

1 A. Yes, sir.

2 Q. -- my understanding is that was from 2003 and
3 2004 that you have said; is that right?

4 A. I don't remember the exact year, sir.

5 Q. I understand that totally; but it has not been
6 recently, has it?

7 A. No, sir.

8 Q. Not recently prior to the event?

9 A. No, sir.

10 MR. STRADLEY: I'll pass the witness, Judge.
11 Thank you.

12 MS. MICKELSON: Thank you. Nothing further.
13 May this witness be excused?

14 THE COURT: You may step down, Ms. Garcia.
15 State, call your next witness.

16 MS. MICKELSON: The State would call Jennifer
17 Varela.

18 (Witness sworn.)

19 THE COURT: You may take the stand.

20 JENNIFER VARELA,
21 having first been duly sworn, testified as followed:

22 DIRECT EXAMINATION

23 BY MS. MICKELSON:

24 Q. Ms. Varela, could you please introduce yourself
25 to the jury?

1 A. Hello my name is Jennifer Varela.

2 Q. How are you currently employed?

3 A. I'm a licensed clinical social worker and
4 Director of Family Violence Services with the Harris
5 County District Attorney's office.

6 Q. Now, can you tell us a little bit about your
7 background and what type of training you've had to have
8 this job that you do today?

9 A. I have a master's degree in social work and I was
10 licensed initially and then I completed two years of
11 clinical supervision and received my clinical license and
12 I've had a number of professional training for domestic
13 violence, as well as many classes; and I've taught at the
14 graduate college of social work. I taught a domestic
15 violence course there.

16 Q. Now, can you tell us just briefly what are your
17 responsibilities working as a social worker here at the
18 District Attorney's office?

19 A. It's my job to oversee people come to our office
20 regarding domestic violence issues. We have about 3,500
21 people that come to our office every year. So I receive a
22 social service staff. There's 12 of us; and mainly we're
23 talking to people and seeing how we can help them, what
24 type of situation that they're in.

25 If there's a criminal case, you know, we

1 tell them -- we provide information to the prosecutor.
2 They may applying with that process. But the main thing
3 is crisis intervention, you know, seeing how we can help
4 them to help them get safer and then we'll provide
5 supportive counseling and get hooked up with other
6 services.

7 Q. Here, in your role, do you train other people?

8 A. Yes.

9 Q. Do you speak at professional conferences on
10 domestic violence?

11 A. Yes.

12 Q. Are you a supervisor?

13 A. Yes.

14 Q. Now, are your services solely for the victims of
15 abuse?

16 A. Well, our focus is for people who's been through
17 domestic violence.

18 Q. My question really is, family violence, is it
19 more always just between a husband and wife?

20 A. No. It's primarily intimate partner
21 relationship, same sex. We might have cases where
22 adult/child has, you know, assaulted an elderly parent.
23 So we'll have situations like that, but mostly it's
24 intimate partners.

25 Q. Just tell us, what is the nature of the type of

1 contact that you have with victims?

2 A. You can kind of think of this like an ER for
3 domestic violence. It's more of a crisis service. That's
4 pretty much domestic violence. So they'll come and we'll
5 talk to them, and we'll try to assess their situation to
6 help them get safe and you know -- which may include some
7 legal services, getting them in a shelter, hooked up with
8 other services.

9 Q. Now, do you maintain statistics as part of the
10 work you do?

11 A. We do.

12 Q. And what is the purpose of those statistics?

13 A. We have some grants that we have to provide
14 numbers on.

15 Q. And have you previously testified in court
16 before?

17 A. Yes.

18 Q. Was it in a criminal or civil case?

19 A. Both.

20 Q. How many times have you testified?

21 A. At least 150 as an expert witness.

22 Q. So you have been sworn in as an expert of human
23 violence before?

24 A. Correct.

25 Q. Now, from your experience, do most women, do they

1 talk about their experience freely?

2 A. It depends on where they are with the situation.
3 Sometimes they do, sometimes they don't.

4 Q. Can you give us examples of mental abuse?

5 A. You know, that's where you know, where the person
6 who's been abused called you stupid. "Yeah, I hit you but
7 you really are nagging me because you're such a bad
8 person."

9 You know, "You don't know how to do
10 things. You don't know how to dress," you know, wearing
11 down a person's self-esteem and their self-image.

12 Q. Could you give us examples of physical abuse?

13 MR. STRADLEY: Your Honor, this is not
14 relevant; and I also object under the 700 series in the
15 rules of evidence that this is not appropriate at this
16 time. It's improper opinion. It's not related to this
17 offense.

18 THE COURT: All right. We need to reel it in
19 a little bit be more specific about instances of abuse
20 that we're aware of in this case and ask her whether or
21 not they're consistent.

22 MS. MICKELSON: Yes, sir. I was trying to
23 lay a foundation.

24 Q. (BY MS. MICKELSON) Ms. Varela, did you have an
25 ability to interview the complainant Leticia Garcia in

1 this case?

