

1 A He didn't have a car, so he was basically
2 limited to the bus or some of his friends or his
3 family that had vehicles.

4 Q And do you recall how Mr. White got to
5 your school?

6 A Not specifically, no. I know on occasion
7 he got rides, but I'm not sure how he got there.

8 Q Would it be fair to say just public
9 transportation would be the most --

10 A I would think he caught the bus or he had
11 somebody drop him off.

12 Q Now, you mentioned the particular gang
13 that Mr. white was part of was surrounded by enemy
14 territory. Is that fair to say?

15 A Yes.

16 Q And how many different -- when you talk
17 enemy territory, how many different enemy groups
18 were there in between where he was residing and
19 where the school was located?

20 A Oh, between six and ten.

21 Q And what would happen if a person were
22 found in an enemy territory, a person that belonged
23 to, say, one gang, like you mentioned the Six Deuce
24 Brims? What would happen to them if they were found
25 in an enemy territory?

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1 A Well, it would vary. I mean, it could
2 vary. They could be -- the worst case scenario,
3 they could be killed; they could just be -- the
4 least case, they could just be hit up and say,
5 "Where are you from?" and they say nothing, and they
6 could just leave them alone. I mean, it's hard to
7 say exactly what's going to happen every single
8 time. It depends on how you carry yourself and what
9 responses you give to them.

10 Q Would it be fair to say that that would be
11 very volatile as well, anything could happen, the
12 full spectrum at any time?

13 A Yes.

14 Q Now, you've heard the term "homeboy"?

15 A Yes.

16 Q What does a "homeboy" mean?

17 A Friend.

18 Q Do you recall if Mr. White had any friends
19 or homeboys at your institution, at the parole
20 school?

21 A At my parole office?

22 Q Yes.

23 A Initially, no. I didn't think he had any
24 friends when he first walked in, but that's not
25 unusual. A lot of the kids don't have friends when

1 they walk in. They cultivate relationships over a
2 period of time.

3 Q You had mentioned earlier that the area
4 that Mr. White was located in, there was also a lot
5 of drugs?

6 A Yes.

7 Q Would it be fair to say there was a lot of
8 drug abuse in that particular environment?

9 A Yes.

10 Q And these are things that you saw with
11 your own eyes?

12 A Yes.

13 Q And how -- I mean, on a daily basis or how
14 often would you see this type of environment?

15 A Well, it depends on the time of day you go
16 there and the area that you go to. I mean, you
17 could see it every day if you knew where to look,
18 but it depends on the time of day, you know, who was
19 out and what's going on and what street you're on.

20 Q When you were supervising Mr. White, did
21 you have an occasion to learn about his family
22 makeup and his family support structure that he had?

23 A I know that he was raised by his
24 grandmother. Well, he was living with his
25 grandmother and some other relatives, other kids --

1 about six of them in the house. Yes, I know that
2 his mother wasn't there. He did not have a father
3 there either, so, umm -- I know that.

4 Q Would it be fair to say that both his
5 parents had fallen victims to --

6 A Drug.

7 Q -- the drug environment?

8 A That's what was indicated in the reports.

9 Q Now, if I can just talk a little bit about
10 Mr. White's individual education plan, the IEP. We
11 jump back here again for a few minutes.

12 He took some mandatory classes, and he
13 took a voluntary class as well; is that what you're
14 testimony was?

15 A My testimony -- he was placed in the Watts
16 Parole School which would address his IEP needs. He
17 took -- he enrolled in the Youth Fair Chance Program
18 so that he could get a stipend for attending school.
19 To get that stipend, he had to complete a Life
20 Skills Program, and he did that.

21 Q In that Youth Fair Chance Program, was
22 that a voluntary program?

23 A Yes, it was.

24 **MR. WHIPPLE:** If I may approach, at this
25 time, your Honor -- again, I have Defense Proposed

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1 Exhibit PP, and I've shown this to the State.

2 **THE COURT:** All right.

3 **BY MR. WHIPPLE:**

4 Q Mr. Clark, I'm showing you what's been
5 marked as Defense Proposed Exhibit PP.

6 Do you recognize that piece of paper?

7 A Yes, I do.

8 Q What is that?

9 A This is a Certificate of Completion of the
10 Youth Fair Chance Program, the Life Skills
11 Management Program. This entitled him to get the
12 50-dollar-a-week stipend for attending school.

13 Q Okay.

14 **MR. WHIPPLE:** With the Court's permission,
15 I move to admit Defense Proposed Exhibit PP.

16 **MR. DASKAS:** No objection.

17 **BY MR. WHIPPLE:**

18 Q If you would just broadcast that and show
19 that to the folks if you would.

20 That's a voluntary program that Mr. White
21 was involved with.

22 (Defense's Exhibit PP was admitted into
23 evidence.)

24 **MR. WHIPPLE:** Okay. Thank you.

25 / / / / /

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1 **BY MR. WHIPPLE:**

2 Q I just want to confirm what those folks
3 were looking at.

4 That was a voluntary program that
5 Mr. White joined in order to benefit himself?

6 A Yes, it was.

7 Q And it was fair to say he was successful
8 in that endeavor?

9 A Yes. He was one of the first to complete
10 the program, and we had a copy of that certificate
11 on our board to give other people an incentive or
12 encouragement to enroll in and complete that
13 program.

14 Q Why that particular one did you have on
15 the wall?

16 A Because he was one -- I think he was one
17 of the first two to complete the program, so we
18 tried to reward positive behavior by posting it.

19 Q Now, is it fair to say at some point
20 Mr. White started missing classes?

21 A Yes.

22 Q Why don't you, if you would, just tell the
23 folks what happened with regard to Mr. White's work
24 in the programs in the school?

25 A About three-and-a-half months into his

1 parole, he started to miss school. There were days
2 when he just didn't come. Second, he became more
3 defiant, like he didn't want to listen. He didn't
4 want to stay for some of his other classes -- not
5 school-related, but like our substance abuse program
6 or the employment program. He would just leave.
7 When he was admonished, he would just not be as
8 responsive as he was initially. And then that
9 eventually led to him just not coming at all. At no
10 time did he tell me why, specifically, he was having
11 difficulty; he would just make excuses like "I had
12 an appointment" or "I had something else to do,"
13 that kind of thing.

14 Q So, at some point he just stopped showing
15 up, basically?

16 A Yes.

17 Q There are other reasons to, basically, not
18 succeed in a particular school?

19 A Yes.

20 Q In fact, you had mentioned some of them
21 being affiliated with a gang or possibly violence.

22 Are those reasons that you would be ousted
23 from the program that you supervise?

24 A You can be ousted from parole if you come
25 in the office dressed like you're not supposed to or

1 if you misbehave a lot, yes. Those are reasons that
2 he could lose that or he could have tested dirty.
3 If his attitude is such that he just wasn't going to
4 be cooperative, those are all reasons to be either
5 given a temporary detention or placed on electronic
6 monitor or put back in the institution.

7 Q Up until the time Mr. White just stopped
8 showing up, how did he treat you and the other
9 students that he was associated with at the school?

10 A I had no problems with him. He always
11 treated me with respect. He treated every agent in
12 the office with respect. He got along. He did
13 develop friends and he got along with everybody.

14 Q Did you ever see any violence?

15 A No. We did talk about -- he always
16 bragged like he could whip everybody in the world,
17 and we would be discussing how he would handle
18 situations. He would always say he would knock them
19 out. It would only take one punch to knock them
20 out, so we developed a little nickname; we called
21 him "One punch."

22 Q Was that unusual, any different from other
23 kids in the way they talked tough or talked big at
24 times?

25 A No, no. That's no different. It depends

1 on the kid and the relationship you develop with
2 them.

3 Q Tell me about, if you would, the
4 relationship that you had with him after the time
5 that you supervised him.

6 A I thought I had a decent relationship with
7 him. Like I said, he was always polite and cordial
8 to me and respectful to all the other staff and
9 other parolees too.

10 Q Did you like Mr. White?

11 A Yes.

12 Q Did it appear to you that Mr. White wanted
13 to do what was the right thing for you?

14 A Yes.

15 Q And at some point after he just stopped
16 showing up, did he call you?

17 A Yeah. He called me about -- I want to say
18 about six months after he was missing, and he asked
19 did I have a warrant out for his arrest and I told
20 him, "Yeah." He told me he was living in -- he was
21 in Gardena, which is another town that's about 15 or
22 20 minutes from Watts, and he said I wasn't going to
23 catch him and he wasn't going to tell me where he
24 was, and he wanted to see how good I was, if I could
25 catch him, then he hung up. That was the last I

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1 heard from him.

2 Q Did you ever get the impression that he
3 would like to come back, that he enjoyed the time?

4 MR. DASKAS: Judge, I'll object. That
5 calls for speculation.

6 MR. WHIPPLE: I'm asking his opinion.
7 It's lay opinion.

8 THE COURT: Sustained.

9 MR. WHIPPLE: Okay.

10 BY MR. WHIPPLE:

11 Q In that conversation that you had with
12 him, was there any indication he would like to come
13 back?

14 A There might have been. I thought there
15 might have been, especially had he told me where he
16 was, but when he didn't do that, I didn't think so.

17 Q Now, I want to -- in your previous
18 testimony, you had an opportunity to talk about
19 choices.

20 Do you recall that?

21 A Yes.

22 Q In fact, the questions were kind of
23 directed towards Mr. White, what kind of choices did
24 he have in that particular environment growing up as
25 he did?

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1 A Yes, I recall.

2 Q In fact, there was people contrasted, the
3 type of choices that Mr. White had as other students
4 might have.

5 Do you recall some of that dialogue?

6 A Yes.

7 Q If you would, please, what kind of choices
8 did Mr. White have from your supervision and the
9 time that you spent with him?

10 A Initially, and for the first three months
11 of his parole, I thought he was making appropriate
12 choices. He had difficult choices because he would
13 choose to cross the different neighborhoods to
14 participate in the parole program, but had he
15 continued, he would have, at least it appears that
16 he would have been able to rid himself of parole.
17 He could have gotten off parole in 13 months, which
18 is different from most parolees. He had the choice
19 of earning his high school diploma, enrolling in a
20 vocational training program, and he had several
21 choices he could have made, all positive, but it
22 took -- it takes patience, and a lot of times our
23 kids don't have patience. They want immediate
24 gratification. You hear that all the time, and
25 maybe that was one of the motivating factors for him

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1 to leave parole because it takes so long.

2 Q So, it's fair to say he made some positive
3 choices and good choices in the beginning?

4 A Yes.

5 Q But after time, some of his choices didn't
6 work out?

7 A Yes.

8 Q When you compare Mr. White to a regular
9 student, how would you compare the type of
10 choices -- I mean, you tell me about an environment
11 that's full of gangs and an environment that's full
12 of drugs. How would you compare the choices that
13 Mr. White had living where he did with, say, a
14 student living in like Marina del Rey? What type of
15 choices would Mr. White have?

16 A Well, if he were living in Marina del Rey,
17 he wouldn't have to cross gang neighborhoods. He
18 would have programs that he could go to where he
19 could go to parks; he could get involved in a lot of
20 different things. In South Central, those kind of
21 opportunities are limited. It's a lot different
22 than living in one of the more affluent
23 neighborhoods or, not necessarily affluent, just a
24 middle income neighborhood, it's a lot different.

25 Q Would it be fair to say the choices that

1 one would find in the park at South Central is a
2 little different than one would find in a park at
3 Marina del Rey?

4 A Yes.

5 Q Describe those, if you would, please.

6 A Well --

7 **MR. DASKAS:** Judge, I'll object. That's
8 been asked and answered. We just covered that.

9 **THE COURT:** Overruled.

10 **MR. WHIPPLE:** Thank you.

11 **THE WITNESS:** Most of the parks in South
12 Central are controlled by different gangs. Whatever
13 neighborhood it's in, that's whose park it is. So,
14 Little League was almost nonexistent; Pop Warner was
15 almost nonexistent; basketball was almost
16 nonexistent. If you had a group of kids that was
17 out there and they did not belong to a gang, they
18 run the risk of getting shot in the drive-by
19 shootings. That happens at the parks a lot. In
20 1994/'95, it happened an awful lot. Today it's a
21 lot better, but those kind of things don't really
22 happen in other neighborhoods.

23 **BY MR. WHIPPLE:**

24 Q You mentioned earlier positive role
25 models. Are those -- are those important factors in

1 making proper choices?

2 A Yes.

3 Q And why is that?

4 A Well, because role models give you
5 somebody to emulate, somebody to pattern yourself
6 after, somebody to keep you on the right path and
7 correct you when you're doing wrong.

8 Q From what you could see, what were the
9 role models in the environment that John White
10 lived?

11 A Well, I think his grandmother was a good
12 role model. I think -- while John grew up in a bad
13 neighborhood but he didn't grow up his whole life in
14 that neighborhood. He spent 26 -- 29 months in our
15 system, and I think we had some appropriate role
16 models. I think he was exposed to them, to positive
17 role models as well as negative; role models. I'm
18 not trying to say that -- to suggest that everybody
19 in his neighborhood was negative, there was just a
20 lot of negative influences that had his attention
21 and more close to his age range and he was more
22 willing to emulate them as opposed to, you know, the
23 other people who don't get all the glitz and glitter
24 and they're not glamorized. We just don't talk
25 about our positive role models that are not actors

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1 or rappers or athletes.

2 **MR. WHIPPLE:** Court's indulgence.

3 Mr. Clark, thank you for your time.

4 I have no further questions, your Honor.

5 **MR. DASKAS:** May I, Judge.

6 **THE COURT:** Yes.

7

8 CROSS-EXAMINATION

9 **BY MR. DASKAS:**

10 Q Good afternoon, Mr. Clark.

11 A Good afternoon, sir.

12 Q The Youth Authority -- you said that's a
13 rehabilitative agency, correct?

14 A Yes, sir.

15 Q Their goal is not to punish, it's to
16 modify people's behavior?

17 A Yes, sir.

18 Q And even before the defendant was in the
19 California Youth Authority, he had been in a camp at
20 Chino; am I correct?

21 A Chino is the Youth Authority.

22 Q Okay.

23 But before he did the 26 months or so on
24 the bank robbery, hadn't he been in another
25 facility?

1 A I'm not sure.

2 Q You would agree if he had been, there
3 would be programs to rehabilitate to modify his
4 behavior as well, correct?

5 A Yes.

6 Q He was supposed to be under your watch for
7 about 13 months?

8 A Yes.

9 Q And he made it about three-and-a-half
10 months?

11 A Yes.

12 Q I think you said he first came to you in
13 August of '95, so his enrollment started diminishing
14 somewhere around November of '95?

15 A I think he went missing -- yes.

16 Q The certificate that you were shown, the
17 certificate of completion, he was actually paid to
18 attend school, the defendant was?

19 A He was paid to -- well, he was given a
20 financial incentive to complete -- no, to continue
21 schooling, but before he could get that financial
22 stipend, he had to complete the Life Skills
23 Management Program.

24 Q Had he not completed the Life Skills
25 Management Program, he wouldn't have gotten the 200

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1 bucks a month?

2 A Right.

3 Q And this was completed on November 16th,
4 '95?

5 A Right. Yes.

6 Q About the same time his enrollment started
7 diminishing, correct?

8 A No. Actually, I think he went missing on
9 December 18th. I think that's what it was.

10 Q True, although I think you testified
11 either today or in a previous hearing that around
12 November, his enrollment started diminishing?

13 A Yes.

14 Q In other words, about the same time he
15 completed this and stopped getting paid?

16 A No; he didn't stop getting paid. I said
17 his behavior started to wane. He stopped attending
18 all the classes that he was supposed to. You could
19 see a pattern of him slipping.

20 Q You would agree that the teachers at the
21 facility were meeting his academic needs?

22 A Yes.

23 Q I think you mentioned that at some point
24 either you or someone from the program visited his
25 grandmother's house, correct?

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1 A Yes.

2 Q And it was certainly adequate housing for
3 the defendant?

4 A Yes.

5 Q In fact, I think either you or someone
6 from the facility has to approve his housing,
7 correct?

8 A Yes.

9 Q And it was certainly more than adequate?

10 A Yes.

11 Q I think you told us that his grandmother
12 was a positive role model?

13 A Yes.

14 Q You would agree that at some point his
15 attitude, the defendant's, became defiant, correct?

16 A Yes.

17 Q Defiance directed towards you and towards
18 the rules at your facility, correct?

19 A Defiant in that he stopped meeting the
20 standards that he was supposed to meet -- leaving
21 school early when you're not supposed to leave, not
22 having a legitimate excuse or getting permission,
23 that kind of stuff.

24 Q In fact, you previously testified that he
25 just didn't want to be told what to do?

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1 A Yes.

2 Q That's still your testimony today?

3 A Yes.

4 Q One of your quotes from the defendant back
5 then was that -- and I'll quote, "I got other things
6 to do, man." Those were his words.

7 A Yes.

8 Q You talked to him about violence, that
9 that was no way to solve his problems, correct?

10 A Yes.

11 Q The phone call after the defendant went
12 missing was sometime in June of '96.

13 Does that sound about right?

14 A Yes.

15 Q So, his enrollment or his participation
16 diminished in November, he goes missing in December
17 of '95 and then calls you in June of '96?

18 A Yes.

19 Q And he asks you, the defendant does, "Is
20 there a warrant for my arrest?"

21 A Yes.

22 Q You responded that there was?

23 A Yes, sir.

24 Q And, in fact, you asked him where he was?

25 A Yes, I did.

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1 Q And he wouldn't tell you?
2 A He told me he was in Gardena.
3 Q But he couldn't tell you specifically
4 where he was?
5 A Exactly.
6 Q In fact, he hung up on you?
7 A Yes.
8 Q Before he hung up, he said something like,
9 "Let's see how good you are. Let's see if you can
10 catch me, because you're never going to find me"?
11 A Yes.
12 Q The defendant's words to you?
13 A Yes.
14 Q You would agree, although it's probably
15 difficult, you've certainly had parolees who are
16 successful?
17 A Yes.
18 Q Parolees that you personally monitored?
19 A Yes.
20 Q I would imagine that you are probably that
21 positive male role model some of those parolees
22 need?
23 A I would hope so, yes.
24 Q And I think you said that about three
25 months after Mr. Johnson or Mr. White, as you knew

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1 him, was in the program, he started to test the
2 waters a little bit?

3 A Yes.

4 Q That's when you saw some of that defiance
5 that you mentioned?

6 A Yes.

7 Q Just to be fair, you don't know anything
8 about the crimes that he stands convicted of that
9 brings us all here; am I correct?

10 A I know from the previous trial.

11 Q You have no information to suggest that he
12 committed these crimes on behalf of a gang, do you?

13 A No, sir, I don't know.

14 Q You have no information to suggest that
15 once in Las Vegas, once he moved here or absconded
16 here, that he had to cross gang territory to get
17 anywhere else, do you?

18 A No, sir.

19 Q As far as you know, these crimes have
20 nothing to do with gang activity, correct?

21 A Correct.

22 **MR. DASKAS:** Thank you so much.

23 We'll pass the witness, Judge.

24 /////

25 /////

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1 REDIRECT EXAMINATION

2 **BY MR. WHIPPLE:**

3 Q Mr. Clark, you were asked if you had been
4 a positive role model for some of your other
5 students?

6 A Yes, sir.

7 Q Would you have enjoyed being a positive
8 role model for Mr. White?

9 A I enjoy being a positive role model for
10 all people.

11 **MR. WHIPPLE:** Thank you.

12 **THE COURT:** I have a question for you.
13 Is CYA similar to the California prison
14 system?

15 **THE WITNESS:** It's -- some people refer to
16 it as the youth prisons. We are -- we may merge
17 with the Department of Corrections, but as of now,
18 we're two separate agencies.

19 **THE COURT:** What I mean by that is do we
20 have gangs and whatnot in the Youth Authority, in
21 those institutions?

22 **THE WITNESS:** We have -- yeah, we have
23 gangs, but not like in the prisons. Our kids are
24 gang members, and they tend to group, but we --

25 **THE COURT:** Try to keep a lid on it.

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1 **THE WITNESS:** We try hard, but it goes in
2 cycles.

3 **THE COURT:** Now, you're a peace officer,
4 right?

5 **THE WITNESS:** Yes, sir.

6 **THE COURT:** Policeman?

7 **THE WITNESS:** No, sir, a peace officer.

8 **THE COURT:** All right. Sorry.

9 Any questions?

10 **MR. DASKAS:** Nothing else, Judge. Thank
11 you.

12 **MR. WHIPPLE:** Nothing else, Judge.

13 **THE COURT:** All right. Thank you, sir.
14 Who is next?

15 **MS. JACKSON:** Nancy Hunterton.

16 **THE BAILIFF:** Remain standing and face the
17 clerk.

18 (Oath administered.)

19 **THE WITNESS:** I do.

20 **THE CLERK:** Thank you. Please have a
21 seat. State your full name spelling your last name
22 for the record.

23 **THE WITNESS:** It's Nancy Sargent -- not
24 spelled military; it's S-A-R-G-E-N-T, Hunterton,
25 H-U-N-T-E-R-T-O-N.

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THE CLERK: Thank you.

NANCY SARGENT HUNTERTON,

being called as a witness on behalf of the Defendant, was first duly sworn and testified as follows:

DIRECT EXAMINATION

BY MS. JACKSON:

Q Good afternoon, Miss Hunterton.

What is your business profession or occupation, ma'am?

A I'm a marriage and family therapist.

Q I didn't hear?

A I'm a marriage and family therapist.

Q And how are you employed currently?

A Currently, I have a private practice, and I do family reconciliation programs for Bridge counseling where there's been violence in the family.

Q I want to take you back a few years, oh, about four or five years ago or some time ago.

Did you administer a program at the Clark County Detention Center?

A Yes, I did.

1 Q And when -- what time did you administer
2 that program, ma'am?

3 A I think over about a five-year period I
4 believe, maybe '97 to 2002, something like that.

5 Q Okay -- '97 to 2002?

6 A That might not be exactly accurate.

7 Q Roughly?

8 A Yeah.

9 Q Okay. Fair enough.

10 And during the course of your
11 administering that program, did you come in contact
12 with someone in the class that you see in the
13 courtroom here today, ma'am?

14 A Yes.

15 Q And who is that?

16 A That I know as Donte Johnson.

17 Q When did you first meet my client,
18 Mr. Johnson?

19 A At the beginning of a Life Skills course I
20 believe it was -- I believe it was in 2000, but I'm
21 not positive of the dates. I received a very late
22 subpoena and did not have time to research that out,
23 but it was at the first session of a 40 session
24 group.

25 Q Why don't you tell the ladies and

1 gentlemen of the jury what a Life Skills course, is,
2 ma'am?

3 A Okay. Clark County Detention Center
4 decided to do a Life Skills Course and was trying to
5 do it a little differently. It often, on the
6 outside, will be everyday life processes, like
7 having a bank account, how to handle a job interview
8 and things like that, but we were also looking at
9 people who were going to be facing likely long-term
10 incarceration, how they could learn more about being
11 people with some sense of purpose, so it really hit
12 those two. It was very much life choice focused for
13 those who were going to be getting out and also for
14 those who were going on to a more significant level
15 of incarceration.

16 Q How did an inmate become eligible to be a
17 participant in your class, Miss Hunterton?

18 A The person had to have been requested.
19 The process is called a "kike." They had to write a
20 request, and at that time, there were only 25 people
21 out of the entire institution who could be allowed
22 in a group at a time. So, they could have to, very
23 often, write kikes four or five different times to
24 be admitted. The person who is the director of
25 programs for the jail, an officer, would make the

1 choice, and really, largely, according to the
2 person's apparent desire to be in there.

3 Q So, as far as you knew, the only real
4 requirement, if you will, to get into your class was
5 just a persistence in continuing to ask to get in?

