

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEMAR MATTHEWS, vs. THE STATE OF NEVADA, 	Appellant, Respondent,	Supreme Court No. 62241 APPELLANT'S APPENDIX VOLUME VI	Electronically Filed Aug 14 2013 01:52 p.m. Tracie K. Lindeman Clerk of Supreme Court
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APPELLANT'S INDEX VOLUME VI

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I hereby certify that on the 12th day of August, 2013, a true and copy of above and foregoing APPELANTS APPENDIX VOL. VI was served on all counsel via the Court's electronic filing system to all counsel of record listed below:

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1 You may not form or express any opinion on
2 any subject connected with this case until it is finally
3 submitted to you.

4 We'll be in recess for ten minutes. Thank
5 you.

6 (Jury not present)

7 (Off-record colloquy)

8 THE COURT: Record should reflect we're
9 outside the presence of the jury. At this time this is
10 probably a good point.

11 There needs to be no outbursts, no emotion
12 in the audience during this testimony. It's important
13 that that be honored. Understood? Thank you.

14 We're in recess. Sorry.

15 (Court recessed at 11:55 a.m. until 12:07 p.m.)

16 (Jury not present)

17 THE COURT: And you want to do it now?

18 MR. BATEMAN: Please.

19 THE COURT: All right, let's go on the --

20 MR. BATEMAN: But before that, Your Honor --

21 THE COURT: Yes.

22 MR. BATEMAN: Are we on the record?

23 THE COURT: Yes.

24 MR. BATEMAN: We have one photo that was an
25 issue about whether --

1 (Off-record colloquy)

2 THE COURT: We're on the record in

3 C228460 --

4 UNIDENTIFIED SPEAKER: Shhh.

5 THE COURT: -- State of Nevada, plaintiff,
6 versus Pierre Joshlin and Jamar Matthews.

7 Record should reflect we're outside the
8 presence of the jury, all counsel present with
9 Mr. Matthews and Mr. Joshlin.

10 Mr. Bateman.

11 MR. BATEMAN: It's my understanding there
12 was some -- after speaking with your clerk that there
13 was some issue about whether 156, our proposed exhibit
14 which is a photograph has been admitted. It's my belief
15 that it was admitted during Stephanie Smith's testimony.
16 It's a picture of the Colt .45 that's found in the
17 vehicle and that shows the jammed cartridges.

18 THE COURT: Any objection?

19 MR. BATEMAN: Does anybody have any
20 objection to just admitting this?

21 MR. FIGLER: No.

22 MR. BATEMAN: I mean, if it hadn't -- if for
23 some reason it hadn't been?

24 THE CLERK: Thank you. I'm sorry.

25 THE COURT: 156 is in then. All right.

1 (Plaintiff's Exhibit No. 156 admitted)

2 THE COURT: Mr. Matthews, let's start with
3 you. Mr. Matthews, you have some important
4 constitutional rights that I must explain to you.

5 Under the right -- you have the right under
6 the Constitution of the United States and under the
7 Constitution of the State of Nevada not to be compelled
8 to testify in case. Do you understand that?

9 DEFENDANT MATTHEWS: Yes, sir.

10 THE COURT: You may if you wish give up that
11 right and take the witness stand and testify. If you
12 do, you'll be subject to cross-examination by the
13 District Attorney or anything -- and anything that you
14 may say be it on direct or cross-examination will be the
15 subject of fair comment when the District Attorney
16 speaks to the jury in its final argument. Do you
17 understand that?

18 DEFENDANT MATTHEWS: Yes, sir.

19 THE COURT: If you choose not to testify,
20 the Court will not permit the District Attorney to make
21 any comments to the jury concerning that fact that you
22 have not testified. Do you understand that?

23 DEFENDANT MATTHEWS: Yes, sir.

24 THE COURT: If you elect not to testify, the
25 Court will instruct the jury only if your attorney

1 specifically requests as follows:

2 The law does not compel a defendant in a
3 criminal case to take the stand and testify, and no
4 presumption may be raised and no inference of any kind
5 may be drawn from the failure of the defendant to
6 testify. Do you understand that?

7 DEFENDANT MATTHEWS: Yes, sir.

8 THE COURT: Do you have any questions that
9 you would like to ask me about your rights?

10 DEFENDANT MATTHEWS: No, sir.

11 THE COURT: Have you conferred with your --
12 both of your attorneys regarding your decisions and your
13 rights against self-incrimination?

14 DEFENDANT MATTHEWS: Yes, sir.

15 THE COURT: Has there been a decision on
16 whether he will testify or not to testify?

17 DEFENDANT MATTHEWS: I will not testify.

18 MR. FIGLER: That's correct, Your Honor.

19 MR. BUNIN: That's right.

20 THE COURT: Do you wish that instruction to
21 be given?

22 MR. FIGLER: Yes, Your Honor.

23 THE COURT: Further, under NRS 175.171 you
24 are requesting the instruction be given? Is that my
25 understanding?

1 MR. FIGLER: We are requesting the
2 instruction --

3 THE COURT: All right.

4 MR. FIGLER: -- to be given.

5 THE COURT: Has that been made a package of
6 the proposed instructions --

7 MR. FIGLER: Yes, it has.

8 THE COURT: -- that have been prepared by
9 you? All right. Again, any questions at all of me or
10 of your attorneys at this point regarding your rights?

11 DEFENDANT MATTHEWS: No, sir.

12 MR. FIGLER: Have a seat.

13 THE COURT: All right. Mr. Joshlin, I'm
14 going to have to do the same exact thing with you, sir.

15 You have a right under the Constitution of
16 the United States and under the Constitution of the
17 State of Nevada not to be compelled to testify in this
18 case. Do you understand that?

19 DEFENDANT JOSH LIN: I understand that.

20 THE COURT: You may if you wish give up that
21 right and take the witness stand and testify. If you
22 do, you'll be subject to cross-examination by the
23 District Attorney, and anything that you say may on
24 direct or cross-examination be subject of fair comment
25 when the District Attorney speaks to the jury during

1 final arguments. Do you understand that?

2 DEFENDANT JOSHLIN: (Indiscernible).

3 THE COURT: If you choose not to testify,
4 the Court will not permit the District Attorney to make
5 any comments to the jury concerning the fact that you
6 have not testified. Do you understand that?

7 DEFENDANT JOSHLIN: Yes, sir, I do.

8 THE COURT: If you elect not to testify, the
9 Court will instruct the jury only if your attorney
10 specifically requests as follows:

11 The law does not compel a defendant in a
12 criminal case to take the stand and testify, and no
13 presumption may be raised and no inference of any kind
14 may be drawn from the failure of the defendant to
15 testify. Do you understand that?

16 DEFENDANT JOSHLIN: Yes, I do, sir.

17 THE COURT: Do you have any questions of me
18 or of your attorney, Mr. Singer, regarding your rights?

19 DEFENDANT JOSHLIN: (Indiscernible).

20 THE COURT: Do you request Mr. Singer -- do
21 you gentlemen request that instruction be given as well
22 as part of the proposed package of instructions?

23 MR. SINGER: Yes, we do.

24 THE COURT: All right. Anything further
25 with regard to the rights, gentlemen?

1 DEFENDANT JOSHLIN: No, sir.

2 DEFENDANT MATTHEW: No, sir.

3 THE COURT: I want to make sure everything's
4 on the record.

5 MS. LEWIS: I'm sorry, Judge. I didn't get
6 that. Is Defendant Joshlin testifying or not?

7 THE COURT: He's --

8 DEFENDANT JOSHLIN: No. I'm not, sir.

9 THE COURT: He's indicating that he --

10 MS. LEWIS: Okay. And they want the
11 instruction as well? Okay.

12 THE COURT: Both want the instruction, both
13 have elected not to testify.

14 The record should reflect also a conference
15 at the bench regarding the question that was asked that
16 the question that -- that that final question that was
17 asked regarding the ten cartridges was agreed to in the
18 form I asked.

19 Is that correct, Mr. Singer? You just said
20 stay away from the crime scene.

21 MR. SINGER: Right. And that you told the
22 jury that you read, modified or asked it, and they
23 should listen to it in your form.

24 THE COURT: Right. Is that a correct
25 statement?

1 MR. SINGER: Right.

2 THE COURT: All right. And I've marked --
3 for the record, I've had that marked as Court's Exhibit
4 No. 2.

5 MR. SINGER: And did you -- you just left it
6 as it was written?

7 THE COURT: I left the question -- it's not
8 going back to the jury.

9 MR. SINGER: Right.

10 THE COURT: I've left the question as
11 written, but the record will reflect --

12 MR. SINGER: That it was asked differently.

13 THE COURT: -- that it was asked differently
14 as you have requested.

15 MR. SINGER: Thank you.

16 THE COURT: Is that acceptable?

17 MR. SINGER: Yes.

18 THE COURT: All right. I just want the
19 record to be clear.

20 MR. FIGLER: And just in case the record
21 wasn't clear before, Judge, we had audience members
22 throughout the course of the proceeding here on both
23 sides, apparently there was something that happened
24 between them on day one, apparently that was satisfied.

25 I've been noting small sighs and cries, and

1 I think that's to be expected on some level. They've
2 been growing in intensity. I didn't make note of it I
3 believe yesterday, and I believe that somebody said
4 something to someone.

5 Be that as it may, today it kind of came to
6 a boil during the testimony of Mr. Krylo who in
7 describing the bullet -- and that was the time of the
8 record when I asked for a bench conference when he was
9 describing the bullet that we all know to be retrieved
10 from Ms. Williams' autopsy.

11 That there was an outburst from what appears
12 to be the people who have been sitting on the
13 prosecution side who, ostensibly, are relatives and
14 family members and supporters of Ms. Williams. They
15 were either asked to leave or left on their own accord.

16 And upon leaving the courtroom I heard,
17 Mr. Singer heard, Ms. Kilpatrick (phonetic) who is in
18 the audience heard words to the affect of they killed my
19 baby as she was leave being the courtroom, and we were
20 up -- headed up towards the bench. It's inappropriate.

21 I can't assign that to the State on any
22 level. It was what happened at the prelim. It's what's
23 happening here. I ask that they be admonished.
24 Your Honor did admonish them.

25 If there is yet another outburst during this

1 witness' testimony, I think I have to renew an objection
2 for the record, and I'm not sure what the remedy would
3 be at that point.

4 THE COURT: I understand. The record's
5 made. I, frankly, did not hear those words.

6 MR. BATEMAN: Neither did the State.

7 THE COURT: I have instructed
8 Officer Reichert to be on guard. We have admonished --

9 MR. FIGLER: I know.

10 THE COURT: -- the audience, and we're just
11 taking all precautions that we have -- that we can.

12 State, is there anything further?

13 MS. LEWIS: Yeah. I just want to have this
14 document marked as a Court exhibit. It's a two-page
15 document. It's a DNA results in this particular case.
16 And only because we discussed DNA earlier, I
17 (indiscernible) have it marked as a Court exhibit so
18 that it's part of the record.

19 And I just ask the Court to note or I'll
20 just say for the record there's a signature on those
21 documents that belongs to a woman by the name of
22 Kelly Gatiae (phonetic) who I now know as the person who
23 performed the DNA analysis in this case.

24 That's the same signature that exists on
25 some of the seals on some of the State's exhibits that

1 were referenced, specifically when Mr. Singer questioned
2 one of the witnesses about is this your seal, is this
3 your signature, and there was Stephanie Smith
4 specifically testified she didn't recognize the
5 signature. That was the signature she was referencing.

6 THE COURT: And we can have that marked as a
7 Court exhibit. We've litigated this. It's my
8 understanding that this information was not provided to
9 the defense.

10 MR. FIGLER: Correct. I just have an
11 objection that even be made part of the record, but I'll
12 submit it, Your Honor.

13 THE COURT: All right.

14 MS. LEWIS: Well, Judge, it's not --

15 MR. SINGER: I (indiscernible).

16 MS. LEWIS: -- that it wasn't provided to the
17 defense. It was provided when it was available.

18 Unfortunately, because of the continuances
19 requested by the defense, the State didn't get the
20 buccal swabs that were needed in order to perform the
21 testing in a timely fashion. We requested a continuance
22 on that basis and the Court denied that request.

23 THE COURT: Well, based upon the fact that
24 there was a 60-day rule invoked, the decision was made.
25 Yes. That's correct.

1 MR. BATEMAN: And then just, also, I think
2 we ought to refrain -- and I don't see why we would ask
3 it. If defense counsel were to ask anything about we
4 don't know who the seal was and it could have been
5 tampered with, I mean, I would ask that, you know, that
6 can't be mentioned in closing argument because it's, you
7 know, it's already been ruled inadmissible, so --

8 THE COURT: Is that anticipated?

9 MR. SINGER: (Indiscernible). No, it's not.
10 It's not anticipated (indiscernible) ask it.

11 THE COURT: All right. All right.

12 MR. SINGER: That's marked --

13 THE COURT: Is there anything else?

14 MR. SINGER: So that's marked for
15 identification only.

16 THE COURT: Yes. It's not going back to the
17 jury. All right.

18 Anything else to come before the Court?

19 MR. FIGLER: Oh, that was one other thing,
20 and I guess we could just make sure before. There was
21 one exhibit, the gun-residue sample kits, that were not
22 admitted should not go back to the jury either. I think
23 it was 163 or something like that.

24 THE COURT: If they're not admitted, they
25 don't go back to the jury.

1 MR. FIGLER: Okay. Just double-checking.

2 MS. LEWIS: And the record should reflect
3 there are numerous exhibits that were marked and not
4 admitted, so --

5 MR. FIGLER: Okay. That's fine.

6 MS. LEWIS: -- those weren't the only ones.

7 MR. FIGLER: Right. Just want to make sure
8 164 doesn't go back. That's all.

9 THE COURT: Understood.

10 MR. FIGLER: Thank you, Judge.

11 THE CLERK: 164 is not admitted.

12 MR. FIGLER: Great.

13 THE COURT: Okay. Is there anything else?
14 All right.

15 THE CLERK: I do have one thing, Your Honor.
16 Just on the record, I did get a list of the unadmitted
17 exhibits (indiscernible).

18 MS. LEWIS: That's right, Judge. We did
19 confer with the clerk, and we believe that all of our
20 exhibits have been admitted, that we want admitted have
21 been admitted.

22 THE COURT: Okay.

23 MS. LEWIS: Thank you.

24 (Off-record colloquy)

25 THE COURT: You promised me 1:00 o'clock,

1 gentlemen, right?

2 MR. FIGLER: He's here at 1:00, our witness.

3 THE COURT: Okay. Any time before 1:00
4 because we --

5 MR. FIGLER: I told him to get here as quick
6 as he could before 1:00 so that he would be here at 1:00
7 for sure, so he might show up a little early. If he
8 does, I'll alert the Court.

9 I believe this witness, her direct is
10 probably going to take about 20 minutes to go through.
11 There's going to be very limited cross if hardly any.
12 We already put her through it the first time, and we got
13 nowhere. She's solid.

14 (Off-record colloquy)

15 THE BAILIFF: Jury's present, please.
16 Your Honor, panel's present.

17 THE COURT: Thank you.

18 Record should reflect we're back on the
19 record on C228460, State of Nevada versus Pierre Joshlin
20 and Jamar Matthews.

21 Will counsel stipulate to the presence of
22 the jury?

23 MS. LEWIS: Yes, Judge.

24 MR. FIGLER: Yes, Your Honor.

25 MR. SINGER: Yes, Your Honor.

1 THE COURT: You may continue with your
2 witness. Have we sworn?

3 ALANE OLSON, PLAINTIFF'S WITNESS, SWORN

4 THE WITNESS: I do.

5 THE CLERK: You may be seated. Please state
6 your full name for the record, spelling your last name
7 for us.

8 THE WITNESS: My name is Alane Olson. My
9 first name is spelled A-l-a-n-e. My last name is
10 spelled O-l-s-o-n.

11 THE CLERK: Thank you.

12 DIRECT EXAMINATION

13 BY MS. LEWIS:

14 Q. How are you employed?

15 A. I'm employed as a medical examiner at the Clark
16 County Coroner's Office.

17 Q. And how long have you been so employed?

18 A. I've worked in Las Vegas for just under two
19 years.

20 Q. Okay. And prior to working for the Las Vegas
21 Clark County Coroner's Office, did you work elsewhere as
22 a medical examiner?

23 A. Yes, I did.

24 Q. And how long have you been a medical examiner or
25 a doctor?

1 A. I graduated from medical school in 1994, and I
2 have worked as a medical examiner for just under seven
3 years.

4 Q. Okay. And do you have special skills that allow
5 you to be a medical examiner?

6 A. Yes. I have special skills and training which
7 enable me to carry out my job.

8 Q. Okay. And what are some of the training that
9 you've received that allows you to perform those duties?

10 A. I have an undergraduate degree from the
11 University Idaho. I went to medical school at the
12 University of Nevada School of Medicine. After that I
13 moved to Portland, Oregon, and spent five years at
14 Oregon Health and Sciences University in a pathology
15 residency program which included training in anatomic
16 pathology as well as clinical pathology.

17 Following that I moved to Milwaukee, Wisconsin,
18 and spent one year at the Milwaukee County Medical
19 Examiner's Office in a forensic pathology fellowship
20 program, and then I was able to go out and get a real
21 job.

22 Q. All right. And since you've been working for the
23 Clark County Coroner's Office, you have occasion to
24 perform autopsies?

25 A. Yes, I do.

1 Q. And how many autopsies have you performed total
2 in your career?

3 A. It would be somewhere around 2,000.

4 Q. When you perform an autopsy, do you also prepare
5 a report in conjunction with the autopsy that you're
6 performing at that time?

7 A. Yes.

8 Q. Okay. I want to direct your attention to an
9 autopsy performed on the body of Mercy Alesa Williams
10 (phonetic). Do you recall performing that autopsy?

11 A. Yes, I do.

12 Q. And when you performed that autopsy, was the body
13 of Mercy Alesa Williams identified to you by a Clark
14 County Coroner number?

15 A. Yes.

16 Q. And do you recall what that number was?

17 A. Yes. The number was 06 dash 07629.

18 Q. Okay. And is that the same number that you also
19 would use in your report that you finally prepared?

20 A. Yes, it is.

21 Q. Okay. I want to show you --

22 MS. LEWIS: May approach, Judge?

23 THE COURT: Yes.

24 BY MS. LEWIS:

25 Q. I've previously shown to defense counsel, showing

1 you what's been marked as State's Proposed Exhibits 98
2 and 102. Do you recognize those photographs?

3 A. Yes, I do.

4 Q. And are those photographs that were taken in
5 conjunction with the autopsy that you performed?

6 A. Yes.

7 Q. Okay. And do you recall the day that you
8 performed that specific autopsy?

9 A. It was October 1st of 2006.

10 Q. And do those photographs fairly and accurately
11 depict the autopsy as you viewed it at that time?

12 A. Yes. The portions depicted in these photographs
13 are fair and accurate.

14 MS. LEWIS: Judge, I'd move for the
15 admission of State's Proposed 98 and 102.

16 THE COURT: Any objection?

17 MR. FIGLER: Submit it, Judge.

18 MR. SINGER: No, Judge.

19 THE COURT: They're admitted.

20 (Plaintiff's Exhibit Nos. 98 and 102 admitted)

21 MS. LEWIS: Okay. Permission to publish?

22 THE COURT: Yes.

23 BY MS. LEWIS:

24 Q. And when you perform an autopsy, what is it that
25 you are looking for? What do you do when you first are

1 viewing a body?

2 A. An autopsy examination consists of two basic
3 components. There's an external examination which
4 consists of a general appraisal of the body, how tall is
5 this person, how much do they weigh, what color is their
6 hair, what color are their eyes, do they have any marks,
7 scars and tattoos, have they had any resuscitation
8 efforts from medical personnel, and also we look for
9 evidence of injury and natural disease.

10 The second part of an autopsy consists of
11 actually open up the -- opening up the body cavities, so
12 an incision is made. It's a Y-shaped incision. It goes
13 from the shoulders onto the central chest, and then
14 continues down across the abdomen.

15 The body wall is pulled to the side. The rib
16 cage is taken off in the front, and we have the
17 opportunity to examine the organs as they sit in the
18 body.

19 We then describe any changes that might be
20 present in the organs and the body cavities, and we take
21 the organs out one by one and examine them, again,
22 looking for natural disease as well as injuries.

23 We also examine the contents of the head, and
24 that's accomplished by performing an incision across the
25 top of the head from ear to ear. The front portion of

1 this scalp is pulled forward over the face. The back
2 portion is pulled backwards toward the neck.

3 The top portion of the skull is then removed and
4 we can examine the brain. Again, we look as the brain
5 is sitting inside the head to see if there's any
6 evidence of natural disease or injury, and then the
7 brain is taken out and further examined.

8 During the course of an autopsy we also collect
9 specimens. This consists of toxicology specimens which
10 is usually blood, urine, if it's available, and vitreous
11 which is the fluid in the eye.

12 We make take additional specimens if there are
13 questions about drug use. And if there are, for
14 example, injuries consisting of bullet wounds and there
15 are missiles still present within the body, then we
16 recover those as well during the course of the autopsy.

17 Q. So all of these things that you've just described
18 that you look for and that you perform during the course
19 of an autopsy, are you ultimately looking for a
20 conclusion as to the cause and manner of death?

21 A. Yes.

22 Q. And basically you do an external exam and then
23 you do a more detailed internal examination, is that
24 right?

25 A. Yes. That's correct.

1 Q. During the external examination of the body of
2 Mercy Williams, what, if any, did you note of her body?

3 MR. FIGLER: I think it's a little vague
4 question, Judge.

5 MS. LEWIS: Oh, I'm sorry. Did I leave
6 something out?

7 BY MS. LEWIS:

8 Q. During the external examination of
9 Mercy Williams' body what, if any, injuries did you note
10 on her body?

11 A. Thank you. On her body surfaces I noted that
12 there was a gunshot entry wound. It was on the left
13 side of her forehead, above the left eye and about
14 midway between her eye brow and her hairline.

15 Q. Okay. And that was readily apparent as you
16 performed the external examination?

17 A. Yes, it was.

18 Q. Did you still go to the extent of removing the
19 outer skin layer as you described in performing an
20 internal examination as well on that area of the body?

21 A. Yes. I did, in fact, look at her brain directly.

22 Q. Okay. And aside from that particular injury to
23 the head, did you note any other injuries to the body of
24 Mercy Williams?

25 A. No, I did not.

1 Q. And the exhibits that I've shown you, 98 and 102,
2 can you tell us what they are? 98.

3 A. State's Exhibit 98 consists of a photograph which
4 was taken. It depicts a label which is attached to a
5 blue body bag. The label contains the Case No. 06-7629.
6 It also contains a name.

7 When she arrived at the coroner's office, she
8 still had not been definitively identified, so she is
9 listed as Jane, open quotes, "Balzar, B-a-l-z-a-r",
10 closed quotes, Doe. It also lists the date and the time
11 when death was pronounced and certain other information
12 is as in she's a black female and the name of the Clark
13 County Coroner's Office investigator who was responsible
14 for conducting the investigation.

15 Q. And that's the tag that was on the bag that the
16 body was contained in; is that right?

17 A. Yes. And let me asked add because I forgot it,
18 in that photograph there's also a blue plastic seal.
19 The body bag was received in our office sealed, and the
20 seal was broken prior to the commencement of the autopsy
21 to allow photography and processing.

22 Q. Okay. And State's Exhibit 102, what is depicted
23 in that photograph?

24 A. State's Exhibit No. 102 is a photograph which was
25 taken of Mercy's Williams' face, specifically

1 concentrating on the left forehead. There is a
2 triangular-shaped photo scale in this photograph, and
3 caught within the arms of that photo scale is the entry
4 gunshot wound.

5 MR. FIGLER: And, Your Honor, instead of
6 handing it to the jurors, if it would be possible to do
7 it like we used to do and just kind of walk it by the
8 jurors. I think that might be --

9 THE COURT: She -- you have permission to
10 publish if you --

11 MS. LEWIS: Thank you.

12 BY MS. LEWIS:

13 Q. And when you performed the internal examination
14 of that area, did you note any specific injuries or any
15 specifics with regards to that specific gunshot injury
16 to the head?

17 A. Yes, I did.

18 Q. And what were those findings that you made?

19 A. I found that the bullet passed through the skin
20 of the forehead as well as the skull. It then went
21 through the brain from left to right, and it ended up in
22 the right back of the head above and behind the right
23 ear. There was a fracture or the skull was broken in
24 that area.

25 The bullet had not exited, but rather was found

1 just beneath those broken fragments of skull, and the
2 primary observations had to do with the fact that the
3 bullet actually went all the way through her brain.

4 Q. Okay. And what if anything was done with that
5 bullet fragment?

6 A. I collected the bullet fragment and turned it
7 over to a crime scene analyst from the Las Vegas
8 Metropolitan Police Department.

9 Q. And can you tell -- could you tell at that time
10 what path that bullet had entered and exited?

11 A. I could tell the path. The bullet did not exit,
12 in fact, but it passed from left to right, from front to
13 back and slightly upward.

14 Q. And what was the ultimate conclusion that you
15 made with regards to the cause and manner of death?

16 A. Her cause of death was listed as a gunshot wound
17 to the head, and the manner of death was listed as
18 homicide.

19 Q. Thank you.

20 MS. LEWIS: I'll pass the witness.

21 THE COURT: Cross.

22 MR. FIGLER: Your Honor, we never disputed
23 the cause of death here, so we don't have any questions
24 for this witness.

25 THE COURT: Mr. Singer.

1 MR. SINGER: No more questions for this
2 witness, Judge. Thank you.

3 THE COURT: May this witness step down?

4 MS. LEWIS: Yes, Judge.

5 THE COURT: All right. Thank you for your
6 testimony, Doctor.

7 THE WITNESS: Thank you, Your Honor.

8 THE COURT: State, call your next witness.

9 MS. LEWIS: Judge, the State has no
10 additional witnesses to call. At this time the State
11 would rest.

12 THE COURT: State now rests.

13 Ladies and gentlemen, it is now time for
14 defense case.

15 Do you want to take a short recess --

16 MR. FIGLER: Yeah. I'm kind of a little
17 earlier than I thought it would be, so I guess there's
18 some exhibits that I'm going to grab those back from the
19 jurors.

20 (Indiscernible) wanted to check and see if
21 we have (indiscernible), Judge?

22 THE COURT: Yes.

23 MR. FIGLER: Thanks.

24 MR. SINGER: Judge, prior to the defense's
25 case, I want to just reserve the right to make motions

1 that are supposed to come directly after the State's
2 case. I know, procedurally, we're going to go directly
3 to the defense case.

4 THE COURT: Let's take a short break, then.

5 It's your duty not to converse among
6 yourselves or with anyone else on any subject connected
7 with this trial.

8 Further, you may not read, watch or listen
9 to any report of or commentary on this trial from any
10 medium of information including, without limitation, to
11 the newspaper, television or radio.

12 You may not form or express any opinion on
13 any subject connected with this case until it is finally
14 submitted to you.

15 We'll be in recess for approximately ten
16 minutes.

17 Record should reflect that Mr. Figler and
18 Mr. Bunin have stepped out.

19 (Jury not present)

20 THE COURT: We're back on the record outside
21 the presence of the jury. I excused the jury based upon
22 the request of Mr. Singer. He has motions.

23 Mr. Singer.

24 MR. FIGLER: And we got priority to have him
25 haul butt to get over here, Judge.

1 THE COURT: Okay.

2 MR. SINGER: Judge, I have a motion to
3 dismiss the specific counts that referred to Maurice
4 Hickman. No evidence whatsoever was produced
5 (indiscernible) as to Maurice Hickman. Obviously,
6 Maurice Hickman didn't testify today.

7 And the cumulative testimony of the other
8 two people at that scene which was Michel'le Tolefree
9 and Myniece Cook didn't provide anything whatsoever that
10 the jury could even speculate or maybe even cause them
11 to speculate, but not even that much.

12 All she -- all they said was that they drove
13 to his house. They called on the cell phone to have him
14 meet them outside. They never said that he did meet him
15 outside. They never said anything about where
16 Maurice Hickman was, and we didn't have him here to
17 confirm anything.

18 He wasn't at the preliminary hearing either.
19 So he's an invisible man as far as this case as been,
20 and I don't think that the jury should be able to
21 consider attempted murder counts against Pierre Joshlin
22 on no evidence whatsoever.

23 MS. LEWIS: Well, Judge, I would disagree
24 with Mr. Figler's (sic) representation of what the --

25 MR. SINGER: Singer.

1 MS. LEWIS: -- the evidence --

2 THE COURT: Mr. Singer.

3 MR. SINGER: Figler's over there.

4 MS. LEWIS: I'm sorry. Mr. Singer's --

5 THE COURT: And I think for the record,
6 we're referring to Count V?

7 MR. SINGER: Yes, Judge.

8 MS. LEWIS: I would --

9 THE COURT: Yes.

10 MS. LEWIS: -- disagree with Mr. Singer's
11 recollection of the evidence. Both Myniece Cook and
12 Michel'le Tolefree specifically testified that Maurice
13 Hickman and them and Mercy Williams were all standing
14 outside in front of that house that evening.

15 As for as I know there's no law, case law,
16 statute or otherwise that says that a person has to be
17 here in court to testify in order to be labelled as a
18 victim, and so I don't see any reason why on those
19 reasons that count should be dismissed.

20 THE COURT: I believe --

21 MS. LEWIS: I think there was evidence. It
22 should be up to the jury at this point.

23 THE COURT: I believe Myniece Cook and
24 Michel'le Tolefree did testify that Maurice Hickman was
25 present with them in front of the house visiting I think

1 was the phrase before shots were fired. Based upon that
2 fact, I deny your motion to dismiss Count V. I think
3 there's sufficient evidence to support sending that
4 count to the jury.

5 MR. FIGLER: For the record, Judge, we'll
6 join in in Mr. Singer's motion.

7 THE COURT: I understand.

8 Are there any other motions to come before
9 us at this time? Any other motions to come before the
10 Court at this time? Are we just waiting for your
11 witness?

12 MR. BATEMAN: The only thing I would note,
13 they have I believe notices of one witness. I don't
14 know if that's the only --

15 MR. FIGLER: That's the only one.

16 MR. BATEMAN: -- they intend on calling. I
17 haven't received any witness notices from Mr. Singer. I
18 don't know if he's intending on calling anybody because
19 we are breaking at 2:00 today.

20 I don't see any reason why we can't be done
21 pretty early, and, obviously, we need to talk about jury
22 instructions, so I would just inquire as to whether
23 Mr. Singer intends to call anyone.

24 MR. SINGER: Not at this time, Judge.

25 THE COURT: All right. Let's do jury

1 instructions, then, gentlemen and --

2 MR. FIGLER: That sounds great.

3 THE COURT: -- lady.

4 (Off-record colloquy)

5 THE COURT: You guys better have these
6 worked out.

7 MR. BUNIN: We're a lot closer than normal.

8 THE COURT: Well, that's good.

9 MR. BUNIN: It shouldn't be too bad.

10 MR. BATEMAN: Judge, with your 20-plus years
11 of experience and jury instructions --

12 THE COURT: Give me a break, Bateman.

13 (Off-record colloquy)

14 THE COURT: How many instructions,
15 approximately, are we looking at?

16 (Off-record colloquy)

17 MR. BATEMAN: Probably somewhere -- oh.

18 (Off-record colloquy)

19 MR. FIGLER: Judge, we decided with your
20 permission --

21 THE COURT: Okay. We're still on the
22 record.

23 MR. FIGLER: -- is if we leave the amended
24 information in the jury instructions because it usually
25 is.

1 THE COURT: Record should reflect that
2 Mr. Singer's not present.

3 MR. BATEMAN: All right. We'll wait.

4 MR. FIGLER: We'll wait. Just to save a
5 little time.

6 THE COURT: And I fully appreciate that.

7 Oh, Danny, after we settle instructions, I
8 want each member of the jury to have a copy of the
9 instructions as well for tomorrow.

