ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 46509

FILED

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APPELLANT'S REPLY BRIEF

APPEAL FROM REMANDED PENALTY HEARING
AND SENTENCE OF DEATH

DAVID M. SCHIECK
CLARK COUNTY, NEVADA
SPECIAL PUBLIC DEFENDER
Nevada Bar #0824
330 South Third Street, Ste. 800
Las Vegas NV 89155-2316
(702) 455-6265

ATTORNEYS FOR APPELLANT

DAVID ROGER
CLARK COUNTY, NEVADA
DISTRICT ATTORNEY
Nevada Bar #2781
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155
(702) 671-2500

GEORGE CHANOS
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701-4717

ATTORNEYS FOR RESPONDENT

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* * *

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Carson City, NV 89701-4717

ATTORNEYS FOR RESPONDENT

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PRELIMINARY STATEMENT

As this matter was before the Court on remand from the Supreme Court on THOMAS' appeal from the denial of his post conviction Petition for Writ of Habeas Corpus, both parties have relied upon the factual statement contained in the direct appeal of THOMAS. Thomas v. State, 114 Nev. 1127, 901 P.2d 647 (1998). THOMAS' trial occurred in June 1997 and since that time he has been held in the Nevada Department of Prisons. As such the most recent factual information that could be presented at the remanded penalty hearing was by necessity confined to events which transpired while THOMAS was incarcerated.

Both parties have agreed that the facts presented at the 1997 penalty hearing are not relevant to the current proceedings, however, it is noteworthy that at the first penalty hearing the jury found the existence of no mitigating circumstances, while at the remanded hearing the jury found seven (7) mitigating circumstances. (11 APP 2649). It will never be known whether the jury at the first penalty hearing would have returned a verdict of death had it been presented with these existing mitigating circumstances, likewise it is unknown the extent to which the negative aspects of THOMAS' prison record since 1997 influenced the decision at the second penalty hearing. The dichotomy between the special verdict in the two hearings illustrates the constitutional perils of remanded penalty hearings after the passage of many years.

Similarly, the unfairness of the proceedings is highlighted by the ability of the State to present evidence of the underlying murder cases in support of urging the jury to return a death

verdict, while prohibiting the defense from presenting evidence that creates a lingering or residual doubt as to the accuracy of the factual basis of the convictions. There is no constitutional mandate that at a remanded sentencing hearing in a capital case residual or lingering doubt can be considered as a mitigating circumstance because lingering doubts over a defendant's guilt are not an aspect of the defendant's character, record, or a circumstance of the offense. Evans v. State, 112 Nev. 1172, 926 P.2d 265; Homick v. State, 108 Nev. 127, 141, 825 P.2d 600, 609 (1992).

The Court in Smith v. Balkcom, 660 F.2d 573, 581 (5th Cir. 1981) stated the need for residual doubt to be a consideration:

> "The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt - doubt based upon reason - and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt - this absence of absolute certainty - can be real...Even [this] serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremediable penalty of death."

The State called witnesses Stephen Hemmes, Vincent Oddo and Stephen Sontag to testify concerning the events of the underlying crimes, even though the jury was instructed that they could not consider guilty or innocence as part of their deliberations. Thus although the parties for purposes of this appeal are proceeding on the facts from the finding of guilt at trial, a fairer process would allow that a defendant at a remanded penalty hearing be allowed to present evidence in response to the prior finding.

ARGUMENT

I

THE COURT ERRED IN ADMITTING EVIDENCE IN VIOLATION OF THOMAS' RIGHTS UNDER THE SIXTH AMENDMENT TO CONFRONT WITNESSES AGAINST HIM

A. The Court Erred in Admitting the out of Court Statements of Kenyon Hall During the Penalty Hearing.

The State takes two positions with respect to the admissibility of the out-of-court statement of Kenyon Hall to the police; that the statement has sufficient indicia of reliability to make it admissible under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and that THOMAS opened the door during cross-examination to the admission of the hearsay statement. The State is incorrect in both assertions.