6 A Absolutely.

7 Q There was no specifications regarding the
8 type of charges that you were facing?

9 A No.

10 Q It was not based upon the length of
11 incarceration an inmate was facing?

12 A It would only be that because it was a
13 ten-week course that they would, in fact, be in the
14 institution for the ten weeks so that they could
15 complete.

16 Q So, basically, anybody who was a real
17 short timer would not get the benefit --

18 A Would not be.

19 Q -- benefit of the course?

20 A Right.

21 Q Okay.

22 Is there any type of security screening
23 for the course?

24 A No.

25 Q All right.

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1 Did there come a time when Donte Johnson
2 showed up at your course?

3 A Yes.

4 Q Did you -- prior to his showing up, were
5 you given any kind of briefing or notification --
6 anything out of the ordinary that you would not
7 receive for the normal student? Did you receive
8 anything in that regard for Donte?

9 A No, I didn't. I originally, when I first
10 started with the program, was given a sheet which
11 indicated people's exact charges, and I did -- it
12 would say "murder" or whatever it was. That did not
13 happen by the time Donte was in the program.

14 Q Did there come a time when you ascertained
15 what charges Mr. Johnson was facing, ma'am?

16 A Yes. I think it was sort of in sequence.
17 Can I sort of amplify?

18 Q Please.

19 A The very first day of the course, I would
20 ask people why they were in there, trying to get
21 beneath people who might have been chosen solely
22 because it was at that point co-educational, only to
23 be in the company of females or males, whichever
24 they were not, and Donte's response was unusual.

25 Q In what way, ma'am?

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1 A He said that he had heard that this was a
2 place where you could think about very serious
3 matters, and he specifically said it was an
4 interesting place -- he said he was facing the death
5 penalty and he understood that it was a place where
6 you could really think about what that meant and
7 evaluate what your life meant.

8 Q And over the course of some period of
9 time -- well, let me just ask you, was Mr. Johnson
10 in your course for a period of time?

11 A Yes, he was.

12 Q And how long a period of time,
13 Miss Hunterton?

14 A He was there for approximately 20 of the
15 40 sessions, and very faithful in attendance during
16 that period.

17 Q And how long did these sessions last?

18 A Two hours long.

19 Q So, he was there for 20 sessions times two
20 hours a piece?

21 A Forty hours of contact with him, yeah.

22 Q During the course of that 40 hours or so,
23 do you feel you got a chance to observe Mr. Donte
24 Johnson's demeanor and behavior?

25 A Yes.

1 Q And did you form an opinion about his
2 performance, ma'am?

3 A Yes.

4 Q And what is that assessment?

5 A I found him quiet, reflective, thoughtful
6 in responding to others -- that was one of the
7 things that was encouraged in the group, so if
8 someone was having a problem or trying to make sense
9 of their own behavior, he was insightful; asked
10 questions occasionally, but was much more, I think,
11 responsive to, I think, what other people were
12 doing.

13 Q Can you give us an example of what you
14 mean by "responsive to what other people were
15 doing"?

16 A One of the things was the group was almost
17 universally people who had been significantly abused
18 as children or if not abused, neglected. That would
19 be probably typical of many groups of incarcerated
20 people, and in this group especially so, and as
21 women would talk about being raped by family members
22 or a gang jumping them and doing something or
23 whatever, he was visibly bothered, just appeared to
24 have a heart for other people, and when people would
25 talk about -- maybe a woman losing a child or

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1 something like that, he was responsive.

2 Q Miss Hunteerton, as a counselor, when you
3 saw this behavior, you're describing a very
4 empathetic almost sympathetic person.

5 You were aware of what he was charged
6 with, a quadruple homicide?

7 A I was not, although at that time I knew it
8 had to be very severe because of his saying that he
9 was facing the death penalty.

10 Q Okay.

11 How do you juxtapose an individual that
12 you're describing with someone who committed murder?
13 How do you reconcile those two images?

14 A Well, I think as a therapist in the
15 outside world and even at a more dramatic level on
16 the inside world, you really see the contradictions
17 in people, and one of the things that I think you
18 really see is that the parts don't always come
19 together, and you see some goodness and you see some
20 monstrous stuff, but the one doesn't negate -- the
21 horror of the monstrous stuff is real, but it does
22 not mean the other isn't also real.

23 Q Is it fair to say that sometimes you just
24 can't explain? You have to answer out loud.

25 A Oh, yes. Yes.

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1 Q You deal with -- you used to deal with
2 inmates exclusively in this program.

3 Obviously, you occasionally or I don't
4 know -- how frequently did you run across someone
5 who was trying to manipulate the system?

6 A Oh, many times, yes.

7 Q Tell us how you would handle that type of
8 situation.

9 A Well, what you don't want to do is reward
10 exactly the behavior that's being used on you if
11 somebody is being charming, if somebody is --
12 appears to be strategizing, playing you or playing
13 on group sympathies or whatever. You do try to find
14 ways that that's exposed, and it's sort of subtle.
15 You don't always confront someone or I did not
16 always confront someone directly, but I would set up
17 scenarios, turn them around; we would do a lot of
18 role playing, and someone would show their kind of
19 true nature. If they're really jealous, if they
20 were unforgiving, we would talk about fact pattern.
21 We did sometimes do mock court, and I'd put inmates
22 in the position of being jurors, and it was
23 interesting to watch who would be -- not their
24 literal cases.

25 Q Sure.

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1 A But, you know, scenarios, and it would be
2 interesting to watch. People would profess to have
3 all kinds of feelings, but then they would be
4 viciously punitive jurors; so, they kind of exposed
5 that it wasn't true. There just are lots of ways
6 that you can see that somebody is not consistent.
7 They will show what they're hiding.

8 Q And is it fair to say that you certainly
9 were trained to detect those type of deception and
10 that type of manipulative behavior?

11 A I've been a school counselor; I've worked
12 in a lot of areas; I've done a lot of things of that
13 nature in order -- where I've learned to do that,
14 yes. I think that's true.

15 Q Did you see anything of that nature in
16 John White or Donte Johnson, the man you know as
17 Donte Johnson?

18 A I wouldn't have characterized him as
19 perfect, but I did not see -- I saw a fairly
20 consistent, decent person in that setting, yes.

21 Q Now, you were subpoenaed into court at
22 Mr. Donte Johnson's first penalty hearing back in
23 the year 2000?

24 A Correct.

25 Q As a matter of fact, we never met. I was

1 able to pretrial you from your transcript, if you
2 will.

3 You're here today because I sent you a
4 subpoena. However, do you have any problem in
5 coming in here today and testifying about the worth
6 that you saw in this man?

7 A No, I -- I think what I thought then.

8 Q And your opinions about Donte Johnson have
9 not changed --

10 A No.

11 Q -- from the first hearing?

12 Now, the prosecutor at that hearing went
13 through a very -- what seems to be a very thorough
14 cross, and he asked you things like would it
15 surprise you to know that this man laughed and was
16 thrilled at killing four people.

17 Do you remember that line of questioning?

18 A Yes, I do. Yes, I do.

19 Q Do you have any different answers to those
20 questions today, all of the things that Mr. Johnson
21 has been convicted of doing --

22 A I understand that.

23 Q -- of doing, by the way, does that change
24 any of your opinions based upon the observations you
25 made, and I believe it was in 1999? Anything that

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1 changes your opinion, ma'am?

2 A No. I would state, I'm sure, the same
3 thing, that I think people can be contradictory to
4 that extreme.

5 Q Now, you indicated at the last hearing
6 that there came a time when John received a number
7 of write-ups or enough write-ups and that he was not
8 allowed to come back to your class.

9 Were you aware of the nature of those
10 write-ups?

11 A Not until actually I was shown them later,
12 I think prior to the last -- to one of the penalty
13 hearings.

14 Q And who showed you those write-ups?

15 A I don't recall who it was. I'm sorry.

16 Q Was it the State or the defense?

17 A Presumably the defense.

18 Q Okay.

19 And you've had a chance to review those
20 write-ups? You saw the nature of the violations?

21 A I did see them, yes.

22 Q Some of them were petty. I think you
23 mentioned in your report here that one was for
24 drinking too much Kool-Aid or something like that.
25 One was for calling a guard a mother fucker, another

1 one for getting a shirt that was too big?

2 Now, you had a term for those type of
3 infractions in the CCDC. What were those type of
4 infractions called, in your estimation?

5 A I don't remember the term. I think I
6 thought it was petty, and that it was clearly a
7 political thing. I don't know. I don't remember
8 the term. I'm sorry. You could ask me or I could
9 tell you if I recognize it, but they're sort of
10 made --

11 Q Do you have your testimony?

12 A You know, I do. Shall I go pick it up?

13 Q No.

14 **MS. JACKSON:** I'll just show you, if I may
15 approach the witness.

16 **THE COURT:** Yes.

17 **MS. JACKSON:** Page 221, Counsel.

18 **BY MS. JACKSON:**

19 Q I'm going to show you page 221 starting at
20 about line five. This is a transcript of your
21 former testimony. Just take a moment and read that
22 to yourself and see if that will refresh your
23 recollection.

24 (Witness reviewing document.)

25 **THE WITNESS:** Okay.

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1 **BY MS. JACKSON:**

2 Q Okay. Does that help?

3 What was your answer to the type of
4 infractions that you described as being, quote,
5 "petty"?

6 A I thought you were looking for some slang
7 that I had forgotten, and what I was saying, and I
8 would still say, is that it's almost a little bit
9 rebellious, kind of like a parent-child situation
10 that when the parent is concerned that they don't
11 have sufficient control, they will sometimes seek to
12 make a big deal over something small to say, you
13 know, this is -- "I'm in charge here," and that it
14 appeared to me that it was of that nature.

15 Q And that would include things like having
16 an extra soup in your cell?

17 A Yes.

18 **THE COURT:** Extra what?

19 **MS. JACKSON:** Extra soup in your cell,
20 S-O-U-P, your Honor.

21 **BY MS. JACKSON:**

22 Q Now, there was one infraction where
23 Mr. Johnson is accused of, quote, "popping another
24 inmate in the mouth."

25 Were you shown that one?

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1 A I don't recall it.

2 Q I will represent to you that there is an
3 infraction -- I won't take the time to find it in
4 the stack that's in evidence that indicates that on
5 a certain day at a certain time Mr. Johnson was out
6 with another inmate and that he popped the inmate in
7 the mouth -- and I'm paraphrasing here, and if I'm
8 wrong, I'm sure counsel will correct me -- that he
9 went to a disciplinary hearing, said, "Yeah, I did
10 it. This is my first infraction -- my first
11 write-up since I have been back."

12 You're shaking your head in agreement.
13 Does that ring a bell now?

14 A I do recall something where he was --
15 handled the process exactly the way he was supposed
16 to, and I think was -- I believe was actually
17 exonerated, was allowed to do something. I'm sorry.
18 I shouldn't have shook my head.

19 Q But that was an infraction that he
20 admitted to, popping another inmate --

21 A Exactly, yeah.

22 Q -- in the mouth, and if it wasn't the
23 mouth, some other place.

24 Again, would that behavior be inconsistent
25 with the behavior that you observed over the course

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1 of the 20 weeks in your class?

2 A No. I think there was consistent -- more
3 consistent kind of truth telling. I think inmates
4 generally say as little as possible, and one of the
5 things we worked on was just kind of saying what's
6 really going on with each other so that -- and then
7 with the systems so that situations are resolved
8 more, and I think I saw what appeared to me to be
9 increasing honesty.

10 Q Increasing honesty?

11 A Yes.

12 Q The last hearing, Miss Hunterton, you were
13 asked if you felt this was a person that can be and
14 was worth fixing.

15 Do you recall your answer and "this
16 person" referring to my client?

17 A I think I said "yes." I think he was
18 bright and someone who hopefully can make sense out
19 of the tragedies that he's involved in.

20 Q Now, even though you're here pursuant to a
21 subpoena, did you contact my investigator to
22 indicate that you refused to come or you somehow had
23 a problem with coming?

24 A No. What ended up happening -- this was a
25 very last minute thing.

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1 Q Yes, it was, and I apologize for that.

2 A And I grumbled a bit because I did not get
3 to see clients and I didn't get paid for today, and
4 I did grumble about that, but I said you wouldn't
5 even have need to have done that, you could have
6 just called me and I would have appeared, but I just
7 wish I had gotten the call a few days earlier, but
8 not a problem.

9 MS. JACKSON: I certainly understand, Miss
10 Hunterton, and my sincere apologies. Thank you for
11 your testimony.

12 THE COURT: Cross?

13

14 CROSS-EXAMINATION

15 BY MR. STANTON:

16 Q Miss Hunterton, I just want to get,
17 initially, some time lines down.

18 You were at CCDC, I believe from your
19 testimony, in 1997 to 2002?

20 A You know, I'm not sure of the exact date,
21 sir. I don't want to hold to this. I was there for
22 approximately five years, yes --

23 Q Okay.

24 A -- and I've not been there in a couple of
25 years.

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1 Q I'm not trying to hold you to a precise
2 day or month, but it would have been 2002 when you
3 left CCDC, sometime during that year?

4 A I think so.

5 Q And in your previous testimony, you were
6 describing the program that you ran that the
7 defendant attended, and you testified regarding many
8 different reasons why people attend your class.

9 Do you remember that portion of your
10 testimony?

11 A Yes, sir.

12 Q You have to answer out loud. I'm sorry.

13 A Yes, sir.

14 Q One of those was because your class had
15 both male and female attendees, correct?

16 A There were people that came for that
17 reason, yes.

18 Q So, people came to your class to see
19 members of the opposite sex?

20 A Yes. I'm sorry.

21 Q Now, I want to show you an incident report
22 from -- Exhibit 256 in evidence. I ask you, ma'am,
23 if you could look at that item.

24 Are you familiar with incident reports
25 within CCDC? Are you familiar with them?

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1 A Um-hmm.

2 Q What was the date of that incident?

3 A 10/28/99.

4 Q Could you read out loud the entirety of
5 the description of that right down here -- it says,
6 "Full description"?

7 A "On the above date and time, inmate
8 Johnson refused to go to a scheduled GED class.
9 Inmate Johnson stated he signed up last year and is
10 no longer interested in attending any GED classes
11 because it is a waste of his time."

12 Q When was your program with Mr. Johnson?

13 A Sir, I can't tell you the exact date. I'm
14 sorry. I don't mean to be difficult.

15 Q Once again, Counsel referred to you --
16 about an incident about popping another inmate in
17 the mouth.

18 Once again, Exhibit 256, referring to this
19 incident report -- do you recognize that to be an
20 incident report?

21 A Yes.

22 Q Okay.

23 And the date of that incident -- right up
24 here -- what date is that?

25 A Six of 2003.

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1 Q Okay.

2 June 6th?

3 A June 3rd.

4 Q June 3rd of 2003?

5 A OF 2003.

6 Q And on page 2 of that report, would you
7 read, beginning on that line where it says, "Inmate
8 Johnson"? Could you read that entire sentence?

9 A "Inmate Johnson was the aggressor, and
10 Inmate Carter did not attempt to defend himself nor
11 retaliate."

12 Q And that's where the defendant punched
13 another inmate in June of 2003; is that correct --
14 after you had left CCDC?

15 A Yes.

16 Q And did you review all of the incident
17 reports that are reflected in this exhibit, do you
18 know?

19 A No; I'm sure I've not seen what you've
20 just shown me at all.

21 Q You haven't seen any of these?

22 A Well, not what you've shown me.

23 Q Let me show you the entirety of 256 and
24 ask you to take a brief look through those.

25 (Witness reviewing document.)

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1 **BY MR. STANTON:**

2 Q Are any of those looking familiar to you,
3 Miss Hunterton?

4 A No. These are all before my -- thus far
5 anyway, before -- I'm sorry. They follow my time at
6 the jail.

7 Q Thank you.

8 Would any of these incident reports that
9 you just read change your opinion about Mr. Johnson?

10 A No, sir, but we're, perhaps, talking
11 apples and oranges. I am saying, and I did in the
12 original testimony, that I see contradictions in
13 this person. I see two hearts to this person, so
14 no, that's not inconsistent with the more aggressive
15 side I saw or no, that I did not see, I'm sorry --
16 that I did not see evidenced, I just know about from
17 what I had heard.

18 Q So, you only saw one side of his
19 personality; the other side you didn't see reflected
20 in your classes?

21 A No, I saw -- correct.

22 **MR. STANTON:** Thank you. Nothing further.

23 **THE COURT:** Anything else?

24 **MS. JACKSON:** Court's indulgence.

25 Nothing further, your Honor. Thank you.

1 **THE COURT:** All right. Thank you very
2 much, ma'am.

3 **THE WITNESS:** Thank you.

4 **THE COURT:** Approach the bench, Counsel.
5 (Sidebar conference outside the presence
6 of the court reporter.)

7 **THE COURT:** We're going to take a five- or
8 ten-minute recess.

9 During this recess, you're admonished not
10 to discuss this case among yourselves, don't read
11 any newspaper articles, listen to any radio or
12 television reports.

13 **THE BAILIFF:** All rise.

14 (Recess taken.)

15 **THE COURT:** You can bring them in.

16 (Jury present.)

17 **THE BAILIFF:** Be seated, come to order.
18 Court is again in session.

19 **THE COURT:** Call your next witness.

20 **MS. JACKSON:** Thank you, your Honor. The
21 defense calls Mr. James Esten.

22 **THE BAILIFF:** Step right up there; watch
23 your step; remain standing and face the clerk.

24 (Oath administered.)

25 **THE WITNESS:** I do.

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THE CLERK: Thank you.

Please have a seat. State your full name spelling your last name for the record.

THE WITNESS: James Esten, E-S-T-E-N.

JAMES ESTEN,

being called as a witness on behalf of the Defendant, was first duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. WHIPPLE:

Q Mr. Esten, what is your occupation?

A I'm retired from the California Department of Corrections, and I'm currently working as a correctional consultant.

Q Where do you reside?

A Sacramento, California.

Q To learn a little bit about yourself, if you would, give us a little bit about your formal education.

A Following completion of my military obligation, I attended San Francisco State University receiving my Bachelor of Arts degree in English. That was in 1973, the same year that I

1 began working for the Department of Corrections. In
2 1975, I completed my Master's of Arts in Educational
3 Administration at San Jose State University and
4 worked in various assignments within the California
5 Department of Corrections until December of 1992.

6 Q You call it the "California Department of
7 Corrections"?

8 A When I was there. Currently, it's the
9 California Department of Corrections and
10 Rehabilitation.

11 Q Okay.

12 That is prison system in the State of
13 California, I take it?

14 A It is.

15 Q How many years did you work there?

16 A Nineteen years, eight months.

17 Q Tell us a bit about the positions that you
18 were involved with starting from your, obviously
19 you're entry level until when you finished up 19
20 years later.

21 A My initial assignment in 1973 was as a
22 vocational instructor of offset printing. My
23 objective and assignment was to train inmates with
24 the skills necessary to become offset printers upon
25 their parole from prison, give them a trade. I held

1 that position until 1980 at which time I became a
2 supervising correctional counselor. I had four
3 correctional counselors working for me. They, in
4 turn, had a 125-man inmate case load, so I was
5 responsible for them who, in turn, were responsible
6 for 125 -- I had 600 inmates that I supervised from
7 a correctional counselor standpoint.

8 As a supervising correctional counselor, I
9 was also part of the reception center intake
10 classification process. We screened all new inmates
11 coming into the correctional training facility at
12 Soledad for appropriate placement within the prison
13 complex.

14 I also was an inmate appeals investigator
15 investigating inmate complaints that were filed by
16 inmates at the correctional training facility, and
17 my response was on behalf of the warden or
18 superintendent.

19 At the same time, I was also the
20 institution public information officer making
21 contacts with the media any time there was a
22 newsworthy press release to be put out or any other
23 activity necessary that would require a release from
24 the warden's office. I worked as a supervising
25 correctional counselor in the lockup unit at the

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1 same institution identifying which inmates could be
2 released from lockup, which inmates could be
3 accepted into lockup and classifying them and
4 determining what yard groups they were compatible
5 with based on their geographic origin prior to
6 coming to the institution and possible gang
7 involvement.

8 From that point, I became a program
9 administrator and was given my own housing unit, 600
10 general population inmates on the north side of the
11 correctional training facility, again at Soledad. I
12 was assigned to Rainier Hall -- R-A-I-N-I-E-R -- and
13 I had 600 inmates under me along with the
14 correctional officers correctional sergeants,
15 correctional lieutenants and one captain.

16 I then transferred to Sacramento area
17 where I was placed in charge of the correctional
18 training center at Galt -- G-A-L-T -- where all new
19 correctional officers were trained for assignment
20 throughout the Department of Corrections. This was
21 in the mid-80s when the Department of Corrections in
22 California was a booming business, and during the
23 period of time that I was there, I trained and
24 placed approximately 12,000 inmates -- excuse me,
25 correctional officers.

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1 My final assignment was in the
2 headquarters office in Sacramento where I
3 investigated inmate complaints throughout the State
4 on behalf of the director of corrections, and there
5 were nine of us doing this at the time, and we had
6 the authority to overturn the warden or
7 superintendent's decision at what would have been a
8 lower level of decision.

9 Since my retirement, I have worked as a
10 consultant since approximately 1994. The position
11 was offered to me by a former director of
12 corrections, Jerry Enomoto -- E-N-O-M-O-T-O -- who
13 was appointed as the U.S. Marshal for the Eastern
14 District of California. He had been a consultant
15 and couldn't do both jobs. He called me, asked me
16 if I was interested; I responded that I was, and I
17 have been consulting ever since. I've consulted on
18 approximately 60 cases in California. This is my
19 fourth case in Nevada.

20 Q You're being compensated for your work?

21 A I am.

22 Q And how much are we paying you?

23 A Clark County has authorized \$2,000, and
24 they are picking up travel and housing expenses.

25 Q Would you please tell the folks why you're

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1 here?

2 A I'm here having reviewed the records of
3 the defendant and met with him and interviewed him
4 regarding those records, having toured Ely State
5 Prison to make an evaluation as to whether or not he
6 can be safely housed and placed within the confines
7 of Ely State Prison.

8 Q Now, how does Ely State Prison differ from
9 the other prisons in the State of Nevada?

10 A It is the only maximum security
11 institution designated as a maximum security prison
12 in Nevada.

13 Q Before we jump into the details on Ely,
14 what is your experience in maximum security prisons
15 in California? How many are there, what did you do
16 with them, et cetera?

17 A There are 11 designated maximum security
18 prisons in California of the 32 prisons. I have
19 been in each of them. I have interviewed inmates in
20 each of them. I have toured the cells, housing
21 units and other aspects of the facilities
22 themselves. I am thoroughly familiar with all of
23 California maximum prisons, and before I would have
24 considered testifying in a case in Nevada, I fought
25 a fairly lengthy battle to tour Ely and made sure I

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1 knew that facility before I could testify.

2 Q Tell us about that tour, if you would,
3 please.

4 A The tour was conducted by E.K. McDaniel,
5 currently -- then the warden and currently the
6 warden of Ely State Prison. It was under a court
7 order. That court order was objected to by the
8 Attorney General's Office. There was a hearing
9 prior to my approval to tour the facility. I did
10 manage to tour it, and I took three photographs of a
11 typical cell at Ely State Prison.

12 Q And you brought those photographs with us
13 here today?

14 A Yes.

15 Q Now, I asked you just briefly a minute ago
16 have you ever reached a conclusion where the
17 individual could not be safely housed?

