IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE MONAY-PINA,

Appellant,

v.
STATE OF NEVADA,

Respondent.

Docket No. 84321

Electronically Filed
Jul 01 2022 12:55 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX VOL. III

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ADAM LAXALT MONIQUE MCNEILL

STEVEN WOLFSON

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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By:____/S/ Monique McNeill _____
MONIQUE MCNEILL
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1 presumptive test. It gives us a good indication that, yes,
2 that item possibly has blood on it. It does not say, yes,
3 that item does have human blood, but it does give us an
4 indication. And the reason why it's called presumptive is
5 because other things in the world can also react positive and
6 give us a positive test.
7 Q And will you do a presumptive test for every piece
8 of evidence you ever examine?
9 A It's case dependent and evidence dependent. So if I
10 have an item of evidence that, say, has a red-brown stain
11 indicative of possible blood, I would do a presumptive test
12 for possible blood. If I had an item of evidence that they --
13 like a T-shirt or something, and they wanted to see who
14 possibly wore it, I wouldn't do a presumptive test, because at
15 that point, I'm just swabbing the areas that would touch the
16 body.
17 Q Okay. So if you have some indication that maybe
18 there's blood, that would be something that would kind of lead
19 you to do that presumptive test; is that kind of what you're
20 indicating?
21 A Yes. That is correct.
22 Q Once you complete your analysis, what do you do with
23 those results?
24 A Once I get my data, I will go through and make any
25 interpretations on the actual crime scene evidence. For items

of evidence where I can make an interpretation, I will then compare to any known reference standards.

Q And once you've done that and come to your conclusion on whether or not the DNA matches, what will you do with that information?

A If somebody is included as a contributor to a profile, I then will run statistics to give a statistical weight to that inclusion.

Q And so after you've compiled sort of all this data is it -- do you put it in some type of report?

A Yes. So I generate report once my case file is complete. I made all my comparisons, all my interpretations, done any statistics. I will finalize my case file and generate a DNA report.

Q And what type of information -- other than the results, what type of information will be found at the top of those reports?

A The top of the report will have the -- once the case is completed -- will have the distribution date, so the day the report was finalized. It will have the event number. It will also have our internal lab number, the requester who submitted the original DNA request, and then it will also the type of case.

Q You mentioned an event number, can you explain what that is?

1 A An event number is assigned by LVMPD when the event
2 actually occurs. It's going to be the year, the date, and
3 then basically sequential order of when that call came in to
4 dispatch.
5 Q So each call will have its own unique number?
6 A That is correct. Yes.
7 Q And that's called an event number?
8 A Yes.
9 Q Okay. And typically, is all the evidence kept under
10 the same event number? Is that kind of how you organize
11 things?
12 A Typically, yes. If it's not, then we'll make a note
13 that that item of evidence was booked under a different event
14 number.
15 Q And were you asked to do a comparison, or were you
16 assigned to do a comparison in a case with the event number
17 160112-0494?
18 A I was. Yes.
19 Q And did you end up preparing a report in that case?
20 A I did. Yes.
21 MR. SCHWARTZ: Okay. And if -- Your Honor, if I could
22 approach?
23 THE COURT: Go ahead.
24 BY MR. SCHWARTZ:
25 Q I'm showing you what's been marked as State's

1 proposed Exhibit 110. Take a look at that.
2 A Oh, sorry.
3 Q Thank you. Do you recognize that?
4 A I do. Yes.
5 Q And what is that?
6 A That is the report for the event number you just
7 mentioned.
8 MR. SCHWARTZ: And, Your Honor, at this time, the State
9 would move to admit State's proposed Exhibit 110. I believe
10 it's been stipulated to.
11 MR. GILL: That's correct, Your Honor.
12 THE COURT: 110 will --
13 MR. BOLEY: Correct.
14 THE COURT: -- be admitted.
15 [Plaintiff's Exhibit 110 Received]
16 BY MR. SCHWARTZ:
17 Q And if you could just kind of give me a general
18 overview of the different -- kind of like the tasks you had in
19 this case?
20 A From this case, I was asked to look at various items
21 of evidence. Some of those items of evidence were swabs
22 collected at the scene by a crime scene analyst, and some of
23 the items of evidence were the actual evidence itself that I
24 did my own testing and swabbing on.
25 Q And let's talk about that. When you say swabs,

1 whether it's a swab that's collected at the scene or a swab
2 conducted by yourself, what does that really mean?
3 A So we take what's, essentially, a cotton-tip swab.
4 It's a little wooden stick with a cotton on the end, very
5 similar to like the cotton people use at home to clean their
6 ears. So there's a little cotton ball on the end, and we'll
7 use that. We'll put a few drops of sterilized water, and
8 we'll take our swabbing from an item of evidence. And that's
9 just to help collect DNA -- possible DNA from that item, so
10 that we can do our analysis.
11 Q A fancy Q-tip?
12 A Yes.
13 Q Okay. Is there also something that's referred to,
14 in your report or in general, as a reference standard?
15 A Yes.
16 Q And can you generally explain what that is?
17 A A reference standard or -- I mentioned earlier --
18 like a known standard is just a sample from a known person.
19 So we call them buccal swabs, the samples taken from the
20 inside of someone's cheek, buccal cells, so those end up
21 becoming buccal swabs. And we just know that that sample came
22 from this particular person, and that's why it's called a
23 reference standard.
24 Q Okay. And reference standard meaning you know whose
25 sample that is?

1 A Yes.
2 Q And you will use that to compare it to a swab that
3 you take or a swab that's given to you from a particular piece
4 of evidence to see if there's a match?
5 A That is correct.
6 Q Okay. In particular, let's take a look at your
7 report here. I'll just kind of do the top part where we
8 indicated that there was -- primary case number, is that going
9 to be the event number that you described earlier?
10 A That is correct. Yes.
11 Q And for the record, I'm showing State's Exhibit 110.
12 You mentioned there's also a lab case number?
13 A Yes.
14 Q Is that something that the lab assigns to each case
15 when it receives a request for processing?
16 A Yes. That's the internal lab number.
17 Q And then we'll see a little bit lower here. The
18 next sort of section is a little chart, if you will. What is
19 generally found within this chart?
20 A So on this report chart or table, the left two
21 columns are going be the -- I'm sorry. The left most column
22 is going to be our internal lab number designation. So each
23 item, when we get a request that in -- our internal tracking
24 system, that assigns that unique lab number that he just
25 showed you, also assigns unique item numbers to each item of

1 evidence. So that left most column is our internal,
2 basically, assignment of evidence.
3 The next two columns, that say impound package number and
4 impound item number, those are going to correspond to what the
5 crime scene analyst designated that item in the field. So you
6 have 8427. It's going to be the person's personnel number,
7 who collected it. It's going to be package 5 at the scene,
8 and then the item numbers that they collected it under.
9 Q And you're indicating to this first impound package
10 number, here?
11 A Yes. That is correct.
12 Q 8427 would be the personnel or P number of the
13 officer that impounded the items?
14 A That's correct. Yes.
15 Q And I believe you mentioned that the 5 would be the
16 package number that they impounded along with the number of
17 the item -- each item?
18 A That is correct. Yes.
19 Q And then continuing on to the right, that's a going
20 to be a description of what's in each of those packages or
21 numbers?
22 A Yes. So the description will be a basic
23 description, and then the last column to the far right is
24 going to be examination summary. So if I did any testing for
25 biological fluids, that would be noted there as a quick

1 reference point.
2 Q And that would be the presumptive test that you
3 mentioned earlier?
4 A That is correct. Yes.
5 Q So for example, this very first item, the lab gave
6 it item number 5?
7 A Yes.
8 Q It was from this package number and this officer
9 number?
10 A Yes.
11 Q It was this impound number when it -- the officer
12 impounded it under that number, and then this would be the
13 description of what's in that package number?
14 A That is correct. Yes.
15 Q Okay. And then as we go through each of these items
16 below the list, is this where we would find your different
17 conclusions on page -- bottom of page 1, 2, and the top of
18 page 3?
19 A That is correct.
20 Q So for each lab item number, which again is the
21 number that the lab assigns to a piece of evidence, you will
22 have a conclusion there?
23 A Unless it's stated no further testing at this time,
24 or reference standards will not have a conclusion. But yes,
25 every piece of crime scene evidence will have a conclusion

1 otherwise.
2 Q Understood. Okay. So let's go through just sort of
3 in order of this different lab item numbers that you tested
4 and the results of those. So if we're looking at lab item 5,
5 and that, the description provides us, is a swab from the
6 Beretta 90TWO, six millimeter. What were the results? What
7 did you compare to that swab?
8 A In this instance, I did not do any comparisons,
9 because a DNA profile was not obtained from that swab.
10 Q And what does that mean?
11 A When I say a DNA profile was not obtained, that
12 means, when I'm looking at the data, there was just nothing
13 there to make any comparisons to.
14 Q So you would look at the swab that was given to
15 you --
16 A Um-hum.
17 Q -- and determine whether there was enough data in
18 that swab to compare it to something else like a reference
19 standard?
20 A Correct. So looking at my data -- when I say my
21 data, it's basically a graphical representation of our DNA
22 profile. We have a bottom limit, and if nothing basically
23 pops, if there's no peak above that bottom limit for any of
24 our locations, then there's no DNA profile in that sample that
25 I obtained.

1 Q Is there a number of -- I'm not sure what you call
2 it -- but a number of profiles you look at, like there's
3 sixteen profiles or however it's described?
4 A When looking at an individual profile by itself, I'm
5 actually looking at sixteen different locations to determine
6 if there's DNA present. If there was DNA present, I'd be
7 making comparisons at those locations.
8 Q And I believe you described it, but if there's not
9 enough data, enough of those sixteen profiles present, then
10 you can't even do a comparison; is that fair to say?
11 A Correct. If there's not any data at those sixteen
12 locations that kind of pop above that bottom threshold, I
13 can't do anything with that. There's no DNA present.
14 Q And what would be an explanation for why a profile
15 wasn't able to be obtained on the swab?
16 A It, perhaps, could have been very limited to begin
17 with on the item of evidence. It's all dependent on where you
18 swab an item of evidence, how the evidence was handled, cared
19 for, the environment it was in. There's many reasons as to
20 why you would not obtain a DNA profile.
21 Q There might not be any DNA on the spot that was
22 swabbed?
23 A That is one possibility. Yes.
24 Q And is that going to be the same result that we have
25 with lab item 6, which would have been the swab from the

1 airsoft magazine from that same Beretta?
2 A That is correct. A DNA profile was not obtained.
3 Q And looking at lab item 7, which was a swab from
4 the -- in the description, is a swab from the broken DX17 BB
5 gun. And you can't see it on the screen. I'll put it up
6 there for you. Do you recall what the results of that
7 comparison were?
8 A So for this results, there was a partial DNA
9 profile. There was at least one male contributor, but due to
10 the limited data, I cannot make any conclusions.
11 Q So there was enough of a profile to determine male
12 versus female?
13 A Correct. There was at least one male contributor
14 within that profile.
15 Q And when you say at least one, you can't -- why do
16 say at least one, I guess?
17 A Just that there's an indication there's a male, but
18 I -- because the profile is limited and partial, I just -- I
19 can't determine how many, if there's possibly more than one
20 male. It's just a partial profile. It's very limited.
21 Q And before we go on to the next page, the three --
22 were you given three reference standards in this case?
23 A I was. Yes.
24 Q Okay. And who were those reference standards for?
25 A They were from Casimiro Venegas, Javier Colon, and

1 Jose Monay-Pina. I'm sorry if I mispronounced those.
2 Q It's okay. That's good. And those would be the
3 reference standards that you -- if you can, you would compare
4 that to a swab or whatever profile you have?
5 A Correct.
6 Q Okay. So let's move on to lab item number 8, and
7 that was going to be a swab -- lab item 8 was a swab of
8 apparent blood from the broken DX17 BB gun, and that would
9 have been provided -- was that provided to you by the officer,
10 as well?
11 A Yes. In this case, the person collecting evidence
12 already did the swabbing for me.
13 Q And so you would take that swab of apparent blood
14 from the DX17 BB gun, compare it to the three reference
15 standards you had to see if you could make a comparison?
16 A That is correct.
17 Q And in this case, were you able to?
18 A In this case, I was able to make comparisons for
19 this sample.
20 Q And what were the results of that comparison?
21 A So for this sample, the profile as a whole was
22 consistent with a mixture of at least two individuals. At
23 least one of those individuals was a male.
24 Q Let me stop you right there. For each of these
25 comparisons, if you can make a comparison with the profile,

1 will you always give if it -- if the data shows, will you
2 always give sort of a multiple people, male versus female?
3 That how you do it, how you have in this one?
4 A Yes. In our conclusion -- so in the report
5 paragraphs for each sample that was submitted, we will
6 distinguish if it's a -- basically, a single source profile,
7 so it came from just one individual, versus a mixture profile,
8 meaning I can tell that it came from more than one individual.
9 And then if we can tell it's a mixture profile, we will
10 usually try and give how many people are possibly present in
11 that mixture DNA profile.
12 So in this case, because I'm saying that there was a
13 mixture of at least two individuals, I can tell based on the
14 data that there's more than one person present on this
15 profile. And there is at least one male present, as well.
16 Q Were you able to -- what was the remainder of your
17 conclusions with regard to this item?
18 A So for the rest of the conclusions for this item,
19 there was a major DNA profile that was consistent with Javier
20 Colon. When I say major profile, that means that, looking at
21 my data, there is a distinct profile that is sitting --
22 resting higher, or their peaks are a lot higher on that
23 graphical representation than the rest of the data. So I can
24 pull out that profile by itself and say this profile is the
25 major component of this mixture and make comparisons to that

1 major profile by itself. So that's what I did for this
2 sample. So --
3 Q Were you --
4 A I'm sorry.
5 Q Go ahead.
6 A So in this case, I was able to make comparisons on
7 that major profile.
8 Q And were you able to make any conclusions with
9 regard to the other two reference standards that you had for
10 Casimiro Venegas and Jose Monay-Pina?
11 A They were both excluded as contributors to that
12 major profile.
13 Q And when you do these comparisons, are you able to
14 generate some type of statistic with regard to that major
15 profile?
16 A Yes. So because I did include someone or say
17 someone was consistent with a part of this profile, I have to
18 give a statistical weight. And in this case, the probability,
19 of randomly selecting an unrelated individual from a general
20 population having a DNA profile consistent with that major DNA
21 profile from the evidence sample, is going to be approximately
22 1 in 784 quadrillion.
23 Q So 784 quadrillion -- it's not a number we use too
24 often. What -- can you explain that in sort of -- for
25 example, the population of the world?

1 A The population of the world, to my knowledge, is
2 approximately seven -- seven and a half billion people right
3 now.
4 Q Seven and a half billion?
5 A Billion with a --
6 Q Okay.
7 A -- B, as in boy.
8 Q And so if you were to take that seven to seven and a
9 half billion and compare it to 784 quadrillion, what would
10 that be?
11 A Just to give you an idea of the size of the number,
12 just the quadrillion number itself, that's going to be
13 approximately one million worlds.
14 Q One million --
15 A Earths. Excuse me.
16 Q On one million worlds of seven billion people?
17 A Yeah, seven and a half billion. Yeah.
18 Q Seven and a half billion. Okay. Did you do a
19 presumptive test on this swab, as well?
20 A I believe I did, if you were to go back to the front
21 page.
22 Q Okay. And that would be contained on the front
23 page?
24 A That is correct. Yes.
25 Q Okay. And we were looking at lab item number 8

1 there?
2 A Yes.
3 Q Okay. What was the result of the presumptive test?
4 A That would be positive presumptive for blood.
5 Q The next item that you tested would be lab item
6 number 9, which was the swab obtained from the Daisy Powerline
7 BB gun?
8 A Yes.
9 Q What were the results of that?
10 A A DNA profile was not obtained.
11 Q So again, there wasn't enough data to even have a
12 profile?
13 A Correct.
14 Q Lab item number 10 was a swab from the pair of red
15 and black work gloves. And what was the result of that
16 comparison?
17 A So for this item, it was consistent with a mixture
18 of at least three individuals. At least one of those
19 individuals was a male. However, due to the limited data, no
20 conclusions could be made.
21 Q And lab item 2.1 was the swabbing of the inside of a
22 black knit glove. So again, we did the red/black gloves just
23 prior, and this is the black knit glove. What was the result
24 of that?
25 A So for this, a DNA profile was obtained that was

1 consistent with a mixture of at least four individuals. At
2 least one of those individuals was male. However, due to the
3 complexity of the data, I could not make conclusions.
4 Q So this is a little different than the last one, as
5 far as the last one was limited data. This one is complexity.
6 What's the difference?
7 A So when I say limited, it means there just isn't
8 much there, or the data that is there is very limited. I
9 really can't make conclusions, because I'm not sure if all the
10 data is present. When I say complex, I'm saying there is a
11 lot of data present, but there's so much data that I really
12 cannot make conclusions, either.
13 Q Lab item 3.1 would be a swabbing of the inside of
14 the black knit hat. What would the conclusions with regards
15 to your testing of that versus the reference standards?
16 A So for item 3.1, it was consistent with a mixture.
17 At least one of those individuals was male. For this item,
18 I'm assuming there's a mixture of three contributors, and
19 there are going to be two major contributors present, as well,
20 at least one trace contributor.
21 Q Is that something you can say based on the data
22 you're looking at?
23 A Yes. So looking at the data, I can say that there's
24 three people present. And when I mentioned earlier that major
25 contributor is usually going to be up here compared to

1 everything else, in this case, I could tell there's actually
2 two people that were contributing more DNA than the bottom
3 person. So I could say there's a major -- we call it a major
4 mixture component in this profile or in this item. Excuse me.
5 Q And what was the results of the remainder of your
6 comparison?
7 A So for this one, the major mixture DNA profile
8 obtained was consistent with originating from the known DNA
9 profile of Casimiro Venegas and an unknown individual.
10 Q Okay. So one of the reference standards, Casimiro
11 Venegas, matched with one of the major mixture -- major DNA
12 profiles?
13 A Yes. They were consistent. Yes.
14 Q They were consistent. Thank you.
15 A Yeah.
16 Q And were you able to make any conclusions with
17 regard to the other two reference standards of Javier Colon
18 and Jose Monay-Pina?
19 A They were both excluded as being contributors to
20 that major mixture component.
21 Q And again, is there a statistic associated with the
22 comparison -- the fact that Casimiro Venegas' profile was
23 consistent with this item's profile?
24 A Yes. So the probability of observing the major
25 mixture DNA profile is 235 billion times more likely if it

1 originated from Casimiro Venegas and one unknown individual
2 than if it originated from two unrelated individuals randomly
3 selected from the general population.
4 Q So again, this statistic is a little bit different
5 from the last one --
6 A Yes. It is.
7 Q -- in the sense that you -- and can you explain sort
8 of why this statistic comes up as opposed to the one in
9 number?
10 A This stasti -- excuse me. This statistic is
11 different, because I'm doing it on the mixture, itself.
12 Whereas before, I had a single profile I pulled out, just that
13 major single profile. So this one I'm actually comparing two
14 different scenarios or two different hypothesis.
15 Q And lab item 4.1 was a swab of the inside of a blue
16 knit ski mask. And what were the results of your comparison
17 with regard to that lab item?
18 A So this was consistent with a mixture. At least one
19 of those individuals was male. In this instance, I'm assuming
20 the mixture originated from four contributors. There are
21 going to be two major contributors, as well as at least two
22 trace contributors. So the very same situation as the
23 previous item, where I've got two people that have got their
24 DNA -- they're contributing more DNA, and two people that
25 are -- they don't have much DNA presence. So -- sorry.

1 Q Oh, no. That's okay. So you have the two major
2 DNAs. Were you able to make a comparison between that and the
3 reference standards?
4 A Yes. So that major mixture was consistent with
5 originating from the known DNA profile of Jose Monay-Pina and
6 an unknown individual.
7 Q And were you able to exclude -- what were your
8 conclusions with regard to the other two reference standards?
9 A Both Casimiro Venegas and Javier Colon were excluded
10 from that major mixture profile.
11 Q And what does it mean when it's a partial major
12 mixture?
13 A It just means that I could not do statistics or
14 comparisons at every location.
15 Q Okay. But you were able to give us another sort of
16 probability factor like the last lab item with regard to this
17 one?
18 A Yes. A statistic was generated for this profile, as
19 well.
20 Q And what was that?
21 A The probability of observing the partial major
22 mixture is 298 million times more likely if the mixture
23 originated from Jose Monay-Pina and an unknown individual than
24 if it originated from two unrelated individuals randomly
25 selected from the general population.

1 Q In the last two, these two -- this item and the last
2 one we talked about there's been a comparison done with regard
3 to a reference standard and an unknown individual. You're
4 unable to give us any conclusions about the unknown
5 individual; is that correct?
6 A Correct.
7 Q As far as the reference standards, what you're
8 doing?
9 A Correct. Because I only had the three reference
10 standards submitted, so I do not know who that second
11 contributor is for those major mixture profiles.
12 Q You just can say who it's not?
13 A Correct.
14 Q And moving on to lab item 11.1, that was a swab of
15 the -- I'm sorry. 11.1 was a swab of the handle of the axe.
16 Were you able to come to any conclusions with regard to that
17 item?
18 A Yes. This sample or item was consistent with a
19 mixture of at least three individuals. At least one of those
20 was male. The major DNA profile was consistent with Javier
21 Colon.
22 Q And were you able to make any conclusions with
23 regard to the reference standards of Mr. Venegas and Mr.
24 Monay-Pina?
25 A They were both excluded as being contributors to

1 that major profile.
2 Q And again, the same statistic from the first
3 statistic we talked about, the 1 in 784 quadrillion?
4 A That is the same statistic. Yes.
5 Q Moving on to lab item 11.2, and that was a staining
6 on the blade of the axe. What were you able to determine from
7 that item?
8 A So for this item, there was a full DNA profile
9 obtained, consistent with Javier Colon. So in this instance,
10 it was a single source profile. So only one contributor.
11 Q So there's no mixture of people like we saw in the
12 prior ones? This is a single source DNA profile you were able
13 to obtain?
14 A That is correct. Yes.
15 Q And you said it was consistent with Javier Colon?
16 A Yes.
17 Q And if it's a single source, was that mean you're
18 able to exclude the other reference standards?
19 A They were both excluded. Yes.
20 Q Can you everyone else was exclude -- anyone else
21 would be excluded if it's a single source like that?
22 A Without making comparisons, I can't. No.
23 Q And again that same number, 1 in 784 quadrillion
24 which I think you said 1 million worlds or earths?
25 A Yes. Just to give an idea of how big the number

1 itself is.
2 Q That quadrillion number?
3 A Yes.
4 Q And with regard to that last item, did you also --
5 and so that was lab item 11.2 we just looked at. Were you
6 able to come to any conclusions as far as a presumptive test
7 on that?
8 A For item 11.2, it was presumptive for blood.
9 Q Okay. And it looks like you did two other tests
10 that we kind of skipped over here. Lab item 4.2, there was
11 staining on the outer head portion of a -- of the blue knit
12 ski mask?
13 A Correct.
14 Q That was negative for -- negative presumptive blood?
15 A That was correct. Yes.
16 Q And that would be the same for lab item 10, a swab
17 from the red pair of work gloves?
18 A Yes.
19 Q Was that the conclusion -- was that all of the items
20 that you looked at in regards to this case?
21 A It is. Yes.
22 MR. SCHWARTZ: Court's indulgence. Your Honor, at this
23 time, we'll pass the witness.
24 THE COURT: Mr. Gill?
25 MR. GILL: Thank you, Your Honor.

1 Ms. Dannenberger, I'm going to be fairly brief.
2 And, Your Honor, do you -- would it be all right if
3 the witness referenced her report for my questions?
4 THE COURT: That's fine.
5 MR. GILL: If I can approach?
6 CROSS-EXAMINATION
7 BY MR. GILL:
8 Q I know that often times you guys don't like to
9 summarize, and if I'm being too simplistic, please let me
10 know. But I did make some notes as you were testifying, and I
11 want to just kind of go through the items that you tested and
12 kind of break down results.
13 A Okay.
14 Q If I'm being too simplistic, please stop me. So and
15 I'm just going to go right in order, starting with item 5 --
16 A Okay.
17 Q -- the Beretta 90TWO, correct?
18 A Yes.
19 Q And there was no DNA profile obtained from that,
20 correct? From item 5?
21 A That is correct.
22 Q 6 is more specifically the magazine of that gun.
23 Same thing, no DNA profile obtained?
24 A That is correct.
25 Q DX17 is item 7 and 8, and that's the broken gun. On

1 item 7, at least one male contributor but that was about all
2 we could determine, correct?
3 A That is correct. Yes.
4 Q And then on 8, there was a partial profile and it
5 belonged to Javier Colon, correct?
6 A The major component. Yes.
7 Q Okay. So the major component you could determine,
8 and I'm not going over all those numbers, but Javier Colon,
9 correct?
10 A That is correct. Yes.
11 Q And then we've got Daisy Powerline which is the
12 third BB gun. No DNA profile obtained; is that fair?
13 A Yes.
14 Q And then 10, red and black gloves, three people, one
15 male but that's about it; is that fair?
16 A Yes.
17 Q Black knit gloves, and then, again, 2.1 is the item
18 number. That's the inside of them. Four people, one male,
19 fair?
20 A Yes.
21 Q Black knit hat, at least one male, and that's 3.1.
22 At least on male and that was determined to be Casimiro
23 Venegas by some standard, correct?
24 A He was -- yes.
25 Q And again, the numbers are there, and the jury can

1 reference those. But at least one male, Casimiro being a
2 major contributor, correct?
3 A Yes.
4 Q Blue ski mask, at least one male with Jose being
5 that -- Jose Monay-Pina being the major contributor?
6 A Yes. One of them. Yes.
7 Q Okay. And could you determine any others?
8 A At this time, I could not. No.
9 Q Okay. Were you able to exclude, on that, any others
10 that you compared? Meaning Javier Colon and Casimiro Venegas
11 on that one?
12 A Yes. For 4.1, yes.
13 Q Again, blue ski mask, 4.1?
14 A Yes.
15 Q Same -- similar with the axe handle, 11.1, the
16 handle itself, at least one male with Jose Monay-Pina being
17 the major, excluding Javier Colon and Casimiro Venegas,
18 correct?
19 A I'm sorry. For which item was that?
20 Q That's 11.1, the handle of the axe.
21 A 11.1, the major was Javier Colon.
22 Q Okay. Javier Colon. I misspoke.
23 A Yes.
24 Q Javier Colon, major, and excluding Casimiro and
25 Jose, correct?

1 A Correct. Yes.
2 Q And same with the axe blade, correct? 11.2?
3 A 11.2? Yes. That single source profile was
4 consistent with Javier Colon. Yes.
5 Q So essentially, on the axe handle and blade, where
6 you tested, you found Javier Colon's DNA in, essentially, two
7 spots, correct?
8 A Yes.
9 Q And were able to exclude Casimiro Venegas and Jose
10 Monay-Pina?
11 A That is correct. Yes.
12 MR. GILL: Court's brief indulgence. And if I can
13 approach and just retrieve that, Your Honor?
14 THE COURT: That's fine.
15 MR. GILL: Pass the witness, Your Honor. Thank you.
16 THE COURT: Mr. Boley?
17 MR. BOLEY: I think Mr. Gill covered it. No further
18 questions.
19 THE COURT: Anything from the State?
20 MR. SCHWARTZ: Just a couple things, Your Honor.
21 REDIRECT EXAMINATION
22 BY MR. SCHWARTZ:
23 Q We talked about some items that you weren't able to
24 get a DNA profile from. Can you explain a little bit about
25 how DNA is transferred?

1 A To an item, itself?
2 Q Yes.
3 A DNA could be, basically, transferred to an item. I
4 mean, if you bleed on it, your blood can transfer to it. If
5 you spit on it, sneeze on it, you could get saliva transfer.
6 When you handle an item of evidence, it's possible that you're
7 transferring your skin cells -- touch evidence -- to that
8 item, as well. So there are many avenues as to how DNA could
9 be transferred to an item of evidence.
10 Q And when you handle -- if you -- do you handle the
11 evidence at times?
12 A I do look at the item of evidence in the lab. So if
13 I get like an actual -- like the ski mask or the actual item
14 of evidence itself, I do have to handle it to do my testing,
15 but I'm also wearing gloves, a facemask, a lab coat to prevent
16 contamination.
17 Q Okay. So those items, that you would wear, would
18 prevent your DNA from being put onto the item you're looking
19 at?
20 A Yes.
21 Q Also different surfaces could be better suited for
22 DNA transfer; is that fair to say?
23 A That is fair to say. Usually, if you have a surface
24 where there's more indentions or grooved area, a rough
25 surface, because it's roughed -- rough, it could be getting

1 more DNA off of your hand if you're touching it, versus -- a
2 smooth surface might not get as much DNA. There's a lot of
3 possibilities as to how much could or could not be
4 transferred.
5 Q It's hard to tell unless you actually test it, I
6 guess, right?
7 A This is -- yeah. That is correct.
8 MR. SCHWARTZ: Nothing further, Your Honor.
9 MR. GILL: No, Your Honor. Nothing on that.
10 THE COURT: Mr. Boley?
11 MR. BOLEY: Just one. Just one question.
12 RECROSS-EXAMINATION
13 BY MR. BOLEY:
14 Q Just a follow up on what Mr. Schwartz was talking
15 about. If you have a DNA profile from an item that has
16 multiple contributors and one is a major contributor, is it
17 fair to say that that person had more contact with that item,
18 or is that inconclusive?
19 A I cannot tell you why their DNA is present more, why
20 they're the major contributor, looking at the data. So I
21 don't know if they handled it more, if they touched it last.
22 I cannot give you that information.
23 Q So for instance, I believe there was one item, that
24 was talked about, that had four male contributors. There's no
25 way to know how or which one of those people had more contact

1 with that item?
2 A Based on my testing, no.
3 MR. BOLEY: Thank you.
4 THE COURT: All right. Any questions from the jury?
5 Counsel approach.
6 [Bench Conference Begins]
7 THE COURT: [Indiscernible].
8 MR. SCHWARTZ: What would give a false positive in a
9 presumptive test?
10 MS. HOLTHUS: I was going to ask that.
11 THE COURT: It's a good question.
12 MS. HOLTHUS: It's a real good question.
13 THE COURT: That guy's smart.
14 MR. GILL: Just a great question -- sorry.
15 MR. SCHWARTZ: Thank you.
16 THE COURT: And your guys are not testifying?
17 MR. GILL: They are not.
18 THE COURT: Okay.
19 MR. GILL: Unless he surprises me.
20 THE COURT: That's fine.
21 MR. GILL: I don't anticipate that.
22 [Bench Conference Ends]
23 THE COURT: All right. Ma'am, I'm going to ask you a
24 question. I'm going to ask you to look at the jury when you
25 answer, so they can hear you. All right.

1 THE WITNESS: Okay.
2 THE COURT: What would give a false positive in a
3 presumptive test?
4 THE WITNESS: A false positive could be one of a few
5 vegetable peroxidases. So you can have like -- horseradish
6 could potentially give a false positive. Bleach has also been
7 shown to give a false positive. Rust has been shown, in the
8 literature, to give a false positive. So there are a couple
9 different items that could also give a false positive.
10 THE COURT: Any follow up from the State?
11 FURTHER REDIRECT EXAMINATION
12 BY MR. SCHWARTZ:
13 Q Would those items contain DNA on them or would -- do
14 you know?
15 A I don't know. I mean, in and of themselves, I would
16 not expect it, but if someone like sneeze on a pile of
17 horseradish, there could be a DNA profile from it.
18 MR. SCHWARTZ: Okay. Thank you.
19 THE WITNESS: Sorry.
20 MR. SCHWARTZ: No further questions.
21 THE COURT: Mr. Gill?
22 MR. GILL: No, Your Honor. Thank you.
23 THE COURT: Mr. Boley?
24 MR. BOLEY: No.
25 THE COURT: Thank you, ma'am. You are free to go.

1 State, please call your next witness.
2 MR. SCHWARTZ: Your Honor, at this time, the State has no
3 further witnesses. Assuming that our items 1 through 110 are
4 all admitted, then we would rest.
5 THE COURT: Everything's admitted?
6 MR. SCHWARTZ: Then we would rest at this time.
7 THE COURT: All right.
8 MR. GILL: We will rest, as well, Your Honor.
9 THE COURT: Mr. Boley?
10 MR. BOLEY: Yes. We rest, as well.
11 THE COURT: All right, folks. So we have gotten through
12 this a little quicker than we anticipated, which is good news.
13 We need a little bit of time to get through and get the jury
14 instructions ready for you, since we got through this a little
15 quicker than we anticipated. So we're going to take a extra-
16 long lunch, so that we can take of that. I'm going to ask you
17 to come back at 2:00, and then we'll read the jury
18 instructions and have closings.
19 So if you haven't been down to the new east part of
20 Fremont Street, there's some great funky little restaurants
21 and shops and stuff down there. Be a good time to check that
22 out. But I apologize for the long lunch, but I would rather
23 get this to you today. All right.
24 [Judge Admonishes Jury]
25 THE COURT: We'll see you back at 2.

1 THE MARSHAL: Please rise for the jury.
2 [Jury Exits]
3 THE COURT: All right. I'm going to go check and see how
4 this is coming. I'll be right back. Don't go anywhere.
5 [Pause]
6 THE COURT: We'll have those jury instructions in just a
7 second.
8 [Pause]
9 THE COURT: Okay. So we have 1 -- and if you would just,
10 if you have an objection, just let me know as you go. 1,
11 "it's my duty as Judge". 2, "if, in these instructions, any
12 rule, direction or idea".
13 3, "an Information is a formal method". So in this
14 instruction, what I did -- you'll see -- is, for each count, I
15 put "the Defendants did". I also took out -- I corrected Mr.
16 -- the spelling of Mr. Colon's name, so that it is correct. I
17 took out the AKA of Mr. Monay-Pina, because it was just really
18 a different spelling. So that seemed completely unnecessary
19 to read 50 times. I --
20 MR. SCHWARTZ: The only part that we need to correct,
21 Your Honor, is Count IV doesn't reflect the third amended
22 information. We added a couple words after the word
23 "robbery".
24 THE COURT: Okay. And then I also corrected the names of
25 the kids to Avina, A-V-I-N-A. And so what do you need to add

1 to IV? I don't have a -- I do have a copy. Never mind.
2 MR. SCHWARTZ: It would be --
3 THE COURT: All right. IV -- oh, okay. It should say
4 robbery and/or assault and/or battery and/or larceny?
5 MR. SCHWARTZ: That's correct, Your Honor.
6 THE COURT: Is it otherwise okay, the edits that I made?
7 MR. SCHWARTZ: Yes. Thank you for correcting the
8 spellings.
9 THE COURT: And Defense doesn't have an issue with any of
10 that?
11 MR. GILL: No, Your Honor.
12 MR. BOLEY: No, Your Honor.
13 THE COURT: Then I have 4 is "to constitute the crime
14 charged". 5, "Defendants are presumed innocent". 6 is "you
15 are here to determine the guilt or innocence". Are you all
16 right with that? I, actually, don't prefer that language,
17 just because it's really whether the Defendants are guilty or
18 not guilty, but --
19 MS. HOLTHUS: I don't why we haven't changed our stock,
20 because --
21 MR. SCHWARTZ: Determine whether the --
22 MR. GILL: I think it is somewhat duplicative of 5, Your
23 Honor. Essentially, repeating that you need to find him
24 guilty if -- you need to find beyond a reasonable doubt for
25 guilt.

