

IN THE NEVADA SUPREME COURT

Electronically Filed  
May 03 2021 05:49 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 6 of 10**

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Dated May 3, 2021.

Respectfully submitted,

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Federal Public Defender

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Emma L. Smith  
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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.

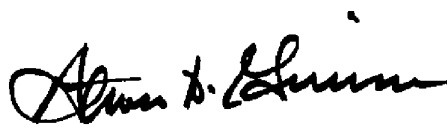
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Alexander Chen.

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An Employee of the  
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CASE NO. C262966

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DEPT. NO. XV

  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	
Plaintiff,	)	
	)	Reporter's Transcript
	)	of
vs.	)	Jury Trial
	)	
	)	
EVARISTO GARCIA,	)	
Defendant.	)	

BEFORE THE HON. ABBI SILVER, DISTRICT COURT JUDGE

JULY 12, 2013

10:30 A.M.

APPEARANCES:

For the Plaintiff: Taleen Pandukht, Esq.  
Noreen Demonte, Esq.  
Deputies District Attorney

For the Defendant: Ross Goodman, Esq.  
Dayvid Figler, Esq.

Reported by: JoAnn Melendez, CCR No. 370

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1 LAS VEGAS, CLARK COUNTY, NV, JULY 12, 2013

2 10:30 A.M.

3 -oOo-

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

5  
6 THE COURT: We're on the record now.  
7 State of Nevada versus Evaristo Garcia. Case No.  
8 C262966.

9 Let the record reflect the defendant  
10 is present with his attorneys Mr. Figler and Mr.  
11 Goodman. And for the State, Ms. Pandukht and Ms.  
12 Demonte.

13 We have a matter outside the  
14 presence of the jury right now and who wanted to  
15 bring that to my attention?

16 MR. FIGLER: I'll start it, Your Honor.

17 THE COURT: Sure.

18 MR. FIGLER: If that's okay. When  
19 counsel arrived this morning, I noted a difference  
20 in the routine in that the jurors were going back  
21 towards chambers in the jury room than being out in  
22 the hallway as they have since the very onset of the  
23 trial every day. So today is day five. Days one  
24 through four, they were out in the hallway.

25 Mr. Goodman was back there before it

1 happened, before they started being let back just as  
2 normally is as we all are.

3 THE COURT: Sure.

4 MR. FIGLER: And the jury saw Mr. Goodman  
5 and had a -- what Mr. Goodman would describe as a  
6 negative visceral reaction to seeing him and  
7 literally jumping back and away from him saying --  
8 did they say something or was it just --

9 MR. GOODMAN: That's defense.

10 MR. FIGLER: Oh, that's defense.

11 MS. PANDUKHT: Who said that? I didn't  
12 hear.

13 MR. FIGLER: One of the jurors.

14 MR. GOODMAN: A couple of the jurors.

15 MS. PANDUKHT: To you?

16 THE COURT: Well, they've been admonished  
17 not to talk to you guys, too.

18 MR. FIGLER: I appreciate that. So Ross  
19 came out and he goes, I just had a weird experience  
20 with the jurors back there. They looked at me like  
21 I was the plague, like something weird was going on.  
22 Then the marshal --

23 THE COURT: It's just Ross. That's  
24 everybody's reaction.

25 MR. GOODMAN: For the record, that is not

1 everyone's reaction.

2 MR. FIGLER: Yeah.

3 THE COURT: I'm teasing.

4 MR. GOODMAN: That's the whole point,  
5 Your Honor, is because most people are very  
6 gracious. During jury -- during a trial, jurors  
7 seem to like me for the most part.

8 This is the first time I've done a  
9 trial that I can remember where I had that type of  
10 overt reaction where they basically jumped up  
11 against the wall as I was walking back.

12 So I think it is significant.

13 MR. FIGLER: That said, we then asked the  
14 marshal what the reason for the difference was. The  
15 marshal said it's not that big, they had something,  
16 but it didn't have anything to do with the trial but  
17 they did have some questions.

18 So they've been communicating with  
19 the marshal which is absolutely proper. In fact,  
20 that's the best way to go is for them to communicate  
21 to the marshal, but the marshal felt based on the  
22 communications made to him that it would be best to  
23 not have them out there anymore.

24 When we further inquired with both  
25 parties here of the marshal, he indicated that there

1 was trepidation on the part of the jury, that  
2 they're afraid of people in the audience, that they  
3 were afraid to be asking questions this entire time  
4 because Your Honor announces their names. Because  
5 their names are known that some of them said  
6 something about they were being followed or that  
7 they felt in a threatened position.

8               So obviously this has caused great  
9 concerns to both sides. We've been talking about it  
10 right before Your Honor took the bench. It's clear  
11 that there's more than just a question or two. It  
12 seems as though the jurors are expressing some great  
13 concerns to the marshal.

14              So I think -- and I think the State  
15 agrees with me that the best course of action to  
16 protect the record is initially to inquire upon the  
17 marshal when he was first made aware of these  
18 concerns by the jurors, which jurors, if he can  
19 remember the concerns, what specific questions or  
20 comments were made and then what he said back.

21              Then I think the appropriate step  
22 after that would be to make, if the Court deems it  
23 to be an issue that needs to be resolved based on  
24 the marshal's representations, that we do a canvass  
25 of the jury.

1 I think both sides agree that the  
2 best way to do that, to make the cleanest record,  
3 would be to do that individually. But I'll leave it  
4 to the Court, how the Court wants to run that, if  
5 the Court even feels that that's necessary, but  
6 that's the position of the defense as consulted with  
7 the State.

8 MS. PANDUKHT: And if I may just add a  
9 tiny bit to that, Your Honor. I agree with  
10 everything Mr. Figler said.

11 And for the record, defense counsel  
12 has been courteous and I've not never seen them do  
13 anything inappropriate during the course of this  
14 trial.

15 Secondly, I wanted to let the court  
16 know, which I've already let the defense know, that  
17 Ms. Nyikos and I -- Ms. Demonte and I -- see, I do  
18 it, too, we instructed all of our witnesses, as well  
19 as the family members that have been watching, not  
20 to talk about the facts of the case outside and to  
21 behave themselves. Obviously not make any looks. I  
22 specifically told the victim's family not to make  
23 any movements, gestures or looks or they would be  
24 thrown out of the courtroom.

25 And I have had my victim advocate



1 Joanna Rash actually sitting with the victim's  
2 family throughout the entirety of this trial. And  
3 I'm sure Your Honor has seen her here in court.  
4 And, in fact, she's been sitting outside with them.

5 So just before we even get  
6 started, I want to make a record of what the State  
7 has done to try and protect the record in this case.  
8 Thank you.

9 THE COURT: Thank you. Okay. Well, I  
10 agree with everyone. My preliminary thoughts on,  
11 just when -- this is the first time they've been  
12 back in the hallway, it's very obvious that they can  
13 see judges, they can see attorneys. And of course,  
14 we encourage you guys to come back any time. I've  
15 always said that if you want coffee, water, whatever  
16 you need, my staff is always there for the attorneys  
17 to assist them.

18 So it's gonna be normal that when  
19 they go back there, it was just in my view since I  
20 admonished them on two different occasions do not  
21 speak to the attorneys, that they might have been  
22 surprised to see an attorney there and them saying  
23 it's the defense may have been a way of commenting  
24 to the rest of their -- the group, you know, to be  
25 quiet, whatever, the defense is here.

1                   Now, it could be the other way that  
2 Mr. Ross thinks that, you know, they don't like him,  
3 I don't know, but I do know that they were  
4 admonished two times by the Court. So --

5                   MR. GOODMAN: And if I could just add,  
6 Your Honor, for the record, I'm been with this jury  
7 passing them, you know, a number of times. Some of  
8 them acknowledge me that I'm passing them. I've  
9 never had this negative reaction.

10                   And for the record, it wasn't that  
11 they said defense. It was the tone of their voice  
12 and how they said it. So it wasn't like a surprise  
13 motion -- a surprise that, that they saw me. The  
14 tone of their voice coupled with the fact that  
15 they -- basically if the wall wasn't right behind  
16 them, I think that they would have tripped over  
17 themselves and fell -- and fell down. I think that  
18 that is a dramatic change from when I walk passed  
19 them the other day.

20                   I don't know what precipitated it,  
21 but then I learned about this new development this  
22 morning. And so I think coupled together it does  
23 raise a concern.

24                   THE COURT: I appreciate your comments.  
25 Well, the record is what the record is. And what

1 I'm gonna do from here on out, we're gonna ask the  
2 marshal some questions. And either sides are free  
3 to ask questions of him.

4 MS. PANDUKHT: Thank you.

5 MS. DEMONTE: Thank you.

6 THE COURT: What I would like to do is we  
7 had the Desai trial going on for about four months  
8 and the jury used the conference room as a meeting  
9 spot.

10 I'm gonna have the marshal pick the  
11 jurors up in the morning down in the jury  
12 commissioner's office and have them escorted up here  
13 right back into the conference room. And they'll  
14 stay back in the hallway. So I'm just letting you  
15 guys know that they'll be back there from here on  
16 out.

17 If you want to use the restrooms,  
18 you might want to go down the hall or you guys might  
19 want to use the public ones to stay away from the  
20 jury because I'm gonna be keeping them back here and  
21 they'll be using those restrooms here along with the  
22 break stuff.

23 MS. DEMONTE: Okay.

24 THE COURT: So that might alleviate any  
25 more concerns with what the marshal is going to

1 discuss which obviously he talked with you about and  
2 what he discussed with me and so now we'll put on  
3 the record what occurred.

4 And if marshal -- it's Marshal David  
5 Ellis who's with us. And go ahead, Marshal Ellis.

6 MARSHAL ELLIS: Yes. When I went out to  
7 see if the jurors were here, that's when they  
8 expressed to me their safety concerns. And we  
9 went -- when we took them to the back -- because I  
10 asked Gail, I went back and talked to Gail about it  
11 because you weren't here yet, and she said that she  
12 felt it would be okay for me to secure them back in  
13 the jury deliberation room. And I did that. But we  
14 didn't see any attorneys when we were going down the  
15 hallway.

16 And when I instructed them we were  
17 going to the deliberation room, we didn't see  
18 anybody in the room. He -- attorney Goodman was  
19 over I guess by the sink area. And when they were  
20 going in, that's when I heard one of the jurors say  
21 he's a defense attorney. And I didn't get the  
22 underlying tone that attorney Goodman did. I, I, I  
23 perceived it as that they were warning the other  
24 jurors this is one of the defense attorneys. So,  
25 you know, not to make any contact.

1                   And then I told them just wait,  
2 he'll come out of the room because it looked like he  
3 was on his cell phone. I didn't know he was in the  
4 room. So he came out and we secured all the jurors  
5 in the room.

6                   But their main concerns were for  
7 their names being mentioned in court.

8                   THE COURT: Which by the way I'm not  
9 gonna say their names anymore. I'll make sure it's  
10 on the question, but I'll just say Juror No. 7.

11                  MS. PANDUKHT: Okay.

12                  THE COURT: And I'll make sure their  
13 names, I won't mention their names anymore.

14                  MARSHAL ELLIS: Yeah, it was specifically  
15 about five jurors that had concerns. The other  
16 jurors were just nodding their heads.

17                  THE COURT: They were all together when  
18 they were telling you this?

19                  MARSHAL ELLIS: Yes. Right out here.  
20 (Indicating.) And there were no witnesses outside  
21 when we were discussing this. I think one witness  
22 came up as we were going back to the deliberation  
23 room. So what we discussed, there was no parties to  
24 this case out there. Just the jurors. As a matter  
25 of fact, a couple of jurors weren't even there.

1                   And they were also concerned about  
2 some of the people that they've seen in the gallery  
3 like hanging around them outside the courtroom and  
4 looking at them and giving them looks.

5                   One of the jurors said that -- I  
6 think it was her nephew. His name --

7                   THE COURT: Who's nephew?

8                   MARSHAL ELLIS: One of the jurors.

9                   THE COURT: Okay.

10                  MARSHAL ELLIS: Has a nephew named --  
11 it's a nephew or son named Giovanny. And she was  
12 talking personal because she said that they've been  
13 instructed only to talk about personal matters.  
14 They haven't -- have not been discussing the case.

15                  So when they're discussing personal  
16 matters, a couple of the Hispanic people that were  
17 out there -- I think they were on this side of the  
18 room. (Indicating.)

19                  THE COURT: So possibly defense people.

20                  MARSHAL ELLIS: Right. Were kind of  
21 looking and trying to listen in to their  
22 conversation. So they were concerned about that.  
23 So those were the main issues.

24                  THE COURT: Well --

25                  MS. PANDUKHT: Your Honor, can I say

1 one --

2 THE COURT: For the record, there have  
3 been a lot of people in the courtroom. Who they  
4 belong to, we don't really know.

5 MR. FIGLER: Thank you, Your Honor.

6 THE COURT: Except for I would say that I  
7 have seen who belonged to the State's like family is  
8 with Joanna Rash and they've been sitting on the  
9 State's side of the room.

10 Who's on the defendant's side, I  
11 don't know. When I say defendant's side, I'm  
12 talking about from the defense table back. I don't  
13 know who they are. They could be defendant's  
14 family, they may not be defendant's family.  
15 Sometimes we've just had spectators in here.

16 MR. FIGLER: Right. Sometimes no one's  
17 been here at all.

18 THE COURT: Correct.

19 MR. FIGLER: And I have seen Ms. Rash  
20 here quite often, but she's not here the whole time.

21 THE COURT: She's not here the whole  
22 time.

23 MR. FIGLER: And they are a very large  
24 crowd on what we'll call the State's side, just that  
25 side of the courtroom. Sometimes in numbers of

1 eight or nine people. So we don't know.

2 MS. PANDUKHT: I just wanted to add --

3 THE COURT: Ms. Rash hasn't been here the  
4 entire time, so that's true, but she has been here  
5 most of the time.

6 MS. PANDUKHT: I just wanted to add one  
7 more thing. That the witnesses yesterday afternoon  
8 and this morning are all police personnel, not lay  
9 witnesses. I just wanted to add that for the  
10 record.

11 THE COURT: Well, I did notice, you know,  
12 he mentioned that they quit asking questions because  
13 their names are being called.

14 MS. PANDUKHT: Oh.

15 THE COURT: And they have stopped asking  
16 questions. Where they were asking more questions  
17 before. So it is a concern if they feel for their  
18 safety I need to address it with them.

19 MS. PANDUKHT: I agree.

20 THE COURT: I will --

21 MR. FIGLER: And especially --

22 THE COURT: I will ask them one by one or  
23 I can ask them -- I'll just -- you know, since some  
24 of the jurors were not there as he just said, they  
25 told him, perhaps I should do it by one by one.



1 MS. PANDUKHT: I would like that, Your  
2 Honor. I agree with Mr. Figler to do it one-on-one.

3 THE COURT: Okay.

4 MS. PANDUKHT: That would be our request.

5 THE COURT: Let's just do that.

6 MR. FIGLER: And just a couple more  
7 things to the record. Number one, we noticed, and  
8 it was very strange, that they were asking sort of  
9 the innocuous witnesses questions, but when it came  
10 to like Edshel who had a lot of testimony, they just  
11 wouldn't ask a question of him. And they didn't ask  
12 a question of Jonathan Harper.

13 THE COURT: Well, we can speculate to  
14 whatever.

15 MR. FIGLER: Well, they didn't ask none  
16 and we just were really -- we were wondering why  
17 they were asking questions of like a Metro officer  
18 that had really nothing to do with much and then  
19 weren't asking any questions to key witnesses who  
20 were up there for a really long time with a lot of  
21 different information coming out and some  
22 conflicting stuff. So that was a concern.

23 Number two, the marshal also  
24 indicated that someone said something about a fear  
25 of being followed to us.

1           MARSHAL ELLIS: No, it was one of the  
2 jurors. Yeah, a female juror.

3           THE COURT: Felt like she was being  
4 followed?

5           MARSHAL ELLIS: While she was waiting on  
6 her father to pick her up.

7           MR. FIGLER: And, and the other concern  
8 for the defense is are they talking to each other  
9 about this fear.

10                   Now, I understand that they say that  
11 they're not gonna talk about the trial per say, but  
12 if this fear is starting to be spoken about, what  
13 impact it has on people, I don't know.

14                   And then finally, I'm curious as to  
15 why whoever the individual who just happened to be  
16 talking about her nephew, who she happened to say  
17 was Giovanny, why that name came up. It seems  
18 fairly random.

19                   Maybe it is random as opposed to  
20 saying well, that's really interesting, there's a  
21 guy named Giovanny in this case, I have a nephew  
22 named Giovanny and just start talking about it,  
23 which implies that they're --

24           THE COURT: Well, I don't want you to  
25 start grilling a bunch of jurors.

1 MR. FIGLER: And I don't want to.

2 THE COURT: I don't want them to be on  
3 the defense because then we're really gonna get a  
4 mistrial, okay. So really watch what you guys say  
5 to both sides. You know, you don't want to put  
6 people in like defense of themselves.

7 MR. FIGLER: No, no. And I, I've  
8 wanna -- I actually have a mindset that we leave the  
9 vast majority of any --

10 MR. GOODMAN: Yeah.

11 MR. FIGLER: -- questions to the Court.

12 MS. PANDUKHT: I think it should be the  
13 judge.

14 MR. FIGLER: That the parties, unless  
15 there's absolutely some necessary follow up wouldn't  
16 do that, that it would just be Your Honor doing it.  
17 So I don't --

18 MS. PANDUKHT: I agree.

19 MR. FIGLER: -- we have that concern.  
20 But you understand where we're going with this. And  
21 that is --

22 THE COURT: I understand.

23 MR. FIGLER: If they haven't been  
24 participating in the process because of some fear,  
25 because of all the gang information that's come in

1 so far, which is kind of petered out now for the  
2 State, but was kind of heavy in the beginning, has  
3 prejudiced my client that they have him already as a  
4 gang member or afraid of him or afraid what's gonna  
5 happen because of their perceptions or what's  
6 happening inside or outside.

7 And then the last point that I'll  
8 make is I understand that the State has tried to  
9 keep, you know, and instructed their witnesses to  
10 not be close to the jurors and vice versa, but we've  
11 really seen witnesses all other the place. I  
12 mean --

13 THE COURT: I agree.

14 MR. FIGLER: Yesterday Jonathan Harper  
15 was right there. The jurors were -- when Mr.  
16 Goodman and I went out and the State went out, I  
17 mean, the jurors were like two arm lengths away from  
18 where Mr. Harper was. They were right there.

19 And so actually Mr. Goodman asked me  
20 do you think that the, the jurors are seeing the  
21 prosecutors interact with Mr. Harper. And I'm like,  
22 well, how can they miss it, they're right there.

23 I don't know how that's playing.  
24 You know, there was some interesting stuff going on,  
25 but it was like right out there.

1                   And I know that's the -- they talked  
2 about this when they were building the RJC that this  
3 problem would be solved. And they built the RJC and  
4 it's the same problem we have in the old courtroom.

5                   THE COURT: Right. It's the same problem  
6 that occurs in every single trial throughout this  
7 courthouse.

8                   MR. FIGLER: But we don't --

9                   THE COURT: It is what it is.

10                  MR. FIGLER: And we don't usually get  
11 the --

12                  THE COURT: Here's the problem: If it  
13 goes over into where it's a problem, okay. Right  
14 now -- I mean, you know the logistics of the  
15 courthouse and how people talk to their witnesses  
16 and who's floating out there possibly intimidating a  
17 juror, you know, I need to just find out.

18                  But I mean, whether -- if he gets  
19 convicted, the supreme court who were most of them  
20 district court judges here or in the other  
21 courthouse, they get it. So they'll look at this  
22 record.

23                  And unless there's some bad play or  
24 intimidation or problem, you know, it is what it is.  
25 We all get how it, how trials go.

1 I'm gonna try to alleviate any  
2 further problems by putting these measures into  
3 place.

4 MR. FIGLER: Right.

5 THE COURT: But all we can do is ask  
6 them. So let's just start with Juror No. 1. So it  
7 doesn't look funny, we'll just go through 1 through  
8 14.

9 MR. FIGLER: Thank you, judge.

10 MS. PANDUKHT: Thank you.

11 THE COURT: Okay. Let's start bringing  
12 them in one by one.

13 Hi.

14 JUROR GRIFFIS: Hi.

15 THE COURT: Come on in. Go ahead and  
16 have a seat there. Just go ahead and sit in the  
17 first chair. It's fine.

18 JUROR GRIFFIS: Over here?

19 THE COURT: Yeah. The only two people in  
20 the courtroom besides the attorneys and the parties  
21 are my externs. And they're law clerks from --  
22 students. So there's nobody out for the record in  
23 the audience as we're doing this.

24 You're Juror No. 1. And can you  
25 state your name because I don't have my list in

1 front of me. Oh, here it is. You're Lisa Griffis,  
2 right?

3 JUROR GRIFFIS: Correct.

4 THE COURT: So we just have some  
5 questions because of some information. The  
6 questions are -- well, let me just say this: From  
7 now on I think what we're gonna do is I'm gonna have  
8 my marshal pick everybody up at the jury  
9 commissioner's office.

10 JUROR GRIFFIS: Okay.

11 THE COURT: And you guys will just go  
12 back there into the conference room and you'll stay  
13 there in and out of breaks. There's restrooms and  
14 everything else for you, okay?

15 JUROR GRIFFIS: Okay.

16 THE COURT: So having said that, there  
17 was some information related to my marshal and we  
18 were just gonna make some inquiries.

19 Were you at any time ever  
20 intimidated by anybody outside of the courtroom or  
21 inside of the courtroom? Have you been intimidated  
22 by anybody?

23 JUROR GRIFFIS: Not at all, but I've  
24 heard from other jurors that, you know, when we're  
25 talking out there and there's -- and we're laughing,

1 it's -- I think they were concerned that the other  
2 people involved with the trial were -- because we're  
3 talking about anything but the trial.

4 THE COURT: Right.

5 JUROR GRIFFIS: To just try to get our  
6 minds off of it. So I think they were thinking that  
7 maybe we're laughing at, at them. Or I don't know.  
8 But I never got threatened by anyone or anything.

9 THE COURT: Do you know the jurors or  
10 their numbers who felt worried about this?

11 JUROR GRIFFIS: I just heard it from  
12 Erika. She mentioned that to me that -- but she  
13 didn't mention names.

14 THE COURT: Okay.

15 JUROR GRIFFIS: But I don't know her  
16 number.

17 THE COURT: So Erika was worried. Okay.  
18 So anyway, you haven't felt intimidated or  
19 threatened by anybody in or outside the courtroom?

20 JUROR GRIFFIS: Not at all.

21 THE COURT: Okay, thank you so much. So  
22 do either sides have any questions?

23 MS. PANDUKHT: No, Your Honor.

24 THE COURT: Okay, great. Thank you so  
25 much.



1 MS. GRIFFIS: Okay.

2 THE COURT: We'll bring in Juror No. 2.

3 (Whereupon, the juror exited the  
4 courtroom.)

5 THE COURT: Okay. Outside the presence.  
6 Did you have a question?

7 MR. FIGLER: Yeah, I don't think --  
8 because she said she wasn't threatened or  
9 intimidated in any way. She seemed very forthright  
10 about that so.

11 THE COURT: Right.

12 MR. FIGLER: But I think maybe some kind  
13 of question is if -- just try to find out if they --  
14 they think there is any kind of prejudice or any  
15 kind of fear or fear to participate in the process  
16 or --

17 THE COURT: Okay.

18 MR. FIGLER: -- any prejudice against  
19 either, either side or any perceptions that are  
20 causing them grave concern that's on their mind.

21 THE COURT: I stopped with her because  
22 she clearly did not.

23 MR. FIGLER: No, that's why I didn't --

24 MS. PANDUKHT: And I don't want to create  
25 a problem.

1 MR. FIGLER: I don't want to create  
2 either.

3 THE COURT: Right.

4 MR. FIGLER: That's why I jumped up  
5 and --

6 THE COURT: I didn't want to start like a  
7 whole new jury selection process, can you be fair  
8 and impartial.

9 MR. FIGLER: Right.

10 THE COURT: I just didn't want to go  
11 there.

12 MR. FIGLER: But you get what I'm saying.  
13 So if we get --

14 THE COURT: I do. I'll go further if I  
15 feel like I need to I guess.

16 MR. FIGLER: Perfect.

17 THE COURT: I really felt like she was  
18 being forthright as you just --

19 MR. FIGLER: Right.

20 THE COURT: We're now in the presence of  
21 Juror 2, Mr. Bhatnagar. Good morning.

22 JUROR BHATNAGAR: Good morning.

23 THE COURT: Go ahead and just have a seat  
24 right there. It's fine. We want to let you know  
25 that with the jury what we're gonna start doing is I

1 have my marshal pick you guys up in the morning and  
2 just -- over at jury commission and just bring you  
3 guys up here. So from now on you guys will probably  
4 be back here in our conference rooms.

5                   Having said that, have you felt any  
6 kind of intimidation from anybody inside or outside  
7 the courtroom in these proceedings?

8                   JUROR BHATNAGAR: When I walk out the  
9 door, I mean, people do kind of tend -- I tend to  
10 not look at people when I walk out the door, but I  
11 do notice like certain stares and stuff.

12                  THE COURT: Okay.

13                  JUROR BHATNAGAR: So that's kind of --  
14 and then -- well, since you brought it up, I was --  
15 I wasn't gonna mention anything and it could have  
16 been I was hearing things, but it happened -- this  
17 happened on Wednesday when we were, when we were  
18 being dismissed. I was -- when I was walking out,  
19 like I was out the door, I could have sworn I heard  
20 somebody say --

21                  THE COURT: I can't hear you.

22                  JUROR BHATNAGAR: Oh.

23                  THE COURT: I could have sworn I heard  
24 somebody say --

25                  JUROR BHATNAGAR: I thought I heard

1 somebody say idiot. And I was like --

2 THE COURT: Like idiot to you?

3 JUROR BHATNAGAR: Well, I just -- it was  
4 just -- it was just kind of a coincidence. Like I  
5 was the last guy by the door and I just like heard  
6 it. And I heard it, I heard it enough where I can  
7 hear it. And it wasn't like he wasn't talking to  
8 any of you. So unless he was talking to himself, I  
9 know I was protected. I just heard it just as soon  
10 as I'm walking out the door. And I was all like I  
11 don't know if there's some people in the back. It  
12 happened like somewhere over there by the door.

13 THE COURT: So somebody more on -- here's  
14 the defense table, here's the State's table.  
15 There's been people throughout this trial coming in  
16 and sitting and listening. Which side of the  
17 courtroom would you say? More on the State's side  
18 you're saying? This side over here, right?

19 JUROR BHATNAGAR: Right. It was like  
20 somewhere by the door. And I was just getting out  
21 the door and I heard somebody say idiot. Like I  
22 guess I really didn't expect that I was gonna hear  
23 that. Maybe it wasn't directed at me, but it was  
24 just --

25 THE COURT: It was weird?

1 JUROR BHATNAGAR: Yeah, it was weird. I  
2 mean, I know people don't like us. So I mean.

3 THE COURT: Have you been in fear at all  
4 for your safety?

5 JUROR BHATNAGAR: No, no.

6 THE COURT: Okay. All right. Is there  
7 any -- is there any questions by either side?

8 MR. FIGLER: Your Honor, I think the  
9 juror just said "I know people don't like us." If  
10 you can follow up on that.

11 THE COURT: You said you think people  
12 don't like you, the jury?

13 JUROR BHATNAGAR: Oh, no. I mean like  
14 perception because we're the ones making the  
15 decision.

16 So I can understand how the people  
17 who are listening or watching or are involved in the  
18 family of the suspect or even on the plaintiff that,  
19 that they may say hey, this guy's, this guy's gonna  
20 make a decision. I mean, I wasn't -- I mean, it's  
21 all body language. So of course, you know, I can  
22 understand how they might see me as oh, he's a juror  
23 or, you know.

24 THE COURT: So it's more your perception  
25 do you think?

1 JUROR BHATNAGAR: I think it was more  
2 just the perception of the -- because of the, how  
3 big the case is and how important it is, you know.  
4 When people look at us, especially like witnesses, I  
5 can understand it's not gonna be a warm greeting.  
6 It's gonna be like oh, you know, he's a --  
7 especially if it's on the defendant's side, I mean,  
8 you know, they, they, you know, they're not gonna  
9 appreciate, they're not gonna give us like a warm  
10 greeting. It's gonna be more like a cold.

11 So I understand their, their point  
12 of view. So but I'm not, I'm not in fear. It's  
13 just, it's just a process so.

14 THE COURT: Okay. Well, I'm gonna start  
15 having the marshal bring you -- I mean, there has  
16 been larger crowds of people. Not knowing which  
17 side they're on, I mean, there's been large groups  
18 of people sitting and watching in here.

19 So to alleviate any kind of concern  
20 from the jurors, we'll just start having the marshal  
21 walk you guys up. You won't even be around any of  
22 the audience at all.

23 JUROR BHATNAGAR: Okay. That's cool.

24 THE COURT: All right. Have you heard  
25 other jurors, and specifically what jurors have you

1 heard, regarding has anybody said to you they're  
2 afraid or concerned for their safety? And if so,  
3 what jurors were they?

4 JUROR BHATNAGAR: I haven't heard anybody  
5 say that.

6 THE COURT: All right. Is there any  
7 follow up by either side or would like me to ask  
8 anymore questions?

9 MS. PANDUKHT: No.

10 THE COURT: Defense?

11 MR. FIGLER: Just about the  
12 participation. That one question we talked about.  
13 Participation of the process questions.

14 THE COURT: Is there anything about the  
15 process now that would prevent you from  
16 participating as a juror in this? Anything that's  
17 gone on?

18 JUROR BHATNAGAR: No, no. I'm fine.

19 THE COURT: Okay. Thank you so much.  
20 Anything further?

21 MR. FIGLER: None.

22 THE COURT: Okay. Thank you very much,  
23 sir.

24 (Whereupon, the juror exited the  
25 courtroom.)

1 MR. FIGLER: Your Honor, Mr. Goodman's  
2 assistant's at the door to get some documents. Can  
3 he get them right now?

4 THE COURT: Yeah, he can get the  
5 documents, but I prefer nobody else being in here  
6 during this process.

7 THE COURT: One second, sir. We're just  
8 waiting for Mr. Goodman to be brought in. And these  
9 are my two law clerks, the two individuals sitting  
10 in the audience.

11 MR. FIGLER: It looks like Mr. Goodman's  
12 preventing other people from trying to come in, too.

13 THE COURT: I'll have the marshal do  
14 that.

15 MR. GOODMAN: I didn't know you were  
16 waiting for me, Your Honor. Thank you.

17 THE COURT: I'd prefer to have you here,  
18 too.

19 MR. GOODMAN: I'm sorry.

20 THE COURT: My marshal will keep out  
21 whoever else. This is Mr. Michael Arcana, No. 3.

22 Sir, we are just taking each one of  
23 you one by one and we just want to let you know that  
24 from here on out my marshal's gonna pick you guys up  
25 at the jury commissioner's office and we're gonna



1 bring you guys back to the conference room.

2 So you guys will be back here in the  
3 conference room. You'll take breaks in the  
4 conference room. Whatever you need, we'll  
5 accommodate you back here behind chambers.

6 Having said that, is there  
7 anything that you have a concern about for your  
8 safety? Has anybody intimidated you inside or  
9 outside the courtroom or do you feel like you were  
10 intimidated at all?

11 JUROR ARCANA: No, Your Honor.

12 THE COURT: All right. So you're not  
13 concerned about anything or participating in the  
14 process?

15 JUROR ARCANA: Not really.

16 THE COURT: Okay. And have you heard  
17 anybody else, and if so, who have you heard being  
18 worried about their fear or safety?

19 JUROR ARCANA: Some of the other jurors  
20 are a little anxious about taking off these tags as  
21 fast as they can, but.

22 THE COURT: Okay.

23 JUROR ARCANA: I don't share that  
24 anxiety.

25 THE COURT: Who -- do you recall which

1 ones or who?

2 JUROR ARCANA: Juror with the short hair.

3 THE COURT: Where about does she sit?

4 JUROR ARCANA: Right here. (Indicating.)

5 She would be Juror No. 5.

6 THE COURT: No. 5. So Jackie Wiese,  
7 she's kind of like an older lady with blondish hair?

8 JUROR ARCANA: She's very nice, but she  
9 gets very nervous about having the tags on and she  
10 orders us to take them off as soon as we leave here.

11 THE COURT: All right.

12 JUROR ARCANA: And we are respectful to  
13 her and we do that for her.

14 THE COURT: Okay. Is there any further  
15 questions from the --

16 MR. FIGLER: (Negative nod of the head.)

17 THE COURT: Okay. Thank you very much,  
18 Mr. Arcana.

19 JUROR ARCANA: No problem.

20 (Whereupon, the juror exited the  
21 courtroom.)

22 MR. FIGLER: She orders them.

23 THE COURT: She's a nurse. She gives  
24 orders.

25 MR. FIGLER: We tried to challenge her

1 for cause. Just joking.

2 THE COURT: All right. Good morning,  
3 Mrs. Olson.

4 JUROR OLSON: Good morning.

5 THE COURT: These are my two law clerks  
6 out here in the audience. And just to let you know,  
7 from here on out we're basically gonna have you guys  
8 meet in the morning at the jury commission station  
9 and my marshal's gonna escort you guys up here.

10 And from here on out, we're just  
11 gonna keep you guys in the conference room where  
12 there's bathroom breaks. And anyway, you'll feel  
13 nice and comfortable out here.

14 Having said that, has there been  
15 anyone or anything that you've been intimidated  
16 inside or outside the courtroom that you feel is a  
17 concern that you want to let us know about?

18 JUROR OLSON: No.

19 THE COURT: Okay. So you feel confident  
20 that you are -- you know, you still are  
21 participating in the process and you're not --  
22 nobody's trying to intimidate you at all?

23 JUROR OLSON: No. They have not.

24 THE COURT: Have you heard from any of  
25 the jurors, and if so, which jurors have you heard

1 voice a concern about their safety?

2 JUROR OLSON: Not really. I think the --  
3 before the trial actually got started, when it was  
4 so unknown that maybe everybody had some concerns,  
5 but once the trial began, I don't feel that  
6 anybody's been concerned about their safety or.

7 THE COURT: Okay. Any further questions  
8 from either side?

9 MS. PANDUKHT: No, Your Honor.

10 THE COURT: No. Thank you so much.

11 JUROR OLSON: You welcome.

12 THE COURT: Okay. Bring in the next  
13 juror, No. 5.

14 (Whereupon, the juror exited the  
15 courtroom.)

16 THE COURT: Good morning, Ms. Wiese.

17 JUROR WIESE: Good morning.

18 THE COURT: This is just my two law  
19 clerks in the audience. And we just want to let you  
20 know from here on out with the jury we're gonna have  
21 you guys meet in the morning at the jury commission  
22 office.

23 My marshal's gonna escort you all up  
24 here and you all can basically -- we're gonna put  
25 you in the conference room from here on out. And

1 you'll have bathrooms back there and anything that  
2 you need we can take care of back here.

3                   Having said that, is there anything  
4 that you've been worried about or concerned for your  
5 safety? Has anybody intimidated you inside or  
6 outside of the courtroom?

7                   JUROR WIESE: No.

8                   THE COURT: Okay. Have you been  
9 concerned at all about, you know, your safety?

10                  JUROR WIESE: Yes.

11                  THE COURT: And why is that?

12                  JUROR WIESE: It just uncomfortable.  
13 You're in close proximity outside in those hallways.  
14 There's not really many places to go or leave, you  
15 know, when you just have 10 minutes.

16                  THE COURT: Right.

17                  JUROR WIESE: And of course you're not  
18 allowed to talk about the case, you don't talk about  
19 it. So if you're talking about other things and  
20 you're laughing, it's kind of they may feel it's  
21 disrespectful that we're laughing about, you know,  
22 something like, you know, serious as this and it's  
23 really not true.

24                  THE COURT: So it's been --

25                  JUROR WIESE: Misinterpret something.

1 THE COURT: And it's been uncomfortable  
2 having the people who have been sitting here in  
3 trial in the audience out there with you as you're  
4 waiting to come back in the courtroom?

5 JUROR WIESE: Yes.

6 THE COURT: Okay. Well, I'm gonna  
7 alleviate that because now we'll make sure that you  
8 guys are in the conference room during the breaks.

9 And again, we can get you guys any  
10 kind of sodas, whatever you guys need, we can get  
11 you.

12 JUROR WIESE: Okay, thank you.

13 THE COURT: Is that gonna -- will that  
14 alleviate any concerns that you might have, again,  
15 with the escorting back and forth with my marshal  
16 down to the jury commission room?