18 A No.

19 Q And why is that?

20 A It is the responsibility of the State
21 agency, be it any state, to house the inmate that is
22 sent to them. Once a trial has been completed and a
23 county has finished its processing of a defendant,
24 that defendant is turned over to that state's
25 department of corrections, and even if a special

1 cell needs to be built, then that's what that
2 department of corrections must do, because they are
3 charged with the responsibility of housing, as
4 safely as possible, that inmate.

5 Q Now, Mr. Esten, you mentioned briefly how
6 many times where you testified with regard to this
7 topic in the past.

8 Again, how many times have you testified
9 here in Nevada with regard to this issue?

10 A I testified once in Elko -- that was my
11 first case -- that's a case that generated the tour
12 of Ely, and twice before here in Clark County. This
13 is my third.

14 Q And approximately how many times have you
15 testified in California at your home state?

16 A Fifty-five to 60.

17 Q Now, before we get to the photos, I want
18 to ask you a little bit about Ely State Prison, if I
19 can.

20 A Fine.

21 Q First of all, who is housed up there and
22 how many?

23 A The most -- those inmates who require the
24 most security and death row inmates are housed at
25 Ely State Prison. The emergency population for Ely

1 is 1,109 -- if my memory is serving me, and they are
2 now at 1,120. They're somewhat over the emergency
3 allocated population level, so they are overcrowded,
4 as is the case for most institutions throughout the
5 nation.

6 Q If an individual -- an inmate receives a
7 life sentence in the State of Nevada, where are they
8 going to go to serve their sentence?

9 A They go to Ely.

10 Q And why is that?

11 A Because they are designated maximum
12 security inmates, and Ely is the maximum security
13 institution.

14 Q And if a person is convicted, they go to
15 prison, what is the process from the point of the
16 conviction until they get put into prison?

17 A They could go from here to High Desert
18 where they would receive an initial evaluation, an
19 initial classification to use the term that's used
20 in the system where they are evaluated by a
21 psychiatrist, where they are prodded by doctors and
22 nurses, where they receive a dental exam, a general
23 work-up, but their destination is already
24 predetermined. A life-term inmate will be going to
25 Ely. In other cases, the determination is made at

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1 High Desert as to where the inmate ultimately will
2 go within the Nevada system. Not so with a life
3 inmate.

4 Q Now, you have -- again, you have
5 experience with regard to classification; is that
6 correct?

7 A My most experience is with classification.
8 That was my forte in California.

9 Q And if you would, please, just explain
10 what you mean by "classification."

11 A "Classification" is the process that all
12 prisons used -- use to evaluate an inmate, his
13 unique experiences, the uniqueness of his crime, his
14 age, his race, and if it's pertinent, his gender/her
15 gender, and place them in what institution is most
16 appropriate for all of the factors that are involved
17 in their case. That becomes a moot issue in Nevada,
18 because if we're talking of a life-term inmate, they
19 only go to one place, and that's Ely. In
20 California, they can go to 11.

21 Q All right.

22 So, again, a person with a life sentence
23 goes to Ely.

24 Let's talk about Ely State Prison for a
25 minute, if we can.

1 Tell these folks if they go up to Ely and
2 got a tour of the prison what they would find up
3 there.

4 A It's a new facility, but it's dark,
5 concrete, two tiers to all or two stories to all.
6 The kind of concrete that's poured flat and then
7 tilted up, not poured in place. The facility
8 impressed me as being incredibly clean, and I've
9 been to a lot of prisons, not only in California but
10 Arizona, back East and others, and this was probably
11 the cleanest institution I've ever seen.

12 When you see an inmate being escorted, if
13 he is in an orange jump suit, he is being escorted
14 by two correctional officers, one on each elbow with
15 their arms or hands on his elbow and their other
16 hand on the side end of a baton that is in their
17 baton holder. It is probably the most controlled
18 and secure facility I've toured, including Pelican
19 Bay State Prison in Northern California, which is a
20 super max. Ely controls movement and inmate access
21 to and from their housing to a greater degree than
22 any facility I've ever been in.

23 Ely is set up in two phases. Phase I was
24 that part which was built first, and it's commonly
25 called by the people who work there and it was

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1 called by Warden McDaniel, "Phase I." That's where
2 the administrative segregation and death row inmates
3 are housed. The other side is Phase II, and inmates
4 there are permitted to graduate, if you will, up a
5 sliding ladder to attain more freedom, more
6 movement, more yard access, more job opportunities.
7 But when an inmate is sentenced to a life term
8 arrives at Ely, he goes to Phase I and he is an ad
9 seg, administration segregation inmate.

10 Q I'm going to ask you some questions about
11 ad seg or that particular area, but I want to
12 clarify an issue with regard to a life sentence.

13 Does it make a difference if a person has
14 life without the possibility of parole or life with
15 the possibility of parole with regard to how they're
16 treated at Ely?

17 A It does. A life-without-possibility-of-
18 parole inmate is on the ad seg ladder train, if you
19 will, for a greater period of time and has less
20 opportunity to leave the Phase I side and go to the
21 Phase II side than does the Life-with-possibility-
22 of-parole inmate. The opportunities stop much
23 sooner for the life without possibility of parole
24 inmate than they do for the life with possibility of
25 parole inmate.

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1 Q Now, let's talk about ad seg for a minute.
2 That's in Phase I you said?

3 A Correct.

4 Q And in Phase I is where death row is
5 located?

6 A Yes.

7 Q It's where what else is located in Phase
8 I?

9 A Protective custody inmates.

10 Q Anything else?

11 A Any new arrival life-term inmate is there.
12 Life without possibility of parole inmates, for the
13 most part, are there, disciplinary detention inmates
14 are there.

15 Q And you talked about Phase II.

16 Can inmates move from the Phase I area to
17 the Phase II?

18 A They can if they meet the criteria.
19 Obviously a death row inmate cannot move from Phase
20 I to Phase II. A life-with-possibility-of-parole
21 inmate can move from Phase I to Phase II to the most
22 secure level of Phase II and only up one level from
23 that. A life-without-possibility-of-parole inmate
24 may be able to move from Phase I to Phase II, but
25 that's on an individually determined basis, and it

1 requires exemplary behavior.

2 Q Mr. Esten, I want to get into the
3 lifestyles of the persons and these different phases
4 in a minimum.

5 Is it fair to say you've had the
6 opportunity to look at Mr. Donte Johnson's records
7 at Ely State Prison?

8 A Yes.

9 Q If you would, please, tell these folks
10 where he's housed and where you would anticipate him
11 to remain housed.

12 A He was, during his stay at Ely State
13 Prison, housed in Phase I as an administrative
14 segregation inmate. He did request of a
15 classification committee that his administrative
16 segregation status be changed. They denied that
17 request.

18 Q What does this administrative segregation
19 lifestyle consist of?

20 A Inmates in administrative segregation are
21 housed one man to a cell. As I indicated earlier,
22 any time they go anywhere, they are escorted by two
23 correctional officers. They are in full restraint
24 during that escort. That means waist restraint with
25 handcuffs and leg restraint. The inmate must submit

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1 to an unclothed body search any time he leaves his
2 cell. If he is permitted to visit, let's say, with
3 his attorney, and that visit requires him to leave
4 the administrative segregation building, which it
5 would, he must undergo the unclothed body search
6 prior to leaving that cell, and again before he is
7 re-celled.

8 Q Let's talk about how often an inmate would
9 have the opportunity of leaving their cell and then
10 we'll about talk the living conditions in the cell.

11 A He has an opportunity to visit two days a
12 week. He does not leave the cell to eat. All his
13 meals are brought to him in the cell. If he had a
14 medical need or a dental need, he would leave his
15 cell. If he had a classification appearance, he
16 would leave his cell. He has the opportunity to
17 exercise for one hour, and to do so, he would have
18 to leave the cell and undergo the search. If he
19 showers -- and he is permitted three showers a week,
20 15 minutes per shower -- he undergoes, again, the
21 same unclothed body search. There are no other
22 normal activities that would require him to leave
23 the cell than those that I mentioned. He does not
24 go to religious services; he does not go to the
25 library; he does not go to the exercise yard where

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1 the grass is. He goes to the exercise yard
2 designated for administrative segregation inmates
3 which is a concrete floored, concrete block walled
4 facility half the size of a basketball court.

5 Q All right.

6 Let's go through the lifestyle of an
7 inmate.

8 He's housed in this cell how many hours
9 out of the day?

10 A Twenty-three.

11 Q So, one hour of each day he gets to leave
12 that cell?

13 A Correct.

14 Q Now, where does that inmate eat?

15 A In his cell.

16 Q Where does he -- does he have the
17 opportunity to make telephone calls?

18 A There is a mobile phone available to him.
19 There's a sign-up sheet or a rotation program that
20 he can become involved in so that he has access to
21 that phone. The phone conversation is recorded for
22 the records of the institution. All calls made out
23 of any institution anywhere in the country are
24 collect.

25 Q So, he makes a phone call from inside the

1 cell?

2 A Yes.

3 Q Now, when you say "he eats," is it like a
4 door is opened or is it just a little slot in the
5 door?

6 A There's a food port in the door which also
7 serves as a handcuff port that allows a tray to be
8 slipped through.

9 Q If an inmate wants to read a book, how
10 does he determine what book he can read?

11 A He would submit a note to the staff who
12 would turn it in to the library inmate or trustee,
13 if there is one, and a book would be delivered to
14 the housing unit and ultimately get to him.

15 Q Twenty-three hours out of the 24-hour
16 period he eats inside the cell?

17 A Correct.

18 Q He does all communications, if any
19 communications, inside the cell?

20 A Correct.

21 Q His books are delivered to his cell?

22 A Correct.

23 Q Let's talk about the cell for a minute.
24 You said you had some pictures?

25 A I do.

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1 (Defense Exhibits CCC, DDD and EEE were
2 marked for identification.)

3 **MR. WHIPPLE:** If I may approach at this
4 time, your Honor, I have Defense Proposed Exhibits
5 triple-C, triple-D and triple-E.

6 **BY MR. WHIPPLE:**

7 Q Mr. Esten, I'm going to hand these to you,
8 and if you can describe what we're looking at there
9 (indicating). Before you show the jurors, I'll have
10 to admit them and move them into evidence, so if you
11 can tell me what you're looking at one by one.

12 A I am looking at Exhibit DDD which is a
13 view of the two bunks in a typical cell and the two
14 shelves of that same cell. This is on the Phase II
15 side.

16 Q Who took that picture?

17 A I did.

18 Q Is that a fair and accurate representation
19 of the cell on that date?

20 A Yes.

21 Q Okay.

22 What's the next one?

23 A Exhibit CCC.

24 **THE COURT:** I thought he wasn't supposed
25 to show them.

1 Why don't you just look at all of them and
2 see if they're accurate, and then we'll admit them.

3 **THE WITNESS:** CCC is the same.

4 **THE COURT:** No, no, no. Just look at all
5 of them and see if they're all accurate
6 representations.

7 **THE WITNESS:** Very good. They are all the
8 photos that I took for the Kelly Rhyne --
9 R-H-Y-N-E -- case out of Elko.

10 **BY MR. WHIPPLE:**

11 Q They're all fair and accurate
12 representations of the cells?

13 A Yes.

14 **MR. WHIPPLE:** Move to admit Defendants
15 CCC, DDD and EEE.

16 **MR. STANTON:** No objection.

17 **THE COURT:** All right. Admitted.

18 (Defense Exhibits CCC, DDD and EEE were
19 admitted into evidence.)

20 **MR. WHIPPLE:** At the same time with the
21 Court's permission, if Mr. Esten can stand up and
22 show these folks those photographs and explain
23 what's inside of them.

24 **BY MR. WHIPPLE:**

25 Q Mr. Esten, you took a few minutes today at

1 lunch, and I had you make a diagram or a piece of
2 paper that takes up about the approximate size of a
3 cell.

4 A Yes.

5 Q Tell us, if you would, please, exactly
6 what you did and what we're going to see.

7 A The cell size, as I determined it to be
8 and later checked on it, is 5 feet by 8 feet. What
9 we did was make a template, if you will, of the
10 floor space of a five-by-eight cell by taping
11 together sheets of construction paper.

12 Q Now, what's the size of a standard ping
13 pong table?

14 A I believe it's five by seven.

15 Q So, where an individual lives --

16 A Is roughly one foot longer than a ping
17 pong table.

18 Q Now, what about using the bathroom?

19 A There is a toilet/sink/drinking fountain
20 combination facility in the cell. All showering is
21 done in a shower area outside of the cell.

22 Q What do the walls look like?

23 A They are painted concrete.

24 Q What about the ceiling?

25 A Painted concrete.

1 Q Floor?

2 A Painted concrete.

3 **MR. WHIPPLE:** With the Court's permission,
4 I'll bring that diagram or --

5 **BY MR. WHIPPLE:**

6 Q What do you want to call it, "profile"?

7 A Template of the floor.

8 Q The template of the floor, and then,
9 Mr. Esten, can you show the photographs, with the
10 Court's permission --

11 **THE COURT:** What do you want him to do
12 first?

13 **MR. WHIPPLE:** If he can come down here to
14 the well, your Honor, and describe those floors, and
15 I'll get the template laid out and describe it to
16 the best of his ability.

17 **THE COURT:** Has the template been marked?

18 **MR. WHIPPLE:** It has not, your Honor.

19 **THE COURT:** You should do this.

20 **MR. WHIPPLE:** I'll do that.

21 Mr. Esten, if you will just hold for one
22 second, please.

23 (Defense Exhibit FFF was marked for
24 identification.

25 **MR. WHIPPLE:** Your Honor, with the Court's

1 permission, I'll roll this out.

2 **THE COURT:** All right. Go on.

3 That's exhibit number --

4 **MR. WHIPPLE:** That would be Exhibit FFF.

5 **THE COURT:** All right.

6 **BY MR. WHIPPLE:**

7 Q Mr. Esten, if you would, come here and in
8 front of the jurors explain what's in the
9 photographs and how it would compare to this
10 template before us in the courtroom today.

11 A The first exhibit is EEE, and what we are
12 looking at is from the front of the cell to the back
13 of the cell.

14 This top angled metal piece (indicating)
15 is a bunk as is the red lower one below it. The
16 vertical whiter area (indicating) is a window. The
17 concrete has been angled in to protect and
18 strengthen the window area. The windows in all of
19 the newer institutions are made of a combination
20 plexiglass and glass to make them impossible to
21 break. The windows at Ely are approximately
22 four inches wide by 36 inches tall. The four inches
23 wide precludes anyone from breaking the material and
24 escaping out that space. The two other objects are
25 the shelves for the two other inmates that allows

1 them to store whatever property they have in their
2 cell. This is Phase II (indicating) because this
3 has two bunks. All of Phase I has one bunk.

4 Q So, where Mr. Johnson is housed would look
5 approximately the same with the exception it would
6 only have one bunk instead of two?

7 A Correct.

8 Q Now, if we ask -- I mean, it's hard to
9 see -- if you were looking at this behind you, this
10 template being the cell itself (indicating), which
11 way would you be looking? Is this from the door
12 right at the beginning (indicating)?

13 A This is from the door, and I'll walk
14 across the template floor. It would be like that
15 (indicating) placing the exhibit at the end of the
16 template.

17 Q Just hold that right there. I'm going to
18 get something that we can lean that up with. In
19 fact, just put that right here behind you.

20 What's the next exhibit?

21 A The next exhibit is CCC. This is a
22 photograph from inside the cell. The large black
23 area on the right is the door with the door open.
24 What we have is a view of the combination toilet,
25 sink and drinking fountain. The sink is the bowl

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1 below the buttons. The buttons actuate the water
2 hot and cold and the drinking fountain. This
3 particular unit has a hollowed out space for a roll
4 of toilet paper. Most of them do not.

5 Q Taking this photograph -- I apologize, sir
6 for interrupting you.

7 Taking this photograph, it would be from
8 the other side of the cell shooting back towards
9 the --

10 A It would be approximately this way
11 (indicating) placing the exhibit in the forward
12 right corner of the template.

13 Q Okay. I don't think we can see it from
14 here.

15 Why don't we just put this one up on the A
16 frame back there so they can see F and the floor at
17 the same time.

18 A The last exhibit is EEE. Again, a view of
19 the combination toilet/sink/drinking fountain with
20 the mirror, which is really just a metal -- a
21 stainless steel metal piece that's shined, a speaker
22 actually above and to the left of the mirror and a
23 portion of the upper bunk that protrudes from the
24 left towards the mirror in the photograph. The
25 light above all of this is the fluorescent light

1 that is in the ceiling.

2 Q All right.

3 Mr. Esten, why don't we go ahead and put
4 that back right next to this one where we can see.

5 Now, if you were housed in the cell, would
6 you be able to touch both walls at the same time?

7 A Yes. In double-checking the size this
8 morning at one of the jury's recesses, I called and
9 spoke with Sergeant Rodriguez who is the sergeant
10 commander for the day. I asked for the watch
11 commander. That's not a term they use in Nevada,
12 and I asked him if a five- to six-foot tall person
13 could reach their arms out and touch both walls
14 while standing in the center of his cell, he said
15 yes. They could not do it lengthwise in the
16 eight-foot section, but certainly anyone can do it
17 widthwise in that position in Ely's cell.

18 Q And this is where an inmate in ad seg will
19 spend 23 out of 24 hours a day?

20 A Correct.

21 Q Now, we have one hour when they are let
22 out of this cell per day; is that correct?

23 A That's correct.

24 Q And what is their -- where do they get to
25 go during that one hour?

1 A They can go to the small exercise yard
2 that is half the size of a basketball court.

3 Q Okay.

4 And if you could, just using, you know,
5 part of this room as an example, tell the folks what
6 they would see when they got to that exercise room.

7 A The exercise yard is outside of the
8 building, but the concrete block walls are 15 to
9 16 feet tall. The yard, because it is narrow --
10 half the size of a basketball court and short,
11 again, because that's half the size of a basketball
12 court, and because of the height of the walls, all
13 you see is straight up. If there were hills in the
14 near distance to Ely, you could not see those
15 because you don't have a perspective that allows you
16 to look up and over that wall because the wall is so
17 high.

18 Q So, essentially, you talked about being in
19 the cell, you're looking at raising concrete.

20 Is it basically the same concrete that
21 you're looking at in this (indicating)?

22 A Other than the fact that these are
23 concrete block, so you've got some lines with the
24 mortars.

25 Q Could you see a tree?

1 A No.

2 Q Could you see a mountain?

3 A It would have to be a very tall mountain
4 and very close to the grounds of the institution.

5 Q So, essentially, all you see is concrete
6 walls and possibly some sky above you?

7 A And one wall of this exercise yard abuts
8 the control booth for that housing unit so
9 correctional staff can monitor what's going on in
10 the exercise yard.

11 Q Now, during that one hour that a person is
12 let out into the rec hall, how many other people are
13 out there with him?

14 A You're there by yourself.

15 Q Now, tell us again the process that an
16 individual will go through to move from this cell
17 for one hour a day into that yard.

18 A He must -- he's approached by correctional
19 staff, "Do you want yard today?" "Yes, I want
20 yard." When it's his turn for yard, they will come
21 to his cell, and he will undergo an unclothed body
22 search before he can leave his cell.

23 Q Unclothed body search.

24 Clearly the person is naked?

25 A Yes.

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1 Q Tell us what happens.

2 A Two correctional officers will come to the
3 front of the cell. The inmate would be in his
4 boxers and a t-shirt. He would hand his other
5 clothes -- jump suit or whatever else he has to one
6 of the officers.

7 Q Now, is this through the door?

8 A This is through the -- the port by which
9 the cell is opened for access for feeding.

10 Q So, when you say "port," that's a little
11 hole in the door?

12 A It's about 18 inches wide by 6 inches tall
13 with a flap on it that locks shut.

14 Q So, all that communication is done through
15 a little slot in the door?

16 A Correct.

17 Q Okay. Go ahead.

18 A The inmate then submits to the unclothed
19 body search. There is a glass window in the door so
20 the correctional officers can see him and give him
21 directions, and every inmate who is that far in the
22 system knows what is expected of him in an unclothed
23 body search, and he will go through the entire
24 process while one correctional officer watches him
25 and the other one searches his clothing.

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1 Q Tell us the process.

2 A He starts at his head, and this is going
3 to vary by institution, because every institution
4 has its peculiarities in how they do things, but
5 what I'm giving you is what must be covered in every
6 unclothed body search. The inmate runs his hands
7 through his hair to make sure there is nothing in
8 his hair. An inmate can't go to the yard with
9 braids, because there may be something in the
10 braids. He then allows them to look behind each ear
11 to see if there's anything behind his ears. They
12 look in his ears. He then opens his mouth by
13 tilting his head back and lifts his tongue, runs his
14 finger around the inside of his mouth to make sure
15 nothing is sequestered inside his mouth. At the
16 same time, the staff member is looking up his nose.
17 He lifts his arm, they look under his arms. He
18 spreads his fingers to make sure there's nothing
19 between his fingers. He then -- they get to his
20 genitals. He has to lift his penis. If he's not
21 circumcised, he has to pull the skin back so they
22 can look in that area. He lifts his scrotum. He
23 then turns around and lifts each foot, one at a
24 time, and wiggles his toes and spreads them apart,
25 then sets the other foot back down. He then squats

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1 while he is turned around, and while is he squatted,
2 he coughs. This is to see if anything is
3 sequestered in his anus. By coughing, it's supposed
4 to remove anything that's there. In addition, many
5 institutions have what they would say to the inmate
6 as "spread them," and he takes his fingers and he
7 spreads his buttocks apart. That is an unclothed
8 body search.

9 Q This happens each and every time?

10 A Every time you leave this cell, every time
11 you come back into the housing unit from somewhere
12 to go back into the cell.

13 Q Okay.

14 So, this inmate is now ready to spend his
15 hour in the block yard. Explain what happens next.

16 A In the block yard?

17 Q No -- to get out there. He's now naked.
18 What's the next step?

19 A He gets dressed. They've gone through his
20 clothes, so he can put on --

21 Q So, his clothes were handed to the
22 officers?

23 A Right. They search them thoroughly.

24 Q Okay.

25 A And he puts them back on, including shoes.

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1 Q Okay.

2 A And then goes out to the exercise yard.

3 Q Now, tell me -- he's still inside his
4 room, correct?

5 A Yes; somewhere along the line they'll open
6 the door.

7 Q Tell me about what shackling -- what types
8 of shackling -- how many officers -- tell me about
9 all the confinements and restrictions.

10 A He is put in waist restraint to move from
11 the cell to the exercise yard.

12 Q What is a "waist restraint"?

13 A "Waist restraint" is a belly chain that
14 goes around the inmate with the longer chains
15 attached to handcuffs so that he's got some movement
16 of his hands but not full movement. I can't tell
17 you because I didn't observe this whether or not
18 they put ankle cuffs on them to go to the exercise
19 yard. They may, they may not, and that may be an
20 elected, they're not going very far, but if they do,
21 then the inmate sits down and they put one ankle on,
22 he lifts his other leg, they put the other one.
23 He's stood up with help, because it's difficult to
24 do. Your feet only move six inches or so, and then
25 he would shuffle off to the yard if he's in

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1 restraint. Then he goes to the unrestraining
2 process when he gets to the yard.

3 Q From the cell to the yard, how many
4 officers are with him?

5 A Two.

6 Q Where are they and what do they do?

7 A Again, we're talking ad seg inmate, one on
8 each arm escorting him to the yard.

9 Q Do they have physical control of him or
10 are they just walking next to him?

11 A They are holding on to his elbow area much
12 as you just demonstrated to the jury.

13 Q One on each side?

14 A One on each side.

15 Q How far is it from the cell to the yard,
16 approximately, if you know?

17 A I couldn't tell you. I don't know.

18 Q So, he's marched to a yard?

19 A Correct.

20 Q What happens once you arrive there?

21 A Then he is taken out of the restraint.

22 Q Now, is he alone in the yard?

23 A He's alone in the yard.

24 Q Is there a slot in the door that they take
25 the restraints off or do they just take them off in

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1 his presence?

