular telephones, computers, luggage, and recorded materials documenting Koulis administering drugs to Buchanan or engaged in any illegal activity.

to be searched for in accordance with the Laws of the State of Tennessee, upon the following described property, namely:

101 Gillespie Drive, Apt. 17305. Traveling from the Square in Franklin, travel north on Main Street until it becomes Franklin Road. Continue on Franklin Road to Mack Hatcher Pkwy. Turn right on Mack Hatcher Pkwy to Cool Springs Blvd. Turn left on Cool Springs Blvd. and travel to Carothers Pkwy. Turn left onto Carouthers Pkwy to Gillespie Drive. Turn right onto Gillespie Drive. The first apartment complex on the right is Alara of Cool Springs. The address is 101 Gillespie Drive. The building containing the above referenced apartment is the first building on the left adjacent to the Clubhouse/Leasing Office.

The building including the apartment is marked with the number 17. The apartment is located on the third floor of this building. Take the center stairwell to the third floor. The apartment door is prominently marked with a placard above the door with the number 17305.

To be included in the search is the apartment described above, the accompanying garage, and Lesa Buchanan's white 1999 Acura parked outside the building at the bottom of the stairwell. The vehicle has a Kentucky license plate number 568-HHN and is registered to Buchanan. The VIN number is 19UUA5642XA004577.

Statement of Facts in Support of Probable Cause

This affidavit is made by Detective Eric Anderson of the Franklin Police Department who has six years of law enforcement experience as a sworn police officer and now testifies herein based on information that your affiant believes to be true, and is as follows:

On July 4, 2005, Franklin Police Officers Mark Sanchez and John Morton-Chaffin responded to a 911 call at 101 Gillespie Drive, Apt. 17305 in Franklin, Williamson County. Detective Stephanie Cisco has listened to the 911 call. A male caller stated that his girlfriend was not responding and that he was a doctor from Chicago and had administered .01 mg of epinephrine and was performing CPR at the time of the call.

When Officer Sanchez arrived, Christ Pete Koulis and Lesa Buchanan were the only individuals in the apartment. Koulis reported to Officer Sanchez that Buchanan was

taking Xanax, Ephedrine and Norco. Officer Sanchez observed multiple syringes and an ampoule of clear liquid on the bathroom counter in the apartment, as well as three prescription bottles. Koulis told Officer Sanchez that he self-administers Viagra to produce prolonged erections and later injects an unstated substance to relieve erections. At the scene, Koulis told Officer Sanchez that he administered 0.1 mg of "Epi" to Buchanan via injection after she complained of medical problems and collapsed. Koulis also performed CPR on Buchanan.

According to Officer Sanchez's report, emergency medical personnel transported Lesa Buchanan by ambulance to the Williamson County Medical Center. At that time, the apartment, now vacant, was locked and Koulis followed Buchanan to the Medical Center.

Detective Cisco observed several marks on the body of Buchanan immediately following the incident consistent with injection sites on the left and right groin areas. Dr. Ragel at the Williamson Medical Center Emergency Room told Detectives Cisco and Becky Johnson that the observed marks were needle marks. Lesa Buchanan was subsequently pronounced dead at the Williamson Medical Center

Initial toxicology reports following the autopsy of Lesa Buchanan by State of Tennessee Medical Examiner, Dr. Thomas Deering, indicated the presence of methadone, barbiturates, opiates and benzo in her body.

Following Buchanan's death, Detectives Cisco and Johnson went to Apartment #17305. The apartment's security officer, Andre Davis, with the approval of apartment management, provided the keys to the apartment to the detectives. According to a copy of the leasing agreement provided by Tammy McDaniel, leasing manager for the complex, the guarantor for the apartment is Steve Buchanan. Permitted tenants are Tonya Buchanan, Lesa Buchanan and Jessica Buchanan.

Upon entry, Detectives Johnson and Cisco took photographs of the entire apartment and observed in plain view numerous needles, syringes (both new and used), a broken vial of epinephrine, a glass vial of sodium chloride, a shaving kit with an additional vial, and additional needles and syringes. In the master bathroom, used needles and syringes were observed by the detectives in the sink and trash can, as well as a medicine cabinet containing numerous prescription bottles. A large quantity of professional medication samples were observed by the detectives in the bathroom closet and under the bathroom sink.

Various sex devices and aids were observed by Detectives Cisco and Johnson in the master bedroom, as well as a video camera with a tape and a one cellular phone. An open suitcase containing sexual aids was in plain view of the detectives, another suitcase was also in the room, as well as several videos.

In the living/dining room areas, Detectives Cisco and Johnson saw a laptop computer, another cellular phone, a plastic cap from a syringe, and two desktop computers.

Lesa Buchanan's mother, Peggy Roberts, Lesa Buchanan's biological sister, Tara Bentley, and Tonya Buchanan, now married to Steve Buchanan (Lesa Buchanan's ex-husband) have all been interviewed by your affiant. During the course of these interviews, your affiant learned that Koulis and Buchanan have been involved in a long distance relationship for more than five years. Koulis told Detective Cisco that he currently resides in Chicago. According to statements made by the family members, Lesa Buchanan's habit was to document and retain any communication between Lesa Buchanan and Koulis. Roberts and Bentley advised your affiant that Koulis gave

Buchanan a large carat diamond engagement ring prior to Mother's Day 2005. Koulis also told Detective Cisco that he recently purchased a ring for Buchanan. Dr. Ragel at the Williamson County Medical Center did not observe the ring at the hospital, nor did Detective Johnson who was at the hospital.

According to Detective Bobby Pate of the Boone County, Kentucky Sheriff's Office, Christ Pete Koulis is a convicted felon in Kentucky. Koulis was convicted of possession of a controlled substance, possession of drug paraphernalia, first and second degree possession of a controlled substance, and second degree wanton endangerment following an incident in which Lesa Buchanan was hospitalized in intensive care in 2002 after being injected with various controlled substances. Koulis is a medical doctor by profession, however, according to the Disciplinary Action Report from the State of Tennessee Department of Health, Koulis permanently surrendered his Tennessee medical license in April 2002.

Your affiant believes that based on Koulis' past history, including the prior hospitalization of Buchanan under similar circumstances, the suspicious nature of Lesa Buchanan's death, and the variety of controlled substances and medications observed in Buchanan's apartment and found during initial toxicology tests on Buchanan's body, that property and other evidence of a crime will be found in the above-referenced apartment, garage and vehicle.

Experience and Basis of Knowledge of Affiant

Detective Anderson has extensive training in all areas of criminal investigations and has six years experience as a law enforcement officer with the Franklin Police Department. He has reviewed the initial police report prepared by Officer Sanchez, as well as any other reports generated by the Franklin Police Department in relation to this case, interviewed the above-named detectives and witnesses involved in this case, and reviewed the documentation mentioned in the above affidavit. Following this incident, your affiant contacted the Franklin Police Dispatcher, Jim Chamblin, who used the NCIC data base to verify that Lesa Buchanan is the owner of the 1999 white Acura, license tag number, ~~5666~~ 568 QXB-HHN and VIN No. 9UUA5642XA004577

He, therefore, complains and asks that a warrant issue to search the said ***PREMISES*** above described in said County, where she/he believes said ***PREMISES*** described above is now located, as well as the above described vehicle.

NAME OF AFFIANT (Affiant)

Sworn to and subscribed before me, this 13th day of July, 2005.

(Signature of Judge or Magistrate)

Title: JUDGE Court: CIRCUIT COURT, PART III
Williamson County, Tennessee

ORIGINAL

EVIDENCE LOG

Case Number: 2005001866 APT. LOG Page: 1 of 2

Date: 7-13-05 Time: 1441 HRS

Address: 101 GILLESPIE #17305

City: FRANKLIN State: TN Zip: 37069 Completed By: E. ANDERSON

ITEM #	DESCRIPTION	LOCATION FOUND	OFFICER	TIME
1	CELL PHONE - SPRINT	LR - PADDED COFFEE TABLE	J.P. TAYLOR	1515
2	FLANNEL SHIRT - [redacted]	LR - COUCH	J. LEWIS	1517
3	LAPTOP / DELL	LR - FLOOR / PATIO DOOR	J. LEWIS	1520
4	SANYO CELL PHONE	MASTER BR FLOOR	E. ANDERSON	1530
5	RED DILDO	" " "	E. ANDERSON	1532
6	CLEAR RIBBED DILDO	" " "	"	1538
7	RED ELASTIC TIE / ROPE	" " "	"	1540
8	(2) VIBRATORS	" " "	"	1543
9	LETTERS TO C. KOULIS	" " "	"	1547
10	DVDS	MASTER BED ROOM DVD PLAYER	"	1550 HRS
11	RECEIPT / BLACKSTON (7/3)	" " TABLE	C. KIRBY	1555
12	PINK ANAL BEADS / STRAP ON	" " FLOOR	C. KIRBY	1555
13	RED ELASTIC BAND / MALE SEX DEVICE	" " "	CISCO	1557
14	RED VIBRATOR	BATHROOM SHELF	CISCO	1558
15	GYM BAG - C. KOULIS	MASTER BEDROOM FLOOR	CISCO	1601
16	HOSPITAL BILL - ST. ELIZABETH	BR FLOOR	CISCO	1603
17	DOCUMENTS	LR DESK	TAYLOR	1545
18	UNLABELED VCR TAPE	LR BOOKSHELF	LEWIS	1540
19	ALCOHOL SWABS	MASTER BEDROOM	CISCO	1605
20	TISSUE / STAINED	" " "	CISCO	1606
21	MALE SEXUAL DEVICES	" " "	CISCO	1608
22	DOCUMENTS - HYDROCODONE	LR DESK	TAYLOR	1555
23	PROCTOFOAM (MEDS)	KITCHEN CABINET	LEWIS	1600
24	CELLULAR PHONE	LR DESK DRAWER	TAYLOR	1608
25	NOKIA CELL PHONE	JESSIE'S BR / STARTREK BIN	ADAMS	1610
26	ACCIDENTAL DEATH POLICY	LR DESK (FILE CAT)	TAYLOR	1615
27	BLUE PILLS / BUSTERS	PURSE ON KITCHEN COUNTER	LEWIS	1625
28	BLACK RESTRAIN STRAPS	MASTER BR FLOOR	CISCO	1631
~~29~~	~~CASH ($74 + CHANGE)~~	~~LEFT IN PURSE~~	~~TO EVIDENCE~~	~~FAMILY~~
30	SAMSUNG VIDEO (MICRA)	KITCHEN COUNTER	ANDERSON	1630
31	COMPUTER	MASTER BEDROOM	LEWIS	1043
32	DIGITAL CAMERA	(OLYMPUS) LR COMP. TABLE	LEWIS	1625
33	GATEWAY COMPUTER	DESK - LR	LEWIS	1655
34	APPLE COMPUTER	COMP. DESK OFF KITCHEN	LEWIS	1630
35	ALCORTIN PACKAGE	DESK - LR	TAYLOR	1627
36	8MM VIDEO TAPE	CABINET ABOVE DESK	TAYLOR	1635
37	RINGS / JEWELRY	BR DRAWER	CISCO	1644
38	ONLINE SCRIPT DOC.	CABINET ABOVE DESK	TAYLOR	1645

A COPY OF THIS LOG MUST BE LEFT AT THE RESIDENCE IF EXECUTING A SEARCH WARRANT

EVIDENCE LOG

Case Number: 2005 00 18666 Apt. Log Page: 2 of 2

Date: 7-13-05 Time: _____

Address: 101 Gillespie #17305

City: Franklin State: TN Zip: 37067 Completed By: E. Anderson

ITEM #	DESCRIPTION	LOCATION FOUND	OFFICER	TIME
39	(2) 8mm Video Tapes	Cabinet above Desk	Taylor	1655
40	Lexapro	" " " (LR)	Taylor	1700
41	Lexapro	Comp. Desk off Kitchen	C. Kirby	1700
42	Everex Laptop	LRm. Closet off LR	Anderson	1735hrs

A COPY OF THIS LOG MUST BE LEFT AT THE RESIDENCE IF EXECUTING A SEARCH WARRANT

EVIDENCE LOG

CAR LOG

Case Number: 2005001866

Date: 7-13-05 Time: _____

Address: OUTSIDE 101 GILLESPIE #17305

City: FRANKLIN State: TN Zip: 37067

Completed By: E. ANDERSON

ITEM #	DESCRIPTION	LOCATION FOUND	OFFICER	TIME
1	DOCUMENTS	LFT. MAP POCKET	LEWIS	1440
2	DOCUMENTS	MIDDLE CONSOLE	"	1450
3	SMALL BLUE TABLET	BACK SEAT POCKET	"	1455
4	CELLULAR PHONE	TRUNK	"	1503

A COPY OF THIS LOG MUST BE LEFT AT THE RESIDENCE IF EXECUTING A SEARCH WARRANT

Order Denying Motion to Suppress Search of Franklin Apartment with relevant portion of Affidavit

IN THE CRIMINAL COURT FOR WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

STATE OF TENNESSEE	)	
	)	
VS.	)	**CASE NO. I-CR111479**
	)	
CHRIST KOULIS	)	

ORDER DENYING MOTION TO SUPPRESS

This cause came before the Court on defendant's amended motion to suppress filed on August 7, 2006. Defendant challenges the search of the victim's Alara apartment on July 4, 2005 and the viewing of all items therein on that date, the July 5, 2005 viewing of the video taken from the apartment, and the subsequent searches on July 6, 2005 and July 13, 2005. Prior to ruling, this Court has heard two days of testimony, read the submissions of the attorneys in this case, case law provided by the attorneys, and conducted its own research. In addition, the Court has studied the issues raised by these motions and makes the following rulings:

As to the first issue, this Court finds that the defendant, Christ Koulis, has standing to contest the search of the apartment based on his status as an overnight guest of Lesa Buchanan. This Court finds that defendant has previously stayed overnight at the apartment, paid some of the bills for the apartment, and although he was not listed on the lease, he did spend the night at the apartment of July 3, 2005. Based on the testimony, this Court finds sufficient proof that the defendant had a legitimate expectation of privacy prior to the challenged searches.

In order to determine whether any consent was to search the apartment was valid, this Court has considered the recent United States Supreme Court case of *Georgia v. Randolph*, 126 S.Ct. 1515 (2006). On July 4, 2005, defendant Koulis summoned 911 to Lesa Buchanan's apartment. In response to that call, emergency officials made a proper response to the

apartment. After emergency crews left the apartment to transport Buchanan to the Williamson County Medical Center, the door was locked and the apartment sealed.

Lesa Buchanan died at the Williamson County Medical Center. As part of the investigation into Buchanan's death, Detectives Becky Johnson and Stephanie Cisco spoke with defendant Koulis at the hospital. At that time, he refused consent to search. Subsequently, the detectives contacted the management at the apartment complex and received permission to enter. The detectives searched the apartment without a warrant before resealing it and relocking the door.

The State carries the burden of showing this search was valid. There was no oral or written consent. The State argued that defendant Koulis intentionally abandoned the apartment. Although testimony during the hearing indicated that defendant Koulis returned to the apartment complex on July 4, 2005 but then left without approaching the building, it is unclear when he arrived in relation to the search by Detectives Johnson and Cisco. Based on the testimony, this Court does not find that defendant Koulis abandoned the apartment. This Court also does not find any exigent circumstances supporting the search without a warrant. Accordingly, the search on July 4, 2005 was not a valid search.

In addition, based on the same reasoning, the subsequent July 5th viewing of a videotape taken from the apartment is also invalid.

On July 6, 2005, the detectives received the oral consent to search the apartment from lessee Tanya Buchanan. The testimony revealed that she stayed at the apartment and kept clothing and personal items there. This presents a different situation from the circumstances of July 4, 2005. Despite Koulis' prior refusal, a co-tenant provided consent to search. However, this Court finds that no material distinction exists between the circumstances present here and those in *Randolph*. Accordingly, this Court finds that the search on July 6, 2005 was also invalid.

On July 13, 2005, the Detective Eric Anderson secured a search warrant from this Court. In light of this Court's prior rulings, this Court must review the affidavit in support of probable cause after excluding any information obtained during the invalid searches. Attached to this order is a copy of the affidavit marked with the appropriate exclusions. After reviewing the remainder of the affidavit, this Court finds that there are sufficient independent issues and observations raised to provide probable cause for the issuance of the warrant. Accordingly, the search on July 13, 2005 was valid.

This Court then determines whether the evidence and observations made during the prior invalid searches fall within the doctrine of inevitable discovery. "[I]llegally obtained evidence is admissible if the evidence would have otherwise been discovered by lawful means." *Nix v. Williams,* 467 U.S. 431, 444 (1984); *State v. Ensley,* 956 S.W.2d 502, 511 (Tenn. Crim. App. 1996). "Proof of inevitable discovery 'involves no speculative elements by focuses on demonstrated historical facts capable of ready verification or impeachment.'" *State v. Cothran,* 115 S.W.3d 513, 525 (Tenn. Crim. App. 2003)(*quoting Nix*, 467 U.S. at 444 n.5)

This Court may not consider any speculative elements but must look at the demonstrated facts. Here, the apartment was locked and sealed and remained sealed. The record reflects that the defendant was informed that he could not return to the apartment. Based on the information in the record and the compelling facts before this Court, the disputed evidence would have been discovered through the lawfully executed search warrant. *See U.S. v. Kennedy,* 61 F.3d 494, 499-500 (6th Cir. 1995). Accordingly, this Court finds that the evidence obtained by Detectives Johnson and Cisco from searches on July 5 and July 6, 2005 is admissible, as the evidence would have been inevitably discovered on July 13, 2005.

THEREFORE, for the above stated reasons, the motion to suppress is denied.

JEFF BIVINS
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the above order was served by fax and/or United States Mail on October 5, 2007 to Lee Ofman, 317 Main Street, Suite 208, Franklin, TN 37064, and David L. Raybin, Hollins, Wagster, Yarbrough, Weatherly and Raybin, 424 Church Street, Suite 2200, Nashville, TN 37219 and filed with this Court.

Kim R. Helper
Assistant District Attorney

WARRANT WITH EXCLUDED INFORMATION

_____'s COPY

ORIGINAL

STATE OF TENNESSEE
WILLIAMSON COUNTY

AFFIDAVIT

Personally appeared before me, ***DET. ERIC ANDERSON, FRANKLIN POLICE DEPARTMENT***, and made oath that he has good ground and belief, and does believe the following described property is located within the apartment located at 101 Gillespie Drive, #17305, Franklin, Tennessee, and the accompanying garage, namely:

One large carat diamond (or similar) gemstone ring, diary/day planner/any written documentation evidencing the relationship and/or drug use between Christ Pete Koulis and Lesa Buchanan, controlled substances/narcotics/drug paraphernalia, cellular telephones, computers, luggage, and recorded materials documenting Koulis administering drugs to Buchanan or engaged in any illegal activity.

to be searched for in accordance with the Laws of the State of Tennessee, upon the following described property, namely:

101 Gillespie Drive, Apt. 17305. Traveling from the Square in Franklin, travel north on Main Street until it becomes Franklin Road. Continue on Franklin Road to Mack Hatcher Pkwy. Turn right on Mack Hatcher Pkwy to Cool Springs Blvd. Turn left on Cool Springs Blvd. and travel to Carothers Pkwy. Turn left onto Carouthers Pkwy to Gillespie Drive. Turn right onto Gillespie Drive. The first apartment complex on the right is Alara of Cool Springs. The address is 101 Gillespie Drive. The building containing the above referenced apartment is the first building on the left adjacent to the Clubhouse/Leasing Office.

The building including the apartment is marked with the number 17. The apartment is located on the third floor of this building. Take the center stairwell to the third floor. The apartment door is prominently marked with a placard above the door with the number 17305.

To be included in the search is the apartment described above, the accompanying garage, and Lesa Buchanan's white 1999 Acura parked outside the building at the bottom of the stairwell. The vehicle has a Kentucky license plate number 568-HHN and is registered to Buchanan. The VIN number is 19UUA5642XA004577.

Statement of Facts in Support of Probable Cause

This affidavit is made by Detective Eric Anderson of the Franklin Police Department who has six years of law enforcement experience as a sworn police officer and now testifies herein based on information that your affiant believes to be true, and is as follows:

On July 4, 2005, Franklin Police Officers Mark Sanchez and John Morton-Chaffin responded to a 911 call at 101 Gillespie Drive, Apt. 17305 in Franklin, Williamson County. Detective Stephanie Cisco has listened to the 911 call. A male caller stated that his girlfriend was not responding and that he was a doctor from Chicago and had administered .01 mg of epinephrine and was performing CPR at the time of the call.

When Officer Sanchez arrived, Christ Pete Koulis and Lesa Buchanan were the only individuals in the apartment. Koulis reported to Officer Sanchez that Buchanan was

taking Xanax, Ephedrine and Norco. Officer Sanchez observed multiple syringes and an ampoule of clear liquid on the bathroom counter in the apartment, as well as three prescription bottles. Koulis told Officer Sanchez that he self-administers Viagra to produce prolonged erections and later injects an unstated substance to relieve erections. At the scene, Koulis told Officer Sanchez that he administered 0.1 mg of "Epi" to Buchanan via injection after she complained of medical problems and collapsed. Koulis also performed CPR on Buchanan.

According to Officer Sanchez's report, emergency medical personnel transported Lesa Buchanan by ambulance to the Williamson County Medical Center. At that time, the apartment, now vacant, was locked and Koulis followed Buchanan to the Medical Center.

Detective Cisco observed several marks on the body of Buchanan immediately following the incident consistent with injection sites on the left and right groin areas. Dr. Ragel at the Williamson Medical Center Emergency Room told Detectives Cisco and Becky Johnson that the observed marks were needle marks. Lesa Buchanan was subsequently pronounced dead at the Williamson Medical Center

Initial toxicology reports following the autopsy of Lesa Buchanan by State of Tennessee Medical Examiner, Dr. Thomas Deering, indicated the presence of methadone, barbiturates, opiates and benzo in her body.

~~Following Buchanan's death, Detectives Cisco and Johnson went to Apartment~~ #17305. The apartment's security officer, Andre Davis, with ~~the approval of~~ apartment management, provided the keys to the apartment ~~to the~~ detectives. According to a copy of the leasing agreement ~~provided by~~ Tammy McDaniel, leasing manager for the complex, the ~~guarantor for the~~ apartment is Steve Buchanan. Permitted tenants are Tonya ~~Buchanan, Lesa Buchanan and Jessica Buchanan.~~

~~Upon entry, Detectives Johnson and Cisco took photographs of the entire~~ apartment and observed in plain view numerous needles, syringes (both new ~~and~~ used), a broken vial of epinephrine, a glass vial of sodium chloride, ~~a shaving~~ kit with an additional vial, and additional needles and syringes. ~~In the master~~ bathroom, used needles and syringes were observed by the ~~detectives~~ in the sink and trash can, as well as a medicine cabinet ~~containing~~ numerous prescription bottles. A large quantity of ~~professional~~ medication samples were observed by the detectives in the bathroom closet ~~and under the bathroom sink.~~

~~Various sex devices and aids were observed by Detectives Cisco and Johnson in~~ the master bedroom, as well as ~~a video camera with a tape and a one~~ cellular phone. An open suitcase ~~containing~~ sexual aids was in plain view of the detectives, another suitcase ~~was also in the room, as well as several videos.~~

~~In the living/dining room areas, Detectives Cisco and Johnson saw a laptop~~ computer, ~~another cellular~~ phone, a plastic cap from a syringe, and two desktop ~~computers.~~

Lesa Buchanan's mother, Peggy Roberts, Lesa Buchanan's biological sister, Tara Bentley, and Tonya Buchanan, now married to Steve Buchanan (Lesa Buchanan's ex-husband) have all been interviewed by your affiant. During the course of these interviews, your affiant learned that Koulis and Buchanan have been involved in a long distance relationship for more than five years. Koulis told Detective Cisco that he currently resides in Chicago. According to statements made by the family members, Lesa Buchanan's habit was to document and retain any communication between Lesa Buchanan and Koulis. Roberts and Bentley advised your affiant that Koulis gave

Buchanan a large carat diamond engagement ring prior to Mother's Day 2005. Koulis also told Detective Cisco that he recently purchased a ring for Buchanan. Dr. Ragel at the Williamson County Medical Center did not observe the ring at the hospital, nor did Detective Johnson who was at the hospital.

According to Detective Bobby Pate of the Boone County, Kentucky Sheriff's Office, Christ Pete Koulis is a convicted felon in Kentucky. Koulis was convicted of possession of a controlled substance, possession of drug paraphernalia, first and second degree possession of a controlled substance, and second degree wanton endangerment following an incident in which Lesa Buchanan was hospitalized in intensive care in 2002 after being injected with various controlled substances. Koulis is a medical doctor by profession, however, according to the Disciplinary Action Report from the State of Tennessee Department of Health, Koulis permanently surrendered his Tennessee medical license in April 2002.

Your affiant believes that based on Koulis' past history, including the prior hospitalization of Buchanan under similar circumstances, the suspicious nature of Lesa Buchanan's death, ~~and the variety of controlled substances and medications observed in Buchanan's apartment~~ and found during initial toxicology tests on Buchanan's body, that property and other evidence of a crime will be found in the above-referenced apartment, garage and vehicle.

Experience and Basis of Knowledge of Affiant

Detective Anderson has extensive training in all areas of criminal investigations and has six years experience as a law enforcement officer with the Franklin Police Department. He has reviewed the initial police report prepared by Officer Sanchez, as well as any other reports generated by the Franklin Police Department in relation to this case, interviewed the above-named detectives and witnesses involved in this case, and reviewed the documentation mentioned in the above affidavit. Following this incident, your affiant contacted the Franklin Police Dispatcher, Jim Chamblin, who used the NCIC data base to verify that Lesa Buchanan is the owner of the 1999 white Acura, license tag number, ~~5666~~ 568 GHN and VIN No. 9UUA5642XA004577

He, therefore, complains and asks that a warrant issue to search the said ***PREMISES*** above described in said County, where she/he believes said ***PREMISES*** described above is now located, as well as the above described vehicle.

NAME OF AFFIANT (Affiant)

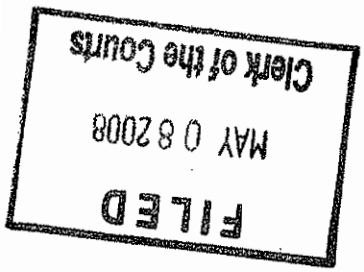
Sworn to and subscribed before me, this 13th day of July, 2005.

(Signature of Judge or Magistrate)

Title: Judge Court: Circuit Court, Part III
Williamson County, Tennessee

ORIGINAL

Chicago, Illinois Search Warrant



Chicago Search
Warrant
For Hearing
Ex 9.

NO. # I.C.R. 111479

STATE OF TENNESSEE
VS
Christ Koulis

AUTHENTICATED AS TRIAL EXHIBIT # 9 IN THE ABOVE STYLED CASE.

THIS 12th DAY OF February, 2009

JUDGE

(3-81) CCMC-1-220

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois to all Peace Officers of the State and Federal Agents

SEARCH WARRANT

On this day, Detective Steven E. BRADLEY #20760 , Chicago Police Department, Detective Division, Complainant has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search:

Christ Pete KOULIS, M/2/37, DOB: 22 September 1967, Eyes: Brown, Hair: Brown, Ht: 5'10", Wt: 176, SS# 336-68-8843, TN DL# 090136917

and the premises:

165 North Canal Street, Apt. 1113 Chicago, Illinois

and seize the following instruments, articles and things:

Narcotics, drug paraphernalia and mediums for delivery of such drugs. Digital, audio and video recordings and devices with which to make such recordings including but not limited to computers that may contain digital files and/or documents of communications between KOULIS and BUCHANAN. Written letters, notes or any other documents related to KOULIS and BUCHANAN'S relationship and activities.

which have been used in the commission of, or which constitute evidence of the offense of:

Prescription Fraud, Possession of Drug Paraphernalia, Possession of a Controlled Substance, Reckless Endangerment and Criminally Negligent homicide.

On July 4, 2005 at 101 Gillespie Drive, #17305 Franklin , Tennessee, Lesa R. BUCHANAN died of suspicious causes following a weekend spent in the company of Christ P. KOULIS. Several suspicious injection sites were located on BUCHANAN'S body. An initial toxicology (post mortem) showed that BUCHANAN"S urine had amounts of opiates, barbituates, methadone, and benzo. A videotape recovered from the scene contemporaneous with BUCHANAN'S death showed that BUCHANAN was holding a gauze pad over one of the injection sites. KOULIS was viewed in the video with BUCHANAN. KOULIS' belongings and luggage at the scene were found to contain several needles and syringes. KOULIS was arrested and convicted in 2002 of several felony charges in the state of Kentucky (Boone County) involving the administering of various narcotics to BUCHANAN, which resulted in her hospitalization. KOULIS is currently a practicing physician (probationary license) in the State of Illinois.

FILED
MAY 08 2008
Clerk of the Courts

I further command that a return of anything so seized shall be made without necessary delay before me or before any court of competent jurisdiction.

Judge Michele M. Simmons

JUDGE

Judge's No. 1832

Date and time of issuance: July 15, 2005 6:45 pm

RSA & LK Mel 05SW5835 @17:25

COURT BRANCH _____ COURT DATE _____

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

(3-81) CCMC-1-219

STATE OF ILLINOIS
COUNTY OF COOK

THE CIRCUIT COURT OF COOK COUNTY

COMPLAINT FOR SEARCH WARRANT

This affidavit is made by Detective Eric Anderson of the Franklin, TN Police Department who has six years of law enforcement experience as a sworn police officer and now testifies herein based on information that your affiant believes to be true, and is as follows:

Detective Anderson has extensive training in all areas of criminal investigations and has six years experience as a law enforcement officer with the Franklin Police Department in the state of Tennessee. He has reviewed the initial police report prepared by Officer Sanchez, as well as any other reports generated by the Franklin Police Department in relation to this case, interviewed the above-named detectives and witnesses involved in this case, and reviewed the documentation mentioned in the above affidavit.

On July 4, 2005, Franklin, TN Police Officers Mark Sanchez and John Morton-Chaffin responded to a 911 call at 101 Gillespie Drive, Apt. 17305 in Franklin, Williamson County. TN. I spoke to Detective Stephanie Cisco, Franklin, TN Police Department who has listened to the 911 call. In the tape recording of the 911 call a male caller who stated that his girlfriend was not responding and that he was a doctor from Chicago and that he had administered .01 mg of epinephrine and was performing CPR at the time of the call.