17 JUROR WIESE: Yes, that'd be fine. Thank  
18 you.

19 THE COURT: And you feel confident that  
20 you'll just continue to participate as you have  
21 been?

22 JUROR WIESE: Yes.

23 THE COURT: Okay. Does either side have  
24 any questions?

25 MS. PANDUKHT: No, Your Honor.

1 MR. FIGLER: Well, actually, can we all  
2 go -- because we were gonna talk about that one  
3 thing. May we come up?

4 THE COURT: Sure.

5 (Whereupon, the following proceedings  
6 were had in open court outside the  
7 presence of the jury panel.)

8 MR. FIGLER: The purpose for me in  
9 raising this issue was to ask whether or not there's  
10 a negative, a negative perception with any of the  
11 lawyers in the courtroom.

12 THE COURT: Oh, okay. Are you sure you  
13 want me to?

14 MS. PANDUKHT: May I have a suggestion?

15 THE COURT: On second thought, hold on.  
16 That's opening a can of worms, okay, because every  
17 time I go back after a jury verdict, they've got  
18 something to say about the lawyers, okay, and that's  
19 got nothing to do maybe with the evidence in the  
20 case. They may like the way, you know, something  
21 you just did yesterday, they may not like something  
22 you do. That doesn't mean they can't be fair and  
23 impartial in a case. I think that's opening a can,  
24 opening a can of worms.

25 There's nothing that I need to get

1 into based on what she just said about lawyers  
2 because I'm just -- I'm not making that record. So  
3 I'm gonna, I'm gonna refrain from doing that.

4 Go ahead.

5 MR. FIGLER: Okay. Maybe more a general  
6 question, given the court's position, which would be  
7 something like is there anything that has been in or  
8 out of the courtroom that has caused you any bias or  
9 prejudice against either party.

10 MS. PANDUKHT: No.

11 THE COURT: No, I'm not getting into  
12 that. I'm not getting into that.

13 MR. FIGLER: Do you think that --

14 THE COURT: I'm not getting into it.

15 MR. FIGLER: How about do you think --

16 THE COURT: These people have -- so far  
17 nobody's said anything that I've got a concern for a  
18 mistrial, okay.

19 MR. FIGLER: Except that this gal is  
20 ordering other people to take a badge off.

21 THE COURT: So what. That doesn't mean  
22 she doesn't like you or you or if she does. She  
23 just may not like you and she's got every right.

24 MR. FIGLER: Unless it affects her  
25 ability to be a fair and impartial juror.



1 MS. PANDUKHT: No, she's not.

2 THE COURT: So respectfully you can make  
3 your objection. I'm not going into that. That's  
4 just opening up a can of worms.

5 MR. FIGLER: We just want to make sure  
6 everyone's fair and impartial.

7 MS. PANDUKHT: If she doesn't like me  
8 personally, I don't want to know that.

9 THE COURT: There isn't one time I go  
10 back to the jury room afterwards where they've got  
11 something to say about the lawyers. And that's all  
12 of them, okay. They've got something to say about  
13 everybody. And that doesn't mean that they have a  
14 wrong verdict or they were not fair and impartial.  
15 People just like to pick apart attorneys.

16 And I think that if I go into  
17 that --

18 MR. FIGLER: If a juror can hear  
19 everything that's being said here, is this defeating  
20 the purpose?

21 THE COURT: The juror can't hear  
22 everything that's being said.

23 MR. GOODMAN: Judge, it's pretty loud.

24 THE COURT: Well, then stand back unless  
25 you have something relevant to ask on prejudice.

1 MR. GOODMAN: No, we appreciate the  
2 judge's ruling.

3 (Whereupon, the bench conference ended.)

4 THE COURT: Thank you very much.

5 (Whereupon, the juror exited the  
6 courtroom.)

7 THE COURT: And we'll take Juror No. 6.  
8 By the way, there's whiteout noise throughout this  
9 courtroom. When we're having a bench conference,  
10 all you hear is static through this courtroom.

11 Good morning, Ms. Angelica  
12 Numez-Morarrez. These are just my two law clerks in  
13 here. And I just want -- we're bringing each juror  
14 in. We're gonna let you guys know that from here on  
15 out -- you can have a seat. From here on out, we're  
16 gonna get the jury at jury commissioner's office.

17 My marshal's gonna escort you guys  
18 up, and you guys will hang out during the breaks and  
19 stuff in the conference room, and then he'll escort  
20 you back at the end of the night.

21 What we want to make sure when we're  
22 bringing each juror in here is that you haven't felt  
23 intimidated at all by anything that's gone on inside  
24 the courtroom or outside the courtroom.

25 So my question is has anybody or

1 anything intimidated you inside or outside the  
2 courtroom?

3 JUROR NUMEZ-MORARREZ: No. I couldn't  
4 say in particular, but I do feel stares when we're  
5 in the lobby. So we, we told marshal.

6 THE COURT: Okay. Well, that should be  
7 alleviated with all of you coming back.

8 JUROR NUMEZ-MORARREZ: Okay.

9 THE COURT: It's close quarters out there  
10 and I think it's a lot easier because there is a  
11 larger audience to just bring you guys back instead  
12 of, you know, some cases nobody's in the audience.  
13 So it's a lot easier just to bring you guys back.

14 Would that alleviate your concerns?

15 JUROR NUMEZ-MORARREZ: It would at that  
16 point. Thank you.

17 THE COURT: Okay. And that you'll  
18 continue in your participation in this process,  
19 there's no hesitation?

20 JUROR NUMEZ-MORARREZ: Not at all, not on  
21 my part.

22 THE COURT: Okay. Anything further from  
23 either side?

24 MR. FIGLER: Any other jurors.

25 THE COURT: Oh. Have there been other

1 jurors that you've heard concerned for their safety  
2 or worried?

3 JUROR NUMEZ-MORARREZ: Not at all.

4 THE COURT: Okay. Thank you so much.  
5 Anything further?

6 MR. FIGLER: (Negative nod of the head.)

7 MS. PANDUKHT: No.

8 THE COURT: Okay, thank you.

9 JUROR NUMEZ-MORARREZ: Thank you, Your  
10 Honor.

11 (Whereupon, the juror exited the  
12 courtroom.)

13 THE COURT: Hi. Good morning, Mr.  
14 Trombetta. These are just my two law clerks in the  
15 audience.

16 What we're gonna start doing from  
17 here on out because of the close quarters out front  
18 is we're gonna have my marshal pick the jury up from  
19 jury selection, jury services.

20 We're gonna have you come back here  
21 into the conference room area so that you guys will  
22 be taking your breaks in the conference area. We'll  
23 get you whatever you need as far as refreshments,  
24 and there's bathrooms back there, to alleviate any  
25 kind of interaction with -- there's been a very

1 large audience in this case.

2 In any event, we wanted to ask each  
3 one of you have you been intimidated or concerned  
4 for your safety in any way?

5 I guess I'll ask you first: Have  
6 you been intimidated by anybody inside or outside  
7 the courtroom or have you felt intimidated or in  
8 fear for your safety?

9 JUROR TROMBETTA: No.

10 THE COURT: And do you feel like if we  
11 bring you guys back that would be a better situation  
12 for you guys?

13 JUROR TROMBETTA: That I would like  
14 because it is uncomfortable out there.

15 THE COURT: Yeah.

16 JUROR TROMBETTA: But yes, I would  
17 appreciate that.

18 THE COURT: Okay. And have you heard any  
19 other jurors, and specifically if you have, which  
20 jurors, relate any concerns or fears that they've  
21 had?

22 JUROR TROMBETTA: Just briefly. And that  
23 was just earlier when we were initially talking  
24 about seeing if we can go somewhere else.

25 THE COURT: Okay.

1 JUROR TROMBETTA: Just two jurors stated  
2 that they did get some funny looks or constantly  
3 being stared at.

4 One other was talking about well,  
5 waiting in front of the courthouse, waiting for a  
6 ride that she saw one person walk back and forth  
7 several times.

8 THE COURT: Who was that one? Which  
9 juror? Do you know? You can point to a chair if  
10 you can't remember their name.

11 JUROR TROMBETTA: I'm not sure. I'm not  
12 sure which chair. Either front row. You haven't  
13 seen her yet. I'm trying to remember her name. We  
14 were trying to talk about names the other day.  
15 Possibly Erika.

16 THE COURT: Okay.

17 JUROR TROMBETTA: Erika. I could be  
18 wrong.

19 THE COURT: Okay. And do you recall the  
20 ones that said that they felt like they were being  
21 stared at or looked at?

22 JUROR TROMBETTA: Well -- hum. No, she  
23 was just -- we were just talking about it here. You  
24 haven't spoken to her yet either.

25 THE COURT: Okay.

1 JUROR TROMBETTA: I'm sorry. I can't  
2 think of her name.

3 THE COURT: We've got -- I'll tell you  
4 who I haven't talked to yet. I haven't talked to  
5 Kristina Beber.

6 JUROR TROMBETTA: I believe it is her.

7 THE COURT: She's Juror No. 8 down here.

8 JUROR TROMBETTA: I believe so. Again,  
9 she was just talking about the fact that she was  
10 talking her foster children's pictures and one of  
11 the names is a name that's been mentioned in the  
12 courtroom.

13 THE COURT: Is that Giovanny?

14 JUROR TROMBETTA: Yes.

15 THE COURT: Okay.

16 JUROR TROMBETTA: So but it was her  
17 foster child's name. And so when she was talking to  
18 another juror about her foster child, other people  
19 that weren't part of the jury were looking at her  
20 strangely.

21 THE COURT: Like the audience, somebody  
22 from outside?

23 JUROR TROMBETTA: Yes.

24 THE COURT: And that's while you guys  
25 were waiting to come in here?

1 JUROR TROMBETTA: Well, that's when she  
2 just brought it up.

3 THE COURT: Okay.

4 JUROR TROMBETTA: We were --

5 THE COURT: Okay. And that's all you've  
6 heard or --

7 JUROR TROMBETTA: Correct.

8 THE COURT: -- or mentioned?

9 JUROR TROMBETTA: Correct.

10 THE COURT: All right. So you're gonna  
11 continue in participating in this process, you've  
12 got no fears?

13 JUROR TROMBETTA: No, not at this time.

14 THE COURT: All right. Anything further  
15 from anyone?

16 MS. PANDUKHT: No, Your Honor.

17 MR. FIGLER: The juror indicated that by  
18 moving it back he would either be less concerned  
19 or -- can you just follow up on that just a little  
20 bit? Something like that, there was less concern  
21 for him or he would feel more comfortable, something  
22 like that.

23 THE COURT: You'd be more comfortable  
24 being back here I'm assuming because of all the  
25 audience?



1 JUROR TROMBETTA: Yes.

2 THE COURT: Okay.

3 JUROR TROMBETTA: Again, it's  
4 uncomfortable being out there. You don't know who  
5 is out there. They're all connected in some way  
6 with the trial being here I would assume. So but  
7 you just feel uncomfortable with everyone else  
8 walking by knowing that you're here and especially  
9 with the type of trial it is. So yes, I would feel  
10 more comfortable in the back.

11 THE COURT: All right. Thank you so  
12 much.

13 JUROR TROMBETTA: You're welcome. Thank  
14 you.

15 (Whereupon, the juror exited the  
16 courtroom.)

17 THE COURT: I don't have my jury  
18 selection notes. Was Kristina Beber the one with  
19 the foster kids?

20 MR. FIGLER: Yes.

21 THE COURT: Okay.

22 MR. FIGLER: You know, judge, I think the  
23 big elephant --

24 THE COURT: We're outside the presence  
25 right now --

1 MR. FIGLER: Right.

2 THE COURT: -- as he's talking. Go  
3 ahead.

4 MR. FIGLER: Definitely. I think the big  
5 elephant in the room is, is the implied because this  
6 is a gang case we're afraid or because --

7 THE COURT: Well, I disagree with you. I  
8 think whenever you have a big audience of people,  
9 and they could be the victim's family or the  
10 defendant's family, it's uncomfortable because  
11 they're ultimately the finder of fact.

12 And we've had a very large audience.  
13 Sometimes you think it could be the victim's family  
14 or friends, it could be the defendant's family and  
15 friends, and it's an uncomfortable position for them  
16 to be outside, even when they're talking, that  
17 they're getting looked at by, you know, if they  
18 laugh about something, they feel like that the  
19 other, you know, the group thinks that they're being  
20 disrespectful because of course it's serious for the  
21 defendant.

22 Okay. We're back on the record and  
23 we're in the presence of Ms. Beber. Okay. Well,  
24 just to let you know, we just have my law clerks in  
25 here.

1                   And so from here on what we're gonna  
2 do is my marshal's gonna pick up the jury from jury  
3 services in the morning and escort you guys up.

4                   And we're gonna put you guys in the  
5 conference room from here on out. You'll have  
6 bathroom breaks. If you need something, we can get  
7 you refreshments, whatever.

8                   Because, you know, it's been a very  
9 large audience here in the courtroom and there's  
10 been some mention that you would more comfortable  
11 back there than out there with the audience.

12                  JUROR BEBER: Yes.

13                  THE COURT: And some jurors have brought  
14 up something about you're having a foster named  
15 Giovanny?

16                  JUROR BEBER: I have a foster son that's  
17 named Giovanny. And Erika and I were going through  
18 pictures on my phone and I'm like, oh here's my  
19 kids. And it just didn't -- that's Giovanny to me  
20 and this is something totally removed. And so I was  
21 showing her a picture.

22                  And there were two family members  
23 that were across the hall and I just remember them  
24 glancing up. And they looked -- you know what I  
25 mean? They were just like -- (indicating.) And so

1 I just went back to talking to her.

2 And it wasn't until the next morning  
3 I got up and I was in the bathroom getting ready and  
4 the little boy was doing something and I turned.  
5 And when I said his name, I was like oh, that could  
6 come across as, you know, something different to  
7 them.

8 THE COURT: Right. Like maybe you were  
9 talking about the trial or something and they gave  
10 you a look?

11 JUROR BEBER: (Positive nod of the head.)

12 THE COURT: Okay. Is there anything  
13 about that or any other instance that you felt  
14 intimidated or in fear of your safety either inside  
15 or outside this courtroom? Has anything happened to  
16 make you concerned?

17 JUROR BEBER: It's just very -- it's very  
18 uncomfortable out there. It's hard when our names  
19 are read out loud as --

20 THE COURT: I'm not gonna do that  
21 anymore. I'll ask you to put your badge number, but  
22 I won't say your names anymore.

23 JUROR BEBER: It's okay because you never  
24 pronounce my name correctly anyway.

25 THE COURT: I know, I never --

1 JUROR BEBER: It's Beber like the dumb  
2 little singing kid.

3 THE COURT: I know, but I never say his  
4 name right either.

5 JUROR BEBER: Well, then that's fair.

6 THE COURT: Beber, Biber (phonetic). I  
7 don't know.

8 JUROR BEBER: So it's very -- especially  
9 when we're all lined up at the front and they're all  
10 just, you know, they're sitting and they're just  
11 staring at you like this, (indicating), it is very  
12 uncomfortable.

13 We're trying very hard not to make  
14 eye contact or not to, you know. And there's times  
15 that they're sitting, you know, on benches right  
16 next to us whispering to one another, having  
17 conversations, and you're kind of like trying so  
18 hard -- how do you try not to hear. I mean, that's  
19 just hard.

20 THE COURT: Well, we're gonna alleviate  
21 that. Do you think that you'll feel much more  
22 comfortable --

23 JUROR BEBER: Oh, yeah, absolutely.

24 THE COURT: And none of this -- all of  
25 your concerns will be alleviated --

1 JUROR BEBER: Absolutely.

2 THE COURT: -- based on that?

3 JUROR BEBER: Absolutely. I feel much  
4 better that way.

5 THE COURT: And have you heard any other  
6 jurors worried about or concerns for their safety or  
7 fear?

8 JUROR BEBER: Yeah. I know that Erika  
9 that sits next to me, I started -- she doesn't have  
10 a car and so I started picking her up in the  
11 mornings and dropping her off at her house at night.  
12 She doesn't live that far from me. Because she  
13 would have to call her family when she left at night  
14 and she's standing outside in front of the  
15 courthouse. And so it was uncomfortable.

16 She had an incident one evening  
17 where she didn't know exactly who it was, she just  
18 knew it was one of the people that was actually  
19 inside the courtroom sitting and he had walked back  
20 and forth, you know, probably waiting for his car as  
21 well, but she's young and she's standing on the  
22 street corner by herself and it just made her  
23 uncomfortable.

24 So I started -- it's easier for me  
25 to pick her up and drop her off. She's not waiting

1 out there.

2 THE COURT: Okay. Any other people that  
3 you've heard any other concerns with?

4 JUROR BEBER: Not that I can think of.

5 THE COURT: All right. Does either side  
6 have anymore questions for this particular juror?

7 MS. PANDUKHT: No, Your Honor.

8 MR. FIGLER: No, Your Honor.

9 THE COURT: Thank you so much.

10 MS. BEBER: Are we allowed to say we're  
11 really glad she's back?

12 THE COURT: They like you, JoAnn.

13 JUROR BEBER: We appreciate you a lot  
14 more today.

15 (Whereupon, the juror exited the  
16 courtroom.)

17 THE COURT: Ms. Villanueva, good morning.  
18 Just to let you know, these are my law clerks in the  
19 courtroom. Nobody else is in here but the parties.

20 And what we're doing is letting all  
21 of you know that we are -- from here on out, we're  
22 gonna have you meet in the jury commissioner's  
23 services room. My marshal's gonna bring you up here  
24 to the conference room and that's where you guys are  
25 gonna pretty much hang out for the rest of the

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1 trial, so that you don't necessarily have to be out  
2 there with the audience, okay.

3 So we'll have restrooms for you. If  
4 we need any refreshments, we'll have that for you.

5 And you, you just made what appears  
6 to be like a sigh of relief?

7 JUROR VILLANUEVA: Yes.

8 THE COURT: So would that make you more  
9 comfortable?

10 JUROR VILLANUEVA: Yes.

11 THE COURT: Okay.

12 JUROR VILLANUEVA: A lot more  
13 comfortable.

14 THE COURT: And we've learned that you've  
15 had some uncomfortable experiences.

16 Can you share those with us?

17 JUROR VILLANUEVA: Yes. Well, apparently  
18 the family -- I don't know if it's the family that  
19 sits here. (Indicating.)

20 THE COURT: Well, let me ask you: What  
21 side of the room are they sitting on? So where the  
22 State's desk is and the State's people. Okay.

23 JUROR VILLANUEVA: Yeah. Well, we go  
24 outside, we can't talk about this so we're just  
25 laughing at something else and they're just staring.



1                   And one of the jurors has a son  
2                   named Giovanni. So she was showing me a picture of  
3                   the baby. And as soon as they heard Giovanni, they  
4                   were just (indicating) --

5                   THE COURT: They were listening.

6                   JUROR VILLANUEVA: Listening, yeah.

7                   THE COURT: They, they -- let the record  
8                   reflect she moved in like as to listen.

9                   JUROR VILLANUEVA: Yes. And it's kind  
10                  of --

11                  THE COURT: Or eavesdrop.

12                  JUROR VILLANUEVA: Yeah. And the first  
13                  day we walked out of the court -- I don't have a car  
14                  so I was waiting for my dad. I was outside in the  
15                  front and all of a sudden one of the guys from this  
16                  side. (Indicating.)

17                  THE COURT: Again, the State's -- more on  
18                  the State's side of the room.

19                  JUROR VILLANUEVA: Yeah. One of them, he  
20                  just walked past me once and then again and then  
21                  again. And I was waiting for my dad and I thought  
22                  oh, I've got to go home.

23                  THE COURT: That scared you?

24                  JUROR VILLANUEVA: He didn't say anything  
25                  or do anything at all. He just passed by.

1 THE COURT: Did that scare you?

2 JUROR VILLANUEVA: Yeah. I was like I've  
3 got to go home.

4 THE COURT: But he didn't say anything --

5 JUROR VILLANUEVA: No, no.

6 THE COURT: -- or do anything?

7 JUROR VILLANUEVA: Nothing at all. No.

8 THE COURT: Just your perception?

9 JUROR VILLANUEVA: Just the way they look  
10 at you. That's, that's it.

11 THE COURT: And that makes you feel  
12 uncomfortable?

13 JUROR VILLANUEVA: But now I have a ride,  
14 they take me home.

15 THE COURT: So between the rides back and  
16 forth, so you don't have to stand outside --

17 JUROR VILLANUEVA: Yeah, I --

18 THE COURT: -- the courtroom?

19 JUROR VILLANUEVA: No, I don't.

20 THE COURT: And now you'll be back in the  
21 jury back in the conference room.

22 Do you think that will alleviate any  
23 concerns that you may have for your safety?

24 JUROR VILLANUEVA: Yes. A lot.

25 THE COURT: Okay. And you feel like you

1 can participate in this process much more confident  
2 now?

3 JUROR VILLANUEVA: Yes.

4 THE COURT: Is there any concerns you  
5 want to share with us right now besides that, now  
6 that I've told you we're gonna be putting you back  
7 there in the conference room?

8 JUROR VILLANUEVA: No, I think  
9 everybody's okay now. Oh, yeah, and the names.

10 THE COURT: Oh, yeah, we won't say the  
11 names anymore.

12 JUROR VILLANUEVA: Okay. Yeah, thank  
13 you.

14 THE COURT: We're not gonna say the names  
15 anymore. I'm just gonna say Juror No. 7 is asking a  
16 question. Just write your names on it, but I won't  
17 say your names anymore.

18 JUROR VILLANUEVA: Okay. Yeah, that's  
19 why I kind of hold back on like asking questions.

20 THE COURT: Okay.

21 JUROR VILLANUEVA: Because I don't like  
22 the whole mentioning the names, yeah.

23 THE COURT: Okay. We will make sure only  
24 to say numbers.

25 JUROR VILLANUEVA: Okay.

1 THE COURT: And if we say only numbers,  
2 you won't have any reservations, if you have a  
3 question, you'll ask it?

4 JUROR VILLANUEVA: Yes.

5 THE COURT: Okay. Is there anything  
6 further from either side?

7 MR. FIGLER: No, Your Honor.

8 MS. PANDUKHT: I just have one quick  
9 question.

10 THE COURT: Sure.

11 MS. PANDUKHT: The incident outside in  
12 front of the RJC, was that on Monday when we were  
13 picking a jury?

14 JUROR VILLANUEVA: Yes.

15 MS. PANDUKHT: Okay, thank you.

16 JUROR VILLANUEVA: No, no, no. That was  
17 Tuesday because this is when the family was in here.

18 MS. PANDUKHT: So Tuesday.

19 JUROR VILLANUEVA: Tuesday, yeah.

20 MS. PANDUKHT: Thank you.

21 THE COURT: Anything further from either  
22 side? Okay, thank you so much.

23 (Whereupon, the juror exited the  
24 courtroom.)

25 THE COURT: Hi. Good morning, sir.

1 These are my two law clerks. What we're gonna do  
2 from now on is have you all meet in jury services.  
3 My marshal will escort you out here.

4 We're gonna put you back in the  
5 conference room. We're gonna try to alleviate any  
6 uncomfortable feelings because I know it's been a  
7 large group up in the audience.

8 Also, even though you write your  
9 name on the questions, we're just gonna say in open  
10 court your number, not your names.

11 Having said that, do you think that  
12 will alleviate any fears or concerns you might have  
13 had --

14 JUROR CATELLO: Yeah.

15 THE COURT: -- in the trial?

16 JUROR CATELLO: Yeah, I definitely think  
17 so.

18 THE COURT: Okay. Has there been  
19 anything that you felt has intimidated or has  
20 anybody harassed you outside the courtroom that we  
21 need to know about or any concerns that you've had?

22 JUROR CATELLO: No. I just -- I made  
23 sure myself that I don't make eye contact with  
24 anybody. So no.

25 THE COURT: Okay. So you'll be able to

1 participate in this process with more -- more  
2 comfortable?

3 JUROR CATELLO: Absolutely, yeah.

4 THE COURT: Okay.

5 JUROR CATELLO: Yup.

6 THE COURT: Is there anything that you  
7 want to ask, either side?

8 MR. FIGLER: No, Your Honor.

9 MS. PANDUKHT: No, Your Honor.

10 THE COURT: Thank you so much, sir.  
11 Thank you.

12 (Whereupon, the juror exited the  
13 courtroom.)

14 THE COURT: We're outside the presence.  
15 It just appears one after another just the  
16 uncomfortableness with the audience. They just  
17 don't want to be in the same area because it's  
18 uncomfortable.

19 MR. FIGLER: I mean, in concern to the  
20 defense, Your Honor, is why the uncomfortableness.  
21 Do they think someone's gonna hurt them or if they  
22 rule a certain way it's gonna -- I know we can't get  
23 that deep.

24 THE COURT: I understand that. I'm not  
25 gonna go into it.

1 MR. FIGLER: No, I get that, but you  
2 understand that's where we're like --

3 THE COURT: Sure. We're making a record,  
4 I'm doing what you want. We're taking an hour and a  
5 half in the morning and we'll do it.

6 All right, sir. Good morning.  
7 These are my two law clerks in the courtroom. And  
8 basically just to let you guys know, all the jurors,  
9 we're gonna bring all of you in the morning, you'll  
10 meet in jury commission.

11 And we're gonna bring you guys up  
12 here into the conference room. And that way you  
13 guys can use the restrooms up here behind the  
14 conference room, get you refreshments, and you won't  
15 be necessarily out there with what's been the  
16 audience here during the trial, to make you guys  
17 feel more comfortable.

18 Has there been anybody -- and we're  
19 also, I'm not gonna call out your names in the  
20 courtroom. Just write your names on the question,  
21 but I'll just say Juror No. 7 or something like  
22 that.

23 Is there anything that you want to  
24 share with us that you have felt intimidated or  
25 harassed in any way by anyone inside or outside the

1 courtroom?

2 JUROR MCCALLUM: No, ma'am.

3 THE COURT: Do you think that by doing  
4 this, putting you guys back there in the conference  
5 room, it will make you feel more comfortable in this  
6 process and more willing to participate?

7 JUROR MCCALLUM: I basically go with the  
8 flow. I'm good.

9 THE COURT: Okay. So you have no -- you  
10 really didn't have much concerns anyway?

11 JUROR MCCALLUM: Oh, no.

12 THE COURT: Anything further from either  
13 side?

14 MS. PANDUKHT: Nothing.

15 MR. FIGLER: No, Your Honor.

16 THE COURT: Okay, thanks. All right.  
17 Thank you.

18 (Whereupon, the juror exited the  
19 courtroom.)

20 MS. PANDUKHT: Are you gonna ask the  
21 alternates as well, judge?

22 THE COURT: I'm sorry?

23 MS. PANDUKHT: Are you gonna ask the  
24 alternates as well?

25 THE COURT: Yes. For fear if we ever



1 need an alternate, we might as well get it out with  
2 making a record or anything.

3 MS. PANDUKHT: Thank you.

4 MR. FIGLER: Home stretch, though.

5 THE COURT: I'm just about there, right?  
6 I'm on 11. No, wait. I'm on 12.

7 MR. FIGLER: Yeah.

8 MS. PANDUKHT: I thought we were on 11,  
9 but I --

10 THE COURT: I'm had on 12. Yeah,  
11 Elizabeth Uhrle. What I'm gonna do is tell them all  
12 to take a really big bathroom break and then go into  
13 a two-hour session, okay?

14 MS. DEMONTE: Okay.

15 THE COURT: Hi, Ms. Uhrle. These are my  
16 two law clerks in the audience and nobody else is  
17 here.

18 What I'm gonna do from here on out  
19 is I'm gonna make sure you all meet -- go ahead and  
20 have a seat. You're all gonna meet in jury services  
21 from here on out and my marshal's gonna escort you  
22 up into the conference room in the back.

23 You can see use the restrooms,  
24 they'll be refreshments and that should alleviate  
25 you, the jury, having to mingle with what's the

1 audience in the gallery of what's going on, you  
2 know, during trial.

3 Do you think that will alleviate any  
4 concerns that you may have with any  
5 uncomfortableness with that large group of audience?

6 JUROR UHRLE: No.

7 THE COURT: It won't alleviate or you  
8 feel more comfortable?

9 JUROR UHRLE: Oh, I'm sorry. Yes, I  
10 would feel comfortable.

11 THE COURT: Okay. Has there been  
12 anything that you felt inside or outside the  
13 courtroom that anybody intimidated you or harassed  
14 you at all?

15 JUROR UHRLE: No.

16 THE COURT: And I won't be saying your  
17 names anymore. I'll just say your badge number.  
18 Just keep writing your names on it.

19 JUROR UHRLE: Okay.

20 THE COURT: Do you think that you'll be  
21 participating in the process even more if I do that  
22 or you'll feel comfortable?

23 JUROR UHRLE: I feel fine either way. It  
24 doesn't matter to me.

25 THE COURT: Okay. Anything further from

1 either side?

2 MS. PANDUKHT: No, Your Honor.

3 MR. FIGLER: No, Your Honor.

4 THE COURT: Thanks so much.

5 (Whereupon, the juror exited the  
6 courtroom.)

7 THE COURT: Good morning, ma'am. These  
8 are my two law clerks. And what we're gonna start  
9 doing is having all the jurors meet in the morning  
10 in the jury room, jury commissioners room.

11 My marshal's then gonna escort you  
12 up here and we're gonna keep you guys back here from  
13 here on out in the conference room.

14 ALTERNATE JUROR MORASCO: Uh-huh.

15 THE COURT: There's -- you can have  
16 refreshments, there's restrooms back there. We're  
17 just gonna keep you apart from the general audience  
18 that's been out there lately because of the close  
19 quarters so to speak.

20 ALTERNATE JUROR MORASCO: Uh-huh.

21 THE COURT: Do you think that will  
22 alleviate or make it more comfortable for you as a  
23 juror?

24 ALTERNATE JUROR MORASCO: Yes.

25 THE COURT: Okay. And has anybody -- oh,

1 we're also gonna make sure that if you have  
2 questions I just say you're No. 13. We won't say  
3 your names anymore.

4                   Having said that, has anybody inside  
5 or outside the courtroom intimidated you or harassed  
6 you in any way?

7                   ALTERNATE JUROR MORASCO: No.

8                   THE COURT: Okay. So you think you'll  
9 feel more comfortable once that's done?

10                  ALTERNATE JUROR MORASCO: Yes.

11                  THE COURT: Okay. Is there anything  
12 further then from either side?

13                  MS. PANDUKHT: No, Your Honor.

14                  MR. FIGLER: No, Your Honor.

15                  MS. DEMONTE: No, Your Honor.

16                  THE CLERK: Her badge number.

17                  THE COURT: Her badge number?

18                  THE CLERK: We're gonna use badge  
19 numbers.

20                  THE COURT: I did just say that to her.  
21 Okay. Thank you so much.

22                  (Whereupon, the juror exited the  
23 courtroom.)

24                  THE CLERK: Oh wait. Can you tell the  
25 rest of them to start going to the bathroom?

1 Because when I bring them in, we're gonna be like  
2 two hours. Okay. Let everybody start going thanks.

3 I guess you guys will use the public  
4 one. Sorry. Or if you want to go all the way  
5 around and use the other one, you can do that, too,  
6 at the end of the hallway. There's another set.

7 I just thought you probably  
8 shouldn't come right back here anymore. The  
9 attorneys should stay away from chambers. But Judge  
10 Barker and Judge Villani are really nice. So if you  
11 wanted to go back there and get coffee, you're more  
12 than welcome.

13 MS. PANDUKHT: Okay, thank you.

14 THE COURT: Good morning, Ms. Gomez.

15 ALTERNATE JUROR GOMEZ: Good morning.

16 THE COURT: These two individuals are my  
17 law clerks here. They're my law clerks. What we're  
18 gonna start doing is we're gonna have all the jurors  
19 meet in jury commissions each morning and then my  
20 marshal's gonna escort everybody back here to the  
21 conference room.

22 You can have refreshments and  
23 there's restrooms back here, but we're gonna keep  
24 you separated from the audience. There's been large  
25 groups of people sitting in the audience.

1                   And so do you think that that would  
2 make you feel more comfortable during this process?

3                   ALTERNATE JUROR GOMEZ: Yes.

4                   THE COURT: Also, instead of calling out  
5 your name's during questions, we'll just say your  
6 numbers. So No. 14, you know --

7                   ALTERNATE JUROR GOMEZ: Okay.

8                   THE COURT: -- on the record so that in  
9 court your name's won't be said.

10                  Do you think that will make you feel  
11 more comfortable as well?

12                  ALTERNATE JUROR GOMEZ: Yes.

13                  THE COURT: Has anybody or anything  
14 intimated or harassed you inside or outside the  
15 courtroom that you fear for your safety at all that  
16 we need to know?

17                  ALTERNATE JUROR GOMEZ: No, no.

18                  THE COURT: All right. So you'll feel  
19 more comfortable during this process?

20                  ALTERNATE JUROR GOMEZ: Yes.

21                  THE COURT: Is there anything further  
22 from either side?

23                  MS. PANDUKHT: No, Your Honor.

24                  MS. DEMONTE: No, Your Honor.

25                  MR. FIGLER: No, Your Honor.

1 THE COURT: All right. Thank you so  
2 much. We're getting ready to go back on the record.  
3 So take a restroom break before we come back, okay?

4 ALTERNATE JUROR GOMEZ: Okay, thank you.

5 THE COURT: Thank you. We're gonna go  
6 off the record for five minutes. Everybody take a  
7 little break and then we'll come back on and start  
8 our day. Thanks.

9 (Whereupon, a recess was had.)

10 THE COURT: All right. Please be seated.  
11 State of Nevada versus Evaristo Garcia. Case No.  
12 C262966.

13 Let the record reflect we're in the  
14 presence of the jurors, the defendant's present, Mr.  
15 Figler, Mr. Goodman's present. Ms. Pandukht and Ms.  
16 Demonte is present.

17 We're now still on the State's  
18 case-in-chief. State, go ahead and call your next  
19 witness.

20 MS. DEMONTE: The State calls Scott  
21 Hendricks.

22 THE COURT: Scott Bindrup?

23 MS. DEMONTE: Hendricks.

24 THE COURT: Okay.

25 (Whereupon, T. Scott Hendricks was duly

1           sworn to tell the truth, the whole truth,  
2           and nothing but the truth.)

3           THE CLERK: Please be seated. State and  
4 spell your full name for the record, please.

5           THE WITNESS: T. Scott Hendricks. First  
6 initial T, S-c-o-t-t, H-e-n-d-r-i-c-k-s.

7           THE COURT: Okay. Go ahead and proceed.

8           MS. DEMONTE: Thank you.

9                         DIRECT EXAMINATION

10 BY MS. DEMONTE:

11           Q. Sir, how are you employed?

12           A. I'm a special agent with the FBI.

13           Q. And what is your job assignment as a  
14 special agent?

15           A. I'm currently assigned to a violent  
16 crimes task force.

17           Q. Back in 2006, did you have a different  
18 assignment?

19           A. No, I did not.

20           Q. Okay. Sorry. The violent crimes task  
21 force, is there a subgroup of that?

22           A. Yes, there is. Commonly known as a  
23 criminal apprehension team. It's a violent crime  
24 fugitive task force.

25           Q. Okay. And what is the job role of the

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1 criminal apprehension team?

2 A. Our job is to locate and apprehend  
3 persons wanted for violent felonies.

4 Q. And you've mentioned this is a task  
5 force. What do you mean by that?

6 A. It's composed of officers and detectives  
7 and agents from the FBI, Las Vegas Metropolitan  
8 Police Department and Henderson Police Department.

9 Q. Okay. Now, directing your attention to  
10 2006, roughly June 21st of 2006, did you have a  
11 partner you were working with at the time?

12 A. Yes, I did.

13 Q. And who was that person?

14 A. Las Vegas Metropolitan Police Department  
15 Detective Steve Devore.

16 Q. And is that spelled D-e-v-o-r-e?

17 A. Yes, it is.

18 Q. And is that how it commonly works is it's  
19 one FBI agent and one metro officer?

20 A. Often times, yes.

21 Q. Now, directing your attention  
22 specifically to June of 2006, were you contacted by  
23 someone in the Las Vegas Metropolitan Police  
24 Department with regard to a person by the name of  
25 Evaristo Garcia?

1 A. Yes.

2 Q. And who contacted you?

3 A. Detective Cliff Mogg.

4 Q. And were you provided with any  
5 documentations to help you, to assist you with your  
6 investigation?

7 A. An arrest warrant for Evaristo Garcia.

8 Q. And to your knowledge when was that  
9 issued?

10 A. June of that year.

11 Q. June of that year?

12 A. I believe so.

13 Q. Okay. Now, once you have the arrest  
14 warrant for someone in hand, what do you do next?

15 A. We then conduct investigation to locate  
16 and hopefully apprehend.

17 Q. Okay. And in this particular case, did  
18 you conduct an investigation here in the United  
19 States?

20 A. Yes, we did.

21 Q. And without going into anything anyone  
22 said, what did you personally do on this case in --  
23 here in the United States?

