

1 questioning McCarty.

2 THE COURT: Well, Mr. Sgro, I think from the -- what we heard here today, it
3 doesn't sound -- it sounds primarily like it's -- is it Collins?

4 MR. SGRO: Detective Collins is the primary guy.

5 THE COURT: Right. That he's really the one doing the bulk of the
6 questioning. And it's not as was expressed in your motion that it's kind of like three
7 people standing around with the white light shining in somebody's eye kind of
8 situation. There were not three vehicles there, there were only two vehicles there.

9 MR. SGRO: Right. We did not know about this drop off situation.

10 THE COURT: And so it's out in the open, it's out in the back of a 7-Eleven.
11 So --

12 MR. SGRO: Suffice to say, Your Honor, it just strikes me, and again, the
13 record's the record.

14 THE COURT: It is.

15 MR. SGRO: It strikes me as incredibly odd that Detective Ridings who's the
16 right-hand guy on the case, that they're attached at the hip for four days. They're
17 going with some fervor on this case, things are opening up quickly. I mean, you
18 know from start to finish four days on a double homicide, there's a lot of things going
19 on. And these detectives are able to interview a lot of people, gather a lot of
20 information, and corral the suspects within 96 hours, which is -- that's a big deal.

21 THE COURT: Pretty good.

22 MR. SGRO: Right. Now, the two of them are together. They want me to --
23 not me, they want the Court to believe that, you know, Detective Collins and Mr.
24 McCarty are here and Ridings is back here and he's just going to yell out : Hey, ask
25 him that, you know, other question. Every inch of my being is telling me that Ridings

1 is next to --

2 THE COURT: And so if they're --

3 MR. SGRO: -- McCarty.

4 THE COURT: Okay.

5 MR. SGRO: Okay. So --

6 THE COURT: But how long is -- this statement's what? An hour and a half,
7 two hours?

8 MR. SGRO: It's about two hours. I thought it was over two hours, Mr. Owens
9 said an hour and 49 minutes or something like that. I thought it was a little bit over
10 two hours.

11 Bottom line is they moved away from the heat and put him in the back
12 of the 7-Eleven, that's what the affidavit says, which I didn't bring up because I could
13 have thrown it in the brief.

14 The two officers on one issue is an issue in terms of voluntariness.
15 He's definitely not free to leave. I think it is all -- equally disingenuous to assert that
16 Mr. McCarty after having been the subject of a search warrant two days prior was
17 going to be free to leave after these officers just advised a judge that they had him
18 lined up as a suspect in a double murder. I'm just not buying off on that. So did the
19 testimony come out that way? You know, I'll concede that I didn't get them to admit
20 to me that they fudged a little bit, so I'm not good enough to get that out of the cops.

21 THE COURT: No.

22 MR. SGRO: So shame on me. On the other hand --

23 THE COURT: I don't know -- Mr. Sgro, I don't know certainly that I would put
24 it that way.

25 MR. SGRO: On the other hand, it strikes me that this Court can take

1 reasonable inferences and based on reasonable inferences it strikes me that there's
2 at least two officers there. It strikes me that Detective Webster's not going to get
3 dropped off at a scene interviewing Suspect Number 3 to stand by a block wall and
4 not participate. It just doesn't strike me that way. So I'm suggesting to the Court a
5 reasonable inference is that the three of them were there. And these detectives, I'm
6 not going to say that, you know, they're lying and there's some big conspiracy
7 amongst the three of them. They frankly can't recall a lot of what occurred. I had to
8 refresh Collins' recollection that another detective was even participating in the
9 questioning process.

10 So I don't think given what occurred in this case and the way that the
11 investigation developed, I don't think it's a stretch to say all three of them there.

12 THE COURT: All -- they were certainly all there in the back of that area of the
13 7-Eleven. It certainly wasn't some little bitty closed-in interview room --

14 MR. SGRO: No, that's -- right.

15 THE COURT: -- where somebody is chained to a chair and can't leave the
16 room as we see so many times. So, you know, I don't know if there's anything else,
17 Mr. Sgro, that you could give me that you need to point me out to --

18 MR. SGRO: With respect to that issue, I mean, I think the Court's heard it.
19 The Court heard the reference to the affidavit. I'll tell you, as an officer of the Court,
20 there's mention in an affidavit about having to relocate him to the back because of
21 the heat. I mean, so they moved him to the back.

22 MR. DIGIACOMO: Who moved him?

23 MR. SGRO: I don't know if that's of any moment to the Court or not. There's
24 the ability of Mr. McCarty to leave freely I think is highly suspect. And I guess I'll
25 submit it on that; although, I would like to be heard on the -- on Mr. McCarty's being

1 in jail for that extended period of time without counsel.

2 THE COURT: Okay. You want to talk about that?

3 MR. SGRO: Yes, ma'am. The difficulty from our perspective in this case is
4 that the District Attorney's involvement occurs in this matter on June 1st. The District
5 Attorney is now -- the guy involved is the screening deputy and I think it makes it
6 worse because the screening deputy is in charge of when the matter gets filed as to
7 Mr. McCarty. I don't have -- I have them somewhere, but I don't recall specifically
8 when Domonic Malone and Donald Herb get charged with the independent what I'm
9 calling the beating case.

10 THE COURT: Right.

11 MR. SGRO: There's the scenario --

12 MR. DiGIACOMO: Herb never gets charged with that because he wasn't
13 involved and wasn't present, so that --

14 THE COURT: Okay.

15 MR. DiGIACOMO: -- couldn't have possibly happened.

16 MR. SGRO: There was -- there were cases brought, I know specifically when
17 we're doing this motion, I know that other Defendants were charged with these
18 crimes prior to Mr. McCarty being charged.

19 THE COURT: These crimes meaning?

20 MR. DiGIACOMO: No. Mr. Malone, I believe, might have had a criminal
21 Complaint filed on the charges that Mr. McCarty is not charged with --

22 THE COURT: Like the other case.

23 MR. DiGIACOMO: But the rest of these charges, their criminal Complaint was
24 filed at the exact same time. I don't know whether or not Mr. Malone had a different
25 criminal Complaint on the other charges --

1 THE COURT: Okay.

2 MR. DIGIACOMO: -- that Mr. McCarty's not.

3 MR. SGRO: And there was something on Herb, too, that was pending at the
4 time, and I -- because he had some drug cases and I can't tell you right now if that, if
5 his charges were the same ones or not. But here's the problem. If the screening
6 deputy is controlling the police officer's actions on June 1st, he's telling --

7 THE COURT: At the behest of the Defendant's --

8 MR. SGRO: Correct.

9 THE COURT: -- father.

10 MR. SGRO: That's how it starts. But the DA at that time is controlling when
11 the Complaint gets filed. He is the same guy. So while the Defendant's father -- I
12 mean -- the Defendant's father could call a DA today. He could call Mr. DiGiacomo
13 today to send police in there. That, I'm not sure if that carries as much weight --

14 THE COURT: Because your client asks.

15 MR. DIGIACOMO: If his client calls me today and asks me to come over and
16 speak to him, I will send an investigator over to speak to him. I mean, that's -- I
17 mean, if you ask --

18 THE COURT: I mean --

19 MR. DIGIACOMO: -- we go. It's his right.

20 THE COURT: -- Mr. Sgro, I can certainly understand maybe if --

21 MR. SGRO: He can't.

22 THE COURT: -- if it wasn't --

23 MR. DIGIACOMO: Yeah, I can.

24 THE COURT: -- that the way the scenario was, but in this case, your client's
25 father is calling to say we want someone from the DA's office to speak to our son.

1 So the DA finds out who the detective is that is handling the case and say -- calls
2 and says: Hey, Mr. McCarty's father called and wants and says Mr. McCarty wants
3 to speak to us. Well, the person we're going to send is the investigating detective.
4 Lo and behold, he goes to the jail. Remirandizes him and says: I hear you want to
5 talk to us or me. But I can't promise you anything because I'm not the DA.

6 MR. SGRO: Well, that's kind of how it goes.

7 THE COURT: And I understand your point is is that so then the detective gets
8 the info, calls back Scott Mitchell, tells Scott Mitchell this is what happened. Okay.

9 MR. SGRO: But Scott --

10 THE COURT: And then there seems to be no more discussion until the
11 phone records come in --

12 MR. SGRO: And they called --

13 THE COURT: -- because we're not talking, we're just now between June 1st
14 and June 6th. The phone records come in which is part, ordinary part of the
15 detective's investigation. Apparently there's something in them that doesn't jive with
16 what they've been told. He calls up Scott Mitchell and says: I've got the phone
17 records. Mitchell says: Well, since he's wanting to talk, go back and talk to him
18 again. Goes back and talk. Obviously, there's because -- I mean, I've got to look at
19 what they say, but there's obviously some communication going on here between
20 the detective and the Defendant.

21 He goes back and talks to him, they go on the little field trip and that's it.
22 I mean, I think what you're trying to convince me is that there was some
23 manipulation of this situation by the DA and the DA -- Scott Mitchell purposely held
24 off on filing a Complaint -- is that what you're trying to tell me?

25 MR. SGRO: Well, Your Honor, I don't know that it's not -- I don't know that it's

1 purposely, here's what I'm suggesting.

2 THE COURT: No, no.

3 MR. SGRO: I'm suggesting --

4 THE COURT: Come on, Mr. Sgro.

5 MR. OWENS: He slandered the police, why leave our office out?

6 THE COURT: Mr. Sgro, I think -- come on.

7 MR. SGRO: Here's what I'm --

8 THE COURT: Come on.

9 MR. SGRO: I think here's --

10 THE COURT: Come on, Mr. Sgro.

11 MR. SGRO: Here's a plausible -- here's a plausible innocent explanation.

12 There's all this paperwork on my desk, here's McCarty's stuff over here whether or
13 not we prosecute him, here's Defendant X. And you know what? That was so
14 voluminous, I just didn't get to it on time, I focused on Defendant X and I knew I'd
15 get to it. The difficulty I'm having, Your Honor, is that Scott Mitchell's a lawyer who's
16 regulated by a set of rules that don't apply to other folks. He has an appearance of
17 impropriety for sure. He's a screening deputy that has responsibility to make an
18 assessment on the case and get in or get -- or not. He knows. He knows that once
19 that Complaint gets filed and Mr. McCarty appears to Court, I'm going to go out on a
20 limb here and say we're all going to agree if I'm Jason McCarty's lawyer on June 1st,
21 he's not ever talking to the police on June 1st. I don't care if his dad, mom, grandma,
22 his brother and sister all called. That conversation's never happening. And I think
23 Scott Mitchell knows that. And what happens on the 6th is the same thing. Now
24 you've got from May 25th to June 6th a guy on a double homicide never appearing
25 once in front of Judge George? That is unheard of. Okay. There's no 72-hour

1 show up, there's no video, there's no nothing. The State is given essentially --

2 THE COURT: There has to be a 72-hour hearing.

3 MR. DiGIACOMO: 72, right. There has to be.

4 THE COURT: There has to be.

5 MR. SGRO: But they're giving -- they're giving a -- they're giving a blanket --

6 THE COURT: There has to be.

7 MR. SGRO: Well, then what happened? They're giving just a blanket file --

8 THE COURT: I don't know.

9 MR. SGRO: -- the Complaint whenever you want to? You know --

10 THE COURT: Uh-uh. No, no, no, no, no, no.

11 MR. OWENS: I know we're kind of grinning here, but it really is kind of
12 insulting. If he had any evidence out here, I think he could fairly argue it. But to do
13 it --

14 THE COURT: Yeah. I mean --

15 MR. OWENS: -- it's just character assassination. And the way things go out
16 in Henderson, I've been out there for years, they don't meet as frequently as the JPs
17 here and they tend to give the State a little bit longer time than the JPs do. But they
18 have their hearings, they have a 48-hour, they have a 72, and they set it out for what
19 they think it is reasonable for the State to be able to make a decision on the case.
20 And that's what they did here.

21 MR. SGRO: And who's being asked?

22 THE COURT: And I suspect that it probably was a holiday weekend.

23 MR. DiGIACOMO: It very well may be, but the other thing that you --

24 THE COURT: Memorial Day, maybe?

25 MR. DiGIACOMO: -- that nobody is discussing here is merely because

1 there's an arrest doesn't mean our office is going to file. And certainly we're making
2 requests for there's -- for information --

3 THE COURT: Yeah. I mean, I --

4 MR. DiGIACOMO: -- so we can make a determination who is and who is
5 not --

6 THE COURT: Mr. Sgro, this is -- this is not --

7 MR. DiGIACOMO: -- guilty, ultimately both charged on Mr. Herb.

8 THE COURT: Your argument is not winning me over, let me put it to you that
9 way.

10 MR. SGRO: Fair enough. At the end of the day, Your Honor, doesn't Scott
11 Mitchell -- and with all aspersions cast aside, doesn't he have an obligation to sit
12 there and think, you know, I'm the screening deputy, I'm in charged of when this
13 case gets filed and now I'm in charge of telling the cops what they should and
14 shouldn't be doing with -- in terms of speaking to the Defendant. He's not
15 represented right now, he's not going to be represented until this Complaint gets
16 filed. So it's not going to hurt my case to not file.

17 Now, just facially, okay, forget about character assassination or
18 whatever, superficially on it's face, doesn't that create an appearance of
19 impropriety? Doesn't he have an obligation to step away, give it to somebody else,
20 do something except for be both people?

21 THE COURT: Except that you have somebody, a family member calling up
22 and saying: My son wants to talk to the DA.

23 MR. SGRO: Not on June 6th. That was the cops calling -- that was the police
24 calling Scott Mitchell saying: Hey, we've got these phone records, what should we
25 do? Scott Mitchell says: Well, if he wants to keep talking, let him keep talking and

1 he sends them back.

2 THE COURT: And he sends them back. And your client could have said: I
3 don't want to talk to you anymore.

4 MR. SGRO: If he had an attorney with him, he would have said that.

5 THE COURT: Anything more you want to say?

6 MR. DIGIACOMO: No, Judge, other than the fact that as for the ethical
7 obligations for Scott Mitchell, he has an obligation to inform the Defendant if he has
8 a representative go that he doesn't represent the Defendant. That's his ethical
9 obligation. We call that a *Miranda* warning. He was giving him both at both times
10 he had contact. Scott Mitchell did absolutely nothing wrong and to accuse him in
11 this courtroom is offensive.

12 The only thing I want to add is that I got to 23 of 10,000 now and I
13 finally got to a case that came down October 12th of 2007. While it's the only the
14 southern district of Ohio federal court, they do quote the case, and I know Mr. Sgro
15 said innocent doesn't fall in the juris prudence of Nevada or U.S. Supreme Court
16 law, so I'll quote: A seizure does not occur simply because a police officer
17 approaches an individual and asks a few questions. So long as a reasonable
18 person, parens, reasonable innocent person would feel free to disregard the police
19 and go about his business, the encounter is consensual and no reason or suspicion
20 is required for the stop.

21 That would *Florida v. Bostick*, 501 US 429, 1991, which was quoting
22 *California v. Hodari, D.*, 499 US 621, 628, 1 -- 1991. It is a fully established position
23 of law in juris prudence that the reasonable person is a reasonable innocent person.
24 I'll submit it.

25 MR. SGRO: You've got New York and Ohio.

1 MR. DiGIACOMO: U.S. Supreme Court.

2 THE COURT: Or the U.S. Court.

3 MR. OWENS: There's some logic to that when you think of the telltale heart
4 kind of thing. A guilty person might always think they're on the brink of getting
5 arrested.

6 THE COURT: All right. It's amazing where this goes, you know.

7 Okay. What I'd like to do is look over a couple of more things in the
8 statements? Can I keep this three-volume set --

9 MR. DiGIACOMO: Sure.

10 MR. OWENS: Oh, yeah, that's yours.

11 THE COURT: Three-volume set here for my own edification?

12 MR. OWENS: Just keep it, Judge.

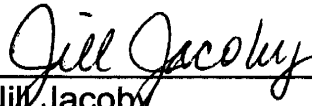
13 THE COURT: And then I'll give you my decision. Okay?

14 MR. ORAM: Thanks, Judge.

15 THE COURT: It's been real.

16 [Proceeding concluded at 2:52 p.m.]
17
18
19
20

21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual
22 recording in the above-entitled case.

23 
24 Jill Jacoby
25 Court Transcriber

FILED

2008 JAN 31 P 2:53

CLERK OF COURT

0001
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

DOMONIC MALONE,
Defendant.

CASE NO. C 224572
DEPT. NO. V

DATE: 2/19/08
TIME: 8:30 AM

**MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE, or,
in the alternative, MOTION FOR CORRECTIVE INSTRUCTION**

COMES NOW, DOMONIC MALONE, by and through his attorneys DAVID M. SCHIECK, Special Public Defender. RANDALL H. PIKE, Assistant Special Public Defender and CHARLES CANO, Deputy Special Public Defender, and moves this Court for an Order dismissing the instant case due to the failure of the State to preserve evidence. In the alternative, Defendant requests that this Honorable Court allow a corrective instruction be given to the jury at the time of trial in this matter to correct the State's spoliation of and failure to collect evidence.

This motion is made and based on the pleadings of file herein, the Affidavit attached hereto, and any argument of counsel at the time of hearing of the motion.

1 NOTICE OF MOTION

2 TO: THE STATE OF NEVADA, Plaintiff; and

3 TO: DISTRICT ATTORNEY'S OFFICE, Plaintiff's attorneys:

4 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion
5 on for hearing before the above-entitled Court on the 19 day of FEB, 2008, at
6 the hour of 830 a.m.

7 STATEMENT OF CASE AND STATEMENT OF FACTS

8 DOMONIC MALONE (hereinafter referred to as Malone) was charged with two counts
9 of Murder, and a number of ancillary crimes. At the time of the preliminary hearing, the State
10 had "rolled" Donald Herb, aka Donny, who offered testimony to implicate Mr. Malone as being
11 involved in the above charges. Specifically, Herb offered testimony regarding the alleged
12 clothing that Mr. Malone was allegedly wearing during the night in question. Herb testified that
13 during this time, Mr. Malone was allegedly wearing black shorts, sandals and a long sleeved
14 black t-shirt. (PHT Vol. V p. 30-31). The State had executed a search warrant at the residence
15 of Mr. Malone previously and, in fact, he had told detectives where his clothing was at within
16 the residence yet they refused to collect the evidence.

17 The State has therefore failed to obtain any of this evidence which would verify through
18 appropriate forensic testing that there was neither blood, DNA evidence, trace, or dirt evidence
19 that would support the accusations of Herb.

20 In addition to this evidence which was not collected, the State failed to gather and
21 collect the clothing evidence that was worn by Herb on the night in question. Herb testified
22 that his clothing was at his residence, testifying that he (Donny) to Malone to his (Donny's)
23 house, where Donny turns off his alarm, changes his clothes for work, and drops off D-Roc
24 near Lake Mead and Martin Luther King Drive. (V 31). Herb's shoes and clothing were at his
25 residence, but were not impounded, tested for the presence of blood, DNA or trace evidence
26 that would have surely established that he was more than just a driver in the instant case.

27 While the blood and trace evidence regarding the clothing of the two individuals is at
28 question, also is the relationship between Ms. Estorres a.k.a. "Red" and the Defendant. Mr.

1 Malone also specifically requested that the voicemail threats of Ms. Estorres against him be
2 retrieved by the State. Discovery provided by the State indicates that this was not retrieved
3 and recorded.

4 Trial is set for August 4, 2008.

5 ARGUMENT

6 FAILURE TO PRESERVE GATHERED EVIDENCE IS GROUNDS FOR DISMISSAL

7 "The loss of material and potentially exculpatory evidence by a law enforcement
8 agency can deprive a defendant of the opportunity to corroborate his or her
9 testimony, thereby severely prejudicing the defense." Cook v. State, 114 Nev.
10 120, 124, 953 P.2d 712 (1998).

11 "The government is flirting with the danger of reversal any time evidence is lost
12 or inadvertently destroyed. When evidence is seized, the government should
13 take every reasonable precaution to preserve it." United States v. Heiden, 508
14 F.2d 898, 903 n. 1 (9th Cir. 1974).

15 A conviction may be reversed when the State loses evidence if the defendant is
16 prejudiced by the loss or the State acted in bad faith in losing it. Id. at 125 citing Sparks v.
17 State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988). To establish prejudice, the defendant
18 must show that it could be reasonably anticipated that the evidence would have been
19 exculpatory and material to the defense. Id. citing Boggs v. State, 95 Nev. 911, 913, 604 P.2d
20 107, 108 (1979). Further, the State cannot benefit from its failure to preserve evidence, and
21 therefore, dismissal of charges is proper. Sparks at 319, 320.

22 Cook was charged with sexual assault and during the investigation the Sparks Police
23 Department collected several key pieces of evidence, including photographs and physical
24 evidence. Prior to trial the Sparks Police Department lost the evidence. On appeal, Cook
25 alleged that the loss of evidence prejudiced his case by depriving him of the opportunity to rebut
26 or impeach witness testimony and to corroborate his own testimony. The Nevada Supreme
27 Court agreed with Cook and held that Cook established prejudice by showing the lost evidence
28 could have been reasonably anticipated to be both exculpatory and material. Cook, at 127.
The Court reversed Cook's conviction and dismissed the case. Id.

In the instant matter, Mr. Malone is charged with a double homicide. He voluntarily

1 surrendered himself to detectives and offered the location of his clothing and tried to be of
2 assistance to the police. (See Mr. Malone's transcribed statement attached hereto). Romeo
3 (Defendant McCarty) was questioned and stated that Mr. Herb was involved in the homicide.
4 Mr. McCarty's statement was the subject of the Motion to suppress previously heard by this
5 Honorable Court on November 30, 2007. As was indicated in the motion to suppress Herb's
6 statement heretofore filed in this matter, during Herb's statements to police, the detectives
7 never impounded any of Herb's clothing and or shoes.

8 To rebut and impeach the "snitch" witness, Herb, Defendant Malone is unable to
9 process any samples of the clothing of Herb and/or Romeo to determine the presence of
10 Blood, DNA or trace evidence that could be recovered from such clothing to be independently
11 tested by an expert of his choice. Due to the Henderson Police Department and/or the crime
12 lab's failure to preserve or collect this clothing source of DNA evidence, there has been
13 severe prejudice to Malone's ability to defend himself.

14 The Nevada Supreme Court has also reversed a conviction where the lost evidence
15 was material to the identification of the defendant. In Howard v. State, 95 Nev. 580, 600 P.2d
16 214 (1979), the State collected the defendant's clothing. Id. at 581. During trial Howard wanted
17 to introduce the clothing to establish that he was not the person identified by an eyewitness,
18 however, the State could not produce the requested evidence. Howard contended that this
19 failure to produce the clothing was a prejudicial suppression of evidence and deprived him of
20 due process of law. The Supreme Court agreed. Howard's "shoes and clothing were material
21 to the identification of him as the perpetrator of the offense. Accordingly, since these articles
22 were not produced at the trial, [Howard's] conviction must be reversed." Id.

23 As with the Howard case, Malone desires to use shoes and clothing as evidence to not
24 only establish his innocence, but to identify the actual perpetrator of these offenses.
25 Defendant Malone asserts that the proper collection and use of the DNA for identification is
26 material to his case. Since the State cannot produce this clothing due to the lapse of time and
27 warning to their witness Herb, there is a suppression of evidence which will deprive Malone
28 the due process of law.

1 In a case such as Malone's where he is being charged with a capital murder case,
2 the State and the Henderson Police Department should have reasonably anticipated DNA
3 evidence to be material and exculpatory. It is Malone's position that he has been prejudiced
4 by the failure to preserve evidence that is material and exculpatory, therefore the charges
5 against him in regards to the homicides should be dismissed.

6 In the alternative, if this Honorable Court finds insufficient cause for dismissal, the
7 Defendant herein requests that proper corrective instructions be given the jury regarding the
8 lack of DNA or trace evidence on the clothing that Herb says Malone was wearing on the night
9 in question and/or the presence of trace evidence upon the clothing that Donald Herb was
10 wearing that evening.

11 CONCLUSION

12 Defendant DOMONIC MALONE respectfully requests this Court find that the loss and/or
13 destruction of the DNA evidence regarding the homicides be material and exculpatory; and
14 that said loss and/or destruction of the DNA evidence is prejudicial to Malone's case.
15 Defendant further requests based on the foregoing the court grant this Motion to Dismiss all
16 of the counts regarding the homicides or, in the alternative allow for appropriate corrective
17 instructions.

18 DATED this 29th day of January, 2008.

19 SUBMITTED BY:

20 DAVID M. SCHIECK

21 SPECIAL PUBLIC DEFENDER'S OFFICE

22 
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

DOMONIC MALONE,
Defendant.

CASE NO. C 224572
DEPT. NO. V

DATE: 2/19/08
TIME: 8:30 AM

RECEIPT OF COPY

RECEIPT of a copy of the Motion to Dismiss for Failure to Preserve Evidence is hereby
acknowledged this 31 day of January, 2008.

DISTRICT ATTORNEY'S OFFICE

[Signature]
200 Lewis Ave., 3rd Floor
Las Vegas NV 89155


CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13
14 Plaintiff,

-vs-

DOMONIC MALONE,
#1670891

Defendant.

CASE NO: C224572

DEPT NO: V

OPPOSITION TO DEFENDANT MALONE'S MOTION TO DISMISS FOR FAILURE TO
PRESERVE EVIDENCE, OR IN THE ALTERNATIVE, MOTION FOR CORRECTIVE
INSTRUCTION

DATE OF HEARING: 3/11/08
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
MARC DIGIACOMO, Chief Deputy District Attorney, and hereby submits the attached
Points and Authorities in Opposition to Defendant's Motion To Dismiss For Failure To
Preserve Evidence.

This opposition is made and based upon all the papers and pleadings on file herein,
the attached points and authorities in support hereof, and oral argument at the time of
hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS**

3 On May 20, 2006 at approximately 0915, the Henderson Police Department received
4 a 9-1-1 emergency call that there were two naked deceased females in the desert just west of
5 Paradise Hills and Dawson Street. (PH, vol 3, p. 366). Patrol officers responded to the
6 location and secured the scene. At the time, there was no identification for the partial
7 decomposed females who appeared to have been killed by both blunt and sharp force trauma.
8 (PH, vol 3, p. 368).

9 **MELISSA ESTORES aka "RED"**

10 The next day, during the autopsies, two individuals contacted the HPD about the
11 bodies, Ryan Noe and Melissa Estores (hereinafter "Red"). (PH, vol 1, p. 130). Red was a
12 friend of Noe who informed him that she believed she knew who the two females in the
13 desert were. Noe brought Red to the police station. (PH, vol 1, p. 131).

14 Red is a street hustler that sells both "hard" and "soft" drugs for various people.
15 "Hard" refers to crack cocaine while "soft" refers to methamphetamine. In the months
16 leading up to the killings, Red worked mainly for an individual named Tre Black (later
17 identified as Ramaan Hall) selling methamphetamine. (PH, vol 4, p. 75). Tre Black had a
18 protégée named D-Roc (later identified as Defendant Domonic Malone). Red would sell
19 crack for D-Roc. (PH, Vol 1, 52-58). Red's main area of sale was the bar at the Royal
20 Sportsman Manor located at the corner of Tropicana and Boulder Highway. (PH, vol 1, p.
21 60).

22 **APRIL KIDNAPPING AND**

23 **BEATING OF RED**

24 At some point, Red and D-Roc struck up some sort of sexual relationship. Thereafter,
25 D-Roc either wanted more than Red, or wanted it exclusive with Red which she did not.
26 (PH, vol 1, p. 91). Sometime in April of 2006, D-Roc showed up at the bar in the Royal
27 Sportsman Manor and told Red he wanted to talk to her. Red left the bar with D-Roc and he
28 led her behind it, at night, where no one could see them. (PH, vol 1, pp. 103, 225, 230).

1 Once they were back there, D-Roc demanded his "work" and money back from Red. Red
2 gave D-Roc all of his stuff. D-Roc then told Red it was "PT" time or "prayer time." This is
3 a saying for getting a beating. (PH, vol 1, p. 68). Other witnesses have said "PT" stands for
4 Pimp Training. (PH, vol 2, p. 18).

5 D-Roc explained the rules of the beating. (PH, vol 1, p. 65). He was going to punch
6 Red in the chest. If she tried to block, he was going to hit her in the right temple, left temple
7 and forehead. Then he was going to do it all over again. D-Roc began by punching Red in
8 the chest. When he did so, she naturally tried to block. (PH, vol 1, p. 66). Then he would
9 punch her in the head three times, and start all over. This went on for a lengthy period of
10 time until Red ultimately was down and severely hurt. (PH, vol 1, p. 67). In fact, her injuries
11 and pain lasted for more than six weeks. (PH, vol 1, p. 70). At that point, a friend came and
12 helped her to a car. (PH, vol. 1, p. 68).

13 During the beating, Red lost Tre Black's work and money, although she isn't sure
14 how. After several days of convalescing, Red went back to work. When she went back, she
15 learned that Tre Black never received the "work" she had given back to D-Roc, and he
16 wanted to get paid.

17 **TUESDAY MAY 16th KIDNAPPING OF VICTORIA**

18 On Tuesday, May 16, 2006, Red was "working" in the Royal Sportsman manner
19 when she saw Charlotte Combado (hereinafter "Christine"). Christine was another local
20 hustler who sold drugs for "D boys," or low level street drug dealers. (PH, vol 1, p. 77). On
21 this occasion, Christine was selling for another individual known simply as "Black" (later
22 identified as Leonard Robinson, hereinafter Leonard Black). Christine sold her work in the
23 bar, however, she lost all of her money in the gambling machines, so she owed Leonard
24 Black \$150 and didn't know what to do. (PH, vol 1, pp. 79, 122). Red offered to help
25 Christine. (PH, vol 1, p. 78). This eventually led to them coming into contact with
26 Defendant Jason McCarty (hereinafter Rome) in a green Oldsmobile Alero. (PH, vol 1, p.
27 80).

28 While everyone knew the green Oldsmobile as Rome's car, the car is actually owned

1 by Donald Herb (hereinafter "Donny") the accessory after the fact to the murder. (PH, vol 2,
2 p. 20). Donny is "D Boy" that hung around D-Roc and Rome. (PH, vol 1, p. 174).

3 Rome began driving downtown. As they were going, Christine told Rome her
4 problem of needing \$150. Rome explained that he was having an issue with one of his girls,
5 Victoria Magee as she owed him \$80. (PH, vol 1, pp. 87-9). The group wound up at the
6 Oasis hotel downtown and began to smoke Marijuana. (PH, vol 1, p. 84). During this time,
7 Rome and Christine struck up an agreement that Christine would find Victoria and bring her
8 to Rome and Rome would cover her debt to Leonard Black. (PH, vol 1, pp. 87-9).

9 Red fell asleep in the room. When she woke up, Christine and Rome were gone.
10 While they were gone, she looked out the window, saw the green Oldsmobile across the
11 street at a Burger King. In the parking lot, Christine had her arm around Victoria and was
12 leading her to the car. (PH, vol 1, pp. 93-4).

13 The car left, however, shortly thereafter, Rome arrived at the room. Rome and Red
14 left the Oasis on foot and walked towards the Stratosphere. (PH, vol 1, p. 94). On the way,
15 Rome was on the Nextel two-way with Christine in the green Oldsmobile. (PH, vol 1, p.
16 95). Rome told Christine that they would meet at the valet to the Sahara Hotel. By this time,
17 it was early evening.

18 When Red and Rome arrived at the valet, they came into contact with green
19 Oldsmobile. In the Oldsmobile with Donny, who was driving, was D-Roc, Christine and
20 Victoria. (PH, vol 1, pp. 95-7). Everyone piled into the Green Oldsmobile. From the
21 Sahara, the group drove to Donny's house, where Donny got out and the group left.

22 Eventually, the group, minus Donny, arrived back at the Sportsman. D-Roc and Red
23 remained in the car, while Rome, Victoria and Christine went into the complex. (PH, vol 1,
24 p. 97). D-Roc told Red that she still owed Tre Black \$360 but Red told D-Roc that she had
25 paid off her debt. The \$360 was allegedly the money owed from the incident in April where
26 D-Roc had beaten Red. (PH, vol 1, p. 283). After a while, Rome, Victoria and Christine
27 came back to the car. (PH, vol 1, p. 98).

**TUESDAY MAY 16TH KIDNAPPING
AND BEATING OF RED**

From the Sportsman, Rome began driving south on I-95. As he was driving, D-Roc was acting strange. (PH, vol 1, p. 99). Eventually, the group pulled off the Wagonwheel exit and wound up in a desert site near some new home construction. (PH, vol 1, p. 101). Once she got there, Red was ordered out of the car by Rome. (PH, vol 1, p. 103). When she got out, D-Roc guided her to a location, and began to beat her again. (PH, vol 1, p. 104). D-Roc explained that once again, this was "PT" time. As D-Roc continued to beat her, Rome was yelling at Red to just take her beating. (PH, vol 1, p. 106). The beating was related to the prior April beating.

Ultimately, Red went down and played unconscious. Rome told D-Roc to leave her there to die and "let's go." When D-Roc stopped, Rome yelled to Red, that she had five (5) seconds to get into the car or he was going to leave her there. (PH, vol 1, p. 106). Ultimately, D-Roc dragged Red back into the car. At this point, it was approximately midnight or early morning on Wednesday, May 17th.

On the way back into town, D-Roc wanted Red's purse. (PH, vol 1, p. 110). Ultimately, Red gave D-Roc her purse, and he threw the contents of it out of the window. (PH, vol 1, p. 111). Once they got back into town, D-Roc and Rome explained what was going to happen. (PH, vol 1, p. 113).

**THREATS TO KILL PRIOR TO DROPPING THE GIRLS
OFF AT THE HARDROCK**

D-Roc and Rome explained to the girls that Victoria had to make \$80 to give to Rome, Red had to make \$360 to give to D-Roc and Christine had to make sure no one got away. (PH, vol. 1, p. 281). If any one of them did not do what they were told, there would be three shallow graves in the desert where Red had just been beaten. (PH, vol 1, p. 113). Defendant Malone alleged the \$360 was owed to Tre Black from the April beating, even though Red believed she had paid the money back to Tre Black. (PH, vol 1, p. 283).

Thereafter, the three girls were left off at the Hardrock Hotel. Red felt like D-Roc

1 and Rome were trying to "put her on the track." (Prostituting). (PH, vol 1, p. 115). The
2 group remained at the Hotel for hours however, Red had nothing to sell and refused to
3 prostitute herself, Victoria couldn't catch a date, and Christine used all the drugs that she
4 was supposed to sell. (PH, vol 1, pp. 115-6).

5 Ultimately, fearing that D-Roc and Rome were coming back, Red called a friend
6 named David Parker. Parker came and picked all three girls up and took him back to his
7 house behind the Cancun Hotel. (PH, vol 1, p. 116).

8 The group spent most of Wednesday, during the day, at Parker's house. (PH, vol 1, p.
9 117). Finally, the three decided that they needed to head back to the South Cove Apartments
10 where both Tre and Leonard Black live. Early in the evening on Wednesday, the group
11 wound up at the South Cove Apartments.

12 **WEDNESDAY KIDNAPPING OF**
13 **VICTORIA AND CHRISTINE FROM**
14 **THE SOUTH COVE APARTMENTS**

15 When they got there, they tried to go to Leonard Black's apartment which is 222,
16 however, they could not get in. (PH, vol 1, p. 117). The group ran into Tre Black near his
17 apartment at 217 and Tre Black told Red that D-Roc was looking for her. (PH, vol 1, p.
18 118). Finally, Leonard Black arrived, with a friend named DeMarcus. The three girls then
19 got into 222. (PH, vol 1, p. 120). Leonard Black, Red and Demarcus left to go get gas in
20 Demarcus' car.

21 When they return to the apartment, Victoria and Christine were gone, there was a golf
22 club missing from the apartment, as well as signs that they did not leave voluntarily. (PH,
23 vol 1, pp. 124-5). The clothes of both people were still there along with other personal items.
24 Most importantly, Victoria's sandals were still there. They were the only shoes that Victoria
25 owed, and she would not have left without them.

26 Leonard Black was upset that someone broke into his home and asked Red who did it.
27 Red told Leonard Black that it was D-Roc and Rome. (PH, vol 1, p. 127). Early the next
28 morning, Leonard went looking for D-Roc and Rome at the Sportsman.

**THURSDAY MAY 18th BEATING OF
ROME BY LEONARD BLACK**

On May 18th, at 4 a.m., Leonard Black found Rome in the parking lot of the Sportsman and beat him pretty badly. (PH, vol 1, p. 128). The police were called and the ambulance arrived.

