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SAMUEL HOWARD

VS.

### Respondents.

Case No. 57469

## Docket 57469 Document 2011-14204

1 AND WHILE YOU'RE ON THE STAND, EACH OF YOU SAY, OF CDURSE I CAN  
2 IDENTIFY. THAT WAS THE MONA LISA. ANYBODY KNOWS THE MONA LISA.  
3 AND THE DEFENSE ATTORNEY SAYS TO YOU, WELL, NOW, MR. OR MISS  
4 WITNESS, HOW DOES THE MONA LISA HAVE HER HAIR DONE? IS IT UP  
5 IN A BUN? IS IT HANGING DOWN ON HER SHOULDERS? IS IT BROWN?  
6 IS IT BLACK? IS IT PULLED BACK, AND IF IT IS, DOES SHE HAVE  
7 EARRINGS OR DOES SHE NOT HAVE EARRINGS, AND IF SHE DOES DO THEY  
8 DANGLE? DOES SHE HAVE A NECKLACE ON? WHAT COLOR ARE HER EYES?  
9 HOW ABOUT HER DRESS? WHAT CAN YOU TELL ME ABOUT HER DRESS?  
10 IS IT LIGHT BLUE? IS IT RED? DOES IT HAVE RUFFLES ON THE  
11 SLEEVES OR IS THERE BUTTONS COMING DOWN, OR IS IT A SCOOPED  
12 NECK?

13 WELL, IF YOU'RE LIKE ME, YOU HAVEN'T  
14 THE SLIGHTEST IDEA TO THE ANSWER OF ANY OF THOSE QUESTIONS.  
15 NONE OF THEM. NONE OF THEM.

16 BUT IS THERE ANY DOUBT IN YOUR MIND  
17 THAT YOU SAW THE MONA LISA AND YOU KNOW YOU SAW THE MONA LISA  
18 AND YOU'RE GOING TO TESTIFY TO IT? AND YOU'RE RIGHT, YOU'RE  
19 TELLING THE TRUTH.

20 WHAT THE DEFENSE ATTORNEYS WANT IN  
21 THAT SITUATION IS TO BE ABLE TO SAY BECAUSE YOU DON'T KNOW ALL  
22 THOSE DETAILS THERE'S SOME SORT OF A REASONABLE DOUBT AS TO  
23 YOUR IDENTIFICATION OF THE MONA LISA. AND YOU SEE IT DOESN'T  
24 WORK THAT WAY BECAUSE PEOPLE ARE BETTER -- PEOPLE ARE BETTER AT  
25 RECOGNIZING THAN THEY ARE AT DESCRIBING. YOU KNOW, YOU LOOK AT  
26 SOMETHING AND YOU GET A FEEL FOR IT. THERE'S AN AURA THAT IT  
27 HAS, AND YOU'D KNOW IT ANYWHERE IF YOU SAW IT AGAIN. YOU'D  
28 KNOW REGGIE JACKSON ANYWHERE. YOU'D KNOW THE SPACE SHUTTLE  
29 ANYWHERE. YOU'D KNOW THE WHITE HOUSE ANYWHERE. AND YET YOU  
30 COULDN'T DESCRIBE THOSE THINGS REAL CAREFULLY WITH ALOT OF  
31 DETAIL, BUT YOU KNOW THEM, AND IT'S BECAUSE YOU'RE GOOD AT  
32 RECOGNIZING THEM, NOT DESCRIBING THEM.

1 NOW, I'D LIKE TO MOVE ON TO THE PART  
2 OF THE CASE THAT HAS TO DO WITH THE MURDER AND THE ROBBERY OF  
3 DOCTOR MONAHAN. YOU KNOW, LIKE A LOT OF THE SEARS CASE OF KEITH  
4 KINSEY, THIS NOW IS GETTING DOWN TO THAT PURELY, ALMOST PURELY,  
5 CIRCUMSTANTIAL KIND OF A CASE. NOW, WE HAVE TO GO BACK TO OUR  
6 THOUGHTS ON CIRCUMSTANTIAL EVIDENCE. AND I WANT TO TELL YOU  
7 I'M ALMOST EMBARRASSED TO DO IT, BUT I WILL BECAUSE I DON'T  
8 GET EMBARRASSED REAL EASILY. I WANT TO TELL YOU THE OLDEST  
9 STORY IN THE BOOKS ABOUT CIRCUMSTANTIAL EVIDENCE, AND IT'S  
10 THIS:

11 YOU GO TO BED -- YOU GET READY TO GO  
12 TO BED ONE NIGHT AND YOU LOOK OUT THE WINDOW AND THE GROUND IS  
13 CLEAR, THE SKY IS CLEAR, AND YOU CAN SEE, OH, A RAKE IN THE YARD  
14 AND WHERE THE KIDS LEFT THEIR TOYS AND THE HOSE. AND YOU GO TO  
15 BED AND YOU SLEEP ALL NIGHT LONG LIKE A BABY. AND YOU WAKE UP  
16 THE NEXT MORNING. YOU GET UP OUT OF BED AND YOU LOOK OUTSIDE  
17 AGAIN AND THERE'S SNOW EVERYWHERE AND THE SKY IS CLEAR.

18 NOW, THE QUESTION IS: DID IT SNOW  
19 LAST NIGHT? WELL, OF COURSE IT SNOWED LAST NIGHT. YOU DIDN'T  
20 SEE IT SNOW BUT THE FACT THAT IT WASN'T THERE WHEN YOU WENT TO  
21 BED AND IT WAS THERE WHEN YOU GOT UP, THAT IS CIRCUMSTANTIAL  
22 EVIDENCE THAT WHILE YOU WERE SLEEPING IT SNOWED.

23 AND SO IN THE SNOW CASE YOU ASK YOUR-  
24 SELF: WHAT DID IT DO LAST NIGHT? THAT'S THE KEY QUESTION.  
25 AND THE ANSWER PROVEN BY CIRCUMSTANTIAL EVIDENCE IS: IT SNOWED.

26 THE QUESTION IN THIS CASE IS: WHAT  
27 DID THE DEFENDANT DO BETWEEN THE HOURS OF 7:00 AND 8:00 O'CLOCK  
28 IN THE MORNING OF MARCH THE 27TH, 1980, HERE IN LAS VEGAS,  
29 NEVADA? THAT'S THE QUESTION.

30 THE OTHER SIDE OF THAT COIN IS: HOW  
31 DO WE PROVE -- WELL, LET ME SAY IT DIFFERENTLY.

32 I SUGGEST TO YOU THAT THE EVIDENCE

1 SHOWS THAT THE ANSWER TO THAT QUESTION IS THAT THE DEFENDANT  
2 SAM HOWARD MURDERED AND ROBBED DOCTOR MONAHAN.

3 NOW, THE QUESTION IS: HOW DO WE  
4 GO ABOUT PROVING IT IN THIS CIRCUMSTANTIAL CASE THAT WE'VE GOT?  
5 WELL, HERE'S HOW WE DO IT: WE KNOW ALOT OF THINGS AND LET'S  
6 GO DOWN THE LIST OF WHAT WE KNOW AND SEE WHAT CONCLUSIONS WE  
7 ALMOST HAVE TO DRAW FROM IT;

8 WE KNOW, FOR ONE, THAT THE DEFENDANT  
9 MADE AN APPOINTMENT WITH DOCTOR MONAHAN. MARY LOU TELLS US  
10 THAT. BARBARA ZEMAN TELLS US THAT. DAWANA THOMAS TELLS US  
11 THAT;

12 WE KNOW THAT THE DEFENDANT SHOWED UP  
13 FOR THAT APPOINTMENT. HELENE ZUCKERMAN KIND OF TELLS US THAT,  
14 BUT DAWANA TELLS US REAL GOOD;

15 WE KNOW THAT DOCTOR MONAHAN SHOULD  
16 HAVE ARRIVED SHORTLY AFTER THE DEFENDANT ARRIVED AT THE  
17 WINCHESTER PLAZA BECAUSE MARY LOU TELLS US THAT HE HAD HEADED  
18 FOR WORK ABOUT THAT TIME;

19 AND WE KNOW, AS A MATTER OF FACT,  
20 THAT HE DID ARRIVE AT THE WINCHESTER PLAZA, OR THAT THE  
21 DEFENDANT WAS THERE WAITING FOR HIM. AND HOW DO WE KNOW THAT?  
22 BECAUSE THE TRUCK WAS THERE, THE TRUCK THAT HE DROVE FROM HOME  
23 TO THE WINCHESTER PLAZA TO GO TO WORK. REMEMBER THE NIGHT  
24 BEFORE HE LEFT THE VAN AT THE WINCHESTER PLAZA AFTER THEY'D  
25 GONE TO CAESARS AND THEY ALWAYS PARKED IT OUT THERE NEAR THE  
26 STREET SO THAT THE TRAFFIC COULD SEE IT.