24 A. Conducted database checks, conducted  
25 interviews, logical fugitive investigation.

1           Q.     Okay. Now, based on what your  
2 investigation was giving you, did you then focus  
3 your investigation elsewhere?

4           A.     Yes, we did.

5           Q.     And where did you focus your  
6 investigation to?

7           A.     To Mexico.

8           Q.     Okay. Now, in order to conduct your  
9 investigation, is there something on the federal  
10 court level that you yourself have to do as an FBI  
11 agent?

12          A.     Yes. Yes, we do.

13          Q.     And in this particular case, I want to  
14 direct your attention to October of 2006.

15                   What did you do within the federal  
16 courts?

17          A.     Once we determined that somebody has fled  
18 the jurisdiction, we then obtain an arrest  
19 warrant --

20                   MR. FIGLER: I'm gonna object, Your  
21 Honor, to the characterization of "fled the  
22 jurisdiction."

23                   If there is a different  
24 jurisdiction, then that's --

25                   THE COURT: Overruled.

1 MS. DEMONTE: Okay.

2 THE WITNESS: We then obtain a federal  
3 arrest warrant for unlawful flight to avoid  
4 prosecution.

5 MR. FIGLER: And, again, I'm gonna make a  
6 continuing objection to using the word fled or  
7 flight because the facts have not been established.

8 THE COURT: Overruled.

9 BY MS. DEMONTE:

10 Q. In this particular case, did you actually  
11 get a warrant issued by the United States District  
12 Court?

13 A. Yes, we did.

14 Q. And what date? Do you recall what date  
15 that was?

16 A. October of that same year. October 8th,  
17 I think.

18 Q. Okay. Would it is refresh your  
19 recollection if I showed you the warrant?

20 A. Yes, it would.

21 Q. In the interest of time, actually would  
22 it refresh your recollection if I showed you your  
23 affidavit for a subsequent warrant that you  
24 received?

25 A. That's fine.

1 Q. Okay.

2 A. On the 10th.

3 Q. October 10th?

4 A. October 10th, yes.

5 Q. So you received the federal -- and is  
6 that commonly referred to you as UFAP, U-F-A-P?

7 A. Yes.

8 Q. Okay. And what does that stand for?

9 A. Unlawful flight to avoid prosecution.

10 MR. FIGLER: And, again, we'll object,  
11 Your Honor.

12 THE COURT: Overruled.

13 BY MS. DEMONTE:

14 Q. And you obtained that warrant on October  
15 10th of 2006?

16 A. Yes, we did.

17 Q. Now, after you obtained that warrant, did  
18 you then do some more investigation into how to  
19 determine where exactly Evaristo Garcia was?

20 A. Yes, we did.

21 Q. And what type of investigation did you  
22 do?

23 A. We obtained a pen register.

24 Q. Okay. Now, what is a pen register?

25 A. A pen register is a -- we obtain a court

1 order that's served on a phone company and it then  
2 provides us with telephone numbers that -- for  
3 those -- for that phone that that phone number  
4 calls.

5 Q. Okay.

6 A. So it gives us incoming and outgoing  
7 calls for a particular phone number.

8 Q. And do you have to apply for a federal  
9 search warrant to get that?

10 A. Yes.

11 Q. Okay. And did you in fact do that?

12 A. Yes, I did.

13 Q. Now, how did you know what numbers to ask  
14 the court for records for?

15 A. We, we obtained the information via  
16 subpoena for subscriber information for particular  
17 numbers.

18 Q. And do you recall what company you got  
19 that information from?

20 A. I believe it was T-Mobile.

21 Q. Okay. And do you recall what numbers you  
22 were asking the court to provide records for?

23 A. I don't. I know they were both 702  
24 numbers.

25 Q. Okay. Would it refresh your recollection

1 to show you a copy of your pen register application?

2 A. Yes, it would.

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

5 THE COURT: You may.

6 MS. DEMONTE: Thank you.

7 THE WITNESS: The pen register was for  
8 telephone number 702-413-8968.

9 BY MS. DEMONTE:

10 Q. Okay. And was there a second phone  
11 number also that you asked for?

12 A. Yes, there was.

13 Q. And what number was that?

14 A. There's probably another order for it.  
15 It was also 702-413, but I think the last four were  
16 different. Hold on.

17 Q. Okay.

18 A. 8972.

19 Q. Okay. And who did those phone numbers  
20 belong to?

21 A. They were subscribed to by Victor G.  
22 Tapia.

23 Q. And how do you spell that?

24 A. V-i-c-t-o-r. G. T-a-p-i-a.

25 Q. And who is Victor Tapia?

1           A.     I believe that's Evaristo's father.

2           Q.     Okay. And in your application did you  
3 state who the phone numbers were being -- phones  
4 were being used by?

5           A.     Yes, we did.

6           Q.     And who did you state those phones were  
7 being used by?

8           A.     Evaristo's mother and father.

9           Q.     And do you recall the name of Evaristo's  
10 mother?

11          A.     I do not.

12          Q.     Now, after receiving the pen register --  
13 first of all, do you remember when you actually  
14 applied for and received that and were granted the  
15 pen register warrant?

16          A.     That would have been on the day or  
17 shortly -- sometime shortly after we obtained the  
18 warrant. It would be on that, it will be on that  
19 pen register order.

20          Q.     Okay. But as you're sitting here today,  
21 you don't recall when you actually obtained that?

22          A.     I don't.

23          Q.     And would it refresh your recollection to  
24 see a copy of the pen register warrant?

25          A.     Yes.



1 MS. DEMONTE: May I approach the witness?

2 THE COURT: You may.

3 THE WITNESS: It would have been on April  
4 20th of 2007.

5 BY MS. DEMONTE:

6 Q. Thank you. Now, after you received this  
7 pen register on April 20th of 2007, approximately  
8 four days later did you have contact with Detective  
9 Mogg?

10 A. Yes, I did.

11 Q. And did you, did you yourself ask  
12 Detective Mogg to do something?

13 A. I did.

14 Q. What did you ask Detective Mogg to do?

15 A. I asked him to go to the home of the  
16 parents of Evaristo Garcia and conduct an interview.

17 Q. Okay. And why did you ask him to do  
18 that?

19 A. It was what we call tickle the pen  
20 register. We were hoping to see what numbers might  
21 be called after we conducted an interview.

22 Q. And were you notified when Detective Mogg  
23 went to the house?

24 A. Yes, I was.

25 Q. Okay. And do you recall when he -- and

1 when he went to the house?

2 A. Would have been April -- it would have  
3 been shortly after we obtained the pen, pen register  
4 that same month.

5 Q. Okay. And did you actually document this  
6 in a --

7 A. In a --

8 Q. -- in a 302?

9 A. Yes, I did.

10 Q. And what is a 302?

11 A. A 302 or an electronic communication is a  
12 reporting document. It's similar to an officer's  
13 report that we use to document an investigation.

14 Q. Okay. And would it refresh your  
15 recollection if I showed you your 302 as to when  
16 this took place?

17 A. Absolutely.

18 MS. DEMONTE: May I approach the witness?

19 THE COURT: You may.

20 MR. FIGLER: May I took a look?

21 MS. DEMONTE: Yeah.

22 MR. FIGLER: Court's indulgence.

23 BY MS. DEMONTE:

24 Q. Okay. There you go.

25 A. On the 24th of April of 2007.

1 Q. Okay. And were you notified as to when  
2 that interview began and concluded?

3 A. Just after 1800 hours. Just after 6 p.m.

4 Q. Is when it began?

5 A. Yes.

6 Q. And when did that conclude?

7 A. Shortly thereafter. I don't think it was  
8 that long.

9 Q. Okay. And after you were notified --

10 A. 1840 hours it concluded.

11 Q. So about 40 minutes later?

12 A. Yes.

13 Q. So after you were notified that the  
14 interview concluded, did you then research the pen  
15 register?

16 A. Yes, we did.

17 Q. And what did you find?

18 A. We found that there was some, that there  
19 was some outbound calls to Mexico.

20 Q. Okay. And you still have that report up  
21 there, right?

22 A. Yes, I do.

23 Q. Sitting here today, do you recall the  
24 number that was dialed?

25 A. Without looking at the report, I don't

1 recall the number.

2 Q. Okay. And you actually wrote that report  
3 in tandem with when this information came to you,  
4 correct?

5 A. Correct.

6 Q. And so you recorded that as it was  
7 happening?

8 A. Yes, I did.

9 Q. Okay. What number was the outbound call  
10 coming from?

11 A. It was coming from -- the outbound call  
12 was to a number in Veracruz, Mexico.

13 Q. Which phone was dialing that number first  
14 of all?

15 A. Let's see. 702-413-8968.

16 Q. Okay. And what number was being dialed?

17 A. International number. So 0 -- you dial  
18 011-52-274-745-3017.

19 Q. Okay. Now, based on this information and  
20 the call to Mexico occurring after the interview  
21 that Detective Mogg conducted, where did the  
22 investigation take you next?

23 A. To Veracruz, Mexico.

24 Q. And is that because that's where that  
25 phone number was going to?

1           A.       That's correct.

2           Q.       Okay. And at some point did you then  
3 dispatch federal agents to Veracruz, Mexico to  
4 verify information?

5           A.       Yes, we did.

6           Q.       After doing that, did you then seek  
7 another warrant?

8           A.       Yes, we did.

9           Q.       And what type of warrant is that?

10          A.       It's called -- it's what they call a  
11 provisional arrest warrant.

12          Q.       And what is a provisional arrest warrant?

13          A.       It's a -- I guess you could kind of  
14 simply say that it's kind of an international arrest  
15 warrant, but we basically are requesting Mexican  
16 officials to arrest an individual in their country  
17 based on our warrant.

18          Q.       Okay. And is there documentation that  
19 you had to provide to Mexican officials for the  
20 provisional arrest warrant regarding whether or not  
21 this person was a United States citizen?

22          A.       Yes, there was.

23          Q.       Okay. May I approach the witness, Your  
24 Honor.

25               THE COURT: You may.

1 BY MS. DEMONTE:

2 Q. Showing you what's been marked as State's  
3 proposed Exhibit 110, do you recognize that?

4 A. Yes, I do.

5 Q. And what is that?

6 A. It's a birth certificate for Evaristo  
7 Garcia.

8 Q. Okay. Now, is that the exact copy you  
9 sent?

10 A. I don't know.

11 Q. Okay. Is that actually a certified copy  
12 of the --

13 A. That is a certified copy and we did send  
14 a certified copy to Mexico.

15 Q. Okay. And that is identical to what you  
16 sent?

17 A. Yes, it is.

18 MS. DEMONTE: Your Honor, State moves to  
19 admit 110 as it is a certified copy of a public  
20 record.

21 THE COURT: Is there any objection?

22 MR. FIGLER: It's our client's birth  
23 certificate. I don't see the relevance of it.

24 THE COURT: Overruled.

25 MS. DEMONTE: Thank you, Your Honor.

1 BY MS. DEMONTE:

2 Q. And at some point were you notified that  
3 the defendant was actually arrested on the  
4 provisional warrant?

5 A. Yes, I was.

6 Q. And do you recall when he was arrested?

7 A. Would have been in 2008 I believe. 4-21  
8 of 2008 but.

9 Q. Would it refresh your recollection to --

10 A. Yes, it would.

11 Q. Okay.

12 A. I received an electronic communication  
13 back notifying me of his arrest.

14 Q. Okay. And with respect to the exact  
15 date, would it refresh your recollection to see the  
16 302 that you drafted --

17 A. Yes.

18 Q. -- at the time you received this  
19 information?

20 A. Uh-huh. The 23rd. It's actually 2008  
21 that he was arrested.

22 Q. Okay. So April 23rd --

23 A. I said it was 2007, but that's my  
24 mistake.

25 Q. All right. So to your knowledge it was

1 April 23rd of 2008?

2 A. Yes.

3 Q. But you caught that you had made a typo  
4 when you drafted your report?

5 A. That's correct.

6 Q. All right.

7 A. The actual typo was actually by the --  
8 it's a electronic communication from the A line or  
9 the agent in Mexico City back to me and his typos,  
10 but it's 2008 though.

11 Q. Okay. Now, after the defendant was  
12 arrested on the provisional warrant, what then did  
13 you have to do?

14 A. I then contact the DA's office and the  
15 attorneys office in international affairs and they  
16 began working on formal extradition.

17 Q. Okay. Because is a provisional warrant  
18 enough?

19 A. It's not.

20 Q. Okay. And do you recall who in the  
21 district attorney's office you contacted to begin  
22 the extradition process?

23 A. I contacted you.

24 Q. Okay. And at some point -- now, is there  
25 a time limit once someone is arrested in Mexico for



1 the government of the United States to issue the  
2 formal ex -- to initiate the formal extradition  
3 process?

4 A. Yes. You have 60 days.

5 Q. And did you assist in making that  
6 deadline?

7 A. Yes, I did.

8 Q. Okay. And are you aware that in August  
9 of 2008 that the government of Mexico did grant that  
10 extradition after defendant waived?

11 A. Yes, I am.

12 Q. Okay. So was he then returned to the  
13 United States?

14 A. Yes, he was.

15 Q. Okay. And did you yourself retrieve him  
16 from Mexico?

17 A. I did not travel to Mexico. I traveled  
18 to the Las Vegas McCarran International Airport and  
19 waited for him who was accompanied by two FBI  
20 agents.

21 Q. And were there Las Vegas Metropolitan  
22 Police detectives also there?

23 A. Yes, there were.

24 Q. Who was there?

25 A. Detective Mogg and Detective Hardy.

1 Q. And did you actually lay eyes on Evaristo  
2 Garcia at McCarran International Airport?

3 A. Yes, I did.

4 Q. Looking around the courtroom today, do  
5 you see Evaristo Garcia?

6 A. I do.

7 Q. Can you please point to him and describe  
8 something he's wearing?

9 A. He's seated to Mr. Figler's left and he's  
10 in a -- it looks like a white or a light blue button  
11 down Oxford shirt.

12 MS. DEMONTE: Record reflect  
13 identification of the defendant.

14 THE COURT: The record will reflect  
15 identification of the defendant.

16 MS. DEMONTE: Thank you. Pass the  
17 witness.

18 THE COURT: Cross-examination.

19 MR. FIGLER: Thank you.

20 CROSS-EXAMINATION

21 BY MR. FIGLER:

22 Q. Agent Hendricks, just a couple questions  
23 for you.

24 A. Sure.

25 Q. The one and only time that you saw

1 Evaristo Garcia was in October of 2008 then?

2 A. If that's when he was --

3 Q. Brought back?

4 A. Brought back, yes.

5 Q. Okay. And you just identified him here  
6 today in court, correct?

7 A. Yes, I did.

8 Q. Okay, thanks. Hey, you don't know the  
9 facts and circumstances surrounding why a person  
10 would go to another country.

11 You just do your job to retrieve  
12 him, correct?

13 A. My job is once there's an arrest warrant,  
14 to locate and apprehend. Whether that's here  
15 locally in Las Vegas or whether they leave to  
16 another state, country, wherever that might be in  
17 the world.

18 Q. Exactly. So do you know -- do you have  
19 any personal knowledge when Evaristo Garcia went to  
20 Mexico?

21 A. I do not. There was no official record  
22 with the border crossing so I don't know when he  
23 went to Mexico.

24 Q. Okay. And usually if I'm just an  
25 American citizen walking down, they don't tag me or

1 register me at -- back in '06. That probably wasn't  
2 happening or do you know?

3 A. Going out of the country, no. Coming  
4 back into the country, yes.

5 Q. Right. So do you know when this arrest  
6 warrant was issued for Evaristo Garcia?

7 A. The local warrant or the --

8 Q. Yes.

9 A. -- federal warrant?

10 Q. The local one here in Las Vegas.

11 A. If I look at a copy of the -- I can tell  
12 you the exact date if, if you have a copy of the  
13 arrest warrant.

14 Q. I absolutely do. I thought you might be  
15 asking so I had it right there.

16 MR. FIGLER: Does that work?

17 MS. DEMONTE: Well, no.

18 MR. FIGLER: Well, that's the application  
19 for the arrest warrant.

20 MS. DEMONTE: Yeah, that's the  
21 application for the arrest warrant. I have the  
22 warrant. You do want the --

23 MR. FIGLER: It will work. They're  
24 pretty close in time to each other. Whoever gets  
25 there first.

1 I got the dec. Do you have the  
2 warrant?

3 MS. DEMONTE: I'll stipulate it was June  
4 21st, 2006.

5 MR. FIGLER: Thanks.

6 MS. DEMONTE: I have it off the top of my  
7 head.

8 MR. FIGLER: Yeah, you do. I've got June  
9 19th.

10 MS. DEMONTE: Okay.

11 BY MR. FIGLER:

12 Q. I'm showing you the declaration for  
13 warrant. That is usually something that occurs  
14 before the warrant's even issued, correct?

15 A. That's correct.

16 Q. Okay. So this date is June 19th,  
17 correct?

18 A. It is.

19 Q. Okay. Of 2006?

20 A. Yes.

21 MR. FIGLER: And I think counsel's going  
22 to stipulate that the actual arrest warrant wasn't  
23 issued until -- was it June 21st, 2006?

24 MS. DEMONTE: Yes, it was signed by Judge  
25 Jansen June 21st, 2006.

1 BY MR. FIGLER:

2 Q. Okay. So if the warrant for arrest was  
3 not issued until June 21st, 2006 and if somebody  
4 never saw that, they wouldn't know that there's a  
5 warrant for their arrest, correct?

6 A. Whether there's a person that knows that  
7 they have a warrant for their arrest or not is, is  
8 irrelevant to me.

9 Once they have a warrant, that's  
10 when my -- that's when I start taking part in the  
11 investigation.

12 Q. Okay. But you would agree  
13 chronologically, and I know this is gonna sound like  
14 a stupid question, but lawyers ask stupid questions  
15 all the time, February or March of 2006 is before  
16 June 21st of 2006; isn't that correct?

17 A. Yes, it is.

18 Q. Okay. Thank you for establishing that  
19 indisputable fact.

20 You didn't talk to Evaristo Garcia  
21 at all, did you?

22 A. Prior to me coming in contact with him at  
23 the airport, no.

24 Q. Okay. So he didn't tell you why he went  
25 down to Mexico, correct?

1           A.       He did not.

2           Q.       So you indicated, and I objected a couple  
3 times, to the word flight. Flight to you probably  
4 has a different meaning than flight to me.

5                   Flight to you means that they're out  
6 of the jurisdiction when there's a warrant for their  
7 arrest, correct?

8           A.       That too. Any time that there's a  
9 warrant for their arrest and they leave the  
10 jurisdiction where they're wanted from, that is  
11 considered flight.

12          Q.       Okay. But they, but they might not even  
13 know that there's a warrant for their arrest.

14                   You would agree with that that they  
15 might not know?

16          A.       I can't speak to what he knew. I can  
17 speak to that there was a warrant for his arrest and  
18 he left the State of Nevada to Mexico.

19          Q.       At some point?

20          A.       At some point.

21          Q.       Maybe before the warrant of his arrest,  
22 you don't know?

23          A.       I don't know when he entered Mexico. We  
24 have no record with U.S. crossing, and Mexican  
25 immigration has no record either.

1 Q. Okay. So he -- you would agree with me  
2 that there are a lot of reasons why someone might  
3 want to go to another country that have nothing to  
4 do with avoiding arrest; isn't that correct?

5 A. People travel all the time.

6 Q. People do go on vacation. That's one  
7 thing, correct? You agree?

8 A. That's correct.

9 Q. People can have business in another  
10 country; isn't that correct?

11 A. That's correct.

12 Q. People can be afraid that a bunch of  
13 violent people are trying to kill him and want to  
14 get away from that; isn't that correct?

15 A. People can travel to whatever country  
16 they want for whatever reason.

17 Q. Okay, thank you. Oh, and I think that  
18 the -- I think the prosecutor went over it quickly,  
19 and I just want to make sure the ladies and  
20 gentlemen of the jury heard.

21 You went through all these processes  
22 that occur and then there's an extradition that  
23 occurs down in the other country, correct?

24 A. That's correct.

25 Q. Now, a person has a right to fight that



1 extradition, don't they?

2 A. They do.

3 Q. Okay. And in this case, Evaristo Garcia  
4 did not fight that and waived his extradition,  
5 meaning he voluntarily agreed to come back; isn't  
6 that correct?

7 A. He waived his extradition.

8 Q. Okay. And when he was taken into  
9 custody, he was personally informed by the  
10 authorities that there was an arrest warrant for  
11 him, correct?

12 A. I was not present for his arrest, but I  
13 would assume they would advise him that he has an  
14 arrest warrant and --

15 Q. That would be the process, correct?

16 A. Yes.

17 Q. And then he voluntarily came back into  
18 the country with those people?

19 A. He waived, he waived extradition.

20 Q. That's right. No further questions.

21 THE COURT: Redirect.

22 MS. DEMONTE: Thank you.

23 REDIRECT EXAMINATION

24 BY MS. DEMONTE:

25 Q. Just so we're clear on the time line, he

1 was arrested in -- on April 23rd?

2 A. April 23rd, yes.

3 Q. And waived in August?

4 A. Correct.

5 Q. Okay. Now, Agent Hendricks, counsel  
6 asked you a lot of questions about various reasons  
7 that people flee.

8 First of all, in order to obtain  
9 that, use that warrant, you did not have to know  
10 when he went to Mexico?

11 A. That's correct, I do not.

12 Q. And you did not have to tell the court --  
13 is it a prerequisite that the person know there's an  
14 arrest warrant?

15 A. No, there's not.

16 Q. Okay, thank you. Nothing further.

17 THE COURT: Is there anything further?

18 RECROSS-EXAMINATION

19 BY MR. FIGLER:

20 Q. Just about the time gap between  
21 extradition, he's in custody down in Mexico during  
22 that time, correct?

23 A. Yes, he is in custody.

24 Q. He can't just say hey, I want to just go  
25 right now. The process has to take place, correct?

1           A.       He's in custody in a Mexican jail. I'm  
2 not familiar with all of the Mexican judicial  
3 processes and how all that works, but he is in  
4 custody in a Mexican jail.

5           Q.       So the one time that they asked him do  
6 you waive extradition, to your knowledge he said  
7 yes?

8           A.       I don't know how many times they asked  
9 him. I, I have no -- I don't have any knowledge to  
10 date on how that went.

11          Q.       You do have knowledge though that when it  
12 came down to extradition he waived?

13          A.       At some point when they asked him to  
14 waive extradition, he waived.

15          Q.       Thank you.

16                 THE COURT: Anything further, Mr. Figler?

17                 MR. FIGLER: No. No, Your Honor.

18                 THE COURT: Do the ladies and gentlemen  
19 of the jury have any questions for this particular  
20 witness? All right. Negative response.

21                         Thank you so much for your  
22 testimony. You're excused.

23                 THE WITNESS: Thank you.

24                 THE COURT: State, call your next  
25 witness.

1 MS. DEMONTE: The State calls Clifford  
2 Mogg.

3 (Whereupon, Clifford Mogg was duly sworn  
4 to tell the truth, the whole truth, and  
5 nothing but the truth.)

6 THE CLERK: Please be seated. State and  
7 spell your full name for the record, please.

8 THE WITNESS: Clifford, C-l-i-f-f-o-r-d.  
9 Mogg, M-o-g-g.

10 DIRECT EXAMINATION

11 BY MS. DEMONTE:

12 Q. Sir, how are you employed?

13 A. I'm a detective with the Las Vegas  
14 Metropolitan Police Department homicide section.

15 Q. And how long have you been with Metro?

16 A. 17 years.

17 Q. How long with the homicide section?

18 A. 10.

19 Q. Okay. And directing your attention to  
20 February 6th of 2006, were you with homicide at that  
21 time?

22 A. I was.

23 Q. And did you have a partner at the time?

24 A. I did. Detective Ken Hardy.

25 Q. Okay. Now, is Ken Hardy still your

1 partner?

2 A. No. He's since retired.

3 Q. Okay. And how long ago did Detective  
4 Hardy retire?

5 A. Almost two years.

6 Q. Okay. Now, on February 6th of 2006, were  
7 you called out to investigate a shooting at the  
8 Morris Sunset East High School?

9 A. Yes.

10 Q. And is that here in Clark County, Nevada?

11 A. It is.

12 Q. Okay. And when you arrived at the scene,  
13 were you briefed by patrol?

14 A. Yes.

15 Q. Okay. And were responsibilities for this  
16 investigation divided up between yourself and  
17 Detective Hardy?

18 A. That's correct.

19 Q. And how did that divide go?

20 A. Detective Hardy was assigned to conduct  
21 the investigation of the crime scene and I was  
22 assigned to conduct the investigation of witnesses,  
23 any potential suspects that may be developed and  
24 also to follow up on information that was obtained  
25 that night during the course of the interviews with

1 various witnesses.

2 Q. Okay. Now, with regard to witnesses, did  
3 some of them remain on scene to speak with you?

4 A. Did they what?

5 Q. Were there already some witnesses that  
6 had remained on the scene to speak with you?

7 A. That's correct.

8 Q. And you spoke with all of those  
9 witnesses?

10 A. Yes.

11 Q. Those being -- is Crystal Perez one of  
12 them?

13 A. I believe she was one of them. Either  
14 myself or some of the other detectives that were  
15 assisting us conducted the interviews.

16 Q. Okay. And based on information you  
17 retrieved from those interviews, did you go and --  
18 go off the scene to conduct additional investigation  
19 based off of those interviews?

20 A. Yes.

21 Q. Where did you go?

22 A. We went to a man by the name of Giovanny  
23 Borradas' residence on -- I believe it was Albedo  
24 (phonetic). And we picked him up, brought him back  
25 to our office and interviewed him.

1 Q. Now, was he under arrest at the time?

2 A. He was not.

3 Q. Okay. And without telling me what Mr.  
4 Borradas said, did you collect any information from  
5 items in his position?

6 A. Yes.

7 Q. What did you collect?

8 A. Information from his cell phone.

9 Q. Okay. And he actually had that cell  
10 phone on his person?

11 A. That's correct.

12 Q. And the cell phone, do you recall the  
13 number off the top of your head?

14 A. I do not. I believe it was a 371 number,  
15 but I don't recall.

16 Q. Would it refresh your recollection to  
17 look at your report as to the remaining four digits  
18 of that phone number?

19 A. It would.

20 Q. And you have that report up there with  
21 you?

22 A. I do.

23 Q. And would you like to look at that  
24 report?

25 A. Yes. 371-2678.

1 Q. Okay. Now, when you made contact with  
2 Mr. Borradas, did you actually have him photographed  
3 as well?

4 A. I did.

5 Q. I'm placing on the screen State's Exhibit  
6 50. Is that Giovanny Borradas?

7 A. It is.

8 Q. So your knowledge did he go by other  
9 names?

10 A. Yes.

11 Q. And what other name did he go by?

12 A. Giovanny Garcia, I believe it was Yobanni  
13 Garcia or Yobanni Borradas.

14 Q. Okay. But they are all one and the same  
15 person?

16 A. They are.

17 Q. Okay. And to your knowledge was he still  
18 wearing the same clothing that he was wearing at  
19 the -- during the night of the shooting?

20 A. Yes.

21 Q. Okay. Showing you State's Exhibits 51,  
22 was that photographed as well?

23 A. That is.

24 Q. Okay. Now, after conducting this  
25 interview with Giovanny, did you make an arrest?



1 A. Not that night, no.

2 Q. Okay. Had you developed any additional  
3 leads though from your conversation of Giovanny --  
4 with Giovanny?

5 A. Not from Giovanny.

6 Q. Okay. Where did your investigation take  
7 you next?

8 A. Well, we had a description of a possible  
9 suspect who was the person that actually did the  
10 shooting. It was described as a Hispanic male,  
11 somewhere around 19 years old, average build.

12 The key thing that stood out to the  
13 majority of the witnesses was that this person was  
14 wearing a gray hooded sweatshirt and some type of  
15 dark shorts and that he was armed with a handgun.

16 Q. Okay. And to your knowledge was there  
17 one interview that was different that gave a  
18 different identification of the shooter? Did  
19 someone implicate Giovanny?

20 A. Yes.

21 Q. And did that comport with what you were  
22 getting from other witness interviews?

23 MR. FIGLER: I'm gonna object, Your  
24 Honor, it as may comport what other interviews, how  
25 many interviews?

1 THE COURT: Overruled.

2 THE WITNESS: There were numerous  
3 interviews that we had conducted. The majority of  
4 them all either described the person with the gray  
5 hooded sweatshirt or they didn't see anybody at all.  
6 They heard the shots, but they didn't see the person  
7 who did the shooting.

8 The only person was -- I believe was  
9 Ms. Perez who described Giovanni and said that he  
10 was the one that had done the shooting, which later  
11 determined based on the clothing he was wearing and  
12 the clothing the other witnesses described, that was  
13 not him.

14 BY MS. DEMONTE:

15 Q. Okay. Now, after you had gotten all  
16 these interviews describing the gray hooded  
17 sweatshirt, investigative wise, what did you try to  
18 do?

19 A. At that point we started looking into  
20 phone calls that were made by Giovanni Borradas the  
21 night of the shooting, we obtained the surveillance  
22 video from the school, we continued to search for  
23 other people that were associated with Mr. Borradas.

24 Q. Now, I'm gonna ask you specifically about  
25 that surveillance video from the school.

1                   You yourself reviewed that video,  
2 correct?

3           A.     I did.

4           Q.     And can you describe the quality of that  
5 video?

6           A.     The quality from inside the school area  
7 was okay. When you started looking at the exterior  
8 video, the fact that it was dark outside, the  
9 distance away from the cameras that the shooting  
10 took place, I couldn't identify anyone. Some of  
11 them I couldn't even see the scene where the  
12 shooting had occurred.

13          Q.     Okay. So was the video at all helpful in  
14 your investigation?

15          A.     It was not.

16          Q.     Okay. And you said you looked into phone  
17 records of Giovanni's phone.

18                   Did you actually obtain a subpoena  
19 for his records?

20          A.     I did.

21          Q.     And what did you determine once you  
22 obtained those records via subpoena?

23          A.     That there was approximately 20 calls  
24 placed to and from his phone to a Manuel Lopez, and  
25 then there were also approximately 12 calls placed

1 either to or from his phone to a Melinda Lopez.

2 Q. And during what time frame were those  
3 phone calls taking place?

4 A. At about the time of the murder and  
5 afterwards.

6 Q. Okay. Was it the time of the murder for  
7 sure or was it leading up to the murder and  
8 afterwards?

9 A. It was leading up to and after.

10 Q. Okay. And did you determine who Manuel  
11 Lopez was?

12 A. Yes.

13 Q. Okay. And did you actually speak with  
14 Manuel Lopez?

15 A. I did on two occasions.

16 Q. Okay. And when was that first occasion?

17 A. It was a couple days after the shooting  
18 had occurred.

19 Q. Okay. And I'm showing you State's  
20 Exhibit 58. Is that Manuel Lopez?

21 A. It is.

22 Q. And did you make a determination after  
23 interviewing with Mr. Lopez as to whether or not he  
24 was even present?

25 A. He was present at the time that the

1 shooting took place and he drove to the school where  
2 the shooting took place.

3 Q. Okay. Now, after speaking with Mr.  
4 Lopez, where did your investigation take you?

5 A. At that point, we continued following up  
6 on information that we had. We began to review the  
7 video, go over all the other statements that we had  
8 obtained and then I received information from  
9 Detective Ericcson.

10 Q. And who is Detective Ericcson?

11 A. He is a detective on the Metropolitan  
12 Police Department.

13 Q. Okay. And what unit is he assigned to?

14 A. The gang unit.

15 Q. Okay. And did Detective Ericcson inform  
16 you that he was conducting a different  
17 investigation?

18 A. Yes.

19 Q. Okay. And did he tell you what  
20 investigation he was conducting?

21 A. He did.

22 Q. And what investigation was that?

23 A. He was conducting an investigation into  
24 the shooting of a person by the name of Jonathan  
25 Harper. And Jonathan was shot by a person by the

1 name of Salvatore Garcia.

2 Q. Okay. And did Detective Ericcson  
3 indicate to you whether or not he believed Mr.  
4 Harper might have information?

5 A. He did.

6 Q. Did he tell what that information might  
7 be though?

8 A. All he told me on the phone was that this  
9 information that Mr. Harper had was concerning the  
10 shooting that we were investigating at the Morris  
11 Academy.

12 Q. And did you then interview Mr. Harper?

13 A. I did.

14 Q. Okay. And when did that interview take  
15 place?

16 A. I believe it took place -- I would have  
17 to refer to his statement to be accurate on the  
18 date, but it was a couple months after the shooting  
19 had occurred at Mr. Harper's residence where his  
20 mother lived.

21 Q. Okay. And who was present during this  
22 interview?

23 A. It was myself, Detective Hardy, Mr.  
24 Harper, his mother, and I believe his father was  
25 there also.

1           Q.     Now, to be clear, what information did  
2 you have about the identity of the shooter at the  
3 time you interviewed Mr. Harper?

4           A.     All I had was a clothing description and  
5 a vague description of a Hispanic male approximately  
6 19 years old.

7                     I believe there was some physical  
8 description as to medium to thin build,  
9 approximately 5 foot 7 to 5 foot 9.

10          Q.     Okay.

11          A.     With a shaved head.

12          Q.     And when you conducted your interview  
13 with Mr. Harper, did you ever provide information to  
14 Mr. Harper?

15          A.     I did not.

16          Q.     Did you ever tell Mr. Harper what to say?

17          A.     I did not.

18          Q.     Did you make any promises to Mr. Harper?

19          A.     I did not.

20          Q.     Now, detective, we've heard testimony  
21 that Mr. Harper believes you had made a promise of  
22 immunity to him.

23                     Is this the first time you're  
24 hearing that?

25          A.     It is not.

1           Q.     Was the first time you heard that at  
2 preliminary hearing?

3           A.     That's correct.

4           Q.     Do you know where that came from?

5           A.     I have no idea. We don't offer immunity  
6 to anyone. That's not something that we're  
7 authorized to do, nor would we even do that prior to  
8 interviewing somebody because it could sway their  
9 information one way or the other.

10          Q.     Based on your knowledge as to what had  
11 occurred and your interview with Mr. Harper, was  
12 there any need for such a promise anyway?

13          A.     There was not.

14          Q.     Was Mr. Harper in danger of facing  
15 charges?

16          A.     No.

17          Q.     Why not?

18          A.     The only crime that I could determine  
19 that Mr. Harper had committed is that he went to the  
20 school with some other individuals; Mr. Lopez being  
21 one, Mr. Lopez's girlfriend, Decarlois another, and  
22 then a person by the name of Evaristo Garcia with  
23 the intent to fight.

24                     Fighting is a misdemeanor that did  
25 not occur in my presence, so hence I would not be



1 able to make an arrest on somebody who is going  
2 somewhere to fight.

3 Q. Okay. Now, after conducting your  
4 interview with Mr. Harper, did you have a little bit  
5 more information about who was in the gray hooded  
6 sweatshirt?

7 A. I did.

8 Q. And would that be a first name?

9 A. Yes.

10 Q. Armed with that information, were you  
11 able to conduct additional investigation at that  
12 point?

13 A. Yes. We followed up on that.

14 Q. Okay. And at some point did you receive  
15 information?

16 A. Yes.

17 Q. And what is Crime Stoppers?

18 A. Crime Stoppers is a program by which a  
19 citizen can call into a number, provide information  
20 to the police concerning an investigation that they  
21 have knowledge of or crime that they have knowledge  
22 of and remain anonymous.

23 Q. Okay. And in approximately May of 2006,  
24 did you actually receive a Crime Stopper tip?

25 A. Yes.

1 Q. With regards to this case?

2 A. That's correct.

3 Q. Without telling me the specific  
4 information, did that lead you to a certain area of  
5 town?

6 A. Yes. It led me to the 4900 block of  
7 Pearl Street.

8 Q. And what did you do investigative wise at  
9 3900 block of Pearl Street?

10 A. 4900. We had a --

11 Q. Sorry.

12 A. -- specific address. I believe it was  
13 4985 Pearl Street. I went to that location,  
14 obtained a license plate number from the vehicles  
15 that were parked there.

16 I also did a sight check on a house  
17 to see who was living there, power check, and I  
18 determined that the woman and the man that lived  
19 there, the woman worked at the Stratosphere Casino.