2 A. Yes. I was referred the case by a defense
3 attorney who knew one of the attorneys that she worked
4 with; and I went out, along with my co-worker Norma and we
5 went to Ms. Garcia's mother's home and we talked to her
6 and Victoria on August the 3rd of 2010.

7 Q. And so you actually went to and met with
8 Ms. Garcia really quite quickly after this; isn't that
9 fair to say?

10 A. Correct.

11 Q. And what were your observations? What were your
12 physical observations of her at that time?

13 A. Well, she had -- she was actually in bed; and she
14 had her face covered. So we really couldn't see much of
15 her injuries, but we talked about what happened. They had
16 several family members there and it seemed like everybody
17 was gathered together to take care of them.

18 And I would say that Leticia was pretty
19 much in shock about what happened. She was actually kind
20 of calm. That's calm where you're trying to figure out
21 what happened to you; and then I --

22 MR. STRADLEY: Object to narrative, Your
23 Honor.

24 THE COURT: Let's proceed with question and
25 answer.

1 Q. (BY MS. MICKELSON) My question was, what was
2 your physical observations? I mean, you had been
3 elaborating on what you observed. What was her mental
4 state?

5 A. She really seemed in shock. She was scared. She
6 was, seem to me to be in a stage of still trying to
7 process what happened to her and that what this was going
8 to mean for her life.

9 Q. What was the purpose of you going to her home
10 that day?

11 A. I wanted to, you know, see how they were doing,
12 see how we could help increase their safety in terms of
13 the legal side, something that I could communicate to the
14 prosecutor, you know, maybe in terms of court orders or
15 bounds and things like that.

16 Q. Now, what types of things, what would you say
17 while you were there and you were collecting information
18 and giving her information, did you have specific
19 questions about how the defendant's behavior?

20 A. Yes.

21 Q. What types of things did you ask Ms. Garcia?

22 A. I did a typical assessment that I normally do. I
23 asked them about the major of the relationship, you know
24 the behaviors, you know, what was the course of the
25 relationship.

1 I normally ask about first, worst and
2 last incidents of violence, which I did in this case; and
3 you know, just trying to sort of figure out how we got to
4 this point, what led up to this.

5 Q. And so what was your assessment of the
6 relationship between the Defendant and Ms. Garcia while
7 you conducted the assessment?

8 MR. STRADLEY: Your Honor, I object to
9 anything that's based on hearsay.

10 THE COURT: It's overruled.

11 A. She told me that they had been in a relationship
12 for several years but she would go in and out relationship
13 due to his violence and drinking and then she ended the
14 relationship several years prior but they still had an
15 ongoing, not perhaps romantic relationship; but because of
16 the children, they still saw each other but she told me
17 was afraid to ever file child support on him because of
18 what he would do. So -- and she told me he was always
19 very jealous and controlling.

20 MR. STRADLEY: Objection. Hearsay.

21 THE COURT: Jury, disregard the portion about
22 child support and calling child support. Let me get
23 lawyers up here real quick.

24 (A brief discussion was held off the record.)

25 Q. (BY MS. MICKELSON) Ms. Varela, are you aware --

1 familiar with something that's called a Lithotomy
2 assessment?

3 A. Yes.

4 Q. Can you tell us what is that?

5 A. That's the one that we use as based on research
6 from the National Institute of Justice and some objective
7 measures that we try to ask all of our complainants about,
8 just kind of to assess, you know, how dangerous the
9 situation could potentially be.

10 It's a risk assessment. So there's
11 certain questions that you ask -- "Did this happen? Is
12 this behavior present or is not present?" And it's a
13 risk. Even if you have a lot of factors, it does not mean
14 this is going to happen. It just means your risks are
15 higher or lower.

16 Q. What are those factors?

17 A. If there was ever any violence during pregnant.
18 If there's a substance abuse issue, every threat or use of
19 a weapon in the past, any kind of increased use of
20 violence, interaction with law enforcement without change
21 in behavior and this kind of controlling and you know,
22 jealous obsessive sort of behavior.

23 MR. STRADLEY: Your Honor, I'm going to
24 object to this line of testimony. Is improper opinion.
25 It's, we need to have a daubert hearing to determine

1 whether or not it meets the threshold of scientific
2 evidence from a courtroom.

3 THE COURT: Okay. Please take the jury out.

4 At this point, we'll go forward. All
5 right. Obviously, you can have an opinion or you can
6 establish expertise in the soft science as well. So go
7 ahead and prove her up again as an expert. I'll take any
8 objections from there. We'll move forward.

9 MS. MICKELSON: Your Honor, as a timing
10 issue, while we have this recess, would it be okay to
11 argue fingerprint expert outside the presence of the jury
12 and the Defendant because of the DWI, I offered a
13 stipulation --

14 THE COURT: No. He needs to be present and
15 listening to his trial and not being fingerprinted while
16 doing this hearing. You have to wait a minute. There
17 will be an opportunity.

