

IN THE NEVADA SUPREME COURT

Electronically Filed  
May 03 2021 05:46 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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**Evaristo Jonathan Garcia,**

Petitioner-Appellant,

**v.**

**James Dzurenda, et al.**

Respondents-Appellees.

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On Appeal from the Order Denying Petition  
for Writ of Habeas Corpus (Post-Conviction)  
Eighth Judicial District, Clark County (A-19-791171-W)  
Honorable David M. Jones, District Court Judge

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**Petitioner-Appellant's Appendix in Support of Brief  
Volume 4 of 10**

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Federal Public Defender,  
District of Nevada  
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	2/2/2021	

Dated May 3, 2021.

Respectfully submitted,

Rene L. Valladares  
Federal Public Defender

/s/ Emma L. Smith  
Emma L. Smith  
Amelia L. Bizzaro  
Assistant Federal Public Defender



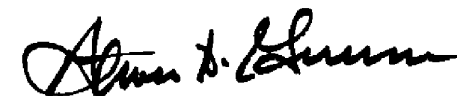
### **CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2021, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include:  
Alexander Chen.

/s/ Jessica Pillsbury  
An Employee of the  
Federal Public Defender

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02/10/2014 05:08:00 AM



CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	
	)	Case No. C262966
vs.	)	Dept. No. XV
	)	
EVARISTO JONATHAN GARCIA,	)	
	)	
Defendant.	)	
	)	

Before the Honorable ABBIE SILVER  
Thursday, July 11, 2013, 10:30 a.m.  
Reporter's Transcript of Proceedings

JURY TRIAL

APPEARANCES:

For the State: TALEEN PANDUKHT, ESQ.  
NOREEN DEMONTE, ESQ.  
Deputies District Attorney

For the Defendant: ROSS GOODMAN, ESQ.  
DAYVID FIGLER, ESQ.  
Attorneys at Law

REPORTED BY: RENEE SILVAGGIO, C.C.R. No. 122

Renee Silvaggio, CCR 122, ACCUSCRIPTS  
(702) 477-5191

FPD-0628

App.746

## I N D E X

State of Nevada v. Evaristo Jonathan Garcia

Case No. C262966

	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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STATE'S WITNESSES:

Jonathan Harper	5	26	54	60
Lary Sims	96	106	108	---
Maria Lopez	110	117	---	---
Ken Hardy	121	133	161,177	168,179
Voir Dire Examination	132	---	---	---
Dinnah Angel Moses	182	202	---	---

DEFENSE WITNESSES:

(None called.)	---	---	---	---
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<u>EXHIBITS MARKED AND ADMITTED INTO EVIDENCE</u>	<u>Marked</u>	<u>Admitted</u>
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State's Exhibits 76 through 84, respectively	3	99
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\* \* \* \* \*

1 Las Vegas, Clark County, Nevada

2 Tuesday, July 9, 2013, 12:30 a.m.

3 P R O C E E D I N G S

4 \* \* \* \* \*

5  
6 (State's Proposed Exhibits 64 through 84, respectively,  
7 State's Proposed Exhibits 90 through 95, respectively,  
8 State's Proposed Exhibits 100, 102 and 111, respectively,  
9 were marked for identification.)

10  
11 (The following proceedings were had in open  
12 Court in the presence of the jury panel:)

13  
14 THE COURT: Good morning, ladies and gentlemen.

15 We're back on the record on State of Nevada versus  
16 Evaristo Garcia, Case Number C262966.

17 Let the record reflect that the defendant is present  
18 with his attorneys, Mr. Figler and Mr. Goodman; and also for  
19 the State, Ms. Pandukht and Ms. Demonte.

20 We're in the presence of the jurors.

21 I sincerely apologize. I really don't like to have  
22 a jury sit and have to wait, especially when you waited one  
23 hour this morning.

24 My calendar was, as much as I tried to move it, it's  
25 right after the 4th of July, and it was like a double calendar,

1 so, again, I apologize for that inconvenience.

2 I really do try to get you in and out without  
3 sitting out there waiting.

4 It just -- it's one of those things and I apologize.

5 So having said that, we're still in the State's case  
6 in chief, and we're going to start with the next witness.

7 MS. DEMONTE: Thank you.

8 State calls Jonathan Harper.

9 THE MARSHAL: He's in the restroom. He'll be right  
10 back.

11 (Pause in proceedings.)

12 MS. DEMONTE: Okay.

13 THE MARSHAL: Could you -- I'm sorry, remain  
14 standing and raise your right hand, please.

15

16 JONATHAN HARPER

17 called as a witness on behalf of the State,

18 having been first duly sworn,

19 was examined and testified as follows:

20

21 THE WITNESS: Yes.

22 THE CLERK: Please be seated.

23 State and spell your full name for the record,  
24 please.

25 THE WITNESS: Jonathan -- spell it?

1 THE CLERK: Please.

2 THE WITNESS: J-O-N-A-T-H-A-N.

3 MS. DEMONTE: What's your last name?

4 THE WITNESS: Harper.

5 MS. DEMONTE: Can you spell that?

6 THE WITNESS: H-A-R-P-E-R.

7 MS DEMONTE: May I proceed, Your Honor?

8 THE COURT: Yes, you may.

9 MS. DEMONTE: Thank you.

10

11 DIRECT EXAMINATION

12 BY MS. DEMONTE:

13 Q. Jonathan, how old are you today?

14 A. 23.

15 Q. Back in 2006 that made you about 15?

16 A. Yes.

17 Q. When you were 15 years old, were you part of a gang?

18 A. Yes.

19 Q. What gang was that?

20 A. PL. Puros Locos.

21 Q. Okay. And when did you become a member of that  
22 gang?

23 A. Several months before, before my injury.

24 Q. Okay. You had a head injury?

25 A. Yes.

1 Q. Was that in 2006 as well?

2 A. Yes.

3 Q. To be exact that's February 18th of 2006?

4 A. Yes.

5 Q. Okay. So you became a member of Puros Locos, you  
6 said, several months prior to that?

7 A. Yep -- yes.

8 Q. Yes? Okay.

9 How did you become a member?

10 A. Through a friend -- you know --

11 Q. Which friend?

12 A. Can you be more -- precise on the question?

13 Q. Oh, okay. How did you first learn about the gang?

14 A. Again, through a friend.

15 Q. Which friend was that?

16 A. Edshel.

17 Q. Do you remember Edshel's last name?

18 A. Calvillo.

19 Q. And how long have you known Edshel?

20 A. I've known Edshel since sixth grade.

21 Q. Did you and Edshel become members of this gang  
22 together?

23 A. No.

24 Q. Okay. Did you become members of the gang at the  
25 same time?

1           A.     No.

2           Q.     Who was in the gang first?

3           A.     Edshel.

4           Q.     Okay. And is he the one that brought you into the

5 gang?

6           A.     He introduced me.

7           Q.     Okay. And at some point you yourself became a

8 member; correct?

9           A.     Yep -- yes.

10          Q.     And how did that happen?

11          A.     Just influence.

12          Q.     Influenced?

13          A.     Yeah, just influenced in the crowd around me. You

14 know, I was just into bad things.

15          Q.     Okay. Now, in order to become an actual member, did

16 you have to do something?

17          A.     Um, just fight and tag.

18          Q.     Fighting and tagging?

19          A.     Yep -- yes.

20          Q.     Do you know what "jumped in" is?

21          A.     Yes.

22          Q.     Did that happen with you?

23          A.     Yes.

24          Q.     Okay. What is jumped in?

25          A.     When you got other people around you, seven people,



1 and they're beating your ass for over 30 seconds.

2 Q. And you did that?

3 A. Yes.

4 Q. Who jumped you in?

5 A. It was Edshel, Giovanny, Puppet, Chavi --

6 Q. Chavi?

7 A. Yep. And then Stranger.

8 Q. Okay. And you said a couple of nicknames. Let me  
9 start with Chavi, who is Chavi?

10 A. Salvador.

11 Q. Do you know Salvador's last name?

12 A. Garcia.

13 Q. Who is Puppet?

14 A. Puppet is Emmanuel.

15 Q. Do you know Emmanuel's last name?

16 A. No.

17 Q. Okay. Who's Stranger?

18 A. I don't know his name.

19 Q. That's okay, but he was in the gang?

20 A. Yes.

21 Q. And you used Giovanny's name. Do you know what  
22 Giovanny's nickname was?

23 A. Little One.

24 Q. What was Edshel's nickname?

25 A. Danger.

1 Q. And once you got jumped in, did you get a nickname?

2 A. Yes.

3 Q. What --

4 A. Silent.

5 Q. Now, you said you had to do tagging and fights. How  
6 often would you get into fights?

7 A. Pretty much every day.

8 Q. And when you got into these fights, would these be  
9 for the gang?

10 A. Before and after.

11 Q. Sorry, would the fight be for the gang?

12 A. Like fighting?

13 Q. Yes.

14 A. Yeah, before and after. I would fight before, you  
15 know, and then after, fighting when I was in it.

16 Q. When you were in the gang you got in fights?

17 A. Yeah.

18 Q. I'll leave it at that.

19 Tagging, what is tagging?

20 A. Tagging is when you got spray paint and you're  
21 tagging on the walls.

22 Q. And what would you spray paint on the walls?

23 A. PL.

24 Q. Okay. And how often did you do that?

25 A. Um, again, pretty much every day.

1 Q. Okay. Now, Jonathan, a couple of weeks -- actually,  
2 let me just show you a couple pictures to see if you recognize  
3 any of these people.

4 Putting on the screen State's Exhibit 50, who is  
5 that?

6 A. Giovanny.

7 Q. And is that Little One?

8 A. Yes.

9 Q. Next putting on the screen 58, who is that?

10 A. Puppet.

11 Q. And that's Emmanuel?

12 A. Yes.

13 Q. Okay. Did Puppet have a girlfriend?

14 A. Yes.

15 Q. Do you remember her name?

16 A. Stacey.

17 Q. State's Exhibit 86, is that her?

18 A. Yes.

19 Q. All right. Now, a couple of weeks prior to you  
20 getting hurt, do you remember being with Puppet that day?

21 A. Yes.

22 Q. Okay. And where were you?

23 A. At Sal's.

24 Q. Okay. And I'm talking in particular about  
25 February 6th of 2006. You were at Sal's house?

1 A. Apartment.

2 Q. Sal's apartment.

3 And who was with you at Sal's apartment?

4 A. It was me, Puppet, Stranger -- I mean Danger --

5 Q. Danger is Edshel?

6 A. Yes.

7 Q. Okay.

8 A. -- Sal and E.

9 Q. And who is E?

10 A. Jonathan?

11 Q. He goes by the name Jonathan?

12 A. Yeah, I think that's his real name.

13 Q. Do you see E in the courtroom today?

14 A. No.

15 Q. Okay.

16 (Sotto voce at this time.)

17 MR. GOODMAN: Yeah, Your Honor, can we approach with  
18 a question of admissibility.

19 THE COURT: All right. Bench conference, please.

20 (Bench conference outside the presence of the jury  
21 reported as follows:)

22 MR. GOODMAN: The -- the prosecutor is about to  
23 admit a booking photo of Evaristo Garcia.

24 THE COURT: But you can't do it. You can't  
25 necessarily admit that photo through this witness, so they can

1 show him this. Go ahead.

2 THE REPORTER: I can't hear.

3 MS. PANDUKHT: Sorry. Can I get to the microphone?

4 THE COURT: I don't think they're trying to admit --

5 MS. DEMONTE: I'm not trying to admit it. I'm going  
6 to show it to him and not show it to the jury, and just give it  
7 right back to the clerk. And then I'll admit through it to a  
8 person who has knowledge as to when it was taken.

9 MR. GOODMAN: But the objection is foundation is  
10 when the photograph was taken of them, what the date was.

11 MS. DEMONTE: Like I said, I'm not seeking to admit  
12 it through this witness. I'm just going to ask this witness if  
13 he recognizes the person in State's Exhibit whatever it's going  
14 to be.

15 MR. GOODMAN: It's just I can't propose exhibit when  
16 she wants the witness to --

17 THE COURT: So you have an objection to it. What's  
18 your objection?

19 MR. GOODMAN: The objection is it should not be  
20 published to the jury.

21 THE COURT: It's not going to be published to the  
22 jury?

23 MS. DEMONTE: It's not.

24 THE COURT: Oh, okay. That's fine, of course.

25 (End of bench conference.)

1 (Proceedings in the presence of the jury.)

2 THE COURT: All right. Thanks. Go ahead.

3 BY MS. DEMONTE:

4 Q. Jonathan, you looked around the courtroom, and you  
5 did not see E; correct?

6 A. No.

7 Q. Okay.

8 MS. DEMONTE: May I approach, Your Honor?

9 THE COURT: You may.

10 BY MS. DEMONTE:

11 Q. Jonathan, showing you State's Proposed Exhibit 111,  
12 do you recognize the person in that picture?

13 A. Yes.

14 Q. Is that E?

15 A. Yes.

16 Q. Okay. And does that look like E back when you knew  
17 him?

18 A. Yes.

19 Q. Thank you.

20 And, um, while you're at Sal's house with E,  
21 Puppet, Sal, Stranger and Edshel, does -- does something  
22 happen?

23 A. Someone got a phone call and said there's going to  
24 be a fight after school, and they wanted us to come.

25 Q. And who told you that you had -- you were going to

1 go to the school?

2 A. Sal.

3 Q. Okay. And did you then go to the school?

4 A. Yes.

5 Q. Okay. Do you know who called?

6 A. Little One.

7 Q. Is that Giovanny?

8 A. Yes.

9 Q. Okay. Now, why were you going to the school?

10 A. I was going to -- I was going there to fight and  
11 back up a friend -- he used to be a friend.

12 Q. To back up Little One?

13 A. Yes.

14 Q. Did you know who you were going to fight with?

15 A. No. I just know that there was going to be a fight.

16 Q. Okay. So how did you get to the school?

17 A. I rode with Puppet in his El Camino.

18 Q. Okay. Showing you --

19 A. A black El Camino.

20 Q. It's black? Or do you remember?

21 A. Or gray, dark gray.

22 Q. State's Exhibit 63, is that Puppet's El Camino?

23 A. Yes.

24 Q. Okay. And who rode with you in Puppet's El Camino?

25 A. It was me, E, Stacey and Puppet.

1 Q. Okay. And now, where in the car were you when you  
2 were riding to school?

3 A. I was in the back.

4 Q. The -- the bed that we can see there (indicating)?

5 A. Yes.

6 Q. And was anybody in the bed with you?

7 A. No.

8 Q. Okay. And who was in the front seats?

9 A. It was E, Stacey and Puppet.

10 Q. Now, before you left Sal's house, did you see any  
11 weapons?

12 A. Puppet's nine.

13 Q. Puppet's nine?

14 A. Yeah, Emmanuel's.

15 Q. Okay. Where did you see that?

16 A. On his hip.

17 Q. On whose hip?

18 A. On Emmanuel's hip.

19 Q. Did you see what Puppet did with it?

20 A. Gave it to E.

21 Q. And did that happen at Sal's house?

22 A. No. It was before we got in the car.

23 Q. Okay. But were you still at Sal's apartment  
24 complex?

25 A. Yes.



1 Q. All right. Once you got in the car where did you  
2 go?

3 A. We were driving to the school.

4 Q. Okay. Do you remember where that school was?

5 A. Washington and Pecos.

6 Q. Okay. Now, were there other people that were also  
7 going to come to the school with you?

8 A. Yes, but we got there first.

9 Q. Okay. Who was going to come too?

10 A. Danger.

11 Q. And Danger is Edshel?

12 A. Yes.

13 Q. Okay.

14 A. Edshel, Edshel's brother, Sal, uh -- I don't -- so  
15 there was Sal, Danger, Danger's brother.

16 Q. Danger's brother, what's Danger's brother's name?

17 A. Scrappy.

18 Q. Do you know his real name?

19 A. Brian.

20 Q. And he's -- Brian and Edshel are brothers?

21 A. Yeah.

22 Q. Okay. Did Edshel have another brother also in the  
23 gang?

24 A. He was not a part of the gang, but he did have an  
25 older brother.

1 Q. Okay. What was his name?

2 A. Arian (phonetic).

3 Q. All right.

4 THE REPORTER: Can you spell that?

5 THE WITNESS: Me?

6 THE REPORTER: Yeah.

7 THE WITNESS: No, I can't.

8 MS. DEMONTE: I can give you the spelling later.

9 BY MS. DEMONTE:

10 Q. All right. Now, you said you got to the school  
11 first?

12 A. Yes.

13 Q. What happened when you got to the school?

14 A. It was just a big -- it was a big brawl.

15 Q. How -- now, where was this brawl taking place?

16 A. Right there in the middle of the parking lot.

17 Q. Now, how many people were in this big brawl?

18 A. It was Giovanni by himself at the time, and then it  
19 was 15 people around him, you know. And then we got there, and  
20 it was like -- and then it was me, E and Puppet.

21 Q. What was E wearing?

22 A. A gray hoody.

23 Q. Okay. Now, you said Giovanni was fighting by  
24 himself at first. Who were you fighting with?

25 A. I ran to the circle and punched the same person that

1 he was fighting.

2 Q. Can you describe this person?

3 A. He was big and fat.

4 Q. Okay. And then what happened?

5 A. And then the same person -- Puppet jumped in the  
6 circle -- we all jumped in the circle and pretty much fought  
7 the same dude because he was bigger than everyone.

8 Q. Really big fat guy?

9 A. Huh?

10 Q. Really a big fat guy?

11 A. Yep.

12 Q. Okay.

13 A. And then I got sideswiped by another person that was  
14 a part of that group, and I --

15 Q. How do you know he was part of that group?

16 A. Because he was fighting with them.

17 Q. Okay. And what happened next?

18 A. He punched me and then me and him started fighting.

19 Q. And did you know who this person was?

20 A. I didn't know him, like, personally, but I know that  
21 his name was Diablo.

22 Q. Okay. And did you know if he was part of any gang?

23 A. He was part of Brown Pride.

24 Q. Now, would --

25 MR. FIGLER: Objection, Your Honor, foundation.

1 THE COURT: Well, it's not timely. It's already  
2 been answered.

3 BY MS. DEMONTE:

4 Q. Now, when you were a member of Puros Locos, were  
5 there other gangs that you would fight with?

6 A. Um, other Surenos.

7 Q. Other Surenos?

8 A. Yeah.

9 Q. Okay. Can you name some of them?

10 A. No.

11 Q. That's okay.

12 So what happened after you got in the fight with  
13 Diablo?

14 A. We started fighting, and then the kid that started  
15 the fight or all the -- all that ruckus with Giovanny, he ran  
16 out of the circle.

17 Q. Can you describe that kid for me?

18 A. He was kind of -- not tall, taller, but he was tall  
19 and lanky.

20 Q. Was he about your age?

21 A. Yes.

22 Q. Okay. How do you know he started it with Giovanny?

23 A. Because Giovanny was talking about somebody that he  
24 was having a problem with because he's talking to a girl, and  
25 they didn't like that.

1 Q. Okay.

2 A. And that's how all that started.

3 Q. All right. So you thought this was the person  
4 Giovanni had trouble with?

5 A. Yeah, because they -- the whole fight started -- I  
6 mean stopped, and they ran out of the circle, and then they  
7 started chasing the kid.

8 Q. Who started chasing the kid?

9 A. Giovanni and E.

10 Q. Okay. What was Giovanni wearing?

11 A. A white shirt.

12 Q. Okay. And were you running with Giovanni and E?

13 A. I was running -- they were running this way  
14 (indicating), and I was running this way (indicating).

15 Q. Okay. So --

16 A. And we were like 50 feet apart.

17 Q. Could you hear Giovanni and E talking at all?

18 A. Yeah. They were arguing with -- for the gun.

19 Q. What were they saying?

20 A. Give me the gun.

21 Q. Who said that?

22 A. Giovanni. And then E, he said: Nah, it's cool --  
23 Nah, I got it.

24 Q. He said: Nah, I got it?

25 A. Yeah.

1 Q. What happened next?

2 A. Kid ran across the street, traffic's passing this  
3 way, passing that way, and E's in the middle, and he shot him.

4 Q. How many times did he shoot?

5 A. The first one hit him, and then he ran up to him  
6 and, uh, dumped a whole -- loaded the whole clip in the kid.

7 Q. Okay. Where was he when he was doing that?

8 A. The kid was on the floor.

9 Q. Okay. And he was still shooting?

10 A. Yeah.

11 Q. Okay.

12 A. And then he -- he heard the -- he heard the  
13 principal, he's like: Shots fired, shots fired.

14 And everything went hectic.

15 Q. Did you see what happened -- where E went right  
16 after that?

17 A. He ran in towards the neighborhood.

18 Q. Okay. And where did you go after that?

19 A. I ran the opposite way, out -- out to the gang and  
20 started running through the field.

21 Q. At some point did you make it back to Sal's house?

22 A. Yes.

23 Q. When was that?

24 A. 15 to 20 minutes after.

25 Q. Okay. And did you see E later that day?

1 A. Yes.

2 Q. Did you talk to E?

3 A. For a split second.

4 Q. What did he say to you?

5 A. I got him. You know, I gotta go.

6 MR. GOODMAN: Objection, Your Honor. I don't think  
7 there's foundation laid for this.

8 THE COURT: Overruled.

9 BY MS. DEMONTE:

10 Q. He said: I got him?

11 A. Yes.

12 Q. Okay. Did you talk to E about where the gun was?

13 A. No.

14 Q. Okay. Did you talk to somebody else about where the  
15 gun was?

16 A. They were just talking about it, you know, and I  
17 just heard it over them talking, and it was in the toilet.

18 Q. Okay. I'm sorry, you overheard people talking?

19 A. Yes.

20 Q. Who did you overhear talking?

21 A. Sal --

22 THE COURT: Actually, I'm going to -- I'm going to  
23 allow those statements in subject to the State connecting up  
24 the foundation if the State wants to with another witness.

25 MR. GOODMAN: I was just going to say, Your Honor --

1 THE COURT: That's fine. I'm going to -- I'll  
2 sustain it if -- if they don't, and we can move to strike that  
3 part of the testimony.

4 I'm going to -- I'd let it in.

5 MS. DEMONTE: I'm sorry, which statement is it?

6 MR. GOODMAN: And the foundation --

7 THE COURT: I understand what the foundation is,  
8 okay? So what I'm telling you is, for the record, it will all  
9 be stricken if it's not connected up through the State through  
10 another witness.

11 MR. GOODMAN: Another felony --

12 THE COURT: If there was an identification on  
13 Exhibit 111 --

14 MR. GOODMAN: No.

15 THE COURT: So through the admission of that, I'm --  
16 I'm not going to bring in another witness because I think,  
17 based on what I know from the bench, it's going to be connected  
18 up.

19 MR. GOODMAN: But the other foundational objection  
20 was when did they have this conversation with E?

21 THE COURT: Oh, I'm sorry. When you said  
22 foundation, I was thinking --

23 MR. GOODMAN: No -- no, that as well, but the  
24 witness --

25 THE COURT: Okay. Sorry. I was thinking more as



1 far as identification --

2 MR. GOODMAN: Like to lay the foundation for that.

3 MS. DEMONTE: I already asked him that, I'll ask him  
4 again.

5 THE COURT: Okay, that's fine. And -- and like I  
6 said, if it's not connected up, then that part of the testimony  
7 that we're talking about right now will be stricken.

8 MS. DEMONTE: Understood, Your Honor.

9 THE COURT: Okay. So I've let it in. It is what it  
10 is.

11 MS. DEMONTE: Thank you.

12 BY MS. DEMONTE:

13 Q. When E said to you I got him, was that later this  
14 same day?

15 A. Later the same night?

16 Q. I'm sorry, was it -- this happened at night, didn't  
17 it?

18 A. Yes.

19 Q. Okay. When did you see E again?

20 A. The -- the same night. You know, just for a split  
21 second.

22 Q. Okay.

23 A. We were at -- we were at Sal's.

24 Q. At Sal's house? Okay.

25 And -- now, you said you overheard people

1 talking about what happened to the gun. Who did you overhear?

2 A. Puppet.

3 Q. Okay. Now, Jonathan, a couple weeks after this,  
4 you -- you got shot in the head, didn't you?

5 A. Yes.

6 Q. Okay. And do you have any symptoms because of that?

7 A. No.

8 Q. Okay. Does it affect how you talk?

9 A. Yes.

10 Q. And how you move?

11 A. Yes.

12 Q. All right. And can you explain that for me?

13 A. How do you want me to explain it?

14 You know, I walk with a limp. I got a speech  
15 impediment. You know, my whole left side is like a stroke  
16 victim.

17 Q. Okay. But does -- how is your memory?

18 A. My memory is good.

19 Q. Okay.

20 A. You know.

21 Q. And as you sit here today, are you telling us things  
22 because you remember them?

23 A. Yes.

24 MS. DEMONTE: Thank you.

25 I'll pass the witness.

1 THE COURT: Cross-examination.

2 MR. GOODMAN: Thank you, Your Honor.

3

4 CROSS-EXAMINATION

5 BY MR. GOODMAN:

6 Q. Jonathan, are you taking any medication?

7 A. Yes.

8 Q. What -- what type of medication are you on?

9 A. I'm on seizure pills.

10 Q. Why do you take seizure pills?

11 A. Because chemicals in my head is -- they're not  
12 right. So if I don't take them, my -- the levels will get low,  
13 and if I do take them, my levels get -- they'll stay right.

14 Q. You don't operate well under stress, do you?

15 A. Stress?

16 Q. Yeah.

17 A. I don't think anybody does.

18 Q. Well, if you get -- if there's a stressful situation  
19 for you, then you can go into a seizure; correct?

20 A. Yes.

21 Q. All right. You gave many statements in this case  
22 that we're talking about today; correct?

23 A. Um, what I know I only gave one statement.

24 Q. Okay. So you talked to police; correct?

25 A. Yes.

1 Q. Okay. You gave testimony at a Preliminary Hearing;  
2 correct?

3 A. Yes.

4 Q. Okay. And you've met with the prosecutors quite a  
5 bit, haven't you?

6 A. Them?

7 Q. Yes.

8 A. Yes.

9 Q. Okay. And, in fact, just right outside before you  
10 came in today, you were out there meeting with the prosecutors,  
11 weren't you?

12 A. Yes.

13 Q. And you were -- and you were going over your  
14 testimony today; correct?

15 A. No.

16 Q. Well, what were you talking to the prosecutors about  
17 right before Court?

18 A. There was nothing, like -- it was about here, but it  
19 was nothing serious, like, you know, they were telling me  
20 something.

21 Q. So they weren't going over what -- what questions  
22 that they were going to ask you today?

23 A. No, they didn't.

24 Q. How many times have you gone over to the  
25 prosecutor's office to rehearse or review your testimony for

1 today?

2 MS. DEMONTE: Objection, argumentative.

3 THE COURT: Overruled.

4 THE WITNESS: Only once.

5 THE COURT: Let me just strike -- hold on.

6 I'm going to actually sustain that based on the  
7 order that you just used.

8 Re-ask it.

9 MR. GOODMAN: Okay.

10 THE COURT: Thanks.

11 BY MR. GOODMAN:

12 Q. How many times have you gone over to the  
13 prosecutor's office?

14 A. Once.

15 Q. How many times have the DA's investigators gone over  
16 to your house to talk to you about your testimony?

17 A. Once, but I was not there.

18 Q. Okay. So according to you, when did you speak to  
19 the prosecutors last about your testimony?

20 A. It was last week.

21 Q. Okay. And how long did you meet with them?

22 A. An hour at the most.

23 Q. Okay. And did they go over your recorded statement  
24 that you gave to the police?

25 A. Yes.

1 Q. Did they go -- and did they go over your testimony  
2 that you gave under oath at a Preliminary Hearing?

3 A. No.

4 Q. So they only reviewed the Voluntary Statement with  
5 you?

6 A. Yes, the original statement.

7 Q. Okay. To the police; correct?

8 A. Yes.

9 Q. And that was done approximately about five weeks  
10 after you got shot in the head; correct?

11 A. Yes.

12 Q. Okay. Now, you -- there's a lot of different  
13 statements here, so if you want me to slow down, you just tell  
14 me because I'm not here to try to confuse you. Okay?