20 I called the Stratosphere, provided  
21 the security personnel there with her name, and they  
22 then provided me with some employment information  
23 that she had given them concerning emergency  
24 contacts. One of those emergency contacts that she  
25 listed was her son Evaristo Garcia at that address.

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1 Q. And now that you have the name Evaristo  
2 Garcia and an address, did you then attempt to  
3 obtain a photograph?

4 A. I did.

5 Q. And where did you get that photograph  
6 from?

7 A. From the driver's license, the Nevada  
8 driver's license. Went on to website that we use,  
9 obtained his photograph and then I took that  
10 photograph and obtained some other photos that were  
11 similar looking to the photograph of Evaristo Garcia  
12 and then I conducted a photo lineup.

13 Q. And who did you show that photo lineup  
14 to?

15 A. I showed that photo lineup to Jonathan  
16 Harper and Manuel Lopez.

17 Q. Okay. And did Jonathan Harper make an  
18 identification for you?

19 A. He did.

20 Q. Who did he identify?

21 A. Evaristo Garcia.

22 Q. Did Manuel Lopez make an identification  
23 for you?

24 A. He did.

25 Q. Who did he identify?

1           A.     Evaristo Garcia.

2           Q.     After you obtained that information, what  
3 did you do next?

4           A.     After that, I wanted to confirm some  
5 additional information, reviewed some of the  
6 statements, reviewed the secret witness information,  
7 reviewed the information that I obtained from  
8 Jonathan Harper, and then I applied for and was  
9 granted an arrest warrant for Evaristo Garcia  
10 charging him with murder with a weapon.

11          Q.     Now, in addition to applying for the  
12 arrest warrant of Evaristo Garcia, did you also  
13 apply for an arrest warrant for someone else?

14          A.     I did. On June 15th, I applied for both  
15 the arrest warrants for Evaristo Garcia and Yobanni  
16 Borradas.

17          Q.     Okay. And were both of those granted?

18          A.     They were.

19          Q.     And to your knowledge were both of those  
20 granted on June 26th, 2006?

21          A.     I believe that's the date.

22          Q.     Now, was Giovanni Borradas arrested close  
23 in proximity after that?

24          A.     He was.

25          Q.     Okay. And he actually -- sorry. Court's

1 indulgence. So Giovanni was arrested on that  
2 warrant.

3 What about Evaristo? Was he  
4 arrested on the warrant?

5 A. Eventually he was arrested. I was unable  
6 to locate him at the time that the warrant was  
7 issued. He was nowhere to be found.

8 Q. Now, after you obtained these arrest  
9 warrants, Giovanni is now in custody and Evaristo is  
10 still out and you're unable to locate him, was there  
11 another witness that then came forward to be  
12 interviewed by you?

13 A. Yes.

14 Q. And who was that?

15 A. Edshel Calvillo.

16 Q. And do you recall when that interview  
17 took place?

18 A. I believe that took place about a year  
19 later. Maybe July of '09.

20 Q. Would it refresh your recollection to see  
21 Edshel Calvillo's --

22 A. Yes.

23 MS. DEMONTE: May I approach the witness,  
24 Your Honor?

25 THE COURT: You may.

1 THE WITNESS: Sorry. July of '06.

2 BY MS. DEMONTE:

3 Q. Oh, you got it?

4 A. Yes.

5 Q. Okay. And after conducting your  
6 interview with Edshel Calvillo, did you take any  
7 action with respect to Giovanny?

8 A. No.

9 Q. Did you call up and say dismiss all  
10 charges?

11 A. Did not.

12 Q. Why not?

13 A. Because the warrant was appropriate, his  
14 being in custody was appropriate, and charges  
15 against him were charges that I had applied for  
16 based on a probable cause that I had for his arrest  
17 concerning the murder of Victor Gamboa.

18 Q. Now, did you believe Giovanny to be the  
19 shooter?

20 A. No.

21 MR. FIGLER: I'm gonna object, Your  
22 Honor, as far as his belief.

23 THE COURT: Sustained.

24 MR. FIGLER: And I move to strike.

25 MS. DEMONTE: I'm sorry.

1 THE COURT: It will be stricken. That's  
2 an ultimate issue for the jury to determine.

3 MS. DEMONTE: Thank you.

4 BY MS. DEMONTE:

5 Q. When you applied for the arrest warrant  
6 against Giovanni Borradas, did you say that Giovanni  
7 Borradas was the shooter?

8 MR. FIGLER: And I'm gonna object as to  
9 what was said in an application for the most minimal  
10 of burden necessary in the system.

11 THE COURT: Sustained.

12 MS. DEMONTE: Okay.

13 THE COURT: Ask different questions.

14 MS. DEMONTE: I will.

15 The court: It's irrelevant what the  
16 officer's belief was, all right. It's an  
17 ultimate -- what you're asking this officer is  
18 ultimate issues that they will determine, all right?

19 MS. DEMONTE: All right.

20 BY MS. DEMONTE:

21 Q. But you had issued arrested warrants for  
22 both?

23 A. Yes.

24 Q. Okay. All right. Now detective, after  
25 speaking with Edshel Calvillo, were you still

1 looking for Evaristo Garcia?

2 A. We were.

3 Q. Now, prior to your interview with Edshel  
4 Calvillo, had you already contacted other personnel  
5 within the law enforcement community?

6 A. I did.

7 Q. Who did you contact?

8 A. After I obtained arrest warrants for  
9 murder suspects, I contact the FBI criminal  
10 apprehension team of which Special Agent Scott  
11 Hendricks is a member, and I advised him that I had  
12 an active arrest warrant for Evaristo Garcia.

13 Q. Okay. And at some point did you have to  
14 participate in the extradition process?

15 A. Yes.

16 Q. Okay. Now, prior to participating in the  
17 extradition process, did Scott Hendricks ask you to  
18 do something?

19 A. Yes.

20 Q. What did he ask you to do?

21 A. To go to Evaristo Garcia's mother and  
22 father's house on Pearl Street and just make contact  
23 with them to see what type of investigative leads  
24 that would generate.

25 Q. Okay. And did you in fact do that?



1 A. I did.

2 Q. Now, when you went to the house to  
3 contact Evaristo's parents, was Evaristo there?

4 A. He was not.

5 Q. Okay. And did you interview his parents?

6 A. I did.

7 Q. How long did that interview last?

8 A. Well, I can recall maybe 10, 15 minutes  
9 of conversation, was not recorded.

10 Q. Okay. And after leaving that interview,  
11 did you advise Agent Hendricks that the interview  
12 had concluded?

13 A. Yes.

14 Q. And did he share with you certain  
15 information?

16 A. Yes.

17 Q. Okay. Now, at some point in 2008, were  
18 you advised that the defendant was going to be  
19 returned to the United States?

20 A. That's correct.

21 Q. And did you actually show up at the  
22 McCarran International Airport to retrieve your  
23 suspect?

24 A. On October -- I believe it was 16th.

25 Q. And do you see Evaristo Garcia in the

1 courtroom today?

2 A. I do.

3 Q. Can you please point to him, describe  
4 something he's wearing?

5 A. Seated at defense counsel table, wearing  
6 the blue shirt and a shaved head with the small chin  
7 hair. (Indicating.)

8 MS. DEMONTE: Record reflect  
9 identification of defendant.

10 THE COURT: The record will reflect the  
11 identification of the defendant.

12 BY MS. DEMONTE:

13 Q. Now, does the defendant, as he sits here  
14 today, appear the same to you as he did when you saw  
15 him at McCarran?

16 A. His head's shaved a little bit more, he's  
17 a little bit bigger, but the facial features are  
18 still the same.

19 Q. Okay. So you're able to identify him,  
20 correct?

21 A. Yes.

22 Q. Showing you State's Exhibit 111, is this  
23 how Mr. Garcia appeared when you picked him up at  
24 McCarran?

25 A. That's correct.

1 Q. Okay. Now, two months later, did you  
2 participate in the preliminary hearing in this  
3 matter?

4 A. I did.

5 Q. And did you in fact testify in this case?

6 A. Yes.

7 Q. And did you in fact identify Mr. Garcia  
8 as being present in the courtroom during that  
9 preliminary hearing?

10 A. I did.

11 Q. Okay. Now, detective, throughout the  
12 course of this investigation from February 6th of  
13 2006 until the defendant was ultimately arrested,  
14 were certain forensics requested by yourself and/or  
15 Detective Hardy?

16 A. That's correct.

17 Q. And what was requested?

18 A. We requested that the cartridge casings  
19 recovered at the scene, excuse me, and the bullet  
20 fragments recovered at the scene be compared to a  
21 Makarov 9mm pistol which was recovered that night in  
22 the 800 block of Park Hurst inside the tank of a  
23 toilet that was sitting on the side of the street.

24 We also requested that the handgun  
25 be processed for fingerprints. And then later on

1 after the fingerprint processing had been conducted,  
2 I believe Detective Hardy also asked for some DNA  
3 processing of that weapon.

4 Q. Okay. To your knowledge was the DNA able  
5 to be completed?

6 A. It was not. The item location on the gun  
7 that they swabbed that they believed may have been  
8 blood was not.

9 Q. Okay. And -- now, you had asked for  
10 fingerprint processing.

11 Before Mr. Garcia was taken into  
12 custody, did you have certain known fingerprints  
13 samples that you requested the gun be compared to?

14 A. Yes.

15 Q. And who were those -- who did you request  
16 those to be compared to?

17 A. I believe it was Giovanny Borradas and  
18 Manuel Lopez.

19 Q. After Mr. Garcia was taken into custody,  
20 did you then make an additional request?

21 A. Yes. To have his fingerprints compared  
22 to those recovered from the pistol.

23 Q. Okay. And was additional information  
24 sought by the fingerprint lab to obtain additional  
25 prints?

1 A. Yes.

2 Q. And were those additional prints  
3 collected?

4 A. Yes.

5 Q. And did you then provide those to the  
6 fingerprint laboratory?

7 A. That's correct.

8 MS. DEMONTE: Okay. I'll pass the  
9 witness.

10 THE COURT: Cross-examination.

11 MR. FIGLER: Thank Your Honor.

12 CROSS-EXAMINATION

13 BY MR. FIGLER:

14 Q. Detective Mogg, I'm gonna start with a  
15 question. I might end with the same question in a  
16 different form. I just want to make sure I heard  
17 you right.

18 With regard to Jonathan Harper, you  
19 knew that Jonathan Harper was present when a call  
20 came out to go to the school to get into a fight,  
21 correct?

22 A. That's correct.

23 Q. And you know that Jonathan Harper got  
24 into an El Camino with Manuel Lopez, correct?

25 A. That's correct.

1           Q.     And with that knowledge, they went  
2 directly to the school. Based on your  
3 investigation, you learned that, correct?

4           A.     Yes.

5           Q.     And you also learned that Jonathan Harper  
6 got out of the vehicle and started fighting with  
7 people, correct?

8           A.     Yes.

9           Q.     He is not on the hook for murder for  
10 doing any of those things, correct?

11          A.     That's correct.

12          Q.     Even though there was some fight scenario  
13 that was going on, not on the hook for murder,  
14 correct?

15          A.     There were multiple people fighting.

16          Q.     Okay. Thank you for clearing that up for  
17 me. Now, Jonathan Harper says that you promised him  
18 immunity.

19                   He's just making that up?

20          A.     That's correct. That's not accurate.

21          Q.     Okay. You knew that he had a brain  
22 injury when you interviewed him, correct?

23          A.     Yes.

24          Q.     Okay. So you knew he was capable of  
25 making things up?

1           A.     There's always that potential with any  
2 witness.

3           Q.     Okay.  It's a little more when there's  
4 someone who has 23 percent of their brain blown out,  
5 correct?

6           A.     I wouldn't know about percentage of his  
7 brain, sir.

8           Q.     Okay.  So it's your testimony that you  
9 don't know anything about Evaristo Garcia until you  
10 get this secret witness -- and you don't know who  
11 the secret witness came from.  They're secret,  
12 right?

13          A.     That's correct.

14          Q.     It could have been Jonathan Harper's  
15 mother for all you know, correct?

16          A.     It could have been anyone.

17          Q.     It could have been anyone.  And  
18 information that you got from this Detective  
19 Ericcson, correct?

20          A.     That's correct.

21          Q.     Okay.  So presumably Detective Ericcson  
22 had some interaction with Jonathan Harper or his  
23 family before contacting you, correct?

24          A.     Yes.

25          Q.     And you and your partner Ken Hardy knew

1 that, correct?

2 A. That Detective Ericcson had spoken to  
3 Harper's family?

4 Q. Before you got to talk to him with Ken?

5 A. Yes.

6 Q. Okay. So you and Detective Hardy knew  
7 that Detective Ericcson had talked to him first and  
8 then you went and talked to him.

9 And I believe that date was in April  
10 of 2006, about 5 weeks after this incident had  
11 occurred, correct?

12 A. Approximately, yes.

13 Q. So if I told you it was at 1522 hours on  
14 April 1st, 2006, does that sound about right?

15 A. That would be accurate.

16 Q. Okay. And was there a discussion or  
17 coordination with Detective Ericcson about when he  
18 would go and interview Jonathan Harper that same  
19 day?

20 A. I don't believe so.

21 Q. Okay. It would be awkward if both of you  
22 showed up at exactly the same time to interview.  
23 You'd have to pick who goes first, right?

24 A. Yeah, I don't believe he was even there.

25 Q. On August -- I'm sorry. On April 1st,



1 2006?

2 A. That's correct.

3 Q. All right. I'm gonna show you something.  
4 Maybe it will refresh your recollection. I'm gonna  
5 show you a recorded statement of Jonathan Harper  
6 from April 1st, 2006.

7 Does that appear to be an official  
8 Metropolitan Police Department document?

9 A. Yes.

10 Q. Okay. And I want you to review that.  
11 And does that refresh your recollection that maybe  
12 Detective Ericcson came in to interview Jonathan  
13 Harper right after you and Detective Hardy left?  
14 Does it appear that way?

15 A. It could based on the time.

16 Q. Okay. Isn't it true, sir, that there was  
17 a conscious decision to make sure that you got  
18 information out of Jonathan Harper about the  
19 shooting before anyone was gonna show any interest  
20 in prosecuting the person who shot him in the head?

21 A. That's not accurate.

22 Q. That's not accurate. Just a coincidence  
23 that it was on the same day then?

24 A. Yes.

25 Q. And it was a coincidence that you went

1 first?

2 A. Probably not.

3 Q. Do you know if Jonathan Harper was afraid  
4 of Sal Garcia?

5 A. I don't know that I ever asked him  
6 whether or not he was afraid of him.

7 Q. Okay. Do you know if Detective Ericcson  
8 made him any promises before or after you spoke to  
9 him?

10 A. Not that I know of.

11 Q. Okay. Anything about protecting him if  
12 he helps out or anything like that?

13 A. Not that I know of.

14 Q. Okay. Now, let's go to some of the  
15 investigation that occurred. A call comes in that  
16 there's a shooting at a school.

17 So you go out, you and Detective  
18 Hardy split it up, he's dealing with any sort of  
19 evidence that might exist in the scene or the  
20 periphery. Your primary focus is interviewing the  
21 witnesses and reviewing those videotapes.

22 Is that a fair, general assessment  
23 of what happened out at the scene?

24 A. That's correct.

25 Q. Now, the prosecutor asked you on direct

1 is the only person who gave you any information that  
2 Giovanni was the shooter, Crystal Perez.

3 Do you remember that question?

4 A. I do.

5 Q. And you answered affirmative that the  
6 only one who gave any information to you about  
7 Giovanni being the shooter was Crystal Perez,  
8 correct?

9 A. To the best of my recollection.

10 Q. Okay. You interviewed a lot of kids out  
11 there that night, didn't you?

12 A. I interviewed some, my partners also  
13 interviewed several people.

14 Q. Okay. Do you remember who Brian Marquez  
15 was? Does that name sound familiar?

16 A. The name is familiar, I don't recall  
17 exactly what he told me. It's been almost seven  
18 years.

19 Q. Okay. Do you remember there was a car of  
20 kids who came over, maybe had Brian Marquez, the  
21 decedent in this case, they all came over? Do you  
22 remember that?

23 A. Yes.

24 Q. So maybe that name sounds familiar now,  
25 Brian Marquez?

1 A. The name sounds familiar.

2 Q. Okay.

3 A. It does.

4 Q. How about Gilbert Garcia? Does that name  
5 sound familiar?

6 A. Yes.

7 Q. Okay. That was another person who drove  
8 with Brian Marquez over to the school; isn't that  
9 correct?

10 A. Again, I'd have to refer to the  
11 statements. That's been seven years.

12 Q. Sure. And it might have been your  
13 partner who interviewed Gilbert Garcia, correct?

14 A. That's correct.

15 Q. All right. Well, let's find out. Here  
16 we go. May I approach, Your Honor?

17 THE COURT: You may.

18 THE WITNESS: I actually interviewed him.

19 BY MR. FIGLER:

20 Q. Oh, okay. You actually got that in front  
21 of you?

22 A. I do.

23 Q. Okay. You got the big book. So you  
24 interviewed Gilbert Garcia. Do you want to review  
25 that for a second, make sure we're talking about the

1 same guy, that he was the guy that drove over with  
2 Brian Marquez and Victor Gamboa?

3 Maybe just the first couple of pages  
4 might refresh your recollection.

5 A. Yes.

6 Q. Okay. Now, we've heard from Brian  
7 Marquez, but I don't think that the prosecution  
8 called Gilbert Garcia. Let me ask you, you  
9 interviewed him.

10 Can you turn to page seven?

11 MS. DEMONTE: Object as to hearsay.

12 MR. FIGLER: I haven't asked a question  
13 yet.

14 THE COURT: He just said turn to page  
15 seven.

16 MS. DEMONTE: Okay.

17 THE COURT: Overruled.

18 BY MR. FIGLER:

19 Q. Now, during the course of your  
20 investigation, detective, there were other people  
21 than Crystal Perez who were indicating they heard  
22 information that Giovanny had the gun  
23 contemporaneous, in fact, right before the shooting;  
24 isn't that correct?

25 MS. DEMONTE: Objection, hearsay. Calls

1 for hearsay.

2 MR. FIGLER: It's impeachment and it also  
3 is something that during the course of the  
4 investigation. It's not for the truth of the  
5 matter. It's just based on his investigation and  
6 according to his --

7 MS. DEMONTE: Not if it's --

8 THE COURT: I'm gonna overrule it.

9 MR. FIGLER: Thanks.

10 BY MR. FIGLER:

11 Q. So this witness told you that before the  
12 shooting he heard with his own ears someone scream  
13 Giovanni's got a strap and then he heard the gun  
14 shots bam, bam, bam; is that correct?

15 A. If I can read that section.

16 Q. Go ahead.

17 THE COURT: And this is Brian Marquez; is  
18 that correct?

19 MR. FIGLER: No, no. This is Gilbert  
20 Garcia.

21 MS. DEMONTE: Somebody who didn't  
22 testify.

23 MR. FIGLER: Someone they didn't call.  
24 But based of this investigation, it's part of his  
25 investigation.

1 MS. DEMONTE: So the State renews it's  
2 objection as to hearsay.

3 THE COURT: Well, it's an out-of-court  
4 statement on somebody on identification as well.  
5 I'm gonna allow it.

6 MR. FIGLER: Thank you, Your Honor.

7 BY MR. FIGLER:

8 Q. Do you see where I'm pointing there on  
9 seven?

10 A. I do. I don't know that this girl was  
11 with him, was in an area where she could have seen.

12 Q. I got that, but I'm just asking if that  
13 information was imparted to you; yes or no?

14 A. It's in his statement.

15 Q. Okay. Now, you said that there was a  
16 general description of the person who shot, correct?

17 A. Yes.

18 Q. And they said he was wearing shorts,  
19 correct?

20 A. I believe the prevailing description was  
21 the gray tank top -- or gray hooded sweatshirt  
22 rather, and then the shorts, pants changed with  
23 witnesses.

24 Q. But other than that, you had a lot of --  
25 let's take the gray sweatshirt out for just half a

1 heartbeat.

2                   That was a description that could  
3 have described pretty much everyone that you were  
4 interviewing; Giovanny, Manuel, Edshel, Sal Garcia.  
5 All those guys generally fit that description age  
6 wise, Hispanic wise, short or shaved head, that sort  
7 of thing, correct?

8           A.       With the exception of the person that was  
9 shooting that had the gray hooded sweatshirt on,  
10 yes.

11          Q.       Thank you. Now, this is gonna sound  
12 like -- I've been asking stupid questions all day.

13                   Is a gray hooded sweatshirt  
14 something that has to stay on somebody at all times,  
15 is a removable item?

16          A.       They weren't removing it when they were  
17 shooting.

18          Q.       I got that. I'm asking in general. Is a  
19 sweatshirt something that's permanently affixed to a  
20 person's body or is it something that can be easily  
21 taken off?

22          A.       It would think it could be easily taken  
23 off.

24          Q.       Thank you, sir. I told you it was a  
25 stupid question, but you gave me a smart answer. I



1 appreciate it.

2 Now, let's talk a little bit about  
3 Manuel Lopez. Manuel Lopez was the person who  
4 Giovanni was making phone calls to, correct?

5 A. That's correct.

6 Q. And you were able to confirm that,  
7 correct?

8 A. Yes.

9 Q. Okay. And that was prior to the shooting  
10 occurring, correct?

11 A. Yes.

12 Q. All right. And Manuel Lopez was over at  
13 Sal Garcia's house at some point, and you were able  
14 to confirm that, correct?

15 A. Correct.

16 Q. And Manuel Lopez got in the car that  
17 drove to the school. You were able to confirm that,  
18 correct?

19 A. Yes.

20 Q. And that was an El Camino which you later  
21 took into impound; is that correct?

22 A. Yes.

23 Q. Okay. And Manuel Lopez and you had a  
24 conversation; is that correct?

25 A. Yes.

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1 Q. And in that conversation, Manuel Lopez  
2 admitted to you he was wearing a gray sweater that  
3 day?

4 A. I think he said a gray sweater, but he  
5 was talking about a gray, and I can't remember the  
6 term that he used for this, but it wasn't hooded.

7 Q. Okay. But he admitted to that part,  
8 right?

9 A. That's correct.

10 Q. And he also admitted to owning the gun  
11 and having the gun, correct?

12 A. He didn't have the gun at the time the  
13 shooting took place.

14 Q. I got that.

15 A. But Evaristo did.

16 Q. Okay. I appreciate that. But he  
17 admitted to you that it was his gun, didn't he?

18 A. Yes.

19 Q. Okay. So Garcia got the call, Garcia got  
20 in his car, it was Garcia's car, it was Garcia's  
21 gun, Garcia drives to the school, Garcia has the  
22 sweatshirt that is gray, but not the hoody, he  
23 doesn't say that, you also find out that Garcia has  
24 prior knowledge of these toilets where the -- I'm  
25 sorry. I'm saying Garcia, I'm meaning Lopez.

1 I'm gonna redo that. Court  
2 reporter, I'm redoing.

3 Start with Lopez because we know  
4 Garcia doesn't have an El Camino. Lopez got the  
5 call, Lopez has the car, Lopez drives the car to the  
6 school, Lopez admits to wearing a gray sweatshirt,  
7 Lopez admitted it was his gun.

8 You also found out that Lopez  
9 previously worked at the exact place where the gun  
10 was found, correct?

11 A. At the where?

12 Q. At the place where the gun was found, the  
13 toilet bowls.

14 A. No.

15 Q. You didn't find that out?

16 A. No.

17 Q. Did -- Detective Hardy said that that was  
18 confirmed. You don't remember that?

19 A. There was two plumbing companies. The  
20 lady who lives at the house identified --

21 Q. Manuel Lopez, right?

22 A. Manuel Lopez as being a person who came  
23 in and did some flooring work when she had a toilet  
24 replaced.

25 Q. Got it. That's --

1           A.       But he didn't work for that plumbing  
2 company.

3           Q.       Got it. That's right, that's right, but  
4 she picked him out of the lineup?

5           A.       Yes.

6           Q.       Okay. And that was the place where the  
7 gun was found?

8           A.       In the toilet.

9           Q.       Right. And during the course of your  
10 investigation, you learned that at some point later  
11 Lopez tried to go back to retrieve the gun, but you  
12 guys had already gotten it, correct?

13          A.       That's correct.

14          Q.       Lopez. Let's talk about the video of the  
15 school.

16                    There's quite a bit of video, right?

17          A.       Yes.

18          Q.       And you say that there is nothing of  
19 value to it, right?

20          A.       Nothing that you can see the shooting and  
21 who is doing the shooting.

22          Q.       But you could probably see some kids out  
23 in the parking lot.

24                    Just generally speaking, you saw  
25 people, right?

1           A.     That's correct.

2           Q.     And there are, in general, and this is a  
3 question just in general, that there are  
4 enhancements techniques that can be used for videos  
5 to blow up and we see it on TV all the time that  
6 exists in the world, correct?

7           A.     Not for this type of video. Once you get  
8 to a point where the video was blurry, it doesn't  
9 get any better.

10          Q.     Okay.

11          A.     When you're trying to enhance video at  
12 night from a distance, it just picks the lights out  
13 and all you get are big blobs.

14          Q.     Okay. So do you have that video still,  
15 so I can show it to the jury?

16          A.     I have several videos.

17          Q.     Okay. Do you have the video in front of  
18 the parking lot?

19          A.     Yes, I do.

20          Q.     Okay. And there was like 18 different  
21 angles on that video; is that correct?

22          A.     I don't recall exactly how many different  
23 angles.

24          Q.     And I appreciate that you had some  
25 difficulty picking out some people, but I just want

1 to make it clear, you have nothing from that video  
2 that shows Evaristo fighting or shooting or doing  
3 anything, correct?

4 A. I don't have anything from the video that  
5 shows any people at all fighting or shooting.

6 Q. Okay. So that video doesn't implicate my  
7 client at all, correct?

8 A. No.

9 Q. And you did a thorough examination of  
10 course, because you're a good detective, of that El  
11 Camino where you ordered a thorough investigation of  
12 that El Camino, correct?

13 A. Yes.

14 Q. And there's no evidence in there  
15 whatsoever implicating my client Evaristo Garcia,  
16 correct?

17 A. We didn't find anything in the vehicle  
18 that belonged to him.

19 Q. Thank you. Now, finally, sir, you  
20 indicated that you went to Jonathan Harper after he  
21 had been shot, showed him a photo lineup and he was  
22 able to pick out Evaristo Garcia; is that correct?

23 A. That was after the initial interview that  
24 I did with him.

25 Q. Okay. What's a photo lineup?

1           A.       A photo lineup is a set of six  
2 photographs. You have your suspect in the photo  
3 lineup along with five people who look similar.  
4 They don't have to look exact, they just have to  
5 look similar.

6           Q.       And why is that? Why would you give six  
7 photographs instead of just one?

8           A.       Well, one would presume that someone was  
9 guilty. If I showed you one photograph and said is  
10 this the guy, some people will think that you have  
11 him in custody, it's got to be the guy.

12                       So we want to give a fair  
13 opportunity for somebody to look at several  
14 photographs and we want to be fair to the suspect,  
15 so that somebody just doesn't arbitrarily pick one  
16 photograph and show it to a witness and have that  
17 person identify them.

18          Q.       That's a caution. That's a good caution,  
19 right?

20          A.       That's correct.

21          Q.       Now, Jonathan Harper had just been shot  
22 in the head by Sal Garcia five weeks later and then  
23 he picks out Evaristo Garcia, correct?

24          A.       I don't recall the exact timeline, but  
25 that's approximate.

1           Q.     Okay. Edshel Calvillo voluntarily went  
2 into your office on his own free will, not under  
3 arrest, and he picked out Evaristo Garcia out of a  
4 photo lineup of six, a fair photo lineup, correct?

5           A.     That's correct.

6           Q.     Okay. You went to Melissa Gamboa and  
7 showed her a six pack of different people.

8                     And was she able to pick out  
9 Evaristo Garcia out of that six pack?

10          A.     I don't believe so.

11          Q.     Okay. Did Edshel Calvillo ever tell you  
12 what he was wearing that night at the night of the  
13 shooting?

14          A.     I don't recall.

15          Q.     In fact, he told you he didn't even go to  
16 the school, correct?

17          A.     That's correct.

18          Q.     Okay. If he was giving you bad  
19 information on that, is that of concern to you?

20          A.     Well, I corroborated his statement other  
21 ways.

22          Q.     Okay. So you were sure that -- so if he  
23 told somebody that he was at the school or drove to  
24 the school, you corroborated that that's not true,  
25 correct?



1           A.       I corroborated that he was not with  
2 Evaristo Garcia, Manuel Lopez, Ms. Decarlois and  
3 Jonathan Harper in the El Camino when they drove to  
4 the school.

5           Q.       Okay. But he could have been in a car  
6 right behind him, you don't know?

7           A.       Not that anybody knew.

8           Q.       Okay. Did you ever find a gray hooded  
9 sweatshirt that is in any way linked to my client?

10          A.       No.

11          Q.       Court's indulgence. Detective, would you  
12 be surprised to know that Edshel Calvillo testified  
13 that he drove to the school that night of the  
14 shooting?

15                 MS. DEMONTE: Objection. Misstates the  
16 evidence.

17                 THE COURT: I'm gonna overrule it.

18                 MR. FIGLER: He drove.

19                 THE COURT: I'll let the jury determine  
20 who said they were driving.

21 BY MR. FIGLER:

22          Q.       Would you be surprised if Edshel Calvillo  
23 said that that night after the Camino left, he got  
24 into the car with Sal Garcia and he drove to the  
25 school as well?

1 A. I don't know what he testified, counsel.

2 Q. Does that surprise you, that information?

3 A. That he drove to the school?

4 Q. Yeah.

5 A. He told me he didn't drive to the school.

6 Q. Okay. No further questions, Your Honor.

7 THE COURT: Redirect.

8 MS. PANDUKHT: Court's indulgence.

9 REDIRECT EXAMINATION

10 BY MS. DEMONTE:

11 Q. I'm gonna ask Mr. Figler's last question  
12 a different way. Would it ask surprise you if  
13 Edshel Calvillo took the stand and said that he got  
14 in the car with Sal and they were driving to the  
15 school but got stuck at a stoplight and by the time  
16 they got to the school, the fight was already over?

17 A. No, it wouldn't surprise me.

18 Q. Okay. Now, counsel had asked you about  
19 Manuel Lopez telling you what he wore that day.

20 And he actually did during one of  
21 the statements he gave you, gave you a description  
22 of what he was wearing during the night of the  
23 shooting; is that correct?

24 A. That's correct.

25 Q. Do you off the top of your head remember

1 exactly what he said?

2 A. No. It was some kind of term they have  
3 for the clothes he was wearing.

4 Q. Okay. Would it refresh your recollection  
5 if I showed you page 13 of that statement?

6 A. It would.

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

9 THE COURT: You may.

10 THE WITNESS: That's it. Ben Davis.

11 BY MS. DEMONTE:

12 Q. Okay. Does he use the phrase hoody?

13 A. No.

14 Q. Does he use the phrase sweater?

15 A. No.

16 Q. Okay. And what color gray did he say it  
17 was?

18 A. I believe it was dark gray.

19 Q. Specifically?

20 A. Charcoal gray.

21 Q. Okay. And you actually met and saw  
22 Manuel Lopez?

23 A. I did.

24 Q. Besides being a Hispanic male of that age  
25 range, did he match the description otherwise?

1 A. No.

2 Q. Why not?

3 A. He was much bigger than the way they  
4 described the suspect that was wearing the gray  
5 hooded sweatshirt.

6 Q. And is Manuel Lopez obviously bald?

7 A. Yes.

8 Q. Okay. Now, counsel had asked you about  
9 whether Melissa Gamboa was able to identify Mr.  
10 Garcia from a lineup.

11 Did you actually show Melissa Gamboa  
12 a lineup?

13 A. I don't recall if I did or not.

14 Q. Okay. Have you had contact with her  
15 after Evaristo Garcia was taken into custody?

16 A. No.

17 Q. Okay. In fact, when was the first time  
18 you saw her after he was taken into custody?

19 A. I believe it was at the preliminary  
20 hearing.

21 Q. All right. Now, you had mentioned people  
22 being in the car.

23 Are you talking about the El Camino?

24 A. That's correct.

25 Q. And you said it was Manuel Lopez?

1 MR. FIGLER: Well, I'm gonna object. It  
2 goes to personal knowledge. I mean, again, I  
3 appreciate going over testimony again, but he got  
4 this from other information. He wasn't there, he  
5 didn't see it.

6 MS. DEMONTE: Same response to a question  
7 Mr. Figler asked.

8 THE COURT: Overruled.

9 MS. DEMONTE: Thank you.

10 BY MS. DEMONTE:

11 Q. When Mr. -- when you had responded to Mr.  
12 Figler about who was in the car, you used the name  
13 Decarlois.

14 Who is Decarlois?

15 A. That is Manuel Lopez's girlfriend.

16 Q. And do you remember her first name?

17 A. If I could look at my notes, I could  
18 remember her first name.

19 Q. Okay.

20 A. I want to say it was Melissa or something  
21 like that.

22 MR. FIGLER: We'll stipulate to Stacy,  
23 Your Honor.

24 MS. DEMONTE: Thank you.

25 BY MS. DEMONTE:

1           Q.     And you actually obtained a photograph of  
2 Stacy Decarlois, correct?

3           A.     I did.

4           Q.     Okay. And where did you obtain that  
5 photograph from?

6           A.     It's a driver's license photograph.

7           Q.     Okay. And do you have any knowledge  
8 personally as to what Stacy Decarlois looked like on  
9 the night of February 6th?

10          A.     I don't recall.

11          Q.     Okay. Now, counsel was asking you about  
12 things Manuel Lopez admitted to you. He admitted to  
13 owning the gun is what counsel asked you.

14                   Did he also admit to you that he  
15 gave that gun to the shooter?

16          A.     Yes.

17                   MS. DEMONTE: Nothing further.

18                   THE COURT: Any recross?

19                   MR. FIGLER: None.

20                   THE COURT: Do the ladies and gentlemen  
21 of the jury have any questions for this witness?  
22 With a negative response -- wait. We have one.  
23 Okay. I'll see the attorneys at the bench.

24                   (Whereupon, the following proceedings  
25 were had in open court outside the

1 presence of the jury panel.)

2 THE COURT: This is from Juror No. 7,  
3 Keith Trombetta.

4 MS. PANDUKHT: Oh, that's a good  
5 question.

6 THE COURT: Any objection?

7 MS. PANDUKHT: No.

8 MR. FIGLER: No objection.

9 MR. GOODMAN: No.

10 (Whereupon, the bench conference ended.)

11 THE COURT: This is from Juror No. 7.  
12 What is a Ben Davis?

13 THE WITNESS: To the best of my  
14 knowledge, it is a Dickies brand of clothing. So  
15 like a Dickies shirt and a pair of Dickies pants.

16 THE COURT: Is there any follow-up by the  
17 State?

18 MS. DEMONTE: None by the State.

19 THE COURT: Any by the defense?

20 EXAMINATION

21 BY MR. FIGLER:

22 Q. So you're guessing, you don't really have  
23 a personal knowledge of that?

24 A. Right. I don't wear them.

25 Q. You don't know their full line, do you?

1           A.       I don't, no.

2                   MR. FIGLER: All right, thanks. No  
3 further questions.

4                   THE COURT: Thank you very much,  
5 Detective Mogg. You're excused.

6                   THE WITNESS: Thank you, Your Honor.

7                   THE COURT: All right. This is a good  
8 time to take our lunch break.

9                           During this recess, you're  
10 admonished not to talk or converse among yourselves  
11 or with anyone else on any subject connected with  
12 this trial.

13                           Or read, watch or listen to any  
14 report of or commentary on the trial or any person  
15 connected with this trial by any medium of  
16 information, including, without limitation,  
17 newspapers, television, radio or internet.

18                           Or form or express any opinion on  
19 any subject connected with the trial until the case  
20 is finally submitted to you.

21                           We'll take an hour for lunch. Maybe  
22 an hour and 10. So let's do 1:20 we'll resume  
23 testimony. Thank you. Have a good lunch.

24                           (Whereupon, the jury exited the  
25 courtroom.)



1 THE COURT: I think we can go off the  
2 record.

3 (Whereupon, a lunch break was had.)

4 THE COURT: Good afternoon, ladies and  
5 gentlemen. We're back on the record in the presence  
6 of the jurors in State of Nevada versus Evaristo  
7 Garcia. Case No. C262966.

8 Let the record reflect the  
9 defendant's present with his attorneys, Mr. Goodman  
10 and Mr. Figler are present, and for the State Ms.  
11 Pandukht and the Ms. Demonte.