The State cites to the direct appeal opinion herein which allowed the admission of Hall's preliminary hearing testimony at trial based on Hall's refusal to testify at trial. (Answering Brief page 16). THOMAS is not challenging the admission of the under-oath testimony from the preliminary hearing of Hall under NRS 171.198(6)(b), but rather the admission of the out-of-court interrogation which occurred when Hall was arrested. Hall was subjected to cross-examination at the preliminary hearing (although the effectiveness of such cross-examination was challenged as a violation of the right to effective assistance of counsel under the Sixth Amendment), however, he was not subject to cross-examination at the time he gave his statement to the police. It is that distinction that brings the issue within the purview of the Confrontation Clause and the holding of the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354

(2004). The preliminary hearing testimony was admissible hearsay, but the out-of-court statement contained therein was hearsay within hearsay. This made it inherently unreliable and a violation of the confrontation clause.

The State cites to United States v. Littlesun, 444 F.3d 1196 (2006) for the proposition that Crawford does not apply to sentencing hearings. The Court in Littlesun, supra, indicated that Crawford did not explicitly overrule existing precedent, and as such hearsay is admissible at sentencing so long as accompanied by some minimal indicia of reliability. Littlesun, 444 F.3d at 4559. Littlesun is distinguishable in that it concerns sentencing on a drug offense after a guilty plea and does not address the special need for reliability in death penalty hearing. It is respectfully urged that the due to the severity and irreversibility of the death sentence and because of its qualitative difference from other punishments that there is "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. See Woodson v. North Carolina, 428 U.S. 280, 305, 98 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). THOMAS respectfully urges that the need for heightened reliability applies to the introduction of hearsay without the ability to confront the declarant in a capital sentencing hearing.

Although hearsay may be generally admissible at a sentencing hearing, it is respectfully urged that this Court find that the need for Confrontation Clause protection mandates a different standard at a death penalty sentencing.

Most recently in United States v. Mills, 2006 U.S. Dist. Lexis 62066 the Court found that the constitutional right to

confrontation applies to both phases [eligibility and selection] of federal capital sentencing stating, inter alia,

> "Thus, while the Court recognizes the policy reasons encouraging the admission of the maximum quantum of evidence during the selection phase, that policy is insufficient to overrule Defendant's right to confront witnesses during such a critical position of the capital trial."

Mills, U.S. Dist. Lexis 62066 at 38.

With respect to the State's position that THOMAS "sought to take unfair advantage of [the initial] favorable evidentiary ruling and pressed a number of key issues, which included impugning the memory of Officer Bailey and suggesting that Hall's statement to police was coerced" (Answering Brief page 16), and therefor opened the door to the admission of the statement, the State has misinterpreted the proceedings below. THOMAS did not suggest that the statement was coerced, the State has extrapolated a question as to the number of persons present during the interview on cross-examination in response to the State asking on direct examination if Hall's mother was present into suggesting that the statement was coerced. The record belies such a finding. Additionally, if the State feels that asking the number of persons present suggests coercion then the problem becomes whether there is sufficient indicia of reliability to allow admission of the hearsay.

A review of the record shows that:

> "THE COURT: Anything else we want to take up outside the presence of the jury?
>
> MR. OWENS: We wanted to offer a copy of the statement that Kenya Hall gave to Trooper Bailey. They don't' have an objection to foundation, but they want to make the same objection as they did yesterday as to hearsay, or was it Crawford, Mr. Schieck?
>
> MR. SCHIECK: Yes, Crawford.

THE COURT: So the State is moving to admit the transcript of Kenya Hall's conversation with Trooper Bailey conducted in Hawthorne on April 15th of 1996. And what is your objection, Mr. Schieck?

MR. SCHIECK: The objection is that under the confrontation clause under the Sixth Amendment that out-of-court testimonial statements are not admissible under the US Constitution and --

. . .

MR. SCHIECK: The admission is what's unconstitutional. There's no ability to confront the declarant here in court.