When Officer Sanchez arrived, Christ Pete Koulis and Lesa Buchanan were the only individuals in the apartment. Koulis reported to Officer Sanchez that Buchanan was taking Xanax, Ephedrine and Norco. Officer Sanchez observed multiple syringes and an ampoule of clear liquid on the bathroom counter in the apartment, as well as three prescription bottles. Koulis told Officer Sanchez that he self-administers Viagra to produce prolonged erections and later injects an unstated substance to relieve erections. At the scene, Koulis told Officer Sanchez that he administered 0. 1 mg of "Epi" to Buchanan via injection after she complained of medical problems and collapsed. Koulis also performed CPR on Buchanan.

According to Officer Sanchez's report, emergency medical personnel transported Lesa Buchanan by ambulance to the Williamson County Medical Center. At that time, the apartment, now vacant, was locked and Koulis followed Buchanan to the Medical Center.

Detective Cisco observed several marks on the body of Buchanan immediately following the incident consistent with injection sites on the left and right groin areas. Dr. Ragel at the Williamson Medical Center Emergency Room told Detectives Cisco and Becky Johnson that the observed marks were needle marks. Lesa Buchanan was subsequently pronounced dead at the Williamson Medical Center. Initial toxicology reports following the autopsy of Lesa Buchanan by State of Tennessee Medical Examiner, Dr. Thomas Deering, indicated the presence

05 SW 5935 @ 17:25

15A John Mahoney

COMPLAINANT

Subscribed and sworn to before me on _____, ?

JUDGE 1832 Judge's No.

Michele M. Simmons

COURT BRANCH COURT DATE

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

(3-81) CCMC-1-219

STATE OF ILLINOIS
COUNTY OF COOK

THE CIRCUIT COURT OF COOK COUNTY

COMPLAINT FOR SEARCH WARRANT

of methadone, barbiturates, opiates and benzo in her body. Buchanan's initial toxicology report from the autopsy indicated the presence of narcotics.

Following Buchanan's death, Detectives Cisco and Johnson went to Apartment #17305. The apartment's security officer, Andre Davis, with the approval of apartment management, provided the keys to the apartment to the detectives. According to a copy of the leasing agreement provided by Tammy McDaniel, leasing manager for the complex, the guarantor for the apartment is Steve Buchanan. Permitted tenants are Tonya Buchanan, Lesa Buchanan and Jessica Buchanan.

Upon entry, Detectives Johnson and Cisco took photographs of the entire apartment and observed in plain view numerous needles, syringes (both new and used), a broken vial of epinephrine, a glass vial of sodium chloride, a shaving kit with an additional vial, and additional needles and syringes. In the master bathroom, used needles and syringes were observed by the detectives in the sink and trash can, as well as a medicine cabinet containing numerous prescription bottles. A large quantity of professional medication samples were observed by the detectives in the bathroom closet and under the bathroom sink.

Various sex devices and aids were observed by Detectives Cisco and Johnson in the master bedroom, as well as a video camera with a tape and one cellular phone. An open suitcase containing sexual aids was in plain view of the detectives, another suitcase was also in the room, as well as several videos.In the living/dining room areas, Detectives Cisco and Johnson saw a laptop computer, another cellular phone, a plastic cap from a syringe, and two desktop computers.

Lesa Buchanan's mother, Peggy Roberts, Lesa Buchanan's biological sister, Tara Bentley, and Tonya Buchanan, now married to Steve Buchanan (Lesa Buchanan's ex-husband) have all been interviewed by your affiant. During the course of these interviews, your affiant learned that Koulis and Buchanan have been involved in a long distance relationship for more than five years. Koulis told Detective Cisco that he currently resides in Chicago. According to statements made by the family members, Lesa Buchanan's habit was to document and retain any communication between Lesa Buchanan and Koulis. Roberts and Bentley advised your affiant that Koulis gave Buchanan a large carat diamond engagement ring prior to Mother's Day 2005. Koulis also told Detective Cisco that he recently purchased a ring for Buchanan. Dr. Ragel at the Williamson County Medical Center did not observe the ring at the hospital, nor did Detective Johnson who was at the hospital.

According to Detective Bobby Pate of the Boone County, Kentucky Sheriffs Office, Christ Pete Koulis is a convicted felon in Kentucky. Koulis was convicted of possession of a controlled substance, possession of drug paraphernalia, first and second-degree possession of a controlled substance, and second degree wanton endangerment

COMPLAINANT

Subscribed and sworn to before me on ..... ?

JUDGE Michele M. Simmons Judge's No. 1872

COURT BRANCH COURT DATE

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

(3-81) CCMC-1-219

STATE OF ILLINOIS
COUNTY OF COOK

THE CIRCUIT COURT OF COOK COUNTY

COMPLAINT FOR SEARCH WARRANT

following an incident in which Lesa Buchanan was hospitalized in intensive care in 2002 after being injected with various controlled substances. Koulis is a medical doctor by profession, however, according to the Disciplinary Action Report from the State of Tennessee Department of Health, Koulis' license to practice medicine was suspended in April 2002.

Based upon the foregoing, as well as based on Koulis' past history, including the prior hospitalization of Buchanan under similar circumstances, the suspicious nature of Lesa Buchanan's death. and the variety of controlled substances and medications observed in Buchanan's apartment and found during initial toxicology tests on Buchanan's body, your affiant sought and obtained a judicially authorized warrant to search the premises at 101 Gillespie Drive, Apartment 17305, Franklin, TN, as well as a white 1999 Acura belonging to Lesa Buchanan. That search warrant was executed on July 13, 2005.

Among the items seized during the execution of that search warrant were numerous containers of professional samples of drugs, and prescription bottles containing controlled substances, such a hydrocodone. A list of the items seized during the execution of that search warrant is attached hereto as Exhibit 1. Many of the seized prescription vials that contained controlled substances had labels that identified Christ Pete Koulis as the prescribing physician. In order to prescribe a controlled substance, the prescribing physician is required to be approved to prescribe controlled substances by the United States Drug Enforcement Agency ("DEA"). Such a physician is then issued a DEA Number. According to Juan Morales, a Special Agent with the DEA, Christ Pete Koulis does not have a DEA number and is therefore not authorized to prescribe controlled substances.

After extensive interviews with the following, Peggy Roberts (mother of victim), Tara Bentley (sister of victim), Tonya Buchanan (personal friend of victim), and Jessica Buchanan (daughter of victim) and the search of the apartment in Franklin, TN it has been established that Koulis and Buchanan engaged in sexual activities including sado-masochistic practices, use of sexual paraphernalia, and narcissism, with the use of videotaping and still photography. During the execution of the search warrant on July 13, 2005, several 8 mm videotapes were recovered from the apartment. I spoke to my partner Detective Stephanie Cisco who viewed one of the tapes. Det. Cisco told me that the tape that she viewed clearly showed Buchanan engaging in sadomasochistic sexual activities with Christ Pete Koulis. During these acts, Buchanan is seen holding a gauze pad on an injection site on her inner thigh. During the tape, Buchanan appeared to be in a narcotic-induced stupor as if she was under the influence of a barbiturate or opiate.

According to Buchanan's family members, Buchanan resided with Koulis at his apartment located at 165 N. Canal Street, apt 1113 Chicago, Il, and that a great deal of personal belongings, including a computer of Buchanan remain in that apartment. Koulis has been providing monetary assistance to Buchanan for living expenses. Buchanan

COMPLAINANT

Subscribed and sworn to before me on ..... 2 .....

JUDGE Michele M. Simmons 1872 Judge's No.

COURT BRANCH | COURT DATE

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

(3-81) CCMC-1-219

STATE OF ILLINOIS
COUNTY OF COOK

THE CIRCUIT COURT OF COOK COUNTY

COMPLAINT FOR SEARCH WARRANT

left Koulis' apartment and returned to Franklin, TN in August 2004. Since that time, Koulis has made several visits to Franklin, TN (approx. 10) since Buchanan has established residence there in August of 2004.

An ROCIC Intelligence Unit document shows that Koulis current address is 165 N. Canal Street. During the initial investigation, Koulis reported to Det. Johnson and Cisco that he resides at 165 N. Canal St. Apt. 1113, Chicago, IL. Buchanan was known to keep correspondence (written and digital) that corroborated her relationship and activities with Koulis. A written document found in the Franklin apartment listed pros and cons of Lesa Buchanan's relationship with Koulis which said "*he gives me drugs*" as a con. A bag belonging to Koulis was recovered that contained drug samples, a Visa credit card belonging to Koulis, and a receipt/stub from a Hertz rental car from the Nashville airport dated 06/15/05.

Medications were recovered in the apartment. Documentation of prescriptions issued for Jessica Buchanan from a Franklin Walgreens for medications that Jessica Buchanan stated she did not take, nor was to be taking, issued by Koulis. Jessica Buchanan stated that she was not under the medical care of Koulis. According to NCIC/III criminal history, Koulis is a convicted felon from the State of Kentucky. According to information from Det. Bobby Pate of the Boone County Sheriff's Office, Koulis administered narcotics to Buchanan in 2002 that caused her to be hospitalized in intensive care.

Documents that were located at the Franklin apartment that showed Koulis communicated via email and sent digital information to various websites. According to information from Buchanan's family members, both Koulis and Buchanan were patients in a drug/alcohol treatment facility in Tuscon, Arizona, which indicates Koulis past drug usage. Koulis had his Tennessee medical license suspended and permanently revoked, and his Illinois medical license is a probationary status. This status requires him to have regular and random drug screens.

Based upon the foregoing, your affiant believes that probable cause exists for the search of Koulis' residence which is located at 165 N. Canal Street, Apt 1113, Chicago Illinois, and that narcotics, drug paraphernalia, and mediums for delivery of such drugs, digital, audio, and video recordings and devices with which to make such recordings, computers that contain digital files and/or documents of communications between Koulis and Buchanan Written letters, notes, or any other documents related to Koulis and Buchanan's relationship and activities

In furtherance of the investigation, the affiant requests that a warrant to search be issued for the location of 165 N. Canal Street, Apartment # 1113, Chicago, Illinois in Cook County.

05-W35835 @ 17:35

ASA Joel J. Mel

COMPLAINANT

Subscribed and sworn to before me on ..... ?

JUDGE 1632

Judge's No.

Michele M. Simmons

*Lab Items

2005001866
Evidence

1. 37 pills of Lexapro, 10mg (6 blister packs)
2. 13 packs of Caltrate, 600+ (26 pills)
3. 3 blister packs of Foradil Aerolizer (17 pills)
4. 10 blister packs of Allegra-D (18 pills)
5. 1ml box of Vigamox
6. 1 box of Telithromycin (10 pills)
7. 4 blister packs of Avelox (4 pills)
8. 1 blister pack of Levaquin (1 pill)
9. 1 blister pack of Singulair (2 pills)
10. 3 blister packs of Clarinex (30 pills)
11. 2 blister packs of Vioxx (3 pills)
12. 11 blister packs of Singulair (43 pills)
13. 26 blister packs of Zyrtec (26 pills)
14. 13 blister packs of Zyrtec-D (26 pills), 1 pack Zithromax (3 pills)
15. 1 box Advair discus, 2 boxes of Aciphex (10 pills), 1 box of Rhinocort-Aqua Nasal spray
16. 4 boxes of Bextra 10mg (12 pills), 1 box of Bextra 20mg (12 pills)

*17. Sodium Chloride IV bag

18. 1 empty prescription bottle of Valtrex, 1 empty prescription of Ambien, 1 bottle of Promethazine (15 ½ pills), 1 bottle of Promethazine (3 pills), 1 empty prescription bottle of Valtrex issued to Jessica Buchanan.
19. 1 empty prescription bottle of Promethazine, 1 bottle fo Promethazine (12 ½ pills), 1 bottle of Ciprofloxacin. All 3 prescriptions were issued to Christ Koulis.
20. 1 tube of Cortizone 10, 1 blue and white inhaler

*21. 2 used syringes containing tan fluid

22. 1 blister pack of Lexapro (5 pills)
23. 1 box of Prozac (3 pills)
24. 1 prescription bottle of Hydrocodone (1 pill)

*25. 4 1ml syringes with caps

*26. 1 used 10ml syringe containing white liquid

*27. 2 22 ½ gauge used needle tips, 3 18 gauge used needle tips

*28. 2 unopened syringes, 5ml and 3ml

29. 1 box of Viagra (3 pills)

EXHIBIT 1

30. 1 blister pack of Avelox (1 pill)
*31. 1 capped 1ml syringe, 1 30 ½ gauge sterile needle, 14 alcohol prep pads
*32. 1 10ml vial of Papaverine HCL, Phenotolamine Meslate, Alprostadif
33. 1 prescription bottle of Hydrocodone (10 ½ pills)
*34. .9% Sodium Chloride, 10ml vial
*35. 6 sterile 22 gauge1 ½ needles
*36. 4 1ml syringes with caps
*37. 3 empty 10ml syringe wrappers, 1 1ml 26g3/8 syringe wrapper, 2 30 gauge1/2 syringe wrapper, 1 18 gauge syringe wrapper.
38. Plastic bag with one orange tablet embossed Centrum, 2 blue capsules embossed Zoller, 4 clear capsules with brown filler
*39. 1 used needle with cap in 30 gauge needle wrapper (brown discoloration to hub)
40. 1 professional sample of Relpax (1 pill), 1 Zithromax packet (1 pilll), plastic baggie containing miscellaneous orange vitamins
*41. 1 syringe with cap with gray/white substance at hub of syringe
42. 1 bottle of Metronidazole (19 pills), 8 blister packs of Singulair (31 pills), 1 blister pack of Zyrtec (1 pill)
*43. 12 18 gauge sterile needles, 9 20 gauge sterile needles
*44. 1ml syringe with reddish-brown substance at the tip
45. 3 sterile 1ml syringes
*46. Glass top of Adrenaline vial, 1 plastic needle cap
47. 1 blank video tape, 1 8mm tape, 1 CD-R
*48. 1 broken 1ml glass vial labeled Adrenaline containing clear liquid
49. 1 8mm tape
50. 1 prescription bottle of Promethazine (23 pills) issued to Christ Koulis
51. 5 bottles of Lexapro (150 pills), 1 opened bottle of Lexapro (29 pills)
52. 1 blister pack of Sam-E 200mg (10 pills)
53. 1 FedEx box from Christ Koulis to Lesa Buchanan

EVIDENCE LOG

Case Number: 2005 00 1866 — Apt. Log — Page: 1 of 2

Date: 7-13-05 Time: 1441 HRS

Address: 101 Gillespie #17305

City: Franklin State: TN Zip: 37067 — Completed By: E. Anderson

ITEM #	DESCRIPTION	LOCATION FOUND	OFFICER	TIME
1	CELL PHONE - SPRINT	LR - PADDED COFFEE TABLE	JP TAYLOR	1515
2	FLANNEL SHIRT - ~~BROWN~~	LR - COUCH	J. LEWIS	1517
3	LAPTOP / DELL	LR - FLOOR / PATIO DOOR	J. LEWIS	1520
4	SNYO CELL PHONE	MASTER BR FLOOR	E. ANDERSON	1530
5	RED DILDO	" " "	E. ANDERSON	1532
6	CLEAR RIBBED DILDO	" " "	"	1538
7	RED ELASTIC TIE / ROPE	" " "	"	1540
8	(2) VIBRATORS	" " "	"	1543
9	LETTERS TO C. KOULIS	" " "	"	1547
10	DVDS	MASTER BED ROOM DVD	PLAYER "	1550 HRS
11	RECEIPT / BLACKSTON (7/3)	" " TABLE	C. KIRBY	1555
12	PINK ANAL BEADS / STRAPON	" " FLOOR	C. KIRBY	1555
13	RED ELASTIC BAND / MALE SOX	DEVICE " " "	CISCO	1557
14	RED VIBRATOR	BATHROOM SHELF	CISCO	1558
15	GYM BAG - C. KOULIS	MASTER BEDROOM FLOOR	CISCO	1601
16	HOSPITAL BILL - ST. ELIZABETH	BR FLOOR	CISCO	1603
17	DOCUMENTS	LR DESK	TAYLOR	1545
18	UNLABELED VCR TAPE	LR BOOKSHELF	LEWIS	1540
19	ALCOHOL SWABS	MASTER BEDROOM	CISCO	1605
20	TISSUE / STAINED	" " "	CISCO	1606
21	MALE SEXUAL DEVICE	" " "	CISCO	1608
22	DOCUMENTS - HYDROCODONE	LR DESK	TAYLOR	1555
23	PROCTOFOAM (MEDS)	KITCHEN CABINET	LEWIS	1600
24	CELLULAR PHONE	LR DESK DRAWER	TAYLOR	1608
25	NOKIA CELL PHONE	JESSIE'S BR / STORAGE BIN	ADAMS	1610
26	ACCIDENTAL DEATH POLICY	LR DESK (FILE CAB)	TAYLOR	1615
27	BLUE PILLS / BUSTERS	PURSE IN KITCHEN COUNTER	LEWIS	1625
28	BLACK RESTRAIN STRAPS	MASTER BR FLOOR	CISCO	1631
29	CASH ($74 + CHANGE)	~~LEFT IN PURSE~~	TO ~~BE GIVEN~~ APD	~~EARLIER~~
30	SAMSUNG VIDEO (MICRO)	KITCHEN COUNTER	ANDERSON	1630
31	COMPUTER	MASTER BEDROOM	LEWIS	1643
32	DIGITAL CAMERA	(OLYMPUS) LR COMP. TABLE	LEWIS	1625
33	GATEWAY COMPUTER	DESK - LR	LEWIS	1655
34	APPLE COMPUTER	COMP. DESK OFF KITCHEN	LEWIS	1630
35	ALCORTIN PACKAGE	DESK - LR	TAYLOR	1627
36	8MM VIDEO TAPE	CABINET ABOVE DESK	TAYLOR	1635
37	RINGS / SENORY	BR DRAWER	CISCO	1644
38	ONLINE SCRIPT DOC.	CABINET ABOVE DESK	TAYLOR	1645

A COPY OF THIS LOG MUST BE LEFT AT THE RESIDENCE IF EXECUTING A SEARCH WARRANT

EVIDENCE LOG

Case Number: 2005OD1866 Apt. Log Page: 2 of 2

Date: 7-13-05 Time: _____

Address: 101 Gillespie #17305

City: Franklin State: TN Zip: 37067 Completed By: E. Anderson

ITEM #	DESCRIPTION	LOCATION FOUND	OFFICER	TIME
39	(2) 8mm Video Tapes	Cabinet above Desk	Taylor	1655
40	Lexapro	" " " (LR)	Taylor	1700
41	Lexapro	Comp. Desk off Kitchen	C. Kirby	1700
42	Everlex Laptop	Lrg. Closet off LR	Anderson	1735hrs

A COPY OF THIS LOG MUST BE LEFT AT THE RESIDENCE
IF EXECUTING A SEARCH WARRANT

EVIDENCE LOG CAR LOG

Case Number: 2005001866 Page: 1 of 1

Date: 7-13-05 Time: _____

Address: OUTSIDE 101 GILLESPIE #17305

City: FRANKLIN State: TN Zip: 37067 Completed By: E. ANDERSON

ITEM #	DESCRIPTION	LOCATION FOUND	OFFICER	TIME
1	DOCUMENTS	LFT. MAP POCKET	LEWIS	1440
2	DOCUMENTS	MIDDLE CONSOLE	"	1450
3	SMALL BLUE TABLET	BACK SEAT POCKET	"	1455
4	CELLULAR PHONE	TRUNK	"	1503

A COPY OF THIS LOG MUST BE LEFT AT THE RESIDENCE IF EXECUTING A SEARCH WARRANT

Order Denying Motion to Suppress Chicago Search Warrant

IN THE CRIMINAL COURT FOR WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

STATE OF TENNESSEE	)	
	)	
VS.	)	**CASE NO. I-CR111479**
	)	
CHRIST KOULIS	)	

ORDER DENYING MOTION TO SUPPRESS CHICAGO SEARCH WARRANT

This cause came before the Court on defendant's motion to suppress any evidence recovered during a search of the defendant's Chicago apartment. This Court has heard the evidence elicited by the parties, the argument of parties, and reviewed the exhibits and case law provided to the Court in support and opposition to this motion.

In order to address the motion, this Court must determine whether adequate probable cause existed at the time of issuance for the Chicago warrant. During a prior hearing, this Court ruled that warrantless searches at the Lesa Buchanan's apartment were unlawful. Therefore, the facts recited in the affidavit supporting the Chicago warrant that were gained from those searches are excised by this Court.

Defendant claims that Detective Anderson willfully or recklessly misstated the facts in a number of areas set forth in the affidavit. The Court has heard the testimony of Detective Anderson and finds no evidence that Detective Anderson willfully or fraudulently intended to deceive the Court. This Court credits the testimony of Detective Anderson that there was no intent to deceive the Court.

Defendant claims Detective Anderson recklessly stated in the affidavit that Christ Koulis was convicted of a prior offense involving controlled substances. This is the same information provided in the affidavit in support of the July 13th warrant for Lesa Buchanan's apartment. This Court previously found that Detective Anderson acted in good faith based on information

provided by Kentucky law enforcement officers. No evidence exists for this Court to change its prior ruling.

Defendant also claims that Detective Anderson's affidavit states that among the items seized during the execution of the prior search warrant were numerous containers of professional samples of drugs and prescription bottles of controlled substances, such as hydrocodone. In addition, the defendant raises an issue concerning a discussion about defendant's ability to prescribe medications, as opposed to controlled substances. Although this Court finds there was some misinformation in the affidavit as to these issues, there were samples of drugs in the apartment as well as hydrocodone. Although some of the information was inaccurate, this Court, based on the credibility of Detective Anderson, does not find that the misinformation included rises to the level of recklessness.

As to defendant's concerns about the statements made regarding the videotapes, this Court does not find any recklessness or intent to deceive the Court. In fact, this Court excluded that portion of the affidavit in finding that probable cause existed to search Lesa Buchanan's apartment. Therefore, those items are excluded from this search warrant as well.

Defendant also complains about the inclusion of the statement "you bought drugs" as opposed to "he gives me drugs". This Court finds the statement to be inaccurate, but it does not appear to be the result of reckless conduct or an intent to deceive the Court. However, the Court is concerned about the statement that prescription vials containing controlled substances were seized with identifying labels listing Christ Koulis as the prescribing physician. While this Court acknowledges that Detective Anderson was involved in working long hours on a difficult investigation, this Court finds that the statement may rise to the level of recklessness. Accordingly, this statement shall be stricken from the affidavit.

This Court notes that the defendant claims there is not a sufficient nexus between the warrant and the purpose of the search for defendant's apartment. Defendant's argument focuses on the issue of what drugs were involved in the death of Lesa Buchanan. However, this

Court notes that the search warrant was issued for possible evidence of a number of offenses, including prescription fraud, possession of drug paraphernalia and controlled substances, as well as reckless endangerment and criminally negligent homicide. After considering all of the evidence, this Court finds a sufficient nexus with regard to the warrant and the purpose for searching the defendant's home in Chicago.

This Court, after reviewing the information in the warrant, minus the statements excised though this Order or previously redacted, still finds sufficient probable cause for the issuance of the warrant. Accordingly, the warrant was properly issued and the motion is denied.

THEREFORE, for the above stated reasons, the motion to suppress is denied.

JEFF BIVINS
Circuit Court Judge

Submitted by:

Kim R. Helper
Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the above order was served by fax and/or United States Mail on May 11, 2007 to Lee Ofman, 317 Main Street, Suite 208, Franklin, TN 37064, and David Raybin, Hollins, Wagster, Yarbrough, Weatherly and Raybin, 424 Church Street, Suite 2200, Nashville, TN 37219 and filed with this Court.

Kim R. Helper
Assistant District Attorney

Order Denying Motion to Suppress Dr. Koulis' Statements at the Hospital

IN THE CRIMINAL COURT FOR WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

STATE OF TENNESSEE)
)
VS.)
)
CHRIST KOULIS)

CASE NO. I-CR111479

ORDER RE MOTION TO SUPPRESS

This cause came to be heard following defendant's motion to suppress his statements made at the Williamson County Medical Center (WCMC). Defendant claims he was not given *Miranda* warnings while in the custody, thereby making his statements inadmissible at trial. After hearing the testimony of witnesses and the argument of counsel, this Court makes the following findings under the standard set forth by the Tennessee Supreme Court in *State v. Anderson,* 937 S.W.2d 851, 855 (Tenn. 1996). In *Anderson*, the Court recognized that the trial court should consider the totality of the circumstances from the perspective of a reasonable person in the suspect's position.

Custodial Interrogation

In this case, it is undisputed that the defendant was not advised of his rights under *Miranda v Arizona,* 384 U.S. 436 (1966). First, this Court considers the time and location of the statements. The statements were made in a small private meditation room located near the emergency room at the Williamson County Medical Center shortly after Lesa Buchanan's death. The defendant was in the room for a period of about one hour prior to his conversation with the detectives and then for approximately an additional hour during their conversation.

This Court also considers the tone of voice and demeanor of the officers. Christ Koulis testified that he felt threatened when he spoke with Officer Sanchez and Detectives Johnson and Cisco. The officers testified that no threats were made to the defendant. After reviewing

the testimony, this Court must make a credibility determination and does credit the testimony of Officer Sanchez and Detectives Johnson and Cisco.

The defendant also testified that he was forced to go to the meditation room by Officer Sanchez. However, Officer Sanchez stated that he directed Christ Koulis to the meditation room after the death of someone close to him in order to give the defendant some privacy. This Court, after hearing the evidence, credits the testimony of Officer Sanchez. The defendant also claims that the Franklin Police Department limited his movement and that he was physically prevented from leaving the room. Officer Sanchez and Detectives Johnson and Cisco deny the defendant's claim. This Court credits the testimony of the officers.

In reviewing the interaction between the defendant and the officers, this Court credits the testimony of Officer Sanchez that he provided his personal cell phone to the defendant so that he might make a telephone call. The defendant's sister testified that she spoke with the defendant by telephone. Again, this Court must credit the testimony of Officer Sanchez.

Finally, this Court reviews whether the defendant was free to refrain from answering questions or to leave. Here, the Court again credits the testimony of the officers, including Detective Cisco, who testified that she told the defendant he was free to leave at any time. Accordingly, after reviewing the totality of the circumstances from the perspective of a person in Christ Koulis' position, this Court finds that the defendant's movement was not restrained, that he was not in custody, and that *Miranda* warnings were not required.

Voluntariness of Statements

The defendant also claims that his statements were not voluntary under the circumstances that afternoon. This Court applies the same test to determine whether the actions of the officers were coercive of overreaching. After reviewing the testimony, this Court finds for the same reasons that the officer's actions were not so coercive or overreaching to overcome the defendant's free will.

Right to Counsel

The Court does note that it's concern about the testimony of Christ Koulis that he asked whether he needed a lawyer and Detective Johnson responded by asking whether he did something wrong. However, after reviewing *State v. Saylor,* 117 S.W.3d 239 (Tenn, 2003), this Court finds that the defendant's question was an equivocal invocation of his right to counsel. Therefore, he is not entitled to relief on this issue.

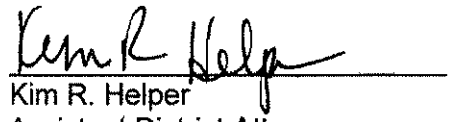
ACCORDINGLY, after consideration of the testimony and the arguments and memorandums filed by counsel, this Court denies the defendant's motion to suppress his statements.

JEFF BIVINS
Circuit Court Judge

Submitted by:

Kim R. Helper
Assistant District Attorney

Respectfully Submitted,



Kim R. Helper
Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the above order was served by fax and/or United States Mail on September 16, 2007 to: Lee Ofman, 317 Main Street, Suite 208, Franklin, TN 37064.

Kim R. Helper
Assistant District Attorney

Defense Special Request on a Unanimous Verdict

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

FILED 9.21. 2007
DEBBIE McMILLAN BARRETT

STATE OF TENNESSEE	)	
	)	
v.	)	Case No. I-CR111479
	)	
CHRIST KOULIS	)	

DEFENSE SPECIAL REQUEST ON A UNANIMOUS VERDICT

The Defense requests that the Court instruct the jury that the jury must agree unanimously as to each and every element of the offense. The Defense asserts that it is not adequate, in this case, to simply advise the jury that the verdict must be unanimous. Rather, because each element of the offense is contested here the jury must vote unanimously as to each and every element. To that extent, the pattern jury instruction is deficient because it does not specify the unanimous requirement within the separate elements of the crime itself.

Pattern jury instruction 2.04 provides that "the State must have proven without a reasonable doubt all of the elements of the crime charged, and that it was committed before the finding and returning of the indictment in this case." The Defense asserts that this sentence is inadequate. Rather, the Defense would request that this Court instruct the jury that: "The State must prove beyond a reasonable doubt each and every element of the crime charged. Further, the State must prove beyond a reasonable doubt that the crime was committed before the finding and returning of the indictment in this case."

This instruction separates the factor concerning the time of the commission of the offense which of course is not a contested issue in this case at all. At minimum, these concepts should be separated. See generally *State v. Forbes* 918 S.W. 2d 431 (Tenn. Criminal Appeals 1995).

Respectfully submitted,

Lee Ofman, # 9595
Attorney for Defendant
317 Main Street, Suite 208
Franklin, TN 37064
(615) 790-9494

David L. Raybin, # 3385
Attorney for Defendant
Hollins, Wagster, Yarbrough,
Weatherly & Raybin
424 Church St., Suite 2200
Nashville, TN 37219
(615) 256-6666

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by hand delivery to Kim Helper, Assistant District Attorney, this 21 day of September, 2007.

David L. Raybin

Defense Special Request on Pattern Jury Instructions

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

FILED 9.21. 2007
DEBBIE McMILLAN BARRETT

STATE OF TENNESSEE	)	
	)	
v.	)	Case No. I-CR111479
	)	
CHRIST KOULIS	)	

DEFENSE SPECIAL REQUEST PERTAINING TO PATTERN JURY INSTRUCTIONS

The Court has requested that counsel submit pattern jury instruction numbers which the defense believes should be instructed in this case. The defense requests:

1. Given that reckless homicide is a charged offense the defense here specifically requests that this Court instruct the jury as a lesser included offense, the crime of criminal neglect homicide as set forth in pattern jury instruction 7.07.
2. The Defense requests that the Court instruct the jury as to the provisions of "simple" assault pursuant to the provisions of pattern jury instruction 6.01 [part A].
3. The Defense requests the Court instruct the jury the provisions of pattern jury instruction 42.02 concerning expert witnesses.
4. The Defense requests that this Court instruct the jury as to the provisions of pattern jury instruction 42.03 concerning direct and circumstantial evidence, and

5. The Defense requests that the Court charge the jury as to pattern jury instruction 42.23 concerning the duty of a government to preserve evidence.