2 A I did not observe that. I can't answer
3 it. The safe way to do it is for him to step into
4 the yard where there's a door similar to the one in
5 his cell and he backs up to the door and the
6 restraint is removed. The ankle restraint would be
7 removed before that happened. That would be the
8 safe way.

9 Q And then the inmate would have one hour to
10 do what?

11 A Run in circles, do jumping jacks. There
12 are no items of activity out there that I observed.
13 I mean, there are no handballs or anything like that
14 that I saw.

15 Q It's simply a block?

16 A Correct.

17 Q Courtyard where the block walls go up
18 approximately how high?

19 A Sixteen feet, approximately. When I
20 interviewed the defendant and I didn't see any yard
21 notations in his records at Ely, he told me that he
22 declined going to the yard because of this process.

23 Q I don't understand.

24 What do you mean "because of this
25 process"?

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1 A Many inmates feel that for the hour of
2 time in that confining area, it's not worth going
3 through the unclothed body search to and from for
4 what you're going to get out of that one hour on the
5 yard; so, they pass on the yard and refuse to go.

6 Q How about just the weather conditions at
7 Ely? Has that become an issue?

8 A Ely is a cold climate institution, and
9 there could be snow on the yard. There's not anyone
10 to shovel the snow on the yard and the yard is open
11 to fresh air, so it certainly could be very cold on
12 the yard, and inmates could refuse for that reason
13 as well.

14 Q Now, you had an opportunity to look at
15 Mr. Johnson's prison records.

16 Has there been any variation in the years
17 that he's been up there? Tell me what you found by
18 looking at his records?

19 A His Ely records?

20 Q Sure. Yes.

21 A I did not see anything that was any
22 different than when I toured Ely. I did learn by
23 calling Carson City this morning that Ely, as I
24 shared with the jury a few minutes ago, is
25 significantly overcrowded. They are now talking

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1 about double celling the ad seg inmates so that this
2 cell that was representative of Phase II, because it
3 has two bunks, will also be representative of Phase
4 I with two inmates, ad seg inmates in that same
5 space 23 hours a day.

6 Q So, what you're telling me is that instead
7 of one person in this space a little bit larger than
8 a ping pong table, you would have two individuals?

9 A That's what Ely is doing as we speak.

10 Q And just putting one extra bed above the
11 other?

12 A As the pictures reflect from Phase II.

13 Q Okay.

14 So, let's talk about what other options
15 exist at Ely other than ad seg.

16 A Okay.

17 Q That's all in Phase I, correct?

18 A That is Phase I that I had been describing
19 to the jury. That is where a life-without-
20 possibility-of-parole inmate or a life-term inmate
21 with significant years to serve beyond just a single
22 life would be sent initially.

23 Q Tells us about Phase II.

24 A Phase II provides for an inmate to move
25 from ad seg to what Ely calls "Level IV." Now, a

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1 Level IV inmate gets to live in a two-man cell as
2 depicted in the exhibits and the template, has
3 access to a yard with other individuals but does not
4 have access to tier time. Now, tier time is free
5 time in the housing unit wherein mates can interact
6 with each other other than yard time. They still
7 eat in their cells; they are still in their cells
8 for the majority of the day.

9 Q Twenty-three hours out of 24?

10 A Close to that, maybe a little less with
11 the tier time factor built in, but there is a
12 possibility of movement from Level III -- I'm sorry,
13 from Level IV to Level III, and that's the incentive
14 that is given to those inmates at Ely who ultimately
15 want to get a job and have as much movement as
16 possible. There is a thing called "Level I" which
17 are the inmates that require the least amount of
18 custodial supervision and who all must have jobs in
19 order to become Level Is. Can a life without
20 possibility of parole inmate become a Level I -- no.

21 Q If you would, just explain Levels IV, III
22 and II.

23 What possibilities exist at the Ely State
24 Prison?

25 A Four, as we've talked about; IIIs have

1 more tier time. If I remember correctly -- and bear
2 with me, because I wasn't dealing so much with
3 someone who would move there -- IIs have tier time
4 and I believe go to the dining room as opposed to
5 eating in their cells. So, it's more of a general
6 population facility in Level II than it is in III,
7 IV and Phase I.

8 Q I've often heard carrot and stick type of
9 approach at the Ely State Prison.

10 Would you explain that, please?

11 A The whole objective in having the various
12 levels is that you hold out a carrot to the inmate
13 so that he ceases to act out and misbehave. The
14 carrot is the incentive to move from ad seg to IV,
15 from IV to III. That's their reward for the
16 positive behavior. The stick is that it's much
17 easier to go from III to IV back to Phase I and ad
18 seg than it is to go the other way; so that the
19 stick falls harder than the carrot tastes good.
20 Terrible analogy.

21 Q Tell me, how controlling -- how much
22 control is there on these inmates' lives?

23 A Ultimate, absolute control. They do not
24 control anything themselves, other than, perhaps,
25 when they go to sleep. Their meals are brought to

1 them at a specific time. That's breakfast, lunch
2 and dinner. Lights out are at a specific time.
3 When they would go to the yard, if they choose to go
4 to the yard, is at a specific time. Everything is
5 regulated and regimented. They do not have the
6 opportunity to make decisions for themselves because
7 there are no decisions to be made. It's all decided
8 for them. They don't have the opportunity to get up
9 in the morning and decide what they're going to
10 wear. They've got an orange jump suit. That's what
11 they wear. That's all there is. They've got three
12 pairs of boxers, three T-shirts. That's what we're
13 going to put underneath the orange jump suit.

14 Q With regard to rules and regulations, how
15 specific do they get at the Ely State Prison?

16 A Ely is the max facility for Nevada, and
17 they follow the rules to a T. They want absolute
18 compliance from their inmates, and they get it by
19 enforcing the rules to the letter of the rule. Does
20 anyone bend the rules for a particular inmate
21 because they like them? It's certainly not supposed
22 to happen, not at Ely. Does it happen? It may.
23 But the inmate that we're talking about is in ad
24 seg, the most restrictive environment there is. If
25 an inmate in ad seg has the back window in Exhibit

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1 DDD covered up, he will be written up for that and
2 he will lose some little privilege that he may have
3 as a result of that window being covered up. Is
4 that a major violation? Not really. Is it
5 something that's against the rules? It is. Is it a
6 way of controlling behavior? It is. Is it a carrot
7 and stick? It's a stick.

8 Q You had an opportunity to read through
9 Mr. Johnson's write-ups.

10 What type of write-ups did you see?

11 A At Ely?

12 Q Yes.

13 A A covered back window.

14 Q Anything else?

15 A I would have to look, but nothing of any
16 major consequence. Some nuisance stuff, some stuff
17 that he was pushing them a little bit to see what he
18 could get away with, a guy that was new to Ely,
19 certainly not new to the system but new to Ely, so
20 he wanted to see where he could go and he found out.
21 His biggest complaint was that he wanted to be
22 changed from administrative segregation and they
23 wouldn't do that.

24 Q Let's talk about the Clark County
25 Detention Center for a minute.

1 Do you feel comfortable talking about
2 what's known as CCDC?

3 A Yes.

4 Q How does it compare to Ely State Prison?

5 **THE COURT:** Sir, you want to still stand
6 there or you want to sit down?

7 **THE WITNESS:** I don't care.

8 **THE COURT:** It's up to you.

9 **THE WITNESS:** I'll stay here, your Honor.
10 This is kind of nice.

11 **THE COURT:** All right.

12 **THE WITNESS:** Despite the fact that Ely is
13 the max in the state, in many respects, Clark County
14 is a more difficult place to do time, and I know
15 that sounds like it's in opposition to itself, but
16 the reason is that a county jail does not have any
17 stability. Your inmates in a county jail are there
18 awaiting trial or awaiting transfer after trial or
19 in some cases are doing short sentences for
20 relatively minor offenses. So, you've got a lot of
21 inmate movement in and out. At the same time,
22 you've got a lot of correctional staff movement in
23 and out because people would rather work the street
24 than the jail. If they have the opportunity, they
25 would rather work a courtroom, and I don't know that

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1 deputies have the opportunity to work in courtrooms;
2 in some jurisdictions, they do. So, you've got the
3 pressure of being on trial which is difficult for
4 anyone coupled with the other pressures that I
5 identified. So, it's always harder time, and it's
6 not just Clark County harder time but every county
7 jail that I've visited since I've been a
8 consultant -- every county jail inmate that I've
9 talked with who has done state time previously has
10 said that it's much harder to do county time than it
11 is to do State time, because once you get to State,
12 regardless of how repressive it may be as ad seg and
13 Phase I would be, at least you're settled.. You know
14 that this is your cell, these are your inmates
15 around your cell, these are the staff who are going
16 to be working this unit on this shift and the next
17 shift for quite a while, so there's no turmoil in
18 your life. There's no decisions to make -- there's
19 none of that, but at least it's stationery and
20 static, unlike the county jail experience.

21 The other problem with county jail is lack
22 of consistency. Because the staff rotate so often,
23 what's an infraction on Monday may be ignored on
24 Wednesday, and we're talking about minor kind of
25 stuff. If you had five boxer shorts instead of

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1 three on Monday and they did not bust you but they
2 bust you on Wednesday, you know, why is it one way
3 and not the other? It will be far more consistent
4 in the State prison system.

5 Q I want to ask you, an individual that's in
6 this Phase I or this ad seg, how often -- how can
7 they have contact with other human beings? When
8 does it occur and who is it? Explain it. You stay
9 in 23 out of 24 hours of a day in this little cell.
10 When do they have human contact?

11 A The term isn't used at Ely, but it's used
12 in other max prisons, and the term is "sensory
13 deprivation." What they're attempting to do is
14 break down inmates who have been problematic inmates
15 anywhere in their history by preventing them from
16 seeing and contacting other inmates. They will see
17 another inmate when they walk past cells through
18 that little piece of glass. There is some
19 communication, verbal communication at night from
20 cell to cell. There is message passing on what in
21 California is a "fish line," which in Nevada is a
22 "Cadillac." It's a piece of string that's slid
23 along the floor from one cell to two or three cells
24 further down so you can communicate with another
25 inmate.

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1 Q Is that legal?

2 A No. If it's found that you're doing that,
3 whatever is being passed is confiscated as
4 contraband, and you receive the disciplinary charge
5 and lose another privilege from another stick. So
6 is there any real interaction, no, there isn't.

7 Q How about interaction with the
8 correctional officers?

9 A There's one on each side of you any time
10 you go anywhere. I'm not sure that that's the kind
11 of interaction most inmates are looking for.

12 Q Go ahead and take your seat, if you would,
13 please.

14 **THE COURT:** Tell me, how long does one
15 normally stay on administrative segregation?

16 **THE WITNESS:** At Ely, your Honor, a person
17 can be on administrative segregation their entire
18 time there if their behavior warrants it.

19 **BY MR. WHIPPLE:**

20 Q You studied the records of Mr. Johnson.
21 Where has he been the entire time that
22 he's been at Ely State Prison?

23 A Administrative segregation, Phase I.

24 Q You're a classification officer; would you
25 ever expect him to leave?

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1 A Given his most recent records at Clark
2 County, if I were sitting on a classification
3 committee at Ely, I would not attempt to forecast
4 when he would be removed from ad seg, because my
5 vote would be he remains in ad seg.

6 **MR. WHIPPLE:** Thank you. Nothing further.

7 **MR. STANTON:** Your Honor, may counsel
8 approach?

9 **THE COURT:** Yes.

10 (Sidebar conference outside the presence
11 of the court reporter.)

12 **MR. WHIPPLE:** I want to move this into
13 evidence, your Honor, with the Court's permission.

14 **THE COURT:** Any objection?

15 **MR. STANTON:** No, your Honor.

16 **THE COURT:** All right. Admitted.

17 (Defense Exhibit FFF was admitted into
18 evidence.)

19 **THE COURT:** Cross-examination?

20

21 CROSS-EXAMINATION

22 **BY MR. STANTON:**

23 Q Mr. Esten, you said you toured Ely State
24 Prison one time, correct?

25 A Correct.

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1 Q When was that tour?

2 A Nineteen ninety-nine.

3 Q You haven't been back since, I'm assuming,
4 from your testimony?

5 A That's correct.

6 Q And you've testified on direct examination
7 that you testified in 55 to 60 cases in the State of
8 California; is that correct?

9 A Correct.

10 Q And were those cases, at least 55 of them
11 capital cases?

12 A Probably 50 were capital cases.

13 Q Okay.

14 Do you recall testifying in another case
15 here in the State of Nevada, State vs. Butler, where
16 you indicated that you've testified 55 times on
17 capital cases? Would that be a combination of
18 California and Nevada capital cases or just
19 California?

20 A Probably California.

21 Q Okay.

22 A Because the case prior -- I'm trying to
23 remember if the Elko case was capital or not, and I
24 don't know.

25 Q Okay.

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1 So, out of the 55 to 60 cases in
2 California that you've testified in, you've
3 testified in capital cases 55 times?

4 A I -- you know what, I don't have an
5 absolute count. It's an estimate each time I
6 testify.

7 Q And that's an estimate with the numbers I
8 just gave you, they're fairly accurate?

9 A Except that that was a number of years
10 ago, and I haven't revised them upward, and maybe I
11 need to.

12 Q Okay.

13 Other than the one time when you were
14 called as, I guess, actually as an agent of the
15 State in an undercover operation, how many times
16 have you been called by the State to testify?

17 A I have been -- I have not been called by
18 the State other than that instance, but I was
19 retained by the federal prosecutor in Fresno but did
20 not testify.

21 Q Okay.

22 So, all the times that you've testified in
23 the State of California and the State of Nevada,
24 you've been testifying on behalf of the defense?

25 A Correct.

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1 Q You indicated that there is a term called
2 "administrative segregation" commonly referred to as
3 "ad seg," and you're familiar with that concept as
4 it relates to incarceration and classification of
5 inmates in the State of Nevada?

6 A Yes.

7 Q Now, you indicated, I believe your quote
8 was that "all life sentences you go through ad seg."

9 A That's the testimony of E.K. McDaniel.

10 Q I'm just asking about your testimony, sir.

11 A That's where I got it from, so yes, that's
12 my testimony.

13 Q So, that's your understanding?

14 A Correct.

15 Q And also, is it your testimony that all
16 life -- people that receive life sentences are
17 housed in Ely State Prison? Is that your testimony
18 here today?

19 A Initially, yes.

20 Q They're all initially housed in there?

21 A Correct.

22 Q So, people that receive life sentences
23 after their initial housing in Ely, you'd agree with
24 me they are not all housed in Ely State Prison in
25 the State of Nevada?

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1 A I think we would have to qualify how long
2 "initially" is.

3 Q I'm not talking about the length of time.
4 I'll break it down even simpler for you, Mr. Esten.

5 Are there people that have been sentenced
6 to life terms in the State of Nevada that are not
7 currently housed in Ely State Prison?

8 A Yes.

9 Q So, medium security prisons of you
10 testified Ely is the only maximum security prison
11 facility, those inmates with life sentences are
12 housed in medium security prisons, correct?

13 A Correct.

14 Q Now, you're talking about 23 hours a day
15 in a cell.

16 You're talking about only that environment
17 as it relates to ad seg inmates in Ely State Prison,
18 correct?

19 A Correct.

20 Q If you are not an ad seg inmate, then you
21 would not have the restriction regarding the length
22 of time in the cell of 23 out of 24 hours, correct?

23 A Correct.

24 Q Do ad seg inmates at Ely State Prison have
25 visitation?

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1 A Yes.

2 Q How many days a week do they have
3 visitation?

4 A Two.

5 Q And how many hours a day is visiting
6 permitted through ad seg inmates on those two days?

7 A Up to six.

8 Q Six what?

9 A Hours per day.

10 Q And that's face-to-face, in-person contact
11 with other individuals that come to visit the
12 inmate?

13 A Yes.

14 Q You indicated that there is phone calls
15 that are permitted from ad seg inmates, correct?

16 A Correct.

17 Q And those ad seg inmates can call, albeit
18 collect, to any place in the United States, correct?

19 A Any place in the world, if they wished.

20 Q And, in fact, that exists with a number of
21 ad seg inmates at Ely State Prison is that they have
22 conversation with people all over the world. Did
23 you know that?

24 A I do.

25 Q What is "commissary"?

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1 A "Commissary" is "canteen."

2 Q And what's "canteen"?

3 A "Canteen" is what an inmate is allowed to
4 purchase with monies that he has in his trust
5 account. They consist of toiletry articles and what
6 is commonly referred to in prison jargon as
7 "wham-whams" and "zoo-zoos" -- potato chips, Cups of
8 Noodles, those kinds of things.

9 Q Things outside of what you're normally
10 provided as an inmate?

11 A Correct.

12 Q And what does "on the books" mean?

13 A An inmate has a trust account established
14 for him upon his arrival in an institution, and if
15 he has money in that trust account, he has money on
16 the books.

17 Q And on the books -- money on the books, is
18 that used by an inmate to purchase commissary?

19 A Correct.

20 Q Is there a restriction regarding money
21 placed on the books for someone in ad seg?

22 A Not to my knowledge.

23 Q And can a person on ad seg have access to
24 and the benefit of the commissary?

25 A Yes.

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1 Q You indicated that a life without
2 possibility of parole sentence can never be a Level
3 II; is that correct?

4 A That is my understanding.

5 Q That's your understanding?

6 A Correct.

7 Q Is it possible you can be incorrect about
8 that, Mr. Esten?

9 A If E.K. McDaniel is incorrect, because I'm
10 reading his transcript.

11 Q Okay.

12 How about your personal knowledge, sir?

13 A I was unable to obtain that from the
14 administrative regulations, because that part is
15 currently being revised; so, I don't have an answer.
16 I researched it but couldn't get an answer.

17 Q Okay.

18 And did you research that back when you
19 testified in State vs. Butler and in the other cases
20 that you testified here in the State of Nevada?

21 A I did research it then but felt the
22 information needed to be updated.

23 Q Needed to be updated?

24 A Yes. That's why I researched it this
25 time.

1 Q So, as you sit there today, you have no
2 personal knowledge one way or the other whether or
3 not a person suffering a life without possibility of
4 parole sentence can be classified as something other
5 than a IV?

6 A I thought we were discussing whether or
7 not he could be a II.

8 Q We are.

9 A So, is the question whether you can be a
10 III or a II?

11 Q A IV right now is the question before you.

12 A He can be a IV.

13 Q Can he be a III?

14 A I believe he can. I do not know if he can
15 become a II.

16 Q And you do not -- I'm assuming your answer
17 to my question is that you're not certain whether he
18 can be a I either?

19 A I'm going to tell you that he more than
20 likely cannot be a I.

21 Q And that's because of your own personal
22 knowledge of the classification process in the State
23 of Nevada?

24 A And my review of E.K. McDaniel's
25 transcript.

1 Q And what transcript -- what trial did you
2 review of E.K. McDaniel's testimony?

3 A The proceedings were recessed on
4 January 8th, 2001. The prosecutor was Mr. Laurent,
5 L-A-U-R-E-N-T.

6 Q Okay.

7 A If that tells you more than it does me.

8 Q It tells me enough. Thank you, sir.

9 I want to discuss with you, I guess what
10 you previously defined as a relative term of the
11 length of time someone is on ad seg when they go
12 into Ely State Prison.

13 How long is someone in ad seg, based upon
14 your knowledge?

15 A It varies by the individual. There is no
16 set time for ad seg placement for a life-term inmate
17 at Ely. It's a classification decision.

18 Q And do you know -- since you've reviewed
19 E.K. McDaniel's testimony, do you know what his
20 testimony was regarding the minimum amount of time a
21 person is on ad seg when they get processed in Ely
22 State Prison?

23 A I would have to look it up. I know that
24 he responded positively when asked if anyone could
25 be on ad seg for 15 years, but Ely hadn't been open

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1 for 15 years at that time.

2 Q That's great Mr. Esten, but that's not my
3 question.

4 The question is whether or not E.K.
5 McDaniel, based upon your review as a professional
6 and as an expert -- whether or not you know how
7 long, minimum, someone is required to be reviewed at
8 ad seg before they can go off in Ely State Prison?

9 A A review is every 180 days. That's per
10 the administrative regulations. That I can tell
11 you.

12 Q Okay.

13 So, you can't answer my question about
14 once they're initially evaluated at Ely State
15 Prison, the length of time before they're
16 potentially off ad seg?

17 A I can't give you that answer right now.

18 **MR. STANTON:** I have nothing further at
19 this time.

20 **THE COURT:** Any redirect?

21 **MR. WHIPPLE:** Sure, your Honor. Thank
22 you.

23 /////

24 /////

25 /////

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1 REDIRECT EXAMINATION

2 **BY MR. WHIPPLE:**

3 Q Mr. Esten, who is E.K. McDaniel?

4 A E.K. McDaniel is the warden of Ely State
5 Prison.

6 Q Is he the actual authority of what goes on
7 at Ely State Prison?

8 A He determines institution policy and
9 enforces the rules and regulations for Ely State
10 Prison as directed by the director of the Nevada
11 Department of Corrections.

12 Q When you did the tour of Ely, who did you
13 visit with?

14 A He conducted the tour personally.

15 Q The issue of canteen was brought up, I
16 think you called them "wham-whams" and "zoo-zoos"?

17 A Yes.

18 Q Obviously, people can buy the little soups
19 or different soups and the different candies?

20 A Yes.

21 Q How do they get to their cell?

22 A They're delivered by correction staff.

23 Q It's not like they can go walk down the
24 hall and choose through a store?

25 A No. They're given a list of what's

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1 available. They mark on the list what they wish to
2 have, and then it's delivered.

3 **MR. WHIPPLE:** Nothing further.

4 **THE COURT:** Anything else?

5 **MR. STANTON:** Yes.

6 May I approach?
7

8 RECROSS-EXAMINATION

9 **BY MR. STANTON:**

10 Q Can I see the beginning of your transcript
11 of E.K. McDaniel that you reviewed that you have
12 with you?

13 A It's not a cover page.

14 Q Could you please turn to 148 in that
15 transcript?

16 A Okay.

17 Q Do you see a question beginning at line
18 12?

19 A Yes.

20 Q Does it begin with "With regard to"?

21 **MR. WHIPPLE:** Judge, can we approach at
22 this time?

23 **THE COURT:** Yes.

24 (Sidebar conference outside the presence
25 of the court reporter.)

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1 **THE COURT:** Read it back to me, the
2 redirect examination.

3 (The record was read as follows:

4 **"BY MR. WHIPPLE:**

5 "Q Mr. Esten, who is E.K.
6 McDaniel?

7 "A E.K. McDaniel is the warden
8 of Ely State Prison.

9 "Q Is he the actual authority
10 of what goes on at Ely State Prison?

11 "A He determines institution
12 policy and enforces the rules and
13 regulations for Ely State Prison as
14 directed by the director of the Nevada
15 Department of Corrections.

16 "Q When you did the tour of
17 Ely, who did you visit with?

18 "A He conducted the tour
19 personally.

20 "Q The issue of canteen was
21 brought up, I think you called them
22 "wham-whams" and "zoo-zoos"?

23 "A Yes.

24 "Q Obviously, people can buy
25 the little soups or different soups

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1 and the different candies?
2 "A Yes.
3 "Q How do they get to their
4 cell?
5 "A They're delivered by
6 correction staff.
7 "Q It's not like they can go
8 walk down the hall and choose through
9 a store?
10 "A No. They're given a list of
11 what's available. They mark on the
12 list what they wish to have, and then
13 it's delivered.
14 "MR. WHIPPLE: Nothing
15 further.")
16 **THE COURT:** Sustained.
17 Next question. Proceed.
18 **MR. STANTON:** I have no further questions,
19 your Honor, based upon the Court's ruling.
20 **THE COURT:** Anything else?
21 **MR. WHIPPLE:** Nothing, your Honor. Thank
22 you.
23 **THE COURT:** You're excused.
24 **THE WITNESS:** Thank you.
25 **THE COURT:** Any more witnesses for today?