18 Q. (BY MS. MICKELSON) Ms. Varela -- and let's start
19 from the beginning again. What is your current
20 occupation?

21 MR. STRADLEY: Judge, just so for the sake of
22 streamlining this, I'm not interested in delaying this
23 process. It's just important to make this challenge at
24 this point as to whether or not this is reliable science.
25 I'm not -- she's already established her credentials.

1 THE COURT: Well, I think at this point, she
2 needs to do that; and we need to go through, you know,
3 through the process. Let's go ahead and that way the
4 record is clear.

5 MR. STRADLEY: yes, sir.

6 THE COURT: Go ahead.

7 MS. MICKELSON: Yes, sir.

8 Q. (BY MS. MICKELSON) What is your current
9 occupation?

10 A. Licensed clinical social worker, Director with
11 the Harris County District Attorney's office.

12 Q. How long have you been employed in that capacity?

13 A. I've been a social worker for 17 years this
14 summer. I've been the Director, I think, about 12 years.

15 Q. Can you describe the responsibilities of your
16 position?

17 A. I oversee the services that we provide to people
18 who've been involved in domestic violence situations.

19 Q. And how long has this program been in existence?

20 A. Since about 1984.

21 Q. And what type of services does your program
22 offer?

23 A. We provide crisis services to people who've been
24 through domestic violence crisis and supportive counseling
25 issues. We try to help them with things that the District

1 Attorney's office can do, like protective orders on
2 bonds.

3 We discuss -- we provide information to
4 the prosecutor so they can help evaluate the criminal case
5 if there is one pending.

6 Q. Now, you've already testified a moment ago that
7 you're a supervisor and train your staff. Can you tell us
8 how many people are on your staff.

9 A. There's a total of 12 of us on the social service
10 staff.

11 Q. Are you familiar with the batter intervention
12 program?

13 A. Yes.

14 Q. Do you ever participate in that program?

15 A. No.

16 Q. Do you have direct contact with victims of
17 domestic violence?

18 A. Yes.

19 Q. Do you have any contact -- just tell us how much
20 contact do you have with victims.

21 A. I usually see between three and four people a
22 week. I don't see people as much now as I used to; but
23 over my career, I've seen thousands of people, and I also
24 evaluate a lot of cases and do supervision, you know,
25 discuss a lot of cases with the people I supervise.

1 Q. And so while now your direct contact with victims
2 less frequent because you have other responsibilities, how
3 long have you been having this direct contact with victims
4 over the course of your years?

5 A. 17 years this past summer.

6 Q. I'd like to get more specifically to your
7 education. What is the highest degree you have obtained?

8 A. Master's degree in social work.

9 Q. What was your area of concentrate?

10 A. Political social work.

11 Q. And did you ever do any field work related to
12 domestic violence?

13 A. Not really.

14 Q. How did you then come to this speciality?

15 A. My husband is a defense attorney who heard about
16 a job opening. Seem like a good first job.

17 Q. You have been training or done any research since
18 you started this job?

19 A. A lot, yes.

20 Q. Can you describe for the Court what type of
21 training or research you conducted?

22 A. Well, I don't do -- I'm a clinical practitioner
23 but I read a loft of research but I train probably --
24 hundreds of police officers on domestic violence issues
25 and a whole lot of other people; and then I taught a class

1 at the graduate social work on domestic work.

2 Q. How long have you been teaching that class?

3 A. At the college?

4 Q. Yes, ma'am.

5 A. This summer was my first time.

6 Q. Now, have you attended state or national
7 conferences?

8 A. Yes.

9 Q. Who sponsors those conferences?

10 A. Texas Counsel on Family Violence National College
11 of District Attorneys, National Association of Social
12 Workers, just a whole variety.

13 Q. What are the purposes or education that you're
14 serving as.

15 THE COURT: I think we got far enough down
16 that road. What I need to -- what we need to do is talk
17 about the assessment, because that's what she's here to do
18 is to give an assessment. And so let's -- would you -- I
19 just need some information regarding that assessment; and
20 then I can probably -- well, first I'll give Mr. Stradley
21 an opportunity to ask questions; but that's probably all I
22 need.

23 MS. MICKELSON: All right.

24 Q. (BY MS. MICKELSON) We've gone over your
25 background. I'd like to turn to the assessments you did

1 in this case. Now, you said that you met with the victim,
2 with Leticia Garcia August 4th, 2010; is that fair?

3 A. The 3rd.

4 Q. And you went to other home?

5 A. Her mother's home, correct.

6 Q. How long were you there that day?

7 A. Only a couple of hours, I would say.

8 Q. Did you have direct contact with Ms. Garcia that
9 day.

10 THE COURT: What I mean, the instrument
11 itself, the assessment instrument itself, where does it
12 come from? And you know, is it something -- is that
13 something we can rely on? That's what I mean. That's
14 what you need to establish so that it can go before a
15 jury.

16 MS. MICKELSON: Yes, sir.

17 Q. (BY MS. MICKELSON) Can you explain to us what is
18 a Lithotomy assement?

19 A. A Lithotomy assessments is an instrument that can
20 be used to assess the level of risk in a domestic violence
21 situation. It's important to realize risk is not
22 predictive.