Respectfully submitted,

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(615) 790-9494

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by hand delivery to Kim Helper, Assistant District Attorney, this 21 day of Sept, 2007.

David L. Raybin

Defense Special Request On Order of Deliberations

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

FILED 9.21. 20 07
DEBBIE McMILLAN BARRETT

STATE OF TENNESSEE	)	
	)	
v.	)	Case No. I-CR111479
	)	
CHRIST KOULIS	)	

ORDER OF DELIBERATIONS AS TO SEPARATE COUNTS

In *State v. Banes*, 874 S.W.2d 73 (Tenn. Crim. App. 1993) the Court held that different procedures must be followed where lesser included offenses are alleged in the same indictment which also charges greater offenses. While it is usually unnecessary for the government to include lesser included offenses as separate counts, the government may do so. In the event the government charges greater and lesser offenses in the same indictment the Judge should clearly instruct the jury as to the nature of the charges and the manner of considering them in their deliberations. It is also appropriate for the Court to emphasize by additional instruction or by the verdict form that, under the circumstances, only one conviction is appropriate. The jury should be told, in advance, so that they can properly evaluate the evidence and not be misled into believing that they are determining guilt or innocence on more than one offense, when, in fact, only one criminal act is charged.

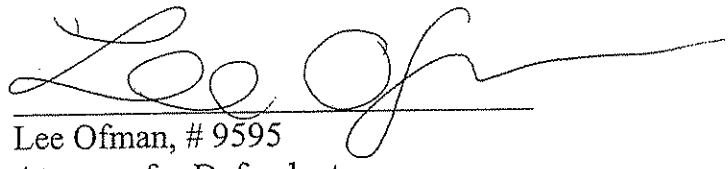
The process of having the jury separately deliberate lesser included offenses is unnecessary, misleading, and may be prejudicial.

The defense believes that the pattern jury instruction set forth in 41.02 is not completely accurate.

Accordingly, the defense suggests that that the Court charge the jury that:

> Although the indictment charges two separate criminal offenses these separate counts all relate to the same alleged event. Consequently, you may render a verdict only as to one of the counts or as to any lesser included offenses set forth in these instructions.
>
> You should first consider the first count of the indictment charging murder in the second degree. If you have a reasonable doubt as to Mr. Koulis' guilt of murder in the second degree as charged in count one of the indictment then you should next proceed to determine whether he is guilty or not guilty of reckless homicide as charged in count two of the indictment.
>
> If you have a reasonable doubt to Mr. Koulis' guilt of reckless homicide then you must next consider the lesser included offense of criminally neglect homicide.
>
> If you have a reasonable doubt as to Christ Koulis' guilt of criminally neglect homicide then you would next proceed to consider the lesser included offense of reckless assault.
>
> If you have a reasonable doubt as to Christ Koulis' guilt of reckless assault then your verdict would be not guilty.

Respectfully submitted,



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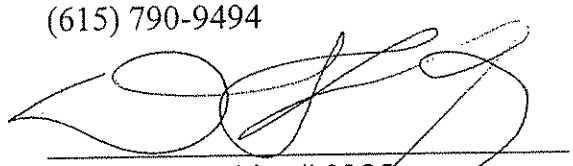

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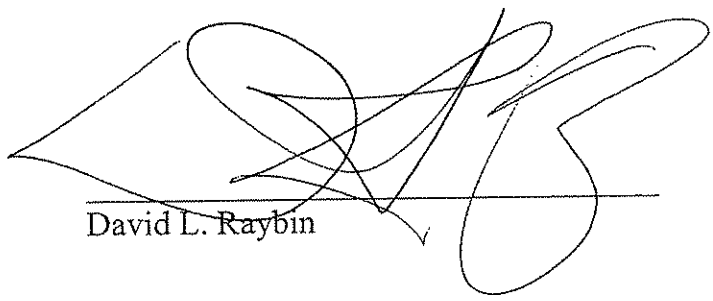
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by hand delivery to Kim Helper, Assistant District Attorney, this 21 day of Sept., 2007.



David L. Raybin

Defense Authority on Preservation of Evidence

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

FILED 9.27. 2007
DEBBIE McMILLAN BARRETT

STATE OF TENNESSEE)
)
v.) Case No. I-CR111479
)
CHRIST KOULIS)

Authority for Jury Instruction on Preservation of Evidence

In this case the police were in control of the three pill bottles. They turned them over to the hospital for safekeeping and after failing to retrieve them after eleven days (!) the hospital disposed of same. The government also failed to preserve the photo on the cell phone. Thus, the defense is entitled to a failure to preserve evidence charge which is a spoilation instruction.

The spoilation and the destruction or withholding of evidence which a party ought to preserve gives rise to a presumption unfavorable to him, as his conduct may properly be attributed to his knowledge that the truth would operate against him. This principle has been applied in a great variety of cases, and is now so well established that it is unnecessary to do more than state it.

Usually the doctrine is applied against a criminal defendant since defendants often hide the truth. See *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir.1986), cert. denied, 480 U.S. 922 (1987)(spoilation evidence, including evidence that the defendant attempted to bribe or threaten a witness, is admissible to show consciousness of guilt). The doctrine applies in many different cases. Spoilation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *West v. Goodyear Tire & Rubber Company*, 167 F.3d 776, 778 (2d Cir. 1999).

The term "spoilation" encompasses a party's intentional *or* negligent destruction or loss of tangible evidence, which destruction or loss impairs a person's ability to prove or defend a prospective action. *Bush v. Thomas*, 888 P.2d 936, 939 (N.M.Ct.App.1994) (collecting cases).Where the facts associated with spoilation of evidence and its alleged prejudicial effect are unclear, referral of the spoilation issue to a jury with accompanying instructions is the proper and advisable course of action. *McHugh v. McHugh*, 186 Pa. 197, 40 A. 410)(1898); *Wills v. Hardcastle*, 19 Pa.Super. 525 (1902); *Equitable Trust Co. v. Gallagher*, 34 Del.Ch. 249, 102 A.2d 538 (1954).

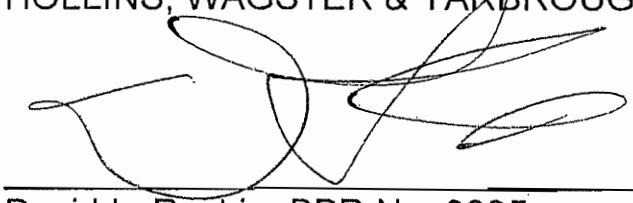
A party may be entitled to a jury instruction explaining that destroyed documents are presumed to be damaging to the party responsible for destruction. Such an "adverse inference charge" serves two purposes--remediation and punishment. The remedial purpose of the sanction serves to place the prejudiced party in the same position with regard to its ability to prove its case as it would have been if the evidence had not been destroyed. The punitive purpose both deters parties from destruction of relevant evidence and directly punishes the party responsible for spoilation. The strength of the adverse inference instruction given to the jury "will vary according to the facts and evidentiary posture of a given case." *Welsh v. United States*, 844 F.2d 1239, 1247 (6th Cir.1988). To the extent that relevant documents that were destroyed cannot or have not be reproduced, the jury will be permitted to infer from the unavailability of these documents that they would have been unfavorable to the party. See e.g., *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148 (1st Cir.1996); *Donato v. Fitzgibbons*, 172 F.R.D. 75; *Shaffer v. RWP Group*, 169 F.R.D. 19 (E.D.N.Y.1996); *Alliance to End Repression v. Rochford*, 75 F.R.D. 438 (N.D.Ill.1976); *General Atomic Co. v. Exxon Nuclear Co., Inc.*, 90 F.R.D. 290 (S.D.Cal.1981).

A showing of bad faith is not a prerequisite for drawing a negative inference against the spoliator. See, for example, *Vodusek v. Bayliner*

Marine Corp., 71 F.3d 148, 156 (4th Cir.1995) (Niemeyer, J.); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir.1993); *Nation-Wide Check Corp. v. Forest Hills Dist.*, 692 F.2d 214 (1st Cir.1982); *Rhode Island Hosp. Trust Nat'l Bank v. Eastern General Contractors, Inc.*, 674 A.2d 1227 (1996).

Respectfully submitted,

HOLLINS, WAGSTER & YARBROUGH, P.C.



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(615) 256-6666

CC to Kim Helper via EMAIL

STATE OF TENNESSEE)
)
vs.) Williamson County No. ~~CR-111479~~ I-CR111479
)
CHRIST P. KOULIS)

FILED
SEP 27 2007
Debbie McMillan Barrett
Circuit Court

JURY CHARGE

Ladies and Gentlemen of the Jury

The defendant, Christ P. Koulis, is charged in Count 1 of the indictment with the offense of Second Degree Murder, and in Count 2 of the indictment with the offense of Reckless Homicide. The indictment in this case is the formal written accusation charging the defendant with a crime. It is not evidence against the defendant and does not create any inference of guilt. To this offense the defendant pleads not guilty.

The evidence in this case has been completed, and it is my duty now to instruct you as to the law. After I have completed these instructions, you will hear the closing arguments of both sides. The law applicable to this case is stated in these instructions, and it is your duty to carefully consider all of them. The order in which these instructions are given is no indication of their relative importance. You should not single out any one or more of them to the exclusion of another or others but should consider each one in light of and in harmony with the others.

At times during the trial, I have ruled upon the objections and admissibility of evidence. You must not concern yourself with these rulings. Neither by such rulings, these instructions nor any other remarks which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be.

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence. If any statements were made that you believe are not supported by the evidence, you should disregard them.

You are the exclusive judges of the facts in this case. Also, you are the exclusive judges of the law under the direction of the court. You should apply the law to the facts in deciding this case. You should consider all of the evidence in the light of your own observations and experiences in life.

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The law presumes that the defendant is innocent of the charges against him. This presumption remains with the defendant throughout every stage of the trial, and it is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden never shifts but remains on the State throughout the trial of the case. The defendant is not required to prove his innocence. The State must have proven beyond a reasonable doubt all of the elements of the crime charged.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

Before you may convict the defendant of any offense in this case, you must further find that the crime was committed in Williamson County, Tennessee. The State's burden of proof in this connection is carried if you find that the preponderance of the evidence established that the crime was committed in Williamson County. Preponderance of the evidence means the greater weight and value of all the evidence on the issue.

EVIDENCE

You are to decide this case only from the evidence which was presented at this trial. The evidence consists of:

1. The sworn testimony of the witnesses who have testified;
2. The exhibits that were received and marked as evidence; and
3. Any facts to which all the lawyers have agreed or stipulated.

STATEMENTS OF COUNSEL - EVIDENCE STRICKEN OUT - INSINUATIONS OF QUESTIONS

In reaching your verdict you may consider only the evidence that was admitted. Remember that any questions, objections, statements or arguments made by the attorneys during the trial are not evidence. If the attorneys have stipulated or agreed to any fact, however, you will regard that fact as having been proved.

Testimony that you have been instructed to disregard is not evidence and must not be considered. If evidence has been received only for a limited purpose, you must follow the limiting instructions I have given you. You are to decide the case solely on the evidence received at trial.

LIMITING INSTRUCTION

The testimony regarding the incident in May 2002 between Lesa Buchanan and Christ Koulis is not to be considered by you to show that because the defendant was previously involved in an incident with Lesa Buchanan involving the intravenous injection of drugs, that he is guilty of the charged crimes. The State is not permitted to introduce or argue "propensity evidence" to the effect that "if he did before, he did it again." It would be improper for you to consider the 2002 incident for such purpose. You may consider the evidence only to show the nature of the relationship between Lesa Buchanan and Christ Koulis. The evidence may also be considered to show Christ Koulis' intent and his state of mind.

T.P.I. -- CRIM. 42.05(a)

IDENTIFICATION

The Court charges you that the identity of the defendant must be proven in the case on the part of the State to your satisfaction beyond a reasonable doubt. In other words, the burden of proof is on the State to show that the defendant now on trial before you is the identical person who committed the alleged crime with which he is charged. In considering the identity of a person, the Jury may take into consideration all the facts and circumstances in the case.

The Court further charges you that if you are satisfied from the whole proof in the case, beyond a reasonable doubt, that the defendant committed the crime charged against him, and you are satisfied beyond a reasonable doubt that he has been identified as the person who committed the crime charged, then it would be your duty to convict him. On the other hand, if you are not satisfied with the identity from the proof, or you have a reasonable doubt as to whether he has been identified from the whole body of the proof in the case, then you should return a verdict of not guilty.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

One type of evidence is called direct evidence and the other type is called circumstantial evidence.

Direct evidence is those parts of the testimony admitted in court which referred to what happened and was testified to by witnesses who saw or heard what happened first hand. If witnesses testified about what they themselves saw or heard, they presented direct evidence.

Circumstantial evidence is all the testimony and exhibits which give you clues about what happened in an indirect way. It consists of all the evidence which is not direct evidence. For example, if a witness testified that the witness saw it raining outside, that would be direct evidence that it was raining. If a witness testified that the witness saw someone enter a room wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining. Do not assume that direct evidence is always better than circumstantial evidence. According to our laws, direct evidence is not necessarily better than circumstantial evidence. Either type of evidence can prove a fact if it is convincing enough. A defendant may be convicted on direct evidence, circumstantial evidence, or both. When the evidence is entirely circumstantial, then before you would be justified in finding the defendant guilty, you must find that all the essential facts are consistent with the theory of guilt, and the facts must exclude every other reasonable theory except that of guilt.

MERE PRESENCE

Mere presence of the accused at the scene of a crime does not, standing alone, justify an inference of his participation or guilt.

T.P.I. -- CRIM. 42.04(a)

CREDIBILITY OF WITNESSES

It is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of any person's testimony.

In deciding which testimony you believe, you should rely on your own common sense and everyday experience. There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

(1) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?

(2) Did the witness seem to have a good memory?

(3) How did the witness look and act while testifying? Did the witness seem to be making an honest effort to tell the truth, or did the witness seem to evade the questions?

(4) Has there been any evidence presented regarding the witness' intelligence, respectability or reputation for truthfulness?

(5) Does the witness have any bias, prejudice, or personal interest in how the case is decided?

(6) Have there been any promises, threats, suggestions, or other influences that affected how the witness testified?

(7) In general, does the witness have any special reason to tell the truth, or any special reason to lie?

(8) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

Sometimes the testimony of different witnesses will not agree, and you must decide which testimony you accept. You should think about whether the disagreement involves something important or not, and whether you think someone is lying or is simply mistaken. People see and hear things differently, and witnesses may testify honestly but simply be wrong about what they thought

they saw or remembered. It is also a good idea to think about which testimony agrees best with the other evidence in the case.

The defendant has testified in his own behalf. His credibility should be determined by the same rules by which the credibility of other witnesses is determined, and you should give his testimony such weight as you may think it is entitled.

IMPEACHMENT OF WITNESSES

A witness may be impeached by proving that the witness has made material statements out of court which are at variance with his or her evidence on the witness stand. Your verdict must, however, be based upon evidence introduced during the course of this trial. References to prior inconsistent statements may, therefore, be considered by you only for the purpose of testing the witness' credibility and not as substantive evidence of the truth of the matter asserted in such out of court statements unless the court has specifically admitted the contents of the statement into evidence.

Further, a witness may be impeached by a careful cross-examination, involving the witness in contradictory, unreasonable and improbable statements. However, immaterial discrepancies or differences in the statements of witnesses do not affect their credibility unless it should plainly appear that some witness has willfully testified falsely.

When a witness is thus impeached, the jury has the right to disregard his or her testimony, and treat it as untrue, except where it is corroborated by other credible testimony, or by the facts and circumstances proved on the trial.

EXPERT WITNESS

The rules of evidence provide that if scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by reason of special knowledge, skill or experience may testify and state his or her opinions concerning such matters and give reasons for his or her testimony.

Merely because an expert witness has expressed an opinion does not mean, however, that you are bound to accept this opinion. The same as with any other witness, it is up to you to decide whether you believe this testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the witness' background or training and experience is sufficient for the witness to give the expert opinion that you heard. You must also decide whether the witness' opinions were based on sound reasons, judgment and information.

You are to give the testimony of an expert witness such weight and value as you think it deserves along with all the other evidence in the case.

ORDER OF CONSIDERATION

When you begin your consideration, you will first consider the defendant's guilt or innocence of the offense of Second Degree Murder as alleged in Count 1 of the indictment.

If you find the defendant guilty beyond a reasonable doubt of this offense you will convict him and your verdict will be "We, the jury, find the defendant guilty of Second Degree Murder." Such finding would end your deliberation.

If you have reasonable doubt as to the defendant's guilt of this offense, then your verdict must be not guilty as to this offense, and then you shall proceed to determine his guilt or innocence of Reckless Homicide as charged in Count 2 of the indictment.

If you find the defendant guilty beyond a reasonable doubt of Reckless Homicide you will convict him and your verdict will be "We, the jury, find the defendant guilty of Reckless Homicide." Such finding would end your deliberation.

If you have reasonable doubt as to his guilt of this offense, you will acquit him and you will proceed to consider his guilt or innocence to the lesser included offense of Criminally Negligent Homicide.

If you find the defendant guilty beyond a reasonable doubt of this offense you will convict him and your verdict will be "We, the jury, find the defendant guilty of Criminally Negligent Homicide." Such finding would end your deliberation.

If you have reasonable doubt as to his guilt of this offense, you will acquit him and you will proceed to consider his guilt or innocence to the lesser included offense of Assault.

If you find the defendant guilty beyond a reasonable doubt of this offense you will convict him and your verdict will be "We, the jury, find the defendant guilty of Assault." Such finding would end your deliberation.

If you have reasonable doubt as to his guilt of this offense, you will acquit him. Such finding would end your deliberation.

Count 1

T.P.I. -- CRIM. 7.05(b)

SECOND DEGREE MURDER (Drugs as Proximate Cause)

Any person who commits second degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully distributed oxycodone, a Schedule II drug;

and

(2) that said drug was the proximate cause of the death of the user;

and

(3) that the defendant acted either intentionally, knowingly or recklessly.

A "proximate cause" of the result is a cause which occurs or concurs with another and which, in natural and continuous sequence, produces the result, and without which the result would not have occurred.

"Distribute" means to deliver a controlled substance.

"Deliver" means the actual, constructive, or attempted transfer from one person to another of a controlled substance.

Count 2

T.P.I. – CRIM. 7.09

RECKLESS HOMICIDE

Any person who commits the offense of reckless homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant killed the alleged victim;

and

(2) that the defendant acted recklessly.

T.P.I. -- CRIM. 7.07

CRIMINALLY NEGLIGENT HOMICIDE

Any person who commits criminally negligent homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant's conduct resulted in the death of the alleged victim;

and

(2) that the defendant acted with criminal negligence.

T.P.I.-- CRIM. 6.01

ASSAULT

Any person who commits an assault upon another is guilty of a crime.

For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant caused bodily injury to another;

and

(2) that the defendant acted either intentionally, knowingly or recklessly.

DEFINITIONS

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct, or the result of the conduct, when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

"Criminal negligence" means that a person acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

The requirement of criminal negligence is also established if it is shown that the defendant acted intentionally, knowingly or recklessly.

"Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ or mental faculty.

USE OF JUROR NOTES

Some of you have taken notes during the trial. Once you retire to the jury room, you may refer to your notes, but only to refresh your own memory of the witnesses' testimony. You are free to discuss the testimony of the witnesses with your fellow jurors, but each of you must rely upon your own individual memory as to what a witness did or did not say.

In discussing the testimony, you may not read your notes to your fellow jurors or otherwise tell them what you have written. You should never use your notes to persuade or influence other jurors. Your notes are not evidence. Your notes should carry no more weight than the unrecorded recollection of another juror.

When you retire to the jury room, you will first select one of your members as presiding juror who will preside over your deliberations. When you have reached a verdict, you will return with it to this courtroom and your presiding juror will announce it.

In order to assist you in reaching a correct verdict, a verdict form is attached to and included in these instructions setting forth the possible verdict for each count of the presentment. This form should be marked in the appropriate spaces, the appropriate blanks filled in, and the form should be signed by your presiding juror.

Both the defendant and the State are entitled to your calm, unbiased judgment upon the truth of the charges in the indictment. You can have no sympathy or prejudice in any criminal case but will decide the case solely and alone upon the facts shown in the proof and upon the law given you in this charge.

Your verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous.

As jurors, it is your duty to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case yourself but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

We will now proceed with the closing arguments for each side. When the attorneys conclude their arguments, these instructions will be handed to you, and you will retire to consider your verdict.

JEFF BIVINS
CIRCUIT COURT JUDGE

Verdict Form

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

STATE OF TENNESSEE	)	
	)	
vs.	)	Williamson County No. CR111479
	)	
CHRIST P. KOULIS	)	

FILED
SEP 28 2007
Debbie McMillan Barrett
Circuit Court

VERDICT FORM

As to Count 1 of the indictment, we, the Jury, unanimously find the defendant, Christ P. Koulis:

( ) Guilty of Second Degree Murder

(X) Not guilty.

OR

As to Count 2 of the indictment, we, the Jury, unanimously find the defendant, Christ P. Koulis:

( ) Guilty of Reckless Homicide

(X) Not Guilty.

OR

(X) Guilty of Criminally Negligent Homicide

( ) Not Guilty.

OR

( ) Guilty of Assault

(X) Not Guilty.

SEPTEMBER 28, 2007
Date

Presiding Juror

Unpublished Cases

State v. Likens

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Nashville.
STATE of Tennessee, Appellee,
v.
Ronnie LIKENS, Appellant.

April 3, 1986.

No. 85-315-III

Macon County No. 2361

Honorable Robert E. Bradshaw, Judge

(Rape)

Charles E. Bush, Assistant Attorney General, Nashville, Tennessee, John Wooten, Assistant District Attorney General, Hartsville, Tennessee, for appellee.

A. Russell Brown, Lafayette, Tennessee, for appellant.

OPINION

MARTHA CRAIG DAUGHTREY, Judge.

***1** The defendant, Ronnie Likens, was convicted of rape and sentenced to 15 years in prison as a Range II, especially aggravated offender. On appeal, he raises five issues, all of which we find to have merit. He alleges that the trial court erred (1) by allowing introduction of his prior convictions without a proper hearing, (2) in permitting the state to characterize him as an "experienced criminal" in closing argument, (3) by inquiring into the numerical split of the jury, (4) by failing to find that an acquittal of sexual battery implicitly acted as an acquittal of rape, and (5) in sentencing him as an especially aggravated offender. Some of the errors that occurred in the trial court were less serious than others, but at least one would require a new trial and another requires outright dismissal of the charge.

At the close of the state's proof and with the jury out, the prosecutor notified the court that he would seek to introduce the defendant's two prior felony convictions for the purpose of impeachment, in the event the defendant testified. According to the prosecutor, both convictions fell within the 10- year rule of *State v. Morgan*, 541 S.W.2d 385, 389 (Tenn.1976), and were for burglary and for attempt to commit a felony. The trial judge ruled, without hearing more, that "when the defendant takes the stand he does so at his own peril." He repeated this statement even after defense counsel raised an appropriate objection. By this ruling, the trial court apparently meant that all prior felony convictions are automatically admissible to impeach. If so, the ruling was clearly erroneous.

In *Morgan, supra*, the Tennessee Supreme Court adopted Federal Rule of Evidence 609 to govern the introduction of prior convictions for purposes of impeachment. Under Rule 609(a), two classes of crimes qualify: (1) those punishable by death or imprisonment in excess of one year, *if* the court determines that the probative value of admission outweighs the prejudicial effect, and (2) those involving dishonesty or false statement, regardless of the penalty. *Id.* at 388-389.

Convictions falling within the first category are subject to a "balancing test." In a jury-out hearing, the trial court must weigh the probative value of admitting the evidence against the prejudicial effect it would have on the defendant. *Id.* Moreover, the trial court should set out reasons for its decision to allow introduction. *Long v. State*, 607 S.W.2d 482, 485 (Tenn.Crim.App.1980). However, if the crime involved dishonesty or false statement under the second category, use of the conviction is not subject to the balancing test, and the conviction is admissible without regard to its prejudicial effect. *See State v. McKay*, 680 S.W.2d 447, 452 (Tenn.1984).

Under Tennessee law, burglary is considered facially within the "dishonesty or false statement category."

State v. Martin, 642 S.W.2d 720, 724 (Tenn.1982). Hence, the defendant's prior conviction for burglary was automatically admissible to impeach. However, his conviction for attempt to commit a felony should not have been ruled admissible without a jury-out hearing to determine its probative value and possible prejudicial effect. *See State v. Stafford*, 670 S.W.2d 243, 245 (Tenn.Crim.App.1984). The failure to hold such a hearing was error.

***2** Had an appropriate hearing been held, however, it apparently would have developed that the attempted felony involved larceny. Because larceny is also considered to fall into the "dishonesty or false statement" category, this conviction, too, would have been automatically admissible to impeach. *State v. Goad*, 692 S.W.2d 32, 37 (Tenn.Cr.App.1985); *see State v. Sheffield*, 676 S.W.2d 542, 549 (Tenn.1984). It thus appears that the failure to hold the hearing was harmless error in this case. We nevertheless caution against omission of an appropriate inquiry into submitted prior convictions, because the potential for reversible error in the absence of a *Morgan* hearing is obvious.

The next error identified by defense counsel involves the use of the defendant's two prior convictions by the prosecutor as a basis for arguing to the jury that the defendant was an "experienced criminal." The first time the prior offenses were mentioned by the prosecutor in closing argument, defense counsel made no objection, and properly so, because the allusion was couched in terms of credibility. The prosecutor said:

> Now, do you want to believe a lady who is 72 and gets up here on this witness stand and she related all those details to each of you, and to a courtroom full of people, to the news media to put her name in the paper and all that, or do you want to believe a man that now has denied everything that she has said, a man who admits being guilty of at least two felonies and who is cool as a cucumber?

Thereafter, however, the prosecutor made repeated references to the defendant as an "experienced criminal," not in terms of credibility but to demonstrate his culpability of the offense on trial. He did so despite defense counsel's objections, which the trial court erroneously overruled. Once, for example, the prosecutor, commenting on testimony by defense witnesses, said:

> They just tried to tell you that [the defendant] was acting normal. Well, I submit to you that maybe that's fine. But that doesn't matter at all because he's an experienced criminal is what it amounts to. That's all that tells you.

On another occasion he argued:

> Like I say, an experienced criminal. Now that's just the fact of the matter and he even said that. He's been in court before and he knows what it's all about.

On still another occasion the prosecutor said:

> Of course he asserted his rights, as he should have. I mean everybody who's accused of a criminal offense, they don't need to make any statement. But that shows how experienced he is. He knows his way around a courtroom and to the courtroom....
>
> He didn't even seem nervous up there on that witness stand. He's experienced, and he knows how to tell it, and that's the appearance he led everyone to believe that night too.

There was, needless to say, no evidence introduced concerning the defendant's prior "courtroom experience." Indeed, he testified that he had pleaded guilty in the prior cases and had not gone to trial on them.

***3** Be that as it may, it is clear to us that the prosecutor went over the *Morgan* line and engaged in improper and prejudicial argument. The test to be applied in reviewing such misconduct is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." *Harrington v. State*, 215 Tenn. 338, 340, 385 S.W.2d 758, 759 (1965). The factors to be considered in reaching this determination are set out in *Judge v. State*, 539 S.W.2d 340, 344 (Tenn.Crim.App.1976), as adopted by the Tennessee Supreme Court in *State v. Buck*, 670 S.W.2d 600, 609 (Tenn.1984). These factors, in context, are as follows:

> (1) The conduct complained of, viewed in light of the facts and circumstances of this case.

Any rape case is going to incur strong feelings on both sides, particularly when the alleged victim is 71 years of age. This case was no different. [FN1] However, the statements made by the

prosecutor are clearly erroneous even under these circumstances. The characterization was not in response to a proposition advanced by the defense, nor was it excused by defense counsel's understandable attempt to rebut it in his closing argument. The repeated use of the challenged term merely compounded the error. *See Smith v. State,* 527 S.W.2d 737 (Tenn.1975). Whether or not it was a "reasonable inference from the evidence," as argued by the state, is immaterial. The defendant's prior convictions had a specific, limited use at trial--they were to be considered solely for the purpose of evaluating his credibility, not his guilt or innocence. *State v. Morgan,* 541 S.W.2d 385 (Tenn.1976).

(2) The curative measures undertaken by the court and the prosecutor.

No curative measures were attempted. In fact, the trial judge implicitly sanctioned the remark by overruling the defendant's objection to it.

(3) The intent of the prosecutor in making the improper statement.

It is difficult to conclude that the prosecutor's argument was made in good faith. Although he attempted to cloak his remarks about the defendant's prior record in the permissible garment of "credibility," the disguise quickly wore thin, as indicated by the examples set out above. A prosecutor may argue reasonable inferences from the record, *State v. Sutton,* 562 S.W.2d 820, 826 (Tenn.1978), but he may not argue in effect that a defendant is a "bad person" who "should be convicted on general principles ... for the good of society." *Knight v. State,* 190 Tenn. 326, 332, 229 S.W.2d 501, 503 (1950).

(4) The cumulative effect of the improper conduct and any other errors in the record.

Because there are other errors in the record, the likelihood of cumulative effect upon the jury is obvious.

(5) The relative strength or weakness of the case.

Without detailing the evidence in the record, it is sufficient to say that the case was a substantially close one. The state's case was based entirely on the testimony of the victim, who suffered no physical injury as a result of the alleged rape. She did have semen in her vagina, and she identified a knife confiscated from the defendant as the one he used to subdue her. There was no physical evidence found at the scene. The defendant and his witnesses offered an arguably plausible explanation of his activities on the night in question, and defense counsel was able to point out several discrepancies in the victim's story.

***4** Considering the misconduct in total context of the facts and circumstances of the case, we conclude that it may have affected the outcome of the trial and that it therefore constituted reversible error. Were it not for a more serious error in the record, we would remand the case for a new trial on this basis.

