

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BURNS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Aug 12 2020 02:20 p.m.
Elizabeth A. Brown
Supreme Court Case No. 80834
Clerk of Supreme Court

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Conviction Solutions
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Nevada Bar Number 7154
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CLARK COUNTY DISTRICT ATTY.
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Las Vegas, Nevada 89155
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ORIGINAL

1 IND

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 PAMELA WECKERLY
6 Chief Deputy District Attorney
7 Nevada Bar #006163
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

FILED

OCT 13 2010

Alan L. Blum
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,

12 Plaintiff,

13 -vs-

14 WILLIE DARNELL MASON, aka
15 Willie Darnell Mason Jr. aka
16 G-DOGG, #1856118
17 DAVID JAMES BURNS aka
18 D-SHOT, # 2757610
19 STEPHANIE JEAN COUSINS, aka
20 Stephanie Jean Cousins, #2757784

21 Defendant(s).

Case No. C-10-267882-2
Dept. No. IV

SUPERCEDING
INDICTMENT

19 STATE OF NEVADA }
20 COUNTY OF CLARK } ss.

21 The Defendant(s) above named, WILLIE DARNELL MASON, aka Willie Darnell
22 Mason Jr. aka G-DOGG, DAVID JAMES BURNS aka D-SHOT, and STEPHANIE JEAN
23 COUSINS, aka Stephanie Jean Cousins, accused by the Clark County Grand Jury of the
24 crime(s) of CONSPIRACY TO COMMIT ROBBERY (Felony - NRS 199.480; 200.380);
25 BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060);
26 ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165);
27 MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030,
28 193.165), ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony -

C-10-267882-2
IND AA 0001

Indictment
993397



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OCT 13 2010

CLERK OF THE COURT

1 200.010, 200.030, 193.330, 193.165), and BATTERY WITH A DEADLY WEAPON
2 RESULTING IN SUBSTANTIAL BODILY HARM (Felony – 200.481) committed at and
3 within the County of Clark, State of Nevada, on or about the 7th day of August, 2010, as
4 follows:

5 COUNT 1 – CONSPIRACY TO COMMIT ROBBERY

6 did then and there meet with each other and/or MONICA LOUISE MARTINEZ
7 and/or JEROME THOMAS aka JOB-LOC and between themselves, and each of them with
8 the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit:
9 robbery, and in furtherance of said conspiracy, Defendants and/or their co-conspirators
10 committed the acts as set forth in Counts 3 thru 8, those acts incorporated by reference as if
11 fully set forth herein.

12 COUNT 2 – CONSPIRACY TO COMMIT MURDER

13 did then and there meet with each other and/or MONICA LOUISE MARTINEZ
14 and/or JEROME THOMAS aka JOB-LOC and between themselves, and each of them with
15 the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit:
16 murder, and in furtherance of said conspiracy, Defendants and/or their co-conspirators
17 committed the acts as set forth in Counts 3 thru 8, those acts incorporated by reference as if
18 fully set forth herein.

19 COUNT 3 - BURGLARY WHILE IN POSSESSION OF A FIREARM

20 did then and there wilfully, unlawfully, and feloniously enter, while in possession of a
21 firearm, with intent to commit larceny and/or assault and battery and/or a felony, to-wit:
22 robbery and/or murder, that certain building occupied by DERECA NEWMAN and/or
23 CORNELIUS MAYO and/or DEVONIA NEWMAN, located at 5662 Meikle Lane,
24 Apartment A, Las Vegas, Clark County, Nevada, the defendants being responsible under the
25 following principles of criminal liability, to-wit: 1) by directly or indirectly committing the
26 acts constituting the offense; and/or 2) by engaging in a conspiracy to commit larceny and/or
27 assault and/or battery and/or robbery and/or murder and/or burglary whereby Defendants had
28 the specific intent to commit burglary; and/or 3) by aiding or abetting each other in the

1 commission of the crime by Defendant WILLIE DARNELL MASON aka G-DOGG
2 accompanying Defendant STEPHANIE JEAN COUSINS and/or Defendant DAVID JAMES
3 BURNS aka D-SHOT to the residence while MONICA LOUISE MARTINEZ drove the
4 getaway vehicle and/or acted as a lookout, Defendant STEPHANIE JEAN COUSINS
5 creating a ruse for DEREZIA NEWMAN to open the door, Defendant WILLIE DARNELL
6 MASON aka G-DOGG and/or Defendant STEPHANIE JEAN COUSINS and/or Defendant
7 DAVID JAMES BURNS aka D-SHOT entering the residence with the intent to commit
8 larceny and/or assault and/or battery and/or robbery and/or murder, Defendant WILLIE
9 DARNELL MASON aka G-DOGG and/or Defendant DAVID JAMES BURNS aka D-
10 SHOT possessing the firearm, the Defendants and/or MONICA LOUISE MARTINEZ
11 and/or JEROME THOMAS aka JOB-LOC offering counsel and encouragement to each
12 other throughout.

13 COUNT 4 - ROBBERY WITH USE OF A DEADLY WEAPON

14 did then and there wilfully, unlawfully, and feloniously take personal property, to-wit:
15 cocaine and/or lawful money of the United States, from the person of DEREZIA
16 NEWMAN, or in her presence, by means of force or violence or fear of injury to, and
17 without the consent and against the will of the said DEREZIA NEWMAN, said defendant
18 using a deadly weapon, to-wit: a firearm, during the commission of said crime, the
19 defendants being responsible under the following principles of criminal liability, to-wit: 1)
20 by directly or indirectly committing the acts constituting the offense; and/or 2) by engaging
21 in a conspiracy to commit larceny and/or assault and/or battery and/or robbery and/or murder
22 and/or burglary; and/or 3) by aiding or abetting each other in the commission of the crime by
23 Defendant WILLIE DARNELL MASON aka G-DOGG accompanying Defendant
24 STEPHANIE JEAN COUSINS and/or Defendant DAVID JAMES BURNS aka D-SHOT to
25 the residence while MONICA LOUISE MARTINEZ drove the getaway vehicle and/or acted
26 as a lookout, Defendant STEPHANIE JEAN COUSINS creating a ruse for DEREZIA
27 NEWMAN to open the door, Defendant WILLIE DARNELL MASON aka G-DOGG and/or
28 Defendant DAVID JAMES BURNS aka D-SHOT possessing the firearm, Defendant

1 WILLIE DARNELL MASON aka G-DOGG and/or Defendant DAVID JAMES BURNS
2 aka D-SHOT shooting DERECA NEWMAN in the head, Defendant WILLIE DARNELL
3 MASON aka G-DOGG and/or Defendant STEPHANIE JEAN COUSINS and/or Defendant
4 DAVID JAMES BURNS aka D-SHOT taking money or cocaine, the Defendants and/or
5 MONICA LOUISE MARTINEZ and/or JEROME THOMAS aka JOB-LOC offering
6 counsel and encouragement to each other throughout.

7 COUNT 5 - MURDER WITH USE OF A DEADLY WEAPON

8 did then and there wilfully, feloniously, without authority of law, and with malice
9 aforethought, kill DERECA NEWMAN, a human being, by shooting at and into the head
10 and/or body of said DERECA NEWMAN, with a firearm, the actions of defendants and/or
11 MONICA LOUISE MARTINEZ resulting in the death of the said DERECA NEWMAN,
12 the killing having been (1) done with premeditation and deliberation, and/or (2) committed
13 during the perpetration or attempted perpetration of robbery and/or burglary; the defendants
14 being responsible under one or more of the following principles of criminal liability, to-wit:
15 1) by directly or indirectly committing the acts constituting the offense; and/or 2) by
16 engaging in a conspiracy to commit robbery and/or murder and/or burglary; and/or 3) by
17 aiding or abetting each other in the commission of the crime with the intent a killing occur
18 by Defendant WILLIE DARNELL MASON aka G-DOGG accompanying Defendant
19 STEPHANIE JEAN COUSINS and/or Defendant DAVID JAMES BURNS aka D-SHOT to
20 the residence while MONICA LOUISE MARTINEZ drove the getaway vehicle and/or acted
21 as a lookout, Defendant STEPHANIE JEAN COUSINS creating a ruse for DERECA
22 NEWMAN to open the door, Defendant WILLIE DARNELL MASON aka G-DOGG and/or
23 Defendant STEPHANIE JEAN COUSINS and/or Defendant DAVID JAMES BURNS aka
24 D-SHOT entering the residence with the intent to commit larceny and/or assault and/or
25 battery and/or robbery and/or murder, Defendant WILLIE DARNELL MASON aka G-
26 DOGG and/or Defendant DAVID JAMES BURNS aka D-SHOT possessing the firearm,
27 Defendant WILLIE DARNELL MASON aka G-DOGG and/or Defendant DAVID JAMES
28 BURNS aka D-SHOT shooting DERECA NEWMAN in the head resulting in her death,

1 Defendant WILLIE DARNELL MASON aka G-DOGG and/or Defendant STEPHANIE
2 JEAN COUSINS and/or Defendant DAVID JAMES BURNS aka D-SHOT taking money or
3 cocaine, the Defendants and/or MONICA LOUISE MARTINEZ and/or JEROME THOMAS
4 aka JOB-LOC offering counsel and encouragement to each other throughout.

5 COUNT 6 - ROBBERY WITH USE OF A DEADLY WEAPON

6 did then and there wilfully, unlawfully, and feloniously take personal property, to-wit:
7 cocaine and/or lawful money of the United States, from the person of DEVONIA
8 NEWMAN, a twelve (12) year old child, or in her presence, by means of force or violence or
9 fear of injury to, and without the consent and against the will of the said DEVONIA
10 NEWMAN, said defendant using a deadly weapon, to-wit: a firearm, during the commission
11 of said crime, the defendants being responsible under the following principles of criminal
12 liability, to-wit: 1) by directly or indirectly committing the acts constituting the offense;
13 and/or 2) by engaging in a conspiracy to commit larceny and/or assault and/or battery and/or
14 robbery and/or murder and/or burglary; and/or 3) by aiding or abetting each other in the
15 commission of the crime by Defendant WILLIE DARNELL MASON aka G-DOGG
16 accompanying Defendant STEPHANIE JEAN COUSINS and/or Defendant DAVID JAMES
17 BURNS aka D-SHOT to the residence while MONICA LOUISE MARTINEZ drove the
18 getaway vehicle and/or acted as a lookout, Defendant STEPHANIE JEAN COUSINS
19 creating a ruse for DEREZIA NEWMAN to open the door, Defendant WILLIE DARNELL
20 MASON aka G-DOGG and/or Defendant DAVID JAMES BURNS aka D-SHOT possessing
21 the firearm, Defendant WILLIE DARNELL MASON aka G-DOGG and/or Defendant
22 DAVID JAMES BURNS aka D-SHOT shooting DEVONIA NEWMAN in the stomach,
23 Defendant WILLIE DARNELL MASON aka G-DOGG and/or Defendant STEPHANIE
24 JEAN COUSINS and/or Defendant DAVID JAMES BURNS aka D-SHOT taking money or
25 cocaine, the Defendants and/or MONICA LOUISE MARTINEZ and/or JEROME THOMAS
26 aka JOB-LOC offering counsel and encouragement to each other throughout.

27 ///

28 ///

1 COUNT 7 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

2 did then and there, without authority of law, and with malice aforethought, willfully
3 and feloniously attempt to kill DEVONIA NEWAN, a twelve (12) year old child, by
4 shooting at or into the body of the said DEVONIA NEWMAN, with a deadly weapon, to-
5 wit: a firearm, during the commission of said crime, the defendants being responsible under
6 the following principles of criminal liability, to-wit: 1) by directly or indirectly committing
7 the acts constituting the offense; and/or 2) by engaging in a conspiracy to commit assault
8 and/or battery and/or robbery and/or murder and/or burglary with the specific intent to kill;
9 and/or 3) by aiding or abetting each other in the commission of the crime with the intent a
10 killing would occur by Defendant WILLIE DARNELL MASON aka G-DOGG
11 accompanying Defendant STEPHANIE JEAN COUSINS and/or Defendant DAVID JAMES
12 BURNS aka D-SHOT to the residence while MONICA LOUISE MARTINEZ drove the
13 getaway vehicle and/or acted as a lookout, Defendant STEPHANIE JEAN COUSINS
14 creating a ruse for DERECA NEWMAN to open the door, Defendant WILLIE DARNELL
15 MASON aka G-DOGG and/or Defendant DAVID JAMES BURNS aka D-SHOT possessing
16 the firearm, Defendant WILLIE DARNELL MASON aka G-DOGG and/or Defendant
17 DAVID JAMES BURNS aka D-SHOT shooting DEVONIA NEWMAN in the stomach, the
18 Defendants and/or MONICA LOUISE MARTINEZ and/or JEROME THOMAS aka JOB-
19 LOC offering counsel and encouragement to each other throughout.

20 COUNT 8 - BATTERY WITH A DEADLY WEAPON RESULTING IN SUBSTANTIAL
21 BODILY HARM

22 did then and there wilfully, unlawfully, and feloniously use unlawful force or violence
23 upon the person of DEVONIA NEWMAN, a twelve (12) year old child, with use of a deadly
24 weapon, to wit: by shooting into the body of DEVONIA NEWMAN with a firearm, causing
25 substantial bodily harm to the said DEVONIA NEWMAN; the defendants being responsible
26 under the following principles of criminal liability, to-wit: 1) by directly or indirectly
27 committing the acts constituting the offense; and/or 2) by engaging in a conspiracy to
28 commit assault and/or battery and/or robbery and/or murder and/or burglary; and/or 3) by

1 aiding or abetting each other in the commission of the crime by Defendant WILLIE
2 DARNELL MASON aka G-DOGG accompanying Defendant STEPHANIE JEAN
3 COUSINS and/or Defendant DAVID JAMES BURNS aka D-SHOT to the residence while
4 MONICA LOUISE MARTINEZ drove the getaway vehicle and/or acted as a lookout,
5 Defendant STEPHANIE JEAN COUSINS creating a ruse for DEREZIA NEWMAN to open
6 the door, Defendant WILLIE DARNELL MASON aka G-DOGG and/or Defendant DAVID
7 JAMES BURNS aka D-SHOT possessing the firearm, Defendant WILLIE DARNELL
8 MASON aka G-DOGG and/or Defendant DAVID JAMES BURNS aka D-SHOT shooting
9 DEVONIA NEWMAN in the stomach resulting in substantial bodily harm, the Defendants
10 and/or MONICA LOUISE MARTINEZ and/or JEROME THOMAS aka JOB-LOC offering
11 counsel and encouragement to each other throughout.

12 DATED this 12th day of October, 2010.

13
14 DAVID ROGER
15 DISTRICT ATTORNEY
16 Nevada Bar #002781

17 BY Pamela Weckerly
18 PAMELA WECKERLY
19 Chief Deputy District Attorney
20 Nevada Bar #006163

21
22 ENDORSEMENT: A True Bill

23 [Signature]
24 Foreperson, Clark County Grand Jury
25
26
27
28

Names of witnesses testifying before the Grand Jury:

BAINES, BENJAMIN, c/o CCDA, 200 Lewis Ave, LV, NV

BUNTING, CHRISTOPHER, LVMPD #6484

HENDRICKS, T. SCOTT - FBI

JOHNSON, SUSAN, c/o CCDA, 200 Lewis Ave, LV, NV

MAYO, CORNELIUS, c/o CCDA, 200 Lewis Ave, LV, NV

MITCHELL, TYLER, c/o CCDA, 200 Lewis Ave, LV, NV

PHALER, MICHAEL, c/o CCDA, 200 Lewis Ave, LV, NV

OLSON, ALANE, CLARK COUNTY CORONER

ROWLAND, DONOVAN, c/o CCDA, 200 Lewis Ave, LV, NV

WILDEMAN, MARTIN, LVMPD #3516

Additional witnesses known to the District Attorney at time of filing the Indictment:

COUSINS, STEPHANIE, c/o CCDA, 200 Lewis Ave, LV, NV

CUSTODIAN OF RECORDS, CCDC

CUSTODIAN OF RECORDS, CLARK COUNTY CORONER

CUSTODIAN OF RECORDS, GREYHOUND BUS

CUSTODIAN OF RECORDS, LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS, LVMPD RECORDS

CUSTODIAN OF RECORDS, METRO PCS

CUSTODIAN OF RECORDS, OPERA HOUSE

CUSTODIAN OF RECORDS, T-MOBILE

DAHN, ROBBIE, LVMPD #5947

HARDY, KENNETH, LVMPD #3031

NEWMAN, DEVONIA, c/o CCDA, 200 Lewis Ave, LV, NV

NEWMAN, WANDA, c/o CCDA, 200 Lewis Ave, LV, NV

10AGJ054A-C/10F15563X/10F17607X/10F18963X/sam
LVMPD EV#1008070732
(TK11)


CLERK OF THE COURT

NISD
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO: C-10-267882-2
)	
-vs-)	DEPT NO: IV
)	
DAVID JAMES BURNS,)	
#02757610)	
)	
Defendant.)	

NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District Attorney, by and through PAMELA WECKERLY, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of:
 - (a) Another murder and the provisions of subsection 12 do not otherwise apply to that other murder; or
 - (b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony.

To establish this aggravating circumstance, the State plans to rely on the conviction of the defendant for the Attempt Murder With a Deadly Weapon, alternatively, Battery With a Deadly Weapon Resulting In Substantial Bodily Harm charged in the Indictment regarding victim, Devonia Newman as a prior violent felony.

AA 0009

1 2. The murder was committed while the person was engaged, alone or with
2 others, in the commission of, or an attempt to commit or flight after committing or
3 attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home
4 or kidnapping in the first degree, and the person charged:

5 (a) Killed or attempted to kill the person murdered; or

6 (b) Knew or had reason to know that life would be taken or lethal force used.

7 To establish this aggravating circumstance, the State will rely on the fact that Burns and his
8 co-defendants intended to rob Derecia Newman and/or the other occupants of the residence
9 in the course of these events. The State will establish that Burns entered Newman's
10 residence and shot her. Then, he chased Davonia Newman down a hallway and ultimately
11 shot her in the stomach. After shooting Davonia, Burns went through the pockets on her
12 clothing and asked her where the drugs and/or money were located, thereby attempting to
13 rob her. Cornelius Mayo will also testify that money and/or drugs were taken from the
14 residence. In the instant case, the murder occurred during the course of a burglary of the
15 residence and the robbery of Derecia Newman.

16 DATED this 28th day of October, 2010.

17 Respectfully submitted,

18 DAVID ROGER
19 Clark County District Attorney
20 Nevada Bar #002781

21 BY /s/ Pamela Weckerly
22 PAMELA WECKERLY
23 Chief Deputy District Attorney
24 Nevada Bar #006163
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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing was made this 28th day of
October, 2010, by facsimile transmission to:

ANTHONY SGRO, ESQ.
FAX: (702) 386-2737

BY: /s/ J. Georges
Secretary for the District Attorney's Office

User ID: GEORGJE

=====

TO: Name: Anthony Sgro, Esq.

Company:

Fax Phone Number: (702) 386-2737

Contact Phone Number:

Info Code 1:

Info Code 2:

Sent to remote ID:702 386 2737

Sent at:Thu Oct 28 16:05:10 2010

Sent on channel 1

Elapsed Time: 1 minute, 30 seconds

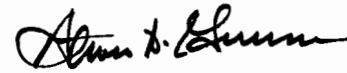
Transmission Status (0/339;0/0): Successful Send

Page Record: 1 - 3.

1 **MOT**

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3 Nevada Bar No.: 3811
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5 720 S. 7th Street, 3rd Floor
6 Las Vegas, Nevada 89101
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9 tsgro@pslrfirm.com

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10/12/2014 08:53:43 PM



CLERK OF THE COURT

7 CHRISTOPHER ORAM, ESQ.
8 Nevada Bar No.: 4349
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10 Las Vegas, NV 89101
11 Telephone: (702) 384-5563
12 Fax: (702) 974-0623
13 crorambusiness@aol.com
14 *Attorneys for Defendant*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 THE STATE OF NEVADA,
15
16 Plaintiff,
17
18 vs.
19
20 DAVID BURNS,
21 #2757610
22 Defendant.

CASE NO. C267882-2

DEPT. XX

Hearing Date:

Hearing Time:

20 **DEFENDANT'S MOTIONS IN LIMINE #1-3**

21 COMES NOW, Defendant DAVID BURNS, by and through his attorneys of record,
22 ANTHONY P. SGRO, ESQ., and CHRISTOPHER ORAM, ESQ. and hereby files his Motions in
23 Limine # 1-3.

24 ///


25 ///

26 ///

27 ///

1 These Motions are made and based on the following points and authorities, the papers and
2 pleadings on file herein, together with oral argument at the time set for hearing on the matter.

3 DATED this 12th day of October, 2014.

4
5 
6 ANTHONY P. SGRO, ESQ.
7 Nevada State Bar No. 3811
8 PATTI, SGRO, LEWIS & ROGER
9 720 S. 7th Street, 3rd Floor
10 Las Vegas, Nevada 89101
11 *Attorney for Defendant*

12 **NOTICE OF MOTION**


13 TO: THE STATE OF NEVADA, Plaintiff, and

14 TO: STEVEN B. WOLFSON, District Attorney,

15 YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will
16 bring the foregoing Motion on for hearing before the above-entitled Court on the 23 day of
17 OCT., 2014, at the hour of 8:30 am in the above-entitled court, or as soon thereafter
18 as counsel may be heard.

19 DATED this 12th day of October, 2014.

20 PATTI, SGRO, LEWIS & ROGER

21 
22 ANTHONY P. SGRO, ESQ.
23 Nevada Bar No. 3811
24 PATTI, SGRO, LEWIS & ROGER
25 720 S. 7th Street, 3rd Floor
26 Las Vegas, NV 89101

1
2 **POINTS AND AUTHORITIES**

3 **I.**

4 **INDEX OF MOTIONS OF LIMINE**

- 5
6 No. 1: MOTION IN LIMINE TO PRECLUDE THE STATE FROM ADMITTING THE
7 SIX-PACK PHOTOGRAPHIC LINEUP OF DAVID BURNS SIGNED BY
8 DE'VONIA NEWMAN AND TO PRECLUDE THE IN-COURT
9 IDENTIFICATION OF DEFENDANT BURNS BY NEWMAN
10
11 No. 2: MOTION IN LIMINE TO PRECLUDE LAW ENFORCEMENT FROM GIVING
12 LAY WITNESS TESTIMONY AS TO THE IDENTITY OF THE SUSPECT ON
13 THE SURVEILLANCE VIDEO
14
15 No. 3: MOTION IN LIMINE TO PRECLUDE REFERENCE TO ASSEMBLY BILL 444
16

17 **II.**

18 **GENERAL STATEMENT OF FACTS**

19 The instant case involves the shooting death of Derecia Newman, and the non-fatal
20 shooting of her daughter De'Vonja Newman on August 7, 2010.

21 In the early morning of August 7, 2010, Derecia Newman was at her residence located at
22 5662 Meikle Lane, with her live in boyfriend, Cornelius Mayo, their children, and Derecia's sister
23 Erica Newman. (GJT1 14-16)¹. At approximately 3:00am Derecia received a call from a number
24 that registered as "Cousins S" on the caller ID. (GJT 1, 17). Mr. Mayo recognized the caller ID as
25 belonging to Stephanie Cousins, a woman who bought drugs from Derecia on occasion. (GJT1 17-
26 18). Approximately ten minutes later, Mr. Mayo noted that Cousins called again. (GJT 1 19).
27 Shortly thereafter, Mr. Mayo heard a commotion in the front of the home, a scream, and then two
28 more gunshots. (GJT1 19). Following another round of two to three gunshots, Mr. Mayo observed
DeVonja Newman, Derecia's daughter, run into the bathroom that he was occupying. (GJT1, 20-
21). Following another gunshot, DeVonia exited the bathroom and was shot by an assailant that

¹ The Transcript of the Grand Jury Proceeding that occurred on September 28, 2010 is cited as GJT1.

1 Mr. Mayo was unable to see. (GJT1, 22). Derecia Newman was found dead from a gunshot
2 wound to the head. She was lying on the couch with a twenty dollar bill in her hand. (GJT1, 31).

3 Pursuant to statements made by Stephanie Cousins, the State presented evidence at the
4 grand jury proceedings that prior to this incident, Cousins, an individual named Willie Mason, and
5 an unknown man who Cousins knew as "Curly," "D-Loc," or "D-Shock" met at Cousins'
6 apartment. (GJT2, 25-28)². After the first meeting, the as yet unidentified man left with Cousins
7 and Mason and returned in a vehicle driven by Monica Martinez. (GJT1, 26-27). In the car, the
8 unidentified man and Mason allegedly asked Cousins if she had contact with people that sold
9 drugs or had valuables, so that they may rob them. (GJT1, 28).

11 Cousins stated that she provided three potential targets and that through the process of
12 elimination the group chose to rob Derecia Newman. (GJT2, 29-32). Cousins then made a phone
13 call to Newman to set up a purchase of narcotics. (GJT2, 34).

15 As to the events that occurred when the group arrived at the Meikle residence, Cousins told
16 several inconsistent stories. (GJT2, 35). However, her original story was that Monica Martinez
17 had handed Cousins a twenty dollar (\$20.00) bill so as to appear to Newman that Cousins
18 legitimately wanted to purchase narcotics. (GJT2, 35) Tasked with the job, Cousins went to the
19 front door of Newman's residence and observed the unidentified man (who was allegedly holding
20 a firearm in his left hand) and Mason stand alongside the apartment wall just outside Newman's
21 door. (GJT2, 35-36). The pair of men allegedly entered the residence behind Cousins as Derecia
22 Newman opened the door. (GJT2, 35-36). After Cousins entered the residence, the unidentified
23 man allegedly pushed his way into the residence and shot Newman in the head and then shot
24 DeVonia Newman. (GJT2, 36).

26 Though there was evidence presented at the Grand Jury proceedings that put Mason,
27

28 ² The Transcript of the Grand Jury Proceeding that occurred on October 12, 2010 is cited as GJT2.

1 Martinez, and Cousins' cell phones in the area of the incident, no such evidence was presented
2 regarding a mobile device belonging to Defendant Burns. (GJT2, 17).

3
4 **III.**

5 **MOTIONS IN LIMINE**

6 **No. 1: MOTION IN LIMINE TO PRECLUDE THE STATE FROM ADMITTING THE**
7 **SIX-PACK PHOTOGRAPHIC LINEUP OF DAVID BURNS SIGNED BY DE'VONIA**
8 **NEWMAN AND TO PRECLUDE THE IN-COURT IDENTIFICATION OF DEFENDANT**
9 **BURNS BY NEWMAN**

10 **A. STATEMENT OF FACTS**

11 Prior to the Grand Jury hearing in the instant matter, the police spoke with De'Vonia
12 Newman at the Pediatric Intensive Care Unit at UMC on August 8, 2014. At that time, Ms.
13 Newman had just been released from surgery and was highly medicated.³ The voluntary
14 statement reflects that Ms. Newman only had a brief encounter with her assailant wherein he
15 supposedly chased her down a hallway and then briefly looked through her pockets. See
16 *Statement of Newman*, attached hereto as Exhibit "1."

17 It was not until September 29, 2010, nearly two months after the incident, that law
18 enforcement provided Ms. Newman with a six-pack photo lineup containing a picture of David
19 Burns. See *Six-Pack Photo lineup* attached hereto as Exhibit "2."⁴ In said line-up, a prior booking
20 photo of Burns is placed in the middle of the bottom row with a dark gray background. The four
21 pictures on the right and left sides are all on bright blue backgrounds. In addition, each of the
22 individuals in those blue-backed photos appear to be smiling, while Defendant Burns has a dour
23 expression.
24

25 At to the remaining picture located above Burns, said picture is of a much darker skinned

26 ³ Due to privacy and HIPPA concerns Ms. Newman's medical records are not attached to the instant document.
27 However, such records can be privately provided to the Court upon the Court's request.