27 WHAT ELSE DO WE KNOW? WE KNOW THAT  
28 DOCTOR MONAHAN WAS PLANNING ON MEETING SAM HOWARD. AND THE BEST  
29 EVIDENCE OF THAT IS THE FACT THAT HE TOOK THAT TITLE THAT  
30 MORNING. NOW THAT WE KNOW THAT HE HAD MADE AN APPOINTMENT WITH  
31 HIM FOR SOMETIME DURING THE DAY -- SOMETIME DURING THE MORNING,  
32 AND MARY LOU MONAHAN TELLS US THAT GEORGE WAS SO EXCITED ABOUT

1 SELLING THE CAR HE GATHERED TOGETHER THE PAPERS, WHICH INCLUDED  
2 THE TITLE, AND PUT THEM IN THE BAG WITH THE DAY'S RECEIPTS IN  
3 IT, PUT IT ON THE FRONT SEAT OF THE TRUCK, AND PROCEEDED TO THE  
4 OFFICE.

5 WHAT ELSE DO WE KNOW? WE KNOW THE  
6 PROXIMITY AND THE TIMING BETWEEN DOCTOR MONAHAN'S OFFICE AND  
7 THE DEW DROP INN, A SHORT DISTANCE, AND I'M GOING TO HAVE  
8 TROUBLE REMEMBERING THIS BUT IT SEEMS LIKE IT WAS A COUPLE OF  
9 MILES. BUT IT'S REAL CLOSE. IT'S A SHORT DISTANCE.

10 WE ALSO KNOW THE PROXIMITY AND THE  
11 TIMING OF THE DEW DROP INN TO THE WESTERN 6 MOTEL, RIGHT ACROSS  
12 THE STREET, SORT OF KITTY-CORNER ON D.I. AND BOULDER HIGHWAY.

13 AND WE KNOW NOW, NOW THIS IS GETTING  
14 DOWN TO THE NITTY-GRITTY, NOW WE KNOW THAT THE DEFENDANT, WHEN  
15 HE WALKED INTO THAT ROOM, WHICH WAS JUST ACROSS THE STREET FROM  
16 THE DEW DROP INN WHERE THE BODY WAS IN THE VAN JUST SEEN ALMOST  
17 PROBABLY SIMULTANEOUSLY BY CHUCK MARINO, WE KNOW THAT THE  
18 DEFENDANT WALKED INTO THE ROOM WITH DAWANA THOMAS WITH A C.B.  
19 RADIO WITH WIRES HANGING OUT OF IT, AND WITH WIRES STILL HANG-  
20 ING OUT OF THE VAN, THE HEADLINER IN THE VAN. WE KNOW ABOUT  
21 THE WATCH. AND NOW AFTER SOME GOOD POLICE WORK, WE KNOW A  
22 LITTLE BIT MORE. WE KNOW ABOUT A GUN AND A BULLET AND A  
23 PROJECTILE, THE LITTLE LEAD PIECE WAS LAYING ON THE RUNNING  
24 BOARD. THAT'S THE -- THAT'S THE BIT OF DISRUPTION THAT KILLED  
25 DOCTOR MONAHAN AND IS LAYING OUT THERE IN THE OPEN ON THE  
26 RUNNING BOARD. FROM TESTS OF THAT PARTICULAR ITEM, WE WERE  
27 ABLE TO TELL, POLICE ARE ABLE TO TELL, THAT THAT BULLET IS  
28 PROBABLY A .357 SPECIAL. IT'S EITHER A .32 SPECIAL OR IT'S A  
29 .357 MAGNUM. AND THE DEFENDANT HAD A .357 MAGNUM AND HE HAD A  
30 BUNCH OF BULLETS IN A BAG, 11 OF WHICH WERE .357 LOADS AND ONE  
31 OF WHICH WAS A .38 SPECIAL LOAD. AND I THOUGHT THIS WAS REAL  
32 INTERESTING, NEVER KNEW IT WAS COMING, IT WAS A HOT BULLET, MORE

