

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE FERNANDO MONAY-PINA,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

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APPELLANT'S APPENDIX VOLUME IV

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1 A I can only --

2 Q I'm sorry?

3 A Sorry. I can only see half of the handgun.

4 Q Sorry.

5 A Oh, there you go. Yes, sir.

6 Q So those were positioned, I think, back by the five
7 bushes, correct, when you saw them? Those five bushes --

8 A Those five --

9 Q -- the Charlie Brown tree in the back against the
10 wall?

11 A No, sir. Those are positioned in the north corner
12 towards --

13 Q Okay. So I was backwards.

14 A The other side --

15 Q Behind the shed.

16 A -- of the shed. Yes, sir.

17 Q Got you. And were you able to determine that these
18 were replica guns, as well?

19 A Yes, sir.

20 Q And how did you do that? Let's start with the gun
21 that's depicted in the lower portion of State's 68.

22 A I can look at that one and tell because I -- I don't
23 believe there's a barrel on any firearm that that -- is that
24 long outside of maybe a revolver.

25 Q Okay. So the length of the barrel tips you off?

1 A Yes, sir.

2 Q And then what about the BB gun that's positioned in
3 the top part of that, 68?

4 A I could -- I could see the plastic that it was made
5 out of.

6 Q Okay. So when you came up, you could see it was
7 made of all plastic?

8 A Yes, sir.

9 Q Okay. And just for clarification because I screwed
10 up, this is 67. That's the corner yard, correct?

11 A Yes, sir.

12 Q The two firearms I just showed you in 68 -- or the
13 two BB I just showed you in 68 were the ones positioned in the
14 corner yard here in 67?

15 A Yes, sir.

16 Q And the solo, State's 57, the first one we went over
17 with the writing on it, that was in the planter, correct?

18 A Correct. South of where the person I had my knee
19 on.

20 Q Okay. Just want to make sure we get everything
21 mapped out. So fairly near you, at least when you apprehended
22 the first suspect?

23 A Yes, sir.

24 MR. GILL: Court's brief indulgence.

25 [Counsel confer]

1 MR. GILL: Nothing further, Your Honor. Thank you.

2 MR. BOLEY: Yes.

3 CROSS-EXAMINATION

4 BY MR. BOLEY:

5 Q Officer, I want to show you some of the exhibits
6 here. Bear with me.

7 A Sure.

8 Q I am going to go through these and find what I'm
9 looking for.

10 [Pause]

11 BY MR. BOLEY:

12 Q Okay. I want to just clarify. You approached and
13 apprehended Mr. Pina, correct?

14 A Yes, sir.

15 Q You testified about that. And there were some items
16 found near him and on his person. And I just want to clarify
17 with you which ones were found on his person and which ones
18 were found near him. So you testified earlier that there were
19 these items in some bushes that were fairly near him, right?

20 A Yes, sir.

21 Q Okay. But these were not on his person?

22 A Correct.

23 MR. BOLEY: So just for the record, I'm showing the
24 Officer State's Exhibit 43, and they're referring to the
25 victim's wallet and the wad of cash.

1 BY MR. BOLEY:

2 Q Now, I'm going to refer to State's Exhibit 35. I'm
3 going to try to zoom in here so you get can a little more
4 specific. So is this the area where Mr. Pina was apprehended
5 or should I say the first subject?

6 A Yes.

7 Q The first subject was apprehended. Where in that
8 photo was he apprehended?

9 A Lying right there in that -- that dirt that's open
10 or do you want me to circle it or --

11 Q Yeah. Go ahead and circle it if you could.

12 A I'll try. Yeah. Right in here.

13 Q So -- and I'll zoom out for this question a little
14 bit. Where was the wallet and wad of cash found from the
15 photo from before?

16 A You can't really see it from here, but it's east --
17 east of all the other property that I pulled out of his
18 pocket.

19 Q Okay. So what -- of the items that were found on
20 Mr. Pina -- what was found on Mr. Pina's person is the best
21 way to ask that?

22 A From my recollection, all the items that were out in
23 the dirt surrounding where he was taken into custody were
24 items that I pulled out of his pocket.

25 Q Do you remember specifically what those items were?

1 A I don't.

2 Q Okay. Do you remember testifying at the preliminary
3 hearing in this matter?

4 A I don't remember. It was awhile ago.

5 Q You don't. If I showed you part of the transcript,
6 would that refresh your recollection?

7 A Yes, sir.

8 MR. BOLEY: Permission to approach the witness.

9 THE COURT: Uh-huh.

10 BY MR. BOLEY:

11 Q Officer, I've sort of delineated a portion of Page
12 69 there. If you could just read it to yourself?

13 A Is it specifically where this little --

14 Q Yes.

15 A Just that area there, sir?

16 Q That is what I'm referring to.

17 A I see. Yes, sir.

18 Q Okay. Does that help refresh your recollection
19 about what exactly you found on Mr. Pina?

20 A Yes, sir.

21 Q All right. So there was -- there were two knives
22 found near Mr. Pina; is that correct?

23 A I believe there was a sheath in a --

24 Q Sheath.

25 A -- in a planter found by -- to the south.

1 Q Okay. But that's not in this photo. That's to the
2 south.

3 A Correct.

4 Q Were there any knives found on Mr. Pina?

5 A I believe just the folding knife that's right there.

6 Q The folding knife? So could you --

7 MR. BOLEY: Can we clear that screen still?

8 MR. SCHWARTZ: Yeah.

9 BY MR. BOLEY:

10 Q Could you gesture towards or, you know, circle
11 somehow that knife? I'll zoom a little bit so we can get a
12 little more specific.

13 A I guess there's two here, and then there's also one
14 here that I just noticed.

15 Q So those were all three on Mr. Pina's person?

16 A I believe so. Yes, sir.

17 Q You believe so. What about the other items in that
18 stack? It looks like a lighter. Were those found -- was that
19 found near or near Mr. Pina's person or on him?

20 A As I said before, I believe all these items that
21 were found out here were items I took out of his pocket.

22 Q Okay. What about the ski mask that was previously
23 referred to? Was that on his head when you apprehended him?

24 A Yes, sir.

25 Q I'm going to show you what's been marked as State's

1 Exhibit 36. I'm going to zoom out. Is that the ski mask that
2 you pulled off Mr. Pina's head when you apprehended him?

3 A Yes, sir.

4 Q All right. Now, you described to Mr. Gill the --

5 sort of the situation as you were combing through this

6 neighborhood. Where were you standing when you -- you

7 described earlier in your testimony a gentleman with a black

8 stocking cap on that was peaking over a wall and then

9 disappeared down into -- behind the wall; is that correct?

10 A He wasn't peaking. He was standing in the middle of

11 the -- the back yard over here with all the circles you can

12 see. He was -- my gosh. This is so far off. I'm sorry.

13 He was right in this area here when I first observed

14 him from --

15 Q Okay.

16 A -- somewhere up here.

17 Q And you can just see over that wall you saw him and

18 he hit the dirt immediately when he saw you?

19 A Yeah. He ducked -- sorry. He ducked down.

20 Q Was he wearing a ski mask?

21 A All I could see from that distance was a black cap

22 on top of his head.

23 Q Okay.

24 MR. BOLEY: Pass the witness.

25 MR. SCHWARTZ: Your Honor, the State doesn't have any

1 further questions.

2 THE COURT: Okay. Anything from the jury?

3 Counsel approach, please.

4 [Bench Conference Begins]

5 THE COURT: Is that the only one?

6 MR. SCHWARTZ: What suspect said you don't understand?

7 The one that was in the bushes or in the shed?

8 MS. HOLTHUS: Oh, all right.

9 THE COURT: Okay.

10 MR. SCHWARTZ: That's fine.

11 THE COURT: Yeah.

12 MS. HOLTHUS: Do you want to answer that?

13 THE COURT: Let me see.

14 MR. SCHWARTZ: Oh, well, he's good.

15 THE COURT: [Indiscernible].

16 MR. GILL: What'd you say?

17 [Bench Conference Ends]

18 THE COURT: All right, sir. I'm going to ask you this
19 question. I want you to look at the jurors when you answer
20 this so they can hear you all right.

21 THE WITNESS: Yes, sir. Sorry. Yes, Your Honor.

22 THE COURT: Which suspect said you don't understand, the
23 one that was in the bushes or the shed?

24 THE WITNESS: Oh, I'm sorry. The what?

25 THE COURT: What suspect said you don't understand, the

1 one that was in the bushes or the one that was in the shed?

2 THE WITNESS: It was the one that was originally hiding
3 behind the Charlie -- Charlie Brown Christmas tree that I put
4 my -- my knee on his back.

5 THE COURT: All right. Any follow-up from the State?

6 MR. SCHWARTZ: No, Your Honor.

7 THE COURT: Mr. Gill?

8 MR. GILL: No, Your Honor.

9 MR. BOLEY: Nothing.

10 THE COURT: All right. Thank you, sir. You are free to
11 go.

12 THE WITNESS: Thank you, Your Honor.

13 THE COURT: Uh-huh. Folks, we are going to go ahead and
14 break for the evening. During this break you are admonished
15 not to talk or converse among yourselves or with anyone else
16 on any subject connected with this trial or read, watch, or
17 listen to any report or commentary on the trial or any person
18 connected with this trial by any medium of information,
19 including without limitation to newspapers, television,
20 Internet, and radio or form or express any opinion on any
21 subject connected with the trial until the case is finally
22 submitted to you.

23 We'll see you tomorrow at 9:00. Thank you.

24 THE MARSHAL: And, folks, if you will please rise for the
25 jury? Leave your clipboards on your seats. Take all your

1 personal items.

2 [Jury Exits]

3 THE COURT: All right. When should I anticipate getting
4 the jury instructions from anyone?

5 MR. SCHWARTZ: Your Honor, I will send you the jury
6 instructions this evening.

7 THE COURT: All right.

8 MR. GILL: I do have something I want to address just to
9 make something clear, Your Honor. I did --

10 THE COURT: All right. Hold on --

11 MR. GILL: Okay.

12 THE COURT: -- before we move on to that.

13 Mr. Gill or Mr. Boley, are you going to be proposing
14 any additional jury instructions?

15 MR. GILL: I talked to Mr. Schwartz about what I would
16 like to see in there. I'm sure he'll put those in. If he
17 doesn't, Your Honor, I will add those, but I have spoken to
18 him before [indiscernible], and I did [indiscernible].

19 THE COURT: Great. Because I'd like to be able to get
20 you -- I will come in early tomorrow so I can get you a draft
21 right after that.

22 MR. SCHWARTZ: We'll get them done, Your Honor.

23 THE COURT: Mr. Gill?

24 MR. GILL: And, Judge, I just wanted to clarify one of my
25 objections. I said I -- I think my comment was I'm objecting

1 as to the same thing. I wanted to make it clear that that was
2 not a bench conference objection that -- regarding cumulative
3 with --

4 THE COURT: It was the ongoing hearsay objection? That's
5 what I understood it to be.

6 MR. GILL: Thank you. I just wanted --

7 THE COURT: -- as the thing I had already ruled on was
8 that it was an excited utterance.

9 MR. GILL: Thank you very much, Your Honor. It wasn't --
10 I did not object to Cesar's testimony.

11 THE COURT: Okay. Great. Thank you.

12 Anything else?

13 MR. SCHWARTZ: Not from the State, Your Honor. What --

14 MR. GILL: Thank you, Your Honor.

15 MR. SCHWARTZ: What time tomorrow, 9?

16 THE COURT: 9. Great. We'll see you in the morning.

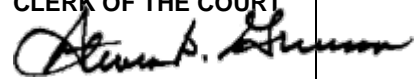
17 MR. GILL: Thank you, Your Honor.

18 [Proceedings adjourned]
19
20
21
22
23
24
25

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



DEBRA PARMER
Transcriber



RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

CASE NO. C313118-1
C313118-2

v.

DEPT. VII

CASIMIRO VENEGAS,
JOSE FERNANDO MONAY-PINA,
AKA JOSE FERNANDO MONAYPINA

Defendants.

BEFORE THE HONORABLE LINDA MARIE BELL, DISTRICT COURT JUDGE

TUESDAY, MARCH 15, 2017

**RECORDER'S TRANSCRIPT
JURY TRIAL DAY 3**

APPEARANCES:

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RYAN SCHWARTZ, ESQ., ESQ.
Clark County District Attorney's
Office

For the Defendant ADAM L. GILL, ESQ.
Venegas: Aisen, Gill & Associates LLP

For the Defendant THOMAS D. BOLEY, ESQ., ESQ.
Monay-Pina: Boley & AlDabbagh

RECORDED BY: RENEE VINCENT



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1 WEDNESDAY, MARCH 15, 2017 AT 9:06 A.M.

2 THE COURT: We good? So you have three witnesses this
3 morning?

4 MR. SCHWARTZ: Yes, Your Honor.

5 THE COURT: Yes?

6 MR. SCHWARTZ: Yes.

7 MS. HOLTHUS: Yeah.

8 THE COURT: Okay. And how long do you anticipate?

9 MR. SCHWARTZ: I would anticipate each one being 20
10 minutes.

11 THE COURT: Okay. So we're going to be done by --

12 MR. GILL: 10:30.

13 MR. SCHWARTZ: The third witness was coming around 10:15,
14 10:30, so --

15 THE COURT: Okay. So we'll be done by --

16 MR. SCHWARTZ: I gave 30 minutes for each one.

17 THE COURT: -- by 11 or so?

18 MR. SCHWARTZ: Yes.

19 THE COURT: And then we need to settle the jury
20 instructions. I need to -- oh, but I haven't talked to -- let
21 me -- you know what? Before we bring -- do have additional
22 witnesses?

23 MR. GILL: No, Your Honor.

24 THE COURT: Are you anticipating that your clients are
25 going to testify?



1 MR. GILL: No. But if you're going to admonish them now,
2 can I just have a minute? A second?

3 THE COURT: Yeah. I was going to maybe just do that
4 right now.

5 MR. GILL: Okay. Just --

6 THE COURT: Okay.

7 MR. GILL: Just a brief moment.

8 THE COURT: Yeah.

9 [Pause]

10 THE COURT: Under the Constitution of the United States
11 and under the Constitution of the State of Nevada -- you can
12 sit. It's all right.

13 MR. GILL: Thank you, Your Honor.

14 THE COURT: Sit down. You cannot be compelled to testify
15 in this case. Do you understand that?

16 DEFENDANT VENEGAS: Yes, ma'am.

17 THE COURT: And you may, at your own request, give up
18 this right and take the witness stand and testify. If you do,
19 you will be subject to cross-examination by the District
20 Attorney, and anything you say, be it on direct examination by
21 your attorney or cross-examination from the District Attorney,
22 will be the subject of fair comment when the District Attorney
23 speaks to the jury in his or her final argument. Do you
24 understand that, sir?

25 DEFENDANT VENEGAS: Yes, ma'am. I do.

1 THE COURT: And if you choose not to testify, I will not
2 allow the -- either of District Attorneys to make any comments
3 to the jury because you have not testified. Do you understand
4 that? So they wouldn't be able to say, you know, why didn't
5 he get up and --

6 DEFENDANT VENEGAS: Right. Yes.

7 THE COURT: -- tell you. I know. Why didn't he get up
8 and tell his side of the story? Do you understand that?

9 DEFENDANT VENEGAS: Yes, ma'am.

10 THE COURT: Okay. If you elect not to testify, I will
11 instruct the jury but only if your attorney specifically
12 requests that the law does not compel a defendant in a
13 criminal case to take the stand and testify, and no
14 presumption may be raised and no inference of any kind can be
15 drawn from the failure of the Defendant to testify. Do you
16 understand that?

17 DEFENDANT VENEGAS: Yes, ma'am.

18 THE COURT: Okay. Do you have any questions about these
19 rights?

20 DEFENDANT VENEGAS: No, ma'am.

21 THE COURT: You are further advised that if you have a
22 felony conviction, and I understand that you have some prior
23 felony convictions, and more than ten years have not elapsed
24 from the date you have been convicted or discharged from
25 prison, parole, or probation, whichever is later, and the

1 defense has not sought to preclude that from coming before the
2 jury, and you elect to take the stand and testify, the
3 District Attorney in the presence of the jury would be
4 permitted to ask you the following: have you been convicted of
5 a felony? What was the felony? And when did it happen?
6 However, no details would be gone into.

7 So if you did testify, your record to the extent that any
8 of your felonies were less than ten years old -- and what I
9 mean by less than ten years old, ten years when you
10 finished --

11 DEFENDANT VENEGAS: Right.

12 THE COURT: -- serving the sentence completely. Those
13 would be able to -- those would come in, in front of the jury.
14 Okay. Do you understand that, sir?

15 DEFENDANT VENEGAS: Yes, ma'am.

16 THE COURT: Do you have any questions at all about that?

17 DEFENDANT VENEGAS: No, ma'am.

18 THE COURT: All right. And Mr. Monay-Pina?

19 DEFENDANT MONAY-PINA: Yes, ma'am.

20 THE COURT: Okay. Sir, under the Constitution of the
21 United States and under the Constitution of the State of
22 Nevada, you cannot be compelled to testify in the case. Do
23 you understand that?

24 DEFENDANT MONAY-PINA: Yes, ma'am.

25 THE COURT: And you may, at your own request, give up

1 this right and take the witness stand and testify. If you do,
2 you will be subject to cross-examination by the District
3 Attorney, and anything you say, be it on cross-examination or
4 direct examination, will be the subject of fair comment when
5 the District Attorney speaks to the jury in his or her final
6 argument.

7 Do you understand that?

8 DEFENDANT MONAY-PINA: Yes, ma'am.

9 THE COURT: If you choose not to testify, I will not
10 allow the District Attorney to make any comments to the jury
11 because you have not testified. Do you understand that, sir?

12 DEFENDANT MONAY-PINA: Yes, ma'am.

13 THE COURT: If you elect not to testify, I will instruct
14 the jury but only if your attorney specifically requests that
15 the law does not compel a defendant in a criminal case to take
16 the stand and testify, and no presumption may be raised and no
17 inference of any kind can be drawn from the failure of a
18 defendant to testify. Do you understand that, sir?

19 DEFENDANT MONAY-PINA: Yes, ma'am.

20 THE COURT: Do you have any questions about these rights?

21 DEFENDANT MONAY-PINA: No, ma'am.

22 THE COURT: You are also advised that if you have a
23 felony conviction -- you have prior convictions as well, sir?

24 DEFENDANT MONAY-PINA: No, I do not.

25 THE COURT: You don't have any prior convictions. All

1 right. But if you did a prior felony, and more than ten years
2 have not elapsed from the date you have been convicted or
3 discharged from prison, parole, or probation, whichever is
4 later, and the defense has not sought to preclude that from
5 coming before the jury, and you elected to take the stand and
6 testify, the deputy District Attorney in the presence of the
7 jury would be permitted to ask you: have you been convicted of
8 a felony? What was the felony? When did it happen? However,
9 no details would be able to be gone into. Do you understand
10 that, sir?

11 DEFENDANT MONAY-PINA: Yes, ma'am.

12 THE COURT: All right. Do you have any questions about
13 that at all?

14 DEFENDANT MONAY-PINA: No, ma'am.

15 THE COURT: All right. Okay. Anything else we need to
16 take care of right now?

17 MR. SCHWARTZ: Not from the State, Your Honor.

18 THE COURT: Okay. So we're going to have about -- so
19 we'll done about 11. We need to settle jury instructions. So
20 I'll probably just bring the jury back about 1:30, something
21 like that?

22 MS. HOLTHUS: Yeah. We would -- we'd appreciate as much
23 time as we can, just a extra [indiscernible].

24 THE COURT: Okay. All right. And yeah. And then --
25 because we got to finalize the jury instructions. We got to

1 make copies for everybody. You guys need to get a final copy.
2 You need to get your closings done and -- all right. Okay.
3 That will work. 1:30 or 2:00. Let me -- I'm going to think
4 about that. Okay. Go ahead and bring them in.

5 MR. SCHWARTZ: Your Honor, could I grab some photos real
6 quick? Thank you.

7 THE COURT: Can you ask the witness about that axe,
8 before we open that box?

9 MR. SCHWARTZ: The axe? Yes.

10 THE COURT: Thank you. Sorry.

11 [Pause]

12 THE MARSHAL: Please rise for the jury.

13 [Jury In]

14 THE MARSHAL: Please be seated.

15 THE COURT: Good morning, everyone.

16 GROUP RESPONSE: Good morning.

17 THE COURT: Back on the record in case number C313118,
18 State of Nevada v. Venegas and Monay-Pina. Let the record
19 reflect the presence of all of our jurors, Defendants, and
20 counsel.

21 State, please call your next witness.

22 MS. HOLTHUS: Adam Felabom.

23 THE MARSHAL: Ready for him?

24 MS. HOLTHUS: Um-hum.

25 THE MARSHAL: Please remain standing, and raise your

1 right hand, and face the clerk to be sworn in.

2 ADAM FELABOM, PLAINTIFF'S WITNESS, SWORN

3 THE COURT: Good morning, sir. Go ahead, and have a
4 seat. If you could state your name and then spell it for the
5 record, please.

6 THE WITNESS: Adam Felabom. A-D-A-M F-E-L-A-B-O-M

7 DIRECT EXAMINATION

8 BY MS. HOLTHUS:

9 Q What do you do?

10 A I'm a crime scene analyst with the Las Vegas
11 Metropolitan Police Department.

12 Q And could you, for the jury, explain your education,
13 experience, and training in the area?

14 A I have my bachelor's degree in criminal justice. I
15 also have a few hundred hours of training over various courses
16 including fingerprint processing, evidence collection, prints
17 and photography, and subjects like that.

18 Q Kind of describe for us the protocol. A crime is
19 committed in Las Vegas; what happens? How do you get
20 involved?

21 A Typically what happens is patrol officers will
22 respond to the scene first. And then if they determine that
23 we could assist them in their investigation, they will make a
24 request either over the radio or over the phone to our office.

25 Q Direct your attention to January 12th, 2016. Did

1 you respond to 510 Brush Street, about 5 a.m. --

2 A I did.

3 Q -- 5:05? Actually, the exact time was -- what time
4 did you get there?

5 A 5:05 a.m.

6 Q And what did you find when you got there?

7 A When I first arrived there, there were multiple
8 patrol officers on the scene, and they had a couple different
9 scenes in the area. My main concern was in the backyard of
10 510 Brush Street.

11 Q And why was that your main concern?

12 A There were two scenes, but they were two houses
13 apart. So another crime scene analyst came out, and she
14 focused on the other residence, while I focused on the 510
15 address. That way, we could split up the work, get it done a
16 little faster.

17 Q So yours was basically where the suspects were
18 found; is that correct?

19 A Correct.

20 Q So what did you do?

21 A First, I photographed two subjects that the police
22 had in custody, to document any injuries or lack of injuries
23 that they had. I then went into the backyard of 510 Brush
24 Street and began taking notes about the layout, any items of
25 evidence that I saw back there. And then I began taking

1 photographs to document the scene as I found it, and then,
2 after that, I began collecting any evidence that I thought
3 would be pertinent to the case.

4 Q Are you also guided to evidence by the officers that
5 are at the scene, as well?

6 A Yes. As the primary officers on scene, when they
7 first get there, part of their job is to search for evidence.
8 And then, once I get there, they'll direct me to anything
9 they've found. I'll continue to search to see if there's
10 anything else that I might have seen that they didn't see.

11 Q And obviously, protocol is they -- nobody touches
12 anything; is that fair to say?

13 A Typically, they will leave the scene as they found
14 it, unless for some extenuating circumstance -- if they felt
15 that the evidence was going to become damaged due to weather,
16 or maybe the sprinklers were about to go off or something like
17 that. They will typically leave everything where they find
18 it, unless there's some exigent circumstance for them to move
19 it.

20 Q Were you made aware of any exigent circumstances?

21 A I was not.

22 Q So as far as you know, nobody told you they moved
23 anything?

24 A Correct.

25 Q Would they normally tell you if something had to be

1 moved?

2 A Yes.

3 Q In addition to photographing all of the evidence,
4 did you collect it and impound it, as well?

5 A I did.

6 Q Did you do that -- how did you do that? I mean, do
7 you do it in a way that you preserve the integrity of the
8 evidence?

9 A Yes. I will take each individual item of evidence
10 that I'm collecting. I'll photograph it, just to document its
11 overall condition. Then, depending on what type of evidence
12 it is, I'll package it in its own container, whether it be a
13 bag or an envelope, and then I will sort it and package it in
14 larger packages to be deposited in the evidence vault.

15 Q Let me take you through your photograph chronology
16 of the area. Is that the area that you first responded?

17 A Yes. This is the front of the residence of 510
18 Brush Street.

19 Q And that was Exhibit 33. Exhibit 34?

20 A Now, we're in the backyard of the residence. And
21 you can see there are some planters along the walls of the
22 backyard, and the rest is kind of like a dirt gravel.

23 Q 35?

24 A This is closer towards the wall. There's some --
25 there's a lot of property on the ground around here. There's

1 some items in the bushes at the top.

2 Q Can you point to that? If you circle that? There
3 you go.

4 A There's some items up here in the bush, and then
5 there's also a bunch of cell phones, pocket knives, as well as
6 a mask on the ground, and a wallet down in the dirt area, down
7 in here.

8 Q And by way of -- where on this picture are those
9 items?

10 A Those items are down over in this area, up here.

11 Q Showing you State's Exhibit 36?

12 A This is a blue ski mask that I found on the ground.
13 It was in the previous photo, next to the planter area.

14 Q Close up of that?

15 A Correct.

16 Q And again, all of these items were impounded by you?
17 This was impounded?

18 A That was impounded. Not all of the items that were
19 on the ground there were impounded by me.

20 Q Okay. Which ones? Do you know which ones were?

21 A The mask was. There is a -- actually, a glove back
22 in the planter area, back here. That was impounded by me.
23 The rest of the property, if I recall correctly, was either
24 returned to -- was returned to its owners.

25 Q And I think 37 is just another view?

1 A Yes. I put down a clean brown paper bag, and then
2 laid the mask out, so you could see a little easier what it
3 was.

4 Q And 40?

5 A These are some items that were found on the ground
6 right there, next to the planter. Some cell phones and a
7 camera.

8 Q Again laid out on the brown paper?

9 A Correct.

10 Q State's 41?

11 A Again, this is just more of all of those items that
12 were piled together, next to planter area. It's just some
13 keys, a lighter, and some pocket knives that were -- that I
14 laid out on the brown paper, just to spread them out, give you
15 a nice clean background to see what they are.

16 Q And again, we're still -- these are still kind of
17 closeups and clarifications of these items, correct?

18 A Correct. All of the items down by the planter area.

19 Q State's Exhibit 46?

20 A This a wallet that was also found among that
21 property.

22 Q 47?

23 A That's the inside of that wallet, once it's been
24 opened up. And that's the driver's license that I found
25 inside.

1 Q State's Exhibit 43?

2 A So back when I was talking about that planter area
3 and there were some items inside the bush, this is a closer up
4 of the items inside the bush. There's a wallet, as well as --
5 there's a wad of money.

6 Q And in this picture, approximately where would that
7 be?

8 A It would be the same as the other area, back in
9 back, up in here.

10 Q 49?

11 A This is that wallet that I found inside the bush.

12 Q And 50?

13 A And once again, I've opened up the wallet, and you
14 can see the identification card inside.

15 Q Indicating Javier Colon?

16 A Correct.

17 Q State's 53?

18 A This is that wad of cash that you saw inside the
19 bush. Once I pulled it out, I placed it on a brown bag.

20 Q 54?

21 A This is that same wad of cash. I'm just spreading
22 out -- laying it out, so that, when I take a photo of it, you
23 can actually count it if you wanted to.

24 Q And are so all of the bills -- all of the fives and
25 the twenties are reflected there?

1 A Correct.

2 Q One 20 and the rest fives?

3 A Correct. There should be another photograph with
4 more bills, because they wouldn't all fit into one frame.

5 Q This one, maybe? 55?

6 A Correct.

7 Q And those were just -- those were the ones?

8 A Those are the ones. Correct.

9 Q And so is that the total amount of the moneys in the
10 wad that was in the bushes?

11 A Yes. I counted \$138.

12 Q Exhibit 42?

13 A So down in the bottom left of the screen, you can
14 see that wad of cash and the wallet that we were just looking
15 at in the other photos. And then up in the top, here, is that
16 little black spot. That's actually a black knit glove.

17 Q 44?

18 A And that's the glove, once I've laid it out on the
19 paper.

20 Q And 45?

21 A Again, that's the glove. The previous photograph,
22 it was kind of like, once you pull it off, the fingers kind of
23 get stuck inside themselves. So once I've like pulled the
24 fingers out and made it look like a glove again, that's just
25 to show the overall condition of it.

1 Q State's Exhibit 56?

2 A This is a little, kind of like, circular planter
3 area. They were throughout the backyard, but one, of the ones
4 down in the southeast corner of the backyard, had -- there was
5 a BB gun in the planter area. You can see it there.

6 Q I'm going to go back for just a minute. And State's
7 Exhibit 48?

8 A Yes.

9 Q What is that? Are you able to tell?

10 A That is the money that I found in -- if I recall
11 correctly, I believe it was inside --

12 Q Would it be inside --

13 A I believe it was the one with -- yes. That one,
14 there.

15 Q So the moneys that you took out, you would
16 photograph with the wallet from which it came?

17 A Correct.

18 Q 57?

19 A This is the photo of that planter area, that
20 circular planter area that they just showed a photo of. And
21 you can see the BB gun here, and then there's also a knife
22 next to it.

23 Q Ultimately, did you impound the BB gun?

24 A I did. Yes.

25 Q Specifically, what kind of gun was that one?

1 A It was a Beretta.

2 Q Beretta?

3 A A 90TWO. Nine zero T-W-O.

4 Q What does that mean?

5 A That's like to model of it.

6 Q Of the BB gun?

7 A Of the BB gun. Yes.

8 Q 58?

9 A That is the knife that I found next to the Beretta.

10 Q 59?

11 A And then, this would be a photograph of the BB gun,
12 itself. Once again, I've laid it out on the brown paper to
13 give a cleaner background, just to show its overall condition.

