

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL McNAIR

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 78871

Appeal From A Judgment of Conviction (Jury Trial)
Eighth Judicial District Court
The Honorable Douglas Herndon, District Judge
District Court No. C-17-327395-1

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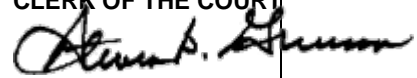
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
MICHAEL MCNAIR,
Defendant.

CASE NO. C-17-327395-1
DEPT. III

BEFORE THE HONORABLE DOUGLAS W. HERNDON,
DISTRICT COURT JUDGE

TUESDAY, MARCH 05, 2019

**RECORDER'S TRANSCRIPT OF HEARING
JURY TRIAL - DAY 6
VOLUME VI**

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Las Vegas, Nevada, Tuesday, March 05, 2019

[Trial began at 1:14 p.m.]

[In the presence of the jury]

THE MARSHAL: All rise for the jurors.

The panel's present, Your Honor.

THE COURT: Thank you.

You all can be seated.

We're going to be back on the record. Mr. McNair is present with his attorney. State's attorneys are present. Our jurors are present as well. We're going to continue on with the State's case in chief. Your next witness is?

MS. BLUTH: Dr. Mancini.

DR. CHIARA MANCINI

[having been called as a witness and being first duly sworn, testified as follows:]

THE CLERK: Please be seated.

Please state and spell your name for the record, please.

THE WITNESS: My name is Dr. Chiara Mancini.

C-H-I-A-R-A. Last name is M-A-N-C-I-N-I.

THE COURT: All right. Dr. Mancini, welcome to court, thank you.

Ms. Bluth.

MS. BLUTH: Thank you, Judge.

...

1 **DIRECT EXAMINATION**

2 BY MS. BLUTH:

3 Q Good afternoon. Doctor, how are you employed?

4 A I am a medical examiner in the Clark County Coroner's Office.

5 Q What's a medical examiner?

6 A A medical examiner is a medical doctor or physician who has
7 special training in pathology and forensic pathology and performs
8 autopsies to -- the goal is to determine the cause and manner of death.

9 Q Okay. So I want to -- if you don't mind, I just want to break
10 down a few of those times -- a few of those terms. What -- tell us what a
11 pathologist does?

12 A A forensic pathologist -- a pathologist is a physician --
13 pathology is the study of disease. Forensic pathology is using that
14 medical knowledge in a medical legal sense, applying it the legal
15 system. Specifically we perform autopsies to help determine the cause
16 and manner of death.

17 Q Okay. So let's talk a little bit about an autopsy, like you said.
18 The point of an autopsy is to determine the cause and manner of death,
19 right?

20 A Yes.

21 Q Can you give us some examples of when we use the term
22 cause of death -- for your purposes of a forensic pathologist, give us
23 some examples when you say cause of death. What would be some
24 causes of death?

25 A Cause of death is why a person died. So that can be an injury

1 or a disease. So examples are a gunshot wound, a stab wound,
2 pneumonia, all of these are causes or why the person died.

3 Q And then what about manner of death? Can you tell us what
4 the manners of death are, please?

5 A If the cause of death is the why, the manner of death is the
6 how, or -- how the person died or circumstances leading up to the death.
7 The five manners of death in Nevada are natural, suicide, homicide,
8 accident, and undetermined.

9 Q Okay. All right. So we've talked about your occupation and
10 what you do. Could you give us a -- some information in regards to your
11 education and training that allowed you to have that position, please?

12 A Yes, I went to undergraduate at Colorado State University and
13 got my undergraduate degree in Biochemistry. Then I went to medical
14 school at the Kansas City University of Medicine in Biosciences. Then I
15 went to residency at the University of Louisville Hospital and I did my
16 residency in Anatomic and Clinical Pathology. And then after that I went
17 to do a sub -- to have subspecialty training or a fellowship in Forensic
18 Pathology in Dayton, Ohio.

19 THE COURT: Sounds like the courtroom is about to take off.
20 I know that's something related to the air condition system, so don't get
21 alarmed.

22 MS. BLUTH: We have a doctor here if we need you.

23 THE COURT: True.

24 MS. BLUTH: All right.

25 THE COURT: Generally, if we need treatment from this

1 doctor, we're in trouble.

2 MS. BLUTH: Yeah, I would agree with you. I would agree
3 with you.

4 THE COURT: Not that you're not a good doctor. Don't get
5 me wrong. I think it stopped. Okay. Go ahead.

6 MS. BLUTH: Okay.

7 BY MS. BLUTH:

8 Q All right. So in a moment I'm going to ask you about a specific
9 autopsy, but before we get into the specifics, I'd just like you to talk to
10 the Ladies and Gentleman of the Jury in regards to how autopsies are
11 performed; the steps that you go through.

12 A So an autopsy is a physical exam. It's very similar to a
13 physical exam that a clinician would perform in a doctor's office, but for a
14 forensic pathologist, an autopsy is like a physical exam for the
15 deceased. So it begins with radiology. We take films of people and then
16 there's an external exam where I look at the body -- the decedent as
17 received and document evidence there. And then after the external
18 exam, we begin the internal examination to examine the organs and
19 tissues. During the internal exam, we also take samples for additional
20 testing like toxicology studies.

21 Q Okay. Thank you. All right. So I want to ask you a few
22 questions about when you do an autopsy and gunshot wounds. You see
23 gunshot wounds, all right. So first of all, can you tell the difference
24 between an entrance wound and an exit wound? So where the bullet
25 entered the body and where it exited the body?

1 A Yes.

2 Q How can you do that?

3 A There are findings and trends that are more consistent with
4 one than the other. For example, an entrance wound usually has an
5 abrasion margin and an exit wound usually doesn't, but there are special
6 exceptions. Also things like soot deposition and gunpowder stippling, if
7 those things are present.

8 Q All right. So that leads me to my next question is, is there ever
9 any circumstances that allow you to say how close or how far the person
10 was who was shooting the victim?

11 A Yes, there are findings consistent with approximate ranges.
12 The -- generally the three categories are contact, intermediate, and
13 indeterminate range of fire. Features that help with that are soot
14 deposition and gunpower stippling. And generally -- if you don't see
15 either of those things, it's an indeterminate range. So you are far
16 enough away that those findings don't make it to the body for me to see.

17 Q Okay. So if someone -- so actually, let's start with this. So
18 when you say you see gunpowder or you see stippling, talk to us about
19 what you would actually see on the body and what that would mean.

20 A Soot deposition is when -- well -- soot is deposited on the skin,
21 that's a -- usually associated with closer ranges. Soot is something you
22 can wipe off. It's just resting on the skin. Gunpowder stippling is -- they
23 are abrasion marks made by gunpowder particles. So the particles kind
24 of rub against the skin and leave marks.

25 Q So -- and when you see those things you can gen -- you can

1 determine generally how close the person may have been?

2 A Yes.

3 Q So at what point is it? One foot, two feet, three feet, where
4 you get to that indeterminate range and you're like, now we can't tell?

5 A Soot deposition, generally, ends at about 12 inches.
6 Gunpowder stippling ends at approximately 18 to 24 inches, but there's
7 a lot of variables in that; the type of gun used, the type of ammunition
8 and gunpowder used, et cetera. But those numbers are approximate.

9 Q Thank you. All right. So now I would like to ask you some
10 specific questions in regards to autopsy 17-09471. The decedent's
11 name is Gordon Phillips, Jr. Is that correct?

12 A Yes.

13 Q Are you the doctor that did the actual autopsy on Mr. Phillips?

14 A No.

15 Q Okay. Because that doctor is out of the jurisdiction, are you
16 the doctor assigned to do that?

17 A Yes, I was assigned to review the case and see whether I
18 agreed with the conclusions in it, in order to testify today.

19 MR. AFSHAR: And Your Honor, we had stipulated that the
20 autopsy was performed on Gordon Phillips prior to this time.

21 THE COURT: Okay.

22 MS. BLUTH: Thank you. So --

23 THE COURT: Before you go any further, because you said
24 you were asked to see if you agree, I just want to make clear you're
25 going to offer your own opinions about what you reviewed, correct?

1 THE WITNESS: Yes, sir.

2 THE COURT: Okay. Thank you.

3 BY MS. BLUTH:

4 Q So that leads me to my next question, which is I'd like you to
5 discuss with the jury what items you reviewed in order to be here to
6 testify today in regards to this specific autopsy.

7 A I mentioned x-ray, radiographs, before, I reviewed those. I
8 reviewed the autopsy report and the toxicology findings, as well as
9 photographs of the autopsy performed.

10 Q And after reviewing those, are you then able to make your
11 own conclusions and opinion in regards to the cause and manner of
12 death of the decedent in this case?

13 A Yes.

14 Q All right. Can you give us, please, the date that this actual
15 autopsy was completed upon? And I should have told you this to begin
16 with, Dr. Mancini, but if at any point in time you need to reference your
17 report, that's totally fine, just let us know that you are doing so, just so
18 we can have it on the record that that's what you're doing, okay?

19 A Oh, thank you. Yes.

20 Q All right. So what was the date that this autopsy was done
21 on?

22 A It was performed on September 15th, 2017.

23 Q All right. And how old was Mr. Phillips on -- when he died?

24 A 39 years.

25 Q And the height and weight of Mr. Phillips, please.

1 A He was 72 inches in length and 203 pounds.

2 Q Okay. All right. So I'd like to go through the autopsy and
3 discuss any external findings that you could see either via -- well actually
4 though photography, all right? But before we do so I'd like to ask you
5 some questions about when the body comes into the medical examiner's
6 office how it is -- I don't want to use the term packaged, but sealed, I
7 guess. Could you explain that to the Ladies and Gentleman of the Jury?

8 A Yes, the decedents are typically received in a body bag. In
9 cases like this, usually a sealed body bag by the time the medical
10 examiner looks at -- begins their examination, the decedent has been
11 processed. And what that means is autopsy technicians have unsealed
12 the bag, begun taking photos, begin removing the clothing and
13 processing it. All of those photos I do see when I'm reviewing the
14 autopsy. So generally, when we see them they are unclad, so their
15 clothing has been removed and preliminary pictures have been taken.

16 Q Is it also common for the decedent to have bags over their
17 hands?

18 A Occasionally, yes.

19 Q All right.

20 MS. BLUTH: So, Your Honor, pursuant to stipulation, State's
21 88 through 95, 97 through 113, and 115, 116, 118 through 120 are being
22 offered by the State at this time.

23 THE COURT: Any objections?

24 MR. AFSHAR: No, Your Honor, we've reviewed them and
25 discussing it with the doctor, those are relevant to her determinations

1 and so she will be using those. The only thing is during the public --
2 publishing portion of, a few photographs will be covered and they are not
3 relevant to the findings, it's just for privacy, so.

4 THE COURT: All right. We will admit those and you can
5 publish them

6 **[STATE'S EXHIBIT NUMBERS 88 through 95, 97 through 113, 115 to**
7 **116, and 118 through 120 ADMITTED]**

8 MS. BLUTH: Thank you, Judge.

9 BY MS. BLUTH:

10 Q All right. So I'm going to start with State's 88.

11 THE COURT: By the way I redid that whole thing last night so
12 you guys can have mouse right up by there by you now. You can --

13 MS. BLUTH: Look at that --

14 THE COURT: --you can thank me later.

15 MS. BLUTH: -- just full service in here, guys.

16 THE COURT: Apparently, I re-wired it wrong, so we had to
17 have IT come in here this morning to re-fix what I screwed up.

18 MS. BLUTH: Thank you, Judge.

19 BY MS. BLUTH:

20 Q All right. Dr. Mancini, could you explain to us what we're
21 seeing in State's 88?

22 A Yes, this is an identification tag that's affixed -- fastened to the
23 decedent so that we know that we're -- that we've -- in order to identify
24 the decedent. It -- we -- obviously want to make sure that we are
25 performing the autopsy on the correct person and linking that to the

1 correct results.

2 Q Okay. Thank you.

3 Now I'd like to show you State's 89. And we see this hand in
4 a lot of the photos with this little white placard here with the number
5 1709471. Can you explain to us what the point of that is?

6 A Yes, there's two points to it actually. One is to identify the
7 case because that number 170941 is the number that the Coroner's
8 Office affixes to the case performed. It's also what's on the autopsy
9 report and it's another way to ensure proper identification.

10 Also the scaling on that placard is for when someone is
11 referring to the picture later they have an approximate idea of how large
12 something in the photograph is; for example, gunshot wounds.

13 Q All right. In a second I'm going to ask you a serious -- excuse
14 me, a series of questions in regards to some gunshot wounds on Mr.
15 Phillips. How many gunshot wounds were found on the body of Mr.
16 Phillips?

17 THE COURT: Entry and exit?

18 MS. BLUTH: Entry.

19 THE COURT: Okay.

20 BY MS. BLUTH:

21 A Eight.

22 Q And with each of those entry, was there a corresponding exit?

23 A Yes.

24 Q Okay. So therefore, no bullets were retained inside of Mr.
25 Phillip's body, is that correct?

1 A Correct.

2 Q So I'm going to start with State's Exhibit 90. Can you explain
3 to us what we're looking at here?

4 A This photograph is depicting a gunshot wound of the left upper
5 clavicle and neck. It is an entrance gunshot wound.

6 Q All right. So I'm going to put up State's 91, which is a close up
7 of that injury. Earlier we were talking about, you know, certain findings
8 that you see that -- that tells you this is an entrance wound. Would this
9 picture help you in explaining to the jury how you can tell that this is an
10 entrance wound?

11 A Yes.

12 Q Could you explain to them why?

13 A So there is a marginal --

14 Q Oh sorry, Dr. Mancini, I forgot to tell you one thing.

15 A Yes.

16 Q In this courtroom you'll see a mouse in front of you, and you
17 can utilize that. Let Judge click on the red pencil first.

18 A Sorry.

19 THE COURT: I'm going to [unintelligible]

20 MS. BLUTH: There you go.

21 THE COURT: Let's see if I can make it color, and see if it will
22 show up any better. Okay.

23 BY MS. BLUTH:

24 Q So now Dr. Mancini, if you just left click and you -- if that
25 mouse would help you in showing the jury, then feel free to use that.

1 A Thank you.

2 Okay. So things that help me determine that this is a -- an
3 entrance wound is a marginal abrasion, which you can see around this
4 area. That helps determine that it's an entrance wound. Also of interest
5 is something I do not see on this picture which is evidence of soot or
6 gunpowder stippling. Since I don't see either of those things the
7 determination is it's an indeterminate range of fire.

8 Q So I want to ask you some questions. So you put -- if we're
9 looking at the photograph you put a green line at the bottom, left side of
10 this injury. You called that an abrasion. Explain to us that you are
11 seeing and what -- what you mean by abrasion.

12 A Yes, as a projectile enters the skin it rubs against the skin on
13 the point of entry. So this is indicative to me that the marginal abrasion
14 it's at the margin of the wound but it's -- I also know it is likely it was
15 made by a projectile. And this I marked where it was most prominent
16 and easiest to see.

17 Q Okay. Thank you. So now -- one second.

18 I'm going to move on to State's 92. What are we looking at
19 here?

20 A This is a gunshot wound of the right upper clavicle, and it is an
21 exit gunshot wound.

22 Q All right. So now I'm going to show you State's 93. Tell us by
23 looking at this how you can tell that this is an exit wound.

24 A The interesting thing about this gunshot wound is it does have
25 this long abrasion here, and I did say earlier that there are exceptions to

1 rules; one of them being accounting for folds in the skin. Now the fold in
2 the skin of his neck caused an abrasion as the bullet was exiting the
3 body. Just as important as the findings that I see on the skin are the
4 findings upon internal examination. This wound is linked to the entrance
5 wound we just saw. So that's also helpful in determining that this is an
6 exit wound.

7 Q Could you explain to us how the bullet coursed through the
8 body, please?

9 A Yes. It went through the upper clavicle and neck skin. The
10 subcutaneous tissues, the left sternocleidomastoid muscles, and all
11 these muscles I'm naming are muscles of the neck.

12 THE COURT: And, I'm sorry doctor, you're referring to the
13 report --

14 THE WITNESS: Yes.

15 THE COURT: -- so to refresh your recollection on that?

16 THE WITNESS: Yes.

17 THE COURT: Thank you. I appreciate that.

18 A Thank you. The left sternocleidomastoid muscle, the left
19 sternohyoid muscle, the thyroid gland, the right sternohyoid muscle, the
20 right sternocleidomastoid muscle, and the right upper clavicle, which is
21 this wound that we're describing here, subcutaneous tissue and skin.

22 Q What does subcutaneous mean?

23 A Right under the skin. So actually, you can actually see some
24 of this subcutaneous soft tissue right under here. So that -- kind of that
25 stuff.

1 MS. BLUTH: All right. So Judge, when Dr. Mancini was
2 originally speaking about some markings showing that this -- showing
3 the outside of this wound, she was dis -- she used the green pencil to
4 describe the left of the wound, the black markings. Now, when she was
5 explaining the subcutaneous tissue, she used the green marker to the
6 center of the exit wound.

7 BY MS. BLUTH:

8 Q Would that be a fair representation, Dr. Mancini?

9 A Yes, although that does bring up a question, can I change the
10 color?

11 Q Sure.

12 A Oh, okay. Well, I'll try to do that from now on to be less
13 confusing.

14 Q No, that's okay.

15 THE COURT: No, no, no, no, you're fine.

16 THE WITNESS: Oh, okay.

17 THE COURT: She's just for the record just saying that it was
18 using the green marker. But that's okay, you don't have to change the
19 color each time --

20 MS. BLUTH: Nope.

21 THE COURT: -- it's okay.

22 MS. BLUTH: Yeah. So every time you make a marking then I
23 just -- I'll just put on the record exactly what you are doing, okay?

24 THE WITNESS: Yes, thank you.

25 MS. BLUTH: Thank you.

1 BY MS. BLUTH:

2 Q All right. So now I would like to talk about State's 94. And if
3 you could orient us in regards to what we're looking at. And if looking at
4 your report would refresh your recollection feel free to do so.

5 A Thank you. What we're looking at is the left lateral torso. So
6 this is the left side of his body. And we're looking at two gunshot
7 wounds.

8 Q Could we start please with the one closer to the armpit?

9 A Yes, this -- in the report it is named the left lateral upper
10 aspect of the chest.

11 Q Okay. And I'm going to show you State's 95. Would that just
12 be a close up? Would that just be a close up of that wound?

13 A Yes.

14 Q Okay. And would that be an entrance or an exit wound?

15 A An entrance.

16 Q And explain to us where this bullet went, please?

17 A I'm sorry, I'm referring to the report.

18 Q Okay.

19 A Perforation of the left lateral upper aspect of the chest skin,
20 subcutaneous tissue, posterior lateral left tenth rib -- and that's a lot of
21 words, but it's just indicating where on the rib it is. So we're talking
22 about the posterior left tenth rib and the lateral aspect of it. So
23 essentially hitting the left tenth rib.

24 Q And when you were doing that you were using your left hand
25 to go more towards the -- your back and I'm going to use the term

1 lateral, but more towards your back but then towards the lateral aspect
2 of your ninth and tenth rib, would that be fair?

3 A Yes, correct. And also if I ever say medial and lateral, medial
4 is closer to the midline and lateral is farther away from the midline.

5 To continue, after hitting the left tenth rib, left mid aspect of the
6 back muscle, subcutaneous tissue and skin. And that's about to refer to
7 the exit wound I'm about to describe. The left mid aspect of the back.

8 Q Okay. So I'm going to go to State's 98. And could you circle
9 for us where the exit wound it, please? And then I'll do a close up for
10 you.

11 THE COURT: Got to click the little pen down there first.

12 THE WITNESS: Oh, sorry.

13 THE COURT: Thank you.

14 MS. BLUTH: And Judge, for the record Dr. Mancini has
15 circled the gunshot wound that's in the mid-back to the left.

16 BY MS. BLUTH:

17 Q And then now I'm going to ask you some questions Dr.
18 Mancini. State's 105, would that be a close up of that exit wound?

19 A Yes.

20 Q Okay. Going to go back here. All right. So now I'd like to ask
21 you some questions about this, the lower gunshot wound on State's
22 Exhibit 94.

23 A Yes.

24 Q Is that a gunshot entrance wound?

25 A Yes. And I'm sorry, just to clarify, we're talking about the

1 wound on the left lateral upper chest. That -- this one? Oh, sorry. This
2 one?

3 Q That's okay. So that one is the one that you -- you already
4 discussed it's course through the body or you did not?

5 A I did already.

6 Q Okay.

7 A Okay. So we're referring to the other one?

8 Q Yes, we are please. Thank you.

9 A Sorry.

10 Q That's okay.

11 A So the left lateral lower chest, yes.

12 Q Okay. And could you explain where that bullet coursed
13 through the body?

14 A Yes. The left lateral lower aspect of the chest skin,
15 subcutaneous tissue muscle, peritoneal cavity, and that's a word for your
16 abdominal cavity, anything below the diaphragm. So the peritoneal
17 cavity, loops of small bowel and associated mesentery; mesentery is
18 tissue that affixes loops of bowel to your inner cavity wall, so small bowel
19 and associated mesentery, basically. Psoas muscle, right mid-lower
20 aspect of the back muscle, subcutaneous tissue and skin.

21 Q And where did that bullet exit the body?

22 A The right mid-lower aspect of the back is -- is what the -- this
23 wound is named. And I'm sorry for the cumbersome names.

24 Q That's okay. So I'm going to show you State's 101, and let me
25 just get us there. So that would be the area, just right above the right

1 buttocks?

2 A Correct.

3 Q And then I'm going to show you State's 102. Would that be a
4 close up of that exit wound?

5 A Yes.

6 Q Okay. So now I'd like to move into State's 103. We see the
7 placard just above a bullet on the left flank. Could you explain to us
8 what we're looking at here?

9 A Yes, this is a gunshot entrance wound and this one is named
10 the left mid back or flank. You can see a very nice abrasion -- margin of
11 abrasion -- well all around but it's most concentrated here.

12 Q Okay.

13 MS. BLUTH: And for the record, Judge, Dr. Mancini, circled a
14 half circle just showing the abrasion around the bullet we were
15 referencing.

16 THE COURT: Right.

17 BY MS. BLUTH:

18 Q And I'm going to show you State's 104. Would this be just be
19 a close up where we can really see this abrasion?

20 A Yes.

21 Q Okay. Thank you. Can you explain where this bullet coursed
22 through the body?

23 A Yes. The skin subcutaneous tissue and muscle of the left mid
24 aspect of the back, the mesentery, the aorta at the bifurcation of the iliac
25 arteries. So the aorta is your -- a major artery, it comes off the heart. It

1 actually goes down the back of your peritoneal cavity, and then way
2 down low it branches into your iliac arteries. So this is saying it hit the
3 aorta at the bifurcation or splitting of those iliac arteries. Loops of small
4 bell and associated mesentery, right lateral lower quadrant abdominal
5 muscle.

6 And this is starting to refer to where the abdomen it's exiting.
7 It -- the abdomen is divided into four quadrants, so the right lower
8 quadrant laterally is what we mean. We're about to see it. The right
9 lateral lower quadrant abdominal muscle, subcutaneous tissue and skin.

10 Q So showing you State's 107 here. And we see a ruler over a
11 wound. Is that the corresponding exit wound with that particular bullet?

12 A Yes.

13 Q I'm going to show you State's 99. Could you explain what
14 we're looking at here?

15 A We are looking at an entrance wound and this one is named
16 the left mid-lower aspect of the back.

17 Q Would this be an entrance or an exit wound?

18 A An entrance wound.

19 Q Showing you State's 100. Is that a close up of that particular
20 wound?

21 A Yes.

22 Q And where did this bullet course through the body?

23 A Left mid-lower aspect of the back skin, subcutaneous soft
24 tissue and muscle, sacrum, which is a bone as the base of your spine,
25 right iliac artery, right medial lower quadrant of the abdomen muscle,

1 subcutaneous tissue and skin.

2 MR. PIKE: And again, Doctor, you were referring to your
3 notes while you were testifying that?

4 THE WITNESS: Yes, thank you.

5 MR. PIKE: Thank you.

6 BY MS. BLUTH:

7 Q State's 109. Would that be the corresponding exit wound
8 associated -- we see two but on the autopsy -- on the medical examiner
9 placard there's one directly above that, would that be the corresponding
10 exit wound?

11 A Yes.

12 Q Now in a moment I'm going to get through the injuries to the
13 arms, but does that conclude the bullet wounds -- the gunshot wounds to
14 the chest and back?

15 A Yes.

16 Q All right. So now let's go, if you wouldn't mind please into the
17 bullet wounds into the right arm, and I'm going to show you State's 113.
18 And if just give me second, I'll zoom out so we can kind of orient ourself
19 as to where we are. Would it help if I kept it up or do you want me to
20 turn it sideways? What would be best for you?

21 A Well that's fine, thank you.

22 Q You're welcome. Could you orient us in what part of the body
23 we're looking at and how Mr. Phillips is laying?

24 A Yes, this -- he is laying in a prone position, which means
25 stomach side down. So the -- his back is up here then then his head is

1 towards this direction. So this would be -- this would denote the right
2 arm. The back of the --

3 Q Thank --

4 A -- right arm.

5 Q Thank you. And for the record you put a B on the top of the
6 picture where Mr. Phillips' back is and an H to the right of the picture
7 where -- in the direction where his head would be laying.

8 A Yes.

9 Q Thank you. All right. Is this an entrance or an exit wound?

10 A An entrance.

11 Q And where did this gunshot -- where did this bullet exit?

12 A The right antecubital fossa.

13 Q Showing you State's 111. Is that the antecubital fossa?

14 A Yes, it means the crook of the elbow, basically on the front.
15 So that is the right antecubital fossa.

16 Q And showing you State's 112. Would that be a close up of
17 that exit wound?

18 A Yes.

19 Q So now I'd like to --

20 MR. PIKE: Sorry, Counselor, it was 112?

21 MS. BLUTH: Yes, sir.

22 MR. PIKE: Thank you.

23 BY MS. BLUTH:

24 Q I'd like to move into the left arm if we could, State's 116. Now
25 we see two gunshot wounds. One above the placard towards the left

1 elbow and one below more towards the wrist. If we could I'd like to start
2 with the one to the right of the placard more towards the elbow, which
3 would be State's 118. And if you don't mind I'll do a -- put a close up of
4 that on right now. Is that an entrance wound or an exit wound?

5 A An entrance.

6 Q And where did that bullet course through?

7 A Perforation -- and I'm sorry. I'm referring to my report again.

8 Q Thank you.

9 A Perforation of the left upper arm skin, subcutaneous soft
10 tissues and muscle -- and muscle of the left forearm. And then the left
11 upper ventral forearm subcutaneous tissue and skin. Which it looks like
12 you are about to show --

13 Q Yeah.

14 A -- me.

15 Q So State's 119. If you could show which of these two that you
16 were talking about, please.

17 A Yes, the ventral forearm just means the front of your forearm.
18 So when I say the upper ventral forearm, I'm referring to the one -- the
19 gunshot wound closer to the antecubital fossa, the crook of the elbow.

20 Q Thank you. Now I want to go back if we could please to
21 State's 116 and now I'd like to talk about the gunshot wound towards the
22 wrist of Mr. Phillips left arm. Is that an entrance wound or an exit
23 wound?

24 A Entrance.

25 Q And where did that bullet course through the arm?

1 A The left lower forearm skin subcutaneous soft tissue, and left
2 lower forearm muscle. And then the left lower ventral forearm muscles
3 subcutaneous soft tissue and skin.

4 Q Okay. Showing you State's 119. Let me make sure I have
5 that right, 119. And obviously we just talked about the exit wound closed
6 to the elbow is the one to the right of that with the picture of the exit
7 wound.

8 A The one closer to the wrist, yes.

9 Q And does that conclude the gunshot wounds --

10 A Yes.

11 Q -- in regards to what was noted by Dr. Gavin but was also --
12 excuse me, doctor -- yeah, Dr. Gavin, but which was also noted during
13 your examination of the reports, as well as the photos.

14 A Yes

15 Q Now, in regards to, you know, we just saw the gunshot
16 wounds to the hands, we saw them to the chest to the back. Which of
17 those would be fatal? And if looking at the report would help refresh
18 your recollection, please feel free to do so.

19 A Thank you.

20 Several of them cause substantial injury, but if I had to pick a
21 few of them that caused the most injury I would say the one in the
22 neck -- so the one that -- that begins in the left upper clavicle and neck
23 area and there were two that contribute to hemoperitoneum, or blood
24 within the peritoneal cavity, and I am trying to find those in the report.

25 Q I guess -- and I shouldn't have been so specific, but I guess

1 what I was asking is, are those more towards -- the ones that actually
2 entered the chest area and into the back are more concerning than the
3 ones on the arms?

4 A Yes, correct.

5 Q And when you use the peritoneal cavity, forgive me if you
6 already said this but where are you explaining that to be to the jury?

7 A That is an area that encompasses the abdominal and pelvic
8 organs. It's below the diaphragm, the peritoneal cavity.

9 Q As part of the autopsy, was toxicology done on Mr. Phillips?

10 A Yes.

11 Q And what were the results of that?

12 A One moment, please.

13 MS. BLUTH: And for the record, she is referring to her report.
14 Dr. Mancini is referring to her report.

15 BY MS. BLUTH:

16 A A drugs of abuse screen is negative. And no ethanol is
17 detected on toxicology. A vitreous screen, vitreous humor is the fluid
18 inside the globe of the eye, shows no clear evidence of dehydration,
19 uremia, or hyperglycemia.

20 Q So Mr. Phillips had no alcohol or drugs in his system?

21 A Correct.

22 Q Did you -- after conducting your own analysis, did you form
23 your own opinion as to the cause and death of Mr. Phillips?