1 THE COURT: No. It's actually the if it's somebody else.
2 MR. GILL: Okay.
3 THE COURT: But if you don't have any problem, my
4 preference is just to instruct -- I just don't like the way
5 the first sentence is worded, because it's --
6 MS. HOLTHUS: That's fine.
7 THE COURT: -- not really the function of the jury.
8 MR. BOLEY: So how would Your Honor --
9 THE COURT: You are here to determine whether the
10 Defendants are guilty or not guilty.
11 MR. GILL: Just remove?
12 MR. SCHWARTZ: From the --
13 MS. HOLTHUS: Instead of the "innocence" part, it's the
14 "not guilty" is basically the change.
15 MR. BOLEY: So guilty or not guilty.
16 MR. GILL: Oh.
17 THE COURT: Jurors just don't determine --
18 MR. GILL: Yep. Yep.
19 THE COURT: I mean, that's not their function.
20 MR. GILL: I got you.
21 MR. SCHWARTZ: Yeah. We're fine with that --
22 MR. GILL: So are we.
23 MR. SCHWARTZ: -- with that correction.
24 MR. GILL: Thank you, Your Honor.
25 THE COURT: And "the evidence you are to consider" with

1 the colon in line 4. In all the trials I've done, I've had
2 one lawyer, ever, submit that instruction with the correct
3 punctuation. One.
4 MR. GILL: Where are you looking, Your Honor? The colon?
5 THE COURT: Line 4. I fixed it.
6 MR. SCHWARTZ: She fixed it.
7 THE COURT: I fixed it already.
8 MR. GILL: Perfect.
9 THE COURT: I'm just trying to make Mr. Schwartz feel
10 better about this --
11 MR. SCHWARTZ: Thank you.
12 MR. BOLEY: Normally, it gets into the --
13 THE COURT: -- incorrect punctuation.
14 MR. BOLEY: -- District Attorney's forms, then it stays
15 that way for a long time.
16 MR. GILL: He'll have it fixed.
17 MS. HOLTHUS: I always put a comma there, myself.
18 MR. SCHWARTZ: Just don't tell my mom. She'll be
19 disappointed in me.
20 MS. HOLTHUS: Would a comma be incorrect?
21 THE COURT: Yes. It's a colon.
22 MS. HOLTHUS: Hm. I wasn't --
23 THE COURT: A dash would be all right.
24 MS. HOLTHUS: Oh, okay. I like dashes. I write with a
25 lot of dashes.

1 THE COURT: Yeah. A dash would be fine.
2 MS. HOLTHUS: Okay.
3 THE COURT: If you're not into colons, a dash would be
4 fine.
5 MS. HOLTHUS: I don't know that I've ever used one,
6 really.
7 THE COURT: Yeah. But the semicolon? Huh-uh. Because a
8 semicolon says it's a whole separate sentence that comes after
9 it, an independent clause like a whole separate sentence. But
10 "direct and circumstantial" is not --
11 MS. HOLTHUS: Not.
12 THE COURT: Not. All right. "Credibility and
13 believability", I just replaced this with a gender-neutral
14 instruction. That's 8. "Person who has special knowledge,
15 skill, experience", also replaced this with a gender-neutral
16 instruction. That's 9. 10, "it is your duty to give separate
17 personal consideration", 10. "In this case you must decide
18 separately whether each of the two is guilty or not guilty,
19 that's 11. 12, "unless otherwise indicated, each instruction
20 referred separately and individually to all". Can we say
21 "each defendant" instead of "all"?
22 MR. SCHWARTZ: Yes. It sounds better. Each defendant.
23 THE COURT: "Where two or more persons are accused",
24 that's 13. "Conspiracy is an agreement" is 14. "It is not
25 necessary in proving" is 15. "Each member is liable" is 16,

1 and that has the specific intent and the general crimes listed
2 out separately. That looks right to me. Is that --
3 MR. GILL: Yes, Your Honor.
4 THE COURT: Okay. And I just reordered these to put the
5 specific and general intent instruction -- I just moved it up
6 a couple --
7 MR. SCHWARTZ: All right.
8 THE COURT: -- from the drafts that I got, so it was
9 right after that instruction. "Specific intent is the intent
10 to accomplish", that's 17. Any statement -- "any evidence of
11 a statement made by one alleged conspirator" is 18. "A guilty
12 verdict must be unanimous" is 19. "A person who, by day or
13 night" is 20. "Larceny is defined as stealing" is 21.
14 "Assault is defined as unlawful attempting" is 22.
15 "Battery is defined as the willful and unlawful use of
16 force". Comma should be inside the quotation marks. Down
17 there on line 7, that comma needs to go inside the quotation
18 marks. We'll fix that.
19 24, "is not necessary that the State prove". 25,
20 "the intention with which entry was made is a question of
21 fact". 26, "consent to enter is not a defense". 27, "every
22 person who commits the crime of burglary". 28, "deadly weapon
23 means".
24 MR. GILL: Your Honor, if I may interrupt --
25 THE COURT: Yes.

1 MR. GILL: -- at this point? The reason Mr. Lexis is
2 here is I've requested the firearm instruction. I think it
3 would -- if Your Honor agrees -- go well as 29, right after
4 this deadly weapon definition.
5 MR. BOLEY: Very true.
6 THE COURT: Where?
7 MR. GILL: And I haven't --
8 [Counsel confer]
9 MR. GILL: And, Your Honor, if I could --
10 THE COURT: Sure.
11 [Counsel confer]
12 THE COURT: How is this different? All right. Ball
13 bearing -- all right. So this is going to go -- how is this
14 different than the definition of pneumatic gun?
15 MR. SCHWARTZ: I think it just kind of explains it a
16 little bit better, Your Honor. I don't --
17 THE COURT: Do you want to --
18 MR. SCHWARTZ: I didn't get to -- the main thing that I'd
19 like in there -- the main thing the new one has that the old
20 one doesn't is the gas or air expels the -- whether loaded and
21 unloaded, as well. Those are the different things.
22 THE COURT: Okay. So I'm going to add this right after
23 6, or am I replacing pneumatic gun? What am I doing with
24 this?
25 MR. SCHWARTZ: Can we approach and get that again, Your

1 Honor? Maybe just -- we're -- I'm sorry. We're not quite
2 ready with the firearm one yet, but we think we can amend the
3 one we handed you to include firearm.
4 Is that right, now?
5 MR. GILL: I think so, Your Honor.
6 THE COURT: Okay.
7 MR. SCHWARTZ: Okay. The new one we gave you says a
8 deadly weapon includes any device whether loaded or unloaded,
9 operable or inoperable, from which a metal projectile,
10 including any ball bearing or pellet, may be expelled by means
11 of spring, gas, or other force.
12 MR. GILL: Yes, so --
13 MR. SCHWARTZ: Is that --
14 MR. GILL: -- firearm is device from which a projectile
15 may be expelled by explosion or combustion.
16 MR. SCHWARTZ: Okay. So why don't we --
17 THE COURT: Alrighty.
18 MR. GILL: And that's not included in what we have yet,
19 correct?
20 MR. SCHWARTZ: Correct.
21 THE COURT: No.
22 MR. SCHWARTZ: Correct. So my suggestion, if you guys
23 are okay with it, would be to include this language --
24 THE COURT: Like do an instruction that says this and
25 then have the firearm?

1 MR. SCHWARTZ: Well, then I was just going to say a
2 separate one for the firearm --
3 MR. GILL: Yeah. That's --
4 MR. SCHWARTZ: -- that says a firearm is defined as --
5 MR. GILL: And then straight out.
6 MR. SCHWARTZ: -- a device from which a projectile --
7 combustion --
8 MR. GILL: Explosion.
9 MR. SCHWARTZ: We have it --
10 THE COURT: I mean, do you want like a 28[a] that has
11 this and that?
12 MR. GILL: Yeah. That's fine.
13 MR. SCHWARTZ: Sure.
14 THE COURT: A deadly weapon and firearm?
15 MR. SCHWARTZ: Yeah. Sure.
16 MR. GILL: That's fine.
17 THE COURT: So we have this instruction and then this
18 with that?
19 MR. SCHWARTZ: Yes.
20 MR. GILL: Yes.
21 MR. SCHWARTZ: That'd be great.
22 THE COURT: Does that make sense?
23 MR. SCHWARTZ: It does. That's good for me.
24 THE COURT: That was super unclear. Okay. You know what
25 I'm talking about though?

1 MR. SCHWARTZ: The way you said it makes sense to me.
2 MR. GILL: No. The way you said it. We leave that
3 alone.
4 THE COURT: We leave this alone --
5 MR. GILL: Add --
6 THE COURT: -- and then we'll make this -- I'm going to
7 make it 28[a] if you don't mind --
8 MR. GILL: Yeah.
9 THE COURT: -- so we don't have to mess with all of the
10 other numbers. But we'll have this --
11 MR. SCHWARTZ: We'll provide you with a --
12 THE COURT: -- and then we'll have a firearm. Do you
13 have just that language?
14 MR. GILL: What I'll do is highlight, Your Honor, and
15 then you can -- we can just type it straight from the
16 highlight.
17 THE COURT: Okay. Okay. So everybody's good with that?
18 So we'll have 28[a] as deadly weapon includes any device
19 whether loaded or unloaded, operable or inoperable, from which
20 a medical -- metallic projectile including any ball bearing or
21 pellet may be expelled by means of spring, gas, air, or other
22 force. That was so hard to read. And then we'll have the
23 definition of firearm following that, and that will be 28[a].
24 Are you okay with that, Ms. Holthus? You're making
25 a face.

1 MS. HOLTHUS: Yeah. No. I'm -- no. I'm thinking. No.
2 I'm okay with that.
3 THE COURT: Okay. You guys want me to wait a second?
4 Are you --
5 MR. GILL: Sorry, Your Honor. Please.
6 THE COURT: All right. Okay.
7 MR. GILL: I just want to get this question. I really
8 apologize.
9 THE COURT: No.
10 [Counsel confer]
11 THE COURT: All right. Do you want me to boot up?
12 MR. SCHWARTZ: Sure. Yeah. Sure. It's --
13 MR. GILL: 202.253.
14 THE COURT: You know what? I can't get. I haven't been
15 able to pull up Westlaw since I moved up here, because I can't
16 remember my password. Let me try. Oh, no. That's not the
17 problem. My -- I have to fix my browser. Oh, here it is.
18 What's your -- what's the statute?
19 MR. SCHWARTZ: 202.253.
20 THE COURT: 202.253. Oh, it went away. 202.253.
21 "Firearm means any device designed to be used as a weapon from
22 which a projectile may be expelled through the barrel by" --
23 "force of any explosion or other form of combustion"?
24 MR. GILL: Yep.
25 THE COURT: Okay.

1 MR. GILL: Thank you.
2 [Counsel confer]
3 THE COURT: All right. I'm writing it right out of the
4 statute.
5 MR. SCHWARTZ: Thank you, Your Honor.
6 [Counsel confer]
7 THE COURT: All right. So we got that. Then I have 29.
8 Are we still like --
9 MR. SCHWARTZ: Can I --
10 THE COURT: -- kibitzing about firearms?
11 MR. SCHWARTZ: We are. We are.
12 THE COURT: All right.
13 MR. SCHWARTZ: Because it's just to, you know, cut into
14 our lunch a little more, but the only thing that I think
15 might -- as I'm looking at this case -- and I don't know if
16 the defense will have a position on it. The way that it's
17 been defined, up there with you, is that "deadly weapon is"
18 and then we have that language.
19 THE COURT: Uh-huh.
20 MR. SCHWARTZ: Propel by air, gas, et cetera.
21 THE COURT: Uh-huh.
22 MR. SCHWARTZ: In the case it refers to that as being a
23 firearm, as well, under the law. If you would like to look at
24 the case? I think maybe it would just be cleaner, then, to
25 say "a firearm --

1 THE COURT: No.
2 MR. SCHWARTZ: -- or deadly weapon includes" and then the
3 language that the --
4 THE COURT: Well, a deadly weapon is a firearm, but a
5 firearm is -- I mean --
6 MR. GILL: This is referencing a different statute.
7 MR. SCHWARTZ: Okay. The deadly weapon statute?
8 MR. GILL: 265. Yeah.
9 MR. SCHWARTZ: But they're referencing -- so if you see
10 it says, defining a firearm as any device from which a
11 metallic projectile including any ball bearing or pellet may
12 be expelled by means of spring, gas, air, or force. So I
13 think it's defining firearm including this definition that we
14 were just using as deadly weapon definition, pneumatic gun
15 definition, but it's including that in the firearm definition,
16 as well.
17 MR. BOLEY: And correct me if I'm wrong. That's what
18 Judge Johnson said when we had that battle in court?
19 MR. LEXIS: That's correct.
20 MS. HOLTHUS: It's a fairly important distinction,
21 arguably.
22 THE COURT: All right.
23 MR. LEXIS: Your Honor, in Judge Johnson's case, the
24 argument in that case was basically whether or not a pneumatic
25 gun, whether it's spring or gas combustion, is a deadly

1 weapon. This case --
2 THE COURT: Well, it is a deadly weapon, but it isn't a
3 firearm.
4 MR. SCHWARTZ: It's a firearm. That's the issue.
5 MR. LEXIS: That case, from the Nevada Supreme Court,
6 defines firearm as including pneumatic gun, spring, air, gas,
7 combustion, et cetera.
8 MR. GILL: That's not what it says, though. It doesn't
9 say pneumatic gun. It doesn't make it as clear as --
10 MR. SCHWARTZ: I agree. It doesn't say pneumatic gun,
11 but it does say what is the definition of pneumatic gun, as I
12 understand it.
13 THE COURT: Well, it's -- under the statute, it's a
14 deadly weapon, but deadly weapon covers many things.
15 MR. SCHWARTZ: Agreed. So really, it's -- a firearm is
16 what we're talking about?
17 THE COURT: Right. So I mean, a firearm is defined under
18 the statute as something that expels a pellet with combustion.
19 A BB or pellet gun would be a deadly weapon.
20 MR. GILL: Yes.
21 THE COURT: Yes?
22 MR. GILL: That's been conceded by us, Your Honor.
23 MR. LEXIS: That case -- this case also defines the
24 firearm portion of --
25 THE COURT: What case are you looking at there?

1 MR. LEXIS: Berry v. State. I don't have the cite.
2 MR. GILL: I do, Your Honor. 125 Nevada 265.
3 THE COURT: All right.
4 [Pause]
5 MR. GILL: You want some -- did Your Honor find it
6 already?
7 THE COURT: Yes. So under NRS 202.265, the statute in
8 question.
9 MS. HOLTHUS: I'm sorry. What statute is that, because I
10 don't know the number off my --
11 THE COURT: It was cited in the case. They were saying
12 you can't have on a school -- at a school, a explosive device,
13 a dirk, dagger, switchblade, nunchuck, or trefoil, blackjack,
14 billy club, pneumatic gun, pistol, revolver, or other firearm.
15 Let's see. They were looking at DC -- they've changed -- I
16 think they've changed the definition since that case, because
17 this doesn't match the case.
18 MR. SCHWARTZ: And I mean, I don't that it's a -- I think
19 it's just -- my understanding is that they're interpreting the
20 statute to include this kind of language, but that that
21 certainly is still -- I mean, that's the definition, and it's
22 been interpreted to include all type of -- because if it's
23 a -- I think it's the, you know, metallic projectile is kind
24 of why it is consistent with a firearm as opposed to a
25 plastic.

1 THE COURT: They're -- I think that this is interpreting
2 an old statute. Because when I click on that statute, it
3 doesn't match what it says.
4 MS. HOLTHUS: That's the deadly weapon on a school
5 statute?
6 MR. SCHWARTZ: Dangerous weapon at a -- yeah. It looks
7 like that statute might have --
8 THE COURT: .202.265[b], there is no 202 -- 202.265[b] is
9 a nunchuck. I mean that doesn't. It just doesn't exist. It
10 isn't a definition of a firearm, anymore. So it appears to me
11 that the legislature clarified that. So we have a statute
12 that says a firearm works on combustion and a deadly weapon
13 uses spring, air, gas, whatever, firearm. That's what I --
14 that's all I can tell. I mean, because when I'm pulling up
15 the statute, it -- the statute reference in Berry now has the
16 definition of pneumatic gun that we have in this jury
17 instruction. It does not have the definition that they're
18 talking about, that they reference in Berry. It just doesn't.
19 So I'm guessing it was --
20 MR. LEXIS: Well, I believe they were further qualifying
21 what a firearm is, which would also include spring as well as
22 gas and combustion.
23 THE COURT: Right. But, Mr. Lexis, if it was amended by
24 the legislature, then Berry wouldn't apply anymore.
25 MR. GILL: So are we back, Your Honor -- and then I'll

1 ask Mr. Schwartz -- to the definition straight out of -- I
2 think it was --
3 THE COURT: The statute?
4 MR. GILL: -- subsection 2?
5 MR. SCHWARTZ: Our request would be to include the
6 language, but understanding their ruling denying that --
7 THE COURT: Include the language of?
8 MR. GILL: From Berry.
9 MR. SCHWARTZ: From Berry where they define firearm. It
10 appears to be good law still. As far as the cite --
11 THE COURT: I have --
12 MR. SCHWARTZ: Unless it's not good law?
13 THE COURT: I have negative treatment of Berry. It has a
14 red flag, but I have --
15 MS. HOLTHUS: It's pretty definitive in Berry, for sure.
16 I think.
17 MR. SCHWARTZ: She's saying the statute that they're
18 referring to has been --
19 MS. HOLTHUS: No. I understand.
20 MR. SCHWARTZ: It's amended.
21 MS. HOLTHUS: I understand.
22 THE COURT: I'm trying to see. There's other things. It
23 was overruled on one ground, and it was abrogated on another
24 ground. But I mean, that statute's very language, that it's
25 based on, just doesn't exist anymore. Because the case cites

1 the -- is based on the statute that is not --
2 MR. SCHWARTZ: I mean, I'm looking at the old statute
3 here, Your Honor, if you'd like to see what was amended.
4 THE COURT: Right. But that's not the statue anymore.
5 MR. SCHWARTZ: But I -- doesn't appear that it's taken
6 anything out that would relevant is my point. But I can't see
7 it in the new statute, either.
8 MS. HOLTHUS: Am I reading this wrong? Don't they
9 basically say that anywhere in the statutes that firearm is
10 used it includes all these things?
11 THE COURT: What statute are you looking at?
12 MS. HOLTHUS: I'm still looking at the case, at Berry.
13 MR. LEXIS: And, Your Honor, that case also cites, in its
14 definition to include this, the 202.253 --
15 MS. HOLTHUS: It does. That's what I'm talking about.
16 MR. LEXIS: -- which includes --
17 MR. GILL: But that's the -- and I don't mean to cut you
18 off, Chad. But that's what was amended by the legislature --
19 THE COURT: Right.
20 MR. GILL: -- since Berry.
21 THE COURT: That's what I'm saying is 202.265[b] is now
22 the definition of a nunchuck, and it doesn't -- no longer
23 defines a firearm as a device from which a metallic
24 projectile, including any ball bearing or pellet, may be
25 expelled by means of spring, gas, air, or other force.

1 MR. LEXIS: It, well, now defines firearm as a projectile
2 may be expelled through a barrel by the use of force of any
3 explosion or other form of -- oh.
4 THE COURT: Combustion, which is what we had in the
5 instruction --
6 MR. LEXIS: Correct.
7 THE COURT: -- which is straight from the statute, which
8 is different than air, spring, gas.
9 MS. HOLTHUS: Is it? I mean it's --
10 THE COURT: Yeah. I mean, because that's how a gun
11 works, right? You have a primer that gets hit by a pin, and
12 it causes a spark which sets the gunpowder on fire, which
13 causes an explosion, which causes the bullet to come out of
14 the barrel. Are you so impressed? And then a BB works with
15 air pressure which pushes the BB out of the gun, which is why
16 a BB isn't as dangerous, because air pressure doesn't cause as
17 much force as the explosion -- the pressure, from the
18 explosion of the gunpowder igniting, causes that bullet to
19 move at a much higher velocity than the pressure of air. That
20 was good; wasn't it?
21 MR. SCHWARTZ: I do agree that the statute had -- I
22 looked at the amendments that were made. It looks like -- at
23 least the 2015 -- and it does take out that language that they
24 relied on.
25 THE COURT: Yes.

1 MR. SCHWARTZ: And they just replaced -- they added
2 pneumatic gun in that like A through F section, so -- right.
3 It defines it actually now in that statute.
4 MR. GILL: Got you.
5 MS. HOLTHUS: So it doesn't specifically refer -- yeah,
6 it does. It says pneumatic gun, right?
7 MR. GILL: Yeah, but in the deadly weapon, right?
8 MR. SCHWARTZ: Well, yeah.
9 THE COURT: As deadly weapon, but it doesn't refer to a
10 pneumatic gun as a firearm. The firearm statute specifically
11 only says explosion, combustion.
12 MR. SCHWARTZ: That's consistent with the NRS as far as
13 the case law is. The only thing that I think I was pointing
14 out, but if you're --
15 THE COURT: But the case law is based on a statute that
16 has been amended by the legislature.
17 MR. SCHWARTZ: Correct.
18 THE COURT: I mean, I don't think it's entirely in -- and
19 then the other thing is they're saying a firearm is a deadly
20 weapon. I mean, I think we would all agree a firearm is a
21 deadly weapon. The question is whether -- it's sort of --
22 whether it goes --
23 MR. GILL: Whether the BB guns are firearms, is the
24 issue.
25 THE COURT: Yeah. Whether it goes the other way.

1 MR. SCHWARTZ: Because a deadly weapon isn't
2 automatically a firearm.
3 THE COURT: A deadly weapon isn't necessarily a firearm.
4 MR. SCHWARTZ: Agreed.
5 MR. GILL: Feels like a [indiscernible] question.
6 MR. SCHWARTZ: We need a flow chart.
7 MS. HOLTHUS: It's feeling --
8 THE COURT: Right. So like okay. Let's use a less
9 complicated example, because I -- like a trash compactor is
10 not a firearm, but a trash compactor could be a deadly weapon.
11 MR. BOLEY: Or maybe an axe?
12 MR. GILL: Whoa. Slow down.
13 THE COURT: Yeah. Well, I was trying to use a not this
14 case specific of an example, just some other example that's
15 existed in cases. So you can have something that is not a
16 firearm but is a deadly weapon.
17 MS. HOLTHUS: I have no internet service for some reason.
18 THE COURT: So I can note the State's objection.
19 Are you objecting?
20 MR. SCHWARTZ: No.
21 THE COURT: Are we --
22 MR. SCHWARTZ: Not what's being included. I was just
23 objecting -- I wasn't objecting. I was trying to include
24 other language that the Court's rejecting.
25 MR. GILL: But the way that the Court is writing it is

1 straight out of the statute as it reads currently. I don't
2 think he's objecting to that language coming straight out of
3 subsection 2 --
4 MR. SCHWARTZ: Correct.
5 MR. GILL: -- of 202.253.
6 MR. SCHWARTZ: Right. I was just trying -- I was
7 proffering -- I'm -- no objection to that.
8 THE COURT: Okay.
9 MR. SCHWARTZ: I was --
10 THE COURT: So do you want something else?
11 MR. GILL: He wanted more and, Your Honor --
12 MR. SCHWARTZ: Go ahead.
13 MR. GILL: Sorry, Brian.
14 MR. SCHWARTZ: No. Go ahead.
15 MR. GILL: I just want to read this real quick. If I can
16 approach, Your Honor.
17 THE COURT: Yeah. Okay.
18 [Counsel confer]
19 THE COURT: All right. Yes. So what additional language
20 is it that you would like?
21 MR. SCHWARTZ: I was just going to ask for the additional
22 language that we had discussed from the case of Berry v. State
23 which we discussed as being relying on old case -- on old
24 versions of a statute.
25 THE COURT: Okay. Because it appears to be based on old

1 versions of -- what is the specific language, though, so we
2 have it in the record?
3 MR. SCHWARTZ: The specific language would be that a
4 firearm includes a device that is designed to be capable of
5 expelling projectiles by means of spring, gas, air, or other
6 force, and by -- and/or by explosion or combustion.
7 THE COURT: All right. So the current statute does not
8 contain that language, so I am going to deny the State's
9 request.
10 MR. SCHWARTZ: Thank you, Your Honor.
11 THE COURT: All right. 29, "every person, who in the
12 commission of a burglary, commits another crime. 30, "robbery
13 is the unlawful taking of personal property". 31, "it is
14 unnecessary to prove both violence and intimidation". 32,
15 "you are instructed that if you find a defendant guilty of
16 robbery". 33, "in order to use a deadly weapon". 34, "if you
17 find one or more defendants guilty of battery". 35, "if you
18 find beyond a reasonable doubt". 36, "any person who commits
19 a battery". 37, "attempt murder". 38, it's the "elements of
20 an attempt to commit a crime". 39, "malice of forethought".
21 40, "you are instructed that if you find a defendant guilty of
22 attempt murder". 41, "any person who aims any gun, pistol,
23 revolver, or other firearm". 42, "any person who uses
24 violence upon another person". 43, "you are instructed that
25 if you find a defendant guilty of coercion". 44, "it is the

1 constitutional right of a defendant in a criminal trial".
2 You want that instruction?
3 MR. GILL: Yes, Your Honor. Thank you.
4 THE COURT: Mr. Boley? Yes?
5 MR. BOLEY: Yes.
6 THE COURT: All right. I don't know what I'd do if one
7 of you wanted it and one of you didn't. Okay.
8 45, "although you are to consider only in the
9 evidence in the case". 46, "in your deliberation". Oh, and I
10 fixed that. I changed that one to guilty or not guilty
11 instead of guilt and innocence.
12 47, "during the course of this trial, you are not to
13 communicate with anyone". 48, "when you retire to consider
14 your verdict". 49, "during your deliberations". And this is
15 the playback one. And 50 is "now you will listen". All
16 right. So we're good with all the rest of those?
17 MR. GILL: Yes, Your Honor.
18 THE COURT: Great. Will you take a look at the verdict
19 form, because I made some changes to that? I'm going run this
20 into my assistant who has to leave very soon.
21 Are there any additional proposed instructions?
22 MR. BOLEY: No, thank you.
23 MR. GILL: No, Your Honor.
24 THE COURT: No? We're good? Okay. So --
25 MR. GILL: I, for one, appreciate the verdict form, Your

1 Honor.
2 THE COURT: All right. I like to start with --
3 MR. SCHWARTZ: We usually ask for guilty first, because
4 we have the burden of proof. But I understand.
5 THE COURT: Well, not guilty is the default so we start
6 with that first, because there's -- you know -- that's the
7 presumption. And then I took out "we the jury" for every
8 single one, so that my clerk doesn't have to read that --
9 MS. HOLTHUS: That's good.
10 THE COURT: -- 50 times. And then we also -- I had my
11 assistant just add in the -- a name, just so we had a -- of
12 victim attached to the different counts, so we can kind of
13 tell which one is which.
14 MS. HOLTHUS: Thank you. Yeah. That's helpful.
15 THE COURT: All right. So everybody is good with that?
16 MS. HOLTHUS: Yeah.
17 MR. GILL: Yes, Your Honor.
18 MR. BOLEY: Yes, ma'am.
19 THE COURT: All right. Anything else?
20 MR. GILL: No, Your Honor.
21 MR. SCHWARTZ: No, Your Honor. Thank you.
22 MS. HOLTHUS: I don't think so, Judge.
23 THE COURT: All right. We'll see you all back at 2:00.
24 MR. BOLEY: Thank you.
25 [Recess at 12:19 p.m.]

1 [Jury Instructions read but not transcribed]
2 MR. SCHWARTZ: Your Honor, can we move the TV just a
3 little bit closer?
4 THE COURT: Absolutely.
5 MR. SCHWARTZ: Thank you.
6 MS. HOLTHUS: We good?
7 THE COURT: Go whenever you're ready.
8 MS. HOLTHUS: All right. Court, counsel, ladies and
9 gentlemen of the jury, in every case, the State has to prove
10 two things: that the crime or crimes were committed and that
11 the Defendant or, in this case, defendants committed the
12 crimes.
13 There's different theories of liability in this
14 case, and that's kind of -- if you remember one of our earlier
15 jurors was talking about team kind of liability? That's kind
16 of what we're talking about here. Defendants may have either
17 directly committed the crime, they aided and abetted one and
18 other, or they acted pursuant to a conspiracy. Any of these
19 ways, they would be liable, ultimately, for the crime, itself.
20 Doesn't matter which person actually robbed Richard, struck
21 Javier with the axe, struck Javier with the gun, or robbed
22 Javier. As long as they were functioning under a conspiracy,
23 which would be the agreement between the two to them for some
24 unlawful purpose, they must both, obviously, intend to commit
25 the crime, and then they would both be liable.

1 So basically, all that conspiracy language and the
2 information that was read to you, you know, three different
3 theories, and there's that big chunk of stuff at the bottom of
4 the information, the jury instructions, that you say acting
5 pursuant to a conspiracy or aiding and abetting. Basically,
6 what that means is it's a conspiracy language. It's the act
7 of one is that act of all. If they're engaged in a conspiracy
8 and one commits one act, the other involved in the conspiracy
9 is liable for the same act as though he did the -- if you will
10 -- pulled the trigger himself, kind of theory.
11 Same thing with an aiding or abetting. If you are
12 aiding someone, if you're standing there holding the gun on
13 the individual so they can't call the police and stop the
14 axing of the victim, then you also are liable, just as though
15 you were axing the victim yourself.
16 Count II, burglary while in possession of a
17 firearm -- burglary, you have the elements of burglary. It's
18 entering a building -- in burglary number 1 there, it's the
19 7-Eleven -- with intent to commit robbery. And I would submit
20 to you that the security -- this is a still from the security,
21 and you'll be able to watch that video over. From the moment
22 they walked in the door, they had one intent, one purpose on
23 their mind. Guns drawn, faces hidden, directly to the clerk,
24 they were coming in for purposes of committing a robbery.
25 There can be no other inference drawn.

1 Deadly weapon, it includes a pneumatic gun by law,
2 which is any implement designed as a gun that may expel a ball
3 bearing or a pellet by means of spring, gas, air, or other
4 force, whether loaded or unloaded, operable or inoperable.
5 Robbery with a deadly weapon at the 7-Eleven. Again, taking
6 of personal property, in this case, it was the money from the
7 register. From the person or presence, Richard DeCamp. By
8 force or violence, guns. There's the force. There's the
9 violence. There's the guns.
10 Conspiracy to commit robbery -- again this is
11 different from the theory of liability. This is actually a
12 crime. If you have a conspiracy, you're liable for everything
13 else, but there's also a separate crime just for the
14 agreement, itself. If they got together in the parking lot
15 and said, let's agree to go in and rob that place, and they
16 were stopped before they even walked in, the crime of
17 conspiracy, the crime of the agreement, would have been
18 committed regardless of whether they carried out the crime.
19 In this case, they did, but it doesn't mean they're
20 also not liable for the actual conspiracy to commit the
21 robbery in the first place. Because that agreement is, in and
22 of itself, a violation of the law. Again, it doesn't matter
23 whether it was successful or not. With respect to the
24 conspiracy, there doesn't have to be a formal meeting or
25 making of express agreement required. It's simply inferred

1 from all circumstances that show the common intent. In this
2 case, you can see throughout these two crimes, these two crime
3 scenes, the two of them were acting together in concert and in
4 conspiracy throughout.
5 In fact, the number of times that we're actually
6 going to find a written agreement or formal agreement, of a
7 conspiracy in a criminal action, is almost never. And again,
8 we're not required to prove precisely which defendant did
9 what. Although in this case, you do have a pretty good feel,
10 I think, based upon the evidence, who actually did what. And
11 if you watch the security video from the 7-Eleven, that
12 becomes apparent. And if you remember back to Javier's
13 testimony, he pretty -- was pretty clear in terms of who did
14 what at that point.
15 Burglary while in possession of a firearm --
16 entering a building -- now, this is the Brush Street burglary.
17 And again, it says firearms, burglary while in possession of a
18 firearm. And that's what the title of the charge, but it
19 actually -- the law is -- and you have it in your
20 instructions -- it's firearm or deadly weapon. So it's
21 required that it be a firearm. It can also be the deadly
22 weapon, which brings us back to the pneumatic gun and the BB
23 guns.
24 With intent to commit assault and/or battery and/or
25 larceny and/or robbery. In this case, they went in with guns.