14 Q And 60?

15 A This is the same BB gun. I've just turned it over
16 to photograph the other side.

17 Q And the BB gun is also a pneumatic gun; is that
18 correct?

19 A Yes.

20 Q State's Exhibit 61?

21 A In the northeast corner of the backyard, there was
22 this shed. It's kind of raised up. It's on little stilts,
23 and there's the block wall in the background of the photo.
24 All the items that we were just looking at would be over to
25 the right-hand side. If it was a larger photo, they would be

1 over here on the right-hand side.

2 Q 62?

3 A This is a photo, closer up towards that raised shed
4 and looking underneath it, below the floorboards of it. You
5 can see these items here, which are a pair of gloves and a
6 hat.

7 Q 63?

8 A This is a closer photo. Again, you can see the red
9 and the black gloves as well as the knit hat on the ground
10 next to them.

11 Q 64?

12 A This is that knit hat that was on the ground. I've
13 laid it out on some paper. Once I had done that, I noticed
14 that the top of the hat had been cut, so that there was a hole
15 in it. So it was more of a tube than an actual hat.

16 Q 65?

17 A And this is a photograph of the red and the black
18 gloves that were in the previous photos.

19 Q And 66?

20 A This is the same gloves. I've just turned them over
21 to photograph the palms of the gloves.

22 Q The palms are black?

23 A Yes.

24 Q And 67?

25 A What we're looking at here is, actually, the

1 northeast corner of the backyard. So it'd be on the back side
2 of that shed that we showed. On the ground, you can see a few
3 items. There's two BB guns, up in here, as well as a knife,
4 down here.

5 Q State's 69?

6 A This is one of those BB guns that I found on the
7 ground in the planter area.

8 Q 70?

9 A And that's the other side. I've just turned it
10 over, and you can see that it's missing the left-hand grip.

11 Q And what type of BB gun is that?

12 A That's a Daisy Powerline.

13 Q 71?

14 A This is the other BB gun that I found back there.
15 It was next to the Daisy Powerline.

16 Q 72?

17 A Once again, it's the same BB gun. I've just turned
18 it over, photographing the other side.

19 Q And that -- what type of BB gun is that one?

20 A The only markings that I saw on it were DX17.

21 Q And these stuff on the gun, did you determine what
22 that was?

23 A There was a bunch of dirt on the gun. On these
24 photos, I'm not sure if you can see very well, at least with
25 the glare. But there is -- up towards the nose of the gun,

1 there is blood on the gun.

2 Q And 73 is just a zoom in of that?

3 A Correct. And here, you can see some of the blood,
4 these little red dots, down in here.

5 Q And 74?

6 A And this is that knife that was also found in that
7 back-northeast corner of the backyard.

8 Q And then you also indicated that you photographed
9 the two suspects at the scene?

10 A Yes.

11 Q And I can't show you head to toe, so I'm going to
12 show you in two pieces. Head and toe. That would be one of
13 the suspects?

14 A Yes.

15 Q Exhibit 75. Yeah, 75. And State's Exhibit 77,
16 second individual?

17 A Yes.

18 Q Did you also, at our request, bring one of the items
19 of evidence with you?

20 A I did. I brought an item from the other residence,
21 from the 504 Brush Street. Yes.

22 Q That was impounded by the second -- the other CSA?

23 A Correct.

24 Q And none of these -- these items are all -- the
25 majority of these are in evidence if needed, but for the time

1 being, we just have the photographs; is that correct?

2 A Correct.

3 Q Now, I'm showing you State's Exhibit 107. Do you
4 recognize that?

5 A It's the box that I brought in yesterday.

6 Q Okay. And how is it that you know that?

7 A It has, on the front, a label. It has the event
8 number and the labeling information for what I picked up
9 yesterday.

10 Q And is it currently in a sealed condition?

11 A Yes.

12 Q Do you recognize the initials on the seals?

13 A I recognize Brenda Vaandering's. I don't know what
14 the -- I don't recognize the blue ones. I'm assuming that's
15 from the forensics lab.

16 Q From the what?

17 A Forensic lab.

18 Q When forensics are done on it?

19 A Yes. They use blue seals, typically, over at the
20 lab, and we use red seals.

21 Q And just for jury's information, when evidence is in
22 a sealed condition and it's opened, it's then resealed with
23 someone's initials or name on it, so that we know who got into
24 it, correct?

25 A Correct. Every time -- whenever it's initially

1 sealed, we'll put these little red pieces of tape over the
2 corners or the edges, and then we'll initial and date to show
3 when we sealed it. Anytime someone breaks those seals and
4 they put new seals on, they also do the same thing to show
5 their initials and P number, their personnel number, to show
6 who was -- who had that item and also what date they sealed it
7 back up.

8 Q And so the blue tags, you recognize to be lab tags
9 from the forensic lab?

10 A Correct.

11 Q And then the red ones, you said were Brenda
12 Vaandering? Was she that CSA at the 504 Brush Street --

13 A Correct.

14 Q -- address? Okay. If you could open those?

15 MS. HOLTHUS: Do you want to see it all sealed up first?

16 MR. GILL: No.

17 MS. HOLTHUS: Judge, let me go ahead and move for
18 admission at this point.

19 MR. GILL: We have no objection, Your Honor. We
20 discussed it earlier.

21 THE COURT: All right. So it's 107?

22 UNIDENTIFIED SPEAKER: Yes.

23 THE COURT: 107 will be admitted.

24 [Plaintiff's Exhibit 107 Received]

25 THE COURT: Are we going to separately mark the contents

1 as A?

2 MS. HOLTHUS: We're kind of waiting to see what the
3 content -- I mean, we know -- I know, generally --

4 THE COURT: Yeah.

5 MS. HOLTHUS: -- what the contents are, but how the
6 contents are packaged.

7 THE COURT: All right.

8 THE WITNESS: There should be only one item here.

9 BY MS. HOLTHUS:

10 Q Right. Is there bags within a bag within a bag or?

11 A I'm assuming it's just zip tied in, but --

12 Q And for the record, there -- is there an indicator,
13 on the front, of what's in that?

14 A Yes. On the label, it lists everything that's
15 inside the box.

16 Q And what's inside the box?

17 A She described it as one axe with a double-edged
18 blade, a wooden handle, and apparent blood. Did you want me
19 to show it or?

20 Q Yes, please. Very good. Now, so is it tied to the
21 box?

22 A Yes. These zip ties are holding it into the box.
23 Yes.

24 Q Can we remove the brown thing at the top?

25 A The paper?

1 Q Right. Is that where the --

2 THE COURT: How is it -- can I see how it's in there?
3 All right.

4 MS. HOLTHUS: Do you want to mark that separately or
5 because it's attached to the box or?

6 THE COURT: No. I don't think we need to mark it
7 separately since it's attached to the box.

8 MS. HOLTHUS: Thank you. The State rests.

9 MR. GILL: Thank you, Your Honor. And if we want, Judge,
10 I'm not going to be asking any questions about the axe. If we
11 want to maybe put that back?

12 THE COURT: Yeah. Thank you.

13 CROSS-EXAMINATION

14 BY MR. GILL:

15 Q Mr. Felabom, how are you this morning?

16 A Doing well. Thank you.

17 Q Now, when you're asked to process a scene -- well,
18 specifically, this scene -- you arrived about 5:05 or at
19 5:05 --

20 A Correct.

21 Q -- a.m.?

22 A Correct.

23 Q And you -- I mean, for lack of a better term -- you
24 don't have an interest in parties, necessarily? You're there
25 to process the scene, correct?

1 A Correct.

2 Q And part of that includes photographing?

3 A Correct.

4 Q And then do you do any finger -- or fingerprint
5 work?

6 A It all it depends on the -- on a case by case.

7 Q And before --

8 A In this specific case, I did.

9 Q You did?

10 A Yes.

11 Q Okay. So you're trained to collect the fingerprints
12 and then send them for analysis; is that fair?

13 A Correct.

14 Q Did you collect any fingerprints in this case?

15 A I collected in the sense that I photographed it. I
16 chemically processed a number of items from the scene. And
17 instead of actually lifting those fingerprints with a piece of
18 tape, I photographed them with the camera for comparison,
19 printed out those photographs at a one-to-one scale, and then
20 submitted those to be examined.

21 Q And that's common. You're not going -- you're not
22 necessarily going to do the comparison. You're going to
23 submit them to somebody with Metro to do that comparison,
24 correct?

25 A Correct. We have a specific lay and print detail.

1 That's pretty much all they do is the fingerprint comparisons.
2 We don't -- we do the field work, and then they do the
3 analysis work.

4 Q In part of that field work, you don't determine
5 whether the print is comparable, for lack of a better term, or
6 the quality of the print?

7 A The standard we look for is if we feel it's suitable
8 for recovery. Just because we feel it's suitable for
9 recovery, i.e., meaning, suitable to be either lifted with
10 tape or to be photographed -- just because we feel it's
11 suitable to be recovered, doesn't necessarily mean it's going
12 to be determined to be suitable for comparison later on, down
13 the road, by the lay and print detail.

14 Q And you know that from experience, correct?

15 A Correct.

16 Q And probably training?

17 A Yes.

18 Q So you submitted how many fingerprints in this case?

19 A I developed --

20 Q Or photographs of fingerprints? I apologize.

21 A I developed one fingerprint.

22 Q And where did you develop that from?

23 A That was on the magazine that was found inside that
24 Beretta BB gun in the backyard.

25 Q And I'll find that -- I believe it's -- I'll find

1 that specific gun. Give me one moment. Was the State -- I'm
2 showing you State's 56. The one in the planter was the
3 Beretta; is that correct?

4 A Correct.

5 Q And you can see it on the left of the circle
6 planter?

7 A Correct.

8 Q Now, when you say Beretta, you also described it as
9 a pneumatic gun. Can you tell the jury what you mean by that?

10 A It's operated by, basically, compressed air. It's
11 not a typical firearm where you have the cartridge with
12 gunpowder in it. It's a BB gun or an airsoft type gun where
13 you charge some air into there, and then you -- when you pull
14 the trigger, it releases that air, and the air is used as the
15 propellant to propel the projectile.

16 Q Okay. And that's what is known as a pneumatic gun?

17 A Yes.

18 Q And then there were two others and -- State's 72
19 shows yet another that you recovered, correct?

20 A Correct.

21 Q And specifically -- this is a pneumatic gun, as
22 well, correct?

23 A Yes. They all were.

24 Q All three that you recovered?

25 A All three appeared to be. Yes.

1 Q And you described some -- I think you said blood and
2 dirt, correct?

3 A Correct.

4 Q Now, the jury will have this when they go back,
5 because I do understand the -- this screen is -- well, you
6 described it kind of on the tip of the weapon, there, or the
7 barrel, correct?

8 A Yes. There's -- I thought there may have been a
9 photo better of it.

10 Q And there might be.

11 A But you can also see --

12 Q Oh, there is. You know --

13 A You can see it right there, as well.

14 Q I've got a better one. 73 is the better photo. I'm
15 sorry. Same photo -- same gun, correct? Same BB gun?

16 A Same gun. It's just a much closer photo, and you
17 can see areas down in here, and then you can see also up in
18 here.

19 Q Now, did you do any testing on what you thought was
20 the blood?

21 A I did perform a presumptive test on -- to see if it
22 was blood, and it came back positive.

23 Q Did you do any determinations on whose blood it
24 might be?

25 A No. I did not. Again, that's something where I do

1 the field work, and then we have forensic scientists over in
2 the lab. They're the ones that perform the actual DNA
3 testing, if that's requested to be done.

4 Q Okay. So your role, out in the field, was to do a
5 presumptive test? Came back positive?

6 A Correct.

7 Q And you move it along?

8 A Correct. I collected a sample of the blood off the
9 gun and impounded that, prior to fingerprint processing it.

10 Q Now, I'm showing you 62. And you described that
11 as -- and I'll zoom out a little bit. You described that as
12 the shed in that backyard at 510 Brush, correct?

13 A Correct.

14 Q And underneath is a pair of gloves and a -- it was
15 the one that's not quite the hoodie, correct? Almost a scarf?
16 Is that what we're seeing there?

17 A Correct. It's the hat that has the hole cut in the
18 top, so that is more of tube shaped than a hat.

19 Q Tube shape is the phrase you used. Okay. So were
20 these items in this condition, or did you have to move them to
21 photograph them?

22 A This photograph is how I found them.

23 Q When you arrived and processed the scene?

24 A Correct.

25 Q Now, I know I moved the axe, but you had read, from

1 the list on the box, what the contents were, correct?

2 A Correct.

3 Q And you said axe, wood handle, correct?

4 A Yes.

5 Q And with apparent blood?

6 A Yes.

7 Q Now, I know you didn't process -- well, let me ask
8 you. Did you process the axe?

9 A No. I had nothing to do with the axe until
10 yesterday when I picked it up.

11 Q Okay. So you're going off notes from another CSA?

12 A I'm going off strictly what I just read off that
13 label.

14 Q Well, and who would put that label on? Would that
15 be --

16 A That would be Brenda Vaandering, the other crime
17 scene analyst.

18 Q Okay. And is she the same crime scene analyst who
19 processed 504?

20 A Yes.

21 Q And that's what you were describing earlier with
22 spread up duties or separate duties and get the scenes
23 processed more quickly?

24 A Correct.

25 MR. GILL: Court's brief indulgence.

1 BY MR. GILL:

2 Q Well, let's go to State's 35. So and this is more
3 of a general question, but we'll use 35 as our example. You
4 come on a scene, and you photograph. And these are the items
5 listed in 35 that are phones, knives, keys, wallets. This
6 shows quite a bit of items, correct?

7 A Correct.

8 Q You don't know who these belong to, correct? Well,
9 let me ask a better question. When you first arrive, are you
10 told by detectives who this stuff belongs to or simply to
11 photograph it?

12 A I will get basic information from patrol officers
13 and detectives. In this particular case, I was told that they
14 had taken one of the subjects into custody right there, and
15 when they patted him down, they just pulled everything out of
16 his pockets and dumped it right there.

17 Q Okay. And that's essentially all the information
18 you're given before --

19 A Correct.

20 Q -- processing?

21 MR. GILL: Court's brief indulgence.

22 [Pause]

23 MR. GILL: Pass the witness, Your Honor. Thank you.

24 THE COURT: Mr. Boley?

25 MR. BOLEY: Yes, ma'am.

CROSS-EXAMINATION

BY MR. BOLEY:

Q Briefly, I'll try not to be duplicative. Let me show you what's been marked as State's Exhibit 35. I think you discussed this at length, already. When you showed up at the scene -- and I know Mr. Gill sort of led into this -- were these items separated at all, like some of the items were taken off the person of one of the subjects and some were not?

A That was my understanding. Yes.

Q Okay. So some of them were not on the person of the subject taken into custody there?

A That was my initial understanding. I didn't have any firsthand knowledge. It was just what I was told.

Q Okay. So you're not personally aware of what was on the person of that subject?

A Correct.

Q Okay. One second. I'm looking for a specific -- I'm going to show you what's been marked as State's Exhibit 73, a BB pistol with the marking DX17. This is the gun that was found with blood on the tip, right?

A Correct.

Q Where in the yard was that found?

A That was found in the planter area at the northeast corner of the backyard, so in that area behind the shed.

Q Behind the shed? So let me be more specific here,

1 if I can find the right exhibit. I apologize.

2 A No worries.

3 Q Oh, I think I can use the more zoomed in photo. I'm
4 showing you what's been marked as State's Exhibit 62. That's
5 a photo of the shed you're referring to, right?

6 A Correct.

7 Q So behind that was found the gun with blood on it?

8 A Correct.

9 MR. BOLEY: Thank you.

10 THE COURT: Anything else from the State?

11 MS. HOLTHUS: Just a couple things.

12 REDIRECT EXAMINATION

13 BY MS. HOLTHUS:

14 Q And I don't recall. I apologize if I asked you this
15 already, but I just want to make sure. On the red and black
16 work gloves, did you also find apparent blood stains on those?

17 A I did. Yes.

18 Q And did you test those?

19 A I did that presumptive test, again, to see if it was
20 blood, and it came back positive. I didn't do any
21 identification type DNA testing on it though.

22 Q Then the only other question I wanted to ask -- the
23 axe, it's marked biohazard, and that's because of the apparent
24 blood on it?

25 A Yes.

1 Q You put gloves on with it. If I were to pick it up
2 later to show it to the jury or the jury were to want to look
3 at it in the room, handling it with gloves, is that what you
4 recommend? Well, there's no danger to the axe sitting there,
5 right? There's nothing air born or anything?

6 A Yeah. I would assume there wouldn't be. I don't --
7 I wouldn't wear gloves. I don't know if any of it was
8 collected off of there --

9 Q Okay. So --

10 A -- or how much, or if it was all collected, or part
11 was left on there.

12 Q Okay.

13 A So I would definitely recommend wearing gloves
14 just --

15 Q So you just wear the gloves for -- as a precaution?

16 A Correct.

17 Q And that is the reason for it is the biohazard of
18 any time there's apparent blood?

19 A Correct.

20 MS. HOLTHUS: That's all. Thank you.

21 THE COURT: All right. Anything else, Mr. Gill?

22 MR. GILL: Very briefly.

23 RECROSS-EXAMINATION

24 BY MR. GILL:

25 Q But again, you don't know whose blood?

1 A Correct.

2 Q You just know it's human blood or blood?

3 A I know it's blood. I -- the presumptive testing
4 that we do is not specific enough to tell whether it is human
5 blood or animal blood.

6 MR. GILL: Nothing further, Your Honor.

7 MR. BOLEY: Briefly.

8 RECROSS-EXAMINATION

9 BY MR. BOLEY:

10 Q Sir, you talked about two sets of gloves, and
11 forgive me. I'm going to show you State's Exhibit 62. The
12 State asked you was there blood found on the gloves. Are
13 these the gloves you were talking about?

14 A Yes.

15 Q And there was another set of gloves that were black.
16 Just trying to find that one. There was another set of gloves
17 that were black that were found?

18 A It was just a single glove, but yes.

19 Q Just a single glove?

20 A Yes.

21 Q Was there blood on that glove?

22 A No. There was not.

23 MR. BOLEY: Okay. Thank you.

24 MS. HOLTHUS: Nothing further.

25 THE COURT: Anything from the jury?

1 Counsel approach.

2 Officer Walker, I got it.

3 THE MARSHAL: Okay.

4 THE COURT: I'll take care of it. Thank you.

5 [Bench Conference Begins]

6 MR. SCHWARTZ: You described the gloves in the bush as
7 knit gloves. How would you describe the material in the red
8 gloves? Garden gloves, knit gloves, ski gloves? I guess he
9 could say, how would describe it?

10 MS. HOLTHUS: [Indiscernible] gloves.

11 MR. SCHWARTZ: Do you know whose fingerprints are on the
12 gun found with blood on it, also on the axe?

13 MR. GILL: He already said no.

14 MS. HOLTHUS: Anybody can ask anything. He obviously
15 missed it.

16 MR. GILL: Sorry.

17 MR. SCHWARTZ: Was the other black glove found at the
18 scene? If so, where? Okay. We said that a million times.

19 MR. GILL: Yeah. The last two are kind of asked and
20 answered, but I don't care.

21 THE COURT: [Indiscernible].

22 MR. GILL: I don't care. I mean, I have no preference
23 for it, but I don't care if they missed it.

24 THE COURT: I don't not ask questions that are asked and
25 answered with jury questions, because it could be they just

1 missed it.

2 MR. BOLEY: That have been asked?

3 MR. GILL: That's right.

4 MR. BOLEY: That's fine.

5 MS. HOLTHUS: [Indiscernible] my request.

6 MR. SCHWARTZ: So then if -- do we --

7 THE COURT: [Indiscernible].

8 MR. SCHWARTZ: Oh, we aren't. Okay.

9 MS. HOLTHUS: All right.

10 MR. GILL: Thank you.

11 MR. SCHWARTZ: Thank you.

12 [Bench Conference Ends]

13 THE COURT: All right. Sir, I'm going to ask you
14 questions. I'm going to ask you to look at the jury so they
15 can hear you when you answer.

16 THE WITNESS: Okay.

17 THE COURT: You described the gloves in the bush as knit
18 gloves. How would you describe the material of the red gloves
19 pictured?

20 THE WITNESS: Those were more of like gardening type
21 gloves. Whereas, the ones that I described as knit gloves are
22 more like those stretchy winter type gloves with like -- I
23 mean, they're a knit type pattern. Whereas, the red and black
24 ones were -- the palms were more of like -- I'm not sure I'd
25 say leather, but kind of like a leather like type -- the rough

1 leather, like work gloves.

2 THE COURT: Was the other black glove found at the scene?
3 If so, where?

4 THE WITNESS: No. We did not find a second black glove.

5 THE COURT: Do you know whose fingerprints are on the gun
6 found with the blood on it, also on the axe?

7 THE WITNESS: I -- I'm sorry. Could you ask that one
8 more time?

9 THE COURT: Yes. Do you know whose fingerprints are on
10 the gun found with the blood on it, also on the axe?

11 THE WITNESS: As for the axe, I had nothing to do with
12 that, so I don't even know if that was fingerprint processed
13 or not. As for the gun with the blood on it, I fingerprint
14 processed it, but I did not find any fingerprints on that gun.

15 THE COURT: Follow up from the State?

16 FURTHER REDIRECT EXAMINATION

17 BY MS. HOLTHUS:

18 Q The only fingerprint was found on a magazine from
19 one of the guns; is that right?

20 A Correct. The only fingerprint I found was on
21 magazine found in the magazine well of the Beretta gun that
22 was down at the south end of the yard.

23 Q And of everything you processed, that was the only
24 print you found?

25 A Correct.

1 Q You don't know if it matched anything, because
2 that's not your job?

3 A Correct.

4 MS. HOLTHUS: Nothing else.

5 MR. GILL: No, Your Honor.

6 THE COURT: Mr. Boley?

7 MR. BOLEY: No, thank you.

8 THE COURT: All right. Thank you, sir. You are free to
9 go.

10 State, please call your next witness.

11 MS. HOLTHUS: Detective Smith.

12 [Pause]

13 THE MARSHAL: Please remain standing. Raise your right
14 hand. Face the clerk to be sworn in.

15 TRACY SMITH, PLAINTIFF'S WITNESS, SWORN

16 THE CLERK: Thank you.

17 THE COURT: Good morning, ma'am. Go ahead and have a
18 seat.

19 THE WITNESS: Morning.

20 THE COURT: If you could state your name and then,
21 please, spell it for the record.

22 THE WITNESS: My name is Tracy Smith. T-R-A-C-Y. Smith,
23 S-M-I-T-H.

24 THE COURT: Thank you. Whenever you're ready.

25 MS. HOLTHUS: Sorry.



1 DIRECT EXAMINATION

2 BY MS. HOLTHUS:

3 Q What do you do?

4 A I'm a police detective for the Las Vegas
5 Metropolitan Police Department.

6 Q And how long have you been with Metro?

7 A Coming up on 21 years.

8 Q Are you assigned to a particular bureau? How does
9 it work now?

10 A Yes, ma'am. I am currently assigned to Bolden Area
11 Command. I'm a -- we call them PD detectives, police
12 detectives. We're -- we handle basically everything except
13 for homicide and sex crimes.

14 Q And so what is the -- what's the procedure in the
15 detective bureau? How do you get involved in a case?

16 A I get involved in a case when I get a call from a
17 patrol sergeant. Some of the patrol officers will call us if
18 they have questions. Usually, on our high -- I guess -- high
19 violent type crimes, we'll go out and help with the -- at the
20 scene.

21 Q So you don't drive around in a car and respond to
22 calls?

23 A No, ma'am. I don't.

24 Q You said --

25 A Well, actually, not like a patrol officer, but we do

1 have our detective cars. But we are at our desks, and we do
2 go out to crime scenes when asked to.

3 Q Okay. So you leave your desk with a destination?

4 A Yes, ma'am.

5 Q What's your education, experience, and training in
6 the area of law enforcement?

7 A I have gone to -- I've been to two colleges. I
8 don't currently have a degree. I have enough credits, because
9 I transferred. I went to UNLV, and then I went to Cal State,
10 Long Beach, and then when I transferred back when I got hired
11 here. I am a retired OSI agent. I spent twenty-two and half
12 years in the military. An OSI agent is Airforce Office of
13 Special Investigations, where we handle all felony crimes
14 within the Airforce. I don't currently have a degree, but I
15 have quite a bit of schooling.

16 Q Okay. And you've been on the job for twenty --

17 A In our department, for almost twenty-years.

18 Q And prior to that, you said then?

19 A I was in the Airforce.

20 Q Did you become involved in a case with Richard
21 DeCamp as victim, as well as Javier Colon?

22 A Yes, ma'am. I did.

23 Q How did you become involved in that one?

24 A I was called out by -- I believe the patrol sergeant
25 called my sergeant, and my sergeant -- I was on call that

1 particular morning, and my sergeant called me out to go assist
2 on a robbery that had occurred at a 7-Eleven. And they found
3 out that it also had something that to do with a home invasion
4 that occurred, I think, about twenty minutes later.

5 Q Was that -- first of all, was that on January
6 12th --

7 A Yes, ma'am.

8 Q -- 2016?

9 A January 12th.

10 Q And approximately what time did you respond?

11 A I know it was early in the morning. I believe it
12 was about 3:30 maybe 4:00 in the morning that I was called.

13 Q And where did you respond first?

14 A I initially responded to the house on Brush Street
15 where the victim, Colon, was the victim of the home invasion.
16 And I believe my partner had gone to the 7-Eleven.

17 Q And who is your partner?

18 A That morning, I believe was Detective Eric Toms
19 [phonetic].

20 Q And that's how you would do it, you -- with two
21 crime scenes, obviously, you had to split?

22 A Yes, ma'am.

23 Q So what did you do at your scene?

24 A At my crime scene, I had kind of gotten a
25 walkthrough. I get a briefing from the patrol officer,

1 because they had -- the crime scene was no longer a dynamic
2 scene. The suspects were in custody. He gave me a
3 walkthrough of the crime scene that had occurred at the home
4 invasion and then where the suspects were later located in the
5 backyard, approximately two houses away.

6 Q And just basically, what did you observe at the home
7 invasion site.

8 A The home invasion, I remember initially walking into
9 like the carport that kind of turned into a garage. I --
10 first thing I noticed was a bloody axe. I had gone into the
11 bedroom where Mr. Colon had been, I guess, sleeping. And
12 really, I don't walk actually in. I -- because our crime
13 scene investigators come in to do the overall pictures, and I
14 don't want to, you know, add stuff to the crime scene.

15 So I just kind of gave a look around, which is actually a
16 garage that's made into a bedroom. So I mean, it doesn't
17 have, you know, air conditioning or heating or anything like
18 that. I noticed it was very dark, and I noticed that there
19 was a window from the garage/carport/bedroom, a window with
20 miniblinds that goes into the house. I noticed that it looked
21 kind of disheveled. And then the police officer took me to
22 the house two doors down that had where the suspects were
23 later taken into custody. The --

24 Q And what did you see there?

25 A I saw there that there were puffy jackets. There

1 were actually three firearms or three guns that looked like
2 firearms which later were BB guns. Money, there was money
3 kind of wrapped in a wad. There was a red hat and, I believe,
4 some gloves. And it was all similar items that were also
5 involved in the 7-Eleven. Because I remember the description
6 of the 7-Eleven robbery, so when I saw the items in the
7 backyard, it matched the exact description of the 40- -- the
8 robbery at the 7-Eleven.

9 Q And so what did you do then?

10 A I instructed -- I believe, around the same time that
11 I got there, our crime scene investigator also there. And she
12 is the one that takes the overall pictures of the crime scene.
13 She takes pictures of where the items were located, before she
14 actually takes them and processes them in as evidence.

15 Q And that was done, according to Mr. Felabom, by
16 Vaandering at the home invasion and by him at the suspect
17 arrest point?

18 A Yes, ma'am. Yes.

19 Q Ultimately -- let me -- you testified that there was
20 a lot of money found --

21 A Yes, ma'am.

22 Q -- correct? Did you impound that?

23 A I believe I did. Yes, I did.

24 Q I'm showing you what's been marked -- well, do you
25 know exactly the -- how much money and exactly the break down

1 without looking?

2 A No. I -- that I do not. I believe it was \$138, and
3 I don't recall the exact denominations. But it was \$138, I
4 believe.

5 Q I'm showing you State's -- what's proposed Exhibit
6 108. Do you recognize that?

7 A Yes. That's my writing.

8 Q And what is that?

9 A That is our money accounting report. Whenever money
10 is recovered from a crime scene or when it's actually evidence
11 in a crime, we impound it on -- this is our LVMPD form 131,
12 and it's required for us to fill out the exact denominations
13 of what was recovered as evidence. And it also has to go
14 through my chain when it's money.

15 Q That's kept in the ordinary course of business and
16 used and relied upon by Metro?

17 A Yes, ma'am.

18 MS. HOLTHUS: Move to admit.

19 MR. GILL: No objection, Your Honor.

20 THE COURT: That's 108?

21 MS. HOLTHUS: Pardon?

22 THE COURT: 108?

23 MS. HOLTHUS: Yes.

24 THE COURT: 108 will be admitted.

25 [Plaintiff's Exhibit 108 Received]

1 MS. HOLTHUS: Thank you.

2 BY MS. HOLTHUS:

3 Q And so now, looking at that -- and this -- there's a
4 difference between moneys impounded as evidence, i.e. found at
5 a crime scene, versus say moneys found in a suspect in his
6 wallet which would be not impounded, but -- right?

7 A That would not be impounded. That would actually be
8 part of his property when he's taken to jail.

9 Q Okay. So this \$138 was impounded as evidence taken
10 at the scene in that wad of money?

11 A Yes. Taken at the scene of the backyard.

12 Q And what was the breakdown of those moneys?

13 A There were twenty-three \$1 bills. There were
14 nineteen \$5 bills, and one 20.

15 Q Did you -- would you also be responsible to submit
16 items of evidence for testing, forensic testing and -- do you
17 know if testing was done in this case?

18 A I do believe -- I know I was, I believe, at a
19 conference, and my partner had to get a buccal swab search
20 warrant for one of the suspects. So I believe they did some
21 testing, but that usually -- I know, usually, the DA's office
22 asks for that through our lab, but I'm not --

23 Q Okay.

24 A -- sure what exactly was done.

25 Q But in this case, buccal swabs were taken from the

1 two suspects; is that correct?