15 A. Okay.

16 Q. When you first gave a statement to the police, you  
17 told the police that you were at Sal's house; correct?

18 A. Yes.

19 Q. Okay. And that Giovanni called to have you come  
20 over to the school; correct?

21 A. Yes.

22 Q. And that Puppet, Emmanuel Lopez, came to pick you  
23 up; correct?

24 A. He was already there.

25 Q. Didn't you just testify on direct that

1 Emmanuel Lopez came to pick you up?

2 A. He was already there.

3 Q. Oh, at the house?

4 A. Yes.

5 Q. Okay. But Lopez came with his girlfriend, Stacey;  
6 correct?

7 A. Yes.

8 Q. Okay. And then you jumped into the car with  
9 Puppet -- with Lopez and Stacey; correct?

10 A. Yes.

11 Q. Okay. And you remember telling the police that --  
12 that Giovanny was there; correct?

13 A. At the school?

14 Q. At Sal's house.

15 A. At the school?

16 Q. At Sal's house.

17 A. Giovanny?

18 Q. Yeah.

19 A. No, Giovanny was at school.

20 Q. Okay. And do you remember telling the police that  
21 Edshel, or Danger, was at the house?

22 A. Yes.

23 Q. Okay. But you didn't mention that Evaristo Garcia  
24 was at the house; did you?

25 A. He was there.

1 Q. Okay.

2 MR. GOODMAN: If I may approach, Your Honor?

3 THE COURT: You may.

4 MR. GOODMAN: Thank you.

5 MS. DEMONTE: Page?

6 MR. GOODMAN: Page 5.

7 BY MR. GOODMAN:

8 Q. I want to have you look to -- and this is your  
9 statement -- at this question and then your answer. Okay?

10 And then -- and then once you're done, you can  
11 let me know.

12 A. (Witness complies.)

13 Q. Are you done reviewing your statement?

14 A. Yep.

15 Q. Okay. Have you seen your statement before?

16 A. Yes.

17 Q. Okay. So can you tell the ladies and gentlemen of  
18 the jury who you told the police was at the house, at Sal's  
19 house?

20 A. It says on the statement: Danger, Little One,  
21 Puppet.

22 Q. Okay. So there was no mention of Evaristo Garcia in  
23 your statement; was there?

24 A. No.

25 Q. Okay. So even though you just got done testifying



1 on direct examination to this jury that Evaristo Garcia was at  
2 Sal's house, you told the police, in your recorded statement,  
3 that the only people at Sal's house was Puppet, Little One and  
4 Edshel; correct?

5 A. Yes.

6 Q. No mention of Evaristo Garcia in your statement;  
7 correct?

8 A. Not in the paper.

9 Q. Okay. Now, you told the police that Manuel Lopez  
10 had the gun in his waistband before he left Sal's house;  
11 correct?

12 A. Yes.

13 Q. And that -- and that Lopez owned the gun; correct?

14 A. Yes.

15 Q. So you told the police that Manuel Lopez had that  
16 9-millimeter -- I mean that .380 gun in his waistband; correct?

17 A. .380?

18 Q. Yeah.

19 A. Wasn't it a nine?

20 Q. I mean -- okay, strike that, I withdraw that.

21 So your -- so your statement to the police was  
22 that Manuel Lopez had the gun in his waistband before you left  
23 Sal's house; correct?

24 A. Yes.

25 Q. Okay. And that you got into the car; correct?

1 A. I got in the back of the car.

2 Q. You got into the back of the car, and that you  
3 didn't see Manuel Lopez hand the gun to anybody, did you?

4 A. Yes, I did.

5 MR. GOODMAN: If I may approach, Your Honor?

6 THE COURT: You may.

7 BY MR. GOODMAN:

8 Q. Do you remember giving a Preliminary Hearing or  
9 testimony at a Preliminary Hearing on December 18th of 2008?

10 A. No.

11 Q. But -- but -- but you gave testimony at a  
12 Preliminary Hearing; correct?

13 A. Yes.

14 MR. GOODMAN: So, Your Honor, if I could approach  
15 with the transcript?

16 THE COURT: You may.

17 MR. GOODMAN: Thank you.

18 MS. DEMONTE: Page, please?

19 MR. GOODMAN: Page 20.

20 BY MR. GOODMAN:

21 Q. You can read your transcript and then look up when  
22 you're done.

23 A. (Witness complies.)

24 Q. You done?

25 A. Yeah. Do you want me to read it out loud?

1 Q. Nope.

2 Does that refresh your recollection of what you  
3 testified at the Preliminary Hearing?

4 A. No.

5 Q. Okay. So the question is: Did you see him get it  
6 from Puppet?

7 The answer is: No.

8 Okay. Was that what you just reviewed on the  
9 transcript?

10 A. Yes.

11 Q. Okay. And that was testimony that you gave under  
12 oath; correct, Mr. Harper?

13 A. In 2008?

14 Q. Right. So you were sworn in to tell the truth;  
15 correct?

16 A. Yes.

17 Q. Under oath, and you told -- and you told the Judge  
18 at the Preliminary Hearing that you didn't see Puppet give the  
19 gun to Evaristo; correct?

20 A. Yes, unless I'm mistaken.

21 Q. Now, you mentioned on direct examination here about  
22 a gray hoody, but -- but you also testified at that same  
23 hearing that we just talked about that you saw Evaristo wearing  
24 all black sleeved --

25 MS. DEMONTE: Objection --

1 BY MR. GOODMAN:

2 Q. -- sleeved pants; correct?

3 THE COURT: Hold on.

4 THE WITNESS: No.

5 THE COURT: Hold on, hold on, hold on.

6 THE WITNESS: Can you rephrase that?

7 MR. GOODMAN: Well, I think there's an objection.

8 THE COURT: Overruled. Overruled.

9 MR. GOODMAN: Thank you, Your Honor.

10 MS. DEMONTE: Page number, Counsel?

11 MR. GOODMAN: Well, I'm not there yet. He hasn't  
12 answered.

13 THE COURT: It's cross-examination. You don't have  
14 to give a page number on cross.

15 BY MR. GOODMAN:

16 Q. Okay. At this same Preliminary Hearing where you  
17 took the same oath that you just took today; correct?

18 A. Yes.

19 Q. Okay. You were sworn to tell the truth; correct?

20 A. Yes.

21 Q. Okay. You described Evaristo on that night as  
22 wearing all black sleeves; correct?

23 A. No.

24 Q. No?

25 A. No.

1 Q. Okay.

2 MR. GOODMAN: If I may approach again, Your Honor?

3 THE COURT: You may.

4 BY MR. GOODMAN:

5 Q. Take a look at the question and answer, then look up  
6 when you're done.

7 A. (Witness complies.)

8 Q. Now, the question to you, Mr. Harper, was: Now, on  
9 the day of shooting -- on the day of the shooting, can you tell  
10 me what he was wearing, do you remember?

11 Answer: All black sleeved, long sleeves, pants.

12 Was that your answer?

13 A. On that statement.

14 Q. And that was under oath too; correct?

15 A. Yes.

16 Q. About this gun you were -- you never talked to  
17 Evaristo about how he allegedly got this gun, did you?

18 A. He got it before he got in the fight.

19 (Sotto voce at this time.)

20 MR. GOODMAN: It's the same statement I just  
21 impeached him with.

22 BY MR. GOODMAN:

23 Q. Now, Manuel Lopez told you that he was going back to  
24 pick up the gun from the toilet; correct?

25 MS. DEMONTE: Objection, hearsay.

1 THE COURT: Overruled.

2 THE WITNESS: Do I answer that?

3 BY MR. GOODMAN:

4 Q. Yes.

5 A. Now, what was it?

6 THE COURT: I've already made a ruling for you on  
7 that exact issue, by the way.

8 MS. DEMONTE: Oh, okay.

9 THE COURT: So it's --

10 THE WITNESS: Can you repeat that?

11 BY MR. GOODMAN:

12 Q. Yes. If you don't -- and again, if you don't  
13 understand a question, just ask me, okay?

14 A. No, I do, but just can you repeat it because --

15 Q. You told -- you told -- Manuel Lopez told you that  
16 he was going back to pick up his gun from the toilet; correct?

17 A. Yes.

18 Q. Now, you testified earlier that you got to the  
19 school, that -- that you jumped on a guy named -- named Diablo;  
20 correct?

21 A. No. Diablo sideswiped me while I was fighting the  
22 big guy.

23 Q. So were you fighting Diablo or somebody else?

24 A. I was fighting the same person that Giovanni was  
25 hitting, and then I got sideswiped by Diablo, he hit me on the

1 side.

2 Q. Okay. At some point did you fight Diablo?

3 A. Yeah, we were fighting.

4 Q. And there was a lot of fights going on at the same  
5 time; correct?

6 A. Yeah, this was just one big one.

7 Q. You said that it was crazy and hectic; correct?

8 A. Yes. After the gun shooting.

9 Q. Now, you said that once the principal came out, and  
10 everybody started to scatter --

11 A. Principal was already outside.

12 Q. Okay. So once the fight broke up, and everybody  
13 started to scatter, Giovanni ran across the street -- ran  
14 across Washington Street; correct?

15 A. No.

16 MR. GOODMAN: Okay. If I may approach, Your Honor?

17 THE COURT: You may.

18 BY MR. GOODMAN:

19 Q. Take a look at that statement.

20 A. (Witness complies.)

21 Q. Do you see that, Mr. Harper?

22 A. Hold on. Okay.

23 MR. GOODMAN: For the record, this is from his  
24 Grand Jury testimony on March 4th of 2010.

25 BY MR. GOODMAN:

1 Q. Now, you testified that Giovanni was running across  
2 the street; correct?

3 A. Yes.

4 Q. And that you were running towards the baseball  
5 field; correct?

6 A. Yes.

7 Q. So you saw Giovanni run across Washington; correct?

8 A. Giovanni?

9 Q. Yeah.

10 A. No.

11 Q. You just --

12 A. Giovanni didn't run across Washington.

13 Q. You just got done testifying that Giovanni ran  
14 across the street.

15 A. That was E.

16 Q. Oh, okay. So -- okay. So did you just read your  
17 testimony?

18 A. Yeah.

19 Q. Do you want to look at it again?

20 A. E and Little One ran this way --

21 Q. Who's Little One?

22 A. Giovanni.

23 Q. Okay. Okay. So go ahead.

24 A. He ran this way, and when I saw them two run this  
25 way (indicating), I ran this way (indicating).



1 Q. So --

2 A. And we were 50 -- to, like, 40 to 50 feet apart.

3 And they're yelling at each other.

4 Q. So you're running in the opposite direction of  
5 Giovanni; correct?

6 A. Yes.

7 Q. And you were running towards the baseball fields;  
8 correct?

9 A. Towards this way (indicating).

10 Q. Right. Towards --

11 A. Because they're running this way towards the kid.

12 Q. Are the baseball field is in the direction that  
13 you're running?

14 A. Yes.

15 Q. Okay. So just so we're clear, you're not running in  
16 the same direction as Giovanni; correct?

17 A. No.

18 Q. Now, you couldn't hear -- you couldn't hear what  
19 anybody was saying, the people that were running across the  
20 street, you couldn't hear what they were saying; isn't that  
21 true?

22 A. That's false, because they were loud enough to the  
23 point I did hear them. They were screaming at each other.

24 Q. Do you remember what they were arguing about?

25 A. They were arguing for the gun.

1 MR. GOODMAN: If I may approach, Your Honor?

2 THE COURT: You may.

3 MS. DEMONTE: What's that?

4 MR. GOODMAN: The Grand Jury testimony.

5 MS. DEMONTE: Okay.

6 BY MR. GOODMAN:

7 Q. You can take a look at your testimony here, and then  
8 it follows to your answer here (indicating), here at the bottom  
9 of the page, and then it comes up to the top of the page  
10 (indicating).

11 It's a question, answer; question, answer. Do  
12 you see that?

13 A. Yeah, but I'm reading it. Hold on. I'm sorry, I do  
14 got an infarim (phonetic) in there.

15 Q. Do you see that?

16 A. (No audible response.)

17 Q. So you don't remember what you -- or you couldn't  
18 hear what they were arguing about, could you?

19 A. Again, I said they were arguing for the gun.

20 Q. Okay. So in this Grand Jury testimony, the question  
21 was: Could you hear what they were arguing about?

22 Answer: They were arguing about something.

23 Question: Do you remember what they were  
24 arguing for?

25 Answer: No.

1                   Wasn't that your testimony?

2           A.     Yes.

3           Q.     You just -- you just reviewed that; correct?

4           A.     (No audible response.)

5           Q.     You just reviewed that, I just showed that to you;  
6 correct?

7           A.     Yes.

8           Q.     Okay. Also, you testified in front of a Grand Jury  
9 under oath that you did not see who the shooter was, did you?

10          A.     That's false.

11                 MR. GOODMAN: If I may approach, Your Honor?

12                 THE COURT: You may.

13 BY MR. GOODMAN:

14          Q.     Here's page 119. You can look at answer, question,  
15 answer, question.

16          A.     (Witness complies.)

17          Q.     So the question was: All right. So they were  
18 chasing this kid and arguing -- arguing over the gun. What --  
19 what happens next?

20                 Answer: Like, I just started hearing gunshots.

21                 Question: Do you remember seeing what happened?

22                 Answer: No.

23                 Is that your testimony that you just reviewed?

24          A.     Yes.

25          Q.     Under oath in front of a Grand Jury; correct?

1 A. Yes.

2 Q. Now, when you heard the police siren, you started to  
3 run; correct?

4 A. No. I ran when I heard the gunshots.

5 Q. After the shooting where did you go?

6 A. I ran towards the field, and I got picked up with  
7 Giovanni.

8 Q. So -- okay. So Giovanni and who else picked you up?

9 A. One of his friends. I don't know.

10 Q. You don't know who one of his friends was?

11 A. No.

12 MR. GOODMAN: If I may approach, Your Honor?

13 THE COURT: You may.

14 BY MR. GOODMAN:

15 Q. See your testimony on page 120, who picked you up,  
16 you can read from there.

17 A. (Witness complies.)

18 You asked me did I know him. You didn't ask me  
19 what did I get picked up in.

20 Q. Okay. Did you review this?

21 A. This?

22 Q. Yes.

23 A. Yes.

24 Q. Okay. So the question was: Who picked you up?

25 Answer: A girl and this guy in a truck.

1 Question: Did you know them?

2 Answer: No.

3 That was your testimony under oath, wasn't it --

4 A. Yes.

5 Q. -- Mr. Harper?

6 You didn't mention anything about -- about  
7 Giovanni, did you?

8 A. No.

9 Q. Now, after the shooting, it's true that you didn't  
10 talk to Garcia again, did you? You didn't talk to  
11 Evaristo Garcia, did you?

12 A. After the shooting?

13 Q. Yeah.

14 A. I did.

15 Q. When you went back to the house -- when you went  
16 back to Sal's house, it's Chavi?

17 A. Chavi.

18 Q. Chavi, who's Sal; correct?

19 A. Yes.

20 Q. And Little One; correct?

21 A. Little One is Giovanni.

22 Q. Stranger was there?

23 A. I don't know Stranger's name.

24 Q. But Edshel and his older brother was there; correct?

25 A. Yes.

1 Q. There was no mention of Evaristo Garcia at Sal's  
2 house, was there?

3 A. What was that?

4 MR. GOODMAN: If I could approach with his  
5 Grand Jury testimony, Your Honor?

6 THE COURT: You may.

7 BY MR. GOODMAN:

8 Q. Look at page 120.

9 A. (Witness complies.)

10 Q. Do you see that, sir?

11 A. Yeah.

12 Q. Question was: Okay. When you got back to Sal's,  
13 who was there?

14 Answer: It was me, Chavi, Little One, Stranger,  
15 Edshel and his brother.

16 Correct?

17 A. Correct.

18 Q. Okay. Do you remember where E was?

19 Answer: No.

20 Question: Did you see or did you talk to E  
21 after this shooting happened?

22 Answer: No.

23 Is that -- is that your testimony, sir?

24 A. Yes, under oath.

25 Q. Right, under oath; correct?

1 A. (No audible response.)

2 Q. Now, before you gave the recorded statement to the  
3 police and before you gave your Preliminary Hearing testimony,  
4 before you gave testimony in front of a Grand Jury, you were --  
5 you suffered a gunshot injury to the head; correct?

6 A. Yes.

7 Q. So this -- this incident happened on February 6th,  
8 2006; correct?

9 A. The incident right there?

10 Q. This case that we're talking about happened on  
11 February 6th, 2006; correct?

12 A. Yes.

13 Q. And you sustained a gunshot -- gunshot head injury  
14 on February 18th of 2006; correct?

15 A. Yes.

16 Q. Between February 6th and February 18th of 2006, you  
17 never went to the police to tell them the story, did you?

18 A. No. They came to me.

19 Q. You were admitted to Sunrise Hospital in critical  
20 condition; correct?

21 A. Yes.

22 Q. You suffered a hemorrhage to the left side of your  
23 head?

24 A. Hemorrhage?

25 Q. Yeah.

1 A. Can you -- what does that mean?

2 Q. You had bleeding inside of your head?

3 A. Yeah, I had 20 percent of my brain blown out.

4 Q. So you had swelling and tissue damage; correct?

5 A. Yes.

6 Q. Okay. After you left Sunrise Hospital, you then  
7 went to Health South; correct?

8 A. Yes.

9 Q. And do you know how long you were at Health --  
10 Health South for?

11 A. Thirty days.

12 Q. Okay. So right after that, you then gave this first  
13 initial statement to the police; correct?

14 A. Yes, on a tape recorder.

15 Q. And -- and your mother was present; correct?

16 A. Yes.

17 Q. And two detectives were present; correct?

18 A. Yes.

19 Q. And about an hour and a half after you gave that  
20 statement to police, you then gave a statement regarding the  
21 incident of what happened with your shooting to the head;  
22 correct?

23 A. Yes.

24 Q. Now, when you gave a statement in this case, you  
25 couldn't say who Evaristo's name was, right? You couldn't say



1 the name of Evaristo at the time that you gave the statement;  
2 correct?

3 A. Yes.

4 Q. In fact, you didn't even know when the shooting  
5 occurred, did you, when you gave that statement to the police?

6 A. I know it was before I got shot.

7 Q. Okay. But when the police asked you, you didn't  
8 know if it was a month before, two months before or when that  
9 shooting in this case happened, did you?

10 A. No.

11 Q. In fact, you also gave testimony, under oath, at a  
12 trial, in the case where the person who shot you in the head  
13 was prosecuted; correct?

14 A. Yes.

15 Q. And you testified at that trial; correct?

16 A. Yes.

17 Q. All right. Well, before we get there, let me ask  
18 you this. This whole statement about -- about -- about what  
19 you -- about what you told to the police in this case, you've  
20 reviewed that statement, and you don't really remember anything  
21 you said in that statement, do you?

22 A. The statement of what's going on right now?

23 Q. In this case.

24 A. I remember the tape.

25 Q. Okay.

1           A.     Did you hear the tape?

2                     (Sotto voce at this time.)

3           MR. GOODMAN:  If I could have just a moment,  
4 Your Honor?

5           THE COURT:  You may.

6                     (Pause in proceeding.)

7           THE COURT:  If you would like to stand up and  
8 stretch for a moment, go ahead.

9           MR. GOODMAN:  Okay.  If I may approach, Your Honor?

10          THE COURT:  You may.

11          MR. GOODMAN:  There are several statements, I  
12 apologize, I had to find out which one.

13 BY MR. GOODMAN:

14          Q.     Okay.  Sir, this is again from your testimony in  
15 front of the Grand Jury.  If you could look at this part and  
16 this part (indicating)?

17          A.     (Witness complies.)

18          Q.     Do you see that, sir?

19          A.     Yeah, right here.  But you see, when --

20          Q.     And then --

21          A.     -- when --

22          Q.     And then -- well, wait.

23          A.     No.  When was this?  Because if you are trying to  
24 bring up that, you know --

25          Q.     This is your Grand Jury testimony, sir, I'm asking

1 you to review the transcript --

2 A. I read it.

3 Q. -- of your Grand Jury testimony.

4 A. I read it.

5 Q. And then follow-up to here (indicating), please.

6 A. Okay.

7 Q. I'm trying to get some truthful testimony here, sir,  
8 so I just ask you to follow the transcript.

9 A. I'm following whatever you're asking.

10 Q. Okay. So, question: Okay, now, Jonathan, you got  
11 this head injury, yeah?

12 Answer: Yes.

13 Question: Does it cause you to have some memory  
14 problems sometimes?

15 Answer: Yes.

16 Question: Now, you met with me in my office  
17 earlier, yes?

18 This is, of course, the prosecutor asking you this.

19 Answer: Yes.

20 Question: Okay. Do you remember giving a statement  
21 to Detectives Mogg and Hardy?

22 Answer: Bits and pieces.

23 Correct?

24 A. Yes.

25 Q. So you've reviewed this statement that we're talking

1 about many times before, haven't you?

2 A. No.

3 Q. Well, you reviewed earlier before the Preliminary  
4 Hearing, before you gave testimony at the Preliminary Hearing;  
5 correct, your statement to the police?

6 A. And when was this? When was this?

7 Q. Okay. You gave a statement to the police; correct?

8 A. Yes.

9 Q. And then before you testified under oath at a  
10 Preliminary Hearing, you reviewed that statement; correct?

11 A. A week ago?

12 Q. No, at the Preliminary Hearing, Mr. Harper. In  
13 December of 2008, you reviewed your police statement; correct?

14 A. Yes.

15 Q. Okay. And then again you reviewed that police  
16 statement before you gave testimony before the Grand Jury;  
17 correct?

18 A. Yes.

19 Q. Okay. And you told the prosecutor that you had  
20 memory problems, and you could only remember bits and pieces of  
21 that statement; correct?

22 A. Yeah.

23 Q. And this statement that you can only remember bits  
24 and pieces of, you didn't even give until about five weeks  
25 after the gunshot injury to your head; correct?

1 A. Yes.

2 Q. Now, in the trial that you testified in your case,  
3 you also had problems recalling what you had previously said;  
4 correct?

5 A. (No audible response.)

6 Q. Do you remember being confused in your trial when  
7 you gave testimony?

8 A. Yes. At the beginning.

9 Q. And the prosecutors asked you if you had recovered  
10 now.

11 And you said: Not -- not -- not normal.

12 Do you recall that?

13 A. Yes.

14 Q. And then they asked you if you think you were  
15 screwed up when you made these other statements.

16 And your answer was: Yes.

17 Do you recall that?

18 A. Yes.

19 Q. Now, you were asked whether or not you were promised  
20 anything to give testimony in this case.

21 Do you remember that?

22 A. Yes.

23 Q. And you were promised -- and you -- and you said  
24 that you were promised that you wouldn't be prosecuted; isn't  
25 that correct?

1 A. Yes.

2 Q. And you have not been prosecuted, have you?

3 A. No.

4 MR. GOODMAN: One moment, Your Honor.

5 (Sotto voce at this time.)

6 BY MR. GOODMAN:

7 Q. Did you shoot yourself in the head?

8 A. No.

9 Q. Did E shoot you in the head?

10 A. No.

11 Q. Did Chuckie shoot you in the head?

12 A. That's the same person.

13 Q. You had reason to be afraid of the person who shot  
14 you; correct?

15 A. Yes.

16 Q. What was Sal wearing the day of the shooting, of the  
17 shooting in this case, Mr. Harper?

18 A. A black shirt, and that's all I can recall.

19 I know that he had a bald head.

20 Q. And what was Edshel wearing the night of the  
21 shooting?

22 A. I can't recall.

23 Q. What was Edshel's brother wearing the night of the  
24 shooting?

25 A. Again, I can't recall.

1 Q. What was Puppet wearing the night of the shooting?

2 A. I can't recall.

3 Q. So why can you recall what Sal was wearing?

4 A. Because I was -- we had an argument before he shot  
5 me.

6 Q. So -- so, Mr. Harper, your testimony today is that  
7 the shooter ran up and unloaded the gun into the kid; correct?

8 A. Yes.

9 Q. Okay.

10 A. He dumped the clip, if you want to be precise.

11 MR. GOODMAN: Thank you.

12 THE COURT: Redirect.

13 MS. DEMONTE: Thank you.

14

15 REDIRECT EXAMINATION

16 BY MS. DEMONTE:

17 Q. Now, Jonathan, I want to start with the questions he  
18 just asked you about what Sal was wearing. And he said -- he  
19 asked you what Sal was wearing the night of the shooting. What  
20 shooting were you talking about when you answered?

21 A. I was talking about when he shot me.

22 Q. When Sal shot you?

23 A. Yes.

24 Q. Okay. On February 6th, 2006, did Sal make it to the  
25 school?

1 A. He was on the way with Edshel and his older brother.

2 Q. Okay. Did you ever see Sal get to the school?

3 A. No.

4 Q. Okay. Now, counsel asked you about testifying at  
5 the Preliminary Hearing, that you were promised you wouldn't be  
6 prosecuted. Do you remember who you said at the Preliminary  
7 Hearing made that promise to you?

8 A. Um, um, I know she's short, black hair, and, um --

9 Q. Do you remember telling -- okay. It was not me?

10 A. No.

11 Q. It was not Miss Jimenez?

12 A. No.

13 Q. Okay. Would it refresh your recollection as to who  
14 you testified about that promise to if I showed you what you  
15 said?

16 A. Yes.

17 Q. Okay.

18 (Pause in proceedings.)

19 BY MS. DEMONTE:

20 Q. It's right here (indicating). Do you remember?

21 A. Yes.

22 Q. Is your memory refreshed?

23 A. Yes.

24 Q. Okay. Who did you say made you that promise?

25 A. Mogg.



1 Q. Okay. And is Mogg a detective?

2 A. Yes.

3 Q. All right. Now, Jonathan, last week you said -- you  
4 told counsel that you -- you went over your statement with me.  
5 Did we look at it together, or did we just listen to it?

6 A. We listened to it.

7 Q. Okay. How -- do you speak better now than you did  
8 then?

9 A. Yes.

10 Q. Okay. In what way?

11 A. In all ways. You know, you can understand me while  
12 I'm talking, you know. Before I couldn't -- I could barely  
13 talk.

14 (Sotto voce at this time.)

15 BY MS. DEMONTE:

16 Q. Now, Jonathan, I'm going to start with your  
17 statement to Detective Mogg, and that was April 1st, the one we  
18 listened to?

19 A. Yes.

20 Q. Okay. And counsel showed you page 5 and asked you:  
21 Isn't it true you never said E was at Sal's house?

22 A. Yes.

23 Q. Okay. Do you remember for sure, as you sit here  
24 today, whether or not you told the police that E was at Sal's  
25 house?

1 A. No.

2 Q. Okay. Would it refresh your recollection if I  
3 showed you page 3?

4 A. Yes.

5 Q. Thank you.

6 A. (Witness complies.) Yeah.

7 Q. Okay. Is your memory refreshed?

8 A. Yes.

9 Q. Okay. So did you tell the police that E was with  
10 you that night?

11 A. Yes.

12 Q. All right. Now -- now, counsel again asked you  
13 about whether or not you mentioned Puppet giving the gun to E  
14 in your Voluntary Statement.

15 Do you remember whether or not you said that to  
16 the police on April 1st?

17 A. I don't remember.

18 Q. Would it refresh your recollection if I showed you  
19 page 18 of that statement to the police?

20 A. Yes.

21 Q. Okay.

22 A. (Witness complies.)

23 Q. Is your memory refreshed?

24 A. Yes.

25 Q. So did you tell the police that Puppet gave the gun

1 to E?

2 A. Yes.

3 Q. Now, counsel then asked you to fast-forward to a  
4 Preliminary Hearing, which was, for the record, December 18th  
5 of 2008, so two and a half years later.

6 A. Yes.

7 Q. Do you remember being there?

8 A. Yes.

9 Q. Okay. And it was in this building (indicating)?

10 A. (No audible response.)

11 Q. Is that a yes?

12 A. Yes.

13 Q. Okay. Now, counsel showed you page 24 and asked you  
14 about you testifying that E was wearing all black. But do you  
15 remember if you corrected yourself?

16 A. Yes.

17 Q. You actually --

18 MR. GOODMAN: Objection -- I'm going to object,  
19 Your Honor, as to correction.

20 THE COURT: Sustained.

21 BY MS. DEMONTE:

22 Q. Do you remember if you changed your answer?

23 A. Yes.

24 Q. Okay. And what did you change your answer to?

25 A. I changed it to he was wearing a black -- he was

1 wearing a gray hoody.

2 Q. And why did you change your answer?

3 A. Because that's what he was actually wearing.

4 Q. Okay. Now, you also testified even two years after  
5 that in front of the Grand Jury.

6 Do you remember that?

7 A. Yes.

8 Q. You told me a lot that you didn't remember things?

9 A. (No audible response.)

10 Q. Is that a yes?

11 A. Yes.

12 Q. Okay. Why did you tell me you didn't remember  
13 things at Grand Jury?

14 A. Because I had to look over the papers and refresh  
15 myself.

16 Q. Okay. Do you like coming to Court to testify in  
17 this case?

18 A. No.

19 Q. Do you like that we have been bothering you over the  
20 years to talk about this case?

21 A. You gotta do what you gotta do.

22 Q. But do you like it?

23 A. No.

24 Q. Okay.

25 A. I'm just -- I mean -- I'm doing what I'm supposed to

1 do.

2 Q. All right.

3 (Sotto voce at this time.)