28 ⁴ A color copy of the lineup was not provided to the defense by the State. However, an identical lineup that was
provided to witness Taylor Mitchell was obtained by the defense from the Exhibit Vault and has also been provided
under Exhibit "2."

1 male with what appears to be a radically different hair-style. However, even given the suggestive
2 line-up provided to Ms. Newman she gave the following statement on the six-pack:

3 I believe it's the picture #5, because of his eyes. I'm 10% sure he's the one who
4 shot my mom. I'm not sure. (Exhibit "2.")

5 Ms. Newman, was then provided a suggestive line-up, the interview preceding the line-up was
6 either not recorded (or such recording was not produced), and still Ms. Newman was "not sure"
7 about the identity of #5 as her assailant.

8 **B. ARGUMENT**

9 The defense anticipates that at the time of trial, the State will not only present the six-pack
10 line-up to the jury, but will also solicit an in-court identification of Defendant Burns by De'Vonnia
11 Newman. However, the facts and circumstances surrounding the instant case render Ms.
12 Newman's in-court identification untrustworthy and tainted by the previously administered photo
13 array.
14

15 **1. The Six-Pack Line-up was Unnecessarily Suggestive and Unreliable.**

16 In reviewing the propriety of a pretrial identification, this court considers "(1) whether the
17 procedure is unnecessarily suggestive, and (2) if so, whether, under all the circumstances, the
18 identification is reliable despite an unnecessarily suggestive identification procedure." *Thompson*
19 *v. State*, 125 Nev. 807, 813, 221 P.3d 708, 713 (2009); citing *Bias v. State*, 105 Nev. 869, 871, 784
20 P.2d 963, 964 (1989). Pursuant to *Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979), the
21 Court must consider the totality of the circumstances and determine whether "the confrontation
22 conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken
23 identification that (appellant) was denied due process of law." Citing *Stovall v. Denno*, 388 U.S.
24 293, 301, 87 S. Ct. 1967, 1972, 18 L. Ed. 2d 1199 (1967).
25
26
27
28

1 In this case, the picture of Defendant Burns in the six-pack array is not only distinctive, it
2 is inconsistent with the rest of the photos. Four of the six persons in the six-pack have what appear
3 to be bright blue digitally inserted backgrounds. While Burns and another suspect, located in the
4 middle, have gray backgrounds. It is unclear why law enforcement choose not to alter the
5 background of two of the photos when it appears that there was some effort to make the other four
6 consistent. In addition, the only other photograph that is not placed on a blue background is of a
7 darker skinned man, who has radically different facial features. Moreover, the background and
8 lighting of Burns' photograph is entirely different than the rest. He is shot in a dark light and with
9 a dour expression affecting his face, while at least four of the other suspects have some semblance
10 of a smile on their face.
11

12 The totality of the circumstances in which the photo array was both organized and
13 presented, in tandem with Ms. Newman's admission that she is "not sure" and can give only
14 "10%" accuracy, render the admissibility of the photo array more prejudicial than probative. See
15 NRS 48.035. As such, it should be precluded from admission before the jury.
16

17 **2. Ms. Newman's In-Court Identification was Tainted by the Pre-trial**
18 **Identification.**

19 Ms. Newman has already been exposed to a picture of Burns by law enforcement in a
20 highly suggestive line-up. In such cases where the pre-trial line-up has been conducted in a
21 highly suggestive manner, the State of Nevada has held that the State must show by "clear and
22 convincing proof that an in-court identification is independent of the illegal pretrial lineup."
23 *Thompson v. State*, 85 Nev. 134, 138-39, 451 P.2d 704, 707 (1969).
24

25 In this case, Ms. Newman did not have prolonged contact with her assailant. Further, the
26 attack happened at night, in a poorly lit hallway, and was over in a matter of seconds. Ms.
27 Newman was unable to say that any of the men in the line-up were her assailant with any degree of
28 accuracy, despite the highly suggestive manner in which the line-up was presented to her. Ms.

1 Newman was still "not sure." As such, there is little to no evidence in the record that Ms.
2 Newman would have an independent recognition of Burns, outside the photo presented to her by
3 law enforcement. Absent a showing that she could identify him independent of that knowledge,
4 her in-court identification should be precluded by this Court.
5

6
7 **No. 2: MOTION IN LIMINE TO PRECLUDE LAW ENFORCEMENT FROM GIVING**
8 **LAY WITNESS TESTIMONY AS TO THE IDENTITY OF THE SUSPECT ON THE**
9 **SURVEILLANCE VIDEO**

10 **A. STATEMENT OF FACTS**

11 At the time of the first grand jury proceeding Defendant Burns was not identified as the
12 unknown assailant that had allegedly shot Derecia and DeVonia Newman. At the second
13 proceeding the State introduced evidence attempting to identify Burns as the man that Cousins'
14 had alternatively called "Curly," "D-Shock," and "D-Loc." Detective Wildemann was called at
15 the Grand Jury to identify Burns, Mason, and Martinez in a video from the Opera House Casino
16 taken on the day of the incident. (GJT2, 10-11). He further identified Mason, Burns, and an
17 individual named Jerome Thomas getting onto and off of Greyhound buses in video footage from
18 the same day. (GJT2, 12-13).
19

20 **B. DETECTIVE WILDEMANN'S LAY IDENTIFICATION OF BURNS IS**
21 **INADMISSIBLE OPINION EVIDENCE.**

22 Pursuant to NRS 50.265 if a witness is not testifying as an expert, his testimony in the form
23 of opinions or inferences is limited to those opinions or inferences which are: 1) Rationally based
24 on the perception of the witness; and 2) helpful to a clear understanding of his testimony or the
25 determination of a fact in issue. In this case, the State intends to introduce the lay opinion
26 testimony of Detective Wildemann that one of the persons depicted in the surveillance videos
27 taken at various downtown casinos was Burns. However, such testimony is impermissible unless
28

1 there is "some basis for concluding that the witness is more likely to correctly identify the
2 defendant from the photograph than is the jury." *Rossana v. State*, 113 Nev. 375, 380, 934 P.2d
3 1045, 1048 (1997); quoting *United States v. Towns*, 913 F.2d 434, 445 (7th Cir.1990); quoting
4 *United States v. Farnsworth*, 729 F.2d 1158, 1160 (8th Cir.1984)).

5
6 In the *Rossana* case, the court permitted a private detective hired by the victim to testify
7 that the person depicted on a home surveillance tape was Rossana. *Id.* at 380-381. In permitting
8 such identification, the court noted that it was appropriate to do so because the private investigator
9 was familiar with Rossana's appearance at the time that the crime occurred. *Id.* at 380-381. This
10 information was helpful to the jury because Rossana's appearance had changed dramatically since
11 that time. *Id.* at 380-381. However, the court did note that such testimony would not be
12 permissible where a photograph is deemed "so hopelessly obscure that the witness is no better
13 suited than the jury to make the identification. *Id.*; citing *United States v. Jackman*, 48 F.3d 1, 5
14 (1st Cir. 1995).

15
16 In reaching its decision the *Rossana* court relied on federal jurisprudence and Nevada's
17 adoption of the federal rules. Persuasively, the court cited to *United States v. Barrett*, 703 F.2d
18 1076, 1086 (9th Cir.1983) for support that lay witness testimony would be helpful if the witness
19 was familiar with the defendant's appearance at the time of the crime and the defendant's
20 appearance had since changed. *Id.* In *Barrett*, the defendant's girlfriend was permitted to testify as
21 to the identity of the defendant in a surveillance photograph because, while the defendant was
22 clean shaven at the time of trial, both he and the robber had a full beard and mustache at the time
23 of the crime. *Barrett*, *supra* at 1086. The *Barrett* court further stated that because of the
24 girlfriend's "intimate" relationship with the defendant she was qualified to be helpful in the
25 determination of identity. *Id.*

26
27 ///

1 In *U.S. v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993), the Ninth Circuit once again
2 addressed the issue of lay witness identification of a defendant in a surveillance photograph. In
3 that case the investigating officer was permitted to identify the defendant in photographs at the
4 time of trial. The Ninth Circuit found that this identification was of dubious value and could have
5 invaded the province of the jury, who were just as capable of comparing the defendant to the
6 surveillance photograph. *Id.* In addition, the court held, "the use of lay opinion identification by
7 policemen or parole officers is not to be encouraged, and should be used only if no other adequate
8 identification testimony is available to the prosecution." *Id.*; citing *United States v. Butcher*, 557
9 F.2d 666, 670 (9th Cir.1977). Finally, the *LaPierre* court found that lay opinion testimony of this
10 sort is only appropriate when 1) the witness has had substantial and sustained contact with the
11 person in the photograph, and 2) when defendant's appearance in the photograph is different from
12 his appearance before the jury and the witness is familiar with the defendant as he appears in the
13 photograph. *Id.*

14
15
16 Moreover, pursuant to NRS 48.035, relevant evidence is not admissible if the probative
17 nature of the evidence is outweighed by unfair prejudice. In *United States v. Butcher*, 557 F.2d
18 666, 670 (9th Cir.1977), the Court held that the use of the identifications by police officers, while
19 constitutionally permissible, did increase the possibility of prejudice to the defendant in that he
20 was presented as a person subject to a certain degree of police scrutiny.

21
22 In this case, there is no reason to believe that Detective Wildemann would be any better
23 suited to identifying Burns' on video surveillance. In the course of discovery, defense counsel has
24 been provided with video surveillance from a number of casinos, which purport to show Burns,
25 Monica Martinez, and Willie Mason in the company of each other. These videos range in quality
26 from blurry to hopelessly obscure. There is no evidence that Detective Wildemann would have
27 any knowledge to better deduce the identity of the persons on that video than the jury themselves.
28

1 Detective Wildemann has never acknowledged to have known Burns prior to the incident, nor is
2 there any evidence that Burns has changed in his appearance from the time that Detective
3 Wildemann first interviewed him in San Bernardino custody until the present day. As such,
4 Detective Wildemann should be precluded from giving his lay opinion as to the identity of the
5 person alleged to be Burns in surveillance videos presented to the jury.
6

7 **No. 3: MOTION IN LIMINE TO PRECLUDE REFERENCE TO ASSEMBLY BILL 444**

8 **A. STATEMENT OF FACTS**

9 On May 2, 2013, Assembly Bill 444 was introduced before the Assembly. On May 17,
10 2013, following testimony on the matter, the Assembly passed Bill 444 with vote of thirty-eight
11 (38) to one (1). The Senate passed the Bill on May 30, 2013 by a vote of eleven (11) to ten (10).
12 Finally, on June 10, 2013, the Bill was approved by Governor Sandoval and codified as Chapter
13 469 of the Laws of the State of Nevada, 2013.
14

15 The Bill calls for a fiscal audit of the cost of the death penalty in Nevada, with an eye
16 toward evaluating whether capital punishment is still fiscally viable for the State of Nevada.

17 **B. ARGUMENT**

18 Pursuant to NRS 48.035, relevant evidence is not admissible if the probative nature of the
19 evidence is outweighed by unfair prejudice. In this case, Defendant Burns seeks to preclude the
20 State from referencing Assembly Bill 444 and the pending audit of the death penalty based on the
21 prejudicial effect that it may have on the jury. If given some indication that the death penalty may
22 not actually be effectuated in this case, the jury may be more inclined to give a verdict of death in
23 this case.
24

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IV.

CONCLUSION

Based upon the foregoing, Defendant Burns respectfully requests that this Court grant his Motions in Limine Nos. 1-3.

DATED this 12th day of October, 2014.



ANTHONY P. SGRO, ESQ.
Nevada State Bar No. 3811
PATTI, SGRO, LEWIS & ROGER
720 S. 7th Street, 3rd Floor
Las Vegas, Nevada 89101
Attorney for Defendant

1
2 **CERTIFICATE OF SERVICE**

3 I HEREBY CERTIFY that on the ____th day of October, 2014, I served a true and
4 correct copy of the foregoing document entitled: DEFENDANTS MOTIONS IN LIMINE #1-3 as
5 indicated below:
6

7 ☒ the documents were submitted electronically for filing and/or service within the
8 Eighth Judicial District Court pursuant to Administrative Order 14-02 for e-service to the
9 following:

10 ☒ sending a copy via electronic mail, and/or

11 _____ placing the original copy in a sealed envelope, first-class, postage fully pre-paid
12 thereon, and depositing the envelope in the U.S. mail as Las Vegas, Nevada addressed as
13 follows:

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27
28

An employee of Patti, Sgro, Lewis & Roger

EXHIBIT “1”

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 1

EVENT #: 100807-0732

SPECIFIC CRIME: HOMICIDE

DATE OCCURRED: 08-07-2010

TIME OCCURRED: 0353 HRS

LOCATION OF OCCURRENCE: 5662 MEIKLE LANE #A

CITY OF LAS VEGAS

CLARK COUNTY

NAME OF PERSON GIVING STATEMENT: DEVONIA JAVON NEWMAN

DOB: 12-09-91

SOCIAL SECURITY #: [REDACTED]

RACE:

SEX:

HEIGHT:

WEIGHT:

HAIR:

EYES:

HOME ADDRESS: 4910 E. OWENS #C
LAS VEGAS, NV

PHONE 1:

WORK ADDRESS:

PHONE 2:

The following is the transcription of a tape-recorded interview conducted by DETECTIVE C. BUNTING, P#6484, LVMPD HOMICIDE SECTION, on 08-08-2010 at 1615 hours.

Q. This is Detective C. Bunting, conducting a taped interview reference Event #100807-0732. I'm going to be speaking with DeVonia, D-E capital V-O-N-I-A, Javon, J-A-V-O-N, Newman, N-E-W-M-A-N. Ah, date of birth of [REDACTED] social of [REDACTED]. Today's date is 08-08-10, and the time is 1615 hours. The interview is taking place at UMC PICU, Pediatrics Intensive Care Unit in bed, or Room 280. And, ah, Devonina informed me that it's De'Vonina. Okay, De'Vonina, I know, um, we're gonna, we've talked a little bit about what happened, okay, and,

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 2

EVENT #: 100807-0732
STATEMENT OF: DE'VONIA NEWMAN

um, you wanna take a couple deep breathes and we'll, for a second. There you go. Okay, and you're doing--that's good--you're doing a great job. You can, you can go ahead and stop. You're doing a great job. And I'm just gonna ask you a couple questions about what happened? Okay? Um, on the night that this happened, you were with your mom, uh, you call her Ree?

A. (Unintelligible)

Q. Does, does, she goes by Ree though?

A. Yeah, but _____.

Q. Right. Derecia Newman, right?

A. (Unintelligible)

Q. Okay.

A. (Unintelligible)

Q. Newman. Right. Um, now you and your mom were in the living room area?

A. _____. I told her _____. She _____ the door, _____ like _____, and, and _____. My mom was like...

Q. Okay, hold on let me slow you down here so I can follow you, okay? So you hear a knock at the door and you go get your mom in her room and tell her that somebody's at the door, and you're shaking your head yes. And she comes to the front door, and it's Stephanie.

A. (Unintelligible). Yeah.

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VOLUNTARY STATEMENT
PAGE 3

EVENT #: 100807-0732
STATEMENT OF: DE'VONIA NEWMAN

Q. She opens the door and Stephanie is there.

A. My mom _____

Q. I'm sorry?

A. _____

Q. Right, the couches are that far apart.

A. _____ shut the door. Then the dude...

Q. Okay, Stephanie's by the big couch near the door, and your mom's by the other couch.

A. _____ He ran right there, shot my mom. I wasn't even paying attention where he shot her but all I know I just _____. So I ran...

Q. Okay, hold on, I'm gonna stop you there for a second, okay? So Stephanie's about to shut the door, and this guy comes in immediately and shoots your mom.

A. Yes.

Q. Okay. Um, the guy, can you describe him to me, what race is he?

A. Black.

Q. Okay, and about how old is he?

A. Twenty-seven or thirty.

Q. Okay. And how tall do you think he was?

A. Like 6'2".

Q. And was he heavy, skinny?

VOLUNTARY STATEMENT

PAGE 4

EVENT #: 100807-0732

STATEMENT OF: DE'VONIA NEWMAN

A. Skinny.

Q: He was skinny. Okay. Did he have any facial hair?

A: _____.

Q: A moustache?

A: Sorta like yours.

Q: Okay, just not shaven, so real...

A: _____.

Q: Right.

A: _____.

Q: Just on the lip he had a thin, a small moustache?

A: Yeah, _____.

Q: Okay. Now what was he wearing, do you remember what color shirt he was wearing?

A: _____.

Q: A white tee shirt with blue, with blue overalls, and they were rolled up at the pant.

You mean like down hear the shoes? Okay.

A: Yeah, and I think they were white.

Q: What, the shoes?

A: Yeah.

Q: Okay. So a white tee shirt, blue coveralls, or overalls, and then white tennis shoes. And was he wearing a hat?

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

VOLUNTARY STATEMENT

PAGE 5

EVENT #: 100807-0732

STATEMENT OF: DE'VONIA NEWMAN

- A. Orange hat with _____.
- Q. Orange hat with white writing. Did you see what that writing was?
- A. Yeah, but _____.
- Q. It starts with a D. Okay.
- A. _____.
- Q. His, his hair was curly and down to his ear?
- A. I think _____.
- Q. So it went, it was as long as, um, his, the middle of his ear is what you're point to.
- A. Yeah.
- Q. Okay. And it was, was it wet like he had stuff in his hair?
- A. It was _____.
- Q. Poofy, curly, so kinda poofed out underneath the hat?
- A. Yeah.
- Q. Okay.
- A. And _____.
- Q. Okay, so he comes in and can you describe the gun to me?
- A. It was about that long, _____ this long.
- Q. Very long. Okay. You're showing me a pretty long gun. Okay. It was a handgun?
- A. Yeah.
- Q. A pistol?

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PAGE 6

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STATEMENT OF: DE'VONIA NEWMAN

- A. _____.
- Q. Like a handgun.
- A. Yeah, it's one of those ones that _____ push out and twist it.
- Q. The cylinder, it's a got a, it's a revolver? Okay. What color was it?
- A. Silver.
- Q. Silver?
- A. Yeah.
- Q. Okay. You're doing, you, you're doing awesome. Okay?
- A. Yeah, it was silver.
- Q. Okay.
- A. _____, open the door.
- Q. You ran into the bedroom and shut the door.
- A. No, the bathroom.
- Q. The bathroom. Okay.
- A. He shot through the door.
- Q. He shot through the bathroom door.
- A. _____. He opened the door and then he shot me in the stomach.
- Q. Okay, he shot through the door and then opened the door and shot you?
- A. Yeah.
- Q. Okay. So he was chasing you down the hallway?

VOLUNTARY STATEMENT

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EVENT #: 100807-0732

STATEMENT OF: DE'VONIA NEWMAN

A. He didn't quite get me yet.

Q. Okay.

A. But he knows that I ran through that door. And then...

Q. He didn't quite get you...

A. ...and then _____, this is what happened.

Q. Okay.

A. 'Cause I was _____, and I _____, and he was a little bit stronger than me, so he shot me in the stomach, and I, I fell down.

Q. Okay, hold on one second. Okay? You said--what, what happened right before he shot you in the stomach?

A. I tried to _____.

Q. You were wrestling with him?

A. Yeah. _____ stronger than me he turned this way, shot me in the stomach. And then _____.

Q. He went through your pockets?

A. Yeah, saying where's the money? Where's, where's the dope?

Q. Where's the money, where's the dope, as he going through your pockets?

A. Yeah.

Q. Were you lying on the ground, or standing up/

A. _____.

Q. Okay.

VOLUNTARY STATEMENT

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EVENT #: 100807-0732

STATEMENT OF: DE'VONIA NEWMAN

A. Then he seen the dope on the water jug.

Q. He saw some dope on the water, the water jug?

A. _____ opened the top drawer.

Q. He opened the top drawer.

A. And took some on the money.

Q. And he took some money out of the top drawer?

A. What I believe _____, oh yeah, when we were _____, sorry.

Q. That's okay, you're all right.

A. When I ran _____, my dad had picked up his phone and _____.

Q. Your, your dad had picked up what?

A. Some of the money. So _____.

Q. Oh, out of the drawer?

A. So _____ so we can buy out school clothes.
_____.

Q. Was this before the shooting, or after?

A. No, it was _____, 'cause he heard it, and then shot when he shot my mom.
And then he seen me _____, and then he run in the
door _____.

Q. Okay. So he was in the bedroom, grabbing money out of the drawer?

A. Yeah, so if something happened _____.

Q. Sure. So he heard gunshots, you run...

VOLUNTARY STATEMENT

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EVENT #: 100807-0732

STATEMENT OF: DE'VONIA NEWMAN

A. And he was calling _____.

Q. Hold on, hold on, slow down, give me a second. Okay? 'Cause I need you to slow down so I can understand what you're saying. So you're getting--you're running down the hallway and when you come into the master bedroom, in your dad's room, you see him in the drawer taking money out, and then you guys both go into the bathroom.

A. Yeah, he had picked, while he's calling the police, he had picked up some money just in case if _____, then we both went in the bathroom.

Q. Oh, you said when he's calling police.

A. Yeah. And then, and then I...

Q. Was he on the phone when the guy was still in the house shooting?

A. _____ uh, I tried to shut the door _____ got in the shower and then...

Q. You trying to shut the door, your dad jumps in the shower.

A. Yeah, _____ shut the door the dude pushes the door.

Q. He's pushing through the door?

A. Yeah.

Q. And you're struggling trying to keep it shut.

A. He shut the door first, and then he opened the _____ shot me in the stomach.

Q. Okay, stop right there. Let me repeat to make sure I understand you correctly.

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So your dad grabs some money and you guys both go into the bathroom. Okay. He jumps into the shower, you shut the door, and this guy, the suspect starts pushing on the door and you're struggling to keep the door shut. You're struggling. Yes? Okay.

A. _____.

Q. Okay. And then he shoots through the door, but then he gets the door open and then he shoots you in the stomach. Yes? Okay.

A. And then _____ After that _____ front door like in five seconds, and then _____.

Q. Okay, let's go back though. After he shoots you, is that when he grabs the, the crack rocks off the top of the water bottle, and then, and then he goes...

A. _____.

Q. ...of the money.

A. But I think my dad picked up like a hundred dollars, and 'cause he picked up a _____, and he...

Q. So he, there was still money in the drawer that your dad didn't get, and he, the suspect that shot you, he's the one who picked up the rest of that money.

A. _____. He grabbed all the _____ and stuff _____ and left _____.

Q. Okay, he stuffed what he could of the crack into his pockets, and then some of it fell

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On the floor? Okay. And then what?

A. That was it.

Q. And then he left?

A. Yeah.

Q. Okay, he was the...

A. _____

Q. Okay.

A. _____

Q. Okay, hold on, let me slow you down, let me slow you down.

A. And then...

Q. Hold on. After the suspect leaves, okay, um, real quick, was there anybody else besides Stephanie and this guy that was wearing the orange hat, was there anybody else inside that apartment that you saw?

A. _____

Q. Okay, I'm gonna run through this real quick up to this point, okay, and you just tell me if I'm wrong. Okay? You hear a knock at the door. Okay. You go get your mom who's in the back bedroom and tell her about that somebody's at the door. Then you both come out to the living room and she opens the door and it's Stephanie. Stephanie comes in just inside the door, and your mom is over near the couch. Where are you at, at this point?

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STATEMENT OF: DE'VONIA NEWMAN

A. I'm sitting on the left side of the couch. My mom, uh, was standing by the right side of the couch.

Q. Okay. So you're closer to the door.

A. No. _____. Big couch is right by the door and the little couch is by the patio door.

Q. Are you, which couch are you near?

A. _____ patio.

Q. The patio, so you're behind the couch where your mom is at.

A. Not behind, where the first one is...

Q. There's the couch near the door.

A. There's three couches.

Q. Right, the couch near the door, the couch, um, in the middle of the room, and then the couch near the patio.

A. I was by the one in the middle of the room.

Q. You were by the one in the middle of the room. Okay. And you're mom was by that one too. And then right when Stephanie starts to shut the door...

A. The dude pushes the door.

Q. He pushes...

A. _____.

Q. He hit her? Stephanie?

A. Yeah, on the back. But I--they shot my mom first. So I think Stephanie was a

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part of it. And then I ran back.

Q. Okay, let me stop you real quick right there. You said that he comes in, he barges--does he push Stephanie out of the way and then shoots your mom?

A. He hits her with the door, and_____.

Q. He hits Stephanie with the door.

A. And she said, "What the fuck?"

Q. Who, Stephanie?

A. Yeah.

Q. Okay, so she was surprised to get hit by the door?

A. Yeah, but she could have been acting.

Q. Okay.

A. But then he shot my mom first, then _____.

Q. And then--did he say anything, or did he just barge in and shoot?

A. Oh, he said where's the money at?

Q. That was the first thing he said _____?

A. _____. He just shot her.

Q. So he said, as he's coming in he said where's the money at and then just shot. He didn't give her a chance to answer.

A. No, 'cause I really believe she would of told him where it was.

Q. Right. But she didn't have enough time to even answer? No? Okay. All right. So he, it's just those two, Stephanie and him that come in. He's by himself. Do

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you remember if he had the gun in his right or his left hand?

A. (No response)

Q. That's okay, take your time. You're doing, you're doing awesome. Left hand? Left hand. Okay. Okay, you just showed me and raised your finger up in the shape of a gun with your left hand, and that's what you're saying, the left hand, right? Okay. Okay. So you, you run back to the back bedroom, he's shooting at you while you're running back there? Not sure? Don't know? Okay. So you run back to the back bedroom. Do you hear him say anything else?

A. _____ try to shut the door but _____.

Q. The towels were on the door so you couldn't shut the door?

A. Yeah.

Q. Okay. So he followed you to the back bedroom, he then, um, tries to push open the...first of all when you come in the bedroom your dad is pulling money out of the top right drawer to the right of the bed. He pulls some but he doesn't get it all.

A. _____ He _____ like a hundred dollars, just in case.

Q. Right. And then he goes into the bathroom, you follow.

A. Yeah, I follow him.

Q. Let me finish, let me finish, and just tell me if I'm right, okay? You go, um you follow behind him into the bathroom. You try and...

A. He _____.

Q. He tells you to come in. Okay?

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A. And I try to shut the door.

Q. Try to shut the door.

A. So _____.

Q. The towels were on there so you couldn't shut it.

A. _____.

Q. He pushes it open.

A. Shots the...

Q. Shoots through the door, then pushes it open?

A. Yeah.

Q. Okay.

A. _____.

Q. And then...

A. Shoots me in the stomach.

Q. Shoots you in the stomach.

A. I fall down and _____.

Q. What was that?

A. He _____.

Q. Who did?

A. My dad _____. And then he waited 'til the dude walked away
and he told me just lay there, _____.

Q. Okay, hold on. I gotcha. When he, when after he shoots, shoots you in the

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STATEMENT OF: DE'VONIA NEWMAN

stomach, he then goes through your pockets right then and asks where the money is and where the, the dope is. Is that the word he used, dope? Okay. And then he sees the dope, the crack rock on top of the water bottle. Was it on a plate? Is that what that plate is in there?

A. _____.

Q. Okay. And then he puts that in his pocket, right? Okay. And then he goes into the top drawer and gets the money and leaves. Is that correct?