24 A Yes.

25 Q And what was that, please?

1 A The cause of death was multiple gunshot wounds.

2 Q And the manner?

3 A Homicide.

4 Q Thank you so much. That concludes my direct examination,
5 Your Honor.

6 THE COURT: Okay. Mr. Pike. Ms. Simpkins.

7 **CROSS-EXAMINATION**

8 BY MR. PIKE:

9 Q Good afternoon, Doctor.

10 A Good afternoon.

11 Q I'm Randy Pike. I'm going to be asking you a few questions
12 this afternoon, if I may.

13 A Thank you.

14 Q And a little bit about your specialty as far as being a forensic
15 medical examiner. You go through the same medical school that all
16 doctors go through, don't you?

17 A Yes.

18 Q And you -- and I assume that you're licensed to practice
19 medicine or if you've just chosen to do the forensic portion of your
20 training that that's what you're doing here in Las Vegas.

21 A I am licensed to practice medicine in the state of Nevada, yes.

22 Q Okay. Great. And in going through your preparation for
23 testimony today, you had an opportunity to review not just the
24 photographs that were done but any slides or any other testing that may
25 have been done?

1 A Ancillary testing, yes.

2 Q Okay. Thanks. And ancillary testing. What type of ancillary
3 testing was done in the autopsy?

4 A Toxicology studies on the blood and vitreous humor, as
5 previously described.

6 Q Okay. From your review of the photographs that were taken
7 of autopsy, it appears that there were some other items of note and if I
8 may ask you some questions about those.

9 A Yes.

10 Q Showing you State's Exhibit 109, which has been admitted.
11 Can you tell us what the tube is and the purpose for that?

12 A It appears to be providing intravascular access in the right
13 inguinal cleft, evidence of medical intervention.

14 Q Okay. Great, thanks. So when -- sometimes when a body
15 comes to you to perform an autopsy that body has already been taken to
16 a hospital and there's been an attempt to treat or cure or patch up any of
17 the treat -- any of the injuries. And it appears from the body of Mr.
18 Phillips that there was some medical intervention, correct?

19 A Yes.

20 Q Were you able to determine the extent of that medical
21 treatment?

22 A I was not, no.

23 Q Okay. When the autopsy is performed, normally there is an
24 exterior examination and I believe it's not uncommon to be an interior
25 examination.

1 A Correct.

2 Q Was there an in tune -- interior examination of this autopsy?

3 A Yes.

4 Q Okay. And that was performed by Dr. Gavin?

5 A Correct.

6 Q You had an opportunity to discuss the autopsy with Dr. Gavin
7 prior to coming into court today, didn't you?

8 A I did.

9 Q Okay. So in preparing for this autopsy, then Dr. Gavin also
10 assisted you in determining which exit wound may attach to or be
11 associated with an entrance wound.

12 A I made those conclusions before I spoke with Dr. Gavin.

13 Q Okay. In making those determinations and from reviewing the
14 photographs that you did, did you review any photographs of the body
15 as clothed -- as it may have been clothed at the time of the shooting?

16 A I believe I did, yes.

17 Q Okay. And did -- those photographs that you observed, did
18 that show you the detective impounding those clo -- items of clothing?

19 A They did not.

20 Q Okay. But it's your experience as a medical examiner and
21 performing autopsies it is usual protocol for a detective to come -- to
22 attend the autopsy and collect or -- along with a CSA and collect any
23 pieces of evidence that may be of forensic value to them.

24 A That is customary, yes.

25 Q And you don't have any reason to believe that that didn't

1 happen in this autopsy?

2 A No, I don't.

3 Q Okay. Along with an autopsy, just the internal examination
4 and the external examination is -- were there x-rays taken of -- during
5 the course of this autopsy?

6 A Yes.

7 Q And you had an autopsy to where you review the actual
8 photographs or the x-ray results?

9 A I did review the radiology and the photographs, yes.

10 Q Okay. And I appreciate you helping me with the terminology,
11 thank you very much. And that also indicated to help support the
12 conclusions that you testified about in court today?

13 A Yes.

14 Q There are some things that you may or may not be able to
15 make a determination during the course of an autopsy, such as whether
16 or not an individual suffers from any form of mental illness.

17 A That is true, yes.

18 Q Okay. Now that -- there may be findings that you can identify
19 through either an MRI of the brain or an examination of the brain to
20 determine whether or not there is any impairments or damage to the
21 executive portion of the brain, isn't that true?

22 A I'm not a neurologist, but I believe that there are studies that
23 can assist with that. I mean my -- my purview is a forensic pathologist,
24 largely centers on evidence of injury or natural disease, such as if there
25 was a gross tumor within the brain, something like that.

1 Q Okay. Was the brain examined either through an MRI or
2 through a physical examination of the brain?

3 A One moment, please.

4 Q You bet. And refreshing to your -- referring to the report would
5 help refresh your recollection, wouldn't it?

6 A Thank you.

7 Q Thank you.

8 A The brain was examined during the autopsy, yes.

9 Q Okay. Was that -- were any portions of the brain taken -- were
10 slides of any portion of the brain taken for a review by a neurologist?

11 A Sections of all major organs were retained for use in
12 producing microscopic slides if that was determined to be necessary.
13 No slides were produced for this autopsy for review. So certainly a
14 neuropathologist wouldn't be -- there aren't slides for them to review.

15 Q Okay. Fair enough. Thank you. And that's because it was
16 fairly obvious during this autopsy that the cause of death was gunshot
17 wounds.

18 A Yes.

19 Q The stitching on the -- we saw in the body of Mr. Phillips --
20 sorry.

21 As contained in State's Exhibit Number 95. Can you describe
22 what those -- the stitching along this portion right under the -- between
23 the seventh and the eighth mean to you?

24 A Yes, and I -- you mean the seventh and eighth centimeter
25 marker on the ruler?

1 Q Right.

2 A Okay. To refresh your memory, we're looking at the left lateral
3 torso again or the left lateral chest. There is a sutured incision
4 consistent with a thoracotomy incision and that is a procedure that's
5 performed as a medical intervention to assist with resuscitation. I'm sure
6 an ER physician could tell you more but it's a -- evidence of medical
7 intervention.

8 Q And when the body came to the corner's office for the Las
9 Vegas -- Clark County Corner's office, then would that have been
10 stitched up the way it is now or was that done by Dr. Gavin when she
11 performed the autopsy?

12 A No, that was as received. We did not do that.

13 Q You'd indicated that one of the gunshot wounds actually had
14 struck the tenth vert -- not vertebrae but rib.

15 A Yes, the left tenth rib.

16 Q Was there any fracture to that rib?

17 A Yes, and that was also demonstrated on the radiology.

18 Q Did -- when the bullet comes through a body, if it does not hit
19 something hard like a rib, is it generally a fairly straight entrance and
20 exit?

21 A It depends -- the issue with determining trajectory or direction, the
22 course of the projectile through the body is bodies move, you know, they
23 don't stay in standard anatomic position. So if someone's turning as the
24 projectile is going through, I can't say that it's perfectly straight all the
25 time. But I believe what you're asking is would -- generally speaking,

1 would striking a hard object be more like to deviate it's course?

2 Q I think the way you answered it was probably the -- where I
3 was getting to --

4 A Oh.

5 Q -- so I appreciate it, thank you.

6 So you can't tell from an autopsy, generally, unless there's
7 sooting that shows a -- whether or not -- well let me rephrase the
8 question. And if I'm asking a poor question, just ask me to restate it and
9 I'll try and do it right. When -- in performing this autopsy, you can't
10 determine which of the gunshot wounds was the first, second, or all the
11 way up to the eighth, right?

12 A Correct. There aren't findings that are indicative that -- that
13 show you temporality, like what order the shots were fired in.

14 Q And the -- they're just kind of numbered for references in the
15 autopsy as the first -- Gunshot Number 1, Gunshot Number 2. And that
16 assists the forensic medical examiner and saying okay this is what I'm
17 dealing with here. This is Number 1 and then this is Number 2.

18 A Yes, there is a system -- I often do anatomic, you know, from
19 superior to inferior, starting on one side of the body. But yes, that's --
20 they're referencing -- the order that the gunshot wounds are in, in the
21 report is for convenience of explanation and does not imply a time
22 component to it.

23 Q And because the body came to you at -- or came to your office
24 after there had been medical intervention, the body had been washed by
25 the treating physicians?

1 A I don't know whether -- what the -- I don't have evidence of
2 what the clinicians did or whether the body was washed before it arrived
3 to the coroner's office.

4 Q Okay. And from the -- what you observed as far as the
5 photographs of the body during the terms of the autopsy, you didn't see
6 any gravel or dirt or anything on the body that you -- that was washed off
7 by Dr. Gavin?

8 A No.

9 Q So -- and from the autopsy, you could not determine whether
10 or not Mr. Phillips was coming towards the person that was shooting the
11 gun, turning away from the gun, or what his position was in relationship
12 to the individual that actually shot him?

13 A No.

14 Q The only that you could probably tell that is if there was a
15 contact wound, right?

16 A I'm sorry -- could you -- could you rephrase the question --

17 Q You bet.

18 A -- in terms of the contact --

19 Q Okay.

20 A -- wound?

21 Q You talked about some different kinds of wounds. Ones that
22 were close, medium, and the distance undetermined.

23 A Uh-huh.

24 Q I'm probably using the wrong term, but if someone is holding a
25 gun against the body then I'm referring to that as a contact shot.

1 A Yes.

2 Q Okay. So if that's really the only type of a gunshot wound that
3 you can tell where the two individuals may be related to their standing.

4 A I would say so, yes.

5 Q Okay. But by the same token that is the type of a wound that
6 might be associated with a suicide?

7 A Yes.

8 Q Okay. And the -- let me ask you this question, and correct me
9 if -- or help me with this one. Just as you cannot tell whether or not the
10 individual that was shot is coming towards somebody, you can't tell
11 whether or not the person who is firing the weapon is either backing
12 away from the individual or coming towards them?

13 A I think it might be -- to phrase it this way our expertise is the
14 course of a projectile through the body. It's harder to -- you can't really
15 gather information of what's going on around it. So I would agree with
16 your statement, yes.

17 Q Okay. Great. And I think I asked you this, but there wasn't an
18 MRI that was done of the brain, it was just a physical examination?

19 A We don't -- we don't have an MRI machine at the Clark
20 County Coroner's office. I don't know whether an MRI was performed
21 on this patient in the hospital, but I know that the extent of our radiology
22 was an x-ray.

23 Q Okay. Thank you very much, Doctor. It was a pleasure to
24 interview you today.

25 A Thank you.

1 THE COURT: Ms. Bluth?
2 MS. BLUTH: Nothing further, Judge.
3 THE COURT: Anything from our jurors?
4 Yes.
5 [Bench Conference Begins]
6 THE COURT: [Unintelligible] wants to ask questions like --
7 MS. BLUTH: Oh, I knew it.
8 MS. SIMPKINS: Is that a stack of questions?
9 MR. PIKE: I know.
10 THE COURT: What's that?
11 MS. BLUTH: Are those all?
12 MS. SIMPKINS: Is that a stack of questions?
13 MS. BLUTH: Oh, my God.
14 That's fine. This one.
15 MR. PIKE: Don't determine --
16 MS. BLUTH: [Unintelligible].
17 THE COURT: You can't ask the question.
18 MS. BLUTH: I'd like to answer it. Okay.
19 MR. PIKE: That's inside her expertise.
20 MS. SIMPKINS: Yeah.
21 THE COURT: Yeah. I think, you know, obviously that's not
22 proper. I could ask her about the [unintelligible] clothing, that issue and
23 then directionality of the wounds, which was kind of described in that,
24 but I'm assuming she could say whether they were going up or through
25 the body --

1 MS. BLUTH: Yeah.

2 THE COURT: -- or [unintelligible]. But I think she already
3 said -- she can't say anything about what position the everybody was in;
4 sitting, standing --

5 MS. BLUTH: Yeah.

6 MR. PIKE: Right.

7 THE COURT: -- you know. So --

8 MS. BLUTH: Yeah. So -- yeah, everything else, I think, is
9 fine, right? And we'll do follow-ups in regards to them?

10 MR. PIKE: Yeah.

11 MR. ROGAN: Some of them are outside of her knowledge.

12 MR. PIKE: Well, no that one.

13 MS. BLUTH: To tell if the shooter was standing downward
14 or -- well no, I mean I think she can say, no, right? I can't tell --

15 MR. PIKE: I'm talking about this one.

16 MS. BLUTH: Oh, sorry.

17 MS. SIMPKINS: Yeah.

18 MR. PIKE: Got residue on any clothing.

19 MS. BLUTH: But I think maybe we could ask it though so she
20 could say no, that's not something we deal with.

21 MR. PIKE: Okay.

22 MS. SIMPKINS: Yeah, that's fine.

23 THE COURT: So ask them all?

24 MS. BLUTH: Yeah.

25 THE COURT: Okay.

1 [Bench Conference Concludes]

2 THE COURT: Okay. I have some questions for you Dr.
3 Mancini, if I could. And if any of these are things that you cannot answer
4 then just tell me.

5 **EXAMINATION BY THE COURT**

6 BY THE COURT:

7 Q Can you tell if Mr. Phillips was standing or -- at the time he
8 was shot, right? And can you tell me if Mr. Phillips was standing or
9 sitting at the time he was shot?

10 A I'm sorry, I can't tell that.

11 Q Okay. Did you find any gun residue on anything clothing that
12 could better decide how far away the shooter was standing?

13 A I would be most comfortable describing findings on the body. I
14 would recommend a firearms or ballistics expert to comment on the
15 appearance of things on clothing.

16 Q Thank you. Let me jump to a different question to that's kind
17 of related to that. Would soot and or gunpowder stippling show on the
18 skin or remain on the clothing?

19 A It could do both. Clothing can also impede soot -- well, soot at
20 least, it'd be less likely than stippling would. So it can be on both the
21 clothing and the skin and I would say that clothing can impede soot
22 deposition somewhat.

23 Q Okay. Can you tell if the shooter was shooting downward or
24 mid-level?

25 A No, I'm sorry. I can't tell that.

1 Q Can you tell or demonstrate the position that Mr. Phillips was
2 in at the time of the shooting?

3 A No, I'm sorry.

4 Q Okay.

5 THE COURT: State, do you have any questions based on
6 mine?

7 MS. BLUTH: Yes, please.

8 **FOLLOW-UP EXAMINATION**

9 BY MS. BLUTH:

10 Q So I just want to make clear, when you say no I can't do that,
11 like, no I can't tell if Mr. Phillips was standing or sitting or --

12 A To elaborate on that, the course of a projectile through the
13 body can be a result of multiple positions. Like if I had a straight through
14 gunshot wound through the chest I could be sitting or standing. Since
15 there are multiple positions can -- that can result in the findings that you
16 discover at autopsy, you could ask me multiple questions. Is this
17 consistent? Is this consistent? Is this consistent? Yes. Yes. Yes. No.
18 Yes. No. But can I link it to one? No.

19 Q Yeah --

20 A Okay.

21 Q -- that makes perfect -- well, I mean -- yes, thank you.

22 So what I want to ask you though is we can though look at the
23 way the bullet moves, right? So when you are explaining, for instance,
24 the first bullet we spoke to went on the left clavicle, right?

25 A Uh-huh.

1 Q And you stated that it moved from left to right?

2 A Yes.

3 Q So we can talk about the directionality of the bullet --

4 A Yes.

5 Q -- whether a bullet moves, you know, from head to toe, or right
6 to left.

7 A Yes, I can comment on the direction as it -- of the wound tract
8 through the body.

9 Q So if you don't mind, if we could just talk about that in regards
10 to -- would looking at your report -- I'm going to ask you for each bullet --

11 A Yes.

12 Q -- so we can talk about the directionality, would looking at your
13 report help you be able to do that?

14 A Yes.

15 Q So I already spoke about gunshot wound, which was the one
16 in the left upper clavicle. So that one just went left to right. Is that -- is
17 that correct?

18 A That's correct.

19 Q Okay. So the second one which was the left lateral upper
20 chest.

21 A Uh-huh.

22 Q What was the directionality of that?

23 A Left to right and slightly upward.

24 Q Okay. Left to right and slightly upward.

25 A Yes.

1 Q Okay. Third gunshot wound, which would be the one on the
2 lower left lateral.

3 A Uh-huh.

4 Q What was the directionality of that one?

5 A Left to right and downward.

6 Q Okay. Gunshot wound to the left mid-back, so that one we
7 were looking at. I'm not going to go through each of the pictures again,
8 but the one to the left mid-back, where was that?

9 A The one on the flank, the lateral one, that was left to right and
10 downward.

11 Q The wound to the left mid-lower aspect of the back, what was
12 the trajectory of that?

13 A Left to right and downward.

14 Q Okay. Gunshot wound to the right elbow, which one was --
15 where -- what was the directionality of that?

16 A Indeterminate. And the reason for that is the torso -- it's
17 easier to determine on a torso, which can't really move too far in relation
18 to itself, but depending on where, for example my arm is in space, I
19 couldn't tell you whether that's front to back or back to front or -- so for
20 extremities, directions are often indeterminate.

21 Q So I don't need to go through each of the ones to the arms
22 because those will all be the same that will be indeterminate.

23 A Correct.

24 Q Thank you so much.

25 MS. BLUTH: That concludes all my questions, Judge.

1 THE COURT: All right. Mr. Pike anything further?

2 MR. PIKE: If I may.

3 **FOLLOW-UP EXAMINATION**

4 BY MR. PIKE

5 Q So when you say that -- the trajectory of a bullet is going from
6 left to right -- sorry, I didn't mean to turn my back to the jury. But I can
7 only turn it so much because this is my torso there. So it would be from
8 the left side coming this way through the body?

9 A Correct.

10 Q Okay. And that only tells you the trajectory. It doesn't tell you
11 whether or not the individual as they were shot was coming this direction
12 or was leaning down, leaning up, or -- all it does is tell you the trajectory
13 though the body.

14 A Yes.

15 Q And because you did not recover any bullets from the body, is
16 there anything about the bullet wounds that can tell you the possible
17 caliber of the bullet?

18 A No.

19 Q All bull -- it would be safe to say that all bullets when they go
20 in and -- are shot into the body that because it is entering the body, its
21 pushing the skin and that's what causes the markings that -- so you can
22 say that is the entrance wound.

23 A The marginal abrasion. And yes, that is one way to tell if
24 something is an entrance wound.

25 Q Okay. And the only -- the only ones that would be different

1 than that, as I indicated before may have been like a contact wound
2 where if the gun is held up against the body because of the heat of a
3 bullet that is being expelled from the gun, sometimes you'll actually see
4 a burn mark that looks like a -- the --

5 A Muzzle imprint?

6 Q That's it, thank you.

7 A Searing of the skin and muzzle imprint are two signs of a
8 contact range of fire.

9 Q Thank you very much.

10 THE COURT: Ms. Bluth, anything further?

11 MS. BLUTH: No, Your Honor, I think we have another
12 question.

13 THE COURT: I'm sorry? No, we do the questions, and the
14 attorneys follow up, and that's it.

15 Okay. All right. Dr. Mancini, thank you very much for you
16 time, I appreciate it. You are excused.

17 DR. MANCINI: Thank you.

18 THE COURT: State my call their next witness.

19 MS. BLUTH: Doct -- excuse me -- Tiffany Adams.

20 **TIFFANY ADAMS**

21 [having been called as a witness and being first duly sworn, testified as
22 follows:]

23 THE CLERK: Thank you. Please be seated.

24 If you could state and spell your name for the record, please.

25 THE WITNESS: My name is Tiffany Adams. First name,

1 T-I-F-F-A-N-Y. Last name, A-D-A-M-S.

2 THE COURT: Thank you, Ms. Adams.

3 Ms. Bluth.

4 MS. BLUTH: Thank you.

5 **DIRECT EXAMINATION**

6 BY MS. BLUTH:

7 Q Ma'am how are you employed?

8 A I am a forensic scientist that specializes in DNA, which is often
9 referred to as a DNA Analyst.

10 Q Okay. And how long have you been with the lab?

11 A I've been working as a DNA Analyst at the lab, at the Las
12 Vegas Metropolitan Police Department Forensic Laboratory, since 2007.

13 Q All right. Could you explain to us your training and education
14 that led you to have the position as a DNA Analyst?

15 A I have a Bachelor of Science degree in genetic engineering,
16 which includes all the courses that are required to work in an accredited
17 forensic laboratory. For both my current and my previous employer, I
18 completed extensive documented training programs encompassing
19 hundreds of samples that mimic those that a typically encountered in
20 day to day forensic case work.

21 At the completion of these programs I demonstrated my
22 knowledge, skill, and ability to perform the testing through competency
23 exams and I also completed forensic case work under the supervision of
24 a more senior analyst before being able to conduct it on my own.

25 Q Thank you. All right. So I'm going to ask you some questions

1 about the Las Vegas Metropolitan Police Department Lab. First of all,
2 you used the term accredited. Is the Las Vegas Lab accredited?

3 A Yes, it is.

4 Q And what does that mean?

5 A Accreditation means that you have demonstrated your
6 compliance with established guidelines and standards to perform the
7 testing.

8 Q And who is it that accredits you?

9 A We are accredited by ANAB. The NAB stands for National
10 Accreditation Board. And the A stands for American National Standards
11 Institute.

12 Q So when you do your testing, does your work get reviewed
13 before anybody else -- before the results are actually issued?

14 A Yes, every case is reviewed by two additional analysts
15 ensuring that the documentation in the case file indicates that the work
16 was conducted according to standard operating procedures and that
17 they support the conclusions that are included in the DNA report.

18 Q All right. So now I want to ask you some specific questions in
19 regards to DNA. We hear that term all the time especially now with
20 shows like CSI and NCIS. Tell us what DNA actually is.

21 A Our bodies are composed of millions of tiny microscopic cells
22 and they operate sort of like factories. They manufacture raw materials
23 and then they assemble all of these materials into the difference pieces
24 that make up our body. DNA is the chemical blueprint that contains all
25 of the instructions for building and operating each of these tiny cellular

1 factories. It's the biological plan that allows all the parts of our body to
2 work together as one complete system and it's the -- also the way that
3 we manufacture new cells and also pass our biological information to our
4 offspring.

5 Q So now -- and I don't -- I don't think you just said that but if you
6 did -- two people can or cannot have the same DNA.

7 A There are three characteristics of DNA that make it useful for
8 identification. First, it's unique to an individual, with the exception of
9 identical siblings, such as identical twins, identical triplets, et cetera.
10 This means that nobody has the same DNA as me because I don't have
11 any identical siblings.

12 Second, the DNA is contained inside nearly all of the cells that make
13 up our bodies, which means there are many opportunities or ways that
14 you can transfer it to an object that you've handled or leave it behind at a
15 location that you visited.

16 And third, even though our body is composed of millions of
17 different kinds of specialized cells, the DNA that's inside them is the
18 same, regardless of their specialized duty or function. This means that
19 the DNA from my hair follicle is the same as the DNA from my skin, from
20 my blood, from my saliva. All of the biological material that originates
21 from my body contains the same DNA.

22 And together these three characteristics are what allow us to
23 develop a DNA profile from some biological evidence left at a scene and
24 then compare it to a particular person by swabbing inside their cheek, so
25 that we can help answer the questions who, is where, and sometimes if

1 we perform some additional testing to identify the type of biological
2 material, we can help answer what. But it's also important to understand
3 that DNA itself can't answer when, why, or how.

4 Q Okay. So and you talked about it a little bit, but there are
5 difference sources of DNA like you said, your hair follicle, your saliva,
6 your blood. What are some other sources?

7 A Pretty much anything that has biological material can yield
8 DNA. Depending how much biological material is involved, that dictates
9 how much DNA will be available for testing. So a rich source of DNA
10 would be a biological fluid, such as saliva or blood. We do shed DNA
11 from our skin, but it doesn't transfer DNA quite as readily as a biological
12 fluid does. And there are many factors that can affect whether or not we
13 transfer DNA directly from our hands and how long it will stay on
14 whatever we've transferred it to.

15 Q So what are those factors?

16 A Things like time, exposure to heat or chemicals or water. If I
17 freshly wash my hands and dry them there will be very little cells to
18 transfer to something that I touch. It could also be dependent upon
19 how long I touch it, how vigorously, whether I keep my hands still or I
20 move it back and forth. The surface that is involved can also affect how
21 much DNA is transferred. A smooth surface is not as good at grabbing
22 onto the cells as a rough surface would be.

23 People also do gross things. They don't wash their hands,
24 they pick their noses, they put their fingers in their mouth and they
25 scratch their scalp. All of those things can transfer more rich biological

1 material on their hands and then if they touch an object they might
2 transfer more material than someone who has just freshly washed their
3 hands.

4 Q All right. So let's talk about that a little bit. So here I have a
5 relatively smooth surface, so you are saying, not the best, right?

6 A That's correct.

7 Q Now if I touch it just, just, barely touch it, would -- versus
8 rubbing my hand multiple times over it, which of those two would create
9 a better way for me to leave my DNA?

10 A The prolonged rubbing contact will leave more DNA, typically.

11 Q Okay. If I touch it versus I've cut my hand and I bleed on it,
12 which of those two would leave a better chance of recovering my DNA?

13 A The blood will definitely leave more DNA than then brief
14 contact.

15 Q All right. So certain factors determine first of all which type of
16 source it is whether it be touched DNA, bleeding, saliva, things like that?

17 A Yes.

18 Q And then also the amount of contact?

19 A Yes.

20 Q All right. So in a second I'm going to ask you some questions
21 about some specific testing you did in regards to the case that we are
22 here for today. But before we do that I'm going to ask you to define a
23 few terms that you'll be using when you talk about your results, okay?
24 So if you wouldn't mind, a couple of different times you said this term, a
25 DNA profile. What does that mean?

1 A The most common type of forensic identity testing is based
2 upon the discovery that within humans there are short sequences in the
3 blueprint that are repeated multiple times right next to each other. And
4 the number of repeats that we observe across these locations is a
5 different combination from person to person. Sort of like a bar code. A
6 DNA profile is simply a summary of the number of repeats that we
7 observe when we test these locations.

8 Q Okay. What is a standard buccal swab?

9 A A standard buccal swab is a DNA sample that we collect by
10 taking a swab and rubbing it against the inside of their mouth, against
11 their cheek. It's collected under supervision and it has a chain of
12 custody associated with it and it represents the known sample from a
13 particular person and this is the sample that we use for comparison
14 when we're trying to answer questions.

15 Q So if you wanted to see if my DNA was on something, you
16 would get a standard buccal swab, swipe the inside of my cheek, and
17 then you would know that that swab has my DNA on it?

18 A That's correct.

19 Q So then reference standard, what does that mean?

20 A A reference standard is -- in this particular case it would be a
21 reference buccal swab. Buccal is simply a type of cell that is found on
22 the inside of our cheeks and it is considered a reference sample. So the
23 buccal swab would be a reference standard.

24 Q Okay. And then some very specific terms that we'll see on
25 reports is something where it says number of contributors. What does

1 that mean?

2 A Because we can transfer our DNA through contact, many
3 objects are handled by multiple people. And this means that there can
4 be DNA from more than one contributor. Contributor is simply a DNA
5 contributor.

6 Q Okay. And then in regards to mixture proportions, talk to us
7 about what that definition would be.

8 A If you think back when you learned about fractions in
9 elementary school, we often use an analogy of a pie or a pizza and we
10 talked about the slices representing a part of the whole pie. Proportions
11 are similar, it represents the contribution of a particular contributor to the
12 whole.

13 Q All right. So I'm going to just for demonstrative purposes, I'm
14 going to say our number of contributors is two. And now you just give
15 me a mixture of proportions so I can write it out and we're going to
16 explain what that means.

17 A Fifty-Fifty.

18 Q Okay. So talk to us and -- what's this going to say?

19 A Number of contributors being two indicates that I see DNA
20 from more than one contributor and it appears to be consistent with two
21 DNA contributors. This is usually determined by the number of repeats
22 that I see in the sample. If I see one or two repeat numbers, that's
23 indicative of one DNA contributor. If I see three or four that could be two
24 contributors. If I see five or six different repeats that could be three or
25 more contributors.

1 Now the proportions of fifty-fifty means that in this mixture of
2 two individuals that they each contributed approximately half of the DNA
3 in the total mixture. Now that mixture proportion is diagnostic tool. It's
4 used by our interpretation software in order to come up with all of the
5 different DNA combinations that could explain a mixture profile. And it's
6 also a diagnostic tool for the DNA analyst because it allows us to see
7 whether the interpretation software performed the way that we would
8 expect it to.

9 Q All right. And then lastly before we get into some specific
10 questions about the testing you did in the case, what is a likelihood
11 ratio?

12 A A likelihood ratio which we often refer to as an LR is a
13 statistical calculation that we perform to determine whether or not a
14 particular person could be considered a DNA contributor or could be
15 excluded as a DNA contributor.

16 Q So give us an example of -- give us an example of a likelihood
17 ratio and then I want to talk about it in real world terms what that means.

18 A A likelihood ratio calculation which results in a positive
19 number, say that it is 10,000 times more likely to observe this evidence
20 profile if it was generated by Person A versus a random person selected
21 from the population indicates that I'm comparing the evidence profile
22 under two explanations. One explanation is that it came from Person A.
23 The other explanation is that it came from somebody random. We don't
24 know who, they just were selected.

25 When I compare those two explanations and how well they fit

1 the evidence, I will either get a positive number or I will -- excuse me, a
2 positive number greater than one, or I will get a positive number less
3 than one. The bigger that number is the more weight is supporting that
4 Person A contributed DNA in the mixture. If I get a very, very, small,
5 number it means that their DNA profile doesn't fit the evidence very well
6 and instead a random person could be the originator of that DNA profile.

7 Q So scientists, kind of like lawyers, use a lot of words to say
8 something, you know, that sometimes could be a little bit more easily
9 said. Do you have like an analogy that you sometimes use when you
10 are talking to people like me or the jury in explaining how that kind of
11 works?

12 A A likelihood ratio is essentially answering the question, how
13 likely is it to observe this particular piece of DNA evidence if Explanation
14 1 is true versus 2. And it's really easy to understand this concept if you
15 think about a teeter totter or a seesaw on a children's playground. If I
16 put a child on one side of the teeter totter and I sit on the other side it
17 tips towards me. It favors me because compared to the child I have
18 significantly more weight.

