

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

DAVID BURNS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown  
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Supreme Court Case No. 77424

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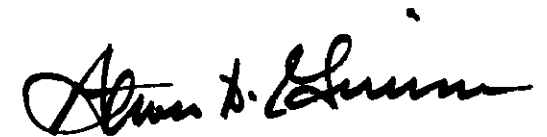
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CLERK OF THE COURT

RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

WILLIE DARNELL MASON and  
DAVID BURNS,

Defendants.

CASE NO. C267882-1

C267882-2

DEPT. NO. XX

BEFORE THE HONORABLE JEROME T. TAO, DISTRICT COURT JUDGE

TUESDAY, OCTOBER 14, 2014

**RECORDER'S TRANSCRIPT OF PROCEEDINGS  
CALENDAR CALL; DEFENDANT'S MOTION FOR THE DISCLOSURE OF  
MATERIALS AND FACTS RELATIVE TO FUTURE; DEFENDANT'S MOTION TO  
COMPEL DISCLOSURE OF EXCULPATORY EVIDENCE; DEFENDANT'S  
MOTION TO DISCLOSE PAYMENTS TO WITNESSES BY CLARK COUNTY  
DISTRICT ATTORNEY'S OFFICE; AND STATUS CHECK: PHONE CALLS**

APPEARANCES:

For the State:

MARC DiGIACOMO  
PAMELA WECKERLY  
Chief Deputies District Attorney

For Defendant Mason:

ROBERT L. LANGFORD, ESQ.

For Defendant Burns:

CHRISTOPHER R. ORAM, ESQ.  
ANTHONY P. SGRO, ESQ.

RECORDED BY: SARA RICHARDSON, COURT RECORDER

1 LAS VEGAS, NEVADA, TUESDAY, OCTOBER 14, 2014, 10:28 A.M.

2 \* \* \* \* \*

3 THE COURT: All right. State versus Willie Mason and David Burns,  
4 C267882. I think they're bringing out one of the defendants right now. All right,  
5 here's the situation, procedurally, there's a couple motions set for today. I also was  
6 given a bunch of motions with requests to set them on O.S.T. by defense counsel. I  
7 haven't actually signed them because -- since they were just handed to me  
8 yesterday. There's no way to calendar them and give anybody a chance to even  
9 read them. So I'm kind of -- I don't even -- do you even have copies of those, of  
10 what I'm talking about? The request --

11 MR. DiGIACOMO: I responded to some that were e-mailed to me by  
12 Mr. Sgro's office.

13 THE COURT: Yeah, but technically speaking they're not on calendar  
14 because I wasn't sure, you know, you can't hand stuff to me the day before and  
15 expect it to be calendared the next day because, first of all, you can't get it on  
16 calendar, the clerk's office doesn't work that way. And secondly, when were we  
17 going to have any kind of opposition and argument, kind of a thing? So I'm not sure  
18 what to do with those because technically, I haven't calendared them, but it sounds  
19 like the State's aware of them, so I guess we can -- suppose I can deem them  
20 calendared if you guys are, you know, I just wasn't sure what to do with them given  
21 the amount of time.

22 MR. SGRO: What happened was, Your Honor, we filed them, and we knew  
23 that master calendar was going to calendar them automatically at would have been  
24 at a point past trial, so --

25 THE COURT: Sure, right.

1 MR. SGRO: -- all we did was an O.S.T. just to accelerate the date, we figured  
2 we --

3 THE COURT: No, I understand, which, you know, I understand you're trying,  
4 but honestly, I just wasn't sure what to do with it because, you know, I -- it just  
5 creates procedural issues here.

6 I also note for the record that on behalf of Mr. Mason, Mr. Langford filed  
7 a motion to sever which master calendar calendared for October 21<sup>st</sup>, which  
8 obviously is -- I'm not sure what to do with that one either. I guess we can sort of --

9 MR. DiGIACOMO: I believe we filed an opposition to that yesterday as well.

10 THE COURT: Okay. See, I didn't even know that. Stuff that's, you know,  
11 here's the problem with Odyssey, as you guys know, stuff that's filed yesterday, it  
12 doesn't even pop up until today. So I don't even know what's in your opposition.  
13 The problem is, we have all these motions that are either half-briefed or they might  
14 have been briefed, but I don't actually have copies because they didn't pop up on  
15 Odyssey, they might be there now, but I didn't have them when I was going through  
16 the calendar yesterday at 5:00 o'clock. So that leaves us in this procedural, kind of  
17 weird area where there's all these motions that are just sort of hanging out there and  
18 I'm not, honestly not sure what to do about all of them.

19 But let's start with the over-arching one, all right, I have a motion to  
20 continue the trial which was set on order shortening time on behalf of Mr. Sgro.  
21 He's alleging that certain things have happened in discovery. On that one I was  
22 handed a copy of the State's response, but because of the timing of it, I only had  
23 literally, like, minutes to kind of scan through it. So, all right, Mr. Sgro, on behalf of  
24 your client.

25 MR. SGRO: Yes, Your Honor, essentially, and I don't know to what level of

1 detail the Court wants to micromanage this issue, but I have letters dating back to  
2 two years ago where we have been looking for discovery to be turned over on  
3 various matters. And we've gotten -- we've gotten some, we haven't gotten some.  
4 And one of the things that happens is we've gotten disks, for example, and the State  
5 cited in their opposition to the motion, Well, we sent a disk.

6 And I'll tell you, Your Honor, when you click on the disk, here's what  
7 happens, and I don't know how it happens because I'm not very computer smart.  
8 But it'll say, for example, autopsy report on the folder that's prepared on the disk.

9 THE COURT: Well, let me do this, Mr. Sgro, in the last two weeks, you filed a  
10 bunch of requests for certain information --

11 MR. SGRO: Yes, sir.

12 THE COURT: -- C.P.S. records, juvenile records, that kind of thing, let me  
13 ask you the big question here, okay.

14 MR. SGRO: Yes, sir.

15 THE COURT: This isn't the first trial setting, it's not even the second trial  
16 setting, it's not even the first time we've gotten to the stage of getting  
17 questionnaires, okay. Some of this stuff, I'm not sure what your defense is, I don't  
18 know what records are out there, but on its face, you know, getting records relating  
19 to the alternative suspects seems like something that ordinarily you would want to  
20 investigate, why wasn't this stuff filed a year ago, two years ago? This is not the first  
21 calendar call, and like I said, it's not even the first time we've gotten to the stage of  
22 getting jury questionnaires. So why wasn't this stuff -- I mean, like I said, it looks like  
23 you're entitled to some stuff, or at least poke around on it, but why wait until ten  
24 days before the trial, two weeks before trial?

25 MR. SGRO: Because here's the dance that's done, Your Honor, we send

1 letters requesting things --

2 THE COURT: And here's the other thing, just to jump in there, I know -- just  
3 the other thought that I had is the problem with some of this stuff like C.P.S. records,  
4 juvenile records, you know, we had -- we had a short discussion last week about  
5 this, but, you know, the chances of you actually getting them, because I know some  
6 of that stuff is coming to me *in camera*, I haven't seen it yet, we're at calendar call  
7 today, that's the problem with you asking for this stuff. And maybe I haven't seen it  
8 because there's nothing out there, I have no idea, but the problem is, as a functional  
9 matter, as a legal matter, why'd you wait until then to -- now to file it when we've had  
10 previous calendar calls.

11 And the second here is, as a practical matter, if that stuff exists out  
12 there, when was it going to come in here? Because you're -- you're expecting the  
13 guys down at juvy, the guys down at C.P.S. to work on a timetable which based on  
14 my experience is a little bit shorter than the time table they usually need to gather up  
15 records considering the hundreds of records requests they get all the time.

16 MR. SGRO: Okay, so let me try and address them one at a time. Why didn't  
17 I do this earlier? I have done it earlier, Your Honor. And we engage in this  
18 letter-writing process and what happens is the D.A., for whatever reason, has in  
19 their mind what they have sent us. We experienced this even in the last file review  
20 we did a week ago.

21 When we -- when we get materials sent to us, they don't always match  
22 what the D.A. thinks they're giving to us. Videos, for example, came in  
23 upside-down, okay, there's video evidence in this case, okay, the Opera House,  
24 Binion's, the Golden Nugget, and a Greyhound bus. We have several videos that  
25 when they were made available to us, they were upside-down, they were



1 mirror-imaged videos where everything's flipped backwards. We have disks where  
2 when you click on something and it says autopsy report it's something completely  
3 different than that.

4           So they -- they may -- I don't know, Your Honor, I'm not suggesting  
5 there's any grand scheme to divest us of information. I will tell you that there is a  
6 constant theme of, you know, we'll get to you when we get to you. But what -- I  
7 have been pursuing this, I have letters with me that I brought in case this came up,  
8 that date back two year -- more than two years ago we've been looking for these  
9 materials.

10           So now we go to the file review last week, and here's a similar  
11 conversation we have all the time. What happens is they say, We gave it to you.  
12 We say, We don't have it. And that's even in their opposition to the motion to  
13 continue trial. Well, we then, Mr. Oram and I compare notes, Mr. Langford's there at  
14 the file review, only when we have a consensus that none of the attorneys and none  
15 of the investigators have ever seen it, at that point they will relent and say, Okay, I  
16 guess we'll give it to you. And that therein is the dilemma.

17           I've been, you know, I didn't wait 'til two weeks before trial to, for the  
18 first time, seek discovery. That's not how I do it. And again, I have letters that go  
19 back, extremely detailed letters, pages and pages long of very specific items I need.  
20 And for whatever reason, they believe they've given 'em to us. I'm looking, I ask  
21 Chris, Mr. Oram, and we don't have 'em. So now we go do the file review. The file  
22 review took a week or so to set up. They didn't want to do the file review until  
23 Mr. Langford was ready. I said, you know, Let us do it when we're available, let  
24 Mr. Langford do it on his own time. They simply stopped responding to e-mails  
25 thereby unilaterally determining when the file review would take place.

1           We have the file review last Wednesday, Judge, six days ago. Last  
2 Wednesday we marked things that we believed we didn't have, including by the  
3 way, two videotaped interviews. We have transcripts, but we don't have the  
4 videotape, the video-audio of two of three statements of someone they said that  
5 they potentially were going to flip in this case. Wednesday goes by, we leave.  
6 Thursday comes and goes. Friday comes and goes. On Friday, late afternoon,  
7 we're peppering the D.A. with e-mails, asking can we pick up the discovery.  
8 Ms. Weckerly and Mr. DiGiacomo are both copied on the e-mail chain.  
9 Mr. DiGiacomo doesn't respond at all. Ms. Weckerly says, Marc's in charge of that.  
10 You have to ask him when discovery's available. Then Mr. DiGiacomo doesn't  
11 respond to me, he texts Mr. Oram, I think Friday night, I think it was Friday night late  
12 or Saturday, I can't remember right now. And for the first time we hear, It's taking  
13 forever to download this discovery, will you send me --

14           THE COURT: Well, I mean, here's the thing, all right, this is what the State's  
15 response essentially is is that over the last couple of years they've given you --

16           MR. SGRO: I know.

17           THE COURT: -- thousands of pages of stuff, and so they're saying you've got  
18 all this.

19           MR. SGRO: They have. They have given us thousands of pages, the  
20 problem is there's -- that's not the universe of information that they have. So this  
21 case is voluminous. Your Honor, this case involves evidence relative to DNA, guns,  
22 fingerprints, cell phone records for numerous cell phones, potential alternative  
23 suspects, witness statements that are probably 25 to 30, multiple ballistics reports.  
24 There's about every kind of forensic science involved in this case. There's  
25 eyewitness identification issues in this case. There's videotape in this case.

1           This case is a monster relative to all the disciplines that are involved.  
2   So when we look, for example, at the ballistics tests, we want all the underlying  
3   data. When we look at the cell phone records, I explained to Mr. DiGiacomo --  
4   here's another example, Your Honor, the cell phone records that we got, and I don't  
5   know what -- what experience the Court has had with cell records, but if you look at  
6   a cell phone record, some records go right across the top, left to right, and they have  
7   when the call started, when it ended, *et cetera*. At the very end, Your Honor, is the  
8   tower location. What we got in our discovery, and I told Mr. DiGiacomo this when  
9   we met last week, we got a font that was big. So the font then went across, let's say  
10   five columns, the tower information was produced on a separate page. So we got a  
11   bunch of --

12           THE COURT: Sure, I've seen that a million times. It happens frequently.

13           MR. SGRO: Right, but we don't have any rhyme or reason on how to match  
14   up now the tower in a vacuum to thousands of pages of cell phone records. So  
15   what I'm suggesting to Your Honor is we have done every -- I have -- since the  
16   Court last denied the motion to continue, we've had all hands on deck, I have a very  
17   capable staff, there's eight or nine of us working on this case around the clock. I  
18   can't come to you and tell you I have everything because I don't know that I do.

19           Now, this morning, this morning, just prior to court, Mr. DiGiacomo  
20   handed Mr. Oram an envelope with two thumb drives that we gave him yesterday,  
21   ostensibly, that have the discovery on them. So what I think I would at least like to  
22   do is to come back, the Court's indicated we need to come back and deal with some  
23   issues, on another date, my suggestion, Your Honor, is to give me today and  
24   tomorrow to go through the thumb drive that was just produced and table this until  
25   we come back so that I can tell you if we have everything.

1           And by the way, we have -- we have two experts we have -- we're going  
2 to endorse today, an eyewitness ID expert and a ballistics expert based on the  
3 materials we have seen and based on the positions taken in the pleadings that were  
4 just filed a couple days ago specifically relative to the eyewitness ID.

5           So with that, Your Honor, we'd ask to be given the opportunity to look  
6 through the thumb drive and to see if we finally have everything. I would ask the  
7 Court to consider allowing us to return on Thursday.

8           THE COURT: All right, State, your response to all that?

9           MR. DiGIACOMO: Yes, Judge, and I laid it out about as specifically as I  
10 possibly could. These attorneys, now Mr. Langford's slightly different because  
11 Ms. Burke was handling it at the time.

12          THE COURT: Right. Sure.

13          MR. DiGIACOMO: But these attorneys came to the Las Vegas Metropolitan  
14 Police Department, the police department itself, in October of 2011. They went  
15 through the books. They identified the items they wanted and I discovered those  
16 items to the defense and I kept a copy of what I gave 'em on my computer, which  
17 include all three videotapes of Stephanie's which as of right now is not a witness in  
18 this case, she's a codefendant, but all three of her videotapes and her audiotapes.

19               After that in 2012, they wanted to go back to Metro again, and they  
20 wanted to look. And they retabbed many of the items that I had previously give  
21 them, but I did it again for them. And then Mr. Sgro's right, he wrote me a letter, and  
22 in that letter he says, basically, here's all the things I'm missing, and I attached as  
23 an exhibit and it's Exhibit Number 3 to my opposition --

24          THE COURT: Well, hang on, let me do it this way, let me ask you this, okay,  
25 there's two different things going on here, one is whatever you gave before and

1 whether he's gotten it or not; the other issue is that I kind of alluded to is in the last  
2 couple of weeks I've signed a bunch of orders for other stuff to be reviewed  
3 *in camera*, I haven't gotten anything back. Does anybody know the status of all the  
4 other stuff? Like, one of them was, like, Jerome Thomas's juvenile records; one of  
5 them was -- I'm trying to even remember -- does anyone know? There's two issues  
6 here, one is whatever was given previously and one is the stuff that Mr. Sgro's  
7 requested in the last, like, 30 days or so, is there -- is there new stuff coming in?

8 MR. DiGIACOMO: I don't even know if anything that he's asked for has  
9 existed.

10 THE COURT: Right.

11 MR. DiGIACOMO: But just so the Court --

12 THE COURT: That's what I'm asking is, let's put aside this, you know,  
13 whatever was given, whatever wasn't given, whether he's got a complete file of what  
14 you have, what about the stuff that might be coming in, is there other stuff?  
15 Because I know I signed orders on this, we talked about this last week --

16 MR. DiGIACOMO: Not that I'm aware of.

17 THE COURT: -- does anyone know that --

18 MR. DiGIACOMO: I mean, not -- not that has ever been asked of us that was  
19 in our possession, Judge.

20 And just so we're clear, I'm not being flippant when I tell you that this is  
21 Mr. Sgro's maneuver to get out of this trial date. We had this argument in 2013 and  
22 they said, The only thing we didn't have, the only thing we didn't have after we  
23 went through the homicide books is the 3600 pages of medical records of  
24 Devonia Newman, and we need to have a continuance because maybe she was on  
25 drugs, and the Court -- we vehemently objected saying, This is ridiculous, you don't

1 need a continuance because you need to find out if she was on drugs at the time  
2 she did her photo lineup. We had this lengthy, 41-page argument, and I attached --  
3 or I put in my opposition this discussion about how that's the only thing left out there,  
4 and then now here we are again, and Mr. Sgro, and it was comical in my office on  
5 Wednesday, Mr. Sgro's going, I don't have this; and Mr. Oram's like, Well, I've seen  
6 that; and Mr. Langford's like, Well, I have that.

7 I gave them a copy of anything they asked for this time, but the problem  
8 is is that it's 38.6 gigs of information. It's the same thing that I've given to 'em in  
9 October of 2011, the same thing I've given 'em in July of 2012. There is zero  
10 information out there that they need, they now physical have it in their position with  
11 the exception of Mr. Sgro's incorrect, he has one thumb drive, the rest of the videos  
12 are currently still burning on my computer downstairs because they've been burning  
13 for two days now because they want another copy of what have already been given  
14 to 'em in the past.

15 I know the courts are always concerned that later on, should we get a  
16 conviction, you're going to be the court, and you're going to have to determine  
17 whether or not someone was ineffective or not ineffective. I'm going to ask the  
18 Court to set that aside. I'm willing to run the risk at this point, there is absolutely no  
19 basis for a continuance of this trial, whatsoever. The record, there's been  
20 transcripts each year for the last three years, discussing this exact issue with the  
21 Court.

22 There are letters back and forth that specifically tell Mr. Sgro, If you  
23 think the stuff's not on the disk in July of 2012, if you think it's not there, bring it back  
24 to me and I'll show it to you where it is and how it is you can access it if that seems  
25 to be a problem. But here we are in 2014, and they're saying it's not on there when

1 I have a letter to 'em saying, it's all on there, come show me the disks and I can  
2 show it to you and they never came back to me.

3 So to the extent that there's some suggestion that they're prejudiced by  
4 information they don't have, they now have it now four times over. The fact that they  
5 decided late on to file motions for *ex parte* stuff to try to convince the Court to  
6 weasel another continuance of this case, that's on them. If they get the records,  
7 great. If they don't get the records, too bad, they should go to trial. But they have to  
8 file an affidavit for good cause for why it is they get a continuance. And their  
9 affidavit -- I called it perjurious, and I don't say that lightly in a courtroom.

10 It is absolutely offensive to be reading this motion to continue and the  
11 allegations that are contained therein considering the number of times they sat in my  
12 office and said, We don't have any color copies of the photo lineups. Really?  
13 Ms. Weckerly in March of 2013 gave you 653 pages. On those 653 pages are the  
14 color copy of every single photo lineup done in this case and it's one file. So they  
15 can't say, Oh, we clicked on this folder or we couldn't find this, we clicked on that  
16 folder, we couldn't find this. It's one file, one PDF that's 653 pages that has the  
17 information that they claim the didn't have. Oh, and by the way, Judge, that was  
18 included in the disks in 2012 and it was included on the original discovery that was  
19 given in 2011, the exact same photo lineup of Devonia Newman that's the subject of  
20 a motion to suppress that they filed on Friday.

21 The suggestion that we should be having a continuance of this trial date  
22 at this point, this is a maneuver by the defense in order to get a defense, Judge. I  
23 ask you to deny the motion, set all the other motions over for Thursday and let's go  
24 to trial. This is now the third panel we've done questionnaires on, one in 2013; one  
25 in 2014; and now our third panel in 2014. And each time they try a new maneuver

1 to get a continuance, it's time to go to trial.

2 MR. SGRO: Your Honor, may I just very briefly? Relative to the C.P.S. stuff,  
3 there's a case called *Thigpen versus Roberts*, it's a United States Supreme Court  
4 case that imputes the responsibility to the prosecuting authority to all of its agents.  
5 In other words, it's a case that stood for the proposition that they couldn't say, Well,  
6 we don't have it, knowing full well another prosecutorial branch, like a police  
7 department or something like that would have it.

8 And as to the C.P.S. records, Your Honor, Cornelius Mayo is a witness  
9 in this case. Cornelius Mayo is the boyfriend -- live-in significant other of the victim  
10 who is -- was killed in this case. He is the stepfather of the 12-year-old girl that was  
11 shot. Cornelius Mayo got charged with abuse and neglect, and I know from  
12 experience that abuse and neglect charge is going to have, hand-in-glove, with it a  
13 component of C.P.S. So they charged Mr. Mayo with -- with abuse and neglect.

14 Now, part of this is part of our *Giglio* motion which I know we're not here  
15 to talk about today, but coincidentally, that preliminary hearing from four years ago,  
16 they're talking about this trial, that preliminary hearing has never gone forward and  
17 we believe it's been bounced contemporaneously with this trial because they want to  
18 see what he testifies to when we try this case.

19 Relative to that abuse-and-neglect case, it would be easy -- it would be  
20 easy to have the State provide those records if there's underpinnings from C.P.S.  
21 there. We have reason to believe that those are out there. In looking at their -- in  
22 looking at their record, we have -- we have a sense that police officers were there  
23 often. We have a sense that -- that the kids were exposed to drug trafficking activity  
24 all day every day. And so our -- we don't do it lightly when we ask for the C.P.S.  
25 records. We strongly believe there's a lot there, and I think the State can easily get



1 them.

2 THE COURT: Well, I mean, then the question still stands, why did you wait  
3 until now as opposed to the first couple of trial continue -- settings --

4 MR. DiGIACOMO: He was charged in 2010 with that case.

5 THE COURT: Right.

6 MR. DiGIACOMO: And they're aware --

7 THE COURT: Why didn't -- why wait until now to even ask for it?

8 MR. SGRO: Well, Judge, because we assumed if Cornelius Mayo got  
9 charged with abuse and neglect in 2010, the D.A. would give us the records. And  
10 here's, just as a very brief response, Your Honor, when we were in Mr. DiGiacomo's  
11 office last week, you know, the representations he just made to you about how we  
12 tagged stuff and he copies them and all that jazz, we learned for the first time that  
13 he, after we leave, determines what we're really not entitled to. So, for example,  
14 SCOPes or N.C.I.C.s, they're in the file, we tag 'em. He says, You're not entitled to  
15 'em, so when I make copies I take that out. So in other words, there's a vetting  
16 process that takes place as well which he neglected to point out.

17 Other than that, Your Honor, I know Mr. Langford wants to address the  
18 Court. I'll submit it.

19 MR. DiGIACOMO: Very briefly, just so the record's clear, July 26, 2012, in a  
20 letter to Mr. Sgro items 1, 3, 4, and 22, quote, "The following items are not subject to  
21 N.R.S. 174.235 and as such were not provided as copies despite you're being able  
22 to review them for any potential exculpatory information." The first time when I told  
23 them, No, you don't get to copy the N.C.I.C.s, but you want to look at 'em and take  
24 your information, I told them that in 2012, they saw the books again in 2013, and  
25 now he's claiming for the very first time in 2014 he hears that? I have it in writing to

1 Mr. Sgro. This is merely an effort for them.

2 THE COURT: All right.

3 MR. DiGIACOMO: And I'm not sure what these C.P.S. record would have to  
4 do with whether or not Cornelius Mayo takes the stand and they can cross him on,  
5 well, you were charged for abuse and neglect for selling dope out of an apartment  
6 that happened to have five kids in it, something that they've been aware of for a very  
7 long time. Whether or not they're entitled to the C.P.S. investigation of whether or  
8 not he had done that in the past, how is that relevant to anything in this proceeding?  
9 How is it relevant to *Giglio* or *Brady*? The fact of the matter is they're selling dope  
10 out of an apartment in which the kids were present in which the mother was killed.  
11 What other information would they be entitled to to cross-examine Mr. Mayo as it  
12 relates to that fact?

13 THE COURT: All right, Mr. Langford, you wanted to add something?

14 MR. LANGFORD: Just, Your Honor, as Mr. Sgro and Mr. Oram have  
15 developed their defense, it is becoming clear to me, and I'm just giving the Court  
16 kind of a head's up on what's on the horizon, that we are developing at this point an  
17 antagonistic defense. And the Court has an ongoing, as the Court is aware, an  
18 ongoing duty to, if that becomes apparent, to sever the cases. And I can't at this  
19 point disclose to the Court, I could in chambers *in camera* because of the nature of  
20 the two defenses. But that's on the horizon, so.

21 Additionally, Your Honor, there's --

22 THE COURT: Is that the subject of the motion that's calendared for, I know  
23 it's a weird calendar, but it's currently set for October 21<sup>st</sup>? Or are you making a  
24 different point now?

25 MR. LANGFORD: No, Your Honor, that's a different, unfortunately it's a

1 different one that I'll be having to file in writing.

2           Also, I know these motions are coming late, but as the Court also  
3 knows, any constitutional issue that becomes apparent, I have a duty to raise that  
4 constitutional issue. If it rises to the level of being a constitutional violation, I have a  
5 duty to raise that no matter when I discover it.

6           MS. WECKERLY: Just on that, Your Honor, the nature of this case hasn't  
7 changed since it happened in 2010, if Mr. Langford wants to file an additional motion  
8 to sever, the State will respond to it. But him saying I'll have to tell you --

9           THE COURT: Yeah, I mean, it sounds like --

10          MS. WECKERLY: -- in secret what it is, I mean, that's ridiculous.

11          THE COURT: Well, I mean, that's the -- I mean, essentially what I heard is  
12 he -- that's exactly what he said is he want -- he's going to file another motion. The  
13 problem, you know, these consolidation motions are always kind of difficult because  
14 when somebody says their defenses are antagonistic with the codefendant, I mean,  
15 essentially, the only way for me to even have a basis to rule on that is for him to tell  
16 me what the defense is, but he's not obligated to do that. It becomes this kind of  
17 circular thing. Those are always, in a way, procedurally the most difficult motions for  
18 me to resolve because I'm sort of, you know, short of having --

19          MS. WECKERLY: Well --

20          THE COURT: -- some sort of secret proffer, you know, how does he know,  
21 you know --

22          MS. WECKERLY: No, respectfully, all the case law is he is obligated to tell  
23 you. It's their burden. It affects our rights to a fair trial. All the case law, all of it,  
24 federal --

25          THE COURT: So --

1 MS. WECKERLY: -- and state is is it's discussed in open court. There is not  
2 a separate procedure for severance. It's a open motion. It's discussed. It's based  
3 on the evidence. All the case law in Nevada and federally is that you don't get to go  
4 tell the Court in secret your secret defense.

5 Besides, it's not really much of a mystery to us that they're going to be  
6 disputing who the shooter is in this case.

7 THE COURT: Yeah, I mean, here's my question, Mr. Langford --

8 MS. WECKERLY: -- I mean, everything else is pretty clear.

9 THE COURT: Hang on. Hang on.

10 Mr. Langford, let me ask you this question, because you already have a  
11 motion to sever out there, which is set a couple weeks out. There was a previous  
12 motion to sever, I mean, essentially what I think you're saying or maybe I -- just from  
13 the timing of it is, essentially you're saying that something's happened in the last  
14 couple of weeks which makes your defense -- or you're learning more about  
15 Mr. Sgro's defense, so the question is --

16 MR. LANGFORD: Something's happened in the last couple of days, Your  
17 Honor.

18 THE COURT: What has happened in the last couple of days that's different  
19 than what you knew about 30 days ago or whenever you -- or even a couple weeks  
20 ago when you filed this motion that's currently calendared for the 21<sup>st</sup>? I mean,  
21 what's actually, because essentially, what I'm hearing from the State is nothing new  
22 has happened. They're giving Mr. Sgro the exact same documents they gave him  
23 two years ago. You're saying something's happened in the last two days?

24 MR. LANGFORD: Your Honor, if the Court would allow us to do that on  
25 Thursday, then we can more fully flush it out and provide a fuller answer to the

1 Court.

2 THE COURT: Well, I mean, here's the problem with doing stuff on Thursday  
3 is, I mean, I'm not even sure what the basis for this motion is. I know that you're  
4 saying you're going to file something so we're just sort of, you know, talking about a  
5 hypothetical motion that I obviously haven't read yet. The problem is, this is the  
6 calendar call date, if I'm going to grant the severance, then this trial's not going to  
7 go. So that's the problem is it becomes sort of a post-calendar-call motion.

8 And I don't know exactly what's happened in the last couple of days,  
9 I'm, you know, that you didn't know about over the last -- how old is this case, like  
10 four years now, right?

11 MS. WECKERLY: Four years.

12 THE COURT: Or five years now?

13 MR. DiGIACOMO: Four and a half, yeah.

14 THE COURT: I mean, I don't know exactly what Mr. Sgro's defense is. Just  
15 reading through the police reports, and obviously I haven't talked to any of the  
16 witnesses, reading the police report, I can think of a couple different ways, I mean,  
17 obviously, they're going to dispute who the shooter is, I gathered that from day one,  
18 that's clearly one of the issues here.

19 But I guess I'm a little bit puzzled about what could have happened in  
20 the last couple days that suddenly makes your defense antagonistic. I mean, I know  
21 you're, you know -- we're talking about a hypothetical motion now because you  
22 haven't even filed it yet. But is it something to do with discovery? A new witness?  
23 Can you at least give me a hint about what the event is?

24 MR. SGRO: Your Honor, I'll tell you, I'm not going to, obviously, it's  
25 Mr. Langford's motion, it has to do with communications I've made to Mr. Langford

1 relative to witness interviews that we have been conducting in anticipation of this  
2 trial date. Witnesses have told us things that are new to us that they have not said  
3 before, as far as I'm aware. They may have said them to the State, but never to us.

4 MS. WECKERLY: Well, we would request those interviews in discovery  
5 because we haven't received anything.

6 MR. SGRO: We don't have a formal interview, Your Honor.

7 MS. WECKERLY: Whatever the basis is then.

8 MR. SGRO: Your Honor, there's no authority for us to do anything other than  
9 the reciprocal rule of discovery. We don't intend to call those witnesses. Under the  
10 *Grey* case, it's going to be tendered for rebuttal. So we can file --

11 MS. WECKERLY: It's going to be tendered for rebuttal? They don't have a  
12 rebuttal case.

13 MR. SGRO: We can fight that fight on a different -- on a different day.

14 As for today, that's what Mr. -- Mr. Langford and I have been in very  
15 regular and constant contact, particularly in the last 30 days as this thing's been  
16 ramping up. And we have shared with each other different ideas and different things  
17 we're looking at, different people we've spoken to, *et cetera*. So at a high level,  
18 Your Honor, that's what he's referring to.

19 MR. DiGIACOMO: And just for the record, Judge, the one thing about  
20 severance after the case that was in Judge Bell's department, *Chartier*, is that it  
21 could be raised at any time, so it's the one motion that --

22 THE COURT: Right.

23 MR. DiGIACOMO: -- calendar call doesn't matter.

24 THE COURT: No, I know, but the problem is --

25 MR. DiGIACOMO: And so I don't think should affect the Court's setting it.

1 But if the Court severs it, we'll go on one and not the other.

2 THE COURT: No, but the problem is --

3 MR. DiGIACOMO: But I don't think you're going to be severing it.

4 THE COURT: No, but here's the problem, I mean, as a practical matter, it's  
5 sort of outside this case, I understand that they can raise it any time, they can even  
6 raise it in the middle of trial, but here's the problem is Mr. McClinton's sitting there,  
7 he's in custody, he invoked. That's the other calendar call I have kind of trailing  
8 behind you guys. If we're going to not even resolve this until Thursday or whenever  
9 we're going to resolve this, the question functionally, and his case isn't overflow  
10 eligible and it's like a five-year-old sexual assault. The question is functionally, what  
11 am I going to do with his trial? Because he's invoked, he's in custody, it's a  
12 five-year-old case. Essentially we're just kicking --

13 MR. DiGIACOMO: Can I ask you --

14 THE COURT: -- that along is what we're doing.

15 MR. DiGIACOMO: Can I ask you two questions?

16 THE COURT: Sure.

17 MR. DiGIACOMO: How is somebody who's five-year-old case have a  
18 invoked status? But you don't have to answer that. But, I mean, ultimately --

19 THE COURT: Because he's been --

20 MR. DiGIACOMO: -- if you're talking about is it a six-or-seven-day case, give  
21 'em a week so the Court can resolve these motions, but what I don't want to do, is I  
22 can guarantee you in a year we'll have a different mechanism to get them another  
23 continuance. Like, at some point, Judge, you need to hold their feet to the fire, and  
24 when you don't hold their feet to the fire, we never go to trial, ever go to trial.

25 And so at some point the State is getting very prejudiced by the fact

1 that our witnesses are four and a half years older, they have memories that are four  
2 and a half years old and the defense -- when the subject of their motion is people  
3 shouldn't be identifying the defendant on videotape when it's four and a half years  
4 later and he's got three feet of hair on his head now. Ultimately, we're being  
5 prejudiced by these maneuvers.

6           The Court set this date, then moved it two weeks so that they could --  
7 they could fix whatever problem they had with their experts, and now we're talking  
8 about moving it again because they're filing last-minute stuff. Ultimately, that's not  
9 the way this should work. The Court should deny that and set us and tell us to start.  
10 All of these issues could be handled in the middle of jury selection. It wouldn't make  
11 a difference.

12           THE COURT: Yeah, I mean, you know, this is the thing is, you guys are filing  
13 all these motions, and like I said when I opened this hearing, you submitted a whole  
14 bunch of motions that you wanted set on an O.S.T. that technically aren't set, but  
15 you can't just throw them in on Monday and expect them to be heard on Tuesday  
16 because, first of all, I don't have time to read 'em, they don't have time to file a  
17 response. And that's putting aside the practical matter of you can't actually get them  
18 on calendar through the logistics of the way the court system works because the  
19 computer system doesn't work that way.

20           So essentially what we have here is a flurry of motions that really aren't  
21 ready. And you're sort of saying, well, can we push this over to Thursday to argue  
22 all these motions is essentially what you're saying.

23           MR. SGRO: Well, I believe motions in limine, by rule, are, I think, are due five  
24 days before trial, the evidentiary issues, so we tried to -- I understand what the  
25 Court's saying relative to the practical logistics of Odyssey and that.



1 THE COURT: Right, I mean, there's -- there's -- yeah, it's just bunch of  
2 logistical things, right.

3 MR. SGRO: So, what -- let me throw out some things that we have done in  
4 other cases. We have done evidentiary hearings the day we were going to pick a  
5 jury and have the jury come the next day. We have done things, and we've invited  
6 the jurors to come back later. So I have typically -- there's typically going to be a  
7 flurry of motions right before trial because that's when everyone's really ramping up  
8 and --

9 THE COURT: No, I understand that. What I'm concerned about is the flurry  
10 of requests for new discovery in the couple weeks before trial on our third trial  
11 setting. That -- that's why I opened the hearing the way that I did. Where's that  
12 coming from?

13 MR. SGRO: I understand, Your Honor, I'm doing the best I can to explain to  
14 you the day-in-day-out workings between my office and the D.A.'s office. I mean,  
15 this is -- this is par for the course where we have disputes on what we have, what  
16 we don't have. And I disagree with Mr. DiGiacomo that in the room I was the, quote,  
17 unquote, "Only one that didn't have discovery." There were many thing -- many  
18 items that no one had in the room. But I'll leave that -- I don't want to belabor that.

19 I do want to address one thing though we do have to resolve,  
20 Your Honor, and that's with respect to that panel that we have. One of the requests  
21 that we had -- so the Court, for the record, the Court sent us a letter, you know, Get  
22 with the State and go through and see which --

23 THE COURT: Right.

24 MR. SGRO: -- jurors you want to exclude, which we do pretty much every  
25 time.

1 THE COURT: Right.

2 MR. SGRO: When we started going through the jury questionnaires we  
3 noticed that out of the 150 jury questionnaires we believe we had nine  
4 African-Americans which is about half of what we would have expected if the  
5 representation component of African-Americans would have been present on our  
6 jury. I responded to the Court via letter that we had to have an evidentiary hearing  
7 relative to the systematic exclusion of African-American venire men for this  
8 particular case. So --

9 THE COURT: Yeah, I mean, here's the thing, all right, I know that's not even  
10 a motion, technically it's a letter which I read. But --

11 MR. SGRO: No, we filed a motion, Your Honor, as well.

12 THE COURT: Okay, that must be one of the ones that -- okay. But here's the  
13 situation, I have two observations, number one, this a case -- there's a lot of  
14 precedence on this. The Supreme Court has held repeatedly that the system that  
15 we have here in Nevada which is we select jurors by random draw through the  
16 D.M.V. records, is not itself unconstitutional. There's that recent case involving  
17 Judge Silver, it doesn't actually say you're required to have an evidentiary hearing.  
18 What that case was about is structural error. In that case what she did is she  
19 ordered an evidentiary hearing, she made a finding that an evidentiary hearing is  
20 necessary. She then didn't have one. And the Court said, well, that's structural  
21 error because essentially you have two inconsistent findings. The case doesn't say  
22 that I'm required to have an evidentiary hearing.