A. _____.

Q. Okay. Hey, you have done awesome. Okay? You're a very strong young girl. Very proud of you. Okay. All right. That'll conclude the interview, and the time is 1633.

THIS VOLUNTARY STATEMENT WAS COMPLETED AT UMC, ON THE 8th DAY OF AUGUST, 2010, AT 1633 HOURS.

CB:sd
10V1044

EXHIBIT “2”

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
PHOTO LINE-UP WITNESS INSTRUCTIONS

NAME: De'Vonica Newman EVENT#: 100807-0732
ADDRESS: 4910 E. Owens C Las Vegas, NV INTERVIEWED BY: C. Bunting
PHONE NUMBER: _____ LOCATION: UMC Pediatric ICU Rm 2
DATE & TIME: 9/29/10 1241

"In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. The fact that the photos are being shown to you should not cause you to believe or guess that the guilty person has been caught. You do not have to identify anyone. It is just as important to free innocent persons from suspicion as it is to identify those who are guilty. Please keep in mind that hair styles, beards, and mustaches are easily changed. Also, photographs do not always depict the true complexion of a person - it may be lighter or darker than shown in the photo. You should pay no attention to any markings or numbers that may appear on the photos. Also, pay no attention to whether the photos are in color or black and white, or any other difference in the type or style of the photographs. You should study only the person shown in each photograph. Please do not talk to anyone other than Police Officers while viewing the photos. You must make up your own mind and not be influenced by other witnesses, if any. When you have completed viewing all the photos, please tell me whether or not you can make an identification. If you can, tell me in your own words how sure you are of your identification. Please do not indicate in any way to other witnesses that you have or have not made an identification. Thank you."

SIGNED: De'Vonica

STATEMENT:

DATE & TIME: 9/29/10 1244

I believe it's picture #5, because of his eyes. I'm 10% sure
he's the one who shot my mom. I'm not sure.

This statement written by Det. Bunting
in De'Vonica Newman's words. Witnessed
by Det. Kyger P#4191

SIGNED: De'Vonica

DATE & TIME: 9/29/10 1248

OFFICER'S NAME & P#: C. Bunting P#6484

LVMPD 104 (REV. 5-96) • AUTOMATED/WP12

AA 0044

Date: 9/29/2010

Case #: 100807-0732

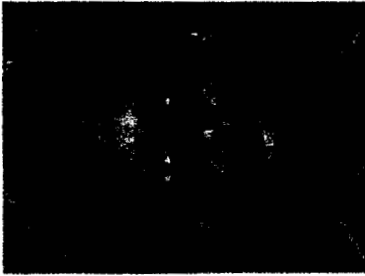
Author ID: c6484b



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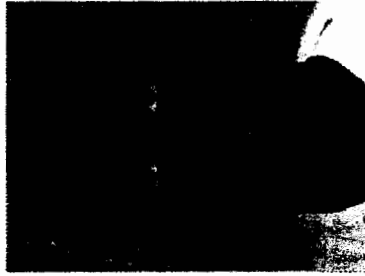
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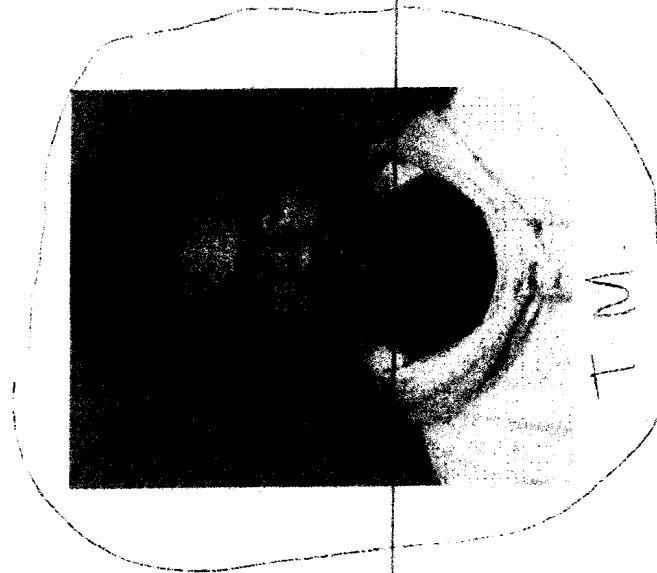
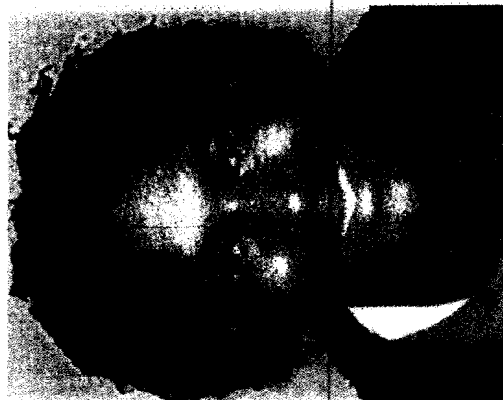
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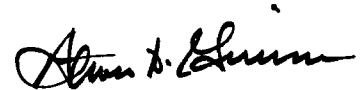
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Date: 9/12/2010

Case #: 100807-0732

Author ID: c6484b





CLERK OF THE COURT

OPPS

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DAVID JAMES BURNS, aka
D-SHOT,
#2757610

Defendant.

CASE NO: C-10-267882-2

DEPT NO: XX

STATE'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE #1 - 3

DATE OF HEARING: OCTOBER 23, 2014
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion In Limine #1 - 3.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **THE PHOTOGRAPHIC LINE-UP WAS NOT UNDULY SUGGESTIVE**

3 Defendant Burns asserts his photographic line-up with Devonian Newman was unduly
4 suggestive and should be suppressed.¹ The majority of his argument seems to rest upon the
5 certainty of the witness, instead of the legal basis for suppression. As there was nothing
6 improper in the procedure, suppression is not a remedy.² He is free to cross-examine the
7 witness on her certainty.

8 A pretrial identification by photograph will be set aside only if the photographic
9 identification procedure was so impermissibly suggestive as to give rise to a very substantial
10 likelihood of irreparable misidentification. Odoms v. State, 102 Nev. 27, 30, 714 P.2d 568,
11 570 (1986) *citing* Simmons v. U. S., 390 U. S. 377 (1968).

12 In Cunningham v. State, 113 Nev. 897 (1997), defendant sought to suppress a
13 photographic lineup that was overly suggestive. In that case, NHP Officer Christopher Perry
14 ("Perry") had an encounter with an individual in a car who ultimately eluded Perry. *Id.* at 900-
15 901. Perry described the driver of the car as a "white man with collar-length curly hair." *Id.*
16 at 901. Cunningham, who was actually black, later became a suspect in a homicide in which
17 a car had been stolen from the homicide victim. *Id.* Perry was shown a photographic line-up
18 to determine if the person who had eluded him was Cunningham, the homicide suspect. *Id.*

19 The line-up included photographs of three white men and three light-skinned black or
20 Hispanic men. *Id.* at 901. Despite the fact that Perry had previously told detectives the suspect
21 was a white man, the detective (who knew Perry was actually black) asked Perry if it was
22 possible the suspect was a light-skinned black man. *Id.* at 901. Perry answered that it was
23 possible. *Id.* at 901. Cunningham's photo was the only photo displaying short hair, while the
24 other five photo subjects had longer length hair. *Id.* Perry identified Cunningham, a light-
25 skinned black man, as the driver of the car. *Id.*

26
27
28 ¹ The same or similar photo-lineup was utilized with several other witnesses. Some witnesses made identifications of Defendant and some witnesses did not. Defendant does not attack the propriety of the other photo lineups.

² Defendant asserts he does not have a color copy of the line-up, however, for the record, it was provided in March of 2013.

1 Cunningham argued the procedure was overly suggestive. *Id.* at 903. He asserted that
2 when the detective asked Perry if the driver of the car could have been a light-colored black
3 man, the detective was suggesting the suspect was black and not white. *Id.* Further, shortly
4 before presenting the photographs, the detective told Perry that hair length can change. *Id.*
5 Cunningham argued this was suggestive because his was the only picture portraying short hair.
6 *Id.*

7 The Nevada Supreme Court recognized that a photographic identification must be set
8 aside only if the photographic identification procedure was so impermissibly suggestive as to
9 give rise to a very substantial likelihood of irreparable misidentification. Cunningham, 113
10 Nev. at 904. The Court concluded that the district court did not err in admitting the photo line-
11 up. Perry did not identify the defendant based on any statements made by the detective. *Id.*
12 The detective did not unduly suggest to Perry that Cunningham was the suspect the detective
13 had in mind. *Id.* Finally, the pre-printed guidelines themselves stated that hair length can
14 change. *Id.* Accordingly, the Court concluded that Cunningham's argument lacked merit, and
15 the photographic lineup was proper. *Id.*

16 Similarly, in Odoms v. State, 102 Nev. 27 (1986), defendant sought to suppress a
17 photographic lineup that was "so impermissibly suggestive as to give rise to a substantial
18 likelihood of misidentification." *Id.* at 30. The Court's review of the record, however,
19 revealed that the six photographs used in the line-up matched the general description of the
20 assailant which was provided by the witnesses. *Id.* at 31. Further, the witnesses independently
21 reviewed the six photographs. *Id.* Finally, the officer conducting the line-up did nothing to
22 suggest to either eyewitness which photograph to select or which photograph was the
23 defendant. *Id.* Thus, the Court found that the photographic lineup and the identification
24 procedure were not impermissibly suggestive. *Id.* citing French v. State, 95 Nev. 586, 600
25 P.2d 218 (1979). See also U.S. v. Barrett, 703 F.2d 1076 (Th Cir. 1982) (photographic spread
26 not impermissibly suggestive where all men in display are remarkably similar in appearance
27 and the only noticeably difference was that Barrett wore darker photosensitive glasses); U.S.
28 v. Carbajal, 956 F.2d 924 (Th Cir. 1991) (photographic line-up allowed where Defendant had

1 facial bruises, but all men Hispanic, about the same range, similar skin, eye, hair coloring, hair
2 length.); U.S. v. Collins, 559 P. 2d 561 (Th Cir. 1977) (photographic line-up allowed where
3 all six black males in photos similar in age range, five or six had similar hair style as Defendant
4 and half of photos depicted person with a beard and all had facial hair.)

5 In the instant case, Devonian Newman was read the following instructions:

6 In a moment I am going to show you a group of photographs. This group
7 may or may not contain a picture of the person who committed the crime now
8 being investigated. The fact that the photos are being shown to you should not
9 cause you to believe or guess that the person has been caught. You do not have
10 to identify anyone. It is just as important to free innocent persons from suspicion
11 as it is to identify those who are guilty. Please keep in mind that hair styles,
12 beards, and mustaches are easily changed. Also, photographs do not always
13 depict the true complexion of a person – it may be lighter or darker than shown
14 in the photo. You should pay no attention to any marking or numbers that may
15 appear on the photos. Also, pay no attention to whether the photos are in color
16 or black and white, or any other difference in the type or style of the
17 photographs. You should study only the person shown in each photograph.
18 Please do not talk to anyone other than Police Officers while viewing the photos.
19 You must make up your own mind and not be influenced by other witnesses, if
20 any. When you have completed viewing all the photos, please tell me whether
21 or not you can make any identification. If you can, tell me in your own words
22 how sure you are of your identification. Please do not indicate in any way to
23 other witnesses that you have or have not made an identification. Thank you.

24 (Defendant's exhibit 1). Thereafter, Devonian made an identification. The line-up consisted
25 of six (6) photographs of African American males, all with longer or bushy hair, all of the
26 approximate same age, and all with some amount of facial hair. The only difference in the
27 line-ups is that some of the pictures had a grey background while others had a blue
28

1 background.³ Nothing about the lineup itself is suggestive at all. Defendant's entire argument
2 is centered around the certainty of the witness, but that fact is irrelevant if the procedure itself
3 is not suggestive. Defendant concedes, yet ignores, the law in his motion. The reliability
4 prong is only reached if the procedure was unnecessarily suggestive. There has been
5 established no fact which could even be construed as being unnecessarily suggestive. Thus,
6 there is no basis for suppression.⁴

7 **I. THE DETECTIVES ARE ALLOWED TO TESTIFY TO THE**
8 **IDENTIFICATION OF DEFENDANT ON THE VIDEO TAPES**

9 Defendant Burns asserts that lay witness identification should not be allowed by
10 detectives involved in the case. Defendant Burns appears to disregard the law in Nevada as it
11 relates to lay witness video identification:

12
13 There is a plethora of federal jurisprudence holding that lay witnesses' opinion
14 testimony is admissible where it identifies the defendant as the perpetrator of a
15 crime from a surveillance video. United States v. Saniti, 604 F.2d 603, 604-05
16 (9th Cir.1979). Generally, a lay witness may testify regarding the identity of a
17 person depicted in a surveillance photograph " 'if there is some basis for
18 concluding that the witness is more likely to correctly identify the defendant
19 from the photograph than is the jury.' " United States v. Towns, 913 F.2d 434,
20 445 (7th Cir.1990) (*quoting* United States v. Farnsworth, 729 F.2d 1158, 1160
21 (8th Cir.1984)). In United States v. Barrett, 703 F.2d 1076, 1086 (9th Cir.1983),
22 the Ninth Circuit concluded that the opinion testimony of a lay witness would
23 be particularly appropriate where the witness was familiar with the defendant at
24 the time of the crime and the defendant's appearance had changed by the time of
25 trial.
26

27 ³ Defendant asserts that all the individuals in the blue background are smiling, however, only one person has a full grin, one is perhaps
28 slightly smiling while everyone else has the same expression as Defendant.

⁴ Defendant also moves the Court to suppress an in court identification. However, an in court identification, if even possible, can only
be suppressed where there has found to be a prior constitutionally defective line-up procedure. See French v. State, 95 Nev. 586, 600
P.2d 218 (1979)(*citing* Thompson v. State, 85 Nev. 134, 451 P.2d 704 (1969)).

1 Rossana v. State, 113 Nev. 375, 380-1, 934 P.2d 1045, 1048 (1997). Defendant Burns
2 committed his crime on August 7, 2013, when he was almost 19 years of age. Slightly
3 over a month later, detectives from Las Vegas as well as from San Bernardino, California
4 came into contact with Defendant. At that time, he had bushy, curly hair and was much
5 younger than he is four years later with long hair which he tends to wear in a lengthy
6 ponytail. Certainly, their viewing of Defendant Burns close in time to when the video
7 surveillance captured Defendant Burns, is more reliable than a jury doing a comparison
8 from photographs or from how he looks now in the courtroom.⁵ Additionally, several
9 other people who knew Defendant Burns in August and September of 2010 may be asked
10 to identify Defendant Burns in the surveillance footage. There is simply no basis to
11 exclude such testimony.⁶

12 **II. THE STATE DOES NOT INTEND TO REFERENCE ASSEMBY BILL 444**

13 Defendant Burns moves this Court to exclude reference to AB 444 as more prejudicial than
14 probative under NRS 48.035. The Court should exclude any reference to AB 444 as irrelevant
15 under NRS 48.015. The State does not intend to present evidence concerning AB 444.
16 However, the State obviously reserves the right to present such evidence should Defendant
17 make anything about AB 444 relevant.

18 //

19 //

20 //

21 //

22 //

23 //

24 //

25 _____
26 ⁵ In his taped statement to Detectives Bunting and Wildemann, Defendant Burns appears to acknowledge himself in the video surveillance, but certainly, that may be an issue disputed at trial.

27 ⁶ Defendant also makes citation to a pre-Rossana case, U.S. v. LaPeirre, 998 F.2d 1460, 1465 (9th Cir. 1993), for the proposition that police officer testimony of this type is discouraged. Defendant misrepresents LaPeirre's holding. LaPeirre required personal contact **OR** a change in appearance. Moreover, the concern in LaPeirre is that the detective had never met Defendant and was merely comparing photographs which were admitted at trial. Obviously, a lay person cannot make the same comparison as the jury as NRS 50.265 requires the testimony to be helpful to the jury. Nothing in LaPeirre should preclude the Court from following the law established in Nevada by Rossana.

1 CONCLUSION

2 Based on the foregoing, Defendant's Motion In Limine 1 & 2 should be denied, and
3 Motion in Limine 3 should be granted to the extent Defendant does not make AB 444 relevant.

4 DATED this 13th day of October, 2014.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY


10 MARC DIGIACOMO
11 Chief Deputy District Attorney
12 Nevada Bar #006955

13 CERTIFICATE OF FACSIMILE TRANSMISSION AND/OR ELECTRONIC MAIL

14 I hereby certify that service of State's Opposition to Defendant's Motion In Limine
15 #1 - 3, was made this 13th day of October, 2014, by facsimile transmission and/or e-mail to:

16 ROBERT LANGFORD, ESQ.
17 E-Mail: robert@nvlitigation.com
18 FAX #702-471-6540

19 MAGGIE MCCLETCHIE, ESQ.
20 E-Mail: maggie@nvlitigation.com
21 FAX #702-474-6540


22 (COUNSEL FOR WILLIE MASON)

23 ANTHONY SGRO, ESQ.
24 E-Mail: tsgro@pslrfirm.com
25 FAX #702-386-2737

26 CHRISTOPHER ORAM, ESQ.
27 E-Mail: corambusiness@aol.com
28 FAX #702-974-0623

(COUNSEL FOR DAVID BURNS)

BY:


J. Robertson
Secretary of the District Attorney's Office

10F15563/MD/jr/MVU


CLERK OF THE COURT

1 RTRAN

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5 THE STATE OF NEVADA,

6 Plaintiff,

7 vs.

8 WILLIE DARNELL MASON and
9 DAVID BURNS,

10 Defendants.

CASE NO. C267882-1

C267882-2

DEPT. NO. XX

11 BEFORE THE HONORABLE JEROME T. TAO, DISTRICT COURT JUDGE

12
13 MONDAY, OCTOBER 20, 2014

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

16
17
18 APPEARANCES:

19 For the State:

MARC DiGIACOMO
PAMELA WECKERLY
Chief Deputies District Attorney

21 For Defendant Mason:

ROBERT L. LANGFORD, ESQ.

22 For Defendant Burns:

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

24
25 RECORDED BY: SARA RICHARDSON, COURT RECORDER

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

2 * * * * *

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

7 MR. DiGIACOMO: Not from the State.

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

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

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

16 THE COURT: Right.

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

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

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

1 THE COURT: Okay.

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

10 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

16 THE COURT: Okay.

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

20 THE COURT: Oh, yeah.

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

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

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

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

16 MR. DiGIACOMO: Sure.

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

24 MR. DiGIACOMO: Sure.

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

1 a joinder to Mr. Sgro's motions.

2 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

5 THE CLERK: Is that granted?

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

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

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

14 THE COURT: Okay.

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

18 THE COURT: Right.

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

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

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

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

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

7 THE COURT: Okay.

8 MS. WECKERLY: That's the benefit.

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

13 MS. WECKERLY: That's fine.

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

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

19 THE COURT: Yeah.

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

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

23 MS. WECKERLY: Sure.

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

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

4 MS. WECKERLY: Thanks.

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

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

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

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

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

14 MR. SGRO: We don't.

15 THE COURT: Okay.

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

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

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

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

20 MS. WECKERLY: Withdrawn.

21 MR. SGRO: Yes. Yes, sir.

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

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

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

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

4 THE COURT: Sure.

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

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

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

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

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

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

18 MR. DiGIACOMO: I don't --

19 MR. SGRO: -- understood.

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

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

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

5 MR. DiGIACOMO: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 THE COURT: All right.

7 THE CLERK: It's deferred to trial?

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

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

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

14 MR. SGRO: No, I --

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

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

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

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

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

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

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

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

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

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

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

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

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

17 THE COURT: Right.

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

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

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

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

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

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

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

23 THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

21 THE COURT: Right.

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

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

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

5 MR. SGRO: There's --

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

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

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

12 MR. SGRO: Yes, sir.

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

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

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

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

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

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

1 resulted in. So --

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

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

11 THE COURT: Right.

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

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

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

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

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

9 THE COURT: Right.

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

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

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

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

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

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

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

18 THE COURT: Right.

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

21 THE COURT: Right, sure.

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

1 THE COURT: Right.

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

4 THE COURT: Right.

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

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

17 THE COURT: Right. I understand.

18 MR. SGRO: Your Honor --

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

22 MR. DiGIACOMO: Sure.

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

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

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

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

10 THE COURT: Right, sure.

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

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

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

15 THE COURT: But the only on that --

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

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

21 MR. SGRO: Yes, sir.

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

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

5 THE COURT: Right.

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

9 THE COURT: Right.

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

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

22 THE COURT: Sure.

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

1 worked in the Public Defender's office --

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

3 THE COURT: Yeah, they don't.

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

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

6 MR. SGRO: Well --

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

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

11 THE COURT: But the bottom line is --

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. DiGIACOMO: Judge, I oppose that.

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. DiGIACOMO: Correct.

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

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

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

1 MR. DiGIACOMO: Yes.

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

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

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

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

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

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

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

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

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

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

15 THE COURT: Okay.

16 MR. DiGIACOMO: Albert Davis.

17 MR. SGRO: Right.

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

22 MR. SGRO: Okay.

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

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

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

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

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

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

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

17 THE COURT: Okay.

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

22 MR. SGRO: Is it ours?

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

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

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

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

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

9 THE COURT: Right. Okay.

10 Anything else you guys want to address?

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

13 THE COURT: Right.

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

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

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

21 THE COURT: Right.

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

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

4 THE COURT: Okay.

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

9 MS. WECKERLY: We provided that.

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

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

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

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

20 MS. WECKERLY: In that --

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

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

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

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

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

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

15 THE COURT: Right, sure.

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

19 THE COURT: I'm assuming --

20 MR. SGRO: That's --

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

25 MR. SGRO: Absolutely, absolutely.

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

3 MR. LANGFORD: No, Your Honor.

4 THE COURT: All right.

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

7 THE COURT: Which one?

8 THE CLERK: I don't know.

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

11 MS. WECKERLY: It's moot.

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

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

15 THE COURT: Right.

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

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

22 All right, thanks, guys.

23 MR. SGRO: Thank you, Your Honor.

24 MR. LANGFORD: Thank you, Your Honor.

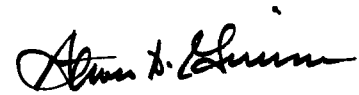
25 MR. DiGIACOMO: Thank you, Judge.

1 PROCEEDING CONCLUDED AT 11:04 A.M.

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

22 
23 SARA RICHARDSON
24 Court Recorder/Transcriber
25



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C267882-1
)	C267882-2
vs.)	DEPT NO. XX
)	
WILLIE DARNELL MASON, AKA)	
WILLIE DARNELL MASON, JR.,)	TRANSCRIPT OF
AKA G-DOGG,)	PROCEEDING
DAVID JAMES BURNS, AKA)	
D-SHOT,)	
)	
Defendants.)	

BEFORE THE HONORABLE CHARLES THOMPSON, SENIOR DISTRICT JUDGE

JURY TRIAL - DAY 1

TUESDAY, JANUARY 20, 2015

APPEARANCES:

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

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

KARR REPORTING, INC.

AA 0095

1 LAS VEGAS, NEVADA, TUESDAY, JANUARY 20, 2015, 1:14 P.M.

2 * * * * *

3 (Outside the presence of the prospective jury panel.)

4 MR. ORAM: Judge, I have a housekeeping matter. Are
5 we on the record yet?

6 THE COURT: I hope not.

7 Are we on the record? Yes, we are.

8 (Disruption in recording)

9 MR. ORAM: -- two sets of documents, one for 512
10 pages, another for 616 pages. They had made requests for me
11 for these documents. They are California Youth Authority
12 records that we would use in the event of a penalty phase to
13 show the past of Mr. Burns.

14 THE COURT: The record will so reflect.

15 All right. State of Nevada versus Willie Mason and
16 David Burns. The record will reflect the presence of both
17 defendants with their respective counsel. Are we ready for
18 trial?

19 MR. ORAM: Yes, Your Honor.

20 MR. SGRO: Yes, Your Honor.

21 MR. DiGIACOMO: Yes, Your Honor.

22 MR. LANGFORD: Yes, Your Honor.

23 THE COURT: All right. The bailiff will bring in
24 the jurors.

25 (Pause in the proceedings.)

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1 (In the presence of the prospective jury panel.)

2 THE COURT: Please be seated.

3 All right. State of Nevada versus Willie Mason and
4 David Burns. The record will reflect the presence of the
5 defendants, counsel, and the District Attorneys.

6 Good morning, ladies and gentlemen.

7 PROSPECTIVE JURY PANEL: Good morning.

8 THE COURT: My name is Charles Thompson. I am a
9 Senior District Court Judge. This is Department No. 20 of the
10 Eighth Judicial District. Until recently, Judge Tao was the
11 judge in this department, and you probably saw his name out
12 there. When you got your questionnaire, Judge Tao signed it.
13 Recently Judge Tao was appointed to the new Intermediate Court
14 of Appeals, and so he's no longer the judge in this
15 department.

16 Under Nevada law, the Nevada Supreme Court is
17 authorized to appoint certain retired District Court Judges as
18 Senior District Court Judges. I am a retired District Court
19 Judge and unfortunately I've been appointed a Senior District
20 Court Judge in this department until the Governor appoints a
21 replacement, which we don't expect to happen for many weeks,
22 probably a couple of months.

23 This case is a case that was routinely assigned to
24 -- assigned to Department 20, and so I'm going to be the judge
25 in the case. By way of introduction, my staff includes Linda

1 Skinner, who is the clerk next to me right here, and the --
2 the blonde-haired lady. And she's in charge of taking minutes
3 of everything that goes on in the court and swearing in the
4 witnesses, and she's also in charge of any exhibits when
5 they're marked and received in court.

6 Next to her is Susan Dolorfino, who is the recorder,
7 and she's recording everything we say, everything that I say,
8 everything you say, and all the lawyers. And periodically she
9 will be seeing that a transcript of everything that we say is
10 prepared for use by the lawyers if they want it.

11 You've already met my -- my marshal, Randy Hawkes.
12 He's over here to the right. There is a law clerk down here.
13 Her name is Holly Walker. You may get an opportunity to meet
14 the secretary that's assigned to this department. She's in
15 and out occasionally. Her name is Paula Walsh and she's not
16 in here right now.

17 As you are already aware, this -- you've been
18 summoned to serve as jurors in this case. It's a criminal
19 case. The defendant -- the defendants in the case, there's
20 two of them, they're Willie Mason and David Burns.

21 Mr. Mason, would you stand so that the jurors can
22 see you, please. Thank you. You can be seated.

23 And Mr. Burns, David Burns, is -- is seated right
24 here with the blue shirt on. Mr. Burns, you can be seated.

25 The defendants are charged with multiple offenses,

1 including murder, burglary, and robbery. The exact offenses
2 will be described to you in more detail by the Deputy District
3 Attorney when -- in a few minutes. And I will describe them
4 in more detail in my written jury instructions that I gave to
5 the -- to the jurors at the conclusion of the evidence.

6 The District Attorneys in this case are Marc
7 DiGiacomo, that's Mr. DiGiacomo right here, and Pam Weckerly.
8 And that's -- Pam Weckerly is -- they're the two Deputy
9 District Attorneys that have been assigned to prosecute this
10 case.

11 Mr. Burns is represented by Tony Sgro. He's the
12 gentleman without the hair right there and Mr. Oram -- I knew
13 him when he had hair, by the way -- and Mr. Oram who is next
14 to him, and Chris Oram, those are the two attorneys
15 representing -- representing Mr. Burns.