19 However, if the child steps off and a large man, a rugby
20 player, steps on to the spot that was carrying the child now the teeter
21 totter tips way from me. It favored me compared to the child, but
22 compared to the large man, it favors him. He carries more weight.

23 So the likelihood ratio is looking at the same piece of
24 evidence, but looking at two explanations for it and favoring the one that
25 better fits the evidence.

1 Q So in your first analogy -- okay, we're going to draw a teeter
2 totter and this is going to be rough. I drew a tree one time in the
3 courtroom and it was laughed at, but here's the teeter totter. Okay. So
4 you use --

5 THE COURT: You haven't gotten any better.

6 MS. BLUTH: Uh-huh, I know. I knew that was coming.

7 BY MS. BLUTH:

8 Q All right. So -- but you said in your first example that it was
9 10,000 more times likely that Person A had it, right?

10 A Right.

11 Q So over here, it'd be 10,000 more times likely that it was
12 Person A than this Person B and obviously the teeter totter or seesaw is
13 going to go up because it's 10,000 times more likely.

14 A It actually goes down --

15 Q Okay.

16 A -- it's favoring the person. They carry more weight.

17 Q Oh, they carry more weight, sorry --

18 A Yes.

19 Q -- you're right. It's been a long time since I've been on one.

20 A The weight here is represented by the probability. So on Side
21 A, is the probability of observing this particular piece of DNA evidence if
22 Person A is the DNA contributor. The higher that probability, the better
23 they fit that particular profile.

24 Q Okay.

25 A The lower the probability, the less that they fit it. They don't

1 explain the profile very well.

2 Q Okay.

3 A Side B is the randomly selected person. When I divide Side A
4 by Side B, I got a number that was 10,000 times greater, which means it
5 supported Person A explanation for that DNA evidence, compared to the
6 random explanation.

7 Q Thank you. So you also talked about chain of custody. And I
8 just want to walk through the steps when a request for analysis is made
9 saying Analyst Adams, could please make sure to do this testing, how
10 does the evidence in itself come to you?

11 A Once I receive the request, I have call the evidence to the lab.
12 It's maintained in an evidence vault that is offsite. All of the evidence is
13 entered into a database and I use software to call up that evidence, I
14 make a list saying these are the pieces of evidence that I need, that
15 software lets the evidence technician know where it's located, they put
16 together that list, and they bring it to the lab, and all of these
17 transactions, that's what we call the movement of these items, are
18 recorded. So where it is at any given time is recorded by this software.

19 Q Okay. Now each specific case has its own unique event
20 number, is that right?

21 A That's correct.

22 Q And so the items in this case that came to you were all under
23 the same event number.

24 A I believe so. I would have to refer to my report.

25 Q Go ahead if you -- if that would help refresh your recollection,

1 please do so.

2 A Yes, all of the items came from the same event number.

3 Q And would you mind reading that into the record, please?

4 A All of the items that were in my report came from the same
5 event number.

6 Q Oh, no. Sorry, I meant like read the event number.

7 A Oh.

8 Q That's okay.

9 A I apologize.

10 Q That's okay.

11 A It is -- the LVMPD event number was 170914-3919.

12 Q Thank you so much. All right. So can you walk us through
13 how your -- the specific steps of how you do the analysis?

14 A There's five basic steps in this testing process. First, I have to
15 collect a sample of biological material. And sometimes of perform some
16 additional testing to determine whether that material could be a
17 particular body fluid such as blood, semen, or saliva.

18 After I do that part the next piece of that first step is to use
19 chemicals to break open the cells so that I can get the DNA contained
20 inside them and separate it from all of the other biological material. I
21 don't care about the other biological material, I just need the DNA
22 blueprint.

23 In the second step I determine how much DNA I extracted
24 from these cells and also the quality of the DNA that's in that extract.
25 We do this because it gives us a heads up on how to proceed with the

1 rest of our testing so that we can develop a DNA profile that has as
2 much identification detail contained within it as possible.

3 The third step I use a chemical xeroxing process and it makes
4 copies, millions of copies, of the blueprint but just of the very specific
5 barcode locations and as it's doing this it incorporates a fluorescent tag
6 into each of those copies that is produces.

7 In the fourth step I use special robots and software that sort
8 and count and organize all of these copies using that fluorescent tag.
9 This step produces a picture that can show me what the DNA profile
10 looks like at those specific locations.

11 And then in the fifth final step, I use more software in order to
12 interpret that DNA profile, come up with all of the possible DNA
13 combinations that could explain it, rank them according to how well or
14 not well they fit the data, and I also use that software to calculate those
15 likelihood ratios which are used to determine whether or not a particular
16 person could be included or excluded from that mixture, or from that
17 DNA profile.

18 Q Okay. So now I want to ask you about the items that you were
19 given to look at. So the pieces of evidence. I'm going to get to the
20 reference standards in a second, but were there certain pieces like
21 swabs of evidence that you were going to look at and then see if you
22 could see if any certain individuals DNA was on them?

23 A Yes.

24 Q And can you give us an idea of those -- or list those items for
25 us?

1 A I was asked to test two swabs which were collected from a
2 firearm and a magazine inside the firearm. I was also asked to test
3 fingernail clippings which were removed from the body of Gordon
4 Phillips, Jr.

5 Q Okay. And then you were also asked to -- we talked about
6 reference standards. So you had some individual's DNA from a swab
7 and you were going to see if those individual's DNA were on those
8 items, is that right?

9 A Yes.

10 Q Okay. So one of those individuals was Michael McNair?

11 A Yes.

12 Q The other was Gordon Phillips?

13 A Yes.

14 Q Ramiro Romero.

15 A Yes.

16 Q And Mitchell Johnson.

17 A Yes.

18 Q Okay. So the first -- and if you don't mind I'm just going to go
19 down your report numerically, so we can stay on the same page, okay.
20 So I would like to start with the first piece of evidence that you were
21 asked to look at. And that would be the swabs taken from the trigger,
22 the slide serrations, and the grip of the Glock gun, is that correct?

23 A That's correct.

24 Q Okay. Walk us through your testing of that and then your
25 results.

1 A I developed a DNA profile and that profile was consistent with
2 originating from more than one DNA contributor. It appeared to be
3 consistent with two contributors. I performed the analysis to interpret
4 that profile and come up with the DNA combinations that could explain it
5 and rank them, and then I used that analysis to calculate likelihood ratios
6 comparing to each of the individual reference standards that I had in the
7 case.

8 Q Okay. So you said that the number of contributors was two?

9 A That's correct.

10 Q And could you tell whether those individuals were male or
11 female?

12 A At least one contributor was male.

13 Q And then we talked a little bit about mixture proportions, could
14 you come up with a mixture proportion for this?

15 A The mixture proportion was 93 to 7.

16 Q All right. So just like we were doing before -- I'm going to use
17 this as a demonstrative aid. So the contributors, the number is two, the
18 approximate mixture proportion was 93 to 7. What does that mean? Is
19 that the pizza pie you were talking about?

20 A Yes. It means that if I separated that pie into two pieces one
21 piece would represent 93 percent and the other piece represented 7
22 percent. And that combination of 93 to 7, was used by the software in
23 order to dictate which combinations made sense for that particular
24 mixture and which did not.

25 Q Okay. So were any of the names that I read, those being,

1 Michael McNair, Ramiro Romero, Mitchell Johnson, or Gordon Phillips,
2 were any of those individuals included in that sample?

3 A The DNA profile that I obtained from Michael McNair was
4 included in that mixture profile.

5 Q Okay. And we talked about that likelihood ratio on the teeter
6 totter, was there a number that represented that?

7 A It was 26.5 billion times more likely to observe that particular
8 evidence profile if Michael McNair and a random person were a
9 contributor versus two random people.

10 Q Okay. So 26.5 billion more times likely that it would be
11 Michael McNair's DNA and the other person who's the second person in
12 the ratio versus two unknowns, is that right?

13 A That's correct. The teeter totter tipped in favor of the
14 explanation that included Michael McNair's DNA profile.

15 Q Now what about the other individuals in regards to Ramiro
16 Romero, Mitchell Johnson, and Gordon Phillips. Could any conclusions
17 be made to those three people?

18 A The likelihood ratio calculation was inconclusive for those
19 individuals. That means that the teeter totter didn't tip either way. I
20 didn't have a clear indication as to whether to include or exclude them.
21 That's why we say it's inconclusive. It means that the result of the
22 calculation was uninformative. It gave me no indication either way.

23 Q And what could be some reasons for that?

24 A The comparison of each individual person compared to the
25 random person did not yield a probability that was high enough to

1 outweigh the random person calculation. So in other words, the random
2 contributor was equally as likely as them.

3 Q Okay. So just you don't -- you can't say one way or the other?

4 A I cannot.

5 Q Now in regards to the second item that you tested that was
6 from the feeding ram and the -- excuse me, the base and the feeding
7 ramp of that same Glock firearm, is that correct?

8 A The magazine that was inside it.

9 Q The magazine, and were you able to do -- find any DNA on
10 those items, on those swabs?

11 A I was not able to develop a DNA profile from the magazine
12 swab.

13 Q And what about the fingernail clippings from Mr. Phillips right
14 and left hand?

15 A I did develop DNA profiles for the fingernail clippings. They
16 were consistent with Gordon Phillips, Jr. Now, because those items
17 were removed directly from his body, it's reasonable to assume that his
18 DNA would be present and my data did support that, but because I didn't
19 have any other indications of a DNA contributor, other than him being
20 present no calculation was performed since it was removed from his
21 body.

22 Q Thank you, so much.

23 MS. BLUTH: That concludes my direct, Your Honor. I'll pass
24 the witness.

25 THE COURT: Mr. Pike or Ms. Simpkins.

1 MS. SIMPKINS: Thank you, Your Honor.
2 Give me just a second.

3 **CROSS-EXAMINATION**

4 BY MS. SIMPKINS:

5 Q Ms. Adams, my name is Melinda Simpkins and I'm
6 representing Michael McNair. I'm going to -- a lot of what you said kind
7 of went over my head. So I'm just going to try to simplify this a little bit,
8 so bear with me. If I'm incorrect, please let me know.

9 Let's see, I am showing you what has been admitted as
10 Defendant's Exhibit F. There we go, okay. Does that look familiar to
11 you at all?

12 A Yes.

13 Q Okay. Can you describe that for me, please? What that is?

14 A That is a picture of what I received for testing. It shows the
15 labeling of the envelope and the swab that was contained inside that
16 envelope. And then that envelope containing the swab was inside
17 another outer package.

18 Q Okay. And let me ask you a few questions about the swab.
19 Did it come closed up, enclosed, in that plastic casing around it?

20 A Yes.

21 Q Okay. And was there a reason for that?

22 A This a potect -- excuse me -- a particular kind of swab where it
23 comes with that protector on it. When they use it they first wet the swab,
24 they wipe it on the material that they are trying to collect biological
25 samples from, and then they close it up in order to protect it from

1 touching other things that are inside the envelope.

2 Q Okay. Is there a reason to protect it from touching other
3 things inside the envelope?

4 A If it's wet and it's put away wet, it could adhere to the envelope
5 and then when you try to remove it, it can tear off.

6 Q Could it also be cross contaminated with other things in the
7 envelope as well?

8 A It's possible if the envelope has other sources of DNA inside
9 of it.

10 Q Okay. And then I am showing you Defendant's Exhibit E.
11 Could you tell me what that is?

12 A That is the other swab that I tested.

13 Q Okay. So and it -- same condition as the first swab that we
14 looked at, correct? It's got the plastic coating around -- or plastic box,
15 for lack of a better word, around the swab.

16 A Yes. And they were inside the separate envelopes.

17 Q Okay. Now Ms. Bluth asked you about contact DNA and s
18 he -- you talked about if it's prolonged rubbing you're -- you've got a
19 better possibility of having DNA on something versus just a touch,
20 correct?

21 A That's correct.

22 Q Okay. But it's still possible to have DNA on something from
23 just a touch, correct?

24 A It depends on how much biological material is present on the
25 hand to begin with. If they were putting their fingers in their mouth,

1 then -- and their fingers are still wet that would be a rich source of
2 biological material because they still have saliva on it. But if their hands
3 are freshly washed and they just briefly contacted that would not be as
4 good of a sample.

5 Q So it is possible, is that correct?

6 A It is possible.

7 Q Okay. And so it depends on a number of other factors, such
8 as you just described, you know, picking your nose, or washing your
9 hands or -- it also depends on how much I shed DNA on a regular basis,
10 right?

11 A Some people shed more DNA than others. It could be due to
12 their habits or it could be dependent upon how easily their skin flakes off.

13 Q And I don't necessarily have to touch somebody to have their
14 DNA on me, is that -- would that be a fair statement?

15 A Sometimes it's possible to transfer DNA by speaking to
16 someone. If -- some people tend to spit a lot when they talk, so they
17 might not touch something directly but if they're speaking over it and
18 spitting a lot while they're speaking, they can transfer saliva to an item.

19 Q Okay. And also since Ms. Bluth rubbed this podium and if I
20 rub in this same place it's possible that I could pick up her DNA from this
21 podium?

22 A It's possible, but for each subsequent transferred event less
23 and less happens --

24 Q Sure.

25 A -- so first it depends how much I transfer the first time I touch

1 it, it then depends then next person how long they wait before they touch
2 it and how much they are in contact, how much can transfer to them.
3 But each time there's a loss, so it gets significantly smaller for each
4 transferred event.

5 Q Now specifically turning to the test that you did in this case
6 you were given, I think Ms. Bluth said the DNA of Michael McNair,
7 Ramiro Romero, Mitchell Johnson, and Gordon Phillips. Is that correct?

8 A That's correct.

9 Q Okay. And when you test the DNA, there are three possible
10 outcomes, correct? In which would -- by that I mean they could be
11 included, excluded, or inconclusive.

12 A That's correct.

13 Q Okay.

14 A If -- that's if the profile is suitable for comparison. Some
15 profiles aren't even suitable to run through the software.

16 Q Okay. So included means you found a specific person's DNA
17 on the swab or on what the evidence that you were looking at.

18 A It means that their particular barcode is one of the
19 explanations that was ranked highly by the software as being a possible
20 contributor to the DNA profile.

21 Q And excluded means you can't -- it is not their DNA.

22 A It means their DNA barcode does not fit the evidence profile
23 very well and it is not reasonable to include them.

24 Q And if it's inconclusive you can't tell either way.

25 A That's correct.

1 Q And in this instance Ramiro Romero, Mitchell Johnson, and
2 Gordon Phillips -- and I'm specifically talking about the DNA taken from
3 the gun. Those three -- and Mit -- I'm sorry those three Ramiro Romero,
4 Mitchell Johnson, and Gordon Phillips their DNA was inconclusive. It
5 was not excluded.

6 A It's inconclusive. I can't tell either way.

7 Q Okay. Now the first swab that you tested was from the trigger,
8 the slide serrations, and the grip of the weapon, correct?

9 A That's correct.

10 Q But you only received one swab from that --

11 A That's correct.

12 Q -- right? So they swabbed all three areas and then gave them
13 to you to test.

14 A Yes, that's very common for weapons.

15 Q Okay. So you can't tell from your -- any of your testing what
16 area of the gun that DNA came from, can you?

17 A From those three areas that were swabbed collectively --

18 Q Okay.

19 A -- and the reason why they do that is because it concentrates
20 more DNA.

21 Q Okay. Let me just add -- let me rephrase that question a little
22 more clear. For example, if there was DNA on the slide serrations but
23 not on the grip and on the trigger, you can't tell from the testing that you
24 did that it just came from the slide serrations, can you?

25 A That's correct.

1 Q Okay. And these three areas are all on the outside of the gun,
2 right?

3 A I didn't see the gun personally. To me that description -- I
4 don't have a lot of gun familiarity --

5 Q Okay. Fair enough.

6 A -- but it sounds to me like those are all exterior areas.

7 Q Okay. Thank you. And your conclusion was you found -- on
8 that swab that was taken from those three areas of the gun, you found
9 DNA from more than one individual, correct?

10 A Yes, it was consistent with originating from two contributors.

11 Q And on the second swab that was taken from the gun there
12 was no DNA, right?

13 A I would have to look at my case file to see during that step
14 where I determine how much DNA was there to see if there was even a
15 detectible amount of DNA present, but there wasn't enough for me to
16 develop a DNA profile.

17 Q Okay. Fair enough. So you were asked to determine if
18 Michael McNair was the only person to possess the firearm and at the
19 end of the day you don't know who possessed the firearm, did you?

20 A It's more accurate to say that I was asked to compare the
21 reference standards to all of the items of evidence. It's not dictated that I
22 specifically compare only certain individuals to certain things. We
23 compare all of it. Everything that's ends up being suitable for the
24 comparisons we will calculate a likelihood ratio for each of the
25 standards.

1 Q So if you were asked to eliminate other subjects as possible
2 suspects you could not do that, correct?

3 A Anybody that they give me a reference standard for, I can
4 perform the calculation to see whether they are included, excluded, or
5 inconclusive. So for each standard that was submitted I performed
6 those calculations.

7 MS. SIMPKINS: Pass the witness, Your Honor, I have no
8 further questions.

9 THE COURT: Thank you.

10 MS. SIMPKINS: Thank you, Ms. Adams.

11 THE COURT: State?

12 MS. BLUTH: Nothing, Your Honor.

13 THE COURT: Anything from our jurors?

14 Ms. Adams, thank you very much for you time. I appreciate it.
15 You are excused, okay. All right.

16 We will take a short break before we continue on with
17 witnesses, Ladies and Gentlemen.

18 During the recess you're admonished not to talk or converse
19 among yourselves or with anyone else on any subject connected with
20 the trial. Or read or watch or listen to any report of or commentary on
21 the trial by any medium of information including, without limitation,
22 newspapers, television, the internet, or radio. Or form or express any
23 opinion on any subject connected with the trial until the case is finally
24 submitted to you.

25 We'll be in break for about 15 minutes.

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THE MARSHAL: Rise for the jurors.

[Outside the presence of the jury]

THE COURT: Do you guys have anything outside the presence?

MS. BLUTH: No.

THE COURT: Okay. Who do you got next?

MS. BLUTH: My investigator, Jamie Honaker. And then Detective Hoffman is our last witness.

THE COURT: Okay.

MS. BLUTH: They're both here.

THE COURT: Okay. All right. We'll see you in a few minutes.

MS. BLUTH: Sounds good.

[Recess taken at 2:53 p.m.]

[Trial resumed at 3:09 p.m.]

[In the presence of the jury]

THE MARSHAL: Rise for the jurors.

THE COURT: You all can be seated, thank you. We will be back on the record. Mr. McNair attorneys, States attorneys, jurors are all present.

We will continue with the State's case in chief. Your next witness is going to be?

MS. BLUTH: Jamie Honaker

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JAMIE HONAKER

[having been called as a witness and being first duly sworn, testified as follows:]

THE CLERK: Thank you. Please be seated.
If you could state and spell your name for the record, please.
THE WITNESS: Jamie Honaker. J-A-M-I-E. H-O-N-A-K-E-R.
THE COURT: All right. Thank you, Mr. Honaker.
Ms. Bluth.
MS. BLUTH: Thank you.

DIRECT EXAMINATION

BY MS. BLUTH:

Q Sir, how are you employed?
A I'm a criminal investigator with the District Attorney's Office.
Q All right. And how long have you been with the DA's Office?
A I've been here 11 years.
Q What section do you currently work in?
A I'm in the Major Violators Unit, the Homicide Team.
Q Okay. And are you one of the investigators of -- that works along myself as part of the Homicide team?
A Yes.
Q And does that mean you work on the cases that are assigned to me?
A Yes.
Q Could you give us just the -- a short list or idea of what it is that you're job duties are as an investigator on the Homicide Unit?

1 A It's finding and tracking witnesses and serving court
2 paperwork subpoenas and that such.

3 Q Sometimes do you sit -- also sit on what is referred to as
4 pretrial conferences?

5 A Yes, I do.

6 Q Can you explain what a pretrial conference is?

7 A A pretrial conference usually in these cases a lot of time
8 passes between the crime and the Court date, so we meet with the
9 witnesses to explain the Court process, show them their statements, ask
10 some questions.

11 Q All right. So now I'd like to talk to you about the case of State
12 of Nevada versus Michael McNair. Was that a case that was assigned
13 to me to prosecute?

14 A Yes.

15 Q And then what is it then assigned to you since we work
16 together on our cases?

17 A Yes, it was.

18 Q In this case the majority of the witnesses we were working
19 with were homeless?

20 A Yes.

21 Q What -- was it easy to find those individuals?

22 A It was not.

23 Q Okay. Just kind of give us an idea of why not.

24 A Well, homeless persons don't have homes. They don't have
25 addresses to go to. A lot of times they don't have working phone

1 numbers. If they do, some of those are temporary and they change
2 frequently. Their lives can change. They can get housing. Sometimes
3 their address and such are not listed in databases like domes -- excuse
4 me the Department of Motor Vehicles, so that's a challenge in itself.

5 Q When you can't find somebody, like you said they don't have a
6 home, do you check all sorts of different places? For instance, like --
7 sadly, like the morgue?

8 A Yes.

9 Q Local hospitals?

10 A Yes.

11 Q Local jails?

12 A Yes.

13 Q Homeless shelters, et cetera?

14 A Yes.

15 Q All right. I'd like to talk to you about an individual who testified
16 at the preliminary hearing by the name of Kenneth Saldana. Do you
17 know who I'm speaking about when I refer to him?

18 A Yes.

19 Q Were you able to find Kenneth Saldana at the time that the
20 preliminary hearing was held?

21 A Yes, I did.

22 Q Were you able to find him to come to court for this trial?

23 A I was not.

24 Q Let's start with the preliminary hearing. Would you say it was
25 easy to get Mr. Saldana to come to court?

1 A No. I found him to be minimally cooperative, resistant to the
2 process, not easy to deal with.

3 Q Okay. When you did have contact with him on multiple
4 occasions, was he inebriate -- was he drunk?

5 A He was under the influence of alcohol and inebriated, and very
6 angry.

7 Q Ultimately, though, didn't Mr. Saldana agree to come and did
8 testify at the preliminary hearing?

9 A Yes, he did.

10 Q Thus far, though, after the preliminary hearing and leading up
11 to this trial ha -- what had you done to try and find Mr. Saldana?

12 A A lot of the law enforcement databases, checked the jails, and
13 also contacted a lot of the persons he knew when he was homeless, and
14 then going through all the social services that he was known to access
15 back then and talking to as many people as I could.

16 Q But again at this point, unable to locate him?

17 A Unable to locate is correct.

18 Q All right. So now I'd like to talk to you about another individual
19 by the name of Ramiro Romero. Recognize that name?

20 A Yes, I do.

21 Q Okay. Showing you State's 43. Could this be Mr. Romero?

22 A That is, yes.

23 Q All right. How would you characterize Mr. Romero's
24 cooperation in regards to coming to court; whether it be preliminary
25 hearing or trial?

1 A Rude, non-cooperative, minimally cooperative, and just not an
2 easy person at all to deal with.

3 Q For trial, did you in fact, have to get what's referred to as a
4 material witness warrant in the hopes of securing his presence?

5 A I did, yes.

6 Q Before that warrant actually went into the system though were
7 you able to make contact with Mr. Romero's family?

8 A I was, yes.

9 Q And were they able to talk Mr. Romero into making contact
10 with you?

11 A Yes, they did.

12 Q Now, lastly, I'd like to speak to you about an individual by the
13 name of Mitchell Johnson. When I refer to that individual, do you know
14 who I'm speaking of?

15 A Yes.

16 Q And are you aware of his relationship or how he is related to
17 the Defendant in this case, Mr. McNair?

18 A Yes, he is his brother.

19 Q When I started asking you questions at the beginning of your
20 testimony I had asked some preliminary questions in regards to what is
21 a pretrial conference. Did we conduct pretrial conferences with basically
22 every witness who testified in this trial?

23 A Yes, we did.

24 Q Including Mr. Johnson?

25 A Yes.

1 Q In regards to our pretrial conference with Mr. Johnson, did he
2 discuss whether or not he saw who shot the victim in this case?

3 A He said he initially didn't see anything.

4 Q All right. When he said he didn't see anything, did he admit to
5 hearing the gunshot?

6 A Yes, he did.

7 Q During that pretrial conference, you know, was the question
8 brought up to him like if you hear gunshots you know that you're, you
9 know, your brother's behind you -- would you -- wouldn't you have
10 looked to see if your brother was okay or not? Do you remember that
11 line of questioning?

12 A Yes.

13 MR. PIKE: Objection, Your Honor. There's been no report
14 that's been prepared in the pretrial conference by a non-attorney that's
15 present, so I have not been provided any of those. In addition to that --

16 THE COURT: Well, why don't you approach the bench? That
17 way we don't do long speaking objections.

18 [Bench Conference Begins]

19 THE COURT: All right. So what we're going to say? No
20 report? Which I get, they're not required to do a report, but go ahead.

21 MR. PIKE: Right. Well just their -- as far as the impeachment
22 aspect of it, I understand that. It's a cooperative thing. They can say
23 that all day long --

24 THE COURT: Right.

25 MR. PIKE: -- but I have no knowledge of any inconsistent

1 statements. They haven't provided any of that -- that would seemly --
2 seemingly be something that she would have been provided by way of
3 discovery. And I have a problem saying he was uncooperative, he
4 seemed to, but to come in and say then he told me I would have turned
5 around and looked at him or I would have said this or I would have done
6 that. And the opportunity to question him about that at the time that he
7 was testifying.

8 THE COURT: I think he -- he did question him about that
9 when he was testifying. I mean, I remember him being asked questions
10 about did you, you know, you were confronted with certain things and
11 police officers. And this is the stuff that you all turned in with the part to
12 the --

13 MS. BLUTH: So this sp --

14 THE COURT: -- statement, right?

15 MS. BLUTH: Sorry. This specifically is when I was asking
16 him questions. I said would you agree with me that in both my pretrial
17 conferences with you --

18 THE COURT: Right.

19 MS. BLUTH: -- that is not what you stated and he said yes, I
20 would agree with that. But in my understanding of the statute that in
21 order for it to come in substantively, I have to give him an opportunity --

22 THE COURT: Yeah.

23 MS. BLUTH: -- and then they have to have the second
24 individual, you know, who was part of the interview. So that's why I'm
25 having him. And this is as far as I'm getting is this.

1 MR. PIKE: Okay. And I'm --

2 MS. BLUTH: No.

3 MR. PIKE: He's not going to turn around -- he's not going to
4 say that he saw his brother shoot him?

5 MS. BLUTH: Oh, yeah, no. He is --

6 MR. PIKE: Okay.

7 MS. BLUTH: Okay. So this is his --

8 MR. PIKE: He's not -- okay.

9 MS. BLUTH: This is as --

10 MR. PIKE: Okay. Thanks.

11 MS. BLUTH: -- this is as far as it's getting, though --

12 MR. PIKE: Okay.

13 MS. BLUTH: -- that I'm going to say when he was confronted
14 with the question of, you know, you hear shots and you know your
15 brother's there, do you turn around. And his response was yes, I heard
16 the shots, I turned around, I saw the individual fall, and I saw my -- a gun
17 in my brother's hand and that's it. That's as far as he's --

18 THE COURT: And he didn't the actual shooting though?

19 MS. BLUTH: Correct.

20 THE COURT: Okay. All right. You can go ahead.

21 [Bench Conference Concludes]

22 THE COURT: Okay. So I overruled the objection. You can
23 proceed.

24 BY MS. BLUTH:

25 Q Okay. So my question was is, at that point was Mr. Johnson

1 confronted with the question, hey your brother's near you, you hear --
2 you hear gunshots, do you ever turn around to see if your brother's
3 okay? Do you remember that line of questioning?

4 A Yes.

5 Q And what was his response?

6 A He did turn around -- or he saw the victim fall and he saw his
7 brother with a gun in his hand.

8 Q Okay. Fair to say that -- would it be fair to say that Mr.
9 Johnson really didn't want to have to come in and testify against his
10 brother?

11 A That is correct, yes.

12 Q And that that was a difficult thing for him to do and he voiced
13 that.

14 A Yes.

15 Q Okay. Nothing further, Your Honor.

16 THE COURT: All right. Mr. Pike.

17 MR. PIKE: Thanks.

18 **CROSS-EXAMINATION**

19 BY MR. PIKE:

20 Q Good afternoon, Mr. Honaker.

21 A Good afternoon.

22 Q How are you today?

23 A I'm good, how are you sir?

24 Q Oh good, I'm not being served today. You're often called
25 upon to even serve attorneys to appear in court proceedings sometimes.

1 A That is correct, yes.

2 Q Okay. And so your -- the function of your job is to assist the
3 members of the District Attorney's Office in serving subpoenas, securing
4 the attendance of witnesses at trial, preliminary hearings, and otherwise
5 assist in the collection of any other evidence that may be appropriate.

6 A Yes.

7 Q Okay. Let me start with Mitchell Johnson, if I may. You were
8 in here when Mr. Johnson testified?

9 A I was not.

10 Q Okay. Mr. Johnson, when he was testifying, said that he had
11 smoked a couple of blunts before he came in to testify and he says he
12 smokes marijuana regularly. So when he came in and was talking with
13 you and the prosecuting attorneys in this case, did he appear to be or
14 could you smell marijuana on him?

15 A At the prelim -- or the pretrial, is that what you are referring to?

16 Q Yes.

17 A I didn't smell it at the pretrial, no.

18 Q Okay. At the time that he was talking with you and with the
19 the DA's, you didn't make any reports about what was being said?

20 A No.

21 Q You didn't record it?

22 A No.

23 Q At the time that that was being done, you didn't have a -- well
24 let me -- let me ask the question a different way. You have -- you have
25 law enforcement training?