23 You know, you cannot say because they
24 have a high risk factor, it's research based on a whole
25 big group of people that says it's more likely to happen

1 or not more likely to happen.

2 Q. Is the Lithotomy assessments that you just told
3 us based on a lot of something that's commonly used in
4 your field?

5 A. Yes. And this one was published by the National
6 Institute of Justice.

7 Q. And so how long has that Lithotomy assement been
8 used in the field of domestic violence to assess, just the
9 risk, not the probablity; but how long has it been used?

10 A. This was published in, I think, 2003; and we've
11 been using it -- I'm not sure how many years we've been
12 using it. We've been using it at least probably since
13 2006, if not before; but I feel safe saying at least six.

14 Q. Is it fair to say that in the last five years, a
15 Lithotomy assessment is commonly used in your field?

16 A. Yes.

17 Q. Is sit something that other experts like yourself
18 rely upon across the country in testifying in these types
19 of cases?

20 A. Yes.

21 Q. Have you testified as an expert in other courts
22 regarding a Lithotomy assessment?

23 A. Yes.

24 Q. Has your testimony been accepted in those other
25 courts regarding this assessment?

1 A. Yes.

2 Q. Did you perform this same time of assessment and
3 use these same questions or procedures in this case?

4 A. Yes.

5 Q. And do you have an opinion in this case?

6 A. An opinion of what?

7 Q. The use of the Lithotomy assesement on
8 Mr. Petriciolet based on your interview of Leticia Garcia?

9 A. Are you asking me, do I have an opinion about his
10 further risk -- or her further risk?

11 Q. Is that something that you used in this case?

12 A. Yes.

13 THE COURT: All right. The question is:
14 Were you able to use that instrument in this case and were
15 you able to, I guess, come to a conclusion based on that
16 assessment or use that instrument to make an assessment?

17 THE WITNESS: Yes.

18 Q. (BY MS. MICKELSON) Because I know you're not
19 trying to predict, you know, whether or not it's going to
20 happen. It's simply an assessment that says whether or
21 not something is more likely not to happen; is that
22 correct?

23 A. That is correct.

24 MR. STRADLEY: Can I cross the witness?

25 THE COURT: Yes, sir.

1 CROSS-EXAMINATION

2 BY MR. STRADLEY:

3 Q. Ms. Varela, specifically, what is it that you
4 propose to tell the jury about the Lithotomy risk of this
5 situation? What are you going to tell them?

6 A. Well, it depends on what y'all ask me.

7 Q. What is your opinion, what is your --

8 A. Just talk. Okay. When I go out --

9 THE WITNESS: Like, you want me to just
10 talk?

11 THE COURT: Yeah.

12 MR. STRADLEY: Please.

13 A. When I go one of the things that I want to try to
14 figure out, especially in a really serious case, is how
15 did we get to this point? So what's happened in the past
16 that says that this could have been -- you know, was this
17 something that was just out of the blue, a pattern of
18 behavior?19 And some one of the things I was really
20 doing, we have this pattern of behavior that says, "Hey,
21 these things happened; but it's not so shocking that it
22 happened."23 And my answer to that is, "Yes, we did
24 have that pattern of behavior in the past. This is not so
25 shocking that this happened." If we're talking about

1 looking forward, I think what the research will tell us is
2 the fact that he's actually shot her, you know, the fact
3 that he shot her in such a vital area means he could score
4 high on the risk assessment. Now, is he going to shoot
5 her again? I don't know.

6 THE COURT: He would score high on the risk
7 assessment?

8 THE WITNESS: That is correct.

9 Q. (BY MR. STRADLEY) And so what if you could break
10 down -- what are the specific facts that you are using to
11 present that opinion that he has a higher risk of
12 something?

13 THE COURT: That's a fair question.

14 A. Yes. The number one thing is the fact that he's
15 used a weapon in the past and he's actually shot her and I
16 think like the average man on the street, I don't even
17 know if we need research to tell us that.

18 Q. (BY MR. STRADLEY) We don't need to have an
19 expert to tell us that the fact that Arturo -- we don't
20 need an expert to tell us that that is a dangerous thing,
21 do we?

22 A. I should hope that like most of us would have
23 enough common sense to realize that.

24 Q. You don't need to Lithotomy risk assessment to
25 say that or to give, you know, some scientific credance to

1 state that he's a danger? That's not really expert
2 testimony, is it?

3 A. You know, I guess it depends on who you ask,
4 because sometimes people -- you know, I think we all know
5 from past experience that people believe all kinds of
6 things that we assume that they would never believe and
7 it's not simply the shooting.

8 It's the rest of the behavior, the
9 jealous behavior, the controlling behavior, the fact that
10 he's been violent with her in the past and he himself said
11 that he went over there to check up on them every day or
12 send somebody on his crew, even prior to this happening.
13 So you got to look at everything.

14 Q. Let me frame a question so I'm unclear as to what
15 your expert opinion specifically is going to be. Are you
16 going to say that Arturo deserves a specific number of
17 years or range of years?