The jury in this case began deliberations in mid-afternoon on the first day of trial. About two hours later, the trial judge brought them back to the courtroom and inquired about their current numerical split (it was reported as 9-3). The judge then told the jury that he was going to send them home early because of inclement weather. The jury returned the next morning and resumed deliberations at approximately 9:00 a.m. When they came back to the courtroom a little over an hour later, the trial judge asked if they had reached a verdict. The foreman responded affirmatively. Asked to report the jury's finding, the foreman told the judge that the jury had found the defendant not guilty because of reasonable doubt. This colloquy between the trial judge and the foreman then followed:

The Court: And the [next offense] is just simple rape. How does the jury find?
The Foreman: Your Honor, we couldn't come to a decision on that.... [W]e can't come to a unanimous vote on that.
The Court: Have you explored the possibility of the third [offense, the] lesser included offense of sexual battery?
The Foreman: Yes, sir. We don't think that was there.
The Court: In other words ..., you're finding the defendant not guilty of aggravated rape....
The Foreman: Reasonable doubt, Your Honor.
The Court: And you can't, or haven't reached a decision insofar as rape is concerned....
The Foreman: Yes, sir.
The Court: And you found the defendant not guilty of sexual battery?
The Foreman: Yes, sir.

After conferring with counsel at the bench and again

inquiring into the numerical split of the jury on the offense of rape (it was reported as 11-1), the trial judge sent the jury back to deliberate on that charge, over the defendant's objection. The jury subsequently found the defendant guilty of rape.

The defendant now complains that the trial judge erred when not once, but twice, he inquired into the numerical split of the jury. The defendant is correct. Such an inquiry is prohibited by *Kersey v. State,* 525 S.W.2d 139 (Tenn.1975). We trust that having had the error pointed out the trial judge will abjure this practice in the future. However, in this case he did no more than ask for the numbers, and there was no indication given as to the majority position. If this were the only error in connection with the jury's verdict, we are persuaded that it would have been harmless.

We conclude, however, that by finding the defendant not guilty of the lesser included offense of sexual battery, the jury had implicitly acquitted the defendant of rape, as a matter of law. They should not have been permitted to deliberate further, and a motion for judgment of acquittal should have been entertained.

***5** The elements of rape charged by the trial court were (1) sexual penetration of another, accomplished by the use of either (2) force or coercion, or (3) fraud. T.C.A. § 39-2-604(a). Sexual battery, as charged, required (1) sexual contact with another, (2) accomplished by force or coercion. T.C.A. § 39-2-607(a). The elements of sexual battery are necessarily included in the elements of rape. Accordingly, it is impossible in this instance to commit rape without also committing sexual battery. [FN2]

Since the verdict of not guilty of sexual battery meant that one or more of the elements necessary for the offense was not present, it follows that one or more of the elements of rape was missing. Hence, the defendant's conviction for rape must be reversed. *Cf. Whitwell v. State,* 520 S.W.2d 338, 344 (Tenn.1975).

The facts in *Whitwell* are strikingly similar to those in this case, with one exception that is not pertinent. Whitwell and his co-defendant were charged with grand larceny of cattle, as well as receiving and concealing the stolen cattle. The jury, in reporting a deadlock, was asked by the judge if they had reached a verdict on the larceny charge. The foreman replied that the jury had found the defendants not guilty of that offense. He volunteered that although "the defendants did take and load the cattle ... in their trucks [,] ... we don't think they knew they were stealing at the time." *Id.* at 340. The trial judge entered a not guilty verdict as to grand larceny and ordered a mistrial on the remaining charges. When the state attempted to retry the defendants for petit larceny and receiving and concealing stolen property, the Tennessee Supreme Court ruled that the remaining charges should have been dismissed because the jury had found a failure to prove guilty knowledge, an element of all the original offenses.

The only distinction between this case and *Whitwell* is that the trial judge here sent the jury back to deliberate, rather than declaring a mistrial and ordering a retrial. The distinction has no bearing on the outcome and the result--dismissal of the charge--must be the same.

The state nevertheless argues that the verdict rendered against defendant Likens was not final because it failed to follow proper form, and cites several federal cases in support of its argument. We note, first of all, that federal authority is not binding in this case. Tennessee authority is, and for the same reason that the colloquy between the jury and the trial judge in *Whitwell, supra,* 520 S.W.2d at 342-3, was held to constitute a verdict exonerating the defendant, we hold that the form of the verdict in this case was sufficiently clear to provide grounds for relief. Indeed, we are convinced that the verdict in this case meets even the standard set out by Justice Harbison, dissenting on this point in *Whitwell. Id.* at 345-7.

It follows that, the trial judge having failed to enter a judgment of acquittal at the appropriate time, the judgment of conviction must be reversed and the charge dismissed on the merits.

***6** Although rendered moot by our decision to reverse the defendant's conviction, the sentencing question presented by the last issue involves error and warrants some discussion. The state gave notice that it intended to seek enhanced punishment for the defendant as an especially aggravated offender. The prosecutor then presented proof at the sentencing hearing that the defendant was a persistent offender; however, the trial court specifically

sentenced him for an especially aggravated offense. The defendant objects on two grounds: that the notice was defective and that the elements for classification as an especially aggravated offender were not met.

Prior to trial, pursuant to T.C.A. § 40-35-202(a), the state filed notice that it intended to seek enhanced punishment "for an especially aggravated offense under Tennessee Code Annotated, Section 40-35-107." The following factors were listed:

1. The defendant is charged with a felony during the commission of which the defendant willfully inflicted serious bodily injury upon another person.
2. The defendant has a prior history of previous convictions or criminal behavior:
a. attempt to commit a felony on the 11th day of May, 1981 in the Criminal Court of Davidson County, and
b. burglary in the third degree on the 17th day of July, 1979 in the Criminal Court of Macon County.
3. The victim of the alleged offense was particularly vulnerable because of her advanced years of age.
4. The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement.

Neither T.C.A. § 40-35-106, the persistent offender statute, nor the term "persistent offender" was mentioned in the notice.

The requirements for sentencing for an "especially aggravated offense" are set out in T.C.A. § 40-35-107. The only subsection applicable to this case is § 40-35-107(2), which concerns a defendant who inflicts serious bodily injury or death during the commission of a felony. [FN3] T.C.A. § 40-35- 202(a) directs that the enhancement notice "must set forth ... the nature of any injury or threat of injury relied upon to establish that the defendant has committed an especially aggravated primary offense." The notice in this case, however, does not contain with sufficient particularity the details of the alleged injury and, in fact, no such injury was proven at trial or at the sentencing hearing.

If sentencing as a persistent offender under T.C.A. § 40-35-106 is sought, the notice must include details about the prior convictions. T.C.A. § 40-35-202(a). The appropriate information is included here, but, as previously noted, the defendant was not notified that persistent offender status would be sought.

An "especially aggravated offense" was not proven at the sentencing hearing, and we thus conclude that the defendant's sentencing as an "especially aggravated offender" was error. No bodily injury, either particular or general, was demonstrated, nor were any of the other statutory criteria present. Although the defendant admits the existence of two prior convictions, which, if properly shown, would justify enhancement as a persistent offender, possible "persistent offender" status was not included in the notice, nor was the defendant sentenced as such.

***7** These irregularities would have been fatal to the defendant's sentencing as a Range II offender. "[T]he State is obligated to comply with the notice requirements of T.C.A. § 40-35-202(a) (1982) before a Range II sentence can be imposed upon a defendant." *State v. Pender*, 687 S.W.2d 714, 720 (Tenn.Crim.App.1984). Under ordinary circumstances the Range II sentence could not stand, but for the reasons set out above, a new sentencing hearing is not required in this case.

The judgment of the trial court is reversed, and the charge for which the defendant was convicted is dismissed on its merits.

MARK A. WALKER, P.J., and ALLEN R. CORNELIUS, Jr., J., concur.

FN1. The state contends that the prosecutor was merely "carried away by the emotion of the moment." He was apparently "carried away" more than once; at one point during cross-examination of the defendant, the trial judge admonished the prosecutor, "Don't scream, General."

FN2. The state in its brief mentions that the jury could have found sexual penetration accomplished by fraud. However, there was no hint of fraud in the proof presented, and this contention has no merit.

FN3. The last three allegations in the notice, involving the defendant's prior record, the age of the victim, and the defendant's motive

> of self-gratification, are enhancement factors under § 40-35-111, which can be used in determining the actual sentence to be imposed within Range I or Range II, once the appropriate range has been identified. They are not available under § 40-35-107 to support the initial determination that the offense is an "especially aggravated" one falling within Range II.

Not Reported in S.W.2d, 1986 WL 3992 (Tenn.Crim.App.)

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State v. Harris

State v. Harris
Tenn.Crim.App.,2001.
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SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Knoxville.
STATE of Tennessee,
v.
Carlos Demetrius HARRIS.
No. E2000-00718-CCA-R3-CD.

Jan. 4, 2001.

Appeal from the Criminal Court for Hamilton County, No. 220706;Stephen M. Bevil, Judge.

Cynthia A. LeCroy-Schemel, for appellant, Carlos Demetrius Harris.
Paul G. Summers, Attorney General and Reporter; R. Stephen Jobe, Assistant Attorney General; Bill Cox, District Attorney General; and Barry Steelman and Christopher Poole, Assistant District Attorneys General, for appellee, State of Tennessee.

WELLES, J., delivered the opinion of the court, in which WILLIAMS, J. and ACREE, Sp.J., joined.

OPINION

WELLES.
***1** The Defendant, Carlos Demetrius Harris, appeals as of right from his reckless homicide conviction. On appeal, he presents the following six issues: (1) whether the trial court erred by granting the State's motion to amend the indictment from voluntary manslaughter to reckless homicide; (2) whether the trial court erred by allowing inadmissible items into evidence; (3) whether the trial court erred by not allowing testimony by the Hamilton County Medical Examiner that an ordinary person would be unaware that one blow to the head would cause death; (4) whether the trial court erred by granting the State's jury instruction request regarding causation and intent; (5) whether the evidence was sufficient to support the conviction; and (6) whether the trial court erred by sentencing the Defendant to a term of six years and by denying the Defendant alternative sentencing. We find no reversible error; accordingly, we affirm the judgment of the trial court.

The proof at trial established that the Defendant loaned the victim, Charles Freeman, thirty dollars on February 22, 1998. The Defendant had previously loaned money to Mr. Freeman, and Mr. Freeman had always repaid the money in a timely fashion. However, on February 23, 1998, when the Defendant asked Mr. Freeman about the money, Mr. Freeman gave the Defendant the "runaround."

Mr. Freeman and the Defendant secured a ride to Mr. Freeman's residence with two acquaintances of the Defendant, Mary Mangram and Felicia Jones. Mr. Freeman lived with his mother, Essie Freeman. Mr. Freeman got out of the car and went inside, leaving the other three individuals in the car. When Mr. Freeman went inside, he talked to his mother. Essie Freeman told her son that he could no longer live with her because he had a drug problem, but she agreed to let him stay until the following Friday. After that, Mr. Freeman went back outside, and he asked the Defendant to join him behind the car.

Both Mary Mangram and Felicia Jones testified that they were not paying attention to the Defendant and Mr. Freeman; instead, they were attempting to operate the cassette player. However, both of them heard a loud noise, like a "lick" or a "pow," as though something had been hit. Ms. Mangram then heard a woman yell, "Stop that, stop that." Ms. Jones testified that she heard a woman yell, "Get back in that car, get out from here, get back in that car."The Defendant got in the car, and Ms. Mangram drove away. She testified that the Defendant did not say anything about what happened. He just asked for a cigarette.

Essie Freeman testified that she was looking out her front window after her son left her house on February 23, 1998. She saw her son and another man talking, and she said that they appeared to be "flustered." At one point, the man hit Mr. Freeman in the head, and Mr. Freeman fell to the ground. Ms. Freeman testified

that she did not see her son raise his hand to the man or attempt to touch him prior to the man striking her son.

***2** Paramedics responded to the scene, where they discovered that Mr. Freeman had a pulse but was not breathing. On the way to the hospital, Mr. Freeman experienced cardiac arrest. He ultimately died as a result of his injuries.

Dr. Frank King, the Hamilton County Medical Examiner, testified that Mr. Freeman's death was caused by blunt force trauma to the head. He explained that the head injury consisted of multiple fractures of the skull and injury to the brain. The location of the skull fractures and the brain injury indicated that the injuries were caused by a sudden movement of the head going back with the face going upward. Dr. King also testified that there were secondary injuries to the back of the head caused by a second impact. Dr. King agreed with counsel that a possible explanation for the injuries would be that Mr. Freeman was struck in the head, causing the first injuries, and then his head hit the pavement, causing the secondary injuries. Dr. King admitted that the extent of injury caused by a blow to the head in any particular individual is difficult to predict; what might cause death in one person might not harm another person at all.

Dr. King testified that Mr. Freeman tested positive for cocaine, which would tend to stimulate a person's nervous system. Dr. King agreed that cocaine could make a person agitated and aggressive, but he asserted that the effect of cocaine on any particular person could not be determined by a laboratory test. In addition, Dr. King testified that he observed Mr. Freeman's fingernails, and they did not show signs of foreign material such as skin, hair, or fiber.

When Mary Mangram learned that Mr. Freeman had died, she went to the police and informed them about the incident. The Defendant was arrested as a result, and he gave a statement to the police which was recorded and played for the jury. In that statement, the Defendant admitted striking Mr. Freeman one time on the head. However, he claimed that he did so in self-defense. He said that Mr. Freeman "grabbed" him. He showed the police his neck and face, which had scratches on them. The police made pictures of the Defendant's neck and face, which were shown to the jury.

I. AMENDMENT OF INDICTMENT

The Defendant first argues that the trial court erred by granting the State's motion to amend the indictment to reflect a charge of reckless homicide rather than voluntary manslaughter. The Defendant asserts that he was "highly prejudiced" by the amendment because it occurred only a couple of weeks prior to trial and completely changed the offense and the elements. However, the Defendant did not present this issue in his motion for a new trial. Therefore, this issue has been waived. *See*Tenn.R.App.P. 3(e); *State v. Clinton*, 754 S.W.2d 100, 103 (Tenn.Crim.App.1988).

Notwithstanding, we have considered this issue, and we find that it lacks merit. Rule 7(b) of the Tennessee Rules of Criminal Procedure provides that an indictment may be amended in all cases with the consent of the defendant, and if no additional or different offense is charged and if no substantial rights of the defendant are prejudiced, the indictment may be amended without the defendant's consent before jeopardy attaches. While there is no evidence in this record regarding whether the Defendant did or did not consent to the amendment of the indictment, we conclude that the amendment was proper whether or not the Defendant consented because the amendment did not charge an additional offense, and the substantial rights of the Defendant were not prejudiced.

***3** When a person is charged with an offense, that person is also charged with all lesser offenses included within that offense. *See Strader v. State*, 362 S.W.2d 224, 227 (Tenn.1962). A trial court is under the mandatory duty to instruct the jury on the offense charged and any lesser included offenses.Tenn.Code Ann. § 40-18-110(a). In this case, the Defendant was originally charged with the offense of voluntary manslaughter, which is "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner."*Id.* § 39-13-211. The indictment was amended to reflect a charge of reckless homicide, which is "a reckless killing of another." *Id.* § 39-13-215. Pursuant to *State v. Burns*, 6 S.W.3d 453 (Tenn.1999), an offense is a lesser included offense if

(a) all of its statutory elements are included within the

statutory elements of the offense charged; or

(b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing

(1) a different mental state indicating a lesser kind of culpability....

Id. at 466-67.

Reckless homicide contains two elements: the killing of another and reckless conduct. *See*Tenn.Code Ann. § 39-13-215. Obviously, the killing of another is included within the offense of voluntary manslaughter. While the element of reckless conduct is not technically included within the elements of voluntary manslaughter, which requires intentional or knowing conduct, the element of reckless conduct does establish a different mental state indicating a lesser kind of culpability. *See*Tenn.Code Ann. §§ 39-11-301(a)(2), 39-11-302. Therefore, reckless homicide is a lesser included offense of voluntary manslaughter under part (b) of the *Burns* test.[FN1]Because reckless homicide is a lesser included offense of voluntary manslaughter, the Defendant was necessarily charged with reckless homicide when he was charged with voluntary manslaughter. It follows that he would have had to prepare a defense to reckless homicide as well as voluntary manslaughter. Thus, the amendment to the indictment did not charge a new offense, and the Defendant's rights were not prejudiced. Accordingly, we find no error.

> FN1. Although finding that reckless homicide is a lesser included offense under part (b) of the *Burns* test, we note that pursuant to statute, "[w]hen recklessness suffices to establish an element, that element is also established if a person acts intentionally or knowingly."Tenn.Code Ann. § 39-11-301(a)(2). Thus, a compelling argument could be made that reckless homicide is a lesser included offense under part (a) of the *Burns* test because all of the elements are included within the elements of the greater offense. *See State v. Jumbo Kuri*, No. M1999-00638-CCA-R3-CD, 2000 WL 680373, at *5 (Tenn.Crim.App., Nashville, May 25, 2000).

II. INADMISSIBLE EVIDENCE

Next, the Defendant claims that the trial court erred by allowing inadmissible items into evidence which resulted in denying the Defendant a fair trial. He asserts that each of these errors standing alone requires reversal and that the cumulative effect of the errors require reversal. Specifically, he complains (1) that the trial court allowed the jury to observe the Defendant being brought from the holding cell; (2) that the trial court informed the jury that the Defendant was in custody and was appointed a lawyer; (3) that the Defendant's statement which was played for the jury improperly made reference to the Defendant's driver's license being suspended; and (4) that a State's witness improperly made reference to "pulling" the Defendant's record, thereby indicating that the Defendant had a criminal record. We will first address the Defendant's contentions separately, and then consider any cumulative effect.

***4** Unfortunately, the record regarding the jury observing the Defendant being brought into the courtroom from the holding cell is sparse. The only reference to that occurring was a comment made by defense counsel approximately half-way through the jury voir dire, in which counsel stated,

Judge, before we bring the jury back in I just want to put one thing on the record, that we had had the conversation up at the bench earlier in terms of my objection of the jury being in here at the time of the other items that were going on and to see Mr. Harris come from out of the holding cell area and being-also in terms of being informed that he was in custody and I was an appointed attorney as well, just for the purposes of the record.

The trial court overruled the objection, commenting that it did not believe those actions would have any effect on the jury.

In the recent case of *State v. Marlon D. Beuregard*, No. W1999-01496-CCA-R3-CD, 2000 WL 705978 (Tenn.Crim.App., Jackson, May 26, 2000), we considered a similar issue. In that case, the defendant was brought into the courtroom from the holding cell by two sheriff's deputies while the prospective jurors were in the courtroom. *Id*. at *8. While acknowledging the cases which hold that a defendant should not be forced to wear prison clothes or shackles during trial,

we noted that the defendant was neither shackled nor in prison clothes and was not restrained in any way; he was merely escorted into the courtroom from a side door rather than permitted to use the door available to the general public. *Id.* Finding no evidence of prejudice in the record, we determined that there was no reason to set aside the trial court's order overruling the defendant's objection to the manner in which he was brought into the courtroom. *Id.* at 9. We reach a similar result in this case as well. There is no evidence that the Defendant was shackled or in prison clothes. There is no evidence that the jury had a negative impression or reaction to seeing the Defendant come through a side door rather than the door open to the public. Without evidence of prejudice, we see no reason to set aside the trial court's ruling.

The Defendant also complains because the trial judge informed the jury that he was incarcerated and that he had an appointed attorney. During jury voir dire, the trial judge began to ask the prospective jurors typical questions concerning their knowledge of the parties and of the case. During this process, the judge commented to the jury that Ms. Cynthia Lecroy-Schemel had been appointed to represent the Defendant and that the Defendant was incarcerated because he could not make bond. The trial judge then asked the jurors,

Would any of you hold it against him because he could not make bond in this case and he's not like somebody who can make bond and is out in the community? You shouldn't hold that against him but I need to ask you those things to make sure that if there's any thought at all you need to get that out of your mind at this time.

***5** Can you give Mr. Harris the same treatment as you could anyone who, for example, hired his own attorney and was able to make bond?

The Defendant did not object at the time, but later, during a recess, the Defendant made an objection on the record in which he objected to the manner in which he was brought into the courtroom, and he objected to the prospective jurors being told that he was incarcerated and that he had an appointed attorney. The trial judge overruled the Defendant's objections, finding that this information would not affect the jury. On appeal, the Defendant asserts, "One could conclude as a juror that the Defendant must be guilty since he was in custody and could not hire his own attorney."

"It is the duty of the trial judge to participate in the examination of prospective jurors."*State v. Irick*, 762 S.W.2d 121, 125 (Tenn.1988); *see also*Tenn.R.Crim.P. 24(a). The trial judge is given wide discretion in conducting the voir dire examination of potential jurors, and that discretion will not be disturbed absent an abuse thereof. *Irick*, 762 S.W.2d at 125."[A]ppellate courts must indulge the presumption that the trial court has but one purpose in mind, 'to assure a fair and impartial trial before an unprejudiced and competent jury.' " *State v. Prince*, 713 S.W.2d 914, 917 (Tenn.Crim.App.1986) (quoting *Vines v. State*, 231 S.W.2d 332, 334 (Tenn.1950)). We believe that by questioning the jurors on their ability to give the Defendant a fair trial when he was incarcerated and when he had an appointed attorney, the trial judge was simply trying to assure the Defendant a fair and impartial trial. Unlike cases in which a jury venire is informed of extraneous information such as a defendant's prior criminal activity, *see e.g., State v. Scruggs*, 589 S.W.2d 899, 900-01 (Tenn.1979), the prospective jurors in this case were informed only of the Defendant's present condition in relation to the current charges. They all indicated that they could give the Defendant a fair trial and that they would not hold against him the facts that he was incarcerated and that he had an appointed attorney. Accordingly, we find no error.

The Defendant next argues that the trial court should have redacted his statement, in which the police detective made reference to the Defendant's driver's license being suspended, because the reference indicated non-compliance with the law, which would prejudice the jury against him. The trial court did order portions of the Defendant's statement redacted, such as references to the Defendant's prior arrests, but the court declined to redact the following portion of the statement:

[Detective]: How do you get around town? Do you drive? I mean I know your license [sic] suspended, I'm not trying to get you up on that.

[Defendant]: No, no. I mostly ride.

[Detective]: How did you get from your girlfriend's out to ... Duncan Avenue to meet up with Mr. Freeman?

***6** In declining to redact this portion of the statement, the trial court noted that a driver's license may be suspended for reasons other than criminal convictions.

The admissibility of evidence is a matter within the sound discretion of the trial court, and this Court will not disturb the trial court's ruling absent a clear showing of an abuse of that discretion. *See State v. Cauthern*, 967 S.W.2d 726, 743 (Tenn.1998); *State v. Banks*, 564 S.W.2d 947, 949 (Tenn.1978). We cannot say that the trial court abused its discretion by refusing to redact that portion of the Defendant's statement. Although hearsay, the Defendant's statement was admissible as an admission of a party opponent. *See*Tenn.R.Evid. 803(1.2). While we question the relevance of the detective's statement regarding the Defendant's driver's license, the Defendant's version of the events in question-including how he came to be in Mr. Freeman's company that day-was undoubtedly relevant to his guilt or innocence. *See*Tenn.R.Evid. 401. Moreover, the Defendant has shown no prejudice. An error does not require reversal unless it affirmatively appears to have affected the result of the trial on the merits. *See*Tenn.R.Crim.P. 52(a). Based on our review of the record, we conclude that any error in failing to redact the Defendant's statement was harmless.

Next, the Defendant asserts that the trial court should have granted a mistrial because Detective Tillery of the Chattanooga Police Department remarked that after learning the Defendant was a possible suspect, he "proceeded on pulling up Mr. Harris' record."The Defendant immediately objected and requested a mistrial because the trial court had previously ruled that the Defendant's prior criminal record was inadmissible. During a jury-out hearing, Det. Tillery was permitted to clarify that he meant he pulled the Defendant's driver's license record in order to get an address for the Defendant. The trial court accredited Det. Tillery's testimony, determined that the clarification placed the testimony in a different light, and denied a mistrial. When the jury was brought back in, Det. Tillery clarified for the jury that he meant he pulled the Defendant's driver's license history to find the Defendant's address.

The decision of whether the grant a mistrial is a matter within the discretion of the trial court, and we will not disturb the trial court's action on appeal absent an abuse of that discretion. *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn.Crim.App.1991). Generally, a mistrial will only be declared "if there is a manifest necessity requiring such action by the trial judge."*Arnold v. State*, 563 S.W.2d 792, 794 (Tenn.Crim.App.1977)."If it appears that some matter has occurred which would prevent an impartial verdict from being reached, a mistrial may be declared."*Id.*

We find no "manifest necessity" for a mistrial here. While Det. Tillery's initial comment, standing alone, may have indicated to the jury that the Defendant had a prior criminal record, we believe that any prejudice was remedied when Det. Tillery clarified that he meant he pulled the Defendant's driver's license history. Because no evidence of the Defendant's prior record was before the jury, we cannot find that the statement prevented an impartial verdict from being reached.

***7** Finally, the Defendant asserts that the cumulative effect of these alleged errors mandates a reversal of his conviction. We disagree. We are unable to find any prejudice to the Defendant due to the errors alleged by the Defendant. A conviction will not reversed on appeal absent errors which affirmatively appear to have affected the result of the trial on the merits. *See*Tenn.R.Crim .P. 52(a); Tenn.R.App.P. 36(b). Thus, any error in admitting this evidence was harmless.

III. TESTIMONY OF MEDICAL EXAMINER

The Defendant asserts that the trial court erred by refusing to let him ask Dr. Frank King, the Hamilton County Medical Examiner, whether an ordinary and reasonable person would be aware that one blow to the head could cause death. Dr. King testified at trial that the victim died of blunt force trauma to the head. He further testified that it is difficult to predict what injury might be caused by a push or blow to the head; what might cause death in one person might not cause any serious injury to another person. However, when defense counsel asked Dr. King whether an ordinary person would be aware that a hit to the head might actually cause death, the trial court sustained the State's objection. The Defendant now asserts that Dr. King should have been permitted to convey his opinion regarding whether an ordinary and reasonable lay person, as viewed from the accused's stanDP1oint, would be aware that one blow to the head could cause

death. We disagree.

Tennessee Rule of Evidence 702 governs testimony of expert witnesses, and it provides, "If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."Qualifications, admissibility, relevancy, and competency of expert testimony are matters within the discretion of the trial court, and the trial court's discretion will not be disturbed absent an abuse of that discretion. *State v. Ballard,* 855 S.W.2d 557, 562 (Tenn .1993).

The trial court determined that the question of whether an ordinary and reasonable person would know that a single blow to the head could cause death called for speculation outside Dr. King's area of expertise. We agree. Dr. King was certified as an expert in forensic pathology. The question asked by the Defendant did not relate to the field of forensic pathology. In fact, it did not call for an expert scientific, technical, or specialized opinion at all. The issue of whether an ordinary and reasonable person would be aware that a single blow to head could cause death was a matter within the purview of the jury, which consisted of ordinary persons. Because the jury could decide for itself what an ordinary and reasonable person would know about the consequences of a blow to the head, the proposed testimony of Dr. King would not "substantially assist" the jury in understanding the evidence. Accordingly, we find no error on the part of the trial court in sustaining the State's objection to this testimony.

IV. JURY INSTRUCTIONS

***8** In his fourth issue, the Defendant contends that the trial court erred by granting, in part, the State's requests for special jury instructions on the issues of causation and intent. Regarding causation, the trial court gave the following special instruction: "One who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury, whether the sequence be direct or through the operation of intermediate agencies dependent upon and arising out of the original cause."The trial court also granted the State's request for the following instruction regarding reckless conduct: "The definition of 'reckless' conduct provides liability for conscious risk creation where there is no desire that the risk occur or no awareness that it is practically certain to occur."The Defendant asserts that these instructions "empowered the jury to convict him for behavior that was completely unintentional and unknowing" and that the trial court "in essence turned reckless homicide into a strict liability crime."We disagree.

A defendant has a constitutional right to a complete and correct charge of the law. *State v. Teel,* 793 S.W.2d 236, 249 (Tenn.1990). In determining whether jury instructions are erroneous, this Court must read the entire charge and invalidate it only if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law. *See State v. Vann,* 976 S.W.2d 93, 101 (Tenn.1998); *State v. Phipps,* 883 S.W .2d 138, 142 (Tenn.Crim.App.1994).

Looking at the jury instructions as a whole, we conclude that the charge fairly submitted the legal issues to the jury, and it did not mislead the jury. When the parties were discussing the proposed jury instructions with the trial judge, the judge expressed concern about the jury becoming confused as to whether the Defendant caused Charles Freeman's death if the jury concluded that Mr. Freeman's death resulted from injuries received when his head struck the pavement rather than injuries received when his head was struck by the Defendant. The trial judge then decided to give an instruction which was approved by our supreme court in the case of *State v. Vann. See Vann,* 976 S.W.2d 93, 101. That instruction included *the special request by the State* and stated as follows:

Cause of death. Before the defendant can be convicted of any degree of homicide the state must have proven beyond a reasonable doubt that the death of the deceased, Charles Freeman, was brought about as a result of the criminal agency of the defendant. That is, that the defendant-death of the deceased was due to the unlawful act of the defendant. One who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury whether the sequence be direct or through the operation of intermediate agencies dependent upon and arising out of the original cause.

To convict the defendant it is not necessary that his act or failure to act be the sole cause, nor the most

immediate cause of death, it is only necessary that the defendant unlawfully contributed to the death of the deceased.

***9** If you find the defendant's acts, if any, did not unlawfully cause or contribute to the death of the deceased or if you have a reasonable doubt as to this proposition, then you must acquit him.

We conclude that this instruction properly informed the jury that it must find, beyond a reasonable doubt, that the Defendant's actions caused the victim's death. *See id.*

Likewise, the jury was properly informed of the definition of reckless conduct. The complete jury instruction regarding reckless conduct read as follows:

[A] person acts recklessly if that person is aware of and consciously disregards a substantial and unjustifiable risk either, one, that a particular result will occur, or two, that a particular circumstance exists. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's stanDP1oint.

Reckless conduct makes a person liable for conscious risk creation where there is no desire that the risk occur or no awareness that it is practically certain to occur. The requirement of recklessness is also established if it shown that the person acted intentionally or knowingly.