23 The third observation is, as a factual matter, you don't know that there  
24 are only 9 of 150 because 150 people didn't actually fill out the race part. I looked  
25 through the questionnaires, about half of them did. So what you know is 9 of about

1 75 of them are African-American --

2 MR. SGRO: No, that's not --

3 THE COURT: -- but the other half you don't know.

4 MR. SGRO: That's not the case, Your Honor, because what we did is we  
5 didn't just do garbage in, garbage out. We took those jury questionnaires. We went  
6 online. We looked at social media. And I'm telling you, there's either going to be 9  
7 or 10. Okay, so I believe, I am anticipating a problem. I believe we're making a  
8 *Batson* issue. And once we make a *Batson* issue, I believe, and respectfully, I'm  
9 going to disagree with you, Your Honor, relative to procedurally what happens next.

10 If we come in on Monday and out of 150 people there are 30  
11 African-Americans, I'll withdraw the motion. If of 150 people I am correct in my  
12 guesstimate that there are either 9 or 10 African-Americans and then that number  
13 would represent only 50 percent of what would be expected --

14 THE COURT: But the problem is under the law, and like I said, there's a lot of  
15 precedent on this, you're not actually required to a panel that exactly mirrors the  
16 percentage of minorities in the community. What you're entitled to is a method  
17 which is race-neutral and doesn't systematically exclude African-Americans. In this  
18 courthouse we have jury pools come in all the time. Sometimes there are more  
19 minorities than are reflected in the population. Sometimes there's fewer.  
20 Sometimes it's about the same.

21 But the point is the system that we use is not unconstitutional. The  
22 mere fact that in a particular case the numbers don't exactly match does not make  
23 the system itself *per se* unconstitutional. That's the problem.

24 MR. SGRO: How does the -- I'm -- and I don't mean to be flippant, I'll borrow  
25 Mr. DiGiacomo's phrase, but how would anyone know that without having the

1 requisite information? For example, are they doing -- there was a time when they  
2 were talking about doing power bills as a potential venire person because of the  
3 disparity that was found relative to voter registration and then drivers licenses. Do  
4 you know, Your Honor, if they're doing subpoenas based on who lives at particular  
5 addresses? Do you know if they're looking at different neighborhoods with a  
6 specific demographic? I don't think anybody knows. And by the way, Your Honor,  
7 when jurors call in and they get that tape, they're asked specifically for their age,  
8 race, and gender. And I don't know if they keep records of that or not.

9           Only through an evidentiary hearing would we be able to determine  
10 whether or not it actually does occur. It should not be by luck of the draw. It should  
11 be systematic insofar -- I understand the Court's suggestion to us that we're not  
12 always going to get to the person exactly the representation, it's not --

13           THE COURT: You don't have a right to that. That's the problem.

14           MR. SGRO: I understand.

15           THE COURT: Right.

16           MR. SGRO: I understand, Your Honor, what I do have a right to know though  
17 is that it's just my bad luck that day because the system does work and while I'm  
18 doing this capital murder trial in front of Your Honor, a colleague of mine is upstairs  
19 doing a capital murder trial somewhere else and that colleague of mine has more  
20 than enough minority venire people.

21           What I'm suggesting to the Court is there's no evidence in this record at  
22 all that there is not a systematic exclusion, and we have not had the opportunity to  
23 investigate into that. And I believe we are entitled to an evidentiary hearing. I don't  
24 know that the Court, with all due respect, is in a better position than us anecdotally.  
25 I'm sure the State's going to tell you we've done a million trials, it's always been fine.

1 We're going to tell you, and if I pull out some defense attorneys from the back, we're  
2 all going to tell you it's always a problem. Only by getting to the information that's  
3 garnered, do you ever get to a place where you have something we can rely on as  
4 opposed to anecdotally what's occurred.

5           The case -- the Judge Silver case that the Court spoke of is only a  
6 couple weeks old. I believe, Your Honor, the case has to be looked at in conjunction  
7 with the *Brass* case, which reversed for a procedural error relative to when a *Batson*  
8 challenge was raised. It has to be looked at in conjunction with the case that came  
9 out this summer, the one that Ms. Weckerly was involved in. I can't remember now,  
10 it starts with C. It had to do with the State's exercise of six peremptory -- six  
11 peremptory challenges out of nine being applied towards --

12           THE COURT: Yeah, but, see, but the problem is, look, those cases, how the  
13 State exercises its peremptory challenges when we get to that stage is a very  
14 different thing than the composition of the panel when we walk in the door.

15           MR. SGRO: I totally agree with you.

16           THE COURT: It's two completely different lines of cases.

17           MR. SGRO: Right. And what I'm suggesting to the Court is that the Nevada  
18 Supreme Court in the last 12 months, I have the tape of the McCarty argument  
19 wherein Mr. DiGiacomo was questioned about his peremptories. All I'm suggesting  
20 to the Court, Your Honor, is that the Supreme Court in our state has raised an  
21 eyebrow relative to our system, relative to the representation of African-Americans  
22 in our jury system.

23           Now, obviously, I can't force the Court to hold an evidentiary hearing.  
24 I'm suggesting that when you look at what's been going on in our jurisprudence in  
25 the last year, relative to jury selection, the composition of the jury, *et cetera*, I

1 believe you cannot do so in a vacuum. I believe the Nevada Supreme Court is  
2 inviting defense attorneys to ask questions of someone who would know as  
3 opposed to anecdotal references so that this issue can be explored and thereafter  
4 put to bed. And I'll submit it on that, Your Honor. Your Honor, knows the case I'm  
5 referring to. You mentioned it, so --

6 THE COURT: Sure.

7 MR. SGRO: -- you know, we simply have somewhat of a disagreement as to  
8 procedurally how it goes.

9 THE COURT: Well, but structural error's a very specific thing. Structural  
10 error versus whether a hearing is required are two different things. The problem in  
11 that case, the finding was Judge Silver committed structural error, structural error  
12 means she made two rulings which are incompatible with each other. It's sort of the,  
13 I know you guys don't think of it this way, there are some cases, obviously. It's the  
14 opposite of law of the case.

15 Law of the case means all -- a ruling follows its way through the case.  
16 Structural error occurs when the judge doesn't follow the law of the case. She's  
17 actually contradicting herself, which is what Judge Silver did. She said, I make a  
18 finding that a hearing is necessary. She then made a ruling without a hearing,  
19 that's -- that's obvious structural error. It's two incompatible findings. So I'm not  
20 sure that case has anything to do with anything other than she, honestly, screwed  
21 up by contradicting herself.

22 But, anyway, State, your response?

23 MR. DiGIACOMO: Just briefly, Judge, much like in a *Batson* challenge  
24 situation, there is a first step to a venire situation, which is establishing a *prima facie*  
25 basis to believe. Mr. Sgro says, We've looked and I think it's nine or ten. I think his

1 methodology may be less reliable than maybe when the panel gets here, if you -- we  
2 look at it, we make a numbers determination. Because I even think *Buchanan*  
3 suggests that unless you get below the 50 percent representation level, there's no  
4 *prima facie* is the case to even believe that there is some sort of -- of systematic  
5 exclusion.

6           If the Court determines that there has or there is reason to believe there  
7 might be a systematic exclusion, then the Court grants an evidentiary hearing. And  
8 what happened in *Buchanan* was the People stood up and said there's zero  
9 African-Americans in the panel, Judge, and based upon that, I move to strike the  
10 panel for systematic exclusion. The judge says, Well, looking out there is no  
11 African-Americans in the panel; therefore, I find that there is at least a *prima facie*  
12 case to be made that there is exclusion. I'm going to hold the hearing, and then  
13 decided to hold the hearing after they had the trial and then made a ruling. And the  
14 Court said, I don't really need a hearing because I know what the witness is going to  
15 say.

16           We actually all know what the witness is going to say. We used to do it  
17 with Judy Roland, now it's somebody else. We all know what she's going to say.  
18 But it's not going to be an issue until the Court makes a determination that there is  
19 at least a *prima facie* case that there may be some exclusion going on and you can't  
20 do that in the position you're in until the 150 --

21           THE COURT: Right, I mean, that --

22           MR. DiGIACOMO: -- people make it to the room.

23           THE COURT: -- that's why I opened up the way I did, which is I looked  
24 through -- after I got your letter, I looked through the questionnaires. And from my  
25 count and I, unfortunately, I don't have the exact number. I have it in my notes

1 somewhere. About half of the jurors didn't even fill out the race section. So based  
2 on that, I don't know that I can any information -- I have any information to say that  
3 it's even true that only 9 of 150 are African-American. All we know are 9 of the  
4 about half who responded are African-American. And honestly, if you project that  
5 out, that actually suggests there may be 18 among the 150.

6 MR. SGRO: Judge, I'll --

7 THE COURT: Now you're saying that there's other information which you  
8 have which I don't have, social media and whatnot, which suggests that there might  
9 not be more in the other half that didn't respond, but the problem is as I sit here right  
10 now, I don't know that to be true. That's the problem.

11 MR. SGRO: I'm willing to table it 'til Monday.

12 THE COURT: Yeah, I mean, honestly, that's what we have to do is we have  
13 to -- we have to look at the panel. If you're right, if, you know, then we have a  
14 different thing. If you're wrong, if of the -- of the 70 or so people who didn't respond,  
15 if, you know, if there's 20 African-Americans, then obviously there's no need for an  
16 evidentiary hearing. But we don't know that is the problem.

17 MR. SGRO: Your Honor, we're absolutely on the same page. This whole  
18 motion is predicated on my best guesstimate of what we're going to have show up  
19 on Monday.

20 THE COURT: Right.

21 MR. SGRO: And if you -- if everyone wants to wait until Monday, then we'll  
22 approach the bench once everyone's here, we'll make our record, and at that point  
23 then, we would simply, if the Court was so inclined, we would adjourn at that point  
24 and -- and thereafter call the appropriate witnesses.

25 THE COURT: All right, Mr. Oram, you wanted to add something?



1 MR. ORAM: Yes, Your Honor. I think -- I understand what the Court is saying  
2 when the Court says it's two different issues is the representation of the whole panel  
3 underrepresented of African-Americans versus peremptory challenges. My concern  
4 is just the -- is sort of a whole process and I'd like to address it just briefly with the  
5 Court.

6 THE COURT: Well, let me just say this, there's one caveat to they're two  
7 things, in a way they're not because, and I actually had this happen in a case, I had  
8 a case once where for whatever luck of the draw reason, of the 24 people in the  
9 box, it wasn't a life-tail case, so we had 24 people in the box, literally, and I, you  
10 know, I kind of keep records of this, 21 of them were minorities of one kind or  
11 another. So they're interrelated in the sense of at that stage, you know, what  
12 actually happened in that case is the D.A. struck a couple minorities and the  
13 defense made a *Batson* challenge, and the obvious finding is if 21 of 24 are  
14 minorities, how can you not strike a minorities among your peremptory challenges  
15 that you have?

16 So the composition of the panel as a whole has some overlap with how  
17 the State exercises its strikes, and this was actually in a recent case, don't  
18 remember the name of it because I've read so many of them, where the Court said  
19 one of the things you have to look at in evaluating a *Batson* challenge is what is the  
20 composition of the panel as a whole. And what is the State doing with it?

21 MR. ORAM: And I think that was on females. Wasn't it? Was that what you  
22 were reading?

23 THE COURT: Yeah, I think it was, where the Court noted in that case, Look,  
24 there are so many --

25 MR. DiGIACOMO: John Watson.

1 THE COURT: -- females, how can you not strike --

2 MR. ORAM: Right.

3 THE COURT: -- any females? And so there's some overlap to the two  
4 processes, they aren't completely discrete in the sense of how the State exercises  
5 its challenges has to be assessed in the view of what the panel looks like as a  
6 whole.

7 MR. ORAM: And, Judge, what I was really going to say is that I was  
8 concerned, *Brass* was my case, and so when I argued that on appeal, it was that the  
9 judge didn't even want to hear, wouldn't even hold the hearing about what the  
10 race-neutral reason was before he let the juror go. My concern is, and I did argue  
11 the case with Mr. DiGiacomo that has been -- Mr. Sgro's referred to where it was a  
12 African-American male accused of murdering two non-African-American  
13 male-females, and we essentially end up -- and Mr. DiGiacomo and I can go back  
14 and forth and we did in front of the Supreme Court on basically, pretty much an  
15 all-white jury who was trying to determine whether this man should be sentenced to  
16 death.

17 And it causes me concern, not at this point, but when I see Mr. Sgro  
18 telling me, based on the media, social media, that we're really underrepresented,  
19 what I'm really concerned of, Judge Tao, is that at the end, when we're swearing in  
20 this jury, that we end up really with an underrepresentation or no African-American  
21 jurors. And that to me would cause me great concern. And that's why I think,  
22 Judge, we definitely want to bring this to the Court's attention early on so that we are  
23 pounding a drum.

24 Mr. Burns does have a right, since his life is on the line, I guess  
25 everybody else does as well who's going to trial, to have a cross-section of the

1 community. And it's something we just want to bring to the Court's attention early  
2 on and often.

3 THE COURT: All right. So here's what I'm going to do, I mean, honestly, I  
4 consider it premature, I know you're making representations, but I don't have that  
5 information. As far as I can tell, it does appear that about nine of the 70 who  
6 responded -- 70 or so, I don't remember the exact number, are African-Americans.  
7 But I have no data on the other half of the panel. So there isn't even a *prima facie*  
8 case. For all we know, you know, if it turns out, you know, whatever the numbers  
9 are on Monday, we'll go from there. But at this stage, there's honestly nothing I can  
10 do because I don't know what the panel is based on -- at least the way they filled out  
11 their questionnaires. It would have been nice if they all filled that out, but they didn't.  
12 And that leaves us with an evidence gap here.

13 All right, so --

14 MR. DiGIACOMO: Judge, I have a little more information on your other trial.  
15 Mr. Sweetin has just told me that Mr. Fumo got a federal order to be in trial next  
16 week.

17 THE COURT: A federal order?

18 MR. DiGIACOMO: Yes.

19 THE COURT: They can do that? I'd like to do that.

20 MR. DiGIACOMO: Yeah, well, if you were a federal judge.

21 MR. MARCELLO: And Your Honor, I'm doing the trial with him, it's actually an  
22 in-custody, invoked federal trial scheduled on the same date as this trial. The  
23 government had moved to continue it and the -- and that's why we thought we were  
24 going to announce ready today. The judge denied the order and said we're going to  
25 trial, so.

1 THE COURT: Oh, okay. You know what, let me call that case then, let's do  
2 that.

3 [Proceeding trailed until 11:24 a.m.]

4 THE COURT: So, let's go back to State versus David Burns and Mr. Mason.

5 All right, so here's the situation, we've got -- I mean, let me just ask you  
6 procedurally, we've got all these motions that, like I said, have been kind of  
7 submitted in the last couple of days. You want to just -- since we now don't have to  
8 worry about that other case, which makes it a little easier, do you want to just -- do  
9 you want me to just technically calendar everything for Thursday? I know on some  
10 of them you guys already filed responses even though they're not sort of filed yet,  
11 you want to just to set them all for argument on Thursday? Or what do you want to  
12 do?

13 MR. DiGIACOMO: Set them all for Thursday, we will get responses on  
14 anything that's left out there done today.

15 THE COURT: Okay.

16 MR. DiGIACOMO: And we will provide the courtesy copies to the Court and  
17 send it over to the defense.

18 MR. ORAM: Can we do it at 10:00 o'clock?

19 MR. DiGIACOMO: And just --

20 THE COURT: I think we actually have it set at 11:00 because I think we have  
21 a -- don't we have a 10:00 o'clock?

22 THE CLERK: We have a 10:00 o'clock revo.

23 MR. ORAM: So 11:00 o'clock?

24 THE COURT: 11:00 o'clock, but let's sort of, between us --

25 [Colloquy between the Court and the Clerk]

1 THE COURT: Let's make it 10:30 because it sounds like it's a one witness  
2 revo, but it's definitely going, so it hopefully --

3 MR. SGRO: Your Honor, there's a -- a motion that was filed on an order  
4 shortening time, if the Court will recall, and this is scheduled for 11:00, which is why  
5 I bring it up, on Thursday. The Court signed an order for the Jury Commissioner to  
6 do the background checks because of that holding --

7 THE COURT: And they filed a motion to strike that, which honestly, I knew it  
8 was coming because frankly, we discussed this last week, there's no way they could  
9 do that in the amount of days that they had.

10 MR. SGRO: Right, and as we discussed, this is based on a brand new case,  
11 looks like a new procedure, and so that's going to dovetail -- that did dovetail into  
12 one of the motions for Thursday, which is the motion to have the State either provide  
13 us all the background checks or not do them at all, and we'll talk about it on  
14 Thursday. I bring that up because it's for 11:00 a.m. So I don't -- just as a  
15 housekeeping matter, we're going to be here at 11:00 anyway if you want us to just  
16 come at that time.

17 THE COURT: Let's, since we have so many motions, and I had a 10:00  
18 o'clock set which is why I set the other one at 11:00, but it sounds like the 10:00  
19 o'clock's not going to take an hour, so why don't we just make it at 10:30?

20 MR. SGRO: Okay.

21 MR. DiGIACOMO: Set everything that they've filed for that date?

22 THE COURT: Yeah, we'll just everything at 10:30. We'll leave that other one  
23 on at 11:00 just 'cause, you know, we'll probably still be here at 11:00. But it  
24 doesn't, yeah, in my mind, it doesn't really matter as long as everybody's here at  
25 10:30 and then we can, you know, start cycling through them because there's a lot

1 of stuff to get through here.

2 So, all right, so one of the --

3 MR. DiGIACOMO: One of the --

4 THE COURT: -- things that's out there is you said, Mr. Sgro, is you  
5 apparently just received a couple of thumb drives, you're going to look through that  
6 the next couple of days?

7 MR. SGRO: Apparently I've got one.

8 MR. DiGIACOMO: The other one is the rest of the videos that are -- that's  
9 burning on my computer right now. Mr. Langford had everything. But I could only  
10 do one at a time, so I did Mr. Langford's first because he got me the thumb drives  
11 first. I gave Mr. Sgro everything but the last six videos which is 30 gigabytes worth  
12 of information and it's burning on to his 32 gig drive right now. But he has all the  
13 paper and everything else that he requested again, I submitted it back over to him.

14 MR. SGRO: I'll be able to report to you on Thursday. I'm going to take this  
15 back to the office now. I'll report to you by Thursday. If there's anything I think I'm  
16 missing --

17 THE COURT: Okay.

18 MR. SGRO: I do have two housekeeping things. There was an individual  
19 named Kevin Boles, B-O-L-E-S, just says F.B.I. agent on Friday. We have nothing  
20 relative to that witness. I don't know if he's an expert. Typically F.B.I. agents come  
21 into cases like -- well, it's relevant because it was Friday and our trial is scheduled  
22 for Monday, so there may be a timing violation. And I need to know --

23 THE COURT: I don't know who this person is why I'm shrugging. I literally  
24 have no -- I've never heard that name before.

25 MR. DiGIACOMO: I don't know that his name is listed in any of the discovery.

1 There is a reference when Mr. Burns is captured by I think it's off -- Detective Vasek  
2 in San Bernardino. He is assigned to the Inland Empire's version of the CAT team.  
3 And so he's an F.B.I. agent that's assigned to the CAT team and we have no  
4 additional --

5 THE COURT: Did he write any reports or anything?

6 MR. DiGIACOMO: -- reports or anything that relate to him, but in case  
7 Mr. Vasek or Detective Vasek wasn't available for how it is Mr. Burns is taken into  
8 custody, that's what the F.B.I. Agent Boles was noticed for because he was involved  
9 in trying to locate and take Mr. Burns into custody.

10 MR. SGRO: So then if that's the case, he'd be timely. I just, usually F.B.I.  
11 agent in a case like this is cell phone --

12 THE COURT: Yeah, they're usually experts.

13 MR. SGRO: Right.

14 THE COURT: But, yeah.

15 MR. SGRO: Right, so I just wanted to make --

16 THE COURT: But he's not.

17 MR. DiGIACOMO: No, no.

18 THE COURT: Sounds like, so, yeah.

19 MR. DiGIACOMO: He's not an expert, no, no. He's not an expert.

20 MR. SGRO: Okay.

21 THE COURT: So let me, the other thing, Mr. Langford, you said you have  
22 another motion to sever which you intend to file, any chance you can file that today  
23 and we'll -- or tomorrow and we'll address on Thursday?

24 MR. LANGFORD: Yes, I also have a motion --

25 THE COURT: Because I don't -- I know we talked about it, but I don't

1 specifically know what you're going to say in it.

2 MR. LANGFORD: Yes, Your Honor, I certainly can file that.

3 THE COURT: Okay.

4 MR. LANGFORD: I believe I'll be able to file that today. I have another  
5 motion that I'm filing today, a motion to suppress my client's statement. Again,  
6 some of these things, I came in, unfortunately, I had misimpressions, I don't want to  
7 say misstatements made, but misimpressions about the trial readiness of my case  
8 and what had been done. In reviewing things, I discovered that no motion to  
9 suppress my client's statement had ever been made. So I began that yesterday  
10 morning. We should have that ready this afternoon to file with the court. So --

11 THE COURT: All right, well --

12 MR. DiGIACOMO: Judge, just to be clear, much like I opposed the --  
13 Mr. Burns' motion in limine number one, even though it's a motion to suppress a  
14 photo lineup, as just a motion in limine, we will waive any time defects as it relates  
15 their filing of a motion to suppress, and in fact, if we can, and we believe there  
16 needs to be an evidentiary hearing, which I don't know if there does or doesn't  
17 based upon the information that I currently have, but if we do, we'll make the  
18 witnesses show up on Thursday and we can handle it right then and there Thursday  
19 afternoon, if the Court wants to so that we can handle all the matters we can  
20 possibly handle before Monday morning.

21 THE COURT: All right, let's do it that way. If you already know where he's  
22 going with it, because I -- this is the first I've heard of it.

23 MR. DiGIACOMO: I don't know where he's going with it.

24 THE COURT: Okay.

25 MR. DiGIACOMO: But I'm assuming when I see it, usually that requires a



1 hearing or at the very least, the Court's going to have to receive the audiotape of  
2 Mr. Mason's statement and review it.

3 THE COURT: How long, just so I know, for timing purposes, how long is his  
4 audiotaped statement? Is it like hours long or is it 15 minutes? Ballpark it because  
5 I'm going to have to listen to it.

6 MR. SGRO: For which, Your Honor?

7 MR. LANGFORD: The statement of my client?

8 THE COURT: Yeah.

9 MR. SGRO: It's about an hour and 16 minutes, I believe.

10 THE COURT: Oh, so that right there is going to take -- is it all, I mean, are  
11 there gaps in it that you can sort of skip over? Or is it literally an hour talking that  
12 I'm going -- I'm just, in my own mind, just trying to plan out --

13 MR. LANGFORD: Well, we'll reference --

14 THE COURT: -- how much time.

15 MR. LANGFORD: -- to the transcript the multiple times that my client says, If I  
16 say anything it's going to be used against me. I don't want to talk, get me a room. A  
17 variety of things that indicates he clearly didn't want to answer questions. And they  
18 continued asking questions and they should not have.

19 And also Mr. DiGiacomo's saying, We'll waive any time, it's a  
20 constitutional issue. Two minutes before a cop takes the stand, I'm sorry, but that's  
21 the state of the law, two minutes before the cop takes the stand, I'm like, oh, my  
22 goodness, this is a constitutional issue. I have a duty to raise it when I discover it.  
23 You know, shame on me for waiting, I apologize to the Court for that, to the State.  
24 At the same time --

25 THE COURT: No, I understand, you got into this case mid-stream, so, all

1 right, well, I guess we'll address that all on Thursday.

2 MR. SGRO: One final -- one final housekeeping --

3 MR. DiGIACOMO: There's a couple things I have.

4 MR. SGRO: Okay. Mine's very brief, on Friday, October twenty -- I don't  
5 even remember the date, the first Friday --

6 MR. DiGIACOMO: 24<sup>th</sup>.

7 MR. SGRO: It's the 24<sup>th</sup>, okay.

8 MR. DiGIACOMO: Correct.

9 MR. SGRO: I have contacted the State and I've contacted Mr. Langford and  
10 recognizing that I know the -- the dates may be subject to change based on what  
11 happens Thursday, but presupposing we start Monday morning with this case, I  
12 have another matter that I need to attend to personally and it's on the afternoon of  
13 the 24<sup>th</sup>. I was going to ask the Court if the Court would entertain adjourning at the  
14 midday point on the 24<sup>th</sup>.

15 And I ask that because we'll want to let the jurors know what's going on  
16 with the calendaring. But the State has no objection nor does co-counsel.

17 THE COURT: Do you guys have a position? It's --

18 MR. DiGIACOMO: We have no objection, that's fine with the State.

19 THE COURT: You know, honestly, on things like that, if we're really going to  
20 spend three, four weeks together, I'm fine with taking half days. Probably, frankly,  
21 the jury probably appreciates it. I know we talked about some other dates which  
22 we're going to have to be dark. We have that weird Tuesday, Veteran's Day, and  
23 we all talked about being dark on that Monday which I think makes sense.

24 MR. ORAM: Yes.

25 THE COURT: And then the other thing is the day before Nevada Day, I need

1 to be dark also because of some prior commitments. And frankly, the other thing is  
2 I'm guessing, because that's a long weekend, jurors might be heading out of town.

3 MR. SGRO: What's the -- what's the Nevada Day --

4 THE COURT: So, these little breaks might actually make it easier to pick --

5 MR. DiGIACOMO: The 31<sup>st</sup> is Nevada Day, so the 30<sup>th</sup> is the Thursday.

6 THE COURT: The 30<sup>th</sup> is a Thursday, and then we're all agreeing that  
7 Monday, the 10<sup>th</sup> will be dark. That might actually make it easier to pick jurors  
8 because those are the days when jurors might have -- may have plane tickets or  
9 something.

10 MR. SGRO: And Thanksgiving week was another issue that came up in the  
11 questionnaires.

12 THE COURT: Yeah.

13 MR. SGRO: We're dark that whole week, right? I think Mr. Langford's  
14 actually going to be out of town.

15 THE COURT: From what I understood before, I'm not sure we're going into  
16 that week. But I don't know if we are or not because that's actually going to be, one,  
17 two, three, that would be the sixth week of trial. Are we actually going that long?

18 MR. DiGIACOMO: Yeah, I mean, the issue was, I think, Judge, is if we get  
19 through guilt and the jury takes a while on guilt.

20 THE COURT: Yeah.

21 MR. DiGIACOMO: And then ultimately we're not going to start a penalty  
22 Monday, Tuesday and then expect a jury to be here the Wednesday before  
23 Thanksgiving.

24 THE COURT: Yeah, we're talking about doing the penalty phase, like, the  
25 week after.

1 MR. DiGIACOMO: So we'll do the penalty the week after Thanksgiving only if  
2 we get there.

3 THE COURT: Yeah, and that's assuming we even run into the sixth week of  
4 this thing, which, I mean, you never know how it's going to but --

5 MR. LANGFORD: As to Thursday, this Thursday, Your Honor, I have to leave  
6 the courtroom at 12:30. So, I mean, we could recess until, if we are still going, I'd  
7 ask if we could recess from 12:30 until 2:30, but I have an appointment that it takes  
8 eight weeks to get the kind of appointment I got, and I apologize. It wasn't going to  
9 interfere until we reset this.

10 THE COURT: Right. I mean, we'll have to do what we can. The problem is I  
11 have a jury trial now which everyone is anticipating we might be doing closings on  
12 Thursday afternoon. So that's the one thing that might blow it up. Now, obviously,  
13 what we can do is, we'll have to see how it goes, in fact these are the defense  
14 lawyers on that case right now. If it's still going then, if we're not done by then, then  
15 obviously we can do the closings, send the jury out, and we can sort of resume then.  
16 But I can't tell you what time that's going to be. You know how it goes with closings,  
17 I just -- I just can't promise you what time.

18 MR. DiGIACOMO: What does your Friday calendar look like, Judge?

19 THE COURT: Friday, this Friday, I don't actually have a calendar this Friday.  
20 I suppose we could do it on Friday. Well, let's --

21 MR. DiGIACOMO: I mean, let's start Thursday, but obviously, like, if we have  
22 to run into an evidentiary hearing for Mr. Langford's motion or something, maybe the  
23 Court could do that, or we could bring the jury in at -- wait, you are a  
24 Monday-Wednesday criminal calendar, aren't you?

25 THE COURT: No, Tuesday-Thursday.

1 MR. DiGIACOMO: Tuesday-Thursday? So maybe Monday morning we  
2 could finish up what else we needed to do and bring in the jury Monday afternoon.

3 THE COURT: Yeah, I mean, that's the thing is, what I did is,  
4 Monday-Wednesday is normally my civil day, but I doubled up my civil day so that  
5 I -- my civil calendars on Wednesdays are sometimes twice as long. But we can  
6 start anything we need to start on Mondays. That gives us some flexibility. You  
7 know, if there's any leftover stuff we can do that and have the jury come in at 12:00  
8 o'clock or 1:00 o'clock, whenever. But let's see what we can do on Thursday, and  
9 that'll give me a couple of days to read over this -- the pile of stuff that you guys  
10 gave me yesterday, which, literally, I glanced at it last night because I was picking  
11 the jury yesterday, so I kind of have an idea of what it is, but I haven't studied it,  
12 read any of the cases. I obviously haven't seen your responses yet either. So this  
13 will give me a couple days to sort of catch up to where you guys are. So I guess  
14 we'll take a shot on Thursday and see where we stand then, all right?

15 MR. SGRO: And finally, Your Honor -- I'm sorry, finally, Your Honor, we do  
16 have -- I've heard a couple times at the last hearing and at this hearing that they're  
17 going to waive some timing issues, and I just want to make sure that's still -- we  
18 have two witnesses we're endorsing today, relative to eyewitness identification and  
19 relative to --

20 THE COURT: Two experts you mean?

21 MR. SGRO: Yes, sir. Two experts and neither of them are persons they have  
22 not encountered before in this district court. It's not going to come as a surprise to  
23 them. But based on the opposition we got and the motion to suppress eyewitness  
24 identification, I think now they've become more relevant.

25 THE COURT: All right. Do you know what he's talking about and are you

1 waiving the timeliness?

2 MR. DiGIACOMO: Well, we'll have to see the notices and then we'll make  
3 some sort of determination. But if they make the notices today, we can address that  
4 on Thursday.

5 MR. SGRO: Yeah, that was my --

6 MR. DiGIACOMO: Mr. Oram had told me that he was supposed to give me  
7 the underlying data for the mitigation today in court, I just asked Mr. Oram, he hasn't  
8 given it to us, in fact, we received no reciprocal discovery from either defendant at  
9 this point, and certainly we're not going to waive that. If they're not going to give it to  
10 us, we may be fighting at penalty phase that they don't get to get into it, so.

11 MR. ORAM: Well, Judge, let me address that because I actually reached out  
12 to Mr. DiGiacomo and told him last week that I had some reciprocal discovery for  
13 him. It's actually hundreds and hundreds of pages from California authority about  
14 Mr. Burns's background. I believe, because we will, in the event of a penalty phase,  
15 introduce this information that I have to turn that over to him.

16 That is all of the reciprocal discovery that I have. But it is hundreds and  
17 hundreds of pages. It's the background of Mr. Burns and how he grew up. And I did  
18 tell Mr. DiGiacomo I'd get it to him, I didn't think I said today in court, I said I thought  
19 it would be today, sometime during the day. My secretary had been out very, very ill  
20 in the last few days, so it may be a struggle. I'll reach out to Mr. DiGiacomo. This is  
21 not something that's going to be a difficulty for them in the next week or two, and  
22 they'll recognize what it is once they see it.

23 Additionally, I've looked over those discovery statutes very carefully,  
24 based upon reciprocal discovery and what it -- my -- the reading that I see of the  
25 statute is if I have statements of witnesses we intend to call during our case-in-chief,

1 that I have to turn it over. I know of none, we don't have any reports. But I do know  
2 that if I do --

3 MR. DiGIACOMO: They're going to call no penalty witnesses?

4 MR. ORAM: Yes.

5 MR. DiGIACOMO: And they have no statement of those penalty witnesses?

6 MR. ORAM: When Mr. DiGiacomo's saying that, let me -- let me tell again --  
7 tell you again, we may call witnesses that could be family members of Mr. Burns.  
8 They have made representations to me about what they would say, but it's not --

9 THE COURT: You're not going to have written statements, right.

10 MR. ORAM: And they know, I've done many trials with them, these are the  
11 type of people that say, you know, he had a bad childhood, please let him live, you  
12 know that kind of thing.

13 THE COURT: Right.

14 MR. ORAM: Okay. But we don't have anything like that, nor do I have any  
15 reports from anyone that I intend on calling. Does that statement make sense to the  
16 Court? In other words --

17 MR. DiGIACOMO: Can we have the underlying data then for their experts?  
18 Because they're noticed four experts for penalty.

19 MR. ORAM: Which ones?

20 MS. WECKERLY: On fetal alcohol that would have done testing in order to  
21 be relevant.

22 THE COURT: Yeah, if they wrote any reports, if you had them look at any  
23 data --

24 MR. SGRO: I'll take care -- I'll take care of that --

25 MR. ORAM: Can -- can --

1 MR. SGRO: -- but I don't want to interrupt the --

2 MR. ORAM: Can he -- Mr. Sgro is dealing with fetal alcohol. What were the  
3 other ones? Just so I --

4 MS. WECKERLY: There were two on that, there was one on the victim's  
5 injuries which I didn't know --

6 MR. ORAM: Oh, Mel Pohl has not written a report. He would just look at the  
7 overall case and the hospital records and draw opinions, but we haven't had -- we  
8 don't have a report, nor will I have him do a report.

9 MS. WECKERLY: Which victim?

10 THE COURT: But the stuff he looked at, is that stuff that everybody already  
11 has or not?

12 MR. ORAM: It's stuff the State gave us from U.M.C.

13 THE COURT: Okay.

14 MR. ORAM: The other thing, Your Honor, is the mitigation, we don't have our  
15 mitigation witness prepare reports. The underlying data that she may testify about is  
16 these hundreds of pages from the California authority that I would be turning over to  
17 Mr. DiGiacomo.

18 MR. DiGIACOMO: Did the mitigation expert interview any of the family  
19 members?

20 MR. ORAM: Yes.

21 MR. DiGIACOMO: And she didn't write down anything?

22 MS. WECKERLY: Entitled to her notes.

23 MR. ORAM: No.

24 MR. SGRO: No.

25 MR. ORAM: What we -- we have -- because we've had this problem in the



1 past, what we do, Judge, is my mitigation expert, when she -- if comes out and deals  
2 with person X, and person X says, X, Y, and Z, then she contacts my office and  
3 immediately tells my office. My secretary then drafts up an internal document for  
4 me. And I do that specifically to avoid having to turn it over. And the reason being,  
5 Judge Tao, if you wonder why do we do that, because I have argued vehemently  
6 against these prosecutors in the past. What happens is we're obligated to have a  
7 mitigation expert. In these type of cases, when your mitigation expert goes out and  
8 talks to family members, friends, oftentimes, they hear things that are very negative.  
9 And you can imagine, okay, not in this case, but Johnny, the defendant has skinned  
10 the family cat --

11 THE COURT: Right. They're telling you family secrets, sure.

12 MR. ORAM: And they can obviously be very devastating. So in order to  
13 avoid turning that over and essentially have our investigators become an arm of the  
14 State, what I do is I tell my mitigation experts, You make sure that you interview the  
15 person and immediately call my office and run down everything that they have said.  
16 And then I will then instruct them whether to go out there or whether I want to  
17 interview the people, which I have in this case interviewed the mitigation people  
18 based upon the notes that I have.

19 So there's nothing discoverable in that fashion. But I do recognize to  
20 avoid the fight that's coming, that I'm going to have to hand over what I would say is  
21 several hundred pages of California authority.

22 THE COURT: Al right, so, I mean, there's nothing to do here, you're  
23 essentially putting everybody on notice, that's what's going on, right?

24 MR. ORAM: Well, it was -- the State asked me for them today, and I honestly  
25 want to tell Mr. DiGiacomo, give me maybe even a little bit more time just because

1 my office staff is burdened. This is not something that I think he'll find --

2 MR. DiGIACOMO: If we can have 'em by Thursday, that'd be fine.

3 MR. ORAM: That's fine. I appreciate that.

4 MR. DiGIACOMO: He can bring 'em to court with him on Thursday. And if  
5 we need to litigate any of the other issues for penalty, we can do that at some point,  
6 but I'm not really sure if your witness or if your mitigation expert takes notes, or if  
7 your witness -- your mitigation expert calls his secretary and says, Hey, type this  
8 down, that there is a functional difference between those two because if she wrote  
9 'em down as a note, we'd be entitled to 'em. Calling his secretary and saying,  
10 Here's what this person said, and she types 'em up, I'm not sure that there's a  
11 functional difference between those two things.