A couple of days later, Red saw a news story related to the two bodies and knew, since she had not seen them, that the two girls in the desert were Victoria and Christine. (PH, vol 1, p. 130). The police had Red show them where her beating took place, and she directed them to a desert area just across the street from where the bodies were taken. Based upon this information, the police set out to find D-Roc, Rome, and Donny.

CORRINA PHILLIPS AND LYNN NAGEL

In the Sportsman, a lesbian couple, Corrina Phillips and Lynn Nagel were eventually contacted. Corrina initially tried to alibi Rome and D-Roc but eventually changed her tune. (PH, vol 2, p. 103).

Corrina corroborated that Rome, Victoria and Christine showed up at their place in at the Sportsman on Tuesday night. (PH, vol 2, pp. 7-8). While there, Rome and D-Roc sent Victoria upstairs to "give a blow job to somebody for a rock." (PH, vol 2, 12). Also, D-Roc was on the phone talking about taking the girls out to the desert for "PT time." (PH, vol 2, 14).

Rome had once explained to her that he was a pimp, and the "PT training" or Pimp Training, was a method of putting his prostitutes to work and keeping them in line. (PH, vol 2, p. 18). He had previously explained that he and D-Roc were going to take the girls out to the desert and smack them around. (PH, vol 2, p. 51).

Corrina remembers D-Roc and Rome picking her up on Wednesday night from work and taking her home somewhere around 11 p.m. (PH, vol 2, p. 26). At around midnight, D-Roc and Rome left together. They did not see Rome until several hours later when he was beat up in the parking lot by Leonard Black. (PH, vol 2, p. 30). They heard statements by Rome in front of D-Roc after the murder about having the tires on the car changed. (PH, vol

1 2, pp. 43-4). In fact, Corrina at one point tried to get the tires changed. When queried why
2 he needed the tires changed, Rome, in the presence of D-Roc, stated that he had been out in
3 the desert where the girls had been killed. (PH, vol 2, p. 46). When Corrina could not get
4 the tires changed, she told Rome and D-Roc about the problem. They indicated that they
5 would take care of it. (PH, vol 2, p. 49). Corrina heard D-Roc make mention of leaving the
6 girls in the desert without clothing. (PH, vol 2, p. 37). Corrina overheard a conversation
7 between D-Roc and Rome on Friday where they were checking the paper to see if there was
8 any news in it. (PH, vol 2, p. 40).

9 **ACCESSORY DONNY HERB'S TESTIMONY**

10 Donny Herb waived his preliminary hearing to plead guilty to accessory to murder.
11 Donny testified during the preliminary hearing. Donny testified that he owed the green
12 Oldsmobile but that Rome had borrowed it for the past two months. (PH, vol 5, pp. 5-6) That
13 on some day in mid-May, Donny said he drove the green Oldsmobile to the Sahara Casino to
14 pick-up Rome and Red. (PH, vol 5, p. 12). At the time, D-Roc, Victoria, and Christine were
15 in the vehicle. After picking them up, he drove to his house and stayed there. (PH, vol 5, p.
16 13). The rest left in the green Oldsmobile. Sometime thereafter, Rome told Donny that D-
17 Roc beat up Red and that Rome, Victoria and Christine were there also. (PH, vol 5, pp. 22-
18 3). After the beating, Rome told Donny that they drove to the Hard Rock to "put the girls to
19 work" to sell drugs and prostitute themselves. (PH, vol 5, p. 24). D-Roc and Rome
20 explained the reason for the beatings were the money owed by Victoria and Red. (PH, vol 5,
21 p. 25). Additionally, both Defendants had been looking for the girls for several days.

22 At approximately 1:30 a.m., on Thursday morning, Donny received a call from Rome.
23 (PH, vol 5, p. 15). At the time, Donny was home. In the first phone call, Rome told Donny
24 that D-Roc and Rome had the girls, that they were "had to put in some work", and asked him
25 if he wanted to come. (PH, vol 5, p. 27). Donny said no. Rome called back and told him
26 that if he wanted the green Oldsmobile, he was going to have to come and get it or they were
27 going to drive to California and send it back to him on a flatbed truck. Donny agreed to
28 drive his other car to meet them. (PH, vol 5, p. 15). Donny had trouble finding the location

1 and had multiple phone calls with Rome. (PH, vol 5, pp. 16-7). When he almost arrived,
2 Rome called and told him, "You know what we're doing out here. We're not just beating
3 them up this time. You're involved in two murders now." (PH, vol 5, p. 18). In the
4 background, Donny could hear Rome and D-Roc talking about the killings. Rome asked D-
5 Roc what was taking so long. D-Roc told Rome that he had broken the golf club. In
6 response, Rome told D-Roc, "Okay. Just hit the bitch in the head with a rock." Thereafter,
7 Rome told Donny that they were just cleaning up and would meet him in a minute. (PH, vol
8 5, p. 19). At one point, Rome told Donny, "Victoria is dead." (PH, vol 5, p. 39).

9 Donny drove to the area of exit 56 by the Railroad Pass Casino and met up with D-
10 Roc and Rome. The three then drove off to a remote desert location. (PH, vol 5, p. 28).
11 Defendants began emptying items from the trunk of the Oldsmobile. D-Roc was emptying
12 rocks, Rome removed a knife and D-Roc gave Donny the head of a golf club. (PH, vol 5, p.
13 29). Rome disappeared for a short time, then came back to the vehicles. Rome instructed D-
14 Roc to burn the victim's clothing. (PH, vol 5, p. 34). Rome asked Donny to be his alibi, and
15 D-Roc said his wife would alibi him. (PH, vol 5, p. 36).

16 Thereafter, both vehicles drove back to town. On the way, Rome called Donny and
17 asked him to buy a bottle of water at a convenience store. (PH, vol. 5, p. 30). Donny did so,
18 Rome drank it and D-Roc threw a plastic bag in a dumpster at that location. Rome asked
19 Donny for money to change the tires. (PH, vol 5, p. 41). Donny gave him \$200. Thereafter,
20 Rome left in the Oldsmobile and Donny drove D-Roc home.

21 Later in the week, Rome acknowledged that he had blood spatter on his pants, but he
22 didn't know if it was the victims' or his own as he was beaten later that morning. (PH, vol 5,
23 p. 35). Rome now indicated that Corrina and Lynn were now going to be his alibi. (PH, vol
24 5, p. 37). When Rome, D-Roc, Corrina and Lynn were in the room, Rome said D-Roc beat
25 up Christine, and that they took the clothes to keep them from leaving the desert. (PH, vol 5,
26 p. 38).

27 Donny drove the detectives out to the remote location. (PH, vol 5, p. 42). During the
28 ensuing search, a golf putter, broken in three places was found.

1 **DETECTIVE COLLINS**

2 Detective Collins testified to the examination of the crime scene. One thing of note
3 was a golf ball that appeared to be relatively new. (PH, vol 3, p. 373). On one occasion,
4 Accessory Donald Herb helped him locate some of the murder weapons. (PH, vol 4, p. 87).
5 On another occasion, Rome helped him locate some of the murder weapons. (PH, vol 4, p.
6 88). Additionally, Detective Collins interviewed the Defendant D-Roc.

7 **D-ROC'S STORY**

8 D-Roc was first contacted on May 23, 2006 by HPD. (PH, vol 3, p. 378). At that
9 time, D-Roc denied any knowledge of the any of the crimes, with the exception of beating
10 Red in April. (PH, vol 3, p. 382). Specifically, D-Roc told Detective Collins that Red owed
11 money to Tre Black, and D-Roc felt it was his responsibility to collect, so he beat her. (PH,
12 vol 3, p. 383). On May 31st, D-Roc admitted to being at the Sportsman the day of the crime,
13 however, said that Rome took him home around midnight. (PH, vol 4, p. 68).

14 **AUTOPSIES**

15 **CHARLOTTE "CHRISTINE" COMBADO**

16 On May 21, 2006, Dr. Piotr Kubicek of the Clark County Coroner's Office conducted
17 an autopsy on the person of Charlotte Combrado. (PH, vol 4, p. 5). Dr. Kubicek identified
18 multiple blunt force and sharp force injuries to the head, neck, thorax, abdomen, and upper
19 and lower extremities. (PH, vol 4, p. 16). Ultimately, he appeared to identify at least 20 blunt
20 force injuries and two sharp force injuries. (PH, vol 4, pp. 17-20). The one to the chest
21 appears to be a superficial incision before death, however, the stab wound to the neck it peri-
22 mortum as there is no injury to the skin itself from the wound. Ultimately, the cause of death
23 is blunt and sharp force trauma to the head and thorax. The manner of death is homicide.
24 There is an amount of methamphetamine in both the decomposition fluid and the liver.

25 **VICTORIA MAGEE**

26 On the same date, Dr. Piotr Kubicek of the Clark County Coroner's Office conducted
27 an autopsy on the person of Victoria Magee. (PH, vol 4, p. 5). Dr. Kubicek identified
28 multiple blunt force and sharp force injuries to the head, neck, thorax, abdomen, and upper

1 and lower extremities. (PH, vol 4, p. 6) Ultimately, he appeared to identify at least 31 blunt
2 force injuries and three sharp force injuries. (PH, vol 4, pp. 8-15). All three appear to be
3 superficial to the head, however, the stab wound to the jaw is peri- mortum as there is no
4 injury to the skin itself from the wound. Ultimately, the cause of death is blunt and sharp
5 force trauma to the head and thorax. The manner of death is homicide. There is an amount
6 of cocaine in both the decomposition fluid and the liver.

7 POINTS AND AUTHORITIES

8 Defendant Malone requests dismissal of his capital murder case for failure to preserve
9 certain evidence.¹ In his argument, Defendant Malone asserts that the police failed to
10 preserve Defendant Malone's clothing, Donald Herb's clothing, as well as voicemails
11 received by Defendant Malone. As the police were never in possession of any of these
12 items, none of Defendant Malone's authority applies, and his motion should be summarily
13 dismissed. *See Daniels v. State*, 114 Nev. 261, 956 P.2d 111 (1998). Moreover, Defendant
14 Malone fails to establish even the existence of the evidence which he claims the police failed
15 to collect, let alone his burden of establishing its materiality, or any claim of bad faith or
16 gross negligence in failing to collect it.

17 What Defendant Malone may have meant is that he is seeking a remedy for the
18 police's failure to collect certain evidence. However, the law is abundantly clear that no
19 remedy is available for Defendant Malone, as he cannot show gross negligence or bad faith
20 in the failure to collect the evidence which he asserts should be collect, if it even exists. As
21 such, his motion should be denied.

22 "In a criminal investigation, police officers generally have no duty to collect all
23 potential evidence." However, " 'this rule is not absolute.' " *Gordon v. State*, 121 Nev. 504,
24 117 P.3d 214 (2005) (*quoting Randolph v. State*, 117 Nev. 970, 36 P.3d 424 (2001)). In
25

26
27 ¹ Defendant makes citation to a number of cases. However, he fails to even
28 mention the case which controls, *Daniels v. State*, 114 Nev. 261, 956 P.2d 111
(1998). Clearly, his failure to mention this case was willful as a review of
this precedent demonstrates that his motion is frivolous. Such action raises
ethical concerns. See NRPC 3.1 and 3.3(a) (1 & 2).

1 Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998), the Nevada Supreme Court created a
2 test to be applied when there is an allegation of a failure to collect certain evidence. In
3 Daniels, the court created a two-part test:

4 The first part requires the defense to show that the evidence was
5 "material," meaning that there is a reasonable probability that, had the
6 evidence been available to the defense, the result of the proceedings
7 would have been different. Id. 881 P.2d at 685; see United States v.
8 Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). If the
9 evidence was material, then the court must determine whether the
10 failure to gather evidence was the result of mere negligence, gross
11 negligence, or a bad faith attempt to prejudice the defendant's case.
12 Ware, 881 P.2d at 685-686. When mere negligence is involved, no
13 sanctions are imposed, but the defendant can still examine the
14 prosecution's witnesses about the investigative deficiencies. Id. When
15 gross negligence is involved, the defense is entitled to a presumption
16 that the evidence would have been unfavorable to the State. Id. In
17 cases of bad faith, we conclude that dismissal of the charges may be
18 an available remedy based upon an evaluation of the case as a whole.

19 Id at 267.

20 As an initial starting point, Defendant Malone cannot establish the existence of the
21 evidence that he sought to have collected. Moreover, he fails to establish the "material"
22 nature of any of the items which he claims are exculpatory. There are actually two parts to
23 the materiality test. The first part is that Defendant Malone did not have access to the
24 evidence. As to both his clothing as well as the voicemails, he is in possession of the items,
25 as such, he cannot establish that he did not have access to them. The second part of the
26 materiality test requires defendant to demonstrate that there is a reasonable probability that
27 the result of the proceeding would be different. Defendant Malone cannot establish such a
28 fact.

1 In Daniels, the defendant claimed that the police failed to collect his blood which
2 would have established that he was under the influence at the time of the murder. The Court
3 found that such speculation could not rise to the level of materiality. Id at 268. Defendant
4 Malone's allegations about the evidence in this case is just as speculative. Moreover, the
5 existence, at least as to Defendant Malone's clothing, has not been established.

6 **I. DEFENDANT MALONE'S CLOTHING**

7 On May 25, 2006, Donald Herb told the police a description of Defendant Malone's
8 clothing on the night of the murder. However, search warrants had already been executed at
9 both Malone residences on May 22nd. It is highly speculative to believe that the clothing
10 remained at those locations after the search of them three (3) days before. Moreover, there is
11 simply no evidence to suggest that the clothing was there during the searches on May 22nd.
12 Even if the clothes were present on May 22nd, the police were not in possession of the
13 information which would lead them to search for those items. As such, their failure to
14 collect, even if they were present, cannot be seen as negligent in any manner. There is
15 simply no law to suggest that the police need to execute a another search warrant, without
16 any additional probable cause, after already executing a search warrant where Defendant
17 Malone was not taken into custody for a full day afterward. Finally, Defendant is in
18 possession of the items.

19 **II. DEFENDANT MALONE'S VOICEMAIL MESSAGES**

20 Defendant Malone, without citation to the record, indicates that Melissa Estores left
21 threatening voicemails to Defendant Malone. Defendant Malone also indicates that these
22 voicemails were not collected. Without more, it is difficult to respond to the allegations.
23 However, even if these voicemails exist, Defendant Malone has not established that they
24 were ever in the possession of the police or failed to be preserved.

25 **III. DONALD HERB'S CLOTHING**

26 Defendant Malone indicates that Donald Herb's clothing should have been preserved.
27 However, the only clothes in the possession of the police were the clothing worn by Donald
28 Herb when he was arrested on May 25th, at least five (5) days after the crime. As far as the
State can tell, there is no description of the clothing worn by Defendant Herb on the night in

1 question. Therefore, the police cannot be negligent for failing to collect items which were
2 not known to them. Even had they been known, Defendant Malone cannot establish that
3 there would have been anything on the clothing which would have exculpated Defendant
4 Malone. Moreover, all of the case law on failing to collect, deal with the police failing to
5 collect evidence that was in their presence. There is simply no evidence that the police ever
6 came into contact with the evidence Defendant Malone claims exists.

7 The Nevada Supreme Court has directly addressed a situation where a co-defendant's
8 clothing was not collected based upon the failure to execute a search warrant. In Randolph,
9 *supra* at 987, the police were aware that after the shooting, Randolph's co-defendant,
10 Garner, returned to a trailer and changed from brown clothes to green. Later that day, after
11 Garner was arrested, the police impounded the green clothes, but never searched for the
12 brown clothes which they were aware. In ruling that no relief was appropriate, the Court
13 stated:

14 Nevertheless, we conclude that Randolph has not shown that the
15 ungathered evidence was material. If testing of Garner's clothing or
16 shoes had revealed the victim's blood, it is possible that Randolph
17 might not have received a death sentence. However, Randolph has
18 not demonstrated a reasonable probability that such testing would
19 have revealed any blood. He offers no evidence to corroborate his
20 allegation that Garner was the shooter. The possibility that testing
21 Garner's clothing and shoes would have been favorable to his case
22 remains mere speculation.

23 Even assuming the evidence was material, the failure to collect it was
24 at worst negligent. First, Randolph has not shown that police could
25 have collected the brown shirt and pants. He simply assumes that a
26 search of the trailer or the clothing in the trunk of Garner's car would
27 have uncovered them. Second, Randolph has not shown that the
28 potential evidentiary significance of Garner's shoes, which were
available to police, was so obvious that it was gross negligence not to
impound and test them. Thus, assuming the evidence was material
and police were negligent in not gathering it, Randolph's remedy was
to examine witnesses regarding the deficiency of the investigation.
The record shows that he did so.

The district court did not err in refusing to give the proposed instruction.

Id at 987-8. Randolph is controlling to this situation. In Randolph, even though the police
knew what they should be looking for, the Court found that failure to search cannot be
grossly negligent. Additionally, the Court held that any argument that the clothing would
have contained blood is purely speculative. Such an argument holds with even more force in

1 the instant matter. There is simply no evidence to suggest that even if the police knew what
2 clothes Herb was wearing at the time of the crime, or where they were located, there is
3 simply no evidence that they would contain any blood.

4 **CONCLUSION**

5 Based on the foregoing, Defendant Malone's Motion to Dismiss For Failure to
6 Preserve Evidence, Or In The Alternative, Motion for Corrective Instruction should be
7 denied.

8 DATED this 25th day of February, 2008.

9 Respectfully submitted,

10 DAVID ROGER
11 Clark County District Attorney
12 Nevada Bar #002781

13 BY /s/MARC DIGIACOMO
14 MARC DIGIACOMO
15 Chief Deputy District Attorney
16 Nevada Bar #006955

17
18 **CERTIFICATE OF FACSIMILE TRANSMISSION**

19 I hereby certify that service of the above and foregoing, was made this 25th day of
20 February, 2008, by facsimile transmission to:

21
22 SPECIAL PUBLIC DEFENDER'S OFFICE
23 455-6273

24 /s/D.Daniels
25 Secretary for the District Attorney's Office

26
27 MD/dd
28

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4 DISTRICT COURT


CLERK OF THE COURT

5 CLARK COUNTY, NEVADA

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7
8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 DOMONIC RONALDO MALONE,

12 Defendant.

)
)
) CASE #: C224572

) DEPT. V
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13
14 BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE
15 THURSDAY, MARCH 13, 2008

16
17 **TRANSCRIPT OF PROCEEDINGS:**
18 **DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE**
19 **OR IN THE ALTERNATIVE MOTION FOR CORRECTIVE INSTRUCTION**

20 APPEARANCES:

21 For the State:

CHRISTOPHER J. OWENS, ESQ.
Deputy District Attorney

22 For the Defendant:

23 CHARLES A. CANO, ESQ.
24 RANDALL H. PIKE, ESQ.
25 Special Public Defenders

RECORDED BY: RACHELLE HAMILTON, Court Recorder

1 THURSDAY, MARCH 13, 2008; 9:22 A.M.

2
3 THE COURT: All right, Domonic Malone on page nine, and he's here.

4 MR. PIKE: He is. Randall Pike appearing on behalf of the Special Public
5 Defender's office along with Charles Cano.

6 THE COURT: All right, and this is Defendant's motion to dismiss for
7 failure to preserve evidence or in the alternative motion for corrective
8 instruction.

9 MR. PIKE: That's correct, Your Honor. I find myself in the situation
10 where I agree with the State in many aspects but we have to deal with
11 materiality of the evidence --

12 THE COURT: Yes.

13 MR. PIKE: -- and the intent, and so if you'll allow me --

14 THE COURT: Yeah, you can sit down. You don't get to talk. Sit down.
15 Sit down.

16 MR. PIKE: In reference to a -- in describing why it's material and why the
17 evidence indicates that it was more likely than not that there was a decision-
18 making process that was involved in not taking this, let me briefly argue to the
19 Court that in this case, as the Court is aware, there were bodies found. They
20 were found on the 20th. By the time there was -- by the time this had moved to
21 the 23rd they were already talking to Mr. Malone. They were arresting him on
22 the battery charge but he was a suspect at that point in that in the murder
23 along with Mr. McCarthy -- McCarty, and along with Donald Herb.

24 A decision was made early on that Donald Herb was going to be
25 rolled and become State's evidence. He testified at the time of the preliminary

1 hearing. We've argued about him, his participation over, and over, and over
2 again. As the Court documents and the testimony indicated it was the two
3 cars that Mr. Herb had that were used in the transporting of these girls to the
4 place of their demise or from the place that they were killed to where the
5 bodies were disposed of, as well as a transportation of the instrumentalities of
6 death from the location to a place where they were hid out near Boulder Dam.

7 THE COURT: So tell me why they're material.

8 MR. PIKE: Okay. The -- his clothing is material because any --

9 THE COURT: His meaning Mr. Herb's?

10 MR. PIKE: Herb's.

11 THE COURT: Yes.

12 MR. PIKE: Because any time you come on to a scene of a crime
13 something happens. It affects either the scene of the crime or you. It affected
14 him because if he was there, if he was the one that was actually out there --
15 we know he was out there because of his cell phone records. If he got out of
16 the car and he was involved in the beating death of these two girls then there
17 was going to be spatter evidence, biological evidence, dirt, fibers, anything
18 else; and those are things that the police were seeking in search warrants that
19 were issued before they ever went over to Mr. Herb's house.

20 They knew that those were important. They knew that they
21 existed, and when they went over and were talking with Mr. Herb's family and
22 making a decision to roll him, it was important enough to search the cars for
23 it, Mr. Herb's cars, and it -- but it wasn't important enough to take his
24 evidence. And I think that there was an insidious decision-making process in
25 that because they had made a decision to turn him, to roll him, and they didn't

1 want to risk having any physical evidence that would have proved that he was
2 out there, that he had blood, any sort of tissue on him, or dirt from that
3 location, fiber or anything that tied him to the death of those two girls.

4 And that was the decision-making process that is extrapolated from
5 their actions because they knew about its importance before they went in and
6 they specifically chose not to take it from him, although they took it from the
7 cars; and it even continues on past that because along with the consideration
8 of getting basically a walk on these two murders and his involvement on it, he
9 also got the two cars back after they were searched.

10 THE COURT: All right, Mr. Owens.

11 MR. OWENS: Your Honor I -- one big thing that's missing here is the
12 time element. This Court had heard some of the facts on this at the prior
13 hearing.

14 The police didn't make a decision to turn Donald Herb. They
15 continued to interview all of the potential suspects in the case. I think it was
16 ten days or even two weeks later when they finally were able to start getting
17 some information and some specifics about what had happened.

18 It was -- there was no immediacy to it. I mean these guys could
19 have gone -- it wasn't like they were there right after it happened and they
20 were grabbing evidence. I mean it was clothing that could have been washed.
21 If it was in the Defendant's position it's clothing that he had access to.

22 With regard to Mr. Herb, they just kind of met the materiality test
23 or the -- they haven't shown a lack of good faith on the police or any
24 intentional misconduct here, or that anything would have come of this. This
25 was many days later before they were able to even get a handle on what had

1 occurred; and the cell phone records don't show that Mr. Herb was out there
2 until after the murder had occurred. At the time that it was happening he was,
3 according to the cell phone records, back at his home area which was up at
4 more -- North Las Vegas. So I think we need to take the facts --

5 THE COURT: And the dates of the murder?

6 MR. PIKE: They were around the -- they're -- I take exception with that.
7 There is no specific time of death within a short period of time that can be
8 established.

9 THE COURT: Right.

10 MR. PIKE: The bodies weren't found for a couple of days, and they were
11 found --

12 THE COURT: The --

13 MR. PIKE: -- on the 20th and I think we're dealing with the 18th or 16th on
14 that.

15 Now as far as the physical evidence surviving that, I think we all
16 learned from national politics that even dry cleaning doesn't remove biological
17 evidence from clothing, from dresses, and the same thing with just merely
18 washing an individual's clothes. The fact that they made a decision to not
19 even try, and I think the facts and the way everything happened bears out that
20 this was an intentional, or -- although not enunciated because that would be an
21 admission of selective collection of evidence on their part. The facts indicate it
22 to be an insidious decision not to do this.

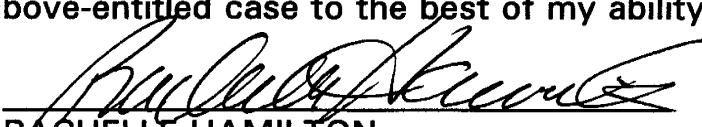
23 THE COURT: All right. So the motion is denied. The cell phone records,
24 according to what was presented to me, don't bear out your allegations. The
25 timing doesn't bear out your allegations so it's not material. Your motion's

1 denied. Thank you.

2 MR. PIKE: Thank you.

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5 [Proceeding concluded at 9:28 a.m.]
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video recording in the above-entitled case to the best of my ability.

23 
24 RACHELLE HAMILTON
25 Recorder/Transcriber

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CLERK OF THE COURT

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CHRIS J. OWENS
Chief Deputy District Attorney
Nevada Bar #001190
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

DOMONIC MALONE,
#1670891

Defendant.

Case No. C224572
Dept No. V

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO
PRESERVE EVIDENCE, OR IN THE ALTERNATIVE, MOTION FOR CORRECTIVE
INSTRUCTION

DATE OF HEARING: 3/11/08
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the
11th day of March, 2008, the Defendant being present, REPRESENTED BY RANDALL
PIKE and CHARLES CANO, Deputy Special Public Defenders, the Plaintiff being
represented by DAVID ROGER, District Attorney, through CHRIS J. OWENS, Chief
Deputy District Attorney, and the Court having heard the arguments of counsel and good
cause appearing therefor,

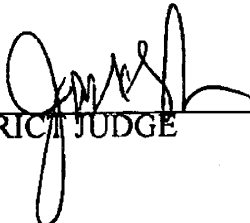
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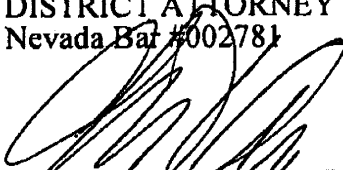
MAR 27 2008

CLERK OF THE COURT

1 IT IS HEREBY ORDERED that the Defendant's MOTION TO DISMISS FOR
2 FAILURE TO PRESERVE EVIDENCE, OR IN THE ALTERNATIVE, MOTION FOR
3 CORRECTIVE INSTRUCTION, shall be, and it is Denied.

4 DATED this 21 day of March, 2008.

5
6 
7 DISTRICT JUDGE

8
9 DAVID ROGER
10 DISTRICT ATTORNEY
11 Nevada Bar #002781
12 

13 CHRIS J. OWENS
14 Chief Deputy District Attorney
15 Nevada Bar #001190

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DISTRICT COURT
CLARK COUNTY, NEVADA

Chaf
CLERK OF THE COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE

Defendant.

CASE #: C224572

DEPT. V

BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE
TUESDAY, JUNE 24, 2008

**TRANSCRIPT OF PROCEEDINGS:
ALL PENDING MOTIONS**

APPEARANCES:

For the State:

MARC P. DIGIACOMO, ESQ.
Deputy District Attorney

For The Defendant:

RANDALL H. PIKE, ESQ.
CHARLES A. CANO, ESQ.
Special Public Defenders

RECORDED BY: RACHELLE HAMILTON, Court Recorder

1 TUESDAY, JUNE 24, 2008; 9:00 A.M.

2
3 THE COURT: Malone and McCarty, page four. Hello.

4 MR. PIKE: Good morning, Your Honor. For the record Randall Pike
5 appearing on behalf of the Defendant along with Charles Cano, from the Special
6 Public Defender's office.

7 THE COURT: Hi.

8 MR. CANO: Good morning.

9 THE COURT: And are they here?

10 CORRECTIONS OFFICER: Malone.

11 MR. PIKE: He's present in custody.

12 THE COURT: Hi.

13 THE DEFENDANT: Hi.

14 THE COURT: They're there.

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: Okay.

17 THE DEFENDANT: I'm right here.

18 THE COURT: And -- oh it's just Malone today?

19 MR. PIKE: That's correct.

20 MR. DIGIACOMO: I thought McCarty but apparently it's just Malone.

21 THE COURT: All right. Who knew? All right, so Mr. Malone's here,
22 thanks.

23 This is the Defendant's motion to strike notice of intent to seek the
24 death penalty.

25 MR. PIKE: That's correct, Your Honor.

1 THE COURT: Anything you want to add to what you've already told me?

2 MR. PIKE: The only thing that I'd like to add is that in reference to this,
3 while we're looking at the DNA evidence that is -- potential biological evidence
4 that was collected around the scene there, there has not been a complete
5 testing. There is a -- was a used condom that was located there that has not
6 been tested. There are items that are -- have -- that are associated or around
7 near where the bodies were located. Those haven't been done.

8 The severity or the necessity of doing full testing is reflected, as
9 I've indicated, under NRS 176, specifically the last two provisions of that, 918,
10 deal with a stay of execution pending testing of DNA evidence and an
11 extension of time while there is DNA evidence outstanding; so the statutes
12 have indicated that unknown or untested DNA items are of such a nature and
13 quality, and particularly here in a case where as we've addressed over and over
14 again, we're dealing with a majority of the statements of a co-Defendant that
15 pled out and obtained a favorable negotiation, and sub -- and some -- subs --
16 corroborative evidence based upon -- merely upon destruction of evidence after
17 the time that was involved in this. And because of the importance of that, and
18 because of the nature of the persons that were identified or chosen to -- by the
19 State to be prosecuted for the death penalty, it's our request at this point in
20 time that the Court grant the release that we've requested.

21 THE COURT: Go ahead.

22 MR. DIGIACOMO: Just very briefly. We've never received a request
23 from the defense to test anything other than the items that the detectives in
24 Henderson chose to test. There's no reason to believe that any items weren't
25 tested would have any relevance to the case whatsoever. The cops went out

1 there, found two dead bodies, and left with everything they could. Later when
2 they found out the story they made a determination as to what to test. If the
3 defense wants something else tested, tell them -- let us know whether they
4 want --

5 THE COURT: Do you want something else tested?

6 MR. PIKE: Certainly. There -- we contacted the lab to determine whether
7 or not there were testings that were done at different times or under different
8 ID numbers.

9 THE COURT: Mr. Pike, just do you want the items --

10 MR. PIKE: Yes.

11 THE COURT: -- tested?

12 MR. PIKE: Yes; yes I do.

13 THE COURT: Take that as a formal notice that you have to have them
14 tested.

15 MR. DIGIACOMO: If he could give me a list of what he --

16 THE COURT: Give him a list.

17 MR. DIGIACOMO: -- what else to test.

18 MR. PIKE: I will. I will.

19 THE COURT: And in the meantime.

20 MR. DIGIACOMO: As of right now there is no foreign DNA that could be
21 put into [indiscernible] or in any manner utilized, so that's as to the first issue.
22 The second issue is their allegations about the disparate treatment of --

23 THE COURT: Right.

24 MR. DIGIACOMO: -- of the death penalty have absolutely no basis of
25 fact, and we'll submit it, Judge.

1 THE COURT: Okay. Motion's denied.

2 MR. PIKE: Thank you.

3 THE COURT: I don't find that there's any sufficient basis for any of your
4 allegations, and now we've got the testing issue and you're going to make a
5 list and provide that to Mr. DiGiacomo, I would imagine before the close of
6 business tomorrow.

7 MR. PIKE: I will.

8 THE COURT: And then should I have a status check, Mr. DiGiacomo, or
9 just -- what would you like?

10 MR. DIGIACOMO: Let me see what Mr. Pike gives us. I mean obviously
11 there's an issue of if he wants a whole bunch of things tested that appear to be
12 clearly irrelevant we may --

13 THE COURT: Okay, well --

14 MR. DIGIACOMO: -- have a discussion about their experts doing the
15 testing versus --

16 THE COURT: Okay.

17 MR. DIGIACOMO: -- ours and so we'll --

18 THE COURT: Why don't we --

19 MR. DIGIACOMO: -- have a discussion and we could --

20 THE COURT: So we'll wait and --

21 MR. DIGIACOMO: -- always put it back on calendar.

22 THE COURT: You'll just put back on?

23 MR. DIGIACOMO: If we can't reach an agreement.

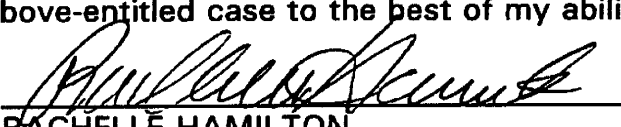
24 THE COURT: Okay. That'll be fine. Thank you.

25 MR. PIKE: All right, thank you.

1 MR. DIGIACOMO: Thank you, Judge.

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3 [Proceeding concluded at 9:05 a.m.]
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19 ATTEST: I do hereby certify that I have truly and correctly transcribed the
20 audio/video recording in the above-entitled case to the best of my ability.

21 
22 RACHELLE HAMILTON
23 Recorder/Transcriber
24
25

Dominic Malone #1670891
CCEC
330 S. Casino Center Dr.
Las Vegas, NV. 89101

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

2009 JAN -7 429 12

STATE OF NEVADA

Plaintiff,

VS.

DOMINIC RONALDO MALONE
1670891
Defendant

Case No.: C2245429 12
Dept. No.: CLERK OF THE COURT
Docket No.:

1/20/09

MOTION TO DISMISS COUNSEL

COMES NOW, the defendant, Dominic Ronaldo Malone, and moves
this honorable court to DISMISS COUNSEL, Charles Cano, Bar#005901
and Randy Pike #1940.

This motion is based upon previous motion to Dismiss filed 10/30/2007
also Factual statements set forth in the POINTS AND AUTHORITIES contained
therein.

Dated this 29th day of December. 2008

Respectfully

Dominic R. Malone #1670891
Dominic R. Malone

CLERK OF THE COURT

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RECEIVED

Mr. Dominic R. Malone #11270891
CEDC 330 S. Casino Center Dr.
Las Vegas, NV. 89101



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1 MTN
2 DAVID M. SCHIECK
3 SPECIAL PUBLIC DEFENDER
4 Nevada Bar No. 0824
5 Randall H. Pike
6 Assistant Special Public Defender
7 Nevada Bar No. 1940
8 Charles A. Cano
9 Deputy Special Public Defender
10 Nevada Bar No. 5901
11 330 South Third Street, Suite 800
12 Las Vegas, NV 89155-2316
13 (702) 455-6265 (702) 455-6273 fax
14 Attorneys for Malone
15
16

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E. J. [Signature]
CLERK OF THE COURT

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13 Plaintiff,
14 vs.

CASE NO. C 224572
DEPT. NO. XVII

15 DOMONIC MALONE,
16 Defendants.

Date of Hearing:
Time of Hearing:

17 **MOTION TO RECUSE THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE OR IN**
18 **THE ALTERNATIVE MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF**
19 **STATEMENTS MADE BY CO-DEFENDANT HERB AT THE TIME OF TRIAL**

20 Comes defendant, DOMONIC MALONE, by undersigned counsel, pursuant to the
21 sixth, eighth and fourteenth amendments to the United States Constitution, and the
22 Nevada Constitution and moves this court to recuse the Clark County District Attorney's
23 office or, in the alternative, to bar the introduction of the testimony of Donald Herb at the
24 time of the trial of this matter, as well as all derivative evidence secured there from.

25 This Motion is based upon the attached points and authorities, arguments of counsel at
26 the time of the hearing on this matter as well as the points and authorities contained within
27 both of the defendants Writs of Habeas Corpus heretofore filed in this matter.
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NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, and Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION TO RECUSE THE DISTRICT ATTORNEY'S OFFICE OR IN THE ALTERNATIVE MOTION IN LIMINE** on the 5th day of Feb, 2009 at the hour of 8:00 a.m., in Department No. XVII of the above-entitled Court, or as soon thereafter as counsel may be heard.

STATEMENT OF FACTS

Defendant Malone, by this reference adopts the statements of facts contained within both of the Writs and Motions to sever heretofore filed with the Court. Specific to the instant motion, the Defendant additionally adopts the arguments contained in his previous Motion to Suppress the Statements of Donald Herb or in the alternative Motion in Limine.

PROCEDURAL STATEMENT POINTS AND AUTHORITIES

Since this has been designated as a capital prosecution, exacting standards must be met to assure that it is fair. The death penalty "is unique in its irrevocability." Furman vs. Georgia, 408 U.S. 238, 306, 92 S. Ct. 2726, 33 L. Ed. 2d. 346 (1972) (Stewart, J. concurring). As the United States Supreme Court has held, "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case." Johnson vs. Mississippi, 486 U.S. 578, 584, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) (quoting Gardner vs. Florida, 430 U.S. 349, 363-64, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (quoting Woodson vs. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (White, J., concurring)).