4 MS. DEMONTE: Pass the witness.

5 THE COURT: Recross.

6 MR. GOODMAN: Thank you, Your Honor.

7

8 RECROSS-EXAMINATION

9 BY MR. GOODMAN:

10 Q. In your recorded statement, you said that -- or do  
11 you recall saying that -- well, you didn't know when you went  
12 to the park that you were going to shoot anybody or have  
13 somebody in your gang shoot somebody; correct?

14 A. Yes.

15 MS. DEMONTE: Objection, outside the scope of  
16 redirect.

17 MR. GOODMAN: It's the same page as she just  
18 impeached him -- the witness with.

19 THE COURT: I can have him recalled at a later date,  
20 or I can just allow it, so I'm just going to allow it. How's  
21 that?

22 MS. DEMONTE: Okay.

23 BY MR. GOODMAN:

24 Q. Before you got there, you knew that Puppet had the  
25 gun; correct?

1 A. Yes.

2 Q. Now, we talked about all these statements, this  
3 statement, the police statement; correct, which was unsworn,  
4 and then your testimony at the Preliminary Hearing and at the  
5 Grand Jury, which was -- which was sworn, and it was under  
6 oath; correct?

7 A. Yes.

8 Q. Okay. And you also met with the prosecutors;  
9 correct?

10 A. Yes.

11 Q. As you said before.

12 And you also met with a defense lawyer and  
13 defense investigator before by name of Scott Bindrupt; correct?

14 A. I can't recall that.

15 Q. Do you recall meeting with any lawyers or  
16 investigators that represented Evaristo Garcia?

17 A. I think one -- I think one did come by the house,  
18 but then I had a seizure, and then that's the last time I did  
19 hear about this Court.

20 Q. And when you interviewed with the defense lawyer and  
21 the investigator, you told them that you were sick of the  
22 prosecutors putting words in your mouth.

23 Do you remember saying that?

24 A. Yes.

25 MR. GOODMAN: Thank you, Your Honor.

1 THE COURT: Do the ladies and gentlemen of the jury  
2 have any questions for this witness?

3  
4 (Negative response from the jury panel.)

5  
6 THE COURT: That's a negative response.

7 Mr. Harper, thank you very much for your testimony.  
8 You are excused. Thank you.

9 THE WITNESS: Thank you.

10  
11 (Whereupon, at this time the witness was excused.)

12  
13 THE COURT: May I see counsel up at the bench.

14 And, ladies and gentlemen, I'm going to start my  
15 admonishment right now.

16 During this recess you are admonished not to  
17 talk or converse among yourselves or with anyone  
18 else on any subject connected with this trial;

19 Or read, watch, or listen to any report of or  
20 commentary on the trial, or any person connected  
21 with this trial, by any medium of information,  
22 including, without limitation, newspapers,  
23 television, radio or internet;

24 Or form or express any opinion on any subject  
25 connected with the trial until the case is finally

1 submitted to you.

2 (Bench conference outside the presence of the jury  
3 reported as follows:)

4 THE COURT: Do you have the gang expert coming on  
5 after lunch, is that what you are looking at?

6 MS. PANDUKHT: This afternoon, yes.

7 THE COURT: Are we taking another break before that?

8 MS. PANDUKHT: Yeah, we have several witnesses  
9 before.

10 THE COURT: Oh. Tell me about when is that gang  
11 expert coming.

12 MS. PANDUKHT: Well, we have a CSA, a detective --  
13 you know, it will be later in the afternoon just because we  
14 have several witnesses before, I bet we could do it after  
15 your -- after your afternoon break.

16 THE COURT: So let me do over an hour now because I  
17 was giving them an hour and a half to argue that.

18 MS. PANDUKHT: It's up to you. Whatever you want.

19 THE COURT: Let me give them an hour and a half and  
20 that way they only come back once and break it --

21 MS. PANDUKHT: And do you want to do it now or after  
22 you've read everything?

23 THE COURT: Oh, yeah, what I'm going to do is give  
24 them an hour and a half, give you guys an hour, come back after  
25 we've all read it after lunch, and you can argue for a half



1 hour before the next witness.

2 MS. PANDUKHT: Okay.

3 THE COURT: But here's the deal, if we're not done,  
4 I want to get started and you can pick up wherever you are done  
5 arguing on the next break. Okay? So if we're not fully  
6 done -- I don't want to keep them waiting like we did this  
7 morning. It's just not courteous.

8 MS. PANDUKHT: We'll try to do it --

9 THE COURT: If it's not done in a half hour, I'm  
10 just telling you -- I'll let you argue and keep making your  
11 record. I'll just spill into the afternoon.

12 MR. FIGLER: It's --

13 MS. PANDUKHT: We can do that -- we can do that,  
14 Your Honor.

15 THE COURT: Well, it's gone longer before, so --  
16 okay.

17 MS. PANDUKHT: Okay.

18 (End of bench conference.)

19 (Proceedings back in the presence of the jury.)

20 THE COURT: We're back on the record.

21 So, ladies and gentlemen, I am going to give you --  
22 let's see.

23 I may give you an hour and a half lunch. Be happy.

24 So it gives you a little bit more time.

25 We're going to come back on the record at about

1 3:15. That gives you an hour and a half exactly for lunch.

2 I've given your admonishment, have a good lunch.

3 Just wait outside the hallway at an hour and a half,

4 3:15 -- did I say it wrong? Or, I'm sorry, 2:15.

5 Wow, that's a really great dinner break -- I mean a

6 lunch break. Okay? I've been on the record since nine, so I

7 gotta give my staff a break. I'm sorry. 2:15.

8

9 (The following proceedings were had in open

10 Court outside the presence of the jury panel:)

11

12 THE COURT: All right. We're outside the presence.

13 I'm going to see the attorneys at 1:45 -- not 1:45,  
14 right?

15 MS. PANDUKHT: 1:45.

16 MS. DEMONTE: 1:45.

17 THE COURT: 1:45 we'll go back on the record outside  
18 the presence. Okay? Have a good lunch.

19 MS. PANDUKHT: Thank you.

20 MS. DEMONTE: Thank you.

21 MR. FIGLER: Thank you, Your Honor.

22 (Recess in proceedings.)

23

24 (The following proceedings were had in open

25 Court outside the presence of the jury panel:)

1 THE COURT: We're back on the record on State of  
2 Nevada versus Evaristo Garcia, Case Number C262966.

3 And let the record reflect the defendant is present.  
4 We're outside the presence of the jurors.

5 MS. PANDUKHT: I'm going to get Noreen.

6 THE COURT: Sure.

7 We have defendant present, Mr. Goodman, Mr. Figler,  
8 and --

9 THE CLERK: Everybody.

10 THE COURT: We're going to have the prosecutors in a  
11 second.

12 They gave me a case for me to read.

13 Now I have both prosecutors present.

14 MS. DEMONTE: Sorry, Your Honor.

15 THE COURT: So, anyway, I just had read  
16 Origel-Candido. Did you give any to the defense what you gave  
17 to me by any chance?

18 MS. PANDUKHT: You know, I didn't because they cited  
19 it in their proposed instructions, so I thought --

20 THE COURT: Oh, well --

21 MR. FIGLER: We know Origel --

22 THE COURT: Well, because Origel seems to be, like,  
23 you know, against the State as far as allowing a gang expert  
24 testimony if it's not sufficiently, you know, they really -- if  
25 they go into conclusory facts that it's a criminal street gang,

1 Supreme Court reversed on that level.

2 MS. PANDUKHT: Yes, because when --

3 THE COURT: It wasn't really important, but, okay.

4 MS. PANDUKHT: Well, the reason why --

5 THE COURT: Can you see that new case that came

6 down --

7 MR. FIGLER: Unpublished, but a lot more detail.

8 THE COURT: Well, yeah, I know.

9 MR. FIGLER: A lot more that they don't have in this

10 case.

11 THE COURT: Well, that's what I'm saying. I mean I

12 look at that, and you both had an opportunity to read that

13 Furman's (phonetic) recently, and it's, like, of last month, so

14 I know it was not published but, you know, I've only had an

15 hour to really read this stuff.

16 So my understanding is defense is going to object to

17 the expert; is that right?

18 MR. FIGLER: That's correct, Your Honor.

19 THE COURT: So I looked at your Power Point, too, so

20 go ahead and argue it.

21 MS. PANDUKHT: Do you want me to argue it?

22 THE COURT: They have an objection and --

23 MS. PANDUKHT: I don't mind going forward.

24 THE COURT: And assuming the objection is also to

25 the Power Point that they gave to me just for me to look at.

1 MR. FIGLER: That's correct, Your Honor.

2 THE COURT: What part of the Power Point are you  
3 not -- maybe you should make your argument and then -- more  
4 fuller, and then I'll let them respond.

5 MS. PANDUKHT: Thank you.

6 MR. FIGLER: Sure, Your Honor.

7 As it goes -- and let me just give you a little bit  
8 of context of our argument first.

9 Is that we don't feel that, in the light viewed most  
10 favorable to the State, at this point, and with the exception  
11 of the gang expert to come, I don't believe the State can make  
12 an offer of proof that there's any more evidence that's going  
13 to come before the Court that they could -- with the light most  
14 favorable to the State, show that this fight was in furtherance  
15 of any gang activity or promotion of the gang in any way.

16 That the gangs sometimes fight, that's as best as  
17 they got out of Harper, nothing beyond that.

18 This is all about some girl and some boy who had a  
19 dispute, and they just came to one of their buddy's aid.

20 There was no intention to shoot anybody. No  
21 intention to kill anybody. This kid, Victor, isn't even in  
22 anybody's gang.

23 And there's no evidence so far that Evaristo is part  
24 of anybody 's gang. He's with some of the gang members by  
25 their light most favorable.

1           So they don't get to -- they don't get to the point  
2 where, by any stretch of the imagination, this could be in  
3 furtherance of the gang.

4           That said, now we have to look at what they want to  
5 do to prove that a gang under the law exists for the jury's  
6 consideration.

7           THE COURT: Mm-hmm.

8           MR. FIGLER: And now we look at this Power Point,  
9 and so now we finally have a road map of what the State intends  
10 to do.

11           Now, prior to us getting this road map, here's what  
12 we do know, that Evaristo Garcia had no field investigation  
13 cards on him, not a one.

14           That Evaristo Garcia has never been arrested for any  
15 criminal activity whatsoever in Juvenile Court at all.

16           What we know is that Evaristo Garcia has never  
17 admitted to participation or -- or being part of this gang to  
18 anyone at any time.

19           And we don't have any of the PL on him (indicating)  
20 or the one three on him or the Puros Locos on him at any time,  
21 even currently.

22           Subsequent to all of this, he winds up getting the  
23 words "east" and "side" tattooed on his body, so we have that  
24 now. The State can't establish that that was even anywhere  
25 near his body before this happened. Okay.

1                   So that's who Evaristo Garcia is in 2006.

2                   Completely off everyone's radar and none of the  
3 traditional indicia and none of the admissions or connections  
4 to a gang of any sort.

5                   Now we've got this Power Point where -- and we've  
6 been asking for any other documentation that this is a gang, or  
7 that he is in the gang.

8                   They gave us a bunch of Field Investigation Cards,  
9 and Your Honor is aware of those; right?

10                  THE COURT: Mm-hmm.

11                  MR. FIGLER: Okay. With pretty much a lot of these  
12 folks, Edshel Calvillo and Manuel Lopez and Giovanni and all  
13 these guys' field cards, okay, but as far as arrests go, the  
14 best they could come up with for the whole gang is one guy in  
15 '05, who has never been mentioned by anybody here, has a PCS,  
16 with intent I think. No other gang member or any other  
17 associate is there in that crime.

18                  There's another one where Puppet winds up with a  
19 PSV. And then there's a bunch of prison stuff for some of  
20 these guys involved with Surenos, which now they want to come  
21 in and say is affiliated with -- with Puros Locos.

22                  Interestingly enough, in this Hernandez case, they  
23 say that Surenos is affiliated with Brown Pride.

24                  THE COURT: Yeah, I just read that in the --

25                  MR. FIGLER: Yeah, yeah. So I mean it's all

1 conjecture, it's all speculation.

2 But the bottom line is here that that's what they  
3 want to bring in, so they want to bring in priors, which -- or  
4 other bad acts of other people by association, which I know  
5 there's a limiting instruction, but if that limiting  
6 instruction is grossly outweighed by the prejudice of it, the  
7 Court can deny it to come in.

8 I know they want to try to establish that there was  
9 a criminal gang in effect because those priors, but I don't  
10 think that anyone in this room truly believes that that's a  
11 legal sufficient standard to show that the purpose of this gang  
12 is felonious activity.

13 I mean, Jiminy Cricket, if for 30 years they've been  
14 trying get Hell's Angels to be a criminal gang for purposes of  
15 enhancements, and no one has been able to do that yet in any  
16 Clark County courtroom or in federal.

17 You know, I don't see how this would amount to it.

18 But more importantly, on the last part of the Power  
19 Point, not only do they have east side as the tattoos, which  
20 they cannot say when those were put on Evaristo Garcia, but now  
21 they're saying, in the Power Point, Evaristo Garcia is  
22 documented as affiliating with Puros Locos gang. Documented.

23 I got no documentation. That -- that is conclusory.

24 Evaristo Garcia is referred to as a member of  
25 Puros Locos through a reliable source.



1           They have not revealed the reliable source. I don't  
2 have any information on the reliable source.

3           MS. PANDUKHT: That information is contained in the  
4 jail incidence that I have provided to the defense.

5           THE COURT: Is that after the fact though?

6           MS. PANDUKHT: After the fact, but that's where that  
7 information came from.

8           MR. FIGLER: Two years later -- three years later.

9           THE COURT: Somebody can join a gang in jail.

10          MR. FIGLER: Yeah. And sometimes they have to,  
11 quite frankly.

12          MS. PANDUKHT: I'll respond to everything, I just  
13 want to clarify that I didn't hide that.

14          THE COURT: I mean it's pretty clear from the  
15 testimony, by the way, that he wasn't in the gang when this  
16 occurred.

17          MS. PANDUKHT: If I could --

18          THE COURT: Go ahead. Unless I've been sitting  
19 through a different trial, I -- I did not hear that he was part  
20 of a gang.

21          MR. FIGLER: That's correct, Your Honor.

22          So all this stuff --

23          THE COURT: I mean, even somebody sitting here,  
24 Edshel whatever, I can't say his name, looked at him and goes:  
25 He wasn't in the gang.

1 MR. FIGLER: Right.

2 And so our whole contention is that this now becomes  
3 so grossly prejudicial, because that he's being accused of  
4 being around these people, et cetera, that they can't even  
5 show, under the light most favorable to them, that a gang  
6 exists, let alone that he's in the gang, let alone that all  
7 this other stuff that's in this Power Point, I mean it is  
8 opening up a remarkable can of prejudice here on our client  
9 without any backup whatsoever.

10 And do we object to the entire Power Point.

11 We really think at this point that the State  
12 shouldn't even be able to pursue, now that they've given their  
13 full offer of proof to the Court, this gang enhancement in this  
14 particular matter; or the alternative, that there be a directed  
15 verdict on with regard at least to the enhancement by the time  
16 we get to jury instructions, because what we're really doing is  
17 laying on the --

18 THE COURT: I don't want to talk about jury  
19 instructions.

20 MR. FIGLER: Okay. So I'll go off on that.

21 THE COURT: Because we've got five minutes.

22 MS. PANDUKHT: So --

23 MR. FIGLER: So we're talking about this.

24 THE COURT: Okay. We're talking about expert and  
25 Power Point right now.

1 MR. FIGLER: Right. So we think that the expert is  
2 inappropriate given the fact the Power Point is remarkably  
3 prejudicial and doesn't have the proper foundation.

4 We'll submit it.

5 MS. PANDUKHT: Thank you, Your Honor.

6 Okay. First of all, there is no requirement that  
7 the defendant or the victim actually be a member of a criminal  
8 gang. I refer you --

9 THE COURT: That helps when they're --

10 MS. PANDUKHT: But I just want to -- Your Honor,  
11 there is no --

12 THE COURT: It almost defies logic. I can't believe  
13 you're saying that.

14 MS. PANDUKHT: But, Judge --

15 THE COURT: It defies logic.

16 MS. PANDUKHT: True, because in the statute -- in  
17 the statute it directly states, Your Honor, in 139.168, that a  
18 person who is convicted of a felony commit --

19 THE REPORTER: Slow down.

20 MS. PANDUKHT: Sorry.

21 She said I was rushing --

22 THE COURT: Go ahead. I'm going to let you --

23 MS. PANDUKHT: Please let me. Thank you, Judge.

24 -- who is convicted of a felony, committed knowingly  
25 for the benefit of, at the direction of or in affiliation with

1 a criminal gang with the intent to promote, further or assist  
2 the activities of the criminal gang.

3 There is no case and no statute, Judge, that says  
4 that the defendant or the victim must be a member of the  
5 criminal gang.

6 But he has to --

7 THE COURT: P.S., the victim is not in a gang,  
8 conclusory. And he -- there's been not one -- not one person  
9 has testified that this defendant is a member of that gang.

10 MS. PANDUKHT: They did -- if I could continue?

11 THE COURT: Go ahead.

12 MS. PANDUKHT: And I think you -- because that will  
13 help me direct the Court's questions.

14 THE COURT: Okay.

15 MS. PANDUKHT: And so basically I understand that  
16 there were witnesses that had said previously in the discovery  
17 that they were -- that he was a member of the gang.

18 THE COURT: Okay. But, P.S., I'm a blank slate  
19 listening to trial. I don't care what the discovery said.

20 Police reports say all kinds of things.

21 What I go by is the evidence at trial. So I don't  
22 care what the discovery says.

23 MS. PANDUKHT: I just want to --

24 THE COURT: Or what the gang experts say.

25 I know what I heard at trial. Let's stick with the

1 evidence at trial.

2 MS. PANDUKHT: I will. I just want to make sure I  
3 make a clear record on everything.

4 THE COURT: Well --

5 MS. PANDUKHT: I just want to make sure I make a  
6 record of everything.

7 THE COURT: You know, listen, you've got a very  
8 good -- you're an ethical prosecutor.

9 MS. PANDUKHT: Thank you.

10 THE COURT: You bring things because you think it's  
11 there.

12 But we're all in the same room right now, and we all  
13 heard the same evidence. And the only record that I know of is  
14 the record that's made in this trial.

15 And I didn't hear a shred of evidence that this  
16 defendant is a gang member, and it was clear that the victim  
17 wasn't a gang member, although they're hanging out with some  
18 gang members.

19 MS. PANDUKHT: May I continue?

20 THE COURT: Go ahead.

21 MS. PANDUKHT: So as I have stated, the testimony  
22 came out through all of the witnesses that there were members  
23 of Brown Pride that were there at the school.

24 So we heard testimony, Your Honor, of Crystal and  
25 Jesus Alonzo and Brian Marquez, who has previously been a

1 member of Brown Pride Locotes. They were there, and there was  
2 an altercation.

3 And I would direct your attention, you heard several  
4 witnesses testify, but one of the strongest ones was Crystal  
5 Perez. And she testified before how Jesus, who is allegedly  
6 one of the leaders of Brown Pride, going up to Giovanny and  
7 hitting him up.

8 Now, we didn't get an opportunity to have that  
9 defined for the jury. That's something our gang expert could  
10 do, but hitting up is challenging another gang member to fight.  
11 And that's what our gang expert would say.

12 And then she also described the hand sign that  
13 Giovanny Garcia did. And I'm talking about Giovanny Garcia and  
14 all of his tattoos and all of his hand signs, and his showing  
15 off him being Puros Locos. The reason, because he's the one  
16 that gets on the phone and calls up the rest of Puros Locos  
17 members at Sal's apartment and says: I need backup, I need you  
18 to come up here.

19 We've got challenge to fight that is alleged in this  
20 case, and these members of Puros Locos all go, including the  
21 defendant, who is there, who the State contends does not have  
22 to prove that he's a gang member yet.

23 I mean it's our contention he was trying to earn his  
24 membership and become a member of the gang.

25 And my gang expert --

1 THE COURT: You can still do that without a gang  
2 expert.

3 MS. PANDUKHT: No, Judge, and the reason --

4 THE COURT: You can still do it without a gang  
5 expert.

6 MS. PANDUKHT: No. Can I just explain -- let me  
7 explain that matter?

8 THE COURT: Go ahead.

9 MS. PANDUKHT: I know I can't do it without a gang  
10 expert because of that Origel-Candido case. I know that the  
11 Supreme Court will overturn that enhancement on appeal because  
12 of that case, because you just can't have -- this is not  
13 sufficient in the Supreme Court's mind. It isn't.

14 And there's evidence that we bring up from lay  
15 witnesses that we bring up in this case that is -- is  
16 bolster -- you know, it's important evidence.

17 I don't want to belittle the direct evidence you got  
18 from witnesses, but I know under the cases that I provided  
19 Your Honor, including -- let me cite, I want to make sure --

20 THE COURT: Well, the case -- I mean, you say --  
21 here's what the Supreme Court says --

22 MS. PANDUKHT: Hold on, Judge.

23 THE COURT: The fact that individual members  
24 committed a felony -- I'm more concerned, quite frankly, with  
25 the definition of criminal gang, okay?

1           Because the best you're showing in -- in a slide  
2 slow, and Mr. Figler didn't hit on this, but I am going to  
3 because I'm having a problem with your slide show where the  
4 best felonious thing that they're doing is somebody gets  
5 stopped in a car with dope, okay, the intent to sell, in '05,  
6 who has not been mentioned. And then you've got Manuel Lopez,  
7 who had a PSV. Okay?

8           One of the things the Nevada Supreme Court said in  
9 here is that the conclusion of felonious action is a common  
10 denominator of the gang.

11           How in the world are you proving that a common  
12 denominator of the gang exists here, especially with the Power  
13 Point you've presented to me?

14           MS. PANDUKHT: May I address that, Your Honor?

15           THE COURT: Sure.

16           MS. PANDUKHT: Okay. First of all, there is no  
17 requirement in the State of Nevada for a specific number --  
18 that just, you know, Judge --

19           THE COURT: Oh, God, I don't want reversible error.  
20 I know there's no requirement.

21           MS. PANDUKHT: Judge --

22           THE COURT: This is just common sense to me.

23           MS. PANDUKHT: Can I just -- and I don't want to  
24 argue with Your Honor, I just want to make a full record of  
25 everything that I need to say.



1 THE COURT: Okay.

2 MS. PANDUKHT: So --

3 THE COURT: Good, because you're probably going to  
4 appeal me on it.

5 MS. PANDUKHT: No, no.

6 THE COURT: I'm telling you I can think so far  
7 ahead --

8 MS. PANDUKHT: That's not my intention, Your Honor.

9 THE COURT: Okay. Go ahead.

10 MS. PANDUKHT: I'm not trying to entrap you,  
11 Your Honor.

12 THE COURT: Don't worry, I don't care. Trap me.  
13 I'm good.

14 MS. PANDUKHT: Judge -- I'm talking a mile a minute,  
15 my apologies.

16 THE COURT: Go ahead.

17 MS. PANDUKHT: Okay. Your Honor, I just want to  
18 make for the record that you do not have to provide a  
19 specific -- wait, I'm just stating for the record, not a  
20 specific number of felonies, but the biggest problem in this  
21 particular case is that almost all of these individuals were  
22 juveniles, so it is very difficult finding these records of  
23 juveniles.

24 THE COURT: Are you kidding me? You're the DA. Are  
25 you kidding me?

1           You don't have -- you've got a whole DA juvenile  
2 division. You can get anything you want down there. You give  
3 me an order, I sign it. Are you kidding me?

4           Yeah, you can. Yeah, you can.

5           MS. PANDUKHT: I just wanted to make --

6           THE COURT: Now that's disingenuous. Come on.

7           MS. PANDUKHT: And --

8           THE COURT: What, are you kidding me?

9           MS. PANDUKHT: We have tried and this is the  
10 evidence that we were able to --

11           THE COURT: In seven years you're telling me -- you  
12 never came to me with an order to get their juvie records, not  
13 one.

14           MS. PANDUKHT: And we've come up with examples that  
15 we provided in the Power Point, and I am not trying to be  
16 disingenuous with the Court.

17           And let me go back, if I may, also there was a  
18 petition for Writ of Habeas Corpus that, you know, brought up  
19 the gang enhancement and that was denied, and the motion wasn't  
20 filed before, you know -- there was no motion.

21           THE COURT: I don't care about writs right now. I'm  
22 talking about excluding testimony of your expert.

23           MS. PANDUKHT: I'm sorry?

24           THE COURT: I don't care about what I did on a writ.  
25 Go ahead.

1 MS. PANDUKHT: No, I just wanted to bring all the  
2 timing of everything, too, because I feel as though now that we  
3 have charged the gang enhancement, and we've had witnesses  
4 testify about the gang enhancement, that I should be able to  
5 finish that -- you know, because this motion wasn't brought  
6 ahead of time to strike the gang enhancement, so because we had  
7 a gang enhancement charged, we actually provided all this  
8 testimony to the jury.

9 So I think that pursuant to Pineda also versus  
10 State, Pineda versus State is 120 Nevada 204, that in that case  
11 they spoke about the importance of a person talking about these  
12 issues of gang expert, and it's because they have specialized  
13 training, knowledge and experience.

14 And in Pineda they said: It is quite probable that  
15 the average juror either knows little of gang subcultures,  
16 obligations placed upon its members, and the interaction of  
17 gang members, either with an individual gang or between  
18 members --

19 THE COURT: And that's a defense case. That was  
20 reversed because the defense, that District Court Judge didn't  
21 allow the defense to bring in gang affiliation on a  
22 self-defense claim.

23 MS. PANDUKHT: Agree.

24 THE COURT: Okay. So that's apples and oranges  
25 right now. It's apples and oranges, and you're not addressing

1 what I asked you to address.

2 MS. PANDUKHT: Okay.

3 THE COURT: Which, P.S., is how you -- how are you  
4 showing me that, based on this Power Point, and we'll mark it  
5 as an exhibit, trust me.

6 MS. PANDUKHT: Okay.

7 THE COURT: That under both the definition that  
8 you've provided me in the statute and according to  
9 Origel-Candido versus State, that that Power Point is anywhere  
10 close to what the Supreme Court expects an expert to testify  
11 to.

12 Because if I'm going to call him an expert in gang,  
13 one of the things you have to look at is -- and this is their  
14 words, thanks for bringing it to me -- the fact that individual  
15 members committed felony crimes, which benefited the gang --  
16 and by the way the PCS with intent in a car doesn't show a  
17 benefit of the gang, it's like a kind of an isolated act from  
18 what I saw, and you've not given me anything different.

19 And then the other one with Manuel Lopez is a PSV.  
20 There's no showing it benefited the gang.

21 In the case that just came down, it was unpublished,  
22 that Mr. Figler just talked about, they were talking about  
23 drive-by shootings. That's a felony, assault with a deadly  
24 weapon, discharge of a firearm in the promotion of a gang.

25 To promote their gang.

1           The two things that you included in your Power Point  
2 do not show that the felonies benefited the gang and did not  
3 lead to the conclusion that felonious action is a common  
4 denominator of the gang.

5           Looking at the light most favorable to everything  
6 I've listened to, if everybody who's going to testify testified  
7 in this case, after Jonathan Harper you're just putting on, you  
8 know, experts and everything else, then I've heard all the  
9 testimony. It's not even close.

10           I mean are they a gang? Yeah, they're a gang.

11           Do they wear tattoos? Yeah, they wear tattoos.

12           It's a club of ten and they think they're bad, and  
13 they're high schoolers.

14           But it doesn't -- part of the definition of criminal  
15 gang is that it's got to be for promotion of felonious conduct.

16           And I just haven't heard anything.

17           And when I look at your Power Point, you know, at  
18 best you got -- there's a, like, three slides that I turned to  
19 the side, which is somebody in jail, and you have -- you  
20 have -- he had some problems in jail, but there's no conviction  
21 on that. You know, they're just going to talk about some  
22 problems in jail.

23           It's just an event, battery by a prisoner.

24           But you don't have on there that he's convicted of  
25 that.

1           That's on the Boxer.

2           In any event, the only two convictions, two  
3 convictions in all this time, and we're talking it's been seven  
4 years, is a PCS with intent and --

5           MR. FIGLER: PSV.

6           THE COURT: And the PSV.

7           How in the world do you say that this gang is to  
8 promote felonious conduct, you know, to promote the gang?

9           MS. PANDUKHT: The battery by prisoner, I believe he  
10 was convicted of a gross misdemeanor. I thought it said that  
11 in here.

12          THE COURT: Well, that's not a felony last time I  
13 checked. Gross misdemeanor is not a felony.

14          Felonious acts the statute requires, not gross  
15 misdemeanor acts, not misdemeanor acts, because you know what,  
16 you would have met your burden.

17          MS. PANDUKHT: And I --

18          THE COURT: All day, all night. If it was about  
19 grosses, misdemeanors, and just crimes, you would have met --  
20 you would have met the burden.