10 (Off-record colloquy)

11 (Off the record at 12:40 p.m. until 1:10 p.m.)

12 (Off-record colloquy)

13 THE COURT: We're back on the record in
14 C228460, State of Nevada, plaintiff, versus
15 Pierre Joshlin and Jamar Matthews.

16 Record should reflect that we had some
17 technical difficulties. We're now back on the record
18 appropriately, all counsel present with clients outside
19 the presence of the jury.

20 State has requested a proffer of proof on
21 the witness.

22 Mr. Figler.

23 MR. FIGLER: Thank you, Your Honor. The
24 defense intends to call its one and only witness
25 Richard Franky who was appointed a couple -- I guess

1 about a month ago in this particular case by the State
2 to aid us in this investigation.

3 Mr. Franky was directed to find any public
4 records that would support that Mr. Jamar Matthews,
5 Jamar D. Matthews, would have had cause to be in that
6 neighborhood, Jimmy, on the day in question, and how he
7 would also have some concern if the police are there
8 because he might have been in violation of the law being
9 at that location at that time.

10 To that end, Mr. Franky, was able to procure
11 four public record documents. Number one record
12 document is a certificate of live birth. It references
13 a child whose name is Jamar Demon Matthews, junior to a
14 Ronanda Renee Jones (phonetic). That is of 2 -- I'm
15 sorry, March 3rd, 2005, is when the child was born.

16 There is no father's name listed on there,
17 but we indicate that Jamar Demon Matthews is the name of
18 the defendant. To prove that Jamar Demon Matthews is
19 the name of the defendant, we have procured his Nevada
20 identification card. His Nevada identification card
21 identifies him as Jamar Demon Matthews.

22 Finally, Judge, there was a restraining
23 order against -- oh, and also, the live birth address,
24 the address of the mother, is listed at 1301 Jimmy
25 Street.

1 On the restraining order number one, there
2 is a restraining order against Mr. Matthews to stay away
3 from Ms. Jones and her son that was in effect. The
4 address given was 1301 Jimmy Street. That was in effect
5 from 4/07/06 to 4/25/06. However, it was extended to
6 include 4/25/06 to 4/25/07 which encompasses the date of
7 the offense.

8 So the offer of proof and the relevance,
9 Your Honor, is that Mr. Matthews had a son living there.
10 He was ordered to stay away.

11 He was in the vicinity when the police came.
12 He didn't want to be arrested for the misdemeanor
13 offense of domestic violence, so he ran and hid from the
14 police, and that would be the offer of proof.

15 THE COURT: State.

16 MR. BATEMAN: The only thing I would note, I
17 assume --

18 MR. FIGLER: TPO violation. Not domestic
19 violence, I'm sorry.

20 MR. BATEMAN: I assume they're making a
21 motion under the public records exception --

22 THE COURT: It's certified.

23 MR. BATEMAN: -- to the hearsay. I won't
24 object necessarily to that.

25 The problem I have with the TPO is generally

1 when we're prosecuting people for violation of TPO
2 orders, we're required to actually show that the
3 defendant or the person that's subject to the TPO got
4 notice. There's nothing in this particular document
5 that was ever served on the defendant, so I don't know
6 how the defendant would have any idea whether there was
7 a TPO against him.

8 DEFENDANT MATHEWS: Because I went to
9 court --

10 MR. FIGLER: Hey, hey, hey, hey.

11 MR. BUNIN: Don't say anything.

12 MR. FIGLER: I also have certified records
13 of his court appearance on the matter, Your Honor;
14 however, it does contain some hearsay information and
15 some excludable information under 48045.

16 I could offer that as an offer of proof to
17 the Court, but I don't think it would be proper for the
18 jury to see the allegations that were being made. The
19 only real relevance is the fact that a restraining order
20 was against him.

21 MR. BATEMAN: I don't know when that hearing
22 was. I don't have any idea about it. I have no proof
23 that he --

24 MR. FIGLER: I'm making a proffer, Judge.

25 THE COURT: I think the temporary order of

1 protection certified as admissible at this point. I'm
2 going to allow it in.

3 MR. FIGLER: And if the State wants to
4 question my investigator about the hearing, I do have
5 that and I think it would be improper to imply that he
6 wasn't noticed as a hearing. I'll show that information
7 to the State.

8 MR. BATEMAN: Well, that's exactly what I'm
9 going to ask his investigator, is there --

10 MR. FIGLER: Well, and --

11 MR. BATEMAN: -- notice on
12 (indiscernible) --

13 MR. FIGLER: -- my investigator can say that
14 the certified record showed that he had a hearing and
15 notice of it.

16 MR. BATEMAN: Then we need those records.

17 MR. FIGLER: I don't believe it should go to
18 the jury. There's too much prejudicial stuff unless we
19 were to redact it.

20 THE COURT: About the fact that he had
21 notice?

22 MR. FIGLER: No. The fact that he had sex
23 with the woman and that she doesn't like him --

24 THE COURT: You're concerned about the
25 notice?

1 MR. FIGLER: -- because of gangs and drugs.

2 MR. BATEMAN: Well, how do I have any way of
3 proving one way or the other that this individual has
4 any idea that there's a TPO against him?

5 MR. FIGLER: Because I have the court
6 minutes where he was present.

7 MR. BUNIN: He appeared in court.

8 MR. FIGLER: Where he did appear, and that's
9 a certified copy. I just don't believe --

10 THE COURT: Show it to counsel.

11 MR. BATEMAN: So I get to ask why he's in
12 there on a TPO? Do I get to ask the mom at this point
13 why she has a TPO against him?

14 MR. FIGLER: I don't think that's relevant,
15 only the fact that he would be reason to hide. If you
16 want to get into the fact that he -- because he was a
17 gang --

18 MR. BATEMAN: (Indiscernible).

19 MR. FIGLER: -- in her opinion a gang banger
20 and that's excluded.

21 MR. BATEMAN: I think it's called rebuttal
22 big time.

23 THE COURT: You may be opening a door.

24 MR. FIGLER: I don't believe so, Judge. I
25 think that the prejudicial impact of that is highly --

1 outweighs the probative value. What possible reason
2 would they need to know why as long as it's a legitimate
3 court order? Why would they need to know what the basis
4 of that was?

5 THE COURT: I agree.

6 MR. BATEMAN: Other reasons he's in the
7 area.

8 MS. LEWIS: Judge, we're entitled to present
9 in rebuttal other reasons to rebut why he might be in
10 the area if that's what they're proposing this
11 information to come in for.

12 MR. FIGLER: And what would that be and how
13 would they tie that up?

14 MS. LEWIS: We might have --

15 MR. BATEMAN: He's a gang member and the
16 whole motive behind the actual shooting itself we
17 believe was gang retaliation. I mean --

18 THE COURT: How would you prove that if I
19 let you do it? How would you do that?

20 MS. LEWIS: Well, we have documents or other
21 information that suggests that he might have been in the
22 area for other reasons, aside from this TPO, and so we'd
23 be entitled to explore that and certainly one means of
24 exploring that is cross --

25 THE COURT: Ms. Lewis, tell me how.

1 MR. BATEMAN: (Indiscernible).

2 MS. LEWIS: Do you want me to make you an
3 offer of proof?

4 THE COURT: Sure.

5 MS. LEWIS: We have several FI cards on this
6 individual showing not only that he resides in this
7 area, but that he's frequently in this area and stopped
8 in this area, and that when he's stopped, he says he's a
9 member of this gang or that gang. He gives monickers.
10 He says what he's doing. He says what activities he's
11 up to in that area.

12 MR. BATEMAN: (Indiscernible).

13 MS. LEWIS: And it also includes other
14 people that he's with when he's stopped in this area so
15 that --

16 MR. BATEMAN: Including --

17 MS. LEWIS: -- certainly would rebut other
18 reasons or would rebut their one and only reason for why
19 he might be in that area.

20 THE COURT: I'm going to let the TPO in.

21 THE CLERK: Okay. So we're talking about
22 E then, Your Honor?

23 THE COURT: Yes.

24 MR. BATEMAN: Again, well, then I need to
25 know what the parameters that we can cross-examine the

1 investigator.

2 THE COURT: Well, you can cross-examine the
3 investigator regarding the notice that he has of the
4 TPO, but we're not going to get into gang member.

5 THE CLERK: Is that admitted now,
6 Your Honor?

7 THE COURT: No, not yet. It hasn't been
8 offered. Let's get the -- are we ready? Are you ready?

9 MR. BUNIN: Yes.

10 MR. FIGLER: One moment, Judge.

11 MR. BUNIN: No, we're not.

12 (Off-record colloquy)

13 MR. FIGLER: I mean, the first line of it is
14 adverse party appeared in custody, sworn and testified.
15 We're ready to go forward, Judge.

16 THE COURT: All right. Bring the jury in.

17 MR. BATEMAN: I want a copy of it.

18 THE COURT: Yeah. Show it to opposing
19 counsel.

20 MR. FIGLER: I'll make a copy. I showed it
21 to him, but I don't have a copy for him.

22 (Off-record colloquy)

23 MR. BATEMAN: So how much of this do we get
24 to get into?

25 THE COURT: Notice. The notice.

1 MR. FIGLER: That he was present and told
2 about the restraining order being extended.

3 THE BAILIFF: Jury's present, please.
4 Panel's present, Your Honor.

5 THE COURT: Thank you. Record should
6 reflect we're back on the record in C228460, State of
7 Nevada, plaintiff, versus Jamar Matthews and
8 Pierre Joshlin. Record should also reflect presence of
9 all counsel.

10 Do counsel stipulate -- does counsel
11 stipulate to the presence of the jury?

12 MR. FIGLER: Yes, Your Honor.

13 MS. LEWIS: Yes, Your Honor.

14 MR. SINGER: Yes, Judge.

15 THE COURT: Defense.

16 MR. FIGLER: Defense would call
17 Richard Franky to the stand.

18 THE CLERK: I'll swear you in, sir. Raise
19 your right hand.

20 RICHARD FRANKY, DEFENDANT'S WITNESS, SWORN

21 THE WITNESS: I do.

22 THE CLERK: Thank you. You may be seated.
23 Please state your full name for the record and spelling
24 both first and last name.

25 THE WITNESS: Richard Franky. Last name is

1 spelled F-r-a-n-k-y.

2 DIRECT EXAMINATION

3 BY MR. FIGLER:

4 Q. Thank you. Mr. Franky, how are you employed?

5 A. I was employed by the law office of Bunin &
6 Bunin.

7 Q. And in what capacity?

8 A. As a private investigator.

9 Q. Okay. Sir, and as a private investigator do you
10 have any licensing in State of Nevada?

11 A. Yes, I do. I'm licensed to conduct business
12 under the DBA of RDF Investigative Agency, Nevada State
13 license No. 797 issued through the Private Investigators
14 Licensing Board, a subdivision of the Attorney General's
15 Office of the State of Nevada.

16 Q. Thank you, Mr. Franky. And did Mr. Bunin and
17 myself engage your services to find some public records
18 relating to Mr. Jamar Matthews?

19 A. Yes, you did.

20 Q. Okay. And were you able to procure those
21 records?

22 A. Yes, I was.

23 Q. Okay. And exactly what records were you
24 requested to find?

25 A. I was requested to go town to Vital Records

1 Marriage -- or not -- sorry, Vital Records Birth
2 Certificates from the Clark County and extract or obtain
3 a certified copy of the birth certificate of
4 Mr. Matthews' son.

5 Q. Okay.

6 MR. FIGLER: And may I approach, Your Honor?

7 THE COURT: Yes.

8 BY MR. FIGLER:

9 Q. And, Mr. Franky, I'm showing you what's been
10 marked as Defense Proposed Exhibit B. Does that appear
11 to be a true and accurate copy of the public record
12 which you procured from that agency?

13 A. Yes, it is.

14 Q. And what is the name of the child on that birth
15 certificate?

16 MS. LEWIS: Judge, I'd object as to hearsay.

17 THE COURT: It's a certified document.

18 BY MR. FIGLER:

19 Q. Let me ask --

20 MS. LEWIS: I don't know that --

21 BY MR. FIGLER:

22 Q. -- again. Is that a certified copy of that
23 document sir?

24 A. Yes. Yes, it is, Your Honor.

25 MS. LEWIS: Judge, then I'd object to

1 foundation.

2 THE COURT: Overruled.

3 MR. FIGLER: Thank you. At that point,
4 Judge, I'd move for the admission of Defense Proposed
5 Exhibit B.

6 THE COURT: Any other objection?

7 MS. LEWIS: No, Judge.

8 THE COURT: It's in.

9 (Defendant's Exhibit No. B admitted)

10 MR. FIGLER: Thank you.

11 BY MR. FIGLER:

12 Q. Mr. Franky, can you tell me who the child that
13 belongs to this birth certificate is? What the name of
14 that child is.

15 A. It's Jamar Demon Matthews, Junior.

16 Q. Okay. And does it list the mother?

17 A. Yes, it does.

18 Q. And her name?

19 A. Ronanda Renee Jones.

20 Q. And does it give her address?

21 A. Yes, it does. 1301 Jimmy Street, Las Vegas,
22 Nevada, 89106.

23 Q. Thank you. Now, having the name of the mother of
24 the child, were you able to find any other public record
25 documents that referenced Mr. Matthews?

1 A. Yes, I was. I was able to locate a temporary
2 protective order in basically Family Division District
3 Court, Eighth Judicial District, and temporary
4 protective.

5 Q. Okay.

6 MR. FIGLER: May I approach, Your Honor?

7 THE COURT: Yes.

8 MR. FIGLER: Thank you.

9 BY MR. FIGLER:

10 Q. Mr. Franky, I'm showing you what's marked as
11 Exhibits -- Defense Proposed Exhibit D and E. Do you
12 recognize these documents?

13 A. Yes, I do.

14 Q. Are these the documents that you procured from
15 the Family Division of the District Court?

16 A. Yes, I did.

17 Q. And are they certified and accurate copies of the
18 -- of those documents that you retrieved from the public
19 record?

20 A. Yes, sir.

21 Q. Okay.

22 MR. FIGLER: At this time, Your Honor, I'd
23 move for the admission of Defense Proposed Exhibits D
24 and E.

25 THE COURT: State.

1 MS. LEWIS: Same objections as to foundation
2 and also as to relevance.

3 THE COURT: Overruled. They're in.

4 (Defendant's Exhibit Nos. D-E admitted)

5 MR. FIGLER: Thank you.

6 BY MR. FIGLER:

7 Q. Mr. Franky, now with regard to that temporary
8 order for protection, what is the date on the first one?

9 A. The date that it was filed the first one was
10 filed on April the 11th of '06.

11 Q. And can you tell me what dates that encompassed?

12 A. It says date issued 4/7/06 and date expires
13 4/25/06.

14 Q. Okay. And within that document does it indicate
15 how far away from the complaining party -- and what was
16 the name of the complaining party in that?

17 A. Ronanda R. Jones --

18 Q. Okay.

19 A. -- the mother of his son.

20 Q. Okay. And does that indicate that someone needs
21 to stay away from that person?

22 A. Yes, it does.

23 Q. And does it say what the consequence of not
24 staying at least 100 yards away from that place would
25 be?

1 A. I believe it's punishable by a misdemeanor.

2 Q. Thank you. Now, there's a second document that
3 you have up there called an extended order for
4 protection; is that correct?

5 A. Correct.

6 Q. And can you tell me and that's off of Defense
7 Exhibit E; is that correct?

8 A. Actually, it's D.

9 Q. That's -- I'm talking about the next one, E.

10 A. You just talked about E.

11 Q. Oh, I got them reversed. Okay. Oh, I see.
12 Okay. Now we're going to talk about D. That was E. I
13 got them backwards. Let's go with E then.

14 A. Can you repeat the question?

15 Q. Or D, sorry. Yeah. You have one filed on July
16 -- I'm sorry, June 21st, '06?

17 A. Correct.

18 Q. Okay. And what's the name of the parties there?

19 A. Ronanda R. Jones, applicant, versus Jamar D.
20 Matthews, adverse party.

21 Q. Okay. And that's also an extended order for
22 protection?

23 A. Correct.

24 Q. And can you tell me the date that was issued?

25 A. This was issued on 4/25 of the year 2006.

1 Q. And when did that expire?

2 A. 4/25 of the year 2007.

3 Q. So the date of September 30th, '06, would be
4 encompassed by this order; is that correct?

5 A. Yes, sir.

6 Q. And what would be the violation or the penalty
7 for violation of this order?

8 A. A misdemeanor, once again.

9 Q. Okay. Lastly, you were asked to procure the
10 identification card for Jamar Matthews; is that correct?

11 A. That's correct.

12 MR. FIGLER: May I approach, Your Honor?

13 THE COURT: Yes.

14 BY MR. FIGLER:

15 Q. I'm showing what's been marked Proposed Exhibit

16 C. Does that appear to be the true Nevada
17 identification card based on your experience of
18 Jamar Matthews?

19 A. Yes, sir.

20 Q. Is that a state-issued document?

21 A. Yes, sir.

22 Q. Okay.

23 (Off-record colloquy)

24 MR. BUNIN: I'm sorry.

25 MR. FIGLER: Okay.

1 BY MR. FIGLER:

2 Q. And that is the identification of -- what's the
3 name on that identification?

4 A. Jamar Demon Matthews.

5 Q. Okay. And it gives other identifying
6 information?

7 A. Yes, it does.

8 MR. FIGLER: At this time, Your Honor, we
9 move for the admission of the actual Nevada
10 identification card of Jamar Matthews.

11 MS. LEWIS: No objection.

12 THE COURT: It's in.

13 (Defendant's Exhibit No. C admitted)

14 MR. FIGLER: Thank you.

15 BY MR. FIGLER:

16 Q. Now, Mr. Franky, I have a demonstrative exhibit.

17 MR. FIGLER: It's just a blowup of it,
18 Judge. The only thing is putting it up on the thing.
19 It's identical. I'm going to show it to the witness
20 first to make sure it is identical. I believe there's
21 no objection to it being published to the jury.

22 MS. LEWIS: No objection, Judge.

23 THE COURT: All right. It's in.

24 BY MR. FIGLER:

25 Q. And so that's Jamar Demon Matthews; is that

1 correct?

2 A. That is correct.

3 Q. Thank you. Now, Mr. Franky, you were also
4 informed that Mr. Matthews was arrested in the present
5 matter at a certain location; is that correct?

6 A. That's correct.

7 Q. And do you know what that location is?

8 A. Yes. It's 1116 Jimmy Street or Jimmy Avenue.

9 Q. Okay. And have you had occasion to go out to
10 that area?

11 A. Yes, I did.

12 Q. Okay. And at that area what is its proximity to
13 Ms. Jones' address at 1301 Jimmy Street?

14 A. It is precisely five houses east from the address
15 of Ms. Ronanda Jones.

16 Q. And is it visually -- are you visually able to
17 see one home from the other?

18 A. Yes, you are.

19 MR. FIGLER: No further questions,
20 Your Honor.

21 THE COURT: Cross.

22 CROSS-EXAMINATION

23 BY MS. LEWIS:

24 Q. So, Mr. Franky, did you actually go and meet with
25 Ms. Jones at her address?

1 A. No. I never approached her.

2 Q. You've never had any contact with Ms. Jones;
3 isn't that true?

4 A. That's correct.

5 Q. In fact, the only information or only contact you
6 have that relates to Ms. Jones is going down to the
7 family court and obtaining certified records.

8 A. Correct.

9 Q. So you don't actually know what relationship
10 Ms. Jones has to Mr. Matthews as you sit here today, do
11 you?

12 A. Well, through the documentation, the actual
13 application that she filed.

14 Q. Right. And on here does it say what relationship
15 she has to Mr. Matthews? It does not, does it? It just
16 says that she filed for a temporary protective order;
17 isn't that true?

18 A. Correct.

19 Q. Okay. So you don't know what relationship if any
20 she has with Mr. Matthews; isn't that correct?

21 A. Based on the document you're showing me, that's
22 correct.

23 Q. Okay. Based on anything else, you don't know
24 what relationship Ms. Matthews has -- Ms. Jones has with
25 Mr. Matthews, do you?

1 A. There was an application that Ms. Ronanda Jones
2 filed with District Court Family Division in which she
3 stated that Mr. Jamar D. Matthews was his -- was her
4 ex-boyfriend --

5 Q. And which --

6 A. -- and the father of her son.

7 Q. -- application is that?

8 A. There was handwritten application that she filed.

9 Q. Is that one that you brought here to court that's
10 been certified?

11 A. No.

12 Q. Okay. So let's not talk about that. Let's just
13 talk about the documents that you brought to court
14 that's certified.

15 And back to my original question, despite what
16 you might have read in papers and documents, you've
17 never spoken to Ms. Jones to find out from her what the
18 state of her relationship is with Mr. Matthews; isn't
19 that right?

20 A. That is correct.

21 Q. Okay. And you're familiar with the process of
22 obtaining protective orders or not?

23 A. Yes, I am.

24 Q. You are. And so you know that in order to
25 actually generate these documents that you brought with

1 you to court today, these certified documents from
2 family court, you have to go through a number of steps;
3 isn't that right?

4 A. The applicant?

5 Q. Yes.

6 A. Yes. That is correct.

7 Q. And the applicant, the person who's asking for
8 these documents from the family court, has to jump
9 through a number of hoops in order to get them in the
10 first place, isn't that right?

11 A. That is correct.

12 Q. And there has to be a reason that the family
13 court judge would even grant these documents in the
14 first place --

15 MR. FIGLER: And I'll --

16 BY MS. LEWIS:

17 Q. -- or issue them; isn't that right?

18 MR. FIGLER: And I'll object, Your Honor, as
19 to --

20 THE COURT: What's the basis?

21 MR. FIGLER: -- the foundation and I don't
22 know if Mr. Rick Franky is an attorney and he knows what
23 the standard of proof is in a family court proceeding.

24 THE COURT: I'll allow her. I'll give her
25 some latitude.

1 MR. FIGLER: If he knows.

2 BY MS. LEWIS:

3 Q. And I'm not asking you about, you know, what
4 might have happened in the courtroom because you weren't
5 there, right?

6 A. Correct.

7 Q. Okay. And so, I mean, everything that you're
8 telling us is just based on papers that you've read that
9 you obtained from the family court, right?

10 A. Correct.

11 Q. Okay. But as an investigator, you're familiar
12 with these types of documents and generally what is
13 required in obtaining them; isn't that right?

14 A. Yes, ma'am.

15 Q. Okay. So you know that in order to go down to
16 family court and even go before a judge, not even
17 talking about what happens in the courtroom, but before
18 you even get to that point, you have to jump through a
19 few hoops, right?

20 A. Yes, ma'am.

21 Q. Okay. And so then you go in front of a judge,
22 and you basically state your claim to the judge, and you
23 tell the judge reasons why you want these documents;
24 isn't that true?

25 A. Correct.

1 Q. Okay. And sometimes the judge might say yes and
2 sometimes the judge says no; isn't that right?

3 A. That's correct.

4 MR. FIGLER: I'll object, Your Honor, as far
5 as the relevance of the underlying basis. There was a
6 restraining order in place. He'd be arrested if he was
7 violating it. I don't understand why the process is
8 important.

9 MS. LEWIS: Judge, this is
10 cross-examination. This is his own witness.

11 THE COURT: Overruled.

12 BY MS. LEWIS:

13 Q. And when you go down to family court and you ask
14 for these things to be granted, sometimes the judge will
15 grant them and sometimes the judge won't; isn't that
16 right?

17 A. That is correct.

18 Q. Okay. And, generally speaking, a protective
19 order against domestic violence means that there's some
20 reason why the person is asking for it in the first
21 place; isn't that right?

22 MR. FIGLER: And I'll object, Your Honor. I
23 believe that the State is trying to speculate as to
24 reasons when it's absolutely irrelevant. He's not being
25 charged with any other offense.

1 THE COURT: Well, they're your documents
2 so --

3 MR. FIGLER: That's correct, Your Honor.

4 THE COURT: -- overruled.

5 THE WITNESS: Can you repeat the question,
6 I'm sorry.

7 BY MR. FIGLER:

8 Q. Yes, Mr. Franky. Generally speaking, a temporary
9 protective order against domestic violence, there has to
10 be some reason why a person would go and ask for that in
11 the first place; isn't that right?

12 A. That is correct.

13 Q. And these aren't -- these documents you brought,
14 these aren't just temporary protective orders. They're
15 specific. They're specifically related to protection
16 against domestic violence; isn't that right?

17 A. That is correct.

18 Q. Okay. And so by the very nature that they were
19 granted by a judge means that the judge had to make some
20 sort of factual determination or some sort of finding in
21 a courtroom in order to grant that particular
22 application; isn't that right?

23 MR. FIGLER: And I would object as to
24 foundation, how this witness would possibly know what
25 happened in that courtroom. He already established that

1 he wasn't there. He has no personal knowledge.

2 THE COURT: I think she's referring to the
3 documents.

4 MS. LEWIS: That's absolutely right, Judge.
5 Thank you.

6 BY MS. LEWIS:

7 Q. My question was in order for a judge to actually
8 grant the application -- and the application is the
9 person's asking for it, right?

10 A. Correct.

11 Q. Okay. So in for a judge to say yes, I'll give
12 you what you're asking for, that means the judge had to
13 have had some sort of proceedings on a record and had to
14 have made some sort of factual findings, some sort of
15 basis for granting that request; isn't that right?

16 A. That is correct.

17 Q. Okay. And that happened in this case, right?

18 A. It appears that it did.

19 Q. And you know that because you've got the
20 documents that prove it, right?

21 A. Yes, ma'am.

22 Q. Okay. And you also have court minutes as well
23 that you brought with you that show who was there and
24 just a brief summary of what happened in the courtroom;
25 is that right?

1 A. That's correct.

2 Q. Okay. And you reviewed those court minutes?

3 A. I did read them.

4 Q. And based on your review of those court minutes,
5 do you agree with the position that the judge actually
6 in this instance made specific factual findings that
7 allow the judge to say yes, I will grant that request;
8 isn't that right?

9 A. Can I request to read those documents at that
10 point?

11 Q. Sure. You --

12 A. At this point?

13 Q. The --

14 A. The minutes that you have in your hand. Thank
15 you.

16 Q. And you brought these to court with you today,
17 right?

18 A. Correct. Actually, these were provided to
19 Attorney David Figler prior to today's hearing.

20 Q. Oh, when did you provide those to Mr. Figler?

21 A. I believe my office provided them this week or
22 last week --

23 Q. Okay.

24 A. -- because they're certified on April 24th.

25 Q. Okay.

1 A. I'm talking about the court minutes that you're
2 referring to.

3 Q. And the actual protective order documents that
4 you brought to court, were those also provided --

5 A. No.

6 Q. -- at the same time?

7 A. -- those were obtained this morning.

8 Q. Okay. So those you just brought with you to
9 court this morning?

10 A. Correct.

11 Q. Okay. Go ahead, read through that.

12 A. Thank you. Yes.

13 Q. Okay. So back to my original question. After
14 reviewing those records, then, you're aware that in this
15 particular instance with relating to this particular
16 protective order against domestic violence, the judge
17 who heard that request actually made specific factual
18 findings that supported that request for granting the
19 protective order; isn't that right?

20 A. That would be correct.

21 Q. Okay. And you said that you came about these
22 records by doing this records search for the name
23 Ronanda Jones, right?

24 A. That is correct.

25 Q. And did you do any other records search or are

1 these the only records that you came up with?

2 A. These are the records that I came up with.

3 Q. Okay. So you didn't do any other further searches
4 after that?

5 A. No.

6 Q. And you're familiar with the process of having a
7 protective order against domestic violence dissolved,
8 are you not?

9 A. Yes, I am.

10 Q. And so you're aware that in certain instances
11 even though these documents might be granted on one
12 date, parties can go back to court and ask the judge,
13 you know what, we've reconciled, we don't need this
14 anymore; isn't that right?

15 A. That is correct. It does exist.

16 Q. And you don't know whether Ronanda Jones went
17 back to court and maybe made that request of a judge, do
18 you, because you didn't do any further checks after you
19 obtained these records, did you?

20 MR. FIGLER: Calls for speculation, Judge.

21 THE WITNESS: Today --

22 THE COURT: If he can answer.

23 MS. LEWIS: If he can answer.

24 THE WITNESS: Can I answer?

25 THE COURT: Yes.

1 THE WITNESS: Okay. Today I actually
2 requested to see the file.

3 BY MS. LEWIS:

4 Q. Um-h'm.

5 A. And I went through the file page by page --

6 Q. Um-h'm.

7 A. -- and the document that you're describing does
8 not exist in this file.

9 Q. In that file.

10 A. Correct.

11 Q. Okay. Did you check any other files or any other
12 records?

13 A. There is only one file pertaining to this TPO --

14 Q. Okay.

15 A. -- in family division. There's no two files.
16 There's one.

17 Q. Okay. But did you check for any other files?

18 A. They did run the name of Ronanda Jones and
19 Matthews, and this is the only file that came --

20 Q. Oh, who's they?

21 A. -- up. The county -- the clerk at the window at
22 family court.

23 Q. Oh, so you didn't actually go and do anything.
24 You just went and asked somebody else to do it.

25 A. That is the procedure with the county.

1 Q. Okay. So you don't know if there are other files
2 with the name of Ronanda Jones, then?

3 A. That is correct.

4 Q. You just know what was given to you.

5 A. That is correct.

6 Q. And so the record search that you did only led
7 you to this one file; is that right?

8 A. That is correct.

9 Q. Okay. And you said that you went out to this
10 address -- where is it -- 1301 Jimmy Street, right?

11 A. That is correct.

12 Q. And you believe that that's Ronanda Jones'
13 address?

14 A. That is correct.

15 Q. Did you go to the door to see if Ronanda Jones
16 resided there?

17 A. No, because of the temporary protective order.

18 Q. When did you go out there?

19 A. I went out there about a week and a half ago.

20 Q. Okay. So because of the temporary protective
21 order you didn't go to the door?

22 A. Correct.

23 Q. Well, do you have a temporary protective order
24 against going over to Ronanda Jones' residence?

25 A. No. But I am working for his -- Mr. Matthews'

1 attorney, so, therefore, I did not want to cross that
2 line.

3 Q. Oh, I see. So you're trying to be safe.

4 A. Yes, ma'am.

5 Q. All right. That's fair. But you don't know,
6 then, who actually resides at that address today or when
7 was it that you said you went there?

8 A. About a week and a half ago.

9 Q. So a week and a half ago you don't know who
10 resided at that address, do you?

11 A. That would be accurate.

12 Q. And back on September 30th of 2006, you don't
13 know whether she resided there at all, do you?

14 A. That would be correct.

15 Q. You were out in that general vicinity or that
16 neighborhood for some time a week and a half ago when
17 you went out there?

18 A. Yes.

19 Q. Okay. And, in fact, you said that the house,
20 1116 Jimmy, was five houses to the east, right?

21 A. Correct.

22 Q. You counted that yourself?

23 A. Yes, I did.

24 Q. Did you measure out in yards the distance between
25 the two?

1 A. No, I did not.

2 Q. Are you familiar with the location of 1801 J
3 Street?

4 A. I did not look at that address.

5 Q. You didn't. Well, didn't you know that on the
6 driver's license that you brought to court with you
7 today? Doesn't it say 1801 J Street on there?