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1 **MS. JACKSON:** Yes, your Honor. That's all
2 we have to present.

3 **THE COURT:** What now?

4 **MS. JACKSON:** This is -- this is the last
5 witness that we have for today.

6 **THE COURT:** That's what I asked you if you
7 have any more, so no.

8 **MS. JACKSON:** No.

9 **THE COURT:** That's all you have to say is
10 no.

11 **MS. JACKSON:** No.

12 **THE COURT:** Ladies and gentlemen, we're
13 going to call our evening recess.

14 You're admonished not to read any
15 newspaper articles about the case, listen to radio
16 commentary about the case, listen to newscasts about
17 the case; don't talk to anyone about the case; don't
18 let anyone talk to you about the case; don't express
19 any opinion on anyone, and we'll see you tomorrow
20 morning at 9:00 o'clock.

21 **THE BAILIFF:** All rise.

22 (Evening recess taken at 5:25 p.m.)

23 * * * * *

24

25

5/2/05

FILED IN OPEN COURT

MAY 03 2005

SHIRLEY B. PARRAGUIRE, CLERK

BY *Sharon Coffman*

DEPUTY

5/2/05

STATE OF NEVADA
vs.
DONTE JOHNSON

District Court Case No. C153154

Incident Report

Location: Eighth Judicial District Court
Clark County Courthouse - Department 8

Date/Time: 5/2/05 Approximately 1355 hrs.

Roy L. Burrell, Sr. is the Bailiff for Judge Lee A. Gates in Department Eight. On above date and time, the penalty phase trial for convicted murderer Donte Johnson was being heard in Department 8 by Judge Lee A. Gates. During the lunch break, I was approached by juror number six (6), Linda Suckow, who asked if anyone else was in the jury box over the weekend because she had observed an object on the floor that looked like a crack pipe. The term crack pipe is a slang expression for describing an instrument for smoking narcotic contrabands.

After lunch, I immediately went to the jury box and retrieved a small glass tube and a small screw lying on the floor between jury seats twelve (12) and thirteen (13). Judge Gates was advised, and a side bar was called to place the matter on record.

I re-interviewed jury number six (6), and she stated that she did not observe the items when the court recessed for the weekend on Friday (4/29/05 Approximately 1715 hours). She further stated that she noticed the item this morning (5/2/05 Approximately 0930 hours) when she placed her purse on the floor in the jury box.

COUNTY CLERK

MAY 03 2005

RECEIVED

I had checked the jury seating that morning (5/2/05 Approximately 0800 hours), however, I felt that I may have overlooked the items in my haste to get the courtroom ready for the high profile testimony that was set to began that day. Several high security risk inmates from Ely Prison were testifying. Metro S.W.A.T was in the courthouse, and I was attempting to prepare for the courtroom security.

After court recessed for the day, I continued my investigation of the incident. While re-examining the area where the items were found, I recovered small glass fragments wedged between the bottom cushion and the back wooden frame of jury seat number thirteen (13). It appears that when juror number thirteen (13), Theresa Knight, sat in the seat she may have pushed the items through the space that separated the seat, and the items fell to the floor. Other glass fragments were found between jury seat numbers six (6) and seven (7). It is uncertain how long the items had been wedged in the seat; however, Friday morning (4/29/05 approximately 0830 hours) several defendants were seated in the area where the items were recovered and two of the defendants (Defendants: Alan Hanna C210956 and Thomas Kaczmarek C210934) were there on drug charges.

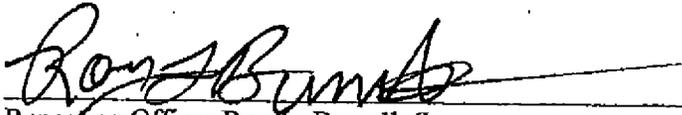
I secured the area and resumed my investigation the next day. During the investigation Clark County District Attorneys' Robert Daskas and Melvin Whipple were present and observed the glass fragments under the seat cushion of jury seat number thirteen (13).

Evidence:

- 1-1 glass tube broken on both ends w/brown/black residue inside.
(Recovered 5/2/06 on floor between juror seats twelve (12) and thirteen (13).

- 2-1 small screw (Recovered 5/2/05 on floor between juror seat twelve (12) and thirteen (13).
- 3-6 small glass fragments with dark colored residue on inside of fragments (Recovered from between seat cushion and wood frame of juror seat thirteen (13) and between jury seat numbers six (6) and seven (7) (5/3/05 Approximately 0900 hours).

All above items were recovered by Officer Roy L. Burrell, Senior.


Reporting Officer Roy L. Burrell, Sr.


Delois Williams
Judicial Executive Assistant to the Honorable Lee A. Gates

1 A Yes, ma'am.

2 Q Now, let's talk about this plea agreement.
3 What Counsel showed you, you aptly
4 recognized. You called it a "Complaint." However,
5 when you go through District Court, it's called an
6 "Information."

7 A Okay.

8 Q That's what he showed you, isn't it?

9 A Yes, ma'am.

10 Q That date had a file stamp of April of
11 '01, didn't it?

12 A I didn't look at it.

13 Q That would have been filed after you were
14 bound over after the preliminary hearing, correct?

15 A Yes, ma'am.

16 Q And preliminary hearing occurred within a
17 very short period of time after the incident where
18 you threw Oscar over the railing, right?

19 A Yes, ma'am.

20 Q Your plea, however, was much later.

21 I'm going to show you a document which is
22 the plea agreement.

23 **MS. JACKSON:** Your Honor, if I may
24 indicate for the record, this proposed exhibit is a
25 copy. The original is in my file -- which I got

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1 from Miss Navarro -- back at the office. It never
2 was filed, so this is a copy of an original, which I
3 can -- if the Court has any concern or counsel
4 objects to it being a copy, I can bring that in
5 after the break.

6 **THE COURT:** That's fine. Just go on.

7 **MR. STANTON:** Court's indulgence.

8 **MS. JACKSON:** It was never filed. That's
9 what I just said.

10 I'll have this marked for identification
11 as defendant's next in order.

12 (Defense Exhibit ZZ was marked for
13 identification.

14 **BY MS. JACKSON:**

15 Q Mr. Johnson, I'm going to hand you what's
16 been marked for identification only, sir, as
17 Proposed Defendant's Exhibit ZZ.

18 Do you recognize that, sir?

19 A Yes, ma'am.

20 Q What is that document?

21 A That's a Guilty Plea Agreement.

22 Q Okay.

23 This is the agreement that you signed.

24 I'm going to flip over to -- it's page 4.

25 Okay?

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1 Is that your signature?

2 A Yes, ma'am.

3 Q Okay.

4 And down here where it says, "Agreed to
5 by" -- and there's a line, it says "Deputy District
6 Attorney," and can you read that writing?

7 A O'Neale.

8 Q Okay. And he signed off.

9 Now, on the last and final page, it says
10 "Certificate of counsel."

11 Did someone sign off on that date and who
12 was that?

13 A Is that Gloria?

14 Q That's her signature. I recognize it.
15 I'll represent to you that it is.

16 A Miss Navarro.

17 Q The date on that?

18 A It's October 3rd.

19 Q Does that conform with your memory as to
20 when you would have entered this negotiation, sir?

21 A Yes, ma'am, around that time. I'm not
22 really certain -- good on dates.

23 Q Okay.

24 Now, the circumstances you are entering a
25 plea, you testified that a jury panel was -- had

1 jury selection begun?
2 A It was finished.
3 Q A panel had been selected?
4 A A signed that on the day of trial. Trial
5 was about to begin.
6 Q So, you had selected a jury?
7 A Yes, ma'am.
8 Q And they were going forward with the next
9 phase?
10 A Yes, ma'am.
11 Q And at that juncture, there was a
12 negotiation entered into.
13 Do you recall that?
14 A Yes, ma'am.
15 Q Did they take the time to file an Amended
16 Information?
17 A I'm lost.
18 Q What Counsel showed you was an
19 Information --
20 A Okay.
21 Q -- which has -- in Justice Court it's
22 called a "Complaint."
23 A Okay.
24 Q Up here it's called an "Information."
25 It's the same thing.

1 Do you recall them filing an Amended
2 Information?

3 A No.

4 Q Okay.

5 And was that because time was a factor?

6 A I'm not really certain. You know,
7 Miss Navarro explained to me that they reserved the
8 right to file a habitual criminal. I'm just
9 explaining to you what I know --

10 Q Yes, sir.

11 A -- as far as the legal terminology and all
12 of that.

13 Q You may do so.

14 A I'm not really abreast of that, but she
15 explained to me that they reserve the right to file
16 the habitual criminal because I had two prior
17 convictions of Conspiracy to Commit Murder and
18 Attempted Murder, and they couldn't file the
19 habitual criminal unless I pled guilty to Conspiracy
20 to Commit Murder and Attempted Murder. Now, the
21 reason why I had reservations about doing that is
22 because I thought it would implicate that Donte was
23 with me, but she explained to me that the Complaint
24 would read "conspiracy with another" and charges
25 would be dropped against him with prejudice. This

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1 is why I'm so pissed off that I'm here today.

2 Excuse me.

3 Q I understand, Mr. Johnson.

4 Now, however, an Amended Information --
5 and you don't really even know what that is --

6 A Right.

7 Q -- to your knowledge was not filed?

8 A I don't know. I don't know what it is.

9 Q And the judge, when she took your plea --
10 they asked you a series of questions.

11 Do you recall -- it's called a "canvass"?

12 A Yes, ma'am.

13 Q In other words, no judge would just let
14 you plead guilty --

15 A I remember that.

16 Q She asked you a series of questions.

17 When it came to the part about a
18 conspiracy, did she ask you who did you conspire
19 with, sir?

20 A I think so.

21 Q And what was your answer?

22 A I said nobody.

23 Q And was that plea acceptable to the court?

24 A That's what they said, but I'm here.

25 Q Now, you understand that this written

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1 Guilty Plea Agreement, although you signed it, it
2 was, in fact, never filed. There's not a file stamp
3 on it.

4 Did you know that?

5 A No.

6 Q I have the original in my file.

7 A No, I don't.

8 Q This is the document that you filed, and
9 you did verify your signature?

10 A Yes, ma'am. I did not know that.

11 **MS. JACKSON:** Thank you. That's all I
12 have, your Honor. Thank you so much.

13 **THE COURT:** Anything else?

14 **MR. STANTON:** Nothing further.

15 **MS. JACKSON:** Thank you, Mr. Johnson.

16 **THE WITNESS:** Thank you.

17 **MS. JACKSON:** Your Honor, the defense
18 calls Gloria Navarro.

19 **THE COURT:** There she is.

20 **THE CLERK:** Please remain standing. Raise
21 your right hand.

22 (Oath administered.)

23 **THE WITNESS:** I do.

24 **THE CLERK:** Thank you. Please have a
25 seat. State your full name spelling your last name

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1 for the record.

2 **THE WITNESS:** Gloria Navarro,
3 N-A-V-A-R-R-O.

4 **THE CLERK:** Thank you.

5
6 GLORIA NAVARRO,
7 being called as a witness on behalf of the
8 Defendant, was first duly sworn and testified as
9 follows:

10
11 DIRECT EXAMINATION

12 **BY MS. JACKSON:**

13 Q Good morning, Miss Navarro.

14 A Good morning.

15 Q Your business profession or occupation,
16 ma'am?

17 A I'm an attorney.

18 Q And where are you employed?

19 A I'm currently employed at the District
20 Attorney's office in the Civil Division.

21 Q And prior to that employment, your
22 position, please.

23 A I was employed as a deputy special public
24 defender.

25 Q And before that?

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1 A And before that, I was in private
2 practice, and I had contracts with the federal
3 courts and the county courts to provide defense --
4 legal defense to individuals who could not afford an
5 attorney but who the court was going to appoint an
6 attorney and the Public Defender had a conflict.

7 Q Pursuant to that arm of your career, did
8 there come a time when you came in contact with the
9 gentleman who just left the courtroom, Mr. Reginald
10 Johnson?

11 A Yes. I was appointed by Judge Saitta to
12 represent him.

13 Q When did you first make contact with
14 Mr. Johnson, Miss Navarro?

15 A I don't have the exact date. It would be
16 2001.

17 Q Was your appointment pursuant to the Oscar
18 Irias criminal complaint?

19 A Yes.

20 Q And your understanding of what those
21 charges were -- ma'am, would you recite to the jury
22 what your understanding of those charges entail?
23 What was he charged with?

24 A Attempt Murder and Conspiracy to Commit
25 Murder. I don't think it was with a deadly weapon.

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1 I don't think there was a weapon that was alleged to
2 be used.

3 Q Okay.

4 And who was it that he was alleged to have
5 conspired with?

6 A One of -- another individual who was
7 housed in the same unit of the jail, Donte Johnson.

8 Q As a result of your being appointed by the
9 Court, did you undertake to represent Mr. Johnson?

10 A Yes, I did.

11 Q Can you describe for the jury, ma'am, the
12 preparation? Did there come a time when you
13 perceived that this matter may proceed to trial?

14 A Yes, but that was a long -- a long ways
15 down from the preparation. Originally, when I met
16 Mr. Johnson, Reggie, I explained to him why it was
17 that I was representing him, why the attorney was
18 not the Public Defender and so forth, and then I
19 explained to him what his charges were, and he
20 immediately told me that he admitted guilt and that
21 Donte Johnson had nothing to do with it. And then
22 he handed me some documentation -- I think it was a
23 handwritten letter; I don't think it was typed.
24 Usually, it's handwritten when they're in the
25 jail -- and he wanted to plead guilty right away to

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1 all the charges as they're charged. I tried to
2 explain to him that usually we try to negotiate
3 something, you don't have to admit to everything
4 right away. Usually, that's the way that the
5 process works. And then the prosecutor at the time
6 was Mr. L.J. O'Neale; so, I contacted him to let him
7 know that Reggie wanted a deal.

8 Q Okay. And --

9 A I'm sorry, not a deal; he wanted to plead
10 guilty. I wanted him to take a deal; he wanted to
11 plead guilty. I don't know if that distinction is
12 clear to the jury.

13 Q In other words, Mr. Johnson did not
14 instruct you to try to seek some type of, as we
15 would say, "quid pro quo" in exchange for his plea
16 to these charges?

17 A That's correct. Usually, the District
18 Attorney's office will give a lesser charge in a
19 guilty plea to make up for the fact that you're not
20 having to go to trial, the expense, the jury having
21 to be brought in, the court time -- all that. They
22 usually get a little benefit for pleading guilty,
23 and that was not what Reggie wanted to do. He
24 wanted to plead what we call "straight up," which
25 means plead guilty to everything.

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1 Q Why, Miss Navarro, did he want to do that,
2 if he told you?

3 A Reggie is kind of an odd individual -- I
4 say unique -- is a unique person. He has his own
5 code. He always has pled guilty to everything that
6 he's ever done. He fully admits that when you
7 commit the crime, you know what you're doing and
8 that you know that it's wrong, and that you know
9 what the odds are of getting caught, and if you get
10 caught, then you got to do the time. If you get
11 away with it, then you get away with it, and that's
12 kind of the way he feels about it. And in fact, we
13 would argue about this all the time. At sentencing
14 he wanted to make arguments kind of like he did
15 today where he kind of goes off, and of course, I
16 just wanted him to stay quiet and let me do the
17 talking, but he's not that kind of guy. He likes to
18 talk, and even at sentencing, he said, "I'm not
19 going to tell your Honor that I'm sorry, because I'm
20 not sorry. If Mr. Oscar Irias was here today, I
21 would do it again." He doesn't believe in
22 pretending that you're sorry for something that
23 you're really not sorry for. He did it knowing what
24 he was doing and he got caught, and he pays the
25 price. And when he did not get caught, he benefited

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1 from not getting caught, and that's how life works,
2 and that's kind of his code.

3 Q Now, there came a time during the course
4 of your employment with the Special Public
5 Defender's office and Clark County that actually I
6 caused -- I originated a document whereby
7 Mr. Johnson waived any potential conflict so that
8 you could talk to us about this incident?

9 A That's correct.

10 Q And he also waived any attorney-client
11 privilege as it relates to this case at that time?

12 A That's correct.

13 Q So, during that time frame, did you have
14 extensive discussions with Mr. Reginald Johnson
15 about this case?

16 A I had one discussion with him to get his
17 signature, because I don't think that -- he was not
18 housed in CCDC any longer, he had been sentenced, so
19 I had to go to High Desert Prison, which is in
20 Indian Springs -- that's the maximum security area,
21 and we telephone called to let him know that I was
22 coming, and I had the documentation that he wanted,
23 and when I arrived there -- I think that we had made
24 an appointment, but I wasn't able to see him because
25 he was categorized as a "walk alone," and I did not

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1 know even though I had been -- over 12 years. I had
2 been doing criminal defense work, I had not had an
3 opportunity to find out what a "walk alone" was, and
4 he was a "walk alone," which means that you can't
5 make an appointment to visit him on an ordinary day
6 like everybody else; you have to see him totally
7 separate on a non-visitation day. So, I had to come
8 back a whole different day to see him. He's not
9 allowed -- he's in isolation is what it means.

10 Q However, before you allowed -- based upon
11 the documents that are filed in this case, it
12 appears the Information was filed sometime in April.

13 Did you represent Mr. Reginald Johnson at
14 a preliminary hearing in this matter?

15 A Yes, I did.

16 Q And we've learned from Mr. Johnson that
17 the Guilty Plea Agreement, although signed, was
18 never filed.

19 That was in October of '01?

20 A That's correct.

21 Q During the interim time frame,
22 Miss Navarro, did you conduct what we termed
23 "extensive investigations" into this incident?

24 A Oh, absolutely.

25 Q And as part of your investigation, did you

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1 cause photographs to be taken of the area 5C?
2 A Yes. I was present myself when the
3 photographs were taken with Mr. Ralph Diamet who has
4 since passed away -- an excellent investigator.
5 Because of that area being what they call "The
6 Hole," because that's the maximum security area, no
7 one is allowed in there, and I had to fight very
8 hard to get in there. Even though the judge said I
9 had a right to take pictures of it and videotape it,
10 because that's the scene of the crime, for security
11 reasons they didn't want anybody in there. So, I
12 had to go -- jump through a lot of hoops in order to
13 be able to get clearance, even though I had a judge
14 order. You would think a judge order is enough, but
15 even with the judge's order, I had to jump through a
16 lot of hoops to get in there with the video camera
17 and a camera, so I knew that was probably going to
18 be the only time I would ever have an opportunity, I
19 went myself. Usually, the investigator does that,
20 but I wanted to make sure everything got done right
21 the first time.

22 Q I'm going to put on the screen --
23 actually, I'm going to show you first, and you could
24 tell me which one would best depict. I'm going to
25 show you QQ, RR and SS. They're all in evidence.

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1 They are defense exhibits.

2 Are these the pictures that, as a matter
3 of fact, were taken pursuant to your investigation?

4 A Yes, they are.

5 Q Okay.

6 And as a result of your investigation,
7 there came a time when you were convinced that the
8 officer, Gonzalez, could not have possibly seen what
9 he claims to have seen?

10 A That's correct. From the beginning,
11 Reggie would tell me what had happened, and I guess
12 for lack of a better word, from my experience with
13 criminal defendants you can't always believe what
14 they say, and you kind of have to do your own
15 background search. I pretty much found everything
16 that Reggie ever told me about what happened and how
17 it happened -- I wasn't there, and in my opinion,
18 panned out true -- I was able to confirm, including
19 him telling me that Officer Gonzalez --

20 **MR. STANTON:** Your Honor, I'm going to
21 object to that line.

22 **THE WITNESS:** -- could not see.

23 **MR. STANTON:** I'm going to object to that
24 line of testimony. It's improper vouching for the
25 credibility or veracity of another witness, and

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1 since Mr. Johnson has testified in this matter, I
2 believe it's improper.

3 **THE WITNESS:** Well, I can --

4 **THE COURT:** Well, what are you --

5 **THE WITNESS:** I can state only as to --

6 **THE COURT:** Excuse me.

7 **MS. JACKSON:** She's just so used to being
8 a defense attorney.

9 **THE COURT:** You're a witness; you're not
10 the lawyer.

11 **MS. JACKSON:** I would submit that the
12 State has also submitted testimony -- the only
13 testimony in this case of my client allegedly doing
14 this has been Officer Gonzalez, and this is a
15 penalty hearing, and hearsay is allowed. And
16 Miss Navarro conducted an extensive investigation,
17 and she's allowed to testify to her finding. She's
18 not vouching for anything; she's saying that she,
19 through independent means, confirmed what her client
20 told her.

21 **MR. STANTON:** That's not what the content
22 of the testimony is.

23 **THE COURT:** Read it back to me.

24 (The record was read as follows:

25 "A That's correct. From the

1 beginning, Reggie would tell me what
2 had happened, and I guess for lack of
3 a better word, from my experience with
4 criminal defendants you can't always
5 believe what they say, and you kind of
6 have to do your own background search.
7 I pretty much found everything that
8 Reggie ever told me about what
9 happened and how it happened -- I
10 wasn't there, and in my opinion,
11 panned out true -- I was able to
12 confirm, including him telling me that
13 Officer Gonzalez --")

14 **THE COURT:** Sustained.

15 **BY MS. JACKSON:**

16 Q Did there come a time, Miss Navarro, where
17 you were able to conduct your own independent
18 investigation?

19 A Yes, I did.

20 Q Were you able to make certain findings?

21 A Yes, I did.

22 Q One of those findings was that
23 Officer Gonzalez -- was he in a position to see what
24 he claimed he saw?

25 A No, he did not. It was a position in

1 this -- it's probably in some other picture that's
2 called a "Bubble."

3 Q If I give you your file, do you think that
4 might assist you? I have your file which has all
5 the photographs.

6 A Would that assist you, Miss Navarro?

7 A Yes, it would. In these other
8 photographs, you can see something that is -- like,
9 houses the computers, and it's the office of the
10 guards in that unit, and they refer to it as "The
11 Bubble," because it's in the middle of four
12 different cells. There's A, B, C and D.

13 Q Okay.

14 A Is that depicted in either of these
15 photographs?

16 A Yeah. Right here (indicating), that's the
17 door to The Bubble, and those are the windows to The
18 Bubble.

19 Q I'm going to --

20 A Here again --

21 **THE COURT:** What are you guys going to do,
22 just talk among yourselves?

23 **MS. JACKSON:** I'm just trying to have her
24 show me which ones, and I'm going to have them
25 marked and show Defense Counsel (sic).

1 **MR. DASKAS:** Judge, may we approach on
2 this issue, please?

3 **THE COURT:** Yes.

4 (Sidebar conference outside the presence
5 of the court reporter.)

6 (Defense Exhibit AAA was marked for
7 identification.)

8 **BY MS. JACKSON:**

9 Q Miss Navarro, I'm going to put on the
10 screen -- well, I'm going to show it to Counsel
11 first.

12 **MS. JACKSON:** Before we put this on the
13 screen, I had this marked for identification. It's
14 triple-A, defense next in order.

15 **BY MS. JACKSON:**

16 Q Is this the photograph that was taken from
17 your original file in this matter which you
18 indicated would somewhat depict the area called the
19 "Command Center" or "The Bubble"?

20 A Yes, it is.

21 Q And you recognize this photograph as one
22 of the ones that you caused to be taken in the
23 course of your investigation?