2 A The two suspects and our victim, also.

3 Q And that's for purposes of checking against any
4 evidence that's recovered?

5 A Yes, ma'am.

6 Q Also, to the extent any fingerprints were recovered
7 from the scene, would that also have been submitted for
8 testing?

9 A Yes. Yes, it would have. It would have gone
10 through our lab.

11 Q I'm showing you what's been marked as State's
12 proposed 109 for identification. See if you recognize that.

13 A I do recognize that, but I'm not sure. Is there a
14 second page to this?

15 Q Well, I'm only -- we're only concerned with this
16 page --

17 A Okay.

18 Q -- for now. To the extent that there's other lab
19 reports out there, we'll address that.

20 A Yes. Oh, I'm sorry. Yes. Okay. I read that, none
21 listed. Yes.

22 Q All right. And is this, in fact, a report of the
23 testing of the latent print that was recovered in this case?

24 A Yes, ma'am.

25 Q And as the case agent, you would have all of this

1 information, ultimately?

2 A Yes. I would print it. If it was done, usually,
3 the crime lab makes a report, if there's any latent prints
4 found at the scene, whether it be at the 7-Eleven or at the
5 home invasion. And I would print that and add it to my file.
6 Yes.

7 Q And so in this case, the latent print that was
8 recovered was, in fact, tested and found that it was not
9 suitable for comparison; is that correct?

10 A Yes, ma'am.

11 MS. HOLTHUS: Move to admit State's proposed 109.

12 MR. GILL: I believe we stipulated that earlier, Your
13 Honor, but no objection.

14 MR. BOLEY: No objection.

15 THE COURT: All right. 109 will be admitted.

16 [Plaintiff's Exhibit 109 Received]

17 MS. HOLTHUS: Thank you. Pass the witness.

18 THE COURT: Mr. Gill?

19 MR. GILL: Thank you, Your Honor. Thank you.

20 CROSS-EXAMINATION

21 BY MR. GILL:

22 Q Detective Smith, how are you today?

23 A I'm okay. Thank you. How are you?

24 Q Now, we just talked about 109, correct? The latent
25 print examination? What she just had --

1 A Yes. Yes.

2 Q -- shown you. What Ms. Holthus -- and I'm showing
3 it there.

4 A Yes, sir.

5 Q And you're very familiar with these, correct?

6 A I get them added to my report once it's processed
7 through our lab. Yes.

8 Q And in this case, you were kind of the lead
9 detective; is that fair?

10 A Yes. Yes, I was.

11 Q So when you say your report, you're getting a lot of
12 information that comes in?

13 A Correct.

14 Q In this one, again, it says that there was -- well,
15 you tell me. How many prints were examined in this report?
16 Can you read it okay? Do you want me to zoom in?

17 A No. I can't read it at all. Sorry.

18 MR. GILL: Your Honor, can I approach the witness --

19 THE COURT: Absolutely.

20 MR. GILL: -- with the exhibit?

21 BY MR. GILL:

22 Q Does that refresh your recollection as to how many
23 prints were examined?

24 A Just one.

25 Q Okay. Thank you. And again, the results of that

1 were that it was not suitable, correct?

2 A Yes.

3 Q What does that mean, or what could that mean?

4 A I guess it means -- it's another word for
5 inconclusive.

6 Q Okay. So it could mean, for instance, it didn't
7 have enough ridges? And I don't want to --

8 A Ridges and -- right. It did not have enough. I
9 mean, if it was just a partial, and they -- it was not
10 suitable to actually get the proper amount of numbers and
11 ridges to compare to another like full print.

12 Q And in this instance, do you know which -- whose
13 prints it was compared to or --

14 A I do not.

15 Q And based on that, we don't either, correct?

16 A No, sir.

17 Q Now you'd also mentioned that you --

18 MR. GILL: Court's brief indulgence.

19 THE COURT: Um-hum.

20 BY MR. GILL:

21 Q Ms. Holthus had asked you about 108, and I'm kind of
22 showing it to you there, correct?

23 A Yes. That's the money counting report.

24 Q The breakdown of the money, right?

25 A Yes, sir.

1 Q Did you count the money out?

2 A Yes. I did and --

3 Q So it was your -- I'm sorry. I didn't mean to cut
4 you off.

5 A I was going to say and you have to have a witness,
6 too.

7 Q Okay. So you've got somebody with you. You count
8 the money out. You -- do you know where the money came from
9 before you got it?

10 A Before I got it, it was actually in -- I'd have to
11 exactly look at the crime scene photos, but I remember it was
12 in -- on the ground in the backyard.

13 Q Okay. What about when you came in contact with it?
14 Where was that, or when was that?

15 A When I actually counted it?

16 Q Correct.

17 A After the scene was processed and photographed by
18 our CSIs -- the CSIs do not -- or I'm sorry -- our crime scene
19 investigators, they do not impound money. They'll -- they
20 impound every -- basically everything else. And I, I believe
21 particularly in this case, impounded the money, and I
22 impounded the sheaths, the knives that were taken from the
23 home invasion.

24 Q Okay. And then counted it out and filled out the
25 sheet, correct?

1 A Yes, sir. Yes, sir.

2 Q Now you also mentioned that there were some items
3 that looked like firearms but were BB guns. Do you recall
4 that statement?

5 A They ended up turning out to be BB guns. Yes, sir.

6 Q Otherwise known as a pneumatic weapon?

7 A Otherwise known as what? I'm sorry.

8 Q Pneumatic. Would you describe them that way or know
9 that phrase?

10 A Yes. That is -- yes. That is another term for it.

11 MR. GILL: Okay. Court's brief indulgence.

12 BY MR. GILL:

13 Q Now as far as the axe, were you ever in contact with
14 the axe in this case?

15 A I did not touch that axe by any means, but it was
16 laying just outside -- actually, it was standing just outside
17 of Mr. Colon's -- I guess -- his bedroom, right outside the
18 garage, right there.

19 Q Okay. And you saw it?

20 A That was the first thing that I saw as I approached
21 the initial crime scene.

22 Q And you were -- because you went from, essentially,
23 504 to 510, correct?

24 A Yes, sir. Yes, sir.

25 MR. GILL: Nothing further, Your Honor. Thank you.

1 THE COURT: All right.

2 MR. BOLEY: Nothing from us.

3 THE COURT: Any from the State?

4 MR. SCHWARTZ: No, Your Honor.

5 MS. HOLTHUS: No, thanks.

6 THE COURT: Anything from the jury? No?

7 Thank you, ma'am. You are free to go.

8 THE WITNESS: Okay.

9 MR. SCHWARTZ: Your Honor, could we please approach?

10 [Bench Conference Begins]

11 MR. SCHWARTZ: We do have one more witness. I think
12 she's outside. Could we have a five-minute bathroom break?

13 THE COURT: Yeah, sure.

14 MR. SCHWARTZ: Okay. Thank you. Sorry.

15 THE COURT: For you or for --

16 MS. HOLTHUS: It's for him. I ask [indiscernible].

17 MR. SCHWARTZ: It's for me.

18 MR. GILL: [Indiscernible] your bladder.

19 MR. SCHWARTZ: Yeah. I just -- I got too excited
20 earlier.

21 THE COURT: You're so young for that. Usually, it's the
22 old guys that have to go every five seconds.

23 MR. GILL: That's the cool guys. I'm not cool. I never
24 have to go to the bathroom.

25 MR. SCHWARTZ: Yeah. That's not cool. Not cool at all.

1 THE COURT: [Indiscernible] the old guys have to go like
2 every -- I'm not kidding -- like --

3 MR. SCHWARTZ: They're a nervous bunch.

4 MS. HOLTHUS: One of the old guys.

5 THE COURT: -- every 20 minutes.

6 MS. HOLTHUS: I get it.

7 THE COURT: It's terrible.

8 MR. SCHWARTZ: Thank you, Your Honor.

9 [Bench Conference Ends]

10 THE COURT: All right, folks. We're just going to take a
11 short break.

12 [Judge Admonishes Jury]

13 THE COURT: Let's just come back at 10:30. We're just
14 going to take a quick restroom break.

15 THE MARSHAL: Please rise for the jury.

16 [Jury Exits]

17 [Recess at 10:22 a.m.]

18 [Jury In]

19 THE COURT: Back on the record in case number C313118 --

20 THE MARSHAL: Please be seated.

21 THE COURT: -- State of Nevada v. Venegas and Monay-Pina.
22 Let the record reflect the presence of all of our jurors, Mr.
23 Venegas, and Mr. Monay-Pina, and all of the counsel.

24 All right. State, please call your next witness.

25 MR. SCHWARTZ: State calls Kim Dannenberger. Can I

1 approach your clerk, Your Honor?

2 THE COURT: Sure.

3 THE MARSHAL: Please raise your right hand. Face the
4 clerk to be sworn in.

5 KIMBERLY DANNENBERGER, PLAINTIFF'S WITNESS, SWORN

6 THE CLERK: Thank you.

7 THE COURT: Good morning, ma'am. Go ahead and have a
8 seat.

9 THE WITNESS: Thank you.

10 THE COURT: And if you could, please state your name and
11 then spell it for the record.

12 THE WITNESS: Kimberly Dannenberger. K-I-M-B-E-R-L-Y
13 D-A-N-N-E-N-B-E-R-G-E-R.

14 MR. SCHWARTZ: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MR. SCHWARTZ:

17 Q Ma'am, how are you employed?

18 A I'm employed with the Las Vegas Metropolitan Police
19 Department's forensic laboratory in the biology DNA detail.

20 Q And what are your general responsibilities in that
21 job?

22 A I look at items of evidence and take samples for
23 possible DNA analysis. I then will interpret any data that I
24 obtain, write reports, do statistics. I also do reviews,
25 testimony.

1 Q And what type of educational background and training
2 do you have to make you qualified for that position?

3 A I have a bachelor's of science degree from the
4 University of Nevada, Las Vegas in cell and molecular biology.
5 As well, I completed an approximate sixteenth month --
6 sixteen-month training program within the biology DNA detail.

7 Q And how long have you been a forensic analyst at the
8 Las Vegas Metropolitan Police Department?

9 A I've been in the DNA section for approximately six
10 years. Sixteen months of that was in a training program.

11 Q And just in general, you said you -- do you deal
12 exclusively with DNA?

13 A Yes. I am only assigned to the DNA section.

14 Q Okay. Can you tell us a little bit, just generally,
15 what DNA is and where we can find DNA?

16 A DNA is basically your genetic blueprint. It is what
17 makes you who you are, the codes for your hair color, your eye
18 color, your height. We get half of our DNA from our mom and
19 half of our DNA from our dad. And between two individuals,
20 approximately 99.9 percent of us will share the same DNA.
21 It's that .1 percent that makes us unique, makes us
22 individuals. So within that .1 percent is what we're looking
23 at to obtain DNA profiles from very specific locations. The
24 exception being, identical siblings will share the same DNA
25 profile. DNA profile is found on various bodily fluids as

1 well as skin cells that can be sloughed off.

2 Q And in your role at the Metro Police Department, how
3 does it -- how do you become involved in a case? What's the
4 first thing that happens where you get assigned a case?

5 A The first thing that happens is that a request comes
6 into the laboratory. And then, as an analyst, when I'm ready
7 for a new batch of cases, I will go to management, and they
8 actually assign me the cases to work.

9 Q And a request would come in from a police officer,
10 the District Attorney's Office asking the lab to make a
11 comparison; is that fair to say?

12 A Yes.

13 Q Okay. And then once you are assigned a case, what's
14 the -- what do you do?

15 A I look at the items of evidence. The first thing
16 I'll do is see if there's any possible biological fluids on
17 the items of evidence, depending on what the evidence is. The
18 fluids that we can test for in house are going to be blood,
19 semen, and saliva. So depending on the case, depending on the
20 evidence, I will do testing to determine if there's possibly
21 those fluids there.

22 Q Is there also something that you can do in the lab
23 that's called a presumptive test?

24 A Yes. So the first step in testing, for a biological
25 fluid or a bodily fluid, is going to be what we call a

1 presumptive test. It gives us a good indication that, yes,
2 that item possibly has blood on it. It does not say, yes,
3 that item does have human blood, but it does give us an
4 indication. And the reason why it's called presumptive is
5 because other things in the world can also react positive and
6 give us a positive test.

7 Q And will you do a presumptive test for every piece
8 of evidence you ever examine?

9 A It's case dependent and evidence dependent. So if I
10 have an item of evidence that, say, has a red-brown stain
11 indicative of possible blood, I would do a presumptive test
12 for possible blood. If I had an item of evidence that they --
13 like a T-shirt or something, and they wanted to see who
14 possibly wore it, I wouldn't do a presumptive test, because at
15 that point, I'm just swabbing the areas that would touch the
16 body.

17 Q Okay. So if you have some indication that maybe
18 there's blood, that would be something that would kind of lead
19 you to do that presumptive test; is that kind of what you're
20 indicating?

21 A Yes. That is correct.

22 Q Once you complete your analysis, what do you do with
23 those results?

24 A Once I get my data, I will go through and make any
25 interpretations on the actual crime scene evidence. For items

1 of evidence where I can make an interpretation, I will then
2 compare to any known reference standards.

3 Q And once you've done that and come to your
4 conclusion on whether or not the DNA matches, what will you do
5 with that information?

6 A If somebody is included as a contributor to a
7 profile, I then will run statistics to give a statistical
8 weight to that inclusion.

9 Q And so after you've compiled sort of all this data
10 is it -- do you put it in some type of report?

11 A Yes. So I generate report once my case file is
12 complete. I made all my comparisons, all my interpretations,
13 done any statistics. I will finalize my case file and
14 generate a DNA report.

15 Q And what type of information -- other than the
16 results, what type of information will be found at the top of
17 those reports?

18 A The top of the report will have the -- once the case
19 is completed -- will have the distribution date, so the day
20 the report was finalized. It will have the event number. It
21 will also have our internal lab number, the requester who
22 submitted the original DNA request, and then it will also the
23 type of case.

24 Q You mentioned an event number, can you explain what
25 that is?

1 A An event number is assigned by LVMPD when the event
2 actually occurs. It's going to be the year, the date, and
3 then basically sequential order of when that call came in to
4 dispatch.

5 Q So each call will have its own unique number?

6 A That is correct. Yes.

7 Q And that's called an event number?

8 A Yes.

9 Q Okay. And typically, is all the evidence kept under
10 the same event number? Is that kind of how you organize
11 things?

12 A Typically, yes. If it's not, then we'll make a note
13 that that item of evidence was booked under a different event
14 number.

15 Q And were you asked to do a comparison, or were you
16 assigned to do a comparison in a case with the event number
17 160112-0494?

18 A I was. Yes.

19 Q And did you end up preparing a report in that case?

20 A I did. Yes.

21 MR. SCHWARTZ: Okay. And if -- Your Honor, if I could
22 approach?

23 THE COURT: Go ahead.

24 BY MR. SCHWARTZ:

25 Q I'm showing you what's been marked as State's

1 proposed Exhibit 110. Take a look at that.

2 A Oh, sorry.

3 Q Thank you. Do you recognize that?

4 A I do. Yes.

5 Q And what is that?

6 A That is the report for the event number you just
7 mentioned.

8 MR. SCHWARTZ: And, Your Honor, at this time, the State
9 would move to admit State's proposed Exhibit 110. I believe
10 it's been stipulated to.

11 MR. GILL: That's correct, Your Honor.

12 THE COURT: 110 will --

13 MR. BOLEY: Correct.

14 THE COURT: -- be admitted.

15 [Plaintiff's Exhibit 110 Received]

16 BY MR. SCHWARTZ:

17 Q And if you could just kind of give me a general
18 overview of the different -- kind of like the tasks you had in
19 this case?

20 A From this case, I was asked to look at various items
21 of evidence. Some of those items of evidence were swabs
22 collected at the scene by a crime scene analyst, and some of
23 the items of evidence were the actual evidence itself that I
24 did my own testing and swabbing on.

25 Q And let's talk about that. When you say swabs,

1 whether it's a swab that's collected at the scene or a swab
2 conducted by yourself, what does that really mean?

3 A So we take what's, essentially, a cotton-tip swab.
4 It's a little wooden stick with a cotton on the end, very
5 similar to like the cotton people use at home to clean their
6 ears. So there's a little cotton ball on the end, and we'll
7 use that. We'll put a few drops of sterilized water, and
8 we'll take our swabbing from an item of evidence. And that's
9 just to help collect DNA -- possible DNA from that item, so
10 that we can do our analysis.

11 Q A fancy Q-tip?

12 A Yes.

13 Q Okay. Is there also something that's referred to,
14 in your report or in general, as a reference standard?

15 A Yes.

16 Q And can you generally explain what that is?

17 A A reference standard or -- I mentioned earlier --
18 like a known standard is just a sample from a known person.
19 So we call them buccal swabs, the samples taken from the
20 inside of someone's cheek, buccal cells, so those end up
21 becoming buccal swabs. And we just know that that sample came
22 from this particular person, and that's why it's called a
23 reference standard.

24 Q Okay. And reference standard meaning you know whose
25 sample that is?

1 A Yes.

2 Q And you will use that to compare it to a swab that
3 you take or a swab that's given to you from a particular piece
4 of evidence to see if there's a match?

5 A That is correct.

6 Q Okay. In particular, let's take a look at your
7 report here. I'll just kind of do the top part where we
8 indicated that there was -- primary case number, is that going
9 to be the event number that you described earlier?

10 A That is correct. Yes.

11 Q And for the record, I'm showing State's Exhibit 110.
12 You mentioned there's also a lab case number?

13 A Yes.

14 Q Is that something that the lab assigns to each case
15 when it receives a request for processing?

16 A Yes. That's the internal lab number.

17 Q And then we'll see a little bit lower here. The
18 next sort of section is a little chart, if you will. What is
19 generally found within this chart?

20 A So on this report chart or table, the left two
21 columns are going to be the -- I'm sorry. The left most column
22 is going to be our internal lab number designation. So each
23 item, when we get a request that in -- our internal tracking
24 system, that assigns that unique lab number that he just
25 showed you, also assigns unique item numbers to each item of

1 evidence. So that left most column is our internal,
2 basically, assignment of evidence.

3 The next two columns, that say impound package number and
4 impound item number, those are going to correspond to what the
5 crime scene analyst designated that item in the field. So you
6 have 8427. It's going to be the person's personnel number,
7 who collected it. It's going to be package 5 at the scene,
8 and then the item numbers that they collected it under.

9 Q And you're indicating to this first impound package
10 number, here?

11 A Yes. That is correct.

12 Q 8427 would be the personnel or P number of the
13 officer that impounded the items?

14 A That's correct. Yes.

15 Q And I believe you mentioned that the 5 would be the
16 package number that they impounded along with the number of
17 the item -- each item?

18 A That is correct. Yes.

19 Q And then continuing on to the right, that's a going
20 to be a description of what's in each of those packages or
21 numbers?

22 A Yes. So the description will be a basic
23 description, and then the last column to the far right is
24 going to be examination summary. So if I did any testing for
25 biological fluids, that would be noted there as a quick

1 reference point.

2 Q And that would be the presumptive test that you
3 mentioned earlier?

4 A That is correct. Yes.

5 Q So for example, this very first item, the lab gave
6 it item number 5?

7 A Yes.

8 Q It was from this package number and this officer
9 number?

10 A Yes.

11 Q It was this impound number when it -- the officer
12 impounded it under that number, and then this would be the
13 description of what's in that package number?

14 A That is correct. Yes.

15 Q Okay. And then as we go through each of these items
16 below the list, is this where we would find your different
17 conclusions on page -- bottom of page 1, 2, and the top of
18 page 3?

19 A That is correct.

20 Q So for each lab item number, which again is the
21 number that the lab assigns to a piece of evidence, you will
22 have a conclusion there?

23 A Unless it's stated no further testing at this time,
24 or reference standards will not have a conclusion. But yes,
25 every piece of crime scene evidence will have a conclusion

1 otherwise.

2 Q Understood. Okay. So let's go through just sort of
3 in order of this different lab item numbers that you tested
4 and the results of those. So if we're looking at lab item 5,
5 and that, the description provides us, is a swab from the
6 Beretta 90TWO, six millimeter. What were the results? What
7 did you compare to that swab?

8 A In this instance, I did not do any comparisons,
9 because a DNA profile was not obtained from that swab.

10 Q And what does that mean?

11 A When I say a DNA profile was not obtained, that
12 means, when I'm looking at the data, there was just nothing
13 there to make any comparisons to.

14 Q So you would look at the swab that was given to
15 you --

16 A Um-hum.

17 Q -- and determine whether there was enough data in
18 that swab to compare it to something else like a reference
19 standard?

20 A Correct. So looking at my data -- when I say my
21 data, it's basically a graphical representation of our DNA
22 profile. We have a bottom limit, and if nothing basically
23 pops, if there's no peak above that bottom limit for any of
24 our locations, then there's no DNA profile in that sample that
25 I obtained.

1 Q Is there a number of -- I'm not sure what you call
2 it -- but a number of profiles you look at, like there's
3 sixteen profiles or however it's described?

4 A When looking at an individual profile by itself, I'm
5 actually looking at sixteen different locations to determine
6 if there's DNA present. If there was DNA present, I'd be
7 making comparisons at those locations.

8 Q And I believe you described it, but if there's not
9 enough data, enough of those sixteen profiles present, then
10 you can't even do a comparison; is that fair to say?

11 A Correct. If there's not any data at those sixteen
12 locations that kind of pop above that bottom threshold, I
13 can't do anything with that. There's no DNA present.

14 Q And what would be an explanation for why a profile
15 wasn't able to be obtained on the swab?

16 A It, perhaps, could have been very limited to begin
17 with on the item of evidence. It's all dependent on where you
18 swab an item of evidence, how the evidence was handled, cared
19 for, the environment it was in. There's many reasons as to
20 why you would not obtain a DNA profile.

21 Q There might not be any DNA on the spot that was
22 swabbed?

23 A That is one possibility. Yes.

24 Q And is that going to be the same result that we have
25 with lab item 6, which would have been the swab from the

1 airsoft magazine from that same Beretta?

2 A That is correct. A DNA profile was not obtained.

3 Q And looking at lab item 7, which was a swab from
4 the -- in the description, is a swab from the broken DX17 BB
5 gun. And you can't see it on the screen. I'll put it up
6 there for you. Do you recall what the results of that
7 comparison were?

8 A So for this results, there was a partial DNA
9 profile. There was at least one male contributor, but due to
10 the limited data, I cannot make any conclusions.

11 Q So there was enough of a profile to determine male
12 versus female?

13 A Correct. There was at least one male contributor
14 within that profile.

15 Q And when you say at least one, you can't -- why do
16 say at least one, I guess?

17 A Just that there's an indication there's a male, but
18 I -- because the profile is limited and partial, I just -- I
19 can't determine how many, if there's possibly more than one
20 male. It's just a partial profile. It's very limited.

21 Q And before we go on to the next page, the three --
22 were you given three reference standards in this case?

23 A I was. Yes.

24 Q Okay. And who were those reference standards for?

25 A They were from Casimiro Venegas, Javier Colon, and

1 Jose Monay-Pina. I'm sorry if I mispronounced those.

2 Q It's okay. That's good. And those would be the
3 reference standards that you -- if you can, you would compare
4 that to a swab or whatever profile you have?

5 A Correct.

6 Q Okay. So let's move on to lab item number 8, and
7 that was going to be a swab -- lab item 8 was a swab of
8 apparent blood from the broken DX17 BB gun, and that would
9 have been provided -- was that provided to you by the officer,
10 as well?

11 A Yes. In this case, the person collecting evidence
12 already did the swabbing for me.

13 Q And so you would take that swab of apparent blood
14 from the DX17 BB gun, compare it to the three reference
15 standards you had to see if you could make a comparison?

16 A That is correct.

17 Q And in this case, were you able to?

18 A In this case, I was able to make comparisons for
19 this sample.

20 Q And what were the results of that comparison?

21 A So for this sample, the profile as a whole was
22 consistent with a mixture of at least two individuals. At
23 least one of those individuals was a male.

24 Q Let me stop you right there. For each of these
25 comparisons, if you can make a comparison with the profile,

1 will you always give if it -- if the data shows, will you
2 always give sort of a multiple people, male versus female?
3 That how you do it, how you have in this one?

4 A Yes. In our conclusion -- so in the report
5 paragraphs for each sample that was submitted, we will
6 distinguish if it's a -- basically, a single source profile,
7 so it came from just one individual, versus a mixture profile,
8 meaning I can tell that it came from more than one individual.
9 And then if we can tell it's a mixture profile, we will
10 usually try and give how many people are possibly present in
11 that mixture DNA profile.

12 So in this case, because I'm saying that there was a
13 mixture of at least two individuals, I can tell based on the
14 data that there's more than one person present on this
15 profile. And there is at least one male present, as well.

16 Q Were you able to -- what was the remainder of your
17 conclusions with regard to this item?

18 A So for the rest of the conclusions for this item,
19 there was a major DNA profile that was consistent with Javier
20 Colon. When I say major profile, that means that, looking at
21 my data, there is a distinct profile that is sitting --
22 resting higher, or their peaks are a lot higher on that
23 graphical representation than the rest of the data. So I can
24 pull out that profile by itself and say this profile is the
25 major component of this mixture and make comparisons to that

1 major profile by itself. So that's what I did for this
2 sample. So --

3 Q Were you --

4 A I'm sorry.

5 Q Go ahead.

6 A So in this case, I was able to make comparisons on
7 that major profile.

8 Q And were you able to make any conclusions with
9 regard to the other two reference standards that you had for
10 Casimiro Venegas and Jose Monay-Pina?

11 A They were both excluded as contributors to that
12 major profile.

13 Q And when you do these comparisons, are you able to
14 generate some type of statistic with regard to that major
15 profile?

16 A Yes. So because I did include someone or say
17 someone was consistent with a part of this profile, I have to
18 give a statistical weight. And in this case, the probability,
19 of randomly selecting an unrelated individual from a general
20 population having a DNA profile consistent with that major DNA
21 profile from the evidence sample, is going to be approximately
22 1 in 784 quadrillion.

23 Q So 784 quadrillion -- it's not a number we use too
24 often. What -- can you explain that in sort of -- for
25 example, the population of the world?

1 A The population of the world, to my knowledge, is
2 approximately seven -- seven and a half billion people right
3 now.

4 Q Seven and a half billion?

5 A Billion with a --

6 Q Okay.

7 A -- B, as in boy.

8 Q And so if you were to take that seven to seven and a
9 half billion and compare it to 784 quadrillion, what would
10 that be?

11 A Just to give you an idea of the size of the number,
12 just the quadrillion number itself, that's going to be
13 approximately one million worlds.

14 Q One million --

15 A Earths. Excuse me.

16 Q On one million worlds of seven billion people?

17 A Yeah, seven and a half billion. Yeah.

18 Q Seven and a half billion. Okay. Did you do a
19 presumptive test on this swab, as well?

20 A I believe I did, if you were to go back to the front
21 page.

22 Q Okay. And that would be contained on the front
23 page?

24 A That is correct. Yes.

25 Q Okay. And we were looking at lab item number 8

1 there?

2 A Yes.

3 Q Okay. What was the result of the presumptive test?

4 A That would be positive presumptive for blood.

5 Q The next item that you tested would be lab item
6 number 9, which was the swab obtained from the Daisy Powerline
7 BB gun?

8 A Yes.

9 Q What were the results of that?

10 A A DNA profile was not obtained.

11 Q So again, there wasn't enough data to even have a
12 profile?

13 A Correct.

14 Q Lab item number 10 was a swab from the pair of red
15 and black work gloves. And what was the result of that
16 comparison?

17 A So for this item, it was consistent with a mixture
18 of at least three individuals. At least one of those
19 individuals was a male. However, due to the limited data, no
20 conclusions could be made.

21 Q And lab item 2.1 was the swabbing of the inside of a
22 black knit glove. So again, we did the red/black gloves just
23 prior, and this is the black knit glove. What was the result
24 of that?

25 A So for this, a DNA profile was obtained that was

1 consistent with a mixture of at least four individuals. At
2 least one of those individuals was male. However, due to the
3 complexity of the data, I could not make conclusions.

4 Q So this is a little different than the last one, as
5 far as the last one was limited data. This one is complexity.
6 What's the difference?

7 A So when I say limited, it means there just isn't
8 much there, or the data that is there is very limited. I
9 really can't make conclusions, because I'm not sure if all the
10 data is present. When I say complex, I'm saying there is a
11 lot of data present, but there's so much data that I really
12 cannot make conclusions, either.

13 Q Lab item 3.1 would be a swabbing of the inside of
14 the black knit hat. What would the conclusions with regards
15 to your testing of that versus the reference standards?

16 A So for item 3.1, it was consistent with a mixture.
17 At least one of those individuals was male. For this item,
18 I'm assuming there's a mixture of three contributors, and
19 there are going to be two major contributors present, as well,
20 at least one trace contributor.

21 Q Is that something you can say based on the data
22 you're looking at?

23 A Yes. So looking at the data, I can say that there's
24 three people present. And when I mentioned earlier that major
25 contributor is usually going to be up here compared to

1 everything else, in this case, I could tell there's actually
2 two people that were contributing more DNA than the bottom
3 person. So I could say there's a major -- we call it a major
4 mixture component in this profile or in this item. Excuse me.

5 Q And what was the results of the remainder of your
6 comparison?

7 A So for this one, the major mixture DNA profile
8 obtained was consistent with originating from the known DNA
9 profile of Casimiro Venegas and an unknown individual.

10 Q Okay. So one of the reference standards, Casimiro
11 Venegas, matched with one of the major mixture -- major DNA
12 profiles?

13 A Yes. They were consistent. Yes.

14 Q They were consistent. Thank you.

15 A Yeah.

16 Q And were you able to make any conclusions with
17 regard to the other two reference standards of Javier Colon
18 and Jose Monay-Pina?

19 A They were both excluded as being contributors to
20 that major mixture component.

21 Q And again, is there a statistic associated with the
22 comparison -- the fact that Casimiro Venegas' profile was
23 consistent with this item's profile?

24 A Yes. So the probability of observing the major
25 mixture DNA profile is 235 billion times more likely if it

1 originated from Casimiro Venegas and one unknown individual
2 than if it originated from two unrelated individuals randomly
3 selected from the general population.