12 MR. ORAM: Your Honor, we have --

13 THE COURT: I'm sure he's going to say it's privileged or attorney work  
14 product.

15 MR. ORAM: Right. And we have gone round --

16 THE COURT: But then you get into this whole issue of -- yeah.

17 MR. ORAM: We've gone the rounds, Mr. DiGiacomo and I have --

18 MR. DiGIACOMO: There's a thought process, yes.

19 MR. ORAM: -- bored more judges with this than you can possibly imagine.  
20 And this was my solution. I like to hear -- and we maybe we can do it another day,  
21 this is something for a penalty phase, we can do this at another time and go in the  
22 rounds. But what I've told the Court is what I have done and I'm telling the Court,  
23 honestly, I do it for that purpose so that I don't have to turn it over because I've  
24 complained to courts otherwise you're forcing me to hurt my client. Right?

25 THE COURT: Right. I understand. I understand why you do it, I mean, the

1 interesting legal issue, which I don't know because I haven't looked at attorney-client  
2 privilege or work-product law recently is whether if you -- if you have an expert just  
3 say -- instead of writing their own report, dictate it to the attorney, does that actually  
4 make it attorney work-product? I don't know the answer to that, maybe it does,  
5 maybe it doesn't. I'm sure there's got to be case law on that. But --

6 MR. ORAM: It'd be like an investigator.

7 THE COURT: -- my point is, I understand why you're doing that, I don't know  
8 that it actually works under the law, but I get where you're going with that. But I  
9 guess we'll have to -- essentially as we sit here right now, you know, I don't know  
10 that there's any motion.

11 MR. DiGIACOMO: There's nothing pending. We may --

12 THE COURT: You're essentially saying -- yeah, you're handing over the  
13 documents by Thursday, I guess we'll pick it up on Thursday if we have to, if we  
14 even have a motion by then. I don't know where this is going. But, yeah, I mean,  
15 other than that, you know, I guess we just -- essentially the bottom line is you're  
16 going to give 'em those hundreds of pages of documents by Thursday and we'll --  
17 when you look through 'em, I guess we'll see if there's a motion or anything that  
18 needs to be addressed, right?

19 MR. DiGIACOMO: Correct.

20 THE COURT: Is kind of where we stand?

21 MR. DiGIACOMO: Yes.

22 MR. ORAM: Yes.

23 THE COURT: Okay.

24 MR. DiGIACOMO: And then I just have a couple of final issues, one is on  
25 their motion in limine one through three, one is a motion to suppress one witness's

1 identification from a photo lineup.

2 THE COURT: Yeah, I saw that.

3 MR. DiGIACOMO: There wasn't an easy way to put a color copy.

4 THE COURT: I was going to ask for one. I'm glad you brought that up  
5 because I had the -- when I was going through the motion last night, it occurred to  
6 me I don't have a clean one, I just have the messy, third generation one that you  
7 can't see stuff on. Is this --

8 MR. DiGIACOMO: Even that, my printer wasn't fantastic on, but at least you  
9 get the --

10 THE COURT: It's better than the one I have, all right. That's helpful. Okay.

11 MR. DiGIACOMO: Yeah, the color copy of it.

12 THE COURT: Okay.

13 MR. DiGIACOMO: Judge, the other thing, and I -- and I don't mean to bring  
14 up a subject that we don't need to discuss, but I think the record needs to be made  
15 completely clear is there was some discussion I think at the last hearing as it relates  
16 to jail phone calls and some representations made by Mr. Oram and just so that --  
17 we don't need to go any farther, but I think in case we ever wind up in a place where  
18 there is a review of that, our office did an independent investigation, lack of a better  
19 term, by calling Captain Forbus at the jail who is the person who is charge of the  
20 Century Link or the inmate phone system and he was able to generate a report as it  
21 relates to this case under this defendant's I.D. number and determined that the two  
22 calls that I saw and that I told Mr. Oram about were the only two calls that Mr. Burns  
23 ever dialed Mr. Oram's number and that those calls have never been accessed or  
24 played.

25 The only other thing I would like to add, Judge, is that I looked on my

1 computer because I called Mr. Oram at the time period in which I was doing  
2 something that refreshed my recollection, I called Mr. Oram at 9:52 a.m. on  
3 October 3<sup>rd</sup> of 2014, and informed him that this phone number was not blocked at  
4 the jail. I have a record here of the jail that that phone number was unblocked and  
5 somebody called, I'm assuming this would be Mr. Oram's secretary, on October 3<sup>rd</sup>  
6 of 2014, at 11:25 and indicated that this was an attorney phone line, it was checked  
7 in the Nevada Legal Directory to verify it was an attorney phone line, and that was  
8 the first time that that phone line has ever been blocked by this calling system, and  
9 they had never been notified previously that this was an attorney phone line.

10 And so I brought that particular record with me. I told Mr. Oram this on  
11 Friday because there was some representations made that this number had always  
12 been blocked and that's what his secretary had found.

13 THE COURT: Can I get counsel to approach quickly?

14 MR. ORAM: Judge, I don't think --

15 THE COURT: Wait, wait, can I get you to approach?

16 [Bench conference -- not recorded]

17 THE COURT: All right, Mr. Oram, anything you want to add to that?

18 MR. ORAM: Yes, Your Honor. First of all, I'd just like to give some  
19 background to this. I work in the 520 South 4<sup>th</sup> Street office. It is occupied on the  
20 second floor by Goodman, Chesnoff, Palazzo --

21 THE COURT: Right.

22 MR. ORAM: -- Steve Stein, David and Jay Brown, numerous other attorneys.  
23 There's -- the number, the main number is 384-5563. For the last, as long as I've  
24 been in there, which is 20 years, that's the number you call. And everybody has that  
25 number in there. Then we have individual numbers that go, so if you want

1 David Brown or you want David Chesnoff, then the number goes from the  
2 receptionist to these 598 numbers. Mine has been 598-1471 for as long as I can  
3 recall. And so it would be astonishing to me to know that those numbers have not  
4 been blocked.

5 Now, what I would do, first of all, is thank the Court for the order where  
6 you've ordered the Metropolitan Police Department not to record that if they have. A  
7 couple of things, I've had many, many phone call cases, even with Ms. Weckerly  
8 and Mr. DiGiacomo, where my number has not come up with one exception. And so  
9 I wanted to notify the Court, when the Court said on page 3 of the order, on line 21,  
10 and you go on before that, but you say, Especially when defense counsel apparently  
11 took no steps to investigate the matter or seek corrective action in any other case.

12 Your Honor, that -- if I could just give a little bit of background, be very  
13 quick, I had a case maybe ten years ago, all I can remember for the life of me was  
14 the defendant's nickname was Mannish, it was a double homicide, I do remember  
15 that Karen Winckler represented the man in federal court. They dismissed the  
16 double homicide and there was a companion Crip case, a big gang case in federal  
17 court. Somebody, who I don't even -- can't even tell you, called me up and said, I've  
18 heard you talking to Mannish on the jail. It was just something that put a red flag up  
19 and there was no court -- controversy for me to go into.

20 Then in I think 2006, I see a homicide detective who has a disk and tells  
21 me, these are your phone calls on it. This was upsetting to me, and this was a case  
22 against Ms. Weckerly and there actually were hearings about my phone calls and  
23 three-ways and so at that point I thought, Okay, you know, for sure, they are aware  
24 of my phone number because there were many hearings.

25 And so I would, if the Court was inclined, now that I've told the Court

1 that, to maybe take out that part, amend the order saying that I've never had  
2 hearings. There were many hearings on that matter. And the State, there was an  
3 independent person who listened to these three-ways, just to make sure the  
4 defendant didn't confess on these three-way calls. So there have been hearings.

5 Now, since this time that I was talking the other day, I've learned from  
6 the Public Defender and the Special Public Defender that they're having problems  
7 with recordings. And so I don't think -- I think Mr. DiGiacomo may be somewhat  
8 inaccurate, we did call over, and he's right, that Ms. Jessie Vargas, did call over  
9 there and there was some confusion as to whether it was blocked. So I appreciate  
10 the court order.

11 I have never heard that my number has not been blocked before. We'll  
12 make sure that it is, and I'll take every precaution as I have done in the past. I don't  
13 know what else to say. But I was just a little concerned. One other thing --

14 THE COURT: Yeah, I'm happy to do that. I didn't, you know, obviously, I  
15 didn't know that. I, you know, you heard what I --

16 MR. ORAM: Yes, I heard.

17 THE COURT: I was trying to, you know, I was concerned about what you  
18 were saying on the record, that's why I was trying to, without saying it, desperately  
19 trying to get you to stop talking last week because what I was hearing, I was  
20 thinking, you know, this may be going someplace where I didn't know if you knew  
21 where you were going.

22 MR. ORAM: And I have, Judge. And the other thing I do want to tell the  
23 Court, I don't know if I gave the wrong impression, I didn't want a continuance from  
24 it. When I see that in the order --

25 THE COURT: No, no, no, no, no. That's not -- that's not, I mean, well, there's

1 a couple things going on. That order kind of conflated a bunch of stuff. I don't know  
2 that we need to spend a bunch of time on this because the record is what it is.

3 MR. ORAM: We don't. We don't.

4 THE COURT: But there were -- there was a whole -- based on what you said,  
5 because I'm actually pretty familiar with some aspects of attorney-client privilege  
6 law, there's actually a case in front of the Ninth Circuit, I don't remember the  
7 disposition, the issue was when an attorney uses Gmail to contact with his clients, is  
8 that even privileged because when you do sign up for a Gmail account in the terms  
9 of service, one of the sentences is, We own your -- Google owns your e-mails and  
10 they can use it for marketing, research purposes. And the issue is, is that a waiver  
11 of privilege on every e-mail you ever send to every client.

12 And it went up to the Ninth Circuit. And I don't remember the  
13 disposition, but it was a big issue. I mean, obviously it was a very controversial one  
14 because tons of attorneys use their phones and stuff to contact people, but the rule  
15 is, if you don't take steps to ensure that you're using a confidential means of  
16 communication, you've waived the privilege whether you wanted to or not, and  
17 opened yourself up to a ton of stuff.

18 And so, I appreciate your clarification that you have. I'm happy to do an  
19 amended order based on the information that I have now --

20 MR. ORAM: Yes.

21 THE COURT: -- to clarify that.

22 MR. ORAM: And can --

23 THE COURT: But that's one -- but, you know, one of the reasons for that  
24 order is, look, if this is happening, it needs to stop now to ensure that every  
25 conversation you have at least now, is fully privileged.



1 MR. ORAM: And, Judge, one other matter, I don't actually make phone calls  
2 to the jail, never. I don't have the ability to do this, and when the call comes in to me  
3 sitting in my office, I don't know if it's come through 384 or 598. If one of those are  
4 not somehow recognized, then everyone in my building, you've got some of the --

5 THE COURT: Right.

6 MR. ORAM: -- top criminal lawyers in that building.

7 THE COURT: Oh, I know how your building works. You get that main  
8 switchboard thing --

9 MR. ORAM: Right.

10 THE COURT: -- and you don't know where the phone -- where the phone call  
11 is routed after that.

12 MR. ORAM: Where it's coming from.

13 THE COURT: Yeah.

14 MR. ORAM: And if it isn't, then, I mean, I would need to alter people in my  
15 office, Hey, we've got to do something.

16 THE COURT: Right.

17 MR. ORAM: In general. But I appreciate the Court sending that order to --

18 THE COURT: Yeah, I'm happy to change that sentence. I'd forgotten that  
19 sentence was even there. But based on the record that's been made, I'm happy to  
20 strike that and I'll do an amended order off of that. Okay?

21 MR. ORAM: I appreciate it. Yes, Your Honor, thank you.

22 THE COURT: All right. I guess I'll see you guys on Thursday, and you know,  
23 like I said, it'll give me a couple days to read all the stuff that you guys just filed.  
24 And we'll pick it up then, all right?

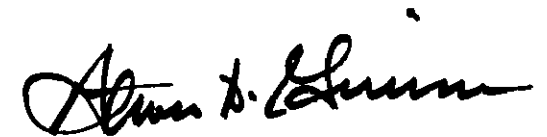
25 MR. DiGIACOMO: Thank you, Judge.

1 PROCEEDING CONCLUDED AT 11:53 A.M.

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-  
22 video recording of this proceeding in the above-entitled case.

23   
24 SARA RICHARDSON  
25 Court Recorder/Transcriber



CLERK OF THE COURT

RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

WILLIE DARNELL MASON and  
DAVID BURNS,

Defendants.

CASE NO. C267882-1

C267882-2

DEPT. NO. XX

BEFORE THE HONORABLE JEROME T. TAO, DISTRICT COURT JUDGE

MONDAY, OCTOBER 20, 2014

**RECORDER'S TRANSCRIPT OF PROCEEDINGS**  
**ALL PENDING MOTIONS**

APPEARANCES:

For the State:

MARC DiGIACOMO  
PAMELA WECKERLY  
Chief Deputies District Attorney

For Defendant Mason:

ROBERT L. LANGFORD, ESQ.

For Defendant Burns:

CHRISTOPHER R. ORAM, ESQ.  
ANTHONY P. SGRO, ESQ.

RECORDED BY: SARA RICHARDSON, COURT RECORDER

1 LAS VEGAS, NEVADA, MONDAY, OCTOBER 20, 2014, 10:10 A.M.

2 \* \* \* \* \*

3 THE COURT: All right, this is State versus Willie Mason and David Burns,  
4 C267882. Both of the defendants are present in custody with their attorneys. We're  
5 here to kind of clean up some of these left over motions. Anything that you guys  
6 want to address before get started with the motions?

7 MR. DiGIACOMO: Not from the State.

8 MR. SGRO: I don't think so, Your Honor.

9 THE COURT: All right. Some of these motions may or may not even be valid  
10 any more, but, all right, I don't know, any particular motion -- order that you want to  
11 do these motions in? It doesn't really matter to me, but --

12 MR. SGRO: I only have 'em in the order we filed 'em in and I think some of  
13 'em we've had some discussion about, I think we just need to get a ruling for the  
14 record. So the first one I have, Your Honor, is the motion to disclose the payments  
15 to any witnesses from the State.

16 THE COURT: Right.

17 MR. SGRO: The State had indicated they didn't oppose it. Where we left off  
18 was we just want to make sure that their -- their suggestion was that they hadn't  
19 paid anyone.

20 THE COURT: Yeah, well, I'm pretty sure they said that last, whenever it was,  
21 Thursday, that he said it on the record that there weren't any payments that at least  
22 that you knew of, right?

23 MR. DiGIACOMO: Correct. They attached the articles concerning a  
24 particular account that is used for relocation of witnesses. That account has  
25 expended no funds in this case.

1 THE COURT: Okay.

2 MR. SGRO: And obviously, Your Honor, we don't have the wherewithal to  
3 know every account from which money may be drawn. All I'm looking for,  
4 Your Honor, is if -- the distinction between we haven't paid anyone versus we  
5 haven't paid anyone that we need to disclose statutorily. If they're saying blanket  
6 we haven't paid anyone, then that's fine. I just don't want to get into the semantics  
7 of whether or not they're making representation because some statute they believe  
8 affords them protection to say we're just not paying someone that you need to know  
9 about.

10 THE COURT: All right.

11 MR. DiGIACOMO: We're fully aware of our *Giglio* and *Brady* responsibilities.  
12 If there comes a point in time where there's something that relates to *Brady* or  
13 *Giglio*, we're certainly not going to sit down and figure out statutorily -- statutory  
14 witness fees. But certainly if we compensate somebody in order to get their  
15 cooperation for their testimony, we will provide it. It's somewhat premature now that  
16 we're three months away from trial. But, I mean, to that extent, we will abide by an  
17 order that provides them *Giglio* material.

18 THE COURT: Anything else you want to add or no?

19 MR. SGRO: One of the issues was payment to witnesses for coming to their  
20 office to be pretried, none of which was mentioned in that dissertation. Again, all  
21 I'm looking is for clarity. If they've haven't paid anybody any money, then we're fine.  
22 We can move on to the next motion. If they do pay someone at any point between  
23 now and trial, so long as they disclose it, we're also fine. That's all I'm looking for,  
24 Your Honor.

25 THE COURT: All right, anything you want to add to that or no?

1 MR. DiGIACOMO: Just that I can tell the Court that certainly since the office  
2 changed their interpretation of the statute, that no witness was compensated outside  
3 that statutory framework. The -- there's been no audit done and I'm not aware if  
4 anyone's ever been paid for a pretrial or not in the history of this case. Certainly we  
5 could litigate whether or not it's *Brady* or *Giglio* material as to whether or not you pay  
6 somebody a witness payment for coming down for a pretrial or not, but I'm not  
7 aware of any. But I also didn't cause the office to conduct an audit of prepolicy  
8 change because I consider that a statutory fee, and the office considered it a  
9 statutory fee. To the extent that their non-statutory fees, we will certainly comply  
10 with any directive of the court.

11 MR. SGRO: So then I have to file a motion, Your Honor, to compel the  
12 disclosure of the fees that they claim they're not entitled to disclose. Now we're  
13 finally at the heart of the motion, which I'm happy to do, Judge. We'll take it up a  
14 different time, a different day.

15 THE COURT: All right, here's what I'm going to do just to expedite things, all  
16 right, I understand that this is an issue that's been in the press and there's been  
17 policy changes and whatnot, and I don't know what the effective date of those policy  
18 changes are on a case like this where the alleged offense happened several years  
19 ago. Here's what I'm going to do, and I'm not -- obviously not sure how this is going  
20 to play out because obviously because it's an issue that's been in the press, the  
21 Supreme Court hasn't done anything with it yet, so I'm not sure that the pay -- even  
22 in the, for example referring to the newspaper articles, if the alleged payment were  
23 things like, you know, rent payments and those kinds of things, I'm not sure that's  
24 going to play out because this is sort of one of those developing issues.

25 Here's what I'm going to instruct the State to do, I'm going to instruct

1 you to at least contact VWAC and see what payments were made. If we're limited  
2 to just, you know, the usual 20 bucks or whatever it is nowadays to come in get  
3 pretried, I mean, that's something that everybody has known about, the defense  
4 bar's known about that, it's a policy that's been in place for, I want to say decades,  
5 but I'm not even positive of that, at least for -- at least for a decade, I know that for a  
6 fact. And I don't know that that creates any kind of issue. But if there were  
7 additional payments beyond just your usual 20 bucks to come in and -- in response  
8 to a subpoena or come in and get pretried, here's what I'm going to do, I'm going  
9 to instruct you to at least inquire of VWAC whether any additional payments like that  
10 were made and if there were any, at least submit them to me *in camera* so I can see  
11 what they are.

12 Because as I said, I don't know exactly what the Supreme Court's going  
13 to do with it, but if in fact there are no such payments other than the 20 bucks -- is it  
14 20 bucks or 45? I don't even know what it is any more. I know it changed --

15 MR. DiGIACOMO: I think it's 20 -- it was 25, I believe. I think it's been 25 --

16 THE COURT: Okay.

17 MR. DiGIACOMO: -- for years, plus mileage, so maybe it gets to 28. Does  
18 your order include out-of-state witness travel expenses? Because that's the other  
19 thing I don't know in this case --

20 THE COURT: Oh, yeah.

21 MR. DiGIACOMO: -- if we have an out-of-state witness.

22 THE COURT: Yeah, I'm presuming, I mean, again, that's something that's  
23 been done for at least a decade. I don't think that you guys are surprised that  
24 they're paying for people's plane tickets and hotel stays and those kinds of things,  
25 right? You're really talking about other things like rent assistance and I can't

1 remember what the other stuff the newspaper articles talked about. So, no, it  
2 doesn't cover -- basically where I'm going with this is it doesn't cover the things that  
3 everybody's known about for ten years, the 20 or 25 bucks a day plus travel fees  
4 and hotel rooms for out-of-state witnesses. But anything other than that, at least  
5 inquire of VWAC whether any payments like that were made. You can submit them  
6 to me *in camera*. I'm not sure that those things are actually illegal, I know there's  
7 been discussion, but, you know, it's an issue that's sort of developing, submit them  
8 to me *in camera* and then I'll kind of see what there is.

9           If there isn't anything that makes it easy. But, you know, we don't want  
10 this to be one of those things where -- I guess what I'm concerned about is if down  
11 the line there was something like that, I mean, the easiest thing is there wasn't  
12 anything like that, but say there's rent assistance or something like that, if in fact the  
13 Supreme Court, I don't know, in the next year or so says, oh, yeah, that stuff is, you  
14 know, it's -- it's -- it has certain implications, then we at least want to avoid having a  
15 retrial because of an issue that the Supreme Court --

16           MR. DiGIACOMO: Sure.

17           THE COURT: -- hasn't yet ruled on that suddenly we just sort of screwed up  
18 this whole trial is really where I'm going with that. So let's at least see what there is.  
19 If you can make that inquiry and, you know, like I said, submit 'em to me sealed  
20 *in camera*, I'll look at it and see if there is such a thing, then we'll go from there. And  
21 if there isn't, obviously, I'll, you know, I can -- I'm happy writing an order saying,  
22 look, there is nothing, the D.A.'s made representations, looked into it, *et cetera*,  
23 *et cetera*, but let's at least see what we're looking at, all right?

24           MR. DiGIACOMO: Sure.

25           MR. LANGFORD: Your Honor, just wanted to make sure, I have formally filed



1 a joinder to Mr. Sgro's motions.

2 THE COURT: Right.

3 MR. LANGFORD: My only concern is, you know, mileage is 56 cents a mile  
4 at this point, the I.R.S. allows 56 cents a mile, that adds up pretty quickly. And if  
5 you're doing multiple pretrials, it starts to be, you know, several hundred dollars. So  
6 I'm still, I mean, I don't want to beat a dead horse, I think I understand the Court's  
7 meaning, but I think there's still a way for the State to be able to give substantial  
8 sums of money to witnesses and say, oh, all we did was have 'em come in for a  
9 pretrial and we paid 'em mileage on top of that.

10 THE COURT: Yeah, but the difference is you know that. So you know how to  
11 ask them that on cross-examination. What I'm talking about are things that no one  
12 would have known about like the things that came out in the paper, rent assistance  
13 that no one even knew to ask the questions. If you know that they're getting paid 25  
14 bucks a day and you know they're getting paid mileage, you can certainly ask the  
15 witnesses either in your own pretrials or at trial, hey, you know, how many trips did  
16 you make? If you know where it's going, then you certainly know enough to ask  
17 cross-examination. The issue, at least from the newspaper articles is they didn't  
18 even know to ask the question because no one knew they were doing that.

19 MR. SGRO: And, Your Honor, again, for the record, this is another issue  
20 because -- and as the Court points out, it's developing, are we as defense attorneys  
21 allowed to make the same offer of the \$25.00 a day to invite these witnesses to  
22 come and pretrial with us at our office?

23 THE COURT: I'm not sure what you're asking for, you're asking for an  
24 advisory ruling on something you haven't done yet?

25 MR. SGRO: No, no, Your Honor, I'm suggesting that we won't -- in order to

1 be on a level playing field, the order I'm seeking from the Court is an order  
2 permitting us to pay the same witnesses the \$25.00 fee.

3 THE COURT: I'm not, again, I'm not sure what you're asking for, you're  
4 saying, I mean, if you want to --

5 MR. SGRO: Right, here's what we don't want to do, Your Honor, and this is --  
6 this is an issue that's relatively hot right now amongst defense attorneys, if we were  
7 to -- let's just -- Donovan Rowland, who is a witness in this case, can we pay him for  
8 coming to our office and not have any aspersions cast on us for attempting to  
9 influence testimony, bribe, that sort of thing? That's the -- that's the thing that we're  
10 seeking. So I guess, I'm not asking for an advisory ruling, I'm asking for a ruling that  
11 it's okay, or alternatively, that the State has no opposition to such a procedure.

12 MR. DiGIACOMO: Well, I believe our office policy is that we no longer pay for  
13 pretrials, Judge, so if Mr. Sgro wants to agree to allow the witnesses to be paid for  
14 pretrials, that's a whole different story. But I think, essentially, what Mr. Sgro is  
15 making an argument that the Court doesn't need to rule upon.

16 THE COURT: Yeah, I'm not sure what you're -- I mean, here's really where  
17 I'm going with that is, are you saying that if I say it's okay to do so, you're actually  
18 going to start doing that? Because if you're not going to start doing that, you are  
19 literally asking for an advisory opinion on something that's never going to happen.

20 MR. SGRO: No, Your Honor, I -- let me -- let me try to be a little more clear. I  
21 want to just do whatever the State's going to do. So if these two prosecutors are  
22 going to say that in this case they aren't paying their witnesses to come in for  
23 pretrials, then we're not going to pay, like we always have never paid, and  
24 everyone's on the same playing field. And so with that representation, then we're  
25 fine.

1           If the -- if these prosecutors, in this case, were going to pay for pretrials,  
2 then we would have a different issue. So given the -- the representation of  
3 Mr. DiGiacomo just made, I think there's no issue.

4           THE COURT: All right. Next motion is --

5           THE CLERK: Is that granted?

6           THE COURT: Yeah, that motion's granted with the additional *proviso* of the  
7 *in camera* review.

8           Next one is the motion for disclosure of materials and facts relative to  
9 future prosecutions of State's witnesses pursuant to *Giglio*, anything that we actually  
10 need to address -- are you talking about something in particular or what?

11          MR. SGRO: Very briefly, Your Honor, there's two witnesses in the case that  
12 have had criminal charges with the inception of the case and then one who's picked  
13 some up along the way.

14          THE COURT: Okay.

15          MR. SGRO: Cornelius Mayo, Your Honor, is the victim's significant other, as  
16 you know, because we've discussed it several times, he picked up an abuse and  
17 neglect charge.

18          THE COURT: Right.

19          MR. SGRO: And I think some other drug-related charges, if my memory's  
20 correct. And that case has been constantly continued contemporaneous with this  
21 case. So he's had a -- a case I think in justice court for about four years. And I  
22 believe at one point the State represented to Mr. Oram that there was going to be  
23 some *Giglio* material coming as to Mr. Mayo, we just haven't received it yet.

24                 So if we could have representations from the State on what, if any,  
25 benefit Mr. Mayo has received and what, if any, benefit Mr. Rowland has received.

1 And then, of course, there's Monica Martinez whose -- whose N.C.I.C. we're going  
2 to ask the State to produce, given the whirlwind of activity that happened on  
3 Thursday. It's just something we haven't had done yet.

4 THE COURT: All right, State, any response?

5 MS. WECKERLY: With regard to Mr. Mayo, his cases have been continued  
6 by the agreement of the State.

7 THE COURT: Okay.

8 MS. WECKERLY: That's the benefit.

9 THE COURT: I mean, here's the thing is, you know, we're still, as it is now,  
10 we're a couple months away from the trial date, so, you know, things could happen.  
11 I mean, honestly, what I was going to do with this one is kick it over to the calendar  
12 call or something --

13 MS. WECKERLY: That's fine.

14 THE COURT: -- because, you know, for all you know, you guys are, you  
15 know, as you made reference to, there may be other offers out there to other  
16 witnesses like Stephanie Cousins or the codefendant here, you never know, things  
17 may change. So I don't know that you need a ruling now on it, right?

18 MS. WECKERLY: We don't. And it's a trial right anyway, so --

19 THE COURT: Yeah.

20 MS. WECKERLY: -- as long as they get it for use at trial, it doesn't really  
21 matter.

22 THE COURT: I mean, they have the continuing *Giglio* obligation anyway.

23 MS. WECKERLY: Sure.

24 THE COURT: So I don't know that you need a specific ruling. So honestly,  
25 I'm just going to kick this one 'til calendar call, or if there's another specific thing that

1 happens, like if they flip another witness between now and the calendar call, we can  
2 obviously put it on calendar earlier and readdress it is where I was coming from on  
3 that one.

4 MS. WECKERLY: Thanks.

5 THE COURT: Does that satisfy you, Mr. Sgro?

6 MR. SGRO: Calendar call is fine, Your Honor.

7 THE COURT: Yeah, and again -- again, if something comes up where you  
8 believe something specific has happened, you can put it on calendar before that and  
9 we'll address it, if that's too late, all right?

10 MR. SGRO: Sure, calendar call's fine.

11 THE COURT: Then we have the motion to sever or in the alternative, request  
12 for a new venire. I don't know if this is even still a motion that you -- that's -- that's --  
13 that you want rulings on now considering what's going on or not. But --

14 MR. SGRO: We don't.

15 THE COURT: Okay.

16 MR. SGRO: I don't on behalf of Mr. Burns.

17 MR. LANGFORD: Yeah, I'm in the same boat, Your Honor.

18 THE CLERK: So that one's off calendar?

19 THE COURT: Yeah, I guess we'll deem it withdrawn then, right?

20 MS. WECKERLY: Withdrawn.

21 MR. SGRO: Yes. Yes, sir.

22 THE COURT: All right. We've got, let's see, motions in limine number one  
23 through three which are --

24 MR. SGRO: One -- one of them is that no one refer to Assembly Bill 444,  
25 which was not opposed.

1 THE COURT: Anything to add? I gather that --

2 MR. DiGIACOMO: Well, when you say un -- when I say it's unopposed, it's  
3 unopposed assuming the defense doesn't open the door to something --

4 THE COURT: Sure.

5 MR. DiGIACOMO: -- in some manner. Certainly we're not going to present  
6 anything in our case-in-chief related to A.B. 444.

7 THE COURT: Right, and that's the overarching thing on any motion in limine,  
8 whether it's a civil or criminal trial is, you know, you ask for a ruling on something,  
9 but if the other side opens the door, it's a whole different ball game as you guys  
10 should know, right?

11 MR. SGRO: Right, and this would be for penalty, Your Honor, not for -- I don't  
12 expect they're going to get into it at trial. This would be for penalty.

13 THE COURT: All right. Were you guys planning on talking about this during  
14 the penalty phase?

15 MR. DiGIACOMO: No, when I say case-in-chief I meant case-in-chief in  
16 penalty.

17 MR. SGRO: I'm sorry, then I mis --

18 MR. DiGIACOMO: I don't --

19 MR. SGRO: -- understood.

20 MR. DiGIACOMO: I certainly wasn't planning on talking about it in the guilt  
21 phase at all.

22 THE COURT: Right. All right, so that's granted as unopposed. Number two,  
23 motion in limine to preclude law enforcement from giving lay witness testimony as to  
24 identity of the suspect on the surveillance video. And so this one is basically, if you  
25 are saying -- essentially what you're saying is you don't want the police officer

1 saying, Yes, the person in the video matched the person who's sitting in court today.  
2 The State's opposition is essentially saying that, look, that's -- if -- if however, they're  
3 basing their in-court identification of something on a video based on their interaction  
4 with a suspect four years ago, that's a different thing, right?

5 MR. DiGIACOMO: Correct.

6 THE COURT: All right, anything you guys want to add to that?

7 MR. SGRO: Well, Your Honor, I believe we're entitled to an evidentiary  
8 hearing to allow us to develop the record that this police officer or these police  
9 officers that they intend to have identify Mr. Burns on a video, had no interaction or  
10 knowledge with -- about him prior to seeing him on the videotape and the inception  
11 of this case.

12 In other words, we believe the *Rossana* case, which we cited in our  
13 brief, stands for the proposition that the identification on the video by someone  
14 would be attendant to someone that had prior knowledge and experience of the  
15 individual that they're identifying, they use a change of circumstances. I think there  
16 was weight loss or weight gain. They had cut their hair. They had glasses on, that  
17 sort of thing.

18 It is universally accepted that the police officers pointing to the video  
19 tape and saying that's the -- that's the guy or that's the girl is extremely prejudicial.  
20 Without the predicate that we believe the *Rossana* case calls for, we -- we would  
21 submit, Your Honor, it's overly prejudicial and should not be allowed, which is why  
22 we sought an evidentiary hearing.

23 THE COURT: All right, State, your response?

24 MR. DiGIACOMO: Yeah, multiple things, I don't know why it is they'd be --  
25 they'd be entitled to an evidentiary hearing. The parties can all agree that Mr. Burns

1 is five years older now, his hair is significantly different. But most importantly, the  
2 detectives that will be asked about the video had contact with him four and a half  
3 years ago.

4           And what *Rossana* says doesn't say you have to have a whole bunch of  
5 contact before you see the video, it's just you had to have contact at the time with  
6 the individual that was on the video. And they're going to be the only witnesses, the  
7 jury's not going to be able to draw the inference -- or the conclusion that this person  
8 sitting here looks exactly the same as he did four and a half years ago. He has a  
9 different hairstyle. He's certainly significantly older.

10           And as I cited, what *Rossana* actually for is that exact proposition that if  
11 it's going to help the trier of fact to draw the conclusion based upon a reasonable  
12 inference based on personal experience of the witness, they're allowed to testify to  
13 it. And these witnesses all saw the defendant four and a half years ago, all saw him  
14 with the hairstyle that he had on the video and are going to be able to make the  
15 conclusion that he's the person who's on the video.

16           THE COURT: All right. First of all, I'm not sure that the *Rossana* case  
17 requires an evidentiary hearing. I'm not sure what the point of an evidentiary  
18 hearing is. It's not, you know, it's not a deposition. The purpose -- an evidentiary  
19 hearing has to have a point which is I'm making some ruling on something. If the  
20 police -- and this is the kind of, exactly the kind of thing that happens at trial, if the  
21 police officer -- I agree with the defense in that police officer would be intruding on  
22 the jury's role if his only role is to say, yeah, the guy sitting there looks like the guy  
23 on the video, clearly that's the -- one of the ultimate issues in the case, and the jury  
24 can do that as well as anybody.

25           If, however, they have an independent basis that the jury doesn't have



1 for making an ID based on their prior interactions with the suspect, if they're able to  
2 say, and the State's going to have to lay a foundation for this, based on my, you  
3 know, I interacted with the defendants four years ago in such and such place and  
4 they look a little different today, but in fact, the people on the video were -- do look  
5 exactly like the person that I met with four years ago in the police station or  
6 wherever, then that's something that the jury wouldn't have a basis for and that's the  
7 kind of thing that, according to the *Rossana* case, they can testify to because it is  
8 outside of the jury's -- it's outside -- it's beyond the capability of what the jury can do  
9 in the courtroom. And it is helpful to the trier of fact.

10 So the issue is obviously, you know, as I sit here right now, I can't make  
11 a definitive ruling because it depends on whether or not the State can lay a  
12 foundation that the officer has a basis for giving that testimony or not. If the only  
13 basis is, yeah, that guy sitting there looks like the guy on the video, then the  
14 objection would be -- by the defense would be sustained if the State can lay a  
15 foundation that they had a basis that they met these people four years ago, and I've  
16 read the paperwork, but obviously I haven't heard from the witnesses yet, but if they  
17 can lay a foundation that, yeah, I met him four years ago, and at the time, looking at  
18 the video, it looked exactly like them, if you can lay that foundation, then they can  
19 certainly answer that question. All right?

20 MR. SGRO: Your Honor, just -- not that I'm going ask for a response or  
21 anything, I will supplement the motion then just to include Mr. Burns's booking photo  
22 because I think reasonable minds can disagree as to whether or not he looks  
23 different at all. He is definitely older, right, because time has gone off the calendar.

24 THE COURT: Well, and people in C.C.D.C. just change. They're on a  
25 different diet, I mean, we've all seen it a million times, but, yeah.

1 MR. SGRO: We have. I'm going to submit to Your Honor, that if you look at  
2 his booking photo, I'm not sure you're going to notice a marked change. But I just  
3 wanted to alert the Court, I'll just supplement it, just with his booking photo. I don't  
4 need the State to do any response. And that's just to -- so we have it for when we're  
5 at trial, Your Honor.

6 THE COURT: All right.

7 THE CLERK: It's deferred to trial?

8 THE COURT: It's deferred to trial so long as the State can lay a foundation  
9 and -- with those parameters.

10 The next one is the motion to preclude the State from admitting the  
11 six-pack photo lineup of David Burns signed by Devonia Newman and to preclude  
12 the in-court identification of Burns by Newman.

13 All right, anything you guys, Mr. Sgro, anything you want to add?

14 MR. SGRO: No, I --

15 THE COURT: Honestly, let me just make a tactical, not a legal observation, I  
16 mean, considering that the person only said they're ten percent sure, I'm not sure  
17 why you don't want this in, but that's a tactical observation, not a legal ruling, but  
18 anyway.

19 MR. SGRO: Because my experience is that that ten's going to increase  
20 dramatically once -- by the time we get through a couple pretrials and we have her  
21 testify. That's why. And it is in fact for that exact reason, the exact reason that the  
22 Court just pointed out, if I was confident she was going to stay at ten percent, I  
23 would withdraw this.

24 THE COURT: Well, but even if she doesn't, what you get to do is you get to  
25 point out, oh, at the time four years ago it was ten percent, now it's a lot more

1 positive than that. I mean, that's what cross-examination is for.

2 MR. SGRO: Right, I get to -- I get to beat up a 16-year-old who when she  
3 was 12 saw her mother get shot and then got shot herself in the stomach. That's  
4 not an extremely appealing option to me, Your Honor.

5 What I'm suggesting to the Court is that there a lot of studies and a lot  
6 of research done about the solidification that occurs. When Ms. Newman comes  
7 into court, there will be two African-American males. So ten percent necessarily  
8 increases to a 50-50 shot if she's asked to point to anyone in the courtroom. Now I  
9 hate to use this euphemism, but if I get lucky, for lack of a better term, she picks the  
10 wrong defendant, then that's fine. But if I am unlucky, you know, she's got a  
11 one-in-two chance. So the motion is drafted such that we are entitled to rely on the  
12 uncertainty of her identification as opposed to the solidification of that identification  
13 once she comes into court.

