

1 any video showing the defendant entering Wal-Mart?

2 A I did look. Unfortunately, the files delete after 60
3 days.

4 Q And so did you find one?

5 A No. There was no video.

6 Q Did you look within 60 days from June 9th?

7 A I do not recall.

8 MR. BOGALE: No further questions.

9 THE COURT: Mr. Schachter.

10

11

CROSS-EXAMINATION

12

BY THE DEFENDANT:

13

Q You testified that you burned these videos?

14

A This specific video.

15

Q It wasn't Ms. Young who burned them?

16

A That one, no.

17

Q All these -- These are all burned together?

18

A I am testifying to this one.

19

20

Q I don't even know how to put this. This is not the
video that is in my discovery?

21

THE COURT: I don't believe so. The one you gave the
22 clerk for safe keeping is marked A and B.

23

THE CLERK: That is correct.

24

THE COURT: So he's now showing you C. Do you want

1 him to look at A and B? Do you want to ask him questions
2 about A and B?

3 THE DEFENDANT: No.

4 THE COURT: Okay.

5 THE DEFENDANT: I thought the hearing, this was about
6 the discovery about what I was entitled to and whether that
7 video was altered.

8 THE COURT: Mr. Schachter, it really doesn't matter
9 if it was altered. If the State were able to produce the
10 documents that you thought were exculpatory, then it may give
11 you a different remedy if you continue going to trial in two
12 weeks, but maybe it still would be admissible. You made a
13 motion of the fact that they had no video provided to you in
14 the discovery that showed you walking into Wal-Mart, and you
15 said that was exculpatory evidence because you had the
16 backpack on when you walked in. So there are many motions
17 here. You have discovery issues which you are claiming they
18 aren't giving you, is it fair and accurate, whatever they did
19 have. But you are also claiming that they did not burn the
20 proper CDs.

21 THE DEFENDANT: Exactly.

22 THE COURT: Right?

23 THE DEFENDANT: Yes.

24 THE COURT: So the State has said what they burned.

1 They have got a witness here. You can ask him why he burned
2 it, didn't burn it, do whatever you want with it. You can
3 have him look at A and B if you want, because you have lodged
4 those with the Court.

5 BY THE DEFENDANT:

6 Q Thank you. So, again, there is no video of me
7 available right now walking into the store?

8 A Correct.

9 Q What was the deadline for you to be able to retrieve
10 that video?

11 A Whatever 60 days would have been.

12 Q Is that the procedure-- How did you decide which
13 snippets to burn?

14 A I burned anything showing you throughout the store
15 selecting items.

16 Q But nothing prior to 11:30 or 11:27 that was on that
17 video, the first video, right?

18 A If that is the time, yes.

19 Q And did you-- That is all the video you could find
20 of me in the store, is that what you are saying?

21 A Yes.

22 Q So it is the policy not to get all, I am sorry, all
23 the entrance videos, right?

24 A I am sorry? Repeat that.

1 Q All the entrances and exists are on video
2 surveillance?

3 A Yes, they are.

4 Q Is it the policy not to record when you have a
5 suspected shoplifter, not to record him or her coming into the
6 store?

7 A There is no policy.

8 Q It was just your decision not to keep that video, is
9 that right, not to burn that video along with the rest of the
10 videos?

11 A Yes. I did not see the relevance.

12 Q There is no other video that you know of of me in
13 the store on that date?

14 A There could be, but I wouldn't see the relevance of
15 recording just you walking down an aisle.

16 Q But in front of the video, does it show me without
17 the backpack?

18 A Okay.

19 Q But you said in your statement that you started
20 surveillance at 11:40 but the video, the earliest video in
21 there is 11:30, and I have the backpack in the shopping cart?

22 A Okay.

23 Q So there is no video prior to 11:30 or any video
24 that you brought with you today or have available that does

1 not show me with the backpack, correct?

2 A Correct.

3 THE DEFENDANT: That's all.

4 THE COURT: That's the end of your questioning?

5 THE DEFENDANT: Yes.

6 THE COURT: Counsel.

7 MR. BOGALE: Just a couple more questions, Your
8 Honor.

9

10

11

REDIRECT EXAMINATION

12 BY MR. BOGLE:

13 Q Did you see the defendant in Wal-Mart without a
14 backpack?

15 A Yes.

16 Q And then did you see him select a backpack?

17 A Yes.

18 Q Is it the same backpack he was holding when you
19 confronted him outside the store after he walked out without
20 paying for it?

21 A Yes.

22 Q Did you view the video of Mr. Schachter coming into
23 Wal-Mart?

24 A I did not.

1 Q Okay. You don't know if there is one, correct?

2 A That is correct.

3 THE DEFENDANT: He just, excuse me, testified there
4 was video.

5 THE COURT: Not a time to object.

6 MR. BOGALE: No further questions. Thank you.

7 THE COURT: Now did you have something?

8 THE DEFENDANT: He just testified -- excuse me.

9

10 RECROSS EXAMINATION

11 BY THE DEFENDANT:

12 Q You testified all the entrances and exits are video
13 taped?

14 A Correct.

15 Q So at one point, there was video of me walking in
16 the store, correct?

17 A Assuming you used an entrance or exit, yes.

18 Q Is there some other way to get in?

19 A You could have jumped a fence in the garden center,
20 sure.

21 THE COURT: Is there anything further from the
22 State?

23 MR. BOGALE: Nothing further for this witness right
24 now.

1 THE COURT: You may step down.

2 (Witness excused.)

3 MR. BOGALE: The State calls Nick Reed.

4 THE COURT: Counsel, you may proceed.

5

6 NICK REED

7 called as a witness, having been first duly sworn,

8 took the witness stand and testified as follows:

9

10 DIRECT EXAMINATION

11 BY MR. BOGALE:

12 Q Good morning. Please state your name and spell your
13 last?

14 A Nick Reed, R-E-E-D.

15 Q Nick, what is your occupation?

16 A I am a police officer with the Reno Police
17 Department.

18 Q How long have you been there?

19 A About ten years.

20 Q Are you on a special assignment?

21 A I am assigned to detectives.

22 Q Are you part of the Repeat Offender Program?

23 A Yes, sir.

24 Q What is that?

1 A That is basically the career criminal unit.

2 Q Okay. Does that mean you track career criminals?

3 A Yes, sir, we do.

4 Q What sort of tracking do you do?

5 A It could vary from surveillance to checking certain
6 programs that we have that show for instance like a pawn
7 tracking program. We might track somebody through pawns if
8 they are pawning a lot of items or coming up with stolen
9 property, something like that.

10 Q You track their whereabouts and behavior?

11 A Basically, yes.

12 Q Are you assigned a certain amount of targets,
13 essentially?

14 A Yes.

15 Q Is Mark Schachter one of your targets?

16 A Currently, yes.

17 Q Let me bring you back to a few months ago, June of
18 this year.

19 A Yes, sir.

20 Q Were you involved in an investigation of an
21 individual named Mark Schachter?

22 A Yes, sir.

23 Q What did that investigation entail?

24 A Mr. Schachter had been arrested June 9th, and on

1 June 10th I received an in-custody report from Washoe County
2 Jail indicating he had been arrested. I read through the
3 report, the initial report and conducted a little bit of
4 follow up. In that follow up, I collected a surveillance
5 video, and I spoke to asset protection officer named Anna
6 Young both over the phone and in person. I watched the video
7 at Wal-Mart. I completed a report based on what I had seen in
8 the video, what I had read in Mr. Alex Monroy's statement and
9 a little bit of about what Anna, Ms. Young, had told me, and I
10 later booked the video.

11 Q You booked video into evidence?

12 A Yes, sir, I did.

13 Q Okay. I am going to show you what has been marked
14 and admitted as Exhibit C, okay? And just tell me if you
15 recognize these files, how you recognize them and if they
16 comport with the original video that you booked, okay?

17 THE COURT: Wait a minute, is this the video he
18 booked or a different video?

19 MR. BOGALE: It is the State's position it is just a
20 copy of the same video.

21 THE COURT: Where is the video he booked?

22 THE WITNESS: Right here, Your Honor.

23 THE COURT: Let's mark that.

24 THE WITNESS: Okay.

1 MR. BOGALE: Thank you.

2 BY MR. BOGALE:

3 Q Could you open this for me, please?

4 THE COURT: Let the record reflect the envelope is
5 being opened by the witness.

6 THE WITNESS: Your Honor, I just want to indicate it
7 is a Reno Police Department envelope. It has my name and
8 badge number on the front, the date of June 10th. Chain of
9 custody. Case number on the back. It is sealed. My name,
10 Reed, my badge number 9473, case number 14-10834.

11 THE COURT: Is that in the same condition as you put
12 it into evidence?

13 THE WITNESS: Yes, ma'am.

14 THE COURT: Did you retrieve it today?

15 THE WITNESS: I retrieved it last night.

16 THE COURT: From evidence?

17 THE WITNESS: Yes, ma'am.

18 THE COURT: Then you can open it. The clerk is
19 going to mark the envelope as well as the CD.

20 THE CLERK: The envelope is marked 1. The CD,
21 itself, will be marked 1-a.

22 (Exhibit 1 and 1-a marked for identification.)

23 MR. BOGALE: Your Honor, pursuant to Mr. Reed's
24 explanation of how he booked this into evidence, where he got

1 it from, the chain of custody, his name, badge number and case
2 number, I move to admit this in evidence.

3 THE COURT: Mr. Schachter. Any objection?

4 MR. LESLIE: Court's indulgence, Your Honor.

5 THE DEFENDANT: For the purpose of this hearing
6 only.

7 THE COURT: No objection?

8 THE DEFENDANT: No objection.

9 THE COURT: Exhibit 1 and 1-a are admitted.

10 (Exhibits 1 and 1-a admitted in evidence.)

11 MR. BOGALE: May I publish the disk, Your Honor?

12 THE COURT: You may.

13 MR. BOGALE: Thank you.

14 THE COURT: Do you want to return C to the clerk?

15 MR. BOGALE: Sure.

16 BY MR. BOGALE:

17 Q Next I am going to show you what has been marked and
18 admitted as Exhibit 1-a.

19 A Okay.

20 Q Now let me show you a couple of videos. This one is
21 called Stanley GC. Is this a fair and accurate representation
22 of what you burned?

23 A You know, I don't recall. I never watched any of
24 these other files. I remember watching Mr. Schachter,

1 specifically, and it was, my focus was more on the end of the
2 surveillance that loss prevention did with Mr. Schachter in
3 the alleged robbery at the time. That is where I kind of
4 focused my attention, so I don't remember the file that you
5 showed me.

6 THE COURT: Just play it for the Court.

7 MR. BOGALE: You want me to play the last one again?

8 THE COURT: No. Do you have the printout of what
9 you are playing? Have you done that?

10 MR. BOGALE: The printout? I am sorry.

11 THE COURT: Have you printed a screen shot from that
12 so you know which file you are supposed to be looking at? The
13 issue here is whether or not you, the D.A.'s office, or the
14 Police Department really burned a fair and accurate copy for
15 the defendant. It is a discovery motion as well as his motion
16 for exculpatory evidence. So in order to compare C which you
17 brought in with the loss prevention officer and this exhibit,
18 it would be helpful if we knew you had a list of the files
19 that you were going to show instead of saying, well, I am
20 going to jump here, I am going to look at this.

21 MR. BOGALE: Well, I can do that.

22 THE COURT: Do you have a list?

23 MR. BOGALE: I don't have a list, but I can make up
24 a list.

1 THE COURT: Maybe you should talk to your
2 investigator.

3 MR. BOGALE: Do you want to do that now?

4 THE COURT: You can ask her now.

5 MR. BOGALE: After speaking with our investigator, I
6 do have a screen shot of the file that we received from RPD.

7 THE COURT: Okay. Did you want to mark that?

8 THE CLERK: Exhibit 1-b marked, "b" as in boy.

9 (Exhibit 1-b marked for identification.)

10 THE COURT: For purposes of today's hearing as it is
11 a pretrial hearing. Where did you get 1-b?

12 MR. BOGALE: From my investigator, Michelle Bays.

13 THE COURT: It was prepared in the course of your
14 preparation for trial?

15 MR. BOGALE: Yes.

16 THE COURT: Have you disclosed that or is that part
17 of your work product?

18 MR. BOGALE: I have not disclosed that, Your Honor.

19 THE COURT: You considered it part of your work
20 product?

21 MR. BOGALE: That's what I figured.

22 THE COURT: But you think it might assist the Court
23 in understanding the exhibits. You can go ahead and show the
24 defendant the document.

1 MR. BOGALE: I think it will definitely help the
2 Court understand the exhibits.

3 THE DEFENDANT: This is for the one that the officer
4 just --

5 THE COURT: Yes, it is. That is my understanding.

6 THE DEFENDANT: Is that what it is? Is this a
7 screen shot?

8 THE COURT: This doesn't have to be on the record.
9 You can talk just like you would a lawyer.

10 MR. LESLIE: Your Honor, I think the colloquy should
11 be on the record, because Mr. Schachter is facing habitual. I
12 am sorry.

13 THE COURT: I didn't know how involved it was going
14 to be.

15 MR. LESLIE: If it was -- I mean those colloquies
16 occur where we say Court's indulgence and whisper at each
17 other, but it sounds like information that probably should be
18 recorded.

19 THE COURT: Okay. Mr. Schachter, you are concerned
20 about the document. What is your question?

21 THE DEFENDANT: Well, the date modified is
22 everything from six to just a couple of weeks ago to August.
23 From June to August. I don't know how it could be from that
24 date. I don't know which video it is from, the date modified.

1 THE COURT: Why don't we hold off on it then. Go
2 ahead and take it back, Mr. Bogale. Hold on to it. We might
3 have to have a witness to testify to whatever it is.

4 MR. BOGALE: I think Ms. Bays would be the right
5 person to testify to it.

6 THE COURT: Okay.

7 BY MR. BOGALE:

8 Q Okay. So this disk that I just played a file from,
9 you booked into evidence and never gave it to anybody else.
10 It stayed in evidence; is that correct?

11 A That's correct.

12 Q If it had been moved, it would have been marked on
13 the chain of custody; is that correct?

14 A That's correct.

15 Q And on this chain of custody --

16 MR. BOGALE: May I approach the witness?

17 THE COURT: You may.

18 BY MR. BOGALE:

19 Q Showing you what is marked Exhibit 1, what does the
20 chain of custody say?

21 A So when I booked this in, I put it into a locker
22 identified as 827. So the evidence people show they removed
23 it from 827 and put it into evidence, EVD dated 6-12 of '14
24 and then I put on yesterday that I removed it from evidence,

1 from the evidence clerk, my name and badge number and the date
2 which was 6-10-14.

3 Q Thank you.

4 MR. BOGALE: I have no further questions, Your Honor.

5 THE COURT: Mr. Schachter, do you have any
6 questions?

7 THE DEFENDANT: I don't. I am sorry.

8

9 CROSS-EXAMINATION

10 BY THE DEFENDANT:

11 Q How does that evidence get shared with the
12 prosecutor?

13 THE COURT: Would you return the evidence to the
14 clerk, please? Make sure it all gets put back together.

15 MR. BOGALE: I understand.

16 THE WITNESS: I will answer you in a second. So what
17 I have done, which is common for a detective in my unit, I
18 created two packets. A packet has the evidence disk in it,
19 the reports, the, you know, the paperwork. And in this case,
20 the surveillance disk. So I created a packet for the defense,
21 and I created a packet for the D.A.'s office, and that is only
22 to expedite discovery, because often times a guy in your
23 position will want to go to trial, so it is just to help
24 things along.

1 So to answer your question, he got the disk from me.
2 I burned it or I had Wal-Mart burn it, I don't really
3 remember, but I created two packets, one for the defense and
4 one for the D.A.'s office.

5 BY THE DEFENDANT:

6 Q Prior to lodging it into evidence, correct?

7 A Yeah, correct.

8 Q Do you know the date? Was that the same date that
9 you logged it into, the 10th, on June 10th or sometime after?

10 A It had to have been the same date, because I booked
11 the original in on the 10th and the 10th is when I did my
12 follow-up at Wal-Mart. It was the day after you were arrested.

13 Q So you don't know how the 6-14 date that is on the
14 other copy is on there, right?

15 A I don't even know what you are talking about.

16 Q I am sorry.

17 THE COURT: Did you want Exhibit A or B shown to the
18 witness?

19 THE DEFENDANT: That is helpful. I am trying to do
20 it as quickly as possible.

21 THE CLERK: Which one would you like first? I am
22 handing the bailiff Exhibit A.

23 THE DEFENDANT: Either one of them.

24 THE COURT: Is there anything on the outside of that

1 envelope?

2 THE DEPUTY: Not on the outside of the envelope.
3 They are marked on the disk, disk 1-DA 14-1219 Schachter,
4 marked 7-24 of '14. The initials of KB.

5 THE COURT: Would you hand that to the witness?
6 We'll just do that first.

7 THE COURT: Is that the condition that you produced
8 a copy of the disk for the defendant?

9 THE WITNESS: I didn't write that down. But I mean
10 the disk, it looks -- I mean they all kind of look the same.
11 It looks similar to what we would use.

12 THE COURT: When you prepare a packet for the
13 defense, do you write on the disk?

14 THE WITNESS: Not always, but I have. Usually it is
15 in a black sharpie. It has the case number and defendant's
16 name on it.

17 THE COURT: Would you write on the sleeve?

18 THE WITNESS: I have done both.

19 THE COURT: Would you leave it completely blank?

20 THE WITNESS: I have done that as well.

21 THE COURT: Would the bailiff hand him Exhibit B.
22 Would you put that disk back in the sleeve?

23 THE WITNESS: Absolutely. Yes, ma'am.

24 THE COURT: Is there any writing on Exhibit B?

1 THE WITNESS: Should I pull it out? There is
2 writing. It is Disk 2, DA 14-12219 Schachter, Mark, 2-24-14.

3 THE COURT: Is that your writing?

4 THE WITNESS: No, ma'am.

5 THE COURT: Okay. Thank you.

6 THE WITNESS: Yes, ma'am.

7 THE COURT: Now did you have some questions?

8 BY THE DEFENDANT:

9 Q On those two videos, all the videos say --

10 THE COURT: The question is for him not me.

11 BY THE DEFENDANT:

12 Q On those two DVDs, all the videos say modified and
13 created on June 14th. Is there some explanation for that that
14 you know of?

15 A No.

16 Q Because you only made copies on June 10th, right,
17 one for the D.A. and one for the defense?

18 A Well, there was three copies. There was the
19 original, then there was two additional copies, but I don't
20 remember, and I apologize, if I had Wal-Mart burn me three
21 total copies, or if I burned two additional copies. I'm not
22 computer, extremely computer savvy, so I tend to believe that
23 I probably asked Wal-Mart to burn me three copies, because
24 that is where I watched this particular incident. So -- I'm

1 sorry. Could you repeat the question? I didn't burn anything
2 after June 10th.

3 Q Okay. In your police report it just says the one
4 disk was booked into evidence. Are you saying it is possible
5 that more than one was booked into evidence? Wal-Mart might
6 have given you additional DVDs or just the one?

7 THE COURT: That is not what he testified to.

8 BY THE DEFENDANT:

9 Q I am sorry. You only received one DVD from Wal-Mart,
10 correct?

11 A Well, I can't say that I received just one, because
12 I may have had three total copies of the same disk. But the
13 two additional videos, whether Wal-Mart burned them or I
14 burned them myself, I don't remember. They were specifically
15 for the defense and the D.A. just to expedite the discovery
16 process. So the one disk that was booked into evidence, that
17 should depict the same as the other two discs.

18 Q That would have been on June 10th, correct?

19 A That it was booked?

20 Q That it was burned?

21 A Yes.

22 Q And booked?

23 A Yes, burned and booked both the same day.

24 Q Okay.

1 THE DEFENDANT: That's it.

2 THE COURT: Thank you. Questions?

3 MR. BOGALE: No further questions.

4 THE COURT: Thank you, sir, you may step down.

5 (Witness Excused.)

6 MR. BOGALE: I want to clarify where we are going
7 here. I wasn't here September 30th. Matt Lee covered for me.
8 I had the pleasure of reading the Court's minutes that were
9 filed yesterday, and they explained what happened at that
10 hearing. We are here, please correct me if I am wrong, to make
11 sure Mr. Schachter has all the video evidence and discovery
12 that the State has; is that correct?

13 THE COURT: That's partially correct. There is
14 also, if you read his motion, there is a motion to dismiss the
15 charges because exculpatory evidence was destroyed. His
16 allegation was he entered the Wal-Mart with the backpack that
17 he is charged with stealing, and that the exculpatory evidence
18 was on a video not produced by the State.

19 He's also objected to the content of video discovery
20 stating that the video discovery that was provided to him was
21 not complete, an accurate copy of whatever was produced and
22 booked into evidence. So your job today was to confirm what
23 was booked into evidence, confirm whether there was any video
24 exculpatory evidence available, perhaps have the witness

1 testify it is not available and refute the exculpatory
2 evidence Mr. Schachter is claiming you destroyed or someone
3 who works for you destroyed.

4 He's also alleging the videos he's been given are
5 not a fair and accurate depiction of what was marked into
6 evidence or booked into evidence, so he's been alleging that.
7 So you have got now what was booked into evidence, but you
8 still haven't been able to compare. And then the one you did
9 play was something that was burned by the witness not having
10 anything to do, I don't think, with the discovery that was
11 provided to Mr. Schachter.

12 So he has his Motion to Dismiss on substantive
13 grounds and Motion to Dismiss for failure to provide
14 discovery.

15 MR. BOGALE: Well, I never had a chance to view the
16 discovery that he has. Evidently he booked that into evidence
17 as A and B.

18 THE COURT: Who did view the discovery before it was
19 provided to Mr. Schachter?

20 MR. BOGALE: I viewed it, but the disks he has, the
21 physical disks he has he's claiming are different or aren't
22 exactly what we provided him, so I would like to view those.

23 THE COURT: That would be fine.

24 MR. BOGLE: To see what the discrepancy is.

1 THE COURT: At the last hearing, Mr. Schachter left
2 those disks with safekeeping in the clerk. They were marked.
3 They have been in the clerk's control ever since. If you
4 would like to take a short recess and review them.

5 MR. BOGALE: Yes, I do.

6 THE COURT: Any objection?

7 THE DEFENDANT: No, Your Honor.

8 THE COURT: As long as you do it with Mr. Schachter
9 and the clerk present. We'll be in a short recess.

10 (Short recess taken.)

11 THE COURT: Thank you. Please be seated. Counsel?

12 MR. BOGALE: Thank you, Your Honor. Before we go
13 ahead, I would like to call Michelle Bays as a witness,
14 please, Your Honor.

15 THE COURT: Okay.

16

17 MICHELLE BAYS

18 Called as a witness, having been first duly sworn,
19 took the witness stand and testified as follows:

20

21 DIRECT EXAMINATION

22 BY MR. BOGALE:

23 Q Good morning. Please state your name and spell your
24 last name for the court reporter?

1 A Michelle Bays, B-A-Y-S.

2 Q What is your current occupation?

3 A Supervising investigator with the Washoe County
4 District Attorney's Office.

5 Q Are you assigned as the investigator to a case
6 involving Mark Schachter?

7 A I am.

8 MR. BOGALE: Your Honor, may I approach the clerk?

9 THE COURT: You may.

10 MR. BOGALE: May I approach the witness?

11 THE COURT: Yes, you may.

12 BY MR. BOGALE:

13 Q I am showing you what has been marked as Exhibit
14 1-b. Take a moment to review that and let me know when you
15 are done?