THE COURT: Mr. Owens.

MR. OWENS: I don't know if it was Mr. Schieck or somebody else had argued the same thing, Crawford's application. We had this over in Department XII a few weeks ago. There are no cases of Crawford that I'm aware of that are applying it to the penalty phases. I've heard that allegation, but I have yet to see the cases. Trooper Bailey testified yesterday that as to the conversation he had with Kenya Hall. We just want to have that conversation in its entirety to put before the jury.

THE COURT: Well, didn't we read Kenya Hall's preliminary hearing testimony?

MR. OWENS: We read his preliminary hearing testimony, but that's not as comprehensive as his statement is.

THE COURT: His preliminary hearing testimony would be what does not violate Crawford, and that was used at trial.

MR. SCHIECK: Well, I'm not going to concede that it doesn't violate Crawford.

THE COURT: IT was at a hearing where Mr. Thomas was under oath, and Mr. Thomas was represented and where Mr. Thoma's (sic) representatives had the right to cross-examine Kenya Hall, and it was admitted and it was read. And the question is in a penalty proceeding can the transcript of an out-of-court statement be admitted, and I think that to be safe, to always err on the side of caution so we're not looking at ourselves ten years from now in number three, it would be better not to admit the statement.

MR. OWENS: We're going to have to recall the officer who testified at length about the statement that he took

from --

THE COURT: Why didn't you ask him the right questions yesterday?

MR. OWENS: We're not sure if we did. We think that we did.

THE COURT: You have an overnight transcript. You can review it.

MR. OWENS: We'll take a look at it and see, but we think there was one key area that came up yesterday that wasn't covered. We thought this was the cleanest way to put that in, just put the statement in. If Crawford starts applying to sentencing hearings, which is what we're in right here, the judge wouldn't be able to read a PSI. We'd have to have a hearing, we'd have to cross-examine every person that put information in that PSI. Crawford has not been extended to that sentencing process. If it ever did, it would be ridiculous, and that's the process we're in here with this jury. It's already come in in large part. We just want the full statement in its context rather than just the paraphrasing that we got from Trooper Bailey. It's already come in.

MR. SCHIECK: Over our objection which we raise confrontation.

THE COURT: I allowed Trooper Bailey to testify regarding a conversation because hearsay is admissible in a penalty proceeding. However, that was your chance to get that in. If you have to recall him, you have to recall him, but I'm not going to allow the transcript of the conversation.

MR. SCHIECK: Just as yesterday we would object to him recalling and having him testify. Yesterday we objected on hearsay and on confrontation." (11 APP 2654-55)

Therefore, THOMAS respectfully asserts that the Court erred in the admission of out-of-court statements of Kenyon hall and the sentence must be vacated and the case remanded for further proceedings.

B. The Court Erred in Admitting Records and Reports from the Department of Prisons and Parole and Probation Without Calling the Declarant or Author Thereof to Testify and Be Subject to Cross-examination.

The State is entirely correct that THOMAS is concerned about the introduction of the two separate sets of records from the Department of Prisons and Parole and Probation during the penalty hearing (Answering Brief page 18).

With respect to the Certification Order from Juvenile Court in 1990 the Court did not allow it's admission during the first phase of the bifurcated hearing, but did allow the State to inquire of Mrs. Thomas as to statements attributable to her in the report as prior inconsistent statements. Without calling the declarant of the hearsay report, the State should not have been permitted to introduce the actual report into evidence.

The Certification Order itself is different in nature from the statement addressed above attributable to Kenyon Hall, which was an out of court statement during the course of an interrogation wherein the officer who took the statement was available to testify. With respect to the Certification Report and Order the author of the document was not called to verify the contents or lend any indicia of reliability to the contents of the report. For instance, was the report based on a written form completed by Mrs. Thomas or the result of a face to face interview? Was the report

written by the person who conducted the face to face interview or was in prepared based on a report written by the person who conducted the interview. All of these factors were not presented by the State and as such, even if this Court were to follow the reasoning of the Littlesun court, there was no indicia of reliability presented upon which to base the admission of the documentary hearsay.