14 And I'll submit it on that, Your Honor.

15 THE COURT: All right. Anything to add by the State?

16 MR. DiGIACOMO: Only that the procedure itself has to be unduly suggestive  
17 in order for you to exclude the testimony. And so I've supplied a copy for the record  
18 of the color copy of the lineup. And upon my review, there's absolutely nothing  
19 improper about the lineup and I would note that they don't even argue really, other  
20 than some minor things, that there is anything improper about the lineup itself. They  
21 basically are relying upon the witness's statements, which is not something the  
22 Court can consider in making the determination. You have to decide is the lineup  
23 valid or not valid. If the lineup's valid, the testimony comes in.

24 THE COURT: Right. I understand what Mr. Sgro's doing, he's kind of  
25 merging the two things, and I understand why because there's the -- there's a whole

1 bunch of psychological studies on, you know, the six-pack photo lineup then what  
2 happens later on in court a couple years later. But you are kind of -- the problem is,  
3 I understand where you're going with the psychology of it, but the problem is now  
4 you're sort of merging two things, the in-court ID and the previous photo six-pack ID.  
5 So I'm not exactly sure, legally, which one you're more concerned about.

6           Your motion was directed to the six-pack. But your argument today  
7 was more like -- more about the in-court identification. So you are -- and I'm not  
8 saying I don't understand why you're doing that because I understand what you're  
9 concerned about, but in terms of a legal ruling, you are sort of bunching the two  
10 things together when at least in the eyes of the law, if not in the eyes of a  
11 psychologist, they're two different things. So what is it that you are actually focusing  
12 on? Because your oral argument today is not exactly the same as what was in your  
13 brief.

14           MR. SGRO: Yes, sir. So the -- the motion in limine sought both things. And  
15 obviously, the Court's correct, they are two different things. With respect to the  
16 six-pack, the photographic lineup, I think the Court has a color copy of it.

17           THE COURT: Right.

18           MR. SGRO: I'll simply state the following, Your Honor, the unduly  
19 suggestiveness of the photograph deals with the coloring of the -- so you have four  
20 people in the six-pack that are blue. Their pictures are larger. Their headshots are  
21 larger. The two -- the two in the middle are some sort -- I guess a discolored brown  
22 background. Their heads are smaller. And one of the two men is smiling who's in  
23 the brown.

24           So our position, Your Honor, is that it's unduly suggestive relative to the  
25 way the photos are positioned, the size and the different color. And again, the Court

1 touched on this, the psychology of it is you have bright blue versus that discolored  
2 brown is what I'm calling it, which tends to -- tends to foster the eye to go towards  
3 the middle of that lineup. And given Ms. Newman was only ten percent sure, we  
4 believe that that's *indicia* of her uncertainty, and that is *indicia* of the suggestiveness  
5 having caused her to focus on the two photos that are in the middle. And so that's  
6 relative to the six-pack, Your Honor.

7           With the respect to the in-court identification, I think I've previously  
8 addressed those with respect to our concerns.

9           THE COURT: All right. I'm looking at the photo lineup and for the record,  
10 these are going to be in the record anyway, but there are six people on these -- in  
11 the photo lineup. Four of them do have blue backgrounds, the four kind of on the  
12 left column and the right column. The two in the center are of -- do have a -- I'm not  
13 sure what that color is. It is kind of a -- it's a version of tan or brown or something  
14 like that.

15           I'm not sure I agree with you that of the two people in the tan lineups in  
16 the middle one of them is smiling. In fact, they both look like they're not smiling. It  
17 looks like the one -- there are some who are smiling and some who aren't. One and  
18 four who are blue backgrounds look like they're smiling, but the others don't look like  
19 they're smiling. So I'm not even sure which one on the tan background you believe  
20 is --

21           MR. SGRO: May I approach very briefly? I don't have that in front of me.  
22 May I approach very briefly?

23           THE COURT: Sure.

24           MR. SGRO: Can I see which one? Okay.

25           THE COURT: So I'm not sure -- I'm not sure I agree with you that -- that one

1 of the two in the tan background is smiling. It looks like they're both not smiling  
2 actually. It looks like of the six people in the photo lineup, four of them are not  
3 smiling and two of them are. Do you disagree?

4 MR. SGRO: You're right, Your Honor, it was the -- the smile was something  
5 that I had noticed previously. The hair is different. The -- one of the driving  
6 components in this case relative to identification is the bushiness of the assailant's  
7 hair. And I believe the one in the top photo has the braids. The one with ostensibly  
8 Mr. Burns's photo depicts the big bushy hair. That -- that was the mechanism, there  
9 were two significant mechanisms of identification in this case. One was a piece of  
10 clothing that has been attributed to Mr. Burns which is a pair of overalls.

11 The second most compelling point of identification in the case is the  
12 bushiness of the assailant's hair. And if you look at that, Your Honor, in the brown  
13 photos or the dirty brown, whatever they are, only Mr. Burns of the two has the  
14 bushy hair, which I believe, after pretrialing Ms. Devonian Newman, the victim in this  
15 case, I believe that's going to be what led her to -- to lead -- lead her to that photo.

16 THE COURT: All right. Well, in looking through the photo lineup, it is a little  
17 bit different that two people are -- have brown backgrounds whereas the other four  
18 have blue backgrounds. But -- and I would be a lot more concerned if the defendant  
19 were the only person with a brown background, but there's at least one other person  
20 with a brown background, and they're arranged such that the entire middle column  
21 is essentially a brown background.

22 Referring to the bushy hair, I mean, of the six people in the photo  
23 lineup, five of them have bushy hair. There is one person who has -- it looks like, I  
24 can't tell quite if they're braids or if it's just more of an unkempt kind of thing, and I'm  
25 referring to number two. The copy -- I have two copies here of varying quality, and

1 it's kind of hard to tell, but there's at least some bushiness to it.

2 But anyway, so my point is, I would be a lot more concerned if the  
3 defendant were the only person with the brown background. There's a ton of case  
4 law that that's almost presumptively illegal. But in this one you have six photos  
5 arranged by column. Two of the columns you can have the blue backgrounds. The  
6 middle column is the brown backgrounds. I'm not sure I agree with you that this is  
7 unduly suggestive in the sense of, you know, when I was looking through this, I'm  
8 not sure that my eye was necessarily drawn to any particular column given the way  
9 that it's arranged.

10 If it were arranged more asymmetrically, I -- I think I'd be a lot more  
11 inclined to have some concerns about this, but the way it's arranged it's kind of  
12 symmetrical. And I know it's kind of hard -- I don't -- I don't know if it's -- if I'm  
13 putting this on the record very clearly so that anyone reading this would understand,  
14 it's sort of hard to describe when you're talking about arrangements of photos. But  
15 given that it's symmetrical and there's more than one person with a brown  
16 background, I'm not sure that I agree with Mr. Sgro, so based on that the motion is  
17 denied. And then I'm not even sure if your motion even covered the in-court  
18 identification or if you're just sort of throwing that in there to explain the impact of  
19 these -- of prior out-of-court identifications.

20 MR. DiGIACOMO: Well, once you deny step number one --

21 THE COURT: Right.

22 MR. DiGIACOMO: -- then step number two becomes irrelevant because it  
23 has to be based upon a violation of step number one, the in-court identification is not  
24 based on independent evidence.

25 THE COURT: Well, and the other thing is, the in-court identification hasn't

1 happened yet, so, and we don't know what, you know, what they're going to be  
2 wearing on those days and where they're going to be sitting and all that kind of stuff.  
3 So, all right. Is that all the motions? Or was there another one? Let me flip back to  
4 my index here.

5 MR. SGRO: There's --

6 MR. DiGIACOMO: There's the background checks on jurors.

7 MR. SGRO: -- the background check, so -- on the jurors, Your Honor, so as  
8 the Court --

9 THE COURT: So essentially what you're asking for is, I mean, essentially  
10 this, in a sense it's moot because we're going to start with a whole new panel  
11 anyway.

12 MR. SGRO: Yes, sir.

13 THE COURT: But essentially what you're asking for is if the D.A. does a  
14 background check on the prospective jurors that they give you the results; is that  
15 really what you're after?

16 MR. SGRO: Right. I think the case calls upon us to do a couple different  
17 things to make sure we're on the same playing field. So if the State --

18 THE COURT: Well, the dissent certainly did. I'm not sure the majority did.  
19 But the dissent of --

20 MR. SGRO: No, well, I guess the majority --

21 MR. DiGIACOMO: Right, the case actually concludes it.

22 MR. SGRO: -- the majority says the reason we are voting this direction is  
23 because you defense attorneys have a number of mechanisms you can employ to  
24 be on the same playing field. And so they do the footnote where they say, for  
25 example, you could ask the Jury Commissioner for them, and we saw what that



1 resulted in. So --

2 THE COURT: Well, honestly, and, you know, that's one of those things where  
3 honestly, I read the case, I read the footnote, but as a practical matter because the  
4 case just came out, what, like, two weeks ago, the Jury Commissioner isn't geared  
5 up for anything like that. That's just -- it's impossible to do at this -- at this date.  
6 Maybe six months from now it's a different ball game, but that's -- that's exactly one  
7 of the problems with brand new cases is the Jury Commissioner just doesn't have  
8 the resources right now.

9 MR. SGRO: Right. I understand, Your Honor, but we did what we thought we  
10 needed to do.

11 THE COURT: Right.

12 MR. SGRO: So we did the Jury Commissioner scenario, it did not pan out.  
13 So now I think we go to step two, which is we get a representation from the State,  
14 and Mr. Oram and I have personal experience where the State has gone out and an  
15 run SCOPEs during, I think it was during jury selection, and it was a mechanism by  
16 which they justified a peremptory in a case that I'm thinking about. The bottom line  
17 is this, if the State runs any sort of SCOPE or N.C.I.C. or does any background  
18 investigation, we would just like it because we don't have the access to do it. So if  
19 the State doesn't do it, and they affirmatively represent such, then we're fine. If the  
20 State does it and agrees to give us a copy in advance of trial of whatever they do,  
21 we're also fine.

22 So I think this is simply step two after we saw the difficulty inherent in  
23 trying to get the Commissioner to do the background checks.

24 THE COURT: All right, State, your position?

25 MR. DiGIACOMO: Judge, if you read the case as opposed to the footnote, it

1 actually says, and I will tell you that we were arguing this in front of the  
2 Supreme Court, and I can tell you that the justices that dissented were the ones that  
3 were giving us the issue in the last oral argument. But it says, quote, Most courts  
4 have held that in the absence of a statute or rule mandating disclosure, no such  
5 disclosure obligation exists, and then goes on, the holding of the cases, if policy  
6 considerations dictate that defendant should be allowed to see prosecution  
7 developed jury dossiers, then a court rule should be proposed, considered, and  
8 adopted in the usual manner.

9 THE COURT: Right.

10 MR. DiGIACOMO: Such a formal rule-making procedure is implicitly  
11 authorized by N.R.S. 179(a).107(j) and better suited to the job of assessing the  
12 scope of the disparity, the impact on juror privacy and interest, the need to protect  
13 work product, practicality, and fundamental fairness in this case with its limited  
14 record and arguments. The case essentially says no, and then the footnote says  
15 here's all the possible ways that a rule might work --

16 THE COURT: Right. This is where I was coming from, I read the footnote,  
17 and in a -- in a, literally speaking, you're right. Here -- this is where -- this where I  
18 was coming from, just so you guys know, look, there's things that we do in death  
19 penalty cases that we might not do in, like, a stolen car case or some, you know,  
20 little burglary case for obvious reasons, first of all, because of what's at stake for the  
21 defendants, but also because of what's at stake for the victims and their families,  
22 and, you know, the relatively severe nature of what's going on for everybody.

23 In that case, it was a four-to-three opinion. So my thinking was, look, all  
24 you need is one justice to flip -- to find some factual difference in this case or some  
25 factual difference in that case, and now you're looking at a possible reversal and

1 doing this trial over again. So it was sort of like err on the side of caution, let's see if  
2 the Jury Commissioner can do it, they obviously couldn't. Really, that's where I was  
3 coming from.

4 If this were a P.S.V. case or some a, you know, some burglary case, I  
5 wouldn't even go there, I'd say, yeah, that's what the Supreme Court has said, but  
6 the concern is in a death penalty case they're going to look at it a little bit more  
7 carefully, and all you need is one justice to find some factual glitch in there. And  
8 that's why I at least signed that order and, you know, at least put that process in.  
9 Now, obviously, as a practical matter, it didn't happen, not sure what to do with it  
10 now. But that's kind of my thinking on this is, I don't want this case to be the one  
11 where the one where that one justice flips and, you know, finds some factual  
12 distinction. That's really where I was coming from on it.

13 Now, where that goes, as a practical matter, not sure. But any way, just  
14 to let you -- I'm giving you kind of a window into my thinking on that, but anyway, go  
15 ahead, Mr. DiGiacomo, you can finish.

16 MR. DiGIACOMO: Well, yeah, I mean, obviously, in fact, the Court will recall,  
17 I didn't oppose them --

18 THE COURT: Right.

19 MR. DiGIACOMO: -- getting the order from the Jury Commissioner, if they're  
20 willing to do it.

21 THE COURT: Right, sure.

22 MR. DiGIACOMO: I hadn't read the case. But now that I've read the case,  
23 this is pretty clear that the Supreme Court wants to sit down because of all these  
24 competing interests and craft out a rule, and in fact, that's what the oral argument  
25 was, and that was a capital case we were making this argument.

1 THE COURT: Right.

2 MR. DiGIACOMO: And it was those dissenting, three dissenting justices and  
3 that oral argument happened before this case came out.

4 THE COURT: Right.

5 MR. DiGIACOMO: And so it's pretty clear that the Court wants to consider all  
6 of that by way of a court rule, and absent a court rule, they don't want district courts  
7 issuing orders to -- to anybody, particularly even the State to give over SCOPES.  
8 And I can tell you that argument was about SCOPES, but there's a lot of other  
9 databases that that argument turned into and Justice Douglas and Justice Cherry  
10 narrowed it down to what about just SCOPE.

11 And I'm not sure after reading N.R.S. 179.100 whether or not a court  
12 order to the Commissioner was lawful or not after reading the statute. And so the  
13 position that the State's going to take on this particular case is, is, look, the Supreme  
14 Court has spoken in black and white that says we're going to sit down and do a  
15 court rule, and absent a court rule, this shouldn't happen, so we oppose the motion  
16 in its entirety at this point.

17 THE COURT: Right. I understand.

18 MR. SGRO: Your Honor --

19 THE COURT: And I understand that's literally what it says. I understand that  
20 that is what four justices said, and it is what the footnote says. But, I mean, you  
21 know where I'm coming from and hopefully you can appreciate it.

22 MR. DiGIACOMO: Sure.

23 THE COURT: Is, you know, no one wants to do this trial twice, especially  
24 since we're looking at a possible six-weeker and, you know, if we do it twice, it's  
25 going to be four years from now and now everyone's, you know, the crime's going to

1 be eight-years-old. So it's sort of, you know, out of an abundance of caution, I'll give  
2 'em that order and see where it goes. It didn't go anywhere, but, all right.

3 Here's what I'm going to do, I'm not, you know, I know that, the extra  
4 thing that plays into this, even though it's a death penalty case is you can't really --  
5 even if you run an N.C.I.C., you can't really turn that over. What other databases  
6 are you even talking about, by the way, if you don't mind my asking as a factual  
7 thing?

8 MR. DiGIACOMO: As a factual thing, I mean, a lot of these are public  
9 records.

10 THE COURT: Right, sure.

11 MR. DiGIACOMO: But, you know, there are LexisNexis databases, there are  
12 Westlaw databases, there is voter registration --

13 THE COURT: County recorder, County -- okay.

14 MR. DiGIACOMO: -- databases. There is --

15 THE COURT: But the only on that --

16 MR. DiGIACOMO: -- D.M.V. databases --

17 THE COURT: -- the only one that -- I know but hang on, but the only ones  
18 that they wouldn't have access to because, you know, we can all search assessor's  
19 records, recorder's records, that kind of thing, what are the ones that they don't have  
20 access to? Is it just SCOPE and N.C.I.C.? Or is it something else?

21 MR. SGRO: Yes, sir.

22 MR. DiGIACOMO: No, there's all JusticeLink databases that are associated  
23 with investigative. So there's SCOPE, there's N.C.I.C., there's D.M.V. records,  
24 there's -- not that we've searched -- I don't think I've ever searched anything other  
25 than SCOPE for a juror personally, but law enforcement has a number of databases

1 available to it, all of which fall under the N.C.I.C., slash, SCOPE, slash, criminal  
2 history rules that some prosecutor may decide that they want to, for whatever  
3 reason, look at, and there shouldn't be a court order that precludes it. We have our  
4 own operating agreements with the people --

5 THE COURT: Right.

6 MR. DiGIACOMO: -- who handle those. And those operating agreements  
7 control what the prosecutor does and doesn't do. I mean, we are a branch of  
8 government that is involved in a lot of things, and, you know --

9 THE COURT: Right.

10 MR. DiGIACOMO: -- making some sort of post *ad hoc* determination as to  
11 whether or not a particular database was accessed or not is problematic which is  
12 also something that we had a discussion with the Supreme Court about is how is it  
13 you're going to know that a particular running, if you find out later on, of a particular  
14 individual was related to the investigation of a criminal case or was related to the  
15 fact that they were a juror on a case because the name being run is not going to be  
16 under mine, it's going to be under an investigator. So then we're going to have a lot  
17 of issues as it relates and they need to have a procedure in place to, okay, look, this  
18 is who was run, this is the information that was gotten, this was submitted  
19 *in camera*, there was a lot of issues that relate to just simply, Hey, State, did you  
20 turn this over?

21 MR. SGRO: Your Honor, may I briefly --

22 THE COURT: Sure.

23 MR. SGRO: -- interject here? The one factual distinction here, Your Honor, is  
24 that Mr. Burns has the misfortune of having two court-appointed attorneys that don't  
25 have access to SCOPE. Okay, and I think that's a big deal for this case. If we

1 worked in the Public Defender's office --

2 MR. DiGIACOMO: They would not have access to SCOPE.

3 THE COURT: Yeah, they don't.

4 MR. SGRO: Well, I thought they did.

5 THE COURT: They used, nope, they used to, but they don't now.

6 MR. SGRO: Well --

7 THE COURT: They haven't for several years now.

8 MR. DiGIACOMO: I think when Dave Roger took office, Dave Roger became  
9 aware that they had access to a criminal database in violation of N.R.S. 179.100;  
10 and therefore, there is no longer --

11 THE COURT: But the bottom line is --

12 MR. DiGIACOMO: -- I believe that there is no --

13 THE COURT: -- at least for several years --

14 MR. DiGIACOMO: -- non-law enforcement agency that currently has access  
15 to SCOPE.

16 THE COURT: Yeah, I know for a fact that at least for several years the P.D.'s  
17 office has not had access to SCOPE.

18 MR. SGRO: You know, I'll just say this, Your Honor, this particular fact  
19 pattern, I don't -- I was, obviously, unaware that they don't have it any more. If they  
20 have had it in the last four years --

21 THE COURT: Nah, it's been a lot longer than four years, I can tell you that. I  
22 don't know if it was when Dave Roger took over or not, but it's been a lot longer than  
23 four years that they haven't had it.

24 MR. SGRO: Well, Your Honor, I think in an abundance of caution, I think  
25 when you're looking at this, when we're only suggesting that we only get what they

1 get, what you would have going to the Nevada Supreme Court is a record that says,  
2 Hey, the defendant's attorneys tried the Jury Commissioner route, it was somewhat  
3 of a cluster and it was unsuccessful, for good reasons. Then the defense attorneys  
4 asked to simply get a copy of whatever the D.A. did, that too was denied. In other  
5 words, what I'm suggesting is for so little we can avoid so much down the road.

6 THE COURT: All right, here's what I'm going to do, I'm not going to order that  
7 the State can or can't do any particular investigation with any -- with regard to any  
8 jurors, they can do whatever they want to do, maybe they -- maybe they'll  
9 investigate a juror, maybe they won't. I know it comes down to, you know, time and  
10 all that kind of stuff. If, I'm going to order that if you run SCOPE or N.C.I.C. of any  
11 prospective jurors, okay, you can't turn over the printouts, I know it because of  
12 privacy things, but if it turns out that one or more of the prospective jurors has either  
13 been arrested, charged, or convicted of a crime, and you find that on N.C.I.C., at  
14 least turn over the dates of the conviction and the case numbers to the defense.

15 That's something that we would cover during verbal *voir dire* anyway.  
16 One of my standard questions is anyone ever been accused of a crime whether or  
17 not there was a result in conviction. So in theory, if everybody's answering truthfully,  
18 we would all have that information anyway. But you know, if you're going to know  
19 that before I even ask that question, you know, all you're doing is you're getting the  
20 same answer they would have given, you're just getting it a little bit earlier, and if --  
21 and if you have that information that they have been convicted of a crime in Nevada  
22 or another state, if they've been charged with a crime and the case was dismissed  
23 or denied in screening or something like that, at least give that -- if you do that  
24 search, and I'm not ordering that you do it, if you do that search, give that  
25 information to the defense. Because like I said, it's not information they wouldn't



1 have had anyway, they'll just get it at the same time that you guys get it.

2 MR. SGRO: Your Honor, the -- I hate to keep throwing these wrinkles in,  
3 the -- the search that was done was relative to a work card in the case that we had  
4 before, and the juror in question was a topless dancer which wouldn't fall under the  
5 categories you've just articulated. So as you know, Judge, the SCOPE has a  
6 number of line-item entries included in those would be work card privileged license  
7 issues *et cetera*. And so to the extent that there are those sorts of entries, we'd like  
8 those included in the order as well.

9 THE COURT: Well, I'm not sure --

10 MR. DiGIACOMO: Judge, I oppose that.

11 THE COURT: -- what you mean because there's tons of different kinds of  
12 work cards. I'm not sure what you're asking for.

13 MR. SGRO: Well, let's --

14 MR. DiGIACOMO: He wants basically any information that we gather from  
15 any database inaccessible to the defense to be provided to the defense. That's  
16 exactly what the court says no to, that that evades many things, not just privacy  
17 interests, but also the prosecution's deliberative process in making certain  
18 determinations.

19 THE COURT: Yeah, I mean, let me ask you this --

20 MR. DiGIACOMO: And how this was utilized --

21 THE COURT: -- hang on, if you guys want that information, why don't you put  
22 it in the questionnaire? Do you have any, you know, state-issued work cards? Why  
23 don't you ask that question if that's what you really want?

24 MR. DiGIACOMO: Because that's not what they're looking to do, what they're  
25 looking to do is do a post *ad hoc* analysis of our peremptory challenges, which is

1 how they utilized it against us in the last case was they got up there and said, well,  
2 the State is making a *Batson* challenge, and I gave a race-neutral reason in the  
3 sense that, well, look, I'm not going to leave somebody with a work card, who by the  
4 way, did not disclose that information during *voir dire*, on the jury. And then they  
5 started screaming about how they didn't have equal access. And that's how this  
6 issue wind up in front of the Supreme Court.

7           The State may do a lot of investigation of a particular juror and make  
8 determinations. And that determination is something we're allowed to have, and  
9 they're not allowed to invade our thought processes on how we want a jury and how  
10 we don't want a jury. And they are utilizing this in order to then create and argue  
11 their *Batson* challenges. The only reasons they learned about it in that case was  
12 because it was my race-neutral reason for striking a juror. And therefore, then there  
13 was a long discussion of who do we do SCOPES on, was the SCOPE on -- did you  
14 do SCOPES on just African-American jurors, or were there on similarly situated  
15 non-African-American jurors and it went down this rabbit hole of a discussion about  
16 *Batson*.

17           We oppose having to turn over information we utilize to make our  
18 preemptive challenges and it only becomes relevant if at some point they make a  
19 *Batson* challenge, the Court finds that there's a *prima facie* case that there is  
20 discrimination going on and then asks for our race-neutral challenges.

21           THE COURT: All right, here's what I'm going to do, the difference -- I don't  
22 know if, you know, I don't about the facts of that other particular case, other than  
23 what I read in the Supreme Court's opinion, if what you're after is the actual  
24 information on these people, you know, we're doing a questionnaire anyway. If you  
25 want to know work cards, why don't you throw a question in about work cards. If

1 you want to know if they have a C.C.W. permit, why don't you throw a question into  
2 the questionnaire about C.C.W. permit?

3 If what you're doing -- let me do this then, all right, here's the order I'm  
4 going to give, any evidence of prior arrests, whether or not they resulted in a  
5 conviction, or any evidence you uncover from an N.C.I.C. or SCOPE, which are the  
6 databases they don't have access to, which indicate that a juror has lied on their  
7 questionnaire, I think that's fair because probably -- and frankly, you know, aside  
8 from Mr. Sgro wants, I would want to know that anyway, if you affirmatively uncover  
9 evidence that somebody, for example, denies having a work card or denies having a  
10 C.C.W., and you found out, hey, they got one right now, we'd all want to know that  
11 anyway, right?

12 MR. DiGIACOMO: Correct.

13 THE COURT: Other than that, if what Mr. Sgro is after is evidence of  
14 dishonesty, then you need to, you know, turn that over. If -- if what he's after is the  
15 information about work cards, you can certainly throw questions in the questionnaire  
16 about that. All right?

17 MR. SGRO: We'll get together with the State. I think Ms. Weckerly's handling  
18 the questionnaires. We'll submit some proposed questions and we'll work it out.

19 THE COURT: Yeah, and I'll -- we'll do 'em that way 'cause, you know, I  
20 guess -- I understand exactly what the State's concern is, if you're actually after the  
21 information, that's one thing, there's another way to get that. If you're just trying to  
22 use this as sort of a set up to second guess the State's challenge, that's a whole  
23 different thing. If in -- if you're after the information, like I said, we'll just put it in the  
24 questionnaire, and we'll go over it that way. So let's do it that way, is that pretty  
25 clear what the order is then?

1 MR. DiGIACOMO: Yes.

2 THE COURT: All right. And, again, I'm not ordering you to do it, but if you do  
3 it, if you find it, you gotta turn it over to them, and like I said, that's the kind of stuff I  
4 would want to know anyway. If someone's lying on their questionnaire, I'm going to  
5 boot them regardless.

6 MR. DiGIACOMO: I think we'd have an obligation to the Court to provide that,  
7 so.

8 THE COURT: Yeah, I think you would, right, exactly. So let do it that way. Is  
9 that -- is that all the motions or is there another one?

10 MR. SGRO: There's -- there's --

11 MR. DiGIACOMO: I thought we handled the motion on Stephanie, Monica,  
12 Jerome, and Quentin White and Dellane Bryant. I will --

13 THE COURT: Yeah, a bunch of 'em we've handled I think.

14 MR. DiGIACOMO: Yeah, I will inform the Court that I issued a subpoena for  
15 all those records. Upon my review I'll submit anything that needs to be submitted to  
16 the Court *in camera* for your review. The production of medical records for  
17 Mr. Thomas, I believe that we all agreed that he went to Utah and utilized  
18 Albert Davis and that that was the copy of the records you're looking for that he  
19 didn't go to U.M.C. But if you have some other information as it relates to  
20 Mr. Thomas, I have no opposition to them getting records on Mr. Thomas from  
21 U.M.C. so long as we get a copy, but I don't think he went there.

22 MR. SGRO: Right, I don't know that he did or not. And what -- when we met  
23 on Thursday, Your Honor, Mr. DiGiacomo told me that there was a picture in a  
24 search warrant that we couldn't -- we couldn't retrieve. That was -- like someone  
25 took a screen shot of a document that showed that Mr. Thomas was in the hospital.

1           And let me explain the relevancy, Mr. Thomas, on a completely  
2 unrelated matter about a month or two prior, was running away from law  
3 enforcement, tried to hop over a cinderblock wall, and injured his leg. The extent of  
4 that injury remains in some dispute. We're trying to get to the medical records and  
5 the reason why, Your Honor, is because in front of the grand jury they explained that  
6 his injury to his leg would have been *indicia* of his inability to participate in this crime,  
7 okay.

8           And the -- the bus video that shows Mr. Thomas getting off the bus in  
9 California, shows him having crutches handed to him when he gets off the bus and  
10 then before -- and when he leaves Vegas to go to California, there's a tape of him  
11 on crutches. So there -- there is some investigation that needs to be done as to the  
12 extent and the gravity of that injury. So what we have -- and the -- to make it even  
13 more complicated, Jerome Thomas used a fake name when he went to the hospital,  
14 Alvin --

15       THE COURT: Okay.

16       MR. DiGIACOMO: Albert Davis.

17       MR. SGRO: Right.

18       MR. DiGIACOMO: Just so the record's clear, it's not a photograph in a  
19 search warrant, although there is actually a photograph in a search warrant, but  
20 attached to the impound report from the apartment, Jerome Thomas's apartment, is  
21 a photocopy of all those documents.

22       MR. SGRO: Okay.

23       MR. DiGIACOMO: And it's in the discovery that Mr. Sgro has because I  
24 looked it up just to make sure he had it. So if they want to submit an order,  
25 unfortunately, it's in Utah, I'm not sure a district court order in Utah's going to get

1 them any more additional records. So, I mean, they can do a compelling order in  
2 Utah. Certainly if they get any records, I'd ask that they be provided to the State as  
3 well.

4 MR. SGRO: So all we want to do, Your Honor, is submit an order to you  
5 stating that there's good cause for us to get them, and then obviously we have some  
6 time now to go to Utah and try and vet that out.

7 THE COURT: Yeah, I mean, the good thing is we've got time to do it now, at  
8 least, so, all right.

9 MR. DiGIACOMO: As long as the order says we both get copies, I have no  
10 problem with that.

11 MR. SGRO: Right, I have no problem, obviously, with them getting it. And I  
12 think that does it, other than the notice of witnesses, Your Honor --

13 MR. DiGIACOMO: Well, there's two things, one is, for whatever reason,  
14 there's been a motion to compel exculpatory evidence that's been on calendar for  
15 years now, I'm assuming that you can clear that off your calendar, this is according  
16 to your J.E.A. --

17 THE COURT: Okay.

18 MR. DiGIACOMO: -- with an order that we follow our statutory and  
19 constitutional obligations. We then did subsequent, specific motions as it relates to  
20 specific discovery, but this was their original motion for exculpatory evidence, slash,  
21 discovery motion. So I assume that it's covered by all the other --

22 MR. SGRO: Is it ours?

23 MR. DiGIACOMO: Yeah, it's yours.

24 THE COURT: Is there anything else in there --

25 MR. SGRO: We'll take it off calendar, Your Honor.

1 THE COURT: Yeah, because sometimes these things just get kicked along,  
2 so, all right, let's take it off calendar. If you -- if there's something in there that we  
3 just -- everybody overlooked, you can put it back on calendar. But I'm assuming  
4 that it's been taken care of with everything that's happened in the last couple of  
5 months. But if you find out that's not the case, just let us know and we'll put it back  
6 on calendar then, all right?

7 MR. SGRO: For purposes right now we can take it off the record just so it  
8 doesn't continue to linger.

9 THE COURT: Right. Okay.

10 Anything else you guys want to address?

11 MR. SGRO: Just very briefly, housekeeping, there's a letter from  
12 Jerome Thomas, Your Honor, this same individual.

13 THE COURT: Right.

14 MR. SGRO: We have an envelope and a return address that it's from  
15 Jerome Thomas to Detective Chris Bunting. Chris Bunting's the main detective.

16 THE COURT: Why is he sending letters to the detective if you don't mind  
17 my --

18 MR. DiGIACOMO: I don't know and I forgot -- and I apologize, I told Mr. Sgro  
19 I would ask Detective Bunting. We got a copy of the letter because San Bernardino  
20 jail was copying mail out. So you know, you only get the envelope.

21 THE COURT: Right.

22 MR. DiGIACOMO: So there's a cop -- there's a photograph of an envelope,  
23 the actual letter itself, I could not find and I forgot to ask Detective Bunting when we  
24 got continued. I will certainly ask Detective Bunting if he ever received it. It may  
25 have just been an I.A.D. request to be processed on his warrant here. I don't know

1 if it has anything substantive, but it certainly, I'll check with Detective Bunting, if he  
2 maintained copy of the letter, or if he even received it and read it. And I just don't  
3 have an answer for Mr. Sgro, but I'll answer that question.

4 THE COURT: Okay.

5 MR. SGRO: And then, we would like an updated witness list with the right  
6 addresses, Your Honor. I know that when they filed they get a new name, they put  
7 the name on the list, it's been regurgitation. So for example, Cornelius Mayo, they  
8 still have him living at the Meikle Lane address. And --

9 MS. WECKERLY: We provided that.

10 MR. SGRO: -- we asked for some addresses, I bring him up because we  
11 brought it up to the State, they gave us a new address sheet, Donovan Rowland,  
12 who's a pivotal witness in this case still says address unknown; Devonia Newman,  
13 parent-guardian of Devonia Newman, we understand that she's been in and out, I  
14 would guess that they have some mechanism by which they're keeping in touch. All  
15 I'm asking for, Your Honor, is if they have a good address for Donovan Rowland, we  
16 still have the address unknown, even after --

17 MR. DiGIACOMO: But didn't we give --

18 MS. WECKERLY: We don't have one of him.

19 MR. DiGIACOMO: -- we sat down --

20 MS. WECKERLY: In that --

21 MR. DiGIACOMO: We don't have an address on this one?

22 MS. WECKERLY: No, but we'll provide that. Also the defense witnesses  
23 were all noticed at least four or five of 'em from Mr. Sgro's office, if we could have an  
24 accurate address on those witnesses too, and the underlying discovery of the  
25 experts that the defense noticed as to Mr. Burns with fetal alcohol syndrome. We



1 still don't have the underlying data and then again, those lay witnesses, all we have  
2 is the office address of Mr. Sgro for them, which is -- now we have time, they could  
3 give us an actual address.

4 MR. SGRO: Right, so we need -- we need --

5 THE COURT: So here's what I'm going to do, look, the trial date's been reset,  
6 so the deadlines for filing all the witness notices have, you know, *de facto* been  
7 reset anyway. So you guys, I mean, the statute says, at the time you file the notice  
8 of witnesses, although I guess you're -- unless you're relying on the old ones, you  
9 have to the address that's known to you at the time that the notice is filed. So I'm  
10 going to make it effective to both sides that you guys have to provide everybody  
11 updated addresses, contact information, with all the witnesses that you -- whatever  
12 information, contact information you have effective of today or when the trial date is.

13 MR. DiGIACOMO: And I'm sure that both sides don't necessarily want to  
14 make a public record of the addresses of the witnesses.

15 THE COURT: Right, sure.

16 MR. DiGIACOMO: As long as we convey them between the parties so that  
17 the parties are aware of what they are, I'm assuming neither side has a problem with  
18 that.

19 THE COURT: I'm assuming --

20 MR. SGRO: That's --

21 THE COURT: -- I'm assuming, I mean, I was going to say, I'm assuming  
22 that's what -- that's done in a lot of these cases anyway, I'm assuming you don't  
23 have any objection to that as long as you get an address available to you  
24 somewhere, right?

25 MR. SGRO: Absolutely, absolutely.

1 THE COURT: Okay. All right, Mr. Langford, anything you want to add to all of  
2 that or no?

3 MR. LANGFORD: No, Your Honor.

4 THE COURT: All right.

5 THE CLERK: Is the motion to suppress as to Mason, was that already  
6 discussed?

7 THE COURT: Which one?

8 THE CLERK: I don't know.

9 MR. DiGIACOMO: The motion to suppress Mr. Mason's statement, I believe  
10 it was --

11 MS. WECKERLY: It's moot.

12 THE COURT: Oh, because you weren't going to introduce the statements in  
13 your case-in-chief because you --

14 MR. DiGIACOMO: Correct, it's moot.

15 THE COURT: Right.

16 MR. DiGIACOMO: But I believe that the Court was going to enter an order  
17 that says there's a *Miranda* violation, I think that that was the discussion that we  
18 had, that there was a *Miranda* violation, therefore, it can't be used in our  
19 case-in-chief.

20 THE COURT: Yeah, we discussed that last week. It was sort of thrown out  
21 there verbally that, yeah, that's the order then, all right.

22 All right, thanks, guys.

23 MR. SGRO: Thank you, Your Honor.

24 MR. LANGFORD: Thank you, Your Honor.

25 MR. DiGIACOMO: Thank you, Judge.

1 PROCEEDING CONCLUDED AT 11:04 A.M.

2 \* \* \* \* \*

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

  
SARA RICHARDSON  
Court Recorder/Transcriber

  
CLERK OF THE COURT

NWEW  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
PAMELA WECKERLY  
Chief Deputy District Attorney  
Nevada Bar #006163  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

WILLIE DARNELL MASON, aka  
Willie Darnell Mason, Jr.  
#1856118  
DAVID JMES BURN, aka  
D-SHOT,  
#2757610  
Defendants.

CASE NO: C-10-267882-2  
DEPT NO: XX

THIRD SUPPLEMENTAL NOTICE OF WITNESSES  
[NRS 174.234(1)(a)]

TO: WILLIE DARNELL MASON, aka Willie Darnell Mason, Jr.