16 Mr. Robert Langford represents Mr. Mason. That's
17 Mr. Langford over there.

18 Occasionally Linda Weaver will be assisting Mr.
19 Sgro, and that's Ms. Weaver there. And occasionally Margaret
20 McLetchie will assist Mr. Langford. And I don't think Ms.
21 McLetchie is in here right now.

22 The prosecutor is going to more fully explain to you
23 what this case is about now and who the witnesses are that are
24 going to be called by the prosecution in the case. I want you
25 to make a mental note of the names of all of these witnesses

1 because if you know somebody, in a few minutes I'll be asking
2 you if you know the witnesses or the attorneys or anybody
3 involved in the case.

4 Mr. Langford.

5 MR. LANGFORD: Your Honor, I do know one of the
6 jurors and so I don't know if the Court wants to reload that
7 particular for the purposes of time, or if you want to wait
8 until a different time.

9 THE COURT: You know one of these jurors?

10 MR. LANGFORD: One of these jurors, yeah.

11 THE COURT: Which juror is it that you know?

12 MR. LANGFORD: Sonny -- Sonny, I forgot your last
13 name. I apologize. Newton.

14 THE COURT: You know him really well, then?

15 MR. LANGFORD: Yeah, we -- I'm -- I'm -- I'm a scuba
16 instructor occasionally at Sport Chalet and --

17 THE COURT: We'll talk to him about it in a few
18 minutes.

19 MR. LANGFORD: Okay.

20 THE COURT: All right. Mr. DiGiacomo, if you would
21 tell the prospective jurors the nature of the case and who the
22 witnesses are that you may be calling in the case.

23 MR. DiGIACOMO: Thank you, Your Honor.

24 Good afternoon, ladies and gentlemen. As you heard,
25 my name is Marc DiGiacomo. I'm a Deputy District Attorney

1 here in Clark County. And that's Pam Weckerly. She's also a
2 DA here in Clark County. We've been assigned the prosecution
3 of two individuals, Willie Mason and David Burns.

4 The two of them are accused, they're actually
5 accused with two other people, one of which is a Monica
6 Martinez, another one is a Stephanie Cousins. The four of
7 them are accused of driving to an address at 5662 Meikle Lane,
8 which is generally in the northeast area of the valley to an
9 apartment there.

10 Mr. Mason and Mr. Burns are accused of entering that
11 apartment with the intent to rob the occupants thereof, and
12 they're accused of shooting the mother that lives there,
13 Derecia Newman, and Derecia Newman, and then chasing down her
14 12 year old daughter, Devonia Newman, and shooting her.
15 Devonia lives.

16 So they're accused with a number of crimes,
17 including conspiracy to commit robbery, burglary while in
18 possession of a firearm, robbery with use of a deadly weapon,
19 murder with use of a deadly weapon, attempt murder with use of
20 a deadly weapon, and battery with a deadly weapon resulting in
21 substantial bodily harm.

22 Now, in order to establish the crimes that are
23 alleged here, we're going to call some, not all, of these
24 witnesses. But these names may very well come up during the
25 course of the trial. And so just to make sure, I'm going to

1 read off more names than we'll ever intend to call, but if you
2 know any of them, the Court is going to ask you about that and
3 that's going to be one of the areas that we inquire about.

4 The State may call an Officer J. Bahtu (phonetic),
5 an Officer Curtis Atwood, Kathryn Ayoama who is a fingerprint
6 expert at Metro, Benjamin Baines who works for Greyhound, FBI
7 Agent Kevin Boles, T Brownlee who is a crime scene analyst,
8 Detective Chris Bunting who is a homicide detective, Crime
9 Scene Analyst Daniel, this is a tough name, Carvounaiaris,
10 Maurice Clinkscale, Ulonda Cooper, and then there's going to
11 be a number of custodian of records.

12 You may not know the actual custodian, but if you
13 work for or have a lot of contact with any of these locations,
14 that may become something that you want to address. Binion's
15 Hotel & Casino, there's the Clark County Detention Center, but
16 the Fremont Street Experience, Greyhound Bus Lines, the Opera
17 House, T-Mobile, Metro PCS, Nextel, Texas Station, the Western
18 Hotel & Casino.

19 There's Crime Scene Analyst Robbie Dahn, there's a
20 Dr. Filmore and a Dr. Goshi, both which work at the University
21 Medical Center. There's Crime Scene Analyst Shawn Fletcher
22 and Officer Hector Gonzalez and Officer Wessley Gonzalez. A
23 homicide detective who is now retired by the name of Kenneth
24 Hardy, Jonathan Houghton, Detective Barry Jensen, Matt Johns
25 who is an investigator with the DA's office. Samantha Knight,

1 Teresa Kyger who is a homicide detective, James Krylo who is a
2 firearms and tool mark examiner, Security officer Lambright
3 from UMC, and Anthony Lassiter.

4 Sergeant Maines, Cornelius Mayo, Tyler Mitchell,
5 Monica Monroe, as I already said, Monica Martinez, Devonia
6 Newman, Erica Newman, Wanda Newman, Crime Scene Analyst Sheree
7 Norman, Dr. Alane Olson who is a medical examiner here in
8 Clark County, Officer A Peterson, Tamika Christine Pierce,
9 Donovan Rowland, Charisse Salmon, Officer Scanlon, Officer
10 Scott, Jan Seaman-Kelly who is a footwear analyst, Crime Scene
11 Analyst Speas, Crime Scene Analyst Szukiewicz, Crime Scene
12 Analyst Taylor, Jennifer Thomas who is a DNA analyst expert,
13 Officer Thomas, Kristin Thomas, Crime Scene Analyst
14 Vaandering, John Vasek who is a San Bernardino County Police
15 Department officer, Detective Marty Wildemann, Marie Willis,
16 and I think that completes my list. Thank you.

17 THE COURT: Thank you, Mr. DiGiacomo.

18 Mr. Sgro, do you wish to advise the jurors of any
19 prospective witnesses that you're going to call?

20 MR. SGRO: Yes, sir. May I approach?

21 THE COURT: Certainly.

22 MR. SGRO: Good afternoon, ladies and gentlemen. As
23 Judge Thompson indicated, my name is Tony Sgro, and along with
24 Mr. Chris Oram, we'll be representing David Burns throughout
25 the course of this case. You're going to learn here in a few

1 minutes the defendant has no burden of proof and we don't have
2 to call any witnesses.

3 So we do this in an abundance of caution just in
4 case there are names we think are going to come up in the
5 trial or people that may come that aren't necessarily included
6 on the State's list. So Mr. Burns has entered a not guilty
7 plea. And this trial, then, is a natural consequence of that
8 not guilty plea once we receive the charging document.

9 So the -- the folks that we want you to see if you
10 know them, the first one is Samantha Burch-Leech (phonetic),
11 Malcolm Turner, Marvalin (phonetic) Eley, E-L-E-Y, Rochelle
12 Sparks, Shauntel Amaya, Vernon Burch, Craig Altmeyer
13 (phonetic) who works at CPS, Tina Luek (phonetic) who works at
14 L.A. County Department of Child and Family Services, Anthony
15 Lassiter, Dr. Mel Pohl, P-O-H-L, Lyndsay Elliot, Richard
16 Adler, who is also a doctor, Natalie Brown, Paul Connor, Larry
17 Smith who is retired Metro, Willis Ifill, Jerome Thomas,
18 Russell Shoemaker who is a Metro police officer.

19 And then like Mr. DiGiacomo indicated, we're going
20 to have likely some custodian of records, and the businesses
21 will be for Medic West Ambulance, University Medical Center,
22 Sunrise Hospital, the Department of Family Services, and Dixie
23 Regional Medical Center. Also Hava Simmons, Tiffany
24 Flowers-Holmes, and Thomas Dillard. Thank you very much.

25 THE COURT: Mr. Langford, do you wish to advise the

1 prospective jurors of any witnesses?

2 MR. LANGFORD: I do, Your Honor. And if I could
3 just stand here I'm generally pretty loud.

4 THE COURT: That's certainly fine.

5 MR. LANGFORD: Thank you, Your Honor. Mr. Mason
6 will be relying upon witnesses called by both the State and
7 Mr. Burns to meet -- to show that the State will not be able
8 to meet its burden of proving the case beyond a reasonable
9 doubt, and he has pled not guilty to the charges.

10 THE COURT: Thank you, Mr. Langford.

11 All right. Now, ladies and gentlemen, this Court
12 and the lawyers and everybody involved in the case are deeply
13 interested in having the case tried by a jury composed of 12
14 open-minded, unbiased individuals, citizens who have no bias
15 or prejudice against either side in the case. You've all
16 filled out jury questionnaires, and the attorneys each have
17 copies of those questionnaires. But in addition to the
18 written answers that you have given us to those questions, I'm
19 going to ask you each some questions, and then the attorneys
20 are given the opportunity to -- to follow up with some
21 additional questions.

22 I don't have any particular desire to pry into your
23 personal lives and nor do the lawyers. But in order for us to
24 learn whether or not you can serve as fair jurors in the case,
25 we have to ask you some personal questions. The -- the

1 questioning of the jury at the beginning of the case is called
2 jury voir dire. The jurors are first placed under oath before
3 any of the questions are asked. I'll now ask that you all
4 stand, raise your right hand, and the clerk will administer
5 that oath to you.

6 (Prospective jury panel sworn)

7 THE COURT: Please be seated.

8 It's important that you understand the significance
9 of full, complete, and honest answers to all the questions
10 we're going to ask you. I caution you not to try to hide or
11 withhold something because that fact might tend to contaminate
12 your verdict and subject you to further inquiry even after
13 you're discharged as jurors. So the bottom line is be honest
14 with us and tell us in response to the questions that we ask
15 you. If you are excused, you have to report back to the third
16 floor where the jury commissioner is and report to the jury
17 commissioner.

18 I'm going to start with each juror in turn, starting
19 with Juror No. 91, Mr. -- is it Marwah?

20 PROSPECTIVE JUROR NO. 091: Yes.

21 THE COURT: Please be seated. Do you know any of
22 the lawyers or the witnesses that may be called to testify in
23 the case?

24 PROSPECTIVE JUROR NO. 091: Not -- not personally.
25 Like I don't --

1 THE COURT: Okay. And I understand it may turn out
2 during the middle of trial that one of the witnesses lives on
3 your block or something, and those things happen. We
4 understand that. You will be later told that you have to tell
5 us that. They won't necessarily disqualify you from being a
6 witness, but you can't talk to them about the case, obviously,
7 and so on. I understand that you are from India?

8 PROSPECTIVE JUROR NO. 091: Yeah.

9 THE COURT: And you --

10 PROSPECTIVE JUROR NO. 091: I was from India.

11 THE COURT: I'm sorry?

12 PROSPECTIVE JUROR NO. 091: I was.

13 THE COURT: You were from India?

14 PROSPECTIVE JUROR NO. 091: I were from India.

15 THE COURT: Okay. When did you come to the United
16 States?

17 PROSPECTIVE JUROR NO. 091: 2000.

18 THE COURT: And when did you come to Nevada?

19 PROSPECTIVE JUROR NO. 091: 2003.

20 THE COURT: Where were you before you came here?

21 PROSPECTIVE JUROR NO. 091: I was in California.

22 THE COURT: What brings you to Nevada?

23 PROSPECTIVE JUROR NO. 091: Job.

24 THE COURT: You're the manager of a 7-Eleven store?

25 PROSPECTIVE JUROR NO. 091: Yes, sir.

1 THE COURT: Is that -- what part of town is that
2 7-Eleven in?

3 PROSPECTIVE JUROR NO. 091: Downtown close to --

4 THE COURT: Downtown, right down here?

5 PROSPECTIVE JUROR NO. 091: Well, close to
6 Stratosphere on Commerce and Wyoming Avenue.

7 THE COURT: Okay. I assume it's a 24-hour --

8 PROSPECTIVE JUROR NO. 091: It is.

9 THE COURT: -- store that's open --

10 PROSPECTIVE JUROR NO. 091: Yes.

11 THE COURT: -- every day --

12 PROSPECTIVE JUROR NO. 091: Yeah.

13 THE COURT: -- all day and all night and everything?

14 PROSPECTIVE JUROR NO. 091: Yep.

15 THE COURT: So you probably have, what, three shifts
16 of workers there?

17 PROSPECTIVE JUROR NO. 091: Yes, sir.

18 THE COURT: How many workers on each shift?

19 PROSPECTIVE JUROR NO. 091: Usually one or two
20 sometimes.

21 THE COURT: Usually a couple there?

22 PROSPECTIVE JUROR NO. 091: Yeah.

23 THE COURT: And you kind of manage all of them?

24 PROSPECTIVE JUROR NO. 091: Yeah.

25 THE COURT: All right. I understand that you --

1 you've got to do things besides being a juror during the day.
2 And we're going to have you come in in the morning. It won't
3 be real early, but you may want to go to your store before and
4 after. And I understand all these things happen.

5 PROSPECTIVE JUROR NO. 091: Yeah.

6 THE COURT: Just try to arrange to be here when you
7 have to be --

8 PROSPECTIVE JUROR NO. 091: Yes.

9 THE COURT: -- and so on. You indicated that your
10 wife is a student?

11 PROSPECTIVE JUROR NO. 091: She is a doctor
12 originally from India and she's studying to be a doctor in the
13 U.S.

14 THE COURT: A medical doctor?

15 PROSPECTIVE JUROR NO. 091: Yeah.

16 THE COURT: And where is she going to school?

17 PROSPECTIVE JUROR NO. 091: She's not going to any
18 school right now, but she's doing the preparation for the
19 exams at house.

20 THE COURT: Okay.

21 PROSPECTIVE JUROR NO. 091: Yeah.

22 THE COURT: All right. And you -- you don't have
23 any children?

24 PROSPECTIVE JUROR NO. 091: I do have a two year old
25 daughter.

1 THE COURT: Oh, you have a two year old daughter?

2 PROSPECTIVE JUROR NO. 091: Yeah.

3 THE COURT: Oh, okay. I didn't read that. You
4 indicated that your store has been the victim of crimes on
5 occasion.

6 PROSPECTIVE JUROR NO. 091: Yeah.

7 THE COURT: I assume people have taken things out of
8 the store?

9 PROSPECTIVE JUROR NO. 091: And robbed at gunpoint.

10 THE COURT: Robbery, too?

11 PROSPECTIVE JUROR NO. 091: Yeah.

12 THE COURT: Were you present during any of the
13 robberies?

14 PROSPECTIVE JUROR NO. 091: No, I was not.

15 THE COURT: Your -- your employees told you about
16 it?

17 PROSPECTIVE JUROR NO. 091: Well, we have a
18 procedure to call right away as soon as they press the panic
19 button, or call 911 if they're robbed. And then I have to
20 report it to the 7-Eleven authorities right away. And then I
21 have to come down to the store if it's in the middle of night
22 or whatever time it is to talk to the -- the Metro officers
23 who have -- like there is usually one officer who responds
24 first, it is the officer who is in charge. And then you have
25 to burn the video, show the video, investigators come in,

1 fingerprint experts come in and the whole nine years.

2 THE COURT: Okay.

3 PROSPECTIVE JUROR NO. 091: Yeah.

4 THE COURT: How many -- how many robberies do you
5 think?

6 PROSPECTIVE JUROR NO. 091: 2014 in -- one in
7 November, one in December.

8 THE COURT: Two in 2014?

9 PROSPECTIVE JUROR NO. 091: Yeah.

10 THE COURT: How long have you been the manager of
11 the store?

12 PROSPECTIVE JUROR NO. 091: This location since
13 2007.

14 THE COURT: Okay. And -- and you only had robberies
15 in 2014?

16 PROSPECTIVE JUROR NO. 091: No, I had before also.

17 THE COURT: You had before also?

18 PROSPECTIVE JUROR NO. 091: Yeah. Yeah.

19 THE COURT: Any more armed robberies?

20 PROSPECTIVE JUROR NO. 091: Most of them are.

21 THE COURT: Most of them are?

22 PROSPECTIVE JUROR NO. 091: Yeah.

23 THE COURT: Has anybody even been hurt in any of the
24 robberies?

25 PROSPECTIVE JUROR NO. 091: Luckily not in my store,

1 but in 7-Elevens usually -- I mean, there have been cases
2 where they have been --

3 THE COURT: Sure, I know that.

4 PROSPECTIVE JUROR NO. 091: Yeah.

5 THE COURT: Is this -- this is the only store that
6 you manage, though; right?

7 PROSPECTIVE JUROR NO. 091: Yeah. Yeah.

8 THE COURT: Have you had to go to court and testify
9 on any cases?

10 PROSPECTIVE JUROR NO. 091: Not yet.

11 THE COURT: Do you have any pending, or do you know?

12 PROSPECTIVE JUROR NO. 091: There is one pending, yeah.

13 THE COURT: But you --

14 PROSPECTIVE JUROR NO. 091: One is pending and --

15 THE COURT: -- were never personally a witness to
16 any of the robberies?

17 PROSPECTIVE JUROR NO. 091: No.

18 THE COURT: They were -- your employees were,
19 though?

20 PROSPECTIVE JUROR NO. 091: Employees were because
21 they happened in the late night shift.

22 THE COURT: Are you satisfied with the assistance
23 and work that the police department has done in investigating
24 the cases to the extent that they could?

25 PROSPECTIVE JUROR NO. 091: In the investigations,

1 yes, because I would say I've been robbed a total of maybe
2 five or six times so far in all. But the last one is -- has
3 been caught and arrested and are serving sentence.

4 THE COURT: Okay.

5 PROSPECTIVE JUROR NO. 091: Yeah.

6 THE COURT: You're satisfied with the prosecution
7 and -- and to the extent they were able to do it; right?

8 PROSPECTIVE JUROR NO. 091: Yeah.

9 THE COURT: Okay. So you're not going to hold that
10 against the prosecutor in this case because --

11 PROSPECTIVE JUROR NO. 091: No.

12 THE COURT: And you're not going to hold it against
13 the defense attorneys; right?

14 PROSPECTIVE JUROR NO. 091: No.

15 THE COURT: Do the defense attorneys in this case
16 have anything to do with those cases?

17 PROSPECTIVE JUROR NO. 091: Nobody in this room has
18 anything to do with that.

19 THE COURT: All right. You and I are a team.

20 PROSPECTIVE JUROR NO. 091: Uh-huh.

21 THE COURT: I'm the judge of law in the case in it's
22 my job after the evidence is presented to tell the jurors what
23 law applies in the case.

24 PROSPECTIVE JUROR NO. 091: Uh-huh.

25 THE COURT: But you're the judge of the facts. It's

1 your job to decide what the facts are. I'm not going to tell
2 you how to decide the case.

3 PROSPECTIVE JUROR NO. 091: Uh-huh.

4 THE COURT: I'm going to tell you what the law is,
5 and then you take the facts that you find and apply them to
6 the law and reach a fair verdict. Do you think you can do
7 that?

8 PROSPECTIVE JUROR NO. 091: I can try.

9 THE COURT: Okay. Well, we can only ask that you do
10 the best you can.

11 PROSPECTIVE JUROR NO. 091: Yeah. Yeah.

12 THE COURT: Okay. In a case like this a defendant,
13 both defendants, are presumed to be innocent until the
14 contrary is proved. Have you heard that before?

15 PROSPECTIVE JUROR NO. 091: Yes, I have.

16 THE COURT: Do you agree with that?

17 PROSPECTIVE JUROR NO. 091: Absolutely.

18 THE COURT: That means that the defendants don't
19 have to prove their not guilty. It's up to the State to prove
20 that -- prove that they are. And the State has to prove that
21 by evidence beyond a reasonable doubt.

22 PROSPECTIVE JUROR NO. 091: Uh-huh.

23 THE COURT: And I'll define a reasonable doubt in my
24 written instructions.

25 PROSPECTIVE JUROR NO. 091: Yeah.

1 THE COURT: If they fail to meet that burden, the
2 jury is required to find them not guilty. Do you have any
3 quarrel with that?

4 PROSPECTIVE JUROR NO. 091: No.

5 THE COURT: If you were a defendant in a case like
6 this, if you were charged with a crime, would you want 12
7 citizens like yourself sitting in judgment of the case?

8 PROSPECTIVE JUROR NO. 091: Sure.

9 THE COURT: Okay. So you could be fair to every --
10 both sides in the case.

11 PROSPECTIVE JUROR NO. 091: Yes.

12 THE COURT: All right. Do you wish to examine, Mr.
13 DiGiacomo?

14 MR. DiGIACOMO: I do, Judge. Thank you.

15 Good afternoon, sir.

16 PROSPECTIVE JUROR NO. 091: Good afternoon.

17 MR. DiGIACOMO: Judge Thompson pretty much covered
18 the first half of everything I was going ask you, so --

19 THE COURT: That's why I do that. I try to keep --

20 MR. DiGIACOMO: I know.

21 THE COURT: -- the lawyers --

22 MR. DiGIACOMO: You're going to --

23 THE COURT: -- from talking --

24 MR. DiGIACOMO: -- speed us all up.

25 THE COURT: -- any more than necessary.

1 MR. DiGIACOMO: Unfortunately for you, the first
2 juror usually takes longer because by the time we get to Juror
3 No. 10 they're going to hear almost every question that's been
4 asked in this case.

5 PROSPECTIVE JUROR NO. 091: Uh-huh.

6 MR. DiGIACOMO: But the good news is you do get done
7 first.

8 PROSPECTIVE JUROR NO. 091: Uh-huh.

9 MR. DiGIACOMO: Okay. You filled out your
10 questionnaire and I'm just going to jump forward to your
11 questionnaire. And you said something actually to Judge
12 Thompson before I get there. You said your wife was a medical
13 doctor in India.

14 PROSPECTIVE JUROR NO. 091: Yes, she is.

15 MR. DiGIACOMO: Okay. Does she have a particular
16 area of practice that she was doing in India before she came
17 here to -- to get her license? PROSPECTIVE JUROR NO.

18 091: No, she doesn't have license in U.S. yet and she was a
19 general practitioner in India.

20 MR. DiGIACOMO: General practitioner.

21 PROSPECTIVE JUROR NO. 091: Yeah.

22 MR. DiGIACOMO: And how long did she do that for?

23 PROSPECTIVE JUROR NO. 091: She was with the
24 government job in India for almost 12 or 13 years.

25 MR. DiGIACOMO: And as a general practitioner

1 there --

2 PROSPECTIVE JUROR NO. 091: Yeah.

3 MR. DiGIACOMO: -- is it like the general
4 practitioners here, if someone gets sick they -- they might
5 have a long going issue, it's not trauma related treatment?

6 PROSPECTIVE JUROR NO. 091: No, not -- nothing
7 specific. Just like an outpatient department. You know,
8 systems are different over there.

9 MR. DiGIACOMO: Okay.

10 PROSPECTIVE JUROR NO. 091: Our healthcare system at
11 the first level is free. So if you're not feeling well you
12 can go to government hospital and get checked in by a general
13 practitioner doctor.

14 MR. DiGIACOMO: And that's what she did?

15 PROSPECTIVE JUROR NO. 091: And that's what she did.

16 MR. DiGIACOMO: Okay.

17 PROSPECTIVE JUROR NO. 091: Like most common cold
18 cases, small slip and falls, general stuff like that.

19 MR. DiGIACOMO: Okay.

20 PROSPECTIVE JUROR NO. 091: Yeah.

21 MR. DiGIACOMO: All right. Now, let me jump to your
22 questionnaire. There was a question about kind of what you
23 thought of defense attorneys and prosecutors and judges, and
24 then there was one about police and you indicated something to
25 the effect that they're not very proactive.

1 PROSPECTIVE JUROR NO. 091: Yeah, I see that all the
2 time.

3 MR. DiGIACOMO: What do you mean by that?

4 PROSPECTIVE JUROR NO. 091: I don't think we have
5 enough laws and enough police officers where we can stop the
6 crime before it happens. It's usually most -- mostly a
7 responsive thing. If something happens, then and only then it
8 becomes a priority case. If it is not reached to a particular
9 level, you know, that is Las Vegas being such a big state, a
10 big city right now, so many tourists coming in, there is
11 always something going on and we don't have enough police
12 officers, I feel.

13 So every time we call in, especially in 7-Eleven or
14 retail store related issues, our calls are always put on hold.
15 If there is nothing going on serious in the city, then they
16 will have an officer come by. But usually there is always
17 something more aggravated, more -- more problematic going on,
18 so the officers cannot be -- for common person, they don't
19 feel protected because it's -- it's a response.

20 MR. DiGIACOMO: Right.

21 PROSPECTIVE JUROR NO. 091: It's like an ambulance,
22 you know. You have an accident, you will have an ambulance to
23 come in. It's the same thing. There is no -- it's up to the
24 citizens or general community to -- I have to take precaution
25 for myself rather than I feel, you know, okay, there is a

1 police department close by and there are police cars around,
2 you know, taking care of the community. There is no such
3 thing as -- as that.

4 MR. DiGIACOMO: And I -- and I imagine as a manager
5 of a 7-Eleven it's not just armed robberies, but there's
6 probably all kinds of crimes that occur to --

7 PROSPECTIVE JUROR NO. 091: Oh, yes.

8 MR. DiGIACOMO: -- your employees.

9 PROSPECTIVE JUROR NO. 091: Oh, yes. Armed
10 robberies are the ones which get reported. There are a lot of
11 issue with small thefts and small crimes, which can obviously
12 be escalated to a bigger level, and we tend to absorb the loss
13 by not going -- and we always advice you can't go out, you
14 can't chase, but you -- you've got to accept the loss. And
15 you're in business, so it's okay to accept the loss, whereas
16 the corporate structure, it doesn't look like that, or the
17 franchisees, they don't look at it like that.

18 MR. DiGIACOMO: Right.

19 PROSPECTIVE JUROR NO. 091: But --

20 MR. DiGIACOMO: I've got to imaging that's
21 frustrating.

22 PROSPECTIVE JUROR NO. 091: It is.

23 MR. DiGIACOMO: Okay. You would agree with me that,
24 or I hope you'll agree with me, that at least at this point,
25 once you wind up in -- in a situation like a courtroom, that's

1 naturally going to be a reactive situation. We don't charge
2 people in order to prevent crime, we only charge people for
3 crimes that have been committed, assuming we can --

4 PROSPECTIVE JUROR NO. 091: True.

5 MR. DiGIACOMO: -- prove that fact.

6 PROSPECTIVE JUROR NO. 091: True.

7 MR. DiGIACOMO: Okay. I imagine that there's
8 probably a lot of people who want more police officers, would
9 like more proactive policing, but I'm assuming that nothing
10 about the idea that we don't have enough police officers would
11 affect your ability to be fair and impartial in this
12 particular case.

13 PROSPECTIVE JUROR NO. 091: No, but, I mean it
14 generally escalates the situation beyond to a point where it
15 becomes, how do you say, like level two, level three situation
16 instead of, you know, a level one situation.

17 MR. DiGIACOMO: Sure.

18 PROSPECTIVE JUROR NO. 091: And if like -- and if
19 there's something happening and if somebody calls in Metro
20 officers and they have officers available to dispatch, they
21 can probably, you know, take care of a situation before it
22 escalates to a bigger point rather than, you know, let us --
23 call us back if -- if -- sometimes the 911 operator will tell
24 you call 211, this is not an emergency, or the sergeant says
25 that there's not enough officers available or everybody --

1 there's some other crime, and we'll -- we have a broadcast
2 they call, and if somebody is available they come to you. I
3 mean, that does get frustrating at a point, but that's at the
4 store level. That's -- that's not --

5 MR. DiGIACOMO: Sure.

6 PROSPECTIVE JUROR NO. 091: Yeah.

7 MR. DiGIACOMO: And I guess that's my question is is
8 that I'm sure that there is going to be a lot of people who
9 have either frustrations or beliefs or everybody comes in the
10 door with their own kind of ideas.