1 A I do, yes.

2 Q What sort of training is that?

3 A I go through an academy and obviously I have a bachelor's
4 degree, as well to fulfill this position.

5 Q And what's the bachelor's degree in?

6 A Psychology.

7 Q Have you gone through POST training?

8 A Yes.

9 Q And what does that P-O-S-T stand for?

10 A Post Officer Standard Training.

11 Q And during the course of that you're trained on how to collect
12 and preserve evidence?

13 A Yes.

14 Q You're trained on how to interrogate witnesses?

15 A Yes.

16 Q You are aware of some of the requirements about what you
17 should do when you're talking with somebody in order to gather
18 information from them?

19 A Yes.

20 Q During the course of your pretrial conversations with Mitchell
21 Johnson, you had secured the testimony of Kenneth Saldana for the
22 preliminary hearing?

23 A Yes.

24 Q And you didn't have to get a warrant for his arrest. He agreed
25 to come in and he testified?

1 A Yes.

2 Q And he was a witness for the State?

3 A Yes.

4 Q And when he got done testifying, you had an opportunity to
5 discuss with the attorneys that you worked with as part of a team, the
6 testimony that Mr. Saldana had given.

7 A Yes.

8 Q And you were aware that Mr. Saldana had --

9 MS. BLUTH: Judge --

10 MR. PIKE: -- indicated that the --

11 MS. BLUTH: -- I'm going to -- I apologize -- I'm going to object
12 as hearsay in regards to anything Mr. Saldana said --

13 MR. PIKE: Okay.

14 THE COURT: Well --

15 MS. BLUTH: -- at the time of preliminary hearing.

16 THE COURT: -- we haven't got there yet so let me hear
17 what --

18 MS. BLUTH: Okay.

19 THE COURT: -- the question's going to be.

20 MR. PIKE: Okay.

21 BY MR. PIKE:

22 Q You were aware after the preliminary hearing, were you not,
23 that there was potential allegation that Mitchell Johnson had fired the
24 weapon?

25 A Yes.

1 Q And during the time that you were having the conversation
2 with Mr. Johnson, did you --

3 MS. BLUTH: Mr. Saldana, sorry.

4 MR. PIKE: I'm sorry, no --

5 MS. BLUTH: For which one?

6 MR. PIKE: -- I'm back to Mr. Johnson.

7 MS. BLUTH: Okay. I apologize

8 THE COURT: He's back to Mr. Johnson, yeah. All right.

9 BY MR. PIKE:

10 Q So after the preliminary hearing -- and that's a hearing like
11 this. People come under oath and they testify, just like you did.

12 A Correct.

13 Q During the time of the pretrial interview with Mitchell Johnson,
14 did you confront him with that?

15 A Confront him with what?

16 Q The fact that he -- he might be asking questions about him
17 shooting the gun?

18 A I talked to him briefly about that.

19 Q Okay. So he was aware before he came in to testify that that
20 was something that may come up during the time of the trial?

21 A Possibly, yes.

22 Q Well, he knew because you told him.

23 A I told him, yes.

24 Q Yeah. Okay. Possibly because I might ask the question.

25 Okay. Fair enough?

1 A Yes, that's fair enough.

2 Q All right. And so in preparing him for his testimony at the trial
3 and when he came in, did you transport Mr. Mitchell over to the
4 courthouse so that he could be here to testify?

5 A Yes.

6 Q Did you transport him over to his attorney's office?

7 A I walked him over there, yes.

8 Q Okay. Were you present when -- let me ask if there was
9 anybody else that was present during the pretrial interview with Mr.
10 Mitchell; for instance, was his attorney present?

11 A It -- he was, yes.

12 Q Okay. And what was his attorney's name?

13 A Josh Tomsheck.

14 Q Okay. Now, because you work with attorneys day in and day
15 out, you understand that there is such a thing as an attorney/client
16 privilege?

17 A Correct, yes.

18 Q And what's your understanding of what that is?

19 A Typically there's a confidentiality amongst the client and the
20 attorney that doesn't need to be repeated.

21 Q Okay. So -- but if my client is talking to you and I'm there and
22 I'm letting him talk, you would consider that a waiver of attorney/client
23 privilege?

24 A Say it again.

25 Q Okay. Let me see if I can. If I'm talking to my client, that's

1 attorney/client privilege, right?

2 A Yes.

3 Q Okay. If I am present and I'm allowing my client to talk to you,
4 then that is an implied waiver of that attorney/client privilege.

5 MS. BLUTH: Judge, I'm going to object as to beyond the
6 scope and then also I don't know -- outside this witnesses' scope of
7 knowledge.

8 MR. PIKE: Okay.

9 THE COURT: I'm not sure -- well why don't you approach?

10 MR. PIKE: Okay. Well I can ask a different question.

11 THE COURT: Well, I'm just --

12 MR. PIKE: Okay.

13 THE COURT: I want to figure out what the relevance is.

14 [Bench Conference Begins]

15 THE COURT: So what's the relevance of attorney/client
16 privilege with Mitchell Johnson?

17 MR. PIKE: Well because now I can interview Josh --

18 THE COURT: About what happened in the meeting?

19 MR. PIKE: Yeah, call -- potentially call him as a witness.

20 THE COURT: Oh, when Mitchell Johnson --

21 MR. PIKE: As a surrebuttal.

22 THE COURT: -- met with the prosecutors and --

23 MR. PIKE: Right.

24 THE COURT: Oh, oh. Well but that's -- still that's a question
25 for me.

1 MR. PIKE: Okay.

2 THE COURT: I mean, I would agree with you that to the
3 extent the guy comes in and Josh is there or whatever, but he sits down
4 and talks with him, he's waiving attorney/client privilege to have those
5 conversations with the attorneys, investigators. So to the extent you're
6 just getting at that, I would say yes, you can contact Josh and ask him
7 about that.

8 MR. PIKE: Okay.

9 THE COURT: But I would agree that's not really his expertise.

10 MR. PIKE: Okay. All right.

11 [Bench Conference Concludes]

12 THE COURT: Okay. Mr. Pike.

13 MR. PIKE: Thank you.

14 BY MR. PIKE:

15 Q Now, having gone through the POST training and working in
16 the position that you do, are you classified as a peace officer?

17 A I am, yes.

18 Q Okay. So you have the ability to arrest people?

19 A Yes.

20 Q And you have been trained on how to question them or
21 interrogate them?

22 A That's correct.

23 Q In reference to Kenneth Saldana, it's not uncommon that you'll
24 come across investigators from my office who may be looking for the
25 same people that you're looking for.

1 A That's true.

2 Q And because many times witnesses are just witnesses but --
3 and both sides want them to come in.

4 A True, yes.

5 Q The -- in 2017, at the time that this was happening, there was
6 a high number of homeless people that were living in that homeless
7 corridor. That'd be a fair statement, wouldn't it?

8 A Well can you specify what corridor?

9 Q Oh, sorry. Kind of in between Washington and North Las
10 Vegas on Las Vegas Boulevard North and on Main Street?

11 A Yes.

12 Q And that's because there's a lot of facilities that are available
13 for the homeless people live -- serve -- Shadetree, the Catholic Services,
14 and other services that help those individuals that are homeless?

15 A That's true because they're centralized in that area.

16 Q And you made your best efforts to attempt to locate as many
17 of the witnesses in this case as you could?

18 A True, yes.

19 Q And sometimes, like you just bump into them because you
20 were in the right place at the right time?

21 A True, yes.

22 Q With Kenneth Saldana, did you transport him to testify at the
23 preliminary hearing?

24 A I did, yes.

25 Q Okay. And which -- where did you specifically locate him, if

1 you could remember?

2 A I -- there's different points where I talked to Ken and
3 specifically he was known to the Foremaster and Las Vegas Boulevard
4 area and that was around the area I had talked to him.

5 Q And because you assist the attorneys in preparing the
6 witnesses to testify, you would give them a heads up if you -- for
7 instance if you thought that they were intoxicated?

8 A That's true.

9 Q And during the time that you -- did -- when Mr. Mitchell
10 testified, did you bring him to court to testify when he testified?

11 A Yes.

12 Q Did he appear to be intoxicated when you brought him here
13 into the courtroom to testify? And when I say intoxicated, I'm not saying
14 alcohol -- did he smell of marijuana?

15 A He smelled of marijuana early in the morning and the witness
16 stayed outside the courtroom for a period of time, so that's the last time I
17 actually had interaction specifically close enough to smell that, so yes.

18 Q Now in addition to being able to write memos or investigative
19 memos regarding statements that were made during these pretrial
20 conference, did you prepare any in this case?

21 A No, I did not.

22 Q I asked you about them being recorded -- an audio recording.
23 Do you have the equipment or do you have anything where you can
24 have surreptitious recordings?

25 A I have a recorder, yes.

1 Q Okay. And that is small enough so that it can be concealed
2 upon you so that the individual you're talking to you may not know that
3 they're being recorded?

4 A I have the ability to do that, yes.

5 Q Okay. And that's perfectly legal.

6 A Yes, it is.

7 Q I could record you, you could record me.

8 A True, but --

9 Q We just couldn't do it in court.

10 A That's true, but --

11 Q Okay. Also the District Attorney's Office has -- and tell me
12 whether this is true or not, they have the ability to record audio visually,
13 individuals that are going to -- that are being interviewed?

14 A They do, yes.

15 Q And you have those at your beck and call?

16 A I don't know about my beck and call, but I believe the
17 attorneys can request that and that's highly unusual. We don't do that
18 often.

19 Q Okay.

20 MR. PIKE: Thank you. I have no further questions.

21 THE COURT: State.

22 **REDIRECT EXAMINATION**

23 BY MS. BLUTH:

24 Q When was the last time you had contact with Mr. Saldana --
25 Kenneth Saldana?

1 A It would have been the day of the preliminary hearing.

2 Q You were asked some questions in regard to pretrial
3 conferences. Number one, are pretrial conferences ever recorded?

4 A No.

5 Q And when I say that I mean, either audio-wise or by video?

6 A Not in my experience, no.

7 Q And you were also asked some questions in regards to
8 interview techniques or interrogation. Do you -- when the witnesses are
9 brought in for pretrial conferences, do you conduct the flow of the pretrial
10 conference or do the attorneys?

11 A The attorneys do.

12 Q And then you stated that you walked Mr. Mitchell -- or excuse
13 me, Mr. Johnson over to his attorney for an appointment with his
14 attorney?

15 A That is correct. That was a courtesy.

16 Q Is -- in regards to his attorney, his name's Josh Tomsheck, is
17 that right?

18 A Yes, it is.

19 Q Josh Tomsheck is not Mr. Johnson's like defense criminal
20 attorney for this case?

21 A No.

22 MR. PIKE: Objection, calls for speculation.

23 THE COURT: Well I don't know that's it's speculation but as I
24 said yesterday, I appointed the attorney to advise Mr. Johnson.

25 MS. BLUTH: Okay. So that's my last question was that.

1 Thank you, Judge.

2 THE COURT: Okay.

3 Do you have anything further?

4 MS. BLUTH: I don't, thank you.

5 THE COURT: And I'm sorry, I don't know, did you guys bring
6 up the date of the preliminary hearing? I know you asked the gentleman
7 when was the last time he had contact, but I didn't know if anybody
8 actually brought out the date of the preliminary hearing.

9 MS. BLUTH: I did not ask. Do you know off the top of your
10 head, Mr. Honaker? If not, I can --

11 THE COURT: Well, I know.

12 MS. BLUTH: Oh, well --

13 THE COURT: I mean, I can take judicial notice that it was
14 October 23rd, 2017. But I just wanted to make sure.

15 THE WITNESS: Thank you, Your Honor.

16 MS. BLUTH: Thank you.

17 MR. PIKE: Okay.

18 THE COURT: All right. Do you have anything further, Randy?

19 MR. PIKE: Just a couple.

20 THE COURT: Okay.

21 **RECROSS-EXAMINATION**

22 BY MR. PIKE:

23 Q Well, in getting Ramiro Romero to testify --

24 MS. BLUTH: Judge, I'm going to object it's outside the scope
25 of my direct. I didn't to speak about Mr. Romero.

1 MR. PIKE: Okay.

2 THE COURT: Well --

3 MR. PIKE: Just going to --

4 THE COURT: -- I don't want to recall Mr. Honaker, so I'll give
5 you a little leeway --

6 MR. PIKE: Okay. Thanks.

7 THE COURT: -- and then the State can follow up if they need
8 to. Okay.

9 MS. BLUTH: Okay.

10 BY MR. PIKE:

11 Q Now, he was a reluctant witness for you to testify, wasn't he?

12 A At the trial -- at this trial setting he was, yes.

13 Q And at the time that you made arrangements to come in and
14 testify in lieu of being arrested, did he tell you that we'd also had come to
15 his house and he was not being cooperative with us as well?

16 A He did not tell me that, no.

17 Q Okay. And when you said that you walked Mr. Mitchell over to
18 his attorney's house -- house -- office as a courtesy, you also had some
19 concern that he just might keep walking and not come back to court.

20 A Actually my concern was he would have been lost downtown,
21 as a lot of citizens down here find it confusing.

22 Q Okay. A little bit more confusing because he had been
23 smoking marijuana, right?

24 A Not that day, no.

25 Q Oh, okay.

1 A Just confused as far as finding the address, because it's not
2 easy to find addresses down here.

3 Q But his address is less than two blocks away from here, right?

4 A Well I feel that you and I know that and a normal person might
5 not find that as easy.

6 Q And --

7 MR. PIKE: No, that'll do it. Thank you.

8 THE COURT: Anything further from the State?

9 MS. BLUTH: No, Your Honor.

10 THE COURT: Anything from our jurors?

11 Mr. Honaker, thank you for your time. Sir, I appreciate it --

12 THE WITNESS: Thank you.

13 THE COURT: -- you're excused.

14 The State my call their next witness.

15 MS. BLUTH: Thank you, Detective Hoffman.

16 **DETECTIVE JOHN HOFFMAN**

17 [having been called as a witness and being first duly sworn, testified as
18 follows:]

19 THE CLERK: Thank you, please be seated. If you could state
20 and spell your name for the record please.

21 THE WITNESS: John Hoffman. J-O-H-N. H-O-F-F-M-A-N.

22 THE COURT: All right. Detective, thank you.

23 Ms. Bluth.

24 MS. BLUTH: Thank you.

25 ...

1 **DIRECT EXAMINATION**

2 BY MS. BLUTH:

3 Q Sir, how are you employed?

4 A I am a homicide detective with the Las Vegas Metropolitan
5 Police Department.

6 Q How long have you been with Metro?

7 A Fif -- excuse me, 13 years.

8 Q Okay. So I'd like to turn your attention specifically to
9 September 14th of 2017, working as a homicide detective then?

10 A Yes.

11 Q And were you one of the homicide detectives assigned to
12 investigate the homicide of an individual by the name of Gordon Phillips?

13 A Yes.

14 Q And that was committed on 1300 block of North Las Vegas
15 Boulevard?

16 A Yes, it was.

17 Q All right. Can you explain how it is determined, like, within
18 Homicide which detectives get the case to investigate?

19 A The Homicide section is made up of 24 detectives which
20 breaks down to 12 two-man teams and they are put into a rotation. So
21 it's just one team after another after another. So once one team catches
22 the case then the other team is up. So the night in question, my partner
23 and I were the -- what we call the up-team, so when we were notified,
24 we went out to investigate it.

25 Q And who was your partner?

1 A At the time it was Chris Vaughn, but he wasn't present on
2 scene.

3 Q Okay. So you get -- so you're the up-team. So you get
4 notified -- about what time is it that you get notified, hey there's a
5 homicide we need you guys to come out?

6 A I believe it was around 10:15/10:30 at night.

7 Q At that point in time, and this might sound like a silly question
8 because you are a homicide detective, but at that point in time had the
9 victim already succumbed to his injuries?

10 A Yes. Yes, the -- Gordon Phillips was pronounced deceased at
11 approximately 10:17 payment, so after that we were notified.

12 Q All right. So can you explain, though, how it is, like, what
13 information are you given that makes you go to a location you go to?

14 A Now a days we get text messages from our Sargent alerting
15 us that we're going out to a call. Initially we don't get many details. We
16 might get the event number and the location to where to show up.
17 That's pretty much what -- the basic message we get when we go
18 respond to scenes.

19 Q Okay. So -- on -- when you're on your way, though, do you
20 only receive a text message or do you see -- do you receive any
21 information like when you get there this is what you're going to be
22 looking into. How is that determined?

23 A It's on a case by case basis. Sometimes we do, sometimes
24 we don't. So I think on this night we really didn't have much information
25 when -- before we arrived on scene.

1 Q All right. When you describe -- when you arrive on scene, can
2 you just give us an idea of what had been done at that point, where
3 things are situated?

4 A When I arrived at the scene there's a -- at the southern part,
5 past where the actual crime occurred, there's crime scene tape that is
6 strung across North Las Vegas Boulevard from the west to east side.
7 The scene is just located north of that. There's some cartridge casings
8 in the roadway. There's some on the sidewalk. The victims' property is
9 in the desert landscaping.

10 And as you go further north there's some more crime scene
11 tape across North Las Vegas Boulevard west to east. Then as you go
12 east -- actually excuse me -- at the intersection of the Boulevard and
13 Searles, there's one bullet, there's a lighter, and then further east of
14 there, there's another section of crime scene tape. It's blocking Searles
15 from the north to the south. You have the Defendant's truck that's
16 parked in the parking lot of Flavors and then you have the business
17 itself.

18 Q Okay. That homeless encampment that you were discussing
19 where the victim's belongings were found, had homeless individuals --
20 had some stuck around to speak to the police and had they been
21 separated from one another?

22 A Yes. Yes, they were.

23 Q In regards to the employees -- I'm going to refer to it as
24 Unified Containers, Flavors that area. Had those individuals been pulled
25 out of the building and separated?

1 A Yes, they have.

2 Q By the time you got there, where was Michael McNair?

3 A He was in the parking lot of Flavors.

4 Q Do you see Mr. McNair in the courtroom today?

5 A Yes, I do.

6 Q Could you just describe an article of clothing that he's
7 wearing?

8 A He's wearing the grey suit.

9 Q Okay. And you looked a certain direction, but could you
10 explain to me where he is in proximity to myself?

11 A He's off to your right at the Defense table.

12 Q Thank you.

13 MS. BLUTH: Your Honor, may the record reflect the
14 identification of the Defendant.

15 THE COURT: Yes.

16 MS. BLUTH: Thank you.

17 BY MS. BLUTH:

18 Q When you get there, are you briefed in regards to what has
19 gone on, up to that point investigation-wise, by a certain individual?

20 A Yes.

21 Q And who would that be?

22 A That was Detective Quinteros from downtown patrol
23 investigations.

24 Q Right. So does he kind of catch you up to speed in regards to
25 what they've done up to that point?

1 A Yes.

2 Q And I don't want to get into specifically what Detective
3 Quinteros said, but at that point in time has a suspect vehicle been
4 identified?

5 A Yes.

6 Q All right. And are you aware of whom -- who Michael McNair
7 is?

8 A Yes.

9 Q All right. Thank you.

10 So once you are briefed by Detective Quinteros, walk us
11 through what you do now as taking over as the lead investigator of this
12 homicide.

13 A Usually when we write down a homicide -- a homicide scene,
14 you have the scene, and then you have whoever's going to interviews.
15 At this time I was the one that documented the scene, and then the other
16 detectives on my squad, they went and they conducted interviews.

17 Q How many individuals from your squad were also present?

18 A I believe there was four other detectives.

19 Q Okay. So you're in charge of the scene, and then those other
20 four detectives are in charge of locating witnesses, speaking with them,
21 et cetera?

22 A Yes.

23 Q Now while you are on scene, does an individual identify
24 herself as Michael McNair's wife come on scene?

25 A Yes.

1 Q And what is her name?

2 A Tyesha McNair.

3 Q What time does she come on scene at, if you remember?

4 A Actually on scene I believe it was about 9:40/9:50.

5 Q Okay. And does she come once or twice?

6 A She arrives twice. The first time she doesn't make it
7 necessarily on the scene. She -- she's seen on the video surveillance
8 out on the street and then she makes a U-turn and leaves, and then she
9 comes back about 15 minutes later, and that's when she drives onto the
10 property.

11 Q Okay. While you were on scene, do you make contact with
12 one of the managers of supervisors by the name of Tyler Coon -- well,
13 do you make contact with him?

14 A Yes.

15 Q And does he allow you to access the video surveillance -- the
16 ability to watch that?

17 A Yes.

18 Q So not only did you have the ability to watch that, but were you
19 also provided a copy of all of the cameras, with all of the different
20 angles?

21 A Yes.

22 Q In -- or in, you know, putting a case together, did you also
23 provide those cameras -- not the cameras, but the footage to the District
24 Attorney's Office?

25 A Yes. Yes, I did.

1 Q And have you had the opportunity to review those?

2 A Yes.

3 Q Okay. And what we are about to play, is that a fair and
4 accurate depiction or an exact copy in regards to the certain camera
5 angles that were given to you by Mr. Coon?

6 A Yes.

7 MR. PIKE: Your Honor, I'll -- we have agreed that all of the
8 surveillance tapes have -- will be provided to the Ladies and Gentleman
9 of the Jury.

10 THE COURT: Okay.

11 MR. PIKE: And there are separate component parts that are
12 relevant to the witnesses' testimony, and it makes more sense to just go
13 ahead and break it down into that, so that will be introduced by way of
14 stipulation.

15 THE COURT: Okay.

16 MS. BLUTH: So --

17 THE COURT: Go ahead.

18 MS. BLUTH: -- thank you, Judge. So if you don't mind I'm
19 going to ask Detective Hoffman a few questions about that.

20 THE COURT: Sure.

21 BY MS. BLUTH:

22 Q So how many different cameras, if you know, were -- were that
23 you had to look through?

24 A I believe there was -- I believe it was about seven in total.

25 Q Okay. So what I am about to play, instead of looking at all

1 seven of those for like a 55-minute period, were you able to track certain
2 individuals movements and then create a compilation through that?

3 A Yes.

4 Q Okay. So there's that compilation, but also did you turn over
5 all of the videos, so you know, if the jurors or if the attorneys want to look
6 at it that they can look at all of the camera footage that was taken from
7 Unified Containers?

8 A Yes.

9 Q All right.

10 MS. BLUTH: So for purposes of the point in this examination,
11 Judge, we'll be looking at, I believe, what's stipulated into evidence is
12 State's 127.

13 THE COURT: That's fine.

14 BY MS. BLUTH:

15 Q So I am going to turn this oh -- one second, Detective
16 Hoffman, I've got to get the video situated.

17 So while I'm playing the video, I'll probably stop at certain
18 points and put the timing on the record, but I'm going to also ask you
19 about certain individuals and what you see them to be doing. So at
20 certain points I'm going to ask you to narrate in regards to what we're
21 looking at, okay?

22 A Okay.

23 Q All right. So I have -- we're going to start this video at five
24 minutes in and 48 seconds, Detective Hoffman.

25 Have you had the opportunity to testify with the new system?

1 We don't have the touch screen anymore and I can't remember.

2 A No, I have not.

3 Q Okay. So in front of you, you see that mouse?

4 A Okay.

5 Q So this pen right here -- I think I'm going to go back to red for
6 purposes of this video. So if at any point in time it would help you to
7 point out certain things, you just have to -- is it left click? Yeah. Left
8 click and then the pen will come up, okay?

9 A Okay.

10 Q All right. So, again, I am going to start this on with five
11 minutes and 48 seconds. In the upper left-hand corner we see a black
12 vehicle and an individual outside of it.

13 A Yes.

14 Q That individual outside of the vehicle, who is that?

15 A That's the Defendant.

16 Q And the black vehicle, is that his?

17 A Yes.

18 Q And we see a white security vehicle. Or I'm going to say
19 security vehicle, but is that in fact the vehicle that security drives in that
20 promise -- premises?

21 A Yes.

22 Q I am going to hit play.

23 [Surveillance video playing]

24 BY MS. BLUTH:

25 Q Now I am going to fast forward to about 12 minutes and 30

1 seconds, because otherwise we are just going to be looking at the same
2 screen for a while.

3 All right. So I fast forwarded 12 minutes and 18 seconds. Do
4 you still see Mr. McNair --

5 A Yes.

6 Q -- outside of his vehicle?

7 A Yes.

8 [Surveillance video continues playing]

9 BY MS. BLUTH:

10 Q Now if you wouldn't mind keeping your eye across the street --
11 there's going to be an individual walking across the street from Las
12 Vegas Boulevard coming towards Searles and I am going to ask you
13 some questions when we see that individual hit the street.

14 [Surveillance video continues playing]

15 BY MS. BLUTH:

16 Q Do you see an individual, looks like in all black, coming from
17 across the Boulevard, walking down Searles at this point?

18 A Yes.

19 Q And who is that individual?

20 A That's the victim, Gordon Phillips.

21 Q Okay.

22 [Surveillance video continues playing]

23 BY MS. BLUTH:

24 Q Does it appear that Mr. McNair and Mr. Phillips are now on
25 opposite sides of the fence as to one another, but in proximity to each

1 other?

2 A Yes.

3 Q And that's at 14:02.

4 [Surveillance video continues playing]

5 BY MS. BLUTH:

6 Q Both individuals still in that same area at 14:47?

7 A Yes.

8 [Surveillance video continues playing]

9 BY MS. BLUTH:

10 Q Okay. At 15:08, does it appear that that Defendant has now
11 gone into his vehicle and has started the vehicle?

12 A Yes.

13 Q Is that Mr. Phillips still on Searles --

14 A Yes.

15 Q -- walking down away from the boulevard?

16 A Yes.

17 [Surveillance video continues playing]

18 BY MS. BLUTH:

19 Q Do you see a vehicle now coming on property? Would that be
20 the Defendant's vehicle?

21 A Yes, it is.

22 Q Okay. Who is it that just exited the vehicle?

23 A The Defendant.

24 Q And what is he doing?

25 A It appears as though he's pointing out towards the street.

1 Q And is that where Mr. Phillips is now located?

2 A Yes.

3 MS. BLUTH: And for the record I don't know if I said it, Judge,
4 I stopped it at 16:39.

5 THE COURT: Thank you.

6 [Surveillance video continues playing]

7 BY MS. BLUTH:

8 Q So now I'm stopping it at 16:50. We see that would be the
9 Defendant walking in to the Unified Containers?

10 A Yes.

11 Q And who is the individual walking towards him with the hair
12 net?

13 A That's Ramiro Romero.

14 Q Okay. Would that be those same two individuals now on the
15 dock?

16 A Yes.

17 Q What do you see here?

18 A What you see here is the Defendant with his arm outstretched
19 with a firearm in his hand?

20 Q Can you please use the red pen to show exactly what we're
21 looking at?

22 A Right there.

23 Q Thank you.

24 THE COURT: For the record he circled in front of the two
25 gentleman standing out on the dock where the one man's arm appears

1 to be outstretched and then kind of circled part of the backdrop to the
2 grinder machine that was discussed by Mr. Coon earlier.

3 MS. BLUTH: Thank you.

4 [Surveillance video continues playing]

5 BY MS. BLUTH:

6 Q Then we can't see Mr. Phillips, but is he located in the street?

7 A Yes, he is.

8 MS. BLUTH: That was stopped at 17:04, Judge.

9 [Surveillance video continues playing]

10 BY MS. BLUTH:

11 Q Now I am going to fast forward it to about 18:25, so we are not
12 just sitting here watching the same thing. Or actually I'll just go back to
13 18:02. Where are the Defendant and Mr. Romero walking towards?

14 A They are walking towards a gate that opens up that allows
15 vehicles to come in and out of the property.

16 Q Okay.

17 [Surveillance video continues playing]

18 BY MS. BLUTH:

19 Q What do you see now at about 18:34?

20 A The Defendant and Mr. Romero are now walking westbound
21 through the Unified Containers parking lot.

22 Q Is the Defendant now going to his truck?

23 A Yes.

24 Q 18:49. Do we see Mr. Phillips in this screen?

25 A Yes, he's currently in the street on Searles walking westbound

1 toward North Las Vegas Boulevard.

2 Q And would you mind circling him, please? I might have taken
3 you off the pencil.

4 A The victim?

5 Q Yes, please.

6 A [No audible response - marking on monitor].

7 Q Thank you.

8 MS. BLUTH: And Judge, for the record, the detective has
9 circled Mr. Phillips who is walking west towards Las Vegas Boulevard in
10 all black.

11 THE COURT: In the street.

12 MS. BLUTH: The only individual in the street in Searles.

13 THE COURT: Got it.

14 BY MS. BLUTH:

15 Q Restarting the video at 18:56.

16 [Surveillance video continues playing]

17 BY MS. BLUTH:

18 Q At 19:25, does the Defendant appear to be opening the gate?

19 A Yes.

20 [Surveillance video continues playing]

21 BY MS. BLUTH:

22 Q And now which direction are both men walking?

23 A They are walking westbound.

24 Q That white security truck, would that be truck we saw earlier
25 with Mr. Simpson?

1 A Yes.

2 [Surveillance video continues playing]

3 BY MS. BLUTH:

4 Q At the very top of the screen, can you see Mr. Phillips
5 returning across the street to his bedroll?

6 A Yes.

7 Q And I know I'm sorry he looks like a little ant, but can you
8 circle it for me please?

9 A [No audible response - marking on monitor]

10 MS. BLUTH: And Judge, for the record at the corner of
11 Searles and Las Vegas Boulevard there's light post and Detective has
12 done a red circle right by the lamppost showing where Mr. Phillips is
13 crossing back across the boulevard.

14 THE COURT: Okay.

15 [Surveillance video continues playing]

16 BY MS. BLUTH:

17 Q And then could you show us, please, where the Defendant
18 and Mr. Romero are?

19 A [No audible response - marking on monitor]

20 MS. BLUTH: And the detective has drawn a red circle in
21 regards to the two individuals crossing or walking up the sidewalk on
22 Searles.

23 [Surveillance video continues playing]

24 BY MS. BLUTH:

25 Q Now you've watched the video in its entirety. At this point in

1 time, do the Defendant and Mr. Romero ever cross the boulevard to get
2 to the other side of Gordon Phillips?