TO: ROBERT LANGFORD, ESQ., and  
MAGGIE MCCLETTCHIE, ESQ., counsel of Record:

TO: DAVID JMES BURN, aka D-SHOT, Defendant; and

TO: ANTHONY SGRO, ESQ., and  
CHRISTOPHER ORAM, ESQ., Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF  
NEVADA intends to call the following witnesses in its case in chief:

NAME

ADDRESS

ACUNA, RON  
OR DESIGNEE

INVESTIGATOR  
C.C. DISTRICT ATTORNEY

\*\* Indicates additional witnesses\*\*

1	ATWOOD, C.	LVMPD #10003
2	AYOAMA, KATHRYN	LVMPD #8025
3	BAINES, BENJAMIN	GREYHOUND 200 S. MAIN ST., LVN
4	BOLES, KEVIN	FBI
5	BOYD, FRED	LVMPD
6	**BROWNLEE (KRUSE), T.	LVMPD #9975
7	BUNTING, CHRISTOPHER	LVMPD #6484
8	CARVOUNAIARIS, D.	LVMPD #!2712
9	**CLARK, JOMARIO	ADDRESS UNKNOWN
10	**CLINKSCALE, MAURICE	ADDRESS UNKNOWN
11	COOPER, ULONDA	2968 JUNIPER HILLS BLDG 16 APT 102 LAS VEGAS, NEVADA
12		
13	**CUSTODIAN OF RECORDS OR DESIGNEE	BINIONS HOTEL & CASINO RECORDS
14	CUSTODIAN OF RECORDS	Clark County Detention Center, 330 S. Casino
15	OR DESIGNEE	Center Blvd., Las Vegas, NV
16	CUSTODIAN OF RECORDS	Clark County Detention Center, Communications
17	OR DESIGNEE	330 S. Casino Center Blvd., Las Vegas, NV
18	**CUSTODIAN OF RECORDS OR DESIGNEE	FREMONT STREET EXPERIENCE RECORDS
19	CUSTODIAN OF RECORDS	GREYHOUND BUS LINES
20	OR DESIGNEE	RECORDS
21	CUSTODIAN OF RECORDS OR DESIGNEE	LVMPD Communications, Las Vegas, NV
22	CUSTODIAN OF RECORDS OR DESIGNEE	LVMPD Records Las Vegas, NV
23	CUSTODIAN OF RECORDS	OPERA HOUSE
24	OR DESIGNEE	RECORDS
25	CUSTODIAN OF RECORDS OR DESIGNEE	T-MOBILE RECORDS
26	CUSTODIAN OF RECORDS	METRO PCS
27	OR DESIGNEE	RECORDS
28	//	

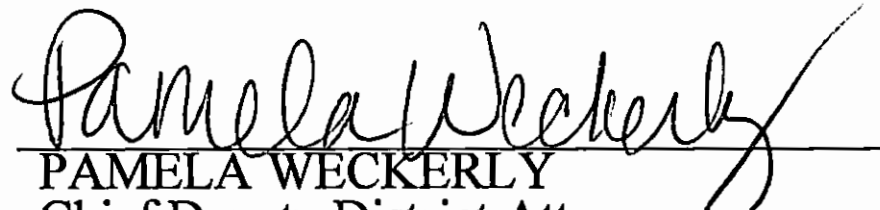
1	CUSTODIAN OF RECORDS OR DESIGNEE	NEXTEL RECORDS
2		
3	**CUSTODIAN OF RECORDS OR DESIGNEE	TEXAS STATION HOTEL & CASINO RECORDS
4	**CUSTODIAN OF RECORDS OR DESIGNEE	WESTERN HOTEL & CASINO RECORDS
5		
6	DAHN, ROBBIE	LVMPD #5947
7	FILMORE, DR.	UNIVERSITY MEDICAL CENTER
8	FLETCHER, SHAWN	LVMPD #5221
9	**GONZALEZ, HECTOR	LVMPD #13891
10	GONZALEZ, WESSLEY	LVMPD #8886
11	GOSHI, DR.	UNIVERSITY MEDICAL CENTER
12	HARDY, KENNETH	LVMPD #3031
13	**HOUGHTON, JONATHAN	LVMPD #9789
14	HUNT, LEKEISHA	2051 N. TORREY PINES, LVN
15	JENSEN, B.	LVMPD #3662
16	JOHNS, MATT OR DESIGNEE	INVESTIGATOR C.C. DISTRICT ATTORNEY
17	KNIGHT, SAMANTHA NICOLE	2802 NORFOLK AVE, HENDERSON, NV
18	KYGER, T.	LVMPD #4191
19	KRYLO, JAMES	LVMPD #5945
20	LAMBRIGHT, SEC. OFFICER	UNIVERSITY MEDICAL CENTER
21	LASSETER, ANTHONY	5095 FOREST HILLS, LV NV
22	**MAINES, M.	ADDRESS UNKNOWN
23	MARTINEZ, MIGUEL	5662 MEIKLE LN #C., LVN 89156
24	MAYO, CORNELIUS	5662 MEIKLE LANE #A, LVN 89156
25	MITCHELL, TYLER	ADDRESS UNKNOWN
26	MONROE, MONICA	14371 MOON VALLEY VICTORVILLE, CA. 92294
27		
28	MONROY, ARMANDO	5662 MEIKLE LN #D, LVN 89156

1	**NEWMAN, DEVONIA	5662 MEIKLE LN #A, LVN 89110
2	NEWMAN, ERICA	4910 E. OWENS #C., LVN
3	NEWMAN, WANDA	c/o C.C. DISTRICT ATTORNEY
4		
5	NORMAN, S.	LVMPD #3110
6	**OLIVER, ROBBIN	2057 N. TORREY PINES #2057, LVN
7	OLSON, DR. ALANE	C.C. CORONER'S OFFICE
8	PARENT/GUARDIAN OF NEWMAN, DEVONIA	5662 MEIKLE LN #A LAS VEGAS, NV 89110
9	**PETERSON, A.	LVMPD #13579
10	PFAHLER, MICHAEL	SILVER NUGGET GAMING
11	PIERCE, CHRISTINE TAMIKA	2935 ALOHA #4/128, LVN
12	ROWLAND, DONOVAN	ADDRESS UNKNOWN
13	SALMON, CHARISSE	2051 N. TORREY PINES, LVN
14	SASNETT-HERNANDEZ, MARSHA	5662 MEIKLE LN #C, LVN 89156
15	SCANLON, M.	LVMPD #13517
16	SCOTT, J.	LVMPD #9618
17	SEAMAN-KELLY, JAN	LVMPD #5666
18	SPEAS, W.	LVMPD #5228
19	SZUKIEWICZ, J.	LVMPD #5411
20	TAYLOR, E.	LVMPD #9619
21	THOMAS, JENNIFER	LVMPD #10074
22	THOMAS, K.	LVMPD #13574
23	VAANDERING, B.	LVMPD #13575
24	VASEK, JOHN	SAN BERNADINO PD
25	VIGIL, STELLA	4616 EL PLAYA, LVN
26	WILDEMANN, MARTIN	LVMPD #3516
27	**WILLIS, MARIE	5905 FOREST HILLS, LVN
28		

1 These witnesses are in addition to those witnesses endorsed on the Information or  
2 Indictment and any other witness for which a separate Notice of Witnesses and/or Expert  
3 Witnesses has been filed.  
4

5 STEVEN B. WOLFSON  
6 DISTRICT ATTORNEY  
7 Nevada Bar #001565

8 BY

  
9 PAMELA WECKERLY  
10 Chief Deputy District Attorney  
11 Nevada Bar #006163

12 CERTIFICATE OF FACSIMILE TRANSMISSION AND/OR ELECTRONIC MAIL

13 I hereby certify that service of State's Third Supplemental Notice of Witnesses, was  
14 made this 12<sup>th</sup> day of January, 2015, by facsimile transmission and/or e-mail to:

15 ROBERT LANGFORD, ESQ.  
16 E-Mail: [robert@nvlitigation.com](mailto:robert@nvlitigation.com)  
17 FAX #702-471-6540

18 MAGGIE MCCLETCHIE, ESQ.  
19 E-Mail: [maggie@nvlitigation.com](mailto:maggie@nvlitigation.com)  
20 FAX #702-471-6540

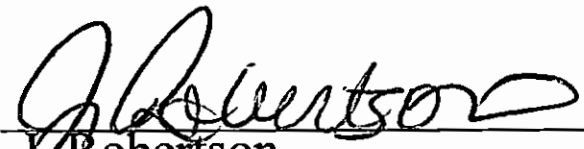
21 (COUNSEL FOR WILLIE MASON)

22 ANTHONY SGRO, ESQ.  
23 E-Mail: [tsgro@pslrfirm.com](mailto:tsgro@pslrfirm.com)  
24 FAX #702-386-2737

25 CHRISTOPHER ORAM, ESQ.  
26 E-Mail: [crorambusiness@aol.com](mailto:crorambusiness@aol.com)  
27 FAX #702-974-0623

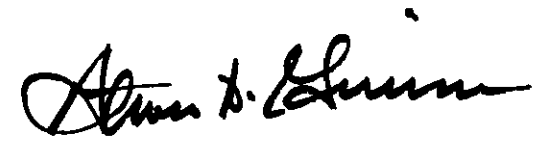
28 (COUNSEL FOR DAVID BURNS)

BY:

  
J. Robertson  
Secretary of the District Attorney's Office

10F17607A/B//jr/mvu





CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

THE STATE OF NEVADA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WILLIE DARNELL MASON, AKA )  
WILLIE DARNELL MASON, JR., )  
AKA G-DOGG, )  
DAVID JAMES BURNS, AKA )  
D-SHOT, )  
 )  
Defendants. )

CASE NO. C-10-267882-1  
C-10-267882-2  
DEPT NO. XX

**TRANSCRIPT OF  
PROCEEDING**

BEFORE THE HONORABLE CHARLES THOMPSON, SENIOR DISTRICT JUDGE

**JURY TRIAL - DAY 6**

TUESDAY, JANUARY 27, 2015

APPEARANCES:

For the State:	MARC P. DIGIACOMO, ESQ. PAMELA C. WECKERLY, ESQ. Chief Deputy District Attorneys
For Defendant Mason:	ROBERT L. LANGFORD, ESQ.
For Defendant Burns:	CHRISTOPHER R. ORAM, ESQ. ANTHONY P. SGRO, ESQ.

RECORDED BY SUSAN DOLORFINO, COURT RECORDER  
TRANSCRIBED BY: KARR Reporting, Inc.

KARR REPORTING, INC.

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1           **LAS VEGAS, NEVADA, TUESDAY, JANUARY 27, 2015, 10:07 A.M.**

2                           **\* \* \* \* \***

3                   (Outside the presence of the jury.)

4           THE COURT: We're on the record. You can bring in  
5 the jurors.

6           THE MARSHAL: Yes, sir.

7                   (Pause in proceeding.)

8                   (Jurors enter at 10:10 a.m.)

9           THE COURT: State of Nevada vs. Burns and Mason. The  
10 record will reflect the presence of the defendants, their  
11 counsel, the district attorneys, all members of the jury.

12           Good morning, ladies and gentlemen. What I'm going  
13 to say to you now is intended to serve as an introduction to  
14 the trial of the case. It's not a substitute for the  
15 instructions on the law that I will give to you both orally  
16 and in writing at the conclusion of the evidence.

17           This is a criminal case. It's commenced by the State  
18 of Nevada, which we sometimes refer to as the State, against  
19 the defendants, Mr. Burns and Mr. Mason. The charging  
20 document that is filed by the State is called an Indictment.  
21 The clerk is going to read that Indictment to you now, and  
22 state the plea of the defendant to the Indictment. She's  
23 going to read the entire Indictment to you and state their  
24 pleas.

25                   (Indictment read - not transcribed.)

1           THE COURT: Now, ladies and gentlemen, you should  
2 distinctly understand that the Indictment that the clerk has  
3 just read to you is simply the charges. It's not in any sense  
4 evidence of the allegations that it contains.

5           The defendants have pled not guilty to the charges,  
6 therefore it's the burden of the State to prove the  
7 defendants' guilt by evidence beyond a reasonable doubt. The  
8 purpose of the trial of course is to determine whether the  
9 State will meet that burden. If the State fails to meet the  
10 burden, it will be the duty of the jury to return a verdict of  
11 not guilty.

12           Now, the trial is going to proceed in the following  
13 order. First the attorneys have the right to make opening  
14 statements to you. The State goes first and makes the first  
15 opening statement. Keep in mind that an opening statement by  
16 any of the parties is not evidence. It's a guideline for you  
17 to follow so you'll know what evidence is going to be  
18 presented, so you'll get an idea of what you're going to be  
19 hearing when the witnesses testify.

20           It's up to you to determine whether or not the party  
21 making an opening statement will be able to produce the  
22 evidence that he or she says they will be able to produce.  
23 The statements then serve as an introduction to the trial of  
24 the case.

25           Now, after the State's opening statement, each

1 defendant is given the opportunity to make an opening  
2 statement. After the opening statements, the State is given  
3 the opportunity to call witnesses and present its evidence.  
4 After the State's evidence, each defendant is given the  
5 opportunity to call witnesses. Keep in mind that the burden  
6 is always upon the State to prove the defendants' guilt, and  
7 the defendants don't have to call witnesses or present  
8 evidence if they don't want to.

9 After all the evidence is produced, I'll read to you  
10 instructions on the law that apply in the case. And when you  
11 retire to consider your verdict, you'll get a copy of my  
12 written instructions to take with you. So you don't have to  
13 write them down when I'm reading them to you, because they're  
14 long and complicated.

15 Your purpose as jurors is to find and determine the  
16 facts of the case. And I explained this to you when we did  
17 voir dire and you were selected. You do this from the  
18 testimony of the witnesses that are testifying here in court,  
19 also from the documents that are marked and admitted as  
20 exhibits during the trial, and from any facts that are  
21 stipulated by the parties. Occasionally, to save you time,  
22 the parties agree to certain facts. If they do that, you  
23 accept those facts as true.

24 You may not conduct any investigation on your own.  
25 Don't go out and research the law or try to talk to anybody

1 else about the case. Let the lawyers do their job. It's  
2 their job to present the evidence to you. You're not  
3 investigators to go out and try to find out what happened in  
4 the case.

5 Now, occasionally an attorney may make an objection  
6 to a question that's asked a witness. You're not to hold it  
7 against the lawyer because he makes an objection. That's part  
8 of his job. If he thinks that a question is improperly  
9 phrased or seeks to elicit information or evidence that isn't  
10 admissible under our evidence code, a lawyer has not only the  
11 right but the duty to make an objection to that evidence.

12 If I overrule the objection, the witness is permitted  
13 to answer the question. But if I sustain an objection, then  
14 the witness is not permitted to answer the question and you  
15 can't speculate what that answer might have been. Anything  
16 you may have seen or heard outside the courtroom is not  
17 evidence and must also be disregarded.

18 No statement, ruling, remark or comment which I might  
19 make during the course of this trial is intended in any way to  
20 indicate my opinion as to how you should decide the case. I'm  
21 not going to decide this case for you. You're going to decide  
22 the case.

23 At times I can even ask a question of a witness  
24 myself. If I do, it's for the purpose of bringing out  
25 something that I think might be confusing or to clarify

1 something, and you're not to give more weight or credence to  
2 that particular opinion -- or that particular question.

3 Do we have somebody that needs the microphones?

4 (Pause in proceeding.)

5 THE COURT: We also permit jurors to ask questions.  
6 However, asking questions is primarily the responsibility of  
7 the attorneys, not of you. The procedure for a juror to ask a  
8 question is somewhat complicated and has a tendency to prolong  
9 the trial. Any question that you ask must be factual in  
10 nature and designed to bring out or clarify information  
11 already presented. You're not permitted to become an advocate  
12 or become a third attorney in the case.

13 If you feel you have to ask a question, write out the  
14 question on a piece of paper. Do so while the witness is  
15 still present. Raise your hand and give it to the marshal  
16 before the witness leaves. I'll halt the trial, examine the  
17 question with the lawyers. If the question is appropriate,  
18 I'll ask it on your behalf. The attorneys will then be  
19 permitted to ask follow-up questions.

20 Until the case is submitted to you, you may not  
21 discuss it with anyone, even your fellow jurors. After it's  
22 submitted to you, you can discuss it only in the jury room  
23 with your fellow jurors pursuant to my instructions. It's  
24 important that you keep an open mind in the case. Wait until  
25 you've heard everything. Wait until you've heard all the



1 evidence, the closing arguments of the lawyers, and then  
2 decide the case.

3           After all the evidence and after the instructions  
4 that I read to you, each lawyer will be given the opportunity  
5 to argue the case to you. That's the first time they'll be  
6 given the opportunity to argue to you how they feel the  
7 evidence should be applied to the law and what verdict you  
8 should reach. The opening statements are not times for  
9 argument. It's just to serve as a guide so you'll know what  
10 evidence is going to be presented.

11           If you can't hear a witness, please raise your hand.  
12 I want you to be able to hear something. We'll make the  
13 witness talk into the microphone so that you can hear them.  
14 You can take notes if you want to during the trial. I caution  
15 you not to rely upon your respective notes if there's a  
16 conflict between them, because the court recorder is taking  
17 down the official record in the case.

18           If during your deliberations you desire to hear again  
19 portions of the testimony, there's a procedure for that to be  
20 played back to you if there's a disagreement among you as to  
21 what the testimony was. Again, that takes a lot of time, so  
22 we don't encourage it unless it's absolutely necessary. But  
23 that's up to you.

24           All right. As I indicated, we start with opening  
25 statements. Now, the State is given the opportunity to make

1 the first opening statement.

2 Ms. Weckerly, I understand you're going to do the  
3 opening for the State.

4 MS. WECKERLY: Yes, Your Honor.

5 STATE'S OPENING STATEMENT

6 MS. WECKERLY: Good morning. No one is above the  
7 law, no one is below it, and we do not ask someone's  
8 permission when we ask them to follow it. This essentially  
9 means that everybody must follow the law, and everyone is  
10 entitled to protection of the law.

11 The victim in this case is a lady by the name of  
12 Derecia Newman. She was 28 years old at the time she was  
13 murdered. Her friends called her Ree. She was the mother of  
14 four children, and three of those children were under age 11  
15 at the time she was murdered.

16 She lived with a man by the name of Cornelius Mayo.  
17 He was the father of her three youngest children. And  
18 Ms. Newman and Cornelius Mayo sold small amounts of drugs  
19 outside of their apartment to various people. They used their  
20 home and they sold drugs out of it.

21 Now, these two lived in a very modest apartment. It  
22 was a two bedroom apartment for the entire family, so they  
23 certainly weren't engaging in high level sales. This wasn't a  
24 drug cartel. But this was definitely a lifestyle that they  
25 were engaging in. And this lifestyle is really of no

1 relevance in this case except for one thing.

2           It is because of that, that danger arrived at the  
3 doorstep of Derecia Newman quite literally. The fact that  
4 they were engaging in this activity is what ended up making  
5 her a target for murder. It's what made a stranger to her  
6 arrive at her doorstep, come in, hold a gun literally on her  
7 forehead and blow off quite literally a third of her head.

8           The second violent crime victim in this case is  
9 Derecia Newman's 12-year-old daughter. Her name is Devonia.  
10 She of course lived in the residence too. She was actually at  
11 the doorstep when her mother was murdered. Her instincts took  
12 over and she turned and ran down the hallway towards the two  
13 bedrooms. As she was running down that small hallway, shots  
14 were fired at her.

15           She ran into the master bedroom. She got through  
16 there and she ran into the bathroom of the master bedroom as  
17 well. The gunman followed her. Her step-dad, Cornelius Mayo,  
18 was hiding in the bathroom. She got on the other side of the  
19 bathroom door at one point and a shot went through the door.  
20 There was a struggle.

21           Devonia eventually is outside the bathroom door. She  
22 actually struggles with the intruder. She gets shot in the  
23 stomach. As she's laying on the floor of the master bedroom,  
24 the intruder, the shooter goes through her pockets and is  
25 saying, Where's the money. She remembered what the gunman was

1 wearing. He was wearing overalls.

2 On -- well, during the course of this case, you won't  
3 all only hear from Devonian Newman, who was a child during the  
4 course of these events. You'll actually hear from another  
5 witness who was a child during the course of these events.  
6 And because both of these children witnessed things and saw  
7 things, they have become witnesses in this case about 4 1/2  
8 years later.

9 Now, these two witnesses were both quite young when  
10 these events took place in 2010. They look different now, 4  
11 1/2 years later. They talk different. And they've  
12 essentially lived in the aftermath of these events. But keep  
13 in mind who they were back when these events took place,  
14 particularly Devonian, who was 12 years old at the time these  
15 events took place.

16 Now, what happened in a nutshell is that on August 7,  
17 2010, four people went to Meikle Lane, went to the Meikle Lane  
18 apartment. The driver, the getaway driver and the person who  
19 drove the four people to the house or to the apartment was a  
20 woman by the name of Monica Martinez.

21 The person who set up the transaction in order for  
22 them to get access into the apartment was a woman by the name  
23 of Stephanie Cousins. And the other two people in the car  
24 were Willie Mason and David Burns. When Monica Martinez drove  
25 the car to the apartment on Meikle Lane, she parks, she waits

1 in the car.

2 The other three get out of the car. Stephanie  
3 Cousins goes up to the door and acts like she's going to buy  
4 drugs. The other two bust in. Devonian -- or Derecia is shot  
5 in the head, and then Devonian runs to the back of the  
6 apartment and is shot as well. And then the four left.

7 Now, there were other people inside that apartment at  
8 the time the murder and attempt murder took place. As I  
9 mentioned, the people inside this two bedroom apartment were  
10 Derecia, were Devonian, and then Cornelius Mayo, who is the  
11 father of the three younger children, and then Derecia's  
12 sister, her younger sister, Erica Newman was present as well.

13 Erica Newman was actually in the other bedroom, not  
14 the master bedroom, and she was asleep with the three -- the  
15 three younger children, and they were all on bunk beds. At  
16 the time the intruders came in the residence, Cornelius Mayo  
17 was in the bathroom of the master bedroom, and Devonian and her  
18 mother, Derecia, were the ones who were at the door.

19 Now, in this case you'll of course learn of the  
20 lifestyle of Derecia Newman and Cornelius Mayo. And some of  
21 you may be familiar with that, maybe not. It may be troubling  
22 to some of you, it may not be. But it really isn't relevant  
23 in this case except to the extent that it made them a target.  
24 It doesn't matter what they were doing except that it explains  
25 the chain of events that took place.

1           What the focus in this case is, is people who decided  
2 to do a takedown robbery, a violent crime, and people who  
3 picked this residence for the very reason that they knew that  
4 children would be present and guns wouldn't be. So this was  
5 essentially an easy target for the defendants in this case.

6           Now, the four defendants that I mentioned that are  
7 involved in this are Monica Martinez, David Burns, and Willie  
8 Mason. Throughout the case though, you'll learn of a man by  
9 the name of Jerome Thomas, and you'll learn of the  
10 relationships between these individuals.

11           Monica Martinez was living in Las Vegas and she was  
12 dating Jerome Thomas. And Jerome Thomas was friends with the  
13 two defendants before you, David Burns and Willie Mason. Now,  
14 Mason knew another individual who was living in Las Vegas at  
15 the time, and her name is Stephanie Cousins.

16           On the night of the incident, on the late, late night  
17 hours of August 6, 2010 into the early morning hours of the  
18 7th, you'll learn that Monica Martinez was out with David  
19 Burns and Willie Mason, and they were going to various places  
20 that you'll eventually see on surveillance tape. They went to  
21 Jerry's Nugget. They went to the Opera House.

22           Jerome Thomas wasn't with them that night. Monica  
23 Martinez was driving around Mason and Burns. They eventually  
24 decide that they're going to commit a robbery, and Willie  
25 Mason knows someone who will help them target the place for

1 the robbery, and that person is Stephanie Cousins.

2 Now, Willie Mason knew Stephanie Cousins through  
3 Stephanie's daughter. Stephanie is in fact a generation older  
4 than Willie Mason, so her daughter knew Willie Mason back when  
5 the two were quite a bit younger. But Stephanie Cousins is  
6 involved this night for one reason.

7 She is someone, her daughter will tell you, who has  
8 been addicted to drugs for a number of years. And as someone  
9 addicted to drugs, she's someone who would know where to buy  
10 drugs. And if you know where to buy drugs, you know a  
11 location where there's likely to be drugs and/or money, and  
12 that's how Stephanie Cousins gets involved.

13 Talk about Jerome Thomas. At the time of these  
14 events he was living in Las Vegas, and he is someone who had a  
15 pending felony case in California as of 2010. He wanted money  
16 to help aid in his defense in his California case, so he was  
17 with Monica Martinez moving drugs, trying to make money in all  
18 sorts of illegal ways.

19 In fact, just prior to our events which are August 7,  
20 2010, Jerome Thomas, with some other individuals, attempted to  
21 commit a burglary at a Walmart. That burglary was ultimately  
22 unsuccessful. He didn't get arrested, but in the process of  
23 attempting to commit that crime, he went over a wall and hurt  
24 his leg so much so that he ended up on crutches.

25 Well, as of August 7, 2010, Jerome Thomas or Job-Loc

1 was dating Monica, but he was hurt. Monica Martinez was the  
2 girlfriend of Job-Loc at the time of these events. She was  
3 about 38 years old at the time this crime was committed.

4 She was someone who was actually working in a  
5 clerical job at a pharmaceutical company when she started  
6 dating Jerome Thomas. She was a single mom renting a house.  
7 She had three kids. And she was someone who was pretty much  
8 making one bad decision after another, and kind of involved in  
9 one bad relationship after another.

10 A couple months prior to August 7, 2010, she hooks up  
11 with Jerome Thomas, and literally within months of dating him  
12 she found herself facing murder and robbery charges, and  
13 you'll ultimately learn that she is in fact going to prison  
14 for her involvement. But we'll talk a little bit more about  
15 that later.

16 Now, Stephanie Cousins, as I said, was the link to  
17 Derecia Newman. Stephanie Cousins used to live in the same  
18 part of California as our two defendants and Jerome Thomas,  
19 and she was someone who has been addicted to drugs for a  
20 number of years. And on the night of the incident, she is the  
21 one who comes up with the location of Derecia Newman's house  
22 for this robbery murder.

23 She had personally known Derecia Newman. She knew  
24 the family. She knew who was in the house. And she expressed  
25 to the other individuals committing this robbery that there



1 weren't going to be any guns in the house, it was just a mom,  
2 a bunch of kids and a boyfriend, so it would be a relatively  
3 easy target.

4           So what happens in this case is the four of them  
5 drive to Meikle Lane after Stephanie has called to set up the  
6 transaction, or alleged drug transaction. And you know what  
7 happened after that. The -- as I said, the three get out of  
8 the car. Derecia opens the door. She's killed immediately.  
9 Devonian runs into the master bedroom and bathroom and she's  
10 shot, and then the four of them leave in Monica Martinez's  
11 car.

12           Now, when the police arrive to investigate, they know  
13 very quickly the name of one individual involved in this case.  
14 They know the name Stephanie Cousins because Derecia Newman  
15 and Cornelius Mayo, her boyfriend, know Stephanie. They have  
16 sold drugs to her. They know that she was involved.

17           And you will hear that within minutes of this crime  
18 taking place Cornelius Mayo knew Stephanie was involved, and  
19 he understandably is extremely angry after the crime occurs,  
20 and he calls Stephanie and threatens to kill her within  
21 minutes of the crime occurring. But in terms of the police  
22 investigation, they have Stephanie Cousins.

23           Now, because Cornelius threatens to kill Stephanie,  
24 Stephanie eventually through her daughter makes contact with  
25 the police, and the police get some information from

1 Stephanie's daughter. They get a phone number for a Willie  
2 Mason and they get the name Monica, and the name doesn't have  
3 a last name attached to it. So that's sort of all they have  
4 to go on. They get this phone number of Willie Mason and they  
5 get the name Monica.

6 The police do what's called a pen register on the  
7 phone number of Willie Mason, and that's sort of like a search  
8 warrant on a phone. It's not a wiretap where you can hear  
9 conversations. But you can take a phone number and research  
10 the numbers that that phone is calling. And so they look  
11 during the relevant time period at what numbers are this -- is  
12 this Willie Mason phone calling at the time of our events.

13 And they learn that Willie Mason's phone is calling a  
14 person by the name of Jerome Thomas, who is later identified  
15 as Job-Loc. They look at his phone and they find out that his  
16 phone during this relevant time period is calling a woman by  
17 the name of Monica Martinez, which matches their initial  
18 information that a Monica is involved.

19 Now, this is said pretty quickly. In actuality, the  
20 way the investigation works is there's warrants served on  
21 phone companies and information comes back, and then you have  
22 to cross-reference it. And sometimes Monica's phone and  
23 certainly her property weren't all in her name, so it takes a  
24 day or two for them to actually find who is the right Monica.

25 But they eventually go to Monica where she's working,

1 at the pharmaceutical company, about two days after the murder  
2 took place. And she's there at her job and homicide  
3 detectives show up. She goes with them and they have what  
4 starts out as a pretty combative conversation.

5 The police aren't messing around. They have a dead  
6 mother of four and they have a 12-year-old girl who's in  
7 critical condition. So they are definitely leaning on her and  
8 trying to get information out of her. Monica initially says,  
9 well, I don't really know what you're talking about and I, you  
10 know, I wasn't involved in this and I have no idea what  
11 happened.

12 But eventually, through a very long interview, Monica  
13 gives what happened and where these individuals were on the  
14 night of the murder and robbery. She explains how she was the  
15 driver, and she explains various places that they went to  
16 before they arrived at Derecia Newman's house.

17 The police actually pull some of the videotape of the  
18 places that Monica mentioned, and they see Monica Martinez on  
19 surveillance tape with Willie Mason and David Burns on the  
20 night as she described. And they see something else too.  
21 They see David Burns dressed in overalls, just like Devonia  
22 Newman described.

23 Now, once they have Monica, she had given names.  
24 They had the name Willie Mason. They certainly knew Stephanie  
25 Cousins' name. But Monica didn't know David Burns as David

1 Burns. She only knew him by a nickname of D-Shock or D-Shot,  
2 and she wasn't sure at the time she was describing it to the  
3 police.

4 And they don't really have anything to go on, because  
5 it's not like you can look up that nickname in a phonebook.  
6 There's no Social Security card with that name on it. It was  
7 just a nickname that he went by, and so they're kind of stuck  
8 for a while. Eventually the police serve a search warrant at  
9 Monica's house, because they're still missing the murder  
10 weapon, and they don't really find it. They don't find  
11 anything there.

12 They serve a search warrant at where Job-Loc was  
13 living at the time, and that's another apartment, and that  
14 place looks cleaned out. It looks like someone left in a  
15 hurry. But the police do collect evidence from there. They  
16 collect a lot of cigarette butts that were in that vacant  
17 apartment. And they don't get immediate testing at the time  
18 like you see on TV. But some cigarette butts that were at  
19 Job-Loc's apartment were later tested and they had the DNA of  
20 David Burns and Willie Mason on it.

21 The police got another break fairly early on in the  
22 case about the murder weapon. As the police were looking for  
23 it, someone calls in to the police just out of the blue and  
24 reports that a young man by the name of Donovan Rowland, who  
25 goes by the nickname West, was in possession of the gun.

1           The police eventually through some effort make  
2 contact with Mr. Rowland, and he is someone who is, they  
3 learn, associated with Job-Loc, and they had never heard his  
4 name before. But remember how earlier on I told you that  
5 Job-Loc attempted to do that burglary at the Walmart where he  
6 broke his leg and it didn't really work out. Donovan Rowland  
7 was involved in that.

8           And he tells the police that he's an associate of  
9 Job-Loc and he's kind of evasive with the police and not fully  
10 candid with them, but he does tell them that he gave the gun  
11 that Job-Loc gave him to a friend of his. The police follow  
12 up on that and they find the gun.

13           They eventually test the gun, and an expert will tell  
14 you that the barrel of this gun was actually altered, damaged  
15 on the inside; meaning that it could not be matched to bullets  
16 recovered from the crime scene. But the police eventually  
17 ended up in possession of the gun.

18           So as the police were doing this investigation, what  
19 was going on with everyone else? Well, Monica was sitting in  
20 jail charged with murder, robbery, burglary and attempt  
21 murder. Stephanie Cousins was in town still. And these two  
22 defendants, along with Job-Loc, had left Las Vegas and gone to  
23 San Bernardino, where they're all from, on the Greyhound bus.

24           And the police eventually recovered surveillance  
25 tape. That's David Burns in the blue. You'll see Job-Loc

1 come by on crutches, and then you'll see Willie Mason come by  
2 on the surveillance tape, and he has something white on top of  
3 his head. So the three defendants, they go down to San  
4 Bernardino on the bus. Eventually the police enlist the aid  
5 of the FBI and they're able to locate Willie Mason in San  
6 Bernardino.

7 They still don't end up -- they still are for weeks  
8 not having a name for David Burns. And a local detective down  
9 there sends them a picture that Monica Martinez later  
10 identifies as David Burns, so they're able to take him into  
11 custody as well. And Job-Loc is taken into custody on his  
12 original California charge.

13 Now, since 2010 some things have happened. In fact  
14 very recently, in December, like a month ago, 2014, Monica  
15 agreed to testify in this case. And in her agreement she will  
16 receive a lesser sentence in exchange for her testimony that  
17 she will give before you all in this trial.

18 Since that time Job-Loc has been charged as an  
19 accessory to this murder, and Stephanie Cousins has been  
20 charged with her involvement in these crimes as well. This  
21 case though, will focus on these two defendants, David Burns  
22 and Willie Mason.

23 You will hear evidence about fingerprints, evidence  
24 about DNA. You'll get eyewitness testimony. And you'll also  
25 have -- well, you'll also receive evidence in the form of

1 photographs and firearms testing. In addition, you will also  
2 hear evidence or be able to read evidence about -- that are  
3 communications between Job-Loc, David Burns and Willie Mason.

4 And this excerpt is in fact a letter that David Burns  
5 sent to Willie Mason so he could send it to Job-Loc, or Jerome  
6 Thomas. And it gives you some insight into their assessment  
7 of the evidence. David Burns writes, "They told me they just  
8 got pictures and DVDs of us walking through casinos and on the  
9 Strip. Damn, it's true what they say, conspiracy will  
10 railroad the clique. That only shows what I was wearing  
11 though basically, and that the three of us were together on  
12 the Strip. They also got pictures of you walking onto the  
13 Greyhound in L.A., which don't mean anything. But they're  
14 trying to say you basically was helping us get away of some  
15 sort. That just means we were done with our visit to Las  
16 Vegas."

17 And done they were by the time they eventually got to  
18 San Bernardino. After you hear all the evidence in this case,  
19 hear more of their communications, you will know the lengths  
20 they went to, to avoid sitting exactly where they are now, and  
21 you will know they are guilty of all of the crimes charged.

22 THE COURT: Mr. Sgro.

23 MR. SGRO: Thank you, Your Honor. If I could just  
24 have a second to switch the computer and all that.

25 (Pause in proceeding.)

1 MR. SGRO: Thank you, Judge.

2 DEFENDANT BURNS' OPENING STATEMENT

3 MR. SGRO: Good morning. As Judge Thompson has told  
4 you, you are to keep an open mind until the case is concluded,  
5 because this very thing of opening statements and the way that  
6 they're going to try to get the pendulum to swing. And it's  
7 only fair we get to speak to you for a minute about what we  
8 think the evidence is going to show in this case.

9 Now, we start with how does a case break down? And  
10 there's really two ways this case break down -- breaks down.  
11 There are the counts related to attempted murder. Okay. And  
12 this -- these counts are the group of counts that relate to  
13 Devonia Newman being shot in the stomach. Then there are the  
14 counts related to the murder charge. Okay. And that is  
15 Derecia Newman being shot and killed.

16 Now, when we analyze what the evidence is going to be  
17 in this case and how do we break these counts down, we start  
18 with, Well, who did what? Maybe we can get some guidance from  
19 the charging documents. Now, the -- the clerk just read to  
20 you a long charging document that had a -- a lot of detail to  
21 it. I want to break down a couple of things.

22 The first thing we know, Jerome Thomas is named in  
23 every count, but he's not charged. Which I think you're going  
24 to find interesting as the evidence unfolds in this case.

25 And you heard the Indictment. I just picked a couple



1 of examples. You see, for example, Count 1 -- or, I'm sorry,  
2 Count 2, Conspiracy to Commit Murder, Jerome Thomas, also  
3 known as Job-Loc; Count -- Count 1, Conspiracy to Commit  
4 Robbery, Jerome Thomas, also know as Job-Loc. The State  
5 includes him as a coconspirator, but never charges him, which  
6 is going to be interesting in this case.

7 The other -- the other thing we look at is, okay,  
8 well, let's -- at least do we have consistency on who the  
9 shooter or shooters were? If we look at our charging document  
10 to begin to get some guidance, we see that the State, in what  
11 you just had read to you, named, well, either Mr. Mason or Mr.  
12 Burns possessing the firearm, both are named as potentially  
13 being a shooter. And the point of this is that it would be a  
14 tremendous error to pick and choose through this case  
15 different items without looking at this case in the totality.