8 A. Yes, it does.

9 Q. Do you know where that is in relation to
10 Ronanda Jones' house, for example?

11 A. No, I do not.

12 Q. Would it surprise you to know that it's almost
13 around the corner, practically? Would that surprise
14 you?

15 A. Okay.

16 Q. Okay. The ID card that you brought with you,
17 that's a Nevada ID card, right?

18 A. Yes, ma'am.

19 Q. You go down to DMV and you request that, correct?

20 A. How did I obtain this identification?

21 Q. No. I'm saying generally speaking, a Nevada ID
22 card, in order to get one, if I wanted to get one or
23 anybody wanted to get one you just go down to DMV, you
24 request it, correct?

25 A. Yes, ma'am.

1 Q. And you have to fill out some paperwork to get
2 that, right?

3 A. Yes, ma'am.

4 Q. And on that paperwork you fill out your
5 information; your name, date of birth, that sort of
6 stuff, correct?

7 A. Yes, ma'am.

8 Q. And, in fact, you also give them your address.
9 What else is on here? Your height, your weight, your
10 hair color, what else? Your eyes, that's all
11 information that you give DMV, correct?

12 A. Yes, ma'am.

13 Q. And then when you give them that information,
14 they put it in the computer, they do whatever they do
15 with it, they take your picture, and then this handy
16 little ID card comes out that's marked Exhibit C, right?

17 A. Correct.

18 Q. Okay. So nobody measures your height before they
19 put that information on there, do they?

20 A. Not that I know of.

21 Q. They don't put you on a scale and take your
22 weight before they put that information on there, do
23 they?

24 A. Not that I know of.

25 Q. And you haven't -- well, let me say it this way.

1 You're familiar with Mr. Matthews because you've been
2 working on this case, correct?

3 A. Yes, ma'am.

4 Q. And that's because you're employed by
5 Mr. Matthews' lawyers, correct?

6 A. Correct.

7 Q. So you're not a friend of his. You don't
8 socialize with Mr. Matthews, right?

9 A. No, I do not.

10 Q. Okay. So would you know or would you have reason
11 to know of other instances besides September 30th of
12 2006 -- because you said you're aware that he was
13 arrested on that date at 1116 Jimmy Street, correct?

14 A. Correct.

15 Q. So would you be aware of or would you have any
16 other instances --

17 MR. FIGLER: And I'm going to object,
18 Your Honor. Beyond the scope of direct and beyond the
19 scope of the relevant inquiry.

20 THE COURT: It's cross.

21 MS. LEWIS: Judge --

22 THE COURT: I'm not sure where she's going.

23 MS. LEWIS: Judge, there's no scope --

24 MR. FIGLER: Well, maybe we should approach.

25 MS. LEWIS: -- to cross-examination.

1 THE COURT: Let's approach.

2 (Off-record bench conference)

3 BY MS. LEWIS:

4 Q. Mr. Franky, are you aware of any other times when
5 Mr. Matthews was in the neighborhood of let's say for
6 argument sake Ronanda Jones' home because we're
7 presuming that that's her home there. Would you know of
8 any other times that Mr. Matthews might have been in
9 that area?

10 A. No, I do not.

11 Q. So if he was in that area May 20th of 2005, you
12 wouldn't know about that, correct?

13 A. No.

14 Q. Or how about if he was in the area June in 2006,
15 would you know about that?

16 A. No. I don't -- no, I would not.

17 Q. Would you have done any other investigation or
18 records checks to find out if there were any other
19 instances when, perhaps, Mr. Matthews might have been in
20 that area or in the vicinity?

21 A. No, ma'am.

22 Q. Okay. So the only records checks you did were
23 pertaining to these documents and this is what resulted,
24 the two documents, the protective orders against
25 domestic violence that you brought with you to court,

1 correct?

2 A. That is accurate.

3 Q. And there's two of them because one is the actual
4 protective order and one is an extension, correct?

5 A. That is accurate.

6 Q. And that means that the judge extended it,
7 granted it for a longer period of time than just the
8 initial 30 day period; is that right?

9 A. That is accurate.

10 MS. LEWIS: Thank you. I have no further
11 questions.

12 THE COURT: Mr. Singer.

13 MR. SINGER: No, thank you, Judge.

14 THE COURT: Redirect.

15 MR. FIGLER: Thank you.

16 REDIRECT EXAMINATION

17 BY MR. FIGLER:

18 Q. Mr. Franky, you were asked some questions on
19 cross about the DMV. If I went to the DMV and said I
20 had a head of bushy brown hair and I was
21 five-foot-eleven, do you think they'd issue that ID to
22 me?

23 MS. LEWIS: Objection. Leading.

24 THE COURT: Sustained. Rephrase.

25 //

1 BY MR. FIGLER:

2 Q. Do you believe, Mr. Franky, one way or another
3 that there are some limitations with regard to
4 verification at the DMV?

5 A. I believe so.

6 Q. And if someone says something that's not
7 accurate, do you have a position as to whether or not
8 they would be issued an identification card?

9 A. Rephrase the question, please.

10 Q. With regard to giving false information to the
11 DMV, do you know one way or another if they issue people
12 identification cards with false information on it?

13 A. No, they would not.

14 Q. Thank you.

15 THE COURT: Recross.

16 MS. LEWIS: Nothing, Judge.

17 THE COURT: Is this witness excused?

18 MR. FIGLER: Yes, Your Honor.

19 THE COURT: Thank you, sir, for your
20 testimony.

21 THE WITNESS: Thank you, Your Honor.

22 MR. FIGLER: If we could have this marked
23 Defense next. The bigger version of Defense B.

24 THE COURT: Okay. Defense, call your next
25 witness.

1 MR. FIGLER: The defense rests.

2 THE COURT: Mr. Figler rests.

3 Mr. Singer.

4 MR. SINGER: Mr. Joshlin rests.

5 THE COURT: Mr. Singer rests?

6 MR. SINGER: Yes, Judge.

7 THE COURT: Does that conclude -- State,
8 rebuttal?

9 MS. LEWIS: Yes, Judge. We'd reserve that
10 right for tomorrow because I understand we're recessing
11 today at 2:00 so --

12 THE COURT: We are recessing today at 2:00.

13 MS. LEWIS: And we didn't know the length of
14 the defense case --

15 THE COURT: I understand.

16 MS. LEWIS: -- so we didn't prepare any for
17 today.

18 THE COURT: Ladies and gentlemen, we're
19 going to take our afternoon recess at this time. We
20 still have some additional items to take care, but it's
21 important that I admonish you on your evening
22 admonishments.

23 You're admonished not to converse among
24 yourselves or with anyone else on any subject connected
25 with this trial, read, watch or listen to any report of

1 or commentary on this trial or any person connected with
2 this case by any medium of information including,
3 without limitations, newspapers, television or Internet
4 or radio. You are further admonished not to form or
5 express any opinion on any subject connected with this
6 trial until the case is finally submitted to you.

7 We'll be in recess until tomorrow. I think
8 we'll start at 9:30 tomorrow morning, and we will work
9 the full day tomorrow. Thank you. We'll be in recess,
10 and Officer Reichert has stepped away.

11 Officer Reichert, you're in charge.

12 (Off-record colloquy)

13 THE COURT: Record should reflect -- the
14 door's still open. Record should reflect we're outside
15 the presence of the jury. All parties present.

16 Where we going?

17 MR. BATEMAN: Do you want to continue with
18 -- I don't know if Mr. Figler wants to address just the
19 specific ones in our packet. I don't think we have that
20 many more.

21 MR. FIGLER: It's up to you, Judge. We got
22 ten minutes before your investiture.

23 THE COURT: I want to settle these
24 instructions.

25 MR. BATEMAN: Okay.

1 THE COURT: Assuming that it's not affected
2 by the rebuttal case --

3 MR. BATEMAN: It shouldn't be.

4 THE COURT: -- that you're working on.

5 MS. LEWIS: No. And we're able to print,
6 right?

7 THE CLERK: Yes.

8 THE COURT: So where are we at? Are we on
9 D8?

10 MR. SINGER: Yes, Your Honor.

11 THE COURT: All right. D8, you have
12 received no evidence that there's a proven relationship
13 between the witness' confidence and the accuracy of the
14 witness' testimony. Even if the witness is positive in
15 his identification, this does not relieve you of the
16 duty to carefully consider identification testimony,
17 especially if you find that only evidence or most
18 significant evidence that directly supports this claim
19 the defendant committed the offense charged.

20 You also know that some identifying
21 witnesses are of a different race than the defendant
22 than the witness who is a member of one race identifies
23 the defendant who is a member of another race
24 (indiscernible) that we said there was cross-racial
25 identification.

1 You may consider it if you think it
2 appropriate to do so whether cross-racial nature of the
3 identification is affected by the action of the witness
4 original perception or the accuracy of the subsequent
5 identification.

6 I see a New York citation from 1996, state
7 New York citation.

8 State.

9 MR. BATEMAN: I think the -- I think it's
10 the first part is covered in the credibility of
11 witnesses part, Your Honor. I think the second
12 paragraph is not really a statement of law at all. I
13 think that it may be borderline if there was an expert
14 on cross racial or ID that come in and testify, but I --

15 THE COURT: I think it's covered by other
16 instructions. I'm not going to give it. All right.

17 Let's talk about conspiracy, D9, and, State,
18 you had a bunch of conspiracy instructions, too. Where
19 -- you take me where we need to go to clear this up.

20 The instructions I see from the State
21 involve four -- four different -- no. Three
22 instructions involving conspiracy; is that correct?

23 MS. LEWIS: Let me find them.

24 THE COURT: One says conspiracy's agreement
25 or mutual understanding, and I want conservative on

1 this. I want statutory language.

2 I see the citation on the defense
3 instruction is Bolden which is obviously good authority.
4 Tell me where we differ, where we differ.

5 MR. BATEMAN: Judge, I think these -- ours
6 are basically standard from cases previous to Bolden. I
7 don't think Bolden changes them. I don't think Bolden
8 is all inclusive of every conspiracy.

9 THE COURT: Where in D9 is there a problem?
10 Where is there a misstatement in law --

11 MR. BATEMAN: I don't have a problem giving
12 it --

13 THE COURT: Okay.

14 MR. BATEMAN: -- as long as it's in addition
15 to ours.

16 THE COURT: Okay. All right. That's fine.
17 Well, that's what we'll do.

18 MR. FIGLER: I think -- Judge, I know that
19 there's no problem with D9 --

20 MS. LEWIS: I think some of it is redundant.

21 MR. FIGLER: -- because it is all exact
22 identical language that comes out of Bolden.

23 THE COURT: Perfect.

24 MS. LEWIS: Post-Bolden, however, there's
25 still language in there about the act of one is the act

1 of all and their conspiracy instructions. That's not
2 the law anymore. I think if we have one concise
3 statement of conspiracy law in the most recent case on
4 the subject matter, then we're covered.

5 MR. BATEMAN: Judge, I'd be happy to give
6 you the Bolden case. I have it here. The instruction
7 that was at issue in Bolden included act of one and is
8 act of all.

9 THE COURT: Right.

10 MR. BATEMAN: If you'll remember --

11 THE COURT: I remember Bolden.

12 MR. BATEMAN: Yeah. And it specifically
13 addressed the reasonable and foreseeable consequences
14 when the ultimate --

15 THE COURT: One act as it relates to another
16 act as it relates to the parties involved. I know --

17 MR. BATEMAN: And only specific crimes.

18 THE COURT: -- Bolden. Right.

19 MR. BATEMAN: The instruction that it
20 addressed in Bolden specifically stated in that
21 instruction -- it was the instruction that we always
22 give -- act of one is act of all, and nothing in Bolden
23 says that particular portion of the instruction is --

24 THE COURT: Is bad.

25 MR. BATEMAN: -- inappropriate.

1 THE COURT: Right. I --

2 MR. BATEMAN: And I've got the case law.
3 I'd be happy it give it to you.

4 MR. FIGLER: Right. And --

5 THE COURT: No.

6 MR. FIGLER: And --

7 THE COURT: I don't --

8 MR. FIGLER: And --

9 THE COURT: I don't need to read Bolden.

10 MR. FIGLER: -- there is not one Nevada
11 State law case. This has always been something put in
12 as dicta that says, quote/unquote, the act of one is the
13 act of all.

14 What my instruction does is encompass every
15 active of conspiracy that the State could possibly need.
16 Everything else in there is either duplicative or it
17 adds areas that are marginal admissibility after Bolden.

18 It doesn't include the mere presence aspect
19 of it. It doesn't include the mere approval of it, but
20 it does have everything else, including the language
21 reasonably foreseeable consequences of the object of the
22 conspiracy as opposed to the act of one is the act of
23 all. This sums it up.

24 This is the latest, greatest and absolutely
25 concise conspiracy instruction that one could glean from

1 the most recent case. There is no Nevada Supreme Court
2 case that approves instructions against conspiracy, not
3 one. I think Mr. -- Sam would agree with me.

4 THE COURT: I'm inclined to give D9 in
5 conjunction with the other three instructions. I
6 believe that's fair. It gives both parties the ability
7 to answer. I don't believe the conspiracy instructions
8 as contained here are inconsistent in the law.

9 MR. FIGLER: And honestly, Judge, I don't
10 think anything in theirs isn't contained in mine, so,
11 apparently, on our side when it's duplicative it's out,
12 but on theirs it comes in --

13 THE COURT: Well, there's --

14 MR. FIGLER: -- and that's fine.

15 MS. LEWIS: Actually, that's not true,
16 Judge.

17 THE COURT: I don't --

18 MS. LEWIS: There are things in our
19 instructions that are not contained in this one.

20 MR. FIGLER: And that aren't supported --

21 MS. LEWIS: I can go through --

22 MR. FIGLER: -- by the law including the act
23 of one is the act of all. That language --

24 MS. LEWIS: I can go --

25 MR. FIGLER: -- has never been approved by

1 Nevada Supreme Court as an instruction, never.

2 MR. BATEMAN: Been implicitly --

3 MR. FIGLER: Never approved, Judge.

4 MS. LEWIS: Can I finish what I was saying?

5 MR. FIGLER: And post (indiscernible) it's
6 marginal, questionable, if it is even alive anymore.

7 MS. LEWIS: Can I finish what I was saying?

8 MR. FIGLER: Of course.

9 THE COURT: Yes.

10 MS. LEWIS: Judge, I can point out specific
11 examples of things that are in our three conspiracy
12 instructions that are not contained in D9.

13 UNIDENTIFIED SPEAKER: Yes.

14 MS. LEWIS: Just as an example, for example,
15 conspiracy is an agreement our instruction says which
16 they have. And then our instruction says the crime is
17 the agreement to do something unlawful. It doesn't --
18 does not matter whether it was successful or not. Their
19 instruction doesn't address that.

20 MR. FIGLER: And that's --

21 MS. LEWIS: That isn't --

22 MR. FIGLER: -- extraneous.

23 MS. LEWIS: It's not.

24 MR. FIGLER: That's not the law of
25 conspiracy, per se. That does not -- that's not what

1 the definition of conspiracy is under Bolden. That's
2 extra dicta language that they want to throw in every
3 case, sure, but show me a case where it's supported as
4 being an instruction. Not. Bolden is the last word --

5 THE COURT: Were you finished?

6 MR. FIGLER: -- on what is conspiracy.

7 MS. LEWIS: It's okay.

8 MR. FIGLER: I'm sorry.

9 MS. LEWIS: It's okay. I'm done.

10 MR. FIGLER: It's just, you know, why they
11 get extra language and I don't get my eyewitness
12 identification which I've offered in about ten other
13 murder cases that always come in. It seems to me --

14 THE COURT: Which one?

15 MR. FIGLER: Which murder case has it come
16 in?

17 THE COURT: No, no, no. Which instruction.

18 MR. FIGLER: The eyewitness identification.
19 You said it was duplicative of the other one, the D1.

20 MS. LEWIS: Judge, I think we need to finish
21 this issue of D9 before we move on to the next one.

22 THE COURT: D9's coming in.

23 MS. LEWIS: Okay. And the State's
24 conspiracy instructions?

25 THE COURT: Yes.

1 MS. LEWIS: I'll take it up right now.

2 THE COURT: All right. Now, let's not go
3 back to D1 yet, because I want to give Mr. Figler every
4 opportunity.

5 MR. FIGLER: I appreciate it, Judge.

6 THE COURT: Let's talk about malice. You
7 have two malice instructions --

8 MR. FIGLER: I just submit it, Judge. I say
9 that the malice instruction that the State has offered
10 includes extraneous language that the actual definition
11 of malice aforethought is presented in Guy v. State
12 which is a '92 decision.

13 And I'll leave it to the Court. This isn't
14 one that I need to fight about. It's just what I think
15 is appropriate.

16 MS. LEWIS: And, Judge, the record should
17 reflect we did meet last night. We had two different
18 malice instructions. We discussed this particular issue
19 at length.

20 And based on that, we paired it down to one
21 malice instruction, and that's the one that we included
22 in our packet. It does have some extra language that
23 D10 does not have, so we would ask to give ours.

24 THE COURT: So the language contained in D10
25 is also contained in the State's instruction?

1 MS. LEWIS: Yes.

2 THE COURT: Okay. And is there additional
3 language in the State's instruction on malice that,
4 Mr. Figler, you find objectionable?

5 MR. FIGLER: I just think it's extraneous,
6 Judge, and superfluous, and that it's not supported by
7 any cases. There's one case where it's listed as dicta,
8 and that's the only time it ever appears in a Nevada
9 Supreme Court case, so I don't think it's necessary.

10 THE COURT: D10. I'm not giving D10. We'll
11 make a record.

12 Let's go back -- does that include all the
13 defense instructions?

14 MR. FIGLER: That would hit all of ours.

15 MS. LEWIS: Actually, that's all of Mr. --

16 THE COURT: All right. Now let's talk about
17 D1.

18 MS. LEWIS: That's all of Mr. Figler's.

19 MR. FIGLER: I don't know if Mr. Singer has
20 any.

21 THE COURT: Yes, Mr. Singer?

22 MR. SINGER: No. (Indiscernible).

23 THE COURT: All right.

24 MR. SINGER: Thank you, Judge.

25 THE COURT: You have heard the witness. You

1 heard the testimony of an eyewitness in deciding how
2 much weight to give as testimony. You may take into
3 account various factors mentioned in these instructions
4 concerning credibility.

5 In addition to these factors in evaluating
6 eyewitness identification, you may also take into
7 account (indiscernible) an opportunity of the witness to
8 observe the offender based upon the length of time and
9 observation and conditions at time of observation,
10 whether the identification was the product of the
11 eyewitness' own recollection or was the result of
12 subsequent influence or suggestiveness, any inconsistent
13 identifications made by the eyewitness, the totality of
14 the circumstances surrounding the witness. State.

15 MS. LEWIS: Judge, we have a credibility of
16 witness instruction that essentially addresses most of
17 these points, and it basically says credibility or
18 believability of a witness should be determined by his
19 manner upon the stand, his relationship to the parties,
20 his fears, motives, interests or feelings, his
21 opportunity to have observed the matter to which he
22 testified, the reasonableness of his statements and the
23 strength or weakness of his recollections. It goes onto
24 say more. As far as I know it's the standard --

25 THE COURT: I agree.

1 MS. LEWIS: -- stock instruction. I don't
2 have on objection.

3 THE COURT: I think that language addresses
4 all witnesses, not just eyewitnesss. It covers all the
5 operative points in D1; therefore, I'm inclined to just
6 not give D1.

7 MR. FIGLER: So are you reconsidering the
8 conspiracy because that does the same thing or no?

9 THE COURT: I think the conspiracy language
10 -- the three are not inconsistent in theory.

11 MR. FIGLER: And neither are these two.
12 This is --

13 THE COURT: You know what, David? That's
14 not a bad argument. Okay. It's in.

15 MR. FIGLER: Thank you, Judge.

16 THE COURT: We'll put it right behind the
17 credibility, believability instruction.

18 MR. FIGLER: That's where it belongs.
19 That's exactly where it belongs in the packet.

20 THE COURT: So you have them matched up.

21 MR. BATEMAN: Do you want to go through our
22 packet real quick?

23 Was there any others, David? We had just
24 did the aiding and abetting and --

25 MR. FIGLER: Right. There was a --

1 MR. BATEMAN: -- then there was one other --

2 MR. FIGLER: -- secondary the act of one is
3 the act of all, so it is duplicated in there in their
4 packet. The act of one is the act of all shows up
5 twice.

6 THE COURT: How are we going to do this
7 easy? Do we have a clean package?

8 MR. FIGLER: I believe we did.

9 THE COURT: I want a clean package of the
10 Dls that I -- or the D instructions that I want to mark
11 as a Court's exhibit so you can have a record on appeal
12 for them.

13 (Off-record colloquy)

14 MR. BATEMAN: Do you have a -- you've only
15 included the one, right?

16 THE COURT: I'm including --

17 MR. FIGLER: The one and the two.

18 THE COURT: -- D1.

19 MR. BATEMAN: Two.

20 THE COURT: There was two. D1 --

21 MR. BATEMAN: Give me clean copies of D1 and
22 D2. I'll give them to the judge and we can
23 (indiscernible).

24 MR. FIGLER: Okay. D2 needs to have the
25 amendment to it. I'll print these up in the right

1 format. I wanted to keep them in different format so we
2 could distinguish them.

3 MS. LEWIS: I've already done it. She's
4 already got one.

5 THE COURT: Yes. They all have to be in the
6 same format.

7 MS. LEWIS: Judge, I --

8 THE COURT: How are we going to do this?

9 MS. LEWIS: I've already done one of them I
10 believe your clerk has already given you, and I'm typing
11 the other one right now.

12 THE COURT: Which one was that? This one?

13 THE CLERK: (Indiscernible).

14 MR. FIGLER: So what's coming? D1 and D2 or
15 D1 and D9?

16 MR. BUNIN: D1 and D9, I thought.

17 THE COURT: Whether two or more persons
18 joined together by common design?

19 MR. BATEMAN: I think we're including the
20 Bolden instruction and then that number one. Is that
21 the two you --

22 THE COURT: Well, here's D1 we're including.

23 MR. FIGLER: Right.

24 MS. LEWIS: D1 I'm typing right now. Give
25 me a couple more minutes.

1 (Off-record colloquy)

2 MR. FIGLER: I've got all the ones that were
3 offered but not admitted, clean copy of them. I'm going
4 to give those to your clerk.

5 THE COURT: Yes.

6 MR. FIGLER: So that would be D2, D3, D4,
7 D5, D6, D7, D8 and D10.

8 THE COURT: Good. I have those too.

9 MR. FIGLER: (Indiscernible) as Court
10 exhibit next?

11 THE COURT: Court exhibit next in order,
12 that's fine.

13 THE CLERK: Court exhibits
14 (indiscernible) --

15 THE COURT: Staple them together and --

16 THE CLERK: No. Wait, Your Honor.

17 THE COURT: Oh.

18 THE CLERK: These are the ones that are
19 proposed but not used, right?

20 THE COURT: Correct.

21 THE CLERK: Okay. They're filed in the
22 clerk's office as --

23 MR. FIGLER: Okay.

24 THE COURT: -- proposed not used.

25 MR. FIGLER: Thank you.

1 THE COURT: Okay.

2 THE CLERK: Defendant's.

3 MR. BATEMAN: Before you insert those, do we
4 want to go through ours, Judge, or how do you want to do
5 it?

6 THE COURT: Well, right now as a consequence
7 of this effort I've pulled apart the entire package.

8 MR. BATEMAN: Okay.

9 THE COURT: But what I want is one clean
10 copy, and I want multiple copies for --

11 MR. FIGLER: And if we could just spin
12 through the State's packet that they gave you, and I can
13 just note my objections for the record --

14 THE COURT: Yes.

15 MR. FIGLER: -- if that's okay.

16 THE COURT: Yes.

17 MS. LEWIS: Here. Do you want mine? Mine's
18 clean.

19 MR. BATEMAN: Oh, yeah.

20 MS. LEWIS: You can take mine.

21 MR. BATEMAN: Let me give you -- Judge, if
22 you pulled it apart already --

23 MS. LEWIS: Here. Mine's clean. Just trade
24 with mine. The only thing is this is the one that --
25 one of the Dls or I don't know which one that he wanted.

1 I've already typed it.

2 MR. BATEMAN: This's D9.

3 MS. LEWIS: It needs to be included
4 somewhere. You need to figure out where to put it in.

5 MR. FIGLER: D9 is the conspiracy. D1 is
6 the (indiscernible).

7 MS. LEWIS: Why don't you guys decide right
8 now where to put it in there.

9 MR. BATEMAN: (Indiscernible) this one too.

10 MR. FIGLER: No. He said that was covered
11 by the other one.

12 MR. BATEMAN: Oh, okay.

13 MS. LEWIS: No. That's the one that you
14 wanted --

15 MR. FIGLER: Is that the one --

16 MS. LEWIS: -- that he said he would give.

17 THE COURT: Is that the ID one?

18 MR. FIGLER: Oh, no. There's a third one,
19 Judge. In this case, there are two defendants. Some
20 evidence may be applicable to one and only one. That
21 was a third one that was (indiscernible).

22 MR. BATEMAN: That's right. You did
23 (indiscernible).

24 MS. LEWIS: And you said you would give it.

25 MR. FIGLER: That is correct.

1 THE COURT: Well, it was covered by a
2 different instruction.

3 MS. LEWIS: But you said you would give it.

4 (Off-record colloquy)

5 THE COURT: I'm going to give it.

6 MS. LEWIS: Look, I wouldn't have typed it
7 if you didn't say you'd give it, so take it.

8 MR. FIGLER: That was D5. I'm pulling D5
9 out of the proposed.

10 MR. BATEMAN: Judge, I'm going to give you a
11 clean copy of ours, and you can insert what you just
12 received.

13 THE COURT: Hang on. All right.

14 MS. LEWIS: But you need to -- where's that
15 clean copy because that's -- that you took? That one in
16 your left hand?

17 MR. FIGLER: Yes.

18 MS. LEWIS: Yeah. Bring it back here. You
19 need to decide where in here to put it.

20 MR. FIGLER: Okay. We'll figure out as
21 we're going through it.

22 MS. LEWIS: We need to give it to the judge.
23 No, because he wants a clean copy of it.

24 THE COURT: Hold on to that clean copy.

25 MR. FIGLER: Hold on to clean copy. We're

1 going to go through and insert.

2 THE COURT: All right. Page 1 a problem?

3 MR. FIGLER: No.

4 MR. BATEMAN: No.

5 THE COURT: If it needs instructions a
6 problem?

7 MR. FIGLER: Are we going to mark these as
8 numbers now? Why don't we do that. That will be
9 instruction No. 2, correct? 1.

10 MS. LEWIS: No. 1 is the first page.

11 THE COURT: Yeah. 1 is the first page.

12 MR. FIGLER: Right. So that's No. 2.

13 THE COURT: 2. Amended is 3.

14 MR. FIGLER: And, Judge, the parties -- at
15 least myself and Mr. Bateman have decided that with
16 regard to the amended information it should stay as
17 instruction 3, but to save the Court time, Your Honor
18 would only have to read the counts, not the
19 (indiscernible) within.

20 THE COURT: I appreciate that. Both parties
21 agree?

22 MR. SINGER: Yes.

23 THE COURT: Mr. Singer?

24 MR. BATEMAN: Right. There's an initial
25 sentence, and then at the end of all of the -- and you

1 read the counts, and then at the end of all the counts
2 there's actually two more paragraphs that I believe the
3 Court would probably have to read --

4 MR. FIGLER: That's correct.

5 MR. BATEMAN: -- because that's the standard
6 stuff.

7 THE COURT: Okay. So I'm going to read
8 lines one through 14, page 1 of that instruction --

9 MR. FIGLER: And then skip.

10 THE COURT: -- and then line -- and then
11 skip to the back and read lines 6 through 11.

12 MR. FIGLER: Save us some time.

13 MR. SINGER: The only problem with that,
14 Judge, is that like in their opening, they put Counts X
15 and XI on both defendants which is not accurate.

16 MR. BATEMAN: Judge, I'm going to stand up
17 in summation and state specifically that I don't believe
18 that we charged Pierre with those charges, with those
19 assault with deadly --

20 MR. SINGER: Right. But then when you read
21 this particular jury charge, you're just going to read
22 Count X, assault with a deadly weapon.

23 MS. LEWIS: No. He's going to -- no. He's
24 going to say defendant so and so is charged with A, B,
25 C, D. Defendant so and so is charged with A, B, C, D,

1 E, F.

2 THE COURT: How am I going to do that,
3 Linda? I can't do that.

4 MR. FIGLER: Yeah.

5 THE COURT: I can read --

6 UNIDENTIFIED SPEAKER: Yeah.

7 THE COURT: I can read lines 1 through 14 as
8 outlined.

9 UNIDENTIFIED SPEAKER: Correct.

10 THE COURT: And then I can read -- how do
11 you want me to do it, Phil?

12 MR. SINGER: I don't think there's any way
13 to do it. I mean, unless you read the first nine counts
14 just of line and (indiscernible) Count X, XI, the whole
15 count.

16 MR. BATEMAN: Right. Read the whole thing.

17 (Off-record colloquy)

18 MS. LEWIS: I think it would be easier if
19 you just said defendant Pierre Joshlin is charged with
20 and list the counts, name the counts he's charged with.
21 Defendant Jamar Matthews is charged with and name the
22 counts he's charged with, and you don't have to read all
23 the things.

24 MR. SINGER: That's fine.

25 THE COURT: Okay.

1 MR. SINGER: So you don't have to read all
2 the to wits or all that other stuff.

3 MS. LEWIS: As long as you agree to separate
4 them that way, though. I mean, you'll have to make a
5 note to yourself.

6 THE COURT: Well, it looks like -- yeah.

7 MR. BATEMAN: The only difference is the
8 possession of short-barrel rifle is charged I believe as
9 to Jamar Matthews, and then the two assaults are charged
10 as to Pierre Joshlin.

11 MR. SINGER: No.

12 THE DEFENDANT: No, no, no, no.

13 MR. BATEMAN: I'm sorry. Jamar Matthews.

14 MS. LEWIS: It's backwards.

15 MR. BATEMAN: So Pierre is not in Count

16 VI --

17 MR. SINGER: Or X or XI.

18 MR. BATEMAN: -- X or XI.

19 THE COURT: You guys are killing me.

20 MR. SINGER: VI, X and XI.

21 THE COURT: All right. VI, X and XI as

22 to --

23 MR. BATEMAN: Pierre Joshlin. He's not in
24 those. Those are only charged as to Jamar Matthews.

25 THE COURT: So I say you should note Counts

1 VI, X, XI are charged as to Jamar Matthews only?

2 MR. BATEMAN: Correct.

3 MR. FIGLER: Fine. However you want to do
4 it to expedite time.

5 THE COURT: Well, I'll think about that.

6 MR. BATEMAN: However you want to do it,
7 Judge.

8 THE COURT: Exactly. Four is in this case.

9 MR. FIGLER: You know, we had decided if all
10 parties were amenable to just get rid of all references
11 to voluntary manslaughter, and Ms. Lewis can knock all
12 those out and put a fresh set. It's up to Your Honor.
13 We'll waive any --

14 THE COURT: You guys tell me you have dinner
15 and you settle instructions?

16 MR. FIGLER: No. We all agreed that --

17 THE COURT: Okay.

18 MR. FIGLER: -- if Your Honor was --

19 THE COURT: So what are we doing?

20 MR. FIGLER: If Your Honor's cool with
21 getting rid of voluntary manslaughter --

22 THE COURT: Why is voluntary manslaughter
23 even mentioned here? This is --

24 MR. FIGLER: Because open --

25 THE COURT: -- ID defense.

1 MR. FIGLER: -- murder necessarily
2 includes --

3 THE COURT: Yeah.

4 MR. FIGLER: -- ba, ba, ba, ba.

5 THE COURT: Yeah.

6 MR. FIGLER: But involuntary is not listed
7 here. I figured might as well get rid of voluntary.
8 There's no factual basis for voluntary.