LEGAL ARGUMENT

In the present case, Donald Herb, a.k.a. "Donny" was originally charged as a co-defendant in the murder of Charlotte Cambado and Victoria McGee. Since then Herb has been offered by the State to plead guilty to the charge of Accessory and has been reinstated on probation in exchange for his cooperation with the State as well as his agreement to testify against his co-defendant. The terms of the negotiation as well as the nature in which they have been secured constitutes an impermissible "vouching" of the reliability of the testimony of the statement of Donald Herb by the State. This may only be corrected by either the recusal of the District Attorney's Office from the prosecution or by disallowing the testimony of Herb at the time of the trial.

In a multiple defendant case, such as the instant case, the Court must take care to ensure that the disposition of the charges against one defendant does not adversely affect the prosecution or the defense of co-defendants. Specifically, adverse consequences to be considered are the potential negative jury inferences that may result when a prosecution witness who appears to be as culpable as the defendants, but because he gives apparent corroboration to the State's theory of the case he has been allowed to plead to a significantly less serious offense. The impact that those prosecutorial decisions have upon the reliability and significance of such secured testimony and the impression that because the witness was given a very favorable negotiation his testimony must be true gives the appearance of bolstering or vouching of that witness' testimony. (Especially, as in the instant case, when there is an absence of physical evidence that corroborates the testimony of co-defendant Herb), See generally, Department of Justice, United States Attorney's Manual, P9-16.000 et seq., available at <http://www.doj.gov/usao/eousa/foia>

1 reading room/usam/title9/ [hereinafter "USAM"]; see also United States Attorney's Manual,
2 Title 9, United States Attorney's Criminal Resource Manual, available at
3 [http://www.usdoj.gov/usao/eousa/foia_reading room/usam/title9](http://www.usdoj.gov/usao/eousa/foia_reading%20room/usam/title9) [hereinafter "USACRM"].at
4 P9-27.430.B.
5

6 In this case, wherein the very core of the case against the defendant is based upon
7 the testimony of a co-defendant agreeing to testify, anything that shows some bolstering or
8 vouching for that testimony constitutes plain error. See, e.g. review for plain error under
9 Federal Rule of Criminal Procedure 52(b). Under the plain error doctrine, courts will
10 recognize only "those errors that 'seriously affect the fairness, integrity or public reputation
11 of judicial proceedings,' and ... will reverse solely in those circumstances in which a
12 miscarriage of justice would otherwise result."
13

14 Improper bolstering may be distinguished from improper vouching, although many
15 courts appear to merge the two concepts. See United States v. Bowie, 892 F.2d 1494,
16 1499 n.1 (10th Cir. 1990). Vouching as opposed to bolstering is the government's
17 impermissible placing of its prestige behind a client, a prosecutor or government acting as
18 a guarantor of the witness's truthfulness, or a prosecutor relying on evidence not within the
19 jury's purview. Compare Bowie, 892 F.2d at 1498-99 (analyzing concepts of "credibility-
20 vouching" and "credibility bolstering" separately) with United States v. Hendersen, 717 F.2d
21 135, 137-38 (4th Cir. 1983) (defining the concept of bolstering similar to Bowie, then
22 declaring the facts of that case to not be a form of bolstering or vouching) and
23 Commonwealth v. Rivera, 712 N.E.2d 1127, 1132 (Mass. 1999) (defining "vouching" in
24 terms of bolstering). Bowie also cites United States v. Townsend, 796 F.2d 158, 162-63
25 (6th Cir. 1986), as an example of a court merging the concepts. This is not the case, as
26 Townsend mentions only bolstering, and defines the concept similarly to Bowie.
27
28

1 While Plea or immunity agreements may not be directly offered to bolster the
2 immunized or beneficiary witness' credibility, the existence of the agreement, reached with
3 the permission of the State, does just that. The plea agreement combined with the
4 agreement to testify constitutes an implied bolstering or vouching for the witness called.
5 See United States v. Winter, 663 F.2d 1120, 1133-35 (1st Cir. 1981); United States v.
6 Roberts, 618 F.2d 530, 533 (9th Cir. 1980); see also Oregon v. Charbonneau, 913 P.2d
7 308, 311 (Or. 1996) (where the state drafted into an actual agreement that the primary
8 reason for the agreement is that, based on the witness' statements and its investigation,
9 the state believes the charge actually reflects the role the defendant played in the victim's
10 death). Commonwealth v. Lam, 684 A.2d 153, 157 (Pa. Super. Ct. 1996), defined
11 "bolstering" as whenever a state places its prestige of the government behind the witness
12 through personal assurances of his or her veracity or indicates that information not before
13 the jury supports the witness' testimony. This would more accurately be described as
14 improper vouching. Bolstering is better described as the improper evidentiary practice of
15 increasing the witness's standing in front of the jury before an attack on her truthful
16 character.
17
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20 Even the ABA has addressed the problems associated with the "vouching" for
21 witnesses and their testimony. Direct vouching has been deemed impermissible under
22 ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-5.8(b). "It is unprofessional
23 conduct for the prosecutor to express his or her personal belief or opinion as to the truth or
24 falsity of any testimony or evidence on the guilt of the defendant." Is properly extended to
25 the implied vouching via a plea agreement. An in-trial expression of personal opinion of the
26 prosecutor is improper, the plea agreement should be viewed as an implied expression of
27 personal opinion by the prosecutor and not allowed at trial. The testimony if allowed tends
28

1 to be a form of unsworn, unchecked testimony and exploits the influence of the
2 prosecutor's office and undermines the objective detachment that should separate a lawyer
3 from the cause being argued. Such an argument is expressly forbidden by the Code of
4 Professional Responsibility, and such an implied argument should also be precluded.
5

6 The testimony that was elicited at the time of the preliminary hearing and is
7 anticipated to be introduced at the time of trial is based upon highly suspect interrogation
8 techniques. In this case, wherein Herb was given by detectives an offer to either "be a
9 suspect or a witness". The technique used tends to result in very suspect and unreliable
10 testimony that should be viewed as unconstitutionally inadmissible testimony that must
11 be precluded at trial. Additionally, the interrogation techniques used by the police place the
12 suspect in a precarious situation of either being charged with the full culpability of the crime
13 or alter their statement to coincide with the police theory of the sequence of events. This
14 educates the "suspect" into becoming a "witness". Because the State relies on the "new
15 and improved" version of the "suspect/witness" statement and it becomes so intertwined
16 with negotiations the States offers, it becomes increasingly difficult, if not impossible, for
17 the defense to use cross-examination to demonstrate the "implicit promise" of leniency in
18 charging or sentencing that the testifying individual took into consideration when giving his
19 suspicious and unreliable statement. Indeed, with the clear language of NRS 199. 240 in
20 reference to "Bribing or intimidating witness to influence testimony", a person who:
21

22
23 1. Gives, offers or promises directly or indirectly any "compensation", gratuity or
24 reward to any "witness" or person who may be called as a witness in an official proceeding,
25 upon an agreement or understanding that his testimony will be thereby influenced;

26 While recognizing the need for some latitude in an interrogation setting, here there
27 appears to be a continuing enhancement of witness statements, leading to more
28 cooperation and eventually a statement that the prosecution must use to prosecute

1 the case. In addition, it becomes more and more difficult for a jury to not rely upon the
2 expertise of the State that impliedly vouches for the "unreliable" testimony.

3 **CONCLUSION**

4
5 The reasons for the position and limiting the testimony as requested go to the heart
6 of Defendant Malone to obtain a fair trial in this case. The prosecutor is cloaked with the
7 authority of the State of Nevada, he stands before the jury as the community's
8 representative. His remarks are those, not simply of an advocate, but rather of a County
9 official duty-bound to see that justice is done. The jury knows that he has prepared and
10 presented the case and that he has complete access to the facts uncovered in the
11 government's investigation. Thus, when the prosecutor conveys to the jurors his personal
12 view directly or even impliedly via an agreement to testify, that a witness spoke the truth, it
13 may be difficult for them to ignore his views, however biased and baseless they may in fact
14 be.
15

16 Wherefore Mr. Malone prays that this Honorable Court either recuse the District
17 Attorney's office or, in the alternative suppress the statements of Donald Herb.
18

19 DATED this 12th day of January, 2009.

20 DAVID SCHIECK
21 SPECIAL PUBLIC DEFENDER

22 
23 By: 

24 RANDALL PIKE
25 Assistant Special Public Defender
26 330 South Third Street, Suite 800
27 Las Vegas, Nevada 89155
28 (702) 455-6265

1 ROC
2 DAVID M. SCHIECK
3 SPECIAL PUBLIC DEFENDER
4 Nevada Bar No. 0824
5 Randall H. Pike
6 Assistant Special Public Defender
7 Nevada Bar No. 1940
8 Charles A. Cano
9 Deputy Special Public Defender
10 Nevada Bar No. 5901
11 330 South Third Street, 8th Floor
12 Las Vegas, NV 89155-2316
13 (702) 455-6265 (702) 455-6273 fax
14 Attorneys for Malone

FILED

JAN 12 1 48 PM '09

E. J. [Signature]
CLERK OF THE COURT

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

13 THE STATE OF NEVADA,
14 Plaintiff,

15 vs.

16 DOMONIC MALONE,

17 Defendant.
18

CASE NO. C224572

DEPT. NO. XVII

DATE OF HEARING:
TIME OF HEARING:

19 RECEIPT OF COPY

20
21 RECEIPT of a copy of Motion to Recuse the Clark County District Attorney's Office or
22 in the Alternative Motion in Limine to Prohibit introduction of Statements made by Co-
23 Defendant Herb at the time of Trial is hereby acknowledged.

24 Dated: 1/12/09

25 DISTRICT ATTORNEY OFFICE

26
27 *[Signature]*
28 200 Lewis Ave, 3rd Floor
Las Vegas, NV 89155

FILED

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TRAN

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-VS-

DOMONIC RONALDO MALONE,

Defendant.

CASE NO. C224572

DEPT. NO. XVII

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT JUDGE

TUESDAY, JANUARY 20, 2009

RECORDER'S TRANSCRIPT OF
DEFT'S PRO PER MOTION TO DISMISS COUNSEL

Appearances:

For the State:

CHRIS J. OWENS, ESQ.
Deputy District Attorney

For the Defendant:

CHARLES A. CANO, ESQ.
RANDALL H. PIKE, ESQ
Deputy Special Public Defenders

Recorded by: MICHELLE RAMSEY, Court Recorder

1 TUESDAY, JANUARY 20, 2009: 8:22 A.M.

2
3 THE MARSHAL: Page 5, Malone.

4 THE COURT: C224572, State of Nevada versus Domonic Malone. Mr.
5 Malone is present in custody with -- who's actually the attorney, both of you, or --

6 MR. PIKE: Yes, Your Honor.

7 MR. CANO: Good morning, Your Honor. Charles Cano and Randall
8 Pike --

9 THE COURT: All right.

10 MR. CANO: -- Your Honor, on behalf of Mr. Malone currently.

11 THE COURT: And Mr. Owens for the State.

12 This is the Defendant's pro per motion to dismiss counsel. Are
13 you trying to dismiss both counsel or --

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Why?

16 THE DEFENDANT: Well, as -- I have written you a letter of December
17 15th explaining why, but then had I filed a motion and it was set for a court date.
18 So I just go from what I have written from the Supreme Court of Nevada,
19 Professional Rule Conduct 1.4, it's amended, but okay. It's say -- on numerous
20 occasions I have requested that my attorneys provided me with the complete
21 discovery concerning this case in its entirety. To this day, they have not done as
22 I had asked them; they have only given me a portion of the discovery. I wanted
23 all the information in regard to this case as quickly as possible and my counsel
24 neglected to abide by this simple demand. Right.

25 So they say in Rule 3.1, meritorious claims and petitions. That a

1 lawyer shall not bring or defend a proceeding, or assert on conviction [sic] an
2 issue therein, unless there is a basis in law and fact for doing so that is not
3 frivolous, which includes a good faith argument for an extension, modification or
4 reversal of existing law. A lawyer for the defendant in a criminal --

5 THE COURT: Sir, I'm familiar with that.

6 THE DEFENDANT: Okay.

7 THE COURT: Any other besides not turning discovery over to you, any
8 other reasons?

9 THE DEFENDANT: On, no, no, that's not the only reason --

10 THE COURT: That's what I want to know.

11 THE DEFENDANT: -- I have a list of them.

12 I have -- one of the certain issues that to be brought in doing a
13 habeas corpus proceeding that was not brought up, such as my unlawful arrest
14 without a warrant, you know. The different, whole list, a laundry list of things that
15 I have written down, I just have written of in the letter, saying about the perjury of
16 the testimony, the DA using perjured testimony, but they did not argue it during
17 the time or made a timely objection during the habeas corpus hearing. And I
18 have pointed this out to them that they -- Mr. DiGiacomo have read from the
19 newspaper of her thing and he said that, no, don't worry about it; he would take
20 care of that but he have not, of this day, have done these things.

21 Under these things, being it's a 250 capital cases, are things that
22 you need to take care of prior to the set of a trial, so if -- there is stuff that
23 because -- and then I had asked for a selected prosecution situation. And
24 according to the law book, it says that I had to make that assertion before trial
25 before I lose my right to have that as an appeal and I had brought them, to that

1 as well. And they said that, you know, it's not a issue, so.

2 THE COURT: Okay. Let me talk to your counsel here, Mr. Pike and Mr.
3 Cano.

4 MR. PIKE: Your Honor, in reference to not providing him everything,
5 we've provided him, at least twice I personally have gone through my complete
6 file, after we met with the District Attorney's office to make sure we had every-
7 thing that they had. I made a list of all the documents that we had. I sent him
8 that list, asked him to check the items that he did not have; got that back, I
9 provided that to him. He complained of it again. I went through the same
10 procedure again. I gave him a list of all the discovery and gave it back to him.
11 And I have not received a word back from him in reference to this.

12 And we filed 18 motions on this case, including a writ of habeas
13 corpus. We're well-trained attorneys. I'm not going to --

14 THE COURT: Sir, you probably have one of the two most experienced
15 attorneys in the Special PD's office representing you here. The trial is not until, I
16 think, it's October or so, and they have filed numerous motion. I'm sure they're
17 going to file some motions in the future as well.

18 And if there's other discovery that you're missing, contact Mr.
19 Cano or Mr. Pike and they'll get it to you.

20 THE DEFENDANT: I have done that on numerous occasions, this is
21 not --

22 THE COURT: Well, he said he sent you two sets already.

23 THE DEFENDANT: But he did not. They're for him, so he would tell you
24 that the things that he sent me, then I should have already have them. I do not.

25 THE COURT: Okay. Sir, give him a specific list --

1 THE DEFENDANT: I have been three years --

2 THE COURT: Sir, listen to me.

3 THE DEFENDANT: -- I gave him this.

4 THE COURT: Sir, listen to me.

5 Give him a specific list of what you think you are missing. He will
6 make sure that -- he will provide those things to you. If he's already given them
7 to you, then you need to look in your records again, but he will follow-up with
8 that. I know Mr. Pike and Mr. Cano and they will -- I'm sure -- they will follow-up
9 and get you everything you need. As new discovery comes in, they will also
10 forward that to you. Okay. So I don't find good cause here at this point --

11 THE DEFENDANT: Yeah, they --

12 THE COURT: -- sir, your motion to dismiss counsel is denied.

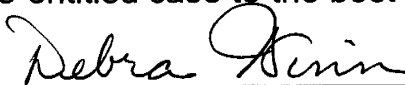
13 THE DEFENDANT: Yeah, yeah, I know. But they --

14 THE COURT: Sir, I denied your motion, okay.

15 THE DEFENDANT: This is -- okay. Thank you.

16 * * * * *

17
18 ATTEST: I hereby certify that I have truly and correctly transcribed the
19 audio/video proceedings in the above-entitled case to the best of my ability.

20 

21 DEBRA WINN, Court Transcriber
22
23
24
25


CLERK OF THE COURT

1 **OPPS**
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 CHRIS J. OWENS
6 Chief Deputy District Attorney
7 Nevada Bar #001190
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13
14 Plaintiff,

-vs-

DOMONIC MALONE,
#1670891

Defendant.

CASE NO: C224572

DEPT NO: XVII

**OPPOSITION TO DEFENDANT'S MOTION TO RECUSE THE CLARK COUNTY
DISTRICT ATTORNEY'S OFFICE, OR IN THE ALTERNATIVE, MOTION IN
LIMINE TO PROHIBIT INTRODUCTION OF STATEMENTS MADE BY CO-
DEFENDANT HERB AT THE TIME OF TRIAL**

DATE OF HEARING: 2-5-09
TIME OF HEARING: 8:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
CHRIS J. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points
and Authorities in Opposition to Defendant's Motion to Recuse the Clark County District
Attorney's Office, or in the Alternative, Motion in Limine to Prohibit Introduction of
Statements Made by Co-Defendant Herb at the Time of Trial.

This opposition is made and based upon all the papers and pleadings on file herein,
the attached points and authorities in support hereof, and oral argument at the time of
hearing, if deemed necessary by this Honorable Court.

POINTS AND AUTHORITIES

ARGUMENT

The Defendant seeks recusal of the Clark County District Attorney based upon the State's agreement to testify with witness Donald Herb. The authorities cited by the Defendant do not support this position. He also seeks the suppression of Donald Herb's testimony. Again, he has cited no law to this effect.

Instead, the exact opposite position is supported. In each case cited by the Defendant, the respective courts held that revelation of a witness truthfulness clause to the jury was appropriate, or was not unduly prejudicial to the defendant. In fact, the case of United States v. Townsend, 796 F.2d 158 (6th Cir. 1986), cited by Defendant, declares that, "a majority of the courts that have considered this issue have held that elicitation during direct examination of a plea agreement containing a promise to testify truthfully does not constitute impermissible bolstering of the witness' credibility." At p.163.

Similarly, the court in United States v. Bowie, 892 F.2d 1494 (10th Cir. 1990), cited by the Defendant, states that, "Presenting evidence on a witness' obligation to testify truthfully pursuant to an agreement with the government and arguing that this gives the witness a strong motivation to tell the truth is not, by itself, improper vouching." [Citations omitted]. "Use of the "truthfulness" portions of these agreements becomes impermissible vouching only when the prosecutors explicitly or implicitly indicate that they can monitor and accurately verify the truthfulness of the witness' testimony." At p.1498.

But the State need not rely exclusively on the law cited by the Defendant, for the State of Nevada has also addressed this issue directly in the case of Sessions v. State, 111 Nev. 328, 890 P.2d 792 (1995) (Not cited by Defendant). Noting that the legislature has specified the protocol for such agreements in NRS 174.061, the Sessions court approved agreements to testify consistent with this statute. It further ruled that the "truthfulness" clause required in such agreements should not generally be presented to the jury. It did not specify any remedies of recusal or suppression. In fact, it found the revelation of such a clause to the trial jury in that case to be harmless. Id. At p. 334.

1 The State of Nevada intends to conduct itself in accord with Nevada statutes and case
2 authority on this subject. But if the Defendant would prefer to perform the trial in accord
3 with the majority federal position cited in its brief, the State is amenable to that course as
4 well.

5 Based upon the forgoing, the State respectfully requests that the Defendant's Motion
6 to Recuse be denied.

7 DATED this 28th day of January, 2009.

8 Respectfully submitted,

9 DAVID ROGER
10 Clark County District Attorney
Nevada Bar #002781

11
12
13 BY /s/CHRIS J. OWENS

14 CHRIS J. OWENS
15 Chief Deputy District Attorney
16 Nevada Bar #001190
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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 28th day of
January, 2009, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER'S OFFICE
FAX: 455-6273
ATTN: RANDALL PIKE & CHARLES CANO

/s/Deana Daniels
Secretary for the District Attorney's Office

CJO/dd

1 **RPLY**
2 DAVID M. SCHIECK
3 SPECIAL PUBLIC DEFENDER
4 Nevada Bar No. 824
5 Randall H. Pike
6 Assistant Special Public Defender
7 Nevada Bar No. 1940
8 Charles Cano
9 Deputy Special Public Defender
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14 (702) 455-6273 fax
15 rpike@co.clark.nv.us
16 canoca@co.clark.nv.us
17 Attorneys for Malone

FILED

JAN 30 1 40 PM '09

E. J. [Signature]
CLERK OF THE COURT

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13 Plaintiff,
14 vs.

CASE NO. C 224572
DEPT. NO. XVII

15 DOMONIC MALONE #1670891
16 Defendants.

17 **REPLY TO STATE'S OPPOSITION**

18 Date of Hearing: 2-5-09
19 Time of Hearing: 8:00am

20 Comes now Defendant, DOMONIC MALONE, by and through his attorneys, DAVID
21 M. SCHIECK, Special Public Defender, RANDALL H. PIKE, Assistant Special Public
22 Defender and CHARLES A. CANO, Deputy Special Public Defender, and submits the
23 following Reply to State's Opposition:.

24 **LEGAL ARGUMENT**

25 Certainly, the procedure in which the State may seek and secure the testimony of a
26 co-defendant (or any witness) in a case has been previously addressed. In Sessions v.
27 State, 111 Nev. 328, 331 (Nev. 1995), the issue was addressed when the court in that
28 case followed the following procedure. Before the witness testified at trial, the State sought

1 the court's permission, pursuant to NRS 175.282, to have the jury inspect the written plea
2 agreement. Sessions objected, unsuccessfully, on the basis that language in the
3 agreement conditioning its validity on Rodon's truthful testimony was improper
4 prosecutorial vouching for Rodon's credibility. The district judge concluded that the
5 controversial provision conformed to the requirements of NRS 174.061, and allowed the
6 jury to inspect the document. The Supreme Court in Sessions then found that

7 Although NRS 174.061 requires that plea agreements "include a statement that the
8 agreement is void if the defendant's testimony is false," such a requirement only
9 operates to invalidate the benefit of the negotiated agreement in the event the
10 witness testifies falsely. We do not ascribe a legislative purpose in NRS 174.061 to
11 include the introduction of prejudicial material against the defendant who is the
12 subject of the testimony. The statutory imposition relating to the nullification of a
13 plea agreement upon "any false testimony on [the testifying defendant's] part," and
14 the provision added by the State subjecting the agreement to the condition that the
15 testifying defendant "testify truthfully," are, in the context of the instant issue,
16 functional equivalents. Language invalidating a plea agreement for false testimony
17 is the practical equivalent of conditioning the validity of such an agreement upon
18 truthful testimony. In either case, inferences of vouching, daring to speak aught but
19 the truth, and a prosecutorial monitor to disabuse the jury of any false testimony,
20 may be drawn by the jury to the prejudice of the defendant.

21 The precise statutory language of NRS 174.061 requires that the written agreement
22 "include a statement that the agreement is void if the defendant's testimony is false."
23 As noted above, we are of the opinion that the Legislature mandated the inclusion of
24 such invalidating language in plea agreements in order to deprive the testifying
25 defendant of an undeserved bargain where the recipient of the bargain testifies
26 falsely. We do not glean from the measure a legislative purpose to prejudice the
27 defendant against whom the testimony is given. We therefore conclude that neither
28 the provision added by the State requiring "truthful testimony," nor the statutory
provision declaring an agreement void when perverted by false testimony are to be
included within the written agreement provided for a jury's inspection. In other
words, our HN6 district courts have both the discretion and the obligation to excise
such provisions unless admitted in response to attacks on the witness's credibility
attributed to the plea agreement.

Despite our conclusion, we perceive no compelling reason to reverse Sessions'
conviction on the present facts. The cautionary jury instruction given to the jury on
the risks inherent in plea agreements negated any prejudicial effect the written plea
agreement may have otherwise had on the minds of the jurors. Although the district
court should have exercised its discretion to excise the "testify truthfully" and "void if
false" language from the agreement prior to inspection by the jury, the error was —
harmless. See Shaw, 829 F.2d at 717-18 (cautionary jury instruction rendered
erroneously allowed prosecutorial vouching harmless).

In the present case, Donald Herb, aka "Donny" having already received the majority of the
benefit of his bargain after he testified at the preliminary hearing, it is unmistakable that the

1 State has obtained testimony that it believes supports its theory and is therefore is
2 "truthful". The Defense concedes that the manner exercised by the State in this case is in
3 accord with previous procedures, statutes and protocols. The defense, in this case, has
4 made the allegations based upon the inherent "vouching" that has occurred as a result of
5 the negotiations.

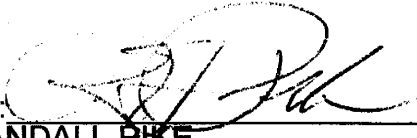
6 Contrary to Shaw, 829 F.2d at 717-18 the defense believes that a cautionary jury
7 instruction is unable to render this inherent form of prosecutorial vouching harmless. The
8 "edification concerning the nature of the risks associated with plea agreements." Sessions,
9 supra at 33. Cross examination and a direct attack on the plea agreement and testimonial
10 agreement merely creates a paradigm in which the Defense is forced to show the extent to
11 which the State vouches for this purchased testimony. The slippery slope of acquired
12 testimony is seen in cases such as United States v. Hilton, 772 F.2d 783 (11th Cir. 1985);
13 State v. Charboneau, 323 Or. 38, 913 P.2d 308 (1996), wherein it was found to be error to
14 admit a plea agreement including language indicating that the state believed the witness's
15 assertions; although the evidence took the form of a document, it was equivalent to the
16 prosecution calling a police detective to testify that on the basis of the state's investigation,
17 he or she believed that the witness was telling the truth; "A witness' testimony or an exhibit
18 may not, explicitly and directly, contain an opinion as to a trial witness's credibility"). While
19 in cases such as Commonwealth v. Miller, 2002 Pa. LEXIS 2221 (Pa. Sup. Ct., Oct. 25,
20 2002) prosecutor's questions on direct examination about the plea negotiation may be
21 considered "merely an articulation of the parameters of [the] plea agreement", in the
22 present case, contrary to those of United States v. Universal Rehabilitation Servs. (PA),
23 205 F.3d 657 (3d Cir. 2000) the existence and terms of the agreement were relevant to
24 explain how the witness acquired first-hand knowledge need not be expressed via the plea
25 agreement. Indeed the nature of the investigation and the selection of Herb to receive this
26 negotiation further fails to serve as a basis to eliminate any concern the jurors might have
27 that the government was selectively prosecuting the defendant in this case (*Id.*). The

1 Defendant, similar to the findings in United States v. Spriggs, 996 F.2d 320 (D.C. Cir.) is of
2 a belief that this matter is currently not so well established within the United States that the
3 Nevada Statutes may survive direct challenge. In Spriggs, (*Id*) the Court notes the split of
4 authority and collecting the cases from the Second, Ninth, and Eleventh Circuits to the
5 effect that the aspects of the cooperation agreement that are more likely to bolster than
6 impeach are inadmissible on direct), cert. denied, 510 U. S. 938 (1993)

7 Accordingly, given the specific circumstances of this case, defendant must seek the
8 unusual relief requested within his motion.

9 DATED this 30th day of January, 2009.

10
11 DAVID SCHIECK
12 SPECIAL PUBLIC DEFENDER

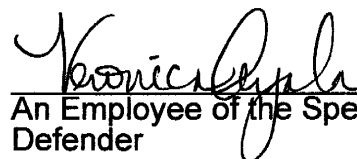
13
14
15 By: 
16 RANDALL PIKE
17 Assistant Special Public Defender
18 Nevada Bar #1940
19 330 South Third Street, Suite 800
20 Las Vegas, Nevada 89155
21 (702) 455-6265
22
23
24
25
26
27
28

1 CERTIFICATE OF MAILING

2
3 I HEREBY CERTIFY that on the 30th day of January, 2009, I mailed out a copy of
4 the foregoing REPLY TO STATE'S OPPOSITION, by depositing a copy thereof, in the
5 United States Mail, in Las Vegas, Nevada, to:

6
7 CHRISTOPHER ORAM, ESQ.
8 520 S. 4th Street, 2nd Floor
9 Las Vegas, NV 89101
10 Co-Counsel for Jason McCarty

BENJAMIN C. DURHAM, ESQ.
601 S. 10th Street, Suite 101
Las Vegas, NV 89101
Attorney for Donald Herb

11
12 
13 An Employee of the Special Public
14 Defender

15
16
17 RECEIPT OF COPY

18 Receipt of a copy of the foregoing Reply to State's Opposition is hereby
19 acknowledged.

20 Dated: Jan 30, 2009
21

22 DISTRICT ATTORNEY OFFICE

23
24
25 
26 MARC C. DIGIACAMO
27 200 Lewis Ave. 3rd Floor
28 Las Vegas, NV 89155

1 TRAN

2
3 **COPY**

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,)

7 Plaintiff,)

CASE NO. C224572

8 -vs-)

DEPT. NO. XVII

9
10 DOMONIC RONALDO MALONE,)
11 JASON D. McCARTY,)

12 Defendants.)

13 BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT JUDGE

14 THURSDAY, FEBRUARY 5, 2009

15 RECORDER'S TRANSCRIPT OF
16 DEFT MALONE'S MOTION TO RECUSE
THE DISTRICT ATTORNEY'S OFFICE

17 DEFT McCARTY'S JOINDER TO MALONE'S MOTION TO RECUSE

18 Appearances:

19 For the State:

CHRIS J. OWENS, ESQ.
Deputy District Attorney

20
21 For Defendant Malone:

CHARLES A. CANO, ESQ.
RANDALL H. PIKE, ESQ
Deputy Special Public Defenders

22
23 For Defendant McCarty:

JONATHAN POWELL, ESQ.

24
25 Recorded by: MICHELLE RAMSEY, Court Recorder

1 THURSDAY, FEBRUARY 5, 2009: 9:29 A.M.

2
3 THE MARSHAL: Page 2, Malone and McCarty.

4 THE COURT: C224572, State of Nevada versus Malone and McCarty.
5 We have -- Defendants are present in custody.

6 MR. PIKE: Randall Pike and Charles Cano appearing on behalf of Mr.
7 Malone, who's present in custody.

8 MR. CANO: Morning.

9 THE COURT: This only on for Malone 'cause I know we -- both
10 Defendants are here.

11 MR. POWELL: We filed a joinder motion, Your Honor.

12 THE COURT: Okay.

13 THE CLERK: McCarty's joinder. McCarty filed a joinder.

14 THE COURT: Right. Do we have that here?

15 Okay. And Mr. Owens for the State. And this is defense motion
16 to recuse the District Attorney's office; who wants to take it?

17 MR. PIKE: I'll take it, Your Honor. Or, in the alternative preclude the
18 testimony of Mr. Herb.

19 As you know -- and I appreciate the Court's patience in these
20 motions. I've got -- on Rule 250 cases, we're obligated to try and see out into the
21 future and to look at what's involved in this.

22 As Mr. Cano and myself were preparing for the trial that was
23 scheduled for this, we were looking at the cross-examination of Mr. Herb, an
24 individual who is the -- the one of them that actually has the most to lose out of
25 the three individuals that are involved in this. It was both his cars that were used.

1 They could have been forfeited. He could be sitting, facing the same charges
2 that the Defendants are facing in this case. And, yet, pursuant to his -- work of
3 his attorney and the selection of the State, he was allowed to enter into a plea
4 negotiation. We've all -- the State is often put in the position to have -- to make
5 these value judgments, and so the case authority is developed towards trying to
6 solve this to not allow for an impermissible vouching for the witness, through
7 redaction of the plea agreement or agreement to testify. And so those processes
8 sometimes work.

9 In this case, where there is no physical evidence to tie Mr.
10 Malone to the scene of the crime and that evening, and yet there is cell tower
11 and telephone calls and those other things that would necessarily tie Mr. Herb,
12 who was allowed to plead out, and Mr. McCarty who stands -- who remains
13 charged in this.

14 Then the selection of the State as to whom to believe, and the
15 person that is appearing out of custody, that is such an inherent vouching and an
16 implicit vouching, that there is no way to solve that through any sort of effective
17 cross-examination. The more I attempted to rehearse a, an attack on Mr. Herb in
18 anticipation of his testifying, I found that I was, in effect, doing the vouching that
19 the State would not necessarily be able to do. And as I attacked him more they,
20 of course, would then have the ability to rehabilitate Mr. Herb. And then it
21 becomes more and more apparent that intrinsic to this negotiation, that the
22 negotiation and the presence of him appearing and testifying out of custody the
23 way that he was was -- is inherently an indestructible vouching. And that
24 basically I'm put on a Occam's razor that I can't attack him effectively, because if
25 I do that then I'm doing the work of the State. So in reference to that I believe

1 that the only appropriate remedy that I have is to exclude one of those two
2 parties.

3 Now, the State's invested a lot of time in this and that's -- and
4 invested a lot of prosecutorial effort in relationship to that, and that's the reason I
5 give the Court the option towards the two. The case law regarding vouching, and
6 the primary case is cited both in the State's response and my reply to that,
7 discusses all of that. And so for that reason we're locked into those -- into this
8 position and it's a corner that I can't figure a way out of unless one of the two
9 obstacles that Mr. Malone has in his case is removed.

10 THE COURT: All right. Mr. Owens.

11 MR. OWENS: Your Honor, we cut deals with other involved individuals
12 all the time, as this Court is aware, that's not license to force the State to get off
13 of a case. I mean we always have people testifying.

14 Mr. Herb was an individual who came and assisted with the
15 cleanup and had a lot of other information about the crime. And he was allowed
16 to plead guilty to an offense and he's going to be testifying in the State's case.
17 But there's no cases that the defense has presented that would offer a remedy of
18 recusal.

19 In fact, the cases that discuss this don't offer any remedy
20 whatsoever other than to prevent the State from arguing the credibility of the
21 witness, based upon the plea deal that he should be truthful. The State doesn't
22 intend to do that. There is a Nevada state case on point here that we cited to, it
23 wasn't raised by the defense. And in that case, they specify what the remedy is
24 for potential bolstering, based upon a plea agreement with another interested
25 party that's going to be testifying. And we comply with that. We intend to comply

1 with that in this case.

2 We don't intend to go into anything about the agreement for
3 truthfulness, unless they go into that and then all the case law, including the case
4 law that they cite in their brief, all the federal cases would allow it in that instance.
5 Other than that, we will be arguing the credibility of this witness based upon the
6 other evidence in the case that the jury lawfully hears, just like we would with any
7 other witness in the case.

8 I mean the bottom line here is there's not a shred of authority in
9 support of the Defendant's motion.

10 THE COURT: Anything further, Mr. Pike?

11 MR. PIKE: No, Your Honor. I outlined in my reply as to why that would
12 not be applicable. And after the ruling on the Court's decision, I have some
13 housekeeping matters in relationship to the case also.

14 THE COURT: Mr. Owens is correct; I mean the joy of cases, sometimes,
15 a co-defendant does take a deal and agree to plead, and it's just a fact of life.
16 And you can impeach them and I know you know how to do that, and I'm sure
17 you will in this case, based upon any negotiations of favorable treatment he has
18 received. So I am going to deny the motion, motion to recuse the DA's office
19 and, also, to prohibit the testimony of this witness. Both motions are denied.

20 You had a housekeeping matter?

21 MR. PIKE: Yes, Your Honor.

22 Last time we appeared it was on the Defendant's proper person
23 motion to remove the Special Public Defender's officer. Pursuant to the Court's
24 instructions at that time, I advised the Court and said I had sent Mr. Malone a
25 catalog of all of the documents that he had. He did then send me a letter

1 outlining those items which he believed he -- or he stated he did not have. I'm
2 not challenging that. So I have prepared a copy of all of those documents. The
3 -- I brought it to court with me today.

4 The majority of the items that had not been provided to him were
5 items that may be considered mitigation, if it reaches that stage. CCDC records,
6 Department of Correction records, medical records, all of those items. Complete
7 crime files of potential other bad act evidence. So to comply with the Court's
8 recommendation, that was done.

9 In addition, in relationship to this motion, in particular as to the
10 involvement of the State in selecting Mr. Herb as a witness in this case, Mr.
11 Malone has expressed some discontent with our refusal to bring some motions,
12 which we do not believe are based in authority or in fact. So I took the liberty of
13 contacting the Nevada State Bar in relationship to whether or not I could present
14 those simply by putting a cover sheet on the Defendant's motions and allowing
15 him to argue those.

16 The State Bar contacted me pursuant to that request for advice
17 on that and some other items in relationships to the letter that I received from Mr.
18 Malone and indicated that ethically I could not do that, it would not be the best
19 practice. However, if the Court directed or allowed that to occur in this case that I
20 could then follow that procedure. And so I -- I'm just bringing that to the Court in
21 reference to allegations that are being brought by Mr. Malone feeling that he's
22 the victim of a selective prosecution or impermissible or unjurisdictional or illegal
23 arrest items, which we have researched but he wants brought and I have that
24 dilemma.

25 So I'm asking the Court as to whether or not the Court would

1 allow for that in this case, as to those items, those motions he desires to bring.
2 And if not, then to advise the Court that I have made those efforts to attempt to
3 resolve any complaints or issues that Mr. Malone has in reference to the manner
4 in which we're handling the case.

