

No. _____

In the
Supreme Court of the United States

IN RE DAVID CHARLES THATCHER,
Petitioner.

APPENDIX VOL. 4

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1 explain what she did; she went home.

2 MS. AIELLO: Everything. Everything she
3 said in this conversation explains certain things
4 that she said or did.

5 THE COURT: You're not telling me what
6 the offer of proof is as to what the other fellow
7 said.

8 MS. AIELLO: Well, when she asked about
9 are you going to go rob the store? And the one
10 guy's saying no, and he's pulling out money, and
11 the defendant --

12 THE COURT: Who pulled out money?

13 MS. AIELLO: Apparently, the codefendant
14 did.

15 THE COURT: Well, that's something she
16 saw.

17 MS. AIELLO: All I'm saying is I've been
18 asking questions. There have been hearsay
19 objections about the conversation. I think, you
20 know, anything that the defendant -- excuse me,
21 anything that Mr. Palafox said is not being
22 offered for the truth of the matter.

23 THE COURT: I don't know what -- I don't
24 know what he said. It depends -- just because
25 somebody says it, I can't -- I don't have the
26 police reports. I don't have anything.

1 MS. AIELLO: Well, I'd like to be able
2 to answer --

3 THE COURT: There's a hearsay
4 objection -- no. I don't know what -- obviously,
5 I'm not making myself clear.

6 If you have an offer of proof as to
7 what the other fellow said, tell me what it is,
8 and then I can rule on the hearsay objection.

9 MS. AIELLO: She says are you guys gonna
10 go rob my store? Apparently, Mr. Palafox says no;
11 see, we've got money, and he pulls out a ten
12 dollar bill.

13 I think there was also part of the
14 conversation where she's talking to them and says
15 what are you guys doing, and one or both of them
16 says we're just going to go to the store to buy
17 beer, and --

18 MR. STOREY: I would also have an
19 Aranda-Bruton issue.

20 MS. AIELLO: It's not Aranda-Bruton.

21 MR. STOREY: In regards to the statement
22 by Palafox that we've got money, which includes my
23 client.

24 THE COURT: That's hearsay. You can --
25 if she made an observation about somebody pulling
26 out money, sure.

1 MS. AIELLO: Okay.

2 (Whereupon, the side-bar
3 proceedings were concluded.)

4 BY MS. AIELLO:

5 Q. Ms. Slayton, when you were having
6 this conversation with the two men, did the white
7 man say -- did the defendant tell you where he was
8 going?

9 A. No.

10 Q. Did he tell you he was going to the
11 store to get some beer?

12 A. No.

13 Q. Did you tell Detective Winslow that
14 the man -- the white man, the defendant, said he
15 was going to go get some beer at the store?

16 A. I just said they went to go get
17 beer. They was going to go get a beer.

18 Q. Did the defendant say at the store?

19 A. No.

20 Q. When you were conversing, when you
21 were talking to both subjects, you asked them
22 where they were going; you said where are you
23 going?

24 A. I think so, yes.

25 Q. Okay. Well, I don't want to put
26 words in your mouth; I mean --

1 A. I don't -- I'm not -- I don't
2 know. I remember saying what's up or something,
3 and they said they -- um, it was just said that
4 I'm going to the store to get a beer.

5 Q. Who said that?

6 A. The Spanish man.

7 MR. STOREY: Move to strike, ask the
8 jury be admitted -- admonished.

9 THE COURT: All right. That part of the
10 of the answer is stricken. The jury will
11 disregard it.

12 BY MS. AIELLO:

13 Q. Did the defendant tell you he was
14 going to the store to get beer?

15 A. No.

16 Q. To get a beer?

17 A. No.

18 Q. Did you tell Detective Winslow --

19 A. No. I don't know.

20 Q. Okay. If I -- page 201.

21 Ms. Slayton, I'd like you to just
22 take a look at this bottom paragraph here and see
23 if -- read it to yourself.

24 A. (Witness reading.)

25 Hm-hmm. Yes.

26 Q. Does that refresh your recollection

1 about the conversation you had with
2 Detective Winslow?

3 A. No.

4 Q. You don't remember saying any of
5 those --

6 A. I remember saying something like
7 that, but I don't know that it was exactly like
8 that, though.

9 Q. Okay.

10 A. But I know that it -- it was just
11 that they was going to get something to drink; it
12 was hot.

13 Q. After this conversation you had
14 with -- with the defendant and the Spanish guy,
15 what did you do?

16 A. I continued to go home.

17 Q. When you -- about maybe three weeks
18 to a month later, you spoke to Detective Winslow?

19 A. Yes.

20 Q. And did he show you some
21 photographs?

22 A. Yes.

23 Q. And in that -- in the photographs,
24 did he show you a lineup of what would look like
25 Hispanic males?

26 A. Yes.

1 Q. Did you select a photo out of that?

2 A. Yes, I did.

3 Q. And the photo you selected, was
4 that the guy that you saw at the store, the
5 Spanish man?

6 A. Yes.

7 Q. Did you also take a look at a
8 lineup containing white males?

9 A. Yes.

10 Q. And in that lineup, did you point
11 out a photo?

12 A. Yes.

13 Q. And who was -- who were you picking
14 out or pointing to in that photo lineup?

15 A. David.

16 Q. Okay. And was there something
17 about that photo that was causing you problems or
18 confusion?

19 A. No.

20 Q. Something different about him?

21 A. Um, no.

22 Q. When you looked at the photo lineup
23 and you pointed to the one that was David, did
24 that photo have hair in it? Did he have hair on
25 his head?

26 A. Yes.

1 Q. Okay. And when you saw the
2 defendant on the day at the market, did he have
3 hair?

4 A. No.

5 Q. Let me show you what's been marked
6 as People's Exhibit 6 for identification. Does
7 the person in that photo look familiar?

8 A. Yes.

9 Q. And who is that?

10 A. That's Leo.

11 Q. That the guy that you saw with
12 David?

13 A. Yes.

14 Q. How long have you known the
15 defendant or when did you first meet him?

16 A. David?

17 Q. Yes.

18 A. I've known David for a while now,
19 for many years -- oh, well, say about maybe eight,
20 eight to ten years.

21 Q. That long?

22 A. Yes.

23 Q. Okay. And approximately how many
24 times have you seen him this year?

25 A. This year, I've seen David three
26 times this year.

1 Q. And say from the first time you saw
2 him this year and the last time you saw him this
3 year, did his appearance --

4 A. Yes.

5 Q. -- change?

6 A. Yes.

7 Q. What was different about him in
8 between those two times that you saw him?

9 A. He had lost a lot of weight.

10 MS. AIELLO: Thank you. I have no
11 further questions.

12 CROSS-EXAMINATION

13 BY MR. STOREY:

14 Q. Now, Ms. Slayton, you say you've
15 known David for eight to ten years?

16 A. Yes.

17 Q. And you know this is David here?

18 A. Yes.

19 Q. And you have seen David three, four
20 times this year?

21 A. Yes.

22 Q. Okay. And you've never had any
23 trouble I.D.'ing him, have you?

24 A. No.

25 Q. Yet when you did the interview with
26 Detective Winslow, you picked David's picture out;

1 correct?

2 A. Yes.

3 Q. And you told Detective Winslow you
4 were 60 percent sure that was the same person as
5 the one you talked to; is that correct?

6 A. Yes, yes.

7 Q. And you know this is David?

8 A. Yes.

9 Q. And you know the picture was David?

10 A. Well, the -- the only thing, he had
11 hair. That's what threw me off was the hair, and
12 I was like no, because I could tell the facial
13 part was him, but he just had hair.

14 Q. Okay. So the person that you saw
15 and talked to on that day was similar looking to
16 David, and you're 60 percent sure that David is
17 the person you're talking to?

18 A. No, I'm quite sure who I was
19 talking to.

20 Q. Ms. Slayton, you indicated that you
21 went to the market to get something to drink?

22 A. Yes, eat and drink.

23 Q. What was your beverage of choice?

24 MS. AIELLO: Objection, relevance.

25 THE COURT: Sustained.

26 MR. STOREY: It goes to ability to

1 perceive.

2 THE COURT: Well, perhaps. I'll allow
3 it subject to a motion to strike.

4 BY MR. STOREY:

5 Q. The beverage that you were
6 consuming, did you consume it as you were leaving
7 the market?

8 A. No.

9 Q. Had you consumed that beverage
10 prior to arriving at the market?

11 A. No.

12 Q. At the time that you saw the
13 individuals, were you in a state of intoxication?

14 A. No.

15 Q. When you were meeting with
16 Detective Winslow, I believe it was July 23rd;
17 does that sound right?

18 A. (Witness nods head.)

19 Q. Approximately three weeks later?

20 A. I believe so.

21 Q. And you viewed the photographic
22 lineup?

23 A. Yes.

24 Q. When you viewed that photographic
25 lineup, immediately, you could identify
26 David Thatcher; is that right?

1 A. No, I identified Leo first.

2 Q. Okay. Leo and David were not in
3 the same lineup?

4 A. No.

5 Q. The first lineup is the one with
6 the gentleman you identify as Leo?

7 A. Yes.

8 Q. You didn't know that he was Leo;
9 somebody told you?

10 A. No. He was on the second page, but
11 I'd looked, and I knew that was David, but I
12 wasn't quite sure of his -- the hair --

13 Q. Okay.

14 A. -- and -- 'cause it was different
15 or something, something he had done with his hair.

16 Q. But in regards to the July 23rd
17 date?

18 A. What about it?

19 Q. You looked at a photo lineup that
20 contained David Thatcher?

21 A. Yes.

22 Q. And at that time, you recognized
23 David Thatcher?

24 A. Yes.

25 Q. And you told Officer Winslow that
26 that was David Thatcher?

1 A. Yes, I did.

2 Q. And you told Officer Winslow that
3 you were 60 percent sure that that was the same
4 person that you had talked to?

5 A. Yes.

6 Q. Did you -- were you interviewed by
7 an officer on June 30th or about June 30th or July
8 1st or July 2nd?

9 A. I'm not sure. I don't even know
10 what I was doing on those dates.

11 Q. Okay. Before going in and talking
12 with Officer Winslow on July 23rd, were you
13 interviewed by an officer?

14 A. A peace officer?

15 Q. Yes.

16 A. A sheriff officer?

17 Q. Yes.

18 A. Yes, I was.

19 Q. And the interview was in regards to
20 what had happened at Mike's store; is that
21 correct?

22 A. Yes, that's right; you're right,
23 uh-huh.

24 Q. And at that time, you did not tell
25 the officer that one of the people -- you told the
26 officer you saw some people; right?

1 A. Right.

2 Q. Okay. But you did not tell the
3 officer that one of those people was
4 David Thatcher, did you?

5 A. No, I did not.

6 Q. And at the time that you made that
7 statement, you were trying to be truthful; isn't
8 that correct?

9 A. No, I wasn't. I was just answering
10 some questions, and I didn't answer some questions
11 I felt that didn't need to be to.

12 Q. When you answered the officer's
13 questions, were you trying to be truthful?

14 A. Yes.

15 Q. And were you trying to give them
16 the information they would need --

17 A. Some of it.

18 Q. -- in order to solve --

19 A. Somewhat, 'cause I didn't really
20 know what was going on. He was just asking me
21 questions.

22 Q. Then were you purposely withholding
23 information or lying to the officer?

24 A. Could have been.

25 I knew -- I knew it was David. I
26 just didn't say it was David because David's been

1 my daughter's friend, family of the friends, you
2 know, and this isn't nothing I want to do. I
3 don't want to do this, but I -- I got wrapped up
4 in it, and now here I am.

5 That's the reason why I didn't tell
6 him it was David when I first talked to him.

7 Q. Isn't it true that you did not tell
8 the officer the person that you talked with or one
9 of the persons you talked with was David Thatcher?

10 A. Did I not tell him that?

11 Q. The first interview with the first
12 officer, you did not tell him?

13 A. I did not tell him it was David.
14 Yes, that's right.

15 Q. In 1996, did you have a felony
16 conviction for a crime involving moral turpitude?

17 A. A what? I don't understand your
18 question.

19 Q. In 1996, did you have a felony
20 conviction of second degree burglary?

21 A. A second degree murder?

22 Q. Burglary.

23 A. Oh, yes, I did.

24 THE COURT: Ladies and gentlemen, I'll
25 be instructing you about the effect of such
26 testimony at the conclusion of the case. I'll

1 just tell you right now that such evidence is
2 offered for a limited purpose.

3 MR. STOREY: Nothing further.

4 REDIRECT EXAMINATION

5 BY MS. AIELLO:

6 Q. Ms. Slayton, when you spoke to the
7 first deputy the day of the robbery, were you
8 directly asked do you know either of these people?

9 A. No.

10 Q. When you spoke to the deputy on
11 that day, did you know who the white male was?

12 A. I don't even know which deputy it
13 was I was talking to, so I don't know really
14 whatever conversation.

15 I talked to quite a few of 'em
16 already, so I don't know which one -- what time or
17 where this is happening or what. I don't know if
18 it's when he came to the house; is that the deputy
19 that we're talking about?

20 Q. I want -- whoever you spoke to on
21 the day of the robbery.

22 A. Okay, yeah. Um, wasn't that
23 Sellers or somebody?

24 Q. Webb?

25 A. Webb, okay. Yes, all right, yes.

26 Q. When you were speaking to

1 Deputy Webb, did you know who that white male was
2 that you saw?

3 A. Yes.

4 Q. Why is it that you didn't offer
5 then that information?

6 A. I was just still like in shock that
7 he had done that, and I just couldn't believe that
8 he did that.

9 Q. Had you ever seen that Hispanic
10 male before?

11 A. No.

12 Q. Ms. Slayton, when you -- when you
13 saw the white male on that day --

14 A. Hm-hmm.

15 Q. -- did you know who it was?

16 A. Yes.

17 Q. And when you were looking at the
18 lineup of the six pictures, what was it that
19 caused you only to be 60 percent sure or caused
20 you to say that figure 60 percent?

21 A. I believe it was his facial hairs.
22 I think he had a beard or something. I'm not
23 sure. I'd have to see the pictures again to tell
24 you.

25 Q. But when you were looking at the
26 photo lineup --

1 A. Hm-hmm.

2 Q. -- it was whether or not that was
3 the picture of David that was giving you -- or
4 causing you to question?

5 A. It wasn't even that. Only thing it
6 was, was just he had hair, and he didn't have hair
7 then, you know. I knew it was David. I knew it
8 was David, you know. I could tell David. I've
9 been around David enough to know David.

10 Q. I'm going to show you People's
11 Exhibit 17 for identification.

12 I'm gonna show you what's been
13 marked as People's Exhibit 17 for identification.
14 Do you recognize the person in that photo?

15 A. Yes, that's David.

16 Q. Okay. And looking at that
17 photograph, does that look more like his
18 appearance on the day of the robbery?

19 A. No.

20 Q. What's different about his
21 appearance in that photograph?

22 A. He was bald. He was completely --
23 I mean slick bald, like he'd shaved it kind of
24 slick bald, and he didn't have no beard, and I
25 told you once that he had the mustache. I didn't
26 know how far it came down.

1 Q. Okay, all right.

2 A. But the beard was gone and the head
3 hair was gone.

4 Q. Okay. How did you feel about
5 having to come and testify?

6 A. I didn't want to.

7 MS. AIELLO: I have no further
8 questions.

9 RECROSS-EXAMINATION

10 BY MR. STOREY:

11 Q. Okay. You looked at People's 17;
12 right?

13 A. Yes.

14 Q. Now, is that the picture that
15 confused you?

16 A. This wasn't the picture they showed
17 me, no.

18 Q. That wasn't the one that they
19 showed you?

20 A. They showed me one that it looked
21 like he had been on a copy machine, and it was
22 like real close-up of his face. He looked real
23 like -- you know, it was like a real close-up on
24 it.

25 Q. Okay. Well, this picture is David;
26 right?

1 A. Yes.

2 Q. Okay. And you can tell that's
3 David?

4 A. Yes.

5 Q. Now, in regards to that picture,
6 does this have more hair or --

7 A. Yes.

8 Q. -- less hair?

9 A. More hair.

10 Q. Okay. On the head?

11 A. And face.

12 Q. Okay. And you said it was shaved
13 bald?

14 A. Yes.

15 Q. Okay. You wouldn't have an
16 estimate about how long the hair is on that
17 particular head on the picture, would you?

18 A. How long it is?

19 Q. Yeah.

20 MS. AIELLO: Your Honor, I would
21 object. The picture speaks for itself.

22 MR. STOREY: Well, if she can tell to
23 get an estimate.

24 THE COURT: The objection is sustained.

25 MR. STOREY: Okay.

26 / / /

1 BY MR. STOREY:

2 Q. And in regards to the day that you
3 saw this individual, that individual was -- I
4 think you said the person had a mustache and then
5 they would be clean shaven on the chin; is that
6 correct?

7 A. Hm-hmm, yes.

8 Q. Okay. And that was July 5th is
9 when you talked with Officer Webb; right, about a
10 week -- little less than a week after the thing at
11 the USA?

12 A. I couldn't tell you. I'm not
13 really sure what the dates was, but yes, I talked
14 to him.

15 Q. Okay. And as far as your testimony
16 today, when you saw the people on June 30th, the
17 one -- the white male that you saw was clean
18 shaven, no beard?

19 A. He was bald, clean shaved, and he
20 just had the mustache.

21 Q. Just a little mustache?

22 A. Yes.

23 Q. Okay.

24 Q. You have any idea how long it would
25 take to grow a beard that long?

26 MS. AIELLO: Objection, lack of

1 foundation, speculation, relevance.

2 THE COURT: Sustained.

3 MS. AIELLO: Argumentative.

4 BY MR. STOREY:

5 Q. If this picture was taken within a
6 month after the date you saw the individual at the
7 USA Market, and this is a picture of
8 David Thatcher, David Thatcher could not have been
9 the person at USA Market; right?

10 A. I didn't see --

11 MS. AIELLO: Objection, calls for
12 speculation.

13 THE WITNESS: I didn't see him at the
14 store.

15 THE COURT: Excuse me, ma'am, there's no
16 question right now.

17 The objection is sustained.

18 BY MR. STOREY:

19 Q. You don't know when that picture
20 was taken?

21 A. No, sir.

22 Q. But that picture is different than
23 the individual that you saw on June 30th?

24 A. Yes.

25 Q. The beard in particular is quite a
26 bit longer; is that right?

1 A. The beard wasn't there. The hair
2 wasn't there.

3 Q. Okay. And when you saw the
4 photographic lineup that was shown to you on July
5 23rd by Detective Winslow, you said the beard is
6 what threw you; right?

7 A. The hair -- the hair portion, yes.

8 Q. And that's why you said you were
9 only 60 percent sure?

10 A. I don't even know why I said that
11 actually.

12 MR. STOREY: Nothing further.

13 REDIRECT EXAMINATION FURTHER

14 BY MS. AIELLO:

15 Q. Ms. Slayton, I'm going to show you
16 what's been marked as People's Exhibit 18 for
17 identification. Do you recognize this sheet of
18 paper?

19 A. Yes.

20 Q. How do you recognize that?

21 A. I recognize it. That's the sheet
22 that they had me to look at for a lineup.

23 Q. Okay. And does that lineup contain
24 the photograph that you pointed out?

25 A. Yes.

26 Q. Okay. And which photograph is it?

1 A. Um, 53805, David.

2 Q. Why don't you go ahead and put --
3 why don't you go ahead and circle the number.

4 A. Okay.

5 Q. Okay. All right. And what was it
6 about this particular photograph?

7 A. That made me say the --

8 Q. Yeah, that made you say 60 percent?

9 A. I know now. It was 'cause he was
10 like this. It was like -- he was posed different
11 or something in here, and it just -- with that big
12 throat looking like that, it just kinda -- I
13 looked at it, and I was like that's him, but he
14 looks different in that picture right there.

15 Q. Do you remember you sort of placed
16 your finger over the top of his head?

17 A. Yes.

18 Q. Why did you do that?

19 A. 'Cause of his hair being gone when I
20 seen him.

21 Q. To try to block out the hair?

22 A. Yes.

23 MS. AIELLO: I have no further
24 questions.

25 MR. STOREY: Nothing further.

26 THE COURT: All right. May this witness

1 be excused?

2 MS. AIELLO: Yes.

3 THE COURT: All right. If you would
4 take a -- how are we doing timewise?

5 MS. AIELLO: We are doing great
6 timewise.

7 THE COURT: All right.

8 MS. AIELLO: I'll be resting tomorrow
9 morning.

10 THE COURT: We'll take a 10-minute
11 recess.

12 (Whereupon, a recess was taken at
13 3:45 p.m.)

14 (Whereupon, the following
15 proceedings were had in open court following the
16 recess, to wit, at 3:59 p.m.): 4.

17 THE COURT: Call your next witness,
18 please.

19 MS. AIELLO: People call
20 Detective Winslow, Winslow.

21 DOUGLAS WINSLOW,
22 a Witness, called on behalf of the People, and
23 after having first been duly sworn, testified as
24 follows:

25 THE CLERK: Please take the witness
26 stand.

DIRECT EXAMINATION

BY MS. AIELLO:

Q. Good afternoon. Could you please state your name.

A. Douglas Winslow.

Q. Where -- could you spell your last name for the record?

A. It's W-I-N-S-L-O-W.

Q. Where are you employed?

A. With the Tulare County Sheriff's Department.

Q. In what capacity?

A. As a detective.

Q. How long have you been with the sheriff's department?

A. Thirteen years.

Q. Detective Winslow, were you involved in the follow-up investigation in regards to a robbery that took place at USA Market on June 30th, 2001?

A. Yes, yes, I was.

Q. And as part of your involvement, did you contact Michael Alrhimi?

A. Yes, I did.

Q. And did you interview him?

A. I conducted a V.T. interview with

1 him.

2 Q. And when you interviewed him, did
3 he tell you that he had seen Leo Palafox -- or a
4 Hispanic male at his store two weeks prior to the
5 robbery?

6 A. Yes, he did say that.

7 Q. Did he tell you that on that
8 occasion when he saw Mr. Palafox, he was
9 accompanied by a white male and two other people?

10 A. Yes.

11 Q. Did you contact Glorys Slayton?

12 A. Yes, I did.

13 Q. What day did you contact
14 Ms. Slayton?

15 A. Referencing my report for a
16 confirmed date.

17 Q. If that will refresh your
18 recollection.

19 A. July 23rd, 2001.

20 Q. And when you were with Ms. Slayton,
21 did you show her a couple of photo lineups?

22 A. I showed her two six-pack photo
23 lineups.

24 Q. I'm gonna show you what's been
25 marked as People's Exhibit 18 for identification.
26 Do you recognize this -- this photo lineup?

1 A. Yes.

2 Q. And is that identical to the lineup
3 you showed Ms. Slayton?

4 A. Yes, it is.

5 MS. AIELLO: Okay. Madam Clerk, do you
6 have any more exhibit tags?

7 (Whereupon, People's Exhibit 19 was
8 marked for identification.)

9 BY MS. AIELLO:

10 Q. Detective Winslow, I'm going to
11 show you what's been marked as People's Exhibit 19
12 for identification. Do you recognize this?

13 A. Yes. This is the other photo
14 lineup I showed her.

15 Q. Okay. And is that an exact copy of
16 the photo lineup that you showed her?

17 A. Yes.

18 MS. AIELLO: Okay. I have no further
19 questions.

20 THE COURT: Cross-examination?

21 CROSS-EXAMINATION

22 BY MR. STOREY:

23 Q. Officer Winslow, when you talked
24 with Mr. Alrhimi --

25 A. Alrhimi.

26 Q. Alrhimi, is it? And what I'm

1 concerned about is the time that he discovered it
2 was not a shotgun but a BB gun or small caliber
3 rifle.

4 A. Correct.

5 Q. Now, when he was describing to you
6 when he discovered that, did he describe it as
7 being at the time the individual, the white male,
8 came around the counter, or did he describe it to
9 you as being a time when he was being questioned
10 by the person he described or he identified as
11 Leo Palafox was asking him about a gun?

12 A. Mr. Alrhimi stated at the time he
13 was being -- he was lying face down on the floor,
14 and he was asked by Palafox where his gun was.

15 He stated he initially told them he
16 did not have a gun, but he knew his .380, which
17 was a chrome gun, was under the register and he
18 would likely find it, and in order to facilitate
19 them leaving the store, he told 'em where it was,
20 under the register. Palafox went there to find
21 it, couldn't find it --

22 Q. Officer Winslow, do you understand
23 the question is asking you as to what Mr. Alrhimi
24 said as far as time that he made that discovery?

25 A. Time? Like as --

26 Q. I'm giving you two choices. If one

1 of them is correct, would you please tell me.

2 Did he describe to you the time
3 that he discovered it wasn't a shotgun was when
4 the white male came through the counter and made a
5 statement to him, or did he tell you it was during
6 the time that Leo Palafox, the person he described
7 as Leo Palafox, was asking him about his .380 and
8 its location?

9 A. During the time Palafox was asking
10 him the location of the .380.

11 Q. Thank you.

12 Now, when you met with
13 Ms. Slayton -- and this would have been on July
14 23rd --

15 A. Correct.

16 Q. -- did you happen to be present
17 when they did the -- the live lineups?

18 A. No, I was not.

19 Q. Well, on the 23rd when you talked
20 with her, did you show her a lineup containing
21 David Thatcher?

22 A. Yes, I did.

23 Q. Did she ask you the question: Is
24 this David?

25 A. Yes, she did.

26 Q. During that same interview, did she

1 describe her asking the white male do I know you?

2 A. She asked him that, yes.

3 Q. And as far as her identification,
4 she told you she was 60 percent certain that the
5 person in the lineup that was picked out as
6 David Thatcher was the person she talked to?

7 A. She stated she was 60 percent
8 certain the person in the photo, position five,
9 was David Thatcher, was the person she saw that
10 day.

11 Q. She stated she was 60 percent
12 certain that the subject in photo five, which is
13 David Thatcher, was the white male she spoke to on
14 June 30th?

15 A. Correct.

16 Q. Okay. And were you present during
17 the portion of an interview with a person by the
18 name of Freddie Patino?

19 A. Yes, I was.

20 Q. And was Mark Lopez present?

21 A. Yes.

22 Q. He was conducting an interview with
23 you?

24 A. We both were.

25 Q. And then did that initial interview
26 stop and then you conduct another interview with

1 him?

2 A. Yes. There was a break where we
3 ended the interview, and then I went out after
4 obtaining permission to search Mr. Patino's car; I
5 did that outside the building. Then I came back
6 in and wanted to clarify an issue who was with
7 Mr. Patino that day.

8 Q. Okay. And when you went back and
9 started this interview again, did Mr. Patino ask
10 you to take a lie detector test to prove his
11 innocence?

12 A. I don't recall specifically. I
13 don't recall.

14 Q. Do you remember if you gave him a
15 lie detector test?

16 A. I didn't give him a lie detector
17 test, no.

18 MR. STOREY: Nothing further.

19 REDIRECT EXAMINATION

20 BY MS. AIELLO:

21 Q. Detective Winslow, I want to
22 clarify something.

23 When you were speaking with
24 Ms. Slayton on the 23rd, was she sure of who the
25 person -- the white male was that she spoke to on
26 June 30th?

1 A. Yes. After she reviewed the photo
2 lineup, asked if this was David, I asked her how
3 she knew him. She said this is David Thatcher.
4 That's who I met that day on the 30th, June 30th.

5 Q. What was her uncertainty when she
6 was looking at the photo lineup?

7 A. She knew David Thatcher to usually
8 have hair. The photo I presented her that day had
9 hair; he had hair.

10 The day she met him on the 30th of
11 June, he was shaved bald. That was her concern
12 that day regarding his recognition when she
13 initially contacted him.

14 MS. AIELLO: I have no further
15 questions.

16 RE CROSS-EXAMINATION

17 BY MR. STOREY:

18 Q. Did she also indicate to you that
19 he was clean shaven on June 30th with the
20 exception of a small mustache?

21 A. May I refer to my report?

22 Q. Go ahead.

23 A. She made no reference that day
24 regarding a mustache.

25 MR. STOREY: Nothing further.

26 / / /

REDIRECT EXAMINATION FURTHER

BY MS. AIELLO:

Q. Did she make any statements about facial hair?

A. Shaved head as of -- on June 30th.

Q. But nothing about beard, mustache, goatee, anything like that on the face?

A. No, nothing.

Q. Do you recall if you specifically asked her?

A. She gave me a very good -- when I asked her to describe this person, she was able to come up with -- just starting with a clothing description, a very thorough description involving him. I didn't really have to ask for details specific.

MS. AIELLO: I've got nothing further.

MR. STOREY: No questions.

THE COURT: All right. May the Detective be excused?

MR. STOREY: No objection.

MS. AIELLO: Yes, your Honor.

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

MS. AIELLO: People call
Detective Lopez.

1 THE CLERK: Raise your right hand.

2 MARK LOPEZ,

3 a Witness, called on behalf of the People, and
4 after having first been duly sworn, testified as
5 follows:

6 THE CLERK: Please take the witness
7 stand.

8 DIRECT EXAMINATION

9 BY MS. AIELLO:

10 Q. Good afternoon. Could you please
11 state your name.

12 A. My name is Mark Lopez, L-O-P-E-Z.

13 Q. Where are you employed?

14 A. I'm currently employed with the
15 City of Visalia with the Visalia Police Department
16 as a detective.

17 Q. And how long have you been with the
18 Visalia Police Department?

19 A. I been with the Visalia Police
20 Department since 1993, and prior to that, with
21 San Jose Police Department since 1983.

22 Q. I didn't hear that last part.

23 A. 1983.

24 Q. 1983, okay.

25 A. At the San Jose Police Department.

26 Q. Detective Lopez, were you involved

1 in the follow-up investigation of two robberies
2 that took place at the recycling trailer at 1845
3 North Dinuba?

4 A. Yes, I was.

5 Q. And as part of your follow-up
6 investigation, did you contact Francisco Ortega?

7 A. Yes, I did.

8 Q. And what was the purpose of your
9 contact with Mr. Ortega?

10 A. My purpose was to hopefully
11 identify the suspect who had robbed him on the
12 18th.

13 My job was basically to attempt to
14 obtain from him an idea of what the suspect looked
15 like. So my job was basically to identify a
16 suspect who committed that crime.

17 Q. Did you meet with Mr. Ortega at the
18 police department?

19 A. Yes. The following day, I met with
20 him and took him to the police department.

21 Q. Did you show him some photographs
22 on a computer screen?

23 A. Yes, I did.

24 Q. How were those photographs viewed
25 or constructed?

26 A. In the police department, we have a

1 computer room basically that has a screen that's a
2 little larger than, say, your home computer. What
3 it is and what it basically says on the screen is
4 Tulare County Mug Shots.