9 MS. LEWIS: But Mr. Singer has to agree as
10 well.

11 MR. SINGER: I agree.

12 THE COURT: So are we still on 4? It says
13 in this case defendants are accused.

14 MR. FIGLER: Right. So then it would just
15 say --

16 THE COURT: Do you want to strike voluntary
17 manslaughter?

18 MR. FIGLER: Yeah.

19 MR. SINGER: That's fine, Judge.

20 THE COURT: So, Linda, are you doing that
21 one too?

22 MS. LEWIS: I guess.

23 MR. BATEMAN: We'll get you a clean copy by
24 either this evening, Judge, and we'll E-mail it to your
25 chambers.

1 THE COURT: Yeah. Right.

2 MR. BATEMAN: Or tomorrow morning.

3 MS. LEWIS: I'll do it right now.

4 THE COURT: That's exactly where I'll be.

5 MR. FIGLER: That's 4. 5.

6 THE COURT: 5, murder is the unlawful.

7 MR. FIGLER: Correct.

8 THE COURT: (Indiscernible). 6, expressed
9 malice.

10 MR. FIGLER: Correct.

11 THE COURT: Murder in the first degree, 7.

12 MR. FIGLER: Correct.

13 THE COURT: Law does not undertake, 8.

14 MR. FIGLER: Correct.

15 THE COURT: It is -- if an illegal is 9.

16 MR. FIGLER: Our objection, Your Honor, is
17 that 9 and 10 are both transferred-intent instructions.
18 One's duplicative of the other. That the State would
19 have to choose because it unnecessarily gives emphasis
20 to the transferred intent there.

21 THE COURT: Why do we need both, State?

22 MR. BATEMAN: One talks about the definition
23 of transferred intent and one is specific as to an
24 attack on a group. Transferred intent could be I have
25 no idea somebody's behind the -- my intended target.

1 I also have a case, Your Honor. I'd be
2 happy it hand it to you, Pal v. State, 113 Nevada 258,
3 what would be instruction No. 10 is specifically
4 referenced in this particular --

5 MR. FIGLER: That's correct, Your Honor, but
6 not with instruction 9 accompanying it. I'd say it's
7 one or the other, and I don't care which one at this
8 point because they're both good law. Just that they --
9 they don't need to be emphasized.

10 MR. BATEMAN: I don't think they're
11 emphasized by having two instructions on it.

12 MR. FIGLER: About transferred intent. I
13 think it is.

14 MR. BATEMAN: We can put one at the bottom
15 of the first one.

16 THE COURT: That's what I was thinking,
17 moving -- move what you think to be 10 --

18 MR. BATEMAN: Down into 9?

19 THE COURT: -- down into 9.

20 MR. BATEMAN: Okay.

21 MR. FIGLER: That solves 70 percent of the
22 problem of my objection.

23 THE COURT: 70 percent. I'll take 70 at
24 this point.

25 MR. FIGLER: All right. So that will be 9,

1 and we're going to strike that as 10.

2 MR. BATEMAN: I'll move it to 9.

3 THE COURT: Move to 9.

4 MR. BATEMAN: Okay.

5 THE COURT: All right. 10, the intention to
6 kill.

7 MR. FIGLER: Correct.

8 THE COURT: 11, all murder.

9 MR. FIGLER: Correct.

10 MR. BATEMAN: Yep.

11 THE COURT: 12, you are instructed.

12 MR. FIGLER: Correct.

13 THE COURT: Are we eliminating manslaughter?

14 MR. BATEMAN: Yes.

15 MR. FIGLER: Yes. And the next one.

16 THE COURT: Heat of passion. If you find
17 the State.

18 MR. FIGLER: And the next one.

19 THE COURT: In arriving at your verdict.

20 MR. FIGLER: That's correct.

21 MR. BATEMAN: That's good.

22 THE COURT: That will be 13. You are
23 instructed.

24 MR. SINGER: There's voluntary in there.

25 MR. BATEMAN: I just need to take out --

1 we'll just strike the voluntary manslaughter. That's --

2 THE COURT: 13. 14 is --

3 MR. BATEMAN: It's actually -- I think that
4 was 14, Judge.

5 MR. FIGLER: Nope. Yeah. That was 14.

6 MR. BATEMAN: You are instructed that if you
7 fine defendants guilty --

8 THE COURT: You're right.

9 MR. BATEMAN: -- that's 14.

10 THE COURT: You're right. You're right, 14.
11 15 is off cycle or off font there --

12 MR. BATEMAN: We'll move it.

13 THE COURT: -- or whatever you call it.

14 MR. FIGLER: That's the new one, so we're
15 going to object to that because that hasn't been
16 approved yet.

17 THE COURT: What do you mean?

18 MR. FIGLER: I think that's a brand-new
19 instruction.

20 MS. LEWIS: No.

21 THE COURT: You are instructed that a
22 firearm whether loaded or unloaded, operable or
23 inoperable, is a deadly weapon?

24 MR. FIGLER: I just haven't seen that
25 before, so I'm just going to make my objection to it.

1 THE COURT: Okay. Objection is -- what's
2 the basis for the objection?

3 MR. FIGLER: That a firearm is -- oh. She
4 took out the deadly weapon one.

5 MR. BATEMAN: Yeah.

6 MR. FIGLER: That's fine. Okay. There was
7 two instructions that were in there. She took one out.
8 She took the statutory instruction out and put this new
9 one in, so I just don't know if it's been --

10 MR. BATEMAN: Well, you're not suggesting
11 the firearm isn't a deadly weapon, are you?

12 MR. FIGLER: No, I'm not. So that's fine.

13 THE COURT: All right. That's 15.

14 MR. BATEMAN: Yep.

15 THE COURT: 16, in order to use.

16 MR. BATEMAN: Yep.

17 MR. FIGLER: That's fine.

18 THE COURT: 17, attempted murder.

19 MR. FIGLER: That's fine.

20 THE COURT: 18, malice aforethought.

21 MR. FIGLER: With our noted objection.

22 THE COURT: With your noted objection. 19,
23 it is not necessary.

24 MR. FIGLER: I fundamentally oppose what the
25 State doesn't have to prove being in instructions. I

1 think instructions should be what the State does have to
2 prove, but on this particular one I don't take great
3 offense.

4 THE COURT: All right. 20 --

5 MS. LEWIS: Then why did you say it?

6 MR. FIGLER: Because I made my record.

7 THE COURT: -- robbery is the unlawful. 21,
8 is to knowingly.

9 MR. BATEMAN: That's short-barrel shotgun
10 statute.

11 MR. FIGLER: That's correct.

12 THE COURT: Okay.

13 MR. BATEMAN: Or rifle (indiscernible).

14 THE COURT: 22, assault with a -- an assault
15 with a deadly weapon.

16 MR. FIGLER: Again, the last line, Judge,
17 doesn't need to be in place. It says what they don't
18 need. I'd ask that it be stricken.

19 MR. BATEMAN: I'm sorry.

20 THE COURT: Yeah. Let's see. The statute
21 does read reasonable apprehension of immediate bodily
22 harm by or through the use of a deadly weapon.

23 MR. BATEMAN: Here's the problem. If that's
24 not in there and they get up and say no injury occurred,
25 it can be an assault.

1 MR. FIGLER: That argument, and everyone's
2 entitled to argument.

3 MR. BATEMAN: Not if it's the law.

4 MR. FIGLER: But that's not the law.

5 MR. BATEMAN: If it is the law.

6 THE COURT: The law just requires the
7 creation of reasonable apprehension. It does not
8 require actual infliction. I can't remember the case
9 name off the top of my head.

10 MR. FIGLER: I know it's not an untrue
11 statement of law, but it's argument. I always object to
12 anything that would be argument when the statute states
13 it all. They're allowed to argue what they want.

14 THE COURT: All right. I'll strike it.

15 MR. FIGLER: Thank you.

16 THE COURT: 23, there are two or more
17 persons -- where there are two or more persons.

18 MR. BATEMAN: Wait, wait, wait.

19 THE COURT: Where there are --

20 MR. BATEMAN: This is where I had the
21 conspiracy are three. Did you --

22 THE COURT: All right. Let's insert them.

23 MR. FIGLER: That's fine. D --

24 MR. BATEMAN: So this would be 20 --
25 whatever you want to insert right here would be 20 --

1 THE COURT: All right.

2 MR. FIGLER: This would be the D9?

3 MR. BATEMAN: 23.

4 THE COURT: You want D9 in front or you want
5 D9 in the back of the conspiracy?

6 MR. FIGLER: I think D9 in front because it
7 tells --

8 THE COURT: All right.

9 MR. FIGLER: -- what the conspiracy is.

10 (Off-record colloquy)

11 THE COURT: So D9 in front becomes 23. And
12 we strike the citation?

13 MR. FIGLER: Yeah. We will strike the
14 citation, Judge, obviously.

15 THE COURT: Conspiracy is agreement, 24.

16 MR. FIGLER: And we object to the act of one
17 is the act of all being in there.

18 THE COURT: Noted for the record. We
19 haven't settled these up yet, anyway, but I guess we
20 kind of are.

21 MR. BATEMAN: We're pretty close.

22 MR. FIGLER: We're getting close.

23 THE COURT: Each member of the criminal
24 conspiracy, 25.

25 MR. FIGLER: I've gotten out of order.

1 MR. BATEMAN: (Indiscernible) conspiracy
2 ones. I think you objected to it, anyway.

3 MR. FIGLER: I objected to it, anyway,
4 Judge, so if I could just note my objection to that
5 again.

6 THE COURT: Okay. Each member of conspiracy
7 is liable for the act, each act, and bound by each
8 declaration of every other member of the conspiracy.
9 That one you object to?

10 MR. FIGLER: Yeah. I don't believe that
11 that is actually consistent with Bolden, so that was our
12 objection.

13 THE COURT: Okay. 26. It is not necessary
14 in proving.

15 MR. BATEMAN: (Indiscernible) objection?

16 MR. FIGLER: Same thing, Judge.

17 THE COURT: Okay. 27, where two or more
18 persons joined together.

19 MR. FIGLER: Is that my -- no.

20 MR. SINGER: I think he missed something.

21 MR. BATEMAN: That's kind of the first part
22 of the aiding. That's the aiding and abetting one.
23 It's kind of in between.

24 MR. FIGLER: I got lost.

25 THE COURT: Are you -- everybody up?

1 MR. FIGLER: Not yet, Judge.

2 THE COURT: So far we were doing okay.

3 MR. FIGLER: We were good and I got lost. I
4 apologize, Your Honor.

5 THE COURT: It's okay.

6 (Off-record colloquy)

7 MR. FIGLER: I'll tell you exactly where I
8 got lost was at 24. So if we could just tell me what 25
9 is I'm going to --

10 THE COURT: Go back. Okay. 25 is each
11 member of a criminal conspiracy.

12 MR. FIGLER: Is liable. Okay. And we
13 objected.

14 THE COURT: And you object --

15 MR. FIGLER: -- to that one --

16 THE COURT: You --

17 MR. FIGLER: -- and I got that.

18 THE COURT: And you object to 25.

19 MR. FIGLER: That's 25.

20 THE COURT: All right. 26, it is not
21 necessary in proving a conspiracy.

22 MR. FIGLER: Got that now. Thank you.

23 THE COURT: Are you objecting 26?

24 MR. FIGLER: Yes, we are, Your Honor.

25 THE COURT: Okay. 27, where two or more

1 persons joined together.

2 MR. FIGLER: And I'm just trying to locate
3 that one.

4 THE COURT: It's the aiding and abetting.

5 MR. FIGLER: Is that the general aiding and
6 abetting or is that the one that has --

7 MR. BATEMAN: Yes. We have two aiding and
8 abettings.

9 MR. FIGLER: -- the act of one is act of
10 all.

11 THE COURT: It's the only one I have.

12 MR. SINGER: No. The one before that.

13 MR. BATEMAN: The next one after as well.

14 MR. FIGLER: Okay. I don't have that one.

15 THE COURT: Well, whatever. I --

16 MR. FIGLER: I have no objection to that
17 first aiding and abetting which is No. 27.

18 THE COURT: It ends in contemplation of all
19 the acts of one or the acts of all.

20 MR. BATEMAN: This was before.

21 THE COURT: I --

22 MR. BATEMAN: You have an objection to this
23 one, but not this one.

24 MR. FIGLER: Right.

25 MR. SINGER: There's one that says to aid

1 and abet means to actively know (indiscernible)
2 purposely.

3 MR. FIGLER: That one I have no objection
4 to. That's the law.

5 THE COURT: Say that again, Phil.

6 MR. SINGER: The one that's before that
7 should say to aid and abet means to actively.

8 THE COURT: Okay. So that should be 27. To
9 aid or abet means to actively should be 27.

10 MR. BATEMAN: Fine.

11 MR. SINGER: And then where two or more
12 persons.

13 THE COURT: Should be 28.

14 MR. FIGLER: I'm sorry, Judge. 28 I think
15 is being pulled.

16 THE COURT: Okay. We don't need 28?

17 MR. BATEMAN: Wait. Which one was that?

18 MS. LEWIS: Where two or more persons.

19 THE COURT: Where two or more persons.

20 MS. LEWIS: Is that it?

21 MR. BATEMAN: Yeah.

22 THE COURT: Because it's covered in 27.

23 MR. BATEMAN: Right. And, actually, in the
24 conspiracy statute or the conspiracy --

25 THE COURT: All right. So 28 is the -- now

1 I'm onto flight. Is everybody onto flight?

2 MR. FIGLER: Yep.

3 MR. SINGER: Yeah.

4 THE COURT: 28 of the flight of a person
5 immediately after.

6 MS. LEWIS: Um-h'm.

7 MR. FIGLER: And we object that that doesn't
8 have the necessary safeguards, and we offered two
9 alternatives, neither of which was accepted by the
10 Court.

11 THE COURT: Correct. Those are marked as
12 defense exhibits.

13 MR. FIGLER: Thank you.

14 THE COURT: I feel that the flight
15 instruction is given -- is supported by current case
16 law.

17 Mr. Bateman, I want you to make your
18 statement on the record, too, regarding -- because I
19 can't recall what you had --

20 MR. FIGLER: I wouldn't disagree that that
21 was an approved flight instruction by the State of
22 Nevada.

23 THE COURT: Yeah. It --

24 MR. FIGLER: But I did note that in the case
25 law it says that it should be given cautiously and under

1 the proper safeguards, and that's why I offered my two
2 alternate versions.

3 THE COURT: Okay. Your record's made. Very
4 good.

5 29, to constitute the crime charged.

6 MR. FIGLER: Correct. Oh, we would object,
7 Your Honor, of what the State does -- just I'm objecting
8 for the record. We object to what they don't have to
9 prove.

10 If motive is not an element, there shouldn't
11 be a commentary in the instruction about motive because
12 it unnecessarily emphasizes what the State does not have
13 to prove which is not the burden on the State.

14 THE COURT: Very good. You've made your
15 record on 29.

16 30, the defense -- the defendant is presumed
17 innocent --

18 MR. FIGLER: Object.

19 THE COURT: I figured you might. That's 30.

20 MR. FIGLER: That's a reasonable doubt.

21 THE COURT: That's the reasonable doubt
22 instruction. It does appear to be the correct
23 reasonable doubt instruction.

24 MS. LEWIS: We'll take it.

25 MR. FIGLER: That's a little funny.

1 THE COURT: Okay. 31, it is the
2 constitutional right of the defendant. Based upon my
3 proffer or the proffer that you made to me with your
4 clients, that is the appropriate instruction based upon
5 your decision, correct, Counsel?

6 MR. FIGLER: Correct.

7 THE COURT: Mr. Singer?

8 MR. SINGER: Yes.

9 THE COURT: All right.

10 MR. FIGLER: And then I would like to insert
11 our D5 which was approved at that point.

12 THE COURT: Okay.

13 MS. LEWIS: No. I think it needs to go a
14 couple after that.

15 MR. FIGLER: Or after.

16 MS. LEWIS: Look at the next --

17 MR. FIGLER: It needs to be close to the
18 next one.

19 THE COURT: All right.

20 MR. FIGLER: That's all I'm saying.

21 THE COURT: All right. Okay.

22 MR. FIGLER: In fact, it really does
23 encompass theirs plus ours. It has actually the same
24 language.

25 MS. LEWIS: That's what I tried to say.

1 MR. FIGLER: But ours just has that little
2 extra in there that emphasizes the difference between
3 the two defendants which I think is appropriate in a
4 codefendant case.

5 MS. LEWIS: Um-h'm.

6 THE COURT: So you want it -- okay. Hang
7 on, then.

8 MS. LEWIS: 32.

9 THE COURT: So we've got 31. We're on to 32
10 which is you are here to determine the guilt --

11 MS. LEWIS: Yes.

12 THE COURT: -- or innocence.

13 MR. FIGLER: And our D5 which is the exact
14 same language, but it does make that little extra about
15 how there's two separate defendants in this case, and I
16 think that's important.

17 THE COURT: All right. And you want that as
18 33?

19 MR. FIGLER: Instead of --

20 MS. LEWIS: Can you tell me --

21 MR. FIGLER: -- their 32, actually, to
22 replace their 32.

23 MS. LEWIS: Can you tell me how does D5
24 begin?

25 MR. FIGLER: In this case --

1 THE COURT: In this case.

2 MR. FIGLER: -- there are two defendants.

3 MS. LEWIS: Okay. And we've got a clean
4 copy of that one.

5 MR. FIGLER: So if we could just sub that
6 in.

7 THE COURT: Do you have any objection to
8 substituting D5 for your 32? There's your 32. D5.

9 MS. LEWIS: No, no, no. We need them both
10 because they don't both say the same thing.

11 MR. BATEMAN: Yeah, they do.

12 MS. LEWIS: They do?

13 MR. BATEMAN: Yeah.

14 MS. LEWIS: Oh, okay. Then that's fine.

15 MR. FIGLER: I think --

16 THE COURT: Then --

17 MR. BATEMAN: There's no objection --

18 THE COURT: Then --

19 MR. BATEMAN: -- making ours 32.

20 THE COURT: Then we're going to make yours
21 32.

22 MR. FIGLER: Thank you, Judge.

23 (Off-record colloquy)

24 THE COURT: Now I have a clean copy of one
25 we don't need. In this case there are two defendants.

1 Is that the one we do not need?

2 MS. LEWIS: No. That --

3 MR. BATEMAN: Well, the only thing that this
4 one says is that when you --

5 MS. LEWIS: No. He's on a different
6 instruction.

7 MR. BATEMAN: I know.

8 MS. LEWIS: Say it again because that one's
9 a different --

10 THE COURT: Okay. Now I've got the one that
11 was D5 --

12 MR. BATEMAN: Right.

13 THE COURT: -- now is 32.

14 MS. LEWIS: Yeah.

15 MR. BATEMAN: Now he's on 33.

16 THE COURT: I believe, Linda, you just
17 approached me and you gave me one that says in this case
18 there are two defendants.

19 MS. LEWIS: Yeah.

20 THE COURT: Isn't that the one --

21 MS. LEWIS: That's a clean copy.

22 MR. FIGLER: Yeah. That's fine.

23 MR. BATEMAN: That's a clean copy of theirs
24 that you're inserting.

25 MS. LEWIS: I thought it was D5.

1 MR. FIGLER: And it does encompass the next
2 one as well.

3 THE COURT: Okay. So in this case you must
4 decide separately.

5 MR. FIGLER: Yeah. I think that goes out
6 because that --

7 MS. LEWIS: Right.

8 MR. FIGLER: -- is encompassed in our new
9 32.

10 THE COURT: Okay. 33, the evidence which
11 you are to consider.

12 MR. FIGLER: Correct.

13 MR. BATEMAN: No. That's in. Well, I don't
14 have a replacement yet, so as soon as I get a
15 replacement --

16 MS. LEWIS: Oh.

17 MR. FIGLER: That's 33.

18 THE COURT: Credibility or believability.

19 MR. FIGLER: That's 34.

20 THE COURT: That's 34.

21 MR. FIGLER: And then our D1 would be 35.

22 (Off-record colloquy)

23 THE COURT: Do I have a clean copy of D1?

24 MS. LEWIS: Yes. She should be printing
25 them or they should have printed.

1 Sharon, did you get those other E-mails to
2 print?

3 THE CLERK: (Indiscernible).

4 THE COURT: I'm sure my family's --

5 MR. FIGLER: Freaking out? That's 35.

6 We're almost done, Judge.

7 THE COURT: I know. Well, we're going to
8 get a clean copy of 35.

9 MR. FIGLER: Right.

10 THE COURT: 36, a witness who has special
11 knowledge.

12 MR. BATEMAN: Yep.

13 MR. FIGLER: That's fine, Judge.

14 THE COURT: Although you are here to
15 consider.

16 MR. FIGLER: That's fine, Judge.

17 THE COURT: 37. 38, if in your
18 deliberation.

19 MR. FIGLER: That's fine.

20 THE COURT: 39 --

21 MR. BATEMAN: When you retire.

22 THE COURT: -- you're here to retire -- you
23 are -- when you retire, 39. 40, you will now listen to
24 arguments of counsel.

25 MR. FIGLER: Okay.

1 THE COURT: Now I'm sure you guys are going
2 to fight about the verdict forms or --

3 MR. FIGLER: No. No objection to the
4 verdict form, Judge.

5 THE COURT: Okay. Let's --

6 MS. LEWIS: No. But we have to change them
7 to take --

8 MR. FIGLER: Except they have to --

9 MS. LEWIS: -- out all the manslaughter.

10 MR. FIGLER: -- remove manslaughter.

11 MS. LEWIS: Can you not interrupt me once,
12 please.

13 MR. FIGLER: Manslaughter.

14 THE COURT: All right.

15 MS. LEWIS: Just once.

16 THE COURT: So you're going to change the
17 verdict forms to reflect manslaughter by tomorrow?

18 MR. BATEMAN: Sure.

19 MS. LEWIS: Yes.

20 MR. FIGLER: I didn't interrupt you then.

21 THE COURT: All right. Can we settle these
22 now?

23 MR. FIGLER: The only thing that's left --

24 THE COURT: Let's settle them -- I want to
25 settle them tomorrow.

1 MR. BATEMAN: Yeah. That's fine.

2 MR. FIGLER: Fine, because, you know what,
3 Mr. Bateman and I are going to work on the theory
4 defense instruction and see if we can come up
5 (indiscernible) we all agree on.

6 THE COURT: I like that idea because I don't
7 want to get any more on the record (indiscernible).
8 Let's go off the record now. I think I'm good to go.

9 (Off-record colloquy)

10 MR. FIGLER: Congratulations, Judge.

11 THE COURT: Yeah.

12 MS. LEWIS: Sorry if you don't see us there,
13 but as you can tell, we have lots of work to do.

14 THE COURT: I understand. I'm just going to
15 go.

16 THE BAILIFF: I'll see you over there, boss.

17 THE COURT: Okay.

18 (Court recessed at 2:21 p.m. until Friday,

19 May 11, 2007, 9:30 at a.m.)
20
21
22
23
24
25

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FRED BOYD	74	82,88	97	100
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DEFENDANT'S WITNESSES:				
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THE STATE OF NEVADA,

Plaintiff

vs.

PIERRE JOSH LIN

JEMAR D. MATTHEWS,

Defendants
.....

CASE NO. C-228460

DEPT. NO. XVIII

**Transcript of
Proceedings**

BEFORE THE HONORABLE DAVID BARKER, DISTRICT COURT JUDGE

JURY TRIAL - DAY 5

FRIDAY, MAY 11, 2007

APPEARANCES:

FOR THE PLAINTIFF:

LINDA Y. LEWIS
SAMUEL G. BATEMAN
Deputy District Attorneys

FOR DEFENDANT JOSH LIN:

PHILLIP SINGER, ESQ.

FOR DEFENDANT MATTHEWS:

DANIEL M. BUNIN, ESQ.
DAYVID J. FIGLER, ESQ.

COURT RECORDER:

TRANSCRIPTION BY:

RICHARD KANGAS
District Court

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Littleton, CO 80120
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Proceedings recorded by audio-visual recording, transcript
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AA0001320

1 LAS VEGAS, NEVADA, FRIDAY, MAY 11, 2007, 9:36 A.M.

2 (Jury not present)

3 THE COURT: State of Nevada, plaintiff,
4 versus Jamar Matthews and Pierre Joshlin. Record should
5 reflect the presence of counsel for the State, counsel
6 for the defense, the defendants, outside the presence of
7 the jury.

8 We were in the process of settling jury
9 instructions yesterday afternoon. We had actually
10 tentatively numbered some instructions, but we now have
11 all -- should all have clean packages of instructions
12 that have been prepared, and we'll have to go through
13 and number.

14 Before we do that, there's two instructions
15 that we need to discuss further and insert or disregard.
16 First is an instruction that was submitted by the State.
17 States, "Your verdict must be unanimous to the charge.
18 You do not have to be unanimous on the principle of
19 criminal liability. It is sufficient that each of you
20 find beyond a reasonable doubt that the crime was
21 committed under any one of the principles of criminal
22 liability."

23 Is there any objection to that instruction?

24 MR. FIGLER: None from Mr. Matthews.

25 MR. SINGER: No, Judge.

1 THE COURT: All right. We'll insert that in
2 right after where it was in the package, right after the
3 aiding and abetting instruction.

4 MR. SINGER: That's fine.

5 THE COURT: Now we also have what we're
6 going to mark as D next in order. I don't remember how
7 many we have.

8 MR. FIGLER: 11 now. This will be 11.

9 THE COURT: I'm not going to touch this yet,
10 but we'll refer to it as D11. It is a -- well, we can
11 call for the record the second theory of defense
12 instruction.

13 Yesterday we discussed D7, and I disallowed
14 D7 jury instruction based upon the proffered decision
15 and discussion with counsel.

16 We now have what Mr. Figler has prepared as
17 a second -- what we can refer to as theory of defense
18 instruction that reads while the State has allowed --

19 MR. SINGER: Judge, can -- which one is
20 that? I'm sorry.

21 MR. FIGLER: That's a new one. I don't have
22 a copy for Mr. Singer.

23 MR. BATEMAN: Here, you want to read ours
24 while we're standing here.

25 MR. SINGER: Is it going in or it's being

1 argued?

2 MR. FIGLER: We're going to argue it.

3 THE COURT: We're arguing it. "While the
4 State has allowed to offer alternate theories of
5 criminal liability, the State is disallowed from taking
6 inconsistent positions with regard to material facts. A
7 fact is material if it has significant bearing upon the
8 theory of prosecution.

9 If the State takes the position that
10 Jamar Matthews was the driver of the vehicle as well as
11 the individual pursued on foot by Officer Walter, it
12 cannot suggest that the facts support a different
13 finding.

14 Therefore, you if you believe the State has
15 not proved beyond a reasonable doubt that Jamar Matthews
16 was the driver of the vehicle as well as the individual
17 pursued on foot by Officer Walter, then you must find
18 that Jamar Matthews was not at the scenes where the
19 other crimes took place and render a verdict of not
20 guilty on all counts."

21 State's position.

22 MR. BATEMAN: Well, Your Honor, the first
23 paragraph which is two sentences stating what the State
24 is or is not allowed to do, I don't know why that has
25 anything to do with theory of the defense. That's -- I

1 mean, I don't know any case law that says that, so I
2 would just object to that.

3 I don't know -- I know Mr. Figler said he
4 had some Ninth Circuit cases. I don't have any case law
5 with regard to that one way or another. I've never seen
6 it before, and I don't think it has anything to do with
7 theory of defense.

8 The second portion I think is what they're
9 claiming is their theory of the defense. Their theory
10 of the defense is identity.

11 THE COURT: Exactly.

12 MR. BATEMAN: Right. It's not -- and the
13 proffered case that I know Mr. Figler is referring to,
14 the instruction that was proffered in Crawford by the
15 defense and wasn't given by the district court in a
16 murder case was referenced voluntary manslaughter.

17 And this is the instruction, and this is on
18 the -- it's the State versus Crawford, 121 Nevada 744.
19 I'm looking for a pin. Let's go with the Pacific
20 Reporter, 121 P (indiscernible) D582 at 586.

21 This is the instruction. "If after
22 consideration of all the evidence you have a reasonable
23 doubt as to whether or not the defendant acted in heat
24 of passion, you must return a verdict of voluntary
25 manslaughter. This is because the State has the

1 burdening of proving beyond a reasonable doubt the
2 defendant did not act in the heat of passion."

3 That was the instruction that was at issue
4 in Crawford, and what the district court said is all
5 those other (indiscernible) instructions covered
6 essentially what was being offered by the defendant.

7 It went up to the Supreme Court, and the
8 Supreme Court said no, you have the right to have what
9 is called a significance instruction, the significance
10 of your theory of the case, and they said that that was
11 allowed in this particular case, and that was at issue.

12 And then it further even stated that the
13 district court is not required to give the significance
14 instruction when they're not accurate or -- I'll find
15 the portion that it says that.

16 There's another portion in here that says
17 that when they're not exactly accurate, but I don't see
18 how this particular offering is in any way analogous --
19 is in any way analogous to what we were talking about in
20 Crawford. This is specific facts.

21 THE COURT: Fact specific as opposed to the
22 analysis of the law.

23 MR. BATEMAN: Right. If you determine that
24 this element is as such, this is the significance of
25 making that determination. Being the driver in the

1 vehicle is not an element of any of the charges.

2 Their theory of defense is identity, and
3 that's why I kind of threw out there yesterday, and I
4 hadn't really thought about it, but, you know, they said
5 if you find that he's merely present, that might be, you
6 know, resulting in acquittal.

7 But this is too fact specific. It's not any
8 way analogous to the instruction that was at issue in
9 Crawford. I don't think it's appropriate.

10 THE COURT: Mr. Figler.

11 MR. FIGLER: Thank you, Judge. In every
12 single theory of defense case with the exception of this
13 one in Crawford -- and Crawford is not by any means heat
14 of passion instruction specific. I don't think anyone's
15 saying that.

16 What Crawford stands for is the general
17 proposition that no matter how weak or incredible the
18 evidence may be, the defense has an absolute right to
19 have the jury instructed on its theory of the case.

20 THE COURT: And your theory of the case is
21 ID.

22 MR. FIGLER: Okay. Now let's just presume
23 for a moment that theory of the case is identification.
24 We are, by the State's admission, allowed to show the
25 significance of that identity issue.

1 Now, in the theory of defense instruction,
2 there's nothing in there that the State can dispute.
3 The State is indicating that -- and the State will argue
4 based on the facts, and we have to take each case based
5 on some facts. We have to. I mean, that's what's here.
6 That's what we're doing, and that's what's being in
7 front of this jury.

8 So if we take each line -- let's bypass the
9 first two lines which is in our belief an accurate
10 statement of the law because I don't think that
11 Mr. Bateman's going to get up right now and tell
12 Your Honor that he's allowed to take inconsistent
13 positions with regard to the facts.

14 I think that's a violation of due process
15 under the Fifth and Fourteenth amendment, let alone
16 Ninth Circuit case law. But be that as it may, if
17 somehow the State is saying that they're allowed to take
18 inconsistent positions, I don't think that's an accurate
19 statement of the law.

20 I don't think that anyone thinks that the
21 State can -- they can argue alternate theories of
22 liability. He was either aiding or abetting here or
23 conspirator, et cetera, but he can't say that he was
24 both there and not there. They can't take those --

25 THE COURT: I agree --

1 MR. FIGLER: -- positions.

2 THE COURT: -- with that.

3 MR. FIGLER: Okay. So starting from that
4 original premise, the State is going to argue based on
5 the facts, and I put in a qualifier here, if the State
6 argues.