16 A Okay.

17 Q Do you recognize that document?

18 A I do.

19 Q What is it?

20 A It is a screen shot of a disk that was or that is
21 currently in our case file for the Schachter case.

22 Q Did you print that screen shot out?

23 A I did.

24 MR. BOGALE: Your Honor, I move to admit Exhibit 1-b.

1 THE DEFENDANT: For the purpose of this hearing
2 only, I agree.

3 THE COURT: Exhibit 1-b is admitted.

4 (Exhibit 1-b admitted in evidence.)

5 MR. BOGALE: Thank you. Let me take that back from
6 you.

7 MR. BOGALE: Your Honor, may I approach the clerk?

8 THE COURT: Yes.

9 MR. BOGALE: Thank you. May I have this marked?

10 THE CLERK: Exhibit D marked.

11 MR. LESLIE: May we see it before it is proffered?

12 (Exhibit D marked for identification.)

13 MR. BOGALE: Your Honor, may I approach the witness?

14 THE COURT: You may.

15 BY MR. BOGALE:

16 Q Showing you what has been marked Exhibit D, take a
17 look at that for a moment.

18 A Okay.

19 Q Do you recognize that?

20 A I do.

21 Q What is it?

22 A It is a screen shot of disk two of a disk or a file
23 in the Schachter case.

24 Q Did you print that screen shot?

1 A I did.

2 MR. BOGALE: Your Honor, I move to admit Exhibit D.

3 THE COURT: Counsel, should it be marked -- Is it
4 the same as this?

5 MR. BOGALE: That's a little different, because the
6 disks have the exact same files on them, but the date modified
7 is a couple minutes off.

8 THE COURT: If I look at this, would I look at this
9 and the document you handed the witness at the same time?
10 Would I be comparing those two?

11 MR. BOGALE: You would be comparing this with a
12 disk.

13 THE COURT: This meaning 1-b?

14 MR. BOGALE: This meaning 1-b, and you would be
15 comparing that with a disk already in evidence as well to make
16 sure they comport.

17 THE COURT: Okay. What I would like is this document
18 that has been marked D should be marked as a subset of the
19 disk it goes with. You can have the witness help us with that.
20 BY MR. BOGALE:

21 Q Sure. What disk is that?

22 A This would be disk two.

23 Q Okay.

24 THE CLERK: The only disk two that is currently

1 marked in evidence is marked as Exhibit B as in boy so D will
2 be converted to B-1.

3 THE COURT: Do you move its admission?

4 MR. BOGALE: Yes, I do, Your Honor.

5 THE COURT: Mr. Schachter?

6 THE DEFENDANT: Again for the purpose of this
7 hearing.

8 THE COURT: Exhibit B-1 is admitted.

9 (Exhibit B-1 marked and admitted in evidence.)

10 MR. BOGALE: Can I take that back so she can remark
11 it?

12 THE CLERK: Thank you.

13 BY MR. BOGALE:

14 Q Okay. I am going to do some comparing and
15 contrasting here. Let me give you what is marked Exhibit 1-b
16 and Exhibit B-1. Exhibit 1-b is disk one. Exhibit B-1 is
17 disk two, okay?

18 A Okay.

19 Q So first look at Exhibit 1-b?

20 THE COURT: I am sorry. I don't understand. You
21 say Exhibit 1 is disk one?

22 MR. BOGALE: Disk A.

23 THE COURT: I don't think that is what you said.
24 Ma'am, would you look at 1-b?

1 THE WITNESS: Yes, ma'am.

2 THE COURT: Which disk does that go with?

3 THE WITNESS: It goes with disk one.

4 THE COURT: We don't have a disk one. We have a
5 disk A and B which says it is disk one. We marked it as A,
6 and B says it is disk two, and we marked it as B. Those were
7 both provided to us by Mr. Schachter. We also have a disk
8 marked as Exhibit 1 which was the exhibit that was marked by
9 the officer. What does 1-b go with?

10 THE WITNESS: Well 1-b I created today, took a
11 screen shot of disk one, what we call disk one in our system
12 which had previously been discovered, it is my understanding,
13 today.

14 THE COURT: You took a screen shot of something you
15 have in digital form in your office?

16 THE WITNESS: Yes, I did.

17 THE COURT: It is not here at all, not physically
18 here at all?

19 THE WITNESS: No, ma'am.

20 THE CLERK: We do have an issue because I have C
21 which was marked today at this hearing that has disk 1 on it.
22 Disk B he currently or somebody currently has, what is it
23 labeled?

24 MR. BOGALE: Disk A and B.

1 THE CLERK: Okay. Come here. Disk A that was marked
2 from the Defendant's property also says disk 1. So I know
3 where I got them and how I got them. I am just letting you
4 know talking in disk 1 and disk 2 is not working.

5 THE COURT: We have A and B that were provided to us
6 from Mr. Schachter and they say on the disk, disk 1 and disk
7 2.

8 THE CLERK: Correct.

9 THE COURT: We have Exhibit C that was marked today
10 with Mr. Monroy, and it says on it Exhibit 1, but we do not
11 have anything from Mr. Monroy that says disk 2. And now the
12 witness is saying she has a screen shot marked 1-b and it
13 relates to a digital file that she has in her office, correct?

14 MR. BOGALE: That's correct, Your Honor.

15 THE COURT: Okay.

16 MR. BOGALE: So what I was about to do is compare
17 the screen shot that Ms. Bays took from our file and that
18 screen shot has files on it, I am going to compare it to the
19 files on Exhibit A which is disk 1 which comports with 1-b
20 which says disk 1 on it. I want to show the Court it is a
21 screen shot.

22 THE COURT: Does it matter? Does it matter what you
23 have in your office? Mr. Schachter's objection is he wasn't
24 given what the officer had. His objection has been he's been

1 given a modified version of what the officer had. So I mean I
2 think you are missing the point here about what you need to
3 produce.

4 MR. BOGALE: Okay. In that case, if you don't want
5 me to do that.

6 THE COURT: I am not saying that. I would be more
7 than glad to let you do it, do whatever you want. We are
8 going to go to lunch first. It is noon. If that is the way
9 you want to prove it up, great. I don't think it is what the
10 motion is about. But I can't say -- I am not sure where you
11 are going with it.

12 MR. BOGALE: Can I answer your point?

13 THE COURT: Uh-huh.

14 MR. BOGALE: Please, Your Honor. If your point is
15 for me to prove up that Mr. Schachter didn't have, or to prove
16 Mr. Schachter actually had the files Mr. Reed brought today, I
17 can do that right now, because the same files Mr. Reed brought
18 are included on disk A and disk B Mr. Schachter provided to
19 the Court. In fact, Your Honor, during the break,
20 Mr. Schachter and I agreed to that, he had the exact same
21 files that Mr. Reed brought today in addition to three
22 additional files. So there is a little discrepancy, but he
23 got more than what Mr. Reed brought today.

24 THE COURT: Three additional video files?

1 MR. BOGALE: Just files on the CD. What
2 Mr. Schachter has, always had, is eight video files that is
3 reflected on disks A and B. Those are duplicates of each
4 other, A and B. Those are duplicates. They have eight video
5 files on them. What Mr. Reed brought today has five video
6 files on them. All five of those video files are contained on
7 disks A and B.

8 THE COURT: Where did the other three come from?

9 MR. BOGALE: The other three came from Mr. Monroy
10 who burned them, so he burned those files as we heard him this
11 morning say. I went through all eight files with him and he
12 said that's a fair and accurate depiction of what he burned.

13 THE COURT: The officer -- Are you going to put on
14 some evidence about how you ended up with three files that the
15 officer didn't take? I mean the officer said this is what I
16 got and you are saying that is five files, now all of a sudden
17 you have three more but you have no evidence as to which
18 law-enforcement officer went and collected those three files
19 to give them to you so that you could give them to the
20 defendant.

21 MR. BOGALE: I have Mr. Monroy here who burned the
22 files himself and gave them directly to the D.A.'s office.

23 THE COURT: I didn't hear any testimony like that.

24 MR. BOGALE: I can recall him.

1 THE COURT: Do you think you had him testify to
2 that?

3 MR. BOGALE: No. No, he did not.

4 THE COURT: Okay. So --

5 MR. BOGALE: But he's still here, and I can have him
6 testify to that.

7 THE COURT: Okay. Whatever you want to do, but do
8 you need anymore from this witness right now, from Ms. Bays?

9 MR. BOGALE: Not right now.

10 THE COURT: Okay. Thank you, ma'am.

11 (Witness excused.)

12 THE COURT: We have to figure out when we can do
13 this. I don't know what the schedule is.

14 Let's come back at 1:00 and get the witness
15 testimony done, then we can figure out when else we can do
16 something, okay? We should be able to get through the
17 witnesses.

18 MR. BOGALE: I think so, Your Honor.

19 THE COURT: We will be in the lunch recess.

20 (Whereupon the Court adjourned for the lunch recess.)

21 THE COURT: Go ahead and call your witness.

22 MR. BOGALE: The State calls Michelle Bays.

23 MR. LESLIE: For what it is worth, I can actually go
24 later than 1:30.

1 THE COURT: I have two 1:30's. Ma'am, you are still
2 under oath. Please retake the stand. Welcome back, Ms. Bays.

3 THE WITNESS: Thank you.

4 BY MR BOGALE:

5 Q When we broke, we were discussing comparing screen
6 shots to disks and all that. Do you remember that?

7 A I do.

8 Q So I'm going to --

9 MR. BOGALE: Actually, Your Honor, may I approach the
10 clerk?

11 THE COURT: Certainly.

12 THE CLERK: Exhibit D marked. That was "D" as in
13 dog.

14 (Exhibit D marked for identification.)

15 MR. BOGALE: Your Honor, may I approach the witness?

16 THE COURT: Yes. Did you show Mr. Schachter?

17 MR. BOGALE: Yes.

18 BY MR. BOGALE:

19 Q Let me show you what has been marked Exhibit D.
20 Take a look at that and tell me if you recognize it?

21 A I do.

22 Q What is that?

23 A It is a screen shot of a disk in the Schachter file
24 that is maintained by my office.

1 Q Okay. What do you understand that file-- Where did
2 that file come from?

3 A Are we talking about the disk, itself?

4 Q The actual disk you made the screen shot from, yes?

5 A Meaning it is maintained in our physical file for
6 the Schachter case, and my assumption is that it came from the
7 Reno Police Department in the course of them collecting
8 evidence in the case which is routine.

9 Q And did you print that screen shot, yourself?

10 A I did.

11 Q You printed it after you put in the physical disk?

12 A I did.

13 MR. BOGALE: Your Honor, move to admit Exhibit D.

14 THE COURT: Do you have any objection?

15 THE DEFENDANT: On the assumption we don't know
16 where it came from.

17 THE COURT: Sustained.

18 BY MR. BOGALE:

19 Q You know where the disk is, correct?

20 A Yes.

21 Q Where is the disk?

22 A The actual physical disk is maintained in the case
23 file for the Schachter case in our office.

24 Q And you inserted that disk into a computer?

1 A Yes.

2 THE COURT: You are leading.

3 BY MR. BOGALE:

4 Q What did you do with that disk?

5 A I inserted the disk into the computer into the
6 screen shot of all the files contained in the disk.

7 Q Okay.

8 MR. BOGALE: Based on that, Your Honor, the State
9 moves to admit Exhibit D.

10 THE COURT: Where is the disk she's talking about?

11 MR. BOGALE: It is here.

12 THE COURT: Why don't you have her talk about that.

13 MR. BOGALE: Your Honor, may I approach the witness?

14 THE COURT: Yes.

15 MR. BOGALE: It hasn't been marked or anything. I
16 just wanted to show her, see if it is the same disk she burned
17 or printed the screen shot from.

18 THE COURT: You probably should have it marked. Just
19 approach the clerk and she will have it marked for you.

20 THE CLERK: Exhibit E marked.

21 (Exhibit E marked for identification.)

22 BY MR. BOGALE:

23 Q Thank you. Showing you what has been marked as
24 Exhibit E, do you recognize that?

1 A I do.

2 Q What is it?

3 A It is the disk in which I took the screen shot of
4 the digital files.

5 Q And where was that disk?

6 A The disk was in our master file for the Schachter
7 case.

8 MR. BOGALE: I move to admit Exhibit D, the screen
9 shot.

10 THE COURT: Any objection?

11 THE DEFENDANT: That is a copy of the disk from
12 officer Reed that was in evidence that was taken out of the
13 evidence?

14 THE COURT: Are you asking a question of the
15 witness, of Mr. Bogale or me?

16 THE DEFENDANT: The witness.

17 THE COURT: You may ask the witness a question on
18 voir dire.

19

20 VOIR DIRE EXAMINATION

21 BY THE DEFENDANT:

22 Q That is a copy of the disk that officer Reed brought
23 to court today that was in evidence?

24 A I believe so, yes.

1 Q You believe so?

2 A I would have, to be 100 percent sure, I would have
3 to compare the two, but as a routine, they make copies. The
4 police department makes a copy and forwards it to our office.

5 Q Who made--

6 THE DEFENDANT: I would object. There is no
7 foundation where the copy came from.

8 THE COURT: May I see Exhibit D?

9 MR. BOGALE: You may.

10 THE COURT: D as in dog.

11 THE WITNESS: Can I clarify, Your Honor?

12 THE COURT: Yes.

13 THE WITNESS: Earlier today during the recess, I
14 apologize, I forgot, I was able to view the files that
15 contained the copy detective Reed brought with him and they
16 are the same as the digitals that are contained on this disk
17 that we had in our file.

18 THE COURT: Okay. There is five video clips on
19 Exhibit D and five the officer testified to on this exhibit
20 disk that he brought, so I am going to go ahead and admit
21 Exhibit D as it is. What it says it is.

22 (Exhibit D admitted in evidence.)

23 THE COURT: Exhibit E, no one has asked for it to be
24 admitted yet.

1 MR. BOGALE: That's correct. I can take that back
2 from you, the disk.

3 THE COURT: It goes to the clerk once it is marked.

4 THE CLERK: Are you going to talk about D still?

5 BY MR. BOGALE:

6 Q Actually I am going to give this to you. Ms. Bays.
7 I am just going to put the files on this disk, make sure they
8 comport with the printout?

9 THE COURT: You are going to play Exhibit 1-b?

10 MR. BOGALE: Not going to play it, just pull up the
11 files and have her look at the files on the disk.

12 THE COURT: Okay.

13 BY MR. BOGALE:

14 Q Okay. Ms. Bays, do you see there on the television
15 screen the video files on the disk admitted as Exhibit 1-b?

16 A I do.

17 Q Can you just look and compare the video files with
18 the printout on Exhibit D and tell me if you find any
19 discrepancies?

20 A Okay.

21 Q Expand the name of the file so you can see the
22 entire file.

23 A Okay.

24 Q Are the same files on the disk that are printed on

1 that printout?

2 A Yes.

3 Q Okay. I am going to show you now what is marked as
4 Exhibit A. I am going to have you do the same thing here and
5 tell me if the files on that printout are included on this
6 disk, okay?

7 A Okay.

8 Q Okay. Have you had a chance to compare them?

9 A I have.

10 Q Are the files on the printout contained on that
11 disk?

12 A Yes.

13 Q Are there additional files on that disk that are not
14 on the printout though?

15 A Yes.

16 Q Now I am going to show you what has been marked and
17 admitted as Exhibit B.

18 THE COURT: I don't think it was admitted.

19 MR. BOGALE: Wasn't it at the last hearing, Your
20 Honor? It is my understanding they were.

21 THE COURT: They were just marked.

22 THE CLERK: For safekeeping.

23 MR. BOGALE: I am sorry about that.

24 THE COURT: Did you want to move they be admitted?

1 MR. BOGALE: I assume there is no objection because
2 the defendant provided them.

3 THE DEFENDANT: It is okay.

4 THE COURT: It is admitted. Do you want A and B?

5 MR. BOGALE: Yes.

6 THE COURT: A and B are admitted. No objection.

7 (Exhibits A and B admitted in evidence.)

8 BY MR. BOGALE:

9 Q Showing you marked and admitted as Exhibit B, can
10 you please again take a look at Exhibit D, the printout, and
11 see if those files on that are included on the disk marked as
12 Exhibit B.

13 A Yes.

14 Q Okay. Again, there are three additional files on
15 Exhibit B that aren't on the printout in D; is that correct?

16 A Correct.

17 Q Do you know if those are the same three files that
18 were additional on Exhibit A?

19 A Yes, they are.

20 Q Thank you. So Exhibit A and Exhibit B appear to
21 contain the exact same files; is that right?

22 A Yes.

23 Q Just to recap: The disk that has been admitted from
24 officer Reed contains the exact same files that are on that

1 printout on D, right?

2 A Yes.

3 Q And the files printed out on D are also contained on
4 Exhibits A and B, right?

5 A Yes.

6 MR. BOGALE: No further questions.

7 THE COURT: Any questions?

8

9 CROSS-EXAMINATION

10 BY THE DEFENDANT:

11 Q Can you tell by looking at either the screen shot or
12 the disks themselves if anything has been removed? Have any
13 files been deleted?

14 A From the screen shot?

15 Q Either the screen shot or the disks themselves? You
16 said you looked at the disks themselves?

17 A Yes.

18 Q Can you tell if any files have been deleted?

19 A By simply looking at the disk, no. Well, I can't.

20 THE DEFENDANT: That's all.

21 MR. BOGALE: No further questions.

22 THE COURT: Okay. Thank you. You can step down.

23 Counsel, do you have another witness?

24 MR. BOGALE: Court's indulgence for just a moment. At

1 this time, Your Honor, the State has no further witnesses.

2 THE COURT: Okay. Before lunch you said that you
3 were going to put on the risk manager from Wal-Mart to say
4 that he burned the new disks that had eight files on it and
5 somehow that was given to the D.A.'s office. You told us you
6 were going to call that witness. What happened?

7 MR. BOGALE: He's here, Your Honor. I thought my
8 presentation here with Ms. Bays covered the fact that we are
9 trying to undercover here which is the disk that officer Reed
10 booked was allegedly never given to the defendant. We just I
11 believe established that the files on Nick Reed's disk were
12 contained on the file that the defendant, himself, already
13 had.

14 THE COURT: Where did the other video clips come
15 from?

16 MR. BOGALE: They came from --

17 THE COURT: You told me something, but you didn't
18 have any testimony. When I asked you about it, you said this
19 is what the Wal-Mart man would say, and I said, well, he
20 didn't testify to that. You said I am going to put him on to
21 testify to it. You told me that the disk he brought today had
22 eight video clips on it.

23 MR. BOGALE: He didn't bring that today.

24 THE COURT: Well, you better call him. That is not

1 what he testified to. I am not sure when he brought it, but
2 that was the argument here, where are all these video clips
3 coming from, when were they prepared, who had control of them.
4 You know this issue here is either you and the State destroyed
5 evidence according to Mr. Schachter, or perhaps you failed to
6 collect evidence. But in the interim, you collected three
7 more video clips from what the officer had to what you
8 produced. So you haven't connected that up at all.

9 MR. BOGALE: We produced the three additional clips
10 to Mr. Schachter.

11 THE COURT: You did? Where did you get them? You
12 haven't connected where you got them, because the officer only
13 produced to you, supposedly, based on his testimony, five
14 video clips. That is what he said he got from Wal-Mart.

15 MR. BOGALE: I understand, Your Honor.

16 THE COURT: So you gave Mr. Schachter eight. You
17 told me verbally where you think the other three came from but
18 haven't put any evidence on as to that.

19 MR. BOGALE: I will recall Mr. Monroy.

20 THE COURT: That is what you had said you wanted to
21 call him for.

22 MR. BOGALE: I understand. Thank you.

23 THE COURT: Sir, you are still under oath. Please
24 retake the stand. Thank you.

1 ALEJANDRO MONROY

2 Called as a witness, having been previously sworn,

3 Took the witness stand and testified as follows:

4
5 REDIRECT EXAMINATION

6 BY MR. BOGALE:

7 Q Welcome back Mr. Monroy. Before you testified that
8 you had burned a disk of the video surveillance at Wal-Mart;
9 is that correct?

10 A Yes.

11 Q Okay. Where did you get those files to burn on that
12 disk?

13 A From the investigation on our computer.

14 Q Okay. Did you ever give them to the State? Did you
15 ever give them to the District Attorney's office?

16 A I did. I handed them to you on the date of the
17 Preliminary Hearing.

18 Q Was that July 1st? Does that sound about right?

19 A Yes.

20 Q So you handed me a disk that you burned on July 1st;
21 is that correct?

22 A I actually burned the disk back in June.

23 Q But you gave me that disk?

24 A Correct, yes.

1 Q The 1st of July. Is that Exhibit C that you have
2 previously viewed?

3 A Correct.

4 Q Just, again, why did you select those eight files
5 that are on that disk?

6 A Just as shots of evidence of him being in the store.

7 Q Okay. Did you ever offer to give them to the Police
8 Department?

9 A No.

10 Q Why not?

11 A I was unaware that they needed the file. I thought
12 that was taken care of separately.

13 THE COURT: I am sorry, I couldn't hear you.

14 THE WITNESS: I thought that was taken care of
15 separately with Anna.

16 BY MR. BOGALE:

17 Q You took it upon yourself to bring a copy to me,
18 personally?

19 A Yes.

20 Q That was on July 1st?

21 A Correct.

22 MR. BOGALE: No further questions, Your Honor.

23 THE COURT: Mr. Schachter.

24 ///

1 RE CROSS-EXAMINATION

2 BY THE DEFENDANT:

3 Q The videos you burned and gave the State,
4 Mr. Bogale, on the 1st, were those already selected by Ms.
5 Young or did you burn new ones?

6 A They are the ones that were already on the computer.
7 They had already been selected.

8 Q So there was nothing new. It should be the same as
9 what was on the ones given to the detective by Ms. Young on
10 the 10th?

11 A I am completely unaware what was given to the
12 detective on the 10th.

13 Q You didn't burn any new. You didn't take any new
14 video of the Wal-Mart security system that wasn't already
15 taken by Ms. Young?

16 MR. BOGALE: Objection, asked and answered, Your
17 Honor.

18 THE COURT: I think it was, but I will let the
19 question stand.

20 THE WITNESS: Yes.

21 THE DEFENDANT: That's all, Your Honor.

22 THE COURT: In your direct this morning you said,
23 maybe it was cross, you said that you did not select video of
24 Mr. Schachter before he picked up the backpack because you did

1 not think that video was relevant.

2 THE WITNESS: Correct.

3 THE COURT: Are you the person who selected the
4 video initially or is Anna Young the person who selected the
5 video, initially?

6 THE WITNESS: It would be Anna.

7 THE COURT: Why did it matter whether you thought it
8 was relevant? Did Anna collect the video of Mr. Schachter and
9 you picked out which things you thought were more relevant?

10 THE WITNESS: No. Basically, I just took what the
11 investigation -- looked at the video that was on the
12 investigation and burned that.

13 THE COURT: Who made the investigation?

14 THE WITNESS: Anna.

15 THE COURT: So why did you say you didn't do it?

16 THE WITNESS: Well, because I could have gone back
17 and looked at more video and selected more to add to the
18 investigation but I didn't.