21          It's specifically -- the statute says: Felony.

22          MS. PANDUKHT: It doesn't --

23          THE COURT: This is what Mel Harmon used to say, and  
24 unfortunately the facts are against you on this.

25          MS. PANDUKHT: Your Honor, I just will -- I wanted

1 to make a record of what -- I can't change the facts,  
2 Your Honor.

3 THE COURT: You can't.

4 MS. PANDUKHT: I can't change the testimony.

5 THE COURT: You can't make it any better because  
6 it's not.

7 MS. PANDUKHT: But I do want to make sure that I  
8 make a proper record of everything that the State intended to  
9 do in this case.

10 And I want to make sure that there is no ruling that  
11 the State did anything intentional or wrong.

12 THE COURT: Oh, I don't -- I don't find that.

13 MS. PANDUKHT: We proceeded with this gang  
14 enhancement.

15 THE COURT: No.

16 MS. PANDUKHT: In my opinion the discovery stated  
17 that he was in that gang. Okay?

18 That that discovery from Edshel and Jonathan and  
19 every piece of evidence that we have is that this defendant was  
20 in that gang with them. So I understand that testimony may  
21 have come out a little different --

22 THE COURT: Way different.

23 MS. PANDUKHT: -- at trial, but the State proceeded  
24 in good faith.

25 THE COURT: I believe that. I don't doubt that.

1 MS. PANDUKHT: And the State did everything that it  
2 could to find out everything it could and presented stacks of  
3 FI cards to the defense and incident reports and records and  
4 anything that we could find.

5 The reality, Your Honor, is that --

6 THE COURT: Well, didn't this other -- the material  
7 witness, he didn't testify before. So you didn't have an  
8 opportunity to talk to him.

9 So you weren't aware that he was going to look over  
10 and say: That guy is not in the gang.

11 MS. PANDUKHT: No.

12 THE COURT: I understand that.

13 But what about Jonathan Harper? He didn't say this  
14 guy was in a gang today, and he's been up here many times.

15 Did he say ever, did he testify that he was in a  
16 gang?

17 MS. PANDUKHT: Yes, he said he was in a gang.

18 MR. FIGLER: But that was impeached and it didn't  
19 come out.

20 THE COURT: I see. Okay.

21 MS. PANDUKHT: And then, Judge --

22 THE COURT: Interesting. Okay. No.

23 MS. PANDUKHT: Let me say this.

24 THE COURT: That's fine.

25 MS. PANDUKHT: One more thing I want to say.



1 THE COURT: Go ahead.

2 MS. PANDUKHT: The other thing I want to say,  
3 Your Honor, is that this gang was a very -- as you know, you  
4 know this, this gang was a smaller gang, Brown Pride Locotes  
5 and a lot of other gangs are bigger. And this gang got a lot  
6 more violent after this incident. And, you know, it -- okay.

7 So, you know, that's -- that's the record the State  
8 wanted to make, and I wanted to make sure that -- this I know,  
9 if you don't allow the gang expert to testify, correct me if  
10 I'm wrong, Ms. DeMonte, but I don't think there's any point in  
11 having the gang enhancement without the gang expert testifying.

12 THE COURT: I'm going to grant their motion to  
13 preclude the expert based on now that in your case in chief  
14 what's been presented to me does not even come close, in the  
15 light most favorable, not even close.

16 And I'm going to put in a copy of your Power Point.  
17 And if --

18 MS. PANDUKHT: As a Court's Exhibit only,  
19 Your Honor; right?

20 THE COURT: As a Court's Exhibit.

21 So that -- and honestly, that's how you make law.  
22 And if he's convicted of Murder One and you're unhappy with it,  
23 feel free, go ahead -- and because you know what, maybe they  
24 need to make law. Maybe they need to make it more clear.

25 But the statute does say specifically felonious --

1 felonies, felonious conduct.

2 And so I just think, you know, it's not the  
3 prosecution's fault right now as far as, you know, you believed  
4 he was in the gang up until now.

5 It's just the evidence as what I've heard, this  
6 defendant's not technically in that gang.

7 And I don't think there's enough to present what you  
8 want to present in this -- you know, if I thought there was  
9 even, like, enough, I'd just give it to the jury, let them  
10 decide.

11 My worry is it's so bad for the State right now on  
12 the evidence of gang that, if he's convicted of Murder One --  
13 and, P.S., if he's convicted of Murder One with use, okay, you  
14 got --

15 THE REPORTER: One person at a time.

16 MS. PANDUKHT: You can't have a second enhancement.

17 THE COURT: What do you care? They already heard  
18 all this gang nonsense anyway. Okay?

19 MS. PANDUKHT: Which is why I wanted to make sure  
20 you made a ruling that that wasn't improper in any way by the  
21 State.

22 THE COURT: I will. I mean these people flip like  
23 fishes out of water. Okay? They're flippers. All right?  
24 Depending on the day.

25 I think it's pretty obvious that they flip flopped

1 on their testimony all over the place, all of them.

2 So having said that and because of the number of  
3 years that have gone by, people have changed their testimony.

4 MS. PANDUKHT: Yes.

5 THE COURT: Okay. That's not the State's fault.

6 I am going to make a finding that the State has not  
7 in any way acted in bad faith, has brought this in good faith,  
8 okay, but it's been presented.

9 At this point I'm going to stop any further  
10 prejudice, and I'm not going to allow, based on their  
11 objection, you know, and they're free, even though they can do  
12 a motion in limine at any time they feel like they have to  
13 object to something, to make an objection, and after reviewing  
14 it and reviewing the case law, it's just not even close to  
15 being enough to where it would be overly prejudicial, to allow  
16 somebody to testify to gang expertise and to make a conclusion  
17 in this case, which is ultimately what you're going to ask him  
18 to say.

19 You're going to ask him to say, you know, is  
20 Puros Locos a criminal street gang?

21 I can't allow him to legally say yes, because I  
22 don't think legally, as a matter of law, that it's even close  
23 to being what is in the definition. And so it would be too  
24 prejudicial.

25 MR. FIGLER: Thank you, Your Honor.

1 MS. PANDUKHT: Um --

2 THE COURT: And whatever you want to do with it, you  
3 can change your Information, do what you want, we can deal with  
4 jury instructions and the pleadings later, but I can't allow  
5 that testimony.

6 That testimony and what is contained, which will be  
7 a Court's Exhibit, your -- your Power Point, you know, with all  
8 due respect, is so prejudicial, listening -- after I've  
9 listened to the facts of what's come out, to put that on, it's  
10 just -- it's just beyond prejudicial.

11 MR. FIGLER: And, Your Honor, you understand we  
12 brought this up --

13 THE COURT: And I can't even believe -- I don't know  
14 what kind of Power Points are brought in these types of cases,  
15 but, wow, it's just -- wow.

16 MR. FIGLER: And that's why we brought this to the  
17 Court's attention, obviously, under NRS 47.080, if there is  
18 going to be a question about admissibility, it's our obligation  
19 to bring it to the Court, that's why we did it just now. So  
20 thank you, Your Honor.

21 MS. PANDUKHT: And, Your Honor --

22 THE COURT: If it was just a matter of assisting the  
23 jury, yeah, to terms what does "hit up" mean? You know, I have  
24 no problem with that.

25 But what you're ultimately going to ask him, is

1 Puros Locos a criminal street gang; correct? Under the  
2 definition in the statute, okay? It's not, not even close,  
3 based on what I've seen and heard at trial.

4 I mean it's just not, and based on even the Power  
5 Point.

6 Is it a gang? It's a gang.

7 MS. PANDUKHT: It is --

8 THE COURT: Is it a criminal street gang? It's just  
9 not.

10 MS. PANDUKHT: Your Honor --

11 THE COURT: And to have a Metro say that is just --  
12 not only error, it's just disingenuous in the Court's opinion.  
13 It's just disingenuous based on what I heard. It really is.

14 I don't know how you make a statement otherwise.

15 MS. PANDUKHT: Your Honor, so you -- just so you  
16 know, that Power Point was not -- was not prepared by me. It  
17 was prepared by the detective. I just want to make that clear  
18 for the record.

19 THE COURT: But that's what you were going to show  
20 the jury.

21 MS. PANDUKHT: No, I know, I just wanted to say -- I  
22 just want to make sure everything is here.

23 THE COURT: Oh, I see, you want to get off the hook;  
24 right?

25 MS. PANDUKHT: No, no.

1 THE COURT: You're off the hook, Ms. Pandukht.

2 MS. PANDUKHT: I'm clear on the record because --  
3 because I got it last night, and that's when I showed it to  
4 defense counsel, so I just want to make it clear, I didn't  
5 prepare it and then hide it from the defense.

6 THE COURT: No.

7 MR. FIGLER: We got this one first thing this  
8 morning, very first thing she gave it to us.

9 THE COURT: All right. And at the end of the day,  
10 you know, my biggest concern is having an officer testify, who  
11 hasn't sat through a trial as an expert and to just conclude  
12 legally, giving the jury a legal conclusion that based on,  
13 quote, his opinion, Puros Locos is a criminal street gang under  
14 the definition of an NRS, it's just -- it's not there.

15 MS. PANDUKHT: And in other trials, the gang  
16 detective never does sit through the entire trial because he's  
17 a witness, and so Judges preclude him from sitting through it.

18 THE COURT: But I bet other trials are about Crips  
19 and Bloods and --

20 MS. PANDUKHT: A lot of them are.

21 THE COURT: Really, really big gangs that everybody  
22 knows, like I could almost take judicial notice that they are,  
23 you know, criminal street gangs --

24 MS. PANDUKHT: So --

25 THE COURT: -- under the definition of Nevada law.

1 MS. PANDUKHT: So your ruling is specific only to  
2 the facts of this case?

3 THE COURT: Yeah, only as to Puros Locos and what  
4 I've heard in this case.

5 MS. PANDUKHT: In this particular case.

6 THE COURT: You know, if another jury trial goes on  
7 in, you know, the department down the hallway, and somebody  
8 else testifies that these Puros Locos on a daily basis are  
9 doing drive-by shootings on people, then that Judge should hold  
10 that as a criminal street gang.

11 It's just not enough in this particular case.  
12 That's all I'm saying.

13 MS. PANDUKHT: And at this point all the Judge is --

14 THE COURT: It doesn't even exist today because  
15 how -- the three members that it had are in jail.

16 MS. PANDUKHT: You're absolutely --

17 THE COURT: This guy is going off. This guy is in  
18 jail. The others guy's in jail.

19 So most of its members are gone.

20 MS. DEMONTE: Right.

21 MS. PANDUKHT: Your ruling today is only excluding  
22 the gang expert, and then I would request, you know, tonight,  
23 and I'll --

24 THE COURT: You figure it out tonight what you want  
25 to do with the rest of it.

1 MS. PANDUKHT: Thank you.

2 THE COURT: But I can't let a gang expert take the  
3 stand with that Power Point and testify.

4 MR. FIGLER: Thank you, Your Honor.

5 THE COURT: It would just be error. So --

6 MR. GOODMAN: Could we take a two-minute break,  
7 Your Honor?

8 THE COURT: Yeah.

9 MS. PANDUKHT: I would appreciate that. I'll go  
10 make a call.

11 (Recess in proceedings.)

12

13 (The following proceedings were had in open  
14 Court in the presence of the jury panel:)

15

16 THE COURT: All right. Please be seated.

17 All right. We're back on the record, State of  
18 Nevada versus Evaristo Garcia, Case Number C262966.

19 Let the record reflect the defendant is present,  
20 with his attorneys, Mr. Figler, Mr. Goodman; and for the State,  
21 Ms. Pandukht and Ms. Demonte.

22 We're still on the State's case in chief, and the  
23 State can call their next witness.

24 MS. DEMONTE: State calls Lary Sims.

25



1

LARY SIMS

2

called as a witness on behalf of the State,

3

having been first duly sworn,

4

was examined and testified as follows:

5

6

THE WITNESS: I do.

7

THE CLERK: Please be seated.

8

State and spell your full name for the record,

9

please.

10

THE WITNESS: My first name is Lary, spelled

11

L-A-R-Y; my last name is Sims, spelled S-I-M-S.

12

THE COURT: Go ahead.

13

14

## DIRECT EXAMINATION

15

BY MS. DEMONTE:

16

Q. Sir, how are you employed?

17

A. I'm a forensic pathologist at the Clark County

18

Coroner's Office.

19

Q. And how long have you been there?

20

A. Almost 15 years.

21

Q. And what are your job duties as a forensic

22

pathologist at the Coroner's Office?

23

A. Well, any case that comes under the jurisdiction of

24

the Coroner's Office can be assigned to one of the forensic

25

pathologists there in order to ascertain the cause and manner

1 of death.

2 Q. And is there any specific training that you've had  
3 to undergo in order to get the job you do today?

4 A. Yes.

5 Q. And what training is that?

6 A. Well, I'm a licensed physician. I've done specialty  
7 training in pathology, just general pathology at Michigan State  
8 University. And then I did a fellowship of forensic pathology  
9 at the Cook County Medical Examiner's Office in Chicago.

10 And I'm board certified in anatomic pathology,  
11 clinical pathology and forensic pathology by the American Board  
12 of Pathology.

13 MR. FIGLER: Your Honor, I've been doing homicide  
14 cases with Dr. Sims for about 15 years, and so we'll stipulate  
15 to his qualification as an expert in this field.

16 THE COURT: I don't know if the State wants to.

17 MS. DEMONTE: That's fine, Your Honor.

18 THE COURT: Okay.

19 MS. DEMONTE: May I proceed with the questions?

20 THE COURT: The State will -- with that stipulation  
21 then, obviously, the -- the position is going to be a forensic  
22 pathologist is an expert in that field.

23 MR. FIGLER: That's correct, Your Honor.

24 THE COURT: All right.

25 THE WITNESS: Thank you.

1 MS. DEMONTE: May -- may I then proceed with the  
2 questioning?

3 THE COURT: Yes.

4 MS. DEMONTE: Thank you.

5 BY MS. DEMONTE:

6 Q. Dr. Sims, I want to direct your attention to  
7 February 6th of 2006. Did you yourself actually perform an  
8 autopsy on the body of the person by the name of Victor Gamboa?

9 A. Yes.

10 Q. Okay. And -- and while you're conducting an  
11 autopsy, are photographs taken to document your findings as  
12 that is done?

13 A. Yes.

14 MS. DEMONTE: May I approach the witness,  
15 Your Honor?

16 THE COURT: You may.

17 MS. DEMONTE: Thank you.

18 BY MS. DEMONTE:

19 Q. Dr. Sims, showing you what's been marked as State's  
20 Proposed Exhibits 76 through 84, if you could please flip  
21 through those.

22 A. (Witness complies.)

23 Q. Thank you.

24 And do those photographs fairly and accurately  
25 depict how the autopsy was documented?

1 A. Yes.

2 MS. DEMONTE: Move for admission of 76 through 84.

3 MR. FIGLER: No objection to that.

4 THE COURT: With no objection, 76 through 84 are now  
5 admitted.

6 (State's Exhibits 76 through 84, respectively,  
7 were admitted into evidence.

8 MS. DEMONTE: Thank you.

9 BY MS. DEMONTE:

10 Q. Now, Dr. Sims, how does an autopsy -- actually, how  
11 do you go about conducting an autopsy?

12 A. Well, start by inspecting the skin surfaces, from  
13 the top of the head to the bottom of the feet.

14 And then there's some incisions that are made in  
15 the front of the body and on the head, and the internal organs  
16 are examined, and then the internal body surfaces are examined.

17 Q. Now, as you're -- as you're inspecting the skin  
18 surfaces, are you looking to document injuries or abrasions of  
19 that nature?

20 A. Yes.

21 Q. Okay. And were you able to find some on the body of  
22 Victor Gamboa?

23 A. Yes.

24 Q. Okay. And you start from head to toe?

25 A. Yes.

1 Q. Beginning with the head what did you find?

2 MR. FIGLER: And just for the record, Dr. Sims is  
3 referring to the Coroner's Report, the Autopsy Report.

4 THE COURT: All right.

5 THE WITNESS: His forehead had a linear abrasion at  
6 the edge of the scalp. There was also some hemorrhage  
7 underneath there.

8 There were several punctate abrasions on the bridge  
9 of his nose.

10 He had blood coming out of his nose.

11 His upper lip had a small laceration.

12 And then his left knee had an abrasion.

13 BY MS. DEMONTE:

14 Q. All right. Now, starting with the head --

15 MS. DEMONTE: Your Honor, move to publish State's  
16 Exhibit 76.

17 THE COURT: You may.

18 MS. DEMONTE: Thank you.

19 BY MS. DEMONTE:

20 Q. And do you see the injuries you just referred to  
21 there?

22 A. Yes.

23 Q. Okay. The first being the top of the head?

24 A. Right. There's an abrasion right there, and then  
25 there's some punctate abrasions here on the bridge of his nose,

1 and there's also blood from his -- from his nose.

2 Q. Okay. And then you mentioned an abrasion at his  
3 knee. State's Exhibit 84, is that what we see there?

4 A. Right. Yes.

5 Q. Okay. Now, did you also take note of the appearance  
6 of his hands?

7 A. Let's see. His fingernails anyway.

8 Q. Okay.

9 A. There was fingerprint -- there was a lot of  
10 fingerprint ink on his hands also.

11 Q. Okay. And showing you State's Exhibit 83, do you  
12 see what's being documented there?

13 A. It looks like an abrasion.

14 Q. Okay. And that's to the palm of the hand  
15 (indicating)?

16 A. Correct.

17 Q. With some dirt?

18 A. Definitely dirt or fingerprint ink or something.

19 Q. Okay. And where else did you note injuries to  
20 Mr. Gamboa's body?

21 A. He had a gunshot wound.

22 Q. Okay. And where was that gunshot wound?

23 A. The entrance was on the left back, and the exit was  
24 on the abdomen.

25 Q. Now, the entrance on the left back, showing you

1 State's Exhibit 79 (indicating), is that what we're looking at  
2 here?

3 A. Yes.

4 Q. Okay. And then the exit you said was on the lower  
5 abdomen?

6 A. Let's see. Right, yes, on the right side of the  
7 abdomen, correct.

8 Q. Showing you State's Exhibit 80, do you see that  
9 depicted there?

10 A. Right. This is the exit wound right there  
11 (indicating).

12 Q. Okay. Now, after you conduct the external  
13 examination, what do you do next?

14 A. I do an internal examination.

15 Q. Okay. And what's the purpose of the internal  
16 examination?

17 A. Oh, on this case would be to understand the  
18 trajectory of the bullet.

19 Q. Okay. And how did you go about doing that in this  
20 case?

21 A. Made some incisions on the body, removed the  
22 internal organs.

23 Q. Okay. And what did you find with respect to the  
24 trajectory of the bullet?

25 A. The bullet came in, in the left back. It went

1 through the diaphragm, the spleen, and then it went across the  
2 body, went through the aorta and the inferior vena cava, and  
3 then exited on the front of the right abdomen.

4 Q. And was this a fatal injury?

5 A. Going through the aorta and the inferior vena cava  
6 would have caused a fairly rapid and significant blood loss.

7 Q. Okay. And what does the aorta do?

8 A. It's a main blood vessel that supplies blood to  
9 almost the -- the entire body starting at the heart.

10 Q. Okay. And have you seen injuries to aortas before?

11 A. Yes.

12 Q. Okay. Are they, fair to say, fatal?

13 A. I would say probably the fatality rate is near a  
14 hundred percent. I guess if you got shot in a surgical suite,  
15 they might be able to save you.

16 Q. But that's probably --

17 A. About the only thing, yes.

18 Q. Now, is there anything significant that you found  
19 about the -- well, let me ask you this, you made note in your  
20 autopsy of a shored exit. What does that mean?

21 A. That means that the -- the -- when the bullet came  
22 out in the abdomen, that there was either some heavy clothes or  
23 there was some kind of surface that the skin slapped up against  
24 and caused some damage to the skin that indicated that  
25 something was in close proximity to the skin.



1 Q. And if I were to show you a close-up of that exit  
2 wound, on Exhibit 82, can you explain to the members of the  
3 jury what you're talking about?

4 A. You can see --

5 Q. You want me to zoom in?

6 A. Can you zoom out?

7 Q. Zoom out? Sure.

8 Or do you want a different photograph that's  
9 more further back? Would Exhibit 80 help?

10 A. Yeah, that would probably be better.

11 Q. Okay.

12 A. Yeah. You can see around that there's a lot of  
13 ecchymosis -- or contusion, bleeding, and there's also some  
14 damage at the very edge, at the very edge of the -- of the  
15 wound that that was an abrasion there.

16 So to me that indicated the possibility that it  
17 wasn't just a typical exit wound, that it -- the skin had been  
18 forced to slap up against something.

19 Q. Could it possibly be a brick wall?

20 A. Sure.

21 Q. Thank you.

22 Now, did I ask you this before, what was the age  
23 of the decedent that you examined?

24 A. He was a young man, actually wasn't -- he was only  
25 15.

1 Q. 15 years old?

2 A. 15 years of age.

3 Q. Okay. Now, after conducting your external and  
4 internal examination, did you reach a conclusion as to the  
5 cause of death of Victor Gamboa?

6 A. Yes.

7 Q. And what was that?

8 A. A gunshot wound to the back.

9 Q. And did you reach a conclusion as to the manner of  
10 death of Victor Gamboa?

11 A. Yes.

12 Q. And what was that?

13 A. Homicide.

14 (Sotto voce at this time.)

15 BY MS. DEMONTE:

16 Q. What is the -- now, you mentioned the aorta, and I  
17 asked you about that. What about the vena cava?

18 A. It's the main blood vessel that brings blood back to  
19 the heart.

20 Q. Okay. So aorta out, vena cave in?

21 A. Correct.

22 Q. All right.

23 MS. DEMONTE: Thank you. I'll pass the witness.

24 THE COURT: Cross-examination.

25 MR. FIGLER: Sure.

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CROSS-EXAMINATION

BY MR. FIGLER:

Q. Good afternoon, Doc.

A. Good afternoon.

Q. Hey, homicide as a manner, that's a scientific term; correct?

A. Well, it's a general term.

Q. General term?

A. Yeah. And --

Q. It just means by the agency of another person?

A. Correct.

Q. That's all it means?

A. Right.

Q. Okay. Just a couple questions about this, and then I'll let you get on your way.

Q. You noted that there was only one bullet injury to the body; correct?

A. Correct.

Q. And that's the one that went in and the one that eventually came out; correct?

A. Correct.

Q. Okay. You did note some other injuries. There were some abrasions to the head, face, knee, that sort of thing, you did note that?

1 A. Correct.

2 Q. And those would be consistent with someone who was  
3 maybe just in a fight; would you agree?

4 A. Um, well, they're not in a specific pattern of that.

5 The one on the hand may be, but the -- the,  
6 um -- and I guess the one on the head could possibly be, the  
7 bloody nose.

8 Q. Sure.

9 A. I guess -- I guess probably the one I was thinking  
10 about was the knee, which probably would happen when he fell,  
11 but I think I would agree with you, the others could -- could  
12 be associated with this.

13 Q. And you got one ahead me.

14 The knee is consistent with somebody falling,  
15 you've seen that a million times, right?

16 A. Correct.

17 Q. Okay. There was no evidence of somebody then going  
18 up to close range and -- and shooting him four additional  
19 times, right?

20 A. No.

21 Q. Or three or two?

22 A. No.

23 MR. FIGLER: Okay. Court's indulgence.

24 BY MR. FIGLER:

25 Q. Here's a question: What happens to somebody's

1 clothes?

2                   You said he probably came in with clothes at  
3 some point, and then, obviously, the photos that we looked at,  
4 he's -- he's nude. What happens to those clothes?

5           A.     In cases like this, the police process the body  
6 prior to me getting it, and they are involved in processing the  
7 clothes.

8           Q.     Okay. So they were to take it into custody, that  
9 would be their business, not yours?

10          A.     That is correct.

11               MR. FIGLER: Doc, that's it. Thanks so much.

12               THE COURT: Is there any redirect?

13               MS. DEMONTE: Just one very briefly, please.

14

15                               REDIRECT EXAMINATION

16 BY MS. DEMONTE:

17          Q.     Counsel had asked you about whether you saw any  
18 evidence of close range, what -- what do you define as close  
19 range?

20          A.     For a handgun it would be within 24 inches.

21               MS. DEMONTE: Thank you. Nothing further.

22               THE COURT: Any recross?

23               MR. FIGLER: None.

24               THE COURT: Do the ladies and gentlemen of the jury  
25 have any questions for this witness?

(Negative response from the jury panel.)

THE COURT: All right. With a negative response, thank you very much, Dr. Sims. Have a good day. You are excused.

THE WITNESS: Thank you.

(Whereupon, at this time the witness was excused.)

THE COURT: State, go ahead and call your next witness.

MS. DEMONTE: The State calls Maria Lopez.

(Sotto voce at this time.)

THE CLERK: Could you raise your right hand, please.

MARIA LOPEZ

called as a witness on behalf of the State,

having been first duly sworn,

was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Please be seated.

State your name full name for the record please.

THE WITNESS: Maria Lopez.

1 THE CLERK: Spelled like it sounds?

2 THE WITNESS: Yes.

3 THE CLERK: Thank you.

4

5 DIRECT EXAMINATION

6 BY MS. DEMONTE:

7 Q. Ma'am, how are you employed?

8 A. I'm a crime scene investigator with Huntington Beach  
9 Police Department in California.

10 Q. And how long have you been with Huntington Beach?

11 A. Approximately, five years.

12 Q. Prior to moving to Huntington Beach, how were you  
13 employed?

14 A. I was a crime scene analyst with Las Vegas  
15 Metropolitan Police Department.

16 Q. Okay. And how long were you with the Las Vegas  
17 Metropolitan Police Department?

18 A. Approximately, 19 years.

19 Q. Okay. Now, directing your attention to February 6th  
20 of 2006, were you employed with Metro at that time?

21 A. Yes, I was.

22 Q. Okay. And as a crime scene analyst?

23 A. Yes, I was.

24 Q. Okay. Now, is one of the duties of a crime scene  
25 analyst to also respond to autopsies?

1 A. Yes. On day shifts particularly.

2 Q. And what is the purpose of that?

3 A. It's a continuation -- considered to be a  
4 continuation of a crime scene where they're to document the  
5 body and any evidence on the body or in the body.

6 Q. Now, I want to direct your attention to a specific  
7 event that occurred on February 6th of 2006, did you, the  
8 following day, at the direction of homicide detectives  
9 Clifford Mogg and Ken Hardy, respond to an autopsy of a person  
10 by the name of Victor Gamboa?

11 A. Yes, I did.

12 Q. And what did you do when you got there?

13 A. Take photographs of the -- the body bag, the seal  
14 showing that the seal was intact on the body bag.

15 Then the bag was opened, along with personnel  
16 from the Coroner's Office, they were also present. And I  
17 documented the condition of the body as we found it when we  
18 opened the bag and then as we removed the clothing, and  
19 additional photographs as necessary or as required by the  
20 coroner.

21 Q. Okay. So you documented the body when the bag was  
22 first opened and -- and as well as the removal of the clothing.

23 With respect to the clothing, did you do  
24 anything in particular with that?

25 A. Just photographs and then I recovered it and



1 impounded it as evidence.

2 Q. Okay.

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

5 THE COURT: You may.

6 BY MS. DEMONTE:

7 Q. Ma'am, showing you what's been marked as State's  
8 Proposed Exhibits 64 through 75, do you recognize those?

9 A. Yes, the clothing found in the body bag.

10 Q. Okay. And are those -- are these photographs --  
11 do -- you actually took these yourself, correct?

12 A. Yes.

13 Q. And do they fairly and accurately depict the  
14 clothing that you were documenting and then later impounded?

15 A. Yes.

16 MS. DEMONTE: Move for admission of 64 through 75.

17 MR. FIGLER: No opposition.

18 THE COURT: All right. State's Proposed Exhibits 64  
19 through 75 now admitted as State's exhibits.

20 (State's Exhibits 64 through 75, respectively,  
21 were admitted into evidence.)

22 BY MS. DEMONTE:

23 Q. Now, I'm showing you State's Proposed Exhibit 102,  
24 and I'm wondering -- hopefully, you can read through the  
25 plastic bag that we placed on it.

1           A.     Yes. This is the label that I placed on the bag  
2 containing the clothing that I recovered at autopsy.

3           Q.     Okay. So the photograph you just looked at document  
4 what is inside this bag?

5           A.     That's correct.

6           Q.     And you -- you've actually -- you've placed this  
7 label on here; correct?

8           A.     Yes.

9           Q.     And you placed this evidence number?

10          A.     Yes.

11          Q.     Sorry, this event number?

12          A.     The report number.

13          Q.     Okay.

14          A.     Along with the evidence numbers.

15          Q.     All right. And you've also got a sticker here that  
16 says: Biohazard. Did you place that?

17          A.     Yes.

18          Q.     And why did you place that?

19          A.     Because there appeared to be blood on the -- some of  
20 the clothing.

21          Q.     Okay. And is that a common thing that you would do?

22          A.     Yes.

23          Q.     Okay. And why is that?

24          A.     The label?

25          Q.     Yes.

1           A.     It's placed on there to alert whomever is going to  
2 be reviewing or analyzing the evidence that there's blood, and  
3 so it could be contaminated, et cetera, so they have to take  
4 certain precautions.