4 Q So again, this statistic is a little bit different
5 from the last one --

6 A Yes. It is.

7 Q -- in the sense that you -- and can you explain sort
8 of why this statistic comes up as opposed to the one in
9 number?

10 A This stasti -- excuse me. This statistic is
11 different, because I'm doing it on the mixture, itself.
12 Whereas before, I had a single profile I pulled out, just that
13 major single profile. So this one I'm actually comparing two
14 different scenarios or two different hypothesis.

15 Q And lab item 4.1 was a swab of the inside of a blue
16 knit ski mask. And what were the results of your comparison
17 with regard to that lab item?

18 A So this was consistent with a mixture. At least one
19 of those individuals was male. In this instance, I'm assuming
20 the mixture originated from four contributors. There are
21 going to be two major contributors, as well as at least two
22 trace contributors. So the very same situation as the
23 previous item, where I've got two people that have got their
24 DNA -- they're contributing more DNA, and two people that
25 are -- they don't have much DNA presence. So -- sorry.

1 Q Oh, no. That's okay. So you have the two major
2 DNAs. Were you able to make a comparison between that and the
3 reference standards?

4 A Yes. So that major mixture was consistent with
5 originating from the known DNA profile of Jose Monay-Pina and
6 an unknown individual.

7 Q And were you able to exclude -- what were your
8 conclusions with regard to the other two reference standards?

9 A Both Casimiro Venegas and Javier Colon were excluded
10 from that major mixture profile.

11 Q And what does it mean when it's a partial major
12 mixture?

13 A It just means that I could not do statistics or
14 comparisons at every location.

15 Q Okay. But you were able to give us another sort of
16 probability factor like the last lab item with regard to this
17 one?

18 A Yes. A statistic was generated for this profile, as
19 well.

20 Q And what was that?

21 A The probability of observing the partial major
22 mixture is 298 million times more likely if the mixture
23 originated from Jose Monay-Pina and an unknown individual than
24 if it originated from two unrelated individuals randomly
25 selected from the general population.

1 Q In the last two, these two -- this item and the last
2 one we talked about there's been a comparison done with regard
3 to a reference standard and an unknown individual. You're
4 unable to give us any conclusions about the unknown
5 individual; is that correct?

6 A Correct.

7 Q As far as the reference standards, what you're
8 doing?

9 A Correct. Because I only had the three reference
10 standards submitted, so I do not know who that second
11 contributor is for those major mixture profiles.

12 Q You just can say who it's not?

13 A Correct.

14 Q And moving on to lab item 11.1, that was a swab of
15 the -- I'm sorry. 11.1 was a swab of the handle of the axe.
16 Were you able to come to any conclusions with regard to that
17 item?

18 A Yes. This sample or item was consistent with a
19 mixture of at least three individuals. At least one of those
20 was male. The major DNA profile was consistent with Javier
21 Colon.

22 Q And were you able to make any conclusions with
23 regard to the reference standards of Mr. Venegas and Mr.
24 Monay-Pina?

25 A They were both excluded as being contributors to

1 that major profile.

2 Q And again, the same statistic from the first
3 statistic we talked about, the 1 in 784 quadrillion?

4 A That is the same statistic. Yes.

5 Q Moving on to lab item 11.2, and that was a staining
6 on the blade of the axe. What were you able to determine from
7 that item?

8 A So for this item, there was a full DNA profile
9 obtained, consistent with Javier Colon. So in this instance,
10 it was a single source profile. So only one contributor.

11 Q So there's no mixture of people like we saw in the
12 prior ones? This is a single source DNA profile you were able
13 to obtain?

14 A That is correct. Yes.

15 Q And you said it was consistent with Javier Colon?

16 A Yes.

17 Q And if it's a single source, was that mean you're
18 able to exclude the other reference standards?

19 A They were both excluded. Yes.

20 Q Can you everyone else was exclude -- anyone else
21 would be excluded if it's a single source like that?

22 A Without making comparisons, I can't. No.

23 Q And again that same number, 1 in 784 quadrillion
24 which I think you said 1 million worlds or earths?

25 A Yes. Just to give an idea of how big the number

1 itself is.

2 Q That quadrillion number?

3 A Yes.

4 Q And with regard to that last item, did you also --
5 and so that was lab item 11.2 we just looked at. Were you
6 able to come to any conclusions as far as a presumptive test
7 on that?

8 A For item 11.2, it was presumptive for blood.

9 Q Okay. And it looks like you did two other tests
10 that we kind of skipped over here. Lab item 4.2, there was
11 staining on the outer head portion of a -- of the blue knit
12 ski mask?

13 A Correct.

14 Q That was negative for -- negative presumptive blood?

15 A That was correct. Yes.

16 Q And that would be the same for lab item 10, a swab
17 from the red pair of work gloves?

18 A Yes.

19 Q Was that the conclusion -- was that all of the items
20 that you looked at in regards to this case?

21 A It is. Yes.

22 MR. SCHWARTZ: Court's indulgence. Your Honor, at this
23 time, we'll pass the witness.

24 THE COURT: Mr. Gill?

25 MR. GILL: Thank you, Your Honor.

1 Ms. Dannenberger, I'm going to be fairly brief.

2 And, Your Honor, do you -- would it be all right if
3 the witness referenced her report for my questions?

4 THE COURT: That's fine.

5 MR. GILL: If I can approach?

6 CROSS-EXAMINATION

7 BY MR. GILL:

8 Q I know that often times you guys don't like to
9 summarize, and if I'm being too simplistic, please let me
10 know. But I did make some notes as you were testifying, and I
11 want to just kind of go through the items that you tested and
12 kind of break down results.

13 A Okay.

14 Q If I'm being too simplistic, please stop me. So and
15 I'm just going to go right in order, starting with item 5 --

16 A Okay.

17 Q -- the Beretta 90TWO, correct?

18 A Yes.

19 Q And there was no DNA profile obtained from that,
20 correct? From item 5?

21 A That is correct.

22 Q 6 is more specifically the magazine of that gun.
23 Same thing, no DNA profile obtained?

24 A That is correct.

25 Q DX17 is item 7 and 8, and that's the broken gun. On

1 item 7, at least one male contributor but that was about all
2 we could determine, correct?

3 A That is correct. Yes.

4 Q And then on 8, there was a partial profile and it
5 belonged to Javier Colon, correct?

6 A The major component. Yes.

7 Q Okay. So the major component you could determine,
8 and I'm not going over all those numbers, but Javier Colon,
9 correct?

10 A That is correct. Yes.

11 Q And then we've got Daisy Powerline which is the
12 third BB gun. No DNA profile obtained; is that fair?

13 A Yes.

14 Q And then 10, red and black gloves, three people, one
15 male but that's about it; is that fair?

16 A Yes.

17 Q Black knit gloves, and then, again, 2.1 is the item
18 number. That's the inside of them. Four people, one male,
19 fair?

20 A Yes.

21 Q Black knit hat, at least one male, and that's 3.1.
22 At least one male and that was determined to be Casimiro
23 Venegas by some standard, correct?

24 A He was -- yes.

25 Q And again, the numbers are there, and the jury can

1 reference those. But at least one male, Casimiro being a
2 major contributor, correct?

3 A Yes.

4 Q Blue ski mask, at least one male with Jose being
5 that -- Jose Monay-Pina being the major contributor?

6 A Yes. One of them. Yes.

7 Q Okay. And could you determine any others?

8 A At this time, I could not. No.

9 Q Okay. Were you able to exclude, on that, any others
10 that you compared? Meaning Javier Colon and Casimiro Venegas
11 on that one?

12 A Yes. For 4.1, yes.

13 Q Again, blue ski mask, 4.1?

14 A Yes.

15 Q Same -- similar with the axe handle, 11.1, the
16 handle itself, at least one male with Jose Monay-Pina being
17 the major, excluding Javier Colon and Casimiro Venegas,
18 correct?

19 A I'm sorry. For which item was that?

20 Q That's 11.1, the handle of the axe.

21 A 11.1, the major was Javier Colon.

22 Q Okay. Javier Colon. I misspoke.

23 A Yes.

24 Q Javier Colon, major, and excluding Casimiro and
25 Jose, correct?

1 A Correct. Yes.

2 Q And same with the axe blade, correct? 11.2?

3 A 11.2? Yes. That single source profile was
4 consistent with Javier Colon. Yes.

5 Q So essentially, on the axe handle and blade, where
6 you tested, you found Javier Colon's DNA in, essentially, two
7 spots, correct?

8 A Yes.

9 Q And were able to exclude Casimiro Venegas and Jose
10 Monay-Pina?

11 A That is correct. Yes.

12 MR. GILL: Court's brief indulgence. And if I can
13 approach and just retrieve that, Your Honor?

14 THE COURT: That's fine.

15 MR. GILL: Pass the witness, Your Honor. Thank you.

16 THE COURT: Mr. Boley?

17 MR. BOLEY: I think Mr. Gill covered it. No further
18 questions.

19 THE COURT: Anything from the State?

20 MR. SCHWARTZ: Just a couple things, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. SCHWARTZ:

23 Q We talked about some items that you weren't able to
24 get a DNA profile from. Can you explain a little bit about
25 how DNA is transferred?

1 A To an item, itself?

2 Q Yes.

3 A DNA could be, basically, transferred to an item. I
4 mean, if you bleed on it, your blood can transfer to it. If
5 you spit on it, sneeze on it, you could get saliva transfer.
6 When you handle an item of evidence, it's possible that you're
7 transferring your skin cells -- touch evidence -- to that
8 item, as well. So there are many avenues as to how DNA could
9 be transferred to an item of evidence.

10 Q And when you handle -- if you -- do you handle the
11 evidence at times?

12 A I do look at the item of evidence in the lab. So if
13 I get like an actual -- like the ski mask or the actual item
14 of evidence itself, I do have to handle it to do my testing,
15 but I'm also wearing gloves, a facemask, a lab coat to prevent
16 contamination.

17 Q Okay. So those items, that you would wear, would
18 prevent your DNA from being put onto the item you're looking
19 at?

20 A Yes.

21 Q Also different surfaces could be better suited for
22 DNA transfer; is that fair to say?

23 A That is fair to say. Usually, if you have a surface
24 where there's more indentions or grooved area, a rough
25 surface, because it's roughed -- rough, it could be getting

1 more DNA off of your hand if you're touching it, versus -- a
2 smooth surface might not get as much DNA. There's a lot of
3 possibilities as to how much could or could not be
4 transferred.

5 Q It's hard to tell unless you actually test it, I
6 guess, right?

7 A This is -- yeah. That is correct.

8 MR. SCHWARTZ: Nothing further, Your Honor.

9 MR. GILL: No, Your Honor. Nothing on that.

10 THE COURT: Mr. Boley?

11 MR. BOLEY: Just one. Just one question.

12 RECROSS-EXAMINATION

13 BY MR. BOLEY:

14 Q Just a follow up on what Mr. Schwartz was talking
15 about. If you have a DNA profile from an item that has
16 multiple contributors and one is a major contributor, is it
17 fair to say that that person had more contact with that item,
18 or is that inconclusive?

19 A I cannot tell you why their DNA is present more, why
20 they're the major contributor, looking at the data. So I
21 don't know if they handled it more, if they touched it last.
22 I cannot give you that information.

23 Q So for instance, I believe there was one item, that
24 was talked about, that had four male contributors. There's no
25 way to know how or which one of those people had more contact

1 with that item?

2 A Based on my testing, no.

3 MR. BOLEY: Thank you.

4 THE COURT: All right. Any questions from the jury?

5 Counsel approach.

6 [Bench Conference Begins]

7 THE COURT: [Indiscernible].

8 MR. SCHWARTZ: What would give a false positive in a
9 presumptive test?

10 MS. HOLTHUS: I was going to ask that.

11 THE COURT: It's a good question.

12 MS. HOLTHUS: It's a real good question.

13 THE COURT: That guy's smart.

14 MR. GILL: Just a great question -- sorry.

15 MR. SCHWARTZ: Thank you.

16 THE COURT: And your guys are not testifying?

17 MR. GILL: They are not.

18 THE COURT: Okay.

19 MR. GILL: Unless he surprises me.

20 THE COURT: That's fine.

21 MR. GILL: I don't anticipate that.

22 [Bench Conference Ends]

23 THE COURT: All right. Ma'am, I'm going to ask you a
24 question. I'm going to ask you to look at the jury when you
25 answer, so they can hear you. All right.

1 THE WITNESS: Okay.

2 THE COURT: What would give a false positive in a
3 presumptive test?

4 THE WITNESS: A false positive could be one of a few
5 vegetable peroxidases. So you can have like -- horseradish
6 could potentially give a false positive. Bleach has also been
7 shown to give a false positive. Rust has been shown, in the
8 literature, to give a false positive. So there are a couple
9 different items that could also give a false positive.

10 THE COURT: Any follow up from the State?

11 FURTHER REDIRECT EXAMINATION

12 BY MR. SCHWARTZ:

13 Q Would those items contain DNA on them or would -- do
14 you know?

15 A I don't know. I mean, in and of themselves, I would
16 not expect it, but if someone like sneeze on a pile of
17 horseradish, there could be a DNA profile from it.

18 MR. SCHWARTZ: Okay. Thank you.

19 THE WITNESS: Sorry.

20 MR. SCHWARTZ: No further questions.

21 THE COURT: Mr. Gill?

22 MR. GILL: No, Your Honor. Thank you.

23 THE COURT: Mr. Boley?

24 MR. BOLEY: No.

25 THE COURT: Thank you, ma'am. You are free to go.

1 State, please call your next witness.

2 MR. SCHWARTZ: Your Honor, at this time, the State has no
3 further witnesses. Assuming that our items 1 through 110 are
4 all admitted, then we would rest.

5 THE COURT: Everything's admitted?

6 MR. SCHWARTZ: Then we would rest at this time.

7 THE COURT: All right.

8 MR. GILL: We will rest, as well, Your Honor.

9 THE COURT: Mr. Boley?

10 MR. BOLEY: Yes. We rest, as well.

11 THE COURT: All right, folks. So we have gotten through
12 this a little quicker than we anticipated, which is good news.
13 We need a little bit of time to get through and get the jury
14 instructions ready for you, since we got through this a little
15 quicker than we anticipated. So we're going to take a extra-
16 long lunch, so that we can take of that. I'm going to ask you
17 to come back at 2:00, and then we'll read the jury
18 instructions and have closings.

19 So if you haven't been down to the new east part of
20 Fremont Street, there's some great funky little restaurants
21 and shops and stuff down there. Be a good time to check that
22 out. But I apologize for the long lunch, but I would rather
23 get this to you today. All right.

24 [Judge Admonishes Jury]

25 THE COURT: We'll see you back at 2.

1 THE MARSHAL: Please rise for the jury.

2 [Jury Exits]

3 THE COURT: All right. I'm going to go check and see how
4 this is coming. I'll be right back. Don't go anywhere.

5 [Pause]

6 THE COURT: We'll have those jury instructions in just a
7 second.

8 [Pause]

9 THE COURT: Okay. So we have 1 -- and if you would just,
10 if you have an objection, just let me know as you go. 1,
11 "it's my duty as Judge". 2, "if, in these instructions, any
12 rule, direction or idea".

13 3, "an Information is a formal method". So in this
14 instruction, what I did -- you'll see -- is, for each count, I
15 put "the Defendants did". I also took out -- I corrected Mr.
16 -- the spelling of Mr. Colon's name, so that it is correct. I
17 took out the AKA of Mr. Monay-Pina, because it was just really
18 a different spelling. So that seemed completely unnecessary
19 to read 50 times. I --

20 MR. SCHWARTZ: The only part that we need to correct,
21 Your Honor, is Count IV doesn't reflect the third amended
22 information. We added a couple words after the word
23 "robbery".

24 THE COURT: Okay. And then I also corrected the names of
25 the kids to Avina, A-V-I-N-A. And so what do you need to add

1 to IV? I don't have a -- I do have a copy. Never mind.

2 MR. SCHWARTZ: It would be --

3 THE COURT: All right. IV -- oh, okay. It should say
4 robbery and/or assault and/or battery and/or larceny?

5 MR. SCHWARTZ: That's correct, Your Honor.

6 THE COURT: Is it otherwise okay, the edits that I made?

7 MR. SCHWARTZ: Yes. Thank you for correcting the
8 spellings.

9 THE COURT: And Defense doesn't have an issue with any of
10 that?

11 MR. GILL: No, Your Honor.

12 MR. BOLEY: No, Your Honor.

13 THE COURT: Then I have 4 is "to constitute the crime
14 charged". 5, "Defendants are presumed innocent". 6 is "you
15 are here to determine the guilt or innocence". Are you all
16 right with that? I, actually, don't prefer that language,
17 just because it's really whether the Defendants are guilty or
18 not guilty, but --

19 MS. HOLTHUS: I don't why we haven't changed our stock,
20 because --

21 MR. SCHWARTZ: Determine whether the --

22 MR. GILL: I think it is somewhat duplicative of 5, Your
23 Honor. Essentially, repeating that you need to find him
24 guilty if -- you need to find beyond a reasonable doubt for
25 guilt.

1 THE COURT: No. It's actually the if it's somebody else.

2 MR. GILL: Okay.

3 THE COURT: But if you don't have any problem, my
4 preference is just to instruct -- I just don't like the way
5 the first sentence is worded, because it's --

6 MS. HOLTHUS: That's fine.

7 THE COURT: -- not really the function of the jury.

8 MR. BOLEY: So how would Your Honor --

9 THE COURT: You are here to determine whether the
10 Defendants are guilty or not guilty.

11 MR. GILL: Just remove?

12 MR. SCHWARTZ: From the --

13 MS. HOLTHUS: Instead of the "innocence" part, it's the
14 "not guilty" is basically the change.

15 MR. BOLEY: So guilty or not guilty.

16 MR. GILL: Oh.

17 THE COURT: Jurors just don't determine --

18 MR. GILL: Yep. Yep.

19 THE COURT: I mean, that's not their function.

20 MR. GILL: I got you.

21 MR. SCHWARTZ: Yeah. We're fine with that --

22 MR. GILL: So are we.

23 MR. SCHWARTZ: -- with that correction.

24 MR. GILL: Thank you, Your Honor.

25 THE COURT: And "the evidence you are to consider" with

1 the colon in line 4. In all the trials I've done, I've had
2 one lawyer, ever, submit that instruction with the correct
3 punctuation. One.

4 MR. GILL: Where are you looking, Your Honor? The colon?

5 THE COURT: Line 4. I fixed it.

6 MR. SCHWARTZ: She fixed it.

7 THE COURT: I fixed it already.

8 MR. GILL: Perfect.

9 THE COURT: I'm just trying to make Mr. Schwartz feel
10 better about this --

11 MR. SCHWARTZ: Thank you.

12 MR. BOLEY: Normally, it gets into the --

13 THE COURT: -- incorrect punctuation.

14 MR. BOLEY: -- District Attorney's forms, then it stays
15 that way for a long time.

16 MR. GILL: He'll have it fixed.

17 MS. HOLTHUS: I always put a comma there, myself.

18 MR. SCHWARTZ: Just don't tell my mom. She'll be
19 disappointed in me.

20 MS. HOLTHUS: Would a comma be incorrect?

21 THE COURT: Yes. It's a colon.

22 MS. HOLTHUS: Hm. I wasn't --

23 THE COURT: A dash would be all right.

24 MS. HOLTHUS: Oh, okay. I like dashes. I write with a
25 lot of dashes.

1 THE COURT: Yeah. A dash would be fine.

2 MS. HOLTHUS: Okay.

3 THE COURT: If you're not into colons, a dash would be
4 fine.

5 MS. HOLTHUS: I don't know that I've ever used one,
6 really.

7 THE COURT: Yeah. But the semicolon? Huh-uh. Because a
8 semicolon says it's a whole separate sentence that comes after
9 it, an independent clause like a whole separate sentence. But
10 "direct and circumstantial" is not --

11 MS. HOLTHUS: Not.

12 THE COURT: Not. All right. "Credibility and
13 believability", I just replaced this with a gender-neutral
14 instruction. That's 8. "Person who has special knowledge,
15 skill, experience", also replaced this with a gender-neutral
16 instruction. That's 9. 10, "it is your duty to give separate
17 personal consideration", 10. "In this case you must decide
18 separately whether each of the two is guilty or not guilty,
19 that's 11. 12, "unless otherwise indicated, each instruction
20 referred separately and individually to all". Can we say
21 "each defendant" instead of "all"?

22 MR. SCHWARTZ: Yes. It sounds better. Each defendant.

23 THE COURT: "Where two or more persons are accused",
24 that's 13. "Conspiracy is an agreement" is 14. "It is not
25 necessary in proving" is 15. "Each member is liable" is 16,

1 and that has the specific intent and the general crimes listed
2 out separately. That looks right to me. Is that --

3 MR. GILL: Yes, Your Honor.

4 THE COURT: Okay. And I just reordered these to put the
5 specific and general intent instruction -- I just moved it up
6 a couple --

7 MR. SCHWARTZ: All right.

8 THE COURT: -- from the drafts that I got, so it was
9 right after that instruction. "Specific intent is the intent
10 to accomplish", that's 17. Any statement -- "any evidence of
11 a statement made by one alleged conspirator" is 18. "A guilty
12 verdict must be unanimous" is 19. "A person who, by day or
13 night" is 20. "Larceny is defined as stealing" is 21.
14 "Assault is defined as unlawful attempting" is 22.

15 "Battery is defined as the willful and unlawful use of
16 force". Comma should be inside the quotation marks. Down
17 there on line 7, that comma needs to go inside the quotation
18 marks. We'll fix that.

19 24, "is not necessary that the State prove". 25,
20 "the intention with which entry was made is a question of
21 fact". 26, "consent to enter is not a defense". 27, "every
22 person who commits the crime of burglary". 28, "deadly weapon
23 means".

24 MR. GILL: Your Honor, if I may interrupt --

25 THE COURT: Yes.

1 MR. GILL: -- at this point? The reason Mr. Lexis is
2 here is I've requested the firearm instruction. I think it
3 would -- if Your Honor agrees -- go well as 29, right after
4 this deadly weapon definition.

5 MR. BOLEY: Very true.

6 THE COURT: Where?

7 MR. GILL: And I haven't --

8 [Counsel confer]

9 MR. GILL: And, Your Honor, if I could --

10 THE COURT: Sure.

11 [Counsel confer]

12 THE COURT: How is this different? All right. Ball
13 bearing -- all right. So this is going to go -- how is this
14 different than the definition of pneumatic gun?

15 MR. SCHWARTZ: I think it just kind of explains it a
16 little bit better, Your Honor. I don't --

17 THE COURT: Do you want to --

18 MR. SCHWARTZ: I didn't get to -- the main thing that I'd
19 like in there -- the main thing the new one has that the old
20 one doesn't is the gas or air expels the -- whether loaded and
21 unloaded, as well. Those are the different things.

22 THE COURT: Okay. So I'm going to add this right after
23 6, or am I replacing pneumatic gun? What am I doing with
24 this?

25 MR. SCHWARTZ: Can we approach and get that again, Your

1 Honor? Maybe just -- we're -- I'm sorry. We're not quite
2 ready with the firearm one yet, but we think we can amend the
3 one we handed you to include firearm.

4 Is that right, now?

5 MR. GILL: I think so, Your Honor.

6 THE COURT: Okay.

7 MR. SCHWARTZ: Okay. The new one we gave you says a
8 deadly weapon includes any device whether loaded or unloaded,
9 operable or inoperable, from which a metal projectile,
10 including any ball bearing or pellet, may be expelled by means
11 of spring, gas, or other force.

12 MR. GILL: Yes, so --

13 MR. SCHWARTZ: Is that --

14 MR. GILL: -- firearm is device from which a projectile
15 may be expelled by explosion or combustion.

16 MR. SCHWARTZ: Okay. So why don't we --

17 THE COURT: Alrighty.

18 MR. GILL: And that's not included in what we have yet,
19 correct?

20 MR. SCHWARTZ: Correct.

21 THE COURT: No.

22 MR. SCHWARTZ: Correct. So my suggestion, if you guys
23 are okay with it, would be to include this language --

24 THE COURT: Like do an instruction that says this and
25 then have the firearm?

1 MR. SCHWARTZ: Well, then I was just going to say a
2 separate one for the firearm --

3 MR. GILL: Yeah. That's --

4 MR. SCHWARTZ: -- that says a firearm is defined as --

5 MR. GILL: And then straight out.

6 MR. SCHWARTZ: -- a device from which a projectile --
7 combustion --

8 MR. GILL: Explosion.

9 MR. SCHWARTZ: We have it --

10 THE COURT: I mean, do you want like a 28[a] that has
11 this and that?

12 MR. GILL: Yeah. That's fine.

13 MR. SCHWARTZ: Sure.

14 THE COURT: A deadly weapon and firearm?

15 MR. SCHWARTZ: Yeah. Sure.

16 MR. GILL: That's fine.

17 THE COURT: So we have this instruction and then this
18 with that?

19 MR. SCHWARTZ: Yes.

20 MR. GILL: Yes.

21 MR. SCHWARTZ: That'd be great.

22 THE COURT: Does that make sense?

23 MR. SCHWARTZ: It does. That's good for me.

24 THE COURT: That was super unclear. Okay. You know what
25 I'm talking about though?

1 MR. SCHWARTZ: The way you said it makes sense to me.

2 MR. GILL: No. The way you said it. We leave that
3 alone.

4 THE COURT: We leave this alone --

5 MR. GILL: Add --

6 THE COURT: -- and then we'll make this -- I'm going to
7 make it 28[a] if you don't mind --

8 MR. GILL: Yeah.

9 THE COURT: -- so we don't have to mess with all of the
10 other numbers. But we'll have this --

11 MR. SCHWARTZ: We'll provide you with a --

12 THE COURT: -- and then we'll have a firearm. Do you
13 have just that language?

14 MR. GILL: What I'll do is highlight, Your Honor, and
15 then you can -- we can just type it straight from the
16 highlight.

17 THE COURT: Okay. Okay. So everybody's good with that?
18 So we'll have 28[a] as deadly weapon includes any device
19 whether loaded or unloaded, operable or inoperable, from which
20 a medical -- metallic projectile including any ball bearing or
21 pellet may be expelled by means of spring, gas, air, or other
22 force. That was so hard to read. And then we'll have the
23 definition of firearm following that, and that will be 28[a].

24 Are you okay with that, Ms. Holthus? You're making
25 a face.

1 MS. HOLTHUS: Yeah. No. I'm -- no. I'm thinking. No.
2 I'm okay with that.

3 THE COURT: Okay. You guys want me to wait a second?
4 Are you --

5 MR. GILL: Sorry, Your Honor. Please.

6 THE COURT: All right. Okay.

7 MR. GILL: I just want to get this question. I really
8 apologize.

9 THE COURT: No.

10 [Counsel confer]

11 THE COURT: All right. Do you want me to boot up?

12 MR. SCHWARTZ: Sure. Yeah. Sure. It's --

13 MR. GILL: 202.253.

14 THE COURT: You know what? I can't get. I haven't been
15 able to pull up Westlaw since I moved up here, because I can't
16 remember my password. Let me try. Oh, no. That's not the
17 problem. My -- I have to fix my browser. Oh, here it is.
18 What's your -- what's the statute?

19 MR. SCHWARTZ: 202.253.

20 THE COURT: 202.253. Oh, it went away. 202.253.

21 "Firearm means any device designed to be used as a weapon from
22 which a projectile may be expelled through the barrel by" --
23 "force of any explosion or other form of combustion"?

24 MR. GILL: Yep.

25 THE COURT: Okay.

1 MR. GILL: Thank you.

2 [Counsel confer]

3 THE COURT: All right. I'm writing it right out of the
4 statute.

5 MR. SCHWARTZ: Thank you, Your Honor.

6 [Counsel confer]

7 THE COURT: All right. So we got that. Then I have 29.
8 Are we still like --

9 MR. SCHWARTZ: Can I --

10 THE COURT: -- kibitzing about firearms?

11 MR. SCHWARTZ: We are. We are.

12 THE COURT: All right.

13 MR. SCHWARTZ: Because it's just to, you know, cut into
14 our lunch a little more, but the only thing that I think
15 might -- as I'm looking at this case -- and I don't know if
16 the defense will have a position on it. The way that it's
17 been defined, up there with you, is that "deadly weapon is"
18 and then we have that language.

19 THE COURT: Uh-huh.

20 MR. SCHWARTZ: Propel by air, gas, et cetera.

21 THE COURT: Uh-huh.

22 MR. SCHWARTZ: In the case it refers to that as being a
23 firearm, as well, under the law. If you would like to look at
24 the case? I think maybe it would just be cleaner, then, to
25 say "a firearm --

1 THE COURT: No.

2 MR. SCHWARTZ: -- or deadly weapon includes" and then the
3 language that the --

4 THE COURT: Well, a deadly weapon is a firearm, but a
5 firearm is -- I mean --

6 MR. GILL: This is referencing a different statute.

7 MR. SCHWARTZ: Okay. The deadly weapon statute?

8 MR. GILL: 265. Yeah.

9 MR. SCHWARTZ: But they're referencing -- so if you see
10 it says, defining a firearm as any device from which a
11 metallic projectile including any ball bearing or pellet may
12 be expelled by means of spring, gas, air, or force. So I
13 think it's defining firearm including this definition that we
14 were just using as deadly weapon definition, pneumatic gun
15 definition, but it's including that in the firearm definition,
16 as well.

17 MR. BOLEY: And correct me if I'm wrong. That's what
18 Judge Johnson said when we had that battle in court?

19 MR. LEXIS: That's correct.

20 MS. HOLTHUS: It's a fairly important distinction,
21 arguably.

22 THE COURT: All right.

23 MR. LEXIS: Your Honor, in Judge Johnson's case, the
24 argument in that case was basically whether or not a pneumatic
25 gun, whether it's spring or gas combustion, is a deadly

1 weapon. This case --

2 THE COURT: Well, it is a deadly weapon, but it isn't a
3 firearm.

4 MR. SCHWARTZ: It's a firearm. That's the issue.

5 MR. LEXIS: That case, from the Nevada Supreme Court,
6 defines firearm as including pneumatic gun, spring, air, gas,
7 combustion, et cetera.

8 MR. GILL: That's not what it says, though. It doesn't
9 say pneumatic gun. It doesn't make it as clear as --

10 MR. SCHWARTZ: I agree. It doesn't say pneumatic gun,
11 but it does say what is the definition of pneumatic gun, as I
12 understand it.