19 THE COURT: That is what you meant by not relevant?

20 THE WITNESS: Yes.

21 THE COURT: Do my questions cause any questions for
22 you, counsel?

23 MR. BOGALE: Just one question, Your Honor.

24 THE COURT: Go ahead.

1 REDIRECT EXAMINATION

2 BY MR. BOGALE:

3 Q You could have added to the video files that you
4 gave to me; is that correct?

5 A At that time, yes, I could have.

6 Q Is that because Wal-Mart has 24 hour surveillance?

7 A Correct.

8 Q You can just pick and choose what you think is
9 relevant and what is not?

10 A Correct.

11 Q But you also personally observed the defendant in
12 Wal-Mart, right?

13 A Correct.

14 Q So, based on your personal observations and based on
15 your review of the files that Ms. Young had already picked,
16 you didn't think-- you didn't think there needed to be
17 anything else submitted, right?

18 A Correct.

19 MR. BOGALE: No further questions, Your Honor

20 THE COURT: Mr. Schachter.

21
22 RECROSS EXAMINATION

23 BY THE DEFENDANT:

24 Q So you didn't think video tape of the defendant

1 without the backpack was relevant in this case?

2 A I did not, no.

3 THE DEFENDANT: Thank you.

4 THE COURT: Sir, you observed the video this morning
5 that you showed, I think we played it as Exhibit 3.

6 THE WITNESS: Yes.

7 THE CLERK: C.

8 THE COURT: C. Third one. Exhibit C. And when the
9 video was being shown, the different clips, you commented on
10 when you saw Mr. Schachter and then you testified that you saw
11 Mr. Schachter pick up the video -- or pick up the backpack?

12 THE WITNESS: Yes.

13 THE COURT: Did you miss it or did you not show it
14 or is it not on the video clip?

15 THE WITNESS: There is no video shot of that
16 specific area in the store.

17 THE COURT: There is no video of Mr. Schachter
18 actually picking the backpack up?

19 THE WITNESS: Correct.

20 THE COURT: The first shot you had was when the
21 backpack was in the shopping cart?

22 THE WITNESS: Correct.

23 THE COURT: Any other questions?

24 ///

1 REDIRECT EXAMINATION

2 BY MR. BOGALE:

3 Q There is no video of him picking up the backpack,
4 because there is actually no video footage of that?

5 A There is no camera in the area.

6 Q It just isn't video you didn't just not select?

7 A Correct.

8
9 RECROSS-EXAMINATION

10 BY THE DEFENDANT:

11 Q So there is no video that you reviewed without me
12 and the backpack together?

13 A Correct.

14 THE COURT: Anything else?

15 THE DEFENDANT: One more question.

16 BY THE DEFENDANT:

17 Q How many video cameras in the Wal-Mart?

18 A Seventy or so.

19 THE DEFENDANT: Okay. That's it.

20 THE COURT: Before we excuse this witness, there is
21 also a motion with regard to the pictures and the physical
22 evidence. Do you need any testimony from this witness in that
23 regard?

24 MR. BOGALE: Yes, Your Honor.

1 THE COURT: I have got people here for my 1:30.

2 MR. BOGALE: I understand.

3 THE COURT: So we can put it off, but I didn't know
4 if you were ready.

5 MR. BOGALE: I am ready to, but it might take longer
6 than you have.

7 THE COURT: Okay. Now, Mr. Leslie, you have to be
8 gone by 2:00 or 2:30?

9 MR. LESLIE: I should leave by about 2:00 is my
10 guess. I have to be in the south end by 2:30.

11 THE COURT: Well we can keep Mr. Schachter here
12 until 1:45 and see if we are finished with my 1:30's by then
13 or ten to 2:00. That would give us about 20 minutes with this
14 witness.

15 MR. LESLIE: I am at your disposal until about 2:10.

16 THE COURT: I think we should try to continue to get
17 as much as we can get done while we have Mr. Schachter, and
18 the witness is already gone from wherever he wanted to be.
19 He's here with us. In your case, we'll take a short recess
20 and proceed with the other cases.

21 MR. BOGALE: Okay. Thank you Your Honor.

22 THE COURT: You are welcome. You can probably just
23 move things to the edge of the table.

24 (Short recess taken from this matter.)

1 THE COURT: Thank you. Please be seated. Okay.

2 MR. BOGALE: State recalls Mr. Monroy.

3 THE COURT: Mr. Monroy, you are still under oath.
4 Please retake the stand.

5 THE COURT: Go ahead.

6
7 ALEJANDRO MONROY

8 Called as a witness, having been previously sworn,
9 took the witness stand and testified as follows:

10

11 REDIRECT EXAMINATION

12 BY MR. BOGALE:

13 Q Welcome back?

14 A Hello.

15 MR. BOGALE: May I approach the clerk?

16 THE COURT: You may.

17 THE CLERK: Exhibit F marked.

18 (Exhibit F marked for identification.)

19 MR. BOGALE: May I approach the witness?

20 THE COURT: You may.

21 BY MR. BOGALE:

22 Q Mr. Monroy, I am approaching you with what has been
23 marked as Exhibit F in this case. Do you recognize that?

24 A Yes, I do.

1 Q What is it?

2 A Those are the items recovered from Mr. Schachter.

3 Q Recovered meaning the items --

4 A He attempted to steal, yes.

5 Q When you had your confrontation with Mr. Schachter,
6 where were these items?

7 A They were on his person.

8 Q Were they in a backpack or in his hand?

9 A The backpack was over his shoulder.

10 Q And those items were in the backpack?

11 A Correct.

12 Q Do you know where that photo was taken?

13 A That was taken in our security office.

14 Q Were you present when that photo was taken?

15 A Yes, I was.

16 Q Did you take the photograph?

17 A I did.

18 MR. BOGALE: Your Honor, I move to admit Exhibit F.

19 THE COURT: Any objection?

20 THE DEFENDANT: What time was the picture taken?

21 MR. BOGALE: Objection, relevance. He said he was
22 present when the photo was taken.

23 THE COURT: I will allow some voir dire.

24 THE WITNESS: Approximately 1:00 o'clock.

1 THE COURT: Anything else?

2 THE DEFENDANT: No, Your Honor.

3 THE COURT: Exhibit F is admitted. Counsel will you
4 return that exhibit to the Clerk?

5 (Exhibit F admitted in evidence.)

6 MR. BOGALE: Yes. I will take that back from you.

7 BY MR. BOGALE:

8 Q One more clarifying question. From what we talked
9 about earlier today as to the videos, did you ever modify,
10 delete, destroy any video files in this case?

11 A No, I did not.

12 Q You didn't destroy any files in this case?

13 MR. LESLIE: Asked and answered.

14 THE WITNESS: I did not.

15 MR. BOGALE: No further questions.

16 THE COURT: Is standby counsel getting anxious?

17 MR. LESLIE: After three hours, standby counsel
18 feels the need to intervene.

19 THE COURT: Mr. Schachter, do you still want to
20 represent yourself or Mr. Leslie?

21 THE DEFENDANT: As much as I appreciate that, I
22 still wish to represent myself.

23 THE COURT: All right. Cross-examination.

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BY THE DEFENDANT:

Q Just to save the Court time to run back and forth with all the videos, can you explain why the video that officer Reed put in evidence has less video files than the video -- than the disks I received and that you gave to Mr. Bogale on July 1st at the Preliminary Hearing?

MR. BOGALE: Objection. Calls for speculation.

THE COURT: Overruled. He asked if he could explain. We'll see if it is speculation.

THE WITNESS: I couldn't tell you.

BY THE DEFENDANT:

Q But you testified earlier that you didn't make any new -- you didn't pull any new video off the store hard drive when you created the disk that you gave to Mr. Bogale before the Preliminary Hearing, correct?

A This is correct.

Q Was there any other videos that you saw that I was in the video but not that you felt was not relevant to the case? Do you know what I mean?

A No.

Q When you reviewed the video of the date of the incident?

A Yes.

1 Q Did you -- Was there any other video of me in the
2 store, but that you felt wasn't relevant to the case?

3 A No.

4 Q So every bit of video with me has been given to the
5 State; is that correct?

6 A Correct.

7 THE DEFENDANT: That's all Your Honor.

8 THE COURT: Okay. Are you talking about every bit
9 of video that is on the saved computer file?

10 THE WITNESS: Yes.

11 THE COURT: You are not talking about every bit of
12 video that might have been taken in the store?

13 THE WITNESS: Absolutely not, no.

14 THE COURT: Did you tell us it was Ms. Young who
15 copied it off the store video cameras on to the computer?

16 THE WITNESS: Correct.

17 THE COURT: That is what you reviewed?

18 THE WITNESS: Yes.

19 THE COURT: And do I understand correctly that
20 everything on the computer that you saved, data, Ms. Young
21 saved it on, everything that included Mr. Schachter's image
22 was provided to the State?

23 THE WITNESS: Yes, it was.

24 THE COURT: Based on my questions, any other

1 questions?

2 MR. BOGALE: Nothing from the State.

3 THE DEFENDANT: No, Your Honor.

4 THE COURT: Thank you. You may step down.

5 (Witness excused.)

6 THE COURT: Counsel, do you have any other pictures
7 or is this the only picture you have, Exhibit F?

8 MR. BOGALE: That is the only picture that I have.

9 THE COURT: Okay. Argument? Do you have any other
10 evidence? Do you have any other witnesses for another time?
11 What do you want to do?

12 MR. BOGALE: I don't have any other evidence, Your
13 Honor. I was considering calling Mr. Reed, but I think we
14 have covered it so I can start argument now, or do it after
15 your next hearing. It is up to you.

16 THE COURT: Why don't we go ahead and do that and
17 get your thoughts together before the arguments.

18 MR. BOGALE: Okay.

19 THE COURT: I think everyone is here for my other
20 case. You can just push your things off to the side.

21 All right. This is the time set for argument on the
22 motions, several motions that Mr. Schachter has filed, and
23 some of them have already been ruled on at the last hearing
24 but some have not. So, Mr. Schachter, do you want to argue

1 the ones that have not been decided?

2 THE DEFENDANT: Sure. I know last evening we kind of
3 rolled the two Motions to Dismiss together. Based on the
4 evidence that we heard today, I think just to retouch on the
5 prejudicial delay because I was not able to get an
6 investigator to the Wal-Mart in the 60 days the video they
7 said was erased, I would resubmit the motion on its face for
8 that.

9 THE COURT: Okay.

10 THE DEFENDANT: As to the loss, they failed to keep
11 the item that they allege I stole in violation of NRS 205.295,
12 then they selected video they say is all the video of me in
13 the store at the time. Obviously, it can't be all the video
14 of me in the store. And now they are saying that video is
15 gone. I don't have any way else of showing that I walked into
16 that store with that merchandise. There is no evidence of me
17 stealing anything. The detective, himself, said he
18 concentrated on the physical altercation at the end of the
19 incident. I am not even disputing that. What I am disputing
20 is was there ever a theft. My whole criminal history is theft
21 related. It is not robbery related. For a ROP officer not to
22 look at the evidence to the theft, to disregard all that
23 evidence and only concentrate on the robbery part, it doesn't
24 make any sense. Why wouldn't he ask for some kind of

1 evidence, video evidence of the theft? There is no evidence
2 in that video of me stealing anything. That is where the case
3 turns. It turns on the theft. There was a robbery one way or
4 the other at the end of the incident. Either they robbed me
5 or I robbed them. That is the incident. There is no evidence
6 of a theft, because I never stole any property. So as to
7 those two, I can't express it any better than that.

8 THE COURT: Okay.

9 THE DEFENDANT: I don't know if you want to hear on
10 the Preliminary.

11 THE COURT: On the Preliminary Hearing, frankly, I
12 told you that I would grant you a new Preliminary Hearing but
13 you told me you didn't want to do that.

14 THE DEFENDANT: Correct.

15 THE COURT: So as far as I am concerned, that issue
16 is moot because you failed to accept the remedy that was
17 offered by the Court. I can't produce something that didn't
18 exist. At least that is what I thought I was doing. You
19 still agree you do not want that Prelim, correct?

20 THE DEFENDANT: Correct, Your Honor.

21 THE COURT: So based upon their being no showing of
22 purposeful activity on the part of the State, it clearly was
23 an accident that the tape recorder didn't work, and the lack
24 of any showing of prejudice that you didn't have that

1 transcript for the Prelim at this stage of the proceedings,
2 and the fact you are refusing to have a Prelim at this stage
3 of the proceedings, you don't want the remedy, I am going to
4 deny the request for failure to have the transcript. Anything
5 else?

6 THE DEFENDANT: No, Your Honor. I would submit, like
7 I said, I would submit everything that you heard today and
8 what you didn't hear. Still no explanation as to why the
9 video that went into evidence, was booked into evidence, had
10 less than the one we received. How the extra videos came
11 about. They certainly did not explain any of that. I don't
12 know where it came from.

13 THE COURT: Okay. Mr. Bogale.

14 MR. BOGALE: Thank you. Your Honor. Before I
15 respond, would you mind if we go through his motions and say
16 which ones are before the Court and which ones are not?

17 THE COURT: No. We have the Motion to Dismiss the
18 case on the ground of lost or destroyed material, exculpatory
19 evidence. We have the Motion to Advise Witnesses for the
20 State of the Privilege Against Self-Incrimination. I haven't
21 ruled on that, but I can rule on that without any argument
22 from you depending on what you want to do. We have the Motion
23 for Preliminary Hearing Transcript which I have just indicated
24 what the ruling is. We have the Motion to Compel the State to

1 provide exculpatory material, Brady, that is in its
2 possession. I don't think there is really any objection to any
3 Brady material being provided to the defendant. Maybe there
4 is discussion about what is Brady, but the Court has no
5 objection, and I don't think you would have an objection to an
6 order saying that you have to provide Brady material to the
7 defendant. So that would be granted. Motion and Order to
8 Obtain Material and Exculpatory Video Recording. That is what
9 we have been talking about today. Motion for the Production of
10 the replacement or substitute lost or stolen material. And
11 Mr. Schachter said that was the backpack that has not been
12 provided. And that is also his argument with regard to the
13 exculpatory evidence, because he says the backpack was in a
14 condition that proved he had modified it and it was his
15 property. And then there is the Motion in Limine with regard
16 to the surveillance video evidence and demand for legal
17 material and legal supplies which has already been ruled on,
18 and he's been provided that previously. And the Motion to
19 Dismiss the case for prejudicial delay causing loss of
20 exculpatory material which Mr. Schachter just argued was his
21 lack of being able to hire an investigator timely.

22 Then you have a Motion, a Notice of the State's
23 intent to impeach the defendant on credibility with prior
24 convictions. I ordered those prior convictions needed to be

1 provided the Court. I haven't seen them yet.

2 MR. BOGALE: They are here today.

3 THE COURT: So we need to do that. And there is a
4 Motion in Limine regarding the defendant's examination of
5 witnesses. We went over that last time and it was granted,
6 and I admonished the defendant. And there is a Motion in
7 Limine regarding bad acts with regard to any of the State's
8 witnesses, and that was his argument that they had arrested
9 him before and was targeting him, and I granted the motion and
10 said he could not ask questions in that regard in front of the
11 jury without a hearing outside the presence of the jury. At
12 least that is what I think I said. If I didn't, I'm saying it
13 now. So that is the list of what we have.

14 MR. BOGALE: Thank you, Your Honor.

15 THE COURT: Am I missing anything, Mr. Schachter?

16 THE DEFENDANT: No. I think you covered it all.

17 THE COURT: Okay. Basically, he's arguing that you
18 didn't keep the material that was allegedly stolen and so you
19 should have to produce it. And he's arguing that the
20 backpack, had you kept it, would be exculpatory. Since it is
21 lost now and gone, he should have the case dismissed. And
22 he's arguing that the video tape that was destroyed by
23 Wal-Mart would have been exculpatory, therefore, the case
24 should be dismissed.

1 MR. BOGALE: Okay. Start with the backpack, Your
2 Honor.

3 THE COURT: Okay.

4 MR. BOGALE: The testimony we heard today from
5 Mr. Monroy was that he personally observed the defendant. Now
6 I know we are getting sort of caught up here with videos and
7 stuff like that, but Mr. Monroy, as an asset protection
8 officer, personally with his own eyes surveilled the defendant
9 walking throughout the store. And he testified today that
10 there was a time when the defendant wasn't holding a backpack.
11 And he personally observed the defendant select the backpack
12 the defendant carried throughout his time at Wal-Mart and
13 tried to walk out without paying. He saw him grab it. So
14 this whole argument is he came in with a backpack and it was
15 used, and if we just could provide it, it would show he had
16 used it or bought it previously is simply controverted by the
17 only testimony we have here today which is he selected the
18 backpack, he walked out of Wal-Mart without paying for it. So
19 that is what we have.

20 THE COURT: The argument, though, is a failure to
21 collect evidence or failure to preserve evidence argument. It
22 isn't about, and I agree Mr. Schachter's argument didn't
23 really make sense when he said there is no evidence. But
24 there is evidence. There is clearly probable cause here. But

1 the question is what about the fact that this evidence was not
2 preserved. And I think that is a legal issue.

3 MR. BOGALE: So this evidence was never retained by
4 the cops.

5 THE COURT: Correct.

6 MR. BOGALE: That never happened. So it wasn't like
7 the police booked the property and then negligently lost it or
8 something. It is not like they booked the property and
9 destroyed it. It was never booked into evidence. And so to
10 hold the State accountable for that would require, I think the
11 upshot would require a D.A. to be present at every
12 investigation of thefts to make sure that the police are
13 securing all the evidence that the defendant or a suspected
14 individual is suspected of taking. I think that is untenable,
15 Your Honor. We are not keeping tabs on an investigation.

16 THE COURT: Why would you have to do that? This is
17 a robbery case.

18 MR. BOGALE: If the State is being-- If the argument
19 is that the State should be sanctioned in some respect --

20 THE COURT: Not you.

21 MR. BOGALE: -- because the police --

22 THE COURT: The police. That is his argument, the
23 police officer failed to secure the evidence as he should have
24 in a robbery case. Why do you have to be there?

1 MR. BOGALE: Well, I am the party here. The State's
2 the party here.

3 THE COURT: But th D.A. doesn't have to be there for
4 the cops to do the right thing. And they book evidence all
5 the time without D.A.'s being present.

6 MR. BOGALE: Right. So what is the proper remedy I
7 guess is the question. Is the proper remedy to dismiss the
8 case because they didn't keep the backpack that we have a
9 picture of? Is it the right remedy?

10 THE COURT: Well, do you have any cases? This is an
11 interesting argument that is being made, and it is a real
12 argument about the obligation of the State. And the State
13 includes the police officer and the District Attorney's Office
14 who prosecute the case. That is the responsibility that is
15 the State's.

16 MR. BOGALE: I would direct the Court to Bass-Davis
17 122 Nev. 442, a 2006 case from the Nevada Supreme Court. It
18 involves suppression and spoliation of evidence. And the
19 issue in the case was whether, because certain video evidence
20 was suppressed or destroyed, what the remedy is. And the
21 Plaintiff asked for a jury instruction that explained there is
22 a permissible inference that the destroyed evidence would be
23 adverse when applied, sorry, would be adverse, and that a
24 rebuttable presumption for applying destruction of evidence is

1 appropriate. I think, if anything, a jury instruction that
2 says you may, a permissible inference may arise when there is
3 evidence that evidence was lost or destroyed or something like
4 that. That would be the proper remedy if he was making a
5 credible allegation here. I don't believe he is. We have, we
6 have a picture of the bag, a picture of the stuff he took from
7 Wal-Mart. From my understanding, the items were restocked
8 pursuant to company policy. They weren't retained by law
9 enforcement. They were never secured by law enforcement as
10 evidence, so they were restocked and put on the shelf and
11 sold. So if that is spoliation --

12 THE COURT: What is the picture? What exhibit?

13 THE CLERK: Exhibit F.

14 THE COURT: So is it Exhibit F what you are talking
15 about?

16 MR. BOGALE: Yes, Your Honor.

17 THE COURT: That is the only picture you have,
18 right?

19 MR. BOGALE: Yes, Your Honor.

20 THE COURT: Okay. So go ahead. I didn't mean to
21 interrupt you.

22 MR. BOGALE: If a company policy to restock items
23 stolen but not tampered or opened is spoliation of evidence, I
24 think that sets a dangerous precedent, because a lot of stores

1 have that policy. So they are going to be tagged with
2 spoliation of evidence in cases where people steal from them
3 and they restock the item. But if Your Honor is inclined to
4 characterize that as spoliation of evidence, I think a proper
5 remedy would be a jury instruction to that effect.

6 In terms of the surveillance video. The testimony we
7 have is that there is no video of the defendant entering the
8 store with a backpack.

9 THE COURT: That was saved on the computer that the
10 store kept.

11 MR. BOGALE: Right.

12 THE COURT: Remember, we have a bifurcated process.

13 MR. BOGALE: We don't have that video.

14 THE COURT: Yes. As I understand, there is a 24
15 hour 7 days a week video. Someone manually, we think Ms.
16 Young, went in and pulled certain excerpts of that 24 hour 7
17 day a week video and placed it on the Wal-Mart computer. When
18 it was on the Wal-Mart computer, Mr. Monroy was unable to find
19 any other photographs.

20 MR. BOGALE: That's correct.

21 THE COURT: So there is that bifurcation.

22 MR. BOGALE: Right. Bottom line is we don't have it
23 and we couldn't get it. Well, we both had equal access to it.
24 The State I guess could have gotten it, so could the

1 defendant.

2 THE COURT: That is the defendant's argument, he's
3 incarcerated and he does not have an investigator. He doesn't
4 have counsel. He has no investigator. How could he get it?

5 MR. BOGALE: I don't know. Why is it the State's
6 problem that he doesn't have an investigator if he wants to
7 represent himself? It is a principle of Faretta versus
8 California that a defendant is not given special treatment.
9 He's expected to subpoena materials, subpoena evidence, get an
10 investigator if he needs to to present his own defense. So if
11 we are going to give him a crutch and say he was in jail,
12 couldn't get a private investigator, that violates the
13 principles of that case. It is not the State's fault he's
14 incarcerated. We charged him with a crime, but we shouldn't
15 be sanctioned because there was a delay in him getting this
16 stuff. Like if the cop had it, if RPD had this, that is an arm
17 of the State. If we didn't produce it, that is a Brady
18 violation. But a third party holding video that is equally
19 accessible to the State and the defense, that doesn't qualify
20 as Brady material.

21 THE COURT: Is that failure to collect?

22 MR. BOGALE: It is failure to collect on both sides.

23 THE COURT: Does the State have an obligation to
24 collect?

1 MR. BOGALE: No, the State does not have an
2 obligation.

3 THE COURT: Do you have a case that says that?

4 MR. BOGALE: Yes, I do, State versus Huggler, a 2012
5 case 275 P.3d 91. It quotes State versus -- I will just read
6 it. "Brady and its progeny require a prosecutor to disclose
7 evidence favorable to the defendant. To prove a Brady
8 violation, you must make three showings the evidence is
9 favorable to the accused because it is exculpatory. One,
10 impeachment. Two, the State possessed or withheld the evidence
11 either intentionally or inadvertently. Three, prejudice
12 insured that the evidence was material. I would focus on the
13 second prong there. The State possessed and withheld
14 evidence. The State never possessed this evidence. So we
15 can't --

16 THE COURT: Technically if you're a detective, the
17 evidence was not possessing.

18 MR. BOGALE: What did he view? He viewed the files
19 that were in the computer. The State isn't required, the State
20 isn't held responsible for actions of a third party. If
21 Wal-Mart, whatever Wal-Mart decided to do with the video, they
22 cut it up and law enforcement comes in and gets what they
23 have. That is what they get. They get what they get from
24 Wal-Mart. They get what they get from 7-Eleven. The State

1 isn't required to keep tabs on what Wal-Mart's surveillance
2 video is keeping. The State isn't required. That is a third
3 party. In State versus Nett, 119 Nev. 509, a 2003 case, the
4 State attorney is charged with constructive knowledge and
5 possession of evidence withheld by other state agents such as
6 law enforcement officers. And the Court referred to that
7 earlier. Nowhere in here or nowhere in that case does it
8 refer to evidence held by third parties like Wal-Mart. It
9 makes no reference to that. So whatever Wal-Mart did with the
10 video should have no bearing on the State's obligation under
11 Brady. What the police got they gave to the State. What the
12 State got, it gave to the defendant. That is what happened in
13 this case.