5           Q.     Okay. Now, you yourself placed the clothes into  
6 this bag?

7           A.     Yes.

8           Q.     And were those clothes in your sole care, custody  
9 and control from the time they were removed from the body to  
10 the time you placed them in the bag?

11          A.     Yes, they were.

12          Q.     And once you placed them in the bag and labeled the  
13 bag, what did you then do with it?

14          A.     It's placed in the evidence vault.

15          Q.     Okay. And was this bag in your sole care, custody  
16 and control from the time that you placed the items in it until  
17 the time it was lodged in the evidence vault?

18          A.     Yes.

19          Q.     And did you place your own seals on this?

20          A.     Yes, I did.

21          Q.     And is that what we see up --

22          A.     Across here.

23          Q.     Up here?

24          A.     Correct.

25          Q.     Now, there's another seal down the side, is that

1 your seal?

2 A. No.

3 Q. Okay. Do you know whose seal that is?

4 A. I believe that's Joe Matvey.

5 MR. FIGLER: I'm sorry, I couldn't hear, Your Honor.

6 MS. DEMONTE: I'm sorry.

7 THE WITNESS: Actually, this one I do not know.

8 BY MS. DEMONTE:

9 Q. You don't know?

10 A. I do not know.

11 THE REPORTER: One person at a time, please.

12 MS. DEMONTE: Sorry.

13 BY MS. DEMONTE:

14 Q. But it says K and then it ends in an H; correct?

15 A. (No verbal response.)

16 Q. I know we're trying to read it through the bag.

17 A. Actually, this would be the personnel number, and  
18 the initials are KH.

19 Q. Okay.

20 A. With a 3031 is their personnel number.

21 Q. Okay. And -- and when somebody does something with  
22 the clothing at the evidence vault, do they have to sign a  
23 chain of custody?

24 A. Yes, they do.

25 Q. Okay. And do you see a chain of custody label on

1 this evidence?

2 A. Yes.

3 Q. And it indicates that there were two signatures;  
4 correct?

5 A. Correct.

6 Q. The first one being Joe Matvay (phonetic).

7 A. Correct.

8 Q. Okay. And the second one being -- do you know -- do  
9 you recognize that one?

10 A. I do not recognize those initials.

11 Q. Okay. That's fine.

12 MS. DEMONTE: I believe there's not going to be a  
13 chain of custody objection on State's Exhibit 102, so the State  
14 will move to admit 102.

15 THE COURT: All right. State -- with no objection,  
16 State's Proposed Exhibit 102 is now State's Exhibit 102.

17 MR. FIGLER: That's right, Your Honor, no objection.

18 (State's Exhibit 102  
19 was admitted into evidence.)

20 MS. DEMONTE: I'll pass the witness, Your Honor.

21 THE COURT: Any cross?

22 MR. FIGLER: Just real briefly, Your Honor.

23 THE COURT: Sure.

24 MR. FIGLER: Do we have the photos that were just  
25 admitted?

1 MS. DEMONTE: Yeah, I'm sorry.

2 MR. FIGLER: No, no problem.

3

4 CROSS-EXAMINATION

5 BY MR. FIGLER:

6 Q. So, ma'am, I'll keep it quick.

7 Directly from the body bag into the bag were the  
8 items of clothing that were shown to you in these -- these  
9 photos (indicating); correct?

10 In other words, these are the things that are  
11 inside that bag right now -- this shirt, this shirt, this  
12 shirt, these shorts, these shorts, jeans and those items;  
13 correct?

14 A. Yes.

15 Q. Okay. And -- and it's important, this chain of  
16 custody, because everything has to be preserved and there has  
17 to be integrity as you move along the line; correct?

18 A. That's correct.

19 Q. You're trained that that's vital to preserve the  
20 integrity of evidence for a case; correct?

21 A. That's correct.

22 Q. Okay. Now, there's also markings on this bag, so  
23 when this goes into official evidence impound, people can refer  
24 to it by -- by numbers; correct?

25 A. Correct.

1 Q. Okay. And if you do --

2 THE REPORTER: I can't hear when you make all that  
3 noise. I'm sorry.

4 MR. FIGLER: I know. It's the bag.

5 THE REPORTER: I know. But it's really difficult.  
6 I'm sorry.

7 MR. FIGLER: Got it. No problem.

8 BY MR. FIGLER:

9 Q. If I show you the bag right now, you will be able to  
10 tell me that this is Package 11 for the purposes of impound;  
11 correct?

12 A. May I refer to the bag?

13 Q. Sure, you can take the whole thing if you like.

14 A. Pack -- packaging in --

15 Q. On impound?

16 A. I don't know where you see Package 11 on there. If  
17 I may refer to my report?

18 Q. Yeah, if you could refer to the report?

19 A. That -- that would be Package 2.

20 Q. Two?

21 A. Containing those items.

22 Q. Okay. Oh, I'm sorry, you know what I did, Number 11  
23 there is what? I'm sorry.

24 A. Yes, Number 11 is the -- the belt.

25 Q. Oh, okay.

1 A. Yes, that was in the bag.

2 Q. 11 is the belt?

3 A. Yes.

4 Q. So 11 is that belt right there (indicating)?

5 A. Yes.

6 Q. Okay. So if we were to open this up, and I don't  
7 think we need to open it up, you're going to find Number 11  
8 inside there being the belt?

9 A. That's correct.

10 Q. Okay. Thanks.

11 And then this bag, to your knowledge, has been  
12 opened twice and then resealed properly to maintain the chain  
13 of custody after you put the items inside that bag; correct?

14 A. That's correct.

15 MR. FIGLER: Thank you. No further questions.

16 THE COURT: Any redirect?

17 MS. DEMONTE: No, Your Honor.

18 THE COURT: All right. Thank you very much. Wait.

19 Ladies and gentlemen of the jury, do you have any  
20 questions for this witness?

21

22 (Negative response from the jury panel.)

23

24 THE COURT: Negative response.

25 Thank you very much for your testimony. You're



1 excused.

2

3 (Whereupon, at this time the Witness was excused.)

4

5 THE COURT: Call your next witness.

6 (Sotto voce at this time.)

7 MS. DEMONTE: State calls Ken Hardy.

8

9 KEN HARDY

10 called as a witness on behalf of the State,

11 having been first duly sworn,

12 was examined and testified as follows:

13

14 THE WITNESS: I do.

15 THE CLERK: Please be seated.

16 State and spell your full name for the record,

17 please.

18 THE WITNESS: Ken Hardy.

19 K-E-N, H-A-R-D-Y.

20 THE COURT: Go ahead and proceed.

21 MS. DEMONTE: Thank you.

22

23 DIRECT EXAMINATION

24 BY MS. DEMONTE:

25 Q. Sir, how are you employed?

1 A. I'm retired.

2 Q. And what are you retired from?

3 A. The Las Vegas Metropolitan Police Department.

4 Q. And how long did you work for the Las Vegas  
5 Metropolitan Police Department?

6 A. 25 years and 9 months.

7 Q. Okay. And what was your last assignment at the  
8 Las Vegas Metropolitan Police Department?

9 A. The homicide section.

10 Q. And how long were you with homicide section?

11 A. 16 years.

12 Q. And what was your job title with the homicide  
13 section?

14 A. Detective.

15 Q. Now, I want to direct your attention to February 6th  
16 of 2006, were you called out to investigate a shooting at the  
17 Morris Sunset East High School?

18 A. Yes.

19 Q. Is that here in Las Vegas, Clark County, Nevada?

20 A. Yes.

21 Q. And did you have a partner at the time?

22 A. I did.

23 Q. And what was his name?

24 A. Detective Cliff Mogg.

25 Q. And is he still employed with the Las Vegas

1 Metropolitan Police Department?

2 A. Yes.

3 Q. All right. Now, when you respond to a homicide  
4 scene, are the duties divvied up between the two detectives?

5 A. Yes.

6 Q. And how are they divided up?

7 A. They are divided up that when we arrive we are  
8 briefed by the detectives that are on the scene already. And  
9 one detective would be assigned to interview any witnesses, and  
10 the other detective would be assigned to document the crime  
11 scene.

12 Q. Okay. And who was assigned the task of interviewing  
13 witnesses?

14 A. Detective Mogg.

15 Q. And so that left yourself with the crime scene;  
16 correct?

17 A. Yes.

18 Q. Okay. Now, Detective, showing you what's already  
19 been admitted as State's Exhibit 3, do you recognize this as  
20 being the crime scene diagram?

21 A. Yes.

22 Q. Okay. Now, this involved a -- the -- the area of  
23 Washington Street; correct?

24 A. Yes.

25 Q. Okay. And were you present when crime scene

1 analysts located various shells and casings on Washington and?

2 A. Yes, I was.

3 Q. Okay. Were you also present during the location and  
4 retrieval of a firearm?

5 A. Yes.

6 Q. And where was that located?

7 A. The firearm?

8 Q. Yes.

9 A. It was to the street west of the Morris Academy on  
10 Parkhurst, and it would have been south of Washington.

11 Q. And how were you notified that that firearm was  
12 found?

13 A. I was notified by an officer at the scene that they  
14 had located a firearm in some garbage that was put out to the  
15 curb.

16 Q. And was that Officer Rich Moreno?

17 A. Yes.

18 Q. Okay. Now, showing you what's already been admitted  
19 as State's Exhibit 36, do you recognize this (indicating)?

20 A. Yes.

21 Q. And what are we looking at there?

22 A. Two toilets that appear to be put out to the curb.

23 Q. And is that where you responded to?

24 A. Yes.

25 Q. Okay. And State's Exhibit 37, what do we see there?

1           A.     That is a black semiautomatic handgun in the tank of  
2 one of the toilets.

3           Q.     Okay. Now, Detective, once you were notified by  
4 Officer Moreno that the firearm had been located there, what  
5 did you do?

6           A.     I notified the crime scene analyst, advised him of  
7 it. He came over and took pictures and recovered it.

8           Q.     Okay. And would that be Dan Proietto?

9           A.     Yes.

10          Q.     Okay. And were you present when Dan Proietto  
11 retrieved that firearm?

12          A.     Yes.

13          Q.     And did you observe anyone besides Dan Proietto  
14 touch that firearm?

15          A.     No.

16          Q.     And at your direction, did Dan Proietto then lodge  
17 that into the evidence vault?

18          A.     Yes.

19          Q.     Okay. Now showing you State's Exhibit 100, do you  
20 recognize this?

21          A.     Yes, I do.

22          Q.     Okay. And what is State's Exhibit 100?

23          A.     It is a semiautomatic handgun. It -- it's a box  
24 that appears to contain a semiautomatic handgun, and on the  
25 side of it, it has my initials on one of the seals.

1 Q. Okay. And how do you know that this box contains a  
2 semiautomatic handgun?

3 A. Under the item description, it has an Imez pistol  
4 with a serial number, the caliber, the color, the grip.

5 Q. Okay. And based on the description, is it the same  
6 item that was located by Officer Moreno?

7 A. Yes.

8 Q. Are there other indicia of identification as well  
9 that tell you that that's the same firearm?

10 Does it bear an event number specific to this  
11 case?

12 A. It -- it has the event number for the case, yes.

13 Q. Now you said it bears your seals.

14 Let me ask you this: When it's first lodged in  
15 the evidence vault, that's done by Crime Scene Analyst  
16 Proietto; correct?

17 A. That's correct.

18 Q. And is there a notation on the exhibit itself that  
19 that was done?

20 A. It -- it has his signature and his initials and  
21 P number, yes.

22 Q. And does the -- the evidence label contain also a  
23 chain of custody for that item?

24 A. Yes, it does.

25 Q. Are there names following Dan Proietto's on that

1 item?

2 A. Yes.

3 Q. What's the first name following Dan Proietto?

4 A. I believe it's Alice Maceo.

5 Q. And who is Alice Maceo?

6 A. Alice Maceo worked in our fingerprint section of the

7 lab.

8 Q. And do you see her seals present on that box?

9 A. There's Dan's.

10 Yes.

11 Q. Okay. And who is the next person after Alice Maceo?

12 A. P number 8,002.

13 Q. And is that a forensic analyst in the firearms

14 department?

15 A. I believe that's the firearms examiner that examined

16 the firearm.

17 Q. Now, following the firearms examiner's notation on

18 the chain of custody, what's the next name on there?

19 A. My name.

20 Q. Okay. And when was that item obtained by you?

21 A. This item I have dated it December 29th of 2010.

22 Q. Okay. And you actually retrieved that for -- from

23 the evidence vault to open on that date; correct?

24 A. Yes.

25 Q. And what was the purpose of doing that?

1 A. It was an evidence view in preparation of trial.

2 Q. Okay. And who was doing the evidence view?

3 A. It would have been the prosecuting attorney, the  
4 defense attorney, and then myself.

5 Q. Okay. And it was for this case; was it not?

6 A. Yes.

7 Q. And is it fair to say that you actually opened all  
8 the evidence in the vault to show to not only myself but  
9 defense attorneys involved in this case?

10 A. All the evidence that was requested to be viewed,  
11 yes.

12 Q. And this was one item particularly that was  
13 requested to be viewed?

14 A. Yes.

15 Q. And who made that request?

16 A. I would -- I would imagine it was the defense  
17 attorney that wanted to view what was inside this box.

18 Q. Okay. And you actually opened it at the vault?

19 A. Yes.

20 Q. And once you opened it at the vault, did you touch  
21 it in any way?

22 A. Um, I -- I can't recall whether I touched it. When  
23 we do an evidence view, we have our gloves on, and we try to  
24 open the package but not touch it.

25 Whether I did or not I couldn't tell you.



1 Q. But you wore gloves?

2 A. Yes.

3 Q. Okay. And what was the purpose of you wearing  
4 gloves?

5 A. We always wear gloves when we're handling evidence  
6 for contamination, some of the evidence may have blood on it.

7 Q. And did you allow anyone else to touch the item?

8 A. No. We don't -- we don't allow anyone to touch the  
9 item.

10 Q. Okay. Now, after allowing the parties involved in  
11 this case to view this item, did you then reseal it and lodge  
12 it back in the vault?

13 A. Yes, I did.

14 Q. And do you see your seals on that box?

15 A. I do.

16 Q. Okay. Thank you.

17 Now, Detective, on the night of February 6th of  
18 2006, did you make any arrests?

19 A. No.

20 Q. Okay. Was this still an open case for several  
21 months?

22 A. Yes.

23 Q. Okay. I want to direct your attention to April 1st  
24 of 2006. Did you interview a person -- were you present at the  
25 interview of a person by the name of Jonathan Harper?

1 A. Yes, I was.

2 Q. And who also was present?

3 A. Cliff Mogg.

4 Q. Did either you or Detective Mogg give Jonathan  
5 Harper any information regarding the case?

6 A. No.

7 Q. Did either you or Detective Mogg tell Mr. Harper  
8 what to say?

9 A. No.

10 Q. Okay. At the time you interviewed Jonathan Harper,  
11 did you have an identity of the shooter?

12 A. Yes.

13 Q. Okay. And where did you get that information from?

14 A. I don't recall, but in the statement his name was --  
15 his name had been discussed and also a photo lineup had been  
16 prepared, I believe.

17 Q. Okay. I'm sorry.

18 Prior to interviewing Jonathan Harper, did you  
19 have an identification --

20 A. No.

21 Q. Okay.

22 A. I'm sorry.

23 Q. So Jonathan Harper is the person that initially  
24 supplied you with the name?

25 A. And that would have been more of a monicker, I

1 believe.

2 Q. Okay. Now, I want to fast-forward to July 26th of  
3 2006. Were you present at an interview of Edshel Calvillo?

4 A. Yes.

5 Q. Did you give any information about the case to  
6 Edshel Calvillo?

7 A. No.

8 Q. And who was present with you?

9 A. Detective Mogg.

10 Q. Did either you or Detective Mogg tell Edshel  
11 Calvillo what to say?

12 A. No.

13 Q. At some point was an arrest made of a person by the  
14 name of Evaristo Garcia?

15 A. Yes.

16 Q. And did that happen here in the United States?

17 A. No.

18 Q. When is the first time you laid eyes on  
19 Evaristo Garcia?

20 A. The first time was October 2008, I believe the 16th  
21 or the 18th, and it was at McCarran International Airport.

22 Q. And what was the purpose of going to McCarran  
23 International Airport?

24 A. We were to meet with the federal authorities that  
25 were transporting him back to the United States from Mexico.

1 Q. And is that the first time you saw Evaristo Garcia?

2 A. Yes.

3 Q. Do you see Evaristo Garcia in the courtroom today?

4 A. Yes.

5 Q. Can you please point to him and describe something  
6 that he's wearing?

7 A. He's sitting behind the table with the blue  
8 long-sleeved shirt on.

9 MS. DEMONTE: Record reflect identification of the  
10 defendant?

11 THE COURT: It will. The record will so reflect.

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

14 THE COURT: Yes.

15 BY MS. DEMONTE:

16 Q. Once you met with Evaristo Garcia at McCarran  
17 Internation Airport, was he then booked into custody for this  
18 case?

19 A. Yes.

20 Q. Okay. Showing you State's -- State's Proposed  
21 Exhibit 111, is that a fair and accurate depiction of Evaristo  
22 Garcia when he was booked into the Clark County Detention  
23 Center for this case?

24 A. Yes, in October of 2008.

25 MS. DEMONTE: Move for admission of State's

1 Exhibit 111.

2 MR. FIGLER: May I do a quick voir dire about that  
3 photo, Your Honor?

4 THE COURT: You may.

5 MR. FIGLER: Thank you.

6

7 VOIR DIRE EXAMINATION

8 BY MR. FIGLER:

9 Q. Sir, did you take the photo you are holding in your  
10 hand?

11 A. I did not.

12 Q. Do you know what the lighting conditions were in the  
13 room where that photo was taken?

14 A. The lighting conditions?

15 Q. In that room, do you know what they are, can you  
16 testify with personal knowledge what --

17 A. I was there when this picture was taken.

18 Q. You were there?

19 A. I was.

20 Q. Okay. Can you describe the lighting conditions?

21 A. They were brighter than in here. They're in the  
22 jail on the left-hand side where the processing counter is and  
23 the cameras, and that's where the booking pictures are taken.

24 Q. Okay. And did you take another photo of him two  
25 months later or three months later?

1 A. I did not, no.

2 Q. Okay. So this just reflects sometime in October of  
3 2008; correct?

4 A. Yes.

5 MR. FIGLER: We'll renew our objection.

6 THE COURT: No, or you have an objection?

7 MR. FIGLER: We do renew our objection.

8 THE COURT: All right. The objection is overruled.  
9 It will be admitted.

10 (State's Exhibit 111  
11 was admitted into evidence.)

12 MS. DEMONTE: Thank you.

13 Move to publish, Your Honor?

14 THE COURT: You may.

15 MS. DEMONTE: Court's indulgence.

16 (Sotto voce at this time.)

17 MS. DEMONTE: I'll pass the witness, Your Honor.

18 THE COURT: Cross-examination.

19 MR. FIGLER: Thanks.

20

21 CROSS-EXAMINATION

22 BY MR. FIGLER:

23 Q. Yes or no, Sergeant; am I correct?

24 A. No.

25 Q. Detective?

1 A. Yes.

2 Q. Thank you.

3 You're able to recognize that guy is this guy;  
4 correct?

5 A. Yes.

6 Q. Now, Detective, I just have a few questions about  
7 your investigation.

8 With regard to identifying ultimately Evaristo  
9 Garcia as a potential suspect in this case, you would say the  
10 first big break came with Jonathan Harper's April 1 recorded  
11 statement to you; correct?

12 A. Yes.

13 Q. And where was Jonathan Harper when he gave that  
14 statement?

15 A. In his apartment.

16 Q. In his apartment?

17 A. Yes.

18 (Sotto voce at this time.)

19 BY MR. FIGLER:

20 Q. And his mother was present at the time?

21 A. Yes.

22 Q. Okay. And you just walked in, turned on the tape  
23 recorder and just started asking questions right away, there  
24 was no preamble at all; correct?

25 A. I can't say that.

1 Q. Okay. And typically you've probably done, what, I  
2 mean we've been doing cases forever, you've probably done a  
3 couple of thousand interviews, if not 10,000 interviews, in  
4 your career, quite a bit; right?

5 A. Quite a few, I don't know the number.

6 Q. A lot though; right?

7 A. Yes.

8 Q. Okay. And it pretty much goes the same way every  
9 time. You go in, introduce yourself to the people, talk about  
10 what you're going to talk about, maybe feel them out a little  
11 bit, and then you say: I'm going to record you now, okay? And  
12 then you turn on the recorder; correct?

13 A. Not exactly like that, similar but not exactly.

14 Q. Okay. But there is some discussion that you have  
15 with the individual about the subject matter you're about to  
16 talk about; correct?

17 A. No, not necessarily.

18 We -- we try not to do a preinterview.

19 Q. Okay. So you're just going in there completely  
20 blind?

21 A. We -- we go in, explain that we're going to record  
22 it, have their permission. And then we turn the recorder on,  
23 everybody that's present, the date and the time, and then we  
24 start to ask the questions about what information they had.

25 Q. So you just randomly picked Jonathan Harper, showed



1 up at his house, turned on the tape recorder, about just  
2 started asking questions about this defense?

3 A. No. My partner, Detective Mogg, had learned that he  
4 may have information in reference to this case.

5 Q. Okay.

6 A. We were able to locate him, and we responded to  
7 gather what -- what information he had.

8 Q. And -- and how did your -- if you know, how did your  
9 partner figure out to talk to Jonathan Harper?

10 A. He had received information.

11 Q. Do you know from whom?

12 A. Other detectives.

13 Q. Do you know where they got it?

14 A. I don't know.

15 Q. Okay. You also know that Jonathan Harper was a  
16 victim of a gunshot head to -- at that same time; correct?

17 A. I had learned that that day at the apartment.

18 Q. And that had to be on Metropolitan Police  
19 Department's radar that the guy got admitted into a hospital  
20 with a gunshot wound to the head; correct?

21 A. Was it on Metro's radar?

22 Q. Yeah.

23 A. It could have been. I -- I'm not aware of it.

24 I wasn't aware of it at the time I -- that we  
25 talked to him that he was on the radar.

1 Q. Okay. So when you walked in there, you had no idea  
2 that the police knew about a gunshot to his head; is that your  
3 testimony today?

4 A. Are you saying the police?

5 Q. Yes.

6 A. I'm telling you I didn't.

7 Q. Okay. Do you know if your partner did?

8 A. I believe my partner had information prior to, that  
9 he was -- had sustained a head injury, yes.

10 Q. Okay. Do you remember what time you started your  
11 interview with Jonathan Harper on April 1st, 2006?

12 A. I can tell you it was in the afternoon, I believe.

13 Q. If I gave you a copy of his Voluntary Statement, do  
14 you think that would refresh your recollection as to when your  
15 interview started with Jonathan Harper?

16 A. Sure.

17 Q. Sure.

18 MR. FIGLER: May I approach, Your Honor?

19 THE COURT: You may.

20 BY MR. FIGLER:

21 Q. Detective, you can just review that. Make sure I'm  
22 giving you the right thing, that that's the Voluntary Statement  
23 of Jonathan Harper from that April date. Is it?

24 A. Yes, it appears to be.

25 Q. Okay. And now I want you to read that, see if it

1 refreshes your recollection as to when you began your interview  
2 with Jonathan Harper.

3 A. Yes, it does.

4 Q. Okay. And I'll take it back from you.

5 To your recollection, when did you start your  
6 interview with Jonathan Harper?

7 A. 1522 hours, which is 3:22 p.m.

8 Q. Okay. And then does it usually say at the end when  
9 it ends?

10 A. It usually does, yes.

11 Q. All right. Why don't you take a look and see if it  
12 says.

13 A. Okay. It does.

14 Q. Okay. And to your recollection then, Detective,  
15 when did the interview with Jonathan Harper on April 1st, 2006,  
16 end?

17 A. At 1545 hours, which would have been 3:45 p.m., and  
18 that would have been about 23 minutes later.

19 Q. Okay. And do you have knowledge that approximately  
20 an hour later, a detective went in there to talk to him about  
21 the gunshot wound to his head?

22 A. No, I do not.

23 Q. You have no knowledge of that at all?

24 A. I was not there when it happened. So what they  
25 talked about I don't know.

1 Q. Okay. So you're telling me that you had no idea  
2 that the gunshot wound was under investigation. You  
3 interviewed him, and you don't know if anyone interviewed him  
4 right after you in the same exact location?

5 A. I did not know that anybody came after us to  
6 interview him.

7 I was aware that he had been shot in the head.  
8 And whether that was still under investigation or not, I don't  
9 know, I was not handling that.

10 Q. Okay. Do you know who Detective Ericcson,  
11 P Number 6218, is? Have you ever heard of that person?

12 A. I do not know who that is.

13 (Sotto voce at this time.)

14 BY MR. FIGLER:

15 Q. All right. So during the course of your  
16 investigation, things are important for evidentiary value, like  
17 DNA, is that true?

18 A. Yes.

19 Q. All right. So if there is a possibility to test for  
20 DNA, especially in 2006, Metro would do that; correct?

21 A. That's a broad statement.

22 Q. It is?

23 A. They -- depending on the case, depending on the  
24 facts, whether they send it out for DNA analysis, it depends  
25 where the item was located, if it was contaminated. There's

1 many variables to -- is DNA evidence important? Yes.

2 When you want to say as far as the analyzation  
3 of it, that's -- that's the next step is to what needs to be  
4 analyzed.

5 Q. Okay. So here we have a murder case; correct?

6 A. Yes.

7 Q. So that is as high priority as cases get within  
8 Metropolitan Police Department; correct?

9 A. Yes.

10 Q. And you're assigned to the homicide division, you're  
11 Ken Hardy; correct?

12 A. Yes.

13 Q. And that is -- they don't just throw newbies on  
14 there, you work your way up to the homicide section; correct?

15 A. You test to get into the homicide section, yes.

16 Q. You have to pass tests to get on there; correct?

17 A. You have to pass an oral board, yes.

18 Q. Okay. And you were the sergeant at one point -- you  
19 were not?

20 A. I was not a sergeant.

21 Q. I keep thinking you were a sergeant.

22 A. Sorry.

23 Q. No problem. If it's up to me I'd promote you.

24 I'm showing you the exhibit, which was  
25 Number 100.

1 MR. FIGLER: May I approach, Your Honor?

2 THE COURT: You may.

3 BY MR. FIGLER:

4 Q. And -- and you talked about that gun. You were  
5 aware of that gun's existence in this case; correct?

6 A. Yes.

7 Q. Okay. And you knew that there was some red-brownish  
8 material on that gun; correct? You noted that in your report?

9 A. Yes.

10 Q. Okay. And sometimes red-brownish material turns out  
11 to be biological in your training and experience; correct?

12 A. Yes, it could be.

13 Q. Okay. And biological information is a good source  
14 for DNA; correct?

15 A. Yes.

16 Q. So if the brown -- and you remember the  
17 brownish-reddish material was on the grip of that -- of that  
18 gun; correct?

19 A. Yes.

20 Q. Okay. So if that DNA is tested, it could lead to a  
21 potential suspect in the case; correct?

22 A. Yes, it could.

23 Q. Okay. Now, the other end of the equation is you  
24 take people's DNA. It's something called a buccal or a buccal  
25 swab; is that correct?

1 A. Yes.

2 Q. And that's something that looks like a Q-Tip that  
3 could be administered to someone's mouth to get their -- their  
4 genetic material; correct?

5 A. Yes.

6 Q. Okay. And you did that for Evaristo Garcia;  
7 correct?

8 A. Yes.

9 Q. Okay. And you did that for Manuel Lopez; is that  
10 correct?

11 A. I believe so.

12 Q. Okay. He was another suspect in this case; correct?

13 A. Yes.

14 Q. And Giovanni Garcia, that was another suspect in  
15 this case?

16 A. He was another person we had spoken to, yes.

17 Q. Okay. And you took his genetic material as well;  
18 correct?

19 A. Whether I did or not, I don't recall.

20 Q. In the course of your investigation, do you have any  
21 recollection that his genetic material was taken?

22 A. I -- I don't recall.

23 Q. Okay.

24 A. I -- I know that Mr. Garcia, Evaristo Garcia's was.

25 Q. Okay.

1 A. Because I physically impounded that.

2 Q. Now, sometimes you also take fingerprints from  
3 people; correct?

4 A. Yes.

5 Q. Okay. There is a fellow you talked to named  
6 Edshel Calvillo, you testified on Direct; correct?

7 A. Yes.

8 Q. Did you ever take his fingerprints at all?

9 A. I don't recall.

10 Q. All right. How about his genetic material, did you  
11 ever take that?

12 A. I don't recall.

13 Q. Okay. A guy named Sal Garcia, did you ever  
14 interview him; do you remember?

15 A. Sal Garcia, I don't recall interviewing him. I'm  
16 not saying that I didn't, especially that night Detective Mogg  
17 was doing the interviews.