18 A. Absolutely not.

19 Q. Are you going to say you think he's violent?

20 A. I'm going to say that based on the risk
21 assessment that he would score higher on the domestic risk
22 assessment.

23 THE COURT: You know I would limit you to
24 that.

25 THE WITNESS: It's -- I don't want to make up

1 stuff that's not responsible, you know, to research.

2 THE COURT: Right.

3 Q. (BY MR. STRADLEY) Let me ask you a couple more
4 questions. This theory or method -- first of all, is this
5 a theory or a method?

6 A. It's a risk assessment.

7 Q. The Lithotomy risk assessment. Are you familiar
8 with the potential error rate toward this Lithotomy
9 assessment?

10 A. It has an error to be wrong. It's pretty high.
11 It's like 30 or 40 percent.

12 Q. Okay. But you don't know what that rate is?
13 Just high 30 or 40?

14 A. Because I read the research and if you're going
15 to ask me specific questions, I'd really like to go get a
16 copy of it. I hate to do that. I don't know if she has
17 the actual, the actual research in the journal article and
18 then the NIG.

19 THE COURT: Come forward so you can make sure
20 that you bring her the right thing. What's your name
21 name?

22 MS. NORMA: Norma.

23 THE COURT: You might need that on cross-
24 examination. You can proceed with any other questions
25 that you have.

1 MR. STRADLEY: Okay, Judge.

2 Q. (BY MR. STRADLEY) Ms. Varela, have you ever been
3 asked questions that would, that you have understood
4 applied to a daubert hearing before?

5 A. Yes.

6 Q. And have you ever been -- has your expert
7 testimony ever been rejected by any other court as it
8 relates your opinion about Lithotomy assessment?

9 A. Mostly if I'm not allowed to testify, it's been
10 in misdemeanor and it's mostly related to relevant issues;
11 and it's normally -- you can't testify at all because they
12 don't think it's relevant.

13 Q. And that's more of factors considered in a
14 daubert hearing. Do you know whether or not there exist a
15 series of standards or controls concerning a Lithotomy
16 assessment criteria? Does there exist standards and/or
17 control for this application of this theory?

18 A. Yes.

19 Q. What are they?

20 A. There's an instrument that we can use that has
21 the questions on it; but what we've done -- we sort of put
22 that into our own data base so we can collect statistics
23 on it.

24 When I get the actual journal article, I
25 can tell you more about the reviews and stuff; but it was

1 done -- the research was done in 10 different cities. And
2 what they did, they compared groups of people who were
3 killed in domestic violence and people that received a
4 potentially lethal injury and lived. They looked at the
5 previous factors that sort of led up to those instances.

6 Q. Now, is it your proposed testimony that you
7 think that if Arturo is allowed to exit outside of the
8 prison scenario, that he's likely to reoffend? Is that
9 what your testimony is going to be?

10 A. I would not say that. I would say he would score
11 high on the risk assessment.

12 Q. Is there --

13 A. I think that's predictive and I don't think
14 that's good science. I would just say that based on the
15 risk assessment, that he scores high on the risk
16 assessment.

17 Q. Just so I can get clear: You're proposed
18 testimony is that he scores high on the risk assessment,
19 period?

20 A. If that's what the prosecutor going to ask me.

21 Q. I'm not trying to be confrontational. Do you
22 have like a one through ten scale for this type of thing?
23 Are you just going to say he scores high?

24 A. I do not have a neurological score.

25 THE COURT: How are these measured -- high,

1 medium low?

2 THE WITNESS: You can get a neurological
3 score if you use the whole thing; but the biggest risk
4 factor is the use of a weapon.

5 MR. STRADLEY: Okay.

6 A. So that factor being present alone is the highest
7 risk factor.

8 MR. STRADLEY: Okay.

9 A. I'm not sure that we need to have, you know,
10 expert, I'm just really not sure about that part of it.

11 Q. (BY MR. STRADLEY) I don't either. That's why
12 I'm concerned about that -- you testifying as an expert
13 that you think he's a risk based on the fact that he used
14 a gun.

15 My statement to you and to the Court
16 would be that anybody can say that. We don't need to
17 cloak it in terms of an expert. I mean, that's something
18 that the jury could conclude.

19 THE COURT: That's an argument you can make
20 to the jury.

21 MR. STRADLEY: I'm trying to combine all of
22 it since the jury is not in here.

23 THE COURT: Do you have any other questions?
24 Do you need the journal?

25 MR. STRADLEY: Just let me review this real

1 quick.

2 THE COURT: All right.

3 THE WITNESS: Can I talk to the prosecutor?

4 Q. (BY MR. STRADLEY) With regards to the empirical
5 testing that can be applied to this scientific theory, it
6 is testable in any way?

7 A. I think it has been tested, but I don't want to
8 just remember that off the top of my head. I want to look
9 at the research.

10 MR. STRADLEY: That's all I have, Judge.

11 THE COURT: All right. Thank you. Okay.
12 This is -- I've got a couple. So you have this assessment
13 instrument?

14 THE WITNESS: Correct.

15 THE COURT: And it has a standard of
16 questions that you ask every person believed to be a
17 victim of domestic violence or family violence?