5 What happens is that you input
6 parameters into the computer. The computer is
7 able to spit out individuals who fit within these
8 parameters in six-person blocks. So I showed him
9 twelve sets of six out of a potential 700.

10 Q. You showed him 12 screens
11 containing six pictures?

12 A. Yes.

13 Q. Okay. And I'm not -- we may have
14 some teachers on the jury, but I'm not going to
15 attempt to do twelve times six.

16 When he was viewing those
17 photographs, did he comment on any of them?

18 A. Yes.

19 Q. And how many did he comment on?

20 A. He commented on several when he was
21 trying to inform me, say the shape of this
22 person's face, a description of the hair color,
23 but on the 12th set, he showed me a photograph --
24 well, not a photograph, but he showed me an
25 individual on that screen that was very similar to
26 the person that robbed him.

1 Q. I'm gonna show you what's been
2 marked as People's Exhibit 5 for identification.
3 Do you recognize that photograph?

4 A. Yes.

5 Q. And what is the significance of
6 that photograph?

7 A. Well, it was significant because it
8 is his way of explaining to me what the person
9 generally looked like that robbed him.

10 He said that he had similar --

11 MR. STOREY: Objection, your Honor,
12 speculation as to what affected Mr. Ortega.

13 THE COURT: Sustained, it's stricken.

14 BY MS. AIELLO:

15 Q. When you looked at that particular
16 photo, People's Exhibit 5, did he say that that
17 photo contained features similar to the person who
18 robbed him?

19 A. Yes.

20 Q. Did he tell you that that was the
21 man that robbed him?

22 A. No.

23 Q. Okay. Did you contact him again on
24 June 27th, 2001?

25 A. Yes.

26 Q. Did you show him additional

1 lineups?

2 A. Yes.

3 Q. Going to show you what's been
4 marked as People's Exhibit 18 for identification.
5 Do you recognize that exhibit?

6 A. Yes.

7 Q. And what is that?

8 A. This was a photo lineup that I
9 showed him on the 28th; it was the next day. On
10 the 27th, I showed him some photographs of some
11 Pike brothers.

12 Q. Okay. You showed him -- were
13 they -- the photos of the Pike brothers, were
14 those in lineups, as well?

15 A. Yes.

16 Q. Okay. Did he identify anyone from
17 those other lineups?

18 A. No.

19 Q. I'm sorry, then, on the 28th, did
20 you contact him --

21 A. Yes.

22 Q. -- Mr. Ortega? And did you show
23 him People's Exhibit 18?

24 A. Yes.

25 Q. Okay. And did he select anyone
26 from that lineup?

1 A. No.

2 Q. Did you contact Mr. Domingo Lopes?

3 A. Yes.

4 Q. And did you contact him either on
5 the 27th or the 28th?

6 A. On the 27th after his location was
7 robbed.

8 Q. Did you show him some photos or
9 lineups?

10 A. Yes.

11 Q. Which lineups did you show him?

12 A. I showed him also these Pike
13 brothers.

14 Q. Did he select -- I'm sorry. Did he
15 select anyone out of the Pike brother lineups?

16 A. No.

17 Q. How many -- how many lineups were
18 there involving the Pike brothers?

19 A. Well, there's two brothers; two.

20 Q. So two separate lineups?

21 A. Yes.

22 Q. Okay. Did you show him People's
23 Exhibit 18, that lineup?

24 A. On the 28th.

25 Q. And what -- did he make a
26 identification off of that lineup?

1 A. No.

2 Q. Did he make any comment about it?

3 A. Certain people had some features
4 that were the same, but he couldn't identify the
5 person.

6 Q. Did you come into contact with
7 Freddie Patino?

8 A. Yes, I did.

9 Q. When did you first contact
10 Mr. Patino?

11 A. I first contacted him on the --
12 well, the afternoon, evening of the 28th.

13 Q. When -- I'm sorry, Detective Lopez,
14 when did you show Mr. Domingo Lopes People's
15 Exhibit 18?

16 A. On the 28th.

17 Q. Was this after you had spoke to
18 Mr. Patino?

19 A. Before.

20 Q. After you -- let me withdraw that.
21 On June 20 -- excuse me, on July
22 2nd, 2001, was Leo Palafox placed under arrest?

23 A. Yes, he was.

24 Q. And was a Miss Parks with
25 Mr. Palafox?

26 A. Yes.

1 Q. Did you conduct a search of
2 Ms. Parks' belongings?

3 A. Yes.

4 Q. What, if anything, did you find of
5 significance?

6 A. Significance, I found within her
7 purse, she had a .22 caliber bullet that she
8 remembered.

9 Q. Did you interview Ms. Parks that
10 same day?

11 A. Yes.

12 Q. And did you question her about a
13 revolver, a gun?

14 A. Yes.

15 Q. And did she tell you that she had
16 seen Leo Palafox with a revolver?

17 A. Yes.

18 Q. Did she also tell you that the
19 night before, that she and Leo and her mother and
20 David Thatcher were together at the Marco Polo
21 hotel?

22 A. Yes.

23 Q. That same day, did you interview
24 Barbara Wilborn?

25 A. Yes.

26 Q. And did Ms. Wilborn tell you that

1 she had seen David Thatcher with a gun several
2 weeks prior to the interview that you conducted
3 with her?

4 A. Yes.

5 Q. And did she tell you that it was
6 actually -- the gun actually belonged to
7 Leo Palafox?

8 A. Yes.

9 Q. On what day was David Thatcher
10 arrested?

11 A. He was arrested on the -- I believe
12 it was the 9th; referring to my report just to be
13 sure. Make that the 8th.

14 Q. Did you, for lack of a better word,
15 create a live lineup on July 11?

16 A. Yes.

17 Q. And what is a live lineup?

18 A. A live -- live lineup is a way and
19 an opportunity that we are able to present to a
20 witness a group of individuals who are similar in
21 appearance to a person who we believe is a suspect
22 in a crime.

23 A live lineup, not unlike this
24 photograph, exists of six or so persons who we
25 find, in this case in jail, who have similar
26 physical attributes as the person who we believe

1 is a suspect.

2 These persons are asked to
3 participate in this lineup. We confirm that they
4 were not free at the time that the incidents took
5 place. They are dressed in a similar outfit.
6 They are placed into a room where their heights
7 are displayed. They're similar in height;
8 Caucasian if they're Caucasian, Hispanic if
9 they're Hispanic.

10 Afterward, the individuals who are
11 potential victims -- or, I'm sorry, potential
12 witnesses or victims are asked to enter the room,
13 are admonished that these persons may or may not
14 be involved. Just because they're here does not
15 mean that they are suspect; that the facial hair
16 and everything changes, and they're allowed to
17 look at these persons, and if a person is
18 selected, it's just more evidence for you guys.

19 Q. Going to show you what's been
20 marked as People's Exhibit 3 for identification.

21 Who is contained -- what does that
22 photo show?

23 A. This shows a live lineup in this
24 special room within the Tulare County Sheriff's
25 Department. Within it, in position number five,
26 is the defendant, Mr. Thatcher.

1 Q. And I'm going to show you People's
2 Exhibit Number 17 for identification. Who does
3 that show?

4 A. That shows Mr. Thatcher on that
5 day, what he looked like.

6 Q. That photograph was taken on July
7 11th?

8 A. Yes.

9 Q. Okay.

10 A. I should clarify that on the first
11 photo, it's how they were standing for the lineup.

12 Q. That photo, that doesn't actually
13 show them in the room where the live lineup is
14 actually done; is that correct?

15 A. Exactly.

16 Q. Okay.

17 A. I think it's just outside as they
18 walk in.

19 Q. But that photo shows all six
20 participants?

21 A. Yes.

22 Q. Did Mr. Ortega attend the live
23 lineup?

24 A. Yes, he did.

25 Q. And did he select anyone out of
26 that lineup?

1 A. No, he did not.

2 Q. Did Mr. Lopes attend that lineup?

3 A. Yes, he did.

4 Q. Did he select anyone out of that
5 lineup?

6 A. Yes, he did.

7 Q. Who did he select?

8 A. Mr. Thatcher.

9 Q. And which position was Mr. Thatcher
10 in?

11 A. Number five.

12 Q. What did he say when he selected
13 that person or the person in number five?

14 A. He said that the person that robbed
15 him looks like the guy number five, except for he
16 felt he was a little shorter.

17 MS. AIELLO: I have no further questions
18 at this time.

19 CROSS-EXAMINATION

20 BY MR. STOREY:

21 Q. Officer Lopez, when you do lineups
22 and people make statements, is it important to get
23 a correct statement?

24 A. Oh, I think so.

25 Q. And that's something that officers
26 that are giving the statement would be very

1 worried about; isn't that correct?

2 A. No, I don't think they worry. It's
3 just part of the job.

4 Q. Do they try to be accurate?

5 A. Well, sure. It supports his
6 memory, I suspect.

7 Q. And you're fluent in Spanish?

8 A. Sure.

9 Q. And how long have you spoken
10 Spanish?

11 A. All my life.

12 Q. And you are fairly accurate, I
13 assume?

14 A. I believe so.

15 Q. And were you present when Mr. Lopez
16 was -- can I have a sticker for next in order.

17 (Whereupon, People's Exhibit 20 was
18 marked for identification.)

19 BY MR. STOREY:

20 Q. Okay. I'm going to show you what
21 has been marked People's 20.

22 And that appears to be the same one
23 you have a copy of; is that correct?

24 A. Yes.

25 Q. And that appears to be your
26 signature under the officer showing live lineup?

1 A. Yes.

2 Q. Okay. And the comments, it says
3 five looks the most like the person -- or, excuse
4 me. Looks the most like the person, looks a
5 little shorter?

6 A. That's it.

7 Q. Okay. So he didn't say he looked
8 like him; he said he looked most like him of the
9 people that you had in front of him?

10 A. Okay.

11 Q. Officer Lopez, how tall are you?

12 A. Five nine.

13 Q. Would you mind stepping down?

14 Perhaps I could have Mr. Thatcher
15 stand back-to-back with him.

16 THE COURT: That's fine.

17 BY MR. STOREY:

18 Q. Could you step down here, please?

19 A. Sure.

20 Q. Mr. Thatcher, come up.

21 And could you stand back-to-back,
22 please.

23 I'd ask the record to reflect that
24 Mr. Thatcher's approximately two inches taller
25 than Mr. Lopez.

26 MS. AIELLO: Approximately.

1 THE COURT: All right, fine.

2 MR. STOREY: Thank you.

3 BY MR. STOREY:

4 Q. Oh, and it was Domingo Lopes that
5 couldn't identify anyone in People's 18; is that
6 correct?

7 A. Yes.

8 Q. And Mr. Lopes was unable to
9 identify anyone in People's 18?

10 A. That's what you just asked.

11 Q. Excuse me. Mr. Ortega?

12 A. Correct.

13 Q. Okay. And in People's 18,
14 Mr. Thatcher is 53805?

15 A. Yes.

16 Q. On People's 17, that was taken July
17 11th?

18 A. Yes.

19 Q. Eleven days after the USA robbery?

20 A. I don't know the date, but if you
21 say so.

22 Q. Are you aware of the date that the
23 USA robbery took place?

24 A. No.

25 Q. Does June 30th sound about right?

26 A. I think Doug Winslow just said

1 that, so I think -- I wasn't paying that much
2 attention to the date.

3 Q. Okay. And the picture of 17 shows
4 David Thatcher as he existed on July 11th?

5 A. Yes.

6 Q. Including the facial hair?

7 A. Yes.

8 MR. STOREY: Do you have People's 4,
9 People's 5?

10 MS. AIELLO: 5 is up there.

11 BY MR. STOREY:

12 Q. Okay. People's 5 is the one that
13 you indicated where Mr. Ortega made some sort of
14 identification; is that correct?

15 A. Yes.

16 Q. Okay. And you were present in
17 court when Mr. Ortega marked People's Number 4?

18 A. Yes.

19 THE COURT: This -- Mr. Storey, this
20 is -- I think it's -- I'm just guessing, but I
21 think it's a little bit difficult to follow
22 because the jury can't see what you're referring
23 to.

24 BY MR. STOREY:

25 Q. In regards to People's Number 4,
26 that --

1 THE COURT: So --

2 BY MR. STOREY:

3 Q. Could you tell me what that is,
4 please?

5 A. This is another photo that shows
6 these gentlemen in the live lineup positions.

7 Q. Okay. It's similar to People's 3?

8 A. Yes.

9 Q. And People's Number 4 has a mark on
10 the neck of one of those individuals?

11 A. Yes.

12 Q. And who was the person that has the
13 mark on his neck?

14 A. I don't remember his name. I have
15 it someplace, but I don't remember his name
16 offhand, but it's not Mr. Thatcher.

17 Q. Okay. It's not Mr. Thatcher?

18 A. Right.

19 Q. Okay. And Donnie Wright's not
20 Mr. Thatcher?

21 A. Correct.

22 Q. Okay.

23 THE COURT: All right. We're going to
24 continue this discussion tomorrow, but before I
25 release the jurors, I'd like to see counsel at
26 bench, please.

1 MR. STOREY: Your Honor, I don't have
2 any more questions if that changes anything as far
3 as Mr. Lopez.

4 THE COURT: I see. All right. May I
5 still see counsel at bench, please?

6 (Whereupon, an off-the-record bench
7 discussion was had.)

8 REDIRECT EXAMINATION

9 BY MS. AIELLO:

10 Q. Detective Lopez, I'm -- when you
11 showed these witnesses the photo lineups, there's
12 a form that you -- that you sign and they sign, as
13 well?

14 A. Yes.

15 Q. And on that form, you indicate
16 whether or not a photo is selected?

17 A. Yes.

18 Q. Do you have a form that shows that
19 you showed Mr. Lopes lineup A?

20 A. The live lineup?

21 Q. No, the photo lineup A, I think.
22 Isn't A the one with Mr. Thatcher which is also
23 People's Exhibit 18?

24 A. I may or may not. If I didn't have
25 them sign the form, I read the form to 'em. So if
26 you have it, then it exists, and if not, just off

1 the top of my head, I don't remember.

2 Q. Well, what I'm getting at is I
3 can't find a record of you showing Mr. Lopes
4 lineup A, the lineup containing David Thatcher.

5 A. Oh, it's there.

6 Q. Okay.

7 A. I could show you.

8 Q. Okay. This is contained in the
9 body of your report?

10 A. Yes.

11 Q. Okay.

12 Okay, thank you. I apologize,
13 Detective Lopez. I just couldn't get that
14 question answered in my mind.

15 Approximately how many photos total
16 had Mr. Lopes seen?

17 A. At what point?

18 Q. In total, prior to the live lineup,
19 whether that be -- number of photo lineups you
20 showed?

21 A. Prior to the lineup, he saw 24.

22 MS. AIELLO: Thank you. I have no
23 further questions.

24 MR. STOREY: Nothing further.

25 THE COURT: All right. May
26 Detective Lopez be excused?

1 MS. AIELLO: Yes.

2 MR. STOREY: No objection.

3 THE COURT: All right. Do you have any
4 other evidence?

5 MS. AIELLO: No, your Honor. The People
6 would move People's Exhibits 1 through 19 into
7 evidence.

8 MR. STOREY: Defense would move People's
9 20 in and has no objection to the other 19.

10 THE COURT: All right. Is there any
11 objection by either counsel to any side's
12 proffered exhibits?

13 MS. AIELLO: I do have an objection to
14 number 20.

15 THE COURT: All right. We'll take that
16 up later.

17 (Whereupon, People's Exhibits 1
18 through 19 were received in evidence.)

19 THE COURT: Ladies and gentlemen, we'll
20 see you tomorrow at 10:30. It expect that we'll
21 probably get the case to you tomorrow. So have a
22 good evening. 10:30.

23 (Whereupon, the proceedings were
24 recessed at 4:47 p.m. to be reconvened on
25 Thursday, November 8, 2001, at 10:30 a.m.)
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COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	TCSC NO. 77196
	)	5TH NO. _____
DAVID C. THATCHER,	)	
	)	TRIAL DAY 4
Defendant.	)	

APPEAL FROM THE SUPERIOR COURT OF TULARE COUNTY
HONORABLE GERALD F. SEVIER, JUDGE PRESIDING

COPY

REPORTER'S TRANSCRIPT ON APPEAL
THURSDAY, NOVEMBER 8, 2001
VOLUME 3, PAGES 452 THROUGH 574

APPEARANCES:

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OFFICIAL, RPR & CM

CINDY M. HOLWAY, CSR 4371
OFFICIAL COURT REPORTER - DEPARTMENT 4
(559 733-6561 EXT. 138)

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF TULARE
3 DEPARTMENT 4 HONORABLE GERALD F. SEVIER, JUDGE
4 THE PEOPLE OF THE STATE)
5 OF CALIFORNIA,)
6 Plaintiff,)
7 vs.) NO. 77196
8 DAVID C. THATCHER,)
9 Defendant.)

10 Visalia, California Thursday, November 8, 2001

11
12
13 REPORTER'S TRANSCRIPT
14 (Pages 452 through 574)

15
16 APPEARANCES:

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26 OFFICIAL, RPR & CM

CINDY M. HOLWAY, CSR 4371
OFFICIAL COURT REPORTER - DEPARTMENT 4
(559 733-6561 EXT. 138)

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I N D E X

(Whereupon, People's Exhibit 20 was received in evidence.).....	455	8
(Whereupon, People's Exhibit 2 was marked for identification.).....	572	14
(Whereupon, People's Exhibit 21 was received in evidence.).....	572	16

MORNING SESSION

Thursday, November 8, 2001

(Whereupon, the following proceedings were had in open court, outside the presence of the jury, to wit, at 10:22 a.m.):

THE COURT: I think what I propose we do is for the purposes of the verdict, present to the jury Counts 1, 2, 3, 4 and 5 with the understanding as to the information, Count 8 is Count 2 -- that Count -- the verdict form labeled Count 2 is in reality Count 8. The verdict form as to count 13 is in reality Count 3. The verdict form as to Count 14 is Count 4, and the verdict form as to Count 15 is Count 5.

Any problem with that?

MS. AIELLO: I have no problem.

MR. STOREY: No, your Honor.

THE COURT: Okay. And most of the jury instructions are ready; counsel want to take a look at them.

MR. STOREY: Were 2.60 and 2.61 added?

THE COURT: Yes.

(Whereupon, the proceedings went off the record.)

(Whereupon, the following proceedings were had in front of the jury, to

1 wit:)

2 THE COURT: All right. Counsel, all the
3 exhibits are in; correct?

4 MS. AIELLO: No. There was an exhibit
5 to -- one of them, we haven't discussed it.

6 THE COURT: We should have done that.
7 Let's go over to the side.

8 (Whereupon, the following
9 proceedings were had at side-bar, outside the
10 presence of the jury, to wit:)

11 THE COURT: What is 20?

12 MR. STOREY: It's the photocopy of the
13 form filled out by Detective Lopez when
14 Domingo Lopes --

15 THE COURT: Do you see it?

16 MR. STOREY: -- was viewing the live
17 lineup.

18 THE COURT: All right. So what's the
19 objection?

20 MS. AIELLO: The objection is,
21 basically, I think that that is a part of the
22 police report and would be hearsay.

23 He impeached -- if it's offered to
24 impeach the officer, the testimony came out that
25 that's what it said. Like I said, I consider that
26 part of a police report; a police report would

1 never be part of the evidence.

2 THE COURT: Oh, no, this is admissible.
3 I don't -- I don't consider this a police report.
4 It's not a narrative from somebody saying what
5 happened. It's a document that's executed by a
6 witness.

7 MS. AIELLO: Well, the writing is
8 written by --

9 THE COURT: The document speaks for
10 itself as opposed to her testimony as to what it
11 says.

12 MS. AIELLO: Well, the detective fills
13 that out and all the witness does is sign it.

14 THE COURT: Right.

15 MS. AIELLO: So -- and part of that is
16 not relevant because it also deals with a separate
17 witness.

18 MR. STOREY: Oh.

19 THE COURT: So we had two witnesses sign
20 it?

21 MS. AIELLO: Yes, 'cause that's from the
22 live lineup.

23 THE COURT: Probably what we should do
24 is just redact this.

25 MR. STOREY: And I think this 13:44 was
26 the time the second witness viewed it, so --

1 THE COURT: So that would go, that would
2 go, that would go, and then -- we might make a
3 copy of it.

4 MR. STOREY: Can we white those out?

5 THE COURT: Yeah, we will before it gets
6 to the jury. Remind me, please.

7 MR. STOREY: Thank you.

8 (Whereupon, People's Exhibit 20 was
9 received in evidence.)

10 (Whereupon, the side-bar
11 proceedings were concluded.)

12 THE COURT: All right. Good morning,
13 ladies and gentlemen. We're going to continue now
14 with the presentation of the case.

15 As I understand it, the -- I recall
16 from yesterday, the People have rested; is that
17 correct?

18 MS. AIELLO: That is correct, your
19 Honor.

20 THE COURT: All right. Mr. Storey, do
21 you choose to put on any evidence?

22 MR. STOREY: No, your Honor. We would
23 rest. After it's submitted to the jury, I would
24 reserve the right to make a motion.

25 THE COURT: All right. Your right is
26 reserved.

1 All right. Ladies and gentlemen,
2 you've heard all the evidence in the case, and now
3 it becomes my duty to instruct you on the law.

4 I can appreciate the fact that
5 knowing that someone's going to read law to you
6 may cause you -- I don't know what kind of
7 feeling, but certainly maybe a little bit of
8 anxiety about remembering everything. I can
9 understand that. There is a good bit of law that
10 I must read to you, and it's important, obviously,
11 that I do that because this is a statement of the
12 rules that you must follow in your decision-making
13 process.

14 Understand that not only will I
15 read this to you, and I am required to read it to
16 you for good reason, but this entire packet of
17 jury instructions will go into the jury room with
18 you for you to refer to should you choose to do
19 that.

20 Ladies and gentlemen of the jury,
21 you have heard all the evidence, and now it is my
22 duty to instruct you on the law that applies to
23 this case.

24 You must base your decision on the
25 facts and the law. You have two duties to
26 perform. First, you must determine what facts

1 have been proved from the evidence received in the
2 trial and not from any other source. A fact is
3 something proved by the evidence or by
4 stipulation. A stipulation is an agreement
5 between attorneys regarding the facts.

6 Second, you must apply the law that
7 I state to you to the facts as you determine them
8 and in this way arrive at your verdict and any
9 finding you are instructed to consider in your
10 verdict.

11 You must accept and follow the law
12 as I state it to you, regardless of whether you
13 agree with the law. If anything concerning the
14 law said by the attorneys in their arguments or at
15 any other time during the trial conflicts with my
16 instructions on the law, you must follow my
17 instructions.

18 You must not be influenced by pity
19 for or prejudice against a defendant. You must
20 not be biased against a defendant because he has
21 been arrested for this offense, charged with a
22 crime or brought to trial. None of these
23 circumstances is evidence of guilt, and you must
24 not infer or assume from any or all of them that
25 the defendant is more likely to be guilty than not
26 guilty.

1 You must not be influenced by
2 sentiment, conjecture, sympathy, passion,
3 prejudice, public opinion or public feeling. Both
4 the People and Mr. Thatcher have the right to
5 expect that you will conscientiously consider and
6 weigh the evidence, apply the law and reach a just
7 verdict, regardless of the consequences.

8 If any rule, direction or idea is
9 repeated or stated in different ways in these
10 instructions, no emphasis is intended, and you
11 must not draw any inference because of its
12 repetition.

13 Do not single out any particular
14 sentence or any individual point or instruction
15 and ignore the others. Consider the instructions
16 as a whole and each in light of all the others.

17 The order in which the instructions
18 are given has no significance as to their relative
19 importance.

20 Statements made by the attorneys
21 during the trial are not evidence. However, if
22 the attorneys have stipulated or agreed to a fact,
23 you must regard that fact as proven.

24 If an objection was sustained to a
25 question, do not guess what the answer might have
26 been. Do not speculate as to the reason for the

1 objection.

2 Do not assume to be true any
3 insinuation suggested by a question asked a
4 witness. A question is not evidence and may be
5 considered only as it helps you to understand the
6 answer. Do not consider for any purpose any offer
7 of evidence that was rejected or any evidence that
8 was stricken by the court. Treat it as though you
9 had never heard of it.

10 You must decide all questions of
11 fact in this case from the evidence received in
12 the trial and not from any other source.

13 When a witness has testified
14 through a certified court interpreter, you must
15 accept the English interpretation of that
16 testimony even if you would have translated the
17 foreign language differently.

18 You must not independently
19 investigate the facts or the law or consider or
20 discuss facts as to which there is no evidence.
21 This means, for example, that you must not on your
22 own visit the scene, conduct experiments or
23 consult reference works or persons for additional
24 information.

25 You must not discuss this case with
26 any other person except a fellow juror and then

1 only after the case is submitted to you for your
2 decision and only when all twelve jurors are
3 present in the jury room.

4 Some of you have taken notes.
5 Remember, notes are only an aid to memory and
6 should not take precedence over recollection. A
7 juror who does not take notes should rely on his
8 or her recollection of the evidence and not be
9 influenced by the fact that other jurors do take
10 notes. Notes are for the note taker's own
11 personal use in refreshing his or her recollection
12 of the evidence.

13 Finally, should any discrepancy
14 exist between a juror's recollection of the
15 evidence and a juror's notes, or between one
16 juror's recollection and that of another, you may
17 request that the reporter read back the relevant
18 testimony which must prevail.

19 Evidence consists of the testimony
20 of witnesses, writings, material objects or
21 anything presented to the senses and offered to
22 prove the existence or nonexistence of a fact.

23 Evidence is either direct or
24 circumstantial. Direct evidence is evidence that
25 directly proves a fact. It is evidence which, by
26 itself if found to be true, establishes that

1 fact. Circumstantial evidence is evidence that if
2 found to be true proves a fact from which an
3 inference of the existence of another fact may be
4 drawn. An inference is a deduction of fact that
5 may logically and reasonably be drawn from another
6 fact or group of facts established by the
7 evidence.

8 It is not necessary that facts be
9 proved by direct evidence. They may be proved
10 also by circumstantial evidence or by a
11 combination of direct and circumstantial
12 evidence. Both direct and circumstantial evidence
13 are acceptable as a means of proof. Neither is
14 entitled to any greater weight than the other.

15 However, a finding of guilt as to
16 any crime may not be based on circumstantial
17 evidence unless the proved circumstances are not
18 only consistent with the theory that the defendant
19 is guilty of the crime, but cannot be reconciled
20 with any other rational conclusion.

21 Further, each fact which is
22 essential to complete a set of circumstances
23 necessary to establish the defendant's guilt must
24 be proved beyond a reasonable doubt. In other
25 words, before an inference essential to establish
26 guilt may be found to have been proved beyond a

1 reasonable doubt, each fact or circumstance on
2 which the inference necessarily rests must be
3 proved beyond a reasonable doubt.

4 Also, if the circumstantial
5 evidence as to any particular count permits two
6 reasonable interpretations, one of which points to
7 the defendant's guilt and the other to his
8 innocence, you must adopt that interpretation that
9 points to the defendant's innocence and reject
10 that interpretation that points to his guilt.

11 If, on the other hand, one
12 interpretation of the evidence appears to you to
13 be reasonable and the other interpretation to be
14 unreasonable, you must accept the reasonable
15 interpretation and reject the unreasonable.

16 Neither side is required to call as
17 witnesses all persons who may have been present at
18 any of the events disclosed by the evidence or who
19 may appear to have some knowledge of these
20 events. Neither side is required to produce all
21 objects or documents mentioned or suggested by the
22 evidence.

23 There has been evidence in this
24 case indicating that a person other than defendant
25 was or may have been involved in the crimes for
26 which the defendant is on trial. There may be

1 many reasons why that person is not here on trial;
2 therefore, do not discuss or give any
3 consideration as to why the other person is not
4 being prosecuted in this trial or whether he has
5 been or will be prosecuted. Your duty is to
6 decide whether the People have proved the guilt of
7 Mr. Thatcher who is on trial.

8 Evidence that at some other time a
9 witness made a statement or statements that is or
10 are inconsistent or consistent with his or her
11 testimony in this trial may be considered by you
12 not only for the purpose of testing the
13 credibility of the witness, but also as evidence
14 of the truth of the facts as stated by the witness
15 on that former occasion.

16 If you disbelieve a witness's
17 testimony that he or she no longer remembers a
18 certain event, that testimony is inconsistent with
19 a prior statement or statements by him or her
20 describing that event.

21 Every person who testifies under
22 oath or affirmation is a witness. You are the
23 sole judges of the believability of a witness, as
24 well as the weight to be given the testimony of
25 each witness.

26 In determining believability of a

1 witness, you may consider anything that has a
2 tendency to prove or disprove the truthfulness of
3 the testimony of the witness, including, but not
4 limited to, any of the following:

5 The extent of the opportunity or
6 ability of the witness to see or hear or otherwise
7 become aware of any matter about which the witness
8 testified; the ability of the witness to remember
9 or to communicate any matter about which the
10 witness testified; the character and quality of
11 that testimony; the demeanor and manner of the
12 witness while testifying; the existence or
13 nonexistence of a bias, interest or other motive;
14 the existence or nonexistence of any fact
15 testified to by the witness; the attitude of the
16 witness toward this action or toward the giving of
17 testimony; a statement previously made by the
18 witness that is consistent or inconsistent with
19 his or her testimony; an admission by the witness
20 of untruthfulness, and the witness's prior
21 conviction of a felony.

22 Discrepancies in a witness's
23 testimony or between a witness's testimony and
24 that of other witnesses, if there were any, do not
25 necessarily mean that any witness should be
26 discredited. Failure of recollection is common.

1 Innocent misrecollection is not uncommon. Two
2 persons witnessing an incident or a transaction
3 often will see or hear it differently. You should
4 consider whether a discrepancy relates to an
5 important matter or only to something trivial.

6 A witness who is willfully false in
7 one material part of his or her testimony is to be
8 distrusted in others. You may reject the whole
9 testimony of a witness who willfully has testified
10 falsely as to a material point unless from all the
11 evidence you believe the probability of truth
12 favors his or her testimony in other particulars.

13 You are not bound to decide an
14 issue of fact in accordance with the testimony of
15 a number of witnesses which does not convince you
16 as against the testimony of a lesser number or
17 other evidence which appeals to your mind with
18 more convincing force.

19 You may not disregard the testimony
20 of the greater number of witnesses merely from
21 caprice, whim or prejudice or from a desire to
22 favor one side against the other. You must not
23 decide an issue by the simple process of counting
24 the number of witnesses. The final test, of
25 course, is not in the number of witnesses, but in
26 the convincing force of the evidence.