The State, again, accuses THOMAS of intentionally trying "to take unfair advantage of the bifurcated nature of the penalty hearing by eliciting favorable character evidence in the mitigation phase, but then denying the State the right to impeach their witnesses with prior inconsistent statements." (Answering Brief page 19) As discussed above, use of a hearsay written report containing an alleged prior consistent statement is not proper impeachment. This argument by the State ignores the clear precedent that the aggravating circumstances must be weighed against the mitigating circumstances before the other character evidence can be considered by the jury. In Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) the Court reiterated that in

> "deciding whether to impose a death sentence, [the jury] may not consider general character evidence until they have determined that a defendant is eligible for the death penalty..."

Byford, 116 Nev. at 239.

Thus any impeachment using other character evidence not related to proof of aggravating circumstances should not be admissible as impeachment of mitigation evidence presented by the defendant at the weighing stage of the eligibility process in a capital trial.

II.

THE COURT IMPROPERLY LIMITED THE MITIGATION AND INSTRUCTIONS ON MITIGATION OFFERED BY THOMAS

A. The Court Erred in Refusing to Instruct the Jury That the Absence of Premeditated Intent to Kill Could Be Considered as a Mitigating Circumstance.

The State cites to a 1986 case, Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986), for the proposition that the refusal to give a proposed non-statutory mitigating jury instruction is reviewed under an abuse of discretion standard. Such an argument ignores the large body of case law since the Howard decision that modifies, if not impliedly overruling said holding. In Howard, supra, the trial court even refused to instruct on the statutory mitigating circumstances and the Court found that the failure was not an abuse of discretion or judicial error because there was no evidence to support the statutory mitigators and although the subject of objection at trial was not raised on direct appeal. Howard, 102 Nev. at 578. The jury only received one mitigator instruction, i.e., "any other mitigating circumstance." Id.

In Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) this Court considered a claim that it was error to refuse to instruct the jury on the defense theory of mitigation. The Court found that the trial court may have erred in refusing the instruction. The Court went on to state:

> "NRS 175.554(1) therefore requires instructions on alleged mitigators upon which evidence has been presented and does not restrict such instructions to the enumerated statutory mitigators. Therefore, Byford was entitled to appropriate jury instructions on unenumerated mitigating circumstances for which he had presented evidence."

Byford, 116 Nev. at 238.

The State also cites to Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998) as being analogous to the instant case. In Castillo, the trial court refused to give an instruction that listed five (5) non-statutory mitigating circumstances; that Castillo had (1) admitted his guilt of the offense charged; (2) had demonstrated remorse for the commission of the offense, (3) cooperated with police after he was identified as a suspect (4) had not planned to commit the murder and (5) had a difficult childhood. This Court found that the "catch-all" definition of mitigating circumstances was sufficient, a position that the Court retreated from in Byford, supra.

In Holloway v. State, 116 Nev. 732, 6 P.3d 987 (2000) the Court found that the jury required further instruction regarding its responsibilities in assessing the evidence during the penalty phase:

> "The record before us exhibits sufficient evidence to support the conviction for first-degree murder. However, it also reveals a number of potential mitigating factors. For example, there was substantial evidence that Hollaway was remorseful following the murder. There was extensive evidence that alcoholic intoxication played a major role in the crime. The record also showed that Hollaway and Whiting had been arguing incessantly when the killing occurred. Further, the crime did not threaten or endanger any other persons. Also, Hollaway did not flee or conceal the crime in any way or deny his actions; rather he immediately reported the crime and admitted his guilt." (emphasis added)

Hollaway, 116 Nev. at 743.