18 THE WITNESS: Either way is fine.

19 THE COURT: And it's a standard of questions
20 that you ask; and based on those questions, you have an
21 assessment?

22 THE WITNESS: Correct.

23 THE COURT: So the information that's
24 provided to you as a result of these questions, of course,
25 aren't necessarily hearsay, right? It's what they're

1 telling you?

2 THE WITNESS: Yes, sir.

3 THE COURT: But you need -- that's the
4 information that you used to make the assessment? So
5 you're not saying you can say -- and it's not your area to
6 say whether or not any of these things are totally true;
7 but it's reported based on that and what's reported and
8 you make an assessment, right?

9 So therefore, it's not offered for the
10 truth of the matter asserted but just for you making an
11 assessments, correct?

12 THE WITNESS: Yes. Of course there will be
13 collateral information.

14 THE COURT: Because that makes it something
15 other than hearsay. I'm trying to make sure that we get
16 to that. And you do have -- your assessments is a risk
17 assessment; but you don't operate behind a crystal ball.
18 You can't tell us if this happened? If you do, you should
19 run for a Bench.

20 THE WITNESS: Right.

21 THE COURT: So we're clear on that.

22 THE WITNESS: Yes, sir.

23 THE COURT: Okay. I'm going to let her
24 testify under those circumstances. She can talk about --
25 well, I'll hear your argument. I know what your argument

1 is going to be, is that we don't need an expert to do
2 this; but my opinion is that it is relevant and it's a
3 relevant assessment, because potentially, it could be used
4 to, I guess, in anticipation of a Defense argument that
5 this was some kind of average behavior and there was no --
6 you know, just something that came out very bizarre and
7 nobody can explain.

8 But if there's an assessments that's
9 done that says based on these factors he's high risk and
10 now at this point, even higher risk or whatever, then I
11 think that's something that can be argued by the State and
12 any potential argument from the Defense?

13 MR. STRADLEY: If I can put my objection on
14 the record?

15 THE COURT: Yes, sir, please.

16 MR. STRADLEY: First of all, with regard to
17 notice that we received about this particular witness,
18 your court review to the Court's file where the State's
19 notice in there, basically they intend to call Jennifer
20 Varela as an expert on domestic violence, as a clinical
21 social worker. It does not mention that she intended to
22 testify in regards to a Lithotomy assessment. So that's
23 number one.

24 THE COURT: I'm listening.

25 MR. STRADLEY: Number two, I certainly

1 anticipated that she would say she had a conversation with
2 the complaining witness and that the complaining witness
3 appeared to be frightful and afraid. I wasn't made aware
4 or notified that this specific scientific theory was going
5 to be used to risk assessment. I did not get notice.

6 Secondly, with regard this theory that
7 the Lithotomy assessment passes the daubert test, I would
8 argue that we have no evidence before the Court that this
9 scientific theory is falseable, rebuttable or testable at
10 all.

11 And specifically, that we know from the
12 proposed expert testimony that there is a 30 percent
13 potential error rate. So there is a concern that if she
14 tells the jury his risk assessment is high, it can be a 30
15 percent possibility that it could be wrong. It's not
16 reliable enough to be presented to the jury.

17 THE COURT: 70 percent, right? Go ahead.

18 MR. STRADLEY: I would argue that 30 percent
19 not right is a concern. And for the -- around the 30
20 argument, I'm unaware of any maintenance of standards with
21 regard this theory. As the Court don't need an expert to
22 tell us this. That concludes my argument, Your Honor.

23 THE COURT: All right. Thank you, very much,
24 sir. Again, I think that it's relevant. It's relevant
25 evidence. I think again in anticipation of an argument

1 from the Defense, that this was some kind of surprise or
2 unusual behavior by him; but you're going to be limited,
3 all right, to your assessment, to questions presented in
4 the assessment.

5 Of course, you can make objections to
6 those questions; but as I've stated for the purpose of it
7 being used in the assessment, it's not hearsay, in my
8 mind.

9 MR. STRADLEY: Okay, Judge. I don't know if
10 the Court intends to go right back into our hearing; but
11 for the sake of time, if I can review any reports that the
12 expert has. If you have any other court business, if you
13 want to take care of that while I'm doing that.

14 THE COURT: We can actually do fingerprints
15 then. We will take a break. Mr. Petriciolet, you'll have
16 to avail yourself to the deputy. He will take prints for
17 introduction.

18 (Off the record.)

19 THE COURT: Please stand, sir. Raise your
20 right hand.

21 THE CLERK: (Swears in the Defendant.)

22 THE COURT: I'm going to approve this make
23 and make a finding that it is freely and voluntarily. And
24 I'm going to return State's Exhibits 55 and 56 to the
25 State; and she's going to go ahead and finish up with this

1 witness. The hearing is over.

2 (Jury present.)