7 Now, he may argue something else. I don't
8 know what he's going to argue. But if he argues and
9 commits himself to the fact that Jamar Matthews was the
10 driver, and we have every indication he's going to do
11 that, and that Officer Walter in chasing him was able to
12 identify him as Jamar Matthews, okay, so now that's an
13 identity issue.

14 The State cannot disagree that if
15 Jamar Matthews is not that person, if they haven't
16 proved that he's that person, then how in the world did
17 he get there?

18 The only way he could have gotten there is
19 through that high-speed chase and that foot chase to
20 ultimately wind up on 1116 Jimmy Street. There's no
21 other factual variant that the State can make at that
22 time on his presence at the scene.

23 If he was at the scene, he's the guy who was
24 driving the car. If he was the guy driving the car, he
25 was the guy in the foot chase. Identity is the issue.

1 If he is not that guy, they have no factual
2 basis to show that he was at the scene, aiding and
3 abetting, conspiring, being the principal person
4 responsible for it.

5 If they can't change the fact which they're
6 not allowed to do under the law, then the jury can't put
7 Mr. Matthews at the original scene. If the jury can't
8 put him at the original scene, all the alternate
9 theories of liability don't count against Mr. Matthews.
10 He has to be found not guilty over there.

11 However, if they have proven identity, then
12 all bets off. This doesn't apply. And if they choose
13 to do another theory of how Jamar Matthews winds up on
14 1116 Jimmy not being the driver and not being pursued by
15 Officer Walter, that's still their option.

16 I'm not precluding them from choosing
17 whatever theory of prosecution they want in front of
18 that jury. But if that's what they want to do, if they
19 decide to go that way, and if they haven't proven beyond
20 a reasonable doubt this issue of identity, then we are
21 absolutely entitled to a not guilty because he couldn't
22 have been at the other scene.

23 THE COURT: If identity is an issue,
24 identity is covered by the other instructions. You're
25 able to argue identity based upon the law that I intend

1 to give.

2 MR. FIGLER: But that's the whole point.
3 The heat of passion was covered in the other arguments
4 as well, and this was a signifier. This is the one it
5 emphasizes. That's what the whole idea of theory of
6 defense is is to emphasize it, so we're emphasizing the
7 identity issue here if that's what the State wants to
8 boil it down to.

9 THE COURT: And I gave you an instruction
10 that talks about eyewitness identification --

11 MR. FIGLER: Correct.

12 THE COURT: -- to support your ability to
13 argue identification. I believe that's sufficient.
14 We're going to mark this as D next in order.

15 MR. FIGLER: Okay. And then, Judge, I would
16 offer as a third one just the first two paragraphs, just
17 the first two lines, nothing different, just the first
18 two lines as an accurate statement of law not covered by
19 any other instruction.

20 THE COURT: "The State is allowed to offer
21 alternate theories of criminal liability. The State is
22 disallowed from taking inconsistent positions with
23 regard to material facts. A fact is material if it has
24 significance -- has significant bearing on any theory of
25 prosecution."

1 MR. BATEMAN: I don't -- first of all, I
2 don't know what that means, and I don't know what
3 inconsistent --

4 MR. FIGLER: What part of that doesn't --

5 MR. BATEMAN: -- (indiscernible).

6 MR. FIGLER: Well, exactly. And they can't
7 take an inconsistent position. So if they try to say
8 ladies and gentlemen of the jury, Jamar Matthews was the
9 driver of that vehicle. However, maybe some of you
10 think that he wasn't the driver of the vehicle. That he
11 got there as the passenger of the vehicle or he was the
12 person who ran off the other way and wound up there.
13 That's fine too, as long as you think that he was
14 involved, et cetera.

15 That would be an inconsistent factual
16 position based on their presentation. They can't do
17 that. Not if they're going to be --

18 THE COURT: State.

19 MR. BATEMAN: Aiding and abetting.

20 THE COURT: Aiding and abetting.

21 MR. FIGLER: But how is that aiding and
22 abetting if --

23 THE COURT: They're working together in
24 concert in the car.

25 MR. FIGLER: That's fine, if they're there.

1 THE COURT: It's a dynamic situation.

2 They're moving --

3 MR. FIGLER: If they're at the scene, but
4 there's no possible way that they can argue that he got
5 to the Doolittle/Lexington address any other way than
6 being the driver of the vehicle.

7 MR. BATEMAN: (Indiscernible).

8 MR. FIGLER: They can't say -- they're going
9 to say he was the passenger? Are you going to say that?

10 MR. BATEMAN: (Indiscernible).

11 MR. FIGLER: If you're going to take that
12 inconsistent position, I will object because that's an
13 inconsistent position, and that's precluded by law.

14 THE COURT: I'm not going to give this
15 instruction. Let's mark this next D in order.

16 MR. FIGLER: Thank you, Judge.

17 THE COURT: All right. D -- what are they,
18 D10?

19 MR. FIGLER: That will be D11 and D12.

20 THE COURT: All right. We're on D12.

21 MR. FIGLER: I believe.

22 THE COURT: Well --

23 MR. FIGLER: Is that correct, Madam Clerk?

24 THE COURT: -- as long as they -- all right.
25 Are there any other -- all right. Let's go through and

1 mark the final copies here.

2 MR. BATEMAN: (Indiscernible).

3 THE COURT: Yeah.

4 MR. BATEMAN: It was marked as a -- I don't
5 know if it was marked as (indiscernible).

6 (Off-record colloquy)

7 THE COURT: Again, I was reading -- yeah,
8 and I had reviewed the Crawford decision, understand the
9 right of the defense to have an instruction on the
10 theory of the case. The theory of the case is identity
11 based upon the instructions that would have been
12 previously agreed upon. I believe there's sufficient
13 grounds to argue identity and, therefore, that is my
14 ruling.

15 No. 2 is if in these instructions, correct?

16 MR. FIGLER: Correct.

17 THE COURT: An information is but a formal
18 method, 3. Now, how am I going to read this? Am I
19 reading the whole thing?

20 MR. SINGER: No.

21 THE COURT: Because in a previous package we
22 had agreed that I reference specific counts only.

23 MR. FIGLER: I guess you could just say 6,
24 10 and 11 only refer to Mr. Matthews.

25 MS. LEWIS: I think that the best way to do

1 it is to say in this case it is charged an information
2 the defendants above-named having committed these crimes
3 blah, blah, blah. Defendant Pierre Joshlin having
4 committed the crimes of Count I, Count II, Count III,
5 Count IV, go all the way up to Count IX, and then say
6 defendant Jamar Matthews having committed the counts of
7 Count I, Count II, all the way through Counts XI. That
8 would be -- and then you don't have to read all the
9 language.

10 THE COURT: So I to IX for Matthews.

11 MR. FIGLER: Actually, I through XI for
12 Matthews, Judge.

13 MS. LEWIS: I through IX for Pierre Joshlin.

14 MR. SINGER: No.

15 MR. FIGLER: No.

16 MR. SINGER: Not VI.

17 MR. FIGLER: I through V for Jamar Matthews
18 and then VII through IX for Pierre Joshlin.

19 THE COURT: I through V --

20 MR. BATEMAN: (Indiscernible) VI.

21 MR. FIGLER: Right.

22 MS. LEWIS: Right.

23 MR. FIGLER: Matthews is charged in all of
24 them.

25 MS. LEWIS: Right.

1 MR. FIGLER: So Matthews is I through XI.
2 Pierre Joshlin is I through V and then again VII through
3 IX.

4 THE COURT: VII through IX Joshlin.
5 Pierre Joshlin I through V and VII through IX.
6 Mr. Matthews all counts --

7 MR. FIGLER: Correct.

8 THE COURT: -- I through XI.

9 (Off-record colloquy)

10 THE COURT: All right. 4, in this case the
11 defendants. 5, murder is the unlawful killing. 6,
12 express malice. 7, murder in the first -- of the first
13 degree. 8, the law does not undertake. 9, if an
14 illegal yet unintended. 10, the intention to kill. 11,
15 all murder which. 12, you are instructed. 13, in
16 arriving at a verdict. 14, you are instructed that.
17 15, you are instructed that a firearm. 16, in order to
18 use. 17, attempted murder in the performance. 18,
19 malice aforethought. 19, it is not necessary to prove.
20 20, robbery is the unlawful taking. 21, it is unlawful
21 to knowingly. 22, an assault with a deadly weapon. 23,
22 a conspiracy means. 24, conspiracy's an agreement. 25,
23 each member of a conspiracy. 26, it is not necessary to
24 prove. 27, to aid and abet. 28, your verdict must be
25 unanimous. 29, the flight. 30, to constitute the

1 crimes charged. 31, the defendant is presumed innocent.
2 32, it is a constitutional right. 33, in this case
3 there are two defendants. 34, the evidence which you
4 are to consider. 35, the credibility and believability.
5 36, you have heard. 37, a witness who has special
6 knowledge. 38, although you are to consider. 39, if in
7 your deliberation. 40, when you retire. 41, now you
8 will listen.

9 Now we have verdict forms. We have a
10 separate set of verdict forms for both Mr. Joshlin and
11 Mr. Matthews; is that correct?

12 MR. SINGER: Yes.

13 THE COURT: All right. Is the State
14 familiar with the Court's proposed jury instructions
15 number 1 through 41?

16 MR. BATEMAN: Yes.

17 THE COURT: Does the State object to the
18 giving of any those instructions?

19 MR. BATEMAN: No, Your Honor.

20 THE COURT: Does the State have any
21 additional instructions to propose?

22 MR. BATEMAN: No, Your Honor.

23 THE COURT: Is the defense for Mr. Matthews
24 familiar with the Court's proposed jury instructions
25 number 1 through 41?

1 MR. FIGLER: Yes, Your Honor.

2 THE COURT: Does the defense have any
3 objection to the giving of those instructions?

4 MR. FIGLER: Only as whatever was noted
5 previously and as a set we believe that they do violate
6 the due process of Fourteenth amendment to U.S.
7 Constitution and Fifth amendment rights of the
8 defendant, Your Honor.

9 THE COURT: As previously outlined?

10 MR. FIGLER: That's correct, Your Honor.

11 THE COURT: Does counsel for Mr. Joshlin
12 have these instructions?

13 MR. SINGER: Yes, Your Honor.

14 THE COURT: Do you object to the giving of
15 any of these instructions?

16 MR. SINGER: Judge, we join in the
17 co-counsel's objections.

18 THE COURT: Does the State or defense object
19 to the proposed verdict forms of the Court?

20 MR. BATEMAN: I think we might have an
21 error.

22 MS. LEWIS: There's an error in the verdict
23 form as to Pierre Joshlin is not charged in all the
24 counts. It says on the verdict forms as conspiracy
25 (indiscernible) Count VI in the information is

1 possession of short-barreled rifle, so that should
2 actually read count VII. And then counts IX and X
3 shouldn't be there, assault with a deadly weapon, so
4 they need to be renumbered.

5 MR. BATEMAN: Just as to Pierre Joshlin.

6 MR. FIGLER: That's correct.

7 THE COURT: How we going to make that happen
8 gentlemen and lady?

9 (Off-record colloquy)

10 MR. FIGLER: Are we going right into
11 closings or is there rebuttal?

12 THE COURT: Well, I was going to ask that as
13 soon as we finish this up.

14 (Off-record colloquy)

15 THE COURT: Danny, why don't you call Adam
16 and have him run them.

17 (Off-record colloquy)

18 MR. SINGER: Your Honor, can I use the
19 restroom?

20 THE COURT: Yes. Mr. Singer, any objection
21 to the verdict forms as they're presently constituted
22 for Mr. Joshlin? I understand that Mr. Joshlin should
23 be referenced Counts I through V and Counts VII through
24 IX only.

25 MR. SINGER: That's correct, Judge. Thank

1 you.

2 MR. FIGLER: Thanks. They got theirs.

3 THE COURT: All right.

4 (Off-record colloquy)

5 THE COURT: Do either counsel request the
6 Court instruct the jury on the -- instruct the jury
7 before closing arguments?

8 MS. LEWIS: Huh? What?

9 THE COURT: Just on the -- do you want me to
10 read the instructions before closing arguments?

11 MR. SINGER: What's the other choice?

12 MR. BUNIN: Yes, please.

13 THE COURT: Read the -- to do it after,
14 believe or not. Never been done in my time, but --

15 MR. FIGLER: I've never heard of that.

16 MR. BUNIN: Never heard of it.

17 MR. FIGLER: I didn't know it was in the
18 book.

19 THE COURT: It's in the book.

20 MR. FIGLER: That's fine.

21 MS. LEWIS: That's why we were looking at
22 you like what else is there to do.

23 THE COURT: I know, I know.

24 MR. FIGLER: (Indiscernible) the
25 instructions and (indiscernible).

1 THE COURT: Okay. You know what, I'm going
2 to strike that from the book because, you're right, it
3 doesn't make sense.

4 MR. FIGLER: I can't imagine anyone --

5 THE COURT: Do parties agree to waive the
6 reporting of the reading of the jury instructions to the
7 jury?

8 MR. FIGLER: Yes, Your Honor.

9 THE COURT: All right. State?

10 MS. LEWIS: Yes, Judge.

11 THE COURT: All right. It appears that
12 we're prepared to settle instructions -- having settled
13 the instructions, we're prepared to instruct the jury if
14 the State has no rebuttal evidence. Does the State have
15 any rebuttal evidence?

16 MS. LEWIS: Don't we have to do that in
17 front of the jury?

18 THE COURT: You have to tell us if you have
19 a rebuttal case.

20 MS. LEWIS: Oh, no. We don't.

21 THE COURT: Well, I'm asking if you do. If
22 you do, then --

23 MS. LEWIS: Oh, no. I'm saying don't we
24 have to do that in front of the jury, though or no?

25 THE COURT: Again?

1 MR. BATEMAN: I don't think we do.

2 MR. FIGLER: I don't think you need to.

3 MS. LEWIS: Okay.

4 MR. FIGLER: Both parties have rested.

5 MS. LEWIS: Okay. I didn't know.

6 MR. BATEMAN: We're good to go.

7 THE COURT: Now, we're waiting for the
8 copies of the jury instructions because I want each of
9 the jurors to have a copy of the instructions as we read
10 through them.

11 MS. LEWIS: They're coming.

12 MR. FIGLER: That's good for them.

13 MR. SINGER: Is that --

14 MR. FIGLER: Based on the State's
15 representation, I'm going to release my anticipated
16 surrebuttal witnesses, if that's okay, Judge.

17 THE COURT: Yes. I guess since there's no
18 rebuttal, there's no need for a surrebuttal.

19 MR. FIGLER: Okay.

20 MR. BATEMAN: Surrebuttal.

21 MR. FIGLER: What? Have you never heard of
22 surrebuttal.

23 MR. SINGER: (Indiscernible) a copy of the
24 jury instructions that's allowable (indiscernible).

25 THE COURT: Yes.

1 MR. BATEMAN: Got to have the last word.

2 THE COURT: Yes.

3 (Off-record colloquy)

4 THE COURT: We're still on the record. I
5 think it helps them follow along. I mean, me reading
6 these instructions --

7 MR. BATEMAN: Yeah.

8 MR. SINGER: Creates a certain -- yeah,
9 certain things need to be committed to their memory, but
10 I guess that's -- yeah. I just -- I would just wonder
11 why no other (indiscernible) do that.

12 THE COURT: They do it all the time.

13 MR. BATEMAN: Stu does it?

14 MR. SINGER: Stu Bell?

15 MR. BATEMAN: Yeah.

16 THE COURT: All the time.

17 MR. SINGER: Judge Bonaventure never did it.
18 Judge Mosley never did it. Judge Glass never did it.

19 MR. BATEMAN: Judge Barker's cutting edge.

20 MR. SINGER: Yes.

21 THE COURT: Yeah. Well --

22 (Off-record colloquy)

23 THE COURT: All right. Let's bring them in.

24 (Jury present)

25 THE BAILIFF: Jury's present, please.

1 Panel's present.

2 THE COURT: Thank you. Back on the record,
3 C228460, State of Nevada, plaintiff, versus
4 Pierre Joshlin and Jamar Matthews. Record should
5 reflect presence of counsel and all members of the jury.

6 Do the counsel stipulate to the presence of
7 the jury?

8 MS. LEWIS: Yes, Judge.

9 MR. SINGER: Yes, Judge.

10 THE COURT: Ladies and gentlemen, you should
11 all have in your seats copies of proposed jury
12 instructions. I apologize for the delay, but we were
13 working.

14 Does everyone have a copy of the proposed
15 instructions? This morning we will be reading these
16 instructions to you in preparation for final summation.

17 (Thereupon, jury instructions were read,
18 but not transcribed.)

19 THE COURT: Ladies and gentlemen, those are
20 the instructions as give. You will also be given forms
21 of verdict, one series of forms of verdict for
22 Pierre Joshlin and one series of form of verdict for
23 Jamar Matthews. You must consider these separately as
24 they relate to each defendant.

25 You will be permitted, again, to take these

1 instructions with you into deliberations so you can read
2 them, consider them further.

3 Are we prepared for argument?

4 MR. BATEMAN: Yes, Your Honor.

5 THE COURT: State.

6 (Off-record colloquy)

7 MR. BATEMAN: May I proceed, Your Honor?

8 THE COURT: You may.

9 MR. BATEMAN: Thank you.

10 Ladies and gentlemen, generally in pretty
11 much all the criminal cases that come in front of juries
12 they can be broken down into, essentially, two types of
13 cases, cases where what happened is really at issue.

14 Take, for instance, a case where two
15 individuals get in a fight, someone gets seriously
16 injured and one -- the person that does the injury's the
17 one that is charged.

18 The question in a case like that is not who
19 was involved. It's what happened. What was the crime
20 committed? Was there a crime committed? Does this
21 individual have any defenses?

22 The other types of cases, ladies and
23 gentlemen, are really not where the actual crimes that
24 are committed are in dispute. It's who did it. Who
25 committed those crimes? This case is one of the latter.

1 I doubt that the defense will claim or
2 dispute that the charges that were included in the
3 information that were read to you early on in this case,
4 and they're included in your jury instruction form, are
5 really in dispute.

6 The defendants are charged with murder,
7 attempt murder, robbery. Mr. Matthews is charged with
8 assault with a deadly and with possession of an illegal
9 firearm.

10 This case, ultimately, really, is about
11 murder, ladies and gentlemen, the murder of Mercy
12 Williams on September 30th, 2006. That's why we're
13 here. That's what needs to be brought to bear on the
14 proceedings.

15 They'll not dispute that Mercy Williams was
16 murdered in this case. There can be no dispute, so
17 we'll cover the charges initially and talk about the
18 evidence as it relates to these particular charges.

19 Murder, ladies and gentlemen, you'll have
20 instructions in this case that you can choose between
21 first-degree murder and second-degree murder.

22 The evidence in this case, ladies and
23 gentlemen, is quite clear. First-degree murder was
24 committed on September 30th, 2006. The elements of
25 first-degree murder include premeditation, deliberation

1 and willful acts. Second-degree murder is, essentially,
2 a murder without those three elements.

3 How do we determine whether first-degree
4 murder was committed in this case? We look at the
5 scene. The scene tells us all we need to know. The
6 witnesses eventually will tell us all we need to know.

7 What you have in front of you is 1271 Balzar
8 at 9:52 p.m. on the evening of September 30th, 2006.
9 What you see there is a north view of Lexington and then
10 to the right is Balzar. You see the residence on the
11 corner of the street.

12 All those cones, ladies and gentlemen,
13 signify, roughly, at least, 38 cartridge cases that were
14 fired amongst the individuals that arrived from the
15 south to the north on September 30th, stood on the
16 corner of Balzar, and unloaded firearms as
17 Mercy Williams, Myniece Cook, Michele'le Tolfree and
18 Maurice Hickman ran for their lives. Roughly, 38
19 cartridge cases were collected and tied back to
20 firearms, 38.

21 And one juror asked an interesting question.
22 What's the difference between an automatic and a
23 semiautomatic firearm? Ladies and gentlemen, the
24 semiautomatic you have to pull every single time.
25 Remember that .22 and how many times that .22's trigger

1 had to be pulled by the individual shooting it.

2 You make a determination, ladies and
3 gentlemen, about murder in this case based upon the
4 evidence at the scene. The evidence at the scene is
5 that there were between three -- well, the witnesses say
6 between three and five individuals all shooting
7 firearms.

8 Unfortunately, Myniece Cook,
9 Michele'le Tolfree couldn't tell you who those
10 individuals were. They can give you a description. But
11 what's important -- and that will go to ID later.

12 But what's important in both the -- all
13 three of the attempt murder charges and the murder
14 charge is that the State proceeds on three potential
15 theories of liability because with three or four
16 individuals there it's not entirely within the State's
17 ability to tell you exactly who did what, who pulled
18 every trigger, who had exactly what gun at this
19 particular time as they were standing at 1271 Balzar.

20 Direct liability, of course, is someone --
21 if one particular person shoots another person, they are
22 directly liable for that crime.

23 Conspiracy liability is if these individuals
24 came together at some point and made a decision to act
25 as coconspirators in committing a particular crime.

1 That's what we have here. These individuals came from
2 the south to the north, altogether, all had firearms and
3 all began shooting.

4 Aiding and abetting is also a theory of
5 liability where these individuals come together,
6 encourage each other to commit the crimes charged.

7 You do not have to be unanimous as to your
8 theory of liability. If six of you believe that the
9 defendants sitting before you here today conspired
10 together and six of you believe that they aided and
11 abetted one another, they are still guilty of
12 first-degree murder.

13 Just briefly some instructions because this
14 is important law that the judge has provided you.
15 Conspiracy is an agreement or mutual understanding
16 between two or more persons that commit a crime and each
17 member of that conspiracy is liable for those acts.

18 In a sense, ladies and gentlemen, the act of
19 one as long as these individuals are conspiring
20 together is the act of all.

21 Ultimately, we know that Mercy Williams was
22 killed with a .22 bullet. The individual firing the .22
23 is directly liable for Mercy Williams' killing.

24 But that doesn't absolve the other
25 individuals that were there also shooting. As long as

1 you find that these individuals conspired to do what
2 they did on September 30th of 2006, then all are liable
3 for Mercy Williams' killing and the attempted murders of
4 the other individuals at the scene.

5 MR. FIGLER: And, Your Honor, I just lodge a
6 technical objection. It's furtherance or foreseeable,
7 rather, and that's in the instructions.

8 THE COURT: Noted.

9 MR. FIGLER: Thank you.

10 THE COURT: It's argument.

11 MR. BATEMAN: It is not necessary in proving
12 a conspiracy to show a meeting of the alleged
13 conspirators or the making an expressed or formal
14 agreement.

15 It's not required that the State prove that
16 these individuals sat down around a conference table,
17 mapped when they were going to meet, what car they were
18 going to take to when they got there, who was going to
19 shoot first, who was going to shoot second.

20 The formation and existence of a conspiracy
21 may be inferred from all the circumstances tending to
22 show the common intent.

23 The fact that these individuals all arrived
24 together southbound, all shot together at these
25 individuals and all left together and then eventually

1 stole -- robbed Geishe Orduno and Melvin Bolden of their
2 car, fled from police, that is all evidence to show that
3 these individuals were acting in concert throughout the
4 course of this crime.

5 What is the likelihood that all three, four
6 of these individuals show up with firearms at the exact
7 same spot, fire all the firearms, just happen to leave
8 altogether and hadn't made any plans whatsoever one way
9 or the other to do what it is they did?

10 Aiding and abetting means to actively,
11 knowingly or purposely facilitate or assist another
12 individual in the commission or attempted commission of
13 the crime.

14 Again, as long as these individuals take
15 someone who is encouraging someone to commit a crime or
16 helping them by providing them firearms or ammunition,
17 knowing full well what the individual that they are
18 helping and encouraging intends to do, that individual's
19 also guilty of the exact same crime that the ultimate
20 person who directly committed the crime is guilty of.
21 That's what aiding and abetting means.

22 And importantly, those who aid and abet a
23 crime and those who directly perpetrate the crime are
24 principals and equally guilty of the commission of that
25 crime, and, therefore, the finder of fact -- and that's

1 you ladies and gentlemen -- need not unanimously agree
2 nor individually determine whether a defendant is an
3 aider or abetter or direct perpetrator.

4 You don't have to determine what each one of
5 these individual persons did so long as the entirety of
6 the acts together form the commission of a crime.

7 There's also a doctrine called transferred
8 intent, ladies and gentlemen. Basically, this is a
9 situation where let's say an individual tries to punch
10 another individual, and the other individual dodges the
11 punch. And in the course of punching, the person who's
12 doing the punching accidentally hits another person. It
13 was an accident. They didn't mean to hit that
14 individual.

15 The doctrine of transferred intent tells you
16 that under the law the individual that threw that punch,
17 even though they missed the person that they intended to
18 hit, is still guilty of that crime.

19 It's ultimately for you to decide what took
20 place and what the intentions were of the defendants as
21 they arrived at 1271 Balzar on the evening in question.

22 Based upon their actions, it's quite clear
23 that every individual that was there had the intent to
24 commit murder based upon the sheer number of cartridges,
25 cartridge cases that resulted on the ground, the fact

1 that they all came together, the fact that they were
2 shooting at three or four -- actually, four individuals
3 at a fairly close distance. It would suggest that they
4 all individually had that intent.

5 If they went there initially and they
6 intended only to shoot one particular person but
7 continued to attack upon a group, you'll notice also in
8 this instruction, during an attack upon a group a
9 defendant's intent to kill need not be directed at any
10 one individual. It is enough if the intent to kill is
11 directed at that group.

12 Myniece, Michele'le, Mercy and Mr. Hickman
13 were all together in a group sitting in front of
14 1271 Balzar when they were shot at by multiple
15 individuals in close range.

16 Intent to kill. The intention to kill may
17 be ascertained or deduced from the facts and
18 circumstances of the killing such as -- and in this case
19 it's particularly important -- such as the use of a
20 weapon calculated to produce death and the manner of its
21 use.

22 Ladies and gentlemen, we didn't go through
23 the exercise with Jim Krylo for no reason. The fact of
24 the matter is the guns that these individuals brought to
25 the particular location on this day with the number of

1 ammunition that they had is all the evidence you need of
2 their intent to kill.

3 The Glock, .45 caliber, was ultimately found
4 underneath Mr. Joshlin in a dumpster some five minutes
5 after the shooting. 15-round -- or, excuse me, 28-round
6 capacity magazine, an extended magazine. This was
7 brought to the crime scene, to the murder scene.

8 What is the intention of someone who brings
9 a Glock with a 28-round capacity extended magazine and
10 ultimately unloads ten cartridge cases that were tied
11 back by Jim Krylo to this particular gun? Ten rounds.

12 And you saw all of those individual casings
13 come up one by one by one. That's every time pulling
14 that trigger, one, two, three, four, five, six, seven,
15 eight, nine, ten as he stood on the corner of
16 1271 Balzar shooting at three women and a man.

17 A Colt .45 found in the vehicle that the
18 individual shooters robbed from Geishe and Melvin.
19 Again, an extended round, not quite the same as -- not
20 quite as extensive or substantial as the Glock, but
21 still an extended magazine, ten rounds.

22 One cartridge case was recovered at the
23 scene with regard to this Colt .45. Why is that? Why
24 wasn't it shot more? It jammed.

25 Is there any doubt that the individual that

1 was shooting this gun had every intention to unload
2 those ten rounds and was unable to do it solely through
3 the good fortune for the victims that that gun jammed?
4 This gun, again, was found with the individuals that had
5 dodged out of the Lincoln in the front passenger seat,
6 another gun with an extended magazine.

7 Finally, the third gun, .22 caliber rifle
8 that had been sawed off, was illegal. You heard
9 Stephanie Smith describe that the length of the barrel
10 was ten inches -- a little over ten inches, ten-and
11 three-quarters I believe, and the total length of the
12 gun was 20 inches.

13 And you'll see the instruction in there --
14 and we'll get to it in a second -- as to why this
15 particular gun was illegal at the time, but was equipped
16 with a 30-round capacity magazine, magazine empty,
17 empty. Whoever sat and shot this gun emptied it. Is
18 that intent to kill?

19 25 cartridge cases recovered that were
20 matched up to this particular weapon. That's 25 times.
21 I'm not going to count it off. 25 times that that
22 trigger was pulled standing on that corner.

23 One block south, with one block south,
24 Geishe Orduno and Melvin Bolden come back from eating
25 dinner at the Main Street Station Buffet, roll in about

1 9:52, unfortunately, and hear all of this firing, and
2 Geishe tells Melvin let's keep going. Melvin probably
3 thinking, you know, I'm not going to stop or I'm not
4 going to go. We're going to stop and park the car.
5 He's driving because the power steering doesn't work.

6 Immediately after hearing these shots, here
7 they come. Those individuals that had shot at Mercy and
8 Myniece and Michele'le and Mr. Hickman come running
9 southbound, same direction that they came to get to --
10 that they went to get to Balzar.

11 Nobody else is out and around. They take
12 the car, all of them, all of them that made it
13 southbound. Again, this would be a robbery with use of
14 a deadly weapon, unlawful taking of the personal
15 property of another without their permission using force
16 or violence.

17 This isn't even really disputable either.
18 The individuals that forced Geishe and Melvin out of
19 their car took off with the car while they had weapons
20 in their hands, committed robbery with use of a deadly
21 weapon.

22 In this particular case, it's also charged
23 as an aiding and abetting liability. The individual
24 that drove away you could say was directly responsible.

25 How about the other two that got in the

1 vehicle and helped him through the use of their weapons?
2 Should they not be responsible as well for the robbery
3 with use? The law says they should.

4 Possession of short-barreled rifle. Again,
5 we had Stephanie Smith tell you how long a rifle needs
6 to be for it not to be illegal, a rifle having one or
7 more barrels less than 16 inches in length. This one
8 was ten-and-three-quarters. Must be at least 26 inches
9 in total. This one was 20. Again, that particular
10 charge, and I'll reiterate, only is charged against
11 Mr. Matthews.

12 Finally, assault with a deadly weapon
13 against Officers Cupp and Walter. Assault with a deadly
14 weapon is an intentional placing of another person in
15 reasonable apprehension of immediate bodily harm through
16 the use of a deadly weapon.

17 At least once, and there's testimony that
18 twice, the driver of the stolen Lincoln looked out his
19 driver's side door, brandished a weapon at Officers Cupp
20 and Walter, and especially while they were on Lexington
21 after this individual exited the Lincoln stood up with
22 that weapon, and Officer Cupp felt the need to actually
23 direct his car into this individual to avoid what he
24 believed was potential bodily harm to himself and to his
25 partner.

1 Ladies and gentlemen, that's an assault with
2 a deadly weapon. I don't believe the defense will
3 dispute that.

4 So with all of this evidence as to what was
5 committed, the question ultimately for you, the trier of
6 fact, is who are the identities of these shooters.

7 There's a combination of circumstantial and
8 direct evidence, and you'll have an instruction about
9 how you should view circumstantial and direct evidence.
10 That they are equal in their relative importance. One
11 is not better than the other.

12 Circumstantial is like poses of a puzzle.
13 Direct evidence is, for instance, an eyewitness to a
14 crime.

15 The identity of the shooters in this
16 particular case can be gleaned from the time frame of
17 the crimes, the evidence at the scene and the witnesses,
18 ladies and gentlemen, and it's important in this case
19 because you look at all the evidence. There's been a
20 great deal of evidence that's been provided to you over
21 the last four days.

22 Everyone in the room I would ask that when
23 you go back and deliberate, you take a look at this
24 evidence, think about it very -- deliberate over this
25 evidence. You will come to the conclusion that the

1 defendants are at least two of the shooters in this
2 particular case.

3 The evidence tells you exactly, actually,
4 how many shooters were there. There was some talk about
5 four or five I believe by the witnesses at Balzar. Mind
6 you, it was happening very quickly.