1 The fact that a witness has been
2 convicted of a felony, if this is a fact, may be
3 considered by you only for the limited purpose of
4 determining the believability of that witness.
5 The fact of a conviction does not necessarily
6 destroy or impair a witness's believability. It
7 is one of the circumstances that you may take into
8 consideration in weighing the testimony of that
9 witness.

10 You should give the uncorroborated
11 testimony of a single witness whatever weight you
12 think it deserves. Testimony by one witness which
13 you believe concerning any fact whose testimony
14 about that fact does not require corroboration is
15 sufficient for the proof of that fact. You should
16 carefully review all the evidence upon which the
17 proof of that fact depends.

18 A defendant in a criminal trial has
19 a constitutional right not to be compelled to
20 testify. You absolutely must not draw any
21 inference from the fact that a defendant does not
22 testify. Further, you must neither discuss this
23 matter, nor permit it to enter into your
24 deliberations in any way whatsoever.

25 In deciding whether or not to
26 testify, the defendant may choose to rely on the

1 state of the evidence and upon the failure, if
2 any, of the People to prove beyond a reasonable
3 doubt every essential element of the charge
4 against him. No lack of testimony on defendant's
5 part will make up for a failure of proof by the
6 People so as to support a finding against him on
7 any such essential element.

8 A defendant in a criminal action is
9 presumed to be innocent until the contrary is
10 proved, and in case of a reasonable doubt whether
11 his guilt is satisfactorily shown, he is entitled
12 to a verdict of not guilty. This presumption
13 places upon the People the burden of proving him
14 guilty beyond a reasonable doubt.

15 Reasonable doubt is defined as
16 follows: It is not a mere possible doubt because
17 everything relating to human affairs is open to
18 some possible or imaginary doubt.

19 Reasonable doubt is that state of
20 the case which, after the entire comparison and
21 consideration of all the evidence, leaves the
22 minds of the jurors in that condition that they
23 cannot say they feel an abiding conviction of the
24 truth of the charge.

25 The burden is on the People to
26 prove beyond a reasonable doubt that the defendant

1 is the person who committed the crime with which
2 he is charged. If after considering the
3 circumstances of the identification and any other
4 evidence in this case you have a reasonable doubt
5 whether defendant was the person who committed the
6 crime, you must give the defendant the benefit of
7 that doubt and find him not guilty.

8 Eyewitness testimony has been
9 received in this trial for the purpose of
10 identifying the defendant as the perpetrator of
11 the crimes charged.

12 In determining the weight to be
13 given eyewitness identification testimony, you
14 should consider the believability of the
15 eyewitness, as well as other factors which bear
16 upon the accuracy of the witness's identification
17 of the defendant, including, but not limited to,
18 any of the following:

19 The opportunity of the witness to
20 observe the alleged criminal act and the
21 perpetrator of the act; the stress, if any, to
22 which the witness was subjected at the time of the
23 observation; the witness's ability following the
24 observation to provide a description of the
25 perpetrator of the act; the extent to which the
26 defendant either fits or does not fit the

1 description of the perpetrator previously given by
2 the witness; the cross-racial or ethnic nature of
3 the identification; the witness's capacity to make
4 an identification; evidence relating to the
5 witness's ability to identify other alleged
6 perpetrators of the criminal act; whether the
7 witness was able to identify the alleged
8 perpetrator in a photographic or physical lineup;
9 the period of time between the alleged criminal
10 act and a witness's identification; whether the
11 witness had prior contacts with the alleged
12 perpetrator; the extent to which the witness is
13 either certain or uncertain of the identification;
14 whether the witness's identification is, in fact,
15 the product of his or her own recollection, and
16 any other evidence relating to the witness's
17 ability to make an identification.

18 Persons who are involved in
19 committing a crime are referred to as principals
20 in that crime. Each principal, regardless of the
21 extent or manner of participation, is equally
22 guilty.

23 Principals include, one, those who
24 directly and actively commit the act constituting
25 the crime or, two, those who aid and abet the
26 commission of the crime.

1 A person aids and abets the
2 commission of a crime when he or she, one, with
3 knowledge of the unlawful purpose of the
4 perpetrator and, two, with the intent or purpose
5 of committing or encouraging or facilitating the
6 commission of the crime and, three, by act or
7 advice aids, promotes, encourages or instigates
8 the commission of the crime.

9 Mere presence at the scene of a
10 crime which does not itself assist the commission
11 of the crime does not amount to aiding and
12 abetting. Mere knowledge that a crime is being
13 committed and the failure to prevent it does not
14 amount to aiding and abetting.

15 An accomplice is a person who is
16 subject to prosecution for the identical offense
17 charged in Count 1 against the defendant on trial
18 by reason of aiding and abetting.

19 You cannot find a defendant guilty
20 based upon the testimony of an accomplice unless
21 that testimony is corroborated by other evidence
22 which tends to connect the defendant with the
23 commission of the offense.

24 Testimony of an accomplice includes
25 any out-of-court statement purportedly made by an
26 accomplice received for the purpose of proving

1 that what the accomplice stated out of court was
2 true.

3 Did we have any such testimony?

4 MS. AIELLO: Yes.

5 MR. STOREY: Yes.

6 THE COURT: Yes, I thought we did. All
7 right, just wanted to be sure.

8 To corroborate the testimony of an
9 accomplice, there must be evidence of some act or
10 fact related to the crime which, if believed, by
11 itself and without any aid, interpretation or
12 direction from the testimony of the accomplice,
13 tends to connect the defendant with the commission
14 of the crime charged; however, it is not necessary
15 that the evidence of corroboration be sufficient
16 in itself to establish every element of the crime
17 charged or that it corroborate every fact to which
18 the accomplice testifies.

19 In determining whether an
20 accomplice has been corroborated, you must first
21 assume the testimony of the accomplice has been
22 removed from the case. You must then determine
23 whether there is any remaining evidence which
24 tends to connect the defendant with the commission
25 of the crime. If there is no independent evidence
26 which tends to connect the defendant with the

1 commission of the crime, the testimony of the
2 accomplice is not corroborated. If there is
3 independent evidence which you believe, then the
4 testimony of the accomplice is corroborated.

5 In the crime of robbery charged in
6 Count -- excuse me. If the crime of robbery
7 charged in Count 1 was committed by anyone, the
8 witness Freddie Patino was an accomplice as a
9 matter of law, and his testimony is subject to the
10 rule requiring corroboration.

11 To the extent that an accomplice
12 gives testimony that tends to incriminate the
13 defendant, it should be viewed with caution. This
14 does not mean, however, that you may arbitrarily
15 disregard that testimony. You should give that
16 testimony the weight you think it deserves after
17 examining it with care and caution and in light of
18 all the evidence in this case.

19 In the crimes charged in Counts 1,
20 2, 3, 4 and 5 -- Counts 1, 2, 3, and 4 are charges
21 of robbery, Count 5 is a charge of grand theft --
22 or the lesser crimes of grand theft person --
23 grand theft person is a lesser crime to robbery --
24 and petty theft -- petty theft is a lesser crime
25 of grand theft person, as well as a lesser crime
26 of grand theft -- there must exist a union or

1 joint operation of act or conduct and a certain
2 specific intent in the mind of the perpetrator.
3 Unless this specific intent exists, the crime to
4 which it relates is not committed.

5 The specific intent required is
6 included in the definitions of the crimes set
7 forth elsewhere in these instructions.

8 The specific intent with which an
9 act is done may be shown by the circumstances
10 surrounding the commission of the act; however,
11 you may not find the defendant guilty of the crime
12 charged in Counts 1, 2, 3, 4 or 5, or the crimes
13 of grand theft person or petty theft which are
14 lesser crimes, unless the proved circumstances are
15 not only consistent with the theory that the
16 defendant had the required specific intent, but
17 cannot be reconciled with any other rational
18 conclusion.

19 Also, if the evidence as to any
20 specific intent permits two reasonable
21 interpretations, one of which points to the
22 existence of the specific intent and the other to
23 its absence, you must adopt that interpretation
24 which points to its absence. If, on the other
25 hand, one interpretation of the evidence as to the
26 specific intent appears to you to be reasonable

1 and the other interpretation to be unreasonable,
2 you must accept the reasonable interpretation and
3 reject the unreasonable.

4 Now, defendant is accused in Counts
5 1, 2, 3 and 4 of having committed the crime of
6 robbery, a violation of Penal Code Section 211.
7 Every person who takes personal property in the
8 possession of another against the will and from
9 the person or immediate presence of that person
10 accomplished by means of force or fear and with
11 the specific intent permanently to deprive that
12 person of the property is guilty of the crime of
13 robbery, in violation of Penal Code Section 211.

14 The term "immediate presence" means
15 an area within the alleged victim's reach,
16 observation or control so that he or she could, if
17 not overcome by violence or prevented by fear,
18 retain possession of the subject property.

19 The term "against the will" means
20 without consent.

21 In order to prove this crime, each
22 of the following elements must be proved: One, a
23 person had possession of property of some value,
24 however slight; two, the property was taken from
25 that person or from his immediate presence; the
26 property was taken against the will of that

1 person; the taking was accomplished either by
2 force or fear; and, five, the property was taken
3 with the specific intent permanently to deprive
4 that person of the property.

5 To constitute the crime of robbery,
6 the perpetrator must have formed the specific
7 intent to permanently deprive an owner of his
8 property before or at the time that the act of
9 taking the property occurred. If this intent was
10 not formed until after the property was taken from
11 the person or immediate presence of the victim,
12 the crime of robbery has not been committed.

13 The element of fear in the crime of
14 robbery may be either, one, the fear of an
15 unlawful injury to the person or property of the
16 person robbed or to any of his relatives or family
17 members or to the fear of an immediate and
18 unlawful injury to the person or property of
19 anyone in the company of the person robbed at the
20 time of the robbery.

21 There are two kinds of robbery. If
22 you find Mr. Thatcher guilty of the crime of
23 robbery, I instruct you that it is robbery in the
24 second degree as a matter of law.

25 The crime of theft may consist of
26 theft by larceny. Defendant is accused in Count 5

1 of having committed the crime of grand theft, a
2 violation of Section 487 of the Penal Code. The
3 crime of grand theft is also a lesser offense to
4 that charged in Counts 1 through 4.

5 Every person who steals, takes,
6 carries, leads or drives away the personal
7 property of another with the specific intent to
8 deprive the owner permanently of his property is
9 guilty of the crime of theft by larceny.

10 In order to prove this crime, each
11 of the following elements must be proved: One, a
12 person took personal property of some value
13 belonging to another; two, when the person took
14 the property, he had the specific intent to
15 deprive the alleged victim permanently of his
16 property; and, three, the person carried the
17 property away by obtaining physical possession and
18 control for some period of time and by some
19 movement of the property.

20 Theft is either grand theft or
21 petty theft. If you find the defendant guilty of
22 theft, you must determine whether the crime was
23 grand theft or petty theft and state which it is
24 in your verdict.

25 If you find the defendant guilty of
26 theft but unanimously have a reasonable doubt as

1 to whether it is grand theft, you must find it to
2 be petty theft.

3 When property is taken by theft and
4 the value of the property taken exceeds four
5 hundred dollars, the crime is grand theft. If the
6 value is four hundred dollars or less, the crime
7 is petty theft.

8 The theft of personal property of
9 any value from the person of another is grand
10 theft. A taking of property is from the person if
11 the property was either on the person or in the
12 clothing worn or in a container carried by the
13 person from whom it was taken.

14 The theft of a firearm is grand
15 theft.

16 Each count charges a distinct
17 crime. You must decide each count separately.
18 The defendant may be found guilty or not guilty of
19 any or all of the crimes charged. Your finding as
20 to each count must be stated in a separate
21 verdict.

22 If you are not satisfied beyond a
23 reasonable doubt that the defendant is guilty of
24 the crime charged, you may, nevertheless, convict
25 him of any lesser crime if you are convinced
26 beyond a reasonable doubt that the defendant is

1 guilty of the lesser crime.

2 The crime of grand theft person is
3 lesser to that of robbery charged in Counts 1, 2,
4 3 and 4. The crime of petty theft is lesser to
5 that of grand theft person; thus, you are to
6 determine whether the defendant is guilty or not
7 guilty of the crimes charged in Counts 1 through 4
8 or of any lesser crime.

9 In doing so, you have discretion to
10 choose the order in which you evaluate each crime
11 and consider the evidence pertaining to it.

12 You may find it productive to
13 consider and reach a tentative conclusion on all
14 charges and lesser crimes before reaching any
15 final verdicts; however, the court cannot accept a
16 guilty verdict on a lesser crime unless you have
17 unanimously found the defendant not guilty of the
18 charged crime.

19 It is alleged in Counts 1, 3 and 4
20 that the defendant personally used a firearm
21 during the commission of the crime charged. If
22 you find the defendant guilty of one or more of
23 the crimes charged in Counts 1, 3 and 4, you must
24 determine whether the defendant personally used a
25 firearm in the commission of that felony.

26 The word "firearm" includes any

1 device designed to be used as a weapon from which
2 is -- from which is expelled through a barrel a
3 projectile by the force of any explosion or other
4 form of combustion. The firearm need not be
5 operable.

6 The term "personally used a
7 firearm" as used in this instruction means that
8 the defendant must have intentionally displayed a
9 firearm in a menacing manner, intentionally fired
10 it or intentionally struck or hit a human being
11 with it.

12 People have the burden of proving
13 the truth of this allegation. If you have a
14 reasonable doubt that it is true, you must find it
15 to be not true. Include a special finding on that
16 question in your verdict using a form that will be
17 supplied for that purpose.

18 There's one more instruction. It
19 is alleged in Count 2 that in the commission or
20 attempted commission of the crime charged the
21 defendant personally used a deadly or dangerous
22 weapon.

23 If you find the defendant guilty of
24 the crime charged in Count 2 or a lesser included
25 crime, you must determine whether the defendant
26 personally used a deadly or dangerous weapon in

1 the commission or attempted commission of the
2 crime.

3 A deadly or dangerous weapon means
4 any weapon, instrument or object that is capable
5 of being used to inflict great bodily injury or
6 death.

7 The term "personally used a deadly
8 or dangerous weapon" as used in this instruction
9 means the defendant must have intentionally
10 displayed a weapon in a menacing manner or
11 intentionally fired it or intentionally struck or
12 hit a human being with it. The People have the
13 burden of proving the truth of this allegation.
14 If you have a reasonable doubt that it is true,
15 you must find it to be not true. Include a
16 special finding on that question in your verdict
17 using a form that will be supplied for that
18 purpose.

19 Ladies and gentlemen, this
20 completes most of the reading of jury
21 instructions. I have a few more that I'll read
22 after arguments. Those instructions pertain
23 generally to your conduct in the jury room.

24 We're going to next hear from the
25 attorneys. I remind you that the prosecutor,
26 because the prosecutor has the burden of proof,

1 essentially has two arguments. Mr. Storey, his
2 side having no burden of proof, only has the
3 opportunity to argue to you once.

4 We're going to take a five-minute
5 recess before we begin, and then we'll go through
6 to twelve o'clock. So five minutes. Keep in mind
7 the admonitions. Thank you.

8 (Whereupon, a recess was taken at
9 11:15 a.m.)

10 (Whereupon, the following
11 proceedings were had in open court following the
12 recess, to wit, at 11:24 a.m.):

13 THE COURT: All right. Proceed, please.

14 MS. AIELLO: Thank you.

15 As I told you at the beginning of
16 the case, this is a case about the defendant
17 taking property from the person of another with
18 force or fear.

19 As you've just heard, robbery has
20 five elements, and I'm gonna go through the
21 elements quickly and show you how the testimony
22 supports each and every single one of those
23 elements of robbery.

24 First element, person had
25 possession of property. Well, Francisco Ortega
26 had a wallet containing about \$240. Domingo Lopes

1 had his wallet containing about \$40, plus there
2 was the cash box at the recycling trailer which
3 had -- I think he estimated a little bit less than
4 \$200. Michael Alrhimi had his wallet with about
5 \$800, the cash from the register, the cash from
6 the bank bag, his wedding ring and his watch, as
7 well as the gun, and, finally, David Vargo had
8 about 40 -- 30 to \$40, I think he testified to, in
9 his pocket. That's the property.

10 Second element is that the property
11 must be taken from the presence of the person, and
12 the presence means observation, control, reach.

13 Well, obviously, it's very to
14 see -- very easy to see that element when the
15 property is actually taken off the person, the
16 wallet specifically, as well as the money in the
17 pocket, but also that is shown in the property
18 taken from the recycling trailer, the robbery
19 involving Domingo Lopes, the cash box.

20 That cash box is within the
21 possession, the control, the observation of
22 Domingo Lopes. He's the employee in charge of
23 that cash box, and that goes equally as well as to
24 Mr. Alrhimi for the money that's in the register
25 and the bank bag. He is the one that's in
26 possession and control of that property.

1 The third element is that the
2 property is taken against the will of the person.
3 Well, nobody voluntarily handed over their wallets
4 and property to the defendant. That property was
5 taken without the person's consent.

6 The property -- the taking was
7 accomplished by force or fear. We have elements
8 of both. You have the displaying of the weapon
9 which conveys a message to each and every one of
10 those victims hey, I'm in charge here. I'm in
11 control. I want something from you.

12 And you see that force and fear
13 so -- demonstrated so well in that last robbery of
14 USA Market where the guns are being pointed at
15 each of the victim's head and in their face,
16 pointed at them, and each and every single one of
17 those victims testified as to elements of being in
18 fear and scared and nervousness and frustrated.
19 So that taking was accomplished by force or fear.

20 And, finally, the property was
21 taken with the specific intent to permanently
22 deprive. Again, the money isn't being borrowed.
23 The defendant isn't -- the defendant certainly
24 isn't going to be returning this property after
25 he, you know, borrows the watch. That property
26 was taken with a specific intent to permanently

1 deprive.

2 Attached to three of the robbery
3 counts is a gun use enhancement, personal use of a
4 firearm, and basically, there are two aspects or
5 two elements there. The gun must be intentionally
6 displayed, and it must be displayed in a menacing
7 manner. Let's review the evidence.

8 Mr. Ortega testified that he's
9 sitting underneath the tree by the trailer and a
10 man kinda comes around the back, and he's got the
11 gun -- think he said the gun was in his right
12 hand -- I might have been wrong, may have been
13 his left. He's got the gun in his hand, and it's
14 in front of him and he's waving his wrist, and
15 he's using the gun, sort of motion to Mr. Ortega
16 to get into the trailer.

17 Intentional display. Is that an
18 accident that the gun was shown? No. Displayed
19 in a menacing matter. Well, what is the motion
20 that's being sent here by the motion of the wrist,
21 by that movement with the gun? The message that's
22 being sent is hey, I want you to get in the
23 trailer, and I want to get your property, and I
24 don't want any trouble from you. That why that
25 gun is being used, and that's why it's being
26 displayed, and that's why it's being displayed in

1 a menacing manner.

2 In the robbery involving
3 Mr. Alrhimi, is there any question that that gun
4 is being displayed in a menacing manner? It's in
5 his face. It's being displayed, shown to him as
6 soon as the defendant comes in, and then with
7 Mr. Vargo, the gun is displayed and it's actually
8 placed against the back of his head; very easy to
9 see that.

10 Attached to the second robbery
11 count is the personal use of a dangerous or deadly
12 weapon, and that is very similar to the personal
13 use of a firearm, except that you need to first
14 determine whether or not it was a dangerous or
15 deadly weapon, and the testimony was that it was a
16 folding knife about -- I think Mr. Lopez said 8 to
17 10 inches. I apologize, I don't remember
18 specifically what he said, but that it had a blade
19 and that it was rather long with a handle, and I
20 don't believe he testified to what the handle was
21 like.

22 Well, what is a knife? A knife is
23 certainly capable of inflicting great bodily
24 injury or death, and so once you determine that a
25 knife is, in fact, a dangerous or deadly weapon,
26 then you must look to see if -- whether the knife

1 was intentionally displayed in a menacing manner,
2 same language that's used with the gun
3 enhancement.

4 And what's the evidence there?
5 Very similar to the display of the gun in the
6 first robbery. Mr. Lopez stood up. He
7 demonstrated for you again with the knife in the
8 hand and this flicking back and forth of the
9 wrist, this movement back and forth. The knife
10 was intentionally displayed, and it was displayed
11 in a menacing manner, once again, to send that
12 message to the victim get back to the trailer,
13 don't mess with me; I'm gonna take the money.

14 The fifth -- fifth and final count
15 is the grand theft of a firearm, and the firearm
16 that we're dealing with is the firearm that was
17 taken from the USA Market, from Mr. Alrhimi, and
18 he testified that he had a .380 caliber firearm,
19 gun, that was underneath the counter that was
20 taken, and the elements, similar to robbery, but
21 there are some different elements.

22 The person took personal property,
23 the gun. Specific intent to deprive, not gonna
24 return the gun, and that the property was carried
25 away after obtaining physical possession or
26 control. Well, the gun, I think Mr. Alrhimi

1 testified, was placed in the box, the box was
2 taken away, and certainly didn't testify that the
3 gun was ever returned to him.

4 But I submit to you that the issue
5 in this trial was not so much whether or not a
6 robbery or a grand theft firearm occurred, but,
7 rather, is that the man responsible for the
8 robberies? Yes, he is the man responsible for the
9 robberies, and let's go through each of the
10 robberies and that grand theft firearm and review
11 the evidence that proves the defendant is guilty.

12 The first robbery was at the
13 recycling center on 1845 North Dinuba, and that
14 was with Francisco Ortega, and Francisco Ortega
15 gave a description of a white male adult, thin.
16 We tried to determine the height. He was -- I
17 think Mr. Ortega was a few inches shorter than
18 Detective Lopez, and Mr. Ortega was saying that
19 the person was a little bit taller than he.

20 He actually identified the
21 defendant here in court, and he talked a little
22 bit about the live lineup that he attended. And
23 when you look at the photograph of the live
24 lineup, you'll see that Mr. Ortega did not circle
25 the defendant's picture from the live lineup. He
26 circled the man next to the defendant, and he --

1 and when you look at that picture, think you're
2 going to see some of the similarities that keep
3 coming through, the picture that Mr. Ortega
4 actually circled, the man has a goatee, and some
5 of the pictures of the defendant he's shown with
6 this similar facial hair.

7 Some of the other things that
8 Mr. Ortega did in trying to assist the police in
9 finding the man responsible was looking at that
10 computer screen that Detective Lopez testified
11 to. He looked at twelve different screens
12 containing six photographs, and one of the things
13 that was actually accomplished in that viewing of
14 the computer screen was coming up with a
15 photograph of a man who looked similar, and that's
16 People's Exhibit 5, and you can see some of these
17 similar features in that photograph with the
18 defendant, and you also will have a photograph of
19 the defendant -- a much closer view of his face
20 the day of the live lineup for you to kinda look
21 and see, and you also have the lineup that was
22 used to show the witnesses, and you can see some
23 of the differences in appearance between the
24 defendant now and then in July and -- and this
25 live -- or, excuse me, photo lineup.

26 But in addition to Mr. Ortega's

1 testimony, you have the testimony of
2 Freddie Patino. Freddie Patino is a 19-year-old
3 kid that, for a one-week period, about ten days,
4 he moved out of his house, and he committed a
5 robbery with the defendant and Leo Palafox, but in
6 order for you to believe Mr. Patino, Mr. Patino's
7 testimony, you must first find independent
8 evidence connecting this defendant to the robbery,
9 and that's because when you've got someone who
10 admittedly has committed a crime, the law wants
11 you to view that testimony carefully, in fact,
12 with distrust.

13 Why? Because when one person's got
14 the heat on them, what's sort of the natural
15 response? They were involved, too. But when you
16 look at the entire state of the evidence, you will
17 see how there is independent evidence connecting
18 this defendant to that robbery on June 18th, and
19 that independent evidence is the corroboration
20 necessary for you to believe Freddie Patino.

21 What's that independent evidence?
22 Well, we have a description; white male adult,
23 thin, of an approximate height. That, of course,
24 starts you on your way there.

25 I mean, it's not -- there's no
26 distinctive marks; have a scar across his face or

1 a tattoo of his name across his chest, but that
2 gets you there. At least we're dealing with the
3 same race and of a similar body build and height
4 of the defendant who is here in court.

5 By let's also look at -- and I
6 think he said the man had facial hair. You'll see
7 in some of the pictures the defendant has the
8 facial hair.

9 But let's look at the other facts.
10 Let's look at the second robbery that occurred at
11 the same recycling trailer because when you look
12 at that evidence, there is compelling evidence
13 that the same white male adult committed those
14 robberies.

15 The first -- in fact, he's at the
16 same place. Is it a stretch of the imagination
17 that if you're successful in robbing it once, that
18 you're not going to try again, eight days later,
19 nine days later, 18th to the 27th?

20 Look at the manner in which it was
21 done; white male adult shows up with a weapon, the
22 weapon that both witnesses demonstrated in a very
23 similar fashion. They both showed the clenching
24 of the wrist and the flicking back and forth.
25 That, I argue to you, is a very distinctive
26 maneuver. Both witnesses -- both victims were

1 will face no more than four years in prison, and
2 what the judge indicated to him was that the judge
3 who took the plea will consider his testimony in
4 when he is actually sentenced.

5 That is a very significant
6 difference between someone who's given a deal;
7 we'll dismiss something in exchange for your
8 testimony, and even more significant was the
9 testimony -- the statement Freddie Patino gave to
10 the police about who the co-participants were in
11 that first robbery at the recycling trailer --
12 totally lost my train of thought. That statement
13 was given prior to him coming in; in other words,
14 there was no deal made, and then we learned who
15 the co-participants were.

16 That first meeting with
17 Detective Lopez after a rather long interview,
18 Freddie Patino said who these co-participants were
19 before he was charged, before he pled, and that,
20 too, is a very significant indicator as to his
21 truth.

22 I know I've talked a little bit
23 about the testimony of Domingo Lopes, but now I'm
24 ready to move on to that second robbery at the
25 same recycling trailer eight -- nine days later,
26 nine days later.

1 taken to the back of the trailer and their wallets
2 were removed. Each and every aspect of those two
3 robberies corroborate each other and lead to the
4 logical conclusion that the same man committed
5 them.

6 And then with the second robbery,
7 Mr. Lopes selected this defendant in that live
8 lineup, didn't select out of the photo lineups,
9 selected at the live lineup where you have a
10 better opportunity to look, to get that
11 three-dimensional view.

12 So when you look at all of that
13 evidence, you will see that there is evidence that
14 tends to connect this defendant. Not only that,
15 look at who the defendant's partner in crime is,
16 Leo Palafox. In that last robbery, who did
17 everyone pick out? Leo Palafox. There's a white
18 male adult and a Hispanic male adult. All you
19 need is independent evidence that tends to
20 connect, and once you have that, then you can
21 believe Freddie Patino.

22 Now, why should you believe
23 Freddie Patino? Well, first of all, he has
24 nothing to gain. There is no absolute guarantee
25 he will receive any leniency. Mr. Patino pled to
26 everything he was charged with. He was told you

1 Domingo Lopes again testified he
2 was -- I believe -- he said he was in the trailer
3 when two men, a white male adult and a Hispanic
4 male, came to the entrance of the trailer. The
5 white male adult was holding the knife and
6 flicking the wrist back and forth and saying some
7 things to him in English which he didn't quite
8 understand. The Hispanic male told him to get
9 down on the ground or something like that.

10 They went to the back of the
11 trailer, and that's when his wallet was removed,
12 and I apologize, I believe he testified that the
13 white male took the money out of the register.

14 If there are things that I say to
15 you about the facts of the testimony presented and
16 you're not quite sure that's how it came out,
17 that's why we have a court reporter, and there are
18 facts and details that these witnesses testify to
19 that I may not recall exactly. So you always have
20 the opportunity to have something read back if
21 there is a dispute as to what was actually said by
22 these witnesses.

23 Mr. Domingo Lopes took a look at a
24 total of 24 photographs, and out of the 24
25 photographs, he never selected anyone as being the
26 perpetrator of his robbery, but at the live

1 lineup, he selected number five, David Thatcher,
2 the defendant, and said he is most like the
3 person.

4 Now, he did see the lineup, that's
5 lineup A, that contains the photograph of
6 David Thatcher, and when you look at the live
7 lineup photo and the photo lineup, you will see
8 that, you know, there are some -- some differences
9 there, appearances do change, and I submit to you
10 that when Mr. -- Mr. Lopez was able to see the
11 defendant live and in color and in three
12 dimension, that's when he was able to truly see
13 the person who committed the robbery.

14 And he made a tentative in-court
15 identification. It has been a few months. He
16 says that that man sitting in court has the same,
17 similar features of the man who robbed him. So
18 you need to go back and you need to look at what
19 was said at the live lineup.

20 Finally, we have the USA Market,
21 and again, the defendant was not positively I.D.'d
22 by either of the victims, and how really could
23 they when he's wearing a bandanna over his face
24 and a hat over his head.

25 But what you have is circumstantial
26 evidence of his identity, and that evidence was

1 presented to you by Glorys Slayton, a woman who is
2 a resident of Goshen, who happens to be riding her
3 bike to the market and sees two guys in a car on a
4 street.

5 She proceeds to the market. She
6 sees a black truck driver. They have a
7 conversation with him. She leaves the store, and
8 she sees those same two men but doesn't see their
9 car. She stops. She has a conversation with
10 them, and she recognizes the white male adult as
11 David Thatcher. She knows him. She knew it was
12 him on that day.

13 Then she identifies the Hispanic
14 male adult with Mr. Thatcher as Leo Palafox, and
15 Leo Palafox, again, was pointed out and identified
16 by Mr. Alrhimi as the Hispanic male adult who was
17 at that phone booth waiting by the phone as the
18 black truck driver was using the phone.

19 So that timing of when Ms. Slayton
20 saw the Hispanic male adult and the white male
21 adult matches up with the timing of the robbery.
22 Mr. Alrhimi testified that the -- there was a
23 truck driver there and that the truck driver was
24 using the phone.

25 And that ploy of using the phone is
26 also demonstrated in that first robbery that

1 Freddie Patino testified to. He said that
2 Freddie's the getaway driver. He looks -- he's
3 keeping an eye out for the police. Leo Palafox's
4 role was to pretend to be on the phone but also as
5 a lookout.

6 And what was -- what happened in
7 the USA Market robbery? Leo Palafox is waiting by
8 the phone, and when there are no customers in the
9 store, that's when the defendant and Leo Palafox
10 enter the store.

11 Additionally, you've heard
12 testimony from witnesses, albeit reluctant
13 witnesses, that the defendant and Leo Palafox are
14 known to associate. They are friends. They're
15 linked together. They're partners in crime.