3 A No, they do not.

4 [Surveillance video continues playing]

5 BY MS. BLUTH:

6 Q Now on the video at 20:58, did the Defendant and Mr. Romero
7 now appear to be walking back up Searles towards Flavors?

8 A Yes.

9 [Surveillance video continues playing]

10 BY MS. BLUTH:

11 Q Again, Mr. Simpson's truck is entering, about 21:30, the white
12 surveillance truck?

13 A Yes.

14 Q Or white security truck, I apologize.

15 MR. PIKE: Your Honor, I don't recall that we identified the
16 driver of that. If the detective could just indicate, were you able to
17 ascertain who is driving the white truck?

18 THE WITNESS: Yes. Yes, we were.

19 MR. PIKE: And that was who?

20 THE WITNESS: His name was Dennis Simpson.

21 MR. PIKE: Thank you.

22 THE COURT: Thank you. All right.

23 You can continue.

24 MS. BLUTH: Thank you. Restarting at 21:48.

25 [Surveillance video continues playing]

1 BY MS. BLUTH:

2 Q All right. Now at 21:55, do we see the Defendant and Mr.
3 Romero coming back up onto the property?

4 A Yes.

5 Q And that -- would that be Mr. Romero walking up the stairs to
6 re-enter into the building?

7 A Yes, it is.

8 [Surveillance video continues playing]

9 BY MS. BLUTH:

10 Q At the top of the screen, is that still the Defendant in the blue
11 shirt up at the gate?

12 A Yes.

13 Q At 22:22, would that be when the white the Suburban enters
14 on to the property?

15 A Yes, it is.

16 Q Who does that white Suburban belong to?

17 A Mitchell Johnson.

18 [Surveillance video continues playing]

19 BY MS. BLUTH:

20 Q And at 22:46, who's the individual that just gets out and runs
21 towards Mr. McNair?

22 A That's Mitchell Johnson.

23 [Surveillance video continues playing]

24 BY MS. BLUTH:

25 Q Now at 23:12, we see three people walking up the street.

1 Who would be in the front?

2 A That's the Defendant.

3 Q And in the middle?

4 A That's Mitchell Johnson.

5 Q And then this third individual, do we know who that is?

6 A I believe that may be Anthony Razo.

7 Q But you weren't able to ever 100 percent confirm who that
8 third --

9 A No.

10 Q -- individual was?

11 A No.

12 [Surveillance video continues playing]

13 BY MS. BLUTH:

14 Q At 23:31, do you now see the Defendant --

15 MR. PIKE: Objection, Your Honor, leading. Can we just have
16 the witness testify from --

17 MS. BLUTH: Okay.

18 At 20 --

19 MR. PIKE: -- hence forward.

20 BY MS. BLUTH:

21 Q At 23:38, who's walking across the street?

22 A It would be the Defendant and Mitchell Johnson.

23 [Surveillance video continues playing]

24 BY MS. BLUTH:

25 Q And what are they doing now at 23:56?

1 A They are now crossing over the travel lanes of North Las
2 Vegas Boulevard to the -- to the west side where the sidewalk and the
3 desert landscape views.

4 [Surveillance video continues playing]

5 BY MS. BLUTH:

6 Q 24:54, what do you see now?

7 A Is the Defendant and Mitchell Johnson coming back east on
8 Searles from North Las Vegas Boulevard.

9 [Surveillance video continues playing]

10 BY MS. BLUTH:

11 Q What are we seeing at 25:29, in regards to the vehicle?

12 A Mitchell Johnson's wife, Bianca Redding had gotten out of the
13 back seat and then she got into the driver seat.

14 [Surveillance video continues playing]

15 BY MS. BLUTH:

16 Q What's the vehicle doing at 25:59?

17 A It's pulling off the property -- the Unified Container property
18 onto eastbound Searles.

19 [Surveillance video continues playing]

20 BY MS. BLUTH:

21 Q And what are we looking at 26:28?

22 A The Defendant's now entering the Unified Containers building.

23 [Surveillance video continues playing]

24 BY MS. BLUTH:

25 Q What are we seeing at 26:41?

1 A The Defendant is going to remove a firearm from his pocket.
2 And he just had it in his right hand there at that last one.

3 Q All right. I'm going to go back a few, sorry. I went too far on
4 that one.

5 I'm going to start it -- I'm going to pause it at -- can you see it
6 at 26:45?

7 A Yes.

8 [Surveillance video continues playing]

9 BY MS. BLUTH:

10 Q I'm going to fast forward a little bit to 27:42 so we can get
11 inside -- or sorry, 27:37, what are we looking at here?

12 A This I believe is what they describe is the engineer -- one of
13 the engineer rooms --

14 Q Okay.

15 A -- inside Unified Containers.

16 [Surveillance video continues playing]

17 BY MS. BLUTH:

18 Q And what do we see 27:47?

19 A The Defendant going into one of the lockers there and
20 removing what appears to be a red backpack.

21 [Surveillance video continues playing]

22 BY MS. BLUTH:

23 Q And now I'm going to fast forward to 31 minutes flat. Well
24 actually I'm going to go back about -- we start -- can you start to see
25 police arriving at 9 -- it's 12:30 on the clock, but 9:30pm?

1 A Yes.

2 Q All right. Now I'm going to fast forward to 31. I am going to
3 start it at 31:43. What area are we looking at here?

4 A That's the -- that's a -- what they describe as a break room
5 inside Unified Containers.

6 Q And what are you seeing at 31:49?

7 A The Defendant exits that room and he's wearing a maroon
8 shirt and he's holding a blue shirt in his hands.

9 [Surveillance video continues playing]

10 BY MS. BLUTH:

11 Q And at 32 flat, the Defendant is approaching an individual,
12 who's that?

13 A That's Ramiro Romero.

14 [Surveillance video continues playing]

15 BY MS. BLUTH:

16 Q Okay. And 32:50, what's happening now?

17 A The Defendant is buttoning up that maroon tee shirt and then
18 he takes that blue tee shirt from the room in the garbage can.

19 [Surveillance video continues playing]

20 BY MS. BLUTH:

21 Q What's happening here at 33:31?

22 A The Defendant's washing his hands.

23 Q 34:17, what do you see in the top left?

24 A There's a large police presence out on a westbound Searles
25 and North Las Vegas Boulevard.

1 [Surveillance video continues playing]

2 BY MS. BLUTH:

3 Q 34:32, what are we looking at here?

4 A The Defendant's looking out one of the exit doors at all the
5 police that have shown up.

6 [Surveillance video continues playing]

7 BY MS. BLUTH:

8 Q I'm going to fast forward a few minutes. 37:11, what are we
9 looking at here?

10 A It's uniformed patrol officers that are on property now.

11 Q Okay.

12 [Surveillance video continues playing]

13 BY MS. BLUTH:

14 Q I'm going to fast forward to 39:25.

15 [Surveillance video continues playing]

16 BY MS. BLUTH:

17 Q What did we just see at 39:53?

18 A The Defendant walked back into that break room wearing the
19 maroon shirt still.

20 Q Did it appear he had a phone in his hand?

21 A Yes.

22 Q And a thir -- 40 minutes and 4 seconds, was he then on the
23 phone walking out?

24 A Yes.

25 [Surveillance video continues playing]

1 BY MS. BLUTH:

2 Q What do we -- oh sorry. This individual right here at 40:23,
3 were you able to identify that individual?

4 A Not that I remember, no.

5 [Surveillance video continues playing]

6 BY MS. BLUTH:

7 Q What are we looking at, at 40:32?

8 A The Defendant on the phone wearing the maroon shirt walking
9 through that engineer room.

10 [Surveillance video continues playing]

11 BY MS. BLUTH:

12 Q State's 41:10, what are we looking at?

13 A The Defendant walking back through the engineer room.

14 Q And I should have asked a better question. The individual that
15 we were -- that I had asked you if you were able to identify with the hair
16 net, you guys were able, you meaning the squad, was able to pull all of
17 the individuals out Unified Containers and speak to them, is that right?

18 A Yes.

19 Q And anybody -- was -- were you able to speak with anybody
20 who had information or knew what happened outside? Does that make
21 sense? Like the individuals that were pulled out of Unified Container, if
22 they had any information or had seen anything, were you able to talk to
23 those individuals?

24 A Yes

25 MR. PIKE: Objection, calls for speculation.

1 THE COURT: Well it's not going into anything that anybody
2 said, just -- I'll allow the answer to stand. You can go ahead.

3 MR. PIKE: All right.

4 [Surveillance video continues playing]

5 BY MS. BLUTH:

6 Q 41:42, what are we looking at now?

7 A Defendant walking though the engineer room.

8 Q And what room has he gone into a few times now?

9 A That's just that -- an engineer room with a set of lockers in
10 there.

11 Q Okay. And what's happening at 41:52?

12 A He's removing a blue shirt from one of the lockers.

13 [Surveillance video continues playing]

14 BY MS. BLUTH:

15 Q At 42:18, do you know who that individual is?

16 A No, I don't.

17 Q Was an individual by the name of Matt Stedeford interviewed?

18 A Yes. Yes, he was.

19 [Surveillance video continues playing]

20 BY MS. BLUTH:

21 Q What do we see at 43:03?

22 A That's the Defendant entering the break room again. He's
23 changed shirts. Now he's got the blue shirt on and he had the maroon
24 shirt in his hand.

25 [Surveillance video continues playing]

1 BY MS. BLUTH:

2 Q I'm just going to fast forward. What are we seeing at 49:10?

3 A That's the dete -- Defendant's wife driving on property.

4 Q And who's that that just exited?

5 A The Defendant.

6 [Surveillance video continues playing]

7 BY MS. BLUTH:

8 Q We see that -- on the screen, can you see the door opening
9 several times?

10 A Yes.

11 Q Were -- does another camera angle show who's opening that
12 door?

13 A I believe it does.

14 [Surveillance video continues playing]

15 BY MS. BLUTH:

16 Q 51:34, what do we see?

17 A A black and white patrol vehicle arrives on property.

18 [Surveillance video continues playing]

19 BY MS. BLUTH:

20 Q 54:56?

21 A Some plain clothes officers also arrive on property.

22 Q Okay. At that point law enforcement's on the scene?

23 A Yes.

24 Q Right. So now I need to pull out this CD, just one second. So
25 while Mr. Rogan is putting in a different CD for me, I'm going to ask you

1 a few follow-up questions. Okay. So you -- when you testified earlier
2 said -- you said that your job was the scene, correct?

3 A Yes.

4 Q And that your squad members conducted all of the interviews?

5 A Yes.

6 Q So while you may not know, like, that's so and so on the video
7 or that's so and so on the video, your partners on your squad are the
8 ones who did interviews of those individuals?

9 A Yes.

10 Q Are those interviews either recorded or written out and then
11 given to you?

12 A From my partners they'd be digitally recorded and then we
13 would get a transcript of those interviews.

14 Q And then are those provided to you, though, for you to write
15 your final report?

16 A Yes.

17 Q Now there's surveillance that -- there's surveillance that you
18 provided -- every time you make a copy of it, does the quality of it
19 become more and more degraded?

20 A Yes.

21 Q So I'm going to show you a -- an original of a certain -- if you
22 actually copy the surveillance system onto the CD, I'm going to show
23 you now what's been marked for purposes of identification is -- what's
24 been put in evidence as Stipulated 128, which is just a short clip of the
25 part of them on the dock, if you don't mind.

1 So I -- and I said short, but it's a shorter -- it's actually 30
2 minutes because it's the camera angle just for the dock, just so you
3 know Detective Hoffman.

4 A Okay.

5 Q So I'm starting it at 16 minutes and 41 seconds.

6 [Surveillance video playing]

7 BY MS. BLUTH:

8 Q 16:48, what did you just see?

9 A The Defendant enter Unified Containers.

10 [Surveillance video continues playing]

11 BY MS. BLUTH:

12 Q All right. And at 17:02, what do you see?

13 A That's going to be the Defendant and Ramiro Romero
14 standing on the porch.

15 Q Okay. And here, what are you seeing at 17:05?

16 A The Defendant standing there next to Ramiro. He has his
17 right arm extended and he's holding a firearm.

18 MR. PIKE: Objection, Your Honor.

19 THE COURT: Why don't we approach the bench?

20 MR. PIKE: He's holding something in his hand.

21 [Bench Conference Begins]

22 THE COURT: So here's the thing, I've kind of been waiting for
23 you to object.

24 MR. PIKE: Yeah.

25 THE COURT: It's inappropriate to have him narrate the whole

1 video like that and tell the jury what it is that's on there. I mean, the
2 video's in evidence, it's appropriate for them to do that, but not to have
3 the witness narrate.

4 MS. BLUTH: I thought that there was case law, actually that
5 said that it is appropriate to have them narrate it that --

6 THE COURT: No.

7 MR. PIKE: No.

8 THE COURT: No. I mean, it's not inappropriate having them
9 narrate things and describe things when they're in a better position to
10 offer an identification of somebody --

11 MS. BLUTH: Yeah.

12 THE COURT: -- but not just to narrate a whole video like that.
13 They didn't object, so I was just going to let it go, but at the point that
14 they've objected then, I would sustain that.

15 MR. PIKE: For the -- and for the record, I didn't object
16 because there was nothing that shows the shooting or anything else --

17 THE COURT: Yeah, I agree that there's --

18 MR. PIKE: -- right, up to that point in time --

19 THE COURT: -- not a whole lot of --

20 MS. BLUTH: So --

21 MR. PIKE: -- for the -- now he's just repeating it over and over
22 again.

23 MS. BLUTH: But --

24 MR. PIKE: It's duplicitous.

25 MS. BLUTH: -- sorry. But just for clarification purposes, I

1 mean -- okay, I understand the objection in regards to the firearm part of
2 if --

3 THE COURT: Okay.

4 MS. BLUTH: -- but up to that, are you saying we can't say like
5 what do you see entering the room? That?

6 THE COURT: Yeah. The video speaks for itself. I mean -- I
7 mean --

8 MR. PIKE: Yeah.

9 THE COURT: -- a detective can describe what they did, but
10 it's not -- he's not in any position better than them to say -- because he
11 wasn't there, to say he's got a gun there or this is where he's having this
12 conversation or anything. It's just the video is what it is. They can
13 identify the people on there --

14 MS. BLUTH: Yeah.

15 THE COURT: -- and then it's up to the jury to decide what
16 they think is there. Just for future reference.

17 MS. BLUTH: I love these future --

18 THE COURT: Okay.

19 MS. BLUTH: -- references, got it.

20 THE COURT: Look, I ignored this part because I litigated this.
21 In a case I allowed the detective to narrate, to offer an identification as to
22 why, then this video's been connected in the shopping center and his
23 experience with the Defendant to say I'm in a better position to tell you
24 that that guy on the video is the Defendant --

25 MS. BLUTH: Yeah.

1 THE COURT: -- but you guys don't know everything I know --

2 MS. BLUTH: Right.

3 THE COURT: -- but not just to say who did this, who did this,
4 who did this, you know. That kind of stuff.

5 MR. ROGAN: But in the particular --

6 THE COURT: I think you get in trouble there. Go ahead.

7 MR. PIKE: He was -- wasn't even narrating -- narrating it, the
8 DA was. So I objected.

9 THE COURT: Well now, separate issue. But in any event --

10 MR. PIKE: I know, but it was important.

11 THE COURT: -- are we having him go through this as well?

12 MS. BLUTH: No, no, no, no, no --

13 THE COURT: Okay.

14 MS. BLUTH: -- my only point was I'm just trying to get across
15 that we had the video -- every time we've copied it, it has become
16 degraded and degraded. So we had to do a whole thing where we --
17 just that clip, where we had to download it to our system --

18 THE COURT: It would be if -- only if, you know, you're
19 describing something that they did, like well did you go search in the any
20 individual spot for a weapon? Yeah. Why? Because I believed I saw --

21 MR. ROGAN: Right.

22 THE COURT: -- the Defendant with a weapon --

23 MS. BLUTH: Uh-huh.

24 MR. ROGAN: Right.

25 THE COURT: -- and that kind of thing, but not just to basically

1 narrate the thing. Okay.

2 MR. PIKE: And so and move that the response be stricken
3 and the Court --

4 THE COURT: On the last answer?

5 MR. PIKE: Pardon?

6 THE COURT: On the last --

7 MR. PIKE: Yeah.

8 THE COURT: -- answer?

9 MR. PIKE: Last answer.

10 THE COURT: Okay.

11 MR. PIKE: And that the Court admonish or --

12 MS. SIMPKINS: Advise the jury.

13 MR. PIKE: -- advise the jury that the video speaks for itself.

14 THE COURT: Okay.

15 MS. BLUTH: Okay.

16 MR. PIKE: Thank you.

17 THE COURT: All right.

18 [Bench Conference Concludes]

19 THE COURT: Okay. I will sustain that last -- the last
20 objection. Strike that answer. You'll make your determinations from the
21 video. You'll have the video in evidence and so that speaks for itself for
22 purposes of evidence.

23 BY MS. BLUTH:

24 Q Okay. So I want to ask you a few questions. Were you -- you
25 and crime scene analysts able to go in and through the camera system

1 track down that red -- that burgundy shirt that Mr. McNair was wearing?

2 A Yes.

3 MR. PIKE: Objection. A burgundy shirt. Was there DNA
4 testing on it? Was there any --

5 THE COURT: Well, don't argue, Randy. I'll sustain the
6 objection.

7 MS. BLUTH: Okay.

8 THE COURT: Be more specific with regard to the shirt.

9 MS. BLUTH: Sure.

10 BY MS. BLUTH:

11 Q Were you able to determine that that was the one that Mr.
12 McNair was wearing?

13 A Yes.

14 Q And how so?

15 A Because they -- inside that room there was a rack with
16 multiple shirts on there and the actual, for lack of better term, the
17 hamper that it was in, it was empty prior because they had just cleaned
18 the shirts so there was nothing in there but that maroon shirt.

19 Q When you say hamper I'm going to show you State's 41. Is
20 that the hamper you're referencing?

21 A Yes.

22 Q And I'm going to show you State's 123. Is that the shirt once
23 it's been pulled out?

24 A Yes.

25 Q Is there a name on that shirt?

1 A The patch says Joe.

2 Q And then just showing you the other side of that shirt, which
3 would be State's 124. Was that the other patch?

4 A Yes.

5 Q Now after watching the video, did you have the opportunity to
6 interview the Defendant?

7 A Yes, I did.

8 Q And at the time of his interview, was he free to leave?

9 A No.

10 Q Okay. And because of that was he read what's referred to as
11 his Miranda Rights?

12 A Yes.

13 Q During that interview, what did Mr. McNair say about where
14 he -- what he had been doing during his shift that evening?

15 A What the Defendant had said is that he was outside in the
16 parking lot on his smoke break at his truck listening to music. While he
17 was listening to music an individual comes up to him and complains
18 about having the music too loud. They have a verbal conversation about
19 it and the Defendant goes back into Unified Containers.

20 The Defendant then comes out again and he sees the same
21 individual by the gate. He approaches him again, they have another
22 verbal altercation at the point. He says that the gentleman attempts to
23 spit on him.

24 Then at that point in the interview he says I go back inside
25 Unified Containers the next thing I know my wife's -- his wife has called

1 him and there's a bunch of police outside. As we ask him a couple more
2 questions and he says he -- he left in his truck because he had power
3 steering issues with his car so he was going to another area of the
4 business to put in some power steering fluid and that's why -- and then
5 while's he's away he gets a phone call that says one of the machines
6 are down and that's when he comes back and he parks at the angle
7 northwest and he goes inside. And the next thing he knows the police
8 are -- have responded.

9 Q Okay. So at -- by the time you had -- are speaking to the
10 Defendant, had you already watched the video?

11 A Yes.

12 Q So after watching the video and after speaking with him, did
13 you make a decision?

14 A Yes.

15 Q And what was that?

16 A My decision was to arrest the Defendant for the murder of
17 Gordon Phillips.

18 MR. PIKE: Objection, Your Honor.

19 THE COURT: Well, overruled.

20 MR. PIKE: Thank you.

21 BY MS. BLUTH:

22 Q What -- do you know the height and weight of the Defendant
23 at the time in September of 2017?

24 A The Defendant, he was approximately six foot three and
25 approximately 130 pounds.

1 Q Okay. Now while on property did crime scene analysts take
2 photos of both the Defendant's hands, as well as Ramiro Romero's
3 hands?

4 A Yes.

5 Q Why is -- was that done?

6 A They take the photographs to for identification purposes and
7 condition as well. During the interviews we'd received information that
8 one of the individuals who had gone out and contacted the victim, they
9 had gotten into a fight. So we just wanted to note the ca -- condition of
10 their hands to see if we could see any wounds or if it had been any one
11 of them had been in a fight.

12 Q Were any wounds noted on either of those individuals' hands?

13 A No.

14 Q Is there a test referred to as gunshot residue testing?

15 A Yes. Yes, there is.

16 Q Did you have that done on the Defendant or on his clothing,
17 his hands?

18 A No.

19 Q And why is that?

20 A Per our policy for the -- for the CSA policy there's a number of
21 instances where the gunshot residue isn't taken. In this case the one
22 issue we ran up against is they won't take samples when it's extended
23 past four hours. The time of call in his case was roughly about 9:30 in
24 the evening. By the time the search warrant was obtained to get the
25 evidence from the Defendant, it was already past three o'clock in the

1 morning. So at that point you're already past the four-hour mark so
2 that's why no gunshot residue was taken.

3 Q Okay. If an individual has had contact -- let's say an individual
4 goes into the back of a police car. Like let's say are arrested and they
5 go back in to the back of a police car. Can gunshot residue testing --
6 can that be done once they've been back there?

7 A No. Once an individual's placed in handcuffs or in a police
8 vehicle -- it's inherent that police officers will have traces of gunshot
9 residue on them because we hand -- we're in contact with our firearms
10 everyday -- on a everyday basis. So once that happens that's another
11 condition where the gunshot residue test wouldn't be done.

12 Q And it's -- the reasoning behind that that the gunshot residue
13 could have, you know, be on the seats or on the handcuffs and then can
14 transfer to the individual?

15 A Yes, because at that point they're put in handcuffs and the
16 same officer handled a firearm earlier on and they get put into handcuffs
17 once they do the test, it may be a false positive. And that's what would
18 happen if they're in handcuffs.

19 Q And then lastly if -- if you saw on the video that the Defendant
20 was in possession of a gun would that also -- you wouldn't be able to do
21 the testing because he had possession of a gun? Of the -- of a gun you
22 believe to be involved in the murder?

23 MR. PIKE: Objection, calls for a lot of speculation.

24 THE COURT: Yeah, it was just a bad question. Why don't
25 you try and rephrase the question?

1 MS. BLUTH: Sure.

2 BY MS. BLUTH:

3 Q Okay. So if the Defendant -- if you on the video while you
4 were viewing it, if you saw the Defendant in possession of a firearm that
5 was used in that murder, would -- after the murder would he sti -- then
6 be able to be tested?

7 A Yes.

8 Q He would be able to be able to test it?

9 A Yes.

10 Q Okay. And why is that?

11 A Well, if none of those other criteria are met, say he's not
12 contacted by police, he's not put in handcuffs, he's not put in a car, it's
13 within four hours, then yes, we can do the test. Yeah, we can still do the
14 test at that point if it falls if those cri --

15 THE COURT: You're asking could he be tested? Or would he
16 be tested?

17 MS. BLUTH: Would he?

18 THE COURT: Okay.

19 BY MS. BLUTH:

20 A Yes.

21 Q If someone -- so let's say a gun is used in a homicide and then
22 someone touches that gun after wouldn't that tamper with the results?

23 A Yeah, possibly. The one issue we run into is a gunshot
24 residue test is not necessarily if somebody fired the gun. If it's fired and
25 then the particles are still on the gun, and somebody else touches it, just

1 touching that gun could also give you a false positive as well.

2 Q Okay. And all those things that you just assessed, those
3 guidelines, do they apply not only to the hands but to the clothing as
4 well?

5 A Yes.

6 Q So while you were watching that video, you see that white
7 Suburban come on scene, is that right?

8 A Yes.

9 Q Were any of the employees, for instance, like Tyler Coon, was
10 he able to identify who that person was in the vehicle?

11 A Yes.

12 Q Getting out of the vehicle, I should say.

13 A Yes.

14 Q And did he provide you with any information in regards to a
15 phone number or address in which you could contact Mitchell Johnson
16 at?

17 A Yeah. Yes, he did.

18 Q Did you in fact make contact with Mr. Johnson?

19 A Yes, I did.

20 Q And on what date was that done at?

21 A That was September 19th.

22 Q Okay. And you know what? I apologize. I skipped ahead I
23 wanted to ask you a question about Ramiro Romero. Did you or any of
24 your squad members also have an opportunity to interview Mr. Romero?

25 A Yes.

1 Q And then you had -- was that you or one of your squad
2 members?

3 A One of my squad members.

4 Q Have you had the opportunity to review Mr. Romero's
5 statement?

6 A Yes.

7 Q Did you find that to be consistent or inconsistent with what you
8 saw Mr. Romero doing on the video?

9 MR. PIKE: Objection, Your Honor. Calls for hearsay.
10 Confrontation issues there's all kind of -- we have Ramiro Romero
11 coming in to testify.

12 THE COURT: Well I'm going to sustain the objection.

13 MR. PIKE: Thank you.

14 MS. BLUTH: Okay.

15 THE COURT: You can go ahead.

16 BY MS. BLUTH:

17 Q All right. So I want to ask you some follow up in regards to
18 while you were on premises still on the 14 -- probably moving into the
19 early morning hours of the 15th. Are efforts made to recover the firearm?

20 A Yes.

21 Q And what -- discuss with us what resources are used.

22 A Initially it was just members from our squad going through the
23 property attempting to locate it. The one issue that we had is that
24 there -- I believe there are four business contained into that one property
25 so it's a very vast property. There's numerous areas that are high that

1 you can't get to. There's just a lot of nooks and crannies that are inside
2 all that building. So we searched it as best as we humanly could, but
3 what we ended up doing was calling in a narcotics detective who had a
4 K-9 who was -- who's been trained to detect firearms.

5 Q So when the dog was brought in, did that dog hit on the gun,
6 meaning did that dog find the gun?

7 A No. No, the dog did not.

8 Q Now if a dog -- like if the dog is on the ground and the gun is,
9 you know, why high up like, oh near the ceiling, would that interfere with
10 whether or not the dog --

11 MR. PIKE: Objection, Your Honor. Qualifications.

12 Background.

13 THE COURT: I'll sustain the objection. You can lay more
14 foundation.

15 MS. BLUTH: Sure.

16 BY MS. BLUTH:

17 Q Quite often as a homicide detective or -- you -- what were
18 you -- were you in robbery before you were in Homicide?

19 A No. Before I came to Homicide I was a patrol detective in
20 downtown.

21 Q Okay. And in you year -- 13 years as a police officer have you
22 been to several scenes where a dog has been brought on -- to search
23 for various items, whether it be drugs, weapons, things like that?

24 A Yes.

25 Q And are you aware of some of the limitations in which a dog

1 can hit, meaning find an object or not find?

2 MR. PIKE: Objection, Your Honor. Has training, background,
3 ever worked as a K-9 officer?

4 THE COURT: Well, I'm going to let him answer.

5 MR. PIKE: The reliability of the --

6 THE COURT: I'm going to let him answer the question at this
7 point. You can go ahead.

8 THE WITNESS: Can you repeat the question, please?

9 BY MS. BLUTH:

10 Q Sure. Yeah, are you aware of any limitation in regards to
11 locations of items that would or would not be conducive to a dog being
12 able to find them?

13 A No, I'm not.

14 Q Okay. Ultimately, are members of the squad called back to
15 the scene because a weapon had been found?

16 A Yes. Yes, they were.

17 Q Was a search warrant ever received for the Defendant's
18 vehicle?

19 A Yes.

20 Q And was a search done on the Defendant's vehicle?

21 A Yes.

22 Q Was anything of evidentiary value found inside of the vehicle?

23 A No.

24 Q All right. Now once the squad is called back onto the scene,
25 are you notified of a red backpack?

1 A Yes.

2 Q Showing you State's 60. What are we looking at here?

3 A That is the interior of the backpack.

4 Q And inside that backpack, right like this magazine type
5 document -- not document, but is that a magazine?

6 A Yes, it is.

7 Q Okay. Showing you State's 78. I'm going to zoom in. This
8 address 4832 Montebello Avenue, is that connected to anybody in this
9 case?

10 A Yes, the Defendant's address.

11 Q And then showing you State's 61. What are we looking at
12 here?

13 A That's a Glock model 30 firearm.

14 Q The individual that alerted police to that backpack, do you
15 know his name?

16 A His name was Lyle Galeener.

17 Q Did he wish to speak with police or go on tape with police?

18 A No.

19 Q In regards to State's 61, which you testified was the -- the
20 Glock, did a crime scene analyst swab this gun on several different
21 areas of the gun in an effort to obtain DNA?

22 MR. PIKE: Objection. If he was present at the time that that
23 was done.

24 MS. BLUTH: Can we approach, Judge?

25 THE COURT: Sure.

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[Bench Conference Begins]

MS. BLUTH: It was my understanding that we agreed not to call Ubbens to have to go through that questioning --

MR. PIKE: And --

MS. BLUTH: -- of where it was swabbed.

MR. PIKE: You've already had somebody come in and say that they swabbed.

MS. BLUTH: No.

MR. PIKE: The DNA expert.

MS. BLUTH: Yeah, no --

MR. PIKE: We agreed that -- that came in and they said where they swabbed it from all three different areas.

MS. BLUTH: Well, I know, but --

MR. PIKE: It's already done.

MS. BLUTH: I wanted to use a picture so that they can cir -- so he can circle exactly which of the ones -- while the gun was there. The DNA analyst doesn't know the parts of a gun. Or --

THE COURT: I don't know that the CSA said anything about the swabbing. I think it was the Tiffany Adams that she -- where the swabs were done on the gun.

MS. BLUTH: Well I think -- was it --

MS. SIMPKINS: [Unintelligible] the gun guy circle the -- the gun -- was --

MS. BLUTH: It was the gun --

MR. ROGAN: It was the gun expert.

