

1 Defendant claims that counsel was ineffective for not challenging jurors for cause
2 following the Court's allegedly "perfunctory inquiry." Supplemental Petition at 5. However,
3 Defendant does not show, nor does the record support, that there was any evidence of a basis
4 for for-cause challenges during voir dire. Such bare, naked allegation cannot serve as a basis
5 for relief.

6 In addition to failing to show that counsel's performance was deficient, Defendant fails
7 to establish that he was prejudiced by any alleged deficiency. Defendant challenges the Court's
8 questioning as inadequate to protect him and claims that counsel was further ineffective for
9 failing to effectively use peremptory challenges. However, not one of the jurors that Defendant
10 claims were biased in his Supplemental Petition were chosen as jury members. Transcript of
11 Proceedings: Jury Trial, Volume 1 at 49. Defendant conveniently ignores that counsel's
12 performance during voir dire was sufficient to exclude those potential jury members he claims
13 were biased. Defendant's claim that "failure to weed out possibly biased jurors may amount
14 to reversible error" is belied by the record. Supplemental Petition at 6. All the jurors that
15 Defendant contends might have been biased were, in fact, weeded out during voir dire. As
16 such, Defendant has failed to meet his burden under either prong of Strickland. Therefore, this
17 claim should be denied.

18 **III. Counsel was not ineffective when making an opening statement.**

19 In considering whether trial counsel was effective, the court must determine whether
20 counsel made a "sufficient inquiry into the information . . . pertinent to his client's case."
21 Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at
22 690-91, 104 S. Ct. at 2066). Then, the court will consider whether counsel made "a reasonable
23 strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921
24 P.2d at 280 (citing Strickland, 466 U.S. at 690-91, 104 S. Ct. at 2066). Counsel's strategy
25 decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary
26 circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280.

27 This analysis does not indicate that the court should "second guess reasoned choices
28 between trial tactics, nor does it mean that defense counsel, to protect himself against

1 allegations of inadequacy, must make every conceivable motion no matter how remote the
2 possibilities are of success.” Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551
3 F.2d at 1166 (9th Cir. 1977)). In essence, the court must “judge the reasonableness of
4 counsel’s challenged conduct on the facts of the particular case, viewed as of the time of
5 counsel’s conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. However, counsel cannot
6 be deemed ineffective for failing to make futile objections, file futile motions, or for failing to
7 make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

8 Here, Defendant argues that counsel was ineffective for not choosing to present self-
9 defense as the primary defense during the opening statement because “competent counsel
10 would have immediately developed the self defense [*sic*] theory to the jury.” Supplemental
11 Petition at 7. However, he fails to demonstrate deficiency or prejudice. The failure to focus on
12 a self-defense theory during opening statement is objectively reasonable in light of the record
13 showing that self-defense was not the defense’s primary theory of the case. Instead, the
14 defense’s primary theory of the case revolved around inconsistencies in videotape evidence.

15 The question of what defense to pursue is a question of strategy that is virtually
16 unchallengeable, and bare, naked allegations are not sufficient to entitle Defendant to relief.
17 Doleman, 112 Nev. at 846, 921 P.2d at 280; Hargrove, 100 Nev. at 502. Defendant has
18 presented no evidence to show that counsel was deficient for focusing on problems with
19 videotape evidence rather than on a theory of self-defense. He also fails to explain how self-
20 defense would have a superior theory given the evidence in the record. Counsel’s failure to
21 focus on self-defense during the opening statement was reasonable given that counsel had
22 chosen not to pursue a self-defense theory, and Defendant fails to establish the “extraordinary
23 circumstances” necessary to challenge this tactical decision. Doleman, 112 Nev. at 848, 921
24 P.2d at 280-81.

25 Moreover, in order to show that he was prejudiced by any alleged deficiency, Defendant
26 must show that there is reasonable probability that, but for counsel’s errors, the result of the
27 trial would have been different. McNelson, 115 Nev. at 403, 990 P.2d at 1268. Defendant bears
28 the burden of demonstrating, by a preponderance of the evidence, that counsel was ineffective.

1 Means, 120 Nev. at 1011, 103 P.3d at 32. Trial counsel has the “immediate and ultimate
2 responsibility of deciding if and when to object, which witnesses, if any, to call, and what
3 defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Defendant has
4 presented no evidence that making self-defense a primary focus would have been more viable
5 than the approach adopted by trial counsel. Therefore, this claim should be denied.

6 Defendant next alleges that two objections by the State during the defense’s opening
7 statement “immediately left the jury with a strong first impression that the defense was in some
8 way not performing appropriately.” Supplemental Petition at 8. This a bare, naked allegation,
9 unsupported by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (1984). Defendant
10 provides no evidence whatsoever to support this assertion that the jury was left with the
11 impression that the defense did not act appropriately, nor does he show that this alleged “first
12 impression” influenced the jury’s final verdict.

13 Finally, Defendant claims that counsel was ineffective because he “did not even state
14 whether or not the Defendant ... would in fact testify.” Supplemental Petition at 8. However,
15 counsel’s performance cannot be deemed to have below an objective standard of
16 reasonableness because of a failure to state that Defendant would definitively testify during
17 opening statements. Indeed, Defendant does not present any evidence in his Supplemental
18 Petition to establish that he had definitively decided to testify at the time of opening statements.
19 Moreover, Defendant does not explain how he might have been prejudiced by such an
20 omission. Defendant ignores that he might have been harmed if he had exercised his right to
21 not testify after counsel had promised the jury he would do so. Counsel’s choice was a strategic
22 one designed to protect Defendant’s interest and, as such, it cannot be challenged absent
23 extraordinary circumstances. Doleman, 122 Nev. at 846, 821 P.2d at 280.

24 Defendant has wholly failed to meet his burden under either prong of Strickland. He
25 has not shown that counsel’s performance fell below an objective standard of reasonableness
26 because of the strategy that counsel chose to pursue. He has also failed to show that he was
27 prejudiced by any alleged deficiency. Therefore, this claim must be dismissed.

28 **IV. Defense counsel was not ineffective regarding bench conferences.**

1 Defendant claims that he received ineffective assistance of counsel because trial
2 counsel failed to ensure that bench conferences were memorialized. Supplemental Petition at
3 8-9. This claim is without merit because he has failed to show that counsel's assistance was
4 not "[w]ithin the range of competence demanded of attorneys in criminal cases." Jackson, 91
5 Nev. at 432, 537 P.2d at 474.

6 In Preciado v. State, the Nevada Supreme Court ruled that district courts should
7 memorialize all bench conferences, either contemporaneously or by allowing the attorneys to
8 make a record afterward. 318 P.3d 176, 178 (2014); see also Daniel v. State, 119 Nev. 498,
9 507-08, 78 P.3d 890, 897 (2003). However, the Nevada Supreme Court rendered its decision
10 in Preciado in February 2014. The verdict in Defendant's jury trial was entered on February
11 5, 2008. At the time that Defendant's trial took place, the standing law in Nevada was that
12 bench conferences and sidebars must be recorded only in capital cases. Daniel, 119 Nev. at
13 507-08, 78 P.3d at 897. There was no such requirement for non-capital cases until the Nevada
14 Supreme Court extended its holding from Daniel, over six years after the verdict in
15 Defendant's trial was returned. Preciado, 318 P.3d at 178. Trial counsel's performance cannot
16 be deemed to have fallen below an objective standard of reasonableness for following what
17 was the standing law at the time of Defendant's trial.

18 Additionally, in order to establish that he received ineffective assistance of counsel,
19 Defendant must also show prejudice. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065,
20 2068. In cases where a bench conference was not memorialized, Defendant must show that the
21 record's missing portions are so significant that their absence precludes the Court from
22 conducting a meaningful review of the alleged errors that the Defendant identified and the
23 prejudicial effect of any such error. Daniel at 508, 78 P.3d at 897. Defendant does not
24 demonstrate that the Court's failure to record all bench conferences prejudiced him. He makes
25 bare, naked allegations that he was prejudiced, but he cannot explain how discussions during
26 the bench conferences might have resulted in prejudice given the extensive record in this case.
27 He alleges, for example, that the testimony of a witness called to impeach the victim "ended
28 abruptly after the sidebar conference and he was never able to testify fully," implying that it is

1 impossible to deduce the Court's reasoning without a transcript of the bench conference.
2 Supplemental Petition at 10. This assertion is belied by the record. First, the record shows that
3 the witness in question continued to testify on direct examination after the bench conference,
4 and before he was cross-examined. Second, the arguments of both parties are clear from the
5 record:

6 MS. KOLIAS (for the defense): Okay, at any time did you ask
7 Richard if you could go to the hospital?

8 THE WITNESS: Oh yes, I told him I'm going to go to the hospital,
9 I'm bleeding a lot, and he said no, no, you don't need to, you're
10 just fine like that.

11 MS. THOMAS: Your Honor, the answer's calling for hearsay
12 again, and this whole line of questioning at this point is irrelevant,
13 whether he went to the hospital or whether he didn't go to the
14 hospital. At this point I'm going to object, that it's beyond.

15 THE COURT: All right, *it is (a) hearsay, and (b) I don't – how is*
16 *it relevant?*

17 MS. KOLIAS: Number one it completely contradicts what the
18 alleged victim says in this case, and number two the victim talked
19 about how this was unusual –

20 MR. WESTMEYER: Judge, could we do this in sidebar?

21 THE COURT: Come up.

22 [Bench conference – not transcribed]

23 Transcript of Proceedings: Jury Trial, Volume 1 at 155-56 (emphasis added).

24 At this point, the record clearly shows that the Court overruled the State's objection to
25 the defense's line of questioning because, after the sidebar conference, counsel continued the
26 line of questioning about whether the witness went to the hospital or not. Id. Contrary to
27 Defendant's claim that the bench conference "abruptly ended" the witness's testimony, the
28 record shows that defense counsel continued to question him:

1 MS. KOLIAS: Did you end up going to the hospital that night?

2 THE WITNESS: Yes, directly from the club to the hospital.

3 MS. KOLIAS: Did you see Lazaro at the club prior to your leaving
4 the nightclub?

5 THE WITNESS: No.

6 MS. KOLIAS: Okay, so you left the nightclub before Lazaro
7 arrived?

8 THE WITNESS: Yes.

9 MS. KOLIAS: Okay, and did you get any medical treatment?

10 THE WITNESS: Yes.

11 Transcript of Proceedings: Jury Trial, Volume 1 at 156 (emphasis added).

12 The Court allowed the questioning to continue until the questions veered into topics
13 that were not relevant. The Court stated, on the record, its reasoning in halting that particular
14 line of questioning:

15 MS. KOLIAS: What was that medical treatment?

16 THE COURT: Excuse me, counsel, *how is that relevant? He left*
17 *before—*

18 MS. KOLIAS: Okay. All right.

19 THE COURT: —*Mr. Martinez-Hernandez got there.* He went to
20 the hospital. *What they did to him in the hospital is of no*
21 *relevance to what we're doing here.*

22 MS. KOLIAS: *All right, Your Honor. Okay. All right.*

23 Transcript of Proceedings: Jury Trial, Volume 1 at 156 (emphasis added). Defendant's claim
24 that the failure to record a sidebar conference, an act that was in accordance with Nevada law
25 at the time of trial, resulted in a record that was "so very deficient" that the Court can now do
26 nothing but guess at the trial court's reasoning is absurd given the record showing that the
27 Court stated its reasoning shortly after the sidebar conference. Supplemental Petition at 10.

1 The record is sufficient to allow this Court to adequately consider the issues that
2 Defendant raises. Defendant has not shown that counsel acted below an objective standard of
3 reasonableness because counsel followed what was Nevada law at the time of trial, and the
4 unrecorded conferences did not prejudice Defendant. Therefore, this claim should be denied.

5 V. Cumulative Error

6 Defendant alleges that the “numerous error and deficiencies of counsel” require
7 reversal. Supplemental Petition at 10. The Ninth Circuit has recognized a claim of cumulative
8 prejudice in habeas petitions. Harris by & Through Ramseyer v. Wood, 64 F.3d 1432, 1438
9 (9th Cir. 1995). However, while the Nevada Supreme Court has addressed the issue of
10 cumulative error in habeas petitions in unpublished opinions, the Court has never expressly
11 held that ineffective assistance of counsel claims in a Petition for Writ of Habeas Corpus may
12 be aggregated to determine prejudice.

13 Even assuming, *arguendo*, that Defendant may bring such a claim in a petition for writ
14 of habeas corpus, the claim is without merit. The cumulative error doctrine applies where the
15 Court finds multiple errors that, although harmless individually, cumulate to violate a
16 defendant’s constitutional rights. Byford v. State, 116 Nev. 215, 241 (2000). By definition, a
17 finding of cumulative error requires that there be more than one error in a given case.
18 Cumulative error *cannot* exist where, as here, an appellant has not shown that even one
19 underlying error occurred. McConnell v. State, 125 Nev. 243, 259 (2009).

20 Defendant has not asserted a single meritorious claim and, as such, there is “nothing to
21 cumulate.” Id. Therefore, this claim should be denied.

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1 **CONCLUSION**

2 Based on the foregoing, the State respectfully requests Defendant's Supplemental
3 Points and Authorities in Support of Petition for Writ of Habeas Corpus be DENIED.

4 DATED this 7th day of November, 2016.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY 

10 RYAN J. MACDONALD
11 Deputy District Attorney
12 Nevada Bar #012615

13 **CERTIFICATE OF ELECTRONIC FILING**

14 I hereby certify that service of STATE'S RESPONSE TO DEFENDANT'S
15 SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR
16 WRIT OF HABEAS CORPUS FOR POST-CONVICTION RELIEF, was made this 7th
17 day of November, 2016, by Electronic Filing to:

18 TERRENCE MICHAEL JACKSON, ESQ.
19 terry.jackson.esq@gmail.com

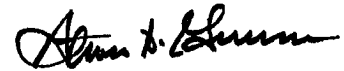
20 
21 C. Jimenez
22 Secretary for the District Attorney's Office

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28 RJM/cmj/L3

of self-defense in light of the evidence of the case would have been a superior theory for defense. 4. Counsel was ineffective for not requesting bench conferences to be properly placed on the record, thereby not preserving: A motion to dismiss during the trial and response to an objection to the testimony of witness Maceo. The Court denied the motion to dismiss so a record was made as to the Court's decision. Further, after due deliberation of the jury, the jury found the Defendant guilty beyond a reasonable doubt which established that the State had presented sufficient evidence of Defendant's guilt. Although, the Bench conference was not recorded and no record of a hearsay objection was made. The record establishes that the State's objection was overruled and the Court allowed the witness to testify. 5. Cumulative errors. Petitioner has failed to establish any meritorious claims of error. Errors if any in the record do not violate defendant's constitutional rights. Under Strickland the Petitioner must show that counsel's representation fell below an objective standard of reasonableness and but for the errors the result of the proceedings would have been different. Based upon the above, the Court finds that Petitioner has not met either of the Strickland two-prong test. Therefore, COURT ORDERED Petition for Writ of Habeas Corpus DENIED. This Court adopts the procedural history provided by the State. The State is directed to submit a formal Findings of Fact, Conclusions of Law and Order within ten (10) days after counsel is notified of the ruling and distribute a filed copy to all parties involved pursuant to EDCR 7.21. Such Order should set forth a synopsis of the supporting reasons proffered to the Court in briefing. CLERK'S NOTE: A copy of this minute order placed in the attorney folders of: Terrence Jackson District Attorney - Criminal

[Return to Register of Actions](#)

0308



CLERK OF THE COURT

1 FCL
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 RYAN J. MACDONALD
6 Deputy District Attorney
7 Nevada Bar #012615
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

CASE NO: 07C230237

12 LAZRO MARTINEZ-HERNANDEZ, aka,
13 Lazaro Martinezhernandez, #1493472

DEPT NO: XVII

14 Defendant.

15 FINDINGS OF FACT, CONCLUSIONS OF
16 LAW AND ORDER

17 DATE OF HEARING: November 9, 2016
18 TIME OF HEARING: 9:30 AM

19 THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI,
20 District Judge, on the 9th day of Month, 2016, the Petitioner being present, REPRESENTED
21 BY TERRENCE MICHAEL JACKSON, the Respondent being represented by STEVEN B.
22 WOLFSON, Clark County District Attorney, by and through ROBERT B. TURNER, Chief
23 Deputy District Attorney, and the Court having considered the matter, including briefs,
24 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court
25 makes the following findings of fact and conclusions of law:

26 FINDINGS OF FACT, CONCLUSIONS OF LAW

27 On February 16, 2007, the State charged Lazaro Martinez-Hernandez ("Defendant")
28 by way of Information with one count of Assault With a Deadly Weapon (Felony – NRS
29 200.471). On February 5, 2008, a jury found Defendant guilty. On April 10, 2008, Defendant

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1 was sentenced to the Nevada Department of Corrections for 12 to 36 months. The sentence
2 was suspended, and Defendant was placed on probation for an indeterminate period not to
3 exceed three years, subject to certain conditions of release. The Judgment of Conviction was
4 filed on April 25, 2008. Defendant did not file a direct appeal.

5 On January 1, 2010, Defendant's stipulated to having violated the conditions of his
6 probation and his probation was revoked. The original 12 to 36 month sentence was imposed,
7 and Defendant received 96 days credit for time served. An Amended Judgment of Conviction
8 was filed on February 1, 2010.

9 On February 1, 2011, Defendant filed a Petition for Writ of Habeas Corpus through
10 counsel, wherein he raised an appeal-deprivation claim. On May 18, 2012, Defendant filed a
11 Supplement to his Petition. The State filed its Response and Motion to Dismiss on July 2,
12 2012. On October 5, 2012, this Court held an evidentiary hearing on Defendant's appeal-
13 deprivation claim, and found that Defendant had been deprived of his right to a direct appeal
14 and was therefore entitled to file an untimely appeal pursuant to NRAP 4(c).

15 On July 22, 2013, Defendant filed a Notice of Appeal. The Nevada Supreme Court
16 affirmed Defendant's conviction on July 22, 2014, and Remittitur issued on August 26, 2014.

17 On February 24, 2015, Defendant filed the instant Supplemental Points and Authorities
18 in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Supplemental
19 Petition") as a supplement to the Petition for Writ of Habeas Corpus that he had filed on
20 February 1, 2011. The State filed its response on July 22, 2015. On September 4, 2015, a
21 hearing was held where the district court deferred its decision and ordered supplemental
22 briefing. On September 11, 2015, Defendant filed a Supplemental Points and Authorities on
23 Whether Court Has Jurisdiction to Consider Petitioner's Post-Conviction Writ. The State filed
24 its Response on October 6, 2015.

25 On November 5, 2015, the Court entered its Findings of Fact, Conclusions of Law and
26 Order denying Defendant's Supplemental Petition as moot because Defendant had already
27 been released from custody at the time he filed it. On November 9, 2015, Defendant filed a
28 Notice of Appeal from the District Court's Order denying his Supplemental Petition. On

1 August 12, 2016, the Nevada Supreme Court ruled that, because the original Petition had been
2 filed while Defendant was in custody in 2011, the Supplemental Petition was not moot even
3 though Defendant was not currently in custody. As such, the Nevada Supreme Court remanded
4 the case to the District Court for Defendant's Supplemental Petition to be considered on the
5 merits. The State responded on November 7, 2016.

6 This Court held a hearing on November 9, 2016, and now orders that Defendant's
7 Petition be DENIED.

8 Defendant sets forth five points for the Court to make the determination that he received
9 ineffective assistance of counsel. To prevail on a claim of ineffective assistance of trial
10 counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel
11 by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See
12 also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must
13 show first that his counsel's representation fell below an objective standard of reasonableness,
14 and second, that but for counsel's errors, there is a reasonable probability that the result of the
15 proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068;
16 Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting
17 the Strickland two-part test).

18 First, Defendant claims that prior counsel should have sought the assistance of an expert
19 to make a determination as to whether the video of the Defendant committing the crime had
20 been altered. The Court finds that Defendant fails to set forth any evidence that the video had
21 been altered and without more he is not entitled to relief. Hargrove v State, 100 Nev. 498, 502,
22 686 P.2d 222, 225 (1984).

23 Defendant next claims that counsel was ineffective during jury selection. However, the
24 Court finds that Defendant fails to establish either deficient performance or prejudice, as not
25 one of the complained of jurors were on the jury. Defendant fails to establish with specificity
26 any claim that would warrant a challenge for cause regarding the jurors in question.

27 Third, Defendant claims that counsel was ineffective in his opening statement since he
28 gave a weak opening statement and that the opening should have addressed the issue of self-

1 defense. It appears that the focus of the defense was the inconsistencies of the video. Defense
2 counsel made the tactical decision not to fully pursue a self-defense theory, and Defendant has
3 failed to establish the extraordinary circumstances necessary to challenge that decision.
4 Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996). The Court further finds
5 that Defendant has failed to establish how a theory of self-defense in light of the evidence of
6 the case would have been a superior theory for defense. Accordingly, he has not shown that
7 the result of the trial would have been different had counsel pursued a theory of self-defense.
8 McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999).

9 Fourth, Defendant claims that counsel was ineffective for not requesting bench
10 conferences to be properly placed on the record, thereby not preserving (1) a motion to dismiss
11 during the trial and (2) response to an objection to the testimony of witness Maceo. The Court
12 finds that Defendant failed to show that the record's missing portions were so significant that
13 their absence precluded the Court from conducting a meaningful review of the alleged errors
14 and the prejudicial effect of any such error. Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890,
15 897 (2003). The Court denied the motion to dismiss; as such, a record was made as to the
16 Court's decision. Further, after due deliberation of the jury, the jury found the Defendant guilty
17 beyond a reasonable doubt, which established that the State had presented sufficient evidence
18 of Defendant's guilt. Although the bench conference was not recorded and no record of a
19 hearsay objection was made, the record establishes that the State's objection was overruled
20 and the Court allowed the witness to testify.

21 Fifth, Defendant claimed cumulative error. Defendant has failed to establish any
22 meritorious claims of error. Errors, if any, in the record do not violate Defendant's
23 constitutional rights.

24 Under Strickland, Defendant must show that counsel's representation fell below an
25 objective standard of reasonableness and but for the errors the result of the proceedings would
26 have been different. Based upon the above, the Court finds that Defendant has not met either
27 prong of the Strickland test.

28 ///

ORDER

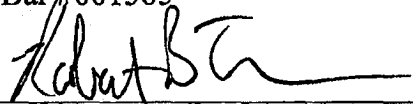
THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 13 day of December, 2016.


DISTRICT JUDGE 

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY


RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, was made this 13 day of December, 2016, by Electronic Filing to:

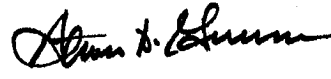
TERRENCE M. JACKSON, ESQ.
Terry.Jackson.Esq@gmail.com


C. Jimenez
Secretary for the District Attorney's Office

RJM/cmj/L3

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CLERK OF THE COURT

NEO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAZARO MARTINEZ-HERNANDEZ,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 07C230237

Dept No: XVII

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

PLEASE TAKE NOTICE that on December 15, 2016, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on December 21, 2016.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of December 2016, I placed a copy of this Notice of Entry in:

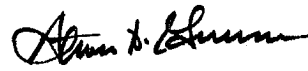
☒ The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:
Lazaro Martinez-Hernandez Terrence M. Jackson, Esq.
1716 Weeping Willow Ln. 624 S. Ninth St.
Las Vegas, NV 89104 Las Vegas, NV 89101
(Last Known Address)

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk

0314



CLERK OF THE COURT

1 RTRAN

2
3
4 DISTRICT COURT
5 CLARK COUNTY, NEVADA
6

7 THE STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 LAZARO MARTINEZ-HERNANDEZ,

11 Defendant.
12

CASE NO. 07C230237

DEPT. XVII

ROUGH DRAFT

TRANSCRIPT OF PROCEEDINGS

13 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE
14 WEDNESDAY, NOVEMBER 9, 2016

15 **ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)**
16
17

18 APPEARANCES:

19 For the State:

ROBERT B. TURNER, ESQ.
Chief Deputy District Attorney

21 For the Defendant:

TERRENCE JACKSON, ESQ.

23 Court Interpreter:

IRMA SANCHEZ GASTELUM

24
25 RECORDED BY: CYNTHIA GEORGILAS, COURT RECORDER

AA 0315

1 LAS VEGAS, NEVADA, WEDNESDAY, NOVEMBER 9, 2016

2 [Proceedings commenced at 9:29 a.m.]

3 THE COURT: Why don't we come up for our 9:30 hearing since both sides
4 are here and my law clerk is getting my paperwork.

5 MR. JACKSON: Could we have a Spanish interpreter available?

6 THE MARSHAL: You need a Spanish interpreter?

7 THE COURT: Well, we can call one.

8 THE MARSHAL: I'll call one.

9 MR. JACKSON: It would help Mr. Lazaro Martinez-Hernandez. He speaks a
10 little English but his English is --

11 THE COURT: We'll call one.

12 [Pause in proceedings]

13 THE COURT: J.R., did they give you an indication on how soon we can get
14 someone?

15 THE MARSHAL: No, Your Honor, but I'll check next door right now, see if
16 they might have one.

17 [Pause in proceedings]

18 THE MARSHAL: Your Honor, we got one next door but they're going to use
19 her on the next case.

20 THE COURT: So we'll get it in about 5 minutes, less than five minutes.

21 MR. JACKSON: I don't think it would take us much more than about 5
22 minutes on this one. I don't know [indiscernible] next case. I don't know what --

23 THE COURT: If you want a court interpreter we'll have one in 5 minutes.

24 MR. JACKSON: Oh, okay, then we'll have one in 5 minutes, okay.

25 THE COURT: Well, yeah --

1 MR. JACKSON: I thought they were going to wait for a while and then bring
2 her over. I would much rather have one.

3 THE COURT: On a procedural matter, I think we can, Mr. Jackson and
4 Mr. Turner, we can do this on procedural matter. We were last in court on
5 November 11th, 2016.

6 THE RECORDER: Judge, did you want this on the record?

7 THE COURT: Yes. I'm sorry.

8 THE RECORDER: That's fine. Okay.

9 THE COURT: I think Ms. Holthus was here for the State. Mr. Jackson was
10 here. And we set the hearing on this for today. At that time, the Court advised that
11 both parties if they wanted supplemental briefing it could be submitted. Has either
12 side submitted supplemental briefing subsequent to the October 11th because what I
13 do have from you, Mr. Jackson, is September -- no, that was October 11th,
14 September 11th -- no, actually I don't. I didn't receive any supplemental briefing by
15 either party. Did --

16 MR. TURNER: Well --

17 THE COURT: -- either party submit any? I mean --

18 MR. TURNER: Well --

19 THE COURT: -- I have the State's November 7th. I'm sorry --

20 MR. TURNER: Yes, that --

21 THE COURT: -- I do have that.

22 MR. TURNER: Okay, that's --

23 MR. JACKSON: I did not file an additional brief. I'm relying on the brief that I
24 filed --

25 THE COURT: Okay.

1 MR. JACKSON: -- in the initial supplemental points and authorities filed --

2 THE COURT: Okay, and did you receive the State's November --

3 MR. JACKSON: Yes.

4 THE COURT: -- 7th?

5 MR. JACKSON: I do have that.

6 THE COURT: Okay. Good. All right, we're up to speed.

7 MR. JACKSON: So, I'm prepared to proceed based on the -- all the
8 pleadings that are on file.

9 [Pause in proceedings awaiting Spanish interpreter]

10 THE COURT: All right, we do have a court interpreter. Ms. Interpreter, we'll
11 need your name for our court clerk.

12 THE INTERPRETER: Yes, Irma Sanchez Gastelum.

13 THE CLERK: Can I get the first name?

14 THE INTERPRETER: Irma, I-R-M-A.

15 THE CLERK: Thank you.

16 THE INTERPRETER: Okay.

17 THE COURT: All right, Mr. Jackson, it's your petition.

18 MR. JACKSON: Yes, Your Honor.

19 Well, we're back here again after a year and I'm going to basically
20 argue the things that we never got to on the merits the last time.

21 The Defendant believes that his attorney did not get to present an
22 adequate case as Strickland would have required when he went to trial. There was
23 evidence presented. The only real evidence that he was guilty was a tape which the
24 Defendant believes had some issues with it. The attorney didn't do anything to
25 check that out. The Defendant is prepared to testify to that. And we believe that

1 when that's the central issue against your client, that's what you want to check out.
2 Tapes can be altered or not be very good. You need to have them looked at by
3 someone that knows what they're doing and that wasn't done in this particular case.
4 The Defendant was convicted basically on that evidence. We think the evidence was
5 flawed.

6 The government always argues, well, it was a strategic decision or it
7 was something that we can't prove it was or wasn't done. Well, we don't have that
8 now. There's no way we can prove it now. When you get a case a few years later
9 it's hard to show what it would have shown. What we do know is that it wasn't done.

10 There's a couple of other things that the Defendant didn't do during the
11 trial that we think reflect that he did not live up to the standard Strickland requires. In
12 reading the transcript of the jury selection, it's the Defense contention that Counsel
13 was not adequate in the jury selection process. The Defendant did very little in terms
14 of questioning the jurors; asked just simple questions, can you be fair. There was
15 not any probing, not any questions. Even though many of the jurors may have had
16 biases, they were not adequately explored by Counsel. A juror would possibly give
17 a conclusory statement but they were never challenged.

18 The Defendant again raised issues regarding whether or not certain
19 things happened in terms of objections and procedures during trial. And the most
20 obvious thing was that we didn't get an adequate appellate record because Counsel
21 did not ask that all the bench conferences be recorded. Now, this was I think before
22 the Preciado case which pretty much made clear that district courts should
23 memorialize all bench conferences contemporaneously or allow attorneys to make a
24 record afterward.

25 Now, the most striking example is on page 10 of our brief where we talk

1 about, or where the Defense attorney actually made a motion to dismiss during trial
2 on the grounds that they thought there was insufficient evidence. And the judge
3 called Counsel to the bench and then a little dialogue took place between the
4 Defense and the Court. And after that happened, there was no indication of what
5 happened at the bench conference. Because of that, we don't have an adequate
6 record on appeal as to why the judge may or may not have ruled the way the judge
7 ruled. I think that denies the Defendant due process of law, denies adequate ability
8 to raise important issues on appeal and I think that alone is grounds to show
9 ineffective assistance of counsel.

10 THE COURT: Mr. Jackson, if -- was I -- I don't know if I was the trial judge or
11 not. I don't recall.

12 MR. JACKSON: I don't think so, Your Honor.

13 MR. TURNER: I don't know, Your Honor.

14 MR. JACKSON: I think it was -- what?

15 MR. TURNER: I don't know. I don't have a sufficient --

16 THE COURT: I just --

17 MR. TURNER: -- record to review.

18 THE COURT: -- don't recall but --

19 MR. TURNER: You were, Judge, according to the appeal.

20 THE COURT: On the -- right, but --

21 MR. TURNER: Yeah, according --

22 THE COURT: -- I don't know about --

23 MR. TURNER: -- to the opinion you were the court -- the trier.

24 MR. JACKSON: Okay.

25 MR. TURNER: Well, actually, Judge, I take that back. This was based upon

1 the initial -- or your order denying the post-conviction --

2 THE COURT: Right.

3 MR. TURNER: -- so I don't know if you're the actual trial court.

4 THE COURT: Well, Mr. Jackson, whether it's me or someone else at the
5 bench, like I said, I have no specific recollection of it without looking at the actual
6 record.

7 My question to you, if there's a motion to dismiss for whatever reason
8 and either myself or another judge denied it, wouldn't that have been an issue not so
9 much the bench conference but would have the issue of the denial been up --
10 wouldn't that have been ripe for the appeal? For example, if the Court allowed
11 evidence that shouldn't have been in, if the Court made some finding whether it was
12 a request for something, wouldn't that have been an appeal issue?

13 MR. JACKSON: That's a good point except if it's not there in the transcript
14 you don't have anything to appeal because you don't have an adequate record.
15 That's the whole point of having the bench conferences transcribed.

16 THE COURT: No, but if I -- if the Court allowed certain evidence to come in,
17 that's part of the record. If the Court precluded certain evidence from coming in,
18 that's part of the record. Whatever --

19 MR. JACKSON: Let me see if I can --

20 THE COURT: -- the argument was, if that wasn't part of the record still the
21 evidence was either included or excluded and which is part of the record.

22 MR. JACKSON: Let me see if I can find the part of the brief I was referring
23 to. And I want to simply point out --

24 [Colloquy between Court and clerk]

25 THE COURT: Oh, this is a Department -- actually --

1 MR. JACKSON: It was 7 I think was the department.

2 THE COURT: It was Judge Glass did the trial.

3 MR. JACKSON: Yeah, I think it was Department 7 or 5. I don't know.

4 THE COURT: I think it's 5. That's probably why I didn't recall the trial.

5 MR. JACKSON: And of course, that's always difficult for a court to rule on
6 something without the --

7 THE COURT: What I'm saying on appeal if it's an issue of insufficient
8 evidence, that would have been brought up on appeal. If the Court made an
9 incorrect evidentiary ruling, that would have been brought up on appeal.

10 MR. JACKSON: I direct the Court to look at the supplemental points and
11 authorities which were filed on 2/24/15. On page 9 of the supplemental points and
12 authorities -- and there's a colloquy between Defense counsel and the Court. And I'll
13 just wrap up after this point.

14 And on page 9 of the supplemental points and authorities, it says:

15 Defense Counsel: Can we make a motion to dismiss? There is a lack
16 of evidence at this time.

17 The Court says: Okay Counsel.

18 And Ms. Westmeyer: And for the record, Judge, I'll oppose that.

19 And then the Court says: Everybody come up here to my...come up
20 here right now.

21 And then it says bench conference not transcribed.

22 Now, we don't know what happened after that. So, you say, you know,
23 well, you could have appealed it but after that -- say, we want to make a motion to
24 dismiss. The judge calls everybody up to the bench and says everybody come up
25 here right now and then there's a bench conference. We don't know what happened

1 after that. So, it's hard to --

2 THE COURT: Well, we know --

3 MR. JACKSON: -- appeal something --

4 THE COURT: -- the judge did not grant it, okay, and it sounds --

5 MR. JACKSON: Didn't grant the motion to dismiss --

6 THE COURT: Right. Right.

7 MR. JACKSON: -- but we don't know why and we don't know what was said
8 at the bench conference. Maybe the prosecution made some reference to facts that
9 weren't true, or maybe made some reference to law that wasn't true, or maybe the
10 judge made some indication that he didn't understand the facts as they really were.
11 You know the Defense could have argued, hey, these witnesses were mistaken as
12 to the facts, and the prosecutor could have said, well, maybe that's true, Your
13 Honor, but on the other hand -- but we don't know what was said at the bench
14 conference and the judge could have said, well, you know, I'm ruling this way
15 because you know I don't care what this witness said. We don't know what the judge
16 said. We can't make a reasoned argument whether the motion to dismiss -- there's a
17 fine standard on a motion to dismiss under Jackson versus Virginia that the State
18 has to prove each element of a case beyond a reasonable doubt. If the judge said
19 something that showed that the judge made a mistake in applying the law or in
20 understanding the facts and it was said at the bench conference, then Counsel
21 could, in arguing our appeal, make a more cogent argument. But you don't have
22 those facts because what happened? They did not record the bench conference.
23 Now, maybe there was nothing there. Maybe 8 times out of 10 there was nothing
24 there but the 2 times out of 10 there was something there. It could have prejudiced
25 the Defendant.

1 I'll simply submit it with that. I think there's at least a reasonable
2 possibility there was something prejudicial, especially since it was a motion to
3 dismiss. Counsel is not supposed to make motions to dismiss without some
4 reasonable belief. They shouldn't -- you should not make frivolous motions. You
5 have an [indiscernible] duty not to do that, although Counsel makes motions all the
6 time that aren't granted like with many of my motions but we would assume that
7 there was some reasonable basis for the motion but we don't have any record on
8 what was discussed at the bench and that's simply my point.

9 The -- we'll simply submit the fact that these kinds of cases of -- that
10 you have an allegation of self-defense, you have an allegation that there was, you
11 know, a credibility problem with the witnesses, we have a question of whether or not
12 the tape was valid or not; an attorney has to, you know, really do a thorough job
13 under Strickland and I don't know if we have that here. And I'll submit it with those
14 observations.

15 Thank you.

16 THE COURT: I have a question. Mr. Jackson, on the issue of the video tape,
17 isn't that, to use you know magic words here, bare naked allegation that the tape
18 was doctored. I mean what evidence are you presenting that the tape was
19 doctored?

20 MR. JACKSON: My client's prepared to testify to that.

21 THE COURT: Okay, but do you have any evidence that's been submitted
22 here that --

23 MR. JACKSON: I don't have the tape.

24 THE COURT: Okay. I mean is he just going to deny, I didn't do it, I -- you
25 know --

1 MR. JACKSON: That's correct.

2 THE COURT: But nothing that some --

3 MR. JACKSON: I do not have the tape. I haven't seen the tape and I don't
4 have access to it.

5 THE COURT: Okay. All right. Thank you.

6 Mr. Turner.

7 MR. TURNER: Well, Your Honor, I will keep it brief.

8 I think the Court asked the questions that I was going to direct my
9 argument towards. Basically, all the Court has in terms of the first issue and the
10 video tape is, quote, unquote, the Defendant's belief that it was altered and the
11 Defendant's belief that if you were to hire an expert that expert would easily show
12 that it was altered. I think that's belied by the evidence and the fact that that video
13 tape, the foundation was laid for the admission of it which rebuts whatever belief and
14 conclusory statement the Defendant makes without any evidentiary basis. It's by
15 definition speculative and for that reason we'd ask the Court to deny that.

16 In terms of the bench conferences, I think the Court hit the nail on the
17 head as well. This wasn't any ordinary motion. It was a motion to dismiss based
18 upon the sufficiency of the evidence. The Court could weigh the sufficiency of the
19 evidence because it was the evidence that was admitted. The Court could review all
20 that evidence. Whatever the Defense counsel's arguments were, the Court could
21 look at that evidence and make a decision. And as this Court indicated, clearly
22 Judge Glass found there was sufficient evidence for it to go to the Jury and clearly
23 the Jury found that there was sufficient evidence to support the conviction. And if
24 there was a challenge it could be made. Counsel could challenge the sufficiency of
25 the evidence as a matter of law before the Supreme Court in the direct appeal. So,

1 we would ask the Court to deny that as well.

2 I'll submit it on the other issues based upon our pleadings.

3 THE COURT: Anything further, Mr. Jackson?

4 MR. JACKSON: No. No, Your Honor.

5 THE COURT: All right, the Court's going to prepare a written decision on this
6 matter.

7 All right. Thank you, Counsel.

8 MR. TURNER: Thank you, Your Honor.

9

10 [Proceedings concluded at 9:50 a.m.]

11 * * * * *

12

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

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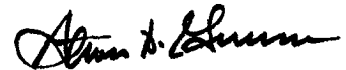
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Cynthia Georgilas
CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII



CLERK OF THE COURT

1 **NOAS**
2 **TERRENCE M. JACKSON, ESQ.**
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5 624 South Ninth Street
6 Las Vegas, NV 89101
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9 *Counsel for Lazaro Martinez-Hernandez*

Electronically Filed
Jan 05 2017 02:57 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

The State of Nevada,
Plaintiff,
v.
Lazaro Martinez-Hernandez,
Defendant.

District Case No.: 07-C-230237
Dept. XVII

NOTICE OF APPEAL

NOTICE is hereby given that the Defendant, LAZARO MARTINEZ-HERNANDEZ, by and through his attorney, TERRENCE M. JACKSON, ESQ., hereby appeals to the Nevada Supreme Court, from the Order denying his Post Conviction Writ of Habeas Corpus, file stamped and dated December 15, 2016.

Defendant, LAZARO MARTINEZ-HERNANDEZ states further that he is indigent and requests that the filing fees be waived.

Respectfully submitted this 23rd day of December, 2016.

/s/ Terrence M. Jackson

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[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court;

[X] Via the Supreme Court Drop Box on the 17th floor of the Regional Justice Center;

[X] and by United States first class mail to the Nevada Attorney General and the Defendant as follows:

STEVEN S. OWENS
Chief Deputy D.A. - Criminal
APPELLATE DIVISION
steven.owens@clarkcountyda.com

ADAM LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

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0328


CLERK OF THE COURT

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9 *Counsel for Lazaro Martinez-Hernandez*

10 IN THE EIGHTH JUDICIAL DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,)

District Case No.: 07-C-230237

13 Plaintiff,)

Dept. XVII

14 v.)

15 Lazaro Martinez-Hernandez,)

CASE APPEAL STATEMENT

16 Defendant.)

17 1. Appellant(s): LAZARO MARTINEZ-HERNANDEZ

18 2. Judge: MICHAEL VILLANI

19 3. Appellant(s): LAZARO MARTINEZ-HERNANDEZ

20 Counsel:

21 Terrence M. Jackson
22 624 South Ninth Street
23 Las Vegas, NV 89101
24 (702) 386-0001

25 4. Respondent: STATE OF NEVADA

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Avenue
Las Vegas, NV 89101
(702) 671-2700

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CLERK OF THE COURT

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**IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

LAZARO MARTINEZ-HERNANDEZ,

Defendant.

CASE NO.: C-07-230237-1

DEPT. NO.: XVII

REQUEST FOR ROUGH DRAFT
TRANSCRIPT

TO: COURT RECORDER - DEPARTMENT XVII - MICHELLE RAMSEY

LAZARO MARTINEZ-HERNANDEZ, the defendant named above, requests preparation
of a rough draft transcript of certain portions of the proceedings before the district court, as follows:

November 9, 2016 Hearing re: Argument on Writ of Habeas Corpus

Any and all proceedings, that is the entire transcript of each of the above hearings for Petition
for Habeas Corpus Writ in the Eighth Judicial District Court.

This notice requests a transcript of only those portions of the district court proceedings which
counsel reasonably and in good faith believes are necessary to determine whether appellate issues
are present. Voir dire examination of jurors, opening statements and closing arguments of trial
counsel, and the reading of jury instructions shall not be transcribed unless specifically requested
above.

I recognize that I must personally serve a copy of this form on the above named court
recorder and opposing counsel, and that the above named court recorder shall have ten days from the
receipt of this notice to prepare and submit to the district court the rough draft transcript requested
herein.

0332

1 DATED this 23rd day of December, 2016.

2
3 //s// Terrence M. Jackson
4 Terrence M. Jackson, Esquire
5 Law Office of Terrence M. Jackson
6 State Bar No.: 00854
7 624 South Ninth Street
8 Las Vegas, NV 89101
9 T: 702-386-0001/ F: 702-386-0085
10 Terry.jackson.esq@gmail.com
11 *Counsel for Defendant Lazaro Martinez-Hernandez*

12 CERTIFICATE OF SERVICE

13 I hereby certify that on the 23rd day of December, 2016, I served a true and correct copy
14 of the foregoing Request for Rough Draft Transcripts on:

15 TO: **Michelle Ramsey, Court Recorder**
16 District Court, Department No. XVII (CR 11A)

17 By: //s// Ila C. Wills
18 Assistant to Terrence M. Jackson

19 CERTIFICATE OF ELECTRONIC FILING

20 I hereby certify that service of the above and foregoing was made this 23rd day of December,
21 2016, by CM/ECF via Electronic Filing to:

22 Steven B. Wolfson, Esquire
23 Clark County District Attorney
24 steven.wolfson@clarkcountynyda.com

25
26
27 By: /s/ Ila C. Wills
28 Assistant to Terrence M. Jackson

1 Nevada law is clear that a defendant usually cannot challenge ineffective assistance of
2 counsel on direct appeal except in extremely limited circumstances. *Daniel v. State*, 100 Nev. 579,
3 688 P.2d 315 (1984). A claim of ineffective trial counsel must generally be supported by factual
4 allegations from an evidentiary hearing. Consequently, a claim of ineffective assistance is properly
5 raised in proceedings for post conviction relief. *See, Lewis v. State*, 100 Nev. 456, 686 P.2d 219
6 (1984); *Bolden v. State*, 99 Nev. 181, 659 P.2d 886 (1983); *Gibbons v. State*, 97 Nev. 520, 634 P.2d
7 1214 (1981). The only remedy which was available to defendant to challenge the ineffective
8 assistance which occurred in this case was by a post conviction habeas corpus petition alleging
9 ineffective assistance because an evidentiary hearing was needed. This could not be done in this case
10 until after the direct appeal process had been completed.

11 In all cases in which a defendant receives a relatively short sentence of incarceration, such
12 as occurred in this case, even when the defendant proceeds as rapidly as possible, without any delays
13 in the process, he cannot, because of time delays inherent in the appellate process, file a post
14 conviction relief petition before he has been released from prison. A defendant should not need to
15 request a lengthy sentence just to be able to appeal an unjust or improper conviction. Such a result
16 would be unfair and is absurd.

17 NEV. CONST. ART. VI, § 6 provides district courts original jurisdiction "in all cases
18 excluded by law from the original jurisdiction of justices' courts" as well as "power to issue writs
19 of Habeas Corpus ..." Although a court may have general jurisdiction over a criminal case until an
20 indictment or information is filed. NEV. CONST. ART. I, § 8; NRS § 173.015. "It is the rule in this
21 state, however, that felonies may be prosecuted by either indictment or information. The statutory
22 provisions are amply sufficient to protect an accused from unfounded accusations." *Cairns v. Sheriff*,
23 *Clark Cnty.*, 89 Nev. 113, 116, 508 P.2d 1015, 1017 (1973) (citations omitted).

24 Once a court has jurisdiction over a case it will lose jurisdiction in very limited
25 circumstances. *See, e.g., Ravera v. City of Reno*, 100 Nev. 68, 71, 675 P.2d 407, 409 (1984) (case
26 was dismissed); *Gemma v. Gemma*, 105 Nev. 458, 462, 778 P.2d 429, 432 (1989) (division of
27 community property is final unless the court specifically retains jurisdiction); *Taylor v. Taylor*, 105
28 Nev. 384, 386, 775 P.2d 703, 704 (1989) (new law restricts the court's jurisdiction); *Friedman v.*

1 *Eighth Judicial Dist. Court of State, ex rel. Cnty. of Clark*, 127 Nev. Adv. Op. 75, 264 P.3d 1161,
2 1163-64 (2011) (child custody when parties move to another jurisdiction); *Vaile v. Porsboll*, 128
3 Nev. Adv. Op. 3, 268 P.3d 1272, 1273 (2012) (modify child support when parties no longer live in
4 Nevada). The current matter has not been determined to be a limited circumstance in which
5 jurisdiction should be automatically be lost, thus the trial court retains jurisdiction to decide
6 defendant's habeas corpus petition on the merits. If this Court were to adopt the State's position
7 herein that a court could lose jurisdiction over a meritorious case simply by passage of time, then the
8 State would erroneously benefit from every delay in every such matter. There would be nothing to
9 prevent the State from always delaying proceedings if a person's meritorious habeas corpus petition
10 could automatically be dismissed upon their release from prison.

11 Courts generally refuse to hear cases where the issue(s) have become moot.

12 This court has frequently refused to determine questions presented in purely
13 moot cases. Cases presenting real controversies at the time of their institution may
14 become moot by the happening of subsequent events. A moot case is one which seeks
15 to determine an abstract question which does not rest upon existing facts or rights.
Nat'l Collegiate Athletic Ass'n. v. Univ. of Nevada, Reno, 97 Nev. 56, 58, 624 P.2d
10, 11 (1981) (citations omitted) (Emphasis added).

16 However, federal courts have long held that the reviewing court does not automatically lose
17 statutory jurisdiction to hear a habeas corpus petition when the prisoner is released from custody.
18 Depending on the relief being sought and whether such relief is rendered moot by release, the court
19 may still maintain constitutional jurisdiction.

20 A prisoner's release from custody pending appeal does not affect the
21 reviewing court's statutory jurisdiction to hear his habeas petition. *See Carafas v.*
22 *LaVallee*, 391 U.S. 234, 238, 88 S.Ct. 1556, 1559, 20 L.Ed.2d 554 (1968). Mootness,
23 however, goes to our constitutional jurisdiction, not our statutory jurisdiction. Under
24 Article III, we may not entertain an appeal if there is no longer a live case or
25 controversy before us.

26 It is clear that the direct consequences of the state action challenged here can
27 no longer be remedied in habeas. Petitioners cannot be released from a term of
28 incarceration that they have already served. Were petitioners seeking to vacate their
original convictions, then the collateral consequences would be sufficient to
overcome mootness. *See Sibrón v. New York*, 392 U.S. 40, 54-55, 88 S.Ct. 1889,
1898-99, 20 L.Ed.2d 917 (1968). But petitioners do not challenge their convictions.
They do not even challenge the finding ... They object solely to the penalty-the
additional incarceration-imposed on them for these acts.

Cox v. McCarthy, 829 F.2d 800, 802-03 (9th Cir. 1987) (Emphasis added).

1 Defendant submits his case is distinguishable from *Nevada Dept. of Prisons v. Arndt*, 98 Nev.
2 84, 640 P.2d 1318 (1982), wherein *Arndt* was found to have already received the precise relief he
3 sought by way of habeas corpus petition (transfer to medium security prison), thus properly rendering
4 his petition moot. *Ibid.*, 98 Nev. 84, 640 P.2d 1318 (1982). In the instant case, Martinez-Hernandez
5 challenges his conviction and the collateral consequences before the trial court. Having argued the
6 collateral consequences of his conviction as part of his habeas corpus proceedings, and having
7 challenged his conviction directly rather than just his sentence to the trial court, it is respectfully
8 submitted the issue of ineffectiveness at trial is not moot even though petitioner has completed his
9 prison sentence. There is still viable relief that can be addressed and given by reversing the
10 conviction.

11 The case of *Jackson v. State*, 115 Nev. 21, 973 P.2d 241 (1999) is also easily distinguishable
12 because of the lengthy delay of fourteen years from the time of defendant's release from prison until
13 the post conviction petition was filed. The court there noted in footnote 2:

14 "[M]oreover, this court has previously recognized that "habeas petitions that
15 are filed many years after conviction are an unreasonable burden on the criminal
justice system." (Id. 23) (Emphasis added).

16 NRS § 34.724 makes clear that habeas relief is constitutionally based as it specifically
17 pertains to a person's liberty interest.

18 Any person convicted of a crime and under sentence of death or
19 imprisonment who claims that the conviction was obtained, or that the sentence was
imposed, in violation of the Constitution of the United States or the Constitution or
20 laws of the State, or who claims that the time that the person has served pursuant to
the judgment of conviction has been improperly computed, may, without paying a
21 filing fee, file a post conviction petition for a writ of habeas corpus to obtain relief
from the conviction or sentence or to challenge the computation of time that the
22 person has served. NRS § 34.724. (Emphasis added).

23 The federal court in defining custody surely had this underlying constitutional issue in mind
24 in interpreting that "in custody" pertains directly to the liberty interest of a defendant. Therefore,
25 assuming the United States Supreme Court and the Ninth Circuit Court of Appeals are both correctly
26 defining "in custody" as including collateral consequences, then the State of Nevada would be remiss
27 not to adopt the same interpretation.

28 Historically when this Court has been unclear regarding habeas corpus proceedings, it has

1 looked to the United States Supreme Court for guidance and has adopted its interpretation. *See,*
2 *e.g., Hill v. Warden, Nevada State Prison*, 96 Nev. 38, 39-40, 604 P.2d 807 (1980); *see also Foster*
3 *v. Dingwall*, 126 Nev. Adv. Op. 5, 228 P.3d 453, 456 (2010) (“[S]erve[s] as persuasive authority for
4 this court’s examination of this issue ...”) Therefore, this Court should look to the federal court’s
5 case law interpreting the constitutionally based concept of “in custody” and determine that the trial
6 court does retain jurisdiction to hear the habeas corpus presented to the court in this case.

7 CONCLUSION

8 Defendant submits that holding this court has no jurisdiction to consider his Writ of Habeas
9 Corpus would be enforcing a procedural bar that would result in a fundamental miscarriage of justice
10 contrary to Nevada Supreme Court law.

11 In *Mitchell v. State*, 122 Nev. 1269, 149 P.3d 33 (2006), the Nevada Supreme Court found
12 that if a procedural bar existed to challenging the conviction of a defendant who was actually
13 innocent, it would amount to a fundamental miscarriage of justice and therefore the procedural bar
14 should be lifted. Defendant submits in this case there is substantial likelihood the ineffectiveness of
15 his counsel prevented him from establishing his innocence and that therefore it would be a
16 fundamental miscarriage of justice to deny him the opportunity to establish this by Writ of Habeas
17 Corpus.

18 Although “ ... There must exist a time when a criminal conviction is final.” *Groesbeck v.*
19 *Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1989) that time has not come yet in this case.
20 There was no delay by the defendant in filing his appeal and then proceeding with the post
21 conviction writ which involved constitutional issues including the defendant’s right to effective
22 assistance of counsel. The writ must be heard on the merits to protect defendant’s fundamental Sixth
23 Amendment rights.

24 **DATED** this 11th day of September, 2015.