12 We'll have the State call their next  
13 witness.

14 MS. PANDUKHT: Thank you, Your Honor.  
15 The State calls Meghan Clement.

16 THE CLERK: Please remain standing and  
17 raise your right hand.

18 (Whereupon, Meghan Clement was duly sworn  
19 to tell the truth, the whole truth, and  
20 nothing but the truth.)

21 THE CLERK: Please be seated. State and  
22 spell your full name for the record, please.

23 THE WITNESS: My name is Meghan Clement.  
24 The first name is M-e-g-h-a-n. And the last name is  
25 C-l-e-m-e-n-t.

1 DIRECT EXAMINATION

2 BY MS. PANDUKHT:

3 Q. Good afternoon.

4 A. Good afternoon.

5 Q. What is your occupation?

6 A. I am the senior director of Forensic DNA  
7 Identity Testing at Selmer Forensics which is  
8 located in Dallas, Texas.

9 Q. How will have you been working there?

10 A. I have been at Selmer, I just had my one  
11 year anniversary. Previous to that, I was working  
12 for a company called Labcorp which was located in  
13 Research Triangle Park, North Carolina.

14 Labcorp had actually purchased the  
15 company in Dallas and then merged the two labs and  
16 chose the Dallas location as the central location  
17 for our testing.

18 So all together, I've been with  
19 Labcorp for a little -- about 18-and-a-half years.

20 Q. And how long have you been working in the  
21 field that you're currently in in total?

22 A. I have been in forensics since 1985. So  
23 a little over 28 years now.

24 Q. And in 2006, what was your position?

25 A. In 2006, I was the technical director of

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1 the forensic identity laboratory in Research  
2 Triangle Park, North Carolina which was the Labcorp  
3 local site.

4 Q. Who worked under you when you were the  
5 director of Labcorp in 2006?

6 A. As the technical director, I was  
7 responsible for all of the daily functions, I was  
8 responsible for the technologists, advising them  
9 what testings to perform. I was also in charge of  
10 the daily activities of my associate technical  
11 directors.

12 I've personally interpreted all of  
13 the data of cases that came across my desk, wrote  
14 reports, calculated statistics, testified. And I  
15 also had a lot of administrative duties as well as  
16 some marketing duties.

17 Q. And what particular individuals worked  
18 under you? Did they include a Duane Winston and a  
19 Sean Weise?

20 A. Yes, that's correct.

21 Q. And did they work with you in 2006 at  
22 Labcorp?

23 A. Yes, they did. We all worked together  
24 from 1994 through the closing of the laboratory in  
25 June of 2012.

1           Q.       So while the laboratory closed in North  
2 Carolina, it kind of just moved a little bit and got  
3 a little bigger it sounds like?

4           A.       That's correct. The Dallas facility was  
5 much larger than the facility in North Carolina and  
6 so they simply merged the two laboratories. The  
7 Selmer Forensics Lab in Texas is still a Labcorp  
8 owned subsidiary. So it's still a Labcorp company.

9                   I've been with Labcorp for, like I  
10 said, over 18 years now and it's still owned by  
11 Labcorp.

12          Q.       Is Labcorp accredited nationally and what  
13 does that mean?

14          A.       Yes. Labcorp is accredited by multiple  
15 organizations. Both the facility in North Carolina,  
16 as well as the facility in Dallas are accredited by  
17 the American Society of Crime Laboratory Directors  
18 Laboratory Accreditation Board under the  
19 international standards.

20                   We are both -- the North Carolina  
21 lab was, and the Dallas still currently is  
22 accredited by the New York State Department of  
23 Health.

24                   We also hold an accreditation  
25 through the Texas Department of Health, as well as

1 the Maryland State Department of Health.

2 The individual state labs require  
3 that any company doing work in their lab have their  
4 own certification from the independent states.

5 So what does it mean to be  
6 accredited? To become accredited, you first have to  
7 submit all of your manuals, your SOPs, standing  
8 operating procedures, your quality program, what  
9 steps you take.

10 And there's a certain set of  
11 criteria that are required for each of the agencies.

12 After you submit all of the raw data  
13 to them, they will actually perform an on-site  
14 inspection of the laboratory where they will inspect  
15 the facility, the instrumentation, ensure that you  
16 are employing the quality measures that you have set  
17 up in your laboratory to employ, as well as ensuring  
18 that you are meeting the minimum requirements that  
19 they require.

20 And it runs the gambit everywhere  
21 from ensuring that you perform maintenance on your  
22 instruments at regular intervals all the way to  
23 performing quality control checks on every chemical  
24 that is a critical reagent, et cetera.

25 Q. Now, in preparation for your testimony

1 today, did you bring your case file that is under  
2 your lab number F066724?

3 A. I did, yes. I brought a copy of it.

4 Q. And is this an item of evidence that you  
5 analyzed at Labcorp with regard to a Las Vegas  
6 Metropolitan Police Department event number? And  
7 that event number is -- let's see. 0602062820.

8 A. Yes.

9 MS. PANDUKHT: May I approach the  
10 witness, Your Honor?

11 THE COURT: You may.

12 BY MS. PANDUKHT:

13 Q. I'm showing you what has been marked as  
14 State's proposed Exhibit No. 109.

15 Do you recognize this and any seals  
16 that you recognize on this item?

17 A. Yes, I do. There are two things that  
18 allow me to recognize this. The first is our  
19 sessioning label. It's a unique identification  
20 number that is given to each item of evidence that  
21 is submitted to Labcorp.

22 It has the Labcorp Case No. 6724  
23 with the initials of one of our technologists, the  
24 unique ID number 10, and also the evidence seal on  
25 the back of Sean Weise was the one who actually

1 sealed this the day that he sealed it prior to  
2 returning it to the agency.

3 Q. Okay. And so was this particular item of  
4 evidence examined at Labcorp?

5 A. Yes, it was.

6 Q. Do you remember what approximate date?

7 A. These items were received on October 5th  
8 of 2006. And so it would have been within a couple  
9 of days.

10 If I can refer to my notes, I can  
11 tell you exactly what day they were examined.

12 Q. Would referring to your report or your  
13 notes reflect your recollection?

14 A. Yes, they would.

15 Q. Then please do so.

16 A. Okay. So the -- this particular item  
17 was, the analysis was begun on October 11th.

18 Q. Of what year?

19 A. Of 2006. I'm sorry.

20 Q. And what is contained within this piece  
21 of evidence?

22 A. In this particular item of evidence,  
23 there was a swab which had a reddish stain on a  
24 portion of that swab tip and it was labeled as from  
25 the rear of slide.

1           Q.     And did it have an item number also  
2 listed or was that listed in your report?

3           A.     The item number was listed in our report  
4 and it was provided on chain of custody  
5 documentation that was accompanying this item of  
6 evidence when we received it.

7           Q.     So was that the chain of --

8           A.     And it's also -- I'm sorry. It's also  
9 listed up here on the label.

10          Q.     What does it say?

11          A.     It's item 11-A.

12          Q.     Thank you.

13          A.     Uh-huh.

14          Q.     Okay. I have one more question. I'm  
15 gonna re-approach.

16                   Now that you showed me this label, I  
17 want to you read what else it says. It says item  
18 11-A, but this sticker, does it have a police  
19 department where it's from?

20          A.     It does. It's listed as Las Vegas  
21 Metropolitan Police Department and it has the Event  
22 No. 0602062820.

23          Q.     And does that sticker also have the  
24 description like the envelope?

25          A.     It does. It lists it as a swab of



1 reddish stain from rear of slide.

2 Q. Thank you. Now, was this reddish, brown  
3 stain given any kind of what's known as presumptive  
4 testing for the presence of blood?

5 A. It was, yes. We tested a portion of the  
6 stain itself.

7 Q. First, could you tell the jury what a  
8 presumptive test for blood is?

9 A. Certainly. A presumptive test is a test  
10 which is used to help determine whether something  
11 could be blood or not.

12 So if you get a positive, it doesn't  
13 mean that it absolutely is blood. It may or may not  
14 be. So it just gives us the information as to  
15 whether we should move forward with that particular  
16 item for testing.

17 Q. And in this particular case, was that  
18 reddish, brown stain given this presumptive testing  
19 for the presence of blood?

20 A. It was. We performed a presumptive test  
21 on about 10 percent of the reddish, brown stain.

22 Q. What were the results?

23 A. And it revealed a negative result for the  
24 presence of blood.

25 Q. And why is it that you only tested a

1 portion of it and not the entire stain? Is that  
2 common practice?

3 A. It is, absolutely. Because if you test  
4 the entire stain, then there wouldn't be anything  
5 left to move forward with DNA.

6 And so in this particular case, you  
7 usually take, for any presumptive test, just a small  
8 portion of the overall stain.

9 Q. And then did you also attempt to isolate  
10 any form of DNA from it to see if there was a  
11 sufficient amount of DNA there?

12 A. Yes, we did. We then went back to the  
13 swab and we took an additional portion about four  
14 times of what we took for the presumptive test to  
15 extract any DNA which might be present on that swab.

16 Once we extracted the DNA, we go to  
17 the next step which is called a quantitation step.  
18 And in this step, you are trying to determine how  
19 much DNA you've been able to recover from that  
20 particular sample.

21 And when we performed the  
22 quantitation, we got a zero result. And so when we  
23 perform the extraction, we end up with about a  
24 hundred microliters of a fluid. We take only two  
25 microliters of that for quantitation.

1                   And when that gave us a zero, we  
2 then went back to the entire 98 microliters that  
3 were left, we concentrated it down to approximately  
4 13 microliters and then took two more of that to  
5 quantitate it again to be sure there was nothing  
6 that we could detect.

7                   And on that second quantitation,  
8 there was also a zero result. So there was no  
9 indication of the presence of human DNA in that  
10 sample.

11           Q.       And then the last thing I wanted to ask  
12 you about was I had noticed that there was an  
13 amended certificate of analysis.

14                   Was there any difference in the  
15 first one and second report?

16           A.       There were no differences as far as the  
17 results were concerned. The only difference was in  
18 the first report we listed subject and the  
19 individual's name and we were requested to go back  
20 and change the word subject to victim.

21                   So that was the only difference is  
22 how that individual was listed on the report.

23           Q.       And what name was next to that person?

24           A.       The name next to that person was Victor  
25 Gamboa.

1 MS. PANDUKHT: No further questions.

2 THE COURT: Cross?

3 MR. FIGLER: Thank Your Honor.

4 CROSS-EXAMINATION

5 BY MR. FIGLER:

6 Q. I'll try to do this brief, too. So  
7 ma'am, Labcorp didn't take any substances off of any  
8 objects, correct?

9 A. That is correct. The -- only the swab  
10 that was submitted to us.

11 Q. So basically you got something in the  
12 mail, you opened it up and then that's what you're  
13 testifying about what came to you, correct?

14 A. Yes.

15 Q. You have no idea where it actually came  
16 from because you weren't present, you don't have  
17 personal knowledge, correct?

18 A. That's correct.

19 Q. Okay. So that's number one. Also, with  
20 regard to the swab, the swabbing that's sent you is  
21 only as good as the person who did the swabbing. Is  
22 that a good general rule?

23 A. Uh --

24 Q. Let me rephrase it, how about that,  
25 because I saw a little consternation on your face.

1 If a person did -- say there was a DNA substance but  
2 a person failed to gather it correctly and they send  
3 you an empty basically, you're not gonna come up  
4 with anything, that was kind of a waste of  
5 everybody's time, right?

6 A. That's correct.

7 Q. Okay. So it's really the person who  
8 gathered the swab or the evidence or whatever,  
9 that's the person I should be asking those questions  
10 to, correct?

11 How they did it, what method they  
12 used, how careful they were, are they sure they got  
13 it all, are they sure they got the best spot, that  
14 sort of thing, that's the person I should ask the  
15 questions to, correct?

16 A. Yes. I would have no personal knowledge  
17 of that.

18 Q. Okay. Now, you were asked to do this by  
19 Metro, the Las Vegas Metropolitan Police Department,  
20 in 2006, correct?

21 A. Yes, sir.

22 Q. Did Metro ever ask you to do any other  
23 testing after that at any time?

24 A. At the same time --

25 Q. For this case. I'm sorry. I'm sure that

1 they probably used your lab for a bunch of others.  
2 So I meant in this particular case.

3 A. This particular case, at the same time we  
4 received the swab, we did receive some known  
5 reference samples which we actually got through the  
6 extraction phase.

7 But when we realized it was not  
8 going to be any evidentiary profile to compare, we  
9 didn't -- we stopped our testing at that point.

10 Q. You stopped right there?

11 A. Right.

12 Q. Okay.

13 A. But other than that, no, we never  
14 subsequently were submitted any additional samples.

15 Q. Metro didn't send you anything else?

16 A. That's correct.

17 Q. On this case Metro didn't ask you to do  
18 anything else?

19 A. That's correct.

20 MR. FIGLER: No further questions.

21 THE COURT: Redirect?

22 MS. PANDUKHT: Nothing at this time.

23 THE COURT: All right. Do the ladies and  
24 gentlemen of the jury have any questions for this  
25 witness?

1                   Seeing a negative response, thank  
2 you very much for your testimony. You're free to  
3 go.

4                   THE WITNESS: Thank you.

5                   THE COURT: You're excused. State, call  
6 your next witness.

7                   MS. PANDUKHT: The State calls Alice  
8 Maceo.

9                   (Whereupon, Alice Maceo was duly sworn to  
10 tell the truth, the whole truth, and  
11 nothing but the truth.)

12                  THE CLERK: Please be seated.

13                  THE WITNESS: Thank you.

14                  THE CLERK: State your full name and  
15 spell it for the record, please.

16                  THE WITNESS: Alice Maceo. A-l-i-c-e.

17                  THE CLERK: Thank you.

18                                 DIRECT EXAMINATION

19 BY MS. PANDUKHT:

20                 Q.       What is your occupation?

21                 A.       I am the, excuse me, the forensic lab  
22 manager for the latent print detail of the Las Vegas  
23 Metro Police Department Forensic Laboratory.

24                 Q.       How long have you been the lab manager  
25 for the latent print section here at Metro?

1           A.       I've been the lab manager since July of  
2 2006. So seven years.

3           Q.       Did you work previously as a latent  
4 fingerprint examiner for the Las Vegas Metropolitan  
5 Police Department?

6           A.       Yes, I did. I was actually hired with  
7 Las Vegas in 2002. And still today, I do some case  
8 work, just not as much as I used to. So I still do  
9 the actual examination, in addition to the  
10 management duties.

11          Q.       So how many years total do you have  
12 working in the field of latent print examination?

13          A.       I actually started in 1997 with the state  
14 of Alaska's crime laboratory. So I've been in the  
15 field since 1997 doing latent print work.

16          Q.       Could you tell the jury about your  
17 education, training and experience which qualifies  
18 you to testify in your field?

19          A.       Well, my Bachelor's degree is in biology  
20 from the University of Alaska, Anchorage. I  
21 graduated in 1994.

22                    I started at the state crime lab in  
23 Alaska as a trainee in latent prints. So most  
24 forensic labs focused back at that time had a  
25 science degree and you had to learn the forensic



1 application on the job. So it was a very intense  
2 training program for the first year where you learn  
3 everything you need to know about your discipline  
4 and develop your skills of, you know, processing  
5 evidence, recovering prints.

6 At that time I also worked crime  
7 scenes so I had to learn how to go out on crime  
8 scenes and do all the evidence collection.

9 It's very intense as far as the  
10 comparison process because you have to learn when  
11 you recover a print from something, when you have  
12 enough information, how do you compare prints, how  
13 do you run them in databases, how do you run your  
14 conclusions. And all of that is coming from  
15 training and repetition. So that process goes on  
16 for quite some time. It's very intense.

17 Additionally, they send you out for  
18 training. So at that time early in my career I was  
19 going out to a lot of training where you'd have a  
20 week of intense, again, just a lot of repetition  
21 through to develop your skill set.

22 A little further on, I did get  
23 certified. So as soon as I was eligible to take the  
24 certification test in my field through the  
25 International Association For Identification, I did

1 take the test and passed to be certified as a latent  
2 print examiner.

3 I got involved in research quite  
4 early. So I started doing research in publishing  
5 quite early in my career. And that led me to  
6 teaching at conferences. So instead of me just  
7 attending conferences, I became a lecturer at a lot  
8 of different conferences.

9 Early on I was studying more the  
10 biological aspects of the skin since my education  
11 was in biology. So I was studying the embryology of  
12 the skin, how it developed, why fingerprints were  
13 unique. You know, how they age over time, what  
14 changes take place as we get older with the skin,  
15 what happens when you cut your skin, what does a  
16 scarring look like.

17 So I looked at all the physiology  
18 and anatomy of the skin and presented that at  
19 conferences.

20 Later on I actually started studying  
21 issues as far as what happens when the skin touches  
22 a surface. Because if I touch straight down versus  
23 touch and move the finger or there's a lot of  
24 residue on my skin, these all cause visual issues in  
25 the prints that we have to interpret through.

1                   And so I spent a long time studying  
2 all the different things that affect the ability to  
3 see and interpret the information that we look at.

4                   And then eventually that information  
5 was also published. And I do a lot of teaching on  
6 that still to this day.

7                   And more recently, management  
8 topics. I'm on the scientific working group for  
9 Friction Ridge Analysis Study in Technology, which  
10 is a federally funded think tank group that sets the  
11 national standards for our field in latent prints.

12                   I served on the National Institute  
13 and Standards and Technology Human Factors  
14 subcommittee.

15                   I'm also a reviewer for the Journal  
16 of Forensic Identification, on their editorial  
17 review board.

18                   So I've stayed quite active in the  
19 field.

20                   And as I mentioned, I still manage  
21 the unit and I stay technically competent and tested  
22 in my laboratory as all the analysts are every year  
23 to ensure the quality of our work product.

24           Q.       Do you have any certifications?

25           A.       As I mentioned, I am certified in latent

1 prints through the International Association for  
2 Identification which is our main professional  
3 organization.

4 Q. Could you give us an estimate on  
5 approximately the number of latent fingerprint  
6 comparisons you have done in your career?

7 A. Oh, my goodness. I have no idea. I  
8 would have to give ballpark. Hundreds of thousands.  
9 I have no idea, but it would be innumerable.  
10 Numerous.

11 Q. Have you previously testified as an  
12 expert witness in your field?

13 A. Yes. I've testified here in Clark County  
14 at the justice court, grand jury, here in district  
15 court, getting close to about 50 times, and also in  
16 the federal court system.

17 Q. So now could you tell the jury what is a  
18 fingerprint?

19 A. If you look at the skin on your hands,  
20 you can see that you have the larger lines in your  
21 palm and in your fingers. These are your major  
22 flexion creases that are in your hands.

23 And, but if you can see a little bit  
24 smaller detail, there's actually finer lines that  
25 run across the surface of your palms and your

1 fingers. And these are the, what we call the  
2 friction ridges. And so they're the ridges on your  
3 skin. And, you know, they develop in actually about  
4 12 to 17 weeks in utero.

5 And the skin which has the ridges  
6 and the creases and any, you know, scars that you've  
7 picked up, if you've ever cut your hand or cut your  
8 finger and that wound has healed, these ridges and  
9 these creases, if you have residue on your hands,  
10 for instance, you know, if you pick up oil from your  
11 face, if you touch a surface, it will actually  
12 deposit.

13 And I'm sure you've seen it like on  
14 your glass top coffee tables at home or your  
15 windows, especially if you have children, you can  
16 actually see all those ridges and creases and  
17 information that will get transferred over with that  
18 bit of residue.

19 And so that, that transfer of that  
20 residue is then what we will use to enhance, to see.  
21 And that's the latent print.

22 So when we refer to a latent print,  
23 it's that touch on the surface. And that's what  
24 we're looking at.

25 Q. What is the difference between an inked

1 print and a latent fingerprint?

2 A. Well, the inked prints, that is gonna be  
3 the intentional recording. So for instance, if my  
4 home was burglarized, they would come in and process  
5 for all the latent prints that were there that were  
6 left behind, but they may take my inked prints  
7 because obviously it's my house, so you're gonna  
8 find my prints on things. So they would ink and  
9 roll my fingers.

10 Sometimes fingerprints are now a lot  
11 of times captured electronically. And so there's  
12 different media. So that known prints or exemplar  
13 prints, there's different terms, it all means the  
14 same thing. That inked prints is that controlled  
15 recording.

16 And so that becomes the standard  
17 that we use to compare all those other prints  
18 collected from the scene to see if we can either  
19 exclude the person or identify the person from those  
20 prints that were collected.

21 Q. So is a latent fingerprint something that  
22 is accidentally or unintentionally left on an object  
23 or surface?

24 A. It's not a controlled recording, so we  
25 don't know the source of it at that time, yes.

1           Q.       What is the basis for the use of  
2 fingerprints as a positive means of identification?

3           A.       Well, what we found over the years  
4 obviously is that fingerprints are unique to an  
5 individual.

6                       So the information that we look at,  
7 the ridges, the creases, the scars, are highly  
8 discriminating. So you can tell two people apart.  
9 Identical twins have different fingerprints. And  
10 all the fingerprints on your hand are different. So  
11 your ring finger is different from your index  
12 finger.

13                      And so because this information is  
14 so highly discriminating, which means we can tell  
15 apart between individuals, it has been obviously  
16 very useful for over a hundred years now to identify  
17 people or exclude people, which is also equally  
18 important.

19                      The other big factor is that they  
20 persist over time. So your fingerprints from the  
21 time that you're born until decomposition after  
22 death, with the exception of as you get older your  
23 hands get bigger obviously. And when you get into  
24 late age, your fingerprints get harder to see.  
25 They're there, but the ridges kind of get more

1 shallow, is that they're -- they persist throughout  
2 that time.

3                   So the arrangement of the ridges on  
4 your skin all the way through your lifetime stay the  
5 same unless you cut them or damage them in some way.

6                   And so because again, they're highly  
7 discriminating, so we can tell people apart and they  
8 stay persistent, which means from the time you're 20  
9 until the time you're 80, we can still see that's it  
10 the same formation of ridges through that time  
11 period. And they're very useful in the  
12 identification process.

13           Q.       What if I were to cut my finger and a  
14 scar is created? Would that change my fingerprints?

15           A.       It can, absolutely.

16           Q.       And how is that relevant at all?

17           A.       Well, if the scar is present in both  
18 impressions, so if you've cut your finger and it's  
19 healed and then you touch a surface and then we take  
20 your known print, the scar's gonna be present in  
21 both. So we can use that scar to help. It actually  
22 is a very great clue. There's a scar in both  
23 impressions and then you have all the other  
24 information around it. That's -- we like to see  
25 that. That's good stuff.



1                   The problem is if you -- for  
2 instance, if you have taken your fingerprints  
3 earlier on and then you cut your skin and now  
4 there's a scar, sometimes scars are very obvious,  
5 you can see there's a scar, so you basically have to  
6 ignore it and look for other information around it  
7 because the scar may not be present if your  
8 fingerprint was taken before the scar happened. So  
9 you have to basically work around it.

10                   The other issue is if the scar's  
11 very subtle, it can literally be so subtle that you  
12 don't know it's there and you can actually exclude  
13 from one erroneously because you don't see that the  
14 scar is there because literally the skin can  
15 sometimes heal in a way that you don't notice it.

16                   And so the analysts have to just  
17 take that consideration in during the examination  
18 process. It can be challenging, but it's typically  
19 obvious.

20           Q.       How are fingerprints compared and  
21 identification's affected?

22           A.       We have to first -- when we're looking at  
23 latent prints either on an object, so if we're  
24 processing something to actually recover the prints,  
25 or if someone else has recovered those prints for

1 instance from the scene and submit them to the  
2 laboratory, the first thing we have to do, excuse me  
3 for a second, is determine is there enough  
4 information in the print to actually render a  
5 reliable conclusion.

6                   So is there enough information here  
7 if I compare the print that I can reach a level of  
8 confidence that it does not belong to this person or  
9 it does belong to this person.

10                   Because a lot of times when we touch  
11 things, if things get smeared, you know, the skin,  
12 you know, maybe exits and leaves the surface and it  
13 gets wiped out, later on things can get wiped off.

14                   And so if that fragile information  
15 we're looking at is too obliterated or there's --  
16 for instance, Styrofoam's a bad surface because of  
17 the background or the pattern of the Styrofoam in  
18 the background. So the first thing you have to  
19 figure out is do I have enough here to even get into  
20 a comparison.

21                   So the first look thing we -- the  
22 first thing we do when we're looking at this print  
23 is okay, well, how much ridge structure is present,  
24 how many detail can I see, how clear is it, is there  
25 a lot of background noise and can I see enough

1 information to move on to the comparison stage.

2           So if there is enough information,  
3 you know, we'll mark the print and say it's suitable  
4 for comparison, and then we'll find the information  
5 that we need and then start going through the known  
6 prints or the exemplar prints to see if we can  
7 determine does it belong to this person.

8           If I can't find it within this  
9 person's palms and fingers, do I have everything I  
10 need as far as all the exemplars because sometimes  
11 the fingers aren't recorded completely or the palm's  
12 not recorded completely.

13           So if I don't have anything I need  
14 from the skin recorded, I have to stop the  
15 examination and ask for more. If I have everything  
16 I need in the skin, can I exclude that person.

17           And after that part's done, you  
18 issue your report and your findings.

19           And in our laboratory, it goes  
20 through another level of review and then the report  
21 goes out.

22           Q.     Is every latent print an identifiable  
23 latent fingerprint?

24           A.     Certainly not. A lot of prints are not  
25 comparable at all because of their parts and pieces

1 and fragments and overlays.

2           There's so many factors that go into  
3 whether that detail which is really small and coming  
4 off of certain surfaces can actually be seen that we  
5 have to meet that threshold or there's enough here  
6 to get into that comparison process. And it's just  
7 the nature of the process.

8           Most prints are not comparable. So  
9 we focus on the ones that are and carry those  
10 through the process.

11       Q.     Now, I know you've spoken some about the  
12 factors that can affect this, but can you give us a  
13 list of all of the types of factors that can affect  
14 whether a print is identifiable?

15           At least mention the ones that you  
16 have not already mentioned. Starting with, you  
17 know, moisture.

18       A.     Well, there's a lot of different things.  
19 For instance, the condition of the skin. If your  
20 skin's really dry and flaky for some reason, you  
21 won't leave a good impression of the skin because  
22 the skin can have too much shallow damage.

23           It will eventually recover, but if  
24 you have lots of -- for instance, if you've been  
25 working in the yard and you've got a lot of

1 callouses on your skin, the skin gets really dry and  
2 flaky and the ridge detail doesn't transfer over to  
3 a surface as well.

4                   If your skin is just dry because you  
5 have no residue, you just washed your hands, you  
6 pull off all that moisture, you pull off all the  
7 oils from your skin.

8                   If you have too much residue. So if  
9 you're really -- you know, if you're just eating  
10 french fries and you've got a lot of oil on your  
11 hands, you will touch and it will just be a blob  
12 because there's so much residue it just deposits  
13 everything, you don't see anything.

14                   Depending on how you move on the  
15 surface, it can smear and obliterate that  
16 information.

17                   A textured surface like the  
18 microphone is too textured because you need a flat  
19 surface to let the ridges come down on to it and  
20 leave a nice clean impression. A textured surface  
21 like this, you won't be able to see any of the ridge  
22 detail that's present on it. (Indicating.)

23                   If it gets wiped off later on, you  
24 know, all those things, environmental factors can  
25 affect whether a print is suitable or not. Or even

1 just not enough of the hand made contact.

2 Q. And you mentioned earlier something about  
3 overlay or overlapping.

4 Can you explain that a little  
5 further?

6 A. If a finger for instance lays down on a  
7 surface and then behind it it goes like this, it  
8 touches multiple times, you basically have ridges  
9 being laid on top of ridges being laid on top of  
10 ridges. (Indicating.)

11 And there's so much interference  
12 from that you can't see what came from what. And so  
13 you cannot discern one layer from the other and it  
14 will render it useless because you can't actually  
15 tell which details appropriate or if this finger  
16 touched and then that finger touched and then  
17 someone else touched. And it will render it useless  
18 at that point for comparison.

19 Q. And then finally how about exposure to  
20 the environment or the outlets --

21 A. Uhm --

22 Q. -- and the passage of time, anything with  
23 regard to that?

24 A. Possibly. It depends on the, you know,  
25 the condition. Obviously if it's on a vehicle and

1 it's raining outside, that's not gonna be a good  
2 thing. If it's in a protected environment, it may  
3 last a long time.

4 So it just depends on all those  
5 circumstances.

6 And it depends on the nature of the  
7 residue at that time. Some residue for people is  
8 very durable over time and some people it's very  
9 fragile. Like if it's just moisture, sweat, it will  
10 evaporate. But if you have a more oily, heavy  
11 residue, it may last quite a bit longer. It's just  
12 more resilient. And so a lot of different things  
13 can play into that.

14 Q. Now, as the lab manager for the latent  
15 print section, do you conduct any studies or  
16 statistics on the recoverability of certain types of  
17 latent prints?

18 A. Well, not certain types. We have looked  
19 at certain surfaces.

20 Q. Yes. That would have been the better  
21 question. And I'd like to ask you specifically  
22 about semi-automatic pistols.

23 Have you determined the  
24 recoverability rate of identifiable latent prints  
25 from those types of surfaces?

1           A.       In early 2010, we were looking at our  
2 recovery rates on different kinds of firearms  
3 evidence to evaluate the efficiency of some of the  
4 processing that we were doing on different kinds of  
5 evidence.

6                       And I took two years worth of data  
7 from 2008 and 2009. I literally took every case  
8 where we worked firearms evidence and I catalogued  
9 the type of firearm we looked at or the type of  
10 evidence and the number of those that we actually  
11 got comparable prints off of to see where we were  
12 falling.

13                      And with pistols, in particular  
14 semi-automatic pistols, we were getting at least one  
15 print we could compare on about 14 percent of the  
16 pistols that we were processing through the  
17 laboratory.

18           Q.       What percentage did not have any usable  
19 latent print?

20           A.       Oh, that amount would have been 86  
21 percent.

22           Q.       So now I'd like to direct your attention  
23 to an analysis that you conducted in this case that  
24 involved actually three separate dates.

25                      On April 2nd, 2006, April 22nd,



1 2009, and March 9th, 2010, did you compare and  
2 examine fingerprint evidence under the Las Vegas  
3 Metropolitan Police Department event number  
4 0602062820?

5 A. Yes, I did.

6 Q. What evidence did you examine?

7 A. If I can refer back to my reports and  
8 notes.

9 Q. If that would refresh your recollection.

10 A. Please. For the first report that is  
11 dated April 2nd, 2006, on February 7th, there was a  
12 pistol brought directly to me by the crime scene  
13 analyst Dan Priotto into the laboratory. This was  
14 item 10. It was a Makarov 9mm pistol with serial  
15 number AKB 6366.

16 And it wasn't just the pistol.  
17 There was also a magazine that had one cartridge  
18 contained within it and then also in the package  
19 there was a loose cartridge.

20 Q. And could you --

21 A. Yeah.

22 Q. Could you tell the jury how you proceeded  
23 to conduct your examination?

24 A. When the -- it was in a sealed box and it  
25 was brought into the laboratory directly from the

1 crime scene analyst.

2                   When I opened the box, I noted that  
3 there was a red stain of some kind on the back of  
4 the slide.

5                   And our policy at that time in 2006  
6 was that if you saw any kind of biological fluid  
7 like blood for instance or suspected that you had a  
8 biological fluid on an item, particularly if it was  
9 a homicide case, was that you would call a DNA  
10 analyst in to swab that item, just to make sure that  
11 that was recovered before we went through the latent  
12 print processing because we would expose it to  
13 different chemistry that could interrupt, you know,  
14 the DNA process later.

15                   So I did note that there was a red  
16 spot on the back of the slide. So I contacted our  
17 DNA manager at the time. His name was Birch Henry.  
18 And then Birch Henry came into my unit with me in  
19 the laboratory and swabbed that item and then he  
20 took the swab back to --

21                   MR. FIGLER: I'm gonna object, Your  
22 Honor, as far as testifying as to what Birch did,  
23 Birch Henry did, with anything. Birch Henry could  
24 testify what Birch Henry did.

25                   MS. PANDUKHT: She --

1 THE COURT: Well, you can lay more of a  
2 foundation of whether or not she observed it.

3 BY MS. PANDUKHT:

4 Q. Did Mr. Henry, Mr. Birch Henry do that in  
5 your presence?

6 A. Yes.

7 Q. So did you personally watch him as he  
8 swabbed the item?

9 A. Yes. Because I had custody of the item.  
10 And whenever DNA analysts swabbed anything in my  
11 custody, I was absolutely right with him because I  
12 had to document in my case file the areas of the  
13 items that were swabbed.

14 Q. Where did you see Mr. Birch Henry take  
15 the swab from the firearm?

16 A. It was taken from the back of the slide.

17 MS. PANDUKHT: May I approach the  
18 witness?

19 THE COURT: You may.

20 BY MS. PANDUKHT:

21 Q. I'm showing you what has previously been  
22 marked as State's proposed Exhibit No. 109, and I'd  
23 like to ask you if you recognize what is contained  
24 on the outside identifying this piece of evidence?

25 A. Well, this is not my handwriting because

1 I don't actually book the swab that is recovered  
2 from the item. There is a Las Vegas Metro evidence  
3 label on this. And this was actually booked by the  
4 evidence custodian Barb Lamaro (phonetic) at that  
5 time.

6 Q. Okay, thank you. And for the record,  
7 what does it say on the top of the label?

8 A. Swab of reddish stain from rear of slide.

9 Q. So before you conducted any latent print  
10 process on the firearm, you watched Birch Henry take  
11 the swabbing of that area?

12 A. That's correct.

13 Q. Of -- from the rear of the sliding of the  
14 stain?

15 A. Yes.

16 Q. Did you ask Mr. Henry to conduct any  
17 swabbing of any other part of the firearm?

18 A. No.

19 Q. Why not?

20 A. At that time in 2006, all we did was swab  
21 for biological stains.

22 Q. Why is that?

23 A. Well, this was prior to us analyzing  
24 anything except biological stains. We did not  
25 analyze for touch DNA during that time frame. The

1 laboratory hadn't even explored that as an option  
2 yet.

3                   Due to technology changes, changes  
4 in policies and procedures, a significant amount of  
5 infrastructure needs to be in place before that was  
6 put in.

7                   We started studying the possibility  
8 of touch DNA in approximately late 2007, early 2008,  
9 we started conducting studies on the potential for  
10 the use of touch DNA as many laboratories were  
11 during that time.

12                   So as of 2006, when this case was  
13 worked early 2006, that simply wasn't part of our  
14 policies and procedures or capabilities at that  
15 time.

16           Q.       And have now there been advancements in  
17 the area of retrieving touch DNA?

18           A.       Yes. We certainly do a lot of swabbing  
19 now of firearms evidence for touch DNA after those  
20 methods were validated and we figured out the proper  
21 way to go in sequence with the evidence in the  
22 laboratory.

23           Q.       And just so the jury understands, is  
24 touch DNA then from skin cells?

25           A.       Correct. So biological stains refers

1 to -- so obviously the red stain, in case it was  
2 blood, we wanted to have that swabbed. So  
3 biological stain would be like blood or saliva  
4 versus touch which is right where I touch this item,  
5 they would swab that area to see if they can develop  
6 DNA from the residue that I've just left on the  
7 surface. It's touch DNA as it implies is that  
8 process.

9                   So you require a lot more  
10 sensitivity for things to get that DNA from that  
11 kind of sample.

12           Q.     Now, currently, is it the protocol and  
13 procedure of the Las Vegas Metropolitan Police  
14 Department forensic lab that if a particular object  
15 has both smooth surfaces and textured surfaces, how  
16 do you properly examine and collect evidence from an  
17 object that perhaps has both types of surfaces?

18                   MR. FIGLER: And I'm gonna object, Your  
19 Honor, as far as exceeding the scope of her  
20 expertise. She's not a DNA specialist, she doesn't  
21 know where to take the DNA, she hasn't qualified for  
22 any of that.

23                   She just talking about if she sees  
24 appearance that she calls in the specialists. So I  
25 think that's an improper question?

1 MS. PANDUKHT: I'm asking about those  
2 procedures and how they collect evidence. It was  
3 certainly raised extensively yesterday by Mr. Figler  
4 on cross of another witness and she knows the  
5 procedures they use at the lab.

6 THE COURT: I'm gonna overrule it. It  
7 has to do with procedures of the lab and protocols  
8 on collecting evidence.

9 MS. PANDUKHT: Thank you.

10 THE COURT: Overruled.

11 MS. PANDUKHT: Thank you.

12 THE WITNESS: If an item has been  
13 requested for both DNA and latent prints, it's  
14 relevant to the case. Often times with firearms it  
15 is.