16 And you further heard testimony
17 that Leo Palafox is known to carry a .22 caliber
18 handgun revolver, and David Thatcher is known to
19 carry a pocketknife -- excuse me, a folding knife,
20 weapons that were used in these robberies.

21 Each and every crime charged must
22 be proven beyond a reasonable doubt. That doesn't
23 mean that you don't look at the entire state of
24 the evidence. When you look at the robberies and
25 you look at them together, you will see how they
26 overlap and how they all fit together.

1 The crimes don't occur in a
2 vacuum. You don't have to turn a blind eye to the
3 aspects of the other robberies when determining
4 whether or not the first one was committed or the
5 second one was committed. The elements and the
6 aspects of each of these robberies are
7 circumstantial evidence. They all fit together,
8 and when you look at those aspects, you will see
9 how they tend to overlap and connect.

10 Each witness, each piece of
11 evidence, each identifying aspect of the way that
12 the robberies occurred is like a piece of a
13 puzzle. Each piece of the puzzle that you've
14 heard today when taken together, when fit
15 together, paint a picture, and the picture that is
16 painted is one of guilt.

17 Find the defendant guilty of four
18 counts of robbery and one count of grand theft
19 firearm. Thank you.

20 THE COURT: Thank you.

21 Mr. Storey, I don't want to
22 interrupt your argument. Maybe we should simply
23 come back at 1:15 and --

24 STOREY: I can start and we can break.

25 THE COURT: All right, that's fine.

26 MR. STOREY: One of the differences

1 between what the District Attorney's --
2 prosecution is doing and what I'm doing, there's a
3 jury instruction that talks about looking at each
4 of the offenses and looking at the evidence that
5 applies to each of those offenses, and making the
6 decision based on the evidence that applies.

7 The argument that I was hearing,
8 and I think I told you to expect this argument in
9 my opening statement, is what they seem to be
10 saying is convict Mr. Thatcher, not because we can
11 show what he did, but because we can show who he
12 associates with, because there are discussions in
13 regards to Freddie Patino and Freddie Patino's
14 acts. There are discussions in regards to
15 Leo Palafox and what Mr. Palafox does, but they're
16 not here on trial.

17 The District Attorney, one of the
18 very first things she started doing was talking
19 about the defendant. You have to prove each of
20 the elements of the offense. The big question
21 here isn't the element of the offense. It's the
22 identity of the perpetrator, and there's some
23 instructions, I think it's 2.91 and 2.92, that
24 talks about the burden that the prosecutor has
25 when you're trying to prove identity with
26 witnesses, eyewitnesses, I think.

1 The second one is talking about the
2 factors that you consider, and I'm gonna spend a
3 few minutes talking about that right now because
4 one of the things that she was saying is
5 Mr. Ortega, on that very first one and the
6 identity that -- that he made or the
7 identifications he made, go back and look at his
8 testimony because I think my recollection of it --
9 but you can go by your recollection. If you have
10 a problem with it, go back and have the court
11 reporter read the transcript, but my recollection
12 of what he was saying is that he was watching the
13 teli, looking at that screen trying to make an
14 identification, and then there was a picture that
15 came up and it caused him to jump back.

16 That jumping back, I think, is
17 important because he testified at the time, he
18 said that was the person he identified as the
19 perpetrator. If he's looking at something and he
20 says well, this person has similar features, why
21 would he have that reaction of jumping back?
22 Jumping back isn't what was testified to by
23 Mr. Lopez.

24 Mr. Lopez came in and started to
25 soft pedal. He tries to make it where when
26 Mr. Ortega identified this individual in People's

1 5 as the person that was in the trailer with him;
2 oh, no, all he was saying is he had similar
3 characteristics. That wasn't the testimony of
4 Mr. Ortega. Go back and look at it. He
5 identified this as the person who perpetrated the
6 offense.

7 He also acknowledged when I was
8 questioning him that, yes, he acknowledges this
9 isn't the person. He made a wrong
10 identification. That's one of the factors that
11 you start considering when you look at the factors
12 that you consider when you evaluate the -- the
13 testimony of the individual and their
14 identification.

15 What was the first identification
16 he gave; who did it come in through?
17 Officer Demarais? I hope I pronounced her name
18 correctly. 150 pounds, blonde hair, brown eyes.
19 That's right when it occurred. He said on the
20 stand that the person was thin.

21 In regards to the measuring, he
22 initially held his hand up and said the person was
23 about -- I think he said about two inches taller
24 than him, and then I think you'll remember that
25 Mr. Ortega came down and stood next to Mark Lopez,
26 and the indication at that point was that

1 Mark Lopez was three to four inches taller than
2 Mr. Ortega, and I grudgingly agreed as to his
3 stature 'cause he was three to four inches
4 taller.

5 Okay. You've got height. You've
6 got hair color. You've got eye color, and this is
7 the identification that's done the same day that
8 this occurs, and none of it, none of it matches
9 David Thatcher.

10 Do you have People's 17 up here?

11 MS. AIELLO: All the evidence is here:
12 This is 17.

13 MR. STOREY: Well, then it was People's
14 4.

15 Mr. Ortega was also given some --
16 the opportunity to look at photo lineups described
17 by Mark Lopez as the people that participated in
18 the live lineup in the same order that they were
19 in on that day, and that date was, I believe, July
20 10th or 11th. It's one of those -- those two, and
21 he marked the individual, and you'll see this.

22 And Mark Lopez, I asked him who
23 this individual was. He says it's not
24 David Thatcher, and it's not -- and he made that
25 identification while they sat here in court, and
26 he had David Thatcher in front of him, two

1 misidentifications -- no, no, that's three. I was
2 trying to figure out where I got three strikes and
3 he was out.

4 The first one was Demarais, and the
5 verbal description he gave doesn't fit. The
6 second one was People's Number 5; I don't know if
7 we gave you that person's name, and the third one
8 was the individual that he identified as being in
9 that lineup, and none of them are David Thatcher.

10 What about the other observations
11 that Mr. Ortega made? And what I'm looking at is
12 trying to compare and contrast what he says versus
13 perhaps what Freddie Patino says, and I don't know
14 how you could equate those at all.

15 And remember, Mr. Patino's
16 testimony can't be used to convict. You can use
17 it to acquit.

18 But where is the alignment of the
19 aluminum trailer? Now, I think both
20 Mr. Domingo Lopes and Mr. Ortega had that trailer
21 in an east-west orientation. Mr. Ortega was
22 talking about the person coming, would have been
23 west, and coming around the door that opened
24 toward the north before he got into the entry
25 which would have been facing the east. That's the
26 opposite of what Mr. Patino says. There's no

1 correlation. They don't even have the same
2 orientation.

3 I'm trying to figure out
4 what Patino was talking about because it doesn't
5 appear that he's telling the truth. The District
6 Attorney gives him an awful lot of credibility on
7 what he was saying because he got in there and he
8 talked for an extended length of time to
9 Mark Lopez and eventually said something which
10 could be used against David Thatcher, and he came
11 here and he testified to that.

12 And what the court said is not
13 nearly as important as what Mr. Patino believes
14 because Mr. Patino was testifying that he believes
15 that he's going to get local time for his
16 cooperation. The District Attorney read out what
17 the court had said and then asked a question to
18 him if he was told by the court that he was going
19 to get local time? And then there was a little
20 break, and then he finally answered the question.
21 He said yes, he was wrong, that's not what the
22 court said at all, but at least in his mind, he
23 thought it was.

24 Then the thing that bothers me
25 most, and I asked him about it, meaning
26 Mr. Patino. I also asked Officer Winslow 'cause

1 there's this two-hour interview. Within ten
2 minutes after that two-hour interview, he comes in
3 and essentially tells Officer Winslow I lied. I
4 want to take a lie detector test to prove I had no
5 involvement.

6 When he talked to Mark Lopez, was
7 he indicating he was being truthful? I don't
8 think so with that second statement, and you have
9 to view what he says with distrust.

10 Still going -- we're still talking
11 about that first alleged robbery, and I believe
12 the District Attorney was right. When Mr. Ortega
13 got up, he had his hands -- he was going like
14 this. Then he later described that he had one
15 hand on the wrist, and he was going like this.

16 And she says well, that's the same
17 thing that Mr. Lopes, Domingo Lopes said. No.
18 When Domingo Lopes was up there, he was making a
19 motion, and I think I put it on the record, may
20 the record reflect that he was going up and down
21 with his hands. It is not the same motion.

22 If it was the same person that's
23 doing these things, you would think they would
24 have the same tendency to make the same motion,
25 and that doesn't occur.

26 Go by your memory, go by what's on

1 the record. I'm just giving you the way that I
2 saw it.

3 The enhancement -- because when
4 you're talking about -- first of all, you don't
5 even reach enhancements unless you find the person
6 has committed the offense: If you find that
7 Mr. Thatcher committed that robbery on June 18th,
8 then you have to look at whether or not he used a
9 firearm.

10 Now, the firearm becomes very
11 interesting when you start talking about Counts 3
12 and 4. It's also a little interesting in regards
13 to Mr. Ortega's testimony because is Mr. Ortega
14 familiar with the guns? He said no.

15 I was asking him about what he
16 saw. He saw this thing that's sticking out; he
17 described as a barrel. I asked him if it had a
18 sight; he doesn't know. I asked him how he knew
19 it was a weapon or a gun, and he said he heard a
20 click, like plastic guns he'd heard. Asked him if
21 it was plastic? He said no, it was like metal on
22 metal. I asked him if he knew it was a gun? He
23 said no.

24 As far as the proof, it has to be
25 proven beyond a reasonable doubt, each element,
26 and that includes in the enhancements. If the

1 testimony before you is that the witness doesn't
2 know whether or not this thing is a firearm, how
3 do you know?

4 Lots of times, they'll bring items
5 in, firearms, and they'll present 'em to you and
6 you can make a determination; wasn't done here.
7 What's the state of the evidence in regards to
8 Count 1 and the special -- and the enhancement?

9 You know, we -- we have a system,
10 and I get up and I complain about it all the time,
11 and I'll yell at District Attorneys and I'll
12 complain to judges, I'll complain with the people
13 I represent, but we've got the best system in the
14 world. There's no system like ours, and part of
15 it is because it relies on you.

16 You know, it's an outgrowth -- I
17 think it was the English magazine Encarta; you
18 have a right to a jury by your peers, and that's
19 what's going on here. You are presented the
20 evidence. From that, you determine what the facts
21 are. You take those facts and you apply the law,
22 and you come up with your verdict.

23 And one of the things that's argued
24 by defense attorneys frequently all the time is
25 that burden and what they have to prove and how
26 they have to prove it, and it's called, you know,

1 proof beyond a reasonable doubt, but another
2 portion of that talks about -- and if I talk about
3 law, this is just a general statement. The court
4 gives you the law.

5 When he's reading it out to you,
6 you say how much of this am I going to remember?
7 You can't. That's why when you go back into the
8 jury room, they'll have that packet so you can
9 look at it, you can review it, and you can see
10 what it says if you have a question. Use that for
11 a reference. It's very seldom -- I'll tell you
12 right now I'm not going to read any jury
13 instructions to you. I will paraphrase things and
14 just to give you a guideline about where it's at,
15 but at the top of each of those pages, there are
16 numbers. I said 2.91, 2.92, those are in regards
17 to the eyewitness.

18 2.90 is the one that talks about
19 reasonable doubt and the presumption of
20 innocence. I think it's 2.60 and 2.61 talks about
21 a defendant not having a burden, not required to
22 put anything on because it's the People that have
23 that burden, and I told you in opening statement
24 that what we were going to do here at the close of
25 it is tell you they haven't proven their case.

26 So we are asking you to look at

1 that evidence that was presented to you, determine
2 the facts and apply the law. That law includes
3 giving that presumption of innocence to the
4 defendant, to Mr. Thatcher. He's presumed
5 innocent as he sits there until the contrary is
6 proved, and at the conclusion of this case when
7 you go in and you do your deliberations, if you
8 have a reasonable doubt [- and the law says it's
9 not beyond any possible doubt.

10 What's a possible doubt? Okay; the
11 sun came up this morning, or we determined it
12 appeared to come up. Is it going to come up
13 tomorrow? People could argue no, it may go
14 supernova tonight or what have you, and there's a
15 possibility, you could make an argument that it
16 may not come up.

17 Do you have to prove it beyond that
18 kind of a probability? No, but, also, it's not
19 like flipping a coin. You take a coin, you flip
20 it up. There's a 50 percent chance it's going to
21 come down on one side or the other.

22 This is a burden substantially
23 beyond that. It's something where tomorrow, next
24 week, a year from now, you'll be sure that you
25 made the right decision, and the general argument
26 that I'm making at this point is that in this

1 case, you're not going to be able to do that.

2 We've talked a little bit about
3 Count 1.

4 THE COURT: Do you want to stop now?

5 MR. STOREY: Yeah, because then I can
6 talk about 2, 3, 4 and 5.

7 THE COURT: All right.

8 MR. STOREY: I ran longer than I thought
9 I was going to.

10 THE COURT: All right. That's fine.

11 Ladies and gentlemen, we'll get
12 back at 1:30. See you then. Thank you.

13 (Whereupon, a recess was taken at
14 12:18 p.m.)

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AFTERNOON SESSION

Thursday, November 8, 2001

(Whereupon, the following
proceedings were had in open court, to wit, at
1:32 p.m.:)

THE COURT: All right. Mr. Storey, go
on.

MR. STOREY: Good afternoon.

I talked a little bit about
Count 1, and I talked a little bit about the
duties that are set out by the law.

Next thing I'm gonna do is try and
combine both of those a little bit because you've
got a tough job, and I think the illustration
comes down to the testimony of Barbara Wilborn.

She was the lady that got on, had
the longer hair and had a bit of a problem getting
to court when the District Attorney wanted her
here, and she was the lady that had gone up to the
court and read the public records, read the case
file.

And the testimony that she was
giving is she said I don't remember, and they were
talking about a statement, and Officer Lopez got
up and he talked about what the statement was.

The statement is essentially

1 something that she said at some point where she
2 saw a gun fall out of the pants of David Thatcher,
3 and that's to come in as a prior inconsistent
4 statement, maybe, because what she said on the
5 stand is she didn't remember. She didn't remember
6 making that statement. She didn't remember that
7 portion of the conversation, and then she was
8 saying but if that's what the police report says,
9 then I must have said it.

10 You don't have the police report.
11 She said if that's what's on the tape, her taped
12 interview, then that's what I must have said. You
13 don't have the taped interview.

14 There's an instruction that talks
15 about prior inconsistent statements, and it talks
16 about a situation where somebody says I don't
17 remember, and you need to make a determination
18 whether that person remembers or not, and if you
19 decide that she really doesn't remember, that
20 inconsistent statement isn't inconsistent. If she
21 says I can't remember making the statement, you
22 believe that she can't remember making the
23 statement, if she says something, it is not
24 inconsistent.

25 So then you're going to have to
26 disregard what Mark Lopez said, and you've heard

1 it, and you know what it is, and you've got a
2 tough job. It's really frustrating for somebody
3 such as myself. I tried to bring it out in the
4 questioning because when you start talking about
5 this statement which you may or may not consider,
6 gun falling out of David Thatcher's pants, what
7 count does it pertain to? Think back about all
8 the counts. The one on June 18th is the only one
9 where there was a white male that weighs 150
10 pounds, brown-haired, blonde-haired guy carrying
11 something that may have been something like a
12 revolver.

13 Now, think about how these things
14 might play out. If I had a gun and something had
15 occurred two weeks ago with a gun, what's the
16 connection? If I have a gun today and two weeks
17 from now there's something that happens with a gun
18 and I'm around, what's the connection? How
19 relevant is it that I have this gun?

20 Now let's change it, and let's say
21 not two weeks ago, but an hour ago, there was
22 something happened with a gun. I happened to be
23 there, and I got a gun now. It carries much more
24 weight.

25 What is the date that
26 Barbara Wilborn saw this? You're not going to

1 have any date given to you. You didn't get a date
2 from Mark Lopez.

3 What we have is they moved into the
4 house on Vine Street sometime in January and
5 February. They moved out sometime in June, in the
6 latter part of June. What relevance is it if you
7 don't have a date and you have testimony that
8 David Thatcher may have had a firearm in his past
9 which fell out? And there's only one person that
10 sees it, and it's a prior inconsistent statement.

11 You have a tough job where you have
12 to start weighing things like this. You know it.
13 You've heard it. How do you disregard it and not
14 consider it? That's your job, and it's tough. We
15 appreciate the effort that you're going to go
16 through.

17 Next area that I'm going to talk
18 about bothers me a little because I don't like it
19 when I show my bias, my prejudice, how I might be
20 a bit of a racist, but that's what this next
21 section deals with, and I'm talking about the
22 identification that's done by Domingo Lopes.

23 I'm talking about some of the
24 testimony of Mark Lopez, and I'm talking about the
25 jury instruction that tells you the factors you
26 are to consider when you're evaluating that

1 eyewitness identification.

2 Now, I'm talking in regards to
3 Domingo Lopes, but it also applies to Mr. Ortega.
4 It also applies to Glorys Slayton because one of
5 the things that you consider in regards to that
6 identification is the cross-ethnicity.

7 All of us would have a tendency to
8 associate with people that are basically the same
9 ethnic group, there are certain things that we
10 pick up about how people look, maybe about
11 relationships of eyes, nose, lips, mouth, I don't
12 know, but there's subconscious things that allow
13 us to recognize people and people of our own
14 ethnic group who we're more familiar with, more
15 familiar with those characteristics. I look at
16 this maybe showing my bias or racism. I remember
17 jokes that were told when I was younger, and one
18 of the punch lines, you can't tell one from the
19 other.

20 I remember articles that I've
21 seen -- not articles, but on the editorial page,
22 the cartoons they'll have, and they'll have people
23 of different ethnic groups; essentially, they're
24 making the statement you can't tell one from the
25 other. I think some day that's going to go away,
26 but right now you have to consider that

1 cross-ethnicity.

2 I was -- in regards to terrorist
3 attacks and they're talking about the face
4 recognition software that they're putting into
5 airports now so that they can take relationships
6 as to the way the face is and make a
7 determination, an identification similar to a
8 fingerprint. They can do that right now.

9 In 20 years, they'll be able to
10 take that tape that was played for you, because my
11 understanding is this recognition software, even
12 if somebody tries to disguise themselves, it
13 works. In 20 years, they'll be able to take that
14 software, apply it to that take, make a
15 determination as to who that individual is if
16 their face is in the data bank. We can't do it
17 today.

18 You need to consider the
19 identification in regards to Mr. Domingo Lopes.
20 Remember the testimony of Mark Lopez as where they
21 get the sample? People in jail. There aren't
22 that many people in jail. You have a very small
23 sample.

24 If I was going to make a
25 determination and I knew there was a male that
26 committed an offense and they brought in a male

1 and a female, I'd make the statement the male
2 looks most like him.

3 When Domingo Lopes viewed the
4 physical lineup, the live lineup, when they were
5 there, he had a total of five people or six --
6 six, and what he said wasn't what Mr. Mark Lopez
7 said on the stand; wasn't he looks like him. He
8 said he looks most like him. He acknowledged on
9 the stand that he couldn't point out Mr. Thatcher
10 as being the person that was in the trailer with
11 him. What he indicated is he was the person that
12 looked most like him from a small sample.

13 The decision you have to make has
14 to be beyond a reasonable doubt. Look at the
15 characteristics that they have. Also, look at the
16 ability to perceive because there was a lot of
17 discussion in regards to how much Mr. Lopez could
18 see.

19 He said when the people came in
20 front of that trailer, he only saw 'em for a
21 second, and then he started moving toward the
22 back, and I was asking him about as you went back
23 into the trailer -- because remember, this is open
24 to the east end, then extends west. This is in
25 the afternoon, the sun is behind you, and you've
26 got a picture, and as you get deeper into that

1 trailer, it does get darker. It is harder to see,
2 and I think he acknowledged that.

3 You've also got a light source
4 behind you, and all of you have been in the
5 situation where you're in the dark. Somebody is
6 coming from a lit room. What you see is the
7 silhouette; facial features are covered by the
8 rest of your head. So it is very difficult to
9 make an identification.

10 Next area -- well, most of this
11 case is on identification. I think you know that,
12 and as far as the cross-ethnicity, that also
13 applies to Glorys Slayton, but one of the things
14 that I thought was most interesting is that she is
15 saying on June 30th, this individual was clean
16 shaven. He didn't have a beard.

17 Officer Lopez indicated that this
18 picture, People's 17, was taken on July 11, eleven
19 days later. You'll be able to see the length of
20 that beard. If somebody was clean shaven, could
21 they grow a beard that long in eleven days? I
22 don't see how.

23 The other thing that I was
24 concerned about, she got on the stand and she
25 testified, and she said she knew this individual
26 immediately. Then why did she tell

1 Officer Winslow she asked the person do I know
2 you?

3 She indicated when she was looking
4 at the -- the photo lineup, she put her hand over
5 the top of it and identified it as being
6 David Thatcher. Is that what Detective --
7 Deputy Winslow said? Huh-uh. What he said she
8 indicated when she was looking at that, she asked
9 is this David? If her -- why is she saying those
10 things if she was correct when she says on the
11 stand yeah, I knew it was him immediately; I
12 didn't have a question.

13 What was the identification? How
14 certain was she? Well, what she told
15 Detective Winslow is that she was 60 percent
16 certain that the person that she saw was the one
17 she had talked to on the 30th.

18 I think you need to look at her
19 testimony. You consider it in the value that it
20 has, but I'd look at those prior statements, the
21 earlier statements that she made. Why she's
22 coming in now, yes, she knows this is
23 David Thatcher. She's known him for 8 to 10
24 years, but she knew David Thatcher on June 30th
25 and said do I know you? She knew David Thatcher,
26 whatever day she went in and looked at that photo

1 lineup and said is this David? That's a far cry
2 from what she said when she was on the stand.

3 What about another identifications
4 that take place from June 30th? Mr. Alrhimi --
5 I'll call him Mike, which I had to do during trial
6 'cause I had trouble with his name -- he said the
7 person that came in was essentially much shorter.
8 David Thatcher stood up next to Mark Lopez and
9 he's taller.

10 What was the testimony given by
11 Mike in regards to this person? He said he was
12 five three, 140 pounds. The District Attorney
13 said well, aren't you up on a level, trying to
14 figure out if that was -- he says that's not where
15 I made the identification. Where I made the
16 identification is where that individual -- and
17 they keep calling him the white guy -- the white
18 guy came around the counter and lifted up that
19 edge of it, and they were standing. He was just a
20 little taller. They were eye to eye, and that's
21 why -- he's five two, and that's why they said
22 person was five three. The physical description
23 that was given at the time doesn't match up.

24 Next thing I was concerned about in
25 regards to that particular one because there are a
26 couple counts there on Mr. Vargo and in regards to

1 Mr. Alrhimi about there's an arming -- a use
2 allegation, excuse me, saying the person used a
3 firearm.

4 Now, when you look at the
5 instruction that tells you what a firearm is,
6 essentially, it's something where a projectile
7 goes out the barrel, but it's caused by some
8 explosion-type device.

9 Shotgun would be a firearm. A
10 rifle would be a firearm; anything that has that
11 cartridge would be a firearm.

12 What about a BB gun? Huh-uh,
13 there's no explosion.

14 As far as here, what evidence is
15 there that it is a shotgun? You've got three
16 people, all of them say from the outside, it
17 looked like a shotgun. Who else had a look at
18 it? Mr. Vargo was asked whether or not he saw the
19 end of it, the open end; said no. To him, it
20 looked like a shotgun. His girlfriend said it
21 looked like a shotgun; no description of the open
22 end. I think she was talking about it being put
23 into a box.

24 Mr. Alrhimi -- and as far as when
25 he saw it, when he saw it, whether he saw it when
26 that person came around, was standing eye to eye

1 with him and he saw it or whether he was laying
2 down on the ground looking up pointing to an area
3 where his .380 revolver is doesn't make a whole
4 lot of difference, but what he saw was a very
5 small hole. He said at that point, he didn't --
6 he knew it wasn't a shotgun. He thought it was a
7 BB gun or perhaps a small caliber rifle.

8 I would submit to you the
9 description of that small hole indicates that it
10 was a BB gun. Why? What's one of the differences
11 between a rifle and a shotgun, and it's the size
12 of that barrel. The barrel, itself, is wider. If
13 this object was described by three people as being
14 like a shotgun, it has to have that wide barrel.

15 If you had a rifle that you're
16 going to use and shoot, do you ever see a rifle
17 with a real thick barrel? No. You've got too
18 much weight.

19 And I'm picking up the waver of the
20 head, so I don't know if that means there are such
21 things, but I'm not an expert on rifles. Maybe,
22 though I'm not familiar with it, use your own
23 knowledge, maybe there are rifles with thick
24 barrels. I would think there would be too much
25 weight for the size of the barrel to assist in
26 aiming and moving if you had a thick barrel on a

1 rifle.

2 When you look at the bore, whether
3 it's a shotgun or whether it's a rifle, you're
4 going to have a hole taking up most of that
5 barrel. It's not going to be mostly metal.
6 That's not the description given by Mr. Alrhimi.
7 He was talking as he looks in the end, it's not a
8 big hole. It was a small hole which means it's
9 probably a replica of some sort, and BB guns I
10 used to have had a barrel that was smaller. You
11 could pull it in, pull it out of the -- the BB
12 gun, itself, and the tube that the BB went through
13 was actually very small even though the end of it
14 would be probably an inch wide.

15 So I think the description that he
16 was giving was that of a BB gun. It's not a
17 firearm. That's something that you need to
18 consider when you start your deliberations, and
19 again, same argument I made with Mr. Ortega, if he
20 doesn't know what it was, and it's his description
21 that it was a BB gun or small caliber rifle, and
22 he doesn't know. If he doesn't know, how can you
23 be sure beyond a reasonable doubt?

24 Okay. I did want to talk a little
25 bit about the accomplice because I don't think
26 there's anything to corroborate Freddie Patino,

1 and I'm looking at the orientation. Mr. Ortega
2 was looking at this and says this opens to the
3 east, and he described the individual as coming
4 along the trailer which would be from the west,
5 and then this would be from the north as he made
6 that turn going south. The -- and he drew this
7 line in regards to that same drawing, and the
8 orientation -- this is the arrow, the green arrow
9 was the one that was put on by Freddie Patino.
10 They didn't have 'em oriented the same way.

11 You're going to have the diagram
12 that Freddie Patino drew. You have the pictures
13 which were identified by Mr. Domingo Lopes and
14 Mr. Ortega. You got the arrows going opposite
15 directions.

16 The other thing I'm concerned
17 about, and if Freddie Patino was telling the truth
18 and somebody was coming back from that trailer,
19 did he describe David Thatcher as having a
20 revolver? No. He talked about a knife.

21 My recollection is he gave a number
22 of inconsistent statements even while he was on
23 the stand. At one point, he sees the wallet in
24 the hand; at one point, he doesn't see the wallet
25 in the hand. He sees the money in the car; he
26 doesn't see the money in the car.

1 I can't see -- I don't think he's
2 as believable as Mr. Ortega was. I think when
3 Mr. Ortega said that somebody came in; there were
4 some motions made. He put his wallet up. He said
5 he -- prosecutor said 240. I think he said he got
6 paid 240 and he thought 235 was in there. 235 is
7 not 25 to 40. I think you're going to know the
8 difference between 'em.

9 What factors are there that
10 corroborate the testimony of Freddie Patino?
11 There isn't any -- there aren't any, excuse me.

12 I think I told you earlier, I
13 apologize for repeating it, in opening statement,
14 this case is one that's just guilt by
15 association. They're not going to prove -- at
16 this point, they haven't proven the case as to the
17 elements they are required to prove, and
18 especially in regards to identity.

19 What they have shown is that
20 David Thatcher knew Heather Parks. He was her
21 uncle's best friend. He was developing a
22 friendship with her mother during the months
23 from -- I don't know, January or February,
24 whenever they moved into Vine Street until June.
25 He had only known Leo Palafox for a short period
26 of time.

1 They have identified Leo Palafox.
2 They have a strong case on Mr. Palafox. He's not
3 here.

4 In regards to Mr. Thatcher, there's
5 a showing of relationship through his girlfriend
6 in saying well, he's a white guy, blame it on
7 him.

8 I'm asking you to look at the
9 counts, look at the evidence, apply the law and
10 make the appropriate decision. I believe that
11 decision as to each count has to be not guilty.
12 Thank you.

13 THE COURT: Thank you, Mr. Storey.

14 Ms. Aiello?

15 MS. AIELLO: Thank you.

16 This is not guilt by association.
17 This is guilt by being partners in crime. The
18 defendant and Leo Palafox committed a string of
19 robberies together, and every piece of evidence
20 connecting the two together strengthens the
21 eyewitness testimony pointing towards the
22 defendant as being the actual perpetrator of these
23 robberies.

24 I'm gonna kind of comment on some
25 of the things that defense counsel said, and what
26 I will try to avoid doing is nitpicking because

1 what I often find is that when it's my turn to
2 rebut, I always want to say did I walk into the
3 wrong courtroom; you know, was he listening to the
4 same trial I was? But really, it's up to you to
5 determine what the evidence came out to be and the
6 inferences from that evidence.

7 Let's start with Mr. Ortega.

8 Mr. Ortega talked about this picture, this number
9 5 picture. This picture, I think, that
10 Detective Lopez ultimately identified as
11 Donnie Wright.

12 And what Mr. Ortega first said
13 about this photo is yeah, there was a photo that
14 reminded me of the man. Mr. Ortega did not
15 initially say that he ever said this was the man
16 who committed the robbery, but when you go back
17 through the cross-examination and the redirect
18 examination, it kept getting beaten to where
19 Mr. Ortega finally says well, okay, yeah, I was
20 nervous and I did point him out, but that's why we
21 have Detective Lopez who was there with Mr. Ortega
22 to clarify; he never said this was the person.

23 This photo was selected and
24 documented because this man had features. There
25 were things about this man that made Mr. Ortega
26 comment on it. So that is not a

1 misidentification. We don't have a series of
2 misidentifications by Mr. Ortega, and when
3 Mr. Ortega was looking at these photos from the
4 live lineup, he kept saying it's blurry, it's
5 blurry, and what he did say when he picked out
6 number four and not the defendant was defendant
7 had hair, and what I submit to you based upon
8 Mr. Ortega's testimony was that Mr. Ortega was
9 focusing on the goatee, but when in court, he
10 pointed out the defendant.

11 The gun. Mr. Ortega was very
12 clear, it was a gun. It looked like a real gun.
13 It didn't look like a toy. It had a barrel. He's
14 got a handle in his hand. There's no question
15 what that weapon was, it was a gun.