25 Respectfully submitted,

26 /s/ Terrence M. Jackson
27 **TERRENCE M. JACKSON, ESQ.**
28 Nevada Bar No. 00854
Terry.jackson.esq@gmail.com
Counsel for LAZARO MARTINEZ-HERNANDEZ

1 **CERTIFICATE OF SERVICE**

2 I hereby certify I am an Assistant to Terrence M. Jackson, and that on the 11th day of
3 September, 2015, I served a copy of the Defendant, Lazaro Martinez-Hernandez's, Supplemental
4 Points and Authorities on Whether Court has Jurisdiction to Consider Petitioner's Post Conviction
5 Writ via CM/ECF, electronic filing, to the District Attorney's Office via the email service address
6 noted below:

7
8 STEVEN B. WOLFSON
Clark County District Attorney
9 steven.wolfson@clarkcountyda.com

10 JACOB VILLANI
Deputy District Attorney - Criminal
11 jacob.villani@clarkcountyda.com

12 [x] And by U.S. postal service to the parties listed below:

13 ADAM LAXALT
Nevada Attorney General
14 100 North Carson Street
Carson City, NV 89701
15

16
17
18
19 By: /s/ Ila C. Wills
Ila C. Wills, Assistant
20
21
22
23
24
25
26
27
28



CLERK OF THE COURT

1 **RSPN**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **RYAN MACDONALD**
6 **Deputy District Attorney**
7 **Nevada Bar #12615**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

DISTRICT COURT
CLARK COUNTY, NEVADA

9 **THE STATE OF NEVADA,**

10 **Plaintiff,**

11 **-vs-**

CASE NO: 07C230237

12 **LAZARO MARTINEZ - HERNANDEZ,**
13 **aka, Lazaro Martinezhernandez, #1493472**

DEPT NO: XVII

14 **Defendant.**

15 **STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL POINTS AND**
16 **AUTHORITIES ON WHETHER COURT HAS JURISDICTION TO CONSIDER**
17 **PETITIONER'S POST CONVICTION WRIT**

18 **DATE OF HEARING: October 9, 2015**
19 **TIME OF HEARING: 9:30 AM**

20 **COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County**
21 **District Attorney, through RYAN MACDONALD, Deputy District Attorney, and hereby**
22 **submits the attached Points and Authorities in Response to Defendant's Supplemental Points**
23 **and Authorities on Whether Court Has Jurisdiction to Consider Petitioner's Post-Conviction**
24 **Writ.**

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

28 **///**

///

POINTS AND AUTHORITIES
STATEMENT OF THE CASE

On February 16, 2007, the State charged Lazaro Martinez-Hernandez (hereinafter "Defendant") by way of Information with one count of Assault With a Deadly Weapon (Felony – NRS 200.471). On February 5, 2008, a jury found Defendant guilty. On April 10, 2008, Defendant was sentenced to the Nevada Department of Corrections for 12 to 36 months. The sentence was suspended, and Defendant was placed on probation for an indeterminate period not to exceed three year, subject to certain conditions of release. The Judgment of Conviction was filed on April 25, 2008. Defendant did not file a direct appeal.

On January 1, 2010, Defendant's stipulated to having violated the conditions of his probation and his probation was revoked. The original 12 to 36 month sentence was imposed, and Defendant received 96 days credit for time served. An Amended Judgment of Conviction was filed on February 1, 2010.

On February 1, 2011, Defendant filed a Petition for Writ of Habeas Corpus through counsel, wherein he raised an appeal-deprivation claim. On May 18, 2012, Defendant filed a Supplement to his Petition. The State filed its Response and Motion to Dismiss on July 2, 2012. On October 5, 2012, this Court held an evidentiary hearing on Defendant's appeal-deprivation claim, and found that Defendant had been deprived of his right to a direct appeal and was therefore entitled to file an untimely Lozada appeal.

On July 22, 2013, Defendant filed a Notice of Appeal. The Nevada Supreme Court affirmed Defendant's conviction on July 22, 2014, and Remittitur issued on August 26, 2014.

On February 24, 2015, Defendant filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Petition"). The State filed its response on July 22, 2015. On September 4, 2015, a hearing was held where the district court deferred its decision and ordered supplemental briefing.

ARGUMENT

In his Supplemental Points and Authorities, Defendant claims that the district court retains jurisdiction to resolve his Petition even though he is no longer in custody or on probation or parole. First, Defendant argues that once a court has jurisdiction it will lose

1 jurisdiction in very limited circumstances. To support his argument, Defendant cites to several
2 Nevada cases for the proposition that those cases represent the only limited circumstances in
3 which a court will lose jurisdiction over a case. However, Defendant's argument attempts to
4 ignore Nevada Supreme Court's finding that "[a] district court may not issue a writ of habeas
5 corpus if the post-conviction petitioner filed the petition challenging the validity of a
6 conviction after having completed the sentence for the challenged conviction." Jackson v.
7 State, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999); see also, Dir., Nev. Dep't of Prisons v. Arndt,
8 98 Nev. 84, 84, 640 P.2d 1318, 1319 (1982) (use of the extraordinary Writ of Habeas Corpus
9 is warranted only to challenge present custody or restraint and the legality of that
10 confinement); State v. Baliotis, 98 Nev. 176, 178, 643 P.2d 1223, 1224 (1982) (citing Dixon
11 v. Warden, 85 Nev. 703, 704-5, 462 P.2d 753, 754 (1969)) (explaining that custody is required
12 for persons seeking post-conviction relief under former NRS 177.315).

13 Next, Defendant attempts to distinguish his case from both Jackson and Arndt.
14 Defendant claims that in Arndt the Court denied defendants petition because he was found to
15 have already received the precise relief he sought, thereby rendering his petition moot.
16 However, the Court in Arndt specially found that because the defendant was no longer under
17 the custody or restraint that he claimed was unlawful, there was no longer a basis for a habeas
18 corpus remedy. 98 Nev. at 85-86, 640 P.2d 1319. Similarly, in Jackson, the Court held that
19 writs of habeas corpus may not be issued if the post-conviction petitioner filed the petition
20 challenging the validity of a conviction after having completed the sentence for the challenged
21 conviction. 115 Nev. at 22, 973 P.2d 241. The Court's commentary on the fact that the
22 defendant in Jackson filed his petition 14 years after his conviction went to the fact that habeas
23 relief might not have been available in that case even if the defendant was in custody at that
24 time. Id. at 23, 973 P.2d at 242; see also Groesbeck v. Warden, Nev. State Prison, 100 Nev.
25 259, 259, 679 P.2d 1268, 1268 (1984) (even in cases where a defendant was still in custody
26 habeas corpus petitions filed many years after conviction were an unreasonable burden
27 on the criminal justice system).

1 Third, Defendant claims that federal courts have interpreted "in custody" to
2 pertain directly to the liberty interest of a defendant. Defendant argues that the State of
3 Nevada should adopt the same interpretation. However, Defendant fails to cite to any
4 case law or authority to support this interpretation of the meaning of "in custody."
5 Moreover, the Nevada Supreme Court has previously declined to follow federal court's
6 approach in habeas corpus cases. Dir., Nev. Dep't of Arndt, 98 Nev. at 86 n.2, 640 P.2d
7 at 1320 ("The United States Supreme Court has acknowledged the appropriateness of
8 the federal habeas corpus remedy to challenge future confinement. The Supreme Court
9 of Nevada found no compelling reason to apply the federal approach.").

10 Lastly, Defendant cites to Mitchell v. State to support his argument that if a
11 procedural bar exists to challenging the conviction of a defendant who was actually
12 innocent, it would amount to a fundamental miscarriage of justice and, therefore, the
13 procedural bar should be lifted. In Mitchell, the Court analyzed the procedural bars to
14 an untimely or successive petition where a constitutional violation probably resulted in
15 a conviction of someone who is factually [actually] innocent. 122 Nev. 1269, 1274,
16 149 P.3d 33, 36 (2006). However, habeas corpus remedy exists to test the legality of
17 the State's restraint on liberty, therefore, if a defendant is no longer in custody the habeas
18 relief is moot. Jackson, 115 Nev. at 23, 943 P.2d at 242. In this case, Defendant is no
19 longer in custody, he has finished serving his sentence and is not on parole or probation.
20 Therefore, habeas relief is moot and the district court lacks jurisdiction.

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1 **CONCLUSION**

2 Based on the foregoing, the State respectfully requests that this Court DISMISS
3 Defendant's post-conviction petition.

4 DATED this 10th day of October, 2015.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar # 001565

9 BY



10 RYAN MACDONALD
11 Deputy District Attorney
12 Nevada Bar #12615

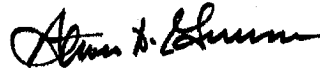
13 **CERTIFICATE OF ELECTRONIC FILING**

14 I hereby certify that service of STATE'S RESPONSE TO DEFENDANT'S
15 SUPPLEMENTAL POINTS AND AUTHORITIES ON WHETHER COURT HAS
16 JURISDICTION TO CONSIDER PETITIONER'S POST CONVICTION WRIT, was made
17 this 10th day of October, 2015, by Electronic Filing to:

18 TERRENCE M. JACKSON, ESQ.
19 terry.jackson.esq@gmail.com

20
21
22 
23 C. Jimenez
24 Secretary for the District Attorney's Office

25
26
27
28 RM/cmj/L3



CLERK OF THE COURT

1 **FCL**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **RYAN MACDONALD**
6 **Deputy District Attorney**
7 **Nevada Bar #12615**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

DISTRICT COURT
CLARK COUNTY, NEVADA

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

11 **-vs-**

CASE NO: C230237

12 **LAZARO MARTINEZ-HERNANDEZ,**
13 **aka, Lazaro Martinezhernandez, #1493472**

DEPT NO: XVII

14 **Defendant.**

15 **FINDINGS OF FACT, CONCLUSIONS OF**
16 **LAW AND ORDER**

17 **DATE OF HEARING: October 9, 2015**
18 **TIME OF HEARING: 9:30 AM**

19 **THIS CAUSE** having come on for hearing before the Honorable MICHAEL VILLANI,
20 District Judge, on the 9TH day of October, 2015, the Petitioner being present, REPRESENTED
21 BY TERRENCE M. JACKSON ESQ., the Respondent being represented by STEVEN B.
22 WOLFSON, Clark County District Attorney, by and through JACOB VILLANI, Deputy
23 District Attorney, and the Court having considered the matter, including briefs, transcripts,
24 arguments of counsel, and documents on file herein, now therefore, the Court makes the
25 following findings of fact and conclusions of law:

26 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

27 On February 16, 2007, the State charged Lazaro Martinez-Hernandez (hereinafter
28 "Defendant") by way of Information with one count of Assault With a Deadly Weapon (Felony
- NRS 200.471). On February 5, 2008, a jury found Defendant guilty. On April 10, 2008,

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DEPT 17 ON
NOV - 2 2015

1 Defendant was sentenced to the Nevada Department of Corrections for 12 to 36 months. The
2 sentence was suspended, and Defendant was placed on probation for an indeterminate period
3 not to exceed three year, subject to certain conditions of release. The Judgment of Conviction
4 was filed on April 25, 2008. Defendant did not file a direct appeal.

5 On January 1, 2010, Defendant's stipulated to having violated the conditions of his
6 probation and his probation was revoked. The original 12 to 36 month sentence was imposed,
7 and Defendant received 96 days credit for time served. An Amended Judgment of Conviction
8 was filed on February 1, 2010.

9 On February 1, 2011, Defendant filed a Petition for Writ of Habeas Corpus through
10 counsel, wherein he raised an appeal-deprivation claim. On May 18, 2012, Defendant filed a
11 Supplement to his Petition. The State filed its Response and Motion to Dismiss on July 2,
12 2012. On October 5, 2012, this Court held an evidentiary hearing on Defendant's appeal-
13 deprivation claim, and found that Defendant had been deprived of his right to a direct appeal
14 and was therefore entitled to file an untimely Lozada appeal.

15 On July 22, 2013, Defendant filed a Notice of Appeal. The Nevada Supreme Court
16 affirmed Defendant's conviction on July 22, 2014, and Remittitur issued on August 26, 2014.

17 On February 24, 2015, Defendant filed a Supplemental Points and Authorities in
18 Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Petition"). The
19 State filed its response on July 22, 2015. On September 4, 2015, a hearing was held where the
20 district court deferred its decision and ordered supplemental briefing. On September 11, 2015,
21 Defendant filed a Supplemental Point and Authorities on Whether Court Has Jurisdiction to
22 Consider Petitioner's Post-Conviction Writ. The State filed its Response on October 6, 2015.

23 This Court finds that Defendant is not entitled to relief through a post-conviction
24 Petition for Writ of Habeas Corpus since Defendant is no longer in custody or on probation or
25 parole. The Nevada Supreme Court has found that "[a] district court may not issue a writ of
26 habeas corpus if the post-conviction petitioner filed the petition challenging the validity of a
27 conviction after having completed the sentence for the challenged conviction." Jackson v.
28 State, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999). The Nevada Supreme Court has consistently

1 held that the use of the extraordinary Writ of Habeas Corpus is warranted only to challenge
2 present custody or restraint and the legality of that confinement. Dir., Nev. Dep't of Prisons
3 v. Arndt, 98 Nev. 84, 84, 640 P.2d 1318, 1319 (1982); see also State v. Baliotis, 98 Nev. 176,
4 178, 643 P.2d 1223, 1224 (1982) (citing Dixon v. Warden, 85 Nev. 703, 704-5, 462 P.2d 753,
5 754 (1969)) (explaining that custody is required for persons seeking post-conviction relief
6 under former NRS 177.315). This Court finds that pursuant to Arndt there is nothing left for
7 Defendant to challenge as far as the legality of his confinement since Defendant has completed
8 his sentence and he is not on probation or parole.

9 **ORDER**

10 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
11 shall be, and it is, hereby denied.

12 DATED this 4 day of October, 2015.

13 *Nov* *[Signature]*
14 _____
15 DISTRICT JUDGE *JS*

16 STEVEN B. WOLFSON
17 Clark County District Attorney
18 Nevada Bar #001565

19 BY *[Signature]*

20 RYAN MACDONALD
21 Deputy District Attorney
22 Nevada Bar #12615

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

CERTIFICATE OF FACSIMILE TRANSMISSION

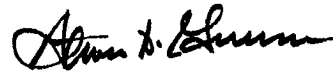
I hereby certify that service of FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER, was made this 5th day of ~~October~~, 2015, by facsimile transmission
to: November

TERRENCE MICHAEL JACKSON, ESQ.
1702-386-0085

BY


C. Jimenez
Secretary for the District Attorney's Office

RM/cmj/L3



CLERK OF THE COURT

1 NEO

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 LAZARO MARTINEZ-HERNANDEZ,

6 Petitioner,

Case No: 07C230237

Dept No: XVII

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

10 **NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

11 **PLEASE TAKE NOTICE** that on November 5, 2015, the court entered a decision or order in this
12 matter, a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on November 13, 2015.

16 STEVEN D. GRIERSON, CLERK OF THE COURT



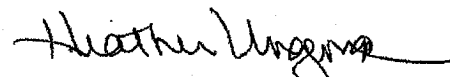
18 Heather Ungermann, Deputy Clerk

19 **CERTIFICATE OF MAILING**

20 I hereby certify that on this 13 day of November 2015, I placed a copy of this Notice of Entry in:

21 ☒ The bin(s) located in the Regional Justice Center of:
22 Clark County District Attorney's Office
23 Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:
25 Lazaro Martinez-Hernandez Terrence M. Jackson, Esq.
1716 Weeping Willow Ln. 624 S. Ninth St.
Las Vegas, NV 89104 Las Vegas, NV 89101
26 (last known address)



28 Heather Ungermann, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO MARTINEZ-HERNANDEZ,
A/K/A LAZARO
MARTINEZHERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69169

FILED

AUG 12 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Reversed and remanded.

Law Office of Terrence M. Jackson and Terrence M. Jackson, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Steven S. Owens, Chief Deputy District Attorney, and Ryan J. MacDonald, Deputy District Attorney, Clark County, for Respondent.

BEFORE HARDESTY, SAITTA and PICKERING, JJ.

OPINION

By the Court, SAITTA, J.:

It is settled law that a petitioner must either be imprisoned or under supervision as a probationer or parolee in order to file a postconviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction. In this case, we are asked to decide whether a

AA 0283

16-25001

petition filed under these conditions later becomes moot once the petitioner is released.

We hold that a habeas petition challenging the validity of a judgment of conviction filed while the petitioner is imprisoned or under supervision does not become moot when the petitioner is released if there are continuing collateral consequences stemming from that conviction. We further hold that continuing collateral consequences are presumed to flow from a criminal conviction. Therefore, we hold that the petition is not moot, and we reverse the district court's order and remand this case for further proceedings.

FACTUAL AND PROCDURAL HISTORY

The original conviction

On February 5, 2008, appellant Lazaro Martinez-Hernandez was found guilty by a jury of one count of assault with a deadly weapon. He was sentenced to 36 months in prison with parole eligibility after 12 months. The district court suspended the sentence and placed Martinez-Hernandez on probation for an indeterminate period of time not to exceed three years. A judgment of conviction was entered, from which Martinez-Hernandez did not appeal.

In 2010, Martinez-Hernandez stipulated to having violated the conditions of his probation. Accordingly, the district court revoked his probation and imposed the original sentence with a 96-day credit for time served. An amended judgment of conviction was issued, from which Martinez-Hernandez again did not appeal.

The habeas petition

On February 1, 2011, Martinez-Hernandez, while still imprisoned, filed a postconviction petition for a writ of habeas corpus in which he alleged ineffective assistance of counsel and appeal deprivation.



On July 19, 2013, the district court granted the petition in part, finding that Martinez-Hernandez was wrongfully deprived of an appeal and, as such, was entitled to file an untimely appeal as provided in NRAP 4(c). The district court did not address the other ineffective-assistance-of-counsel claims. Martinez-Hernandez subsequently filed his direct appeal from the judgment of conviction, and on July 22, 2014, this court affirmed Martinez-Hernandez's conviction and sentence in an unpublished order.

On February 24, 2015, Martinez-Hernandez filed a supplement to the 2011 petition, in which he again alleged ineffective assistance of counsel. After a hearing and additional briefing, the district court dismissed Martinez-Hernandez's petition as moot because he was no longer in custody, on probation, or on parole.

Martinez-Hernandez now appeals. The issue on appeal is whether his postconviction petition for a writ of habeas corpus was rendered moot by his release from physical custody.

DISCUSSION

This court has frequently refused to determine questions presented in purely moot cases. Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events. A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights.

Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) (citations omitted). Whether an issue is moot is a question of law that we review de novo. See *Stevenson v. State*, 131 Nev., Adv. Op. 61, 354 P.3d 1277, 1280 (2015).

The Nevada Constitution states:

The District Courts and the Judges thereof shall also have power to issue writs of Habeas Corpus on petition by, or on behalf of any person who is held in actual custody in their respective districts, or who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction.

Nev. Const. art. 6, § 6. We have held that a petitioner must either be imprisoned or “under supervision as a probationer or parolee” in order to file a petition for a writ of habeas corpus. *Coleman v. State*, 130 Nev., Adv. Op. 22, 321 P.3d 863, 865-66 (2014); *Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999); *see also* NRS 34.724. The issue in this case, however, is whether a postconviction habeas petition that is filed while the petitioner is imprisoned later becomes moot when the petitioner is released from physical custody and supervision. We have never addressed this issue. However, decisions by this court and the United States Supreme Court suggest that a petition that was filed while the petitioner was imprisoned or under supervision does not necessarily become moot after the petitioner’s sentence has expired.

Other jurisdictions allow proceedings on habeas petitions to continue where collateral consequences exist stemming from the conviction

In *Carafas v. LaVallee*, the United States Supreme Court considered whether, when a petitioner has timely filed a federal habeas corpus petition while imprisoned, the expiration of a petitioner’s sentence and his unconditional release from prison prior to the final adjudication of habeas proceedings renders his petition moot. 391 U.S. 234, 237 (1968). The *Carafas* petitioner had been convicted of burglary and grand larceny in New York state court. *Id.* at 235. Because of his convictions, he could

not engage in certain businesses, vote in state elections, or serve as a juror. *Id.* at 237. The Supreme Court concluded that because of these “collateral consequences,” the *Carafas* petitioner’s habeas claim was not moot. *Id.* at 237-38. The *Carafas* court reasoned that due to the “disabilities or burdens” that may have resulted from the petitioner’s conviction, he possessed “a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.” *Id.* at 237 (internal quotations omitted). The court further stated that a habeas petitioner “should not be . . . required to bear the consequences of [an] assertedly unlawful conviction simply because the path has been so long that he has served his sentence.” *Id.* at 240.

This court has recognized that the collateral consequences stemming from a criminal conviction can prevent mootness, albeit in the context of a direct appeal. *Knight v. State*, 116 Nev. 140, 143-44, 993 P.2d 67, 70 (2000). In *Knight*, this court reconsidered a previous case holding that “an appeal in a misdemeanor or gross misdemeanor case [is] rendered moot by satisfaction of a fine or completion of a defendant’s sentence” because “no effective relief would accrue from reversal of the defendant’s conviction if the fine had been paid or the sentence served.” *Id.* at 143, 993 P.2d at 70. In overruling the previous case, the *Knight* court recognized that “criminal convictions carry with them certain collateral consequences,” such as the “impact [they have on] penalty considerations in a subsequent criminal action.” *Id.* Therefore, the *Knight* court held that “satisfaction of a fine or completion of a sentence [does not] render[] a timely appeal from a criminal conviction moot.” *Id.* at 143-44, 993 P.2d at 70.

We therefore hold, consistent with the *Knight* case and with the Supreme Court's jurisprudence in *Carafas*, that in instances where collateral consequences of a conviction exist, a habeas petition challenging the validity of a judgment of conviction does not become moot when the petitioner, who was in custody at the time the petition was filed, is released from custody subsequent to the filing of the petition.¹

A criminal conviction creates a presumption that collateral consequences exist

An incarcerated convict's (or a parolee's) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction. Once the convict's sentence has expired, however, some concrete and continuing injury other than the now-ended incarceration or parole—some “collateral consequence” of the conviction—must exist if the suit is to be maintained.

Spencer v. Kemna, 523 U.S. 1, 7 (1998). Examples of collateral consequences due to a conviction identified by the United States Supreme Court include being prohibited from: (1) engaging in certain businesses, (2) voting in state elections, and (3) serving as a juror. *Carafas*, 391 U.S. at 237. In *Spencer*, the Supreme Court went even further and held that there is a *presumption* that “a wrongful criminal conviction has continuing

¹However, we note that completion of a defendant's sentence may still render a challenge to the sentence itself moot. *See generally Johnson v. Dir., Dep't of Prisons*, 105 Nev. 314, 316, 774 P.2d 1047, 1049 (1989) (stating that expiration of a defendant's sentence rendered any question concerning computation of the sentence moot).

collateral consequences [for the purposes of mootness].” 523 U.S. at 8. However, some state courts decide on a case-by-case basis whether the collateral consequences claimed by a petitioner are sufficient to preclude a finding that the case is moot. See, e.g., *Gural v. State*, 251 A.2d 344, 344-45 (Del. 1969); *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981); *E.C. v. Va. Dep’t of Juvenile Justice*, 722 S.E.2d 827, 835 (Va. 2012).


Our caselaw supports the adoption of the presumption of collateral consequences articulated by the Supreme Court in *Spencer*. In *Knight*, this court identified the impact that a conviction may have on penalty considerations in a subsequent criminal action as a collateral consequence that prevents mootness. 116 Nev. at 143, 993 P.2d at 70. The *Knight* court reasoned that “it is an ‘obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.’” *Id.* (quoting *Spencer*, 523 U.S. at 12). By citing to *Spencer* for this proposition, we believe that the *Knight* court was moving toward the adoption of *Spencer*’s presumption of continuing collateral consequences, even if it did not explicitly so state. Therefore, we hold that there is a presumption that continuing collateral consequences exist whenever there is a criminal conviction, and thus, the district court erred in summarily dismissing Martinez-Hernandez’s petition as moot.

CONCLUSION

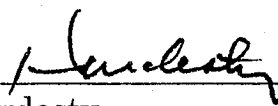
A postconviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction filed while the petitioner is imprisoned or under supervision as a probationer or parolee does not become moot when the petitioner is released if there are continuing collateral consequences stemming from that conviction. Furthermore, a criminal conviction creates a presumption that continuing collateral consequences exist. Given this presumption, the district court

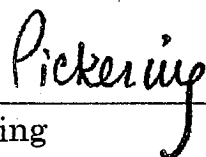
0289

erred in summarily dismissing the petition as moot. We therefore we reverse and remand this case for further proceedings consistent with this opinion.


_____, J.
Saitta

We concur:


_____, J.
Hardesty


_____, J.
Pickering

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO MARTINEZ-HERNANDEZ, A/K/A
LAZARO MARTINEZHERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 69169
District Court Case No. C230237

FILED

SEP 23 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: September 07, 2016

Tracie Lindeman, Clerk of Court

By: Joan Hendricks
Deputy Clerk

cc (without enclosures):

Hon. Michael Villani, District Judge
Terrence M. Jackson
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

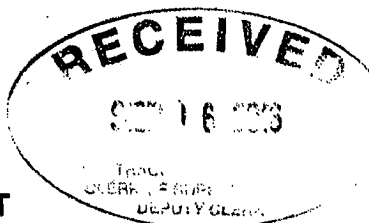
Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on SEP 13 2016

[Signature]
Deputy District Court Clerk

RECEIVED

SEP 09 2016

CLERK OF THE COURT



IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO MARTINEZ-HERNANDEZ, A/K/A
LAZARO MARTINEZHERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 69169
District Court Case No. C230237

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Reversed and remanded."

Judgment, as quoted above, entered this 12th day of August, 2016.

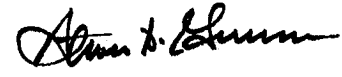
IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
September 07, 2016.

Tracie Lindeman, Supreme Court Clerk

By: Joan Hendricks
Deputy Clerk

1 **RSPN**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **RYAN J. MACDONALD**
6 **Deputy District Attorney**
7 **Nevada Bar #012615**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CASE NO: C230237

LAZARO MARTINEZ-HERNANDEZ,
aka, Lazaro Martinezhernandez, #1493472

DEPT NO: XVII

Defendant.

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL POINTS AND
AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS FOR
POST-CONVICTION RELIEF

DATE OF HEARING: November 9, 2016
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
District Attorney, through RYAN J. MACDONALD, Deputy District Attorney, and hereby
submits the attached Points and Authorities in Response to Defendant's Supplemental Points
and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief.

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

///

///

///

POINTS AND AUTHORITIES
STATEMENT OF THE CASE

On February 16, 2007, the State charged Lazaro Martinez-Hernandez (hereinafter "Defendant") by way of Information with one count of Assault With a Deadly Weapon (Felony – NRS 200.471). On February 5, 2008, a jury found Defendant guilty. On April 10, 2008, Defendant was sentenced to the Nevada Department of Corrections for 12 to 36 months. The sentence was suspended, and Defendant was placed on probation for an indeterminate period not to exceed three years, subject to certain conditions of release. The Judgment of Conviction was filed on April 25, 2008. Defendant did not file a direct appeal.

On January 1, 2010, Defendant's stipulated to having violated the conditions of his probation and his probation was revoked. The original 12 to 36 month sentence was imposed, and Defendant received 96 days credit for time served. An Amended Judgment of Conviction was filed on February 1, 2010.

On February 1, 2011, Defendant filed a Petition for Writ of Habeas Corpus through counsel, wherein he raised an appeal-deprivation claim. On May 18, 2012, Defendant filed a Supplement to his Petition. The State filed its Response and Motion to Dismiss on July 2, 2012. On October 5, 2012, this Court held an evidentiary hearing on Defendant's appeal-deprivation claim, and found that Defendant had been deprived of his right to a direct appeal and was therefore entitled to file an untimely appeal pursuant to NRAP 4(c).

On July 22, 2013, Defendant filed a Notice of Appeal. The Nevada Supreme Court affirmed Defendant's conviction on July 22, 2014, and Remittitur issued on August 26, 2014.

On February 24, 2015, Defendant filed the instant Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Supplemental Petition") as a supplement to the Petition for Writ of Habeas Corpus that he had filed on February 1, 2011. The State filed its response on July 22, 2015. On September 4, 2015, a hearing was held where the district court deferred its decision and ordered supplemental briefing. On September 11, 2015, Defendant filed a Supplemental Points and Authorities on Whether Court Has Jurisdiction to Consider Petitioner's Post-Conviction Writ. The State filed its Response on October 6, 2015.

1 On November 5, 2015, the Court entered its Findings of Fact, Conclusions of Law and
2 Order denying Defendant's Supplemental Petition as moot because Defendant had already
3 been released from custody at the time he filed it. On November 9, 2015, Defendant filed a
4 Notice of Appeal from the District Court's Order denying his Supplemental Petition. On
5 August 12, 2016, the Nevada Supreme Court ruled that, because the original Petition had been
6 filed while Defendant was in custody in 2011, the Supplemental Petition was not moot even
7 though Defendant was not currently in custody. As such, the Nevada Supreme Court remanded
8 the case to the District Court for Defendant's Supplemental Petition to be considered on the
9 merits. The State responds herein.

10 ARGUMENT

11 **I. Defendant fails to prove that counsel was ineffective regarding presentation of** 12 **videotape evidence.**

13 Defendant claims that he received ineffective assistance of trial counsel because
14 counsel failed to seek expert assistance to examine videotape evidence. Supplemental
15 Supplemental Petition at 2. This claim is without merit.

16 The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal
17 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
18 defense." The United States Supreme Court has long recognized that "the right to counsel is
19 the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,
20 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
21 (1993).

22 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
23 he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of
24 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
25 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
26 representation fell below an objective standard of reasonableness, and second, that but for
27 counsel's errors, there is a reasonable probability that the result of the proceedings would have
28 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison

1 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
2 "[T]here is no reason for a court deciding an ineffective assistance claim to approach the
3 inquiry in the same order or even to address both components of the inquiry if the defendant
4 makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

5 The court begins with the presumption of effectiveness and then must determine
6 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
7 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel
8 does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of
9 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432,
10 537 P.2d 473, 474 (1975).

11 Based on the above law, the role of a court in considering allegations of ineffective
12 assistance of counsel is "not to pass upon the merits of the action not taken but to determine
13 whether, under the particular facts and circumstances of the case, trial counsel failed to render
14 reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
15 (1978). This analysis does not mean that the court should "second guess reasoned choices
16 between trial tactics nor does it mean that defense counsel, to protect himself against
17 allegations of inadequacy, must make every conceivable motion no matter how remote the
18 possibilities are of success." Id. To be effective, the constitution "does not require that counsel
19 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
20 cannot create one and may disserve the interests of his client by attempting a useless charade."
21 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

22 "There are countless ways to provide effective assistance in any given case. Even the
23 best criminal defense attorneys would not defend a particular client in the same way."
24 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after
25 thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State,
26 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
27 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's
28

1 challenged conduct on the facts of the particular case, viewed as of the time of counsel's
2 conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

3 Even if a defendant can demonstrate that his counsel's representation fell below an
4 objective standard of reasonableness, he must still demonstrate prejudice and show a
5 reasonable probability that, but for counsel's errors, the result of the trial would have been
6 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
7 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability
8 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89,
9 694, 104 S. Ct. at 2064-65, 2068).

10 The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the
11 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
12 the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
13 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
14 be supported with specific factual allegations, which if true, would entitle the petitioner to
15 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked"
16 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
17 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims
18 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
19 petition to be dismissed." (emphasis added).

20 In support of his assertion that counsel was ineffective for not pursuing a self-defense
21 theory, Defendant cites to People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587 (1979).
22 Defendant's reliance on Frierson is misplaced. Since the time Frierson was decided in the
23 Supreme Court of California in 1979, the United States Supreme Court established the two-
24 part Strickland test to determine questions of ineffective assistance of counsel. As discussed
25 below, Defendant has failed to meet his burden under either prong of Strickland, which
26 requires showing both that counsel's performance fell below an objective standard of
27 reasonableness and that the defendant was prejudiced by the deficiency.

1 Defendant claims that "[t]he possibility the tape have [sic] been altered should have
2 been easy to prove with expert assistance. Counsel's investigation pretrial must therefore be
3 considered inadequate." Supplemental Petition at 3. A defendant who contends his attorney
4 was ineffective because he did not adequately investigate must show how an investigation
5 would have led to a better outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538
6 (2004). Instead of explaining why an expert would be necessary to the defense theory that the
7 videotape evidence was inaccurate, Defendant makes a conclusory statement, unsupported by
8 evidence. Defendant does not present any evidence or argument to support his assertion that it
9 "should have been easy to prove with expert assistance" that the tape had been altered, nor
10 does Defendant explain how an expert could have easily established that the tape was altered.
11 Supplemental Petition at 3.

12 Such unsupported allegations do not meet the preponderance of the evidence standard
13 required by Means, 120 Nev. at 1012, 103 P.3d at 33. Additionally, the claim that counsel did
14 not sufficiently investigate self-defense before settling on the strategy they chose is a bare,
15 naked allegation. Defendant has failed to meet his burden under Strickland of showing by a
16 preponderance of the evidence that counsel was ineffective. Therefore, this claim should be
17 denied.

18 **II. Defendant fails to prove that counsel was ineffective during jury selection.**

19 Defendant claims that he received ineffective assistance of counsel during voir dire
20 because counsel did not "effectively use voir dire or their peremptory challenges during this
21 case." Supplemental Petition at 5.

22 In analyzing claims of ineffective assistance of counsel, the Court must apply the two-
23 pronged test set forth in Strickland. 466 U.S. at 687-88, 104 S. Ct. at 2063-64. The first prong
24 of Strickland can be satisfied by showing that counsel's performance fell below an objective
25 standard of reasonableness. Id. To overcome the presumption of effectiveness, Defendant must
26 demonstrate by a preponderance of the evidence that counsel was ineffective. Means, 120 Nev.
27 at 1011, 103 P.3d at 32. Bare, naked allegations are not sufficient to entitle Defendant to relief.
28 Hargrove, 100 Nev. at 502.

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO MARTINEZ-HERNANDEZ,)	
Appellant,)	CASE NO.: 72069
v.)	E-FILE
STATE OF NEVADA,)	D.C. Case No.: 07-C-230237
Respondent.)	Dept.: XVII
)	

APPELLANT'S APPENDIX VOLUME II

**Appeal from the Denial of a Post-Conviction Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

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Nevada Attorney General
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...
Counsel for Appellant

Counsel for Respondent

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Case No.: 72069

Document (file stamp date in parenthesis)	Volume	Page No.
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CERTIFICATE OF SERVICE

I certify I am an assistant to Terrence M. Jackson, Esquire; a person competent to serve papers, not a party to the above-entitled action and on the 2nd day of May, 2017, I served a copy of the foregoing: Appellant's Appendix, Volumes I and II, as follows:

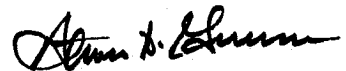
[X] Via Electronic Service to the Nevada Supreme Court, to the Eighth Judicial District Court, and by U. S. mail with first class postage affixed to the Nevada Attorney General and the Petitioner/Appellant as follows:

STEVEN B. WOLFSON
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steven.wolfson@clarkcountyda.com
APPELLATE DIVISION
steven.owens@clarkcountyda.com

ADAM P. LAXALT
Nevada Attorney General
100 North Carson Street
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Lazaro Martinez-Hernandez c/o
1716 Weeping Willow
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By: /s/ Ila C. Wills
Assistant to Terrence M. Jackson, Esq.



CLERK OF THE COURT

1 WRIT
2 TERRENCE M. JACKSON, ESQ.
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10 Counsel for LAZARO MARTINEZ-HERNANDEZ

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IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

LAZARO MARTINEZ-HERNANDEZ,

Petitioner,

v.

HOWARD SKOLNIK,
Director Nevada Department of Prisons,

Respondent.

CASE NO.: C-07-230237-1

DEPT. NO.: XVII

Date of Hearing: June 5, 2015.

Time of Hearing: 9:30 AM

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF

PETITION FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF

COMES NOW the Defendant/Petitioner LAZARO MARTINEZ-HERNANDEZ, by and through his undersigned attorney, TERRENCE M. JACKSON ESQ., and moves this court to enter an order granting his Petition and Supplemental Points and Authorities in support of Defendant's Petition for Writ of Habeas Corpus and Post Conviction Relief on the grounds his attorneys were ineffective in the following respects:

- (1) Defense counsel were ineffective under *Strickland* because they did not seek expert assistance to examine the video tape evidence.
- (2) Defense counsel rendered ineffective assistance of counsel during the jury selection process.
- (3) Defense counsel were ineffective because of failure to make an effective opening statement.

AA 0248

1 (5) The Defense counsel were ineffective by failing to protect the appellate record by
2 insisting all bench conferences be recorded.

3 (6) The accumulation of errors in this case violated the Defendant's right to due process
4 of law under the Fifth, and Fourteenth Amendments and the right to counsel under the Sixth
5 Amendment.

6 But for the errors and ineffectiveness of counsel, there is a reasonable probability that Larzaro
7 Martinez-Hernandez (hereinafter "Martinez-Hernandez") would not have been convicted of the
8 crime charged, assault with a deadly weapon. This petition is brought pursuant to N.R.S. 34.360 as
9 defendant is constructively in custody. Wherefore, petition prays the Honorable Court grants the Writ
10 of Habeas Corpus and issue an order granting such further relief as justice requires.

11
12 **INTRODUCTION**

13 **Procedural Statement**

14 The defendant has been convicted of assault with a deadly weapon by jury trial in the
15 Eighth Judicial District Court. The Judgment was entered February 1, 2010 and the petitioner was
16 sentenced to 12 to 36 months in the Nevada Department of Corrections. The trial counsel Christine
17 Edoards and Marina Kalias did not inform petitioner of his right to appeal his conviction. The
18 Nevada Supreme Court granted a Writ of Habeas Corpus filed by Martin Hart, Esq., because the
19 Petitioner's counsel did not timely file a direct appeal and remanded the case to district court for
20 appointment of counsel to raise additional challenges to his conviction by a writ of habeas corpus.

21 This writ of habeas corpus raises additional issues of ineffectiveness not previously directly
22 decided by The Nevada Supreme Court which establishes that Petitioner's trial counsel were not
23 effective advocates under *Strickland v Washington*.

24 I. THE DEFENSE COUNSEL WERE INEFFECTIVE BECAUSE
25 THEY FAILED TO SEEK EXPERT ASSISTANCE TO
26 EXAMINE THE VIDEO TAPE EVIDENCE WHICH HAD
27 LIKELY BEEN ALTERED.

28 The defense case was predicated on the theory that the video tape of the crime was not

1 complete or was in some way altered or mishandled prior to trial. (TT 139, 140) In order to establish
2 or document this defense it could only have been accomplished effectively by hiring an expert to
3 review all the video tape evidence before trial and present testimony of such an expert. Merely
4 alleging the possibility of evidence tampering was not enough to persuade the judge, or a jury this
5 evidence was defective. There was however evidence to support the defendant's contention he was
6 acting in self defense and because there existed evidence of self defense, this should have alerted
7 counsel to investigate further with expert assistance. The possibility the tape have been altered
8 should have been easy to prove with expert assistance. Counsel's investigation pretrial
9 must therefore be considered inadequate.

10 *Strickland* noted that:

11 ...[j]udicial scrutiny of counsel performance must be highly deferential
12 however, counsel must at a minimum conduct a reasonable investigation enabling
13 him to make informed decisions about how best to represent his client.
14 *Strickland*, *Id.* 691, 104 S. Ct. at 2066. (Emphasis added)

15 That was not done here.

16 Reversing a conviction for ineffective assistance of counsel, the Nevada Supreme Court in
17 *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) stated:

18 To state a claim of ineffective assistance of counsel that is sufficient to
19 invalidate a judgement of conviction, Sanborn must demonstrate that trial counsel's
20 performance fell below an objective standard or reasonableness and that counsel's
21 deficiencies were so severe that they rendered the jury's verdict unreliable. See,
22 *Strickland v. Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984);
23 *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. Denied*, 471 U.S. 1004,
24 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). Focusing on counsel's performance as a
25 whole, and with due regard for the strong presumption of effective assistance
26 accorded counsel by this court and *Strickland*, we hold that Sanborn's representation
27 indeed fell below an objective standard of reasonableness. Trial counsel did not
28 adequately perform pre-trial investigation, failed to pursue evidence supportive of a
claim of self-defense, and failed to explore allegations of the victim's propensity
towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the
defendant by the Sixth Amendment.
Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Counsel's failure to fully investigate by seeking expert testimony must be found ineffective
assistance.

Consider the case of *People v. Frierson*, 599 P.2d 587 (Cal. 1979), where the court reversed
for ineffective assistance of counsel by finding that failure to develop expert testimony to support

1 a diminished capacity was prejudicial error. The court stated:

2 "In the present case, despite his admitted awareness of the possibility of
3 developing a successful diminished capacity defense, trial counsel neglected either
4 to seek or obtain an expert appraisal of defendant's mental condition or the effect of
5 the drug PCP upon his physical or mental condition. Although, unlike *Saunders*,
6 counsel here did attempt to assert a diminished capacity defense, nevertheless it was
7 doomed to failure in the absence of evidence supporting it." *Id.* 598, 599 (Emphasis
8 added)

9 The court then continued...:

10 "...[W]e should not be understood as requiring that trial counsel must seek
11 psychiatric or expert advice in every case wherein drug intoxication is a possible
12 defense. Yet in a capital case, where it appears to be the **sole** potentially meritorious
13 defense, and counsel has elected in fact to present such a defense at trial, counsel
14 must be expected to take those reasonable measures to investigate the factual
15 framework underlying the defense preliminary to exercise of an informed choice
16 among the available tactical options, if any. In the present case, we need not speculate
17 as to the likely prejudicial effect of counsel's omissions; for counsel's failure to take
18 reasonable investigative measures actually resulted in the presentation to the jury
19 of an incomplete, undeveloped diminished capacity defense." *Id.* 599 (Emphasis added)

20 In this case, as in *Frierson*, counsel having chosen a particular defense (i.e., self defense)
21 were ineffective when they did not follow through with the necessary investigation including
22 retaining necessary expert witnesses to support the defense theory. Such expert testimony will
23 would have included any expert that could have established that defense.

24 Defendant's case can easily be distinguished from a case like *People v. Williams*, 751
25 P.2d 395 (Cal. 1998), where the court affirmed the murder conviction, finding defense counsel
26 were not ineffective because counsel had actually considered the opinions of two experts on the
27 issue of defendant's sanity. Similarly, a case such as *People v. Apodaca*, 998 P.2d 25 (1999), in
28 which the court found that failure to get blood stains tested was not grounds for reversal as
ineffective assistance of counsel because prejudice could not be shown. The court in *Apodaca*
noted: "...even if tested such evidence would not likely have changed the outcome of the
proceeding." *Id.* 29. See also, *Evans v. State*, 117 Nev. 609 28 P.3d 498 (2001).

But consider, *Dees v. Caspiri*, 904 Fed 452 where the court noted... "counsel has a duty
to make a diligent investigation of the forensic evidence and its potential weaknesses."

Because that was not done in this case, and prejudice was likely a result, the conviction
must be reversed.

1 II. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF
2 COUNSEL DURING JURY SELECTION.

3 The Sixth Amendment right to a fair jury is fundamental. Key to that right is fair and
4 unbiased jurors. An attorney's diligence or skill during the voir dire jury selection process is
5 absolutely critical to a defendant receiving a fair trial. Criminal defendants have a Sixth Amendment
6 right to be tried by impartial and unbiased jurors. *Quintero v. Bell*, 256 F3d 409 (6th Cir. 2001) As
7 long ago as *Pointer v. United States*, 151 U.S. 396 (1809) the United States Supreme Court
8 recognized that "The right to challenge a given number of jurors without showing cause is one of
9 the most important rights secured to the accused." *Id.* 409 (Emphasis added).

10 Defendant's attorneys however did not effectively use voir dire or their peremptory
11 challenges during this case and the defendant was prejudiced thereby.

12 The judge began the voir dire process with routine questioning of the jurors. This questioning
13 however was not adequate to protect the defendant. A large number of potential jurors were directly
14 connected to law enforcement or had close family relatives connected to law enforcement (See
15 Response of Jurors #25, 150, 152, 153, 120, 125, 121, 143). Some jurors, such as Juror #121,
16 actually had multiple family members connected to law enforcement. The Court's voir dire of these
17 potential jurors seemed designed to convince jurors they would be fair despite their connections to
18 police. It was not designed to challenge them in a meaningful way. A typical question to all the
19 prospective jurors was like the rhetorical question asked to juror #143 ... "it shouldn't impact your
20 ability here." "Thanks." (T.T. Vol I, p. 20.) After that question, no follow up questions were asked
21 by the counsel for Martinez-Hernandez, not a one. Nothing was done to challenge such perfunctory
22 answers and juror #143 was never challenged for cause (T.T., Vol. I p. 48) Such perfunctory inquiry
23 of the court to these jurors was inadequate to discover any potential bias.

24 In *Darbin v. Nourse*, 664 F.2d 1109 (9th Cir. 1981) the court noted:

25 The failure to make the inquiry requested by Darbin was not cured by the remainder
26 of the *voir dire*. Except for the inquiry into the family relationships, most of the
27 jurors were not asked any question which would help elicit bias in favor of law
28 enforcement officers or their testimony. The trial court did ask some additional
questions of the prospective jurors who stated that they were related to law
enforcement officers. However, the court simply invited some of those individuals
to make an express denial of bias resulting from their relationships. While a negative

1 response to the trial court's inquiry precluded counsel from challenging those jurors
2 for cause, the inquiry was not adequate to permit the informed exercise of peremptory
3 challenges. (Emphasis added).

3 The court continued in footnote:

4 A general inquiry concerning a juror's ability to try a case on the evidence presented
5 at trial and the law provided by the court should, at least theoretically, serve to
6 identify any bias that might preclude the juror from making an impartial decision.
7 However, as a practical matter, such general inquiries are inadequate to alert the
8 parties or the jurors themselves to potential sources of bias. A single, all-
9 encompassing and conclusory question would be sufficient. See, *Rosales-Lopez v.*
10 *United States*, 451 U.S. at 203 n.8 101 S. Ct. at 1641 n.8

(Stevens, J., dissenting):

8 [A]lthough trial judges have broad discretion to formulate *voir dire* questions, the
9 general question whether there was any reason "why you could not sit in this case as
10 a fair and impartial juror," . . . is not an inadequate substitute for a specific inquiry;
11 if it were, trial judges might be well advised simply to ask that question and nothing
12 else. *Id.* (Emphasis added).

11 The conclusory type questions of the trial court in this case were not sufficient to perform the
12 necessary screening function to find a fair and impartial jury. Counsel did not follow up. This was
13 ineffective assistance of counsel under *Strickland*. In this case, as in *Darbin*, defense counsel didn't
14 even try to question the potentially biased jurors to cure the court's inadequate questioning.

15 The failure to weed out possibly biased jurors may amount to reversible error. *United States*
16 *v. Pappas*, 639 F.2d 1(1st Cir. 1980); *United States v. Cenagros*, 853 Fed 1 (1st Cir. 1985) and See
17 *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979) which held failure to question prospective
18 jurors whether they believed law enforcement officers were more credible than other witnesses was
19 error.

20 The entire voir dire process, which was almost entirely conclusory questions such as: "Could
21 you be fair?" was inadequate under *Strickland*. This led to a structural error in the composition of
22 the jury that requires reversal. The defense attorneys' ineffectiveness of counsel during voir dire
23 required the use of valuable peremptory challenges on jurors who may have been excused for cause.
24 The entire voir dire/jury selection process was inadequate under *Strickland* and this led to a
25 structural error in the composition of the jury that requires reversal.

26 III. TRIAL COUNSEL FOR DEFENDANT RENDERED
27 INEFFECTIVE ASSISTANCE OF COUNSEL UNDER
28 *STRICKLAND* BY NOT MAKING AN EFFECTIVE OPENING

1 STATEMENT TO THE JURY.

2 Defense counsel for Petitioner made a very weak opening statement that was scarcely better
3 than waiving the opening statement. The Nevada Supreme Court has noted that failure to make an
4 'opening statement' is strong indicia of incompetency of counsel. In *Buffalo v. State*, 111 Nev.
5 1139, 901 P.2d 647 (1995), the Nevada Supreme Court reversed for incompetency of counsel.

6 Warner was based principally on counsel's failure to engage in an investigation of
7 the facts. Here there is much more than this. Defense counsel's failure to make an
8 opening statement, failure to consider legal defenses of self defense and defense of
9 others, failure to spend any time in legal research, and general failure to present a
10 cognizable defense rather clearly resulted in rendering the trial "unreliable." *Id.*
11 (Emphasis added).

12 Counsel here, rather than forego the opening, instead chose to make a weak opening
13 statement that was not clear, precise, or organized. The jury most likely developed a favorable
14 impression of the prosecution's case and an unfavorable view of the defense counsel. The opening
15 statement is of central importance because it comes first. As James R. Lucas noted in his article,
16 Opening Statement, 13 Hawaii L.R. 349:

17 Being first, it exploits the psychological principle of primacy. Being human, the first
18 thing the jurors do is form first impressions, and, as one author noted, 'in the
19 opening, the narrative, the outline of the flesh and bones of the case, the juror's first
20 impressions harden the cement. No amount of instruction from the court that minds
21 should not be made up until the conclusion of the case can prevent people from
22 forming first impressions.' And what happens after the jurors have formed their first
23 impression? 'Most jurors have made up their mind about the outcome and do not
24 change it through the balance of the trial.' First impressions count. *Id.* 351.
25 (Emphasis added).

26 A District of Columbia Court has stated:

27 The purpose of an opening statement for the defense is to explain the defense theory
28 of the case, to provide the jury an alternative interpretative matrix by which to
evaluate the evidence to focus the jury's attention on the weaknesses of the
government's case. *Oesky v. United States*, 398 F.2d 1 (D.C. 1977); See also, *United*
States v. Stansfield, 521 F.2d 1122, 1125 (9th Cir. 1975). (Emphasis added)

Competent counsel would have immediately developed the self defense theory to the jury
explaining it and carefully outlining with a specificity the testimony of each witness showing the
strengths of the Defendant's case and the weaknesses of the State's case. Compare the prosecution's
opening statement in which the prosecutor skillfully explained what he believed evidence would
show. The Defendant's prior statements were damaging and contradictory. The prosecutor then

1 concluded with a brief explanation of the law.

2 The defense counsel's inadequate opening was a product both of prior errors by the defense,
3 i.e., failure to properly research, analyze, prepare, or investigate alternative factual or legal theories,
4 and counsel's failure to effectively argue to the court the necessity of critical evidence with
5 competency. After receiving several negative rulings from the court at the trial's beginning, defense
6 counsel was unable to respond adequately to articulate with clarity the defense's theory of the case
7 to the jury that the video tape had been altered. The State of Nevada made two objections which were
8 sustained concerning the credibility of the tape. (Vol. I. p. 61, 63). This immediately left the jury
9 with a strong first impression that the defense was in some way not performing appropriately.
10 Counsel did not even state whether or not the Defendant, Martinez-Hernandez would in fact testify.

11 It is respectfully submitted that if it was unclear at the time of the opening statement that
12 Lazaro Hernandez-Martinez would testify than the better strategy would have been to waive the
13 opening statement rather than give a disjointed unpersuasive opening that was counterproductive.
14 The opening statement did not benefit the defendant's case. Counsel was clearly unprepared for the
15 opening and it had a lasting negative affect on the Defendant's case.

16 IV. THE DEFENSE COUNSEL FAILED TO ADEQUATELY
17 PROTECT THE RECORD ALLOWING NUMEROUS
18 UNRECORDED BENCH CONFERENCES AND OTHER
19 MATTERS DURING THE TRIAL WHICH DEPRIVED
20 DEFENDANT OF HIS FIFTH, SIXTH AND FOURTEENTH
21 AMENDMENT RIGHTS TO A COMPLETE RECORD
22 NECESSARY FOR HIS APPEAL.

23 In this case there were numerous unrecorded bench conferences during critical times of the
24 trial. (T.T. Vol. I, pg. 112), (T.T. Vol. I, pg. 140), (T.T. Vol. I, pg. 199), (T.T. Vol. I, Pg. 156), (T.T.
25 Vol. I, pg. 167). In *United States v. Gillis*, 773 F.2d 549 (4th Cir. 1985), the court stated:

26 A criminal defendant has a right to a meaningful appeal based on a complete
27 transcript. *See, Hardy v. United States*, 375 U.S. 277, 279, 84 S. Ct. 424, 11 L.Ed.2d
28 331 (1964). When a transcript is less than complete, the court must determine
whether the alleged omissions or deficiencies justify a new trial. In *United States v. Gillis*, it was held that whether an omission from a transcript warrants a new trial

1 depends on whether the appellant has demonstrated that the omission "specifically
2 prejudices his appeal. ..." 773 .2d 549, 554 (4th Cir.1985). (Emphasis added)

3 In *Bransford v. Brown*, 806 F.2d 83 (6th Cir. 1986), the court appellate counsel was deficient
4 for not acquiring necessary transcripts for appeal:

5 We agree with petitioner that Mr. Townsend's performance as his appellate counsel
6 was deficient. Although Mr. Townsend testified that he twice read the trial transcript
7 of over nine hundred pages, he somehow failed to notice that the jury instructions and
8 subsequent proceedings were missing, and so he never attempted to obtain them. As
9 the Supreme Court has noted, appellate counsel's duty cannot be discharged unless
10 he has a transcript of the court's charge to the jury. *Hardy v. United States*, 375 U.S.
11 277, 282, 84 S. Ct. 424, 428, 11 L.Ed.2d 331 (1964).

12 Indeed, the most basic and fundamental tool of [an appellate advocate's] profession
13 is the complete trial transcript, through which his trained fingers may leaf and his
14 trained eyes may roam in search of an error, a lead to an error, or even a basis upon
15 which to urge a change in an established and hitherto accepted principle of law.¹⁹
16 Anything short of a complete transcript is incompatible with effective appellate
17 advocacy. (Emphasis added). *Id.* at 288, 84 S. Ct. at 431 (Goldberg, J.
18 concurring)(Emphasis added and footnote omitted). Justice Goldberg noted that this
19 is true even when trial counsel is the same as appellate counsel. *Id.* Thus, Mr.
20 Townsend's failure even to discover that the transcripts for the final proceedings
21 were absent fell below professional norms for appellate representation. (Emphasis
22 added).

23 Counsel for the Defendant in this case unfortunately did not demand that all bench
24 conferences be recorded. Counsel allowed the judge to determine that many bench conferences went
25 unrecorded. It is now impossible for appellate counsel to do anything but speculate whether or not
26 evidence or rulings in those unrecorded bench conferences establish ineffective assistance of counsel
27 under *Strickland*. In such a highly contested case, this was inexcusable professional neglect by trial
28 counsel.

Appellate counsel submits it is likely the unrecorded bench conferences may have shown
important appellate issues that cannot now be raised. For example, the argument for a critical motion
to dismiss at the close of evidence was not recorded. (T.T. V1, pg. 149).