The first part of this instruction was taken directly from the statutory definition of "reckless," and the second part of the instruction was taken directly from the sentencing commission comments to the statute. *See*Tenn.Code Ann. § 39-11-302(c). The instruction was a proper statement of the law, and it did not serve to confuse or mislead the jury. On the contrary, we believe that the added instruction, taken from the sentencing commission comments, helped distinguish reckless conduct from intentional conduct or knowing conduct, which were also defined for the jury. At no time did the instruction make the crime of reckless homicide a strict liability crime. Rather, the instruction informed the jury that even if the Defendant did not intentionally or knowingly kill Charles Freeman, he would be guilty of reckless homicide if he consciously created and consciously disregarded a substantial and unjustifiable risk that Mr Freeman's death would the be result of his conduct. The jury was repeatedly informed that it must determine the Defendant's guilt beyond a reasonable doubt. Thus, we find no error.

V. SUFFICIENCY OF THE EVIDENCE

The Defendant argues that the evidence was insufficient to support the verdict. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. *McBee v. State*, 372 S.W.2d 173, 176 (Tenn.1963); *see also State v. Evans*, 838 S.W.2d 185, 191 (Tenn.1992) (citing *State v. Grace*, 493 S.W.2d 474, 476 (Tenn.1976), and *State v. Brown*, 551 S.W.2d 329, 331 (Tenn.1977)); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn.1982); *Holt v. State*, 357 S.W.2d 57, 61 (Tenn.1962).

***10** In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom."*Tuggle*, 639 S.W.2d at 914 (citing *State v. Cabbage*, 571 S.W .2d 832, 835 (Tenn.1978)). The court may not "re-weigh or re-evaluate the evidence" in the record below.*Evans*, 838 S.W.2d at 191 (citing *Cabbage*, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. *Tuggle*, 639 S.W.2d at 914.

To prove that the Defendant was guilty of the offense of reckless homicide, the State was required to prove that the Defendant recklessly killed Charles Freeman. *See*Tenn.Code Ann. § 39-13-215. As defined by statute,

"[r]eckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Id.§ 39-11-302(c). The Defendant admittedly hit Mr. Freeman once in the head, causing injuries which resulted in Mr. Freeman's death. Although he asserts that he did so in self-defense, the jury was at liberty to reject his assertion, especially in light of Essie Freeman's testimony that her son never touched the Defendant prior to the Defendant hitting Charles Freeman on the head. We acknowledge that the State's proof was not overwhelming. Looking at the evidence in the light most favorable to the State, however, we believe that any rational juror could have concluded that the Defendant was aware of but consciously disregarded the substantial and unjustifiable risk that his conduct would cause Mr. Freeman's death. Thus, we conclude that the evidence is sufficient to support the conviction.

VI. SENTENCING

Finally, the Defendant challenges the sentence imposed by the trial court. The trial court sentenced the Defendant to six years incarceration as a Range II, multiple offender. When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn.Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances."*State v. Ashby,* 823 S.W .2d 166, 169 (Tenn.1991).

When conducting a *de novo* review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. *State v. Thomas,* 755 S.W.2d 838, 844 (Tenn.Crim.App.1988); Tenn.Code Ann. §§ 40-35-102, -103, -210.

***11** If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. *State v. Fletcher,* 805 S.W.2d 785, 789 (Tenn.Crim.App.1991).

The presumptive sentence for a Class B, C, D, or E felony is the minimum sentence in the range if there are no enhancement or mitigating factors.Tenn.Code Ann. § 40-35-210(c). In determining the appropriate sentence, the trial court is to start at the presumptive sentence in the range, increase the sentence within the range as appropriate for enhancement factors, and then decrease the sentence within the range as appropriate for mitigating factors.*Id.* § 40-35-210(e).

Because the Defendant was a Range II, multiple offender, the sentence range for this Class D felony was four to eight years. *See id.* § 40-35-112(b)(4). The trial court sentenced the Defendant to a mid-range sentence of six years, after finding the presence of two enhancement factors and two mitigating factors. The court determined, however, that the enhancement factors outweighed the mitigating factors. On appeal, the Defendant asserts that the trial court erred by applying one of the enhancement factors and that the trial court should have considered other mitigating factors.

The Defendant does not challenge the application of enhancement factor (1), that the Defendant has a history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. *See id.* § 40-35-114(1). However, he asserts that statutory enhancement factor number (11), that the felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the Defendant has previously been convicted of a felony that resulted in death or bodily injury, should not have been applied because death or

bodily injury is an element of the offense. *See id.* § 40-35-114(11). We agree that death is an element of reckless homicide, but the additional requirements of this enhancement factor, that the Defendant has previously been convicted of a felony that resulted in death or bodily injury, are not elements of reckless homicide. Therefore the enhancement factor itself is not an element of the offense. The proof established that the Defendant had previously been convicted of two counts of aggravated assault due to his actions of shooting two people. Thus, we conclude that this enhancement factor was properly applied.

The trial court applied as mitigating factors (1) that the Defendant expressed remorse for his actions and (2) that the Defendant had made strides toward improving himself while being incarcerated. *See id.* § 40-35-113(13). The Defendant asserts that the trial court should have applied the following additional factors: (1) the Defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct; (2) the Defendant acted under strong provocation; (3) substantial grounds exist tending to excuse or justify the Defendant's criminal conduct though failing to establish a defense; (4) the Defendant was motivated by a desire to provide necessities for his family; and (5) the Defendant is of low intelligence. *See id.* § 40-35-113(2), (3), (7), (11), (13). Although the trial court considered these factors, it determined that they were not applicable. We agree.

***12** We can find no evidence in the record regarding the Defendant's intelligence, and while the Defendant testified that he was arguing with Mr. Freeman about money, there was no proof that the Defendant was motived by a desire to provide necessities for his family. Additionally, we find no evidence of strong provocation. Granted, there was proof that the Defendant and Mr. Freeman were arguing, and the Defendant in his statement asserted that he was acting in self-defense; however, the State's proof established that the Defendant struck Mr. Freeman without first being touched by Mr. Freeman. Furthermore, the only evidence of justification was that the Defendant was acting in self-defense, and that evidence was refuted by the State's proof. In addition, the Defendant's prior record, which includes multiple assault convictions, tends to negate any assertion that the offense was committed under such unusual circumstances that it was unlikely a sustained intent to violate the law motivated the Defendant's conduct. Accordingly, we find no error on the part of the trial court in refusing to apply these mitigating factors. The mid-rage sentence was therefore appropriate due to the presence of two enhancement factors which outweighed the two mitigating factors.

The Defendant also contends that he should have been granted an alternative sentence rather than having to serve his sentence in incarceration. His argument, however, is based on his assertion that he is entitled to the presumption of alternative sentencing. A defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in absence of evidence to the contrary. *Id.*§ 40-35-102(6). While reckless homicide is a Class D felony, the Defendant is a Range II, multiple offender. Thus, the presumption of alternative sentencing is inapplicable. Considering the principles of sentencing established by the legislature, we agree with the trial court that a sentence of incarceration was appropriate. Recognizing the limited capacity of prison facilities, the legislature has maintained that convicted felons "possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration."*Id.*§ 40-35-102(5). The trial court was faced in this case with a Defendant who has a long history of criminal conduct spanning ten years and who has multiple convictions for violent conduct. *See id.* § 40-35-103(1)(A). Despite numerous convictions, the Defendant has not been deterred from committing crimes. *See id.* § 40-35-103(1)(C). We thus find no error in the sentence imposed by the trial court.

The judgment of the trial court is affirmed.

Tenn.Crim.App.,2001.
State v. Harris
Not Reported in S.W.3d, 2001 WL 9927 (Tenn.Crim.App.)

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State v. Faulkner

State v. Faulkner
Tenn.Crim.App.,2003.
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,at Jackson.
STATE of Tennessee,
v.
Robert FAULKNER.
No. W2001-02614-CCA-R3-DD.

May 6, 2003 Session.
Sept. 26, 2003.

Direct Appeal from the Criminal Court for Shelby County, No. 99-07635;Chris Craft, Judge.

Robert C. Brooks, Memphis, Tennessee, for the appellant, Robert Faulkner.
Paul G. Summers, Attorney General and Reporter; Gill Geldreich, Assistant Attorney General; William L. Gibbons, District Attorney General, and Phillip Gerald Harris and Jennifer Nichols, Assistant District Attorney General, for the appellee, State of Tennessee.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

OPINION

THOMAS T. WOODALL, J.
***1** Defendant Robert Faulkner appeals as of right his conviction for first-degree murder and resultant sentence of death arising from the January 1999, murder of his wife, Shirley Faulkner. A Shelby County jury convicted Defendant of first-degree premeditated murder. Following a separate sentencing hearing, the jury found the proof supported one aggravating circumstance beyond a reasonable doubt, *i.e.*, the defendant had been previously convicted of one or more violent felonies, Tenn.Code Ann. § 39-13-204(i)(2), determined that the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt, and sentenced the Defendant to death. The trial court approved the sentencing verdict. Defendant appeals, presenting for our review the following issues: (1) the trial court improperly excluded testimony regarding the Defendant's diminished capacity; (2) the trial court improperly permitted the introduction of numerous gruesome photographs of the homicide victim; (3) the trial court improperly instructed the jury; (4) the indictment failed to charge a capital offense; (5) the death penalty violates treaties which have been ratified by the United States, and violates established international law; (6) the Tennessee death penalty sentencing statute and the imposition of death are unconstitutional; and (7) the criteria of Tenn.Code Ann. § 39-13-206(c)(1) have not been satisfied in this case. After review, we find no error of law requiring reversal. Accordingly, we affirm the Defendant's conviction for first-degree murder and the jury's imposition of the sentence of death in this case.

Factual Background

The Shelby County Grand Jury returned an indictment charging forty-three-year-old Defendant Robert Faulkner with the premeditated murder of Shirley Faulkner. Subsequently, the State filed notice of its intent to seek the death penalty. Pursuant to a court order, Defendant was evaluated by Midtown Mental Health Center to determine (1) the Defendant's competency to stand trial and (2) the Defendant's mental capacity at the time of the offense. The evaluation revealed that Defendant was able to appreciate the wrongfulness and nature of his alleged behavior. It was further determined that Defendant was competent to stand trial. The case proceeded to trial, at which time the following facts were developed.

Guilt Phase

Memphis Police Officer Elenor Worthy was on duty on January 18, 1999. At around 12:20 p.m., Officer Worthy responded to a complaint filed by the victim, Shirley Faulkner. Shirley Faulkner was making a complaint against her husband, Defendant Robert Faulkner. During Officer Worthy's conversation with

Shirley Faulkner, Officer Worthy observed that Mrs. Faulkner "was upset. Appeared to be nervous. Her hands were shaking."Officer Worthy also observed that Mrs. Faulkner "had swelling on the left side of her face."Mrs. Faulkner reported that her husband, the Defendant, had struck her with his fist the previous night. During this incident, the Defendant had "held an ashtray over her head and threatened to kill her."Again, on the 18th, the Defendant threatened to kill his wife. Mrs. Faulkner related to Officer Worthy that she suspected that her husband was using cocaine. Three weeks prior to this incident, Mrs. Faulkner had "put her husband out...."

***2** Dr. Freddy Everson, a doctor specializing in family medicine, examined Mrs. Faulkner on January 19, 1999. Dr. Everson concluded that Mrs. Faulkner had "been subjected to some form of trauma to her face."Mrs. Faulkner reported that she had been hit in the face with a fist. Dr. Everson treated Mrs. Faulkner's injury with "non-cirrhodal [sic] anti-flammatory agents or arthritis pills" and instructed her to come back for a follow-up appointment on January 22, 1999. Mrs. Faulkner failed to return for her follow-up visit.

Annie May Brassell, Mrs. Faulkner's supervisor at the Piggly Wiggly on Madison Avenue, testified that Mrs. Faulkner usually worked the 4 to 12 shift. Ms. Brassell related that, on January 21, 1999, Mrs. Faulkner arrived at work around 5:00 p.m. Because business was slow, Ms. Brassell let Mrs. Faulkner leave early, at approximately 11:00 p.m. Before leaving, Mrs. Faulkner purchased some frozen food items and told Ms. Brassell that she was going to the casino. This was the last time Ms. Brassell saw Shirley Faulkner. Ms. Brassell related that Shirley Faulkner had married Robert Faulkner in September 1998. On cross-examination, Ms. Brassell revealed that she and Shirley Faulkner had been to the casinos together on prior occasions.

Jimmy Lee Blaydes, a security guard at Piggly-Wiggly, testified that on the evening of January 21, 1999, Mrs. Faulkner was at her position as cashier. Shirley Faulkner checked out at 11:15 p.m. and asked Mr. Blaydes to walk her to her car. On the way to her vehicle, Mrs. Faulkner "was kind of excited or shaking real bad from about her shoulders down..... She was kind of, like, maybe crying a little bit."Mr. Blaydes asked her what was wrong. Once reaching her vehicle, Mrs. Faulkner confided to Mr. Blaydes that she was afraid of her husband. Mrs. Faulkner added that she was separated from her husband and she was afraid "he was going to jump on her."

Andre De'Wayne King is married to Shirley Faulkner's daughter, Twyla. Mr. King testified that, in January 1999, he knew Shirley Faulkner to be married to the Defendant, although the two were not living together at the time. Shirley Faulkner resided at 1011 Joseph Place in north Memphis. She had lived there prior to their marriage, during their marriage, and after their separation. Mr. King stated that during the week of January 14, 1999, Shirley Faulkner came to stay with him and his family in their home. Later, Shirley Faulkner later returned to her own home.

On the evening of January 21, 1999, Mr. King recalled that it was raining outside and Shelby County was under a tornado watch. That evening he remained at home with his family, but left the house around midnight to check on his mother-in-law. When Mr. King arrived at Shirley Faulkner's residence, there was no one at home and her vehicle was not in the driveway. He waited in front of the house for about thirty minutes, then left, assuming that Shirley had gone to a friend's home or to the casino.

***3** Twyla King, Shirley Faulkner's daughter, testified that, in January 1999, her mother was working two jobs. During the day, Shirley Faulkner worked for Hilldale Apartments doing housekeeping, and at night she worked at Piggly Wiggly as a cashier. She confirmed that her mother had married the Defendant in September 1998, but by January 1999, the couple had separated. The Defendant had moved in with his grandmother, while Shirley Faulkner remained at the house on Joseph Place.

On January 22, 1999, Mrs. King received a telephone call at approximately 2:00 p.m. from a close family friend, Joe Ann Stewart. Ms. Stewart informed Mrs. King to meet the police at Shirley Faulkner's residence. Two police officers met Mrs. King at the residence. The officers unlocked the front door and went into the house, while Mrs. King and Ms. Stewart remained outside. Sometime that afternoon, Mrs. King learned from a neighbor that her mother was dead.

Joe Ann Stewart had known Shirley McGee Faulkner for thirty years Ms. Stewart had referred Shirley

Faulkner to Evonne Churchman for the housekeeping position at the Hilldale Apartments. On January 22, 1999, Ms. Stewart had received a telephone call from Ms. Churchman inquiring as to whether Ms. Stewart had heard from her as she did not report to work that day. In response to Ms. Churchman's telephone call, Ms. Stewart telephoned Twyla King and told her to meet her at Shirley Faulkner's home. While waiting for Mrs. King to arrive, Ms. Stewart walked to a nearby gas station to telephone the Memphis Police Department. Upon arriving at the service station, Ms. Stewart noticed a patrol unit in the parking lot. She asked the officers to follow her to Mrs. Faulkner's home because she felt that something was wrong. The officer instructed Ms. Stewart to return to Mrs. Faulkner's house and informed her that he would call for help.

Memphis Police Officer Elizabeth Smith testified that, on January 22, 1999, at approximately 3:30 p.m., she arrived at 1011 Joseph Place in North Memphis with her partner Officer Eric Petrowski. The officers were met by Twyla King, who asked the officers to look inside the house and check to see if there were signs of her mother, Shirley Faulkner, being there. The officers failed to discover any signs of forced entry into the home. Officer Petrowski unlocked the door, while Officer Smith asked Mrs. King to remain outside.

Upon entering the residence, Officer Smith observed that a light was on in a library area, and the television was on in the den. As the officers walked down the hallway, Officer Smith noticed groceries on the floor, in the doorway of the kitchen. Officer Smith continued down the hallway toward the bedroom. The bedroom door was closed. In fact, it was the only door closed in the entire house. The officers opened the door, and observed a “white shoe, and the shoe had a foot in it.”Officer Petrowski instructed Officer Smith to return to the patrol car to obtain a flashlight. Returning to the house with the flashlight, Officer Smith entered the bedroom and “flashed the light toward the-where the head should be on the body, and really nothing was there.”The officers assumed that the person was dead. At this point, the officers exited the home and contacted their supervisor. The area was then secured by the officers.

***4** Memphis Police Sergeant Robin Hulley was assigned to the crime scene unit on January 22, 1999. On this date, Sergeants Hulley and Rewalt responded to a dispatch to 1011 Joseph Place. Upon entering the residence, Sergeant Hulley made the following observation:

The outside-there-approaching the house, there was no evidence that we could see of any-any problems. You open up into the door; it's a long hallway, something similar to like a boarding house; the rooms are all separate on the sides with-You walk in-from the moment that you walk in, what appeared to be blood was on the floor all the way back to that furthest back bedroom which would be considered-

...

These were drops of blood starting about four to five feet after you enter the front door, all the way back to the master bedroom to the back of the house.

Inside the bedroom, Sergeant Hulley reported that the victim was face up on her back on the bedroom floor. A chest in the bedroom was covered with what appeared to be blood spatter. On the bed, officers found “[s]ome assorted clothing and what appeared to be the handle of an iron skillet.”The officers also discovered what appeared to be drops of blood on the hallway floor.

Officer Mark Rewalt accompanied Sergeant Hulley to 1011 Joseph Place. Officer Rewalt was responsible for measuring and drawing a diagram of the crime scene area along with collecting evidence and tagging it in the property room.

Shelby County Deputy Eddie Gross was on duty on Sunday, January 24, 1999. At approximately 10:00 am, “a male black come [sic] into the office and stated that he wanted to turn hisself [sic] in. And I pulled up in the computer to see what he was wanted for, and I found out that we didn't have anything on him. And so I asked the subject what was his charge, and he stated that, I killed my wife Thursday.”The man identified himself as Robert Faulkner. Deputy Gross identified Defendant as the person that made the confession on January 24.

Deputy Gross cuffed Defendant and placed him on the bench, but did not ask any further questions. He then reported the incident to his sergeant and contacted the Memphis Police Department.

Sergeant William Ashton was assigned to investigate the homicide of Shirley Faulkner. During the investigation, Sergeant Ashton discovered that a horseshoe was missing from the house in addition to the missing part of the skillet. Also, the victim's vehicle was missing from the scene. The vehicle was discovered on Saturday, January 23, on Hastings Street, a block south of a residence owned by Defendant's sister. The vehicle had what appeared to be blood on the interior and was later towed to the crime scene office. Sergeant Ashton learned that Defendant was residing with his grandmother at 2328 Shasta Street.

On the morning of Sunday, January 24, Sergeant Ashton received a telephone call from the Shelby County Sheriff's Department Fugitive Bureau, reporting that Defendant was in the fugitive office. Sergeant Ashton then escorted Defendant to the homicide office. Defendant was presented a form containing the *Miranda* rights and was asked to read the form aloud and explain them to Sergeant Ashton. Defendant complied and then dated and signed the form. During this time period, Sergeant Ashton described the Defendant's demeanor as “very calm and very rational.” Sergeant Ashton then conducted an oral interview with Defendant.

***5** Sergeant Ashton began his interview by asking Defendant whether he ever used an alias. The Defendant responded, “Yes, Skillet. Defendant added, with a grin on his face, “That's what I hit her with, too.”The following written statement, in part, was then taken from Defendant, after again advising him of his rights:

Question: Do you understand each of these rights I've explained to you?

Answer: Yes. [the initials “R.F.” are beside the yes].

...

Question: On Friday, January the 22nd, 1999, at approximately 3:03 P.M., the body of Shirley Ann McGhee-Faulkner was found in the residence located at 1011 Joseph Place. Ms. McGhee-Faulkner had been fatally beaten about the head and face. Are you the party responsible for these injuries and the subsequent death of Ms. McGhee-Faulkner?

Answer: Yes.

Question: What type of relationship did you share with Ms. McGhee-Faulkner?

Answer: She was my wife.

Question: How long had you been married?

Answer: Four months.

Question: Did you share the residence at 1011 Joseph Place with her?

Answer: No, we was separated and I was living at 2328 Shasta with my grandmother.

Question: Was there anyone else living at the residence with Ms. McGhee-Faulkner at the time of her death?

Answer: No, for the simple reason her 14 year old son, Jamil, had just received a sentence from Juvenile Court for approximately six months to a year for car theft, and her oldest son, Mushunda, was living on a college campus outside of Nashville-Austin Peay College.

Question: You have indicated that you are responsible for the fatal injuries. When did the incident actually occur?

Answer: Yes, I indicated that I was responsible for the fatal injuries, and the incident occurred around, maybe 12:00 or 12:30 Thursday night or Friday morning.

Question: What was used to inflict the injuries?

Answer: A frying pan and a metal horseshoe.

Question: Where did you get these items from?

Answer: Right next to the bedroom in the little hallway next to the bathroom.

Question: Where in the house did the incident take place?

Answer: The last bedroom at the back of the house which was her bedroom.

Question: How is it that the items that you used were in the hallway and the attack took place in the bedroom?

Answer: Well, before we separated, the horseshoe-horseshoes were always there in the hallway. I have no idea how the pan was in the hallway on the black stove. So as we were finishing our conversation that was turning into an argument, I proceeded to walk from her bedroom to the front door as I was leaving. She walked behind me and asked me not to come back while I was standing in the hallway and everything exploded. And I pushed her back off me and grabbed the two items that I seen, and I struck her repeatedly across the head.

Question: Do you recall how many blows were struck?

Answer: Somewhere between seven and eight blows. I wasn't counting and I can't recall.

***6** Question: At what point was the victim knocked to the floor?

Answer: Maybe the second blow, and I hit her the other times while she was on the floor.

Question: What did you do after the attack?

Answer: After the attack, I became afraid and scared, and I took the car keys that was in the hallway in the table, got two bags out of the kitchen cabinet and placed the weapons in the bags. Then proceeded to get in her car and drove to Springdale and Hunter and disposed of the weapons in the viaduct that was over flooded because of the rain. I proceeded to go to my house at 2328 Shasta and removed my clothing I had on that was stained with blood, also putting them in a bag I had got out of the house and proceeded to go back towards Springdale and Hunter and threw those in the viaduct along with everything else.

Question: When did you dispose of the car?

Answer: It took approximately twenty minutes to get back off of Jackson to Hastings, and I parked the car on Hastings by some apartments.

Question: Did you know anyone living in the apartments?

Answer: No.

Question: Where did you go after leaving the car?

Answer: I began to sleep in empty houses until I turned myself in.

...

Question: Why did you go to the Joseph Place address on Thursday?

Answer: I got a call from my wife at about 12:30-it was lunch hour-to come by the house once she got off.

Question: Once you arrived at the residence, what was the nature of your conversation with your wife?

Answer: My conversation with my wife was reconciling, and she had on her mind divorce. She said she just wanted the divorce, and I asked her why didn't she just call me on the phone and tell me that. I said, you didn't have to make me walk all the way from Shasta Street in the rain just to tell me you wanted a divorce. I sat back down on the bed and explained to her that I had enough problems already over my head and had to bury my brother on Monday. Everything I've tried to do since being out has just collapsed. I've lost my job, I've lost my wife, I was subject to being sent back to the penitentiary because I can't be without a job for 30 days. And you called me back here to discuss a divorce, and I only came to reconcile and ask we set aside our differences and go to my brother's funeral together. And she responded she was going, but she wasn't going with me.

Question: When we found the car, there were no keys in it. Do you recall what you did with the keys?

Answer: I can remember somewhere on Leath and Looney in an alley; I throwed [sic] the keys in there at the corner of Leath and Looney by a vacant house.

...

Question: Have you and your wife been involved in any altercations since your separation?

Answer: Yes. On the night of January 17th, my wife came to my residence and an altercation erupted, and she thought that she had stuck me with a knife. I only was trying to get her to leave the house by saying to her that she had stuck me with the knife. She proceeded then to leave, went home, called the ambulance and police. It was between 10:00, 11:00 and 12:00, she called me and told me she had sent the police and the ambulance, and I left the house, and I wasn't there when they came.

***7** Question: Did she receive any injuries during this altercation?

Answer: Yes. As she went to get the knife from the kitchen, I slapped her in the eye to try to stop her from getting to the knife.

Question: Is there anything else that you would care to add to your statement that we have not covered in our questioning?

Answer: Yes. For the record, I would like to say, I loved my wife with all my heart. I never meant to take her life. Everything that I had ever tried to do right turned out wrong. Under all the pressure, stress and strain, I made a wrong decision. I only like to say that I'm sorry.

After providing the written statement, Defendant was booked and processed. Defendant requested that jail personnel place him on suicide watch. Although law enforcement officers later searched the viaduct for the frying pan and the horseshoe, their efforts were unsuccessful.

On January 22, 1999, Dr. O'Brian Cleary Smith, the Shelby County medical examiner, and his staff were requested by the Memphis Police Department to report to the crime scene at 1011 Joseph Place. At the scene,

we did an overall scene evaluation to find out where the victim was located and then looked at everything. First, at the victim from the-where she was positioned, how her clothing was arranged, any stains or marks on her clothing. And then we expanded from there to include the room and then the house. So that she was found in a back bedroom and we did the examination with the body in place of what things we thought were significant findings whether it was projected blood-stain patterns as well as any evidence material that was present in the bedroom.

Additionally, we then went through the rest of the house trying to find anything which could be related back to the injury pattern that was seen on the victim, as well as looking for other evidence of blood throughout the house.

Later that day, the body of Shirley McGhee Faulkner was received by the forensic center on Madison Avenue at which time normal procedures for autopsies ensued. Dr. Smith testified:
The observational phase was significant for the fact that Ms. McGee's trauma was entirely focused about the head. She had numerous bruises and tears to the skin known as lacerations about the face and the head that had produced injuries to the bony structures of the face and the jawbone causing fractures of the facial bones, fractures of the jaw. Some of those injuries had distinct patterns, others did not.

The surgical phase ... showed the injuries had focused in the head region producing bruising of the brain and some of the bone fragments had actually cut into the base of the brain from their dislodgment from the face. Those injuries would have been sufficient to have caused her death. Additionally, it was found that she had taken some of the blood from the injuries down her windpipe into her lungs. And in an effort to breathe this had generated a red frothy foam which obstructed her airway. Also, we found over a ... pint of blood in her stomach where she had swallowed the blood prior to death.

***8** ...

It indicates active swallowing. That much blood certainly can't just leak back down into the stomach.

In other words, the victim had to have been alive to swallow that amount of blood. It was surmised that it would take approximately 36 or 37 times to swallow that much blood.

Dr. Smith continued:

In detail, the injuries centered about the head were about 13 in minimum number. She received a blow which tore the scalp. A laceration is a tearing or splitting or crushing of the skin, where the skin is opened up. But she received a blow to her right brow that lacerated or tore the skin. She received another blow to the glabella, which is the flat part of the forehead in-between the eyes at the top of the nose.

...

Also, she received another blow, a patterned blow. It had two edges to it on the outside of her right eye, a V-shaped tearing of the skin under the right eye; another sort of V-shaped tearing of the skin on her right cheek; two blows to the jaw and lip area and nose area that produced tears and patterned injuries that had a distinct shape of parallel lines about 3/10ths an inch apart on the lips fracturing her dentures and fracturing the jaw, not at the point of the jaw but over here at the hinge point. There's another blow with some abrasions or fine scratches to the upper eyelid and a bruise on the left brow and then there were two bruises deep to the surface of the skin up against the skull on the left side of the head above the ear and one blow to the left back of the head.

Because of the nature of the injuries, Dr. Smith was not able to determine which particular blow was fatal. However, he was able to conclude that the blows to Mrs. Faulkner's head occurred while she was low to the ground and that Mrs. Faulkner made no attempt to move away from the attacker. Dr. Smith further stated that Mrs. Faulkner's blood tested negative for both drugs and alcohol. He concluded that "[t]he cause of death is blunt trauma to the head and the manner is homicide."

In his defense, Defendant presented the following proof. Robert Earl Faulkner, no relation to the Defendant, testified that in 1998 he was employed at Wesley's Auto Service, which at that time was close to the Kroger's warehouse. He could not recall another "Robert Faulkner" working at the Kroger's warehouse during that time period, although he remembered that Jimmy Blaydes had worked there as a security guard. Indeed, Robert Earl Faulkner testified that he has never seen the Defendant Robert Faulkner.

Carl B. McGhee, the vice-president and manager of human resources at Empire Chemical Supply Company, verified that Defendant was employed part-time by the company on March 28, 1998, and was terminated on October 28. Mr. McGhee described the Defendant's job duties as that of "a floor technician and, basically, all he did was just empty trash in the hallways and mop and dust mop and mop the floors and buff them."Jane Cashion, an employee at Remedy Staffing, testified that the Defendant was employed by the company on August 4, 1998, and worked for the company until January 3, 1999.

***9** Sherrie Osby testified that her husband, Jimmy, committed suicide on January 21, 1999. She stated that her husband and Defendant were very close, like brothers.

Joel Bramlitt, chief of operations at Wagonhut Security, testified that Jimmy Blaydes was employed as an armed guard working at Piggly Wiggly grocery stores in 1999. Mr. Bramlitt stated that Mr. Blaydes was terminated from employment because he was carrying a personal weapon, which was against company policy. He affirmed that Mr. Blaydes was not terminated for "not doing his job," or for "stealing, or anything like that...."

Claude E. Hodges, an employee of the Shelby County Sheriff's Department, testified that Defendant was placed in the custody of the Shelby County Jail on January 24, 1999. Defendant was immediately placed on suicidal precaution.

After closing arguments, the jury retired to deliberate on the question of guilt or innocence and returned with a verdict finding Defendant guilty of the premeditated murder of his wife, Shirley Faulkner.

Penalty Phase

Paulette Sutton, a forensic scientist with the Shelby County Medical Examiner's Office, testified that, on January 22, 1999, she and other members from the Medical Examiner's Office were called to a residence located at 1011 Joseph Place. Ms. Sutton explained that, at the scene:

My job is basically the blood stains or any body fluid stains. First, to do as much analyses as possible in the

field and then secondly to look at the stain characteristics. We're looking at the size of a blood stain to tell us what type of activity caused that stain to be created and then looking at the shape of the stain to allow us-to tell us where the stain came from. In other words, if the stains are all going in one direction, we can back track from that and locate the source of the blood or the victim by doing that.