14 Additionally, what Wal-Mart itself provided to the
15 State, the State gave to the defendant. The State is not
16 withholding anything that it possesses, and the State can't
17 possess anything that doesn't exist. So that video that he is
18 talking about doesn't exist. I mean it is his motion. It is
19 his burden to show it was destroyed.

20 THE COURT: Your witness testified it was destroyed.

21 MR. BOGALE: Intentionally or inadvertently by the
22 State. The State didn't do that. Wal-Mart did that. His
23 motion should be denied on that count.

24 So I think that covers Brady and the surveillance

1 video and exculpatory evidence. I believe they are all kind
2 of mushed together.

3 THE COURT: Counsel, I don't know if there is a
4 digital version of Exhibit F. Is there a digital picture then
5 you printed out?

6 MR. BOGALE: That was printed from a digital file,
7 yes, Your Honor.

8 THE COURT: Okay. It is pretty hard to read it or
9 see what the parameters of the backpack were. I don't know,
10 is it better on digital?

11 MR. BOGALE: I guess you could zoom in on a computer
12 a little bit.

13 THE COURT: All right. Go ahead.

14 MR. BOGALE: I believe that covers exculpatory
15 evidence, obtaining video, exculpatory video and the
16 surveillance video. And I think I briefly addressed the
17 prejudice of delay. No fault of the State the defendant is a
18 self-representing individual. Under Faretta, he's cast with
19 certain obligations the same as an attorney is. If there is a
20 delay in getting an investigator, that is, to be frank, not
21 the State's problem. The State shouldn't be sanctioned.

22 THE COURT: One of the arguments you missed last
23 month or whenever you were here together before and you
24 weren't here, was the argument with regard to the record in

1 Justice Court. It is my understanding that the defendant was
2 offered counsel when he was arraigned and refused counsel, and
3 then received a Faretta canvass from a Justice of the Peace
4 who granted his right to represent himself, but there is no
5 record of that. There is no record of the Faretta canvass, and
6 the defendant argued it was an ineffective Faretta canvass.
7 Since there was no record, he couldn't contest it. That is
8 why he didn't have an investigator. Obviously, he went forward
9 and I did a canvass and canvassed him and found that he still
10 wanted to represent himself. So you certainly can argue to
11 that. But that was his argument perhaps you missed.

12 MR. BOGALE: I was present at the Faretta canvass,
13 Your Honor. For what it is worth, I believe it was thorough
14 and appropriate. I witnessed your Faretta canvass of him as
15 well. It was similar. It was Judge Lynch. I believe it
16 happened before the Preliminary Hearing. It was the same
17 hearing that had static. That is why there is no record of
18 it. So we don't have any objective evidence to support what I
19 am saying or he's saying, because we don't have a transcript.
20 But I can represent to the Court that I had a certain check
21 list after reading the case and reading Nevada Supreme Court
22 cases interpreting it, and I believe she knocked off all the
23 marks on the canvass check list. So I believe it was thorough
24 and appropriate. He didn't object to it at the time either.

1 He didn't ask her -- He didn't say it was inappropriate. So I
2 am not saying he waived it, but that is some kind of
3 acquiescence to it being an appropriate canvass.

4 THE COURT: What is the retention at Wal-Mart of the
5 videos?

6 MR. BOGALE: Sixty days.

7 MR. BOGALE: I believe Mr. Monroy testified 60 days.
8 As to the witnesses perjuring themselves and being advised of
9 their right of self-incrimination, I will submit that one on
10 the briefs, Your Honor. I refer to the Fifth Amendment. I
11 think that, again, advises any prospective witness of their
12 right against self-incrimination.

13 Just to sum up, Your Honor, I think the defendant is
14 just making something out of nothing here. He's literally
15 making something out of nothing. There is no video that the
16 State had or that law enforcement had that shows him walking
17 in with the backpack, that backpack. There is no evidence that
18 the State possessed and intentionally or inadvertently
19 withheld that shows that that was the defendant's backpack.
20 There is no evidence of that. It is his burden to meet that,
21 and he hasn't met that burden. The evidence we do have is
22 that Mr. Monroy personally followed him in the store and saw
23 him select that backpack inside Wal-Mart, place it in a cart,
24 walk around a little bit, put the bag on his shoulder, pay for

1 some other items and then walk out with the backpack and the
2 items in Exhibit F inside the backpack that he didn't pay for.
3 That is the evidence that we have. So he has not met his
4 burden, and his motion should be denied. Thank you, Your
5 Honor.

6 THE COURT: Anything further, Mr. Schachter?

7 THE DEFENDANT: I was just asking Mr. Leslie, I asked
8 the investigator to get more video from other sources besides
9 Wal-Mart because I took the bus to the Wal-Mart that day. So
10 the investigator said the video from on the bus wasn't
11 available, but there may be video at the bus station, itself.
12 So there is a chance at least. I haven't been able to talk to
13 the investigator. There is a possibility of other evidence of
14 me with the backpack just prior to getting on the bus and
15 going to the store. And the bus ticket is in my property at
16 the jail, so there is further evidence of that.

17 THE COURT: When did you first ask for the
18 investigator to get the Wal-Mart video?

19 THE DEFENDANT: I gave it to Mr. Leslie on the 31st
20 when we set the trial date. I was originally supposed to be
21 arraigned in Department 10 because you weren't here. At that
22 time, I notified Judge Sattler there was a time sensitive
23 video. He said one more week is not going to matter, and we
24 came on the 24th.

1 THE COURT: Of July.

2 THE DEFENDANT? Of July, yes. I gave the ex parte
3 motion for the investigator. In there it also talks about the
4 time sensitive video. And then you said you needed time to
5 research the investigative part.

6 THE COURT: Well, it was Mr. Leslie didn't know
7 whether or not he had provided an investigator as standby
8 counsel. I said I would investigate it further. But
9 Mr. Leslie was going to notify the Court if he could not
10 provide one.

11 THE DEFENDANT: On the 31st when we came back to set
12 the trial date is when I gave him the paperwork for the
13 investigator.

14 MR. LESLIE: Court's indulgence.

15 THE COURT: Okay.

16 MR. LESLIE: I am looking at some documents, Your
17 Honor.

18 THE COURT: Okay. That is fine, Mr. Leslie.

19 THE DEFENDANT: I don't want to keep --

20 MR. LESLIE: Your Honor, he's correct. Looking at my
21 records, a memorandum dated 7-31, I put in there: A two page
22 handwritten request for investigation was provided by client.
23 Jim will do investigative request to get investigator on
24 assignment. Have an investigative request, copy of one that I

1 made with his two page request attached as a check list for
2 myself." We don't, we don't have a date prepared, so I had
3 notated it with the date of the 7-31. So I am deducing I came
4 back from that 7-31 hearing, the memo for which I would be
5 doing that and documented it that date. And attached is his
6 two page list of requests, and we followed up after that date.
7 Now realistically it could be anywhere from that same date the
8 7-31 date to within a couple of days or so before the
9 investigator would actually see it. If you can imagine, he
10 has an in-box as well. He might be out, any number of things.
11 So sometime within that, you know, number of days after the
12 31st is when we would have begun our investigation in response
13 to his request.

14 And then with regard to we subpoenaed everything he
15 asked for. And my investigator's report with regard to the
16 RTC bus service, they don't keep that. So my notations were
17 "sub. Not kept."

18 THE COURT: What about the subpoena for Wal-Mart?

19 MR. LESLIE: We issued subpoenas on Wal-Mart. We
20 were told, and this is a little anecdotal, literally this
21 morning as I was coming in from the parking garage, I ran into
22 my investigator. I said give me a rundown, and he told me
23 that they were unable to recover the video that he had
24 requested which includes internal cameras that would have been

1 focused on the entrance and the exists.

2 THE COURT: But you don't know when it was
3 requested?

4 MR. LESLIE: Your Honor, I would have to dig down on
5 that. And I have got it. I would just have to double check
6 with my investigator. He said that he had been in contact with
7 Wal-Mart and was told of the 60-day limitation as well. I
8 think we just missed that by the time you go through Justice
9 Court and the Faretta canvass and then him coming up before
10 you and you appointing us as standby. That is where we start.
11 So by the time of the end of July, July 31st, we are on the
12 order of about seven weeks past the occurrence date.

13 THE COURT: June 9th.

14 MR. LESLIE: He did tell me that Wal-Mart advised
15 they had expanded that 60-day limitation and pushed it out to
16 90 or more days. But that we missed that expansion.

17 THE COURT: Well, June to July is 30-days. July to
18 August is 60 days. Ninety days would be September 9th. Just a
19 couple of days.

20 MR. LESLIE: The 60 days was very recent. They were
21 unable to scoop our request into that new policy as I
22 understand it. So the 60 days applied at the time we served
23 our subpoenas. They said sorry, we don't have it.

24 THE COURT: Did you have anything else?

1 THE DEFENDANT: Just as to, quickly as to the
2 Faretta canvass, part of the new argument based on what I
3 heard today, I wasn't given full discovery at the Prelim, so
4 that also --

5 THE COURT: You don't have a right.

6 THE DEFENDANT: That would also affect my Faretta
7 canvass. Judge Lynch ordered, as you did, to give me all the
8 discovery. I never got the disk. I never got Mr. Monroy's
9 statement or the original probable cause in the discovery
10 Mr. Leslie gave me at Preliminary.

11 MR. BOGALE: Your Honor, if I could make a comment
12 quickly. He had an attorney before the Faretta canvass. We
13 provided discovery to the Public Defender, all the discovery
14 we had to the Public Defender's office. I believe that
15 included the video. And so I think it has more to do with
16 communication between the Public Defender's Office and the
17 defendant than it does with the State and the defendant.

18 MR. LESLIE: And, Your Honor, on that, as I was
19 telling Mr. Bogale during one of the breaks, let's see if I
20 can find it. So it was the Preliminary Hearing on 7-1?

21 THE DEFENDANT: Yes.

22 MR. LESLIE: As we approached the Preliminary
23 Hearing, we had had a MMC or two. I can't remember how many.
24 Mr. Schachter evinced his desire to not engage in settlement.

1 We went forward. As we approached the July Preliminary
2 Hearing date, I prepared the redacted discovery myself because
3 I wanted to shorten any delays between me going through staff
4 and having them do it on the computer. So I did it myself.
5 And because we were getting close to the Preliminary Hearing
6 date, I prepared a memo to file dated the first for the
7 Preliminary Hearing date, itself, saying: On above date I
8 provided redacted copy of attached materials to client. So I
9 provided him documents. I remember doing that. What I do not
10 have recollection of is handing him any kind of disk or having
11 a disk to hand him. As I told Mr. Bogale, if I really wanted
12 to feel highly confident about that answer, I would have to go
13 back and look at Justice Web and look at the production
14 e-mails and things like that. I would have recollected giving
15 him a disk, and I do remember and I have a memo indicating I
16 gave him written documents. So I'm not 100 percent disputing
17 Mr. Bogale. What I am saying is I can't line up and agree him
18 with 100 percent today we had video turned over to
19 Mr. Schachter on that date.

20 THE COURT: Okay. Okay. Anything else?

21 THE DEFENDANT: It wasn't the video, Your Honor, it
22 was the witness's statement and the original probable cause
23 and arrest declaration. None of that was handed to me on the
24 Preliminary Hearing, so it wasn't just the video.

1 THE COURT: Okay. Because of the lateness of the
2 hour and what we are doing, I am going to take everything
3 under submission. I will notify you of my decision.

4 You are set for trial a week after Monday, so about
5 7, 8, 9 days from now. So I will try to get the decision to
6 you as soon as I possibly can. I think you may need to mark
7 exhibits with the clerk. Do you have a date and time set?
8 Has everything been marked today that you are going to use?

9 MR. BOGALE: Not everything, Your Honor.

10 THE COURT: And your prior convictions --

11 MR. BOGALE: I have those, and I have Jury
12 Instructions as well that you ordered us to provide.

13 THE COURT: Why don't you provide those to the --

14 THE CLERK: The Jury Instructions are to be provided
15 to the defendant.

16 THE DEFENDANT: Your Honor --

17 THE COURT: Go ahead and have those marked.

18 MR. BOGALE: The certified copies of conviction?

19 THE COURT: Certified copies. We'll mark them
20 numerically. I don't know if they will end up being used.
21 Mr. Leslie, you had requested we not do that the last time.
22 We postponed the discussion until today because you wanted an
23 opportunity to look those over. You also said that you wanted
24 to talk to Mr. Schachter about some strategy, about the

1 argument with regard to prior convictions.

2 MR. LESLIE: What I had hoped, what I counseled him
3 to do was to have the State identify exactly which of his
4 priors they were going to try to use for impeachment. That is
5 what I would like to look at. I have got a lot of priors in
6 the file. He's also charged with habitual. They are going
7 after that. I don't know which ones specifically they want to
8 try to use against him for impeachment. I would like to see
9 those before Mr. Schachter will respond, just because I
10 didn't --

11 THE COURT: Are the ones you handed to the clerk the
12 ones you anticipated using for impeachment or is there no
13 distinction?

14 MR. BOGALE: There is really no distinction.

15 THE COURT: They are all within ten years?

16 MR. BOGALE: Not all of them, sorry. Sorry, Your
17 Honor.

18 THE DEFENDANT: Your Honor.

19 THE COURT: No. No. Nothing for a second. It is
20 5:25. Let's try to get those marked so we can just have that
21 done.

22 MR. LESLIE: While Mr. Bogale is looking at the
23 documents, for purpose of standby counsel, I know the Court
24 Reporter is busy, would we be able to have a transcript of

1 these proceedings by the end of next week, because there was
2 evidentiary matters undertaken that might be the subject of
3 cross or impeachment.

4 THE COURT: But the evidentiary evidence we are
5 talking about, the police officer and Mr. Monroy, I believe
6 that the Court Reporter will be able to do that.

7 MR. LESLIE: So I can give it to Mr. Hylin.

8 MR. BOGALE: I have a copy of the Jury Instructions,
9 so should I provide them now? I have a copy for the Court as
10 well, if you would like them.

11 THE COURT: Leave those with the clerk.

12 MR. LESLIE: Is there a copy for standby counsel?

13 MR. BOGALE: Yeah, you can have mine.

14 THE COURT: Why don't you go ahead and keep the
15 extra copy for now and make a copy for the Court. We'll give
16 Mr. Leslie the copy. You can make another copy and drop it off
17 with the clerk tomorrow.

18 MR. LESLIE: Thank you.

19 THE CLERK: Exhibits 2, 3, 4 and 5 marked.

20 (Exhibits 2, 3, 4 and 5 marked for identification.)

21 THE COURT: Have you provided a copy of these
22 exhibits to the defendant?

23 MR. BOGALE: No, I have not. Yes, I have. I
24 discovered those electronically.

1 THE COURT: Okay. So Exhibit 2 is from CR09-1729.
2 Exhibit 3 in this District -- Exhibit 3 is the Ninth Judicial
3 District for the State of Nevada and it involves a case from
4 2006, 06CR00052 DCF CAP before Judge Gamble. Exhibit 4 is
5 from California case number E9171929 from 1992. Exhibit 5 is
6 from Suffex County, New York and it is Indictment number
7 1024-86 from a charge from January 8, 1986. So those are the
8 five exhibits that the Court has.

9 Mr. Bogale, which ones did you want to use for
10 impeachment? Your motion was that you wanted permission to or
11 notice to the defendant you were going to impeach with prior
12 convictions.

13 MR. BOGALE: The notice was the State's intention to
14 do so if he decided to testify.

15 THE COURT: Which exhibits?

16 MR. BOGALE: The first two. I guess Exhibits 2 and
17 3. The one out of this Court this department and the other
18 one out of the Ninth Judicial District.

19 THE COURT: Okay. Mr. Schachter, do you have any
20 questions?

21 THE DEFENDANT: No, Your Honor.

22 THE COURT: The Court notes that Exhibits 2 and 3
23 are certified copies of prior convictions relating to
24 defendant. Is there any objection?

1 THE DEFENDANT: I will object to both of them.

2 THE COURT: I am sorry?

3 THE DEFENDANT: I would object to both of them.

4 THE COURT: On what grounds?

5 THE DEFENDANT: Prejudicial.

6 THE COURT: Are you objecting because you don't want
7 to be impeached or objecting because you think the certified
8 copy isn't adequate? What is the basis of the objection? Do
9 you think the statute is wrong, you shouldn't be impeached
10 with prior convictions? Tell me what it is so I can rule on
11 it.

12 THE DEFENDANT: Could I have one second?

13 THE COURT: Yes, you may.

14 MR. LESLIE: Your Honor, could we look at those two
15 exhibits for a moment?

16 THE COURT: Sure. You may approach, Mr. Leslie.

17 MR. LESLIE: Your Honor, Mr. Schachter and I are
18 conversing about these two prior felonies.

19 THE COURT: Okay.

20 MR. LESLIE: We were just talking about it. I sensed
21 something on his part, so I said do you want me to argue this
22 particular point and he said yes. We can do it or wait,
23 whatever the Court wants to do. I can talk to him and repeat
24 it a couple of times to let it sink in and he can parrot it

1 over to you. I think as standby counsel there is an active
2 part of it as well. He's asking me questions and saying do
3 you have some ground I can use to argue on these. I don't mind
4 arguing that but still having him represent himself. I don't
5 know how you want to do this, Judge. That is why I wanted to
6 know which ones are they going to use. There are a couple of
7 arguments under Gibbons is the only case that comes to mind
8 that talk about redacting. He's on trial for a theft related
9 crime. The 2009 conviction in CR09-729 is for grand larceny.
10 I think this is argument to be made if he does take the stand,
11 if he is subject to impeachment. This as a prior felony, it
12 should be redacted to simply say a felony. Additionally, the
13 State proffered a thick packet of documents as Exhibit to. The
14 only thing, assuming there is traverse by the defendant about
15 the conviction, if he doesn't admit, the only thing he can
16 really do is enter the Judgment at most. All the other
17 documents would be inadmissible.

18 That would be the motion Mr. Schachter wants me to
19 make.

20 THE COURT: Did you want to respond? Do you want to
21 look at them?

22 MR. BOGALE: I have seen them, Your Honor. Those are
23 the copies we got. Those are the records that we requested,
24 the Judgment is in there on both cases. Both are certified

1 copies of his conviction. The fact it was a grand larceny
2 conviction is I think beside the point here. It is a felony
3 and it is for grand larceny. We can admonish the jury that you
4 are not to construe his prior conviction as a statement of his
5 character. But I would object to the redaction, Your Honor.
6 That is all I have to add.

7 THE COURT: Okay. The Court is familiar with the
8 case law that you are referring to, but I do not find that the
9 conviction for grand larceny is so inflammatory or so negative
10 that the jury would find him guilty of grand larceny again
11 simply because he had previously been convicted of grand
12 larceny. So I am not going to grant the request to redact the
13 Judgment if the defendant denies the conviction. But I do
14 agree that only the Judgment should be presented to the jury.
15 So what happens here is, if the State asks Mr. Schachter, if
16 you are on the stand, if you have a prior conviction and he
17 says isn't it true you have had a prior conviction on this
18 date for a felony and what the name of it is and you say yes,
19 that is where the inquiry ends. No exhibits are ever provided
20 to the jury. If you say no, then the State has the option to
21 ask that the prior conviction be admitted and then the jury
22 would see it, and that prior conviction would consist of the
23 Judgment on both of those cases, and not the backup plea and
24 all of that. The backup plea etcetera would be provided the

1 Court and part of the Court record for purposes of determining
2 the constitutionality of the conviction. We haven't really
3 contested that. The Court also has made an independent review
4 and find them to be Constitutionally valid for purposes of
5 impeachment.

6 If it does become necessary, Mr. Bogale, remember
7 you are going to have to ask the document be separated and
8 only the Judgment be presented so you can use it, approach the
9 clerk and then whisper to her and she will tell you how to
10 break it out and mark it for you.

11 THE DEFENDANT: May I ask him one question?

12 THE COURT: Yes. And we need those exhibits back.

13 MR. LESLIE: I can return those exhibits, Your Honor.

14 THE COURT: Thank you.

15 MR. LESLIE: Is your ruling, just so standby counsel
16 knows, that he's only subject to impeachment by these felonies
17 if he testifies?

18 THE COURT: Correct. There is no other basis that I
19 know of right now that these would come in except if the
20 defendant is convicted, then they would be utilized for
21 purposes of habitual sentencing.

22 THE DEFENDANT: But I would still be able to argue.
23 We are only arguing these for impeachment purposes right now,
24 not for habitual, right?

1 THE COURT: These exhibits, I am finding both of
2 them constitutionally valid. If you testify, they can use the
3 Judgment part of the exhibit to impeach you. If you are
4 convicted, there will be a hearing with regard to your
5 sentencing at which point the weight to be given these
6 exhibits and the content thereof can be argued by you, is that
7 what you were asking?

8 THE DEFENDANT: Yes and yes. Yes. Thank you.

9 THE COURT: Anything further? The things I am
10 taking under submission are those that I have not ruled on.
11 Everything else I ruled on will be in the minutes of the Court
12 and we will notify you of our decision on the things we have
13 not ruled on. And my apologies and thanks to the staff for
14 staying. We appreciate the Sheriff's Office and my staff for
15 staying tonight to get this finished. Thank you.

16 MR. LESLIE: What are we doing for exhibit marking?
17 Do we have a date?

18 THE COURT: How much more do you have? The reason I
19 am asking, with Mr. Schachter's in-custody status, it is
20 difficult to have a whole transport just for the purpose of
21 marking one or two pieces of paper. If it is a short list of
22 exhibits, the clerk could mark those the morning of the trial.
23 But if there is lots to be marked and presented to the clerk,
24 then we need to do it in advance.

1 MR. BOGALE: There is not lots to be marked, Your
2 Honor. I am presuming the exhibits that we marked and
3 admitted are going to be used at trial.

4 THE COURT: Okay. They are all marked and we will
5 use them, whatever you need.

6 MR. LESLIE: So the morning of trial?

7 THE COURT: I think the morning of trial makes
8 sense.

9 MR. BOGALE: That is fine. It is not going to take
10 more than ten minutes to mark additional exhibits.

11 THE COURT: Ms. Clerk what time do you want them
12 here for that?

13 THE CLERK: 9:00 a.m. is fine.

14 THE COURT: Mr. Leslie, are you assisting
15 Mr. Schachter in getting proper clothing for court?

16 MR. LESLIE: I will have my investigator take care of
17 that. We will probably have him clothed him up for the days.

18 THE COURT: Anything else?

19 MR. BOGALE: Not from the State.

20 MR. LESLIE: Is there anything else, Mr. Schachter?

21 THE DEFENDANT: No.

22 THE COURT: Nothing else for the Court?

23 THE DEFENDANT: No, Your Honor.

24 THE COURT: Court is in recess.

1 STATE OF NEVADA,)
2) ss.
3 COUNTY OF WASHOE.)
4

5 I, Judith Ann Schonlau, Official Reporter of the Second
6 Judicial District Court of the State of Nevada, in and for the
7 County of Washoe, DO HEREBY CERTIFY:

8 That as such reporter I was present in Department No. 4 of the
9 above-entitled court on Thursday, September 11, 2014, at the
10 hour of 10:00 a.m. of said day and that I then and there took
11 verbatim stenotype notes of the proceedings had in the matter
12 of THE STATE OF NEVADA vs. MARC PPAUL SCHACHTER, Case Number
13 CR14-1044.