The mitigation instruction in the instant case that included that there was a lack of premeditation in the homicide is the equivalent to that found in Hollaway that the killing occurred during an argument. THOMAS' jury was therefore not properly

instructed in the penalty defense theory of mitigation in the penalty hearing. Although the Court has not deemed such error to be plain or constitutional error, in the instant case there was a timely tender of the proposed mitigation instruction, and the failure should be reviewed under an abuse of discretion standard.

The refusal of the District Court to fully instruct the jury on THOMAS' theory of mitigation reasonably prevented the jury from giving full consideration to the mitigation proffered by THOMAS. The fact that THOMAS described the incident as having occurred during a confrontation and not with premeditated intent to cause death should have been open to full consideration by the jury. The denial of proper instruction violated the Eighth and Fourteenth Amendments. See, Lockett v. Ohio, 438 U.S. 586, 602-609, 98 S.Ct. 2954 (1978) plurality opinion; Brown v. Payton, 544 U.S. 133, 125 S.Ct. 1432 (2005).

B. The State Committed Error in Limiting the Consideration of Mitigation in It's Closing Argument.

The State takes the position that the closing argument of the prosecutor properly tells the jury that "there should be some connection between a fact and a defendant's actions before it has much weight as a mitigating factor." (Answering Brief page 22). This argument in the Answering Brief incorrectly reflects the statement made by the prosecutor in his closing which drew the objection. Specifically the prosecutor told the jury: "In other words, there has to be some causation, connection between that fact and the thing that the person did before it becomes a mitigator" (12 APP 2853-54). There is clearly no requirement that a mitigator has to have a causal connection to the murder to be considered by

the jury. Whenever a prosecutor tells jurors that they cannot consider evidence the defense presents as mitigation, he or she violates the Eighth and Fourteenth Amendments. Penry v. Lynaugh, 492 U.S. 302, 326-328 (1980).

The relevant authority is clear that the "catch-all" mitigation provision in a state's statutory scheme encompasses anything that happened before and after the crime or later. Brown v. Payton, 544 U.S. 133, 125 S.Ct. 1432 (2005). Argument to the jury that it could not consider mitigating evidence of post conviction conduct in determining whether the defendant should receive a sentence of life imprisonment violates the Eighth Amendment. Lockett v. Ohio, 438 U.S. 586, 602-609, 98 S.Ct. 2954 (1978) (plurality opinion).

It was improper argument for the prosecutor to tell the jury that there should be a connection between the fact and the defendant's actions before it can be mitigation. In fact, events that transpire long after the underlying crime and which have no connection whatsoever to the actions of the defendant, are properly admitted as mitigation.

C. The District Court Erred in Limiting the Defense Theory of Mitigation in the Case Involving the Failure to Charge Angela Love.

The State, in part, makes the point for THOMAS on the error of the trial court in limiting examination concerning the involvement of Angela Love in the events that proceeded and transpired at the Lone Star Restaurant. The State acknowledges the propriety of the defense "theory that Angela Love was a bad influence on [Thomas] or that her involvement with Defendant precipitated the murder and was a factor to be considered in mitigation" (Answering Brief page 24-

25). The comment by the trial court was that the information concerning Love was "not even mitigation. So I don't know why you brought it up" (11 APP 2543), was totally contrary to existing precedent, and in itself forms a basis for reversal of the sentence.

The United States Supreme Court has held that to ensure that jurors have reliably determined death to be the appropriate punishment for a defendant "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." Penry v. Lynaugh, 492 U.S. 302, 328 (1980). In Penry the absence of instructions concerning certain mitigation evidence resulted in the case being remanded for a resentencing.

While the District Court and the prosecution may not agree that the failure to prosecute the person who aided and abetted in the commission of the homicide is mitigation, the decision is not left to the prosecutor. It is a jury of the defendant's peers that is called upon to make the ultimate decision. If any one juror believe that the selective prosecution of the case was a factor upon which to spare the life of THOMAS, it would have thwarted the State's efforts to obtain a death sentence. It was error to deny THOMAS the ability to present and argue the full available mitigation to his jury.

III.