16 In my unit, my analysts actually do  
17 the DNA collection as well for touch DNA. So it is  
18 actually part of our procedures and processes that  
19 if they have a firearm and touch DNA has been  
20 requested, the analysts in my unit, just like our  
21 crime scene analysts, are trained to target the  
22 textured portions for instance of a firearm for the  
23 DNA.

24 Because the textured portions as I  
25 mentioned for fingerprints is really bad, we don't

1 get fingerprints off the textured portions. But  
2 it's rough so it's good for leaving stuff on your  
3 fingers behind. It's just not stuff that the  
4 fingerprint analysts can use but may be good for  
5 DNA.

6 So the analysts do now swab those  
7 textured portions and then the item goes into the  
8 latent print processing techniques after that.

9 And so that has been in place, my  
10 analysts have been swabbing for DNA for probably for  
11 the last year and a half.

12 Prior to that, the DNA analysts were  
13 doing all the swabbing. And now we share that  
14 responsibility in the lab.

15 BY MS. PANDUKHT:

16 Q. Why is it significant that you do your  
17 processing second after DNA?

18 A. We do that just to prevent any potential  
19 contamination of the DNA with the techniques that we  
20 use, which involve quite a bit of chemistry on the  
21 item.

22 So some latent print processing  
23 techniques may not interfere with DNA. But just to  
24 prevent that from happening, we go ahead and swab  
25 those areas first since there's very little or no



1 chance of getting a print.

2 And then again, the smooth areas are  
3 left behind because those are the best opportunities  
4 for the latent prints to be recovered from.

5 Q. Now, did you receive known fingerprints  
6 of certain individuals; including Evaristo Garcia,  
7 Manuel Lopez and Yobanni Borradas?

8 A. When I initially processed the evidence  
9 back in February of 2006, at that time I only  
10 received prints of Manuel Lopez and Yobanni  
11 Borradas. I did recover two prints from the pistol  
12 at that time so there were -- well, I photographed  
13 three. One of them -- as I mentioned, remember it  
14 has to have enough information for me to do a  
15 comparison with. One of those prints just simply  
16 didn't have enough information. The other two did.

17 I compared the -- those two prints  
18 that did have enough information and I was actually  
19 able to exclude Lopez and Manuel. So those two  
20 first people I looked at were excluded from both  
21 prints that were recovered from the gun.

22 MS. PANDUKHT: May I approach the  
23 witness?

24 THE COURT: You may.

25 BY MS. PANDUKHT:

1           Q.     I am showing you what has been marked for  
2     identification as State's proposed 96, State's  
3     proposed 97 and State's proposed 98.

4                     Do you recognize these three  
5     proposed exhibits?

6           A.     Yes, I do.

7           Q.     How do you recognize them?

8           A.     These are actually pages from my case  
9     files. So these are copies or printouts of --  
10    actually they're actually copies of photographs that  
11    are printed in my case file.

12                    MS. PANDUKHT: At this time I move to  
13    admit State's proposed Exhibit 96 through 98.

14                    MR. GOODMAN: There's no objection, Your  
15    Honor.

16                    THE COURT: No objection, State's  
17    proposed Exhibit 96, 97, 98 are now admitted as  
18    State's Exhibits 96, 97, 98.

19                    MS. PANDUKHT: Thank you, Your Honor.  
20    Move to publish.

21                    THE COURT: You may.

22    BY MS. PANDUKHT:

23           Q.     First I'm gonna show you State's Exhibit  
24    No. 96.

25           A.     Yes.

1 Q. Do you recognize this item?

2 A. Yes. So for the initial examination of  
3 the firearm, this is a picture that I took of the  
4 gun showing the location of the three latent prints  
5 that I photographed on the surface.

6 You can see L1. That L1, that just  
7 means latent number one is at the top of the grip.

8 Q. Can I interrupt you for a moment?

9 A. Sure.

10 Q. If you point on your screen, it will put  
11 a colored circle or -- on to that screen.

12 A. Whenever I drive this, it doesn't seem to  
13 go well for me.

14 Q. Let's try it.

15 A. So here's L1. It's at the top of the  
16 grip. That print was suitable for comparison so  
17 that's one of the prints I excluded from the first  
18 two people I compared.

19 L2 was here at the top of the back  
20 strap of the gun. And again, I was able to exclude  
21 the first two people. And again, those were Lopez  
22 and Borradas.

23 L3 is this one right here on the  
24 side of the grip. (Indicating.) And that's the one  
25 that I realized didn't have -- I photographed in

1 case, but it did not have enough information for me  
2 to actually compare.

3                   So in the first examination, I  
4 processed the weapon, I photographed the prints and  
5 I compared the first two people and was able to  
6 exclude them both.

7           Q.       Okay. And then did you receive some  
8 further known prints?

9           A.       There was a second request that came in,  
10 again, I'm gonna have to refer back here, in it  
11 looks like April 2009. That's when the report was  
12 issued. Actually the request came in in October  
13 2008. I began working the case shortly -- well, no,  
14 not shortly after. Afterwards.

15                   And this was a request to compare  
16 the known prints of Evaristo Garcia to a latent  
17 print that was submitted by CSA Speas from 3801  
18 Washington Avenue. And also the two prints that I  
19 had from the firearm.

20                   When I received that request, we had  
21 a set of prints available; however, it was just a  
22 standard set of rolled fingers. There was no palm  
23 prints present.

24                   In one of the prints, the one on the  
25 back of the back strap of the gun, L2, appeared to

1 be a partial palm print. And the fingerprint that  
2 was on the side, this L1, was way up on the tip of  
3 the finger and out on the edge. And on a standard  
4 rolled fingerprint record, that area is generally  
5 not recorded.

6 So essentially I had a set of  
7 fingerprints to compare, I didn't have palm prints.  
8 And the fingerprints I had didn't have the  
9 information that I needed for the two prints that  
10 were on the firearm.

11 So I had to submit a report back out  
12 that basically said that I needed additional  
13 standards. So I couldn't render any conclusions at  
14 this point in time until I got standards that  
15 included all the palm areas and way up on the edges,  
16 what we call major case prints of basically a  
17 recording of everything they could get off the hands  
18 of Mr. Garcia.

19 Q. And then did you compare Mr. Garcia's  
20 known prints to the two latent prints that you found  
21 that were identifiable on the Makarov pistol?

22 A. Later on in 2010, we did get major case  
23 prints. So we had a full recording of tips and  
24 edges and down the fingers and into the palms of  
25 Evaristo Garcia.

1                   And I was able to identify the --

2           Q.       I'm gonna give you a new exhibit. This  
3 one is No. 97. Let me blow it up for a moment.

4           A.       So I need to probably explain what we're  
5 looking at.

6           Q.       Yes. That was gonna be my next question.  
7 And, Mr. Figler, if you --

8                   MR. FIGLER: Sure.

9                   MS. PANDUKHT: Thank you.

10                  MR. FIGLER: Sure.

11                  THE WITNESS: During the -- when I'm  
12 processing evidence, there's different stages. It's  
13 different chemical techniques that we use.

14                   And if we develop a print and we  
15 think there's enough information, we photograph  
16 after each stage.

17                   So the first thing I did was I  
18 fumed -- I put the gun into a fuming chamber that  
19 has super glue. And so the image on the right, the  
20 far right, sorry, here, was the latent print after  
21 superglue fuming. (Indicating.)

22                   So I superglue fumed it and I can  
23 see this detail up towards the tip of the finger and  
24 I photographed it.

25                   Well, after I superglue fumed it and

1 took the appropriate pictures and then I use a  
2 fluorescent dye stain, I notice that there was a  
3 little bit more detail coming out that I could see  
4 in the print that's large, I told you I'm not good,  
5 on this print which is orange color.

6                   And what -- underneath is like a  
7 ram. So the CA underneath the one on the left,  
8 that's why I don't touching it, is the superglue.  
9 The CA just stands for cyanoacrylate which is the  
10 chemical name for superglue. And that's under the  
11 one that says L1A.

12                   Under L1G, that ram, that's the  
13 acronym for fluorescent dye stain that we use. And  
14 we used a laser so it fluoresces. And it fluoresces  
15 really green but the camera has an orange filter on  
16 it. So that's why the image looks orange.

17                   So the orange one on the left and  
18 the one on the right are these same latent prints,  
19 but they look different because under superglue,  
20 certain areas of the print were easily, more easily  
21 photographed than under the dye stain.

22                   So essentially the same print is  
23 photographed a little differently because of the  
24 technique that I used, but it is the same image. So  
25 that's the same latent print. I know it's a little

1 complex.

2                   And as I mentioned, the latent print  
3 was way up on the tip of the finger and it was also  
4 on the far left edge. Well, that's not an area  
5 normally recorded when you just plainly roll the  
6 finger.

7                   So for instance, the fingerprint on  
8 the left here, this would be like your classic  
9 rolled fingerprint. So the area here on the left  
10 side of the latent that you can see on the  
11 fluorescing image was available to me here on the  
12 rolled image. (Indicating.)

13                   But the tip area which is up here  
14 and you can kind of see the green ridges in that  
15 impression and the green ridges here and the green  
16 ridges here, all the same ridges. (Indicating.)

17                   So I highlighted them all the same  
18 color because you have to sort of puzzle it back  
19 together.

20                   In order to look at the ridges that  
21 were up in the tip, these are the same ridges that  
22 are present here and there is literally an image of  
23 the ink with the tip down because they knew I needed  
24 the tip area. So they put the finger down like this  
25 and rolled up and then they put the tip like this.



1 (Indicating.)

2 So I literally had to use the  
3 regular rolled fingerprint, the same finger down  
4 again which was this and then the tip down to  
5 actually get all the recorded area. Because  
6 unfortunately there's no way to record even just a  
7 finger and get it all in one piece. (Indicating.)

8 So I've got all these basically  
9 pieces of the same finger in ink rolled out in  
10 different areas and then I've got my latent which I  
11 can see different areas of. And I had to use the  
12 combination of all of that. So that's not always as  
13 complicated as that, but there's good information.

14 You can see, if you can see the  
15 ridges up on the screen, I have them all color coded  
16 out as far as the actual detail that I found in  
17 agreement.

18 So this is the print that was at the  
19 top of the grip and it's the -- I believe the right  
20 ring finger of Mr. Garcia. (Indicating.)

21 BY MS. PANDUKHT:

22 Q. And you identified that to Mr. Garcia.  
23 And again, for the jury --

24 A. I don't know how you clear the -- thank  
25 you.

1 MR. FIGLER: You're welcome.

2 THE WITNESS: Correct. So this would  
3 be -- the print was located in this area.  
4 (Indicating.) And it's actually kind of -- the tip  
5 of the finger's kind of -- I think it's facing in  
6 like a down -- no, excuse me. It was like in this  
7 direction like that, the tip of the finger. So it's  
8 kind of down in that direction. (Indicating.)

9 BY MS. PANDUKHT:

10 Q. Okay. Now I'd like to show you State's  
11 Exhibit No. 98. Could you explain -- and I'm gonna  
12 zoom in on this as well.

13 Could you explain what we're looking  
14 at here?

15 A. We're actually looking at the back strap  
16 of the gun. And so the textured portion -- so if  
17 you're looking along the spine of the handle of the  
18 of the gun, the textured portion, it would be like  
19 coming down.

20 Q. Let me show you this diagram really  
21 quickly.

22 A. Thank you. So this area right here is  
23 the textured portion. (Indicating.) And this  
24 little smooth piece right in here -- and if we can  
25 go back to the other one.

1 Q. I will.

2 A. That little smooth piece is where you see  
3 those rainbow colored lines, those are the ridges.  
4 (Indicating.) That's where the latent print is  
5 sitting. So it's above the textured portion in  
6 that, where all those colored ridges that you see on  
7 the right-hand side in the latent print.

8 So based on the position, I  
9 suspected that it was gonna be in the webbing area  
10 of the hand how you would typically handle something  
11 because that's one of the things that we have to  
12 consider.

13 So when I got the major case prints  
14 of Evaristo Garcia, I really focused on the palms in  
15 the webbed area of the palms to see if I can find  
16 that same information.

17 And sure enough on the right palm in  
18 that web which is just the skin between the index  
19 finger and the thumb right here, I found that same  
20 information available to me in the right palm.  
21 (Indicating.)

22 Q. And you were able to make an  
23 identification?

24 A. Yes.

25 Q. What was that identification?

1           A.       Again, that's the palm print was  
2 identified to the right palm of Evaristo Garcia.

3           Q.       Were you able to identify any latent  
4 prints or any identification from the toilet tank?

5           A.       The CSA Speas had submitted one print I  
6 mentioned earlier from 30 -- excuse me. 3801 East  
7 Washington Avenue. And that print was from the tank  
8 of the northern most of the two toilets set out on  
9 the northwest corner of the property. This was  
10 submitted by the crime scene analyst.

11                   And I excluded Evaristo Garcia,  
12 Manuel Lopez and Yobanni Borradas from that print.  
13 So none of them were identified to that print.

14                   MS. PANDUKHT: May I approach the  
15 witness?

16                   THE COURT: You may.

17 BY MS. PANDUKHT:

18           Q.       And for the record, I've made sure that  
19 our marshal has secured the weapon. And it has been  
20 admitted into evidence. This is State's Exhibit No.  
21 100. Here's some gloves for you.

22                   I am wondering if you would be  
23 able -- we have yet to see -- I believe it's been  
24 opened, correct, madam clerk?

25                   THE CLERK: Correct.

1 BY MS. PANDUKHT:

2 Q. I'm not going to touch it. So I'll give  
3 this to you. It has been opened, you know,  
4 unsealed. I'll stand back.

5 A. Do you have scissors? It's been secured  
6 to the box.

7 THE COURT: Do you have like scissors or  
8 clippers?

9 BY MS. PANDUKHT:

10 Q. I'd like you to show us on the actual  
11 object how these latent prints are positioned.

12 A. Let me see if my markings are still here.

13 Q. If you're able to do that.

14 A. On the pistol here, actually I can still  
15 see my original markings. So whenever we see a  
16 print on the item that we're gonna photograph, we  
17 literally use a Sharpie and indicate this is the  
18 location and then we write like L1, L2, L3. And so  
19 my markings are actually still present on here.

20 And so L2 was the one right here on  
21 the smooth portion above the textured portion of the  
22 grip. (Indicating.) That's the one that was the  
23 right webbing area.

24 And then L1 is the right ring  
25 finger. Just sort of in this direction.

1 (Indicating.)

2 THE COURT: You might want to hold it up  
3 because some of the jurors are having problems  
4 seeing what you're talking about. They're leaning  
5 over.

6 THE WITNESS: So there's a right ring  
7 finger over here headed this direction.

8 (Indicating.)

9 And then there is the right webbing  
10 of the palm here. (Indicating.)

11 And then there was another little  
12 print, excuse me, on the side. Here. (Indicating.)  
13 This is the one -- it's just a small surface area.  
14 It was just a little piece of ridge detail here that  
15 I attempted to photograph. Well, I did photograph  
16 it, but it wasn't enough to work with.

17 BY MS. PANDUKHT:

18 Q. Okay. Is there any doubt as to any of  
19 your identifications in this case?

20 A. No.

21 MS. PANDUKHT: I'm going to return the  
22 object number 100 to the clerk. I would like to  
23 pass the witness.

24 THE COURT: Cross-examination.

25 MR. GOODMAN: Thank you, Your Honor.

1 THE COURT: Mr. Goodman.

2 MR. GOODMAN: Thank you, Your Honor. I'm  
3 gonna use that in a second, marshal. Thank you.

4 CROSS-EXAMINATION

5 BY MR. GOODMAN:

6 Q. Good afternoon, Ms. May -- is it Mesa?

7 A. Maceo.

8 Q. Maceo. Very good. I'm gonna put that up  
9 there, so we can talk about that.

10 Now, you processed the prints  
11 yourself, correct?

12 A. Yes.

13 Q. The latent print?

14 A. That's correct.

15 Q. Okay. And you were able to photograph  
16 three prints, correct?

17 A. Yes, that's correct.

18 Q. Okay. Now, were there other prints that  
19 weren't developed as sufficiently that you didn't  
20 photograph?

21 A. Most likely. Generally there are bits  
22 and pieces and so we tend to focus on the ones that  
23 might have enough information. We generally don't  
24 make a notation of the other ones that aren't  
25 sufficient. We generally just note the ones that

1 are. So most items do have a lot of parts and  
2 pieces.

3 Q. Okay. And in this particular case with  
4 that gun, were there other prints that you didn't  
5 photograph because it didn't rise to the level of  
6 sufficient ridge structured detail?

7 A. Looking at the image, just based on the  
8 way the superglue was reacting to the item, there  
9 probably was, but I can't say for sure because I  
10 didn't note if there was other additional detail I  
11 don't believe.

12 Q. Okay. But there could have been other  
13 prints on there just not rising to the level of  
14 ridge detail you need?

15 A. The only other notation I have is that  
16 there was insufficient ridge detail on the magazine  
17 and the cartridges.

18 Q. Okay. You decide -- when you're  
19 inspecting that gun, you decide which prints are  
20 potentially comparable, correct?

21 A. Yes.

22 Q. Okay. So the ones that may have been on  
23 there but didn't rise to the level of sufficient  
24 ridge detail, you can't know whether or not that was  
25 from Garcia or from somebody else, correct?



1           A.     No.  If it's not a sufficient to compare,  
2 there's no way to know who they may have come from.

3           Q.     Okay.  So let's start -- so you have  
4 three prints, two of which you say were identified  
5 to Garcia which is L1 and L2, correct?

6           A.     That's correct.

7           Q.     And then L3 which was not sufficient so  
8 you couldn't, you couldn't identify that to Garcia,  
9 correct?

10          A.     I couldn't compare it to anyone.

11          Q.     Okay.  So the source of the print for L3  
12 could have been from somebody else, correct?

13          A.     Unknown.

14          Q.     Someone other than Garcia, correct?

15          A.     I have no way to know.

16          Q.     Now, we kind of went over quickly about  
17 the orientation for print number L1.  So I just  
18 wanted to take a look at that gun, so we can show  
19 the jury exactly, ma'am, where L1 is on the gun  
20 because -- and you still have your gloves up here?

21          A.     No, those are the ones I think I used.  
22 You can bring them back over.

23          Q.     Okay.

24          A.     I didn't flip them inside out when I took  
25 them off so I think we're good.

1           Q.       Now, what I'm gonna ask you to do, ma'am,  
2       is maybe -- and, Your Honor, if I can have the  
3       witness step down, so we can show --

4           THE COURT:   Sure.

5           MR. GOODMAN:  -- the jury better and  
6       closer.

7           THE COURT:   Yes.

8       BY MR. GOODMAN:

9           Q.       And if we can show them exactly where  
10      that L1 on that photograph is on the gun, ma'am.

11      A.       Okay.

12      THE COURT:   Yeah.  If you want to stand  
13      before the jury, you can.  Go ahead and right in the  
14      center.

15      THE WITNESS:  Okay, thank you.  On -- so  
16      L2 is on the back strap.  L1 is here on the side.  
17      (Indicating.)  And it's the right ring finger of Mr.  
18      Garcia and it's positioned sort of at this angle as  
19      far as where the tip of the finger is going.  So  
20      it's in this position.  (Indicating.)

21      BY MR. GOODMAN:

22      Q.       Now, is there a mark on there that you  
23      left you said?

24      A.       Yes.  There's a --

25      Q.       Can I see that?

1 A. Right here. (Indicating.)

2 Q. Okay.

3 A. Which marks that this is the print that's  
4 close to the up orientation because you can actually  
5 see the tip of the fingers a little bit.  
6 (Indicating.)

7 Q. Okay, thank you.

8 A. Uh-huh.

9 MR. GOODMAN: Now, Your Honor, if I can  
10 actually hold the gun myself so I can --

11 THE COURT: Sure.

12 MR. GOODMAN: -- show the jury.

13 THE COURT: You might want to put on  
14 gloves.

15 MR. FIGLER: I don't think they're  
16 testing it anymore.

17 MR. GOODMAN: I don't mind if I --

18 THE COURT: Do you want --

19 MS. PANDUKHT: I'd still like to use --  
20 I'd still like to use the gloves, please.

21 THE COURT: I think it's probably better.  
22 I would always handle evidence in the courtroom with  
23 gloves.

24 MR. GOODMAN: That's okay. I can use  
25 hers.

1 BY MR. GOODMAN:

2 Q. Okay. So I can't have the jury -- I  
3 guess if I can just walk down, Your Honor, so the  
4 jury can see this, this spot.

5 So if everybody can take a look, I  
6 don't know if you can inspect it, but this will be  
7 given to you in evidence and so you can actually  
8 look at the mark where L1 is, but I just wanted to  
9 point that out to everybody's attention because  
10 we're gonna talk about it now. (Indicating.)

11 And, again, this will be for your  
12 actual inspection when you go back into the jury  
13 room, okay.

14 Now, it's not loaded so I don't have  
15 to worry about pointing it at anybody.

16 A. It's still a safety problem.

17 Q. I understand. And now, ma'am, what  
18 you're saying, and I don't know if you just want to  
19 see on this side of it, but what you're saying is  
20 that the person that would have held this gun --

21 MS. PANDUKHT: Can I interrupt for just  
22 a -- he's touching the gun with his other hand.

23 Can you put both gloves on, please?

24 MR. GOODMAN: I will do it at the  
25 prosecutor's request, but --

1 MS. PANDUKHT: Thank you.

2 MR. GOODMAN: -- I've done it many times  
3 without the gloves, Your Honor.

4 What's your concern? Because  
5 they're not swabbing it anymore or testing it.

6 MS. PANDUKHT: Well, I want to make sure  
7 it's handled properly at all times.

8 THE COURT: I'll talk to you at the  
9 break.

10 BY MR. GOODMAN:

11 Q. Okay. So based on your examination,  
12 ma'am, it would be this right ring finger, correct?

13 A. Correct.

14 Q. Okay. And it would be wrapped around and  
15 it would be up on this portion of the handle,  
16 correct?

17 A. I don't -- I didn't say it would be  
18 wrapped around. All I said was the ring finger  
19 would be positioned in this direction, but I don't  
20 know how it got there.

21 Q. And you said it was positioned in the 2  
22 o'clock position, correct?

23 A. I didn't say 2 o'clock. I just showed  
24 the angle of the finger on the item.

25 Q. Well, did you write like an arrow and you

1 went down like this first and then you changed it to  
2 the 2 o'clock? Like 2 o'clock?

3 A. Right. Because the image was up on my  
4 latent, but I noticed that was upside down compared  
5 to the gun. That's why I got it backwards on here.  
6 So my latent print was upright.

7 Q. Right.

8 A. Which means that was turned. So I was  
9 thinking the orientation of the latent. But you can  
10 see up here. So the ring finger is like basically  
11 going this way. So it's that way. (Indicating.)  
12 Now how it got that way and how the hand would have  
13 to be positioned, I don't know.

14 Q. But would you agree that that arrow going  
15 upwards would be in the 2 o'clock position?

16 A. Sure, yes.

17 Q. Okay. So the jury understands this, the  
18 ring finger -- and it would be the tip of the ring  
19 finger, correct, the right ring finger?

20 A. Well, actually, you can see the edge all  
21 the way down here and through here. So this whole  
22 portion of the finger and up on the tip. The tip is  
23 present because it's a curved surface.

24 (Indicating.)

25 So when the finger is in the

1 curvature of, if I may point, of this, you're gonna  
2 get more of it recorded up on the tip that you  
3 wouldn't typically get if it was a flat surface.  
4 (Indicating.)

5 So the reason the tip's being  
6 recorded is because of that curvature. So you've  
7 got this whole portion of that ring finger present.  
8 You can see it in the latent print. (Indicating.)

9 Q. Okay. And so somebody, if somebody was  
10 actually holding this gun to shoot, this finger  
11 would have to wrap around and go up here and be in a  
12 2 o'clock position, is that correct, based on your  
13 examination of where that tip was?

14 A. I never said a person was shooting to be  
15 putting that finger in that position.

16 Q. Okay. So the latent print that we just  
17 looked at L1 is consistent -- could be consistent  
18 with somebody just touching the gun, correct?

19 A. I don't know how it got there. I didn't  
20 see it happen.

21 Q. Okay. Would you agree with me that the  
22 print in L1 is in an unusual spot?

23 A. Yes.

24 Q. Okay. I'm now taking the gloves off,  
25 Your Honor. I don't know why because I'll probably

1 have to come back here and put them back on.

2 A. We'll give you the orange ones. They're  
3 easier.

4 Q. I just ripped it anyway. Okay. So now  
5 we have -- so we talked about L3 which is not  
6 identifiable to Garcia.

7 We just talked about L1 which is in  
8 an unusual spot, in a 2 o'clock position, correct?

9 A. I see prints on guns in all kinds of  
10 positions. So it depends I guess on what your  
11 activity is at that time.

12 Q. Okay. But that's in a 2 o'clock  
13 position, correct?

14 A. That's correct.

15 Q. Okay. Now, let's talk about L2 again.  
16 You showed the jury that that would be between the  
17 thumb and index finger, right?

18 A. Correct.

19 Q. It'd be the webbing part?

20 A. Right here, yes. (Indicating.)

21 Q. And that would be like right up against  
22 the high end of the back strap, correct?

23 A. That's correct.

24 Q. Okay. Now, that, that surface is smooth,  
25 correct?



1 A. That's correct.

2 Q. Okay. Where L2 was. And L1 surface is  
3 smooth, correct?

4 A. Yes.

5 Q. Okay. Now, the location that we just  
6 talked about where the webbing would be, that would  
7 also be consistent with somebody just holding the  
8 gun, correct?

9 A. Well, to get the webbing up in there,  
10 yes, you'd have to be holding it by the grip.

11 Q. Okay. So you're not saying based on  
12 orientation of that print that somebody was shooting  
13 the gun, correct?

14 A. I don't know what activity was taking  
15 place, no.

16 Q. Okay. And, in fact, these two prints,  
17 one in that unusual spot, another in the high end  
18 back of the strap, you can only tell that Evaristo  
19 Garcia at some point in time had touched that gun,  
20 correct?

21 A. That's correct.

22 Q. Doesn't tell you when he touched the gun?

23 A. No, it does not.

24 Q. Now, if somebody held that gun on the  
25 grip part where that textured portion is, ma'am,

1 would you be able to lift prints off of that?

2 A. I would not anticipate getting a print  
3 off the textured portion.

4 Q. Did you lift any prints off of that grip  
5 portion where you would be holding the gun?

6 A. I only photographed the three areas that  
7 are indicated.

8 Q. Okay. Now, there's -- we talked about  
9 the smooth surface and we talked about the texture  
10 surface much like that microphone you just mentioned  
11 and the grip on that pistol, correct?

12 A. Yes.

13 Q. So if somebody was, if somebody was  
14 breaking into a house like you said and there was a  
15 print that you were able to lift off of the inside  
16 window, that would be pretty good evidence that the  
17 person was inside that house, correct?

18 A. A print from the interior of a house for  
19 someone not supposed to be there I would say is  
20 pretty strong.

21 Q. Right. And that would be like a fixed  
22 surface, correct?

23 A. A window typically is, yes.

24 Q. And then there's prints you can get on  
25 transitory things like a pen, correct?

1           A.       Of course.

2           Q.       Okay.  So if I was in the courtroom  
3 downstairs before I came up here and I forgot my  
4 pen, then it would be pretty good proof I was down  
5 there, correct, in the bottom courtroom?

6           A.       I apologize.  What was the scenario  
7 again.

8           Q.       Okay.  So -- okay.  Let's just talk about  
9 this again and make it easy.

10                   A gun is a transitory item, correct?

11          A.       Yes.

12          Q.       So somebody could have been at a house  
13 with a group of people passing around the gun and  
14 that doesn't indicate that that person then took the  
15 gun to a park, correct?

16                   MS. PANDUKHT:  I'm gonna object as to  
17 speculation, vague.

18                   THE COURT:  Overruled.  She's been  
19 qualified as an expert.  She can give hypotheticals.

20 BY MR. GOODMAN:

21          Q.       Right, a gun is a mobile item?

22          A.       Right.  Yes.

23          Q.       Okay.

24          A.       But I have no knowledge of where the gun  
25 has been or gone to.  That's not in my purview.  I

1 only know when it was in my custody and for the  
2 chain of custody on the departments. The activities  
3 of the crime scene are different.

4 Obviously a mobile item, common  
5 sense, can be moved versus a car door which I guess  
6 could be moved, but would be a lot more difficult.  
7 So that part of that aspect, yes.

8 Q. Okay. So again, just because there's two  
9 prints on there that have been identified to Mr.  
10 Garcia doesn't mean that you know who the shooter  
11 was, correct?

12 A. All I can say is he touched the item.

13 Q. At some point in time?

14 A. Correct.

15 Q. Now, had the textured area of that grip  
16 been swapped, would some type of DNA been collected?

17 A. Possibly, but not necessarily.

18 Q. And that would have been like what you  
19 mentioned earlier, like skin cells, correct?

20 A. Possibly.

21 Q. And now we do that -- well, we start  
22 doing that at Metro in 2007 you said, correct?

23 A. We were exploring those options in 2007,  
24 2008 it became more routine practice. But just like  
25 prints, they don't always get a profile and they

1 don't always get a usable profile. So it's the same  
2 issues that are present.

3 Q. That would be a good way to identify who  
4 the shooter was, right?

5 A. It would be the same as the latent  
6 prints.

7 Q. Okay. Now, there was a latent print  
8 taken off of the toilet where the gun was collected,  
9 correct?

10 A. That's correct.

11 Q. Okay. And you excluded Mr. Garcia from  
12 that print, correct?

13 A. That's correct.

14 Q. One second, Your Honor. Okay. So you  
15 talked about like 86 percent of the time you can't,  
16 you can't recover fingerprints, correct?

17 A. From a pistol. So all I said was in that  
18 study, 14 percent of the pistols resulted in the  
19 recovery of at least one comparable print.

20 Q. So sometimes people hold a gun and they  
21 just don't leave a fingerprint, correct?

22 A. Absolutely.

23 MR. GOODMAN: Thank up.

24 THE COURT: Redirect.

25 MS. PANDUKHT: Thank you, judge.

1 REDIRECT EXAMINATION

2 BY MS. PANDUKHT:

3 Q. So the two prints that were identified to  
4 Evaristo Garcia, could they have been left on that  
5 fire arm at two different times?

6 A. Yes.

7 Q. So both prints did not have to be  
8 deposited on the firearm at exactly the same moment?

9 A. Correct.

10 Q. Okay. So when you demonstrated earlier  
11 how you -- when I asked you about how the right ring  
12 fingerprint was located on the firearm, you  
13 demonstrated by -- you had the gun upside down.

14 Do you recall that?

15 A. Correct. Just to make it, the  
16 positioning, yes.

17 Q. So could that -- in the way that you have  
18 demonstrated the positioning of the right ring  
19 finger, could it have been deposited by holding the  
20 gun upside down?

21 A. Yes.

22 Q. Do you know how the gun was recovered in  
23 this case?

24 A. No.

25 Q. Do you know where it was recovered?

1           A.       I believe there was a description of a  
2 toilet tank.

3           Q.       Do you know how the gun was positioned  
4 inside the toilet tank?

5           A.       I saw a photograph of it. Yes, it was  
6 upside down.

7                   MS. PANDUKHT: May I approach?

8                   THE COURT: You may.

9                   MS. PANDUKHT: Well, actually it's been  
10 admitted.

11                   THE COURT: Okay.

12 BY MS. PANDUKHT:

13           Q.       I'm showing you a photograph. Let me  
14 zoom it back out.

15                   Okay. Is this the photograph you  
16 were talking about?

17           A.       Oh, yes. I've seen that photograph, yes.

18           Q.       And do you see what this is?

19           A.       It looks like a pistol.

20           Q.       So could that right ring fingerprint have  
21 been deposited by putting it upside down inside the  
22 toilet tank?

23           A.       Possible.

24           Q.       You had mentioned earlier about prints  
25 being overlay or overlapping.

1                   If a print was placed on top of  
2 either one of these fingerprints, could it have  
3 affected whether an identifiable print could have  
4 been located and identified?

5           A.       Yes, it could affect it.

6           Q.       How could it have?

7           A.       As I mentioned, if you have overlaying  
8 fingerprints, you can't discern which detail belongs  
9 to which touch. And so it causes too much  
10 background interference and then you can't compare  
11 the print.

12          Q.       So if somebody else touched in exactly  
13 the same spot that Mr. Garcia's fingerprints were  
14 found, could it have destroyed Mr. Garcia's  
15 fingerprints?

16          A.       It could have possibly, yes.

17                   MS. PANDUKHT: No further questions.

18                   THE COURT: Recross.

19                   MR. GOODMAN: Thank you, Your Honor.  
20 Just briefly.

21                               RECROSS-EXAMINATION

22 BY MR. GOODMAN:

23          Q.       So somebody can hold the pistol in a  
24 gripped part and that would not have been recovered,  
25 correct?



1 A. Someone could hold the --

2 Q. On the grip part.

3 A. Yes.

4 Q. And that would not have -- I think your  
5 term is obliterated the print that you recovered in  
6 L2, correct?

7 A. It's possible.

8 Q. Thank you.

9 THE COURT: Do the ladies and gentlemen  
10 of the jury have any questions for this witness?  
11 Yes. All right. I'll see the attorneys at the  
12 bench, please.

13 (Whereupon, the following proceedings  
14 were had in open court outside the  
15 presence of the jury panel.)

16 THE COURT: I just want to put on the  
17 record that the State has filed a Fourth Amended  
18 Indictment; is that correct?

19 MS. PANDUKHT: Correct.

20 THE COURT: And is there any opposition  
21 to that?

22 MR. FIGLER: Not at this time, no. It  
23 did delete the gang as we discussed.

24 MS. PANDUKHT: You looked at it.

25 THE COURT: I just want to make a record

1 that the indictment was filed before the close of  
2 the State's case-in-chief, okay.

3 MS. DEMONTE: Yeah.

4 THE COURT: This is from No. 7, Keith  
5 Trombetta.

6 MS. PANDUKHT: No objection.

7 THE COURT: Any objection?

8 MR. GOODMAN: No.

9 THE COURT: This is from Juror 5, Angelic  
10 Numez-Morarrez.

11 MS. PANDUKHT: Oh, okay. She sort of  
12 answered that, but no objection. Is that okay?

13 MR. FIGLER: That's fine.

14 THE COURT: This is from Juror No. 10.  
15 They didn't put their name, but.

16 MS. PANDUKHT: Oh, okay.

17 THE COURT: Any objection?

18 MS. PANDUKHT: No.

19 MR. FIGLER: No objection. Yeah, that's  
20 fine.

21 THE COURT: Hold on. One more.

22 MR. FIGLER: One more.

23 THE COURT: This is from Juror No. 1,  
24 Lisa Griffis.

25 MR. FIGLER: Okay. Good question.

1 MS. PANDUKHT: Okay.

2 THE COURT: And after you rest -- you're  
3 gonna rest in front of the jury and then --

4 MS. PANDUKHT: One issue I have to make.

5 THE COURT: Okay.

6 MS. PANDUKHT: And then I'll make it.

7 THE COURT: I just don't want to excuse  
8 them until you rest, okay. Just take a moment.

9 MS. PANDUKHT: Okay.

10 THE COURT: Thank you.

11 (Whereupon, the bench conference ended.)

12 THE COURT: This is from Juror 7. Number  
13 one, regarding print L2, are you able to confirm if  
14 there were any overlapping prints or images?

15 THE WITNESS: I did not see any  
16 overlapping ridge detail on top of L2.

17 THE COURT: Number two, would print C-2  
18 be considered the last print in that position?

19 THE WITNESS: I did not see any  
20 overlapping so I don't see a sequence. I'm not  
21 quite sure I understand the question.

22 THE COURT: Juror No. 5. This is a  
23 question from Juror 5. The print you tested for the  
24 toilet tank, were you given a subject or print to  
25 compare it to? Who did it identify?

1           THE WITNESS: I was asked to compare it  
2 to the three subjects in the case which were  
3 Evaristo Garcia, Manuel Lopez and Yobanni Borradas.  
4 And the print did not belong to any of them. So  
5 that print remains unidentified at this time.

6           THE COURT: This is from Juror 10.  
7 Please explain what the "slide" is.

8           THE WITNESS: On the firearm, the slide  
9 is the portion. If I can show you here. This is  
10 the grip. The slide is this portion and it's the  
11 portion that kicks back when you --

12          THE COURT: Can all the jurors see this?  
13 Do you want to stand up? Go ahead, stand up.

14          THE WITNESS: Yeah. So the slide is the  
15 portion that you can pull back or that kicks back  
16 when you fire it. And so the back of the slide is  
17 over here and that's where the swab was taken from.

18                 And you can see kind of -- this  
19 little textured portion here is actually where you  
20 can hang on to it to pull it back and that's where  
21 you check like to make sure the weapon is clear.  
22 And again, that's what kicks back.