7 How do we know there are four shooters? We
8 talked about firearms that were found. The Glock, the
9 Colt, the Ruger. What was the fourth gun? It was that
10 9mm that wasn't found. How do we know? Two shell
11 casings -- excuse me -- cartridge cases are found in the
12 street.

13 Where did that fourth shooter go? We know
14 exactly where he went. When Maurice and Michele'le took
15 off running for their lives, one shooter took off after
16 them. Remember how Michele'le said that someone was
17 following her and that her and Maurice had to hide. He
18 was shooting as he was following them in the middle of
19 that street, and he went northbound across Balzar.

20 So when the three individuals on the corner
21 decided to take off out of there southbound and get the
22 heck out after they just killed and murdered one of the
23 individuals, maimed the other, they took off south, the
24 three of them.

25 There wasn't time, obviously, for or perhaps

1 the fourth individual wasn't around to see them leave or
2 to know where they went. Four shooters, that's what the
3 scene tells you.

4 And again, one block. Is there any doubt
5 that the individuals who shot at 1271 ended up one block
6 south to do the carjacking? The time tell you that.
7 Melvin and Geishe tell you that when they hear shooting
8 and immediately on top of them are three to four they
9 say. We know it's three. Three come out of the car.

10 It's highly doubtful the defense will
11 suggest that there are two different groups of males
12 similar in description, one shooting at Balzar, one
13 carjacking at Lawry. It makes virtually no sense.

14 Let's talk about just briefly the identity
15 -- the description of these individuals. The witnesses
16 that are these two particular scenes because all
17 (indiscernible) was insinuated that all of these
18 descriptions are so off and that they are, you know,
19 completely wrong, inconsistent.

20 Myniece Cook and Michele'le Tolfree tell you
21 three to five young African-American males wearing dark
22 clothes is headed southbound, and, specifically, Myniece
23 says all dark clothes.

24 Michele'le initially said all dark clothes.
25 She told the police officers at the time one of them

1 that she saw with the hands behind his back was wearing
2 blue jeans or some sort of blue-jean shorts or pants.

3 Why did that individual have their -- why
4 did these two ladies fail to see the red gloves? Could
5 it be the individual with the blue jeans had his hands
6 behind his back, as they testified, and there were the
7 red gloves?

8 And when the gun came out, they didn't see
9 the red gloves. They were running for their lives. All
10 they saw was the or felt was the bullets whizzing past
11 their heads.

12 Geishe Orduno and Melvin Bolden -- well, and
13 let me back up. Myniece Cook and Michele'le say it's
14 too dark. I didn't get a look at their face. She
15 didn't say it wasn't these two. She said at the time
16 and in here today it was too dark. I couldn't see their
17 face. And is that really something we should hold
18 against these individuals as they're running from 38, at
19 least, shots?

20 Geishe Orduno and Melvin Bolden coming home
21 late at night, again, ten to 10:00, describe three to
22 four young African-American males, dark clothes. Geishe
23 says one with a white shirt, at least one with red
24 gloves. Melvin also talked about red gloves.

25 What this tells you is that people under

1 these types of circumstances, generally when it's very
2 short periods of time and when guns are pointed at their
3 face, get a little bit of the inconsistencies in their
4 descriptions. Is that really to be unexpected under the
5 circumstances? Especially when you have -- if you think
6 about it, Cupp and Walter pull up on this corner, and
7 they still can't see what's going on.

8 It must be awfully dark in one, two, three,
9 four, five, six witnesses are having a hard time seeing.
10 That doesn't mean they're wrong about what they see,
11 necessarily. It makes it difficult to make an
12 identification at this point, but they give you some
13 very important information.

14 Young, they all said they were young. These
15 guys are young. Said they're African-American males.
16 That's important because they're African-American males,
17 and it's important because at the scene down at
18 Lexington or the people that Cupp and Walter see exiting
19 the Lincoln or the individuals that are found on J
20 Street or at Jimmy, they're not Hispanic, they're not
21 white, they're not Asian.

22 If these young ladies had said it was four
23 Hispanic males and these two individuals were found down
24 the street, well, that's a pretty big material
25 inconsistency that doesn't exist in this case.

1 Cupp and Walters follow -- and I go back to
2 Lawry. There was some mention about height, ladies and
3 gentlemen, of the individual that came up with the rifle
4 and the red gloves to Geishe's side of the door and
5 opened it up.

6 She said they were pulled up to a curb.
7 Could she have made a mistake about saying they were my
8 height as she scrambled out of the car and dodged back
9 east to her hiding spot?

10 Could it be that the individual that was
11 holding the gun and screaming at them to get out was
12 crouched down?

13 Could it be that the individual that was
14 holding that gun was standing on the asphalt, and when
15 Geishe exited the vehicle, she stood up on the actual
16 sidewalk some inches above to make it look like they
17 were the same height? Is that so impossible or
18 improbable? Does that make any of the information she
19 gave less reliable?

20 1271 Balzar. You'll see that the route that
21 Cupp and Walter take as this vehicle speeds off from the
22 carjacking at 1284 westbound on Lawry out to Martin
23 Luther King.

24 What's important here? The individuals in
25 the vehicle take off westbound out to Martin Luther King

1 Boulevard. Martin Luther King, as everyone in this
2 community knows, is a fairly large road. It's fairly
3 populated. It's out in the open where people can see
4 things.

5 They cross Lake Mead Boulevard. Inevitably,
6 these individuals are thinking to themselves how do we
7 get away with a police officer behind us with these
8 lights blaring? And they know what's going on.

9 They turn right on Martin Luther King.
10 They're getting out of the neighborhood going westbound.
11 They don't go east because they haven't decided yet what
12 they're going to do. They continue to come down Lake
13 Mead -- excuse me, Martin Luther King.

14 There's no place to go right and run. It's
15 all open field. What do they do? They turn back in on
16 Jimmy back to the neighborhood because they think they
17 can ditch the car at this point.

18 And remember its power steering's out, so
19 they're having a tough time controlling this car most
20 likely. It's a big boat.

21 They turn back into the neighborhood where
22 they know that they -- they know the houses, they know
23 the lay out, they think that their best bet for getting
24 away from the officers with this is to get back into the
25 neighborhood.

1 How do we know they know the neighborhood?
2 1801 J Street, No. 217. Mr. Matthews knows the
3 neighborhood. They crash the vehicle, and they exit the
4 vehicle at this point.

5 Now, at least one of the officers had seen
6 the door open or testified to seeing the door open on
7 Jimmy and seeing the driver's general description and
8 face.

9 They both, obviously, observe the driver get
10 out of the vehicle where it crashes at the church down
11 here on Lexington. This was after this individual who
12 was driving opens the door while the car is moving at a
13 slow pace, looks out, has the gun with them and
14 brandishes it to the officers.

15 Yet, neither of them said they were
16 particularly far away who saw this individual and,
17 eventually, the car runs off into the road and onto the
18 fire extinguisher or -- excuse me -- fire hydrant. This
19 is obviously because of the power steering that he can't
20 control the car.

21 And they find themselves against the fire
22 hydrant next to the church. And important to note in a
23 minute, this is the grassy area in front of the church
24 and behind the Lincoln where Mr. Matthews runs.

25 But it's important to slow that down. As

1 this car makes a turn and it slows down and these
2 officers at this point have just been chasing someone
3 who they basically observe what they thought was some
4 suspicious activity when the car was taken and it peels
5 out immediately after shots are fired, are they not
6 looking? Are they paying attention to other stuff?

7 These are Las Vegas Metropolitan police
8 officers in what has been described as a high-crime area
9 should be concerned about what's going on. They do this
10 every day for a living. Observing this car travel,
11 observing the individual as he's sticking his head the
12 driver's side door turning around looking at him.

13 When the car stops, the driver leaves,
14 actually, ends up outside the vehicle, stands up.
15 Officer Cupp feels the need to actually angle the car
16 into him, front right corner, to avoid being shot
17 potentially. He's now seen the gun brandished as the
18 door was open.

19 The driver gets out of the vehicle, tumbles
20 over the right side, and they both told you that the
21 driver then heads back along the sidewalk this way
22 northbound on Lexington.

23 Walters gives chase at this point. He's
24 designated as the primary individual who's going to give
25 chase if that's what occurs. They both told you that

1 they thought this was coming the way of the slowing
2 down, the way the individuals in the car were driving
3 and acting. He takes off after this individual. He
4 heads northbound and then, ultimately, towards Eleanor.

5 You'll note that Officer Cupp first sees one
6 of the passengers get out on the passenger side and head
7 directly west through the parking. He said he didn't
8 see any guns at that time. That's because the gun was
9 left in the front passenger seat, the Colt.

10 Why was it left in the front passenger seat?
11 Because he can't fire it. It was jammed. So that
12 individual takes off. This unknown individual takes off
13 westbound.

14 Cupp then sees the other individual get out
15 and sees a Glock. What's ultimately found? A Glock.
16 Remind you that he saw a Glock at the time. He must
17 have got a pretty good look at that gun. He must have
18 been paying attention to what was going on.

19 He sees him running with a Glock down
20 Doolittle where he ultimately sees this individual point
21 the gun over his shoulder at him. Officer Cupp stops,
22 fires three times.

23 That was determined by the CSA on the scene,
24 by Krylo, the firearms examiner, testified exactly
25 truthfully as to what happened. He fired three times,

1 missed the guy. That's exactly what was found at the
2 scene.

3 The passenger then runs through a parking
4 lot across J Street at the exact same time officers are
5 bearing down on these individuals. It's been called
6 over the dispatch what's going on from the north down.
7 Officers are bearing down forming a perimeter.

8 And Rios, Officer Rios, sees a young
9 African-American adult running across J Street and into
10 1701 J Street apartments, immediately pulls in behind
11 him as the gate opens up.

12 Well, and let me back up. Again, these were
13 the shells that were found on Doolittle that Cupp fired.

14 Individual shoots through 1701 J Street
15 through the gate where they said he could pry through.
16 They have to actually wait for the gate to open. He's
17 right in front of them as he's walking through or he's
18 running through basically eastbound on the north side of
19 1701 J Street.

20 He hangs a right, right as Rios and his
21 partner are coming through the gate, they pull in, form
22 a perimeter, hear some movement in these dumpsters.
23 They pull this man that was identified in court,
24 Pierre Joshlin, out of that dumpster.

25 And what's he sitting on top of? Black

1 gloves that have been described before and that Glock, a
2 Glock that Cupp saw, the Glock that ultimately was tied
3 back to the homicide scene, the Glock with the extended
4 magazine.

5 And on those gloves is gunshot residue. It
6 was both identified by individuals at the Balzar and
7 Lawry. They all this gloves on. There's your shooter
8 or one of your shooters.

9 9:57, five minutes. Time. In the case of
10 Mr. Joshlin time got him. And look at his clothes.
11 Dark clothes, black shirt, jeans.

12 Back at the crash Walter had taken off after
13 Mr. Matthews. His gun was actually dropped on the way
14 running north out onto the grass. This was the Ruger
15 that was ultimately found with the extended magazine
16 tied back to the shooting at Balzar.

17 Walters follows him northbound on Lexington
18 and immediate right into Eleanor where he jumps a
19 chain-link fence leaving behind the red glove, the red
20 glove that Walter identified when he called out through
21 dispatch or called to dispatch, someone else to dispatch
22 out, red gloves, the red gloves that were identified by
23 Geishe Orduno and a torn red glove.

24 There's a little bit of information from the
25 canine officer, Cord Overson, who said, yeah, he came up

1 when he located Matthews at 111 Jimmy, right around the
2 corner, that he had some injury to his hand, and he said
3 that it was unusual for a dog to bite someone's hand.
4 He didn't see it actually happen.

5 MR. FIGLER: Misstates the evidence,
6 Your Honor. I'm going to object that. He said that
7 when he hit him on the nose that the dog bit him.

8 THE COURT: This is argument. The jury's
9 impression and memories of the evidence will stand.

10 MR. BATEMAN: That torn glove right there on
11 the palm as he's going over the fence, there's your
12 injury.

13 Importantly, again, at 11:59 the description
14 of -- I'm sorry, 9:59, the description of Jamar Matthews
15 is broadcast as wearing dark clothes, blue jeans, red
16 gloves.

17 I show you these two pictures because,
18 obviously, ultimately, this is how Mr. Matthews was
19 located at the 111 Jimmy Street which is right very near
20 where Walters broke off his pursuit when he heard
21 Officer Cupp firing shots.

22 And remember, again, we've got a perimeter
23 set up. There was testimony about the lights and sirens
24 apparently going off to let everybody know they were
25 there. They set up a perimeter on this area. There was

1 nowhere for Mr. Matthews to go after he had hopped two
2 fences and Walters had hopped two fences.

3 Mr. Matthews inevitably saw Walters cut off
4 his pursuit and decided at that point rather than
5 running back out onto Jimmy which is the next road over,
6 where police are descending, be out in the open, I'm
7 going to hunker down. I'm going to hunker down into
8 somebody's backyard, and I'm going to wait it out.

9 And the canine officers had some interesting
10 testimony about the scent or the pheromones that are
11 given off in someone who's in this kind of a position as
12 Mr. Matthews and based upon what he had done. That's
13 what the dog is designed to look for.

14 Just briefly, there was some information
15 about a TPO. I'd ask you when you go back to deliberate
16 to ask yourselves whether Mr. Matthews was really
17 worried about that TPO or was he worried about being
18 caught for the murder of another individual, for the
19 attempt murder of other individuals, for the robbery
20 with use of a deadly weapon or running from police
21 officers.

22 I'd ask you to look at the documents very
23 carefully. There's a reason why they presented you with
24 the birth certificate with the address of the
25 complaining witness from 2005. It's because that

1 address is not on any of the documents in the TPO.
2 There's no information to tell you where that
3 complaining individual was in September of 2003, where
4 she was living. In fact, those documents say that her
5 residence on them is marked confidential.

6 Ladies and gentlemen, there is no evidence
7 that has been presented regarding this TPO other than it
8 was in existence. No evidence.

9 This is a court of law. Evidence is what is
10 brought in before you. You make decisions in criminal
11 trials based upon evidence.

12 For you to speculate as to where
13 Mr. Matthews was or that he was actually not the
14 individual and he was just afraid that he was in
15 vicinity 100 yards of the residence that was on the
16 birth certificate some almost year and a half prior,
17 pure speculation. Instructions say you can't do it.

18 Importantly, in this case why did
19 Mr. Matthews drop that Ruger? This is not his pants
20 just falling down. These are long shorts. This is how
21 young kids wear their pants --

22 MR. FIGLER: Objection, Your Honor.
23 Absolutely that's not in evidence whatsoever that
24 somehow the State is going to say they brought in an
25 expert to say how Mr. Matthews or any other black person

1 in that -- young person in that neighborhood wears their
2 pants.

3 They obviously were pulled down by the
4 officers for a number of different reasons including
5 search which was brought into evidence, so this is
6 outside the scope of what evidence is in the record.

7 THE COURT: And you can respond in argument.

8 MR. BATEMAN: I never said the term "black".
9 I said young people across all ethnicities have begun
10 wearing their pants, generally, shorts -- it started out
11 when I was in college, a little bit short, so that you
12 could see --

13 MR. FIGLER: And again, Your Honor, I would
14 object to the prosecutor testifying as to his personal
15 experiences with fashion.

16 THE COURT: Argue the facts.

17 MR. BATEMAN: I didn't wear (indiscernible)
18 because I'm kind of a dork, but started out kind of high
19 so you could see a little bit of boxers, and it slowly
20 worked its way lower as time has gone on, slowly worked
21 its way lower and the shirts gotten longer, longer,
22 longer to cover those boxers.

23 Everybody knows that -- I'm not saying in
24 particular any type of people are doing it other than
25 young people. I don't generally see too many, you know,

1 60-year-old grandparents doing it.

2 This is how he looked on the day in question
3 when he got out of that car. This is how he was
4 running, and he couldn't run that way. You can't hop
5 fences with your pants down around your thighs. He had
6 to pull them up. He needed hands to pull them up. He
7 had to drop that firearm because he's running down the
8 street pulling his pants up so that he can jump over
9 fences.

10 Identity. In opening statement the defense
11 said that this really comes down to the identification
12 of Cupp and Walters. I dispute that. It's certainly
13 important.

14 Cupp and Walter are police officers, had
15 been in that area, in the Bolden area command, for at
16 least I believe both of them said two to three years,
17 had been in that neighborhood talking to people,
18 patrolling the neighborhood. They were familiar with
19 the neighborhood.

20 They (indiscernible) tell you truthfully I
21 can see who at 12 -- at Lawry who those individuals
22 were. They could have said right then. They could have
23 side right then, oh, we knew who they were. They
24 didn't. They said I didn't know who they were. That's
25 why we followed them.

1 At 11:54, after the individuals bailed,
2 after this chase, after seeing at least the driver poke
3 his head out at least once, Cupp as he's following calls
4 out black male adult, black shirt headed southbound.

5 MR. SINGER: Objection. That's not what the
6 -- there's a document in evidence that refers to that,
7 and it's miswritten purposely by the prosecution on the
8 screen there in contrast to what the catalogue says.

9 THE COURT: The jury --

10 MR. BATEMAN: I'm sorry. And that actually
11 is a mistake. It's 9:54, not 11:54.

12 MR. SINGER: It says BMJ and not BMA, so are
13 we going to allow the prosecution to --

14 MR. BATEMAN: I don't know what BMJ is.

15 MR. SINGER: -- write up -- well, that's
16 what he says in the evidence.

17 THE COURT: And he's accurately reflected
18 the evidence.

19 MR. BATEMAN: The catalogue's not in
20 evidence, Judge.

21 MR. SINGER: Yes, it is.

22 MR. BATEMAN: 9:54 -- and I apologize for my
23 typo -- calls out black male adult, black shirt,
24 southbound. Who's found? Who's found southbound on J
25 Street, black male adult, black shirt sitting on top of

1 the gun that was fired?

2 Walter tells you that he tells someone else
3 to call out at 11:59 black male adult, black shirt,
4 blue-jean shorts, red gloves. And again, that should be
5 9:59 as well.

6 Who's found at 11:10 wearing the black
7 shirt, blue-jean shorts, a red glove closely nearby
8 hiding in a backyard, hiding in a backyard?
9 Mr. Matthews.

10 Both Officers Cupp and Walter, Walter on the
11 scene identifies Mr. Matthews. Officer Cupp identifies
12 him in court as the driver.

13 Been much made about identification
14 processes that were used. There's been no evidence
15 before you, ladies and gentlemen, that the process that
16 was used with regards to Walter's identification with
17 Mr. Matthews was somehow inappropriate. In fact, he
18 testified that it is done all the time pursuant to
19 police procedures.

20 And think about it. Someone commits a
21 crime. Someone steals someone's car. They're found a
22 short period of time later. They're in this vehicle.
23 Doesn't it make sense to bring the individual who got
24 their vehicle stolen over and say, hey, I'm just going
25 to have you look at somebody. Does this person look

1 familiar?

2 Is that so unreasonable to say is this
3 person? Do we not expect that much of our officers that
4 they're going to come in here and just say, you know,
5 looks like him. I'm going to say 100 percent positive.
6 I'm going to risk my career -- 100 percent positive --
7 if it later turns out that it's not him.

8 Joshlin is found on top of the gun that was
9 used, top of the gloves that he was wearing with gunshot
10 residue. Mr. Matthews was located in the same area that
11 Mr. -- or that Officer Walter broke off his chase and
12 was last seen near the red glove hiding.

13 Ladies and gentlemen, this is substantial
14 evidence, more than enough evidence to convict both of
15 these individuals of all the crimes charged. They match
16 the description. Two officers came in here and
17 identified these individuals.

18 The scene tells you that they were the
19 shooters. The time tells you that they were the
20 shooters.

21 There was a certain inevitability on
22 September 30th of 2006. These two individuals -- all of
23 the shooters weren't going to get away.

24 That car, that Lincoln Town Car, was there.
25 Perhaps if they hadn't taken it, they would have gotten

1 away, but they decided to take it in front of two
2 officers, two officers that just happened to be nearby
3 and saw this happen.

4 There's a certain inevitability when they
5 turned back into the neighborhood, cashed the car.

6 There's an inevitability when the police are
7 coming from the north and south creating a complete
8 barricade in.

9 There's an inevitability when Mr. Matthews
10 finds himself in the backyard pinned down, nowhere to
11 go.

12 There's an inevitability that as Mr. Joshlin
13 is running across J Street that Rios is driving right at
14 him, and he's got nowhere to go.

15 It was inevitable, unfortunately, that they
16 were going to commit the crimes they night they decided
17 to do it.

18 It was inevitable, ladies and gentlemen,
19 that they were going to get caught that night.

20 The only question now is whether it's
21 inevitable that this jury is going to return the right
22 verdict. It is inevitable. I ask this jury to return
23 verdicts of guilty as to all counts.

24 THE COURT: Defense.

25 (Proceedings from 11:35 p.m. until 1:07 p.m.)

1 previously transcribed.)

2 (Jury present)

3 THE BAILIFF: The jury's present, your
4 Honor.

5 THE COURT: Thank you. May the record
6 reflect we're back on C228460, State of Nevada,
7 plaintiff, versus Pierre Joshlin and Jamar Matthews.

8 Counsel stipulate to the presence of the
9 jury?

10 MS. LEWIS: Yes, Judge.

11 MR. FIGLER: Yes, your Honor.

12 MR. SINGER: Yes, your Honor.

13 THE COURT: Are you ready, Counsel?

14 MR. SINGER: I am. Thank you, Judge.

15 Let me tell you, that's a tough act to
16 follow (indiscernible) one of those meetings that going
17 to bomb after the headliner comes on.

18 But nevertheless, a certain thing I want to
19 tell you is I haven't heard from the prosecution and I
20 haven't heard from anybody a real sincere thank you to
21 all of you as jurors.

22 I was a prosecutor a long, long time ago and
23 our chiefs used to always tell us make sure you thank
24 those jurors because it's not a -- it's an unenviable
25 job. It's part of our legal system. It's part of our

1 justice system. It's part of why all of this works
2 because of you. And on behalf of Pierre and myself, I
3 just want to say thank you for paying attention.

4 You know, part of our job is to pay
5 attention to you guys and make sure you guys are paying
6 attention to the evidence, and I carefully watched all
7 of you, maintained eye contact with most of you, and I
8 see everybody taking notes. I really appreciate on
9 behalf of Pierre that you did that, you know. Because
10 of you our system's really working here.

11 I understand it's been a long couple days,
12 and I understand that there's been a lot of people
13 talking at you, more to come still, but if you could
14 just pay a little -- hang in there a little bit longer
15 and pay attention to some of the -- some of the points
16 I'm going to bring up to you, because I'm going to try
17 very hard not to duplicate the excellent summation that
18 Mr. Bunin gave you.

19 I'm going to try to let you know that if
20 there's a point that he made that could be applied to
21 Pierre as well, please do that, because I'm not going to
22 go over them in detail again to save time, keep you here
23 any longer for that reason.

24 During my closing, I'm going to make some
25 references to facts that occurred during the testimony

1 that came from the stand, both testimony and physical
2 evidence. And if I misstate something, believe me it's
3 not on purpose because everybody -- as you've seen from
4 this trial, everybody from their own perspective sees
5 things differently.

6 So if I saw something sitting over there or
7 I heard something, maybe my ear was somewhere else or
8 halfway or on three different things, but it's your
9 memory that rules. It's your memory that is what
10 governs the decision that you must make.

11 So it's not purposeful on my part, and I
12 apologize in advance if I do that. So just use your
13 recollection to tell what you heard from the stand.

14 What I'm going to try to do also is take you
15 through the facts as you've heard them and the law as
16 you've heard them because, really, what your verdict is
17 is a marriage between the facts and the law.

18 You take the law that the judge told you
19 about and you apply the facts that you believe, that you
20 believe are credible, that you heard. You put those two
21 together and you get the verdict. It's a simple
22 equation.

23 Now, before I get to that, let me just
24 remind you a little bit about your role as a juror, you
25 know. When we were on voir dire it was a long voir

1 dire, and you made certain promises, and one you have to
2 remember is you were told that Pierre was arrested and
3 he was taken into custody. We saw that.

4 And at that first moment he was given an
5 opportunity to enter a plea. And from the minute he was
6 arrested until right now as he sits there, he's had the
7 same plea of not guilty, never wavered, and that's why
8 we have this trial.

9 But you also have to remember that he could
10 have at any point in time from the first time he was
11 taken into custody until right now, he could have said
12 I'm guilty, but he never said that. He never changed
13 his mind. He never wavered, always done what any of us
14 would have done if wrongfully accused. He couldn't have
15 done anything else. He put his faith in the system.
16 That's all he could really do.

17 Now, one thing that I want you to pay some
18 attention to is that when we talked to you on voir dire
19 about some people have preconceived notions of defense
20 attorneys or different attorneys have different styles
21 and there were a lot of questions about that.

22 Well, in this case something that struck me
23 last night is that you heard a law from the defense team
24 for Mr. Matthews, and you heard less from the defense
25 attorney for Mr. Joshlin, and that's not for any purpose

1 as in we don't take it as seriously because we do.

2 And don't speculate as to why, but one of
3 the reasons why could be and was is that I don't want to
4 repeat things. I didn't intend on repeating things. I
5 all I wanted to address was specific facts, specific
6 points that referred to Pierre Joshlin.

7 And by my very nature I like to cut to the
8 chase. I see things in black and white. I want to get
9 you to the point quickly. That's just me. For good,
10 for better or for worse, that's just me.

11 But please, this case -- Pierre's life's on
12 the line, and I know that. Nothing could be further
13 from the truth that because I said I'm a man of fewer
14 words that this case is not very, very important to me
15 and Pierre.

16 And we also spent a lot of time on the right
17 not to testify. Now you promised all of us, all of us,
18 that you wouldn't hold that against Pierre, and he
19 didn't testify.

20 And you have to stick to your promises
21 because when you made them, I believed you. Pierre
22 believed you. He and I conversated and we talked, and
23 we agreed to believe you when you took your oath and you
24 made those promises, so now I'm going to hold you to
25 them.

1 The burden of proof as you heard from the
2 judge is on the prosecution to prove that Pierre is
3 guilty beyond and to the exclusion of every reasonable
4 doubt. And if there is a reasonable doubt, you promised
5 the judge -- and it's your promise to the legal system--
6 that you must find Pierre not guilty, and that's what
7 your oath as jurors is all about.

8 We also talked about in voir dire the
9 preponderance of the evidence and how that applies to a
10 civil case where if somebody wants money and both sides
11 kind of start out on an even level playing field. But
12 in this case, we don't start out on a level playing
13 field. The scales of justice is tipped like this in
14 favor of Pierre.

15 So it's not when we mentioned a 51/49
16 preponderance. It's beyond a reasonable doubt, and
17 there's no quantity -- numerical quantity to it, but the
18 scale's definitely tipped to protect an innocent person.

19 Reasonable doubt is not some possible
20 speculative, imaginary or doubt that you force into your
21 mind. In other words, if you have to strain to find
22 reasonable doubt, then it's not there. It's only
23 present when there's a doubt as to the guilt of Pierre
24 and there is a reason, an articulable reason, for that
25 doubt. And it can be found from the evidence, conflicts

1 in the evidence or lack of evidence.

2 You have to ask yourself has the State, the
3 prosecution, eliminated all reasonable doubt. And your
4 verdict must be based on the evidence that's presented
5 to you, and it can't be based on speculation or
6 questions of why wasn't certain evidence presented to
7 you because, you know what, if certain evidence wasn't
8 presented to you, you can't put that burden -- you can
9 never shift the burden to this table right here
10 anywhere. You have to hold the burden to this table
11 right here. That's why it's next to you.

12 And if you say to yourself, for example, how
13 come I never heard from any homicide detectives in a
14 homicide case, you can't say, well, the defense could
15 have presented them, too. You can't do that. It
16 violates your oath as a juror.

17 You have to say why didn't it come from the
18 prosecution. And if it didn't come from the
19 prosecution, why didn't it come from the prosecution?
20 And Mr. Bunin pointed out to you a couple example of
21 those. I'm not going to go repeat them.

22 We have to come down to asking ourselves
23 this question. What proof is there that Pierre killed
24 Mercy Williams, attempted to kill Myniece Cook,
25 Maurice Hickman, Michel'le Tolefree? And what proof is

1 there that he robbed Melvin and Geishe of their vehicle?
2 And from what I see, where I'm sitting, I didn't see
3 concrete tangible proof of that fact, and they owe that
4 to you.

5 Can we just say, well, Pierre was found in a
6 dumpster in the neighborhood so he must be guilty and
7 he's here? You can't do that. The prosecution wants
8 you to do that. They want you to work backwards and
9 say, well, we found him in the dumpster, he must have
10 done something wrong. There has to be evidence to allow
11 you to come to that conclusion.

12 Just because Pierre was found in the
13 dumpster doesn't automatically place him at either crime
14 scene, and I'm going to go over with you in detail why
15 that's true. As if it's not obvious enough, I'm going
16 to go over with you, write down for you all the reasons
17 why it doesn't do anything. It doesn't implicate him in
18 either scenario, either the Balzar scenario or the Lawry
19 scenario.

20 Now, right before I start showing you what
21 evidence that I'm going to ask you to pay attention to
22 regarding Pierre, I'm going to ask you -- before you
23 actually get to the evidence, you have to look -- in a
24 way you have to look at each witness. You have to look
25 at their demeanor. You have to look at their ability to

1 see the situation, their bias.

2 There's a lot that goes into evaluating the
3 evidence prior to even hearing the person's words or
4 actions. You have to -- are they giving you eye
5 contact? Are they giving you up-front, forward answers?
6 Are they hesitating? Are they looking down? Are they
7 sweaty? There's a lot of things that go into it before
8 you even get to the substance of someone's words.

9 You have to really say to yourself I can't
10 leave my everyday life experiences and my experience
11 outside the door. I have to bring them to me, and what
12 do I know about people from my life.

13 No one's asking you to leave your common
14 sense outside the courtroom. You know, if a person
15 lies, they lie with a badge or without a badge, and
16 that's common sense.

17 You know, for example -- and I'm going to
18 give you a good example of what a person's demeanor can
19 tell you. Look at Officer Rios, very minor player in
20 this case.

21 But came up there and he really had a hard
22 time or seemed it a little combative to me when we were
23 talking about, well, he looked defeated. Do you
24 remember that?

25 And he gave me this whole face, and that was

1 ridiculous, but it shows what an arrogant person he is.
2 It tells you a lot about who he is. It tells you a lot
3 about how he presents himself above and beyond what he
4 says.

5 And, you know, it seems a little bit silly,
6 irrelevant as an aside, not really important to the
7 case, but I personally asked these policemen about their
8 dress, and I think each and every one of you can tell
9 with 100 percent certainty that those policemen don't go
10 to work in their uniforms.

11 And then the whole garbage about I don't own
12 a suit and have to come in a suit or a uniform. You
13 know that's not true. 100 percent you know it's not
14 true because we had an officer later, relevant or not,
15 you know now before you even get to the substance of the
16 testimony that they lied.

17 They wear the badge, they wear the gun belt
18 because they think that they're going to sucker you into
19 believing that the badge equals justice or badge equals
20 truth, and it doesn't. And I'm going to show you as it
21 relates to Pierre how that's -- how you can tell that
22 there was lies 100 percent.

23 And according to the jury charge that you
24 read about credibility, if you think that there's one
25 piece of a person's testimony that's unbelievable, you

1 can throw out the whole substance of it. And, you know,
2 that makes sense in everyday life experiences because
3 let's say we all go to lunch and we eat something that's
4 not so good.