Defense counsel stated:

24 DEFENSE COUNSEL: "Can we make a motion to dismiss? There is a lack of
25 evidence at this time."

26 THE COURT: "Okay Counsel -
27
28

1 MR. WESTMEYER: "And for the record Judge, I'll oppose that."

2 THE COURT: "Everybody come up here to my ... come up here right now."

3 [BENCH CONFERENCE - NOT TRANSCRIBED]

4 The court's reasoning on the arguments of counsel is left unknown because the transcript was never
5 recorded, so no appellate remedy is available to defendant.

6 Similarly, an important sidebar conference occurred during the questioning of an important
7 defense witness, Maceo. He was called to impeach the alleged victim Richard Pena. (T.T. Vol. I, pg.
8 155). This failure to record this bench conference is another example during critical time of trial
9 when counsel failed to adequately respond to the prosecutor's objections during testimony and then
10 did nothing to protect the record during the side bar conference. Maceo's testimony ended abruptly
11 after the sidebar conference and he was never able to testify fully. (T.T. Vol. I, pg. 156). It is not
12 known how, if at all, Maceo could have assisted defendant's self defense claim.

13 In the case of *United States v. Nolan*, 910 F.2d 1553, 1560 (7th Cir. 1990), the court noted
14 that "prejudice is found when a trial transcript is so deficient that it is "impossible for the appellate
15 court to determine if the district court has committed reversible error." The record here is so very
16 deficient and that the appellate court must guess at what the court may have stated in the numerous
17 unrecorded bench conferences. There was no strategic reason for not asking to record bench
18 conferences. Counsel cannot justify these actions on the grounds the bench conferences were not
19 significant. It can reasonably be inferred that the manner in which counsel handled other issues
20 during trial demonstrates counsels ineffectiveness during bench conferences, but without an actual
21 record it is impossible to know for certain.

22 V. THE ACCUMULATION OF ERRORS IN THIS CASE VIOLATED THE
23 DEFENDANT/PETITIONER'S RIGHTS TO DUE PROCESS OF LAW
24 UNDER THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH
25 AMENDMENTS AND REQUIRES REVERSAL.

26 The numerous errors and deficiencies of counsel in this case require reversal of the
27 conviction. It can be argued that even considered separately, the errors or omissions of counsel
28 were of such a magnitude that they each require reversal. But it is clear, when viewed cumulatively,

1 the case for reversal is overwhelming. *State v. Daniel*, 119 Nev. 498, *see also*, *Sipsas v. State*, 102
2 Nev. at 123, 216 P.2d at 235, stating: "The accumulation of error is more serious than either isolated
3 breach, and resulted in the denial of a fair trial."

4 Prejudice may result from the cumulative impact of multiple deficiencies. *Cooper v.*
5 *Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (*En Banc*), cert. Denied, 440 U.S. 970; *Harris by*
6 *and through Ramseyer v. Wood*, 61 F.3d 1432 (9th Cir. 1995).

7 The multiple errors of counsel in this case when cumulated together require reversal. A
8 quantitative analysis makes that clear. *See*, Van Cleave, Rachel, ***When is Error Not an Error?*** Habeas
9 Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

10 Relevant factors to consider in evaluating a claim of cumulative error are [1] whether the
11 issue of guilt is close, [2] the quantity and character of the error, and [3] the gravity of the crime
12 charged. *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), citing *Leonard v. State*, 114
13 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See also*, *Big Pond v. State*, 101 Nev. 1, 692 P.2d 1228
14 (1985); *Daniel v. State*, 119 Nev. 498, 78 P.3d 890 (2003).

15 Defense counsel in this case failed by not seeking expert assistance pre trial. During trial
16 counsel were not effective during jury selection, opening statement, and by not protecting the record
17 and demanding all bench conferences be recorded during trial. The defendant was deprived of due
18 process rights and was prejudiced thereby.

19 20 21 22 CONCLUSION

23 "If counsel entirely fails to subject the prosecution to meaningful adversarial testing, then
24 there has been a denial of Sixth Amendment rights that make the adversary process itself
25 presumptively unreliable." *United States v. Cronin*, 466 U.S. 648, 656-59, 104 S. Ct. 2039, 2045-47,
26 80 L.Ed.2d 657 (1984).

27 It is respectfully submitted the Defendant/Petitioner in this case did not receive his Sixth
28 Amendment right of effective assistance of counsel under *Strickland v. Washington* at both pretrial

1 and trial. The failures of Mr. Martinez- Hernandez's defense counsel prejudiced him so that his
2 conviction must be reversed.

3 DATED this 24th day of February, 2015.

4
5 Respectfully submitted,

6
7 /s/ Terrence M. Jackson
8 TERRENCE M. JACKSON, ESQ.
9 Nevada Bar No. 00854
10 Law Office of Terrence M. Jackson
11 624 South Ninth Street
12 Las Vegas, NV 89101
13 T: 702-386-0001 / F: 702-386-0085
14 Terry.jackson.esq@gmail.com
15 Counsel for LAZARO MARTINEZ-HERNANDEZ
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1 **NOTICE OF MOTION**

2 TO: CLARK COUNTY DISTRICT ATTORNEY

3 YOU WILL PLEASE TAKE NOTICE that a motion for: Supplemental Points and
4 Authorities in Support of Petition For Writ of Habeas Corpus For Post Conviction Relief in the
5 above-captioned case will be heard on the 06 day of June, 2015, at the hour of 9: 30 AM
6 / PM in the Clark County Courthouse.

7
8
9 Clark County District Attorney

10
11 **CERTIFICATE OF SERVICE**

12 I hereby certify as an Assistant to Terrence M. Jackson, a person competent to serve papers
13 and not a party to the above-entitled action and that on the 24th day of February, 2015, I served a
14 true, correct copy of the same and e-filed stamped copy of the foregoing Supplemental Points and
15 Authorities in Support of Petition For Writ of Habeas Corpus For Post Conviction Relief to the
16 District Attorney's Office via the email service address noted below.

17
18 STEVEN B. WOLFSON
19 CLARK COUNTY DISTRICT ATTORNEY

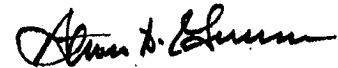
20 PDMotions@ccdanv.com

21 ADAM LAXALT
22 NEVADA ATTORNEY GENERAL

23 Grant Sawyer Building
24 555 E. Washington Ave., Ste. 3900
25 Las Vegas, NV 89101

26 By: /s/ Beverly Jackson

27 An Assistant to Terrence M. Jackson
28



CLERK OF THE COURT

1 **OPPS**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 RYAN MACDONALD
6 Deputy District Attorney
7 Nevada Bar #012615
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9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 **THE STATE OF NEVADA,**

15 Plaintiff,

16 -vs-

CASE NO: 07C230237

17 **LAZARO MARTINEZ-HERNANDEZ,**
18 **#1493472**

DEPT NO: XVII

19 Defendant.

20 **STATE'S MOTION TO DISMISS DEFENDANT'S SUPPLEMENTAL POINTS AND**
21 **AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS FOR**
22 **POST CONVICTION RELIEF**

23 **DATE OF HEARING: SEPTEMBER 4, 2015**
24 **TIME OF HEARING: 9:30 AM**

25 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
26 District Attorney, through RYAN MACDONALD, Deputy District Attorney, and hereby
27 submits the attached Points and Authorities in Opposition to Defendant's Supplemental Points
28 and Authorities in Support of Petition for Writ of Habeas Corpus for Post Conviction Relief.

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

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On February 16, 2007, the State charged Lazaro Martinez-Hernandez (hereinafter
4 "Defendant") by way of Information with one count of Assault With a Deadly Weapon (Felony
5 – NRS 200.471). On February 5, 2008, a jury found Defendant guilty. On April 10, 2008,
6 Defendant was sentenced to the Nevada Department of Corrections for twelve (12) to thirty
7 six (36) months. The sentence was suspended, and Defendant was placed on probation for an
8 indeterminate period not to exceed three (3) years, subject to certain conditions of release. The
9 Judgment of Conviction was filed on April 25, 2008. Defendant did not file a direct appeal.

10 On January 1, 2010, Defendant's stipulated to having violated the conditions of his
11 probation, and his probation was revoked. The original twelve (12) to thirty six (36) months
12 sentence was then imposed, and Defendant received ninety six (96) days credit for time served.
13 An Amended Judgment of Conviction was filed on February 1, 2010.

14 On February 1, 2011, Defendant filed a Petition for Writ of Habeas Corpus through
15 counsel, wherein he raised an appeal-deprivation claim. On May 18, 2012, Defendant filed a
16 Supplement to his Petition. The State filed its Response and Motion to Dismiss on July 2,
17 2012. On October 5, 2012, this Court held an evidentiary hearing on Defendant's appeal-
18 deprivation claim, and found that Defendant had been deprived of his right to a direct appeal
19 and was therefore entitled to file an untimely Lozada appeal.

20 On July 22, 2013, Defendant filed a Notice of Appeal. The Nevada Supreme Court
21 affirmed Defendant's conviction on July 22, 2014, and Remittitur issued on August 26, 2014.

22 On February 24, 2015, Defendant filed the instant "Supplemental" Points and
23 Authorities in Support of Petition for Writ of Habeas Corpus for Post Conviction Relief. The
24 State hereby responds as follows.

25 ///

26 ///

27 ///

28 ///

ARGUMENT

I. BECAUSE DEFENDANT IS NOT IN CUSTODY, THIS COURT LACKS JURISDICTION TO GRANT DEFENDANT'S PETITION

Defendant began serving a sentence of twelve (12) to thirty six (36) months in the Nevada Department of Corrections on January 1, 2010, with ninety six (96) days credit for time served. Thus, at the very latest, Defendant would have been released from custody in 2013.¹ The Supreme Court of Nevada has found that "[a] district court may not issue a writ of habeas corpus if the post-conviction petitioner filed the petition challenging the validity of a conviction after having completed the sentence for the challenged conviction." Jackson v. State, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999); see also Nev. Const. art. 6, § 6(1); see also NRS 34.360 ("Every person unlawfully committed, detained, confined or restrained of his or her liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint."); NRS 34.724(1) ("Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained ... in violation of the Constitution of the United States or the constitution or laws of this state ... may ... file a post-conviction petition for a writ of habeas corpus to obtain relief from the conviction....").

As the instant petition was filed after Defendant finished serving his sentence, he is not entitled to relief through a Post-Conviction Petition for Writ of Habeas Corpus.

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¹ Defendant has provided no detail whatsoever regarding his custody status, and as such, it is unknown to the State.

CONCLUSION

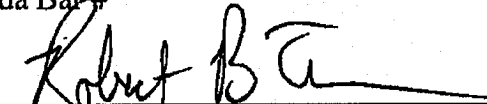
Based on the foregoing, the State respectfully requests that this Court DISMISS Defendant's post-conviction petition.

DATED this 22nd day of July, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #

BY



RYAN MACDONALD
Deputy District Attorney
Nevada Bar #012615

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Motion To Dismiss Defendant's Supplemental Points And Authorities In Support Of Petition For Writ Of Habeas Corpus For Post Conviction Relief, was made this 22nd day of July, 2015, by facsimile transmission to:

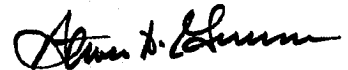
TERRENCE JACKSON, ESQ.
702-386-0085

BY:



C. Cintola
Employee of the District Attorney's Office

RM/MR/cc/L3



CLERK OF THE COURT

1 RPLY
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9 *Counsel for LAZARO MARTINEZ-HERNANDEZ*

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IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

LAZARO MARTINEZ-HERNANDEZ,
149347,

Defendant.

CASE NO.: C-07-230237-1

DEPT. NO.: XVII

Date of Hearing: September 4, 2015

Time of Hearing: 9:30 AM

REPLY TO STATE'S MOTION TO DISMISS DEFENDANT'S SUPPLEMENTAL
POINTS AND AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF

The State of Nevada argues that because to Defendant is not in physical custody, he cannot assert the Writ of Habeas Corpus for post conviction relief for a wrongful conviction.

Defendant/Petitioner LAZARO MARTINEZ-HERNANDEZ, has suffered a felony conviction and thereby is still in constructive custody of the State of Nevada.

Unless the State wishes to grant Defendant a full pardon, and restore him all of his civil rights, so that he will not have the collateral consequences associated with a felony conviction which entails substantial loss of liberty, Defendant submits his right to Habeas Corpus cannot be denied.

Defendant has no other remedy at law to correct the ineffective assistance of counsel which led to his wrongful conviction.

...

0265

1 Wherefore, Defendant/Petitioner LAZARO MARTINEZ-HERNANDEZ submits that there
2 being no opposition on the merits to his petition, he prays this Honorable Court should grant the Writ
3 of Habeas Corpus and issue an order granting such further relief as justice requires.

4 DATED this 24th day of July, 2015.

5 Respectfully submitted,

6
7 /s/ Terrence M. Jackson
8 TERRENCE M. JACKSON, ESQ.
9 Nevada Bar No. 00854
10 Law Office of Terrence M. Jackson
11 624 South Ninth Street
12 Las Vegas, NV 89101
13 T: 702-386-0001 / F: 702-386-0085
14 Terry.jackson.esq@gmail.com
15 Counsel for LAZARO MARTINEZ-HERNANDEZ

16 **CERTIFICATE OF SERVICE**

17 I hereby certify I am an Assistant to Terrence M. Jackson, am a person competent to serve
18 papers, not a party to the above-entitled action and that on the 24th day of July, 2015, I served a true
19 and correct copy of the same by e-filing via Wiznet a copy of the foregoing Reply to State's Motion
20 to Dismiss Defendant's Supplemental Points and Authorities in Support of Petition For Writ of
21 Habeas Corpus For Post Conviction Relief to the District Attorney's Office via the email service
22 address noted below:

23 STEVEN B. WOLFSON
24 Clark County District Attorney
25 PDMotions@ccdany.com
26 RYAN MACDONALD
27 Deputy District Attorney
28 ryan.macdonald@clarkcountyda.com

and by U.S. postal service with first class postage affixed to:

ADAM LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

By: /s/ Ila C. Wills

An Assistant to Terrence M. Jackson


CLERK OF THE COURT

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Counsel for LAZARO MARTINEZ-HERNANDEZ

**IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

LAZARO MARTINEZ-HERNANDEZ,
Petitioner,
v.
HOWARD SKOLNIK,
Director Nevada Department of Prisons,
Respondent.

CASE NO.: C-07-230237-1
DEPT. NO.: XVII
Date of Hearing: 10/09/15
Time of Hearing: 9:30 AM

**SUPPLEMENTAL POINTS AND AUTHORITIES ON WHETHER COURT HAS
JURISDICTION TO CONSIDER PETITIONER'S POST CONVICTION WRIT**

COMES NOW the Defendant/Petitioner LAZARO MARTINEZ-HERNANDEZ, by and through counsel, TERRENCE M. JACKSON, ESQ., and at this court's request files these Supplemental Points and Authorities on the question: whether the court has jurisdiction to consider Petitioner's Writ of Habeas Corpus in this case even though the Defendant/Petitioner is no longer in physical custody of the State of Nevada.

POINTS AND AUTHORITIES

The District Court Retains Jurisdiction in This Case to Resolve the Defendant's Timely Filed
Writ of Habeas Corpus for Post Conviction Relief.

1 to ask the questions that call for open-ended kind of answers.

2 MS. KOLIAS: That's fine.

3 THE COURT: Like why, and how, and where, and when. He gets to ask the
4 questions that call for yes or no answers.

5 MS. KOLIAS: Yesterday when I did that, Your Honor, I was asking,
6 apparently it was objectionable because I was asking for a narrative, so I will try to --

7 THE COURT: Well there's a happy medium between the two and we just
8 happened have not found it at that point.

9 BY MS. KOLIAS:

10 Q Alex told you why he wanted you to come?

11 A Because he didn't know what to do.

12 Q Why did you go then?

13 A Because he had a big wound on his head.

14 Q And were you going to assist him? What were you going to do?

15 A I went to speak with Richard so he would call an ambulance.

16 Q Did you have concerns that Richard was not going to take care of Alex?

17 A Yes.

18 Q And is that -- what was that based on? Why did you think that?

19 A Because I know Richard and I know that he doesn't treat his employees
20 well.

21 Q All right, thank you. So that's why you felt like you had to go to the
22 scene?

23 A Yes.

24 Q Just to clarify, you had the -- your hand on the gun when you were
25 taking it out of the holster, right?

1 A Yes.

2 Q So let's just be clear and make sure that everybody understands that
3 there was a time you had your hand on the gun, but it was just to take it out of the
4 holster, correct?

5 A Yes, and that's what I always told the police --

6 MR. WESTMEYER: Judge, I don't think there's a question pending.

7 THE COURT: He already asked -- you answered yes, that's it, we're done.

8 MS. KOLIAS: All right.

9 THE COURT: Anything else?

10 BY MS. KOLIAS:

11 Q And while you have the gun in your hand -- just one other question,
12 Your Honor. While you had the gun in your hand did you say anything to anybody?

13 A No.

14 Q Did you point it at anybody?

15 A No.

16 Q All right. Thank you.

17 MR. WESTMEYER: Just a couple of quick follow-up questions, Your Honor.

18 RECROSS-EXAMINATION

19 BY MR. WESTMEYER:

20 Q You just testified you took the gun from the holster and put it on the
21 seat?

22 A Yes.

23 Q But you never intended to point the gun at anyone?

24 A I never pointed --

25 Q It's a yes or no question.

1 A -- with the gun to anyone.

2 Q You never intended -- when you took it out of the holster your intent
3 was not to point it at someone, is that right? Or did you intend to?

4 A No, it was not my intention to point it at anyone.

5 Q You just were taking it out because you didn't want it in the holster
6 anymore, is that right?

7 A No.

8 Q So you must have taken it out just to look at it?

9 A No.

10 Q Okay. Alex wasn't there when you arrived at the El Premier, was he?

11 A He wasn't there.

12 Q He was not there?

13 A No.

14 MR. WESTMEYER: Okay, thank you Judge, I have nothing else.

15 THE COURT: Arthur. I need counsel to approach, please, the jury has
16 questions.

17 [Bench conference -- not transcribed]

18 THE COURT: All right, Mr. Hernandez, we get to ask you questions that are
19 given to me by the jury, so I'm going to ask them and then you answer their
20 questions, all right?

21 THE WITNESS: Yes.

22 THE COURT: Was there a bullet in the chamber of the gun?

23 THE WITNESS: You mean on top?

24 THE COURT: In the -- was there bullets in the gun?

25 THE WITNESS: Only in the magazine.

1 THE COURT: Was the magazine in the gun?
2 THE WITNESS: Yes.
3 THE COURT: You have said you know Richard, how do you know him?
4 THE WITNESS: I have known him for several years.
5 THE COURT: Why did you believe he wouldn't take care of your friend?
6 THE WITNESS: Because he has always had problems with the security of
7 that place.
8 THE COURT: When Mr. Hernandez -- when you arrived at the El Premier,
9 what side of the Hummer did you exit, driver's side or passenger's side?
10 THE WITNESS: On the driver's side.
11 THE COURT: Anything else?
12 MR. WESTMEYER: No ma'am.
13 MS. KOLIAS: Can we have follow-up questions? Do you -- should I have
14 follow-up questions?
15 THE COURT: Like what?
16 MS. KOLIAS: With regard to Richard. I don't know if that was sufficient.
17 THE COURT: I think we've done enough of that, okay? All right, you may
18 step down.
19 Ms. Kolias, do you have any more witnesses to present?
20 MS. KOLIAS: I don't, Your Honor.
21 THE COURT: Is the defense resting?
22 MS. KOLIAS: Defense is resting.
23 THE COURT: Anything else from the State?
24 MR. WESTMEYER: No, Judge.
25 THE COURT: Arthur, could you get me the jury instructions?

1 Ladies and gentlemen, we're going to move right into the jury
2 instruction portion of today's trial. These jury instructions have been prepared for
3 your convenience. This is the official Court document with the blue backing on it.
4 They're the same. I read them to you. You're fortunate, there's only 14 of them.
5 Some cases I have 35, 36, 38, 45. So I'll read them to you and then we'll move right
6 into our arguments. I'll tell my secretary to order lunch for when we're done.

7 [Colloquy]

8 [The Court reads instructions to the Jury]

9 THE COURT: All right, and who will be -- Ms. Thomas?

10 MR. WESTMEYER: Ms. Thomas.

11 THE COURT: You may begin.

12 **CLOSING ARGUMENT BY THE STATE**

13 MS. THOMAS: I'm going to kill you. The Defendant put a gun, a loaded gun
14 in his hand and he pointed it at Richard Pena. Richard was afraid for his life. Why
15 did the Defendant come to Premier Nightclub that day, June 12th, 2006? He came
16 because he felt that his friend Alex wasn't being taken care of. He was going to take
17 care of it himself. Alex was no longer at the nightclub when the Defendant arrived.

18 The Defendant came, he was aggressive, he was angry. He came
19 directly to the main entrance. When he came to the main entrance he went to
20 contact with Richard and Beatrice. Both Richard and Beatrice testified. They both
21 told you that Richard got pushed, and then the Defendant ran to his car, the yellow
22 Hummer that was parked with the passenger side closest to the club. He went to
23 that Hummer, he got the gun from his car, and he came back to Richard and
24 Beatrice. He pointed the gun at them, he told Richard he was going to kill him, then
25 he ran back to his car and he put that gun away.

1 Officer Richter testified that he came and saw the Defendant five feet
2 away from the yellow Hummer closer to the passenger door. Officer Richter told
3 you he was dispatched because of the 9-1-1 call with a person with a gun, black
4 shirt, camo pants, male, adult with a gun.

5 Officer Richter arrived on the scene. He saw someone that matched
6 that description who was the Defendant. He pulled his shotgun out and he ordered
7 the Defendant onto the ground. Officer Richter and Officer Fletcher told you they
8 saw that gun in the passenger seat of that yellow Hummer.

9 The officers testified that a gun to be out of a holster is unusual. The
10 Defendant testified, and the Defendant told you he came to the nightclub to help his
11 friend out, and that his friend wasn't there. But he came there and then went back
12 to his car, the passenger side, he opened the door. You can see him, he's a big
13 man.

14 He opened the door to the Hummer, he reached over to the holster and
15 yesterday he told you that at that point he pulled the gun out inside the car still but
16 Richard saw it and Richard ran away. Today he testified he didn't know if Richard
17 saw it.

18 Yesterday -- showing you State's Exhibit 3. Yesterday the Defendant
19 testified and he told you keys in my hand. Those are keys. Today the Defendant
20 testified I don't recall.

21 Yesterday the Defendant testified and he said I called the police; I was
22 waiting for the police. The phone call that the police were responding to they told
23 you, it was a man with a gun. They came, they saw that man, and they pulled out
24 their shotgun and put him on the ground. Did that sound like a phone call the
25 Defendant made to the police?

1 The Defendant said he went to the car. He went to the car. Ladies and
2 gentlemen, he didn't go to the car, take the gun out of the holster, put it back. He
3 went to the car to get the gun. He went to the car to get the gun because he wanted
4 to take care of his friend who thought he wasn't being taken care of. Remember the
5 friend was already gone.

6 You will have all the evidence in the back to review. You want to see
7 that video one more time, you will have the video to take a look at, and I'm going to
8 leave the video for your recollection.

9 I'd like to talk about some of the jury instructions that are in your
10 packets there. I'd like to start with number four. The State, we must prove beyond a
11 reasonable doubt that the Defendant committed the crime of assault with a deadly
12 weapon. Jury instruction number four tells you an assault with a deadly weapon is
13 an intentional placing of another person.

14 Intentional placing, the Defendant, he arrived, he went to the door of the
15 El Premier. He went back to his car, removed the gun from the holster, came back
16 to where Richard and Beatrice were, pointed the gun at Richard and said: I'm going
17 to kill you. That is an intentional placing of another person, Richard Pena.

18 In reasonable apprehension of immediate bodily harm; reasonable.
19 Reasonable that Richard was in fear for his life. He had a gun pointed straight at
20 him. He not only had a gun pointed straight at him, that gun had bullets in it. And
21 the Defendant told him: I'm going to kill you. It's reasonable that Richard was placed
22 in apprehension of immediate bodily harm by or through the use of a deadly
23 weapon.

24 A deadly weapon you have instruction number five which says a deadly
25 weapon is any instrumentality which is inherently dangerous. A firearm -- a gun is

1 what we have in this case. And your last sentence a firearm is a deadly weapon.

2 Let me back up just for a moment and take a look at number four, I
3 forgot a line on that. This says to constitute an assault is not necessary that any
4 actual injury be inflicted. He would not have to cock the gun. The Defendant did not
5 have to shoot that gun in order for there to be assault with a deadly weapon. He
6 picked up the gun and said I'm going to kill you, and he pointed a loaded gun. It's
7 an intentional placing of another person in reasonable apprehension of immediate
8 bodily harm.

9 Instruction number 10. This talks about the credibility and believability
10 of witnesses. And it tell you that you can consider things like the manner upon the
11 stand, the reasonableness of his statement, and the strength or weaknesses of his
12 recollection.

13 Yesterday the Defendant said there were keys in his hands; today, I
14 don't recall. Yesterday the Defendant said Richard saw the gun and ran away. He
15 just ran away. And today he said he didn't know they saw it. All of these things are
16 things that you can take into consideration.

17 The last paragraph of this says that if you believe that a witnesses has
18 lied about any material facts in that case, you may disregard the entire testimony of
19 that witness, or any portion of the testimony which is not proved by other evidence.

20 And lastly I want you to take a look at number 11. I'm not going to read
21 this whole thing to you, number 11, but it talks about your common sense. You
22 have it. This jury instruction, you can read it in the back with you, it's been read to
23 you already.

24 When you are deliberating use your common sense. That gun was
25 brought out. That gun was placed and pointed and Richard Pena. The Defendant

1 said he was going to kill him and Richard Pena was in fear for his life.

2 In this trial we're going to ask that you find the Defendant guilty of
3 assault with a deadly weapon. Thank you.

4 THE COURT: Thank you. Ms. Kolias.

5 MS. KOLIAS: Thank you, Your Honor.

6 **CLOSING ARGUMENT BY THE DEFENSE**

7 MS. KOLIAS: Everyone is entitled to their own opinion but everyone is not
8 entitled to their own facts in this case. As we told you from the -- as we predicted in
9 our opening statement you've been presented with a series of edited facts rather
10 than all the facts by the State, okay. I'm going to show you some jury instructions as
11 well and my closing [Inaudible].

12 The first one state -- is there a zoom?

13 THE COURT: There's a zoom out and a zoom in, can you -- do you see that?
14 Got it?

15 MS. KOLIAS: The evidence which you are to consider in this case consist of
16 the testimony of the witnesses, the exhibits, and any facts agreed to, or admitted or
17 agreed to by counsel.

18 Let's look at the witnesses in this case, okay. The first witness that was
19 put on the stand was Richard Pena, okay. Richard was the alleged victim in this
20 case, however he is the person who had available to him not only the criminal
21 complaint to refresh his memory but all of his notes --

22 MR. WESTMEYER: I'm going to object at this point, Judge. I don't think that
23 came out at all in the evidence.

24 MS. KOLIAS: He did refresh his recollection with papers, okay.

25 THE COURT: Oh --

1 MS. KOLIAS: He was asked who was the security guard that got hurt. No,
2 the first question we had, did anything unusual happen the evening of the subject
3 accident, and I apologize, I think it was June 12th, 2006, on that date. Okay.

4 Yes, something unusual happened. The first thing he tells you about is
5 how this person brandished the gun. It wasn't unusual for an employee to get hit
6 with a bottle. No, that was just a little thing, and he wasn't hurt that bad. The guy
7 ended up with nine stitches in his head, but no one cared about that. This is the
8 type of person Richard Pena is. Oh but when it comes to this case, when he knew
9 that his -- he was challenged, he was challenged by why can't you help my friend,
10 that's when he wanted to become vindictive, and that's why he's like I'm going to get
11 this guy. I am going to call the police and get this guy to get him.

12 MR. WESTMEYER: Again, Judge, I don't think any of this actually came out
13 of the testimony at trial.

14 MS. KOLIAS: And this is closing statement.

15 THE COURT: Okay listen folks, it's closing argument but you have to argue
16 within the scope of the facts that have come out during the trial. So you get a little
17 leeway because it's argument but you --

18 MS. KOLIAS: I'll try to stick a little closer to the --

19 THE COURT: Thank you very much.

20 MS. KOLIAS: Okay Richard, only upon prompting said oh yes, and I was in
21 fear of my life. We have the testimony of Officer Fletcher who kind of let it slip out:
22 Yeah, we're there a lot. Okay so they're there a lot. What can -- what do
23 reasonable minds know about that? This is a place that frequented by the police,
24 yet in this specific case this is that he was in fear of his life. He wasn't in fear of the
25 life of Alex who had a bottle broken over his head, no he was in fear of his life.

1 Richard was the person who had the care, custody and control of the
2 videotape. According to the officer it was Richard and his crew who showed him the
3 tape, but the officers are like -- but Mr. Pena's like oh I don't know, I don't know
4 anything about the tape. Well obviously there's an inconsistency.

5 Mr. Pena, when the tape was given to the officers, you heard the officer
6 say: Well I saw the tape and that's not the tape that I saw the night of the incident.
7 Well what do you infer from that with the credibility of that tape? And certainly if you
8 were the victim of a crime and your testimony was corroborated by a videotape that
9 you had care and custody and control of, wouldn't you take a little bit more
10 consideration or try to get someone to make the tape work rather than have it go
11 backwards and forwards and be didacted [phonetic] or edited? Wouldn't you want a
12 tape of the whole incident from the proceeding time of when Alex was hit with the
13 bottle, or when Mister -- when the Defendant showed -- when Lazaro showed up?
14 Wouldn't you want the whole videotape of showing him -- showing him show up
15 rather than the bits and pieces?

16 And if you remember what Lazaro said it was Mr. Pena that pushed him
17 and said get out of here, this is none of your business. We have bits and pieces of
18 this videotape that are missing. Use your own experiences. Videotape -- knowing
19 how videotapes work. There was testimony that said this is an oscillating camera. I
20 want you to see where it stops oscillating and going like this and then you can see it
21 again, okay? Where -- why was this tape altered? Who is it to protect? And was
22 the tape edited to make it look like he was guilty? These are questions that you
23 need to ask as reasonable persons.

24 Then we have the testimony of Beatrice Hernandez. I think she
25 testified that the gun was pointed at her too. Okay well, all I want you to know about

1 Beatrice is that she is that she is supposedly the head of security, okay. According
2 to her she was outside and she witnessed Alex getting hit over the head. She had to
3 because she's the one with the sheriff's card. You ask Alex he's on the phone with
4 Lazaro because his supervisor is nowhere to be found and he's scared, and he's
5 bleeding, and he doesn't know what to do. Probably not a choice I would have
6 made, but I'm sure that's what he did.

7 MR. WESTMEYER: And Judge, again I want to object, I don't think that's
8 proper argument.

9 THE COURT: And that's sustained. What you would do?

10 MS. KOLIAS: I got you, Your Honor. Sorry about that.

11 But according to Alex he -- there was no supervisor there, and again if
12 you ask Beatrice she also poopooed any injuries that Alex got, okay. But at the
13 same time when it was her boss of eight years, yes he pointed a gun at him.

14 You remember Beatrice's testimony, yes that Mr. Pena in the picture
15 there, he's standing right in that picture. Where was he -- where was Mr. Pena and
16 you when the gun was pointed at you? We were facing the Hummer and Lazaro
17 was facing us. I didn't see any picture of that.

18 If you remember Mr. Pena's testimony, I'm not in these pictures, I'm
19 way -- I'm not even in these pictures. But according to Beatrice he was in the
20 pictures, okay. Then you ask Lazaro and he says Mr. Pena's not in these pictures
21 either. Let's look at that picture. Ms. Clerk, may I approach and get the pictures?

22 Reasonable people, this is a charge of assault with a deadly weapon,
23 okay. Assault with a deadly weapon is an intentional placing of another person in a
24 reasonable apprehension of immediate bodily harm by the -- or through the use of a
25 deadly weapon. Okay, let's see, intentional placing of another person in reasonable

1 apprehension of immediate bodily harm. So let's look at the prosecutor's exhibits in
2 this case and want you to tell -- I want you to look at the video and I want you to look
3 at the pictures as a reasonable person because I don't know of any -- well let's just
4 put it this way, is it reasonable if this -- if in this picture, which is State's Exhibit
5 number 3, we have here what has truly been identified as Beatrice and Lazaro in
6 this case. Lazaro says he doesn't [indiscernible]. You're going to be able to look at
7 the video and if -- and whether or not that is a gun. You should also take into
8 consideration that this tape was not given, and this is not -- this is taken from the
9 tape that the officer -- notice that the officer never saw the tape. Notice that the
10 officer never saw these pictures. And notice the officer never testified where on the
11 video or what video he saw, where he saw the Defendant with a gun.

12 MR. WESTMEYER: Judge, I need to object again, I don't think that's the facts
13 that was elicited from the officer, but I'll let the jury let their recollection.

14 MS. KOLIAS: Let the jury decide.

15 Does this look like a picture where everyone is in reasonable
16 apprehension of immediate bodily harm? It looks like they're looking at -- off in the
17 distance including the head security guard, looking off at a distance. It certainly
18 doesn't look like anyone is, you know, afraid of someone brandishing a gun, does it?
19 I -- that's for you to decide.

20 As I said the officer readily admitted that the tape he saw is not the tape
21 that the prosecution has admitted into evidence. And Mr. Pena said he is not on the
22 tape.

23 The last testimony or witness I would like to talk about is Mr. Martinez
24 who is, as any reasonable person would be, nervous facing such a charge. But he
25 took the stand in this case because he wanted you to know that he did have a gun

1 there, he did take the gun out of the [indiscernible] but what he didn't do are what
2 the allegations are in this case, that he took the gun and went up to Mr. Pena and
3 said I'm going to kill you. He didn't do that. Those are the allegations.

4 The tape -- all right, you have to base your testimony on all of the facts,
5 all of the evidence, the totality of the circumstances. Not the evidence part that the
6 prosecution wants to tell you about. Not even our edited parts, all of it. You must
7 consider all of it. You must understand what your burden of proof is in this case.
8 And I'm going to go through some other instructions with you.

9 In the case it says the Defendant did then, there willfully, unlawfully,
10 feloniously, intentionally place another person, Richard Pena, place Richard Pena in
11 reasonable apprehension of immediate bodily harm with use of a deadly weapon to
12 wit a firearm by displacing the firearm and threatening to kill him causing him to
13 reasonably apprehend being shot. Okay that takes me to this jury instruction which
14 says: The credibility or believability of a witness to be determined by his manner
15 upon the stand, his relationship to the parties, his fears, his motives, interests or
16 feelings, his opportunity to have observed the matter to which he testified. His
17 opportunity to have observed the matter to which he testified, the reasonableness of
18 his statements and the strength or weakness of his recollection. And I'm telling you,
19 Mr. Pena couldn't even remember his employee's name, the one that had been hit
20 over the head with a beer bottle.

21 Now if you believe that a witness lied about any material facts you may
22 disregard the entire testimony of that witness or any portion of his testimony which is
23 not proved by other evidence.

24 Now I we had this one up before. We talked about the witness. We
25 talked about any facts, now the exhibits are this edited tape and these three photos

1 that are clipped from that tape. There's two other exhibits and that is our client's
2 sheriff's card and his permit to carry a weapon. Okay you can't get a sheriff's card if
3 you're a criminal. They take that from your --

4 MR. WESTMEYER: I'm going to object to that, Judge. I don't think that's
5 proper argument.

6 THE COURT: Oh well, thank you, your objection is noted for the record.

7 MR. WESTMEYER: Thank you, Judge.

8 THE COURT: We'll just have a continuing objection.

9 MR. WESTMEYER: Thank you.

10 MS. KOLIAS: With regard to the evidence -- let's go to this one. Although you
11 are to consider only the evidence in this case in reaching a verdict you must bring to
12 the consideration of the evidence your everyday common sense and judgment as
13 reasonable men and women. When you look at this evidence that's your instruction.

14 To constitute the crime charged there must exist a union or joint
15 operation of an act forbidden by law and it's intent to do the act, okay. The intent
16 with which an act is done is shown by the facts and circumstances regarding the
17 case. Do not confuse intent with motive. Motive is what prompts a person to act.
18 Motive is the reason why somebody would go when his friend called. My motive in
19 going there was to help my friend. Intent refers only to the state of mind with which
20 the act was done. That's what you are to consider when we're talking intent. What
21 was his state of mind? And when you look at that, and looking at his state of mind
22 and intent, and all the elements of his alleged crime this instruction is the one that
23 you must consider.

24 The Defendant is presumed innocent until the contrary is proved, okay.
25 This presumption places upon the State the burden of proving beyond a reasonable

1 doubt every material element of the crime charged and that the Defendant is the
2 person who committed the offense. Every element, intentionally place someone in
3 apprehension of bodily harm. Oh yes, I was afraid. A reasonable doubt is one
4 based on reason, okay. Not a mere possible doubt, but such doubt as would govern
5 and control a person in the more weighty affairs of life.

6 If you were in Mr. Martinez's shoes --

7 MR. WESTMEYER: I object again Judge. I'd like to renew my objection.

8 THE COURT: And --

9 MS. KOLIAS: If the -- okay listen, if the mind of the jurors after the entire
10 comparison and consideration of all the evidence are in such a condition that they
11 can say they feel an abiding conviction of the truth of the charge -- an abiding
12 conviction, understand those words. There is not a reasonable doubt, okay? Doubt
13 to be reasonable must be actual and not mere possibility or speculation, and if you
14 have a reasonable doubt as to the guilt of Lazaro Martinez he is entitled to a verdict
15 of not guilty. Thank you.

16 THE COURT: Thank you. Let's have the finish by the State.

17 MR. WESTMEYER: Thank you, Judge.

18 **STATE'S REBUTTAL**

19 MR. WESTMEYER: Ladies and gentlemen, you just heard a lot about the
20 edited facts of the case. I just want to clarify a couple of points that we just heard
21 about.

22 Counsel just asks rhetorically who is this tape designed to protect?
23 Who are we protecting with this tape? You will see the tape when you go back to
24 deliberate. The tape is in evidence, you will get a chance to look at it, and it's not
25 the greatest tape in the world, grant it. It goes forward, it goes back, it vacillates as

1 counsel described, and as you saw earlier when we showed it in court. It's not a
2 great tape. If the tape was going to be edited, if we were out to get someone, the
3 tape might -- if we're going to get a tape and change what's on there ask yourselves
4 if it's reasonable if we would want it to look like the tape that you saw. Is that
5 reasonable? It's common sense, what we talked about, is that reasonable?

6 You also heard about Richard. He was the first guy that testified, he
7 was here yesterday. He sat up there and he told us about the events of that night.
8 He told us he was scared for his life because there was a gun pointed at him. He
9 also said, when I asked, he couldn't remember the name of an employee who had
10 worked for him in June of 2006, it is now February of 2008, who had worked for him
11 for two days. He couldn't off the top of his head remember the name of that person.
12 What he did remember was the gun that was shoved in his face. That much he did
13 remember.

14 Address that with what the Defendant remembered. He testified
15 yesterday, and I asked him today about some of the things that he testified to
16 yesterday, and again he couldn't remember some of those things, and Ms. Thomas
17 went through some of that already. I won't rehash that with you. You were all here
18 for that, you remember that. I'll let you recall what the testimony was. But ask
19 yourself, there's a jury instruction on this as well, and I don't remember which one it
20 was, the Judge just read it to you, the other attorneys have gone over it with you. If
21 you have any doubt as to the truthfulness of any portion of a person's testimony you
22 may disregard that testimony, or any portion of that testimony that isn't proved by
23 the other evidence.

24 So what happened here? The Defendant, Lazaro Martinez, come to
25 the nightclub to help his friend who isn't there, and not by calling an ambulance, not

1 by calling a doctor, not by calling a nurse or an EMT, but by going there himself for
2 what was a medical situation, you heard about that. Did he go there to help his
3 friend with his gun, get out of his car, take the gun out of the holster but leave it in
4 the car just because? I asked him about that, he never told me what his intent was,
5 but he put the gun on the seat of the car and then later Richard doctors a tape and
6 gives a doctored tape to the police and that's the tape that we saw today; is that
7 what happened? Is that reasonable? Ask yourselves that.

8 Also ask yourselves is it reasonable that the Defendant got a call from
9 his friend, was upset, drove to the nightclub with his gun, got out of the car yelling
10 and screaming, finds Richard, says his peace, and says you know what, that's not
11 enough. Goes to the Hummer, opens the door, gets the gun and threatens him
12 because he's mad, his friend was hurt dang it.

13 MS. KOLIAS: Your Honor, may I approach? I have an objection.

14 THE COURT: You can't state it out loud.

15 MS. KOLIAS: Well we have someone who's -- yesterday we were
16 admonished for my cross-examining in the objection saying by Ms. DiEdoardo.
17 Here we have I'm being tag-teamed by two people on closing.

18 THE COURT: That's allowed.

19 MS. KOLIAS: Two different person --

20 THE COURT: That happens every single day of every single week --

21 MS. KOLIAS: And that's why I wanted to approach Your Honor, thank you.

22 THE COURT: -- of every single year in this courthouse.

23 MS. KOLIAS: Well that's why I wanted to approach Your Honor, thank you.

24 THE COURT: Please continue.

25 MR. WESTMEYER: Thank you, Judge.

1 Those are the two stories that are going on here. Ask yourselves which
2 of those is more reasonable. They can't both be true. We heard conflicting
3 testimony. Ask yourself who do you believe more? Which of these is more
4 reasonable? Apply your common sense like we talked about. Which is more
5 reasonable? That's why we're here. And ladies and gentlemen, I submit to you
6 after you review all the facts, after you review all the evidence you will come back
7 with a verdict of guilty of the sole charge of the information assault with use of a
8 deadly weapon. The evidence has proven it and justice commands it. Thank you.

9 THE COURT: Okay ladies and gentlemen, here's what's going to happen
10 now. My secretary is going to come in and be sworn, hopefully, as one of the -- is
11 coming? Is Elana coming?

12 THE MARSHAL: Yes, Judge.

13 THE COURT: Okay, and in the meantime I'm going to pick the alternates
14 scientifically here, so stand by as I do that. If it would work, Arthur. It's not. Sandy,
15 would you swear in? See if you can get it to work -- well be sworn and then see if
16 you can get it to work.

17 [The Clerk swore in the officers to take charge of the jury during deliberations]

18 THE COURT: Arthur, the battery was in backwards. Have a seat, please.
19 This was passed down from another judge who Arthur used to work for. I took pity
20 on him and took Arthur and I got this. He's not a Supreme Court Justice, so there
21 you go. Sandy.

22 COURT CLERK: Juror number 12.

23 THE COURT: Number 12, okay, my pharmacist. You're the alternate, don't
24 go anywhere.

25 Take charge of your jury, Arthur.

1 [The Jury retires to deliberate at 12:34 p.m.]

2 [On the record at 3:53 p.m.]

3 [In the presence of the Jury]

4 THE COURT: Did you get the alternate, Arthur?

5 THE MARSHAL: Yes, Judge.

6 Please be seated, Department 5 is again in session. The Honorable
7 Jackie Glass presiding.

8 THE COURT: Thank you, we're back on the record in State vs. Martinez-
9 Hernandez, all the parties are present as well as the ladies and gentlemen of the
10 jury, and the alternate; and Juror Number 9, it's my understanding you are my
11 foreperson.

12 FOREPERSON [Juror Number 9]: I am.

13 THE COURT: And it's my understanding that the Jury has reached a verdict.

14 JURY FOREPERSON: We have.

15 THE COURT: All right, hand Arthur the documents, please. Thank you.

16 All right, Ms. Clerk, would you please read the verdict out loud. Go
17 ahead and stand up, sir.

18 COURT CLERK: District Court, Clark County, Nevada, the State of Nevada,
19 plaintiff, versus Lazaro Martinez-Hernandez, Defendant, case number C230237,
20 Department Number 5. Verdict; we the Jury in the above entitled case find the
21 Defendant, Lazaro Martinez as follows: Count 1, assault with a deadly weapon;
22 guilty of assault with a deadly weapon. Dated this fifth day of February, 2008, Juror
23 Number 9, foreperson.

24 Ladies and gentlemen of the Jury, is that your verdict as read so say
25 you one, so say you all?

1 THE JURY PANEL: Yes.
2 THE COURT: Do you wish to have the jury polled?
3 MS. KOLIAS: Yes.
4 THE COURT: All right, have a seat please. And when Sandy calls out your
5 seat number please just answer her out loud. Thank you.
6 COURT CLERK: Juror number 1, is that your verdict as read?
7 JUROR NO. 1: Yes.
8 COURT CLERK: Juror number 2, is that your verdict as read?
9 JUROR NO. 2: Yes.
10 COURT CLERK: Juror number 3, is that your verdict as read?
11 JUROR NO. 3: Yes.
12 COURT CLERK: Juror number 4, is that your verdict as read?
13 JUROR NO. 4: Yes.
14 COURT CLERK: Juror number 5, is that your verdict as read?
15 JUROR NO. 5: Yes.
16 COURT CLERK: Juror number 6, is that your verdict as read?
17 JUROR NO. 6: Yes.
18 COURT CLERK: Juror number 7, is that your verdict as read?
19 JUROR NO. 7: Yes.
20 COURT CLERK: Juror number 8, is that your verdict as read?
21 JUROR NO. 8: Yes.
22 COURT CLERK: Juror number 9, is that your verdict as read?
23 JUROR NO. 9: Yes.
24 COURT CLERK: Juror number 10, is that your verdict as read?
25 JUROR NO. 10: Yes.

1 COURT CLERK: Juror number 11, is that your verdict as read?

2 JUROR NO. 11: Yes

3 COURT CLERK: Juror number 13, is that your verdict as read?

4 JUROR NO. 13: Yes.

5 THE COURT: Thank you. All right, the clerk will record the verdict.

6 Ladies and gentlemen of the jury, thank you very much for your jury
7 service. As I said in the beginning, I can't do my job here without having folks like
8 you coming in and serving, so on behalf of all of us here at the Eighth Judicial
9 District Court I want to thank you for your service.

10 What's going to happen now is Arthur is going to take you back into the
11 jury room. I'm going to be back in in just a minute to talk to you. I've got letters for
12 all of you to take to your employers who need them to tell them where you've been
13 for the last two days, and I'll be happy to answer any questions that you have
14 regarding what has just happened during the last two days. So Arthur, please take
15 the jury with you.

16 [The Jury is excused.]

17 THE COURT: Okay, we'll set a sentencing date. Here's your date.

18 COURT CLERK: It'll be April 10th at 8:30.

19 THE COURT: All right Mr. Martinez-Hernandez, you need to show up here on
20 that date for your sentencing. Arthur is going to give you your referral for the
21 Department of Parole and Probation.

22 MR. WESTMEYER: Judge, I'd like to move for remand. No bail pending
23 sentencing.

24 THE COURT: That's denied. But I can tell you that if Mr. Martinez-Hernandez
25 has anything happen between now and the time that I see him for sentencing, that

1 will have a very great impact on what happens when he is sentenced.

2 MR. WESTMEYER: Thank you, Judge.

3 MS. KOLIAS: Your Honor, just for your information from arraignment until this
4 day that he got out of jail, he has been every Monday to the court to check in.

5 THE COURT: Okay, but there was a point where he did bench warrant in this
6 case, Ms. Kolias, isn't that correct?

7 MS. KOLIAS: If he did it wasn't while on my watch.

8 THE COURT: Okay, prior to your watch he did bench warrant in this case, so
9 that would be a speech, Ms. Kolias, that I would give to anybody who just got
10 convicted of a serious felony offense and is not remanded to the custody of the
11 sheriff and is remaining out at liberty. So he, like everybody else, needs to know
12 that if anything happens between now and when I see him that that certainly is going
13 to have an impact. Plus if he bench warrants and doesn't show up for sentencing a
14 no bail bench warrant will be issued for his arrest and he will not be released.
15 Thank you.

16 MR. WESTMEYER: Thank you, Judge.

17
18 [Proceeding concluded at 3:57 p.m.]
19
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21

22 ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I
23 acknowledge that this is a rough draft transcript, expeditiously prepared, not
24 proofread, corrected, or certified to be an accurate transcript.

25 
RACHELLE HAMILTON
Recorder/Transcriber


CLERK OF THE COURT

1 RSPN
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 THOMAS CARROLL
6 Chief Deputy District Attorney
7 Nevada Bar #004232
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13
14 Plaintiff,

15 -vs-

16 LAZARO MARTINEZ-HERNANDEZ,
17 #1493472

18 Defendant.

CASE NO: C230237

DEPT NO: XVII

19 STATE'S RESPONSE AND MOTION TO DISMISS SUPPLEMENTAL
20 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

21 DATE OF HEARING: AUGUST 17, 2012
22 TIME OF HEARING: 9:30 AM

23 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
24 District Attorney, through THOMAS CARROLL, Chief Deputy District Attorney, and
25 hereby submits the attached Points and Authorities in Opposition to Defendant's
26 Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).

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

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AA 0234

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On February 16, 2007, Lazaro Martinez-Hernandez (hereinafter "Defendant") was
4 charged by way of Information with one (1) count of Assault with a Deadly Weapon (Felony
5 – NRS 200.471). Defendant's jury trial began on February 4, 2008. On February 5, 2008,
6 the jury found Defendant guilty of Assault with a Deadly Weapon.

7 Defendant was present in court with counsel on April 10, 2008, and sentenced to
8 twelve (12) to thirty-six (36) months in the Nevada Department of Corrections. This
9 sentence was suspended and Defendant was placed on probation for an indeterminate period
10 not to exceed three (3) years. Defendant was given the following conditions of his
11 probation: (1) submit his person, property, place of residence, vehicle, or areas under his
12 control to search at any time, with or without a search warrant, for evidence of a crime or
13 violation of probation by the Division of Parole and Probation (P&P) or its agent; (2) comply
14 with any curfew imposed by P&P; (3) complete impulse control and anger management
15 counseling as deemed necessary by an evaluation; (4) have no contact whatsoever with the
16 victim or the victim's family; (5) obtain and maintain full-time employment; and (6) not
17 possess any weapons. Judgment of Conviction was filed on April 25, 2008. Defendant did
18 not file a direct appeal.

19 Thereafter, P&P provided the Court with a written statement claiming that Defendant
20 violated the terms of his probation. On January 21, 2010, Defendant was again present in
21 court with counsel for a probation revocation hearing. Following the revocation hearing, the
22 Court revoked Defendant's probation and instituted the underlying sentence of twelve (12) to
23 thirty-six (36) months in the Nevada Department of Corrections. Defendant was given
24 ninety-six (96) days credit for time served. The Amended Judgment of Conviction was filed
25 on February 1, 2010. Defendant did not file an appeal from the revocation of his probation.

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1 Defendant filed a Motion for Transcripts at State's Expense on August 20, 2010.¹
2 The State filed an opposition on August 27, 2010. On October 5, 2010, the Court denied the
3 motion.

4 On February 1, 2011, Defendant's counsel filed a Petition for Writ of Habeas Corpus.
5 Defendant's counsel then filed a Supplemental petition on May 18, 2012. The State
6 responds as follows:

7 **ARGUMENT**

8 **I DEFENDANT'S PETITION IS TIME BARRED UNDER NEVADA REVISED**
9 **STATUTE 34.726.**

10 Defendant's Petition for Writ of Habeas Corpus is time barred with no good cause
11 shown for delay. Pursuant to NRS 34.726:

12 1. Unless there is good cause shown for delay, a petition that
13 challenges the validity of a judgment or sentence must be filed
14 within 1 year of the entry of the judgment of conviction or, if an
15 appeal has been taken from the judgment, within 1 year after the
16 Supreme Court issues its remittitur. For the purposes of this
17 subsection, good cause for delay exists if the petitioner
18 demonstrates to the satisfaction of the court:

- 17 (a) That the delay is not the fault of the petitioner; and
18 (b) That dismissal of the petition as untimely will unduly
prejudice the petitioner.

19 The Defendant's petition does not fall within this statutory time limitation. The
20 Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain
21 meaning. Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001). As per the
22 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from
23 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
24 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

25 In the instant case, Defendant did not file a direct appeal. The original Judgment of
26 Conviction was filed on April 25, 2008. An amended Judgment of Conviction following the
27

28 ¹ It is possible that Defendant actually attempted to file this document sometime after July 7, 2010, the date he signed it, however, he was still far beyond the thirty (30) day time limitation in which to file an appeal. NRAP 4.

1 revocation of his probation was filed February 1, 2010. Thus, any petition challenging the
2 original conviction had to be filed by Monday April 27, 2009. See Sullivan v. State, 120
3 Nev. 537, 96 P.3d 761, (2004). All of Defendant's claims pertain to this original conviction
4 but his initial petition which he has now supplemented was not filed until February 1, 2011,
5 over a year and a half beyond his April 27, 2009 deadline for filing a timely petition.

6 Additionally, the one-year time limit for preparing petitions for post-conviction relief
7 under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 53 P.3d 901
8 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late
9 despite evidence presented by the defendant that he purchased postage through the prison
10 and mailed the Notice within the one-year time limit.

11 Furthermore, the Nevada Supreme Court has held that the district court has *a duty* to
12 consider whether a defendant's post-conviction petition claims are procedurally barred. State
13 v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070 (2005). The Court found that
14 "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is
15 **mandatory**,[emphasis added]" noting:

16 Habeas corpus petitions that are filed many years after conviction are an
17 unreasonable burden on the criminal justice system. The necessity for a
18 workable system dictates that there must exist a time when a criminal
conviction is final.

19 State v. Eighth Judicial District Court, 121 Nev. at 231, 112 P.3d at 1074. Additionally, the
20 Court noted that procedural bars "cannot be ignored [by the district court] when properly
21 raised by the State." 121 Nev. at 233, 112 P.3d at 1075. The Nevada Supreme Court has
22 granted no discretion to the district courts regarding whether to apply the statutory
23 procedural bars; the rules *must* be applied.

24 In this case, Defendant filed the original and supplemental Petition for Writ of Habeas
25 Corpus outside of the one-year time limit. Defendant's original Judgment of Conviction was
26 filed on April 25, 2008. Defendant did not file the original Petition until February 1, 2011.
27 The instant supplemental petition was filed May 18, 2012. Both are over the one (1) year

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1 time prescribed in NRS 34.726. Absent a showing of good cause for this delay, Defendant's
2 claim must be dismissed because of its tardy filing.