3 THE COURT: All right ladies and gentlemen,
4 thank you for giving me the time to resolve an issue here;
5 and this is where we are. I'm going to premit your
6 witness to testify as an expert in domestic violence,
7 social work and to testify concerning an assessment
8 instrument that's used in her field and her conclusion as
9 a basis of that assessment instrument.

10 Now, there could be -- in coming to her
11 conclusion using that assessment instrument, she has to
12 rely on information given to her from other people; and
13 she uses that information to reach her assessment.

14 She cannot tell you whether or not the
15 information that's given is true or not true. All right;
16 but we do know that is the information that she has to
17 reach her assessment.

18 In other words, those things are not
19 offered for the truth of the matter, just so that you know
20 what she used to reach her assessment. You may proceed.

21 MS. MICKELSON: Thank you, Your Honor.

22 Q. (BY MS. MICKELSON) Ms. Varela, I'm going to try
23 to ask you some specific questions around what the Judge
24 just told us. Did you speak with Leticia Garcia?

25 A. Yes, I did.

1 Q. And without telling us what she told you, did she
2 give you information about her relationship with the
3 Defendant?

4 A. She did.

5 Q. Throughout the course of this trial -- let's just
6 say this: Did you ever interview the Defendant in this
7 case?

8 A. I did not.

9 Q. Now, did you have the opportunity to hear him
10 testify in this case?

11 A. I did.

12 Q. Did you hear Ms. Garcia testify today during the
13 punishment phase of the trial?

14 A. I did.

15 Q. And have you taken the things that you've learned
16 before in your investigation and their testimony today,
17 have you taken those things to form an opinion in this
18 case?

19 A. Yes.

20 Q. In regards specifically to the incident that
21 already occurred on July 28th, 2010, once you had all the
22 information you collected, would you describe that
23 incident as an aberration or a unique event or is that
24 something you see that fits into a pattern of behavior?

25 A. I don't see it as an anomaly. I see it that --

1 something that does fit into a pattern of behavior based
2 on the things that you just said.

3 Q. Without telling us what anyone told you, what
4 types of things do you take into account in forming that
5 opinion?

6 A. Talking about, you know, the type of
7 relationship, what types the of things went on in the
8 relationship. I'm not sure how specific, in terms of
9 excessive jealous or controlling type of behavior or
10 action, any use of previous violence, any use of
11 substances, you know, in the past, any interaction with
12 law enforcement and also we look at particular types of
13 violence if they've been present or not.

14 Q. Now, in other words, to the Lithotomy assessment,
15 can you tell us what factors go into -- are you
16 evaluating -- what are the factors you look at in the
17 Lithotomy assessment?

18 A. We look at, well, pretty much just all the things
19 that I just said. We look at the type of violence that
20 has happened in the past, the frequency, has it increased,
21 the severity of the violence, this isolating type
22 behavior, look at the presence of substance abuse, of
23 mental illness, if there was any violence during a
24 pregnancy in the past, use of weapon in the past.

25 Q. Now, when you take all of those factors into

1 account in your Lithotomy assessment, you -- I know that
2 you cannot predict what anyone will do, what are you
3 trying to use the Lithotomy assessment to do?

4 A. We're trying to look at risk. It's really
5 important to understand the difference between risk and
6 possibility. Risk is something more or less likely to
7 happen. It does not mean it's going to happen.

8 So if we have ten things on our risk
9 assessment and we check off -- we have eight of these
10 things, it does not mean that this person is going to do
11 something in the future. It means they're more likely to
12 do something in the future.

13 Q. So you're not here trying to tell us that you can
14 say to a 78 percent accuracy that something will happen in
15 the future?

16 A. In terms of this, yes, that's right.

17 Q. Can you tell us what is the highest risk factor
18 in the Lithotomy assessment?

19 A. It's the use of a weapon.

20 Q. And is that factor present in this case?

21 A. Yes.

22 Q. Now, when you talked a moment ago about substance
23 abuse, does substance abuse include alcohol?

24 A. Yes.

25 Q. Now, in regards to the Lithotomy risk factors

1 other than the use of a weapon, were there other factors
2 that were present that you know of based on the testimony
3 you heard and the people you've spoken to?

4 A. Yes.

5 Q. Can you tell us which factors you also noted in
6 this case?

7 A. The previous use of violence, privilege threats,
8 the type of control and jealous behavior that the
9 Defendant exhibited in the past, also talking from
10 Ms. Garcia and her daughter Victoria, also the Defendant's
11 mood and behavior in the weeks indicated that something
12 was wrong, there was a change in behavior.

13 Q. Now, in regards to this case, I know that I
14 mentioned some of the people that you spoke to, including
15 the complainant and their daughters. Were there other
16 people who you actually tried to investigate to verify
17 information from?

18 A. I talked with Ms. Claudia Gonzalez, which is the
19 Defendant's ex-wife.

20 Q. And some of the information, as part of your role
21 to investigate and also, you know, have the ability to
22 determine some of the things people say to you are true
23 and not true?