16 Talking a little bit about
17 Domingo Lopes and Glorys Slayton, and I think
18 defense counsel was talking about the
19 cross-ethnicity, and I don't know what that
20 means. I don't know what that -- that line in the
21 jury instruction means about the ability to -- the
22 cross-racial or ethnic nature of the
23 identification, and I don't know if that means
24 if -- if a Caucasian person is looking at photos
25 of six Hispanics, I don't know how that means
26 they're gonna choose somebody who is identified by

1 other people. I just don't know what that means.

2 But Mr. Lopes as a Hispanic male
3 goes and views a live lineup, and he selects a man
4 and he says that looks the most like the person,
5 and when he was shown prior lineups, he didn't
6 select anybody. So it's not just the fact that he
7 goes in and he sees six faces, and he picks
8 somebody, but he had seen a total of 24 pictures,
9 24 pictures, 24. That's -- it sounds to me like
10 that's four lineups plus the six people in the
11 live lineup. So it sounds like 30.

12 That's not a tremendous number, I
13 realize that, but again, you're not viewing this
14 evidence in a vacuum. You are looking at the
15 entire state of the evidence when determining the
16 identity of the perpetrator.

17 And whether or not the sun's behind
18 the trailer, Mr. Lopez was very clear, he could
19 see the man's face. He saw the man's face when he
20 came up. He saw the man's face when he told him
21 to go back to the trailer. He had an opportunity
22 to see the defendant's face.

23 Let's talk a little bit about
24 Glorys. I see a clear distinction in her viewing
25 the photo lineup and her knowing the man that she
26 spoke to. She said -- this is what she told

1 Detective Winslow: She knew the man that she was
2 speaking to was David Thatcher, but that the times
3 that she had seen him from the first time in 2001
4 to the last time, he had lost a lot of weight and
5 he had no hair.

6 And there was no testimony that
7 yeah, she sees him every day, which means if she
8 ran into him on the street, you should be really
9 concerned about why she didn't know him right off
10 the bat or whatever, but she knows him, and she
11 was very adamant about knowing him.

12 And what she had problems with was
13 whether or not the photo of this man who we know
14 is David Thatcher, if that was the man that she
15 saw on the street, and that's why she did this;
16 she covered his head. She tried to look at what
17 the similarities were, and what -- when she was
18 saying is this David? Is this -- never fails,
19 whenever your cell phone goes off, you can't find
20 in which pocket of the purse it's in; also gave me
21 an opportunity to get a glass of water.

22 I think it's very natural when
23 you're looking at a photo versus someone in three
24 dimension, and what she was having a hard time
25 with was is this the photo of the man that she
26 saw? But she knew who the man that she saw was,

1 but again, that's not all that she was able to
2 identify. How do you explain her identifying
3 Leo Palafox? Picked him out without any problems,
4 and she had never seen him before.

5 What she also told you was she
6 didn't offer information to the first deputy. I
7 don't think she really wanted to get involved, and
8 that, too, to a certain extent is very natural,
9 don't like to get involved as much as we want them
10 to and hope that they would.

11 I'm going to talk about the gun.
12 Again, the gun as far as the USA Market, it's a
13 sawed-off shotgun. Is it a rifle? Is it a BB
14 gun?

15 What I think the witnesses were
16 trying to say about the sawed-off shotgun was it
17 was the length. They see the length, and they
18 assume because of the length that it's a sawed-off
19 shotgun. I think that's why Ms. Atilano describes
20 it as a sawed-off shotgun, and she, by all
21 accounts, didn't get a close look. There's just
22 no way, where she was, where the defendant came
23 out and put the gun in the box. So you look at
24 Mr. Alrhimi's testimony, and the best description
25 that you can give, and when it came down to it, he
26 felt it was a real gun.

1 In addition to the phrase partners
2 in crime, there's a word that I just can't get out
3 of my mind when I think about this case -- and
4 very, very poor handwriting -- it's the word
5 coincidence; coincidence.

6 When you look at the entire case --
7 and I can't stress this enough, and I know I
8 stressed it in my first opening. When you look at
9 the entire case and the state of the evidence, is
10 it a coincidence that these things are happening?

11 Is it a coincidence that
12 Freddie Patino says David Thatcher and Leo Palafox
13 committed the first robbery, and he was the
14 getaway driver?

15 Is it a coincidence that
16 Domingo Lopes identified or points out this
17 defendant in the live lineup regarding the second
18 robbery?

19 Is it a coincidence that
20 Glorys Slayton knows the defendant and I.D.'s
21 Leo Palafox, a person she doesn't know?

22 Is it a coincidence that
23 Michael Alrhimi identifies Leo Palafox when he --
24 in the USA robbery? Is it a coincidence that
25 Freddie Patino -- strike that, already said that.

26 Is it a coincidence that the

1 defendant and Leo are friends?

2 Is it a coincidence that Leo is
3 known to be in possession of a revolver, a
4 revolver that was seen in the defendant's
5 possession several weeks prior to the interview of
6 Barbara Wilborn?

7 Is it a coincidence that the
8 defendant is known to carry a knife? That
9 information was provided to you by Freddie Patino
10 and by Heather Parks, although very grudgingly, I
11 might add.

12 Is it a coincidence that the
13 defendant and Leo Palafox borrow Freddie Patino's
14 car, a car that's seen at the USA Market two weeks
15 prior to the actual robbery?

16 And is it a coincidence that the
17 first two robberies are committed at the same
18 place at approximately the same time within less
19 than an hour of each other, within nine days? No,
20 it's not a coincidence. That's why you look at
21 everything.

22 Go back and watch the videotape of
23 the robbery, and if you rewind it, you're gonna
24 see a black gentleman making a purchase, and prior
25 to that, you're going to see Glorys Slayton
26 talking to a black gentleman, just like she said.

1 It all fits together.

2 MR. STOREY: Your Honor, there is an
3 issue I would want to take up in regards to that
4 last statement.

5 THE COURT: Well, let's take it up now.

6 (Whereupon, the following
7 proceedings were had at side-bar, outside the
8 presence of the jury, to wit:)

9 (Whereupon, the record was read
10 back by the court reporter.)

11 MR. STOREY: That was never played
12 during the trial. That was also not in the
13 discovery that was presented to me. I saw it for
14 the first time after the conclusion of the trial
15 when counsel rewound the tape that's in here which
16 is not identical to mine, and then she played
17 through it and saw that this is on that tape, but
18 I think that's inappropriate to be commenting into
19 offering evidence which was not presented to the
20 jury during trial.

21 THE COURT: Well, I didn't see the tape
22 because the television was turned towards the
23 jury, so I don't know what was played and what
24 wasn't. Was the part you referred to played?

25 MS. AIELLO: No, but the whole tape is
26 in evidence.

1 MR. STOREY: But I was never given --

2 THE COURT: All right. We'll play your
3 tape --

4 MS. AIELLO: I can tell you exactly what
5 he was provided, and it was what was provided to
6 me when I asked for a copy of the robbery. The
7 detectives made me a copy, and it starts with
8 probably a minute of actual time footage prior to
9 the robbery.

10 THE COURT: Well, excuse me. It
11 seems -- do you have your tape here?

12 MR. STOREY: No, but I don't --

13 MS. AIELLO: But the copy that was given
14 to him was the identical copy of mine, and it
15 was -- honestly, after thinking about that, the
16 question in my mind is what's back there prior?
17 And it is on there.

18 THE COURT: Well, it wasn't provided in
19 discovery.

20 MS. AIELLO: No, it was not.

21 THE COURT: Seems to me that whatever
22 Mr. Storey was provided in discovery should be
23 substituted in as evidence, assuming that what was
24 played in evidence is the same thing that
25 Mr. Storey has. It sounds like it was; right?

26 MR. STOREY: I believe it was.

1 MS. AIELLO: Granted, Mr. Storey did not
2 have the whole store surveillance tape, but I
3 think it's always been at least in the reports
4 that this was a surveillance camera, and I didn't
5 think about it earlier, and it sounds to me like
6 he didn't think about it earlier about what is on
7 this tape prior.

8 MR. STOREY: And what was presented to
9 the jury.

10 THE COURT: Who was in possession of the
11 tape, the original?

12 MS. AIELLO: The sheriff's department.

13 THE COURT: All right. Then it's
14 discoverable. Mr. Storey should have had the
15 whole tape.

16 Only that portion of the tape that
17 was provided to Mr. Storey is admissible in
18 evidence, and I'll modify the evidence that's --
19 the item of evidence that apparently the jury has
20 that has more information than that which was
21 provided in discovery.

22 Okay; now, what?

23 MR. STOREY: I just think that that was
24 why I had the problem because she was mentioning
25 something --

26 THE COURT: I know. Is that what you're

1 asking me to do?

2 MR. STOREY: Yes.

3 THE COURT: All right.

4 MR. STOREY: Thank you.

5 MS. AIELLO: I don't think that -- I
6 mean, I really don't think -- I mean, it's a piece
7 of corroborating evidence. I understand the
8 court's concern about --

9 THE COURT: Excuse me. What is required
10 under the law is that items in possession of the
11 prosecution be provided to defense counsel.

12 MS. AIELLO: Okay.

13 THE COURT: He wasn't provided it. So
14 it's a sanction for noncompliance with the
15 discovery, even though I'm not suggesting in any
16 way that it was intentional.

17 MS. AIELLO: Thank you, because it
18 really wasn't, and my intent was that was a
19 question that came up in my mind, was talking
20 about Ms. Slayton's credibility.

21 THE COURT: Then what should have been
22 done is if it was discovered during trial that
23 there was more, then it could have been turned
24 over and we could have dealt with it, but now
25 everything is in. To me, this is the only way to
26 deal with it.

1 MS. AIELLO: Before Mr. Storey finishes
2 closing argument, he did know that Ms. Slayton was
3 on the tape. So I think he could have had an
4 opportunity to argue that, and if he wants to take
5 a look at it and then --

6 MR. STOREY: It wasn't in evidence.

7 MS. AIELLO: The whole tape's in
8 evidence.

9 THE COURT: All right. I'm applying the
10 discovery sanction.

11 MR. STOREY: Thank you.

12 (Whereupon, the side-bar
13 proceedings were concluded.)

14 MS. AIELLO: Okay. I thought you were
15 going to -- never mind. I'll finish, I guess.

16 You all have a life experience.
17 You've all seen things, done things and
18 experienced things, and one of the things that you
19 use when you go back and deliberate is your common
20 sense, and your common sense will tell you that
21 this is not just a string of coincidences that
22 just kind of fell out of the sky and landed on
23 poor defendant's shoulders 'cause when you look at
24 all the evidence and when you place it together
25 like you should, it points towards the picture of
26 guilt.

1 I want to just comment briefly on
2 Ms. Wilborn, her convenient lack of recollection
3 in certain areas; prior consistent or inconsistent
4 statements in evidence.

5 The law recognizes that people will
6 come to court and they will say things that are
7 inconsistent with things that they've said
8 previously, and what is allowed to be done is the
9 person who heard that first statement can come in
10 and say yes, that they told me, and that's why you
11 have the police officers who were asked, you know,
12 what did they tell you?

13 And one of the things when you look
14 at the prior consistent statement -- inconsistent
15 statement as evidence is if you -- excuse me, if
16 you disbelieve a witness's testimony that she no
17 longer remembers a certain event, that testimony
18 is inconsistent with a prior statement or
19 statements, and so that is why Detective Lopez was
20 allowed to come in and testify to those things
21 that she was saying on that videotape, and you
22 certainly didn't have any dispute as to what was
23 actually said on the videotape.

24 Finally, pretty close, I'm almost
25 done, just to kind of go back to Freddie Patino
26 and the so-called numerous inconsistencies that

1 defense counsel brings up, and he makes certain
2 assumptions, certain assumptions that, hey,
3 Freddie was given his fair cut. We don't know
4 that.

5 How hard would it be to pocket
6 money in your pocket? An assumption that Freddie
7 knew that the defendant was armed with a gun.
8 Maybe they didn't tell him. He's just the getaway
9 driver, but what he did know was the time the
10 robbery took place, the place where the robbery
11 took place and how it went down and what the
12 different roles were, and those different roles
13 again are seen; Palafox on the phone at the USA
14 Market. Everything fits together.

15 Find the defendant guilty and find
16 all the special allegations true. Thank you for
17 your time, your attention and your patience.

18 THE COURT: All right. Thank you,
19 counsel.

20 Ladies and gentlemen, again, I want
21 to remind you that nothing said by counsel during
22 argument is evidence and that you must decide this
23 case based upon the evidence presented to you at
24 trial.

25 I want to emphasize that certainly
26 nothing that I have said or done during this trial

1 was intended to intimate or suggest what you
2 should find to be the facts or that I believe or
3 disbelieve any witness. If anything I have done
4 or said has seemed to so indicate, you will
5 disregard it and form your own conclusion.

6 The purpose of the court's
7 instructions is to provide you with the applicable
8 law so that you may arrive at a just and lawful
9 verdict. Whether some instructions apply will
10 depend upon what you find to be the facts.
11 Disregard any instruction which applies to facts
12 determined by you not to exist.

13 Do not conclude that because an
14 instruction has been given that I am expressing an
15 opinion as to the facts.

16 Understand that both sides are
17 absolutely entitled to the individual opinion of
18 each and every one of you. As we've already
19 discussed, each and every one of you is an
20 independent and separate judge. Each of you must
21 consider the evidence for the purpose of reaching
22 a verdict if you can do so. Each of you must
23 decide the case for yourself, but should do so
24 only after discussing the evidence and
25 instructions with your fellow jurors.

26 Do not hesitate to change an

1 opinion if you are convinced it is wrong; however,
2 do not decide any question in a particular way
3 because a majority of the jurors or any of them
4 favor that decision. Do not decide any issue in
5 this case by the flip of a coin or by any other
6 chance determination.

7 Obviously, the attitude and conduct
8 of jurors at all times are very critical. It is
9 rarely helpful for a juror at the beginning of
10 deliberations to express an emphatic opinion on
11 the case or to announce a determination to stand
12 for a certain verdict. When one does that at the
13 outset, one's sense of pride may be aroused and
14 one may hesitate to change a decision even when
15 convinced that it is wrong. Remember, you are not
16 partisans. You are not advocates. You are
17 impartial judges of the facts.

18 The integrity of the trial requires
19 that jurors at all times during their
20 deliberations conduct themselves as required by
21 these instructions. Accordingly, should it occur
22 that any juror refuses to deliberate or expresses
23 an intention to disregard the law or to decide the
24 case based on any improper basis, it is the
25 obligation of the other jurors to immediately
26 advise the court of the situation.

1 In your deliberations, do not
2 discuss or consider the subject of penalty or
3 punishment. That subject must not in any way
4 affect your verdict.

5 During deliberations, if you have a
6 question or request, it's very important that your
7 request or question be communicated to me in a
8 very formal way. Any discussions that we have
9 must be very formal. They must be on the record.

10 If you have a question or a
11 request, you'll find a form for that purpose on
12 the blackboard -- it's really a green board; I
13 don't remember, but anyway, it's back in the jury
14 room. Use it for that purpose.

15 Formulate your question or request,
16 have your designee sign it and date it and then
17 have one of your members come to the door and
18 deliver it to the bailiff. The bailiff will
19 deliver it to me.

20 Before I respond, I must consult
21 with counsel, give them a chance to provide input
22 and also provide for them the opportunity to know
23 how I'm going to respond to you before I do
24 respond.

25 Bottom line is that process will
26 take a while. That's fine. It's not the least

1 bit uncommon for jurors to have a request or a
2 question. Just understand that it will take a
3 while to get back to you. That's part of the
4 process; continue deliberating.

5 One other matter that I should
6 mention -- actually, a couple. If you request
7 read back of testimony, and I've already referred
8 to that, that, of course, is fine. Understand
9 that there are a number of possibilities. I'm not
10 going to mention all of them. I'm just going to
11 give you some examples.

12 Let's say you want to hear the
13 entire testimony of two witnesses, that's fine.
14 On that same form, say we'd like to hear the
15 testimony of witnesses X and Y. On the other
16 hand, maybe it's a possibility you just want to
17 hear the testimony of the witness Z as to a
18 particular subject.

19 Understand that Ms. Holway has the
20 ability assisted by the wonders of modern
21 technology to search through her notes
22 electronically and find a particular subject
23 area. So if you don't want to hear the entire
24 testimony but just a portion related to a
25 particular subject, she can quickly go through her
26 notes that way and pull out all the testimony

1 related to that subject, and then you just tell us
2 exactly what you want.

3 Also, I mentioned that if you had a
4 question or request, that you come to the door and
5 deliver it to the bailiff. Understand that the
6 bailiff, Deputy Lacy or some other bailiff, will
7 be in the courtroom at all times while you are
8 deliberating.

9 My next instruction to you --
10 actually, it doesn't look like it was pulled, so
11 I'll just tell you. You may take recesses, of
12 course, and to this point, you really haven't had
13 a choice as to when you get a recess and how long
14 it is for. Now it's totally up to you. You can
15 take a recess whenever you want as a group and, of
16 course, for whatever duration you feel is
17 appropriate.

18 When you do take a recess,
19 remember, you're not to discuss the case. The
20 only time you can discuss the case is when all
21 twelve of the jurors are present in the jury room
22 for the purpose of deliberating.

23 So when you're on a break, you
24 can't talk about the case. Don't talk about it.
25 Go outside, do whatever, but this gets back to the
26 bailiff; don't forget about the bailiff. Don't

1 all go outside, leave the bailiff wondering what's
2 happening because that's when the bailiff gets his
3 or her recess. So have somebody tell the bailiff
4 we're taking a 15-minute break. When you're all
5 ready to resume your deliberations, have somebody
6 come to the door and say we're resuming
7 deliberations because the bailiff has to keep a
8 record of that. All right, thank you.

9 Do not disclose to anyone outside
10 of the jury, not even to me or any member of my
11 staff, either orally or in writing how you may be
12 divided numerically in your balloting as to any
13 issue unless I specifically direct otherwise.

14 Now, ladies and gentlemen, when you
15 go back into the jury room, what -- this is what
16 you're going to get insofar as tangible items
17 relating to the trial. You're going to get all
18 the physical evidence that's been admitted in the
19 case. One of the pieces of evidence, of course,
20 is a videotape. If you want to watch the
21 videotape -- we'll keep the playing device in the
22 courtroom. If you want to watch it, just let the
23 bailiff know you want to watch it, and the bailiff
24 will set it up for you.

25 In addition, you're going to get
26 the jury instructions, as I mentioned, and

1 additionally, you're going to get the forms of
2 verdict. The forms of verdict are very
3 self-explanatory.

4 For example, I've mentioned to you
5 that in Count 1, that -- the forms of verdict
6 aren't going to go in right away. Since we have
7 different dates and to avoid confusion, I think
8 the verdict form should be modified to reflect the
9 date charged for the offense so the jurors can
10 know what Count 1, 2, 3 and 4 --

11 MS. AIELLO: 3 and 4 --

12 THE COURT: -- are alleged.

13 MS. AIELLO: -- because they're alleged
14 to be the same incident, the victim's name is on
15 there but not the date. Do you just want the date
16 on all of them then?

17 THE COURT: Yes, please.

18 MS. AIELLO: Okay.

19 THE COURT: As well as on 3 and 4, then,
20 of course, the names, as well.

21 MS. AIELLO: Okay.

22 THE COURT: And probably the alleged
23 victim should be alleged, too, on the counts.
24 Let's have both, the alleged victims and the
25 dates.

26 MS. AIELLO: And the dates.

1 THE COURT: All right. So these won't
2 be coming in right away, but when they do, you'll
3 see that it's very self-explanatory. There's the
4 title of the case; there's a count. We, the jury,
5 find the defendant, and then there's a line,
6 guilty, not guilty, that's for you, of course, to
7 fill in, whatever your verdict is, as charged in
8 Count 1 of second degree robbery, and then it will
9 reflect the alleged victim and the date so that
10 you'll know exactly what you're addressing. Have
11 your foreperson date the verdict and sign the
12 verdict on your behalf.

13 So in Count 1, we have the charged
14 count, and we have the two lesser possible
15 offenses that you've been instructed about. I'm
16 going to elaborate on that right now.

17 In this case, the defendant has
18 been charged with robbery and grand theft; robbery
19 in Counts 1 through 4, grand theft in Count 5.
20 The foregoing charged crimes of robbery include
21 the lesser offenses of grand theft person and
22 petty theft.

23 You will be given verdict forms
24 encompassing both the charged crime and the lesser
25 included offenses. Since the lesser offenses are
26 included in the greater, you are instructed that

1 if you find the defendant guilty of the greater
2 offense, you should not complete the verdicts on
3 the corresponding lesser offenses, and those
4 verdicts should be returned to the court unsigned
5 by the foreperson.

6 If you find the defendant not
7 guilty of the charged offense, then you need to
8 complete the verdict on the lesser included
9 offenses by determining whether the defendant is
10 not -- is guilty or not guilty of the lesser
11 included crimes, and the corresponding verdicts
12 should be completed and returned to the court
13 signed by the foreperson.

14 I hope you understand that, but let
15 me just talk about it in another way.

16 In Count 1 -- and by the various
17 scenarios that I'm going to be talking about, I'm
18 not suggesting in any way how I think you should
19 find the case. It just a matter of analysis.

20 If, for example, you found
21 Mr. Thatcher guilty of the charged offense,
22 robbery, then you'd write guilty, your foreperson
23 would date it and sign it.

24 Now, there -- there is a special
25 allegation alleged, as well, and if you found him
26 guilty, then you'd address the issue of the

1 special allegation. That has to do with personal
2 use of a firearm. So you'd address the second
3 issue, as well.

4 On the other hand, if you find
5 Mr. Thatcher not guilty of the crime of robbery,
6 you'd write in not guilty, not address the special
7 allegation, have your foreperson date and sign the
8 verdict form, and then you'd consider the lesser
9 offense of grand theft person and -- in other
10 words, the court cannot accept a verdict as to a
11 lesser offense unless there's been an acquittal of
12 the greater offense. That has been explained to
13 you previously. I don't feel any further
14 instructions would be helpful to you.

15 Are there any other instructions
16 related to that issue, counsel, you want me to
17 provide to the jury?

18 MR. STOREY: No, your Honor.

19 MS. AIELLO: No.

20 THE COURT: All right.

21 All right. Now, as to the
22 alternates, this trial went a little bit faster
23 than anticipated. We don't need you now to
24 deliberate. I'm going to read one more
25 instruction. I'd like you to stay for that
26 because there's certainly the possibility that you

1 might be substituted in to deliberate,
2 nevertheless.

3 I want to tell you that it's not
4 required that either of you ladies stay and wait
5 to see if you're going to be needed. You will be
6 allowed to go back to your work or wherever you
7 normally are during these hours. You are still
8 under an obligation to not talk about the case.
9 Do not form or express any opinion on any issue
10 until you actually deliberate.

11 If for some reason one or more of
12 the jurors is unable to continue with
13 deliberations -- let's say one was, what we would
14 do is we'd put your two names in the jury box and
15 at random we would pull one of them and then call
16 you and, of course, give you time to come back to
17 the courtroom and then you'd go in and start
18 deliberating.

19 Don't worry, you're not going to be
20 engaged in Thanksgiving festivities and wonder
21 whether or not that trial is over yet. It will be
22 completed by then, I'm sure.

23 The bailiff will call you. If
24 you're needed, the bailiff will call you. If your
25 services are complete and your services are no
26 longer needed, the bailiff will call you, as

1 well.

2 If we don't see you again, I want
3 to thank you very much. I know that it's, again,
4 been less time than anticipated, but,
5 nevertheless, it's been significant time. You
6 have helped us. You may still help us. We have
7 the benefit of knowing that we will have a jury
8 deliberate on this case.

9 So if we don't see you again, thank
10 you very much. The bailiff calls you and tells
11 you that your services are no longer needed,
12 you're free to talk about your experience if you
13 want, and if you don't want to talk about it,
14 that, too, is your choice. So again, please stay
15 for one more instruction. Please provide the
16 bailiff with a telephone number where we can reach
17 you between the hours of 8:00 and 5:00, and you
18 will be called one way or another, and again,
19 thank you very much.

20 I -- I understand -- I've never had
21 the experience and undoubtedly won't -- well, I
22 suppose it's possible some years from now to be a
23 juror. I certainly have not had that experience.
24 We've talked about the sacrifice involved and the
25 work involved in being a juror. I think it's
26 certainly at least as hard for an alternate and,

1 in some sense, even though you don't deliberate,
2 it's difficult because you know your services may
3 not actually be needed insofar as deliberation,
4 and yet you pay as close attention, each of you
5 has, as the other jurors. So all's I'm trying to
6 say in a very long fashion is thank you very
7 much. We really appreciate it.

8 All right. Last instruction.
9 Ladies and gentlemen, you shall now retire and
10 select one of your number to act as foreperson.
11 He or she will preside over your deliberations.

12 In order to reach verdicts, all
13 twelve jurors must agree to the decision and to
14 any finding you have been instructed to consider
15 in your verdict. As soon as you have agreed upon
16 a verdict so that when polled, each may state
17 truthfully that the verdict expresses his or her
18 vote, have it dated and signed. When you complete
19 your deliberations, return with the verdict forms
20 to this courtroom. Return any unsigned verdict
21 forms.

22 All right. Ladies and gentlemen,
23 thank you very much. You may begin deliberating.
24 You may take your notebooks in. The evidence will
25 be coming in, the jury instructions will be coming
26 in, and shortly, we'll have the verdict forms for

1 you, as well. Thank you very much.

2 (Whereupon, the jurors were excused
3 from the courtroom, and the following proceedings
4 were had outside the presence of the jury, to
5 wit:)

6 THE COURT: All right. We'll have the
7 bailiff sworn.

8 (Whereupon, the bailiff was sworn
9 in by the clerk.)

10 THE COURT: Mr. Storey, do you have
11 anything else?

12 MR. STOREY: I think we should probably
13 make a record in regards to Exhibit Number 20.

14 THE COURT: Yes.

15 MR. STOREY: That that was modified and
16 20-A was substituted. 20 remains a Court Exhibit,
17 and I believe in regards to the tape, we need to
18 do the same thing.

19 THE COURT: Yes.

20 MR. STOREY: Which is --

21 MS. AIELLO: 14.

22 MR. STOREY: -- Exhibit Number 14,
23 probably have it 14-A.

24 THE COURT: All right. Do we have
25 the --

26 MS. AIELLO: Whose tape we going to

1 use? My tape has two robberies on it; one that
2 was not charged. So I don't know that we can play
3 my tape.

4 MR. STOREY: Mine only has one, but it's
5 in Tulare.

6 MS. AIELLO: What I may suggest --

7 THE COURT: Yes.

8 MS. AIELLO: -- is -- I don't know if
9 you want to instruct them about my comment. I
10 mean, I kinda feel like -- you did say that
11 closing statements are not evidence, but, I mean,
12 I made that statement.

13 If they want to review the tape --

14 THE COURT: I'm sure they will -- I
15 would expect they would.

16 MS. AIELLO: -- then you can instruct
17 them not to rewind the tape. It is cued up where
18 it was when it was played, or if they want to
19 watch it, they have to do it in open court while
20 we watch it.

21 THE COURT: Don't you have a device to
22 make a -- to record another tape?

23 MS. AIELLO: Yes. I would have to take
24 probably this one.

25 THE COURT: Is it here in the building?

26 MS. AIELLO: Yes, yes.

1 THE COURT: All right. All right. I
2 will authorize release of that tape, and unless
3 you have some objection, Mr. Storey will go with
4 you and -- at least to your office, unless
5 Mr. Storey just wants to let her take it from
6 evidence and bring it back. We need to get it
7 done right away.

8 MR. STOREY: I believe -- I believe --

9 THE COURT: You'll have an opportunity
10 to review it before it actually goes in.

11 MR. STOREY: I believe the error was
12 totally accidental.

13 THE COURT: Yes.

14 MR. STOREY: And I believe that
15 Ms. Aiello is totally forthright, and I believe
16 that the copy would be as she represented it.

17 MS. AIELLO: Well, thank you. I
18 appreciate that, Mr. Storey.

19 THE COURT: Okay.

20 MS. AIELLO: Okay.

21 THE COURT: So what's -- what's the
22 agreed upon procedure then; it should be on the
23 record?

24 MR. STOREY: She can take the tape, go
25 down -- it's cued up. She can make the duplicate,
26 bring it back up.

1 THE COURT: Okay. And then give it to
2 the clerk and the clerk will --

3 MR. STOREY: Mark it 14-A, and that will
4 be substituted.

5 THE COURT: All right. Ms. Aiello, is
6 that agreeable?

7 MS. AIELLO: That is agreeable. I -- I
8 do feel like the jury should be instructed that
9 that portion that I commented is not in evidence
10 so that they don't sit there and rewind it and go
11 what is she talking about.

12 THE COURT: Well --

13 MR. STOREY: I'd have no objection to an
14 instruction from the court that they disregard the
15 prosecutor's comments.

16 THE COURT: That remedy wasn't
17 requested, so I --

18 MR. STOREY: I'm sorry, the jury is not
19 here; I was making a joke.

20 THE COURT: I know, I know.

21 MS. AIELLO: It went over my head.

22 THE COURT: All right. So you'll take
23 care of the verdict forms and --

24 MS. AIELLO: Yes.

25 THE COURT: All right. Thank you very
26 much.

1 And, Mr. Storey, I don't think it
2 would be necessary for her to change the
3 lessers --

4 MR. STOREY: No.

5 THE COURT: -- because --

6 MS. AIELLO: Okay.

7 THE COURT: -- on the charged offense,
8 it will set forth a date and a victim, and that
9 will make it clear. Agreed?

10 MR. STOREY: Yes.

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

13 (Whereupon, a recess was taken at
14 2:44 p.m.)

15 (Whereupon, the following
16 proceedings were had in open court following the
17 recess, outside the presence of the jury, to wit,
18 at 4:24 p.m.): 4.

19 THE COURT: All right. The jury has
20 apparently reached a verdict, but we have a couple
21 matters to put on the record, if counsel will be
22 seated.

23 All right. First of all, there was
24 a question or, probably more properly, a comment
25 presented to the court. Counsel was present, we
26 just didn't put this on the record.

1 The communications that Count 2, it
2 states we, the jury, find the defendant, blank, as
3 charged in Count 8, and the foreperson apparently
4 put "I believe it should say Count 2."

5 The court consulted with counsel.
6 Counsel agreed that the court could simply
7 eliminate the 8, write in 2 and that the
8 document -- the verdict form, that is, could go
9 right back into the jury, and it was agreed that
10 what occurred would go -- could go on the record
11 later. I'm doing that now.