5 THE COURT: Where's Mr. Malone?

6 DEFENDANT MALONE: I'm right here, sir.

7 THE COURT: Stand up, sir.

8 DEFENDANT MALONE: All right.

9 THE COURT: I just want to deal with the first issue. You received your
10 discovery, correct?

11 MR. PIKE: It's right here [indicating], Your Honor. I have it here and
12 because of that I -- usually the transportation officers don't like us to deliver to
13 them in open court. I can either do that -- we had to go through and redact
14 Social Security numbers, addresses and the rest of that. And I can indicate that
15 those items have been done. And I can either deliver it to him in court today,
16 because I need to make a record that all these items have been provided to him.
17 Or I can put it on his property and then he can ask to have it released to him from
18 his property from the jail.

19 THE COURT: Why don't we have you deliver that to the jail --

20 MR. PIKE: Okay.

21 THE COURT: -- 'cause I know there's certain rules and regulations of
22 receiving things here in court. So if you can drop that off today or the next day.

23 MR. PIKE: I'll do it this morning.

24 FEMALE TRANSPORTATION OFFICER: Your Honor --

25 THE COURT: Okay. Anything else as far as discovery?

1 FEMALE TRANSPORTATION OFFICER: -- he can have it. He can
2 have it.

3 MR. PIKE: Okay.

4 THE COURT: Okay. Hang on, sir. Just want to check with the trans-
5 portation officer. There's no objection to turning these over to you here in open
6 court?

7 MR. PIKE: There are no staples, there's nothing metal contained in that
8 and --

9 THE COURT: All right.

10 DEFENDANT MALONE: I have received the portions --

11 THE COURT: Okay.

12 DEFENDANT MALONE: -- that I had asked for and I just want to say
13 thank you, really did.

14 THE COURT: All right.

15 Now, you had some other motions you want your attorney to
16 file. Sir, Mr. Pike and Mr. Cano are very experienced attorneys. Believe Mr. Pike
17 is number two in the Special PD's office, Mr. Cano handles many cases there. I
18 can tell you that my experience with both of them, that they file every conceivable
19 motion that has some merit, and they've done that in your case, as well as many
20 other cases. And it's their job as attorneys and officers of the Court to present
21 motions that have some merit and some possibility of being granted or, also, to
22 protect the record. And they've done an analysis that perhaps what you want
23 them to do is not legally supported.

24 DEFENDANT MALONE: Okay.

25 THE COURT: All right.

1 DEFENDANT MALONE: Okay.

2 THE COURT: Okay. So are we fine with Mr. Pike and Mr. Cano?

3 DEFENDANT MALONE: Well, like I said I asked for it, he gave it to me.

4 THE COURT: Okay.

5 DEFENDANT MALONE: All the things I asked for. I just -- and I had just
6 that one issue that I said with Karina Phillips.

7 THE COURT: And everything is fine now.

8 DEFENDANT MALONE: But everything else. But I only had one issue,
9 just -- that's it.

10 THE COURT: Okay.

11 DEFENDANT MALONE: Just the motion and stuff, just one motion.

12 MR. PIKE: And if he'll go ahead and write that.

13 THE COURT: What's the title of the motion?

14 DEFENDANT MALONE: No, it was just to preclude Karina Phillips'
15 testimony based upon what had happened at the preliminary. I had written a
16 letter --

17 THE COURT: Well, let's don't get into that, I don't want to file anything.

18 DEFENDANT MALONE: No, no. No, just --

19 THE COURT: But, sir, typically the defense attorney can't preclude
20 someone from testifying --

21 DEFENDANT MALONE: Uh-huh.

22 THE COURT: -- you know like if -- I'm assuming you're thinking 'cause
23 they may give some harmful testimony for your case, the defense typically can't
24 file a motion just to prevent people from testifying, all right, if that was the base of
25 your motion.

1 DEFENDANT MALONE: That was just on the -- the thing that she
2 perjured herself.

3 THE COURT: Okay. Well, then Mr. Pike or Mr. Cano, will impeach her
4 or attempt to impeach her on the witness stand. And if you have any documents
5 or anything to support the fact that you think she was lying, give it to them and
6 they'll investigate it. All right.

7 DEFENDANT MALONE: Okay.

8 THE COURT: All right. Thank you.

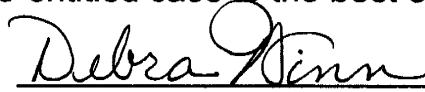
9 DEFENDANT MALONE: Thank you.

10 MR. PIKE: Thank you, Your Honor.

11 [Whereupon the proceedings concluded]

12 * * * * *

13
14 ATTEST: I hereby certify that I have truly and correctly transcribed the
audio/video proceedings in the above-entitled case to the best of my ability.

15 

16 DEBRA WINN, Court Transcriber

1 Q With a marker?

2 A Yes.

3 Q Then we have two disks that say June 6th on them; is that correct?

4 A Yes.

5 Q What's on these?

6 A Those are conversations that we had at the jail on the morning of the 6th
7 and subsequently in the car traveling to a location.

8 Q Okay. Now we know from the transcriptions there were sort of three
9 continuing conversations --

10 A Correct.

11 Q -- but there's two disks. Have you got two on one there or something?

12 A I think that's the way they were downloaded and recorded. They could
13 have been all put on one disk but they were put on two, I think, because of the way
14 they were downloaded.

15 Q And the first one has the designation Henderson Detention Center?

16 A Yes.

17 Q That would be the first one chronologically on the 6th?

18 A Yes.

19 Q And the second one says: Traveling in vehicle to Lake Mead, would be
20 the second one.

21 A Yeah.

22 MR. OWENS: Okay. We'd ask to have those marked as 3 and 4.

23 THE COURT: Yes. That's fine.

24 MR. SGRO: No objection.

25 THE COURT: Great. Well, Sandy will mark them.

1 BY MR. OWENS:

2 Q Did the Defendant during your conversation, near the front-end of your
3 conversation, indicate a desire to talk to you about some of the things you were
4 asking him about?

5 A Well, when I told him I wanted to talk to him about a girl being beat, he
6 says: Yeah, that's what I want to get to. I want to get to that now. Type of incident.

7 Q All right. And --

8 THE COURT: So, I'm sorry, stop for just a sec. I've got to write this down.

9 You mentioned to him you wanted to talk to him about a girl that had
10 been beaten?

11 THE WITNESS: I wanted -- yes. I wanted to talk to him about a -- first I told
12 him I needed to speak to him about a beating and then I wanted to talk to him about
13 a girl getting beaten. And he said: Yeah, I want to talk to you about that now. Or
14 words to that effect, I can't remember the exact wording, I'd have to look back on the
15 transcript.

16 BY MR. OWENS:

17 Q And does that occur on about page 8 of the transcript?

18 A Right around -- right at the beginning, right around there.

19 Q And for the record, did you bring copies of the transcript with you to
20 assist you if you need to reference those?

21 A Yes; I did.

22 Q If you need to, just let us know if that's what you're doing.

23 A Okay.

24 THE COURT: Are there any extra copies? One --

25 MR. OWENS: There's a whole -- yeah, we can get the Court a set, but

1 there's a whole --

2 MR. DiGIACOMO: Do you want to give her that set?

3 MR. SGRO: They're attached, Your Honor.

4 MR. OWENS: They're attached to his motion.

5 THE COURT: Which is in, like, one of the A, B, C, D or Es of this file, so how
6 about if I just use this for now?

7 MR. OWENS: Okay.

8 THE COURT: Thanks. Is this an extra one?

9 MR. DiGIACOMO: Yes.

10 THE COURT: Okay.

11 MR. DiGIACOMO: We know which one.

12 THE COURT: Go ahead.

13 BY MR. OWENS:

14 Q And so by -- in that first statement where he said that's what he wanted
15 to talk to you about, that references about page 8, you think?

16 A I don't know. Looking back on it, yes. Page 8, line 9, 10, 11, 12.

17 Q Okay. And you begin to question him. You started asking him about a
18 battery and then that moved over into the death of the two victims -- the bodies that
19 you found back on the 20th.

20 A Yes.

21 Q Okay. There's an allegation that at some point he wanted to talk to his
22 mother and that you refused to let him talk to his mother. Do you know what that's
23 about? Do you remember any reference to him ever telling you that he wanted to
24 talk to a parent?

25 A Well, there was one reference where he -- we were talking about a

1 medical receipt that he had received when he had gotten beaten early in the
2 morning on the 18th. And we were talking, I was asking him along the lines of who
3 filled it out, what it had to do with. And he says: Well, let -- you know, if I call my
4 mom, I can find out exactly. And I said: No, we don't have to, you know, we don't
5 have to call her. And we went on from there.

6 The next thing that had to do with his mom, he said he wanted to -- he
7 said he wanted to be taken to his mother or something along that line, but at that
8 point in time, he was under arrest.

9 Q This was much, much later in the conversation.

10 A Oh, much later.

11 Q So up at the front-end the only reference was that he could get certain
12 information from his mother?

13 A Yes.

14 Q And prior to the arrest which occurs back around page 140 something, I
15 think, he had never said that he wanted to talk to a parent?

16 A No.

17 Q He'd never been told that he couldn't contact a parent if he wanted to?

18 A No.

19 Q Okay. And, but I think also over on page 4 there was a reference that --
20 he talked about his mother back on page 3 or page 2 with regard to having to ask
21 his mother about his specific address. On page 3, I think. Page -- I'm sorry, page 2.

22 A Well, I asked him -- in that context, I asked him where did he lived, what
23 his address was. And he told me he didn't know, that he would have to ask his
24 mother.

25 Q Okay. But then he gave you an address?

1 A Yeah, he said -- according to this, it says 5920 Pecos.

2 Q You never told him he couldn't ask his mother?

3 A No. He never -- he just said: I have to ask my mother.

4 Q Was there some point in the conversation where the Defendant talked
5 about wanting to take a walk? Do you remember that?

6 A Yeah.

7 Q Let's take a look over at that. I think that's around page 136.

8 A Okay.

9 THE COURT: All right.

10 BY MR. OWENS:

11 Q Now in preparation for your testimony, have you had a chance to review
12 the transcripts that we're looking at here?

13 A Yes.

14 Q This thing about wanting to take a walk, it starts on page 136, a few
15 lines in. He says: Can we walk for a second?

16 A Right.

17 Q And you said: Can we walk for a second? Did you know what he
18 meant at that point in time?

19 A I was under the impression that he wanted to go off the record.

20 Q Okay.

21 A And just walk away from --

22 MR. SGRO: Objection. That calls for speculation, Your Honor.

23 MR. OWENS: Just for what was in the mind of the officer and his -- what he --

24 THE COURT: What he thought, not what --

25 MR. OWENS: Yeah. What he thought, that's all.

1 THE COURT: Okay. That's --

2 MR. OWENS: Because that's what they put an issue here.

3 THE COURT: Overruled.

4 BY MR. OWENS:

5 Q You then talked about this request of his to take a walk. That goes on
6 for a couple of pages from page 136; doesn't it?

7 A Right.

8 Q And that's accurately reported in the transcript that we have.

9 A Yes.

10 Q Okay. Were you able to satisfy yourself on what you thought he wanted
11 at that point in time?

12 A At the end I just came to the assumption he just wants to walk away
13 from the -- from -- to where we're totally alone, I guess, you know, and wanted to do
14 it that way. At that -- I told him: Hey, there's no secrets in this murder
15 investigation.

16 Q At first you had said: Do you want to turn off -- or walk away from the
17 recorder? He said: No, he wanted to record.

18 A Right.

19 Q But he wanted to take a walk with you away --

20 A Right.

21 Q -- from the area where you standing.

22 A And then he made it clear that he, no, he said: Bring the recorder, go
23 ahead and bring the recorder.

24 Q Okay.

25 A You know.

1 Q Did you ever tell him that he wasn't free to leave up until the point of his
2 arrest?

3 A I never did.

4 Q And the point of his arrest occurred just a few pages later; is that
5 correct?

6 A Yes.

7 Q You were talking to him about --

8 THE COURT: What page is that on?

9 MR. OWENS: Your Honor, I'm taking the time to look here -- there's a
10 reference --

11 THE COURT: Okay. It's on page 147.

12 THE WITNESS: No.

13 THE COURT: Line 17.

14 THE WITNESS: 139.

15 THE COURT: Okay. You're under arrest and you're going --

16 THE WITNESS: No, the first time I'm making a statement is 139 --

17 MR. OWENS: Okay.

18 THE WITNESS: Line 6.

19 THE COURT: 139.

20 THE WITNESS: Line 6. Let's go to jail.

21 BY MR. OWENS:

22 Q That's okay. 139 you say: Let's go to jail.

23 A Right.

24 Q Okay. So that would have been about three pages or maybe just one
25 page after his conversation about wanting to take a walk at that point in time?

1 A That was 136 and this is 139, yeah.

2 Q Right. But that conversation about the walk had gone on for a couple of
3 pages?

4 A Right.

5 Q Okay. Prior to that -- him talking about wanting to walk away from the
6 truck area there, had you ever restricted his movement or told him he wasn't free to
7 leave or had there been any other request to go anywhere by him?

8 A No, he just -- we just stayed there and we were talking.

9 Q And you made a decision to take him into custody at that time?

10 A At page 139.

11 Q Okay. And his response to you telling him that he was going to be
12 taken into custody was wanting to know why, what the charge was going to be?

13 A Yeah.

14 Q And what the basis for it was.

15 A Right.

16 Q Did you attempt to explain that to him?

17 A He was at that point in time beginning very -- I don't want to say
18 animated, but I mean, he was worked up at that point and he couldn't understand
19 why I was taking him into custody, especially when he says: I told you, you know,
20 what had happened. I told you I tried to stop it. This, that, and all. And I was trying
21 to explain to him why I was and I was trying to get over his voice, you know, and
22 telling him to listen to me and to explain so why I told him I was taking him into
23 custody. So it was kind of an exchange there for about 30 seconds, a minute, or
24 something like that.

25 Q Okay. Did you advise him of his *Miranda* rights at that point in time?

1 A When I finally got him in cuffs and to him listen to me, I did.
2 Q Okay. And so you advised him of his constitutional rights, and did he
3 indicate that he understood those?
4 A Don't think he ever said -- I'd have to look back, but I don't think he ever
5 said I understand my rights or anything like that.
6 Q Did it seem to you that he understood what you were saying?
7 A Yes.
8 Q And that was on page --
9 THE COURT: What page --
10 MR. OWENS: -- for the reference 142.
11 THE COURT: What page did the cuffs go on?
12 MR. OWENS: 142, Your Honor, toward the bottom.
13 BY MR. OWENS:
14 Q Because if you look at page 143 at the top. You said: Now listen to
15 me, if you're hearing me. And he said: Yes, sir.
16 A Okay. Yes.
17 Q All right. So he acknowledged that he was listening to your
18 admonishment there. Is that right?
19 A Yes.
20 Q Okay. And then he continued to discuss --
21 MR. SGRO: I'm sorry, Counsel, what page did you say the cuffs?
22 MR. OWENS: We haven't talked about cuffs.
23 THE COURT: Oh,
24 MR. SGRO: I thought the Court just asked about handcuffs.
25 THE COURT: I did.

1 MR. OWENS: The arrest, I think.

2 THE COURT: And then I -- that -- I know *Miranda's* at 142; right?

3 MR. OWENS: Right.

4 THE COURT: Okay. So when did the cuffs go on?

5 THE WITNESS: The cuffs were on, the cuffs were going on before *Miranda*.

6 THE COURT: All right, so when was that?

7 THE WITNESS: Probably about --

8 THE COURT: When you said: Let's go to jail? Because I --

9 MR. OWENS: Page 139.

10 THE COURT: Because I see something about taking the fucking cuffs off.

11 MR. OWENS: Right.

12 THE COURT: So that would be on page 139 --

13 MR. OWENS: Right.

14 THE COURT: -- at the bottom, so I imagine the cuffs went on before then.

15 THE WITNESS: When I said: Let's go to jail.

16 THE COURT: You were putting them on?

17 THE WITNESS: That's when they were going on.

18 THE COURT: Okay.

19 MR. OWENS: That's all on page 139.

20 THE COURT: Got it.

21 MR. OWENS: Okay.

22 BY MR. OWENS:

23 Q Then after you advised him of his constitutional rights, he continued to
24 talk to you about the case?

25 A Yes.

1 Q He never invoked his right to remain silent?

2 A No; he did not.

3 Q When you had your conversation with him on the 25th of May, was he a
4 suspect in the case?

5 A To a certain extent, yes.

6 Q Had you got some information about his involvement?

7 A Yes.

8 Q Did you know the full extent of his involvement?

9 A Not full extent. Not the full extent.

10 Q But he was a person of interest to you?

11 A Yes; he was.

12 MR. SGRO: I'm going to object to the leading, Your Honor. This is the heart
13 of the issue -- one of the hearts of the issues. If this officer thinks he was a person
14 of whatever he was, that's fine. But I'm going to object to Mr. Owens suggesting the
15 answer.

16 MR. OWENS: Fine. I mean, he -- that's how I'm going into it. He's welcome
17 to go into that in cross if he wants to. It's really -- the test here is subjective. It's
18 what the reasonable person in the position of the Defendant perceived.

19 THE COURT: Why don't you just reask your question again for me?

20 MR. OWENS: Yeah.

21 BY MR. OWENS:

22 Q What was your intention toward the Defendant at that point in time?

23 A I wanted to talk to him and get his side of the story.

24 THE COURT: And we're talking back at the beginning.

25 MR. OWENS: Right, right. At the beginning.

1 THE COURT: We've moved from page 139 --

2 MR. OWENS: Right.

3 THE COURT: -- and now gone back to the beginning; is that right?

4 THE WITNESS: When I originally went to speak with them?

5 THE COURT: Yes.

6 MR. OWENS: Yeah.

7 THE WITNESS: Yeah. I wanted to -- I wanted to talk to him and get his side
8 of the story.

9 MR. OWENS: Okay.

10 THE WITNESS: So it's kind of still open to the fact that hey, if he gives me
11 something that I don't have.

12 BY MR. OWENS:

13 Q All right. Let's go over to June 1st now. You had another opportunity to
14 talk to the Defendant.

15 A Yes.

16 Q What were the circumstances on the June 1st occasion?

17 A The circumstances were I got a call from Deputy District Attorney Scott
18 Mitchell and he advised me that he was in contact with Jason McCarty's dad and
19 that Jason McCarty's dad had told Scott Mitchell that Jason wanted to talk to the
20 DA. And Mr. Mitchell basically told me, he says: Go down there and see what he
21 wants to talk about.

22 Q Okay.

23 A Go see what it is that he wants.

24 THE COURT: So Mitchell told you to go down there and see what he wants?

25 THE WITNESS: Basically, yes.

1 BY MR. OWENS:

2 Q And so did you do that?

3 A Yes.

4 Q What did encounter Mr. McCarty on this occasion?

5 A He was incarcerated at the Henderson Detention Center.

6 Q Where did you meet with him at?

7 A I met with him inside the Henderson Detention Center, one of the rooms
8 that we have there. I believe it was a law library.

9 Q Was anyone else there with you?

10 A Yeah, Detective Ridings was there with me, too.

11 Q Did you remind him of his *Miranda* rights again?

12 A I read him his *Miranda* rights again.

13 Q And did you reference the fact that he had heard the *Miranda* rights the
14 prior occasion when you'd talked to him?

15 A I might have. I don't know if I did or not.

16 Q Did he indicate to your satisfaction that he understood those rights at
17 that point in time?

18 A Yes.

19 Q And did he express a willingness to talk to you?

20 A He didn't express a willingness not to talk.

21 Q What happened? He began talking to you?

22 A Can I reference this?

23 Q Yeah. If you need to look at it to refresh your memory.

24 THE COURT: And is that in here, too --

25 THE WITNESS: Yes.

1 THE COURT: -- in this little book?

2 MR. OWENS: It's all -- yeah.

3 THE COURT: Okay. And what page are you going to?

4 MR. OWENS: I think he's just looking at the first couple of pages --

5 THE COURT: Okay.

6 MR. OWENS: -- [indiscernible].

7 THE COURT: Okay.

8 THE WITNESS: Well, I asked him if he wanted to talk to me. And he said: I
9 want to talk to the DA. And he says -- I asked him again: Do you want to talk to
10 me? And then on line 20 he says: You told me once before you couldn't help me.

11 THE COURT: What page are you on?

12 THE WITNESS: We're on page number 2 of the transcript dated --

13 THE COURT: June 1st.

14 MR. OWENS: June 1st.

15 THE WITNESS: -- June 1st.

16 MR. SGRO: Page 2.

17 BY MR. OWENS:

18 Q There were a number of conversations that you had with him
19 throughout this and subsequent interviews about him wanting to talk to the DA?

20 A Yes.

21 Q Were you ever involved in brokering a deal between him and the
22 District Attorney's office?

23 A No. No.

24 Q Did you ever discuss a deal or offer any negotiations to Mr. McCarty?

25 A No, absolutely none. On several occasions we told him we could not

1 make deals for the District Attorney that he would -- District Attorney has to make
2 the deals himself.

3 Q And did he acknowledge that he understood that he could only do that
4 directly with the District Attorney?

5 A Yes.

6 Q Nevertheless, he gave you information?

7 A Yes.

8 Q And that became the subject of this particular recording of the
9 interview?

10 A Yes.

11 Q And that's memorialize what we've had marked as State's Proposed
12 Exhibit No. 2?

13 A Yes.

14 Q And that's a true and accurate copy of the conversation you had with
15 him on that occasion?

16 A Yes.

17 Q All right. Let's go to the 6th of June now, and if you would kind of tell us
18 how you again came to meet with Defendant McCarty.

19 A 6th of June, by the 6th of June we received records back from the phone
20 companies and we had record details, call details, cell site locations and different
21 things. And we were able to establish call patterns for Mr. McCarty's phone and Mr.
22 Herb's phone and the different phones that were in use. And I had talked with Mr.
23 Mitchell about it and he basically said: Well, go back and talk to him see what he's
24 got to say about it because we knew he wasn't being totally truthful with us.

25 Q And so that caused you to go back there to ask him why he said

1 something different about the telephone before?

2 A Yes.

3 Q And so, you did that, where did that take place?

4 A That took place again at the Henderson Detention Center, the same
5 room, the law library.

6 Q Who else was there?

7 A I believe -- there was a third detective that became involved eventually,
8 Detective Fuentes, but I believe it was -- Detective Ridings was with me at the initial
9 part of the interview.

10 Q How long did that initial interview inside the detention center last?

11 THE COURT: The --

12 MR. OWENS: First one, the initial one.

13 THE COURT: -- June 1st one?

14 MR. OWENS: No, June 6th. We're discussing --

15 THE COURT: June 6th one.

16 MR. OWENS: Yeah.

17 THE COURT: Okay.

18 THE WITNESS: I don't know, 15 minutes or so, 15, 20 minutes, something
19 like that.

20 BY MR. OWENS:

21 Q Okay. And did you confront him with this information you have?

22 A About the phones and all that, yes.

23 Q And then at the beginning of that conversation, had you reminded him
24 of his constitutional rights again?

25 A I reminded him that I read him his rights prior to -- back on June 1st and

1 he told me he understood his rights.

2 Q And in fact he did talk to you?

3 A Yes.

4 Q Did he continue to insist that he wanted to talk to the District Attorney?

5 A Yes.

6 Q To acknowledge again that he knew that he would need -- if he wanted
7 to deal, he would have to talk directly to the DA?

8 A Yes.

9 Q And that you couldn't offer any kind of negotiation?

10 A Yes.

11 Q He gave you information that caused you to then take a trip with him.

12 A Yes.

13 Q Tell us about that.

14 THE COURT: I'm sorry.

15 MR. OWENS: Yeah.

16 THE COURT: I've got people here waiting for me to do a 12 o'clock meeting.

17 MR. OWENS: Okay. How long is that going to last? Because I've got a thing
18 I need to go also. I was wondering [indiscernible].

19 THE COURT: Well, my meeting usually lasts about 15 minutes. Then if I
20 don't eat something, I won't be able to sit here and listen to you all.

21 MR. OWENS: Okay.

22 THE COURT: Unlike Mr. DiGiacomo who doesn't have to eat all day, the
23 Judge has to eat. So, if we -- I don't have anything this afternoon. If we could come
24 back 1:15ish, would that work?

25 MR. SGRO: The closer to 1, 1:15 the better for me. I have an obligation in

1 TRAN

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3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 DOMONIC RONALDO MALONE and
12 JASON DUVAL MCCARTY,

13 Defendants.

CASE NO. C224572

DEPT. V

14 BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE
15 THURSDAY, NOVEMBER 29, 2007

16 **TRANSCRIPT OF PROCEEDINGS**
17 **DEFENDANTS' MOTIONS**

18 APPEARANCES:

19 For the State:

CHRIS J. OWENS, ESQ.
Chief Deputy District Attorney

MARC DIGIACOMO, ESQ.
Deputy District Attorney

21 For Defendant Malone:

ANTHONY P. SGRO, ESQ.

CHRISTOPHER R. ORAM, ESQ.

22 For Defendant McCarty:

RANDALL H. PIKE, ESQ.
Assistant Special Public Defender

CHARLES A. CANO, ESQ.
Deputy Special Public Defender

25 RECORDED BY: RACHELLE HAMILTON, COURT RECORDER

1 another -- something else at 3:30.

2 THE COURT: Okay. And I have something else at 4. So 1:15 --

3 MR. OWENS: That's fine.

4 THE COURT: -- would work for me. Because I have to do my meeting, like
5 run across the street eat, and come back, and need to take a breather. So --

6 MR. OWENS: And I [indiscernible].

7 THE COURT: So --

8 MR. SGRO: Okay.

9 THE COURT: 1:15 come back -- and the jail, 1:15.

10 MR. OWENS: Can we leave our things out here?

11 THE COURT: Leave your -- you can leave your stuff. And then move on to
12 my next activity.

13 [Proceeding resumed at 1:21 p.m.]

14 MR. OWENS: Before we left on the break, we were talking --

15 THE COURT: Wait, wait, are we on the record?

16 COURT RECORDER: Yes.

17 THE COURT: Let me tell it so we're on the record. We're back on the record
18 in Malone and McCarty. We're all present, the parties are present. And the
19 detective is still on the stand and he's still under oath.

20 And now you can start off --

21 MR. OWENS: Thank you.

22 THE COURT: -- like we never ended before.

23 MR. OWENS: I didn't know where you were.

24 **DIRECT EXAMINATION CONTINUED**

25 BY MR. OWENS:

1 Q Before we took our break you were talking about the statement on the
2 6th of June, the three parts, the first one was in the jail. And then I think my last
3 question to you was at some point you took this on the road, essentially.

4 A Yes.

5 Q Tell us about that.

6 A We began in the jail, we talked, and at one point Mr. McCarty wanted to
7 show us where the items were that were hidden, the weapons and things like that.
8 But prior to us leaving, I had already showed him pictures of the golf club that we
9 had recovered and he said he could take us and show us where the red
10 handkerchief, or some kind of handkerchief, was buried. And I asked him what was
11 it? And he said he didn't know, and then later on he identified it as a knife. It's a
12 knife, whatever. And so we -- I asked him, I said: Do you want to show us where
13 that is? And he said: Yes, I do. And so we left the jail, I checked him out of the jail
14 and we got into a vehicle and we drove out there.

15 Q Okay, and so the second part of the conversation on the 6th, then, was
16 from the car?

17 A Inside the car going up to the area where the items were recovered.

18 Q And the Defendant was with you at that point in time?

19 A Yes.

20 Q And then there's a third conversation that occurs. Tell us about that.

21 A I believe that was still in the car on the drive back while we were in the
22 desert up there. I think the reason why they're separated like that is the recorder
23 might have been turned off, I'm not quite sure. But I know when the recorder is
24 turned off it recreates another file, and so that's probably why they were downloaded
25 in three separate ones.

1 Q And that was a very short conversation?
2 A Which one?
3 Q The last one.
4 A I believe it was very short, yeah.
5 Q And for the record, Exhibits No. 3 and 4 for identification contain those
6 three recordings?
7 A Yes.
8 MR. OWENS: Okay. Your Honor, I move to the admission of Proposed
9 Exhibits 1 through 4.
10 MR. SGRO: No objection, Your Honor.
11 THE COURT: Great. They're admitted.
12 [Exhibits 1 through 4 admitted]
13 BY MR. OWENS:
14 Q Now are these all audio or do they include video?
15 A No, those are just audio.
16 Q Just audio. Okay. And I think --
17 MR. OWENS: This is just for the record as an aside, Your Honor, I think in
18 the exhibits in the Defendant's motion, the second or third conversations on the 6th
19 are not in the exact order. I think they're kind of flip-flopped. I don't know if that --
20 when you look at those that'll make any difference.
21 MR. SGRO: I know we included them all. I --
22 MR. OWENS: Yeah, they're there.
23 MR. SGRO: Okay.
24 MR. OWENS: I think they might be flip-flopped.
25 THE COURT: Okay. I'll take a look at the dates.

1 MR. SGRO: That's fine.

2 MR. OWENS: That's all I have, Your Honor.

3 THE COURT: All right. Mr. Sgro.

4 MR. SGRO: Thank you, Your Honor.

5 **CROSS-EXAMINATION**

6 BY MR. SGRO:

7 Q Good afternoon, Detective. Can you give me a description of as you
8 arrive to the back of the 7-Eleven, you do go behind the 7-Eleven when you first
9 there on May 25th, 2006; is that right?

10 A Yes.

11 Q You find Detective Ridings with Mr. McCarty in the back of the
12 7-Eleven?

13 A Yes.

14 Q And where -- how are they positioned? Are they standing, sitting? Do
15 you remember?

16 A It was just -- I remember them being casual. I mean, there wasn't --
17 there might have been -- I don't know if there was one sitting on the tailgate, but I
18 know they were just by the vehicle and they were just standing there. I didn't notice
19 anything, like somebody being held, you know. Any kind of a confrontational thing, it
20 was just kind of like hanging around.

21 Q So close proximity one to the other?

22 A Yeah.

23 Q All right. How much time went by from the time that you got there to the
24 time Detective Webster got there?

25 A It had to be within a very, very short period of time because when I got

1 there and made contact, I started the interview and Detective Webster was there.

2 Q Okay. Now, when he's there -- I'm trying to get the location of
3 everybody. You were obviously pretty close to Mr. McCarty because you're both
4 talking into the same tape machine; right?

5 A Right.

6 Q How many feet away, if any, is Detective -- let's start with Detective
7 Ridings. Where was he in proximity to you?

8 A While we're -- while Mr. McCarty and I are engaged in the interview?

9 Q You've just turned the tape recorder on and the first thing I think you
10 say is: What's your name? What's your date of birth? That sort of thing, right?

11 A Yeah, get the date and time, the introduction.

12 Q So where's Detective Ridings?

13 A I think he was, like, off to the side -- maybe feet-wise, probably off
14 towards the wall area which let's say the back of the 7-Eleven is to this side. The
15 truck is here. The tailgate is facing north; the front of the truck is facing south. And
16 the wall -- there's a block wall at the end of the property line or the parking area. I
17 think he's kind of like off towards the -- off towards the block wall. So I'm saying, I
18 don't know, maybe about 10, 15 feet, something like that.

19 Q So further --

20 A A little further, maybe a little closer.

21 Q So further away from the car, but closer to the block wall, roughly?

22 A Yeah, I would say more towards the block wall.

23 Q Okay, still within earshot? Could he hear what was going on?

24 A I don't know. I don't know.

25 Q And Detective Webster, where was he? Give me the same kind of

1 layout, how many feet away was he from the tape?

2 A Probably about the same amount of feet. Kind of off with Detective
3 Ridings.

4 Q Did either of those two police officers ever come closer and take more
5 of an interactive role while you were conducting your interview?

6 A I don't -- I was engaged in conversation with Mr. McCarty. Now if they
7 came closer on their own, I probably didn't notice it, but I know I did at a couple of
8 times, one time or maybe twice called Detective Ridings over. Once was to answer
9 my phone; and then I know he came in again when he gave Mr. McCarty a cigarette
10 and Mr. McCarty asked me if I could smoke -- or if he could smoke. And I said:
11 Yeah, sure, go ahead.

12 Q How about interacting in terms of the interview, do you recall any of
13 that?

14 A I don't -- I don't think they had any interaction with the interview.

15 Q Do you have the statement in front of you?

16 A Yeah. Yes, I do.

17 Q Okay. Let's -- can I --

18 MR. SGRO: Your Honor, just to accelerate, can I have him refer to his own
19 statement?

20 THE COURT: Absolutely.

21 BY MR. SGRO:

22 Q All right. Let's go to May 25th. Now if what you've just told the Court is
23 accurate, you're speaking to Mr. McCarty, no one else is really interacting in that
24 conversation; and Detective Ridings and Webster are 10 to 15 feet closer to the
25 block wall than they are the car. Is that pretty accurate?

1 A As far as I can remember, yes.

2 Q All right. And with the exception of Detective Ridings coming over to
3 give a cigarette and to answer your phone, that would have been the extent of his
4 involvement in that close area by the tape recorder?

5 A From what I can remember, yes.

6 Q All right. Can you turn to page 133, maybe help me clear something
7 up, then? Tell me when you're there, sir.

8 A I'm here.

9 Q Okay, if you look -- I think it's near the bottom of the page, it says:
10 Unknown detective. Do you see that?

11 A Yes.

12 Q And it says something, you know, I'm paraphrasing because I don't
13 have it in front of me, but something along the lines of: Dude, I've been showing
14 your photograph downtown. Words to that effect?

15 A Yes, I see it.

16 Q All right. Who was the detective aside from yourself that participated in
17 the interview?

18 A It could have been either -- if I would have to guess, and I'm guessing
19 this at this point, I would say it was Detective Ridings.

20 Q Now if you look at that, the context of that suggests that the person that
21 asked that question would have had to be listening to the prior page or so. In other
22 words, let me put it to you this way. You started like page 131, 132 saying about,
23 you know, what's your name and how --

24 A Right.

25 Q -- do people on the street know you. That happens for a couple of

1 pages; right?

2 A Yes.

3 Q Okay. So the person at page 133 who asks the questions would have
4 had to have asked that question in context of what you're speaking to Mr. McCarty
5 about; right?

6 A He could have heard me, yes.

7 Q Okay. So what I'm trying to get at is this. Obviously they're not asking
8 that question from 10 or 15 feet away, whoever's asking it and yelling it into the
9 tape; right?

10 A Yes.

11 Q They -- somebody was next to you interacting at least for some period
12 of time during the interview process; correct?

13 A Yes.

14 Q Okay. Can you tell the Court if you call specifically whether it was
15 Ridings or Webster?

16 A No, I don't remember if it was Ridings or Webster. The reason why I
17 say it was Detective Ridings because Detective Ridings I think had more intricate
18 knowledge of the case.

19 Q Can you tell the Court how long Detective Ridings was with you
20 listening to the interview before he asked questions?

21 A No, I couldn't tell you that.

22 Q And after reading that section on the bottom of page 133, does that
23 refresh your recollection that perhaps Detective Ridings was a little more involved in
24 the interview process than you initially testified on direct examination?

25 A I don't think he was that much involved. If he did come in and throw,

1 you know, like a question, like he overheard something, he came in and jabbed in.
2 But as far as him standing with me and the two of us, I don't --

3 Q Brief moments of time as opposed to the whole thing?

4 A Correct.

5 Q Now, can you tell the Court how many times he would have been with
6 you -- and I know it seems tedious, but I'm trying to get as best -- as good a record
7 as possible. How many times is he actually standing next to you where he would
8 have been able to participate such as he did on page 133, where he's asking
9 questions; do you remember?

10 A I couldn't answer that. Especially if I was conversing with Mr. McCarty.

11 Q And when -- okay, that's fair. And when Detective Ridings -- let's
12 assume it was Detective Ridings because he's the guy who's helping you through
13 the investigation; right?

14 A He's the one that's doing -- he's doing more help than Detective
15 Webster.

16 Q Right. And you and him have been together now for about four days on
17 May 25th of 2006, putting things together, interviewing witnesses and that sort of
18 thing; right?

19 A Yes.

20 Q All right. Was Detective Webster, would he have been with Detective
21 Ridings when he came up to interact in the conversation; do you know?

22 A I don't know.

23 Q Okay. So you can't tell us out of hand that there weren't three police
24 officers at some given point engaged in the interview process? That being you as a
25 questioner, Ridings as a questioner, and Webster as an onlooker?

1 A That -- recalling the event, I don't -- I don't ever remember -- I don't
2 remember the three of us being there asking Mr. McCarty questions. I don't
3 remember that at all.

4 Q Aside from the transcript, do you have an independent recollection as
5 you sit here today of the two of you, you and Detective Ridings asking questions?