14 That the foregoing transcript, consisting of pages numbered
15 1-107 inclusive, is a full, true and correct transcription of
16 my said stenotypy notes, so taken as aforesaid, and is a full,
17 true and correct statement of the proceedings had and
18 testimony given upon the trial of the above-entitled action to
19 the best of my knowledge, skill and ability.

20 DATED: At Reno, Nevada this 23rd day of January, 2015.
21
22

23 /s/ Judith Ann Schonlau
24 JUDITH ANN SCHONLAU CSR #18

3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,
Plaintiff,

vs.

MARC PAUL SCHACHTER,
Defendants.

Case No. CR14-1044

Dept. No. 4

**ORDER DENYING DEFENANT'S MOTION TO DISMISS CASE ON GROUNDS THAT
THE STATE HAS LOST AND/OR DESTROYED MATERIAL EXCULPATORY
EVIDENCE**

On August 21, 2014, Defendant Marc Paul Schachter (hereinafter "Schachter") filed his *Motion to Dismiss Case on Grounds that the State has Lost and/or Destroyed Material Exculpatory Evidence*. The State of Nevada (hereinafter "the State") filed *Omnibus Opposition to Defendant's Pretrial Motions* on August 28, 2014. On September 11, 2014, the Court heard oral arguments on the Motion and took the matter under advisement.

The Nevada Supreme Court "has consistently held that in order to establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed." Sheriff, Clark County v. Warner, 112 Nev. 1234, 1239-1240 (1996) (citing State v. Hall, 105 Nev. 7, 9 (1989)). The burden to establish that loss

1 of evidence was prejudicial to the defendant lies with the defendant. Id., at 1240. The burden
2 requires "some showing that it could be reasonably anticipated that the evidence sought would be
3 exculpatory and material to appellant's defense. It is not sufficient that the showing disclose
4 merely a hoped-for conclusion from examination of the destroyed evidence, nor is it sufficient
5 for the defendant to show only the examination of the evidence would be helpful in preparing his
6 defense." Boggs v. State, 95 Nev. 911, 913 (1979). "Mere assertions by the defense counsel that
7 an examination of the evidence will potentially reveal exculpatory evidence does not constitute a
8 sufficient showing of prejudice." Warner, 112 Nev. 1234, 1242 (1996). Evidence must be
9 disclosed if "it provides grounds for the defense to attack the reliability, thoroughness, and good
10 faith of the police investigation or to impeach the credibility of the State's witnesses." Lay v.
11 State, 116 Nev. 1185, 1194 (2000); see Kyles v. Whitney, 514 U.S. 419, 442 n. 13, 445-451
12 (1995).

13 Schachter argues the State has lost or destroyed exculpatory evidence by failing to
14 produce the allegedly stolen backpack or any video evidence of him entering the store.
15 According to Schachter, the backpack he is alleged to have stolen was customized by him and on
16 his person when he entered the WalMart. Schachter argues the backpack itself and video footage
17 of him entering the store are exculpatory evidence because it would tend to show that he entered
18 the store with a backpack he customized and is now charged with having stolen.

19 The State argues there is no obligation upon the State to produce information which it
20 does not possess or of which it is unaware. The State argues they were never in possession of the
21 backpack or video which Schachter alleges to be exculpatory. Therefore, the State argues they
22 have no obligation to produce such evidence. Additionally, the State argues it is Schachter's
23 burden to produce evidence to show the State possessed or knew about material favorable to the
24 defense and failed to disclose it. The State argues Schachter has not met this burden. Lastly, the
25 State argues the actions of third party actors, WalMart asset protection employees, are not state
26 action and do not constitute the State's destruction of evidence.

1 Although Schachter characterizes the State's inaction as a failure to preserve the
2 evidence, his claim of error more accurately relates to the State's failure to collect the backpack
3 and video evidence from WalMart. Schachter argues that he could have proven he had the
4 backpack when he entered the store from the customization of the backpack and video of him
5 entering the store with the backpack. However, the backpack was re-stocked pursuant to
6 WalMart policy and the video evidence was not recorded by WalMart personnel.

7 In relying on case law involving failure to preserve evidence, Schachter fails to
8 distinguish between collection and preservation of evidence. Had the State gathered the
9 backpack and video evidence and then allowed it to be lost or failed to deliver it to Schachter, his
10 argument would be more appropriate. The State's failure to preserve potentially exculpatory
11 evidence may result in dismissal of the charges if the defendant can show "bad faith or
12 connivance on the part of the government" or "that he was prejudiced by the loss of the
13 evidence." Daniels v. State, 114 Nev. 261, 266-267 (1998); Howard v. State, 95 Nev. 580, 582
14 (1979).

15 In Daniels v. State the Nevada Supreme Court discussed a rule regarding the present
16 circumstances. The Nevada Supreme Court adopted an approach used by the New Mexico
17 Supreme Court, recognizing that "although police officers generally have no duty to collect all
18 potential evidence from a crime scene . . . this rule is not absolute," due to the injustices that
19 could arise from "the State's failure to gather evidence under certain circumstances." Daniels,
20 114 Nev. at 267. The Nevada Supreme Court developed a two-part test for circumstances where
21 the State has failed to gather evidence. Id. First, the defense must show that the "evidence was
22 'material,' meaning that there is a reasonable probability that, had the evidence been available to
23 the defense, the result of the proceedings would have been different." Id. (citation omitted).
24 Second, if the evidence was "material" the next determination is whether the failure to gather
25 evidence was "the result of mere negligence, gross negligence, or a bad faith attempt to prejudice
26 the defendant's case. Id. The Court next articulated a difference in outcome depending upon the

1 culpability of the State. "When mere negligence is involved, no sanctions are imposed, but the
2 defense can still examine the prosecution's witnesses about the investigative deficiencies. When
3 gross negligence is involved, the defense is entitled to a presumption that the evidence would
4 have been unfavorable to the State. In cases of bad faith, we conclude that dismissal of the
5 charges may be an available remedy based upon an evaluation of the case as a whole." Id.
6 (citations omitted).

7 The Nevada Supreme Court in Daniels v. State denied a defendant's appeal because he
8 failed to establish that the blood evidence was likely to have been material to his defense of
9 involuntary intoxication, because he failed to establish that that State's failure to gather the blood
10 evidence was attributable to negligence, gross negligence, or bad faith. 114 Nev. at 268. The
11 Court concluded that "whether the blood evidence would likely have prevented [the defendant's]
12 conviction is pure speculation." Id. In Leonard v. State the Nevada Supreme Court found the
13 standard for a failure to collect evidence does not apply when a state employee failed to make a
14 video tape, because he was not acting for the police or prosecuting authorities when he failed to
15 make a tape. 114 Nev. 639, 655 (1998).

16 First the Court will consider whether the backpack and video footage at issue were
17 "material." "Evidence is material if there is a reasonable probability that the result would have
18 been different if the evidence had been disclosed." Lay v. State, 116 Nev. 1185, 1194 (2000). A
19 reasonable probability is shown when "the nondisclosure undermines confidence in the outcome
20 of the trial." Id. Schachter argues the video footage would prove he entered the WalMart with
21 the backpack he is alleged to have stolen. Additionally Schachter argues the backpack itself
22 would prove the backpack was customized and as a result it could not have been stolen on the
23 day in question. Unlike the blood evidence in Daniels, the nondisclosure of this evidence
24 undermines the confidence in the outcome of the trial because there is a reasonable probability
25 that these items may change the result of this trial. The Court finds that Schachter has met his
26 burden of proving these items of evidence are material.

1 Next the Court will consider whether the State's failure to collect this evidence was the
2 result of negligent, gross negligent or bad faith conduct. "The presence or absence of bad faith
3 by the [government actor] for the purposes of the Due Process Clause must necessarily turn on
4 the [government actor's] knowledge of the exculpatory value of the evidence at the time it was
5 lost or destroyed." Arizona v. Youngblood, 488 U.S. 51, 56 n * (1988). The Nevada Supreme
6 Court has found police action does not amount to bad faith when the police did not destroy
7 evidence in an attempt to make it unavailable to the defendant. See Warner, 112 Nev. at 1240.
8 In the instant case, the WalMart asset protection personnel did not copy the video evidence of
9 Schachter entering the WalMart, resulting in its destruction sixty (60) days later. Additionally,
10 the employees took only one photo of the backpack at issue before returning it to the store as
11 merchandise. The facts of this case show no indication that the failure to collect these items was
12 a result of any bad faith on the part of the State in an effort to make this evidence unavailable to
13 the defense. Facts of this case indicate the WalMart employees were simply acting pursuant to
14 store policies. However, the Court does find that actions of the State indicate negligence on
15 behalf of the State. The Court finds the actions by the State indicate the State made no effort to
16 collect the evidence at issue, or direct WalMart employees to collect the evidence. Therefore,
17 the Court finds the State has negligently failed to collect potentially exculpatory evidence.

18 The Court finds the State has failed to collect evidence, including the backpack and video
19 of Schachter entering the WalMart. The Court further finds that the State's failure to collect was
20 a result of negligence on the part of the State. Therefore, the Court finds Schachter's motion to
21 dismiss is denied. However, Schachter may examine the State's witnesses about these
22 investigative deficiencies at trial.

23 ///

24 ///

25 ///

26 ///

CERTIFICATE OF SERVICE

CASE NO. CR14-1044

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 11th day of September, 2014, I filed the **ORDER DENYING DEFENDANT'S MOTION TO DISMISS CASE ON GROUNDS THAT THE STATE HAS LOST AND/OR DESTROYED MATERIAL EXCULPATORY EVIDENCE** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

X I electronically filed with the Clerk of the Court, using the ECF which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the ECF system:

NICKOLAS GRAHAM, ESQ. for STATE OF NEVADA
KELLY KOSSOW, ESQ. for STATE OF NEVADA
JOSEPH GOODNIGHT, ESQ. for MARC PAUL SCHACHTER
JAMES LESLIE, ESQ. for MARC PAUL SCHACHTER
DIV. OF PAROLE & PROBATION
ZELALEM BOGALE, ESQ. for STATE OF NEVADA

X Deposited in the Washoe County mailing system in a sealed envelope for postage and mailing with the United States Postal Service in Reno, Nevada:


Marc Schachter, #14-09450
c/o Washoe County Detention Center
911 Parr Blvd.
Reno, NV 89512

 Placing a true copy thereof in a sealed envelope for service via:

 Reno/Carson Messenger Service – [NONE]

 Federal Express or other overnight delivery service [NONE]

DATED this 11th day of September, 2014.



CASE NO. CR14-1044 **TITLE: THE STATE OF NEVADA VS. MARC
PAUL SCHACHTER**

DATE, JUDGE OFFICERS OF COURT PRESENT	PAGE ONE APPEARANCES-HEARING	CONT'D TO
9/11/14	<u>ONGOING PRE-TRIAL MOTIONS/MOTION TO CONFIRM TRIAL DATE</u>	
HONORABLE	Deputy District Attorney Zelalem Bogale, Esq., represented the State.	
CONNIE	Defendant present representing himself. Chief Deputy Public Defender	
STEINHEIMER	James Leslie, Esq., present as stand-by counsel for the Defendant.	
DEPT. NO.4		
M. Stone	Alejandro Monroy called by State's counsel, sworn and testified.	
(Clerk)		
J. Schonlau	***Witness identified the Defendant for the record.	
(Reporter)		
	EXHIBIT C marked by State's counsel.	
	Witness Monroy further direct examined.	
	EXHIBIT C offered by State's counsel; voir dire and no objection by Defendant; ordered admitted into evidence.	
	Witness Monroy further direct examined; cross-examined; redirect examined; recross-examined; excused.	
	Nick Reed called by State's counsel, sworn and testified.	
	EXHIBITS 1 and 1A marked and offered by State's counsel; no objection by Defendant; ordered admitted into evidence.	
	Witness Reed further direct examined.	
	EXHIBIT 1B marked by State's counsel.	
	Witness Reed further direct examined; cross-examined; excused.	
	Discussion ensued regarding the purpose of the testimony and contents of Exhibits A and B marked at previous hearing.	
	11:11 a.m. Court recessed.	
	11:48 a.m. Court reconvened with State's counsel, Defendant and Stand-By counsel present.	
	Michelle Bays called by State's counsel, sworn and testified.	
	EXHIBIT 1B offered by State's counsel; no objection by Defendant; ordered	

DATE, JUDGE OFFICERS OF COURT PRESENT	PAGE TWO APPEARANCES-HEARING	CONT'D TO
---	---------------------------------	-----------

9/11/14 J. Schonlau (Reporter)	<u>PRE-TRIAL MOTIONS</u> admitted into evidence. EXHIBIT B1 marked by State's counsel.	
--------------------------------------	---	--

Witness Bays further direct examined.

EXHIBIT B1 offered by State's counsel; no objection by Defendant; ordered admitted into evidence.

Witness Bays further direct examined.

State's counsel set forth differences to all the surveillance videos.

Witness Bays excused subject to recall.

12:06 p.m. Court recessed.

1:09 p.m. Court reconvened with State's counsel, Defendant and Stand-By counsel present.

Witness Bays, heretofore sworn, resumed stand and was further direct examined.

EXHIBIT D marked by State's counsel.

Witness Bays further direct examined.

EXHIBIT D offered by State's counsel; objection by Defendant; objection sustained, admission denied.

Witness Bays further direct examined.

EXHIBIT D re-offered by State's counsel; admission held in abeyance pending further questioning of the witness.

Witness Bays further direct examined.

EXHIBIT E marked by State's counsel.

**DATE, JUDGE
OFFICERS OF**

PAGE THREE

COURT PRESENT

APPEARANCES-HEARING

CONT'D TO

9/11/14

PRE-TRIAL MOTIONS

J. Schonlau
(Reporter)

Witness Bays further direct examined

EXHIBIT D re-offered by State's counsel; voir dire and objection by Defendant; ordered admitted into evidence over objection.

Witness Bays further direct examined.

EXHIBITS A and B offered by State's counsel; no objection by Defendant; ordered admitted into evidence.

Witness Bays further direct examined; cross-examined; excused.

Discussion ensued regarding the State recalling Witness Monroy.

Witness Monroy, heretofore sworn, recalled by State's counsel and was direct examined; cross-examined; examined by the Court; redirect examined; recross-examined; further examined by the Court, State's counsel and Defendant; excused

1:30 p.m. Court recessed.

4:06 p.m. Court reconvened with State's counsel, Defendant and Stand-by counsel.

Witness Monroy, heretofore sworn, recalled by State's counsel and was direct examined.

EXHIBIT F marked by State's counsel.

Witness Monroy further direct examined.

EXHIBIT F offered by State's counsel; voir dire and no objection by Defendant; ordered admitted into evidence.

Witness Monroy further direct examined; cross-examined; examined by the Court; excused.

State rested.

4:10 p.m. Court recessed.

**DATE, JUDGE
OFFICERS OF
COURT PRESENT****PAGE FOUR****APPEARANCES-HEARING****CONT'D TO**

9/11/14

PRE-TRIAL MOTIONSJ. Schonlau
(Reporter)

4:45 p.m. Court reconvened with State's counsel, Defendant and Stand-by counsel present.

Motion to Dismiss due to Prejudicial Delay by defendant; presented argument.

Motion to Dismiss due to Lost or Destroyed Evidence by defendant; presented argument.

COURT ENTERED ORDER denying the Motion for Preliminary Hearing Transcript based on the defendant's refusal to accept the remedy of remanding case back to Justice Court for preliminary examination; granting Motion to Compel State to provide "Brady" Material; granting the Motion in Limine regarding bad acts of the State's witnesses and a hearing outside the presence of the jury must be conducted prior to any questions being asked.

State's counsel presented objections to the Motions to Dismiss.

Discussion ensued regarding the Faretta canvass conducted by Judge Lynch in the lower Court, the defendant's inability to hire an investigator, the request for an investigator at public expense and subpoena's issued on behalf of the defendant by the Public Defender's Office.

State's counsel provided the defendant and stand-by counsel with the State's packet of proposed Jury Instructions.

EXHIBITS 2, 3, 4 and 5 marked by State's counsel.

State's counsel advised the Court and the defendant that Exhibits 2 and 3 would be utilized for impeachment purposes.

Stand-by counsel Leslie presented argument on behalf of the defendant for the limited purpose of the use of Exhibits 2 and 3 for impeachment purposes. State's counsel presented reply argument.

COURT ENTERED ORDER allowing for the use of the Judgments of Conviction contained in Exhibits 2 and 3 for impeachment purposes should the defendant testify and deny having prior convictions. **COURT** further found Exhibits 2 and 3 constitutionally valid for impeachment purposes.**COURT** took the following Motions under advisement: Motions to Dismiss due to Prejudicial Delay, Motion to Dismiss due to Lost or Destroyed Evidence, Motion to Advise Witnesses for the State of the privilege against self-incrimination, Motion to Compel the State to provide exculpatory evidence, Motion to Obtain Material and Exculpatory Video Recording, Motion for the Production of the Replacement or Substitute lost or stolen Material, and Motion in Limine with Regard to the Surveillance video Evidence.

Exhibit marking set.

CERTIFICATE OF SERVICE

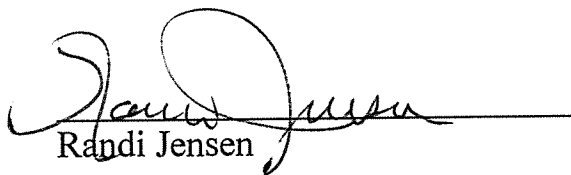
I hereby certify that I am an employee of the Washoe County Alternate Public Defender's Office and that on this date I served a copy of the **JOINT APPENDIX – VOLUME II** to the following:

MARC PAUL SCHACHTER #91445
C/O NNCC
P.O. BOX 7000
CARSON CITY, NEVADA 89701
Via U.S. Mail

ADAM LAXALT
ATTORNEY GENERAL STATE OF NEVADA
100 N. CARSON STREET
CARSON CITY, NEVADA 89701
Via Electronic Filing

CHRIS HICKS
WASHOE COUNTY DISTRICT ATTORNEY
Attn: Appellate Department
Via Electronic Filing

DATED this 29 day of June, 2015.


Randi Jensen

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jun 29 2015 10:02 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

MARC PAUL SCHACHTER,)

Appellant,)

vs.)

THE STATE OF NEVADA,)

Respondent.)

Case No. 67673

**Appeal from Judgment of Conviction
Second Judicial District Court of the State of Nevada
The Honorable Elliott Sattler**

JOINT APPENDIX – VOLUME II

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2/9/15

COPY

4185
JUDITH ANN SCHONLAU
CCR #18
75 COURT STREET
RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVA
IN AND FOR THE COUNTY OF WASHOE
BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-o0o-

THE STATE OF NEVADA,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO. CR14-1044
)	DEPARTMENT NO. 4
MARC PAUL SCHACHTER,)	
)	
Defendant.)	
_____)	

TRANSCRIPT OF PROCEEDINGS

PRETRIAL MOTIONS

WEDNESDAY, SEPTEMBER 3, 2014, 2:00 P.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

A P P E A R A N C E S

FOR THE PLAINTIFF: OFFICE OF THE DISTRICT ATTORNEY

BY: MATTHEW LEE, ESQ.

DEPUTY DISTRICT ATTORNEY

WASHOE COUNTY COURTHOUSE

RENO, NEVADA

FOR THE DEFENDANT: APPEARING IN PROPER PERSON

STANDBY COUNSEL: OFFICE OF THE PUBLIC DEFENDER

BY: JAMES LESLIE, ESQ.

DEPUTY PUBLIC DEFENDER

350 S. CENTER STREET

RENO, NEVADA

1 RENO, NEVADA; WEDNESDAY, SEPTEMBER 3, 2014; 2:00 P.M.

2 -oOo-

3
4 THE COURT: Thank you. Please be seated.

5 MR. LEE: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MR. LESLIE: Good afternoon, Judge. I remain here as
8 standby counsel.

9 THE COURT: Yes.

10 MR. LESLIE: Before we get going on the motions, may
11 I advise the Court of something?

12 THE COURT: Certainly.

13 MR. LESLIE: That is simply I have a murder trial on
14 the 22nd, and this case is set. I meant to highlight that
15 fact last time we were here, and I didn't. I am working on
16 getting somebody to come in between now and then as standby
17 counsel, but I don't feel I am at the point yet where I can
18 direct somebody. I am working with somebody at the
19 supervisory level that can do that. Right now I don't have
20 anybody. I just wanted to let the Court, and Mr. Schachter
21 actually has known that for a few weeks. I wanted to make
22 sure the Court understood that we are working on it.

23 MR. LEE: Judge, I should say Mr. Bogale intends to
24 try this case. I am standing in for him today. He's

1 unavailable. Matt Lee for the record.

2 THE COURT: Mr. Schachter is here and I am here.

3 THE DEFENDANT: Good morning.

4 THE COURT: Good afternoon.

5 THE COURT: We have several motions that we are
6 going to work on today, and we might as well start with the
7 defendant's motions. So let's start with your Motion to
8 Dismiss the case on the ground the State has lost and/or
9 destroyed material exculpatory evidence.

10 THE DEFENDANT: Okay. As far as I know, the
11 controlling case is Youngblood versus Arizona, and the Supreme
12 Court said it is a two-prong test for due process violation,
13 one bad faith by the police, the other being material was lost
14 and can't be replaced. None of the -- none of the articles
15 they said I stole was recovered. According to them, it all
16 went back on the shelf for restocking.

17 NRS 205.295, I have it right here, Your Honor. The
18 officer arresting any person charged as a principal or
19 accessory in a robbery or larceny should use reasonable
20 diligence to secure the property alleged to be stolen, and,
21 after seizure, shall be answerable therefor while it remains
22 in the officer's hands and shall annex a schedule thereof to
23 the return of the warrant. Whenever the District Attorney
24 shall acquire such property for use as evidence upon the

1 examination of trial, such officer, upon demand of the
2 District Attorney, shall deliver it to the District Attorney
3 and take a receipt therefor, after which such District
4 Attorney shall be answerable for the same.

5 They never, the police never had possession of the
6 the alleged property. So that is part of the bad faith. The
7 State's response is it is store policy to return it to the
8 shelf. I don't understand what part of store policy is above
9 and beyond the NRS. How they can, I mean if that is the
10 policy, why are we here? If they already decided that
11 property belongs to them, then what is this for? They made no
12 attempt at all. They took a picture of it. The picture is not
13 even mentioned in any report. There is a trailing receipt.
14 That receipt doesn't match the property in the picture. I
15 asked the investigator to bring the backpack.