16 Now, at the grand jury, you -- you heard the clerk  
17 read to you what's called a Grand Jury Indictment. There's  
18 reference to a grand jury. Essentially, it's a setting where  
19 people come in, they get sworn under oath, there's no defense  
20 attorneys there. The State of Nevada just puts on witnesses  
21 one by one, they ask them what they want, and then there's --  
22 there's a decision whether or not the case should go to trial.

23 There's a guy named Detective Wildemann, he's one of  
24 the homicide detectives in this case, who testified before the  
25 grand jury that they had information that Job-Loc was the

1 shooter.

2 Now, that leads us to this point. How do you  
3 investigate a case? There's two ways, right? The first way  
4 is you look at every detail. You interview everybody that's  
5 important. And at the conclusion of your investigation you  
6 decide what happened.

7 The other, Plan B, is you pick your suspect. You  
8 then decide that you will only attribute importance to the  
9 things that cause the person you picked to be the suspect, to  
10 be the one you're ultimately going to charge. I'm going to  
11 tell you that's what the evidence is going to show you in this  
12 case.

13 So how does this case start? Cornelius Mayo finds  
14 himself on a cell phone while paramedics are going in and out,  
15 crime scene people are going in and out, and he starts shaking  
16 down Stephanie Cousins, threatens to kill her. And I'm going  
17 to tell you that there's a number of phone calls where he's  
18 extremely aggressive with her.

19 Stephanie Cousins needs a fall guy. Who can I blame?  
20 And we're going to talk about the relationships in this case,  
21 which are going to be critical. And Cornelius Mayo, as he is  
22 sitting outside of his apartment, while police officers are  
23 overhearing, begins to shake Stephanie Cousins down for  
24 details about what happened and who's involved.

25 Now, Stephanie Cousins, who knows David Mason -- or,

1 I'm sorry, Willie Mason -- my apologies -- tells Cornelius  
2 things like, Well, I don't even know who that is. You know, I  
3 don't know that other dude. This, ladies and gentlemen, is  
4 the birth of -- this shaking-down episode is the birth of, Oh,  
5 it was the guy with the overalls.

6 Now, let's examine why that is. We start with who  
7 are the people involved in this case? Stephanie Cousins is  
8 almost 50 at the time; she's older than 50 now. She's almost  
9 50 years old. Willie Mason is 27; Monica's almost 40; Jerome  
10 Thomas is 30; David Burns is 18. You're going to hear these  
11 -- he's the outsider. No -- half -- most of these people  
12 didn't even know him until all these events unfolded. So  
13 clearly Stephanie Cousins makes an election to give up David  
14 Burns to Cornelius Mayo.

15 Now, what happens with Cornelius Mayo? This is him  
16 here photographed some time after all the events unfold after  
17 the homicide. Now, Cornelius Mayo leaves the police interview  
18 that he gives. Now, if you understand, there's going to be  
19 some time that goes by where Mr. Mayo's just sitting there. A  
20 police officer's watching him. He's making these calls. He's  
21 extremely pissed off and wants to know what happened.

22 After he gets this information, he literally sneaks  
23 into the hospital to see Devonia. Now, Devonia's 12 years  
24 old, she's just been shot. You're not going to hear evidence  
25 that he goes to check on her, and you're going to -- you're

1 not going to hear things like, Hey, are you okay? Or, We're  
2 going to be okay. Or, Man, this is horrible. Instead, what  
3 he talks to Devonia about is an eye for an eye, shooters, and  
4 revenge.

5 This is what's documented relative to the  
6 conversation he had with his daughter. He has the opportunity  
7 to tell her what he knows and the evidence is going to show  
8 you that he wanted to make sure he got to her before the  
9 police did.

10 Now, I want to go through the timeline of how these  
11 events unfold. And these are approximate times, because we're  
12 going to talk about the cell phone records and the minute --  
13 and the cell phones aren't always consistent with each other,  
14 which -- which carrier and -- and they're inconsistent with  
15 caller ID, etcetera. But I want to give you the basics.

16 At around 3:45 a.m. the incident occurs. Now, we're  
17 going to talk about Cornelius Mayo and the fact that time went  
18 by where he made a different phone call before he called  
19 9-1-1. He called 9-1-1, he says, from the bushes about eight  
20 or so minutes later. Five calls between Cornelius Mayo and  
21 Stephanie Cousins between 3:57 and 4:09, and those are the  
22 calls where he's shaking her down. He's going to admit to you  
23 he threatened to kill her, send people over, You'd better  
24 bring your army, all that kind of stuff.

25 Cousins reaches out through -- I can't remember now

1 if it's personally through her daughter or a combination, but  
2 at 4:33, about 20 minutes. And she's -- she's very scared.  
3 And she reaches out through 9-1-1. Cornelius Mayo gives a  
4 police statement at 6:26 a.m. Now, this is about three hours  
5 after everything happens. Okay.

6 At 7:20, Stephanie Cousins would be in the police  
7 station, about an hour later. And this, ladies and gentlemen,  
8 10:25 a.m., is where he's caught. You know, when you sneak  
9 in, you don't expect to get caught. But there are incident  
10 reports and a security log that memorialize the time that you  
11 snuck into the hospital at 10:25 a.m. to speak with Devonian.

12 Once CPS gets involved -- and you'll learn that once  
13 -- anytime children are involved in situations like this, CPS  
14 gets involved and they're given the job task of keeping an eye  
15 on -- on the kids. So CPS gets involved and that's that in  
16 terms of Cornelius Mayo.

17 Now, Cornelius Mayo is asked at the grand jury, you  
18 know, this proceeding where he gets sworn under oath, there's  
19 no defense attorneys, he's asked, Hey, did you go to the  
20 hospital? And he says under oath, No. And the State -- don't  
21 think I can do it with the pointer. But you see, "I mean,  
22 you've seen her since back in August, I'm sure?"

23 Answer, "No." Next question, "You haven't?" "No."  
24 That's what he said in front of the grand jury under oath.

25 Now, remember the 9-1-1 call. He initially said very

1 generically, you know, once everything died down, I called  
2 9-1-1. Well, then he changed his mind. Now, two times -- and  
3 remember, we talked a lot about credibility, a lot about red  
4 flags. I'm going to encourage you as we go through this case  
5 to look for changes, changes in testimony and -- and evaluate  
6 those as to whether they should be red flags or not. He  
7 changed his mind.

8           What he did, according to the police -- and you'll  
9 learn, too, we have the opportunity to go interview witnesses  
10 before the case starts, and when we interviewed him, he told  
11 our investigator the same thing he told the police, which was,  
12 I first, though, decided to call some friends to handle their  
13 business. That's the phrase he used with us. With others he  
14 said, I called family. And he actually later would tell our  
15 investigators, actually, his brothers that he called.

16           So bottom line is, handle their business, means I  
17 needed someone to come over and take some stuff out of here.  
18 Drugs and property. That's what he told us.

19           During this entire time while he's cleaning out his  
20 apartment, Devonia is bleeding on the threshold of the  
21 bathroom. Now, what was his first priority? Drugs. Whether  
22 or not he's small time or a drug cartel, whatever it is, drugs  
23 is definitely going to be relevant in this case, because it  
24 proved -- it proves a motive to do a lot of things as this  
25 investigation unfolds.

1           Cornelius's first motive was to protect the crime  
2 scene in terms of eliminating materials that he thought would  
3 make him look bad. There's crack cocaine all over the floor.  
4 This is a vial of crack cocaine that's later collected by the  
5 police. And, in fact, there came time, remember, Cornelius is  
6 standing outside interacting with the police? Well, he went  
7 outside, he didn't have shoes on. So he asked for a pair of  
8 shoes. And rock cocaine fell out of his shoes, which was --  
9 which were in the master bedroom.

10           Now, the police have been sitting with Cornelius Mayo  
11 for several hours. They have heard threats. They have heard  
12 that he's collected information. When they interview him,  
13 though, they don't ask him anything about whether or not he  
14 owned a gun. Now, I just heard Ms. Weckerly state a couple of  
15 times this whole thing about there's a family and kids and  
16 there's no gun. Make no mistake, Cornelius Mayo was a drug  
17 dealer. Drug dealers typically own weapons. And I'm going to  
18 tell you what he told us here in a minute.

19           The police don't even ask him, Do you own a gun?  
20 They didn't ask him on tape, Tell us about what just happened  
21 with you and Stephanie Cousins and tell us the information she  
22 gave you. They don't ask him about the threats to anybody,  
23 about the -- the suspects he's speaking to. And -- and  
24 understand that some detail was given to you about  
25 relationships and Cornelius calls Stephanie Cousins.

1 Cornelius Mayo is speaking to Willie Mason, Jerome Thomas, and  
2 Stephanie Cousins. He gets the information, he gets the phone  
3 numbers.

4 Now, as I told you, CPS is involved. They -- they  
5 ask Cornelius some questions also. What's the -- if --  
6 because Cornelius Mayo, to Child Protective Services, keeps  
7 saying, I don't get it, I don't sell drugs, I am not a drug  
8 dealer. Okay. Well, if that's the case, why, then, did  
9 people come to your home and target you, to borrow the State's  
10 word.

11 Well, I won \$2,500 on a basketball bet. I picked 10  
12 teams, I bet \$5, and I won.

13 Well, a judge would later point out that in August of  
14 2010 there weren't enough basketball games to bet 10 games.  
15 And a \$5 bet would have been 500 to 1, which doesn't exist on  
16 any parley card in Las Vegas. So then he'll say, Oh, well,  
17 maybe it was basketball and baseball, I don't know.

18 He tells CPS, though, that the only things that were  
19 taken were \$120, some cigarettes, and a stick of deodorant.  
20 He would continue to say he smokes marijuana but doesn't sell  
21 any drugs. And incidentally, remember those photos I showed  
22 you about the drugs? It's all crack cocaine.

23 Several times during the interview Cornelius  
24 reiterated he doesn't sell drugs out of that house. Now, CPS,  
25 to verify, contacts people that interacted with him over those



1 several hours. One of those people is Detective Shoemaker, I  
2 read his name off of our defense witness list, in case he  
3 shows up.

4 Detective Shoemaker says, you know what, Cornelius is  
5 lying to you. He is selling drugs out of the home, he told me  
6 that. And not only that, but our investigation is Devonian was  
7 the one who would go the front door, collect the money from  
8 Derecia, and walk it back to Cornelius and retrieve the drugs  
9 from him, which makes sense as to why Derecia was at that  
10 front door at 3:30 in the morning. Cornelius had trained  
11 Devonian to be a courier, effectively.

12 Now, unbelievably, not on tape and not at the grand  
13 jury, did Cornelius Mayo ever get asked about his interactions  
14 with Jerome Thomas, Job-Loc. Right? He was the one that  
15 Detective Wildemann said he had a tip that he might be the  
16 shooter and they are communicating. This is Cornelius Mayo's  
17 inbox on his cell phone, and I want you to see that, the text  
18 messages. Now, just so you know how it works, I -- the only  
19 way to do this is to hit click, and then it's going to run  
20 through the text messages one by one till they're finished.  
21 Okay.

22 (Video of text messages played.)

23 Now, the final text message that had queued up, "Love  
24 your family, babe." This is Cornelius Mayo trying to engage  
25 Jerome Thomas in heated conversation, because Cornelius Mayo

1 is saying, I know what you did. You're involved. And those  
2 aren't responses from David Burns. Those are responses from  
3 Jerome Thomas.

4 Now, let's talk about the State's theory. One of the  
5 things that you're going to learn, and they showed you a photo  
6 of it, is the six-shot Redhawk .44 Magnum revolver. Okay.  
7 Now, let's start out with this. There is no evidence, zero,  
8 that this weapon was loaded -- loaded -- before any gunman  
9 went into this home. Okay. It holds six, but there's no  
10 evidence as to how many bullets were actually in the chamber  
11 of this revolver.

12 Now, on August 7th, 2010, the day of the homicide,  
13 crime scene analysts go and they're going to talk about three  
14 bullet paths. And the way they do it is they follow strike  
15 paths of bullets, and -- and let -- and they name them. Like,  
16 here's A-1, here's A-2. And they go A-1 through A-whatever,  
17 until they find where the bullet has its resting place. Makes  
18 sense.

19 And so the crime scene analysts trace three travel  
20 paths of bullets. A-1 through something, B-1 through  
21 something, C-1 through something. That happens the day of the  
22 homicide.

23 On August 15th, there is another bullet, and I  
24 believe this comes from the buttocks area of Devonia Newman,  
25 because the travel path of the bullet was through her stomach

1 and lodged somewhere in her buttock area. So that's another  
2 bullet that -- that the police recovered in this case.

3 Now, on September 14th, 2010, Cornelius Mayo is  
4 moving. He moves a shelf and he says someone should come out  
5 here. The crime scene analysts go out there and they see two  
6 more bullet holes that they trace. And they trace the path  
7 and the reports all say -- remember now, I'm doing this,  
8 they're listening, Monica Martinez's attorneys are in the  
9 courtroom, watch for changes. Okay. Because the reports  
10 right now all say a bullet -- A, the flight path of a bullet  
11 went into one hole; Bullet B, the flight path of another  
12 bullet. Okay. They talk about different trajectory paths and  
13 different bullets.

14 Now, what happens at the grand jury? Another  
15 homicide detective. His name is Chris Bunting. Chris Bunting  
16 is asked about this particular day, these two bullet holes.  
17 Mistakenly, confused, who knows? For whatever reason, Chris  
18 Bunting changes this crime scene analyst report and tells the  
19 grand jury under oath that there's only one hole in that wall.  
20 I predict he's going to have an explanation when he shows up.

21 Now, another thing that happens is they get a bullet  
22 fragment from a TV. They open up a big-screen TV, and this  
23 again is going to be some -- this TV gets moved when they find  
24 the holes. They say -- they recall there's a TV, there's a  
25 bullet fragment, they locate a bullet fragment from the TV.

1 Why is this important? Well, because it shows you the level  
2 of detail that they examined this television with. They found  
3 a fragment.

4 Now, what happens, 15 months later -- 15 months later  
5 -- Cornelius Mayo contacts the police and says, I have another  
6 bullet from that crime scene. And literally somebody from  
7 Metro goes to meet Cornelius Mayo and he hands them another  
8 bullet. Now, Cornelius Mayo -- whose credibility is suspect  
9 at best -- Cornelius Mayo says, This is from the crime scene.

10 Where'd you get it? I got it from the back of the  
11 TV. The same TV that was taken apart and it's difficult to --  
12 even to see on a blown-up photo where that fragment was.  
13 Police found it. Cornelius Mayo's going to suggest to you  
14 that this bullet, too, came from the same TV.

15 Now, if we do the math, the crime scene analysts  
16 recovered three bullets from the scene. There's two more  
17 bullets that are identified as this A and B bullet, the two  
18 new holes that were found when shelving was removed.

19 Of course, there's the bullet that killed Derecia  
20 Newman. There's also a bullet from Devonia. And, of course,  
21 there's this mystery bullet that Cornelius produced. Remember  
22 I said there's no evidence, no evidence, that this revolver  
23 was loaded when any assailant went into this residence. Best  
24 case scenario, if it was loaded, there's still too many shots  
25 that were fired inside that residence.

1           So Cornelius owns a gun. How do we know that?  
2 Despite what you just heard Ms. Weckerly say, we interviewed  
3 him. And interestingly, the police never looked for a gun.  
4 They did, however, do a gunshot residue test, which as of  
5 yesterday or the day before when we last checked, the gunshot  
6 residue test to determine if there was any evidence that he'd  
7 fired a weapon, went from his hand into the evidence vault  
8 where it sits today, some four years later. They never did  
9 anything with it.

10           They didn't give a gunshot residue test to the  
11 neighbor or to the person across the street. The police gave  
12 a gunshot residue test to Cornelius Mayo, which they did not  
13 do anything with.

14           Cornelius says to us, Yeah, I own a gun. But you  
15 know what's weird? On the exact day that this homicide went  
16 down, I loaned that gun to my friend. Remember the two ways  
17 to investigate a case. It is going to be a challenge through  
18 this case to explain if you bother to take the gunshot residue  
19 test, why not complete it? Why not, instead of arguing about  
20 it, why not just complete it? And -- and tell us, yeah, we  
21 did the test and -- and it's all good.

22           Now, Devonia Newman was also there. Remember, this  
23 is just as to who shot her. Remember the sequence of events.  
24 The shooting occurs, she's running, she is running away.  
25 Cornelius Mayo is in the back bedroom, where arguably his gun

1 would be. It is dark. He hears gunshots. I think the  
2 evidence is going to suggest he's a little worried. And the  
3 evidence is in conflict where he was at. You know, Ms.  
4 Weckerly had to pick a scenario. The scenario she picked was  
5 he was in the bathroom, right? That's what she said.

6 Now, his statements and Devonian's statements are all  
7 over the board, because there's one statement that says that  
8 Cornelius, when he heard gunshots, goes and grabs money first,  
9 and the two of them go in the bathroom together. There's  
10 another statement where he says, I was actually using the  
11 bathroom and Devonian busted in as I was pulling my pants up.

12 So, as the case unfolds, understand that, as they  
13 tell you what happened in this case, that they are picking and  
14 choosing different parts of statements, but that they are not  
15 consistent.

16 Now, Devonian gets shot, no doubt about that. In the  
17 gunshot situation that is occurring, whether or not there's  
18 one revolver being used, two revolvers being used, we don't  
19 know what the brothers came and cleaned up, because no one  
20 ever asked them about it other than they handled their  
21 business. That's all he told us.

22 We get copies of what are called voluntary  
23 statements, and we get transcriptions of those statements.  
24 You can see there's questions and answers, and occasionally on  
25 those witness statements there's blank lines. And you can see

1 one has an "A" for "answer."

2 Now, Devonian Newman is medicated. She is recovering  
3 from a very serious injury. She's speaking very softly. And  
4 the police officers in this case, when they do the  
5 transcripts, you know, they -- they -- from time to time they  
6 come up with something that they call "unintelligible," right?  
7 The blank lines.

8 So what we do is we listen to these tapes. And --  
9 and I want you to hear, as she's laying on the ground,  
10 remember, remember the scenario of what's happening, the gun  
11 battle that's occurring in this home, what does Devonian say?

12 (Audio played.)

13 Now, obviously, we've had this case for a long time.  
14 We've -- we've listened to this thing a thousand times. I  
15 want you to just listen to the portion that we have filled in.

16 (Audio played.)

17 Now, you all will be the judges of what occurred.  
18 And despite the giggle and unprofessionalism to my right, this  
19 is serious. And when you listen to this statement, you tell  
20 me -- or not tell me, I apologize -- you decide if Cornelius,  
21 scared, in the back bedroom with a gun, not on purpose,  
22 potentially felt that an assailant was about to shoot him, as  
23 well.

24 Now, this is what Devonian said, and I'm going to tell  
25 you this, too. Throughout Devonian's statement the police

1 constantly go back and say, Okay, let me clarify this, let me  
2 clarify that. All right. When this comes out, the police  
3 officer taking this interview moves onto a different subject.  
4 He doesn't clarify anything. Listen to the tape and  
5 understand this, too, if you don't know these people, right,  
6 and Ms. Weckerly -- the State was going to concede Mr. Burns  
7 doesn't know these people. They were "targets" because of a  
8 need to get some drugs.

9           When you think of this statement, rifling through  
10 pockets to look for drugs, the persons that would know that  
11 Devonia may have drugs on her -- remember, she's a 12-year-old  
12 little girl. She's not the -- the -- the drug dealer. That's  
13 the adult at the front door. It seems that it's going to make  
14 more sense as this case unfold that it would be Cornelius's  
15 friends or family that knew the situation that would know  
16 enough to rifle through a 12-year-old girl's pockets.

17           Now we move to the second component of -- of counts  
18 in this case, and that's who killed Derecia. Again, the  
19 charging document gives us alternative people that could have  
20 been -- could have been the shooter. The State's not, at  
21 least in this charging document, telling us who the shooter  
22 is.

23           Now, the police in this case begin with, Well, let's  
24 analyze the murder weapon. Well, how do they get the murder  
25 weapon? First thing is there -- there is evidence of the



1 murder weapon being damaged. Okay. The -- the rifling, the  
2 barrel, it's -- it's altered and causes testing to not be  
3 possible.

4           How'd they find the gun? Well, the gun was at  
5 Anthony Lasseter's house. Anthony Lasseter is an individual  
6 with big, bushy hair and very striking eyes, and the eyes are  
7 going to be important in this case. How did Anthony Lasseter  
8 get the gun? Anthony Lasseter got the gun from Donovan  
9 Rowland.

10           Donovan Rowland and Jerome Thomas are extremely  
11 tight. Donovan Rowland and Jerome Thomas speak to each other  
12 while Jerome is in custody in San Bernardino. Donovan Rowland  
13 tells Jerome Thomas, Man, I'm -- I'm your guy. So much so  
14 that I think I'm going to apply to be a prison guard, so I'm  
15 going to get a job at your jail, I'm going to break you out.

16           These two are attached at the hip. Donovan Rowland  
17 is the one that tells the police that he gave it to Lasseter.  
18 Well, what's Donovan Rowland doing? How did he get the gun?  
19 He's interviewed by the police.

20                           (Video played.)

21           Jerome Thomas is cleaning the murder weapon. And I  
22 want you to ask yourself questions as this case unfolds, what  
23 would they tell you the value of each of these pieces of  
24 evidence if it had been David Burns? In other words, if David  
25 Burns was cleaning the murder weapon, would they rely on that

1 for a conviction? And the answer is absolutely.

2 And I want you to think about these different  
3 components of the case, which, by the way, were almost  
4 completely ignored during the opening presentation.

5 So Donovan Rowland later is asked, Well, okay, you  
6 saw him cleaning the gun, then what happened? Well, Job-Loc,  
7 Jerome Thomas, says, "'Something happened, I got a lead. So  
8 pretty soon I'm going to be gone. Hold this for me.' Then I  
9 got the gun and I left." So Jerome Thomas is telling his  
10 buddy something happened, I have to go. Now, understand, I  
11 have to go is I have to go to a place where there are warrants  
12 for my arrest for charges that involve life sentences. You've  
13 got to wonder what happened here that causes him to think that  
14 he's better off going there.

15 Donovan Rowland tries to sell the gun. He didn't  
16 just try to hold onto it. What happens when he tries to sell  
17 the gun? Well, he's out there asking questions and -- and Ms.  
18 Weckerly alluded to this a little bit. But what she didn't  
19 say is that the people that he tried to sell it to, the  
20 Coopers, Yolanda Cooper said that, Hey, Donovan said he was  
21 involved in the murder. Donovan said they took \$4,000 and  
22 Donovan got \$1,000 for participating. For participating.  
23 Remember that question, man, if this was David Burns, would  
24 they use this evidence to convict David Burns? You bet.

25 Now, Jerome Thomas, also known as Albert Davis, also

1 known as Job-Loc, also known as Cowboy, also known by about 22  
2 other names, is the boyfriend, and it's unclear if it's just  
3 boyfriend/girlfriend or -- or pimp and prostitute.

4 But there's -- there's also some prostitution type of  
5 relationship that exists between him and Monica Martinez. He  
6 knows Mr. Mason. He is buddies with Donovan Rowland. And  
7 he's also buddies with Anthony Lasseter, the other individual  
8 who was involved in the murder weapon. And there's calls, a  
9 lot of calls to Mr. Rowland and Mr. Lasseter.

10 Who's Albert Davis? Well, Albert Davis is a fake  
11 name. How do we get Albert Davis? Because Monica Martinez is  
12 working in that pharmacy company, right? And she's a clerk  
13 there. Monica Martinez has a spiral notebook where she writes  
14 down names, dates of birth, and Social Security numbers so she  
15 can use those identities down the road. For what purpose,  
16 it's not totally clear. She has a notebook full of these  
17 names. You see here, Albert Davis is the one with asterisk,  
18 right?

19 Now, why is Albert Davis important? It's important  
20 for a couple of reasons. Do you remember the incident that  
21 the State told you about where he tried to rob a Walmart and  
22 it was unsuccessful? You know -- and -- and keep in mind,  
23 Donovan Rowland and Job-Loc are -- are tight. They're out  
24 committing burglaries together. The Walmart one was foiled,  
25 right? Well, he hurt his leg. He's got an active warrant in

1 California. So to evade police and get medical treatment, he  
2 uses the name Albert Davis, which Monica Martinez stole from  
3 her office. That's who Albert Martinez is.

4 And who else is he? Monica Martinez will tell the  
5 police she doesn't know a Job-Loc. She says, on the way to  
6 the interview, you know, My boyfriend's name is Albert Davis.  
7 She maintains her boyfriend's name is the fake name that she  
8 stole from the pharmacy, which he used to get medical  
9 treatment.

10 Now, on the night of the homicide, it's Jerome that's  
11 stressed out about money. And this is Monica Martinez. And  
12 you'll find at the -- at the end of this case that police keep  
13 saying to her, "Who are you protecting? Who are you trying to  
14 help?" She ultimately says, "Job-Loc." Now, Job-Loc, Jerome  
15 Thomas, wanted money. He's calling her, Go out, you've got to  
16 get me money, you've got to get me money.

17 He owns a gun. And, in fact, during the interview  
18 with Ms. Martinez, Ms. Martinez identifies the gun that I  
19 showed you a picture of. Detective Wildemann gets on the  
20 phone and calls another officer, and he says, "Hey, just so  
21 you know, Job carries a big silver revolver."

22 Now, there's going to be some evidence in this case  
23 about cell phones. We spoke about it voir dire for a little  
24 bit about the accuracy of information received and testimony  
25 received about cell phones. Okay. Now, the grand jury, when

1 they decided to charge this case, probably had some questions  
2 about, Well, where's Job-Loc? I mean, there seems to be an  
3 awful lot of evidence about him.

4           So testimony's adduced that they -- that the State  
5 put on -- remember, there's no defense attorneys there to  
6 challenge it. The testimony is through phone calls, his phone  
7 keeps pinging off the same tower -- right -- through the  
8 night. And they -- they're very careful how they choose the  
9 generic description of what happens with his cell phone  
10 records. And they say, "Through the course of the evening his  
11 phone seems to be at the same spot."

12           You know what, in a vacuum -- in a vacuum, probably  
13 true, probably -- there is a problem even with that. But  
14 understand this. This is what the State's looking at. Well,  
15 there's a call at 2:03, and then the next time Jerome Thomas  
16 uses his cell phone's at 4:07. So while they fed the grand  
17 jury that there's this two-hour -- or there's only, you know,  
18 this one tower, they neglected to tell them, But there's no  
19 calls during these relevant timeframes.

20           And the police notice that. The police initially,  
21 before they go to the grand jury they pointed out, they  
22 confront Monica Martinez. Why aren't you on the phone with  
23 Job-Loc? You guys talk every 15 minutes. Because the  
24 inference is you don't call someone if you're together.  
25 Right?

1           And this whole thing about the tower and where it  
2 hit, Ms. Weckerly told you about a PIN register. Now, I just  
3 showed you a record that shows Job-Loc's phone was at  
4 2-something -- 2:03 and 4:06 or something like that. This is  
5 the PIN register which conflicts, which shows a call from  
6 Monica Martinez to Jerome Thomas minutes before the homicide.  
7 And you're going to hear that there was, according to Monica,  
8 some frustration on Jerome Thomas's part because she was  
9 unsuccessful in getting money. She tried to prostitute  
10 herself, she tried to do all these things and wasn't making it  
11 work.

12           Now, why is this call important? Because Monica  
13 Martinez lives on a street called Cinnabar. Homicide happens  
14 on a street called Michael, or Mickle. It takes literally  
15 about a minute to do this drive. You literally go out on  
16 Monica's street, go down two blocks, turn left, and you are at  
17 the homicide scene. At 3:30 in the morning, that takes a  
18 minute.

19           Now, after the homicide's done, Jerome has the money.  
20 Would it be incriminating if David Burns had the money after  
21 the murder was done? Of course it would be. Jerome Thomas  
22 has the money. He's the one doling it out. The police,  
23 incredibly -- and you may find this as one of the most  
24 remarkable parts of this story -- they search Jerome Thomas's  
25 home, they make a list of a bunch of items that are there.

1 There are three cell phones on the counter which are not  
2 taken.

3 Remember the grand jury testimony about, Well, he had  
4 a phone? There's this mistake that sometimes people make  
5 where people assume that if there's a phone that does  
6 something, that automatically the person on the other end of  
7 it is the person that the phone is attributed to. Mr. Thomas  
8 had access to three, none of which were taken. But they took  
9 that disposable camera just six inches to the left of it.  
10 They didn't take the phones, though, after the homicide.

11 These are still photos lifted from a video at Texas  
12 Station that happens about 4:30 in the morning. You see  
13 Monica Martinez walk in, you see her on her way out, and you  
14 see she's looking for Jerome Thomas. And this still shot, and  
15 I'm going to tell you it's hard to see, but there certainly  
16 appears to be a man on crutches exiting the Texas right after  
17 Monica leaves.

18 Now, what did they charge Jerome Thomas with?  
19 Remember, this is the new thing, Jerome Thomas is now charged.  
20 Well, they filed something against him back in 2011, Accessory  
21 After the Fact. Accessory. Accessory.

22 There's no conspiracy charges in what he's actually  
23 facing. There's no conspiracy to commit murder. There's no  
24 conspiracy to commit robbery. It's all accessory. Which is  
25 going to be relevant. Because if you go to Plan B and you

1 just assume David Burns is our guy, you can't charge him,  
2 because then you create confusion beyond that which already  
3 exists.

4 Now, we do know one thing amongst all these cell  
5 records; David Burns doesn't have a cell phone. You will  
6 never be called upon to determine who David Burns was on his  
7 phone with, because he doesn't have one.

8 Now, Monica Martinez, the woman who turned State's  
9 evidence, the woman who's a snitch, the woman who's working  
10 with the State, pick your adjective, tells the police on the  
11 way to her interview -- now, this is the person, by the way,  
12 that the State has cut a significant amount of time off of her  
13 sentence in order to come in here and testify. And we talked  
14 about plea agreements, we've talked about plea bargains and  
15 the impact they might have on people and why they might want  
16 to lie.

17 Now on the way to the interview Monica says, I can't  
18 remember what happened, because I was blacking in and out. I  
19 was so high, I used all these drugs, I don't know what  
20 happened. She is setting the stage for I don't know. Right?  
21 And this is the woman, now, that's going to come in and  
22 suddenly elect to tell the truth. Right?

23 One of the reasons to look at someone's interview is  
24 not only -- not only the content of what they say, but it's  
25 for tone and demeanor. In other words, does this particular



1 person have the capacity to look you in the eye and lie to  
2 you? We talked about that in voir dire. Remember? Can --  
3 can a witness take the stand, swear to tell the truth, look  
4 you in the eye, and lie? Okay.

5 Now, I only have examples, because her interview was  
6 very long. But I want you to get a little bit of a feel for  
7 what she said and the kind of body language she has, etcetera.

8 (Video played.)

9 Honestly -- honestly, Chris -- Chris Bunting, you  
10 guys know more than I do. And it was at that moment that she  
11 decided to look him in the eye and say that.

12 Now, her tone and demeanor here, she's going to flail  
13 and say, I don't know, I don't know.

14 (Video played.)

15 The animation that she adds is another sign of how  
16 committed she is to what she is saying. And the question, by  
17 the way, in that clip was, Who's Albert? I don't know, I  
18 don't know. Albert, remember, is that fake name that she gave  
19 Jerome Thomas when he needed medical care.

20 This is one of several references throughout the  
21 course of the interview process where she says she's loaded  
22 and she doesn't know Willie Mason and can't describe him.

23 (Video played.)

24 I don't know, I was loaded. This is the man she  
25 claims to have been intimate with, doesn't know anything about

1 him. Zero.

2 Now, pages and pages of this transcript are laced  
3 with a reference to the fourth person in the car and that --  
4 that fourth person in the car had braids. Now, through the  
5 course and of the braids, you know, because they keep  
6 referring to this fourth individual, she says, "He had braids.  
7 They looked old." Okay. So again, it's not only that he had  
8 braids, but they looked old.

9 "How long were the braids?"

10 "They weren't that long." And -- and the police  
11 officer in the interview is saying, you know, To the ears, to  
12 the shoulder? And when he -- when he goes, "To the shoulder?"

13 She says, "No, not that long."

14 "Was he wearing a hat?"

15 No, he didn't have a hat, "Because I saw the braids."

16 "What about the guy with the braids?" Yeah, he was  
17 sitting in the back. He was in the front? Yeah, the guy with  
18 the braids was in the back. The guy with the braids, when you  
19 say the braids, did he have, like, beads, stuff in it, just  
20 braids? And then she says, "No, just braids."

21 And this goes on, ladies and gentlemen, there's  
22 another 20 examples of the level of detail to the braids.

23 (Video played.)

24 He doesn't have braids. And then the police are  
25 trying to ascertain from her, Okay, when is the time where we

1 get a story that we can rely on? And -- and the bottom line  
2 is when you look at the motive, she has an extreme amount of  
3 anxiety about being in jail. Her letters bear it out, her  
4 phone calls to her friends and family bear it out. And she,  
5 from day one, had anxiety about being arrested and going to  
6 jail.

7 (Video played.)

8 She said, I was in that car, I'm going to jail. And  
9 the tape is replete with, I want to go home now. There are  
10 sections in her statement where she says to the homicide  
11 detective, I want to go home, I want to go home. And the  
12 detective never says yes or no. He just sort of blows her off  
13 and says, Well, let me check on this, let me check on that.

14 There came a time when the storytelling and later  
15 changing her mind on what the story was became so often that  
16 the detectives ran out of technique, and so they tried this  
17 novel approach.

18 (Video played.)

19 Now, the detectives put her under oath. Obviously,  
20 it's not like a courtroom oath, but they say, you know, maybe  
21 this'll work. Let's cause her to look at us in the eye, swear  
22 to tell the truth.

23 Right after they do this oath, she's asked some  
24 questions about, Well, what did you do after? And -- and we  
25 get all kinds of details about going to a park. Pages of

1 details about going to the park.

2 (Video played.)

3 Okay. Now, the most impressive part of that story  
4 and something that I don't know if I've ever seen before is  
5 she actually says, The point where I lied was this. She was  
6 fully aware of when she breaks off from the truth, but her  
7 tone and demeanor never change. But she can remember back,  
8 okay, this is the part that I told you that wasn't true.

9 Now, we spoke a lot about the difference between  
10 witnesses that have motives to lie and science. And in this  
11 case you're going to hear some evidence of DNA. Ms. Weckerly  
12 alluded to some.

13 Now, police officers in a case like this with these  
14 kinds of witnesses, they know that persons may question  
15 motives to lie. And they also know that science typically  
16 does not lie. And this is a -- a memorandum of a conversation  
17 that exists between the DNA expert in the case and Chris  
18 Bunting, the homicide detective. And he says, "We need to put  
19 the suspects in the car and in both residences to corroborate  
20 the story."

21 There is an affirmative recognition that without  
22 science they don't have anything. So what do they do? They  
23 elect to not take Jerome Thomas's DNA. Why? Because they  
24 have already gone with Plan B; David Burns is our guy, why  
25 bother?

1           And by the way, the prior slide was authority to take  
2 all the samples. Jerome Thomas gets neglected. They check  
3 the crime scene, they check the victims, they check the gun  
4 and the holster, they check Monica Martinez's car. And -- and  
5 imagine, and the testimony is going to be, you know, this  
6 gunshot wound right to her -- right to her head, the trigger  
7 was pulled, blood would have immediately come out. Devonia is  
8 -- is bleeding from her stomach. She just got shot in the  
9 stomach. They're going to tell you David Burns went through  
10 her pockets. He shot, he went through pockets, he's got to  
11 have blood on him.

12           There will be evidence that when he came out, I think  
13 that they're going to say from the stand he had blood on him,  
14 right? Okay. Let's check the car. They say, Monica, did you  
15 clean the car?

16           No, I didn't. And -- and just as an aside, would it  
17 have made a difference that they cleaned the car? No.  
18 Because the technology would have shown the cleaning agent.

19           Bottom line, they check everything; nothing. Nothing  
20 related to David Burns. Other than he is guilty of smoking a  
21 cigarette and drinking some juice and having a soda.

22           Now, they did some testing on the gun. Guess who  
23 could not be eliminated? David Burns was eliminated. Monica  
24 Martinez can't be excluded. Donovan Rowland can't be  
25 excluded. David Burns was.

1           Now, let's talk about Devonian Newman. When it came  
2 down to the second part of this case, which is who shot and  
3 killed her mom, she's asked questions, you heard some of the  
4 statement that was taken in the hospital. Now, I'm -- I'm  
5 going to talk about something just to allow the opportunity to  
6 evaluate how much time she really had. These are seconds,  
7 moments in time. From her perspective, I can't even begin to  
8 imagine the stress, anxiety, and how things looked.

9           She actually told CPS that she was shot in the back.  
10 Nobody -- nobody is going to say she was shot in the back.  
11 This is only a reflection of a 12-year-old girl's inability to  
12 really remember everything and how it went down. She couldn't  
13 even remember where she was shot, which is a pretty --  
14 relatively simple detail, I would think.

15           Now, she's asked to describe the assailant. She says  
16 a white t-shirt, white shoes, orange hat, 27-30 years old.

17           This is the person State's going to say is David  
18 Burns, right there in the overalls. He's not wearing a white  
19 t-shirt or white shoes or the right hat. And he's not 27-30.  
20 He's 18.