6 A Well, obviously, this has refreshed it again because he came in with the
7 exception of those two times that I already mentioned. So he might have done it
8 once in awhile, but like I say, I don't remember him standing next to me and then us,
9 like, him and I actually asking questions to McCarty or anything like that.

10 Q Okay. Fair enough. But you would agree that questions in the
11 transcript reflect someone that must have been there for some period of time?

12 A Obviously, yes.

13 Q Okay. Did you have an opportunity to speak to Detective Ridings prior
14 to your testimony today about this hearing?

15 A The only thing is we just had a pretrial before -- or prehearing in the
16 DA's office and that was the extent of it.

17 Q Okay. And when was that?

18 A That was yesterday afternoon.

19 Q And were you both together in the same room --

20 A Yes.

21 Q -- during the pretrial?

22 A Yes.

23 Q Okay. So you could hear what he was saying, he could hear what you
24 were saying?

25 A Yes.

1 Q All right. Did you have an opportunity where one of you may have
2 remembered something and another was refreshed by that recollection or vice
3 versa? Does that make sense?

4 A No, I understand what you're asking.

5 Q Questions asked, you know, when did that happen? And you say, I
6 don't know, Detective Ridings, was it Wednesday or Thursday? That kind of thing.

7 A As far as this type of interjecting in the -- we didn't go over that.

8 Q Were the issues discussed with you, did you know you were coming to
9 testify about, you know, going down to the jail and who called the DA, whether it was
10 Mr. McCarty or Mr. McCarty's father, that sort of thing?

11 A I was advised that this was going to be a hearing on the interviews with
12 Mr. McCarty.

13 Q Okay. And did you read -- you said you had done a lot of reading last
14 night; is that right?

15 A I listened to the recordings and read along with it as much as I could.

16 Q Okay. Now you were asked some questions on direct examination
17 about what Mr. McCarty's status was in terms of whether or not he was a suspect.
18 Do you remember those questions?

19 A Yes.

20 Q Can you tell the Court right now what your position is on whether or not
21 Mr. McCarty was a suspect?

22 THE COURT: At what time?

23 BY MR. SGRO:

24 Q The time that you -- at May 25th, 2006, as you were walking up to
25 Mr. McCarty and you turn the tape recorder on; classify him for the Judge, please.

1 A A person of interest, possible suspect.
2 Q Possible suspect? Now you know --
3 A With the information -- with the information that we had at the time.
4 Q Well, and we're going to get to that.
5 A Sure.
6 Q You testified -- I've asked you these same questions before under oath;
7 right?
8 A Right.
9 Q Did you read your preliminary hearing transcript, by the way?
10 A No.
11 Q You did not read that?
12 A No.
13 Q Did you review the affidavits that you drafted?
14 A Which affidavits?
15 Q Well, let's start with did you review any of them?
16 A Well, I wrote out some search warrant affidavits, yes.
17 Q Okay. I want to --

18 [Colloquy]

19 THE COURT: Go ahead.

20 BY MR. SGRO:

21 Q I want to refer you to an affidavit that you drafted on May 22nd. Okay,
22 this would have been three days before you met with Mr. McCarty.

23 THE COURT: Is this an affidavit in support of a search warrant?

24 MR. SGRO: Yes, ma'am.

25 BY MR. SGRO:

1 Q Do you have any independent recollection of that affidavit as you sit
2 here today?

3 A Yes.

4 Q Do you recall in the affidavit swearing under oath that you -- you were
5 the affiant; right?

6 A Yes, I was.

7 Q Affiant believes that Malone and Rome -- and now by the time you draft
8 this affidavit on the 23rd, Malone is who?

9 A That first affidavit?

10 Q Who's Malone? Who are you telling the Judge Malone is?

11 A Domonic Malone.

12 Q Okay. And who is Rome?

13 A If he was identified, I said he was Jason McCarty.

14 Q Okay, and you said: Affiant believes that Malone and Rome are
15 responsible for kidnappings and murders of Charlotte Cambado and Victoria
16 Magee?

17 A Right.

18 Q Fair?

19 A Fair.

20 Q Okay. And does that refresh your recollection of some of the language
21 that was in the warrant?

22 A Yes.

23 Q All right. And that would have been done three days before; right?

24 A Yes.

25 Q So it's fair to say that you told the Judge under oath that you thought

1 Mr. McCarty or Rome was responsible for murder; correct?

2 A On the information we had, yes.

3 Q Okay. You did not use the term person of interest when you swore that
4 document out in front of the Judge; correct?

5 A No, I did not.

6 Q And, I asked you about that affidavit at the preliminary hearing. I know
7 you didn't read the prelim transcript, but do you remember our exchange at all?

8 A I know we have a lot of them.

9 Q At the time of the preliminary hearing --

10 MR. DiGIACOMO: Which volume, Counselor?

11 MR. SGRO: Yes. Volume 4, Wednesday, July 26th of '06.

12 BY MR. SGRO:

13 Q I asked you about that same section in the affidavit; do you recall that at
14 all?

15 A Not right offhand, no.

16 MR. SGRO: Court's indulgence, Your Honor.

17 THE COURT: All right.

18 BY MR. SGRO:

19 Q Now by the time you went to meet with Mr. McCarty on May 25th, 2006,
20 you had no intention of calling him as a witness for the state of Nevada; correct?

21 A Probably not, no.

22 Q At the preliminary hearing you said: No. Personally, I'm not looking at
23 him as a witness. Do you remember saying that to me?

24 A If it reflects in the record, I must have said it.

25 Q Okay. And then I asked you: Right. You're looking at him as a

1 suspect; right? And you answered: That's correct.

2 A Yes.

3 MR. SGRO: So -- and this is at page 155, for the record, Your Honor.

4 BY MR. SGRO:

5 Q Do you see right -- it's at line 11: You're looking at him as a suspect;
6 right? You answered: That's correct?

7 A Yes.

8 Q All right. So, a year ago and change -- maybe a year and four or five
9 months ago when I asked you the questions about from May 23rd when you put
10 down that he was response -- he, Jason McCarty, was responsibility for murder, at
11 that moment in time, and then when I asked you about it under oath, you said:
12 Yeah, he was not a witness, he was a suspect. Fair?

13 A Yes.

14 Q Okay. And you're not looking to change what you told me over a year
15 ago under oath at today's proceeding are you?

16 A No, absolutely not.

17 Q Okay. And from the time that you had begun this investigation, this
18 investigation begins on May 21st; right? When Melissa Estores and Ryan Noe come
19 to meet with you all as --

20 A Well, it began on May 20th.

21 Q May 20th is when the bodies --

22 A Bodies are found.

23 Q -- are discovered.

24 THE COURT: Bodies are found.

25 MR. SGRO: My mistake.

1 BY MR. SGRO:

2 Q The first witnesses you come across would have been Ms. Melissa
3 Estores and Ryan Noe. They'd seen the news broadcast and they wanted to give
4 you some information; right?

5 A Yes.

6 Q All right. Now in that timeframe in the intervening days, you had
7 assembled information to the point where you were authoring in getting search
8 warrants signed within two days; right?

9 A Yes.

10 Q Okay. Case was moving forward rather quickly in terms of your
11 amassing information; right?

12 A Yes.

13 Q All right. And do you recall having Jason McCarty's picture in a six-
14 pack photo lineup that you showed Ms. Estores?

15 A Yes.

16 Q All right, and that was done before you ever saw him at the 7-Eleven.

17 A Yes.

18 Q All right, and you knew before you ever saw Mr. McCarty at the
19 7-Eleven -- in fact, at the bottom of page 133 you confirm: You know Jason
20 McCarty uses this name of Rome or Romeo; right?

21 A Yes.

22 Q Okay. And that's before 7-Eleven happens; correct?

23 A Yes.

24 [Colloquy]

25 Q In fact, in the statement itself on May 25th, you're calling him Rome and

1 Romeo; right?

2 A Yes.

3 Q You were asked some questions about the things that you initially
4 began speaking to Jason McCarty about on direct examination; do you remember
5 that? You were told that page 8, there was a reference to a beating. Do you recall
6 that question?

7 A Yes.

8 Q Okay. Now, that's at page 8. Now, prior to page 8, you're talking to
9 him about whether he knows Domonic Malone and Donald Herb. Do you remember
10 that?

11 A This is in the statement on --

12 Q Yeah, I was talking about --

13 THE COURT: Back to the 25th?

14 MR. SGRO: May 25th.

15 THE WITNESS: 25th?

16 THE COURT: Yeah, we switch around a lot, here.

17 MR. SGRO: Sorry.

18 THE WITNESS: That's the 25th at Nellis behind the 7-Eleven?

19 BY MR. SGRO:

20 Q Yes, sir.

21 A Yes.

22 Q Okay. So before you get to the statement about: I want to talk to you
23 about the, a beating; you'd already asked him about Domonic Malone; right?

24 A Yeah.

25 Q Donald Herb; correct? You need to answer --

1 THE COURT: You need to answer out loud.

2 THE WITNESS: Yes.

3 THE COURT: Thank you.

4 BY MR. SGRO:

5 Q And you also asked him for a couple of pages about South Cove;
6 correct?

7 THE COURT: About whom?

8 MR. SGRO: South Cove. It's an address that's relevant in the case, Your
9 Honor.

10 THE WITNESS: I believe I did, yes.

11 BY MR. SGRO:

12 Q Okay, and the relevancy of South Cove is as to the murder charges not
13 to any beating of Melissa Estores that occurred sometime before; right?

14 A Yes.

15 Q The beating information, the location that was relevant was a
16 Sportsman's Pub or Sportsman's Manor; correct?

17 A That was one location, yeah.

18 Q One locate -- right. But the South Cove location had to do with the
19 focus on the murder part of the case; right?

20 A Yes, it did.

21 Q Okay, and those South Cove questions, the knowledge of Domonic
22 Malone and Donald Herb, precede the statement on page 8 about: I wanted to talk
23 to you about this beating also; right?

24 A I believe it does.

25 Q Okay.

1 A I'd have to look back, though, on my statement.

2 Q And throughout the statement there are numerous references where
3 you're going back from D-Roc in his relationship -- D-Roc is Domonic Malone; right?

4 A Yes.

5 Q You're going from D-Roc and his relationship with Melissa Estores to
6 whether or not he -- he, Jason McCarty -- knows Victoria, do you know Christina
7 Rabado [sic]; right?

8 A Yes.

9 Q It's not -- in other words, it's not a battery case from beginning to end
10 and then you start talking about a murder case, it's very fluid in and out. Would you
11 agree with that?

12 A Yeah, it's in and out.

13 Q Now --

14 A And general questions.

15 Q Right, but you didn't say: I don't want to talk about this particular topic,
16 yet, let's finish up speaking of the battery incident that happened a month before the
17 homicide? That's not the flow of the interview. There's a lot of stuff going on; right?

18 THE COURT: Are you asking if he's kind of jumping different topics?

19 MR. SGRO: Yes.

20 THE COURT: Is that where you're going?

21 MR. SGRO: Yes, Your Honor, because I got the impression from the State
22 that they're trying to leave you with an impression that they began with this -- the
23 beating case.

24 THE COURT: And it's done sequentially?

25 MR. SGRO: Yes. And that's not the case.

1 MR. OWENS: I don't -- I don't know if we even went into that.

2 MR. SGRO: Well, then I'll move on. I'll withdraw it. .

3 BY MR. SGRO:

4 Q Now, you had, again, just for purposes of setting up this next question.
5 This warrant was an existed where you swore under oath to a Judge that you
6 believe Mr. Malone was -- or Mr. McCarty was a suspect; right?

7 A Yes.

8 Q Okay. Now, can you turn to page 64 of your statement I think 25th?

9 THE COURT: Of the 25th?

10 MR. SGRO: Yes, ma'am.

11 THE COURT: 64?

12 MR. SGRO: Yes.

13 THE WITNESS: Okay.

14 BY MR. SGRO:

15 Q Okay now, we had some discussion before the break about *Miranda*
16 coming in somewhere I think around page 142 roughly. The point is Mr. McCarty's
17 not been mirandized up until page 64 yet; right?

18 A No, he has not.

19 Q He's not. All right now on page 11, you say to Mr. McCarty --

20 THE COURT: Page 11 or line?

21 MR. SGRO: Line 11, page 64.

22 THE WITNESS: Oh, okay.

23 BY MR. SGRO:

24 Q You guys, you and Roc, D-Roc, took Victoria and Christina out to the
25 desert and killed them. Did I read that correctly?

1 A Yes, you did.

2 Q Answer: Oh, no. You say: Okay, now. Answer: No, no, no. And then
3 your statement is: Now, I'm going to tell you something right now. You can either
4 be a witness or you can be a suspect, it's up to you. Is that correct?

5 A Yes.

6 Q All right, I read it right?

7 A Yes.

8 Q Okay. Now, at the time you made this statement, you already have
9 determined Mr. McCarty is a suspect, right, that's what you told the Judge a couple
10 of days ago. A couple of days prior to this; correct?

11 A Right.

12 THE COURT: Not me, the Judge, Judge George, the --

13 MR. SGRO: Yes.

14 THE COURT: -- signing Judge.

15 THE WITNESS: Yes.

16 MR. SGRO: You had pre -- I'm sorry, Your Honor.

17 BY MR. SGRO:

18 Q At the time you uttered the words that exist on page 60 for the
19 May 25th statement, two days had lapsed since you had told Judge George out in
20 Henderson that Mr. McCarty was a suspect in a murder case; right?

21 A Yes.

22 Q Okay. So you are telling Mr. McCarty at page 64 it's up to him whether
23 to be a witness or a suspect; correct?

24 A Yes.

25 Q Okay. In your preliminary hearing transcript, I asked you under oath

1 whether it was ever your intention that Mr. McCarty was a witness and you told me
2 back in June of 2006, no, he wasn't a witness to the State, for the State. Right?

3 A Okay.

4 Q Do you agree?

5 A If you're telling --

6 MR. OWENS: Your Honor, we've asked and answered this and he hasn't
7 testified inconsistently with that today.

8 MR. SGRO: Okay.

9 THE COURT: So what's the point? I know what the big point is, but --

10 MR. SGRO: Okay.

11 THE COURT: -- I think you can move along.

12 BY MR. SGRO:

13 Q Can you go to page 70?

14 THE COURT: 7-0?

15 MR. SGRO: 7-0.

16 THE WITNESS: Okay.

17 BY MR. SGRO:

18 Q At line 12. You ask Mr. McCarty, or you say: Okay, I want you to tell
19 me about you dumping the two bodies out there. Did I read that correctly?

20 A Yes, you did.

21 THE COURT: It's at -- yeah.

22 MR. SGRO: At line 12, Your Honor.

23 THE COURT: I got it.

24 BY MR. SGRO:

25 Q Can you go to page 135?

1 A Okay.

2 Q At line 16, did you -- now this is just four pages of transcript before you
3 place handcuffs on him, right? At the break at 139 or so you told the Judge, -- this
4 Judge -- you placed Mr. McCarty in handcuffs --

5 A Yes.

6 Q -- right?

7 A Yes.

8 Q In four pages of type, I don't know how many minutes it is, but it's not --
9 there's not a lot of time between page 135 and 139 in real time, would you agree
10 with that?

11 A Yes.

12 Q All right. And page 135 you again utter the words, you say: Like I told
13 you, you're either a witness or a suspect; correct?

14 A Yes.

15 Q And how many minutes do you think went by from 135, line 16, to the
16 time you put the cuffs on him four pages later?

17 A I don't know.

18 Q Less than five?

19 A You know, if you want to get real accurate, we can listen to it and it'll --

20 Q And the reason -- right -- and the reason I asked is because you said
21 earlier you listened to the tape and tried to match it up to the transcript --

22 A Right.

23 Q -- last night. So I'm wondering if you --

24 A But I didn't time -- I didn't time anything.

25 Q Okay.

1 A Now this whole walking thing. On the transcript it says: Can we walk
2 for a second? Right? Correct?

3 THE COURT: You need to answer out loud.

4 THE WITNESS: Yes.

5 BY MR. SGRO:

6 Q And this is at page 36.

7 MR. OWENS: 136.

8 MR. SGRO: 136.

9 BY MR. SGRO:

10 Q And you responded with: We're not walking anywhere. Correct?

11 A Correct.

12 Q There's nothing in there about -- or there's nothing that --

13 MR. OWENS: Your Honor, I think that misstates what's in the record here.

14 MR. SGRO: We ain't walking nowhere.

15 THE COURT: Walking nowhere.

16 MR. OWENS: Well it says, he says: Can we walk for a second? He actually
17 says: Can we walk for a second?

18 MR. SGRO: Right.

19 MR. OWENS: Am I missing that? Just you and me.

20 MR. DIGIACOMO: Just you and I?

21 MR. OWENS: Just you and I?

22 THE COURT: Okay. So, the detective says -- well, first of all, the Defendant
23 on line 6 says: Can we walk for a second? Is that right?

24 MR. SGRO: Yes.

25 THE COURT: And then the detective says: Can we walk for a second? I

1 guess like a question?

2 THE WITNESS: It's like, what do you mean, can we walk for a second?

3 THE COURT: Right. I mean, that's -- and then the Defendant says: Just --
4 whatever. Just you and I. And then the detective says: We ain't walking nowhere.
5 Then it's: Me and you. And then it's: Listen to me. And: I'm just asking. Right?

6 MR. SGRO: Right.

7 MR. OWENS: Thanks, Judge, I just -- I didn't want to skip over those two
8 lines. I just wanted to make sure.

9 MR. SGRO: Okay.

10 THE COURT: Okay.

11 BY MR. SGRO:

12 Q The words that come out of your mouth two sentences after you ask
13 can you walk for a second, are: We ain't walking nowhere. Correct?

14 A Yes, I did say that.

15 Q Okay. And is it your testimony that at page 136 when Mr. McCarty
16 says: Can we walk? You respond with: We ain't walking nowhere. Then Mr.
17 McCarty's still free to leave at that time?

18 A Well the reason why I said: We ain't walking anywhere. Because I
19 thought he wanted to go off the record.

20 Q I understand what you testified earlier on direct examination --

21 A Right.

22 Q -- I got that. I'm asking you a different question. Are you -- because
23 what I got from your direct was you told this Judge that up until page 139 when the
24 cuffs go on, up until that moment in time --

25 A Right.

1 Q -- Mr. McCarty was free to leave, that's the position you've taken today;
2 correct?

3 A Right.

4 Q Okay, so what -- are you suggesting to the Court that on page 136 just
5 a few minutes before you put the cuffs on him when Mr. McCarty says: Can we
6 walk? And there's this exchange, you come back with: We ain't walking nowhere;
7 that at that moment in time, Mr. McCarty's still free to go?

8 A We're getting close to where I know I'm going to hook him. In fact one
9 of the -- a couple of pages later where I says: Then let's go to jail. Or whatever. Is
10 he free to go at that point in time? If he would have asked me, I probably would
11 have said -- I probably would have said no.

12 Q Okay, well I mean -- and that's a little different than what you said
13 earlier which is why I'm asking the question .

14 MR. OWENS: Your Honor, I object to that comment.

15 MR. SGRO: Well, Your Honor, the Court's been taking notes. I mean, the
16 record is what it is.

17 BY MR. SGRO:

18 Q I thought you said earlier --

19 MR. OWENS: Whether it's true or not, and I don't remember hearing that,
20 you don't make a comment as part of your questioning, that's argument.

21 MR. SGRO: Let me ask it, then.

22 THE COURT: All right. So, that part of -- what? That wasn't what you said
23 earlier, I think is what he said?

24 MR. OWENS: Right. It's an editorial comment.

25 THE COURT: I'm going to disregard.

1 MR. OWENS: All right.

2 MR. SGRO: Okay.

3 THE COURT: Go ahead.

4 BY MR. SGRO:

5 Q Can you tell the Court with specificity at what moment in time -- and I'll
6 use your phrase, okay? If Mr. McCarty would have said: Can I go? At what moment
7 in time would you have said no because it was too close to when you actually put
8 cuffs on him?

9 MR. OWENS: Your Honor, at this point I'm going to object based on the
10 ground I stated at the beginning. I mean, I know they want to explore their issue
11 somewhat, but the legal issue here is what subjectively a reasonable person in the
12 position of the Defendant would have perceived at that point in time. That's the key
13 there, not what the officer was perceiving about whether he was going to let him go
14 or not.

15 MR. SGRO: Well, there's also -- that's true, but there's also -- if there's going
16 to be facts and disputes, Your Honor, I'm going to ask the Court to engage in, and
17 based on recollection and credibility, my -- in my humble view what has come out in
18 the last couple of minutes is a little bit different than what came out when on direct
19 examination.

20 THE COURT: And

21 MR. SGRO: So I just --

22 THE COURT: I mean that's fine, but it's not what he believes that's the issue.
23 So if it's, you know --

24 MR. OWENS: And I never asked him when he planned to hook him up. I just
25 said: Is this the point when you --

1 THE COURT: When you did.

2 MR. OWENS: -- said you're under arrest?

3 THE COURT: Right.

4 MR. OWENS: Right.

5 THE COURT: So, Mr. Sgro, if -- I don't know how relevant it is, I understand
6 your position that he said, that you believe he said something on direct and now
7 something on cross.

8 MR. SGRO: I'll move on, Your Honor. I'll move on.

9 THE COURT: Thanks.

10 BY MR. SGRO:

11 Q Okay. Let me ask you this. In the first statement, May 25th of 2006,
12 was there any communication about Mr. McCarty asking you about the DA, getting
13 the DA involved, any of that sort of thing during the very first conversation that you
14 had, the couple hours behind 7-Eleven?

15 A On May 25th?

16 Q Yes, sir.

17 A No.

18 Q Okay. So there's nothing about the DA?

19 A No.

20 Q All right, and do you remember being asked about whether or not there
21 was any inquiry by Mr. McCarty about calling his parents?

22 A Yes.

23 Q And did you say on direct examination that Mr. McCarty's parents or his
24 desire to contact them never came up on May 25th, 2006; did I understand that
25 correctly?

1 A I thought I said that he said he wanted to go to his parents once I took
2 him into custody and I told him no.

3 Q Okay.

4 A The only other statement he had reference his parents was when I
5 asked his address and he said: I'd have to call my mother.

6 Q Now, what about when you first arrived on the scene, had Mr. McCarty
7 said anything to you about wanting to contact his parents before the tape gets
8 turned on?

9 A I don't recall that.

10 Q Let's go now to this -- if you --

11 THE COURT: Excuse me, got to ask a question. How old is Mr. McCarty?
12 Does anybody know?

13 MR. SGRO: Mid-thirties, Your Honor.

14 THE COURT: Just --

15 MR. SGRO: And obviously it goes to the subjective state of mind, not that
16 he's 14 and needs a guardian.

17 THE COURT: Yeah. You know, I'm just kind of, okay, I didn't think he was
18 16.

19 MR. SGRO: No, Your Honor, that's the point for which it's proffered, Your
20 Honor, his subjective state of mind.

21 THE COURT: Okay.

22 BY MR. SGRO:

23 Q All right. Do you recall at what point in time Detective Ridings came
24 over to provide with -- provide Mr. McCarty with cigarettes during this interview
25 process?

1 A No, I don't recall at what point in time, no.

2 Q Did Mr. McCarty have anything in his hands when you approached the
3 back of the truck where he was with Detective Ridings?

4 A Anything in his hands, like what do you mean?

5 Q Was he drinking anything?

6 THE COURT: Did he have a bottle of water? Did he have any cigarettes?
7 Did he have any snacks?

8 THE WITNESS: He could have had something to drink, I can't remember.

9 BY MR. SGRO:

10 Q You don't remember one way or another?

11 A No.

12 Q Okay.

13 A I know that -- I know that Detective Ridings bought him something to
14 eat and drink.

15 Q Well, you know that Detective Ridings told you that he'd done that.

16 A Yes, he told me but I don't know if he -- when I approached him, I can't
17 recall if he had it in his hands or anything like that.

18 Q And did he tell you that yesterday in preparation for today's hearing?
19 Or do you have a specific recollection of him telling you that --

20 A No, he told me. He reminded me yesterday.

21 Q Okay.

22 A While they were waiting, they went in the 7-Eleven and bought him a
23 hot dog, I think he said, and a drink or something like --

24 Q So he told you he bought him a hot dog and that was a reminder that
25 Detective Ridings gave you yesterday?

1 A Yes, he told me that yesterday, yes.

2 Q Okay. What did he remind you of that he bought for Mr. McCarty to eat
3 and drink, do you remember?

4 MR. OWENS: Your Honor, I object to the use of the word reminder unless we
5 show this witness had some knowledge that he could be reminded of. I think the
6 transaction of the food occurred before he arrived there. It may have been
7 communicated to him, but I don't know if it reminded him of it.

8 MR. SGRO: I just used his word, Your Honor --

9 THE COURT: Right.

10 MR. SGRO: -- it's semantical at this point. What did he --

11 MR. OWENS: No, he said that word to him on a leading question.

12 BY MR. SGRO:

13 Q What did Detective Ridings tell you he had done with Mr. McCarty in the
14 7-Eleven store in terms of purchases?

15 A He said why they were waiting for us they went in 7-Eleven and he
16 bought him a hot dog and something to drink.

17 Q Okay. And did he tell you whether or not he bought him cigarettes or
18 was it consistent with your memory that Detective Ridings had come over and given
19 him a cigarette?

20 A I remember Detective Ridings coming over and giving him a cigarette or
21 attempting to give him a cigarette. But he might have had the cigarette or Detective
22 Ridings might have given him the cigarette. But I know he lit up the cigarette there.
23 He asked me if I, you know, if, he said: Can I smoke? And I said: Yeah, go ahead.

24 Q The conversation where this was occurring between you and the other
25 police officer, was it in the presence of the DA or outside the presence of the DA?

1 THE COURT: You mean yesterday?

2 MR. SGRO: Yes, ma'am.

3 THE COURT: Thank you.

4 THE WITNESS: As far as what he bought him in the store and all that? That
5 was in the office.

6 BY MR. SGRO:

7 Q Okay. So this was in front of the DA?

8 A I know they were in and out, so I don't -- one of them could have been
9 there, yes. Because they just finished something else up on another case. So they
10 were kind of like moving around in and out.

11 Q Okay. Let's go now to June 1st. Okay. This is the next time that you
12 will have interacted with Mr. McCarty; right?

13 A Yes.

14 Q Is it just you and Detective Ridings that goto visit with Mr. McCarty?

15 A In this interview?

16 Q On June 1, yes.

17 THE COURT: The June 1st.

18 THE WITNESS: Yes.

19 BY MR. SGRO:

20 Q Okay. Now all my question for right now are going to be for June 1st,
21 2006. Okay?

22 A Yes.

23 Q All right. What prompts you to go down to the jail to visit with
24 Mr. McCarty?

25 A I had a phone from DA Scott Mitchell.

1 Q Prior to the phone call from Scott Mitchell, had you done anything
2 proactively to communicate to the DA's office a desire of Mr. McCarty to
3 communicate with some DA?

4 A No, I don't believe so. No.

5 Q All right. So you get a phone call from -- it's Scott Mitchell; right?

6 A Yes.

7 Q And what is he tell you in terms of your assignment?

8 A He tells me he's a screener for the case. And he said he received a
9 phone call from Mr. McCarty's dad and that Mr. McCarty had told him, the dad had
10 told him that Jason wanted to talk to somebody from the District Attorney's office
11 and that he wanted to give them some information. And at that point, Mr. Mitchell
12 said, he says: Just go down there and see what he wants to talk about.

13 Q Okay. And you complied with that request.

14 A Sure. Yes.

15 Q And you conduct the interview on June 1st; correct?

16 A Yes.

17 Q Now, in the June 1st interview, you do recall some significant
18 conversation about the DA called me and, you know --

19 A Yes.

20 Q -- the DA, this vernacular, this term DA was used throughout the
21 June 1st interview; correct?

22 A Yes.

23 Q And the question was asked on direct, you know, did you ever promise
24 him you could make a deal? You didn't specifically promise him that you could
25 make Mr. McCarty a deal. Fair?

1 A Yes, I did not promise him.

2 Q You did not promise that?

3 A No.

4 Q However, you did tell Mr. McCarty several times, we're going to let them
5 know if you cooperate, we're going to pass this information on, that sort of thing;
6 correct?

7 A Yeah, whatever information he gave us we would pass on to the DA.

8 Q You were creating the impression that while the DA wasn't sitting
9 across the table telling, you were essentially the next best thing, you were the
10 liaison.

11 A Impression to who?

12 MR. OWENS: I object. It calls for speculation as to an impression's being
13 created in the Defendant's mind.

14 MR. SGRO: No, I didn't ask that question.

15 BY MR. SGRO:

16 Q Were you -- was he, this officer trying to create an impression that he
17 was -- you were the conduit, you were the mechanism through which Mr. McCarty
18 could speak to the DA. Did you try and do that?

19 A What I was doing was that I was telling him that DA had told us to come
20 down here and talk to him because he had information and the DA wanted us to
21 relate that information to him.

22 Q You had been told by Mr. McCarty he didn't want to speak to you,
23 essentially, because you couldn't make him the deal or words to that effect.

24 A It wasn't that he didn't want to speak to me, but he wanted to speak to
25 the DA --

1 Q Right. And you're --

2 A -- referencing information that he had.

3 Q And you were given, you were trying to create the impress -- strike that.

4 You wanted Mr. McCarty to speak to you, didn't you?

5 A Oh, absolutely.

6 Q Okay. So you did not want to say -- or you didn't want to leave to go on
7 some quest to have a DA present, right, you wanted to have the interview at that
8 time, didn't you?

9 A Yeah, I wanted to talk to him then, there, and I wanted to get the
10 information from him.

11 Q So is it fair to say that you wanted to create the impression for
12 Mr. McCarty that you were the liaison or the conduit to speak to the DA. Even
13 though the DA himself wasn't there, you were essentially the next best thing.

14 A I guess the only way I can answer that is I told him that he would have
15 to give the information to me and I would pass it on to the DA.

16 Q Did you tell Mr. McCarty on June 1st that he still had a shot to be either
17 a witness or a suspect?

18 A I can't remember if I used that terminology. I might have. I might have,
19 but --

20 THE COURT: I imagine it's in the transcript.

21 MR. SGRO: I'm asking him his recollection.

22 THE COURT: Oh, okay.

23 THE WITNESS: Okay.

24 BY MR. SGRO:

25 Q Do you recall using this -- the vernacular, you know, I'm going to make

1 sure the DA knows your level of cooperation? Do you remember that?

2 A Those exact words? Is that what you're asking me? Or around about
3 that?

4 Q Yes.

5 A I know I told -- I know --

6 MR. OWENS: Your Honor, I object at this point. Instead of paraphrasing --

7 THE COURT: Yeah, I mean, Mr. Sgro --

8 MR. OWENS: We've got the statement.

9 MR. SGRO: Okay.

10 THE COURT: -- listen, you -- I know you know me and you know that rather
11 than go through this tortured process, it's either in this transcript or it's not.

12 MR. SGRO: Fair enough.

13 THE COURT: So whatever -- what he recalls to me really doesn't matter, it's
14 what actually -- since we have it all transcribed, it's what I want to know.

15 MR. SGRO: Okay. Your Honor, may the Court indulge me, then, in allowing
16 me to present a brief at the conclusion of these proceedings and then I will just
17 reference the transcripts in conjunction with the testimony. Would that be
18 acceptable?

19 THE COURT: Well, no, I mean, if you want to -- if -- I know you want to point
20 out certain things to me, so if that's what you want to do --

21 MR. SGRO: Okay.

22 THE COURT: -- to point me to, you know, if you want to do it now while I'm
23 here and say -- 'cause June 1st I don't think is as long as the other one.

24 MR. SGRO: It's not.

25 THE COURT: So if you want to go to a specific line and page and say

1 Detective, isn't this what you said here? Or if you want to wait and do it afterwards?
2 Whatever works, I don't care.

3 BY MR. SGRO:

4 Q Okay, let me ask you this. After you conclude your communications
5 with Mr. McCarty on June 1st, did you report those communications to Mr. Mitchell?

6 A Yes.

7 Q Did you receive any additional instruction?

8 A Not at that point, no.

9 THE COURT: Hold on. And wasn't the June 1st -- is that the one when they
10 left?

11 MR. SGRO: That's June 6th, Your Honor.

12 THE COURT: That's June 6th. Okay.

13 BY MR. SGRO:

14 Q Okay. So you report what has been told to you on June 1st, you've left
15 for the jail, what's the next communication you have with Mr. McCarty? That's on
16 June 6th; right?

17 A It would be June 6th; yes.

18 Q What prompts you to communicate with him on June 6?

19 A Well, by that time we had received the phone call records. Record call
20 details from the cell phones and things like that, and they showed a pretty clear and
21 concise story as to, you know, the phone calls that were made. So I contacted Mr.
22 Mitchell again.

23 Q And what did you tell him?

24 A And I basically told him about the phone calls and all that. And we --
25 we discussed things and we said that Jason would have to be a little more truthful,

1 he's not being totally truthful. And so Mr. Mitchell again told me, he says: Go down
2 there and basically tell him about this and see what he says.

3 Q Did you -- I'm sorry, I didn't mean to cut you off. Did you ever ask
4 Mr. Mitchell, you know, when's the guy going to appear in court or anything along
5 those lines?

6 A No, I don't think I ever did.

7 Q Did you ask whether or not Mr. McCarty had had an attorney appointed
8 for his case at that time?

9 A No.

10 Q And now by the time you get to June 6th, about 12, 13 days or so have
11 passed from the time you put him in custody to the time of the June 6th
12 communication; is that right?

13 A Correct.

14 Q Okay. Does Scott Mitchell talk to you about -- you know, he's got the
15 case in screening, does he speak to you at all in terms of timing of when it's going to
16 happen in the justice court that the information or the Complaint's going to get filed?

17 A Well, eventually, I think he said that the Complaints were going to come
18 down after a certain date or whatever it was.

19 Q When did he --

20 A Well, I don't -- I don't recall what date he said the Complaints were
21 going to come down, but we had brushed over that as far as him talking about going
22 to talk to him. As far as specifically, like, hey, the Complaints are going to come
23 down on this day, I need you to go talk to him -- no, nothing was ever done like that.

24 Q Now there were codefendants in this case back then, right?

25 A Yes.

1 Q Domonic Malone and Donald Herb; correct?

2 A Yes.

3 Q And the way it initially came -- this case came down is that there was a
4 separate battery case, Estores' battery; right?

5 A Yes, it was two separate cases.

6 Q Two separate cases initially. And then there was a subsequent, the
7 double murder charges; right?

8 A Yes.

9 Q All right. And then essentially they all got rolled into one case naming
10 all the Defendants?

11 A Yes, that's what the DA did.

12 Q Right. But as you were presenting them -- you were aware by the time
13 you went down -- or were you aware? When you went down on June 1st to speak to
14 Mr. McCarty for conversation number two --

15 A Yes.

16 Q -- that the battery case had already been filed against the codefendant;
17 did you know that that happened?

18 A No, I don't recall that. I didn't know that.

19 Q And so for some -- when you went to Mr. McCarty on June 6th, were you
20 aware that charges against other defendants had already been filed and other
21 defendants had made court appearances?

22 MR. OWENS: Your Honor, if we can be specific as to what defense he's
23 talking about? I mean --

24 BY MR. SGRO:

25 Q Between Domonic Malone and Donald Herb, did you become aware of

1 whether or not they had already been in court and had been charged with at least a
2 predicate first case? I'm calling the first case the beating case.

3 A I don't -- I don't recall if I -- if I was told that. And that doesn't -- I don't
4 think I was, no.

5 Q You don't have --

6 A As far as them formally charged and arraigned and things like that.

7 Q And this brief conversation that you say you kind of glanced over with
8 Mr. Mitchell about when the Complaint would be filed, did that happen before you
9 went into the jail on June 6th?

10 A Yes.

11 Q Okay. Now you go and do your --

12 A As far as the phone record you're talking, when I called him and told
13 him --

14 Q Yes.

15 A Yes.

16 Q Yes, sir.

17 A That was before we went .

18 Q Now you go and do your thing with Mr. McCarty on June 6th, you do the
19 thing at the jail, you record the car ride, and then there's I'm going to say, like, a field
20 trip sort of thing where he takes you out?

21 A Right.

22 Q Okay. Do you -- after you bring him back to the jail, do you contact
23 Scott Mitchell again at the DA's office to report what had occurred?

24 A Yes, eventually I did. Yes.

25 Q Within a day or so?

1 A Probably within a day.

2 Q All right. At that moment in time, do you receive any further direction or
3 instruction?

4 A No.

5 Q Did Mr. Mitchell ever tell you relative to communications with
6 Mr. McCarty, as long as he's -- Mr. McCarty -- as long as he's talking, let him talk.