3 **II DEFENDANT HAS NOT SHOWN GOOD CAUSE FOR THE DELAYED**
4 **FILING OF PETITION.**

5 In the instant Petition, Defendant has not established good cause for the delay in filing
6 a late petition. "Generally, 'good cause' means a 'substantial reason; one that affords a legal
7 excuse.'" Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) *quoting Colley v.*
8 State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). "In order to demonstrate good cause,
9 a petitioner must show that an impediment external to the defense prevented him or her from
10 complying with State procedural default rules." Hathaway, 71 P.3d at 506 *citing Pellegrini v.*
11 State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353,
12 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).
13 An impediment external to the defense can be demonstrated by a showing "that the factual or
14 legal basis for the claim was not reasonably available to counsel or that some interference by
15 officials made compliance impracticable." Hathaway, 71 P.3d at 506.

16 In this case, Defendant has not given any legally relevant excuse for failure to file his
17 Petition in a timely manner. Defendant has not stated any facts that would show good cause
18 for not filing his Petition in the required time frame. In fact, Defendant does not even attempt
19 to demonstrate good cause. Defendant has also stated no facts that would show he would be
20 in any way prejudiced by having to comply with the procedural time bar. Therefore, since
21 the Defendant cannot show good cause or actual prejudice for failing to comply with the one
22 year time limit for Petitions, the instant Petition should be dismissed.

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CONCLUSION

Based on the foregoing arguments, the State respectfully requests this Honorable Court to deny Defendant's Supplemental Petition for Writ of Habeas Corpus.

DATED this 2nd day of July, 2012.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ THOMAS CARROLL
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Response And Motion To Dismiss Supplemental Petition For Writ Of Habeas Corpus (Post-Conviction), was made this 2nd day of July, 2012, by facsimile transmission to:

MARTIN HART, ESQ.
384-6006

BY: /s/ C. Cintola
C. Cintola
Employee of the District Attorney's Office

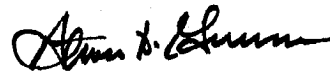
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CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

Case No: 07C230237

Dept No: XVII

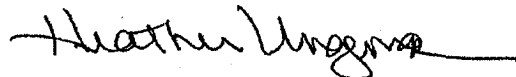
LAZARO MARTINEZ-HERNANDEZ aka
LAZARO MARTINEZHERNANDEZ,

Defendant,

NOTICE OF APPEAL

Notice is hereby given that the Defendant above named, hereby appeals to the Supreme Court of Nevada from the Judgment of Conviction (Plea of Guilty) entered in this action on April 25, 2008.

STEVEN D. GRIERSON, CLERK OF THE COURT



Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

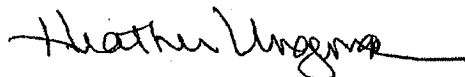
I hereby certify that on this 22 day of July 2013, I placed a copy of this Notice of Appeal in:

The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☒ The United States mail addressed as follows:

Lazaro Martinez-Hernandez	Martin Hart, Esq.
1716 Weeping Willow Ln.	229 S. Las Vegas Blvd., Ste. 200
Las Vegas, NV 89104	Las Vegas, NV 89101

☒ This appeal was electronically submitted to the Clerk of the Supreme Court.



Heather Ungermann, Deputy Clerk

AA 0240

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO MARTINEZ-HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63650

FILED

JUL 22 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal under NRAP 4(c) from a judgment of conviction, pursuant to a jury verdict, of assault with a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

First, appellant Lazaro Martinez-Hernandez argues that the police acted in bad faith in failing to collect the raw video of the incident, which he contends is exculpatory. We discern no plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unobjected-to error for plain error affecting substantial rights). Martinez-Hernandez did not demonstrate that had the raw footage been available to the defense, the result of the proceedings would have been different. *See Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (providing that defendant must show that evidence that police failed to gather was material). Martinez-Hernandez's contention that the raw footage would have supported a conclusion that he brandished the weapon without pointing it at the victim to stop an imminent assault by the victim was "merely a hoped-for conclusion." *Sheriff, Clark Cnty. v. Warner*, 112 Nev. 1234, 1240, 926 P.2d 775, 778 (1996) (quoting *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)). The record indicates that the video

introduced at trial was consistent with the raw footage of the event. The jury apparently observed nothing in the video that suggested the eyewitness' reports of the incident were inaccurate. Further, Martinez-Hernandez failed to demonstrate gross negligence or bad faith on the part of the police officers who collected the recording. *See Daniels*, 114 Nev. at 267, 956 P.2d at 115 (providing that where defendant demonstrates evidence was material, "the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or . . . bad faith" and imposing no sanction for mere negligence). Due to the lack of expertise of the business's staff, a copy of the incident could not be replicated that night. The police could not obtain the video until a knowledgeable staff member could copy it. The district court did not plainly err in not instructing the jury that the evidence would have been unfavorable to the State. *See id.*

Second, Martinez-Hernandez argues that the district court erred in admitting the video because technical glitches rendered it more prejudicial than probative. We discern no plain error. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Witnesses testified that the video accurately reflected the events of the evening and a police officer testified that the video was consistent with the raw footage of the events. Further, defense counsel was able to address the defects in front of the jury during the examination of witnesses. Any difference between the admitted copy and the raw footage went to the weight of the evidence and not its admissibility. *See Sorce v. State*, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972) ("[I]t is sufficient to establish only that it is reasonably certain that no tampering or substitution took place, and the doubt, if any, goes to the weight of the evidence.").

Third, Martinez-Hernandez claims that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to disclose that the eyewitnesses to the assault were facing charges. Although the information surfaced prior to his sentencing, Martinez-Hernandez did not raise a *Brady* argument in the district court; therefore, we review the issue for plain error. See *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. The record indicates that the eyewitnesses to the incident were facing charges, but had not yet been formally charged in the district court. A witness can generally be impeached only with an appropriate felony conviction, not mere arrest. NRS 50.095; *Sheriff v. Hawkins*, 104 Nev. 70, 75 & n.5, 752 P.2d 769, 773 & n.5 (1988). The record does not indicate that the witnesses received favorable treatment in exchange for their testimony in this case. Therefore, Martinez-Hernandez failed to demonstrate plain error affecting his substantial rights.

Fourth, Martinez-Hernandez argues that the district court erred in excluding a defense witness. We discern no abuse of discretion. See *Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008) (reviewing “district court’s decision whether to allow an unendorsed witness to testify for abuse of discretion”). Defense counsel attempted to endorse an eyewitness to the incident on the Friday before trial, which began the following Monday. See NRS 174.234(1) (requiring written notice of defense witnesses to be served upon the prosecuting attorney “not less than 5 judicial days before trial”). Although a strong presumption exists in favor of allowing late-disclosed witnesses to testify, see *Sampson v. State*, 121 Nev. 820, 827, 122 P.3d 1255, 1260 (2005), the right to present testimony is not absolute and must be balanced against “countervailing public interests,” *Taylor v. Illinois*, 484 U.S. 400, 414

(1988). As the witness's name does not appear in the record apart from the argument concerning admitting his testimony, there is no indication that the State could have anticipated the witness and therefore his testimony would have resulted in unfair surprise to the State. See *Sampson*, 121 Nev. at 828, 122 P.3d at 1260.

Fifth, Martinez-Hernandez argues that the district court abused its discretion in failing to give an instruction consistent with his theory of the case. Martinez-Hernandez did not request an instruction defining the offense of exhibiting a weapon in a threatening manner, and we discern no plain error in the district court not giving such an instruction. See *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Martinez-Hernandez pursued a theory of defense that any brandishing of the weapon was justified by the circumstances, which was in opposition to the instruction. See NRS 202.320(1) (prohibiting exhibiting of a deadly weapon "in a rude, angry or threatening manner not in necessary self-defense"). Therefore, the district court's failure to sua sponte issue the instruction was not an error that was "so unmistakable that it reveals itself by a casual inspection of the record." *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation omitted); *Bonacci v. State*, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980).

Sixth, Martinez-Hernandez claims his conviction was not supported by sufficient evidence. We disagree. When viewed in the light most favorable to the State, the evidence presented at trial is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). The victim and another witness testified that Martinez-Hernandez was upset, pushed the victim, then

retrieved a handgun from his vehicle, pointed it at the victim, and verbally threatened to kill the victim. See NRS 200.471. While he contends that other evidence contradicted this testimony, it was for the jury to determine the weight and credibility to give the conflicting testimony. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Seventh, Martinez-Hernandez argues that cumulative error warrants reversal of his conviction. Because we have found no error, there is nothing to cumulate. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Michael Villani, District Judge
Law Offices of Martin Hart, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO MARTINEZ-HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 63650
District Court Case No. C230237

FILED

SEP 04 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk ✓

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: August 20, 2014

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):

Hon. Michael Villani, District Judge
Law Offices of Martin Hart, LLC
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on AUG 26 2014.

Deputy *[Signature]*
District Court Clerk

RECEIVED

AUG 29 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

RECEIVED

AUG 25 2014

CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO MARTINEZ-HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 63650
District Court Case No. C230237

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 22nd day of July, 2014.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
August 20, 2014.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

0247

1 A Yes.

2 Q And do you have a permit to carry a weapon?

3 A Yes.

4 MS. KOLIAS: May I approach the witness, Your Honor?

5 THE COURT: Yes.

6 MS. KOLIAS: All right.

7 THE COURT: Has it been marked?

8 MS. KOLIAS: I think it has been marked.

9 THE COURT: It has to be marked as a proposed exhibit.

10 MS. KOLIAS: May I approach?

11 THE COURT: Yes. No, is it all one exhibit or is it two exhibits?

12 MS. KOLIAS: May I approach the witness, Your Honor?

13 THE COURT: Yes. Has -- I'm sorry -- have they.

14 MR. WESTMEYER: I was just going to -- I do have a copy I think of all three
15 of these, if I can just verify these are the same. Yeah, I've got all three, Judge.

16 Thank you.

17 THE COURT: Okay, good. Go ahead.

18 BY MS. KOLIAS:

19 Q I'm going to show you what's been marked Defendant's Exhibit A

20 [Inaudible].

21 A My sheriff card.

22 Q Okay, and I'm going to show you what's been marked as Defendant's
23 Exhibit B, and what is this?

24 A The blue paper of my gun.

25 Q Okay, so is that permission to carry a concealed weapon?

1 A Yeah, with the sheriff card.

2 THE COURT: All right, hold on. Is that a concealed weapon's permit?

3 MS. KOLIAS: No, it's not, Your Honor, it's a gun registration card.

4 THE COURT: So your question was does that allow you to carry a weapon.

5 That would to me mean to infer that it was a CCW. It's not a CCW, it's a permit to
6 have a gun, is that correct?

7 MS. KOLIAS: That's right, Your Honor.

8 THE COURT: Okay. So it's a gun permit.

9 MS. KOLIAS: Gun registration card, Your Honor.

10 THE COURT: Okay. Just want to keep the record clear.

11 MS. KOLIAS: Thank you. I ask that they be admitted.

12 MR. WESTMEYER: I only heard A and B.

13 THE COURT: I think one of them is stapled together, counsel.

14 MR. WESTMEYER: Oh, I'm sorry.

15 MS. DIEDOARDO: Yeah, they're -- counsel, they're the front and back.

16 MR. WESTMEYER: Okay.

17 THE COURT: Any objection to A or B?

18 MR. WESTMEYER: I have no objection, Judge.

19 THE COURT: All right, A and B will be admitted.

20 **[EXHIBITS A AND B ADMITTED]**

21 BY MS. KOLIAS:

22 Q Lazaro, in your 12 years of experience in security have you ever had
23 any criminal issues in the past?

24 A No.

25 Q Okay, and where have you worked in the past 12 years?

1 A In several places as a security.

2 Q Okay, in Hispanic bars typically?

3 A Yes.

4 Q Okay, have you ever -- were you ever employed by the El Premier?

5 A No.

6 Q Okay, had you ever been to the El Premier in the past before this
7 accident on June 12th, 2006?

8 A Yes, I've been there several times.

9 Q Okay, and did you have any problems with anybody at that bar in the
10 past?

11 A Never.

12 Q Okay, very good. Let's go to June 12th, 2006. If you could tell us what
13 happened prior to you getting to that bar? What made you go to the bar that night?

14 A Alexander called me.

15 Q About what time did he call you?

16 A Between 3:10 and 3:15.

17 Q Okay, and what did -- what was said that made you go to the bar?

18 MR. WESTMEYER: And Judge, I'm going to object at this point as to
19 hearsay.

20 THE COURT: No what made him go --

21 MR. WESTMEYER: She said what was said that made him go to the bar.
22 That calls for hearsay.

23 MS. DIEDOARDO: And he's had -- Judge, and he's had the other speaker
24 here in court as well. I mean I don't think it's a -- hardly a hearsay statement. He
25 can testify as to what he said.

1 THE COURT: No it's actually technically still hearsay. The question is
2 whether it's going to be admissible because of the questions regarding reliability.
3 We just had the witness testify, so what -- you can ask him without eliciting the
4 hearsay. Why did he go to the bar?

5 MS. KOLIAS: Exactly.

6 THE COURT: Why did you go to the bar?

7 THE WITNESS: Alex needed assistance.

8 BY MS. KOLIAS:

9 Q What kind of assistance?

10 A To call to request an ambulance so that he could be taken care of.

11 Q Was there something wrong with Alex?

12 A No, since he didn't know I told him just remain there, wait until the
13 ambulance comes and the police.

14 Q Okay. Did you get the impression that something was wrong with Alex?

15 A Yes.

16 Q What was wrong with Alex?

17 A Something odd because in a problem like that the police has to be
18 called and then the ambulance.

19 THE COURT: Why -- what was wrong with him? Why did he call you?

20 THE WITNESS: Because he had no experience. He didn't know what to do.

21 THE COURT: What -- no, no, no --

22 BY MS. KOLIAS:

23 Q Was there something physically wrong with Alex?

24 THE COURT: What happened to him?

25 THE WITNESS: He told me that he had been struck with a bottle and he had

1 lacerations on the face.

2 BY MS. KOLIAS:

3 Q Thank you. Okay. And you then told him to stay there and to go -- and
4 you were going to the bar?

5 A Yes.

6 Q Okay, and then what happened, did you go to the bar?

7 A Yes.

8 Q Okay, and once you got to the bar what happened after that?

9 A There was a Richard Pena at the door, Manuel Tortosa [phonetic], and
10 the other security.

11 Q Okay, so did you pull up in a Hummer?

12 A Yes.

13 Q Okay, and did you have a gun on you?

14 A In my car.

15 Q Okay, and did you get out of the car?

16 A Yes.

17 Q And when you got out of the car did you have a gun with you?

18 A No.

19 Q Okay, and did you leave the gun in the car?

20 A Yes.

21 Q Okay, and where was the gun located in the car when you left it there?

22 A In the passenger seat.

23 Q Okay, and after you got out of the car what did you do after that?

24 Where did you walk to?

25 A Directly to the door.

1 Q Okay and when you walked to the door, who was at the door?
2 A Richard Pena, Manuel Tortosa and another security.
3 Q Okay, did you go directly to the door?
4 A Yes.
5 Q Okay, and when you went to the door what happened after that?
6 A I asked why they didn't call the ambulance and the police.
7 Q Okay, did anybody have anything in their hands -- did Mr. Pena have
8 anything in his hands when you went to talk to him?
9 A Not at that moment.
10 Q Okay, did Beatrice Hernandez have anything in her hands at that time?
11 A She was not there.
12 Q Okay, you said that she was there. Was she there or was she not
13 there?
14 A Manuel Tortosa and another security, not her.
15 Q Okay, very good. Then after -- did you have words with Mr. Pena?
16 THE COURT: That's a yes or no answer. Did you have words with Mr. Pena?
17 BY MS. KOLIAS:
18 Q Yes or no?
19 A No.
20 Q Did you have any conversation with Mr. Pena?
21 A Yes.
22 Q Okay, and what was said during your conversation?
23 A The problem as to why the police and the ambulance were not called,
24 and he told me get out of my business and he pushed me.
25 Q Okay, and after he pushed you what happened after that?

1 A He --

2 THE INTERPRETER: Interpreter would like to clarify something, Your Honor.

3 THE COURT: Sure.

4 [Colloquy]

5 THE WITNESS: Richard Martinez had a flashlight just like the other security.

6 BY MS. KOLIAS:

7 Q Is this another person?

8 A Yes.

9 Q Okay so when -- after Mr. Pena told -- pushed you and told you to stay
10 out of his business did -- what happened after that? More people came or what?

11 A No the other security.

12 Q The other security, this other Mr. Martinez, correct?

13 A I don't know his name.

14 Q Okay, so another person came up? Another security person came up?

15 A Yes.

16 Q Okay and what happened after that?

17 A I was pushed and I was followed all the way to the car with a flashlight
18 like he was going to hit with it, and I said: I have a gun.

19 Q And who did you tell this to?

20 A To them two.

21 Q Who is them two?

22 A The other security who's not been mentioned here.

23 Q Okay, and these were two other securities not mentioned?

24 A No, just one, just one.

25 Q Okay, so did you -- you told them that you had a gun; did you tell Mr.

1 Pena you had a gun?

2 A Yes.

3 Q Where was Mr. Pena when you said I have a gun?

4 A He left running. He went inside and I called the police.

5 Q Okay, did you ever point the gun to Mr. Pena?

6 A Never.

7 Q Where were you standing when you said I have a gun, where were you
8 standing?

9 A I was not running, like they were threatening me so I was like going to
10 my car.

11 Q Where were you when you said I have a gun? Were you standing by
12 your car? Were you standing by the door? Were you standing by Mr. Pena?
13 Where were you standing.

14 THE COURT: Hold on. You only get to ask one question at a time, counsel,
15 so where were you standing will work.

16 THE WITNESS: Like close to my car.

17 BY MS. KOLIAS:

18 Q Okay, where was Mr. Pena standing when you said that?

19 A He was facing me with the other security.

20 Q Okay, so were there just two of them facing you?

21 A Yes.

22 Q Okay, and after that, what happened after that?

23 A When I opened the door they left. They left and I called the police.

24 Q And then what happened after that?

25 A The police came, I was talking to the police, they took away my phone, I

1 was thrown to the floor, and I was arrested.

2 Q Where was your gun this whole time?

3 A In my car.

4 Q Okay, did you ever have the gun in your hand?

5 A Yes.

6 Q And tell us when you had the gun in your hand.

7 A When I opened the car door I retrieved it and then they saw it.

8 Q And then what happened after they saw the gun.

9 A They left.

10 Q And you stayed there in the parking lot?

11 A Yes.

12 Q And why did you stay in the parking lot?

13 A Because I have to wait until the police will arrive.

14 Q And why were you waiting for the police to come?

15 A Because I not leave the scene.

16 Q And why did you not want to leave the scene?

17 A Because if I would leave I would be charged with something now
18 because I would be leaving.

19 Q Okay, so you stayed because you wanted to show you were innocent?

20 A Yes.

21 Q And you were the person that called the police, correct?

22 A Yes.

23 Q And why did you call the police?

24 [Colloquy]

25 MS. KOLIAS: Okay, may we approach the bench then? May we approach

1 Your Honor?

2 THE COURT: Okay.

3 [Bench conference -- not transcribed]

4 THE COURT: Ask -- counsel would you re-ask the question at issue, which is
5 -- and then if we -- we'll see how --

6 BY MS. KOLIAS:

7 Q Did you take the gun out of the car?

8 A No.

9 Q Okay, did you take the gun out of the holster?

10 A Yes.

11 Q Did the -- Mr. Pena and the other security guards see it?

12 A Yes.

13 Q And then what did you do?

14 A I left it on the seat.

15 Q Okay, so you left the gun on the seat then?

16 A Yes.

17 Q And you waited for the police to come?

18 A Yes.

19 Q Okay did you wait because you were afraid that -- why did you wait?

20 THE COURT: Why did you wait?

21 BY MS. KOLIAS:

22 Q Why did you wait for the police?

23 A I waited for the police to show that I didn't do anything, and besides that
24 I know him.

25 Q You know who?

1 A I know Richard.

2 Q And what does that have to do with the police?

3 A Because he could have made up lots of things. I don't know, lots of
4 things.

5 Q And in this case did he make up a lot of things?

6 MR. WESTMEYER: I'm going to object at this point, Judge. That's -- he
7 doesn't know what Richard's -- if the testimony is Richard made something up he
8 wouldn't know that. He has no knowledge about what Richard knows.

9 MS. DIEDOARDO: Well Judge, he was here to watch Mr. Pena testify, I think
10 we know -- he can speak to what he's heard Mr. Pena said.

11 THE COURT: And that would be for the jury to decide. And Ms. DiEdoardo,
12 she's doing the witness, she does the objections.

13 MS. DIEDOARDO: Understood Your Honor.

14 THE COURT: She does the answers. She does everything.

15 MS. DIEDOARDO: I apologize, Your Honor.

16 THE COURT: One at a time.

17 The objection is sustained. Don't answer the question. Ask your next
18 question.

19 BY MS. KOLIAS:

20 Q Did you point a gun at Richard?

21 A No.

22 Q Did you threatened Richard and tell him that you were going to kill him?

23 A No.

24 Q Were you just there to find out why your friend wasn't getting any help?

25 A Yes.

1 Q And you stayed there for the police because you had nothing to hide, is
2 that correct?

3 A Yes.

4 Q Was there, at any time, anything in your hand while you were out of the
5 car?

6 A No.

7 MS. KOLIAS: Okay, may we have prosecution exhibits 1 through 3, Your
8 Honor.

9 THE COURT: Sure.

10 BY MS. KOLIAS:

11 Q We have here what is marked as Prosecution Exhibit number 1. Can
12 you explain to us what you see in this photograph, Lazaro?

13 A The open door of my car.

14 Q Okay, and where are you located? Can you -- you can point with your
15 finger on the video.

16 THE COURT: Take your finger and --

17 BY MS. KOLIAS:

18 Q Okay, where is Richard?

19 A He does not appear there. I don't know.

20 Q Okay, are you -- which way are you facing? Can you see which way
21 you're facing in this video?

22 A Um.

23 Q Can you tell which way you're going, yes or no?

24 A No, specifically I don't know. I don't know because Beatrice is to my
25 side.

1 Q I'm going to show you next what is Prosecution Exhibit number 2.

2 Okay, do you see this here?

3 A Yes.

4 Q Okay, and where are you located in this video? Okay, do you have
5 anything in your hand?

6 A No.

7 Q Okay, and do you see Richard in this video?

8 A No.

9 Q Okay, the door of your car is open?

10 A Yes.

11 Q Okay, and where is Beatrice? And where were you coming from, and
12 where were you going to; can you tell?

13 A I was going to my car.

14 Q Okay.

15 THE INTERPRETER: To the car -- interpreter's correction.

16 BY MS. KOLIAS:

17 Q And this is Prosecution Exhibit number 3. Do you see yourself in this
18 video? Or photograph? Okay, do you see in your left hand -- is there anything in
19 your left hand in this video?

20 A I think those are keys.

21 Q So you did not have a gun in your hand?

22 A No.

23 Q Do you see anybody other than Beatrice in this video? Can you identify
24 anybody else?

25 A My friend, Manuel Tortosa.

1 Q Anybody else?

2 A Beatrice.

3 Q Is that it?

4 A Yes.

5 Q At any time, when you got out of the car, did you have anything in your
6 hand? Did you have a gun in your hand at all that far away from your car?

7 A No.

8 Q Very good.

9 MS. KOLIAS: I'm going to give these back to the clerk.

10 THE COURT: Okay.

11 MS. KOLIAS: One minute, Your Honor.

12 BY MS. KOLIAS:

13 Q Have you ever been convicted of a felony in the past ten years?

14 A No.

15 Q Okay, and you've worked as a security guard in Las Vegas for 12
16 years?

17 A Yes.

18 Q Have you ever had any other criminal convictions?

19 A No.

20 Q None? No criminal convictions?

21 A No.

22 Q All right, let's see, and it's your testimony that you never had the gun in
23 your hand?

24 A No.

25 Q Okay. All right. Thank you.

1 THE COURT: Let me speak to counsel and then I'll tell the jury what's
2 happening.

3 [Bench conference -- not transcribed]

4 THE COURT: All right ladies and gentlemen, I have to be at a presentation
5 for a retiring judge at 5:15, otherwise we would finish this up today. So I have to
6 have you come back tomorrow. Tomorrow I have to have you come back at 10:45
7 in the morning. No questions until after the cross -- we have to have -- only
8 questions after cross-examination, all right? So you get to ask questions tomorrow.

9 So I anticipate tomorrow that it will be finishing up with the examination
10 of the witness, closing argument -- instructions, closing argument, and this case will
11 go to you as the jury, and hopefully will not be long. So that's why I said today it
12 could be tomorrow. I had to hedge my bet there.

13 So during this recess -- so at 10:45, Arthur will tell you where to meet
14 him. I have a big calendar in the morning but I'm going to try and get through it so
15 that we can start as close to 10:45 as possible.

16 During this recess you're not to talk or converse among
17 yourselves, or with anybody else on any subject connected with this trial; read,
18 watch or listen to any reports or commentary on the trial, by any medium of
19 information including without limitation to the newspaper, the television, the internet
20 or the radio. Do not form or express any opinion on any subject connected with this
21 case until it is finally submitted to you. So not bring food for Arthur tomorrow.

22 UNIDENTIFIED JUROR: But he was so nice.

23 THE COURT: I know. Yeah he's nice, and he's nice and wants food. So
24 you may all go now.

25 [Outside the presence of the Jury]

1 THE COURT: If the alias isn't on there --

2 MR. WESTMEYER: Okay.

3 THE COURT: -- do me a first one that doesn't have that on there. So that's
4 number one. Number two is if in these instructions. Number three is an information,
5 is but a formal method. Number four, an assault with a deadly weapon. Number
6 five is a deadly weapon is any instrumentality. Number six is to constitute the crime
7 charged. Number seven is the defendant is presumed innocent. Number eight
8 would be you are here to determine the guilt or innocence of the defendant and
9 nobody else. Number nine is the evidence which you are to consider. Number ten
10 is the credibility or believability. Number 11 is although you are to consider.
11 Number 12, don't talk about punishment. Number 13, when you retire. And number
12 14 is now you will listen.

13 MS. DIEDOARDO: Your Honor, won't we have madam recorder -- if we might
14 make the record --

15 THE COURT: Yeah, we're going to do that right now.

16 MS. DIEDOARDO: Okay.

17 THE COURT: So here's what I'm going to do. Mr. Westmeyer, are you
18 familiar with the Court's proposed jury instructions number one through 14?

19 MR. WESTMEYER: Yes, ma'am.

20 THE COURT: Do you object to giving any of those instructions?

21 MR. WESTMEYER: No, ma'am.

22 THE COURT: Do you have any additional instructions you'd like to add?

23 MR. WESTMEYER: No, ma'am.

24 THE COURT: Okay, Ms. DiEdoardo, are you familiar with the Court's
25 proposed jury instructions number one through 14?

1 MS. DIEDOARDO: Yes, Your Honor, I am.

2 THE COURT: Do you object any of those instructions?

3 MS. DIEDOARDO: Yes, Your Honor, respectfully I do. Respectfully Judge,
4 this would be --

5 THE COURT: Which one --

6 MS. DIEDOARDO: This would be -- Your Honor, this would be instruction
7 number four.

8 THE COURT: Number three is the assault -- no, three is the assault, number
9 four is the definition of assault with a deadly weapon.

10 MR. WESTMEYER: I'm sorry, Judge, three is the information.

11 THE COURT: Three is the information. Four is assault with deadly weapon.

12 MR. WESTMEYER: Correct.

13 MS. DIEDOARDO: Oh okay, I apologize, Judge. And then -- yeah, four is the
14 assault with a deadly weapon and then the -- I believe five is the deadly weapon is
15 any instrumentality, is that correct?

16 THE COURT: Right.

17 MS. DIEDOARDO: Okay, Your Honor, then at this point the defense would
18 respectfully object to instructions four and five, and we have offered in their place
19 special instructions two and three that I would like to read -- make an offer and read
20 into the offer briefly.

21 THE COURT: You don't read them into the record, you just have them
22 attached as a Court Exhibit and you can make the record as to what it is that you
23 want -- why you want them.

24 MS. DIEDOARDO: Certainly, Your Honor, should I do this as a group or
25 individually?

1 THE COURT: No, there's two of them, right?

2 MS. DIEDOARDO: That's correct, Your Honor.

3 THE COURT: So the first one we'll mark as what?

4 COURT CLERK: Court's two.

5 THE COURT: And which one -- which one is that?

6 MS. DIEDOARDO: Your Honor, this is marked as our special instruction two
7 which I've just shown to my learned colleague from the State, if I may approach?

8 THE COURT: Yeah, and the one --

9 MS. DIEDOARDO: This is the one that begins, Your Honor, Nevada Law
10 requires the State to prove either that a gun was loaded or capable of being fired.

11 THE COURT: Okay. All right, and why do you want that one?

12 MS. DIEDOARDO: The reason I want that in there, Your Honor, due -- as the
13 Nevada Supreme Court has ruled in the *Loretta* case, which is *Loretta vs. Sheriff of*
14 *Clark County*, 93 Nev. 344, 345, 1977: In order to establish probable cause that
15 appellant committed the charged crimes, it was incumbent upon the state to submit
16 evidence of appellant's quote present ability, unquote, to use a quote, loaded
17 weapon, unquote.

18 There's an internal string cite to *State vs. Napper*, spelled N, like Nancy
19 -A-P-P-E-R, 6 Nev. 113, 115, 1870.

20 THE COURT: Okay.

21 MS. DIEDOARDO: So at this point, Your Honor, what we have stated that --
22 the reason we would like that instruction is because in this case it appears from the
23 available testimony the State's theory is that Mr. Martinez-Hernandez intended to
24 threaten to shoot the gun at Mr. Pena, not to use it to club him with. As a result we
25 think it's incumbent upon them pursuant to *Loretta* and *Napper* to show that the gun

1 was in a condition capable of being fired as one of the officer has testified, that's not
2 the case. The slide was not cocked back.

3 THE COURT: Okay.

4 MS. DIEDOARDO: And then with regard to special instruction number --

5 MR. WESTMEYER: May I respond?

6 THE COURT: Yeah, I want counsel to --

7 MS. DIEDOARDO: Oh I apologize, counsel.

8 THE COURT: Go ahead.

9 MR. WESTMEYER: I just want to make my record real quick. I think it's a
10 misstatement of the law. I believe the law is correctly laid out as we've -- in our
11 proposed instruction which the Court has adopted as instruction number five, I
12 believe. And I believe that is the legal definition of a deadly weapon. Any weapon,
13 any item capable of causing substantial harm or death is a deadly weapon. A
14 firearm is a deadly weapon. And Judge, anything can become a deadly weapon if
15 properly used, or I should say if improperly used. And for that matter -- for that
16 reason we submitted this proposed instruction which is now number five.

17 MS. DIEDOARDO: And Your Honor --

18 THE COURT: And that's why I gave it. Go ahead.

19 MS. DIEDOARDO: If I can just say one or two words in rebuttal, Your Honor.
20 Obviously nobody's contesting that anything can be rendered a deadly weapon, our
21 issue is primarily that a gun obviously --

22 THE COURT: This is an assault -- Ms. DiEdoardo, this is an assault.

23 MS. DIEDOARDO: Right.

24 THE COURT: There's no contention here that any weapon was ever fired.

25 MS. DIEDOARDO: True.

1 THE COURT: This is a threatening event. That gun could have been
2 unloaded. That gun could have disabled, but the person who it's threatened to has
3 no earthly idea at the time that's happening whether it's a BB gun, whether it's a toy
4 gun, or whether it's any kind of gun, so it does not matter.

5 MS. DIEDOARDO: And I understand that, Your Honor, the only reason that
6 we offered it respectfully the Nevada Supreme Court has ruled otherwise in *Napper*
7 versus *Loretta*, but under if the Court has ruled as that we respect that.

8 THE COURT: But under the facts of this case it does not matter. It could
9 have been a hammer, it could have been an ice pick, it could have been a rock, it
10 doesn't matter. If you stand there and the facts say that somebody threatened
11 somebody with something in saying certain things like I'm going to kill you, it doesn't
12 matter.

13 They found a gun, they found a gun that was loaded. They found -- and
14 they have several witnesses that have testified that he threatened them with a gun
15 and said I'm going to -- something to the effect of I'm going to kill you. So your
16 instruction does not apply. Next.

17 MS. DIEDOARDO: Fair enough, Your Honor. Then showing for the State is
18 our proposed special instruction 3-0, which if I may approach to have it marked?

19 THE COURT: Yes.

20 MS. DIEDOARDO: This is -- for the record this is the instruction that begins
21 with mere menace or threats are not sufficient to support a conviction for assault
22 with a deadly weapon. And the Court can note we have cited the case on which that
23 is based, unlike the State's instructions, and this would be *State versus Wilkerson*,
24 which is -- excuse me, *Wilkerson vs. State*, 87 Nev. 123. And the quote into that is
25 quote, there must be enough -- evidence of menace is not sufficient to support a

1 conviction of assault. There must be an effort to carry the intention into execution.

2 THE COURT: Intentional place -- number four, which I'm giving, is an -- the
3 definition of an assault with a deadly weapon, intentional placing another person in
4 reasonable apprehension of immediate bodily harm by or through the use of a
5 deadly weapon. And that's --

6 MR. WESTMEYER: And Judge, I believe -- the reason I submitted that I
7 believe that is the legal definition of an assault with a deadly weapon. That's why
8 that was submitted. I don't have case cites with me now and that was my neglect,
9 Your Honor, but by tomorrow morning I can have those if we need to make a record
10 of the legal authority for all these definitions.

11 THE COURT: If you would like to that will be fine.

12 MS. DIEDOARDO: Well I think we've got enough here, Your Honor. I mean
13 if that's what the Court has ruled then we preserve the issues, so that's fine.

14 THE COURT: Other than those we're -- it's just the 14 instructions, there's
15 no more you want to add, and the verdict form is appropriate. It's guilty or not guilty
16 on the assault with a deadly weapon, right?

17 MS. DIEDOARDO: That's fine, Your Honor.

18 MR. WESTMEYER: It will be appropriate, Judge, after we take out the aka,
19 and on the first page. Yes, ma'am.

20 MS. DIEDOARDO: Thank you, Your Honor.

21 [Proceeding concluded at 4:55 p.m.]

22 ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I
23 acknowledge that this is a rough draft transcript, expeditiously prepared, not
24 proofread, corrected, or certified to be an accurate transcript.

25 
RACHELLE HAMILTON
Recorder/Transcriber

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
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9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 LAZARO MARTINEZ-HERNANDEZ,

13 Defendant.

CASE #C230237

DEPT. V

14
15 BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE
16 TUESDAY, FEBRUARY 5, 2008

17 **ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS:**
18 **TRIAL BY JURY**
19 **VOLUME II**

20 APPEARANCES:

21 For the State:

MICHELLE L. THOMAS, ESQ.
DANIEL WESTMEYER, ESQ.
Deputy District Attorneys

22 For the Defendant:

MARINA E. KOLIAS, ESQ.

23 Also Present:

24 Court Interpreter:

MARIA MALDONADO

25 RECORDED BY: RACHELLE HAMILTON, Court Recorder

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VOLUME II -- PAGE 1
ROUGH DRAFT TRANSCRIPT



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1 TUESDAY, FEBRUARY 5, 2008, AT 11:21 A.M.

2
3 [Outside the presence of the Jury]

4 THE COURT: We're on the record in State vs. Martinez-Hernandez. Mr.
5 Martinez-Hernandez is present with Ms. Kolas, and we have Mr. Westmeyer and
6 Ms. Thomas for the State. And Mr. Westmeyer, yes, you were going to get me
7 some information regarding the issue of whether they opened the door yesterday
8 on cross-examination if they asked him if he had any kind of criminal record?

9 MR. WESTMEYER: I believe the question, Judge, was do you have any type
10 of criminal issues, to which he responded no. Now I believe that opens the door to
11 any type of cross-examination as to arrests of any type. I wasn't going to go into
12 these -- into his priors because they're not felony convictions within the last 10
13 years which he also testified to, but he also testified very early as one of the first
14 questions during cross-examination --

15 THE COURT: No, it was.

16 MR. WESTMEYER: -- was whether he had any criminal issues, and I would
17 like to cross-examine him on that; however I wanted to bring this to your attention
18 outside the presence of the jury out of an abundance of caution.

19 THE COURT: Ms. Kolas?

20 MS. KOLIAS: Your Honor, criminal issues I think is certainly ambiguous
21 enough to be clarified to mean felony convictions within the past ten years, and I
22 asked that question too.

23 THE COURT: No you -- when you said -- no, clearly Ms. Kolas, you
24 understand that there's a distinction between criminal issues and do you have any
25 prior felony convictions. I admonished your client outside the presence of the jury

1 regarding any prior felony convictions, and I laid it out that there were certain things
2 that there could and couldn't be done, but then to ask him in general do you have
3 any criminal issues and he says no, and then he's had criminal issues such as?

4 MR. WESTMEYER: Prior arrests. A prior arrest for aiming a firearm at a
5 human being as well as resisting and obstructing, I believe. And I'd like to ask him
6 about those. If he doesn't consider those criminal issues I'd like the jury to be
7 aware of that.

8 THE COURT: That was not a question, if you didn't want us to go into this,
9 that you should have asked.

10 MS. KOLIAS: Your Honor, I think criminal issues certainly is a matter of
11 interpretation. Criminal issues, with the understanding of my client, are those that
12 he was convicted of obviously because that's what I intended for it to mean and
13 that's how he took it. If you're going to let open -- I don't even know if these are
14 convictions, arrest --

15 THE COURT: I don't think --

16 MS. KOLIAS: -- and certainly arrests --

17 THE COURT: Once you open the door and he says no, I think --

18 MS. KOLIAS: What are issues? What are issues, that I've been arrested?

19 Well I've been arrested too, does that make me have criminal issues? I don't think
20 so, Your Honor.

21 THE COURT: You're not on trial today.

22 MS. KOLIAS: Well my client is.

23 THE COURT: And yes he is.

24 MR. WESTMEYER: And he --

25 THE COURT: So asking an open-ended question that says do you have any

1 criminal issues when --

2 MS. KOLIAS: Are these -- what does that mean? What does that mean,
3 Your Honor?

4 MR. WESTMEYER: That's what we're going to find out on cross.

5 THE COURT: I don't know, that's what we have to find out because he said
6 no. Tell me what it is you plan on asking about and tell me when they occurred.

7 MR. WESTMEYER: Yes, ma'am. In the year 2000, March of 2000, I'm
8 showing an arrest for aiming a firearm at another. I'd like to ask him about that. He
9 also has, I believe, misdemeanor arrests for resisting a public officer and
10 obstructing a peace officer from September of 2001. And if he doesn't consider
11 those criminal issues, again I'd like the jury to be aware of that.

12 THE COURT: The problem, Mr. Westmeyer, is we're in a -- we're treading in
13 a bad area.

14 MR. WESTMEYER: Yes, ma'am. Again I think she's opened the door to that
15 I and I think it's proper cross-examination material. But again I want to make my
16 record outside the presence of the jury for Your Honor to consider.

17 THE COURT: And do you have the dispositions of those cases?

18 MR. WESTMEYER: I don't believe any of them were convictions, and he
19 testified that he has no criminal convictions of any kind, misdemeanor or felony.
20 And I don't believe that they were ever convicted on those. The aiming of firearm I
21 think there was a plea negotiation in which if he fulfilled certain conditions the
22 charge would be dismissed. And to my understanding if he fulfilled those
23 conditions the case was dismissed he was never adjudicated on that. However, he
24 was arrested for it, I think that's a criminal issue, I'd like to ask him about it.

25 MS. KOLIAS: Your Honor, if I would have asked do you have any past

1 criminal issues talking about a time area, I'm sure that that would be a little bit more
2 clear and in more -- give the prosecutor a little more reason to try to kick the door
3 open and get these in. However, when I asked my client if has any criminal issues
4 certain, even by virtue of the fact that we have a Spanish interpreter going through
5 this, there was no reference in my question as to whether it was past tense or
6 present tense, and certainly I would imagine that I was asking about at present.

7 THE COURT: Okay listen, unfortunately, Mr. Westmeyer, I think that those
8 issues would be highly prejudicial, more prejudicial than probative, particularly since
9 he did not suffer any convictions. However, I have to tell you that that's not a
10 question you ever should have asked, but I'm going to not allow you to bring that in
11 at this time.

12 MR. WESTMEYER: Yes, ma'am.

13 THE COURT: Can we bring in the jury now?

14 MR. WESTMEYER: I have -- I'm sorry, Judge, I have one more quick record
15 I'd like to make --

16 THE COURT: Just one more thing.

17 MR. WESTMEYER: -- about the jury instructions. Yesterday we spoke
18 about instructions 4 and 5. There was colloquy regarding the legal basis for those.
19 I would just like to make a record as to what those are.

20 THE COURT: The assault with a deadly weapon? Go ahead.

21 MR. WESTMEYER: Yes, ma'am. With regard with instruction number 4,
22 excuse me, instruction number 5, there's a deadly weapon instruction. I'd just like
23 to point out NRS 193.165, which defines a firearm as a deadly weapon. Also
24 *Manning vs. State*, and the site is 107 Nev., 337, 1991 case. I believe the defense
25 cited to a 1990 -- or excuse me, a 1977 case. As to instruction number 4, the

1 assault with a deadly weapon charge, that is defined in NRS 200.471, as amended
2 in 2001, AB 344.

3 THE COURT: Okay.

4 MR. WESTMEYER: I just wanted to make my record as to the legal basis for
5 our instruction.

6 THE COURT: And Ms. DiEdoardo made her record yesterday on the other
7 ones.

8 MS. KOLIAS: That's right.

9 MR. WESTMEYER: That's all I have.

10 THE COURT: Can I bring in the jury now?

11 MR. WESTMEYER: Yes.

12 THE COURT: Except I lost Arthur.

13 [In the presence of the Jury]

14 THE COURT: Okay, ladies and gentlemen of the Jury. Have a seat,
15 everybody.

16 We're back on the record in state of Nevada versus Martinez-
17 Hernandez. And first off, ladies and gentlemen, let me apologize to you. My
18 morning calendar went a lot longer than I thought. I had to have one group of
19 people come in, take those people back out down to the jail and have the officers
20 bring up my next group of people that I had to deal with because I had so many
21 people. I dislike very much keeping my juries waiting. I apologize.

22 My plan is this. We're going to finish up the examination of Mr.
23 Martinez-Hernandez. The jury instructions are all done. Then we'll go into closing
24 arguments. Then you'll go back in the jury room and deliberate where we will
25 provide you with lunch. So I'm hoping we can go through this and not stop until you

1 go back and deliberate, all right? And if anybody needs anything -- I have candy
2 here if anybody's blood sugar gets low, let me know. Arthur will come by with a
3 bucket of candy to keep everything going okay. All right?

4 All right, so now Mr. Martinez-Hernandez is on the stand, it's time for
5 cross-examination. Mr. Westmeyer, you may begin.

6 MR. WESTMEYER: Thank you, Judge.

7 CROSS-EXAMINATION

8 BY MR. WESTMEYER:

9 Q Good morning.

10 A Good morning.

11 Q Mr. Martinez, you testified yesterday that you went to the bar on the
12 night of June 12th, 2006, correct?

13 A Yes.

14 Q You drove your Hummer?

15 A Yes.

16 Q You had your gun in the car, right?

17 A Yes.

18 Q At one point you took the gun out of the holster, right?

19 A No.

20 Q You didn't testify to that yesterday?

21 A I was nervous yesterday.

22 Q So now you're saying the gun was never out of holster?

23 A From the holster, yes.

24 Q So you did take the gun out of the holster?

25 A Yes.

1 Q You had the gun in your hand; I think you testified to that yesterday, do
2 you remember that? You said you had the gun in your hand?

3 A Inside the car.

4 Q Only inside the car?

5 A Yes.

6 Q I think you testified yesterday also that Mr. Pena and the others that
7 were outside they saw you with the gun in your hand?

8 A No.

9 Q So you didn't testify to that yesterday?

10 A In the car.

11 Q In the car, but I think you said yesterday that they saw you with the gun
12 and they left; is that right?

13 A I was in the car. I didn't point it at anyone.

14 Q It's a simple question. You testified yesterday they saw you with the
15 gun in your hand; is that still your testimony? Yes or no will do.

16 A I don't know if they saw it in my hand.

17 Q Well you had it in your hand in a position where they could see it, right?

18 A No.

19 Q So you had it in your hands down where no one could see it?

20 A On the seat. That's what it was.

21 Q You never had it in your hand?

22 MS. KOLIAS: Objection, asked and answered.

23 THE COURT: You know it is, Mr. Westmeyer, so --

24 MR. WESTMEYER: Yes, ma'am.

25 THE COURT: -- maybe you could either rephrase or --

1 BY MR. WESTMEYER:

2 Q You just testified that you had the gun in your hand; are you saying now
3 that you didn't?

4 A I didn't threaten anybody with a gun --

5 Q That's not my question. I have a very simple question. You just
6 testified that you had the gun in your hand, then you testified that it wasn't in your
7 hand, it was on the seat, and I just want to know which of those is correct. Very
8 simple.

9 A The gun was inside the car.

10 Q In your hand or on the seat?

11 A On the seat.

12 Q Only on the seat? Okay.

13 A Yes.

14 Q You've seen the exhibits that we showed earlier the still pictures, the
15 State's Exhibits 1 through 3?

16 A Yes.

17 Q And that is you in the picture, you'd agree with me, right?

18 A Yes.

19 Q And I'm showing you what's been admitted at State's Exhibit 3; you do
20 agree with me that this is you in the picture, right?

21 A Yes.

22 Q I think you testified yesterday that those were keys in your left hand, is
23 that right?

24 A I do not recall.

25 Q You don't recall what you testified yesterday?

1 A I don't recall.

2 Q And that's not a gun?

3 A No.

4 Q You originally went to the El Premier, I think you testified yesterday,

5 because your friend Alex called you, is that right?

6 A Yes.

7 Q And you thought he needed an ambulance, right?

8 A Yes.

9 Q He told you?

10 A Yes.

11 Q Because he was injured?

12 A Yes.

13 Q But you're not a medical professional of any type, are you?

14 A Yes.

15 Q You are?

16 A No.

17 Q Okay, so you're not a doctor?

18 A No.

19 Q Not an EMT?

20 MS. KOLIAS: Objection, irrelevant.

21 MR. WESTMEYER: I think it's highly relevant. He testified that his friend

22 needed medical attention.

23 THE COURT: Overruled. Go ahead.

24 BY MR. WESTMEYER:

25 Q You're not an EMT?

1 A I have experience. In those cases you have to call an ambulance, you
2 don't have to be a paramedic.

3 Q It's a simple question, you're not an emergency medical tech?

4 THE COURT: Hold on. This is cross-examination. His questions are calling
5 for yes or no answers. If you need to explain something I'm sure your attorney will
6 ask in other questions afterwards, but for right now answer the question that he's
7 asking you, please.

8 Ask it.

9 MR. WESTMEYER: Thank you.

10 BY MR. WESTMEYER:

11 Q You're not an emergency medical technician?

12 A No.

13 Q You're not a nurse?

14 A No.

15 Q But you went to the El Premier anyways?

16 A Yes.

17 Q You didn't just call an ambulance for your friend?

18 A No.

19 MR. WESTMEYER: Judge, I have nothing further.

20 THE COURT: All right, Ms. Kolias.

21 REDIRECT EXAMINATION

22 BY MS. KOLIAS:

23 Q Lazaro, I want to clarify some things here. I know that you're nervous
24 here today. Is your testimony that you had the gun in the holster and that you took
25 the gun out of the holster, and so your hand had to be on that gun when you took it

1 out of the holster, correct?

2 MR. WESTMEYER: I'm going to object, Judge, that's a leading question on
3 direct.

4 THE COURT: And hold on, don't answer that.

5 MS. KOLIAS: Your Honor, I'm trying to clarify time, place and clarify what --
6 on recross what was said, to clarify my client's answers. If you want me to go
7 through the yes and no I can do that.

8 THE COURT: No, just ask nonleading questions.

9 BY MS. KOLIAS:

10 Q Lazaro, you -- when you went to the El Premier you had your holster --
11 did you have your holster on the seat next to you?

12 A Yes.

13 Q You didn't have a gun in the holster?

14 A Yes.

15 Q Did at any time did you use your hand to take the gun out of the
16 holster?

17 A Yes.

18 Q And you -- when you took the gun out of the holster did you do it while
19 still in the car?

20 A Yes.

21 Q After you took the gun out of the holster did you put the gun on the
22 seat?

23 A Yes.

24 Q While you -- did you at any time turn around and show the gun to
25 anybody?

1 A I never showed the gun to anyone and I never threatened anyone.
2 Q Okay, so you didn't show the gun to anyone, correct?
3 A Yes.
4 Q Okay, so you did take the gun out of the holster and you sat it on the
5 seat?
6 A Yes.
7 Q When the police came where was the gun?
8 A On the seat.
9 Q Okay, it wasn't in your hand?
10 A No.
11 Q Okay. All right. Now there were some questions about why you came
12 to the El Premier to begin with. No I have to ask you, Alex is your friend, right?
13 A Yes.
14 Q Did Alex ask you to come to the scene?
15 A Yes.
16 Q Did -- do you know that Alex has very little security experience?
17 A Yes.
18 Q Did Alex tell you to come to the scene because he was injured and he
19 didn't know what to do because he had little security experience?
20 MR. WESTMEYER: I have to object again to the form of that question, Judge.
21 THE COURT: Yeah -- excuse me, don't answer. How much more leading do
22 you want to get? So it's sustained.
23 MS. KOLIAS: I'll make it a little less leading, Your Honor. I'm trying to get the
24 yes and no answers.
25 THE COURT: Well no, he gets to ask the yes or no. You ask the -- you have

1 MS. DIEDOARDO: No, no objections to that, Your Honor.

2 THE COURT: Have him come in here --

3 MR. WESTMEYER: Okay.

4 THE COURT: -- and have Arthur secure the gun. So -- and then after him
5 who's next?

6 MS. THOMAS: Officer Richter. He should be -- my direct relatively short.

7 THE COURT: Because I don't see this going to the -- I don't see us getting
8 done today.

9 MS. DIEDOARDO: No, I think that's probably a true statement because we
10 still have -- the State may be able to rest today depending on how far the direct go,
11 but I think we probably will be continuing till tomorrow, Your Honor.

12 THE COURT: Remember what I told the jury.

13 Officer, come up and have Arthur secure that gun. So we're not going
14 to have any chain of custody issues?

15 MS. DIEDOARDO: No, Your Honor.

16 [Recess taken at 3:08 p.m.]

17 [In the presence of the Jury]

18 THE COURT: Okay, we're back on the record in State vs. Martinez-
19 Hernandez. All the jury's back and everybody else is back, so the State will call
20 their next witness, please.

21 MR. WESTMEYER: Judge, the State calls Donald Fletcher.

22 THE COURT: Right up here to the witness stand please, officer. Raise your
23 right hand and be sworn.

24 **DONALD FLETCHER**

25 [Having been called as a witness and being first duly sworn, testified as follows:]

1 THE COURT: Have a seat. State your name.

2 THE WITNESS: Donald Fletcher.

3 THE COURT: Spell that last name for us.

4 THE WITNESS: F-L-E-T-C-H-E-R.

5 THE COURT: Thank you, go ahead please.

6 MR. WESTMEYER: Thank you, Judge.

7 DIRECT EXAMINATION

8 BY MR. WESTMEYER:

9 Q How are you employed, sir?

10 A I'm employed with Las Vegas Metropolitan Police Department.

11 Q And how long have you been with Metro?

12 A About two and a half years.

13 Q Okay, now were you working on the night of June 12th, 2006?

14 A Yes, I was.

15 Q I should say that was the morning hours of that day?

16 A Yes, sir.

17 Q Now do you recall responding to any incidents in the early morning
18 hours of June 12th?

19 A Yes, sir.

20 Q Can you tell us what you remember about that incident?

21 A I was responding to a person with a gun call at the El Premier Nightclub
22 located at I think it's 3041 East Fremont Street.

23 Q Is that here in Clark County in Las Vegas, Nevada?

24 A Yes, it is.

25 Q Please continue.

1 A Details were called, stated a person was outside the club near a yellow
2 Hummer brandishing a large frame semiautomatic hand gun.

3 Q And what did you do when you responded?

4 A I was in dispatch [indiscernible] code so I was running lights and sirens.
5 Upon my arrival another officer arrived there moments before I did and he already
6 had the subject that matched the description at gunpoint prone down on the ground.

7 Q Do you see that person in court today?

8 A Yes, I do.

9 Q Can you point to that person and describe an article of clothing that he's
10 wearing today?

11 A It's the gentlemen in the suit with the blue shirt.

12 THE COURT: The record will reflect he's identified the Defendant.

13 MR. WESTMEYER: Thank you, Judge.

14 BY MR. WESTMEYER:

15 Q Now what did you do -- you said the other officer already had the
16 Defendant in custody, is that right?

17 A He had him at gunpoint and he was in the process of proning him out,
18 which a standard operating procedure to put the subject on the ground with his arms
19 spread out since there was a weapon involved.

20 Q And what did you do at that point?

21 A At that point I came up and I placed the subject in handcuffs, and patted
22 him down for weapons.

23 Q And did you weapons when you patted him down?

24 A I did not find any on the subject, no.

25 Q Okay, what did you do next after you patted him down?

1 A We stood him up, walked him over to the patrol car. We checked the
2 immediate area. The details also included a yellow Humvee which was right next to
3 where the subject was prone out and where he was located by the other officer.
4 The passenger door was left open so when I looked into the vehicle I noticed a large
5 frame semi auto handgun sitting on the passenger seat.

6 Q Did you see anything else on the passenger seat?

7 A Yeah, there was also a duty belt that was similar to what I wear with a
8 holster on it and the weapon was actually sitting right next to the holster.

9 Q So the weapon was not in the holster?

10 A It was not in the holster at that time, no.

11 Q Is that usual or did that surprise you?

12 A Generally, like for me, I don't -- if I'm carrying my weapon home I keep it
13 in a holster at all times, I don't just leave it on a seat because it could easily fall onto
14 the ground and possible cause a discharge. So normally we'd see weapons inside
15 of a holster or in some sort of carrying device.