12 Comment by counsel?

13 MR. STOREY: That's correct, your Honor.

14 MS. AIELLO: Submit it.

15 THE COURT: All right. Is there
16 anything else that we need to put on the record?

17 MS. AIELLO: There was one thing that I
18 wanted to put on the record.

19 Yesterday, the People called
20 Detective Galvez to the stand. Defense counsel
21 indicated at that point in time that he did not
22 have her report. We went back, I checked my
23 records, and I indicated to him that I had an
24 acknowledgment of receipt for that report. He
25 indicated to me that once he started reading the
26 report, he had previously received it. So since

1 that issue was on the record, I wanted to clarify
2 it.

3 MR. STOREY: That's correct, your Honor.

4 THE COURT: All right. There -- there
5 is another matter. Of course, I have no idea what
6 the verdict is -- verdicts are going to be. There
7 are two possibilities, of course, that
8 Mr. Thatcher is acquitted, or if Mr. Thatcher is
9 convicted, then we have the bifurcated issues
10 relating to the prior convictions alleged in the
11 information.

12 There are priors alleged, three --
13 two strike priors alleged. There are priors
14 alleged pursuant to Penal Code Section 667.5(b),
15 and there are -- there is another allegation
16 pursuant to Section 667(a)(1), and the question
17 is: If Mr. Thatcher is convicted of any of the
18 counts wherein there is an issue relating to
19 priors, whether -- what type of trial he wants on
20 that issue.

21 Mr. Storey?

22 MR. STOREY: Your Honor, I discussed
23 with Mr. Thatcher. He is prepared at this time to
24 waive a jury in regards to that matter -- or those
25 matters and proceed with a court trial.

26 THE COURT: All right. Are the People

1 willing to waive if that's what Mr. Thatcher,
2 indeed, chooses to do?

3 MS. AIELLO: Yes, your Honor.

4 THE COURT: All right. Mr. Thatcher,
5 there are priors alleged in each of the counts
6 against you. Obviously, if you are convicted, the
7 priors have very serious ramifications. They are
8 strike priors. A conviction as to any of the
9 counts would essentially be a third strike.

10 There are consecutive sentences,
11 too, that depending upon whether or not there is a
12 conviction and, if so, the number of convictions,
13 that wherein there was sentencing issues relating
14 to consecutive sentences, as well.

15 So the strike allegations are very
16 important should you be convicted of any count; do
17 you understand that?

18 THE DEFENDANT: Yeah.

19 THE COURT: Have you talked with your
20 attorney about the ramif -- possible ramifications
21 if you are convicted as to the allegations
22 relating to the prior felonies?

23 THE DEFENDANT: Yes.

24 THE COURT: All right. You understand
25 that you have the absolute right to a jury trial
26 on whether or not those allegations are true.

1 THE DEFENDANT: Yes.

2 THE COURT: Do you understand that?

3 THE DEFENDANT: Yes.

4 THE COURT: We have a jury, and it's --
5 if you are convicted, then, of course, we have a
6 jury ready to hear that; do you understand that?

7 THE DEFENDANT: Yes.

8 THE COURT: You have the right to a jury
9 trial. You also -- if you wish, your counsel
10 agrees and if the District Attorney waives, then
11 you have the right to a court trial on the issue
12 of the priors --

13 THE DEFENDANT: Yes.

14 THE COURT: -- do you understand that?

15 Now, Mr. Storey has indicated after
16 talking with you that he believes that you're
17 going to waive your right to a jury trial on the
18 issue of the priors.

19 THE DEFENDANT: Yes.

20 THE COURT: Are you?

21 THE DEFENDANT: Yes.

22 THE COURT: All right. As to all
23 counts?

24 THE DEFENDANT: Yes.

25 THE COURT: And all special
26 allegations?

1 THE DEFENDANT: Yes.

2 THE COURT: Relating to the prior
3 convictions?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you understand your right
6 to a jury trial?

7 THE DEFENDANT: Yes.

8 THE COURT: Do you have any questions at
9 all about your right to a jury trial as to the
10 issues -- possible issues relating to the priors?

11 THE DEFENDANT: No.

12 THE COURT: All right. And I should
13 caution you before you actually waive, you should
14 do that, having in mind the worst case scenario,
15 that would be that you were convicted of one or
16 more of the crimes charged.

17 Have you taken that into
18 consideration?

19 THE DEFENDANT: Yes.

20 THE COURT: All right. Do you wish to
21 talk to Mr. Storey at all relating to this
22 matter?

23 THE DEFENDANT: Nah.

24 THE COURT: All right. Do you give up
25 your right to a jury trial on the issue of the
26 priors as to any count in which you're found

1 guilty, if any?

2 THE DEFENDANT: Yes.

3 THE COURT: And as to all counts if,
4 indeed, it is all counts?

5 THE DEFENDANT: Yes.

6 THE COURT: All right. Mr. Storey, do
7 you concur?

8 MR. STOREY: Yes, your Honor.

9 THE COURT: All right. Ms. Aiello?

10 MS. AIELLO: People would waive jury
11 trial.

12 THE COURT: Do you have any admonitions
13 or anything to Mr. Thatcher?

14 MS. AIELLO: No. I believe the court
15 has indicated his potential penalty,
16 seriousness --

17 THE COURT: Well, I haven't discussed
18 penalties. It's the issue to the right -- as to
19 the trier of fact.

20 MS. AIELLO: No. I think the court has
21 taken a sufficient waiver.

22 THE COURT: All right, very well then.
23 I find there's an oral, knowing, voluntary,
24 understanding, explicit waiver by Mr. Thatcher as
25 to his right to a jury trial as to the Three
26 Strikes allegation, the allegations under

1 667.5(b), as well as the allegations under
2 667(a).

3 Anything else, Mr. Thatcher?

4 THE DEFENDANT: No.

5 THE COURT: All right.

6 All right. Is there anything
7 else?

8 MR. STOREY: Not at this time, your
9 Honor.

10 THE COURT: All right. Let's bring in
11 the jury.

12 (Whereupon, the following
13 proceedings were had in front of the jury, to
14 wit:)

15 THE COURT: Good afternoon, ladies and
16 gentlemen. I understand that you have reached
17 verdicts?

18 A JUROR: We have.

19 THE COURT: All right. Would you
20 deliver your forms of verdict to the bailiff,
21 please.

22 All right. The verdicts appear to
23 be in order. The clerk will read the verdicts,
24 please.

25 THE CLERK: The People of the State of
26 California versus David Charles Thatcher.

1 Verdict, Count 1.

2 We, the jury, find the defendant
3 guilty as charged in Count 1 of the information of
4 second degree robbery, victim FO, date 6/18/01, a
5 violation of Penal Code Section 211.

6 We, the jury, further find to be
7 true the special allegation that defendant
8 personally used a firearm within the meaning of
9 Penal Code Section 12022.53(b).

10 Dated November 8th, 2001,
11 foreperson.

12 Title of court and cause. Verdict,
13 Count 2.

14 We, the jury, find the defendant
15 guilty as charged in Count 2 of the information of
16 second degree robbery, victim DL, date 6/27/01, in
17 violation of Penal Code Section 211.

18 We, the jury, further find to be
19 true the special allegation that defendant
20 personally used a deadly and dangerous weapon, to
21 wit, knife, said use not being an element of the
22 above offense within the meaning of Penal Code
23 Section 12022(b)(1) and causing the above offense
24 to be a serious felony within the meaning of Penal
25 Code Section 1192.7(c)(23).

26 Dated November 8th, 2001,

1 foreperson.

2 Title of court and cause. Verdict,
3 Count 3.

4 We, the jury, find the defendant
5 guilty as charged in Count 3 of the information of
6 second degree robbery, victim MA, date 6/30/01, a
7 violation of Penal Code Section 211.

8 We, the jury, further find to be
9 true the special allegation that defendant
10 personally used a firearm within the meaning of
11 Penal Code Section 12022.53(b). Dated November
12 8th, 2001. Foreperson.

13 Title of court and cause. Verdict,
14 Count 4.

15 We, the jury, find the defendant
16 guilty as charged in Count 4 of the information of
17 second degree robbery, victim DB, date 6/30/01 in
18 violation of Penal Code Section 211.

19 We, the jury, further find to be
20 true the special allegation that defendant
21 personally used a firearm within the meaning of
22 Penal Code Section 12022.53(b).

23 Dated November 8th, 2001,
24 foreperson.

25 Title of court and cause, verdict,
26 Count 5.

1 We, the jury, find the defendant
2 guilty as charged in Count 5 of the information of
3 grand theft firearm, victim MA, date 6/30/01 in
4 violation of Penal Code Section 487(d).

5 Dated November 8th, 2001,
6 foreperson.

7 THE COURT: Ladies and gentlemen, are
8 these your verdicts?

9 THE JURY PANEL: Yes.

10 THE COURT: Mr. Storey, do you wish to
11 have the jury polled?

12 MR. STOREY: I'd ask that they be polled
13 one time through as to all counts and
14 enhancements.

15 THE COURT: Not as to each, but as to
16 all?

17 MR. STOREY: Yes.

18 THE COURT: And the -- as to the
19 findings?

20 MR. STOREY: Yes.

21 THE COURT: All right.

22 THE CLERK: As to the verdicts I have
23 just read, is this your verdict, juror number 1?

24 A JUROR: Yes.

25 THE CLERK: Is this your verdict, sir?

26 A JUROR: Yes.

1 THE COURT: Are these your verdicts, say
2 yes.

3 THE CLERK: Are these your verdicts,
4 juror number 2?

5 A JUROR: Yes.

6 THE COURT: Are these your verdicts,
7 juror number 3?

8 A JUROR: Yes.

9 THE CLERK: Juror number 4, are these
10 your verdicts?

11 A JUROR: Yes.

12 THE CLERK: Are these your verdicts,
13 juror number 5?

14 A JUROR: Yes.

15 THE CLERK: Are these your verdicts,
16 juror number 6?

17 A JUROR: Yes.

18 THE CLERK: Are these your verdicts,
19 juror number 7?

20 A JUROR: Yes.

21 THE CLERK: Are these your verdicts,
22 juror number 8?

23 A JUROR: Yes.

24 THE CLERK: Are these your verdicts,
25 juror Number 9?

26 A JUROR: Yes.

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(559 733-6561 EXT. 138)

1 THE CLERK: Are these your verdicts,
2 juror number 10?

3 A JUROR: Yes.

4 THE CLERK: Are these your verdicts,
5 juror number 11?

6 A JUROR: Yes.

7 THE CLERK: Are these your verdicts,
8 juror number 12?

9 A JUROR: Yes.

10 THE COURT: All right. Anything else,
11 counsel, as to the verdicts?

12 MR. STOREY: No, your Honor.

13 MS. AIELLO: No, your Honor.

14 THE COURT: All right, very well. The
15 clerk will record and enter the verdicts.

16 Ladies and gentlemen, this does
17 complete your service in the case. On behalf of
18 everyone involved in the case, I want to thank you
19 for your work. You've already recognized that
20 it's not easy, that it does involve sacrifice.

21 There's really nothing I can
22 adequately say to thank you. So I'm going to
23 simply say thank you very much for your service.
24 You have by your service here preserved in a real
25 way your right to have a jury trial, your family's
26 right to have a jury trial, in fact, all of our

1 right to have a jury trial. So thank you for your
2 service.

3 Before I discharge you, I want you
4 to understand that you have the right to talk
5 about this case and your service in any and all
6 respects should you choose to. On the other hand,
7 if you don't choose to talk about it, that is your
8 right, as well. That's entirely your decision.

9 I really don't expect that anyone
10 would -- associated with the case would contact
11 you in any way. As a matter of fact, that --
12 release of your addresses would require a noticed
13 motion to the court, as well as prior notice to
14 you. So your privacy rights are protected in that
15 sense.

16 If for any reason you're in any way
17 made to feel uncomfortable or require the
18 assistance of the court, again, I real -- there's
19 no reason for me to suspect that that would be the
20 case, but if that should happen, please call us
21 right away, and we will assist you. Again, I have
22 no reason to think that that will occur.

23 Ladies and gentlemen, you are
24 discharged. I ask that everyone in the courtroom
25 stand out of respect for these jurors. Thank
26 you. You are excused.

1 (Whereupon, the jurors were excused
2 from the courtroom, and the following proceedings
3 were had outside the presence of the jury, to
4 wit:)

5 THE COURT: All right. We will set the
6 hearing on the bifurcated trial tomorrow morning
7 at nine o'clock -- actually, we'll make that
8 9:30. 9:30, Mr. Thatcher, you're ordered to come
9 back tomorrow morning at 9:30. Thank you.

10 MS. AIELLO: Thank you.

11 MR. STOREY: Your Honor?

12 THE COURT: Yes.

13 MR. STOREY: May we approach just for a
14 moment?

15 THE COURT: Certainly.

16 (Whereupon, an off-the-record bench
17 discussion was had.)

18 THE COURT: All right. Mr. Thatcher,
19 apparently, you would prefer to proceed this
20 afternoon rather than having to come back tomorrow
21 morning?

22 THE DEFENDANT: Yes.

23 THE COURT: All right, very well. Is
24 everyone ready to proceed?

25 MR. STOREY: Yes, your Honor.

26 MS. AIELLO: Your Honor, the People

1 would ask that the 969(b) packet be marked, I
2 guess it would be next in line, People's Exhibit
3 21 for identification.

4 THE COURT: Okay.

5 MS. AIELLO: And we would submit on
6 that.

7 THE COURT: All right. Mr. Storey?

8 MR. STOREY: We would have no evidence,
9 your Honor.

10 THE COURT: Do you have any objection to
11 that coming in?

12 MR. STOREY: No, your Honor.

13 THE COURT: It's received.

14 (Whereupon, People's Exhibit 2 was
15 marked for identification.)

16 (Whereupon, People's Exhibit 21 was
17 received in evidence.)

18 THE COURT: All right. I have reviewed
19 the evidence. Is there any argument?

20 MS. AIELLO: No, your Honor.

21 MR. STOREY: No, your Honor.

22 THE COURT: All right. Based upon the
23 evidence received, I find beyond a reasonable
24 doubt that it is true that pursuant to Penal Code
25 Section 1170.12(c)(2)(a) that Mr. Thatcher, prior
26 to the commission of the offense charged, did

1 suffer a conviction for the following crimes:
2 January 15th, 1998, in this county, case number
3 37306, conviction for the crime of robbery, and
4 that he suffered a conviction the same date, case
5 number 37306, the conviction was for robbery.

6 I further find that -- beyond a
7 reasonable doubt that it is true that Mr. Thatcher
8 suffered the following prior convictions pursuant
9 to Penal Code Section 667.5(b): He was convicted
10 in this court on January 5th, 1998, in case number
11 37306 of two counts of robbery.

12 I further find that -- beyond a
13 reasonable doubt that a term was served for that
14 offense; that that term was in state prison, and
15 Mr. Thatcher did not remain free of prison custody
16 for and did commit an offense resulting in a
17 felony conviction during a period and within five
18 years subsequent to the conclusion of that term.

19 I further find that -- beyond a
20 reasonable doubt pursuant to Penal Code Section
21 667(a)(1) defendant suffered a conviction for two
22 counts of robbery in case number 37306 in this
23 court, in this county, on January 15, 1998.

24 I make the same findings beyond a
25 reasonable doubt in Count 8.

26 I make the same findings beyond a

1 reasonable doubt as to Count 13.

2 I make the same findings beyond a
3 reasonable doubt as to Count 14.

4 I make the same findings beyond a
5 reasonable doubt as to Count 15.

6 All right. Mr. Thatcher, this
7 matter is referred to the probation department for
8 a report and recommendation. You'll come back to
9 court in four weeks. That's December the 4th, a
10 Tuesday, of this year at 8:30 in this department
11 for sentencing. You're ordered to appear that
12 date.

13 Any bail that's been set is set
14 aside. You're held in custody on no bail. You're
15 remanded.

16 (Whereupon, the proceedings were
17 concluded at 4:47 p.m.)
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STATE OF CALIFORNIA)
) ss.
COUNTY OF TULARE)

I, CINDY M. HOLWAY, an Official
Certified Shorthand Reporter of the Superior Court
of the State of California, do hereby certify:

That the foregoing action entitled
THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,
versus DAVID C. THATCHER, DEFENDANT, was taken
down in stenographic shorthand writing and
thereafter transcribed into typewriting, pages 1
through 574, and that the foregoing transcript
constitutes a full, true, and correct transcript
of said proceedings.

Dated this 16th day of February,
2002.


CINDY M. HOLWAY, CSR 4371
OFFICIAL, RPR & CM

CINDY M. HOLWAY, CSR 4371
OFFICIAL COURT REPORTER - DEPARTMENT 4
(559 733-6561 EXT. 138

1 COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 FIFTH APPELLATE DISTRICT

3 THE PEOPLE OF THE STATE)
4 OF CALIFORNIA,)

5 Plaintiff,)

6 vs.)

7 DAVID C. THATCHER,)

8 Defendant.)
_____)

TCSC NO. 77196

5TH NO. _____

SENTENCING

9 APPEAL FROM THE SUPERIOR COURT OF TULARE COUNTY

10 HONORABLE GERALD F. SEVIER, JUDGE PRESIDING

11 COPY

12 REPORTER'S TRANSCRIPT ON APPEAL

13 TUESDAY, DECEMBER 4, 2001

14 TUESDAY, DECEMBER 18, 2001

15 PAGES 1 THROUGH 18

16 APPEARANCES:

17 For Plaintiff/Respondent: WILLIAM LOCKYER
18 ATTORNEY GENERAL
19 1515 "K" Street
20 Sacramento, CA 95814

21 For Defendant/Appellant:

22 REPORTED BY: CINDY M. HOLWAY, CSR #4371
23 OFFICIAL, RPR, CP & CM
24

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF TULARE
3 DEPARTMENT 4 HONORABLE GERALD F. SEVIER, JUDGE
4 THE PEOPLE OF THE STATE)
OF CALIFORNIA,)
5)
Plaintiff,)
6)
vs.) NO. 77196
7)
DAVID C. THATCHER,) SENTENCING
8)
Defendant.)
9 _____)

10 Visalia, California Tuesday, December 4, 2001
11 Tuesday, December 18, 2001
12

13 REPORTER'S TRANSCRIPT
14 (Pages 1 through 18)
15

16 APPEARANCES:

17 For the Plaintiff: PHILLIP J. CLINE
DISTRICT ATTORNEY
18 BY: MELINDA AIELLO, DEPUTY
County Civic Center, Rm 224
19 Visalia, CA 93291

20 For the Defendant: PAUL R. STOREY
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21 225 North M Street
Tulare, CA 93274
22

23
24
25 REPORTED BY: CINDY M. HOLWAY, CSR #4371
OFFICIAL & CM
26

MORNING SESSION

Tuesday, December 4, 2001

(Whereupon, the following
proceedings were had in open court, to wit, at
8:30 a.m.:)

THE COURT: All right. David Thatcher?

MR. STOREY: Paul Storey appearing for
Mr. Thatcher who is present in court in custody,
your Honor.

MS. AIELLO: Melinda Aiello for the
People.

THE COURT: All right. Mr. Thatcher is
present with Mr. Storey, his counsel.

MR. STOREY: Your Honor, my --

THE COURT: Mr. Storey?

MR. STOREY: -- my client has just
indicated that he wishes to have the sentencing
postponed for 30 days. He has indicated to me
there are family problems. I don't know what
those family problems are at this moment. I'd
like to trail this for a few minutes so I can
discuss the matter with him if I may.

THE COURT: All right, that's fine.

(Whereupon, the proceedings went
off the record.)

THE COURT: Thatcher?

1 MR. STOREY: Your Honor, Mr. Thatcher is
2 asking the sentencing be put off for 30 days.
3 Part of this has to do with logistical problems
4 and family problems.

5 He hasn't been able to see his --
6 members of his family. He is anticipating that
7 the sentence may be for the rest of his life, most
8 likely. He has previously been in prison. When
9 he was in prison previously, he was in Santa
10 Nella. Now, that is not the Santa Nella over
11 where Anderson's Split Pea Soup is. It's one down
12 near Calipatria, California, which is close to the
13 Mexican border. I think it's about 30 miles from
14 the Mexican border.

15 He was there previously. On that
16 occasion, in the four years that he was there, he
17 did not have the opportunity to visit with his
18 family.

19 He's asking for this continuance
20 today to try to provide his family with the
21 opportunity to come out and visit him. His father
22 who is present in court today, they won't allow
23 him visitation because he doesn't have a picture
24 I.D. He has applied to the California Department
25 of Motor Vehicles. He indicates that he should be
26 receiving that fairly shortly and -- but he

1 doesn't know when, and he would like to be able to
2 come out and see Mr. Thatcher before he goes.

3 His mother is located in Marysville
4 up near Sacramento. She has livestock. She has
5 difficulty making arrangements to have somebody
6 take care of the livestock and get down here. For
7 this reason, he is asking that the sentencing be
8 put off for 30 days in order to allow them to have
9 a visit with him.

10 I asked Mr. Thatcher. He thought
11 it was approximately a week after sentencing that
12 he would be transported to Department of
13 Corrections. I inquired of Mr. Lacy. He believes
14 that it's taking approximately three weeks at this
15 time. I was thinking if he was sentenced, it
16 might be he could go ahead and be sentenced and
17 they still have the time in order to meet with
18 'em. I don't know that that is true, but that's
19 the basis for the request, and it is to try to
20 have a visit with his family.

21 I don't think there's any adverse
22 consequences to the People by waiting that
23 additional 30 days.

24 THE COURT: Well, it really isn't good
25 cause.

26 MR. STOREY: All I can do is present it

1 to the court.

2 THE COURT: I understand.

3 MR. STOREY: It is my client's request,
4 he is willing to waive time and put the sentencing
5 over. He does have a reason for it. I think it's
6 a logical reason. It's a very personal reason.

7 We would ask the court to grant his
8 request for a continuance for that 30 days.

9 MS. AIELLO: Your Honor, the People's
10 preference would be to proceed with the sentencing
11 today because we do agree with the court that this
12 does not appear to be good cause, and that will be
13 my only comment.

14 UNIDENTIFIED MAN: Your Honor, may I say
15 something?

16 THE COURT: No, sir, I'm sorry.

17 MR. STOREY: That was Mr. Thatcher's
18 father.

19 THE COURT: I assumed that.

20 I'm willing to put it over for a
21 week, but no longer.

22 MR. STOREY: We appreciate that, your
23 Honor, and all we can do is try to make the
24 arrangements.

25 THE COURT: All right. Mr. Thatcher,
26 you have the right to be sentenced today; do you

1 understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: You're asking that this be
4 put over a week?

5 THE DEFENDANT: Yes.

6 THE COURT: Well, actually, you're
7 asking longer.

8 All right. I'll continue it to
9 December the 12th at 8:30 -- wait a minute.

10 MR. STOREY: Thank you, your Honor.

11 THE COURT: Just a moment. December
12 11th at 8:30.

13 Mr. Thatcher, you're ordered to be
14 here that day.

15 MR. STOREY: Your Honor, could -- this
16 is just my request. My calendar, I would prefer
17 it to be on the 12th.

18 THE COURT: I may not be here the 12th.

19 MR. STOREY: Then I'll be here on the
20 11th.

21 THE COURT: Okay. I'm sorry,
22 Mr. Storey. Thank you.

23 MS. AIELLO: Thank you.

24 (Whereupon, the proceedings were
25 concluded.)

26

MORNING SESSION

Wednesday, December 12, 2001

(Whereupon, the following proceedings were had in open court, to wit, at 8:30 a.m.:)

THE COURT: All right. People versus Thatcher? All right. This is the matter of People versus David Charles Thatcher.

Mr. Thatcher is personally present with his attorney, Mr. Storey. Ms. Aiello is here representing the People.

I have read and considered the report and recommendation of the probation officer. This matter has been continued once.

Is there any legal cause why sentence cannot be pronounced?

MR. STOREY: No, your Honor.

THE COURT: Do you waive arraignment for judgment?

MR. STOREY: So waived.

THE COURT: All right, proceed.

MR. STOREY: Your Honor, there are a couple of requests that we would have of the court, and part of it is looking at my client's age. Potentially, he's a young man, 22, 23.

THE DEFENDANT: Just turned 21.

1 MR. STOREY: Excuse me, I mis --

2 THE COURT: He is a young man, he's 21.

3 MR. STOREY: And what we're talking
4 about here is someone that hasn't gained all his
5 maturity. He has been in trouble, and whether or
6 not the court is going to impose a sentence that
7 would not only punish him, it also punishes the
8 public.

9 There is no chance of redemption if
10 the court follows the recommendation by the
11 People, and there are several alternatives that
12 the court could apply which would result in a more
13 equitable sentence and one that fits with the
14 ideas that people can be rehabilitated. They can
15 do things in their life to change.

16 There isn't any sense in keeping
17 Mr. Thatcher in prison after he's 40, 50, 60 years
18 old. It doesn't do us -- doesn't do society any
19 good. It doesn't do him any good. I think it
20 would be better to impose a sentence that could
21 give him some chance of some day seeing the light
22 of day.

23 Part of the reason here is that I
24 would point out there is no hurt, there is no
25 injury in regards to the individuals that were
26 victims here.

1 There was one person that said that
2 he was a victim, and he thanked Mr. Thatcher for
3 not imposing any violence. Yes, there are
4 threats. Threats are necessary in order to have a
5 robbery, but that's all that occurred. No one is
6 struck, no one is injured by Mr. Thatcher.

7 I would point out that the two
8 strikes that Mr. Thatcher has both were one
9 proceeding. Yes, there happened to be two victims
10 there, and that's why there are two separate
11 counts, but it is one proceeding. On that
12 occasion, he was sent to prison on that occasion.
13 It's alleged here as the prior violent felony.

14 It's a single prior violent felony
15 because it was just one proceeding, and we would
16 ask the court since it was one proceeding to
17 strike a strike. That could lead to a sentence
18 which would be -- and I'm just assuming for the
19 court, if this were done not on a three-strike
20 basis, but a two-strike basis, the court could
21 take the base term as Count 1. It's a 2, 3, 5
22 felony. You double that to make it 10. Then
23 there's the use of a firearm which is an
24 additional 10 to make it 20, plus the prior
25 serious felony to make it 25. You also have an
26 additional year for the prior prison where he has

1 been in prison previously on this case for
2 possibly 26 years as to Count 1. That by itself
3 would probably be sufficient in this particular
4 case and probably justified because there were
5 separate instances, even though this could be one
6 course of conduct because we're talking about a
7 period of, I believe, ten or eleven days.

8 Count 2 is also a 2, 3, 5 robbery.
9 If you doubled the midterm, took one third of it,
10 that would be 2 years. There's also an
11 indication -- there is also a prior -- excuse me,
12 not a prior, but a principal armed -- no, this is
13 an arming with a knife, I believe. The
14 enhancement there, because this is a violent
15 felony, it would be one-third that enhancement or
16 add an additional 4 months or 2 years, 4 months on
17 Count 2.

18 On Count 3, 4 and 5, those were all
19 in the same market. At that point, my client was
20 armed; that that was the finding by the jury.
21 They said that it wasn't a BB gun, but they felt
22 it was a firearm.

23 On that case, we would ask the
24 court to impose the midterm doubled for the 6
25 years, one-third of that, and then it would also
26 be one-third of that arming with the firearm, 3

1 years, 4 months. That gives a total of 32 years,
2 8 months if the court strikes the strike.

3 Additional terms could be added in
4 regards to Count 4 and Count 5 under that same
5 theory which would allow still a sentence of about
6 40 years.

7 There is a second alternative in
8 regards to if the court is inclined not to strike
9 the strike.

10 On Count 1, it's 25 years to life.
11 There is also a ten-year enhancement for the gun
12 use. There's a five-year enhancement for the
13 prior serious felony and a prior -- and a one-year
14 prior prison for a total of 41 years.

15 That, again, is more than
16 sufficient in this particular case, and because it
17 was during one short period of time which has to
18 do with drug use of the individuals that were
19 involved, and it's one course of conduct, the
20 court could impose a term of 41 to life, and we
21 would ask the court to consider that.

22 My preference would be to have the
23 court strike the strike and impose the 32 years, 8
24 months.

25 THE COURT: Well, I'll certainly hear
26 from the People on this, but insofar as an

1 argument that these can be considered same
2 occasion felonies, under the standards in People
3 versus Hendricks at 16 Cal.4th 508, we have a
4 series of incidents, one on June 18th, one on June
5 27th and one on June 30th. These are not same
6 occasion felonies. The court has no discretion,
7 and even if I had discretion, given Mr. Thatcher's
8 criminal history, I would not exercise it.

9 Insofar as striking the strike is
10 concerned, again, under the standards set forth in
11 Romero and its progeny, I would not exercise my
12 discretion to strike the strike.

13 Ms. Aiello?

14 MS. AIELLO: Thank you. Given the
15 court's comments, I will keep my comments brief.

16 This was a jury trial. The court
17 did hear all the facts, had the opportunity to
18 view the victims, and while no injury was
19 inflicted on any -- no physical injury was
20 inflicted on the victims, the defendant was armed
21 with weapons in each of the robberies.

22 I think it speaks volumes that the
23 second victim who actually did thank the defendant
24 for not harming him demonstrates, I think, what a
25 tremendous amount of fear he had on that day. I
26 think that man thought that he very well could be

1 injured and is thankful that he is alive to -- to
2 testify.

3 I would point out that the
4 defendant was only on parole for four and a half
5 months before these offenses were committed. They
6 are identical offenses to what he was on parole
7 for.

8 Even the brief synopsis of facts
9 from the prior robberies indicates how vicious
10 they were. One was a residential robbery. One
11 was a robbery of a video store. Weapons again
12 were involved in those robberies. The defendant
13 has gang ties, and there were multiple robberies,
14 multiple victims, and as the court has recognized,
15 it would not be appropriate and not in the
16 interest of justice to strike the strikes, and I
17 would submit on that and request the court follow
18 the recommendation of the probation department and
19 ask that the restitution be imposed as indicated,
20 as well.

21 MR. STOREY: Your Honor, we would point
22 out that the court does need to update the custody
23 credits because this was prepared for December
24 4th. Today is the 18th. So we'd add 14 days.

25 THE COURT: All right. So what is the
26 result, 164 actual?

1 MR. STOREY: Yes, your Honor.

2 THE COURT: And what about the 2933.1
3 credits?

4 MR. STOREY: Can't rely on my math.

5 Your Honor, I would also ask the
6 court to -- when looking at the restitution, there
7 is a request for actual restitution. If that's
8 what the People are requesting, those are the
9 amounts that were stated by the victims. I
10 believe that would be appropriate.