13 THE COURT: Well, it's -- under the statute, it's a
14 deadly weapon, but deadly weapon covers many things.

15 MR. SCHWARTZ: Agreed. So really, it's -- a firearm is
16 what we're talking about?

17 THE COURT: Right. So I mean, a firearm is defined under
18 the statute as something that expels a pellet with combustion.
19 A BB or pellet gun would be a deadly weapon.

20 MR. GILL: Yes.

21 THE COURT: Yes?

22 MR. GILL: That's been conceded by us, Your Honor.

23 MR. LEXIS: That case -- this case also defines the
24 firearm portion of --

25 THE COURT: What case are you looking at there?

1 MR. LEXIS: Berry v. State. I don't have the cite.

2 MR. GILL: I do, Your Honor. 125 Nevada 265.

3 THE COURT: All right.

4 [Pause]

5 MR. GILL: You want some -- did Your Honor find it
6 already?

7 THE COURT: Yes. So under NRS 202.265, the statute in
8 question.

9 MS. HOLTHUS: I'm sorry. What statute is that, because I
10 don't know the number off my --

11 THE COURT: It was cited in the case. They were saying
12 you can't have on a school -- at a school, a explosive device,
13 a dirk, dagger, switchblade, nunchuck, or trefoil, blackjack,
14 billy club, pneumatic gun, pistol, revolver, or other firearm.
15 Let's see. They were looking at DC -- they've changed -- I
16 think they've changed the definition since that case, because
17 this doesn't match the case.

18 MR. SCHWARTZ: And I mean, I don't that it's a -- I think
19 it's just -- my understanding is that they're interpreting the
20 statute to include this kind of language, but that that
21 certainly is still -- I mean, that's the definition, and it's
22 been interpreted to include all type of -- because if it's
23 a -- I think it's the, you know, metallic projectile is kind
24 of why it is consistent with a firearm as opposed to a
25 plastic.

1 THE COURT: They're -- I think that this is interpreting
2 an old statute. Because when I click on that statute, it
3 doesn't match what it says.

4 MS. HOLTHUS: That's the deadly weapon on a school
5 statute?

6 MR. SCHWARTZ: Dangerous weapon at a -- yeah. It looks
7 like that statute might have --

8 THE COURT: .202.265[b], there is no 202 -- 202.265[b] is
9 a nunchuck. I mean that doesn't. It just doesn't exist. It
10 isn't a definition of a firearm, anymore. So it appears to me
11 that the legislature clarified that. So we have a statute
12 that says a firearm works on combustion and a deadly weapon
13 uses spring, air, gas, whatever, firearm. That's what I --
14 that's all I can tell. I mean, because when I'm pulling up
15 the statute, it -- the statute reference in Berry now has the
16 definition of pneumatic gun that we have in this jury
17 instruction. It does not have the definition that they're
18 talking about, that they reference in Berry. It just doesn't.
19 So I'm guessing it was --

20 MR. LEXIS: Well, I believe they were further qualifying
21 what a firearm is, which would also include spring as well as
22 gas and combustion.

23 THE COURT: Right. But, Mr. Lexis, if it was amended by
24 the legislature, then Berry wouldn't apply anymore.

25 MR. GILL: So are we back, Your Honor -- and then I'll

1 ask Mr. Schwartz -- to the definition straight out of -- I
2 think it was --

3 THE COURT: The statute?

4 MR. GILL: -- subsection 2?

5 MR. SCHWARTZ: Our request would be to include the
6 language, but understanding their ruling denying that --

7 THE COURT: Include the language of?

8 MR. GILL: From Berry.

9 MR. SCHWARTZ: From Berry where they define firearm. It
10 appears to be good law still. As far as the cite --

11 THE COURT: I have --

12 MR. SCHWARTZ: Unless it's not good law?

13 THE COURT: I have negative treatment of Berry. It has a
14 red flag, but I have --

15 MS. HOLTHUS: It's pretty definitive in Berry, for sure.
16 I think.

17 MR. SCHWARTZ: She's saying the statute that they're
18 referring to has been --

19 MS. HOLTHUS: No. I understand.

20 MR. SCHWARTZ: It's amended.

21 MS. HOLTHUS: I understand.

22 THE COURT: I'm trying to see. There's other things. It
23 was overruled on one ground, and it was abrogated on another
24 ground. But I mean, that statute's very language, that it's
25 based on, just doesn't exist anymore. Because the case cites

1 the -- is based on the statute that is not --

2 MR. SCHWARTZ: I mean, I'm looking at the old statute
3 here, Your Honor, if you'd like to see what was amended.

4 THE COURT: Right. But that's not the statue anymore.

5 MR. SCHWARTZ: But I -- doesn't appear that it's taken
6 anything out that would relevant is my point. But I can't see
7 it in the new statute, either.

8 MS. HOLTHUS: Am I reading this wrong? Don't they
9 basically say that anywhere in the statutes that firearm is
10 used it includes all these things?

11 THE COURT: What statute are you looking at?

12 MS. HOLTHUS: I'm still looking at the case, at Berry.

13 MR. LEXIS: And, Your Honor, that case also cites, in its
14 definition to include this, the 202.253 --

15 MS. HOLTHUS: It does. That's what I'm talking about.

16 MR. LEXIS: -- which includes --

17 MR. GILL: But that's the -- and I don't mean to cut you
18 off, Chad. But that's what was amended by the legislature --

19 THE COURT: Right.

20 MR. GILL: -- since Berry.

21 THE COURT: That's what I'm saying is 202.265[b] is now
22 the definition of a nunchuck, and it doesn't -- no longer
23 defines a firearm as a device from which a metallic
24 projectile, including any ball bearing or pellet, may be
25 expelled by means of spring, gas, air, or other force.

1 MR. LEXIS: It, well, now defines firearm as a projectile
2 may be expelled through a barrel by the use of force of any
3 explosion or other form of -- oh.

4 THE COURT: Combustion, which is what we had in the
5 instruction --

6 MR. LEXIS: Correct.

7 THE COURT: -- which is straight from the statute, which
8 is different than air, spring, gas.

9 MS. HOLTHUS: Is it? I mean it's --

10 THE COURT: Yeah. I mean, because that's how a gun
11 works, right? You have a primer that gets hit by a pin, and
12 it causes a spark which sets the gunpowder on fire, which
13 causes an explosion, which causes the bullet to come out of
14 the barrel. Are you so impressed? And then a BB works with
15 air pressure which pushes the BB out of the gun, which is why
16 a BB isn't as dangerous, because air pressure doesn't cause as
17 much force as the explosion -- the pressure, from the
18 explosion of the gunpowder igniting, causes that bullet to
19 move at a much higher velocity than the pressure of air. That
20 was good; wasn't it?

21 MR. SCHWARTZ: I do agree that the statute had -- I
22 looked at the amendments that were made. It looks like -- at
23 least the 2015 -- and it does take out that language that they
24 relied on.

25 THE COURT: Yes.

1 MR. SCHWARTZ: And they just replaced -- they added
2 pneumatic gun in that like A through F section, so -- right.
3 It defines it actually now in that statute.

4 MR. GILL: Got you.

5 MS. HOLTHUS: So it doesn't specifically refer -- yeah,
6 it does. It says pneumatic gun, right?

7 MR. GILL: Yeah, but in the deadly weapon, right?

8 MR. SCHWARTZ: Well, yeah.

9 THE COURT: As deadly weapon, but it doesn't refer to a
10 pneumatic gun as a firearm. The firearm statute specifically
11 only says explosion, combustion.

12 MR. SCHWARTZ: That's consistent with the NRS as far as
13 the case law is. The only thing that I think I was pointing
14 out, but if you're --

15 THE COURT: But the case law is based on a statute that
16 has been amended by the legislature.

17 MR. SCHWARTZ: Correct.

18 THE COURT: I mean, I don't think it's entirely in -- and
19 then the other thing is they're saying a firearm is a deadly
20 weapon. I mean, I think we would all agree a firearm is a
21 deadly weapon. The question is whether -- it's sort of --
22 whether it goes --

23 MR. GILL: Whether the BB guns are firearms, is the
24 issue.

25 THE COURT: Yeah. Whether it goes the other way.

1 MR. SCHWARTZ: Because a deadly weapon isn't
2 automatically a firearm.

3 THE COURT: A deadly weapon isn't necessarily a firearm.

4 MR. SCHWARTZ: Agreed.

5 MR. GILL: Feels like a [indiscernible] question.

6 MR. SCHWARTZ: We need a flow chart.

7 MS. HOLTHUS: It's feeling --

8 THE COURT: Right. So like okay. Let's use a less
9 complicated example, because I -- like a trash compactor is
10 not a firearm, but a trash compactor could be a deadly weapon.

11 MR. BOLEY: Or maybe an axe?

12 MR. GILL: Whoa. Slow down.

13 THE COURT: Yeah. Well, I was trying to use a not this
14 case specific of an example, just some other example that's
15 existed in cases. So you can have something that is not a
16 firearm but is a deadly weapon.

17 MS. HOLTHUS: I have no internet service for some reason.

18 THE COURT: So I can note the State's objection.

19 Are you objecting?

20 MR. SCHWARTZ: No.

21 THE COURT: Are we --

22 MR. SCHWARTZ: Not what's being included. I was just
23 objecting -- I wasn't objecting. I was trying to include
24 other language that the Court's rejecting.

25 MR. GILL: But the way that the Court is writing it is

1 straight out of the statute as it reads currently. I don't
2 think he's objecting to that language coming straight out of
3 subsection 2 --

4 MR. SCHWARTZ: Correct.

5 MR. GILL: -- of 202.253.

6 MR. SCHWARTZ: Right. I was just trying -- I was
7 proffering -- I'm -- no objection to that.

8 THE COURT: Okay.

9 MR. SCHWARTZ: I was --

10 THE COURT: So do you want something else?

11 MR. GILL: He wanted more and, Your Honor --

12 MR. SCHWARTZ: Go ahead.

13 MR. GILL: Sorry, Brian.

14 MR. SCHWARTZ: No. Go ahead.

15 MR. GILL: I just want to read this real quick. If I can
16 approach, Your Honor.

17 THE COURT: Yeah. Okay.

18 [Counsel confer]

19 THE COURT: All right. Yes. So what additional language
20 is it that you would like?

21 MR. SCHWARTZ: I was just going to ask for the additional
22 language that we had discussed from the case of Berry v. State
23 which we discussed as being relying on old case -- on old
24 versions of a statute.

25 THE COURT: Okay. Because it appears to be based on old

1 versions of -- what is the specific language, though, so we
2 have it in the record?

3 MR. SCHWARTZ: The specific language would be that a
4 firearm includes a device that is designed to be capable of
5 expelling projectiles by means of spring, gas, air, or other
6 force, and by -- and/or by explosion or combustion.

7 THE COURT: All right. So the current statute does not
8 contain that language, so I am going to deny the State's
9 request.

10 MR. SCHWARTZ: Thank you, Your Honor.

11 THE COURT: All right. 29, "every person, who in the
12 commission of a burglary, commits another crime. 30, "robbery
13 is the unlawful taking of personal property". 31, "it is
14 unnecessary to prove both violence and intimidation". 32,
15 "you are instructed that if you find a defendant guilty of
16 robbery". 33, "in order to use a deadly weapon". 34, "if you
17 find one or more defendants guilty of battery". 35, "if you
18 find beyond a reasonable doubt". 36, "any person who commits
19 a battery". 37, "attempt murder". 38, it's the "elements of
20 an attempt to commit a crime". 39, "malice of forethought".
21 40, "you are instructed that if you find a defendant guilty of
22 attempt murder". 41, "any person who aims any gun, pistol,
23 revolver, or other firearm". 42, "any person who uses
24 violence upon another person". 43, "you are instructed that
25 if you find a defendant guilty of coercion". 44, "it is the

1 constitutional right of a defendant in a criminal trial".

2 You want that instruction?

3 MR. GILL: Yes, Your Honor. Thank you.

4 THE COURT: Mr. Boley? Yes?

5 MR. BOLEY: Yes.

6 THE COURT: All right. I don't know what I'd do if one
7 of you wanted it and one of you didn't. Okay.

8 45, "although you are to consider only in the
9 evidence in the case". 46, "in your deliberation". Oh, and I
10 fixed that. I changed that one to guilty or not guilty
11 instead of guilt and innocence.

12 47, "during the course of this trial, you are not to
13 communicate with anyone". 48, "when you retire to consider
14 your verdict". 49, "during your deliberations". And this is
15 the playback one. And 50 is "now you will listen". All
16 right. So we're good with all the rest of those?

17 MR. GILL: Yes, Your Honor.

18 THE COURT: Great. Will you take a look at the verdict
19 form, because I made some changes to that? I'm going run this
20 into my assistant who has to leave very soon.

21 Are there any additional proposed instructions?

22 MR. BOLEY: No, thank you.

23 MR. GILL: No, Your Honor.

24 THE COURT: No? We're good? Okay. So --

25 MR. GILL: I, for one, appreciate the verdict form, Your

1 Honor.

2 THE COURT: All right. I like to start with --

3 MR. SCHWARTZ: We usually ask for guilty first, because
4 we have the burden of proof. But I understand.

5 THE COURT: Well, not guilty is the default so we start
6 with that first, because there's -- you know -- that's the
7 presumption. And then I took out "we the jury" for every
8 single one, so that my clerk doesn't have to read that --

9 MS. HOLTHUS: That's good.

10 THE COURT: -- 50 times. And then we also -- I had my
11 assistant just add in the -- a name, just so we had a -- of
12 victim attached to the different counts, so we can kind of
13 tell which one is which.

14 MS. HOLTHUS: Thank you. Yeah. That's helpful.

15 THE COURT: All right. So everybody is good with that?

16 MS. HOLTHUS: Yeah.

17 MR. GILL: Yes, Your Honor.

18 MR. BOLEY: Yes, ma'am.

19 THE COURT: All right. Anything else?

20 MR. GILL: No, Your Honor.

21 MR. SCHWARTZ: No, Your Honor. Thank you.

22 MS. HOLTHUS: I don't think so, Judge.

23 THE COURT: All right. We'll see you all back at 2:00.

24 MR. BOLEY: Thank you.

25 [Recess at 12:19 p.m.]

1 [Jury Instructions read but not transcribed]

2 MR. SCHWARTZ: Your Honor, can we move the TV just a
3 little bit closer?

4 THE COURT: Absolutely.

5 MR. SCHWARTZ: Thank you.

6 MS. HOLTHUS: We good?

7 THE COURT: Go whenever you're ready.

8 MS. HOLTHUS: All right. Court, counsel, ladies and
9 gentlemen of the jury, in every case, the State has to prove
10 two things: that the crime or crimes were committed and that
11 the Defendant or, in this case, defendants committed the
12 crimes.

13 There's different theories of liability in this
14 case, and that's kind of -- if you remember one of our earlier
15 jurors was talking about team kind of liability? That's kind
16 of what we're talking about here. Defendants may have either
17 directly committed the crime, they aided and abetted one and
18 other, or they acted pursuant to a conspiracy. Any of these
19 ways, they would be liable, ultimately, for the crime, itself.
20 Doesn't matter which person actually robbed Richard, struck
21 Javier with the axe, struck Javier with the gun, or robbed
22 Javier. As long as they were functioning under a conspiracy,
23 which would be the agreement between the two to them for some
24 unlawful purpose, they must both, obviously, intend to commit
25 the crime, and then they would both be liable.

1 So basically, all that conspiracy language and the
2 information that was read to you, you know, three different
3 theories, and there's that big chunk of stuff at the bottom of
4 the information, the jury instructions, that you say acting
5 pursuant to a conspiracy or aiding and abetting. Basically,
6 what that means is it's a conspiracy language. It's the act
7 of one is that act of all. If they're engaged in a conspiracy
8 and one commits one act, the other involved in the conspiracy
9 is liable for the same act as though he did the -- if you will
10 -- pulled the trigger himself, kind of theory.

11 Same thing with an aiding or abetting. If you are
12 aiding someone, if you're standing there holding the gun on
13 the individual so they can't call the police and stop the
14 axing of the victim, then you also are liable, just as though
15 you were axing the victim yourself.

16 Count II, burglary while in possession of a
17 firearm -- burglary, you have the elements of burglary. It's
18 entering a building -- in burglary number 1 there, it's the
19 7-Eleven -- with intent to commit robbery. And I would submit
20 to you that the security -- this is a still from the security,
21 and you'll be able to watch that video over. From the moment
22 they walked in the door, they had one intent, one purpose on
23 their mind. Guns drawn, faces hidden, directly to the clerk,
24 they were coming in for purposes of committing a robbery.
25 There can be no other inference drawn.

1 Deadly weapon, it includes a pneumatic gun by law,
2 which is any implement designed as a gun that may expel a ball
3 bearing or a pellet by means of spring, gas, air, or other
4 force, whether loaded or unloaded, operable or inoperable.
5 Robbery with a deadly weapon at the 7-Eleven. Again, taking
6 of personal property, in this case, it was the money from the
7 register. From the person or presence, Richard DeCamp. By
8 force or violence, guns. There's the force. There's the
9 violence. There's the guns.

10 Conspiracy to commit robbery -- again this is
11 different from the theory of liability. This is actually a
12 crime. If you have a conspiracy, you're liable for everything
13 else, but there's also a separate crime just for the
14 agreement, itself. If they got together in the parking lot
15 and said, let's agree to go in and rob that place, and they
16 were stopped before they even walked in, the crime of
17 conspiracy, the crime of the agreement, would have been
18 committed regardless of whether they carried out the crime.

19 In this case, they did, but it doesn't mean they're
20 also not liable for the actual conspiracy to commit the
21 robbery in the first place. Because that agreement is, in and
22 of itself, a violation of the law. Again, it doesn't matter
23 whether it was successful or not. With respect to the
24 conspiracy, there doesn't have to be a formal meeting or
25 making of express agreement required. It's simply inferred

1 from all circumstances that show the common intent. In this
2 case, you can see throughout these two crimes, these two crime
3 scenes, the two of them were acting together in concert and in
4 conspiracy throughout.

5 In fact, the number of times that we're actually
6 going to find a written agreement or formal agreement, of a
7 conspiracy in a criminal action, is almost never. And again,
8 we're not required to prove precisely which defendant did
9 what. Although in this case, you do have a pretty good feel,
10 I think, based upon the evidence, who actually did what. And
11 if you watch the security video from the 7-Eleven, that
12 becomes apparent. And if you remember back to Javier's
13 testimony, he pretty -- was pretty clear in terms of who did
14 what at that point.

15 Burglary while in possession of a firearm --
16 entering a building -- now, this is the Brush Street burglary.
17 And again, it says firearms, burglary while in possession of a
18 firearm. And that's what the title of the charge, but it
19 actually -- the law is -- and you have it in your
20 instructions -- it's firearm or deadly weapon. So it's
21 required that it be a firearm. It can also be the deadly
22 weapon, which brings us back to the pneumatic gun and the BB
23 guns.

24 With intent to commit assault and/or battery and/or
25 larceny and/or robbery. In this case, they went in with guns.

1 They immediately attacked Javier while he was in his bed.
2 It's not like they were waiting for him to do something. It's
3 not like they went in there to rob him and said, hey, get out
4 of -- give us your stuff, and then started beating him. They
5 literally went in and began beating him from the get-go. The
6 purpose of going in there was absolutely to beat him and to
7 rob him, and the evidence suggests, actually, to kill him
8 while he lay defenseless in his bed. In that very short
9 period of time, they took numerous items. That was clear that
10 that was their intent, as well.

11 The robbery with a deadly weapon at the Brush Street
12 address, taking of the personal property, wallets, knives. We
13 also have evidence of the camera that was also taken from the
14 person or presence, Javier Colon, by force or violence.
15 Again, by pistol whipping him and by hacking him with an axe,
16 they were able to take his property, and he was unable to put
17 up any resistance, whatsoever.

18 Count VI, battery with use of a deadly weapon with
19 substantial bodily harm, that's for the pistol whipping.
20 Battery is use of force or violence upon the person of
21 another. Obviously, when you're hitting somebody about the
22 head with a gun, it's force or violence. Substantial bodily
23 harm, substantial risk of death, smashing someone in the skull
24 with a -- repeatedly with a gun, or permanent disfigurement
25 which includes cosmetic disfigurement as well as an injury

1 that is functionally disabling. With respect to the pistol
2 whipping, we're talking about the scaring and the skull injury
3 and the ear that was stapled shut for that particular count.

4 Later on when we talk about the axe, we're talking
5 about, additionally, the cosmetic disfigurement as well as the
6 impairment of the bodily member or prolonged physical pain.
7 Remember, he said he couldn't use his hand the same way he
8 could before after his hand was laid open. Those are the
9 staples of the two injuries from the pistol whipping to his
10 forehead, that he indicated he still had scaring from today,
11 and the ear that was stapled up, and there's also the staples
12 in the scalp.

13 An attempt, an attempt is -- intend to commit a
14 crime, you perform some act towards its commission, but you
15 fail to complete it. How do look at -- how do you determine
16 the intent? You look at the facts and circumstances of what's
17 going on. And this is going to relate to the attempt murder
18 with use of a deadly weapon. The attempt is -- the murder,
19 itself, would be an act which tends to kill a human being. So
20 in this case, we charged it -- oops, I just -- did I turn it
21 off? There.

22 Striking him repeatedly with an axe, and the
23 evidence suggests that the axing was done by Venegas while,
24 again, Monay-Pina held the gun to prevent anybody else from
25 interfering, holding the gun on other people. He's axing this

1 completely defenseless victim. Remember, when they walk in,
2 he's literally lying in his bed. When they beat him with the
3 pistol, he's lying in his bed. When they whack him with the
4 axe, he continues to be lying in his bed. All five feet of
5 him, 140 pounds, with these two guys, guns a blazing, is lying
6 in his bed. I'm going to show you the axe, because you didn't
7 get to see it up close and just in case you don't want to
8 handle a lot of it.

9 [Pause]

10 MS. HOLTHUS: When you raise this up with your hands and
11 bring it down on some fellow who's lying in his bed, when you
12 go after his head with this kind of tool, you have one intent
13 in mind. You have one focus. You have one end. You don't do
14 that unless you're intending to kill somebody. This is a
15 I-mean-business kind of a weapon.

16 Malice of forethought, there'll be a whole
17 instruction on that, but fails. The malice, it's when you
18 intentionally do a wrongful act, again, raising that axe to
19 him. Without legal cause, there's absolutely no excuse.
20 There's no legal provocation for what was going on. Malice
21 can -- that condition of mind can arise from anger, hatred,
22 revenge, spite, or grudge.

23 There's something about thinking somebody popped
24 tires and didn't get what they wanted back. You don't get to
25 go try to kill people because they sliced your tires. That is

1 not legal justification. That is malice, under the law,
2 arising from anger, hatred, revenge, or ill will, but it does
3 not -- it does, actually, amount to an attempt murder.

4 The deadly weapon, again, I've showed you the axe.
5 The weapon, device, instrument, which under the circumstance
6 is used, is capable of causing substantial bodily harm or
7 death.

8 There were two things that caused that attempt to
9 fail, based upon the evidence. Number -- well, three things,
10 I guess, maybe: the blanket, Javier putting up his hand to
11 stop that final blow from hitting his head and able to fend it
12 off with his hand, and Lizbeth calling 9-1-1. Because the
13 evidence suggests that it was not aborted, it didn't fail,
14 until they heard the sirens and saw the lights from the police
15 coming. And that's when they ran off, and abandoned the axe,
16 and ran to the yard.

17 Again, there's no legal excuse for striking him with
18 the axe, three times.

19 Count VIII, that's the battery with use of a deadly
20 weapon, substantial bodily harm, the axe to the hand. He's
21 still got, again, the scar to his hand, permanent
22 disfigurement, and his hand continues to be impaired to this
23 day. Again, at that point, they were aiming -- Venegas was
24 aiming for his head when he raised his hand to protect
25 himself.

1 Count IX, battery with use of a deadly, axe to the
2 leg. Now, that was charged as a battery with use of a deadly
3 weapon with substantial bodily harm. I would submit to you,
4 we didn't prove it. There was no substantial bodily harm.
5 The battery with a deadly weapon? Yes. When he was hit in
6 the leg with the axe, it's still a deadly weapon. It's as
7 deadly a weapon. The fact, that it didn't cause substantial
8 bodily harm, doesn't make it any less a deadly weapon. What
9 it does, however, mean is we were -- we would not request you
10 to return a verdict of guilty as to the battery with
11 substantial, but rather, only as to the battery with a deadly
12 weapon on that count. Because, again, he was saved by the
13 blanket.

14 Same thing on Count X, the battery with use of a
15 deadly weapon where he struck him with the axe to the ribs.
16 We would only be asking you to return a verdict of guilty of
17 battery with a deadly weapon for that count, because -- thanks
18 to the blanket -- the axe didn't lay him open. There was no
19 substantial injury, but still, nonetheless, it is battery with
20 use of a deadly weapon, that axe.

21 Aiming a firearm at a human being, that was Adriana,
22 Lizbeth, Samantha, and Cesar as the stayed in -- as they were
23 inside, looking out the window. There was three guns
24 recovered, one yard away. Simply, one yard over are the guns
25 that Adriana told you were being aimed at her through the

1 window.

2 Coercion with use of a deadly weapon, coercion is
3 forcing you to do or not do something you have a legal right
4 to do. In this case, Adriana, Lizbeth, Samantha, Cesar --
5 they had every right to help Javier. They had every right to
6 call 9-1-1. They had every right to go to his aid, but
7 because the gun was held on them, the -- pointed at them, shut
8 up, don't do anything, I'm going to break you, and all of
9 that. That's coercion with use of a deadly weapon, causing
10 them -- trying to cause them not to do what they had a legal
11 right to do, and in fact, successful with Adriana.

12 Thankfully, Lizbeth became the voice of reason and
13 did the right thing, ultimately. Again, three guns were
14 recovered one yard away. It was also, obviously, a coercion
15 as to Javier, not allowing him to come or go as he pleased,
16 because they kept him in his bed as they continued to beat
17 him.

18 Battery with intent to commit a crime, robbery, they
19 beat him with the guns, and they whacked him with the axe.
20 Again, the evidence is primarily that the physical portion of
21 it was carried out by Venegas, while Monay-Pina acted as
22 lookout. I suggest that the evidence, later found on Monay,
23 is he was probably doing the gathering of the merchandise, as
24 well, because he seemed to have most of the stolen items on or
25 near him at the time of his taken into custody in the next

1 yard. They did all these things in order to take his stuff.

2 That's the what, what crimes were committed.

3 Now it's the how do we know who. This is your still
4 from the 7-Eleven robbery. A half an hour later, one mile
5 away, approximately less than a twenty-minute walk, is him.
6 And you'll have the opportunity. You'll have the pictures.
7 Again, you'll have the surveillance video to compare the puffy
8 coat. You can even see the lettering. Here's the top of the
9 U. There's the part of the R from the shirt that's
10 underneath, there.

11 I submit to you the evidence is this is Mr. Monay-
12 Pina at the time of the robbery of the 7-Eleven. Half hour
13 later, a mile away. It's incredible, the match on the hoodie
14 that's underneath, the blue sneakers, not common. It's not
15 like a pair of black chucks that maybe everybody has on.
16 These are pretty unique. At that hour, that distance away,
17 that time away, it's far more than a coincidence.

18 7-Eleven evidence: the gloves, the gun, the what
19 appears to be a tube-like mask. The Brush Street evidence:
20 the gloves, the tube-like mask, the guns, and then the
21 Defendant himself, again, totally matching the description,
22 every possible last detail. As to those gloves, remember
23 Javier described them as landscaping gloves like they used to
24 have in business. The CSA said they were kind of like
25 gardening gloves. You can see pictures of them, and you can

1 determine better what they are. But you'll see that the palms
2 are black and the tops are red, super distinctive.

3 7-Eleven evidence, Mr. Monay-Pina gun, blue ski
4 mask. If you look at the video, it's a lot clearer to be able
5 to tell what he's got going on. Again, that very distinctive
6 inner jacket pattern, those stripes, and those blue shoes.
7 The Brush Street evidence, there's the guns. There's the navy
8 blue hoodie mask, ski mask.

9 7-Eleven evidence, there's Richard throwing money at
10 him. There's the money. If you look closely at it again. We
11 slowed this down to try and show it to you, but you can see it
12 in the video if you need to look again. And you'll see that
13 the money is coming at the smaller of the two, which the
14 evidence shows is Defendant Monay-Pina, and he's over here
15 with Venegas being up there. And you can see how -- there's
16 the money as he's taking it and putting it into his pocket.

17 Brush Street evidence, there's the wallet of our
18 victim on Brush Street, Mr. Colon, and there's the wad of
19 cash, consistent with the wad of cash taken from 7-Eleven.
20 Remember, it was also found in the shrubbery, in the bushes
21 there, right next to that bush that Monay-Pina was trying to
22 hide behind. It was nearest to him, that evidence, the wallet
23 and the wad of cash. The wad of cash which consisted of one
24 twenty and a number of fives and ones. Just like Richard told
25 you, we don't keep many twenties in there, we put those away,

1 we keep only ones and fives. \$138, Richard thought that it
2 was about \$100 that was taken at the time of the robbery.
3 According to Officer Simmons [phonetic], he was told at the
4 time that it was \$139 that was actually taken in the robbery
5 from the two registers. We recover \$138 in the bushes and \$2
6 on the floor at 7-Eleven. More than a coincidence.

7 Brush Street evidence on Javier: the guns, the
8 sheath, knives that were taken from his place that he
9 described, his phone, his camera. His other knives, that had
10 been taken from him, are found right there in the pockets of
11 Defendant Monay-Pina. Again, I already talked about the
12 wallet and the wad of money found -- recovered from the
13 shrubbery right nearby. The axe, right outside the bedroom.

14 And for those of you who like the physical
15 scientific evidence, there's also DNA evidence in this case
16 connecting everything together. You have blood on the axe,
17 and it belongs to Javier. The axe is found right in the
18 pathway where the Defendants, upon hearing the sirens and
19 seeing the lights, would have run out of the bedroom, dropped
20 the axe, before jumping the walls to try and get away.