5 You're eating some chili or whatever and you
6 eat a bite of it, and it's spoiled, rotten, doesn't
7 taste good. Are you going to just put that piece aside
8 and say, well, let me just finish the rest of it? No.
9 It doesn't make any sense.

10 The rule of law is not based on some judge
11 somewhere that's just making up stuff. It's based on
12 common sense. If you eat something bad, you're going to
13 throw the whole bowl out. You're going to return it.
14 Same thing with testimony. It's just common sense.

15 And, also, before you get to the substance
16 of the testimony, you know, questions aren't evidence.
17 Questions plus answers are evidence. And you're going
18 to have to say to yourself why, a lot of times in this
19 particular case, did we have to wait until
20 cross-examination to get to the actual point, to get to
21 the actual meat of the situation?

22 Is it possible that the prosecution was
23 taking a chance and hoping that the defense was not
24 going to ask certain questions? They could kind of slip
25 some stuff by you without us noticing? Maybe the

1 prosecution wanted you to look at Pierre's case with one
2 eye closed just to see half of a story.

3 But I had to ask you questions. I had to
4 follow up so that you guys could get the entire picture.
5 You can get the whole story. And you need the whole
6 story because you're going to make a really important
7 decision, a decision that's going to affect Pierre's
8 life, an important decision to him and me. And when you
9 make it, you need everything in front of you.

10 None of us are going to go out and buy a
11 used car just on the representation of a used-car
12 salesman. You know a smart purchaser, a smart consumer,
13 is going to go test that for a road test, take it to a
14 mechanic, check it out and make sure it runs well. And
15 that's the purpose of cross-examination.

16 Your job is way more important than these
17 examples I'm giving you. You have a huge question, and
18 you need to use care and caution and deep concern in
19 deciding this question as it relates to Pierre.

20 You have to really think about is all
21 reasonable doubt eliminated from my mind, and I'm going
22 to tell you right now why it can't be that.

23 Now, Mr. Bunin spent a lot of time and did
24 an excellent job on identification, but in Pierre's
25 case, as this case relates to Pierre, there was no

1 identification. None. There was none at Balzar. There
2 was none at Lawry. The only -- and the police in this
3 case, they worked backwards, you know. They found him
4 at the dumpster, and then they figured out how to put
5 him at the scene, but they didn't do a really good job
6 about that because there's holes in every step of their
7 case.

8 They never had one person, any of them, and
9 there were so many witnesses, they never had one person,
10 even Officer Cupp that said I saw his face. That's the
11 guy or I saw that guy in the car or I saw that guy at
12 Balzar, I saw that guy running, none, never. No facial
13 identification. They gave a general description of him
14 and even that was extremely variant between the people.

15 What are the chances that no one at Balzar
16 IDs him by face or even resembling that? No one at
17 Lawry IDs him.

18 And the police officers have no idea who
19 this person is because his back is to them until he gets
20 taken custody, and then they say, yeah, this is the guy.
21 That's the guy that I saw from behind from 60 or 70
22 feet. One person said that.

23 You know, human nature -- we talked about
24 that in the beginning -- wants you to place blame
25 because the tragedy occurred. Someone died. No doubt.

1 We agree with that. You have to fight that urge. When
2 you go back to deliberate, you have to fight the urge
3 that just because Pierre sits here you have to blame him
4 because, you know what, you can blame somebody else.

5 Blame the police for not doing their job.
6 Shame on them. Blame the police for not taking
7 fingerprints off this gun.

8 And, you know, Mr. Boyd could have told you
9 that this gun was really easy to take prints off of, but
10 he hedged. He said it has a little bit of rough
11 surfaces.

12 But, you know, this gun was found in the
13 dumpster and all you had to do (indiscernible). All you
14 got to do is pick it up like this from the dumpster and
15 take prints off of it, really, just like that, you know.

16 Mr. Krylo said he got to his ballistics test
17 in the middle of October, and he did it from like
18 October 16th to the end of October. The crimes occurred
19 the end of September on the 30th, so that's two weeks
20 where these guns weren't being tested at all. You pick
21 it up.

22 Well, we know from the scene of the Lincoln
23 that latent prints are readily available. They took
24 tons of prints that night off the Lincoln.

25 They had the gun in the dumpster. How easy

1 was it? And if that's not enough, if that's not enough,
2 we heard about the Super Glue technique, and they found
3 a clip there also and -- excuse me -- and in the clip
4 were bullets that were loaded by somebody, though, no
5 prints off those either. Shame on the police for not
6 doing that.

7 They found him in the dumpster, a young
8 African-American person in a neighborhood populated by
9 those exact type of people, those exact looking people,
10 those exact dressing people. They found them, and that
11 was enough. No need -- why do we need an investigation
12 anymore?

13 Let's talk about the clothing. You know,
14 something else that just offended me to no end. It
15 amazes me, and I submit to you, you should throw this
16 out with the chili. You know, Michel'le Tolefree gets
17 up there, and she had the recorded statement before and
18 she couldn't ID anybody, and she had the prior
19 proceeding and she couldn't ID anybody, and on direct
20 from the prosecution she couldn't ID, and on
21 cross-examination from me she couldn't ID anybody, and
22 then that's five times right there, but on the sixth
23 time, you know what, on redirect, you know, it maybe it
24 looks like, it could look like that guy right there.
25 That's offensive. You know, but, you know, she's young

1 and her cousin died, and I understand that, and I do
2 understand that, and she wants, everybody, human nature,
3 wants to place blame. Who else to place blame on, but
4 that is not the way this criminal justice works and
5 shame on her for trying that.

6 You know, shame on her because someone did
7 die, and she's just willing to willy-nilly affect
8 someone's life, another person's life. But, you know --
9 I mean, she left herself in such a situation, and you
10 know that couldn't have been Pierre because all black
11 with a black hoody on.

12 Now we know, we know that wasn't Pierre with
13 100 percent certainty because we know what Pierre was
14 wearing that night; black shorts, black hoody, and an
15 Afro. I mean, that's one of those issues of
16 cross-cultural identification.

17 Police officer said -- I mean, he did worse
18 than anybody. He said that doesn't look like an Afro to
19 him.

20 But we know that it's not all black from
21 head to toe. We know it's not a black hoody, and we
22 know if it's an Afro, I mean, in my opinion, I would
23 submit it's probably more of a fade or a close-cropped
24 hair cut, but definitely not an Afro.

25 So she wanted to ID him but she really

1 couldn't because other than her sixth try at doing it,
2 maybe she has the -- we can't escape that she didn't see
3 his clothes. She saw his clothes wrong. She picked the
4 wrong guy in her effort to do what she thought was
5 right.

6 Melvin Bolden said that the person came up
7 to him, had black and red gloves on with short sleeves,
8 all black. Nothing said that there was any black and
9 red gloves ever found at all in this case, and we know
10 it's not short sleeves.

11 Even Officer Cupp said that the person that
12 was running away from him was wearing a sweat shirt
13 because he tried to tuck -- well, as he was looking at
14 him 70 foot away which is double the length of the
15 courtroom he saw him tucking a gun into a sweat shirt.
16 I don't think there's any way we're calling that a sweat
17 shirt. You can see right through it. There's holes in
18 it. It's a thin, long-sleeve T-shirt. More and more
19 ways we know it's not Pierre.

20 Here's another one that you need to really
21 keep in mind. He used that word really carefully and he
22 used it over and over again thank goodness. Thank
23 goodness. "Ejection." You know, when I think of an
24 ejection, you think of like a pilot ejecting from a
25 crashing airplane, a traumatic ejection of a car on a

1 rollover where the driver goes out of the front
2 windshield or through the roof, sun roof that's open or
3 unbelted passenger.

4 You know, the word "ejection" doesn't mean
5 you open the car and step out. It doesn't mean the car
6 opens and you roll out. Ejection. He used that and I
7 held -- I forced him to marry it, you know. He couldn't
8 around that word "ejection".

9 He said Pierre got ejected from the vehicle
10 or the person, the suspect that was in the passenger
11 side got ejected from the vehicle. Now, if you would
12 get ejected from a vehicle, would you say -- let's say
13 you were super enough or fit enough not to get any
14 physical injuries, but you couldn't escape some ripped
15 knees in your pants. How about maybe some grass stains?

16 What else would you associate with an
17 ejection? Not nothing. His hands don't look like he
18 was superman flying through the air getting ejected.
19 You know, as you go forward your body goes forward when
20 you're ejected. Nothing on his face was scraped. His
21 chin probably, maybe nose.

22 I mean you can say he get ejected from the
23 side. Nothing. So you know for sure he wasn't in the
24 car because the two passengers got traumatically
25 ejected.

1 Now while it's true you're going to get a
2 jury charge -- I'm going to move onto the next thing
3 now. While it's true you're going to get a jury charge
4 that the prosecution has no responsibility to prove
5 motive, they can get up here and say there's no -- but
6 it's something you can consider. And (indiscernible)
7 have nothing, nothing, nothing to show any connection
8 from Pierre to Myniece Cook to Michel'le Tolefree to
9 Maurice Hickman who we didn't hear from. We don't know
10 anything about him. To the crime scene at Balzar to the
11 crime scene at Lawry.

12 There's no motive. No jilted lovers. No
13 retribution. No revenge. You didn't hear any of that,
14 so all you know is the prosecution's trying to say it
15 was just random senseless for no reason.

16 But that's not true because the people who
17 really did it probably did have a motive, but Pierre has
18 no motive. He has no connection to them at all. None.

19 MS. LEWIS: Judge, I'm going to object.
20 There's been no evidence of any way one way or the
21 other.

22 THE COURT: It's argument.

23 MR. SINGER: Right. You know, that's an
24 interesting point. There's no evidence one way or the
25 other, but you still -- if there's no evidence one way

1 or the other, the law forbids you to shift the burden
2 here.

3 You can never shift the burden here and say
4 there's no evidence one way or another. I want to hear
5 something from here if there's no evidence one way or
6 the other. No, no, you cannot do that. I need to hear
7 evidence from here if there's no evidence one way or the
8 other. That's the responsibility of a prosecutor who
9 alleges that Pierre did something wrong.

10 Here's another way you know it's not Pierre.
11 When Officer Cupp was chasing him he said that he first
12 was 60 to 70 feet away and then he gained on him a
13 little bit. He became a little bit closer to him. I
14 think he said 30 to 40 feet, maybe, and then he fired
15 three shots.

16 From that close of a range -- and I'm not
17 saying that you know this for sure, but I'm suggesting
18 to you, I'm submitting to you, I'm asking you to use
19 your common sense.

20 If an officer qualifies at a range to be an
21 officer, and he's licensed to carry the gun and, he does
22 the police training, at 30 to 40 feet one-on-one, not in
23 a crowd, with no bad backdrop like said, nobody else
24 around that he could have possibly hit, 30 to 40 feet,
25 that's -- I think we agreed 30 to 40 feet was from here

1 to the door, maybe.

2 It looks to me, I submit to you, like the
3 distance on a police firing range or any firing range.
4 30 to 40 feet, three shots, none of them even grazed
5 him.

6 But, you know what, it probably did. I bet
7 that guy got shot and went to the hospital. It's not
8 just the guy that's here. The guy got shot and went
9 home and nursed his wounds. It's just not the guy
10 that's here.

11 I mean, we can say the cops lie, but we --
12 and that's not something you can prevent by going to the
13 police academy. But you sure can prevent him from being
14 a bad shot because they got to be trained. They're
15 trained police officers. Part of the training is the
16 use of a gun.

17 Even no ID with no Officer Rios, and he said
18 that the guy was an African-American young adult with
19 all black again. No gun mentioned. So we don't know if
20 -- I mean, we know Pierre was in the dumpster, but we
21 don't know if the person Officer Rios saw was Pierre.
22 He didn't see his face, and he missed -- and he said the
23 guy had dark pants on.

24 And another thing that's interesting in this
25 case, you know, that you need to consider is Pierre was

1 never charged with possession of a gun. The prosecution
2 tells you that that gun, in their opinion, is connected
3 to the murder scene. That's a policeman's gun.
4 Remember that. That's a policeman's gun.

5 And you don't know if that policeman is from
6 the same command as these policemen. You don't know
7 anything about them because the prosecution left that
8 out.

9 That's not my responsibility to tell you
10 where that gun was stolen from, when it was stolen, how
11 it was stolen, which policemen it was stolen from, none
12 of that. But you need to remember that's a policemen's
13 gun that was in the dumpster, and Pierre never got
14 charged with it.

15 You heard the charges. He didn't get
16 charged with possession of stolen property. He didn't
17 charged with carrying a firearm without a permit. He
18 didn't get charged with concealed weapons. He didn't
19 get charged with anything to do with that gun, and
20 that's a gun that they say is connected to a murder
21 scene. He didn't get charged with anything, anything.

22 I mean, I can submit to you that there's
23 tons of charges that they could have put on him for that
24 gun. The clip was extra long. It was stolen. We know
25 that. We don't know how that gun got into that

1 dumpster, but we do know it was a policeman's gun.

2 Another thing you need to recall and
3 remember is that the prosecution showed no connection
4 between the defendants, so then when they came up here
5 and you have all these charges about conspiracy is that
6 -- is an agreement between two or more people with some
7 overt acts in furtherance of the agreement.

8 Don't you think they might have to show that
9 there was some connection between these two young
10 people? They're sitting at the table because that's all
11 they could do. They were accused of a crime. But
12 nothing, no connection, no meeting of the minds, not
13 even for one second.

14 I mean, conspiracy doesn't mean you sit
15 around a board room and you have to discuss it, but it
16 does mean that for some time you have to be associated
17 in some way. And you can't speculate that, well, maybe
18 they would be, maybe they're from the same neighborhood.
19 You don't know any of that. It's guessing.

20 And another thing you need to know, there
21 was also gloves found in the dumpster. The forensic
22 analyst or the crime scene analyst uses scissors and all
23 kinds of careful stuff. This is my client's life on the
24 line, you know. I have no fear of touching this stuff.
25 You know, if I contaminated, so be it.

1 I have to show you these, because you know
2 what, these gloves are in evidence, and you need to see
3 that there's somebody else's initials on those gloves.
4 But you know what, I'll tell you one thing for sure. If
5 that said PJ on it, you know these would be in your
6 face.

7 They'd be passing them around. You'd be
8 looking at the P and the J and saying that's pretty
9 conclusive right there. PJ must -- it probably stands
10 for Pierre Joshlin.

11 But AG or whatever this is, definitely not a
12 PJ, so they want to just brush that under the rug. You
13 know, who knows. Guess whose they are. Guess where
14 they came from.

15 You're talking about a dumpster full of
16 garbage in a high-crime neighborhood. We're not talking
17 about a nice, clean, empty, sterile dumpster in
18 Summerlin or in Southern Highlands or wherever we're
19 talking about. We're talking about a dumpster on the
20 old west side that we all heard about over and over
21 again who frequents it and what happens down there.

22 Did the State prove to you beyond a
23 reasonable doubt that these gloves were ever on Pierre,
24 with Pierre, being held by Pierre? No prints from the
25 gloves, no prints from the gun.

1 Tons of prints from the Lincoln. I mean,
2 you could almost say to yourself, gosh, they really
3 wanted those prints in the Lincoln, and they tried
4 everything to get prints from Pierre in that Lincoln and
5 none, nothing, none, not so much as half of a maybe. No
6 palm prints. They can do palm prints, too. Nothing.

7 So you can't tie him to the Lincoln. I
8 mean, you can almost say for sure 100 percent he wasn't
9 in there because you know there was other people. They
10 took a lot of prints. Nothing.

11 But I guess I saved the best for last, you
12 know, something that really offended me both as a former
13 prosecutor, as a human being I guess you could really
14 say. And, you know, I noticed some of you guys laughing
15 at it, so I really appreciate that you're picking up on
16 this stuff.

17 Officer Cupp, boy, he was in a box because
18 he identified the guy as wearing dark pants, and he
19 knows everybody else in the case was identified as
20 everybody wearing dark pants and especially what they
21 said the person that ran out of the car was wearing.

22 I mean, is there anybody that can stretch
23 their imagination to such an extreme that the picture
24 that you're looking at in evidence shows dark pants?
25 Does it even show medium dark pants? I mean, those are

1 faded blue jeans. Faded blue jeans with like almost
2 white patches on them.

3 I mean, if you look here in the folds, it's
4 almost like I wouldn't say white pants because then I
5 would be (indiscernible) Officer Cupp, but, certainly,
6 light blue. Light blue, not medium blue, not brand-new
7 blue.

8 There's no one that has any rationality,
9 common sense or any life experience that's going to call
10 those dark pants, and he did that. He insulted you. He
11 told every one of you that those were dark in his
12 opinion.

13 I mean, in my 15 years of practice I don't
14 think I could ever get a cop on the stand to -- and get
15 him in a situation where he -- you know 110 percent that
16 he's lying.

17 And another way you know he was lying, too,
18 is that he said 70 feet away he knew the gun was a
19 Glock. Now come on. I mean, he didn't even need to
20 embellish that fact. He could have just said it was a
21 gun, but he needed to tie that to the dumpster.

22 If you look at this back in the jury room
23 you can see that the word "Glock" is in black highlights
24 on the side here and the same kind of logo on the
25 chamber there. 70 feet away which is from here to the

1 door twice at night and he knew this was a Glock. I
2 mean, that's just -- why? Why? Why does he have to do
3 that? Why did he do that? There's in reason to. He
4 had to tie that gun to the gun in the dumpster. I mean,
5 it wasn't even a good lie. It wasn't even a lie that
6 really like made any sense and helped his case.

7 You know, and I, too, am going to sit down
8 because I know I only have a certain amount of time and
9 your patience is running, and I understand that, and
10 what I want you to do for me, though, is one thing.

11 When I sit down there, Pierre and I aren't
12 going to get up again, and Mr. Bunin went over this,
13 but, you know, in another way think about it this way.

14 Think about when the prosecution gets up and
15 talks to you again how would Mr. Singer or how would any
16 good, semi-good, average defense attorney answer that
17 point, you know?

18 The prosecution's going to try to take the
19 last bite. It's their burden. They're going to have
20 the last word, you know, but there's going to be a
21 rational explanation and rational -- a way to
22 rationalize and a way to explain their argument. I'm
23 counting on you to do that on behalf of Pierre and
24 myself.

25 Now after today, soon, you're going to go

1 back to your lives and I realize, well, and we're not
2 going to probably see each other ever again in life, so
3 I'm going to take this opportunity again to thank you.
4 Pierre -- on behalf of Pierre and myself, thank you.

5 You did an excellent job. Paid great
6 attention. Never caught anybody sleeping. Everybody
7 was here on time. It was really excellent.

8 I mean, you wouldn't believe what we see as
9 defense attorneys as far as people losing their way to
10 courthouses, as far as people falling asleep, as far as
11 people getting sick, as far as a million things happen.
12 I just want to really say how much I appreciate your
13 time and effort in this very important system that we
14 have in the United States.

15 You know, I mean, I hope also the trial has
16 been important to you. I think that you guys are going
17 to remember this for the rest of your lives. I really
18 do. I really think it's going to be a very meaningful
19 experience to all of you.

20 And today when you retire to deliberate,
21 you're going to have bestowed on you the greatest power
22 that any group of people could ever have put on them.
23 You have the power in your hand to decide the guilt or
24 innocence of a human being, of a fellow citizen. The
25 power to decide the fate of Pierre.

1 And I know, I know from talking to all of
2 you as much as we got to, that you're going to exercise
3 that power with wisdom and compassion. I've tried to
4 the best of my ability to show you that there's only one
5 verdict -- there's only one verdict consistent with what
6 you now know as reasonable doubt.

7 But you know what, I can't give each and
8 every one of you the courage to return that verdict.
9 That has to be within you, you know. You have to find
10 the courage despite the fact that a tragedy occurred.

11 You have to have the courage to return the
12 correct verdict. You have to find the courage in
13 yourselves to say the State of Nevada does not deserve a
14 conviction in this case based on the lack of proof.

15 You have to think of your verdict as a
16 marriage, you know. Although, some, you know,
17 unfortunately, marriages you can get divorced and
18 verdicts you can't. There's no divorce court for
19 verdicts.

20 Your verdict is with you for the rest of
21 your lives. You're inseparable from it. And if you
22 return the proper verdict, a verdict of not guilty, you
23 can walk out of the courtroom with your head high and be
24 very proud of your verdict for the rest of your life.
25 Thank you.

1 (Proceedings from 1:49 p.m. until 2:25 p.m.

2 previously transcribed.)

3 THE COURT: Also, ladies and gentlemen,
4 pursuant to our procedures, two members of the jury of
5 this panel have been -- we have a question.

6 Counsel approach.

7 (Off-record colloquy)

8 (Off-record bench conference)

9 THE COURT: Ladies and gentlemen, we've
10 reviewed the question. The evidence is concluded prior
11 to argument. We're unable to supplement that evidence
12 now. The information that you have as you understand it
13 must control, so we are unable to ask that question.

14 As I was saying, pursuant to Rule -- we have
15 selected two alternate jurors to sit in the -- if there
16 is a need. Those two jurors are jurors No. 13 and 14,
17 Mr. Tate and Mr. Randall. They were predetermined prior
18 to you even walking in the building.

19 We will now swear the officers to take
20 charge of the jury and the alternates.

21 (Officers sworn)

22 THE COURT: Ladies and gentlemen, you're
23 directed to follow the bailiff, Mr. Reichert. Okay.

24 (Jury deliberation)

25 THE COURT: May the record reflect we're

1 outside the presence of the jury.

2 Is there anything else to come before the
3 Court before we recess and await the verdict?

4 MR. FIGLER: Who do we give our cell phone
5 numbers to, Judge?

6 THE COURT: Yes. Phone numbers to --

7 MR. SINGER: Can you advise us what time
8 you're going to release them so that we can be off call?

9 THE COURT: I'll call you.

10 MR. SINGER: I just want to let you know at
11 6:00 I'm going to be in Summerlin. I'll be here,
12 downtown, until 6:00, but I can be here in 10, 15
13 minutes, but --

14 THE COURT: Okay.

15 MR. SINGER: -- (indiscernible).

16 MS. LEWIS: Do you know how late --

17 MR. SINGER: That's what I was asking, too.

18 THE COURT: I'm hesitating because it's 2:30
19 now, and I want to see where we go.

20 MS. LEWIS: Okay.

21 (Off-record colloquy)

22 (Court recessed at 2:58 p.m. until 6:30 p.m.)

23 (Off-record colloquy)

24 MR. FIGLER: There wasn't one query from the
25 jury, huh?

1 THE COURT: No, not as far as I know.

2 (Jury present)

3 THE BAILIFF: Jury's present, please. All
4 rise.

5 THE COURT: We're back on the record in
6 C228460, State of Nevada, plaintiff, versus
7 Pierre Joshlin.

8 (Off-record colloquy)

9 THE COURT: All right. Again, we're back on
10 the record in C228460, state of Nevada, plaintiff,
11 versus Pierre Joshlin and Jamar Matthews.

12 May the record reflect the presence of the
13 defendants, their attorneys, deputy district attorneys.

14 Do parties stipulate to the presence of the
15 jury?

16 MR. FIGLER: There's 12 there, Judge. Yes.

17 MS. LEWIS: Yes, Judge.

18 THE COURT: So parties stipulate to the
19 presence of the jury?

20 MR. FIGLER: Yes.

21 MS. LEWIS: Yes, Judge.

22 THE COURT: All right. Has the jury elected
23 a foreman?

24 JURY NO. 8: Yes.

25 THE COURT: And based upon the blue sheets

1 in your hand, I believe it's Mr. Ashley.

2 JUROR NO. 8: Yes, sir.

3 THE COURT: Mr. Ashley, has the jury reached
4 a verdict?

5 JUROR NO. 8: Yes, we have.

6 THE COURT: Could you hand those verdicts to
7 the bailiff, please, and I'll hand the verdicts to the
8 clerk and ask her to read the verdicts out loud.

9 THE CLERK: Okay. District Court Clark
10 County, Nevada. State of Nevada, plaintiff, versus
11 Jamar Matthews also known as Jamar Demon Matthews,
12 defendant. Case No. 228460 in Department 18.

13 Verdict. We the jury in the above-entitled
14 case find the defendant, Jamar Matthews, as follows:

15 Count I, conspiracy to commit murder.
16 Guilty of conspiracy to commit murder.

17 Count II, murder with use of a deadly
18 weapon. Guilty of first-degree murder with use of a
19 deadly weapon.

20 Count III, attempt murder with use of a
21 deadly weapon, Myniece Cook. Guilty of attempt murder
22 with use of a deadly weapon.

23 Count IV, attempt murder with use of a
24 deadly weapon, Michele'le Tolefree. Guilty of attempt
25 murder with use of a deadly weapon.

1 Count V, attempt murder with use of a
2 deadly --

3 THE CORRECTIONS OFFICER: Face forward.
4 (Indiscernible).

5 THE DEFENDANT: No. Just take me out the
6 courtroom, please. I don't want to react in the
7 courtroom. Can you just take me out, please? Please,
8 I'm guilty of --

9 UNIDENTIFIED SPEAKER: (Indiscernible).

10 THE DEFENDANT: Can I please just step out
11 the courtroom because I don't want to react in the
12 courtroom.

13 MR. FIGLER: That's fine, Judge.

14 THE DEFENDANT: Go ahead. I'll maintain,
15 Judge. I'm sorry about that.

16 MR. FIGLER: Thank you.

17 THE CLERK: Count V, attempt murder with use
18 of a deadly weapon, Maurice Hickman. Guilty of attempt
19 murder with use of a deadly weapon.

20 Count VI, possession of short-barreled
21 rifle. Guilty of possession of short-barreled rifle.

22 Counts VII, conspiracy to commit robbery.
23 Guilty of conspiracy to commit robbery.

24 Count VIII, robbery with use of a deadly,
25 Geishe Orduno. Guilty of robbery with use of a deadly

1 weapon.

2 Count IX, robbery with use of a deadly
3 weapon, Melvin Bolden. Guilty of robbery with use of a
4 deadly weapon.

5 Count X, assault with use of a deadly
6 weapon, Bradley Cupp. Guilty of assault with use of a
7 deadly weapon.

8 Count XI, assault with use of a deadly
9 weapon, Brian Walters. Guilty of assault with use of a
10 deadly weapon." Dated this 11th day of May, the year
11 2007 by the foreperson, Jeffery Ashley.

12 Ladies and gentlemen of the jury, is that
13 your verdict as read, so say you one, so say you all?

14 THE JURY: Yes.

15 THE CLERK: Thank you.

16 In the matter of State of Nevada versus
17 Pierre Joshlin, defendant.

18 Verdict. Count I, conspiracy to commit
19 murder. Guilty of conspiracy to commit murder.

20 Count II, murder with use of a deadly
21 weapon. Guilty of first-degree murder with use of a
22 deadly weapon.

23 Count III, attempt murder with use of a
24 deadly weapon, Myniece Cook. Guilty of attempt murder
25 with use of a deadly weapon.

1 Count IV, attempt murder with use of a
2 deadly weapon, Michele'le Tolefree. Guilty of attempt
3 murder with use of a deadly weapon.

4 Count V, attempt murder with use of a
5 deadly weapon, Maurice Hickman. Guilty of attempt
6 murder with use of a deadly weapon.

7 Counts VII, conspiracy to commit robbery.
8 Guilty of conspiracy to commit robbery.

9 Count VIII, robbery with use of a deadly
10 weapon, Geishe M. Orduno. Guilty of robbery with use of
11 a deadly weapon.

12 Count IX, robbery with use of a deadly
13 weapon, Melvin Bolden. Guilty of robbery with use of a
14 deadly weapon." Dated this 11th day of May, the year
15 2007 by Jeffery Ashley.

16 Ladies and gentlemen of the jury, is that
17 your verdicts read, so say you one, so say you all?

18 THE JURY: Yes.

19 THE CLERK: Thank you.

20 THE COURT: Do either of parties decide to
21 have the jury polled?

22 MR. FIGLER: Absolutely, Judge.

23 MR. BUNIN: Yes.

24 MR. SINGER: Yes, please.

25 THE COURT: Juror No. 1, is that your

1 verdict as read?

2 JUROR NO. 1: (Indiscernible).

3 THE CLERK: No. 2, is that your verdict as
4 read?

5 JUROR NO. 2: Yes.

6 THE CLERK: No. 3, is that your verdict as
7 read?

8 JUROR NO. 3: Yes.

9 THE CLERK: No. 4, is that your verdict as
10 read?

11 JUROR NO. 4: Yes.

12 THE CLERK: No. 5, is that your verdict as
13 read?

14 JUROR NO. 5: Yes.

15 THE CLERK: No. 6, is that your verdict as
16 read?

17 JUROR NO. 6: Yes.

18 THE CLERK: No. 7, is that your verdict as
19 read?

20 JUROR NO. 7: Yes.

21 THE CLERK: No. 8, is that your verdict as
22 read?

23 JUROR NO. 8: Yes.

24 THE CLERK: No. 9, is that your verdict as
25 read?

1 JUROR NO. 9: Yes.

2 THE CLERK: No. 10, is that your verdict as
3 read?

4 JUROR NO. 10: Yes.

5 THE CLERK: No. 11, is that your verdict as
6 read?

7 JUROR NO. 11: Yes.

8 THE CLERK: And, No. 12, is that your
9 verdict as read?

10 JUROR NO. 12: Yes.

11 THE CLERK: Thank you.

12 THE COURT: The Court will now record the
13 verdict and the minutes of the Court.

14 Ladies and gentlemen, I want to thank you
15 for your time and attention in this matter. Without
16 your patience and your cooperation this type of trial
17 could not proceed.

18 Your role in this is fundamental to our
19 system of justice; and, therefore, on behalf of the
20 Eighth Judicial District Courts and the people of the
21 State of Nevada and the community, I thank you for your
22 efforts.

23 Also, on behalf of counsel I wish to thank
24 you for your careful deliberation in this matter. You
25 are now free from your admonishment.

1 I advise you that you may talk to anyone you
2 wish about this or not talk. Parties may be interested
3 in discussing this matter with you further. If you wish
4 to discuss this case with them, you may do so. If you
5 do not wish to discuss this matter with anybody, you
6 don't have to.

7 If someone should approach you and persist
8 in discussing or trying to discuss this case with you
9 and you do not wish to do so, please bring that fact to
10 my attention through the bailiff and appropriate action
11 will be taken.

12 Again, the jury's excused with the thanks of
13 the Court and counsel. Please follow Officer Reichert.

14 (Jury excused)

15 THE COURT: Record should reflect we're
16 outside the presence of the jury. The verdicts having
17 been recorded, we will set this matter for sentencing.

18 THE CLERK: And that will be June the 18th
19 at 8:30.

20 The Court: Are there any further motions to
21 come before the Court before we adjourn?

22 MS. LEWIS: Yes, Judge.

23 The Court: State.

24 MS. LEWIS: The State would ask that both
25 defendants be remanded at this time without bail.

1 The Court: It will be a no-bail hold at
2 this time.

3 Defense, any motions?

4 MR. FIGLER: No, Judge. Just one thing,
5 though. We intend to file a motion for new trial.

6 I was a little curious, and I didn't want to
7 make a big deal of it during the time, but there was a
8 number of objections during the prosecutorial rebuttal
9 and Your Honor simply ruled noted, and there was no
10 ruling on it, so I'm not exactly sure how I'm supposed
11 to proceed on that.

12 The Court: Well, it's my understanding that
13 I note -- I note the -- your objection for the record.
14 In terms of prosecutorial misconduct, that's an issue
15 that you take up on appeal. That was my understanding
16 of the process.

17 MR. FIGLER: Okay. Well, that's fine. What
18 I have then is that they were denied? Our objections
19 were not sustained? They were overruled?