24 A. Yes.

25 MS. MICKELSON: Pass the witness.

1 THE COURT: Cross.

2 MR. STRADLEY: Thank you, Judge.

3 CROSS-EXAMINATION

4 BY MR. STRADLEY:

5 Q. Ms. Varela, when you spoke to Arturo's prior
6 wife, she told you in no uncertain terms that he was not
7 violent with her, right?

8 A. That is correct, she did.

9 Q. And that he was not controlling with her?

10 A. I don't see where I asked her about or in my
11 notes about controlling. She described him as friendly
12 and happy. She did not describe him.

13 Q. She did not describe him in the same terms as
14 Ms. Garcia did, safe to say, correct?

15 A. Correct. But she did say something that
16 indicated to me that things were not maybe so good between
17 them. I'm not sure.

18 Q. What's that?

19 A. She said she doesn't know what was going on with
20 him lately, which match what Ms. Garcia and her daughter
21 told me, that there was a change in mood around this
22 time. And she said she keeps her conversation with him
23 limited to discussing her daughter.

24 Q. She said she didn't know what was going on with
25 him lately?

1 A. Right.

2 Q. Did in your risk assessment -- your expert
3 testimony to the jury is that because a gun was used,
4 which we all know, that that makes the risk high?

5 A. For future.

6 Q. That's the most obvious point for your
7 conclusion?

8 A. Correct.

9 Q. Okay. Now, it would seem to me that you would
10 want to consider the things that Arturo has done since the
11 incident in question, right?

12 A. To talk about future violence or future risk?

13 Q. Well, just risk in general. Let me ask you this
14 question: Did you consider or did you know that Arturo's
15 been on bond for the last two years?

16 A. I did know that.

17 Q. And did you know that he has been in complete
18 compliance with all the requirements of the Court?

19 A. I did not know that.

20 Q. You dispute that?

21 A. No. I said I did not know that.

22 Q. But you don't dispute it?

23 A. I assume that he's doing what he's supposed to
24 do.

25 Q. Well, you don't have any reason to believe that

1 Arturo has attempted to make contact with the complaining
2 witness or anybody else that's been impacted by this?

3 A. I don't have any information that he has. I
4 haven't heard that. I probably would have heard it if he
5 had, but I have not heard that.

6 Q. And in the two years that he's been on bond, if
7 we're considering whether or not he is a current violent
8 risk, it would be important to consider what he's done
9 over the last two years, right, or what he has not done,
10 right?

11 A. Yes.

12 Q. And you know that a person that is, for lack of a
13 better phrase, hell bent on violence, it does not matter
14 what a Court tells them to do, they're going to do what
15 they're going to do?

16 A. There's some research that talks about that.
17 There's a lot of factors that can intervene.

18 Q. Well, let me ask you this: If a person is not
19 tied down in his own bond, if they had a mind to do
20 violence to someone, there would be no way to stop them.
21 They're not being followed by the police or anybody like
22 that on their own bond, are they?

23 A. If someone really wanted to hurt somebody else?

24 Q. There will be nothing stopping them because --

25 A. And that person didn't care like what facing jail

1 time?

2 Q. I think I made my point.

3 A. Okay.

4 MR. STRADLEY: I'll pass the witness, Judge.

5 THE COURT: All right. Anything else?

6 REDIRECT EXAMINATION

7 BY MS. MICKELSON:

8 Q. Just what factors do you look at when you're
9 talking about someone being on bond?

10 A. Well, actually, it could be more on research
11 about the affect of arrest on future -- like domestic
12 violence, a lot of it depends on, you know, what the
13 person has to lose. For example, if they have a job, if
14 they have standing in the community, you know, things like
15 that.

16 If they don't have a lot to lose, then
17 that increases the chance of recidivism. There's a whole
18 lot of other factors that goes to that, as ell as like the
19 risk assessment factors that we've talked about.

20 MS. MICKELSON: No further questions.

21 THE COURT: All right. Anything else, sir?

22 MR. STRADLEY: Yes.

23 RECROSS EXAMINATION

24 BY MR. STRADLEY:

25 Q. Ms. Varela, you testified to the jury that you

1 were aware of prior acts of violence, correct?

2 A. Yes, sir.

3 Q. Is it my understanding -- is that the last act of
4 violence, the slapping incident that was presented to you
5 occurred six years prior to this shooting?

6 A. Yes. But there was also something else that was
7 going on that made them concerned. It wasn't direct
8 violence but it was behavior. They can see it was
9 significant; and you know, that's -- he had the gun around
10 them. They felt uncomfortable about that gun prior to the
11 shooting.

12 Q. All right. But in terms of his physically laying
13 a hand on someone, six years prior to the shooting, right?

14 A. That is correct.

15 MR. STRADLEY: May I have just a minute,
16 Judge?

17 THE COURT: Yes, sir.

18 MR. STRADLEY: Pass the witness.

19 THE COURT: All right. Thank you, ma'am.
20 You may step down. All right. Call your next witness.

21 MS. MICKELSON: Your Honor, at this time, the
22 State would like to offer State's Exhibit 55.

23 (State's Exhibit No. 55 was offered into
24 evidence.)

25 THE COURT: State's 55 is admitted.