11 PROSPECTIVE JUROR NO. 091: Yeah.

12 MR. DiGIACOMO: This system, the way that it works
13 is Ms. Weckerly and I -- Ms. Weckerly and I, we bear the
14 burden of proving --

15 PROSPECTIVE JUROR NO. 091: Yeah.

16 MR. DiGIACOMO: -- each of our charges beyond a
17 reasonable doubt.

18 PROSPECTIVE JUROR NO. 091: Uh-huh.

19 MR. DiGIACOMO: They actually occurred. The crimes
20 occurred.

21 PROSPECTIVE JUROR NO. 091: Uh-huh.

22 MR. DiGIACOMO: And that these two individuals are
23 the people that committed those crimes.

24 PROSPECTIVE JUROR NO. 091: Uh-huh.

25 MR. DiGIACOMO: We do that by presenting witnesses

1 and evidence to 12 people and those 12 people go in a back
2 room, and they decide what happened and did the State prove it
3 beyond a reasonable doubt.

4 PROSPECTIVE JUROR NO. 091: Uh-huh.

5 MR. DiGIACOMO: Can you set aside kind of your ideas
6 about proactive policing and those type of things and just
7 focus on the task at hand?

8 PROSPECTIVE JUROR NO. 091: I can do my best.

9 MR. DiGIACOMO: Okay. And ultimately, that's all
10 any of us are ever going to be able to ask of anybody.

11 PROSPECTIVE JUROR NO. 091: Yeah.

12 MR. DiGIACOMO: Do you have any concerns that you
13 wouldn't be able to do that?

14 PROSPECTIVE JUROR NO. 091: Not likely. You know,
15 every case, every individual, every situation, every scenario
16 is different. And --

17 MR. DiGIACOMO: I imagine as a store manager there
18 are times when you have to ferret out what happened, if you
19 have some loss of -- of some merchandise, was that theft, was
20 that an employee, are there two employees disputing what
21 happened?

22 PROSPECTIVE JUROR NO. 091: Uh-huh.

23 MR. DiGIACOMO: I imagine that happens quite a lot
24 for you.

25 PROSPECTIVE JUROR NO. 091: Yes, it does.

1 MR. DiGIACOMO: And I imagine in your -- in your
2 life, ultimately you're about to reach a conclusion as to what
3 you think would happen or what did happen in most cases.

4 PROSPECTIVE JUROR NO. 091: True.

5 MR. DiGIACOMO: Okay. And do you think you can
6 bring those skills here and make that determination?

7 PROSPECTIVE JUROR NO. 091: Sure.

8 MR. DiGIACOMO: Okay. Now, the Judge didn't touch
9 on this, but this is a capital case, meaning that at least for
10 Mr. Burns, should he be convicted, there are four possible
11 punishments that may be presented, and those range from, you
12 saw from that questionnaire, the death penalty all the way
13 down to a term of years. And there's kind of four categories,
14 life without, life with, term of years, and then obviously the
15 death penalty.

16 Certainly Ms. Weckerly and I are going to have to
17 get through the first phase in which we bear the burden of
18 proving these two defendants are guilty. But then if that
19 happens, this is our only chance to talk to you now is to find
20 out whether or not you can consider all four forms of those
21 punishments. You made some statements in your questionnaire
22 and let me ask you this. Had you thought about the death
23 penalty before you came down here and filled out the
24 questionnaire?

25 PROSPECTIVE JUROR NO. 091: Not thought about it,

1 but, I mean, I just had my general opinion and that's what I
2 wrote down over there.

3 MR. DiGIACOMO: Right. And that happens a lot. I
4 mean --

5 PROSPECTIVE JUROR NO. 091: Yeah.

6 MR. DiGIACOMO: -- some people have thought about
7 the death penalty quite a lot when they've come into the jury
8 room, and then there's some people who sit down and they look
9 at the piece of paper and they go, oh, this is a potential
10 capital punishment case, I don't know, how do I feel about it,
11 and they write down the way that they feel at that moment.
12 It's been several weeks now since you filled out the question.
13 Have you thought about it at all since you filled out the
14 questionnaire?

15 PROSPECTIVE JUROR NO. 091: No.

16 MR. DiGIACOMO: Okay. So let me ask you first about
17 -- your first answer is do you believe in the death penalty
18 and you say something that a lot of jurors will say is --
19 well, first you checked off no and your explanation was
20 something to the effect of, you know, death is too easy, they
21 should be forced to sit in custody for the rest of their life
22 and think about it.

23 PROSPECTIVE JUROR NO. 091: Uh-huh.

24 MR. DiGIACOMO: Is that kind of the way you feel
25 right now?

1 PROSPECTIVE JUROR NO. 091: Yeah.

2 MR. DiGIACOMO: Okay. Would you agree with me that
3 somebody who is in jail being forced to think about it, that
4 that person, by definition, has to have a conscience; right?

5 PROSPECTIVE JUROR NO. 091: Usually. Well, if they
6 don't have it, it comes to them.

7 MR. DiGIACOMO: Do you think --

8 PROSPECTIVE JUROR NO. 091: That's my belief, that
9 it will come to them.

10 MR. DiGIACOMO: And that's my question. Do you
11 think that everybody who winds up in prison for life without
12 for a crime that they've committed would actually think about
13 that crime as opposed to -- you know, the average everyday
14 person, absolutely. We're going to sit there and think, oh my
15 God, why did I do this? Do you think that applies to
16 everybody?

17 PROSPECTIVE JUROR NO. 091: I would assume it would
18 because I also know that all -- not all crimes are committed
19 in -- in sane mind. But they don't have access to all those
20 drugs and all those other things in the prison, so sanity
21 comes to them because they don't have access to the other
22 drugs which will make them insane or --

23 MR. DiGIACOMO: So at least in your mindset -- and,
24 look, I think the Judge probably already told you, if he
25 didn't, he normally does. There's no right or wrong answer

1 from any of the ten jurors. And so people just -- if they
2 give their honest answers, then from there we'll be able to
3 figure it out.

4 PROSPECTIVE JUROR NO. 091: Yeah.

5 MR. DiGIACOMO: In your kind of frame of mind
6 everybody has kind of the capacity to have a conscience.

7 PROSPECTIVE JUROR NO. 091: Yeah.

8 MR. DiGIACOMO: You also mentioned drugs, and let me
9 back up for just a second.

10 PROSPECTIVE JUROR NO. 091: Uh-huh.

11 MR. DiGIACOMO: I don't want to dwell a long time on
12 it, but do you think that somebody who may have committed a
13 crime on drugs still should be held responsible for their --
14 their actions?

15 PROSPECTIVE JUROR NO. 091: Definitely.

16 MR. DiGIACOMO: Okay. So let me jump back forward.

17 PROSPECTIVE JUROR NO. 091: Uh-huh.

18 MR. DiGIACOMO: The next question in the kind of
19 series of death penalty questions kind of dealt with kind of
20 what your general feelings are, and you checked off quite a
21 few of the -- of the various answers. And so one of them was
22 that you believe the death penalty is appropriate in some
23 murder cases, and you could return a verdict in a proper case
24 which imposes the death penalty. I understand that the way
25 the questions are worded sometimes, those aren't necessarily

1 inconsistent answers. I don't believe in the death penalty,
2 but in certain cases I might be willing to impose it.

3 PROSPECTIVE JUROR NO. 091: Uh-huh.

4 MR. DiGIACOMO: Let me ask you, is that what you
5 were thinking when you checked that off?

6 PROSPECTIVE JUROR NO. 091: Yeah.

7 MR. DiGIACOMO: Okay. I am not going to ask you in
8 what kind of situations that you would or would not consider
9 the death penalty. What I would ask you is in your own mind
10 can you conceive of some fact or facts which in your mind
11 would lead you to the conclusion -- you know, you may not
12 necessarily believe in it, but at least in this situation I'm
13 willing to vote for it.

14 PROSPECTIVE JUROR NO. 091: Uh-huh.

15 MR. DiGIACOMO: Is that a yes? I'm sorry.

16 PROSPECTIVE JUROR NO. 091: Yeah.

17 MR. DiGIACOMO: Okay. Everything gets typed up when
18 we're all done --

19 PROSPECTIVE JUROR NO. 091: Okay.

20 MR. DiGIACOMO: -- and the uh-huhs --

21 PROSPECTIVE JUROR NO. 091: Sure.

22 MR. DiGIACOMO: -- and huh-uhs are very difficult
23 for the --

24 PROSPECTIVE JUROR NO. 091: Okay.

25 MR. DiGIACOMO: -- court reporters.

1 PROSPECTIVE JUROR NO. 091: Yes.

2 MR. DiGIACOMO: So at least in some factual
3 scenario, whether or not you believe in it or don't believe in
4 it, at least in some factual scenario you can see yourself
5 voting for it?

6 PROSPECTIVE JUROR NO. 091: Yeah.

7 MR. DiGIACOMO: Okay. Was there -- and it's hard to
8 tell, was there some hesitation in that answer or --

9 PROSPECTIVE JUROR NO. 091: No, there was no
10 hesitation.

11 MR. DiGIACOMO: Okay.

12 PROSPECTIVE JUROR NO. 091: It depends on case to
13 case, individual to individual. In my opinion, if somebody
14 has -- has been a criminal, has been through the justice
15 system, has been in prison, comes out, does it again, and
16 comes out and does it again, and there is nothing -- no
17 contribution from that individual to the society and it keeps
18 the -- the kind of acts get gruesome and gruesome, then at --
19 at one point I would agree to that -- that certain individual
20 if it comes back into the justice system and death penalty is
21 one of the options, then that is at that time fair. But,
22 again, if it's just a first stage and if you ask a grown adult
23 what is two plus two and he says seven, you know, you look at
24 that guy funny compared to a kid and you coach the kid.
25 That's my opinion.

1 MR. DiGIACOMO: Okay. And so there is -- you know,
2 that's a very -- everybody is going to have kind of -- that
3 can consider all four forms of punishment --

4 PROSPECTIVE JUROR NO. 091: Yeah.

5 MR. DiGIACOMO: -- everyone is going to have some
6 factors. And for you the -- the opportunity for
7 rehabilitation and the failure to take hold of that might be
8 something that was important to you in making that
9 consideration, would that be fair?

10 PROSPECTIVE JUROR NO. 091: Yeah.

11 MR. DiGIACOMO: Okay. Now, the Judge is going to
12 instruct you that you have to be willing to consider all four
13 forms of punishment. So I'm assuming based upon your answers
14 back and forth that at least in your mind you're willing to
15 consider and keep an open mind --

16 PROSPECTIVE JUROR NO. 091: Yes.

17 MR. DiGIACOMO: -- to all four forms of punishment?

18 PROSPECTIVE JUROR NO. 091: Yes.

19 MR. DiGIACOMO: You would agree with me that, you
20 know, David Burns, and I don't want to leave out Mr. Mason
21 because Mr. Mason potentially is facing life without, life
22 with the possibility of parole, and a term of years.

23 PROSPECTIVE JUROR NO. 091: Uh-huh.

24 MR. DiGIACOMO: Those are severe punishments should
25 he be convicted of a crime. Would you agree with that?

1 PROSPECTIVE JUROR NO. 091: If it's proven that he
2 was the one who did it, then, yes.

3 MR. DiGIACOMO: You would agree with me that both of
4 them are living, breathing human beings that you're going to
5 sit in the courtroom with for the better part of -- well, so
6 far it says up to six weeks in this questionnaire. We hope it
7 won't take that long, but that could happen.

8 PROSPECTIVE JUROR NO. 091: Yes.

9 MR. DiGIACOMO: All right. Do you have any concerns
10 that sitting in the courtroom for that long a period of time
11 might cause you to -- to not fairly consider the consequences
12 of their actions as opposed to having some sort of -- I don't
13 know, do you think you'd have any hesitation because you've
14 been in a courtroom with these people? It's almost -- not
15 that you know them, but at least you have some sort of
16 connection?

17 PROSPECTIVE JUROR NO. 091: No.

18 MR. DiGIACOMO: At the end of the day, if you and
19 eleven of your fellow jurors all felt that it was appropriate
20 that Mr. Burns receive the ultimate punishment, any hesitation
21 in your mind that you'd be willing to vote for it?

22 PROSPECTIVE JUROR NO. 091: No hesitation.

23 MR. DiGIACOMO: And then ultimately you'd have no
24 hesitation, I'm assuming, coming back in this courtroom and
25 announcing it in their presence even though you've been

1 sitting here for six weeks?

2 PROSPECTIVE JUROR NO. 091: Yeah.

3 MR. DiGIACOMO: Thank you very much, sir.

4 PROSPECTIVE JUROR NO. 091: Thank you.

5 MR. DiGIACOMO: Judge, we pass for cause.

6 THE COURT: Mr. --

7 MR. ORAM: Good afternoon, sir.

8 PROSPECTIVE JUROR NO. 091: Good afternoon.

9 MR. ORAM: Okay. Now, you understand the prosecutor
10 just got done questioning you about the death penalty.

11 PROSPECTIVE JUROR NO. 091: Yeah.

12 MR. ORAM: You understand that?

13 PROSPECTIVE JUROR NO. 091: Yeah.

14 MR. ORAM: Okay. And you -- you don't even get to
15 those type of things if in the end of this case, okay --

16 PROSPECTIVE JUROR NO. 091: Uh-huh.

17 MR. ORAM: The way this works is there's going to be
18 witnesses on the witness stand.

19 PROSPECTIVE JUROR NO. 091: Yeah.

20 MR. ORAM: Okay. The prosecutor, these two
21 individuals, will question those witnesses first, okay, in
22 what's called the State's case in chief.

23 PROSPECTIVE JUROR NO. 091: Uh-huh.

24 MR. ORAM: Okay. And then we get a chance to
25 question the witness. We don't have to.

1 PROSPECTIVE JUROR NO. 091: Uh-huh.

2 MR. ORAM: Okay. And the reason we don't have to is
3 because, as you heard from Judge Thompson, we have no burden
4 of proof. Do you understand?

5 PROSPECTIVE JUROR NO. 091: Yeah.

6 MR. ORAM: Okay. Then the Judge would advise you of
7 the law, there would be closing arguments.

8 PROSPECTIVE JUROR NO. 091: Uh-huh.

9 MR. ORAM: The prosecutors would argue. We can
10 argue, but we don't have to because we have no burden of
11 proof, okay. At the end of this case, you heard this case and
12 you went back there with eleven other people and you thought I
13 have a doubt in my mind, a reasonable doubt that Mr. Burns is
14 not guilty, could you come back in here and tell these two
15 prosecutors not guilty?

16 PROSPECTIVE JUROR NO. 091: Definitely.

17 MR. ORAM: Because that's our system of justice,
18 isn't it, our constitution?

19 PROSPECTIVE JUROR NO. 091: I understand.

20 MR. ORAM: And you have no quarrel with that
21 whatsoever?

22 PROSPECTIVE JUROR NO. 091: No.

23 MR. ORAM: Now, when you were talking about these
24 incidents at the 7-Eleven, and I think you were you talking
25 about there's probably a lot of petty theft and things that we

1 don't hear about because they're not serious armed robberies,
2 is that fair?

3 PROSPECTIVE JUROR NO. 091: Yeah.

4 MR. ORAM: And you also talk about fingerprint --
5 crime scene analysts coming out and doing fingerprints?

6 PROSPECTIVE JUROR NO. 091: Yeah.

7 MR. ORAM: So I presume, based upon your job, that
8 you are somewhat aware of forensic science. Do you know what
9 I mean by that? DNA, fingerprints, examination --

10 PROSPECTIVE JUROR NO. 091: Yes.

11 MR. ORAM: -- of hairs.

12 PROSPECTIVE JUROR NO. 091: Yeah.

13 MR. ORAM: Okay. Do you ever watch those shows, CSI
14 shows?

15 PROSPECTIVE JUROR NO. 091: No, I don't.

16 MR. ORAM: Okay. Neither do I, but a lot of other
17 jurors are going to tell us that they do.

18 PROSPECTIVE JUROR NO. 091: Okay.

19 MR. ORAM: Okay.

20 PROSPECTIVE JUROR NO. 091: Uh-huh.

21 MR. ORAM: Are you open to science?

22 PROSPECTIVE JUROR NO. 091: Yes, I am.

23 MR. ORAM: You'd listen to what a scientist had to
24 say?

25 PROSPECTIVE JUROR NO. 091: Definitely.

1 MR. ORAM: And let's say a scientist says that
2 there's a fingerprint --

3 PROSPECTIVE JUROR NO. 091: Uh-huh.

4 MR. ORAM: -- in your 7-Eleven.

5 PROSPECTIVE JUROR NO. 091: Uh-huh.

6 MR. ORAM: That may prove something, but there's a
7 lot of other factors you have to look at; right?

8 PROSPECTIVE JUROR NO. 091: Yeah.

9 MR. ORAM: Maybe it's the robber, maybe it was just
10 somebody who came in to buy toothpaste.

11 PROSPECTIVE JUROR NO. 091: Uh-huh.

12 MR. ORAM: Is that fair?

13 PROSPECTIVE JUROR NO. 091: Yeah.

14 MR. ORAM: Okay. But you're -- you're willing to
15 listen to all of that science?

16 PROSPECTIVE JUROR NO. 091: Yeah.

17 MR. ORAM: And one of the reasons is in modern day
18 science we've actually been able to solve crimes that we at
19 one point thought people did, and then realized they hadn't
20 don't because of science. Have you heard of those things?

21 PROSPECTIVE JUROR NO. 091: I've heard, yeah.

22 MR. ORAM: DNA?

23 PROSPECTIVE JUROR NO. 091: Yeah.

24 MR. ORAM: Where they thought maybe somebody had
25 committed a crime and then, wow, realized they hadn't?

1 PROSPECTIVE JUROR NO. 091: Uh-huh.

2 MR. ORAM: Okay. So you would be open to science;
3 is that right?

4 PROSPECTIVE JUROR NO. 091: Yes.

5 MR. ORAM: Okay. I'm going to ask you another
6 question. I said when the prosecution calls a witness they
7 get to question that witness first.

8 PROSPECTIVE JUROR NO. 091: Uh-huh.

9 MR. ORAM: And then I have a right, or Mr. Sgro or
10 Mr. Langford, we have a right to ask questions if we want to.

11 PROSPECTIVE JUROR NO. 091: Definitely.

12 MR. ORAM: You wouldn't just close your mind to what
13 the witness said and say, okay, I've heard what the witness
14 said, I don't care what Oram and Sgro have to say?

15 PROSPECTIVE JUROR NO. 091: No.

16 MR. ORAM: You're an open-minded person?

17 PROSPECTIVE JUROR NO. 091: Uh-huh.

18 MR. ORAM: Is that a yes?

19 PROSPECTIVE JUROR NO. 091: Yes, it is.

20 MR. ORAM: Because, again --

21 PROSPECTIVE JUROR NO. 091: Okay.

22 MR. ORAM: Okay. Do you think you'd be a good
23 juror?

24 PROSPECTIVE JUROR NO. 091: I've never been one, but
25 I could do my best, like I said before.

1 MR. ORAM: And it sounds like you really -- you are
2 open to this process.

3 PROSPECTIVE JUROR NO. 091: Uh-huh.

4 MR. ORAM: Is that a yes?

5 PROSPECTIVE JUROR NO. 091: Yes, it is.

6 MR. ORAM: In your -- in your questionnaire, sir,
7 you mentioned that while traveling in Europe, do you remember
8 you said that you had felt people not being nice to you based
9 upon your -- your country of origin. Do you remember saying
10 that?

11 PROSPECTIVE JUROR NO. 091: Based upon the color
12 because they don't know my country of origin.

13 MR. ORAM: Okay.

14 PROSPECTIVE JUROR NO. 091: I don't know your
15 country of origin. I can assume.

16 MR. ORAM: Okay.

17 PROSPECTIVE JUROR NO. 091: But, yeah.

18 MR. ORAM: So it was -- it was based upon the color
19 of your skin you felt that people were not treating you well?

20 PROSPECTIVE JUROR NO. 091: Yes.

21 MR. ORAM: Okay. And that must have made you feel
22 bad.

23 PROSPECTIVE JUROR NO. 091: A little bit.

24 MR. ORAM: It probably made you feel bad for them,
25 too, to think that, boy, you must be an ignorant person to

1 think that way.

2 PROSPECTIVE JUROR NO. 091: Not everybody is the
3 same, you know. There are good and bad in every culture,
4 every society, every country, every religion.

5 MR. ORAM: Okay. It's not shock that Mr. Burns is
6 African American. You see that in the color of his skin.

7 PROSPECTIVE JUROR NO. 091: Yeah.

8 MR. ORAM: Okay. Is there anything about that that
9 would cause you to think that you couldn't be fair?

10 PROSPECTIVE JUROR NO. 091: No.

11 MR. ORAM: Okay. You notice Mr. Burns has long
12 hair. He came in here, you see that? That -- that's not
13 something you would decide, unless it was identification, but
14 that -- you're not going to hold that against Mr. Burns?

15 PROSPECTIVE JUROR NO. 091: No. No.

16 MR. ORAM: Okay. You're going to listen to the
17 facts. And if the State proves the case beyond a reasonable
18 doubt, you would find him guilty; right?

19 PROSPECTIVE JUROR NO. 091: Yeah.

20 MR. ORAM: And if they don't, if you have a
21 reasonable doubt --

22 PROSPECTIVE JUROR NO. 091: Then not --

23 MR. ORAM: -- you find him not guilty.

24 PROSPECTIVE JUROR NO. 091: Yes.

25 MR. ORAM: If you were back in the jury deliberation

1 room and somebody said, you know, he's black, started to say
2 things like that, would you tolerate that?

3 PROSPECTIVE JUROR NO. 091: Being black or being white is just
4 -- that means nothing. That's -- that's not the case.

5 MR. ORAM: That's not about whether somebody is
6 guilty or not, is it?

7 PROSPECTIVE JUROR NO. 091: No, it's not about
8 somebody being guilty. My president is black, I am black or
9 halfway there.

10 MR. ORAM: You know, sometimes they show Lady
11 Justice. You may have noticed her. She's blindfolded and you
12 see her with the sword and the scales of justice. Have you
13 ever noticed that?

14 PROSPECTIVE JUROR NO. 091: Yeah.

15 MR. ORAM: And the reason she's blindfolded is
16 because she's looking at a burden of proof.

17 PROSPECTIVE JUROR NO. 091: Yes.

18 MR. ORAM: Equal protection to all whether it's
19 woman, white man, Asian woman, it doesn't matter.

20 PROSPECTIVE JUROR NO. 091: It doesn't matter.

21 MR. ORAM: Judge on the content of their character.

22 PROSPECTIVE JUROR NO. 091: Absolutely, all the
23 actions.

24 MR. ORAM: And that would be, wouldn't you agree,
25 the content of their -- their character. If you have bad

1 actions --

2 PROSPECTIVE JUROR NO. 091: Yeah.

3 MR. ORAM: -- you may not be a good person; is that
4 right?

5 PROSPECTIVE JUROR NO. 091: Good people make bad
6 choices.

7 MR. ORAM: Okay. Another thing that you said
8 earlier, you said case by case, do you remember that?
9 Everything is case by case?

10 PROSPECTIVE JUROR NO. 091: Uh-huh.

11 MR. ORAM: Is that a yes?

12 PROSPECTIVE JUROR NO. 091: It is a yes.

13 MR. ORAM: Do you have a two year old?

14 PROSPECTIVE JUROR NO. 091: Yes.

15 MR. ORAM: Okay. Sometimes -- I've raised a couple,
16 okay. And so sometimes you catch children in not telling the
17 truth. I guess at two you don't really have that yet; right?

18 PROSPECTIVE JUROR NO. 091: Yeah.

19 MR. ORAM: Are you -- there are going to be
20 witnesses who come in here and testify.

21 PROSPECTIVE JUROR NO. 091: Uh-huh.

22 MR. ORAM: Okay. And you're going to have to
23 determine whether that person is being truthful with you.

24 PROSPECTIVE JUROR NO. 091: Yeah.

25 MR. ORAM: Do you think you'll be good at assessing

1 someone's credibility?

2 PROSPECTIVE JUROR NO. 091: Over the years I have --
3 I have learned not to judge just by the looks or just by the
4 color or just by the -- you know, just by the smile. You
5 know, if -- initially when you start working in 7-Eleven we
6 always start forming our opinion. And pretty soon you realize
7 that every time you think something, that usually is not
8 right. So you start holding back and giving more thought
9 about it. So just because of somebody's color or somebody's
10 -- you know, I think actions speaks louder than word, and just
11 because somebody is saying something, you know, that doesn't
12 mean always it is right, but --

13 MR. ORAM: If you're -- if you're trying to
14 determine whether someone is being truthful with you --

15 PROSPECTIVE JUROR NO. 091: Uh-huh.

16 MR. ORAM: -- you may want to hear what other people
17 who saw the same event would see.

18 PROSPECTIVE JUROR NO. 091: Obviously, yeah.

19 MR. ORAM: Right. So if I say I saw the green light
20 and ten people come in here and say there wasn't even a light
21 there, it was a stop sign --

22 PROSPECTIVE JUROR NO. 091: Uh-huh.

23 MR. ORAM: -- okay, this is something you probably
24 want to look at; right?

25 PROSPECTIVE JUROR NO. 091: Sure.

1 MR. ORAM: Okay. So you want to look at everything;
2 is that right?

3 PROSPECTIVE JUROR NO. 091: Yeah. Yeah.

4 MR. ORAM: Including if maybe I said that I saw a
5 red light, but then somebody said, well, here's a recording of
6 you, you previously said it was green. These are things you'd
7 want to look at; is that right?

8 PROSPECTIVE JUROR NO. 091: Yeah.

9 MR. ORAM: Okay. And you'd be careful -- would you
10 pay special attention to witnesses in this case?

11 PROSPECTIVE JUROR NO. 091: Yeah.

12 MR. ORAM: Okay. Because ultimately that's what
13 you're going to have to decide.

14 PROSPECTIVE JUROR NO. 091: Yeah.

15 MR. ORAM: Okay. Under our constitution --

16 PROSPECTIVE JUROR NO. 091: Uh-huh.

17 MR. ORAM: -- the framers of our country have made
18 it so that a person doesn't ever have to testify if they're
19 accused of crime, did you know that?

20 PROSPECTIVE JUROR NO. 091: I knew that.

21 MR. ORAM: Okay. We call it the Fifth Amendment.
22 You have the right to remain silent.

23 PROSPECTIVE JUROR NO. 091: Yeah.

24 MR. ORAM: Okay. And, you know, sometimes people do
25 that because lawyers tell them don't say a word. You

1 understand that?

2 PROSPECTIVE JUROR NO. 091: Uh-huh.

3 MR. ORAM: Do you -- is that a yes?

4 PROSPECTIVE JUROR NO. 091: Yeah, it is.

5 MR. ORAM: And I don't mean to do that to embarrass
6 you.

7 PROSPECTIVE JUROR NO. 091: I understand.

8 MR. ORAM: I'm just doing it --

9 PROSPECTIVE JUROR NO. 091: I --

10 MR. ORAM: Do you have any problem with that
11 concept? Do you think to yourself, no, they should absolutely
12 get up to testify, this is their trial?

13 PROSPECTIVE JUROR NO. 091: No, I'm -- I'm pretty
14 sure that when the constitution was made, they were made by a
15 lot more wiser and smarter people than I am.