23                 And then the cartridge case ejects  
24 out and then it pulls forward again when you cycle  
25 the weapon.

1           THE COURT: This is from Juror 1, Lisa --  
2 oh, sorry. Number one. Were there any fingerprints  
3 found on the trigger of the gun? Is the trigger a  
4 smooth surface?

5           THE WITNESS: I did not note any prints  
6 on the trigger of the gun. Generally we'll see -- I  
7 don't remember on this particular item, but often on  
8 triggers it is extremely rare to get a print that's  
9 suitable for comparison because it's a small surface  
10 area and it tends to get touched repeatedly.

11           So the -- in my career I think I've  
12 seen it once where we had a print that was actually  
13 identifiable off the trigger. It's very difficult  
14 surface to work with and get a good print off of.

15           THE COURT: Does the State have any  
16 follow up?

17           MS. PANDUKHT: No, Your Honor.

18           THE COURT: Does the defense have follow  
19 up?

20           MR. FIGLER: Briefly may I?

21           THE COURT: Sure.

22           MR. FIGLER: Thank you, Your Honor.

23           THE COURT: Although actually it should  
24 be Goodman.

25           MR. FIGLER: Is it all right, can we

1 switch?

2 THE COURT: You're not supposed to  
3 switch.

4 MS. PANDUKHT: No.

5 THE COURT: No. Improper. One attorney  
6 for one witness.

7 MR. GOODMAN: Okay.

8 THE COURT: You can confer if you want.

9 MR. GOODMAN: No, no, no. It's okay,  
10 Your Honor.

11 EXAMINATION

12 BY MR. GOODMAN:

13 Q. We just wanted to make this clear that  
14 just because someone held a pistol around the grip  
15 wouldn't necessarily have wiped away the piece of  
16 the palm that belongs to Evaristo Garcia which was  
17 high up in the back end, correct?

18 A. Not necessarily.

19 Q. Thank you.

20 THE COURT: All right. Thank you very  
21 much. Before I let you go on recess, I think the  
22 State wanted to have the court's indulgence for a  
23 moment.

24 MS. PANDUKHT: Thank you.

25 THE COURT: Sure. Can I excuse this

1 witness, both sides, at this time?

2 MS. PANDUKHT: Yes, Your Honor.

3 THE COURT: All right. Thank you so  
4 much --

5 THE WITNESS: Thank you.

6 THE COURT: -- for your testimony.  
7 You're excused. One moment.

8 MS. PANDUKHT: All right. At this time,  
9 the State has no further witnesses. The State has  
10 filed a Fourth Amended Indictment in this case, the  
11 State has conferred with madam clerk regarding the  
12 exhibits, all the exhibits that the State sought to  
13 admit have been admitted, and with that, the State  
14 rests.

15 THE COURT: The State has now rested.  
16 Ladies and gentlemen of the jury, we're gonna take a  
17 break until 3:30.

18 During this recess, you're  
19 admonished not to talk or converse among yourselves  
20 or with anyone else on any subject connected with  
21 this trial.

22 Or read, watch or listen to any  
23 report of or commentary on the trial or any person  
24 connected with this trial by any medium of  
25 information, including, without limitation,

1 newspapers, television, radio or internet.

2 Or form or express any opinion on  
3 any subject connected with the trial until the case  
4 is finally submitted to you.

5 We'll take a 20 minute break. My  
6 marshal can take you guys back to the break room and  
7 we'll see you back at 3:30.

8 We'll be at ease while the jury  
9 excuses themselves. We're staying on the record.

10 (Whereupon, the jury exited the  
11 courtroom.)

12 THE COURT: We're now outside the  
13 presence of the jurors and everyone can be seated.

14 Mr. Garcia, I must admonish you that  
15 under the Constitution of the United States and  
16 under the Constitution of the State of Nevada, you  
17 cannot be compelled to testify in this case.

18 Do you understand that, sir?

19 THE DEFENDANT: Yes, Your Honor. Yes,  
20 ma'am.

21 THE COURT: You may at your own request  
22 give up this right and take the witness stand and  
23 testify.

24 If you do, you will be subject to  
25 cross-examination by the deputy district attorney.



1 And anything you say, be it on direct or  
2 cross-examination, will be the subject of fair  
3 comment when the deputy district attorney speaks to  
4 the jury in their final argument.

5 Do you understand that, sir?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: If you choose not to testify,  
8 the Court will not permit the deputy district  
9 attorney to make any comments to the jury because  
10 you have not testified.

11 Do you understand that?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: If you elect not to testify,  
14 the Court will instruct the jury, but only if your  
15 attorney specifically requests, as follows: "The  
16 law does not compel a defendant in a criminal case  
17 to take the stand and testify. And no presumption  
18 may be raised and no inference of my kind may be  
19 drawn from the failure of a defendant to testify."

20 Do you have any questions about the  
21 rights?

22 THE DEFENDANT: No, ma'am.

23 THE COURT: You are further advised that  
24 if you have a felony conviction and more than 10  
25 years have not elapsed from the date you have been

1 convicted or discharged from prison, parole or  
2 probation, whichever is later, and the defense has  
3 not sought to preclude that coming before the jury  
4 and you elect to take the stand and testify, the  
5 deputy district attorney in the presence of jury  
6 will be permitted to ask you the following: Number  
7 one, have you been convicted of a felony; two, what  
8 was the felony; and three, when did it happen.  
9 However, no details may be gone into.

10 Do you understand that, sir?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: All right. Thank you, sir.  
13 All right. I've just admonished the defendant of  
14 his rights.

15 Is there anything further before we  
16 take our break?

17 MR. FIGLER: Yes, Your Honor. You can  
18 also canvass the defendant regarding his waiver of  
19 appellate hearing if you want to do that now or  
20 later. In other words, this --

21 THE COURT: Yeah.

22 MR. FIGLER: We'll put the stipulation on  
23 the record.

24 THE COURT: Why don't you make a record  
25 because they've got to file -- you guys need to file

1 a written stipulation of that.

2 MR. FIGLER: Okay. Then we'll do that in  
3 writing.

4 THE COURT: But go ahead and state it on  
5 the record right now.

6 MR. FIGLER: In the event that Mr. Garcia  
7 is convicted of first degree murder with use of a  
8 deadly weapon, the parties are stipulating to waive  
9 the penalty hearing.

10 And the State has agreed that it  
11 will stipulate to and/or recommend to the Court that  
12 it impose the lightest sentence which is a term of  
13 years, meaning 20 to 50 years on the murder if it  
14 comes back in the first degree, and an equal and  
15 consecutive 20 to 50 on the weapon which was the law  
16 before the change made by the Nevada legislature.  
17 That's the agreement of the parties.

18 THE COURT: Is that correct?

19 MS. DEMONTE: That's correct, Your Honor.

20 THE COURT: All right. We'll make sure  
21 that, that we've filed the stipulation as well.

22 On, you know, punishment because I  
23 know we were going over instructions and we changed  
24 the instruction regarding now the jury will not need  
25 to consider penalty.

1                   Since -- wait. Let me talk and then  
2 you'll have a moment to talk to your attorneys.  
3 Because there's been a stipulation as to the  
4 lightest sentence --

5                   MR. FIGLER: Possible.

6                   THE COURT: Possible sentence, if the  
7 jury was to come back.

8                   MR. FIGLER: The jury can't give him  
9 concurrent.

10                  THE COURT: Right. It's by statute  
11 consecutive.

12                  MR. FIGLER: By statute.

13                  THE COURT: But it is the least amount of  
14 time per the statute in the event of a conviction of  
15 murder of the first degree.

16                         In any event --

17                  MR. FIGLER: With use of a deadly weapon.

18                  THE COURT: Right.

19                  MR. FIGLER: It can't get less than that.

20                  THE COURT: It can't get any less than  
21 what they've agreed to.

22                  MR. FIGLER: A jury can only give him  
23 more.

24                  THE COURT: A jury can only give him more  
25 if it was to go to the jury. So having said that

1 stipulation, we'll follow up with it in writing  
2 later, but we put it on the record.

3 Is there anything else I need to do  
4 before we go off the record?

5 MR. FIGLER: No, Your Honor.

6 MS. DEMONTE: No, Your Honor.

7 THE COURT: Thank you.

8 (Whereupon, a recess was had.)

9 THE COURT: Good afternoon, ladies and  
10 gentlemen. We're back on the record in the presence  
11 of the jury on the case of State of Nevada versus  
12 Evaristo Garcia. Case No. C262966.

13 Let the record reflect the  
14 defendant's present with Mr. Goodman and Mr. Figler.  
15 And for the State, Ms. Pandukht and Ms. Demonte.

16 All right. We're now on the  
17 defense's case-in-chief. Call your first witness.

18 MR. GOODMAN: Dr. Roitman, Your Honor.

19 THE COURT: Mr. Goodman, these are just  
20 copies.

21 (Whereupon, Dr. Norton Roitman was duly  
22 sworn to tell the truth, the whole truth,  
23 and nothing but the truth.)

24 THE CLERK: Please be seated. State and  
25 spell your full name for the record, please.

1 THE WITNESS: My name is Norton A.

2 Roitman, M.D. N-o-r-t-o-n. R-o-i-t-m-a-n.

3 THE COURT: Go ahead.

4 DIRECT EXAMINATION

5 BY MR. GOODMAN:

6 Q. Good afternoon, doctor. Can you please  
7 describe to the jury some of your background?

8 A. I went to college at the University of  
9 Wisconsin and got a Bachelor's in psychology there.

10 Then I went to the University of  
11 Illinois and received my medical degree in 1976.

12 In 19 -- and then after I graduated,  
13 I went to the University of California in San Diego  
14 and did general psychiatry and some -- I helped with  
15 research in medication psychopharmacology and then I  
16 went up to Los Angeles at Rice Davis Child Studies  
17 Center and there I got a child fellowship and some  
18 administrative training as well.

19 I got board certified, which is kind  
20 of like a seal of approval by an agency, in general  
21 psychiatry and child psychiatry in '82 and 1987.

22 Q. Have you been qualified as an expert to  
23 give testimony in this court before?

24 A. Yes. In district court and federal court  
25 in three states.

1 Q. Okay. Now, at some point, Dr. Roitman,  
2 you were asked by the defense to do a medical  
3 review, correct?

4 A. Yes.

5 Q. And that was of a Jonathan Harper?

6 A. Yes.

7 Q. Okay. Can you please describe to the  
8 jury what records you reviewed?

9 A. I received about 2100 pages of medical  
10 records from Sunrise Hospital during the acute  
11 event, the gunshot wound, and then the  
12 rehabilitation phase at Healthsouth.

13 And then I got a series of records  
14 from 2009 where Mr. Harper was hospitalized again at  
15 Sunrise.

16 Q. Okay. And what were the medical findings  
17 from your record review?

18 A. The first record showed that he had a  
19 hole in the left side of his head the size of a golf  
20 ball about, and then there were bone fragments and  
21 fragments from bullets kind of spread throughout the  
22 three of the four lobes of the brain; the parietal  
23 lobe, the temporal lobe and the frontal lobe.

24 Q. So when you say golf ball, just for the  
25 jury, can you explain what did you view that off of?

1           A.       Well, I read the report by the  
2 radiologist. You know, they're the experts at  
3 reading the films. I wouldn't be so good reading  
4 the films.

5           Q.       Okay. The CT scans, correct?

6           A.       Yes.

7           Q.       And about how big was this hole that you  
8 described as a golf ball?

9           A.       About two -- they said five centimeters a  
10 ragged edge in both directions. So that's around  
11 two inches both directions.

12          Q.       So can you explain to the jury about the  
13 bleeding and the swelling that developed?

14          A.       Yeah. You know, it's not just an opening  
15 in the brain and the spray of fragments into the  
16 brain matter. It's a powerful impact into the organ  
17 itself. And it causes a reaction of swelling. Not  
18 just in the area where the fragments were, but in  
19 the other side as well. So there's a lot of  
20 swelling.

21                   He's a little lucky actually that he  
22 had a hole in his skull because that releases  
23 pressure. Sometimes people get a brain injury and  
24 it's contained by the skull, they actually open up  
25 the spot. So there's swelling and then there was



1     bleeding mostly on the left side.

2           Q.     And what's the significance of the  
3     bleeding?

4           A.     Well, there's a blood brain barrier in  
5     our brains and we've got to keep the brain separated  
6     from blood because it's almost like a poison.

7                     When there's a stroke, there's a  
8     bleed into the body of the brain, the gray matter  
9     and the white matter and that becomes poisonous.

10                    So whenever there's a defect in the  
11    blood brain barrier, the brain undergoes damage,  
12    irreversible damage.

13          Q.     And in this case, did Mr. Harper's  
14    gunshot wound develop where he had bleeding in his  
15    brain?

16          A.     Yes.   Bleeding on his brain, in his  
17    brain, under his brain and swelling fluid pretty  
18    much around it.

19          Q.     So what parts of his brain was damaged?

20          A.     The left.   Mostly on the left side, left  
21    parietal, which is about here.   The temporal which  
22    is more on the side.   And the frontal areas over  
23    here.   (Indicating.)

24          Q.     Now, based on that injury, doctor, what  
25    type of impact could that have on somebody giving a

1 statement or providing testimony?

2 A. Well, these areas of the brain, they have  
3 specific functions. It's not exactly like a puppet  
4 like, you know, one area of the brain causes this.  
5 With motor it does, but in terms of things like  
6 comprehension, understanding, finding the words to  
7 explain what somebody's thinking, these symbolic  
8 functions, the ability to logic things out, reason  
9 and math, the areas of his brain was impacted are  
10 those that control those sorts of things as well as  
11 memory.

12 Q. Okay. So to -- so for, for the damage to  
13 the left part of the brain, can you please describe  
14 again what parts would have been affected on  
15 Jonathan Harper?

16 A. The functions or the anatomy?

17 Q. The functions.

18 A. The functions would be the ability to  
19 understand or comprehension, the ability --

20 Q. And why would that be affected?

21 A. Well, comprehension's complex, you know.  
22 It's easy enough for a computer to register that  
23 there's a key stroke, but in order to make meaning  
24 out of a series of key strokes, there's -- you need  
25 the central processing unit that puts all the input

1 together and makes some sense out of it.

2 The brain is in some way similar to  
3 that. And there are -- there's centers that are  
4 more specialized to that.

5 Q. That's right.

6 A. Gather information from all different  
7 directions. What is being seen, what's heard,  
8 memories, things like that, and then produces a  
9 concept. And that's what comprehension is.

10 Q. Okay. Does that affect I guess your  
11 logic as well?

12 A. Yes.

13 Q. Okay. So can somebody answer one  
14 question one way and then be -- and then do the  
15 opposite the next day?

16 A. Yeah. You know, those of us with healthy  
17 brains, we're kind of monitoring and remembering and  
18 tracking. There's a strong drive to be consistent.  
19 And so we are vigilant, careful sorting through what  
20 we think and then output and answer to a question.  
21 And day after day, that question is gonna be the  
22 same. The answer's gonna be the same.

23 Q. Okay. So that also would affect  
24 somebody's judgment?

25 A. Yes.

1 Q. Okay. Can you explain how?

2 A. Well, a judgment is -- to appreciate  
3 something within the context in which it is  
4 happening, and to judge whether it makes sense or  
5 not, if you're unable to see the like figure ground,  
6 I don't know if anybody knows that, if a forest, a  
7 tree in the forest, if you can't appreciate that the  
8 tree is in the forest, then you're dis -- you're  
9 thinking about the tree may be different. But if  
10 you see the big picture, then you see -- you  
11 exercise judgment.

12 I'm sorry if that wasn't too clear.

13 Q. Okay. Well, let me break it down. So  
14 you're aware in this case with Mr. Harper that he  
15 was shot in the head on February 18th of 2006,  
16 correct?

17 A. Yes.

18 Q. And that he later provided a statement to  
19 police on April 1st of 2006. So about five weeks,  
20 correct?

21 A. Yes.

22 Q. What would be the condition of his brain  
23 to be in a position to comprehend, to make judgment  
24 calls, to recall anything at that point in time?

25 A. I would, I would -- if I was asked to

1 examine, I would be very sceptical at five weeks  
2 whether somebody with those injuries had the  
3 capacity to say enter into a contract to buy a car,  
4 you know, buy a house.

5 I would want a psychiatrist there to  
6 do an examination and see if there's by some miracle  
7 he retained the capacity to make judgments.

8 Q. So going along this timeline, you were  
9 able to review some medical records both at the time  
10 the shooting, during his rehab and then I think you  
11 said in 2009, correct?

12 A. Yes, yes.

13 Q. So can you tell the jury about what you  
14 saw based on the record review of his brain and how  
15 that was evolving?

16 A. Yeah. You know, with fingers crossed,  
17 immediate injury, you would hope that maybe there  
18 would be good bounce back, that, that the brain  
19 would heal.

20 Although nervous tissue does not  
21 really grow back, it doesn't heal. Somebody gets a  
22 stroke and they lose the ability to walk or to  
23 speak, they have to recoup new brain tissue. And  
24 through physical training, physical therapy and  
25 relearn to walk and talk and, and remember and

1 things like that.

2 So, so if when you look at 2009, he  
3 entered the hospital and he was in a constant  
4 seizure, they gave him -- they put him out,  
5 completely sedating him and his body still shaking  
6 like this horribly. (Indicating.)

7 So when there's a seizure, it's an  
8 indication of an unhealthy brain. That's the only  
9 reason why there is a seizure. The brain was not  
10 healthy and then they took pictures of it. And  
11 there were extensive areas of decay. About 23  
12 percent, 25 percent of brain loss. And so that's  
13 two points in time.

14 The gunshot wound happened three  
15 years ago and then nine -- and three years later,  
16 there's still evidence of brain damage. And so  
17 that's, that's the state of affairs. That's, that's  
18 not gonna be reversed.

19 Q. So 23 percent of his brain is not gonna  
20 grow back is what you're saying?

21 A. That's right, yeah.

22 Q. Okay. Now, so based on your review of  
23 the records when Mr. Harper first gave his statement  
24 to police in April 1st, 2006, can you describe to  
25 the jury what the, what the neurological affect was

1 on his brain at that time?

2 A. Well, to be fair, I can't really talk  
3 about him. I didn't examine him. I examined his  
4 records and I can talk about somebody who had that  
5 type of injury.

6 I, I -- the areas that were affected  
7 by the swelling and the bleeding and the fragments  
8 in there were the areas that are necessary for  
9 processing information, for speaking, for using  
10 continuous memory.

11 I would, I would -- like I would  
12 doubt that a person like that had the capacity,  
13 unless they demonstrated on testing or with a  
14 psychiatric examination, that they were intact.

15 Q. Okay. So when you say that somebody  
16 would be affected by their speech, are you talking  
17 about like their tongue, their mouth or what?

18 A. No, it's the, it's the, the speech center  
19 of the brain. I mean, that he could -- if he  
20 could -- if a person can't speak at a time like  
21 that, that's the proof that there's damage to the  
22 temporal and parietal lobes.

23 Q. Okay. So can we now talk about  
24 confabulation?

25 A. Yes.

1           Q.     And what's the medical term or the  
2 medical definition of confabulation?

3           A.     Confabulation applies specifically to  
4 persons with brain problems. And it is very  
5 uncomfortable for us humans not to have a continuous  
6 memory.

7                     It's surprising. I've met many  
8 patients and they're so unnerved by not being able  
9 to remember things that have happened. It's part of  
10 the social fabric.

11                    So there's, there's automatic  
12 pressure for us to want to portray us as present and  
13 consistent and part of what's happening.

14                    So there was -- like I'll give an  
15 example. When I was a resident in, in, in Chicago,  
16 some of the residents who worked the emergency room  
17 would demonstrate confabulation to the students.  
18 And they hold like something between their fingers  
19 like this in front of patients in the emergency  
20 room. (Indicating.) Mostly this applied to chronic  
21 alcoholics who had a brain damage. And through  
22 their questioning, they would get the patient to say  
23 that they were holding a red snake. It was the red  
24 snake test.

25                    And it was the, the authentic -- the



1 patients would talk about this as though it was real  
2 and then they'd ask vague questions about it and say  
3 what's the snake doing now and they'd answer that  
4 question.

5                   They were not lying. That's not  
6 what confabulation is.

7                   Confabulation is the medical term  
8 that describes the tendency of a person with brain  
9 injury to fill in gaps. And they are easily led.

10           Q.       Okay. So at the stage of April 1st of  
11 2006, would it be your opinion that based on the  
12 record review that Jonathan Harper would have  
13 confabulation?

14           A.       Yes, yes. I, I -- actually my approach  
15 would be confabulation would have to be ruled out  
16 because he's so -- it was such a set up to have  
17 that.

18           Q.       It was such a what?

19           A.       A set up.

20           Q.       Okay.

21           A.       Because of his medical injuries, he was  
22 prone to -- a person like that would be prone to  
23 confabulation.

24           Q.       Now, you said you reviewed -- you didn't  
25 examine Mr. Harper but you reviewed 21 hundred pages

1 of record, correct?

2 A. Yes.

3 Q. And can you tell for the jury some of  
4 these CT scans that you reviewed as well, the  
5 radiological findings?

6 A. Yes. Consistent with what I was talking  
7 about before, they said there was a ragged edge hole  
8 in the skull, there were fragments of bone and  
9 bullet scattered in the skull and then into the  
10 brain matter in all three areas.

11 And there was still -- at the end,  
12 the last CAT scan still showed a piece of bone stuck  
13 into I believe in the left parietal lobe.

14 Q. And what year was that scan?

15 A. In 2006.

16 Q. Okay.

17 A. There were tumors of blood, hematomas,  
18 along the surface of the brain and there was bleed  
19 within the body, the gray matter of the brain  
20 itself.

21 Some of the debris in there they  
22 didn't even think they should clean out.

23 Q. So as a result of this gunshot injury to  
24 Mr. Harper's head, his brain had swollen to an  
25 extent that he had lost 23 percent of the tissue in

1 his brain?

2 A. Well, the, the, the -- the measurement of  
3 23 percent really comes from the 2009 that shows the  
4 scarring basically. The aftermath of the damage  
5 that took place of the gunshot wound did not grow  
6 back. It doesn't grow back. It's not surprising.  
7 But whatever happened then at the gunshot wound, it,  
8 it doesn't, doesn't progress. It's the worst at  
9 that point and then it doesn't get much better.

10 Q. Okay. So that scarring that you saw in  
11 the 2009 scan --

12 A. Yeah.

13 Q. -- was that scarring visible on an  
14 earlier scan?

15 A. No. Because there was too much activity  
16 going on with -- the swelling would interfere with  
17 it. And, and in a lot of ways, it's almost like  
18 stages of injury. And then in the last stage when  
19 the defect shows up -- because there's so much  
20 damage, the body just clears out the dead tissue.

21 Q. Now, what type of medication was Mr.  
22 Harper on in April of 2006?

23 A. He was given anticonvulsants which keep  
24 the brain from, you know, convulsing.

25 Q. And then at what point, based upon your

1 record, on your record review that Mr. Harper's  
2 swelling in his brain and the bleeding in his brain  
3 started to dissipate?

4 A. I didn't, I didn't -- I mean, the next  
5 snapshot I got was 2009. I didn't get swelling  
6 there, but he had, you know, decay.

7 Q. Okay. So based on your review of Mr.  
8 Harper's records, is your opinion to a reasonable  
9 degree of medical certainty?

10 A. Yes.

11 Q. Okay.

12 A. I would -- if I might. You mentioned  
13 medication.

14 Q. Right.

15 A. In the 2009 records, it showed an EEG  
16 that was affected by medication as well, and it was  
17 called abnormal.

18 So there is a liability to the -- to  
19 thinking when a person is not anticonvulsant. It  
20 affects cognition.

21 Q. And information processing?

22 A. Yes.

23 Q. Okay. Thank you.

24 THE COURT: Is your direct concluded?

25 MR. GOODMAN: Yes. Thank you, Your

1 Honor.

2 THE COURT: Okay. Cross-examination.

3 MS. DEMONTE: Thank you.

4 CROSS-EXAMINATION

5 BY MS. DEMONTE:

6 Q. Good afternoon, Dr. Roitman.

7 A. Hello.

8 Q. Now, you are an M.D., correct?

9 A. Yes.

10 Q. But what is your specialization?

11 A. Psychiatry.

12 Q. So you're a licensed psychiatrist?

13 A. Licensed medical doctor.

14 Q. Okay. You're a licensed medical doctor  
15 but your field is psychiatry?

16 A. Yes.

17 Q. You are not a neurologist?

18 A. No.

19 Q. All right. Now, I want to talk about  
20 what you did review in this case. Because what I  
21 heard was you did a medical review of Mr. Harper?

22 A. Medical records, yes.

23 Q. And was that the extent of the  
24 information you reviewed in this case?

25 A. Yes.

1 Q. All right. So you looked at Sunrise  
2 Hospital records, rehabilitation records from  
3 Healthsouth and then you jumped to 2009 when he was  
4 hospitalized for a seizure?

5 A. Yes.

6 Q. You never interviewed Mr. Harper?

7 A. No.

8 Q. You have never observed Mr. Harper?

9 A. No.

10 Q. You have never spoken with Mr. Harper?

11 A. That's correct.

12 Q. You were -- you did not review the actual  
13 statement he gave on April 1st?

14 A. No.

15 Q. Okay. You did not review statements he  
16 gave in a separate investigation on April 1st and  
17 even prior to that?

18 A. That's correct.

19 Q. You did not review a video of a statement  
20 he gave in a different investigation taken during  
21 the hospital stay?

22 A. That's right.

23 Q. Do you know Dr. Derek Duke?

24 A. Yes.

25 Q. Who is Dr. Derek Duke?

1           A.       He's a neurosurgeon.

2           Q.       And did you see his name in the records  
3 you reviewed of Mr. Harper?

4           A.       I don't recall.

5           Q.       You don't recall seeing Dr. Derek Duke's  
6 name?

7           A.       No, I don't recall.

8           Q.       Okay. Do you have any reason to disagree  
9 with me if I told you that Dr. Derek Duke is the  
10 person that performed the surgery on Jonathan  
11 Harper?

12          A.       No, I have no -- I, I accept that.

13          Q.       Okay. And that doctor -- he was  
14 basically in Dr. Duke's care at Sunrise Hospital?

15          A.       I'll definitely accept that.

16          Q.       Okay. So you did not review Dr. Derek  
17 Duke's testimony in a separate trial regarding  
18 Jonathan Harper's condition and how his injury  
19 affected his ability to remember things?

20          A.       That's correct.

21          Q.       So you did not review any of those  
22 things?

23          A.       That's correct.

24          Q.       All right. Now, counsel asked you to  
25 describe what you saw from the CT scans. And I just

1 want to make sure we're accurate.

2                   You actually didn't review the films  
3 themselves?

4           A.     No.

5           Q.     You reviewed the radiologist's report?

6           A.     That's correct.

7           Q.     That came with the paper medical records?

8           A.     That's correct.

9           Q.     All right. But you were provided  
10 information that the injury to his head was on  
11 February 18th of 2006 and he gave a statement to the  
12 police on April 1st, 2006?

13          A.     Yes.

14          Q.     And you actually authored -- it's not  
15 really a report, but it's a letter directed to Mr.  
16 Goodman?

17          A.     That's correct.

18          Q.     Laying out your findings, correct?

19          A.     That's correct.

20          Q.     And in your report, about the third  
21 paragraph down, you said swelling and film reaction  
22 to tissue damage takes time to resolve. Three weeks  
23 is a very short term.

24                   Where did you come up with three  
25 weeks?



1           A.     Best of my recollection, I might have  
2     been measuring from his discharge from Healthsouth,  
3     but I don't really know.

4           Q.     Okay. Now, and you'd also placed in your  
5     report that Mr. Harper would be susceptible to being  
6     led?

7           A.     Yes.

8           Q.     But you did not review the interview  
9     itself?

10          A.     That's right.

11          Q.     So you have no knowledge whatsoever of  
12     what questions were asked of Mr. Harper?

13          A.     That's correct.

14          Q.     All right. So can I ask you, in your  
15     opinion -- who were you with that night.

16                   Is that a leading -- is that leading  
17     in your opinion?

18          A.     No.

19          Q.     Okay. Can you tell me where the school  
20     is? Is that leading?

21          A.     It depends on what context, but, you  
22     know, this is not my area of expertise,  
23     interrogation.

24          Q.     Okay. But I mean, you've testified about  
25     confabulation and you've got the red snake thing.

1 A. Yeah.

2 Q. Are questions like that the red snake?

3 A. That, that was an example of leading  
4 questions, yeah.

5 Q. Okay. So the red snake would be leading?

6 A. Yeah.

7 Q. Okay. But asking somebody what happened  
8 next?

9 A. That's an open-ended question.

10 Q. Okay. So you -- but you can't tell us  
11 that Mr. Harper was being led on April 1st?

12 A. No, I can't.

13 Q. Okay. Because you -- first of all,  
14 that's not your expertise, you're not an  
15 interrogator?

16 A. That's right.

17 Q. And second of all, you did not review it?

18 A. That's right.

19 Q. Now, you've actually mentioned several  
20 times in your testimony that there would be problems  
21 with memory?

22 A. Yes.

23 Q. But in what you wrote to Mr. Goodman,  
24 your very last paragraph is although there are no  
25 specific memory issues with this injury.

1 Do you recall writing that?

2 A. Yes, I do.

3 Q. Okay. So this type of injury  
4 specifically actually does not affect memory?

5 A. Well, specific memory related to whether  
6 there was, like in my mind it wasn't clearly stated  
7 an amnesia. Like who am I, where am I, I don't know  
8 who I am. There are areas of the temporal lobe that  
9 can produce that type of problem.

10 But the brain is like -- a lot like  
11 an air traffic control map. Every -- like every  
12 group connects to each other. And let's say the --  
13 like if we were flying, let's say Denver was down,  
14 it could affect what's going down in Los Angeles.  
15 And he had so much diffused damage and swelling, so  
16 many areas of injury.

17 And in addition, in particular areas  
18 that are used to process information, I hope by my  
19 opinion that it could affect his memory.

20 Q. It could?

21 A. Yeah.

22 Q. But in your own words there are no  
23 specific memory issues with this injury?

24 A. Yes.

25 Q. Those are your words?

1           A.     I know it contradicts my testimony. I  
2     tried to clear that up.

3           Q.     Okay. Now, would you agree with me, Dr.  
4     Roitman, that someone's recovery is highly  
5     individualized?

6           A.     Within limits.

7           Q.     Within limits, but it's highly  
8     individualized? That without you seeing Jonathan  
9     Harper, you actually can't give us a degree of  
10    medical certainty as to what his condition really  
11    is?

12          A.     That's right. My testimony is only about  
13    the injuries.

14          Q.     Okay. So -- and you've never observed  
15    him?

16          A.     Right.

17          Q.     You've never reviewed any of his  
18    statements?

19          A.     That's correct.

20          Q.     You've never spoken with him?

21          A.     That's right.

22                 MS. DEMONTE: Pass the witness.

23                 THE COURT: Redirect.

24                 MR. GOODMAN: Thank you.

25                         REDIRECT EXAMINATION

1 BY MR. GOODMAN:

2 Q. So when you -- based on your review of  
3 the records from, from February 18th of 2006 through  
4 2009, his brain didn't get healthy again, did it?

5 A. No.

6 Q. Okay. And I think you said, but I just  
7 want the jury to understand that when you -- in his  
8 brain injury when he lost 23 percent of the actual  
9 tissue in his brain, that's not gonna grow back  
10 whether it's 2010, 2011 or, or last week, correct?

11 A. No.

12 Q. Now --

13 A. He's more apt to learn new information  
14 than to retrieve old information.

15 Q. Now, I just want to make sure that the,  
16 the jury understands what confabulation is, okay?

17 Does confabulation fill in gaps if  
18 somebody, you know, you know, doesn't recall or  
19 doesn't know, could somebody then give him  
20 information from one source or multiple sources and  
21 that person will then fill in the gaps?

22 A. Persons with confabulation, that's  
23 exactly what they do.

24 Q. Okay. So in other words, somebody could  
25 piece together a story?

1           A.     Yes.

2           Q.     Okay.  Now --

3           A.     You know, I examine a lot of people with  
4 brain injuries and I have to make it very clear that  
5 I want the history that they actually remember, not  
6 the, the history that they figured out later or that  
7 anybody else told them.

8           Q.     Now, so how could you tell if somebody  
9 has this confabulation?  I mean, if somebody's  
10 testifying from where you are and it appears that  
11 they look like they're giving good testimony, how  
12 does one know if somebody's actually -- if that's  
13 his testimony or if that's based from confabulation?

14          A.     I'd bring in a neuropsychologist and test  
15 for confabulation and memory.

16          Q.     Now, when you -- when counsel asked you  
17 if it was highly individualized, you said within  
18 limits.

19                   Can you tell us what you meant based  
20 on the type of injuries on Mr. Harper suffered?

21          A.     Yeah.  The brain damage that he had is  
22 like an amputation and the limb doesn't grow back,  
23 the brain tissue doesn't grow back.

24                   The question is whether new brain,  
25 unused tissue can be recruited and trained to make

1 up for the tissue that's been lost. But the more,  
2 you know, enriched cognitive free training and  
3 physical therapy a person undergoes, the more likely  
4 they'll retain function, but you can't really tell  
5 if the story from the past is gonna sharpen up.

6 Q. So someone could give Mr. Harper  
7 information beforehand and he could think that is  
8 true now?

9 A. Yes.

10 MR. GOODMAN: Thank you.

11 THE COURT: Any recross?

12 MS. DEMONTE: Yes.

13 RECROSS-EXAMINATION

14 BY MS. DEMONTE:

15 Q. Now, you said just now that Mr. Harper is  
16 more apt to learn new information than to retrieve  
17 old information.

18 Did you include that in the report  
19 that you sent to Mr. Goodman?

20 A. I don't believe so.

21 MR. GOODMAN: I'm gonna object. It's not  
22 a report. It was a letter.

23 MS. DEMONTE: Oh, I'm sorry. I'm calling  
24 it a report.

25 BY MS. DEMONTE:

1           Q.     The letter that you sent to Mr. Goodman  
2 with your findings.

3           A.     I don't believe I put that in.

4           Q.     And this is the only documentation you  
5 made of your findings?

6           A.     That's right.

7           Q.     All right. And now -- but what you did  
8 put in your letter is that yes, while I probably  
9 used the wrong word as individualized, let me use  
10 your words, such wounds have a high degree of  
11 variability.

12          A.     Yes.

13          Q.     And you defined confabulation as being  
14 able to piece together a story.

15                   But doesn't information have to be  
16 given to that person in order to make that happen?

17          A.     Well, in a way, but it may not be the  
18 exact facts that are given. Like a leading question  
19 doesn't have to be concrete and specific.

20                   There was in the McMartin case of  
21 children who were systematically abused by satanic  
22 cults, it turned out that a lot of that material was  
23 generated by the interviews by psychologists who  
24 drew that type of history out of them.

25          Q.     All right. But do you have any reason to



1 dispute with me that there was no psychologist or  
2 psychiatrist with Mr. Harper when he gave his  
3 interview to the police?

4 A. Not that -- I didn't study it. I'll take  
5 your representation.

6 Q. All right. And you actually don't know  
7 the particles that were being used to piece together  
8 because you did not review any of that?

9 A. That's right.

10 Q. All right. And you were hired by the  
11 defense in this case, correct?

12 A. Yes.

13 MS. DEMONTE: Nothing further.

14 THE COURT: Do the ladies and gentlemen  
15 of the jury have any questions? Yup, we do. All  
16 right.

17 (Whereupon, the following proceedings  
18 were had in open court outside the  
19 presence of the jury panel.)

20 THE COURT: Okay. This is from Juror No.  
21 3. There are two questions. Take your time reading  
22 it.

23 MR. FIGLER: It's an interesting  
24 question. No objection.

25 THE COURT: I'm sorry. Ross was

1     distracting me.

2                 MS. DEMONTE:   Okay.   No objection.

3                 THE COURT:   No objection from both sides,  
4     right?

5                 MR. GOODMAN:   Right.   No objection.

6                 THE COURT:   This is from Juror No. 13.

7                 MS. DEMONTE:   No objection.

8                 MR. GOODMAN:   No objection.

9                 THE COURT:   This is from Christy Beber,  
10    No. 8.

11                MS. DEMONTE:   No objection.

12                MR. GOODMAN:   No objection.

13                (Whereupon, the bench conference ended.)

14                THE COURT:   Doctor, this is from Juror  
15    No. 3.   It's two questions.   If someone with brain  
16    damage has symptoms of confabulation, they fill in  
17    blanks in their memory, but is this done  
18    subconsciously?   In other words, is the person aware  
19    their memory is flawed?