21 You have blood on the gun. It belongs to Javier.
22 The gun is found in the yard where the Defendants have run off
23 to, in close proximity to the two of them, immediately
24 following. And this happened, obviously, within minutes. If
25 you listen to that 9-1-1 call, when Lizbeth is on the phone,

1 she's talking, stilling going on there, and the police are
2 responding. They're there. 9-1-1 is still trying to give her
3 instructions, and her mom is already talking to the police.
4 So this is real quick response, because literally it's a mile
5 around the block when they get the call.

6 The mask under the shed, evidence suggests from the
7 video. Evidence from DNA confirms. It belongs to Casimiro
8 Venegas. The other mask near the bushes, the video confirms,
9 and the DNA assures. It's Jose Monay-Pina.

10 Ladies and gentlemen, the evidence is overwhelming
11 in this case. Defendants are both guilty of all charges as
12 presented, and we ask you to so find it. Thank you.

13 THE COURT: Thank you.

14 MR. GILL: Your Honor, can we approach before I give my
15 closing?

16 THE COURT: Sure.

17 [Bench Conference Begins]

18 MR. GILL: I had just a couple of issues that I want to
19 make a record on eventually, but we're closing. I didn't want
20 to interrupt her, but --

21 MS. HOLTHUS: Well, if you're going to object at time --
22 we can't fix it, but --

23 MR. GILL: Well, I want to make reference to the "guns a
24 blazing" comment, as well as her reference to the juror who we
25 removed for making the teammate comments. And then I believe

1 the last slide was incorrect when it -- she identified the red
2 gloves as containing DNA?

3 MR. SCHWARTZ: It was the -- that was the -- I think she
4 said the mask, the tube mask

5 MR. GILL: Tube mask, the mask --

6 MR. SCHWARTZ: It was -- the tube mask and the glove were
7 in the picture, but the text said mask under shed, as I
8 recall.

9 MR. GILL: Then I'd have to look, but the only DNA found
10 was the mask that matched my client.

11 MS. HOLTHUS: Yeah, but you could have just objected, and
12 I could have made that record in front of them.

13 MR. GILL: Well, I mean that was just right now. We
14 can -- I mean that was one of the very last lines.

15 THE COURT: I don't know what you want me to do, Mr.
16 Gill, because there's no contemporaneous objection.

17 MR. GILL: Well, at least to as to --

18 MS. HOLTHUS: You could address it in your argument,
19 then.

20 MR. GILL: At least as to the gloves, I think -- I mean,
21 she literally said that and then said find them guilty.

22 MS. HOLTHUS: I completely disagree, but I'm happy to
23 just say, ladies and gentlemen, if I confused you, there was
24 no DNA on the gloves, the DNA was only on the mask.

25 MR. GILL: I can clean it up, as well.

1 THE COURT: Okay.

2 MR. GILL: Thank you, Your Honor.

3 THE COURT: You interested in your [indiscernible]? Oh,
4 well --

5 MR. GILL: Thank you.

6 [Bench Conference Ends]

7 MR. GILL: May I proceed, Your Honor?

8 THE COURT: Go ahead.

9 MR. GILL: Ladies and gentlemen of the jury, thank you
10 for your patience this week. Again, this is the last
11 opportunity I'll have to address all of you. On behalf of Mr.
12 Venegas, both of us, and Mr. Monay-Pina, and Mr. Boley, we
13 thank you.

14 And I stated it Monday that -- or, excuse me --
15 Tuesday morning, that things were not going to be as easy as
16 the State wants to make it seem. And you just heard from Ms.
17 Holthus, and that's kind of what you got, that this is so
18 easy, find him guilty of all thirteen counts. Well, go
19 through some of the jury instructions and then the counts, as
20 well. Particularly -- and I'll show these up on the overhead.

21 If we can switch that, please?

22 Particularly number 5, it's the, in my opinion, one
23 of the most important jury instructions. And it reads, "the
24 Defendants are presumed innocent until the contrary is proved.
25 This presumption places upon the State the burden of proving

1 beyond a reasonable doubt every element of the crime charged
2 and that the Defendants committed the offenses".

3 And then it goes on to define a reasonable doubt.
4 And I'll just read it. I know you'll have it when you back,
5 but "a reasonable doubt is one based on reason. It is not
6 mere possible doubt but is such a doubt as would govern or
7 control a person in the more weighty affairs of life. If the
8 minds of jurors, after the entire comparison and consideration
9 of all the evidence, are in such a condition that they say
10 they can feel an abiding conviction of the truth of the
11 charge, there is not a reasonable doubt. Doubt to be
12 reasonable must be actual, not mere possibility or
13 speculation. If you have a reasonable doubt as to the guilt
14 of the Defendants" -- or as we've learned from the jury
15 instructions, one or the other of the Defendants -- "they are
16 entitled to a verdict of not guilty."

17 Now as we talk and as you guys deliberate, I'm going
18 to ask that you reference back to jury instruction 5, this
19 reasonable doubt instruction, because it's the cornerstone of
20 what your job is here, today.

21 And number 8, I'm also going to reference in my
22 argument, and that's,

23 "the credibility or believability of a witness
24 should be determined by the witness' manner upon the
25 stand, the witness' relationship to the parties, the

1 witness' fears, motives, interests, or feelings, the
2 witness' opportunity to have observed the matter to
3 which the testified, the reasonableness of the
4 witness' statements, and the strength or weakness of
5 the witness' recollection."

6 Okay. So it's saying you guys get to determine --
7 and I think I said this the other day. You get to watch and
8 determine the credibility or believability of each witness.

9 "If you believe that a witness has lied about
10 any material fact in the case, you may disregard the
11 entire testimony of that witness or any portion of
12 the witness' testimony which is not proved by other
13 evidence."

14 I'm not going to argue that any of the witnesses
15 came up here and lied to you, but I am going to -- we're going
16 to discuss some of the differences in their testimony and some
17 of the weaknesses in their ability to give that testimony or
18 to relay what they were able to perceive.

19 The next instruction I want to briefly touch upon is
20 this deadly weapon instruction, and I'm not going to read it
21 to you. Ms. Holthus did a good job of going over what a
22 deadly weapon is, and you guys heard me ask questions over the
23 last few days regarding these pneumatic guns. I'm going to
24 submit to you that the pneumatic guns in this case were deadly
25 weapons. I would be a fool to get up and argue otherwise,

1 because the law is very clear on that point.

2 However, when we turn the page to 28[a], we get the
3 definition somewhat similar to the definition on the previous
4 page, but it -- of a deadly weapon. It says,

5 "a deadly weapon includes any device whether
6 loaded or unloaded, operable or inoperable, from
7 which a metallic projectile including any ball
8 bearing or pellet may be expelled by means of
9 spring, gas, air, or other force".

10 Yeah, BB guns. "A firearm means any device designed
11 to be used as a weapon from which a projectile may be expelled
12 through the barrel by the force of any explosion or other
13 force of combustion". Not a BB gun. Firearm, not a BB gun.
14 Or a BB gun, not a firearm. My apologies.

15 But again, and with the deadly weapon, you didn't
16 hear us discuss whether it worked or not or -- you know -- one
17 was broken. And it's simply not a concern when we're dealing
18 with this jury instruction. The reason I want you guys to
19 focus on this instruction is that firearm definition, what is
20 and what is not a firearm.

21 And this is the substantial bodily harm instruction,
22 and I'm sorry I'm getting them a little bit crooked there.
23 But this talks about what substantial bodily harm is or is
24 not. And again, the State in their closing, I believe,
25 conceded on Counts IX and X, no substantial bodily harm. So

1 as to Counts IX and X, the axe to the leg and the axe to the
2 rib, no substantial bodily harm.

3 And I'll address the fact that that's broken up into
4 three charges, because I think it should be -- one charge that
5 they've proven is the axe attack, if you will. They charged
6 one battery with substantial for the pistol whip. And then
7 the State got up here and argued, well, he's got injuries here
8 and here and here, in one charge. Now, with the battery,
9 State's trying to break it up into three different charges.
10 He said that it touched his leg, it touched his rib, and
11 that's all the evidence you heard regarding the rib and the
12 leg.

13 So I submit to you that by finding -- if you do find
14 Count VIII, Count IX and X are incorporated in Count VIII. I
15 know the State's charged it differently, and they disagree.
16 But at the very least, ladies and gentlemen, as Ms. Holthus
17 had mentioned, Counts IX and X, she's not even asking that you
18 find substantial bodily harm.

19 Let's talk about the attempt murder charge. This is
20 the one where the State makes it sound like it's so easy, it's
21 attempt murder. But I submit to you that it's not that easy.

22 "Attempt murder is the performance of an act or
23 acts which tend but fail to kill a human being, when
24 such acts are done with express malice, namely with
25 the deliberate intention to unlawfully kill".

1 And then, obviously, instruction 38 kind of
2 distinguishes attempt from actual performance of an act, and
3 then 39 discusses the malice of forethought which is simply a
4 murder determination. This is oft -- commonly used in first
5 degree murder cases, because the, well, the element required
6 in both attempt murder and murder is the same. It's this
7 malice of forethought, which means "the intentional doing of a
8 wrongful act without legal cause or excuse or what the law
9 considers adequate provocation". And I think the word
10 "revenge" was underlined on Ms. Holthus' PowerPoint.

11 Let's talk about the facts surrounding the bedroom.
12 And Ms. Holthus had said that this attack was immediate, and I
13 don't think the evidence supports that. He woke up which made
14 it seem immediate, and he did say that they talked for two or
15 three minutes. So it's not this immediate -- run in the door
16 and commit these acts or do these acts. It was not an
17 immediate jumping on him, and I think the State said with
18 "guns a blazing".

19 And I just -- the State just hasn't proven this
20 intention to kill. And Count VII is the attempt murder count.
21 I'd submit to you that they have not met their burden of proof
22 beyond a reasonable doubt that there was any intention to
23 murder Javier Colon in that bedroom, and I'd ask you to
24 carefully consider Count VII when you guys are deliberating.

25 And Count XI is described in jury instruction 41.

1 This goes back to the firearm-deadly weapon distinction. "Any
2 person who aims any gun, pistol, revolver, or other firearm
3 whether loaded or not, at or toward any human being, is guilty
4 of aiming a firearm at a human being". The State has not
5 proven this. There was no firearm pointed at anyone, and
6 just, please, remember the distinction between deadly weapon
7 and firearm and refer to that jury instruction. The only
8 appropriate verdict for Count XI is not guilty, and that is
9 the aiming a firearm at a human being.

10 The rest of that charge simply doesn't matter, and
11 it lists many different people who were in the house. It
12 lists the children. It lists Adriana. But you can read every
13 word of that, and again, you have the instructions in the --
14 instruction 1 is all of the different counts, and Count XI is
15 what we're talking about.

16 I want to talk about Count XII as well, the coercion
17 instruction, and that's the last one I will put on the
18 overhead. Number 42, jury instruction 42,

19 "any person who uses violence upon another
20 person or threatens violence or injury to another
21 person with the specific intent to compel another to
22 do or abstain from doing an act, which such other
23 person has a right to do or abstain from doing, is
24 guilty of coercion".

25 Well, this is an instance where the State makes it

1 sound, no big -- very easy. The guns are pointed therefore
2 they couldn't go anywhere, they couldn't do anything. And I
3 think one of the slides even said they couldn't call 9-1-1.
4 They called 9-1-1. They had -- I asked the one young girl if
5 they had a door that they could exit.

6 They were down. I submit to you the kids never saw
7 these two guys. I don't know how they could have seen the
8 kids. You saw the windows, the rooms, the difficulty that
9 they would have had to view the room. And you heard from the
10 mother, and you heard from the children. They never -- the
11 mom did not -- simply did not allow these kids to pop their
12 head in or look at, through either one of those windows.

13 And there's repeated testimony about how dark it
14 was. And we've got it through -- Javier talked about how dark
15 it was in that room. Adriana -- hard to see, very dark are
16 the notes that I have for her testimony, and that she thinks
17 it's him. You know, gave an identification. And you might
18 recall I asked her again, well, is it him, or do you think
19 it's him? Her response, yet again, I think it's him. It's
20 dark in that room.

21 Lizbeth, the first young girl to testify, the oldest
22 sister -- difficult to look through mom's window. She
23 didn't -- she later confirmed that she didn't look through the
24 window. And then there's some testimony where she's relaying
25 what her mom is saying to her. She not looking -- Lizbeth is

1 not looking through the window. She's talking to mom. Mom is
2 looking through different windows. And again, go back and
3 look at those pictures of how that room's set up, how those
4 windows are set up, and how dark it is at this time. And when
5 she relays this information from mom -- and I believe this
6 statement was on the 9-1-1 call, no we didn't see them. And
7 then, again, she confirmed that she never looked out. She was
8 asked about the color of things, and she said couldn't see the
9 color because it's very dark in there.

10 Samantha, the second girl who broke down, one of her
11 statements was it was very dark, it was dark in that room. So
12 keep all of these things in mind, especially as to that
13 coercion, and whether or not Adriana could see the guns, could
14 see any of these things with how dark it is in there and how
15 much everybody is commenting on how dark it is.

16 Richard DeCamp got up, and he was scared. He was
17 clearly afraid on that 9-1-1 call, and probably still a little
18 nervous to come testify. But he's seeing two guys in masks in
19 quite a bit of light. You're going to have the stills that
20 the State provided. You're going to have the videos if you
21 want to review them, but remember how much light is in that
22 7-Eleven. He didn't come in here and identify anybody.

23 Sure, they were wearing different things, but
24 they're -- the State's arguing that they're wearing the same
25 things in this very, very dark room, and they're performing

1 all these actions in this very dark room, yet State wants you
2 to believe and these witnesses want you to believe that
3 they're seeing every little thing that's gone on. Keep all
4 that in mind when you go through the coercion count, when you
5 go through all of these other counts.

6 And the State does something here with Count XIII,
7 again. They want to hit -- they want you to hit the
8 Defendants with three batteries for one alleged attack, but on
9 Count XIII, they -- again, they want one battery with intent
10 to commit a crime, and they've included the firearm, the axe.
11 They've included every language under the sun there, so keep
12 that in mind when you guys go count by count and specifically
13 Counts VIII, IX, and X.

14 I'd submit that if you do that -- and that's what
15 we're asking. That's all we can ask of you is to go through
16 this case very carefully. Go through the instructions. And
17 if you do that you'll find them not guilty on all counts, and
18 that's what we're asking for today. Thank you.

19 THE COURT: Thank you, Mr. Gill.

20 Mr. Boley?

21 MR. BOLEY: Yes, ma'am.

22 Ladies and gentlemen, those here at counsel table
23 know better than anybody how tedious these trials are, so we
24 definitely appreciate your attention over the last few days.
25 And I know you've seen a lot of evidence, and you heard from

1 both sides. So I won't belabor this and be repetitive with
2 Mr. Gill, but we will, in defense of Mr. Monay-Pina
3 specifically, echo everything that Mr. Gill argued. But I
4 want to say a few things specifically about Mr. Monay-Pina.

5 So I'm going to put this up. I know you've seen
6 this jury instruction repeatedly, the reasonable doubt jury
7 instruction. Now you've seen some evidence, and you saw some
8 photos that the State presented of the two gentlemen that
9 entered the 7-Eleven and the Defendants later on in similar
10 clothing and such.

11 But there a few pieces of doubt that enter into that
12 equation. First of all, you heard from Mr. Decamp. He
13 identified two people. He was very unsure. In fact, conceded
14 in the last question that he was asked that the second robber
15 could have even been female. In his whole testimony, he never
16 used the word Hispanic, but that entered into the equation
17 later as the officer testified.

18 We move forward through the investigation. Javier
19 Colon testified. He testified that he did not see the face of
20 the second attacker. The second attacker did not -- this is
21 Mr. Colon's words -- speak, strike, or come close to him in
22 any way. He conceded that he couldn't see the second
23 attacker's eyebrows, but could see his eyes only. And he's
24 testified that his eyes were brown, but there's a lot of
25 people with brown eyes out there. But if you can see the

1 color of his eyes and couldn't see the color of his eyebrows,
2 there's clearly some problems with the interpretation of that
3 situation.

4 We heard from Mr. Colon's family, specifically his
5 sister and her children. None of them could positively
6 identify the second assailant. I believe one of them could
7 vaguely identify Mr. Venegas, but none of them identified Mr.
8 Monay-Pina.

9 We then heard from Officer Sperling [phonetic].
10 Officer Sperling apprehended Mr. Monay-Pina later in a yard
11 that was two houses down, hiding in some bushes. There was
12 some confusion in his testimony about where the items around
13 him came from. Some were not on his person. Some were on his
14 person. And Officer Sperling testified vaguely as to a pile
15 of items that were or maybe were not removed from Mr. Monay-
16 Pina's person, so we're not sure there. And you may -- you
17 have to draw your own conclusions, but it's your job alone to
18 determine whether or not what's been presented proves beyond a
19 reasonable doubt that Mr. Monay-Pina is guilty of these
20 crimes.

21 Now, let me draw your attention to something that I
22 believe Mr. Gill presented to you a minute ago, which is jury
23 instruction 10. These two defendants -- and whenever there's
24 two defendants in a criminal case -- are entitled to separate
25 consideration. So you could find that the State has proven

1 one of them guilty beyond a reasonable doubt and not the
2 other. So if you believe that, you could render a different
3 verdict for one gentleman than the other, and that's up to you
4 and what the evidence has -- what conclusions you draw from
5 the evidence.

6 And I want to reiterate what Mr. Gill talked about
7 in defense of Mr. Venegas. In the attempt murder statute --
8 the attempt murder law requires a specific intent to kill a
9 human being. And if that was true and these gentlemen wanted
10 that, why did they bring BB guns? Thank you.

11 THE COURT: Thank you.

12 Rebuttal from the State?

13 MR. SCHWARTZ: Your Honor, can we approach briefly?

14 THE COURT: Sure.

15 [Bench Conference Begins]

16 MR. SCHWARTZ: I was going to ask for one bathroom break,
17 but I understand we're kind of -- it's the last thing, so I
18 just wanted to ask if you were inclined to let me take a quick
19 bathroom break?

20 THE COURT: Can you make it?

21 MR. SCHWARTZ: I can.

22 THE COURT: Then let's not.

23 MR. SCHWARTZ: Okay. Thank you.

24 [Bench Conference Ends]

25 MR. SCHWARTZ: And if we could, please, switch over to

1 the computer again? Okay.

2 Ladies and gentlemen, I appreciate your time during
3 this trial. I do think it's interesting that we go through
4 all these different pictures, all this evidence, all these
5 things. The defense gets up and talks to you about their
6 closing, right? Their case -- they don't show you any of the
7 pictures, right? They don't go through any of the evidence.

8 MR. GILL: Your Honor, can we approach?

9 THE COURT: Yes.

10 [Bench Conference Begins]

11 MR. GILL: Thank you. My objection is about -- shifting
12 the burden right out of the gate is the objection.

13 MR. SCHWARTZ: That wasn't my intention. I was noting
14 what was presented, and I'm going to argue it's our burden
15 still. I wasn't saying that they have to present anything,
16 but what they argued was nothing about the pictures. That's
17 all I said.

18 THE COURT: [Indiscernible].

19 MR. GILL: And I'm going to have to move for a mistrial,
20 as well. It's my only recourse.

21 MR. SCHWARTZ: And I can certainly clean up if that's --
22 if it was implied that I was burden shifting, I would
23 certainly not imply that to them, and I can make it very clear
24 I wasn't.

25 THE COURT: What is your objection again, Mr. Gill?

1 MR. GILL: Burden shifting.

2 MR. SCHWARTZ: Burden shifting.

3 THE COURT: Because?

4 MR. GILL: We don't get up -- we didn't get up and show
5 them any evidence, show them any photographs or anything in
6 our closing arguments, so the State wins.

7 MR. SCHWARTZ: And I could see if I was saying that they
8 didn't present a case as far as they didn't put on witnesses,
9 they didn't put on evidence. I would understand that
10 objection, but I was merely explaining what they just got up
11 and did as far as closing arguments, which is what I'm
12 supposed to do as rebuttal, rebutting their arguments which
13 were based on the laws --

14 THE COURT: They don't even have to do a closing
15 argument, so --

16 MR. SCHWARTZ: Right.

17 THE COURT: -- I'll sustain the objection. I'm not going
18 to grant a mistrial, but --

19 MR. SCHWARTZ: Okay.

20 THE COURT: -- I will remind the jury that the defense is
21 not required to present any evidence.

22 MR. GILL: Okay. And instead of --

23 MR. SCHWARTZ: Thank you, Your Honor.

24 MR. GILL: Instead of -- quote, unquote -- cleaning it
25 up, maybe just --

1 MR. SCHWARTZ: I won't. I'll just move on.

2 THE COURT: All right.

3 MR. GILL: Thank you, Your Honor.

4 THE COURT: Sure.

5 [Bench Conference Ends]

6 THE COURT: I remind the lady -- the ladies and gentlemen
7 of the jury that the burden is on the State, and the defense
8 is not required to present any evidence.

9 MR. SCHWARTZ: Mr. Gill got up here and told you that the
10 BB guns aren't firearms, right? Well, so what? We agree
11 they're not firearms. They're BB guns. They're deadly
12 weapons, and he acknowledged that they are, in fact, deadly
13 weapons. So let's see why this matters.

14 Jury instruction number 27, and specifically, I'm
15 talking about the burglary while in possession of a firearm,
16 because, right? It says while in possession of a firearm, so
17 naturally you think it's got to be a firearm. But if you look
18 at the instruction, and you have it there in front of you.
19 And this is particularly the burglary with regard to the 7-
20 Eleven and with regard to 504 Brush Street.

21 "Every person who commits the crime of burglary
22 who has in his possession or gains possession any
23 firearm or deadly weapon at any time during the
24 commission of a crime, any before leaving or upon
25 leaving the structure, is guilty of burglary while

1 in possession of a firearm".

2 So the fact that the BB guns, these pneumatic guns,
3 they're not firearms -- it has no bearing on these charges,
4 especially the burglary while in possession of a firearm
5 charge.

6 We'll also talk about the aiming a firearm charge in
7 a second, but defense also says -- and this was Mr. Gill. He
8 mentioned that it should just be one battery. Only one
9 battery, because there's only one substantial bodily harm, as
10 well. I believe he indicated that the axe simply touched his
11 leg. It touched his ribs, and then it hit his hand. And it's
12 not that the State wants to charge three batteries. That's
13 what the law says. Each strike is a battery, and each strike
14 -- and I would disagree with the phrase "touching". He struck
15 him in the leg with the axe, which is what Mr. Javier said,
16 struck him in the ribs with the axe.

17 Sure, there was no injury to him. He had a blanket
18 covering him. I understand. I agree. That's why we're not
19 asking you to find substantial bodily harm in those two
20 charges. But it doesn't matter that it's one attack. It can
21 be three separate charges, because that's the different acts
22 that these defendants committed.

23 Similarly, he mentioned that battery with intent to
24 commit a crime is, again, contained within that charge, but
25 again, that's not what the law says. It has a completely

1 separate element. The battery has to be with the intent to
2 commit the robbery. And so given the facts, given the
3 evidence that you heard, the State's proven that these
4 batteries, these three, four separate batteries were for a
5 purpose. And one of those purposes was the robbery, and
6 that's why that other charge comes into play. That's what the
7 law allows for.

8 Defense claims that the Defendants did not try to
9 kill Javier Colon, and in particular, Mr. Gill mentioned that
10 Javier said that they spoke for a few minutes before anything
11 happened. And I'd ask you just to recall your recollection of
12 the testimony, because my recollection, as Javier testified,
13 was that he was woken up and they came in and started
14 attacking him. And the injuries support his version of what
15 happened. Additionally, he never left his bed. That's been
16 consistent with Javier along with what Adriana said. It's not
17 like he was woken up by them, they talked, and he got up out
18 of bed, and they started talking. That's not what the
19 evidence shows. The evidence, in fact, shows that he never
20 left his bed, because he was attacked upon their entry into
21 his room.

22 And Mr. Boley mentioned, I believe, at the end of
23 his closing, he said that if they were going to try to kill,
24 why did they bring BB guns, right? Well, the attempt murder
25 actually has nothing to do with the BB guns. The attempt

1 murder has to do with that axe that you saw over there, and
2 the axe was being swung at his head. That's why it's attempt
3 murder. That's how you can infer from these circumstances.
4 What other result are you hoping to obtain? And just look at
5 the facts and circumstances. Ms. Holthus mentioned it. You
6 swing an axe at someone's head.

7 And I mentioned we would get to this aiming a
8 firearm charge. Again, it's not -- if you read the
9 instruction, and I don't have it up there for you, but the
10 definition says aiming any gun -- comma -- or firearm, et
11 cetera. And as Mr. Gill mentioned, we're talking about
12 pneumatic guns. So it doesn't have to be a firearm. I know
13 it says firearm in the name of the charge, but that's not what
14 the law says. It just has to be a gun, and a pneumatic gun is
15 what the evidence has shown, what Mr. Gill acknowledged was
16 used in this case.

17 Defense claims that there wasn't a coercion, because
18 they actually did call 9-1-1. And I would tend to agree that
19 Lizbeth probably wasn't coerced. Her name's in the pleadings.
20 She did call 9-1-1. Think about Adriana, and that's the mom.
21 She was too scared to help, that she said, too scared to call
22 9-1-1. She didn't call 9-1-1, right? Lizbeth is the one who
23 finally got them to call 9-1-1, probably saving Javier's life.
24 But that's where the coercion comes into play, because Adriana
25 felt, based on what was going on with the guns, that she

1 couldn't call 9-1-1. She couldn't act. She was frozen.

2 In the coercion charge, you'll see in the complaint
3 that there's a bunch of and/or, and/or, and the different
4 names. Meaning if you believe that the State has proven
5 coercion as to one of those people but not the rest, that's
6 okay, because it's an and/or, the way it's been put. So if
7 you think about Javier, think about whether or not he was able
8 to do something that he wanted to do. Was he able to leave?
9 Was able to go back to sleep? Was he able to do something
10 he's entitled to do? That's the essence of the coercion
11 charge.

12 And I think Mr. Gill also mentioned, kind of when we
13 were talking about this idea of coercion, that it was really
14 dark in the room, right? Adriana, the other kids, the two
15 girls and the boy, they couldn't see what was happening
16 inside, right? They couldn't see the guns.

17 But if you think about it this way, they called 9-1-
18 1 while this was happening, right? Before anyone was ever
19 caught, before any pneumatic guns, weapons, were ever
20 recovered, they call 9-1-1, and in the 9-1-1 call, you'll hear
21 the caller, Lizbeth, talking with her mom and explaining to
22 the caller, who's taken the call, that guns were -- there were
23 two guns pointed at them. So it's not as if they came up with
24 this thing afterwards. This is what they're telling the 9-1-1
25 operator as the crime is happening.

1 Mr. Boley had mentioned that no one was really able
2 to identify Mr. Jose Monay-Pina, and you can -- you'll be able
3 to take all of the pictures and the surveillance back there to
4 determine whether or not he was in the 7-Eleven, based on his
5 clothing, based on the items that were found in his vicinity
6 when he was arrested. And Javier said, yeah, I only saw his
7 eyes. He only saw his eyes, but couple that with the fact
8 that he's then found next door, right?

9 So ladies and gentlemen, there's an instruction
10 on -- I believe it was read to you already -- common sense.
11 We ask you to use it when you're coming to your verdict. Use
12 your common sense and judgment as reasonable men and women,
13 and you can draw reasonable inferences based on your common
14 experience. So when you go back and you look at the evidence,
15 pictures, the surveillance, the testimony, use your common
16 sense.

17 And again, Mr. Gill and Mr. Boley mentioned this
18 credibility instruction, which basically instructs you that
19 you can consider the witnesses motives and interests,
20 opportunity to observe what happened, reasonableness of their
21 statements, these different things in determining the
22 credibility of what they said.

23 Now, here's an instruction that I don't think's been
24 discussed yet, but there's an instruction that talks about
25 flight.

1 MR. GILL: Your Honor, can we approach?

2 [Bench Conference Begins]

3 MR. SCHWARTZ: Oh, there's not? I thought we submitted a
4 flight instruction.

5 MS. HOLTHUS: No. But you could still work your flight,
6 just --

7 MR. SCHWARTZ: Okay. I'm not going to put up the
8 instruction then.

9 MS. HOLTHUS: That's a pretty good idea.

10 MR. GILL: I just wanted -- I'm sorry to interrupt again.

11 MR. SCHWARTZ: No. No. You're fine. That's my mistake.
12 I apologize.

13 THE COURT: It's all right.

14 MR. SCHWARTZ: So how would like me to move on past this
15 slide, because it does have two next things? Can I just
16 click? Stand in front of it and click through it? Okay.

17 THE COURT: The jurors close their eyes.

18 MS. HOLTHUS: There you go.

19 MR. GILL: Yeah.

20 [Bench Conference Ends]

21 THE COURT: Oh, I don't know.

22 MR. SCHWARTZ: And if I could just quickly fix that for
23 you guys?

24 THE COURT: There you go.

25 MR. SCHWARTZ: So flight, in general, the idea that

1 leaving a scene, leaving an area with a consciousness of
2 [indiscernible], that's something that can be considered by
3 you in your determination of this case.

4 Reasonable doubt -- I know that both the other
5 attorneys touched on it. Feel an abiding conviction of the
6 truth of the charge, there's not a reasonable doubt. This is
7 not the entire instruction. I encourage you to, please, look
8 at the entire instruction. That's what they put up for you
9 when considering reasonable doubt. And ladies and gentlemen,
10 the State at this point has proven its case beyond a
11 reasonable doubt that these gentlemen robbed Mr. Richard
12 DeCamp on January 12th. They then went down the street. They
13 robbed Javier Colon. They attacked him. They beat him. They
14 tried to kill him with the axe, and they left. They
15 threatened the young lady, Adriana, in her house, and they
16 left. Ask you to find them guilty on all the counts. Thank
17 you.

18 THE COURT: All right. Clerk will now swear in the
19 officer to take charge of the jurors and alternate jurors.

20 THE CLERK: Do you solemnly swear that you will keep this
21 jury together in some private and convenient place, that you
22 will not permit any person to speak to them, nor speak to them
23 yourself unless it be by order of the Court except to ask them
24 whether they have agreed upon a verdict, and that you will
25 return them into court when they have so agreed, so help you

1 God?

2 THE MARSHAL: I do.

3 THE CLERK: Thank you.

4 THE COURT: All right. And our alternate jurors are Mr.
5 Smith and Mr. Murnighan, jurors number 13 and 14, but if you
6 will all, please, go with the marshal. He'll direct you.