21           Now, the only thing that they have, then, that is  
22 consistent would be this notion of the overalls. And even as  
23 to the overalls, I want you to listen to the difference  
24 between what Devonian will say and the difference of what's  
25 attributed to her. And it's subtle, but it's important.

1           Now, you see here, "What was he wearing?" The police  
2 is going through and -- and there's a couple of sections in  
3 her statement. And you see where it says, question -- answer  
4 you can't hear, or -- or they couldn't -- or they did not  
5 transcribe.

6           And then it says, "White t-shirt with blue -- with  
7 blue overalls."

8           Okay. Now compare that to what she said.

9                               (Audio played.)

10          Now, she says a white t-shirt with overalls. The  
11 police officer says, A white t-shirt with blue? And you can  
12 tell it's instinctive, because that's what he believes. And  
13 remember, the police officer spoke to Devonian before ever  
14 hitting record on the -- on the interview device. Right?

15          He says, A white t-shirt with blue -- oh, blue  
16 overalls? And I don't know, you can't tell whether she's  
17 nodding. And then he says, And they were rolled up to the  
18 pant leg, when she comes back and says, The overalls? She  
19 says, They're white.

20          But this matches with the police theory. So all the  
21 transcripts from this point on will say, Yeah, Devonian told us  
22 it was someone with blue overalls. And again, it's a subtle  
23 thing, but it's -- it underscores the importance for you all  
24 to make your own assessment. Now, this is when she's at the  
25 hospital.

1 I told you that we get to interview people. Right?  
2 We interviewed, as I told you, Mr. Mayo. We interviewed  
3 Devonia. Now, I -- strike that.

4 We asked, Tell us about this person. You know what?  
5 This person had a bandanna. And it was from the bridge of the  
6 nose -- the bridge of the nose all the way down. This person  
7 had a hat. Came down right to the rim just above his eyes.  
8 All I could see, really, was his eyes.

9 And remember, I -- I mentioned earlier, I mean, I'm  
10 not sure who it was, but of all the people in this case,  
11 Anthony Lasseter has the -- the most striking eyes in this  
12 whole situation.

13 But this is what she told us; bandanna and a hat.  
14 And the only thing I remember at all was his eyes. And not  
15 only that, but I read through what they said that I told them  
16 about certain things about this case, and it didn't seem right  
17 to me. She told us it -- my statement when I read it didn't  
18 seem right to me. And I told the DA that my statement didn't  
19 seem right to me, and the DA said, Don't worry about it.  
20 That's what I expect she's going to say on the stand when she  
21 testifies here in a few days.

22 Two ways to investigate a case. You go with Burns is  
23 our guy, it's a relatively simple road. You ignore the cell  
24 phone records, you don't do the gunshot residue test on  
25 Cornelius Mayo, you don't get Jerome Thomas's DNA, you don't



1 allow Devonia to talk about her statement, you don't ask  
2 Cornelius the tough questions about do you own a gun -- how in  
3 God's name do you not ask this guy if he owns a gun? -- you  
4 keep things from the grand jury, and you ignore the  
5 description of the bandanna, you ignore the fact that there's  
6 no science to support your accusation, and you give Monica  
7 Martinez a deal. If you follow this -- these steps, you get  
8 to Plan B.

9 Ladies and gentlemen, at the end of this case you  
10 will see that there's nothing reliable to support a conclusion  
11 that David Burns had any role in this case. You will have  
12 doubt, it will be a reasonable doubt, you will have many  
13 doubts about how this actually went down. And remember the  
14 job task. The job task is holding the State to their burden.  
15 They're going to tell you this is what happened. And if they  
16 don't meet that burden and you have a doubt, you will find at  
17 the end of this case, ladies and gentlemen, Mr. Burns is not  
18 guilty.

19 Thank you for your time.

20 THE COURT: All right. Ladies and gentlemen, the  
21 clock says it's noon now so we'll take our luncheon recess,  
22 come back at 1:00. Court will be at ease while the jury  
23 leaves.

24 (Jury recessed at 12:01 p.m.)

25 THE COURT: All right. Record will reflect that the

1 jurors exited the courtroom. We'll see you at 1:00 this  
2 afternoon.

3 MS. WECKERLY: Your Honor, can I just make a quick  
4 record?

5 THE COURT: Yes.

6 MS. WECKERLY: Mr. Sgro's last Powerpoint slide,  
7 which we'd like a copy of, entered into evidence, the whole  
8 Powerpoint, it says, doubt equals not guilty. The State  
9 recently had a case reversed by the Nevada Supreme Court when  
10 we put the word "guilty" in an opening statement slide. The  
11 Nevada Supreme Court said that was improper. I would assume  
12 the same rules apply to the defense. So I would hope that Mr.  
13 Langford, if he has a Powerpoint, doesn't say the same thing.

14 And I just note it for the record that, although this  
15 case has been out and it's used against the State, the defense  
16 opted to put that in their opening, as well.

17 THE COURT: All right. We'll see you at 1:00.

18 (Court recessed at 12:02 p.m. until 1:08 p.m.)

19 (In the presence of the jury.)

20 THE COURT: All right. State versus Burns and Mason.  
21 The record will reflect the presence of the defendants, their  
22 counsel, the district attorney and all members of the jury.

23 It is now the opportunity of Mr. Langford to present  
24 an opening statement for Mr. Mason.

25 Mr. Langford.

1 MR. LANGFORD: Thank you, Your Honor.

2 DEFENDANT MASON'S OPENING STATEMENT

3 MR. LANGFORD: Good afternoon. As you heard  
4 throughout the course of jury selection, we mentioned various  
5 times that the defense doesn't have to put on a case. The  
6 defense doesn't have to present evidence. I said -- you know  
7 when everybody was standing up and giving the list of  
8 witnesses, I said that we would use the witnesses of the State  
9 and the witnesses called by Mr. Burns to assert the defense of  
10 Mr. Mason, okay.

11 The evidence is presented by the State -- let me  
12 stop. When you walk through the door as jurors, nobody is  
13 ever going to ask you to check your common sense at the door  
14 and enter, leaving your common sense outside. So as you look  
15 at the evidence going through this case, look at the evidence  
16 with your common sense because what you will become convinced  
17 of is there is reasonable doubt as to the theory that the  
18 State wants you to believe. Because common sense, as you look  
19 at the evidence, is going to tell you that there's no grand  
20 conspiracy to commit robbery.

21 If you look at the evidence with a critical eye as  
22 you're going along and say, wait a minute, how does this  
23 evidence support Mr. Mason's defense that there was no  
24 conspiracy? There was no agreement to commit a robbery. How  
25 does the evidence prove that? Because the evidence is that a

1 person who knows the people in the house, Stephanie Cousins,  
2 she makes the call to come buy dope. They know her well.

3           You're going to hear a lot about the relationship  
4 between the victim in this case and Stephanie Cousins. So  
5 does that make sense? Is it common sense that she would set  
6 up a robbery at somebody's house that she knew? Does it make  
7 sense then that she's going to take one person up to -- or  
8 into the apartment with her -- to the apartment, rather, with  
9 her. She could take one person to that apartment with her who  
10 has a gun. Why then if it's just one person going with a gun  
11 to do the robbery, what do you need Mr. Mason for? Does that  
12 make sense?

13           Does it make sense then that the person who has the  
14 gun who's going to do the robbery if this is all planned that  
15 this person is going to burst through the door, guns blazing  
16 and shoot the person right away if this is a robbery? Why do  
17 you have to have all these people to do this kind of a  
18 robbery? Don't you just really need one person, if you're  
19 going to do this kind of a robbery, to be involved?

20           So as you listen to the evidence, you're going to --  
21 if you say, how does this support Mr. Mason's defense that  
22 there is no conspiracy to commit a robbery, think about all of  
23 those things, and this is the worst planned robbery in the  
24 world by the stupidest people in the world, or it was the  
25 spur-of-the-moment act of a lone individual who decided for

1 whatever reason to start shooting.

2           When you hear the testimony of various people about  
3 what took place, you will become convinced that Mr. Mason  
4 wasn't there as the robbery -- alleged robbery occurred and  
5 that the shooter pushed Stephanie Cousins out of the way to  
6 shoot people. That's -- it doesn't make sense. What the  
7 State is going to present doesn't make sense. That's the  
8 defense of Mr. Mason.

9           Now, Mr. Sgro has already directed you to look at  
10 certain evidence in such a way that provides reasonable doubt  
11 about a lot of things, and essentially, the State -- if you  
12 look up at the sky -- it's kind of like you look up at the  
13 sky, like the ancient Greeks did, and you see a bunch of  
14 different stars up there, and you point to different stars,  
15 and you connect those stars, and you get an archer, right? Or  
16 you get a crab or a scorpion.

17           But if you look at those stars from the perspective  
18 of Mr. Mason or Mr. Burns, you're going to see that you can  
19 make just about anything out of those stars, and isn't that  
20 the definition of reasonable doubt? Look at this critically  
21 every time a witness from the State takes the stand and ask  
22 them, does that make sense?

23           Who is Monica Martinez really covering for? Well,  
24 first off, Monica Martinez, I mean, that's pretty obvious, and  
25 you'll see that. Who is she really covering for? She's not

1 covering for Mr. Mason. She's not covering for Mr. Burns.  
2 She's covering for the lone shooter in this case, and that's  
3 really about the only thing that makes sense out of all of  
4 this. It's a commonsense case. There is reasonable doubt.

5 Thank you.

6 THE COURT: All right. Ladies and gentlemen, it's  
7 now the opportunity of the State to call witnesses and present  
8 its evidence.

9 Mr. DiGiacomo.

10 MR. DIGIACOMO: Erica Newman.

11 ERICA NEWMAN, STATE'S WITNESS, SWORN

12 THE CLERK: Please be seated. Please state you're  
13 name and spell your first and last name for the record.

14 THE WITNESS: Erica Newman. E-r-i-c-a, N-e-w-m-a-n.

15 MR. DIGIACOMO: May I inquire, Judge?

16 THE COURT: Yes, sir.

17 MR. DIGIACOMO: Thank you.

18 DIRECT EXAMINATION

19 BY MR. DIGIACOMO:

20 Q Ma'am, as you sit here today how old are you  
21 right now?

22 A I am 16.

23 Q 16 years old?

24 A Yes, I'll be 17 in April.

25 Q Did you know Derecia Newman?

1 A Yes, she was my sister.

2 Q She was your sister?

3 A Yes.

4 THE COURT: You're going to have to speak up a little  
5 bit louder.

6 THE WITNESS: Oh, okay.

7 THE COURT: Okay.

8 BY MR. DIGIACOMO:

9 Q There's also a microphone right in front of you.  
10 It doesn't amplify much, but everything you say is going to be  
11 taken down by the court recorders over here. That's probably  
12 going to help a little bit. Okay.

13 I want to ask you about Derecia. Did Derecia have  
14 any children?

15 A Yes, she had four kids.

16 Q Four kids. And what are their names?

17 A Cashmere, Cordazia, Junior and Devonia.

18 Q Cashmere, Cordazia, Junior --

19 A Cornelius I should say.

20 Q Cornelius Junior?

21 A Yes.

22 Q Okay. And Devonia?

23 A Yes.

24 Q In relationship to Devonia, was she older or  
25 younger than you?

1           A     She's older than me.

2           Q     How much older?

3           A     By four months.

4           Q     About four months.   So you're about the same

5 age.

6           A     Yes.

7           Q     Let me -- did you grow up here in Las Vegas?

8           A     Yes.

9           Q     Who's your mother?

10          A     My mom is Wanda.

11          Q     Wanda?

12          A     Yes.

13          Q     And so that would be -- Derecia's mother as well

14 is Wanda?

15          A     Yes.

16          Q     Which would be Devonian's grandmother?

17          A     Yes.

18          Q     Now, I realize that you're technically Devonian's

19 aunt, but what -- would you describe your relationship with

20 Devonian.

21          A     It's more like a sister relationship, but we

22 call each other cousins.   So.

23          Q     Because you're about the same age?

24          A     Yeah, so I call her my cousin.

25          Q     Did you grow up with her?



1           A     Uh-huh.

2           Q     Is that a yes?

3           A     Yes.

4           Q     I want to talk about the night that Derecia  
5 wound up being killed. Did you call Derecia Derecia, or did  
6 you use a different name for her?

7           A     I called her -- we called her Ree.

8           Q     Ree?

9           A     Yeah, R-e-e.

10          Q     R-e-e. Were you present at Ree's residence on  
11 the night that she wound up being killed?

12          A     Yes.

13          Q     How is it that you wound up being over at Ree's  
14 house that night?

15          A     My sister was -- my second sister -- her name  
16 was Jamaiah -- she was in Cleveland, and I was just the only  
17 other child. So I was at home by myself. So I went over to  
18 my sister's because there was kids there for the summertime.

19          Q     So it's August 6th into August 7th of 2010 --

20          A     Uh-huh. Yes.

21          Q     -- so it's summertime. So you're not in school?

22          A     Yeah.

23          Q     All right. Who else is at the house?

24          A     It was just me, my sister, Devonia, Cashmere,  
25 Cornelius and Cornelius Senior and Cashmere.

1           Q     So the other little kids are there. How old are  
2 the -- how much younger are the other kids than you?

3           A     Six years, seven years and I think eight and  
4 nine I think.

5           Q     Now, does your sister wind up spending the  
6 night?

7           A     My other sister?

8           Q     Yes.

9           A     No, she had just got back from Cleveland that  
10 night -- well, that morning.

11          Q     So she left, and did you stay the night?

12          A     Yes.

13          Q     So once everybody went to bed, who were the  
14 adults in the house?

15          A     Cornelius and my sister.

16          Q     Ree?

17          A     Ree.

18          Q     And there is the four children of Derecia?

19          A     Yes.

20          Q     And then there's you?

21          A     Yeah.

22          MR. DIGIACOMO: May I approach, Judge?

23          THE COURT: Yes.

24          BY MR. DIGIACOMO:

25          Q     Ma'am, I'm going to show you State's Proposed

1 Exhibits 150 through 154 and ask you to just briefly flip  
2 through those photographs for me.

3 Ma'am, do you recognize the people that are depicted  
4 in those photographs?

5 A Yes.

6 Q And are they true, fair and accurate depictions  
7 of the way each looked on August 7th of 2010?

8 A Yes.

9 MR. DIGIACOMO: I move to admit 150 through 154,  
10 Judge.

11 MR. SGRO: No objection, Your Honor.

12 MR. LANGFORD: No objection, Your Honor.

13 THE COURT: They'll be received.

14 (State's Exhibit 150 through 154 admitted.)

15 BY MR. DIGIACOMO:

16 Q Ma'am, I'm going to go slowly through. If you  
17 look at that screen just off to your side there, each one of  
18 these -- each one of these are going to come up on -- up there  
19 in front of you.

20 To your left, there are Kleenex if you need them, and  
21 to your right, I believe there's going to be water in that cup  
22 or water in that jug if you need it.

23 A Uh-huh.

24 Q Okay. And you let me know, I'll come up there  
25 and pour it for you if you need it, okay?

1 A I'm fine.

2 Q All right. So let's start with 150. Who's

3 that?

4 A That's me.

5 Q 151?

6 A That's Cornelius Senior.

7 Q That's the dad?

8 A Yes.

9 Q 152?

10 A That's Cashmere.

11 Q Cashmere. And about how old do you think she

12 was in 2010?

13 A About 7 maybe.

14 Q Okay. 153?

15 A That's Cordazia.

16 Q And is she younger than --

17 A Yes.

18 Q -- Cashmere?

19 A Yeah.

20 Q How old do you think she is about?

21 A She was, like, two years younger. So she was

22 probably about 5.

23 Q And then 154?

24 A That's Cornelius Junior, and he was about, like,

25 6.

1           Q     About 6 years old. Now, you indicated that  
2 these individuals, Ree and Devonian, are inside Ree's  
3 apartment; is that correct?

4           A     Yes.

5           Q     When you went to bed, what room did you sleep  
6 in?

7           A     I slept in the room with the bunk beds, the  
8 kids' room.

9           Q     And who else was in that room with you that  
10 night?

11          A     Me and the three other kids.

12          Q     The three little kids?

13          A     Yeah.

14          MR. DIGIACOMO: May I approach again, Judge?

15          THE COURT: Yes, sir.

16 BY MR. DIGIACOMO:

17          Q     Ma'am, I showed you outside a schematic of your  
18 apartment or of Ree's apartment. I'm going to show you what's  
19 been marked as State's Proposed Exhibit No. 13. I know  
20 there's a lot of other information on here, but generally the  
21 layout of your apartment, is that consistent with the layout  
22 of your apartment?

23          A     Yes.

24          Q     And then I'm going to show you State's Exhibit  
25 No. 67 -- Proposed Exhibits 66 and 67 and ask you, are those

1 the bunk beds you're talking about?

2 A Yes.

3 MR. DIGIACOMO: Judge, I move to admit 13, 66 --

4 MR. SGRO: No objection.

5 MR. DIGIACOMO: -- and 67.

6 MR. LANGFORD: No objection, Your Honor.

7 THE COURT: They'll be received.

8 (State's Exhibit 13, 66, and 67 admitted.)

9 BY MR. DIGIACOMO:

10 Q Now I'm going to put first State's Exhibit No.  
11 13 up for the ladies and gentlemen of the jury, and if you  
12 touch that screen in front of you, you can actually make a  
13 mark on the screen itself.

14 A Uh-huh.

15 Q So I'm going to ask you to circle the bedroom  
16 that you're in.

17 A This one.

18 Q And then if I clear this off for you -- just a  
19 second here -- can you tell me, are you on the top bunk or the  
20 bottom bunk in that bedroom?

21 A I was on the top bunk.

22 Q And there are two top bunks; is that correct?

23 A Yes.

24 Q Which top bunk are you on?

25 A I was on this one.

1           Q     Now, in the middle of the night, do you get  
2 awoken by anything?

3           A     Yes.

4           Q     Can you describe for the ladies and gentlemen of  
5 the jury what you hear.

6           A     I was woken up by, like, a couple of gunshots,  
7 which I didn't know were gunshots at first.

8           Q     So you hear some loud noises and you wake up?

9           A     Yes.

10          Q     Which way is your head facing?

11          A     My head is facing this way towards the other  
12 bunk. So I was looking at the other bunk at first.

13          Q     Looking at the other bunk at first?

14          A     Yes.

15          Q     At some point do you move?

16          A     Yes.

17          Q     Okay. How do you move?

18          A     I got up, and I looked over the door. So I  
19 could see over the door.

20          Q     Okay. And I'm going to put up for the ladies  
21 and gentlemen of the jury State's Exhibit No. 67. Looking at  
22 State's Exhibit No. 67, do you see the bunk that you're on?

23          A     Yes.

24          Q     And is the door that you're talking about that  
25 you kind of looked over in State's Exhibit No. 67?

1           A     Yes.

2           Q     Now, that door, if you were to look out that  
3 door, what direction are you looking in?

4           A     I would be looking into the door of the master  
5 bedroom.

6           Q     So there is a master bedroom across the way?

7           A     Yes.

8           Q     When you look over that door, what do you see?

9           A     I saw a man standing there with a gun.

10          Q     You saw a man standing there with a gun?

11          A     Yes.

12          Q     Do you remember anything about the man?

13          A     He was, like, medium build, maybe skinny and had  
14 on, like, overalls, and I remember a hat. That's about it.

15          Q     Do you remember as you sit here whether or not  
16 he was white, black or Hispanic?

17          A     I couldn't really tell you, but I was -- he was  
18 black as I can remember.

19          Q     You said you saw him skinny. Do you remember if  
20 he was short? tall?

21          A     I would say he was tall because he was, like,  
22 kind of, like, to the top of the door almost, like, but  
23 shorter than that. He wasn't that tall.

24          Q     So he wasn't quite as tall as the doorframe?

25          A     Yeah.



1 Q But based upon the doorframe --

2 A Yeah.

3 Q -- you think he was tall?

4 A Yes.

5 Q You said you saw him holding a gun. Do you  
6 remember anything about the gun?

7 A No.

8 Q When you saw this individual holding a gun, what  
9 else do you remember?

10 A Just a whole lot of smoke and just being scared.

11 Q Okay. Do you hear any noises after the noises  
12 that woke you up?

13 A I heard the bed bunk, like, creak or whatever.  
14 So I -- I assumed it was my nephew because he was on the bunk  
15 below me. So I immediately, like, got up and jumped down to  
16 grab him because I assumed the man was still standing there,  
17 but he was gone when I had, you know, finally looked up.

18 Q You go and -- your attention is drawn to --  
19 which child is it?

20 A Cornelius.

21 Q Junior?

22 A Yes.

23 Q Okay. Your attention is drawn to Cornelius  
24 Junior. How long between the time period that -- well, at  
25 some point does something else happen after the man is gone?

1           A     Yes, I went to the hallway because that's where  
2 he was -- that's where he ran to, and I looked down the hall,  
3 and I saw my sister and Cornelius. The dad, he was on the  
4 phone with the police.

5           Q     So you hear noises. You wake up. You look out.  
6 You see the man with the gun and the overalls. You turn your  
7 attention to the -- Cornelius Junior?

8           A     Yes.

9           Q     And you go out in the hall, and now you see your  
10 sister. Where is your sister? Do you know?

11          A     She was on the couch, on -- it was the smaller  
12 couch. There was a big couch and a small couch. So she was  
13 in the living room.

14          Q     Okay. So you saw your sister on the couch, and  
15 your sister being Ree?

16          A     Yes.

17          Q     Okay. And you saw Cornelius on the phone?

18          A     Yes.

19          Q     How long after you see Cornelius on the phone  
20 does help arrive?

21          A     Like, less than, like, two minutes later maybe.

22          Q     And when I say help, who shows up at your  
23 apartment?

24          A     The police.

25          Q     And when the police arrive, are -- do you guys

1 -- what happens to you and the rest of the kids?

2 A They just basically escorted us all outside.

3 Q They take you all outside?

4 A Yes.

5 Q Once you're outside, what happens to you?

6 A They had me talk to a couple of people. I don't  
7 really remember who or who they were, and then they had set us  
8 in, like, a squad car for forever.

9 Q And eventually where do you get taken?

10 A We got taken to Child Haven.

11 MR. DIGIACOMO: Thank you. Thank you, ma'am. Judge,  
12 I pass the witness.

13 MR. SGRO: May I proceed?

14 THE COURT: Yes.

15 CROSS-EXAMINATION

16 BY MR. SGRO:

17 Q Good afternoon. I'm going to ask you a couple  
18 of questions. First of all, you spoke to the police --

19 MR. SGRO: Oh, and can we take the photo down.

20 MR. DIGIACOMO: Sure.

21 MR. SGRO: Thank you.

22 BY MR. SGRO:

23 Q You spoke to the police about what happened,  
24 right?

25 A Yes.

1 Q And they tape-recorded your statement, right?

2 A Yes.

3 Q And they asked you a lot of the same questions  
4 that -- do you know this man behind me? His name is Marc  
5 DiGiacomo. Do you know his name, the guy that just asked you  
6 questions?

7 A Oh, yes.

8 Q Do you know his name is Marc?

9 A Now I do, yes.

10 Q Mr. DiGiacomo. The police asked you the same  
11 questions that Mr. DiGiacomo just asked you, right, about what  
12 you saw? what you heard? where you were, right?

13 A Yes.

14 Q And you were honest with the police, right?

15 A Yes.

16 Q And the police talked to you at around 6:51 in  
17 the morning, so several hours after everything happened; would  
18 that be right?

19 A Yes.

20 Q And now about four years have gone by, right?

21 A Yes.

22 Q You remember things better right away than you  
23 do four years later, right?

24 A Yeah.

25 Q Let me ask you this first. Do you know the

1 photos you just saw?

2 A Yes.

3 Q Had you seen those before today?

4 A No.

5 Q Do you have those photos?

6 A No.

7 Q When you spoke with the police, you were asked  
8 if you saw the man that was there, right?

9 A Yes.

10 Q And you were asked if you saw the gun, right?

11 A Yes.

12 Q And this is right after everything happened, a  
13 few hours later, right?

14 A Uh-huh.

15 Q Yes?

16 A Yes.

17 Q Now, Cornelius, who you say is the dad,  
18 Cornelius is the natural father of some, and your sister is  
19 the natural mother of some, and they lived together, right, a  
20 blended family?

21 A Yes.

22 Q Okay. Did you hear Cornelius, the dad as you  
23 call him, talking on the phone with people before you were  
24 interviewed with the police?

25 A No, other than the cops.

1           Q     All right. Did you see him outside on his cell  
2 phone calling people?

3           A     No.

4           Q     Did you know someone named Stephanie Cousins?

5           A     Yes.

6           Q     Do you remember Cornelius -- if I want to talk  
7 about the child, I'll say Cornelius Junior, okay. If we're  
8 talking about Cornelius Mayo, the older one, can I just say  
9 Cornelius?

10          A     Yes.

11          Q     All right. Do you remember Cornelius on his  
12 cell phone speaking with Stephanie Cousins?

13          A     No.

14          Q     You don't remember him being angry or  
15 threatening her or anything like that?

16          A     No.

17          Q     When you told the police what happened, do you  
18 remember saying, I didn't see who the person was, but I saw  
19 the gun?

20          A     No.

21          Q     No. Well, let me ask you this. Today, today,  
22 four years later, you said, Medium build or skinny, right?

23          A     Uh-huh. Yes.

24          Q     Today you said, Overalls, right?

25          A     Yes.

1 Q Today you said, Black, right?

2 A Yes.

3 Q And today you said, Tall?

4 A Yes.

5 MR. SGRO: May I approach the witness, Your Honor?

6 THE COURT: Yes.

7 BY MR. SGRO:

8 Q I'm showing you page 4 of your statement that  
9 was taken just a few hours after. Tell me if I'm reading this  
10 right, okay.

11 THE COURT: Is this in evidence?

12 MR. SGRO: I'm just refreshing her recollection, Your  
13 Honor.

14 THE COURT: She hasn't indicated her recollection  
15 needed refreshing.

16 MR. SGRO: I said, Do you remember telling the  
17 police, and she said, no.

18 THE COURT: Okay.

19 BY MR. SGRO:

20 Q So does it -- do you answer, I woke up because I  
21 heard gunshot noises, and I didn't want to get up at first  
22 because I had no clue what was going on until I raised up. I  
23 didn't see who the person was, but I did see the gun? Did I  
24 read that right?

25 A Yes.

1 Q And then when you're asked about the gun, you  
2 say, I don't know because it wasn't really clear, right?

3 A Yes.

4 Q Do you remember telling the police that you did  
5 not know that Devonia -- strike that. You didn't know your  
6 sister had been shot?

7 A Yes.

8 Q And do you remember when the police ask you more  
9 questions, later in your statement you say, I don't know what  
10 happened? I don't -- I didn't see the man. I saw a gun. Do  
11 you remember that?

12 A No.

13 Q You don't remember that?

14 A No.

15 Q Ma'am, would you agree with me that what you  
16 said closer in time, over four years ago, would be more  
17 accurate than what you're being -- what you're telling us  
18 today?

19 A Yes.

20 Q Have you spent time with either the police or  
21 with the district attorneys looking at things to get ready for  
22 your testimony today?

23 A Not often, but, yes.

24 Q Pardon me?

25 A Not often, but, yes.



1 Q You have?

2 A Yeah.

3 Q Did they ever show you your statement?

4 A No.

5 Q Did they mention to you things about overalls,  
6 and then did you just say, yeah, overalls? I mean, how --

7 A No.

8 Q Okay. You understand what you're saying today,  
9 four years later, is a lot different than what you said  
10 earlier, right?

11 MR. DIGIACOMO: Objection.

12 THE WITNESS: Yes.

13 MR. DIGIACOMO: Argumentative.

14 THE COURT: Sustained.

15 MR. SGRO: I'll rephrase it. I apologize.

16 BY MR. SGRO:

17 Q Do you remember telling Mr. DiGiacomo that you  
18 saw Cornelius on the phone calling 9-1-1 and then help was on  
19 the way?

20 A Yes.

21 Q Cornelius has -- had brothers at the time,  
22 correct?

23 A I don't know.

24 Q You don't know if he had brothers?

25 A No, I don't know.

1           Q     Do you remember him calling anyone to come over  
2 to the house before the police were there?

3           A     No, I only know of him talking to the police,  
4 and that's it.

5           Q     Okay. Do you know anything about a big sports  
6 bet that he won right before the shooting happened?

7           A     No.

8           Q     Do you know where Devonina was when you heard  
9 everything happened?

10          A     Like, in the moment when everything -- no, I did  
11 not know where she was.

12          Q     Okay. And were you aware that your sister sold  
13 drugs from that apartment?

14          A     Yes.

15          Q     Were you aware that Cornelius sold drugs from  
16 that apartment?

17          A     Yes.

18          Q     Were you aware that sometimes they sold  
19 marijuana, and sometimes they sold crack cocaine?

20          A     I didn't assume they sold it, but, yes.

21          Q     Okay. Were you aware that Devonina -- the girl  
22 that you call your cousin -- sometimes she would help in the  
23 drug transaction, where she'd go to the front and get the  
24 money and go to the back and get the drugs?

25          A     No.

1 Q That didn't happen?

2 A That never has happened.

3 Q When you say you spoke to a couple people about  
4 what happened, would those be the police officers that took  
5 your statement?

6 A Yes.

7 Q Are you aware of -- strike that. Have you ever  
8 written out a statement -- prior to today, have you ever  
9 written anything out where you've said, Hey, I did see the man  
10 that was there?

11 A I can't recall. I don't know.

12 Q Okay. Are you aware of any tape-recorded  
13 statement that exists prior to today where you have ever said,  
14 I did see the man and can now provide a description?

15 A No.

16 Q So the only thing we have that's ever been  
17 recorded, which was at the time, was the statement that you  
18 saw a gun but didn't see the man, right?

19 A Yes.

20 MR. SGRO: Court's indulgence, Your Honor. Pass the  
21 witness, Your Honor.

22 MR. LANGFORD: I have no questions, Your Honor.

23 THE COURT: Okay.

24 MR. DIGIACOMO: May I approach the clerk?

25 THE COURT: Yes.

1 REDIRECT EXAMINATION

2 BY MR. DIGIACOMO:

3 Q Ma'am, Mr. Sgro just asked you a variety of  
4 questions about your statement. Do you remember those  
5 questions?

6 A Yes.

7 Q Okay. I'm going to show you what's been marked  
8 as State's Proposed 262 for identification, and I'm just going  
9 to have you briefly look at it. It says, Erica Newman and  
10 conversation 8/7/2010, at 6:51 in the morning.

11 A Uh-huh.

12 Q Okay. Does this look like the document that Mr.  
13 Sgro was just showing you?

14 A Yes.

15 Q Okay. The police come to you in that morning  
16 and asked if they could tape a statement from you; is that  
17 fair?

18 A Yes.

19 Q And Mr. Sgro asked you a number of questions  
20 from this statement, correct?

21 A Yes.

22 Q Do you remember everything that was either asked  
23 of you or what every one of your answers was?

24 A Like I said, I don't remember.

25 THE COURT: You're going to have to speak up.

1           THE WITNESS: I can't say that I remember everything  
2 that was asked.

3 BY MR. DIGIACOMO:

4           Q     Would you have tried to tell the truth as best  
5 as your ability to the questions that were being asked you  
6 that morning?

7           A     Yes.

8           MR. DIGIACOMO: Judge, I offer 262.

9           MR. SGRO: I suppose I'll submit it. I'm not used to  
10 actually the text of the transcription coming in. I have no  
11 objection to the tape. Typically the best evidence is the  
12 tape. There are some unintelligible marks on the transcript,  
13 but I'll leave it to Your Honor.

14          THE COURT: Technically the best evidence rule would  
15 require the tape.

16          MR. DIGIACOMO: I have the tape as well, Judge.

17          THE COURT: Okay.

18          MR. DIGIACOMO: If you would like me -- I haven't  
19 burned the disc. I would like to ask her questions, and we'll  
20 put the tape in through another detective, but I want to be  
21 able to ask her some questions. I can play the entire tape  
22 for the jury right now.

23          THE COURT: Technically his objection is accurate.

24          MR. SGRO: And the other one, Your Honor, would be --

25          MR. DIGIACOMO: Unless you're going to withdraw it,

1 the objection is good.

2 MR. SGRO: She's -- she's not -- her memory hasn't  
3 been exhausted. So I'm not sure of the relevancy of the  
4 statement yet. So I guess I would object because we don't  
5 know at this point --

6 THE COURT: Well, I think it's relevant, but I --  
7 technically, if you object to the transcript, I would sustain  
8 the objection, unless it's been proven that the transcript is  
9 accurate, which it hasn't been.

10 MR. SGRO: It hasn't been, and I tell you what, Your  
11 Honor, just to facilitate this, if we could do the tape with  
12 the transcript, then that's fine. I can --

13 THE COURT: If he represents he'll introduce the  
14 tape --

15 MR. SGRO: -- yes, sir.

16 THE COURT: -- you have no objection to the  
17 transcript then?

18 MR. SGRO: No, sir.

19 THE COURT: That being the case, the transcript is  
20 admitted. The exhibit will be received.

21 MR. LANGFORD: I don't either, Judge.

22 (State's Exhibit 262 admitted.)

23 THE COURT: Thank you.

24 MR. DIGIACOMO: Thank you.

25 BY MR. DIGIACOMO:

1           Q     Now, ma'am, Mr. Sgro ask you a bunch of  
2 questions. Do you recall if the police ever asked you in your  
3 tape-recorded statement what the man that you saw was wearing?

4           A     I don't know.

5           Q     You have no idea; would that be fair?

6           A     Yeah.

7           Q     Okay. But I want to go to -- Mr. Sgro asked you  
8 questions about you said you never actually saw the man.

9           MR. DIGIACOMO: Counsel, page 7.

10 BY MR. DIGIACOMO:

11          Q     There's a question being asked to you:

12          Question, And where did the shooting happen? In the  
13 master bedroom or in the living room?

14          And your answer is, Um, I don't know whether or not  
15 it happened. I don't know whether my sister got shot or --

16          MR. SGRO: This is leading, Your Honor, and I'm not  
17 sure it's appropriate. Again this is something --

18          THE COURT: Well, he's reading from an exhibit.

19          MR. SGRO: Yes, sir.

20          THE COURT: He can do that.

21          MR. SGRO: Okay.

22 BY MR. DIGIACOMO:

23          Q     -- but I remember seeing the person pointing the  
24 gun into the master bedroom.

25          A     Yes.

1 Q Is that what your answer was?

2 A Yes.

3 Q So would it be accurate to say you did tell the  
4 police that morning --

5 MR. SGRO: Leading and it's not --

6 THE COURT: That is leading.

7 MR. SGRO: -- because he's reading it out of context.

8 THE COURT: That is leading.

9 BY MR. DIGIACOMO:

10 Q Did you say, I remember seeing the person  
11 pointing the gun into the master bedroom?

12 A Yes.

13 Q Okay. There were some questions asked about  
14 Cornelius and Cornelius being on the phone. Do you remember  
15 exactly what you told the police about Cornelius being on the  
16 phone in relation to when the police arrived?

17 A No.

18 MR. DIGIACOMO: Page 7 again, Counsel.

19 BY MR. DIGIACOMO:

20 Q Why don't you read that to yourself right there  
21 starting with, Question. They're talking about Cornelius.  
22 You call him C-Note; is that fair? Is that his nickname?

23 A Yes.

24 Q C-Note?

25 A Yes.



1           Q     And they ask you where he was this -- when it  
2 all happened, and read to yourself.

3           A     Uh-huh. Okay.

4           Q     Do you remember telling the police that he was  
5 on the phone, and that's when the police walked in?

6           A     Yes.

7           Q     And that he was walking out of the master  
8 bedroom when you saw him?

9           A     No, I don't remember that, but I see that.

10          Q     Okay. You don't remember that he was walking  
11 out of the master bedroom. Does your statement say that's  
12 what happened?

13          A     Yes.

14          Q     In your statement, do they also ask you about  
15 what was going on in the house prior to the shooting? Do you  
16 remember those statements -- those questions?

17          A     No.

18          Q     Okay.

19          MR. DIGIACOMO: Bottom of page 6, Counsel, is the  
20 question. The answer is on page 7.

21 BY MR. DIGIACOMO:

22          Q     This is right after they tell you that Devonia  
23 is shot, correct?

24          A     Uh-huh.

25          Q     And they ask you, Any idea how the shooter got

1 into your -- into this apartment or why they were here at 3  
2 o'clock in the morning? Was there a party or anything?

3 Why don't you read to the ladies and gentlemen of the  
4 jury what your answer was.

5 A No, but -- well -- well, I did overhear that  
6 they opened the door for someone, and it was a female, but  
7 there weren't any names involved, and I guess they believe  
8 that person had something to do with the shooting.

9 MR. DIGIACOMO: Thank you. I have nothing further,  
10 Judge -- court's indulgence. Apparently I do.

11 BY MR. DIGIACOMO:

12 Q And just so we're clear, you were 11 at the time  
13 you gave this statement?

14 A I don't know, maybe 11 or 12.

15 Q Okay. Somewhere in that range?

16 A Yes.

17 MR. DIGIACOMO: Thank you.

18 THE COURT: Anything further?

19 MR. SGRO: Yes, sir.

20 RECROSS-EXAMINATION

21 BY MR. SGRO:

22 Q Can you tell the jury when was the last time you  
23 spoke to the DA about this case? Was it yesterday? a month  
24 ago? When was it?