24 A Yes.

25 **MS. JACKSON:** Your Honor, I would move for

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1 the admission of triple-A.

2 **MR. STANTON:** No objection.

3 **THE COURT:** Admitted.

4 (Defense Exhibit AAA was admitted into
5 evidence.)

6 **BY MS. JACKSON:**

7 Q I'm going to put it on the overhead,
8 Miss Navarro.

9 You indicated there's a J number.
10 Triple-A has a series of six photographs.
11 Underneath each photograph is a J number?

12 A Twenty-five and 26.

13 Q So, you're indicating for the record, 25
14 and 26 would depict the area called "The Bubble" or
15 the "Command Center," correct?

16 A Yes, that's correct.

17 **MS. JACKSON:** Mr. Daskas, could you
18 enlarge it for me please, sir?

19 **THE WITNESS:** No. 27 does as well.

20 **BY MS. JACKSON:**

21 Q No. 27?

22 A Um-hmm.

23 Q Okay.

24 There should be a pointer. Here is the
25 pointer, Miss Navarro.

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1 If you could take that if it would assist
2 you in your testimony.

3 You were testifying that based upon your
4 observations and your independent research
5 information that you obtained, you were able to
6 confirm what your client had told you?

7 A Yes.

8 Q And that is that the guard could not
9 possibly have seen what he claim to have saw?

10 A Correct.

11 Q What did you -- what led you to that
12 conclusion, ma'am?

13 A During the preliminary hearing,
14 Officer Gonzalez testified as to where he was
15 located within The Bubble. This is the door to The
16 Bubble (indicating) that has a window right here
17 (indicating). These are the windows to The Bubble.
18 There's computers in here (indicating), and I don't
19 know if you can see through, but there's also more
20 windows on the other side, because there's another
21 jail area cell block on the opposite side of this
22 Bubble (indicating); so, it's actually in the middle
23 of four separate cell block areas. So, as you're
24 looking out, if you're in the middle, you can see
25 all around you.

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1 Q So, the design is such that the officers
2 in this Control Center can essentially monitor those
3 four pods, if you will; is that a fair statement?

4 A That's the exact word, yes.

5 Q Okay. Please continue.

6 A This is where the computers are situated
7 (indicating), this is the door window (indicating),
8 and this was the only area that he could look out of
9 (indicating).

10 Q When you say "he" --

11 A I'm sorry, Officer Gonzalez.

12 Q All right.

13 A Right here, like these boxes (indicating),
14 that's where they keep the cleaning supplies and
15 such that the cell mates are supposed to be taking
16 to clean their rooms and so forth during that little
17 bit of free time that they have out.

18 This area right here (indicating) is
19 actually -- you can kind of see it better down here
20 (indicating) -- is closed off. This is all glass
21 (indicating), and there's doors; so, to get in and
22 out of this area, you have to -- someone has to push
23 a button for the doors to open.

24 Q Yes, ma'am.

25 A Then on this other side of this glass

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1 (indicating) is where you see these cells
2 (indicating).

3 Q Okay.

4 A I believe that it's Picture No. 7 --

5 Q I'll bring it down.

6 A No. 27, that is the one. Maybe it's a
7 larger one.

8 Q Let me slide that up.

9 A There you can see.

10 These are the cells, 8, 9 at the bottom;
11 at the top, 20, 21, 23 -- and this is a column
12 (indicating) that is also this column right here
13 (indicating), and it's this column that obscures the
14 view of the cells from the Control Center.

15 This is the staircase that's right here
16 (indicating) in No. 27; this is staircase here in 28
17 (indicating).

18 Q And the area that you understood to be
19 where Mr. Oscar Irias landed when your client, as he
20 so aptly put it, "helped him over" the banisters,
21 did you determine where that area was in terms of --
22 is it depicted in double-A -- in this photograph,
23 for example, JPG No. 28?

24 A It wasn't directly in front of any
25 particular area; it was in the area between doors,

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1 and I want to say 23 was one of them. I wouldn't
2 recall it without looking at the transcript of
3 Officer Gonzalez. This area right here (indicating)
4 is also a column, as you can see in 26, which is the
5 same size and same dimension as you can see in 26.
6 It looks larger because it's closer. It's a very
7 large area, and the only support for these two
8 floors are these huge columns right here
9 (indicating).

10 Q You indicated because you had such
11 difficulty getting the access, you were there?

12 A Yes, I was. To the best of my memory, it
13 was quite some time ago.

14 JPG No. 27 is the one that shows where
15 approximately someone might have been thrown over --
16 where Reggie threw him over, and that these two
17 columns -- the one that's within The Pod itself and
18 the one that's in that middle recreation area
19 obscured the view from the Control Center. Also,
20 you can probably tell better from Picture No. 25,
21 the Control Center's window is actually very short,
22 and above it is just cement wall, it's not glass;
23 so, it makes it very difficult when you're in there
24 to see anything that's going on on the second floor,
25 because the window -- well, if you're standing up,

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1 the window would come to your head. If you're
2 sitting down, you still have a little bit of window
3 above you, so you can't actually see on to the
4 second floor. For example, if you're looking at the
5 second floor above us, the window would be this high
6 (indicating), and that obscures your vision as well.
7 We tried to take as many pictures as we could and as
8 much videotape as we could to make it a little
9 easier to see from both directions. We were even
10 allowed to go inside of the Control Center, The Pod,
11 The Bubble and take pictures out towards the scene
12 as well.

13 Q So, you were able to place yourself, you
14 and your investigator, in the position that
15 Officer Gonzalez indicated he had been standing or
16 sitting in when this incident occurred?

17 A Not me, my investigator, because I'm much
18 shorter, and Officer Gonzalez, as I recall, was much
19 taller than me, like a six-footer type; so, I had my
20 investigator do it with his camera and with his
21 video camera, and I think there might be a
22 photograph of us taking the picture of him taking
23 the picture to show where he's standing where
24 Officer Gonzalez described himself to be.

25 Q So, you did a very thorough investigation

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1 and you were satisfied based upon your investigation
2 which was prepared when you were preparing to go to
3 trial.

4 A As a matter of fact, you seated a jury?

5 A Yes. No; we did not seat the jury.

6 Q What happened?

7 A We started with jury selection. I want to
8 say like 60, 80 individuals that were called for the
9 jury were all present, and as we were getting ready
10 to select a jury, the District Attorney who was L.J.
11 O'Neale kind of, you know, motioned me over with his
12 finger and said, "Can I talk to you in chambers?"
13 And I said, "Sure." We walked into the hallway, in
14 chambers, and that's when he asked me if my client
15 was still willing to take that deal that he had
16 offered before prelim.

17 Q And that deal had been on the table since
18 before preliminary hearing?

19 A Yes. I used the word "deal," because
20 that's what we do, but it's not really a deal.

21 **THE COURT:** Hold on. Let me stop you.

22 We're going to take a short recess and
23 we're going to pick it up before we get into that.

24 The jury is admonished not to discuss this
25 case among yourselves or with anyone else, and don't

1 watch any television or listen to any radio or read
2 any newspaper articles about the case.

3 Five or ten minutes.

4 **THE BAILIFF:** All rise.

5 (Recess taken.)

6 (Jury present.)

7 **THE BAILIFF:** Be seated, come to order.

8 Court is again in session.

9 **THE COURT:** Proceed, Counsel.

10 **MS. JACKSON:** Thank you, your Honor.

11 **BY MS. JACKSON:**

12 Q Miss Navarro, I believe we were getting to
13 the portion of your testimony respecting -- you said
14 there was what we in the business call a "panel of
15 veneer persons" assembled which were being brought
16 up for jury selection?

17 A That's correct. There was --

18 Q At that juncture, what happened, ma'am?

19 A At that moment, the prosecutor, the
20 attorney was Mr. L.J. O'Neale, and he motioned to me
21 with his finger -- you know, can we talk out in the
22 chambers, which means in the hallway --
23 chamber/hallway, and we went out the back door,
24 which is similar to this (indicating). It was the
25 next door next to where the judge sits, and we went

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1 out into that hallway, and he asked me if my client
2 was still interested in taking -- in pleading guilty
3 in the same manner as we had discussed before the
4 preliminary hearing.

5 Q Let me stop you for a moment.

6 Now, you stated he indicated was your
7 client still interested in pleading guilty in the
8 same fashion, so your client apparently had
9 instructed you to let the D.A. know that he wanted
10 to plead, as we call, "straight up"?

11 A That was many, many months before, before
12 the preliminary hearing, yes.

13 Q Okay.

14 A And that was -- I'm sorry. That had
15 always been his position consistently, but that
16 option was not available because the District
17 Attorney -- the prosecutor is the one who has to
18 make that option available for you in a conspiracy
19 case that involves two different individuals. You
20 can't plead guilty for somebody else. You can plead
21 guilty for yourself, but you can't plead guilty for
22 somebody else.

23 Q How come Mr. Reginald Johnson had not --
24 what was it about the negotiation that was a
25 sticking point, if you will, that was holding up the

1 plea prior to this day?

2 A Well, Reggie wanted it to be made clear
3 that he acted by himself and he had full
4 responsibility for his actions; that he was the one
5 who caused Oscar to fall off of the second story
6 balcony, and that Donte had nothing to do with it.

7 Q And did there come a time when Mr. O'Neale
8 was willing to make that concession?

9 A Yes.

10 Q Other than that factor, was the proffer
11 desire to plead the exact same in all other
12 respects?

13 A Rephrase.

14 Q Oscar was going to -- strike that.

15 Your client, Mr. Johnson, had offered to
16 plead to this document before, and the D.A. insisted
17 that there be an indication, if you will, that
18 Mr. Donte Johnson was involved?

19 A Right. From the beginning all the way
20 through until he pled guilty, he always indicated
21 that he wanted to accept responsibility for his
22 actions and to make it clear that Donte would not be
23 eligible for any kind of punishment because he was
24 not involved and did not deserve any kind of
25 punishment, that it was all Reggie who did it. So,

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1 he wanted to make sure that the documentation
2 legally, not just factually, would represent that.

3 Q I'm going to show you what's been marked
4 for identification only as Proposed Defendant's
5 Double-Z.

6 Do you recognize that document?

7 A Yes.

8 Q What is that, Miss Navarro?

9 A It's a Guilty Plea Agreement. It's a copy
10 of a Guilty Plea Agreement.

11 Q Okay.

12 A It's stamped "original," but it's not the
13 original. It's a copy of the original. The
14 original is in blue, and you can see that there's
15 three different signatures on it. On page 4,
16 there's a signature of Reggie Johnson and L.J.
17 O'Neale, and both of those you can tell are Xerox
18 copies. They're not original ink, and then my
19 signature is on page 5 under where Reggie
20 accidentally signed his name first, and then the
21 word "September" is typed but it's slashed out, and
22 it says "October" over it. I believe that maybe the
23 trial was going to be in September, but it looks
24 like we didn't get the documentation until October.

25 Q Okay.

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1 Does that reflect the actual day that you
2 signed that document, Miss Navarro?

3 A The day that I sign it was October 3rd.

4 Q Okay.

5 A I made sure to change it from September to
6 October.

7 Q Alrighty. Now, looking at double-Z, it
8 does not indicate who the co-conspirator was or does
9 it indicate who Mr. Reginald Johnson conspired with
10 when he entered his plea? In other words, is there
11 an Amended Information attached to that document?

12 A No, there is not.

13 Q From your independent recollection, can
14 you recall if an Amended Information was, in fact,
15 filed?

16 A I do not recall if there was ever one
17 filed, because anybody can go and file something. I
18 don't have to be present for that to happen. In
19 court on the day that he entered his plea, it was an
20 oral plea in front of Judge Saitta, and it's called
21 a "canvass." She canvassed him, asked him what's
22 his name; can you read and write the English
23 language; are you doing this freely and voluntarily.
24 There's a whole litany of questions asked. That was
25 done orally right there while the jury was still

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1 waiting, because if there was a problem -- if either
2 Reggie backed out or if L.J. O'Neale had some
3 problem with the wording or something happened, then
4 we could continue picking the jury and we wouldn't
5 have to call a new jury in and reschedule the trial
6 and everything else.

7 Q So, they were essentially standing by?

8 A Yes. It was a very stressful situation,
9 because it was a "now or never" situation.

10 Q I understand.

11 And you were present for that canvass?

12 A Yes.

13 Q And did you discuss with Mr. Reginald
14 Johnson before, prior to his entering his plea what
15 the consequences was of his entering the plea?

16 A Absolutely, yes.

17 Q And did you discuss any benefits with him?

18 A What the benefits would be to him?

19 Q Yes.

20 A He wasn't interested in the benefits to
21 him; he was interested in what ramifications of him
22 taking a plea would be to Donte. He's not
23 interested in his punishment or anything. He wanted
24 to stipulate to the habitual criminal enhancement,
25 but by law, you can't do that, and I had to explain

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1 that to him and that's just another technicality
2 thing, but he wanted to know why we can't just be
3 over and done with it today. "I did it. I said I
4 did it. I've always said I did it." Why does more
5 paper, more court -- he had to go over to a
6 different sentencing on a different day. He didn't
7 want to do that - just be done with it.

8 Q He was even willing to stipulate to a
9 habitual criminal status?

10 A Yes.

11 Q Did that part of it -- did that benefit
12 Mr. Johnson in any way, shape, form or fashion,
13 Reginald Johnson, being declared a habitual
14 criminal?

15 A I can't see how it would -- not at all.

16 Q In discussions with your client, what was
17 your understanding as to this case being -- the
18 resolution, the disposition of the case as it
19 relates to my client, Donte Johnson?

20 A I'm sorry. I didn't understand.

21 Q What was going to happen to Donte's
22 charges?

23 A They were going to be dismissed with
24 prejudice. He wanted to make sure what the legal
25 words were that meant that they can just bring the

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1 charges back up on him again. What's to keep them
2 from charging Donte with this next week or the week
3 after or the week after? And I explained to him,
4 it's with prejudice. There would be a dismissal
5 with prejudice or without prejudice. If it's
6 without, that means they can always bring the case
7 forward again later if they have more evidence later
8 or whatever, and "with prejudice" means it's done
9 forever.

10 Q And that was your understanding that you
11 relayed to -- conveyed to Reginald Johnson at the
12 time he entered his plea?

13 A That's why he entered his plea, because I
14 guaranteed to him that the charges against Donte
15 would be dismissed with prejudice, gone forever.

16 Q Forever?

17 A And that was my understanding, that that's
18 what "with prejudice" means too.

19 Q I'm going to hand you a copy of something
20 entitled "Defendant's Sentencing Memorandum." I
21 guess I should have it marked first.

22 (Defense's Exhibit BBB was marked for
23 identification.)

24 MS. JACKSON: The record will reflect that
25 I have shown this to the attorneys for the State.

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1 **BY MS. JACKSON:**

2 Q I'm going to ask you a series of questions
3 about this document, and I assume you have not
4 memorized this document?

5 A I can't see it yet.

6 Q You drafted it, looks like September --
7 sometime September of '01?

8 A Yes. This is the Sentencing Memorandum,
9 yes.

10 Q Okay.

11 A This is mine.

12 Q If I ask you some questions about it,
13 would it assist you to have the document in front of
14 you?

15 A Yes.

16 Q In other words, you don't know -- you have
17 not memorized what's in that document?

18 A No. I haven't seen this in quite some
19 time.

20 Q First of all, why did you cause that
21 document to be created, Miss Navarro?

22 A After he orally pled guilty in front of
23 the judge, we set a sentencing date which is usually
24 about 45 days later, and at the sentencing, the
25 judge was going to determine what sentence Reggie

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1 would receive, and in order for the judge to
2 determine what's the appropriate sentence, they
3 receive something that's called a "Presentence
4 Investigation Memorandum" which is done by the
5 probation office. The District Attorney's office
6 and the defense attorney -- me -- also have an
7 opportunity to put together a sentencing memorandum
8 which is just documents that the judge sees to help
9 the judge decide -- you know, see both sides of the
10 picture, and that way the judge can come to the most
11 reasonable sentence having everything in front of
12 him that he needs to know.

13 So, I prepared this in order to show the
14 judge -- it was Judge Saitta, and I think this was
15 maybe -- like her third or fourth month on the
16 bench, and she hadn't done any criminal. And I
17 could be wrong, but it was very early on in her
18 career as a judge, and she hadn't done any criminal
19 cases. She had certainly never sentenced anyone in
20 a habitual criminal -- no one that she had sentenced
21 yet had been someone who had the habitual criminal
22 enhancement on them.

23 So, I think, specifically, she asked me to
24 include on here -- which I did on page 14 -- what
25 the different minimums and maximums and what kind of

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1 sentence we were looking at and what she could and
2 couldn't do, because it's not a fixed number; it was
3 a range.

4 Q So, you prepared this to help the Court?

5 A To help her to make her determination and,
6 of course, I put in there all the information I
7 think benefits my client.

8 Q And toward that end, please, if you would,
9 please, turn to page 4.

10 First of all, is this document accurate,
11 and is it in the same condition as when you prepared
12 it?

13 A It appears to be, yes. It's a copy, but
14 yes.

15 **MS. JACKSON:** I would move for its
16 admission, your Honor. I can't recall what
17 designation the clerk marked it.

18 **THE WITNESS:** Triple B.

19 **MR. STANTON:** No objection, your Honor.

20 **THE COURT:** All right. Admitted.

21 (Defense Exhibit BBB was admitted into
22 evidence.)

23 **BY MS. JACKSON:**

24 Q On page 4, Miss Navarro, do you see a
25 section entitled "Impeachment of Oscar Irias"?

1 A Yes.

2 Q In the second full paragraph, you set
3 forth some information which seems to indicate that
4 you had -- in the course of your investigation and
5 representation of Reginald Johnson, you had
6 uncovered information that Mr. Oscar Irias at one
7 point did not want to go forward, but that he was
8 offered certain incentives to go forward by the
9 State.

10 Would you read that paragraph, please?

11 A Yes. "The defense investigation in this
12 case revealed that the victim, Oscar Irias was in
13 custody on charges of first-degree kidnapping and
14 sexual assaults on a minor under the age of 14 both
15 of which carries penalties of life sentence in the
16 Nevada State Prison. Even though the victim did not
17 want to press charges, the State offered to assist
18 Mr. Irias if he pursued prosecution of this matter."
19 And then it has in parentheses, "(See Exhibit B)."

20 Do you want me to go on?

21 Q What is Exhibit B, just in general?

22 A I have to look at it.

23 Exhibit B is a document that was attached,
24 and it's entitled "Las Vegas Metropolitan Police
25 Department Detention Service Division, Information

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1 Report."

2 Q And is that document that Inmate Irias
3 indicated at one point that he did not want to go
4 forward with these charges?

5 A Right.

6 Q I may have it out of place.

7 In any event, can you recall independently
8 that at some point -- actually, it's the page after
9 that one, Miss Navarro, the following page, at least
10 it is on my stack. It's a little bit -- it's a full
11 paragraph dated 2/25 of 2001.

12 Is it in your packet?

13 A Yes. Incident date 2/25/01.

14 Q Okay.

15 Does that incident --

16 A It's reported by Officer Olson.

17 Q Yes, and the inmate indicates he did not
18 want to press charges anymore?

19 A That's correct.

20 Q Okay.

21 Please continue with page 4 of your
22 sentencing memorandum, ma'am.

23 A I asked him why. I'm sorry.

24 "In fact, the victim was a recipient of a
25 very favorable plea bargain which allowed him to

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1 plead to coercion, a crime which carries a penalty
2 of one to six years with the possibility of
3 probation. See Exhibit C."

4 Q Now, from what he was facing, first-degree
5 kidnapping, as a former defense attorney, do you
6 know what the sentence would be for possible
7 first-degree kidnapping?

8 A Life.

9 Q Pardon?

10 A Life.

11 Q And the possible penalty for sexual
12 assault on a minor under the age of 14?

13 A It's also life.

14 Q So, he went from two life charges down to
15 a coercion of one to six?

16 A That's correct, and that's what I'm trying
17 to point out to the Judge here that the victim
18 received a favorable plea bargain in exchange for
19 testifying when he didn't want to testify.

20 Q Okay.

21 If you will go to page 5 of your
22 Pre-Sentence Report. The first full paragraph
23 there, would you read that entire paragraph, please?

24 A The one that starts "While in custody"?

25 Q Yes.

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1 A "While in custody, Mr. Irias" -- which is
2 the victim -- "had episodes of hallucinations,
3 imaginary cell mates -- see Exhibit G -- hearing
4 voices along with delusions that Bruce Willis,
5 Sylvester Stallone and Lucy did not like him. See
6 Exhibit H. The doctor's progress notes of
7 September 27th, 2000 indicate that Mr. Irias'
8 behavior was erratic and impulsive. Certainly with
9 the psychotherapy Mr. Irias was undergoing coupled
10 with his aggressive personality, his inability to
11 interact with others, his misconceptions of reality
12 and the horse play described by detention center
13 personnel in the preliminary hearing, page 63, lines
14 2 through 6, there exist a question regarding Irias'
15 perception of the events of February 24th, 2001..."

16 Q Okay. And then the next section, the
17 events of that day, do you indicate there that
18 Officer Gonzalez was in a place that he normally was
19 not working?

20 A That's correct.

21 Do you want me to reiterate or tell you?

22 Q You can tell us or read it, whichever
23 you're more comfortable with, ma'am.

24 A Okay. The officers who are in that
25 area -- because it is the high security area, it's

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1 The Hole, it's where the inmates, you know, go when
2 they do -- something wrong. It's the punishment.
3 It's like putting your kid in the corner. That's
4 what you do you put them in The Hole. The officers
5 who are in charge of that area are usually very
6 highly skilled, highly trained individuals. That
7 particular day they were gone on CERT training, and
8 I don't remember what "CERT" stands for, but it's
9 some kind of special emergency something kind of
10 training, so that's how come Officer Gonzalez was
11 there, not because that was Officer Gonzalez's usual
12 post; he was there temporarily to cover for the
13 other individuals so they could go to their
14 training.

15 Q And it indicates further --

16 A Just trying to do the best he could,
17 but --

18 Q You indicate in the next line in your
19 memorandum that the officer made some mistakes, and
20 as a result of those mistakes, you felt that
21 something had occurred. What is that? Just read
22 that line, please.

23 A I'm sorry. Which number line?

24 Q "It was clear..."

25 A Oh. "It was clear that young Officer

1 Gonzalez made some critical mistakes in handling his
2 post and had a personal motive to lie." It's the
3 very beginning of his career is what we were trying
4 to say.

5 Q You put this in your sentencing
6 memorandum?

7 A Yes.

8 Q You did, in fact, file this document with
9 court?

10 A Yes, I did.

11 Q As a licensed attorney, obviously this
12 document would be subject to penalty under perjury?

13 A Oh, yes.

14 Q This is true?

15 A Yes.

16 Q As far as you understood it to be?

17 A Yes.

18 Q Okay.

19 A This is my argument to the judge for
20 leniency on Reggie's behalf.

21 Q And at page 7 of the document, the second
22 full paragraph, Miss Navarro, would you just read
23 that first sentence, please?

24 A "At the time of..."

25 Q Yes, ma'am.

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1 A "At the time of the incident, Officer
2 Gonzalez was in the inner control room" and I'm
3 referring to that Bubble. "Officer Gonzalez could
4 not have seen the incident, because the view from
5 the inner control room was obstructed by a
6 structural support," and I'm talking about that
7 column. "The pole is largely -- "is large enough to
8 conceal a person from the vision of someone on the
9 opposite side. See Exhibit J, a photograph of
10 Module 5 taken from outside the control room in
11 front of the window. Furthermore, when the door to
12 the control room is closed, it is difficult to hear
13 anything outside." I'm referring to that there's
14 that double window because you're inside a control
15 room, and on top of that there's also that -- I
16 think they call it the "day room." There's an area
17 that's between the Control Center and where the
18 cells are, and that's got glass -- very thick glass,
19 probably bullet proof, I would hope, top to bottom.
20 "Furthermore, when the door to the control room is
21 closed, it's difficult to hear anything outside.
22 You can't hear what's going on. They're pretty --
23 it's far" -- I'm sorry. I'm quoting here from
24 testimony. It starts, open quote, "You can't hear
25 what's going on. They're pretty -- it's far away

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1 before -- there is one -- there is two doors that
2 separate us before them, and it's pretty far away.'"
3 I think that was Oscar Irias' testimony. It's
4 preliminary hearing page 73 and page 74.