So my job is to first do whatever field analyses I can do on stains we think might or might not be blood stains but can't visually determine for sure and then look at these other characteristics of the blood stains and give as much interpretation as possible as to how the stains were created, what type of activity is going on, various observations in the blood-stain pattern analyses.

As a result of her investigation of the crime scene, Ms. Sutton made the following conclusions. The blood stains found on the top of the dresser were the only blood stains found in the bedroom that were higher than three feet above the floor. This fact leads to the conclusion that "the victim was down very quickly after the assault started because of the absence of blood stains being distributed on any other high surfaces."This fact is also confirmed by the shape of the blood spatters and the fact that there was no blood found on the bottom of the victim's shoes. Next, the size of the blood stains indicate that the impact of the originating blows were of "medium velocity impact," or "moving at about 25 feet per second."

***10** Ms. Sutton further explained that in order to cause blood spatter there must be an initial blow "to get the victim bloody," and then subsequent blows must be struck in order for blood to spatter away from the victim. Moreover, the blood spatter at the scene at Joseph Place indicated that the victim went down quickly and did not get back up. Blood spatter found on the walls were determined to be "cast off," because "they are being created by blood coming from a weapon as it is being swung."Additionally, Ms. Sutton discovered the presence of "clotted blood" in front of the dresser. Ms. Sutton explained that the normal clotting time is six minutes. She additionally explained that "blood clots... don't jump off of people's bodies and fly around and hit walls and floors and fronts of dressers; that they have to be knocked out by some force."In the present case, "the clots are intermixed with the medium velocity spatter that's on her clothing and on the floor and on the dresser. What that tells me ... is that the ... minimum amount of time that the assault had to have continued is six minutes because of clots being spattered around now and not just blood."

Ms. Sutton also found "expirated blood," blood pulled into a person's mouth, nose and lungs and then expelled. The presence of "expirated blood" reveals that the victim "has to be breathing. That's the only way that the blood could get mixed with air and the only way it could get blown back out...." Additionally, Ms. Sutton discovered a trail of blood leading from the bedroom down the hallway. From the spatter, Ms. Sutton could determine that the source of the blood was not traveling at any high rate of speed. Eventually, the blood spatter disappeared for about ten and one-half feet. On the sacks of groceries, located on the floor near the kitchen, Ms. Sutton discovered transfer bloodstains. Transfer stains are those that are created by a bloody object touching a non-bloody object and transferring blood to it. On the front door, Ms. Sutton discovered a transfer fingerprint on the doorknob.

Later, Ms. Sutton went to the crime scene building to examine the interior of the victim's vehicle. Ms. Sutton collected blood stains on the driver's seat. These were transfer stains. The parties stipulated that the blood taken from the car mat is the blood of Shirley Faulkner, the blood taken from the car seat is consistent with a mixture of two or more individuals to which Defendant is not excluded, and genetic material taken from the car seat belongs to Defendant.

Kim Lenahan testified that she is employed by the Criminal Court Clerk's Office of Shelby County, Tennessee. Ms. Lenahan reported that Defendant had been charged under indictment 84-02169 with the offense of second degree murder, and he had indictments in cases numbered 84-01205, 84-01206, 84-1207, 84-1208, 51322, and 47970. The Clerk's records further indicated that Defendant had been convicted in case 84-02169 of second degree murder on October 1, 1984. In cases 84-01205, 84-01206, 84-01207 and 84-01208, the record reflects that Defendant was convicted of robbery in each case on September 17, 1984. Ms. Lenahan testified that indictment 51322 reveals a conviction of assault with intent to commit murder in the first degree, indictment 51323 reveals a conviction of assault with intent to commit robbery, and indictment 47970 reveals a

conviction for assault to commit voluntary manslaughter. These convictions occurred in March 1976.

***11** Twyla King, the victim's daughter, testified that she has two brothers, Musenda Spencer, age 21, and Jamil Spencer, age 17. Mrs. King further stated that she has three daughters, ages 11, 6, and 2. Musenda, a college student, has suffered financially since his mother's death as she assisted with his college expenses. She stated that she and her children visited her mother frequently at the Joseph Place residence. After her mother's death, the house was not paid for and had to be relinquished to the mortgage company. This forced the relocation of her brothers who were still living at home with their mother. Mrs. King initially received custody of Jamil, although he is now living with his father. Musenda stays with his sister during breaks and holidays.

Mrs. King explained the effect of their mother's death on herself and her brothers. To Mrs. King, her mother was both a mother and father. Likewise, her brothers' father abandoned them while they were very young, so they too had only their mother. After their mother's death, the children had no means of support. Jamil was incarcerated at the time of his mother's death and there was concern as to where he would go when he was released. His biological father did not want him. Eventually, Jamil was released to the custody of his sister but he continued to have problems and get in trouble. Mrs. King testified that the additional burden of caring for her younger brothers was a financial strain on her own household. When Jamil first moved in with his sister and her family, he had to sleep on the couch because there was no bed for him.

Mrs. King stated that her oldest child, Sarenina, had an especially close relationship with her grandmother, Shirley Faulkner. Sarenina, the only grandchild for six years, often states that she misses her grandmother, cries often, and has been going to counseling to help her deal with the loss of her grandmother.

The defense presented the testimony of Dr. Fred A. Steinberg, a forensic and clinical psychologist. Dr. Steinberg was appointed to examine Defendant. He first received data on Defendant on November 4, 2000, and later examined him. Dr. Steinberg examined Defendant through an interview and the conducting of a battery of psychological tests The first test, the Wechsler Adult Intelligence Scale, is a test of intelligence, which reveals one's cognitive functioning, or the capacity of intellectual level. The second test, the Wide Range Achievement test, is given to see the relative level of a person's reading, spelling and mathematical achievement. The next test, the Booklet Category Test, assesses an individual's ability for reasoning and abstract concept formation, while the Nebraska Screening Test is a neuropsychological screening test which indicates abnormality. The Minnesota Multi-Phasic Personality Inventory (MMPI) provides an assessment of an individual's emotional state and psychological functioning. The inkblot test, Rorschach Inkblot Technique, is used as a personality test in conjunction with the MMPI. The S.I.R.S., the structured interview of reported symptoms, is a good measure that is used to assess whether individuals are feigning responses. The Dusky Standard is a very structured interview which allows for the assessment of an individual's competency to stand trial. Finally, Dr. Steinberg used both the Wechsler memory scale and the Rays memory test, used to assess whether there was any memory impairment.

***12** Dr. Steinberg interviewed Defendant for approximately twelve hours, which included testing. Dr. Steinberg determined that the Defendant “was not malingering on these tests. He was not feigning any illness or condition.”Furthermore, as a result of his evaluation, Dr. Steinberg learned that, as a child, Defendant was subjected to quite a great deal of neglect and abuse. Defendant's parents were alcoholics and one was “on drugs.” Moreover, during his childhood, Defendant was placed in foster home situations. As an adult, the Defendant developed into a chronic drug user, specifically, crack cocaine, marijuana, and alcohol.

Regarding Defendant's psychological condition on January 21-22, 1999, Dr. Steinberg opined that Defendant “had a predisposition toward impulsive behavior that was really made significantly worse by a number of stressors that he was experiencing.”“A stressor is a life change that impacts an individual and has an affect upon his psychological and physiological condition.”The stressors impacting the Defendant's behavior included (1) experiencing the life stress of trying to establish himself outside of a prison situation; (2) experiencing marital difficulties; (3) experiencing the loss of a job; (4) experiencing the

hospitalization of his grandmother due to Alzheimer's disease; (5) experiencing the suicide of his close friend; and (6) experiencing the frequent use of cocaine. Based upon these factors, Dr. Steinberg stated that he did not "believe [Defendant] was capable of acting like the reasonable person under these circumstances."Dr. Steinberg further explained that:

[Defendant's] already impulsive personality style was severely compromised by the severity, the number of these stressors that he was experiencing. If you can imagine him being like an individual who became impulsive and lacked the ability to suppress the impulses he was feeling at the time. That's what was happening with him, in my opinion.

He continued:
The data I have in my psychological testing of him in this-in this evaluation indicated him to basically be a man who is prone to impulsive behavior. He has these character traits. Under the circumstances of the stress and the intoxication of the cocaine, his ability to suppress these impulses was greatly compromised.

In defining impulsive behavior, Dr. Steinberg stated "under states of emotion he is prone to basically act before he thinks."Dr. Steinberg concluded that Defendant's reaction on January 21-22, 1999, was consistent with his behavior. That is, "it appears as though [Defendant] once emotionally charged is quite capable under these circumstances of flying into a rage.

Dr. Steinberg related additional findings that Defendant did not fit "anti-social personality disorder, *per se*," Defendant has mixed personality features, and Defendant is prone to feel remorseful and guilty following his episodic acting out kinds of behavior. He added that:

***13** In my opinion, Mr. Faulkner had the ability to form intent. However, once his emotions were aroused under stressful circumstances, he did not have the ability to suppress his emotions or emotional behavior. So in that sense, his capacity was diminished to really cap his behavior.

...

Well, diminished capacity is typically a situation used in mitigation, like right here, where an individual lacked the ability to form intent. And in a strict sense, I didn't feel like he lacked that ability. In other words, did he have the inability to-did he intend to do it, you know. And I think that in a-he had that intent, he just didn't have that ability to stop himself once he got started.

On cross-examination, Dr. Steinberg admitted that Defendant does not have a mental disease nor does he have a mental defect. Moreover, Defendant is completely sane and competent to stand trial. Dr. Steinberg also conceded that on January 13, 1999, approximately eight days prior to the murder, Defendant passed his drug screen from Redwood Drug Detection Specialist, specifically that no amphetamines, alcohol, marijuana, THC, opiates, cocaine, or barbiturates were detected.

Patricia McNealy, executive director/forensic counselor at the Alcohol and Chemical Abuse Rehab Center, testified that Defendant was sent to the Center as a patient in November 1998, because he had a positive drug screen for cocaine while he was on state parole. On the first day that Defendant arrived at the Center, he admitted to using cocaine the previous day. Ms. McNealy opined that his drug use was apparent that day as "he was shaky." Defendant was scheduled to come twice a week staring on November 18, 1998.

Ms. McNealy related that, behaviorally, cocaine use causes people to have the inability to think, to concentrate, and they become paranoid. During the time period that Defendant was coming to the Center, he was employed at the Cook Convention Center. Defendant was excited about his job, and he felt good about the job and the money he was making. Then Defendant lost his job and he again began using cocaine. Defendant also began having marital problems and problems with his wife's son.

On January 13, 1999, Defendant had been to the Center. Prior to the next meeting on the 20th, Defendant called Ms. McNealy and told her that his brother had committed suicide. On the 20th, the Defendant telephoned Ms. McNealy to inform her that he would not be at that evening's meeting. During the telephone conversation, Defendant admitted that he was using cocaine.

At the close of the proof, the jury was instructed on the following statutory aggravating circumstances:

(1) The defendant was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person. The State is relying upon the crime(s) of murder second degree, robbery, assault to commit murder in the first degree, assault with intent to commit robbery, and assault to commit voluntary manslaughter which are felonies, the statutory elements of which involve the use of violence to the person.

***14** (2) The murder was especially heinous, atrocious, or cruel in that it involved torture.

*See generally*Tenn.Code Ann. § 39-13-204(i)(2), (5).

The jury was also instructed that it should consider:

any mitigating circumstances supported by the proof, which shall include, but are not limited to, the following: One, the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. Two, that the defendant had been employed in an effort to rehabilitate himself. Three, that the defendant was enrolled in a drug treatment program. Four, that the capacity of the defendant to control his anger was impaired by the use of cocaine. Five, any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

Following submission of the instructions, the jury retired to consider the verdict. After deliberations, the jury found that the State had proven the aggravating circumstances (i)(2), the defendant was previously convicted of one or more violent felonies other than the present charge. The jury further found that the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt. In accordance with their verdicts, the jury sentenced Defendant to death for the murder of Shirley Faulkner.

I. Evidence of Diminished Capacity

Defendant contends that the trial court improperly excluded testimony regarding Defendant's diminished capacity. Specifically, Defendant asserts that "with the expert testimony of the Defendant's diminished capacity, combined with the Defendant's account of how the homicide came about, the defense would have been able to put on a compelling case for the very real possibility that the Defendant's actions were the result of an explosive, uncontrollable rage, and that this negated any premeditation on his part."We note that, although providing this Court with a short essay on the law applicable to diminished capacity, Defendant has failed to cite to the testimony that was excluded by the trial court. In this regard, the State correctly argues that Defendant has waived this issue for failure to cite where this evidence can be found in the record and where the trial court's ruling can be found in the record. *See*Tenn. R.App. P 27(a)(7) and (g); Tenn. R. Ct.Crim.App. 10(b). Defendant has responded in his reply brief acknowledging the failure to cite to the record, but adopting the State's citation as his own.

A review of the record and the State's brief reveals that Defendant is challenging the trial court's ruling preventing Defendant from introducing the testimony of Patricia McNealy, a board certified drug counselor, and Dr. Fred Steinberg, a forensic psychologist, during the guilt phase of this capital trial. Patricia McNealy was to testify regarding Defendant's drug dependency and "how upset [Defendant] was." Dr. Steinberg was to testify as to the multiple stressors present in Defendant's life that would have, in conjunction with his drug problem, affected his predisposed tendency to have a short-temper. During a jury-out hearing, the trial court extensively warned defense counsel that, absent proof of a mental disease or defect, this testimony would not be admissible at the guilt phase of the trial under *State v. Hall*, 958 S.W.2d 679 (Tenn.1997), *cert. denied*,524 U.S. 941, 118 S.Ct. 2348, 141 L.Ed.2d 718 (1998). At the jury out hearing, Dr. Steinberg concluded, "I found no indication of mental disease or defect, as I understand those terms, on those dates."When questioned further by defense counsel, Dr. Steinberg explained,

***15** Disease is a process of-an illness process, whereas a defect is more of a-something like mental retardation, something as brain damage, neurological dysfunction, epilepsy, something of that nature. And my understanding is that these are-these don't include

mental states.

The following colloquy then occurred between the trial judge and Dr. Steinberg:
THE COURT: Well, let me say this. The case says that he has to be able to testify-and let me just ask you this, Doctor, can you tell the jury under oath that the defendant was inable or unable to form premeditation or intent or knowledge because of a mental disease or defect?

THE WITNESS: Because of a mental disease or defect?

THE COURT: Yes, sir.

THE WITNESS: It's not because of a mental disease or defect.

THE COURT: Okay. Now, could you tell the jury that he couldn't form a requisite mental state or a culpable mental state because of an emotional state or mental condition? Could you do that?

THE WITNESS: I'm sorry. Can you repeat that?

THE COURT: Could you tell the jury that you don't think he was able to form a particular premeditation or intent because of an emotional state or a mental condition that he had that day? Could you do that?

THE WITNESS: Because of a-

THE COURT: An emotional state or mental condition, yes, sir.

THE WITNESS: I would-I would agree with that statement.

THE COURT: Okay. And that's our difference here is that the Supreme Court says I can't allow testimony on a particular emotional state or mental condition, but I can if it's a product of a mental disease or defect. And it's just clear in the Supreme Court ruling. And I looked at every case using the word *Hall*, published and unpublished until today, and I can't find where that case has been reversed. I just can't. And so unless you have any other-

Dr. Steinberg, in response to a question by defense counsel, added that the Defendant was "capable of forming intent, however, he was impaired in his ability to suppress his emotional-emotionality."The trial court then stated:
But I'm finding that the doctor just testified that he was capable of intent. And for that reason I cannot allow this kind of diminished capacity testimony in the guilt phase because I find that the defense has not shown that the defendant's inability to form the requisite culpable mental state was the produce of a mental disease or defect, only that it was the product of a particular emotional state or mental condition. Okay. And because of that, I don't think I can let your drug and alcohol person testify in the guilt phase unless there is something else she's going with an eye to add to that-to that testimony about that, although she's welcome to testify, of course, in mitigation. If we had a second phase all of that would come in; I wouldn't restrict you all at all in that.

In response to this ruling, defense counsel commented:
Yes, sir. You know, just before we finish right there, I'd also-there is some that's been diluted down-I think *Hall* has-speaks of substance abuse whether it be drug or alcohol as to causing a person to have a diminished capacity.

***16** The following colloquy then occurred between defense counsel and the trial court:
THE COURT: We're not going to use those words, now, Mr. Lenow. You need to have a mental condition to where it's hard for them to form a culpable mental state.

MR. LENOW: No, they-okay. Well, they use the word diminished capacity.

THE COURT: I understand that, but ... But unless the drug abuse-unless someone can testify that he was on drugs, and it negated the intent-for instance, if we had the defendant take the stand and say I was so high at the time, I didn't realize when I broke into that man's house, I thought it was my house. Or someone saying I was so drunk, I couldn't intend to rob anyone. Then, of course, I would allow that in because it negates the specific intent of the crime. If you had anyone today who were testifying that he was so high on cocaine or so drunk that he couldn't form the intent, I would allow the testimony.

MR. LENOW: Yes, sir. And I don't mean to be critical, but-

THE COURT: No, no, that's all right. You can make your record....

MR. LENOW: I think Your Honor is like a lot of judges and a lot of people. We have these words, and there's an A.L.R. on it that says too many of our judges don't understand-

...

MR. LENOW: ... And they spoke of the fact that there's-that they get confused in their minds as to what insanity is and what diminished capacity. That they're two different things. That diminished capacity is something less than what insanity is. Now, the scenario of facts you had just given us would be one that would possibly give a person the defense of temporary insanity which would be different from what diminished capacity is, as such.

THE COURT: No, sir. Insanity does not involve intoxication; it involves mental diseases and defects. There is a difference between the diseases of-the non-defense as *Hall* calls it of-non-the non-defense of intoxication. Anything that would keep him from forming the requisite culpable mental state I would allow. And I understand your point of view. All I'm doing is this. In *State versus Hall* they went-they analyzed this issue for pages and they laid it out, and I'm following what they say, And if he is convicted, you're more than welcome to take this up, and I'll watch what the Appellate Courts do with interest. But *State versus Hall,* in my mind, is exactly on point, word for word. And I'm just following our Appellate Courts. And it doesn't-motion for a new trial, if there is one, you can just have at it, Mr. Lenow; it doesn't hurt my feelings. Okay.

In Tennessee, the doctrine commonly referred to as "diminished capacity" was first recognized by this Court in 1994. *See State v. Phipps,* 883 S.W.2d 138,149 (Tenn.Crim.App.1994). After an exhaustive review of authority from sister states and the federal circuits, this Court held that "evidence, including expert testimony, on an accused's mental state, is admissible in Tennessee to negate the elements of specific intent, including premeditation and deliberation in a first degree murder case."*Id.* The supreme court summarily agreed with *Phipps* in *State v. Abrams,* 935 S.W.2d 399, 402 (Tenn.1996). However, the court did not specifically address the doctrine of diminished capacity until *State v. Hall,* 958 S.W.2d 679 (Tenn.1997), *cert. denied,*524 U.S. 941, 118 S.Ct. 2348, 141 L.Ed.2d 718 (1998). In *Hall,* the high court reviewed the exclusion of expert testimony which the appellant alleged was relevant to negate the essential elements of premeditation and deliberation. *Id.* at 688-692.Similar to the discussion in *Phipps,* the *Hall* court held that evidence of diminished capacity is not admissible to justify or excuse a crime, but instead to prove that a defendant was incapable of forming the requisite mental state, thereby resulting in a conviction of a lesser offense. *See id.* at 692;*see also State v. Perry,* 13 S.W.3d 724, 734 (Tenn.Crim.App.), *perm. to appeal denied,* (Tenn.1999). The court cautioned against referring to such testimony as proof of "diminished capacity." *Id.* at 690.Instead such evidence should be presented to the trial court to negate the existence of the *mens rea* for the charged offense. *Id.*

***17** The standard of admissibility of "diminished capacity" type evidence was succinctly coined in *State v. Hall,* 958 S.W.2d at 689.

[T]o gain admissibility, expert testimony regarding a defendant's incapacity to form the required mental state must satisfy the general relevancy standards as well as the evidentiary rules which specifically govern expert testimony. Assuming that those standards are satisfied, psychiatric evidence that the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged is admissible under Tennessee law.

The testimony "*must demonstrate* " that the claimed inability to form the culpable mental state was "*the product of a mental disease or defect,* not just a particular emotional state or mental condition. It is the showing of a lack of capacity to form the requisite culpable mental intent that is central to evaluating the admissibility of expert psychiatric testimony on the issue." *Id.* at 690 (emphasis added). Admissibility, "as with most other evidentiary questions, ... is a matter which largely rests within the sound discretion of the trial court."*Id.* at 689.

Pursuant to the *Hall* standard of admissibility, we are of the opinion that the trial court did not abuse its discretion in excluding the testimony of Dr. Steinberg and Patricia McNealy, which the Defendant sought to present. Dr. Steinberg was unable to testify that the Defendant lacked the capacity to premeditate or to act intentionally or knowingly because of a mental disease or defect. The trial court correctly determined that the Defendant's evidence did not meet the relevancy standard set out in *Hall*.Defendant is not entitled to relief on this issue.

II. Introduction of Photographs of Homicide Victim

Seven color photographs were admitted during the guilt phase of the Defendant's trial and seven color photographs were admitted during the sentencing phase of the Defendant's trial. During the guilt phase, the following photographs were admitted:

1. Exhibit # 3: Color photograph of the victim's body lying on the floor near a dresser. Blood is visible on the victim's head and on the carpet beneath the victim's body.

2. Exhibit # 33: Color photograph of the victim's head during the autopsy. Photo depicts the number and position of wounds to the victim's head.

3. Exhibit # 34: Color autopsy photograph revealing close-up of “cleaned-up” wound to victim's head. Wound showed repeated blows but was not accompanied with pooled or running blood.

4. Exhibit # 35: Color autopsy photograph of victim's facial features, specifically the nose and mouth region. Photo revealed “a definite gap or dent or cut in the bottom lip.”

5. Exhibit # 36: Color autopsy photograph of victim's facial features, specifically the mouth and chin region. Tape measure indicated size of wounds.

6. Exhibit # 37: Color autopsy photograph of victim's facial features, specifically the upper mouth, nose, and left eye region. Photo indicated number of wounds to facial area.

***18** 7. Exhibit # 41: Color autopsy photograph of front view of victim's head. Photo depicted severity of facial wounds inflicted upon the victim.

During the penalty phase, the following photographs were admitted:
1. Exhibit # 47: Color photograph of victim's body lying on bedroom floor.

2. Exhibit # 48: Color photograph of close-up of victim's body as found on bedroom floor.

3. Exhibit # 49: Color photograph of victim's body lying on bedroom floor.

4. Exhibit # 50: Color photograph of victim's body lying on bedroom floor. Different angle showing little or no blood spatter on right side of victim's body.

5. Exhibit # 56: Color photograph depicting blood stain on carpet.

6. Exhibit # 60: Color photograph of victim's body lying on bedroom floor. Photograph indicated the presence of blood clots on victim's person and on carpet.

7. Exhibit # 61: Color photograph of close-up of victim lying on bedroom floor. Photograph indicated the presence of blood clots or spatter on dresser behind victim's body.

The Defendant complains that the trial court erred in admitting these photographs stating that “[t]he introduction of gruesome photographs of the victim violates the Defendant's rights under the federal and state constitutions, as well as the Tennessee Rules of Evidence.”The State responds that “the relevance of these photographs was not substantially outweighed by the danger of unfair prejudice,” and, therefore, the trial court did not err by admitting the photographs.

Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases. *See State v. Banks*, 564 S.W.2d 947, 949 (Tenn.1978) (citations omitted). Accordingly, “the admissibility of photographs lies within the discretion of the trial court” whose ruling “will not be overturned on appeal except upon a clear showing of an abuse of discretion.”*Id.; see also State v. Hall*, 8 S.W.3d 593, 602 (Tenn.1999), *cert. denied*,531 U.S. 837, 121 S.Ct.

98, 148 L.Ed.2d 57 (2000). Notwithstanding, a photograph must be found relevant to an issue that the jury must decide before it may be admitted into evidence. *See State v. Vann*, 976 S.W.2d 93, 102 (Tenn.1988), *cert. denied*,526 U.S. 1071, 119 S.Ct. 1467, 143 L.Ed.2d 551 (1999); *State v. Braden*, 867 S.W.2d 750, 758 (Tenn.Crim.App.), *perm. to appeal denied*, (Tenn.1993) (citation omitted); *see also*Tenn. R. Evid. 401. Photographs of a corpse are admissible in murder prosecutions if they are relevant to the issues at trial, notwithstanding their gruesome and horrifying character. Additionally, the admissibility of evidence at a capital sentencing hearing is controlled by section 39-13-204(c), Tennessee Code Annotated, which allows the admission of any evidence "the court deems relevant to the punishment ... regardless of its admissibility under the rules of evidence."*See Hall*, 8 S.W.3d at 601. In essence, section 39-13-204(c) permits introduction of any evidence relevant to sentencing in a capital case, subject only "to a defendant's opportunity to rebut any hearsay statements and to constitutional limitations."*See Hall*, 8 S.W.3d at 601.

***19** Notwithstanding this broad interpretation of admissibility, evidence that is not relevant to prove some part of the prosecution's case should not be admitted solely to inflame the jury and prejudice the defendant. *Banks*, 564 S.W.2d at 950-51. Additionally, the probative value of the photograph must outweigh any unfair prejudicial effect that it may have upon the trier of fact. *Vann*, 976 S.W.2d at 103;*Braden*, 867 S.W.2d at 758;*see also*Tenn. R. Evid. 403. In this respect, we note that photographs of a murder victim are prejudicial by their very nature. However, prejudicial evidence is not *per se* excluded; indeed, if this were true, all evidence of a crime would be excluded at trial. Rather, what is excluded is evidence which is "unfairly prejudicial," in other words, that evidence which has "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one."*See Vann*, 976 S.W.2d at 103 (citations omitted).

A. Photographs at Guilt Phase

Exhibit number 3 is a photograph depicting the location of the victim's body in relation to the dresser. The defense objected stating that sketches of the crime scene were available to show the location of the victim's body and that the photograph was too graphic. The trial court found that "the probative value of this photograph is not outweighed by any unfair prejudice. It's not, in my mind, other than showing someone dead who obviously has been beaten around the head, it's not inflammatory."Five other photographs that were more graphic were excluded by the trial court.

Exhibit numbers 33 though 37 and exhibit number 41 are all photographs of the victim taken during the autopsy. At trial, the State asserted that the photographs were necessary to show different aspects of the examination performed by Dr. Smith. The prosecution stated that the photographs were also necessary as evidence of repeated blows, or proof of premeditation, and not that a single blow was struck in anger. Because the photographs of the wounds were taken during the autopsy, the wounds had been "cleaned up" as much as possible. There was no fresh blood and the photographs were basically "scientific" photographs.

The trial court made the following rulings with regard to these photographs:

This [exhibit # 33] shows a wound. Apparently, her scalp has been shaved on the right top side of her head to show the wound there. Other than having a little blood in her ear, that seemed to pool in the ear, this picture is a cleaned up picture.

...

Well, I find that this will help assist the jury. It's very probative as to the position and the repeated wounds, and it's been cleaned up. And there's nothing gross or heinous about it other than the obvious wound that was inflicted. So I'm going to allow number nine [exhibit # 33].

Well, for the record, photograph number twelve [exhibit # 34] is a scalp shaved showing a wound or, apparently, several wounds.... Because it's a close up showing the obvious repeated blows to that area, I'm going to allow this. It's been cleaned up. And although the wound is red, there is no running blood or pooled blood, so I'm going to allow picture 12.

***20** All right. Looking at picture eight [exhibit # 35] in it[ ]s totality, there's nothing gross or heinous about it. It's much less graphic than number seven. There is a

definite gap or dent or cut in the bottom lip that you can see in this picture, you can't in the other one. I don't think there's any additional unfair prejudicial value at all to number eight, so I'm going to allow number eight also.

All right. That is-covers the same material that [exihibit # 35] covers .... and that's cumulative with [exhibit # 35]....

He has a ruler next to it.

...

Well, it's-before it was cumulative, but because it has the ruler, I'm going to do this, then ... we're going to ... allow this one as well....

Well, this photograph [exhibit # 37] is a close up of the nose and her left eye and the left side of her mouth, and that shows other things that I didn't see in any other pictures. One, it shows a cut to her nose, to the left side of her nose; it shows two to three cuts to the top left of her mouth, and also a definite cut or blow to the left eye. There's a line on the eyelid. Although her eyelid is partially open, and up at the top-I mean, up in the right eye area, you can barely start to see a wound there. There's nothing about this picture in my mind that's inflammatory, and for that reason, it's probative, and I'm going to allow it.

All right. Well, of all 13 pictures, this is the one that is the most unpleasant to look at because it shows her frontal face., it shows the area where her right eye would be as just a big dent in her head. It show a denture-a partial denture-in her mouth.... Her face has been cleaned up and there's no blood. There are open wounds, but there's no pools of blood or dripping blood, and it shows repeated-what seems to me numerous, repeated blows to the front of her face. Which, in my mind ... would be very probative of the fact that she just laid on the ground. Apparently, if someone hits her in the face like this to cause this wound, her body would have moved. Laying on the ground with someone standing over her, hitting her repeatedly with an object or objects, which is extremely probative of premeditation. The main issue in this case ... is whether or not the defendant could form intent or premeditation, or whether this was just a knowing killing. This is a 3-D picture ... you can see that not only was she struck repeatedly, but from different angles which would take some time to do-to do this damage. And I find that it's cleaned up. And other than being unpleasant, because we have a person who has been killed by these wounds, I don't think that it's being introduced as inflammatory. Any unfair prejudice in this picture over a diagram would be slight, and it does not at all, I think, overcome the extreme probative value of it....

While Defendant admitted to the murder of his wife, he claimed that he acted in a state of passion and thus, was not guilty of first-degree premeditated murder. The issue before the jury was whether the killing resulted from a state-of-passion produced by adequate provocation or whether the killing was premeditated. The purpose for introducing photographs into evidence is to assist the trier of fact. As a general rule, the introduction of photographs helps the trier of fact see for itself what is depicted in the photograph.*State v. Griffis*, 964 S.W.2d 577, 594 (Tenn.Crim.App.), *perm. to appeal denied*, (Tenn.1997).

***21** In *State v. Banks*, 564 S.W.2d at 947, our supreme court set forth several factors to be considered by the trial court in determining admissibility of photographs, including their value as evidence, whether they are needed to establish a *prima facie* case and whether, and to what extent, they are “gruesome.”