16 Q And you said this all -- you found this in the yellow Humvee?

17 A Yes, sir.

18 Q About how far away from the Defendant was the car when you arrived?

19 A He was actually probably approximately between I'd say between five
20 and ten feet from the open passenger door.

21 MR. WESTMEYER: Okay, now Judge, I'd like to show the witness what's
22 been marked as State's Proposed Exhibit number 5, may I approach?

23 THE COURT: Go right ahead. And ladies and gentlemen, Arthur has secured
24 the weapon before we all came in here because that's my policy is we secure the
25 weapon, so just wanted to give you all a heads up that that's what's happened.

1 MR. WESTMEYER: This weapon will not be discharged, it's been verified.

2 THE COURT: No, no, no, just -- but somebody's going to handle it --

3 MR. WESTMEYER: Right.

4 THE COURT: -- and that's why we secure it.

5 MR. WESTMEYER: So no one's getting shot here.

6 THE COURT: Yes, thank you.

7 BY MR. WESTMEYER:

8 Q Officer, could you please open the bag please.

9 THE COURT: And this has been marked?

10 MR. WESTMEYER: I believe that is 5A.

11 THE COURT: 5A, okay.

12 BY MR. WESTMEYER:

13 Q Do you recognize that weapon?

14 A Yes, I do.

15 Q How do you recognize it?

16 A It's the weapon I impounded. I actually put the zip tie through it.

17 Q Okay, it's the same weapon you found on the seat of the Humvee?

18 A Yes, sir.

19 MR. WESTMEYER: Okay, and Judge I'd move for admission of 5A at this
20 time.

21 MS. DIEDOARDO: No objection subject to the other stipulation as to chain of
22 custody and securing the weapon.

23 THE COURT: Okay, 5A's admitted.

24 MR. WESTMEYER: Thank you.

25 THE COURT: And 5. Go ahead.

1 [EXHIBIT 5 AND 5A ADMITTED]

2 BY MR. WESTMEYER:

3 Q What else is in that bag, officer?

4 A It's a magazine clip.

5 THE COURT: She generally keeps the ammunition separate from the gun,
6 so.

7 MR. WESTMEYER: Do you stipulate that would be --

8 THE COURT: Do you stipulate that there is, in 5B, the clip?

9 MS. DIEDOARDO: We do trust Madam Clerk, yes Your Honor, we do.

10 THE COURT: Okay, and then you'll give it back.

11 MR. WESTMEYER: Okay, so I'd move for admission based on stipulation at
12 this point of 5B.

13 THE COURT: 5B is admitted.

14 [EXHIBIT 5B ADMITTED]

15 MR. WESTMEYER: Thank you. Court's indulgence, please, Judge.

16 THE COURT: All right.

17 BY MR. WESTMEYER:

18 Q Officer, were there any rounds in the gun when you found it?

19 A Yes, actually this magazine was in the gun and it's got seven 45 caliber
20 rounds in it.

21 MR. WESTMEYER: Okay, Judge I'll pass the witness at this time and I don't
22 know if you want to put the gun back but --

23 MS. DIEDOARDO: I think that might be a -- well actually I'm going to have to
24 ask him one question so --

25 THE COURT: All right, go ahead.

1 MR. WESTMEYER: Thank you.

2 CROSS-EXAMINATION

3 BY MS. DIEDOARDO:

4 Q Thank you officer, good afternoon. I'm Christina DiEdoardo, cocounsel
5 for Mr. Martinez-Hernandez. You just testified that you've been a police officer for
6 two and a half years, is that correct?

7 A That's correct.

8 Q And officer, how long were you a police officer at the time of this
9 incident which took place on June 12th, 2006?

10 A Approximately six months to a year, I can't recall. I'd have to see.

11 Q Fair enough. So would it be fair to say this was one of your first solo
12 response calls?

13 A No.

14 Q No?

15 A I've been on many response calls by myself before.

16 Q Outstanding. Okay. Officer, do you know who placed the 9-1-1 call
17 which brought you -- oh, strike that. You had mentioned when you arrived on scene
18 that there was another officer who had already arrived?

19 A Yes, ma'am.

20 Q Do you know the name of that officer?

21 A Yes, it's Officer John Richter.

22 Q Okay, and would the Officer Richter be considered the first officer on
23 scene because he arrived first, or?

24 A The way it works is that you could be the first officer arrived but the
25 primary officer are the ones that initially assigned to the call is the one that takes

1 responsibility for the case.

2 Q Okay, thank you, and would that be you or would that be Officer
3 Richter?

4 A That was myself.

5 Q That would be yourself; okay. So then as the -- in your capacity as the
6 primary officer, Officer Fletcher, do you know who placed the 9-1-1 call which
7 caused you to be dispatched to the El Premier Nightclub?

8 A I wouldn't be able to say today. Generally it tells us on the bottom of
9 our call so we'd have to pull a CAD report to verify who was the actual caller.

10 Q Okay, and generally in your experience is it common if an assault with a
11 deadly weapon has taken place for the alleged perpetrator to wait until the police
12 arrive?

13 A There's many cases where that has happened before.

14 Q Okay.

15 A I can't testify yes or no.

16 Q Okay. You testified earlier that you found a gun in Mr. Martinez-
17 Hernandez's car, is that correct?

18 A Yes.

19 Q Okay, and I believe you touched on what my colleague had asked you
20 about to securing the firearm. The LVMPD has a protocol for securing firearms that
21 don't believe to police officers and that are found at the scene, correct?

22 A Yes.

23 Q Okay, and as part of that protocol are officers instructed to check if the
24 firearm has a round in the chamber?

25 A Generally.

1 Q Okay.

2 A That's why we put the zip tie through the firearm to make sure there are
3 no rounds.

4 Q Okay, so at the time that you said you observed the gun which -- I'm
5 sorry, that's State's 5 I believe?

6 THE COURT: 5A.

7 MS. DIEDOARDO: 5A, thank you, Your Honor.

8 BY MS. DIEDOARDO:

9 Q State's 5A, did you notice if there was a round in the chamber at the
10 time you took it into custody?

11 A You know, after reviewing my reports I can't testify to that because I
12 can't remember and I didn't specify it in my report.

13 Q Fair enough. And officer, as part of your training you're familiar with the
14 function semiautomatic weapons, correct?

15 A Yes, ma'am.

16 Q Okay, and in this -- is it not true that State's 5A, in order to be fired
17 because it is a semiautomatic gun, a round must be chambered before it may be
18 discharged?

19 A Yes, ma'am.

20 Q And would the -- and would chambering a round require the gun to be
21 cocked or would it require a different motion?

22 A It would require the slide to be pulled back and then put back forward
23 again.

24 Q If you can do it without disturbing the zip tie can you demonstrate --

25 A I can't demonstrate it on this --

1 Q Fair enough. Fair enough. You -- I'm a little bit confused in that you
2 also referred to in your report the gun as a black semiautomatic handgun, is that
3 correct?

4 MR. WESTMEYER: I'm going to object at this point, Judge. That's not in
5 evidence. She's referring to a report that we haven't seen yet.

6 MS. DIEDOARDO: Well Judge, this is -- it goes to impeach the testimony of
7 both the -- both counsel in his opening refers to a black handgun. Everyone that's
8 testified now keeps talking about a black handgun. We've now seen the gun that's a
9 silver gun.

10 THE COURT: We -- is it Mister -- the first witness?

11 MS. DIEDOARDO: Mr. Pena, yes, officer.

12 THE COURT: Said a dark handgun. You questioned him about a black
13 handgun and he said he had a dark handgun.

14 MS. DIEDOARDO: Okay.

15 THE COURT: So we might have different recollections so if you want to ask
16 him about --

17 MS. DIEDOARDO: I can rephrase, Your Honor.

18 THE COURT: If you want to impeach him with didn't he say in his report, and
19 it was something different, I would suggest perhaps you do that.

20 MS. DIEDOARDO: Okay, thank you, Your Honor.

21 Your Honor, if we might recall State's Exhibits 1 through 3, if I may
22 approach Madam Clerk.

23 THE COURT: You may.

24 MS. DIEDOARDO: Thank you.

25 BY MS. DIEDOARDO:

1 Q Officer Fletcher, when you arrived on the scene you've testified that Mr.
2 Martinez-Hernandez was on the ground at that point in time?

3 A By the time I arrived he was already on the ground, yes, ma'am.

4 Q Okay, and was -- had officer -- but Officer Richter hadn't yet put him in
5 handcuffs, is that correct?

6 A He had not at that point.

7 Q All right, and so when you arrived on the scene Mr. Martinez-
8 Hernandez wasn't pointing a gun at anyone, isn't that correct?

9 A Upon my arrival he was not.

10 Q Officer I'm showing you -- and do you recall -- actually, let me lay a
11 foundation first. Do you recall watching -- how did you determine, other than
12 speaking to -- did you speak to Mr. Martinez-Hernandez?

13 A I attempted to but he claimed that he spoke Spanish only so we called
14 for an interpreter.

15 Q Okay, did you speak to anyone else at the scene?

16 A I spoke to the victim and witness.

17 Q Okay, and do you recall the name of the victim in this case?

18 A I'd have to refer to the report, I cannot.

19 Q Okay. Officer, do you have a copy of your report with you?

20 A Yes.

21 Q Okay.

22 MS. DIEDOARDO: Your Honor, the witness is invited to refresh his
23 recollection

24 THE COURT: If that will help him go ahead and take a look.

25 THE WITNESS: Mr. Richard Pena.

1 BY MS. DIEDOARDO:

2 Q Okay, so you said you spoke to Mr. Pena, and who was the other
3 witness that you spoke with, officer?

4 A It was a security officer there. It's not in my report so I can't testify to
5 that.

6 Q Okay, was it a male or female security officer?

7 A It was a female.

8 Q Okay, and other than speaking with them, did you do anything else to
9 determine to -- ultimately did you take Mr. Martinez-Hernandez into custody?

10 A He was placed into custody. After the whole incident was over and we
11 were trying to determine stories I did review video if that's what you're getting
12 towards.

13 Q Yes, yes officer, thank you.

14 And I'm showing you here, officer, State's Exhibit 3. This is a still
15 capture from said video. Did -- does this fairly and accurately represent the video
16 that you saw to the best of your recollection?

17 A Yes, ma'am.

18 Q Okay. Can you point out for us Mr. Martinez -- where Mr. Martinez-
19 Hernandez is standing in this video capture?

20 A He's the gentleman wearing the black -- I mean the dark colored cargo
21 pants.

22 THE COURT: Thanks to the magic of technology you can take your finger
23 and draw on here and indicate to us where that is. Thank you so much.

24 BY MS. DIEDOARDO:

25 Q Very John Madden. Absolutely, thank you officer. So that's him there?

1 Where, from your understanding of this video, do you believe he's carrying a gun?

2 A In his hand right here.

3 Q So that would be his left hand or his right hand?

4 A That is his left hand.

5 Q That is his left hand, okay. And showing you here, officer, State's
6 Exhibit 1. Again can you identify Mr. Martinez-Hernandez for us? If you can circle
7 then that would be helpful.

8 THE COURT: Thank you.

9 BY MS. DIEDOARDO:

10 Q Thank you, officer. Perfect. And does he, at this point, from your
11 viewing of the tape do you believe he has the handgun at this point?

12 A Without reviewing the whole tape I can't verify off this picture, it's too
13 dark in color.

14 Q Okay. Now showing you State's Exhibit 2, Your Honor. Officer, can
15 you identify and circle for us Mr. Martinez please? And if you're able to do so can
16 you identify the portion of his body that you believe he's carrying the gun?

17 A Like I said without reviewing the whole video I can't tell in this picture.

18 MS. DIEDOARDO: Your Honor, I'm returning to the clerk State's 1 through 3.

19 THE COURT: Okay.

20 BY MS. DIEDOARDO:

21 Q As part of your investigation is it normal protocol to determine when you
22 recover a firearm whether the person who is found with the firearm is authorized to
23 have it?

24 A Yes, ma'am.

25 Q And do you recall whether or not you checked whether Mr. Martinez-

1 Hernandez had a permit to carry the firearm?

2 A We did check at the time.

3 Q And what did you discover?

4 A What we discovered is that he did authorize -- he was authorized to
5 carry it as an armed security officer. He wasn't allowed to carry it concealed of any
6 fashion, form or way though.

7 Q Okay, but when you arrived on scene and from what you've seen of the
8 video, did you see anything of the video -- we've got the whole video to refresh your
9 recollection if you need that, but I prefer not to have to do that for technical reasons.
10 Do you -- did you get any indication that Mr. Martinez-Hernandez ever tried to
11 conceal the weapon?

12 A In this -- no, that's why he was not charged with carrying a concealed
13 weapon.

14 Q Outstanding. All right, and in your experience is it common for
15 individuals who are private security guards that are allowed to carry a weapon to
16 brandish a weapon carelessly?

17 A Yes. Sometimes downtown we actually run across it quite frequently.

18 Q About how frequently, I mean generally?

19 A Probably once a week.

20 Q Really?

21 A Yes.

22 Q Okay. So -- but are those types of security guards individuals who
23 haven't been in that line of work for a considerable --

24 MR. WESTMEYER: I object at this point, Judge --

25 THE WITNESS: I can't testify --

1 A

2 MR. WESTMEYER: -- I think it's speculative, beyond the scope and
3 irrelevant.

4 MS. DIEDOARDO: Well Your Honor it goes to the -- we're going to show Mr.
5 Martinez-Hernandez is a veteran security guard. I think the distinction has to be
6 drawn in between somebody who's been a security guard for 10 minutes and
7 somebody who's been there for 12 years.

8 MR. WESTMEYER: Sounds like argument, Judge.

9 THE COURT: Excuse me, now you're arguing. That's stricken, the jury's to
10 disregard, save it for argument, number one.

11 MS. DIEDOARDO: Understood Your Honor.

12 THE COURT: Number two, it's -- he doesn't have the ability to answer that so
13 the objection's sustained. Move on.

14 BY MS. DIEDOARDO:

15 Q Other than the language barrier, do you believe Mr. Martinez-
16 Hernandez was generally cooperative with your investigation?

17 A As far as I can tell, yes. But like I said I can't testify to what he was
18 saying or what he was talking about.

19 Q But would it be fair to say he didn't physically resist, Officer Richter, that
20 you saw?

21 A No, there was no physical resistance or counter resistance whatsoever.

22 Q And he didn't resist you in any -- really resist you in any way that you
23 recall, correct?

24 A No.

25 Q Okay. And would it be fair to say that Mr. Pena was also cooperative

1 with your investigation?

2 A Yes.

3 Q So would it be fair to say as well that the deciding factor and the
4 ultimate decision to take Mr. Martinez-Hernandez into custody was due to the
5 videotape evidence?

6 A Due to the videotape and also where I located the firearm, outside of
7 the holster sitting on the seat.

8 Q Did it -- you've testified earlier that -- I'm sorry, you haven't testified but
9 as we can see in open court here today the Ruger in question has a silver finish on
10 the top. Does it -- did it surprise you somewhat that that -- you've seen the ambient
11 light conditions from the video capture, wouldn't a silver finish gun be easier to
12 detect or glow a little bit more than a black -- than a dark finished gun would?

13 MR. WESTMEYER: I'm going to object again, Judge. I don't -- I think that
14 calls for speculation. I don't think he can testify as to what a video would show
15 given certain ambient light conditions.

16 THE COURT: Sustained. Don't answer.

17 BY MS. DIEDOARDO:

18 Q Officer, do you have any training on how to interpret videotape
19 evidence? Do you have any training on how to do that?

20 A Technical training, we received some in the academy just on reviewing
21 video evidence and reviewing evidence in general.

22 Q Okay, and in specific -- with specificity as to videotapes, what are the
23 general principles that you received as part of that training?

24 A We can review it -- I can't recover it unless they're willing to give it up
25 and then we take it into evidence.

1 Q Okay.

2 A With this particular video I did not recover the video, it was recovered at
3 a later time.

4 Q Okay, and from -- stepping back from this case for a second from like a
5 history in principles approach to the academy, would it generally be more desirable
6 to take the videotape into custody at the time of the incident or take it into custody
7 later?

8 A Actually we've been trained to leave it with the business so detectives
9 can pick it up at a later time and they could do it with the proper equipment.

10 Q Okay, does the security videotape appear perfectly clear and crisp to
11 you?

12 A For the quality that I've seen in my line of work, yeah, it's actually fairly
13 decent.

14 Q Okay, but wouldn't it be also fair to describe it as fairly grainy and rather
15 blurry?

16 A I can see the -- most of the figures in the scene. I don't have a
17 problem.

18 Q Are you aware as part of your training and experience with regard to the
19 videotape that it's technically feasible to edit or modify videotaped evidence?

20 A I'm not a technical expert so I can't testify to that.

21 Q Do you -- as part of your training do you see or is it your understanding
22 it's your responsibility to prevent unauthorized modification of evidence to the event
23 that you can?

24 A I usually try to see the video as soon as possible from the time of the
25 incident, but other than that I can't.

1 MS. DIEDOARDO: Okay. Your Honor, I think we are going to have to play
2 the tape.

3 THE COURT: We are?

4 MS. DIEDOARDO: Yes.

5 MS. THOMAS: It's not in our computer any longer.

6 MS. DIEDOARDO: Okay, let me get that.

7 THE COURT: All right, and can I have counsel at the bench, please?

8 MR. WESTMEYER: Yes, ma'am.

9 [Bench conference -- not transcribed]

10 BY MS. DIEDOARDO:

11 Q Officer, when you reviewed the videotape did you recall seeing some
12 modifications as to the upper right hand corner, specifically as to how fast the tape
13 was going?

14 A Yes.

15 Q And did you notice in the upper right hand corner was the time running
16 in a consistent fashion. In other words was it running from 4 o'clock, 5 o'clock, 6
17 o'clock, or was it running in what would best be described as an inconsistent
18 fashion?

19 A I know that they had a technical problem as far as trying to copy the
20 tape, and while they were doing that there seemed to be some discrepancy as far as
21 it going forward and backwards. As far as jumping times I can't say, I just know it
22 did run backwards for a period of time and then it started running forward again, due
23 to the error -- the technical difficulties of copying the tape from their digital recorder
24 onto the CD.

25 Q All right, so on the tape that you saw would it then be fair that the tape

1 we have and the copy that we have in court today is not a fair and accurate copy of
2 the tape that you saw?

3 A I'd say it's fairly consistent with what I saw, just like I said they had
4 technical difficulties while copying the tape appeared.

5 Q But the tape that you saw didn't have those technical difficulties,
6 correct?

7 A No, I saw it in a straight forward fashion and then I saw it in a
8 secondary time at the DA's office which I noticed the discrepancies in the tape. My
9 initial viewing of it though was consistent straight though.

10 Q With real time? Okay. And I think I already know the answer to this
11 question but we're going to ask it for the record. No one from the LVMPD modified
12 this tape, correct?

13 A No.

14 Q And no one -- to your knowledge no one from the DA's office modified
15 this tape, correct? Okay.

16 Approximately when did you review the video?

17 THE COURT: The first time or the second time?

18 MS. DIEDOARDO: Thank you, Your Honor.

19 BY MS. DIEDOARDO:

20 Q The first time, when you were at the scene.

21 A As I was saying, anywhere between 4:30 and -- let me review what time
22 I went to the call.

23 Q Please.

24 THE COURT: Would it help for you to look at your report to know?

25 THE WITNESS: Yes, ma'am.

1 THE COURT: Go ahead and refresh your recollection.

2 MS. DIEDOARDO: Yeah, we would invite the witness to refresh his
3 recollection.

4 THE WITNESS: Approximate 4:30 to 5:30 is when I reviewed the videotape.
5 BY MS. DIEDOARDO:

6 Q So you watched that for approximately one hour, is that right officer?

7 A I can't testify to how long I reviewed it, I just -- after the fact.

8 THE COURT: He knows between 4:30 and 5:30 he viewed the videotape.
9 You didn't watch it for an hour, did you?

10 THE WITNESS: No, I did not.

11 MS. DIEDOARDO: Thank you, Your Honor, that's what I'm trying to -- that's
12 what I was trying to get from this particular witness.

13 BY MS. DIEDOARDO:

14 Q So in other words you didn't sit there for an hour, you're just not sure
15 whether you watched it at 4:30 or watched it at 5:30; is that correct?

16 A I watched it somewhere in between those times.

17 Q Okay, and did someone show you that video?

18 A Yes.

19 Q Who was that person?

20 A It was the security section of their business.

21 Q Okay, do you remember that person's name?

22 A No I cannot testify to that.

23 Q Do you remember whether that person was a man or a woman?

24 A I believe that incident it was a female.

25 Q Okay. Do you recall approximately how tall this particular individual

1 was?

2 THE COURT: Are we talking about the video person?

3 MS. DIEDOARDO: Correct. He -- as I understand this witness, Your Honor,
4 he's testifying that a security officer at the El Premier that he does not recall her
5 name, so we're trying to clarify who this person might be.

6 THE WITNESS: I can't testify that it was a security officer or not. There was
7 people in the security office that helped me watch the video.

8 BY MS. DIEDOARDO:

9 Q All right.

10 A And we had gone there many times so I can't testify who exactly helped
11 me watch the video. It was not -- there was one witness in particular. She was not
12 the one that assisted me, she stayed out front, if that's what you're getting to.

13 Q Well I'm just trying to get to who helped you with the videotape.

14 You said just now -- I thought that was interesting that you've been
15 there many times. Is this particular location, would you -- is it considered to be a
16 high crime area?

17 MR. WESTMEYER: I'm going to object to relevance, Judge.

18 MS. DIEDOARDO: He brought it up, Your Honor. He said --

19 THE COURT: It's overruled. Answer the question.

20 THE WITNESS: They call us for in custody trespassing. There's various calls
21 to the club or around the vicinity and we always go by the club to make sure
22 everything is okay.

23 BY MS. DIEDOARDO:

24 Q Okay. If you were to compare it with similarly situated clubs in the
25 neighborhood is it generally -- is it a type of club where you're answering a lot of

1 calls to that location, or is it more unusual to take a call there?

2 MR. WESTMEYER: Again Judge, I don't see how this is relevant.

3 THE COURT: Now we're getting a little bit afield so that's sustained, don't
4 answer that. Move on.

5 BY MS. DIEDOARDO:

6 Q You stated that this particular incident you were not able to take the
7 videotape into custody the night of June 12th, is that correct?

8 A That's correct.

9 Q Do you know when the videotape was taken into custody by Metro?

10 A No, I do not.

11 Q Okay, and so you're not -- you also don't know who had custody and
12 control of the tape after you saw it, correct?

13 A No, I do not.

14 MS. DIEDOARDO: Thank you. Nothing further, Your Honor.

15 THE COURT: Anything else?

16 MR. WESTMEYER: Court's indulgence please, Judge. Judge, I have nothing
17 further.

18 THE COURT: Anything from the jury? Okay, next. You may go.

19 MS. THOMAS: The State calls Officer Richter.

20 THE COURT: Thank you.

21 [Colloquy]

22 THE COURT: All right, officer, remain standing, raise your right hand and be
23 sworn.

24 JOHN RICHTER

25 [Having been called as a witness and being first duly sworn, testified as

1 follows:]

2 THE COURT: Have a seat.

3 MS. THOMAS: I'd like to direct your attention.

4 THE COURT: Wait, wait.

5 MS. THOMAS: Oh, sorry.

6 THE COURT: State your name.

7 THE WITNESS: Officer John Richter, J-O-H-N; last is R-I-C-H-T-E-R.

8 THE COURT: Thank you, go ahead.

9 DIRECT EXAMINATION

10 BY MS. THOMAS:

11 Q I'd like to direct your attention to June 12th, 2006. Were you employed
12 that day by Las Vegas Metropolitan Police Department?

13 A Yes, ma'am, I was.

14 Q And were you dispatched to 3015 Fremont Street?

15 A Yes, ma'am, I was.

16 Q Why were you dispatched there?

17 A There was a reported call of a person with a gun at the El Premier
18 Nightclub.

19 Q Did you get a description of what that person might look like?

20 A The description as I recall was a Hispanic male in dark clothing entering
21 a yellow Humvee.

22 Q And do you recall anything about what type of -- not the shirt but other
23 clothing that they were wearing?

24 A I believe it was -- it said military or camouflage type pants.

25 Q And did you arrive at the Premier Nightclub?

1 A Yes, ma'am, I did.

2 Q And was that approximately 4 a.m.?

3 A Yes, it was.

4 Q Did you find somebody who matched that description?

5 A Yes, I did.

6 Q Where did you locate them?

7 A I located a Hispanic adult male approximately -- actually when I first
8 noticed him he was coming around the passenger side of the vehicle and then I had
9 my firearm drawn due to the nature of the call and ordered the subject to get down
10 on the ground in English as well as Spanish approximately 10 feet from his vehicle.

11 Q And the vehicle that you're speaking of, what color was it and what type
12 was it?

13 A It was a yellow H -- one of the Hummers.

14 Q When you yelled at him to get down what were you physically doing?

15 A I had a 12-gauge shotgun which I retrieved from my vehicle that I was
16 pointing at him while trying to utilize cover and concealment, and ordered him to lay
17 down on the ground and put his arms away from his body.

18 Q And did he comply with your orders?

19 A In English at first he didn't but then I started saying it in Spanish at
20 which time he did comply with my orders.

21 Q How far away from the vehicle, the yellow Hummer, was he when you
22 located him?

23 A Approximately 10 feet.

24 Q And what happened next? What did you do next?

25 A After that what happened is I held my firearm on the subject and waited

1 for another unit to come on because the windows on the Hummer were dark and
2 tinted so I didn't know if there was anybody else inside the vehicle. So I was trying
3 to keep an eye on the subject, or the suspect, as well as the vehicle until another
4 unit arrived. The second unit that arrived was Officer Fletcher. He was the primary
5 unit who was assigned to the call. At that time I went ahead and covered the
6 suspect until Officer Fletcher took the subject into custody while I was watching the
7 suspect as well as the vehicle.

8 Q And the suspect that was taken into custody, did you learn his identity?

9 A Yes.

10 Q And what was that?

11 A It was Lazro [sic] Martinez-Hernandez I believe was his name.

12 Q And do you see the person that you arrested here in the courtroom
13 today?

14 A Yes, ma'am, I do.

15 Q Can you point to him and tell us where he's seated?

16 A He is seated at the table wearing a black jacket and blue shirt.

17 THE COURT: The record will reflect he's identified the Defendant.

18 BY MS. THOMAS:

19 Q You were dispatched on a call regarding a person with a gun; did you
20 locate a gun?

21 A I did not personally locate the gun but I did observe a firearm after
22 Officer Fletcher had observed a firearm in the passenger seat of the Hummer H3.

23 Q And can you describe what was it located next to?

24 A There was -- if I recall correctly it was a security belt similar to like what
25 we wear but with different items on it.

1 MS. THOMAS: No other questions, Judge.

2 THE COURT: Okay. Go ahead.

3 MS. DIEDOARDO: Just a few, Officer Richter.

4 CROSS-EXAMINATION

5 BY MS. DIEDOARDO:

6 Q Officer, as I understand your testimony when you arrived on scene you
7 saw Mr. Martinez-Hernandez walking around his Hummer, is that correct?

8 A He was walking around the passenger side of the vehicle to the rear of
9 the vehicle.

10 Q To the rear of the vehicle?

11 A Yes, ma'am.

12 Q So would it be accurate to say he's walking away from the passenger
13 side door towards the rear of the vehicle?

14 A Yes, ma'am.

15 Q And at that point in time, officer, he didn't -- did you observe him with a
16 firearm in his hand?

17 A No, ma'am.

18 Q Okay.

19 A In fact actually after we took him into custody we did a cursory check for
20 weapons and did not locate any at that time.

21 Q All right, and you were just -- when you had mentioned when you first
22 arrived on the scene you had your firearm drawn because of the nature of the call;
23 was that the shotgun officer or was that your sidearm?

24 A I had a department issued shotgun, ma'am.

25 Q All right, thank you.

1 MS. DIEDOARDO: Nothing further, Your Honor.

2 THE COURT: Okay. Maybe something else?

3 MS. DIEDOARDO: Just briefly.

4 BY MS. DIEDOARDO:

5 Q And officer, if you recall, do you recall whether the passenger side of
6 the hummer door was opened or closed?

7 A I believe the door was open but I am not certain.

8 MS. DIEDOARDO: Thank you. Nothing further, Your Honor.

9 THE COURT: Anything else?

10 MS. THOMAS: No, Your Honor.

11 THE COURT: Anything from the jury? Step down.

12 MR. WESTMEYER: Judge, we have no further evidence to present. At this
13 time the State rests.

14 THE COURT: Okay. Defense?

15 MS. KOLIAS: Can we make a motion to dismiss? There a lack of evidence at
16 this time.

17 THE COURT: Okay, counsel --

18 MR. WESTMEYER: And for the record, Judge, I'll oppose that.

19 THE COURT: Everybody come up here to my -- come up here right now.

20 MR. WESTMEYER: Yes, ma'am.

21 [Bench conference -- not transcribed]

22 THE COURT: Your witness, please?

23 MS. DIEDOARDO: Yes Your Honor, the defense is going to call Mr. Alex
24 Maceo. We are going to need the help of our loyal interpreters for this one.

25 THE COURT: Okay. That's why we have them here.

1 Up to the -- follow him. Raise your right hand -- remain standing. Raise
2 your right hand, be sworn.

3 **ALEXANDER MACEO**

4 [Having been called as a witness and being first duly sworn, testified through the
5 court interpreter as follows:]

6 THE COURT: Have a seat. Do you speak English? Okay si? No, ask him if
7 he -- does he -- tell him to answer in Spanish. Si, sit down. It's like who's on first.
8 All right, state your name, please.

9 THE WITNESS: Alexander Maceo --

10 THE COURT: Could you go closer to the -- move your chair up please, sir,
11 thank you. A little bit more.

12 THE WITNESS: Alexander Maceo.

13 THE COURT: Okay, spell your last name.

14 THE WITNESS: M-A-C-E-O.

15 THE COURT: Thank you. Go ahead.

16 **DIRECT EXAMINATION**

17 **BY MS. KOLIAS:**

18 Q Okay, Mr. Maceo, could you tell us, have you ever worked at the EI
19 Premier Bar?

20 A Yes.

21 Q Okay, and were you working there on the night of June 12th, 2007? Six,
22 excuse me.

23 A Yes.

24 Q Okay, and what was your position there at the time?

25 A Security guard.

1 Q Okay --

2 THE COURT: Okay, in Spanish you must answer so she can interpret.

3 Comprendo? Good. Go ahead.

4 BY MS. KOLIAS:

5 Q How long had you been working at the El Premier at that time?

6 A Two days.

7 Q Okay, did you have any training before working there?

8 A Very little.

9 Q Who did the little training that you had?

10 A My desire to find work.

11 Q Okay, so you didn't have any training. Who was your direct supervisor?

12 MS. THOMAS: Your Honor.

13 THE COURT: Yes.

14 MS. THOMAS: I'm going to object to the line of questioning regarding his
15 training and he did not answer the last question, and it's based on relevance.

16 THE COURT: Are you saying it was nonresponsive?

17 MS. THOMAS: I -- yes, Your Honor.

18 THE COURT: Okay. And are you also asking why is it relevant?

19 MS. THOMAS: I am, Your Honor, asking that --

20 THE COURT: What --

21 MS. THOMAS: The objection is that it's not relevant and that he did not
22 answer the last question.

23 THE COURT: Well he didn't answer.

24 MS. KOLIAS: We'll move on, Your Honor.

25 THE COURT: Well all right, then that's sustained, and go ahead.

1 BY MS. KOLIAS:

2 Q Okay, who was your supervisor at El Premier?

3 A Richard Pena.

4 Q Okay, was Beatrice Hernandez your supervisor too?

5 A Who, I'm sorry?

6 Q Beatrice Hernandez.

7 A No.

8 Q Okay, the night of June 12th, could you tell us what happened while you
9 were there?

10 A Okay, I was at the door working, I was alone at the door working,
11 checking out --

12 Q There were no other security guards there with you at the door?

13 THE COURT: Did we have a time frame --

14 THE WITNESS: No, no, just me.

15 THE COURT: Excuse me. What time are we talking about that you're now
16 referring to because it sounds like there was -- we have one incident at 4 in the
17 morning, we have another incident at another time in the morning, so I don't have
18 any idea what time you're talking about.

19 BY MS. KOLIAS:

20 Q What time are you talking -- what time was this? Around midnight?

21 A Exactly I don't know, but it was after midnight.

22 Q Okay, but before 4 o'clock in the morning?

23 A Yes.

24 Q Okay, so some time after midnight but was it before 3 o'clock in the
25 morning?

1 A Yes. Yes.

2 Q Okay, was it before 2 o'clock in the morning?

3 A Yes.

4 Q Okay, so then some time before 2 o'clock in the morning, go ahead.

5 A So I was working at the door and suddenly I felt an impact and I went
6 blank. When I came back to I had blood running down my face that went into the
7 side. Then I couldn't see. There was a lot of people, there were people coming in
8 and leaving, I was alone, and I got so nervous I didn't know what to do. Now I could
9 only see with this eye because this other eye was full of blood clotting. So I decided
10 to call --

11 THE COURT: Okay now he's giving a narrative response, so could you just
12 ask him questions and get answers?

13 BY MS. KOLIAS:

14 Q Did you -- after -- who was the first person you called after this
15 happened to you?

16 A Lazaro. My friend Lazaro.

17 Q And why did you call Lazaro after this incident?

18 A Because Lazaro has more experience in this, he's been a security
19 guard for a long -- for many years.

20 Q And you did not call your supervisor, and you did not call Richard?

21 A No.

22 Q Okay, and you told Lazaro what happened to you?

23 A Yes.

24 Q You asked him to come to the bar?

25 A Yes, I called Lazaro and said I had a problem, and he said stay right

1 there, I'm coming to you.

2 Q Okay, and then after that what happened? Did you -- did Mr. Pena or
3 Richard come out and talk to you?

4 A No, they took me into a room and I was saying: Call the police; call the
5 police.

6 Q Who is they? Who is they? Richard?

7 A Richard Pena, yes.

8 Q Okay, and you told Richard to call the police?

9 A Yes, more than four times.

10 Q Okay, and then what happened? Did you tell -- did you ask Richard to
11 get the ambulance or did Richard tell you that he was getting the ambulance?

12 MS. THOMAS: Your Honor, I'm going to object --

13 THE WITNESS: At no time did Richard --

14 MS. THOMAS: -- if his answer calls for hearsay, depending on Richard said.

15 THE COURT: Okay.

16 MS. KOLIAS: Did Richard talk to him?

17 BY MS. KOLIAS:

18 Q Okay, was there an ambulance called?

19 A No.

20 Q Okay, and did you ask for an ambulance?

21 A Yes --

22 Q Did somebody refuse to get you an --

23 THE COURT: Wait, wait, excuse me, counsel. Listen, you're asking him
24 questions, he's got to answer, she's got to interpret. You need to wait so that he
25 can answer and she interprets and we can hear the answer. So let's go back to that

1 last question which was something about an ambulance. Do you remember what
2 the answer was?

3 THE WITNESS: No, at no point was an ambulance called.

4 THE COURT: Thank you, and you need to speak louder so we can record it,
5 and you need to speak louder so they can hear it. Go ahead.

6 BY MS. KOLIAS:

7 Q Did you ask for an ambulance?

8 A No, call the police; call the police is what I would say.

9 Q Did you ask for any medical attention?

10 A No, Lazaro sent Beatrice, and Beatrice -- I'm sorry, not Beatrice,
11 Richard, and he did just cure me some.

12 Q Okay so did you get medical attention at the scene?

13 A Yes, just emergency. They put some cotton up there but I was bleeding
14 a lot, there was a lot of blood.

15 Q Okay, at any time did you ask Richard if you could go to the hospital?

16 A Oh yes, I told him I'm going to go to the hospital, I'm bleeding a lot, and
17 he said no, no, you don't need to, you're just fine like that.

18 MS. THOMAS: Your Honor, the answer's calling for hearsay again, and this
19 whole line of questioning at this point is irrelevant, whether he went to the hospital or
20 whether he didn't go to the hospital. At this point I'm going to object, that it's
21 beyond.

22 THE COURT: All right, it is (a) hearsay, and (b) I don't -- how is it relevant?

23 MS. KOLIAS: Number one it completely contradicts what the alleged victim
24 says in this case, and number two the victim talked about how this was unusual --

25 MR. WESTMEYER: Judge, could we do this in sidebar?

1 THE COURT: Come up.

2 [Bench conference -- not transcribed]

3 BY MS. KOLIAS:

4 Q Did you end up going to the hospital that night?

5 A Yes, directly from the club to the hospital.

6 Q Did you see Lazaro at the club prior to your leaving the nightclub?

7 A No.

8 Q Okay, so you left the nightclub before Lazaro arrived?

9 A Yes.

10 Q Okay, and did you get any medical treatment?

11 A Yes.

12 Q What was that medical treatment?

13 THE COURT: Excuse me. Counsel, how is that relevant? He left before --

14 MS. KOLIAS: Okay. All right.

15 THE COURT: -- Mr. Martinez-Hernandez got there. He went to the hospital.

16 What they did to him in the hospital is of no relevance to what we're doing here.

17 MS. KOLIAS: All right, Your Honor. Okay. All right.

18 THE COURT: Anything else?

19 MS. KOLIAS: Okay, no further questions. Thank you.

20 THE COURT: Any cross by the State?

21 MS. THOMAS: One question, Your Honor.

22 CROSS-EXAMINATION

23 BY MS. THOMAS:

24 Q You weren't present when the Defendant came to the El Premier
25 Nightclub, were you?

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A No.

MS. THOMAS: No further questions, Your Honor.

THE COURT: Okay. Anything from the jury?

Step down. Defense's next witness.

MS. DIEDOARDO: Your Honor, the --

MS. KOLIAS: Your Honor --

THE COURT: One of you at a time, please ladies.

MS. DIEDOARDO: I apologize Your Honor, great minds think alike. The defense would call Mr. Lazaro Martinez-Hernandez.

THE COURT: Okay. Sir, up here please.

[Colloquy]

THE COURT: Remain standing, raise your right hand and be sworn.

LAZARO MARTINEZ-HERNANDEZ

[Having been called as a witness and being first duly sworn, testified through the court interpreter as follows:]

THE COURT: Have a seat, please. Tell us your name.

THE WITNESS: Lazaro Martinez.

THE COURT: Spell your last name.

THE WITNESS: M-A-R-T-I-N-E-Z.

THE COURT: Thank you. Go ahead.

DIRECT EXAMINATION

BY MS. KOLIAS:

Q Okay, Lazaro, could you tell me what is your profession?

A Security.

Q And do you have a permit, a gaming permit?

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[The videotape is shown to the Jury]

MS. DIEDOARDO: Is there anyway we can get the -- perfect, thank you.

Okay, please hold.

Let's start from the beginning please because there was some -- there's important information right beneath the time code that I wanted to direct the Court and Jury's attention to.

[Colloquy]

MS. DIEDOARDO: Okay, can we freeze it? Let's go back to the very beginning this. I'd like to get the time stamp for the record. Is this the very beginning?

MR. WESTMEYER: Does it go back any farther?

MS. THOMAS: I don't know.

MR. WESTMEYER: Okay, that's as far back as it goes.

MS. THOMAS: It automatically starts going again.

THE COURT: Okay so it's 4:02 like 36; 30.

MS. DIEDOARDO: Okay, it's 34 now. Time is advancing normally as we would expect it to. I'm -- wait. Hang on, looking here at the -- direct at the upper right hand corner, for the record it's time stamped 4:02, 36 seconds. Do you see the notation immediately below the time code.

THE COURT: Can you see it up on top here? Up here is where she's talking about. Right.

THE WITNESS: 4:02 in the morning? That's correct.

THE COURT: Yeah, you see that?

THE WITNESS: Yes.

BY MS. DIEDOARDO:

1 Q What does it say directly below that?
2 A What does it say? D-O-M-E --
3 Q Oh not that part, just the upper right --
4 THE COURT: Up here, Mr. Pena, do you see where it's got -- there's the four
5 THE WITNESS: That's a four I think.
6 THE COURT: Yeah. Okay.
7 THE WITNESS: I don't know what that is.
8 THE COURT: You don't know what that is?
9 THE WITNESS: No.
10 THE COURT: He said it's times four and he doesn't know what it is. Go
11 ahead.
12 MS. DIEDOARDO: Let's continue to play then, please. Back up two frames
13 please.
14 MS. THOMAS: I will try.
15 BY MS. DIEDOARDO:
16 Q Now what have we here? Now Mr. Pena, looking at times four -- if we
17 can go up just one frame it goes to times two. Now we're at 4:02:38 at normal
18 speed. Let's go ahead one frame, please; 4:02:35; keep going; 4:34.
19 THE COURT: Are you just -- are you playing it this way or is --
20 MS. THOMAS: She wanted me to stop per frame so I'm pushing play and
21 pushing pause, it's the only thing that I can do.
22 THE COURT: Oh okay. All right.
23 MS. THOMAS: I'll push play.
24 THE COURT: Okay.
25 MS. DIEDOARDO: Now we're at 4:02:33. Now we're at times two and times

1 four [Inaudible].

2 MS. THOMAS: I really can't --

3 THE COURT: That's easier said than done, Ms. DiEdoardo.

4 MS. DIEDOARDO: Bingo; perfect.

5 BY MS. DIEDOARDO:

6 Q Mr. Pena, you say you don't know what those -- what that notation is
7 below the time code?

8 A No, ma'am.

9 Q Would it appear that because it's -- there's a multiplication symbol and
10 the number two?

11 A I don't know.

12 Q You don't know what that means?

13 A No.

14 Q And you don't know how that got there?

15 A We call the technician you might know, they'll probably explain but I
16 don't know.

17 Q Okay, and isn't the real reason that what's happened here, Mr. Pena, is
18 that this tape's been edited? And in fact before you gave this tape to the Metro --
19 Las Vegas Metropolitan Police Department it was modified from what the condition it
20 was in that night?

21 MR. WESTMEYER: I'm going to object to this, Judge. He's already testified
22 what the real reason is, he doesn't know. The technician prepared it. That assumes
23 facts not in evidence, it's argumentative.

24 MS. DIEDOARDO: It's a chain of custody question, Your Honor, which is --

25 MR. WESTMEYER: That wasn't the question that was asked.

1 THE COURT: And the objection is sustained and the jury is to disregard the
2 question posed, and go on.

3 MS. DIEDOARDO: I'll rephrase, Your Honor.

4 BY MS. DIEDOARDO:

5 Q Mr. Pena, you've testified that the only persons that had access to this
6 videotape are yourself, the technician, your daughter, and your assistant manager,
7 is that correct?

8 A That is correct.

9 Q Is the technician one of your employees?

10 A No, he's an independent contractor.

11 Q Would the technician have any -- if you know, would the technician
12 have any motivation to modify this tape?

13 A No, ma'am, no reason.

14 Q Okay. If you know would your assistant manager have had any reason
15 to modify this tape?

16 A The only person that got this video out of there is the technician.
17 Myself, I don't even know how I can record that. The machine records 24/7 and
18 save for a week; that's it. If we need anything for evidence of course we call the
19 technician and they can -- like you said the x2, I don't know what it is.

20 Q You don't know what that is? But it would be -- but you're saying it's a
21 fair statement the technician's got no reason to modify the tape as far as you know?

22 A Correct.

23 MS. DIEDOARDO: Okay, let's play forward just a bit more please. Okay,
24 we're at 4:02:35; 33. Now --

25 MR. WESTMEYER: There is goes.

1 MS. DIEDOARDO: Stop please. Go back three frames.

2 MS. THOMAS: Do you want back more?

3 MS. DIEDOARDO: Just maybe [Inaudible]. Okay 4:02 -- let's start from here;
4 4:02:33, 34, now we're going to times two, times eight [Inaudible]. And now we've
5 now gone from 4:02:33, let's stop here please. And now 4:02:06.

6 BY MS. DIEDOARDO:

7 Q Now Mr. Pena, you're not personally aware of any reason why time
8 would appear to be moving forward and then back and forward again on this tape,
9 correct?

10 A No, ma'am.

11 Q Okay. When you first came out and met with Mr. Martinez-Hernandez
12 did you have anything in your hand?

13 A No.

14 Q You testified that there were some other security guards that were
15 present with you the night of the incident, is that correct?

16 A One.

17 Q One security guard was present?

18 A A lady.

19 Q Oh okay, and was that Ms. Hernandez?

20 A Yes.

21 Q Okay, was Ms. Hernandez carrying anything in her hand this night --
22 that night?

23 A No.

24 Q Ms. Hernandez wasn't carrying a large flashlight?

25 A Not that I recall.

1 Q And you don't recall anyone else carrying a large flashlight, specifically
2 a Mag Light?

3 A No, Miss.

4 Q Okay. This videotape here doesn't show the incident with -- that
5 occurred between Mr. Maceo being hit with bottle, correct?

6 A Excuse me?

7 Q The videotape that we've seen here today doesn't depict Mr. Maceo
8 being hit with the Corona bottle as you testified, correct?

9 A No, no.

10 Q Is there a -- did that occur inside the club or outside of the club?

11 A In the entry. In the main entry.

12 Q Okay, so would that have been this entrance, Mr. Pena, or would that
13 have been a different entrance?

14 A That entrance is the only one main entrance we have.

15 Q Okay, so it sounds like, from what you said that this camera's running
16 24/7, there should be video of Mr. Maceo being hit with the bottle, is that correct?

17 A That's correct.

18 Q Okay. When you asked the video technician to retrieve the videotape
19 that we see here today that as the Court sees and as the Jury sees there seemed to
20 be some problems at the time coding in the advancement, did you give him or her
21 any -- actually it's Nick, did you give Nick any instructions?

22 A Just the recorder.

23 Q Did you tell him to shoot certain portions or anything like that, or excise
24 anything from the tape?

25 A Just want we see when that incident happened.

1 Q And did you ask the video technician to provide to Metro any videotape
2 from the incident with Mr. Maceo?

3 A No, nobody asked me for that.

4 Q Okay. When the police arrived was Mr. Martinez-Hernandez still on the
5 property?

6 A Yes.

7 Q Okay, was he doing any -- where was he -- lay a foundation -- if you
8 recall?

9 A He was right there with -- and the policeman came and he has the gun -
10 - he has a gun in the car, he put in the car.

11 Q Okay, so at this point in time Mr. Martinez-Hernandez, it's your
12 recollection that he's not -- he doesn't have the gun on him at this point, is that
13 correct?

14 A It is with the gun now.

15 Q This picture you say he's got the gun?

16 A Yes. Yes.

17 Q Okay well why are all these -- there are other people standing around,
18 and the record at the time shows on this is now showing at times four as 4:02:06 --
19 04:02:06. I notice there's a number of people standing around but no one seems to
20 be running, does that seem odd to you?

21 A This guy here. These other people.

22 Q Okay. You say he's running but he seems to just be -- I mean I realize
23 it's a still camera -- perhaps let's -- we can play the tape forward and see. Now
24 we're up to .16, and now it's back to .401, now back to 4 o'clock at 052.

25 A What you see different time because the camera runs, it won't stay in

1 one position, it rotates back and forth.

2 Q Well I recognize that, Mr. Pena. I'm not concerned with the camera
3 oscillating, I'm concerned with the discrepancies as to the time. I notice that now
4 we're at 04:01:14 -- 16 seconds, excuse me.

5 Mr. Pena, have you had incidents where people display firearms in front
6 of the club before this instance?

7 A No.

8 Q Okay.

9 A Not that I recall.

10 Q Not that you recall. Now we're looking at 4:01. Is the tape -- apparently
11 the tape is now -- oh, may we continue to play it, please? And now we're at 4:01.

12 You mentioned earlier that the tape -- that the reason the times were
13 different is because the camera was oscillating, and I guess I'm just not clear on
14 how the oscillating camera would have to do with the time going forward.

15 A The time rotated as you see. We didn't stop at hitting the top. The
16 cameras keep going and going. You can see the seconds going.

17 Q Right but it's -- but sir, the problem is that the second -- that the time is
18 going forwards and backwards, that's been the difficulty here.

19 MR. WESTMEYER: I object, Judge, is there a question pending?

20 MS. DIEDOARDO: Well what I'm trying to find out is what's his explanation
21 for that.

22 THE COURT: Do you have more than one camera, or is it just one?

23 THE WITNESS: One outside, yes.

24 THE COURT: One outside?

25 BY MS. DIEDOARDO:

1 Q So this would be the only camera then, Mr. Pena?

2 A The only camera, yes.

3 Q Okay, so just so that we're clear, following up counsel's question, you
4 don't have any explanation for why the tape is moving faster then slower, and then
5 why the time keeps moving?

6 A That's the way the manufacturing makes any cameras in any casinos or
7 anywhere. Unfortunately I only have one camera and that's the evidence we
8 provide.

9 Q Okay so it's your testimony that cameras in all casinos in Las Vegas,
10 the time code will go forward and backwards? That's what I heard you say.

11 A I didn't say that, I just --

12 MR. WESTMEYER: I'm going to object to that. I don't think there's any
13 foundation for that.

14 MS. DIEDOARDO: That restates what the witness said. We can do a read
15 back but I think that's what he just said.

16 THE COURT: No we're not doing any read backs. Do you have any idea --
17 let's finally -- this is the last time we're going to bring this up. On the video that we
18 see there's some portions that show the time at one time and then a time in another
19 time; do you have any idea how that happened?

20 THE WITNESS: No, ma'am.

21 THE COURT: Thank you. Move on.

22 MS. DIEDOARDO: Okay, fair enough, Your Honor.

23 BY MS. DIEDOARDO:

24 Q Mr. Pena, can you show us the specific time on the tape where you
25 believe Mr. Martinez-Hernandez had the gun?

1 THE COURT: So we're going to go through here and look at everything, is
2 that right?

3 MS. DIEDOARDO: Yes, Your Honor.

4 THE COURT: Is there a way to help us out with what time it is that it's on
5 there so that we don't have to sit through?

6 MR. WESTMEYER: If I may, Judge, I believe it's the time stamp that's on the
7 stills that we admitted.

8 THE COURT: Well show us the stills, please.

9 MS. DIEDOARDO: May I approach, Your Honor? I'm looking at the State's 1
10 and 2.

11 THE COURT: You have to ask them -- the court recorder to change input.

12 MS. DIEDOARDO: Oh Madam Recorder, may I change out 3 to 1.

13 THE COURT: All right, so I think without having to look at the whole
14 videotape again. Mr. Pena, is this you thought -- you need the time stamp though if
15 that's the -- if you want the answer to that question then you need to see the time
16 stamp. So is this when you think he had a gun?

17 THE WITNESS: Yes.

18 THE COURT: And what time does the picture say?

19 THE WITNESS: About 4 o'clock and two.

20 THE COURT: And what? 4:02 --

21 THE WITNESS: Point 0-7.

22 THE COURT: 02:07? Is that what it says?

23 THE WITNESS: Yes, Your Honor.

24 THE COURT: Okay.

25 BY MS. DIEDOARDO:

1 Q And Mr. Pena where's -- is this -- where's Mr. Martinez?

2 A You just pointed.

3 Q Would this be this dark figure here? If you can -- you can draw on
4 yours, Mr. Pena. I can't draw. Okay, that right there. Thank you, sir.

5 MS. DIEDOARDO: Your Honor, I'm now showing State's 3.

6 THE COURT: Okay.

7 BY MS. DIEDOARDO:

8 Q And Mr. Pena, if you can identify where Mr. Martinez is.

9 A Here.

10 Q And at this point do think you have got the gun?

11 A Yes.

12 Q And where is the gun, sir? Okay, and for the record the time stamp on
13 that is 4:02:11 seconds.

14 THE COURT: All right.

15 BY MS. DIEDOARDO:

16 Q All right now we're looking at State's 2. The time stamp is 4:02:10
17 seconds, allegedly one second prior to the prior shot.

18 A Yes.

19 Q Where's Mr. Martinez in this, sir?

20 A Here.

21 Q And does he have the gun at that point?

22 A Here.

23 Q Okay. And where is your security officer?

24 A Here.

25 Q And where are you?

1 A I don't know.

2 MS. DIEDOARDO: Judge, just to be clear we're looking at State's 1 again.

3 BY MS. DIEDOARDO:

4 Q Mr. Martinez -- I'm sorry, Mr. Pena, can you show us where you are in
5 State's 1?

6 A Here.

7 Q So you're standing closer to his car, what you I believe you identified at
8 Mr. Martinez's car, is that correct?

9 A Yes.

10 Q Is there a reason why you're standing by his car?

11 A We was tried to tell to go away and my security.

12 MS. DIEDOARDO: Thank you, Your Honor.

13 BY MS. DIEDOARDO:

14 Q You were saying at one point he went back and actually got the gun out
15 of his car; is that correct? Is that a true statement of your testimony?

16 A If they say it's yes.

17 Q You say if they say.

18 A I mean the time of the camera I mean.

19 Q So you don't personally recall whether or not he went back to get the
20 gun, is that correct?

21 A I saw run to his Hummer car and open the door and pull the gun and
22 come in.

23 Q I guess --

24 A Everything happened so quick.

25 Q I guess I'm just confused, sir, because it sounds like from your

1 testimony and what we've just seen here is that there's a discussion taking place
2 where Mr. Martinez-Hernandez has his back to the club, you're in front of his
3 vehicle, and I don't see a sequence where he -- on the tape where he runs back to
4 the car.

5 A Unfortunately the tape is like I said early, they rotated, they didn't pick
6 up that.

7 Q So essentially you're saying is that at some point, which is not on this
8 videotape, Mr. Martinez-Hernandez runs to his car, comes back, yet still confronts
9 you with a dark colored gun but somehow you're standing in front of his Hummer, is
10 that correct?

11 A No.

12 Q It's not? But didn't you just testify a few moments ago that you --

13 A You asked me if it was -- if it was the person myself --

14 Q Right.

15 A -- I just said yes.

16 Q Right, but as you recall from that instance you were closer to his
17 Hummer, that's why I was a little confused about that.

18 A After the first time that he came, he came, get out of his car and came
19 to the main entry, and then he run to his car.