1 They immediately attacked Javier while he was in his bed.
2 It's not like they were waiting for him to do something. It's
3 not like they went in there to rob him and said, hey, get out
4 of -- give us your stuff, and then started beating him. They
5 literally went in and began beating him from the get-go. The
6 purpose of going in there was absolutely to beat him and to
7 rob him, and the evidence suggests, actually, to kill him
8 while he lay defenseless in his bed. In that very short
9 period of time, they took numerous items. That was clear that
10 that was their intent, as well.
11 The robbery with a deadly weapon at the Brush Street
12 address, taking of the personal property, wallets, knives. We
13 also have evidence of the camera that was also taken from the
14 person or presence, Javier Colon, by force or violence.
15 Again, by pistol whipping him and by hacking him with an axe,
16 they were able to take his property, and he was unable to put
17 up any resistance, whatsoever.
18 Count VI, battery with use of a deadly weapon with
19 substantial bodily harm, that's for the pistol whipping.
20 Battery is use of force or violence upon the person of
21 another. Obviously, when you're hitting somebody about the
22 head with a gun, it's force or violence. Substantial bodily
23 harm, substantial risk of death, smashing someone in the skull
24 with a -- repeatedly with a gun, or permanent disfigurement
25 which includes cosmetic disfigurement as well as an injury

1 that is functionally disabling. With respect to the pistol
2 whipping, we're talking about the scaring and the skull injury
3 and the ear that was stapled shut for that particular count.
4 Later on when we talk about the axe, we're talking
5 about, additionally, the cosmetic disfigurement as well as the
6 impairment of the bodily member or prolonged physical pain.
7 Remember, he said he couldn't use his hand the same way he
8 could before after his hand was laid open. Those are the
9 staples of the two injuries from the pistol whipping to his
10 forehead, that he indicated he still had scaring from today,
11 and the ear that was stapled up, and there's also the staples
12 in the scalp.
13 An attempt, an attempt is -- intend to commit a
14 crime, you perform some act towards its commission, but you
15 fail to complete it. How do look at -- how do you determine
16 the intent? You look at the facts and circumstances of what's
17 going on. And this is going to relate to the attempt murder
18 with use of a deadly weapon. The attempt is -- the murder,
19 itself, would be an act which tends to kill a human being. So
20 in this case, we charged it -- oops, I just -- did I turn it
21 off? There.
22 Striking him repeatedly with an axe, and the
23 evidence suggests that the axing was done by Venegas while,
24 again, Monay-Pina held the gun to prevent anybody else from
25 interfering, holding the gun on other people. He's axing this

1 completely defenseless victim. Remember, when they walk in,
2 he's literally lying in his bed. When they beat him with the
3 pistol, he's lying in his bed. When they whack him with the
4 axe, he continues to be lying in his bed. All five feet of
5 him, 140 pounds, with these two guys, guns a blazing, is lying
6 in his bed. I'm going to show you the axe, because you didn't
7 get to see it up close and just in case you don't want to
8 handle a lot of it.
9 [Pause]
10 MS. HOLTHUS: When you raise this up with your hands and
11 bring it down on some fellow who's lying in his bed, when you
12 go after his head with this kind of tool, you have one intent
13 in mind. You have one focus. You have one end. You don't do
14 that unless you're intending to kill somebody. This is a
15 I-mean-business kind of a weapon.
16 Malice of forethought, there'll be a whole
17 instruction on that, but fails. The malice, it's when you
18 intentionally do a wrongful act, again, raising that axe to
19 him. Without legal cause, there's absolutely no excuse.
20 There's no legal provocation for what was going on. Malice
21 can -- that condition of mind can arise from anger, hatred,
22 revenge, spite, or grudge.
23 There's something about thinking somebody popped
24 tires and didn't get what they wanted back. You don't get to
25 go try to kill people because they sliced your tires. That is

1 not legal justification. That is malice, under the law,
2 arising from anger, hatred, revenge, or ill will, but it does
3 not -- it does, actually, amount to an attempt murder.
4 The deadly weapon, again, I've showed you the axe.
5 The weapon, device, instrument, which under the circumstance
6 is used, is capable of causing substantial bodily harm or
7 death.
8 There were two things that caused that attempt to
9 fail, based upon the evidence. Number -- well, three things,
10 I guess, maybe: the blanket, Javier putting up his hand to
11 stop that final blow from hitting his head and able to fend it
12 off with his hand, and Lizbeth calling 9-1-1. Because the
13 evidence suggests that it was not aborted, it didn't fail,
14 until they heard the sirens and saw the lights from the police
15 coming. And that's when they ran off, and abandoned the axe,
16 and ran to the yard.
17 Again, there's no legal excuse for striking him with
18 the axe, three times.
19 Count VIII, that's the battery with use of a deadly
20 weapon, substantial bodily harm, the axe to the hand. He's
21 still got, again, the scar to his hand, permanent
22 disfigurement, and his hand continues to be impaired to this
23 day. Again, at that point, they were aiming -- Venegas was
24 aiming for his head when he raised his hand to protect
25 himself.

1 Count IX, battery with use of a deadly, axe to the
2 leg. Now, that was charged as a battery with use of a deadly
3 weapon with substantial bodily harm. I would submit to you,
4 we didn't prove it. There was no substantial bodily harm.
5 The battery with a deadly weapon? Yes. When he was hit in
6 the leg with the axe, it's still a deadly weapon. It's as
7 deadly a weapon. The fact, that it didn't cause substantial
8 bodily harm, doesn't make it any less a deadly weapon. What
9 it does, however, mean is we were -- we would not request you
10 to return a verdict of guilty as to the battery with
11 substantial, but rather, only as to the battery with a deadly
12 weapon on that count. Because, again, he was saved by the
13 blanket.
14 Same thing on Count X, the battery with use of a
15 deadly weapon where he struck him with the axe to the ribs.
16 We would only be asking you to return a verdict of guilty of
17 battery with a deadly weapon for that count, because -- thanks
18 to the blanket -- the axe didn't lay him open. There was no
19 substantial injury, but still, nonetheless, it is battery with
20 use of a deadly weapon, that axe.
21 Aiming a firearm at a human being, that was Adriana,
22 Lizbeth, Samantha, and Cesar as the stayed in -- as they were
23 inside, looking out the window. There was three guns
24 recovered, one yard away. Simply, one yard over are the guns
25 that Adriana told you were being aimed at her through the

1 window.

2 Coercion with use of a deadly weapon, coercion is

3 forcing you to do or not do something you have a legal right

4 to do. In this case, Adriana, Lizbeth, Samantha, Cesar --

5 they had every right to help Javier. They had every right to

6 call 9-1-1. They had every right to go to his aid, but

7 because the gun was held on them, the -- pointed at them, shut

8 up, don't do anything, I'm going to break you, and all of

9 that. That's coercion with use of a deadly weapon, causing

10 them -- trying to cause them not to do what they had a legal

11 right to do, and in fact, successful with Adriana.

12 Thankfully, Lizbeth became the voice of reason and

13 did the right thing, ultimately. Again, three guns were

14 recovered one yard away. It was also, obviously, a coercion

15 as to Javier, not allowing him to come or go as he pleased,

16 because they kept him in his bed as they continued to beat

17 him.

18 Battery with intent to commit a crime, robbery, they

19 beat him with the guns, and they whacked him with the axe.

20 Again, the evidence is primarily that the physical portion of

21 it was carried out by Venegas, while Monay-Pina acted as

22 lookout. I suggest that the evidence, later found on Monay,

23 is he was probably doing the gathering of the merchandise, as

24 well, because he seemed to have most of the stolen items on or

25 near him at the time of his taken into custody in the next

1 yard. They did all these things in order to take his stuff.
2 That's the what, what crimes were committed.
3 Now it's the how do we know who. This is your still
4 from the 7-Eleven robbery. A half an hour later, one mile
5 away, approximately less than a twenty-minute walk, is him.
6 And you'll have the opportunity. You'll have the pictures.
7 Again, you'll have the surveillance video to compare the puffy
8 coat. You can even see the lettering. Here's the top of the
9 U. There's the part of the R from the shirt that's
10 underneath, there.
11 I submit to you the evidence is this is Mr. Monay-
12 Pina at the time of the robbery of the 7-Eleven. Half hour
13 later, a mile away. It's incredible, the match on the hoodie
14 that's underneath, the blue sneakers, not common. It's not
15 like a pair of black chucks that maybe everybody has on.
16 These are pretty unique. At that hour, that distance away,
17 that time away, it's far more than a coincidence.
18 7-Eleven evidence: the gloves, the gun, the what
19 appears to be a tube-like mask. The Brush Street evidence:
20 the gloves, the tube-like mask, the guns, and then the
21 Defendant himself, again, totally matching the description,
22 every possible last detail. As to those gloves, remember
23 Javier described them as landscaping gloves like they used to
24 have in business. The CSA said they were kind of like
25 gardening gloves. You can see pictures of them, and you can

1 determine better what they are. But you'll see that the palms
2 are black and the tops are red, super distinctive.
3 7-Eleven evidence, Mr. Monay-Pina gun, blue ski
4 mask. If you look at the video, it's a lot clearer to be able
5 to tell what he's got going on. Again, that very distinctive
6 inner jacket pattern, those stripes, and those blue shoes.
7 The Brush Street evidence, there's the guns. There's the navy
8 blue hoodie mask, ski mask.
9 7-Eleven evidence, there's Richard throwing money at
10 him. There's the money. If you look closely at it again. We
11 slowed this down to try and show it to you, but you can see it
12 in the video if you need to look again. And you'll see that
13 the money is coming at the smaller of the two, which the
14 evidence shows is Defendant Monay-Pina, and he's over here
15 with Venegas being up there. And you can see how -- there's
16 the money as he's taking it and putting it into his pocket.
17 Brush Street evidence, there's the wallet of our
18 victim on Brush Street, Mr. Colon, and there's the wad of
19 cash, consistent with the wad of cash taken from 7-Eleven.
20 Remember, it was also found in the shrubbery, in the bushes
21 there, right next to that bush that Monay-Pina was trying to
22 hide behind. It was nearest to him, that evidence, the wallet
23 and the wad of cash. The wad of cash which consisted of one
24 twenty and a number of fives and ones. Just like Richard told
25 you, we don't keep many twenties in there, we put those away,

1 we keep only ones and fives. $138, Richard thought that it
2 was about $100 that was taken at the time of the robbery.
3 According to Officer Simmons [phonetic], he was told at the
4 time that it was $139 that was actually taken in the robbery
5 from the two registers. We recover $138 in the bushes and $2
6 on the floor at 7-Eleven. More than a coincidence.
7 Brush Street evidence on Javier: the guns, the
8 sheath, knives that were taken from his place that he
9 described, his phone, his camera. His other knives, that had
10 been taken from him, are found right there in the pockets of
11 Defendant Monay-Pina. Again, I already talked about the
12 wallet and the wad of money found -- recovered from the
13 shrubbery right nearby. The axe, right outside the bedroom.
14 And for those of you who like the physical
15 scientific evidence, there's also DNA evidence in this case
16 connecting everything together. You have blood on the axe,
17 and it belongs to Javier. The axe is found right in the
18 pathway where the Defendants, upon hearing the sirens and
19 seeing the lights, would have run out of the bedroom, dropped
20 the axe, before jumping the walls to try and get away.
21 You have blood on the gun. It belongs to Javier.
22 The gun is found in the yard where the Defendants have run off
23 to, in close proximity to the two of them, immediately
24 following. And this happened, obviously, within minutes. If
25 you listen to that 9-1-1 call, when Lizbeth is on the phone,

she's talking, stilling going on there, and the police are responding. They're there. 9-1-1 is still trying to give her instructions, and her mom is already talking to the police. So this is real quick response, because literally it's a mile around the block when they get the call.

The mask under the shed, evidence suggests from the video. Evidence from DNA confirms. It belongs to Casimiro Venegas. The other mask near the bushes, the video confirms, and the DNA assures. It's Jose Monay-Pina.

Ladies and gentlemen, the evidence is overwhelming in this case. Defendants are both guilty of all charges as presented, and we ask you to so find it. Thank you.

THE COURT: Thank you.

MR. GILL: Your Honor, can we approach before I give my closing?

THE COURT: Sure.

[Bench Conference Begins]

MR. GILL: I had just a couple of issues that I want to make a record on eventually, but we're closing. I didn't want to interrupt her, but --

MS. HOLTHUS: Well, if you're going to object at time -- we can't fix it, but --

MR. GILL: Well, I want to make reference to the "guns a blazing" comment, as well as her reference to the juror who we removed for making the teammate comments. And then I believe

1 the last slide was incorrect when it -- she identified the red
2 gloves as containing DNA?
3 MR. SCHWARTZ: It was the -- that was the -- I think she
4 said the mask, the tube mask
5 MR. GILL: Tube mask, the mask --
6 MR. SCHWARTZ: It was -- the tube mask and the glove were
7 in the picture, but the text said mask under shed, as I
8 recall.
9 MR. GILL: Then I'd have to look, but the only DNA found
10 was the mask that matched my client.
11 MS. HOLTHUS: Yeah, but you could have just objected, and
12 I could have made that record in front of them.
13 MR. GILL: Well, I mean that was just right now. We
14 can -- I mean that was one of the very last lines.
15 THE COURT: I don't know what you want me to do, Mr.
16 Gill, because there's no contemporaneous objection.
17 MR. GILL: Well, at least to as to --
18 MS. HOLTHUS: You could address it in your argument,
19 then.
20 MR. GILL: At least as to the gloves, I think -- I mean,
21 she literally said that and then said find them guilty.
22 MS. HOLTHUS: I completely disagree, but I'm happy to
23 just say, ladies and gentlemen, if I confused you, there was
24 no DNA on the gloves, the DNA was only on the mask.
25 MR. GILL: I can clean it up, as well.

1 THE COURT: Okay.
2 MR. GILL: Thank you, Your Honor.
3 THE COURT: You interested in your [indiscernible]? Oh,
4 well --
5 MR. GILL: Thank you.
6 [Bench Conference Ends]
7 MR. GILL: May I proceed, Your Honor?
8 THE COURT: Go ahead.
9 MR. GILL: Ladies and gentlemen of the jury, thank you
10 for your patience this week. Again, this is the last
11 opportunity I'll have to address all of you. On behalf of Mr.
12 Venegas, both of us, and Mr. Monay-Pina, and Mr. Boley, we
13 thank you.
14 And I stated it Monday that -- or, excuse me --
15 Tuesday morning, that things were not going to be as easy as
16 the State wants to make it seem. And you just heard from Ms.
17 Holthus, and that's kind of what you got, that this is so
18 easy, find him guilty of all thirteen counts. Well, go
19 through some of the jury instructions and then the counts, as
20 well. Particularly -- and I'll show these up on the overhead.
21 If we can switch that, please?
22 Particularly number 5, it's the, in my opinion, one
23 of the most important jury instructions. And it reads, "the
24 Defendants are presumed innocent until the contrary is proved.
25 This presumption places upon the State the burden of proving

1 beyond a reasonable doubt every element of the crime charged
2 and that the Defendants committed the offenses".
3 And then it goes on to define a reasonable doubt.
4 And I'll just read it. I know you'll have it when you back,
5 but "a reasonable doubt is one based on reason. It is not
6 mere possible doubt but is such a doubt as would govern or
7 control a person in the more weighty affairs of life. If the
8 minds of jurors, after the entire comparison and consideration
9 of all the evidence, are in such a condition that they say
10 they can feel an abiding conviction of the truth of the
11 charge, there is not a reasonable doubt. Doubt to be
12 reasonable must be actual, not mere possibility or
13 speculation. If you have a reasonable doubt as to the guilt
14 of the Defendants" -- or as we've learned from the jury
15 instructions, one or the other of the Defendants -- "they are
16 entitled to a verdict of not guilty."
17 Now as we talk and as you guys deliberate, I'm going
18 to ask that you reference back to jury instruction 5, this
19 reasonable doubt instruction, because it's the cornerstone of
20 what your job is here, today.
21 And number 8, I'm also going to reference in my
22 argument, and that's,
23 "the credibility or believability of a witness
24 should be determined by the witness' manner upon the
25 stand, the witness' relationship to the parties, the

1 witness' fears, motives, interests, or feelings, the
2 witness' opportunity to have observed the matter to
3 which the testified, the reasonableness of the
4 witness' statements, and the strength or weakness of
5 the witness' recollection."
6 Okay. So it's saying you guys get to determine --
7 and I think I said this the other day. You get to watch and
8 determine the credibility or believability of each witness.
9 "If you believe that a witness has lied about
10 any material fact in the case, you may disregard the
11 entire testimony of that witness or any portion of
12 the witness' testimony which is not proved by other
13 evidence."
14 I'm not going to argue that any of the witnesses
15 came up here and lied to you, but I am going to -- we're going
16 to discuss some of the differences in their testimony and some
17 of the weaknesses in their ability to give that testimony or
18 to relay what they were able to perceive.
19 The next instruction I want to briefly touch upon is
20 this deadly weapon instruction, and I'm not going to read it
21 to you. Ms. Holthus did a good job of going over what a
22 deadly weapon is, and you guys heard me ask questions over the
23 last few days regarding these pneumatic guns. I'm going to
24 submit to you that the pneumatic guns in this case were deadly
25 weapons. I would be a fool to get up and argue otherwise,

1 because the law is very clear on that point.
2 However, when we turn the page to 28[a], we get the
3 definition somewhat similar to the definition on the previous
4 page, but it -- of a deadly weapon. It says,
5 "a deadly weapon includes any device whether
6 loaded or unloaded, operable or inoperable, from
7 which a metallic projectile including any ball
8 bearing or pellet may be expelled by means of
9 spring, gas, air, or other force".
10 Yeah, BB guns. "A firearm means any device designed
11 to be used as a weapon from which a projectile may be expelled
12 through the barrel by the force of any explosion or other
13 force of combustion". Not a BB gun. Firearm, not a BB gun.
14 Or a BB gun, not a firearm. My apologies.
15 But again, and with the deadly weapon, you didn't
16 hear us discuss whether it worked or not or -- you know -- one
17 was broken. And it's simply not a concern when we're dealing
18 with this jury instruction. The reason I want you guys to
19 focus on this instruction is that firearm definition, what is
20 and what is not a firearm.
21 And this is the substantial bodily harm instruction,
22 and I'm sorry I'm getting them a little bit crooked there.
23 But this talks about what substantial bodily harm is or is
24 not. And again, the State in their closing, I believe,
25 conceded on Counts IX and X, no substantial bodily harm. So

1 as to Counts IX and X, the axe to the leg and the axe to the
2 rib, no substantial bodily harm.
3 And I'll address the fact that that's broken up into
4 three charges, because I think it should be -- one charge that
5 they've proven is the axe attack, if you will. They charged
6 one battery with substantial for the pistol whip. And then
7 the State got up here and argued, well, he's got injuries here
8 and here and here, in one charge. Now, with the battery,
9 State's trying to break it up into three different charges.
10 He said that it touched his leg, it touched his rib, and
11 that's all the evidence you heard regarding the rib and the
12 leg.
13 So I submit to you that by finding -- if you do find
14 Count VIII, Count IX and X are incorporated in Count VIII. I
15 know the State's charged it differently, and they disagree.
16 But at the very least, ladies and gentlemen, as Ms. Holthus
17 had mentioned, Counts IX and X, she's not even asking that you
18 find substantial bodily harm.
19 Let's talk about the attempt murder charge. This is
20 the one where the State makes it sound like it's so easy, it's
21 attempt murder. But I submit to you that it's not that easy.
22 "Attempt murder is the performance of an act or
23 acts which tend but fail to kill a human being, when
24 such acts are done with express malice, namely with
25 the deliberate intention to unlawfully kill".

1 And then, obviously, instruction 38 kind of
2 distinguishes attempt from actual performance of an act, and
3 then 39 discusses the malice of forethought which is simply a
4 murder determination. This is oft -- commonly used in first
5 degree murder cases, because the, well, the element required
6 in both attempt murder and murder is the same. It's this
7 malice of forethought, which means "the intentional doing of a
8 wrongful act without legal cause or excuse or what the law
9 considers adequate provocation". And I think the word
10 "revenge" was underlined on Ms. Holthus' PowerPoint.
11 Let's talk about the facts surrounding the bedroom.
12 And Ms. Holthus had said that this attack was immediate, and I
13 don't think the evidence supports that. He woke up which made
14 it seem immediate, and he did say that they talked for two or
15 three minutes. So it's not this immediate -- run in the door
16 and commit these acts or do these acts. It was not an
17 immediate jumping on him, and I think the State said with
18 "guns a blazing".
19 And I just -- the State just hasn't proven this
20 intention to kill. And Count VII is the attempt murder count.
21 I'd submit to you that they have not met their burden of proof
22 beyond a reasonable doubt that there was any intention to
23 murder Javier Colon in that bedroom, and I'd ask you to
24 carefully consider Count VII when you guys are deliberating.
25 And Count XI is described in jury instruction 41.

1 This goes back to the firearm-deadly weapon distinction. "Any
2 person who aims any gun, pistol, revolver, or other firearm
3 whether loaded or not, at or toward any human being, is guilty
4 of aiming a firearm at a human being". The State has not
5 proven this. There was no firearm pointed at anyone, and
6 just, please, remember the distinction between deadly weapon
7 and firearm and refer to that jury instruction. The only
8 appropriate verdict for Count XI is not guilty, and that is
9 the aiming a firearm at a human being.
10 The rest of that charge simply doesn't matter, and
11 it lists many different people who were in the house. It
12 lists the children. It lists Adriana. But you can read every
13 word of that, and again, you have the instructions in the --
14 instruction 1 is all of the different counts, and Count XI is
15 what we're talking about.
16 I want to talk about Count XII as well, the coercion
17 instruction, and that's the last one I will put on the
18 overhead. Number 42, jury instruction 42,
19 "any person who uses violence upon another
20 person or threatens violence or injury to another
21 person with the specific intent to compel another to
22 do or abstain from doing an act, which such other
23 person has a right to do or abstain from doing, is
24 guilty of coercion".
25 Well, this is an instance where the State makes it

1 sound, no big -- very easy. The guns are pointed therefore
2 they couldn't go anywhere, they couldn't do anything. And I
3 think one of the slides even said they couldn't call 9-1-1.
4 They called 9-1-1. They had -- I asked the one young girl if
5 they had a door that they could exit.
6 They were down. I submit to you the kids never saw
7 these two guys. I don't know how they could have seen the
8 kids. You saw the windows, the rooms, the difficulty that
9 they would have had to view the room. And you heard from the
10 mother, and you heard from the children. They never -- the
11 mom did not -- simply did not allow these kids to pop their
12 head in or look at, through either one of those windows.
13 And there's repeated testimony about how dark it
14 was. And we've got it through -- Javier talked about how dark
15 it was in that room. Adriana -- hard to see, very dark are
16 the notes that I have for her testimony, and that she thinks
17 it's him. You know, gave an identification. And you might
18 recall I asked her again, well, is it him, or do you think
19 it's him? Her response, yet again, I think it's him. It's
20 dark in that room.
21 Lizbeth, the first young girl to testify, the oldest
22 sister -- difficult to look through mom's window. She
23 didn't -- she later confirmed that she didn't look through the
24 window. And then there's some testimony where she's relaying
25 what her mom is saying to her. She not looking -- Lizbeth is

1 not looking through the window. She's talking to mom. Mom is
2 looking through different windows. And again, go back and
3 look at those pictures of how that room's set up, how those
4 windows are set up, and how dark it is at this time. And when
5 she relays this information from mom -- and I believe this
6 statement was on the 9-1-1 call, no we didn't see them. And
7 then, again, she confirmed that she never looked out. She was
8 asked about the color of things, and she said couldn't see the
9 color because it's very dark in there.
10 Samantha, the second girl who broke down, one of her
11 statements was it was very dark, it was dark in that room. So
12 keep all of these things in mind, especially as to that
13 coercion, and whether or not Adriana could see the guns, could
14 see any of these things with how dark it is in there and how
15 much everybody is commenting on how dark it is.
16 Richard DeCamp got up, and he was scared. He was
17 clearly afraid on that 9-1-1 call, and probably still a little
18 nervous to come testify. But he's seeing two guys in masks in
19 quite a bit of light. You're going to have the stills that
20 the State provided. You're going to have the videos if you
21 want to review them, but remember how much light is in that
22 7-Eleven. He didn't come in here and identify anybody.
23 Sure, they were wearing different things, but
24 they're -- the State's arguing that they're wearing the same
25 things in this very, very dark room, and they're performing

1 all these actions in this very dark room, yet State wants you
2 to believe and these witnesses want you to believe that
3 they're seeing every little thing that's gone on. Keep all
4 that in mind when you go through the coercion count, when you
5 go through all of these other counts.
6 And the State does something here with Count XIII,
7 again. They want to hit -- they want you to hit the
8 Defendants with three batteries for one alleged attack, but on
9 Count XIII, they -- again, they want one battery with intent
10 to commit a crime, and they've included the firearm, the axe.
11 They've included every language under the sun there, so keep
12 that in mind when you guys go count by count and specifically
13 Counts VIII, IX, and X.
14 I'd submit that if you do that -- and that's what
15 we're asking. That's all we can ask of you is to go through
16 this case very carefully. Go through the instructions. And
17 if you do that you'll find them not guilty on all counts, and
18 that's what we're asking for today. Thank you.
19 THE COURT: Thank you, Mr. Gill.
20 Mr. Boley?
21 MR. BOLEY: Yes, ma'am.
22 Ladies and gentlemen, those here at counsel table
23 know better than anybody how tedious these trials are, so we
24 definitely appreciate your attention over the last few days.
25 And I know you've seen a lot of evidence, and you heard from

1 both sides. So I won't belabor this and be repetitive with
2 Mr. Gill, but we will, in defense of Mr. Monay-Pina
3 specifically, echo everything that Mr. Gill argued. But I
4 want to say a few things specifically about Mr. Monay-Pina.
5 So I'm going to put this up. I know you've seen
6 this jury instruction repeatedly, the reasonable doubt jury
7 instruction. Now you've seen some evidence, and you saw some
8 photos that the State presented of the two gentlemen that
9 entered the 7-Eleven and the Defendants later on in similar
10 clothing and such.
11 But there a few pieces of doubt that enter into that
12 equation. First of all, you heard from Mr. Decamp. He
13 identified two people. He was very unsure. In fact, conceded
14 in the last question that he was asked that the second robber
15 could have even been female. In his whole testimony, he never
16 used the word Hispanic, but that entered into the equation
17 later as the officer testified.
18 We move forward through the investigation. Javier
19 Colon testified. He testified that he did not see the face of
20 the second attacker. The second attacker did not -- this is
21 Mr. Colon's words -- speak, strike, or come close to him in
22 any way. He conceded that he couldn't see the second
23 attacker's eyebrows, but could see his eyes only. And he's
24 testified that his eyes were brown, but there's a lot of
25 people with brown eyes out there. But if you can see the

1 color of his eyes and couldn't see the color of his eyebrows,
2 there's clearly some problems with the interpretation of that
3 situation.
4 We heard from Mr. Colon's family, specifically his
5 sister and her children. None of them could positively
6 identify the second assailant. I believe one of them could
7 vaguely identify Mr. Venegas, but none of them identified Mr.
8 Monay-Pina.
9 We then heard from Officer Sperling [phonetic].
10 Officer Sperling apprehended Mr. Monay-Pina later in a yard
11 that was two houses down, hiding in some bushes. There was
12 some confusion in his testimony about where the items around
13 him came from. Some were not on his person. Some were on his
14 person. And Officer Sperling testified vaguely as to a pile
15 of items that were or maybe were not removed from Mr. Monay-
16 Pina's person, so we're not sure there. And you may -- you
17 have to draw your own conclusions, but it's your job alone to
18 determine whether or not what's been presented proves beyond a
19 reasonable doubt that Mr. Monay-Pina is guilty of these
20 crimes.
21 Now, let me draw your attention to something that I
22 believe Mr. Gill presented to you a minute ago, which is jury
23 instruction 10. These two defendants -- and whenever there's
24 two defendants in a criminal case -- are entitled to separate
25 consideration. So you could find that the State has proven

1 one of them guilty beyond a reasonable doubt and not the
2 other. So if you believe that, you could render a different
3 verdict for one gentleman than the other, and that's up to you
4 and what the evidence has -- what conclusions you draw from
5 the evidence.
6 And I want to reiterate what Mr. Gill talked about
7 in defense of Mr. Venegas. In the attempt murder statute --
8 the attempt murder law requires a specific intent to kill a
9 human being. And if that was true and these gentlemen wanted
10 that, why did they bring BB guns? Thank you.
11 THE COURT: Thank you.
12 Rebuttal from the State?
13 MR. SCHWARTZ: Your Honor, can we approach briefly?
14 THE COURT: Sure.
15 [Bench Conference Begins]
16 MR. SCHWARTZ: I was going to ask for one bathroom break,
17 but I understand we're kind of -- it's the last thing, so I
18 just wanted to ask if you were inclined to let me take a quick
19 bathroom break?
20 THE COURT: Can you make it?
21 MR. SCHWARTZ: I can.
22 THE COURT: Then let's not.
23 MR. SCHWARTZ: Okay. Thank you.
24 [Bench Conference Ends]
25 MR. SCHWARTZ: And if we could, please, switch over to

1 the computer again? Okay.
2 Ladies and gentlemen, I appreciate your time during
3 this trial. I do think it's interesting that we go through
4 all these different pictures, all this evidence, all these
5 things. The defense gets up and talks to you about their
6 closing, right? Their case -- they don't show you any of the
7 pictures, right? They don't go through any of the evidence.
8 MR. GILL: Your Honor, can we approach?
9 THE COURT: Yes.
10 [Bench Conference Begins]
11 MR. GILL: Thank you. My objection is about -- shifting
12 the burden right out of the gate is the objection.
13 MR. SCHWARTZ: That wasn't my intention. I was noting
14 what was presented, and I'm going to argue it's our burden
15 still. I wasn't saying that they have to present anything,
16 but what they argued was nothing about the pictures. That's
17 all I said.
18 THE COURT: [Indiscernible].
19 MR. GILL: And I'm going to have to move for a mistrial,
20 as well. It's my only recourse.
21 MR. SCHWARTZ: And I can certainly clean up if that's --
22 if it was implied that I was burden shifting, I would
23 certainly not imply that to them, and I can make it very clear
24 I wasn't.
25 THE COURT: What is your objection again, Mr. Gill?

1 MR. GILL: Burden shifting.
2 MR. SCHWARTZ: Burden shifting.
3 THE COURT: Because?
4 MR. GILL: We don't get up -- we didn't get up and show
5 them any evidence, show them any photographs or anything in
6 our closing arguments, so the State wins.
7 MR. SCHWARTZ: And I could see if I was saying that they
8 didn't present a case as far as they didn't put on witnesses,
9 they didn't put on evidence. I would understand that
10 objection, but I was merely explaining what they just got up
11 and did as far as closing arguments, which is what I'm
12 supposed to do as rebuttal, rebutting their arguments which
13 were based on the laws --
14 THE COURT: They don't even have to do a closing
15 argument, so --
16 MR. SCHWARTZ: Right.
17 THE COURT: -- I'll sustain the objection. I'm not going
18 to grant a mistrial, but --
19 MR. SCHWARTZ: Okay.
20 THE COURT: -- I will remind the jury that the defense is
21 not required to present any evidence.
22 MR. GILL: Okay. And instead of --
23 MR. SCHWARTZ: Thank you, Your Honor.
24 MR. GILL: Instead of -- quote, unquote -- cleaning it
25 up, maybe just --

1 MR. SCHWARTZ: I won't. I'll just move on.
2 THE COURT: All right.
3 MR. GILL: Thank you, Your Honor.
4 THE COURT: Sure.
5 [Bench Conference Ends]
6 THE COURT: I remind the lady -- the ladies and gentlemen
7 of the jury that the burden is on the State, and the defense
8 is not required to present any evidence.
9 MR. SCHWARTZ: Mr. Gill got up here and told you that the
10 BB guns aren't firearms, right? Well, so what? We agree
11 they're not firearms. They're BB guns. They're deadly
12 weapons, and he acknowledged that they are, in fact, deadly
13 weapons. So let's see why this matters.
14 Jury instruction number 27, and specifically, I'm
15 talking about the burglary while in possession of a firearm,
16 because, right? It says while in possession of a firearm, so
17 naturally you think it's got to be a firearm. But if you look
18 at the instruction, and you have it there in front of you.
19 And this is particularly the burglary with regard to the 7-
20 Eleven and with regard to 504 Brush Street.
21 "Every person who commits the crime of burglary
22 who has in his possession or gains possession any
23 firearm or deadly weapon at any time during the
24 commission of a crime, any before leaving or upon
25 leaving the structure, is guilty of burglary while

1 in possession of a firearm".
2 So the fact that the BB guns, these pneumatic guns,
3 they're not firearms -- it has no bearing on these charges,
4 especially the burglary while in possession of a firearm
5 charge.
6 We'll also talk about the aiming a firearm charge in
7 a second, but defense also says -- and this was Mr. Gill. He
8 mentioned that it should just be one battery. Only one
9 battery, because there's only one substantial bodily harm, as
10 well. I believe he indicated that the axe simply touched his
11 leg. It touched his ribs, and then it hit his hand. And it's
12 not that the State wants to charge three batteries. That's
13 what the law says. Each strike is a battery, and each strike
14 -- and I would disagree with the phrase "touching". He struck
15 him in the leg with the axe, which is what Mr. Javier said,
16 struck him in the ribs with the axe.
17 Sure, there was no injury to him. He had a blanket
18 covering him. I understand. I agree. That's why we're not
19 asking you to find substantial bodily harm in those two
20 charges. But it doesn't matter that it's one attack. It can
21 be three separate charges, because that's the different acts
22 that these defendants committed.
23 Similarly, he mentioned that battery with intent to
24 commit a crime is, again, contained within that charge, but
25 again, that's not what the law says. It has a completely

1 separate element. The battery has to be with the intent to
2 commit the robbery. And so given the facts, given the
3 evidence that you heard, the State's proven that these
4 batteries, these three, four separate batteries were for a
5 purpose. And one of those purposes was the robbery, and
6 that's why that other charge comes into play. That's what the
7 law allows for.
8 Defense claims that the Defendants did not try to
9 kill Javier Colon, and in particular, Mr. Gill mentioned that
10 Javier said that they spoke for a few minutes before anything
11 happened. And I'd ask you just to recall your recollection of
12 the testimony, because my recollection, as Javier testified,
13 was that he was woken up and they came in and started
14 attacking him. And the injuries support his version of what
15 happened. Additionally, he never left his bed. That's been
16 consistent with Javier along with what Adriana said. It's not
17 like he was woken up by them, they talked, and he got up out
18 of bed, and they started talking. That's not what the
19 evidence shows. The evidence, in fact, shows that he never
20 left his bed, because he was attacked upon their entry into
21 his room.
22 And Mr. Boley mentioned, I believe, at the end of
23 his closing, he said that if they were going to try to kill,
24 why did they bring BB guns, right? Well, the attempt murder
25 actually has nothing to do with the BB guns. The attempt

1 murder has to do with that axe that you saw over there, and
2 the axe was being swung at his head. That's why it's attempt
3 murder. That's how you can infer from these circumstances.
4 What other result are you hoping to obtain? And just look at
5 the facts and circumstances. Ms. Holthus mentioned it. You
6 swing an axe at someone's head.
7 And I mentioned we would get to this aiming a
8 firearm charge. Again, it's not -- if you read the
9 instruction, and I don't have it up there for you, but the
10 definition says aiming any gun -- comma -- or firearm, et
11 cetera. And as Mr. Gill mentioned, we're talking about
12 pneumatic guns. So it doesn't have to be a firearm. I know
13 it says firearm in the name of the charge, but that's not what
14 the law says. It just has to be a gun, and a pneumatic gun is
15 what the evidence has shown, what Mr. Gill acknowledged was
16 used in this case.
17 Defense claims that there wasn't a coercion, because
18 they actually did call 9-1-1. And I would tend to agree that
19 Lizbeth probably wasn't coerced. Her name's in the pleadings.
20 She did call 9-1-1. Think about Adriana, and that's the mom.
21 She was too scared to help, that she said, too scared to call
22 9-1-1. She didn't call 9-1-1, right? Lizbeth is the one who
23 finally got them to call 9-1-1, probably saving Javier's life.
24 But that's where the coercion comes into play, because Adriana
25 felt, based on what was going on with the guns, that she

1 couldn't call 9-1-1. She couldn't act. She was frozen.
2 In the coercion charge, you'll see in the complaint
3 that there's a bunch of and/or, and/or, and the different
4 names. Meaning if you believe that the State has proven
5 coercion as to one of those people but not the rest, that's
6 okay, because it's an and/or, the way it's been put. So if
7 you think about Javier, think about whether or not he was able
8 to do something that he wanted to do. Was he able to leave?
9 Was able to go back to sleep? Was he able to do something
10 he's entitled to do? That's the essence of the coercion
11 charge.
12 And I think Mr. Gill also mentioned, kind of when we
13 were talking about this idea of coercion, that it was really
14 dark in the room, right? Adriana, the other kids, the two
15 girls and the boy, they couldn't see what was happening
16 inside, right? They couldn't see the guns.
17 But if you think about it this way, they called 9-1-
18 1 while this was happening, right? Before anyone was ever
19 caught, before any pneumatic guns, weapons, were ever
20 recovered, they call 9-1-1, and in the 9-1-1 call, you'll hear
21 the caller, Lizbeth, talking with her mom and explaining to
22 the caller, who's taken the call, that guns were -- there were
23 two guns pointed at them. So it's not as if they came up with
24 this thing afterwards. This is what they're telling the 9-1-1
25 operator as the crime is happening.