7 THE MARSHAL: Please stand for the jury.

8 [Jury Exits]

9 THE COURT: And everybody can have a seat. If counsel
10 could just make sure that we know how to get a hold of you,
11 and if everybody could, for now, stay close.

12 MR. SCHWARTZ: Your Honor, we'll provide a copy of our
13 PowerPoints to the Court.

14 THE COURT: That'd be great if we could have that. We'll
15 make it a court exhibit for the record.

16 MR. SCHWARTZ: Thank you.

17 MS. HOLTHUS: All right.

18 THE COURT: Anything else we need to put on the record?

19 MR. GILL: I don't think so, Your Honor. Thank you.

20 MS. HOLTHUS: I don't think so.

21 MR. BOLEY: No, Your Honor.

22 MS. HOLTHUS: Thank you.

23 [Recess at 3:51 p.m.]

24 THE COURT: We're just going to wait a second for Mr.
25 Boley. We got a question from the jury about --

1 MR. GILL: Mind if I --

2 THE COURT: Okay. You can show him.

3 Didn't I tell you guys not to go anywhere?

4 MS. HOLTHUS: You'll notice we did not.

5 THE COURT: I know, but like didn't I say that?

6 [Pause]

7 THE COURT: Can I have that back, please?

8 MR. GILL: Yeah.

9 THE COURT: We have everyone now on the record. We're on
10 the record now, and defendants are present as well as counsel.
11 The jury is not present. We did receive a question sent out
12 form Juror Number 11, Mr. Gildenmeister, who I assume is the
13 foreperson, which says is there to modify Counts IX and X? We
14 feel VIII, IX, and X are all counts of battery but IX and X
15 lack evidence of substantial bodily harm.

16 In the -- and then after the note was sent out, the
17 jury indicated to the marshal that they no longer needed us to
18 answer the question. However, since they have sent the
19 question out, my preference is to make a record of the
20 question and to respond to it by simply telling -- referring
21 them the verdict form, so just indicating that they will need
22 to select one of the options on -- one of options provided in
23 the verdict form.

24 MR. GILL: That's fine, Your Honor. Thank you.

25 MR. BOLEY: Okay.

1 MR. SCHWARTZ: That's fine, Your Honor.

2 THE COURT: All right. So I will write that where it
3 says court notes. We will put a -- they will be given a copy,
4 and then the original will be lodged as a court exhibit.

5 Please don't anywhere like far.

6 MR. BOLEY: Okay.

7 THE COURT: All right.

8 MR. SCHWARTZ: We're just going to go down.

9 [Recess at 4:53 p.m.]

10 THE MARSHAL: Please rise for the jury.

11 [Jury In]

12 THE COURT: Back on the record in case number C313118,
13 State of Nevada v. Venegas and Monay-Pina. Let the record
14 reflect the presence of all of our jurors, our two alternates,
15 defendants, and counsel.

16 Ladies and gentlemen of the jury, has the jury
17 selected a foreperson?

18 JUROR NO. 11: Yeah, Your Honor.

19 THE COURT: All right. And, sir, that's you, Mr.
20 Gildenmeister?

21 JUROR NO. 11: Yeah.

22 THE COURT: Is that correct? All right. And, sir, has
23 the jury reached a verdict?

24 JUROR NO. 11: Yes.

25 THE COURT: And could you please hand the verdict forms

1 to the marshal?

2 [Pause]

3 THE COURT: Will the Defendants and their counsel please
4 rise? And the clerk will read the verdict out loud.

5 THE CLERK: District Court, Clark County Nevada, the
6 State of Nevada v. Casimiro Venegas, case number C-16-313118-
7 1, department number VII, verdict. We the jury in the above
8 entitled case find the Defendant, Casimiro Venegas, as
9 follows:

10 Count I, conspiracy to commit robbery: guilty of
11 conspiracy to commit robbery.

12 Count II, burglary while in possession of a firearm:
13 guilty of burglary while in possession of a firearm.

14 Count III, robbery with use of a deadly weapon,
15 DeCamp: guilty of robbery with use of a deadly weapon.

16 Count IV, burglary while in possession of a firearm,
17 Colon: guilty of burglary while in possession of a firearm.

18 Count V, robbery with use of a deadly weapon, Colon:
19 guilty of robbery with use of a deadly weapon.

20 Count VI, battery with use of a deadly weapon
21 resulting in substantial bodily harm, Colon: guilty of
22 battery with use of a deadly weapon resulting in substantial
23 bodily harm.

24 Count VII, attempt murder with use of a deadly
25 weapon, Colon: guilty of attempt murder with use of a deadly

1 weapon.

2 Count VIII, battery with use of a deadly weapon
3 resulting in substantial bodily harm, Colon: guilty of
4 battery with use of a deadly weapon resulting in substantial
5 bodily harm.

6 Count IX, battery with use of a deadly weapon
7 resulting in substantial bodily harm, Colon: guilty of
8 battery with use of a deadly weapon.

9 Count X, battery with use of a deadly weapon
10 resulting in substantial bodily harm, Colon: guilty of
11 battery with use of a deadly weapon.

12 Count XI, aiming a firearm at a human being, Colon,
13 Avina: guilty of aiming a firearm at a human being.

14 Count XII, coercion with use of a deadly weapon,
15 Colon, Avina: guilty of coercion with use of a deadly weapon.

16 Count XIII, battery with intent to commit a crime,
17 Colon: guilty of battery with intent to commit a crime.

18 Dated this 15th day of March 2017. Mr.
19 Gildenmeister, foreperson.

20 District Court, Clark County Nevada, the State of
21 Nevada v. Jose Fernando Monay-Pina, case number C-16-313118-2,
22 department number VII, verdict. We the jury in the above
23 entitled case find the Defendant, Jose Fernando Monay-Pina, as
24 follows:

25 Count I, conspiracy to commit robbery: guilty of

1 conspiracy to commit robbery.

2 Count II, burglary while in possession of a firearm:
3 guilty of burglary while in possession of a firearm.

4 Count III, robbery with use of a deadly weapon,
5 DeCamp: guilty of robbery with use of a deadly weapon.

6 Count IV, burglary while in possession of a firearm,
7 Colon: guilty of burglary while in possession of a firearm.

8 Count V, robbery with use of a deadly weapon, Colon:
9 guilty of robbery with use of a deadly weapon.

10 Count VI, battery with use of a deadly weapon
11 resulting in substantial bodily harm, Colon: guilty of
12 battery with use of a deadly weapon resulting in substantial
13 bodily harm.

14 Count VII, attempt murder with use of a deadly
15 weapon, Colon: guilty of attempt murder with use of a deadly
16 weapon.

17 Count VIII, battery with use of a deadly weapon
18 resulting in substantial bodily harm, Colon: guilty of
19 battery with use of a deadly weapon resulting in substantial
20 bodily harm.

21 Count IX, battery with use of a deadly weapon
22 resulting in substantial bodily harm, Colon: guilty of
23 battery with use of a deadly weapon.

24 Count X, battery with use of a deadly weapon
25 resulting in substantial bodily harm, Colon: guilty of

1 battery with use of a deadly weapon.

2 Count XI, aiming a firearm at a human being, Colon,
3 Avina: guilty of aiming a firearm at a human being.

4 Count XII, coercion with use of a deadly weapon,
5 Colon, Avina: guilty of coercion with use of a deadly weapon.

6 Count XIII, battery with intent to commit a crime,
7 Colon: guilty of battery with intent to commit a crime.

8 Dated this 15th day of March 2017. Mr.
9 Gildenmeister, foreperson.

10 Ladies and gentlemen of the jury, are these your
11 verdicts as read? So say you one, so say you all?

12 GROUP RESPONSE: Yes.

13 THE CLERK: Thank you.

14 THE COURT: Do either of the -- do any of the parties
15 wish to have the jury polled?

16 MR. SCHWARTZ: No, Your Honor.

17 MS. HOLTHUS: Yes.

18 MR. GILL: Yes, Your Honor.

19 THE COURT: [Indiscernible] be seated.

20 MR. GILL: Thank you.

21 THE CLERK: Juror No. 1, are these your verdicts as read?

22 JUROR NO. 1: Yes.

23 THE CLERK: Juror No. 2, are these your verdicts as read?

24 JUROR NO. 2: Yes.

25 THE CLERK: Juror No. 3, are these your verdicts as read?

1 JUROR NO. 3: Yes.

2 THE CLERK: Juror No. 4, are these your verdicts as read?

3 JUROR NO. 4: Yes.

4 THE CLERK: Juror No. 5, are these your verdicts as read?

5 JUROR NO. 5: Yes.

6 THE CLERK: Juror No. 6, are these your verdicts as read?

7 JUROR NO. 6: Yes.

8 THE CLERK: Juror No. 7, are these your verdicts as read?

9 JUROR NO. 7: Yes.

10 THE CLERK: Juror No. 8, are these your verdicts as read?

11 JUROR NO. 8: Yes.

12 THE CLERK: Juror No. 9, are these your verdicts as read?

13 JUROR NO. 9: Yes.

14 THE CLERK: Juror No. 10, are these your verdicts as
15 read?

16 JUROR NO. 10: Yes.

17 THE CLERK: Juror No. 11, are these your verdicts as
18 read?

19 JUROR NO. 11: Yes.

20 THE CLERK: Juror No. 12, are these your verdicts as
21 read?

22 JUROR NO. 12: Yes.

23 THE CLERK: Thank you.

24 MR. GILL: Thank you, Your Honor.

25 THE COURT: All right. Folks, I am going to thank you

1 again for your time and attention. I'm not going to read you
2 this admonishment anymore. You are free to talk to whoever
3 you like. You also do not have to talk to anybody if you do
4 not want to. I would like just a couple minutes of your time
5 to see -- to talk to you to see if we can do anything better
6 for jurors in the future. So if you will go with Officer
7 Walker, we will be -- I'll be right with you in just one
8 moment.

9 THE MARSHAL: All right. Please rise for the jury.

10 [Jury Exits]

11 THE MARSHAL: Go ahead and sit down.

12 THE COURT: All right. So Mr. Venegas needs to be
13 returned to the custody of the Nevada Department of
14 Corrections pending sentencing, because he was remanded just
15 for the purposes of the trial. And then Mr. Monay-Pina,
16 obviously, will remain in custody until the time of
17 sentencing. Is there any bail set?

18 MR. BOLEY: I think there's a bail set, but it's high.

19 THE COURT: But he'll be held without bail pending
20 sentencing, remanded without bail. And then we'll refer this
21 to parole and probation for a presentence investigation and
22 report and set sentencing.

23 THE CLERK: June 15th, 8:30 a.m.

24 MS. HOLTHUS: And, Judge, we are going to be seeking
25 habitual criminal treatment as to Mr. Venegas. Do you have a

1 preference as to how you get the prior convictions and what --
2 are they okay the day of sentencing or do you want them in
3 advance? I think they've already been provided to defense.

4 THE COURT: No. As long as they're provided in -- as
5 required by the statute. I mean, they have to be certified
6 copies and --

7 MR. GILL: I mean, I'm aware. I don't know that
8 anything's been filed regarding the --

9 MS. HOLTHUS: I've had it both ways. Sometimes, just
10 that they can take a look at it ahead of time, it just speeds
11 along -- it makes sentencing more efficient, so we have
12 already --

13 MR. GILL: I think they still need to file something,
14 Your Honor.

15 THE COURT: Well --

16 MS. HOLTHUS: That day, obviously. I just -- I'm saying
17 I --

18 MR. GILL: Okay.

19 MS. HOLTHUS: In the past, I have sometimes filed them
20 ahead of time and served copies.

21 MR. GILL: Okay.

22 THE COURT: I just need an opportunity to look at them
23 here, but obviously, I'm more concerned about Mr. Gill having
24 that chance to look through them.

25 MS. HOLTHUS: We'll get them to him right away.

1 MR. GILL: Thank you.

2 THE COURT: So he can make any challenge he has to them,
3 because I can look them in, you know, two minutes and --

4 MS. HOLTHUS: Okay.

5 MR. GILL: Thank you.

6 THE COURT: -- see what I need to see, but Mr. Gill needs
7 the -- Mr. Gill's the one who really needs to look at them.
8 You know, I need to -- I can see the issues that I might have
9 with them in a very brief amount of time, so it's of no moment
10 to me.

11 MR. GILL: Thank you, Your Honor.

12 MS. HOLTHUS: Thank you.

13 THE COURT: As long as Mr. Gill gets what he needs in
14 terms of --

15 MR. GILL: And I'm sure I will.

16 THE COURT: All right.

17 MS. HOLTHUS: And Mr. Venegas --

18 THE COURT: Anything else that we need to take care of
19 right now?

20 MR. GILL: I don't think so, Your Honor. You did remand
21 him back to NDOC?

22 THE COURT: I did.

23 MR. GILL: Thank you.

24 THE COURT: Yes. And --

25 MS. HOLTHUS: But he's held without bail, as well? I

1 don't what his sentence -- he's serving, correct?

2 MR. GILL: Yeah. He wouldn't be up for release until
3 next year, but it's --

4 MS. HOLTHUS: Okay.

5 THE COURT: All right. So I just don't want to -- yeah.
6 But he'll be remanded back to Nevada Department of
7 Corrections. I don't want to do anything that's going to keep
8 him here.

9 MR. GILL: And that's our preference.

10 MS. HOLTHUS: As long as there's -- nothing could go
11 wrong.

12 THE COURT: There's no bail on this case.

13 MS. HOLTHUS: That's what I want. Thank you.

14 THE COURT: And he's to be returned to the Nevada
15 Department of Corrections.

16 MR. GILL: Thank you very much, Your Honor.

17 MS. HOLTHUS: Thank you.

18 THE COURT: Because I told him I would return him to the
19 Nevada Department of Corrections. He does not have to stay at
20 CCDC, pending sentencing.

21 MR. GILL: Thank you very much, Your Honor.

22 THE COURT: All right. We need to make sure we have a
23 transport order, though, for sentencing.

24 MS. HOLTHUS: Okay. Transport order.

25 THE COURT: All right.

1 MR. SCHWARTZ: Yes, Your Honor.

2 THE COURT: All right. Don't forget that, because they
3 won't bring him without it.

4 MR. SCHWARTZ: Understood.

5 THE COURT: All right. Thank you, all. I really
6 appreciate everybody's efforts with the trial.

7 MR. SCHWARTZ: Thank you, Your Honor.

8 MR. GILL: Thank you, Your Honor.

9 MS. HOLTHUS: Thank you. Thanks for hearing it.

10 MR. GILL: Oh, Your Honor, your position on us talking to
11 them, do you have one? The jurors?

12 THE COURT: Oh, yeah. I'll send them out in just a
13 second. I'm just going to say, hey, to them.

14 MR. GILL: You like to do it in here?

15 THE COURT: No. I'll send them out. Out in the --

16 MS. HOLTHUS: In the hallway?

17 THE COURT: Oh, yeah. We're not in three anymore. I'm
18 sorry. I'm used to being out in three where there was like
19 out, but they'll be out. Yeah.

20 MR. GILL: Okay.

21 MS. HOLTHUS: All right.

22 [Proceedings concluded]

23

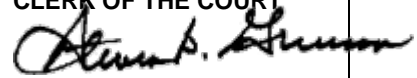
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above entitled case to the best of my ability.



JOSHUA PLANK
Transcriber



1 RTRAN

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5 STATE OF NEVADA,

6 Plaintiff,

7 vs.

8
9 CASIMIRO VENEGAS and JOSE
10 FERNANDO MONAY-PINAY,

11 Defendants.

CASE NO. C-16-313118-1 & 2

DEPARTMENT: VII

12
13 BEFORE THE HONORABLE LINDA MARIE BELL, DISTRICT COURT JUDGE
14 THURSDAY, SEPTEMBER 7, 2017

15 **RECORDER'S TRANSCRIPT OF**
16 **SENTENCING**

17 **APPEARANCES:**

18 For the State:

MARY KAY HOLTHUS, ESQ.
Chief Deputy District Attorney
BRYAN S. SCHWARTZ, ESQ.
Deputy District Attorney

21 For Defendant Venegas:

ADAM GILL, ESQ.

22 For Defendant Monay-Pena:

THOMAS D. BOLEY, ESQ.

23 Also Present: Ricardo Pico, Court Interpreter

24 RECORDED BY: RENEE VINCENT, COURT RECORDER
25

1 Thursday, September 7, 2017 - 8:34 a.m.

2
3 THE COURT: Do we have an interpreter?

4 THE MARSHAL: He's in with the speakers.

5 THE COURT: Oh, all right.

6 MR. GILL: The clients -- the Defendants don't need interpreters.

7 THE COURT: Do the speakers want to come in?

8 MS. HOLTHUS: Yes, please,

9 THE COURT: State of Nevada versus Casimiro Venegas and Jose
10 Monay-Pina, Case Number C-16-313118-1 and 2. Could everybody state their
11 appearance for the record, please.

12 MS. HOLTHUS: Mary Kay Holthus for the State, Bar Number 3814.

13 MR. SCHWARTZ: Bryan Schwartz for the State, 13244.

14 MR. GILL: Adam Gill on behalf of Casimiro Venegas.

15 MR. BOLEY: Tom Boley on behalf of Mr. Monay-Pina.

16 THE COURT: All right. So this is the time set for sentencing. I also,
17 just so you know, I promised some attorneys on a civil case that got continued
18 from Tuesday that I would get them in and out. So if they both come, I'm
19 going to take a very brief -- it's going to take like one second to deal with their
20 matter, but I promised them, so I'm -- I may have to take short break just to
21 deal with their issue.

22 This is the time set for sentencing. Is there any legal cause or
23 reason we should not go forward with sentencing?

24 MS. HOLTHUS: No, Your Honor.

25 MR. GILL: No, Your Honor. If I can just ask if you received my

1 amendment.

2 THE COURT: I received the sentencing memo both from Mr. Gill and
3 from the State. I have read them both.

4 MR. GILL: I amended it to ask for the correct sentence. Did you get
5 that amendment?

6 THE COURT: Oh, no, I didn't see that.

7 MR. GILL: I believe I asked for a 5 to 12 and a half, Judge, which
8 under the statute is impossible.

9 THE COURT: Okay.

10 MR. GILL: So I did amend that to ask for the 10 to 25.

11 THE COURT: All right. Did you make any other change?

12 MR. GILL: No.

13 THE COURT: No. All right.

14 MS. HOLTHUS: May I approach and file the certified judgments of
15 conviction for the priors?

16 THE COURT: Yes.

17 MS. HOLTHUS: For the record, I'm filing the judgement of conviction
18 in C284885-1, here in Nevada, for a robbery; Case Number C246550; also
19 here in Nevada, for robbery with use of a deadly weapon and burglary while in
20 possession of a weapon; Case C244224, also here in Nevada, Count 1,
21 conspiracy to commit robbery, and Count 2, robbery with use of a deadly
22 weapon. Those have been previously provided. They were actually attached
23 as exhibits to our sentencing memorandum.

24 THE COURT: All right. And all the copies are certified. Here you go.
25 Okay. Let's go ahead and start with Mr. Venegas.

1 Sir, by virtue of the jury's verdict, I adjudicate you guilty of
2 Count 1, conspiracy to commit robbery; Count 2, burglary while in possession
3 of a firearm; Count 3, robbery with use of a deadly weapon; Count 4, burglary
4 while in possession of a firearm; Count 5, robbery with use of a deadly
5 weapon; Count 6, battery with use of a deadly weapon resulting in substantial
6 bodily harm; Count 7, attempt murder with use of a deadly weapon; Count 8,
7 battery with use of a deadly weapon resulting in substantial bodily harm;
8 Count 9, battery with use of deadly weapon; Count 10, battery with use of a
9 deadly weapon; Count 11, aiming a firearm at a human being; Count 12,
10 coercion with use of a deadly weapon; and Count 13, battery with intent to
11 commit a crime.

12 All right. State?

13 MS. HOLTHUS: Thanks, Judge. I mean, obviously, you've read our
14 sentencing memorandum that we are seeking life without pursuant to statute,
15 the maximum sentence. And I understand that this comes across as harsh. I
16 mean, it's a lot. Nobody died here.

17 The Defendant is 27 years old. It's crazy that you could even
18 amass a criminal record like that at that age, but when you start out as a
19 juvenile with these same kinds of offenses, if you start out with robberies and
20 batteries with intent to commit mayhem and robbery and other things, and this
21 sets the path -- one of two paths you take. They tried to deal with it at the
22 juvenile level. They were unsuccessful. And almost as soon as he got into
23 the adult system, he continued his ways, violence, beatings, robberies.

24 You have the three felony convictions. I'm not going to beat up
25 on the facts, but approaching a woman in a parking lot, grabbed her, beat her

1 in the chest, that's one of the things about Venegas is the gratuitous beatings,
2 that -- you know, he could probably take her stuff without the beating. He
3 could have probably taken Javier's stuff without the hatchet, axing, but that's
4 not how he rolls, threatening -- threatening her with a knife. The next time it
5 was a revolver. He skipped the gun -- or the knife and now he escalates to
6 revolvers.

7 He got a -- he got a substantial period of time on those cases,
8 and he gets out. And he also in the interim had picked up one other robbery,
9 and that was the one -- let's see. It kind of, I guess, started when he was 18,
10 where he was the passenger. He was the Monay-Pina, if you will, learning
11 from the older, seasoned robber in the community, and then it's just escalated
12 from there resulting ultimately in our case. He was out of prison barely. He
13 got a substantial prison sentence for those other offenses more, honestly, than
14 they were asking for in this case at the outset, here being a fourth-time
15 offense.

16 There's a couple things I want to point out. Number one,
17 sometimes there's always a question, even in the back of your mind, did the
18 jury do the right thing? In this case, I think the evidence was overwhelming
19 that there was really no -- no alternative verdict based upon the evidence that
20 was here.

21 These are the two that did it. This is what they did, and there's
22 really -- with the DNA and everything else, there's no doubt but that they did
23 do it. And ultimately, we know that -- although I guess -- I don't know if you
24 want me to argue both at the same time or should we just focus on Venegas?

25 THE COURT: If we could just do one at a time. This is so

1 complicated, I think because of the number of counts and the enhancements, I
2 just think it would be a little bit cleaner and easier just to do one at a time.
3 If you'd like, we can do everything and then have the speakers -- after we're
4 done with our part, then the speakers can go at the very end of everything.

5 MS. HOLTHUS: Okay.

6 THE COURT: So they only have to speak once. But I'd prefer just to
7 have the adjudication argument from the attorneys on each one separately. It
8 will just be a little bit cleaner.

9 MS. HOLTHUS: Obviously, some of what I'm saying is going to be
10 redundant. But basically, I mean, there's a reason that the legislature has said
11 we have this habitual criminal, and we have habitual criminal for somebody
12 who is a repeat offender. And then over here, we have this special category
13 of individuals who are repeat violent habitual criminals, who just repeatedly go
14 out in the community and hurt people, and that's where Venegas falls into.

15 At the outset, Richard DeCamp didn't come today, and I'm not
16 sure why. He still has been -- one minute he kind of laughs about the thing,
17 and the next minute -- you heard him in the 911 call, literally crying. I mean,
18 he thought he was going to die that night, and he lost it. As tough a guy as
19 he is, it was difficult for him. So I'm not sure why he chose not to speak.

20 It doesn't matter. You saw him at trial. He was certainly
21 impacted by it. He's working alone. It's scary job. He's out there just
22 grinding out a living when these guys come in, masks, guns. I don't know
23 what could be scarier for him, for what, a hundred and something bucks?
24 They put this man through that for that?

25 It appears that Venegas has never really had a job. He's never

1 done anything to contribute to society, to make a legal living. If I read
2 correctly, and I may be wrong, a few weeks here, a week or two there, but
3 never really going out there and being a citizen and providing for the
4 community or doing anything good.

5 He -- they go in, guns a-blazing, terrorize and terrify the guy,
6 and that's -- we're not done for the night. And that the craziest thing. The
7 police are still responding, and then within 30 minutes, they go down into
8 Javier's place, into the place where he sleeps -- it's not, hey, give me your
9 money, I'm going to hurt you. It's none of that.

10 He is lying in his bed, the most vulnerable place, short of being
11 asleep, I suppose, lying in your bed, in the middle of the night, essentially,
12 when somebody comes in, not asking questions, not telling you to do
13 something, but immediately attacking you and beating you, pistol whipping
14 you and -- and raising and trying to kill you.

15 That's what the jury said. They came in there for one purpose,
16 to kill Javier. Stopped by one thing, and that was that child who said, you
17 know what, this can't go on, I know I'm scared, but I'm going to call 911.
18 And thank God that the ambulance -- or the firemen got there and chased
19 them off because they weren't finished, they weren't done, they weren't --
20 that's what they were there for.

21 And I know I had asked yesterday if we could bring the axe in,
22 and the Court indicated you didn't feel that you needed to see it, and I just
23 want to let you know why. I wasn't grandstanding with the weapon. I just --
24 I forget until I saw it at trial how huge it was. And as big as it was, one of the
25 things for me was the weight. When I picked that up, that -- I can't even

1 describe how heavy and how damaging and how Javier's hand knocked that
2 up in front of his face before he was struck, how very likely his whole skull
3 could've been laid open by the weight and the size of that axe.

4 And so the fact that Javier was able to defend himself shouldn't
5 weigh in any favor in Venegas' other than the fact that he can't get the death
6 penalty because Javier, thank God, is alive. But everything else he did, every
7 action he took was intended to kill him, would have killed him but for other
8 circumstances.

9 After that, then they commit the robbery. They have to take his
10 stuff as well. Still never really got a motive for it. The best I think we ever
11 figured out was there may have been some slashing of tires somewhere, but
12 it's never been -- as far as we can tell, even if that is, they literally went in
13 there to could kill him for that.

14 So, again, you remember the evidence is great. We found them.
15 We found a matching glove. It was like -- it was almost like a game of Clue,
16 everything just fell into place corroborated by the DNA, and it was -- it was a
17 pretty amazing case to put together.

18 We are asking for the life without. I'm asking you to run them
19 as consecutive for every one that you can for appeal purpose. The goal in my
20 opinion of the State, I know in trying this case, and I'm asking for the Court is
21 to make sure that Mr. Venegas never, never hits the streets again because
22 every time -- every crime he commits is a life, a potential life sentence and a
23 potential life at the other side because he's got no incentive to leave anybody
24 alive now, Judge. 27 years old, he has wreaked more havoc on more people
25 in our community --

1 And you'll hear from our victims and the tremendous income
2 that it's had on the folks that were the house because, remember, there were
3 Adriana and her kids. Imagine, she's in there with her kids. There's her
4 brother out there. They got guns on him. They're beating him with axes. I
5 can't fathom the fear and what was going through these people's minds for
6 no reason.

7 So I'm going to ask -- we're asking that you run them
8 consecutive. Give him everything you possibly can, covering case appeal first.
9 Something I don't -- I can't imagine that there is. In my opinion, of course,
10 that usually is. It was a pretty clean case. I don't think there was a whole
11 bunch open for anything. But he can't ever get out, Judge, because he has no
12 incentive to comply. He can't comply.

13 His last sentence -- you look at the sentence they're
14 recommending, and if our math is correct, they're recommending 14 to 42
15 years for Monay-Pina, zero record. He's got nothing. So 10 to 25 on Venegas
16 is -- it's just not -- I can't -- I mean, even if we give him, say, 20, let's run a
17 couple consecutives. 20 years, what is he then? At 47, he's been in prison
18 his whole life. All he knows is violence and guns and whatnot.

19 I read the sentencing memorandum that Mr. Gill filed. I don't
20 see anything in the PSI from the Defendant with remorse or feeling bad about
21 what he did or anything else. I see him saying he drinks alcohol occasionally,
22 hasn't had meth in a long time, and in then sentencing memorandum, all of a
23 sudden, oh, he's a drunk, he's -- he uses drugs all the time. That's what
24 caused it. No, there's no evidence of that in this case, Judge.

25 The only evidence in this case is just his heart. He did it. He

1 did -- he's just a mean person. He's a dangerous, violent person, and there's
2 nothing that we as a society can do to change that because he's that -- been
3 that way since he was a juvenile. He's going to continue to be that way. And
4 if we allow him back in this community, someone's going to die the next time.

5 And so we are asking again, maximum sentence, everything
6 consecutive. The robbery was separate from the murder. This robbery
7 could've been committed without the attempt murder and vice-a-versa. They
8 didn't have to do both. I would ask to pay special attention to the coercion
9 and aiming of the firearm that impacted another set of victims entirely.

10 THE COURT: All right.

11 MS. HOLTHUS: I would max him out as much as we can, Judge.

12 THE COURT: Thank you, Ms. Holthus. I'm going to take a short
13 break. Can I have the folks on Portillo-Ayala versus Aznarez, Case Number
14 A-15-717467. You guys can work around them.

15 [Court hears an unrelated matter]

16 [Pause in proceedings]

17 THE COURT: Mr. Venegas, sir, is there anything that you would like
18 to say before your attorney speaks on your behalf?

19 DEFENDANT VENEGAS: Oh, yes, ma'am. Yes, Your Honor. First of
20 all, I'd like to say I understand what Ms. Holthus was saying concerning my --
21 my history and my charges. I understand that. I'm not here to try to justify
22 myself and say, hey, this is the reason that I did it. It was this or that. I'm
23 not here for that. I understand I'm guilty, and you already seen they found me
24 guilty.

25 And I understand that she mentioned a few things concerning

1 my juvenile record because in that, they got robbed. I understand how you
2 took that. It shows my paper, but I'm not trying to justify myself, but I'm just
3 saying that I confessed. I told them, look, I did it. I took responsibility for it.

4 If you look in the record on my past robberies, I took
5 responsibility for them. Look, I confess. I did them all. What they give me, I
6 don't know, but I did them all.

7 Now, again, she's saying that I'm a bad person. I understand.
8 All the odds are against me. What I'm saying is -- the only thing I got to say
9 that I do got something for myself going, and I'm sorry for what I've done. I
10 apologize. I'm sorry. Not just to the courts, but if you give me the permission
11 to apologize -- or say sorry to the victims? Is that okay?