16 MR. ORAM: And a lot wiser --

17 PROSPECTIVE JUROR NO. 091: And I believe and trust
18 in that.

19 MR. ORAM: A lot wiser than me, okay.

20 PROSPECTIVE JUROR NO. 091: Yeah.

21 MR. ORAM: But these are -- these are the rights
22 that we all have; right?

23 PROSPECTIVE JUROR NO. 091: That's true.

24 MR. ORAM: Because as Judge Thompson asked you, if
25 you were sitting over there --

1 PROSPECTIVE JUROR NO. 091: Yeah.

2 MR. ORAM: -- maybe Mr. Sgro and I would be like,
3 no, no, no, they haven't proved it. You understand that?
4 You're not saying anything.

5 PROSPECTIVE JUROR NO. 091: I understand. No.

6 MR. ORAM: Okay?

7 PROSPECTIVE JUROR NO. 091: Yeah.

8 MR. ORAM: And these are smart prosecutors, do you
9 understand? Do you understand that?

10 PROSPECTIVE JUROR NO. 091: Uh-huh.

11 MR. ORAM: Okay. Have you heard of the term guilt
12 by association? Do you know what that is?

13 PROSPECTIVE JUROR NO. 091: I think, I mean, it's
14 self-explanatory. It sounds like --

15 MR. ORAM: Well, there's -- there's ten of you
16 sitting here. And maybe since eight of you aren't very
17 good --

18 PROSPECTIVE JUROR NO. 091: Uh-huh.

19 MR. ORAM: -- they're not very nice, that we --
20 you're a nice one, but we blame you, too, because you're
21 hanging out with these people.

22 PROSPECTIVE JUROR NO. 091: Uh-huh.

23 MR. ORAM: You know what I mean, guilt by
24 association?

25 PROSPECTIVE JUROR NO. 091: Yeah.

1 MR. ORAM: Okay. Have you ever heard of that term?

2 PROSPECTIVE JUROR NO. 091: Not really.

3 MR. ORAM: Okay. That's fair. You mention here
4 about drugs --

5 PROSPECTIVE JUROR NO. 091: Uh-huh.

6 MR. ORAM: -- that you see it all the time at
7 7-Eleven.

8 PROSPECTIVE JUROR NO. 091: Yeah.

9 MR. ORAM: Okay. And drugs changes people's
10 perceptions. Would you agree with that?

11 PROSPECTIVE JUROR NO. 091: And behavior, yeah.

12 MR. ORAM: And behavior. So that somebody who does
13 many different drugs, prescription drugs, street drugs, people
14 under the influence of drugs may act very differently than
15 they normally would; right?

16 PROSPECTIVE JUROR NO. 091: Yeah.

17 MR. ORAM: But you would also have to take a look
18 at, let's say, a witness who was stone cold sober versus a
19 witness who said I was passing out on heroin. Obviously these
20 are things you'd want to look at.

21 PROSPECTIVE JUROR NO. 091: Sure.

22 MR. ORAM: And you have to see that in the 7-Eleven;
23 right?

24 PROSPECTIVE JUROR NO. 091: Yeah.

25 MR. ORAM: People that appear to be under the

1 influence of drugs?

2 PROSPECTIVE JUROR NO. 091: Uh-huh.

3 MR. ORAM: Okay. So these are factors. You're
4 going to hear about drugs in this case, okay.

5 PROSPECTIVE JUROR NO. 091: Okay.

6 MR. ORAM: So you think you're -- you're pretty
7 aware that there are drugs going on in our city?

8 PROSPECTIVE JUROR NO. 091: Yeah.

9 MR. ORAM: Drug use?

10 PROSPECTIVE JUROR NO. 091: Uh-huh.

11 MR. ORAM: Okay. Is there anything, sir, that I
12 haven't asked you that you thought would be important to tell
13 us?

14 PROSPECTIVE JUROR NO. 091: Generally or in what
15 context?

16 MR. ORAM: It sounds to me like there isn't anything
17 you need to tell us. Do you want to be a juror on this case?

18 PROSPECTIVE JUROR NO. 091: I don't mind if I'm
19 chosen to be on.

20 MR. ORAM: Can -- can you look at that man and
21 promise him a fair trial?

22 PROSPECTIVE JUROR NO. 091: Yeah.

23 MR. ORAM: If they don't prove it, will you come
24 back through that door and tell them not guilty? Will you do
25 that? PROSPECTIVE JUROR NO. 091: I can.

1 MR. ORAM: Thank you, sir. Pass for cause.

2 PROSPECTIVE JUROR NO. 091: Thank you.

3 THE COURT: Mr. Langford.

4 MR. LANGFORD: Thank you, Your Honor.

5 The good news is they've asked almost every question
6 there is to ask.

7 PROSPECTIVE JUROR NO. 091: Okay.

8 THE COURT: That's good news.

9 PROSPECTIVE JUROR NO. 091: Okay.

10 MR. LANGFORD: I want to touch on a few things,
11 though.

12 PROSPECTIVE JUROR NO. 091: Uh-huh.

13 MR. LANGFORD: We've already talked a bit about the
14 fact that the State is only seeking the death penalty in this
15 case should there be a conviction for first degree murder
16 against only one of the two people sitting over there.

17 PROSPECTIVE JUROR NO. 091: Okay.

18 MR. LANGFORD: And that's Mr. Burns. My client, Mr.
19 Mason, they are not going to be seeking, under any
20 circumstance, the death penalty against him. Do you
21 understand that?

22 PROSPECTIVE JUROR NO. 091: Yeah.

23 MR. LANGFORD: Do you have a problem judging the two
24 based on he's eligible and he's not, do you have a problem
25 with that?

1 PROSPECTIVE JUROR NO. 091: No, I don't.

2 MR. LANGFORD: Okay. Then it calls to mind some
3 other aspect about this case, and that is that two individuals
4 are on trial here, and they're seated together in the same
5 trial, but to a certain extent you have to hear the evidence
6 in two different ways. One is evidenced as to Mr. Burns, does
7 it prove him guilty beyond a reasonable doubt. Two, hearing
8 the evidence, does it prove Mr. Mason guilty beyond a
9 reasonable doubt. Do you understand that?

10 PROSPECTIVE JUROR NO. 091: Uh-huh.

11 MR. LANGFORD: Okay. In other words, it is possible
12 for one person to be -- that they've met their burden, but the
13 other person they haven't met their burden.

14 PROSPECTIVE JUROR NO. 091: Uh-huh.

15 MR. LANGFORD: Would you have a problem with that
16 was the case, finding guilt as to one, but coming in and
17 saying, sorry, State, you didn't meet your burden as to the
18 other individual. Do you have a problem with that?

19 PROSPECTIVE JUROR NO. 091: No.

20 MR. LANGFORD: Okay. And you understand those are
21 two --

22 PROSPECTIVE JUROR NO. 091: Yeah.

23 MR. LANGFORD: So in a way, it's two trials.

24 PROSPECTIVE JUROR NO. 091: Yeah.

25 MR. LANGFORD: Okay. And you'd look at it that way?

1 PROSPECTIVE JUROR NO. 091: But I'm sure they are
2 linked together. It's the same case; right?

3 MR. LANGFORD: Sure, the same facts and
4 circumstances.

5 PROSPECTIVE JUROR NO. 091: Okay.

6 MR. LANGFORD: Right. But the point is that legally
7 you have to weigh the evidence against each person
8 individually.

9 PROSPECTIVE JUROR NO. 091: Uh-huh.

10 MR. LANGFORD: And I'm asking you can you do that?

11 PROSPECTIVE JUROR NO. 091: Yeah.

12 MR. LANGFORD: You're not going to say, well, they
13 proved against one, good enough, close enough, I don't even
14 have to consider the other person?

15 PROSPECTIVE JUROR NO. 091: No.

16 MR. LANGFORD: Thank you.

17 PROSPECTIVE JUROR NO. 091: Thank you.

18 MR. LANGFORD: No further questions. Pass for
19 cause.

20 THE COURT: All right. If you'd had the microphone
21 there to Ms. -- is it Rowan?

22 PROSPECTIVE JUROR NO. 093: Yes.

23 THE COURT: Ms. Rowan, are you familiar with any of
24 the lawyers or the witnesses whose names were mentioned by the
25 lawyers?

1 PROSPECTIVE JUROR NO. 093: No.

2 THE COURT: You've lived in Nevada, as I understand
3 it, for about 22 years now.

4 PROSPECTIVE JUROR NO. 093: Yes.

5 THE COURT: Where are you from?

6 PROSPECTIVE JUROR NO. 093: California.

7 THE COURT: What brings you here?

8 PROSPECTIVE JUROR NO. 093: Work.

9 THE COURT: And what kind of work is that?

10 PROSPECTIVE JUROR NO. 093: I'm bartending right
11 now.

12 THE COURT: You're -- you indicated you were a
13 bartender at Hooters.

14 PROSPECTIVE JUROR NO. 093: Uh-huh.

15 THE COURT: What shift do you work?

16 PROSPECTIVE JUROR NO. 093: Day shift.

17 THE COURT: And so if you're chosen as a juror
18 you're going to be off during the day.

19 PROSPECTIVE JUROR NO. 093: Yeah.

20 THE COURT: All right. Now, and how long have you
21 been working with Hooters?

22 PROSPECTIVE JUROR NO. 093: 20 years.

23 THE COURT: 20 years with Hooters.

24 PROSPECTIVE JUROR NO. 093: Well, it was San Remo
25 before.

1 THE COURT: Have you been a bartender all this time?

2 PROSPECTIVE JUROR NO. 093: Cocktails too, cocktail
3 waitress too.

4 THE COURT: Oh, a cocktail waitress.

5 PROSPECTIVE JUROR NO. 093: Uh-huh.

6 THE COURT: And now bartender?

7 PROSPECTIVE JUROR NO. 093: Yes.

8 THE COURT: Okay. You mentioned that your husband
9 is having surgery or will have surgery or something like that?

10 PROSPECTIVE JUROR NO. 093: Yeah, the 28th he's
11 scheduled for a surgery.

12 THE COURT: Is it going to be a lengthy process in
13 the hospital or do you know?

14 PROSPECTIVE JUROR NO. 093: He's going to be a
15 couple nights in the hospital, yes.

16 THE COURT: A couple months in the hospital?

17 PROSPECTIVE JUROR NO. 093: No, nights. Nights.

18 THE COURT: Oh, a couple nights.

19 PROSPECTIVE JUROR NO. 093: Yeah.

20 THE COURT: Okay. And that's the 28th of January?

21 PROSPECTIVE JUROR NO. 093: Yes.

22 THE COURT: Okay. And if we're here for a couple of
23 days, the 28th and 29th just during the day, that'll be okay
24 with you; right?

25 PROSPECTIVE JUROR NO. 093: Yeah.

1 THE COURT: All right. I appreciate that.

2 PROSPECTIVE JUROR NO. 093: Uh-huh.

3 THE COURT: I know that -- I know this is
4 inconvenient. Everybody that filled in one of these
5 questions, when they get to the -- I don't know, it's about
6 the second to the last question -- I didn't write these.
7 Judge Tao wrote these --

8 PROSPECTIVE JUROR NO. 093: Right.

9 THE COURT: -- long before I got involved in this
10 case. But they -- he asked if there's any reason that the
11 jurors couldn't sit as a juror.

12 PROSPECTIVE JUROR NO. 093: Well, I'm just --

13 THE COURT: Well, everybody checked yes.

14 PROSPECTIVE JUROR NO. 093: I'm just worried about
15 the insurance because I'm the only one with insurance.

16 THE COURT: Insurance?

17 PROSPECTIVE JUROR NO. 093: Uh-huh. I'm the only
18 one full time. He's part time.

19 THE COURT: Okay. And -- and -- but you have
20 insurance through your employment.

21 PROSPECTIVE JUROR NO. 093: Yeah, it comes out of my
22 check.

23 THE COURT: And so they -- well, they can't -- I can
24 tell you right now it's the law in Nevada that your employer
25 cannot in any way punish you or anything for being a juror.

1 PROSPECTIVE JUROR NO. 093: Right.

2 THE COURT: So they can't terminate your insurance
3 or anything like that, okay.

4 PROSPECTIVE JUROR NO. 093: Okay. Got it.

5 THE COURT: Now, that's the law.

6 PROSPECTIVE JUROR NO. 093: Okay.

7 THE COURT: All right. And if you have any problem,
8 you tell us and we'll write a letter to them and makes sure
9 that you don't have any problem, okay.

10 PROSPECTIVE JUROR NO. 093: Got it.

11 THE COURT: All right. You -- you heard my
12 explanation about the -- the job of the jury is to listen to
13 the evidence and decide what the facts are?

14 PROSPECTIVE JUROR NO. 093: Yes.

15 THE COURT: And then the job of the judge is to
16 decide what law applies and then tell you at the conclusion of
17 the case what law applies. And then you take the facts and
18 apply them to the law and reach a fair verdict. Do you have
19 any quarrel with that procedure?

20 PROSPECTIVE JUROR NO. 093: No.

21 THE COURT: There are times when there are people
22 who disagree with the law. I tried drug cases where people
23 thought that maybe drugs ought to be legal. And I don't know
24 what your view is and I don't really care. It's not
25 important. But sometimes jurors have said to you I don't -- I

1 don't think that ought to be against the law. But even if it
2 is, they have to follow the law. Are you willing to do
3 that --

4 PROSPECTIVE JUROR NO. 093: Right. Yes.

5 THE COURT: -- even if you disagree with it?

6 PROSPECTIVE JUROR NO. 093: Yes.

7 THE COURT: All right. And I don't know that that
8 will be the case here, but it is the -- it is the law that you
9 have to follow the law. I have to follow the law even if I
10 disagree with it. And sometimes judges do, too, by the way.
11 It is, again, and I want to emphasize this, it isn't the
12 obligation of the defendants to prove they're not guilty.
13 It's the obligation of the State to prove they are guilty.
14 And if the State fails to meet that burden, the jury is
15 required to find them not guilty. Do you have any quarrel
16 with that procedure?

17 PROSPECTIVE JUROR NO. 093: No.

18 THE COURT: Again, if you were either the District
19 Attorney prosecuting this case, or one of the defense
20 attorneys defending the case, would you want citizens in your
21 frame of mind deciding it?

22 PROSPECTIVE JUROR NO. 093: Yes, I would.

23 THE COURT: You have an open mind?

24 PROSPECTIVE JUROR NO. 093: Yes, I do.

25 THE COURT: All right. Are you willing to do the

1 best job you can go be fair to both sides?

2 PROSPECTIVE JUROR NO. 093: Of course, yes.

3 THE COURT: Mr. DiGiacomo.

4 MR. DiGIACOMO: Thank you, Judge.

5 Good afternoon.

6 PROSPECTIVE JUROR NO. 093: Hello.

7 MR. DiGIACOMO: I'm going to guess this is going to
8 be a lot shorter than the juror before you, so --

9 THE COURT: They always start with the first one and
10 really beat him up a lot.

11 MR. DiGIACOMO: He gets to tell everybody what every
12 one of us is going to say and then after this it gets a little
13 bit quicker.

14 PROSPECTIVE JUROR NO. 093: Right. Okay.

15 MR. DiGIACOMO: Some personal background on you.
16 You have three daughters?

17 PROSPECTIVE JUROR NO. 093: Yes.

18 MR. DiGIACOMO: Okay. Are any of them full-time
19 students?

20 PROSPECTIVE JUROR NO. 093: Yes, my youngest
21 daughter. She's 13.

22 MR. DiGIACOMO: She's a full-time student? What
23 about your other two daughters, have they worked since they
24 graduated high school?

25 PROSPECTIVE JUROR NO. 093: Yes.

1 MR. DiGIACOMO: And what do they do?

2 PROSPECTIVE JUROR NO. 093: They're stay at home --
3 one is a stay at home mom, and then the other one is looking
4 for work right now.

5 MR. DiGIACOMO: Okay. You indicated that both you
6 and your husband are in the casino industry.

7 PROSPECTIVE JUROR NO. 093: Yes.

8 MR. DiGIACOMO: But he's part time?

9 PROSPECTIVE JUROR NO. 093: He's part time.

10 MR. DiGIACOMO: And that means he's got to utilize
11 your insurance?

12 PROSPECTIVE JUROR NO. 093: Uh-huh.

13 MR. DiGIACOMO: Is that a yes?

14 PROSPECTIVE JUROR NO. 093: Yes.

15 MR. DiGIACOMO: Okay. Knowing that Judge Thompson
16 is going to make sure that Hooters doesn't do anything to you,
17 do you think that you can -- I mean, obviously, you're going
18 to have concerns with your husband considering the nature of
19 his procedure.

20 PROSPECTIVE JUROR NO. 093: Right. Right.

21 MR. DiGIACOMO: But do you think during the day time
22 you're going to be able to listen to the evidence and consider
23 the evidence as part of the civic duty as a juror?

24 PROSPECTIVE JUROR NO. 093: Yes.

25 MR. DiGIACOMO: Okay. There was a lot of questions

1 asked in the question, and I don't want to go through all of
2 them, but you said you didn't have an opinion about the
3 justice system, so I guess I'm going to ask this sort of in a
4 broader way.

5 PROSPECTIVE JUROR NO. 093: Okay.

6 MR. DiGIACOMO: Have you ever had any contact with
7 the justice system in any way, like as a witness from a car
8 accident, you had to sue somebody or you got sued or anything
9 like that?

10 PROSPECTIVE JUROR NO. 093: No, just my daughter was
11 in some trouble when she was a kid, so I just had to deal with
12 the juvenile courts.

13 MR. DiGIACOMO: And I assume that was the juvenile
14 system only?

15 PROSPECTIVE JUROR NO. 093: Yes.

16 MR. DiGIACOMO: Okay. And I imagine that the -- you
17 know, you would agree with me that the adult system is a
18 significantly different --

19 PROSPECTIVE JUROR NO. 093: Different, yes.

20 MR. DiGIACOMO: -- procedure?

21 PROSPECTIVE JUROR NO. 093: Uh-huh.

22 MR. DiGIACOMO: I mean, that's looking at helping
23 children as best we can as opposed to this was about what
24 crime was committed and what punishment should flow from it.

25 PROSPECTIVE JUROR NO. 093: Right.

1 MR. DiGIACOMO: You also indicated that your sister
2 had some problems.

3 PROSPECTIVE JUROR NO. 093: Yeah. Oh, yeah, with
4 the --

5 MR. DiGIACOMO: 20 or 30 years ago.

6 PROSPECTIVE JUROR NO. 093: Yes.

7 MR. DiGIACOMO: Do you think that she was treated
8 fairly by the system?

9 PROSPECTIVE JUROR NO. 093: Yes.

10 MR. DiGIACOMO: Okay. I'm assuming that your
11 sister's problem also is why you answer the question as it
12 relates to drugs. And you indicated there seems to be a high
13 correlation between drugs and criminal activity.

14 PROSPECTIVE JUROR NO. 093: Yes.

15 MR. DiGIACOMO: Is that true?

16 PROSPECTIVE JUROR NO. 093: Yes.

17 MR. DiGIACOMO: Okay. And I guess we can go into
18 all the reasons why that's true or not true and all that
19 other. But ultimately at the end of the day, even if somebody
20 does drugs, do you think that they still should be criminally
21 responsible for their behavior?

22 PROSPECTIVE JUROR NO. 093: Yes.

23 MR. DiGIACOMO: Flip side, not everybody who winds
24 up a victim of a crime is Mother Theresa.

25 PROSPECTIVE JUROR NO. 093: Right.

1 MR. DiGIACOMO: Some of them are engaged in
2 activities that you or I or some other people would think are
3 not good or dangerous. Despite the fact that a witness or
4 victim is on drugs or engaged in activity they probably
5 shouldn't be engaged in, do you think they still deserve the
6 protection of the criminal justice system?

7 PROSPECTIVE JUROR NO. 093: Yes.

8 MR. DiGIACOMO: You indicated that you think the
9 police have a very hard job. Why do you think that?

10 PROSPECTIVE JUROR NO. 093: I wouldn't want it.

11 MR. DiGIACOMO: Yeah. That's fair. Do you think
12 it's difficult for police officers to -- to have to go in some
13 of the situations that they go into?

14 PROSPECTIVE JUROR NO. 093: Yes.

15 MR. DiGIACOMO: You'd agree with me that police
16 officers are human beings and there's probably good police
17 officers and there's probably bad police officers?

18 PROSPECTIVE JUROR NO. 093: Oh, yeah. Yes.

19 MR. DiGIACOMO: And there's also probably -- it's
20 very easy. Have you ever heard the term Monday morning
21 quarterback? Is that a yes?

22 PROSPECTIVE JUROR NO. 093: No.

23 MR. DiGIACOMO: Okay. That's a no.

24 PROSPECTIVE JUROR NO. 093: Yeah.

25 MR. DiGIACOMO: I saw the nod. Okay. It's probably

1 very easy to look back with 20/20 hindsight and say, hey,
2 maybe you should have done this instead of that or something
3 to that effect.

4 PROSPECTIVE JUROR NO. 093: Okay.

5 MR. DiGIACOMO: Would you agree with that statement?

6 PROSPECTIVE JUROR NO. 093: Yes.

7 MR. DiGIACOMO: Okay. Are you willing to listen to
8 what the officers did, make a judgment call about whether or
9 not they're being credible, and what that information tells
10 you without trying to critique, hey, maybe it's a better way
11 to do this some -- in the future?

12 PROSPECTIVE JUROR NO. 093: Yes.

13 MR. DiGIACOMO: Do you understand my question?

14 PROSPECTIVE JUROR NO. 093: Yes.

15 MR. DiGIACOMO: I mean, that's really what this is
16 about. The question is can we prove these two guilty, not is
17 there a better way to do it.

18 PROSPECTIVE JUROR NO. 093: Right.

19 MR. DiGIACOMO: Would you agree with that?

20 PROSPECTIVE JUROR NO. 093: Yes.

21 MR. DiGIACOMO: Okay. I'm going to jump to, and I'm
22 not going to spend a lot of time on it, to your questions on
23 the death penalty. But had you thought about the death
24 penalty before you came down here and filled out this
25 questionnaire?

1 PROSPECTIVE JUROR NO. 093: Yes.

2 MR. DiGIACOMO: And you indicated in your
3 questionnaire that you believed in the death penalty and I
4 think you even said because you believe it works.

5 PROSPECTIVE JUROR NO. 093: For some cases, yes.

6 MR. DiGIACOMO: And that's the next thing is it's
7 appropriate -- you checked off it's appropriate in some cases
8 and not appropriate in other ones, is that fair?

9 PROSPECTIVE JUROR NO. 093: Yeah.

10 MR. DiGIACOMO: And you also indicated that if
11 instructed by the Judge that you're willing to consider all
12 four forms of punishment in the proper situation, would that
13 be fair?

14 PROSPECTIVE JUROR NO. 093: Yes.

15 MR. DiGIACOMO: And I'm going to ask you this
16 because it doesn't really ask you this in the questionnaire,
17 as it relates to Mr. Mason, you're willing to consider all
18 three forms of punishment, would that be fair?

19 PROSPECTIVE JUROR NO. 093: Uh-huh. Yes.

20 MR. DiGIACOMO: Okay. But the one thing you checked
21 off is that -- and I think it's probably a little bit like
22 Juror No. 1 over here, that perhaps life without the
23 possibility of parole is a worse punishment than death. Do
24 you remember checking that off?

25 PROSPECTIVE JUROR NO. 093: Yeah, I agree. Yeah.

1 MR. DiGIACOMO: Why do you think that?

2 PROSPECTIVE JUROR NO. 093: You've got longer time
3 to sit there and think about what they have done.

4 MR. DiGIACOMO: I'm going to ask you the same
5 questions I asked Juror No. 1 which is do you think that maybe
6 in society there are certain individuals who just don't have
7 that conscience or just really wouldn't be sitting there
8 lamenting the actions that caused them to be incarcerated for
9 the rest of their life?

10 PROSPECTIVE JUROR NO. 093: Right. Yeah.

11 MR. DiGIACOMO: And would you also agree that at
12 least in the State of Nevada the legislature recognizes that
13 capital punishment is the worse possible punishment you can
14 give an individual?

15 PROSPECTIVE JUROR NO. 093: Yes.

16 MR. DiGIACOMO: If at the end of the day Ms.
17 Weckerly and I prove our case beyond a reasonable doubt, any
18 issue coming back in this courtroom and -- or voting guilty in
19 the back room and coming back in the courtroom and --

20 PROSPECTIVE JUROR NO. 093: No.

21 MR. DiGIACOMO: -- announcing that?

22 PROSPECTIVE JUROR NO. 093: No.

23 MR. DiGIACOMO: And then likewise, should we get
24 that far, if you and eleven other jurors believe that Mr.
25 Burns deserves the ultimate punishment, any concerns with

1 voting for that punishment and coming back into court and
2 announcing your verdict?

3 PROSPECTIVE JUROR NO. 093: No.

4 MR. DiGIACOMO: Do you think you'd be a fair juror?

5 PROSPECTIVE JUROR NO. 093: Yes.

6 MR. DiGIACOMO: Thank you very much, ma'am.

7 Judge, we pass for cause.

8 THE COURT: Mr. Sgro.

9 MR. SGRO: Your Honor, I have a quick question. May
10 we approach quickly?

11 THE COURT: Certainly.

12 (Off-record bench conference.)

13 THE COURT: All right. Mr. Sgro.

14 MR. SGRO: Thank you, Your Honor.

15 PROSPECTIVE JUROR NO. 093: Hello.

16 THE COURT: These lawyers --

17 MR. SGRO: Good afternoon.

18 THE COURT: -- love to talk --

19 PROSPECTIVE JUROR NO. 093: Good afternoon.

20 THE COURT: -- at the bench, see. They don't have
21 anything else to do, so --

22 MR. SGRO: That's right. How are you today?

23 PROSPECTIVE JUROR NO. 093: Good.

24 MR. SGRO: Good. I'll stand on this side.

25 PROSPECTIVE JUROR: Yeah, I was wondering if you

1 could see her. I was trying to figure out the best way to --

2 THE COURT: If you're not going to stand in front of
3 the microphone, you've got to speak up, Mr. Sgro.

4 PROSPECTIVE JUROR: Or do you want me to move this
5 way or something?

6 MR. SGRO: I'm -- I've got no troubles. Okay. So
7 you have heard some of the questions back and forth.

8 PROSPECTIVE JUROR NO. 093: Yes.

9 MR. SGRO: I want to start with you something that
10 -- you know, we ask all these random questions and each of us,
11 you will see, has an affinity for where we go on the
12 questionnaire. Mine is going to be a very innocuous answer
13 that you did -- that you said you like to puzzles --

14 PROSPECTIVE JUROR NO. 093: Uh-huh.

15 MR. SGRO: -- right?

16 PROSPECTIVE JUROR NO. 093: Right.

17 MR. SGRO: Okay. So when we -- when we heard the
18 first juror talk about some of the frustrations that he had
19 about the justice system, I want to share a possible one with
20 you.

21 PROSPECTIVE JUROR NO. 093: Okay.

22 MR. SGRO: The trial estimate in this case is about
23 five weeks, right? You have exceptional prosecutors, they're
24 very good. They're going to put on some highly regarded
25 individuals and some not so highly regarded individuals. We

1 don't have a burden of proof. I'm going to make a prediction
2 right now that Mr. Oram and I are going to ask some questions
3 in this case.