1 MS. BLUTH: It was the gun expert.
2 MR. ROGAN: Yeah.
3 MS. BLUTH: Did the gun expert cir -- I don't know.
4 MR. PIKE: Yeah, he identified the areas.
5 MS. SIMPKINS: I asked him specifically what those areas
6 were.
7 MS. BLUTH: No, I know that you asked him specifically. I am
8 asking what it circled on the actual picture.
9 MS. SIMPKINS: Yes.
10 MS. BLUTH: You're sure?
11 MS. SIMPKINS: [Unintelligible].
12 THE COURT: If not, you can ask this guy where those areas
13 are. But Randy's objection is just to where was the DNA swabbing
14 done --
15 MR. PIKE: Sure.
16 THE COURT: -- because he didn't see that.
17 MS. BLUTH: Yeah, no.
18 THE COURT: So if you want to say tell us where the grip is,
19 tell us where the slide is --
20 MR. PIKE: You can have him identify the parts of the gun.
21 MS. BLUTH: I know but my point is that we agreed that we
22 weren't going to call in an additional CSA to do that because I was going
23 to do it to the --
24 MR. PIKE: Right.
25 MS. BLUTH: -- detective. That's my issue.

1 MR. PIKE: Oh, we got it out through another one, so I didn't
2 think --

3 THE COURT: Well, but did you agree to that?

4 MS. BLUTH: Yes.

5 MR. PIKE: What's that?

6 THE COURT: For the purpose of this conversation is, did you
7 agree to let her do that?

8 MR. PIKE: I didn't agree to the detective. I agreed that we'd
9 have somebody come in and do it. And so far I think that we've got it in,
10 because --

11 MS. SIMPKINS: It was already done.

12 MR. PIKE: -- asked the question.

13 THE COURT: Well.

14 MR. PIKE: We didn't have to bring in a separate CSA that
15 would say that it was done, but we got it in through --

16 THE COURT: I know, but the DNA analyst said, I'm not
17 familiar with guns, so I don't know where those parts are but --

18 MS. SIMPKINS: But the gun expert --

19 THE COURT: I think those think those things were swabbed.

20 MS. SIMPKINS: -- that I had him circle every area where the
21 swabs were taken. I didn't -- I didn't -- I asked him where the swabs
22 were taken --

23 THE COURT: Oh, so you did, not them.

24 MS. SIMPKINS: -- but I showed -- yeah, but I sho -- I asked
25 for the specific areas.

1 THE COURT: So there you go. If -- well, look, here's the
2 thing. If you agreed to let her do it, I'm going to let you do it.

3 MR. PIKE: He can -- he can --

4 THE COURT: They don't have to rely on you all doing it.
5 They can still do it themselves, but --

6 MR. PIKE: I mean, he can circle the areas that -- this is the
7 slide, this is the --

8 THE COURT: So now if you can ask him if he understands
9 that DNA evidence was swabbed off the gun in certain areas and can
10 you please tell us what those areas are?

11 MS. BLUTH: Okay.

12 MS. SIMPKINS: Good.

13 [Bench Conference Concludes]

14 BY MS. BLUTH:

15 Q All right. So is it your understanding that DNA -- or that this
16 firearm was swabbed for DNA?

17 A Yes.

18 Q And you are aware of those areas?

19 A Yes.

20 Q Could you use the pointer if that would that aid, please in
21 showing us which areas?

22 A There's a swab where this serrated slide -- this portion of the
23 slide which is serrated the --

24 Q And if you, sorry, if you don't mind while -- I'm going to put it
25 on the record while you do it --

1 A Okay.

2 Q -- just so the record shows.

3 MS. BLUTH: So Judge, in regards to the picture on the top
4 right side of the gun we see a serrated slide, basically, and that's where
5 the red circle is that the detective drew.

6 THE COURT: Yeah, but to be clear it's on the left side of the
7 gun it's on the top right portion of the picture of the gun. The gun's
8 laying on its side on the picture.

9 MS. BLUTH: Yeah.

10 THE COURT: But it's at the back part of the slide. Okay?

11 MS. BLUTH: Yeah, thank you.

12 BY MS. BLUTH:

13 Q And then you were about to draw a circle and looks like you
14 are now, around the trigger.

15 A Yes. And then they'll -- and then the grip itself.

16 Q I'm sorry, did you say the grip --

17 A The grip.

18 Q -- itself. Okay. Thank you. All right.

19 Now were you able find -- excuse me, were you able to
20 discern the owner of that gun?

21 A Yes, I was.

22 Q And who's that?

23 A Damar House.

24 Q Now turning your attention to the following day, did you attend
25 the autopsy of Gordon Phillips?

1 A Yes.

2 Q And were you there when Mr. Phillips was declothed?

3 A Yes.

4 Q And did you see his personal belongings?

5 A Yes.

6 Q Were there -- was there any knife recovered, you know, on his
7 person or in his clothing?

8 A No.

9 Q At any point in time have you ever reco -- was a knife ever
10 recovered on scene or near his property?

11 A No.

12 Q The following day on the 16th, did you and members of your
13 squad go back to the scene?

14 A Yes.

15 Q Why did you do that?

16 A The evidence that was recovered on scene, part of it
17 consisted of six cartridge casings. So at that point we knew that there
18 were at least six shots that were fired. On scene we only recovered one
19 bullet and at the autopsy no other bullets were recovered. So at the
20 minimum we were missing five bullets. So we went out on the 16th, to
21 see if we could either, one recover more cartridge casings or if we were
22 able to find anymore bullets.

23 Q Is it -- would you say it's common or uncommon not to be able
24 to get all cart cases or recover all bullets when you are out in a scene
25 like that?

1 A Yes. It's common where you have some sort of deficiency
2 where you have an X number -- we'll just say for the sake of argument
3 like five cartridge cases and you only have -- you can only find two or
4 three bullets. It's more often than not, you're missing one or the other.

5 Q When a cartridge case is ejected from a firearm, does it just
6 simply, just, come right out of the gun and fall right there and say there
7 or does there a lot of -- can there be a lot of movement?

8 A Yes. There can be a lot of movement when a cartridge casing
9 is ejected from a firearm.

10 Q Do you also do what's referred to as an area canvas on that
11 day when you go back out on the 16th?

12 A Yes.

13 Q What's an area canvas?

14 A An area canvas is pretty much in the immediate area -- we'd
15 ask individuals if they were there or if they knew anything associated
16 with what happened the night before.

17 Q Okay. Was there anyone else out there to say what they had
18 seen or speak with?

19 A There were people out there but no -- but nobody had any
20 information.

21 Q All right. So now I'd like to turn your attention to September
22 19th. did you make contact with and individual by the name of Anthony
23 Razo?

24 A Yes, I did.

25 Q How is it that contact was made with him?

1 A Anthony Razo was in a lot located near the intersection of
2 North Las Vegas Boulevard and Owens. In that part where he was
3 located, that's North Las Vegas Police jurisdiction. So Mr. Razo was
4 contacted by an officer -- a North Las Vegas police officer who was --
5 from where I was looking he was a homeless outreach officer. So Razo
6 was contacted by this officer, he says say I have information --

7 MR. PIKE: Objection, Your Honor. Hearsay.

8 THE COURT: I'll sustain the objection.

9 BY MS. BLUTH:

10 Q So based on the information that Mr. Razo gave the homeless
11 poli -- outreach police officer, were you contacted?

12 A Yes, I was.

13 Q And after that did you then make personal contact with Mr.
14 Razo?

15 A Yes, I did.

16 Q Okay. Before interview -- before formally interviewing Mr.
17 Razo, what I mean by formally interviewing, meaning like, put him on
18 tape, Did you speak with him off tape?

19 A Yes, I did.

20 Q So can you walk me through the reasoning of, you know,
21 when you put someone on tape when you don't?

22 A It's not so much as not putting somebody on tape and putting
23 them on tape. This is already, roughly, five to six days after the initial
24 incident occurred. So my goal in speaking to Mr. Razo initially was just
25 to see what kind of information he had. If his information wouldn't have

1 matched what happened on the scene we probably wouldn't have
2 continued the investigation; however, through speaking with Mr. Razo he
3 gave some information that wouldn't have been known if somebody who
4 wasn't there. So at that point we go ahead and put him on a digital
5 recorder and conduct an interview with him.

6 Q So like, if he's saying things that aren't making sense or he's
7 sounding crazy, are you going to go forward with an interview with him
8 and put him on tape?

9 A No.

10 Q But if he has information that leads you to believe hey, he was
11 there, he knows certain things that only a person would know that was
12 there, is that when you make the decision okay, we need to do a formal
13 interview --

14 A Yes.

15 Q -- with this person?

16 All right. Before you actually go on tape does Mr. Razo --

17 MR. PIKE: Objection, Your Honor. Can we approach?

18 THE COURT: Yes.

19 [Bench Conference Begins]

20 MR. PIKE: I think we're getting into -- they're trying to
21 impeach him to say that he said something prior to the recording and
22 then says something after. That's how it -- they already impeached him
23 with that.

24 THE COURT: Well, I think what he said he wasn't -- they
25 asked him about something and he said he has no a -- I can't remember

1 if he said he didn't say it and has no idea why it was in a transcript and
2 why the police said that he said that. So I think they're not just entitled
3 to impeach him by saying did you say that, but also the putting in
4 whatever statement it is to say here's what you actually said.

5 MR. PIKE: Okay.

6 THE COURT: Okay. So I'll allow it.

7 MR. PIKE: Fair enough.

8 [Bench Conference Concludes]

9 THE COURT: All right. You can continue.

10 BY MS. BLUTH:

11 Q During that -- before you go on tape with Mr. Razo, does he
12 give a description of an individual he's walking behind who left Flavors --

13 A Yes.

14 Q -- or left Unified Containers.

15 A Yes.

16 Q Okay. Does he state whether or not he saw a firearm in that
17 individual's hand?

18 A Yes, he did.

19 Q And what did he say about that? That he did or he didn't?

20 A Yes. Mr. Razo did say that he did observe a firearm in the
21 hand of the person who he saw walking off of the Unified Containers'
22 property.

23 Q Okay. And in regards to when you get on tape, does he fail to
24 mention that firearm part?

25 A Yes, he does.

1 Q And do you confront --

2 MR. PIKE: Objection, Your Honor. He isn't saying that he
3 failed to do that. I believe the officers records that he recanted that. It's
4 a significant difference.

5 MS. BLUTH: No.

6 THE COURT: I'll allow you to cross-examine him. You can
7 continue.

8 BY MS. BLUTH:

9 Q Okay. And -- in his interview once he's on tape, does he
10 mention anything about the gun?

11 A No, he doesn't.

12 Q And do you confront him with that?

13 A Yes, I did.

14 Q Like in what way?

15 A Well when he gave his story, he says that the gentleman that
16 he described walked out and he doesn't mention the firearm. So at that
17 point I bring up that hey, before we got on tape you mentioned the
18 firearm, and then he says no, no, no I didn't. And then la -- then later on
19 he does admit to yeah, before we began the interview he did mention
20 that the subject had a gun in his hand.

21 Q Okay. So but ultimately on tape he does confirm that he had
22 said that to you --

23 A Yes.

24 Q -- off tape?

25 A Yes, he does.

1 Q Does he give you any reason for why he had changed his
2 story?

3 A No.

4 Q Does he also write out what's referred to as a I don't -- a
5 written statement or a voluntary statement?

6 A Yes. Before my partner and I arrived, he did write out a
7 voluntary statement.

8 Q Okay. And in that voluntary statement does he give a
9 description of the employee who had left Flavors?

10 A Yes.

11 Q And does he -- again discuss that is the individual that is the
12 shooter?

13 A Yes.

14 Q Now I had asked you some questions while we were -- right
15 after we watched the video in regards to you know, did Mr. Coon identify
16 the individual in the white Suburban and you stated that he had.

17 A Yes.

18 Q And you in fact made contact with Mr. Johnson on what date?

19 A It was September 19th.

20 Q And where was he located when you made contact with him?

21 A At his residence.

22 Q How far is his residence from Flavors Unified Container?

23 A Just under a mile.

24 Q Was his wife or girlfriend home as well? Bianca Redding.

25 A Yes, she was.

1 Q And did -- were you able to make contact with her --

2 A Yes.

3 Q -- as well? In the video -- when you yourself watch the video,
4 was there a point in the video before the homicide occurred that you
5 believed you saw the gun in Mr. McNair's hand?

6 MR. PIKE: Objection, Your Honor.

7 MS. BLUTH: Can we approach?

8 MR. PIKE: The experience --

9 MS. BLUTH: Can we approach?

10 THE COURT: Yeah, come on down.

11 [Bench Conference Begins]

12 THE COURT: So any mention of that isn't objectionable. But
13 now I didn't get the question out there so what's the question?

14 MS. BLUTH: The point is, is that before he sees the gun in
15 the vi -- before he watches it and sees the gun in the video -- he hasn't
16 seen that part of the video when he goes to interview Mitchell and so
17 he's grilling Mitchell about you brought in a gun. You brought him the
18 gun thinking he's a suspect in this. And he goes after him.

19 THE COURT: So why don't you just ask him, did you see the
20 video before you interviewed Mitchell Johnson?

21 MS. BLUTH: Did I see -- did you see what?

22 THE COURT: Did you see the video before you interviewed --

23 MS. BLUTH: Sorry, no.

24 THE COURT: -- Mitchell Johnson?

25 MS. BLUTH: He saw the video. He hadn't seen a gun yet --

1 THE COURT: Okay.

2 MS. BLUTH: -- in Mr. McNair's hand.

3 THE COURT: All right.

4 MS. BLUTH: So he takes on this whole line of questioning

5 because he believes Mitchell has the gun. And the only reason this is

6 rele -- well it becomes relevant for multiple reasons, but one when

7 Randy talks about, you know, Mitchell saying oh, well if you've got the

8 gun it's off of me then.

9 THE COURT: Okay.

10 MS. BLUTH: That's one point of it, but the second part is, is

11 like I said he goes into this line of questioning where he's going after

12 Mitchell saying you're part of it --

13 THE COURT: But none of that ever came up, right? Anything

14 about Mitchell Johnson and Mitchell Johnson's statement, and the police

15 officers grilling them or anything. So --

16 MS. BLUTH: Yeah --

17 THE COURT: -- why doesn't he --

18 MS. BLUTH: Randy did it with Mitchell on cross multi -- for a

19 long time.

20 THE COURT: Oh, when you were talking about the detectives

21 and --

22 MR. PIKE: Uh-huh.

23 THE COURT: -- [Unintelligible].

24 MS. BLUTH: Yeah.

25 MR. PIKE: Well he can -- and he can --

1 MS. BLUTH: Can you hold on for one second because I need
2 my notes.

3 MR. PIKE: Okay.

4 THE COURT: But, no. Look, I'm just saying that -- I mean I
5 think you predicate this by saying when you interviewed Mitchell
6 Johnson, did you ask him a bunch of questions about the gun and
7 whether he provided the gun to Mr. McNair, or why did you do that? I
8 mean --

9 MR. PIKE: All right.

10 THE COURT: -- and I'm assuming he's going to say because
11 I didn't -- hadn't seen the video part of it where Michael McNair
12 appeared to have a gun. So I didn't know where the gun came from.

13 MS. BLUTH: Yeah.

14 MR. PIKE: But he -- but predicating it and trying to get around
15 and say --

16 THE COURT: Yeah, but what I --

17 MR. PIKE: -- you know.

18 THE COURT: -- was saying to you, when you jump the gun to
19 object is any mention of something in the video isn't objectionable as
20 narration. Narration is fine to establish people -- to allow the jury to kind
21 of understand the video. Just general narration I don't think is
22 appropriate, but if they're asking, you know, a question that's predicated
23 on something you saw on the video, they've got to ask him what he saw
24 on the video. Okay. That's what I'm saying. That was okay, even as to
25 her -- I think it was worded badly, but we're still okay doing that. Okay?

1 MR. PIKE: Okay.

2 [Bench Conference Concludes]

3 THE COURT: How much longer do you have with this witness
4 by the way?

5 MS. BLUTH: Probably less than five minutes.

6 THE COURT: Okay. Go ahead.

7 MS. BLUTH: Okay.

8 THE COURT: And the objection is overruled.

9 MS. BLUTH: Okay.

10 BY MS. BLUTH:

11 Q During the interview, do you ask Mitchell Johnson several
12 questions in regards to whether or not he brought his brother the gun?

13 A Yes.

14 Q And why are you doing that? Why are you asking him that?

15 A To determine if he had the firearm or if the Defendant had it
16 before he arrived on scene.

17 Q Okay. Later, after the interview with Mr. Johnson, are you
18 able to understand that better?

19 A Yes.

20 Q And why is that?

21 A After the interview I'm able to look through the video even
22 more and that's when I observe --

23 MR. PIKE: Objection, Your Honor.

24 THE COURT: Overruled.

25 MR. PIKE: He didn't answer the question.

1 THE COURT: Overruled. You can go ahead.

2 BY MS. BLUTH:

3 Q Go ahead.

4 A That's when I observe the clip that we had played before with
5 the Defendant and Ramiro Romero standing on the porch.

6 Q Okay. Now when you speak to Mr. Johnson, do you catch him
7 not telling the truth several times?

8 A Yes.

9 Q And can you explain in what ways?

10 A The -- when I'm interviewing Mitchell Johnson, I throw out the
11 blanket question, just tell me what happened. Tell me how you got
12 there. His first response is, I never arrived. Obviously through the video
13 surveillance that was shown earlier, that's not true.

14 The second time he says that his wife drove and that he was a
15 passenger in the vehicle. Obviously from the video that's incorrect.

16 Then it gets to the point where yes, I drove the vehicle there.
17 Then I ask him well what did you do while you were there? Well, I just
18 got some money from the Defendant and I left. Obviously that's untrue.

19 Then it got to the point where yes, I got out of the vehicle and I
20 waked to the edge of the property. Still not true.

21 Then it progressed to I walked out of the property to the
22 corner. Obviously that's untrue.

23 And then it finally gets to the part where he says he crosses
24 over the boulevard with the Defendant.

25 Q At any point during your interview, did he ever admit to

1 punching the victim?

2 A No, he did not.

3 Q At any point in the interview, did he identify the shooter, the
4 individual who shot Mr. Phillips?

5 A Yes, he did.

6 Q And who did he identify?

7 MR. PIKE: Objection, Your Honor. The witness was here --

8 THE COURT: Overruled. You can go ahead.

9 BY MS. BLUTH:

10 Q Who did he ide -- what did he specifically say in regards to
11 that?

12 A What he said is when he and the Defendant go over and cross
13 over to the west side of North Las Vegas Boulevard, he's standing in the
14 street and then he -- the Defendant is on the sidewalk talking with the --
15 with the victim. He says that he looks back to see if there are any cars
16 coming down the street, that's when he hears gunshots, he looks back
17 and he sees the Defendant lowering a firearm.

18 Q And does he see the victim falling at the same time?

19 A Yes, he does.

20 Q Did you get -- was a buccal swab taken for Mr. Johnson's --

21 A Yes, it was.

22 Q -- DNA?

23 And do you know the height and weight of Mr. Johnson?

24 A He was approximately five-foot-seven and 140 pounds.

25 Q And was Mitchell Johnson ever arrested for anything -- having

1 to do anything with this crime?

2 A No, he wasn't.

3 Q And why was that?

4 A Throughout the investigation there was never any evidence
5 that --

6 MR. PIKE: Objection, Your Honor.

7 THE COURT: I'll sustain your objection.

8 BY MS. BLUTH:

9 Q Turning your attention to September 20th of 2017. Did you go
10 to the Defendant's house at that location that we had seen on the
11 magazine?

12 A Yes.

13 Q And what was the point of that?

14 A The point there was to speak with his wife and obtain consent
15 to search his residence to see if we could find any firearms or related
16 materials inside his home.

17 Q And where you able to make contact with his wife, Ms.
18 McNair?

19 A Yes.

20 Q Were you given consent to search the home?

21 A Yes.

22 Q And was anything of evidentiary value recovered from the
23 home?

24 A No.

25 Q And then lastly I just wanted to ask you a few questions. Did

1 you submit any forensic test to be done in this case?

2 A Yes. The forensic testing that I had submitted was the swabs
3 that were taken from the firearm, I had those tested against the buccal
4 swaps we had taken during the investigation. Then I also put in a
5 request to have the cartridge casings and the bullets that were
6 recovered compared to the firearm that we recovered from the
7 backpack.

8 Q Okay. And then I a -- apologize because I forgot to ask you
9 one thing if an individual has washed their hands, does that also one of
10 the guidelines that can't happen in regards to GSR testing?

11 A No. They would still do the testing at that point at well.

12 Q Okay. Thank you.

13 MS. BLUTH: Nothing further, Judge.

14 THE COURT: All right. Will you guys approach, please?

15 [Bench Conference Begins]

16 THE COURT: Do you have any idea how long you have?

17 MR. PIKE: I've got a while so --

18 THE COURT: Okay.

19 MR. PIKE: Half hour.

20 THE COURT: All right --

21 MS. BLUTH: A half hour?

22 THE COURT: -- then I'm going to tell them to come back at
23 10:30 tomorrow and we'll finish up with this guy. And this is your last live
24 witness?

25 MS. BLUTH: Yep.

1 THE COURT: All right.

2 MS. BLUTH: Uh-huh.

3 THE COURT: And then do you have any live witnesses?

4 MR. PIKE: No.

5 THE COURT: All right. But you're going to be seeking play

6 Saldana's testimony?

7 MR. PIKE: Yes.

8 THE COURT: Which is?

9 MS. BLUTH: Will you --

10 MR. ROGAN: Play or read?

11 MS. BLUTH: Play, yeah.

12 MR. PIKE: Read, read.

13 THE COURT: Read?

14 MR. PIKE: Yeah.

15 THE COURT: Okay. Which is what? Like --

16 MR. PIKE: It's short.

17 THE COURT: -- ten pages, right? So it's like 20 --

18 MR. PIKE: Yeah.

19 THE COURT: -- minutes?

20 MS. BLUTH: Yeah --

21 MR. ROGAN: I mean, I'm --

22 MS. BLUTH: -- it shouldn't be that long.

23 MR. PIKE: No.

24 THE COURT: Are you going to have any rebuttal witnesses?

25 MS. BLUTH: We're talking about it. If we do, it would be very

1 short.

2 THE COURT: All right. Well, I'm still planning on us arguing
3 tomorrow --

4 MS. BLUTH: Yeah.

5 MR. PIKE: Uh-huh.

6 THE COURT: -- just so you know. But we'll do jury
7 instructions and stuff tonight.

8 MR. PIKE: Okay.

9 MS. BLUTH: Cool.

10 [Bench Conference Concludes]

11 THE COURT: All right. Folks, we're going to go ahead and
12 recess for the evening.

13 During the recess you're admonished not to talk or converse
14 among yourselves or with anyone else on any subject connected with
15 this trial. Or read or watch or listen to any report of or commentary on
16 the trial by any medium of information including, without limitation,
17 newspapers, television, the internet, and radio. Or form or express an
18 opinion on any subject connected with the trial until the case is finally
19 submitted to you.

20 We'll start tomorrow at 10:30, so I will see you then. Have a
21 good evening.

22 THE MARSHAL: Rise for the jurors.

23 [Outside the presence of the jury]

24 THE COURT: You can sit down as well. Thank you.

25 You can go ahead.

1 Do you guys have anything outside the presence before we
2 start talking about jury instructions?

3 MS. SIMPKINS: Court's indulgence.

4 THE COURT: No?

5 MS. BLUTH: Judge, quick question about the last objection
6 that was sustained in regards to the detective asking -- being able to
7 answer why Mitchell Johnson wasn't arrested. Now, before I ask that
8 question I do want to preface with it -- preface that question with I
9 understand when he says there is no evidence. I don't think that's the
10 right wording of that answer but --

11 THE COURT: Right.

12 MS. BLUTH: -- are -- is the Defense saying and you're saying
13 that that question itself is improper or how he was starting to answer?

14 THE COURT: Well my concern with a question like that is
15 always what the answer's going to be.

16 MS. BLUTH: Uh-huh.

17 THE COURT: It's -- most detectives aren't going to say, you
18 know, we made a determination there wasn't probable cause to arrest
19 Mitchell Johnson. They are going to say there wasn't any -- our
20 investigation led us to believe, you know, the evidence was that, you
21 know, Mr. McNair committed the crime or something like that --

22 MS. BLUTH: Sure.

23 THE COURT: -- or the evidence suggested to us blah, blah,
24 blah. And it's the jury's decision about what the evidence is. If I had a
25 comfort level, the detectives were always just going to say we didn't

1 have probable cause to arrest Mitchell Johnson then I think the question
2 was okay. So to the extent and I've seen it before where you all's
3 question is, did you make a determination that you had probable cause
4 to effectuate arrest in a case? Yeah. And who did you arrest? That's
5 okay. I mean to ask -- you know, the fact that I know you objected with
6 the arr -- about the question arresting Mr. McNair, it's okay.

7 I mean juries know people get arrested when they are charged
8 with a crime. So you, you know, you do your investigation you
9 accumulate everything and you decide that you have probable cause to
10 make an arrest --

11 MS. BLUTH: Uh-huh.

12 THE COURT: -- and who was that for? But it's usually kind of
13 more like was there anybody else that you determined you had probable
14 cause to make an arrest for? And they say no. But it's always just what
15 they're going to say. So I mean, when they -- when you asked that
16 question I think a lot of times they start going into things and it's
17 inappropriate.

18 MS. BLUTH: But if --

19 THE COURT: So the short answer is no. The question in and
20 of itself -- the topic I can say in and of itself isn't inappropriate.
21 Particularly the case like this because I know what you're getting at -- or
22 they're getting at, is that Mitchell Johnson committed the crime and he
23 should have been arrested, he should have charged --

24 MS. BLUTH: Right.

25 THE COURT: -- he's the real shooter. And you're trying to

1 say the police didn't have evidence to give them a basis to believe they
2 should have arrested him.

3 MS. BLUTH: Right. And I just think that -- and maybe it's
4 premature, but I think if that's how they -- where they go on cross, I think
5 on redirect he's able to discuss fact -- elements that he looked at,
6 especially the gun before and after to decide -- because I mean that's a
7 really big question here.

8 THE COURT: Well depending on what happens on cross,
9 then we can readdress that on redirect, but I would still think it needs to
10 be confined to kind of you make it an arrest based on the totality of an
11 investigation and a belief whether you have probable cause to arrest
12 somebody. And what determination did you make with regard to Mitchell
13 Johnson? That I did not have probable cause to arrest him. But them
14 commenting on the evidence tells us that's for the jury to decide what
15 the evidence says.

16 MS. BLUTH: But as the individual responsible with who gets
17 charged with originally, I mean, don't you think it's fair game that he ex --
18 that he defend that though? I mean, not talking about -- not talking
19 about criminal culpability at a reasonable doubt trial, but the decisions he
20 made and efforts he made in his investigation to determine why Mitchell
21 Johnson shouldn't be arrested in the first place.

22 THE COURT: Right.

23 MR. PIKE: Well --

24 MS. BLUTH: And to be able to get specific.

25 MR. PIKE: Well then that allows me to give into the whole

1 thing about now the State has amended the information to an unknown
2 person that --

3 THE COURT: Well --

4 MR. PIKE: -- was there shooting --

5 THE COURT: -- hold on, hold on. You're still winning here
6 right now so you don't feel --

7 MR. PIKE: Okay.

8 THE COURT: -- like you need to go too deep here. The -- I
9 get that argument, it's made a lot. They should be able to defend
10 themselves. Well they're not on trial, right? So they don't get to just
11 come in and say I want to defend my investigation by telling you all the
12 reasons I think the Defendant's guilty. I mean that's kind of what the
13 detectives do. They all start saying --

14 MS. BLUTH: Sure.

15 THE COURT: -- well I had this that told me he did it. I had
16 this, I had this, I had this. So they can say I did my investigation and I
17 did not have probable cause to arrest anybody else. And that's what I
18 need to make an arrest and the only probable cause I had based on my
19 investigation was to arrest Mr. McNair.

20 Now all that presupposes that Randy does you know kind of a
21 what I would expect to be his cross-examination, if he starts asking him
22 about particular items of evidence and doesn't that suggest to you that
23 Mitchell Johnson was the shooter and you should have arrested him,
24 then we're probably having a difference conversation --

25 MS. BLUTH: Okay.

1 THE COURT: -- for redirect.

2 MS. BLUTH: All right. That's all --

3 THE COURT: But let's -- let's let him do his thing first.

4 MR. PIKE: Right. And I'll wary of those open-ended

5 questions. I've seen that happen way too many times.

6 THE COURT: Yeah. So I mean it's just -- there's certain

7 things that get asked --

8 MS. BLUTH: I understand.

9 THE COURT: -- where you're experience tells you -- and

10 maybe it's not your experience but look I'm dealing with every case --

11 MS. BLUTH: I know, yeah.

12 THE COURT: -- and detectives and police officers oftentimes

13 take you all's questions and now I'm sitting on a mistrial because --

14 MS. BLUTH: No, I understand.

15 THE COURT: -- they're saying things they shouldn't say.

16 MS. BLUTH: And he -- I mean, I knew the answer to that --

17 THE COURT: Right.

18 MS. BLUTH: -- so I felt comfortable doing it but, I mean -- I

19 agree that it is probably premature.

20 THE COURT: Okay.

21 MS. BLUTH: But I would like to lay a little -- another --

22 something else on the record in regards to him narrating the video. I

23 know that we talked a little bit about it at the bench --

24 THE COURT: Sure.

25 MS. BLUTH: -- but if we could.

1 And my understanding, Judge, of the case law was that as
2 long as he's not forming opinions or narrating the crime itself that he can
3 discuss what's being shown, like identifying people in the video saying
4 okay, that's the Defendant, that's the blue shirt, that was the red shirt.

5 THE COURT: Okay.

6 MS. BLUTH: That was my understanding of what I was doing.
7 Now where it got a little -- I understand where the objections was is
8 when he raised the firearm.