1 Mr. Boley had mentioned that no one was really able
2 to identify Mr. Jose Monay-Pina, and you can -- you'll be able
3 to take all of the pictures and the surveillance back there to
4 determine whether or not he was in the 7-Eleven, based on his
5 clothing, based on the items that were found in his vicinity
6 when he was arrested. And Javier said, yeah, I only saw his
7 eyes. He only saw his eyes, but couple that with the fact
8 that he's then found next door, right?
9 So ladies and gentlemen, there's an instruction
10 on -- I believe it was read to you already -- common sense.
11 We ask you to use it when you're coming to your verdict. Use
12 your common sense and judgment as reasonable men and women,
13 and you can draw reasonable inferences based on your common
14 experience. So when you go back and you look at the evidence,
15 pictures, the surveillance, the testimony, use your common
16 sense.
17 And again, Mr. Gill and Mr. Boley mentioned this
18 credibility instruction, which basically instructs you that
19 you can consider the witnesses motives and interests,
20 opportunity to observe what happened, reasonableness of their
21 statements, these different things in determining the
22 credibility of what they said.
23 Now, here's an instruction that I don't think's been
24 discussed yet, but there's an instruction that talks about
25 flight.

1 MR. GILL: Your Honor, can we approach?
2 [Bench Conference Begins]
3 MR. SCHWARTZ: Oh, there's not? I thought we submitted a
4 flight instruction.
5 MS. HOLTHUS: No. But you could still work your flight,
6 just --
7 MR. SCHWARTZ: Okay. I'm not going to put up the
8 instruction then.
9 MS. HOLTHUS: That's a pretty good idea.
10 MR. GILL: I just wanted -- I'm sorry to interrupt again.
11 MR. SCHWARTZ: No. No. You're fine. That's my mistake.
12 I apologize.
13 THE COURT: It's all right.
14 MR. SCHWARTZ: So how would like me to move on past this
15 slide, because it does have two next things? Can I just
16 click? Stand in front of it and click through it? Okay.
17 THE COURT: The jurors close their eyes.
18 MS. HOLTHUS: There you go.
19 MR. GILL: Yeah.
20 [Bench Conference Ends]
21 THE COURT: Oh, I don't know.
22 MR. SCHWARTZ: And if I could just quickly fix that for
23 you guys?
24 THE COURT: There you go.
25 MR. SCHWARTZ: So flight, in general, the idea that

1 leaving a scene, leaving an area with a consciousness of
2 [indiscernible], that's something that can be considered by
3 you in your determination of this case.
4 Reasonable doubt -- I know that both the other
5 attorneys touched on it. Feel an abiding conviction of the
6 truth of the charge, there's not a reasonable doubt. This is
7 not the entire instruction. I encourage you to, please, look
8 at the entire instruction. That's what they put up for you
9 when considering reasonable doubt. And ladies and gentlemen,
10 the State at this point has proven its case beyond a
11 reasonable doubt that these gentlemen robbed Mr. Richard
12 DeCamp on January 12th. They then went down the street. They
13 robbed Javier Colon. They attacked him. They beat him. They
14 tried to kill him with the axe, and they left. They
15 threatened the young lady, Adriana, in her house, and they
16 left. Ask you to find them guilty on all the counts. Thank
17 you.
18 THE COURT: All right. Clerk will now swear in the
19 officer to take charge of the jurors and alternate jurors.
20 THE CLERK: Do you solemnly swear that you will keep this
21 jury together in some private and convenient place, that you
22 will not permit any person to speak to them, nor speak to them
23 yourself unless it be by order of the Court except to ask them
24 whether they have agreed upon a verdict, and that you will
25 return them into court when they have so agreed, so help you

1 God?

2 THE MARSHAL: I do.

3 THE CLERK: Thank you.

4 THE COURT: All right. And our alternate jurors are Mr.

5 Smith and Mr. Murnighan, jurors number 13 and 14, but if you

6 will all, please, go with the marshal. He'll direct you.

7 THE MARSHAL: Please stand for the jury.

8 [Jury Exits]

9 THE COURT: And everybody can have a seat. If counsel

10 could just make sure that we know how to get a hold of you,

11 and if everybody could, for now, stay close.

12 MR. SCHWARTZ: Your Honor, we'll provide a copy of our

13 PowerPoints to the Court.

14 THE COURT: That'd be great if we could have that. We'll

15 make it a court exhibit for the record.

16 MR. SCHWARTZ: Thank you.

17 MS. HOLTHUS: All right.

18 THE COURT: Anything else we need to put on the record?

19 MR. GILL: I don't think so, Your Honor. Thank you.

20 MS. HOLTHUS: I don't think so.

21 MR. BOLEY: No, Your Honor.

22 MS. HOLTHUS: Thank you.

23 [Recess at 3:51 p.m.]

24 THE COURT: We're just going to wait a second for Mr.

25 Boley. We got a question from the jury about --

1 MR. GILL: Mind if I --
2 THE COURT: Okay. You can show him.
3 Didn't I tell you guys not to go anywhere?
4 MS. HOLTHUS: You'll notice we did not.
5 THE COURT: I know, but like didn't I say that?
6 [Pause]
7 THE COURT: Can I have that back, please?
8 MR. GILL: Yeah.
9 THE COURT: We have everyone now on the record. We're on
10 the record now, and defendants are present as well as counsel.
11 The jury is not present. We did receive a question sent out
12 form Juror Number 11, Mr. Gildenmeister, who I assume is the
13 foreperson, which says is there to modify Counts IX and X? We
14 feel VIII, IX, and X are all counts of battery but IX and X
15 lack evidence of substantial bodily harm.
16 In the -- and then after the note was sent out, the
17 jury indicated to the marshal that they no longer needed us to
18 answer the question. However, since they have sent the
19 question out, my preference is to make a record of the
20 question and to respond to it by simply telling -- referring
21 them the verdict form, so just indicating that they will need
22 to select one of the options on -- one of options provided in
23 the verdict form.
24 MR. GILL: That's fine, Your Honor. Thank you.
25 MR. BOLEY: Okay.

1 MR. SCHWARTZ: That's fine, Your Honor.
2 THE COURT: All right. So I will write that where it
3 says court notes. We will put a -- they will be given a copy,
4 and then the original will be lodged as a court exhibit.
5 Please don't anywhere like far.
6 MR. BOLEY: Okay.
7 THE COURT: All right.
8 MR. SCHWARTZ: We're just going to go down.
9 [Recess at 4:53 p.m.]
10 THE MARSHAL: Please rise for the jury.
11 [Jury In]
12 THE COURT: Back on the record in case number C313118,
13 State of Nevada v. Venegas and Monay-Pina. Let the record
14 reflect the presence of all of our jurors, our two alternates,
15 defendants, and counsel.
16 Ladies and gentlemen of the jury, has the jury
17 selected a foreperson?
18 JUROR NO. 11: Yeah, Your Honor.
19 THE COURT: All right. And, sir, that's you, Mr.
20 Gildenmeister?
21 JUROR NO. 11: Yeah.
22 THE COURT: Is that correct? All right. And, sir, has
23 the jury reached a verdict?
24 JUROR NO. 11: Yes.
25 THE COURT: And could you please hand the verdict forms

1 to the marshal?
2 [Pause]
3 THE COURT: Will the Defendants and their counsel please
4 rise? And the clerk will read the verdict out loud.
5 THE CLERK: District Court, Clark County Nevada, the
6 State of Nevada v. Casimiro Venegas, case number C-16-313118-
7 1, department number VII, verdict. We the jury in the above
8 entitled case find the Defendant, Casimiro Venegas, as
9 follows:
10 Count I, conspiracy to commit robbery: guilty of
11 conspiracy to commit robbery.
12 Count II, burglary while in possession of a firearm:
13 guilty of burglary while in possession of a firearm.
14 Count III, robbery with use of a deadly weapon,
15 DeCamp: guilty of robbery with use of a deadly weapon.
16 Count IV, burglary while in possession of a firearm,
17 Colon: guilty of burglary while in possession of a firearm.
18 Count V, robbery with use of a deadly weapon, Colon:
19 guilty of robbery with use of a deadly weapon.
20 Count VI, battery with use of a deadly weapon
21 resulting in substantial bodily harm, Colon: guilty of
22 battery with use of a deadly weapon resulting in substantial
23 bodily harm.
24 Count VII, attempt murder with use of a deadly
25 weapon, Colon: guilty of attempt murder with use of a deadly

1 weapon.
2 Count VIII, battery with use of a deadly weapon
3 resulting in substantial bodily harm, Colon: guilty of
4 battery with use of a deadly weapon resulting in substantial
5 bodily harm.
6 Count IX, battery with use of a deadly weapon
7 resulting in substantial bodily harm, Colon: guilty of
8 battery with use of a deadly weapon.
9 Count X, battery with use of a deadly weapon
10 resulting in substantial bodily harm, Colon: guilty of
11 battery with use of a deadly weapon.
12 Count XI, aiming a firearm at a human being, Colon,
13 Avina: guilty of aiming a firearm at a human being.
14 Count XII, coercion with use of a deadly weapon,
15 Colon, Avina: guilty of coercion with use of a deadly weapon.
16 Count XIII, battery with intent to commit a crime,
17 Colon: guilty of battery with intent to commit a crime.
18 Dated this 15th day of March 2017. Mr.
19 Gildenmeister, foreperson.
20 District Court, Clark County Nevada, the State of
21 Nevada v. Jose Fernando Monay-Pina, case number C-16-313118-2,
22 department number VII, verdict. We the jury in the above
23 entitled case find the Defendant, Jose Fernando Monay-Pina, as
24 follows:
25 Count I, conspiracy to commit robbery: guilty of

1 conspiracy to commit robbery.
2 Count II, burglary while in possession of a firearm:
3 guilty of burglary while in possession of a firearm.
4 Count III, robbery with use of a deadly weapon,
5 DeCamp: guilty of robbery with use of a deadly weapon.
6 Count IV, burglary while in possession of a firearm,
7 Colon: guilty of burglary while in possession of a firearm.
8 Count V, robbery with use of a deadly weapon, Colon:
9 guilty of robbery with use of a deadly weapon.
10 Count VI, battery with use of a deadly weapon
11 resulting in substantial bodily harm, Colon: guilty of
12 battery with use of a deadly weapon resulting in substantial
13 bodily harm.
14 Count VII, attempt murder with use of a deadly
15 weapon, Colon: guilty of attempt murder with use of a deadly
16 weapon.
17 Count VIII, battery with use of a deadly weapon
18 resulting in substantial bodily harm, Colon: guilty of
19 battery with use of a deadly weapon resulting in substantial
20 bodily harm.
21 Count IX, battery with use of a deadly weapon
22 resulting in substantial bodily harm, Colon: guilty of
23 battery with use of a deadly weapon.
24 Count X, battery with use of a deadly weapon
25 resulting in substantial bodily harm, Colon: guilty of

1 battery with use of a deadly weapon.
2 Count XI, aiming a firearm at a human being, Colon,
3 Avina: guilty of aiming a firearm at a human being.
4 Count XII, coercion with use of a deadly weapon,
5 Colon, Avina: guilty of coercion with use of a deadly weapon.
6 Count XIII, battery with intent to commit a crime,
7 Colon: guilty of battery with intent to commit a crime.
8 Dated this 15th day of March 2017. Mr.
9 Gildenmeister, foreperson.
10 Ladies and gentlemen of the jury, are these your
11 verdicts as read? So say you one, so say you all?
12 GROUP RESPONSE: Yes.
13 THE CLERK: Thank you.
14 THE COURT: Do either of the -- do any of the parties
15 wish to have the jury polled?
16 MR. SCHWARTZ: No, Your Honor.
17 MS. HOLTHUS: Yes.
18 MR. GILL: Yes, Your Honor.
19 THE COURT: [Indiscernible] be seated.
20 MR. GILL: Thank you.
21 THE CLERK: Juror No. 1, are these your verdicts as read?
22 JUROR NO. 1: Yes.
23 THE CLERK: Juror No. 2, are these your verdicts as read?
24 JUROR NO. 2: Yes.
25 THE CLERK: Juror No. 3, are these your verdicts as read?

1 JUROR NO. 3: Yes.
2 THE CLERK: Juror No. 4, are these your verdicts as read?
3 JUROR NO. 4: Yes.
4 THE CLERK: Juror No. 5, are these your verdicts as read?
5 JUROR NO. 5: Yes.
6 THE CLERK: Juror No. 6, are these your verdicts as read?
7 JUROR NO. 6: Yes.
8 THE CLERK: Juror No. 7, are these your verdicts as read?
9 JUROR NO. 7: Yes.
10 THE CLERK: Juror No. 8, are these your verdicts as read?
11 JUROR NO. 8: Yes.
12 THE CLERK: Juror No. 9, are these your verdicts as read?
13 JUROR NO. 9: Yes.
14 THE CLERK: Juror No. 10, are these your verdicts as
15 read?
16 JUROR NO. 10: Yes.
17 THE CLERK: Juror No. 11, are these your verdicts as
18 read?
19 JUROR NO. 11: Yes.
20 THE CLERK: Juror No. 12, are these your verdicts as
21 read?
22 JUROR NO. 12: Yes.
23 THE CLERK: Thank you.
24 MR. GILL: Thank you, Your Honor.
25 THE COURT: All right. Folks, I am going to thank you

1 again for your time and attention. I'm not going to read you
2 this admonishment anymore. You are free to talk to whoever
3 you like. You also do not have to talk to anybody if you do
4 not want to. I would like just a couple minutes of your time
5 to see -- to talk to you to see if we can do anything better
6 for jurors in the future. So if you will go with Officer
7 Walker, we will be -- I'll be right with you in just one
8 moment.
9 THE MARSHAL: All right. Please rise for the jury.
10 [Jury Exits]
11 THE MARSHAL: Go ahead and sit down.
12 THE COURT: All right. So Mr. Venegas needs to be
13 returned to the custody of the Nevada Department of
14 Corrections pending sentencing, because he was remanded just
15 for the purposes of the trial. And then Mr. Monay-Pina,
16 obviously, will remain in custody until the time of
17 sentencing. Is there any bail set?
18 MR. BOLEY: I think there's a bail set, but it's high.
19 THE COURT: But he'll be held without bail pending
20 sentencing, remanded without bail. And then we'll refer this
21 to parole and probation for a presentence investigation and
22 report and set sentencing.
23 THE CLERK: June 15th, 8:30 a.m.
24 MS. HOLTHUS: And, Judge, we are going to be seeking
25 habitual criminal treatment as to Mr. Venegas. Do you have a

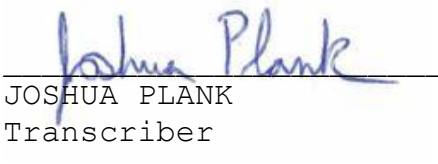
1 preference as to how you get the prior convictions and what --
2 are they okay the day of sentencing or do you want them in
3 advance? I think they've already been provided to defense.
4 THE COURT: No. As long as they're provided in -- as
5 required by the statute. I mean, they have to be certified
6 copies and --
7 MR. GILL: I mean, I'm aware. I don't know that
8 anything's been filed regarding the --
9 MS. HOLTHUS: I've had it both ways. Sometimes, just
10 that they can take a look at it ahead of time, it just speeds
11 along -- it makes sentencing more efficient, so we have
12 already --
13 MR. GILL: I think they still need to file something,
14 Your Honor.
15 THE COURT: Well --
16 MS. HOLTHUS: That day, obviously. I just -- I'm saying
17 I --
18 MR. GILL: Okay.
19 MS. HOLTHUS: In the past, I have sometimes filed them
20 ahead of time and served copies.
21 MR. GILL: Okay.
22 THE COURT: I just need an opportunity to look at them
23 here, but obviously, I'm more concerned about Mr. Gill having
24 that chance to look through them.
25 MS. HOLTHUS: We'll get them to him right away.

1 MR. GILL: Thank you.
2 THE COURT: So he can make any challenge he has to them,
3 because I can look them in, you know, two minutes and --
4 MS. HOLTHUS: Okay.
5 MR. GILL: Thank you.
6 THE COURT: -- see what I need to see, but Mr. Gill needs
7 the -- Mr. Gill's the one who really needs to look at them.
8 You know, I need to -- I can see the issues that I might have
9 with them in a very brief amount of time, so it's of no moment
10 to me.
11 MR. GILL: Thank you, Your Honor.
12 MS. HOLTHUS: Thank you.
13 THE COURT: As long as Mr. Gill gets what he needs in
14 terms of --
15 MR. GILL: And I'm sure I will.
16 THE COURT: All right.
17 MS. HOLTHUS: And Mr. Venegas --
18 THE COURT: Anything else that we need to take care of
19 right now?
20 MR. GILL: I don't think so, Your Honor. You did remand
21 him back to NDOC?
22 THE COURT: I did.
23 MR. GILL: Thank you.
24 THE COURT: Yes. And --
25 MS. HOLTHUS: But he's held without bail, as well? I

1 don't what his sentence -- he's serving, correct?
2 MR. GILL: Yeah. He wouldn't be up for release until
3 next year, but it's --
4 MS. HOLTHUS: Okay.
5 THE COURT: All right. So I just don't want to -- yeah.
6 But he'll be remanded back to Nevada Department of
7 Corrections. I don't want to do anything that's going to keep
8 him here.
9 MR. GILL: And that's our preference.
10 MS. HOLTHUS: As long as there's -- nothing could go
11 wrong.
12 THE COURT: There's no bail on this case.
13 MS. HOLTHUS: That's what I want. Thank you.
14 THE COURT: And he's to be returned to the Nevada
15 Department of Corrections.
16 MR. GILL: Thank you very much, Your Honor.
17 MS. HOLTHUS: Thank you.
18 THE COURT: Because I told him I would return him to the
19 Nevada Department of Corrections. He does not have to stay at
20 CCDC, pending sentencing.
21 MR. GILL: Thank you very much, Your Honor.
22 THE COURT: All right. We need to make sure we have a
23 transport order, though, for sentencing.
24 MS. HOLTHUS: Okay. Transport order.
25 THE COURT: All right.

1 MR. SCHWARTZ: Yes, Your Honor.
2 THE COURT: All right. Don't forget that, because they
3 won't bring him without it.
4 MR. SCHWARTZ: Understood.
5 THE COURT: All right. Thank you, all. I really
6 appreciate everybody's efforts with the trial.
7 MR. SCHWARTZ: Thank you, Your Honor.
8 MR. GILL: Thank you, Your Honor.
9 MS. HOLTHUS: Thank you. Thanks for hearing it.
10 MR. GILL: Oh, Your Honor, your position on us talking to
11 them, do you have one? The jurors?
12 THE COURT: Oh, yeah. I'll send them out in just a
13 second. I'm just going to say, hey, to them.
14 MR. GILL: You like to do it in here?
15 THE COURT: No. I'll send them out. Out in the --
16 MS. HOLTHUS: In the hallway?
17 THE COURT: Oh, yeah. We're not in three anymore. I'm
18 sorry. I'm used to being out in three where there was like
19 out, but they'll be out. Yeah.
20 MR. GILL: Okay.
21 MS. HOLTHUS: All right.
22 [Proceedings concluded]
23
24
25

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above entitled case to the best of my ability.



JOSHUA PLANK
Transcriber

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. CASIMIRO VENEGAS and JOSE FERNANDO MONAY-PINAY, Defendants.	CASE NO. C-16-313118-1 & 2 DEPARTMENT: VII

BEFORE THE HONORABLE LINDA MARIE BELL, DISTRICT COURT JUDGE

THURSDAY, SEPTEMBER 7, 2017

RECORDER'S TRANSCRIPT OF SENTENCING

APPEARANCES:

For the State:	MARY KAY HOLTHUS, ESQ. Chief Deputy District Attorney BRYAN S. SCHWARTZ, ESQ. Deputy District Attorney
For Defendant Venegas:	ADAM GILL, ESQ.
For Defendant Monay-Pena:	THOMAS D. BOLEY, ESQ.

Also Present: Ricardo Pico, Court Interpreter

RECORDED BY: RENEE VINCENT, COURT RECORDER

Thursday, September 7, 2017 - 8:34 a.m.

THE COURT: Do we have an interpreter?

THE MARSHAL: He's in with the speakers.

THE COURT: Oh, all right.

MR. GILL: The clients -- the Defendants don't need interpreters.

THE COURT: Do the speakers want to come in?

MS. HOLTHUS: Yes, please,

THE COURT: State of Nevada versus Casimiro Venegas and Jose Monay-Pina, Case Number C-16-313118-1 and 2. Could everybody state their appearance for the record, please.

MS. HOLTHUS: Mary Kay Holthus for the State, Bar Number 3814.

MR. SCHWARTZ: Bryan Schwartz for the State, 13244.

MR. GILL: Adam Gill on behalf of Casimiro Venegas.

MR. BOLEY: Tom Boley on behalf of Mr. Monay-Pina.

THE COURT: All right. So this is the time set for sentencing. I also, just so you know, I promised some attorneys on a civil case that got continued from Tuesday that I would get them in and out. So if they both come, I'm going to take a very brief -- it's going to take like one second to deal with their matter, but I promised them, so I'm -- I may have to take short break just to deal with their issue.

This is the time set for sentencing. Is there any legal cause or reason we should not go forward with sentencing?

MS. HOLTHUS: No, Your Honor.

MR. GILL: No, Your Honor. If I can just ask if you received my

amendment.

THE COURT: I received the sentencing memo both from Mr. Gill and from the State. I have read them both.

MR. GILL: I amended it to ask for the correct sentence. Did you get that amendment?

THE COURT: Oh, no, I didn't see that.

MR. GILL: I believe I asked for a 5 to 12 and a half, Judge, which under the statute is impossible.

THE COURT: Okay.

MR. GILL: So I did amend that to ask for the 10 to 25.

THE COURT: All right. Did you make any other change?

MR. GILL: No.

THE COURT: No. All right.

MS. HOLTHUS: May I approach and file the certified judgments of conviction for the priors?

THE COURT: Yes.

MS. HOLTHUS: For the record, I'm filing the judgement of conviction in C284885-1, here in Nevada, for a robbery; Case Number C246550; also here in Nevada, for robbery with use of a deadly weapon and burglary while in possession of a weapon; Case C244224, also here in Nevada, Count 1, conspiracy to commit robbery, and Count 2, robbery with use of a deadly weapon. Those have been previously provided. They were actually attached as exhibits to our sentencing memorandum.

THE COURT: All right. And all the copies are certified. Here you go. Okay. Let's go ahead and start with Mr. Venegas.

Sir, by virtue of the jury's verdict, I adjudicate you guilty of Count 1, conspiracy to commit robbery; Count 2, burglary while in possession of a firearm; Count 3, robbery with use of a deadly weapon; Count 4, burglary while in possession of a firearm; Count 5, robbery with use of a deadly weapon; Count 6, battery with use of a deadly weapon resulting in substantial bodily harm; Count 7, attempt murder with use of a deadly weapon; Count 8, battery with use of a deadly weapon resulting in substantial bodily harm; Count 9, battery with use of deadly weapon; Count 10, battery with use of a deadly weapon; Count 11, aiming a firearm at a human being; Count 12, coercion with use of a deadly weapon; and Count 13, battery with intent to commit a crime.

All right. State?

MS. HOLTHUS: Thanks, Judge. I mean, obviously, you've read our sentencing memorandum that we are seeking life without pursuant to statute, the maximum sentence. And I understand that this comes across as harsh. I mean, it's a lot. Nobody died here.

The Defendant is 27 years old. It's crazy that you could even amass a criminal record like that at that age, but when you start out as a juvenile with these same kinds of offenses, if you start out with robberies and batteries with intent to commit mayhem and robbery and other things, and this sets the path -- one of two paths you take. They tried to deal with it at the juvenile level. They were unsuccessful. And almost as soon as he got into the adult system, he continued his ways, violence, beatings, robberies.

You have the three felony convictions. I'm not going to beat up on the facts, but approaching a woman in a parking lot, grabbed her, beat her

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in the chest, that's one of the things about Venegas is the gratuitous beatings, that -- you know, he could probably take her stuff without the beating. He could have probably taken Javier's stuff without the hatchet, axing, but that's not how he rolls, threatening -- threatening her with a knife. The next time it was a revolver. He skipped the gun -- or the knife and now he escalates to revolvers.

He got a -- he got a substantial period of time on those cases, and he gets out. And he also in the interim had picked up one other robbery, and that was the one -- let's see. It kind of, I guess, started when he was 18, where he was the passenger. He was the Monay-Pina, if you will, learning from the older, seasoned robber in the community, and then it's just escalated from there resulting ultimately in our case. He was out of prison barely. He got a substantial prison sentence for those other offenses more, honestly, than they were asking for in this case at the outset, here being a fourth-time offense.

There's a couple things I want to point out. Number one, sometimes there's always a question, even in the back of your mind, did the jury do the right thing? In this case, I think the evidence was overwhelming that there was really no -- no alterative verdict based upon the evidence that was here.

These are the two that did it. This is what they did, and there's really -- with the DNA and everything else, there's no doubt but that they did do it. And ultimately, we know that -- although I guess -- I don't know if you want me to argue both at the same time or should we just focus on Venegas?

THE COURT: If we could just do one at a time. This is so

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complicated, I think because of the number of counts and the enhancements, I just think it would be a little bit cleaner and easier just to do one at a time. If you'd like, we can do everything and then have the speakers -- after we're done with our part, then the speakers can go at the very end of everything.

MS. HOLTHUS: Okay.

THE COURT: So they only have to speak once. But I'd prefer just to have the adjudication argument from the attorneys on each one separately. It will just be a little bit cleaner.

MS. HOLTHUS: Obviously, some of what I'm saying is going to be redundant. But basically, I mean, there's a reason that the legislature has said we have this habitual criminal, and we have habitual criminal for somebody who is a repeat offender. And then over here, we have this special category of individuals who are repeat violent habitual criminals, who just repeatedly go out in the community and hurt people, and that's where Venegas falls into.

At the outset, Richard DeCamp didn't come today, and I'm not sure why. He still has been -- one minute he kind of laughs about the thing, and the next minute -- you heard him in the 911 call, literally crying. I mean, he thought he was going to die that night, and he lost it. As tough a guy as he is, it was difficult for him. So I'm not sure why he chose not to speak.

It doesn’t matter. You saw him at trial. He was certainly impacted by it. He's working alone. It's scary job. He's out there just grinding out a living when these guys come in, masks, guns. I don't know what could be scarier for him, for what, a hundred and something bucks? They put this man through that for that?

It appears that Venegas has never really had a job. He's never

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1 done anything to contribute to society, to make a legal living. If I read
2 correctly, and I may be wrong, a few weeks here, a week or two there, but
3 never really going out there and being a citizen and providing for the
4 community or doing anything good.
5 He -- they go in, guns a-blazing, terrorize and terrify the guy,
6 and that's -- we're not done for the night. And that the craziest thing. The
7 police are still responding, and then within 30 minutes, they go down into
8 Javier's place, into the place where he sleeps -- it's not, hey, give me your
9 money, I'm going to hurt you. It's none of that.
10 He is lying in his bed, the most vulnerable place, short of being
11 asleep, I suppose, lying in your bed, in the middle of the night, essentially,
12 when somebody comes in, not asking questions, not telling you to do
13 something, but immediately attacking you and beating you, pistol whipping
14 you and -- and raising and trying to kill you.
15 That's what the jury said. They came in there for one purpose,
16 to kill Javier. Stopped by one thing, and that was that child who said, you
17 know what, this can't go on, I know I'm scared, but I'm going to call 911.
18 And thank God that the ambulance -- or the firemen got there and chased
19 them off because they weren't finished, they weren't done, they weren't --
20 that's what they were there for.
21 And I know I had asked yesterday if we could bring the axe in,
22 and the Court indicated you didn't feel that you needed to see it, and I just
23 want to let you know why. I wasn't grandstanding with the weapon. I just --
24 I forget until I saw it at trial how huge it was. And as big as it was, one of the
25 things for me was the weight. When I picked that up, that -- I can't even

1 describe how heavy and how damaging and how Javier's hand knocked that
2 up in front of his face before he was struck, how very likely his whole skull
3 could've been laid open by the weight and the size of that axe.
4 And so the fact that Javier was able to defend himself shouldn't
5 weigh in any favor in Venegas' other than the fact that he can't get the death
6 penalty because Javier, thank God, is alive. But everything else he did, every
7 action he took was intended to kill him, would have killed him but for other
8 circumstances.
9 After that, then they commit the robbery. They have to take his
10 stuff as well. Still never really got a motive for it. The best I think we ever
11 figured out was there may have been some slashing of tires somewhere, but
12 it's never been -- as far as we can tell, even if that is, they literally went in
13 there to could kill him for that.
14 So, again, you remember the evidence is great. We found them.
15 We found a matching glove. It was like -- it was almost like a game of Clue,
16 everything just fell into place corroborated by the DNA, and it was -- it was a
17 pretty amazing case to put together.
18 We are asking for the life without. I'm asking you to run them
19 as consecutive for every one that you can for appeal purpose. The goal in my
20 opinion of the State, I know in trying this case, and I'm asking for the Court is
21 to make sure that Mr. Venegas never, never hits the streets again because
22 every time -- every crime he commits is a life, a potential life sentence and a
23 potential life at the other side because he's got no incentive to leave anybody
24 alive now, Judge. 27 years old, he has wreaked more havoc on more people
25 in our community --

And you'll hear from our victims and the tremendous income that it's had on the folks that were the house because, remember, there were Adriana and her kids. Imagine, she's in there with her kids. There's her brother out there. They got guns on him. They're beating him with axes. I can't fathom the fear and what was going through these people's minds for no reason.

So I'm going to ask -- we're asking that you run them consecutive. Give him everything you possibly can, covering case appeal first. Something I don't -- I can't imagine that there is. In my opinion, of course, that usually is. It was a pretty clean case. I don't think there was a whole bunch open for anything. But he can't ever get out, Judge, because he has no incentive to comply. He can't comply.

His last sentence -- you look at the sentence they're recommending, and if our math is correct, they're recommending 14 to 42 years for Monay-Pina, zero record. He's got nothing. So 10 to 25 on Venegas is -- it's just not -- I can't -- I mean, even if we give him, say, 20, let's run a couple consecutives. 20 years, what is he then? At 47, he's been in prison his whole life. All he knows is violence and guns and whatnot.

I read the sentencing memorandum that Mr. Gill filed. I don't see anything in the PSI from the Defendant with remorse or feeling bad about what he did or anything else. I see him saying he drinks alcohol occasionally, hasn't had meth in a long time, and in then sentencing memorandum, all of a sudden, oh, he's a drunk, he's -- he uses drugs all the time. That's what caused it. No, there's no evidence of that in this case, Judge.