16 MR. LESLIE: Your Honor, he asked we subpoena a
17 number of, issue a number of subpoenas. Those are coming. I
18 would have to double check. I think on September 11th we have
19 under subpoena, he asked us to -- We are working off a
20 handwritten worksheet Mr. Schachter provided. I was going
21 over that just yesterday in detail. It looks like we have
22 subpoenas out for everything, but they are not going to come
23 due until I think I said the 11th, and it looks like the 11th
24 it is. So that may be forthcoming. From Schachter's benefit,

1 it may be that we may not have that material, those various
2 materials, until the 11th. But we'll provide those to him as
3 soon as we receive them and go from there.

4 THE COURT: What is it you subpoenaed?

5 THE DEFENDANT: The backpack, itself, to show that
6 it was not new. It was altered. It was customized and will
7 not match the trailing receipt that they printed. I also
8 have --

9 THE COURT: Who did you subpoena the backpack from?

10 MR. LESLIE: Let me look at that. For what it's
11 worth, our understanding as a rule by standby counsel, it is
12 to follow through with his investigative request. It did not
13 seem patently unreasonable. I refer to his position as pro
14 per. With regard to the backpack, I believe that was Wal-Mart,
15 Your Honor. You know, I can keep Mr. Schachter updated, but in
16 our subpoenas, we usually tell them if they produce by a
17 certain date in advance of that, then they don't need to
18 appear. So I have reason to believe these subpoenas may be
19 answered one way or the other by the 9th.

20 THE COURT: What is the date you told them to
21 appear?

22 MR. LESLIE: September 11th.

23 THE COURT: At what time?

24 MR. LESLIE: 9:00 a.m. I'd have to go back and check

1 the file. Off the top of my head, I suspect that is probably
2 a date we have in that case. We have a Motion to Confirm, so
3 my investigator suggested it for that day. It is possible
4 they will comply to the subpoena by the 9th as I indicated.

5 THE COURT: Okay. Go ahead.

6 THE DEFENDANT: Additionally, I have a document that
7 I have labeled "confidential" only because it gives areas of
8 the materiality and readiness or why the material is important
9 and why losing it or not keeping it is important to my
10 defense.

11 THE COURT: You can't file anything like that ex
12 parte at this stage of the proceedings.

13 THE DEFENDANT: I want to show the Court that the
14 material, the items are material to my defense.

15 THE COURT: If your argument is the State is
16 withholding material evidence, you have to tell them that it
17 is material, and you have to convince them in front of me and
18 me in front of them and do an ex-parte application to me.

19 THE DEFENDANT: I am not arguing they are
20 withholding. They already said it went back up on the shelf.
21 It is gone. I am arguing it was lost, under Youngblood.

22 THE COURT: You can't do that ex-parte at this stage
23 of the proceedings. I don't take it. You can argue it, but he
24 has a right to hear it.

1 THE DEFENDANT: Okay. Part of it is that, Your
2 Honor, in the police report, Ms. Young, one of the loss
3 prevention officers, said she saw me opening the package.
4 Obviously, having the package here and showing that everything
5 was sealed would impeach her testimony.

6 THE COURT: It might impeach her testimony, but that
7 doesn't mean that I would dismiss the charges because her
8 testimony is impeached.

9 THE DEFENDANT: Okay. Additionally, like I said,
10 the backpack was completely altered. On the video it shows --

11 THE COURT: I am sorry, sir. You are going -- This
12 is not making a case for me to take a pretrial stance that I
13 am going to dismiss something. You are not convincing me.
14 This isn't getting there. So if you want to impeach the
15 evidence the State put on, you will be able to do that and you
16 can do that at trial.

17 THE DEFENDANT: I am trying to use the evidence that
18 they do not have. That's the problem. They didn't give me the
19 opportunity to impeach the evidence they have. They just gave
20 it back to Wal-Mart even though it was my property, Your
21 Honor. If I can show it was my property, obviously, there is
22 no robbery. The property was mine. The video always has m
23 with the property prior. Every bit of the video has me with
24 the property they say I stole. I walked in with the property.

1 I walked out with the property. That is what the evidence
2 shows.

3 THE COURT: You have a video that shows that?

4 THE DEFENDANT: Yes. The video they gave me. Every
5 minute of the video they have provided me with has me with the
6 property. I asked for the video prior of me walking in, but
7 they don't have it. According to the investigator, it is not
8 available either.

9 THE COURT: So you want me to dismiss the charges
10 because it is not available?

11 THE DEFENDANT: No, no. That is a different motion.
12 This motion is dismissed with the loss of exculpatory
13 evidence. The backpack and the items they say I stole is
14 exculpatory. It is mine, Your Honor. The property was mine.

15 THE COURT: Do you have any evidence of that?

16 THE DEFENDANT: If I can show that to the jury where
17 the backpack couldn't possibly --

18 THE COURT: When I talk, you stop.

19 THE DEFENDANT: Sorry.

20 THE COURT: We'll start that rule. Do you have any
21 evidence that it is your backpack? I know you are telling me
22 it was your backpack. Wal-Mart and the State are telling me
23 no, it wasn't. What evidence do you have to convince me that I
24 should find that it is your backpack as a matter of law?

1 THE DEFENDANT: The video.

2 THE COURT: What about the video?

3 THE DEFENDANT: The video shows the straps have been
4 cut. The way the straps are not on this backpack, the other
5 straps are not on the backpack. Coming brand new off the
6 shelf, it has certain straps. It has a waist strap. It has a
7 strap that goes across the waist.

8 THE COURT: I am going to deny your motion with
9 leave to renew as a directed verdict at the conclusion of the
10 evidence. I have to see the evidence.

11 THE DEFENDANT: Okay. Do you want me to tell you
12 which one to argue next?

13 THE DEFENDANT: Please. You might want to do
14 another motion to replace that evidence so they would bring it
15 if it has been subpoenaed.

16 THE COURT: Motion for Preliminary Hearing
17 Transcript.

18 THE DEFENDANT: Give me one second, Your Honor.

19 THE COURT: Yes.

20 MR. LESLIE: Your Honor, does the Court mind,
21 actually I would request Mr. Schachter be permitted to be
22 unshackled on his left hand. I know his right hand is free.
23 I notice he's having trouble reaching with the shackled hand.

24 THE COURT: Yes, that's fine.

1 THE DEFENDANT: Thank you.

2 MR. LESLIE: It might help him find the motions
3 quicker.

4 THE DEFENDANT: Thank you.

5 THE COURT: Let's go to this motion. I am just
6 going to cut to the chase. The defendant wants the Motion for
7 the Preliminary Hearing transcript, and the State says they
8 heard there was a malfunction. Have you gotten what is
9 available?

10 THE DEFENDANT: Nothing. The State just says this
11 is moot. Why is this moot? Why don't I have a right to have
12 the transcript?

13 MR. LEE: I want to supplement that argument the
14 State included in the opposition. I think we looked at a
15 couple of issues. One is prejudice to the defendant. I
16 think that is important in this. If we look at what could he
17 challenge from a Preliminary Hearing and the transcript would
18 be needed, he could file a Writ of Habeas Corpus. That time
19 has passed.

20 THE COURT: No. Time runs from when the transcript
21 is available.

22 MR. LEE: I thought it was 21 days after Arraignment.

23 THE COURT: No, not if there is no transcript.
24 Believe it or not, they don't get quite that draconian.

1 MR. LEE: Thank you. I like being educated by
2 judges. I appreciate that. The other law instructive is
3 Nevada Rule of Appellate Procedure 9c. If the transcript is
4 unavailable, appellate may prepare a statement of the evidence
5 or proceedings from the best available means including
6 recollection, appellant's recollection. Apparently it gives a
7 procedure when something like this happens, appellant can
8 recollect from what happened at the Preliminary Hearing and
9 confer with the opposing side.

10 THE COURT: Not at the Preliminary. An appeal.

11 MR. LEE: I am talking about the transcript from an
12 earlier hearing.

13 THE COURT: Right. But the transcript, the problem
14 is if the transcript from the Preliminary Hearing would be
15 used not just for a Writ which is available and not available
16 if there is no transcript, but also for impeachment purposes,
17 especially in the case where you have the defendant claiming
18 people aren't being truthful and the evidence isn't what it
19 is. And they testified once before and now all of a sudden
20 that evidence isn't there. I think that is highly
21 prejudicial.

22 MR. LEE: What happens, it is merely a probable
23 cause hearing to get him from one stage to another at trial.
24 He still has all the ability to try to impeach them. He just

1 wouldn't have the transcript.

2 THE COURT: What if they say something different?

3 MR. LEE: Than what happened at Prelim?

4 THE COURT: Right.

5 MR. LEE: He can still impeach them with whatever
6 other means he can find with the evidence in the case.

7 THE COURT: Why do we even have the transcript at
8 all if it is not necessary and there is no prejudice if I
9 don't have a transcript? Why do we have a transcript?

10 MR. LEE: I am not arguing against that. I agree.
11 What I am saying, the law does give some Instructions when
12 this happens. It, apparently it is such a rare thing but it
13 happens enough it gives us guidance in appellate procedure.

14 THE COURT: I am sorry to do this to you. That is
15 based on a civil appeal and there is no right to have a court
16 reporter present in a civil appeal. So that whole procedure
17 goes away. If there is no record of the trial in Justice
18 Court, they can do a statement of the case. And the procedure
19 for that is both sides do the statement and the judge gets to
20 say yea or nay. It isn't they just in the middle of an appeal
21 stand up and say, Judge, this is what happened. Actually, we
22 see that fairly frequently in the civil appeals from Justice
23 Court.

24 MR. LEE: Again, I share the Court's concern that it

1 was not made at the lower level. And, apparently, based on a
2 malfunction, even though the Justice Court clerk says that she
3 was running the equipment properly, nonetheless, when I look
4 at prejudice, I don't believe that is something that would
5 take away from the avenue of impeachment, one avenue of
6 cross-examination, or necessarily prejudices the defendant so
7 much so that we perhaps need a new Preliminary Hearing. He's
8 still free to cross-examine based on evidence, based on
9 whatever else his investigation finds, and based on his
10 interview with these witnesses pretrial or through his,
11 whatever assistance he has. So he can do that and use that
12 avenue to impeach on a prior statement. Just the mere fact of
13 not having a transcript from a Preliminary Hearing which isn't
14 a discovery preliminary, merely a probable cause determination
15 is missing, while unfortunate, the State agrees it does not
16 prejudice it so much so we need to send this case back for
17 Preliminary Hearing. If Your Honor feels it prejudices it,
18 that would be the remedy.

19 THE COURT: Mr. Schachter.

20 THE DEFENDANT: Quoting from Jencks versus U.S.

21 MR. LESLIE: Say that again.

22 THE WITNESS: Jencks versus U.S.

23 THE COURT: You should give the cite. J-I-N-X?

24 THE DEFENDANT: J-E-N-C-K-S, 353 U.S. 657. Every

1 experienced trial judge and trial lawyer knows the value of
2 impeaching people of the State. The witnesses recording events
3 before time impeaches memory. Essentially, a witness' account
4 of the event is the ability to compare that version with other
5 versions the witness has earlier recounted. Defendant's access
6 to a witness' prior statement thus imposes a handicap that
7 strikes at the heart of cross-examination.

8 Obviously, if I was to have another Preliminary this
9 close on the eve of trial, it is not the same as what was said
10 two months ago. I can't get him to say the exact same thing.
11 I had limited cross, because he already testified on direct of
12 the untruthful things. So I didn't have a long lengthy cross
13 on his testimony, but it was enough for me to now show against
14 his written statement and against the video evidence that he
15 was lying.

16 THE COURT: We don't have a transcript to show that.

17 THE DEFENDANT: Exactly. From the very beginning,
18 Your Honor, I said this case hinges on my ability to show that
19 he is lying. When we did the original Faretta canvass, I told
20 the Court that is one of the reasons why I wanted to go pro
21 per was to say, because I knew when he was lying and why he
22 was lying.

23 THE COURT: The only remedy, however, would be a new
24 Preliminary Hearing. It would not be to dismiss the case

1 because of a malfunction.

2 THE DEFENDANT: That is not acceptable. I can't
3 make him say the same exact testimony that he gave back then.

4 THE COURT: Well, unfortunately, you don't get to
5 choose your remedies, necessarily. So you can't get a case
6 dismissed because of the malfunction at the Preliminary
7 Hearing stage. I don't think that is a basis to dismiss the
8 case. But I think it is wrong, and I think you should have
9 the transcript and you should be able to have the testimony
10 from the prior testimony. So the only remedy I can think of
11 would be to remand for a new Prelim.

12 THE DEFENDANT: That's not going to help me, Your
13 Honor. I would not even ask for that.

14 THE COURT: Okay. Let's talk about --

15 THE DEFENDANT: The other problem before we move on,
16 Your Honor, if I may.

17 THE COURT: Yes.

18 THE DEFENDANT: That is not on the recording then.
19 Neither is my original Faretta waiver.

20 THE COURT: I think I went through the Faretta
21 canvass.

22 THE DEFENDANT: Yeah, but I would have a right to
23 say that canvass was unique, now it was involuntary, she
24 denied the right to standby counsel.

1 THE COURT: So what would you be able to argue?

2 THE DEFENDANT: I would be able to argue the Faretta
3 canvass she gave me was unique by me by her denying me my
4 right to standby counsel and not advising me. There is no law
5 library at the jail.

6 THE COURT: Anyway, we all know what she did, so
7 what is the point?

8 THE DEFENDANT: I can't argue any of those issues
9 that were present at the Preliminary because all that
10 recording was lost. That whole proceeding was lost.

11 THE COURT: But that gets you back to what the State
12 argued, you can make a statement of the case.

13 THE DEFENDANT: But not to the Faretta hearing.

14 THE COURT: Why?

15 THE DEFENDANT: Because the Court specifically says
16 it won't acknowledge a silent record on that. You can't argue
17 against --

18 THE COURT: Your argument now is that you think that
19 your case will be overturned because you did not have counsel
20 at your Preliminary Hearing?

21 THE DEFENDANT: No. That is a collateral issue to
22 not having the Preliminary Hearing and that proceedings
23 transcript.

24 THE COURT: That is another reason for you to go

1 back. Now that I did do a Faretta canvass and I do have a
2 record of it and I have appointed standby counsel, I can
3 remand you back to Justice Court for a Prelim so we are sure
4 your rights are completely covered.

5 THE DEFENDANT: But not my confrontation clause
6 right. Because, again, as you put it, I can't redo what has
7 been done. I'd have to change my whole strategy

8 THE COURT: You may change you strategy. That is
9 not your right to confrontation.

10 THE DEFENDANT: You are asking me to do it on the
11 eve of trial.

12 THE COURT: Welcome to the trial.

13 THE DEFENDANT: Why should I waive my right to
14 speedy trial because of something the Court did?

15 THE COURT: I don't think you can say the Court did
16 it.

17 THE DEFENDANT: Who is ever responsible. It is
18 certainly not my fault though, right?

19 THE COURT: You have a right to have a speedy trial,
20 but your right to speedy trial is not at the expense of any
21 other rights, and you cannot say I waive this right because I
22 want a speedy trial and yet I reserve the right to later argue
23 that my right to confrontation or my right to have standby
24 counsel or my right to prove the Judge was wrong have been

1 abrogated by the lack of a transcript. You can't argue one
2 against the other. Certainly people do not always get their
3 trial within 60 days. Had you filed a Writ of Habeas Corpus,
4 you wouldn't get your trial within 60 days. If you were
5 incompetent, you wouldn't get your trial within 60 days. If
6 the Preliminary Hearing needed to be done, for whatever reason
7 remanded for a new hearing, you wouldn't get your jury trial
8 within 60 days of your first appearance in Justice Court. But
9 that would not be a violation of your right to speedy trial if
10 there is good cause.

11 I don't know what I am going to do with you at this
12 point. We'll see. I am just trying to explain to you that
13 there is not a 60-day right to trial no matter what is going
14 to happen.

15 THE DEFENDANT: Okay. I wouldn't object to that I
16 think.

17 THE COURT: You don't want to waive your right to
18 have a transcript do you?

19 THE DEFENDANT: I don't want to waive my right to
20 the speedy at all.

21 THE COURT: Do you want to waive your right to
22 having a transcript of the Prelim before you go to trial?

23 THE DEFENDANT: There is no transcript, Your Honor.

24 THE COURT: There could be. I didn't ask you that.

1 I asked you a straight question.

2 THE DEFENDANT: I am sorry. I do not waive my
3 right.

4 THE COURT: Okay. Okay. What is the Motion to Advise
5 Witnesses for the State Their Privilege Against
6 Self-incrimination?

7 THE DEFENDANT: Again, Your Honor, it is the facts
8 and my intention to show the witnesses were lying, and the
9 moment it becomes apparent that the witnesses were lying about
10 the theft, it is a robbery the other way. They robbed the
11 property from me. Therefore, they are exposing themselves to
12 whatever criminal charges result from that. So at the point at
13 which they are compelled to testify under the subpoena, they
14 would be -- they would have to assert their right then. I
15 don't want a mistrial in the middle because they decide once
16 they are caught in the lie they don't want to testify anymore.

17 THE COURT: Why don't you want a mistrial for that?
18 If they refuse to testify and it is caused by the State, that
19 is not a mistrial that gets to try it over.

20 THE DEFENDANT: They start with the I don't
21 remembers and I don't knows, that is not what I am looking
22 for. I am either looking for acquittal -- I am not, even on
23 these, Your Honor, I would prefer not a dismissal as much as
24 acquittal.

1 THE COURT: I don't understand what you are asking.
2 Are you asking for in front of the jury to notify the
3 witnesses?

4 THE DEFENDANT: Absolutely not. Just present either
5 pretrial to let them know once they start answering questions
6 they are obligated to keep on answering. They waive the
7 privilege when they answer that first question under Rogers.

8 THE COURT: Well, if they are charged with
9 something. They are not a target. Just because they are your
10 target doesn't make them a target of the State.

11 THE DEFENDANT: They are in the dilemma of being
12 under subpoena, self-incrimination or perjury.

13 THE COURT: Why do you think you have standing to
14 raise their right against self-incrimination for them?

15 THE DEFENDANT: No more standing than when the State
16 asks me to keep my examination in the form of a question.
17 That is one of their motions. I am just asking that the Court
18 advise them so I don't have a mistrial. So we don't have any
19 complications in the middle of trial they don't want to answer
20 any questions anymore. Your Honor, I don't think you
21 understand. In the middle of this trial, it is going to become
22 very apparent that they lied about me taking this property. So
23 at that point, they have committed the robbery by their own
24 admission.

1 THE COURT: Do you have anything you want to argue?

2 MR. LEE: Judge, I think I will submit on the
3 written opposition.

4 THE COURT: Okay. Let's talk about the video you
5 want.

6 THE DEFENDANT: I have the video here, Your Honor.
7 Each and every video file it says that they have been edited
8 or created on June 14th after it was in the custody of Reno
9 Police Department. So I don't know what was on it. There is no
10 chain of custody. There is no evidence. I can't tell what was
11 on it before when Wal-Mart gave it to the detective.

12 THE COURT: Do we have someone present to testify
13 about that?

14 MR. LEE: From the State?

15 THE COURT: Yes.

16 MR. LEE: We don't have anyone present about that.
17 We don't understand from the motion what editing is. What was
18 edited out. We just don't see that. In my viewing of the
19 video this morning, I still don't see it.

20 THE COURT: Okay. We are going to have to take a
21 recess, get the equipment. We need equipment to do it.

22 THE DEFENDANT: Sounds to me like they know exactly.
23 Why wouldn't they call the detective and see what happens?
24 How did we get two when he only turned in one?

1 THE COURT: Two what?

2 THE DEFENDANT: DVD's. The detective got one DVD
3 from Wal-Mart. How did we get two to give to me?

4 THE COURT: Are they identical?

5 THE DEFENDANT: No.

6 THE COURT: Do you have a police report that says
7 they got two?

8 THE DEFENDANT: They got one.

9 THE COURT: Where is the police report? Mr. Leslie,
10 did you want to see it?

11 MR. LESLIE: I am standby, if he wants me to review
12 it.

13 THE COURT: I saw him hand it toward you, that is
14 why I was asking.

15 MR. LESLIE: Do you want me to see it before?
16 I think he just thought I would give it to you.

17 THE COURT: Where did you want me to look?

18 THE DEFENDANT: At the bottom. It says he turned in
19 the one disk. The top also says it was one disk.

20 THE COURT: Counsel, do you have this?

21 MR. LEE: The police report?

22 THE COURT: Yes.

23 MR. LEE: I do.

24 THE COURT: Do you know why there are two disks

1 instead of one?

2 MR. LEE: I don't know why. My notes from
3 Mr. Bogale said they are identical. I didn't look at both
4 today.

5 THE DEFENDANT: They are edited two different times,
6 Your Honor.

7 THE COURT: I don't care if they were edited at two
8 different times. I don't know they were actually edited. If
9 they were copied, that doesn't mean it was edited.

10 THE DEFENDANT: My issue is not so much -- Why can't
11 I see the original one?

12 THE COURT: I don't know. Did you make a request for
13 the original one? Did you make a request to view the
14 original?

15 THE DEFENDANT: These were the ones given to me in
16 discovery.

17 THE COURT: You got a copy here, right? Everything
18 is a copy in discovery. Did you make a request to view the
19 original?

20 THE DEFENDANT: Just through this motion, not prior
21 to this motion.

22 THE COURT: Where is the original counsel?

23 MR. LEE: Your Honor, I would assume we have a copy
24 as well from the Reno Police Department. I am going to assume

1 the original is with the Reno Police Department or perhaps
2 even Wal-Mart still has a copy of what they supplied to the
3 Reno Police Department.

4 THE COURT: I am going to consider this a discovery
5 motion for the original to be produced. I am going to grant
6 it. I am not going to say you have to turn it over to him.
7 You have to produce it to the Court. It has to be viewable.
8 I don't know how the State is going to do that, what the
9 format is. I don't know how they record at Wal-Mart. I don't
10 know what it looks like. But the defendant has a right to view
11 the original recording, and since he's in custody, the viewing
12 will have to take place in court so we can see it. He has a
13 right to view that. How long do you think it will take you to
14 produce it?

15 MR. LEE: If Your Honor could give me till early next
16 week.

17 THE COURT: Early next week I am in trial as you
18 heard.

19 MR. LEE: I did not. I am sorry.

20 THE COURT: The case right before you.

21 MR. LESLIE: Motion to Confirm is the 11th which is
22 next Thursday, I believe. I am trying to be helpful to
23 Mr. Schachter to see it. If we did the Motion to Confirm say
24 at 10:00 o'clock, you clean up your calendar, we do this case

1 at 10:00 or 10:14.

2 THE COURT: Let me look up the calendar and see if I
3 can do that. We are going to need the person, the witness and
4 I don't have any equipment to view things. The State is going
5 to have to provide the equipment to view the exhibit and then
6 also the copies that Mr. Schachter has. If those need to be
7 viewed on a different kind of thing, if there is a discovery
8 dispute, we'll have to see those and compare them to the
9 originals.

10 MR. LEE: Could I ask for clarification? Obviously,
11 the original is housed in a storage device in a surveillance
12 system. We can ask Wal-Mart to burn a copy again. They can't
13 bring in their whole surveillance system with the cameras.
14 That is the original. All they can do is burn copies off of
15 that to produce in court. I will attack this two ways: I am
16 going to ask the officer bring in exactly what Wal-Mart
17 provided to him that was booked in evidence. I could also ask
18 Wal-Mart to burn a new disk of what they have saved if they
19 still have it saved. That is as close to the originals I can
20 plan on getting.

21 THE COURT: I don't know too much about the
22 surveillance system. Why don't you describe to me what the
23 surveillance system is at Wal-Mart?