20 Q But we don't have any videotape of that, correct?

21 A Unfortunately we don't.

22 MS. DIEDOARDO: Thank you, Your Honor, nothing further.

23 THE COURT: Anything else?

24 MR. WESTMEYER: Just briefly, Judge.

25 REDIRECT EXAMINATION

1 BY MR. WESTMEYER:

2 Q Mr. Pena, this all happened at four in the morning, is that right?

3 A Yes, sir.

4 Q So was it pretty dark out?

5 A Yeah.

6 Q How far away was the Defendant from you when he pointed the gun at
7 you?

8 A Not --

9 Q Approximately, like from me to you, or closer, farther?

10 A No, more closer.

11 Q Closer? So like maybe from the podium, about this distance here?

12 A From the lady behind to me.

13 Q Okay from where the court recorder --

14 A By the desk area.

15 Q And again, this about?

16 A Yeah, probably yes. Probably a little closer.

17 MR. WESTMEYER: And Judge, for the record, Six to eight feet?

18 THE WITNESS: Yes.

19 THE COURT: Yes, that looks about right. All right.

20 BY MR. WESTMEYER:

21 Q Mr. Pena, do you have any doubt whatsoever that the Defendant was
22 pointing a gun at you?

23 A Can you repeat?

24 Q Do you have any doubt in your mind as to what the Defendant was
25 pointing at you?

1 A No.

2 MR. WESTMEYER: Okay. I have nothing further, Judge.

3 MS. KOLIAS: Can we recross?

4 THE COURT: Ms. DiEdoardo can. It's only one person with one witness.

5 MS. DIEDOARDO: Thank you, Your Honor.

6 RECROSS-EXAMINATION

7 BY MS. DIEDOARDO:

8 Q Just -- are you familiar with guns, Mr. Pena?

9 MR. WESTMEYER: I didn't hear that question.

10 THE COURT: Okay, here's -- you can recross on whatever it is --

11 MS. DIEDOARDO: Whatever he brought out.

12 THE COURT: -- that he already brought out, so anything more than that we're
13 not going into.

14 MS. DIEDOARDO: Okay.

15 THE COURT: Anything you want to follow-up with what he -- what he brought
16 out is fine but that's it.

17 MS. DIEDOARDO: Fair enough.

18 MS. KOLIAS: He was in fear.

19 BY MS. DIEDOARDO:

20 Q Mr. Pena, you just testified that at the point where -- if I may approach,
21 Judge, it's for demonstrative purposes.

22 At the time of the interaction with Mr. Martinez-Hernandez, he was
23 about as far as away from you as I am right now which is about six to eight feet I
24 believe?

25 THE COURT: He said six to eight feet.

1 BY MS. DIEDOARDO:

2 Q Is that correct?

3 A Correct.

4 Q Okay, and sir how is your -- I notice you've got glasses there, do you
5 have any difficulty seeing well at night?

6 A For reading purposes.

7 Q And is there any reason -- did you -- okay so then you have no trouble -
8 - you have no difficulty at all with night vision?

9 A Not really.

10 Q And I noticed this from the videotape that the ambient light conditions
11 were not the greatest being it was four in the morning and there was just a few lamp
12 posts in the lot.

13 THE COURT: Is that a question?

14 BY MS. DIEDOARDO:

15 Q Did you -- I'm getting there, Your Honor. So there's no -- so you believe
16 that you had enough light to see by and that what you think you saw is actually what
17 you saw, to witness Mr. Martinez with [Inaudible].

18 A Yes.

19 Q Thank you.

20 MR. WESTMEYER: Judge, I have nothing further, but if I may approach the
21 clerk with the videotape.

22 THE COURT: Yes. Does anybody on the jury have any questions? Okay.
23 He's done. You may step down. Next?

24 MS. THOMAS: The State calls Beatrice Hernandez, Your Honor.

25 THE COURT: Beatrice?

1 MS. THOMAS: Hernandez.

2 THE COURT: Does she need an interpreter?

3 MS. THOMAS: I don't believe so, Your Honor.

4 [Colloquy]

5 THE COURT: We have the interpreter who will help. If you need to put a
6 chair up there, madam interpreter, you may. I'm sure Arthur would love to help you.
7 And ma'am, would you raise your right hand and be sworn.

8 **BEATRICE HERNANDEZ**

9 [Having been called as a witness and being first duly sworn, testified through the
10 court interpreter as follows:]

11 THE COURT: Have a seat please. Tell us your name.

12 THE WITNESS: Beatrice Hernandez.

13 THE COURT: Spell your last name.

14 THE WITNESS: H-E-R-N-A-D-E-Z.

15 THE COURT: Thank you. Go ahead.

16 **DIRECT EXAMINATION**

17 **BY MS. THOMAS:**

18 Q I'd like to direct your attention to June 12th, 2006. Were you at the El
19 Premier Nightclub at 4 a.m. that morning?

20 A Yes.

21 Q And are you employed by the Premier -- El Premier Nightclub?

22 A Yes.

23 Q How are you employed there? What is your position?

24 A Security.

25 Q How long have you been a security guard at El Premier Nightclub.

1 A Eight years.

2 Q And on June 12th, 2006, at 4 a.m. something unusual happened that

3 day?

4 A Yes.

5 Q Describe what happened.

6 A First of all we had a security guard that was working with us and there

7 was an incident that broke his head open.

8 Q Did that happen before 4 a.m.?

9 A Yes.

10 Q Do you know the name of that security guard who had an incident with

11 his head?

12 A Alexander.

13 Q And he was a security guard working that night?

14 A Yes.

15 Q Were the police called regarding that incident with the beer bottle?

16 A Yes.

17 Q Did they arrive?

18 A Yes, they arrived.

19 Q After that did something -- related to the incident with the security guard

20 and the beer bottle did something else happen that night?

21 A Yes, I don't know what that guy's name is.

22 Q Which guy?

23 A The one that's sitting there.

24 Q So you recognize the gentleman sitting at this table?

25 A Yes.

1 Q How do you recognize him?

2 A Because he also is a security guard and I've seen him in different times.

3 Q He doesn't work for the El Premier Nightclub though, does he?

4 A No. No.

5 Q And on June 12th, 2006, did you see him at the El Premier Nightclub?

6 A Yes, he arrived.

7 Q Did he arrive by a vehicle?

8 A Yes.

9 Q Describe that vehicle for us.

10 A Hummer, yellow.

11 Q Did you see him get out of that vehicle?

12 A Yes.

13 Q Where did he go when he got out of the vehicle?

14 A Directly, he wanted to go into the Premier.

15 Q Who did he speak to?

16 A He spoke to me.

17 Q And what did he tell you?

18 A He came in very upset and screaming that he wanted to speak to the

19 owner using some very offensive words.

20 Q Do you recall what those words were?

21 A He was saying to let the -- make the fag come out, they didn't do

22 anything for his friend. And he was -- he was way too upset.

23 Q He told you he was upset because of his friend?

24 A Yes.

25 Q And who is his friend?

1 A Alexander.

2 Q The security guard who had gotten hit in the head that day? That
3 morning?

4 A Yes.

5 Q When you saw the Defendant get out of the Hummer, he came to the
6 main entrance of El Premier Nightclub?

7 A Yes.

8 Q Did you see anything in his hand at that point?

9 A At that point no.

10 Q And when he came to speak to you, who else was with you?

11 A I immediately asked for help to come out. There was Mr. Richard who
12 had been in the back so I asked him to come.

13 Q And Mr. Richard, is he the individual who was just in the courtroom prior
14 to you?

15 A Yes.

16 Q And did Richard and the Defendant speak?

17 A Yes, they argued.

18 Q At any time did they do than just more than arguing?

19 A Yes, the gentleman here, because he was so upset he pushed him
20 from his chest.

21 Q The Defendant pushed Richard?

22 A Yes.

23 Q What did Richard do?

24 A He told him that he didn't know anything, to leave, that he didn't want
25 him arguing like that.

1 Q Did the Defendant leave?

2 A No, he got even angrier. When all of the employees came out -- well in
3 fact the employee that came out and asked him to please leave. In fact I myself told
4 him look, you should go. And he said well no, and then he went to the car -- he got
5 even angrier, he went to the car, opened the door, and from the passenger side
6 where he took out the gun.

7 Q The car he went to, was it the yellow Hummer?

8 A Yes.

9 Q And where did he go when he retrieved the gun?

10 A He went to his car.

11 Q After he got the gun where did the Defendant go?

12 A He came towards us pointing it at us.

13 Q And who is us?

14 A It was me and there was Mr. Richard, and then there were people that
15 were walking past, and then he had his -- his gun, he was pointing at all of them, he
16 was going like this.

17 MS. THOMAS: For the record the witness used her hand and kind of waived
18 it in a horizontal manner.

19 THE COURT: Well since we all have video here now hopefully that will be on
20 the video.

21 BY MS. THOMAS:

22 Q And when he waived the gun towards you and towards Richard did he
23 say anything at that time?

24 A He said he was going to kill us.

25 Q And after that where did the Defendant go?

1 A After that the police arrived.

2 Q Did you see anybody else with a gun?

3 A No.

4 MS. THOMAS: Court's indulgence.

5 BY MS. THOMAS:

6 Q Do you carry a gun? On June 12th, 2006, did you have a gun?

7 A No. No.

8 MS. THOMAS: No further questions.

9 THE COURT: Okay, go ahead.

10 CROSS-EXAMINATION

11 BY MS. KOLIAS:

12 Q Ms. Hernandez, my name is Marina Kolias and I'm here for Lazaro
13 Martinez-Hernandez. May I call you Beatrice?

14 A Yes.

15 Q Okay, Beatrice, you stated that your job was as security?

16 A Yes.

17 Q Okay, and you have been a security for how long?

18 A Eight years.

19 Q Okay in those eight years have you worked exclusively for Mr. Pena?

20 A Yes.

21 Q Okay, in those eight years did you work anywhere other than the El
22 Premier Bar?

23 A Yes, I worked for a security company as well for events.

24 Q Okay, how long has the El Premier Bar been open?

25 A Eight years.

1 Q Okay and Mr. Pena's been the owner for eight years?
2 A Yes.
3 Q And you've been working there for the entire eight years?
4 A Yes.
5 Q All right. Okay, did you work for Mr. Pena you said other than in Las
6 Vegas?
7 A No.
8 Q Oh, you've only worked for Mr. Pena in Las Vegas?
9 A Yes.
10 Q All right. Okay, what exactly is -- on the day of the incident that we're
11 talking about here, what was your job responsibilities?
12 A As the employees would come in I would mark the time they arrived
13 and the times that they would leave, and inside I would watch whatever else they
14 were doing.
15 Q You would watch?
16 A Yes, make sure they were working, that there wasn't any problems.
17 Q With the employees?
18 A With people.
19 Q Oh with the people too. Okay, so that your job was security, were you
20 the head of security?
21 A Yes.
22 Q Okay, as far as the head of security were you in charge of hiring and
23 firing people?
24 A Not hire, but fire yes.
25 Q Okay, how about training, were you in charge of training the

1 employees?

2 A Yes.

3 Q And what exactly would your training entail when it came to the
4 employees if you were training a security guard?

5 MS. THOMAS: Objection, Your Honor, relevance.

6 THE COURT: What's the relevance?

7 MS. KOLIAS: The relevance has to do with safety and credibility Your Honor.

8 THE COURT: The objection's sustained. I don't understand how this is
9 relevant. Let's move on.

10 BY MS. KOLIAS:

11 Q Did you have as an employee Alex Maceo?

12 A Yes.

13 Q On the night of the incident was Alex Maceo injured?

14 A I'm sorry?

15 Q Was Alex injured the night of the same -- the night of this incident?

16 A Yes.

17 Q Okay, exactly tell us what happened to Alex.

18 A He was -- that night he was outside the door, the front door, and there
19 were two men that were drunk that were arguing and they were leaving, and one of
20 them had a bottle and he told him that he couldn't leave with a bottle, and so he got
21 upset and he threw it at him.

22 Q Did you eyewitness this or was this something you were told?

23 A No, I witnessed it. I was standing next to him.

24 Q You were standing next to him with this occurred?

25 A Yes.

1 Q After it occurred then what did you do?

2 A He ran over, tried to catch him, and I stayed at the door.

3 Q And then what happened after that?

4 A He came back and since he had -- his wound was open, he had a lot of

5 blood so we took him inside to clean him up.

6 Q Okay, what about the police, wasn't this an assault?

7 A The police arrived but Alexander had already left.

8 Q Okay so after Alex left and the police arrived, what did you say to the

9 police?

10 MS. THOMAS: Objection, hearsay. It's not relevant at this point.

11 THE COURT: What is the relevance of this?

12 MS. KOLIAS: Well there's -- her story is absolutely incredible.

13 MS. THOMAS: Your Honor, this isn't proper.

14 THE COURT: Okay, and that is --

15 MS. KOLIAS: With regard to the protocol how they pick and choose which

16 cases they're going to prosecute --

17 MS. THOMAS: Your Honor, can we have a side bar?

18 THE COURT: Yeah, let's have a little side bar.

19 [Bench conference -- not transcribed]

20 THE COURT: The jury's to disregard the editorial comment. The objection's

21 sustained. Don't answer that question. Ask the next question.

22 BY MS. KOLIAS:

23 Q Okay, with regard to the subject incident, again you -- were you outside

24 with Mr. Martinez-Hernandez drove up?

25 A Yes.

1 Q And where were you standing at the time?

2 A At the door.

3 Q And who was standing there at the door with you?

4 A Richard.

5 Q Other than Richard and you were there any other security guards
6 standing in the area?

7 A No.

8 Q Okay, could you tell us then as you saw Mr. Martinez-Hernandez pull
9 up what was the next thing that you saw?

10 A He didn't give us much time because when he got out of the car he was
11 walking straight directly towards us. He was going to -- he was trying to get in
12 through the door. He wanted to go inside, he wanted to speak to Richard, and so
13 Richard started walking towards him as the guy along with him.

14 Q Okay so was Richard in the club then or Richard was outside with you
15 when Mr. Martinez-Hernandez came up?

16 A He was outside by the door. He too was outside the door with me.

17 Q And then so when Mr. Martinez-Hernandez started to walk up the door
18 you guys stayed at the door, you and Mr. Pena stayed at the door?

19 A No, I walked forward. No it wasn't until when he started seeing how he
20 was arguing really bad then he approached, but see because he was telling him that
21 he was a fag, that he was no good as a boss because he hadn't taken care of his
22 friend.

23 Q Okay so when he was walking up to you the first time as you and Mr.
24 Pena were standing at the front door, are you saying that Mr. Martinez-Hernandez
25 was yelling from the time he got out of his car as he was walking up to the front

1 door; is this what you're saying?

2 A Yes. Yes.

3 Q And did you guys stay at the front door, or what did you do?

4 A Well I started walking towards him and it as then I later was when
5 Richard started walking towards him as well.

6 Q Okay so both of you started walking towards him. Is there any point
7 that you met?

8 A Yes.

9 Q Okay, and where exactly in the area did you meet? Was it next to a
10 streetlight or -- in the parking lot?

11 A Almost at the parking lot because there is a sidewalk that leads up to
12 the door so it all happened right but the parking lot.

13 Q So when you guys were together at the sidewalk what happened then
14 after that?

15 A Just a bunch of arguing, a bunch of screaming.

16 Q Okay and was there any physical contact between Mr. Hernandez --
17 Martinez-Hernandez and Mr. Pena then?

18 A Yes.

19 Q Okay, and what happened after -- what was the contact?

20 A He just pushed him like this.

21 Q Okay, did Mr. Pena have anything in his hand at that time? A
22 flashlight?

23 A No.

24 Q Did you have anything in your hand at that time?

25 A No.

1 Q You didn't have a flashlight or anything?

2 A No, I use a security belt in which I have handcuffs and pepper spray
3 and a flashlight, but at the time in my hand I didn't have anything.

4 Q Was there any other security guards out at the time of the -- that there
5 was -- they were having words?

6 A No. No.

7 Q Okay then after they had words then what happened after that?

8 A It got really heated and that's when he went over to his car to get the
9 gun. That's how it happened.

10 Q So you -- did you watch Mr. Martinez-Hernandez go back to his car
11 then?

12 A Yes.

13 Q And then what did he do when he went back to his car?

14 A He opened the door and underneath the seat he took out the gun.

15 Q And then when he took out the gun then what did he do?

16 A He pointed it at us and Mr. Richard was really upset and he said you're
17 going to shoot us and kill us.

18 Q Where was Mr. Richard standing at the time that Lazaro went back to
19 his car?

20 A In front of -- well like by the parking lot in front of -- you could say it was
21 in front of the gentleman's car.

22 Q Okay so did Mr. Pena follow him to his car?

23 A No, he didn't follow. We were left standing there because we didn't
24 know what he was going to be doing in his car.

25 Q Okay and so you guys kept staying right there by the lamppost then

1 right, is that what you're saying, you and Mr. Pena?

2 A Yes.

3 Q Mr. Pena did not move away from the lamppost.

4 A No we didn't because we thought he was going to leave.

5 Q Okay and then -- so at any time did Mr. Martinez come back to where
6 you were standing by the lamppost?

7 A Yes.

8 Q Okay, was he standing in front of you facing the bar or was he facing
9 his Hummer? Was there -- how was he facing?

10 A In front of us in front of the bar.

11 Q And so he was facing you and you were facing out to the Hummer, is
12 that correct?

13 A Yes.

14 Q Okay, was there any period of time where Mr. Martinez-Hernandez was
15 facing the Hummer and you were facing the bar?

16 A No.

17 Q And were there any additional security called when Mr. Martinez-
18 Hernandez came back?

19 A No.

20 Q So there were no any -- no additional security guards, just you and Mr.
21 Pena?

22 A That's why Alexander was there that night because there wasn't very
23 many people and there was just the two of us.

24 Q All right.

25 MS. KOLIAS: Okay, can we go ahead and show the videotape, the beginning

1 please?

2 MR. WESTMEYER: The clerk has it.

3 BY MS. KOLIAS:

4 Q Beatrice, what I'd like for you to do is we're going to show the videotape
5 and I'd like for you to tell me where Mr. Pena is, where you are, and where Mr.
6 Martinez-Hernandez is on this tape, okay?

7 MS. THOMAS: It won't that easy, and frame-by-frame doesn't work.

8 MS. THOMAS: the frame doesn't work?

9 MS. THOMAS: Frame-by-frame doesn't work.

10 MS. KOLIAS: Okay.

11 THE COURT: Would it help if the still pictures -- could you use the still
12 pictures instead and maybe that -- because the videos tough to manage. Please,
13 show her the still pictures and see if we could do it that way, please.

14 MS. KOLIAS: If I could just show these first just to show the inconsistencies
15 that Metro was -- if she could -- if we could just -- off the tape?

16 THE COURT: Play the tape.

17 MR. WESTMEYER: Could you just switch the input back to --

18 THE COURT: Yeah, she will.

19 [The videotape was shown to the Jury]

20 THE COURT: Let us know when you want us to stop.

21 MS. KOLIAS: Okay, I will. Stop.

22 BY MS. KOLIAS:

23 Q In this frame do you see anyone -- do you know anyone in that picture,
24 Beatrice?

25 THE COURT: She's getting her glasses.

1 THE WITNESS: Yes, Mr. Martinez.
2 MS. KOLIAS: Okay.
3 THE COURT: You can take your finger and mark on there where it --
4 THE WITNESS: Here.
5 THE COURT: Make it a little bigger for us, please. Okay. Keep watching.
6 MS. KOLIAS: Stop.
7 THE COURT: Can't do it by frame.
8 MS. THOMAS: I can go back, I can't go back by frame though. Do you want
9 me to go back?
10 MS. KOLIAS: Just one -- yes, just go back and then.
11 BY MS. KOLIAS:
12 Q Do you see Mr. Martinez in this picture?
13 THE COURT: Okay.
14 BY MS. KOLIAS:
15 Q Okay, and where are you standing, Beatrice? And where is Mr. Pena?
16 A Right there.
17 Q He's back there in the white shirt?
18 A Yes.
19 Q All right. Okay. Can we go forward now? And in this frame, where is
20 Mr. Martinez? I'd like to go ahead and show the still of that picture.
21 THE COURT: Okay, so Shelley can you switch over?
22 BY MS. KOLIAS:
23 Q This is the still of what we just showed you.
24 THE COURT: And it's Exhibit Number on the back?
25 MS. KOLIAS: Three.

1 THE COURT: Thanks.

2 BY MS. KOLIAS:

3 Q In this picture it's your testimony that this is Mr. Martinez-Hernandez, is
4 that correct?

5 A Correct.

6 Q And this person in the white back here, that is Mr. Pena, correct?

7 A You can see it clearer there, no it's not him.

8 Q Okay, where is Mr. Pena?

9 A I can't see him.

10 Q Okay, and is this you?

11 A Yes.

12 Q Do you have anything in your hand in this photograph?

13 A Nothing.

14 Q I'm going to show you what's been marked as Exhibit 2, okay and this is
15 one second before taken at 4:02:10, okay. Okay, in this picture do you see Mr.
16 Martinez-Hernandez?

17 A Yes.

18 Q And where is he?

19 A Right here.

20 Q Okay, and do you see Mr. Pena in this picture?

21 A He's there but you can't see him very well because he's always
22 standing next to me.

23 Q Okay, and where are you located in the picture?

24 A Right next to the post right here.

25 Q Okay, I'm going to show you what has been marked, and note the time

1 this is one second earlier, okay. And now three seconds earlier this is another
2 picture here. Okay, and where are you standing in this picture, Beatrice?

3 A Here.

4 Q And is Mr. Pena in the picture?

5 A Yes.

6 Q And where's Mr. Pena?

7 A Here.

8 Q So -- and that's mister -- where's Mr. Martinez-Hernandez?

9 A Right here.

10 Q Okay, and which way is Mr. Martinez-Hernandez walking in the picture?

11 A He's walking on the side.

12 Q Is he walking towards the bar or away from the bar?

13 A Towards us.

14 Q He's walking towards you?

15 A You can see his feet here how he's turning.

16 Q Okay, so he's walking towards you but then you are between him and
17 the car?

18 A Yes, that's the parking lot. That's the area of the parking.

19 Q Right so you were again -- you were not just by the lamppost then, you
20 were in the parking lot, correct?

21 A That's what I said before, everything happened in the parking lot.

22 Q All right, so this was before and thereafter the next picture is Exhibit
23 number 2 at 10 seconds after, where's Richard in this picture?

24 A Like I said, he's always next to me but you can't see him.

25 Q And then again one second later, where's Richard now?

1 MS. THOMAS: Thank you, asked and answered.

2 THE COURT: Yeah, we've been over this like two, three, four times so we're
3 not -- no more.

4 MS. KOLIAS: All right, very good. Just put them in sequential order that time,
5 Your Honor.

6 BY MS. KOLIAS:

7 Q In these photographs did you see Manuel Tortuga [phonetic] in any of
8 these photographs?

9 A No.

10 Q You did not see him in any of these photographs?

11 A I wasn't paying attention.

12 Q All right, very good. Okay, thank you, no more questions.

13 THE COURT: Okay, anything else?

14 MS. THOMAS: No redirect, Your Honor.

15 THE COURT: All right, anything from the jury? You may step down.

16 MS. KOLIAS: Ms. Clerk --

17 THE COURT: Okay how long is our next witness?

18 MR. WESTMEYER: Depends on the cross, Judge, my direct is maybe 30
19 minutes, hopefully less.

20 THE COURT: Okay then we'll take a break.

21 Ladies and gentlemen during this recess you're not to talk or
22 converse among yourselves, or with anybody else on any subject connected with
23 this trial; or read, watch or listen to any reports or commentary of the trial, by any
24 medium of information including without limitation to the newspaper, the television,
25 the internet or the radio. Do not form or express any opinion on any subject

1 connected with this case until it is finally submitted to you. Fifteen minutes, ladies
2 and gentlemen only where Arthur tells you.

3 [Colloquy]

4 [Outside the presence of the Jury]

5 THE COURT: Okay, who's next in this?

6 MR. WESTMEYER: I've got --

7 MS. THOMAS: Officer Fletcher.

8 MR. WESTMEYER: -- Officer Fletcher is next, Donald Fletcher. He's in the

9 --

10 THE COURT: And he's going to take 30 minutes for direct?

11 MR. WESTMEYER: I hope to be less than that. The bulk of that it's going to
12 be -- he brought with him the gun that was impounded and I have to lay the
13 foundation and get that --

14 THE COURT: All right, Arthur needs to secure that gun before it comes in.

15 MR. WESTMEYER: Yes, well it's currently sealed in the evidence bag. I
16 was going to have him open it on the stand.

17 THE COURT: I don't let guns in here unless they're already secured, so do
18 you have any problem with us having --

19 MS. DIEDOARDO: No, Your Honor.

20 THE COURT: -- him open the bag and securing the gun --

21 MS. DIEDOARDO: None, Your Honor.

22 THE COURT: -- because guns don't come in in this department unless
23 they're secured by my bailiff.

24 MR. WESTMEYER: That's fine, Judge. I just didn't want to have any issues
25 there because he brought it and it's sealed right now so.

1 mouth, he's chewing it, pieces are flying, going to town. I'm watching him do this.
2 I'm an eyewitness; direct evidence. Throw the shoe away, give him a nice doggy
3 time out. Everything's good.

4 A couple weeks go by, no shoes have been devoured, until one day I
5 go walking back into my family room. Magic's in the corner, his head's down, his
6 tail's down and he won't even look at me. Across the room there's a shoe. Now my
7 other two dogs, nowhere to be bound. Between the dog and the shoe there's a
8 couple of pieces, and then when I get close up to the dog right there is his fur, right
9 here, is a piece of my shoe. Now he's not doing anything, I'm not watching him do
10 anything, but if I put it all together, all the pieces of the puzzle, the shoe is missing
11 pieces, the pieces are between the dog and the shoe, the piece is right here, the
12 dog's demeanor, that's all circumstantial evidence that Magic once again chewed up
13 one of my shoes.

14 You may give -- you may consider both direct and circumstantial
15 evidence in deciding this case. The law permits you to give equal weight to both,
16 but it is for you to decide just how much weight to give to any evidence.

17 Opening statements and closing arguments are not evidence in the
18 case but they are intended to help you in understanding the evidence in applying the
19 law. No statement, ruling, remark or comment which I may make during the course
20 of this trial is intended to indicate my opinion as to how you should decide this case
21 or to influence you in any way in your determination of the facts. I may even ask a
22 question of the witness. If I do it's for bringing out information which I feel should be
23 brought out and not in any way to indicate the weight I feel you should give to the
24 testimony of the witness.

25 I may also find it necessary to admonish the lawyers, and if I do so you

1 should not show any prejudice against a lawyer or his or her client because I found it
2 necessary to admonish him or her.

3 Until this case is submitted to you, you must not discuss it with anyone,
4 not even with your fellow jurors. After it is submitted to you, you must discuss it only
5 in the jury room with your fellow jurors. It is important that you keep an open mind
6 and not decide any issue in this case until it has been submitted to you under
7 instructions from me.

8 If you can't hear raise your hand, let me know, tug your ear, do
9 something, tell Arthur; or if you need to use the restroom or aren't feeling well let me
10 know. I'm always watching to see what's going on with you all, I give you regular
11 breaks, shouldn't be a problem.

12 During the trial you'll see me taking notes, that's just what I do. You'll
13 also see me typing on my computer across the hall -- or reading emails. Across the
14 hall is my secretary and my law clerk and they communicate with me on the
15 computer and you're not to make any inference from that.

16 You will get notebooks and pencils to use to take notes during the trial.
17 I suggest that you write anything down that you feel is important to know. You get to
18 take those notebooks back with you to the jury deliberation room. There's no
19 transcript that goes with you, but you get to have your notebooks and you get copies
20 of the jury instructions when you go back and deliberate, as well as the evidence.

21 Again let me remind you that until this case is submitted to you, don't
22 talk to each other about it or about anyone who has anything to do with it until the
23 end of the case when you go to the jury room to decide on your verdict. Don't talk
24 with anyone else about this case, or about anyone who has anything to do with it
25 until the trial has ended and you have been discharged by me.

1 Anyone else includes members of your family and your friends. You
2 can tell them you're a juror in a criminal case, but don't tell them anything else about
3 it until after you have been discharged by me.

4 Don't let anyone talk to you about the case or about anyone who has
5 anything to do with it. If someone should try to talk to you you need to report it
6 immediately to me by going to Arthur. Don't read any news stories or articles, or
7 listen to any radio or television reports about the case, or about anyone who has
8 anything to do with it.

9 Ladies and gentlemen, you will be given the opportunity to ask written
10 questions of any of the witnesses who are called to testify in the case. You are not
11 encouraged to ask large numbers of questions because that's the primary
12 responsibility of all of the attorneys.

13 Questions may be asked only in the following manner. After both
14 lawyers have finished questioning the witness, and only at this time, if there are
15 additional questions you would like to ask you can seek permission to ask the
16 witness a written question. Should you desire to ask a question write your question
17 down on a piece of paper out of your juror notebook, raise your hand. You also
18 need to put your seat number. You all have seat numbers now. Top row is one
19 through eight. The bottom row is nine through thirteen, okay.

20 So you write down your question, you put it on a sheet of paper and you
21 give it to Arthur. All questions from jurors must be factual in nature and designed to
22 clarify information already presented. The jurors must not place undue weight on
23 the responses to the questions. Arthur will pick up your question and give it to me.
24 All questions must be directed to the witness, not to me, the Court, or the attorneys.
25 I'll determine after I talk to the lawyers whether your question is legally proper. If it's

1 legally proper I'll ask the question; if it's not, I won't. No adverse inference should
2 be drawn if I do not allow a particular question.

3 All right ladies and gentlemen, timing wise this is a really good thing.
4 I'm going to give you a lunch break. When you come back from lunch we will begin
5 with opening statements and proceed with this case. I'm going to give you till 1:15,
6 and every time I send you out of the room I have to say these words.

7 During this recess you are not to talk or converse among yourselves, or
8 with anybody else on any subject connected with this trial; read, watch or listen to
9 any reports or commentary of the trial, or any medium of information including
10 without limitation to newspaper, the television, the internet or the radio. Do not form
11 or express any opinion on any subject connected with this case until it is finally
12 submitted to you.

13 There's plenty of places within walking distance of the building to each
14 lunch. There's a place in the building. There's a Quiznos down the street. There's
15 the Courthouse Bar and Grill across the street, so it shouldn't be a problem for you
16 to eat something real quick, and then Arthur will take charge of you and tell you
17 where he wants to meet you at 1:15; Arthur.

18 [Colloquy]

19 [Outside the presence of the Jury]

20 THE COURT: Okay, I imagine we don't have very lengthy opening
21 statements.

22 MR. WESTMEYER: No, ma'am.

23 MS. DIEDOARDO: No, Your Honor.

24 THE COURT: And then we'll move right into our witnesses. Do you have
25 jury instructions?

1 MR. WESTMEYER: Yes, Judge. I need to -- just need to get them
2 organized briefly, but I do have a set of proposed instructions and I'll have that for
3 you in just a minute.

4 THE COURT: Well have them for me and for opposing counsel, and if
5 there's any specials that you want you need to have them.

6 MS. DIEDOARDO: We would -- may we bring those prior to getting started
7 right before lunch, Your Honor? We would have those.

8 THE COURT: Well when we come back bring them.

9 MS. DIEDOARDO: That's what I mean.

10 THE COURT: And then why don't I take this opportunity while we're all here
11 to let me admonish your client regarding his right to testify, and then we can be
12 done with that, all right?

13 MS. DIEDOARDO: Certainly Your Honor.

14 THE COURT: Okay Mr. Martinez-Hernandez, I need you to remain standing
15 please.

16 The law does not compel a defendant in a criminal case to take the
17 stand and testify; are you understanding -- is it not working

18 COURT INTERPRETER: Apparently no, Your Honor.

19 THE COURT: You want to just interpret for him right next to him?

20 COURT INTERPRETER: Yes.

21 THE COURT: All right, Mr. Martinez-Hernandez, the law does not
22 compel a defendant in a criminal case to take the stand and testify. No presumption
23 may be raised and no inference of any kind may be drawn from a failure of a
24 defendant -- oh I'm sorry, hold on. Let's go back. Let's rewind.

25 Under the constitution of the United States and under the constitution of

1 the state of Nevada, you cannot be compelled to testify in this case. Do you
2 understand that, Mr. Martinez-Hernandez?

3 THE DEFENDANT [Through the court interpreter]: Yes.

4 THE COURT: You may, at your own request, give up this right and take the
5 witness stand and testify. If you do you will be subject to cross-examination by the
6 deputy district attorney, and anything that you may say, be it on direct or cross-
7 examination, will be the subject of fair comment when the deputy district attorney
8 speaks to the jury in closing argument; do you understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: If you choose not to testify, the Court will not permit the deputy
11 district attorney to make any comments to the jury because you have not testified;
12 do you understand that?

13 THE DEFENDANT: Yes.

14 THE COURT: If you decide not to testify the Court will instruct the jury, but
15 only if your attorney specifically requests as follows: the law does not compel a
16 defendant in a criminal case to take the stand and testify, and no presumption may
17 be raised and no inference of any kind may be drawn from the failure of a defendant
18 to testify. Do you have any questions about these rights?

19 THE DEFENDANT: No.

20 THE COURT: You are further advised that if you have a felony conviction and
21 more than ten years has not elapsed from the date you have been convicted or
22 discharged from prison, parole or probation, whichever is later, and the defense has
23 not sought to preclude that coming before the jury, and you decide to take the stand
24 and testify, the deputy district attorney in the presence of the jury will be permitted to
25 ask you the following questions: one, have you been convicted of a felony; two,

1 what was the felony; three, when did it happen; but they may not go into any details.

2 All right? Thank you.

3 Okay, we'll be in recess and we'll see you back at 1:15.

4 MS. DIEDOARDO: Thank you, Your Honor.

5 [Recess taken at 11:53 a.m.]

6 [In the presence of the Jury]

7 THE COURT: Good afternoon ladies and gentlemen, welcome back to State
8 of Nevada versus Martinez-Hernandez. All the parties are present. And by the way,
9 Arthur is just the messenger on the candy. It's not his candy despite what he tells
10 you. It's my candy, he gives it to you, don't listen to him.

11 UNIDENTIFIED JUROR: He was eating it.

12 THE COURT: Thank you very much. All right, now we're going to begin with
13 opening statements after everybody gets all settles, and would that be you, Mr.
14 Westmeyer?

15 MR. WESTMEYER: Yes, ma'am.

16 THE COURT: All right, well why don't you go ahead and proceed with your
17 opening statement?

18 MR. WESTMEYER: Thank you.

19 **OPENING STATEMENT BY THE STATE**

20 BY MR. WESTMEYER:

21 I'm going to kill you. I'm going to kill you. Ordinarily Richard Pena would not
22 be frightened by hearing these words, but on the night -- in the early morning hours,
23 excuse me, of June 12th, 2006, the Defendant, that man sitting over there, Mr.
24 Martinez-Hernandez, said those words to Richard Pena. He said them while
25 standing about ten feet away holding a black 45 caliber Ruger pistol and pointing it

1 at Richard. I'm going to kill you.

2 Richard was afraid. Richard was in fear for his life. In a few minutes
3 Richard's going to take the stand and he's going to tell you exactly what happened
4 that night. He's going to tell you about how the Defendant came to a nightclub that
5 Richard owns. It's here in town. You heard when we were talking about it in jury
6 selection, it's on Fremont Street.

7 Richard's going to come here and tell you that the Defendant came, he
8 was angry, they started -- the Defendant starting yelling at him, the Defendant
9 started pushing him. The Defendant went to his car, got his gun, pointed it at
10 Richard and said: I'm going to kill you.

11 You're going to hear from a witness, Beatrice. She's also going to get
12 on that stand. She's also going to tell you she was outside of the club, she saw all
13 of this happen. She saw the Defendant, that man, going to his car, grabbed his gun
14 and point it at Richard.

15 You're also going to hear from the officers that responded when they
16 called 9-1-1. You're going to see the gun. You're going to see the gun that the
17 Defendant had in his car and then later in his hand when he pointed it at Richard
18 and told him he was going to kill him.

19 Like we talked about this morning, this won't take a long time to
20 present. This is not a long case. At the close of all the evidence we're going to ask
21 you to return a verdict of guilty for the sole account of the information which is
22 assault with use of a deadly weapon. The evidence will prove it, and we're going to
23 ask that you come back with that verdict. Thank you.

24 THE COURT: Thank you very much. And Ms. Kolias you may do your
25 opening as well.

1 MS. KOLIAS: Thank you, Your Honor.

2 **OPENING STATEMENT BY THE DEFENSE**

3 BY MS. KOLIAS:

4 This is a case of facts and circumstances, and not the facts and
5 circumstances chosen and edited by the prosecution in this case, but the totality of
6 the circumstances.

7 The person, the alleged victim in this case, is the owner of a bar on
8 Boulder Highway. A bar that is frequented by the police. In fact this evening, the
9 evening of this event, at least on two occasions for another assault. You will hear
10 the testimony of the employee who he -- who the prosecution refers to who will
11 testify that there are many assaults there.

12 This is a case about not only all the totality of the circumstances but
13 credibility as well. If one is a bar owner and takes videotape, and he is picking and
14 choosing which cases that he wants to prosecute, I want you to use your common
15 sense.

16 MR. WESTMEYER: Judge, I'm going to object at this point, I don't believe
17 this is proper for opening.

18 THE COURT: Ms. Kolias, in opening you're going to tell us what the evidence
19 is going to show. You can save that for your argument, please.

20 MS. KOLIAS: Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. WESTMEYER: Thank you.

23 BY MS. KOLIAS:

24 The evidence is going to show that we have a defendant here who doesn't
25 have a criminal record, who has been a security guard with a gaming permit and a

1 permit to carry a concealed weapon for over 12 years. He has been a responsible
2 citizen and one who has never been in trouble with the police before.

3 The evidence is going to show that prior to this alleged assault that one
4 of the bar owner's other employees, who was an employee there by -- for only two
5 days, with no training, was set up to be security at this place. And he was security.
6 His name is Alex Maceo, and Mr. Maceo will testify and say I had only been a
7 security guard there for two days. That he had no training, and that on his second
8 night that he was assaulted with a beer bottle. And after he was assaulted that he
9 asked if he could go to the hospital. And this alleged victim who was afraid of an
10 alleged statement said no, you're fine, you don't need to go to the hospital. And as
11 this person, Alex, who eventually went to the hospital ended up with over ten
12 stitches in his head was not working there after that, and he was there with no
13 training at all.

14 Alex called his friend, Lazaro Martinez and said Lazaro, what do I do in
15 this situation, I was just assaulted with a bottle. And Lazaro, because of his twelve
16 years of training as security said well they have to call the police and I'll come there
17 to see what I can do.

18 Lazaro came to the aid of his friend and went to talk to Richard about
19 the situation. When Lazaro went that's when the alleged victim said get out of here,
20 this is none of your business and pushed Mr. Lazaro, and then stated to another
21 person: I'm going to make sure that he gets arrested in this case. And his employee
22 -- you will hear the testimony of his employee, Beatrice, who has been an employee
23 of the alleged victim for eight years, and you will see her written statement and how
24 it word for word conforms with what her boss is saying in this case. That's what
25 you're going to see.

1 You're going to see a videotape taken purportedly by the victim in this
2 case, and what you will see is a videotape that the timing goes from 4:02 to 4:01 to
3 4:00, and then back up to 4:06. This is the videotape by the alleged victim. The
4 credibility of that tape, if that tape was edited, is something that is left to you.

5 MR. WESTMEYER: Judge, I need to object again. I believe that counsel's
6 arguing. I don't think the evidence is going to show that.

7 THE COURT: Ms. Kolas, stick to what the evidence is going to show, please.
8 BY MS. KOLIAS:

9 The evidence will show a tape that is not in chronological order. The person
10 who had care, custody and control of that tape is the alleged victim in this case.
11 That's what the evidence will show, that Mr. Martinez is not guilty of assault with a
12 deadly weapon. Thank you.

13 THE COURT: Thank you. State's first witness, please.

14 MS. DIEDOARDO: Your Honor, at this time the defense would invoke the
15 exclusionary rule.

16 THE COURT: All right. If there are there any witnesses in here that are going
17 to testify they need to leave. First witness.

18 MR. WESTMEYER: Richard Pena, please.

19 THE COURT: Do we need an interpreter for Mr. Pena?

20 MR. WESTMEYER: No, ma'am.

21 THE COURT: Thank you. Mr. Pena, right up here to the witness stand,
22 please. When you get there remain standing, raise your right hand be sworn, by my
23 clerk right over here.

24 **RICHARD PENA**

25 [Having been called as a witness and being first duly sworn, testified as follows:]

1 THE COURT: Have a seat, please. And then tell us your name, please.

2 THE WITNESS: Richard Pena.

3 THE COURT: Spell your last name, please.

4 THE WITNESS: PENA.

5 THE COURT: Thank you. Go ahead.

6 MR. WESTMEYER: Thank you, Judge.

7 DIRECT EXAMINATION

8 BY MR. WESTMEYER:

9 Q Good afternoon.

10 A Good afternoon.

11 Q Mr. Pena, where do you work?

12 A Work for El Premier Nightclub.

13 Q Okay, and in what capacity do you work there?

14 A I'm part of the owner of the corporation.

15 Q And what is the address of the El Premier?

16 A 3015 East Fremont.

17 Q Is that here in Las Vegas in Clark County, Nevada?

18 A Yes sir.

19 Q Now were you working in the early morning hours of June 12, 2006?

20 A Yes, sir.

21 Q You were working; now do you remember anything unusual happening
22 on that night?

23 MS. DIEDOARDO: Objection, Your Honor, calls for speculation.

24 THE COURT: Overruled. Go ahead.

25 THE WITNESS: Yes, sir.

1 BY MR. WESTMEYER:

2 Q Would you please tell us about what you remember?

3 A I remember a gentleman, he's in front of me right now, he became very
4 angry and pulled a gun on me.

5 Q Let's back up just a little bit. Were you working at around 4 a.m. on the
6 12th?

7 A Yes, sir.

8 Q And you said at that time you saw someone come up who was very
9 angry at you?

10 A Yes, sir.

11 Q Do you see that person in court today?

12 A Yes, sir.

13 Q Can you point to him and describe something he's wearing today?

14 A He's wearing a black suit with a blue shirt.

15 MR. WESTMEYER: And Judge, I'd like the record to reflect identification of
16 the Defendant.

17 THE COURT: It shall.

18 MR. WESTMEYER: Thank you.

19 BY MR. WESTMEYER:

20 Q Mr. Pena, you said that the Defendant came to your place of business
21 and he was very angry?

22 A Yes, sir.

23 Q What did he do when he arrived there?

24 A He came to the main entry of the club cussing and yelling about a
25 incident happened early, probably within an hour, probably a little more.

1 Q He was angry about an incident that had happened an hour or two
2 before?
3 A Yes, sir.
4 Q Before we keep going here can you tell us about that incident? Were
5 you there at that time?
6 A Yes. There was a security guard that was hired --
7 Q What was his name, if you remember?
8 A Not right now I can't --
9 Q Okay so there was a security guard?
10 A Yeah.
11 Q And what happened?
12 A And he had an incident with a client and he -- one of the --
13 Q What was the nature of the incident?
14 A One of the client attack with a bottle of the -- Corona bottle.
15 Q And after the security guard was hit with the Corona bottle, what
16 happened?
17 A Well we arrest the guy and we had assist in our security for emergency
18 first kit -- aid -- he had a little cut.
19 Q So your security --
20 A And we --
21 Q -- contained the person that had caused this injury to your security
22 guard, is that right?
23 A Yeah, I believe -- yes, that's what.
24 Q And then what did you do next?
25 A We brought it in to our office, a security guard and tried to attend help

1 and we offered to -- for the ambulance can arrive. He said no it's okay --
2 Q So you offered to take him to the hospital?
3 A Yes, we -- yes.
4 Q The security guard whose name you can't recall?
5 A Yes, and he said no, he's going to be okay. He got a little dizzy or
6 something like that but he's going to be okay. And there was a call for policemen to
7 came.
8 Q And the police came?
9 A Yes, I'm pretty sure they came.
10 Q And when the police came they got rid of this patron who had attacked
11 your security guard?
12 A Yes, it's been kind a while, I cannot.
13 Q Okay, and then -- now you said this was the prior incident?
14 A Yes.
15 Q And you said it was about an hour and a half or two hours later --
16 A Yes.
17 Q -- you saw the Defendant come into your club?
18 A Yes.
19 Q Do you remember what vehicle he came in?
20 A It was a yellow Hummer parked in front of the main entry.
21 Q A yellow Hummer?
22 A Yellow Hummer.
23 Q And you were outside?
24 A Yes.
25 Q And what did you observe when the Defendant arrived in his Hummer?

1 A He came and talked Spanish with a very high tone of voice. He was
2 screaming and yelling why we didn't --

3 Q You said he spoke Spanish, do you speak Spanish as well?

4 A Yes, sir.

5 Q Okay, and so he was yelling at you in Spanish?

6 A Yes, sir.

7 Q And what happened next?

8 A I told to go away and he came and pushed me.

9 Q He pushed you with his hand?

10 A Yeah. Yes.

11 Q With one hand or with two hands?

12 A One --

13 Q One hand like that on your chest?

14 A Yes.

15 Q And what did you do after he pushed you?

16 A Well we told to go away with our security.

17 Q And did he go away with your security?

18 A No, he went to his car right away.

19 Q So you wanted him to go away with security, he went to his car?

20 A Yes.

21 Q What happened next?

22 A He opened the door, the right side passenger side out of that yellow
23 Hummer and walked to me with a gun and pointed to my face like -- he said he's
24 going to kill me.

25 Q He said he's going to kill you?

1 A Yes, I was --

2 Q He was pointing a gun at your face?

3 A Yes.

4 Q What color was the gun?

5 A It was a dark color.

6 Q Dark? Remember what the Defendant was wearing that night? Not
7 today but on that night a year and a half ago?

8 A It was like a black shirt, like security, and like Army pants, something
9 like that.

10 Q Black shirt and Army pants? Okay.

11 Now Richard, when the Defendant was pointing a gun at you, he said
12 I'm going to kill you, were you afraid at that point?

13 MS. KOLIAS: Objection, leading.

14 MR. WESTMEYER: I don't think that's leading, Judge. I'm asking him simply
15 a yes or no question.

16 THE COURT: Well he's not suggesting the answer, so overruled. Go ahead,
17 you can answer that.

18 THE WITNESS: Yes, sir.

19 BY MR. WESTMEYER:

20 Q What were you afraid of?

21 A He's going to kill me.

22 Q You were afraid he was going to kill you?

23 A Yes, sir.

24 Q Did you think he might shoot you?

25 A Yes, sir.

1 Q Did you try to protect yourself in anyway? Did you try to run, anything
2 like that?
3 A No, everything happened so fast.
4 Q Now Richard, you said you had your security guards from your club that
5 were out there also trying to get the Defendant to leave, right?
6 A Yes.
7 Q Do you security guards carry weapons?
8 A No.
9 MR. WESTMEYER: Court's indulgence please, Judge, for one second.
10 THE COURT: All right.
11 BY MR. WESTMEYER:
12 Q Richard, were the two of you the only people outside when this
13 happened?
14 A No.
15 Q Who else was there that you remember.
16 A One of my security guard and other people's clients also.
17 Q Did you see any weapons on anybody other than the Defendant?
18 A No.
19 MR. WESTMEYER: Judge, may I approach the witness?
20 THE COURT: Yes, please.
21 MR. WESTMEYER: Thank you.
22 BY MR. WESTMEYER:
23 Q Richard, I'm showing what's been marked for identification purposes as
24 State's Proposed Exhibit 1, 2 and 3; would you take a look at those, please?
25 A Yes.

1 MR. WESTMEYER: And for the record, Judge, I've shown these to defense
2 counsel.

3 THE COURT: Okay.

4 MR. WESTMEYER: Do you want to see them again?

5 MS. DIEDOARDO: Not necessarily counsel, but if we might be able to get a
6 copy from counsel that would be appreciative; we have not yet received copies.

7 THE COURT: Not at this point. Go ahead.

8 BY MR. WESTMEYER:

9 Q Do you recognize what's depicted here?

10 A Yes.

11 Q Can you describe it for the jury, please?

12 MS. KOLIAS: Objection, lack of foundation.

13 MR. WESTMEYER: I was asking to describe what he sees.

14 THE COURT: Okay. Do you recognize what's in the pictures?

15 THE WITNESS: Yes, ma'am.

16 THE COURT: What's in the pictures?

17 THE WITNESS: I see the yellow Hummer with the open door, and see that
18 gentleman.

19 THE COURT: Can I see the pictures?

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: Okay, Mr. Westmeyer, lay a better foundation.

22 MR. WESTMEYER: Yes, ma'am.

23 BY MR. WESTMEYER:

24 Q Mr. Pena.

25 A Yes, sir.

1 Q Do you have security cameras at your club?

2 A Yes, sir.

3 Q And do those security cameras take pictures of your business?

4 MS. KOLIAS: Objection, leading.

5 THE COURT: Overruled.

6 THE WITNESS: Yes.

7 BY MR. WESTMEYER:

8 Q Okay, now to the best of your knowledge were those security cameras
9 working on the night of June 12, 2006?

10 A Yes, sir.

11 Q Now I'm showing you again what's been marked as State's Proposed 1,
12 2 and 3. You've already testified that you recognize those.

13 A Yes, sir.

14 Q Can you tell me how you recognize those pictures?

15 A That was the car -- he parked his Hummer.

16 Q Without telling us what's in the pictures, can you tell me how you
17 recognize them? Have you seen them before?

18 A The night when we give it to the police department -- when showed it to
19 the police department -- police officer, I'm sorry.

20 Q So you've seen these pictures before?

21 A Yes, the video.

22 Q Okay, and this is from your surveillance?

23 A Yes, sir.

24 MR. WESTMEYER: Okay, now Judge, at this time I'd move for admission of
25 State's 1, 2 and 3.

1 MS. KOLIAS: Objection.

2 THE COURT: What's the objection now?

3 MS. KOLIAS: It's still lack of foundation, Your Honor. We have nothing about
4 the care, custody, or control of the videotape, or whether this is an accurate
5 depiction of what was seen as -- with regard to the night of the incident.

6 THE COURT: Well if -- you've seen the videotape, sir?

7 THE WITNESS: Yes.

8 THE COURT: Okay, and is this a fair and accurate depiction of what was in
9 the videotape?

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: Overruled.

12 MS. KOLIAS: Again, this is not the best evidence. This is another objection
13 that we have.

14 THE COURT: Counsel, thank you, you're objection is noted for the record.

15 MS. KOLIAS: Thank you.

16 THE COURT: Go ahead.

17 MR. WESTMEYER: Are they admitted, Judge?

18 THE COURT: Yes, they're admitted.

19 [EXHIBITS 1, 2 AND 3 ADMITTED]

20 MR. WESTMEYER: Okay, thank you. And Judge, may I publish the admitted
21 documents to the Jury?

22 THE COURT: Are we -- I'm going to imagine that you're going to be admitting
23 the videotape. No?

24 MR. WESTMEYER: It depends on what comes out of direct, Judge.

25 THE COURT: Okay.

1 MR. WESTMEYER: Are these conditional on the admission of the videotape?

2 THE COURT: Well normally yes. So normally I have the video and then off
3 the video we have the still. So I don't know what your plan is but those coming in --
4 if you play the -- those are admitted if you play the video. But you need to lay the
5 foundation for that before you play it as well.

6 MS. THOMAS: I won't play it; I'm trying to get it cued up.

7 THE COURT: Okay.

8 MR. WESTMEYER: Okay.

9 BY MR. WESTMEYER:

10 Q Mr. Pena, we discussed a few minutes ago about the security cameras
11 in your establishment.

12 A Yes, sir.

13 Q Are those running all the time?

14 A Yes, sir.

15 Q And why do you have those?

16 A For secure purposes.

17 Q For prosecuting purposes, so if something happens on your premises
18 you want to be able to have --

19 MS. KOLIAS: Objection, misstates the testimony.

20 MR. WESTMEYER: That's what he just said.

21 MS. KOLIAS: No, he didn't.

22 THE COURT: You asked him for security purposes, right?

23 MS. KOLIAS: He said for prosecution purposes.

24 THE COURT: Right, and then you said for pros --

25 MR. WESTMEYER: I think that's what he said.

1 THE COURT: No, he said for security purposes.

2 MR. WESTMEYER: Oh security.

3 THE COURT: Yes.

4 MR. WESTMEYER: I'm sorry I thought he said for prosecuting purposes.

5 THE COURT: No.

6 BY MR. WESTMEYER:

7 Q You keep them for security purposes?

8 A Yes.

9 MR. WESTMEYER: I'm sorry, Judge, I misheard that.

10 THE COURT: I know.

11 BY MR. WESTMEYER:

12 Q Do you know if there was video taken of June 12, 2006?

13 A Everything was working before we started the business.

14 Q Okay, so everything was working?

15 A Yes.

16 Q So as far as you know there is a videotape of the security cameras from
17 your business from this night, is that right?

18 A It was 24/7.

19 Q Okay. Have you seen the videotape from June 12, 2006?

20 A We did. When we called the technician to provide to District Attorney
21 Office.

22 Q Okay, and were you present when that was conducted?

23 A Yes, my daughter and myself.

24 Q You're daughter and yourself were both present?

25 A Yes.

1 Q Is the videotape that you remember seeing, is that a fair and accurate
2 description of the events that occurred outside your business on June 12, 2006?

3 A Yes.

4 MR. WESTMEYER: Okay, and Judge, at this time I would like to play this
5 tape and then have it admitted.

6 THE COURT: You have to have it admitted before you play it.

7 MR. WESTMEYER: Okay, move for admission, Judge.

8 THE COURT: Okay.

9 MS. DIEDOARDO: Your Honor, we would object. As counsel's previously
10 adverted to there is an issue with -- maybe this is best outside bar.

11 THE COURT: Well I would hope so, so let's have a sidebar.

12 [Bench conference -- not transcribed]

13 THE COURT: Okay, that objection is overruled. The video's admitted. Now
14 you may play it. Do you have it -- is it in the machine?