4 PROSPECTIVE JUROR NO. 093: Uh-huh.

5 MR. SGRO: Okay. We're going to challenge some of
6 the evidence.

7 Are you okay, sir

8 PROSPECTIVE JUROR: Yeah.

9 MR. SGRO: Okay. What all this means is with the
10 State of Nevada having the burden of proof and going through
11 five weeks, sometimes cases don't work out as a puzzle. Do
12 you follow where I'm going?

13 PROSPECTIVE JUROR NO. 093: Got it.

14 MR. SGRO: And I want to share with you, because
15 we've been doing this a little while, sometimes jurors get
16 frustrated because they can't put it all together. Does that
17 make sense?

18 PROSPECTIVE JUROR NO. 093: Yes.

19 MR. SGRO: There may come a time when you just don't
20 know beyond a reasonable doubt. That's the standard we use
21 here, right. Beyond a reasonable doubt you just don't know
22 what occurred. And you understand if you have that kind of
23 doubt, even though we've been here for five weeks, we've been
24 working hard, you may or may not decide to take notes, you're
25 paying careful attention, you might come back and say not

1 guilty. Do you understand that?

2 PROSPECTIVE JUROR NO. 093: Uh-huh.

3 MR. SGRO: Yes.

4 PROSPECTIVE JUROR NO. 093: Yes.

5 MR. SGRO: And do you think that would leave you
6 frustrated?

7 PROSPECTIVE JUROR NO. 093: No.

8 MR. SGRO: You understand from our perspective
9 that's exactly what the system is designed to do, to vet, to
10 look at the evidence, scrutinize it, and if you all believe
11 collectively, the only measure is did they prove it. And if
12 they didn't prove it, the next step of, well, if they didn't
13 prove it, then what did happen, a lot of jurors fall into this
14 trap where they say, well, if this didn't happen this way, how
15 did it happen? Do you understand that's not your job?

16 PROSPECTIVE JUROR NO. 093: Yes.

17 MR. SGRO: Okay. And so can you appreciate how that
18 might be frustrating sitting here every day? You'd want to
19 kind of figure it out; right?

20 PROSPECTIVE JUROR NO. 093: Right.

21 MR. SGRO: This isn't -- we, unfortunately, will not
22 do a Law & Order show where, you know, beginning, middle, end,
23 and by the end everyone knows exactly what happened. Does
24 that make sense?

25 PROSPECTIVE JUROR NO. 093: Yes.

1 MR. SGRO: Okay. Have you ever heard the term
2 presumption of innocence before?

3 PROSPECTIVE JUROR NO. 093: No.

4 MR. SGRO: So one of the things that Judge Thompson
5 will tell you as this case goes on, he's going to give you the
6 law as he said earlier. We -- we as citizens of the United
7 States enjoy a right. We call it -- we are presumed innocent,
8 okay. That means that unless -- unless a prosecuting body,
9 whether it's the State of Nevada, the federal system, whatever
10 it is, unless they prove that something happened, we are
11 presumed to be innocent or not guilty. Does that make sense?

12 PROSPECTIVE JUROR NO. 093: Yes.

13 MR. SGRO: So, for example, Mr. DiGiacomo, when he
14 got up here and he told you about the case, he read a bunch of
15 charges. Do you remember that?

16 PROSPECTIVE JUROR NO. 093: Yes.

17 MR. SGRO: Okay. So he reads a bunch of charges. I
18 got up and I told you Mr. Burns had entered pleas to each of
19 those charges of not guilty; right?

20 PROSPECTIVE JUROR NO. 093: Right. Right.

21 MR. SGRO: So here were are, right. The State has
22 got a charging document, and Mr. Burns has said he's not
23 guilty. So now the trial begins. Do you understand if you
24 had to vote right now, right now, because Mr. Burns is
25 presumed innocent, do you know what your vote would have to be

1 because you haven't heard any evidence?

2 PROSPECTIVE JUROR NO. 093: Not guilty.

3 MR. SGRO: Exactly. So do you have any quarrel with
4 that right?

5 PROSPECTIVE JUROR NO. 093: No.

6 MR. SGRO: And do you understand unless -- unless
7 the State convinces you, Mr. Burns remains presumed innocent
8 all the way through the end of this case. Does that make
9 sense?

10 PROSPECTIVE JUROR NO. 093: Yes.

11 MR. SGRO: Okay. Any -- any problem with that?

12 PROSPECTIVE JUROR NO. 093: No.

13 MR. SGRO: The other -- the other sort of component
14 to that is whether or not someone accused of a crime has to
15 testify.

16 THE MARSHAL: Give me one second. Let me change the
17 batteries in the microphone.

18 MR. SGRO: Absolutely.

19 THE MARSHAL: Sorry. It's going dead.

20 THE COURT: Batteries are going dead?

21 THE MARSHAL: Yeah.

22 THE COURT: After two jurors? We're going to be
23 here a long time, ladies and gentlemen.

24 THE MARSHAL: No, I don't remember the last time I
25 changed them out. I saw the red light and I didn't want you

1 to -- I didn't want you going too far and then her not get the
2 answers.

3 MR. SGRO: I was on the verge of brilliance right
4 there.

5 THE MARSHAL: Sorry about that, Mr. Sgro.

6 MR. SGRO: No problem.

7 THE COURT: Try the microphone.

8 PROSPECTIVE JUROR NO. 093: Hello. Hello

9 THE RECORDER: Much better.

10 THE COURT: Is that better? Thank you, Susan.

11 MR. SGRO: Okay. So we were talking about whether
12 or not someone charged with a crime has to take the witness
13 stand. So have you ever been a juror before?

14 PROSPECTIVE JUROR NO. 093: No.

15 MR. SGRO: All right. So I don't know if you know
16 or not, but in our system, a person that's accused of a crime
17 never has to answer a single question.

18 PROSPECTIVE JUROR NO. 093: I heard that, yeah.

19 MR. SGRO: Does that make sense?

20 PROSPECTIVE JUROR NO. 093: Right. Yes.

21 MR. SGRO: Okay. So one of the things that Judge
22 Thompson will tell you at the end of this case is you can't
23 hold it against somebody if they don't take the witness stand.
24 Do you agree with that or you have any quarrel with that?

25 PROSPECTIVE JUROR NO. 093: No. No quarrel. I

1 agree.

2 MR. SGRO: All right. Now, let's take the -- let's
3 take the other side of it. Let's say someone accused of a
4 crime does testify. Do you think that you would look at that
5 person just a little bit harder than you would another witness
6 in the case, or does everyone get the benefit of your opinion
7 on a level playing field?

8 PROSPECTIVE JUROR NO. 093: The same, yes.

9 MR. SGRO: Okay. So let -- let me give you an
10 example. A police officer says the light was green. Someone
11 accused of a crime says the light was red. Do you
12 automatically believe the light was green just because a
13 police officer said so?

14 PROSPECTIVE JUROR NO. 093: No.

15 MR. SGRO: Okay. Would you be willing and able to
16 look at all those facts and circumstances before making that
17 decision?

18 PROSPECTIVE JUROR NO. 093: Yes.

19 MR. SGRO: If the person accused decides to not
20 testify, do you think you'd have the temptation to go back
21 into the jury room and say, well, if he didn't do it, why
22 didn't he take the stand and tell me he didn't do it? Make
23 sense?

24 PROSPECTIVE JUROR NO. 093: Right.

25 MR. SGRO: Can you see how someone might have the

1 temptation to do that?

2 PROSPECTIVE JUROR NO. 093: Right.

3 MR. SGRO: Can you think of a reason why someone
4 who, quote, unquote, didn't do it, would be reluctant to
5 testify?

6 PROSPECTIVE JUROR NO. 093: Can I think of a reason?
7 No.

8 MR. SGRO: You -- you can't think of any reason?

9 PROSPECTIVE JUROR NO. 093: Why not to testify --

10 MR. SGRO: Yes, ma'am.

11 PROSPECTIVE JUROR NO. 093: -- for themselves? No.

12 MR. SGRO: What if someone were nervous about
13 testifying? Let me -- let me back up. Mr. Burns at the time
14 of this offense was 18 years old, okay. You have two very
15 seasoned prosecutors. Do you think that a person might be
16 worried about being tricked up or nervous or anything like
17 that? Do you think that's possible?

18 PROSPECTIVE JUROR NO. 093: Yes.

19 MR. SGRO: Do you think that people have the right
20 to rely on the constitution which says if the State of Nevada
21 can't meet their burden of proof you have to vote not guilty.
22 Do you think that that's acceptable?

23 PROSPECTIVE JUROR NO. 093: Yes.

24 MR. SGRO: Okay. So now getting back to what we
25 discussed, the Judge is going to tell you you have to follow

1 the law in this case. And if you can't follow the law, then
2 this isn't the right case for you. So the easy example is,
3 you know, can you consider the death penalty, can you consider
4 life with parole? Those are the easy ones because if you
5 can't consider all four, this is not the right case for you;
6 right?

7 PROSPECTIVE JUROR NO. 093: Right.

8 MR. SGRO: Now, I want to give it to you from a
9 different perspective. Do you think you'd be able to follow
10 the law if the Judge tells you you cannot consider the fact
11 that David Burns didn't testify in the case, you cannot hold
12 that against him? Do you think you'd be able to follow that?

13 PROSPECTIVE JUROR NO. 093: Yes.

14 MR. SGRO: All right. Do you think you'd be able to
15 resist that temptation of going back in the jury room and
16 thinking, well, why didn't he, I don't understand? Do you
17 think you'd be able to resist that?

18 PROSPECTIVE JUROR NO. 093: Yes.

19 MR. SGRO: All right. Any question about that or
20 quarrel with that?

21 PROSPECTIVE JUROR NO. 093: No.

22 MR. SGRO: In the course of your job have you ever
23 been involved in a situation where there was any incident at
24 the restaurant where you had to fill out a report or -- or
25 testify to something?

1 PROSPECTIVE JUROR NO. 093: Yes.

2 MR. SGRO: Give me an example.

3 PROSPECTIVE JUROR NO. 093: Just, you know, a
4 customer just getting mad about being cut off or not being
5 able to serve him alcohol anymore. People -- let's see,
6 stealing money off the bar or stealing out of the machines.
7 I've had to fill out reports. Not -- not anything really bad.

8 MR. SGRO: Have you ever been the person that's
9 heard two different stories and been asked to decide which one
10 is the accurate one?

11 PROSPECTIVE JUROR NO. 093: No, I haven't been put I
12 that position, no.

13 MR. SGRO: Okay. So let me give you another
14 promise. I promise you that in this case the State is going
15 to put some witnesses up and -- and they're going to tell you
16 the witness is going to say x, and we're going to tell you
17 that the witness is going to say y, okay. And you -- your job
18 will be to determine the credibility of different witnesses,
19 okay. So there was some -- there was some inquiry made of the
20 first juror, you know, drugs, changes in statements, do you
21 remember those questions?

22 PROSPECTIVE JUROR NO. 093: Uh-huh. Yes.

23 MR. SGRO: Do you think you would be able to sit in
24 the position where you had to determine who was telling you
25 the truth?

1 PROSPECTIVE JUROR NO. 093: Yes.

2 MR. SGRO: Are there people that you would say just
3 are incapable of telling the truth for whatever reason? They
4 just don't -- they're just not ever going to deliver to you
5 anything accurate? Do you think that there could be such a
6 person?

7 PROSPECTIVE JUROR NO. 093: Of not telling the
8 truth? Yes.

9 MR. SGRO: Yeah, just someone who is going to just
10 not tell the truth.

11 PROSPECTIVE JUROR NO. 093: Yes.

12 MR. SGRO: Okay. You -- you may hear in this case
13 some criticism of what the police officers did in this case,
14 okay. So let me ask you this. Is it possible for the police
15 to arrest someone who has not committed a crime? Is that
16 possible?

17 PROSPECTIVE JUROR NO. 093: Yes.

18 MR. SGRO: Is it possible for the police to make
19 mistakes through the course of an investigation?

20 PROSPECTIVE JUROR NO. 093: Yes.

21 MR. SGRO: Okay. And you understand that's
22 different. Mr. DiGiacomo asked you a question about 20/20
23 hindsight, you know, could they have done it better. I'm not
24 talking about that. I'm talking flat out they made a mistake.
25 Is that possible?

1 PROSPECTIVE JUROR NO. 093: Yes.

2 MR. SGRO: As witnesses come here to testify here,
3 they'll all come up to the witness stand and they'll swear to
4 tell the truth; right?

5 PROSPECTIVE JUROR NO. 093: Right.

6 MR. SGRO: You may have seen that on TV. Do you
7 think it's possible for a police officer to swear to tell the
8 truth and then not tell the truth? Is that possible?

9 PROSPECTIVE JUROR NO. 093: I guess it's possible.
10 Anything is possible.

11 MR. SGRO: Okay. Well, and I -- and I understand
12 from that answer we don't want to think so.

13 PROSPECTIVE JUROR NO. 093: Right.

14 MR. SGRO: We respect our police officers. We want
15 them to be honest. We want them to do the right thing.

16 PROSPECTIVE JUROR NO. 093: And they're under oath,
17 yeah.

18 MR. SGRO: Pardon me?

19 PROSPECTIVE JUROR NO. 093: They're under oath, too,
20 yes.

21 MR. SGRO: And they're under oath.

22 PROSPECTIVE JUROR NO. 093: Yes.

23 MR. SGRO: Will you be able to decide the value of
24 the oath to that particular person? Do you think you'd be
25 able to do that in this case --

1 PROSPECTIVE JUROR NO. 093: Yes.

2 MR. SGRO: -- and judge credibility?

3 PROSPECTIVE JUROR NO. 093: Yes.

4 MR. SGRO: Any troubles with that at all?

5 PROSPECTIVE JUROR NO. 093: No.

6 MR. SGRO: I want to ask you a little bit about
7 something called eyewitness identification. Have you ever
8 heard that term before?

9 PROSPECTIVE JUROR NO. 093: No.

10 MR. SGRO: So you will be asked throughout the
11 course of this case to evaluate things that people saw, all
12 right. Things that people saw, some for a long period of
13 time, some for a few seconds, all right.

14 PROSPECTIVE JUROR NO. 093: All right.

15 MR. SGRO: Do you think you would be able to
16 properly evaluate things that people are going to tell you
17 that they saw? Do you think you can do that?

18 PROSPECTIVE JUROR NO. 093: Yes.

19 MR. SGRO: Do you think there are factors that can
20 determine how accurate someone can be when they saw something
21 for a few seconds? Would you look at external factors?

22 PROSPECTIVE JUROR NO. 093: Yes.

23 MR. SGRO: Environmental factors? For example, was
24 it light, was it dark? Would that be something to look at?

25 PROSPECTIVE JUROR NO. 093: Right. Yeah.

1 MR. SGRO: Was the person sober, were they under the
2 influence of alcohol; right?

3 PROSPECTIVE JUROR NO. 093: Right.

4 MR. SGRO: Okay. You're going to be called upon to
5 do that in this case. Do you have any problem in terms of
6 being given that job?

7 PROSPECTIVE JUROR NO. 093: No.

8 MR. SGRO: Do you have a -- I'm going to ask a
9 rhetorical question. Do you own a cell phone?

10 PROSPECTIVE JUROR NO. 093: Yes.

11 MR. SGRO: Have you ever been in a position where
12 you might have had the following conversation. I tested you.
13 Oh, you texted me? I never got it. Have you ever experienced
14 that?

15 PROSPECTIVE JUROR NO. 093: Yes.

16 MR. SGRO: I left you a voicemail. Oh, you left me
17 a voicemail? I didn't get it. Right? Have you been on both
18 sides of that conversation?

19 PROSPECTIVE JUROR NO. 093: Yes. Yeah.

20 MR. SGRO: And have you had personal experience that
21 involves sometimes the disconnect and the technology of cell
22 phone communications?

23 PROSPECTIVE JUROR NO. 093: Yes.

24 MR. SGRO: Okay. So if you saw -- have you ever
25 looked at your personal cell phone bill to verify the calls

1 and the minutes and all that? Have you --

2 PROSPECTIVE JUROR NO. 093: No.

3 MR. SGRO: -- ever done that?

4 PROSPECTIVE JUROR NO. 093: No.

5 MR. SGRO: Would you agree that even records from
6 cell phones would be the kind of evidence you'd want to look
7 at just to make sure everything matched up?

8 PROSPECTIVE JUROR NO. 093: Yes.

9 MR. SGRO: Okay. We talk about the death penalty at
10 this part of the trial. One of the things that we struggle
11 with as defense attorneys is we have to talk about a penalty
12 before we've even had the trial. And it's because we're not
13 allowed to talk to you guys after we're done with voir dire at
14 this question process. If we see you in the hallway, in the
15 elevator, the Judge instructs us, you know, keep your head
16 down and just keep moving. And that's to protect the
17 integrity of the jury system; right?

18 PROSPECTIVE JUROR NO. 093: Of course.

19 MR. SGRO: So unfortunately we have to talk about a
20 penalty which Mr. Oram and I believe we're never going to
21 have. Do you understand that? Do you understand we're here
22 to challenge every piece of evidence and to tell you that Mr.
23 Burns is not guilty? Do you follow that?

24 PROSPECTIVE JUROR NO. 093: Yes.

25 MR. SGRO: Okay. So you -- as -- I'll borrow a

1 phrase that Mr. DiGiacomo used. Prior to filling out the
2 question -- or since filling out the question, have you
3 thought about the death penalty at all?

4 PROSPECTIVE JUROR NO. 093: Since filling it out?
5 No.

6 THE COURT: How about prior to?

7 PROSPECTIVE JUROR NO. 093: I just know that, you
8 know, I'm not against it.

9 MR. SGRO: Okay. Let me ask you the -- the inverse
10 situation. There was a paragraph in the -- the questionnaire.
11 And Mr. DiGiacomo gave you some of the charges in the case,
12 okay?

13 PROSPECTIVE JUROR NO. 093: Yeah.

14 MR. SGRO: If there was a situation or someone was
15 convicted of first degree murder, and I know you -- you don't
16 know what the law is yet because Judge Thompson hasn't given
17 it to you. But let me tell you this. It doesn't mean an
18 accident, okay. It doesn't mean self-defense. It means
19 premeditated, it's deliberate, it's -- it's on purpose. So I
20 want you to eliminate --

21 MR. DiGIACOMO: Judge, I apologize. I'm going to
22 impose an objection.

23 THE COURT: I'm not too sure I know exactly what
24 you're saying.

25 MR. SGRO: I'll move on, Your Honor.

1 THE COURT: Yeah, maybe we can rephrase that.

2 MR. SGRO: Sure.

3 If you eliminate accident, okay, and self-defense --

4 PROSPECTIVE JUROR NO. 093: Got it.

5 MR. SGRO: -- can you envision a situation where
6 someone convicted of first degree murder, okay, deserves
7 consideration to be able to walk the streets again? Because
8 as you have now learned, there are four types of punishments.
9 So the same way the legislature saw fit to include the death
10 penalty in our state, that same body also included a term of
11 years. So someone knows that they get to come out someday.
12 They also included a provision called life with the
13 possibility of parole, okay.

14 PROSPECTIVE JUROR NO. 093: Got it. Yeah.

15 MR. SGRO: So I want you to focus on those two
16 particular forms of punishment. Do you think that you could
17 be persuaded beyond a reasonable doubt that someone is guilty
18 of first degree murder, and then consider letting that person
19 back on the street again?

20 PROSPECTIVE JUROR NO. 093: Can I consider it? Yes.

21 MR. SGRO: Yeah, can you?

22 PROSPECTIVE JUROR NO. 093: Yes.

23 MR. SGRO: Can you imagine a circumstance where
24 someone who is convicted of first degree murder in your mind
25 deserves the opportunity to get back out someday?

1 PROSPECTIVE JUROR NO. 093: Yes.

2 MR. SGRO: Okay. What -- what, in your estimation,
3 is the best argument why we should have the death penalty in a
4 first degree murder case? Why should we have it?

5 PROSPECTIVE JUROR NO. 093: Because it works.

6 MR. SGRO: Okay. And I -- and I saw that on the
7 questionnaire, as well. And -- and can you refresh my memory.
8 What do you mean by it works?

9 PROSPECTIVE JUROR NO. 093: It works? Well, that it
10 works for, you know, in some cases when, you know, when it is
11 a murder that happens and they are fully charged guilty and
12 found guilty. And so I think it's, you know, justice.

13 MR. SGRO: Okay. What's the best argument for
14 someone convicted of first degree murder to get life with
15 parole and be able to come out someday?

16 PROSPECTIVE JUROR NO. 093: I don't know. I
17 couldn't tell you. I really don't.

18 MR. SGRO: Okay. So you understand right now, and I
19 hate to -- I hate to put you on the spot, and as the Judge
20 indicated, we're not looking to pry too much. But the same
21 way the State of Nevada needs an assurance --

22 PROSPECTIVE JUROR NO. 093: Yeah.

23 MR. SGRO: -- that the ultimate punishment can be
24 considered, Mr. Burns needs an assurance --

25 PROSPECTIVE JUROR NO. 093: It's open, yes.

1 MR. SGRO: Okay. So can you give me a reason why we
2 should let people back on the street if they've been convicted
3 of first degree murder?

4 PROSPECTIVE JUROR NO. 093: No, I can't.

5 MR. SGRO: If you can't articulate a reason --

6 PROSPECTIVE JUROR NO. 093: Right.

7 MR. SGRO: -- do you really believe you can consider
8 that as a form of punishment? You know, what would it take
9 for you to be able to deliver that sort of sentence, I guess?
10 Do you think -- do you think because you can't come up with a
11 reason that that's probably not something you would really
12 consider?

13 PROSPECTIVE JUROR NO. 093: No, I don't think that's
14 -- I can consider it, yes.

15 MR. SGRO: Okay.

16 PROSPECTIVE JUROR NO. 093: For me to come up with a
17 reason --

18 MR. SGRO: Okay. So as you sit here you can't come
19 up with a reason?

20 PROSPECTIVE JUROR NO. 093: Right.

21 MR. SGRO: Okay. All right. Do you have any
22 religious beliefs that cause you to lean for or against a
23 particular form of punishment?

24 PROSPECTIVE JUROR NO. 093: No.

25 MR. SGRO: Okay. You've heard some conversation --

1 you've heard some conversation about science.

2 PROSPECTIVE JUROR NO. 093: Okay.

3 MR. SGRO: Do you watch any shows, forensic files --
4 I'm not going --

5 PROSPECTIVE JUROR NO. 093: Some.

6 MR. SGRO: -- to pretend to know all of them. But
7 there -- there are shows out there that specifically deal with
8 the science in a criminal prosecution.

9 PROSPECTIVE JUROR NO. 093: Right.

10 MR. SGRO: Do you watch any of those shows ever?

11 PROSPECTIVE JUROR NO. 093: Sometimes.

12 MR. SGRO: Okay. So if I said DNA, would that be
13 something you've heard of before?

14 PROSPECTIVE JUROR NO. 093: Yes.

15 MR. SGRO: Fingerprints?

16 PROSPECTIVE JUROR NO. 093: Yes.

17 MR. SGRO: And do you have any opinion as to the
18 place or role that science should have in a criminal case? Do
19 you think it's super important or not very necessary or
20 somewhere in the middle?

21 PROSPECTIVE JUROR NO. 093: Somewhere in the middle.

22 MR. SGRO: Somewhere in the middle. Okay.

23 PROSPECTIVE JUROR NO. 093: Yes.

24 MR. SGRO: If people come on and they're experts in
25 their particular craft or field, do you think you'd be able to

1 evaluate their testimony and how it fits in with what the
2 witnesses are saying:?

3 PROSPECTIVE JUROR NO. 093: The best that I can,
4 yeah.

5 MR. SGRO: Okay. When -- when we spoke about the
6 identification, eyewitness identification, you remember that?

7 PROSPECTIVE JUROR NO. 093: Uh-huh.

8 MR. SGRO: Have you ever had the experience of
9 having someone come up to you, and once you turn around
10 they're right up close to you and they say, oh, I'm sorry, I
11 thought you were someone else?

12 PROSPECTIVE JUROR NO. 093: Yes.

13 MR. SGRO: Have you ever been mistaken for someone
14 else?

15 PROSPECTIVE JUROR NO. 093: Yes.

16 MR. SGRO: Okay. And how long ago -- when was the
17 last time that happened?

18 PROSPECTIVE JUROR NO. 093: About a couple years
19 ago.

20 MR. SGRO: Okay. Do you believe -- do you believe
21 that you could be fair in a case like this?

22 PROSPECTIVE JUROR NO. 093: To the best of my
23 knowledge, yes.

24 MR. SGRO: Okay. Would you want to be a juror on
25 this case?

1 PROSPECTIVE JUROR NO. 093: No. To be honest, no.

2 MR. SGRO: And that's --

3 THE COURT: Mr. Sgro, every juror has said that they
4 don't want to be a juror.

5 MR. SGRO: I'm looking for the one, the --

6 PROSPECTIVE JUROR NO. 093: I'm just -- I just --

7 THE COURT: I'm not sure --

8 PROSPECTIVE JUROR NO. 093: I have a lot of
9 stress --

10 THE COURT: -- the Judge --

11 PROSPECTIVE JUROR NO. 093: -- in my life.

12 THE COURT: -- wants to be the Judge in the case,
13 either.

14 PROSPECTIVE JUROR NO. 093: Of course, like everyone
15 else, I've got a lot of stress and, you know, it's hard to
16 give something 100 percent, you know. I've got my family
17 right now.

18 MR. SGRO: I -- I totally get it. And I know you
19 have family with surgery coming up and --

20 PROSPECTIVE JUROR NO. 093: Yes.

21 MR. SGRO: -- I understand all that. So, again,
22 from our perspective, okay, there is nothing else in the
23 entire world more important than a -- than a capital murder
24 trial if you're the one involved in the case.

25 PROSPECTIVE JUROR NO. 093: Yes.

1 MR. SGRO: And I'm sure you appreciate that. So
2 what we need to know, what everyone needs to know, is we need
3 to have an assurance that we've got your undivided attention;
4 right?

5 PROSPECTIVE JUROR NO. 093: Right.

6 MR. SGRO: And so, again, you'll be offered the
7 opportunity to take notes. You don't have to.

8 PROSPECTIVE JUROR NO. 093: Right.

9 MR. SGRO: You can just listen. But while you're
10 here, we have you 110 percent listening to everything.
11 Because can you imagine if you go back to deliberate five
12 weeks from now and someone says, hey, on Day 5 of the trial
13 what did witness so-and-so say, and you have no idea who
14 they're even talking about; right?

15 PROSPECTIVE JUROR NO. 093: Right.

16 MR. SGRO: That's bad for us.

17 PROSPECTIVE JUROR NO. 093: Yeah.

18 MR. SGRO: Bad for the State.

19 PROSPECTIVE JUROR NO. 093: Yeah.

20 MR. SGRO: Worse for Mr. Burns.

21 PROSPECTIVE JUROR NO. 093: Right. Yes, of course.

22 MR. SGRO: Okay. So do we have an assurance that if
23 you are selected as a juror, and I understand you have other
24 things going on.