24 MR. LEE: Based on a past case I have done, there

1 again what they have is this enormous data base of
2 surveillance. It records everything that is going on in the
3 hundreds of cameras that are around the store. It stores it
4 for a time. I don't know how long that is. It stores it in
5 whatever data base, whether it is on site, off-site, I don't
6 know. And then when the Reno police officer comes back say a
7 day or two later and says let me get surveillance of this,
8 they are able to pull it on the computer off of what is stored
9 and download it to a disk, a CD. That is what is provided to
10 the officer.

11 THE COURT: It is recorded digitally?

12 MR. LEE: Yeah. Obviously, if they want to let
13 someone have it, they can view it just on their computer at
14 Wal-Mart. What they do in these cases is provide a disk to
15 Reno police or whatever agency is seeking it. So I guess, to
16 view an original, we would have to go to Wal-Mart and the loss
17 prevention office. They certainly burn a CD and that is what
18 we have. I can certainly ask the detective who obtained the CD
19 from Wal-Mart to bring that. That would be the original we
20 have.

21 THE COURT: What about the different views?

22 MR. LEE: Different cameras.

23 THE COURT: Right. How do they do that?

24 MR. LEE: Again, I believe they are all stored and

1 saved for sometime. What I ascertain is the employee from
2 Wal-Mart has to track down and locate a given subject, in this
3 case Mr. Schachter, and try to find where he was at a certain
4 time and record it from when they see him.

5 THE COURT: Okay. So in terms of the discovery, it
6 seems to me you need the person, Reno Police Department person
7 that collected it, but also the person who prepared it which
8 must be a Wal-Mart employee, and they would have to testify
9 that they viewed this on their computer and they looked where
10 they looked and what they did and what they did witness, then
11 the disk is provided to Reno PD and the disk is provided to
12 you so we can get down to, Mr. Schachter's contention is he
13 walked in with the backpack and there should be video of that,
14 but there doesn't appear to be. Now that could be because
15 someone didn't bother to find it because they didn't believe
16 him, or it could be that he didn't walk in with the backpack.
17 But there should be video of him entering the store one way or
18 the other.

19 MR. LEE: Is that what Your Honor is interested in?

20 THE COURT: I think that is what he's interested in.

21 MR. LEE: I will contact Wal-Mart today. Hopefully
22 this individual is working. I will ask him to try to find
23 that. I don't know if that has been done in the past.

24 THE COURT: I don't know. That is his defense.

1 Either way, it goes either to support his defense if he had
2 the item on him or not support his defense if he did not have
3 those items when he walked in the door. If they don't have it
4 because they couldn't find it, we'll need testimony on that
5 with regard to the discovery.

6 MR. LEE: Thank you for that clarification.

7 THE DEFENDANT: Thank you.

8 MR. LEE: Could I ask the hearing date again?

9 THE CLERK: September 11th at 10:00. We are also
10 going to move the Motion to Confirm to 10:00 o'clock.

11 THE COURT: We'll move the Motion in Limine
12 regarding surveillance video to that same time. And since--
13 You are making a demand for legal material and legal supplies?

14 THE DEFENDANT: It has all been taken care of. That
15 was all prior. If you remember, Mr. Leslie gave me the
16 materials on the day I turned the motions in.

17 THE COURT: Right.

18 THE DEFENDANT: That has all been taken care of.

19 THE COURT: Okay. I think your Motion to Dismiss
20 for the delays and your grounds there is material exculpatory
21 evidence that has all been destroyed, and the information that
22 is Brady in the State's motion, all of that is really sort of
23 one thing, isn't it?

24 THE DEFENDANT: Yes, but about the 9-1-1.

1 THE COURT: Okay.

2 THE DEFENDANT: I got four pages of the 9-1-1
3 dispatch, actually the in-service call. I was curious to know
4 if this was, the whole four pages was everything.

5 THE COURT: So you are asking the State to
6 confirm --

7 THE DEFENDANT: If this is complete discovery.

8 THE COURT: -- if you have gotten complete
9 discovery?

10 THE DEFENDANT: Exactly.

11 THE COURT: I am going to ask the bailiff to take
12 back this part of the Reno Police Department report. I don't
13 know if counsel can answer your question. The bailiff can
14 hand them to counsel to see.

15 MR. LEE: Judge, all I can confirm is that is
16 exactly what the State has.

17 THE DEFENDANT: Because, Your Honor, on the original
18 Declaration of the probable cause and arrest, the officer
19 stated he was called for a petit larceny call, and there is no
20 petit larceny call on that. I was just wondering if there
21 were others or the officer was not telling the truth or
22 whatever.

23 THE COURT: Well, if that is all they have, that is
24 all they have. Now that you have made that clear, perhaps

1 counsel for the State will look at it a little bit
2 differently. I don't know. But he says he doesn't have any.

3 MR. LEE: I would note as well we provided the
4 actual call in discovery, not only the four pages. I don't
5 think it is quite a transcript. It is a call log and also
6 provided the actual logs.

7 THE DEFENDANT: I have not received that, Your
8 Honor.

9 THE COURT: When did you think you provided that?

10 MR. LEE: On August 22nd.

11 THE COURT: Do you show it was delivered to the
12 jail?

13 MR. LEE: I don't know any of that, Your Honor. We
14 can run it again, certainly. I don't know what the procedure
15 has been on this case in the past.

16 THE COURT: I think they have been delivering things
17 to the jail. I actually had to enter a special order at one
18 point so he could get some things.

19 THE DEFENDANT: Excuse me, Your Honor. I have had
20 to do two grievances with the jail about the video. It is a
21 constant struggle with them. But as far as serving me, they
22 have been given to me in the mail, but this is the only four
23 pages I received.

24 THE COURT: Are you sure those two disks, neither of

1 those disks is the audio?

2 THE DEFENDANT: Yeah. Yeah. I looked at them.
3 These have been since the 25th of last month when you
4 originally ordered the discovery.

5 THE COURT: He said he gave them to you to use.

6 THE DEFENDANT: This month?

7 THE COURT: August. We are in September now.

8 THE DEFENDANT: These were July.

9 MR. LEE: I don't know, so I can certainly run
10 another copy or, if possible, we can certainly discover it to
11 the Public Defender. Whatever Your Honor prefers, we'll abide
12 by it.

13 THE COURT: Well the Public Defender has been acting
14 as standby counsel, and he will provide it. If you provide it
15 to the Public Defender, his investigator will take it up to
16 him. But I think you should clarify what you provided by way
17 of discovery. If you are saying you have given it to him, you
18 should know how, because he's in custody. If you gave it to
19 him by providing it to the Public Defender's office, that is
20 where we should work that.

21 MR. LEE: This is marked disk 382 Just Ware.

22 THE COURT: That is a system you use electronically
23 to provide discovery to the Public Defender?

24 MR. LEE: I can't answer that.

1 MR. LESLIE: Your Honor, it was my understanding, at
2 least it was my understanding, if I was wrong, then I
3 apologize, I remember at the last hearing or two when you
4 ordered Mr. Bogale to serve Mr. Schachter with some discovery
5 material, I took that to mean the production of discovery will
6 be directly from the State to Mr. Schachter. Now I have
7 provided him copies of what I received in terms of documents
8 just as sort of a redundant courtesy and to facilitate our
9 relationship in the standby mode, standby counsel mode to keep
10 the line of communication open. But I have a vague
11 recollection that perhaps this 9-1-1 call is on our Just Ware,
12 and I believe I listened to it, but I either probably mistook
13 or misunderstood my obligation. I thought the Court was
14 ordering the State to directly produce documents to him so as
15 to, you know, I guess there are many interpretations one is so
16 he cannot complain he did not receive them, and Mr. Bogale and
17 the State would have some avenue to say by gosh, we did it,
18 our investigator swore in an Affidavit.

19 THE COURT: Right. That was my plan. In order for
20 you to get it off your Just Ware, you would have to burn a
21 copy to hand to him, right?

22 MR. LESLIE: Yes.

23 THE COURT: He wouldn't be able to view the Just
24 Ware discovery?

1 MR. LESLIE: No. I don't know if that will occur in
2 the future where we can show people these things up at the
3 jail. I don't know. Right now it has to be downloaded down
4 on a disk and taken to him. I don't mean to tell the State how
5 to run their case, but the State often has a better ability
6 with the jail to bring up documents, especially media
7 discovery materials and have those played to the defendant.
8 It is easier for them to do sometimes than us because we are
9 on our side and they are on their side. I want him to be able
10 to see this or hear this 9-1-1 call. If his interest in that
11 is better served having the State take that up there and play
12 it for him, provide him the disk, I am in favor. Or, if you
13 want me to make a copy and send it up.

14 THE COURT: I think the State should serve it on
15 Mr. Schachter.

16 MR. LESLIE: If I misunderstood, I apologize.

17 THE COURT: I don't think you did.

18 MR. LESLIE: I am off the hook. They are going to do
19 it. They have control over their own record of production.
20 That is how I understood that.

21 THE COURT: I think that was my intent.

22 THE DEFENDANT: I didn't bring it with me. I do
23 have paperwork from Mr. Bogale saying he understood exactly
24 what Mr. Leslie just said, they were supposed to serve it

1 personally on me.

2 THE COURT: Right. So we'll get that for you.

3 THE DEFENDANT: Okay.

4 THE COURT: What other discovery issues do you have?

5 THE DEFENDANT: Again, as to the photograph of the
6 items that were stolen or allegedly stolen, there doesn't seem
7 to be any paperwork to follow that. It is not mentioned in any
8 police report. Other than the date, there is no connection to
9 this case.

10 THE COURT: Is there nobody saying they took the
11 pictures?

12 THE DEFENDANT: No who, what, where, when. Nothing.
13 I was wondering if there was other discovery along with the
14 pictures. A record, some other pictures maybe.

15 THE COURT: You are entitled to know who took the
16 pictures and when, and that report should have been produced.

17 MR. LEE: Judge, as I understand, that was just
18 included with the second supplemental. I don't see any
19 indication of who took the picture other than I see a picture
20 of items with a receipt right next to them. So we have a
21 photograph, and we have the receipt which are produced in the
22 regular course. That sounds like a great issue on
23 cross-examination.

24 THE COURT: Actually, you don't even get the picture

1 until you can prove to me who took it, when it was taken, it
2 looks exactly the same. Before even getting to testifying
3 about it, you are going to have to prove the standing to put
4 it in. So the discovery motion to have the information in
5 advance is legitimate. Who took the pictures, where did you
6 get them, how do you have the pictures. That is a legitimate
7 motion, and it should be provided to the defense prior to a
8 jury sitting here.

9 MR. LEE: That person who took the pictures doesn't
10 have to testify for them to come in. It has to be someone to
11 say it fairly and accurately depicts what we pulled out of the
12 bag.

13 THE COURT: Do you have something like that?

14 MR. LEE: Again, I don't know the structure of th
15 case. I am assuming as the --

16 THE COURT: How much does he owe you now for this
17 hearing?

18 MR. LEE: Free of charge. Let's say again we have
19 the asset protection individual. We have the officer who
20 first responded.

21 THE COURT: Do you have a report that says how these
22 pictures were gotten?

23 MR. LEE: No. Do I have one that says exactly I
24 took this picture at such and such time showing this? Usually

1 a picture just accompanies a report. Again, outside of
2 bringing in the asset protection and original officer, there
3 are two asset protection individuals, they would be able to
4 lay the foundation properly for the picture. Whether or not
5 they took it, they were there. They pulled the material out
6 and accounted for it and got a receipt drawn up for the
7 material. So based on that, I think there is sufficient
8 foundation to bring the pictures in.

9 As far as discovery, though, it seems like he has
10 those names of the officer responding, the two asset
11 individuals and he can cross-examine them appropriately or
12 even take them up on voir dire.

13 THE COURT: I think this is a motion to exclude the
14 evidence for failure to establish the foundation, and I am
15 going to take it as a motion in limine ahead of trial to
16 exclude it. We'll hear the testimony on September 11th as part
17 of that 10:00 a.m. hearing. You bring whatever you are going
18 to bring to prove up the foundation. If there is any written
19 reports that go with it, etcetera. But bring the witness and
20 we'll figure out whether the Motion in Limine will be granted.

21 THE DEFENDANT: Next?

22 THE COURT: Yes. What else do you have?

23 THE DEFENDANT: Let me see here. As far as the
24 replacement and substitute, if it is not -- are we going to be

1 able to get the subpoena on everything that was on the
2 trailing receipt?

3 MR. LESLIE: Your Honor, we issued the subpoenas. I
4 actually, in working this up, I made a copy of the letterhead
5 given me at some point in the case, and I put notations next
6 to each of the items. We have subpoenas outstanding. My
7 investigator will be back Monday, and, obviously, that will
8 give us time to see if he can do a reach-out on some of these
9 sub entities. It is mostly Wal-Mart, and it would be my
10 prediction we will have product or explanation for non-
11 production by the 11th. Those subpoenas went out for 9:00
12 o'clock. I will ask my investigator to let the subpoenaed
13 parties know it will actually be 10:00 o'clock.

14 THE COURT: If they come at 9:00 they are here. I
15 mean if you can't get ahold of them.

16 MR. LESLIE: Right. Understood. And to the Court's
17 inquiry and Mr. Schacter's question, basically if I don't get
18 what I want in terms of my discovery demand on the State,
19 these subpoenas are served and they are, as with any subpoena,
20 whether that will actually secure the subpoenaed item remains
21 to be seen. We are making our effort to get that done.

22 THE COURT: Okay.

23 THE DEFENDANT: That's all I have, Your Honor. I
24 would just ask the Court consider everything in totality of

1 the evidence not available to me, not just the Preliminary
2 Examination item, but items, all of the evidence either lost
3 or given back, not recorded or whatever in totality. It makes
4 it unfair.

5 THE COURT: Okay. State, did you have any other
6 response to his motions you wanted to make that we didn't give
7 you a chance to do?

8 MR. LEE: No, Judge. I think they are pretty well
9 vetted. If there is something I haven't responded to, I will
10 simply rest on their written. However, I would like a piece
11 of clarification as to the Motion for Preliminary Hearing
12 Transcript. I think we ended that with Mr. Schachter saying I
13 don't waive my right. I don't know if he said that as to the
14 60-days or as to the Preliminary Hearing.

15 THE COURT: I don't know. I am going to have to
16 make a decision what to do with the Preliminary Hearing. I
17 haven't really decided on the final decision. But the way I
18 took it is he would not waive his right to the Preliminary
19 Hearing transcript, and he doesn't want to waive his right to
20 have a trial within 60 days. That is the way I took it. I am
21 just going to decide which things he gets. He obviously can't
22 have both at this point.

23 THE DEFENDANT: I would prefer the speedy trial over
24 the Preliminary Hearing.

1 THE COURT: Okay. Anything else? Okay. Now the
2 State filed a notice of intent to impeach the Defendant's
3 credibility. Do you have the certified copies of the prior
4 convictions?

5 MR. LEE: I have a whole mess of certified priors,
6 Your Honor, I do.

7 THE COURT: Do you want to mark those and admit them
8 for the purpose of this hearing? They will be available at
9 trial if necessary.

10 MR. LEE: I would prefer to keep them so we can
11 prepare with them. We don't have other copies.

12 THE COURT: Okay. Have you shown Mr. Schachter them?

13 MR. LEE: I have no idea.

14 THE COURT: Why don't you go ahead and show
15 Mr. Schachter. Mr. Leslie can answer any questions
16 Mr. Schachter has while he's looking through that.

17 MR. LESLIE: If these are marked, would they be
18 published on eflex?

19 THE COURT: No. No exhibits are on eflex.

20 THE DEFENDANT: I have copies of all those.

21 THE COURT: You are familiar with those?

22 THE DEFENDANT: Uh-huh. Are they asking for
23 Petrocelli?

24 THE COURT: Those are, if you testify, you can be

1 impeached with any felony conviction that is not more than ten
2 years old and with the date of the conviction and what it was
3 for and if it is a felony.

4 THE DEFENDANT: Did you want me to argue those now?

5 THE COURT: If you think any of those certified
6 copies are not sufficient to be a basis for impeachment, you
7 should argue it now.

8 THE DEFENDANT: Yes.

9 MR. LESLIE: Your Honor, just a suggestion,
10 Mr. Schachter can reject this offer if he wants, my suggestion
11 would be that we argue these on the 11th. I would like to
12 counsel Mr. Schachter with regard to a couple of points of law
13 that relate to prior convictions.

14 THE COURT: Okay.

15 MR. LESLIE: I think some people think every prior
16 conviction in the last ten years comes in. I know I am just
17 standby counsel. If he wants to take me up on my offer to
18 have a deeper discussion, he might be --

19 THE COURT: That might make sense. I ask the State
20 to make copies of the certified copies he has so we can have
21 them marked for purposes of the discussion and then at least I
22 can see what everybody is talking about.

23 MR. LESLIE: That is why I asked if they were on
24 eflex. He could have a very direct point by point by point.

1 If not, I can work with opposing counsel and see Mr. Schachter
2 next week before the hearing. He has nothing to lose by
3 having the additional discussion with counsel.

4 THE COURT: Is that all right with the State?

5 MR. LEE: That is fine, Your Honor.

6 THE COURT: Motion in Limine regarding defendant's
7 examination of witnesses.

8 MR. LEE: I will rest on the written motion.

9 THE COURT: I am not sure why the State thought
10 there was a prior act Mr. Schachter would want to bring up
11 with these witnesses.

12 MR. LEE: I think just, Your Honor, Mr. Schachter is
13 representing himself in proper person. Just merely to make
14 that protection known.

15 THE COURT: Did you understand the motion, sir?

16 THE DEFENDANT: I did. I understand the motion. I
17 don't understand the law behind it. I thought, again with the
18 confrontation clause, if there was a prior relative to his
19 testimony that could be brought in. If he had half a dozen
20 perjury convictions, I wouldn't be able to use that.

21 THE COURT: Yes, you might be able to use that if
22 you had a certified copy and gave notice beforehand. But you
23 can't just start talking about it.

24 THE DEFENDANT: Right.

1 THE COURT: In front of the jury.

2 THE DEFENDANT: Right. I understand that.

3 THE COURT: You can prove a person's character based
4 upon certain things, and evidence is only admissible to prove
5 under the statute specific things. And before you can put
6 evidence on or ask any questions about it, you have to have a
7 ruling by the court. So the motion is granted with regard to
8 the prior bad act which means you can't ask anything like that
9 until you have a hearing outside the presence of the jury and
10 discuss it with me first.

11 THE DEFENDANT: The only issue is not going to be
12 their prior bad acts but Wal-Mart's prior bad acts. I have
13 been arrested. It is actually my arrest. So I didn't think
14 there was going to be an issue. I have been arrested and
15 detained three times by Wal-Mart for the same exact thing, and
16 then when the officers responded, there was no -- the case was
17 dismissed.

18 THE COURT: Why is that relevant to this case?

19 THE DEFENDANT: Goes to show motive, Your Honor.

20 THE COURT: Whose motive?

21 THE DEFENDANT: The witness. The Wal-Mart. Why
22 they stopped me or at least a partial motive of why they would
23 lie.

24 THE COURT: Because they have stopped you before?

1 THE DEFENDANT: And I didn't have what they said I
2 had. Again, they stopped me for theft. The police got there
3 and there was no theft.

4 THE COURT: In the same Wal-Mart store and the same
5 people?

6 THE DEFENDANT: No, but Wal-Mart asset protection is
7 the same store.

8 THE COURT: You can have a hearing if you want on
9 that, but, no, you can't ask any questions until you convince
10 me it is relevant to this. Are you talking about when you were
11 arrested in Santa Fe, New Mexico?

12 THE DEFENDANT: No. Washoe County.

13 THE COURT: But a different store, different people?

14 THE DEFENDANT: I am not entirely sure about
15 different people. No, Your Honor.

16 THE COURT: You are going have to have a hearing
17 outside the presence of the jury before you ask those
18 questions.

19 And then there was a Motion in Limine with regard to
20 priors. I am not sure that is the prior bad act evidence that
21 we are talking about. And then with regard to the just asking
22 inappropriate questions is the other. It is a little bit -- I
23 think what the State is getting at is you can't testify when
24 you ask questions.

1 THE DEFENDANT: Absolutely.

2 THE COURT: You understand that?

3 THE DEFENDANT: Uh-huh.

4 THE COURT: You can't say well, you told me or well
5 I was walking down the aisle and you weren't really where you
6 say you were, that kind of thing.

7 THE DEFENDANT: I understand.

8 THE COURT: Does the State have more to argue with
9 regard to that?

10 MR. LEE: No, Your Honor. That's all. Thank you.

11 THE COURT: Did you have anything you wanted to say
12 about that?

13 THE DEFENDANT: I have been practicing.

14 THE COURT: Okay. Then I am going to grant the
15 State's motion. If you think you have something you should be
16 allowed to ask and you aren't because of the granting of this
17 motion, you have to ask for a hearing outside the presence of
18 the jury and discuss it with me.

19 THE DEFENDANT: Okay.

20 THE COURT: So that concludes what I have today. I
21 will have an answer with regard to what we are going to do
22 about the Preliminary Hearing transcript at the conclusion of
23 the hearing next week, and then I am going to have the
24 evidence presented with regard to the lost or destroyed

1 material, the surveillance tape, the video, the audio. All of
2 those issues will be resolved at the hearing next week. And
3 the prior convictions will be at the hearing next week also.
4 Okay. Anything further for today?

5 THE DEFENDANT: Do you want to keep these?

6 THE COURT: Do you want them marked?

7 THE DEFENDANT: At the moment, yes. The jail has
8 been very difficult.

9 THE COURT: You want those marked as what you were
10 provided in discovery?

11 THE DEFENDANT: Okay.

12 THE COURT: We'll mark A and B and admit them for
13 purposes of today's hearing with the notation that I haven't
14 heard them. Just the disks are being provided. We'll be able
15 to look at them at the hearing on the 11th.

16 (Exhibits A and B marked for identification.)

17 MR. LESLIE: Your Honor, you had ordered when we were
18 here on August 21st, you ordered because he's in jail and pro
19 per, Mr. Lee might recall, be familiar with this from other
20 cases he and I did with pro per clients, you asked the State
21 to produce their proposed Jury Instructions earlier in the
22 process. You said to do that and serve the defendant at the
23 jail and us as standby counsel by 9-12 of '14. If we are
24 coming back one day earlier for a motions hearing, I wonder if

1 we could alter that by 24 hours and ask the State to produce
2 their Jury Instructions certainly no later than at that
3 hearing. I am just thinking because it is a pro per trial,
4 that might provide an opportunity to see if there is something
5 that needs to be discussed at that time when we are here
6 before the Court.

7 THE COURT: Okay. Any objection to that?

8 MR. LEE: That is fine.

9 THE COURT: Okay. Thank you, Mr. Lee.

10 THE DEFENDANT: At this point, Your Honor, I don't
11 think I am going to need standby counsel at trial. Mr. Leslie
12 has asked me to let the Court know for the trial purposes I
13 don't think standby counsel is necessary. Just up until that.

14 MR. LESLIE: Just to clarify, what I have been having
15 is an ongoing discussion with him about what he wants from
16 standby counsel. I think you appointed it. I understand why
17 the court might want standby counsel. What I asked him to do,
18 if his position is he wants standby counsel, we are here and
19 working on getting somebody to be here on the 22nd or a
20 different trial date. It might be me or somebody else. But
21 if his position is I don't want standby counsel, it was
22 something the Court gave me, not something I requested, if
23 that is his position that he would voice that if he so
24 chooses. We are happy to do whatever the Court wants. It is

1 just his wish being expressed to you. If for example the
2 Court said, well, I don't want standby counsel here for the
3 actual trial, then we would know what we are doing or not
4 doing. Right now we are planning on having somebody here for
5 the trial.