The only evidence in this case is just his heart. He did it. He

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1 did -- he's just a mean person. He's a dangerous, violent person, and there's
2 nothing that we as a society can do to change that because he's that -- been
3 that way since he was a juvenile. He's going to continue to be that way. And
4 if we allow him back in this community, someone's going to die the next time.
5 And so we are asking again, maximum sentence, everything
6 consecutive. The robbery was separate from the murder. This robbery
7 could've been committed without the attempt murder and vice-a-versa. They
8 didn't have to do both. I would ask to pay special attention to the coercion
9 and aiming of the firearm that impacted another set of victims entirely.
10 THE COURT: All right.
11 MS. HOLTHUS: I would max him out as much as we can, Judge.
12 THE COURT: Thank you, Ms. Holthus. I'm going to take a short
13 break. Can I have the folks on Portillo-Ayala versus Aznarez, Case Number
14 A-15-717467. You guys can work around them.
15 [Court hears an unrelated matter]
16 [Pause in proceedings]
17 THE COURT: Mr. Venegas, sir, is there anything that you would like
18 to say before your attorney speaks on your behalf?
19 DEFENDANT VENEGAS: Oh, yes, ma'am. Yes, Your Honor. First of
20 all, I'd like to say I understand what Ms. Holthus was saying concerning my --
21 my history and my charges. I understand that. I'm not here to try to justify
22 myself and say, hey, this is the reason that I did it. It was this or that. I'm
23 not here for that. I understand I'm guilty, and you already seen they found me
24 guilty.
25 And I understand that she mentioned a few things concerning

1 my juvenile record because in that, they got robbed. I understand how you
2 took that. It shows my paper, but I'm not trying to justify myself, but I'm just
3 saying that I confessed. I told them, look, I did it. I took responsibility for it.
4 If you look in the record on my past robberies, I took
5 responsibility for them. Look, I confess. I did them all. What they give me, I
6 don't know, but I did them all.
7 Now, again, she's saying that I'm a bad person. I understand.
8 All the odds are against me. What I'm saying is -- the only thing I got to say
9 that I do got something for myself going, and I'm sorry for what I've done. I
10 apologize. I'm sorry. Not just to the courts, but if you give me the permission
11 to apologize -- or say sorry to the victims? Is that okay?
12 MR. GILL: He just wants to turn to the victims, Your Honor.
13 THE COURT: That's fine.
14 DEFENDANT VENEGAS: I talk in Spanish because they don't -- is that
15 okay?
16 THE COURT: That's fine.
17 DEFENDANT VENEGAS: Is that okay?
18 MS. HOLTHUS: Is somebody going to translate it for the record?
19 DEFENDANT VENEGAS: They got a -- he can speak --
20 THE COURT: You know what, just go ahead and speak in English
21 because they have a translator. That would be better.
22 DEFENDANT VENEGAS: Okay.
23 MS. HOLTHUS: I don't even know what he's saying sometimes.
24 DEFENDANT VENEGAS: Okay. Regardless of what I've done, you
25 know what I mean, regardless of how I felt -- I might've felt scared, angry,

bitter -- you know what I mean? No matter how I felt, but the way I went about it was wrong. and I understand that now. I should've done -- done it different, and I was (indiscernible), and I know that now.

I ruined whatever friendship we had going. I know -- I know I messed up. And if you believe me, which I hope you do, but if you don't, that's all right. That's fine. But, hey, you got to get your justice that quick. You know what I mean? I'm asking for redemption. I'm sorry. You know what I mean?

THE COURT: All right. Thank you, Mr. Venegas.

DEFENDANT VENEGAS: Thank you.

THE COURT: Anything else you want to say? No. Mr. Gill.

MR. GILL: And, Your Honor, the State's asking for essentially the ultimate penalty, never to let Mr. Venegas out ever again. I think that's -- despite the State's contentions regarding this crime, which, again, Your Honor heard the facts, Your Honor sat through the trial, they're horrendous. Mr. Venegas acted incredibly poorly that night, but does it deserve and does his record deserve to never see the light of day again, Your Honor? I submit to you that it doesn't.

I think 10 to 25 -- the State acts like 10 to 25 is a slap on the wrist. 10 to 25 is a significant amount of time, especially for somebody with a record like Mr. Venegas, who probably won't see parole the first go-round on a 10 to 25 sentence.

So to stand here and ask for him -- again, I'm not trying to downplay what happened to the victims, Judge, but the State did mention it in the argument that nobody died. And I think -- thankfully, thank God because

there were guns in that 7-Eleven, and there were weapons at the house in the garage. Thank God for the victims that something worse didn't happen.

And, you know, Mr. Venegas didn't write a statement because I asked him to speak today. So I don't want the Court to think that the whole time he's been lacking -- lacking remorse because that's not the case either. He understands what he did that night was incredibly stupid, incredibly violent, incredibly -- just -- just out of the ordinary wrong.

But to throw his whole life away -- which he's doing a good job of that on his own, Judge. He's been in custody quite a bit since he was a juvenile, and he's not doing well when he's out in society, but to think that in 10 years or 20 years he's going to be the same man? I think the State is a little misguided on that notion.

And I think Ms. Holthus gave the example of when he's 47. Judge, he's not going to be the same man. And they can't predict it, and I can't predict it, so I'm not going to sit here and say absolutely he won't be. But to predict that no matter what this guy does for the rest of his life, he's just going to come out and commit crimes, I think is a little disingenuous.

And I do think with some reflection over the next decade or so, that he's going to be somebody who can contribute to society. He's going to have to learn skills, but he's going to have to learn them in prison. He understands that, and he's accepted that. And, again, he takes responsibility for what happened.

I don't know if we discussed this prior to trial. There were no offers in this case. The State has that right not to make offers, and they chose not to make any, and we went to trial. Otherwise, he would've taken

1 responsibility and very likely pled. But we didn't receive an offer in this case,
2 Judge, and he exercised his right to go to trial.
3 I don't want the Court to hold that against him in -- again,
4 Judge, the 10 to 25 is such a significant amount of time. We're asking for
5 that. I asked for that in my sentencing memorandum. In that sentencing
6 memorandum, Judge, we did discuss alcohol and drug use, not as an excuse.
7 But as Your Honor knows, when -- as defense counsel, we get
8 very few opportunities to present our side, and I like to use that sentencing
9 memorandum to do that. Not to provide excuses for my client's behavior --
10 again, he's been found guilty -- but to provide the Court will a little bit of
11 insight as to who he is and what he's been through and what he's done.
12 We're asking for the 10 to 25, Judge. I think it's appropriate in this case.
13 THE COURT: Thank you, Mr. Gill. All right. So let's go ahead and go
14 to Mr. Monay-Pina, and then we'll have the speakers. All right?
15 MR. BOLEY: Yes, ma'am.
16 THE COURT: So, sir, by virtue of the jury's finding of guilt, I
17 adjudicate you guilty of Count 1, conspiracy to commit robbery; Count 2,
18 burglary while in possession of a firearm; Count 3, robbery with use of a
19 deadly weapon; Count 4, burglary while in possession of a firearm; Count 5,
20 robbery with use of a deadly weapon; Count 6, battery with use of a deadly
21 weapon resulting in substantial bodily harm; Count 7, attempt murder with use
22 of a deadly weapon; Count 8, battery with use of a deadly weapon resulting in
23 substantial bodily harm; Count 9, battery with use of a deadly weapon; Count
24 10, battery with use of a deadly weapon; Count 11, aiming a firearm at a
25 human being; Count 11 (sic), coercion with use of a deadly weapon; and

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1 Count 13, battery with intent to commit a crime. Ms. Holthus?
2 MS. HOLTHUS: Thank you. And I just want to address one of the
3 things that kind of -- it applies to both Defendants in terms of not making an
4 offer to Mr. Venegas. I don't know if it's really appropriate to argue
5 negotiations. But he's correct, we did not make an offer to Mr. Venegas, and
6 since he opened, I just want to let you know because we thought that this
7 was worthy of life without based upon his record.
8 We certainly never stopped him from pleading to the sheet and
9 then coming in here and taking the full responsibility because at the end of the
10 day, I don't know that there was a viable defense, quite frankly -- I don't mean
11 to be flippant -- but it was a pretty strong case from the get-go, so we didn't
12 have incentive, and our belief was that to give him a chance at getting out in
13 the community was to put someone at risk.
14 THE COURT: I understand that, Ms. Holthus. I mean, I understand
15 that, and I also understand -- you know, Mr. Venegas and Mr. Monay-Pina
16 have the right to go to trial and --
17 MS. HOLTHUS: Absolutely.
18 THE COURT: -- require the State to prove their case, so --
19 MS. HOLTHUS: And that's fine and --
20 MR. GILL: And, Judge, I thought I was clear, the State does not -- and
21 I think I made that clear in my argument, does not have to give us an offer,
22 and I didn't mean --
23 THE COURT: No, and I understand why --
24 MR. GILL: -- anything by that.
25 THE COURT: -- that would be the case here. I see both sides of that

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picture here.

MS. HOLTHUS: Now, and on the other side of it, in fairness to the co-defendant, neither did he get an offer because Mr. Venegas, obviously, was our focus, and we needed to try them together. There might have, in fact, been offer. He has no record. The facts were egregious, but it was his first time out there.

It appears to us from what we see that Venegas is also responsible for helping Monay-Pina to throw his life away. He impacted his co-defendant as well. And now he's looking at, again, if our math is correct, a recommendation of 14 to 42 years. It's a lot. He's 24 years old. He's never been in trouble before. By all accounts, I think we have some --

THE COURT: The recommendation is 8.6 to 28.

MS. HOLTHUS: Is that what you've got?

THE COURT: That's what I had, but I -- you know, it's a lot of counts, so I may not have added correctly, so --

MS. HOLTHUS: And we both tried to back each other up and haven't done very well either. I mean, the same arguments go. The facts of the crime were just egregious beyond belief. And on some level I hold Monay-Pina more responsible because he wasn't this from the get-go, robbing and hurting people. He clearly knew right from wrong. He was the one that was in the position to talk Venegas down, to say, no, this ain't right, we shouldn't be doing this, but he didn't. He went along for the ride.

He held the gun as well, and he was just as involved in that robbery as Venegas was. He was just as involved in the beginning. Now, to his credit again, he pistol whipped him, beat him with a gun instead of the

more likely to kill acts, but found guilty of the same thing. It was the fact that they were working together that made them that much more successful, made them that much more dangerous and why -- he's just chucked a whole bunch of his -- his future, I mean, at 24 years old.

But, again, the State doesn't have the same long-term concerns because I do -- I don't know if he would've done it but for the co-defendant. They're -- he claims he was inebriated at the time. He's claimed that since, I think, day one; whereas, Venegas gave conflicting -- in his sentencing memo to you on drugs and alcohol, when he's actually talking to P&P, is now drugs and alcohol aren't a problem. May have been slightly more with the co-defendant. I don't know.

I'll submit it to you. I think the recommendation by Parole & Probation is reasonable. I do feel strongly that the counts that are different offenses, the robberies with use on different people, the attempt murders, the counts that didn't have to be committed to commit the other, should run consecutive. That counts for the family that was drawn into the mix for absolutely no reason -- they didn't even know this guy -- should run consecutive. And with that, I'll submit it.

THE COURT: Thank you. Mr. Monay-Pina, is there anything you would like to say before your attorney speaks on your behalf?

DEFENDANT MONAY-PINA: I'm sorry. I never meant this to happen. I know what -- I know what I was kind of doing, but I wasn't -- I'm still sorry for whatever happened. It wasn't my intention. I was -- honestly, I'm really sorry for whatever happened.

THE COURT: All right. Thank you, sir. Mr. Boley.

MR. BOLEY: Judge, if I may approach. I have -- and I have provided a copy of this to the State. There are some letters in this packet from members of the community, specifically one of Mr. Monay-Pina's teachers from school here in Las Vegas and also some members of the community, a member of the clergy because he was involved in church -- excuse me, that school is in California. And some other folks.

There are three things that are very different about Monay-Pina than Mr. Venegas. We've heard a lot about Mr. Venegas, but I want to -- I want to point out a couple positive things about Mr. Monay-Pina. He doesn't have a criminal record. This was his first negative contact with law enforcement whatsoever. While the facts are grim, there's no history to sort of hang our hat on as far as enhancing his sentence for a history.

He has no juvenile record, and, clearly, there are some members of the community that believes in him. In fact, he has some family members in the courtroom today, that when he does get done with his sentence because we know if the Court follows the recommendation of Parole & Probation or even deviates one way or the other, Mr. Monay-Pina's life is not over. But when he gets out, he will have family support to get him back on the right track.

I think Ms. Holthus said it the best when we were talking about Mr. Venegas; that, you know, at one point he was Mr. Monay-Pina. You know, at one point he was a secondary participate in some crimes, and it escalated for him. So I think there's an argument that, you know, somebody's life doesn't have to be over just because they do one terrible chain of events.

And, of course, he's going to do -- and he understands he's

1 going to do significant prison time one way or the other, but he -- he also
2 understands that his life is not over. There is hope for Mr. Monay-Pina. You
3 know, and you heard him, he is remorseful. Parole & Probation, I think, was
4 fairly accurate in what they said here, and they gave a fair recommendation.
5 But the one thing I'd like to point out is, the State rightfully
6 focuses on this weapon, this axe, and there's no testimony at trial that Mr.
7 Monay-Pina touched this axe. While he did terrible things, pistol whipped
8 people, robbed people, all those things, he did not touch this very violent
9 scenario there. So the facts of this case, while grim, the grimmest part of it,
10 as a participant in this crime, it could have been horrifying to him to watch his
11 co-conspirator do this because that's not what he meant to participate in from
12 the beginning.
13 So I'm going to ask the Court to consider deviating downward
14 from what Parole & Probation has recommended here and consider a sentence
15 of 48 to 120 months. I think with no criminal record, coming in as a first-
16 timer, I think that that would give him a significant lesson. That's still a
17 significant amount of time on the bottom, and he would do his time, get out
18 and go back to working, going to school and get his life back together. Thank
19 you.
20 THE COURT: Thank you. All right. Can we have the speakers, please.
21 MS. HOLTHUS: Uh-huh. Who wants to go first? Who wants to speak
22 first? Adriana? You want her to come up to the -- where do you want her,
23 Judge?
24 MR. SCHWARTZ: She can stand with us --
25 THE COURT: She can stand right by you guys. That's fine.

All right. If you'll raise your right hand, the clerk will swear you in.

MS. A. COLON: Good morning. (Speaking Spanish).

THE COURT: Ma'am, hang on just one second. The clerk's going to swear you in first.

ADRIANA COLON,

having been duly sworn as a victim/witness, testified through an interpreter as follows:

THE WITNESS: I swear before this public, Your Honor, that I'm telling the truth.

THE COURT: All right, ma'am. Could you state your name, please, and spell it for the record.

THE WITNESS: My name is Adriana Colon, and it's spelled A-D-R-I-A-N-A, C-O-L-O-N.

THE COURT: Thank you, ma'am. All right. Go ahead.

THE WITNESS: This has been very traumatic. I've never had anything like this happen to me before. I never thought that my life was going to be changed in a second. Ever since, I've not been able to -- to have peace. I'm receiving psychological care because I'm always thinking of what they said and what -- and the guns they had, the weapons. I can't imagine if -- you know, that they would have taken someone's life, my -- my children, my life, my brother. It's been -- I mean, I just can't have peace anymore.

THE COURT: All right.

THE WITNESS: To me, if they did something like this, so traumatic, I believe if you let them out, they'll commit something even worse. And that's all I have to say.

THE COURT: All right. Thank you, ma'am.

MS. HOLTHUS: May I ask one question? Are you still living at the same house?

THE WITNESS: I was my (indiscernible) . Not one more day.

THE COURT: All right. Mr. Boley or Mr. Gill, do you have any questions?

MR. GILL: No, Your Honor. Thank you.

MR. BOLEY: No.

THE COURT: Ma'am, you can go ahead and have a seat. Thank you.

THE WITNESS: Thank you.

MS. HOLTHUS: Who wants to go next?

THE COURT: All right, ma'am. If you'll please raise your right hand, the clerk will swear you in.

LIZBETH AZINA COLON,

having been duly sworn as a victim/witness, testified as follows:

THE CLERK: Thank you. If you will state and spell your name for the record.

THE WITNESS: My name Lizabeth Azina Colon. It's L-I-Z-B-E-T-H, A-Z-I-N-A, C-O-L-O-N.

THE COURT: Thank you. Go ahead whenever you're ready.

THE WITNESS: That night me and my siblings were scared. We -- we didn't have much control since we weren't in the right place of mind. It was 4:00 o'clock in the morning. We were thinking that night we were going to school, it was going to be a normal day the next day, and then we wake up at 4:00 in the morning and that happens.

And it's impacted our lives. I feel the most because I feel like I have to take care of my siblings a lot more. We became closer because we -- we thought that day that one of us weren't going to get out alive. My little brother, he can't sleep by himself. He has his own room, but he hasn't slept a day in that bed. He sleeps with my mom.

My sister, she's -- she couldn't come here because she's just very scared to see their faces again. And I seen that her personality has changed a lot. She was very outgoing before, and now she's a little bit more shy and timid.

We had to move schools. We had to move from a different part of Las Vegas. We grew up with all our friends and family on that side, and now we had to change because we were just scared to be there again. It's impacted us as in our state of safety.

We don't -- we don't feel safe anymore. We have to every night make sure every door is locked, every window's locked. We got dogs so that they could be barking in case any -- in case there's any noise at night. It's just impacted us in our state of safety.

THE COURT: You're the one who called the police, right?

THE WITNESS: Yes.

THE COURT: Yeah. You were really brave that night. I'm really sorry this happened to your family.

THE WITNESS: Thank you.

THE COURT: Any questions?

MS. HOLTHUS: No. That's it.

THE COURT: Anything?

MR. GILL: No, Your Honor.

MR. BOLEY: No.

THE COURT: Okay.

MS. HOLTHUS: Javier.

THE COURT: Sir, if you will please raise your right hand, the clerk will swear you in.

JAVIER COLON,

having been duly sworn as a victim/witness, testified through an interpreter as follows:

THE COURT: Sir, could you please state your name and spell it for the record.

THE WITNESS: Javier Colon, J-A-V-I-E-R, C-O-L-O-N.

THE COURT: Thank you, sir. Whenever you're ready.

THE WITNESS: I don't have a lot to say. These two guys are not -- I'm not going to lose any sleep over -- over them. I don't know -- I don't want to hear their excuses because I know they're not sincere. I just -- I just want justice to be done, and that is all. And that's all. That's all I have to say.

THE COURT: All right. Thank you, sir. I'm sorry, did you have questions for the speaker? I'm sorry, I forgot.

MS. HOLTHUS: No.

MR. BOLEY: No.

MR. GILL: No, Judge.

THE COURT: All right. Any additional speakers?

MS. HOLTHUS: That's it, Judge.

THE COURT: I'll start with Mr. Venegas. All right. I have -- before I

start, I have just a general question. With respect to the findings on the deadly weapon enhancement, my question is, can I do that at the end or do I need to do that for each enhancement?

[State Counsel confer]

MS. HOLTHUS: As to the -- if you're using the enhancement, which we believe you are required to by law, there wouldn't be -- it's just one or the other, the deadly weapon or the habitual.

THE COURT: No, but I have to make -- there are certain counts where I have to make the findings under the statute.

MS. HOLTHUS: Okay.

THE COURT: Yeah. So I was just asking if you think it's a problem if I do it at the end just because there are so many counts.

MS. HOLTHUS: No, not at all. Not at all.

THE COURT: Okay. All right. Sir, so with respect to Count 1, conspiracy to commit murder, I sentence you to a minimum of 24 and a maximum of 60 months in the Nevada Department of Corrections.

With respect to Count 2, burglary while in possession of a firearm, I sentence you -- so this is a mandatory habitual felon, so I am going to sentence you under that statute to 25 years with parole eligibility after 10 years. That will run concurrently to Count 2 [sic].

On Count 3, robbery with use of a deadly weapon, that also falls under the habitual felon enhancement. And just for the record, the State has provided certified copies of the priors. I know we did that earlier, but -- and, sir, I sentence you to 25 years with parole eligibility after 10 years. That will run concurrently to Counts 1 and 2.

On Count 4, burglary while in possession of a firearm, I sentence you under the habitual felon statute to 10 years with parole eligibility -- I'm sorry, 25 years with parole eligibility after 10 years. That will run consecutively to Counts 1, 2 and 3.

On Count 5, robbery with use a deadly weapon, that also requires the habitual felon enhancement, I sentence you to 25 years with parole eligibility after 10 years. That will run consecutively to Counts 1, 2 and 3 and concurrently to Counts 4 and 5.

On Count 6, battery with use of a deadly weapon resulting in substantial bodily harm, I sentence you to 24 to 120 months. That will run concurrently to everything.

Count 7, attempt murder with use of a deadly weapon, which requires the habitual felon enhancement, I sentence you to 25 years with parole eligibility after 10 years. That will run consecutively to Counts 1, 2 and 3 and concurrently to the other counts.

On Count 8, battery with use of a deadly weapon resulting in substantial bodily harm, I sentence you to 24 to 120 months. That will run concurrently with all counts.

Count 9, battery with use of a deadly weapon, I sentence you to 24 to 60 months. That will run concurrently to all counts.

Count 10, battery with use of a deadly weapon, I sentence you to 24 to 60 months. That will run concurrently with the other counts.

Count 11, aiming a firearm at a human being, a gross misdemeanor, I sentence you to 364 days in the Clark County Detention Center. That will concurrently with the other counts.

AA000634

Count 12, coercion with the use of a deadly weapon, I sentence you to 24 to 60 months. That will run consecutively to Counts 1, 2 and 3 as well as consecutively to Counts 4, 5 and 7. On Count 13 -- but concurrently to the other counts.

On Count 13, battery with intent to commit a crime, I sentence you to 24 to 60 months to run concurrently with everything else. And --

All right. So I have -- so the aggregated sentence -- the aggregated sentence that I have is 264 to 660 months. It's 22 years with -- well, 55 years with parole eligibility after 22 years has been served. Additionally, I believe that there are -- let's see. It has 476 days' credit for time served. Mr. Gill, does that sound correct --

MR. GILL: Yes.

THE COURT: -- to you?

MR. GILL: Yes, Your Honor.

THE COURT: All right. State, is that --

MR. SCHWARTZ: That's fine.

MS. HOLTHUS: That's fine.

THE COURT: All right. With respect to any of the deadly weapon enhancements, I just want to make the findings under NRS 193.165, just -- I'm not sure that I need to do this for this one, but I will just to be complete. With respect to the facts and circumstances of the crime, this involves two separate violent crimes. Mr. Venegas was an equal participant in the offense and perhaps the leader since Mr. Monay-Pina had never been in trouble. Additionally, Mr. Venegas was the one who was wielding the ax in the second offense.

With respect to the criminal history, obviously, Mr. Venegas' criminal history has put him in a position where the Court is required to impose the habitual felon enhancement, so he has a prior history of serious robbery offenses that impacted the crime on the victim. We've had speakers here today to talk about how difficult this has been for them and also at trial, the 7-Eleven clerk testified that that was extraordinarily difficult for him as well.

In terms of mitigating factors, Mr. Venegas completed one parole successfully, and he was at one point on parole for some time without -- I think almost three years without anything -- without having any problem. So it appears that if he chooses to, he can actually function successfully in society, but he was on parole when this offense was committed.

So there's also a $25 administrative assessment fee; $3 DNA administrative assessment. The DNA was previously taken on September 15th of 2008 so that won't be ordered. And a $350 court-appointed counsel fee. All right. Anything else with respect to Mr. Venegas?

MS. HOLTHUS: The only thing I'm wondering is, I don't know that we can give him the credit for time served because he was on parole at the time. I forgot that.

THE COURT: Oh. I don't have his --

MS. HOLTHUS: It should be zero.

THE COURT: I don't have his parole expiration. Well, it's from his parole expiration.

MS. HOLTHUS: Well, I presume since he's coming in from the prison --

THE COURT: Oh, that -- I don't think that's --

AA000836

1 MS. HOLTHUS: He's still serving --
2 THE COURT: My recollection was that he had expired his parole,
3 but --
4 MR. GILL: Yes, and then we --
5 THE COURT: And I looked at this like --
6 MR. GILL: Yes. No, I think 476 is correct, Judge.
7 THE COURT: -- a month ago. I know I have more than 500 days for
8 Mr. Monay-Pina. I have --
9 MS. HOLTHUS: It should just be from --
10 THE COURT: Actually, closer to 600 days for Mr. Monay-Pina, so I
11 think that Parole & Probation calculated that from the expiration --
12 MS. HOLTHUS: Is it just from the expiration date?
13 THE COURT: I think they just never moved him from the prison except
14 occasionally, so --
15 MS. HOLTHUS: Okay.
16 THE COURT: -- if there's an issue, I'm happy to modify it --
17 MS. HOLTHUS: Okay.
18 THE COURT: -- but I believe that takes into account his expiration
19 date.
20 MS. HOLTHUS: Thank you.
21 MR. GILL: Thank you very much, Your Honor.
22 THE COURT: All right. Okay. With respect to Mr. Monay-Pina, sir, on
23 Count 1, I sentence you -- on conspiracy to commit robbery, I sentence you to
24 a minimum of 24 and a maximum of 60 months.
25 On Count 2, burglary while in possession of a firearm, I

AA000837 000583

sentence you to 24 to 120 months. That will run concurrently with Count 1.

On Count 3, robbery with use of a deadly weapon, I sentence you to 24 to 100 months with -- 120 months with a consecutive 12 to 60 months for the deadly weapon enhancement. That will run concurrently with Counts 1 and 2.

On Count 4, burglary while in possession of a firearm, I sentence you to a minimum of two and a max -- 24 to 120 months. That will run concurrently with the other counts.

Count 5, robbery with use of a deadly weapon, I sentence you to 24 to 120 months, plus 24 -- a consecutive 24 to 60 months for the weapon enhancement. That will run consecutively to Counts 1, 2 and 3.

Count 6, battery with use of a deadly weapon resulting in substantial bodily harm, I sentence you to 24 to 120 months. That will run concurrently with the other counts.

Count 7, attempt murder with use of a deadly weapon, I sentence you to 24 to 120 months, plus a 24 to 60 months consecutive for the weapon enhancement. That will run consecutively to Counts 1 through 3.

Count 8, battery with use of a deadly weapon resulting in substantial bodily harm, I sentence you to 24 to 120 months concurrent to the other counts.

Count 9, battery with use of a deadly weapon, I sentence you to 24 to 60 months, and that will be concurrent.

Count 10, battery with use of a deadly weapon, I sentence you to 24 to 60 months. That will be concurrent.

Count 11, aiming a firearm at a human being, a gross

1 misdemeanor, I sentence you to 364 days in the Clark County Detention
2 Center. That will run concurrent with everything else.
3 Count 12, coercion with use of a deadly weapon, I sentence you
4 to 12 to 60 months consecutive to the other counts, consecutive to -- they'll
5 be consecutive to Count -- to Counts 1, 2 and 3 and then Counts 5 and 7.
6 And then Count 13, battery with intent to commit a crime, I
7 sentence you to 24 to 60 months concurrently.
8 So the aggregate sentence would be 94 to 420 months, 9 to 35
9 years. The credit, I have a different date that I -- Mr. Boley, do you have a
10 current figure for credit?
11 MR. BOLEY: He has been in jail since the day of the -- I think Your
12 Honor is right on the money when it was almost 600 days.
13 MS. HOLTHUS: January 12th, 2016; is that right?
14 THE COURT: I get 604. Does that sound right?
15 MR. SCHWARTZ: Yes.
16 MS. HOLTHUS: That sounds close.
17 THE COURT: Okay. 604 days' credit for time served. With respect to
18 the findings on the deadly weapon enhancement, as I stated before, the facts
19 and circumstances at the time, there were two separate violent crimes, and
20 Mr. Monay-Pina was an equal participant in the offenses. In his favor, he has
21 no criminal history, and that's, in fact, why he's receiving a significantly lower
22 sentence that Mr. Venegas.
23 The impact of the crime on any victim, again, we had the
24 speakers here who expressed how this has impacted them in a very negative
25 way, and also at trial, the 7-Eleven clerk testified about how difficult this

offense was for him.

With respect to mitigating factors, there's no prior criminal history or prior arrests. Mr. Monay-Pina has some employment history. He graduated from high school and had some college. And then he expressed remorse in his victim statement. And I should say, Mr. Venegas had expressed remorse today. So I should have said that earlier. And then other relevant information, just that Mr. Monay-Pina expressed that he has a drinking problem and was under the influence when this offense was committed.

There will also be a $25 administrative assessment fee; a $3 DNA assessment; $150 DNA analysis and testing for genetic markers; and a $350 court-appointed counsel fee. All right. Anything else?

MR. BOLEY: Judge, I was privately retained.

THE COURT: I'm sorry?

MR. BOLEY: I was privately retained.

THE COURT: Oh, I'm sorry. I didn't realize that. So there will be no court-appointed counsel fee. I'm sorry, Mr. Boley.

MR. GILL: Thank Your Honor.

THE COURT: Thank you.

MR. SCHWARTZ: Thank Your Honor.

MS. HOLTHUS: Thank you.

[Proceedings concluded at 9:42 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Renee Vincent

Renee Vincent, Court Recorder/Transcriber

CERTIFICATE OF ELECTRONIC TRANSMISSION

The undersigned hereby declares that on September 24, 2018, an electronic copy of the foregoing APPELLANT'S APPENDIX VOLUME IV was sent via the master transmission list with the Nevada Supreme Court to the following:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 23 2018 02:43 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

JOSE FERNANDO MONAY-PINA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 74199

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE FERNANDO MONAY-PINA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 74199

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(2) because it is an appeal from a Judgment of Conviction that involves a Category B felony.

STATEMENT OF THE ISSUES

1. Whether the State impermissibly shifted the burden of proof at trial.

STATEMENT OF THE CASE

On March 4, 2016, Defendant Jose Fernando Monay-Pina ("Pina") was charged by way of Information with one count of Conspiracy to Commit Robbery; two counts of Burglary While in Possession of a Firearm; two counts of Robbery With Use of a Deadly Weapon; four counts of Batter With Use of a Deadly Weapon

Resulting in Substantial Bodily Harm; one count of Attempt Murder With Use of a Deadly Weapon; one count of Aiming a Firearm at a Human Being; one count of Coercion With Use of a Deadly Weapon; and one count of Battery With Intent to Commit a Crime. 1 Appellant's Appendix ("AA") 0001-0007.

On March 7, 2016, Pina was arraigned, entered a plea of not guilty, and invoked his right to a speedy trial within 60 days. 1 AA 0090. Trial was scheduled for May 2, 2016, with a calendar call of April 25, 2016. Id. At calendar call, Pina waived his right to a speedy trial, requested a continuance, and the trial date was vacated and reset to September 26, 2016. 1 AA 0091-0092. After a few more continuances, at the February 27, 2017, calendar call, the case was reassigned to Department VII. 1 AA 0093, 0095, 0097-0099, 0101, and 0103.

On March 13, 2017, trial commenced before the Honorable Linda Bell. 1 AA 0106. That same day, the State filed a Second Amended Information. Id. On March 15, 2017, the State filed a Third Amended Information. 1 AA 0110-0111. The jury returned guilty verdicts as to all counts against Pina: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Counts 2 and 4 – Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060); Counts 3 and 5 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Counts 6 and 8 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481); Count

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7 – Attempt Murder With Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Counts 9 and 10 – Battery With Use of a Deadly Weapon (Category B Felony – NRS 200.481); Count 11 – Aiming a Firearm at a Human Being (Gross Misdemeanor – NRS 202.290); Count 12 Coercion With Use of a Deadly Weapon (Category B Felony – NRS 207.190, 193.165); and Count 13 – Battery With Intent to Commit a Crime (Category B Felony – NRS 200.400.2). 1 AA 0066-0069, 0110-0111. Sentencing was set for June 15, 2017. 1 AA 0111.

After a continuance, Pina was sentenced on September 7, 2017. 1 AA 0114-0116. Pina was sentenced to an aggregate term of a minimum of nine-four (94) months and a maximum of four hundred twenty (420) months in the Nevada Department of Corrections, with six hundred four (604) days credit for time served. 1 AA 0115-0116. The Judgement of Conviction was filed on September 21, 2017. 1 AA 0074-0077.

Pina filed his Notice of Appeal on October 3, 2017. 1 AA 0078-0079. Pina filed his Opening Brief on September 25, 2018. The State responds below.

STATEMENT OF THE FACTS

On January 12, 2016, Richard DeCamp ("DeCamp"), was working the graveyard shift at a local 7-Eleven convenience store. 3 AA 0145-0146. At approximately 3:00 a.m., while DeCamp was working the store by himself, two men, one later identified as Pina, entered the store. 3 AA 0147; 0177-0179; 0272-0273;

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0276. DeCamp described the men as a "tall guy and a [] short guy" and both men wore masks and had guns. 3 AA 0147. At one point, the men pointed their guns at DeCamp and ordered him to empty the cash register. 3 AA 0150.[1] Seeing a second cash register, the taller man, while continuing to point his gun at DeCamp, demanded that DeCamp empty the second cash register. Id. The men ordered a frightened DeCamp to lay on the floor while the men fled with the money from both cash registers. 3 AA 0152. DeCamp lied on the floor for a few minutes, got up, and called 911. Id. Approximately ten minutes later, Las Vegas Metropolitan Police Department ("Metro") responded. Id.

Metro patrol officer, Isaiah Simmons ("Officer Simmons") and Metro Sergeant Abraham Aguirre ("Sergeant Aguirre") responded to a robbery call at a 7-Eleven. 3 AA 0174-0175; 0191. At trial, Officer Simmons testified that upon making contact with DeCamp he was visibly shaking and frightened. 3 AA 0175. Officer Simmons secured the scene, reviewed the store's surveillance video, and documented that $139.00 had been taken from the store. Id. After DeCamp calmed down, Officer Simmons took a voluntary statement from him and developed a description of the suspects: "two Hispanic males . . . brandishing large firearms, dark clothing, gloves, masks . . . [and] [o]ne had a puffy jacket." 3 AA 0175-0176.

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[1] DeCamp testified that during his shift, he tries to keep about ten five-dollar bills in the register and eliminates twenty-dollar bills by depositing them in a safe. 3 AA 0148.

Nearby, Javier Colon ("Javier"), a former landscape worker, was living with his sister, Adriana Colon ("Adriana") and her three children.[2] 3 AA 0233-0236. At the time, Javier was living in his sister's garage. Id. In the early hours of the January 12, 2016, Javier was asleep and suddenly awakened when two men opened the garage door and one of them screamed "Javier, get up, get up." 3 AA 0235. After the men opened the garage, one of the men rushed Javier and began beating him by using a firearm as a blunt object to repeatedly hit Javier over the head. 3 AA 0238-0239. During the attack, Javier noticed Pina was pointing his firearm at his family through the garage windows. 3 AA 0239. Javier pleaded with the men to stop, but they ignored him. 3 AA 0240. That morning, Javier planned on doing a "side job" so he had sharpened an axe and kept it near his bed. 3 AA 0240. Seeing the axe and while Javier was lying on his back in the bed, Pina's Co-defendant, picked it up and swung the blade at Javier three times: hitting his leg, ribs, and attempting to hit his head. 3 AA 0237-0241. Luckily, prior to the blade hitting Javier's head, Javier raised his right hand and intercepted the blade which cut his hand open. 3 AA 0241-0242.