9 THE COURT: Right.

10 MS. BLUTH: So, again, my point in that was is that was a part
11 of the crime -- I mean -- and I mean this respectfully, but to me, it's very
12 clear that it's a firearm, and when you see it --

13 THE COURT: Right.

14 MS. BLUTH: -- when they see it up close, it's not like I -- it's
15 not like he's speculating about something --

16 THE COURT: And, and I think you have a very tellable
17 argument in that regard that you can see the firearm and it is in his hand
18 on more than one occasion. And so for purposes of, like I said at the
19 bench, look if you're asking a detective, did you have occasion to search
20 the Defendant, why did you search him? I was looking for a firearm.
21 Why did you think he had the firearm? There were points on the video
22 where I believed I could see a firearm in his hand. And things like that.

23 And you're absolutely right in that officers providing
24 narration-ish kind of things regarding identification is different. I mean
25 the case law does allow the officers to identify people on videotapes,

1 particularly when they can provide the jury with information that they're
2 in a better position to offer an identification than the jury is.

3 Because, like in the particular I referenced, the detectives had
4 an interview with the Defendant where they were with him for an hour
5 and half interviewing him and observing his mannerisms and everything
6 about him up close. The jury didn't know about that because nothing
7 about that interview came in. But I knew that the detectives were in a
8 better position to offer identification of who they were seeing on that
9 video than the jurors were, and there were other things as well. So
10 that's one thing.

11 But I think what the case law -- and there's only one case that
12 I found real quickly from my stack of stuff, which was *Hawkins* which is a
13 2016 Nevada Court of Appeals opinion — 2016 West Law 6560417.
14 Where they talked about -- it wasn't plain error for the Court to allow the
15 witness to narrate, but narration is appropriate if it assists the jury in
16 making sense of the video. So it's not just narrating.

17 And like what he was doing was just a lot of narrating. What's
18 happening now? They're walking to the end of the street. What's
19 happening now? They're walking back from the corner. What's
20 happening now? He's talking to a guy through the fence. I mean there
21 was -- there wasn't anything that the jury needed to make sense of any
22 of that. It was just pure narration.

23 Randy wasn't objecting because there really wasn't anything
24 that was prejudicial about what was happening in that regard. But all of
25 that type of narration is what I think the courts say that's not really

1 appropriate. I mean that -- the video speaks for itself in those regards,
2 so you don't need to have a detective up there narrating step by step
3 what's happening and supplanting their testimony for the jurors' own
4 opinions from watching that.

5 But you get -- for instance, you know, to have somebody
6 narrating a little bit to say this is outside, this is inside, this is the blow
7 room, this is the -- what's considered the break room, these are different
8 areas of where theses cameras are, and that's why it's jumping back
9 and forth.

10 MS. BLUTH: Uh-huh.

11 THE COURT: Then that's kind of I'm providing testimony that
12 assists the jury in understanding this video. That's a little different.

13 MS. BLUTH: Okay.

14 THE COURT: Okay. All right.

15 Do you guys want Mr. McNair to say for this? We won't
16 formally put them on the record tomo -- we're going to stay on the record
17 tonight to get them settled and raise objections, but we won't formally
18 make a record of them until tomorrow.

19 MS. BLUTH: Yes.

20 MS. SIMPKINS: We'll have him stay, Your Honor.

21 THE COURT: Okay. All right. So we'll take a break for a
22 couple of minutes before we get started. Let you guy's use the
23 restroom, whatever and get comfortable

24 [Pause in proceedings]

25 THE COURT: Okay. Where do you guys want to start?

1 MR. PIKE: It is now my duty.

2 THE COURT: Well actually you guys have the same set the
3 State has, you just made corrections to it. So we'll just start going
4 through them one by one.

5 MS. BLUTH: Okay.

6 THE COURT: All right. So yeah, it is now my duty as Judge.
7 No objections to that one.

8 If in these instructions. No objection to that one.

9 The next one, the State left out one paragraph and the
10 Defense wants to change a couple of paragraphs. So the paragraph the
11 State left out--

12 MS. SIMPKINS: Uh-huh.

13 THE COURT: -- is the, it is the duty of the jury to apply the
14 rules of law contained in the instructions to the facts of the assets and
15 determine, et cetera. And you all are proposing to change in a number
16 of places in the instruction -- where it references guilty or not guilty, you
17 all want to change it to whether or not the State has met their burden of
18 proof?

19 MR. PIKE: Yes.

20 THE COURT: Okay. What -- what's the authority or reason
21 behind that?

22 MR. PIKE: Is that --

23 THE COURT: I mean, I guess arguably the jury does both
24 those things. We are asking them to find whether somebody is guilty or
25 not guilty and they make that finding based on whether they -- you know,

1 the evidence meets the standard or not.

2 MR. PIKE: Right. It's appropriate to remind them that.

3 THE COURT: Well, I'm going to leave it as is. I think that the
4 jury's determination is guilt or not guilt. How they get to that is based on
5 their working through the evidence and there's obviously the other
6 instructions that tell them they have to find things beyond a reasonable
7 doubt, so. But we do need the paragraph at the end of the information
8 instruction.

9 MS. BLUTH: Yes. So, Judge, I should have asked you, do
10 you want me to make the changes? However you want me to do it I'll do
11 it.

12 THE COURT: Yes, I do actually.

13 MS. BLUTH: Okay.

14 THE COURT: So let's see. If you would stick that between
15 Count 2 and each charge and the evidence pertaining to it.

16 MS. BLUTH: And this goes on the same page as the infor -- it
17 usually goes on the bottom after the charges, right?

18 THE COURT: Yeah, so like after Count 2, but before the each
19 charge paragraph, just insert the paragraph, it is the duty of the jury.

20 MS. BLUTH: But did we -- I don't even think -- I think Gina left
21 off the -- oh no, she didn't --

22 THE COURT: Well each charge --

23 MS. BLUTH: -- I see what you're saying.

24 THE COURT: -- yeah, each --

25 MS. BLUTH: I got you.

1 THE COURT: Oh, wait a minute. There it is. It's buried up at
2 line 7. I didn't see that. I don't know why she put it up there.

3 MS. BLUTH: Holy moley.

4 THE COURT: So just move that down.

5 MS. BLUTH: Got ya.

6 MR. PIKE: Okay. So you wanted that at the bottom of the
7 page?

8 THE COURT: Yeah. So I put those two paragraphs at the
9 very end. So it is the duty of the jury to apply and then each charge and
10 the evidence pertaining to it. And offense you need to have parentheses
11 S in parenthesis at the end of the word offense at the end of y-a. You
12 see that? So that it references the fact that there's more than one
13 offense in the case.

14 MS. BLUTH: Yeah. And then also on -- do I need to on that
15 line 26 too?

16 THE COURT: Yeah, you can remove defendant because
17 there are no other defendants. Just should not control your verdict as to
18 any other offense charged.

19 MS. BLUTH: Got it.

20 THE COURT: Okay. All right. There's no objection on, to
21 constitute the crime charge. I think that the Defense version of
22 reasonable doubt had the change that I put in there that we put in all of
23 them that says unless instead of the word until. You all's copy, the
24 State's copy came out with a until.

25 MS. BLUTH: Sorry, can you tell me the line?

1 THE COURT: Yeah, on line 2. Presumed innocent unless the
2 contrary is proved.

3 MR. PIKE: We were at 5, right?

4 THE COURT: Pardon?

5 MS. BLUTH: It's 5, yeah.

6 MR. PIKE: All right.

7 THE COURT: All right. On the next one you are here to
8 determine whether the Defendant is guilty or not guilty. So, again, the
9 same thing. I know you all are proposing a change on the Defense side
10 to reference meeting the burden.

11 MR. PIKE: Right.

12 THE COURT: But I -- but I do think the jury's determination is
13 whether the Defendant is guilty or not guilty. So I am going to leave that
14 as is.

15 And there are no changes on the evidence for jury to consider.

16 No changes on credibility and believability.

17 MR. PIKE: Right.

18 THE COURT: No changes on expert witnesses.

19 No changes on when a witness fails to remember.

20 No changes on the Defendant is not required to present.

21 And then we get to -- oh, are you all going to have one -- the
22 Defendant is not required to testify?

23 MR. PIKE: Yes, we would request that.

24 THE COURT: Okay. I'll print out a copy. Well you guys have
25 a copy of that, right? Yeah, go ahead and print that out as well.

1 All right. And then we get to the conspiracy. And I think what
2 I provided you all was what the ones that I gave.

3 MR. PIKE: Right.

4 THE COURT: And I know your proposals kind of combine a
5 lot of that into one.

6 MR. PIKE: Yes.

7 THE COURT: Okay. I'm usually a big fan of combining things
8 so that we don't have multiple instructions. That'll make for a long
9 instruction though.

10 MS. BLUTH: I won't even be able to get all that on one.

11 THE COURT: Well it wouldn't fit on one page obviously but --
12 anyway my inclination is to give the instructions that I give. Is there any
13 thing you wanted to add, Randy, as to you all's proposed combination
14 instruction?

15 MR. PIKE: 13. And the fact that it just ties them all together
16 so that -- I think the jury can instead of flipping through them, I just
17 believe that it's better to tie them together, but it's up to the court. It's
18 really more stylistic than substantive because it contains the same
19 information.

20 THE COURT: All right. I'm going to need those as the way I
21 had those.

22 The next one is -- the next one in the -- yeah we had that. The
23 next one in the Defense packet is one of the four that I give anyway. So
24 we'll set that aside.

25 The -- before we get to the aiding and abetting one, and the

1 Defense has a proposed in order to find Defendant criminally liable for
2 the acts of another you must find. Randy?

3 MR. PIKE: Yes. Cite *Carden versus State*. It's an
4 unpublished opinion but it cites *Crawford*.

5 THE COURT: That's a -- and that's a Supreme Court case,
6 isn't it? It's not an Appellate Court case, right?

7 MR. PIKE: Right.

8 THE COURT: Because I can't consider Appellate Court on
9 unpublished opinions.

10 Yeah, I mean, this I view this as kind of a *Crawford*-based
11 instruction, and the -- I know one of the ones I provided you covered --
12 because it was one that we crafted in a recent trial that dealt with
13 *Crawford* issues. Because what I've always said about *Crawford* is it
14 has to be -- the intent of the *Crawford* opinion has to be directed at
15 something that you're challenging in a case.

16 So it's not just -- a lot of times what -- and you guys didn't to
17 his, but a lot of times what defense attorneys do is well I want a
18 *Crawford* instruction that says if you don't find that my client entered with
19 the intent to commit larceny in a certain building -- you know the whole
20 statute and then you have to find a not guilty. And I say well it's not --
21 *Crawford* doesn't stand for the proposition that we give the exact
22 instruction, only word it negatively, it stands for the proposition that
23 you're entitled to instruction that that goes to the theory of defense,
24 right?

25 MR. PIKE: Right.

1 THE COURT: And so if you say if you fail to prove the identity
2 of the Defendant as a perpetrator of the crime, then you have to find him
3 not guilty. Or if you fail to prove that the perpetrator entered a residence
4 with the intent to steal at the time he entered, then you have to find him
5 not guilty of burglary, you know, that kind of stuff.

6 So I think this is designed to be something like that. My
7 concern is that we're talking about the specific intent to commit first-
8 degree murder as opposed to just having a specific intent to commit
9 murder --

10 MR. PIKE: That jury --

11 THE COURT: -- the jury get's -- is going to choose between
12 murder and you don't have to have a specific intent to commit first-
13 degree murder, you just have to have a specific intent to commit murder.

14 MR. PIKE: And I'd agree with that.

15 MS. BLUTH: But Judge, how -- I mean we already have -- we
16 already have that in regards to the conspiracy one where we say -- and
17 they're not numbered, so I apologize but: However, a defendant cannot
18 be liable under conspiracy theory of liability for acts committed by a
19 coconspirator unless the Defendant also had the intent necessary for the
20 particular crime.

21 So.

22 THE COURT: I agree, but this is a specific *Crawford*-based
23 instruction that speaks to a theory of their defense in which you have to
24 find him not guilty, not just the general instructions on conspiracy. It's if
25 you don't find -- if you find that somebody else did the shooting, you

1 can't find him liable for that unless that you find that he specifically
2 intended for that crime to be committed. And it's worded in a way that if
3 you don't find that, you got to find him not guilty. So I think that's
4 appropriate.

5 The question is going to be -- because one of the ones that I
6 provided was kind of a *Crawford* instruction that covered those various
7 things.

8 If you find that the Defendant was not the person who directly
9 committed these crimes and/or that he did not conspire to commit them
10 and or aided abed in their commission then you must find him not guilty
11 of the charges.

12 Now that one only applied to the homicide charge that's a
13 different then the carrying of the firearm charge. But -- I mean we can
14 pull that one out if this is what you want, because you're just really
15 concerned specifically with the homicide charge, right?

16 MR. PIKE: Right.

17 THE COURT: Okay. Me sense would be that you would want
18 the all-encompassing one because it speaks to not just the specific
19 intent but --

20 MR. PIKE: Right.

21 THE COURT: -- but the aiding and abetting language,
22 conspiracy, all that stuff.

23 MR. PIKE: Well, I'd like both of them, but that's -- you know.

24 And they'll think it's too cumbersome. If the Court feels it's
25 more appropriate to have the all-encompassing one --

1 THE COURT: Well --
2 MR. PIKE: -- then --
3 THE COURT: -- hold on, let me think about a way to word
4 that --
5 MR. PIKE: Thank you.
6 THE COURT: -- because I know what you are trying to get at
7 and I'm not disagreeing with that.
8 I would maybe add on to the instruction that I've given that
9 says in regard to the crime of murder, in order to find the Defendant
10 criminally liable for the acts of another, you must find that the State has
11 proven beyond a reasonable doubt that the Defendant had the specific
12 intent to commit the crime of murder.
13 MR. PIKE: That will be fine with the Defense.
14 MS. BLUTH: Okay. So will you say it slowly?
15 THE COURT: Yeah. So we're using the instruction if you find
16 the Defendant was not the person who directly committed the crimes --
17 MS. BLUTH: Got it.
18 THE COURT: -- it's further back in your packet --
19 MS. BLUTH: I have it.
20 THE COURT: -- one of the ones I provided. Okay. We will
21 have a second paragraph that says in regard to the crime of murder --
22 MS. BLUTH: Okay.
23 THE COURT: -- in order to find --
24 MS. BLUTH: Okay.
25 THE COURT: -- the Defendant criminally liable --

1 MS. BLUTH: Okay.

2 THE COURT: -- for the acts of another --

3 MS. BLUTH: Okay.

4 THE COURT: -- you must find that the State has proven

5 beyond a reasonable doubt that the Defendant had the specific intent to

6 commit the crime of murder.

7 MS. BLUTH: You could find that -- you must find that the --

8 THE COURT: It's in their instruction -- I'm reading off --

9 MS. BLUTH: Oh.

10 MR. ROGAN: Oh.

11 THE COURT: -- their instruction.

12 MS. BLUTH: Oh, well I didn't know that part. Okay. Got it.

13 THE COURT: I'm just inserting Defendant instead of Mr.

14 McNair. Because I --

15 MS. BLUTH: Got it.

16 THE COURT: -- really don't name people in my instructions;

17 the victim's name, Defendant's name, anything like that.

18 MS. BLUTH: Okay.

19 THE COURT: Okay. All right. So getting --

20 MS. BLUTH: So, I apologize, Judge, but say to find that the

21 Defendant had -- are you going to go -- that the Defendant had the

22 specific intent to commit the specific crimes of --

23 THE COURT: No. No, not -- not double specific because I

24 think Randy just got really excited about the word specific there.

25 MS. BLUTH: Yeah.

1 THE COURT: So it's just in order to find the -- in regard to the
2 crime of murder in order to find the Defendant criminally liable for the
3 acts of another you must find that the State has proven beyond a
4 reasonable doubt that the Defendant had the specific intent to commit
5 the crime of murder.

6 MS. BLUTH: Okay.

7 THE COURT: The -- you don't have to have the specific intent
8 for the weapon. You don't have to have specific intent for first-degree
9 murder --

10 MS. BLUTH: Correct.

11 THE COURT: -- and you --

12 MS. BLUTH: Got it. Cool.

13 THE COURT: -- don't have the specific intent to specifically
14 commit. It's just specific intent for murder.

15 MR. PIKE: Okay.

16 MS. BLUTH: Understood.

17 THE COURT: All right. The next one getting back to where
18 we were in the order was two or more persons accused of committing a
19 crime. That's the aiding and abetting instruction. The Defense is
20 proposing to insert in there, proving beyond a reasonable doubt. I am
21 going to leave it as is. I believe that we tell them the reasonable doubt
22 applies to all of their findings in the case in the reasonable doubt
23 instruction.

24 MR. ROGAN: Just -- I just have a question, where are we
25 going to insert that amended instruction that we just --

1 THE COURT: I'm not -- I don't have them entered into order
2 yet.

3 MR. ROGAN: Okay.

4 THE COURT: But I'll get that to you.

5 MR. ROGAN: Okay.

6 THE COURT: So let's see here. The next one in the State's
7 packet is when a guilty verdict must be unanimous -- oh you both have
8 that.

9 I don't really have any problem with the proposed changes
10 that the Defense has.

11 Do you guys have any thoughts?

12 MR. ROGAN: Judge, I just think it should say -- well -- I have
13 no problem with the latter two changes they made, but I still think it
14 should say, while a guilty verdict must be unanimous, the jurors need not
15 be unanimous on the means or the theory of liability in arriving at the
16 verdict.

17 Since we're talking about a found guilt for murder but the
18 theory of liability is immaterial, as long as they are all in agreement that
19 it's either first degree or second degree. So we're talking about a guilty
20 verdict. Nothing more.

21 THE COURT: Well, I mean, I never really thought of it, but the
22 reality is either verdict has to be guilt or not guilty has to be unanimous.
23 So I really like the idea of just using the word verdict there. Even though
24 I agree that the purpose of this one is to talk about theories of liability in
25 regard to a guilty verdict. Whether it says jurors or you I'm kind of not

1 real concerned with --

2 MR. ROGAN: Right.

3 THE COURT: -- but I'm going to go ahead and give the one
4 the Defense proposes with those changes.

5 All right. The next one is the Defendant is accused in an
6 Information. I would agree just to strike the word criminal there and just
7 use the word information.

8 MS. BLUTH: Okay.

9 THE COURT: Then the -- and then I would leave the second
10 paragraph as is. I mean the jury's determination, again, is to decide if
11 anybody's guilty of anything.

12 MR. PIKE: This -- this also encompasses voluntary
13 manslaughter.

14 THE COURT: Yeah, I know you didn't put it in there but I saw
15 that you had voluntary lessers, so it's probably good a time as any to
16 have that discussion. So what is the -- your desire is to get voluntary
17 instructions and lessers, okay?

18 MR. PIKE: That's correct.

19 THE COURT: So what's the evidence that lends itself to that?

20 MR. PIKE: If we take Mr. Mitchell and Mr. Johnson at his
21 word, he got into a fight, he was punching and the deceased had come
22 up out of a sitting condition and so it -- there may have been -- there
23 appears to be a sudden act upon which he was reacting. If it was
24 Mitchell Johnson that fired and if Mr. -- well -- anyway I just think that
25 that portion gets it to -- gets us to the point where we can put in a

1 voluntary manslaughter.

2 THE COURT: So you're -- you're conceding there that your
3 position is that Mr. McNair is not guilty? That he didn't do the shooting.
4 He didn't have any intent to kill anybody.

5 MR. PIKE: Right.

6 THE COURT: That just that Mitchell did it and we think
7 Mitchell's entitled to a self-defense for Mitchell -- or excuse me a
8 voluntary manslaughter for Mitchell?

9 MR. PIKE: Voluntary manslaughter. Now if he -- if he was not
10 acting -- if he was acting in self-defense and it was not a true self-
11 defense or you know then we -- then we could argue a second degree
12 for that shooting which would then -- if the jury found the necessary
13 requirements --

14 THE COURT: Well, you're going to get second degree. I
15 mean, I think that's pretty much a given in a homicide case is that you --
16 that the jury is allowed to, you know, decide between first and second
17 degree. But what -- I mean, what is the evidence of highly provoking
18 injury sufficient to give rise to the heat of passion that's irresistible, that
19 would result in a voluntary manslaughter situation?

20 MR. PIKE: As he approached, I believe Mr. -- well Mitchell
21 indicated that he came at him and he got up and was coming towards
22 him so it -- there had not been actually any contact at that point in time,
23 but it appeared as though it was going to be happening. So we're close
24 to it.

25 THE COURT: State?

1 MS. BLUTH: Well, I just -- I guess I'm failing -- I'm failing to
2 follow what the -- what is the exact word? But like the excitable passion
3 or -- I'm not understanding what the act was that evoked such passion?
4 It almost seems like they're saying through like a co-conspirator aiding
5 and abetting Mitchell's Johnson's intent to come as the Defendants and
6 that's what I'm not following. So I guess what I'm saying is that I don't
7 know if you can have your cake and eat it too. If your defense is hey,
8 our guy didn't do it and if Mitchell did it he would be a voluntary, I guess
9 that would be one thing, but --

10 THE COURT: I would say that the decision would begin and
11 end on that point, had you not amended your information to conspiracy
12 and aiding and abetting liability, because then now there's a theory that
13 you want to put forth to the jury that he's responsible as part in parcel of
14 somebody else's responsibility. In which point, you know, then they kind
15 of can boot strap into what defenses would the other person have if I'm
16 being alleged to be a conspirator with that. Okay.

17 MS. BLUTH: Can --

18 THE COURT: But --

19 MS. BLUTH: Oh, sorry. Go ahead.

20 THE COURT: -- now that being said. There's still got to be
21 evidence of the basis for the voluntary manslaughter. And I mean
22 particularly when you're pursuing a theory of we didn't do anything here
23 but we want a benefit on behalf of Mitchell, who's not on trial that there
24 was something that would allow him to get it.

25 And at best what you're telling me is because Mr. Phillips

1 stood up and started coming towards Mitchell that Mitchell was justified
2 in using violence against him. That's self-defense. I mean that's not
3 voluntary manslaughter. I mean you can't set up your own standard of
4 conduct to say well somebody stands up I'm going to kill him because
5 they may invoke some injury on me and I'm worried about that. I mean
6 that's either self-defense or it's, you know, murder, right?

7 And this is one of those things in every trial that I keep
8 bunches of notes on listening to what people have to say so we can
9 address this very issue and listening to Mr. Razo, the security guard, Ms.
10 Lopez, Mr. Romero, Mr. Johnson, Mr. Lesh, Mr. Saldana's stuff that I
11 anticipate is coming in because now everybody seems to understand
12 that he is not available and his given sworn testimony --

13 MS. BLUTH: Agreed.

14 THE COURT: -- I just don't see anything that justified
15 voluntary manslaughter instructions. Most particularly with all the people
16 that say that, I mean, at best looking at it for you all, Razo says he thinks
17 that the victim may have had a knife behind his back when he was
18 talking through the fence Mr. McNair, but that it was never displayed to
19 Mr. McNair. So nobody would have known about that.

20 And then thereafter everybody, Ms. Lopez, Mr. Johnson, Mr.
21 Romero all say the victim had no weapons. They never saw any
22 weapons in his hands. The detective said never found any weapon
23 anywhere autopsy or at the scene. That the victim didn't do anything to
24 instigate this, right? He walks away after the fence and he's pursued by
25 people that re-instigate this situation.

1 And then most importantly Mr. Johnson says -- and he's the
2 one you're relying on -- if Mr. Johnson is responsible for this maybe Mr.
3 Johnson was entitled to a voluntary, but Mr. Johnson says the victim got
4 up he was too close to me so I punched him. He never fought back. He
5 didn't have anything in his hand. I wasn't scared of him. I wasn't
6 threatened by him. After I punched him he said let's leave it alone and I
7 kind of felt -- I think he said I kind of felt bad or whatever and started to
8 walk away, and then he heard the gunshots.

9 So from him, the guy that you're trying to rely on for a
10 voluntary, he doesn't give us voluntary in anything and impeaching him
11 doesn't give us any kind of -- and I agree that a highly provoking injury
12 doesn't necessarily have to be physical but I just don't see that there's
13 anything from the victim that would be highly provoking injury that gives
14 rise to voluntary manslaughter instructions.

15 MR. PIKE: The one part that -- is provoking but it does
16 precede Mitchell being there is when Mr. Phillips is at the fence and is
17 going back and forth --

18 THE COURT: Right.

19 MR. PIKE: -- when --

20 THE COURT: But that doesn't --

21 MR. PIKE: -- my client --

22 THE COURT: -- involve Mr. Johnson.

23 MR. PIKE: No, I know but when Ms. -- when Mr. McNair
24 drives away he saw that the deceased followed him down to where the
25 gate was at --

1 THE COURT: Okay.

2 MR. PIKE: -- and then went there -- was there for awhile and
3 then it was when he walked back -- we don't know --

4 THE COURT: But we don't know about anything that
5 happened there and I can't -- you can't give the instruction based on
6 speculation, right? I mean, maybe we're having a different conversation
7 if you're client decides to testify and says something. I have no idea
8 what he would say, and then that would be revisited.

9 But under the state of the evidence right now, I don't see
10 anything that would justify voluntary manslaughter and I don't think any
11 case law stands for the proposition that just arguing with somebody
12 telling them to turn their music down no, constant back and forth, you
13 know, that kind of stuff somehow gives rise to a voluntary manslaughter
14 instruction to walk down the street and, you know, shoot somebody.

15 So based on everybody that's testified and provided some
16 kind of input as to what they saw and observed and heard, and these
17 interaction, I think you're confined to first or second-degree murder or
18 not guilty at this point.

19 All right. That being the case, this instruction -- and again
20 we'll revisit it once we get to the actual close of --

21 MR. PIKE: Okay.

22 THE COURT: -- evidence if anything changes in that regard.
23 But the instruction we had left off with was just the opening instruction
24 for the beginning of the murder instructions that references the open
25 charge of murder, so I'm going to leave that as -- take the word criminal

1 out so it just says information --

2 MS. BLUTH: Okay.

3 THE COURT: -- but I'm going to leave that confined to first or
4 second-degree murder.

5 MS. BLUTH: Got it.

6 THE COURT: And then I don't believe there's any objection to
7 murder is the unlawful killing.

8 MR. PIKE: No.

9 THE COURT: Malice aforethought is.

10 MR. PIKE: Well and I do have objection to that. I --

11 THE COURT: Okay.

12 MR. PIKE: And it's just the language, a heart fatally bent on
13 mischief. I think that's -- that's really archaic and it -- it lacks any sort of
14 legal meaning whatsoever. I mean, a heart fatally bent on mischief does
15 not have --

16 THE COURT: Bless you.

17 MS. BLUTH: Thank you.

18 MR. PIKE: -- a mindset as a -- you know, with an intent to
19 commit mischief would be something def -- different, but a heart fatally
20 bent on mischief is difficult to understand, apply, or even -- describe to
21 me what a heart fatally bent on mischief?

22 THE COURT: I don't make the law. I just apply the law. And
23 the -- you know, throughout the history of the evolution of homicide
24 instructions, as you know, through *Byford* and everybody else leading to
25 where we are now that's what the Supreme Court says the definition is

1 and I'm leaving that as it is.

2 All right. The next one is express and implied malice.

3 MR. PIKE: Yes.

4 THE COURT: I don't believe there is there any objections
5 there.

6 MR. PIKE: No.

7 THE COURT: I think the murder instructions you guys divided
8 up, that is one that I put together because it has all the elements of the
9 first paragraph. First paragraph is -- references willful, deliberate,
10 premeditated and then the next paragraph to describe those things. So I
11 am going to leave that one combined.

12 MR. PIKE: Okay.

13 THE COURT: Law does not undertake the measure in units
14 of time. If you guys --

15 MR. PIKE: They go first --

16 THE COURT: -- could divide that up. I think you -- you left
17 part of it off in yours, I think, Randy.

18 MR. PIKE: Let's see.

19 THE COURT: There's a second paragraph about the true
20 test.

21 MR. PIKE: What specifically?

22 THE COURT: Well there's two paragraphs to that instruction.
23 The first is the law does not undertake a measure in units of time.

24 MR. PIKE: Right.

25 THE COURT: And then the second paragraph begins the true

1 test is not the duration of time but rather the extent of the reflection. It's
2 the one that's in the State's packet.

3 MR. PIKE: All right.

4 THE COURT: All right. And then the --

5 MR. PIKE: Right about --

6 THE COURT: -- next one in the Defense packet --

7 MR. PIKE: You can have the evidence put on that--

8 THE COURT: -- I'm sorry?

9 MR. PIKE: Okay. That -- that would be appropriate to add a
10 second paragraph on this one.

11 THE COURT: Okay. The next one in the Defense packet is
12 just the definition of willfulness but I think we do have that, right?

13 MR. PIKE: That's on *Byford*.

14 THE COURT: Okay.

15 MS. BLUTH: Yeah.

16 THE COURT: The next one -- I think -- I don't think flight
17 applies here, it was just in what I provided to you all.

18 MS. BLUTH: Oh.

19 THE COURT: When I sent out that here's some from a recent
20 one, I'm assuming that's why you also have it in your packet. You guys
21 pulled it out, didn't you?

22 MS. BLUTH: Yeah.

23 THE COURT: Okay.

24 MR. PIKE: We put it in because I think there was evidence
25 that Mitchell called his wife, didn't go back into there, had her pull out,

1 and then he skedaddled.

2 THE COURT: Okay.

3 MS. BLUTH: Well, I don't -- I mean --

4 MR. PIKE: That's another legal term that's kind of archaic.

5 MS. BLUTH: Skedaddled.

6 THE COURT: Well --

7 MS. BLUTH: Yeah --

8 THE COURT: -- if you're not -- if you're not concerned that
9 your client fled --

10 MR. PIKE: No.

11 THE COURT: All right. You're not saying your client fled.
12 The State's not trying to make an argument that your client fled, so I
13 don't know that you want to give a flight instruction.