THE COURT ERRED BY NOT LIMITING PENALTY HEARING EVIDENCE TO AVOID VIOLATION OF THE EIGHTH AMENDMENT AND DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR PENALTY HEARING

A. The Trial Court Should Not Have Admitted Cumulative and Otherwise Inadmissible Evidence of Prior Bad Acts During the Penalty Phase.

THOMAS agrees that Nevada law allows the admission of character evidence at the penalty phase of a capital trial. NRS 175.552. The problem that exists is that the discretion of the trial court in controlling the admission of such evidence is unbridled and as such can result in the arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment. Death penalty statutes must be structured to prevent the penalty being imposed in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2126, 33 L.Ed.2d 346 (1972).

Nevada cases do recognize that there must be some discretion exercised in the admission of unrelated or uncharged other acts at a penalty hearing:

> Evidence of unrelated crimes for which a defendant has not been convicted is inadmissible during the penalty phase if it is dubious or tenuous, or if its probative value is outweighed by danger of unfair prejudice, confusion or issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence."

Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179 (1991). *See also*, Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983) and Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000), however rarely, if ever, do

the trial courts limit the admission of evidence proffered by the State.

The State cites a number of cases that allow for the admission of other bad acts so long as the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. Pellegrini v. State, 104 Nev. 625, 630-31, 764 P.2d 484 (1988); McKenna v. State, 114 Nev. 1044, 1051-1052, 968 P.2d 739, 744 (1988). In the instant case the Court should have limited the quality and quantity of the "prison incident" evidence that was presented to the jury. The cumulative effect of the volume of evidence outweighed any probative value to said evidence. The Opening Brief and the State's Answering Brief contain fairly full descriptions or summaries of the evidence that was presented, with the competing points of view whether the presentation of this type of evidence needs to be controlled.

In addition to preventing introduction of evidence in contravention of the confrontation clause the Court should have placed some limiting factors upon the prison records probative value. The failure to do so violates the Eighth Amendment and resulted in the arbitrary and capricious imposition of the death sentence.

B. The Statutory Scheme Adopted by Nevada Fails to Properly Limit Victim Impact Statements.

As set forth in the Opening Brief, THOMAS respectfully urges that this Court enact guidelines on the presentation of victim impact testimony at a penalty hearing in a capital case. The Court has adequately set forth such guidelines with respect to the statement of allocution made by the defendant at his penalty

hearing. Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992), *cert. denied* 117 S.Ct at 519 (1996). A similar pronouncement would be appropriate for victim impact testimony. Even though such testimony is given under oath with the opportunity to cross-examine, such is an illusory control mechanism, with such cross-examination rarely, if ever, conducted due to the negative impact same would likely have on the jury.

The failure to have such a framework in place resulted in the rehearsed violation of admissibility by the father of Carl Dixon stating with respect to THOMAS that he was "a person who is in my opinion the lowest form of social sewage". (13 APP 2973). While THOMAS understands and accepts that victim impact testimony is admissible as stated in Lane v. State, 110 Nev. 1156, 881 P.2d 1358 (1994), citing to Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991) that : "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Id, 501 U.S. at 827, 111 S.Ct. at 2609.

The inherent problem with making such evidence admissible without restraint is that death sentences could be imposed based on the status of the victim and not the death worthiness of the defendant. Such evidence also invites prosecutor misconduct in arguing for the death penalty to the jury. For instance in Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) the Court found that:

> "The prosecutor's statement to the jury that Whiting's family would have no more holidays with their daughter and their sister was improper. *See* Quillen v. State 112

> Nev. 1369, 1182, 929 P.2d 893, 901 (1996). The statement encouraged the jury to impose a sentence under the influence of passion: 'holiday arguments' are meant only to appeal to jurors emotions and arouse their passions. *Id.*"

Holloway, 116 Nev. at 742-743.

The question remains whether, if during testimony concerning victim impact, the witnesses referred to missing their daughter or sister at Christmas would be deemed as improper and meant to appeal to "jurors emotions and arouse their passions" when the same statement is misconduct if made in the context of closing argument. This Court must set appropriate limits and the failure to do so has resulted in the arbitrary, capricious, and "freakish" imposition of the death penalty.