At trial, Javier recognized one of the men as a former landscaping colleague who he worked with in the past. 3 AA 0236. Javier also identified Pina as one of the assailants because he remembered seeing Pina's eyes while Pina stood in the garage,

[2] At trial, Adriana testified that her children Lizbeth, Samantha, and Cesar were 16, 14, and 10 years old respectively.

recognized Pina's eyes in court, and, in the past, had worked with Pina in landscaping. 3 AA 0272-0273; 0276. Further, Javier observed Pina wore gloves. 3 AA 0273-0274. Javier recognized the gloves worn by Pina as the same black and red gloves that the landscaping company had given them while they worked there. 3 AA 0275-0276. At one point, the men noticed police lights approaching and escaped. 3 AA 0243. A bloodied Javier was transported to the hospital where he received multiple stiches and staples on his head and hand. 3 AA 0245-0250. Javier noticed the assailants took his camera, an MP3 player, and two collection knives. 3 AA 0246.

Prior to the attack on Javier, Adriana heard Javier screaming that someone was threatening him. 3 AA 0280. She made her way toward the windows facing the garage and saw two men who told her to "shut up" or they were going to "break [her] too." 3 AA 0280. Adriana observed that the men had firearms and were pointing them at the windows where she was standing. 3 AA 0280-0281. Adriana heard the men hitting Javier "really hard." 3 AA 0282. She begged them to leave, but they did not. 3 AA 0281. Eventually, Adriana's daughter called the police and they responded within minutes. 3 AA 0283.

Meanwhile, at approximately 4:22 a.m., while Sergeant Aguirre was putting up crime scene tape at the 7-Eleven he heard a "high priority call" coming through the radio. 3 AA 0193-0194. The call described "two Hispanic males wearing dark clothing had forced their way into [a] home and were pistol whipping [a man]." 3

AA 0193-0194. Sergeant Aguirre made contact with Officer Simmons and told him he was going to respond to the nearby high priority call located approximately "right around the corner" from the 7-Eleven. Id. On arrival Sergeant Aguirre made contact with Officer Ivan Duron ("Officer Duron") and Officer Justin Spurling ("Officer Spurling"). 3 AA 0197. Sergeant Aguirre immediately noticed Officer Duron was rendering aid to Javier in the garage and observed a large "amount of blood on the bedding, walls, and floor." Id. Sergeant Aguirre also observed an axe by the entryway to the garage. 3 AA 0198. Sergeant Aguirre then received a radio call from Officer Spurling indicating he apprehended two suspects in a backyard. 3 AA 0198. Sergeant Aguirre left Officer Duron behind to assist Officer Spurling. Id.

When Officer Spurling arrived he noticed a man screaming and crying inside a garage port. 3 AA 0339-0340. The man was also bleeding "pretty badly from his face." Id. Officer Spurling focused on finding anyone else who might have been involved. 3 AA 0341. He surveilled the area and jumped over a wall. 3 AA 0341-0342; 0352-0353. Once on the other side of the wall, Officer Spurling noticed a man, later identified as Pina, standing in the middle of a backyard. Id. After Officer Spurling and Pina made eye contact, Pina, who was wearing a stocking cap on his head, immediately ducked down. Id. Officer Spurling placed a call on his radio that he potentially located a suspect and continued to give Pina commands until he was taken into custody along with the other assailant. 3 AA 0343-0350. Officer Spurling

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testified the following items were recovered from the backyard where Pina was apprehended: a "wad of cash," Javier's wallet, a "replica firearm," and a knife and sheath. 3 AA 0354-0356. Once Adam Felabom ("Mr. Felabom"), a Crime Scene Analyst with Metro, arrived on scene he examined the wad of cash and it totaled $138.00. 4 AA 0404. Mr. Felabom also photographed, collected, and impounded a blue ski mask from the backyard. 4 AA 0400-0401. A DNA swab was taken from the blue ski mask. 3 AA 0465. After the sample was analyzed, it was determined that the DNA found on the blue ski mask was at least 298 million times more likely to belong to Pina and one other individual compared to any other person. 4 AA 0465-0466.

Once Pina was arrested, Officer Simmons took Decamp to the arrest scene where a show-up was conducted and Decamp identified Pina and the other suspect as the ones who had robbed him at gunpoint at the 7-Eleven. 3 AA 0177-0179.

SUMMARY OF THE ARGUMENT

The State did not commit prosecutorial misconduct in its closing rebuttal argument when it made the following remarks to the jury:

> I do think it's interesting that we go through all these different pictures, all this evidence, all these things. The defense gets up and talks to you about their closing, right? Their case -- they don't show you any of the pictures, right? They don't go through any of the evidence.

4 AA 0532. Pina's argument that these statements constituted burden shifting is meritless. Pina failed to show there was prosecutorial misconduct and Pina cannot

establish that he was prejudiced and denied a fundamentally fair trial. Furthermore, any alleged misconduct does not warrant reversal under plain or harmless error.

ARGUMENT

I. The district court properly denied Pina's motion for a mistrial because the State's remarks did not shift the burden and Pina was not prejudiced.

"[A]s long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented." Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001), citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-45 (1997). This includes commenting on a defendant's failure to substantiate his theory. Colley v. State, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982); See also Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000), citing State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows."). *Further, if the defendant presents a theory of defense, but fails to present evidence thereon, the State may comment upon the failure to support the supposed theory*. Evans, 117 Nev. at 630-631, 28 P.3d at 513; see

McNelton v. State, 115 Nev. 396, 408–09, 990 P.2d 1263, 1271–72 (1999) (emphasis added).

Commenting on the lack of evidence supporting a defense theory does not constitute burden shifting. Pina takes issue with comments made by the State during its rebuttal closing argument. Appellant's Opening Brief ("AOB") at 12. However, these statements must be taken in context, as criminal convictions are not to be overturned lightly. Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) ("When reviewing prosecutorial misconduct, the challenged comments must be considered in context and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.") (internal quotations omitted).

Here, the State was merely commenting on the evidence as part of an evaluation of defense's argument that the State had not presented sufficient evidence to convict Pina. See generally 4 AA 0519-0531. Specifically, it was Pina's counsel, during closing, who mentioned that the State had presented "photos," but that the jury should doubt the State's evidence. 4 AA 0529. The State was not arguing that Pina had to provide evidence to rebut elements of the charges against him. To the contrary, the State at the beginning of their closing argument reminded the jury that it was incumbent on the State "to prove two things: that . . . crimes were committed and that the Defendant . . . committed the crimes." 4 AA 0504. Further, the State's comment that defense counsel did not show the jury "any of the pictures" or

highlight "any of the evidence" did not disparage counsel or Pina. Rather, the State's remark was a mere comment on the evidence presented at trial, which is entirely permissible. Evans, 117 Nev. at 630–31, 28 P.3d at 513; McNelton, 115 Nev. at 408-409, 990 P.2d at 1271–1272; Colley, 98 Nev. at 16, 639 P.2d at 532.

A. Plain Error

This Court may only consider this allegation for plain error because Pina failed to offer an objection during trial. Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002); see also Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (if a party fails to object, this Court reviews for plain error). In determining whether an error is plain, this Court must consider "whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights. Additionally, the burden is on an appellant to show actual prejudice or a miscarriage of justice." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (footnote omitted).

At a minimum, the error must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights." Rimer v. State, 351 P.3d 697, 716 (citation omitted) (2015); Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000). Reversal under plain error requires that an appellant show that a substantial right was prejudiced. Id. "When an appellant fails to raise an issue below and the asserted error is neither

plain nor constitutional in magnitude, this Court will not consider it on appeal." Walch v. State, 112 Nev. 25, 34, 909 P.2d 1184, 1189 (1996).

Here, should the Court find that the State's remarks during closing rebuttal resulted in prosecutorial misconduct, the Court should apply a plain error standard of review. This is particularly true because Pina's trial counsel not only failed to object to the State's remarks, but he also did not seek a bench conference, a curative instruction from the court, or request a mistrial. 4 AA 0532-0534. In fact, it was Pina's Co-defendant's counsel who objected and moved for a mistrial. Id. Pina's counsel never joined Co-defendant's counsel in his objection. Rowland, 118 Nev. at 38, 39 P.3d at 118 (2002); see also Gallego, 117 Nev. at 365, 23 P.3d at 239 (2001) (if a party fails to object, this Court reviews for plain error).

Pina argues the burden of proof was shifted to him because the State's comments suggested that Pina should be found guilty because his attorney failed to address "any of the pictures" or "go through any of the evidence" during Pina's closing. AOB at 12. This argument is unconvincing because Pina cannot avail himself of Co-defendant's objection to preserve this issue for appeal purposes. Pina also fails to show how a substantial right was prejudiced by the State's remarks during rebuttal. Immediately, after Co-defendant's counsel objected and a bench conference was held, the district court reminded the jury that the State bears the

burden of proof.[3] This curative instruction neutralized any prejudice that may have stemmed from the prosecutor's remarks, especially in light of the overwhelming evidence presented to the jury.[4] See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) (stating jurors are presumed to follow the district court's instructions).

B. Harmless Error

However, even if the Court considers the issue preserved, Pina's claim still fails under a harmless error standard of review because Pina cannot show a substantial right was prejudiced and given the evidence at trial a rational jury would have found Pina guilty.

NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3, 119 S. Ct. 1827, 1830 (1999)). Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in

[3] The district court admonished the jury as follows: "I remind the lady -- the ladies and gentlemen of the jury that the burden is on the State, and the defense is not required to present any evidence." 4 AA 0533.
[4] The State does not concede that Pina was prejudiced and any error occurred during trial.

I:\APPELLATE\WPDOCS\SECRETARY\BRIEFS\ANSWER & FASTRACK\2018 ANSWER\MONAY-PINA, JOSE FERNANDO, 74199, RESPONDENT'S ANSW BRIEF.DOCX
AA000658

determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

Here, the State presented extensive and compelling evidence linking Pina to the crime. The jury was presented with testimony from DeCamp and Javier, both of which identified Pina as one of the perpetrators. Notably, Javier identified the gloves worn by Pina as the same gloves they had worn when they worked in landscaping. The jury also heard testimony regarding the uncanny similarity in the amount of cash taken from the 7-Eleven and recovered from the backyard. Furthermore, the State presented DNA evidence linking Pina to the blue mask that was found in the backyard after Javier was brutally attacked. Valdez, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (reasoning that "this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error."); see also United States v. Young, 470 U.S. 1, 11 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context . . .").

Accordingly, because any rational trier of fact, given the overwhelming evidence presented by the State, would have found Pina guilty beyond a reasonable doubt, Pina's argument fails.

CONCLUSION

Based on the foregoing, the State respectfully requests this Court order the Judgment of Conviction AFFIRMED.

Dated this 23rd day of October, 2018.

Respectfully submitted,

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

BY *<u>/s/ John Niman</u>*
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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 3,415 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of October, 2018.

Respectfully submitted

STEVEN B. WOLFSON
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Nevada Bar #001565

BY *\/s/ John Niman*
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 23, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

MATTHEW LAY, ESQ.
Counsel for Appellant

JOHN NIMAN
Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

JN/John Torre/ed

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE FERNANDO MONAY-PINA,	)	DOCKET NUMBER: 74199
	)	
Appellant,	)	Electronically Filed Dec 12 2018 08:48 a.m. Elizabeth A. Brown Clerk of Supreme Court
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

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Attorney for Respondent
THE STATE OF NEVADA

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE FERNANDO MONAY-PINA,	)	DOCKET NUMBER: 74199
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are person and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Attorney of record for Appellant: Matthew Lay, Esq.

Corporation: Nguyen & Lay.

There are no parent corporations involved in the instant appeal.

Dated this 10th day of December, 2018.

Matthew Lay, Esq.
Nevada Bar Identification No. 12249
Attorney for Appellant

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NRAP 26.1 DISCLOSURE ii

ARGUMENT

Here, during the State's rebuttal argument, the prosecutor commented on defense counsel's failure to address "any of the evidence" during closing argument. Specifically, the following occurred during the State's rebuttal argument:

> MR. SCHWARTZ: … I do think it's interesting that we go through all these different pictures, all this evidence, all these things. The defense gets up and talks to you about their closing, right? Their case – they don't show you any of the pictures, right? They don't go through any of the evidence.

IV AA 532. The prosecutor's comments made during the State's rebuttal argument shifted the burden of proof to the Appellant, Jose Fernando Monay-Pina.

Monay-Pina concedes that defense counsel failed to object to the prosecutor's statements, nor did he ask for a bench conference and a curative instruction to the jury, nor did he request a mistrial.

Nevertheless, in this case, the district court should have protected Monay-Pina's right to a fair trial by declaring a mistrial sua sponte because the State shifted the burden of proof to Monay-Pina during its rebuttal argument. Specifically, the State's comments suggested to the jury that Monay-Pina should be found guilty, because his attorney failed to address "any of the pictures" or "go through any of the evidence" during defense counsel's closing argument.

The State, in its Respondent's Answering Brief, asserts that "it was Pina's counsel, during closing, who mentioned that the State had presented 'photos,' but that the jury should doubt the State's evidence." Respondent's Answering Brief, 10. Indeed, Monay-Pina's counsel referenced photographs that the State admitted into evidence during the trial. Specifically, trial counsel stated the following:

> … I know you've seen this jury instruction repeatedly, the reasonable doubt jury instruction. Now you've seen some evidence, and you saw some photos that the State presented of the two gentlemen that enter the 7-Eleven and the Defendants later on in similar clothing and such.

IV AA 529. Defense counsel then proceeded to identify evidence that he believed cast doubt on the assertion that Monay-Pina was one of the perpetrators of the underlying incident. However, defense counsel did not reference these photographs at any other point during Monay-Pina's closing argument.

The State argues that the prosecutor "was not arguing that [Monay-]Pina had to provide evidence to rebut elements of the charges against him." Respondent's Answering Brief, 10. The State supports this argument by asserting that, "the State at the beginning of their *closing argument* reminded the jury that it was incumbent on the State 'to prove two things: that … crimes were committed and that the Defendant … committed the crimes." Id. at 10 (italics added). This assertion ignores the fact that the statements at issue, which shifted the burden of proof to the defendant, were made by a different prosecutor, after the jury had heard the

remainder of the State's closing argument, and after two separate closing arguments by counsel for the co-defendants. Additionally, the statements at issue were made during the rebuttal argument, not the closing argument. By ignoring this crucial distinction, the State attempts to absolve the prosecutor responsible for making the burden-shifting statement by decontextualizing the statement itself.

Additionally, the State's rebuttal argument was factually incorrect. For example, defense counsel addressed the credibility of the victim, Javier Colon's, testimony. IV AA 143-44. Defense counsel also addressed the testimony adduced from Colon's sister and her children, and noted their inability to identify the second assailant, who is alleged to have been Monay-Pina. Additionally, Defense counsel addressed the testimony of Officer Sperling testimony regarding items recovered from where law enforcement ultimately located Monay-Pinay. Thus, despite the State's assertions to the contrary, defense counsel did review the trial evidence during Monay-Pina's closing argument.

More importantly, however, the State's initial rebuttal argument was premised on the claim that defense counsel failed to address "any of the pictures." The State's rebuttal argument suggests that defense counsel was either negligent or deliberately mislead the jury by failing to address the photographs at issue.

The State also claims that the remark at issue was "a mere comment on the evidence presented at trial, which is entirely permissible." Respondent's

Answering Brief, 11. In support, the State cites, among other cases, this Court's opinion in Evans v. State, 117 Nev. 609, 630, 28 P.3d 498, 513 (2001). In Evans, this Court found that the State's remarks during rebuttal argument defending a police investigation and praising the State's witnesses were reasonable, because "defense counsel in closing argument extensively challenged the quality of the police investigation in this case and the credibility of the State's witnesses." Id. As noted above, in the instant case, defense counsel merely noted that the jury had viewed "photos that the State presented of the two gentlemen that enter the 7-Eleven and the Defendants later on in similar clothing and such." IV AA 529. Defense counsel made no further reference to these photographs at any other point during Monay-Pina's closing argument. The State can hardly assert that defense counsel "extensively challenged" the photographs at issue, such as occurred in Evans, because, here, defense counsel merely acknowledged that the State had presented photos, which the jury had the opportunity to view, and then made no further comment about these photos. Therefore, unlike Evans, the State's burden-shifting remark was wholly disproportionate to defense counsel's actions during closing argument.

CONCLUSION

Based on the foregoing, this Court should reverse Monay-Pina's conviction.

Dated this 10th day of December, 2018.

NGUYEN & LAY

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CERTIFICATE OF COMPLIANCE

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2. I further certify that this brief does not comply with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 929 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF ELECTRONIC TRANSMISSION

The undersigned hereby declares that on December 10, 2018, an electronic copy of the foregoing APPELLANT'S REPLY BRIEF was sent via the master transmission list with the Nevada Supreme Court to the following:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE FERNANDO MONAY-PINA, A/K/A
JOSE FERNANDO MONAYPINA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 74199
District Court Case No. C313118

FILED
MAY 15 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 23, 2019

Elizabeth A. Brown, Clerk of Court

By: Amanda Ingersoll
Chief Deputy Clerk

cc (without enclosures):
Hon. Linda Marie Bell, Chief Judge
Nguyen & Lay
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on APR 30 2019.

Deputy District Court Clerk

RECEIVED
APPEALS
APR 30 2019
CLERK OF THE COURT

RECEIVED
MAY 03 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

19-17734

AA000673

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE FERNANDO MONAY-PINA, A/K/A
JOSE FERNANDO MONAYPINA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 74199
District Court Case No. C313118

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 28th day of March, 2019.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this April 23, 2019.

Elizabeth A. Brown, Supreme Court Clerk

By: Amanda Ingersoll
Chief Deputy Clerk

Jose Fernando Monay-Pina 1185276
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

FILED
FEB 18 2020
CLERK OF COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

A-20-810899-W
Dept. VII

Jose Fernando Monay-Pina
Petitioner,

vs.

State of Nevada
Warden Howell
Respondent(s).

Case No. C-16-313118-2
Dept. No. VII
Docket

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

RECEIVED
FEB 18 2020
CLERK OF THE COURT

Failure to raise all grounds I this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) If your petition challenges the validity of your conviction or sentence, the original and one copy must be filed with the clerk of the district court for the county in which the conviction occurred. Petitions raising any other claim must be filed with the clerk of the district court for the county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and who you are presently restrained of your liberty: Southern Desert Correctional Center

2. Name the location of court which entered the judgment of conviction under attack: 8th Judical District Court County of Clark

3. Date of judgment of conviction: 6-13-17

4. Case number: C-16-313118-2.

5. (a) Length of sentence: 94 months to 420 months.

(b) If sentence is death, state any date upon which execution is scheduled: _____.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion:

Yes ____ No X If "Yes", list crime, case number and sentence being served at this time: ____

_____.

7. Nature of offense involved in conviction being challenged: Conspiracy Burglary, Robbery, Battery, Attempted Murder, aiming a firearm, coercion

_____.

8. What was your plea? (Check one)

(a) Not guilty ✓

(b) Guilty _____

(c) Nolo contendere ____

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: ____

_____

_____.

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury ✓

(b) Judge without a jury ____

11. Did you testify at trial? Yes ____ No ✓

12. Did you appeal from the judgment of conviction?

Yes ✓ No ____

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 74199

(c) Result: affirmed

(d) Date of appeal: March 28, 2019

(Attach copy of order or decision, if available).

14.) If you did not appeal, explain briefly why you did not: _____

_____

_____.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ____ No ✓

16. If your answer to No 15 was "Yes", give the following information:

(a) (1) Name of court: _____.

(2) Nature of proceedings: _____

_____.

(3) Grounds raised : _____

_____

_____.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____.

(6) Date of result: _____.

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: _____.

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: _____.

(2) Nature of proceeding: _____.

(3) Grounds raised: _____.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____.

(6) Date of result: _____.

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: _____.

(c) As to any third or subsequent additional application or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes ____ No ____

Citation or date of decision:_____.

(2) Second petition, application or motion?

Yes ____ No ____

Citation or date of decision:_____.

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You may relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). _____

_____

_____.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion or application or any other post-conviction proceeding? If so, identify: NO

(a) Which of the grounds is the same: _____

_____

(b) The proceedings in which these grounds were raised:_____

_____.

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). ____

_____

_____

18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). _____

_____.

19. Are you filing this petition more than one (1) year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). _____

_____

_____

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ____ No X

If "Yes", state what court and the case number: _____

_____.

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Thomas D. Boley

Matthew Lay

_____.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ____ No X If "Yes", specify where and when it is to be served, if you know: ____

_____.

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: Petitioners 6th Amendment rights to effective assistance of counsel and Due Process rights to the 14th Amendment of the United States Constitution have been violated.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Trial counsel (Thomas D. Boley) failed to ask petitioner if he was going to testify.

Trial counsel failed to have petitioner sign the waiver about testifying on his own behalf.

This violated petitioners rights to effective assistance of counsel. For the 6th Amendment of the United States Constitution (see Strickland v Washington 466 U.S. 668) and violated petitioners Due Process rights to the 14th Amendment of the United States Constitution.

23. (b) GROUND TWO: Petitioners 6th Amendment rights to effective assistance of counsel and Due Process rights to the 14th Amendment of the United States Constitution have been violated.

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Trial counsel failed to hire an investigator. A professional investigator would have had the video analyzed, as petitioner was not identified by Richard De Camp (the 7 eleven employee) or anyone else.
A pre-trial line-up should have been done to exclude petitioner from prosecution.

(see Strickland v Washington 466 U.S. 668)

23. (c) GROUND THREE: Petitioners 6th Amendment rights to effective assistance of counsel and Due Process rights to the 14th Amendment of the United States Constitution have been violated.

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Trial counsel failed to discuss petitioners rights to testify at trial and what petitioner would testify to.

Counsel also failed to have petitioner sign the waiver in trial for not taking the stand.

(Strickland v Washington 466 U.S. 668)

23. (d) GROUND FOUR: Petitioners 6th Amendment right to effective assistance of counsel and Due Process Rights to the 14th Amendment of the United States Constitution were violated.

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Trial counsel failed to file a motion to seperate co-defendants before trial.

Petitioner was not identified by anyone before trial. So being tried with the co-defendant prejudice petitioner.

(see strickland v Washington 466 U.S. 668)

Ground five : Petitioners 6th Amendment right to effective Assistance of counsel and Due Process Rights to the 14th Amendment of the United States Constitution were violated

supporting facts

Trial attorney failed to file a pre-trial motion to have the weapons charge dismissed as the supposed weapon was a BB Gun.

(see strickland v Washington 466 U.S. 668)

Ground six: Petitioners 6th Amendment right to effective assistance of counsel and Due Process Rights to the 14th Amendment of the United States Constitution were violated

supporting facts

Trial attorney failed to do any pre-trial investigation. The video from 7eleven doesnt identify the petitioner, nor does any of the residents at the second crime scene.

Pre-trial investigation would have better pre-paired the trial attorney for a through cross-examination of the states witnesses, who couldnt identify the petitioner.

(see strickland v Washington 466 U.S. 668)

Ground seven: Petitioners 6th Amendment right to effective assistance of counsel and Due Process Rights to the 14th Amendment of the United States Constitution were violated

Supporting facts

Trial counsel failed to have petitioner tested by a psychiatrist. To see if petitioner was mentally fit to understand trial and the charges against him.

As petitioner was potentially facing the rest of his life in prison.

(see strickland v Washington 466 U.S. 668)

Ground eight: Petitioners 6th Amendment right to effective assistance of counsel and Due Process Rights to the 14th Amendment of the United States Constitution were violated

Supporting facts

Trial counsel failed to subject the states case to a adversarial testing process. As counsel failed to review the vidio of 7 eleven and make the state prove beond a reasonable doubt that it infact was the petitioner on that vidio. As again nobody Identified the petitioner.

(see strickland v Washington 466 U.S. 668)

Ground Nine: Petitioners 6th Amendment right to effective assistance of Counsel and Due Process Rights to the 14th Amendment of the United States Constitution were violated

Supporting facts

Trial counsel failed to object to prosecutors comments during the rebuttal argument that shifted the burden of proof on petitioner and his co-defendant. This caused actual prejudice because an objection would have led to a mistrial.
This is a miscarriage of justice.

(see strickland v Washington 466 U.S. 668)

Ground ten: Petitioners 6th Amendment right to effective assistance of counsel and Due Process Right to the 14th Amendment of the United States Constitution were violated

Supporting facts

Cummulative error

Trial attorney failed to visit petitioner at the jail and work together to develop a defense.

Trial counsel did the case by himself.

Jury trials always take (2) attorney's as its impossible for one to provide effective assistance at trial.
With the fact that the trial attorney failed to do any investigation, or call any witnesses at trial.

Thus sut trial strategy. Its ineffective assistance of couset.

Ground eleven: Petitioners 6th Amendment right to effective assistance of counsel and Due process rights to the 14th Amendment of the United States Constitution were violated

Supporting Facts

Petitioner still maintains his innocence now. Petitioner did not have any conversation before trial, with his trial attorney. However the trial attorney admitted petitioners guilt at trial.

Strickland V Washington 466 US 866

McCoy V LOUISIANA
No 16-8255

WHEREFORE, Jose Fernando Monay-Pina, prays that the court grant a evidentiary hearn relief to which he may be entitled in this proceeding.

EXECUTED at SDCC

on the 7 day of February, 2020.

Signature of Petitioner

VERIFICATION

Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true and correct of his own personal knowledge, except as to those matters based on information and belief, and to those matters, he believes them to be true.

Signature of Petitioner

Atttorney for Petitioner

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CERTFICATE OF SERVICE BY MAILING

I, Jose Fernando Monay-Pina, hereby certify, pursuant to NRCP 5(b), that on this 7 day of Febuary, 2020, I mailed a true and correct copy of the foregoing, "Writ of habeas corpus"

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Clerk of the Court

Attorney General

District Attorney

CC:FILE

DATED: this 7 day of Febuary, 2020

Jose Fernando Monay-Pina #1185276
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Writ of habeas corpus
(Title of Document)

filed in District Court Case number C-16-313118-2

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

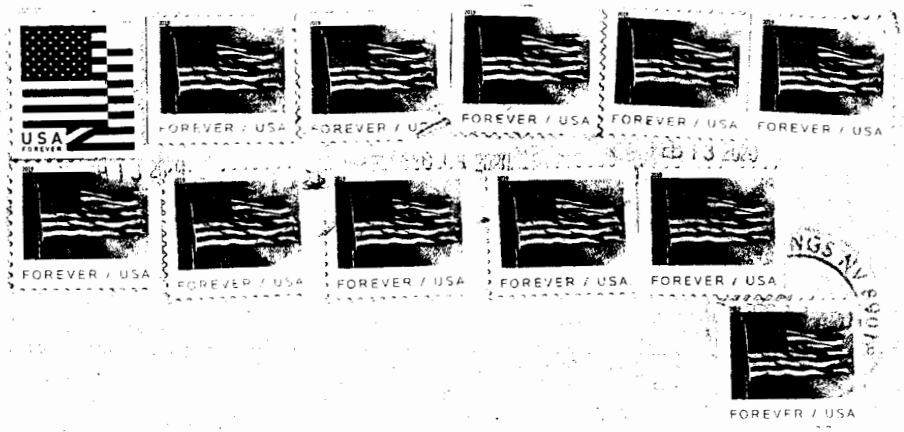
_____
Signature

2-7-20
Date

Jose Fernando Monay-Pina
Print Name

_____
Title

Jose Fernando Monay-Pina 1185276
SDCC
P.O. Box 208
Indian Springs NV 89070



Clerk of the Court
200 Lewis Ave 3rd floor
LV NV
89155

Legal

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JOSE FERNANDO MONAY-PINA, #7028317 Petitioner.	CASE NO: A-20-810899-W DEPT NO: VII

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND OPPOSITION FOR MOTION TO APPOINT COUNSEL

DATE OF HEARING: APRIL 28, 2020
TIME OF HEARING: 10:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JOHN NIMAN, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) and Opposition for Motion to Appoint Counsel.

This opposition/response 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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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 4, 2016, Petitioner Jose Fernando Monay-Pina ("Petitioner") was charged with Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Counts 2 and 4 – Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060); Counts 3 and 5 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Counts 6, and 8 through 10 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481); Count 7 – Attempt Murder With Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 11 – Aiming a Firearm at a Human Being (Gross Misdemeanor – NRS 202.290); Count 12 Coercion With Use of a Deadly Weapon (Category B Felony – NRS 207.190, 193.165); and Count 13 – Battery With Intent to Commit a Crime (Category B Felony – NRS 200.400.2).

On March 13, 2017, trial began. On March 15, 2017, the jury found Petitioner guilty of Count 1 – Conspiracy to Commit Robbery; Counts 2 and 4 – Burglary While in Possession of a Firearm; Counts 3 and 5 – Robbery With Use of a Deadly Weapon; Counts 6 and 8 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Count 7 – Attempt Murder With Use of a Deadly Weapon ; Counts 9 and 10 – Battery With Use of a Deadly Weapon; Count 11 – Aiming a Firearm at a Human Being; Count 12 – Coercion With Use of a Deadly Weapon; and Count 13 – Battery With Intent to Commit a Crime.

On September 7, 2017 Petitioner was sentenced to Count 1 – 24 to 60 months; Count 2 – 24 to 120 months, to run concurrent to Count 1; Count 3 – 24 to 120 months, plus a consecutive 24 to 60 months for the Deadly Weapon Enhancement, to run concurrent to Count 2; Count 3 – 24 to 120 months, plus a consecutive 12 to 60 months for the Deadly Weapon Enhancement, to run concurrent to Counts 1 and 2; Count 4 – 24 to 120 months, to run concurrent to Counts 1 through 3; Count 5 – 24 to 120 months, plus a consecutive 24 to 60 months for the Deadly Weapon Enhancement, to run consecutive to Counts 1 through 3; Count 6 – 24 to 120 months, to run concurrent with Counts 1 through 5; Count 7 – 24 to 120 months,

plus a consecutive 24 to 60 months for the Deadly Weapon Enhancement, to run consecutive to Counts 1 through 3; Count 8 – 24 to 120 months, to run concurrent to Counts 1 through 7; Count 9 - 24 to 90 months, to run concurrent to Counts 1 through 8; Count 10 - 24 to 60 months, to run concurrent to Counts 1 through 9; Count 11 – 364 days, concurrent to Counts 1 through 10; Count 12 – 12 to 60 months, to run consecutive to Counts 1 through 3, 5 and 7; and Count 13 - 24 to 60 months, to run concurrent to Counts 1 through 12. Petitioner's aggregate sentence was 94 to 420 months in the Nevada Department of Corrections, with 604 days credit for time served. The Judgment of Conviction was filed on September 21, 2017.

The Nevada Supreme Court affirmed Petitioner's Judgment of Conviction on March 28, 2019. Remittitur issued on April 23, 2019.

Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition") on February 18, 2020. The State's response follows.

STATEMENT OF THE FACTS

On January 12, 2016, Richard DeCamp ("DeCamp"), was working the graveyard shift alone at a local 7-Eleven convenience store. Recorder's Transcript, Jury Trial: Day 3 ("JT Day 3"), at 15-17. At approximately 3:00 AM, two men, one later identified as Petitioner, entered the store. Id. at 47-49; 142-43; 146. DeCamp described the men as a "tall guy and a [] short guy," wearing masks and carrying guns. Id. at 17. The men pointed their guns at DeCamp and ordered him to empty the cash register. Id. at 20. Seeing a second cash register, the taller man, while continuing to point his gun at DeCamp, demanded that DeCamp empty the second cash register. Id. The men then ordered a frightened DeCamp to lay on the floor while the men fled with the money from both cash registers. Id. at 22. DeCamp laid on the floor for a few minutes, got up, and called 911. Id. Approximately ten minutes later, officers from the Las Vegas Metropolitan Police Department ("Metro") responded. Id.

Officer Isaiah Simmons ("Officer Simmons") and Metro Sergeant Abraham Aguirre ("Sergeant Aguirre") responded to the robbery call. Id. at 44-45; 61. Officer Simmons testified that DeCamp was visibly shaking and frightened. Id. at 45. Officer Simmons secured the scene, reviewed the store's surveillance video, and documented that $139.00 had been taken from the

store. Id. After DeCamp calmed down, he described the suspects to Officer Simmons as, "two Hispanic males . . . brandishing large firearms, dark clothing, gloves, masks . . . [and] [o]ne had a puffy jacket." Id. at 45-46.

Less than a mile away, Javier Colon ("Javier"), a former landscape worker, was sleeping in his sister's garage when he was suddenly awakened when two men opened the garage door and one screamed "Javier, get up, get up." Id. at 103-06. One of the men rushed Javier and began hitting him repeatedly over the head with a firearm. Id. at 108-09. During the attack, Javier noticed Petitioner was pointing his firearm at his family through the garage windows. Id. at 108. Javier pleaded with the men to stop, but they ignored him. Id. at 109. That morning, Javier planned on doing a "side job" so he had sharpened an axe and kept it near his bed. Id. at 110. While Javier was lying on his back in the bed, Petitioner's co-defendant picked up the axe and swung the blade at Javier three times: hitting his leg, ribs, and attempting to hit his head. Id. at 107-111. Luckily, prior to the blade hitting Javier's head, Javier raised his right hand and intercepted the blade which cut his hand open. Id. at 111-12.

Adriana Colon ("Adriana"), Javier's sister, heard Javier screaming that someone was threatening him. Id. at 150. She made her way toward the windows facing the garage and saw two men who told her to "shut up" or they were going to "break [her] too." Id. Adriana observed that the men had firearms and were pointing them at the windows where she was standing. Id. at 150-51. Adriana heard the men hitting Javier "really hard." Id. at 152. She begged them to leave, but they did not. Id. at 151. Eventually, Adriana's daughter called Metro who responded within minutes. Id. at 153.

When the men noticed police lights approaching, they escaped. Id. at 113. When Officer Justin Spurling ("Officer Spurling") arrived, he noticed a man screaming and crying inside a garage port. Id. at 209-10. The man was also bleeding "pretty badly from his face." Id. Officer Spurling focused on finding anyone else who might have been involved. Id. at 211. He surveilled the area and jumped over a wall. Id. at 211-12; 222-23. Once on the other side of the wall, Officer Spurling noticed a man, later identified as Petitioner, standing in the middle of a backyard. Id. After Officer Spurling and Petitioner made eye contact, Petitioner, who was

wearing a stocking cap on his head, immediately ducked down. Id. Officer Spurling placed a call on his radio that he potentially located a suspect and continued to give Petitioner commands until he was taken into custody along with the other assailant. Id. at 213. Officer Spurling testified the following items were recovered from the backyard where Petitioner was apprehended: a "wad of cash," Javier's wallet, a "replica firearm," and a knife and sheath. Id. at 224-26.