7 A Yes.

8 Q Okay. And what point in time did that occur?

9 A Anywhere between June 1st and June 6th. The first conversation we
10 had or the second conversation.

11 Q So was there some question by you to the DA in terms of well, can I
12 continue to speak to him? In other words, if he says: If he wants to keep talking, let
13 him talk; that sounds like an answer to a question. So I'm trying to figure out what
14 you might have asked him to generate that response.

15 A No, I never asked him specifically, do you want me to go talk to him
16 today? Do you want me to do this? Do you want me to do that? No, I never said
17 anything like that. He basically says, you know, go talk to him, see what he says.
18 And then when we talk to him about the phone calls, he says: Hey, go back and talk
19 to him, throw the phone calls at him, see what he says.

20 Q Okay. So from May 25th, 2006, after you concluded that, the next
21 communications with Mr. McCarty would have been at the direction of the DA?

22 A When he called me and told me about his dad called -- Mr. McCarty's
23 dad calling him, yes.

24 THE COURT: But wasn't that for the June --

25 MR. SGRO: June 1.

1 THE COURT: -- 1st conversation?

2 MR. SGRO: Right.

3 BY MR. SGRO:

4 Q So there's no subsequent interviews that you had with Mr. McCarty that
5 weren't directed by the DA's office? I guess that's a better way of putting it.

6 THE COURT: Well, let me see.

7 MR. DiGIACOMO: It was directed by the dad.

8 THE COURT: Right. The June 1st conversation is the dad called Mr. Mitchell
9 or somebody at the DA's office, got to Mr. Mitchell because he's the screening
10 deputy, and Mr. Mitchell called the detective and said: I got call, blah, blah, blah.
11 Go see what he wants. So you go out there, you talk to him, you come back, you
12 call Scott Mitchell. In the meantime, nothing happens. You get the phone records
13 from the cell records. You get more information from that. You speak to Mr.
14 Mitchell, and Mr. Mitchell says: Okay, since he was talking to you before, go back
15 and talk to him about these because it sounds like he wants to talk and see what he
16 can do about maybe working something out with a deal. Right?

17 THE WITNESS: Yes.

18 THE COURT: And so you go back and say: Hey, I've got these cell records,
19 they don't match up or whatever. And you talk to him the third -- this is like the third
20 time; right?

21 THE WITNESS: Right. And he talks to me and we have another
22 conversation. Yes. That leads to us leaving and going --

23 THE COURT: And then you go on the field trip?

24 THE WITNESS: -- on the field trip.

25 BY MR. SGRO:

1 Q Okay. And one final thing that I actually missed earlier. Can I have you
2 flip back to the May 25th statement real fast, please?

3 A Okay. I've got it.

4 Q May 25th; can you go to page 34? And I want just to see --

5 THE COURT: What page again?

6 MR. SGRO: Thirty-four, Your Honor.

7 THE WITNESS: Thirty-four.

8 THE COURT: Three-four.

9 MR. SGRO: Yes.

10 BY MR. SGRO:

11 Q At line three, do you see that there's another reference to an unknown
12 detective asking questions? Or asking a question, sorry.

13 A Yeah, I see that.

14 Q Okay. Do you -- and this is a little more innocuous because it's
15 incomprehensible at the end of the sentence, but by looking at this, does this in any
16 way jog your memory as to who the second questioner would have been?

17 A No, not from that. No.

18 Q Okay. Do you have any reason to believe that Detective Webster was
19 at all involved in asking a question on the tape?

20 A No, I don't think he did. You know. I don't think he did. I think it was --
21 think if it was a second detective that came in it was probably Detective Ridings.

22 Q All right. And just instead of asking them all, this doesn't refresh your
23 recollection in terms of how long Detective Ridings might have been there or how
24 long he stayed or any of that sort of thing; right?

25 THE COURT: We kind of already have been over that and I think he said he

1 didn't know.

2 MR. SGRO: I just want to ask the same thing for page 34.

3 BY MR. SGRO:

4 Q You don't recall; right?

5 A You're going to have to ask that again, please.

6 Q You don't -- this does not job your memory in terms of how long
7 Detective Ridings may have been participating with you in the interview process.

8 A No, it doesn't.

9 Q Okay.

10 A No, it doesn't.

11 MR. SGRO: That's all I have, Your Honor.

12 THE COURT: Anything else Mr. Owens?

13 MR. OWENS: Just a few questions in those areas, if I could, Your Honor.

14 **REDIRECT EXAMINATION**

15 BY MR. OWENS:

16 Q If you could turn on the first statement to page number 8. You were
17 asked by Mr. Sgro on cross-examination about when you brought up the subject of
18 South Cove?

19 A Right.

20 Q That was the area where the murder had occurred. If you look over at
21 page 8 on that first statement of the 35th [sic] of May.

22 THE COURT: 25th of May.

23 MR. OWENS: Yeah, sorry, 25th of May.

24 THE COURT: If there's 35 days in May, I want to know about it.

25 MR. OWENS: Court's indulgence for a moment.

1 THE COURT: Line 13.

2 MR. OWENS: All right. Thank you.

3 BY MR. OWENS:

4 Q Do you see that reference in there?

5 A South Cove?

6 Q Yeah.

7 THE COURT: Yes.

8 THE WITNESS: On line 13, yes.

9 BY MR. OWENS:

10 Q So as early as page 8 you begin bringing up the subject of South Cove;
11 is that correct?

12 A Yes.

13 Q And there's numerous mentions of it there where you're trying to find
14 out if he's been there before.

15 A Yes.

16 Q He told you he hasn't been there in ten years.

17 A Correct.

18 Q And if you look over at page 27 now.

19 A Okay.

20 Q And once again you were asking about South Cove again.

21 A Yes.

22 Q About him and Donny, if they'd ever -- if they'd been over in that area;
23 right?

24 A Yes.

25 Q And you were essentially getting denials.

1 A Yes, he said: Donny won't go there.

2 Q In fact the Defendant never admitted to participating in the murder?

3 A Correct.

4 Q He never confessed to this particular crime?

5 A No.

6 Q In any of these statements?

7 A No.

8 Q Look over to page 62 in that first statement. And once again, you're
9 talking about the Cove and going over to the Cove with D-Roc at that time.

10 A Yes.

11 Q It was on the next page, page 63, where you made a reference down
12 towards the bottom. Then Saturday morning we find Christine and Victoria dead in
13 the desert.

14 A Yes.

15 Q So you reference the killing at that particular time on page 63.

16 A Yes.

17 Q Okay. I'd like to talk about the subject to where the Defendant asks if
18 he could go for a walk. Let's go over to that. I think that that's on page 165. One
19 sixty -- let's see here. It's 167, I think, maybe.

20 THE COURT: No.

21 MR. OWENS: No? Earlier?

22 THE COURT: I thought it was one thirty something.

23 MR. OWENS: One second here; 136.

24 THE WITNESS: Okay.

25 BY MR. OWENS:

1 Q That was the first mention of that? And Mr. Sgro asked you a few
2 questions about how your response to the question: Can we walk for a second?
3 And you said that your understanding was that he was trying to get you to go off
4 tape.

5 A That was my first impression is that he was trying to get me to go off
6 tape and walk around.

7 Q Okay; and in fact if you look down at the bottom of page 136, you said
8 there are no secrets in a murder investigation.

9 A Yes.

10 Q You talk to me right here now. What do you want to tell me? And so
11 you actually had a discussion about your concern about going off of tape?

12 A Yes.

13 Q So it wasn't any desire to restrict his movement at that time.

14 A Oh, no.

15 Q In fact, you made it clear to him that the reason you didn't want to go for
16 a walk --

17 MR. SGRO: This is all leading, Your Honor.

18 MR. OWENS: Well, it may be.

19 THE COURT: Yeah, I know.

20 MR. OWENS: I'm just trying to save a little bit of time.

21 THE COURT: It's okay.

22 BY MR. OWENS:

23 Q You're trying to clarify to him that your concern about walking is the
24 recorder?

25 A Yes.

1 Q In fact, there was some discussion about that just a little bit further; is
2 that correct?

3 A Yeah. He told me, he said: No, you can take the recorder.

4 Q Yeah. And if you go down to the middle of page 137, that's my next
5 question is he confirms his understanding of your position. He says: No, I don't
6 want to leave this recorder?

7 A Correct.

8 Q Do you want me to take me away from that, I want that to go with us, he
9 says?

10 A Yes.

11 Q And -- okay, and that's when you came to understand he just wanted to
12 get you separate from the area where you were talking at the time?

13 A Yes.

14 Q Okay. Then there was -- you had a number of questions about what
15 you explained to the Defendant about the District Attorney and the fact that he
16 wanted to deal. I just wanted to reference some of those. If you could go over to
17 page four.

18 A Which statement?

19 THE COURT: Of June 1st?

20 MR. OWENS: Oh, sorry. the June 6th.

21 THE COURT: Oh, now we're in June 6th?

22 MR. OWENS: June -- I'm sorry, June 1st. I apologize, Your Honor, for
23 jumping around.

24 THE COURT: June 1st, page four.

25 MR. OWENS: Yeah.

1 BY MR. OWENS:

2 Q And right at the top of the page there, the Defendant says: If you can't
3 help me, I need to talk to the District Attorney. Do you see that?

4 A Page six?

5 THE COURT: Page four --

6 THE WITNESS: Sorry.

7 MR. OWENS: Top of page four of June 1st, 6-1.

8 THE WITNESS: Okay.

9 BY MR. OWENS:

10 Q If you can't help me, I need to talk to the District Attorney. Is his
11 express understanding there consistent with what you had informed him of?

12 A Yes.

13 Q You couldn't do any deals with him?

14 A Correct.

15 Q And we go to the next page. Page five, towards the bottom of that
16 same statement, June 1st. Have you got that?

17 A Yes.

18 Q Well, if you're looking for a deal, you know I can't give that to you. And
19 he says: That's why I said I can't talk to you. And you said okay.

20 A Yes.

21 Q Okay. And in fact, you ultimately insisted on having some kind of paper
22 from the DA, that's what he wanted.

23 A Yes, he wanted something substantive.

24 Q But he was willing to give you some information to try to get the DA to
25 give him some kind of a deal.

1 A That's what he was saying. He wanted to give off the information, yes.

2 Q And he says that in there several times. Okay, and then we go over to
3 page -- let's see.

4 MR. OWENS: Court's indulgence for a moment.

5 BY MR. OWENS:

6 Q Over on page 22 on that same statement, June 1st. There's Detective
7 Riding saying: And I want you to be -- I want you to understand that I'm not going to
8 speak for the District Attorney because I cannot do that. However, what I can tell
9 you is the longer it takes to put our hands on this stuff. And basically he then later
10 says: We're going to run a risk or we're going to lose this property.

11 A Yes.

12 Q Okay. Did you ever communicate anything different to him about your
13 inability to make any sort of negotiation or deal?

14 A No, not at all.

15 Q All right. During this period of time that Mr. Sgro asked you about,
16 between when you found the body and you began to try to attempt to locate
17 witnesses and talk to people including Mr. McCarty, was the DA asking you to do
18 additional workup on the case? Was he -- did he give you things that he wanted you
19 to be doing? A request for further investigation on the case?

20 A You mean, from the time we found the bodies all --

21 Q Well, as you were talking to him about the progress of the investigation,
22 was he giving you things that he wanted you to do, people to interview?

23 A No.

24 THE COURT: Between June 1st and June 6th?

25 MR. OWENS: No, from the time they found the body --

1 THE COURT: Oh, okay.

2 MR. OWENS: -- and begin conversations with the District Attorney until, you
3 know, up to the process of filing this Complaint against the Defendant, was the
4 District Attorney giving you things that he wanted you to do follow up in the
5 investigation?

6 THE WITNESS: The only -- the first contact I had with the DA in the
7 investigation was with Scott Mitchell.

8 BY MR. OWENS:

9 Q Okay. Right .

10 A That was my first contact.

11 Q Right.

12 A Okay. And then the only thing he told me to do was to talk with this --
13 with Mr. McCarty because Mr. McCarty wanted to talk to the DA's office.

14 Q Okay. Had you had conversations with Scott Mitchell about doing other
15 things, things that he wanted you to do on the case to be able to approve the
16 Complaint against the individuals involved?

17 A Well, there were other things, like, he wanted all statements, all just
18 what the DA always asks us to do on cases.

19 Q Right.

20 A You know, can I get everything for them and get the smoking gun and
21 everything.

22 Q And were you -- to get those statements, you had to have them
23 transcribed?

24 A Yes.

25 Q And was there quite a few statements that had to be transcribed?

1 A Yes, there were.

2 Q What process do you use to do that?

3 A We have an outside agency that's contracted with us.

4 Q And was it taking some time to be able to get the transcripts back with
5 the witness statements that you were taking?

6 A Yeah, it takes time. It takes time.

7 Q And as you got those, were you trying to get those to the District
8 Attorney so he could review those facts?

9 A As soon as I would get them, I would send them off.

10 Q Okay.

11 MR. OWENS: I don't have anything further, Your Honor.

12 MR. SGRO: I have a follow up, Your Honor.

13 THE COURT: Okay.

14 **RECROSS-EXAMINATION**

15 BY MR. SGRO:

16 Q In terms of the transcription of the statements, I mean, do you
17 remember being called upon to transcribe things even in the middle of the
18 preliminary hearing? Do you remember that?

19 A Yes.

20 Q So the transcribing was not a process that was a predicate to filing
21 charges in this case; right?

22 MR. OWENS: I'm going to object. It calls for speculation.

23 MR. SGRO: Well I'm assuming that was why the groundwork was laid, but
24 the Court should know. We were -- if that's not, then I'll withdraw it.

25 MR. OWENS: No, but I'll agree. I mean, they were -- even up through the

1 prelim they were trying to transcribe stuff. The investigation was continuing. I
2 mean, that's true.

3 THE COURT: Okay.

4 MR. SGRO: Okay.

5 MR. OWENS: I'm not saying that the whole thing was a predicate, there were
6 just -- they needed to get the statements to the DA. That's common; isn't it?

7 THE WITNESS: Well, the DA -- the DA wants statements that are available at
8 the time.

9 BY MR. SGRO:

10 Q At the time.

11 A At the time. Yes.

12 Q Right. Okay.

13 MR. SGRO: That's all, Your Honor.

14 MR. OWENS: I don't have anything further.

15 THE COURT: Okay. Anything else?

16 MR. SGRO: No, Your Honor.

17 THE COURT: Thank you. You may step down.

18 Okay.

19 MR. OWENS: I don't have further witnesses to put on the State's side, Your
20 Honor.

21 MR. SGRO: We don't have any either, Your Honor.

22 THE COURT: All right. So, Mr. Sgro, do you want to -- do you want --

23 MR. DiGIACOMO: I think this needs to be briefed. I mean, they still have -- I
24 mean, they have a burden of saying voluntariness, but there hasn't been a shred of
25 evidence of voluntary. What are we going to argue with for, they don't -- they didn't

1 call a witness to say I didn't say this voluntarily, I was pressured. You don't have
2 any evidence of that.

3 MR. SGRO: It's a subject of state of mind of the Defendant, Your Honor, and
4 I advise the Court instead of going through a number of things on the transcript and
5 the like --

6 THE COURT: Right.

7 MR. SGRO: -- I was going to take Detective Riding's testimony, compare it to
8 the transcript and offer it to you so you can make a finding as to --

9 MR. DiGIACOMO: You have to have some evidence of its involuntariness
10 which means they didn't call their client, there's not a single shred of evidence of an
11 involuntary nature of the statement. We're done. We put on our burden of
12 establishing that he received his *Miranda* rights by the time he was taken into formal
13 custody because it's not *Berkemer versus McCarty*.

14 There is a case out there that says original suspicion, Terry Stop, which
15 is what they might have established with the detective at some point it may have
16 turned in to. You don't need *Miranda* warnings. You only need *Miranda* warnings
17 once you put the cuffs on. They have *Miranda* warnings when the cuffs are on.
18 *Miranda* warning is given. Absolutely no evidence of involuntariness. They didn't
19 call a witness to establish -- he didn't voluntary or do anything. There's no evidence
20 to brief. They're done.

21 THE COURT: It's always such a pleasure to have Mr. DiGiacomo in here to
22 liven things up in the afternoon after lunch.

23 MR. SGRO: It's all about the show.

24 THE COURT: Because we could be sleeping right now.

25 MR. SGRO: That's right.

1 THE COURT: It's okay. Settle down.

2 MR. SGRO: Your Honor, at the end of the day, here's the issue. The Nevada
3 Supreme Court has held many times that once we place voluntariness at issue the
4 State has the burden to show whether or not it was voluntary. They put on
5 witnesses to put on evidence to stand for the proposition that it was a one-on-one,
6 everybody's casual, everybody's loose.

7 The interesting thing is that there's two detectives participating in the
8 interview that the detective who just testified doesn't remember. Detective Collins
9 said -- or, I'm sorry, Detective Ridings says he's at his truck. Ridings hasn't -- I am
10 sorry. Ridings says he's at the truck. Collins has him at the block wall. The
11 transcript's got him on the tape. So, you know, it strikes me that before you can, in
12 such a conclusory fashion, argue while we put on that it was voluntary, what more
13 do you need? The Court has to make a finding of fact. That's what's required by
14 the Nevada Supreme Court. And, Your Honor, if you want to find that there's a
15 phantom speaker on the tape and that Ridings' memory is 100 percent accurate,
16 you have the wherewithal to do so. But until you get there, it's still a fact at issue.

17 Our position's going to be that there were two persons at least on the
18 tape interviewing Mr. McCarty. It seems extremely odd that they would have
19 brought Webster -- you know, we've all been doing this a long time. Webster is at
20 Donald Herb's house kind of keeping an eye on him and they find McCarty.
21 Webster gets taken from Herb's house to go to the 7-Eleven. They're all in very
22 close proximity. Webster gets to cut loose when the other officers arrive to keep an
23 eye on Donald Herb.

24 The State would have you believe that Webster made the trip from
25 Herb's house to the 7-Eleven to stand in a corner isolated and do nothing while two -

1 - while one officer in a very casual atmosphere and environment had this nebulous
2 communication with Mr. McCarty. They completely glossed over the fact as to
3 whether or not *Miranda* was required at page one as opposed to page 142. You've
4 got a police officer swearing under oath in an affidavit that Jason McCarty was
5 responsible for kidnapping and murder. I asked him those questions at the
6 preliminary hearing. He said he was not a witness, he was a suspect. I was -- he
7 was a suspect when I pulled up. Today -- today he announces for the first time that
8 he was somewhat a person of -- actually, he said today: To a certain extent, he was
9 a suspect. That's like being sort of pregnant. You either are or you're not. I have
10 never heard a legal jargon or legal vernacular by any person that he was kind of a
11 suspect. So they have a problem because the *Miranda* warning should have been
12 given upon -- upon arrival. Okay.

13 Detective Ridings calls Collins and he says: I found McCarty, come
14 down here. They've already sworn out search warrants, they've already interviewed
15 Domonic Malone. Melissa Estores has identified Jason McCarty in a photo lineup,
16 they've got -- all the things that we attached to the motion are all the underpinnings
17 of the search warrant and what leads them to the arrest of McCarty.

18 THE COURT: Mr. Sgro.

19 MR. SGRO: Yes, ma'am.

20 THE COURT: When we had the detective on the stand, why didn't you ask
21 him?

22 MR. SGRO: Which detective and what question?

23 THE COURT: The last detective that was here, Detective Collins, why didn't
24 you ask him that question?

25 MR. SGRO: Which one, Your Honor?

1 THE COURT: Why wasn't *Miranda* given at the beginning of the interview?

2 MR. SGRO: Not my burden. I -- my preference is they never mirandize
3 anybody. They have an obligation to, but they should have. And, you know, we
4 have -- we have done a number of these. In this case, Your Honor, here's the thing
5 that is just inexplicable. If the detective would have arrived and mirandized him,
6 would there have been any issues to whether or not he should have mirandized him
7 at page 142? The only issue, the Court makes a dispositive finding voluntary, not
8 voluntary, boom, it's over.

9 The officers are the ones that put us in these predicaments. In front of
10 different judges -- I've had judges ask police officers who come into court and say: I
11 read him the rights, I just didn't tape them. Well, why didn't you tape them? Why do
12 you even create the issue? And we're the ones left holding the bag for climbing the
13 uphill battle to figure it out. And, frankly, with due respect, it's not our -- I don't care
14 why he didn't mirandize him. All I know in my view is he should have and did not.

15 The guy said under oath to Judge George in Henderson, this guy's a
16 suspect. He rolls up on the scene at 7-Eleven and he tells me at the preliminary
17 hearing under oath, I had no intention that this guy was a witness, he was a suspect.

18 Then we've go the other issue, Your Honor, of whether or not the police
19 in this case could have lied to Mr. McCarty about he had a choice to be a witness or
20 a suspect. This dovetails to what we spoke about prior to the break. Why you can
21 lie about, you know, I have your fingerprint on the weapon and your codefendant
22 said that you were there, now what are you going to do about it? Those sorts of
23 things. It has been held you cannot wipe out the impact of the statement. Such --
24 and the seminal case is the one where police officer says we're not going to use this
25 against you. Okay.

1 Now what we have is an officer on two different occasions in the
2 statement saying we're not -- you have a choice, you can be a witness or a suspect.
3 That's not true. And what the officer's --

4 THE COURT: Mr. Sgro.

5 MR. SGRO: Yes, ma'am.

6 THE COURT: How do you know that's not true?

7 MR. SGRO: Because -- not in the officer's state of mind, he's already sworn
8 under oath that the guy's a suspect.

9 THE COURT: But, how do you know that at that moment depending on what
10 this man might be saying to him or what information he gives him or whatever he
11 does that he could turn into a witness?

12 MR. SGRO: Because he -- from the officer's standpoint, he has already
13 sworn that the guy's responsible.

14 THE COURT: Well --

15 MR. SGRO: And here's the interesting thing. The police officer, they make
16 hay of the fact --

17 THE COURT: I see suspects turn into witnesses all the time.

18 MR. SGRO: Well, I see suspects more often turning into cooperating
19 witnesses. But they make -- the State makes hay, the State makes hay of the
20 notion that Mr. McCarty denied, denied, denied his involvement. The more they
21 argue that Mr. McCarty denied his involvement, the more they're making my case.
22 In other words, you come up to somebody, you question them, I had nothing to do
23 with nothing. Okay, that does it, you've pushed me over the edge, you're under
24 arrest. That's the argument that they advance.

25 In other words, for them to be right, the police officer went to the scene,

1 completely open state of mind. I don't know, maybe he's a witness, maybe he's a
2 suspect, let's disregard the search warrant. He's told me only exculpate -- he's only
3 giving me exculpatory information. That was the linchpin. If he denies his
4 involvement, that for sure means he's guilty, I'm arresting him. It's nonsense. And
5 they argue it as if it supports their position. The irony is is from -- the more they
6 argue it, the more it bolsters my position in that he knew from the time that he got to
7 7-Eleven, Detective Collins knew that Mr. McCarty was getting arrested that day.

8 THE COURT: Oh, and I imagine what I'm going to hear from you is it doesn't
9 matter?

10 MR. DiGIACOMO: So what?

11 THE COURT: Yeah, I kind of figured that.

12 MR. DiGIACOMO: As soon as we get the first case that says the fact that
13 you're a suspect suddenly means you need *Miranda* warnings, there isn't a case out
14 there that says that. Mr. Sgro skips over the fact that there has to be a formal arrest
15 situation. Even if the officer had cuffed him, patted him down and said: Now I'm
16 going to interview you out here on the street at 7-Eleven, he wouldn't have had to
17 mirandize him, that's the law, *Berkemer versus McCarty*. The fact of the matter is,
18 until there's a degree of formal arrest, then you have to mirandize him. And that's
19 the standard that he doesn't discuss one iota whatsoever with this case, 'cause the
20 moment the cuffs go on him, there's a little bit of a conversation back and forth. He
21 cuffs him and then he says to him: Here's your rights. And they go from there.

22 So the issue for the Court is what a reasonable, innocent person would
23 have believed --

24 MR. SGRO: That's not true.

25 MR. DiGIACOMO: -- if they're under formal -- yes, it's an innocent person, it's

1 not a guilty person. It's a reasonable innocent person, that's the standard.

2 MR. SGRO: I could be wrong, I've never seen reasonable innocent. We
3 don't have innocent anywhere in our juris prudence, it's not guilty, it's not innocent.

4 THE COURT: Where --

5 MR. DiGIACOMO: I'll pull up the cases for the Court if you want to.

6 THE COURT: Pull them up.

7 MR. DiGIACOMO: That' the standard is what a reasonable innocent person
8 would believe in the situation. And so the fact is that Mr. McCarty may not have in
9 his mind that's he's guilty is irrelevant. It's a reasonable innocent person. That's the
10 standard.

11 THE COURT: All right, find me the case.

12 MR. DiGIACOMO: I will.

13 MR. OWENS: Can I have one thing here, Your Honor? I know --

14 THE COURT: Go ahead.

15 MR. OWENS: -- the Court just doesn't want people just jumping up, that's
16 why I'm asking.

17 THE COURT: Yeah, yeah.

18 MR. OWENS: I just want to remind the Court what their pleading said
19 originally. Because I read this thing and I looked at their references and the records
20 to see if they can support this. But this is what they allege that they were going to
21 be able to prove here. They said that Ridings --

22 THE COURT: Well, except Mr. Sgro says he has nothing he has to prove
23 here.

24 MR. SGRO: Right. The burden shifts. The Nevada Supreme Court says that
25 the burden shifts once I put in an issue of voluntariness, the burden shifts to them.

1 MR. OWENS: Yeah, this is our burden, what is our burden? Well, it's just
2 prima facie showing that it was voluntary and they have to come up with to show
3 that it wasn't.

4 THE COURT: Something to show us not.

5 MR. OWENS: Yeah.

6 THE COURT: So here we go.

7 MR. OWENS: But in their brief they begin by saying that Ridings told the
8 Defendant that he was going to have to wait there, that he couldn't go, that he had
9 to wait and stay there for the other detective to arrive, that's in their brief. Ridings
10 didn't say that, they didn't get that out of Detective Ridings that they weren't able to
11 prove that that happened. They said that there were three cars grouped around the
12 Defendant during the interview. There weren't three cars there, there were two cars
13 there. They were unmarked, they weren't grouped around the interview, they were
14 20 feet apart. They said that three officers stood around the Defendant throughout
15 the interview, you know, confining his movement. They weren't able to establish
16 that under the facts of this hearing. None of those things that they alleged in their
17 pleading were they able to prove. In fact, it got worse than that. I mean, they didn't
18 even maintain a status quo with their allegation here. We found out additional
19 things. We found out this is a public area, that people were coming and going, that
20 it was essentially in the daylight hours. That it was very busy. It was on a Friday
21 afternoon/evening. That cars were coming by. That the --

22 THE COURT: I think actually it was a Thursday.

23 MR. OWENS: Oh, I'm sorry, yeah, Thursday.

24 THE COURT: It was originally a Friday, but now it's a Thursday.

25 MR. OWENS: Right. No, you're right, you're right.

1 And that the Defendant had a chance to get something to eat and
2 something to drink. As they talked to him out there, the other two officers for the
3 most part removed from the conversation other than injecting a couple of things into
4 it. And so my point is if they haven't been able to put the facts out there in this
5 hearing sufficient to overcome the burden that's theirs now on voluntariness, what
6 they are they going to get by continuing this and going back into the pleas. I mean,
7 they did that in the original brief.

8 THE COURT: Stand by, just stand by.

9 MR. DiGIACOMO: Just -- I pulled up the reasonable innocent person.
10 There's 10,000 sites. I pulled up the first one, it came down November 23rd of 2007,
11 *People v. Dooda* [phonetic]. This is a New York case. I can keep going until I find a
12 federal U.S. case, but it says, quote: A reasonable person, innocent of any crime,
13 would not have believed that he or she is in custody under those circumstances.
14 The reasonable person isn't a reasonable guilty person, it's any person standing on
15 the street who hadn't committed a crime who's talking to a police officer. That's the
16 reasonable person we're discussing. There's 10,000 sites to it. If the Court wants
17 to, I can keep going until I find one that applies directly from either the U.S. Supreme
18 Court or whatever.

19 THE COURT: Keep going. Go ahead.

20 MR. SGRO: One in Nevada would be helpful, probably.

21 MR. DiGIACOMO: Oh, come on.

22 MR. SGRO: The issue is this, Your Honor, when it comes to voluntariness,
23 you have to look at whether or not it's a custodial setting, whether or not
24 Mr. McCarty was free to leave, okay, and then you go into the *Miranda* analysis from
25 there. You have conflict from the officers. There were at least two officers

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

DOMONIC MALONE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 61006

Electronically Filed
Jan 14 2013 04:02 p.m.
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Clerk of Supreme Court

APPELLANT'S APPENDIX

VOLUME 3

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Michael Villani, District Court Judge
District Court No. C224572

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DISTRICT COURT


CLERK OF THE COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE;
JASON DUVAL MCCARTY,

Defendants.

CASE #: C224572

DEPT. V

BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE

TUESDAY, SEPTEMBER 11, 2007

**TRANSCRIPT OF PROCEEDINGS:
ALL PENDING MOTIONS**

APPEARANCES:

For the State:

MARK P. DIGIACOMO, ESQ.
Deputy District Attorney

For Defendant Malone:

IVETTE A. MANINGO, ESQ.
CHARLES A. CANO, ESQ.
Special Public Defenders

For Defendant McCarty:

CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: RACHELLE HAMILTON, Court Recorder

1 TUESDAY, SEPTEMBER 11, 2007; 9:29 A.M.

2
3 THE COURT: Okay, page five; we have Mr. Malone and Mr. McCarty.
4 For Mr. Malone we have the Special Public Defender, Mr. Cano and Ms.
5 Maningo; and for Mr. McCarty we have Mr. Oram, right?

6 MR. ORAM: Yes Your Honor.

7 THE COURT: All right, and are Malone and McCarty here?

8 MR. ORAM: Yes.

9 MR. CANO: They're present, Your Honor.

10 THE COURT: I just want to make sure they're here. This is one and I see
11 the other. Thank you. Have a seat. They're both here; and we have Mr.
12 DiGiacomo from the State.

13 It's my understanding that this was put on at the State's request
14 because of a scheduling conflict.

15 MR. DIGIACOMO: Not my scheduling conflict, Judge. Mr. Oram, my
16 understanding is, is that Mr. Oram is in another capital trial set for the same
17 time as this one. I talked to Mr. Powell from Mr. Sgro's office about that
18 matter, and I also talked to Randy Pike from Mr. Cano's office, and what I
19 suggested is that I believe that today we could move Mr. Crawley's trial, which
20 is set on the 27th of May, and fit Malone and McCarty into Mr. Crawley's trial
21 slot. That's also a case with Mr. Oram. That should free him up. It's also
22 with Mr. Sgro if that would work out for Mr. Pike.

23 THE COURT: Don't I need those people here to do that too?

24 MR. DIGIACOMO: They are here. They're on calendar today. Mr. Oram
25 represents Mr. Crawley.

1 THE COURT: Right.

2 MR. CANO: There is an issue thought with that, Your Honor, because I
3 have a conflict on that 27th date I didn't realize until they put our calendar up. I
4 mean I'm free July and August.

5 THE COURT: That's usually my civil stack.

6 MR. CANO: Okay, I'm not sure what your stack was, but I know I'm free
7 those months --

8 MR. DIGIACOMO: Whatever the Court --

9 MR. CANO: -- and so is Mr. Pike.

10 MR. DIGIACOMO: Whatever the Court's pleasure, and I think it's -- this
11 is a combination for Mr. McCarty because he wanted to go faster because I
12 suggested -- let's put them into August to your stack after your May stack.

13 MR. ORAM: And Mr. McCarty is anxious to go, Your Honor. He does
14 want --

15 THE COURT: And I'm anxious for him to be able to go. But you can't be
16 in two places at one time.

17 MR. ORAM: Yes Your Honor, and actually it wasn't -- just for the record
18 it wasn't me putting it off, it was actually in the other case which was the
19 Cologne [phonetic] case, the DA in that case, Mr. Lalli, said, you know, he
20 could make sure that this was done and I -- so I just wanted the Court to know
21 it wasn't something where I was saying: Oh I can get this moved.

22 THE COURT: No, I under -- I certainly understand that. The problem is is
23 the other case -- the other case is older than this case.

24 MR. ORAM: It is older, yes.

25 THE COURT: All right, and then the Crawley matter was set for when?

1 MR. ORAM: May.

2 MR. DIGIACOMO: May 27th, but apparently Mr. Cano can't do that day.

3 THE COURT: And how long will this take?

4 MR. DIGIACOMO: It'll take -- we set aside a full stack on the March
5 stack, so I'd hate to try and do anything then on the May stack. We have the
6 next stack which starts what?

7 THE COURT: August 6th.

8 MR. DIGIACOMO: We'll take August 6th.

9 THE COURT: Can you do August 6th, Mr. Cano?

10 MR. CANO: I'm available Your Honor, so is Mr. Pike.

11 COURT CLERK: Wait you're looking at '07.

12 THE COURT: Oh sorry. Now I'm in '07 when I should be in '08. My --
13 August 4th. Are you available August 4th?

14 MR. CANO: I'm available the entire month, Your Honor.

15 THE COURT: All of August. Are you available in August?

16 MR. ORAM: Yes Your Honor. I am Your Honor.

17 THE COURT: Are you available in August?

18 MR. DIGIACOMO: Yes.

19 THE COURT: So we will move this case --

20 MR. DIGIACOMO: McCarty and Malone.

21 THE COURT: -- to August 4th and take up the whole stack.

22 MR. DIGIACOMO: Yes Judge.

23 THE COURT: All right.

24 COURT CLERK: So it'll be August 4th, 2008, at 10 a.m. for the jury trial;
25 calendar call on July 29th, 2008, at 8:30.

1 THE COURT: Do I need to still move Crawley?

2 MR. DIGIACOMO: I don't -- no, the only reason that that may happen,
3 but unfortunately they didn't bring Ms. Hane, is whether or not one of them
4 invoked, that might move that trial date anyways, but --

5 THE COURT: Wasn't I going to arraign them today?

6 MR. DIGIACOMO: Well I mean you're going to have a hard time
7 arraignment Ms. Hane. I believe the lawyers on that are here.

8 THE COURT: I saw Mr. Langford and Mr. Ciciliano, and --

9 MR. DIGIACOMO: He had to run to another court.

10 THE COURT: Okay, we'll get back to them. All right this one's moved.
11 Thank you.

12 MR. CANO: Thank you, Your Honor.

13 MS. MANGINGO: Thank you, Judge.

14 MR. DIGIACOMO: Judge, I also have --

15 THE COURT: Now wait; we also have all these motions. We leave them
16 the way they are?

17 MR. DIGIACOMO: The dates are fine on the motions, I believe.

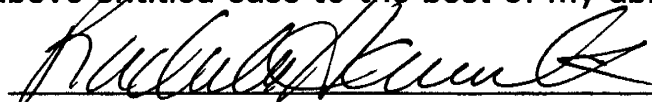
18 THE COURT: The dates are fine on the motions?

19 MR. CANO: They should be Your Honor.

20 THE COURT: Okay, great. Thanks.

21 [Proceeding concluded 9:33 a.m.]

22
23 ATTEST: I do hereby certify that I have truly and correctly transcribed the
24 audio/video recording in the above-entitled case to the best of my ability.

25 
RACHELLE HAMILTON; Recorder/Transcriber

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CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE and
JASON DUVAL MCCARTY,

Defendants.

CASE NO. C224572

DEPT. V

BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE

THURSDAY, NOVEMBER 29, 2007

**TRANSCRIPT OF PROCEEDINGS
DEFENDANTS' MOTIONS**

APPEARANCES:

For the State:

CHRIS J. OWENS, ESQ.
Chief Deputy District Attorney

MARC DIGIACOMO, ESQ.
Deputy District Attorney

For Defendant Malone:

RANDALL H. PIKE, ESQ.
Assistant Special Public Defender

CHARLES A. CANO, ESQ.
Deputy Special Public Defender

For Defendant McCarty:

ANTHONY P. SGRO, ESQ.

CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: RACHELLE HAMILTON, COURT RECORDER

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1 Thursday, November 29, 2007 at 10:21 a.m.

2
3 THE COURT: Okay. We are now on the record in State of Nevada versus
4 Malone and McCarty. Mr. Malone is up in the corner and Mr. McCarty is down front.
5 And for Mr. Malone I have Mr. Pike and Mr. Cano; right?