18 Q. But you did interview some people, you interviewed  
19 Jonathan Harper?

20 A. Correct.

21 Q. And you interviewed Edshel Calvillo; correct?

22 A. Correct.

23 Q. Okay. Do you remember taking any genetic material  
24 or fingerprints from Sal Garcia?

25 A. I don't recall that.



1 Q. How about Fabian (phonetic) Calvillo, did you take  
2 any fingerprints or DNA, genetic material from him?

3 A. I don't recall that.

4 Q. So now you got this gun, and it was found near the  
5 scene -- just one more question.

6 Are you sure that it was Dan Proietto who took  
7 the gun out of the tank?

8 A. I'm very sure that Dan Proietto recovered the gun  
9 from the tank.

10 Q. Okay. It wouldn't have been -- did you know a  
11 CSA Speas?

12 A. Bill Speas?

13 Q. Yeah, Bill Speas.

14 A. Yes.

15 Q. Was he there?

16 A. I -- I don't recall that. I recall Mr. Proietto  
17 impounding all the evidence from the scene.

18 Q. So you don't have personal knowledge one way or  
19 another if Bill Speas handled that weapon at any time?

20 A. I -- I don't.

21 Q. All right. So back to that weapon, it has obvious  
22 evidentiary value in this particular case to you; correct?

23 A. Yes.

24 Q. So everybody wants to make sure that's handled  
25 correctly.

1                   Back in 2006 how were you able to test the DNA  
2 of the weapon that -- potential DNA on the weapon, what would  
3 do you? Would you do it yourself?

4           A.     No.

5           Q.     Would you send it out to a lab?

6           A.     I would put a request in, and it would be up to the  
7 lab as to how they examined it.

8           Q.     Okay. And did this gun go to the lab to ever be  
9 tested for DNA?

10          A.     I don't recall that.

11          Q.     You don't recall it?

12          A.     I don't recall whether the -- whether it was -- the  
13 DNA was recovered from the gun.

14                   I don't recall if it had ever been sent out for  
15 DNA.

16          Q.     Do you have any recollection about potential DNA  
17 testing in this case?

18          A.     Today, no. I don't recall whether it was done or  
19 not.

20          Q.     Oh, okay.

21                   Was it ever a concern of yours that it wasn't  
22 done?

23          A.     No.

24          Q.     No?

25                   MR. FIGLER: May I approach, Your Honor?

1 THE COURT: You may.

2 (Sotto voce at this time.)

3 MR. FIGLER: You know what, Your Honor, I'm going to  
4 have this marked.

5 THE COURT: Sure.

6 (Defense Exhibit A  
7 was marked for identification.)

8 BY MR. FIGLER:

9 Q. Sir, how do you make DNA requests? Do you fill out  
10 any kind of paperwork or a form?

11 A. Yes, we do.

12 Q. Does this look like a form that you would use to  
13 request DNA?

14 A. Yes.

15 Q. And is that a form that you filled out?

16 A. Yes, it is.

17 Q. Is it in substantially the same condition as it was  
18 when you filled out that form?

19 A. What -- what do you mean by that?

20 Q. Are those the words that you typed on it? Is that  
21 the request that you made? That sort of thing.

22 A. Yes, it appears to be.

23 Q. Does it appear to be altered in any way?

24 A. Well, there's three punches on the left side.

25 Q. Okay, I'll give you that one.

1 Anything else?

2 A. It appears to be a copy of it. It's not the one I  
3 submitted.

4 Q. Okay. But it's the same content as the one you  
5 submitted; correct?

6 A. Yes.

7 Q. And it is -- has your name on the top there,  
8 K-H -- K. Hardy?

9 A. Yep.

10 Q. And it has your P number somewhere on there, I would  
11 imagine, somewhere, or at least it has your name?

12 A. It has my P number on the evidence, yes.

13 Q. Okay. And in this document, isn't it true that  
14 you're worried -- let me rephrase that. I can't say whether  
15 you're worried or not.

16 But you're definitely making a lab request for  
17 DNA on the gun because it looks like you might have sent out  
18 the wrong item to be tested for DNA; isn't that correct?

19 A. I -- I don't recall. I'd have to refresh my memory.

20 Q. In fact, in this document, sir, accidentally  
21 Package 11-A was sent out, which is the belt of the decedent,  
22 to test for DNA, when it was supposed to be the gun; isn't that  
23 correct?

24 A. Can you restate your question, please?

25 Q. It appears from that document, doesn't it,

1 Detective Hardy, that you're hoping that they actually tested  
2 DNA because it seems like somebody accidentally sent  
3 Package 11-A, which is the belt buckle, from the decedent?

4 A. No, that's not correct.

5 Q. Why don't you just read what it says?

6 A. Okay.

7 MR. FIGLER: Actually, can I move for its admission,  
8 Your Honor?

9 THE COURT: Is there any objection by the State?  
10 And is it -- is it Defense A?

11 MR. FIGLER: That's correct.

12 THE COURT: State, do you have any objection to  
13 Defense A being admitted?

14 MS. PANDUKHT: You know, normally documents like  
15 this are not admitted into evidence, but I think he should be  
16 asked about it first, so I'd ask for more foundation to be  
17 laid.

18 MR. FIGLER: Well, I don't know what else to say --

19 THE COURT: There is no other foundation to be laid.  
20 It's his request. You're saying foundation hasn't  
21 been laid?

22 Objection overruled.

23 MS. PANDUKHT: That's fine.

24 THE COURT: It will be admitted.

25 (Defense Exhibit A

1                   was admitted into evidence.)

2 BY MR. FIGLER:

3       Q.     Why don't you just read that into the record, sir.

4       A.     Under the details part?

5       Q.     Yes, please.

6       A.     A request was already submitted on this case, and  
7             the DNA was sent out to LabCorp.

8             If there is an unknown DNA profile, can you  
9             please compare it to the above?

10            It is unclear from the LabCorp results where the  
11            swab we sent them came from.

12            It says rear of slide Item 11-A, which the only  
13            Item 11 I see is from a belt of the victim in the  
14            body bag and a bullet that was recovered at the  
15            scene.

16            Also back in 2006, our lab did not do DNA for  
17            possession of the firearm. Is that still available  
18            to do since it was processed for latents, or was it  
19            done back then?

20            If you have any questions, contact me at  
21            828-3521.

22       Q.     And that was your number back then?

23       A.     Yes.

24       Q.     Sir, you said you opened up the gun for the -- for  
25             the defense attorneys and put it right back.

1 Did you open up the clothes for --

2 A. I -- I don't recall.

3 Q. There's a couple of extra stickers on here.

4 MR. GOODMAN: Dayvid, Dayvid --

5 BY MR. FIGLER:

6 Q. Do you remember opening up this package at all?

7 A. I -- I would have to look at it and see if it has my  
8 initials on the seals.

9 Q. Could you inspect that, please? And what I'm  
10 showing you is State's Exhibit -- oh, golly.

11 THE CLERK: 100.

12 MR. FIGLER: What is it?

13 THE CLERK: 100.

14 MR. FIGLER: 100. And I apologize to the court  
15 reporter for rustling this bag.

16 THE WITNESS: Yes, 100 is the gun.

17 THE COURT: I thought 100 was the gun.

18 MR. FIGLER: I thought so too.

19 THE CLERK: I'm sorry. Let me double-check.

20 Evidence -- yes, you're right.

21 This is 102.

22 MR. FIGLER: 102. Thank you.

23 THE WITNESS: Okay.

24 BY MR. FIGLER:

25 Q. Do you see that you opened this up?

1 A. I do.

2 Q. Okay. And is there another seal that's on there as  
3 well that appears to have been opened?

4 A. What do you mean, another seal?

5 Q. Well, when somebody opens up a package, we've  
6 already explained it to the jury, the person who opens it up,  
7 after they open it, they close it, and they put a seal with  
8 their initials on it; correct?

9 A. Correct. Yes.

10 Q. Okay. And so you opened up this package and put  
11 your initials on it; correct?

12 A. Yes.

13 Q. Do you see anyone else who has done that?

14 A. Right here, this is -- these aren't my initials.

15 Q. Okay. Do you know whose those are?

16 A. No.

17 Q. Okay. That's fine. Thank you, Detective.

18 All right. So where we left it, in 2010 --

19 (Sotto voce at this time.)

20 BY MR. FIGLER:

21 Q. As late as October 17th, 2008, I'm sorry, so that's  
22 over two years after the -- the shooting itself; correct?

23 A. Yes.

24 Q. You were still wondering if anyone did that DNA;  
25 correct?



1 A. Am I still wondering?

2 Q. No, were you back in 2008?

3 A. 2008, I was trying to get clarification as to the  
4 results.

5 Q. Gotcha.

6 Did you ever get that clarification, whether DNA  
7 testing was even done?

8 A. I don't recall.

9 Q. That's what I'm looking for.

10 If it was opened up again to do DNA testing or  
11 to do swabbing, would that be indicated on that box?

12 A. If what was?

13 Q. If DNA testing was done off of that gun, if it was  
14 re-swabbed or anything like that?

15 A. They would have signed a chain of custody.

16 Q. Okay. And the last opening of this was with you  
17 with the defense attorneys; correct?

18 A. Yes.

19 Q. And you put it right back in; correct?

20 A. Yes.

21 Q. You never sent this gun out to anyone to get DNA,  
22 did you?

23 A. Did I send it out to get DNA after 2010? No.

24 Q. At any time. At any time.

25 A. I -- from the -- from the request that you showed

1 me --

2 Q. Right.

3 A. -- it was to compare all the DNA already recovered,  
4 like now the buccal swab that we have from Mr. Garcia.

5 Q. Can you prove to me in any way or point me to any  
6 document that says that this gun was ever actually tested for  
7 DNA?

8 A. No.

9 Q. And in 2008 when you made that request, you were  
10 hoping to get some more information; correct?

11 A. We now had a sample from Mr. Garcia when he was  
12 brought back --

13 Q. Okay.

14 A. -- from Mexico.

15 Q. You never got an answer as to whether that DNA was  
16 done in the gun; correct?

17 A. On the gun, not that I recall.

18 Q. Now --

19 (Sotto voce at this time.)

20 BY MR. FIGLER:

21 Q. Now, there was some testimony that Jonathan Harper  
22 was offered immunity. Do you know anything about that?

23 A. No.

24 Q. Okay. And you were with Detective Mogg when that  
25 interview was done with Jonathan Harper?

1 A. The one on April 1st, yes.

2 Q. Okay. Now, let me see how this goes.

3 When you guys are working a case together, do  
4 you typically share information with each other?

5 A. Typically, yes.

6 (Sotto voce at this time.)

7 BY MR. FIGLER:

8 Q. When you first met Evaristo Garcia in McCarran  
9 Airport, do you -- do you know that he waived extradition to  
10 come back to the United States?

11 A. I don't know.

12 Q. You don't know one way or another?

13 A. No.

14 MR. FIGLER: Okay. Court's indulgence.

15 BY MR. FIGLER:

16 Q. Generally speaking, Detective, if someone admits to  
17 handling a murder weapon, is that an important fact for your  
18 investigation?

19 A. It could be, yes.

20 Q. Okay. So if a person suggests to you -- or not  
21 suggests, but admits to you that they handled the murder weapon  
22 minutes or an hour before the actual shooting, is that  
23 something you're going to look into?

24 A. You would know that if there were any prints  
25 recovered that -- that -- that there's an explanation as to why

1 the prints were there then.

2 Q. Okay. But would that be a person of interest to  
3 you, someone said: Oh, yeah, I -- I had that gun an hour  
4 before?

5 A. It -- would it be of interest, yes.

6 Q. Okay. And during the course of your investigation,  
7 you learned that multiple parties handled that gun; isn't that  
8 true?

9 A. I know that the gun was handled from one person to  
10 another.

11 Q. At least?

12 A. Yes, at least.

13 Q. Okay. Do you know that Edshel Calvillo handled that  
14 gun?

15 A. I don't recall.

16 Q. You don't recall. You're the one who did the  
17 interview with him; correct?

18 A. I believe I was there, yes.

19 Q. Okay. Let me ask you something about that.

20 MR. FIGLER: May I approach, Your Honor?

21 THE COURT: You may.

22 BY MR. FIGLER:

23 Q. I just want you to read this to yourself and see if  
24 it refreshes your recollection, Detective. You don't have to  
25 say what it is. It's Edshel Calvillo's interview. Does that

1 appear to be the transcript of that?

2 I want you to see that page because that's what  
3 I want you to look at.

4 A. It appears to be maybe a partial of it, but --

5 Q. Okay. Do you want the rest? I'll give you the  
6 whole thing. I just want to make it a little easier.

7 Here's the rest of that. Sorry, I didn't mean  
8 to leave that out.

9 A. Okay. Yes.

10 Q. So if I could direct your attention to, I think it's  
11 page 14 -- nope.

12 A. 14 is what you --

13 Q. No, 16 is the one I circled there for you.

14 Could you just review that to yourself for a  
15 second, then I'll have a question to see if that refreshes your  
16 recollection.

17 Tell me when you're done.

18 A. Okay.

19 Q. Okay. Now do you recall that Edshel Calvillo  
20 admitted to you that he handled that gun that night?

21 A. Yes.

22 Q. Okay. So that refreshed your recollection?

23 A. Yes.

24 Q. Did you arrest Edshel Calvillo?

25 A. No.

1 Q. Did you take any DNA from Edshel Calvillo?

2 A. I don't recall that.

3 Q. Did you take his fingerprints?

4 A. I don't recall that either.

5 Q. Now, there was a car impounded in this particular  
6 case. Do you remember that?

7 A. I do.

8 Q. Do you remember it being an El Camino?

9 A. Yes.

10 Q. Were you involved in the processing of that at all?

11 A. The processing of the vehicle?

12 Q. Well, let me rephrase that.

13 You're a detective, I know you're not out there  
14 doing the sweeping of dust, but they give you results to that,  
15 don't they?

16 A. They take the photographs --

17 Q. Okay.

18 A. -- and depending on what we're looking for, then  
19 it's usually done in a report from the crime scene analyst that  
20 did it, and what -- what, if any, evidence was recovered.

21 Q. Got it.

22 And that's usually at your direction, if you  
23 find anything of evidentiary value in this El Camino, let us  
24 know; right?

25 A. Yes.

1 Q. Okay. And so you directed that this El Camino,  
2 which you felt was related to the incident, be processed by the  
3 CSAs; correct?

4 A. Yes.

5 Q. Okay. Was there one piece of physical evidence in  
6 that El Camino linked to Evaristo Garcia?

7 A. I don't recall. I -- I don't recall the results of  
8 that. It's seven years now, I don't recall.

9 Q. If there was that would certainly be an important  
10 factor based on your investigation; correct?

11 A. Sure.

12 Q. Sure.

13 And by physical evidence, I mean one piece of  
14 DNA, one fingerprint, any proof of him being in that car, you  
15 understood what I meant by physical evidence; correct?

16 A. I -- yes.

17 Q. Okay. Did you process any other cars in this  
18 particular case, to your knowledge?

19 A. Not that I recall.

20 Q. Did you process a car belonging to Sal Garcia in  
21 this case?

22 A. I don't recall.

23 Q. Did you process a car that Edshel Calvillo said he  
24 was in?

25 A. I don't recall that either.

1 Q. Okay. Oh, wait, Edshel Calvillo told you he never  
2 even went over to the school; isn't that correct?

3 A. I'd have to look at his statement.

4 Q. Okay. If he did say he had went over there, that  
5 would be of importance to you, that night?

6 A. There were a lot of people there. Does that mean  
7 he's the one, no.

8 Q. I mean I don't know. Do you know?

9 A. Do I know whether he was there or not?

10 Q. Yeah.

11 A. I don't recall whether he was there or not. I  
12 didn't talk to him at the school. I don't recall whether he  
13 was there that night.

14 Q. All right. You probably would have asked him  
15 though; right?

16 A. I would have asked him what?

17 Q. If he was at the school that night?

18 A. At what point of the investigation whether he was  
19 there or not, yes. And depending on who had told us what the  
20 other stories were as far as corroboration, yes.

21 Q. Okay. And just to refresh your recollection --

22 MR. FIGLER: May I approach?

23 THE COURT: You may.

24 MR. FIGLER: Thank you.

25 BY MR. FIGLER:



1 Q. The statement that I just showed you, that's the  
2 question part.

3 A. Okay.

4 Q. After reviewing that, do you recall asking: Were  
5 you there that night?

6 A. Okay. And I will say that Detective Mogg is the one  
7 who asked him that.

8 Q. Okay. Did you hear that question though?

9 A. Yes.

10 Q. Okay. And he reaffirmed in the negative; is that  
11 correct?

12 A. That's right.

13 Q. Did you do anything to corroborate or prove that he  
14 was telling you the truth on that one?

15 A. There -- there wasn't much to corroborate it or not  
16 other than eyewitness testimony.

17 Q. Okay. Let's talk about the toilet bowls for a  
18 second. The prosecutor showed you pictures of the toilet  
19 bowls.

20 During the course of your investigation, did you  
21 learn that there had been a contractor who was dispatched to  
22 that house to do work on that house?

23 A. Yes.

24 Q. Okay. And you learned that that contractor came  
25 from Home Depot; isn't that correct?

1           A.     I don't know whether I knew the name of the company  
2 and that one of the people had done work on that house.

3           Q.     Okay. And isn't it true that someone of interest in  
4 this particular case was identified as being someone who had,  
5 prior to this night, been assigned to that house; isn't that  
6 correct?

7           A.     Yes.

8           Q.     And that wasn't Evaristo Garcia; was it?

9           A.     No.

10          Q.     Manuel Lopez; wasn't it?

11          A.     Yes.

12          Q.     So Manuel Lopez had previously worked at that house  
13 where that toilet bowl was; correct?

14          A.     Yes.

15                         (Sotto voce at this time.)

16           MR. FIGLER: Pass the witness.

17           THE COURT: Redirect?

18           MS. DEMONTE: Thank you.

19

20                         REDIRECT EXAMINATION

21 BY MS. DEMONTE:

22          Q.     I'll start with where we left off with Mr. Calvillo.

23                         Now, counsel showed you page 16 of  
24 Mr. Calvillo's statement and asked you if Edshel told you he  
25 handled the gun that night.

1                   Do you remember if that night was the actual  
2 language used?

3           A.     No, it wasn't that night.  Nothing about the time  
4 specificness of it.

5           Q.     About the handling of the gun?

6           A.     Correct.

7           Q.     Okay.  It was just -- the question was just:  Had  
8 you ever handled it before?

9           A.     Yes.

10          Q.     All right.

11                 MS. DEMONTE:  Do you have A?

12                 MR. FIGLER:  I thought I --

13                 MS. DEMONTE:  It's right there.

14                         (Sotto voce at this time.)

15                 MS. DEMONTE:  Okay.  Move to publish?

16                 THE COURT:  You may.

17 BY MS. DEMONTE:

18           Q.     Putting on the screen Defense Exhibit A, and I'm  
19 going to zoom in, and so based on this request, you had already  
20 sent DNA to LabCorp; is that correct?

21           A.     Yes.

22           Q.     And would that be the reddish-brown stain?

23           A.     Yes.

24           Q.     And that was swabbed for DNA?

25           A.     Yes.

1 Q. Okay. And you actually submitted a request to have  
2 that swab of that reddish-brown material sent out?

3 A. It would have had to be if it had gone to LabCorp.

4 Q. Okay. And why is that?

5 A. They wouldn't -- the lab would not just send it out  
6 on their own. The detective has to do the request to initiate  
7 the testing.

8 Q. Okay. And what was LabCorp?

9 A. LabCorp was a -- a company that we would send out  
10 our DNA analysis to be done at.

11 Q. Okay.

12 A. A vendor of Metro, say.

13 Q. Was -- back in 2006 was the capabilities of  
14 Las Vegas's Metro -- sorry, of Metro's DNA lab strained, for  
15 back of a letter word -- lack of a better word?

16 MR. FIGLER: Object, Your Honor.

17 That's an impossible question to answer based on  
18 the -- the wording of it, it lacks foundation. What does  
19 strange mean? What does --

20 MS. DEMONTE: I said strained but, okay.

21 MR. FIGLER: Oh, I'm sorry, strained. Anyway, I  
22 don't know what that means.

23 MS. DEMONTE: I'll just ask a different question.

24 BY MS. DEMONTE:

25 Q. Was it common for things to be sent to LabCorp

1 instead of Metro during this time period?

2 A. Back then, yes.

3 Q. And do you know why that is?

4 A. Specifically I know of incidents where they were  
5 either backlogged or they were going through the certification  
6 process again, and everything had to be sent out.

7 Q. Okay. And you're talking about staffing issues?

8 A. The backlog?

9 Q. Yes.

10 A. Yes.

11 Q. Okay. Now, further down -- so -- and you said it's  
12 unclear from the LabCorp results where the swab came from. Do  
13 you remember what you meant by that?

14 A. The only thing --

15 Q. Just off the top of your head do you remember?

16 A. No, other than the results that come back to us, if  
17 we don't understand exactly where that DNA profile was  
18 retrieved from, we would ask for clarification.

19 Q. Okay. So would it refresh your recollection as to  
20 what you meant by that if I showed you the actual LabCorp  
21 results (indicating)?

22 A. Yes.

23 Q. Okay.

24 MS. DEMONTE: May I approach the witness,  
25 Your Honor?

1 THE COURT: You may.

2 THE WITNESS: Okay.

3 BY MS. DEMONTE:

4 Q. Okay. Does that refresh your recollection as to why  
5 you worded your request this way?

6 A. Yes.

7 Q. Was the report that LabCorp sent to you clear?

8 A. No.

9 Q. Okay. Now, showing you State's Proposed Exhibit  
10 109, do you recognize that?

11 A. Yes. It appears to -- it's an evidence package that  
12 contains a swab of this reddish stain from the rear of the  
13 slide with the event number referencing the homicide.

14 Q. Okay. And is there evidence on this package that  
15 that indeed was examined by LabCorp?

16 A. Yes.

17 Q. So you didn't send the wrong thing to LabCorp?

18 MR. FIGLER: Objection, Your Honor. He doesn't  
19 know. He testified he doesn't know what he sent.

20 THE COURT: Sustained.

21 BY MS. DEMONTE:

22 Q. Okay. So you actually did send that that LabCorp?

23 A. This swab was sent to LabCorp to be analyzed, yes.

24 Q. So that did make it to LabCorp?

25 A. Yes.

1 Q. Okay. And that was analyzed by LabCorp?

2 A. Yes.

3 Q. Okay. Now, counsel was asking you about Item 11  
4 being the belt. Do you see any tape on here from LabCorp?

5 A. No.

6 Q. So LabCorp did not open this package and examine  
7 anything?

8 A. Correct.

9 Q. Okay. So in looking at LabCorp' report and in  
10 reading this, was the confusion based on the way the report was  
11 worded?

12 A. Yes.

13 Q. Okay. Now, you also said: Back in 2006 our lab did  
14 not do DNA for possession.

15 Do you know what that means?

16 A. Yes.

17 Q. What did you mean by that?

18 A. It meant that our lab, one of the analysis that is  
19 currently done, or was done when I was still working there, is  
20 that we could have a gun analyzed by DNA for possession,  
21 anybody that would have possessed a gun.

22 Back in 2006 our lab's rules were that they  
23 would not do it. We would have to then go to the fingerprint  
24 lab to try to prove the possession.

25 Q. Okay. So back in 2006 the method for proving

1 possession was fingerprints?

2 A. Yes.

3 Q. And was it solely fingerprints?

4 A. Yes.

5 Q. Now, your question is -- that follows, to your  
6 knowledge, is there something that could -- that happens to  
7 evidence once it's processed for latents?

8 A. It gets destroyed.

9 Q. Okay.

10 A. There has to -- they -- they normally will work in  
11 concert as to who's going to grab what -- if they swab -- if  
12 they swab the gun, it's going to destroy any fingerprint.

13 Q. Okay. And if they process for latents, do they use  
14 chemicals to do that?

15 A. Yes.

16 Q. And would that destroy any DNA?

17 A. It could. I don't recall, but I believe that they  
18 were -- every time we've had to do an analysis that way where  
19 we're asking for both, the latents works with the DNA to swab  
20 the appropriate areas together.

21 Q. Okay. All right. And so in a case where one had  
22 already been done, what's the -- in your experience, what's the  
23 likelihood of being able to do the second?

24 A. We wouldn't request it.

25 MS. DEMONTE: Okay. I'll pass the witness.



1 THE COURT: Any recross?

2 MR. FIGLER: Oh, yes.

3

4 RECROSS-EXAMINATION

5 BY MR. FIGLER:

6 Q. So let me get this straight.

7 A. Yes, sir.

8 Q. In 2006 you know that if you latent examine an item  
9 first before you do the DNA, you're destroying potential  
10 evidence?

11 A. That is my understanding from the lab's directions,  
12 yes.

13 Q. Okay. And that's why, on 2/08/06, you requested  
14 that the pistol --

15 A. I did not request it.

16 Q. Did your partner?

17 A. It says requested by Detective C. Mogg.

18 Q. That's your partner in this case; correct?

19 A. Yes.

20 Q. Why don't you read that document, see if it  
21 refreshes your recollection that specifically the lab was asked  
22 to do DNA before latent print testing was done.

23 A. Okay.

24 Q. Does that refresh your recollection whether that  
25 request was made?

1           A.     Yes, it does, but that doesn't -- that doesn't --  
2 that's the same date as the murder.

3           Q.     So that doesn't mean it was done?

4           A.     I'm telling you that they didn't -- they -- even  
5 though it was requested, they did not do the DNA process  
6 because they chose to go with the -- with the prints.

7           Q.     Your buddy is not asking -- your partner rather is  
8 not asking them to do the DNA?

9           A.     He asked for the DNA, but instead they went the  
10 print route because they didn't do DNA in 2006 for possession.

11          Q.     Well, it's your testimony that if there's biological  
12 material on an item of evidentiary value in 2006 that Metro  
13 does not do DNA testing; is that your testimony?

14          A.     Explain -- rephrase your questions, I guess,  
15 'cause --

16          Q.     If there are potential -- if there is potential  
17 biological evidence --

18          A.     Mm-hmm.

19          Q.     -- on a weapon, no matter what it is, are you  
20 telling me that the policy of Metro in 2006 was not to do DNA  
21 testing; is that your testimony?

22          A.     For possession, yes.

23          Q.     For possession.

24                   To do any DNA testing?

25          A.     No, I didn't say any DNA testing.

1                   Clearly from my -- from my request, in 2006,  
2 Metro was not doing DNA testing for possession.

3           Q.     I hear what you're saying now.

4           A.     Okay.

5           Q.     But if that reddish-brown material is blood, and it  
6 was the person who actually shot this guy's blood, you'd want  
7 to find that out, wouldn't you? Wouldn't you?

8           A.     Yes.

9           Q.     Okay. You don't know if it's possession DNA or if  
10 it's something else, you've got a reddish-brown stain on that  
11 gun, don't you?

12          A.     And they -- and they recovered the stain and had it  
13 analyzed, yes.

14          Q.     You keep saying that, but I'm looking for proof of  
15 that. The prosecutor showed you -- that bag said: Is there  
16 any evidence that anything was swabbed out of here since the  
17 landmark? Did you see the landmark seal on there?

18          A.     The LabCorp?

19          Q.     The LabCorp seal.

20          A.     On the bag of clothes?

21          Q.     Right.

22          A.     Yeah, there is not a LabCorp seal on there.

23          Q.     Is this the gun (indicating)?

24          A.     Yes.

25          Q.     And do you see the LabCorp seal on there?

1 A. There wouldn't be.

2 Q. So if --

3 A. The swab was sent to LabCorp.

4 Q. Okay. So if something was swabbed from there by  
5 accident, there wouldn't be a LabCorp seal on there either,  
6 would there?

7 A. If there was something swabbed from that material in  
8 there (indicating)?

9 Q. If there was something swabbed from this bag  
10 (indicating) there would be no LabCorp sticker on there, would  
11 there?

12 A. Correct.

13 Q. Okay. So that was a nonsensical question from the  
14 prosecution; right?

15 MS. DEMONTE: Objection, argumentative.

16 THE COURT: Overruled.

17 BY MR. FIGLER:

18 Q. So that was -- that was an irrelevant question;  
19 correct?

20 A. That was a question. I -- I don't know whether it's  
21 irrelevant or not.

22 Q. Okay. And you could say right now with a hundred  
23 percent confidence that at some point that reddish-brown swab  
24 was taken from Package 10 there and sent to LabCorp, you could  
25 say that?