20                THE WITNESS:   It is a subconscious  
21    phenomena.   People are con -- they could pass a lie  
22    detector test.   It's -- it is -- that's what  
23    distinguishes it from lying.

24                THE COURT:   Question two from the same  
25    Juror 3.   Do you believe a person of brain damage

1 may feel ashamed or embarrassed of their flawed  
2 memory enough to claim that their memory isn't  
3 flawed at all?

4 THE WITNESS: Yes. It -- that happens  
5 frequently. It's so shameful. It's, it's the most  
6 important part of our bodies is our brain. And when  
7 people feel, others think that they're defective,  
8 they try to cover it over.

9 THE COURT: This is from Juror No. 13.  
10 Does a person with confabulation fill in the gaps  
11 themselves or do they only fill in the gaps by an  
12 outside source?

13 THE WITNESS: They can fill in the gaps  
14 themselves.

15 THE COURT: This is from Juror No. 8.  
16 Are you stating a person with Jonathan Harper's  
17 level of brain injuries could not have any true and  
18 accurate memories from prior to the injury?

19 THE WITNESS: No, I'm not saying that.

20 THE COURT: Does the defense have any  
21 follow up based on those questions?

22 MR. GOODMAN: One moment. We have one.  
23 Hang on one second.

24 THE COURT: Sure.

25 EXAMINATION

1 BY MR. GOODMAN:

2 Q. Doctor, can you make any assessment in  
3 the context of confabulation based on whether or not  
4 that person's given reliable information?

5 A. Could you ask me again. I'm unclear.

6 Q. Based on your assessment, could that  
7 information be reliable?

8 A. Is, is --

9 Q. Based on Jonathan's Harper's brain  
10 injuries, could the information that he  
11 subconsciously, is that reliable information?

12 A. Is -- are you, are you speaking about  
13 confabulation?

14 Q. Yes.

15 A. It would be random as to whether it was  
16 valid or not.

17 Q. Okay.

18 A. Rather than -- a confabulation is not a  
19 distinct memory of an event. It's a conjecture.

20 Q. And so, and so based on your  
21 reasonable -- or based on your opinion reviewing  
22 Jonathan's Harper's brain damage, is it your opinion  
23 that he would be at the extent of time in April 2006  
24 in a position of confabulating?

25 A. All I can say is it's conceivable. I

1 wouldn't go as far as probable, but I wouldn't give  
2 that to any degree of certainty because I didn't  
3 examine him. But the nature of the injury is  
4 profound and it disturbed language function as was  
5 represented to me and it's inconceivable to me that  
6 it wouldn't affect mental processes.

7 Q. And what is conjecture?

8 A. Conjecture is maybe, maybe it's this,  
9 maybe it's that, I'm gonna go with this.

10 Q. Okay, thank you.

11 THE COURT: Any follow up based on the  
12 questions that have been asked?

13 EXAMINATION

14 BY MS. DEMONTE:

15 Q. But to be clear, you cannot, as you sit  
16 here today, tell the members of this jury that  
17 Jonathan Harper was confabulating; yes or no?

18 A. No, I can't say that.

19 Q. And you cannot tell the members of this  
20 jury, the 12 members of this jury, 14, sorry, to  
21 this day, sitting where you are today that  
22 Jonathan's Harper's memories were not real?

23 A. I can't, I can't stand by sentence  
24 either.

25 Q. Thank you. Nothing further.

1 THE COURT: Thank you very much, doctor,  
2 for your testimony. You're excused.

3 THE WITNESS: Thank you.

4 THE COURT: Thanks. Defense, call your  
5 next witness.

6 MR. GOODMAN: If we can approach the  
7 bench, Your Honor.

8 (Whereupon, the following proceedings  
9 were had in open court outside the  
10 presence of the jury panel.)

11 MR. GOODMAN: I've got to wait for Mr.  
12 Figler. Make sure.

13 MR. FIGLER: He's, he's borderline. He's  
14 very unintelligent. He's unintelligent.  
15 Unintelligent. And he does not want to testify.

16 So I just wanted to make sure that I  
17 just once again went over his constitutional right  
18 to testify. I know Your Honor already did, but I  
19 didn't get a chance to respond to him.

20 We're going to close without him  
21 testifying.

22 MS. PANDUKHT: (Inaudible.)

23 THE COURT REPORTER: Judge, I can't hear.

24 MR. FIGLER: No, she didn't ask him.

25 THE COURT: Well, I mean I need to ask.

1 I'm gonna ask them if they have any rebuttal and  
2 then I'm gonna let the jury go and then we can make  
3 a record that he chose not to.

4 MR. FIGLER: Okay, that's fine.

5 THE COURT: But I mean, if we --

6 MR. FIGLER: If you're comfortable with  
7 that, the State's comfortable with that.

8 THE COURT: I'm gonna ask him again, too.

9 MR. FIGLER: It might be a little  
10 difficult but you can get there. He has told me  
11 what appears to be as no uncertain terms, as Mr.  
12 Garcia is capable of giving me, that he does not  
13 want to testify, understanding that's not just us  
14 who's asking him questions, but that they would ask  
15 him and all the things you already went over with  
16 him.

17 THE COURT: Before I let the jury go.

18 MR. FIGLER: Do you understand?

19 THE COURT: No, I'm just gonna make sure  
20 that on the record I feel sufficient -- you know, he  
21 had done this kind of posturing when I took his plea  
22 and that's what allowed him to withdraw a plea.

23 So I'm going to really make sure we  
24 have a record, record, record, record that we didn't  
25 let the jury go and if he wants to sing and testify,

1 he has all the time in the world.

2 MR. FIGLER: From the defense  
3 perspective, he absolutely can't because of his  
4 incapacity to articulate in a way that would be  
5 favorable to him or --

6 THE COURT: Well, that would be obvious  
7 to a lot of people; however, it's certainly his  
8 right and I want to go over his rights with him.

9 MR. FIGLER: I appreciate that.

10 THE COURT: Because unfortunately we've  
11 had a withdraw of a plea based on his again  
12 posturing, going back and forth. So I just want to  
13 let -- we'll -- I'm gonna have the defense rest and  
14 then I'll talk to him.

15 If I reopen it, I reopen it for him,  
16 okay?

17 MR. GOODMAN: That's great.

18 (Whereupon, the bench conference ended.)

19 MR. GOODMAN: Okay. Your Honor, it's  
20 4:15 and the defense will rest.

21 THE COURT: The defense has now rested.  
22 What I'm gonna do is take just a five-minute break,  
23 quick bathroom break, and we'll come back on the  
24 record.

25 During this recess, you're



1 admonished not to talk or converse among yourselves  
2 or with anyone else on any subject connected with  
3 this trial.

4 Or read, watch or listen to any  
5 report of or commentary on the trial or any person  
6 connected with this trial by any medium of  
7 information, including, without limitation,  
8 newspapers, television, radio or internet.

9 Or form or express any opinion on  
10 any subject connected with the trial until the case  
11 is finally submitted to you.

12 We'll see you in five minutes.

13 Thank you.

14 (Whereupon, the jury exited the  
15 courtroom.)

16 THE COURT: We're outside the presence of  
17 the jury.

18 Let me just ask the State, at this  
19 point are you gonna have any rebuttal.

20 MS. PANDUKHT: You know, Your Honor, Dr.  
21 Roitman did not testify as we expected between the  
22 reports, so we need to confer about that. We may  
23 have a rebuttal witness. It would be first thing  
24 Monday morning.

25 THE COURT: Well, we need to know now

1 because I was gonna settle instructions. It's 4  
2 o'clock, we can go til 5.

3 MS. DEMONTE: Well, understood, but --

4 THE COURT: So make a quick  
5 determination.

6 MS. DEMONTE: The letter indicated that  
7 he would not be testifying that it would have  
8 affected Mr. Harper's memory. Mr. Goodman told us  
9 the exact same thing. So therefore, we did not  
10 prepare to call Dr. Duke; however, now on the stand,  
11 he's now going back on the --

12 THE COURT: Well, do you want to call Dr.  
13 Duke I guess is what I'm asking.

14 MS. DEMONTE: Yes. Can we make a phone  
15 call and see if we can --

16 THE COURT: Oh, yeah.

17 MS. PANDUKHT: We can't get him here  
18 today.

19 MS. DEMONTE: Yeah, I don't have him here  
20 to --

21 MR. GOODMAN: I don't think Dr. Duke is  
22 qualified to testify about memory. I mean, he --

23 THE COURT: He's a neurosurgeon.

24 MR. GOODMAN: Yeah, but he --

25 THE COURT: Are you serious?

1 MS. DEMONTE: He's the neurosurgeon.

2 THE COURT: He's absolutely probably more  
3 qualified than --

4 MR. GOODMAN: Yeah, but when people are  
5 asleep he's --

6 THE COURT: Oh, come on.

7 MR. FIGLER: Once again, I think that  
8 there's --

9 THE COURT: There's probably no one more  
10 qualified than Dr. Duke to testify as to brain  
11 injury.

12 MS. DEMONTE: And specifically with  
13 regard to Mr. Harper, he's the one that operated on  
14 Mr. Harper.

15 THE COURT: Yeah. I'm gonna let them.  
16 If they want that though, I just need to ask you is  
17 if that's something you want, then for sure we can.

18 MS. DEMONTE: We can --

19 MR. FIGLER: She wants then to just take  
20 the break to contact them to see if they can do it.  
21 If not, we'll go forward.

22 MS. PANDUKHT: Well, I just don't think  
23 we can --

24 THE COURT: It's Friday, it's 4:15.  
25 Let's all just take bets right now how fast you can

1 get a doctor, a neurosurgeon over here at our whim  
2 and call.

3 MS. DEMONTE: Right.

4 THE COURT: I mean, we'll be lucky to  
5 get -- is he under subpoena?

6 MS. DEMONTE: Yes, yes.

7 MS. PANDUKHT: Yes. And we noticed him  
8 as a rebuttal expert.

9 MS. DEMONTE: Yeah, he's been noticed  
10 forever, yeah.

11 THE COURT: Here's what I would do.

12 MS. PANDUKHT: We can still settle  
13 instructions though.

14 THE COURT: We're gonna --

15 MS. DEMONTE: He doesn't affect  
16 instructions.

17 THE COURT: No, I know. Well, I mean,  
18 I'm hoping we don't have problems getting him here  
19 Monday morning, okay.

20 MS. PANDUKHT: Well, if we do that --

21 THE COURT: Because people have scheduled  
22 surgeries and you may get a back lash from him.

23 MS. PANDUKHT: Then that's our problem.

24 THE COURT: Well, I mean, it's all of our  
25 problems.

1 MS. PANDUKHT: We'll let you know.

2 THE COURT: Okay. So why don't one of  
3 you run out and call him and make sure that he knows  
4 what's going upon so you can come and tell us while  
5 we're back on the record.

6 Can one of you guys just try to  
7 reach him and just tell him Monday at 9:00.

8 MS. PANDUKHT: I mean, I'm gonna try now.  
9 I just don't know --

10 THE COURT: He's not coming now. He'll  
11 never get here by then and we'll let everybody go  
12 home by 5. It's been a long day. I mean, it will  
13 be great, but it's not gonna happen.

14 Let me just make sure Monday at 9.  
15 Yeah. Okay. All right. So at this point we're  
16 taking a break.

17 Defense has rested, but Mr. Garcia,  
18 your attorneys --

19 MR. FIGLER: Do you want him to stand up?

20 THE COURT: Sure. Mr. Garcia, your  
21 attorneys related to me at the bench that they fully  
22 discussed the pros and cons of testifying and that  
23 you made the -- as much as you would like to take  
24 the stand, it's your feeling that in your best  
25 interest after talking with the attorneys that that

1 may not be -- that that's definitely not what you  
2 want to do in this trial based on their advice.

3 THE DEFENDANT: No, Your Honor.

4 THE COURT: Is that a yes or a no?

5 THE DEFENDANT: No, Your Honor.

6 THE COURT: You want to take the stand,  
7 sir?

8 THE DEFENDANT: I don't want to take the  
9 stand.

10 THE COURT: Okay. So you don't, you've  
11 talked to them, you feel confident you don't want to  
12 take the stand?

13 THE DEFENDANT: No, I won't take the  
14 stand.

15 THE COURT: Okay. I think that's a good  
16 enough record. I just want to make sure.

17 MR. FIGLER: Thank Your Honor.

18 THE COURT: All right. And just for  
19 the -- let me just ask you one more thing. This is  
20 solely your decision. So even if Mr. Goodman and  
21 Mr. Figler tell you it's not a good idea, it's not a  
22 good idea, it's not a good idea, at the end of the  
23 day, the only one that can make that decision, the  
24 only one is you, sir.

25 And that is your decision, is that

1 correct, you do not want to take the stand?

2 THE DEFENDANT: I do not want to take the  
3 stand.

4 THE COURT: Thank you, sir. Okay. We  
5 won't reopen the defense case, but based on what  
6 I've heard from that doctor, Dr. Duke is a fair  
7 rebuttal witness and is gonna be able to competently  
8 testify as to brain injury and any resulting damage  
9 of the brain.

10 MR. FIGLER: Okay. And I just want to  
11 make a real quick record on that. Number one, we  
12 didn't object because we didn't anticipate that they  
13 were gonna try to do rebuttal, but Ms. Demonte made  
14 quite effective use of the fact that Mr. -- I'm  
15 sorry. That Dr. Roitman did not examine Jonathan  
16 Harper. It was repeated at least a dozen times.

17 Your Honor understands that we had  
18 asked for the ability to -- the defense had asked  
19 for the ability to examine Mr. Harper, but that was  
20 denied. That motion was denied. Mr. Goodman made  
21 the motion. So they are taking advantage of a Court  
22 motion. That was fine, but now they want to kind of  
23 go to the next level and say well you examined him  
24 but Dr. Roitman didn't.

25 THE COURT: Now they're bringing up a

1 good point. He never got examined.

2 MS. DEMONTE: Well, now that --

3 THE COURT: You know, you're putting on a  
4 treating doctor who examined him, it was his  
5 patient. And I denied it because you guys all said  
6 you're not gonna, you know, you're not gonna -- I  
7 mean, obviously you are at an advantage because had  
8 I known you were gonna put on a treating doctor,  
9 now, if this was a medical malpractice case, I  
10 would, you know, the other side gets a crack at a  
11 witness, okay. Yeah, they do.

12 MS. DEMONTE: Okay. I --

13 THE COURT: They do.

14 MS. DEMONTE: I understand that, but it's  
15 not that the --

16 THE COURT: Tell me your offer of proof.  
17 What is your offer of proof?

18 MS. DEMONTE: That Dr. Duke actually  
19 previously testified that the injury to Jonathan's  
20 Harper's brain did not affect memory, the portions  
21 of his brain that were affected were not memory.  
22 They were motor skills to the other side of his body  
23 and the speech skills. That was Dr. Duke's  
24 testimony. And he was the treating physician. He  
25 hasn't examined Jonathan Harper since then either.



1 So he's actually not in any more of a -- he doesn't  
2 have continuing access to John Harper. He was the  
3 treating physician at Sunrise Hospital which are the  
4 same records that Dr. Roitman had.

5 And the reason the Court denied the  
6 motion to compel a psychiatric evaluation of  
7 Jonathan Harper is that Jonathan Harper is not the  
8 property of the State or this Court to have  
9 jurisdiction to order that.

10 THE COURT: Oh, no, no, no, you're very  
11 wrong there. I can definitely order somebody to  
12 have a psychiatric exam.

13 MS. DEMONTE: Yes, but under the law  
14 that, that was being cited in that motion, and I've  
15 got the transcript from that motion, we went through  
16 very clearly --

17 THE COURT: It's okay. I see through a  
18 little farther than you. And I'm gonna tell you  
19 right now, I'm gonna preclude you from saying  
20 something to the effect in closing or during your  
21 whole examination you're the treating doctor so  
22 you're better than Roitman.

23 MS. DEMONTE: Oh, I'm not gonna say he's  
24 better.

25 THE COURT: If it's merely to rebut

1 memory, if it's only -- if you ask him 10 questions,  
2 okay, could this type of injury --

3 MR. FIGLER: Impact.

4 THE COURT: -- impact very benign, could  
5 this type of injury impact memory. No.

6 MR. FIGLER: Then that's rebuttal.

7 THE COURT: Then that's a fair rebuttal.

8 MR. FIGLER: And if he says confabulation  
9 can't exist, that's a fair rebuttal.

10 THE COURT: Correct. But I want to stop  
11 the State from arguing to the jury that somehow --  
12 okay. All you're gonna have is two experts saying  
13 two different things.

14 MS. DEMONTE: Right.

15 THE COURT: But I don't think it's fair  
16 that you're then gonna be able to say at closing he  
17 was the treating doctor, he's seen Jonathan, he  
18 could talk to Jonathan, he's a better expert to give  
19 you an opinion.

20 MS. DEMONTE: I was not gonna argue that  
21 way, ever. Ever. Those were the questions I posed  
22 to Dr. Roitman because he's sitting there on the  
23 stand saying he didn't review anything. And, you  
24 know --

25 MR. GOODMAN: He said he reviewed 2100

1 pages of Sunrise Hospital records and Healthsouth  
2 records of everything that the State was able to  
3 provide us and that we got from subpoenas which was  
4 everything.

5 THE COURT: I have to really think about  
6 this.

7 MR. FIGLER: Because I don't think Dr.  
8 Duke was has reviewed that stuff frankly.

9 THE COURT: Well, here's the thing: If  
10 they got another expert, okay, that wasn't Dr. Duke,  
11 that's strictly rebutted, whether it -- so let's  
12 just pretend it wasn't Dr. Duke but it's just a  
13 neuro whoever that comes in and says it doesn't  
14 affect memory, this brain injury, it doesn't do  
15 this, it doesn't do that. It's fair rebuttal. They  
16 would be able to do that. He happens to be  
17 subpoenaed, he happens to be noticed.

18 MR. FIGLER: Right.

19 THE COURT: If he was only limited to  
20 that and the State is prevented from --

21 MR. FIGLER: Trying to --

22 THE COURT: -- somehow arguing or bolster  
23 his testimony as he was the treating doctor, I think  
24 then they should be able to do rebuttal because, you  
25 know, then it's not up to independent examination.

1           MR. FIGLER: I mean, the cat's out of the  
2 bag that Dr. Duke was his treating. If they put it  
3 together, fine. I just don't want --

4           MS. DEMONTE: Well, I did ask it that way  
5 because he didn't -- he reviewed all this but didn't  
6 remember the name Dr. Duke. And so I did ask him  
7 that, isn't that the guy from Sunrise Hospital, you  
8 know, to impeach his -- how thoroughly he reviewed  
9 this. Because I don't know how you can miss that it  
10 was Dr. Duke.

11          MR. FIGLER: Let them check to make sure  
12 that Dr. Duke is really going to be --

13          THE COURT: That's fine. I just don't  
14 see how the State isn't saying oh, gee, we need to  
15 call him for rebuttal. Of course you're gonna call  
16 him for rebuttal.

17          MS. DEMONTE: They told us he was not  
18 gonna testify memory.

19          MR. FIGLER: And with due respect --

20          MR. GOODMAN: It was information  
21 processing.

22          MR. FIGLER: And with due respect to the  
23 State, the work memory got used in different ways  
24 from what I think Dr. Duke would testify to what Dr.  
25 Roitman did. And I think Dr. Roitman explained it

1 when she said at the end about the memory, he said  
2 oh, let me explain this, we're talking about  
3 different things.

4                   So what he's saying is that look,  
5 and then he used that air traffic controller example  
6 that, you know, if one part's down, another part's  
7 impacted, et cetera.

8                   He did not say -- and I think what  
9 Dr. Duke would testify is that there are hemispheres  
10 of the brain. The hemisphere that got blown away in  
11 Harper was not the one that controls memory. That  
12 does not rebut or contradict anything that Dr.  
13 Roitman said.

14                   I don't think Dr. Roitman -- sorry.  
15 I don't think Dr. Duke is gonna be able to say  
16 there's no possibility of confabulation in a patient  
17 who suffered the injury that Jonathan Harper did,  
18 okay. So he's not gonna be able to rebut that I  
19 would bet you whatever would be an appropriate bet  
20 with the judge.

21                   And then the second part is I don't  
22 think that their doctor's gonna say it would have no  
23 impact whatsoever on recalling information or  
24 processing or thought processing which is what  
25 Dr. --

1           THE COURT: Why do you need him? I'm  
2 starting to think about it. He acknowledged all  
3 everything you said on recross. You got him to say  
4 he could have memories.

5           MR. FIGLER: Yeah.

6           THE COURT: The jurors asked could he  
7 have memories. Yes, he could have memories.

8           MR. FIGLER: Could they be --

9           THE COURT: You're opening --

10          MR. FIGLER: -- he even said yes.

11          THE COURT: -- up just a can of worms for  
12 rebuttal. You got everything out of him that you  
13 need, including he wasn't his treating doctor.

14                 Once again, you're gonna put an  
15 issue into the record that doesn't otherwise need to  
16 be put into it.

17          MS. DEMONTE: I don't believe I'm putting  
18 this issue into the record.

19          THE COURT: Oh, come on. You know what,  
20 I'm just gonna make a hard call and say no, no  
21 rebuttal.

22                 I'm tired of the State pushing and  
23 pushing and pushing me into an error. No. No  
24 rebuttal. We're done. Bring the jury back in.  
25 Done. Get her off the phone with Duke and then --

1 thanks. And then we're just -- I'm just not even  
2 gonna put it in there.

3 MR. FIGLER: When do you want to settle?

4 THE COURT: We're gonna do it right now.

5 MR. FIGLER: Got it.

6 THE COURT: I'm just tired of it. You  
7 guys push and wanna take, take, take, and then I'm  
8 gonna get reversed and they didn't get a crack at  
9 it. It's just it's one thing after another. I'm  
10 tired of being pushed into some weird reversal when  
11 you don't need it.

12 Go ahead and have a seat. We're  
13 back on the record of State of Nevada versus  
14 Evaristo Garcia. Case No. C262966.

15 Let the record reflect that the jury  
16 is present, we have the defendant present. Mr.  
17 Figler and Mr. Goodman are present. For the State,  
18 Ms. Pandukht and Ms. Demonte.

19 And at this time, ladies and  
20 gentlemen, with the defense resting, the case is now  
21 submitted almost to you.

22 On 9 a.m. on Monday morning, I'm  
23 going to instruct you on the law in the State of  
24 Nevada and we're gonna go right into closing  
25 arguments and you'll start deliberating probably

1 close to lunch, okay?

2 So have a good weekend.

3 During this recess, ladies and  
4 gentlemen of the jury, you're admonished not to talk  
5 or converse among yourselves or with anyone else on  
6 any subject connected with this trial.

7 Or read, watch or listen to any  
8 report of or commentary on the trial or any person  
9 connected with this trial by any medium of  
10 information, including, without limitation,  
11 newspapers, television, radio or internet.

12 Or form or express any opinion on  
13 any subject connected with the trial until the case  
14 is finally submitted to you.

15 Have a great weekend. Thank you.  
16 See you on Monday at 9.

17 I'll see the attorneys. We're gonna  
18 go off the record, we'll start settling  
19 instructions.

20 (Whereupon, a recess was had.)

21 THE COURT: All right. We're back on the  
22 record on State of Nevada --

23 MR. FIGLER: Do we need the defendant for  
24 the settling?

25 THE COURT: No, not --



1 MR. FIGLER: Okay.

2 THE COURT: I never do. That's why I  
3 said he could leave.

4 MR. FIGLER: Fair enough. I don't want  
5 him here.

6 THE COURT: Yeah, I never have a  
7 defendant in here for settling.

8 State of Nevada versus Evaristo  
9 Garcia. Case No. C262966.

10 Let the record reflect that the  
11 defendant is not present, that his attorneys Mr.  
12 Figler and Mr. Goodman are present, along with the  
13 State's attorneys Ms. Pandukht and Ms. Demonte.

14 It's now the time set for settling  
15 of instructions.

16 Is the State familiar with the  
17 Court's proposed Jury Instructions 1 through 35?

18 MS. DEMONTE: I am, Your Honor.

19 THE COURT: Does the State object to the  
20 giving of any of those instructions?

21 MS. DEMONTE: Your Honor, the State  
22 objects to the giving of Instruction 28. While we  
23 agree that the language in the first two paragraphs  
24 about the accomplice liability is a correct  
25 statement of the law, the language starting at line

1 11, you are instructed that Jonathan Harper, while  
2 not charged as an accomplice under the law given the  
3 prosecutes -- is an accomplice under the law given  
4 the prosecution's theory of criminal culpability.

5 We've charged that either Evaristo  
6 Garcia directly committed it or conspired or aided  
7 and abetted.

8 Under conspiracy on aiding and  
9 abetting, which would be the alternative theories,  
10 Jonathan Harper could not be charged with the exact  
11 same crime under the statute and is not an  
12 accomplice as a matter of law because under Bolden  
13 and Sharma, Jonathan Harper would have to have the  
14 specific intent that a murder be committed. And  
15 there's absolutely zero evidence of that. And no  
16 evidence from the State's perspective that that was  
17 ever the case.

18 So we are objecting to that language  
19 at lines 11 and 12.

20 THE COURT: Mr. Figler, do you have a  
21 response to that?

22 MR. FIGLER: Yes, Your Honor. I mean,  
23 Your Honor heard the evidence as it was revealed.  
24 They still are going under a conspiracy theory and  
25 aiding and abetting and people who basically

1 travelled over there to do it. That's what they're  
2 trying to get Mr. Garcia on as well. It's  
3 absolutely appropriate to give this particular  
4 instruction.

5 THE COURT: The Court heard all the  
6 testimony. It was Giovanni Garcia that called over  
7 the defendant and Puppet, Manuel Lopez, and Jonathan  
8 Harper was right there. All of them were fighting  
9 together.

10 And, in fact, Jonathan Harper was  
11 right there and saw the shooting as well. Albeit he  
12 was running the other way, they all came together,  
13 they left together. It was some time until Jonathan  
14 Harper even talked to the police.

15 The State has selectively picked who  
16 they were charging in this case it's the Court's  
17 position. How you divide up the three that you did,  
18 they all came together and you conveniently chose to  
19 not prosecute Jonathan Harper. But he's clearly --  
20 had you have prosecuted him, he could have been  
21 prosecuted for the exact same crimes that they were  
22 prosecuted under a conspiracy theory.

23 It makes no sense to this Court that  
24 only three of them who were in the car had a quote,  
25 conspiracy to commit murder in Count I, but the

1 other, you know, two individuals who came and were  
2 there and were fighting and were there during the  
3 shooting could not have been charged.

4                   There's absolutely no rhyme or  
5 reason why they couldn't have been charged as well  
6 in the Court's -- the way the Court sees the  
7 evidence. It appears that you conveniently picked  
8 the three that you did. Albeit that perhaps they  
9 did a couple more things.

10                   Giovanny only did one. He made a  
11 phone call. Manuel Lopez only did one more thing,  
12 maybe two. He handed him the gun, the defendant the  
13 gun, prior to them getting in the car and then  
14 allegedly, or as they were running, Jonathan Harper  
15 stated that he said like give me the gun, give me  
16 the gun or something like that.

17                   But they were all together. So you  
18 either have to believe they were all in on a  
19 conspiracy -- I just -- it's the Court's position  
20 there's no rhyme or reason why Jonathan Harper  
21 wasn't selected for prosecution except for the fact  
22 that he talked to the police and the prosecution  
23 decided not to prosecute him. But he certainly  
24 could have been prosecuted for this crime.

25                   So that's the Court's ruling and

1 that's a defense instruction that the defense wish  
2 the Court to give and the Court's gonna give it,  
3 okay?

4 MS. DEMONTE: Okay.

5 THE COURT: Does the State have any  
6 additional instructions to propose?

7 MS. DEMONTE: No, Your Honor.

8 THE COURT: Is the defendant familiar  
9 with the Court's proposed Jury Instructions No. 1  
10 through 35?

11 MR. FIGLER: Yes, Your Honor.

12 THE COURT: Does the defendant object to  
13 the giving of any of those instructions?

14 MR. FIGLER: Yes, Your Honor. We did  
15 have an objection to Instruction No. 30. If I could  
16 be heard. That's the --

17 THE COURT: You may.

18 MR. FIGLER: -- flight instruction.

19 THE COURT: Go ahead.

20 MR. FIGLER: Your Honor, I appreciate  
21 that there was a preliminary oral motion made by  
22 prior counsel with relation to the idea of flight.  
23 That's before the Court had all of the evidence.

24 As it came out at trial, the actual  
25 arrest warrant didn't come out until over five

1 months after the incident, and the State did not  
2 establish that Evaristo Garcia left after an arrest  
3 warrant had been issued for him.

4           Also, there was testimony that upon  
5 contact with the federal enforcement both on the  
6 Mexican side of the border and the American side  
7 that he waived extradition to come back. There is  
8 no indication that in any way he was trying to  
9 avoid -- that he was accused of a crime during the  
10 time that he left for Mexico or that this should be  
11 considered by the jury any consciousness of guilt.

12           Indeed the Ninth Circuit Court of  
13 Appeals has indicated through their pattern  
14 instructions and their modern instructions as well  
15 as the case law that followed that this type of  
16 instruction should only be given rarely when it is  
17 very clear that the person escaped the jurisdiction  
18 for the purpose of avoiding prosecution. And here  
19 there wasn't that sufficient basis.

20           So we feel that it's unduly  
21 prejudicial to Mr. Garcia to have this instruction  
22 even in there.

23           THE COURT: State wish to respond?

24           MS. DEMONTE: Your Honor, there's no  
25 requirement that we know exactly when he fled to

1 Mexico, there's no requirement that the State prove  
2 that the defendant knew there were charges against  
3 him.

4 He fled to Mexico and he remained  
5 there for a period of two-and-a-half years and had  
6 to be extradited back after being picked up on a  
7 provisional warrant several months. Several months  
8 after his arrest on a provisional warrant is when he  
9 waived formal extradition. But it does not mean he  
10 did not flee to Mexico.

11 Also, it should be noted that he's  
12 16 years old and February's the middle of a school  
13 year. So we know that people weren't seeing him  
14 around. No one testified that they saw Evaristo  
15 Garcia after that shooting.

16 There's absolutely -- while the  
17 State can't prove he was in Mexico, we knew that  
18 there's no solid evidence that he was still here in  
19 the United States.

20 He did not actually return  
21 voluntarily. He didn't get a phone call from his  
22 parents and come back to the United States through  
23 the border crossing and turn himself in. He was  
24 arrested on a warrant and he -- in another country.

25 And so we believe we've met that

1 flight burden for this instruction and we ask that  
2 it be given.

3 THE COURT: All right. The Court has  
4 made a determination that it's a proper instruction.  
5 This defendant was a United States citizen through  
6 his birth certificate and it appears that an arrest  
7 warrant was issued several months after the, the  
8 crime had occurred.

9 And by that time, many of the  
10 witnesses had identified the defendant as being the  
11 shooter in this and taking part in this case.

12 In fact, there were arrest warrants  
13 for both Giovanni and Manuel Lopez as well, which  
14 they were arrested on.

15 Thereafter, so right around June of  
16 2006, the CAT team is unable to locate the  
17 defendant. That CAT team is comprised of both FBI  
18 and LVMPD and he's literally off the map, he's gone.  
19 Conveniently and coincidentally at the same time an  
20 arrest warrant is issued.

21 The defendant appears to be in  
22 Mexico two years later in which he has to be  
23 apprehended by the FBI and extradited back.

24 Albeit he waived extradition, he was  
25 still extradited back to the United States after



1 federal warrants of his arrest had been received by  
2 the Mexican officials.

3 So there is evidence of flight in  
4 this case and it's a proper instruction under the  
5 law.

6 Does the defense have any additional  
7 instructions to propose?

8 MR. FIGLER: There was just one, Your  
9 Honor. We had proposed a more detailed version of  
10 the credibility of the witnesses that we pulled from  
11 the Ninth Circuit.

12 THE COURT: Shall I have this marked as  
13 an exhibit for you?

14 MR. FIGLER: Thank Your Honor. Yes,  
15 please.

16 THE COURT: Okay.

17 MR. FIGLER: And we would submit that the  
18 more detailed one is the preferable one by the  
19 defense.

20 Understanding that, we can argue  
21 some of those things under the instruction, but with  
22 the weight of the instruction I thought it was  
23 appropriate and so we submitted it.

24 THE COURT: Is there any response by the  
25 State?

1 MS. DEMONTE: Your Honor, we believe that  
2 the credibility instruction given by the Court is  
3 quite thorough and covers the instruction that had  
4 been proposed by Mr. Figler.

5 And so we suggest that the  
6 credibility instruction as being provided covers the  
7 same information.

8 THE COURT: All right. The Court is  
9 gonna mark that as a Court's exhibit. The proposed  
10 instruction comes from the Ninth Circuit pattern  
11 instruction. It somewhat mirrors our credibility  
12 instruction which is now provided as Instruction No.  
13 26 in this packet.

14 Because it's covered by another  
15 instruction, this Court declines to give of the  
16 defense proposed instruction; however, the Court  
17 will note that the defense is free to argue any of  
18 the points that are in -- that's in that instruction  
19 at any time during their argument.

20 MR. FIGLER: Thank Your Honor.

21 THE COURT: Additionally, I want to make  
22 a record that the State and the Court have offered  
23 the defense two different instructions. And I'm  
24 gonna read them into the record and we're gonna make  
25 each of them a Court's exhibit.

1           The offer was: Evidence of other  
2 crimes, wrongs or acts is not admissible to prove  
3 the character of a person in order to show that the  
4 person acted in conformity therewith. It may  
5 however be admissible for other purposes such as  
6 proof of motive, opportunity, intent, preparation,  
7 plan, knowledge, identity or absence of mistake or  
8 accident.

9           The other instruction alternatively  
10 was: Evidence of other crimes, wrongs or acts is  
11 not admissible to prove the character of a person in  
12 order to show that a person acted in conformity  
13 therewith. It may however be admissible for other  
14 purposes such as proof of motive, opportunity,  
15 intent, preparation, plan, knowledge, identity or  
16 absence of mistake or accident.

17           You have heard evidence that some of  
18 the individuals may have belonged or did belong to a  
19 gang in this case.

20           You are instructed you are not to  
21 consider that evidence for purposes of determining  
22 whether the defendant is guilty or not guilty of the  
23 crimes charged.

24           Both of those instructions are now  
25 gonna be marked as Court's exhibits. And I'll let

1 the counsel make a record as to why strategically  
2 defense has decided not to give those to the jury as  
3 limiting instructions.

4 MR. FIGLER: Thank Your Honor. Mr.  
5 Goodman and I spent a, a good deal of the break and  
6 some additional time after that talking about  
7 whether or not the defense wants to take advantage  
8 of what is typically a limiting instruction to the  
9 benefit of the defense and why we wouldn't want it  
10 in this particular case.

11 It was a strategic and tactical  
12 decision on the part of the defense now that the  
13 gang enhancement has been removed from the State's  
14 theory of prosecution that we do not put undue  
15 attention on the gang evidence that may have been  
16 received by the jury.

17 This was a strategic decision in  
18 that we weighed the pros and the cons of that  
19 limiting instruction coming in and it was our  
20 decision to just not have that come in at all,  
21 especially since no other bad acts of our client  
22 were raised or suggested by, by the State or by any  
23 of the witnesses.

24 THE COURT: Anything further by the  
25 State?

1 MS. PANDUKHT: I just wanted to, for the  
2 record, that we offered either instruction and just  
3 for the record that we would have agreed to either  
4 one of those.

5 THE COURT: All right. And the Court  
6 also said it would give it, but it's been declined  
7 by the defense.

8 Does the State object to the  
9 proposed verdict forms of the Court?

10 MS. DEMONTE: No, Your Honor.

11 THE COURT: Does the defense object to  
12 the proposed verdict forms of the Court?

13 MR. FIGLER: No, Your Honor.

14 THE COURT: Okay. At this time then,  
15 we've settled instructions.

16 I will instruct the jury on Monday  
17 and you guys will go into closing arguments on  
18 Monday.

19 If there's anything glaringly wrong  
20 with the instructions since we went through them  
21 quite quick today, you'll bring it to my attention  
22 prior to court and we'll take care of that ahead of  
23 time.

24 MS. PANDUKHT: Yes.

25 THE COURT: And have a good evening then

1 and we can go off the record.

2 MR. FIGLER: Thank Your Honor.

3 MS. PANDUKHT: Thank you.

4 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE  
5 PROCEEDINGS.

6 /s/ JoAnn Melendez  
7 JO ANN MELENDEZ  
8 CCR NO. 370  
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JO ANN MELENDEZ - (702) 283-2151

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