14 MS. BLUTH: Well, they want to use it to talk about Mitchell
15 flight --

16 MR. PIKE: Right.

17 MS. BLUTH: -- which I think it's inappropriate.

18 THE COURT: Yeah. I mean I don't want to give a legal
19 definition that pertains to a guy that's not on trial. I mean, you guys
20 could argue hey look Mitchell Johnson did this and he took off and ran
21 away. That's where we should be going, but I don't want them to
22 transpose this onto your guy in some fashion, when there's no allegation
23 that he fled.

24 MR. PIKE: No. He we -- he remained there and cooperated
25 with the police and --

1 MR. ROGAN: Changed his shirt and washed off --

2 MR. PIKE: -- gave a statement.

3 THE COURT: Okay. In your packet now I just found the one
4 that says the law does not undertake to measure in units of time and the
5 true test is not the duration of time. So you had it in there twice.

6 MR. PIKE: Okay. So we will move -- propose --

7 MS. BLUTH: What --

8 MR. PIKE: -- 28 to where we have 25.

9 THE COURT: Okay. The next one is the intention to kill may
10 be ascertained. I know you all have objection to that.

11 MR. PIKE: That's right. It -- the objection is that I think it's a
12 burden shifting instruction and it minimizes the burden of proof.

13 THE COURT: All right. State? It comes straight out of the
14 *Payne* case, by the way. I think that's where --

15 MR. ROGAN: Your Honor, this is a very important instruction
16 for the State and in every homicide case I've used it to remind the jury
17 that they don't have to have direct evidence of the Defendant's state of
18 mind because they can never have direct evidence of the state of their --
19 his state of mind. And they have to be able to use circumstantial
20 evidence to deduce that from all the facts and circumstances. So this is
21 a crucial instruction in that regard.

22 MR. PIKE: Not -- not crucial. There are cases where you
23 have direct evidence of somebody's intent. A murder for hire, they could
24 hire somebody and say I want you to kill him. Now kill him. It's a --

25 THE COURT: Well, I --

1 MR. ROGAN: That's not this one.

2 THE COURT: -- would agree that you can have direct
3 evidence, but I also think this is an appropriate instruction. *Payne* is 81
4 Nevada 503 that references this very -- this exact language in terms of
5 intention to kill. So I will give that instruction. I generally give that in
6 every case in which a weapon is involved.

7 The next one is prosecution is not required to present direct
8 evidence of the Defendant's state of mind. I didn't see any objection to
9 that.

10 The -- well wait a second --

11 MS. SIMPKINS: I think we had a proposed --

12 MR. PIKE: We --

13 MS. SIMPKINS: -- alternate.

14 THE COURT: You --

15 MR. PIKE: -- have a proposed alternate.

16 THE COURT: You guys have an al -- you guys have an
17 alternate to that, I'm sorry.

18 MS. SIMPKINS: Yeah.

19 MR. PIKE: That's all right.

20 THE COURT: To return a verdict of not guilty.

21 MS. BLUTH: I think they meant guilty, right? Right, guys?

22 MR. PIKE: Oh, unfortunately yes.

23 THE COURT: Okay. Return the verdict, thank you.

24 MR. PIKE: They can -- they can go ahead and just return the
25 not guilty for any reason.

1 MS. SIMPKINS: We're fine with that.

2 THE COURT: Well this kind of goes to the instruction that we
3 already worded for you, right? The *Crawford* instruction. That you can't
4 find him guilty -- well I guess that was in relation to the act of others,
5 actually.

6 MS. BLUTH: Yeah.

7 MR. PIKE: Right.

8 MS. BLUTH: But I mean this is actually completely contrary to
9 the law. We don't ever have to show direct evidence of defendant's
10 state -- I mean, how would you ever -- I guess -- I guess if you had the
11 Defendant saying I meant to murder someb -- I don't -- how would you
12 ever do that?

13 THE COURT: Well --

14 MR. PIKE: It doesn't say that they have to do direct evidence.
15 They can do it through direct or circumstantial evidence.

16 THE COURT: Well I think the import of this instruction -- and
17 look, I'm going to give the instruction as it's worded in the State's packet.
18 Like I say I know this is -- this is approved in case law as well. The
19 import of the instruction is that you don't have to have direct evidence to
20 find a particular state of mind. The Defense version is saying you might
21 be able to do it with direct evidence --

22 MS. BLUTH: Oh.

23 THE COURT: -- or you may be able to do it with direct
24 evidence, but the idea of the instruction is that that's not what's required
25 and just to point that out. So I'm going to give that one as is. The next

1 one in the packet is all murder which is not murder of the first degree is
2 murder of the second degree --

3 MR. PIKE: Right.

4 THE COURT: -- fine. I think yours, Randy, has -- just repeats
5 that first line for some reason.

6 MR. PIKE: That's correct.

7 THE COURT: Okay. So yeah --

8 MR. PIKE: Okay.

9 THE COURT: -- we'll set it by the side. The next one --

10 MR. PIKE: Um --

11 THE COURT: -- is just --

12 MR. PIKE: -- yeah.

13 THE COURT: -- that you guys have is one that I had given
14 you because it was a felony murder rule --

15 MR. PIKE: Right.

16 THE COURT: -- so it doesn't apply here.

17 MR. PIKE: So that doesn't apply in this one.

18 THE COURT: The next one is lesser included. You each
19 have a version of that. I think the Defense, you guys have two versions,
20 right? You have my version that I provided to everybody and then --

21 MR. PIKE: That's correct.

22 THE COURT: -- that you -- that you made the change to the
23 first sentence about proving beyond a reasonable doubt. And then you
24 have a second version? Which one is it that you're proposing?

25 MR. PIKE: Well on the proposed, it goes down to voluntary

1 manslaughter and the Court's indicated they're not going to grant that.

2 THE COURT: Right.

3 MR. PIKE: So on pro -- on the proposed 2, it's --

4 THE COURT: No, I'm looking at 33 of yours --

5 MR. PIKE: Oh, okay.

6 THE COURT: -- where you cite the statute.

7 MR. PIKE: Right.

8 THE COURT: I think the one that I've given to everybody has
9 all this language in there that what a lesser is. That you can find
10 somebody of the lesser if they find -- if they don't find the former and
11 they find the lesser beyond a reasonable doubt, and that they have to
12 give the benefit of the doubt if there's any question between the two
13 degrees.

14 MR. PIKE: All right. Thank you.

15 THE COURT: All right. And then I think the next one you
16 guys each had voluntary manslaughter instructions, which I've said are
17 not --

18 MR. PIKE: Right.

19 THE COURT: -- appropriate right now based on the evidence
20 that we have so we'll set those aside.

21 And then we have, you're instructed that if you find the
22 Defendant guilty you have to determine whether a deadly weapon was
23 used. I think what the State -- everybody put in there was the
24 manslaughter. So you're going to have to take that part out --

25 MS. BLUTH: I thought I did it.

1 THE COURT: So if you find the Defendant of murder in the
2 first or second degree, to simplify you don't have to say murder in the
3 first degree, murder in the second degree. And I guess you can if you
4 want it doesn't matter. But take out the voluntary manslaughter.

5 And then a deadly weapon is.

6 MR. PIKE: Yeah.

7 THE COURT: Do you guys have a deadly weapon is on the
8 State's packet or --

9 MR. PIKE: Well it's on the same one our Instruction Number
10 37 says you're instructed that a firearm is a deadly weapon.

11 THE COURT: Yeah. No, you've got the one that I sent out.
12 The State I don't think had it in their packet for some reason.

13 MS. BLUTH: Oh, we should have unless I deleted it.

14 THE COURT: So anyway -- well -- I'll give the one that I sent
15 out. The Defense has it marked as Number 37.

16 All right.

17 MS. BLUTH: Hey, Judge, I'm sorry, but did you want me to
18 add that just to the one at the bottom of the one we already had or do
19 you want me to put it in --

20 THE COURT: So that can be a separate instruction --

21 MS. BLUTH: Okay.

22 THE COURT: -- because the former is just telling them that
23 they have to make that decision and then the instructions will tell what
24 deadly weapon is.

25 MS. BLUTH: Got it.

1 THE COURT: Okay. Then the State's instructions then move
2 into carrying concealed weapon. The Defense instructions have
3 accessory after the fact, mere presence, and then carrying concealed
4 weapons. So let me set the mere presence and the accessory aside,
5 and let's do the concealed weapon stuff first. So a person who carries
6 concealed upon his or her person -- firearm. Okay. You both have the
7 same one for that. So we're good now.

8 Concealed weapon means. You both have that. Okay.

9 And then the State has a separate one that says carrying
10 upon a person means actually on the person on in a container carried by
11 the person, which I don't think we define anywhere else, do we? So.

12 Any objection to that?

13 MR. PIKE: Oh, it's an attorney general's opinion. It's --

14 THE COURT: Yeah, that's the logic for it. I saw that citation.
15 I mean, I agree that you can carry a gun concealed without carrying it on
16 you hip, your pocket, your sock, your underwear, whatever.

17 MR. PIKE: You can cover it with the shirt. You can cover it
18 with anything and it's just --

19 MS. BLUTH: I don't -- I mean, I don't --

20 MR. PIKE: I don't --

21 MS. BLUTH: We don't really care, to be honest with you, on
22 that one. I just thought when -- if someone was confused --

23 THE COURT: Yeah, I don't know that -- I don't -- I'm sorry to
24 interrupt. I don't know that this is the case that that's really an issue
25 because you're relying on the video evidence to show certain things

1 but --

2 MS. BLUTH: Agreed.

3 THE COURT: -- let's just go ahead and pull that out then.

4 MS. BLUTH: Sounds good.

5 THE COURT: Okay. Let's see here. Then the State -- the
6 next one in their packet is the one that I made the changes to earlier, the
7 *Crawford* instructions, for the Defense.

8 MS. BLUTH: Right.

9 THE COURT: And then the State has the mere presence that
10 I sent out. The same one the Defense has.

11 MR. PIKE: Right.

12 THE COURT: Right? Yes. Okay. And then -- then we get
13 back to some stock stuff, so. So let's pick up the one -- the Defense has
14 about accessory after the fact. So I mean, not to cut your argument off
15 at the legs, but from a -- an instructions standpoint, I don't think it's
16 appropriate to give them instructions for things that you're not on trial for.
17 So you can argue certainly that, you know, boy, maybe Mr. McNair is
18 guilty of being an accessory because he helped out Mr. Johnson or
19 something, but didn't intend to commit a murder. But they're not -- this
20 isn't a lesser or anything for them to consider, you know, finding him
21 guilty of anything.

22 MR. PIKE: So you're making -- finding it to say a lesser
23 related but not a lesser included?

24 THE COURT: I don't even know that it's a lesser related. I
25 mean, accessory after the fact to murder?

1 MR. PIKE: I don't --

2 THE COURT: That's a --

3 MR. PIKE: -- that is what they --

4 THE COURT: It's certainly less than murder and I guess you
5 can say it's kind of related to the crime of murder, but I don't know that
6 it's a I -- would I -- I would consider it a lesser related. I mean, it's kind of
7 a whole -- I mean, you could be accessory for after the fact for doing
8 something two weeks after a homicide occurs, right, for helping people
9 dispose of evidence or something like that. So --

10 MR. PIKE: Right.

11 THE COURT: -- yeah. I mean you can certainly argue to the
12 jury that, you know, maybe he did something to assist somebody
13 afterwards and that wasn't proper but he's not guilty of murder, but I
14 don't give them an instruction that defines a particular crime that they're
15 not asked to make any determinations of. Particularly since your
16 proposed instruction is telling them they can return a verdict for that.
17 Okay. And it's not -- it is certainly not a lesser included. All right. So
18 we're going to set that aside.

19 Then you have, although you are to consider all the evidence.
20 You both have that.

21 In your deliberation you may not discuss or consider the
22 subject of punishment. I know the Defense changed that to referencing
23 the proof beyond a reasonable doubt but I'm going to leave it as I was
24 saying earlier, the jury makes a decision as to whether somebody's
25 guilty or not guilty.

1 MR. PIKE: At -- in reference to this --

2 THE COURT: Mitchell Johnson?

3 MR. PIKE: No. In reference to any deliberation --

4 THE COURT: Okay.

5 MR. PIKE: -- the subject of punishment.

6 THE COURT: Okay.

7 MR. PIKE: This is a historical argument that I've made many
8 times. It has not gone anywhere and I understand that there is some
9 authority --

10 THE COURT: Hey -- hey, look, man, the law can be tectonic
11 plates sometimes. So that's how things get changed. Keep making
12 them.

13 MR. PIKE: And it -- juries back from the Black Act of 222
14 there -- the Black Act, where the 222 crimes that allowed for the death
15 penalty were still -- the jury was a community of peers so they knew
16 what the punishments were --

17 THE COURT: Right.

18 MR. PIKE: -- they -- there was something -- it was always part
19 of their cannon knowledge, and juries now are being asked to -- to do
20 everything in a -- in a -- basically a vacuum not knowing the
21 consequences of what's going to happen so it's -- there is some
22 authority that cited another cases. I've never won it. It's gone up to the
23 Supreme Court. They just didn't even address it, but --

24 THE COURT: But your point being, and, I'm sorry, that -- that
25 you think the instruction at all should not be given or what?

1 MR. PIKE: No, I think that the jury should be instructed as to
2 the potential punishments for all of the crimes.

3 THE COURT: Oh, you mean the lessers as well?

4 MR. PIKE: Yes

5 THE COURT: Oh, oh, oh. Well look, the only reason they're
6 instructed on the first-degree murder -- or the only reason they have
7 knowledge of the first-degree punishments is because we have to tell
8 the about, you know, potential penalty phase ahead of time.

9 The only reason to tell them about everything else would be
10 inviting them to think about punishment when they go in and -- so you're
11 saying that's what your argument's been. You think the jury should be
12 able to consider punishment ideas when their talking about guilt?

13 MR. PIKE: Right

14 THE COURT: Okay.

15 MR. PIKE: And I think --

16 THE COURT: Got it.

17 MR. PIKE: -- they should. I think that that's a function of
18 juries that has been removed --

19 THE COURT: Right.

20 MR. PIKE: -- legislatively, which is something that should be
21 part and parcel of what's going to -- of their decision.

22 THE COURT: I -- I -- hmm, it's a really interesting discussion.
23 I'm guessing there's -- there might even be a lot of prosecutors that
24 wouldn't disagree with you on that idea. Letting them know what the
25 potential punishments are for certain things.

1 Well, again it's not the law, so I can't -- I'm not going to be
2 making law. I'm not the activist guy, I'm just the application guy, but
3 keep making it.

4 MR. PIKE: I will.

5 MR. ROGAN: I don't think it's going to work.

6 MR. PIKE: Hey, hey, it's taken me 30 years --

7 THE COURT: Well, but look --

8 MR. PIKE: -- to change this.

9 THE COURT: -- I mean, I have cases where after a verdict
10 and jury has said what's the punishment for this and you tell them and
11 their like, that's it? And then obviously you're going to have cases where
12 they're like, oh my God, that's really substantial. And then you know
13 when you tell them something's mandatory prison versus probationable,
14 and, you know, depending upon the severity of it, and offense and
15 somebody's involvement, you'll get varied reactions from the jurors.
16 Okay.

17 The next two the Defense had are really dealing with Mitchell
18 Johnson potentially as an accomplice, which you guys didn't provide any
19 of those, but you've charged it as potentially aiding and abetting now,
20 which means that Mitchell Johnson's the accomplice, right?

21 MR. ROGAN: So far.

22 THE COURT: I know that their position is Mr. McNair is not
23 guilty. He didn't do anything. He didn't conspire with anybody or help
24 anybody commit a murder, Mitchell just did this. And your argument is
25 going to be Mr. McNair did it and Mr. Mitchell didn't do it -- or Johnson

1 didn't do anything really --

2 MS. BLUTH: Well, if --

3 THE COURT: -- other than kind of get in a fight.

4 MS. BLUTH: Yeah. Well, no it's kind of twofold. The position
5 is, is Michael McNair is the shooter.

6 THE COURT: Right.

7 MS. BLUTH: But if you believe that Mitchell Johnson is the
8 shooter, it doesn't matter anyways --

9 THE COURT: Okay.

10 MS. BLUTH: -- because Mike had the gun before and after
11 and so he's in it as a co-conspirator, aider, and abetter.

12 THE COURT: Right. But if they believe that Mitchell Johnson
13 is the shooter then his -- he's an accomplice. So he -- does that mean
14 the instructions are appropriate for somebody that's an accomplice?

15 MR. ROGAN: It does say, however, in their Instruction 44
16 Mitchell -- Mr. Mitchell wasn't given a benefit for his testimony --

17 THE COURT: Yeah, I don't know that --

18 MR. ROGAN: Yeah.

19 THE COURT: -- these are the appropriate --

20 MR. ROGAN: Right.

21 THE COURT: -- instructions. I'd have to go find my
22 accomplice instructions real quick. It think that they're basically on par,
23 but I would agree that I think there's some stuff that -- that --

24 MR. PIKE: Right.

25 THE COURT: -- you might have thrown in here Randy that I

1 would --

2 MR. PIKE: Right --

3 THE COURT: -- disagree with.

4 MR. PIKE: -- I think -- and I think the Court made it a clear
5 that the State didn't give them the benefit, but the Court gave them an
6 attorney.

7 THE COURT: I -- well I didn't say I gave them a benefit or
8 anything. I just wanted it clear for both you your sakes --

9 MR. PIKE: I understand.

10 THE COURT: -- that the Court appointed an attorney for Mr.
11 Johnson before he testified.

12 MR. PIKE: But I think that they should be cautioned that
13 they -- his testimony should considered with greater caution and other
14 witnesses should be corroborated.

15 THE COURT: Let me see if I can find my accomplice notes
16 real quick. I am trying to remember the last case that I had when I might
17 have given that instruction. Any thoughts?

18 MR. PIKE: We just have -- yeah, we just have this in the
19 *Arenas* case.

20 THE COURT: Did you guys give accomplice testimony
21 instructions?

22 MR. PIKE: Yes.

23 THE COURT: Okay. Let's see here.

24 MS. BLUTH: Did you -- you pulled these from *Majunique*,
25 right? Because --

1 THE COURT: Yes, but they're the same ones that I've given
2 in a lot of recent cases.

3 MS. BLUTH: But what I was just saying if these are --
4 because I couldn't remember if we did accomplice in *Majunique* but if --

5 THE COURT: No, because --

6 MS. BLUTH: -- these are from *Majunique* then we didn't.

7 THE COURT: -- Marshan didn't testify. So there was no
8 accomplice --

9 MS. BLUTH: Yeah, you're right. You're right --

10 THE COURT: -- testimony.

11 MS. BLUTH: -- you're right. You're right.

12 MR. PIKE: You know Mitchell has every reason to tie my
13 client into this. He corroborated his highly [unintelligible].

14 THE COURT: Well let's see here.

15 [Colloquy between the Court, the Clerk and Counsel]

16 THE COURT: Okay. Here we go. So I do have one, two it
17 looks like two.

18 The conviction shall not be had on the testimony of an
19 accomplice unless she is corroborated but other evidence which in itself
20 and without the aid of the testimony of the accomplice tends to connect
21 the Defendant with the commission of the offense and a corroboration
22 shall not be sufficient if it merely shows the commission of the offense or
23 she circumstances thereof. An accomplice is hereby defined as one
24 who is liable for prosecution for the identical offense charged against the
25 Defendant on trial. To be an accomplice, the person must have aided,

1 promoted, encouraged, or instigated by act or advice the commission of
2 such offense with knowledge of the unlawful pers -- is of the person who
3 committed the offense.

4 So that's the first one.

5 And the second one is: To corroborate the testimony of an
6 accomplice there must be evidence of some act or factor related to the
7 offense, which if believed by itself without any aid, interpretation, or
8 direction.

9 What is the statute?

10 MR. ROGAN: 175.291. Your first instruction, the first two
11 paragraphs is verbatim --

12 THE COURT: Straight out of the instruction --

13 MR. ROGAN: Right. Right

14 THE COURT: -- Okay.

15 MR. ROGAN: And then I think it just adds the definition of
16 accomplice --

17 THE COURT: Hold on --

18 MR. ROGAN: -- for the statute.

19 THE COURT: -- let me print these two pages here, real quick.

20 [Colloquy between the Court, the Clerk, and Counsel]

21 THE COURT: Here you go, guys. Take a look at these.

22 Obviously the one of them says Sasha Williams is an
23 accomplice as a matter of law because they had all stipulated to that in
24 that case.

25 I just e-mailed you the language in those two instructions so

1 you guys can cut and paste it into the instructions.

2 MS. BLUTH: Got it.

3 THE COURT: But those are the two that I've used.

4 MR. ROGAN: The only question I have is on the instruction --
5 the first instruction, line 10 through 12, where that language derives from
6 because the statute itself says -- which is incorporated on lines 7
7 through 9 already defines what an accomplice is.

8 MS. BLUTH: Isn't that the aiding and abetting definition?

9 THE COURT: The --

10 MR. ROGAN: It's some of it.

11 THE COURT: What's the statute again?

12 MR. ROGAN: 175.291.

13 THE COURT: Yeah, I couldn't tell you where that came from.
14 All I know is that's what we gave in that particular case. Yeah. I mean,
15 the aiding and abetting thing mentions, obviously, instigating by act or
16 advice -- or act and advice, et cetera.

17 MR. PIKE: Well and the indictment -- or excuse me, the
18 Information, let's see -- the State indicates that it could be done by --
19 pursuant to conspiracy to commit a crime was the intent of this crime
20 being committed, Defendant and unknown person aiding or abetting
21 and/or conspiring --

22 THE COURT: Right.

23 MR. PIKE: -- by acting in concert throughout.

24 THE COURT: So here's what I would say then. Take the last
25 paragraph off the first instruction and we'll combine the first instruction to

1 the Nevada statutory language of accomplices. And then we'll give that
2 one and I'm still going to give the second one though.

3 MS. BLUTH: Okay. So 10 through 12 is out?

4 THE COURT: Yes. 10 through 12 is out on Instruction
5 Number 1 --

6 MS. BLUTH: Okay.

7 THE COURT: -- third paragraph. And so we'll give that
8 instruction without that language and then we'll give the second
9 instruction as well.

10 MR. ROGAN: And that's fine.

11 THE COURT: Okay.

12 MS. BLUTH: Okay.

13 And Judge, I'm -- you're going to put these in an order, right,
14 because I'm just typing them in --

15 THE COURT: Yeah.

16 MS. BLUTH: -- it's not going to be in --

17 THE COURT: Yes, I'm going to put it all on there.

18 MS. BLUTH: Okay.

19 THE COURT: All right. And then we get to, during the course
20 of the trial what you can't do, you both have that.

21 When you retire to consider, you both have that.

22 If during your deliberations.

23 Now you'll listen to the arguments of Counsel.

24 And then we need to change the verdict form to eliminate the
25 voluntary manslaughter.

1 And then the Defense is also proposing a special verdict form,
2 correct?

3 MR. PIKE: That is correct, Your Honor.

4 THE COURT: Okay.

5 MR. PIKE: And I think based upon the charging document
6 that we -- it would behoove any review of this to determine whether or
7 not the jury found that Michael, Mitchell, or they couldn't decide but all
8 jurors felt that they were responsible for it.

9 THE COURT: I generally only give special verdict forms if it's
10 going to somehow impact, you know, a penalty hearing, like figuring out,
11 you know, if they found him felony murder and which felony predicate
12 did they decide was the basis for felony murder or whether or multiple of
13 them and how does that impact the ability to move forward on certain
14 aggravating circumstances. Not delineating out, you know, conspiracy,
15 aiding and abetting, who did what.

16 MR. ROGAN: The State also objects in regard to the special
17 verdict form. It invites the jury to consider the guilt or innocence of the
18 person who's not charged in this crime, that being Mitchell Johnson.
19 Specifically, line 17: The Jury finds unanimously that Mitchell Johnson
20 committed the homicide.

21 That's not their concern and they're instructed that it's not their
22 concern.

23 THE COURT: So --

24 MR. PIKE: Can we put in there that Mitchell Johnson
25 committed the battery that preceded the homicide as he --

1 THE COURT: Well --

2 MR. PIKE: -- testified to?

3 MR. ROGAN: It's the same --

4 THE COURT: -- you acknowledge --

5 MR. ROGAN: -- objection.

6 THE COURT: -- that -- I think this has got a lot of problems. I

7 mean, I get what you're getting at. The first thing I would say is that I

8 don't think the law requires any kind of special verdict for the purposes

9 of this kind of a case. The law tells a jury they don't have to be

10 unanimous on any particular theory of liability. And I don't know that I

11 would want to parcel it out in a way that you're proposing here, so I am

12 not going to give a special verdict.

13 All right. Then let's see here. Does the State have a copy of

14 the right to -- Defendant's rights regarding testimony in here or no?

15 MS. BLUTH: No --

16 THE COURT: Okay.

17 MS. BLUTH: -- but I will add it.

18 THE COURT: All right.

19 And if you want to wait a second, I'll get them in order for you,

20 so you'll know.

21 MR. ROGAN: Aren't we addressing self-defense?

22 MS. BLUTH: I thought you said you wanted to, no?

23 MR. PIKE: What?

24 MS. BLUTH: I thought before we started you said you wanted

25 to address self-defense.

1 MR. PIKE: Right. I think we're entitled to the self-defense.

2 THE COURT: Self-defense? Well that goes back to what we
3 were talking about on voluntary manslaughter. I mean, there's still --
4 what would be the theory of self-defense?

5 Again, if you're -- I mean, assuming you're basing this on
6 Mitchell Johnson, right, who said I wasn't scared, I was threatened, the
7 guy never hit me, I hit him and he said okay, let's just this alone and then
8 he got shot.

9 MR. PIKE: Well it may be for the Defense of others but then
10 that was required testimony in relationship to Mr. McNair's mindset.

11 THE COURT: Well, I mean, I can revisit that once we actually
12 close evidence, if there's anything else that gets added but the state of
13 things right now, not having anything from Mr. McNair about any about
14 that, I don't think that there's anything in their record that would provide
15 for self-defense instructions. And that's kind of that same review of all
16 those people that I talked about. But we can talk about that again
17 tomorrow, once we completely rest evidence.

18 MR. PIKE: Thank you, Your Honor.

19 THE COURT: Okay. All right. So let's see here. Give me
20 just like two minutes to get my thoughts here.

21 [Pause in proceedings]

22 THE COURT: Okay. So the first one is going to be it is now
23 my duty as Judge.

24 Number 2 would be, if in these instructions.

25 Number 3, An Information is but a formal method.

1 Number 4, To constitute the crime charged.
2 Number 5, The Defendant is presumed innocent.
3 Number 6, You are here to determine.
4 Number 7, The evidence which you are to consider.
5 Number 8, The credibility or believability.
6 Number 9, A witness who has special knowledge.
7 Number 10, When a witness fails.
8 Number 11 is going to be the Defendant's right to testify. So
9 we'll just put that one in there.
10 Number 12, The Defendant is not required to present any
11 evidence.
12 Number 13, A conspiracy is an agreement.
13 Number 14, It is not necessary in proving.
14 Number 15, When several parties knowingly and with criminal
15 intent join.
16 Number 16, A conspiracy to commit.
17 Number 17, When two or more persons are accused.
18 MR. PIKE: That's 16? I'm sorry --
19 THE COURT: That's 17.
20 MR. PIKE: 17.
21 THE COURT: Number 18, While a verdict must be
22 unanimous.
23 Number 19 and 20 will be Accomplice Number 1 and 2.
24 Number 21, In this case the Defendant is accused.
25 22, Murder is the unlawful killing.

1 23, Malice aforethought means.
2 24, Express malice is.
3 25, Murder of the first-degree is.
4 26, The law does not undertake.
5 27, The intention to kill.
6 28, The prosecution is not required to present direct evidence.
7 29, All murder which is not murder in the first-degree.
8 30, Where a person is accused of committing.
9 31, You are instructed that if you find the Defendant guilty.
10 32, A deadly weapon is.
11 33, A person who carries concealed.
12 34, Concealed weapon means.
13 35, The Defense *Crawford* instruction. That's the one you
14 asked earlier, Jeff, where we were going to stick it. So if you find that
15 the Defendant was not the person who directly committed.
16 And I think that in that first paragraph on -- that I say these
17 crimes, I think that needs to be changed since this is just a general
18 one -- the second paragraph is in regard to the crime of murder but the
19 first paragraph I'm going to change to if you find that the Defendant was
20 not the person who directly committed a crime and/or that he did not
21 conspire to commit it and/or aid and abet in its commission, then you
22 must find him not guilty of the crime.
23 Okay?
24 MS. BLUTH: [Mumbles], sorry. Must find him not guilty of the
25 crime.

1 THE COURT: Yeah.
2 Okay. 36, Mere presence.
3 37, Although you are to consider.
4 38, You may -- in your deliberation you may not discuss.
5 39, During the course of the trial.
6 40, When you retire.
7 41, If during your deliberation.
8 42, Now you'll listen to the arguments of Counsel.
9 All right. So go home. A long night for everybody, I know.

10 [Evening recess at 6:42 p.m.]

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

24

25


Brittany Mangelson
Independent Transcriber

1 JURL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

2
3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

MAR 06 2019

5 BY

Kory Schlitz
KORY SCHLITZ, DEPUTY

6 State of Nevada
7 vs
Michael McNair

CASE NO.: C-17-327395-1

8 DEPARTMENT III

9 **SECOND AMENDED JURY LIST**

- | | |
|--------------------------|--------------------|
| 10 1. Stephen Aguirre | 8. Paul Gustilo |
| 11 2. Maricar Martinez | 9. Ruth Devon |
| 12 3. Renee Robinson | 10. Ashley Padilla |
| 13 4. Dawn Evangelista | 11. Michael Carey |
| 14 5. Harry Alcantara | 12. David Patlan |
| 15 6. Patricia Stockwell | |
| 16 7. Lorna Stevens | |

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18 **ALTERNATES**

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26 C-17-327395-1
AJUR
Amended Jury List
4820919



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