The only seriously contested issue in the case was the degree of homicide. The State relied heavily upon the nature and extent of injuries inflicted upon the victim to establish a *prima facie* case of first degree murder. While repeated blows are not alone sufficient to establish premeditation, *see State v. Brown*, 836 S.W.2d 530, 542 (Tenn.1992), the photographs were relevant to the critical issue of premeditation and were not inflammatory. The photographs, demonstrating repeated blows to the head of the victim, were relevant to show the element of premeditation in this first degree murder case. There is little dispute that the photographs are unpleasant and gruesome. However, they are highly relevant and probative to show that Defendant used a weapon upon an unarmed victim, the repeated blows upon the victim, and the brutality of the attack. Our supreme court has held that photographs of the victim may be admitted “as evidence of the brutality of the attack and the extent of force used against the victim, from which the jury could infer malice, either express or implied.”*State v. Goss*, 995 S.W.2d 617, 627 (Tenn.Crim.App.1998)

(citing *Brown*, 836 S.W.2d at 551;*see also State v. Smith*, 868 S.W.2d 561, 576 (Tenn.1993) (trial court did not abuse its discretion by admitting a photograph of the victim when the trial court stated that the photograph was relevant to show " 'premeditation, malice and intent because of the multiplicity of these wounds and an obvious intent of whoever was inflicting these wounds.' ")). In this case, the State was required to prove that the killing was intentional. *See*Tenn.Code Ann. § 39-13-202(a)(1). The Defendant claims that he acted out of passion. The photographs of the victim demonstrate that the attack was brutal and non-relenting. The primary effect of seeing the photographs is not so much to inflame the viewer as to reveal to the viewer that, whoever inflicted the injuries upon the victim did so deliberately and premeditatively, striking the victim multiple times. The photographs depict a savage beating. Although they are admittedly gruesome, they give a better description of the nature and extent of the wounds than the testimony of the medical examiner. Under the principles expressed in *State v. Banks*, 564 S.W.2d 947 (Tenn.1978), we find that the trial judge did not abuse his discretion in admitting these photographs.

B. Photographs at Penalty Phase

Exhibit numbers 47 through 50 and exhibit numbers 56, 60 and 61 are photographs of the victim's body as it was discovered at the crime scene. Exhibit number 47 depicts the wounds to the victim's head, but also movement of the victim's head from right to left. The trial court found this photograph probative to prove the heinous, atrocious, cruel aggravator. Exhibit 49 is the same photograph as exhibit 47. However, exhibit 49 contains two ink markings referencing blood spatter that exhibit 47 lacks. Exhibits number 48 and 50 were admitted because (1) number 48 was a close-up photograph and (2) number 50 was "far back showing the other side of the body with no blood on it."Exhibit 56 depicts a pool of blood in the carpet. The trial court found this photograph admissible as "it's not gruesome." Exhibits 60 and 61 were admitted to show the duration of the assault demonstrating the various aspects of blood clotting. The court found that "there's nothing in these photographs the jury would not have already have seen from earlier photographs."On appeal, the Defendant complains that the admission of these photographs was error in that (1) the photographs were more prejudicial than probative and (2) the photographs were cumulative.

***22** Photographs are not necessarily rendered inadmissible because they are cumulative of other evidence or because descriptive words could be used. *See Collins v. State*, 506 S.W.2d 179, 185 (Tenn.Crim.App.1973). Photographs must be relevant to prove some part of the prosecution's case and must not be admitted solely to inflame the jury and prejudice them against the defendant.*Banks*, 564 S.W.2d at 951;*see*Tenn. R. Evid. 403 (relevant evidence may be admitted if its probative value is not "substantially outweighed by the danger of unfair prejudice"). On appeal, the trial court's decision to admit a photographic exhibit is reviewable for abuse of discretion. *Banks*, 564 S.W.2d at 949.

Photographs depicting a victim's injuries have been held admissible to establish torture or serious physical abuse under aggravating circumstance (i)(5).*See, e.g., State v. Smith*, 893 S.W.2d 908, 924 (Tenn.1994) (photographs depicting the victim's body, including one of the slash wound to the throat, which was "undeniably gruesome," were relevant to prove that the killing was "especially heinous, atrocious, or cruel" and were admissible for that purpose); *State v. McNish*, 727 S.W.2d 490, 494-95 (Tenn.1987) (photographs of the body of the victim who was beaten to death were relevant and admissible to show the heavy, repeated and vicious blows to the victim and to prove that the killing was "especially heinous, atrocious, or cruel"). Although the photographs are not necessarily pleasant to view, the photographs accurately depict the nature and severity of the injuries inflicted upon the victim. This evidence was relevant to the State's proof of the "heinous, atrocious, and cruel" aggravating circumstance. *See, e.g., State v. Morris*, 24 S.W.3d 788 (Tenn.2000); *State v. Hall*, 976 S.W.2d 121, 162 (Tenn.1998); *State v. Smith*, 893 S.W.2d 908, 924 (Tenn.1994), *cert. denied*,516 U.S. 829, 116 S.Ct. 99, 133 L.Ed.2d 53 (1995); *State v. Smith*, 868 S.W.2d 561, 579 (Tenn.1993), *cert. denied*,513 U.S. 960, 115 S.Ct. 417, 130 L.Ed.2d 333 (1994) (citing *State v. Payne*, 791 S.W.2d 10, 19-20 (Tenn.1990), *judgment aff'd. by*,501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720(1991); *State v. Miller*, 771 S.W.2d 401, 403-404 (Tenn.1989), *cert. denied*,497 U.S. 1031, 110 S.Ct. 3292, 111 L.Ed.2d 801 (1990); *State v. Porterfield*, 746 S.W.2d 441, 449-450 (Tenn.), *cert. denied*,486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988); *McNish*, 727

S.W.2d at 494-495. Moreover, given the fact that the jury rejected the (i)(5) aggravator, we are unable to conclude that the photographs prejudiced the jury's verdict.

The photographs are relevant and are not so unfairly prejudicial as to bar their admission. Accordingly, we cannot conclude that the trial court abused its discretion by admitting these photographs. *See*Tenn. R. Evid. 403. Defendant is not entitled to relief on this issue.

III. Failure to Correctly Charge the Jury

Defendant claims that the trial court improperly charged the jury. Precisely, he alleges that the verdict form employed in this matter failed to reflect that the jury found the (i)(2) aggravating circumstance "beyond a reasonable doubt." Additionally, Defendant cites as error the trial court's failure to define the essential elements of the offenses submitted to the jury. He contends that the trial court failed to properly instruct the jury as to the mental elements of homicide, thus, improperly lessening the State's burden of proof.

***23** Under the United States and Tennessee Constitutions, a defendant has a constitutional right to trial by jury. *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn.2000) (citing U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ..."); Tenn. Const. Art. I, § 6 ("[T]he right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.")). In Tennessee, this right dictates that all issues of fact be tried and determined by twelve jurors. *Garrison*, 40 S.W.3d at 432 (citing *State v. Bobo*, 814 S.W.2d 353, 356 (Tenn.1991); *Willard v. State*, 174 Tenn. 642, 130 S.W.2d 99 (Tenn.1939)). Thus, it follows that a defendant has a right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions. *Garrison*, 40 S.W.3d at 432 (citing *State v. Teel*, 793 S.W.2d 236, 249 (Tenn.1990)).

However, the reviewing court must remain mindful that jury instructions given at trial should not be measured against a "standard of perfection." *City of Johnson City v. Outdoor West, Inc.*, 947 S.W.2d 855, 858 (Tenn.App.1996), *perm. to appeal denied*, (Tenn.1997) (citing *Grissom v. Metropolitan Gov't of Nashville*, 817 S.W.2d 679, 685 (Tenn.App.1991)). The United States Supreme Court has observed that in evaluating claims of error in jury instructions, courts must remember that " 'jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning' " but instead may be presumed to utilize " 'commonsense understanding of the instructions [.]' " *State v. Vann*, 976 S.W.2d 93, 101 (Tenn.1998), *cert. denied*,526 U.S. 1071, 119 S.Ct. 1467, 143 L.Ed.2d 551 (1999) (quoting *Boyde v. California*, 494 U.S. 370, 380-381, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990); *see also State v. Van Tran*, 864 S.W.2d 465, 479 (Tenn.1993)). Therefore, we review each jury charge to determine if it fairly defined the legal issues involved and did not mislead the jury. *See Hall*, 958 S.W.2d at 696;*Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn.1992).

A. Jury Verdict

The Defendant asserts that because the verdict form used by the jury failed to state that the jury found that the State had proven the listed statutory aggravating circumstance beyond a reasonable doubt, his death sentence must be modified to a life sentence. Defendant argues that the defective form, in effect, resulted in the jury's failure to find that the State had proven the (i)(2) aggravator beyond a reasonable doubt. The State asserts that this issue is waived for (1) failure of the Defendant to enter a contemporaneous objection to the verdict and (2) failure to include the issue in his motion for new trial. Although the State's position is well-taken, we elect to review this issue due to the severity of the sentence imposed in this matter. *See, e.g., State v. McKinney*, 74 S.W.3d 291 (Tenn.), *cert. denied*,537 U.S. 926, 123 S.Ct. 321, 154 L.Ed.2d 219 (2002).

***24** The jury verdict in this matter reads as follows:

We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances: the defendant was previously convicted of one or more felonies other than the present charge. The statutory elements of which involve the use of violence to the person. We, the jury, unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance so listed above outweighs any mitigating circumstances. Therefore,

we, the jury, unanimously find that the punishment for the defendant, Robert Faulkner, shall be death.

Prior to the jury's verdict, the trial court provided, in relevant part, the following instructions to the jury:
In arriving at this determination, you are authorized to weigh and consider any of the ***statutory aggravating circumstances proven beyond a reasonable doubt,*** and any mitigating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt-finding phase or sentencing phase or both....

The burden of proof is upon the state to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, but moral certainty is required, and this certainty is required as to every element of proof needed to constitute the verdict.

...

Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the ***State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged.***You may consider the victim impact evidence in determining the appropriateness of the death penalty only if you first ***find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence,*** and find that the aggravating circumstance or circumstances found outweigh the finding of one or mote mitigating circumstances beyond a reasonable doubt.

...

Tennessee law provides that no sentence of death or sentence of imprisonment for life without the possibility of parole shall be imposed by a jury but upon a unanimous finding that ***the state has proven beyond a reasonable doubt the existence of one (1) or more statutory aggravating circumstances,*** which shall be limited to the following ...

...

Members of the Jury, the court has read to you the aggravating circumstances which the law requires you to consider ***if you find proved beyond a reasonable doubt.***...

***25** (Emphasis added). The trial court further instructed:

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state, beyond a reasonable doubt, and said circumstance or circumstances have been proven by the state to outweigh any mitigating circumstance or circumstances, beyond a reasonable doubt the sentence shall be death. The jury shall reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.

You will write your findings and verdict upon the enclosed form attached hereto and made part of this charge. Your verdict shall be as follows:

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances;

(2) We, the jury, unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances so listed above outweigh any mitigating circumstances.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death.

(Emphasis added).

Initially, we note that the verdict form submitted to the jury is a verbatim recitation of that provided in section

39-13-204(g), Tennessee Code Annotated. Indeed, section 39-13-204(g)(2)(A)(i), Tennessee Code Annotated, does not require that the jury shall note on the verdict form that the aggravating circumstance(s) were found beyond a reasonable doubt. Rather, the only requirement made is that the jury signify on the verdict form that the State has proven, beyond a reasonable doubt, that the statutory aggravating circumstance(s) outweigh the mitigating circumstances. Tenn.Code Ann. § 39-13-204(g)(2)(A)(ii). We also recognize that the trial court individually polled the jury as to their verdict. Additionally, the trial court instructed the jury no less than seven times that the State had to prove the existence of the aggravating circumstance/circumstances beyond a reasonable doubt. Reading the jury charge and the verdict form as a whole, the jury could only have understood the burden of proof of "beyond a reasonable doubt" to apply to the determination of whether the State had proven the existence of the aggravating circumstance/circumstances.

The argument in this case is analogous to the claim rejected by this Court in *State v. Timothy McKinney*, No. W1999-00844-CCA-R3-DD, 2001 WL 298636 (Tenn.Crim.App. at Jackson, Mar. 28, 2001), *aff'd by*,74 S.W.3d 291 (Tenn.2002). In *McKinney*, the defendant argued that the jury's verdict was erroneous and incomplete in part due to the jury's failure to find that the State had proven the statutory aggravating circumstance beyond a reasonable doubt. *State v. Timothy McKinney*, No. W1999-00844-CCA-R3-DD.As in the present case, the State relied upon the (i)(2) aggravating circumstance to support the imposition of the death penalty. *See id*.As proof of the aggravating circumstance, the State introduced, without objection or rebuttal, evidence of the defendant's 1994 conviction for aggravated robbery. *Id.* This Court determined that the trial court had provided the jury with thorough instructions which clearly delineated the State's burden of proving the statutory aggravating circumstance beyond a reasonable doubt *and* a valid verdict form. *Id.* This Court concluded that the "jury's findings are clearly those allowed by the statute and permit effective appellate review. It is clear that the jury found the existence of the (i)(2) aggravating circumstance beyond a reasonable doubt, and the verdict in this case is adequate."*Id.*

***26** In the present case, the State sought the death penalty based upon the (i)(2) and (i)(5) aggravating circumstances. In support of the (i)(2) aggravating circumstance, the State introduced, without objection or rebuttal, evidence of the Defendant's convictions for second-degree murder, robbery, assault to commit murder in the first degree, assault with intent to commit robbery, and assault to commit voluntary manslaughter. The trial court provided the same or similar instructions and the same verdict form as provided by our legislature. We discern no persuasive reason to sway from this Court's conclusion in *McKinney*.Defendant is not entitled to relief on this issue.

B. Instruction on "Intentional"

The trial court provided the following instruction, in relevant part, as to the offense of first-degree premeditated murder:

Any person who commits the offense of first degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements: one, that the defendant unlawfully killed the alleged victim; and two, that the defendant acted intentionally. A person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it's the person's conscious objective or desire to engage in the conduct or cause the result: And three, that the killing was premeditated.

The trial court then instructed the jury as to the offense of second-degree murder as follows:
Second Degree Murder: Any person who commits the offense of second degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements: one, that the defendant unlawfully killed the alleged victim: and two, that the defendant acted knowingly.

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person

acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

The requirement of "knowingly" is also established if it's shown that the defendant acted intentionally.

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it's the person's conscious objective or desire to engage in the conduct or cause the result.

Defendant cites as error the trial court's instruction on "intentional" as the necessary culpable mental state for first-degree premeditated murder and in the definition of "knowing" as the necessary culpable mental state for second-degree murder. In support of his argument, the Defendant relies upon this Court's decision in *State v. Page,* 81 S.W.3d 781 (Tenn.Crim.App.2002). In *Page,* the defendant was charged and convicted of second-degree murder. The circumstances of that offense are as follows. The fifteen-year-old defendant was out drinking and riding around with his friends. As they passed the victim, the victim's girlfriend, and her son, the defendant shouted, "Ooh! You're ugly!" *Page,* 81 S.W.3d at 783. The victim responded by gesturing with his middle finger. *Id.* The defendant and his cohorts turned their vehicle around and drove past the victim; this time, the defendant extended a baseball bat out the window, nearly hitting the victim. *Id.* The defendant and his friends then exited the truck and confronted the victim. *Id.* The victim displayed a knife. *Id.* The defendant retrieved the baseball bat from the truck. *Id.* The defendant pursued the victim, taunting the victim. *Id.* The defendant struck the victim on the head from behind. *Id.* The defendant then fled the scene. Later, the defendant testified that he could not believe that the victim had died. *Id.* At trial, the defendant's counsel argued that the defendant was intoxicated to the extent that he did not appreciate his conduct and did not think the blow was that severe. Counsel suggested that the offense was criminally negligent homicide. The State, in its response, emphasized the nature of the conduct and the circumstances surrounding the conduct elements in the instruction. The charge provided by the trial court gave credence and confirmation to the State's erroneous contention that the jury could find the defendant guilty based upon "the nature of the conduct" or "the circumstances surrounding the conduct." Based upon this instruction, the jury found the defendant guilty of second-degree murder.

***27** This Court reversed the defendant's conviction because the trial court instructed the jury that a person acts "knowingly" if the person acts with an awareness: (1) that his conduct is of a particular nature; or (2) that a particular circumstance exists; or (3) that the conduct was reasonably certain to cause the result. *Page,* 81 S.W.3d at 786. Acknowledging our supreme court's designation of second-degree murder as a result of conduct offense, *see State v. Ducker,* 27 S.W.3d 889, 896 (Tenn.2000), this Court determined that "[t]he result of the conduct is the only conduct element of the offense; the 'nature of the conduct' that causes death is inconsequential."*Page,* 81 S.W.3d at 787. The jury had the option of convicting the defendant based upon his awareness of the nature of his conduct or upon the circumstances surrounding his conduct, thus, the State's burden of proof was improperly lessened. *See Page,* 81 S.W.3d at 788. This Court explained, "[f]or second degree murder, a defendant must be aware that *his or her conduct is reasonably certain to cause death.*" *Id.* (citing Tenn.Code Ann. § 39-11-302(b); *State v. Keith T. Dupree,* No. W1999-01019-CCA-R3-CD, 2001 WL 91794, at *4 (Tenn.Crim.App. at Jackson, Jan. 30, 2001), *no appl. for perm. to appeal filed.*(Emphasis added). In dicta, the Court stated that

[p]remeditated first degree murder requires not only that the killing be "intentional," but also that the defendant act with a "premeditated" mental state. Tenn.Code Ann. § 39-13-202(a)(1) (1997). "Premeditation" is defined by statute. *Id.* at (d). We conclude the "intentional" culpable mental state of premeditated first degree murder relates to the result of the conduct. Accordingly, our suggested jury charge for premeditated first degree murder deviates from T.P.I.-CRIM. 2.08 and 7.01(b) (5th ed.2000) by deleting the reference to the nature of the defendant's conduct.

Page, 81 S.W.3d at 789, n. 2. Because the defendant's *mens rea* was essentially the only disputed issue at trial, this Court found that the error required reversal. *Id.* Defendant argues that this Court's decision in *Page* requires reversal in the present case as the trial court committed the same error by instructing the jury in the disjunctive on the definition of "intentional" and

"knowingly." The State asserts that the Defendant has waived this issue for failing to make a contemporaneous objection at trial and for failing to raise the issue in his motions for new trial. *See*Tenn. R.App. P. 36(a). While the State is correct in its assertion, this Court elects to review the issue on its merits.

This Court has previously considered the holding of *Page* in the context of a conviction for first-degree premeditated murder in *State v. Paul Graham Manning*, No. M2002-00547-CCA-R3-CD 2003 WL 354510 (Tenn.Crim.App. at Nashville, Feb. 14, 2003), *perm. to appeal filed*, (Apr. 4, 2003), and *State v. Antoinette Hill*, No. E2001-02524-CCA-R3-CD, 2001 WL 31780718 (Tenn.Crim.App. at Knoxville, Dec. 13, 2002), *no appl. for perm. to appeal filed.*In both cases, this Court concluded that an instruction as to the "nature of the conduct" relative to first-degree murder is irrelevant. *See State v. Paul Graham Manning*, No. M2002-00547-CCA-R3-CD, 2003 WL 354510, at * 7;*State v. Antoinette Hill,* No. E2001-02524-CCA-R3-CD, 2002 WL 31780718, at *5. In this regard, this Court held that the irrelevant definition constitutes error as it improperly lessens the State's burden of proof. *Id.* Indeed, in order to be convicted of first-degree premeditated murder, a defendant must be aware that his conduct is reasonably certain to cause death. *State v. Paul Graham Manning*, No. M2002-00547-CCA-R3-CD, 2003 WL 354510, at *8 (citing *Page*, 81 S.W.3d at 788). Notwithstanding the error, however, this Court, in both *Paul Graham Manning* and *Antoinette Hill*, found the error harmless.

***28** In *Paul Graham Manning*, the defendant did not concede that he had committed the killing. Rather, he claimed that he could not remember what had happened to his wife or how she came to be shot. *State v. Paul Graham Manning*, No. M2002-00547-CCA-R3-CD, 2003 WL 354510, at *8. The defendant had attempted to blame his son for his wife's death. *Id.* Because the defendant maintained that he had not been the person who shot his wife, this Court found the error in the instruction was harmless beyond a reasonable doubt. *Id.*

In *Antoinette Hill*, the defendant, either before the day of the offense or while engaged in the conduct of choking the victim, displayed a previously formed intent to kill. *State v. Antoinette Hill,* No. E2001-02524-CCA-R3-CD, 2002 WL 31780718, at *5. (citation omitted). The evidence was undisputed that the defendant committed acts that contributed to the death of the victim, helped dispose of the body, and fully cooperated in a coverup of the crime.*Id.* Evidence existed to supply the defendant's motive. *Id.* Thus, this Court found the error in the intentional instruction harmless beyond a reasonable doubt. *Id.* Moreover, this Court observed that the jury had determined that the defendant had a preconceived design to assist in the commission of the murder, thereby resolving the issue of intent to cause death. *Id.*

We also conclude that the error in the jury instruction provided in the instant case to be harmless error. Although the Defendant, as in *Page,* admitted that he had killed the victim, the record includes substantial evidence for the jury to have concluded that the Defendant intentionally caused the death of the victim. Evidence was introduced demonstrating the Defendant's previously formed intent to kill, *i.e.*, previous threats made to the victim that he would kill her, the numerous blows inflicted upon the victim, and the presence of defensive marks upon the victim. The Defendant also disposed of the murder weapons and bloody clothing in the viaduct after the murder. These facts are distinguishable from those in *Page.*The evidence in this case sufficiently supported the jury charge as to find result-oriented conduct. Unlike in *Page*, the jury was provided the opportunity to determine whether Defendant was aware that his conduct was reasonably likely to cause death, *i.e.*, the jury was able to determine that Defendant had a preconceived design to assist in the commission of the murder. Accordingly, any error in this matter regarding the instruction on "intentionally" is harmless.

The Defendant makes the same argument as to the "knowing" element of second-degree murder. Because the Defendant was not convicted of this offense, this issue is moot. *See State v. Paul Graham Manning,* No. M2002-00547-CCA-R3-CD.Therefore, Defendant is not entitled to relief on this issue.

IV. Failure of Indictment to Allege Capital Offense

Defendant asserts that, "pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the indictment against him did not charge a capital offense and that he cannot, therefore, be

sentenced to more than life imprisonment."Defendant's argument is based upon the premise that first-degree murder is not a capital offense unless accompanied by aggravating factors. Essentially, Defendant complains that the indictment returned by the grand jury charges non-capital first-degree murder because the grand jury did not find any capital aggravating circumstances. Thus, Defendant alleges that to satisfy the requirements of *Apprendi* the indictment must include language of the statutory aggravating circumstances to elevate the offense to capital murder. Because of this omission in the indictment, he argues that the State was then precluded from filing a Rule 12.3 notice of intent to seek the death penalty as Rule 12.3, Tennessee Rules of Criminal Procedure, provides that a notice of intent to seek the death penalty may be filed "[w]here a capital offense is charged in the indictment or presentment."Defendant asserts that, since a capital offense was not alleged in the indictment, the State could not then rely upon aggravating factors to enhance his sentence to death.

***29** The State asserts that this issue is waived. First, the State contends that Defendant's failure to file a pre-trial motion to dismiss the indictment in this matter results in waiver of this issue. *See*Tenn. R.Crim. P. 12(b). We agree with the State's conclusion based upon the application of this rule to the facts at hand. Tennessee Rule of Criminal Procedure 12(b) provides, in pertinent part:

(b) *Pretrial Motions.*Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.... The following must be raised prior to trial: ... (2) Defenses and objections based on defects in the indictment, presentment or information (*other than that it fails to show jurisdiction in the court or to charge an offense* which objections shall be noticed by the court at any time during the pendency of the proceedings).

Tenn. R.Crim. P. 12(b)(2) (emphasis added). Defendant has claimed that the indictment failed to charge the offense of capital first-degree murder. Defendant's argument fails because there is no question that the trial court had jurisdiction in this first-degree murder case. Furthermore, the indictment clearly charges the *offense* of first-degree murder. Defendant's argument is based upon the assertion that the facts which justify the statutorily authorized punishment of death must be alleged in the indictment. Alternatively, the State argues that the issue is waived because the Defendant failed to preserve the issue by raising the issue in his motion for new trial. *See*Tenn. R.App. P. 3(d). Moreover, while this Court may employ "plain error" to review errors not properly raised by an appellant, such error must affect "the substantial rights of an accused" and must be "necessary to do substantial justice." Tenn. R.Crim. P. 52(b). Plain error review is not implicated in this case.

Nevertheless, our supreme court has resolved the question of whether the Apprendi holding is applicable to Tennessee's capital sentencing procedure. In *State v. Dellinger*, 79 S.W.3d 458, 466-67 (Tenn.), *cert. denied*,537 U.S. 1090, 123 S.Ct. 695, 154 L.Ed.2d 635 (2002), the court dismissed a similar claim involving the constitutionality of a first-degree murder indictment and held that Apprendi was not applicable to capital cases in Tennessee. *See also State v. Richard Odom*, No. W2000-02301-CCA-R3-DD, 2002 WL 31322532, (Tenn.Crim.App. at Jackson, Oct. 15, 2002). Additionally, this Court has since rejected the argument that the United States Supreme Court decision in *Ring v. Arizona* has any effect on our supreme court's analysis in *State v. Dellinger*.*See State v. Richard Odom*, No. W2000-02301-CCA-R3-DD;*cf. Terrell v.. State*, 276 Ga. 34, 572 S.E.2d 595 (Ga.2002) (federal constitution does not render unconstitutional the Georgia procedure of listing the statutory aggravators that support a death penalty through means other than the indictment); *Porter v. Crosby*, No. SC01-2707 (Fla. Jan.9, 2003) (rejecting claim that Apprendi requires aggravating circumstances to be charged in the indictment); *Baker v. State*, 367 Md. 648, 790 A.2d 629, 650-51 (Md.2002) (same), *cert. denied*,535 U.S. 1050, 122 S.Ct. 475 (2001); *Oken v. State*, 367 Md. 191, 786 A.2d 691 (Md.2001) (holding that Apprendi does not invalidate Maryland's capital punishment law), *cert. denied*,535 U.S. 1074, 122 S.Ct. 1953, 152 L.Ed.2d 855 (2002); *Brown v. Moore*, 800 So.2d 223, 225 (Fla.2001)(rejecting claim that Apprendi requires aggravating circumstances to be charged in the indictment): *Mann v. Moore*, 794 So.2d 595, 599 (Fla.2001) (same), *cert. denied*,536 U.S. 962, 122 S.Ct. 2669, 153 L.Ed.2d 843 (2002); *State v. Holman*, 353 N.C. 174, 540 S.E.2d 18, 23 (N.C.2000) (same), *cert. denied*,534 U.S. 910-122 S.Ct. 250 (2001); *State*

v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 193-94 (N.C.2000)(same), *cert. denied*,532 U.S. 931, 121 S.Ct. 1379 (2001).

***30** In *Ring v. Arizona*, the United States Supreme Court applied its earlier holding in *Apprendi v. New Jersey*, 530 U.S. at 466, 120 S.Ct. at 2348, to death penalty cases and held that "[c]apital defendants ... are entitled to a jury determination on any fact on which the legislature conditions an increase in their maximum punishment."*Ring*, 536 U.S. at 584, 122 S.Ct. at 2432. The defendant, in *Ring*, was convicted of felony murder. Under Arizona law, the maximum sentence he could receive was life imprisonment without the possibility of parole. Arizona does not define any particular types of murder as punishable by death. However, Ring could be sentenced to death if the trial court found the presence of an aggravating circumstance. The trial judge is the sole finder of the existence of any aggravating circumstances that would support a death sentence. Indeed, the trial judge, in *Ring*, found the existence of an aggravator and sentenced Ring to death. The United States Supreme Court held: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'*Apprendi*, 530 U.S. at 494, n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435, the Sixth Amendment requires that they be found by a jury."536 U.S. at 584, 122 S.Ct. At 2443.

Death sentences in Tennessee comply with both Apprendi and Ring as our capital sentencing statute requires the jury, or judge (if the jury is waived), to find the presence of an aggravating circumstance(s) beyond a reasonable doubt and that the applicable aggravator(s) outweighs any mitigating factor(s) beyond a reasonable doubt. *See*Tenn.Code Ann. § 39-13-204(g); Tenn.Code Ann. § 39-13-205; *see also Ring v. Arizona*, 536 U.S. at 584, 122 S.Ct. at 2442 n. 6 (the State of Tennessee "commit[s] sentencing decisions to juries"). Moreover, as stated by our supreme court in *Dellinger*,"]t]he death penalty is within the statutory range of punishment prescribed by the legislature for first degree murder. Tenn.Code Ann. § 39-13-202(c)(1)."*Dellinger*, 79 S.W.3d at 466-67. The rule of *Apprendi* and *Ring* is that defendants are "entitled to a jury determination of any fact on which the legislature conditions an increase in their punishment."*Ring*, 536 U.S. at 584, 122 S.Ct. at 2432;*accord Apprendi*, 530 U.S. at 483, 120 S.Ct. at 2348. When a defendant is already eligible for the death penalty, no subsequent finding or evaluation of fact can possibly increase his sentence, for the obvious reason that there is no penalty greater than death. The fact that the finding and weighing process regarding mitigating and aggravating factors may differ, under *Apprendi* and *Ring*, these possibilities are constitutionally irrelevant because they do not increase the maximum sentence that the defendant may suffer. Defendant is not entitled to relief on this issue.

V. Death Penalty Violates United States Treaties and International Law

***31** Defendant next asserts that Tennessee's imposition of a death penalty violates United States treaties and hence the Constitution's Supremacy Clause. Defendant asserts that the Supremacy Clause was violated when his rights under treaties and customary international law to which the United States is bound were disregarded. Specifically, his argument is based upon two primary grounds: (1) customary international law and specific international treaties prohibit capital punishment, and (2) customary international law and specific international treaties prohibit reinstatement of the death penalty by a governmental unit once it has been abolished. This identical argument has recently been rejected by a panel of this Court in *State v. Richard Odom*, No. W2000-02301-CCA-R3-DD.We cannot discern any viable reason to resolve this issue in a different manner in the present case.