6 MR. PIKE: That's correct, Your Honor.

7 MR. CANO: Yes, Your Honor.

8 THE COURT: No, no. Malone --

9 MR. PIKE: Yes. Is with us.

10 THE COURT: Yes. And then Mr. McCarty is Mr. Sgro and Mr. Oram.

11 MR. PIKE: That's correct, Your Honor. As to Mr. Malone, if I could advise the
12 Court where we're at with that. In our discovery motion we met with the State, we
13 were able to catalog all of the discovery that is available to the State at this time.
14 And so there's been a compliance with the Court's recommendations in that.

15 THE COURT: So --

16 MR. PIKE: We --

17 THE COURT: -- then is that off calendar/moot?

18 MR. PIKE: Off calendar/moot. We'll raise it if there's other issues that come
19 up --

20 THE COURT: That'll be fine.

21 MR. PIKE: -- during the period of time.

22 We have drafted a jury questionnaire as has counsel from Defendant
23 McCarty. We've -- on behalf of Defendant Malone, we've disseminated our draft to
24 the State to see if we can -- and the cocounsel to see if we can reach an agreement
25 so that there can be joint submission or alternate submissions to the Court.

1 THE COURT: That would be great.

2 MR. PIKE: And the Court can consider that. So those items have been
3 accomplished to this point in time. And discovery and an investigation is going
4 apace with the -- Mr. Malone's case. We've issued a number of --

5 THE COURT: Subpoenas.

6 MR. PIKE: -- requests for records and proceeded with that. So at this point in
7 time -- well, as appropriate, we'll file any additional motions.

8 THE COURT: That would be great. Thank you, Mr. Pike. So, essentially,
9 any issues regarding your client are taken care of?

10 MR. PIKE: In reference to those two issues, yes. And we're going through
11 and dealing with the other issues.

12 THE COURT: All right.

13 MR. ORAM: That's the same with Mr. McCarty. The only thing I believe we
14 have to do today, Your Honor, is the suppression.

15 THE COURT: Right. All right. But would you -- Mr. Oram or Mr. Sgro, would
16 you make sure that with the questionnaire -- proposed questionnaire that you're
17 working on exchange it with the Special PD's office and the DA --

18 MR. ORAM: Yes, absolutely, and Mr. Pike has provided us both.

19 THE COURT: Okay.

20 MR. ORAM: I think we'll be able to be in agreement with him.

21 THE COURT: Okay. Great. All right. So the only thing we have left is the
22 motion to suppress?

23 ME. ORAM: Yes, Your Honor.

24 THE COURT: All right. Well, let's get started.

25 Well, yeah. I'm going to allow the jury questionnaire. Errr.

1 UNIDENTIFIED SPEAKER: Okay. How would you spell that for the court
2 recorder?

3 THE COURT: E-R-R-R-R-R. That's what is spells, Shelley.

4 And so the motion to submit questionnaire to prospective jurors, both of
5 them are granted -- with the same errr -- and we'll see. I'm going to have lots of
6 experience with jury questionnaires before I even get to this case. So by that point,
7 we'll -- it'll be fine.

8 THE CLERK: Do you want the deadline [indiscernible]?

9 THE COURT: Yeah, where -- and I -- that did go through my mind, Sandra. I
10 want to make sure that we get together and -- on the specifics of the questionnaire
11 in a timely fashion so that two weeks before the trial we're not scurrying around
12 trying to deal with a questionnaire issue.

13 MR. SGRO: May I make a suggestion, Your Honor?

14 THE COURT: Sure.

15 MR. SGRO: What we've done in the past in other death cases, and it's not
16 every time, but one thing that seems to have worked is our prospective panel comes
17 in 30 days before the trial and they fill out the questionnaires on a Friday afternoon,
18 let's say. The parties all get them and then we have a lot of time to --

19 THE COURT: To go through them.

20 MR. SGRO: To go through them. We can come to you with a list of persons
21 that probably aren't going to qualify or they have a -- in other words, you can make
22 preliminary rulings before they even show up. So, just to throw that out there. I
23 know the trial date is not for another eight or nine months.

24 THE COURT: It'll be here before we know.

25 MR. SGRO: But just as a suggestion, we may want it -- if we can get the

1 panel here 30 days in advance --

2 THE COURT: And I'm talking about just -- I want to get a date, I want a
3 deadline for you all to have something that you're going to show me so that if we
4 have to have any debate about what's in the questionnaire.

5 MR. DiGIACOMO: And I received --

6 THE COURT: Right.

7 MR. DiGIACOMO: -- Mr. Malone's. My review of that, there are several
8 questions which we would object to, but generally overall, there's a lot of questions
9 we wouldn't.

10 THE COURT: Right.

11 MR. DiGIACOMO: I think we could probably reach an agreement on most of
12 them.

13 THE COURT: So if -- I have actually the trial date of August 4th, that means
14 that in early July is when we'd have to bring in the panel.

15 What would that be, Sandra? What date?

16 THE CLERK: The first week is the 4th.

17 THE COURT: Yeah, and the 4th happens to be that Friday, so we wouldn't
18 want to do it that day. So maybe the week of --

19 THE CLERK: Make it June 27th?

20 THE COURT: Yeah.

21 THE CLERK: Back it up, I'm assuming.

22 THE COURT: Yeah, I'd want to do it backed up. So I'm looking at a date of
23 June 27th to bring in the prospective panel to fill out the forms. That will give us a
24 good 30 days to deal with those results. I'm also going to cause them to bring in an
25 over -- more than the usual number because several people will be eliminated just

1 by virtue of the fact that it's a death penalty case.

2 Mr. Sgro, how many had -- what kind of -- what size of a jury pool do
3 you usually see?

4 MR. SGRO: About 110.

5 THE COURT: That's it?

6 MR. SGRO: I mean, that's -- that's kind of what we've got.

7 THE COURT: It's got to be more, especially nowadays with the --

8 MR. DiGIACOMO: I'm guessing maybe a 140 or 50.

9 MR. SGRO: I mean, I'm just trying to be conservative. That's probably safer.
10 I -- you know, I'm just thinking, I think the last one Mr. Owens and I tried in August
11 was 110, if I remember correctly.

12 MR. DiGIACOMO: That's what I have in that same department starting
13 Monday, we just got 110 each. So it'll be close when you get to the end.

14 THE COURT: Right.

15 MR. SGRO: Yeah, it was -- actually, that was only a penalty hearing and it
16 turned out it was pretty close, so maybe closer to Mr. DiGiacomo's first number.

17 THE COURT: Okay. So I would think probably between 125 and 150.

18 MR. SGRO: Okay.

19 THE COURT: All right. And -- but what -- where -- I need to set a date for
20 when we're going to deal with the issue of the --

21 MR. CANO: Do you want to do that, Your Honor? May I suggest maybe a
22 couple of weeks before that June 27th date, have a final draft?

23 THE COURT: Yeah. I don't have a next year calendar in front of me. Sandy,
24 what --

25 THE CLERK: Do we want it on like a regular day?

1 THE COURT: No, we'd want it on like a Friday when we can --

2 THE CLERK: Like June 13th? That's two weeks.

3 THE COURT: No, because if I'm going to bring the jury in on the 27th, it's got
4 to go to the printer way before then, so I'm going to have to do this in May. So thank
5 you for giving me a calendar. It's going to them the 27th. Oh, here, can you keep
6 that? I'm not sure what I'm doing on the 30th. Let's ask Elana. Would you ask
7 Elana what I'm doing on May 30th? Maybe that'll be the date that we get together.
8 All right. We'll let you know. Okay. It'll just be a sec and we'll take care of that.

9 [Pause in proceedings.]

10 THE CLERK: She said we should be good.

11 THE COURT: All right. How about May 30th at 9 o'clock?

12 MR. SGRO: That'll be fine, Your Honor. Thank you.

13 THE COURT: All right. Okay. So now, Mr. Sgro.

14 MR. SGRO: Yes, ma'am.

15 THE COURT: On your motion to suppress.

16 MR. SGRO: I'll proceed at the Court's pleasure. But in our moving papers
17 and in the State's opposition, I think both parties agree that once voluntariness has
18 been raised, a hearing must be held so you can make whatever factual
19 determinations you need to. I know that the detectives involved in the case are
20 outside. So, do you want to hear argument first? Do you want to put out testimony
21 on some specific issue?

22 THE COURT: Do you want to just put him on and question him and --

23 MR. OWENS: Well, having sat through six days of preliminary hearing with
24 Mr. Sgro, if we don't have some defined issues in this matter, there may be no end
25 to how long we're going to be going on this thing --

1 THE COURT: No, no, no, no, no, no. Oh, no, no, no, no.

2 MR. SGRO: Is that a compliment, Your Honor?

3 MR. OWENS: I don't know if it's possible, but if we can narrow the factual
4 issues, it might be really helpful at this proceeding, I think.

5 THE COURT: Okay.

6 MR. OWENS: In fact, we've got four statements -- it's really three statements.
7 One on May 25th, one on June 1st, and then three on June -- is it June 6th, that are
8 really one continuous statement but the tape recorder was kind of turned off and on.

9 THE COURT: Well, I think it all starts with the May 25th --

10 MR. OWENS: Right.

11 THE COURT: -- one, which is out in the parking lot with the police cars and
12 then Mr. Sgro makes an argument that that one doesn't come in, nothing comes in.

13 MR. OWENS: So --

14 THE COURT: I think we have to start with the May twenty -- I'll tell you, we're
15 going to start at May 25th. And the issue is that he's --

16 MR. OWENS: The environment and physical circumstances.

17 THE COURT: Right.

18 MR. OWENS: Okay.

19 THE COURT: And coerced.

20 MR. OWENS: All right.

21 THE COURT: So I think that's where we have to start.

22 MR. OWENS: Okay .

23 MR. SGRO: And then, Your Honor, the officers I don't think can add anything
24 to when the adversary proceedings begin. There's the issue about Mr. McCarty's
25 arrest being effectuated on May 25th. And our office not being appointed as counsel

1 until I think June 20th, some extended period of time, I think 20 days -- 20 days
2 lapsed from the time of arrest to the time of us being appointed as his lawyer. The
3 intervening statements have a second layer of attack, whether or not they're
4 constitutionally permissible. And that deals with whether or not the adversary
5 proceedings had begun. Our position is that they began at arrest and when he was
6 charged. The State's position is that they don't -- adversary proceedings don't begin
7 until the Information was actually filed in Justice Court, which we think is a problem.
8 But, so there's the issue about whether or not there's a fruit of a poisoning tree.
9 There's also the issue of whether or not they're permissible because of the due
10 process violation that exists insofar as he was not given an attorney in a timely
11 fashion. And then the third issue --

12 MR. OWENS: If I can touch on that --

13 THE COURT: Yeah.

14 MR. OWENS: -- before we move to the next one.

15 THE COURT: Right.

16 MR. OWENS: I don't see that as a factual issue, Your Honor. The Court can
17 take judicial notice of when the complaint was filed. We know when he was
18 arrested. I don't think there's any factual inquiry that's necessary on that.

19 MR. SGRO: I agree. And if I said that, then I misspoke. That's something we
20 don't need the police officers for --

21 THE COURT: Right.

22 MR. SGRO: -- is what I was trying to get to.

23 And then the third one is, Your Honor, is whether or not these
24 statements come in as an offer of compromise. And there's -- there's discussion
25 from the beginning, from May 25th statement about the DA's involvement. And what

1 information is being passed between the police officer and the DA. Mr. McCarty's
2 father called somebody at the DA's office which prompted the June 1st meeting.
3 There's communications back and forth which we can elicit from the police officer
4 from the transcript about the DA's involvement and all that's going on there. And so
5 that one would involve a factual determination as to whether or not these were
6 statements made in pursuant to the statutory offer of compromise or whether they
7 were not. So we need the officers for two of the three issues that are before you
8 today.

9 THE COURT: And, Mr. Owens, do you want to respond to that?

10 MR. OWENS: Court's indulgence. What?

11 THE COURT: Sure.

12 MR. OWENS: What did you say, Your Honor?

13 THE COURT: The last one is the offer --

14 MR. OWENS: Yeah.

15 THE COURT: -- of compromise.

16 MR. OWENS: Right. And as far as, you know, where we're going to go with
17 that factually, we'll address as we get into that. But there may be certain
18 conversations there that are privileged, but we'll address that when we get there.

19 MR. SGRO: Privilege between?

20 MR. OWENS: Well, there may be a work product or confidentiality privilege if
21 it involves attorneys, if it involves attorneys in our office.

22 MR. DiGIACOMO: If an attorney in our office provided direction to a police
23 officer, that conversation is not the subject of -- that's a work product executive
24 privilege direction to the police officer. Now, what the police officer said to
25 Mr. McCarty, it's on tape, but certainly that could be addressed. But what the state

1 of mind of the DA's office was at the time is irrelevant to the *McKenna* analysis. It's
2 merely what the Defendant knew at the time and it's clear from the transcript that
3 they can't make a *McKenna* argument because *McKenna* specifically says if the
4 cops tell them they don't have the right to make a deal and could just forward
5 information to the DA's office, then it can't be an offer of compromise. And that's
6 clearly supported by the transcript. I don't know why we even have to have a
7 testimony of that. Certainly he can't ask the police officer what was going on in the
8 DA's mind and what it is the DA was thinking at the time that he had those
9 conversations because one, it's irrelevant, and two, it's privileged.

10 MR. SGRO: Who speaks fastest does not win these cases fortunately.
11 Here's why those conversations are --

12 MR. OWENS: Your Honor, we have a day of editorial comments from
13 Mr. Sgro.

14 MR. SGRO: Here's why the conversation is irrelevant, Your Honor.

15 MR. OWENS: I know it's early, but --

16 MR. SGRO: First of all, *McKenna* is not been analyzed correctly by
17 Mr. DiGiacomo. *McKenna* involved issues about waiver, whether or not things were
18 raised and they never got to some of the specifics. We're raising it at the District
19 Court level. Secondly, here's why *McKenna*'s important. We all know the police
20 officers can lie to prospective suspects.

21 THE COURT: They can.

22 MR. SGRO: They can. Right.

23 THE COURT: Right.

24 MR. SGRO: They can say: We found your fingerprint here or there. And it
25 may not be true.

1 THE COURT: Happens all the time.

2 MR. SGRO: Right. But there are certain things they can't lie about. They
3 can't lie about the outcome of the confession, admissibility, or inadmissibility in the
4 case. They can't say, for example: Don't worry about what you tell me, we're not
5 going to use it anyway. That sort of lie is specifically prohibited.

6 In this particular case, the reason that the conversations, if any, exist
7 between the police officer and the DA are irrelevant is because our position would
8 be the DA involvement has been purported to exist and been transmitted to Mr.
9 McCarty would be something that you cannot lie about. In other words, Mr. McCarty
10 makes it clear in his statements that he wants to speak to the District Attorney.
11 Okay? The police officer cannot engage in further communications and use the
12 cloak of this is all being run through the DA's office if that's not true. While I
13 concede and know all the cases suggest that police officers can lie about the facts
14 of the case, they cannot lie about the impact of the statement in a Court proceeding
15 and frankly, I believe that this lie -- if it is a lie, and I don't know if the police officers
16 were in contact, there's reference to DA Scott Mitchell in one of the transcripts, but
17 he doesn't get referenced until later on in the day. I'm sure on May 25th when they
18 first spoke to Mr. McCarty there was no DA.

19 THE COURT: No.

20 MR. SGRO: But our position would be that this would be something that's not
21 about a fact in the case, that the police are allowed to lie about it, it's something that
22 was fostering communications which would be one of the grounds that would be --
23 one of the areas that would be precluded.

24 MR. OWENS: Your Honor, as I indicated, this is something the Court can
25 address as we go along. Are they accusing the police of lying on this particular

1 issue or are they just on a fishing expedition?

2 THE COURT: I don't know.

3 MR. OWENS: You know, what I would propose is if the Court deems that this
4 relevant information potentially, let the Court take the officer in-camera and question
5 him in this area and if it finds something here that's relevant to the proceeding that
6 needs to come out, then we can -- the Court can put that as -- make that a part of
7 the record. Otherwise, we would invoke our, you know, privilege with regard to this
8 information.

9 MR. SGRO: They're speaking to a person in custody that's not represented
10 by counsel that they know -- they want to invoke work product. I mean, it's kind --
11 I'm hearing it and trying to respond as I'm hearing it, but they have an ethical
12 obligation to not communicate with someone they know or have reason to believe is
13 represented by counsel. And this sort of goes on to the constitutional issue, whether
14 or not they can allow him -- in other words, here's my point. I think they're making
15 my argument. What they're saying is almost we didn't charge -- we didn't file the
16 Information strategically so we could keep this man isolated away from counsel and
17 allow the DA to speak to the police officer and give him direction to go talk to the
18 Defendant. And when we were all done strategizing over how we were going to
19 vitiate this client -- this Defendant's constitutional rights, then we figured, okay, now
20 let's go ahead and put this matter on and we'll put it in court. So, it is relevant for a
21 number of reasons. So, I think I -- they're bolstering my position whether they spoke
22 to the --

23 MR. OWENS: That's absolutely untrue. There's nothing true in anything that
24 he's said.

25 THE COURT: Okay. Well, let me first start at the beginning --

1 MR. OWENS: Okay.

2 THE COURT: -- with the issue on the May 25th statement on the
3 voluntariness. All right?

4 MR. OWENS: Okay. We're going to go ahead and call Craig Ridings, if that's
5 okay.

6 MR. SGRO: Who did you say you're calling first? Ridings?

7 THE COURT: Ridings.

8 MR. OWENS: Ridings.

9 MR. SGRO: Ridings.

10 THE COURT: Right up here to the witness stand, please. Remain standing,
11 raise your right hand and be sworn.

12 **CRAIG RIDINGS**

13 [having been called as a witness and being first duly sworn, testified as follows:]

14 THE COURT: Go ahead and have a seat for me. And then state your name.

15 THE WITNESS: Craig Ridings.

16 THE COURT: Spell your last name.

17 THE WITNESS: Last name is R-I-D-I-N-G-S.

18 THE COURT: Go ahead, Mr. DiGiacomo.

19 MR. DiGIACOMO: Thank you, Judge.

20 **DIRECT EXAMINATION**

21 BY MR. DiGIACOMO:

22 Q How are you employed?

23 A As a police detective with the City of Henderson Police Department.

24 Q How long have you been with the City of Henderson?

25 A Since April 1990.

1 Q And what's your current assignment?

2 A Currently assigned to work the homicide investigations.

3 Q Okay. Direct your attention back to May 25th of 2006, the May area of
4 2006, did you become involved at all in the investigation of two women who were
5 found deceased out in the Henderson desert area?

6 A Yes; I was.

7 Q And pursuant to that investigation, did you ultimately come into contact
8 with an individual identified to you as Jason McCarty?

9 A Yes.

10 Q Do you see Mr. McCarty here in court today?

11 A Yes; I do.

12 Q Can you point him out, describe what something he's wearing?

13 A He's wearing a blue jumpsuit, his hair's braided.

14 MR. DiGIACOMO: Let the record reflect identification of Defendant McCarty.

15 THE COURT: Yes.

16 BY MR. DiGIACOMO:

17 Q Now immediately prior to locating Mr. McCarty, where were you in your
18 investigation? Who were you trying to contact before you contacted Mr. McCarty?

19 A We were attempting to locate Donald Herb.

20 Q And Donald Herb was another individual which was ultimately charged
21 with accessory to murder in this particular case?

22 A Yes.

23 Q Where were you trying to locate Mr. Herb?

24 A I don't recall the exact address, but it was off of Charleston and east of
25 Nellis.

1 Q And whose home was it?

2 A It was where Donald Herb was supposed to be living at the time with his
3 parents.

4 Q Describe for the Court -- ultimately do you find Mr. Herb?

5 A Yes; we did.

6 Q And based on conversation you had with Mr. Herb, did you then
7 respond to some location looking for an individual?

8 A Yes; I did.

9 Q And who were you looking for?

10 A I was looking for Mr. McCarty.

11 Q Let's talk about the vehicle you were in. What kind of car were you in?

12 A I was in a white 2002 Chevrolet pickup, unmarked police vehicle with no
13 lights, no sirens.

14 Q How were you dressed?

15 A I was dressed in a pair of jeans and probably a button-down shirt, but I
16 don't recall specifically what I was wearing.

17 Q Badge?

18 A Yes, sir.

19 Q Was it on -- how was it displayed?

20 A Precisely how it is now on my waistband.

21 Q So, on your belt?

22 A On my belt.

23 Q Were you armed or unarmed or do you recall?

24 A I don't recall.

25 Q When Mr. Herb provided you the information, where'd you go?

1 A I started traveling west on Charleston towards Nellis because Mr. Herb
2 indicated that McCarty may have been on foot that direction. I was given a basic
3 description and began to look for him.

4 Q Did you at some point find him?

5 A I did.

6 Q Describe for me when you first saw Mr. McCarty, what happened?

7 A Initially he was walking west on Charleston and he was on the north
8 side of the street near the 7-Eleven, which is at the corner of Charleston and Nellis.

9 Q How did you attempt to make contact with him?

10 A I pulled into the parking lot to the rear of the 7-Eleven and I made
11 contact with him at the rear of 7-Eleven. I exited my truck and explained to him who
12 I was.

13 Q Once you explained to him who you were, what was his reaction?

14 A He initially said that he thought that somebody was after him to hurt
15 him. He said: Oh, I'm glad it's the police. Because he was afraid that somebody
16 was out to get him for some reason or another.

17 Q And when you contacted him and told him you were the police and, you
18 know, and he said: Oh, I'm glad it's the police. Tell me how the conversation
19 progressed from there. What did you tell Mr. McCarty?

20 A I explained to him that I was assisting another detective with an
21 investigation and that that detective would like to speak with him and would he be
22 able to speak to that detective at that location if I called the detective and had him
23 come out.

24 Q What was Mr. McCarty's response?

25 A He said you're -- sure. Excuse me.

1 Q And where was the detective or what detective were you looking to
2 have contact or talk to Mr. McCarty?

3 A I had to contact to contact Detective Jerry Collins and he was
4 somewhere in the Henderson area.

5 Q And you're in Metro's jurisdiction at this point.

6 A Yes; that's correct.

7 Q And you're by yourself at this point.

8 A Yes; that's correct.

9 Q Do you call Detective Collins?

10 A Did I call him? Yes.

11 Q And did he indicate that he was going to respond to the location?

12 A Yes, he said he would be on his way immediately.

13 Q Based upon your knowing that Detective Collins is now coming to your
14 location and describe for me, you're in a parking of the 7-Eleven?

15 A We're behind the 7-Eleven where there was no other cars parked. It
16 was just myself and Mr. McCarty and my truck.

17 Q Did you suggest to Mr. McCarty the two of you should go do
18 something?

19 A I asked him if he was thirsty, if he needed anything to eat. And we went
20 into the 7-Eleven and I bought him a water and I think I bought him some cigarettes
21 and some snack or something.

22 Q At this point any indication that you've related to him that he's in
23 custody or that he had to remain there?

24 A No, absolutely not. I asked him if he would mind sticking around
25 because it was going to take Detective Collins a little while to drive from Henderson.

1 Q So, did you buy him some cigarettes and a drink, whatever?

2 A Yes.

3 Q Where did you go after you bought him that?

4 A We went back around to the rear of 7-Eleven and I opened the tailgate
5 of the truck that I was driving and we sat on the truck and had a casual
6 conversation.

7 Q Just you and him?

8 A Just myself and Mr. McCarty.

9 Q At some point in time does Detective Collins show up?

10 A Yes; he did.

11 Q Does anybody else show up around the same time period as Detective
12 Collins?

13 A Detective Webster showed up. Earlier in the day he was actually riding
14 with me and when we got the information about Mr. McCarty being on foot earlier, I
15 had Detective Webster stay with Donald Herb at his residence while I went out and
16 tried to find Mr. McCarty. So, he ultimately showed up. He was given a ride there
17 by one of the other detectives on their way back to Henderson.

18 Q He was dropped off.

19 A He just was dropped off; yes.

20 Q And how was he dressed?

21 A He was dressed in plain clothes: jeans, casual.

22 Q Detective Collins show up?

23 A Yes.

24 Q Did he have a vehicle?

25 A Yes; he did.

1 Q Was it a plain-clothes vehicle -- or an unmarked vehicle or marked
2 vehicle?

3 A It was unmarked vehicle, but it did have lights in the grill of the car.

4 Q When he showed up, was he -- how was he dressed?

5 A He was dressed casually as well.

6 Q And did you notice the initial indicate -- or initial interaction between
7 Detective Collins and Mr. McCarty?

8 A Yes.

9 Q Okay. And describe for me that to the best of your recollection.

10 A Best of my recollection he asked Jason McCarty if he could speak to
11 him about an incident that had occurred earlier -- I think it was about ten days or so
12 prior to that or a few days prior to that.

13 Q And did Mr. McCarty indicate that he would in fact talk to Detective
14 Collins?

15 A Absolutely.

16 Q And thereafter did Detective Collins then take a taped statement from
17 Mr. McCarty?

18 A Yes; he did.

19 Q And he was the individual doing the interview at that point.

20 A Yes; that's correct.

21 Q Did you remain present for the entire interview?

22 A I remained within earshot. I wasn't an active part of the interview.

23 Q So, wasn't -- so, when you say you're not an active part, you're not
24 standing next to Mr. McCarty listening to exactly what he says, you were standing
25 off to the side?

1 A No, to the best of my recollection, Detective Collins and Mr. McCarty
2 were at the rear of my vehicle over near the tailgate where I had been sitting with
3 Mr. McCarty earlier. And I moved around over to the driver's side up by the door.
4 It's -- the truck that I was driving at the time was an extra cab, long bed, full-size
5 pickup truck. So I just stepped away so that I could allow Detective Collins to
6 conduct his interview.

7 Q What about Detective Webster, do you know where he was during the
8 course of the interview?

9 A He stayed with me most of the time.

10 Q Eventually that interview -- well, terminates; correct?

11 A That's correct.

12 Q At the end of the interview, Mr. McCarty's in custody?

13 A That's correct.

14 Q Placed there by Detective Collins?

15 A Correct.

16 Q Eventually Detective -- or Mr. McCarty is then transported to the Clark --
17 or to the Henderson Detention Center?

18 A Yes.

19 Q I want to direct your attention forward to June 1st of 2006. Were you
20 involved in contacting or were you present when Mr. McCarty was contacted on that
21 date?

22 A Yes; I was.

23 Q And who else was with you during that contact?

24 A Myself and Detective Collins again.

25 Q How is it that you wound up at the Henderson Detention Center to

1 speak to Mr. McCarty?

2 A I was informed by Detective Collins that Mr. McCarty wanted to speak
3 to us about the investigation.

4 Q And did you in fact go with Detective Collins to the Henderson jail?

5 A Yes.

6 Q And was *Miranda* warnings read to Mr. McCarty at that point?

7 A I believe he was readvised of his *Miranda* warnings, yes.

8 Q And then an interview was conducted with him at that point.

9 A Yes, a recorded interview was.

10 Q Taped interview?

11 A Correct.

12 Q At the end of that you left?

13 A Yes.

14 Q On the 6th, did you go back to the Henderson Police Department?

15 A Yes; we did.

16 Q Or jail, I guess.

17 A The jail.

18 Q Did you have contact with Mr. McCarty?

19 A Yes.

20 Q Did -- was he reminded that he had previously been read his rights?

21 A Yes.

22 Q And did he indicate that he still understood his rights?

23 A Yes; he did.

24 Q On this particular occasion, is there anything done with Mr. McCarty as
25 opposed to just talk to him while he was in the jail?

1 A There was some information that he provided about the whereabouts of
2 possible murder weapon. And he indicated that he wanted to show us where they
3 were located.

4 Q So did you guys remove him from the jail?

5 A Yes.

6 Q And did you transport him out to the location where those items --
7 where he pointed out those items?

8 A Detective Collins and Detective Fuentes actually were in the same
9 vehicle with Mr. McCarty and I followed them in a separate vehicle.

10 Q After that excursion, was he returned back to the Henderson Police
11 Department?

12 A Yes.

13 Q Since June 6th of 2006, have you had any contact with Mr. McCarty?

14 A No, sir.

15 Q Other than the three taped statements that are the subject of this
16 interview, have you had any contact with Mr. McCarty?

17 A No, sir.

18 Q And at any point in time that you had contact with Mr. McCarty, and the
19 tapes will speak for themselves, but I'm talking about basically initially your first
20 contact with Mr. McCarty. Did you make any promises, threats, inducements to him
21 to give you that -- the statement to Detective Collins?

22 A Absolutely not.

23 MR. DIGIACOMO: Thank you. I pass the witness, Judge.

24 THE COURT: One moment, I can't write that fast.

25 All right, Mr. Sgro, go ahead.

1 MR. SGRO: Thank you, Your Honor.

2 **CROSS-EXAMINATION**

3 BY MR. SGRO:

4 Q You just testified about involvement in the case that began on May 25th
5 of 2006; correct?

6 A Yes, sir.

7 Q But you had been involved in this case from before May 25th of 2006;
8 correct?

9 A I believe that I was involved in it from the onset of the case.

10 Q Right. In which -- was the onset of the case, is that something you're
11 describing as the 9-1-1 call coming in and the discovery of the two bodies out in the
12 desert?

13 A I was actually contacted to respond out to the desert.

14 Q Okay. And do you --

15 THE COURT: And that date was?

16 BY MR. SGRO:

17 Q Right.

18 A I believe it was the 23rd.

19 Q Would it refresh your recollection if I showed you a report that said it
20 was May --

21 MR. SGRO: Will counsel stipulate it's May 20th?

22 MR. DIGIACOMO: Well, look at the report.

23 THE COURT: I imagine somebody has a piece of paper with the first day of
24 this event --

25 MR. SGRO: We do, Your Honor.

1 THE COURT: -- somewhere.

2 MR. DiGIACOMO: The crime occurred on the 20th, I believe, Judge.

3 THE COURT: Check the file, it's probably in the --

4 MR. SGRO: May I approach the witness, Your Honor?

5 THE COURT: Sure.

6 MR. DiGIACOMO: Oh, yeah, I'm sorry. Let me restate that. The bodies were
7 found on the 20th, the crime occurred probably earlier than that.

8 THE COURT: Okay. Is that the date you're referring to is the discovery of the
9 bodies?

10 MR. SGRO: Yes, Your Honor.

11 THE COURT: Okay. Approach.

12 THE WITNESS: Then, yes --

13 MR. SGRO: Okay.

14 THE WITNESS: -- that is correct. I was involved from the date that the
15 bodies were located.

16 MR. SGRO: Okay.

17 THE COURT: The 20th; right?

18 MR. SGRO: Now -- yes, ma'am.

19 THE COURT: Okay.

20 BY MR. SGRO:

21 Q From May 20th until the time that you see Mr. McCarty behind the
22 7-Eleven, there are things that are being investigated and persons that have been
23 interviewed; correct?

24 A Yes, sir.

25 Q Do you recall a witness in the case whose name is Melissa Estores?

1 A Yes.

2 Q And another individual named Ryan Noe?

3 A I'm sorry, I didn't hear the last name.

4 Q Noe, I think he pronounces it.

5 A Yes.

6 Q Ms. Estores and Mr. Noe had heard a news account and had come to
7 meet with police officers on May 21st of 2006; correct?

8 A Yes.

9 Q Melissa Estores had given you names of persons that may have been
10 involved in the homicide that you got called out to the day before; correct?

11 A She gave us monikers. She didn't give us names.

12 Q Right. And the investigation then ensues, now you're looking for people
13 and persons who match the monikers; fair?

14 A That's correct.

15 Q And you find Mr. Malone, Domonic Malone who's now codefendant in
16 this case on May 23rd. Do you recall doing that?

17 A I don't recall the date, but I do recall that we did -- he was located after
18 he made a telephone call to the police department from, I believe, the Texas Station.

19 Q Okay. And that was a couple of days before you spoke with
20 Mr. McCarty; correct?

21 A Yes.

22 Q In terms of the contact with Mr. Malone, that was May 23rd, do you
23 remember it being at about 11 o'clock at night? I'm sorry, 9 o'clock at night?

24 A I remember being there, I don't remember the time of day.

25 Q Okay. What did review before coming to testify today?

1 A I reviewed specifically the incidents surrounding the interviews of
2 Mr. McCarty.

3 Q So you did not refresh your recollection in terms of the preliminary
4 investigation that led to Mr. McCarty's interview?

5 A That's correct.

6 Q All right. By the time you have concluded your interview of Mr. Malone,
7 you know that the moniker of Rome or Romeo is something that's attributed to
8 Jason McCarty; fair?

9 A I don't recall if that's fair or not.

10 Q Do you recall asking? Who -- strike that.

11 Who did the questioning of Mr. Malone?

12 A Detective Collins.

13 Q Were you again within earshot of that communication?

14 A For the most part, not during the entire time.

15 Q Do you recall Ms. Estores prior to your -- you know, let me do it this
16 way. I want you to have May 25th of 2006 behind the 7-Eleven as kind of the
17 barometer, okay? And I want to do before and after questions.

18 So before May 25th of 2006, did you know that the name of Rome or
19 Romeo was a moniker that had been attributed to Jason McCarty?

20 A To the best of my recollection, I don't recall attributing the name Jason
21 McCarty with that moniker until that day.

22 Q Okay.

23 THE COURT: That day being the 25th?

24 THE WITNESS: 25th, yes, ma'am.

25 BY MR. SGRO:

1 Q Did you have any information before the 25th, did you have any
2 information that Mr. McCarty was a suspect in this double homicide that you had
3 been investigating since the 21st?

4 A Did I believe him to be a suspect?

5 Q Yes.

6 A No; I did not.

7 Q Okay. As you're rolling up on the 7-Eleven and you see Mr. McCarty,
8 you don't think him to be a suspect?

9 A No, I believe him to be a person of interest that we needed to talk to.
10 That was the way it was presented to me by Detective Collins.

11 Q Up until the time he was mirandized on May 25th, he had not admitted to
12 you that he perpetrated the crime; correct?

13 A Correct.

14 Q He had not admitted to you that he was involved in a murder; correct?

15 A He didn't -- we didn't speak about anything to do with the
16 investigation --

17 Q What did you --

18 A -- prior to Detective Collins' arrival.

19 Q Okay. Detective Collins arrives and a tape is turned on; right?

20 A Yes.

21 Q There's no *Miranda* warnings prior to the tape being turned on; right?

22 A Correct.

23 Q And how long was the interview?

24 A Approximately an hour and a half.

25 Q Could it have been 2-1/2 hours?

1 A It could have been an hour; it could have been two hours. I don't recall
2 specifically the number of minutes it took.

3 Q So when you say you reviewed the information about the statement,
4 you didn't go back and check how long the interview was?

5 A No; I did not.

6 Q All right. Did anyone ask you to do that?

7 A No, I was more concerned with what I said and the part that I played
8 during those interviews.

9 Q Okay. As the tape is turned on and questions are being asked,
10 questions are now being asked by Detective Collins of Mr. McCarty that have to do
11 with the homicide and the investigation; correct?

12 A There were quest --

13 THE COURT: Do you know that? I mean, were you close enough to hear
14 that?

15 THE WITNESS: I know that there questions that were asked that were not
16 related to the homicide.

17 BY MR. SGRO:

18 Q That's not my question. Were there questions asked of Mr. McCarty
19 after Detective Collins turned the tape on that did have to do with the homicide?

20 A Not until sometime into it.

21 Q Okay, how long into it?

22 A I'd have to look at the specific time table to be able to tell you, sir.

23 Q Before *Miranda* warnings?

24 A I believe that there was a mention made of two bodies being found in
25 the desert.

1 Q Before *Miranda* warnings?

2 A But other than that, I don't recall anything -- before *Miranda* warnings;
3 that's correct.

4 Q Okay. So your only recollection from the time the tape gets turned on
5 until *Miranda* warnings are given, the only thing that's talked about in terms of the
6 investigation are the location of two dead bodies?

7 A To the best of my recollection, yes, sir.

8 Q And when's the last time you reviewed the statement?

9 A About 1:30 this morning.

10 Q Okay. Did you review it just the one time?

11 A No, I reviewed it a couple of times.

12 Q Okay. And after a couple of times reviewing this statement, that's your
13 best recollection in court this morning; right?

14 A Yes, sir. You can see that there's quite a stack of paper in front of me,
15 so, without referring specifically to chapter and verse, that is the best of my
16 recollection.

17 Q Do you recall swearing out an affidavit for a search warrant on
18 May 22nd in this case?

19 A No; I do not.

20 Q Do you recall in an affidavit or an application for a search warrant that
21 was done on May 22nd you said under oath that Mr. McCarty was a suspect?

22 A What was the search warrant for?

23 Q Do you recall any search warrants that were executed on or about
24 May 22nd in this case?

25 A No, sir; I don't.

1 Q Do you recall any search warrant that predate the interaction at the 7-
2 Eleven where you swear under oath that Mr. McCarty was a suspect?