A bloodied Javier was transported to the hospital where he received multiple stiches and staples on his head and hand. Id. at 115-20. They took his camera, an MP3 player, and two collection knives. Id. at 116.

Meanwhile, at approximately 4:22 AM, while Sergeant Aguirre was putting up crime scene tape at the 7-Eleven he heard a "high priority call" coming through the radio. Id. at 63-64. The call described "two Hispanic males wearing dark clothing had forced their way into [a] home and were pistol whipping [a man]." Id. Sergeant Aguirre responded to that call as it was "right around the corner." Id. On arrival Sergeant Aguirre contacted Officer Ivan Duron ("Officer Duron"), and Officer Spurling. Id. at 67. Sergeant Aguirre immediately noticed Officer Duron was rendering aid to Javier in the garage and observed a large "amount of blood on the bedding, walls, and floor." Id. Sergeant Aguirre also observed an axe by the entryway to the garage. Id. at 68. Sergeant Aguirre then received a radio call from Officer Spurling indicating he apprehended two suspects in a backyard. Id. Sergeant Aguirre left to assist Officer Spurling. Id.

Once Petitioner was arrested, Officer Simmons took Decamp to the arrest scene where a show-up was conducted and Decamp identified Petitioner and the other suspect as the ones who had robbed him at gunpoint at the 7-Eleven. Id. at 47-49.

Adam Felabom ("Felabom"), a Crime Scene Analyst with Metro, arrived on scene and examined the wad of cash totaling $138.00. Recorders Transcript, Jury Trial: Day 3, ("JT Day 3") at 18. Felabom also photographed, collected, and impounded a blue ski mask from the backyard. Id. at 14-15. A DNA swab was taken from the blue ski mask. Id. at 79. After the sample was analyzed, it was determined that the DNA found on the blue ski mask was at least

298 million times more likely to belong to Petitioner and one other individual compared to any other person. Id. at 79-80.

At trial, Javier recognized one of the men as a former landscaping colleague who he worked with in the past. JT Day 2, at 106. Javier also identified Petitioner as one of the assailants because he remembered seeing Petitioner's eyes while Petitioner stood in the garage, recognized Petitioner's eyes in court, and, in the past, had worked with Petitioner in landscaping. Id. at 142-45; 146. Further, Javier observed Petitioner wore gloves. Id. at 143-45. Javier recognized the gloves worn by Petitioner as the same black and red gloves that the landscaping company had given them while they worked there. Id. at 145-46.

ARGUMENT

I. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile motions or for failing to make objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Counsel's strategy decisions are a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Id. at 846, 821 P.2d at 280. Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State,

108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Further, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Here, Petitioner raises eleven claims of ineffective assistance of counsel: 1) violation of his right to testify; 2) inadequate investigation; 3) failure to tell Petitioner to testify and what to testify to; 4) failure to file a motion to sever; 5) failure to file a motion to dismiss the deadly weapon enhancement; 6) failure to investigate; 7) failure to determine Petitioner's competence; 8) failure to subject the State's case to the adversarial process; 9) failure to object to improper burden shifting; 10) cumulative error, failure to have co-counsel, and failure to

communicate with Petitioner; and 11) improper concession of his guilt. All of Petitioner's claims are bare and naked assertions unsupported by specific facts.

A. Counsel was not ineffective regarding Petitioner's right to testify

In Ground 1, Petitioner claims that trial counsel, Thomas Boley, was ineffective because he did not ask Petitioner if he was going to testify and did not have him sign a waiver of his right to testify. Petition at 7. Petitioner's claim is bare and naked.

Defendants have a right to testify at trial. Phillips v. State, 105 Nev. 631, 782 P.2d 381 (1989). However, defendants may not be compelled to testify and the choice of whether to exercise that right rests entirely with the defendant. Griffin v. California, 80 U.S. 609, 618, 85 S.Ct. 1229, 1235 (1965)(Concurrence).

Petitioner's claim is unsupported by the record. Prior to the Court admonishing both Petitioner and his co-defendant about their right to testify, co-defendant's counsel asked for a moment so counsels could speak with their clients. JT Day 3 at 5. The Court paused its proceedings so counsels could do so and then proceeded with the admonishment. Id. at 7-9. While the Court explained Petitioner's right to testify to him, Petitioner stated he understood, and when asked if he had any questions, Petitioner said, "no," thereby indicating that he understood his right as it was explained to him. Id. at 8-9. At no point did Petitioner express confusion or inform the Court that counsel had not explained this right. As such, Petitioner was aware of his right to testify and chose not to exercise it, and his claim that counsel did not speak with him about the right is belied by the record. Moreover, as the decision of whether to testify belongs to Petitioner, counsel cannot be deemed ineffective for Petitioner's decision.

Next, Petitioner provides no authority requiring defense counsels obtain a waiver of that right. A lawyer is presumed to have fully discharged his duties. Sullivan v. Warden, 91 Nev. 563, 567, 540 P.2d 112. 115 (1975). One who would claim ineffective assistance of counsel has the burden of proving the factual basis for that claim by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). As such, Petitioner has failed to show how failure to obtain a waiver of this right amounts to ineffective assistance of counsel and his unsupported claim is suitable only for dismissal.

Finally, Petitioner failed to address how he was prejudiced by counsel's performance. Petitioner does not allege that he even would have testified, what he would have testified to, or how that testimony would have changed the outcome at trial. Therefore, Petitioner's Ground 1 claim fails.

B. Counsel was not ineffective in his pre-trial investigation.

In Ground 2, Petitioner argues that trial counsel was ineffective in his pre-trial investigation because he did not hire a profession investigator to analyze the video. Petition at 8. Petitioner claims this was necessary as he was not identified by anyone at either crime scene. Id. Petitioner further claims counsel should have demanded a pre-trial lineup be conducted because it would have excluded him as a defendant. Id. Petitioner's claims are bare and naked.

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Further, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

Counsel is expected to conduct legal and factual investigations when developing a defense so they may make informed decisions on their client's behalf. Jackson, 91 Nev. at 433, 537 P.2d at 474 (quoting In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 638, 472 P.2d 921, 926 (1970)). "[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Love, 109 Nev. at 1138, 865 P.2d at 323 (*quoting* Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538.

"Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Id. Further, there is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003).

Here, counsel cannot be deemed ineffective for allegedly not investigating a witness's alleged inability to identify Petitioner. Petitioner's claim that a professional investigator would have analyzed the video is a bare and naked assertion. Petitioner does not explain what information on that video would have been analyzed or what crucial fact this professional investigator would have discovered. The 7-11 surveillance video was played for the jury at trial, and while DeCamp did not identify Petitioner by watching the video, that fact was never alleged at trial and Petitioner does not explain how a professional investigator's analysis of that video would have changed that fact. Further, in watching the video, the jury was freely able to conclude whether Petitioner was in fact the suspect in that video.

Petitioner's claim that none of the witnesses identified him is belied by the record. At trial, DeCamp testified that 10 to 15 minutes after two men robbed him, officers took him to Javier's home to conduct a show-up identification. JT Day 2, at 25. There, DeCamp identified the person wearing the brown puffy jacket and red gloves as the man present during the robbery. Id. at 32-33. Next, at trial, Javier testified that he recognized Petitioner's eyes and that he had worked with Petitioner in the past. Id. at 142-45; 146. As such, Petitioner was identified by both victims. Even if none of the witnesses were able to identify Petitioner, he does not explain what additional investigation would have changed that fact, or how it would have provided some additional information that would have changed the outcome at trial.

Similarly, Petitioner does not explain how demanding a pre-trial lineup would have changed the outcome. As both DeCamp and Javier identified Petitioner, not engaging in a line-up was a reasonable strategic decision. Had a pre-trial line up been performed, DeCamp and Javier could have identified Petitioner again. Further, because Metro already conducted a show-up identification with DeCamp, any further identification reasonably would have only

further inculpated Petitioner. While DeCamp identified Petitioner by his clothing and not his face, that issue was thoroughly explored during DeCamp's cross-examination when DeCamp testified that he identified Petitioner by his clothes and not his face because both suspects faces were covered. Id. at 38. As such, Petitioner's claim in Ground 2 is bare and naked that is belied by the record and suitable for summary denial.

C. Counsel was not ineffective regarding Petitioner's right to testify.

In Ground 3, Petitioner claims counsel did not speak with him about his right to testify, did not tell him what to testify to, and did not have him sign a waiver of his right to testify. Petition at 9. Petitioner's claims that counsel did not tell him about his right to testify and did not have him sign a waiver of that right is a mere repetition of the claims raised in Ground 1. The State therefore incorporates its response to those claims *supra* I.A into this claim. Finally, Petitioner's claim that counsel was ineffective for not telling him what to testify to is meritless.

The Nevada Rule of Professional Conduct ("NRPC") 1.2(d) explains: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." These rules of Professional Conduct further prohibit a lawyer from assisting a witness in testifying falsely. NRPC 3.4(b). Moreover, if a defendant exercises their constitutional right not to testify, that decision cannot be commented on. Griffin, 80 U.S. at 614, 85 S.Ct. 1233.

Here, to the extent, Petitioner is claiming counsel was ineffective because he did not talk to the jury about Petitioner's right not to testify, such a claim is meritless as the jury was instructed that it could not consider that Petitioner did not testify against him. Instructions to the Jury, at No. 44. Further, Petitioner does not explain what counsel would have said or how that would have changed the outcome at trial.

Next, to the extent Petitioner accuses counsel of ineffectiveness for not telling him what to testify to, such a claim is meritless. Counsel cannot be deemed ineffective for following the rules of professional conduct. Absent telling him to tell the truth, counsel could not have told Petitioner what to testify to as that would have been encouraging and aiding Petitioner in fabricating a story and potentially lying on the witness stand. Moreover, as the decision of

whether to testify lies with Petitioner, counsel cannot be deemed ineffective for not telling him to testify.

Finally, Petitioner cannot show prejudice. As explained *supra* I.A, Petitioner does not explain that he would have testified, what he would have testified to, or how that testimony would have changed the outcome at trial. As such, Petitioner's claims in Ground 3 are nothing more than bare and naked assertions suitable only for summary denial.

D. Counsel was not ineffective for not filing a motion to sever.

In Ground 4, Petitioner claims that counsel should have filed a Motion to Sever as he was not identified by anyone when his co-defendant was. Petition at 10. Petitioner's claim is baseless and belied by the record.

Counsel cannot be ineffective for failing to make futile motions or for failing to make objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. NRS 173.135 allows for co-defendants to be charged under the same information if they participated in the same criminal conduct. As a general rule, defendants indicted together shall be tried together, absent a compelling reason to the contrary. Rowland v. State, 118 Nev. 31, 44 (2002). Joint trials are overwhelmingly favored in order to promote efficiency and equitable outcomes. Jones v. State, 111 Nev. 848, 853 (1995).

Courts should sever defendants only after a defendant establishes "a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Chartier v. State, 124 Nev. 760, 765 (2008) (quoting Marshall, 118 Nev. at 646); see also Bruton v. United States, 391 US 123 (1968); NRS 174.165. Generally speaking, severance is proper only when: (1) the codefendants' theories of defense are so antagonistic that they are "mutually exclusive" and so irreconcilable with one another that the acceptance of the one co-defendant's theory by the jury precludes acquittal of the other; and (2) there is "a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence." Chartier, 124 Nev. at 765 (internal citations omitted). Broad allegations of prejudice are not enough to mandate severance. United States v. Baker, 10 F.3d 1374, 1389

(9th Cir.1993), cert. denied, 513 U.S. 934 (1994), overruled on other grounds by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000).

Here, Petitioner does not establish that counsel would have been successful had he filed a motion to sever. Petitioner provides no information supporting severance. While Petitioner claims he should have been severed because his co-defendant was identified and he was not, that is not a basis for severance. That his co-defendant was identified does not mean that they had antagonistic defenses. Further, Petitioner has not established that his co-defendant's identification had a substantial or injurious effect on the verdict. Indeed, he cannot as the evidence against Petitioner was overwhelming. DeCamp described the two men who robbed his 7-11 and those same men were identified by him a mere mile away and less than 30 minutes later wearing the same clothes and masks. JT Day 2, at 128. The jury had pictures from both the 7-11 robbery and the description of Petitioner clothes when police stopped him. Id. at 128-29. Both matched. Id. Moreover, DeCamp testified that the robbers took about $138 from him. Id. at 45. When Metro stopped Petitioner less than 30 minutes after that robbery and less than one mile away, they found $139. JT Day 3, at 48. Finally, Petitioner's DNA was found on the mask DeCamp described the suspect wearing and hidden under the shed near where the suspects beat Javier. Id. at 79-80.

Therefore, Petitioner cannot demonstrate that his counsel was ineffective because any motion to sever would have been denied and counsel cannot be deemed ineffective for not filing failing motions. Petitioner's claim in Ground 4 must be dismissed.

E. Counsel was not ineffective for not filing a motion to dismiss the deadly weapon enhancement

In Ground 5, Petitioner claims counsel should have moved to dismiss the deadly weapon enhancement because Petitioner only had a BB gun. Petition at 11. Petitioner's claim is meritless.

Under NRS 193.165(6), a deadly weapon is defined, in part, as, "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or

death." (emphasis added). A pneumatic gun, or BB gun, falls within this statute. Funderburk v. State, 125 Nev. 260, 212 P.3d 337 (2009).

There is no question that Petitioner used a gun during the commission of his crimes. It does not matter that Petitioner used a BB gun instead of a revolver, or glock, or semi-automatic gun because all qualify as deadly weapons pursuant to statute and case law. DeCamp testified that a gun was pointed at him. JT Day 3, at 17. Javier testified that he was beaten with one. Id. at 108-09. As such, any motion to dismiss the deadly weapon enhancement would have been futile and counsel cannot be deemed ineffective. Therefore, Petitioner's claims in Ground 5 must fail.

F. Counsel was not ineffective in his pre-trial investigation.

In Ground 6, Petitioner claims counsel failed to adequately investigate. Petition at 12. Specifically, Petitioner explains that his investigation was deficient because the 7-11 video does not identify Petitioner and none of the residents at the second crime scene identified him. Id. Had counsel done a better investigation, Petitioner claims he would have been better prepared to cross examine the State's witnesses. Id. To the extent, Petitioner is making the same claims he made in Ground 2, the State hereby incorporates its response to those claims made *supra* I.B.

Petitioner's claim is bare and naked. Petitioner does not explain what additional investigation trial counsel should have done or how it reasonably would have changed the outcome at trial. Petitioner does not explain how the cross-examination of the witnesses who allegedly did not identify him was deficient. Petitioner does not provide additional questions that were not asked, but should have been, or how some additional investigation would have changed that.

Moreover, counsel's cross examination of both DeCamp and Javier were reasonable. Counsel cross-examined both witnesses after Petitioner's co-defendant did and incorporated the questions asked by his co-defendant's counsel. During DeCamp's cross examination, counsels confirmed that DeCamp could not identify either suspects' faces as they were wearing masks, and instead could only identify them based on the clothes they were wearing. JT Day

2, at 36-37. Next, when cross-examining Javier, Petitioner's counsel specifically confirmed with Javier that he could not be sure Petitioner was the person who attacked him. Id. at 136. Petitioner has pointed to no specific fact uncovered or question unasked that establishes that counsel's questioning was deficient. Further, Petitioner has not explained what additional specific investigation should have been conducted that would have impacted either cross-examination.

As Petitioner articulates no specific facts explaining what counsel should have investigated that would have changed or impacted his cross-examination of any of the State's witnesses, let alone how that would have changed the outcome of trial, the claims raised in Ground 6 fail.

G. Counsel was not ineffective in not determining whether Petitioner was competent prior to standing trial.

In Ground 7, Petitioner claims counsel was ineffective because he should have sent Petitioner to a psychiatrist to determine if he was competent to stand trial because he was facing a life sentence. Petition at 13. This is a bare and naked claim suitable for summary denial.

Pursuant to NRS 178.405, before a defendant may be evaluated for competency, there must first arise a doubt as to their competence. There is no blanket requirement that all defendants facing life sentences must first be deemed competent.

Petitioner has not provided specific facts showing that he was incompetent or did not understand the proceedings. Absent some showing that he did not understand and could not assist counsel in his own defense, counsel had no obligation to send him to a psychiatrist and cannot be deemed ineffective for failing to do so. Moreover, there is nothing in the record indicating the counsel should have sent him to a psychiatrist. Therefore, Petitioner's claim raised in Ground 7 fails.

H. Counsel subjected the State's evidence to the adversarial process.

In Ground 8, Petitioner claims that counsel did not subject State's case to an adversarial process. Petition at 14. Specifically, Petitioner claims counsel did not review the video and

make the State prove that it was Petitioner on the video. To the extent Petitioner is raising the same claims made in Grounds 2 and 6, the State hereby incorporates its responses to those claims made *supra* I.2 and I.F.

Petitioner's claim that counsel did not subject the State's evidence to the adversarial process is a bare and naked claim belied by the record. By going to trial, in order to sustain a conviction against Petitioner, the State had to call witnesses and admit evidence. They presented all this testimony and evidence to the jury. Petitioner was given the opportunity to question and challenge all of that testimony and evidence, which he did. Therefore, the trial was subjecting the State's evidence to the adversarial process. Additionally, the State's burden was to prove Petitioner's guilt of all crimes charged beyond a reasonable doubt, not to prove that Petitioner was the person in the video. Instead, the State used that video to support their argument that Petitioner was guilty of robbing the 7-11. As Petitioner was convicted of robbing the 7-11 it stands to reason that the State therefore proved that Petitioner was the person depicted in the footage robbing the store.

Petitioner fails to provide specific facts showing how counsel's questions or challenges were deficient or unreasonable. Petitioner does not explain how counsel should have challenged the video and does not provide evidence supporting his claim that he was not the person in that video. Petitioner further fails to explain what specific actions reasonably would have changed the outcome at trial. Therefore, Petitioner's claims in Ground 8 are bare and naked, belied by the record, and should be summarily dismissed.

I. Counsel did not fail to object to improper burden shifting.

In Ground 9, Petitioner claims that counsel did not object during the State's rebuttal when it improperly shifted the burden on to him and his co-defendant. Petition at 15. As an initial matter, Petitioner's claim is bare and naked because he does not point to any specific comment made by the State where this alleged burden shifting occurred. However, when examining both the State's closing and rebuttal argument, it becomes clear that Petitioner's claim is belied by the record.

On appeal, both Petitioner and his co-defendant accused the State of improper burden shifting during closing argument when the State argued: "I do think it's interesting that we go through all these different pictures, all this evidence, all these things. The defense gets up and talks to you about their closing, right? Their case -- they don't show you any of the pictures, right? They don't go through any of the evidence." JT Day 3, at 146. While Petitioner's counsel did not object, co-defendant's counsel did and moved for a mistrial. Id. at146-147. The Court denied that motion. Id. at 147. Both Petitioner and his co-defendant appealed that decision. The Nevada Supreme Court concluded that the State had not engaged in improper burden shifting and that any error was cured by the Court's issuing an instruction. Order of Affirmance, at 2. As the Nevada Supreme Court concluded that no improper burden shifting occurred, Petitioner cannot accuse his counsel of being ineffective for failing to object to it. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Any objection would have been futile because no burden shifting occurred.

Further, this single comment does not amount to improper burden shifting. The Nevada Supreme Court applies a two-step analysis to claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). It first determines whether the prosecutor's conduct was improper, and second, whether the conduct warrants reversal. Id. "A prosecutor's comments should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (quoting United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)). Moreover, it "will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Valdez, 124 Nev. at 1188, 196 P.3d at 476.

To determine whether misconduct was prejudicial, the Nevada Supreme Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process. Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). The court considers such statements in context, as a criminal conviction is not to be lightly overturned. Id. Additionally, "the level of misconduct necessary to reverse a conviction depends upon how strong and convincing the evidence of guilt is." Rowland, 118 Nev. at 38, 39 P.3d at 119. If

the issue of guilt is not close and the State's case is strong, misconduct will not be considered prejudicial. Id.

First, the State's comment was not improper. The State was not shifting the burden and was not commenting on Petitioner's failure to present evidence or failure to testify—merely his failure, during his closing, to acknowledge the evidence that was presented. Id. Moreover, the District Court immediately gave a curative instruction reminding the jury that "the burden is on the State, and the defense is not required to present any evidence." JT Day 3, at 148. Thus, the comment did not infect the trial with unfairness so as to affect the verdict and did not deny Petitioner his constitutional right to a fair trial. Moreover, as the evidence of Petitioner's guilt was overwhelming, any error was harmless. Thus, counsel cannot be deemed ineffective for failing to object and this Court should dismiss the claim raised in Ground 9.

J. Petitioner has no right to a specific relationship with counsel, or two attorneys at trial, and cumulative error is inapplicable

In Ground 10, Petitioner argues that cumulative error warrants relief, that counsel did not visit him to develop a defense, and that he should have had two attorneys representing him at trial because one attorney can never be effective. Petition at 16. All of these claims are bare and naked allegations unsupported by the record.

Taking each claim in turn Petitioner has not demonstrated that counsel was ineffective in his consultation. A defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See Id. Petitioner does not explain what information or defense he would have provided his counsel that he could not because counsel did not visit him as often as Petitioner believed necessary. Moreover, at trial, counsel argued that there was not enough evidence to identify Petitioner as the person who committed the crimes. Counsel argued that witnesses from the 7-11 robbery could not identify Petitioner by his face; and that Javier's identification of Petitioner was suspect because he could only identify him by his brown eyes and that is not sufficient. JT Day 3, at 143-45. Therefore, Petitioner's claim that counsel did not have a defense at trial is belied by the record.

Next, Petitioner's claim that he was entitled to two defense attorneys is a bare and naked claim unsupported by the record or case law. Petitioner provides no authority requiring that each defendant be appointed two defense attorneys. While Petitioner claims two attorneys were needed to investigate his case, as with Petitioner's other claims, he fails to specifically explain what should have been investigated or how that would have reasonably changed the outcome. Petitioner does not identify what witnesses a second attorney would have called differently or how having an additional attorney at trial reasonably would have changed the outcome. As such, Petitioner's claims in Ground 10 must fail.

Finally, Petitioner is not entitled to a cumulative error analysis. The Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

Even if applicable, a finding of cumulative error in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the petitioner fails to demonstrate any single violation of Strickland. Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)). In addressing a claim of cumulative error, the relevant factors are: 1) whether the issue of guilt is close; 2) the quantity and character of the error; and 3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000).

Here, since Petitioner has not demonstrated any claim warranting relief under Strickland, there are no errors to cumulate. Next, as explained above, the issue of Petitioner's

guilt is not close. Further, because Petitioner's allegations are bare and naked or otherwise belied by the record, Petitioner has not demonstrated any claim warranting relief under Strickland. Finally, the crimes charged were not egregious. Thus, even if Petitioner can raise a cumulative-error claim, it is denied.

K. Counsel was not ineffective in his pre-trial discussions with Petitioner and did not violate McCoy v. Louisiana.

In Ground 11, Petitioner claims that while he maintained his innocence throughout trial, because counsel did not speak with him prior to trial, he inappropriately conceded his guilt before the jury. Petition at 17. Petitioner's claim is belied by the record.

Again, Petitioner's claim that counsel did not consult with him prior to trial is a bare and naked claim. Petitioner was not entitled to a specific relationship with his counsel, nor was he entitled to a certain number of visits by counsel. Morris, 461 U.S. at 14, 103 S. Ct. at 1617. Further, Petitioner does not explain how additional visits would have revealed a fact that would have changed the outcome at trial.

Further, Petitioner's claim that counsel violated McCoy v. Louisiana, 138 S. Ct. 1500 (2018), and conceded his guilt is belied by the record. McCoy held that "it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection" and that such an error is structural. 138 S.Ct. at 1511. It does not require counsel to first obtain their client's consent prior to conceding their guilt. Moreover, McCoy was decided on direct appeal, and the Court explicitly stated that it was not analyzing the claim under a Strickland analysis. McCoy, 138 S.Ct. at 1511. As such, it is improper to raise a McCoy claim in a Petition for Writ of Habeas Corpus as habeas petitions are limited to effective assistance of counsel and voluntariness of pleas. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

Here, at the outset, this is a bare and naked claim as Petitioner does not point to anywhere in the trial where this alleged concession occurred. Further, a review of the record establishes that counsel never made such a concession or that Petitioner ever objected to it. Instead, counsel argued through the entirety of the trial, and specifically during closing

argument, that there was not enough evidence that Petitioner was the man who committed the crimes charged. JT Day 3, at 142-45. Specifically, Counsel argued that DeCamp identified clothes worn and not the people in them, Javier only identified brown eyes and not a face, and the simple fact that Petitioner was found near where a 7-11 robbery or assault took place was not enough to assume he was guilty of either. Id. Counsel never conceded his client's guilt. Therefore, Petitioner's Ground 11 must fail.

II. PETITIONER IS NOT ENTITLED TO APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

The Nevada Legislature has, however, given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

Here, Petitioner is not entitled to appointment of counsel because all claims raised are bare and naked allegations that are belied by the record. Further, these claims are not complex, Petitioner is able to comprehend the proceedings, and none of the claims raised require additional discovery.

CONCLUSION

Based on the arguments above, the State respectfully requests this Court DENY Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel.

DATED this 14th day of April, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #

BY [signature]
for JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 14th day of April, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JOSE FERNANDO MONAY-PINA #1185276
SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NEVADA 89070-0208

BY [signature]
J. Robertson
Secretary for the District Attorney's Office

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CLERK OF THE COURT

DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JOSE FERNANDO MONAY-PINA, Petitioner, *vs.* THE STATE OF NEVADA, et al., Respondents.	Case No. A-20-810899-W Dept. No. VII

DECISION AND ORDER

A jury convicted Mr. Monay-Pina of conspiracy to commit robbery, burglary while in possession of a firearm, robbery with use of a deadly weapon, battery with use of a deadly weapon resulting in substantial bodily harm, attempt murder with use of a deadly weapon, battery with use of a deadly weapon, aiming a firearm at a human being, coercion with use of a deadly weapon, and battery with intent to commit a crime. Following the conviction, the Nevada Supreme Court denied Mr. Monay-Pina's direct appeal. Mr. Monay-Pina now challenges the effectiveness of trial counsel through a postconviction Petition for Writ of Habeas Corpus seeking relief from his conviction based on ineffective assistance of counsel. After review of the petition and the State's response, the Court denies Mr. Monay-Pina's Petition for Writ of Habeas Corpus in part and will hold an evidentiary hearing on the remainder of the claims.

Grounds One, Three, Five, and Nine of the Petition are denied. Grounds One and Three claim that Mr. Monay-Pina was not advised of his right to testify. Ground Five claims that trial counsel was ineffective for failing to move to dismiss the weapon charges. Ground Nine claims that trial counsel was ineffective for failing to object to the State's rebuttal argument.

The Court also denies Mr. Monay-Pina's claim, raised in Ground Ten, that he was entitled to two trial attorneys.

Mr. Monay-Pina will have the opportunity to present any additional evidence regarding the remaining grounds at an evidentiary hearing. Those claims include trial counsel's alleged failure to

1) hire an investigator (Ground Two);
2) move to separate Mr. Monay-Pina's and co-defendant Mr. Venegas's cases (Ground Four);
3) conduct a pretrial investigation (Ground Six);
4) challenge Mr. Monay-Pina's competency (Ground Seven);
5) review video surveillance evidence (Ground Eight); and
6) speak with Mr. Monay-Pina prior to trial and allegedly admitting to Mr. Monay-Pina's guilt at trial (Ground Eleven).

Mr. Monay-Pina will also have the opportunity to present evidence regarding his remaining claims in Ground Ten. The remaining claims in Ground Ten include cumulative error and trial counsel's alleged failure to visit Mr. Monay-Pina in jail or to develop a defense together with Mr. Monay-Pina.

As the Court is setting an evidentiary hearing, the Court orders the appointment of counsel for Mr. Monay-Pina. A status check on the appointment of counsel is set for May 12, 2020, at 9:00 AM.

I. Factual and Procedural Background

At 3:00 am on January 12, 2016, two masked men carrying guns entered a local 7-Eleven convenience store. Both masked men were dressed in dark clothing and wore dark puffy-style jackets. The masked men pointed their guns at the sole employee, Richard DeCamp, and ordered Mr. DeCamp to empty two cash registers. ~~A~~fter taking $139.00 from the registers, the masked men fled the store.

At the time of the 7-Eleven robbery, Javier Colon was sleeping in his sister's converted garage less than a mile away from the 7-Eleven. Minutes later, two armed men opened the garage door and began attacking Mr. Colon. The attackers beat Mr. Colon with their guns. One of the attackers grabbed an axe from inside the garage. The attacker swung at Mr. Colon's head with the axe, but Mr. Colon deflected the axe with his hand. Mr. Colon's family woke because of the

commotion. After seeing the two attackers, Mr. Colon's family called the police. When police cars neared the house, the attackers fled.

A responding officer found two men in the middle of a nearby backyard. Both men attempted to hide but were taken into custody. The men were later identified as Mr. Monay-Pina and Casimiro Venegas. In the backyard, police recovered: $138.00 in cash, Mr. Colon's wallet, a replica firearm, and a knife with sheath. When the men were apprehended, Mr. Monay-Pina was wearing a stocking cap on his head and a dark puffy jacket, and Mr. Venegas was wearing a black ski mask and a black puffy jacket. The men matched the description of the men who robbed the 7-Eleven.

Mr. Monay-Pina and Mr. Venegas, were charged with multiple felony and gross misdemeanor counts related to the 7-Eleven robbery and the attack on Mr. Colon. Mr. Monay-Pina and Mr. Venegas were tried together in March of 2017. Thomas D. Boley, Esq. represented Mr. Monay-Pina. On March 15, 2017, the jury returned a verdict finding both men guilty on all counts. Mr. Monay-Pina subsequently appealed, asserting that the State's arguments during rebuttal closing denied Mr. Monay-Pina the right to a fair trial. On March 28, 2019, the Nevada Supreme Court affirmed Mr. Monay-Pina's conviction.

On February 18, 2020, Mr. Monay-Pina filed the Petition for Writ of Habeas Corpus being considered here. Mr. Monay-Pina challenges the validity of his conviction on the grounds that trial counsel was ineffective for failing to: advise Mr. Monay-Pina of his right to testify, conduct a thorough pre-trial investigation, file motions, challenge Mr. Monay-Pina's competency, object to the State's rebuttal argument and admitting to Mr. Monay-Pina's guilt at trial. Along with his petition, Mr. Monay-Pina filed a Motion to Appoint Counsel. On March 3, 2020, the Court ordered a response and the State filed their response on April 14, 2020. After reviewing Mr. Monay-Pena's petition and the State's response, the Court grants Mr. Monay-Pena's Motion to Appoint Counsel and sets an evidentiary hearing on the claims that are not being dismissed.

/ / /

II. Discussion

A. Legal Standard

A claim of ineffective assistance of counsel is analyzed under the two-part test laid out in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a defendant alleging ineffective assistance of counsel must show (1) that their counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687. The Court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one. Id. at 697.

Counsel's performance is deficient when their representation amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 563 U.S. 86, 88 (2011). To find prejudice to the defense in the second half of the Strickland test, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Effectiveness is presumed. The defendant must demonstrate by a preponderance of the evidence that counsel was ineffective. Means v. State, 103 P.3d 25, 32-33 (Nev. 2004). A post-conviction petition's claims of ineffective assistance of counsel must be supported with specific factual allegations which would entitle a petitioner to relief if true; "bare" or "naked" allegations are not sufficient to show ineffectiveness of counsel. Hargrove v. State, 686 P.2d 222, 225 (Nev. 1984).

B. Mr. Monay-Pina is not entitled to relief on Grounds One and Three (failure to advise on right to testify), Ground Five (failure to move to dismiss weapon charges), Ground Nine (failure to object to State's rebuttal argument), and the claim in Ground Ten that Mr. Monay-Pina was entitled to two trial attorneys.

Mr. Monay-Pina argues that trial counsel was ineffective on eleven grounds. Under the Nevada Revised Statutes, a judge may dismiss a petition without a hearing if the judge determines that the petitioner is not entitled to relief and an evidentiary hearing is not required. NRS 34.770(2). The Court finds that Mr. Monay-Pina is not entitled to relief on Grounds One, Three, Five, and Nine of the petition. The Court further finds that Mr. Monay-Pina is not entitled to relief in part on

Ground Ten.

1. Grounds One and Three – Failure to advise on right to testify.

In both Grounds One and Three, Mr. Monay-Pina alleges trial counsel never discussed the right to testify and never asked Mr. Monay-Pina if he was going to testify. Mr. Monay-Pina alleges that trial counsel did not have Mr. Monay-Pina sign a waiver about testifying on his own behalf. Mr. Monay-Pina argues that these failures violated Mr. Monay-Pina's right to effective assistance of counsel. In their response, the State argues that Mr. Monay-Pina's allegations are bare and unsupported by the record. The State further argues that there is no authority which requires a written waiver of a right to testify.

The record reflects that Mr. Monay-Pina was canvassed on his right to testify on the third day of trial as follows:

The Court:	All right. And Mr. Monay-Pina?
Mr. Monay-Pina:	Yes, ma'am.
The Court:	Okay. Sir, under the Constitution of the United States and under the Constitution of the State of Nevada, you cannot be compelled to testify in the case. Do you understand that?
Mr. Monay-Pina:	Yes, ma'am.
The Court:	And you may, at your own request, give up this right and take the witness stand and testify. If you do, you will be subject to cross-examination by the District Attorney, and anything you say, be it on cross-examination or direct examination, will be the subject of fair comment when the District Attorney speaks to the jury in his or her final argument. Do you understand that?
Mr. Monay-Pina:	Yes, ma'am.
The Court:	If you choose not to testify, I will not allow the District Attorney to make any comments to the jury because you have not testified. Do you understand that, sir?
Mr. Monay-Pina:	Yes, ma'am.
The Court:	If you elect not to testify, I will instruct the jury but only if your attorney specifically requests that, the law does not compel a defendant in a criminal case to take the stand and testify, and no

presumption may be raised and no inference of any kind can be drawn from the failure of a defendant to testify. Do you understand that, sir?

Mr. Monay-Pina: Yes, ma'am.

The Court: Do you have any questions about these rights?

Mr. Monay-Pina: No, ma'am.

The record further reflects that Mr. Monay-Pina was given the opportunity confer with counsel prior to being canvassed by the Court.