15 MS. THOMAS: Yes.

16 THE COURT: Okay, when it's out of the machine give it to Sandy and she will
17 mark it.

18 MS. THOMAS: Okay.

19 MR. WESTMEYER: Yes, ma'am.

20 [Playing videotape]

21 BY MR. WESTMEYER:

22 Q Mr. Pena, we're playing what's been admitted as I believe State's
23 Exhibit 4; would you please describe what we're seeing here -- are you seeing it on
24 your screen?

25 A Yes. Yes, sir.

1 THE COURT: Yes, he should.

2 BY MR. WESTMEYER:

3 Q Can you describe what you see here?

4 A I see the parking lot. I see the Hummer with the door open.

5 THE COURT: Okay you're -- okay, could you just pause this for a sec,
6 please?

7 MR. WESTMEYER: Sure.

8 THE COURT: Is your video on right there?

9 MS. DIEDOARDO: And actually it is not, Your Honor. I can see it from here
10 though. So I --

11 THE COURT: There a little button there around the bottom you can touch and
12 maybe it will come on. And then how long is this video?

13 MR. WESTMEYER: The video itself goes on for some time, but the relevant
14 portion is quite short and it's at the beginning.

15 THE COURT: Okay, so why don't we watch it first and then have him -- we'll
16 rewind it and have him go through it when it goes through a second time.

17 MR. WESTMEYER: Okay.

18 THE COURT: So stop it at the relevant -- stop it when it's done being relevant
19 to us and then you can take him through it.

20 MR. WESTMEYER: Okay.

21 THE COURT: Okay, it's going now. And ladies and gentlemen, you'll have a
22 copy of this back with you in the deliberation room when you go back to deliberate.

23 [Playing videotape]

24 MR. WESTMEYER: Okay, Judge, that's all I wanted to show.

25 THE COURT: Okay.

1 MR. WESTMEYER: We can let it keep going if Defense wants to keep it
2 going that's fine, but --

3 MS. KOLIAS: Yes.

4 THE COURT: -- that's all I wanted to show.

5 THE COURT: We're keeping going?

6 MS. KOLIAS: Yes.

7 THE COURT: How bout during when you cross-examine him you show
8 whatever the parts are that you want to show?

9 MS. DIEDOARDO: That might be more efficient, or as I recall the Court's
10 ruling was it asked the State to show it once and then to run it through again with
11 Mr. Pena.

12 THE COURT: If you have some -- where you want to stop it, where he wants
13 to go, so when you cross-examine you can ask them and I'm sure they'd like to help
14 you put it up and we can go through it that way. So rewind to the parts that you
15 need.

16 MR. WESTMEYER: Okay, this is about the part we want to start at.

17 THE COURT: Okay. Go ahead.

18 BY MR. WESTMEYER:

19 Q Now Mr. Pena, can you describe what we're seeing here?

20 A Yeah.

21 THE COURT: You want to pause it? Because otherwise it's going to keep
22 going. Okay, it's paused, go ahead. And you can -- Mr. Pena, you can take your
23 finger and --

24 MR. WESTMEYER: You can write on the screen.

25 THE WITNESS: Okay.

1 THE COURT: -- write on the screen.

2 THE WITNESS: This is it -- this is the Hummer with the door open. This is
3 Mr. Martinez, I think the last name.

4 MR. WESTMEYER: Okay, could we advance a few frames?

5 BY MR. WESTMEYER:

6 Q Okay, now we've paused it again here. Can you again describe what
7 you see?

8 A The Hummer, Martinez, my security officer.

9 Q Okay, you said you identified Mr. Martinez, can you describe in a bit
10 more detail from what you can tell on here?

11 THE COURT: It's hard to see who that is in the video. Is there a reason why
12 you know that it's him?

13 THE WITNESS: Yes, keep going, it's going to see more. Hold on, back it up.

14 THE COURT: You got to be quick on the draw. Now you got to go forward
15 just like a tad.

16 THE WITNESS: Go ahead. Right there.

17 THE COURT: And what's happening there?

18 THE WITNESS: There's a gun right there.

19 MR. WESTMEYER: And Judge, may I approach again?

20 THE COURT: Yes, now you can use the stills.

21 MR. WESTMEYER: Thank you, Judge. And these were admitted additionally
22 with the admission of State's 4.

23 THE COURT: Right.

24 BY MR. WESTMEYER:

25 Q I'm showing you what's been admitted as State's 1, 2 and 3. Are these

1 still taken from the video we just saw?

2 A Yes, sir.

3 Q Okay. Now can you tell us what you see? Directing you to State's
4 Exhibit number three, do you see the Defendant in that picture?

5 A Yes, sir.

6 Q And does he have anything in his hands?

7 A Left hand.

8 Q What do you see in his left hand?

9 A That's the weapon.

10 Q Thank you.

11 THE COURT: Do you need us to switch over to go on the Elmo?

12 MR. WESTMEYER: Please.

13 MS. KOLIAS: Can we turn this on?

14 MS. DIEDOARDO: We tried, it's not working.

15 THE COURT: It's not coming on?

16 MS. DIEDOARDO: It's not coming on, Your Honor.

17 MS. THOMAS: It's not on our side either.

18 THE COURT: That's really kind of strange. Okay, we'll have to get the JAVS
19 people to help us out with that, but not right now, so go ahead and -- go on.

20 MR. WESTMEYER: Judge, we're publishing State's 3.

21 THE COURT: All right.

22 BY MR. WESTMEYER:

23 Q Mr. Pena, we were just talking about this. Again can you -- using the
24 document viewer and the touch screen can you show us what you see there?

25 MS. KOLIAS: Can you show the time on that, counsel?

1 MR. WESTMEYER: Yeah.

2 THE COURT: 4:02:11? Go ahead.

3 BY MR. WESTMEYER:

4 Q And Mr. Pena, can you describe -- or can you use the touch screen and
5 show us what you see in this picture?

6 A Mr. Martinez with a weapon.

7 Q Okay, and can you tell from that picture what he's wearing?

8 A It's a black shirt and Army pants and boots.

9 Q Okay, is that what you remember him wearing when he was pointing
10 the gun at you?

11 A Yes, sir.

12 MR. WESTMEYER: Okay. Court's indulgence please, Judge.

13 THE COURT: All right.

14 BY MR. WESTMEYER:

15 Q And what was the name of the other security guard who was out there
16 with you?

17 A Beatrice Hernandez.

18 MR. WESTMEYER: I have nothing, further Judge. Thank you.

19 THE COURT: Okay. Do you want to take down -- do you want him to leave
20 the picture up?

21 MS. DIEDOARDO: Yes, Your Honor, we're actually going to be referring to it
22 partially on cross. We'll actually play the videotape again.

23 THE COURT: Okay.

24 MS. DIEDOARDO: But we might begin from here.

25 CROSS-EXAMINATION

1 BY MS. DIEDOARDO:

2 Q Good afternoon Mr. Pena.

3 A Yes, good afternoon.

4 Q Mr. Pena, just a couple follow-up questions for you. You've testified
5 here today that you saw Mr. Martinez, and I believe this is State's 3 that's currently
6 up on the screen, a capture of State's 3 that's currently up on screen that you could
7 identify him in the picture; is that correct?

8 A Yes, ma'am.

9 MS. DIEDOARDO: Your Honor, may I approach and --

10 THE COURT: Sure.

11 MS. DIEDOARDO: -- facilitate the screen? Thank you. Actually Court's
12 indulgence, I believe [indiscernible].

13 MR. WESTMEYER: I believe it's up there.

14 THE COURT: It's on the Elmo.

15 BY MS. DIEDOARDO:

16 Q Mr. Pena, where on this screen are you?

17 A Right there.

18 Q So from the orientation of where the camera is placed then Mr. Martinez
19 has his back to the door of the club; is that correct?

20 A It's not back of the doors, it's the sides.

21 Q Okay but is the door to the club behind Mr. Martinez or in front of him?

22 A In front of him.

23 Q In front of him. So the entrance to the club, can you show us where the
24 entrance to the club is on this?

25 A I can't show right now because --

1 THE COURT: It's not in the picture.

2 THE WITNESS: It's not in the picture.

3 BY MS. DIEDOARDO:

4 Q I understand that, sir, but if you can just help orient the scene for us,
5 we'd appreciate that.

6 A I can mark this but -- this section here. Wait, no the other way.

7 Q Okay, is that -- you say that black shadowy figure there is Mr. Martinez-
8 Hernandez. Is his back to you? Do you recall if his back to -- was back to you or
9 was his front to you when this was taken?

10 A Front side.

11 Q So would it be fair to say that he's facing you?

12 A Oh yes.

13 Q Okay, so the -- would it be fair to say that the camera is pointed at his
14 back?

15 A Correct.

16 Q Okay, thank you. You testified earlier that you didn't recall the name of
17 the security guard who was injured earlier that evening, is that correct?

18 A We -- in the past we have a lot of securities come and go, but if you
19 mention one of the names probably surely in your transcript I would remember it.

20 Q Would it refresh your recollection to show you the statement that you
21 gave the police department the night of the incident?

22 A I have it here. I can take a look at it if you don't mind.

23 Q I would have no problem with that, sir, if that will help you give your
24 testimony that would be fine.

25 A Sure.

1 Q If you would take a moment to refresh your recollection and let me
2 know when you're done.

3 A Alexander Maceo.

4 Q And is that your -- does that now refresh your recollection that is the
5 gentleman's name, Mr. Pena?

6 A Yes, it it's there, yes.

7 Q Okay. You've testified earlier that you offered to send Mr. Maceo to the
8 hospital after he was injured, is that correct?

9 A Yes, we offered, yes.

10 Q Okay. If Mr. Maceo -- would you be surprised if when Mr. Maceo gets
11 up to testify he says that you told him to remain on the job?

12 MR. WESTMEYER: I'm going to object, that calls for speculation.

13 THE COURT: It does because we haven't heard from that person, so that's
14 sustained. Don't answer that.

15 MS. DIEDOARDO: I'll rephrase, Your Honor.

16 BY MS. DIEDOARDO:

17 Q Is it a common incident for your security guards to be injured on the job,
18 Mr. Pena?

19 A No.

20 Q So -- and you've testified here tonight that -- today, this afternoon,
21 excuse me, that Mr. Martinez placed -- pointed a gun at you, is that correct?

22 A Yes.

23 Q And you've also testified that it's a black gun, is that correct?

24 A I don't understand your question.

25 Q Well your -- as I recall from -- counsel had mentioned in his opening

1 and also I recall you testifying that it was a dark colored handgun, is that correct?

2 A Correct.

3 Q Okay, and would it be fair to say that in your line of work people are not
4 pointing guns at you on a regular basis; would that be a true statement?

5 A Yes.

6 Q So you'd remember it if someone was pointing a gun at you, correct?

7 A Yes.

8 Q Okay. With regard to -- let's go back to Mr. Maceo. You had
9 mentioned that the police had -- that you had called Metro when the security guard
10 was injured; is that correct?

11 A That was called from my office, yes.

12 Q Okay, and do you recall whether or not Metro responded?

13 A Yes.

14 Q And did they -- so you recall whether they -- did they in fact respond?

15 A They arrived.

16 Q Okay, and did they take anyone into custody? Did they arrest anyone?

17 A No.

18 Q If you know, why didn't they arrest anyone?

19 MR. WESTMEYER: I'm going to object again, Judge, that's speculation.

20 MS. DIEDOARDO: It goes to his knowledge. I asked him if he knew, not why
21 they didn't.

22 THE COURT: Does he know -- I think you asked him.

23 MS. DIEDOARDO: I said if you know why didn't Metro arrest anyone, and if
24 he doesn't know he can say I don't know why they didn't arrest anyone.

25 MR. WESTMEYER: I don't see how he could possibly know so I don't -- I

1 object to the form of that question.

2 THE COURT: Do you know whether anybody was arrested?

3 THE WITNESS: No.

4 THE COURT: Okay, and there's your answer.

5 MS. DIEDOARDO: That answers that. Fair enough.

6 BY MS. DIEDOARDO:

7 Q You testified earlier that you're the only -- that you're apart owner in the
8 corporation that owns El Premier, is that correct?

9 A Correct.

10 Q And which persons have access to this videotape? To the video
11 camera and the videotape that was recording?

12 A My assistant manager and my daughter.

13 Q Okay, and who -- for the record what are the names of those persons?

14 A Carny Pena [phonetic], Margarita Chavez [phonetic].

15 Q Okay, and just so that we're clear, Mr. Pena, Ms. Chavez is your
16 daughter or your assistant manager?

17 A My assistant.

18 Q And Ms. Pena is your daughter, correct?

19 A Correct.

20 Q Okay. So at the night when -- did Metro -- let me lay a foundation first.

21 Given the -- after you testified this altercation that you had with Mr. Martinez-
22 Hernandez, at that point did you call the police?

23 A That was a call from my office.

24 Q Okay but did you personally call the police?

25 A No.

1 Q Okay, do you know who called the police?

2 A My daughter did.

3 Q Okay, and that would be Ms. Pena, correct?

4 A Carny Pena.

5 Q Okay, and then when the police arrived did you give them this
6 videotape immediately?

7 A No.

8 Q Is there a reason why you didn't do that?

9 A Because they see first -- they take about an hour because we just
10 recently change a new -- a system, computerized.

11 Q Okay.

12 A And we don't know how to operate it to get the recorder and give it
13 immediately to the police department.

14 Q Okay.

15 A We had to call the technician to come in and do it for us.

16 Q Okay, and what's the technician's name if you recall it?

17 A Yes; Nick.

18 Q Do you -- Mr. Pena, do you remember Nick's last name?

19 A No, I don't.

20 Q Okay, if I can oppose upon counsel I would like to play the tape from
21 the beginning, and Your Honor we're going to direct the jury's attention to what's
22 happening in the upper right hand corner.

23 For the record this is a portion of the tape that lists the date code, which
24 is June 12, 2006, as well as the time.

25 [Colloquy]

1 impartial?

2 PROSPECTIVE JUROR #152: I try to be impartial and fair to everybody I
3 treated at the department so.

4 THE COURT: Okay well now you're here in court so is that going to apply as
5 well?

6 PROSPECTIVE JUROR #152: I could do so, yeah.

7 THE COURT: All right, thanks for telling us, appreciate it. Next?

8 PROSPECTIVE JUROR #153: Juror 153.

9 THE COURT: Yes 153.

10 PROSPECTIVE JUROR #153: I was a retired police officer in Chicago,
11 Chicago transit.

12 THE COURT: Okay.

13 PROSPECTIVE JUROR #153: And I'm a security officer now.

14 THE COURT: All right, it shouldn't impact your ability to be fair and impartial?

15 PROSPECTIVE JUROR #153: No.

16 THE COURT: Thank you. Next?

17 PROSPECTIVE JUROR #150: 150.

18 THE COURT: 150, yes sir.

19 PROSPECTIVE JUROR #150: My brother-in-law is a narcotics officer out
20 here.

21 THE COURT: All right, that shouldn't impact your ability to be fair and
22 impartial.

23 PROSPECTIVE JUROR #150: Not at all.

24 THE COURT: Thanks for telling us. Go ahead. Yes ma'am.

25 PROSPECTIVE JUROR #121: Badge number 121. I have -- my sister works

1 in the jail, North Las Vegas jail department, and I also have a brother-in-law that's
2 an officer for North Las Vegas.

3 THE COURT: Shouldn't be a problem?

4 PROSPECTIVE JUROR #121: No.

5 THE COURT: Thank you. And I know there are more people over there.
6 What number, sir?

7 PROSPECTIVE JUROR #125: 125.

8 THE COURT: Okay 125.

9 PROSPECTIVE JUROR #125: My son's a Metro police sergeant.

10 THE COURT: All right, and is this a Metro case?

11 MR. WESTMEYER: Yes, ma'am.

12 THE COURT: Did you recognize any -- his name wasn't on the list, was it?
13 You didn't hear his name being called did you, in this case?

14 PROSPECTIVE JUROR #125: I can't hear that well.

15 THE COURT: Okay.

16 PROSPECTIVE JUROR #125: I didn't hear anything you said.

17 THE COURT: Do you need to move closer?

18 PROSPECTIVE JUROR #125: Yes.

19 THE COURT: Well, Arthur, move him up.

20 [Colloquy]

21 THE COURT: Do you need us to give you the headphones?

22 PROSPECTIVE JUROR #125: Yes, I can't hear you, every work.

23 THE COURT: Okay, Arthur give me the -- oh Sandra.

24 [Colloquy]

25 THE COURT: Does your son have the same last name as you?

1 PROSPECTIVE JUROR #125: Yes, he is.

2 THE COURT: Okay so Mr. Westmeyer --

3 MR. WESTMEYER: Yes, ma'am.

4 THE COURT: -- the names of the Metro officers is not the same as this juror
5 number one --

6 MR. WESTMEYER: No ma'am.

7 THE COURT: All right. Okay, put the headphone on for me. Can you hear
8 me now? Is it on? Help us out, Arthur, although I'm afraid technologically -- can you
9 hear me now?

10 PROSPECTIVE JUROR #125: No.

11 THE COURT: Did that make any difference?

12 PROSPECTIVE JUROR #125: I'm not sure.

13 THE COURT: Arthur, may I have the headphones, please? Can you hear --

14 PROSPECTIVE JUROR #125: Say something.

15 THE COURT: Hello testing, one, two, three, four, five.

16 PROSPECTIVE JUROR #125: Yeah I can hear you.

17 THE COURT: Great, have a seat.

18 Anybody else with any law enforcement connections?

19 PROSPECTIVE JUROR #143: Badge number 143.

20 THE COURT: One, four, three; yes, ma'am.

21 PROSPECTIVE JUROR #143: I have three in-laws in police departments.

22 THE COURT: And where are they?

23 PROSPECTIVE JUROR #143: I have two of -- one sister-in-law, one brother-
24 in-law in Dallas, and one brother-in-law in Detroit.

25 THE COURT: It shouldn't impact your ability here. Thanks.

1 PROSPECTIVE JUROR #137: Number 137.

2 THE COURT: Yes 137.

3 PROSPECTIVE JUROR #137: My husband was once a corrections officer
4 but he's not any longer.

5 THE COURT: Okay, it shouldn't be a problem.

6 PROSPECTIVE JUROR #137: No.

7 THE COURT: Anybody else? Okay.

8 Is there anybody who may not be able to follow all of the instructions
9 that I give you on the law, even if those instructions differ from your personal ideas
10 of what the law ought to be? In any criminal trial there are actually 13 judges, the 12
11 jurors who sit over there are the judges of the questions of fact. As the judge
12 presiding in this case I am the judge on the questions of law. It's my responsibility at
13 the end of the case to give you instructions on the law that apply in a particular case.
14 It would be a violation of a juror's duty if he or she tried to make a decision in the
15 case based upon what he or she believed the law to be if that differed from what I
16 give you in the instructions. With that in mind, is there anyone who feels they
17 cannot be fact-finders and follow my instructions on the law in this case?

18 Under our system certain principles apply in every single criminal trial.
19 They are that the information filed in this case is a mere accusation and is not
20 evidence of guilt. Two, that the defendant is presumed innocent. And three, that
21 the State must prove that the defendant is guilty beyond a reasonable doubt. Does
22 anyone not understand or believe in these basic concepts of American Justice?

23 Does anybody know anything about this case other than what we've
24 talked about today in the courtroom?

25 All righty, when your number is called follow Arthur's directions and go

1 to the seat that he points you to.

2 All right, 113.

3 THE MARSHAL: Come to me.

4 THE COURT: Then 116, 117, 118, 119, 121, 122, 123, 124, 125, do I have
5 125? 128, 129, 130, 131, 133, 135. Arthur, somebody left their coat in a chair.
6 We'll get it in a little bit. 136, 137, 138, 139, 141, 142, 143, and 144.

7 Okay for those people over here I'm going to be with you in just a
8 moment to ask you some questions. For all of you over here whoever -- if people
9 leave over here the next in order is going to fill in their spot so you might want to
10 listen to what I ask them because you'll be asked the very same questions if you
11 come over here. So right now I'm just talking to you all.

12 What I'm going to like for everybody to do is introduce themselves, not
13 their names, just their numbers, and I'm going to ask you to tell me the following.
14 You're going to -- number 113 is going to go first and she's going to tell me the
15 following: her number, what she does for a living -- not yet -- what she does for a
16 living, is she married or single, what does the spouse do if she has a -- if she's
17 married or has a significant other, how long have you lived here, where did you
18 move from, have you ever done jury service before.

19 So, and I'll help you if you forget any of those things because I've only
20 done it a thousand times. All right, so 113 -- and you can stay in your seat -- what
21 do you do?

22 PROSPECTIVE JUROR #113: I'm a registered nurse.

23 THE COURT: Married or single?

24 PROSPECTIVE JUROR #113: Married.

25 THE COURT: What does your husband do?

1 PROSPECTIVE JUROR #113: He's an electrician.
2 THE COURT: How long have you lived here?
3 PROSPECTIVE JUROR #113: Fourteen years.
4 THE COURT: Where did you move from?
5 PROSPECTIVE JUROR #113: Southern California.
6 THE COURT: Have you ever done jury service before?
7 PROSPECTIVE JUROR #113: Yes.
8 THE COURT: And where did you do jury service?
9 PROSPECTIVE JUROR #113: In Southern California.
10 THE COURT: So it was a while ago?
11 PROSPECTIVE JUROR #113: Yes, quite a while.
12 THE COURT: Was it a civil or a criminal case, do you remember?
13 PROSPECTIVE JUROR #113: Well actually I just got up and they excused
14 me.
15 THE COURT: All right, so you didn't actually serve?
16 PROSPECTIVE JUROR #113: No, I didn't.
17 THE COURT: I'm looking to know whether you served or not, all right? Okay,
18 thank you very much. Pass the mike next door to you to 116.
19 Hi, what do you do?
20 PROSPECTIVE JUROR #116: Hi, I'm a paralegal.
21 THE COURT: In what kind of firm?
22 PROSPECTIVE JUROR #116: Civil litigation.
23 THE COURT: Okay. Married or single?
24 PROSPECTIVE JUROR #116: Married.
25 THE COURT: What's your spouse do?

1 PROSPECTIVE JUROR #116: Sound designer.
2 THE COURT: How long have you lived here?
3 PROSPECTIVE JUROR #116: Twelve years.
4 THE COURT: And where did you move here from?
5 PROSPECTIVE JUROR #116: Wisconsin.
6 THE COURT: And have you ever done jury service before?
7 PROSPECTIVE JUROR #116: No.
8 THE COURT: Okay, thank you; 117, hello. What do you do?
9 PROSPECTIVE JUROR #117: Optician.
10 THE COURT: Optician?
11 PROSPECTIVE JUROR #117: Uh-huh.
12 THE COURT: Is that a yes?
13 PROSPECTIVE JUROR #117: That's a yes.
14 THE COURT: Okay, uh-huh doesn't work here. Married or single?
15 PROSPECTIVE JUROR #117: I'm single.
16 THE COURT: How long have you lived here?
17 PROSPECTIVE JUROR #117: Fifteen years.
18 THE COURT: Where did you move from?
19 PROSPECTIVE JUROR #117: Salt Lake.
20 THE COURT: And have you ever done jury service before?
21 PROSPECTIVE JUROR #117: No.
22 THE COURT: Thank you. Should be 118?
23 PROSPECTIVE JUROR #118: Delivery --
24 THE COURT: Are you 118?
25 PROSPECTIVE JUROR #118: Yes, 118; yeah.

1 THE COURT: Hi, what do you do?
2 PROSPECTIVE JUROR #118: Delivery driver.
3 THE COURT: Married or single?
4 PROSPECTIVE JUROR #118: Married.
5 THE COURT: What's your wife do?
6 PROSPECTIVE JUROR #118: Partially disabled.
7 THE COURT: Okay. How long have you been here?
8 PROSPECTIVE JUROR #118: Two years.
9 THE COURT: Where did you move from?
10 PROSPECTIVE JUROR #118: Northern California.
11 THE COURT: And have you ever done jury service?
12 PROSPECTIVE JUROR #118: Nope.
13 THE COURT: Thank you; 119? Hi, what do you do?
14 PROSPECTIVE JUROR #119: I work for the Department of Health and
15 Human Services.
16 THE COURT: What do you do there?
17 PROSPECTIVE JUROR #119: I'm a Family Services Supervisor in the
18 Welfare Division.
19 THE COURT: Okay, married or single?
20 PROSPECTIVE JUROR #119: Single.
21 THE COURT: How long you been here?
22 PROSPECTIVE JUROR #119: Thirty-one years.
23 THE COURT: Where did you move from?
24 PROSPECTIVE JUROR #119: Buffalo, New York.
25 THE COURT: And have you ever sat on a jury before?

1 PROSPECTIVE JUROR #119: Yes.
2 THE COURT: And how long ago was that?
3 PROSPECTIVE JUROR #119: About 10 years.
4 THE COURT: Civil or criminal?
5 PROSPECTIVE JUROR #119: Criminal.
6 THE COURT: Without telling me what the verdict was, did your jury reach a
7 verdict?
8 PROSPECTIVE JUROR #119: Yes.
9 THE COURT: Were you the foreperson of that jury?
10 PROSPECTIVE JUROR #119: No.
11 THE COURT: Okay, thanks a lot; 121, hi, what do you do?
12 PROSPECTIVE JUROR #121: Dog groomer.
13 THE COURT: Married or single?
14 PROSPECTIVE JUROR #121: Single.
15 THE COURT: How long you lived here?
16 PROSPECTIVE JUROR #121: Twelve years.
17 THE COURT: Where did you move from?
18 PROSPECTIVE JUROR #121: Massachusetts.
19 THE COURT: And have you ever sat on a jury before?
20 PROSPECTIVE JUROR #121: No.
21 THE COURT: Thank you; 122, hello.
22 PROSPECTIVE JUROR #122: Hello.
23 THE COURT: What do you do?
24 PROSPECTIVE JUROR #122: Delivery driver.
25 THE COURT: Our second delivery driver. Married or single?

1 PROSPECTIVE JUROR #122: Married.
2 THE COURT: What's your wife do?
3 PROSPECTIVE JUROR #122: She's a deli clerk.
4 THE COURT: How long have you lived here?
5 PROSPECTIVE JUROR #122: Twenty years.
6 THE COURT: Where'd you move from?
7 PROSPECTIVE JUROR #122: Southern California.
8 THE COURT: Have you ever been on a jury?
9 PROSPECTIVE JUROR #122: No.
10 THE COURT: Thank you; 123, hi.
11 PROSPECTIVE JUROR #123: Hi.
12 THE COURT: What do you do?
13 PROSPECTIVE JUROR #123: I'm a housewife.
14 THE COURT: Good for you; married?
15 PROSPECTIVE JUROR #123: Yes.
16 THE COURT: What does your husband do?
17 PROSPECTIVE JUROR #123: He's retired.
18 THE COURT: What did he retire from?
19 PROSPECTIVE JUROR #123: From Boeing Aerospace.
20 THE COURT: Okay, how long have you been here?
21 PROSPECTIVE JUROR #123: Been here for about four years.
22 THE COURT: Where did you move from?
23 PROSPECTIVE JUROR #123: Southern California.
24 THE COURT: And have you ever been on a jury before?
25 PROSPECTIVE JUROR #123: Yes.

1 THE COURT: Where did you serve?
2 PROSPECTIVE JUROR #123: In Southern California.
3 THE COURT: How long ago?
4 PROSPECTIVE JUROR #123: I believe it was in the '90's.
5 THE COURT: Okay, do you remember whether it was a civil or a criminal
6 case?
7 PROSPECTIVE JUROR #123: A civil.
8 THE COURT: Okay. Did your jury deliberate and reach a verdict?
9 PROSPECTIVE JUROR #123: Yes.
10 THE COURT: Were you the foreperson of that jury?
11 PROSPECTIVE JUROR #123: No.
12 THE COURT: Thank you. Arthur. All right, hi 124, what do you do?
13 PROSPECTIVE JUROR #124: Mobile detailer.
14 THE COURT: And married or single?
15 PROSPECTIVE JUROR #124: Married.
16 THE COURT: What's your wife do?
17 PROSPECTIVE JUROR #124: Unemployed.
18 THE COURT: And how long have you lived in Las Vegas?
19 PROSPECTIVE JUROR #124: About five years.
20 THE COURT: Where'd you move from?
21 PROSPECTIVE JUROR #124: Arizona.
22 THE COURT: Have you ever been on a jury before?
23 PROSPECTIVE JUROR #124: No.
24 THE COURT: Thank you; 125, hi.
25 PROSPECTIVE JUROR #125: Hi.

1 THE COURT: What do you do?
2 PROSPECTIVE JUROR #125: I'm retired.
3 THE COURT: Retired from what?
4 PROSPECTIVE JUROR #125: General Motors.
5 THE COURT: Okay. Married?
6 PROSPECTIVE JUROR #125: Yes.
7 THE COURT: What's your wife do?
8 PROSPECTIVE JUROR #125: She's a homemaker.
9 THE COURT: How long you lived here?
10 PROSPECTIVE JUROR #125: Nine years.
11 THE COURT: Where'd you move from?
12 PROSPECTIVE JUROR #125: Buffalo, New York.
13 THE COURT: Have you ever been on a jury before?
14 PROSPECTIVE JUROR #125: No, I haven't.
15 THE COURT: Thank you; 128, hello.
16 PROSPECTIVE JUROR #128: Hi.
17 THE COURT: What do you do?
18 PROSPECTIVE JUROR #128: A manager in a phone center.
19 THE COURT: Married or single?
20 PROSPECTIVE JUROR #128: Single.
21 THE COURT: How long have you been here?
22 PROSPECTIVE JUROR #128: About 12 years.
23 THE COURT: Where'd you move from?
24 PROSPECTIVE JUROR #128: Southern California.
25 THE COURT: Have you ever been on a jury?

1 PROSPECTIVE JUROR #128: Yes.

2 THE COURT: In Southern California?

3 PROSPECTIVE JUROR #128: Here too.

4 THE COURT: And here, all right let's talk about here. How long ago do you
5 think you served?

6 PROSPECTIVE JUROR #128: They get me every three years at least.

7 THE COURT: I know, there are people who are here for 30 years, we've
8 never seen them before.

9 PROSPECTIVE JUROR #128: The last time I was here I was on a trial.

10 THE COURT: All right, and civil or criminal?

11 PROSPECTIVE JUROR #128: Civil.

12 THE COURT: Did your jury go back and deliberate and reach a verdict?

13 PROSPECTIVE JUROR #128: Yes, we did.

14 THE COURT: Were you the foreperson of that jury?

15 PROSPECTIVE JUROR #128: No, I was not.

16 THE COURT: Okay great, thanks. And this should be 129?

17 PROSPECTIVE JUROR #129: Yes.

18 THE COURT: Hi, what do you do?

19 PROSPECTIVE JUROR #129: I'm the Chief of Protocol for the state of
20 Nevada.

21 THE COURT: Protocol. Okay, married or single?

22 PROSPECTIVE JUROR #129: Widow.

23 THE COURT: Okay, how long have you been here?

24 PROSPECTIVE JUROR #129: Eleven years.

25 THE COURT: Where'd you move from?

1 PROSPECTIVE JUROR #129: Southern California.

2 THE COURT: Gosh it's a Southern California jury today. Sometimes I get
3 groups, it's interesting. And have you ever done jury service before?

4 PROSPECTIVE JUROR #129: Yes, I was a juror at large, but I sat through
5 the whole trial.

6 THE COURT: Juror at large. Did you deliberate?

7 PROSPECTIVE JUROR #129: No.

8 THE COURT: And was that in California?

9 PROSPECTIVE JUROR #129: Yes.

10 THE COURT: See we don't have jurors at large. We have jurors -- I mean --
11 were you considered an alternate?

12 PROSPECTIVE JUROR #129: That's what I was, I was an alternate. Sorry,
13 it's been 20 years, I forgot the term.

14 THE COURT: Yeah that's okay. So there was a group of you, you were
15 selected as the alternate --

16 PROSPECTIVE JUROR #129: Right.

17 THE COURT: -- and you didn't go back and deliberate?

18 PROSPECTIVE JUROR #129: In case someone got sick or couldn't make it,
19 exactly.

20 THE COURT: Right, that's what you were, an alternate.

21 PROSPECTIVE JUROR #129: Yeah.

22 THE COURT: Okay, was it a civil or a criminal case?

23 PROSPECTIVE JUROR #129: Criminal.

24 THE COURT: Okay. Thank you. Pass that microphone for me; 130?

25 PROSPECTIVE JUROR #130: Yes.

1 THE COURT: Hi, what do you do?
2 PROSPECTIVE JUROR #130: Human resource coordinator and assistant
3 accountant.
4 THE COURT: Okay, married or single?
5 PROSPECTIVE JUROR #130: Single.
6 THE COURT: How long have you lived here?
7 PROSPECTIVE JUROR #130: Born here.
8 THE COURT: Native, okay. And have you ever done jury service before?
9 PROSPECTIVE JUROR #130: No.
10 THE COURT: All right, thanks; 131, hello.
11 PROSPECTIVE JUROR #131: Hello.
12 THE COURT: What do you do?
13 PROSPECTIVE JUROR #131: I'm a loss prevention manager.
14 THE COURT: Married or single?
15 PROSPECTIVE JUROR #131: Married.
16 THE COURT: What's your wife do?
17 PROSPECTIVE JUROR #131: She's a retail manager.
18 THE COURT: How long you been here?
19 PROSPECTIVE JUROR #131: Four years.
20 THE COURT: Where'd you move from?
21 PROSPECTIVE JUROR #131: Southern California.
22 THE COURT: I could've said that and it would have been right. And have
23 you ever done jury service before?
24 PROSPECTIVE JUROR #131: No.
25 THE COURT: Thanks; 133, hello.

1 PROSPECTIVE JUROR #133: Hello.
2 THE COURT: What do you do?
3 PROSPECTIVE JUROR #133: Homemaker.
4 THE COURT: Married?
5 PROSPECTIVE JUROR #133: Married.
6 THE COURT: What's your husband do?
7 PROSPECTIVE JUROR #133: Retired.
8 THE COURT: From?
9 PROSPECTIVE JUROR #133: Banker.
10 THE COURT: How long you been here?
11 PROSPECTIVE JUROR #133: Six and a half years.
12 THE COURT: Where'd you move from?
13 PROSPECTIVE JUROR #133: Southern California.
14 THE COURT: So weird how that happens. Okay, ever been on a jury?
15 PROSPECTIVE JUROR #133: Yes.
16 THE COURT: And in California?
17 PROSPECTIVE JUROR #133: Yes.
18 THE COURT: Civil or criminal?
19 PROSPECTIVE JUROR #133: Civil.
20 THE COURT: Did your jury reach a verdict?
21 PROSPECTIVE JUROR #133: Yes.
22 THE COURT: Were you the foreperson?
23 PROSPECTIVE JUROR #133: No.
24 THE COURT: Thank you; 135, hi.
25 PROSPECTIVE JUROR #135: 135, I'm a contractor. I'm married. My wife

1 works for me. I've been in Vegas for about 15 years, and I've never served on a
2 jury.

3 THE COURT: Where'd you move from?

4 PROSPECTIVE JUROR #135: Southern California.

5 THE COURT: You people are making this up, I know. I'm teasing. Ask
6 Arthur where he's from. Go ahead, tell us, Arthur.

7 THE MARSHAL: Crenshaw and Washington.

8 THE COURT: Southern California. Okay, 136, hi.

9 PROSPECTIVE JUROR #136: Hi.

10 THE COURT: What do you do?

11 PROSPECTIVE JUROR #136: I'm a hair stylist.

12 THE COURT: Married or single?

13 PROSPECTIVE JUROR #136: Single.

14 THE COURT: How long you been here?

15 PROSPECTIVE JUROR #136: Native.

16 THE COURT: Oh good, so you're not from Southern California. And have
17 you ever served on a jury before?

18 PROSPECTIVE JUROR #136: Yes.

19 THE COURT: And how long ago do you think that was?

20 PROSPECTIVE JUROR #136: About three years.

21 THE COURT: Civil or criminal?

22 PROSPECTIVE JUROR #136: Criminal.

23 THE COURT: Did your jury deliberate and reach a verdict?

24 PROSPECTIVE JUROR #136: Yes.

25 THE COURT: Were you the foreperson of that jury?

1 PROSPECTIVE JUROR #136: No.
2 THE COURT: Thank you; 137, hi.
3 PROSPECTIVE JUROR #137: Hi, I'm a teacher.
4 THE COURT: And what grade do you teach?
5 PROSPECTIVE JUROR #137: Kindergarten.
6 THE COURT: Okay.
7 PROSPECTIVE JUROR #137: I'm married. My husband's a realtor. I've
8 been here nine years, and I'm from New Mexico.
9 THE COURT: Oh good. And have you ever served on a jury before?
10 PROSPECTIVE JUROR #137: No.
11 THE COURT: Thank you; 138, hi.
12 PROSPECTIVE JUROR #138: Hi.
13 THE COURT: What do you do?
14 PROSPECTIVE JUROR #138: I'm a teacher. I teach 4th grade, married,
15 been here 22 years. My husband's a fabricator. I've never been on a jury.
16 THE COURT: All right and where'd you move from 22 years ago?
17 PROSPECTIVE JUROR #138: Wisconsin.
18 THE COURT: Okay, good. Number 138, hello.
19 PROSPECTIVE JUROR #139: Hello.
20 THE COURT: What do you do?
21 PROSPECTIVE JUROR #139: Pharmacist. Pharmacist.
22 THE COURT: No, is the little red light on?
23 PROSPECTIVE JUROR #139: How about this?
24 THE COURT: Tap on it for me. Okay just speak closer.
25 PROSPECTIVE JUROR #139: Pharmacist.

1 THE COURT: You're a pharmacist. All right, married or single?
2 PROSPECTIVE JUROR #139: Married.
3 THE COURT: What's your wife do?
4 PROSPECTIVE JUROR #139: Library.
5 THE COURT: How long you been here?
6 PROSPECTIVE JUROR #139: Fourteen years.
7 THE COURT: Where'd you move from?
8 PROSPECTIVE JUROR #139: Baltimore.
9 THE COURT: Have you ever been on a jury?
10 PROSPECTIVE JUROR #139: Yes.
11 THE COURT: And what kind of jury were you on?
12 PROSPECTIVE JUROR #139: Criminal.
13 THE COURT: And was that here or in Baltimore?
14 PROSPECTIVE JUROR #139: In Baltimore.
15 THE COURT: Did you jury deliberate and reach a verdict?
16 PROSPECTIVE JUROR #139: Yes.
17 THE COURT: Were you the foreperson of that jury?
18 PROSPECTIVE JUROR #139: No.
19 THE COURT: Okay, thanks. And this should be one-forty --
20 PROSPECTIVE JUROR #141: One.
21 THE COURT: 141, hi what do you do?
22 PROSPECTIVE JUROR #141: I'm a full-time student.
23 THE COURT: At which school?
24 PROSPECTIVE JUROR #141: Apollo College.
25 THE COURT: What are you studying?

1 PROSPECTIVE JUROR #141: Respiratory therapy.
2 THE COURT: Okay, married or single?
3 PROSPECTIVE JUROR #141: Single.
4 THE COURT: How long you been here?
5 PROSPECTIVE JUROR #141: Ten years.
6 THE COURT: Where'd you move from?
7 PROSPECTIVE JUROR #141: Des Moines, Iowa.
8 THE COURT: You sound like you're from Des Moines. Have you ever been
9 on a jury before?
10 PROSPECTIVE JUROR #141: No.
11 THE COURT: Thank you; 142, hi.
12 PROSPECTIVE JUROR #142: Hi.
13 THE COURT: What do you do?
14 PROSPECTIVE JUROR #142: I'm a nail tech.
15 THE COURT: An --
16 PROSPECTIVE JUROR #142: A nail tech.
17 THE COURT: A nail tech, all right. Married or single?
18 PROSPECTIVE JUROR #142: Single.
19 THE COURT: How long you been here?
20 PROSPECTIVE JUROR #142: Thirteen years.
21 THE COURT: Where'd you move from?
22 PROSPECTIVE JUROR #142: Southern California.
23 THE COURT: Southern California. All right, and have you ever done jury
24 service before?
25 PROSPECTIVE JUROR #142: No.

1 THE COURT: All right, thanks; 143, hi.
2 PROSPECTIVE JUROR #143: Hi.
3 THE COURT: What do you do?
4 PROSPECTIVE JUROR #143: I'm home with my kids now. I used to practice
5 law, employment and labor. Married.
6 THE COURT: Here in Las Vegas?
7 PROSPECTIVE JUROR #143: No.
8 THE COURT: Okay.
9 PROSPECTIVE JUROR #143: Married; my husband is a banker. I'm from
10 Cleveland, Ohio. I've been here for three and a half years, and I've never been on a
11 jury before.
12 THE COURT: Okay great. And wait, so employment and labor, so not
13 criminal law; 144, hi. What do you do?
14 PROSPECTIVE JUROR #144: I'm a service tech.
15 THE COURT: A service tech?
16 PROSPECTIVE JUROR #144: Yeah.
17 THE COURT: And married or single?
18 PROSPECTIVE JUROR #144: Single.
19 THE COURT: How long you been here?
20 PROSPECTIVE JUROR #144: For about five years.
21 THE COURT: Where'd you move from?
22 PROSPECTIVE JUROR #144: Northern California.
23 THE COURT: Okay good, and have you ever been on a jury before?
24 PROSPECTIVE JUROR #144: No ma'am.
25 THE COURT: Okay, great. Okay, Arthur, could you please.

1 THE MARSHAL: I'm on it.

2 THE COURT: Thank you. Sometimes Arthur just needs a little rest because
3 he's older now and has a hard time getting around. Have pity on Arthur.

4 All right, among the 24 of you, do you know of any reason why you
5 couldn't be a completely fair and impartial juror if selected as one in this case?

6 Can everybody wait in forming their opinion as to the guilty or
7 innocence of the Defendant until all of the evidence has been heard? Because
8 that's what I'm going to tell you you have to do.

9 Have you or anybody close to you -- again close to you being the
10 operative word, not distant relatives -- any close family member or friend ever been
11 accused of a crime? Anybody close to you ever been accused of a crime? Please
12 raise your hand and tell us about it. And that would be number 130? Yes, 130.

13 PROSPECTIVE JUROR #130: I have a couple of brothers. I couldn't tell you
14 exactly what they were accused of.

15 THE COURT: But they've gotten in some sort of trouble?

16 PROSPECTIVE JUROR #130: Yes.

17 THE COURT: And if you can't tell us exactly then maybe you haven't -- you're
18 not that close, or you don't know?

19 PROSPECTIVE JUROR #130: I was younger so my mother didn't give me
20 the details, so.

21 THE COURT: All right, and is that in any way going to impact your ability to
22 be fair and impartial in this case?

23 PROSPECTIVE JUROR #130: No.

24 THE COURT: Thank you very much. Anybody else? In the back, Arthur.

25 PROSPECTIVE JUROR #122: Juror 122.

1 THE COURT: Yes, sir.

2 PROSPECTIVE JUROR #122: My daughter was carjacked a couple of years
3 ago, and I don't know if it would effect.

4 THE COURT: Okay, my next question is going to be anybody been the victim
5 of a crime so you're daughter was the victim of a carjacking?

6 PROSPECTIVE JUROR #122: Yes.

7 THE COURT: All right, was that here in Las Vegas?

8 PROSPECTIVE JUROR #122: Yes, it was.

9 THE COURT: Okay, did they catch anybody who did that?

10 PROSPECTIVE JUROR #122: Yes, they did.

11 THE COURT: And did that person go to trial?

12 PROSPECTIVE JUROR #122: Yes, he did.

13 THE COURT: Did she have to be a witness?

14 PROSPECTIVE JUROR #122: I believe she had to go to court, yes.

15 THE COURT: And you're a little emotional about this?

16 PROSPECTIVE JUROR #122: Well kind of nervous myself.

17 THE COURT: Nervous, all right there's nothing to be afraid of. Take a deep
18 breath, everything's good. And you think that that -- you know, you've heard a little
19 bit about this case, only what the prosecutors and the defense have said, you don't
20 know the facts of this case. What we're looking for are people who can sit and listen
21 to the evidence, sit and listen to the witnesses, and then you'd go back with -- you
22 would be back with eleven other people and collectively make a decision to find
23 whether the Defendant is guilty or not guilty. Are you capable of doing that and
24 being fair and impartial?

25 PROSPECTIVE JUROR #122: I believe I can.

1 THE COURT: Okay, let me know if you think of something that tells me you're
2 not, all right?

3 PROSPECTIVE JUROR #122: Yes.

4 THE COURT: Okay. Anybody who's got -- who accused of a crime? And my
5 next question would be the victim of a crime.

6 All right, anybody close to you such as a family member or a friend ever
7 been a victim of crime; 144?

8 PROSPECTIVE JUROR #144: Yeah, I was a victim of a crime when I got out
9 here, a stabbing.

10 THE COURT: A stabbing?

11 PROSPECTIVE JUROR #144: Yeah, I was stabbed by a homeless
12 gentleman and he was never caught.

13 THE COURT: Okay, is that going to impact your ability to be fair and impartial
14 in this case?

15 PROSPECTIVE JUROR #144: I believe so.

16 THE COURT: Okay, thanks for telling us. Anybody else? Right down -- my
17 student, 141.

18 PROSPECTIVE JUROR #141: Domestic violence.

19 THE COURT: Domestic violence? How long ago was that?

20 PROSPECTIVE JUROR #141: Seventeen years ago.

21 THE COURT: Okay, is that going to impact your ability to be a fair and
22 impartial juror in this case?

23 PROSPECTIVE JUROR #141: No, ma'am.

24 THE COURT: Thank you. Anybody else? In the back, Arthur. And that
25 would be 116.

1 PROSPECTIVE JUROR #116: Correct. I'm sorry, but this actually goes to
2 the question before. I just happened to think of it.

3 THE COURT: Oh that's fine.

4 PROSPECTIVE JUROR #141: My brother, who is no longer living, was
5 actually convicted of assault --

6 THE COURT: Okay.

7 PROSPECTIVE JUROR #141: -- 30 years ago.

8 THE COURT: And is that going to impact you in any way in listening to this
9 case?

10 PROSPECTIVE JUROR #141: No.

11 THE COURT: Thank you for telling us, appreciate it.

12 All right, can everybody in this case base their verdict solely on the
13 evidence brought out at the trial and the law that I give you in the instructions
14 without caring about what anybody else is going to think, your spouse, your friends.
15 You know, can you make a decision without caring about what anybody thinks in
16 this case? Okay.

17 And my final question before I turn it over to the attorneys is if you were
18 either the State or the defense on either side of the table here, would you be
19 comfortable having jurors just like yourselves sitting and hearing this case?
20 Everybody good with that? They all seem to be nodding their heads. That's a good
21 thing.

22 All right so that concludes my questioning. Will it be you, Mr.
23 Westmeyer?

24 MR. WESTMEYER: Yes, ma'am. Can I have the Court's indulgence for just
25 a minute?

1 THE COURT: Just a minute.

2 MR. WESTMEYER: Judge, we'll pass the panel for cause.

3 THE COURT: They'll pass for cause.

4 MR. WESTMEYER: I have no further questions to ask.

5 THE COURT: Okay, great. Who's going to do it, Ms. Kolias or Ms.

6 DiEdoardo?

7 MS. DIEDOARDO: Court's indulgence for just one moment. Actually yes, I'll
8 be doing it, Your Honor.

9 THE COURT: That's fine. You going to bring them in now?

10 THE MARSHAL: Yes.

11 THE COURT: Okay, just let me tell the ladies and gentlemen of the jury
12 what's happening.

13 Teach -- they bring children -- they bring in school students in to
14 observe many of the things that go on in our courtrooms and Arthur has just
15 informed me that there's a teacher out there who's got a bunch of students. They're
16 going to be coming in sitting over there where you all used to be, and that's what
17 that is. So I just want to let everybody know that that's what happening. We're
18 going to proceed like they're not here and hopefully they'll be well behaved.

19 Ms. DiEdoardo would you like to use the podium? You may --

20 MS. DIEDOARDO: If I may, Your Honor. Thank you.

21 THE COURT: -- if you'd like to. Just don't move the podium, Arthur gets a
22 little cranky.

23 MS. DIEDOARDO: I take a very strong desire to obey large men with guns,
24 so there you go, I'm all right with that.

25 Good morning everyone, I'm Christina DiEdoardo, cocounsel for the

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1 Defendant in this case, Mr. Martinez-Hernandez. As the Judge had mentioned there
2 are just other few follow-up questions to ask all of you as a group, and as I ask the
3 questions if any of you feel that you can respond to any of them I would appreciate it
4 if you'd raise you hand, that way Arthur can come by with the microphone and we
5 could discuss a little bit in greater detail.

6 First question I'd like to ask you as a group, a number of the parties in
7 this case and some of the witnesses do not speak English, and as a result they're
8 going to be testifying today through the services of our hard working court
9 interpreters. Would that pose a problem for any of you? When I say a problem
10 would that affect your ability to render a fair and impartial verdict in this case? So
11 everyone would have no problem with that whatsoever? Okay.

12 This case also involves -- you're also going to hear testimony regarding
13 a security guard who was also licensed to carry a firearm. If -- would that impact
14 your ability to render a fair and impartial verdict in this case? Okay.

15 And there will also be -- does anyone here have any particularized
16 experience with observing videotapes? I'm sorry --

17 THE COURT: Where's the mike? Arthur's busy right now if you all will assist
18 me.

19 M S. DIEDOARDO: Thank you. I'm sorry what's your badge number?

20 PROSPECTIVE JUROR #131: 131.

21 MS. DIEDOARDO: 131; thank you juror 131, and could you let us -- could
22 you tell us what is your expertise with looking at videotapes?

23 PROSPECTIVE JUROR #131: I've been doing loss prevention for 14 years
24 and we utilize CCTV so.

25 MS. DIEDOARDO: Outstanding, and so then much of your work be looking at

1 closed circuit videotapes and --

2 PROSPECTIVE JUROR #131: A lot of that surrounds that, yes.

3 MS. DIEDOARDO: Outstanding, thank you for telling us.

4 And just to reiterate something that the judge had placed out there as
5 well, the State and the defense have an equal desire to make sure that this is a
6 completely fair and impartial trial. Our client may or may not testify, but if he does
7 not testify the law states that he's -- it's as if he's covered with a blanket that says
8 he's innocent until my learned colleagues across the isle prove otherwise.

9 If Mr. Martinez-Hernandez does not testify in this case would that affect
10 your ability to render a fair and impartial verdict in this case?

11 Your Honor, just Court's indulgence.

12 THE COURT: Okay.

13 MS. DIEDOARDO: Judge, a few things -- just a few other things at the end,
14 Your Honor.

15 Have any of you -- it sounds like from the initial voir dire that the Court
16 conducted none of you are employers where you have employees directly working
17 for you, is that a true statement or do some of you directly have employees? If you -
18 - juror, if you can raise your hand so that we can bring the mike over, please.

19 THE COURT: That's the -- he's a contractor so I would think that he probably
20 has some folks working for him.

21 PROSPECTIVE JUROR #135: I'm sorry, what's the question?

22 MS. DIEDOARDO: Oh I'm --

23 THE COURT: Do you have people working for you?

24 PROSPECTIVE JUROR #135: Yes, ma'am.

25 MS. DIEDOARDO: Okay, and with that impact -- would your experience as

1 an employer having employees reporting directly to you, would that affect your
2 perception of the evidence and affect your ability to render a fair and impartial
3 verdict in this case?

4 PROSPECTIVE JUROR #135: No.

5 MS. DIEDOARDO: Great, thank you. I believe you have the colleague in the
6 back.

7 THE COURT: And in the back, number 119, right?

8 PROSPECTIVE JUROR #119: Yes.

9 THE COURT: Thank you.

10 MS. DIEDOARDO: Yes, juror 119, if you could let us know, you said you also
11 have employees working for you?

12 PROSPECTIVE JUROR #119: Yes I supervise a staff of about 11.

13 MS. DIEDOARDO: Do they work directly for you or are they -- you're working
14 for the same company and you're their --

15 PROSPECTIVE JUROR #119: Well they work for the State but I'm a
16 supervisor.

17 MS. DIEDOARDO: You're the supervisor, I see, okay. And would -- in your
18 capacity as a supervisor would you be able to divorce your experiences there from --
19 and be -- so that it wouldn't affect the testimony here in court today?

20 PROSPECTIVE JUROR #119: Would I be able to?

21 MS. DIEDOARDO: What I'm primarily reaching towards, we want to make
22 sure that people don't take in evidence from prior life experience and say well this is
23 the way I know things are done and not find -- not rule on the case pursuant to the
24 evidence. So my question is would you be able to hear this case with a fair and
25 open mind relying just on the evidence that you hear in court today and the law as

1 Judge Glass gives it to you?

2 PROSPECTIVE JUROR #119: Absolutely.

3 MS. DIEDOARDO: Okay, thank you.

4 THE COURT: The other thing is, Ms. DiEdoardo, is I give an instruction I give
5 in all cases where we know that all of you come with your own life experiences. We
6 don't ask you to leave them at the door. That's not possible. What we do ask for
7 you, like Ms. DiEdoardo just said, is you have to listen to the evidence, take the law
8 that I give you and the jury instructions and apply that, and try not to let too much of
9 what's happened in your life impact what it is in the jury deliberations. But that's
10 going to be kind of impossible. Everybody comes to the table with their own
11 experiences. You're not a clean slate when you walk in here, we understand that.
12 So go ahead.

13 MS. DIEDOARDO: Thank you, Your Honor.

14 And then just lastly, there may be evidence offered regarding an
15 outstanding tax lien in this case. I don't know if any of you have had -- has anyone
16 here had a tax lien entered against them by the IRS? I see none.

17 Judge, just, if I can break out of the format just I'm dying of curiosity, if
18 we might -- would the court ask the panel what a chief of protocol does? I'm just
19 curious, for the state.