3 A No; I do not.

4 Q Would that -- let's assume I'm right, okay, just for the sake of this
5 question, let's assume that there's a search warrant --

6 MR. DIGIACOMO: Objection, assuming a fact not in evidence. Perhaps we
7 could show him the search warrant.

8 THE COURT: Mr. Sgro, what I'd like for you to do is if you have the search
9 warrant and it has that information, then show it to him.

10 MR. SGRO: Well, Your Honor, I -- here's what I would ask the Court to
11 indulge me on. I would like to ask the questions and at the conclusion of the
12 hearing, perhaps I could do a brief -- instead of doing this because it strikes me that
13 there have been some things that have been asserted today under oath but may not
14 be actually consistent. Instead of refreshing his recollection and giving him the
15 opportunity to adjust, my preference would be to simply provide the records to the
16 Court. I'm certainly entitled to ask him if he recalls the search warrant.

17 THE COURT: He says he doesn't.

18 MR. SGRO: Okay. Then I'll move on, Your Honor.

19 MR. DIGIACOMO: I mean, you can't -- now try and impeach him without --
20 with the phantom piece of evidence that allegedly exists that we don't even know
21 about.

22 THE COURT: I mean, Mr. Sgro, I certainly understand what you're attempting
23 to do.

24 MR. SGRO: Right.

25 THE COURT: But my position is either you ask him, he says no.

1 MR. SGRO: Okay.

2 THE COURT: You either impeach him somehow with what -- or refresh --

3 MR. SGRO: Okay.

4 THE COURT: -- his recollection. But for strategic purposes, if you don't want
5 to do that, then we're not given him hypothetical situations and going from there.

6 MR. SGRO: Right.

7 THE COURT: All right?

8 BY MR. SGRO:

9 Q As the investigation is progressing from the 21st of May through the 25th
10 of May, are you speaking with Detective Collins on a regular basis in terms of what
11 the investing is yielding in terms of information?

12 A Yes, I believe we had regular meetings.

13 Q Okay. So, it's not a situation where the left hand doesn't know what the
14 right hand is doing. You guys are actively engaged in pursuing the case?

15 A I believe so.

16 Q All right. Did you assist in any way with the preparation of any search
17 warrants in the case?

18 A I don't recall.

19 MR. SGRO: I just need one moment, Your Honor.

20 THE COURT: Sure.

21 BY MR. SGRO:

22 Q Do you -- well, let me start with this. May I approach, Your Honor?

23 THE COURT: Absolutely.

24 BY MR. SGRO:

25 Q Now the search warrant here, this is for a location 1525 East Fremont

1 Street. Does that address ring a bell to you?

2 A Yes, sir.

3 Q Okay. And it's signed by Detective Collins; is that correct?

4 A That's what it says, yes.

5 Q All right. And this is one of the ones -- and there were a number of
6 search warrants executed in this case. Fair?

7 A I believe so, yes.

8 Q All right. If Detective Collins signed it, can you tell from the content of
9 the search warrant whether or not you had any participation in the drafting of the
10 warrant. Does that make sense?

11 A In other words, by reading --

12 Q Was this a collaborative --

13 A By reading it, will I be able to tell you if I helped him write it?

14 Q Yeah.

15 A I don't know, unless there's something specifically attributed to what I
16 said.

17 Q Well let me tell you that it's signed by Detective Collins. It's a search
18 warrant on May 22nd.

19 A Do you wish for me to read this?

20 Q Just flip through it and let me know if by flipping through it whether or
21 not it refreshes your recollection about you being involved in the --

22 MR. DIGIACOMO: Can we refer to exactly which search warrant that was?

23 THE COURT: Yeah, what --

24 MR. SGRO: I read it, Your Honor.

25 THE COURT: It's the May 22nd one. I don't know if there were more on

1 May 22nd than not.

2 MR. SGRO: 1525 East Fremont Street, F-217.

3 MR. DiGIACOMO: I'm trying to figure out if that's a duplicate original of a
4 telephonic warrant which means by definition he couldn't have helped them because
5 it's -- Detective Collins -- because there is a warrant that is telephonic at that
6 address on May 22nd. So he couldn't have helped him draft the affidavit because
7 the affidavit is orally being spoken by Detective Collins.

8 MR. SGRO: Well, that's --

9 THE COURT: Well, let me ask you this, Mr. Sgro, 'cause are you -- are you --
10 is this a telephonic or not? I mean, that -- I think that's the first thing we need to
11 know. Can you tell from that whether it's a telephonic search warrant? Is it just the
12 affidavit or is there --

13 MR. SGRO: I think it's just the affidavit.

14 THE WITNESS: There's an affidavit, a search warrant, and a sealing order
15 here and it appears to be signed by Judge George.

16 MR. SGRO: That's Steven George, Your Honor, in Henderson.

17 THE WITNESS: I'm not -- I don't see -- let me look. It appears, according to
18 the paperwork on the back, that this was in fact a telephonic warrant.

19 MR. SGRO: Okay.

20 THE COURT: Okay. So the telephonic warrant, then, Mr. DiGiacomo is
21 correct. Somebody calls, they're talking to me or some other judge on the phone.
22 So then, I guess, Mr. Sgro, would a better question be --

23 MR. SGRO: Well --

24 THE COURT: -- what was -- what did he -- did he contribute anything to the --
25 what Detective Collins said to Judge George at that time?

1 MR. SGRO: And with all due respect, Your Honor, the telephonic warrants
2 I've seen usually have: Hello, hello, this judge whoever. This is an affidavit in text
3 that mirrors many of the other documents that were generated in the case.

4 THE COURT: Well, they get typed up.

5 MR. SGRO: Exactly.

6 THE COURT: Right.

7 MR. SGRO: Exactly.

8 THE COURT: Afterwards.

9 MR. SGRO: Right. But this is not your typical: I'm here with this message,
10 can you authorize a warrant, here's what I had which -- in -- I'll move on, Your
11 Honor.

12 THE COURT: Okay.

13 BY MR. SGRO:

14 Q Can you tell from this, are you with Detective Collins when this
15 telephonic warrant is called in?

16 A I don't believe so.

17 Q Okay.

18 THE COURT: And sometimes there's, you know, this witness -- this warrant
19 was witnessed by --

20 MR. SGRO: Exactly.

21 THE COURT: -- another on at the time and, you know.

22 BY MR. SGRO:

23 Q Do you recall prior to the interview behind the 7-Eleven that
24 Mr. McCarty's photograph had been included in a police lineup of photos and shown
25 to different witnesses?

1 A I don't recall that. I don't believe I was involved in that.

2 Q Do you have any recollection of Mr. McCarty's photo being put in a
3 photo lineup and being shown to Melissa Estores?

4 A I don't have any recollection of it, no.

5 Q I want you to tell me the scene again. When you and Mr. McCarty get
6 there, you go from the back of the 7-Eleven parking lot into the store where you buy
7 him water and some cigarettes; is that right?

8 A Yes, sir.

9 Q You exit out of the store and you go back to behind the 7-Eleven?

10 A Right.

11 Q And it is at this point where Detective Webster gets dropped off?

12 A No. Detective Collins and Detective Webster arrived at approximately
13 the same time.

14 Q Okay. Okay. And how is it that you separate yourself from the -- from
15 Mr. McCarty and Detective Collins gets him -- in other words, were three officers
16 speaking to one man or were three officers spread out in the back of the parking lot
17 at 7-Eleven? That's what I'm trying to nail down in my own brain.

18 A When Detective Collins arrived, I introduced Detective Collins to
19 Mr. McCarty.

20 Q And you're standing or sitting next to each other?

21 A We're sitting -- we're -- I don't recall specifically how we were located.
22 But we were near one another, we were able to speak in a conversational voice.

23 Q Okay. Detective Collins then comes over.

24 A Detective Collins, this is Jason McCarty. Jason McCarty, this is
25 Detective Collins. Detective Collins at that point took over the interview because it

1 was his interview, his case, he was the lead detective.

2 Q Okay.

3 A I stepped away.

4 Q When you -- okay, and that's the part. Now, when you're making
5 introductions, where's Detective Webster? Did he come up with Detective Collins?

6 A No, they arrived separately. Detective Collins arrived in his police
7 vehicle, his unmarked detective car. Detective Webster arrived at another time and
8 he was dropped off by another detective --

9 Q Right.

10 A -- who left the scene, who didn't stay, who wasn't there.

11 Q Okay. Let me ask it this way. Give me in proximity. Detective Collins
12 and Mr. Webster are at Point X, how many feet away is Detective Webster?

13 A Sir, I'm not even going to give you a guess, because it would be nothing
14 more than a guess.

15 Q Was Detective Webster in earshot of Collins' and McCarty's
16 conversation?

17 A When Detective Webster was there, he and I stayed away from
18 Detective Collins so that he could conduct his interview. We were not trying to mug
19 Mr. McCarty, we didn't want him to feel pressured. Detective Collins was
20 conducting a simple interview to obtain information about this other incident that
21 occurred.

22 Q And your recollection is today that you met with Mr. McCarty behind the
23 7-Eleven; correct?

24 A That's correct.

25 Q Okay. You did not meet with Mr. McCarty in front of the 7-Eleven and

1 asked him to move to the back of the 7-Eleven because it was too hot?

2 A I don't recall that, no.

3 Q It is --

4 A I recall contacting him in the rear parking lot.

5 Q Okay. Is there anything about -- is there anything that refreshes your
6 recollection if I suggest to you that the meeting occurred at the northeast corner of
7 the 7-Eleven at Charleston and Nellis and that you asked him to move in the back
8 because it was too hot? Does that ring a bell at all?

9 A No, sir, but the northeast corner of that building would be in the rear
10 parking lot of the 7-Eleven.

11 Q Well, then let me make it more -- I just want to know, your recollection
12 for the record, did you move him from the front of the 7-Eleven to the back and
13 suggest that that movement occurred because of the weather?

14 A I don't recall doing that at all; no, sir.

15 Q Okay. One of the questions Mr. DiGiacomo asked you was whether or
16 not Mr. McCarty when you first met with him was free to leave. Do you remember
17 that question?

18 A Yes.

19 Q And your testimony under oath was that Mr. McCarty at the time of the
20 initial meeting was free to go.

21 A Yes. I never --

22 Q Is that right?

23 A -- told him that he had to stay with me.

24 Q But that's not the question.

25 A I indicated -- asked him --

1 Q Hang on. Hang on a second. Hold on.

2 THE COURT: Hold on. One at a time, please.

3 BY MR. SGRO:

4 Q I didn't ask you whether or not you told him he had to stay. What I'm
5 asking you is, was he free to leave?

6 A Absolutely.

7 Q When did that change?

8 A As far as I know it didn't change until he went into handcuffs and was
9 advised he was under arrest.

10 Q Okay. Do you recall any request by Mr. McCarty to take a walk prior to
11 being mirandized?

12 A There may have been something in the transcript. I think he was
13 speaking to Detective Collins about moving away from the recorder or something
14 like that, but I don't recall specifically what that was all about.

15 Q Do you recall Mr. McCarty being told where's the affect of: We're not
16 walking anywhere? Do you recall that?

17 A I believe I read that in the transcript, yes.

18 Q Does a police officer telling an interviewee we're not walking anywhere,
19 in your opinion, does that suggest that that person's still free to go?

20 MR. DiGIACOMO: Objection, calls for speculation on the person being
21 interviewed, first of all. Second of all -- well, that's the first one. Pure speculation
22 and irrelevant.

23 THE COURT: Sustained.

24 MR. SGRO: Fair enough.

25 BY MR. SGRO:

1 Q Officer, if someone is free to leave -- if you're engaging in an interview
2 with someone and in your mind that person's free to go whenever he or she desires,
3 would you ever tell that person: You're not walking anywhere?

4 MR. DiGIACOMO: Relevance, objection. The tape speaks for itself.

5 THE COURT: Right.

6 MR. SGRO: Goes to -- well, if the tape speaks for itself and the Court finds
7 that that credibility issue will be resolved with the tape, then I'll move on .

8 THE COURT: Right. Thank you. It will.

9 MR. SGRO: Okay.

10 THE COURT: Don't answer that.

11 BY MR. SGRO:

12 Q You were asked how you were dressed and I think all three of the
13 police officers arrived in plain clothes, no one had a uniform on, would that be fair?

14 A Yes.

15 Q All the police officers had badges?

16 A To the best of my recollection. Yes.

17 THE COURT: Most of them do, Mr. Sgro, yes.

18 MR. SGRO: For the record.

19 THE COURT: I know you have to ask.

20 BY MR. SGRO:

21 Q Did all the police officers carry weapons?

22 A To be quite honest with you, I had just come from a long-term covert
23 assignment and I didn't carry a gun frequently. I had a gun with me in my car, but
24 as generally speaking, I didn't have it on my hip as often as I probably should have.
25 So I don't recall if I actually had a gun on when I contacted him. I do know that I had

1 my badge because I wanted to be able to identify myself as to who I was.

2 Q Sure. Do you recall whether or not either of the other two police officers
3 who arrived on the scene had a gun?

4 A I believed Detective Collins did, but whether Detective Webster had one
5 on, I really don't recall.

6 Q Okay. The question was asked of you also whether or not you have
7 had any contact with Mr. McCarty since June 6th of 2006. Do you recall that
8 question?

9 A Yes.

10 Q Are you aware of anyone else who has had contact with Mr. McCarty
11 from June 6th of 2006?

12 A No, I'm not aware of anyone else.

13 Q I'm talking law enforcement, obviously.

14 A I don't recall. I wasn't at the prelim.

15 Q And without telling me the contents of any conversation, in the course
16 of your interviews with Mr. McCarty, were you ever in touch with the DA? A
17 representative -- a lawyer from the District Attorney's office?

18 THE COURT: On the 25th -- or --

19 BY MR. SGRO:

20 Q Well, I guess we can do it that way. Let's do it from the 25th. During
21 that interview process with Mr. McCarty, did you contact anyone from the District
22 Attorney's office?

23 A On May 25th?

24 Q Yes, sir.

25 A No; I did not.

1 Q Did you on or about the June 1st timeframe when you returned to the
2 Henderson jail?

3 A I personally did not have any contact with the District Attorney's office.

4 Q At any time?

5 A At any time.

6 Q Were you aware of contact that existed between any police officer and
7 the DA?

8 A I was informed that Detective Collins had been contacted by, I believe it
9 was Scott Mitchell.

10 Q So the detective had been contacted by someone at the DA's office.

11 A I believe that was the case.

12 Q Any idea when that occurred?

13 A I have no idea, sir.

14 Q All right. Are you aware of -- prior to Detective Collins being contacted
15 by the DA, are you aware of Detective Collins' efforts to communicate with the DAs
16 on his own volition?

17 A No, sir; I am not.

18 Q Okay. And no one ever directed you to make such a telephone call?

19 A No, sir.

20 Q All right. Do you recall conversations about the DA being involved in an
21 effort to resolve any potential case that may have come down against Mr. McCarty?

22 A Would you repeat that?

23 Q Sure. Was there conversation -- let's start with May 25th. On May 25th,
24 2006, do you recall any conversation between Detective Collins and Mr. McCarty
25 about the DA's office being involved in potentially resolving this case?

1 A At the scene at the 7-Eleven?

2 Q Yes, sir.

3 A No, sir.

4 Q Okay. Do you recall -- and that's before and after mirandizing, you
5 don't recall anything about the DA being involved?

6 A I don't recall anyone speaking of the District Attorney's office at that
7 time.

8 Q Okay. On June 1st, 2006, do you have a recollection of the DA being
9 involved and that sort of being a theme in the interview?

10 A I believe on June 1st was when Mr. McCarty said that he wanted to
11 speak to the District Attorney's office.

12 Q Okay. That's your recollection?

13 A My recollection, yes, sir.

14 Q On June 6th whether it's three statements or whether it's one continuous
15 statement where the tape gets shut off, whatever it is, but during that course of
16 events, are you aware of communications between Mr. McCarty and Detective
17 Collins about involving the DA's office and potentially resolving the case?

18 A You're asking me did Mr. McCarty ask Detective Collins to involve the
19 DA's office?

20 Q To resolve the case, yes, sir.

21 A I believe that Mr. McCarty said that he wanted to speak to the District
22 Attorney's office in order to resolve his case and that he would testify to whatever he
23 needed to testify to in order to be able to see his children before we went to prison.

24 Q His children came up on May 25th; fair?

25 THE COURT: Wait, wait, wait.

1 THE WITNESS: Possibly.

2 THE COURT: Okay.

3 MR. SGRO: Okay. I'm sorry.

4 THE COURT: Just -- don't apologize. Let me, 'cause I'm trying to keep it all
5 straight and there's a lot.

6 On the 25th you just said no contact -- it was no contact and there was
7 no conversation about the DA's office on the 25th?

8 THE WITNESS: To the best of my recollection that is correct.

9 THE COURT: All right. So -- okay. On June 1st you just said that you believe
10 Mr. McCarty said he wanted to speak to the DA's office to be able to resolve this
11 in -- one moment.

12 Okay. So on June 1st I believe you just said Mr. McCarty said he
13 wanted to speak to the DA's office to resolve this and testify so he could be able to
14 see his children.

15 THE WITNESS: That is what I recall, yes.

16 MR. SGRO: And --

17 THE COURT: On then your -- and then on June 6th, do you recall any further
18 conversation about the DA's office?

19 THE WITNESS: Yes; I do.

20 THE COURT: And what was that?

21 THE WITNESS: The recollection I have is that the DA's office, I was
22 informed, had spoken with Detective Collins and had asked Detective Collins to go
23 out and to interview. There was -- the only instructions that I was informed about
24 was that as long as he was talking, to talk to him.

25 BY MR. SGRO:

1 Q And Mr. McCarty had not yet had an attorney appointed for him;
2 correct?

3 A I don't believe so, no.

4 Q Okay. And would it be fair to say that Detective Collins was able to
5 elicit information from Mr. McCarty by providing -- well, let me ask it a different way.
6 That's going to be way too hard of a question.

7 Mr. McCarty was saying I want the DA involved. Detective Collins was
8 leaving the impression with Mr. McCarty that the DA was going to be involved and
9 this case could possibly be resolved if Mr. McCarty quote/unquote cooperated?

10 MR. DIGIACOMO: Objection.

11 THE COURT: Hold on.

12 MR. DIGIACOMO: First of all, objection, first of all to the form of the question.
13 The suggestion by Mr. -- Detective Collins is something I guess you could ask
14 Detective Collins, but it's on tape. And so ultimately to ask this Detective to interpret
15 what the words are on tape is completely inappropriate.

16 MR. SGRO: And, Your Honor, to be fair, I agree with some of that. Here -- let
17 me suggest --

18 THE COURT: Let me the record reflect that.

19 MR. SGRO: Let me suggest this to the Court. The statements are long,
20 okay. What the tape will not show on it, bland transcript is voice inflection, tone, and
21 demeanor and delivery. The one statement on May 25th is over -- I think it's 2-1/2
22 hours. Just that one statement. And that doesn't include -- and June 6th, I mean, I
23 had to stop the tape three times. So, I'm trying -- with that caveat, Your Honor, if I
24 can maybe if we get to the briefing schedule and I can provide an audio snippet to
25 save the Court from going through 15 hours of statement.

1 THE COURT: I would appreciate that very much.

2 MR. SGRO: Okay. So that's why I'm going.

3 THE COURT: But here's the thing.

4 MR. DiGIACOMO: I don't think you should ever listen to a snippet. Listen to
5 them through their entirety. I believe we've brought copies here today. We'll have
6 them marked with Detective Collins when he's up there --

7 THE COURT: Okay.

8 MR. DiGIACOMO: -- if you want to listen them. But ultimately, that's not the
9 issue.

10 THE COURT: All right. Here's the thing. It sounds like to me most of this
11 was driven by Detective Collins.

12 MR. SGRO: I understand that. And somewhat -- you're right.

13 THE COURT: And so my -- and he -- with all due respect to the detective, I
14 mean, he said Detective Collins was the lead detective. And did you ever personally
15 have a contact with a DA during this May 25th to June 6th timeframe regarding this
16 case?

17 THE WITNESS: No, ma'am.

18 THE COURT: Okay.

19 MR. SGRO: Okay.

20 THE COURT: So my feeling, Mr. Sgro, and I know you're being thorough and
21 I know you're doing your job, but at some point somebody's got to say: Hey, look,
22 let's put the person up here and hear it from the person who actually did or did not
23 have that. And it's not this man.

24 MR. SGRO: Okay. The State is only under an obligation -- and I appreciate
25 where you're going -- they're only under an obligation to throw on who they think

1 they need to throw on to test voluntariness.

2 THE COURT: Is Collins here?

3 MR. DiGIACOMO: He's sitting outside with the tapes.

4 THE COURT: Okay. So --

5 MR. SGRO: If they're going to call him. If I stop now, then I'll stop now.

6 THE COURT: Yeah, I mean --

7 MR. DiGIACOMO: He can choose not to, it doesn't matter either way. He's
8 not going to be released.

9 MR. SGRO: Is Collins coming?

10 THE COURT: I don't like to -- I don't want to waste anybody's time. At noon I
11 have a meeting that I have to do here.

12 MR. SGRO: Okay. If Collins

13 THE COURT: So I say, you know, enough with this, put on Collins and let's
14 answer some questions. That's the person I want to hear from.

15 So, Detective, right now -- do we want --

16 MR. DiGIACOMO: Can I ask him just one thing to clarify for the record before
17 he gets off the stand?

18 THE COURT: All right. Wait, until Mr. Sgro is kind of paying attention here.
19 Okay. What's that?

20 **REDIRECT EXAMINATION**

21 BY MR. DiGIACOMO:

22 Q Just so the record's clear, your understanding was that Mr. McCarty's
23 father contacted Scott Mitchell about him wanting to speak to the DA's office --

24 MR. SGRO: I'm going to object. That's -- he said that the Defendant called,
25 Your Honor, that was his understanding. And, again, I just sat down so we could get

1 the guy on the stand.

2 THE COURT: Right. So why don't we --

3 MR. DiGIACOMO: I just want to make sure that it's not -- there was a
4 representation that said the DA's office said to go speak to him, but that was his
5 understanding. I want to make sure that we get the understanding clear for the
6 Court that Mr. McCarty's father on his behalf contacted our office and said he wants
7 to speak to us.

8 THE COURT: Well, I think that's what I read in these briefs.

9 MR. DiGIACOMO: I know, but this is the actual hearing. I just want to make
10 sure that you don't have any other different understanding of that's how it occurred.

11 THE WITNESS: No, sir, Mr. McCarty's father was a former police officer and
12 he knew how the system worked and he made direct contact specifically on behalf
13 of Mr. McCarty to the DA's office.

14 THE COURT: Okay.

15 MR. DiGIACOMO: And that's how you guys got involved?

16 THE WITNESS: That's how we were involved with the DA's office.

17 MR. DiGIACOMO: Thank you, Judge, I have nothing further.

18 THE COURT: All right. Do we want to have this detective remain or should
19 we excuse him? What do you think? Like I said, at noon I have to take a break and
20 do a meeting. So --

21 MR. DiGIACOMO: Might as well excuse him. If there's some reason the
22 Court needs him, he can be called back.

23 THE COURT: Thank you. We know where to find you.

24 MR. DiGIACOMO: But he has other cases to handle, I'm sure.

25 THE COURT: We know where to find you if we need you again, so you can

1 go ahead and go. Thanks.

2 Let's put Collins on, please.

3 I know it's all about making a record, but there reaches a point where
4 it's not --

5 MR. SGRO: I just didn't know if strategically if they were going to cut Collins
6 loose.

7 THE COURT: I wouldn't let them.

8 MR. SGRO: Okay. Well, I didn't know that and I apologize, Your Honor.

9 THE COURT: Ask me.

10 MR. SGRO: Okay.

11 THE COURT: I'll tell you .

12 All right, Detective, right up here to the witness stand, please. When
13 you get there, remain standing, raise your right hand to be sworn.

14 **GERARD COLLINS,**

15 [having been called as a witness and being first duly sworn, testified as follows:]

16 THE COURT: Have a seat. State your name, spell your last name.

17 THE WITNESS: My name is Gerard Collins, C-O-L-L-I-N-S.

18 THE COURT: How about spelling your first name for us.

19 THE WITNESS: G-E-R-A-R-D.

20 THE COURT: Thank you. Go ahead.

21 **DIRECT EXAMINATION**

22 **BY MR. OWENS:**

23 Q You're with the Henderson Police Department?

24 A Yes; I am.

25 Q What do you do there?

1 A I investigate homicides.

2 Q And how long have you worked for the Henderson Police Department?

3 A About -- almost 19 years now.

4 Q And how long have you been involved in homicide investigations?

5 A Since about 1998, so about nine, ten years.

6 Q And this particular case involving Jason McCarty was a case you
7 became involved in on the 20th of May 2006.

8 A Yes.

9 Q And part of that investigation caused you to go to the 7-Eleven store to
10 meet with Mr. McCarty on the 25th of May of that year, 2006?

11 A Yes.

12 Q So about five days after you'd found the body?

13 A Yes.

14 Q And you had put out some information to other officers that Mr. McCarty
15 wanted to speak to you about the case?

16 A I wanted to speak to him and -- I believe I said he wanted me to speak
17 to me, but I'm not sure about that.

18 THE COURT: Wait, wait. Before the 25th?

19 MR. OWENS: Right.

20 BY MR. OWENS:

21 Q Had you heard something about his father wanting to get ahold or
22 having him talk to you or something from his father wanting to get ahold of you?

23 A No, that was after. That was after --

24 Q Okay.

25 A -- the 25th.

1 Q So that would have been after the 25th. So on the day of the 25th, then,
2 it was simply that you were looking for him --

3 A Yes.

4 Q -- for information?

5 A Yeah.

6 Q Okay. And so you put word out that if anybody came in contact with
7 him they were to get ahold of you?

8 A Yeah, in a roundabout way. It's, like, hey, we're looking for him, I want
9 to talk to him.

10 Q And then you received a contact from Officer Ridings who just testified?

11 A Yes.

12 Q Where were you at the time?

13 A I believe I was -- I was in downtown Henderson, which is up by Water
14 Street around the police station, but I think I was leaving the Fiesta Hotel at the time.

15 Q Were you on duty at the time?

16 A Yes; I was.

17 Q Were you working the investigation of this case?

18 A Yes.

19 Q What did you do when you received that call from Officer Ridings?

20 A I told Craig, I said: Tell him I'm coming right over. Tell him I'll be right
21 there.

22 Q And you went over to the 7-Eleven store?

23 A Yeah.

24 Q Can you describe that for us?

25 A 7-Eleven?

1 Q Yeah.

2 A 7-Eleven is on the -- I'm trying to get my bearings correct. It's on the
3 northeast corner of Nellis and Charleston in Las Vegas. It's a corner store. There's
4 a -- it's like in a strip mall type thing. There's a parking area behind the 7-Eleven.
5 Charleston butts up to it on the south side of it. And then Nellis is on the west side
6 of it in front of the store. And we -- then there's a strip mall to the north side of it.

7 Q So there's parking behind the store as well as in front of the store?

8 A Yeah, you can park vehicles back there. Sure.

9 Q Okay. And is there parking in front also or not?

10 A In front of the store?

11 Q Yeah.

12 A Yes; there is.

13 Q Okay. Are there gas pumps there?

14 A I don't know if there's gas pumps there or not.

15 Q How do you get into the store? Do you have to walk around to the
16 front?

17 A Yes.

18 Q Now most 7-Elevens don't have parking in the backs; is that accurate?

19 A I don't know about most, but a lot that I've seen don't have parking in
20 the back.

21 Q Okay. How would you get into the store from the back part of the
22 7-Eleven?

23 A You would have to walk around to the front either on the south side or
24 the north side.

25 Q What's out in that back area?

1 A I think the trashcans are back there. All the service areas to the rest of
2 the buildings back there.

3 Q And how is the lighting?

4 A It's not great lighting. Rather -- not dark, I mean, you can see. If it's
5 nighttime you can see back there, but it's not really bright lighting.

6 Q You --

7 THE COURT: What time of day is this?

8 BY MR. OWENS:

9 Q This about -- that was my next question. This is about 6:30?

10 A Yes, in the evening.

11 Q And your statement -- your interview with the Defendant Mr. McCarty
12 took about -- little less than two hours?

13 A A little less than that, probably an hour and 40, 50 minutes, something
14 like that.

15 Q So was it still light when you completed your interview?

16 A It might have been -- it might have been dusky, that type of thing, you
17 know, like, the sun wasn't bright or anything like that. I don't remember it being
18 very, very dark, like pitch black at night. But it was -- I know the sun was going
19 down at the time.

20 Q Describe what you saw when you arrived there about 6:30.

21 A Traffic was pretty heavy on Nellis and Charleston.

22 THE COURT: I'm sorry, what day of the week is this?

23 MR. OWENS: This is -- oh, I don't know.

24 BY MR. OWENS:

25 Q Do you know what day of the week it is?

1 MR. DIGIACOMO: The 25th?

2 THE WITNESS: No, I don't. Let me see, Saturday, Sunday, Monday --

3 MR. OWENS: We'll have Mr. DiGiacomo look that up for the Court.

4 THE COURT: Yeah, he can find that on the computer.

5 MR. OWENS: And the Court's welcome to ask any questions directly if it
6 wants to do so.

7 THE COURT: Okay, thanks.

8 BY MR. OWENS:

9 Q The -- all right. What did you see out there besides the traffic patterns?

10 A There was a lot of people walking in the area. Foot traffic. Then I
11 observed the Detective Riding's truck, pickup truck, parked behind the 7-Eleven.
12 And he was standing there with -- he was standing there with Mr. McCarty.

13 Q What were they doing?

14 A Just casually standing around.

15 MR. OWENS: And -- oh, I'm sorry.

16 MR. DIGIACOMO: It's a Friday.

17 MR. OWENS: Friday.

18 THE COURT: Thanks.

19 BY MR. OWENS:

20 Q And what -- was it just the two of them that were there?

21 A I believe so, yeah.

22 Q What did you do then?

23 A I parked my vehicle in back, not too far from --

24 MR. DIGIACOMO: I'm sorry, it's a Thursday.

25 MR. OWENS: Oh, sorry. Thursday.

1 THE COURT: Yeah, I didn't think so because the 25th is a Friday this year.

2 THE WITNESS: 20th was a Saturday.

3 MR. DiGIACOMO: I was -- the twenty -- I was looking at the 26th. The 25th is
4 a Friday, Judge, I apologize.

5 THE COURT: Okay.

6 MR. OWENS: But stay tuned. Okay.

7 THE COURT: Go ahead.

8 THE WITNESS: So I parked my vehicle behind the 7-Eleven not too far from
9 Detective Riding's. Kind of like get it off to the side so there could be a way where
10 vehicles could still get by if they had to get by. And then I get out of the vehicle and
11 I basically make contact with Detective Ridings and Mr. McCarty.

12 BY MR. OWENS:

13 Q Okay. You know, you said this is a parking area back behind the store,
14 so are there parking spaces coming out?

15 A No, I don't think there's any parking spaces. It's kind of like just an
16 open area. Probably about not quite as wide as the courtroom, maybe about from
17 the box right here to the wall, something like that.

18 Q Okay, so maybe about 60 feet?

19 A Yeah. You could get -- you could get -- if two vehicles were parked
20 there, you could still get a third car through it.

21 Q Do cars park there?

22 A My car was parked.

23 Q No, do cars park there?

24 A I'm sure. I don't know, there wasn't any parked there at the time when
25 we were there.

1 Q Okay.

2 A Except our vehicles.

3 Q How far was your vehicle from Officer Riding's vehicle?

4 A Probably about 15, 20 feet, 25 feet, right around there.

5 Q Okay. And you parked a distance so certain vehicles could go between

6 you or people could go between you?

7 A Yeah. Just so we wouldn't be blocking the way if somebody happened

8 to turn in.

9 Q Okay.

10 A So we, you know, we wouldn't have to get out of the way or move

11 things or anything like that.

12 Q All right. And then you went over and approached the detective and Mr.

13 McCarty?

14 A Yes.

15 Q Do you see Mr. McCarty in court today?

16 A Yes.

17 Q Yeah, where is he?

18 A He's right there.

19 MR. OWENS: Let the record reflect identification of the Defendant McCarty.

20 THE COURT: Okay.

21 BY MR. OWENS:

22 Q And what happened when you went over there?

23 A I identified myself, told him I was Detective Collins and that I needed to

24 speak to him.

25 Q What happened then?

1 A I told him that -- I basically approached them and said that I was
2 investigating a beating and that I needed to talk to him. And I had the recorder on. I
3 gave an intro to the recorder so he knew I was going to record the conversation and
4 just started asking him questions.

5 Q And that became, then, a transcribed statement from Mr. McCarty?

6 A Yes.

7 Q And you have a copy of that with you?

8 MR. OWENS: We should probably have the record reflect a copy is attached
9 to the Defendant's petition in this case, the motion in this case, Your Honor.

10 THE COURT: All right.

11 BY MR. OWENS:

12 Q This is the first of several statements that you took from --

13 A Yes.

14 Q -- Mr. McCarty?

15 A Yes.

16 Q The second one being on June the 1st?

17 A Yes.

18 Q And then a series of three statements that were fairly much in order that
19 occurred on June 6th?

20 A Yes.

21 Q Okay. Now going back that May 25th, when you were out there you said
22 the statement took about an hour and 45 minutes?

23 A An hour and 40 to 50 minutes, somewhere in between there.

24 Q And during that period of time, where were you located and where was
25 Mr. McCarty located?

1 A We were at the rear of Detective Riding's truck by the tailgate just kind
2 of standing there.

3 Q At any time were there three police vehicles in the area?

4 A What do you mean by police vehicles? You mean marked units?

5 Q No, police vehicles. Ones that are owned by the police department.

6 A I know there was two. I don't -- there was another one that drove up
7 but then drove away.

8 Q Okay. So there were only two vehicles there during the interview itself?

9 A Yes.

10 Q And were they surrounding yourself and the Defendant during the
11 interview?

12 A No.

13 Q Were there other police officers there?

14 A It was two others beside myself.

15 Q Where were they located during the interview?

16 A They were off to the side probably about maybe 15 feet away from us
17 or off, kind of like hanging out over there. They were not part of the conversation.

18 Q Okay. And you captured the conversation on the recorder that you
19 talked about?

20 A Yes.

21 Q Have you had a chance to review the transcript and can you verify that
22 that's a true and accurate transcript of the recording that you made?

23 A Yes.

24 Q Now you talked about vehicles being marked or unmarked. The two
25 cars that were there, were they marked or unmarked vehicles?

1 A Unmarked vehicles.

2 Q You were standing at the rear of the other detective's vehicle, Detective

3 Rider's [sic] vehicle?

4 A Yeah, his truck.

5 Q His truck? Were you in uniform or plain clothes?

6 A I was in plain clothes.

7 Q What about the other officers?

8 A They were in plain clothes also.

9 Q Were you displaying a badge?

10 A I was displaying a badge and a gun and handcuffs.

11 Q Other than that you didn't have any other police --

12 A Markings or anything?

13 Q -- accoutrements?

14 A No.

15 Q As you talked to him, were you sitting on a bumper, were you standing

16 the whole time, what were you doing?

17 A The tailgate was down and we were just kind of like -- McCarty was,

18 like, leaning against the bumper. I believe at one point he was sitting on the

19 bumper -- or not the bumper, the tailgate. And I was just standing there just in the

20 vicinity of the truck -- of the truck.

21 Q And what was his demeanor at the beginning of the conversation?

22 A His demeanor was friendly. I mean, no problems. He wasn't

23 combative, he wasn't anything.

24 Q He seemed willing to talk to you.

25 A Yes.

1 Q Did you bring a copy of the audio of the recording that you made?

2 A Yes; I did.

3 Q Is it a true and accurate recording or copy of the recording of the
4 conversation you had with --

5 A Yes.

6 Q -- Mr. McCarty on that date?

7 A Yes.

8 MR. OWEN: Your Honor, if we could have that marked as a State's exhibit?

9 THE COURT: I believe you can.

10 BY MR. OWENS:

11 Q You brought some other ones as well. What are those, as long we're
12 asking?

13 A I brought the one up from June -- yeah, from June 6th and the one from
14 June 1st.

15 Q Okay. Why don't you go ahead and produce those as well as long as
16 we're making.

17 THE COURT: Might as well have them marking.

18 MR. OWENS: So we have one here that's from the 25th, we'll mark that 1.
19 We have one here that's from the 1st, we'll mark that number 2. Is that all right?

20 THE COURT: Is that all right?

21 MR. SGRO: No problem, Your Honor.

22 THE COURT: Two?

23 BY MR. OWENS:

24 Q By the way, the dates are specified on the disk itself; is that right?

25 A Yes.