11 In regards to the 1202.4 and
12 1202.45, I believe the \$10,000 is exorbitant.
13 There isn't any ability that my client is going to
14 have to actually pay that. It's just saying for
15 the rest of his life, he's not going to get any
16 credits when he's in prison.

17 THE COURT: Mr. Thatcher, I'm not here
18 to give you a lecture. That serves no purpose, I
19 understand that.

20 People argue that the law is
21 harsh. Mr. Storey talks about the prospect of
22 redemption. Mr. Storey talks about how young you
23 are. You are young. This is a waste of a life,
24 but the reality is you've chosen to waste your
25 life.

26 You've been heavily involved as --

1 as a youngster; apparently, contacts with police
2 started when you were seven years old. You've had
3 a number of sustained petitions for possession of
4 some deadly weapon. You were found unfit for
5 juvenile court in 1997. You went to state prison
6 for 6 years. You got out on parole. You commit
7 three separate robberies, armed. You're committed
8 to a criminal life-style. You made those
9 choices.

10 Given the circumstances of the
11 offenses and given Mr. Thatcher's background,
12 there is no basis to grant Mr. Thatcher probation,
13 obviously.

14 Your application for probation is
15 denied. Your attorney has asked me to strike the
16 strikes. There's no basis to do that. The law
17 sets forth the guidelines to strike the strike.
18 You don't come close to allowing such
19 consideration. The law clearly sets forth what's
20 required on different occasion felonies such as
21 these. The law will be followed.

22 Count 1, you're committed to state
23 prison for the indeterminate term of 25 years to
24 life with an additional and consecutive 10 years.
25 That's pursuant to Penal Code Section 12022.53(b),
26 an additional and consecutive 5 years pursuant to

1 Penal Code Section 667(a)(1), and an additional
2 consecutive one year pursuant to Penal Code
3 Section 667.5(b) for a total of 41 years to life.

4 You get credit for 164 days
5 actually served, plus 26 days 2933.1 credits;
6 total credit of 190 days.

7 Count 2, you're committed to state
8 prison for the indeterminate term of 25 years to
9 life. There's an additional and consecutive one
10 year pursuant to Penal Code Section 12022(b)(1)
11 for a total of 26 years to life with no credits.
12 That's to run consecutive to Count 1.

13 Count 3, you're committed to state
14 prison for the indeterminate term of 25 years to
15 life with an additional and consecutive 10 years.
16 Pursuant to Penal Code Section 12022.53(b)(1),
17 total of 35 years to life with no credits. That's
18 to run consecutive to Count 2.

19 Count 4, you're committed to state
20 prison for the indeterminate term of 25 years to
21 life, an additional consecutive 10 years pursuant
22 to special -- to the special allegation of Penal
23 Code Section 12022.53(b) for a total of 35 years
24 to life with no credits.

25 In Count 5, you're committed to
26 state prison for the indeterminate term of 25

1 years to life with no presentence credits. That
2 term is to run consecutive to Count 4.

3 You're to be placed on parole for
4 life when you are released, if you are.

5 Insofar as restitution to the
6 victims, that issue shall -- any money earned in
7 state prison by you shall go to the victims in the
8 amount set forth in the probation report and
9 recommendation for 8.

10 So far as a restitution fine is
11 concerned, while you're young and in good health,
12 I'm going to set that restitution at \$5,000 given
13 the restitution you have to pay.

14 Insofar as a restitution fine
15 pursuant to Section 1202.45 of the Penal Code,
16 that's set at \$5,000. That fine is suspended.
17 Restitution to the Victim's Advocate is open.

18 You're committed to serve your
19 sentence.

20 MR. STOREY: Your Honor, we would ask
21 the court make a finding of no ability to pay.

22 THE COURT: There's absolutely no
23 ability to pay.

24 MR. STOREY: Your Honor, Mr. Thatcher
25 will be filing a notice of appeal today. We would
26 ask the court to set bail pending appeal.

1 THE COURT: There's no bail pending
2 appeal.

3 So you waive advisement as to right
4 on appeal -- a right to file appeal?

5 MR. STOREY: Yes, your Honor. We'll be
6 processing that this morning.

7 THE COURT: All right. Is that document
8 signed?

9 MR. STOREY: That document is signed.

10 THE COURT: All right. Would you please
11 lodge it with the clerk.

12 MR. STOREY: Your Honor, Mr. Thatcher
13 indicates that he had two other things that he
14 would request. One is because he is filing the
15 appeal, he would request the court to release him
16 the names, addresses and phone numbers of the
17 victims.

18 THE DEFENDANT: That's not what I'm
19 asking, your Honor. I'm asking for the case
20 file. He did not want to give that to me because
21 it has the names and addresses of the victims in
22 it. However, I already have that. I've had that
23 since I've been arrested. Parole brought me the
24 paperwork. I already have all that. That's not
25 why I want it.

26 THE COURT: Well, you really shouldn't

1 have it, but that's beside the point.

2 THE DEFENDANT: I'm going to be filing
3 this appeal. I need to be able to fight my case.
4 Once I --

5 THE COURT: You're entitled --
6 Mr. Thatcher, you're entitled to the appointment
7 of counsel on appeal.

8 THE DEFENDANT: Right.

9 THE COURT: The record will reflect that
10 I -- that's really up to the Court of Appeal, but
11 you certainly are entitled to appointed counsel,
12 and I'm sure the court will provide that to you.

13 All of those documents will be
14 prepared as part of the process of processing your
15 appeal. All those documents will go to your
16 attorney. There's really no order that I can make
17 in that respect. That's all within the province
18 now of the Court of Appeal.

19 All right. You're remanded.

20 (Whereupon, the proceedings were
21 concluded.)

22

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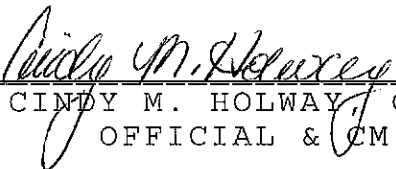
1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF TULARE)
4

5 I, CINDY M. HOLWAY, an Official
6 Certified Shorthand Reporter of the Superior Court
7 of the State of California, do hereby certify:

8 That the foregoing action entitled
9 THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,
10 versus DAVID C. THATCHER, DEFENDANT, was taken
11 down in stenographic shorthand writing and
12 thereafter transcribed into typewriting, pages 1
13 through 18, and that the foregoing transcript
14 constitutes a full, true, and correct transcript
15 of said proceedings.

16 Dated this 2nd day of January,
17 2002.

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CINDY M. HOLWAY, CSR 4371
OFFICIAL & CM

2003 WL 1890480
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fifth District, California.

The PEOPLE, Plaintiff and Respondent,

v.

David Charles THATCHER, Defendant and Appellant.

No. F039852.

|
(Super.Ct.No. 01-77196).

|
April 16, 2003.

Synopsis

Background: Defendant was convicted in the Superior Court, Super.Ct.No. 01-77196, Tulare County, Gerald F. Sevier, J., of robbery and grand theft of a firearm, and he appealed.

[Holding:] The Court of Appeal, Levy, J., held that evidence was sufficient to support defendant's robbery conviction.

Affirmed in part; reversed in part and vacated.

West Headnotes (7)

[1] Criminal Law 🔑 Larceny Offenses

Defendant's robbery and grand theft convictions were based on the same course of conduct, and as such, defendant's grand theft conviction could not stand; information charged defendant with taking personal property from the victim by force or fear and with taking a firearm from victim.

Cases that cite this headnote

[2] Criminal Law 🔑 Duties of Individual Jurors

Trial court's giving of instruction stating that, if any juror refuses to deliberate or expresses an intention to disregard the law, it is the obligation of the other jurors to immediately advise the court of the situation did not infringe upon defendant's constitutional rights or require reversal of his conviction. CALJIC No. 17.41.1.

Cases that cite this headnote

[3] Sentencing and Punishment 🔑 Striking, Quashing, Dismissing

Trial court was not required to strike defendant's prior prison term enhancement, in light of fact that defendant suffered two prior robbery convictions in a single proceeding, the prior robberies were committed three days apart and involved different victims at different places, and defendant received a six-year term for his prior robberies, four years plus a one-year enhancement on the first robbery, and a consecutive one-year sentence for the second robbery. West's Ann.Cal.Penal Code §§ 667(a), 667.5(b).

Cases that cite this headnote

[4] Sentencing and Punishment 🔑 Robbery

Defendant's sentence of 162 years to life for robbery did not constitute cruel and unusual punishment, even though it could not be served within his lifetime. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[5] Sentencing and Punishment 🔑 Striking, Quashing, Dismissing

Trial court properly refused to vacate one or more of defendant's prior strikes based on his prior criminal record; trial court considered defendant's extensive criminal history and decided against vacating any of his prior strikes, court explained that, although defendant was young at the time of his sentencing, he had already committed himself to a "criminal life-style," and vacating one or more of defendant's prior strikes would not have furthered the administration of justice. West's Ann.Cal.Penal Code §§667, 1170.12, 1385(a).

Cases that cite this headnote

[6] Criminal Law 🔑 Larceny;Burglary;Robbery;Receiving Stolen Goods

Evidence was sufficient to support defendant's robbery conviction; the victim's in-court identification of defendant as the perpetrator of the robbery was more than sufficient to corroborate accomplice's testimony that defendant committed the robbery.

Cases that cite this headnote

[7] Sentencing and Punishment 🔑 Sufficiency

Evidence was sufficient to support gun use enhancements; victim testified that defendant used a gun during the commission of the robbery, victim stated that he was fearful that he would have been shot if he did not comply, and victim stated that he thought the gun was real. West's Ann.Pen.Code, § 12001(b).

Cases that cite this headnote

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Attorneys and Law Firms

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez and Mathew Chan, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

LEVY, J.

*1 Appellant, David Charles Thatcher, was convicted by jury of four counts of robbery (Pen.Code, ¹ § 211) and one count of grand theft of a firearm (§ 487, subd. (d)). In addition, the jury found true allegations that appellant had used a firearm in the commission of three of the robberies (§ 12022.53, subd. (b)), and a knife in the commission of one of the robberies (§ 12022, subd. (b)(1)). In a bifurcated proceeding the trial court found true allegations that appellant had committed two prior offenses within the meaning of the three strikes law (§§ 667, subds.(c)-(j), 1170.12, subds. (a)-(e)), had suffered a serious felony within the meaning of section 667, subdivision (a), and a prison prior within the meaning of section 667.5, subdivision (b). The trial court subsequently sentenced appellant to a total term of 162 years to life.

¹ All further references are to the Penal Code unless otherwise indicated.

On appeal, appellant contends (1) his conviction for grand theft must be reversed because it is a lesser included offense of robbery; (2) the trial court erred in instructing the jury pursuant to CALJIC No. 17.41.1; (3) the trial court erred in sentencing appellant; (4) his sentence constituted cruel and unusual punishment; (5) the trial court erred in denying his *Romero*² motion; and (6) there was insufficient evidence to support one of his robbery convictions and the firearm use enhancements. We agree with appellant that his grand theft conviction must be reversed, but find his remaining claims without merit.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628.

FACTS

Count 1

Francisco Ortega was working at a recycling trailer on June 18, 2001, at approximately 3:15 in the afternoon, when he noticed a man approach. The man took a gun from his waistband and waved it at Ortega. He motioned for Ortega to move to the back of the trailer and Ortega complied. In addition, Ortega opened a drawer to show the man that there was no money in the trailer. The assailant spoke to Ortega in English, but Ortega, who does not speak English, did not understand him. The man continued talking angrily and it occurred to Ortega that he wanted Ortega's wallet. Ortega took out his wallet and placed it on a sack of cans. The man took the wallet and left. Ortega was afraid that if he did not give him his wallet, the man would shoot him. Ortega had approximately \$240 in his wallet.

During the robbery, Ortega recalled that the man put a round into the chamber of the gun or pretended to, because he heard the gun make a popping noise. Ortega, who was not familiar with guns, testified that the gun was small with a long thin barrel. He was not sure if it was a real gun or a pellet or BB gun; however, he thought it was real.

At trial Ortega identified appellant as the perpetrator. Ortega had attended a lineup sometime after the incident but did not identify anyone in the lineup. He testified that he recognized appellant in the lineup, but was too nervous to point him out to the police. Ortega had previously pointed out the picture of the man who robbed him, but he testified that he was not the correct person, although he looked like him.

*2 Freddie Patino testified that he has known Lionel (Leo) Palafox for about 12 years, but does not know appellant very well. On June 18, 2001, Patino was involved in a robbery with appellant and Palafox. The robbery took place at approximately 3:25 in the afternoon. Patino drove his car to the Fairway Market and parked about 75 feet from a recycling trailer. After he parked, Palafox went over to the payphones and appellant approached the recycling center.

Appellant was gone for three to four minutes. When he returned, the trio drove back to their house. Appellant had \$25 to \$45 when he returned. Appellant had a folding knife in his possession when he approached the trailer. Patino also testified that Palafox owned a .22-caliber revolver.

Patino entered a guilty plea to robbery for the incident on June 18 with a four-year possible sentence. The trial court informed Patino that it would take Patino's testimony into consideration in determining the sentence.

Detective Mark Lopez of the Visalia Police Department conducted an investigation to determine who was responsible for robbing Ortega on June 18. Lopez showed Ortega a number of photographs, and Ortega picked one as looking like the man who robbed him, but did not say he was in fact the perpetrator. Lopez also had Ortega attend a lineup at the police station, but Ortega was unable to identify anyone from the lineup.

Count 2

Domingo Lopes was working at a recycling center one afternoon when two men approached the trailer. One man was Mexican³ and the other was American. The American waved a knife back and forth and motioned for Lopes to move to the back of the trailer. He told Lopes to lie down on the floor and then took money from a cash box. While on the ground, the American man told Lopes to put his hands behind his back and searched him, taking his wallet. Lopes had \$40 in his wallet and estimated there was less than \$200 in the cash box. After taking the money, the men left running.

³ The terms "Mexican," "Hispanic," "Spanish," "American" and "White" are used throughout this opinion to correspond with witnesses' testimony describing appellant and his cohorts. No disrespect is intended.

Lopes described the American man as 22 to 24 years old, average build, with light hair and hair on his chin. The Mexican man was older and shorter than the American and had a sparse beard. The American man carried a folding knife with a four-inch blade.

Sometime after the incident, Lopes viewed lineup and identified appellant as looking like the man who robbed him, but slightly shorter. He was sure of his identification. He stated the man he identified looked like the man that robbed him. At trial Lopes also testified that appellant looked like his assailant.

Counts 3 to 5

Michael Alrhimi was working alone at the USA Market on June 30, 2001. At approximately 2:30 that afternoon, Alrhimi noticed Palafox, a customer of the store, next to the pay phone in front of the market. He was wearing a black cap, a black shirt and had a red bandana around his neck. Palafox was waiting for a truck driver to finish using the telephone. When the truck driver finished his conversation, Palafox picked up the phone and began dialing numbers. At that point Alrhimi began cleaning the deli, when two armed men came into the store, pointed their guns at Alrhimi, and told him to open the cash register. One of the perpetrators was Palafox, who is of Mexican decent. The other man was White⁴ and bald. Both men wore black caps and red bandanas covering their faces. Palafox held a black revolver and the White man held an 18-inch shotgun.

⁴ According to the report of the probation officer, appellant is Caucasian.

*3 After Alrhimi opened the cash register, the White man walked around the counter and told Alrhimi to get down on the floor. The White man pointed his gun at Alrhimi and said "I told you get the fuck down." Palafox approached, placed his foot on Alrhimi's neck, and placed the gun barrel to his head. Meanwhile, the White man took the money from the cash register. He also took a bank bag and a gun from underneath the cash register. Palafox took Alrhimi's wallet, watch, and wedding band. Palafox also demanded to know where the video surveillance tape was located. Alrhimi

initially told Palafox there was no video, but he told Palafox the location of the tape after Palafox threatened to “blow [Alrhimi's] fucking head off.” Palafox took the video tapes, as well as a box containing 26 cartons of cigarettes.

As the men were leaving, a customer entered the store, and Alrhimi heard the men tell the customer to get on the ground. Palafox had Alrhimi move to the back of the store and lie down again. After the men left, Alrhimi ran to the front of the store and a customer told him the men had driven off. The men absconded with \$1,600 from the cash register and a bank bag, \$800 from Alrhimi's wallet, and Alrhimi's \$900 wedding band, \$50 watch, and \$300 gun.

The gun held by the White man looked like a sawed-off shotgun from a distance, but Alrhimi thought it was a rifle when he viewed it closer. The bore size was small, leading Alrhimi to believe the gun was a small caliber rifle or a BB gun. The gun did not look like a toy, but it could have been either a hunting gun or a BB gun.

David Vargo, along with his girlfriend and two-year-old son, went to the USA Market on the day in question. Vargo walked into the market alone, leaving his son and girlfriend in his van. When he entered the market, he noticed Alrhimi on the floor behind the counter and a Mexican man standing nearby with a gun. A White man with a bandana over his face put a shotgun to Vargo's head and told him to lie on the ground. While Vargo was on the ground, the man had his foot on Vargo's back and asked him where his money was. The man took \$30 to \$40 from Vargo's front pocket. Each of the men had a box, and Vargo noticed them putting things into the boxes and then leave the store. After they left, Vargo got up, went outside to check on his girlfriend and son who were waiting in the van, and attempted to chase after the men. However, they had already fled the scene.

Vargo described the gun held by the White man as a short rifle or sawed-off shotgun. It was about 18 inches in length. Vargo believed the gun was real.

Verna Atilano, Vargo's girlfriend, was waiting in the van when she noticed two men exit the store, each carrying a box and a gun. The first man was Hispanic, had a red bandana over his face and wore a black hat, T-shirt and jeans, and carried a handgun. The other man had on a bandana and cap, and carried a sawed-off shotgun. The men placed their guns into their boxes and ran off.

*4 Glorys Slayton is a regular customer of the USA Market. On the afternoon in question, Slayton went to the market and noticed two men in the alley behind the market. One was a six-foot tall Spanish male, and the other was a five foot nine inch White man. The men got into a car, sat there for about five minutes and then drove away. After finishing her shopping, she exited the store to go home and noticed the men coming toward her. The Spanish man had a mustache and wore a red bandana around his neck, a T-shirt and jeans. The White man was bald, had a mustache, and was sweating and wiping his forehead with a bandanna. She recognized one of the men as appellant and talked to him for a short time. Slayton subsequently picked appellant out of a photo lineup. Slayton admitted she had previously been convicted of second degree burglary.

Heather Parks, Palafox's girlfriend, testified she knew appellant for six years. Parks had a bullet in her purse the day Palafox was arrested. She obtained the bullet from Palafox but denied knowing that he had a gun, although she saw him with a gun case on one occasion. Parks knew appellant to carry a folding knife.

Detective Lopez searched Parks's purse in connection with this case and found a .22-caliber bullet. In addition, Parks told Lopez that she had seen Palafox with a revolver in the past. Lopez also interviewed Barbara Wilborn, who stated that she had seen appellant with Palafox's gun in the past.

DISCUSSION

I. Appellant's conviction for grand theft of a firearm must be reversed.

[1] Appellant was convicted of both robbery and grand theft of a firearm resulting from the USA Market robbery. Appellant contends, and respondent concedes, that appellant cannot be convicted of both robbery and grand theft, as grand theft is a lesser necessarily included offense of robbery. We agree.

It is well established that multiple convictions may not be based on necessarily included offenses. (*People v. Pearson* (1986) 42 Cal.3d 351, 355, 228 Cal.Rptr. 509, 721 P.2d 595.) In *People v. Ortega* (1998) 19 Cal.4th 686, 697, 699, 80 Cal.Rptr.2d 489, 968 P.2d 48, our Supreme Court explained that grand theft is a necessarily included offense of robbery and therefore held that “a defendant may not be convicted of both robbery and grand theft based upon the same conduct.” The robbery and grand theft convictions in this case were unquestionably based upon the same conduct. The information charged appellant with taking personal property from the victim Alrhimi by force or fear. Likewise, the information charged appellant with taking a firearm from Alrhimi. The evidence adduced at trial demonstrated that appellant, along with his cohort, entered the market where Alrhimi was working alone and took the money from the cash register, a bank bag, and the firearm. As our high court has explained “ [w]e find no authority for the proposition that a robber may be charged with and convicted of a separate robbery, or an additional offense of grand theft, because he or she took more than one item from a solitary victim during a single course of conduct.” [Citations.]” (*Id.* at pp. 699-700, 80 Cal.Rptr.2d 489, 968 P.2d 48.) As the robbery and grand theft convictions were based on the same course of conduct, appellant's grand theft conviction must be reversed.⁵

⁵ In light of our holding we need not address appellant's related claim that his sentence for grand theft must be stayed pursuant to section 654.

II. The trial court's instructions pursuant to CALJIC No. 17.41.1 were proper.

*5 [2] Appellant claims that the trial court interfered with his right to a trial by jury when it instructed the jury pursuant to CALJIC No. 17.41.1.⁶ Appellant contends the instruction improperly chills jury deliberations and interferes with the jury's right to nullify the law. We find appellant's argument unavailing.

⁶ CALJIC No. 17.41.1 provides:

“The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.”

In *People v. Engelman* (2002) 28 Cal.4th 436, 439-440, 121 Cal.Rptr.2d 862, 49 P.3d 209, the California Supreme Court rejected an identical argument and held CALJIC No. 17.41.1 “does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict....” While the court concluded the instruction should not be given in future trials, it rejected the defendant's claim that his convictions should be reversed because the instruction was given in his case. In accordance with *Engelman*, we reject appellant's constitutional attack on the instruction and conclude his conviction need not be reversed because the jury was instructed with CALJIC No. 17.41.1. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.)

III. The trial court properly applied the sentencing enhancements.

[3] Appellant sustained two prior robbery convictions, which were alleged in one case and which resulted in one prison term. The trial court used both of these prior convictions as strikes and imposed a serious felony enhancement under section 667, subdivision (a), and a prison prior enhancement under section 667.5, subdivision (b). Thus, the trial court sentenced defendant to 25 years to life on count 1 under the three strikes law, with an additional five years for the prior

serious felony conviction and a one-year term for the prior prison term. Appellant contends that the trial court was required to strike the one-year term.

In *People v. Jones* (1993) 5 Cal.4th 1142, 22 Cal.Rptr.2d 753, 857 P.2d 1163 the California Supreme Court held that the trial court may not impose the sentence enhancement provisions of section 667, subdivision (a), and section 667.5 on the basis of the *same* prior conviction. (*Id.* at p. 1153, 22 Cal.Rptr.2d 753, 857 P.2d 1163.) Appellant argues that the trial court erred in imposing the one-year prison prior enhancement because his prior convictions resulted from a single proceeding. However, appellant's argument has previously been rejected by this court. In *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1666-1671, 52 Cal.Rptr.2d 561, we held the trial court properly imposed a section 667, subdivision (a)(1), enhancement and a section 667.5, subdivision (b), enhancement where the enhancements were based on different offenses, even though the offenses were tried jointly and resulted in a single prison term.

In the present case, appellant suffered two prior robbery convictions in a single proceeding. The probation officer's report indicates that the prior robberies were committed three days apart and involved different victims at different places. Appellant received a six-year term for his prior robberies, four years plus a one-year enhancement on the first robbery, and a consecutive one-year sentence for the second robbery. At the sentencing hearing the prosecutor noted that each of appellant's prior robberies were separate offenses. In light of the multiple convictions in the instant case, the trial court was not required to strike appellant's prior prison term enhancement. (See, e.g., *People v. Ruiz*, *supra*, 44 Cal.App.4th at pp. 1670-1671, 52 Cal.Rptr.2d 561; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1054-1055, 38 Cal.Rptr.2d 751 [*Jones* does not apply where §§ 667, subd. (a) and 667.5, subd. (b) enhancements refer to multiple offenses]; *People v. Gonzales* (1993) 20 Cal.App.4th 1607, 1610-1611, 25 Cal.Rptr.2d 305 [*Jones* not applicable where §§ 667, subd. (a) and 667.5, subd. (b) enhancements based in part on separate cases].)

IV. Appellant's sentence was neither cruel nor unusual.

*6 [4] Appellant asserts his sentence of 162⁷ years to life constitutes cruel and unusual punishment under both the state and federal Constitutions. His argument does not address either the state or federal standards regarding cruel and unusual punishment, but focuses solely on the fact that appellant cannot serve his sentence in his lifetime. Relying on a law review article written by Justice Stanley Mosk, appellant asserts that a sentence, which on its face is impossible to serve, constitutes cruel and unusual punishment. We disagree.

⁷ Because we have reversed appellant's conviction on count 5, his sentence will now be 137 years to life. As the entire sentence still may not be served in appellant's lifetime, we will address appellant's argument.

The very argument appellant makes here has previously been rejected by the Third District in *People v. Byrd* (2001) 89 Cal.App.4th 1373, 108 Cal.Rptr.2d 243. There, the court acknowledged Justice Mosk's position, which was reiterated in his concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, 600-601, 76 Cal.Rptr.2d 255, 957 P.2d 945, and respectfully disagreed with it. (*People v. Byrd*, *supra*, 89 Cal.App.4th at pp. 1382-1383, 108 Cal.Rptr.2d 243.) As *Byrd* explained,

"it is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution (*People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311, 15 Cal.Rptr.2d 30 ...) or the federal Constitution. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 ... [sentence of life without possibility of parole not cruel and unusual for possession of 672 grams of cocaine].)

"Moreover, in our view, a sentence such as the one imposed in this case serves valid penological purposes: it unmistakably reflects society's condemnation of defendant's conduct and it provides a strong psychological deterrent to those who would consider engaging in that sort of conduct in the future.

“We therefore conclude that defendant's sentence does not inflict cruel and/or unusual punishment, under either the state or federal Constitution, even though defendant cannot serve his sentence during his lifetime.” (*Id.* at p. 1383, 108 Cal.Rptr.2d 243.)

We agree with the reasoning in *Byrd*, and likewise reject appellant's claim that his sentence constitutes cruel and unusual punishment because it cannot be served within his lifetime.

V. The trial court properly denied appellant's *Romero* motion.

[5] In *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628 (hereinafter *Romero*), the California Supreme Court held a trial court may, “in furtherance of justice” under section 1385, subdivision (a), vacate a finding that a prior serious felony conviction qualifies as a strike under the three strikes law (§§ 667, 1170.12). Appellant contends the court abused its discretion by refusing to vacate one or more of his prior strikes. We disagree.

In deciding whether to vacate a prior serious felony conviction, the trial court must consider the constitutional rights of the defendant and the interests of society. (*People v. Garcia* (1999) 20 Cal.4th 490, 497-498, 85 Cal.Rptr.2d 280, 976 P.2d 831.) The trial court must also consider the nature and circumstances of the defendant's present offenses, his prior serious or violent felony convictions, and his background, character, and prospects to determine whether he falls outside the spirit of the three strikes scheme. (*Id.* at p. 503, 85 Cal.Rptr.2d 280, 976 P.2d 831; *People v. Williams* (1998) 17 Cal.4th 148, 161, 69 Cal.Rptr.2d 917, 948 P.2d 429.)

*7 The abuse of discretion standard of review “asks in substance whether the ruling in question ‘falls outside the bounds of reason’ under the applicable law and the relevant facts [citations].” (*People v. Williams, supra*, 17 Cal.4th at p. 162, 69 Cal.Rptr.2d 917, 948 P.2d 429.) The appellant bears the burden to show the sentencing decision was irrational or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977, 60 Cal.Rptr.2d 93, 928 P.2d 1171.) Absent such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. (*Id.* at pp. 977-978, 60 Cal.Rptr.2d 93, 928 P.2d 1171.)

Appellant contends the trial court's refusal to exercise its discretion under section 1385 was an abuse of discretion because he received both of his prior strikes when he was only 17 years old and the two convictions were prosecuted and sentenced in a single proceeding constituting only one “period of prison incarceration from which to learn.” We find that the trial court properly exercised its discretion.

The trial court's ruling to deny appellant's motion to vacate a strike based on his prior criminal record was within its discretion. Nothing in the record suggests the trial court based its ruling on any improper motive or that the ruling was otherwise irrational or arbitrary. Nor can the trial court's decision be said to have fallen “outside the bounds of reason under the applicable law and the relevant facts.” (*People v. Williams, supra*, 17 Cal.4th at p. 164, 69 Cal.Rptr.2d 917, 948 P.2d 429.) As the trial court noted, it considered appellant's extensive criminal history and decided against vacating any of his prior strikes. The court explained that although appellant was young at the time of his sentencing, he had already committed himself to a “criminal life-style.”

While we will not reweigh the evidence supporting the trial court ruling, we agree that vacating one or more of appellant's prior strikes would not have furthered the administration of justice as required by section 1385. Appellant's criminal career began in 1987 at the tender age of seven when he committed a petty theft. Two years later he committed a battery followed by another petty theft. The following year, appellant committed another battery. At the age of 13, appellant moved on to more serious crimes and received informal probation for possession of a deadly weapon. During the next two years, the juvenile court sustained two more petitions against appellant for possession of a deadly weapon and violations of parole. Then, at the age of 17, appellant was transferred to adult court and prosecuted for two counts of robbery.

The probation officer's report indicates that appellant committed each of these robberies at gunpoint, and during one robbery appellant struck the victim in the face with a shotgun. Four months after being released from a six-year prison term, appellant committed the instant offenses.

As appellant's criminal history demonstrates, he has been unable to avoid reoffending for any length of time. Two of appellant's convictions were characterized as serious or violent under the three strikes law. In addition, appellant committed other crimes of violence, such as battery. Appellant's criminal history demonstrates that he is unable to avoid reoffending for any substantial period of time. While appellant was only 21 years old at the time he was sentenced, he has made clear that he has truly committed himself to a life of crime. These factors demonstrate that the trial court did not abuse its discretion in failing to vacate one or more of appellant's prior strikes. Appellant is indeed a person who falls within the spirit of the three strikes law.

a

VI. Sufficient evidence supported appellant's convictions.

***8** Appellant claims the evidence adduced at trial was insufficient to support his robbery conviction of Ortega and to support the gun use enhancements. We disagree.

When the sufficiency of the evidence is challenged on appeal, the court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701, 758, 85 Cal.Rptr.2d 203, 976 P.2d 754; *People v. Johnson* (1980) 26 Cal.3d 557, 578, 162 Cal.Rptr. 431, 606 P.2d 738.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, including reasonable inferences based on the evidence and excluding inferences based on speculation or conjecture. (*People v. Tran* (1996) 47 Cal.App.4th 759, 771-772, 54 Cal.Rptr.2d 905.) If the jury's findings are supported by the evidence and are reasonable, the appellate court will not reverse merely because a different finding might also be reasonable. (*People v. Redmond* (1969) 71 Cal.2d 745, 755, 79 Cal.Rptr. 529, 457 P.2d 321.)