20 THE COURT: Oh okay, let's see, number 129 hi. Yes, wait we need to give
21 you the microphone.

22 Because Ms. DiEdoardo is curious, and I actually am too, what does a
23 chief of protocol do?

24 PROSPECTIVE JUROR #129: I'm the official liaison for starters, I do a lot of
25 things. I work with the Las Vegas Convention Authority and all the different ethnic

1 organizations in the state, but I am the official liaison to 92 foreign representatives
2 who are posted in Los Angeles referred to as the Consula Corps. They are one
3 level below an ambassador, so they all have jurisdiction over various states to
4 promote trade, cultural exchanges and academic exchanges, and I'm the official
5 liaison for the state of Nevada. I did that in California prior to coming here and was
6 privileged to be the first person in this state to represent the state here with those
7 foreign representatives.

8 THE COURT: Thank you.

9 MS. DIEDOARDO: Thank you. Thank you, Your Honor.

10 THE COURT: We all learned something today. Anything else, Ms.

11 DiEdoardo?

12 MS. DIEDOARDO: No Your Honor, just Court's indulgence for a moment.

13 THE COURT: All right.

14 [Colloquy]

15 THE COURT: Ladies, are we passing for cause?

16 MS. DIEDOARDO: Your Honor, actually we have some preemptories we
17 would like to exercise at this time.

18 THE COURT: No, you do that --

19 MS. KOLIAS: For cause.

20 MS. DIEDOARDO: Oh for cause at this point I guess -- well yes, we pass for
21 cause at this point in time. Thank you.

22 THE COURT: You pass for cause. Now Arthur will take this sheet, he'll give
23 it to the State, they'll mark down their preemptory challenge, then they're going to
24 give you yours. The State's on the top, the defense is on the bottom. Write in the
25 numbers, and go back and forth until you fill out all those boxes. If you waive one

1 you don't waive all, and then when you're done Arthur will give it to me.

2 We're going to be at ease for a few moments, ladies and gentlemen,
3 while they exercise the preemptory challenges.

4 [Off the record at 11:29 a.m.]

5 [On the record at 11:34 a.m.]

6 THE COURT: Okay, thank you all for your patience, ladies and gentlemen.
7 When your number is called that means you may take your stuff and return back to
8 Jury Services, and here we go.

9 Number 130, thank you very much, you are excused.

10 Number 125, thank you very much sir, you are excused. Leave the
11 headphones for me please. I'll get in trouble; 133, thank you very much, you are
12 excused; 122, thank you very much sir, you are excused; 123, thank you very much
13 ma'am, you are excused; 137, thank you very much ma'am, you are excused; 138,
14 thank you very much, you are excused; and 121, thank you very much, you are
15 excused.

16 So here's what we're going to do, 113 stay where you are; 116 stay
17 where you are; 117, stay where you are; 118, stay where you are; 119, you are in
18 the same; 124, sir move up please; 128, you'll move to the next seat. After him 129,
19 you'll move to the next seat. After that 131, move down please; 135, you're next;
20 136, you'll move up to the next available seat; 139, you'll be next; and 141, you'll be
21 next; 142, 143 and 144, thank you very much, as well as all of you over there, you
22 are all excused, thank you. Go back to Jury Services.

23 All right, I need all our prospective jurors to please rise. Sandra will
24 now swear you in as jurors. Raise your right hands, please.

25 [The Jury Panel is sworn in by the clerk]

1 THE COURT: Have a seat, ladies and gentlemen, I'm going to take the
2 remaining time to go ahead and read you some preliminary information about how
3 the trial's going to work, then we're going to have a lunch break, we're going to
4 come back, we'll do opening statements, we'll do witnesses, and we'll hopefully
5 finish up this trial; hopefully. I'm going to do my best.

6 All right, ladies and gentlemen, you are admonished that no juror may
7 declare to a fellow juror any fact relating to this case of her or her own knowledge.
8 And if you discover during the course of this trial that somehow you know something
9 about this case go right to Arthur, tell him and he'll come tell me.

10 During the course of this trial the attorneys for both sides, the parties,
11 the witnesses and the court personnel other than Arthur are not permitted to talk to
12 you -- bless you. We are not being antisocial, but we are bound by the rules of
13 ethics and the law not to talk to you. To do so might contaminate your verdict.

14 You are admonished additionally that you are not to visit the scene of
15 any of the acts or occurrences made mention of during this trial, and you are not to
16 do any independent internet research on your own relating to anything to do with
17 this trial unless you were directed to do so by me.

18 Ladies and gentlemen, what I will now say is intended to serve as an
19 introduction to the trial of this case. It is not a substitute for the detailed instructions
20 on the law, which I give you at the close of the case before you retire to consider
21 your verdict.

22 This is a criminal case commences by the State of Nevada against Mr.
23 Martinez-Hernandez. The case is based on an information. Sandy, my clerk, will
24 read to you that information and state the plea that the Defendant has entered;
25 Sandra.

1 [The Clerk reads the Information aloud]

2 THE COURT: Thanks, Sandy. This case is based on an information which
3 has been read to you by my clerk. You should distinctly understand that the
4 information is simply a charge and that it is not in any sense evidence of the
5 allegations it contains.

6 The Defendant has pled not guilty to the information. The State
7 therefore has the burden of proving each of the essential elements of the
8 information beyond a reasonable doubt. As the Defendant sits there now he is not
9 guilty. The purpose of this trial is to determine whether the State will meet that
10 burden.

11 It is your primary responsibility as jurors to find and determine the facts.
12 You are the sole judge of the facts under our system of criminal procedure. You are
13 to determine the facts from the testimony you hear and the other evidence included
14 during the trial, and you're -- it's up to you. Wait, you are here to determine the facts
15 from the testimony you hear and the other evidence including exhibits introduced in
16 court. It is up to you to determine the inferences which you feel may be properly
17 drawn from the evidence.

18 The parties may sometimes present objections to some of the
19 testimony or other evidence. It is the duty of a lawyer to object to evidence which he
20 or she believes may not be properly offered, and you should not be prejudiced in
21 any way against the lawyer or his client because of the objections they make on
22 behalf of the party he or she represents.

23 At times I may sustain the objections or direct that you disregard certain
24 testimony or exhibits. You must not consider any evidence to which an objection
25 has been sustained or which I have instructed you to disregard.

1 Anything you may have seen or heard outside of the courtroom is not
2 evidence and must also be disregarded. Remember statements, arguments, and
3 the opinions of the attorneys are not evidence, but if the attorneys stipulate as to the
4 existence of a fact you must accept the stipulation as evidence and regard that fact
5 as proved.

6 You must not speculate to be true any insinuation suggested by a
7 question asked a witness. A question is not evidence and may be considered only
8 as it supplies meaning to the answer.

9 You must not be influenced in any degree by an personal feeling of
10 sympathy for or prejudice against the State or the Defendant. Both sides are
11 entitled to the same and impartial consideration.

12 In considering the weight and value of the testimony of any witness you
13 may take into consideration the appearance, attitude and behavior of the witness,
14 the interest of the witness in the outcome of the case, the relation of the witness to
15 the Defendant or the State, the inclination of the witness to speak truthfully or not,
16 and the probability or improbability of the witness' statements, and all of the facts
17 and circumstances in evidence. You may give the testimony of any witness just
18 such weight and value as you believe the witness is entitled to receive.

19 There are two types of evidence ladies and gentlemen, direct and
20 circumstantial. Direct evidence is testimony by a witness about what that witness
21 personally saw, or heard, or did. Circumstantial evidence is testimony or exhibits
22 which are proof of a particular fact from which, if proven, you may infer the existence
23 of a second fact. Here's some examples. This is my dog, one of my three dogs.
24 His name's Magic, very nice dog, okay. But Magic has a shoe problem, all right.
25 So, I go walking in my family room, Magic has one of my brand new shoes in his

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO MARTINEZ-HERNANDEZ,)

Appellant,)

v.)

STATE OF NEVADA,)

Respondent.)

Electronically Filed
May 03 2017 08:16 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO.: 72069

E-FILE

D.C. Case No.: 07-C-230237

Dept.: XVII

APPELLANT'S APPENDIX VOLUME I

**Appeal from the Denial of a Post-Conviction Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

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ADAM LAXALT
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Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

...

Counsel for Appellant

Counsel for Respondent

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Case No.: 72069

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CERTIFICATE OF SERVICE

I certify I am an assistant to Terrence M. Jackson, Esquire; a person competent to serve papers, not a party to the above-entitled action and on the 2nd day of May, 2017, I served a copy of the foregoing: Appellant's Appendix, Volumes I and II, as follows:


[X] Via Electronic Service to the Nevada Supreme Court, to the Eighth Judicial District Court, and by U. S. mail with first class postage affixed to the Nevada Attorney General and the Petitioner/Appellant as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com
APPELLATE DIVISION
steven.owens@clarkcountyda.com

ADAM P. LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

Lazaro Martinez-Hernandez c/o
1716 Weeping Willow
Las Vegas, NV 89104

By: /s/ Ila C. Wills
Assistant to Terrence M. Jackson, Esq.


CLERK OF THE COURT

1 **INFO**

2 **DAVID ROGER**
3 Clark County District Attorney
4 Nevada Bar #002781
5 **NELL KEENAN**
6 Deputy District Attorney
7 Nevada Bar #008822
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

12 I.A. 02/21/07

13 10:30 AM

14 R. LUCHERINI, Esq.

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,)

16 Plaintiff,)

17 -vs-)

18 LAZRO MARTINEZ-HERNANDEZ,
19 aka, Lazaro Martinezhernandez, #1493472)

20 Defendant.)

Case No: C230237
Dept No: XVIII

INFORMATION

21 STATE OF NEVADA }

22 COUNTY OF CLARK }

ss.

23 DAVID ROGER, District Attorney within and for the County of Clark, State of
24 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

25 That LAZRO MARTINEZ-HERNANDEZ, aka, Lazaro Martinezhernandez, the
26 Defendant(s) above named, having committed the crime of **ASSAULT WITH A DEADLY**
27 **WEAPON (Felony - NRS 200.471)**, on or about the 12th day of June, 2006, within the
28 County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such
cases made and provided, and against the peace and dignity of the State of Nevada, did then
and there wilfully, unlawfully, feloniously and intentionally place another person, to-wit:
RICHARD PENA, in reasonable apprehension of immediate bodily harm with use of a

//

//

AA 0001

1 deadly weapon, to-wit: a firearm, by displaying said firearm and threatening to kill the said
2 RICHARD PENA, causing him to reasonably apprehend being shot.

3
4 DAVID ROGER
DISTRICT ATTORNEY
5 Nevada Bar #002781

6
7 BY /s/ Brian J. Kochevar for
8 NELL KEENAN
Deputy District Attorney
9 Nevada Bar #008822

10 Names of witnesses known to the District Attorney's Office at the time of filing this
11 Information are as follows:

12	<u>NAME</u>	<u>ADDRESS</u>
13	CUSTODIAN OF RECORDS	Clark County Detention Center, 330 S. Casino
14	OR DESIGNEE	Center Blvd., Las Vegas, NV
15	CUSTODIAN OF RECORDS	LVMPD Dispatch, 400 E. Stewart, Las Vegas, NV
16	OR DESIGNEE	
17	CUSTODIAN OF RECORDS	LVMPD Records, 400 E. Stewart, Las Vegas, NV
18	OR DESIGNEE	
19	DENTLER, G.	LVMPD #8371
20	ESTEVEZ, Jorge	2080 Karen Ave., #45, Las Vegas, NV 89109
21	FLETCHER, D.	LVMPD #8734
22	HERNANDEZLEAL, Beatrice	2665 E. Bruce St., #244, Las Vegas, NV 89101
23	PENA, Richard	1014 E. Buffalo, Santa Ana, CA 92706
24	RICHTER, J.	LVMPD #8609

25
26 DA#06f11149x/rj
27 LVMPD EV#0606120431
28 AWDW - F
(TK3)

1 VER

ORIGINAL

FILED IN OPEN COURT

FEB 05 2008

CHARLES J. SHORT
CLERK OF THE COURT

BY

SANDRA JETER, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 LAZRO MARTINEZ-HERNANDEZ,

11 Defendant.

CASE NO: C230237

DEPT NO: V

12 VERDICT

13 We, the jury in the above entitled case, find the Defendant LAZRO MARTINEZ-
14 HERNANDEZ, as follows:

15 COUNT 1 - ASSAULT WITH A DEADLY WEAPON

16 (please check the appropriate box, select only one)

17 ☒ Guilty of ASSAULT WITH A DEADLY WEAPON

18 ☐ Not Guilty

19 DATED this 5 day of February, 2008

20
21
22 FOREPERSON

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25
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28 AA 0003

ORIGINAL

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JOCP

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED

APR 25 9 57 AM '08

Chaf...
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LAZARO MARTINEZ-HERNANDEZ
aka Lazaro Martinezhernandez, #1493472

Defendant.

Case No: C230237

Dept No: V

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime(s) of ASSAULT WITH A DEADLY WEAPON (Felony), in violation of NRS 200.471; thereafter, on the 10th day of April, 2008, the Defendant was present in court for sentencing with his counsel, WILLIAM CROCK, ESQ, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the \$25.00 Administrative Assessment Fee and \$150.00 DNA Analysis fee including submission to testing to determine genetic markers and/or secretor status, the Defendant is sentenced as follows: to a MINIMUM term of TWELVE (12) MONTHS and a MAXIMUM term of THIRTY-SIX (36) MONTHS in the NEVADA DEPARTMENT OF CORRECTIONS; sentence SUSPENDED, PROBATION for an indeterminate period not to exceed THREE (3) YEARS. CONDITIONS:

///

///

CLERK OF THE COURT

APR 25 2008

RECEIVED

CLERK OF THE COURT

APR 14 2008

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- 1 1. Deft. shall submit his/her person, property, place of residence, vehicle or areas under
- 2 his/her control to search at any time, with or without a search warrant or warrant of arrest,
- 3 for evidence of a crime or violation of probation by the Division of Parole and Probation or
- 4 its agent.
- 5 2. Comply with any curfew imposed by P&P.
- 6 3. Complete impulse control and anger management counseling as deemed necessary by an
- 7 evaluation.
- 8 4. Have no contact whatsoever with the victim or the victim's family.
- 9 5. Obtain and maintain full-time employment.
- 10 6. Do not possess any weapons.

11 DATED this 24 day of April, 2008.

12 
13 DISTRICT JUDGE
14 

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1 AJOC

FILED

FEB 01 2010

Alvin L. Williams
CLERK OF COURT

2
3 ORIGINAL

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6
7 THE STATE OF NEVADA,

8 Plaintiff,

CASE NO. C230237

9 -vs-

DEPT. NO. XVII

10 LAZRO MARTINEZ-HERNANDEZ
11 aka Lazaro Martinezhernandez
12 #1493472

13 Defendant.

14 AMENDED JUDGMENT OF CONVICTION

15 (JURY TRIAL)

16
17
18 The Defendant previously entered a plea of not guilty to the crime of ASSAULT
19 WITH A DEADLY WEAPON (Category B Felony), in violation of NRS 200.471; and the
20 matter having been tried before a jury and the Defendant having been found guilty of
21 the crime of ASSAULT WITH A DEADLY WEAPON (Category B Felony), in violation of
22 NRS 200.471; thereafter, on the 10TH day of April, 2008, the Defendant was present in
23 court for sentencing with counsel wherein the Court did adjudge the Defendant guilty of
24 said crime as set forth in the jury's verdict, suspended the execution of the sentence
25 imposed and granted probation to the Defendant.
26

27
28 THEREAFTER, a parole and probation officer provided the Court with a written
statement setting forth that the Defendant has, in the judgment of the parole and

0006

1 probation officer, violated the conditions of probation; and on the 21st day of January,
2 2010, the Defendant was present in court with his counsel, CARL ARNOLD, ESQ., and
3 pursuant to a probation violation hearing/proceeding, and good cause appearing to
4 amend the Judgment of Conviction; now therefore,
5

6 IT IS HEREBY ORDERED that the probation previously granted to the Defendant
7 is revoked; and IT IS FURTHER ORDERED that the original sentence of a MAXIMUM
8 of THIRTY-SIX (36) MONTHS with a MINIMUM Parole Eligibility of TWELVE (12)
9 MONTHS in the Nevada Department of Corrections (NDC) is imposed; with NINETY-
10 SIX (96) DAYS Credit for Time Served.
11

12
13 DATED this 1st day of February, 2010
14

15 
16 MICHAEL VILLANI
17 DISTRICT JUDGE
18
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28

FILED

FEB 01 2011

Alvin L. Harrison
CLERK OF COURT

1 **PCR**
2 **MARTIN HART, ESQ.**
3 Nevada Bar No. 5984
4 The Law Offices of Martin Hart Law, LLC
5 229 South Las Vegas Blvd Ste 200
6 Las Vegas, Nevada 89101
7 (702) 380-4278
8 Attorney for Defendant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

7 LAZARO MARTINEZ-HERNANDEZ,)

8 Petitioner,)

9 vs.)

10 HOWARD SKOLNIK, DIRECTOR
11 NEVADA DEPARTMENT OF
12 CORRECTIONS.)

13 Respondent.)

CASE NO.: C230237
DEPT. NO.:
DOCKET NO.:

PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

15 TO: THE HONORABLE JUDGE OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE
16 STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK:

17 COMES NOW, the above-named Petitioner, LAZARO MARTINEZ-HERNANDEZ, by and
18 through his undersigned attorney, Martin Hart, Esq., and hereby submits his Petition for Writ of Habeas
19 Corpus.

20 1. Name of institution and county in which Petitioner is presently imprisoned: As Defendant
21 is serving a sentence of probation, he is constructively imprisoned in the Nevada Department of
22 Corrections.

23 2. Name and location of court which entered the judgment of conviction under attack: Eighth
24 Judicial District Court - Clark County, Nevada.

25 3. Date of judgment of conviction: February 1, 2010.

26 4. Case number: C230237

27 5. (a) Sentence: 12 months to 36 months Nevada Department of Corrections.

- 1 (b) If sentence is death, state any date upon which execution is scheduled: N/A.
- 2 6. Is Petitioner presently serving a sentence for a conviction other than the conviction under
- 3 attack in this Petition? No.
- 4 7. Nature of offense involved and conviction being challenged: Assault with a Deadly Weapon.
- 5 8. What was Petitioner's plea? Not guilty.
- 6 9. If Petitioner entered a plea of guilty or guilty but mentally ill to one count of an indictment
- 7 or information, and a plea of not guilty to another count of an indictment or information, or if a plea of
- 8 guilty or guilty but mentally ill was negotiated, give details: N/A
- 9 10. If Petitioner was found guilty after a plea of not guilty, was the finding made by: Jury.
- 10 11. Did Petitioner testify at the trial? Yes.
- 11 12. Did Petitioner appeal from the judgment of conviction? No.
- 12 13. If Petitioner did appeal, answer the following:
- 13 (a) Name of court: N/A.
- 14 (b) Case number:
- 15 © Result:
- 16 (d) Date of result:
- 17 14. If Petitioner did not appeal, explain briefly why Petitioner did not: Was not informed of his
- 18 right to appeal.
- 19 15. Other than a direct appeal from the judgment of conviction and sentence, has Petitioner
- 20 previously filed any petitions, applications or motions with respect to this judgment in any court, state
- 21 or federal? No.
- 22 16. If the answer to number 15 was yes, give the following information: N/A
- 23 17. Has any ground raised in this petition been previously presented to this or any other court
- 24 by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? No.
- 25 (a) Which of the grounds is the same: N/A
- 26 (b) The proceedings in which these grounds were raised: N/A
- 27
- 28

1 © Briefly explain why Petitioner is again raising these grounds: N/A

2 18. If any of the grounds listed in numbers 23(a), (b), © and (d), or listed on any additional
3 pages attached, were not previously presented in any other court, state or federal, list briefly what
4 grounds were not so presented, and give reasons for not presenting them: None of the grounds listed
5 have been previously presented; this is Petitioner's initial Petition for Post-Conviction Relief, and this
6 is the first opportunity to address issues of ineffective assistance of counsel.

7 19. Is Petitioner filing this Petition more than one year following the filing of the Judgment of
8 Conviction or the filing of a decision on direct appeal? No.

9 20. Does Petitioner have any petition or appeal now pending in any court, either state or federal,
10 as to the judgment under attack? No.

11 21. Give the name of each attorney who represented Petitioner in the proceeding resulting in
12 Petitioner's conviction and on direct appeal:

13 Christina A. Di Edoardo and Marina Koliass - trial counsel

14 22. Does Petitioner have any future sentences to serve after Petitioner completes the sentence
15 imposed by the judgment under attack? No.

16 23. State concisely every ground on which you claim that you are being held unlawfully.
17 Summarize briefly the facts supporting each ground.

18 a) Ground one: Trial counsel was ineffective in that sufficient pre-trial investigation was not
19 performed resulting in Due Process violations and in violation of the Sixth, Eighth and Fourteenth
20 Amendments of the U.S. Constitution and the Nevada State Constitution.

21 Supporting facts: Defense counsel did not adequately contact all witnesses in trial preparation
22 and did not call essential witnesses.

23 b) Ground Two: Trial counsel did not appeal nor inform defendant of his right to appeal his
24 conviction resulting in Due Process violations and in violation of the Sixth, Eighth and Fourteenth
25 Amendments of the U.S. Constitution and the Nevada State Constitution.

26 Supporting facts: Defendant was found guilty after a jury trial. Trial counsel never informed
27
28

1 him of his right to appeal and did not appeal his conviction even though he expressed unhappiness with
2 the trial results.


3 c) Ground Three: Defendant's trial counsel did not call potential witnesses at trial.

4 Supporting facts: Counsel's failure to call witnesses to the event that contradicted the testimony of the
5 victim resulted in Due Process violations and in violation of the Sixth, Eighth and Fourteenth
6 Amendments of the U.S. Constitution and the Nevada State Constitution.

7 d) Ground Four: Trial counsel was ineffective for failing to raise the issue of prosecutorial
8 misconduct by the State, for failure to preserve exculpatory evidence and to file a motion to potential
9 exculpatory evidence.

10 Supporting facts: In the arrest report for the instant case, the officer notes that he reviewed a
11 videotape of the alleged incident that showed that the defendant never pointed the weapon and the video
12 was never . This along with testimony from other witnesses that were not interviewed would likely have
13 resulted in a different verdict and the failure resulted in Due Process violations and in violation of the
14 Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and the Nevada State Constitution.

15 DATED this 1 day of February, 2011.

16
17 
18 Martin Hart, Esq.
19 Nevada Bar No. 005984
20 229 South Las Vegas Blvd., Ste. 201
21 Las Vegas, N89101
22 Attorney for Petitioner

23 **NOTICE OF MOTION**

24 TO: STATE OF NEVADA

25 NOTICE is hereby given that the foregoing Petition for Writ of Habeas Corpus will be heard
26 on the 29 day of March 2011, at 8:15 a.m/p.m. in Dept. 17 of District Court.

27 
28 Martin Hart, Esq.

1
2
3 **VERIFICATION**

4 Martin Hart, Esq., being first duly sworn, according to law, deposes and says: that Petitioner
5 RICHARD HODSON personally authorized your Affiant to commence this action; that your Affiant
6 has read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof; that the same
7 is true of his own knowledge, except for any matter therein stated upon information and belief and as
8 to those matters therein stated, he believes them to be true.

9
10 
11 Martin Hart, Esq.

12 SUBSCRIBED and SWORN to before me
13 this 1 day of Feb., 2011.



14 
15 NOTARY PUBLIC in and for said
16 COUNTY and STATE

17
18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. STATEMENT OF FACTS**

20
21 On February 16, 2007, Defendant was charged, by way of Information with a count of Assault
22 With a Deadly Weapon. The charges stem from an incident which occurred outside the Premier
23 Nightclub on June 12, 2006.

24 Defendant was accused of threatening Richard Pena, the owner of the nightclub with a firearm.
25 Also present were security guards for the club that approached Defendant and a friend as he retreated
26 to his vehicle. Defendant never pointed the firearm at anyone and held it at his side to stop the security
27

1 and Pena from advancing on him. Defendant acted in self defense only. Much of the video was not
2 turned over to the police. The witnesses against defendant were Pena and his employees that followed
3 defendant out to his vehicle as he retreated.

4 5 **II. STATEMENT OF PROCEDURAL FACTS**

6 Following the preliminary hearing on July 16, 2007, Richard Hodson was bound up on one
7 count of "Bomb Threat." On July 30, 2007, Hodson pled not guilty in District Court and invoked the
8 60 day rule. Trial was set for August 20, 2007, with a calendar call date of August 17, 2007. The case
9 was transferred to Department 18. Trial commenced on August 23, 2007 and lasted one day. A jury
10 verdict of Guilty on the charge of Bomb Threat was returned August 23, 2007.

11 Hodson filed his Notice of Appeal on December 17, 2007. The direct appeal, Supreme Court
12 Case Number 50759, was filed on April 2, 2008. Only two issues were raised in the appeal: 1) that
13 Hodson's statements were protected speech under the First Amendment because he did not intend his
14 joke to cause an immediate breach of the peace or mass pandemonium; and, 2) that the jury instructions
15 given to the jurors were deficient, misleading, and improper.

16 In an unpublished slip order, the Nevada Supreme Court rejected the contention that Hodson's
17 alleged statement was protected speech. *See* Slip Order, Hodson v. State, 2009 WL 1424492, attached
18 hereto as Exhibit "B."

19 Regarding the jury instruction issue, the Nevada Supreme Court stated that Hodson's counsel
20 "did not request an instruction on his theory of the case, he did not object to the jury instructions, and
21 he did not object to the comments the prosecutor made during closing argument." Exhibit "B." The
22 Court noted that "failure to object to a jury instruction ... generally precludes appellate review," unless
23 there is plain error and concluded that Hodson had failed to demonstrated plain error. *Id.* (Internal
24 Citations Omitted).

25 The Nevada Supreme Court filed an Order of Affirmance on January 8, 2009.
26
27
28

III. LEGAL ARGUMENT

A. TRIAL COUNSEL WAS INEFFECTIVE AND THEY DID NOT PERFORM SUFFICIENT PRETRIAL INVESTIGATION.

Pursuant to the Sixth Amendment of the U.S. Constitution, a defendant is entitled to effective assistance of counsel at all critical stages of a criminal case. To establish ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance "fell below an objective standard of reasonableness" and that counsel's "deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687-688 (1984). In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691., 104 S.Ct. at 2066.

In the instant case, trial counsel did not contact potential favorable witnesses nor interview witnesses for the prosecution prior to the trial.

B. TRIAL COUNSEL DID NOT PERFECT AN APPEAL NOR INFORM DEFENDANT OF HIS RIGHT TO APPEAL AFTER THE JURY VERDICT

In Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000), the Court reaffirmed that counsel has a constitutional duty to file an appeal when requested. *Id.* at 477. Specifically, when an appeal is not requested, the Court held, "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480.

Defendant expressed to his counsel that he was unhappy with the jury verdict yet his trial counsel did not file an appeal nor did they inform defendant of his right to appeal his conviction.

C. TRIAL COUNSEL'S FAILURE TO CALL WITNESSES AT TRIAL THAT SUPPORTED HIS ALLEGATIONS THAT THE NAMED "VICTIM" AND HIS EMPLOYEES WERE THE AGGRESSORS CONSTITUTED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

To establish ineffective assistance of counsel, a petitioner must demonstrate that counsel's

1 performance "fell below an objective standard of reasonableness" and that counsel's "deficient
2 performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687-688 (1984).

3 Defendant's trial counsel was clearly ineffective for failing to offer any supporting witnesses
4 to his version of the events that transpired.. Counsel's performance was deficient and prejudiced
5 defendant.

6 "A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of
7 the case so long as there is some evidence, no matter how weak or incredible, to support it." Williams
8 v. State, 99 Nev. 530 (1983). If a defense theory of the case is supported by some evidence which, if
9 believed, would support a corresponding jury verdict, failure to instruct on that theory totally removes
10 it from the jury's consideration and constitutes reversible error. *See* Allen v. State, 98 Nev. 354 (1982);
11 *See also* Barger v. State, 81 Nev. 548 (1965).

12 Despite the fact that the evidence supported the defense's theory of the case, trial counsel never
13 called witnesses nor used that argument to support giving the "reasonable person" instruction to the
14 jury. The Nevada Supreme Court has consistently held that the defense has the right to have the jury
15 instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that
16 evidence may be. Furthermore, there is strong support for the "reasonable person" test to apply in this
17 matter.

18 In failing to effectively put this issue before the trial court, trial counsel substantially increased
19 the risk that the jury would convict defendant.

20
21 **D. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE**
22 **PROSECUTORIAL MISCONDUCT AND/OR MOTION TO DISMISS FOR**
DESTRUCTION/FAILURE TO PRESERVE EVIDENCE.

23 Trial counsel failed to address the issue of prosecutorial misconduct. Prosecutorial misconduct
24 can and will result in the reversal of convictions when it denies defendants their right to a fair trial. *See*
25 McGuire v. State, 100 Nev. 153 (1984). To determine if prosecutorial misconduct was prejudicial, this
26 court examines whether a prosecutor's statements and or action so infected the proceedings with
27

1 unfairness as to result in a denial of due process. Thomas v. State, 120 Nev. 37, 47 (2004).
2 Furthermore, in cases where there is not overwhelming evidence of guilt, prosecutorial misconduct is
3 not harmless. See Morris v. State, 112 Nev. 260, 913 P.2d 1264 (1996) (Emphasis Added); see also
4 Anderson v. State, 121 Nev. 511, 118 P.3d 184 (2005). In Morales v. State, 122 Nev. 966 (2006), the
5 Nevada Supreme Court held that cumulative improper statements by the prosecutor compelled reversal:

6
7 We conclude that this comment was wrong and improper and that,
8 despite the defense's timely objection and the action of the district
9 court in sustaining the objection, this comment aggravated the impact
10 of the other improper arguments made by the State in closing
11 argument. Id. at —, 143 P.3d 468.

12 The Strickland standard for determining ineffective assistance of counsel applies to the
13 performance of appellate counsel, as well. "To establish prejudice based on the deficient assistance
14 of appellate counsel, the [petitioner] must show that the omitted issue would have a reasonable
15 probability of success on appeal." Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102 (1996).
16 Defense attorneys who fail to raise any instances of prosecutorial misconduct on appeal are remiss
17 in their duties pursuant to Stickland. See Howard v. State, 106 Nev. 713, 719; 800 P.2d 175, 179
18 (1990). This is because prejudicial prosecutorial conduct constitutes reversible error. Ross v. State,
19 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990).

20 Trial counsel should have been aware that not all the video was retained by the prosecution
21 and their agents. This resulted in the loss of exculpatory evidence that would likely have resulted in
22 a different verdict. Additionally, trial counsel did not file an appeal nor inform defendant of his
23 right to appeal based on the failure by the State..

24 Based upon the foregoing, obvious prejudicial misconduct, counsel's failure to address these
25 issues constitutes ineffective assistance of counsel. Had these issues been raised on appeal, there
26 was a strong likelihood of success, therefore, reversal of the conviction is warranted.


27 CONCLUSION

28 Petitioner respectfully submits that he was denied the right to effective assistance of counsel
that resulted in Due Process violations and in violation of the Sixth, Eighth and Fourteenth

1 Amendments of the U.S. Constitution and the Nevada State Constitution.

2 Based upon the foregoing facts and legal arguments, Petitioner Lazaro Martinez-Hernandez
3 respectfully requests that this Honorable Court reverse his conviction and dismiss this matter with
4 prejudice.

5 DATED this 1 day of February, 2011.

6
7 
8 Martin Hart, Esq.
9 Nevada Bar No. 005984
229 South Las Vegas Blvd., Ste. 201
Las Vegas, N89101
Attorney for Petitioner
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2 **CERTIFICATE OF MAILING**

3 Pursuant to NEVADA RULES OF CIVIL PROCEDURE 5 (b), I hereby certify that on the
4 15th day of February, 2011, service of the foregoing PETITION FOR WRIT OF HABEAS
5 CORPUS (POST-CONVICTION) was made this date by depositing a true copy of the same for mailing,
6 first class mail, at Las Vegas, Nevada addressed as follows:

7
8 Howard Skolnik, Director
9 Nevada Department of Corrections
10 P.O. Box 7011
11 Carson City, Nevada 89702

12 Attorney General
13 Heroes' Memorial Building
14 Capitol Complex
15 Carson City, Nevada 89710

16 David Roger
17 Clark County District Attorney
18 200 South Lewis
19 Las Vegas, Nevada 89101

20
21
22
23
24
25
26
27
28 Melina G. Campos

1 TRAN

2 ORIGINAL

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FILED

JUL 14 10 58 AM '11

[Signature]
CLERK COURT

3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
7

8
9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 LAZARO MARTINEZ-HERNANDEZ,

13 Defendant.

CASE #C230237

DEPT. V

07C230237
TRANS
Transcript of Proceedings
1525508



14 BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE
15 MONDAY, FEBRUARY 4, 2008
16

17 **ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS:**
18 **TRIAL BY JURY**
19 **VOLUME I**

20 APPEARANCES:

21 For the State:

MICHELLE L. THOMAS, ESQ.
DANIEL WESTMEYER, ESQ.
Deputy District Attorneys

22 For the Defendant:

CHRISTINA A. DIEDOARDO, ESQ.
MARINA E. KOLIAS, ESQ.

23 Also Present:

Court Interpreter:

ALEX ANDRADE

RECORDED BY: RACHELLE HAMILTON, Court Recorder

CLERK OF THE COURT

JUL 14 2011

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1 MONDAY, FEBRUARY 4, 2008, AT 10:06 A.M.

2
3 THE COURT: All right, we're here in State vs. Martinez-Hernandez. Mr.
4 Martinez-Hernandez is present with the court interpreter and Ms. Kolas and
5 DiEdoardo, and the State's represented by Mr. Westmeyer and Ms. Thomas. And
6 we have an issue regarding notices of witnesses by the defense; Mr. Westmeyer.

7 MR. WESTMEYER: That's correct, Judge. As we discussed previously I
8 received notice on Friday afternoon that the defense wished to call, in addition to
9 the Defendant, two other witnesses. These witnesses were never -- the witness list
10 for the defense was never filed with the Court. I received a copy of a fax indicating
11 that they wish to call these witnesses Friday afternoon. I didn't actually see it
12 myself until this morning and I'm asking that any witnesses other than the
13 Defendant be excluded as not timely filed, and pursuant to NRS 174.234, Judge.

14 MS. DIEDOARDO: Certainly, Your Honor, I mean what we would state with
15 regard to Mr. Maceo, the State was on notice that he might be called as a witness
16 since he's the individual that in their own victim statement is -- that gives rise to this
17 entire affair. He's the guy who was originally hit by a bottle and who then calls Mr.
18 Martinez-Hernandez to come to the scene and what gives -- and that's undisputed.

19 The State either knew about this or could have discovered it through
20 some elementary investigation. I think it's clearly a reasonable foreseeable
21 witness.

22 With regard to the other individual that the defense is seeking to bring
23 in, he was an eye witness that it's my understanding Mr. Tortosa [phonetic] -- okay,
24 Court's indulgence for a moment, Your Honor.

25 Your Honor, if the State's -- if the Court's inclined to note that -- to go

1 with the State's objection to Mr. Tortosa in the defense's case in chief, we would
2 ask leave to present him as a rebuttal witness. I think the --

3 THE COURT: You don't get to present rebuttal. They go, you go; that's not
4 rebuttal, that's your case in chief. So that's not rebuttal. You don't --

5 MS. DIEDOARDO: Understood, Your Honor.

6 THE COURT: They have rebuttal, you don't have rebuttal.

7 MS. DIEDOARDO: Understood, Your Honor.

8 THE COURT: That argument won't work with me either.

9 MS. DIEDOARDO: Understood, Your Honor. Then I think at this point, Your
10 Honor, I think what we would ask -- I mean we would ask of course that the Court at
11 its discretion to allow us to present both of them, but if the Court is inclined to grant
12 the State's motion in part that it allow us to present Mr. Maceo given that Mr. Mr.
13 Maceo is referenced in both the statement of the victim and in the police report.

14 THE COURT: Okay.

15 MS. DIEDOARDO: And the State was on reasonable notice.

16 THE COURT: All right, Mr. Westmeyer, let me hear from you.

17 MR. WESTMEYER: Well Judge, I believe the proper remedy here for
18 174.234 is listed in 174.295: The judge may prohibit the party from introducing in
19 evidence the material not disclosed. That's what I'm asking for in this case.

20 THE COURT: Did you know about Maceo? Is he in the discovery?

21 MR. WESTMEYER: I don't believe he's mentioned by name.

22 MS. DIEDOARDO: Yes, he is.

23 MR. WESTMEYER: I think what it says, and --

24 THE COURT: Somebody show me.

25 MS. DIEDOARDO: Your Honor, he's not mentioned specifically --

1 MS. KOLIAS: No he is -- right here.

2 MS. DIEDOARDO: Okay, Your Honor if I may approach. I'm looking here at
3 page 14 of the voluntary statement.

4 [Colloquy]

5 THE COURT: Let's see, where is it?

6 MS. DIEDOARDO: About midway down the page, Your Honor. I think the
7 statement reads his friend, and there's an open paren and it says Alexander --

8 THE COURT: Alexander Maceo was -- okay.

9 MS. DIEDOARDO: Thank you, Your Honor.

10 THE COURT: All right, well here's what we're going to do. The one whose
11 names was mentioned in the report, he can come in. The State -- is he here?

12 MS. KOLIAS: Yes, Your Honor.

13 THE COURT: Okay, well you all -- somebody can go out and chat with him
14 and find out what he's going to say. The other one pursuant to 174.234, no? Not
15 on the list?

16 MS. DIEDOARDO: It's not on the list, Your Honor, that is true.

17 THE COURT: The list was late, the list is -- shall be filed five days before.
18 The State always gives you notice of their witnesses and their information because
19 it's attached, so that argument won't work with me either. So as long as the State
20 has an opportunity to talk to Maceo beforehand --

21 MS. KOLIAS: I'd like to see the State's witnesses, Your Honor, because I did
22 not receive notice of theirs until I called on Friday what witnesses. They -- it was
23 not --

24 THE COURT: Did you not get a copy of an information with the witness list
25 attached?

1 MS. KOLIAS: Not -- no Your Honor, we did not. We got an arrest report --

2 MR. WESTMEYER: Does the Court have a copy, Judge?

3 THE COURT: I have a copy of the information that's been on file since
4 2/15/07, and the names and addresses of everybody is listed right here.

5 MS. KOLIAS: I don't think I have that list, Your Honor, I really don't.

6 THE COURT: Well I would think, counsel, that since 2/16/07 would behoove
7 you to have a list of -- you'd have this. So that's not going to work. Sorry about
8 that, that ain't working.

9 MS. DIEDOARDO: Okay, we appreciate that, Your Honor. So as we
10 understand the Court's ruling then the State will have the opportunity to speak with
11 Mr. Maceo and shall we include you on trial to get an opportunity --

12 THE COURT: No, we're not trailing.

13 MS. DIEDOARDO: We're not trailing, okay.

14 THE COURT: There's two attorneys here for the State. Only one really
15 needs to be here to do this trial, and that person -- the other person, whoever isn't
16 going to be doing the jury selection can take the court interpreter that's sitting here
17 and I would go out there right now and start talking to Mr. Maceo.

18 MS. KOLIAS: I will do that, Your Honor.

19 THE COURT: Could you assist please?

20 MR. WESTMEYER: Thank you, Judge.

21 THE COURT: And as soon as Arthur comes up we will begin. Everybody
22 can have a seat.

23 [On the record at 10:38 a.m.]

24 [In the presence of the prospective jury panel]

25 THE COURT: Thank you. Everybody's been seated.

1 Good morning ladies and gentlemen. Good morning. Monday after
2 Superbowl, everybody's a little bit -- good morning ladies and gentlemen. Thank
3 you, very much.

4 Welcome to Department Five of the Eighth Judicial District Court. I'm
5 Judge Jackie Glass and this is the department that I preside over. We're here in the
6 matter of state of Nevada versus Martinez-Hernandez. Mr. Martinez-Hernandez is
7 present represented by this attorneys, Ms. Kolias and Ms. DiEdoardo, and the
8 State's represented by Mr. Westmeyer and Ms. Thomas.

9 At this point, ladies and gentlemen, I'm going to take an opportunity to
10 introduce you to some of the people you'll be coming in contact with during the
11 course of this trial. Right in front of me is my court recorder, Shelley Hamilton.
12 Wave Shelley. She's recording everything we do here. There's little cameras
13 around the courtroom and there's microphones all over the courtroom, and we
14 record everything that's happening. So it's important in just a few minutes when
15 Arthur comes around with the microphone that you speak into the microphone so
16 that we can make sure we have a good record of what everybody is saying.

17 Right here is my court clerk, Sandy Jeter. Sandy is in charge of the
18 evidence, she's in charge of swearing in the witnesses and the jury, and she keeps
19 track of the minutes of the Court. And you've had an opportunity to meet my bailiff,
20 Arthur Sewell. I'll apologize in advance for Arthur. Arthur is my bailiff and he is in
21 charge of security in the courtroom and making sure that the jury has privacy during
22 deliberations -- what Arthur? They gave you something to eat? And there's a sign
23 on the side of the desk that says please, under order of this Court, do not feed the
24 bailiff. I mean that. You don't want to get in trouble for feeding him food that he is
25 not supposed to have. He will sneak it and try to have it, so just nobody feed the

1 bailiff. Anyway he's in charge of the jury and make sure that if anybody from the jury
2 needs to talk to me, once the jury is sworn in, that he is the person you go to to
3 communicate with me, the judge.

4 All right, at this time I need all of you out there in the audience to please
5 rise and Sandy will swear you in. Raise your right hands for me and answer out
6 loud.

7 [The Prospective Jury Panel was sworn by the Clerk]

8 THE COURT: Thanks, have a seat. Ladies and gentlemen, we are about to
9 begin the process that is called the voir dire examination of the prospective jurors in
10 this case. The term voir dire, loosely translated, means to tell the truth. During this
11 process we're going to ask you questions relating to your ability to sit as fair and
12 impartial jurors in this case. To accomplish this we're going to ask you questions.
13 And I'm going ask you some and the attorneys get to ask you some questions as
14 well. We're not here to unnecessarily pry into your personal life, but the questions
15 are necessary so that the attorneys and myself can make an intelligent
16 determination as to your capabilities to sit as fair and impartial jurors.

17 I want you to know that myself, the attorneys and all the other people
18 involved with this case are deeply concerned with having this matter tried by jurors
19 who are completely open-minded, neutral, objective and unbiased in their thinking.

20 The following areas of questioning are not properly within the scope of
21 your voir dire examination by counsel: questions that are already asked and
22 answered by the Court and other counsel, questions touching upon anticipated
23 instructions on the law, questions touching upon a verdict a juror would return when
24 based on hypothetical facts, and questions that are, in substance, arguments of the
25 case.

1 Ladies and gentlemen it is important that you know the significance of
2 full, complete and honest answers to all of the questions we are about to ask you. I
3 caution you not to try to hide or withhold anything that might indicate a bias or
4 prejudice of any sort by any of you. Should you fail to answer truthfully or if you hide
5 or withhold anything that touches upon your qualifications to sit as jurors you will be
6 subjected to further inquiry by me, the Court, even after you are discharged as jurors
7 and that may also contaminate your verdict.

8 Your decision should be upon all of the evidence presented during the
9 trial and not based on any preconceived bias or prejudice. Prejudice is a
10 predisposition against something or someone, and a bias is a predisposition in favor
11 of something or someone.

12 I'm going to conduct a general voir dire examination of all of you while
13 you are seated in the audience, and then I'll call the first 24 of you to sit over here in
14 the juror box. At some point during the selection process the attorneys will have an
15 opportunity to ask that a particular person not serve as a juror. These requests are
16 called challenges. There are two types of challenges: challenges for cause and
17 preemptory challenges.

18 A challenge for cause means that a juror has been excused because
19 his or her answers to some of the questions indicate that he or she would have a
20 difficult time in giving this case a fair and impartial hearing. A preemptory challenge
21 is one where you get to be excused and the attorneys don't have to give a reason.
22 Please do not be offended if you are excused by either of these procedures, they
23 are simply a part of the process designed to protect the interests of both parties
24 under our system of government.

25 If you wish to respond raise your hand. You need to look down on your

1 badges, ladies and gentlemen, because you all have badge numbers. I'll point out a
2 couple of them right now. This is what you need to tell us when you answer out
3 loud.

4 PROSPECTIVE JUROR #117: Here.

5 THE COURT: Thank you; 129.

6 PROSPECTIVE JUROR #129: Here.

7 THE COURT: 145.

8 PROSPECTIVE JUROR #145: Here

9 THE COURT: 152. Okay, you don't tell us I'm Joe Smith, number 165. All
10 you tell us is I'm 165. We have lists that correspond with your badge numbers. Do
11 not give us your names, all right?

12 Has any one in the audience ever been convicted of a felony? All right.
13 Is there anyone who is not a United State's Citizen? Is there anyone who has such
14 a sympathy, prejudice or bias relating to age, religion, race, gender, or national
15 origin that they feel would affect their ability to be open-minded, fair and impartial
16 jurors? Are any of you acquainted with the Defendant or either of his attorneys?
17 Are any of you acquainted with the deputy district attorneys in this case? The
18 district attorney's office employs many deputies and other personnel; is there
19 anyone who has such a close relationship with the District Attorney, David Roger,
20 any of his deputies or other members of his staff that you feel would affect your
21 ability to be a fair and impartial juror? And we have a hand.

22 PROSPECTIVE JUROR #165: Badge number 165.

23 THE COURT: Yes, 165.

24 PROSPECTIVE JUROR #165: I am in the family court system for drug court.

25 THE COURT: And who do you work for?

1 PROSPECTIVE JUROR #165: Who do I work for? I don't have a job, I'm
2 unemployed.

3 THE COURT: Oh okay, so you are a participant in the Family Court Drug
4 Court Program?

5 PROSPECTIVE JUROR #165: Correct. Correct.

6 THE COURT: So you have come in contact with some of the people in the
7 court system over in family court?

8 PROSPECTIVE JUROR #165: Also in District in the past.

9 THE COURT: In the past, okay. And so I'm going to get to a question where I
10 ask if you've ever been convicted -- well I already asked -- you don't have a felony
11 conviction?

12 PROSPECTIVE JUROR #165: No.

13 THE COURT: Do you have any misdemeanor convictions?

14 PROSPECTIVE JUROR #165: Yes, ma'am.

15 THE COURT: All right, and have you been prosecuted by the District
16 Attorney's Office?

17 PROSPECTIVE JUROR #165: Yes, ma'am.

18 THE COURT: All right, and I'm not hearing you on that microphone. Could
19 you tap on it and tell me if it's actually working? Okay, you need to speak more into
20 the microphone.

21 PROSPECTIVE JUROR #165: Okay, sorry.

22 THE COURT: Thank you, that's better. And because of your experience in
23 being prosecuted perhaps by the district attorney's office is that going to impact your
24 ability to be fair and impartial in this case?

25 PROSPECTIVE JUROR #165: Yes, it would.

1 THE COURT: Because you hold it against the DA's office?

2 PROSPECTIVE JUROR #165: Well yeah, probably.

3 THE COURT: All right, so you wouldn't be able to sit and listen to the
4 evidence and make a decision based on the evidence; is that what you're telling
5 me?

6 PROSPECTIVE JUROR #165: No, I don't think I would.

7 THE COURT: Anybody want to ask any follow-up questions or may I -- I'm
8 going to excuse her.

9 MR. WESTMEYER: I'd like her to be excused too.

10 THE COURT: Okay, I'm going to go ahead and excuse you. Thank you,
11 you're excused. And that was 165?

12 Yes sir, what's your number?

13 PROSPECTIVE JUROR #144: Badge number 144.

14 THE COURT: Yes 144.

15 PROSPECTIVE JUROR #144: I've too been in contact with the some of the
16 district attorney through the family court. I've got a case right now in the family court
17 and I just went to court not too long ago for it, so I've too been in contact with them.

18 THE COURT: Okay if you've been in contact with them I'm going ask you the
19 same questions. This of course is a good opportunity to be able to say I'm going to
20 be impacted by that; are you telling me that you wouldn't be able to listen to the
21 presentation of the evidence and be able to make a decision in this case, and would
22 you hold it against the State of Nevada because you've dealt with people in the
23 family court?

24 PROSPECTIVE JUROR #144: No, I don't think I would.

25 THE COURT: You don't think you would? Okay, then have a seat.

1 Are any of you acquainted with any of the -- you know what, I didn't do
2 that yet. Stop, I need to stop. I'm moving too fast today.

3 Mr. Westmeyer, would you please stand up, introduce yourself, your co
4 counsel, and tell the ladies and gentlemen of the jury panel the nature of the case
5 and who the witnesses are, and then I'll give the defense an opportunity as well.

6 MR. WESTMEYER: Hi, my name is Dan Westmeyer. I'm the deputy DA
7 assigned to this case. With me at counsel table is Michelle Thomas, also a deputy
8 attorney in our office.

9 The Defendant is charged in this case with one count of assault with a
10 deadly weapon by intentionally and feloniously placing a person in fear for his life.
11 That person is Richard Pena, by using a firearm.

12 THE COURT: And the names of the witnesses?

13 MR. WESTMEYER: Oh, I'm sorry. The witnesses the State intends to call
14 include Donald Fletcher, Beatrice Hernandez-Leal, Richard Pena, and Jonathan
15 Richter.

16 THE COURT: Thank you.

17 MR. WESTMEYER: Thank you.

18 THE COURT: All right, and who for the defense? Ms. Kolas would you
19 please stand, introduce yourself, your cocounsel, your client, and state the names of
20 any witnesses that you intend to call.

21 MS. KOLIAS: Thank you, Your Honor. This is Lazaro Martinez-Hernandez
22 and he is the Defendant in this case, and this is Christina DiEdoardo and she is my
23 cocounsel in this case. My name is Marina Kolas and I am defense counsel in this
24 case.

25 In this case Mr. Lazaro Martinez-Hernandez will testify as well as Alex

1 Serna [phonetic] Maceo -- Alex Maceo, and this case revolves around the El
2 Premier Nightclub on Fremont Street, on or near Boulder Highway, and Lazaro and
3 Alex will be testifying on our behalf.

4 THE COURT: Thank you.

5 MS. DIEDOARDO: Thank you, Your Honor.

6 THE COURT: All right now, now let me go to my next question. Are any of
7 you acquainted with any of the witnesses whose names were called out by either
8 party?

9 All right, here's really good news for you, ladies and gentlemen; really,
10 really good news. This case is expected to last today. Hopefully it won't go over till
11 tomorrow. There's a slight chance depending on how we move along. It might have
12 to go over till tomorrow, or maybe deliberations might go over till tomorrow, but I'm
13 hoping we can conclude all the evidence today.

14 Now, this is my jury summons. I didn't have to serve but we've actually
15 had a judge serve here on cases before. There are some limited exemptions now to
16 jury service but in the United States of America under our criminal justice system we
17 have to have jurors come in and listen to the facts of the case and make the
18 decisions. That's how this system works, and it's the best system anywhere. So I
19 can't do my job here in a jury trial without folks just like you.

20 Now, you're very fortunate, at the most this will be a day and a half. If
21 you don't get selected in this case they're looking for jurors in a case, in a
22 construction defect case, that's going to last eight months. I'm not lying. It's a case,
23 a class action lawsuit involving the -- some kind of construction defect out in Sun
24 City; eight months, thousands and thousands of documents; or you could be -- come
25 back at another time and be assigned to a medical malpractice case, and those

1 usually don't last any less than three weeks; or you could come back on a more
2 complicated criminal case which could last two, three, or four weeks. I'm asking for
3 a day and a half of your time, ladies and gentlemen, a day and a half. I know that
4 this interferes with your lives, your jobs, your families, your pocketbook; yes, I do
5 know that, but you're obligated as a citizen of this United State of America to
6 perform this duty as jurors. And especially since it's such a short trial I really don't
7 expect there are going to be a lot of creative excuses to tell me that you don't want
8 to serve.

9 So if you're ill and have a note from a doctor please raise your hand.
10 Or if you have plans to leave town between today and tomorrow raise your hand.
11 We have one in the back.

12 PROSPECTIVE JUROR #140: Badge number 140. Your Honor, I have a
13 trial starting in Pahrump tomorrow.

14 THE COURT: In Pahrump?

15 PROSPECTIVE JUROR #140: Yes.

16 THE COURT: Is that what you said?

17 PROSPECTIVE JUROR #140: Yes. So I will be out of town tomorrow.

18 THE COURT: Not to mention that you externed for me when you were in law
19 school, is that right?

20 PROSPECTIVE JUROR #140: That too, Your Honor. That too, Your Honor.

21 THE COURT: I mean not that that would make a difference --

22 PROSPECTIVE JUROR #140: I know.

23 THE COURT: -- and you could sit, but you're going to be in trial in Pahrump
24 tomorrow?

25 PROSPECTIVE JUROR #140: I will be.

1 THE COURT: And you work for the Attorney General's office?

2 PROSPECTIVE JUROR #140: I do.

3 THE COURT: And so I'd say that that's enough to -- I mean I would probably
4 look for an excuse not to have to go to Pahrump tomorrow but -- I've done cases in
5 Pahrump before. I've done cases in Tonopah before. You're lucky you're not going
6 to Tonopah.

7 PROSPECTIVE JUROR #140: That's next month.

8 THE COURT: So I'm going to go ahead and excuse you. Go ahead.

9 PROSPECTIVE JUROR #140: Thank you.

10 THE COURT: Nice to see you.

11 PROSPECTIVE JUROR #140: Nice to see you too.

12 THE COURT: How does it work that you end up in my courtroom? How does
13 that work?

14 All right is anybody -- now this doesn't mean you're going to get out of
15 jury service, it just means you have to tell us. Has anybody ever been engaged in
16 law enforcement work, or have a -- hold on, I'm not done -- have a close personal --
17 close relative, not meaning your uncle's brother's cousin once removed, a close
18 relative who's ever been engaged in law enforcement work? Like I said, it doesn't
19 mean you're going to get out of jury service, it just means we need to know.

20 So Arthur, where's the mike? All right, yes sir, what number are you?

21 PROSPECTIVE JUROR #152: 152.

22 THE COURT: 152; okay 152.

23 PROSPECTIVE JUROR #152: I work for the Department of Corrections in
24 Nevada for 28 years, recently retired. I was a lieutenant and an associate warden.

25 THE COURT: Okay, and is that going to impact your ability to be fair and