POWER. DO YOU SUPPOSE THAT'S WHAT STRUCK DOCTOR MONAHAN? I DON'T KNOW. THE BULLET WAS TOO BADLY MANGLED, BECAUSE IT WENT THROUGH THE SKULL TWICE, TO BE ABLE TO MAKE THAT KIND OF A DETERMINATION. HOW INTERESTING THAT IS TO KNOW THAT SAM HOWARD IS CARRYING AROUND WITH HIM THAT KIND OF AMMUNITION.

WE KNOW THAT HE HAD THAT GUN, THIS GUN. SAM HOWARD HAD THIS GUN WITH HIM, THE .357 MAGNUM, ON THE MORNING THAT DOCTOR MONAHAN WAS KILLED. WITHIN AT LEAST AN HOUR AND A HALF AFTER HE WAS KILLED, HE HAD IT TUCKED IN HIS BACK BECAUSE HE WAS GOING TO ROB A PIMP AND DAWANA HAD SEEN IT IN THE HOTEL WHEN HE PUT IT IN THERE.

HOW WAS HE SHOT? HOW DID THE MURDER TAKE PLACE? DID IT HAPPEN BY ACCIDENT? DID THE DEFENDANT, AS HE WAS HOLDING THE GUN ON DOCTOR MONAHAN, AS HE HAD HELD THE GUN ON KEITH KINSEY, DID HE ACCIDENTLY SQUEEZE OFF A ROUND? HARDLY. HE KNOWS GUNS LIKE OTHER PEOPLE KNOW SPORTS AND CHURCH AND OTHER THINGS. IT WASN'T AN ACCIDENT. I DON'T BELIEVE THE EVIDENCE SHOWS THAT.

COULD IT HAVE BEEN THE RESULT OF A STRUGGLE? WELL, I SUBMIT TO YOU WHEN YOU LOOK AT THE PICTURES THAT YOU'LL COME TO THE CONCLUSION THAT WHAT HAPPENED THAT MORNING WAS THAT KEITH KINSEY -- EXCUSE ME, DOCTOR MONAHAN WAS MADE TO LIE DOWN ON HIS FACE IN A SPREAD-EAGLE POSITION, JUST THE WAY KEITH KINSEY HAD TO DO, AND THAT THE -- THAT THE SHOT WAS FIRED WHILE HE WAS IN THAT POSITION, AND THAT WOULD ELIMINATE ANY POSSIBILITY OF STRUGGLE. HOW DO YOU STRUGGLE WHEN YOU'RE LAYING FLAT ON YOUR STOMACH? YOU DON'T. WHAT YOU DO IS GET EXECUTED. THAT'S WHAT I THINK THE EVIDENCE SHOWS IN THIS CASE. I THINK IT WAS A PLAIN, EASY TO SEE FROM THE EVIDENCE, EXECUTION.

I THINK THE EVIDENCE SHOWS THAT  
DOCTOR MONAHAN WAS MADE TO LIE DOWN ON HIS STOMACH IN A SPREAD-

1 EAGLE POSITION; THAT THE DEFENDANT, JUST LIKE HE DID WITH  
2 KEITH KINSEY, WENT BESIDE HIM, HAD THE GUN NEAR HIS HEAD, WAS  
3 TAKING OUT HIS WALLET, WAS TAKING OFF HIS WATCH, AND BECAUSE --  
4 THINK ABOUT THIS ONE FOR A MINUTE -- BECAUSE HE HAD THE -- THE  
5 SECRECY, THE PROTECTION OF THE VAN, BECAUSE PEOPLE FROM THE  
6 OUTSIDE COULDN'T SEE HIM VERY EASILY, BECAUSE THEY COULDN'T  
7 HEAR HIM VERY EASILY. BECAUSE OF THE INTERIOR OF THE VAN AS  
8 OPPOSED TO AN OPEN AUTOMOBILE, THE BEST WAY TO GET RID OF YOUR  
9 WITNESS IS TO KILL HIM, AND THIS IS A SAFE PLACE TO DO IT  
10 BECAUSE NOBODY CAN HEAR IT. WE KNOW FOR A FACT THAT NOBODY  
11 DID, AT LEAST NOBODY WE KNOW ABOUT.