IV.

THE SENTENCE OF DEATH MUST BE REVERSED BECAUSE NEVADA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL

The State takes the position that "Nevada has adopted a statutory scheme which clearly satisfies the concerns expressed in Furman and the solutions proposed by Gregg. As in the Georgia scheme which passed muster in Gregg, Nevada has set forth a series of statutory [aggravating] factors; one of which must be proven beyond a reasonable doubt before a sentence of death can be imposed" (Answering Brief page 31). The State, however, in making this argument, misses the point: the Nevada aggravating circumstances are so broad as to fail to legitimately narrow the class of murders eligible for the death penalty, and the ultimate decision on whether to seek death in decided in an uncontrolled decision making process of the prosecuting authority without review procedures to avoid arbitrary and capricious decisions.

The State while defending the aggravating circumstances legislatively created and carried out by the executive branch through the prosecutors office, hails the decision of this Court in McConnell v. State, 120 Nev. Ad. Op. 105, 102 P.3d 606 (2004) as narrowing the discretion of the statutory scheme. The fact that the judicial branch was compelled to intervene is clear evidence that the Nevada statute is overbroad and results in the arbitrary and capricious eligibility for the death penalty. This is an obligation that the Court undertakes under the mandatory review provisions of NRS 177.055(2) because the Court is:

> "also cognizant that because the death penalty is unique in its severity and irrevocability, this Court must carefully review every death sentence to minimize the risk that the penalty is imposed in error or in arbitrary

and capricious manner."

Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000).

Until such time as there is a legitimate narrowing of the aggravating circumstances that allow the State the exercise discretion on which cases are death penalty eligible the Nevada scheme will be unconstitutional in violation of the Eighth Amendment. THOMAS' sentence should therefore be vacated and the case remanded for imposition of a sentence less than death.

V.

THE STATE VIOLATED THE ORDER OF THE COURT BIFURCATING THE EVIDENCE AT THE PENALTY HEARING

The State takes the position that THOMAS was not entitled to a bifurcated penalty hearing and as such any violation of the order to the District Court bifurcating the hearing was not error in the case. While THOMAS does not concede that a bifurcated penalty hearing is not constitutionally mandated, most current decisions of this Court do not require such a procedure. Accord Weber v. State, 121 Nev. Ad. Op. 57, 119 P.3d 107 (2005); McConnell v. State, 120 Nev. Ad. Op. 105, 102 P.3d 606 (2004). THOMAS reasserts that once the District Court determined to conduct a bifurcated penalty hearing to comply with Due Process, the Eighth Amendment and the Nevada statutory scheme, the Court was obligated to enforce it's ruling and the State required to abide by the ruling. Presentation on cross-examination of character evidence tainted the bifurcated process and allowed the jury to consider improper factors in weighing aggravation against mitigation. This error invalidates the death eligibility determination and mandates either a new penalty hearing or the imposition of a life sentence.

CONCLUSION

Based on the arguments and authorities herein contained and in the Opening Brief heretofore filed with the Court, it is respectfully requested that the Court vacate the sentence of death imposed against MARLO THOMAS and remand the matter to District Court for further proceedings consistent with the decision of the Court.

Dated this 21 day of October, 2006.

RESPECTFULLY SUBMITTED:

SPECIAL PUBLIC DEFENDER

BY _____

DAVID M. SCHIECK
Nevada Bar No. 0824
330 S. Third St., Ste. 800
Las Vegas, Nevada 89155
(702)455-6265
Attorney for THOMAS

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 21, 2006

BY _____
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar No. 0824
330 S. Third St., Ste. 800
Las Vegas, Nevada 89155
(702)455-6265

CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 20th day of October, 2006, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas NV 89155

Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

KATHLEEN FITZGERALD, an employee
of The Special Public Defender's Office