25 A I would say a couple months.

1 Q A couple months?

2 A Yeah.

3 Q When is the first time you ever said, Overalls,  
4 that word?

5 A I -- when -- I couldn't tell you.

6 Q Do you think it was in terms of getting ready  
7 for this trial?

8 A No, I know I've said it before.

9 Q You've said it before. So just someone did not  
10 write it down?

11 A Yes.

12 Q Who'd you say it to?

13 A I don't know.

14 Q You can't tell us -- strike that. Who could we  
15 go to and ask, listen, Erica Newman said that she told you  
16 about overalls? Who's that person that we can go find?

17 A I don't know.

18 Q Nobody?

19 A It's almost five years. So I don't know.

20 Q When you were just asked about Cornelius walking  
21 out of the room and being on the phone and that's when the  
22 police walked in -- I want to ask you this question. Are you  
23 aware that Cornelius called 9-1-1, and he told the 9-1-1  
24 operator that he was in some bushes outside the house?

25 MR. DIGIACOMO: Objection. Assumes a fact not in

1 evidence.

2 MR. SGRO: I'm asking her if she's aware, Your Honor.

3 THE COURT: Well, you state it as though it was true.

4 BY MR. SGRO:

5 Q Are you aware -- let me ask it differently then.

6 Are you aware of Cornelius Mayo actually being outside of the  
7 house when he was on the phone with 9-1-1?

8 A No.

9 Q And just to be clear, in your statement, when  
10 Mr. DiGiacomo referred to, I remember seeing the person  
11 pointing a gun in the master bedroom -- do you remember when  
12 he just showed you that?

13 A Yes.

14 Q That's the same as what you said earlier in your  
15 statement when you said, I didn't see who the person was, but  
16 I did see the gun, right?

17 A Yes.

18 Q You always told the police you saw a gun, and  
19 you saw the direction the gun was pointing, right?

20 A Yes.

21 Q So when he showed you in your statement about  
22 seeing the person pointing a gun, you were telling the police  
23 about seeing a weapon and the direction it was pointed, right?

24 A Yes.

25 MR. SGRO: Okay. That's all, Your Honor.

1 MR. LANGFORD: I have no questions still, Your Honor.

2 THE COURT: All right. Ms. Newman, thank you for  
3 being a witness. You'll be excused.

4 MS. WECKERLY: Officer Atwood.

5 CURTIS ATWOOD, STATE'S WITNESS, SWORN

6 THE CLERK: Please be seated. Please state your  
7 name, and spell your first and last name for the record.

8 THE WITNESS: My name is Curtis Atwood. First name  
9 is C-u-r-t-i-s. Last name is A-t-w-o-o-d.

10 MS. WECKERLY: May I proceed, Your Honor?

11 THE COURT: Yes.

12 DIRECT EXAMINATION

13 BY MS. WECKERLY:

14 Q How are you employed, sir?

15 A I'm with LVMPD as a police officer.

16 Q How long have you worked for Metro?

17 A For seven years.

18 Q And you were working for Metro in August of  
19 2010?

20 A I was.

21 Q Do you remember what area command you worked for  
22 or what assignment you had?

23 A Northeast patrol, graveyard shift.

24 Q And what hours are graveyard?

25 A It's 2200 to 0800.

1 Q And so in regular people time, that would be --

2 A Oh, it's -- I'm sorry. It's 10 o'clock at night  
3 until 8 o'clock in the morning.

4 Q Okay. 10 at night to 8 in the morning?

5 A Yes, ma'am.

6 Q Were you working from August the 6th, 2010, into  
7 the morning of the 7th?

8 A Yes, ma'am, I was.

9 Q Do you remember responding to a residence, an  
10 apartment on Meikle Lane?

11 A I do.

12 Q And that's obviously in Las Vegas, Clark County,  
13 Nevada?

14 A Yes, ma'am, it is.

15 Q Do you recall if you were the first officer to  
16 respond?

17 A I was.

18 Q And were you in a marked patrol unit and  
19 uniform?

20 A Yes, ma'am.

21 Q Can you tell the members of the jury what you  
22 saw as you got up to the location.

23 A As we arrived at the location, myself and two  
24 other partners cleared the residence. It was a call of a --  
25 someone was shot. We went in, and there was a female that was

1 obviously shot and deceased on the couch. We went down the  
2 hallway, cleared the residence, made sure there was nobody in  
3 there, came to a room on the left where several children were  
4 sleeping and then went into another room down the hallway, a  
5 little further to the right, which was a master bedroom where  
6 we found a little girl that was shot in the abdomen area.

7 Q When you first got to the residence, was there  
8 anyone outside of it?

9 A There was.

10 Q And do you remember anything about this person,  
11 male, female, anything like that?

12 A He was a male. He just kept yelling at us that  
13 his girlfriend was shot, and he wanted us to come in and help  
14 -- help out.

15 Q Was he holding anything?

16 A Not that I recall, just a phone.

17 Q A phone in his hand?

18 A Yes, ma'am.

19 Q Do you recall anything about his demeanor?

20 A Just very upset, yelling.

21 Q And when you saw him, can you give us like an  
22 approximation of how close he was to maybe the front door of  
23 the residence.

24 A When we first arrived, he was right at the door.  
25 Then he ran out to us, and then he ran back up to the door and

1 was trying to get us to come in. We were waiting for more  
2 units to come clear -- clear the apartment first.

3 Q And is it policy to wait for more units to come  
4 in and clear it?

5 A It is if -- you know, because we were just right  
6 there when the call came out. So we arrived pretty -- fairly  
7 quickly. We weren't sure if there was any of the actual  
8 shooters inside. So we waited.

9 Q And that's, like, what you're trained to do?

10 A Yes, ma'am.

11 Q And so how many people -- or how many officers  
12 arrived before you could clear the residence?

13 A I believe we waited until there was a third  
14 officer, myself and two others.

15 Q Okay. And clearing the residence is what?

16 A Basically you just -- you're clearing to make  
17 sure there is no more bad -- bad people or, you know, suspects  
18 inside.

19 Q Okay.

20 A You know, clearing room to room, making sure  
21 there's nobody hiding.

22 Q And in this residence, would you describe it as  
23 large? small?

24 A It was small, two-bedroom apartment.

25 Q Was it cleared fairly quickly?



1           A     It was.

2           Q     Inside the residence, you mentioned there were  
3 several small children?

4           A     Yes, ma'am.

5           Q     And then you also mentioned there was another  
6 child who had been shot, right?

7           A     Yes, ma'am.

8           Q     Were those children in the same room, or do you  
9 recall anything about that?

10          A     No, they weren't in the same room. There was --  
11 there was -- I would say -- I want to say three children in  
12 another room, a separate room that we cleared. They were  
13 laying on beds, and then the child that was shot was by  
14 herself in a room and just crying.

15          Q     And the child that was shot, you said you heard  
16 her crying?

17          A     Yes, ma'am.

18          Q     Did she appear conscious?

19          A     She was.

20          Q     And do you remember whether or not you or  
21 someone else called medical for her?

22          A     I -- I believe one of my partners did over the  
23 radio. I didn't. Medical responded fairly quickly.

24          Q     You saw medical respond?

25          A     Yes, ma'am.

1           Q     When she was crying, was it that you could see  
2 -- could you see actually how she was injured?

3           A     I could see -- yeah, I could see an injury. She  
4 said she was shot, and I could see it. I'm not exactly sure  
5 where it was, but it was -- I want to say it was on the  
6 abdomen area.

7           Q     Okay.

8           A     And it was obviously a gunshot wound.

9           Q     And was she sitting up? sitting down? Do you --

10          A     She was sitting down when we went in there, in  
11 between the bathroom and the room.

12          Q     Medical is called, and then what are your  
13 responsibilities in terms of a scene like that?

14          A     After medical came out, we -- we just tape off  
15 the scene, the area, kind of lock it down and wait for  
16 investigators to show up.

17          Q     And the purpose of taping off a scene is?

18          A     It is so -- to preserve the crime scene.

19          Q     And after -- once you all arrive and tape off  
20 the scene, was anyone allowed -- any civilians, I guess,  
21 allowed into the residence?

22          A     No, ma'am.

23          Q     And by this time the little girl had been  
24 transported?

25          A     Yes, ma'am.

1           Q     And does that I guess -- did you do anything  
2 else in terms of this investigation, or were you, you know,  
3 the initial response and then that's it?

4           A     Just the initial response.

5           MS. WECKERLY: Thank you, sir. I'll pass the  
6 witness, Your Honor.

7                               CROSS-EXAMINATION

8 BY MR. ORAM:

9           Q     Good afternoon.

10          A     Good afternoon.

11          Q     When you observed the little girl, you said she  
12 was sitting up; is that right?

13          A     She was sitting up on her butt.

14          Q     On the floor?

15          A     On the floor yes, sir.

16          Q     And do you remember the layout of the residence  
17 quite well?

18          A     It was a long time ago, so, fairly.

19          Q     Okay. Where did you see her? Where was her  
20 location within the residence?

21          A     She was in the far back bedroom to the east of  
22 -- the east room, the furthest bedroom. In the bedroom,  
23 there's -- if you go in the bedroom, off to the right there's  
24 a bathroom and then the bedroom itself, and she was kind of in  
25 between that bathroom and room area when I saw her.

1           Q     So as you remember back, how far would you say  
2 she was from that bathroom?

3           A     She was almost in the doorway, in the doorway of  
4 the bedroom and bathroom when I saw her.

5           Q     Very close?

6           A     Very close.

7           Q     And you said that you noticed an obvious gunshot  
8 wound to the abdomen?

9           A     Yes, sir.

10          Q     And how were you -- was her shirt up, or how  
11 were you able to observe that?

12          A     Well, she had her -- she had her shirt up  
13 showing us her injury.

14          Q     Was she bleeding?

15          A     She was.

16          Q     Profusely?

17          A     No. From what I recall, there was a amount of,  
18 like, fat tissue that was blocking the actual gunshot wound,  
19 you know, keeping it from bleeding.

20          Q     Okay. So you could see she was bleeding, but it  
21 wasn't profusely, and it wasn't just all over the place?

22          A     No, not that I remember.

23          Q     Okay. Did you see -- do you know what a gunshot  
24 residue test is?

25          A     I do.

1 Q Did you perform that?

2 A I did not.

3 Q Did you see that performed on the male that you  
4 had seen yelling?

5 A I did not.

6 Q So you have no idea if that was done or not?

7 A I do not know.

8 Q The man you saw yelling outside, can you  
9 describe him.

10 A Fairly. He was a tall black male, large build,  
11 and that's about all I can remember of him.

12 Q Hair puffed out on the sides?

13 A I can't remember what his hair was like.

14 Q Fair enough. Was he -- did you ever observe him  
15 using a cell phone that evening?

16 A He had one in his hand, yes, sir.

17 Q Was he talking or appear to be talking? using  
18 it?

19 A Not when I saw him. He had it in his hand. I  
20 assumed he was talking to dispatch.

21 Q So it wasn't up to his ear; he just had in his  
22 hand?

23 A Yes, sir.

24 Q Okay. Now, as a first responder, one of the  
25 things you're taught is to make sure that a crime scene is

1 well preserved?

2 A Yes, sir.

3 Q Okay. You don't want to be kicking around  
4 cartridges if there were cartridges?

5 A Yes, sir.

6 Q And that's why you put up a yellow tape?

7 A Yes, sir.

8 Q You don't want to be stepping over or on bodily  
9 fluids or anything like that?

10 A Yes, sir.

11 Q And I imagine your partners who were with you  
12 were also aware of that type of training and experience in  
13 making sure that crime scenes are properly preserved?

14 A Yes, sir.

15 Q And so you did your best, did you not, to make  
16 sure that this crime scene was properly preserved?

17 A Yes, sir.

18 Q Okay. What -- did you move anything or touch  
19 anything?

20 A No, sir. Other than people, no.

21 Q And when you say people, did you get everybody  
22 out of that house?

23 A Yes, sir.

24 Q Except for the injured girl?

25 A Yes, sir.

1 Q Okay. She stayed put?

2 A Well, until medical got there and brought her  
3 out.

4 Q Okay. Did you notice anything being moved?

5 A No, sir.

6 Q So as you sit here today, you feel pretty  
7 confident that you were able to properly preserve that  
8 particular crime scene?

9 A Yes, sir.

10 Q Okay. Were there -- did any other males arrive  
11 at that scene that were first responders?

12 A Not that I remember.

13 Q You don't remember any other black males showing  
14 up, talking to the man that you described with the cell phone?

15 A I don't remember.

16 Q Nothing like that?

17 A No, sir.

18 MR. ORAM: Court's indulgence. That concludes  
19 cross-examination, Your Honor.

20 THE COURT: Mr. Langford.

21 MR. LANGFORD: I have no questions, Your Honor.

22 MS. WECKERLY: No redirect.

23 THE COURT: No redirect?

24 MS. WECKERLY: No, thank you.

25 THE COURT: Officer, thank you for being a witness.

1 THE WITNESS: Thank you, sir.

2 THE COURT: You'll be excused.

3 MR. DIGIACOMO: Officer Houghton.

4 JONATHAN HOUGHTON, STATE'S WITNESS, SWORN

5 THE CLERK: Please be seated.

6 THE WITNESS: Thank you.

7 THE CLERK: Please state your name and spell your  
8 first and last name for the record.

9 THE WITNESS: Jonathan Houghton. J-o-n-a-t-h-a-n,  
10 H-o-u-g-h-t-o-n.

11 MR. DIGIACOMO: May I inquire, Judge?

12 THE COURT: Yes.

13 MR. DIGIACOMO: Thank you.

14 DIRECT EXAMINATION

15 BY MR. DIGIACOMO:

16 Q Sir, how are you employed?

17 A Las Vegas Metropolitan Police Department.

18 Q And how long have you been with Metro?

19 A Eight years.

20 Q And what is your current assignment?

21 A Patrol officer.

22 Q Directing your attention back to August 7th of  
23 2010, almost 4 a.m. in the morning, slightly before 4 a.m. in  
24 the morning, were you assigned or did you respond to a  
25 homicide that occurred at 5662 Meikle Lane here in Clark



1 County, Las Vegas, Nevada?

2 A Yes, I did.

3 Q And when you arrived, were you one of the  
4 numerous patrol officers that wound up arriving at the scene?

5 A That is correct.

6 Q Were you given a particular assignment when you  
7 arrived on scene?

8 A Yes, I was. I was to watch Cornelius Mayo to  
9 make sure he didn't leave the scene prior to detectives  
10 conducting their investigation.

11 Q Did you remain with Mr. Mayo until detectives  
12 were ready to interview him?

13 A Correct.

14 Q And while you were with Mr. Mayo, did you see  
15 him with a cellular phone?

16 A Yes, I did.

17 Q And during that time you are standing with Mr.  
18 Mayo, do you see Mr. Mayo utilizing that cellular phone?

19 A Yes, he was.

20 Q And could you hear whether or not there was a  
21 male or a female on the other end of the line?

22 A It was a female's voice that I could overhear.

23 Q Can you describe Mr. Mayo's demeanor at this  
24 point.

25 A He was agitated, obviously upset from what had

1 just happened.

2 Q And how long between the time you think you  
3 arrived on scene and the time that you overhear this phone  
4 call between Mr. Mayo and whoever he's talking to?

5 A It was probably just a few minutes after I was  
6 assigned to keep an eye on him.

7 Q So is it still dark outside?

8 A Correct.

9 Q I mean, it's still early in the morning?

10 A Very much so.

11 Q When Mr. Mayo is agitated, do you overhear him  
12 saying something to the female on the phone?

13 A Yes, I did.

14 Q And what do you hear him say?

15 A I heard him say that, You know who did this.  
16 I'm going to bring all my niggas, and -- you know, I asked him  
17 what he was talking about.

18 Q Do you remember him making any statement about,  
19 You better hide by a police station?

20 A I did, yes.

21 Q When you asked him who -- did you ask him who he  
22 was talking to?

23 A I did, after he hung up the phone.

24 Q And did he respond to you who it was?

25 A Yes, he did.

1 Q And who did he tell you he was talking to?

2 A He said it was Stephanie Cousins.

3 Q Did you ask him about some identifying  
4 information for Ms. Cousins?

5 A I did. I asked him if he knew her birth date.

6 Q And was he able to provide you a birthday?

7 A No, he wasn't, but he told me that she was in  
8 her 40s and that he'd known her for quite a while.

9 Q And did you ask Mr. Mayo what the nature of the  
10 conversation he was having with Ms. Cousins?

11 A I asked him what they were talking about,  
12 basically, and he had said to me that Ms. Cousins called his  
13 girlfriend, Ms. Newman, asked her if she could come over.  
14 They agreed. The girlfriend -- I mean -- sorry -- Ms. Cousins  
15 showed up, knocked on the door, and Ms. Newman opened the  
16 door, and at that time two males stormed in, knocked Ms.  
17 Cousins down to the ground, then dragged her into the  
18 apartment, and then that's when he heard two -- some gunshots.

19 Q Okay. Did Mr. Mayo tell you the description of  
20 one or both that Ms. Cousins provided him of those males?

21 A Yeah, it was a light-skinned male with some  
22 curly hair, and she didn't have a description of the second  
23 person.

24 Q Did Ms. Cousins relay what she heard one of the  
25 males saying?

1           A     Where is it?  Where is it, as they were entering  
2 the apartment.

3           Q     And according to Ms. Cousins, as she's speaking  
4 to Mr. Mayo, what did she do when these --

5           MR. SGRO:  Objection.  Now this is hearsay within  
6 hearsay.  I let -- I understand the initial part, but this is  
7 beyond now.

8           THE COURT:  It probably is.  Sustained.

9 BY MR. DIGIACOMO:

10          Q     Let me back up.  You indicated that Mr. Mayo  
11 informed you that one of the suspects was a light-skinned  
12 male.  Did he tell -- did he use the term whether or not he  
13 was tall or short?

14          A     Tall.

15          Q     And did he describe anything about the hair?

16          A     That it was curly.

17          Q     In addition to the conversation he described to  
18 you about Ms. Cousins, does Mr. Mayo also sort of -- or  
19 describe to you his memory of the incident that occurred?

20          A     He did.

21          Q     Okay.  And then after taking that information  
22 from Mr. Mayo, did you continue to wait with him while waiting  
23 for detectives?

24          A     I did.

25          Q     Did he continue to exhibit agitation and

1 emotion?

2 A Yes, he was.

3 Q And do you hear him make any statements, not on  
4 his phone, while he's just sitting on the curb as it relates  
5 to basically what he's going to do?

6 A He did. He said he -- he was sitting on the  
7 curb. He, like, had his hands in his face, and he said,  
8 Someone's going to die in the next 24 hours. Watch. And I  
9 asked him -- I said, Who? And he said, Stephanie.

10 Q Did he also use the term, She deserves to die?

11 A Correct, actually, she did -- or he did. I'm  
12 sorry.

13 Q At some point, do you pass Mr. Mayo off to an  
14 Officer Scanlon?

15 A I did.

16 Q At that point, is your responsibility at this  
17 scene done?

18 A Yes, sir.

19 MR. DIGIACOMO: Thank you, sir. Judge, I pass the  
20 witness.

21 CROSS-EXAMINATION

22 BY MR. SGRO:

23 Q Good afternoon, sir.

24 A How are you doing?

25 Q You reviewed the officer's report in this case

1 before testifying?

2 A Correct.

3 Q Did you review anything else?

4 A Just the officer's report.

5 Q And spoke to the State I assume, right, for a  
6 few minutes?

7 A Briefly.

8 Q Okay. So if I understand correctly, you are  
9 there, and your job is to watch Cornelius Mayo, right?

10 A That is correct.

11 Q Okay. So I don't remember getting what time you  
12 got there. Can you tell us.

13 A Without looking -- referring back to the report,  
14 I don't remember exactly the time.

15 Q Okay. Well, and that's why --

16 A I don't want to quote a bad time.

17 MR. SGRO: May I approach, Your Honor?

18 THE COURT: Yes. You didn't bring a copy of the  
19 report with you?

20 THE WITNESS: I do not have it with me, no.

21 THE COURT: Okay. Yes, you can show it to him.

22 THE WITNESS: I'm not --

23 BY MR. SGRO:

24 Q So and this is why I ask. This looks like a  
25 copy of the officers' report that you reviewed, correct?

1           A     Correct.

2           Q     And conduct is attributed to you. This report  
3 is sort of like a compilation, right?

4           A     Uh-huh.

5           Q     Yes?

6           A     Yes, sir.

7           Q     Thank you. Now, it start with the overview of  
8 the incident, that things started around 3:53 a.m., right?

9           A     Correct. Uh-huh.

10          Q     Now, in the conduct that's attributed to you, it  
11 goes through a lot of things you just spoke of, but it doesn't  
12 say what time you actually got there.

13          A     Okay.

14          Q     So let me ask it this way. Do you have an  
15 estimate as to the time that lapsed from the 9-1-1 call till  
16 you got there to watch over Mr. Mayo? In other words, would  
17 it have been minutes?

18          A     Correct.

19          Q     Okay. So very -- you may not have it down to  
20 the exact minute, but, you know, you got there shortly after?

21          A     You could look at your -- at the CAD reports for  
22 my arrival time if you want an exact time that I showed up on  
23 scene, but it was -- I would guess -- estimate anywhere from  
24 10, maybe 15 minutes at the most.

25          Q     Okay. While Mr. Mayo is outside of the

1 residence and on the phone, he is threatening Stephanie  
2 Cousins?

3 A Correct.

4 Q And it appears that the -- and these are my  
5 words, not yours -- but the scare tactics that he employed  
6 were working because she was giving him responses, right?

7 A Correct. It sounded like it.

8 Q Right. So he's -- you're hearing him say  
9 clearly, You know who did this. I'm going to kill you, all  
10 those sorts of things, and then you know there's a female  
11 voice on the other end that's providing information?

12 A Correct.

13 Q And I think you said Stephanie Cousins  
14 identified two men, right?

15 A Just one. There were two men there, but she  
16 only could describe one.

17 Q That's exactly right. That's my point. The one  
18 individual that Stephanie Cousins provided identifying  
19 material about was only one, right? Not both, right?

20 A Correct.

21 Q Do you know the relationship that Stephanie  
22 Cousins shares or shared at the time with any of the people  
23 that were suspected of being involved in this?

24 A The only thing I knew is that Mr. Mayo said that  
25 he'd known Stephanie Cousins for a long time.



1           Q     Right. But as to the two males, you're not  
2 aware of Stephanie's closeness or not closeness with either of  
3 the two of them that she told --

4           A     No, I'm not.

5           Q     -- Mr. Mayo was there, right?

6           A     No, I'm not.

7           Q     All right. Now, at the time that you were  
8 there, do you stay with Mr. Mayo until he's interviewed on  
9 tape by the police?

10          A     I handed him off to Officer Scanlon.

11          Q     All right. And do you know what time that was?

12          A     Not -- not exactly, no. It was probably close  
13 to shift change I'm guessing.

14          Q     And do you remember when that was approximately?

15          A     Our -- our shift change would be -- we usually  
16 come back off the streets around 7 in the morning, but Scanlon  
17 I want to say is a Frank unit, which we're separated in two  
18 sections, Frank and George. I was a George unit responding to  
19 a Frank area. So if he took him from her -- from me, then it  
20 would have been earlier in the evening so that I could go take  
21 care of calls in my regular area.

22          Q     Okay.

23          A     The George area.

24          Q     Now, Cornelius told you that he was in the  
25 bathroom using the toilet during this whole event?

1 A Correct.

2 Q All right. Did he tell you that he had grabbed  
3 money and drugs at the time the shooters first went into the  
4 residence?

5 A No, he did not. He said he was in the bathroom  
6 using the toilet.

7 Q Okay. Actually in the bathroom using the  
8 toilet. So did he tell you that him and -- do you know  
9 Devonia, the little --

10 A The daughter?

11 Q Yes, sir.

12 A Correct.

13 Q You know that's her name, right?

14 A Correct.

15 Q Did he tell you that him and Devonia went into  
16 the bathroom together?

17 A He said that she ran to the bathroom when he  
18 heard the -- when she heard the gunshots towards him.

19 Q Did you ask him if he owned a gun?

20 A No, I did not.

21 Q Were you aware that a gunshot residue test was  
22 performed on Mr. Mayo?

23 A No, I did not.

24 Q Did Mr. Mayo ever discuss with you about a fight  
25 -- and I'm going to use that term loosely -- a struggle at the

1 bathroom door where Devonian and her assailant were fighting  
2 with one another?

3 A He didn't tell me that at all. Excuse me.

4 Q Did Mr. Mayo admit to you that he was a drug  
5 dealer?

6 A He did not.

7 Q Okay. Did you ask him whether he sold drugs?

8 A I did not.

9 Q Were you aware that there were a number of items  
10 related to drug trafficking located in his apartment?

11 A No, I was not.

12 Q Were you the one that located a razor blade that  
13 had some powder on it?

14 A No, sir.

15 Q Was that ever shown to you?

16 A No, sir.

17 Q Were you the one that located a scale -- a scale  
18 to weigh --

19 A No, sir, I wasn't inside. So.

20 Q Right. And often times when people go into the  
21 residence, they'll bring things out. They'll mark it, that  
22 sort of thing, but you didn't have anything to do with that?

23 A No, sir.

24 Q In the time that you watched Mr. Mayo, would you  
25 say a couple hours probably went by?

1           A     Probably.

2           Q     Were you aware of other officers as those couple  
3 officers were going by asking him questions about what  
4 occurred, or was he sort of left alone?

5           A     He was left alone with me when I was with him,  
6 and then after I handed him off to the next officer, I don't  
7 know who spoke with him.

8           Q     Did Mr. Mayo give you the impression as he was  
9 speaking to Stephanie Cousins that she was afraid he was going  
10 to harm her?

11          A     Repeat that again. I'm sorry.

12          Q     Sure. Did Mr. Mayo give you the impression  
13 while he was on the phone with Stephanie Cousins that  
14 Stephanie believed he was going to harm her?

15          MR. DIGIACOMO: Objection.

16          THE COURT: You can't ask --

17          MR. DIGIACOMO: Speculation.

18          THE COURT: -- the state of mind of a third person.

19          MR. SGRO: Okay. I'll withdraw it, Your Honor.

20 BY MR. SGRO:

21          Q     Were you there when the paramedics arrived, sir?

22          A     Correct.

23          Q     Okay. The paramedics, how many of them showed  
24 up?

25          A     Off the top of my head, I couldn't tell you.

1 Q Do you know if it was more than one?

2 A Yes.

3 Q And were they allowed access into the residence  
4 to retrieve Devonia?

5 A Correct.

6 Q Put her on a gurney?

7 A I believe -- yeah, I believe she came out on a  
8 gurney.

9 Q And then transport her out of there?

10 A Correct.

11 Q And was anything done relative to photography to  
12 assure the integrity of that scene as paramedics went in and  
13 out?

14 A There was no CSI on scene at that time they were  
15 -- medical was responding for life saving.

16 Q Okay. So we just had some testimony about the  
17 integrity of the scene. You agree it's important to preserve  
18 the integrity of the scene, right?

19 A Correct.

20 Q Are you aware in this case of things that were  
21 located, bullet fragments and that sort of thing?

22 A No, sir.

23 Q Okay. Are you aware that some caution needs to  
24 be taken if paramedics are running in -- I mean, they're  
25 running to save a 12 year old's life, right?

1           A     Correct.

2           Q     They're aggressive, in a hurry, running in, I  
3 assume?

4           A     I didn't see anybody running, but they respond  
5 when we let them know that the scene is safe.

6           Q     Okay. Safe meaning everyone is out?

7           A     It's static. Nobody is shooting at each other  
8 anymore.

9           Q     Right.

10          A     And there's -- the medical folks are safe to go  
11 in when their are lives aren't in jeopardy.

12          Q     Okay. And the paramedics were allowed access  
13 in, recovered Devonia --

14          A     Transported her.

15          Q     -- transported her away all before anyone from  
16 CSI was there?

17          A     Correct.

18          MR. SGRO: Court's indulgence, Your Honor.

19          THE COURT: Yes.

20          MR. SGRO: That's all.

21          THE COURT: Mr. Langford.

22                   CROSS-EXAMINATION

23          BY MR. LANGFORD:

24          Q     Good afternoon, Officer.

25          A     Hello.

1           Q     Okay. So your task essentially was to watch Mr.  
2 Mayo; is that right?

3           A     That's correct.

4           Q     Who assigned you that task?

5           A     Probably my sergeant.

6           Q     All right. Did he direct you to a particular  
7 area to keep Mr. Mayo in?

8           A     Just -- we stood by the sidewalk, right along  
9 the curb.

10          Q     And why was it that you were watching Mr. Mayo?

11          A     Just to ensure he didn't leave the scene.

12          Q     Why were you concerned about him leaving the  
13 scene?

14          A     Because he was a witness to what had happened.

15          Q     At some point, he takes out his cell phone and  
16 calls somebody; is that right?

17          A     I believe he gets a phone call.

18          Q     Okay. So he gets a phone call from somebody?

19          A     Correct.

20          Q     And you are close enough that I believe you said  
21 you could hear a female voice?

22          A     I could.

23          Q     Okay. Are you close enough that you can hear  
24 any of the specifics of the conversation itself?

25          A     Just that it was a female's voice. I was

1 probably within a couple feet of him.

2 Q Okay. So the only side of the conversation that  
3 you're hearing is Mr. Mayo talking to the person on the other  
4 end; is that right?

5 A That's what I could hear, correct, his words.

6 Q Okay. All right. And at some point, he says,  
7 who did this? Or words to that effect?

8 A You know you did this. You better hide by a  
9 police station. I'm going to bring all my niggas. That's  
10 exactly what he said.

11 Q Okay. And at some point, he tells you that she  
12 told him about the people that did it; is that right?

13 A Correct.

14 Q Okay. And she says two people stormed in, two  
15 males --

16 A Uh-huh.

17 Q -- but then she only tells him the description  
18 for one of the males; is that right?

19 A Correct.

20 Q Okay. Doesn't it seem odd to you that -- or did  
21 -- let me rephrase that. Did you ask him, Well, did she give  
22 you the description of the other person?

23 A I asked him if she knew what they looked like,  
24 and she gave the description of the one male but didn't get a  
25 description on the second one because I guess she got knocked



1 down during the entry.

2 Q Okay. Now, are you just supposing that, or is  
3 that what he told you she said?

4 A He told me that she said the description of the  
5 one and did not have a description on the second person.

6 MR. LANGFORD: No further questions, Your Honor.

7 THE COURT: Any redirect?

8 MR. DIGIACOMO: Yes.

9 REDIRECT EXAMINATION

10 BY MR. DIGIACOMO:

11 Q You said you were G unit. What was your call  
12 sign that night. Do you remember?

13 A 1, George, 24.

14 Q 1, George, 24, and you mentioned something about  
15 a CAD. What's a CAD?

16 A That's where we document all of our -- when we  
17 get assigned a call, it comes to us on the computer, and we  
18 clear the call -- or we arrive. We hit the arrive button.  
19 When we clear the call, we clear with detail, and that's a  
20 document that tells all the information.

21 Q I'm going to guess as a patrol officer you  
22 aren't responsible for pulling the CAD from this particular  
23 event --

24 A No, sir.

25 Q -- would that be fair?

1           A     I've never done that.

2           Q     If someone were to pull the CAD from this event  
3 and were to look at 1G24, would we be able to tell when you're  
4 assigned, when you arrived and when you cleared a particular  
5 scene?

6           A     That is correct.

7           Q     You indicated that you weren't sure of the exact  
8 time periods. If the CAD reflects that you were assigned at  
9 4:01 and arrived at 4:09, does that sound about right to you?

10          A     That could be very accurate.

11          Q     Oh, one other thing. In the description that  
12 Cornelius Mayo gives you that Stephanie gives him, did he ever  
13 use the term overalls?

14          A     I don't recall. I'd have to refer to the report  
15 to remember that.

16          Q     Well, let me ask you this. If it's not in this  
17 report, would it have -- let me phrase it this way. Did you  
18 give everything that you received to the homicide detective?

19          A     Correct.

20          Q     And have you had a chance, at least in the past,  
21 to review this particular report?

22          A     Briefly, yes.

23          Q     If the information of overalls for the one  
24 suspect that's description was not in the report, would you  
25 have received the description of overalls?

1 MR. SGRO: What?

2 BY MR. DIGIACOMO:

3 Q Do you understand? That was a terrible  
4 question. Let me rephrase the question.

5 MR. SGRO: Yes.

6 THE COURT: Yes, I didn't even understand it.

7 THE WITNESS: Me neither.

8 MR. DIGIACOMO: May I approach, Judge? Page 9,  
9 Counsel.

10 THE COURT: Yes.

11 BY MR. DIGIACOMO:

12 Q I'm going to show you page 9 and ask you to just  
13 read the bottom paragraph for the description, which I believe  
14 is four lines up from the bottom, to yourself. Does that --  
15 sorry.

16 A I'm sorry. Go ahead.

17 Q Does that refresh your recollection as to  
18 whether or not Mr. Mayo told you anything as it relates to  
19 overalls?

20 A Yes, it does, and there's nothing in there about  
21 overalls.

22 Q Okay. As far as -- as you sit here today, you  
23 have no recollection of overalls being mentioned?

24 A I do not.

25 MR. DIGIACOMO: Thank you very much. I pass the

1 witness, Judge.

2 RE CROSS-EXAMINATION

3 BY MR. SGRO:

4 Q Officer, where's your report that you wrote down  
5 what Cornelius told you?

6 A I had a notepad that I had in my pocket that we  
7 carry around.

8 Q Where is it?

9 A Where is it?

10 Q Yes.

11 A I probably -- I'd probably be able to find it in  
12 my locker actually, maybe not from five years ago but -- or  
13 four years ago.

14 Q The bottom line is this. The report that you  
15 were just asked if it refreshes your recollection is a  
16 compilation of a lot of people feeding information into a  
17 document, right?

18 A The information that I passed on to a detective,  
19 correct.

20 Q You're one of several people that's referenced  
21 in that report, correct?

22 A Correct.

23 Q That report is a summary of the day's  
24 activities, correct?

25 A Correct.

1           Q     Okay.  You didn't refresh your memory with what  
2 you actually wrote down, fair?

3           A     What I wrote down?

4           Q     Yes, sir.

5           A     It would be on my notepad.

6           Q     I get it's the notepad in the locker.

7           A     Okay.

8           Q     I get it.

9           A     Uh-huh.

10          Q     When you were just asked to refresh your memory,  
11 you were shown a document that is a compilation that you did  
12 not even write, correct?

13          A     Correct.

14          Q     So you have to assume if you're correct --  
15 because when you first were asked the question, Does Cornelius  
16 Mayo tell you about overalls, your first answer was, I don't  
17 know, right?

18          A     Correct.

19          Q     Now, you have to assume in that report you said  
20 something to somebody who relayed to somebody else who then  
21 typed it in a document, and that's what the State is showing  
22 you to refresh your recollection, right?

23          A     All I can testify to is that I relayed the  
24 information to a detective.  Where it went from there --

25          Q     I get it.

1           A     -- I couldn't tell you if it changed hands one  
2 or five times.

3           Q     And you're making my point. You cannot tell us  
4 all -- strike that. All you can tell us is at some point 4  
5 years ago you provided information to some police officers,  
6 right?

7           A     The detective, correct.

8           Q     To the detective. The detective then got with  
9 other detectives, created a summary, right?

10          A     That I do not know.

11          Q     Okay. Well, you have a summary report in front  
12 of you, right?

13          A     I do.

14          Q     Someone put that together, right?

15          A     Correct.

16          Q     You were never asked in all four years, Review  
17 this for accuracy. See if it matches up to what you wrote  
18 down, right?

19          A     No.

20          Q     Okay. The detective didn't come to get your  
21 opinion on the accuracy of what's in there, right?

22          A     No.

23          Q     Okay. And, again, as you sit here right now,  
24 you can't tell the jurors with any specificity at all whether  
25 Cornelius did or did not tell you about overalls, fair?

1           A     Correct.

2           MR. SGRO: All right. That's all.

3           MR. LANGFORD: Nothing, Your Honor.

4           THE COURT: Thank you Officer Houghton for being a  
5 witness. You'll be excused, sir.

6           THE WITNESS: Thank you.

7           MR. ORAM: Judge, can we approach very briefly?

8           THE COURT: Sure.

9                     (Bench conference.)

10          MR. ORAM: Judge, it has come to my attention that  
11 Mr. DiGiacomo needs a bathroom break.

12          MR. DIGIACOMO: He was totally -- (unintelligible) --

13          MR. ORAM: -- and once he said that, I thought, geez,  
14 so do I.

15          THE COURT: It's about time for a break. Okay.

16          MR. DIGIACOMO: We have two small witnesses -- well,  
17 one small witness, one long one. So either way you want to do  
18 it.

19          THE COURT: I don't care. We'll take a 10-minute  
20 break.

21          MR. DIGIACOMO: Perfect.

22          THE COURT: Okay.

23                     (Bench conference ends.)

24          THE COURT: All right. Ladies and gentlemen, we're  
25 going to take a brief recess.

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

DAVID BURNS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 77424

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**APPELLANT'S APPENDIX**

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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of February, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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