The Court finds that trial counsel's performance was not deficient on these grounds because Mr. Monay-Pina was fully advised of his right to testify. The record reflects that Mr. Monay-Pinay discussed his right to testify with trial counsel, that the Court canvassed Mr. Monay-Pina on his rights to testify, and that Mr. Monay-Pina understood those rights. The Court therefore denies Grounds One and Three of Mr. Monay-Pina's petition.

2. Ground Five – Failure to move to dismiss weapons charges.

In Ground Five, Mr. Monay-Pina argues that trial counsel was ineffective because counsel should have moved to dismiss the weapons charges on the grounds that the weapon was a BB gun. The State responds that this claim is meritless based on the law.

NRS 193.165 defines a deadly weapon as "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death." NRS 193.165(6)(b). The Nevada Supreme Court has specifically found that a BB gun is a deadly weapon under NRS 193.165. Funderburk v. State, 212 P.3d 337, 340 (Nev. 2009).

The Court finds that Mr. Monay-Pina's claim is meritless on its face. Trial counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 137 P.3d 1095, 1103 (Nev. 2006). Here, a motion to dismiss weapons charges would have been futile because a BB weapon is a deadly weapon under Nevada law. The Court therefore denies Ground Five of Mr. Monay-Pina's petition.

3. Ground Nine – Failure to object to prosecutor comments during rebuttal.

In Ground Nine, Mr. Monay-Pina alleges that trial counsel failed to object to burden-

shifting comments made during the State's rebuttal argument. Mr. Monay-Pina argues that an objection would have led to a mistrial. The State responds that counsel was not ineffective because the State's comment was not improper, the comment did not deny Mr. Monay-Pina a fair trial, and that any error was harmless in light of overwhelming evidence of Mr. Monay-Pina's guilt.

During the State's rebuttal, the prosecutor observed, "I do think it's interesting that we go through all these different pictures, all this evidence, all these things. The defense gets up and talks to you about their closing, right? Their case – they don't show you any of the pictures, right? They don't go through the evidence." Though Mr. Monay-Pina's counsel did not object to the statement, counsel for co-defendant Mr. Venegas did object and moved for mistrial. The Court denied the motion, but sustained the objection and admonished the jury that the defense was not required to present any evidence because the burden was on the State. Both Mr. Monay-Pina and Mr. Venegas appealed the Court's decision but the Nevada Supreme Court affirmed the decision with its order on March 28, 2019. The Nevada Supreme Court found that any harm resulting from the State's rebuttal argument was cured when the Court sustained the objection and admonished the jury.

Trial counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 137 P.3d 1095, 1103 (Nev. 2006). Here, trial counsel was not ineffective because any objection or motion for mistrial would have made no difference in the outcome of the case An objection from Mr. Monay-Pina's trial counsel would not have altered the result of the case because the Court had already sustained co-defendant's objection to the State's rebuttal argument. Additionally, a motion for a mistrial based on the State's rebuttal argument would have been futile because the co-defendant's request for a mistrial was denied by the Court and the Court's denial was affirmed on appeal. The Court therefore denies Ground Nine of Mr. Monay-Pina's petition.

4. Ground Ten – Right to two defense attorneys at jury trial.

In Ground Ten, Mr. Monay-Pina makes several arguments. Mr. Monay-Pina argues that there was cumulative error by trial counsel, that trial counsel failed to visit Mr. Monay-Pina at the jail, that trial counsel failed to work on a defense with Mr. Monay-Pina, and that Mr. Monay-Pina should have been appointed a second trial attorney. Mr. Monay-Pina argues that it is impossible for

a single attorney to be effective at trial. The Court addresses only Mr. Monay-Pina's argument that he was entitled to two attorneys at trial.

The State responds that there is no authority which required appointment of two attorneys to Mr. Monay-Pina's defense. The State further argues that Mr. Monay-Pina fails to show how the outcome of his trial would have been changed by the addition of co-counsel.

The Court finds that this is not a cognizable claim for ineffective assistance of counsel because there is no authority which required appointment of two attorneys to Mr. Monay-Pina. As such, Mr. Monay-Pina's claim that he was entitled to two attorneys is denied.

a. Remaining claims in Ground Ten set for evidentiary hearing.

Monay-Pina's remaining claims in Ground Ten shall be set for evidentiary hearing along with the other remaining grounds. The remaining claims in Ground Ten include cumulative error and trial counsel's alleged failure to visit Mr. Monay-Pina in jail or to develop a defense together with Mr. Monay-Pina.

C. Mr. Monay-Pina's Motion to Appointment Counsel is granted.

Mr. Monay-Pina moves for the appointment of counsel pursuant to NRS 34.750. Appointment of counsel forpost conviction proceedings is appropriate when the petitioner is indigent, the petition is not dismissed summarily, and the issues presented are difficult or counsel is necessary to proceed with discovery. NRS 34.750(1). The State argues that Mr. Monay-Pina is not entitled to appointed counsel because the claims are not complex, Mr. Monay-Pina is able to understand the proceedings, and none of the claims raised require additional discovery.

The Court finds that Mr. Monay-Pina is indigent, the petition has not been dismissed summarily in its entirety, and the remaining issues presented are difficult. Mr. Monay-Pina is also serving a significant prison sentence. Therefore, the Court grants Mr. Monay-Pina's Motion to Appoint Counsel. A status check on the appointment of counsel is set for May 12, 2020, at 9:00 AM.

/ / /

III. Conclusion

Mr. Monay-Pina's petition is denied in part. Grounds One and Three are denied because the record reflects that Mr. Monay-Pina was advised of his right to testify. Ground Five is denied because a BB gun is a deadly weapon under State law, and any motion to dismiss the weapons charge would have been futile. Ground Nine is denied because co-defendant's counsel objection to the State's rebuttal argument was sustained, and an objection by Mr. Monay-Pina's counsel would not have changed the outcome of the case. Finally, Ground Ten is denied in part because there is no authority that required the appointment of two trial attorneys for Mr. Monay-Pina.

Mr. Monay-Pina's remaining grounds shall be set for an evidentiary hearing. The Court grants Mr. Monay-Pina's Motion to Appoint Counsel and a status check on the appointment of counsel is set for May 12, 2020, at 9:00 AM.

Dated this 30th day of April, 2020

DATED this day of April ___, 2020.

LINDA MARIE BELL
DISTRICT COURT JUDGE

2B8 320 7D73 3811
Linda Marie Bell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
Jose Fernando Monay-Pina #1185276 Southern Desert Correctional Center PO Box 208 Indian Springs, Nevada 89070-0208	Petitioner
Steven B. Wolfson Clark County District Attorney John Niman Deputy District Attorney 200 Lewis Avenue Las Vegas, Nevada 89155-2212	Attorney for Respondent

/s/ Sylvia Perry
SYLVIA PERRY
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT VII

AFFIRMATION
Pursuant to NRS 239B.030
The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A810899 **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell Date: 04/ /2020
District Court Judge

DISTRICT COURT
CLARK COUNTY, NEVADA

Jose Monay-Pina, Plaintiff(s)	CASE NO: A-20-810899-W
vs.	DEPT. NO. Department 7
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Decision and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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Wesley Su	dept07lc@clarkcountycourts.us
John Niman	John.Niman@clarkcountyda.com

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5/6/2020 1:03 PM
Steven D. Grierson
CLERK OF THE COURT

NEOJ

DISTRICT COURT
CLARK COUNTY, NEVADA

JOSE MONAY-PINA, Petitioner, vs. STATE OF NEVADA; ET.AL., Respondent,	Case No: A-20-810899-W Dept. No: VII **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that on April 30, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on May 6, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 6 day of May 2020, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Jose Monay-Pina # 1185276
P.O. Box 208
Indain Springs, NV 89070

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

Electronically Filed
04/30/2020
CLERK OF THE COURT

DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JOSE FERNANDO MONAY-PINA, Petitioner, *vs.* THE STATE OF NEVADA, et al., Respondents.	Case No. A-20-810899-W Dept. No. VII

DECISION AND ORDER

A jury convicted Mr. Monay-Pina of conspiracy to commit robbery, burglary while in possession of a firearm, robbery with use of a deadly weapon, battery with use of a deadly weapon resulting in substantial bodily harm, attempt murder with use of a deadly weapon, battery with use of a deadly weapon, aiming a firearm at a human being, coercion with use of a deadly weapon, and battery with intent to commit a crime. Following the conviction, the Nevada Supreme Court denied Mr. Monay-Pina's direct appeal. Mr. Monay-Pina now challenges the effectiveness of trial counsel through a postconviction Petition for Writ of Habeas Corpus seeking relief from his conviction based on ineffective assistance of counsel. After review of the petition and the State's response, the Court denies Mr. Monay-Pina's Petition for Writ of Habeas Corpus in part and will hold an evidentiary hearing on the remainder of the claims.

Grounds One, Three, Five, and Nine of the Petition are denied. Grounds One and Three claim that Mr. Monay-Pina was not advised of his right to testify. Ground Five claims that trial counsel was ineffective for failing to move to dismiss the weapon charges. Ground Nine claims that trial counsel was ineffective for failing to object to the State's rebuttal argument.

The Court also denies Mr. Monay-Pina's claim, raised in Ground Ten, that he was entitled to two trial attorneys.

Mr. Monay-Pina will have the opportunity to present any additional evidence regarding the remaining grounds at an evidentiary hearing. Those claims include trial counsel's alleged failure to

1) hire an investigator (Ground Two);
2) move to separate Mr. Monay-Pina's and co-defendant Mr. Venegas's cases (Ground Four);
3) conduct a pretrial investigation (Ground Six);
4) challenge Mr. Monay-Pina's competency (Ground Seven);
5) review video surveillance evidence (Ground Eight); and
6) speak with Mr. Monay-Pina prior to trial and allegedly admitting to Mr. Monay-Pina's guilt at trial (Ground Eleven).

Mr. Monay-Pina will also have the opportunity to present evidence regarding his remaining claims in Ground Ten. The remaining claims in Ground Ten include cumulative error and trial counsel's alleged failure to visit Mr. Monay-Pina in jail or to develop a defense together with Mr. Monay-Pina.

As the Court is setting an evidentiary hearing, the Court orders the appointment of counsel for Mr. Monay-Pina. A status check on the appointment of counsel is set for May 12, 2020, at 9:00 AM.

I. Factual and Procedural Background

At 3:00 am on January 12, 2016, two masked men carrying guns entered a local 7-Eleven convenience store. Both masked men were dressed in dark clothing and wore dark puffy-style jackets. The masked men pointed their guns at the sole employee, Richard DeCamp, and ordered Mr. DeCamp to empty two cash registers. ~~A~~fter taking $139.00 from the registers, the masked men fled the store.

At the time of the 7-Eleven robbery, Javier Colon was sleeping in his sister's converted garage less than a mile away from the 7-Eleven. Minutes later, two armed men opened the garage door and began attacking Mr. Colon. The attackers beat Mr. Colon with their guns. One of the attackers grabbed an axe from inside the garage. The attacker swung at Mr. Colon's head with the axe, but Mr. Colon deflected the axe with his hand. Mr. Colon's family woke because of the

commotion. After seeing the two attackers, Mr. Colon's family called the police. When police cars neared the house, the attackers fled.

A responding officer found two men in the middle of a nearby backyard. Both men attempted to hide but were taken into custody. The men were later identified as Mr. Monay-Pina and Casimiro Venegas. In the backyard, police recovered: $138.00 in cash, Mr. Colon's wallet, a replica firearm, and a knife with sheath. When the men were apprehended, Mr. Monay-Pina was wearing a stocking cap on his head and a dark puffy jacket, and Mr. Venegas was wearing a black ski mask and a black puffy jacket. The men matched the description of the men who robbed the 7-Eleven.

Mr. Monay-Pina and Mr. Venegas, were charged with multiple felony and gross misdemeanor counts related to the 7-Eleven robbery and the attack on Mr. Colon. Mr. Monay-Pina and Mr. Venegas were tried together in March of 2017. Thomas D. Boley, Esq. represented Mr. Monay-Pina. On March 15, 2017, the jury returned a verdict finding both men guilty on all counts. Mr. Monay-Pina subsequently appealed, asserting that the State's arguments during rebuttal closing denied Mr. Monay-Pina the right to a fair trial. On March 28, 2019, the Nevada Supreme Court affirmed Mr. Monay-Pina's conviction.

On February 18, 2020, Mr. Monay-Pina filed the Petition for Writ of Habeas Corpus being considered here. Mr. Monay-Pina challenges the validity of his conviction on the grounds that trial counsel was ineffective for failing to: advise Mr. Monay-Pina of his right to testify, conduct a thorough pre-trial investigation, file motions, challenge Mr. Monay-Pina's competency, object to the State's rebuttal argument and admitting to Mr. Monay-Pina's guilt at trial. Along with his petition, Mr. Monay-Pina filed a Motion to Appoint Counsel. On March 3, 2020, the Court ordered a response and the State filed their response on April 14, 2020. After reviewing Mr. Monay-Pena's petition and the State's response, the Court grants Mr. Monay-Pena's Motion to Appoint Counsel and sets an evidentiary hearing on the claims that are not being dismissed.

/ / /

II. Discussion

A. Legal Standard

A claim of ineffective assistance of counsel is analyzed under the two-part test laid out in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a defendant alleging ineffective assistance of counsel must show (1) that their counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687. The Court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one. Id. at 697.

Counsel's performance is deficient when their representation amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 563 U.S. 86, 88 (2011). To find prejudice to the defense in the second half of the Strickland test, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Effectiveness is presumed. The defendant must demonstrate by a preponderance of the evidence that counsel was ineffective. Means v. State, 103 P.3d 25, 32-33 (Nev. 2004). A post-conviction petition's claims of ineffective assistance of counsel must be supported with specific factual allegations which would entitle a petitioner to relief if true; "bare" or "naked" allegations are not sufficient to show ineffectiveness of counsel. Hargrove v. State, 686 P.2d 222, 225 (Nev. 1984).

B. Mr. Monay-Pina is not entitled to relief on Grounds One and Three (failure to advise on right to testify), Ground Five (failure to move to dismiss weapon charges), Ground Nine (failure to object to State's rebuttal argument), and the claim in Ground Ten that Mr. Monay-Pina was entitled to two trial attorneys.

Mr. Monay-Pina argues that trial counsel was ineffective on eleven grounds. Under the Nevada Revised Statutes, a judge may dismiss a petition without a hearing if the judge determines that the petitioner is not entitled to relief and an evidentiary hearing is not required. NRS 34.770(2). The Court finds that Mr. Monay-Pina is not entitled to relief on Grounds One, Three, Five, and Nine of the petition. The Court further finds that Mr. Monay-Pina is not entitled to relief in part on

Ground Ten.

1. Grounds One and Three – Failure to advise on right to testify.

In both Grounds One and Three, Mr. Monay-Pina alleges trial counsel never discussed the right to testify and never asked Mr. Monay-Pina if he was going to testify. Mr. Monay-Pina alleges that trial counsel did not have Mr. Monay-Pina sign a waiver about testifying on his own behalf. Mr. Monay-Pina argues that these failures violated Mr. Monay-Pina's right to effective assistance of counsel. In their response, the State argues that Mr. Monay-Pina's allegations are bare and unsupported by the record. The State further argues that there is no authority which requires a written waiver of a right to testify.

The record reflects that Mr. Monay-Pina was canvassed on his right to testify on the third day of trial as follows:

The Court:	All right. And Mr. Monay-Pina?
Mr. Monay-Pina:	Yes, ma'am.
The Court:	Okay. Sir, under the Constitution of the United States and under the Constitution of the State of Nevada, you cannot be compelled to testify in the case. Do you understand that?
Mr. Monay-Pina:	Yes, ma'am.
The Court:	And you may, at your own request, give up this right and take the witness stand and testify. If you do, you will be subject to cross-examination by the District Attorney, and anything you say, be it on cross-examination or direct examination, will be the subject of fair comment when the District Attorney speaks to the jury in his or her final argument. Do you understand that?
Mr. Monay-Pina:	Yes, ma'am.
The Court:	If you choose not to testify, I will not allow the District Attorney to make any comments to the jury because you have not testified. Do you understand that, sir?
Mr. Monay-Pina:	Yes, ma'am.
The Court:	If you elect not to testify, I will instruct the jury but only if your attorney specifically requests that, the law does not compel a defendant in a criminal case to take the stand and testify, and no

presumption may be raised and no inference of any kind can be drawn from the failure of a defendant to testify. Do you understand that, sir?

Mr. Monay-Pina: Yes, ma'am.

The Court: Do you have any questions about these rights?

Mr. Monay-Pina: No, ma'am.

The record further reflects that Mr. Monay-Pina was given the opportunity confer with counsel prior to being canvassed by the Court.

The Court finds that trial counsel's performance was not deficient on these grounds because Mr. Monay-Pina was fully advised of his right to testify. The record reflects that Mr. Monay-Pinay discussed his right to testify with trial counsel, that the Court canvassed Mr. Monay-Pina on his rights to testify, and that Mr. Monay-Pina understood those rights. The Court therefore denies Grounds One and Three of Mr. Monay-Pina's petition.

2. Ground Five – Failure to move to dismiss weapons charges.

In Ground Five, Mr. Monay-Pina argues that trial counsel was ineffective because counsel should have moved to dismiss the weapons charges on the grounds that the weapon was a BB gun. The State responds that this claim is meritless based on the law.

NRS 193.165 defines a deadly weapon as "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death." NRS 193.165(6)(b). The Nevada Supreme Court has specifically found that a BB gun is a deadly weapon under NRS 193.165. Funderburk v. State, 212 P.3d 337, 340 (Nev. 2009).

The Court finds that Mr. Monay-Pina's claim is meritless on its face. Trial counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 137 P.3d 1095, 1103 (Nev. 2006). Here, a motion to dismiss weapons charges would have been futile because a BB weapon is a deadly weapon under Nevada law. The Court therefore denies Ground Five of Mr. Monay-Pina's petition.

3. Ground Nine – Failure to object to prosecutor comments during rebuttal.

In Ground Nine, Mr. Monay-Pina alleges that trial counsel failed to object to burden-

shifting comments made during the State's rebuttal argument. Mr. Monay-Pina argues that an objection would have led to a mistrial. The State responds that counsel was not ineffective because the State's comment was not improper, the comment did not deny Mr. Monay-Pina a fair trial, and that any error was harmless in light of overwhelming evidence of Mr. Monay-Pina's guilt.

During the State's rebuttal, the prosecutor observed, "I do think it's interesting that we go through all these different pictures, all this evidence, all these things. The defense gets up and talks to you about their closing, right? Their case – they don't show you any of the pictures, right? They don't go through the evidence." Though Mr. Monay-Pina's counsel did not object to the statement, counsel for co-defendant Mr. Venegas did object and moved for mistrial. The Court denied the motion, but sustained the objection and admonished the jury that the defense was not required to present any evidence because the burden was on the State. Both Mr. Monay-Pina and Mr. Venegas appealed the Court's decision but the Nevada Supreme Court affirmed the decision with its order on March 28, 2019. The Nevada Supreme Court found that any harm resulting from the State's rebuttal argument was cured when the Court sustained the objection and admonished the jury.

Trial counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 137 P.3d 1095, 1103 (Nev. 2006). Here, trial counsel was not ineffective because any objection or motion for mistrial would have made no difference in the outcome of the case An objection from Mr. Monay-Pina's trial counsel would not have altered the result of the case because the Court had already sustained co-defendant's objection to the State's rebuttal argument. Additionally, a motion for a mistrial based on the State's rebuttal argument would have been futile because the co-defendant's request for a mistrial was denied by the Court and the Court's denial was affirmed on appeal. The Court therefore denies Ground Nine of Mr. Monay-Pina's petition.

4. Ground Ten – Right to two defense attorneys at jury trial.

In Ground Ten, Mr. Monay-Pina makes several arguments. Mr. Monay-Pina argues that there was cumulative error by trial counsel, that trial counsel failed to visit Mr. Monay-Pina at the jail, that trial counsel failed to work on a defense with Mr. Monay-Pina, and that Mr. Monay-Pina should have been appointed a second trial attorney. Mr. Monay-Pina argues that it is impossible for

a single attorney to be effective at trial. The Court addresses only Mr. Monay-Pina's argument that he was entitled to two attorneys at trial.

The State responds that there is no authority which required appointment of two attorneys to Mr. Monay-Pina's defense. The State further argues that Mr. Monay-Pina fails to show how the outcome of his trial would have been changed by the addition of co-counsel.

The Court finds that this is not a cognizable claim for ineffective assistance of counsel because there is no authority which required appointment of two attorneys to Mr. Monay-Pina. As such, Mr. Monay-Pina's claim that he was entitled to two attorneys is denied.

a. Remaining claims in Ground Ten set for evidentiary hearing.

Monay-Pina's remaining claims in Ground Ten shall be set for evidentiary hearing along with the other remaining grounds. The remaining claims in Ground Ten include cumulative error and trial counsel's alleged failure to visit Mr. Monay-Pina in jail or to develop a defense together with Mr. Monay-Pina.

C. Mr. Monay-Pina's Motion to Appointment Counsel is granted.

Mr. Monay-Pina moves for the appointment of counsel pursuant to NRS 34.750. Appointment of counsel forpost conviction proceedings is appropriate when the petitioner is indigent, the petition is not dismissed summarily, and the issues presented are difficult or counsel is necessary to proceed with discovery. NRS 34.750(1). The State argues that Mr. Monay-Pina is not entitled to appointed counsel because the claims are not complex, Mr. Monay-Pina is able to understand the proceedings, and none of the claims raised require additional discovery.

The Court finds that Mr. Monay-Pina is indigent, the petition has not been dismissed summarily in its entirety, and the remaining issues presented are difficult. Mr. Monay-Pina is also serving a significant prison sentence. Therefore, the Court grants Mr. Monay-Pina's Motion to Appoint Counsel. A status check on the appointment of counsel is set for May 12, 2020, at 9:00 AM.

/ / /

III. Conclusion

Mr. Monay-Pina's petition is denied in part. Grounds One and Three are denied because the record reflects that Mr. Monay-Pina was advised of his right to testify. Ground Five is denied because a BB gun is a deadly weapon under State law, and any motion to dismiss the weapons charge would have been futile. Ground Nine is denied because co-defendant's counsel objection to the State's rebuttal argument was sustained, and an objection by Mr. Monay-Pina's counsel would not have changed the outcome of the case. Finally, Ground Ten is denied in part because there is no authority that required the appointment of two trial attorneys for Mr. Monay-Pina.

Mr. Monay-Pina's remaining grounds shall be set for an evidentiary hearing. The Court grants Mr. Monay-Pina's Motion to Appoint Counsel and a status check on the appointment of counsel is set for May 12, 2020, at 9:00 AM.

Dated this 30th day of April, 2020

DATED this day of April ___, 2020.

LINDA MARIE BELL
DISTRICT COURT JUDGE

2B8 320 7D73 3811
Linda Marie Bell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
Jose Fernando Monay-Pina #1185276 Southern Desert Correctional Center PO Box 208 Indian Springs, Nevada 89070-0208	Petitioner
Steven B. Wolfson Clark County District Attorney John Niman Deputy District Attorney 200 Lewis Avenue Las Vegas, Nevada 89155-2212	Attorney for Respondent

/s/ Sylvia Perry
SYLVIA PERRY
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT VII

AFFIRMATION
Pursuant to NRS 239B.030
The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A810899 **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell Date: 04/ /2020
District Court Judge

DISTRICT COURT
CLARK COUNTY, NEVADA

Jose Monay-Pina, Plaintiff(s)	CASE NO: A-20-810899-W
vs.	DEPT. NO. Department 7
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Decision and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Envelope ID: 5993968
Service Date: 4/30/2020

Wesley Su	dept07lc@clarkcountycourts.us
John Niman	John.Niman@clarkcountyda.com

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Steven D. Grierson
CLERK OF THE COURT

SUPPL
MONIQUE MCNEILL, ESQ.
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Tel: (702) 497-9734
Email: Monique.mcneill@yahoo.com
Counsel for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

JOSE MONAY-PINA, Petitioner, -vs- JAMES DZURENDA, STATE OF NEVADA Respondents.	CASE NO: A-20-810899-W DEPT NO: VII

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, JOSE MONAY-PINA, by and through his attorney, MONIQUE A. MCNEILL, ESQ., and hereby submits this Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

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/ / /

This Supplemental Memorandum and Motion 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.

DATED this _25_ day of February, 2021.

Respectfully submitted,

/s/ Monique McNeill
MONIQUE A. MCNEILL, ESQ.
Nevada Bar No. 009862
P.O. Box 2451
Las Vegas, Nevada 89125
Phone: (702)497-9734
Email: Monique.mcneill@yahoo.com
Attorney for Petitioner

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 4, 2016, the State filed an Information charging Jose Monay-Pina ("Monay-Pina") as follows: Counts 1, 4 – Conspiracy to Commit Robbery (Felony – NRS 200.380, 199.480)); Count 2– Burglary While in Possession of a Firearm (Felony – NRS 205.060); Counts 3, 5 – Robbery with a Deadly Weapon (Felony – NRS 200.380, 193.165); Counts 6, 8, 9, 10 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony—NRS 200.481); Count 7—Attempt Murder with Use of a Deadly Weapon (Felony—

NRS 200.010, 200.030); Count 11—Aiming a Firearm at a Human Being (Gross Misdemeanor—NRS 202.290); Count 12—Coercion with Use of a Deadly Weapon (Felony—NRS 207.190); Count 13—Battery with Intent to Commit a Crime (Felony—NRS 200.400.2). Appellant's Appendix ("AA"), 2-7.

On March 13, 2017, the first day of trial, the State filed an Amended Information, which corrected the language *Barren* pleading. AA37, 127. On March 13, 2017, the State filed a Second Amended Information. AA46. On March 15, 2017, the State filed a Third Amended Information. AA56.

Trial commenced on March 13, 2017. AA117. The jury rendered a verdict on March 15, 2017. AA66. The jury found Monay-Pina guilty on counts 1 through 8 and 11-13, as charged. AA67-69. The jury found Monay-Pina guilty as follows on count 9 – guilty of Battery with Use of a Deadly Weapon (no substantial bodily harm), and on count 10—guilty of battery with Use of a Deadly Weapon (no substantial bodily harm), AA68.

On June 8, 2017, the parties entered into a stipulation to continue the sentencing to a date after August 14, 2017. AA72. The court set sentencing for August 17, 2017, and the sentencing was continued again to September 7, 2017. AA75. The court sentenced Monay-Pina as follows: Count 1 – Twenty-Four (24) to Sixty (60) months, Count 2 –Twenty-four (24) to One hundred twenty (120) months, Count 2 to run concurrent to Count 1; Count 3 – twenty-four (24) to one hundred twenty (120) months, plus a consecutive twelve (12) to sixty (60) months for the use of the deadly weapon, to run concurrent with Count 2; Count 4 – twenty-four (24) to one hundred twenty (120) months, Count 4 to run concurrent with Counts 1, 2 and

3; Count 5 – twenty-four (24) to one hundred twenty (120) months, plus a consecutive twelve (24) to sixty (60) months for the use of the deadly weapon, Count 5 to run consecutive with 1, 2, and 3; Count 6 – twenty-four (24) to one hundred twenty (120) months, Count 6 to run concurrent with Counts 1 through 5; Count 7 – twenty-four (24) to one hundred twenty (120) months, plus a consecutive twelve (24) to sixty (60) months for the use of the deadly weapon, Count 7 to run consecutive to Counts 1 through 3; Count 8 – twenty-four (24) to one hundred twenty(120) months, Count 8 to run concurrent with Counts 1 through 7; Count 9—twenty-four to sixty (60) months, Count 9 to run concurrent to Counts 1 through 8; Count 10—twenty-four (24) to sixty (60) months, Count 10 to run concurrent to Counts 1 through 9; Count 11—364 days in the Clark County Detention Center, concurrent with Counts 1 through 10; Count 12—twelve (12) to sixty (60) months, Count 12 to run consecutive to Counts 1, 2, 3, 5, and 7; Count 13—twenty-four (24) to sixty (60) months, Count 13 to run concurrent with Counts 1 through 12. AA74-77. The aggregate sentence was ninety-four (94) months to 420 (four hundred twenty) months. AA77. Monay-Pina had six hundred four (604) days credit for time served. AA77.

A Judgment of Conviction was filed on September 21, 2017. AA74. On October 3, 2017, Monay-Pina filed a Notice of Appeal. AA78. The following issues were presented:

1. District Court erred in failing to protect Mr. Monay-Pina's right to a fair trial by failing to *sua sponte* declare a mistrial because the State's comments during its closing arguments amounted to impermissible burden shifting and prevented him from receiving a fair trial. Appellant's Opening Brief ("AOB"), viii.

On December 17, 2018, the Court of Appeals affirmed Splond's conviction. (Case No. 72545). On April 23, 2019, Remittitur was issued.

On February 18, 2020, Monay-Pina filed a Pro Per Petition for Writ of Habeas Corpus. In his petition, Monay-Pina raised the following issues:

1. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process was violated when his counsel failed to ask if he was going to testify. Further, he alleges that his counsel failed to have him sign a waiver
2. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process was violated when trial counsel failed to hire an investigator, who would have had the video analyzed; a pre-trial lineup should have been done to exclude petitioner from prosecution.
3. His Sixth Amendment right to effective assistance of counsel and Fourteenth Amendment right to Due Process was violated when trial counsel failed to discuss his rights to testify and what he would testify to, and that counsel failed to have him sign the waiver in trial for not testifying.
4. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated by counsel failing to file a motion to sever his trial from that of his co-defendant, as it prejudiced him.
5. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when his attorney failed to file a pretrial motion to have the deadly weapon enhancement dismissed, as the alleged weapon was

a BB gun.

6. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated because his trial counsel failed to do any investigation, and because the witnesses could not identify him, counsel should have investigated. Further, counsel was not prepared to cross-examine the witnesses, and investigation would have helped him prepare.
7. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when trial counsel failed to have petitioner tested by a psychiatrist to see if he was mentally "fit" to understand the charges against him and the trial proceedings.
8. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when counsel failed to subject the State's case to an adversarial testing process, by failing to review the video, and by failing to make the State prove the case beyond a reasonable doubt.
9. His Sixth Amendment right to effective assistance of counsel and Fourteenth Amendment right to Due Process were violated when trial counsel failed to object to the State's argument which shifted the burden of proof, causing prejudice to Monay-Pina.
10. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when trial counsel failed to visit him to develop his defense; trial counsel did the trial by himself; the errors were cumulative.

11. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when trial counsel admitted his guilt at trial.

On April 30, 2020, the district court entered a Decision and Order in which the Court denied Grounds One, Three, Five, Nine, and part of Ground Ten of the petition. The court granted leave for Monay-Pina to present additional evidence regarding Grounds Two, Four, Six, Seven, Eight, and Eleven. The court further ordered that Monay-Pina can present additional evidence regarding Ground Ten regarding the cumulative error and the failure to visit Monay-Pina in jail, or to develop a defense prior to trial.

TESTIMONIAL STATEMENT OF FACTS

Trial began on March 13, 2017. AA117.

RICHARD DECAMP:

Richard DeCamp ("DeCamp") was working at 7-11 at 4950 West Charleston in January 2016. AA145. On January 12, 2016, around 3:00 a.m., two men came through the door. AA146. The men had their faces covered with masks, and only their eyes were showing. AA147. One of the men was tall, and one was short. AA147. The men asked for "all the money" and then took him over to the second register to get the money from that register. AA147. The tall man was giving instructions, but both men had weapons. AA147. After the register, the tall man asked DeCamp for the money in his wallet. AA151. DeCamp showed them that he had nothing in his wallet. AA151. The men told him to lie on the ground and

then left. AA150. DeCamp called 911 and his boss, then the owner of the store. AA151. The police arrived within ten minutes. AA152.

The police asked DeCamp some questions, and then asked him to go and see if he could identify someone who was "down the street". AA152. The location was about eight or nine blocks from the store. AA153. The police asked him if he recognized the clothing, and he did. AA153. The police only asked him to identify one person. AA153. DeCamp told the police that he recognized the clothing, but not the face, as the men had their faces covered during the robbery. AA155. DeCamp testified that the police arrived at his store about ten minutes after the men left, and they took him to look at a suspect about ten to fifteen minutes after that. AA171-172.

ISAIAH SIMMONS:

Isaiah Simmons ("Simmons") was working for the Las Vegas Metropolitan Police Department ("LVMPD") on January 12, 2016. AA174. He responded to a call at a 7-11 at 5700 West Charleston, in Las Vegas. AA174. When he arrived, he spoke with Richard DeCamp, and then collected any information he could, including a witness statement. AA174. Simmons later learned that a potential suspect was in custody, and officers had DeCamp do a show up. AA176-177.

ABRAHAM AGUIRRE:

Abraham Aguirre ("Aguirre") was a sergeant with LVMPD in January 2016. AA191. He responded to the 7-11 first, and Simmons arrived shortly after. AA191. Aguirre tried to

get as much information from DeCamp, and then worked on securing the scene. AA192-93. While Aguirre was securing the scene, he received another high priority call, a few blocks away from the 7-11. AA193. Aguirre made sure Simmons had the scene under control, and then responded to the call at 504 Brush Street. AA193. The Brush street location was about a mile away from the 7-11. AA195.

Other officers were already at the Brush Street scene, including officer Justin Spurling ("Spurling"). AA197. The Brush Street address had a carport that had been converted into a room. AA197. Aguirre remembered that there was blood around the room, and he found an axe near the doorway. AA198. Aguirre, while in the makeshift room, heard a call from officer Spurling, and he immediately went around the north side of the house into the back yard. AA198-99. He saw Spurling looking over the wall of the backyard into the backyard of 510 Brush Street. AA199. Aguirre looked over the wall and saw Spurling illuminating the bushes. AA199. Aguirre could not see anyone, but he heard Spurling giving commands to someone. AA199. He then assisted Spurling by helping him get over the wall, and then he ran to 510 Brush and jumped the wall, along with officer Carter, who had just arrived. AA199.

When Aguirre landed in the yard of 510, he saw Spurling taking a suspect into custody with his pistol drawn. AA200. Spurling was giving verbal commands to another suspect who was hiding underneath a shed. AA200. Aguirre and Carter assisted Spurling in getting control of the potential suspects. AA201. Eventually, the man came out from under the shed and officers were able to search the property. AA203-203. They found a wallet and some money. AA204. Aguirre identified the men in the backyard as the two defendants. AA204. In the