12 MR. GILL: He just wants to turn to the victims, Your Honor.

13 THE COURT: That's fine.

14 DEFENDANT VENEGAS: I talk in Spanish because they don't -- is that
15 okay?

16 THE COURT: That's fine.

17 DEFENDANT VENEGAS: Is that okay?

18 MS. HOLTHUS: Is somebody going to translate it for the record?

19 DEFENDANT VENEGAS: They got a -- he can speak --

20 THE COURT: You know what, just go ahead and speak in English
21 because they have a translator. That would be better.

22 DEFENDANT VENEGAS: Okay.

23 MS. HOLTHUS: I don't even know what he's saying sometimes.

24 DEFENDANT VENEGAS: Okay. Regardless of what I've done, you
25 know what I mean, regardless of how I felt -- I might've felt scared, angry,

1 bitter -- you know what I mean? No matter how I felt, but the way I went
2 about it was wrong. and I understand that now. I should've done -- done it
3 different, and I was (indiscernible), and I know that now.

4 I ruined whatever friendship we had going. I know -- I know I
5 messed up. And if you believe me, which I hope you do, but if you don't,
6 that's all right. That's fine. But, hey, you got to get your justice that quick.
7 You know what I mean? I'm asking for redemption. I'm sorry. You know
8 what I mean?

9 THE COURT: All right. Thank you, Mr. Venegas.

10 DEFENDANT VENEGAS: Thank you.

11 THE COURT: Anything else you want to say? No. Mr. Gill.

12 MR. GILL: And, Your Honor, the State's asking for essentially the
13 ultimate penalty, never to let Mr. Venegas out ever again. I think that's --
14 despite the State's contentions regarding this crime, which, again, Your Honor
15 heard the facts, Your Honor sat through the trial, they're horrendous. Mr.
16 Venegas acted incredibly poorly that night, but does it deserve and does his
17 record deserve to never see the light of day again, Your Honor? I submit to
18 you that it doesn't.

19 I think 10 to 25 -- the State acts like 10 to 25 is a slap on the
20 wrist. 10 to 25 is a significant amount of time, especially for somebody with
21 a record like Mr. Venegas, who probably won't see parole the first go-round on
22 a 10 to 25 sentence.

23 So to stand here and ask for him -- again, I'm not trying to
24 downplay what happened to the victims, Judge, but the State did mention it in
25 the argument that nobody died. And I think -- thankfully, thank God because

1 there were guns in that 7-Eleven, and there were weapons at the house in the
2 garage. Thank God for the victims that something worse didn't happen.

3 And, you know, Mr. Venegas didn't write a statement because I
4 asked him to speak today. So I don't want the Court to think that the whole
5 time he's been lacking -- lacking remorse because that's not the case either.
6 He understands what he did that night was incredibly stupid, incredibly violent,
7 incredibly -- just -- just out of the ordinary wrong.

8 But to throw his whole life away -- which he's doing a good job
9 of that on his own, Judge. He's been in custody quite a bit since he was a
10 juvenile, and he's not doing well when he's out in society, but to think that in
11 10 years or 20 years he's going to be the same man? I think the State is a
12 little misguided on that notion.

13 And I think Ms. Holthus gave the example of when he's 47.
14 Judge, he's not going to be the same man. And they can't predict it, and I
15 can't predict it, so I'm not going to sit here and say absolutely he won't be.
16 But to predict that no matter what this guy does for the rest of his life, he's
17 just going to come out and commit crimes, I think is a little disingenuous.

18 And I do think with some reflection over the next decade or so,
19 that he's going to be somebody who can contribute to society. He's going to
20 have to learn skills, but he's going to have to learn them in prison. He
21 understands that, and he's accepted that. And, again, he takes responsibility
22 for what happened.

23 I don't know if we discussed this prior to trial. There were no
24 offers in this case. The State has that right not to make offers, and they
25 chose not to make any, and we went to trial. Otherwise, he would've taken

1 responsibility and very likely pled. But we didn't receive an offer in this case,
2 Judge, and he exercised his right to go to trial.

3 I don't want the Court to hold that against him in -- again,
4 Judge, the 10 to 25 is such a significant amount of time. We're asking for
5 that. I asked for that in my sentencing memorandum. In that sentencing
6 memorandum, Judge, we did discuss alcohol and drug use, not as an excuse.

7 But as Your Honor knows, when -- as defense counsel, we get
8 very few opportunities to present our side, and I like to use that sentencing
9 memorandum to do that. Not to provide excuses for my client's behavior --
10 again, he's been found guilty -- but to provide the Court with a little bit of
11 insight as to who he is and what he's been through and what he's done.
12 We're asking for the 10 to 25, Judge. I think it's appropriate in this case.

13 THE COURT: Thank you, Mr. Gill. All right. So let's go ahead and go
14 to Mr. Monay-Pina, and then we'll have the speakers. All right?

15 MR. BOLEY: Yes, ma'am.

16 THE COURT: So, sir, by virtue of the jury's finding of guilt, I
17 adjudicate you guilty of Count 1, conspiracy to commit robbery; Count 2,
18 burglary while in possession of a firearm; Count 3, robbery with use of a
19 deadly weapon; Count 4, burglary while in possession of a firearm; Count 5,
20 robbery with use of a deadly weapon; Count 6, battery with use of a deadly
21 weapon resulting in substantial bodily harm; Count 7, attempt murder with use
22 of a deadly weapon; Count 8, battery with use of a deadly weapon resulting in
23 substantial bodily harm; Count 9, battery with use of a deadly weapon; Count
24 10, battery with use of a deadly weapon; Count 11, aiming a firearm at a
25 human being; Count 11 (sic), coercion with use of a deadly weapon; and

1 Count 13, battery with intent to commit a crime. Ms. Holthus?

2 MS. HOLTHUS: Thank you. And I just want to address one of the
3 things that kind of -- it applies to both Defendants in terms of not making an
4 offer to Mr. Venegas. I don't know if it's really appropriate to argue
5 negotiations. But he's correct, we did not make an offer to Mr. Venegas, and
6 since he opened, I just want to let you know because we thought that this
7 was worthy of life without based upon his record.

8 We certainly never stopped him from pleading to the sheet and
9 then coming in here and taking the full responsibility because at the end of the
10 day, I don't know that there was a viable defense, quite frankly -- I don't mean
11 to be flippant -- but it was a pretty strong case from the get-go, so we didn't
12 have incentive, and our belief was that to give him a chance at getting out in
13 the community was to put someone at risk.

14 THE COURT: I understand that, Ms. Holthus. I mean, I understand
15 that, and I also understand -- you know, Mr. Venegas and Mr. Monay-Pina
16 have the right to go to trial and --

17 MS. HOLTHUS: Absolutely.

18 THE COURT: -- require the State to prove their case, so --

19 MS. HOLTHUS: And that's fine and --

20 MR. GILL: And, Judge, I thought I was clear, the State does not -- and
21 I think I made that clear in my argument, does not have to give us an offer,
22 and I didn't mean --

23 THE COURT: No, and I understand why --

24 MR. GILL: -- anything by that.

25 THE COURT: -- that would be the case here. I see both sides of that

1 picture here.

2 MS. HOLTHUS: Now, and on the other side of it, in fairness to the co-
3 defendant, neither did he get an offer because Mr. Venegas, obviously, was
4 our focus, and we needed to try them together. There might have, in fact,
5 been offer. He has no record. The facts were egregious, but it was his first
6 time out there.

7 It appears to us from what we see that Venegas is also
8 responsible for helping Monay-Pina to throw his life away. He impacted his
9 co-defendant as well. And now he's looking at, again, if our math is correct, a
10 recommendation of 14 to 42 years. It's a lot. He's 24 years old. He's never
11 been in trouble before. By all accounts, I think we have some --

12 THE COURT: The recommendation is 8.6 to 28.

13 MS. HOLTHUS: Is that what you've got?

14 THE COURT: That's what I had, but I -- you know, it's a lot of counts,
15 so I may not have added correctly, so --

16 MS. HOLTHUS: And we both tried to back each other up and haven't
17 done very well either. I mean, the same arguments go. The facts of the crime
18 were just egregious beyond belief. And on some level I hold Monay-Pina more
19 responsible because he wasn't this from the get-go, robbing and hurting
20 people. He clearly knew right from wrong. He was the one that was in the
21 position to talk Venegas down, to say, no, this ain't right, we shouldn't be
22 doing this, but he didn't. He went along for the ride.

23 He held the gun as well, and he was just as involved in that
24 robbery as Venegas was. He was just as involved in the beginning. Now, to
25 his credit again, he pistol whipped him, beat him with a gun instead of the

1 more likely to kill acts, but found guilty of the same thing. It was the fact that
2 they were working together that made them that much more successful, made
3 them that much more dangerous and why -- he's just chucked a whole bunch
4 of his -- his future, I mean, at 24 years old.

5 But, again, the State doesn't have the same long-term concerns
6 because I do -- I don't know if he would've done it but for the co-defendant.
7 They're -- he claims he was inebriated at the time. He's claimed that since, I
8 think, day one; whereas, Venegas gave conflicting -- in his sentencing memo
9 to you on drugs and alcohol, when he's actually talking to P&P, is now drugs
10 and alcohol aren't a problem. May have been slightly more with the co-
11 defendant. I don't know.

12 I'll submit it to you. I think the recommendation by Parole &
13 Probation is reasonable. I do feel strongly that the counts that are different
14 offenses, the robberies with use on different people, the attempt murders, the
15 counts that didn't have to be committed to commit the other, should run
16 consecutive. That counts for the family that was drawn into the mix for
17 absolutely no reason -- they didn't even know this guy -- should run
18 consecutive. And with that, I'll submit it.

19 THE COURT: Thank you. Mr. Monay-Pina, is there anything you would
20 like to say before your attorney speaks on your behalf?

21 DEFENDANT MONAY-PINA: I'm sorry. I never meant this to happen. I
22 know what -- I know what I was kind of doing, but I wasn't -- I'm still sorry
23 for whatever happened. It wasn't my intention. I was -- honestly, I'm really
24 sorry for whatever happened.

25 THE COURT: All right. Thank you, sir. Mr. Boley.

1 MR. BOLEY: Judge, if I may approach. I have -- and I have provided a
2 copy of this to the State. There are some letters in this packet from members
3 of the community, specifically one of Mr. Monay-Pina's teachers from school
4 here in Las Vegas and also some members of the community, a member of the
5 clergy because he was involved in church -- excuse me, that school is in
6 California. And some other folks.

7 There are three things that are very different about Monay-Pina
8 than Mr. Venegas. We've heard a lot about Mr. Venegas, but I want to -- I
9 want to point out a couple positive things about Mr. Monay-Pina. He doesn't
10 have a criminal record. This was his first negative contact with law
11 enforcement whatsoever. While the facts are grim, there's no history to sort
12 of hang our hat on as far as enhancing his sentence for a history.

13 He has no juvenile record, and, clearly, there are some members
14 of the community that believes in him. In fact, he has some family members
15 in the courtroom today, that when he does get done with his sentence
16 because we know if the Court follows the recommendation of Parole &
17 Probation or even deviates one way or the other, Mr. Monay-Pina's life is not
18 over. But when he gets out, he will have family support to get him back on
19 the right track.

20 I think Ms. Holthus said it the best when we were talking about
21 Mr. Venegas; that, you know, at one point he was Mr. Monay-Pina. You
22 know, at one point he was a secondary participate in some crimes, and it
23 escalated for him. So I think there's an argument that, you know, somebody's
24 life doesn't have to be over just because they do one terrible chain of events.

25 And, of course, he's going to do -- and he understands he's

1 going to do significant prison time one way or the other, but he -- he also
2 understands that his life is not over. There is hope for Mr. Monay-Pina. You
3 know, and you heard him, he is remorseful. Parole & Probation, I think, was
4 fairly accurate in what they said here, and they gave a fair recommendation.

5 But the one thing I'd like to point out is, the State rightfully
6 focuses on this weapon, this axe, and there's no testimony at trial that Mr.
7 Monay-Pina touched this axe. While he did terrible things, pistol whipped
8 people, robbed people, all those things, he did not touch this very violent
9 scenario there. So the facts of this case, while grim, the grimmest part of it,
10 as a participant in this crime, it could have been horrifying to him to watch his
11 co-conspirator do this because that's not what he meant to participate in from
12 the beginning.

13 So I'm going to ask the Court to consider deviating downward
14 from what Parole & Probation has recommended here and consider a sentence
15 of 48 to 120 months. I think with no criminal record, coming in as a first-
16 timer, I think that that would give him a significant lesson. That's still a
17 significant amount of time on the bottom, and he would do his time, get out
18 and go back to working, going to school and get his life back together. Thank
19 you.

20 THE COURT: Thank you. All right. Can we have the speakers, please.

21 MS. HOLTHUS: Uh-huh. Who wants to go first? Who wants to speak
22 first? Adriana? You want her to come up to the -- where do you want her,
23 Judge?

24 MR. SCHWARTZ: She can stand with us --

25 THE COURT: She can stand right by you guys. That's fine.

1 All right. If you'll raise your right hand, the clerk will swear you in.

2 MS. A. COLON: Good morning. (Speaking Spanish).

3 THE COURT: Ma'am, hang on just one second. The clerk's going to
4 swear you in first.

5 **ADRIANA COLON,**

6 having been duly sworn as a victim/witness, testified through an interpreter
7 as follows:

8 THE WITNESS: I swear before this public, Your Honor, that I'm telling
9 the truth.

10 THE COURT: All right, ma'am. Could you state your name, please,
11 and spell it for the record.

12 THE WITNESS: My name is Adriana Colon, and it's spelled
13 A-D-R-I-A-N-A, C-O-L-O-N.

14 THE COURT: Thank you, ma'am. All right. Go ahead.

15 THE WITNESS: This has been very traumatic. I've never had anything
16 like this happen to me before. I never thought that my life was going to be
17 changed in a second. Ever since, I've not been able to -- to have peace. I'm
18 receiving psychological care because I'm always thinking of what they said
19 and what -- and the guns they had, the weapons. I can't imagine if -- you
20 know, that they would have taken someone's life, my -- my children, my life,
21 my brother. It's been -- I mean, I just can't have peace anymore.

22 THE COURT: All right.

23 THE WITNESS: To me, if they did something like this, so traumatic, I
24 believe if you let them out, they'll commit something even worse. And that's
25 all I have to say.

1 THE COURT: All right. Thank you, ma'am.

2 MS. HOLTHUS: May I ask one question? Are you still living at the
3 same house?

4 THE WITNESS: I was my (indiscernible) . Not one more day.

5 THE COURT: All right. Mr. Boley or Mr. Gill, do you have any
6 questions?

7 MR. GILL: No, Your Honor. Thank you.

8 MR. BOLEY: No.

9 THE COURT: Ma'am, you can go ahead and have a seat. Thank you.

10 THE WITNESS: Thank you.

11 MS. HOLTHUS: Who wants to go next?

12 THE COURT: All right, ma'am. If you'll please raise your right hand,
13 the clerk will swear you in.

14 **LIZBETH AZINA COLON,**
15 having been duly sworn as a victim/witness, testified as follows:

16 THE CLERK: Thank you. If you will state and spell your name for the
17 record.

18 THE WITNESS: My name Lizabeth Azina Colon. It's L-I-Z-B-E-T-H,
19 A-Z-I-N-A, C-O-L-O-N.

20 THE COURT: Thank you. Go ahead whenever you're ready.

21 THE WITNESS: That night me and my siblings were scared. We -- we
22 didn't have much control since we weren't in the right place of mind. It was
23 4:00 o'clock in the morning. We were thinking that night we were going to
24 school, it was going to be a normal day the next day, and then we wake up at
25 4:00 in the morning and that happens.

1 And it's impacted our lives. I feel the most because I feel like I
2 have to take care of my siblings a lot more. We became closer because we --
3 we thought that day that one of us weren't going to get out alive. My little
4 brother, he can't sleep by himself. He has his own room, but he hasn't slept a
5 day in that bed. He sleeps with my mom.

6 My sister, she's -- she couldn't come here because she's just
7 very scared to see their faces again. And I seen that her personality has
8 changed a lot. She was very outgoing before, and now she's a little bit more
9 shy and timid.

10 We had to move schools. We had to move from a different
11 part of Las Vegas. We grew up with all our friends and family on that side,
12 and now we had to change because we were just scared to be there again.
13 It's impacted us as in our state of safety.

14 We don't -- we don't feel safe anymore. We have to every
15 night make sure every door is locked, every window's locked. We got dogs so
16 that they could be barking in case any -- in case there's any noise at night.
17 It's just impacted us in our state of safety.

18 THE COURT: You're the one who called the police, right?

19 THE WITNESS: Yes.

20 THE COURT: Yeah. You were really brave that night. I'm really sorry
21 this happened to your family.

22 THE WITNESS: Thank you.

23 THE COURT: Any questions?

24 MS. HOLTHUS: No. That's it.

25 THE COURT: Anything?

1 MR. GILL: No, Your Honor.

2 MR. BOLEY: No.

3 THE COURT: Okay.

4 MS. HOLTHUS: Javier.

5 THE COURT: Sir, if you will please raise your right hand, the clerk will
6 swear you in.

7 **JAVIER COLON,**

8 having been duly sworn as a victim/witness, testified through an
9 interpreter as follows:

10 THE COURT: Sir, could you please state your name and spell it for the
11 record.

12 THE WITNESS: Javier Colon, J-A-V-I-E-R, C-O-L-O-N.

13 THE COURT: Thank you, sir. Whenever you're ready.

14 THE WITNESS: I don't have a lot to say. These two guys are not --
15 I'm not going to lose any sleep over -- over them. I don't know -- I don't want
16 to hear their excuses because I know they're not sincere. I just -- I just want
17 justice to be done, and that is all. And that's all. That's all I have to say.

18 THE COURT: All right. Thank you, sir. I'm sorry, did you have
19 questions for the speaker? I'm sorry, I forgot.

20 MS. HOLTHUS: No.

21 MR. BOLEY: No.

22 MR. GILL: No, Judge.

23 THE COURT: All right. Any additional speakers?

24 MS. HOLTHUS: That's it, Judge.

25 THE COURT: I'll start with Mr. Venegas. All right. I have -- before I

1 start, I have just a general question. With respect to the findings on the
2 deadly weapon enhancement, my question is, can I do that at the end or do I
3 need to do that for each enhancement?

4 [State Counsel confer]

5 MS. HOLTHUS: As to the -- if you're using the enhancement, which
6 we believe you are required to by law, there wouldn't be -- it's just one or the
7 other, the deadly weapon or the habitual.

8 THE COURT: No, but I have to make -- there are certain counts where
9 I have to make the findings under the statute.

10 MS. HOLTHUS: Okay.

11 THE COURT: Yeah. So I was just asking if you think it's a problem if I
12 do it at the end just because there are so many counts.

13 MS. HOLTHUS: No, not at all. Not at all.

14 THE COURT: Okay. All right. Sir, so with respect to Count 1,
15 conspiracy to commit murder, I sentence you to a minimum of 24 and a
16 maximum of 60 months in the Nevada Department of Corrections.

17 With respect to Count 2, burglary while in possession of a
18 firearm, I sentence you -- so this is a mandatory habitual felon, so I am going
19 to sentence you under that statute to 25 years with parole eligibility after 10
20 years. That will run concurrently to Count 2 [sic].

21 On Count 3, robbery with use of a deadly weapon, that also
22 falls under the habitual felon enhancement. And just for the record, the State
23 has provided certified copies of the priors. I know we did that earlier, but --
24 and, sir, I sentence you to 25 years with parole eligibility after 10 years. That
25 will run concurrently to Counts 1 and 2.

1 On Count 4, burglary while in possession of a firearm, I
2 sentence you under the habitual felon statute to 10 years with parole
3 eligibility -- I'm sorry, 25 years with parole eligibility after 10 years. That will
4 run consecutively to Counts 1, 2 and 3.

5 On Count 5, robbery with use a deadly weapon, that also
6 requires the habitual felon enhancement, I sentence you to 25 years with
7 parole eligibility after 10 years. That will run consecutively to Counts 1, 2 and
8 3 and concurrently to Counts 4 and 5.

9 On Count 6, battery with use of a deadly weapon resulting in
10 substantial bodily harm, I sentence you to 24 to 120 months. That will run
11 concurrently to everything.

12 Count 7, attempt murder with use of a deadly weapon, which
13 requires the habitual felon enhancement, I sentence you to 25 years with
14 parole eligibility after 10 years. That will run consecutively to Counts 1, 2 and
15 3 and concurrently to the other counts.

16 On Count 8, battery with use of a deadly weapon resulting in
17 substantial bodily harm, I sentence you to 24 to 120 months. That will run
18 concurrently with all counts.

19 Count 9, battery with use of a deadly weapon, I sentence you to
20 24 to 60 months. That will run concurrently to all counts.

21 Count 10, battery with use of a deadly weapon, I sentence you
22 to 24 to 60 months. That will run concurrently with the other counts.

23 Count 11, aiming a firearm at a human being, a gross
24 misdemeanor, I sentence you to 364 days in the Clark County Detention
25 Center. That will concurrently with the other counts.

1 Count 12, coercion with the use of a deadly weapon, I sentence
2 you to 24 to 60 months. That will run consecutively to Counts 1, 2 and 3 as
3 well as consecutively to Counts 4, 5 and 7. On Count 13 -- but concurrently
4 to the other counts.

5 On Count 13, battery with intent to commit a crime, I sentence
6 you to 24 to 60 months to run concurrently with everything else. And --

7 All right. So I have -- so the aggregated sentence -- the
8 aggregated sentence that I have is 264 to 660 months. It's 22 years with --
9 well, 55 years with parole eligibility after 22 years has been served.

10 Additionally, I believe that there are -- let's see. It has 476 days' credit for
11 time served. Mr. Gill, does that sound correct --

12 MR. GILL: Yes.

13 THE COURT: -- to you?

14 MR. GILL: Yes, Your Honor.

15 THE COURT: All right. State, is that --

16 MR. SCHWARTZ: That's fine.

17 MS. HOLTHUS: That's fine.

18 THE COURT: All right. With respect to any of the deadly weapon
19 enhancements, I just want to make the findings under NRS 193.165, just --
20 I'm not sure that I need to do this for this one, but I will just to be complete.
21 With respect to the facts and circumstances of the crime, this involves two
22 separate violent crimes. Mr. Venegas was an equal participant in the offense
23 and perhaps the leader since Mr. Monay-Pina had never been in trouble.
24 Additionally, Mr. Venegas was the one who was wielding the ax in the second
25 offense.

1 With respect to the criminal history, obviously, Mr. Venegas'
2 criminal history has put him in a position where the Court is required to impose
3 the habitual felon enhancement, so he has a prior history of serious robbery
4 offenses that impacted the crime on the victim. We've had speakers here
5 today to talk about how difficult this has been for them and also at trial, the
6 7-Eleven clerk testified that that was extraordinarily difficult for him as well.

7 In terms of mitigating factors, Mr. Venegas completed one
8 parole successfully, and he was at one point on parole for some time
9 without -- I think almost three years without anything -- without having any
10 problem. So it appears that if he chooses to, he can actually function
11 successfully in society, but he was on parole when this offense was
12 committed.

13 So there's also a \$25 administrative assessment fee; \$3 DNA
14 administrative assessment. The DNA was previously taken on September
15 15th of 2008 so that won't be ordered. And a \$350 court-appointed counsel
16 fee. All right. Anything else with respect to Mr. Venegas?

17 MS. HOLTHUS: The only thing I'm wondering is, I don't know that we
18 can give him the credit for time served because he was on parole at the time.
19 I forgot that.

20 THE COURT: Oh. I don't have his --

21 MS. HOLTHUS: It should be zero.

22 THE COURT: I don't have his parole expiration. Well, it's from his
23 parole expiration.

24 MS. HOLTHUS: Well, I presume since he's coming in from the prison --

25 THE COURT: Oh, that -- I don't think that's --

1 MS. HOLTHUS: He's still serving --

2 THE COURT: My recollection was that he had expired his parole,
3 but --

4 MR. GILL: Yes, and then we --

5 THE COURT: And I looked at this like --

6 MR. GILL: Yes. No, I think 476 is correct, Judge.

7 THE COURT: -- a month ago. I know I have more than 500 days for
8 Mr. Monay-Pina. I have --

9 MS. HOLTHUS: It should just be from --

10 THE COURT: Actually, closer to 600 days for Mr. Monay-Pina, so I
11 think that Parole & Probation calculated that from the expiration --

12 MS. HOLTHUS: Is it just from the expiration date?

13 THE COURT: I think they just never moved him from the prison except
14 occasionally, so --

15 MS. HOLTHUS: Okay.

16 THE COURT: -- if there's an issue, I'm happy to modify it --

17 MS. HOLTHUS: Okay.

18 THE COURT: -- but I believe that takes into account his expiration
19 date.

20 MS. HOLTHUS: Thank you.

21 MR. GILL: Thank you very much, Your Honor.

22 THE COURT: All right. Okay. With respect to Mr. Monay-Pina, sir, on
23 Count 1, I sentence you -- on conspiracy to commit robbery, I sentence you to
24 a minimum of 24 and a maximum of 60 months.

25 On Count 2, burglary while in possession of a firearm, I

1 sentence you to 24 to 120 months. That will run concurrently with Count 1.

2 On Count 3, robbery with use of a deadly weapon, I sentence
3 you to 24 to 100 months with -- 120 months with a consecutive 12 to 60
4 months for the deadly weapon enhancement. That will run concurrently with
5 Counts 1 and 2.

6 On Count 4, burglary while in possession of a firearm, I
7 sentence you to a minimum of two and a max -- 24 to 120 months. That will
8 run concurrently with the other counts.

9 Count 5, robbery with use of a deadly weapon, I sentence you
10 to 24 to 120 months, plus 24 -- a consecutive 24 to 60 months for the
11 weapon enhancement. That will run consecutively to Counts 1, 2 and 3.

12 Count 6, battery with use of a deadly weapon resulting in
13 substantial bodily harm, I sentence you to 24 to 120 months. That will run
14 concurrently with the other counts.

15 Count 7, attempt murder with use of a deadly weapon, I
16 sentence you to 24 to 120 months, plus a 24 to 60 months consecutive for
17 the weapon enhancement. That will run consecutively to Counts 1 through 3.

18 Count 8, battery with use of a deadly weapon resulting in
19 substantial bodily harm, I sentence you to 24 to 120 months concurrent to the
20 other counts.

21 Count 9, battery with use of a deadly weapon, I sentence you to
22 24 to 60 months, and that will be concurrent.

23 Count 10, battery with use of a deadly weapon, I sentence you
24 to 24 to 60 months. That will be concurrent.

25 Count 11, aiming a firearm at a human being, a gross

1 misdemeanor, I sentence you to 364 days in the Clark County Detention
2 Center. That will run concurrent with everything else.

3 Count 12, coercion with use of a deadly weapon, I sentence you
4 to 12 to 60 months consecutive to the other counts, consecutive to -- they'll
5 be consecutive to Count -- to Counts 1, 2 and 3 and then Counts 5 and 7.

6 And then Count 13, battery with intent to commit a crime, I
7 sentence you to 24 to 60 months concurrently.

8 So the aggregate sentence would be 94 to 420 months, 9 to 35
9 years. The credit, I have a different date that I -- Mr. Boley, do you have a
10 current figure for credit?

11 MR. BOLEY: He has been in jail since the day of the -- I think Your
12 Honor is right on the money when it was almost 600 days.

13 MS. HOLTHUS: January 12th, 2016; is that right?

14 THE COURT: I get 604. Does that sound right?

15 MR. SCHWARTZ: Yes.

16 MS. HOLTHUS: That sounds close.

17 THE COURT: Okay. 604 days' credit for time served. With respect to
18 the findings on the deadly weapon enhancement, as I stated before, the facts
19 and circumstances at the time, there were two separate violent crimes, and
20 Mr. Monay-Pina was an equal participant in the offenses. In his favor, he has
21 no criminal history, and that's, in fact, why he's receiving a significantly lower
22 sentence than Mr. Venegas.

23 The impact of the crime on any victim, again, we had the
24 speakers here who expressed how this has impacted them in a very negative
25 way, and also at trial, the 7-Eleven clerk testified about how difficult this

1 offense was for him.

2 With respect to mitigating factors, there's no prior criminal
3 history or prior arrests. Mr. Monay-Pina has some employment history. He
4 graduated from high school and had some college. And then he expressed
5 remorse in his victim statement. And I should say, Mr. Venegas had
6 expressed remorse today. So I should have said that earlier. And then other
7 relevant information, just that Mr. Monay-Pina expressed that he has a drinking
8 problem and was under the influence when this offense was committed.

9 There will also be a \$25 administrative assessment fee; a \$3
10 DNA assessment; \$150 DNA analysis and testing for genetic markers; and a
11 \$350 court-appointed counsel fee. All right. Anything else?

12 MR. BOLEY: Judge, I was privately retained.

13 THE COURT: I'm sorry?

14 MR. BOLEY: I was privately retained.

15 THE COURT: Oh, I'm sorry. I didn't realize that. So there will be no
16 court-appointed counsel fee. I'm sorry, Mr. Boley.

17 MR. GILL: Thank Your Honor.

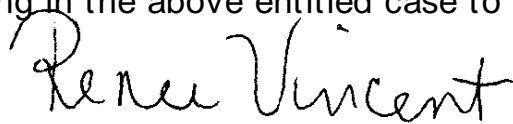
18 THE COURT: Thank you.

19 MR. SCHWARTZ: Thank Your Honor.

20 MS. HOLTHUS: Thank you.

21 [Proceedings concluded at 9:42 a.m.]

22 ATTEST: I do hereby certify that I have truly and correctly transcribed the
23 audio-visual recording of the proceeding in the above entitled case to the
24 best of my ability.

25 

Renee Vincent, Court Recorder/Transcriber

CERTIFICATE OF ELECTRONIC TRANSMISSION

The undersigned hereby declares that on September 24, 2018, an electronic copy of the foregoing APPELLANT'S APPENDIX VOLUME IV was sent via the master transmission list with the Nevada Supreme Court to the following:

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Clark County District Attorney

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Nevada Attorney General

A handwritten signature in black ink, appearing to read 'M Lay', is positioned above a horizontal line.

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