1 A. No, 'cause it's -- we're talking about Item 11.

2 Q. Yeah.

3 A. So whether it's Package 10, I -- I don't know what  
4 the package number is.

5 The question was the item number that it was  
6 recovered from.

7 Q. Got it. Got it.

8 A. That's the question.

9 Q. Got it.

10 MR. FIGLER: Where's my LabCorp? Thank you.

11 May I approach again, Your Honor?

12 THE COURT: You may.

13 BY MR. FIGLER:

14 Q. Does that look like a LabCorp report?

15 A. Yes.

16 Q. From November 20th, 2006?

17 A. November 27th.

18 Q. Where does it say 27th?

19 A. Right there, November 27th, 2006.

20 Q. Oh, that's when Metro entered it; correct?

21 A. Well, no, it's file stamped with LVMPD forensic lab,  
22 November 27th, 2006.

23 Q. So that's when your forensic lab got that LabCorp  
24 report; right?

25 A. I don't know. I can't answer that.

1 Q. Fair enough. But this looks like a document from  
2 2006, November; correct?

3 A. Yes.

4 Q. And it tells you that they tested one sealed  
5 envelope containing a swab listed as a swab of reddish stain  
6 from the rear of slide Item 11-A; isn't that correct?

7 A. Yes.

8 Q. So someone took a swab of Item 11-A, sent it out for  
9 testing, and it came back with no results to you; correct?

10 A. Correct.

11 Q. The belt buckle is 11 (indicating).

12 You admitted it in that report request saying  
13 that 11 is the belt buckle; correct?

14 A. Correct.

15 Q. So that's the swab we're talking about, a swab from  
16 a belt buckle.

17 No swab was ever taken from that gun to your  
18 knowledge today?

19 A. To my knowledge, that's correct.

20 MR. FIGLER: Thank you.

21 THE COURT: Are you done, Mr. Figler?

22 MR. FIGLER: Oh, yes.

23 THE COURT: Do the ladies and gentlemen of the Jury  
24 have any questions for this witness?

25 (Affirmative response from the jury panel.)

1 THE COURT: We do.

2 I'll see the attorneys at the bench. We will take  
3 our break as soon as we're done.

4 Did you write it down? Okay. Perfect, thank you.

5

6 (Bench conference outside the presence of the jury.)

7

8 THE COURT: How many questions are there?

9 THE MARSHAL: Two so far.

10 THE COURT: Oh, just two, okay.

11 THE MARSHAL: Three.

12 THE COURT: This is from Keith Trombetta, Number 7.

13 MR. FIGLER: We can't hear.

14 MS. DEMONTE: Keith Trombetta, Number 7.

15 MR. FIGLER: DA, he said DA.

16 THE COURT: This is from -- oh --

17 MR. FIGLER: I don't know what that means. I don't  
18 have a problem with any of those questions.

19 THE COURT: Do you have any objection?

20 MS. PANDUKHT: I have another witness that would  
21 probably be able to better answer that, so.

22 THE COURT: I'm -- I think he can answer that.

23 MS. DEMONTE: Okay.

24 THE COURT: I'm --

25 MS. PANDUKHT: Okay.

1 THE COURT: I'm just going to allow it. They have  
2 no objection.

3 This is Juror Number 6.

4 MS. DEMONTE: No objection.

5 MR. FIGLER: That's fine, if he knows.

6 THE COURT: This is from Kristina Beber, Number 8.

7 MS. DEMONTE: No objection.

8 MR. FIGLER: No objection.

9 MS. PANDUKHT: I'm sorry, could I finish reading it?  
10 I'm too slow.

11 No, Judge. That's a good question.

12

13 (Proceedings back inside the presence of the jury.)

14

15 THE COURT: Detective, this is from Number 7,  
16 Keith Trombetta: Can DNA testing and prints be done on same  
17 item of different areas of that item, would both be possible  
18 and both be valid.

19 THE WITNESS: I'm sorry, could DNA testing?

20 THE COURT: Let me say it one more time.

21 THE WITNESS: Please.

22 THE COURT: Could DNA testing and prints be done on  
23 same item on different areas of that item, would both be  
24 possible and both be valid?

25 THE WITNESS: Yes, they could be.



1 THE COURT: Second question from Mr. Trombetta:  
2 Could swab be taken from scene and no seal be added?

3 THE WITNESS: Could swab be taken from scene and no  
4 seal added?

5 THE COURT: Could swab be taken from scene and no  
6 seal be added?

7 THE WITNESS: There -- if the swab was taken from  
8 the scene itself, it would just be impounded -- like say there  
9 was a substance on a wall, they would swab it and they would  
10 impound it as a swab. And there would not be -- just the  
11 original seal would be applied to the evidence envelope.

12 If a package was opened, evidence package was opened  
13 and you had a DNA expert and a firearms expert, is it possible  
14 that they both took the swabs -- or I'm sorry, a latent print  
15 person and the DNA person, could they have removed what was  
16 requested and both of them -- I -- I don't know the answer to  
17 that.

18 But have they -- do they work at the same time to  
19 recover them away from the scene in a laboratory environment?  
20 Yes, they do.

21 So that could explain a seal not being added, I  
22 believe, if that's what the question referred to.

23 THE COURT: Juror Number 6, Angelica Numez: What  
24 number of item is the gun in your report?

25 THE WITNESS: I would have to look at the Property

1 Impound Report, which I don't have with me, as far as what that  
2 item number is.

3 THE COURT: Kristina Beber, Number 8: Would Item  
4 11-A be the same as Item 11, and can there be more than one  
5 Item 11 contained in all of the evidence for this case?

6 THE WITNESS: Normally the -- the evidence marking  
7 procedure is that if this is Item 11, and they remove something  
8 from it, including even like a -- if they were to test fire  
9 this item, it would be A-B-C based on what was recovered from  
10 this item at a later time.

11 And, yes, it's very -- it's very normal to have  
12 different item numbers depending on the different scenes.

13 You could have an Item 11 from the scene and an Item  
14 11 from autopsy, and an Item 11 from a car.

15 It's very common that those -- there could be  
16 multiple Item 11 numbers.

17 THE COURT: Is there anything further from the  
18 State?

19 MS. DEMONTE: Yes, Your Honor.

20

21 FURTHER REDIRECT EXAMINATION

22 BY MS. DEMONTE:

23 Q. With respect to their being multiple item numbers,  
24 to your knowledge, does the Las Vegas Metropolitan Police  
25 Department evidence vault have a different numbering system?

1 A. Yes.

2 Q. Do you know what the -- what number the Las Vegas  
3 Metropolitan Police Department's evidence vault assigned to the  
4 reddish-brown swab?

5 A. No. That's a computer-generated number. I don't  
6 know what that is.

7 Q. Okay. Would it refresh your recollection if I  
8 showed you a Property Return Receipt from the evidence vault?

9 A. Yes.

10 MS. DEMONTE: May I approach, Your Honor?

11 THE COURT: You may.

12 THE WITNESS: There's a Property Return Receipt  
13 dated November 17th, 2006.

14 And the -- there's AC numbers, Item 11-A is a swab  
15 of a reddish stain from rear of slide. Quantity is one.

16 Package 2, Item 10.

17 BY MS. DEMONTE:

18 Q. Okay. So 11-A is what the vault gave that numbering  
19 system to?

20 A. Eleven --

21 Q. In the way you read this?

22 A. In the -- in the way I read this, 11-A is assigned  
23 to the Property Return Form. They're calling it Item 11-A.

24 Q. Okay. But it actually has a --

25 MR. FIGLER: I'm going to object, Your Honor,

1 argumentative and leading.

2 THE COURT: I didn't even hear all the question, so  
3 restate the question.

4 MS. DEMONTE: I'll just ask a different question.  
5 BY MS. DEMONTE:

6 Q. So handing you back State's Proposed Exhibit 109,  
7 does this bear a -- a package, an item number?

8 A. This package is the package you showed me previously  
9 from LabCorp' forensic lab.

10 There is no item number right here (indicating)  
11 that would be assigned by the person that impounded it, but  
12 this number up here is 11-A, and this is the computer-generated  
13 from the vault sticker that's applied to it.

14 MS. DEMONTE: Thank you. Nothing further.

15 THE COURT: Any --

16 MR. FIGLER: Just one follow-up.

17 THE COURT: -- follow-up questions?

18 MR. FIGLER: Yeah.

19

20 FURTHER RECROSS-EXAMINATION

21 BY MR. FIGLER:

22 Q. October 17th, 2008, (indicating), you're just not  
23 sure where that reddish-brown stain came from; are you? You  
24 sent that request.

25 A. I'm going to say that the description was from the

1 rear of the slide, so my -- my -- my testimony would be it came  
2 from the back of the gun.

3 Q. Okay. But you didn't know that when you sent it out  
4 in '08, you're trying to figure out what's going on, why you  
5 don't have it?

6 A. No. I was trying to clarify the LabCorp' results.

7 MR. FIGLER: I'll pass.

8 THE COURT: All right. Ladies and gentlemen, we're  
9 going to take a recess, ten minutes.

10 During this recess -- thank you very much,  
11 Detective, for your testimony. You can go ahead and step down.

12

13 (Whereupon, at this time the witness was excused.)

14

15 During this recess you are admonished not to  
16 talk or converse among yourselves or with anyone  
17 else on any subject connected with this trial;

18 Or read, watch, or listen to any report of or  
19 commentary on the trial, or any person connected  
20 with this trial, by any medium of information,  
21 including, without limitation, newspapers,  
22 television, radio or internet;

23 Or form or express any opinion on any subject  
24 connected with the trial until the case is finally  
25 submitted to you.

1 THE COURT: Ten minutes.

2 (Recess in proceedings.)

3 MR. FIGLER: Could we have a little record?

4 THE COURT: Let's take a break.

5 THE REPORTER: Yeah.

6 (Recess in proceedings.)

7  
8 (The following proceedings were had in open  
9 Court in the presence of the jury panel:)

10  
11 THE COURT: State of Nevada versus Evaristo Garcia,  
12 Case Number C6 -- sorry, C262966.

13 Let the record reflect we're in the presence of the  
14 jurors with the defendant here, Mr. Figler and Mr. Goodman.  
15 And also for the State, Ms. Pandukht and Ms. Demonte.

16 And we are on the State's case in chief.

17 Go ahead and call your next witness.

18 MS. PANDUKHT: The State calls Dinnah Angel Moses.

19  
20 DINNAH ANGEL MOSES

21 called as a witness on behalf of the State,  
22 having been first duly sworn,  
23 was examined and testified as follows:

24  
25 THE WITNESS: I do.

1 THE CLERK: Please be seated.

2 State and spell your full name for the record,  
3 please.

4 THE WITNESS: Dinnah, D-I-N-N-A-H; Angel, A-N-G-E-L;  
5 Moses, M-O-S-E-S.

6 THE COURT: Go ahead.

7

8 DIRECT EXAMINATION

9 BY MS. PANDUKHT:

10 Q. What is your occupation?

11 A. I am employed by the -- by the Las Vegas  
12 Metropolitan Police Department as a forensic scientist assigned  
13 to the firearms identification unit.

14 Q. How long have you been in that unit?

15 A. In the -- for Metro, I've been working in that unit  
16 for ten years now.

17 Q. And what is your official title?

18 A. Forensic scientist.

19 Q. Did you work in another jurisdiction in your field?

20 A. Yes, I did.

21 Q. What jurisdiction?

22 A. For the Tennessee Bureau of Investigation, I was a  
23 special agent forensic scientist.

24 Q. Now, in terms of being a forensic scientist, what  
25 particular work do you do?

1           A.     My specialty is actually examining firearms -- it's  
2 firearms identification.

3                     And I predominantly look at ammunition  
4 components and determine if they have been fired from a  
5 particular firearm.

6           Q.     Could you tell the jury about your education,  
7 training and experience that qualifies you to testify today?

8                     MR. FIGLER: Your Honor, we would, at this time,  
9 stipulate to this witness's qualification to testify as an  
10 expert in ballistic analysis and forensic analysis of guns.

11                    MS. PANDUKHT: It's basic --

12                    THE COURT: If that's acceptable to the State.

13                    MS. PANDUKHT: That would be fine because I  
14 understand we're up against a time limit, but it's actually  
15 firearms and toolmark identification.

16                    MR. FIGLER: Oh, well, we'll stipulate it's a  
17 toolmark identification as well.

18                    THE COURT: All right. All right. And you have no  
19 problem with that stipulation?

20                    MS. PANDUKHT: No, that will be fine.

21                    THE COURT: Okay. Then that will be the order.

22 BY MS. PANDUKHT:

23           Q.     Okay. So approximately -- I just want to ask one  
24 question about this, approximately how many times have you  
25 testified previously in your field?



1 A. Approximately, 95 times.

2 Q. Now, you were working in your field back in -- let's  
3 see, 2006?

4 A. Yes.

5 Q. Okay. First I'd like you to describe to this jury  
6 if you can explain to them what toolmark identification is.

7 A. Toolmark identification is the examination of marks  
8 that are transferred from one item to another.

9 Any time two surfaces come into contact, one or  
10 both change. Depending on the type of materials that they are,  
11 they can actually leave marks from one item to another.

12 So for a firearm it's any time an ammunition  
13 component touches a particular part of a firearm, it can  
14 actually leave an imprint that's unique to that firearm and can  
15 be identified to that particular gun.

16 Q. So how do you perform a firearm and toolmark  
17 comparison?

18 A. We actually use a comparison microscope.

19 What this comparison microscope is, is a  
20 compound microscope that has two stages so that two objects can  
21 be looked simultaneously through a binocular eyepiece.

22 This allows me to look for microscopic marks.  
23 Those marks -- when those two items touch and transfer marks, I  
24 can look at the microscopic detail to see if there's enough  
25 quality and quantity to make a conclusion.

1 Q. Do you -- are you able, when you have a firearm, to  
2 determine if bullets were fired from that particular firearm?

3 A. Yes. Any time a -- a bullet or a cartridge case is  
4 fired in a gun, it leaves markings because it touches it.  
5 That's part of the nature of when things are fired.

6 And regardless if I have a gun or not, there's  
7 always markings on the bullet. Depending on how much there  
8 are, I can give some type of information about the bullet in  
9 the cartridge case and, if I have a firearm, determine if  
10 that's the particular firearm responsible to firing those  
11 components.

12 Q. Can you explain to the jury how a semiautomatic  
13 firearm works?

14 A. For a semiautomatic firearm, ammunition components  
15 or a cartridge is actually placed in a magazine, and a top  
16 portion called a slide is actually pulled back beyond the  
17 magazine so it picks up a round from there and places into  
18 what's called a chamber of the gun.

19 This is now ready to fire. With the pull of the  
20 trigger, there is mechanisms inside that will actually cause an  
21 internal reaction in the cartridge that then pushes the bullet  
22 outside -- or down the barrel of the gun and out the muzzle of  
23 the -- or the front of the gun, and uses part of that energy to  
24 pull the slide backward so that it extracts and ejects the  
25 cartridge case or the other portion of the -- of the ammunition

1 component, goes forward, picks up a new round and is ready to  
2 fire. Okay.

3 Q. Okay. And could you explain to the jury what a  
4 cartridge is?

5 A. If I may use the demonstration aid?

6 MR. FIGLER: Your Honor, we've already gone over  
7 this evidence what a cartridge is and what a bullet is, and we  
8 would stipulate to all of this.

9 We'd even stipulate to the conclusions of this  
10 witness. I don't know why we need this again, it's redundant  
11 what a cartridge is.

12 THE COURT: Stipulation means both parties agree.

13 MR. FIGLER: Both sides.

14 THE COURT: So thank you for extending that, except  
15 for it's the State's case, and they're the ones that have the  
16 burden of proving it beyond a reasonable doubt.

17 So I'm going to leave it up to the State as to what  
18 evidence they want to put in.

19 And if you have any future stipulations, feel free  
20 to do it so that I can just advise the jury that it's been  
21 stipulated between the parties X, Y and Z.

22 MR. FIGLER: Thank you, Your Honor.

23 MS. PANDUKHT: And I appreciate counsel's offer, but  
24 I would like to present --

25 THE COURT: Right.

1 MS. PANDUKHT: -- this evidence to the jury on this  
2 issue.

3 THE COURT: It's your burden of proof.

4 MR. FIGLER: And I appreciate --

5 THE REPORTER: One person at a time.

6 MR. FIGLER: And I appreciate --

7 THE COURT: I know you're doing that as a courtesy,  
8 but they obviously have the burden, so unless there's -- you  
9 know, it would be easier if you guys do a stipulation in the  
10 future, and that way we don't have to go through this.

11 MR. FIGLER: No, I appreciate it. You understand we  
12 already had evidence about what a cartridge is, what a bullet  
13 is and all that, so that's why I raised it, that's all. But  
14 I'll sit down.

15 THE COURT: Thank you, Mr. Figler.

16 MR. FIGLER: Thank you, Your Honor.

17 THE COURT: Because I can remake my ruling again,  
18 too, but I won't.

19 MR. FIGLER: Sure.

20 THE COURT: Okay.

21 BY MS. PANDUKHT:

22 Q. Go ahead and show us.

23 A. Well, in this case, since it's been used, any time I  
24 want to make a clarification, I'll just look at the different  
25 components.

1           But essentially, real quickly, a cartridge is an  
2 unfired round that has -- it's a single unit that has four  
3 pieces: It's got a bullet seated at the mouth of a cartridge  
4 case that holds everything together, a primer at the back,  
5 which kind of starts the detonation and gunpowder inside.

6           Q.     And then how do you determine the caliber of the  
7 cartridge?

8           A.     A caliber is actually kind of a difficult thing with  
9 a cartridge because the caliber is part of the name and like --  
10 such as 9-millimeter Luger or 9-millimeter Makarov.

11                  What that is to a person very familiar with  
12 ammunition is it gives an overall characteristic between the  
13 diameter of the bullet, the design of the cartridge case, and  
14 measurements of the cartridge case so that it fits into  
15 particular firearms.

16                  When you talk about 9-millimeter, it's actually  
17 talking about the approximate diameter of the bullet and the  
18 type of firearms that it can fit into.

19                  But once again, a full name designates not just  
20 that diameter, the whole design of the cartridge itself.

21           Q.     Now, what types of cartridges are put into a  
22 9-millimeter firearm, and are there differences amongst some  
23 9-millimeter firearms?

24           A.     9-millimeter firearms, there's actually a family of  
25 them, and they range for the semiautomatics, from .380 auto,

1 9-millimeter Makarov, 9-millimeter Luger, and then there's  
2 actually other ones that aren't as popular, but those are some  
3 of the more popular ones.

4 Q. So what is the difference between a 9-millimeter  
5 Luger and a 9-millimeter Makarov?

6 A. Well, actually, let's also talk about the .380.  
7 Although it says .380, it's -- that's more of -- an English --  
8 or a -- an -- an inches term, and 9-millimeter is in metric  
9 terms. Even though they are actually approximately the same  
10 measurement, okay, that's why one is called .380 because it's  
11 in the -- once again, in the English -- or inches, and then  
12 9-millimeter is in the metric.

13 But a .380 is actually one of the -- between the  
14 three is a little bit smaller because the cartridge case length  
15 is 9 by 17, which means it's 17 millimeters from the bottom to  
16 the edge of the mouth.

17 For a 9-millimeter Makarov, it's 9 -- it's  
18 actually 18 inch -- or millimeters in height, and 9-millimeter  
19 Luger is 19 inches.

20 So they're slightly different, not by a whole  
21 lot because it's really one millimeter, but it's -- depending  
22 on the firearm, may not actually load one or the other,  
23 depending on how it's measured in the caliber.

24 Q. So how similar are the 9-millimeter -- I mean, I'm  
25 sorry, how similar is a 9-millimeter Makarov to a .380 caliber

1 firearm?

2       A.     It's actually more similar to the .380 than the  
3 9-millimeter because the bullets tend to be a little bit  
4 shorter and stouter, so they look -- if you're looking at them  
5 side by side very close to one another, where the 9-millimeter  
6 Luger tends to have larger bullets, so it sticks up a little  
7 bit more than the 9-millimeter Makarov or .380 auto.

8       Q.     Now, specifically with regard to the Makarov, how  
9 many cartridges does a 9-millimeter Makarov gun hold?

10      A.     It actually depends on the size of the gun and what  
11 type of magazine that it's fitted with.

12      Q.     Now, say a firearm was not recovered at a scene,  
13 would you still be able to make comparisons among cartridge  
14 cases or bullets?

15      A.     If there is enough reproducibility, if I have enough  
16 sample quality and the markings are -- have enough  
17 characteristics to them, that I can still make an  
18 identification that it was fired from a single firearm, it's  
19 just an unknown firearm.

20      Q.     Now, are there some times when you cannot actually  
21 make a determination from reviewing and examining cartridge  
22 cases and bullets and test firing a gun?

23      A.     That's correct.

24      Q.     What could impact that?

25      A.     Because of the way the gun fits and the tightness of

1 it, if it fits really well in there, it touches a lot more  
2 parts of the gun. And if the gun has a lot of characteristics  
3 to it, it will pick those up and allow me a lot of  
4 characteristics in microscopic detail to look at.

5 If the gun's not well made, and it's sloppily  
6 made and it has movement in there, then it may not touch it as  
7 well or in a consistent manner that I will be able to get  
8 consistent marks to look at.

9 So it makes it very difficult if there is play  
10 in there because when the cartridge is actually detonated, what  
11 happens is the powder actually increases a little bit but not  
12 enough that it will -- may fit in the whole chamber, picking up  
13 less marks that I can look at.

14 Q. Now, I'd like to direct your attention to an event  
15 number that you examined evidence under, 060206-2820, on or  
16 about June 21st, 2006. Do you recall that?

17 A. Yes, I do.

18 Q. And what evidence did you examine?

19 A. For this case I examined some bullets and cartridge  
20 cases and also was submitted a firearm with some cartridges.

21 Q. Was that firearm impounded as well as the rest of  
22 the cartridges and bullets, was all of that evidence impounded  
23 by Crime Scene Analyst Daniel Proietto?

24 A. Yes, he -- yes, it was.

25 Q. And did his -- like a personal identification



1 number, is that 8180?

2 A. That's correct.

3 Q. And is that number documented in your report?

4 A. Yes, it is.

5 Q. Now, I understand that defense counsel has now  
6 stipulated to the admission of State's Proposed Exhibit 100.

7 MR. FIGLER: This is last witness who touched it,  
8 so, yes, we would stipulate to its admission.

9 MS. PANDUKHT: Well, there's actually one more  
10 witness, the fingerprint expert, but she'll be here tomorrow.  
11 I promise.

12 MR. FIGLER: That's fine.

13 THE COURT: I didn't see a seal on that other one.

14 MS. PANDUKHT: This is State's Proposed Exhibit 100.

15 THE COURT: Oh, wait, no, I did see -- Alice --

16 THE WITNESS: Maceo (phonetic).

17 MS. PANDUKHT: Alice Maceo, yes.

18 THE COURT: It's up to you, I mean --

19 MR. FIGLER: If she wants to open it --

20 THE COURT: If you want to move to admit it right  
21 now, I'm just saying --

22 MR. FIGLER: Yeah, no objection based on the  
23 representations of counsel.

24 THE COURT: So you move to admit, right?

25 MS. PANDUKHT: Yes, I move to admit.

1 THE COURT: Okay. There will be no objection, it  
2 comes in now.

3 (State's Exhibit 100  
4 was admitted into evidence.)

5 MS. PANDUKHT: Okay. Thank you.

6 BY MS. PANDUKHT:

7 Q. And I have a photograph as well that I would like to  
8 show you, and I'm going to come up --

9 MS. PANDUKHT: First, if I may approach?

10 THE COURT: You may.

11 BY MS. PANDUKHT:

12 Q. I have a series of photographs that I want to see if  
13 you recognize, and they are State's Proposed Exhibit 94 --  
14 well, I've moved the order. Let's see here.

15 Okay. It looks like 90 to 95. Could you look  
16 through those.

17 A. (Witness complies.)

18 Q. Do you recognize these photographs?

19 A. Yes, I do.

20 Q. Who took them?

21 A. Actually, I did.

22 Q. Okay. And you took these photographs of what  
23 evidence?

24 A. The evidence that was actually associated to the  
25 Event Number 060206-2820.

1 Q. And what do they represent?

2 A. They represent four bullets and a photograph of the  
3 firearm that I examined as well as some close-ups up that  
4 firearm.

5 MS. PANDUKHT: At this time I move to admit State's  
6 Proposed Exhibits 90 through 95.

7 MR. FIGLER: No objection.

8 THE COURT: All right. 90 through 95 are now  
9 admitted into evidence.

10 (State's Exhibits 90 through 95, respectively,  
11 were admitted into evidence.)

12 MS. PANDUKHT: Now, move to publish, Your Honor?

13 THE COURT: You may.

14 MS. PANDUKHT: Thank you.

15 BY MS. PANDUKHT:

16 Q. State's Exhibit Number 94 is actually -- I'm going  
17 to go out of order here. What is this?

18 A. This is actually the firearm that I examined in this  
19 case.

20 Q. And could you describe the complete name of this  
21 firearm?

22 A. This is actually an Imez, I-M-E-Z, Model  
23 PM/IJ70-18A.

24 THE REPORTER: And A?

25 THE WITNESS: A as in apple.

1 BY MS. PANDUKHT:

2 Q. What type of firearm is this, just to be clear for  
3 the record?

4 A. This is a semiautomatic 9-millimeter Makarov pistol.

5 Q. Now, earlier you said there might be some  
6 differences in terms of how many cartridges, how many  
7 cartridges could this gun hold?

8 A. This cart -- this pistol can actually hold eight in  
9 the magazine and one in the chamber so that's a total or  
10 maximum capacity of nine cartridges.

11 Q. And I have a close-up in Number 95. Is this the  
12 information that identifies the gun?

13 A. Yes, it is.

14 Q. And for the record, it is?

15 A. Yes, it is.

16 Q. And there's also, I see, some initials on here  
17 (indicating). Do you recognize those?

18 A. The initials here are for -- for Alice Maceo, with  
19 the event number.

20 And you could just barely make it out, but this  
21 silver portion up here is my initials on there.

22 Q. Did you test fire that gun?

23 A. Yes, I did.

24 Q. Was it in normal operating condition?

25 A. Yes, it was.

1 Q. So it functioned properly?

2 A. Yes, it did.

3 Q. Okay. Now, after you analyzed that gun, did you  
4 analyst any other evidence?

5 A. I also looked at bullets and cartridge cases.

6 Q. First let me ask you about the cartridge cases.

7 Were you able to examine those?

8 A. Yes, I did.

9 Q. What did you determine?

10 A. I determined that, of the six cartridge cases, they  
11 bared the similar general characteristics of the Imez pistol;  
12 however, there was not sufficient characteristics in details to  
13 identify that particular firearm as having fired this firearm.

14 Although there are general characteristics, what  
15 this means is that this gun cannot be excluded or specifically  
16 identified as having fired these -- the cartridge cases.

17 Q. Does that conclusion have anything to do with what  
18 you were talking about earlier in terms of the size of the  
19 cartridge fitting inside the chamber?

20 A. Yes. And it just did not pick a lot of marks up, so  
21 it was such insufficient detail that I just could not  
22 conclusively say that it had fired these component -- these  
23 cartridge cases.

24 Q. Did you come to any conclusions about the  
25 similarities though amongst the six cartridge cases?

1           A.     They were similar to one another as well as to the  
2 test fire cartridge cases that I obtained from the Imez pistol.

3           Q.     And what were they labeled?

4           A.     The -- the item numbers?

5           Q.     No. What were the --

6           A.     Oh, I'm sorry.

7           Q.     Do cartridge cases have a label?

8           A.     The -- the head stamp on them, which is usually  
9 placed by the ammunition manufacturer is Wolf 9-millimeter  
10 Makarov.

11          Q.     Did all six cartridge cases have the Wolf  
12 9-millimeter Makarov head stamp?

13          A.     Yes, it did.

14          Q.     Now, specifically with regard to this Makarov gun,  
15 could other types of 9-millimeter ammunition have been put into  
16 that gun?

17          A.     Yes, it is. It's possible that a .380 can be fired  
18 in there, but it's definitely designed to shoot 9-millimeter  
19 Makarov.

20          Q.     What about, say, a common gun that we see here in  
21 Las Vegas, 9-millimeter Luger, could 9-millimeter Luger  
22 cartridges fit inside this Makarov?

23          A.     Most likely not because of the larger dimension, it  
24 probably wouldn't fit in there; however, I did not check this  
25 particular gun.

1 Q. Now I'd like to ask, did you examine the bullets?

2 A. Yes, I did.

3 Q. How many bullets did you examine?

4 A. I looked at four bullets that were booked under this  
5 event number.

6 Q. And what were your conclusions with regard to the  
7 four bullets?

8 A. Of the four bullets, there were two of them,  
9 specifically Items 1 and 9, that I could identify back to this  
10 firearm, meaning that I can say that this firearm actually  
11 fired these bullets.