6 THE COURT: Well, I don't know if Mr. Schachter has
7 a tactical reason he doesn't want someone sitting next to him.
8 I don't know. But from the Court's perspective for judicial
9 resource having someone present who can facilitate discovery
10 of documents, securing changes in Jury Instructions, etcetera,
11 is very, very helpful during the course of the trial. There
12 could be research that has to be done during the course of the
13 trial. So I would be not particularly comfortable with not
14 having standby counsel.

15 MR. LESLIE: I just wanted him, if he felt
16 comfortable, again I wanted him to express that. I told him
17 do whatever you want. If you don't want us there, if you are
18 inclined, please let the Judge know and she can make a
19 decision. I don't want you to think I am trying to get out of
20 it. I just want you to understand I simply asked he convey
21 what his thoughts or requests were on that. That is what he's
22 done. We'll be here.

23 THE COURT: Okay. Given all of the evidentiary
24 issues, I am not sure we'll be able to do it without standby

1 counsel. Okay. I will see you back next week. Court's in
2 recess.

3 (Whereupon the proceedings were concluded.)

4 -o0o-

1 STATE OF NEVADA,)
2) ss.
3 COUNTY OF WASHOE.)
4

5 I, Judith Ann Schonlau, Official Reporter of the Second
6 Judicial District Court of the State of Nevada, in and for the
7 County of Washoe, DO HEREBY CERTIFY:

8 That as such reporter I was present in Department No. 4 of the
9 above-entitled court on Wednesday, September 3, 2014, at the
10 hour of 2:00 p.m. of said day and that I then and there took
11 verbatim stenotype notes of the proceedings had in the matter
12 of THE STATE OF NEVADA vs. MARC PAUL SCHACHTER, Case Number
13 CR14-1044.

14 That the foregoing transcript, consisting of pages
15 numbered 1-50 inclusive, is a full, true and correct
16 transcription of my said stenotypy notes, so taken as
17 aforesaid, and is a full, true and correct statement of the
18 proceedings had and testimony given upon the trial of the
19 above-entitled action to the best of my knowledge, skill and
20 ability.

21 DATED: At Reno, Nevada this 23rd day of January, 2015.

22
23 /s/ Judith Ann Schonlau
JUDITH ANN SCHONLAU CSR #18
24

DATE, JUDGE
OFFICERS OF

PAGE ONE

COURT PRESENT

APPEARANCES-HEARING

CONT'D TO

9/3/14	<u>PRE-TRIAL MOTIONS</u>
HONORABLE	Deputy District Attorney Matthew Lee, Esq., represented the State.
CONNIE	Defendant present representing himself. Chief Deputy Public Defender
STEINHEIMER	James Leslie, Esq., present as stand-by counsel for the Defendant.
DEPT. NO.4	Counsel Leslie again advised the Court that he would be in a Murder trial in
M. Stone	another department the week this trial is scheduled but is attempting to
(Clerk)	assign new stand-by counsel for the defendant.
J. Schonlau	Motion to Dismiss Case on Grounds that the State has Lost and/or
(Reporter)	Destroyed Material Exculpatory Evidence by Defendant; presented
	argument.

Based on the arguments presented by defendant in the above Motion, stand-by counsel Leslie advised the Court that his office has sent subpoenas for all witnesses requested by the Defendant.

Defendant presented further argument. **COURT ENTERED ORDER** denying the Motion to Dismiss Case on Grounds that the State has Lost and/or Destroyed Material Exculpatory Evidence with leave to renew as a Motion for Directed Verdict if deemed appropriate.

Motion for Preliminary Hearing Transcript by the Defendant; presented argument; objection and argument by defense counsel; reply by Defendant. **COURT** advised the Defendant that it is inappropriate to dismiss case based on the lack of a preliminary hearing transcript since there were equipment malfunction with the JAVS system. The remedy would be for a remand to Justice Court for a new preliminary hearing, although the Defendant would waive his rights to a speedy trial by doing so. Defendant advised the Court that he is not willing to waive his speedy trial rights. Motion deemed moot due to the equipment malfunction in producing a Preliminary Hearing Transcript.

Motion to Advise Witnesses for the State of Their Privilege Against Self-Incrimination by Defendant; presented argument. State's counsel submitted matter on the written briefs.

Motion in Limine regarding Surveillance Video Evidence by Defendant;
presented argument.

COURT advised counsel for the State and the Defendant that the above Motion is converted into a Motion regarding Discovery.

COURT ENTERED ORDER that the original surveillance Video shall be produced and viewed by the Defendant in Court on September 11, 2014.

The State must provide the proper equipment for viewing the video.

Further, **COURT** advised the State that the officer who has custody of the

DATE, JUDGE
OFFICERS OF

PAGE TWO

COURT PRESENT

APPEARANCES-HEARING

CONT'D TO

9/3/14

PRE-TRIAL MOTIONSJ. Schonlau
(Reporter)

video and/or any Wal-Mart Employee may need to be subpoenaed in order to authenticate the video.

Motion for Legal Materials and Legal Supplies as well as its addendum deemed moot as stand-by counsel Leslie advised the Court at the last hearing that the Defendant has been provide all materials and supplies allowed.

COURT noted the all the Motions to Dismiss filed by the Defendant regarding any exculpatory evidence is all encompassed in the argument presented previously in this hearing.

Motion to Compel the State to Provide Exculpatory Material ("Brady") in its Possession by Defendant. State's counsel advised the Court that the 911 Call Log and Audio of Call were provided to the Defendant. Further, discussion ensued regarding the Audio of Call and service on the Defendant. **COURT** directed the State to re-serve the Audio of the 911 Call on the Defendant at the Washoe County Jail.

Motion for Production of Replacement and/or Substitute Lost/Destroyed Evidence by Defendant; presented argument. **COURT** advised the State that without providing information as to who photographed the items and when the items were photographed, the photographs would not be allowed into evidence. Any further argument on a Motion to Exclude Photographs/Evidence shall be heard at the ongoing pre-trial motions hearing on September 11, 2014.

Defendant again advised the Court that he is unwilling to waive his right to a preliminary hearing transcript and unwilling to waive his speedy trial rights. Discussion ensued regarding impeachment of the Defendant should he choose to testify. State's counsel advised the Court that the State has showed both the Defendant and his stand-by counsel the prior convictions the State intends to utilize. Stand-by counsel requested additional time to advise the Defendant regarding his prior conviction(s) and their use for impeachment purposes. **COURT** directed the State to make copies of the prior conviction(s) for the Court's use during further hearing on this matter on September 11, 2014.

Motion in Limine regarding Defendant's Examination of Witnesses submitted by the State on the pleadings without oral arguments. **COURT ENTERED ORDER** granting Motion. The Defendant shall not testify during examination of any witnesses. Should an issue arise, the State shall request a hearing outside the presence of the Jury.

CASE NO. CR14-1044 TITLE: THE STATE OF NEVADA VS. MARC
PAUL SCHACHTER

DATE, JUDGE OFFICERS OF COURT PRESENT	PAGE THREE APPEARANCES-HEARING	CONT'D TO
9/3/14 J. Schonlau (Reporter)	<u>PRE-TRIAL MOTIONS</u> COURT advised counsel for the State and the Defendant that the issues to be argued at the September 11, 2014 hearing are the issues regarding the Motion to Dismiss regarding Lost/Destroyed Evidence and the Motion in Limine regarding Prior Convictions. State's counsel agreed to provide the State's Proposed Jury Instructions to the Defendant at the September 11, 2014 hearing. Defendant advised the Court that he is willing to waive his right to stand-by counsel during the Jury Trial. COURT did not allow such waiver as stand-by counsel will assist in judicial resources for the Defendant during the trial. Discussion ensued regarding the surveillance videos previously received by the Defendant in discovery. Defendant requested both be placed into evidence for safekeeping.	9/11/14 10:00 a.m. Ongoing Pre-Trial Motions/ Motion to Confirm Trial Date 9/22/14 10:00 a.m. Jury Trial

EXHIBITS A and B marked by the Defendant.

Court recessed. Defendant remanded to the custody of the Sheriff.

Exhibits

Title: **THE STATE OF NEVADA VS. MARC PAUL SCHACHTER**

PLTF: **THE STATE OF NEVADA** PATY: **ZELALEM BOGALE, ESQ.**

DEFT: **MARC P. SCHACHTER** DATY: **PRO PER**

Case No: **CR14-1044**

Dept. No: **4** Clerk: **M. Stone**

Date: **9/3/2014**

Exhibit No.	Party	Description	Marked	Offered	Admitted
A.	Defendant	CD – “Disc 1; DA 14-12219; Schachter, Marc; 7/24/14 KP”	9/3/14		
B.	Defendant	CD - “Disc 2; DA 14-12219; Schachter, Marc; 7/24/14”	9/3/14		

COPY

CCR #18

RENO, NEVADA

IN AND FOR THE COUNTY OF WASHOE

-ooo-

Plaintiff,

CASE NO. CR14-1044
DEPARTMENT NO. 4

Defendant.

PRE-TRIAL MOTIONS

Reno, Nevada

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A P P E A R A N C E S

FOR THE PLAINTIFF: OFFICE OF THE DISTRICT ATTORNEY
BY: ZELALEM BOGALE, ESQ.
DEPUTY DISTRICT ATTORNEY
WASHOE COUNTY COURTHOUSE
RENO, NEVADA

FOR THE DEFENDANT: APPEARING IN PROPER PERSON

STANDBY COUNSEL OFFICE OF THE PUBLIC DEFENDER
BY; JAMES LESLIE, ESQ.
DEPUTY PUBLIC DEFENDER
350 S. CENTER STREET
RENO, NEVADA

I N D E X

WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

ALEJANDRO MONROY

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NICK REED

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MICHELLE BAYS

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EXHIBITS:

MARKED FOR
IDENTIFICATION

ADMITTED
INTO
EVIDENCE

1

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1-B

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2, 3, 4, 5

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A

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B

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B-1

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C

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D (REMARKED)

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1 RENO, NEVADA; THURSDAY, SEPTEMBER 11, 2014; 10:00 A.M.

2 -oOo-

3 THE COURT: This is the time set for a continued
4 motion, and we have Mr. Schachter present with standby
5 counsel, Mr. Leslie. Thank you. And the State is represented.

6 Counsel we kind of put off some things, some of
7 Mr. Schachter's motions, as well I do have some rulings to
8 make on the State's motions. Are you ready to go forward with
9 those motions this morning?

10 THE DEFENDANT: I am, Your Honor.

11 MR. BOGALE: State is ready to proceed.

12 THE COURT: All right. Shall we, I think we need to
13 talk about the video surveillance. Let's start there.

14 MR. BOGALE: Okay. The State has witnesses here to
15 authenticate the original video as the Court ordered on 9-3 so
16 I guess I'll call both of them first.

17 THE COURT: That's fine. Why don't you tell us the
18 name of who you are going to be calling.

19 MR. BOGALE: Nick Reed.

20 THE COURT: Okay.

21 MR. BOGALE: The next is Alejandro Monroy.

22 THE COURT: Last name Roy?

23 MR. BOGALE: M-O-N-R-O-Y.

24 MR. BOGALE: I will start with Alejandro Monroy, Your

1 Honor.

2 THE COURT: Okay.

3 THE CLERK: Please raise your right hand.

4

5 ALEJANDRO MONROY

6 called as a witness, having been first duly sworn,
7 took the witness stand and testified as follows:

8 THE COURT: Counsel you may proceed.

9 MR. BOGALE: Thank you Your Honor.

10

11 DIRECT EXAMINATION

12 BY MR. BOGALE:

13 Q When you get comfortable, please state your name and
14 spell your last name for the Court Reporter?

15 A Alejandro Monroy, M-O-N-R-O-Y.

16 Q What is your occupation?

17 A Asset protection officer for Wal-Mart.

18 Q And do you work at a specific Wal-Mart?

19 A I now work for the Kietzke Wal-Mart store 2189.

20 Q Have you worked for other Wal-Marts in town?

21 A I have, the Seventh Street Wal-Mart, store 3254.

22 Q And did you work for that Seventh Street Wal-Mart on
23 or about, excuse me, June 9th of this year?

24 A Yes, I did.

1 Q And what was your employment status there? What did
2 you do there?

3 A Asset protection.

4 Q What is asset protection?

5 A Asset protection is basically walking the store
6 looking for safety issues and any suspicious activity that
7 customers must be displaying to catch shoplifters.

8 Q Do you just look with your eyes, look for video
9 cameras, how do you keep track of this?

10 A Ninety-nine percent of the time it is with my eyes.

11 Q So you have an office in the store?

12 A Yes, we do.

13 Q And have you been trained to detect suspicious
14 customers?

15 A Yes.

16 Q What sort of training have you undergone?

17 A Basically walking with an experienced asset
18 protection officer, demonstrating what suspicious activity
19 might look like, looking around nervously, having an empty
20 tote in their hand, shopping erratically, things like that.

21 MR. LESLIE: Your Honor, I apologize for the
22 interruption. I forgot to ask, can we have him uncuffed like
23 we did last time?

24 THE COURT: Yes.

1 MR. LESLIE: Thank you.

2 BY MR. BOGALE:

3 Q Now you said you observe customers with your own
4 eyes; is that correct?

5 A Yes.

6 Q Do you also have video equipment?

7 A Yes, we do.

8 Q Does Wal-Mart have video surveillance?

9 A Yes, they do.

10 Q Is it constantly recording or triggered by certain
11 things? Explain that?

12 A It is recording 24 hours a day 7 days a week.

13 Q Now we are here because an individual named Mark
14 Schachter has been identified, sorry, has been charged with
15 some crimes. Let me bring your attention back to June 9th. Do
16 you recall seeing somebody in your store that you thought was
17 acting suspicious?

18 A Yes.

19 Q Did you eventually confront that person?

20 A Yes, I did.

21 Q Do you see that person here in the courtroom today?

22 A Yes, I do.

23 Q Could you please point at him and describe an
24 article of clothing he's wearing?

1 A The defendant has a gray jumpsuit. I can't tell
2 what it is. And orange shoes.

3 MR. BOGALE: May the record reflect the
4 identification of the defendant by this witness?

5 THE COURT: The record will so reflect.

6 MR. BOGALE: Thank you. Your Honor, may I approach?

7 THE COURT: You may.

8 MR. BOGALE: I will ask the clerk to have this
9 marked.

10 THE CLERK: Exhibit C marked.

11 (Exhibit C marked for identification.)

12 THE CLERK: Just so everybody remembers, A and B
13 were marked at the end of the previous hearing which were the
14 CD's in the custody of the defendant.

15 MR. BOGALE: Your Honor, may I approach this
16 witness?

17 THE COURT: You may.

18 MR. BOGALE: Thank you.

19 BY MR. BOGALE:

20 Q Mr. Monroy, I am going to show you what has been
21 marked as Exhibit C, okay? It is a disk. Can you-- do you--
22 can you tell me whose name is on there, first?

23 A That is Mark Schachter.

24 Q Who do you understand Mark Schachter to be?

1 A The defendant.

2 Q And do you know what this disk has on it?

3 A Yes.

4 Q What is on this disk?

5 A It is the video of my confrontation with Mark
6 Schachter along with some video of him in the store selecting
7 some items.

8 MR. BOGALE: Your Honor, may I move to admit Exhibit
9 C in evidence?

10 THE COURT: Any objection?

11 THE DEFENDANT: How does he know what is on that
12 disk?

13 THE COURT: You want to ask him a question before I
14 admit the document?

15 THE DEFENDANT: Yes. How do you know what is on the
16 disk?

17 THE WITNESS: I burned the disk.

18 THE DEFENDANT: Okay. Thank you.

19 THE COURT: Exhibit C is admitted.

20 (Exhibit C admitted in evidence.)

21 MR. BOGALE: Thank you, Your Honor. May I publish?

22 THE COURT: You may.

23 MR. BOGALE: We tried to set up the video so Your
24 Honor can see it. I hope it is sufficient.

1 BY MR. BOGALE:

2 Q Mr. Monroy, there are several files on this disk. I
3 am going to play the beginnings of them, and if you are
4 satisfied it accurately reflects what you burned, just tell me
5 okay?

6 A Okay.

7 THE DEFENDANT: Your Honor, I just have an
8 objection. Where are we going with this? I thought the
9 hearing was about the disk that was already in evidence not a
10 new disk.

11 THE COURT: We may have to compare the two, I guess.

12 THE DEFENDANT: This is a recently burned disk he
13 brought. He said he brought it.

14 THE COURT: He said he burned it. Mr. Schachter, we
15 don't argue back and forth. So since you are in trial in two
16 weeks, we better start figuring this out. So you don't get to
17 sit there and debate issues. If you have a motion, make it.
18 If you have an objection, make it. You say what the objection
19 is. You stand up when you say it, but we don't have to do it
20 today but in a trial, then I rule on it and you don't debate
21 it with me, okay?

22 THE DEFENDANT: Sorry.

23 THE COURT: I am going to let the question stand.
24 Whatever the objection was, which I am not sure I understood,

1 is overruled. I am going to let the question stand and the
2 witness can answer.

3 BY MR. BOGALE:

4 Q Okay. Mr. Monroy, I am going to open this disk and
5 play the file with you. Just look at that screen behind you.
6 Start with a file called AA GM. Do you recognize this video?

7 A Yes.

8 Q What does it show?

9 A It is showing Mr. Schachter going to the front of
10 the pharmacy and health and beauty department.

11 Q I don't believe we have the ability to kind of like
12 use high technology and point and circle things. Can you at
13 least point at Mr. Schachter in the video?

14 A Absolutely. Right there.

15 Q Is this an accurate reflection of the Wal-Mart
16 surveillance recording at your store on Seventh Street on June
17 9th?

18 A Yes, it is.

19 Q I am going to close that file out and open up
20 another one. This one is entitled GC Portable. Those are the
21 first two words. Okay. Have you had a chance to view that?

22 A Yes.

23 Q What is this video?

24 A This is a video of Mr. Schachter going up to the

1 register at the garden center and paying for some items.

2 Q And there appears to be a date and time stamp on
3 that; is that correct?

4 A Yes.

5 Q What does that date and time stamp say?

6 A June 9, 2014, 11:48 a.m.

7 Q Is this an accurate depiction or reflection of the
8 Wal-Mart surveillance on that date and time?

9 A Yes, it is.

10 Q Is this an accurate reflection of what you burned
11 that day?

12 A Yes.

13 Q While we are on that, do you recall the exact date
14 you burned this file?

15 A These files --

16 Q If you don't remember the exact date that's okay?

17 A I know it was within a few days of the actual
18 incident.

19 Q So within what, two or three days?

20 A Yes.

21 Q Of June 9th?

22 A Yes.

23 Q Could it have been a week?

24 A No. It was two or three days.

1 Q Are these video files maintained on like a server of
2 some kind?

3 A It is actually saved on a computer.

4 Q Do you have a certain amount of time within which
5 you need to burn them if you want to preserve them?

6 A When we create an actual investigation file where we
7 take snippets of the video and place them into an
8 investigation, I am not 100 percent if that ever deletes
9 unless we physically delete it.

10 Q Now I am going to show you a file entitled RX POX
11 are the first two words. Do you recognize this video?

12 A Yes, I do.

13 Q What does it show?

14 A It is showing Mr. Schachter in the first aisle of
15 the pharmacy looking at some items.

16 Q Where is Mr. Schachter? If you could point him out
17 as to the place?

18 A Right in there.

19 Q That is pretty hard to see. How do you know that is
20 Mr. Schachter from the video?

21 A Because I was actually physically surveilling him
22 from the aisle in front.

23 Q So you were personally in this store surveilling him
24 with your own eyes?

1 A Yes, I was.

2 Q You can't see it on the video, but you were
3 somewhere to the right, I guess?

4 A Correct.

5 Q Is this a fair and accurate representation of the
6 Wal-Mart surveillance of that location on June 9th?

7 A Yes, it is.

8 Q I am going to show you file RX-0TC. Do you recognize
9 this video?

10 A Yes, I do.

11 Q Do you see Mr. Schachter in it?

12 A I do.

13 Q Where do you see him?

14 A Right there.

15 Q Okay. And is this video recording activities you
16 were also observing with your own eyes?

17 A Yes.

18 Q And is this a fair and accurate representation of
19 what you observed with your own eyes?

20 A Yes.

21 Q Okay. Just for me could you explain what he's doing
22 here?

23 THE DEFENDANT: Your Honor I object. We'll let the
24 video decide what I am doing or not doing. I don't understand

1 what the question is.

2 THE COURT: Overruled. I will allow him to say what
3 he observed personally. He's saying he saw this personally,
4 so I will allow that question.

5 THE WITNESS: It is Mr. Schachter looking at some
6 Icy Hot items and comparing and reading the box.

7 BY MR. BOGALE:

8 Q Okay. What is Mr. Schachter doing with these items?

9 A He places them in the cart.

10 Q Okay. Is it a fair and accurate representation of
11 the video or what you observed?

12 A Yes, it is.

13 Q Now I am going to show you a file called Stanley GC.
14 What does this show?

15 A This is showing the entrance into the garden center.

16 Q Does it show Mr. Schachter in there?

17 A Yes, it does.

18 Q Where is he?

19 A Right there.

20 Q Okay. I will show you another file called Stanley
21 GC. It ends in a zero. The previous one ended in 15. What is
22 this file?

23 A It is the same entrance into the garden center, just
24 the angel on the other side of the door.

1 Q Did it show Mr. Schachter in that video?

2 A Yes, it did.

3 Q Just a couple more, Mr. Monroy. This one is entitled
4 Park Lot Cam is the first two words. Now what is happening in
5 this video?

6 A This is where I confronted Mr. Schachter.

7 Q I am going to pause it. Where is the confrontation
8 happening, if you could point it out to us?

9 A Right there.

10 Q Okay. And you personally confronted Mr. Schachter?

11 A Yes, I did.

12 Q And you know where this video was recording from?

13 A Yes.

14 Q Where was it recording from?

15 A There is a camera on one of the light posts.

16 Q And would this be a fair and accurate reflection of
17 the confrontation?

18 A Yes.

19 Q Okay. Okay. I am now showing you a file entitled
20 Roof Top Cam are the first two words of the file. What is
21 happening here?

22 A The confrontation is continuing. Mr. Schachter is
23 still attempting to get past me.

24 Q Okay. I see there are -- there is a street towards

1 the top of the video. What street is that?

2 A That is Seventh Street.

3 Q You are on like the north side of the parking lot?

4 A Correct.

5 Q And where is Mr. Schachter and where are you in this
6 video?

7 A This is Mr. Schachter.

8 THE COURT: I can't see.

9 THE WITNESS: That is Mr. Schachter and that is me.

10 THE COURT: Okay. Thank you.

11 BY MR. BOGALE:

12 Q It is a long video, so I am going to ask you is this
13 short piece a fair and accurate representation of the
14 aftermath of the confrontation?

15 A Yes.

16 Q Does anyone else have access to the video files at
17 Wal-Mart besides asset protection?

18 A Upper management.

19 Q Is there any way that these video files could have
20 been -- could have been edited?

21 A Not that I am aware of.

22 Q Do you know how to edit them?

23 A No.

24 Q Okay. Have you reviewed Wal-Mart's video files for