5 Q Read on a little more please.

6 A "The control room where the command office
7 is located on the lower level, even though the
8 module is two stories, there's an inner day room and
9 outer day room. An officer can only see the upper
10 tier from the control room if he is squatting or
11 hunched over."

12 Q Stop, please.

13 A What I mean, you would actually have to be
14 like this (indicating) looking up to see into the
15 second floor. If you're standing, then your view is
16 more obstructed. That was from my experience of
17 being there.

18 Q During the course of your representation
19 of Mr. Reginald Johnson, did you ever, at any time,
20 gather information or did he tell you or did you
21 have reason to believe that he was pleading guilty
22 to this -- other than -- for any other reason other
23 than the fact that he was guilty alone?

24 A I'm not sure -- he was only doing it
25 because he himself was guilty alone and Donte did

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1 not have any responsibility in what had occurred.
2 Reggie just wanted to get it over and done with;
3 didn't want to go to court, to trial; did not want
4 to put on the preliminary hearing, didn't want to go
5 to sentencing. He's upset having to come into the
6 courtroom today. He's not a courtroom kind of guy.
7 He's never gone to trial. He's always pled guilty.
8 Maybe he's claustrophobic. I don't know. I never
9 had him psyched where you have the psychological
10 exam.

11 Q I don't know if I ever finished this line
12 of questioning.

13 When the judge asked Mr. Johnson who did
14 he conspire with, what was his answer?

15 He pled guilty to conspiracy to commit
16 murder, Miss Navarro, correct?

17 A Correct.

18 Q During the course of the plea canvass, was
19 he asked who was the other co-conspirator?

20 A No. It was -- before we even put it all
21 on the record, we talked to the judge, Mr. L.J.
22 O'Neale and myself, and we explained to her the
23 circumstances of the plea agreement, and she was
24 fully aware of why we were pleading guilty and what
25 the concerns were. There was one concern; the

1 concern was that Donte Johnson not be implicated in
2 any way in this plea agreement, and she understood
3 that because she had to go -- she couldn't go off of
4 a paper plea agreement like they usually do, she had
5 to do it orally. And also, like I said before, she
6 was pretty new to the bench at that time, so we were
7 asking a lot of her. She was able to do it, as the
8 best of my knowledge, as good as we could have
9 hoped.

10 **THE COURT:** Did she answer the question?

11 **MS. JACKSON:** No.

12 **BY MS. JACKSON:**

13 Q So, when she asked him that part who did
14 he conspire with, what did he say?

15 A Just to another. It didn't name any
16 particular person. In his mind, he thought that it
17 was -- and this came out in the evidentiary hearing,
18 the Petrocelli hearing before the trial began.

19 Q Um-hmm.

20 A That very same day earlier in the day
21 there was a hearing before the trial began to find
22 out whether or not the District Attorney was going
23 to be allowed to use the information about the
24 second attack on Oscar Irias in trial, and there was
25 a lot of testimony given about why they would put

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1 him in the same cell, again, with someone that he
2 had already tried to beat up before, and Reggie had
3 on these things that are called mitts that cover up
4 your hands that are black; he had on this belt. He
5 was fully as secure as they can make people who are
6 in jail be, and they put him in the same cell with
7 Oscar. So, his feeling is they want Oscar to beat
8 me up or I'm going to beat him up, so he beat up
9 Oscar again, and Oscar got stitches and had to be
10 taken to jail. So, there was a question of whether
11 or not that information was going to be used in
12 trial, and during that, it came out that there was
13 this conspiracy between somebody, either -- kind of
14 like cock fighting, rooster fighting; you just put
15 them in there and bet on who you think is going to
16 win, and in Reggie's mind, that's kind of the way
17 they play the inmates, and that was what was going
18 on.

19 Q That did not involve Donte Johnson?

20 A No.

21 Q It would have to involve corrections
22 officers?

23 A Correct.

24 Q The people who have the power to do that?

25 A The people who have the control to place

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1 inmates where they go, where they want them to be.

2 **MS. JACKSON:** Thank you, Miss Navarro.

3 That's all I have, your Honor.

4

5

CROSS-EXAMINATION

6 **BY MR. STANTON:**

7 Q Miss Navarro, how long have you been a
8 defense attorney?

9 A Over 12 years, 13 years. I'm not -- I'm
10 still a defense attorney, but I'm with the District
11 Attorney's offices in a defense capacity, not a
12 criminal defense attorney, but I defend Clark County
13 and the Board of County Commissioners.

14 Q And in your 12 years of criminal defense
15 work, you're aware of the elements and the nature of
16 criminal charges?

17 A Yes.

18 Q All different types that are brought
19 against clients you've defended?

20 A Not off the top of my head. I'm
21 constantly referring --

22 Q But as a general matter you're aware of
23 that?

24 A I believe I am.

25 Q And as a special Public Defender, you

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1 handle cases that involved murder --

2 A Umm --

3 Q -- when you were there?

4 A When I was there, yes.

5 Q So, you've handled cases where clients of
6 yours have been charged with murder, attempted
7 murder, conspiracy?

8 A Oh, yes.

9 Q You're familiar with the elements that
10 constitute -- the elements in criminal law that need
11 to be established beyond a reasonable doubt --

12 A Yes.

13 Q -- to convict your clients?

14 A Yes.

15 Q A conspiracy is an act where two people
16 agree to commit a criminal act, correct?

17 A Correct.

18 Q You cannot conspire with yourself,
19 correct?

20 A Correct.

21 Q Is it your testimony here today that your
22 client pled to a conspiracy to commit murder but
23 that the conspiracy was with correctional officers?

24 A That's what he was pleading to.

25 Q Okay.

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1 **MR. STANTON:** May I have this marked next
2 in order?

3 (State's Exhibit 258 was marked for
4 identification.)

5 **MR. STANTON:** May I approach the witness,
6 your Honor?

7 **THE COURT:** Yes.

8 **BY MR. STANTON:**

9 Q Miss Navarro, I represent to you State's
10 258 is a certified copy of the Information and the
11 Judgment of Conviction in the case involving
12 Reginald Johnson and Inmate Irias.

13 Would you take a moment to and review
14 those documents?

15 (Witness reviewing document.)

16 **THE WITNESS:** Okay. They're stapled
17 together, but they're two different documents. The
18 Information is filed back in April, and the Judgment
19 of Conviction is in October.

20 **BY MR. STANTON:**

21 Q Correct.

22 Do you have any reason --

23 A They would have been filed separately, not
24 together the way they're stapled.

25 Q I understand.

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1 My question to you is do you have any
2 reason to believe those are not true and accurate
3 copies of those documents filed in the case of State
4 vs. Reginald Johnson?

5 A No. In fact, they seem to have the
6 certified copy stamp.

7 **MR. STANTON:** Move for the admission.

8 **MS. JACKSON:** There's a problem. I also
9 thought there were some minutes attached to that
10 document, court minutes.

11 **THE COURT:** Let me see it.

12 **MR. STANTON:** There are no minutes
13 attached to this document.

14 **MS. JACKSON:** There was earlier when I
15 looked at it.

16 **THE COURT:** Did he plead to a habitual
17 criminal?

18 **THE WITNESS:** He was sentenced to habitual
19 criminal.

20 **MS. JACKSON:** As long as the minutes are
21 removed, your Honor, we have no objection.

22 **THE COURT:** All right. It's admitted.

23 (State's Exhibit 258 was admitted into
24 evidence.)

25 **MR. STANTON:** Your Honor, in addition, I'd

1 like the Court to take judicial notice that indeed
2 this is the only charging document in this case of
3 C174692.

4 **THE COURT:** What does that mean, "the only
5 charging document"?

6 **MR. STANTON:** Mainly, that there is no
7 Amended Information filed; that there was no change
8 in the charging document. In addition, I'd ask the
9 Court to take judicial notice that the Guilty Plea
10 Agreement was never filed in this case.

11 **THE COURT:** I'm not taking judicial notice
12 of that. No one ever said it was filed. I thought
13 it was admitted as an exhibit.

14 **MR. STANTON:** It was admitted as an
15 exhibit, but I'm merely --

16 **THE COURT:** No; I'm not taking judicial
17 notice of anything. I don't know. I don't have a
18 copy of the plea canvass, and that's incomplete
19 without a copy of the plea canvass, because you have
20 to do a canvass to make sure the elements are met.
21 From the testimony here that she's making, it was
22 done differently than what the document says. It
23 will be admitted, but I won't take judicial notice.

24 All right. Go on.

25 /////

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1 **BY MR. STANTON:**

2 Q Miss Navarro, was there any Amended
3 Information filed in this case in your presence or
4 to your knowledge?

5 A I do not recall.

6 Q You would have received a copy of any
7 pleading documents that would have been filed in any
8 case, correct?

9 A I would hope so, yes.

10 Q You've never received any Amended
11 Information in this case?

12 A No. This was a unique situation, because
13 usually when you have a plea agreement and a guilty
14 plea, it all happens on the same day. You have the
15 documentation and the judge's canvassing all happens
16 on the same day. This was a unique situation,
17 because of the jury that was standing there, and
18 there was that kind of impetus of the moment that we
19 had to hurry up and get this done.

20 Q Okay.

21 A So, we didn't have paperwork at the time.
22 It was to be done later, and it was to be drafted by
23 the District Attorney.

24 Q And the document, 258, the charging
25 document and Information reflects two counts that

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1 your client pled to, Conspiracy to Commit Murder and
2 Attempted Murder, correct?

3 A No; this is not what he pled to. This is
4 the Information that he was bound over on. After
5 the preliminary hearing when the Justice Court
6 decided that there was enough evidence to hold them
7 to go to trial, this is the document that was
8 generated by the District Attorney's office
9 indicating that the preliminary hearing elements had
10 been satisfied.

11 Q Beyond your testimony, though,
12 Miss Navarro, if there's no other pleading document
13 and an Amended Information that changes the
14 language, you would agree with me that's the
15 charging document in District Court where your
16 client pled, correct?

17 A No. That's not what he pled to.

18 **THE COURT:** Approach the bench.

19 Give me that.

20 (Sidebar conference outside the presence
21 of the court reporter.)

22 **THE COURT:** I have a question for you,
23 Miss Navarro.

24 **THE WITNESS:** Yes.

25 **THE COURT:** When Judge Saitta canvassed

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1 him on the conspiracy charge, what did she ask him?
2 Do you recall whether or not -- I mean, she went
3 through the elements with him and the person that he
4 allegedly conspired with?

5 **THE WITNESS:** Right. It was very clear to
6 her off the record and on the record that he did not
7 conspire with Donte Johnson; he just conspired with
8 another, and that's what's in the Guilty Plea
9 Memorandum.

10 **THE COURT:** No one bothered to amend it
11 through interlineation?

12 **THE WITNESS:** Not at that time.
13 Everything was oral. It was to be taken care of by
14 the prosecutor, Mr. L.J. O'Neale. He was going to
15 be having all those documents prepared, which is
16 always normally the course. Any defense attorney is
17 never allowed to prepare those documents.

18 **THE COURT:** Go on, Counsel.

19 **BY MR. STANTON:**

20 Q Miss Navarro, I want to go back to the
21 elements of the offenses that Reginald Johnson pled
22 to that you were involved as his defense attorney.

23 He was found guilty pursuant to his plea
24 of guilty to Attempted Murder, correct?

25 A Yes.

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1 Q We've heard some testimony about helping
2 Oscar Irias over the balcony and shoving him off.
3 Attempted Murder is a specific intent crime, is it
4 not?

5 A Yes.

6 Q And that his conduct, by throwing Oscar
7 Irias off that railing, the State had to prove
8 beyond a reasonable doubt that he did that with the
9 intent to kill the inmate, correct?

10 A Correct.

11 Q And he pled guilty to that?

12 A Correct.

13 Q Now, you said that Reginald Johnson has
14 pled guilty to everything he's done, and I just want
15 to focus on that.

16 I understand -- I believe the contents and
17 the intent of what you're stating, but it's not
18 entirely precise.

19 He's pled guilty to everything he's been
20 caught at and charged with, correct?

21 A Oh -- correct, yes. I didn't mean to say
22 that he had been caught every time he's ever done
23 anything wrong, no.

24 Q Or that he's admitted to everything that
25 he's done wrong in his life as far as criminal acts?

1 **MS. JACKSON:** Your Honor, I object as to
2 the form. He could have admitted to someone other
3 than Miss Navarro. How would she know?

4 **THE WITNESS:** He's admitted it to me. I
5 don't know that he's admitted to the whole world,
6 but he's admitted to me everything that he has done.

7 **MR. STANTON:** For the ones -- the charges
8 that he has been charged with?

9 **THE WITNESS:** I haven't been standing next
10 to him his whole life, but I'm sure there was some
11 things in his life.

12 **THE COURT:** What's the question? Are we
13 speculating as to what he committed and nobody knows
14 or what?

15 **MR. STANTON:** I'm just asking is that
16 she's admitted to everything he's done, and I think
17 what that reflects is -- the testimony is he's pled
18 guilty to all the criminal charges that he's been
19 charged with.

20 **BY MR. STANTON:**

21 Q Correct?

22 A Yes.

23 **THE COURT:** I think she answered that, so
24 let's go on.

25 //

1 BY MR. STANTON:

2 Q During your extensive investigation of the
3 housing units, Module 5, where Oscar Irias was was
4 important to you in the preparation of your defense,
5 correct?

6 A Correct.

7 Q How many ways can you get up to that tier?

8 A There's two staircases.

9 Q At the time of the preliminary hearings,
10 was the defendant Donte Johnson and Reginald Johnson
11 charged at the same time and had the preliminary
12 hearing at the same time?

13 A Yes.

14 Q You discussed the preliminary hearing that
15 the case is bound over into District Court, correct?

16 A Correct.

17 Q It would be fair to say that both Reginald
18 Johnson and Donte Johnson had sufficient evidence
19 presented at the preliminary hearing that both were
20 held to answer in the District Court?

21 A That was the opinion of the justice of the
22 peace, which I think was Abbatangelo.

23 Q Hearing the testimony of Oscar Irias and
24 Officer Gonzalez, they testified at the preliminary
25 hearing?

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1 A Correct.

2 Q Now, do you recall the Sentencing
3 Memorandum that was admitted in evidence that you
4 prepared?

5 A Yes.

6 Q Now, this is your argument to the Court
7 that's seeking to sentence Reginald Johnson,
8 correct?

9 A Correct.

10 Q Now, could you explain what the potential
11 punishments were for being a habitual offender?

12 A Not off the top of my head, because I
13 don't do those anymore, but I made, like, a chart in
14 that sentencing memorandum.

15 Q Miss Navarro, would it be safe to say or
16 accurate to say that one charge with a habitual
17 offender is a very serious matter as far as the
18 potential punishments?

19 A Yes. Generally, the judge can either say,
20 "I'm not going to adjudicate habitual offender,"
21 instead, "I'm just going to sentence you under the
22 crime itself," or "I'm going to find that you're a
23 habitual offender in two different ways. One is the
24 small and one is the large."

25 Q Okay.

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1 A The details I don't recall.

2 Q At the time that Reginald Johnson was
3 charged and getting ready to go to jury trial, you
4 were aware that the State was going to seek habitual
5 offender status of Reginald Johnson if he was
6 convicted of any of the crimes?

7 A Correct.

8 Q So, when you say that someone pled
9 "straight up," they pled straight up not only to the
10 offenses but knowing that on top of that, the State
11 was going to seek habitual oftener status?

12 A Correct. He wanted to stipulate to the
13 habitual offender status which means plead guilty to
14 it or accept it without argument, but under the law,
15 you can't stipulate to a status. You can stipulate
16 to actions but not to a status; so, we had to go
17 through the technical sentencing process.

18 Q And pursuant to that, there were
19 several -- to adjudicate somebody as a habitual
20 offender under Nevada law, you have to prove that
21 someone has a certain number and a certain type
22 depending upon what type of offender status the
23 State is seeking -- felony convictions?

24 A Right. There's a certain number for small
25 and a certain number for large.

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1 Q And as a result of that process you, as
2 defense counsel, are put on notice regarding this
3 precise type of felony convictions that the State is
4 seeking to adjudicate your client as a habitual
5 offender?

6 A Right. We are provided a certified copy
7 of conviction by the prosecutor showing for each of
8 the crimes that's going to be used.

9 Q And isn't it correct that in addition to
10 the copies of those certified judgments of
11 convictions, that indeed in the charging document
12 itself, there's an articulation of precisely what
13 offenses, the date and the location of the felonies
14 that your client committed, correct?

15 A Well, in the charging document they just
16 list -- when they say we intend to seek habitual
17 criminal status, and they list the additional crimes
18 they believe that the client has done according to
19 either NCIC or SCOPE, the computer printout. They
20 don't have the actual certified copy of conviction
21 yet.

22 Q I understand that, but as part of the
23 notice to you as Mr. Reginald Johnson's defense
24 lawyer, you're put on notice well in advance of when
25 this proceeding occurs about what felony convictions

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1 the State is seeking to enhance the punishment,
2 correct?

3 A Right. We're put on notice of what's in
4 the computer, because we don't have access to the
5 computer.

6 Q Right.

7 And you're told?

8 A The clients don't always tell you the
9 truth about how many prior crimes they have.

10 Q And as a result of being put on notice in
11 this case, you knew that your client, Reginald
12 Johnson, could potentially be sentenced to the most
13 serious offense under habitual offender status that
14 he was charged with was life without the possibility
15 of parole, correct?

16 A Correct -- potentially, yes. That was the
17 top end.

18 Q Now, do you remember what your argument
19 was to the sentencing judge about why Reginald
20 Johnson should not be found a habitual offender? Do
21 you recall that -- what you stated in your written
22 memorandum?

23 A I think it was, like, 19 pages.

24 Q Okay.

25 Would it help you to refresh?

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1 A Sure.

2 Q Okay.

3 **MR. STANTON:** Counsel, I'm referring to
4 page 15.

5 **BY MR. STANTON:**

6 Q If you would begin on line two,
7 Miss Navarro, and read to yourself from two on this
8 page down to line 16, and tell me when you're done.

9 A Okay.

10 "In view of Mr." --

11 Q Just if you could read it to yourself.

12 A Oh, I'm sorry. To myself.

13 (Witness reviewing document.)

14 **THE WITNESS:** Yes.

15 **BY MR. STANTON:**

16 Q Does that refresh your memory about your
17 closing arguments, if you will?

18 A That's my conclusion or summary, yes.

19 Q Okay.

20 And in your summary, you state that,
21 indeed, it's not necessary, Judge -- I'm
22 paraphrasing your argument that you just read -- to
23 sentence Reginald Johnson to habitual offender
24 because he's serving so much time already, society
25 is going to be protected for the rest of his life,

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1 correct?

2 A That was the only argument I come up with,
3 yes.

4 Q He had -- in addition to 64 years in the
5 Nevada State Prison at the low end, minimum, he had
6 or was about to be adjudicated in another case in
7 front of Judge Bonaventure, correct?

8 A Right. That was for beating up Mr. Irias
9 subsequent to the throwing over the balcony. That
10 was that subsequent case was being tried separately
11 and was being brought in a different courtroom and
12 he had pled guilty to that one too.

13 Q Was that the battery by a prisoner with a
14 deadly weapon?

15 A Yes. The deadly weapon was the chains,
16 the handcuffs, the chains, and he cracked his
17 forehead and needed stitches.

18 Q In addition, you also indicate that he is
19 facing multiple counts of robbery out of the State
20 of California, and the State of California is
21 seeking to extradite him as well?

22 A Correct. They were waiting for us to be
23 done in November before they could take him to
24 California for those charges which he had told me he
25 planned to plead guilty to as well.

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1 Q Okay.

2 Now, the sentencing on this case involving
3 Oscar Irias had occurred after he had been sentenced
4 here in front of Judge McGroarty on multiple counts
5 of robbery, armed robbery and attempted murder.

6 Do you recall that?

7 A Yes. I didn't represent him in that other
8 case.

9 Q You did not?

10 A No.

11 Q Okay.

12 Let me show you the PSI for Mr. Johnson
13 before Judge McGroarty.

14 Do you recognize, generally, that document
15 to be a PSI and that it states Reginald Johnson?

16 A I know that it is a PSI, but I don't know
17 that I ever saw this.

18 Q Okay.

19 A I wasn't representing him at the time.

20 Q And do you recognize the last page of that
21 document to be your client, Reginald Johnson's
22 written statement?

23 A It appears -- well, it has his signature
24 at the bottom. I know his signature.

25 Q Does that appear to be his handwriting?

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1 A It appears to be. Sometimes when people
2 write things for you -- but he speaks English, so
3 it's probably his.

4 Q So, if you could, halfway down there, you
5 see this line halfway down on this handwritten
6 statement that starts with "I"?

7 A Uh-huh.

8 Q And ends right there with that period?

9 A Yes.

10 Q Could you read that out loud?

11 A Yes. "I will spend the rest" --

12 **MS. JACKSON:** Your Honor, I object to it
13 being read out loud. It's not in evidence.

14 **THE COURT:** Not only that, what does it
15 have to do with this case? It's not his sentencing
16 document; it's from another case.

17 **MR. STANTON:** Correct, but it speaks to
18 Mr. Reginald Johnson's state of mind regarding his
19 punishment and what the State is going to argue.

20 **THE COURT:** Let me see that. We're having
21 a whole new trial on some other guy. This is
22 getting to be a little bit much.

23 What are you talking about?

24 (Both counsel approached the bench.)

25 **THE COURT:** Sustained.

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1 **BY MR. STANTON:**

2 Q Miss Navarro, you say that in the Guilty
3 Plea Agreement that -- you show or had been
4 previously shown as Defendant's Exhibit ZZ; do you
5 remember that?

6 A Yes.

7 Q That Guilty Plea Agreement was never filed
8 to your knowledge, was it?

9 A That's what I'm being told.

10 **MR. STANTON:** Court's indulgence.

11 Nothing further.

12 **THE COURT:** Anything else?

13 **MS. JACKSON:** No redirect, your Honor.

14 **THE COURT:** All right. You're excused.

15 We're going to take our lunch recess.

16 We'll come back -- it's 12:20 now. We'll come back
17 about 1:30, -35, 1:40 -- whenever you guys finished.

18 Don't read any newspaper articles; don't
19 listen to any radio or television reports about the
20 case, and don't express any opinion.

21 All right.

22 **THE BAILIFF:** All rise.

23 (A lunch recess was taken.)

24 (Outside the presence of the jury.)

25 **THE COURT:** Approach the bench, Counsel.

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1 (Sidebar conference outside the presence
2 of the court reporter.)

3 (Sidebar conference outside of the
4 presence of the jury outside the courtroom.)

5 **THE COURT:** Let's go on the record.

6 Let the record reflect we're outside the
7 presence of the jury.

8 Counsel for the State and the defendant
9 are present. Counsel for the defendant wants to put
10 something on the record, and I think the bailiff
11 found -- I don't know.