12 Of the other two, 6 and 11, they actually were  
13 badly damaged, so I was not able to make a conclusive  
14 identification.

15 Of the characteristics I could see, they were  
16 similar in characteristics, and so similarly to the cartridge  
17 cases, they cannot be identified specifically -- excuse me,  
18 specifically to this firearm, but they cannot be excluded as  
19 having been fired by this firearm.

20 Q. I'd like to show you what has been admitted as  
21 State's Exhibit Number 90. Did you use the same numbering  
22 system on this photograph as the package that was impounded?

23 A. Yes. The DAC were my initials at the time from my  
24 Package Number 1, and the dash one is the same as the item  
25 number from the package by Dan Proietto, so this is Item 1.

1 Q. So when you say Bullet Number 1, is the photograph  
2 here in this Exhibit 1-1, is that what we're talking about  
3 (indicating)?

4 A. That's correct.

5 Q. Okay. So again, could you explain to the jury what  
6 your results were with regard to this particular bullet in  
7 Photograph Number 90?

8 A. This bullet was identified as having been fired by  
9 the Imez pistol.

10 Q. And what was the condition of this bullet?

11 A. There was some secondary damage. So when the bullet  
12 actually goes through the barrel of the firearm, it picks up  
13 characteristics and marks from there that help me identify it  
14 back to there.

15 But once it leaves the barrel of the gun,  
16 anything else that it hits and impacts on can also leave marks  
17 on there.

18 As you can see, there is additional marks that  
19 are long from the nose of it, along the sides, that were picked  
20 up from whatever it impacted on, and it also deformed itself  
21 because it's kind of mushroomed, and you could see the jacket  
22 going beyond the base.

23 So there was secondary damage to this bullet;  
24 however, I -- I was still able to look beyond that damage and  
25 see the characteristics that were left from the gun and



1 identify it back.

2 Q. Now showing you State's Exhibit Number 92, is this  
3 Item Number 9?

4 A. That's correct.

5 Q. So again, the photograph DAC1-9 corresponds to what  
6 you said was Bullet Number 9?

7 A. That's correct.

8 Q. Again, tell us your results with regard to this  
9 particular bullet.

10 A. This bullet I also identified as having been fired  
11 by the Imez pistol.

12 Q. And this along with Number 1?

13 A. Yes.

14 Q. Now, what about Number 91, could you describe the  
15 condition of this bullet and what you've labeled it as?

16 A. This one also had some secondary damage as depicted  
17 here along this edge (indicating). These were not made from  
18 the gun itself but from impact.

19 And as you can see, it's distorted and  
20 flattened. So I could only -- my marks that I looked at was  
21 very limited, and I could not see beyond these marks to  
22 identify it back; however, the characteristics that I could see  
23 were consistent with the Imez pistol.

24 Q. What type of surface could cause these kinds of  
25 other damage?

1           A.     This is a very ungiving surface, probably a concrete  
2 wall or something that's very rough as that would actually  
3 leave that much mark on a very flattened area.

4           Q.     Or could it also be like the ground or asphalt,  
5 something hard?

6           A.     That's correct.

7           Q.     Now showing you State's Number 93, could you  
8 describe which bullet this is and, again, the condition of this  
9 bullet?

10          A.     This is Item 11. This also picked up some secondary  
11 marks and was flattened by these marks here, these not from the  
12 gun.

13                   This, I could not give a conclusive  
14 identification or determination on; however, the  
15 characteristics that I did see were similar to the Imez pistol.

16          Q.     Were there any other conclusions that you came to  
17 that I have not already asked you about?

18          A.     No, that was it.

19          Q.     And are all of your conclusions within the  
20 reasonable bound of scientific certainty?

21          A.     Yes, they are.

22                   (Sotto voce at this time.)

23           MS. PANDUKHT: Pass the witness.

24           THE COURT: Cross-examination.

25           MR. FIGLER: Just a couple questions.

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CROSS-EXAMINATION

BY MR. FIGLER:

Q. Ma'am, that's the gun in this case; correct?

A. That's correct.

Q. And you referred to a slide at some point; correct?

A. Yes.

Q. Now, the slide is what the person who is about to shoot it pulls back before they discharge the weapon; correct?

A. Yes -- it needs to be pushed -- pulled back so that a cartridge can actually be placed in the chamber, that's correct.

Q. So that's part of the process, use the weapon, pull slide back?

A. It can be done at any point in time, but it has to be done prior to it.

Q. Prior to the firing?

A. Yes.

Q. Okay.

A. But that action can be done a week or so prior to the gun actually being pulled.

The gun actually goes --

Q. There's no question before you right now.

A. Okay.

Q. Thanks.

1                   Now, you identified these as one-six; correct?

2           A.     It's Item 6 -- same as Item 6 from Dan Proietto,  
3     yes.

4           Q.     Okay. So you match up with what Dan Proietto marked  
5     as the evidence gatherer; correct?

6           A.     That's correct.

7           Q.     That's so there's no confusion down the road; right?

8           A.     That's correct.

9           Q.     That's the policy; correct?

10          A.     It -- it allows me to put a nice unique identifier  
11     on each of my items, yes.

12          Q.     Okay. And all these match up with Dan Proietto --  
13     11 -- one-one -- Proietto marks as 1, you mark it as 1;  
14     Proietto marks it as 11, you mark it as 11; Proietto marks it  
15     as a 6, you mark it as a 6; correct?

16          A.     Yes, that's correct.

17                 MR. FIGLER: Thank you, no further witnesses -- or  
18     sorry, no further questions for this witness.

19                 THE COURT: Redirect.

20                 MS. PANDUKHT: Based on that, nothing.

21                 THE COURT: Any questions for this particular  
22     witness, ladies and gentlemen?

23

24                         (Negative response from the jury panel.)

25

1 THE COURT: All right. That's a negative response.  
2 Thank you so much for your testimony. You're  
3 excused.

4  
5 (Whereupon, at this time the witness was excused.)

6  
7 THE COURT: Is there anybody else out there?

8 MS. PANDUKHT: No, we sent them away.

9 THE COURT: That's okay.

10 MS. PANDUKHT: I apologize.

11 THE COURT: Fine. It's all right.

12 MS. PANDUKHT: I didn't think we could get one more  
13 done.

14 THE COURT: No, it's all right. I think we're good.

15 MS. PANDUKHT: Okay.

16 THE COURT: I'm sure the jury would like to take a  
17 break.

18 So, ladies and gentlemen, this will be our evening  
19 recess.

20 We'll go nine to five tomorrow. I'll give you a  
21 better morning and afternoon break. I was trying to finish up  
22 with that one witness before breaking, so I'll -- hopefully it  
23 will be more mid section next time.

24 During this recess you are admonished not to  
25 talk or converse among yourselves or with anyone

1           else on any subject connected with this trial;

2           Or read, watch, or listen to any report of or  
3           commentary on the trial, or any person connected  
4           with this trial, by any medium of information,  
5           including, without limitation, newspapers,  
6           television, radio or internet;

7           Or form or express any opinion on any subject  
8           connected with the trial until the case is finally  
9           submitted to you.

10           Have a great evening, and then we'll see you at  
11   nine a.m. Thank you.

12           THE MARSHAL: All rise.

13  
14           (The following proceedings were had in open  
15   Court outside the presence of the jury panel:)

16  
17           THE COURT: We're still on the record.

18           Okay. We're outside the presence of the jurors.  
19   We're on the record still.

20           Tomorrow's Friday. I'm assuming you all got  
21   notified, but I had a media request, which I signed off on.  
22   Why, I don't know. It's only for Friday so I just wanted to  
23   let you know.

24           MS. PANDUKHT: Only for Friday?

25           MR. FIGLER: They must be bored.

1 THE COURT: I don't really know.

2 MR. FIGLER: Where were the day with my fiery cross?

3 THE COURT: Yeah. So I just wanted to let you guys  
4 know. I mean I did sign off on it a day ago so that will  
5 happen tomorrow.

6 The only other thing I was going to mention is  
7 that -- oh, you were going to make a motion.

8 MR. FIGLER: Thank you.

9 THE COURT: Go ahead. Sorry.

10 MR. FIGLER: No problem, Your Honor.

11 And Your Honor allowed me to make this  
12 contemporaneous to the time, we haven't waived anything, we're  
13 just doing it for the Court's convenience.

14 Your Honor, based on the fact that the prosecution  
15 proceeded with all that information about gangs and gang  
16 activity, and then we had the hearing, and Your Honor made the  
17 rulings that she did, the defense needs at this point to make a  
18 motion for mistrial. And we'll just leave it at that.

19 THE COURT: What I'm going to do is I did want  
20 something in writing. I'm going to give you the weekend to  
21 have something in writing to put together the reasons that you  
22 had proceeded on a gang theory. I'm sure, from your discovery,  
23 you know, just list it out and --

24 MS. PANDUKHT: We requested the transcript,  
25 Your Honor.

1 THE COURT: Of who?

2 MS. PANDUKHT: Of today's argument. It would be so  
3 helpful to get that transcript, but she wanted it ordered.

4 THE COURT: Oh, I can get it. I'll give them an  
5 order.

6 THE REPORTER: No problem, I can have it tomorrow.

7 MS. PANDUKHT: Oh, you can?

8 THE REPORTER: Yeah.

9 MS. PANDUKHT: Oh, thank you.

10 (Sotto voce at this time.)

11 MS. PANDUKHT: It's hard, our staff is gone now.

12 THE COURT: No problem. So we'll --

13 MR. FIGLER: That will be pending?

14 THE COURT: Yeah.

15 The only -- another thing I noticed -- yeah, so it's  
16 going to be pending, I'll rule on it on Monday, and that way I  
17 think there will be a better record of your proceeding anyway,  
18 where I had already found that it wasn't intentional.

19 MS. DEMONTE: Yeah.

20 THE COURT: Because you clearly have discovery that  
21 said he was a gang member, the defendant, and you said to me,  
22 on the record, that Jonathan Harper had previously testified  
23 that that defendant was in the gang of Puros Locos.

24 MS. PANDUKHT: That's what I believed.

25 THE COURT: So I'm going to -- you guys can go back



1 over and make sure that that's what your discovery said so that  
2 you can overcome a mistrial motion.

3 And, I mean, I -- I'm going to obviously deny it,  
4 but I don't want to formally do that until they put something  
5 in writing, because it gets helpful on the record because it's  
6 helpful not only to overcome a post-conviction issue, but if  
7 somebody was to second guess what Mr. Goodman and Mr. Figler  
8 did, which I get all day long having, you know, being  
9 Judge Mosley's predecessor in interest, I get a lot because --

10 MR. FIGLER: No, we appreciate you allowing us to  
11 make a full record.

12 There was one other motion that the defense needs to  
13 make.

14 THE COURT: Okay, go ahead.

15 MR. FIGLER: Based on the testimony of  
16 Detective Hardy, Your Honor, we're going to move to dismiss the  
17 charges for destruction of evidence. And I'll explain my  
18 theory.

19 Detective Hardy said, in no uncertain terms, that,  
20 in 2006, that Metro had full knowledge that doing latent prints  
21 before doing any DNA testing would destroy the evidence.

22 The evidence came out that Detective Hardy had no  
23 verification that any DNA testing had been done at any time on  
24 that gun.

25 He testified to that straight up.

1           This last witness testified that the slide of a  
2 handle, where allegedly there was some brownish reddish  
3 material that could have been bio material would be a place  
4 where a shooter, or the person who is cocking the gun  
5 (indicating), would have left potential DNA evidence, which  
6 could have excluded my client or implicated someone else.

7           We also know that there were multiple parties that  
8 handled this weapon, yet their fingerprints don't show up.

9           Additionally, my client's fingerprints show up in  
10 very unusual spots on this -- on this gun.

11           His right ring finger, which would be his fourth  
12 finger down, shows up at the very top, above the grip on the --  
13 on the gun itself, and then there's some webbing that's near  
14 the -- the handle of the gun, which the State is going to use  
15 as being extraordinarily incriminating evidence, and yet we  
16 don't have the ability to test for DNA because it's been  
17 destroyed by the detective.

18           We don't have any of that information which would  
19 include or exclude and, therefore, because they knew that that  
20 would happen if they did latent prints first, they  
21 intentionally destroyed that evidence, so it couldn't be  
22 tested, and we move to dismiss.

23           THE COURT: Here's what I'm going to do, I'm going  
24 to make it real easy on this one, okay?

25           It's -- it's interesting what you're posing, okay,

1 kind of.

2 It's -- it becomes more interesting if he's  
3 convicted. If he's not convicted it's a nonissue. Okay?

4 MR. FIGLER: Of course.

5 THE COURT: What I would rather do with that,  
6 because it just sprung up today, would be to wait until if, in  
7 fact, he's found guilty of murder in the first degree, have  
8 formal motions on destruction of evidence. Because my concern  
9 would be that, if you're fighting, you could get a cut on your  
10 hand, which could be important as to putting blood evidence on  
11 the firearm.

12 And if that blood evidence was not properly  
13 collected, it does rise to a level of a question of whether or  
14 not, you know, at first blush, you may think, well, all you  
15 need is one or the other. But maybe not because we heard that  
16 it was a big melee beforehand.

17 So it becomes much more relevant because of the  
18 fighting that occurred. And as I recall, I heard the coroner  
19 say that the decedent also had cuts on his hands.

20 MR. FIGLER: Correct, Your Honor.

21 THE COURT: Okay? So now cuts on the hand become  
22 important as far as DNA transfer. Okay?

23 So I think it's a very interesting question of  
24 what's gone on. I gotta tell you, I couldn't figure out what  
25 was going on with Hardy in 11-A. Good luck to all of you with

1 the jury because it was just a lot.

2 MS. DEMONTE: I can explain it.

3 THE COURT: Well, I'm going to let you all brief it.  
4 How about that?

5 MS. DEMONTE: Okay.

6 THE COURT: If he's actually convicted of it, then  
7 everybody can really sit down with it, because that's an --  
8 that's a very -- this is an ID case, and there's a destruction  
9 of evidence. You know, I just don't want to shoot from the hip  
10 is what I'm saying.

11 MS. PANDUKHT: There has been no destruction of  
12 evidence.

13 THE COURT: Okay? I don't want to shoot from the  
14 hip.

15 MS. PANDUKHT: But there has been no destruction of  
16 evidence. There -- the evidence --

17 THE COURT: Maybe you are just not understanding.

18 MS. PANDUKHT: Well, yeah, it got confusing, but  
19 there was no destruction of evidence, Your Honor, and that --  
20 that swab turned out to be negative. So it wasn't blood.  
21 So --

22 MR. FIGLER: We don't know what the swab came  
23 from --

24 THE COURT: Well, are you having somebody from DNA  
25 say that it's negative?

1 MS. DEMONTE: That's what the LabCorp report that  
2 Mr. Figler kept putting in Mr. Hardy's face was.

3 THE COURT: You're right, but you're having somebody  
4 from the lab say it's --

5 MS. DEMONTE: We have to make a phone call that we  
6 need someone from LabCorp now.

7 THE COURT: Because I never heard you were putting  
8 on DNA evidence.

9 MS. DEMONTE: No, we weren't going to --

10 THE REPORTER: Whoa, whoa.

11 MS. DEMONTE: Sorry. It wasn't blood.

12 THE COURT: You may want to put on your evidence  
13 then, and I'll determine this later, because if the swab was  
14 not blood, and it's something else, and then they still have an  
15 argument that it should have been swabbed first beforehand?

16 MS. PANDUKHT: It was.

17 MS. DEMONTE: It was.

18 MR. FIGLER: I mean, they keep saying it, but I  
19 haven't seen any proof of that.

20 THE COURT: Hold on, hold on.

21 Yeah, we're going to have more testimony. I think  
22 it's just premature.

23 MS. PANDUKHT: Yes.

24 THE COURT: And that's why I was going to wait  
25 anyway.

1 MS. PANDUKHT: Thank you, thank you.

2 THE COURT: Because I think it may be premature,  
3 they may be able to explain what happened better.

4 MS. DEMONTE: Yes.

5 THE COURT: So let's just continue this either way.  
6 It's a valid -- what you brought up is valid because what I was  
7 hearing on cross was there was some confusion as to whether it  
8 was swabbed first, whether the fingerprints went first, how it  
9 all went down. Maybe with more evidence we'll be able to  
10 figure that out.

11 MR. FIGLER: Sure.

12 THE COURT: So let's just put that one over.

13 And do not let me forget if, in fact, a verdict  
14 comes out, then I'll just have you brief it, and we'll have --  
15 I'll give you lots and lots of time, you can have all the trial  
16 transcripts and attach it, and I'll be able to make a better  
17 record.

18 MR. FIGLER: I appreciate that.

19 Only one other little thing, as Your Honor, I'm  
20 sure, is aware, under Sanborn and Sparks, it might have some  
21 impact on instruction, so the defense may offer some additional  
22 instructions based on how the record stands right now, but I  
23 appreciate what Your Honor is saying about --

24 THE COURT: I know what you're saying.

25 MR. FIGLER: Yeah, yeah, so I get where you're

1 going, and that's fine, but I just wanted to throw that out  
2 there too.

3 THE COURT: Well, even with Sanborn it's got to be  
4 intentional or grossly negligent.

5 MR. FIGLER: Yeah. Yeah.

6 MS. PANDUKHT: It just didn't happen.

7 THE COURT: Let's see how it comes out.

8 So if you're saying that it was swabbed first --

9 MS. PANDUKHT: It was swabbed for that stain, that  
10 reddish brown stain, it was swabbed.

11 THE COURT: So it was swabbed.

12 MS. PANDUKHT: Yes. And then they didn't swab the  
13 rest of the gun, they did the prints. It was confusing with  
14 Hardy because he really wasn't the proper witness to be asking  
15 all those questions to.

16 THE COURT: I understand.

17 MR. FIGLER: Except that --

18 MS. PANDUKHT: But he found that a little  
19 confusing --

20 MR. FIGLER: Except that Hardy was the one who  
21 resubmitted saying: If there's any DNA, I don't know.

22 And it looks like they might have accidentally taken  
23 it from the belt buckle. That's what our point was.

24 But this could have been a big oopsy by Metro, and  
25 now there's a problem. That's why Hardy's trying to clean it

1 up in 2008, two years after the swabbing was allegedly done.

2 THE COURT: Let's -- let's hear from that other  
3 expert tomorrow, and it may get cleared up. You need to clear  
4 it up.

5 MS. PANDUKHT: Yeah.

6 THE COURT: Because it's pretty confusing what went  
7 on with Hardy.

8 MS. PANDUKHT: I will.

9 THE COURT: And do you want all of you like can  
10 have, since Renee is not going to be here, not -- it's up to  
11 you, can -- can you get, you know, can you also get Hardy's  
12 testimony to them?

13 THE REPORTER: You bet. It won't be first think in  
14 the morning, but it will be tomorrow.

15 THE COURT: Yeah. You've got time. I'm just  
16 worried about instructions with Sanborn, if, in fact,  
17 Mr. Figler is somehow correct, and I'm -- it's not what you  
18 say, but you guys should know your case.

19 MS. PANDUKHT: We do. And we also know that the  
20 capability for DNA in 2006 were not touch DNA, like we have  
21 today. That didn't exist back then.

22 MR. FIGLER: I mean, as rebuttal, I could bring in  
23 every single transcript from every case in from 2006 beyond all  
24 the way back to 1998 where they're using DNA evidence to  
25 convict people.



1 I don't know that they had want to go down that path  
2 that DNA is not relevant before 2006.

3 MS. DEMONTE: I'm not saying DNA was relevant --

4 THE COURT: It's the touch.

5 MS. DEMONTE: -- what I'm saying is the touch.

6 MR. FIGLER: DNA is DNA is DNA.

7 THE COURT: But --

8 MR. FIGLER: It's blood --

9 THE REPORTER: One at a time, please.

10 THE COURT: If the protocol is not to do touch DNA  
11 like it is now, okay, then we all live with the protocol that  
12 was going on at that time.

13 MS. PANDUKHT: I would also like to raise the point  
14 that they gave us a report from their expert that said that  
15 Alice Maceo did everything correctly, and the swabs weren't  
16 taken from the grip of the gun.

17 So their own report from Jerry Dickerson (phonetic),  
18 their expert, said that swabs weren't taken from the grip of  
19 the gun, the sides that were textured, but she even said that  
20 swabs were taken and sent to LabCorp of the reddish brown  
21 stain. So every last stain that our witnesses would have  
22 testified to, Miss Dickerson agreed with, other than swabs  
23 weren't taken from the --

24 MR. GOODMAN: And she hasn't testified here,  
25 Your Honor.

1 MS. PANDUKHT: I know, but I'm just saying --

2 MR. GOODMAN: That's completely improper to suggest  
3 a report from an expert that hasn't testified yet.

4 MS. PANDUKHT: I'm just saying --

5 MR. GOODMAN: It's not evidence in the record.

6 MS. PANDUKHT: I agree it's not evidence in the  
7 record, I wanted to bring it up to the Court only because of  
8 the allegation of destruction of evidence. I thought it was  
9 important for that limited purpose. That's all I was saying.

10 THE COURT: So you've got your expert tomorrow.

11 Do you have some DNA expert too?

12 MR. FIGLER: No, because there was never any DNA  
13 taken by our knowledge or DNA tested one way or another.

14 We know that they didn't take DNA from all the  
15 people who I mentioned.

16 THE COURT: Right.

17 MR. FIGLER: We know that didn't happen.

18 I don't have a report back of DNA that is distinctly  
19 traceable chain of custody right now as we sit based on the  
20 evidence that came out, that goes to that gun versus that belt  
21 buckle. I just don't have that yet.

22 Now, maybe they can clean it up and they're saying  
23 that they can, but I'm just sitting here with what I got and  
24 what the record has so far, that's why I'm making this motion.

25 MS. PANDUKHT: They have the report from LabCorp and

1 that's the only report that --

2 MR. FIGLER: Yeah, the LabCorp report says no DNA on  
3 11-A. 11-A is a belt buckle.

4 MS. PANDUKHT: You have the report.

5 THE COURT: I have never seen the report so that  
6 could be a little helpful.

7 MR. FIGLER: The report says there's no DNA on 11-A.  
8 And 11-A, by all counts that we have so far, is a  
9 belt buckle that's in that bag.

10 MS. DEMONTE: That's not true.

11 THE COURT: I heard something else was 11-A too.

12 MS. DEMONTE: This is --

13 MR. FIGLER: 11.

14 MS. DEMONTE: No, no, no. Let me -- I'm going to  
15 say exactly what this is.

16 This is package -- I can't remember what Maria  
17 Thomas's pack number -- Package 1, Items 2, 3, 4, 5, 6, 7, 8,  
18 9, 10 and 11.

19 There are no As, Bs, Cs, Ds assigned to the victim's  
20 clothing.

21 Also in evidence is from Dan Proietto --

22 THE COURT: Where is the LabCorp result?

23 MS. PANDUKHT: Right here.

24 MS. DEMONTE: Which is Package 1, Items 1, 2, 3 --

25 THE COURT: Hold on. You know what, let me read the

1 LabCorp thing first.

2 MS. PANDUKHT: Okay.

3 THE COURT: And let me start looking at packages.  
4 Hold on.

5 MR. GOODMAN: Is that Defense Exhibit A that you  
6 have, Your Honor?

7 THE COURT: This is LabCorp.

8 THE CLERK: It's right in front of her now.

9 THE COURT: I have 8 but I'm looking at LabCorp.

10 MR. FIGLER: Great.

11 THE COURT: LabCorp is what they actually tested.

12 MR. FIGLER: Right.

13 THE COURT: Well, it says Item 6 here. Item 6 is  
14 what the LabCorp talks about, it says: Reddish stain from rear  
15 slide of 11-A, Item 6, revealed negative results for presence  
16 of blood.

17 MR. FIGLER: Right.

18 THE COURT: Now, let me see what Item 6 is because  
19 that's that, and one sealed envelope containing a swab listed  
20 as a swab of reddish stain from the rear of slide, Item 11-A.

21 Wouldn't it be a slide that was sent to them?

22 MR. FIGLER: Yeah, you would think.

23 MS. DEMONTE: No, a swab.

24 MR. FIGLER: Swab.

25 MS. DEMONTE: Swab.

1 THE COURT: But I mean it's a slide -- swab of a  
2 slide.

3 MR. GOODMAN: It's a swab of a slide.

4 THE COURT: That's what it says. Swab of reddish  
5 stain from rear of slide.

6 MR. FIGLER: Right. But 11-A comes into the mix  
7 somewhere, and Hardy says, in '08, 11-A, that's the belt.

8 THE COURT: This is from B -- BL. Who is BL?

9 MS. DEMONTE: That's Burke Henry (phonetic).

10 THE COURT: So Burke Henry is on here.

11 MS. DEMONTE: Yes.

12 THE COURT: And who is SW?

13 MS. DEMONTE: That's LabCorp that worked for Metro.

14 MR. FIGLER: I have no doubt that LabCorp tested  
15 what's in that envelope. I have a huge doubt where that came  
16 from so far based on the record.

17 THE COURT: I see what you're saying.

18 You are saying that this is what they tested, but  
19 you don't know where this (indicating) came from.

20 MR. FIGLER: Right.

21 MS. DEMONTE: Alice Maceo is going to testify.

22 THE COURT: All right. So Alice Maceo will say  
23 tomorrow that --

24 MS. PANDUKHT: She's the fingerprint expert, and she  
25 requested that.

1 THE COURT: Okay. But somebody took a swab from an  
2 item of evidence, so who took the swab from the gun?

3 MS. DEMONTE: Burke Henry at Alice Maceo's request.  
4 Alice Maceo --

5 THE COURT: Burke Henry needs to say he took a swab  
6 and put it into here then.

7 MS. DEMONTE: Well, Alice Maceo watched him do it.

8 THE COURT: Oh, okay, Alice watched him do it.

9 MR. FIGLER: Really?

10 MS. DEMONTE: Yes.

11 MS. PANDUKHT: I'll ask her again but that's what I  
12 thought.

13 THE COURT: Well, here's the deal, where is  
14 Burke Henry?

15 MR. FIGLER: I want --

16 MS. DEMONTE: He's --

17 THE REPORTER: One person at a time, please.

18 THE COURT: Oh, my God. Here's the deal: They're  
19 still questioning where that came from, and there is a question  
20 because two items are 11-A.

21 So what I am saying is it's -- it's a mess, fix it,  
22 or you're going to get these motions, which makes it very, very  
23 complex that doesn't need to be complex. This is simple  
24 evidence here, people. Okay?

25 It shouldn't be where I'm figuring out your chain of

1 custody. All right?

2 So you've got to put somebody on the stand that said  
3 that they took the gun, Item -- which is my Exhibit 100, they  
4 took a little swab, they took the swab, they put it into that  
5 envelope.

6 If Henry Burke (sic) isn't around, if she was  
7 sitting there present and watched the whole thing and can  
8 testify under oath that she watched the whole thing, then  
9 that's fine, but she better -- I would think she has notes to  
10 that effect as well.

11 MS. PANDUKHT: Yeah, she does.

12 THE COURT: Okay. Well, Mr. Figler, if that's going  
13 to be the case tomorrow, if she takes the stand and says she  
14 watched Burke --

15 MR. FIGLER: We want Burke, but I get what you're  
16 saying.

17 MS. PANDUKHT: I'll try and find out.

18 THE COURT: You don't need Burke, all right?

19 If she did it and she did the testing, and she was  
20 standing right there and she can say: I watched Burke swab it,  
21 we're both forensic scientists, and put it in there, then it  
22 will be a nonissue, a non-Sanborn issue, which I don't  
23 personally need either.

24 MR. FIGLER: Right, I get it.

25 THE COURT: Okay? I agree, it's a weird issue,

1 but --

2 MR. FIGLER: You see where we're coming from at this  
3 point.

4 THE COURT: I do, and thanks for the heads-up  
5 because now I gotta sit and watch chain of custody like a hawk.

6 Okay. At least you gave me a heads-up, now I  
7 know -- I know we're on the same page because, you know, I was  
8 just bobbing in and out of consciousness on Ken Hardy's -- with  
9 whatever you guys were doing here.

10 MR. FIGLER: Right.

11 THE COURT: Because I gotta tell you, I really  
12 wasn't following the whole -- and I know -- I mean I know this  
13 stuff, and I wasn't following it. So we got it with the jury.

14 MS. DEMONTE: It got really confusing.

15 THE COURT: That's what I'm saying. All right? So  
16 I would clean it up big time tomorrow for that. Okay?

17 MS. DEMONTE: We're already going on it.

18 MS. PANDUKHT: On it.

19 THE COURT: Thanks. All right. We're off the  
20 record.

21 (Proceedings concluded.)

22 \* \* \* \* \*

23 ATTEST: Full, true and accurate transcript of proceedings.

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