20 The Court: They were overruled.

21 MR. FIGLER: Okay.

22 The Court: As argument.

23 MR. FIGLER: And then as a course what I'll
24 do is I'll make a motion for mistrial based on
25 cumulative prosecutorial misconduct at this time, and

1 then if I need to -- if depending on how Your Honor
2 rules on that, then I'll file my motion for mistrial --
3 or for a new trial, rather.

4 The Court: At this point I'll deny that
5 motion.

6 MR. FIGLER: Okay.

7 The Court: Is there anything further to
8 come before the Court?

9 MR. FIGLER: No.

10 MR. SINGER: No.

11 The Court: We are in adjournment.

12 (Court concluded at 6:41 p.m.)
13
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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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John J. Blum
CLERK OF COURT

 ORIGINAL

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6 (702) 382-2209
7 Attorney for Petitioner

8
9 EIGHTH JUDICIAL DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,

12 Plaintiff,

13 vs.

14 JEMAR MATTHEWS,

15 Defendant

) Case No.: C228460

) Dept.: 18

) PETITION FOR WRIT OF HABEAS
) CORPUS

06C228460-2

PWMC

Petition for Writ of Habeas Corpus

1103486



16 COMES NOW the Defendant, Jemar Matthews, who hereby submits the following
17 Petition for Writ of Habeas Corpus. This brief addresses whether Matthews was prejudiced by
18 ineffective assistance of counsel in his previous District Court case.

19
20 INFORMATION REQUIRED BY NRS 34.735

21 1. Name of institution and county in which you are presently imprisoned or where and how
22 you are presently restrained of your liberty: Nevada State Prison, in Carson City,
23 Nevada.

2. Name and location of court which entered the judgment of conviction under attack:
Eighth Judicial District Court, Clark County Nevada.

Date of judgment of conviction: May 11, 2007.

Case number: C228460.

(a) Length of sentence: Life with a minimum parole eligibility of twenty (20) years.

(b) If sentence is death, state any date upon which execution is scheduled: N/A

CLERK OF THE COURT

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- 1 6. Are you presently serving a sentence for a conviction other than the conviction under
2 attack in this motion? Yes _____ No X
- 3 If "yes," list crime, case number and sentence being served at this time: N/A
- 4 7. Nature of offense involved in conviction being challenged: **Conspiracy to commit**
5 **murder; murder with use of a deadly weapon; attempted murder with use of a**
6 **deadly weapon; possession of a short barreled rifle; conspiracy to commit robbery;**
7 **robbery with use of a deadly weapon; assault with a deadly weapon.**
- 8 8. What was your plea? (check one)
- 9 (a) Not guilty X
- 10 (b) Guilty
- 11 (c) Nolo contendere
- 12 9. If you entered a plea of guilty to one count of an indictment or information, and a plea of
13 not guilty to another count of an indictment or information, or if a plea of guilty was
14 negotiated, give details: N/A
- 15 10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
- 16 (a) Jury X
- 17 (b) Judge without a jury
- 18 (c) Not Applicable
- 19 11. Did you testify at the trial? No
- 20 12. Did you appeal from the judgment of conviction? Yes X No _____
- 21 13. If you did appeal, answer the following:
- 22 (a) Name of court: **The Supreme Court of the State of Nevada**
- 23 (b) Case number or citation: **50052**
- 24 (c) Result: **Decision of the Eighth Judicial District of Nevada Affirmed**
- 25 (d) Date of result: **June 30, 2009**
14. If you did not appeal, explain briefly why you did not: N/A
15. Other than a direct appeal from the judgment of conviction and sentence, have you
previously filed any petitions, applications or motions with respect to this judgment in
any court, state or federal? Yes _____ No X
16. If your answer to No. 15 was "yes," give the following information:
- (a) (1) Name of court: N/A

- 1 (2) Nature of proceeding: N/A
- 2 (3) Grounds raised: N/A
- 3 (4) Did you receive an evidentiary hearing on your petition, application or
4 motion? N/A
- 5 (5) Result: N/A
- 6 (6) Date of result: N/A
- 7 (7) If known, citations of any written opinion or date of orders entered pursuant to
8 such result: N/A
- 9 (b) As to any second petition, application or motion, give the same information: N/A
- 10 (1) Name of court: N/A
- 11 (2) Nature of proceeding: N/A
- 12 (3) Grounds raised: N/A
- 13 (4) Did you receive an evidentiary hearing on your petition, application or
14 motion? Yes NoN/A
- 15 (5) Result: N/A
- 16 (6) Date of result: N/A
- 17 (7) If known, citations of any written opinion or date of orders entered pursuant to
18 such result: N/A
- 19 (c) As to any third or subsequent additional applications or motions, give the same
20 information as above, list them on a separate sheet and attach: N/A
- 21 (d) Did you appeal to the highest state or federal court having jurisdiction, the result or
22 action taken on any petition, application or motion? N/A
- 23 (1) First petition, application or motion? N/A
- 24 Citation or date of decision: N/A
- 25 (2) Second petition, application or motion? Yes No N/A
- Citation or date of decision: N/A
- (3) Third or subsequent petitions, applications or motions? Yes No N/A
- Citation or date of decision: N/A
- (e) If you did not appeal from the adverse action on any petition, application or motion,
explain briefly why you did not. (You must relate specific facts in response to this
question. Your response may be included on paper which is 8 1/2 by 11 inches

attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? **No.** If so, identify: N/A

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: Federal habeas corpus petition. N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? **Yes.** If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) **The delay is because this case has been on appeal to Supreme Court since conviction.**

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes **No** **X**

If yes, state what court and the case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: **Dayvid Figler (Trial Level Counsel), Dayvid Figler (Appeal Counsel).**

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes **No** **X**

If yes, specify where and when it is to be served, if you know: n/a

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same. N/A

(a) Ground one: **Ineffective assistance of counsel**

Supporting FACTS (Tell your story briefly without citing cases or law.): **Trial-Level and Appeal Counsel did not adequately represent Petitioner because he failed to file a Motion to Sever. This ineffective assistance prejudiced Petitioner at the trial-level.**

(b) Ground two: N/A

Supporting FACTS (Tell your story briefly without citing cases or law.): N/A

(c) Ground three: N/A

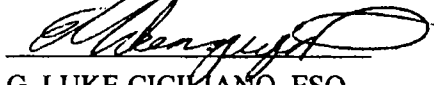
Supporting FACTS (Tell your story briefly without citing cases or law.): N/A

(d) Ground four: N/A

Supporting FACTS (Tell your story briefly without citing cases or law.): N/A

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Las Vegas, Nevada on the 14th day of December, 2010.


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POINTS AND AUTHORITIES

I.

INTRODUCTION

On October 17, 2006 Jemar Matthews (hereinafter "Matthews") was charged with: conspiracy to commit to murder (NRS 799.480; NRS 200.010; NRS 200.030); murder with the use of a deadly weapon (NRS 200.010, 200.030, 193.165); attempted murder with the use of a deadly weapon (NRS 200.010, 200.030, 193.300, 193.165); discharging a firearm at or into a

1 structure (NRS 202.285); possession of a short-barreled rifle (NRS 202.215); conspiracy to
2 commit robbery (NRS 199.480, 200.380); robbery with the use of a deadly weapon (NRS
3 200.380; 193.165); and assault with a deadly weapon (NRS 200.471). Matthews was charged
4 with co-defendant Pierre Joshlin (hereinafter "Joshlin").

5 Matthews was initially arraigned on December 11, 2006, before the Honorable Kevin
6 Williams, arraignment court judge for the Eighth Judicial District Court at which time Matthews
7 plead not guilty and invoked his right to a trial within sixty days. A trial date was set for
8 February 12, 2007 in front of the Honorable Judge Elizabeth Halverson, and was later reset to
9 May 7, 2007. The case was switched over to the Honorable Judge David Baker. A trial by jury
10 commenced on May 7, 2007 and concluded May 11, 2007. The jury returned a verdict of guilty
11 on all counts. Premised on alleged prosecutorial misconduct during closing arguments,
12 Matthews filed a timely Motion for New Trial on or about May 21, 2007. The Court heard the
13 matter on July 9, 2007 whereupon the Motion was denied. Matthews was sentenced the same
14 day to life with the possibility of parole on the murder charge with an equal and consecutive
15 sentence for the weapon enhancement. With regard to the remaining charges, Matthews was
16 sentenced to concurrent time with the exception of mandatory enhancements which ran
17 consecutive within the counts but not concurrent to the life sentence on the murder count.
18

19 Matthews now brings this Petition for Writ of Habeas Corpus to the Court because his
20 trial level Counsel inadequately represented him. Matthews's trial level Counsel inadequately
21 represented him because he failed to file a Motion to Sever, and his failure to do so highly
22 prejudiced Matthews during trial. Accordingly, Matthews Petition for Writ of Habeas Corpus
23 should be granted.
24

25 ///

1 II.

2 DISCUSSION

3 Matthews should be granted a Writ of Habeas Corpus. A Defendant is entitled to
4 effective representation during appeals and post-conviction proceedings. See *State v. Eighth*
5 *Judicial Dist. Court ex rel. County of Clark*, 121 Nev. 225 (2005). "To prevail on a claim of
6 ineffective assistance of counsel, a defendant must establish two elements: (1) that counsel
7 provided deficient performance, and (2) that the deficient performance prejudiced the defense."
8 *Lara v. State*, 120 Nev. 177, 179-180, 87 P.3d 528, 530 (2004) (quoting *Strickland v.*
9 *Washington*, 466 U.S. 668, 686-87 (1984)). Deficient performance occurs where counsel fails to
10 "exercise the skill, judgment, or diligence of a reasonably competent attorney." *United States v.*
11 *Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987) (citation omitted). "The factual allegations
12 supporting an ineffective-assistance claim must be proven by a preponderance of the evidence."
13 *State v. Powell*, 122 Nev. Adv. Op. No. 65, 138 P.3d 453, 458 (2006).

14 Matthews prior Counsel provided deficient performance by failing to file a Motion to
15 Sever. As explained below, prior counsel's failure to file a Motion to Sever highly prejudiced
16 Matthews. N.R.S. §174.165(1) states that:

17 If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses
18 or of defendants in an indictment or information, or by such joinder for trial together, the
19 court may order an election or separate trials of counts, grant a severance of defendants or
20 provide whatever other relief justice requires.

21 Here, Matthews was prejudiced when he was tried together in this action with Joshlin because
22 there is high likelihood that each group of crimes tainted the jury's determination of guilt
23 regarding each individual sets of crime. By moving forward with the Joinder of the parties and
24 stacking of all the unrelated evidence into one case the jury was lead to believe that Matthews
25 was more likely to have committed each of the offenses.

///

1 **A. PRIOR COUNSEL PROVIDED DEFICIENT PERFORMANCE WHEN HE**
2 **FAILED TO FILE A MOTION TO SEVER.**

3 Deficient performance occurs where counsel fails to “exercise the skill, judgment, or
4 diligence of a reasonably competent attorney.” *United States v. Berry*, 814 F.2d 1406, 1409 (9th
5 Cir. 1987) (citation omitted). Here, prior Counsel failed to exercise the judgment of a reasonably
6 competent attorney.

7 Matthews was tried jointly with his co-defendant Joshlin. Prior Counsel should have
8 known that such joinder would be unfairly prejudicial to Matthews. There was a significant
9 amount of evidence presented against Joshlin, aiding in his conviction, which was not presented
10 against Matthews. Prior Counsel knew of such risks because he referenced the possibility of a
11 Motion to Sever in the bench brief filed May 8, 2007. A reasonable competent attorney would
12 have recognized that the evidence presented which was attributable only to Joshlin was highly
13 prejudicial to Matthews and would have not only recognized the possibility of a Motion to Sever,
14 which is what Prior Counsel did here, but would have taken it seriously and filed a Motion to
15 Severe to adequately represent his client.

16 Accordingly, Matthews’ Prior counsel provided deficient performance when he failed to
17 file a Motion to Severe.

18 **B. PRIOR COUNSEL’S FAILURE TO FILE A MOTION TO SEVER**
19 **PREJUDICED MATTHEWS.**

20 Joinder creates undue prejudice when evidence establishing acts will lead a jury to
21 convict someone not charged with those particular acts. *Tabish*, 119 Nev at 304-05. The *Tabish*
22 court held that joinder was prejudicial due to the “graphic” nature of the allegations that were
23 charged against one defendant but not another. *Id.* Accordingly, Matthews’ Counsel should
24 have files a Motion to Sever, and his case should have been tried separately.
25

1 There were numerous testimonies throughout the trial which references the Las Vegas
2 Metropolitan Police Department officers chasing Joshlin. Officers eventually made contact with
3 him in a nearby dumpster. Officers also recovered a gun and gloves in that same dumpster. This
4 evidence is highly prejudicial against Johslin, but should have no impact on Matthews.
5 However, when Matthews is sitting at the same table at trial with Joshlin there is a high
6 likelihood that each group of crimes will be tainted the jury's determination of guilt regarding
7 each individual's charges.

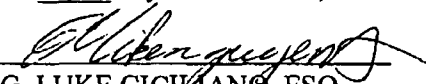
8 By moving forward with the Joinder of the parties and stacking of all the unrelated
9 evidence into one case the jury was lead to believe that Matthews was more likely to have
10 committed each of the offenses. Accordingly, because Matthews' Prior counsel provided
11 deficient performance when he failed to file a Motion to Sever, and because failure to file a
12 Motion to Sever prejudiced Matthews, his Petition for Writ of Habeas Corpus should be granted.
13

14 III.

15 CONCLUSION

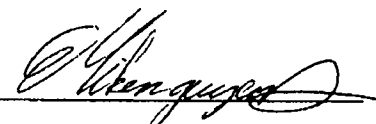
16 For the reasons stated above, Petitioner Jemar Matthews respectfully requests that the
17 Court grant his habeas corpus relief and vacate his conviction so that he may proceed at trial.
18

19 Dated this 14th day of December, 2010.

20 
21 G. LUKE CICILIANO, ESQ.
22 Nevada Bar No. 9530
23 CICILIANO & ASSOCIATES, LLC
24 621 S. 10th Street,
25 Las Vegas, Nevada 89101
(702) 382-2209
Attorney for Petitioner

VERIFICATION

I, G. Luke Ciciliano, Esq. verify that I was appointed to represent Petitioner for the purpose of filing this Petition for Writ of Habeas Corpus. I have read this document and know the contents thereof; the pleading is true of my own knowledge, except as to those matters stated on information and belief, and as to such matters I believe them to be true.

 For Luke
G. Luke Ciciliano, Esq.

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Warden
Nevada State Prison
PO Box 607
3301 East 5th Street
Carson City, Nevada 89702

Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89101

Christy Largone
EMPLOYEE OF CICILIANO & ASSOCIATES

FILED

ORIGINAL

DEC 16 11 31 AM '10

[Signature]
CLERK OF THE COURT

1 OSH
2 G. LUKE CICILIANO, ESQ.
3 Nevada Bar No. 9530
4 CICILIANO & ASSOCIATES, LLC
621 S. 10th Street,
Las Vegas, Nevada 89101
(702) 382-2209
Attorney for Petitioner


DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

Case No.: C228460
Dept.: 18

vs.

JEMAR MATTHEWS,
Defendant

06C228460-2
OPWH
Order for Petition for Writ of Habeas Corpus
1111373


ORDER FOR PETITION OF WRIT OF HABEAS CORPUS

Petitioner filed a petition for a Writ of Habeas Corpus (Post-Conviction Relief) on December 14, 2010. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his liberty, and good cause appearing therefore:

IT IS HEREBY ORDERED that respondent shall, within 45 days of the date of this Order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive;

RECEIVED



DEC 16 2010

CLERK OF THE COURT

FILE WITH
MASTER CALENDAR

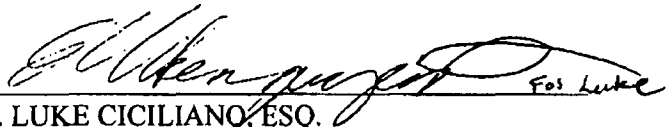
1 IT IS FURTHER ORDERED that this matter shall be placed on the Court's calendar on
2 the 14th day of February, ~~200~~²⁰¹¹, at the hour of 8:15 A.m. for
3 further proceedings.

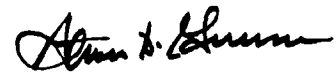
4 DATED this ____ day of DEC 15 2010, 2010.

5
6 
DISTRICT COURT JUDGE 

7
8
9 DATED this 14th day of December, 2010.

10 RESPECTFULLY SUBMITTED by:

11 
12 G. LUKE CICILIANO, ESQ.
13 Nevada Bar No. 9530
14 CICILIANO & ASSOCIATES, LLC
15 621 S. 10th Street,
16 Las Vegas, Nevada 89101
17 (702) 382-2209
18 Attorney for Petitioner
19
20
21
22
23
24



CLERK OF THE COURT

1 SUPP
2 CARMINE J. COLUCCI, ESQ.
3 CARMINE J. COLUCCI, CHTD.
4 Nevada Bar No. 881
5 629 South Sixth Street
6 Las Vegas, Nevada 89101
7 (702) 384-1274 Telephone
8 (702) 384-4453 Facsimile
9 E-Mail: cjc@lvcoxmail.com
10 Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

11 JEMAR MATTHEWS,

12 Petitioner,

13 vs.

14 RENEE BAKER, WARDEN, ELY STATE
15 PRISON,

16 Respondent.

CASE NO. C228460
DEPT NO. XVIII

**SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT
OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

17 Petitioner, JEMAR MATTHEWS (hereinafter Matthews), hereby files these
18 supplemental points and authorities in support of his Petition for Writ of Habeas
19 Corpus (Post-Conviction). Petitioner requests that these be considered in addition to
20 the original points and authorities filed with the original Petition for Writ of Habeas
21 Corpus (Post-Conviction).

I.

STATEMENT OF THE CASE

22 An Amended Criminal Complaint was filed in open court on October 17, 2006,
23 charging petitioner, Matthews, along with co-defendant Pierre Joshlin, with
24 Conspiracy to Commit Murder (NRS 199.480, NRS 200.010, NRS 200.030); Murder
25 with Use of a Deadly Weapon (NRS 200.010, NRS 200.030, NRS 193.165); Two
26 counts of Attempt Murder with Use of a Deadly Weapon (NRS 100.010, 200.030,
27 193.300, 193.165); Discharging a Firearm at or into a Structure (NRS 202.285);
28 Possession of a Short Barreled Rifle (NRS 202.275); Conspiracy to Commit Robbery

AA0001433

1 Possession of a Short Barreled Rifle (NRS 202.275); Conspiracy to Commit Robbery
2 (NRS 199.480, 200.380); two counts of Robbery with Use of a Deadly Weapon (NRS
3
4 200.380, NRS 193.165) and two counts of Assault with a Deadly Weapon (NRS
5 200.471).

6 On November 30, 2006, a preliminary hearing was held. At the end of the
7 hearing, the State moved to amend the Amended Criminal Complaint to reflect one
8 additional count of Attempt Murder (Maurice Hickman) and drop the Discharge of a
9 Firearm charge. Following the preliminary hearing, Matthews was held to answer of
10 all counts in the Amended Criminal Complaint.

11 On or about December 7, 2006, an Information was electronically filed in
12 Department XVIII of the Eighth Judicial District Court with the same charges bound
13 over in the Justice Court.¹ Matthews was then arraigned on December 11, 2006,
14 before the Arraignment Court Judge at which time Matthews pled "not guilty," and
15 invoked his right to trial within 60 days. The trial date was set for February 12,
16 2007, in front of Judge Elizabeth Halverson.

17 A calendar call was held on February 7, 2007, and during that proceeding, the
18 trial date was reset to May 7, 2007. In the interim, the State filed a Motion for
19 Buccal Swabs which was heard and granted on April 20, 2007. A trial by jury
20 commenced on May 7, 2007, and concluded on May 11, 2007. The jury returned a
21 verdict of guilty on all counts on May 11, 2007.

22 Matthews filed a timely Motion to New Trial on or about May 21, 2007, which
23 was mostly premised on alleged prosecutorial misconduct which occurred during
24 closing arguments. The Court heard that matter on July 9, 2007. That motion was
25 denied. Matthews was then sentenced to life with the possibility of parole on the
26

27 ¹See court minutes attached hereto as Exhibit 1 for the chronology of the
28 district court proceedings.

1 murder charge with an equal and consecutive sentence for the weapon enhancement.
2 With regard to the other charges, Matthews was essentially sentenced to concurrent
3 time with the exception of mandatory enhancements which ran consecutive within
4 the counts but concurrent to the life sentence on the murder count.²

5 The Judgment of Conviction was filed on July 17, 2007. The Order denying the
6 Motion for a New Trial was filed on September 17, 2007. A Notice of Appeal was filed
7 on August 17, 2007. Petitioner's conviction on all counts was affirmed. The Order of
8 Affirmance was filed on June 30, 2009.³

9 **II.**

10 **FACTS OF THE CASE**

11 Mercy Williams (hereinafter "Mercy") was killed by a single .22 caliber bullet in
12 the evening hours of September 30, 2006, while standing with others in front of a
13 friend's house on Balzar Street in North Las Vegas (Trial Transcript, hereinafter
14 referred to as TT 5/8/07, p. 9; TT, 5/10/07, p. 126). Two Las Vegas police officers,
15 Cupp and Walter, assigned to the "Problem Solving Unit" were in the vicinity and
16 proceeded to the location where they believed the gunshots had come from (TT,
17 5/8/07, pp. 226-231).

18 A short time after the shooting, a car theft took place approximately one block
19 away. The victims, Geishe Orduno was the passenger and her friend, Melvin Bolden
20 was the driver (TT, 5/8/07, pp. 178-182). Officers Cupp and Walter located and
21 pursued the stolen vehicle which was a silver, Lincoln Towncar with tinted windows.
22 The victims related that this vehicle had been taken by three or more young African-
23 American men (TT, 5/8/07, pp. 237-242).

24 Officers Cupp and Walters engaged in a short car chase that proceeded down
25

26 ²See Judgment of Conviction attached hereto as Exhibit 2.

27 ³The issues considered on appeal are set forth in Section III herein. The Order
28 of Affirmance is attached hereto as Exhibit 3.

1 Martin Luther King Boulevard to Jimmy Street and concluded very suddenly on
2 Lexington. The officers testified that just prior to the stolen vehicle crashing into a
3 fire hydrant, the driver of the vehicle very briefly leaned out of the door of the car
4 while holding a rifle or shotgun. The police saw the driver exit the stolen vehicle and
5 they directed their car towards the driver, striking him and causing him to fall to the
6 ground. He then got up quickly and ran away. Two other individuals also exited the
7 stolen vehicle and fled on foot. A chase of the fleeing individuals ensued (TT, 5/8/07,
8 pp. 239-245, TT 5/9/07, pp. 33-35). It was late at night and very dark where this
9 car crash had occurred.

10 During the incident, Officer Cupp fired shots at one of the fleeing suspects.
11 Not long after that, Pierre Joshlin was found in a nearby dumpster and within that
12 same dumpster were black gloves and a .45 caliber handgun (TT, 5/9/07, pp. 39-41).
13 Officer Walter responded to the sound of Office Cupp's gunshots and abandoned his
14 pursuit of the alleged driver consequently losing sight of that person (TT, 5/8/07, p.
15 251).

16 Approximately an hour later, Jamar Matthews, petitioner herein, was located
17 by a K-9 dog in some bushes in a backyard on Jimmy Street (TT, 5/8/07, pp. 330-
18 353). Matthews had been bitten on the shoulder and the hand by the police dog (TT,
19 5/8/07, p. 352). A single red glove was recovered from Eleanor Street (TT, 5/9/07,
20 p. 236). A rifle was located near the original location of the stolen vehicle's crash into
21 the fire hydrant (TT, 5/9/07, p. 247).

22 During the trial, the State did not produce any lay witnesses from either the
23 shooting, or the car robbery, and who were able to identify Matthews as being present
24 at or involved in either crime. However, the identification and other evidence
25 presented against the co-defendant, Pierre Joshlin, was much stronger (TT, 5/8/07,
26 P. 172).

27 Officers Walter and Cupp both admitted to only catching a "fleeting glimpse" of
28 the fleeing driver from the stolen vehicle (TT, 5/8/07, p. 259, TT 5/9/07, p. 85).

1 the fleeing driver from the stolen vehicle (TT, 5/8/07, p. 259, TT 5/9/07, p. 85).
2 Cupp only identified Matthews at in-court proceedings (TT, 5/9/07, p. 56). Officer
3 Walter identified Matthews as the fleeing driver after a one-on-one line-up while
4 Matthews was in custody (TT, 5/8/07, p. 290-295). Officer Walter was allowed over
5 objection to testify during the trial that he was "100 per cent" certain of his
6 identification and that they had "the right guy" (TT, 5/8/07, p. 324). Officer Walters
7 didn't dispute, however, that Matthews is 5'11" (TT, 5/8/07, p. 296) which conflicted
8 with the testimony of the car theft victims who felt the driver was substantially
9 shorter. Additionally, during the trial, the State elicited that Officer Cupp had
10 identified Matthews in a prior proceeding. An objection was made, and it was
11 sustained (TT, 5/9/07, pp. 56-57). Nevertheless, the State brought it up again in its
12 closing argument (TT, 5/11/07, p. 80).

13 There wasn't any physical evidence admitted at trial that linked Matthews to
14 any of the weapons that were retrieved. There wasn't any evidence produced by the
15 State that linked Matthews to co-defendant, Pierre Joshlin. Indeed, Joshlin was
16 found at a different location from Matthews an hour or more earlier that evening.
17 The State did not offer any evidence of motive or any connection between the
18 defendants and the allegedly "intended" victims of the shooting.

19 Also, both Officers Walter and Cupp agreed that Matthews was hit in the legs
20 by the police vehicle which was traveling approximately 10-15 miles an hour, Yet
21 there weren't any injuries to Matthews' legs or body, except for the dog bites, when he
22 was taken into custody (TT, 5/8/07, pp. 273, 374); TT 5/9/07, p. 84). A number of
23 inconsistent descriptions were given regarding the shooter as well as the ultimate
24 driver of the stolen vehicle, all of which had that person at 5'7" or shorter and in long
25 pants (TT, 5/8/07, pp. 130-219). During the trial, Matthews was identified from his
26 Nevada ID as being 5'11" tall (TT, 5/10/07, p. 150). Matthews was wearing jean
27 shorts at the time of his arrest (TT, 5/8/07, pp. 340-341). Joslin was wearing dark
28 pants at the time of his apprehension (TT, 5/7/07, p. 307).

1 establish that the reason that Matthews was hiding in the bushes when he was
2 apprehended, was because he saw the police and didn't want to be arrested for
3 violating an active restraining order which was in effect during this time period. The
4 restraining order required him to stay out of that area or face arrest. Evidence of
5 that restraining order was presented to the jury (TT, 5/10/07, pp. 142-170).

6 **III.**

7 **ISSUES RAISED ON DIRECT APPEAL**

8 Matthews previously appealed his conviction to the Nevada Supreme Court.
9 The Case Appeal Statement was filed on August 17, 2007. The following issues were
10 raised and decided on appeal.

11 1. Whether there sufficient evidence to convict the defendant on any of the
12 offenses?

13 2. Whether the State committed prosecutorial misconduct by holding up and
14 referring to the defendant's criminal "SCOPE" history and suggesting to the jury that
15 he doesn't look like an innocent person, that he doesn't dress nice, etc?

16 3. Whether it was error to allow the so-called "expert" in gun residue to testify
17 regarding a glove unconnected to any crime?

18 4. Whether the trial court erred in allowing the key witness for the State
19 (Officer Cupp) to offer his opinion that they "had the right guy?"

20 5. Whether the court erred by claiming it had no discretion to order additional
21 peremptory challenges?

22 **IV.**

23 **ARGUMENT**

24 The evidence of guilt against Mr. Matthews in this case was not overwhelming.
25 His conviction was based upon the weak, unreliable identifications of two police
26 officers who responded to a dark, night shooting in the neighborhood that they were
27 patrolling and Mr. Matthew's mere presence in the vicinity of said shooting. "Mere
28 presence" at a crime scene is not enough to sustain a conviction. Brooks v. State,

1 103 Nev. 611, 747 P.2d 893 (1987).

2 The State's case rested upon the testimony of Officers Walter and Cupp. Both
3 officers only got a "fleeting glimpse" of the driver of the stolen vehicle who they
4 identified as Matthews. Walter never saw the driver's face after this mere "glimpse."

5 It is important to note also that there was a collision between the police car
6 driven by Officer Crupp and the driver of the stolen vehicle which resulted in the
7 driver being forcefully knocked down by the police car. At the time of his arrest, Mr.
8 Matthews did not have any injuries consistent with being hit by a car. His only
9 injuries worth noting were from the police dog bites.

10 Further, the police officers could not testify that the driver of the stolen vehicle
11 was involved in the earlier shooting and resulting homicide since they did not witness
12 the shooting and the stolen car was not the car driven by the shooters. Nor was
13 there any corroborating forensic evidence linking the bullet that caused Mercy
14 Williams' death with the rifle found by the police in the grass near the suspect
15 vehicle. It was merely the same caliber.

16 Aside from the "fleeting glimpse" of Officer Walter, there wasn't any evidence to
17 ever put the rifle recovered near the stolen vehicle in Matthew's possession. Quite
18 the contrary. There was evidence introduced during the trial which tended to place
19 this rifle in the possession of a passenger in the backseat of the suspect vehicle. The
20 police testified that based upon their fleeting glimpses that Matthews was the driver
21 of the stolen car. There was never any testimony that Matthews was a passenger in
22 that car.

23 **INEFFECTIVE ASSISTANCE OF COUNSEL**

24 Petitioner has raised, in his original Petition for Writ of Habeas Corpus (Post-
25 Conviction), the issue of whether he was denied his right to due process of law and
26 his Sixth Amendment Constitutional rights to the effective assistance of counsel
27 which would have triggered his constitutional rights to due process and a fair trial as
28 guaranteed under the Fifth, Sixth and Fourteenth Amendments of the Constitution of

1 the United States. Petitioner has asserted that his trial counsel was ineffective in
2 violation of his Sixth Amendment right because his trial counsel failed to attempt to
3 sever his trial from that of Joshlin at any time prior to or during his trial.

4 Petitioner has asserted that being forced to go to trial with this co-defendant
5 denied him a fair trial and due process. Petitioner's attorney did not even request to
6 sever the trials, despite the fact that he acknowledged that the need might arise and
7 if so that he would file for it.⁴

8 Ineffective assistance of counsel claims are properly raised for the first time in
9 a timely first post-conviction petition. This petition has been timely filed. The
10 standard for review has been set forth in Strickland v. Washington, 466 U.S. 668,
11 104 S.Ct. 2052 (1984). That case states the two-prong test that must be satisfied
12 before a court can rule that counsel has been constitutionally ineffective.

13 In State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993), the Nevada
14 Supreme Court adopted the standard announced in Strickland. Under this test, in
15 order to successfully prove a claim of ineffective assistance of counsel, the defendant
16 must show first that, his counsel's representation fell below the objective standard of
17 reasonableness and second, that but for counsel's errors, there is a reasonable
18 probability that the result of the proceedings would have been different. See
19 Strickland, 466 U.S. at 687-688 and 684, 104 S.Ct. At 2065 and 2068. See also
20 Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004)

21 In considering whether trial counsel was effective, the court must determine
22 whether counsel made "sufficient inquiry into the information which is pertinent to
23 his client's case." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996)
24 citing Strickland. The court will then make an inquiry into whether counsel made a
25 reasonable strategy decision on how to proceed. See Doleman at 846. The judge
26 considering a petitioner's claim must "... judge the reasonableness of counsel's
27 _____

28 ⁴See Bench Brief filed on May 8, 2007, attached hereto as Exhibit 4.