12 Bailiff, why don't you tell us what it was
13 you found and where.

14 **THE BAILIFF:** It was a glass tube with
15 some residue in it that was found between jury seat
16 13 and -- 12 and 13 on the floor. It was brought to
17 my attention by another juror -- by a juror that
18 said she saw something on the floor, and I told her
19 that I will check it out. So, when I checked it
20 out, that's what I found. It's a glass tube with
21 residue in it which appeared to be maybe drug or
22 narcotic residue in it, and it had a screw which,
23 from my experience, I know that it's used to be --
24 to push the drugs closer to the end so it can be
25 smoked through the glass tube, and it appeared to be

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1 a street name of "crack pipe."

2 **THE COURT:** All right.

3 Counsel?

4 **MS. JACKSON:** I happened to be at the
5 bench along with the State's attorneys when
6 Mr. Burrell brought the item over to the Court's
7 attention, and we all viewed it together, and my
8 experience as a defense attorney, it certainly
9 appeared to me to be a crack pipe with a pusher.
10 Mr. Whipple was not at the bench; he was back
11 talking to Mr. Johnson, our client. I went back and
12 reported to him what was going on, and he felt that
13 the record should reflect this is what was found.
14 We don't know what it means in terms of jurors, but
15 it was found in the jury box, and the record should
16 so reflect.

17 **MR. DASKAS:** Judge, if I might, the record
18 should also reflect and I think the.

19 Court would concur with that each morning
20 before we begin trial, before the jury is seated,
21 there are a number of inmates who are transported to
22 the courtroom and generally sit in the jury box and,
23 in fact, that was the case, I know for certain, on
24 Friday. Today is Monday, and I don't believe that
25 was the case today, but certainly on Friday there

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1 were inmates in those very seats near the floor
2 where the supposed crack pipe was found, although we
3 don't know exactly what it is, and I think, as
4 Mr. Bailiff indicated, the juror who saw it brought
5 it to his attention, and there's no indication that
6 anybody else saw it or even where it came from.

7 **MR. WHIPPLE:** Your Honor, can I ask a
8 couple brief questions of Mr. Bailiff?

9 **THE COURT:** Go on.

10 **MR. WHIPPLE:** Is there any indication that
11 it was there from Friday? Did you look at the box
12 on Friday?

13 **THE BAILIFF:** On Friday the box was
14 checked before the defendants were brought in. I
15 usually -- what happens is that our custodians
16 hardly ever vacuum the floor, so I go around and I
17 pick up things that are on the floor as much as I
18 can until they come in. Friday they came in. It
19 wasn't anything there, because I had checked the
20 jury box, because I had put the books down to make
21 sure that the books were there. However, Friday
22 evening, I didn't check, and this morning the jury
23 was brought in -- it wasn't checked this morning
24 either, but the jury was brought in and this was
25 seen, I asked the juror had she seen that before,

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1 and she said no, that's why it just looked pretty
2 odd to her for that to be on the floor.

3 **MR. WHIPPLE:** Are you aware of any
4 in-custody inmates being present in the jury box the
5 last time you looked and didn't see anything until
6 when you just found this item today?

7 **THE BAILIFF:** The ones that were in the
8 jury box -- the time before I looked, no inmates
9 were there, but when the inmates came in Friday, it
10 was after I had looked.

11 **MR. WHIPPLE:** Okay.

12 So, Friday morning there were inmates?

13 **THE BAILIFF:** Friday morning after I had
14 checked the box and laid the books down Friday
15 morning that the inmates were there. It wasn't
16 checked that evening, and it wasn't checked this
17 morning; so, there's a great possibility that either
18 one of the inmates or someone -- people are in and
19 out of here cleaning and things of that sort, so I
20 don't know.

21 **MS. JACKSON:** Would you correct me also,
22 didn't you do a few in-custodies Friday at 1:00,
23 Judge?

24 **THE CLERK:** No, not at 1:00; we did them
25 in the morning.

1 **MS. JACKSON:** That was my mistake.

2 **THE CLERK:** There were six of them.

3 **THE COURT:** That was Wednesday at 1:00.

4 **MR. WHIPPLE:** When did the juror first
5 notice this item?

6 **THE BAILIFF:** She said it was there, and
7 she just told me at lunchtime. I don't know exactly
8 what time -- evidently it was there when they got in
9 the box, because they did not leave out of the box
10 until in between the time -- only one time, when the
11 commotion came up.

12 **THE COURT:** Well, Counsel, I know no
13 inmates were smoking crack while we've been in
14 court, I mean, none of the jurors were smoking
15 crack. I think that's kind of ridiculous, but
16 that's the normal seating of the inmates. They sit
17 there Mondays and Wednesdays and Fridays, hundreds
18 of them. They're in and out of there, and not only
19 that, these courtrooms are not locked in the evening
20 because the cleaning crew comes through there, and
21 half of them we don't even know, and it must be 50
22 or 60 of them around here in this building all
23 through the evening. So, they could easily --
24 there's always stuff being tossed over there by the
25 inmates.

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1 Go on.

2 **MR. DASKAS:** Judge, I think the record
3 should also reflect -- although I know that it was
4 handed to you -- and again, I'm using the term
5 "crack pipe" -- we don't know what it was, but it
6 was about, in my estimation, two-and-a-half to
7 three inches long and about maybe a quarter inch in
8 diameter at the most. That's my description, if
9 anybody wants to provide input. It was fairly
10 small, in other words.

11 **MR. WHIPPLE:** The item -- I believe you're
12 going to make a report with regard to that?

13 **THE BAILIFF:** I will make a report.

14 **MR. WHIPPLE:** It will be secure?

15 **THE BAILIFF:** We'll book it in as
16 evidence.

17 **MR. STANTON:** One final thing. Deputy
18 Burrell, is there anything that you've seen by the
19 demeanor or conduct by any of the sitting jurors
20 that would indicate any of them are under the
21 influence of narcotics?

22 **THE BAILIFF:** Not at all. I have very
23 close contact with the jurors, and especially where
24 it was found, I have very close contact with them,
25 and there's no problem at all.

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1 **MR. WHIPPLE:** All right. Thank you.
2 **MS. JACKSON:** Thank you.
3 **MR. STANTON:** Thank you.
4 **MR. WHIPPLE:** Thank you.
5 (Back inside the courtroom.)
6 **THE COURT:** Approach the bench.
7 (Sidebar conference outside the presence
8 of the court reporter.)
9 **THE COURT:** Let the record reflect the
10 presence of all the parties, all the attorneys.
11 Bring in the jury.
12 (Jury present.)
13 **THE BAILIFF:** Be seated, come to order.
14 Court is again in session.
15 **THE COURT:** Call your next witness.
16 **MR. WHIPPLE:** Your Honor, the defense
17 would call Mr. Craig Clark.
18 **THE BAILIFF:** Remain standing; raise your
19 right hand. Face the clerk.
20 (Oath administered.)
21 **THE WITNESS:** I do.
22 **THE CLERK:** Thank you. Please have a
23 seat. State your full name spelling your last name
24 for the record.
25 **THE WITNESS:** My name is Craig Clark,

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1 C-L-A-R-K.

2 **THE CLERK:** Thank you.

3

4 **CRAIG CLARK,**

5 being called as a witness on behalf of the
6 Defendant, was first duly sworn and testified as
7 follows:

8

9 **DIRECT EXAMINATION**

10 **BY MR. WHIPPLE:**

11 Q Mr. Clark, what is your occupation?

12 A Parole Agent II Specialist for the
13 California Youth Authority.

14 Q And what exactly is your job description?

15 A I supervise parolees who have been
16 released from our institution ensuring that they
17 abide by their parole conditions.

18 Q Is it fair to say you're not a resident of
19 Nevada?

20 A No, sir, I'm not.

21 Q Where do you live?

22 A I live in West Covina, California.

23 Q I'm sorry?

24 A California.

25 Q Now, you testified at a prior hearing in

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1 this matter?

2 A Yes, I did.

3 Q And you were subpoena by -- who are you
4 subpoenaed by?

5 A I was subpoenaed by the Clark County
6 District Attorneys the last time.

7 Q Okay.

8 And as a matter of fact, they subpoenaed
9 you again this time?

10 A Yes, they did.

11 Q Do you know why you didn't testify for the
12 State?

13 A Yes. I was scheduled to appear on
14 Thursday, but I couldn't. I had a conflict, so they
15 just said they didn't need me.

16 Q Now, you mentioned you're a parole agent
17 with the California Youth Authority; is that
18 correct?

19 A Yes.

20 Q Why don't you explain to us what is the
21 California Youth Authority.

22 A California Youth Authority is a juvenile
23 rehabilitative agency. It was originally designed
24 to be the last vestige between state prison and a
25 juvenile system for kids. It was after they've

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1 exhausted -- after the kid had exhausted all other
2 levels of intervention and/or if they've committed
3 some serious crime, a felony.

4 Q Now, when you say "kid," what age group
5 are you talking about?

6 A I'm sorry -- meaning juveniles committed
7 by the Juvenile Court, and in some cases by the
8 Superior Court if they're found fit in Juvenile
9 Court, then they would come from Juvenile Court. We
10 had people up to the age of 25 --

11 Q Okay.

12 A -- if they were committed from the
13 Juvenile Court.

14 Q So, is it fair to say you deal with
15 individuals all the way up to the age of 25?

16 A Yes, sir.

17 Q And obviously, there are a number of
18 programs that are involved under the California
19 Youth Authority?

20 A Yes, sir. We have a number of
21 institutions and camps that address treatment needs
22 for the individuals, and then once they've completed
23 those, they are released to parole back into the
24 community where parole agents supervise them out in
25 the field.

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1 Q Okay.

2 And your position as a parole agent,
3 you're assisting these individuals once they're
4 released from the California Youth Authority camps?

5 A Once they're released from the
6 institutions or the camps, they're on parole, and
7 the field parole agent supervises them while they're
8 in the community. They serve -- the parole agent
9 serves as a resource broker in addition to the
10 parole agent trying to help them reintegrate into
11 society.

12 Q Would it be fair to say you're familiar
13 with the different programs at the California Youth
14 Authority as a parole agent?

15 A Yes.

16 Q And, of course, once individuals get out
17 of the California Youth Authority, then there are a
18 number of other programs that you assist them with
19 and supervise them?

20 A Yes.

21 Q Now, I want to draw your attention to --
22 is there an individual here in the front of the
23 courtroom that you recognize this afternoon?

24 A Yes.

25 Q And who is that?

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1 A The defendant. I know him as John White.
2 He's Donte Johnson.

3 Q Would it be fair to say it's this
4 individual right here (indicating)?

5 A Yes, it is.

6 **MR. WHIPPLE:** If the record would so
7 reflect.

8 **THE COURT:** Yes, it shall.

9 (Witness identified the defendant.)

10 **BY MR. WHIPPLE:**

11 Q How did you know Mr. White?

12 A When he was released from Y- -- Youth
13 Training School Facility, he was paroled to my
14 office, and I was the agent that he was assigned to.

15 Q And approximately how many kids or
16 students -- whatever you want to call them -- how
17 many did you supervise at a time?

18 A About -- approximately 60.

19 Q And do you recall spending time with
20 Mr. White?

21 A Yes, I do.

22 Q And -- first of all, how long was he in
23 the California Youth Authority? Do you recall
24 approximately how long he was there?

25 A He was in the institution approximately 26

1 months, then he was released to parole, and he was
2 on parole for three-and-a-half or four months before
3 he went missing.

4 Q Is it fair to say that you got to know
5 Mr. White once he got out of the California Youth
6 Authority?

7 A Once he got out of our institution, yes.
8 Yes.

9 Q Now, if you would, please, tell me about
10 your involvement with him and the things that he did
11 while you were supervising and assisting him.

12 A When he was initially paroled, I became
13 his agent. I developed a program for him to follow
14 instituting his parole conditions. I think he had
15 three specific ones and several general ones. He
16 also -- I placed him in the Watch Parole School. It
17 was housed in our building, and that was because he
18 didn't have his high school diploma. I placed him
19 in several other unit programs, like behavior
20 modification, anger management, parenting, substance
21 abuse, employability, and I assisted him in
22 enrolling in a Youth Fair Chance Program. That's an
23 outside agency program where he would receive a
24 stipend of \$50 a week to work on his high school
25 diploma once he completed a life skills class.

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1 Q Would it be fair to say some of these
2 requirements were mandatory and some were voluntary?

3 A Yes.

4 Q Can you tell us which is which?

5 A The Youth Fair Chance was voluntary.
6 Everything else was mandatory.

7 Q The parole school is one of those
8 mandatory requirements, correct?

9 A Yes, sir.

10 Q Tell us a little bit about the parole
11 school, if you would, please.

12 A Well, it's a school, basically designed to
13 address the needs of our clientele, meaning people
14 released from our institutions. The schools were
15 designed to meet the kids -- I mean the students, at
16 whatever level they were at -- whether they had an
17 IEP -- Individual Education Plan -- or whether they
18 were working at grade level, so they received the
19 work that was consistent with their level.

20 Q Okay.

21 You mentioned "IEP," Individual Education
22 Plan?

23 A Yes.

24 Q Would it be fair to say there was an
25 assessment made of these individuals?

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1 A Yes.

2 Q And then in turn, you tried to meet their
3 needs with these different programs?

4 A Yes.

5 Q And what of those of courses was the
6 school itself, the parole school?

7 A Yes, the parole school is designed to do
8 that.

9 Q And I assume that because he wasn't a
10 graduate, your attempt was to try to get him to
11 where he had additional education?

12 A Yes.

13 Q And what was the goal of the parole
14 school?

15 A Was to get him to get his high school
16 diploma.

17 Q Okay.

18 Where was the parole school located?

19 A In our parole office.

20 Q In the same office in which you were
21 working?

22 A It's in a conference room separate from --
23 we have individual offices, and then we have a
24 conference room. The school is held in the
25 conference room. It's a large conference room.

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1 Q Okay.

2 Now, do you recall approximately when you
3 first interacted or had Mr. White under your
4 supervision?

5 A I don't recall the exact first date that I
6 met him, but it was in August of -- oh, I think '95.

7 **MR. WHIPPLE:** If I can approach, your
8 Honor, it's what I have -- what I've already shown
9 to the State. It's Defense Proposed OO.

10 **BY MR. WHIPPLE:**

11 Q Mr. Clark, we spoke for the first time out
12 in the hallway approximately lunch hour?

13 A Yes, sir.

14 Q I had an opportunity to show you that
15 particular exhibit at that time?

16 A Yes, sir.

17 Q What exactly is that exhibit?

18 A This is a first contact sheet. This
19 explains what his program is going to be like on his
20 first day of parole.

21 Q And this is something -- would it be fair
22 to say this is something that you do with all of the
23 new kids that you supervise?

24 A Yes. One of these is done on everybody
25 that comes into the parole office.

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1 Q Obviously, as one of your students, you're
2 familiar with what his original paperwork included?

3 A Yes.

4 Q And is that the same -- is that a fair and
5 accurate representation of when you originally did
6 it or originally were involved with taking that
7 information?

8 A Actually, I didn't do it; another agent
9 did it for me because I wasn't there.

10 Q But you have seen this?

11 A Yes, I have.

12 Q And it was under your direction?

13 A Yes.

14 **MR. WHIPPLE:** I move to admit Defense
15 Proposed Exhibit OO.

16 **MR. DASKAS:** No objection, Judge.

17 **THE COURT:** All right. Admitted.

18 (Defense Exhibit OO was admitted into
19 evidence.)

20 **BY MR. WHIPPLE:**

21 Q If you would, please, take a few minutes
22 to tell us some of Mr. White's expectations and some
23 of the things he wished to accomplish by attending
24 the school.

25 A "Subject White states that he plans to

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1 contact several restaurants to apply for cooking
2 positions. John has been referred to the EDD
3 specialist Diane Freeman at the Watts Parole Office
4 to help with his employment search. He's also been
5 placed in the Watts Parole School Program, parenting
6 and employability programs. He also plans to
7 complete his high school education. John states
8 that his long-term occupation or goals is to become
9 a cook. John earned a certificate from El Paso De
10 Robles School in the culinary program." At the
11 bottom of the form, it says, "John is a small, quiet
12 young man. He does appear sincere in his responses
13 to questions. He has a history of gang involvement
14 and will be monitored closely."

15 Q Mr. Clark, if you can think back, how did
16 Mr. White first appear to you? How would you
17 explain or describe him when you first met him?

18 A When I first met him, he was a small,
19 quiet young man that seemed to be pleasant and
20 workable.

21 Q Any good vibes or bad vibes, I mean any
22 personal thoughts?

23 A I had good vibes from him.

24 Q Okay.

25 A He was cooperative, and for the most part,

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1 he did everything that we asked.

2 Q Okay.

3 Tell me some of the things that you asked,
4 if you would, please.

5 A I asked him to attend school every day
6 without fail. I instructed him that he wasn't
7 supposed to have hats in my office; he's not
8 supposed to sag; he's not supposed to gangster
9 stand. He couldn't wear gang colors, and he adhered
10 to that for the most part. When he didn't, I
11 admonished him, and he accepted it without attitude
12 or problems. At times -- there was a time once he
13 got real comfortable, I guess he got -- as time went
14 on, he started to, I would say, test the waters
15 where he slipped a little, and we would give him a
16 work assignment where he had to clean up around the
17 building or clean up in the building, and he did
18 that without a problem too, and his attitude
19 continued to be positive.

20 Q Did you do some fun things, go to the fish
21 market? Did you ever get out with Mr. White?

22 A No, I didn't take him out to the fish
23 market or lunch or anything like that, no. I would
24 joke with him in the office. The other agents would
25 also joke with him. I really didn't take him out

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1 anywhere; I don't remember.

2 Q Did you ever take him home? Do you
3 remember taking him home at all?

4 A I might have taken him home a couple of
5 times. I don't remember. I take a lot of kids
6 home.

7 Q I just want to go through some of the
8 things that he was required to do. You said he was
9 required to go to school. How did he do at school
10 while you were there during the first part of your
11 tenure with him?

12 A Well, he apparently did well. We didn't
13 have any complaints about him in the classroom. I
14 didn't enter the classroom to see what kind of work
15 he was doing. We left that up to the teacher, and
16 the teacher had no complaints with him.

17 Q Okay.

18 You mentioned a few things. He wasn't
19 supposed to wear hats, no colors, no sagging.

20 What are you getting at there? Why wasn't
21 he supposed to wear a hat?

22 A Well, the office -- my parole office is
23 located on 91st and Central in Los Angeles. There
24 are, like, six to eight gangs in a three block
25 radius of the office. So, it's mandatory that the

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1 people that come to the office do not manifest any
2 gang behaviors, because that would call attention
3 and cause problems for us.

4 Q Why would that be a problem?

5 A Because of rival gangs. The gangs would
6 feel that if -- they know it's a parole office,
7 first of all, and they know people come from all
8 different areas. If they came wearing their colors,
9 that would be like an insult, and then they would
10 cause problems, disrespect, and it could end up in
11 the building getting shot up and people getting
12 hurt.

13 Q Now, when you previously testified, there
14 were some questions that came out about gangs.

15 Do you remember that?

16 A Yes.

17 Q Some of the questions were what are the
18 ages that the kids join gangs.

19 Do you feel familiar or comfortable
20 answering some of those questions?

21 A Yeah, I can answer some of the questions,
22 but there's no particular age that a kid joins a
23 gang.

24 Q How about a 14-year-old?

25 A Yeah, 14 years old, there are 12 years

1 old, there's nine-year-old gang members.

2 Q Why would you have kids that young joining
3 a particular gang?

4 A Well, in my experience, it's been because
5 of the influence of the neighborhood, of the older
6 gang members, the people that have the notoriety of
7 being an OG or hard core, you know, the man. They
8 have the money, they have the power, they have the
9 women. They have everything that people glorify.
10 They're into drugs and everything; so, the young
11 kids are easily drawn to that, and in order to be
12 part of that -- to be part of that culture, they
13 have to earn -- I'll call them "stripes." They have
14 to earn their way in and prove themselves and do
15 certain things. A lot of times the OGs or the older
16 gang members will put them up to committing crimes
17 or assaulting somebody, that kind of stuff.

18 Q Do you remember you were asked what type
19 of options an individual would have, a young student
20 like that would have in an environment that's full
21 of gang environment? Do you remember being asked
22 that previously five years ago, the type of options
23 a young 14-year-old, you know, nine-, ten-, 12-,
24 14-year-old --

25 A Yes.

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1 Q -- student would have in an environment
2 that's full of this gang?

3 A The options would be limited. I guess
4 positive options would be limited, because when a
5 gang takes over a territory, in order for you to
6 function in that territory, you have to participate
7 in those activities or you view it as an enemy or
8 outsider. So, you take the chance of being beat up,
9 shot or just ridiculed and harassed constantly. So,
10 unless you have a specific place to go with
11 adults -- adult supervision or adult monitoring,
12 then it could be real difficult for you.

13 Q What if there were no adults in one of
14 these young student's life, what type of options
15 would they have?

16 A Well, they can stay inside. Their options
17 would be limited. I don't -- I don't want to paint
18 the picture that there's no adult -- positive adult
19 role models in communities; there are. It's just
20 that sometimes the more attractive people are the
21 ones that are doing all the crime and that kind of
22 stuff, so there's a tendency, if you don't have a
23 lot of positive direction or guidance, you tend
24 to -- the kid may tend to be drawn to the negative
25 and be influenced more heavily by them.

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1 Q Would it be fair to say your parents are
2 often the positive role models?

3 A I would think the parents are supposed to
4 be the positive role models.

5 Q And if you don't have parents, then you
6 kind of have to search for different role models in
7 the environment in which you're located?

8 A Yes.

9 Q Now, I want to talk specifically about the
10 area in which Mr. White was raised in.

11 Are you familiar with where he was living
12 at the time?

13 A Yes, I am.

14 Q And if you would, please, just describe it
15 to these folks, if you can remember how it was?

16 A This was '94, '95, '96. He lives or he
17 lived in an area, we call it "Six Deuce Brims
18 territory." It's a Blood neighborhood, and that
19 neighborhood is surrounded by two or three real
20 heavy Crip gangs -- the Eight-Tray Gangster Crips
21 and the Rollin 60s, it might even be Main Street.
22 There are several gangs there, much larger and more
23 volatile. The Brim neighborhood that John was
24 living in was basically a drug neighborhood where
25 drugs was the -- was what most people got involved

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1 in. That gang was basically a -- they war over drug
2 territory and not necessarily just Bloods and Crips;
3 so, it was kind of a rough neighborhood. There was
4 a lot of drugs.

5 Q When you say "volatile," what do you mean
6 by "volatile"?

7 A You know, shootings, gang wars, trouble,
8 people get jumped, people get shot, people do drugs.
9 You get a lot of crack addicts, just dope fiends.

10 Q How about back in the '94/'95, was that a
11 hostile time or not so hostile time with regard to
12 the Six Deuce Brims and some of the other gangs in
13 the area; can you recall?

14 A Yeah, I recall. It was quite a volatile
15 period for all the gangs. South Central was kind
16 of, like, hot. Like every week there was a war
17 between some gang, and we did a lot of raids. Yeah,
18 it was a tough time.

19 Q Now, from where Mr. White lived to where
20 your parole office lived or was located, what was
21 the distance, approximately?

22 A I'm thinking about a mile or two -- about
23 two miles.

24 Q And what types of modes of transportation
25 did Mr. White have back then?

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 65168

Electronically Filed
Jan 09 2015 02:37 p.m.
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Clerk of Supreme Court

**APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH, PRESIDING**

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**APPELLANT'S APPENDIX TO THE OPENING BRIEF  
VOLUME XXVIII**  
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IN THE SUPREME COURT OF NEVADA

DONTE JOHNSON,

CASE NO. 65168

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

OPENING BRIEF APPENDIX

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CERTIFICATE OF SERVICE

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I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 9th day of January, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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