25 PROSPECTIVE JUROR NO. 093: Right.

1 MR. SGRO: If you're selected, you -- you are in 100
2 percent, all day every day that this trial is going on?

3 PROSPECTIVE JUROR NO. 093: I don't know.

4 MR. SGRO: I need -- I need you to tell -- walk me
5 down that road. Why don't you know?

6 PROSPECTIVE JUROR NO. 093: Because -- mostly
7 because of my husband's surgery.

8 MR. SGRO: Okay. Well, let me ask it a different
9 way. Do you believe that --

10 PROSPECTIVE JUROR NO. 093: [Crying]. Sorry.

11 MR. SGRO: That's all right.

12 THE COURT: Take your time.

13 MR. SGRO: It's usually Mr. Oram who is the mean
14 one. I'm the nice guy. I'm sorry.

15 PROSPECTIVE JUROR NO. 093: It's okay. I don't know
16 if I can.

17 MR. SGRO: Okay. Obviously what your husband is
18 about to go through is an emotional time for you guys at home.

19 PROSPECTIVE JUROR NO. 093: Yes. Uh-huh.

20 MR. SGRO: Okay. And is it for that reason you
21 don't believe you can concentrate here?

22 PROSPECTIVE JUROR NO. 093: [Inaudible].

23 MR. SGRO: Okay. When -- when is the surgery
24 scheduled for?

25 PROSPECTIVE JUROR NO. 093: The 28th.

1 MR. SGRO: Pardon me?

2 PROSPECTIVE JUROR NO. 093: The 28th.

3 MR. SGRO: Of?

4 PROSPECTIVE JUROR NO. 093: January.

5 MR. SGRO: Okay. So eight days. Next Wednesday,
6 yes?

7 PROSPECTIVE JUROR NO. 093: Yes.

8 MR. SGRO: Okay.

9 Your Honor, based on that inquiry I challenge for
10 cause, Your Honor.

11 PROSPECTIVE JUROR NO. 093: What was that?

12 THE COURT: I don't think that's grounds for cause.

13 MR. SGRO: Well, may we approach briefly?

14 THE COURT: Yes.

15 (Off-record bench conference.)

16 MR. LANGFORD: Well, I'm sorry to start asking you
17 questions now, but we do have to -- we do have to be moving
18 along. You've heard what I said before about you understand
19 that this is two people on trial, one trial. You understand
20 that concept?

21 PROSPECTIVE JUROR NO. 093: Yes.

22 MR. LANGFORD: Okay. Do you have a problem with
23 that?

24 PROSPECTIVE JUROR NO. 093: No.

25 MR. LANGFORD: Do you think as you listen to the

1 evidence -- because it really does require you to constantly
2 be thinking about that, okay. So wait, how does what that
3 person just said, how does that in some way prove something
4 about Mr. Burns, or how does that prove something about Mr.
5 Mason? Do you understand that you have to constantly be
6 focusing in on those two individuals hearing one bit of
7 evidence? You have to ask that question constantly. Can you
8 do that?

9 PROSPECTIVE JUROR NO. 093: Yes.

10 MR. LANGFORD: Okay. Likewise, in terms of the
11 punishment, okay, you understand that there are two separate
12 punishments in this case? The State is seeking death as to
13 Mr. Burns, and not death, life without, life with the
14 possibility of parole, only those two as to Mr. Mason. Do you
15 have a problem with that?

16 PROSPECTIVE JUROR NO. 093: No.

17 MR. LANGFORD: Okay. Can you judge those two
18 individuals if we get to that point as individuals, not as a
19 package?

20 PROSPECTIVE JUROR NO. 093: Yes.

21 MR. LANGFORD: I want to caution you. This is not a
22 package trial. It is two separate trials with one set of
23 witnesses.

24 PROSPECTIVE JUROR NO. 093: Okay.

25 MR. LANGFORD: That's probably a better way to look

1 at it, okay.

2 PROSPECTIVE JUROR NO. 093: Okay.

3 MR. LANGFORD: And you believe that you could fairly
4 and impartially judge Mr. Mason not based upon what you think
5 about Mr. Burns?

6 PROSPECTIVE JUROR NO. 093: Yes.

7 MR. LANGFORD: With the same reservations, Your
8 Honor, I will pass for cause.

9 THE COURT: All right. Ladies and gentlemen, we're
10 going to take a brief recess for a few minutes and give you an
11 opportunity to use the restroom and then be back in about ten
12 minutes. The jury -- the Court will be at ease while the
13 jurors retire. Kind of remember where you're seated so we --
14 we know where you are, and if you come back to the same seats.
15 The Court will be at ease while the jury leaves and you can
16 leave at this time.

17 (Prospective jury panel recessed at 2:57 p.m.)

18 MR. DiGIACOMO: I believe maybe the lawyers can
19 approach the bench and explain to the Court. I believe I know
20 what the issue is as it relates to her family.

21 THE COURT: All right.

22 MS. WECKERLY: Her issue is medical.

23 MR. LANGFORD: I'm sorry. I didn't hear.

24 THE COURT: I'm sorry. I can't hear you.

25 MS. WECKERLY: Her issue, I think, is medical, but

1 that's Margie English's daughter.

2 THE COURT: Who is Margie English.

3 MR. DiGIACOMO: Margie in appeals for 30 years.

4 MS. WECKERLY: Yeah. Yeah.

5 THE COURT: Oh, I remember her, yeah.

6 MS. WECKERLY: Yeah.

7 THE COURT: She's gone.

8 MR. DiGIACOMO: Yeah.

9 THE COURT: Didn't she pass away?

10 MS. WECKERLY: Yes.

11 MR. DiGIACOMO: Recently.

12 MS. WECKERLY: So she worked in the DA appellate?

13 MR. ORAM: This one?

14 MS. WECKERLY: Uh-huh. Her mom.

15 MR. DiGIACOMO: Her mom for 30 years.

16 THE COURT: Yeah, I remember her.

17 MS. WECKERLY: So --

18 THE COURT: Good lady.

19 MR. DiGIACOMO: Yeah, and she also has a medical
20 issue. That's why she was on our list.

21 MS. WECKERLY: So, I mean --

22 MR. DiGIACOMO: That's why we had her on our perempt
23 list was related to that and she has a medical issue, as well.

24 THE COURT: What do you want me to do with her?

25 MS. WECKERLY: She has -- I think her issue right

1 now is medical.

2 MR. ORAM: We should -- we should just excuse her,
3 Your Honor.

4 MR. DiGIACOMO: Defense agrees we can excuse her?

5 MR. ORAM: What's her -- what's her number? Let me
6 grab the questionnaire.

7 MR. DiGIACOMO: 162, I think.

8 MS. WECKERLY: 162.

9 MR. DiGIACOMO: What's your juror number?

10 MR. ORAM: What's your badge number?

11 THE COURT: 162. Mrs. English, do you want to
12 approach the bench?

13 PROSPECTIVE JUROR NO. 162: Sure. Thank you.

14 THE COURT: You don't want to say anything in front
15 of these guys?

16 PROSPECTIVE JUROR NO. 162: Oh, okay. Sure. I'll
17 just --

18 THE MARSHAL: Hang on. Hang on. Hang on.

19 PROSPECTIVE JUROR NO. 162: HI. I'm Raegan English
20 and I would just like to -- yes, my mother did work for the
21 County, so --

22 THE COURT: I understand she worked for the District
23 Attorney's office and I knew her. Yeah.

24 PROSPECTIVE JUROR NO. 162: Yes. And also I do know
25 one of the people mentioned that will be at the trial. So I

1 want --

2 THE COURT: Okay. Well, we'll be asking you those
3 questions.

4 PROSPECTIVE JUROR NO. 162: Okay. And also thirdly
5 I have multiple sclerosis and I'm having a real hard time
6 sitting here throughout this -- this --

7 THE COURT: I understand you have MS and I -- that's
8 -- is it -- I don't know, some people have MS and they are
9 able to serve as juror sand other may not be able to. Are you
10 -- you think you'd be unable to?

11 PROSPECTIVE JUROR NO. 162: Unable.

12 MR. ORAM: Able or unable, Your Honor?

13 PROSPECTIVE JUROR NO. 162: Unable.

14 THE COURT: Unable?

15 PROSPECTIVE JUROR NO. 162: Unable.

16 THE COURT: Well, I can excuse people for medical
17 reasons. Do you want me to?

18 MS. WECKERLY: It's -- it's fine with the State.

19 THE COURT: Mr. Sgro?

20 MR. SGRO: It's Mr. Oram's.

21 THE COURT: Mr. Oram?

22 MR. ORAM: Yeah, I -- I think this is a --

23 THE COURT: It's up to you.

24 MR. ORAM: Obviously if there's medical conditions,
25 that obviously causes me concern. I think this particular

1 juror would be a very fair juror on this particular case, and
2 -- and so I'll leave it to the Court's discretion.

3 THE COURT: Mr. Langford?

4 MR. LANGFORD: I'm going to say the same, Your
5 Honor. I'll leave it to the Court's discretion.

6 THE COURT: Well, if you have a medical issue that's
7 going to make it difficult for you to be here, I can excuse
8 you, so --

9 PROSPECTIVE JUROR NO. 162: Correct.

10 THE COURT: And you say you have that medical issue?

11 PROSPECTIVE JUROR NO. 162: Yes, I cannot commit to
12 coming in.

13 THE COURT: All right. I'll excuse you.

14 PROSPECTIVE JUROR NO. 162: Okay. Thank you very
15 much.

16 THE COURT: You can report to the jury commissioner
17 across the hall.

18 MR. LANGFORD: Your Honor, may we put on the
19 record --

20 THE COURT: You can leave.

21 PROSPECTIVE JUROR NO. 162: Thank you.

22 THE COURT: Leave the microphone with the marshal,
23 please.

24 All right. The record will reflect that the ten
25 prospective jurors have left the courtroom, counsel, for the

1 record.

2 MR. LANGFORD: Your Honor, Juror No. -- Badge No.
3 12-0101, Sonny Newton.

4 THE COURT: He's the next one I'm going to be
5 examining.

6 MR. LANGFORD: That's correct. I wanted to put on
7 how I know him. He and I worked together at Sport Chalet. I
8 was an independent contractor for them as a scuba instructor
9 for Sport Chalet Incorporated. He worked mountaineering and
10 for many years we had frequent contact. And, in fact, I have
11 given him informal advice on some family law issues. And --
12 and so I just want to -- I was --

13 THE COURT: I'll ask him if it makes any difference
14 in his mind.

15 MR. SGRO: Your Honor, for what it's worth, I
16 personally think that this is one that slipped through the
17 cracks because we had the piles of jurors going back and
18 forth. Because on his questionnaire in addition to the issues
19 with Mr. Langford, he says at page 5, No. 24, he believes in
20 an eye for an eye and saving the taxpayers on taking care of
21 them, the defendants, for 30 to 60 years. And that seems to
22 be consistent with some of the stuff he has on his social
23 medial pages, as well. I'm not sure we're going to get very
24 far with him on penalty anywhere.

25 And because the Court has done a pretty good job

1 making this expeditious by getting rid of all those folks, my
2 -- my suggestion would be that perhaps this -- we dropped the
3 ball here. Because if I would have seen that, Your Honor, I
4 would have brought it to the Court's attention. My sense is
5 the Court would have agreed with us on the day we went through
6 all those -- all those requests and -- and he would have been
7 excused and not even made it this far.

8 MR. DiGIACOMO: Judge, both answers, 25 and 31 --

9 THE COURT: Answer 24 says he doesn't believe in the
10 death penalty. And he says although I do not personally favor
11 it, as long as the law may require me to consider it he would
12 follow that and --

13 MR. SGRO: I get it, Your Honor. I'm telling you --
14 Here's another question in his questionnaire. He doesn't like
15 when African Americans play the race card for everything and
16 the poor me, the whole world is against me and the U.S.A.
17 because I'm black. My gut is telling me, Judge, if I was a
18 betting man, he's not going to make it. We could probably
19 save a little time if we just cut him loose now. And --

20 THE COURT: Mr. --

21 MR. SGRO: With due respect --

22 THE COURT: Do you agree, Mr. DiGiacomo?

23 MR. DiGIACOMO: No, I think we need to --

24 MR. SGRO: Of course not.

25 MR. DiGIACOMO: -- ask him a question.

1 THE COURT: It may take -- it may take a perempt.

2 MR. DiGIACOMO: Yeah. Or he may now know how to get
3 out of it and he may answer the question as a way to get out
4 of it. I don't know. But his answers to -- I believe it's
5 appropriate and --

6 THE COURT: The answers to the jury questionnaire
7 don't disqualify him.

8 MR. DiGIACOMO: Correct.

9 MR. SGRO: And --

10 THE COURT: The fact that he's a friend of Mr.
11 Langford -- if he tells me because he's a friend of Mr.
12 Langford that he's going to rule in his favor, then I'm going
13 to excuse him. But --

14 MR. DiGIACOMO: Then I'll agree with Mr. Sgro.

15 THE COURT: But, you know, or if he says he -- you
16 know, I don't know if you've done anything to him or if you've
17 ever had a disagreement with him, Mr. Langford.

18 MR. LANGFORD: Never dated his girlfriend, Judge.
19 It's all good.

20 THE COURT: All right. Anything further on the
21 record?

22 MR. SGRO: Yes. Are the conferences at the bench
23 recorded, Your Honor?

24 THE COURT: No, they are not.

25 MR. SGRO: Okay. Then, yes, there is.

1 THE COURT: Well, I don't think they are.

2 THE RECORDER: They're not.

3 THE COURT: Okay. They're not. And whenever we
4 have a conference at the bench, after we recess you'll get the
5 opportunity to put anything that we have said on the record.
6 And I wanted to make very clear that every -- that I'm not
7 going to decide anything substantive at the bench.

8 MR. SGRO: Fair enough. Very briefly as to Juror
9 No. 2, the -- the woman that has a husband who is about to
10 have surgery, she indicated that she may not be able to
11 concentrate or focus on the case given what's going on at
12 home. The record bears out all of the questions and answers.
13 We ask that she be excused for cause. At the bench the State
14 objected. The Court indicated that the answers she gave were
15 not appropriate for a challenge for cause, and I just want to
16 put that on there that we made that request.

17 MR. LANGFORD: And I joined in that request, Your
18 Honor.

19 MR. DiGIACOMO: For the record, I believe the Court
20 said that wasn't for cause before Mr. Sgro asked me. And her
21 answer was the same as Juror No. 1, which is I would try my
22 best. She indicated that she could, despite -- on
23 questioning, despite the issue going on at home that she could
24 focus on the evidence and be a fair and impartial juror. So I
25 don't believe that she acknowledged that there is a reason to

1 be excused for cause.

2 THE COURT: I don't think what she said was grounds
3 for a challenge for cause in and of itself.

4 MR. SGRO: Okay. And I -- I forgot to mention for
5 the record she did start crying when she spoke of her
6 husband's surgery.

7 And then as we proceed through this process I know
8 that the State wanted to make a record of the number of
9 African Americans on this particular panel of ten that we got
10 today. We still have floating out there this issue of an
11 evidentiary hearing to determine whether or not there is a
12 systematic exclusion of African American veniremen. And I
13 understand that we're going through this day by day and we are
14 making notes as we go, but I -- that is still a pending issue.

15 And finally, Your Honor, I am providing to the State
16 right now --

17 If you could just sign an ROC.

18 We received, I believe, 4,000 telephone calls from
19 Monica Martinez and Stephanie Cousins that were taped over
20 several years. So just for edification, the State produced to
21 us certain phone calls. The State did not produce other phone
22 calls. Well, we finally got all of them.

23 Thank you.

24 And Monica Martinez's phone calls, which we probably
25 will use some of those, as well, I'll give them to the State

1 tomorrow. And I just want to put on the record that I gave
2 them Stephanie Cousins today. That's all, Your Honor.

3 THE COURT: Anything further on the record?

4 MR. DiGIACOMO: Just one thing as it relates to what
5 Mr. Sgro raised on the composition of the jurors. There were
6 ten jurors today. The person in Seat No. 6 and the person in
7 Seat No. 7 were both clearly African American, meaning two out
8 of ten. I recognize the first juror said he was from India,
9 and I took his comments to mean that people perceive me as
10 African American. But ultimately I think that Mr. Sgro and
11 Mr. Oram, it was Mr. Oram at the bench had indicated he took
12 his comments the same way. I just want to reflect if we're
13 going to do a count, that's what the count should be because
14 Juror No. 6 who is --

15 MS. WECKERLY: Mr. Shipman.

16 MR. DiGIACOMO: -- Mr. Shipman, Juror No. 133, did
17 not fill out the race answer on the questionnaire.

18 MR. SGRO: And as to -- as to Juror 1, I'll let the
19 record speak for itself. He said he was black. We'll let
20 that lie.

21 THE COURT: I consider him black. He said he was
22 black.

23 MR. SGRO: Okay.

24 THE COURT: All right.

25 MR. LANGFORD: Your Honor, may I proceed without my

1 suit coat?

2 THE COURT: I couldn't hear you.

3 MR. LANGFORD: May I proceed without my suit coat
4 for the rest of the day?

5 THE COURT: Certainly.

6 MR. LANGFORD: Thanks.

7 THE COURT: Anything further on the record?

8 MR. SGRO: No, sir.

9 THE COURT: All right. Five minutes now.

10 (Court recessed at 3:09 p.m. until 3:28 p.m.)

11 (In the presence of the prospective jury.)

12 THE COURT: All right. The record will reflect the
13 presence of the defendant's counsel and all prospective
14 members of the jury.

15 Ladies and gentlemen, for the record, the -- the
16 Court has excused Mrs. English, who was seated over here. And
17 she -- she has some serious medical issues that -- which is a
18 good reason to excuse somebody. And so we had to excuse her.

19 Mr. Newton?

20 PROSPECTIVE JUROR NO. 101: Yes, sir.

21 THE COURT: We need you to have the microphone there.

22 Mr. Newton, you -- or I -- I understand that you're
23 acquainted with Mr. Langford?

24 PROSPECTIVE JUROR NO. 101: Yes, sir.

25 THE COURT: Do you know any of the witnesses or any

1 of the attorneys besides Mr. Langford?

2 PROSPECTIVE JUROR NO. 101: No, sir.

3 THE COURT: All right. Tell me about your
4 relationship with Mr. Langford.

5 PROSPECTIVE JUROR NO. 101: I used to work for a
6 store here in Las Vegas called Sport Chalet Sporting Goods.

7 THE COURT: Sport Chalet?

8 PROSPECTIVE JUROR NO. 101: Sport Chalet.

9 THE COURT: I've been to the Sport Chalet.

10 PROSPECTIVE JUROR NO. 101: I worked --

11 THE COURT: Maybe there's more than one.

12 PROSPECTIVE JUROR NO. 101: There's actually three
13 here in Vegas.

14 THE COURT: Okay.

15 PROSPECTIVE JUROR NO. 101: And I --

16 THE COURT: My grandson likes Sport Chalet. I buy
17 him a lot of things there.

18 PROSPECTIVE JUROR NO. 101: I used to work there part
19 -- partially in the Scuba department, part in what we call
20 mountain shop, which is camping and fishing. And then also I
21 was a master bike tech in the store, as well. And I knew
22 Robert by he was a scuba instructor there. And so I would see
23 some of his students and him getting equipment ready and such.

24 THE COURT: Okay. He had students that he brought in
25 and you gave -- you sold him equipment?

1 PROSPECTIVE JUROR NO. 101: We'd sell him equipment,
2 and also for, like, his classes, we'd just get them sized for
3 their tanks, their scuba suits, that sort of stuff.

4 THE COURT: Okay. Is there any -- have you ever been
5 scuba diving with him?

6 PROSPECTIVE JUROR NO. 101: No, sir.

7 THE COURT: I didn't know if he's a scuba diver or
8 not. I didn't know that. But is he or do you know?

9 PROSPECTIVE JUROR NO. 101: He's one of our diving
10 instructors.

11 THE COURT: Okay. Is there anything that he's ever
12 done with you or for you or to you that would tend to make you
13 favor or disfavor his side of the case?

14 PROSPECTIVE JUROR NO. 101: No, sir.

15 THE COURT: Have you ever seen him socially other
16 than in -- in the store?

17 PROSPECTIVE JUROR NO. 101: No, sir.

18 THE COURT: He's never -- he's never done anything to
19 you that you're mad at him?

20 PROSPECTIVE JUROR NO. 101: No, sir.

21 THE COURT: And he's never done anything that would
22 tend to make you favor his side of the case?

23 PROSPECTIVE JUROR NO. 101: No, sir.

24 THE COURT: Okay. Did you know he was a lawyer?

25 PROSPECTIVE JUROR NO. 101: Yes, sir.

1 THE COURT: Did you know he did criminal defense
2 sometimes?

3 PROSPECTIVE JUROR NO. 101: Yes, sir.

4 THE COURT: All right. Did you ever talk to him
5 about any of his case?

6 PROSPECTIVE JUROR NO. 101: No, sir.

7 THE COURT: Did you -- you've never talked to him
8 about this case, I assume, then?

9 PROSPECTIVE JUROR NO. 101: No, sir.

10 THE COURT: How long has it been since you've seen
11 him in the store?

12 PROSPECTIVE JUROR NO. 101: I'm trying to remember.
13 I think I left Sport Chalet in 2010. And so I haven't -- I
14 haven't been back to the store --

15 THE COURT: So at least four or five years since
16 you've -- you've seen him?

17 PROSPECTIVE JUROR NO. 101: Yes, sir.

18 THE COURT: So you have no other contact with him?
19 You don't know anything about his family or -- or anything
20 like that?

21 PROSPECTIVE JUROR NO. 101: No, sir.

22 THE COURT: Okay. Is it going to make any difference
23 to you that he's one of the attorneys in the case?

24 PROSPECTIVE JUROR NO. 101: No, sir.

25 THE COURT: All right. You came from Arizona?

1 PROSPECTIVE JUROR NO. 101: Yes, sir.

2 THE COURT: About 15 years ago?

3 PROSPECTIVE JUROR NO. 101: No. I was actually born
4 in Flagstaff, Arizona, but I came from Oregon City, Oregon,
5 about 15 years ago, back in 1998.

6 THE COURT: Oh, okay. And what were you doing in
7 Oregon?

8 PROSPECTIVE JUROR NO. 101: My aunt took custody away
9 from my mother when I was 11 years old. So I grew up there
10 out in Oregon. And --

11 THE COURT: You grew up with your aunt; is that
12 right?

13 PROSPECTIVE JUROR NO. 101: Yes.

14 THE COURT: All right. And you went to school there?

15 PROSPECTIVE JUROR NO. 101: Yes, sir.

16 THE COURT: And you came down in Nevada about 15
17 years ago?

18 PROSPECTIVE JUROR NO. 101: Yes. In November of '98.

19 THE COURT: And why'd you come to Nevada?

20 PROSPECTIVE JUROR NO. 101: My whole family moved
21 down here, because my aunt has multiple sclerosis, and the
22 climate up in Oregon is extremely bad. It makes it advance
23 faster, whereas this climate makes it slow down. And also my
24 grandmother was diagnosed with Alzheimer's, which does the
25 same thing in that climate versus this one. So we sold our

1 farm and moved down here to help slow down the progression.

2 THE COURT: All right. And you worked for a -- a
3 company doing scanning?

4 PROSPECTIVE JUROR NO. 101: Yes. I actually work for
5 a company called Excel. And we actually take all the returns
6 from Walmart and Sam's Club nationwide, and we scan all the
7 defective products and either have them destroyed or given to
8 charities or that sort of thing.

9 THE COURT: And what do you do with them then?

10 PROSPECTIVE JUROR NO. 101: All we do is scan them,
11 put them in boxes. Certain stuff, like baby clothes and food
12 and stuff that gets returned, some of that goes to charity,
13 some of it, you know, like broken coffee pots, we just destroy
14 them. Whatever the distributors want us to with it. But we
15 scan it to give them back their credit.

16 THE COURT: And how long have you been with them?

17 PROSPECTIVE JUROR NO. 101: I started November 3rd.

18 THE COURT: And before that what kind of work were
19 you doing?

20 PROSPECTIVE JUROR NO. 101: I worked for Walmart.

21 THE COURT: Okay. And working for Walmart, were you
22 like a checker or a stocker or?

23 PROSPECTIVE JUROR NO. 101: I worked in the sporting
24 goods department over there doing everything from, like, your
25 basic baseballs and basketballs, selling shotguns and hunting

1 rifles.

2 THE COURT: You understand that this is a criminal
3 case and the defendant's accused of -- of certain serious
4 offenses?

5 PROSPECTIVE JUROR NO. 101: Yes, sir.

6 THE COURT: You understand that it's the job of the
7 jury to decide, based upon the evidence that's presented, what
8 the facts are?

9 PROSPECTIVE JUROR NO. 101: Yes, sir.

10 THE COURT: And it's my job to decide what the law
11 is?

12 PROSPECTIVE JUROR NO. 101: Yes, sir.

13 THE COURT: And we're a team. We do our respective
14 jobs, and then you listen to the evidence and the instructions
15 on the law, apply the evidence to those instructions, and
16 reach a fair verdict. Do you think you can do that?

17 PROSPECTIVE JUROR NO. 101: Yes, sir.

18 THE COURT: If -- you understand the presumption of
19 innocence?

20 PROSPECTIVE JUROR NO. 101: Yes, sir.

21 THE COURT: And you understand that the defendants
22 don't have to prove they're not guilty; it's up the State to
23 prove that they are guilty?

24 PROSPECTIVE JUROR NO. 101: Yes, sir.

25 THE COURT: And they have to do that by evidence

1 beyond a reasonable doubt; do you have any quarrel with that
2 process?

3 PROSPECTIVE JUROR NO. 101: No, I have no problem
4 with that, sir.

5 THE COURT: If you were one of the parties in this
6 case, either the prosecution or the defense, would you want
7 citizens like yourself in your frame of mind sitting --

8 PROSPECTIVE JUROR NO. 101: Yes, sir.

9 THE COURT: -- in judgment of the case?

10 PROSPECTIVE JUROR NO. 101: Yes, sir.

11 THE COURT: Any reason you couldn't be fair to both
12 sides?

13 PROSPECTIVE JUROR NO. 101: No, sir.

14 THE COURT: Mr. DiGiacomo?

15 MR. DiGIACOMO: How are you, sir?

16 PROSPECTIVE JUROR NO. 101: Good, sir. How are you?

17 MR. DiGIACOMO: Good. I'm going to jump into your
18 questionnaire, because there was a question about the criminal
19 justice system.

20 PROSPECTIVE JUROR NO. 101: Yes, sir.

21 MR. DiGIACOMO: And your response was it was
22 favorable to the wealthy and the famous class. And that's
23 something jurors here say a lot. Can you tell me why it is
24 your formed that opinion?

25 PROSPECTIVE JUROR NO. 101: It seems like every time

1 I'd see something on TV, you know, if it was someone that was
2 either a lower, like -- like I grew up with a lower income or
3 a medium lower -- or a medium lower incomes, or medium income,
4 it seemed like they're -- if they got convicted or something
5 of that, of whatever crime, it seemed like their punishment
6 was a lot more harsh than somebody, say, a sports star or a
7 millionaire that did the same thing. It seemed like they
8 would just get a slap on the wrist and told not to do it again
9 and some public community service and that was it. Whereas
10 the other person would have to go to jail for a certain period
11 of time and they'd be on parole for a certain time.

12 MR. DiGIACOMO: You would agree with me, I'm -- I'm
13 guessing that that doesn't seem like a very fair way to -- to
14 handle the justice system?

15 PROSPECTIVE JUROR NO. 101: No.

16 MR. DiGIACOMO: I'm assuming you would also accept
17 that, you know, the justice system is made up of people, and
18 while it may be flawed, is the only system we have --

19 PROSPECTIVE JUROR NO. 101: Yes, sir.

20 MR. DiGIACOMO: -- you do know that? Do you agree
21 with the idea that, at least as a juror, the notion about
22 whether people are wealthy or not wealthy, ultimately, end of
23 the day, it's about what happened, did the State meet the
24 burden, then ultimately what the punishment should be; would
25 you agree with that statement?