In a lengthy opinion, Judge Boggs, writing on behalf of the Sixth Circuit Court of Appeals, dismissed similar claims that the Ohio death penalty scheme violated both international laws and treaties. *See Buell v. Mitchell*, 274 F.3d 337 (6th Cir.2001). As in the present case, the defendant argued that Ohio's death penalty statute violates the Supremacy Clause of the United States Constitution by not complying with (1) the American Declaration of the Rights and Duties of Men and (2) the International Covenant on Civil and Political Rights. Additionally, the defendant relied upon statistics indicating that over one hundred nations prohibit executions, a number that defendant claims is far greater than necessary to establish a customary international law norm. *Id.* In essence, the defendant argued that "the prohibition of executions is not only a customary norm of international law, but

rather, a peremptory norm of international law, or *jus cogens*, that is accepted and recognized by the international community and that cannot be derogated."*Id.* at 373 (citations omitted).

In finding the defendant's allegations "wholly meritless," the Sixth Circuit recognized that:

It is a long-standing principle under United States law that 'international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.'*The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900). In order to define what is a 'rule of international law,' the Restatement (Third) of Foreign Relations Law instructs us:

(1) A rule of international law is one that has been accepted as such by the international community of states

(a) in the form of customary law;

(b) by international agreement; or

(c) by derivation from general principles common to the major legal systems of the world.

Restatement (Third) of Foreign Relations Law § 102(1) (1987).

Buell v. Mitchell, 274 F.3d at 370-71. Judge Boggs then addressed the defendant's contentions that "the abolition of the death penalty has been accepted by international agreement and as a form of customary law."*Id.* at 371.

***32** The defendant asserted that "the Ohio death penalty violates international agreements entered into by the United States...."*Id.* at 370.The Sixth Circuit rejected this claim finding (1) to the extent that the agreements ban cruel and unusual punishment, the United States has included express reservations preserving the right to impose the death penalty within the limits of the United States Constitution, and (2) the agreements are not binding on courts of the United States. *Buell v. Mitchell*, 274 F.3d at 372. In so holding, the court reasoned:

These agreements [the American Declaration of the Rights and Duties of Men and the International Covenant on Civil and Political Rights] do not prohibit the death penalty.... Moreover, the United States has approved each agreement with reservations that preserve the power of each of the several states and of the United States, under the Constitution.

Neither the OAS Charter nor the American Declaration specifically prohibit capital punishment. *See State v. Phillips*, 74 Ohio St.3d 72, 656 N.E.2d 643, 671 (1995). Furthermore, the United States Senate approved the OAS Charter with the reservation that 'none of its provisions shall be considered as ... limiting the powers of the several states ... with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.'Charter of the Organization of American States, 1951, 2 U.S.T. 2394, 2484.

...

[T]he International Covenant does not require its member countries to abolish the death penalty. Article 7 of the International Covenant prohibits cruel, inhumane, or degrading punishment.... The United States agreed to abide by this prohibition only to the extent that the Fifth, Eighth, and Fourteenth Amendments ban cruel and unusual punishments. *See* 138 Cong. Rec. S-4781-01, S4783 (1992) ("That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."); *see also Jamison v. Collins*, 100 F.Supp.2d 647, 766 (S.D.Ohio 2000) (citing Christy A. Short, Comment, *The Abolition of the Death Penalty*, 6 Ind. J. Global Legal Stud. 721, 725-26, 730 (1999)).

Moreover, the International Covenant specifically recognizes the existence of the death penalty....

Finally, we note that even if the agreements were to ban the imposition of the death penalty, neither is binding on federal courts. 'Courts in the United States are bound to give effect to international law and to international agreements, except that a 'non-self-executing' agreement will not be given

effect as law in the absence of necessary authority.'Restatement (Third) of Foreign Relations Law § 111 (1987). Neither the American Declaration nor the International Covenant is self-executing, nor has Congress enacted implementing legislation for either agreement. *See Garza v. Lappin,* 253 F.3d 918, 923 (7th Cir.2001) (stating that the "American Declaration ... is an aspirational document which ... did not on its own create any enforceable obligations on the part of any of the OAS member nations"); *Beazley v. Johnson,* 242 F.3d 248, 267-68 (5th Cir.2001)(citing cases and other sources indicating that the International Covenant is not self-executing); *Hawkins,* 33 F.Supp.2d at 1257 (noting that Congress has not enacted implementing legislation for the International Covenant).

***33** *Buell v. Mitchell,* 274 F.3d at 371-72.

As in the present case, the defendant in *Buell v. Mitchell* additionally asserted that the Ohio death penalty violates customary international law. The Sixth Circuit rejected this argument also. The court held:

The prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary international norm. This is confirmed by the fact that large numbers of countries in the world retain the death penalty. Indeed, it is impossible to conclude that the international community as a whole recognizes the prohibition of the death penalty, when as of 2001, 147 states were parties to the International Covenant, which specifically recognize the existent of the death penalty.

Buell v. Mitchell, 274 F.3d at 373(internal citations omitted).
Moreover, since the abolition of the death penalty is not a customary norm or international law, it cannot have risen to the level that the international community as a whole recognizes as *jus cogens,* or a norm from which no derogation is permitted. Therefore, we cannot conclude that the abolition of the death penalty is a customary norm of international law or that it has risen to the higher status of *jus cogens.*

Id. at 373.The court additionally advised
We believe that in the context of this case, where customary international law is being used as a defense against an otherwise constitutional action, the reaction to any violation of customary international law is a domestic question that must be answered by the executive and legislative branches. We hold that the determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it [is] their constitutional role to determine the extent of this country's international obligations and how best to carry them out.

Id. at 375-76 (footnote omitted).

The clear weight of federal and state authority dictates that no customary or international law or international treaty prohibits the State of Tennessee from invoking the death penalty as a punishment for certain crimes. *See Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989); *White v. Johnson,* 79 F.3d 432, 439 (5th Cir.1996); *Buell v. Mitchell,* 274 F.3d at 337;*United Mexican States v. Woods,* 126 F.3d 1220, 1223 (9th Cir.1997); *United States v. Bin Laden,* 126 F.Supp.2d 290, 294-95 (S.D.N.Y.2001) (United States is not a party to any treaty that prohibits capital punishment, per se, and total abolishment of capital punishment has not yet risen to the level of customary international law); *Faulder v. Johnson,* 99 F.Supp.2d 774, 777 (S.D.Tex.,), *aff'd,*178 F.3d 741 (5th Cir.1999) (In signing Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights, United States made reservation stating that it understood language to mean cruel and unusual punishment as defined by the Eighth Amendment, which does not prohibit the death penalty); *Jamison,* 100 F.Supp.2d at 766;*Workman v. Sundquist,* 135 F.Supp.2d 871 (M.D.Tenn.2001); *People v. Ghent,* 43 Cal.3d 739, 778-79, 239 Cal.Rptr. 82, 739 P.2d 1250 (1987); *State v. Gary W. Kleypas,* 272 Kan. 894, 40 P.3d 139 (Kan.2001); *Domingues v. Nevada,* 114 Nev. 783, 785, 961 P.2d 1279 (1998); *New Jersey v. Nelson,* 155 N.J. 487, 512, 715 A.2d 281 (1998); *State v. Phillips,* 74 Ohio St.3d 72, 656 N.E.2d 643, 671 (Ohio 1995); *Hinojosa v. Texas,* 4 S.W.3d 240, 252 (Tex.Crim.1999). We join in the conclusions reached by our sister courts. For these reasons, we reject Defendant's contentions and conclude that Defendant is not entitled to relief on this issue.

VI. Constitutionality of Tennessee Death Penalty Statutes

***34** Defendant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Included within his challenge that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8, 9, 16, and 17, and Article II, Section 2 of the Tennessee Constitution are the following:

1. Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants, specifically, the statutory aggravating circumstances set forth in Tennessee Code Annotated section 39-2-203(i)(2), (i)(5), (i)(6), and (i)(7) have been so broadly interpreted whether viewed singly or collectively, fail to provide such a "meaningful basis" for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death. We note that factors (i)(5), (i)(6) and (i)(7) do not pertain to this case as they were not found by the jury. Thus, any individual claim with respect to these factors is without merit. *See, e.g., Hall,* 958 S.W.2d at 715;*Brimmer,* 876 S.W.2d at 87. Also, this argument has been rejected by our supreme court. *See Vann,* 976 S.W.2d at 117-118(Appendix); *State v. Keen,* 926 S.W.2d 727, 742 (Tenn.1994).

2. The death sentence is imposed capriciously and arbitrarily in that

(a) Unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty. This argument has been rejected. *See State v. Hines,* 919 S.W.2d 573, 582 (Tenn.1995), *cert. denied,*519 U.S. 847, 117 S.Ct. 133, 136 L.Ed.2d 82 (1996).

(b) The death penalty is imposed in a discriminatory manner based upon economics, race, geography, and gender. This argument has been rejected. *See Hines,* 919 S.W.2d at 582;*State v. Brimmer,* 876 S.W.2d 75, 87 (Tenn.), *cert. denied,*513 U.S. 1020, 115 S.Ct. 585, 130 L.Ed.2d 499 (1994); *State v. Cazes,* 875 S.W.2d 253, 268 (Tenn.1994); *State v. Smith,* 857 S.W.2d 1, 23 (Tenn.), *cert. denied,*510 U.S. 996, 114 S.Ct. 561, 126 L.Ed.2d 461 (1993).

(c) There are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter. This argument has been rejected. *See State v. Caughron,* 855 S.W.2d 526, 542 (Tenn.), *cert. denied,*510 U.S. 979, 114 S.Ct. 475, 126 L.Ed.2d 426 (1993).

(d) The death qualification process skews the make-up of the jury and results in a relatively prosecution prone guilty-prone jury. This argument has been rejected. *See State v. Teel,* 793 S.W.2d 236, 246 (Tenn.), *cert. denied,*498 U.S. 1007, 111 S.Ct. 571, 112 L.Ed.2d 577 (1990); *State v. Harbison,* 704 S.W.2d 314, 318 (Tenn.), *cert. denied,*470 U.S. 1153, 106 S.Ct. 2261 (1986).

(e) Defendants are prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing, i.e., the cost of incarceration versus cost of execution, deterrence, and method of execution. This argument has been rejected. *See Brimmer,* 876 S.W.2d at 86-87;*Cazes,* 875 S.W.2d at 268;*State v. Black,* 815 S.W.2d 166, 179 (Tenn.1991).

***35** (f) The jury is instructed that it must agree unanimously in order to impose a life sentence, and is prohibited from being told the effect of a non-unanimous verdict. This argument has been rejected. *See Brimmer,* 876 S.W.2d at 87;*Cazes,* 875 S.W.2d at 268;*Smith,* 857 S.W.2d at 22-23.

(g) Requiring the jury to agree unanimously to a life verdict violates *Mills v. Maryland* and *McKoy v. North Carolina.*This argument has been rejected. *See Brimmer,* 876 S.W.2d at 87;*State v. Thompson,* 768 S.W.2d 239, 250 (Tenn.1989); *State v. King,* 718 S.W.2d 241, 249 (Tenn.1986), *superseded by statute as recognized by, State v. Hutchinson,* 898 S.W.2d 161 (Tenn.1994).

(h) There is a reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances. This argument has been rejected. *See Thompson,* 768 S.W.2d 2 at 251-52.

(i) The jury is not required to make the ultimate determination that death is the appropriate penalty. This argument has been rejected. *See Brimmer,* 876 S.W.2d at 87;*Smith,* 857 S.W.2d at 22.

(j) The defendant is denied final closing argument in the penalty phase of the trial. This argument has been rejected. *See Brimmer,* 876 S.W.2d at 87;*Cazes,* 875 S.W.2d at 269;*Smith,* 857 S.W.2d at 24;*Caughron,* 855 S.W.2d at 542.

(k) Permitting a capital defendant to waive introduction of mitigation evidence without permitting such evidence to be placed in the record for purposes of proportionality review renders the Tennessee death penalty statutes unconstitutional. In essence, Defendant argues that the United States Constitution requires the sentencer to consider mitigating evidence to reach a rational and individualized determination of the appropriate sentence; if a defendant refuses to present such evidence, the imposition of a sentence of death will be imposed in a *per se* arbitrary and unreliable manner. Mitigating evidence is critical to the sentencer in a capital case. *See Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). However, one can choose to forego the presentation of mitigation evidence even over the contrary advice of counsel and warnings of the court. *See Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990); *Silagy v. Peters,* 905 F.2d 986, 1008 (7th Cir.1990). The Supreme Court of the United States does not require a defendant to present mitigating evidence; rather, statements by the Court regarding the ability of a defendant to present such evidence are phrased permissively. *See, e.g., Blystone v. Pennsylvania,* 494 U.S. at 307 n. 5, 110 S.Ct. at1083, n. 5; *McClesky v. Kemp,* 481 U.S. 279, 305-06, 107 S.Ct. 1756, 1774-75, 95 L.Ed.2d 262 (1987); *Skipper v. South Carolina,* 476 U.S. at 8, 106 S.Ct. at 1672-73;*Eddings v. Oklahoma,* 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. at 604, 98 S.Ct. at 2964-65. Indeed, the Eighth Amendment and evolving standards of decency neither require nor demand that an unwilling defendant present an affirmative penalty defense in a capital case. *See State v. Smith,* 993 S.W.2d 6, 13-14 (Tenn.1999); *People v. Bloom,* 48 Cal.3d 1194, 259 Cal.Rptr. 669, 774 P.2d 698, 718-719 (1989); *Wallace v. State,* 893 P.2d 504 (Okl.Crim.App.1995); *Hamblen v. State,* 527 So.2d 800, 804 (Fla.1988). Accordingly, the decision of a *competent* capital defendant not to present mitigating evidence does not deprive the State of its interests in seeing that his sentence was imposed in a constitutionally acceptable manner. *See Smith,* 993 S.W.2d at 14.

***36** (l) Mandatory introduction of victim impact evidence and mandatory introduction of other crime evidence upon the prosecutor's request violates separation of powers and injects arbitrariness and capriciousness into capital sentencing. Section 39-13-204(c) provides that a trial court "shall" permit a victim's representative to testify before the jury in sentencing.Tenn.Code Ann. § 39-13-204(c). Defendant asserts that "[t]his legislation improperly infringes upon a trial court's power to conduct proceedings and is thus a violation of separation of powers."Additionally, Faulkner contends that the legislative mandate and the supreme court's decision in *State v. Nesbit,* 978 S.W.2d 872 (Tenn.1998), "render death sentencing in Tennessee unconstitutional since this factor is rife with discrimination and violates equal protection guarantees of the state and federal constitutions."In essence, Defendant contends that the statutory provision amounts to an unauthorized intrusion upon the rulemaking power of the court.

Recently, in *State v. Mallard,* our supreme court discussed the role of the General Assembly and the Court regarding rules of evidence and procedure to be employed in court proceedings. *Mallard,* 40 S.W.3d 473, 481 (Tenn.2001). Our Supreme Court explained: The authority of the General Assembly to enact rules of evidence in many circumstances is not questioned by this Court. Its power in this regard, however, is not unlimited, and any exercise of that power by the legislature must inevitably yield when it seeks to govern the practice and procedure of the courts. Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state, *see, e.g., State v. Reid,* 981 S.W.2d 166, 170 (Tenn.1998) ("It is well settled that Tennessee courts have inherent power to make and enforce reasonable rules of procedure."); *see also*Tenn.Code Ann. §§ 16-3-401, 402 (1994), and this inherent power "exists by virtue of the establishment of a Court and not by largess of the legislature,"*Haynes v. McKenzie Mem'l Hosp.,* 667 S.W.2d 497, 498 (Tenn.Ct.App.1984). Furthermore, because the power to control the practice and procedure of the courts is inherent in the judiciary and necessary "to engage in the complete performance of

the judicial function,"*cf. Anderson County Quarterly Court v. Judges of the 28th Judicial Cir.*, 579 S.W.2d 875, 877 (Tenn.Ct.App.1978), this power cannot be constitutionally exercised by any other branch of government, *see*Tenn. Const. art. II, § 2 ("No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."). In this area, "[t]he court is supreme in fact as well as in name."*See Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn.1976).

Mallard, 40 S.W.3d at 480-81.

Notwithstanding, our Supreme Court recognized that circumstances arise where it is impossible to perfectly preserve the "theoretical lines of demarcation between the executive, legislative and judicial branches of government."*Mallard*, 40 S.W.3d at 481 (quoting *Petition of Burson*, 909 S.W.2d 768, 774 (Tenn.1995)). Noting the interdependency of the three branches of government, the supreme court acknowledged the "broad power of the General Assembly to establish rules of evidence in furtherance of its ability to enact substantive law."*Mallard*, 40 S.W.3d at 481 (citing *Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739, 743 (1965)). However, the legislature's enactment of rules for use in the courts of this state must be confined to those areas that are appropriate to the exercise of that power. *Id.* Additionally, the court acknowledged the judiciary's acceptance of procedural or evidentiary rules promulgated by the General Assembly where the legislative enactments (1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court. *Id.* (citing *Newton v. Cox*, 878 S.W.2d 105, 112 (Tenn.1994)). In so holding, the court stated that "[t]his Court has long held the view that comity and cooperation among the branches of government are beneficial to all, and consistent with constitutional principles, such practices are desired and ought to be nurtured and maintained."*Id.*

***37** Effective, July 1, 1998, Section 39-13-204(c), Tennessee Code Annotated, was amended to include the following language:

In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, **either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction.**Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of such evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor. The **court may permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons.**Such **evidence may be considered by the jury** in determining which sentence to impose. The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons shall testify during the sentencing proceeding as to the impact of the offense.

(Emphasis added).

As of the effective date of the amendment, the supreme court had not yet filed its decision in *State v. Nesbit. Nesbit* was decided and released on September 28, 1998. *Nesbit* held that Tennessee's capital sentencing statute authorizes the admission of victim impact evidence as "one of those myriad factors encompassed within the statutory language nature and circumstances of the crime."*Nesbit*, 978 S.W.2d at 890.

We do not presume that the legislature intended to usurp the role of the courts in exercising the judicial power of the state. Nor do we presume that the legislature intended to infringe upon the proper exercise of the judicial power in this state. Rather, we interpret the legislature's action in amending section 39-13-204(c) as supplementing the operation of the Rules of Evidence. The use of the word "shall" is generally mandatory, but in the present context is not inflexible. The statute does not indicate what weight should be given to the evidence nor does it indicate what sentence should be imposed. Moreover, regarding victim impact, the statute provides that the trial court "may" permit introduction of said evidence.

Consequently, the contested language does not impermissibly infringe upon the powers of the court.

Our conclusion is advocated by the position of our supreme court on this very subject. Indeed, our supreme court has made clear that "the rules of evidence do not limit the admissibility of evidence in a capital sentencing proceeding."*State v. Stout,* 46 S.W.3d 689, 702 (Tenn.2001) (citing *Van Tran v. State,* 6 S.W.3d 257, 271 (Tenn.1999)). The supreme court has interpreted section 39-13-204(c) as permitting "trial judges wider discretion than would normally be allowed under the Tennessee Rules of Evidence in ruling on the admissibility of evidence at a capital sentencing hearing."*Stout,* 46 S.W.3d at 703 (quoting *State v. Sims,* 45 S.W.3d 1, 14 (Tenn.2001)). To further exemplify the supreme court's acceptance of the legislature's action in this area, we restate the following principles adopted by our supreme court in *State v. Sims:*

***38** The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.

Stout, 46 S.W.3d at 703 (citing *Sims,* 45 S.W.3d at 14). Accordingly, we conclude that the 1998 amendment to section 39-13-204(c), Tennessee Code Annotated, does not violate the separation of powers clauses of either the Constitution of the State of Tennessee nor the Constitution of the United States of America.
3. The appellate review process in death penalty cases is constitutionally adequate. *See Cazes,* 875 S.W.2d at 270-71;*Harris,* 839 S.W.2d at 77. Moreover, the supreme court has held that, "while important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required."*See State v. Bland,* 958 S.W.2d 651, 663 (Tenn.1997), *cert. denied,*523 U.S. 1083, 118 S.Ct. 1536, 140 L.Ed.2d 686 (1998).

VII. Review Pursuant to Tenn.Code Ann. § 39-13-206(c)

For a reviewing court to affirm the imposition of a death sentence, Tennessee Code Annotated section 39-13-206(c)(1) requires a determination that:

(1) the sentence was not imposed in an arbitrary fashion;

(2) the evidence supports the jury's finding of statutory aggravating circumstance(s);

(3) the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances; and

(4) the sentence is not excessive or disproportionate to the penalty imposed in similar cases.

Tenn.Code Ann. § 39-13-206(c)(1). The sentencing phase in the present case was conducted pursuant to the procedure established in the applicable statutory provisions and rules of criminal procedure. We conclude that the sentence of death, therefore, was not imposed in an arbitrary fashion. Moreover, the evidence indisputably supports aggravating circumstances (i)(2) (the Defendant was previously convicted of one or more felonies which involved the use or threat of violence to the person).

Additionally, this Court is required by section 39-13-206(c)(1)(D), Tennessee Code Annotated, and under the mandates of *State v. Bland,* 958 S.W.2d 651, 661-674 (Tenn.1997), *cert. denied,*523 U.S. 1083, 118 S.Ct. 1536, 140 L.Ed.2d 686 (1998) to consider whether the Defendant's sentence of death is disproportionate to the penalty imposed in similar cases. *See State v. Godsey,* 60 S.W.3d 759, 781-82 (Tenn.2001). The comparative proportionality review is designed to identify aberrant, arbitrary, or capricious sentencing by determining whether the death penalty in a given case is "disproportionate to the punishment imposed on others convicted of the

same crime."*Stout,* 46 S.W.3d at 706 (citing *Bland,* 958 S.W.2d at 662 (quoting *Pulley v. Harris,* 465 U.S. 37, 42-43, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984)). If a case is "plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed," then the sentence is disproportionate." *Stout,* 46 S.W.3d at 706 (citations omitted).

***39** In conducting our proportionality review, this Court must compare the present case with cases involving similar defendants and similar crimes. *See Stout,* 46 S.W.3d at 706 (citation omitted); *see also Terry v. State,* 46 S.W.3d 147, 163 (Tenn.2001) (citations omitted). We select only from those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. *See State v. Carruthers*, 35 S.W.3d 516, 570 (Tenn.2000), *cert. denied*,533 U.S. 953, 121 S.Ct. 2600, 150 L.Ed.2d 757 (2001) (citations omitted); *see also Godsey*, 60 S.W.3d at 783. We begin with the presumption that the sentence of death is proportionate with the crime of first-degree murder. *See Terry,* 46 S.W.3d at 163 (citing *State v. Hall,* 958 S.W.2d 679, 799 (Tenn.), *cert. denied*,524 U.S. 941, 118 S.Ct. 2348, 141 L.Ed.2d 718 (1998)). This presumption applies only if the sentencing procedures focus discretion on the " 'particularized nature of the crime and the particularized characteristics of the individual defendant.' " *Terry,* 46 S.W.3d at 163 (citing *McCleskey v. Kemp,* 481 U.S. 279, 308, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (quoting *Gregg v. Georgia,* 428 U.S. 153, 206, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976))).

Applying this approach, the Court, in comparing this case to other cases in which the defendants were convicted of the same or similar crimes, looks at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating factors involved. *See Terry,* 46 S.W.3d at 164. Regarding the circumstances of the crime itself, numerous factors are considered including: (1) the means of death, (2) the manner of death, (3) the motivation for the killing, (4) the place of death, (5) the victim's age, physical condition, and psychological condition, (6) the absence or presence of provocation, (7) the absence or presence of premeditation, (8) the absence or presence of justification, and (9) the injury to and effect on non-decedent victims. *Stout,* 46 S.W.3d at 706 (citing *Bland,* 958 S.W.2d at 667);*see also Terry,* 46 S.W.3d at 164. Contemplated within the review are numerous factors regarding the defendant, including: (1) prior criminal record, (2) age, race, and gender, (3) mental, emotional, and physical condition, (4) role in the murder, (5) cooperation with authorities, (6) level of remorse, (7) knowledge of the victim's helplessness, and (8) potential for rehabilitation.*Stout,* 46 S.W.3d at 706;*Terry,* 46 S.W.3d at 164.

In completing our review, we remain cognizant of the fact that "no two cases involve identical circumstances."*See generally Terry,* 46 S.W.3d at 164. Accordingly, there is no mathematical or scientific formula to be employed. *See State v. Richard Hale Austin,* No. W1999-00281-CCA-R3-DD.Thus, our function is not to limit our comparison to those cases where a death sentence "is perfectly symmetrical," but rather, our objective is only to "identify and to invalidate the aberrant death sentence."*Terry,* 46 S.W.3d at 164 (citing *Bland,* 958 S.W.2d at 665).

***40** The circumstances surrounding the murder in light of the relevant and comparative factors reveal that just after midnight on Friday, January 22, 1999, Defendant, brandishing a frying pan and horseshoe, repeatedly struck his estranged wife, Shirley, repeatedly across the head. Indeed, an autopsy revealed that there were at least thirteen injuries centered about the head during the attack lasting over six minutes. Additionally, the attack was committed while the victim was on the floor. The previous evening, Shirley had made a complaint against Defendant to the Memphis Police Department. Specifically, Shirley Faulkner reported that Defendant had struck her with his fist. Defendant also threatened to kill Mrs. Faulkner. This statement was verified by the presence of swelling on the left side of the victim's face. Evidence was further introduced demonstrative of the victim's fear of Defendant. Two days after the murder, Defendant turned himself in to authorities at the Shelby County Sheriff's Department.

Defendant was previously convicted of one count of second-degree murder and four counts of robbery in 1984. Additionally, Defendant was convicted of assault with intent to commit murder in the first-degree, assault with intent to commit robbery, and assault with intent to commit voluntary

manslaughter. These convictions all occurred in 1976. Evidence was presented establishing that Defendant was subject to quite a deal of neglect and abuse. His parents were alcoholics and one parent abused drugs. As a result, Defendant was placed in foster home situations. As an adult, Defendant developed a drug addiction, involving the use of cocaine, marijuana and alcohol. A psychologist determined that Defendant had a predisposition toward impulsive behavior that was aggravated by stressors, e.g., marital difficulties and suicide of close friend. Indeed, the psychologist concluded that Defendant was capable of flying into a rage and, under states of emotion, acts before he thinks.

While no two capital cases and no two capital defendants are alike, we have reviewed the circumstances of the present case with similar first-degree murder cases and conclude that the penalty imposed in the present case is not disproportionate to the penalty imposed in similar cases. The sentence of death has been upheld in cases where the defendant had killed an estranged wife or girlfriend in a domestic violence context. *See, e.g., State v. Suttles*, 30 S.W.3d 252 (Tenn.2000) (defendant stabbed estranged girlfriend in Taco Bell parking lot; (i)(2) and (i)(5) aggravating circumstances); *State v. Keough*, 18 S.W.3d 175 (Tenn.2000) (after arguing in a bar, defendant followed his estranged wife outside; stabbed her with a knife and left her to bleed to death inside the car; (i)(2) only aggravating factor); *State v. Hall*, 8 S.W.3d 593 (Tenn.1999) (beating, strangulation and drowning death of estranged wife; children were present during part of the assault; one of the aggravating circumstances was (i)(5)); *State v. Hall*, 958 S.W.2d 679 (Tenn.1997) (angered by his girlfriend's decision to leave him, the defendant searched for her, and set fire to her car when she was inside; aggravating circumstance (i)(5) was found); *State v. Smith*, 868 S.W.2d 561 (Tenn.1993) (killing of estranged wife, aggravating circumstance (i)(5) was found); *State v. Johnson*, 743 S.W.2d 154 (Tenn.1987) (killing of estranged wife by suffocation, aggravating circumstances (i)(2) and (i)(5) were present); *State v. Cooper*, 718 S.W.2d 256 (Tenn.1986) (defendant deliberately shot estranged wife after threatening her and stalking her for some time; aggravating circumstance (i)(5) was found). Additionally, the sentence of death has consistently been found proportionate where only one aggravating factor is found. *E.g., State v. Sledge*, 15 S.W.3d 93 (Tenn.), *cert. denied*,531 U.S. 889, 121 S.Ct. 211, 148 L.Ed.2d 149 (2000) (prior violent felony); *Hall*, 8 S.W.3d at 593 (heinous atrocious, cruel); *State v. Middlebrooks*, 995 S.W.2d 550 (Tenn.1999) (heinous, atrocious, cruel); *State v. Matson*, 666 S.W.2d 41 (Tenn.), *cert. denied*,469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984) (felony murder); *State v. Caldwell*, 671 S.W.2d 459 (Tenn.), *cert. denied*,469 U.S. 873, 105 S.Ct. 231, 83 L.Ed.2d 160 (1984) (prior violent felony).

***41** Although a lesser sentence has been imposed in similar cases involving the killing of estranged wives or girlfriends, these cases are distinguishable in that the defendant had not been previously convicted of violent felony offenses. *See, e.g., State v. Dick*, 872 S.W.2d 938 (Tenn.Crim.App.1993); *State v. Weems*, No. 02C01-9401-CR-00011 (Tenn.Crim.App. at Jackson, July 26, 1996); *State v. King*, C.C.A. No. 4 (Tenn.Crim.App. at Jackson, Feb. 10, 1988). Moreover, our function is not to invalidate a death sentence merely because the circumstances may be similar to those in which a defendant received a less severe sentence. Instead, our review requires a determination of whether a case plainly lacks circumstances found in similar cases where the death penalty has been imposed. *Bland*, 958 S.W.2d at 665.

Our review of these cases reveals that the sentence of death imposed upon Defendant is proportionate to the penalty imposed in similar cases. In so concluding, we have considered the entire record and reach the decision that the sentence of death was not imposed arbitrarily, that the evidence supports the finding of the (i)(2) aggravator, that the evidence supports the jury's finding that the aggravating circumstance outweighs mitigating circumstances beyond a reasonable doubt, and that the sentence is not excessive or disproportionate.

X. Conclusion

Having fully reviewed the record, the briefs and the applicable authority, we affirm the Defendant's conviction of first degree murder. Additionally, in accordance with the mandate of section 39-13-206(c)(1), Tennessee Code Annotated, and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this cause and find the sentence of death was not imposed in any arbitrary fashion, that the evidence supports, as previously discussed, the jury's finding of

the statutory aggravating circumstance, and that the jury's finding that the aggravating circumstance outweighed mitigating circumstances beyond a reasonable doubt.Tenn.Code Ann. § 39-13-206(c)(1)(A)(C). A comparative proportionality review, considering both "the nature of the crime and the defendant," convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Accordingly, we affirm the sentence of death imposed by the trial court.

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END APPENDIX