A. The robbery conviction.

[6] Appellant asserts that the evidence was insufficient to support his conviction of the robbery of Ortega. He notes that Patino's testimony was insufficient alone to establish appellant's guilt on that count because Patino was an accomplice as a matter of law. Appellant acknowledges that Ortega identified appellant as his assailant in court, but argues that this evidence was insufficient to corroborate Patino's testimony because Ortega's identification was extremely “weak.” Additionally, he points out a number of inconsistencies between Ortega's and Patino's accounts of the robbery to argue that Ortega's testimony was insufficient to corroborate Patino's testimony that appellant committed the crime. We find these arguments to be without merit.

As appellant correctly notes, the testimony of Patino, standing alone, was not sufficient to support the robbery conviction, because Patino was an accomplice as a matter of law. (§ 1111.) Evidence is sufficient to corroborate accomplice testimony where the evidence tends to implicate the defendant in the commission of the crime and relates to some act or fact that is an element of the crime. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128, 36 Cal.Rptr.2d 235, 885 P.2d 1.) Here, the victim's in-court identification of appellant as the perpetrator of the robbery was more than sufficient to corroborate Patino's testimony that appellant committed the robbery.

As we have already stated, evidence is sufficient to support a judgment if it is reasonable, credible and of solid value.

“ ‘Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the ... jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due

deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.] [Citation.]” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, 26 Cal.Rptr.2d 23, 864 P.2d 103.)

*9 Under this standard of review, we conclude the evidence is sufficient to establish appellant's identity as the perpetrator of the robbery. Appellant was positively identified at trial by the victim. This eyewitness identification testimony is sufficient by itself to sustain appellant's conviction. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497, 263 Cal.Rptr. 328; see also Evid.Code, § 411 [providing that “... the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact”].) Although appellant attempts to undermine the reliability of the identification on appeal, “... when the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court. [Citation.]” (*Gustavo M.*, at p. 1497, 263 Cal.Rptr. 328.)

B. The gun use enhancements.

[7] At trial Ortega testified that appellant used a gun during the commission of the robbery. He stated that he was fearful that he would have been shot if he did not comply. In describing the gun, Ortega stated it was small with a long, thin barrel. Ortega was not familiar with guns and he did not know if the gun was real or a pellet or BB gun, but, when questioned further, he stated that he thought the gun was real. Ortega did recall that the man put a round into the chamber of the gun, or at least pretended to do so, during the robbery because he heard the gun make a popping noise.

Alrhimi testified that appellant had what looked like a sawed-off shotgun during the USA Market robbery. When appellant pointed the gun at him, Alrhimi got a better look at the barrel and stated that he thought the gun was a small caliber rifle because the hole at the end of the gun was smaller than a shotgun. Alrhimi admitted on cross-examination that the weapon could have been either a hunting rifle or a BB gun.

Vargo testified that appellant held what looked like a short rifle or sawed-off shotgun during the robbery. He felt that the gun used by appellant was real. Atilano, who saw appellant leave the market, also described the gun carried by appellant as a sawed-off shotgun.

Relying on the fact that the witnesses were uncertain as to whether appellant used a BB gun or a real gun, appellant argues that the evidence was insufficient to support the arming enhancement because there was no evidence that the gun was a firearm as defined in section 12001, subdivision (b).⁸ We disagree.

⁸ Section 12001, subdivision (b) provides:

“As used in this title, ‘firearm’ means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.”

Evidence is sufficient to demonstrate use of a firearm where it establishes the gun is designed to shoot and has the appearance of shooting capability. (*People v. Hayden* (1973) 30 Cal.App.3d 446, 452, 106 Cal.Rptr. 348, overruled on other grounds by *People v. Rist* (1976) 16 Cal.3d 211, 127 Cal.Rptr. 457, 545 P.2d 833.) There is no requirement that the firearm be recovered to support the enhancement. (*Ibid.*)

The testimony was more than sufficient to prove appellant used a firearm within the meaning of section 12001. Although equivocal at times, both Ortega and Vargo testified that the guns used during the robbery were “real.” All of the men had an opportunity to view the gun during the commission of the robberies. In addition, Detective Lopez testified that Parks told him that Palafox had a revolver and Wilborn stated she had seen appellant with Palafox's gun in the past. When Palafox was arrested, Lopez searched Parks's purse and found a .22-caliber bullet. From this evidence the jury could infer that appellant used Palafox's gun during the Ortega robbery. Furthermore, Vargo, who had the gun pointed at his head, was “[a]bsolutely” sure the weapon used in the USA Market robbery was a real gun. Thus, we conclude the evidence was sufficient to support the arming enhancements. (See *People v. Dominguez* (1995) 38 Cal.App.4th 410,

414, 422, 45 Cal.Rptr.2d 153 [victim's testimony that defendant put cold metallic object which felt like a gun against his neck, while threatening him with death, constituted sufficient evidence defendant used a firearm]; *People v. Green* (1985) 166 Cal.App.3d 514, 517, 212 Cal.Rptr. 451 [evidence sufficient to establish weapon is a firearm where victim stated she felt defendant place gun to her head and where bullets were found in defendant's pocket]; *People v. Williams* (1976) 56 Cal.App.3d 253, 255, 128 Cal.Rptr. 408 [“each victim of the first three robberies charged testified a gun (and not the pellet gun [later found in defendant's possession]) was used” and this was sufficient to sustain § 12022.5 findings].)

DISPOSITION

***10** Appellant's conviction on count five (§ 487, subd. (d)) is reversed and the sentence on that count is vacated. The trial court is ordered to prepare an amended abstract of judgment⁹ reflecting this modification of appellant's sentence and forward certified copies to the appropriate authorities. In all other respects the judgment is affirmed.

⁹ The abstract should reflect a revised sentence of 137 years to life.

WE CONCUR: HARRIS, Acting P.J., and CORNELL, J.

All Citations

Not Reported in Cal.Rptr.2d, 2003 WL 1890480

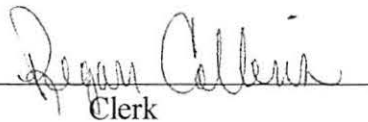
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF TULARE

The People of the State of California)
)
 Plaintiff(s))
)
 vs)
)
 DAVID CHARLES THATCHER)
)
 Defendant(s))
 _____)

Visalia, California September 2, 2003
No. 01-77196 Dept. No. 4
Judge, Honorable GERALD SEVIER
Clerk Regan Collins
Bailiff
Reporter
Probation Officer

NATURE OF HEARING **ORDER TO AMEND ABSTRACT OF JUDGMENT FILED 12/21/01 TO
REFLECT SENTENCE ON COUNT 5 AS VACATED**

IT IS HEREBY ORDERED that the Abstract of Judgment filed 12/21/01 is amended to reflect conviction on Count 5 as reversed pursuant to Disposition by Fifth Appellate District Court of Appeal. Sentence on Count 5 is vacated.


Clerk

cc: Appeals

ABSTRACT OF JUDGMENT – PRISON COMMITMENT - INDETERMINATE

[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-292 ATTACHED]

CR-292

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: TULARE			FILED TULARE COUNTY SUPERIOR COURT SEP 02 2003 LARAYNE CLEEK, CLERK BY: <i>[Signature]</i>	
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: DAVID CHARLES THATCHER		DOB: 07-13-80	01-77196	-A
AKA:		-B		
CI#: A10409711		-C		
BOOKING #:		-D		
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT		☐ NOT PRESENT ☒ AMENDED ABSTRACT		
DATE OF HEARING 12-18-01	DEPT. NO. 4	JUDGE GERALD F. SEVIER		
CLERK REGAN COLLINS	REPORTER CINDY HOLWAY	PROBATION NO. OR PROBATION OFFICER PA-294164		
COUNSEL FOR PEOPLE MELINDA AIELLO, DDA		COUNSEL FOR DEFENDANT PAUL STOREY ☒ APPTD.		

1. Defendant was convicted of the commission of the following felonies:

- ☐ Additional counts are listed on attachment
 ____ (number of pages attached)

CNT.	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	CONVICTED BY			CONCURRENT	CONSECUTIVE	654 STAY
						JURY	COURT	PLEA			
1	PC	211	SECOND DEGREE ROBBERY	2001	11-09-01	X					
2	PC	211	SECOND DEGREE ROBBERY	2001	11-09-01	X					
3	PC	211	SECOND DEGREE ROBBERY	2001	11-09-01	X					
4	PC	211	SECOND DEGREE ROBBERY	2001	11-09-01	X					
					- .						
					- .						

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

CNT.	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL
1	12022.53(b)	10							10
2	12022(b)(1)	1							1
3	12022.53(b)(1)	10							10
4	12022.53(b)	10							10

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL
667(a)(1)	5	667.5(b)	1					6

Defendant was sentenced to State Prison for an INDETERMINATE TERM as follows:

4. ☐ LIFE WITHOUT THE POSSIBILITY OF PAROLE on counts
5. ☐ LIFE WITH THE POSSIBILITY OF PAROLE on counts
6. a. ☐ 15 years to Life on counts ____ c. ☐ ____ years to Life on counts ____
 b. ☒ 25 years to Life on counts **1, 2, 3, 4** d. ☐ ____ years to Life on counts ____
 PLUS enhancement time shown above.
7. ☐ Additional determinate term (see CR-290). TOTAL TERM: 137 YEARS TO LIFE
8. Defendant was sentenced pursuant to ☒ PC 667(b)-(i) or PC 1170.12 ☐ PC 667.61 ☐ PC 667.7 ☐ other (specify):

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for indeterminate sentences. Attachments may be used but must be referred to in this document.

Page 1 of 2

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: THATCHER, DAVID CHARLES			
01-77196	-A	-B	-C -D

9. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):

a. Restitution Fine(s):

Case A: \$ <u>5,000</u>	per PC 1202.4(b) forthwith per PC 2085.5;	\$ <u>5,000</u>	per PC 1202.45 suspended unless parole is revoked.
Case B: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.
Case C: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.
Case D: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.

b. Restitution per PC 1202.4(f):

Case A: \$ <u>4,510.75</u>	☐ Amount to be determined to ☒ victim(s)*	☐ Restitution Fund
Case B: \$	☐ Amount to be determined to ☐ victim(s)*	☐ Restitution Fund
Case C: \$	☐ Amount to be determined to ☐ victim(s)*	☐ Restitution Fund
Case D: \$	☐ Amount to be determined to ☐ victim(s)*	☐ Restitution Fund

(*List victim name(s) if known and amount breakdown in item 11, below.)

c. Fine(s):

Case A: \$	per PC 1202.5. \$	per VC 23550 or	days	☐ county jail	☐ prison in lieu of fine	☐ CC	☐ CS
Case B: \$	per PC 1202.5. \$	per VC 23550 or	days	☐ county jail	☐ prison in lieu of fine	☐ CC	☐ CS
Case C: \$	per PC 1202.5. \$	per VC 23550 or	days	☐ county jail	☐ prison in lieu of fine	☐ CC	☐ CS
Case D: \$	per PC 1202.5. \$	per VC 23550 or	days	☐ county jail	☐ prison in lieu of fine	☐ CC	☐ CS

d. Lab Fee and Drug Program Fee:

Case A: Lab Fee: \$	per HS 11372.5(a) for counts	☐ Drug Program Fee of \$150 per HS 11372.7(a).
Case B: Lab Fee: \$	per HS 11372.5(a) for counts	☐ Drug Program Fee of \$150 per HS 11372.7(a).
Case C: Lab Fee: \$	per HS 11372.5(a) for counts	☐ Drug Program Fee of \$150 per HS 11372.7(a).
Case D: Lab Fee: \$	per HS 11372.5(a) for counts	☐ Drug Program Fee of \$150 per HS 11372.7(a).

10. TESTING

a. ☐ AIDS pursuant to PC 1202.1 b. ☐ DNA pursuant to PC 296 c. ☐ other (specify):

11. Other orders (specify):

DEFENDANT SHALL PAY RESTITUTION TO THE VICTIMS, ALL PAYABLE THROUGH THE CALIFORNIA DEPARTMENT OF CORRECTIONS WHO SHALL COLLECT AND DISBURSE SAID AMOUNTS AS FOLLOWS:

F.O.....\$ 240.00
D.L.....\$ 40.00
B&C RECYCLING\$ 103.00
M.A.....\$1,590.00
D.V.....\$ 29.00
USA MARKET...\$2,508.75

RESTITUTION TO TULARE COUNTY VICTIM'S ADVOCATE'S OFFICE SHALL REMAIN OPEN PURSUANT TO SECTION 1202.4 PC.

12. EXECUTION OF SENTENCE IMPOSED

- a. ☒ at initial sentencing hearing. **12/18/01**
b. ☐ at resentencing per decision on appeal.
c. ☐ after revocation of probation.
d. ☐ at resentencing per recall of commitment. (PC 1170(d).)
e. ☐ other (specify):

13. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A	190	164	26 ☒ 4019 ☒ 2933.1
B			☐ 4019 ☐ 2933.1
C			☐ 4019 ☐ 2933.1
D			☐ 4019 ☐ 2933.1
Date Sentence Pronounced:		Time Served in State Institution:	
12-18-01		DMH	CDC CRC
		[]	[] []

14. The defendant is remanded to the custody of the sheriff ☐ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☒ the reception center designated by the director of the California Department of Corrections.
☐ other (specify):

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE 	DATE 09-02-03
---	-------------------------

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Case Summary	Docket	Briefs
Disposition	Parties and Attorneys	Lower Court

Disposition

PEOPLE v. THATCHER
Case Number [S116119](#)

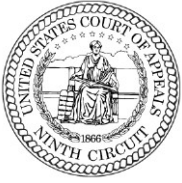
Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation: none

Date	Description
06/25/2003	Petition for review denied

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Molly C. Dwyer
Clerk of Court

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

September 03, 2015

No.: 15-72750
Short Title: David Thatcher v. Dave Davey

Dear Petitioner/Counsel

This is to acknowledge receipt of your Application for Permission to File a Second or Successive Habeas Corpus Petition.

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

The file number and the title of your case should be shown in the upper right corner of your letter to the clerk's office. All correspondence should be directed to the above address pursuant to Circuit Rule 25-1.

ALLISON
9/3/15RECEIVED
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SEP 03 2015

ORIGINAL

Form 12.

Application for Leave to File Second or Successive Petition

(New, 7/1/02)

Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255

FILED
DOCKETED

DATE

INITIAL

UNITED STATES COURT of APPEALS
for the NINTH CIRCUIT
95 Seventh Street
San Francisco, California 94103

Application for Leave to File Second or Successive Petition
Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255

Docket Number

15-72750

15-72750

(to be provided by court)

Petitioner's name

David Thatcher

Prisoner registration number

K. 81267 4B-1R-20

Address

P.O. BOX 3481 CORCORAN, CA. 93212

Instructions - Read Carefully

- (1) This application, whether handwritten or typewritten, must be legible and signed by the petitioner under penalty of perjury. An original and five (5) copies must be provided to the Clerk of the Ninth Circuit. The application must comply with 9th Circuit Rule 22-3, which is attached to this form.
- (2) All questions must be answered concisely. Add separate sheets if necessary.
- (3) The petitioner **shall** serve a copy of this application and any attachments on respondent and must complete and file a proof of service with this application.
- (4) The petitioner **shall** attach to this application copies of the magistrate judge's report and recommendation and the district court's opinion in any prior federal habeas proceeding under 28 U.S.C. § 2254 or § 2255 or state why such documents are unavailable to petitioner.

You Must Answer the Following Questions:

(1) What conviction(s) are you challenging?

ALL COUNTS IN CASE #01-77196 TULARE COUNTY SUPERIOR COURT

Robbery w/ use of weapon

- (2) In what court(s) were you convicted of these crime(s)?

Tulare County Superior Court

- (3) What was the date of each of your conviction(s) and what is the length of each sentence?

EXACT DATE UNKNOWN DEC. 2001. COMBINED TOTAL 16 1/2 TO LIFE. 5

CONSECUTIVE LIFE SENTENCES, REDUCED TO 4 (13 1/2 TO LIFE) VIA DIRECT APPEAL

For questions (4) through (9), provide information separately for each of your previous §§ 2254 or 2255 proceedings. Use additional pages if necessary.

- (4) With respect to **each** conviction and sentence, have you ever filed a petition or motion for habeas corpus relief in federal court under 28 U.S.C. § 2254 or § 2255?

Yes **G**

No **G**

- (a) In which federal district court did you file a petition or motion?

USDC EASTERN DISTRICT OF CA. (FRESNO)

- (b) What was the docket number? UNAV.

- (c) On what date did you file the petition/motion? UNAV.

- (5) What grounds were raised in your previous habeas proceeding?
(list all grounds and issues previously raised in that petition/ motion)

ACTUAL INNOCENCE

- (6) Did the district court hold an evidentiary hearing? Yes **G** No **G**

(7) How did the district court rule on your petition/motion?

G District court **dismissed** petition/motion? If yes, on what grounds?

Denied REASON UNAV.

G

District court **denied** petition/motion;

G

District court **granted** relief;
if yes, on what claims and what was the relief?

(Attach copies of all reports and orders issued by the district court.)

(8) On what date did the district court decide your petition/motion?

UNAV.

(9) Did you file an appeal from that disposition? Yes **G** No **G** (cant remember)

(a) What was the docket number of your appeal? _____

(b) How did the court of appeals decide your appeal? _____

(10) State concisely each and every ground or issue you wish to raise in your current petition or motion for habeas relief. Summarize briefly the facts supporting each ground or issue.

ACTUAL INNOCENCE. The states star witness knowingly perjured himself and lied about his involvement in the crimes. I have a declaration of a private investigator who interviewed the witness

(11) For each ground raised, was it raised in the state courts? If so, what did the state courts rule and when? GROUND RAISED IN ALL STATE COURTS AND DENIED IN ALL STATE COURTS

(12) For each ground/issue raised, was this claim raised in any prior federal petition/motion? (list each ground separately)

ACTUAL INNOCENCE CLAIM RAISED BUT ON DIFFERENT EVIDENCE

(CONT. FROM #10)

During which the witness (a charged co-defendant) admits that he lied about his involvement and admits that he does not know if I ever committed any of the crimes he testified to at trial. (SEE EXHIBIT "A"). This Person's Time card supports this declaration, as it shows that this witness was at work at the time two of the FOS which he plead guilty to took place. (SEE EXHIBIT "B").

I also have a declaration from an alibi witness that trial counsel failed to locate but this declaration was used in a prior petition. I will attach it here if for no other reason than for the (exhibits) courts viewing. I would also bring to the courts attention the transcript of the in limine motions in which the State tells the Court that the only thing tying me to the First robbery is the witness who now admits lying about the whole thing. I would not have been arrested at all had it not been for this witness. (SEE EXHIBIT "D").

- (13) For each ground/issue raised, does this claim rely on a new rule of constitutional law? (list each ground separately and give case name and citation for each new rule of law)

N/A

- (14) For each ground/issue raised, does this claim rely on newly discovered evidence? What is the evidence and when did you discover it? Why has this newly discovered evidence not been previously available to you? (list each ground separately)

It is new evidence and ~~was~~ became available last year. The evidence is a sworn Declaration of Private investigator Katie AKERS and describes an interview conducted by

- (15) For each ground/issue raised, does the newly discovered evidence establish your innocence? How?

The newly discovered evidence does establish my innocence as without Patinos Testimony (sent.)

- (16) For each ground/issue raised, does the newly discovered evidence establish a federal constitutional error? Which provision of the Constitution was violated and how?

IT is a constitutional Error because it is a miscarriage of Justice. U.S. Const. XIV

- (17) Provide any other basis for your application not previously stated.

Date: 8-27-15

Signature: 

Proof of Service on Respondent MUST be Attached.

(cont. from th 14)

Miss Akers with Freddy Patino, in which Mr. Patino admits to lying about his involvement in the crimes and admitting he does not know if I ever committed any robberies. (SEE EXHIBIT "A")

I was not able to get this evidence any sooner because I am indigent and did not have any funds or resources at my disposal.

I am a maximum security prisoner with no access to a phone, computer, or even a County Phone Book.

My Family has just recently agreed to help me and hire the investigator. Had I had funds to hire the investigator I could have gotten the evidence sooner but without resources I am basically helpless.

1 (cont. from #15)

2
3 I would never have been arrested. Patino lied
4 me to the crimes. Both Photo and live
5 line-ups were held and none of the victims
6 identified me as the robber. Without Patino's
7 testimony no jury would have convicted me.
8 Even if I had been arrested, which would not have
9 happened because there was no evidence tying me
10 to the crimes, save Patino's testimony.
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28

EXHIBIT COVER PAGE

Exhibit A

Description of exhibit:

Sworn Declaration of Private investigator Katie Akers

Number of pages to this exhibit: 3

Jurisdiction: (check one only)

Municipal Court

Superior Court

Appellate Court

State Supreme Court

United States District Court

☒ State Circuit Court

United States Supreme Court

Grand Jury

DAVID THATCHER K-81267
IN PRO PER
PO BOX 3481
CORCORAN CA, 93212

DEFENDANT IN PRO PER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF TULARE
VISALIA DIVISION

People,	)	Case No.:
	)	
Plaintiff,	)	
	)	SWORN DECLARATION OF
vs.	)	INVESTIGATOR
	)	
David Thatcher,	)	
	)	
Defendant.	)	
	)	

TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT

I, Katie Akers, declares as follows:

1. On April 28, 2014 I conducted a personal interview with Freddy Patino in Farmersville California.

2. I asked Mr. Patino if anyone had threatened him or coerced him to make a statement to me and he said, "No." I asked Mr. Patino if he would voluntarily speak with me regarding the circumstances of the alleged incident, according to the Visalia police reports, occurred on or about June 18, 2001, and he said, "Yes."

3. Mr. Patino said, "Back then I would hang out with David Thatcher and Leo Palofax and smoke meth. I was high most of the time. I remember the day the cops took me in for questioning; I was at the 24 hour fitness. At that time they didn't tell me I was under arrest they

1 just said they wanted to ask me some questions. My mind was so messed up at that time and I
2 remember that I was so scared. I had a car and we would go out driving a lot. I cannot be
3 positive that they were ever committing any robberies. David and Leo did borrow my car. I
4 remember them coming to my work one time and I told them the keys were under the seat.
5 I also remember at one of my court appearances I could hear two people talking behind me and
6 they said, 'That's not him.'

7 4. I asked Mr. Patino if he had a job at the time of the alleged incidents and he said, "Yes. I
8 worked for Kent Halvorsen doing construction."

9 5. I then showed Mr. Patino a copy of his timecards from Halvorsen Construction and he stated
10 that it was his signature on the bottom of the timecards.

11 6. I asked Mr. Patino if he knew that on the days of the alleged incidents he was clocked in at
12 work and he said, "If my timecard says I was clocked in then I was at work. I had to physically
13 be there in order to clock in and they would check up on us."

14 7. I asked Mr. Patino if he had ever drawn any maps for the officer's showing them where the
15 robberies had taken place and he said, "I don't remember ever drawing any maps but I do
16 remember the officers showing me maps. I can't be sure."

17 8. I asked Mr. Patino why he took a deal if he didn't participate in the robberies and he said, "I
18 was so scared. They were telling me that I was going to get 13 years so when my Attorney got a
19 deal for 1 year I just took it. I ended up doing 9 months in county."

20 9. I asked Mr. Patino if he knew anybody by the name of Amanda Friesen who was David
21 Thatcher's girlfriend from Dinuba and he said, "I do remember that he would go see a lady in
22 Dinuba but I didn't know her name."
23
24
25

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct.

3 Dated this 6th day of May, 2015.

A handwritten signature in black ink, appearing to read 'Katie Akers', written over a horizontal line.

5 Katie Akers

6 Legion Investigative Firm PI27627

EXHIBIT COVER PAGE

Exhibit *B*

Description of exhibit:

Time card of Freddy Patino

Number of pages to this exhibit: 2

Jurisdiction: (check one only)

Municipal Court

Superior Court

Appellate Court

State Supreme Court

United States District Court

✓ State Circuit Court

United States Supreme Court

Grand Jury

APR-21-1900 23:53

ULIAT-CHUT-HUS

RECEIVED JULY 1960

१८३ १८३३ ३४४

Figure 6

TIME CARD
E. KENT HALVORSON, INC.

Employee Name: Freddy Panto

Week Ending Date: 11/23/2001

[illegible]

Note: Both employee and supervisor are required to sign the time card to allow for proper payroll processing.

I certify that for the period covered by this Time Card my hours are recorded correctly and I am injury free or I have reported any injuries to my supervisor.

Employee Signature:

Approved by:

Approved by:

Description of injury or comments:

197 02 01 01 01 01 01

DATE COPY - NAME OFFICE
FBI - NEW YORK

YELLOW COPY - JONASITE

1997年12月17日

2.

TIME CARD
E. KENT HALVORSON, INC.

[illegible]

NOTE: Both employee and supervisor are required to sign the time card to allow for proper payroll processing.

I certify that for the period covered by this Time Card my hours are recorded correctly and I am injury free or I have reported any injuries to my supervisor.

Employer Signature:

Approved by:

APPROVED by:

Description of injury or commitment:

WHITE COPY - MAIN OFFICE

YELLOW COPY - JOURNALS

॥ श्रीगणेशाय नमः ॥

559435 8645

⇒ E KENT MALVORSON

TEL#425 859 0543

07/02/07 09:17

EXHIBIT COVER PAGE

Exhibit C

Description of exhibit:

Declaration of alibi witness Ellen Greer

Number of pages to this exhibit: 1

Jurisdiction: (check one only)

Municipal Court

Superior Court

Appellate Court

State Supreme Court

United States District Court

☒ State Circuit Court

United States Supreme Court

Grand Jury

SWORN DECLARATION/AFFIDAVIT

I have known David Thatcher for 16 years, he has been a family friend and was close with my late husband. In 2001 when David was released from prison, we had spoken to him and asked him what his plans were to stay out of trouble, David came to see my husband and I and stated he wanted to get a job and wished to be left alone. In June of 2001 David came to see my husband and I and stated that he has a drug problem and that he needed help with detoxing. David wanted to get his life together. We told him that could stay in our camper, which is located on our property in the driveway, as long as he did not use drugs. David agreed and stayed in our camper until July first. After staying a week in the camper, he stated that someone owed him some money and left. That was the last time we seen or heard from him. During the period when David was staying in our camper, he would spend his time with my husband in the living room or he stayed inside the camper in our driveway.

David called us after he was arrested and stated that he was being taken to court for things that happened before and during the time that he had been staying in our camper. He asked if we would come to court for him, after a brief discussion with my husband, we agreed, we did not want to see David get into trouble for something he did not do. If he was getting into trouble for something that happened while he was staying with us, we will help because during the time David was staying with us, he never left our property until July 2001. During that time he could not have been out getting in trouble. Before we could go to court me and my husband moved and then on 12/19/01 my husband passed away. Because of everything that was going on, I lost contact with David.

A few years ago my daughter got back in touch with David and started writing to him. David was sent to Corcoran state prison, I was approved to visit him, but I haven't visited or written him. David asked my daughter to ask me if I would still help him with court, I told her I still would.

I don't write letters much or get out of my house so its taken some time get this declaration done for him. I hope this helps to clear up anything or any trouble he is in from when he stayed with us.

I DO HEREBY SWEAR UNDER PENALTY OF PERJURY THE FOREGOING IS TRUE AND CORRECT TO MY KNOWLEDGE

Date: June 27, 2012

Name Printed: ELLEN GREER

Name Signed: Ellen Greer

EXHIBIT COVER PAGE

Exhibit D

Description of exhibit:

Transcript of in limine motions

Number of pages to this exhibit: 2

Jurisdiction: (check one only)

Municipal Court

Superior Court

Appellate Court

State Supreme Court

United States District Court

☒ State Circuit Court

United States Supreme Court

Grand Jury

1 THE COURT: ~~All right Mr. Thatcher,~~
2 your plea to amended Count 8 is not guilty?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: All right.

5 All right. Are there any other
6 issues we need to take up?

7 MS. AIELLO: Yes, your Honor. There's
8 an issue about the evidence that the People intend
9 to elicit at the trial.

10 As the court, I know, is aware,
11 since it did trial call yesterday, this originally
12 was a codefendant case involving a total of five
13 robberies. As currently alleged, Mr. Thatcher is
14 involved in three out of the five.

15 The codefendant Leo Palafox was
16 alleged to have committed -- or be involved in all
17 five robberies.

18 Given the fact that Mr. Palafox is
19 out of the case due to 1368 proceedings being
20 initiated, the People still intend to elicit the
21 testimony of the other two robberies that
22 Mr. Thatcher is not involved in, and the main
23 reason is this is a totality of the circumstances
24 type of case.

25 Even though the People have to
26 prove each and every count by proof beyond a

1 ~~reasonable doubt, the fact is there's~~
2 circumstantial evidence of this defendant's
3 involvement in the charged robberies.

4 One of the key witnesses --

5 THE COURT: Just -- I'm sorry, I don't
6 understand what you just said.

7 MS. AIELLO: That's okay.

8 THE COURT: I heard what you said, but I
9 don't understand it.

10 MS. AIELLO: In the -- in the very first
11 count, very first robbery that's alleged as to
12 Mr. Thatcher's involvement, there is no positive
13 witness identification. The evidence linking
14 Mr. Thatcher to this particular robbery, the first
15 robbery, would be the testimony of the codefendant
16 who pled out on the day of the preliminary
17 hearing, Freddie Patino.

18 The physical description arguably
19 matches the defendant.

20 THE COURT: Okay.

21 MS. AIELLO: The next robbery alleged
22 for Mr. Thatcher is on June 27th, and that would
23 be the Count 8 that we just discussed. That
24 occurred at the very same recycling center and
25 also involved Leo Palafox who is alleged to have
26 committed the first robbery with Mr. Thatcher and

Proof of Service by Mail

[Case Name and Court Number]

I declare that:

I am a resident of Corcoran CA in the county of KINGS,
California. I am over the age of 18 years. My residence address is: P.O. Box 3481
Corcoran CA 93212

On 8-27-15, I served the attached. Petitioner's ^{APP. For leave to file 2nd or succ.} on the
Warden D. Davies 4801 King Ave. Corcoran CA 93212
9TH Cir. Court of Appeals in said case by placing a true copy thereof enclosed in a sealed
envelope with postage thereon fully paid, in the United States mail at Corcoran, CA
Addressed as follows: Warden D. Davies 4801 King Ave. Corcoran CA 93212
9TH Cir. Court of Appeals P.O. Box 193939 San Francisco CA
94119-3939

I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct, and that this declaration was executed on 8-27-15 [date],
at Corcoran, California.

David Thatcher
[Type or Print Name]

[Signature]
[Signature]