12 I THINK THE EVIDENCE SHOWS THAT THE  
13 DEFENDANT SAM HOWARD, IN AS COLD A BLOODED FASHION AS POSSIBLE,  
14 DETERMINED THAT HE HAD TO KILL THE WITNESS TO THIS PARTICULAR  
15 CRIME BECAUSE OF ITS SAFENESS AT THAT PARTICULAR MOMENT, AND  
16 EXECUTED DOCTOR MONAHAN. MAYBE THE ONLY THING HE DIDN'T DO  
17 THAT YOU WOULD THINK OF IN TERMS OF AN EXECUTION WOULD HAVE  
18 BEEN TO HAVE BOUND HIS HANDS BEHIND HIM. BUT REALLY IS THAT  
19 MUCH DIFFERENT THAN BEING LAYING OUT IN A SPREAD-EAGLE POSITION  
20 JUST ABSOLUTELY AND TOTALLY DEFENSELESS?

21 LADIES AND GENTLEMEN, AS SURE AS IT  
22 SNOWED LAST NIGHT, THE DEFENDANT ROBBED AND KILLED DOCTOR  
23 MONAHAN. I THINK THE CIRCUMSTANTIAL EVIDENCE THAT I'VE LISTED  
24 FOR YOU MORE THAN ADEQUATELY DEMONSTRATES THAT.

25 NOW, I WANT TO TALK FOR A MINUTE  
26 ABOUT INSTRUCTIONS, BUT I'M NOT GOING TO TALK LONG ABOUT THEM.  
27 YOU'LL HAVE ALL THE INSTRUCTIONS IN THE JURY ROOM WITH YOU.  
28 YOU'LL BE ABLE TO LOOK AT THEM IF YOU WISH. BUT SOME OF THEM  
29 ARE IMPORTANT INSOFAR AS THE BURDEN ON THE PROSECUTION TO PROVE  
30 CRIMES. FROM THE EVIDENCE THOUGH MY FEELING IS THAT THE CRIMES  
31 ARE SO BLATANT, SO EASILY PROVABLE, THAT THE INSTRUCTIONS DON'T  
32 HAVE TO BE LINGERED ON FOR TOO LONG A PERIOD OF TIME.

1 WE KNOW, FOR EXAMPLE, I THINK WITHOUT  
2 A WHOLE LOT OF THINKING ABOUT IT IN THE KEITH KINSEY ROBBERY,  
3 THAT KEITH KINSEY WAS ROBBED, HIS WALLET, HIS WATCH AND HIS  
4 RADIO WERE TAKEN FROM HIM, THEY WERE TAKEN FROM HIM BY A MAN  
5 IDENTIFIED TO YOU AS SAM HOWARD, WHO HAS TOLD OTHER PEOPLE THAT  
6 HE DID THIS, AND IT WAS DONE AT GUNPOINT. THOSE ARE GENERALLY  
7 THE ELEMENTS THAT HAVE TO BE SHOWN IN A CASE LIKE THIS TO PROVE  
8 ROBBERY.

9 WE FURTHER KNOW, WITH REGARD TO THE  
10 KILLING, WE KNOW THAT DOCTOR MONAHAN WAS KILLED, THAT HE WAS  
11 MURDERED; WE KNOW THAT HE WAS ROBBED, BECAUSE HE HAD THINGS AND  
12 THEY WERE LATER MISSING. THE QUESTION IN THIS CASE, AND  
13 THEY'RE EASILY RESOLVABLE ACCORDING TO THE INSTRUCTIONS: WAS  
14 THERE PREMEDITATION ON BEHALF OF THE DEFENDANT WHEN HE DID THE  
15 KILLING? DID HE THINK ABOUT DOING THE KILLING BEFORE HE DID  
16 IT? AND WAS THERE MALICE IN HIS MIND? AND I'M NOT GOING TO  
17 GO THROUGH ALL THESE THINGS BECAUSE THAT'S SETTLED REAL EASILY  
18 IN A COUPLE INSTRUCTIONS, AND LET ME GO OVER THEM WITH YOU NOW.

19 WITH REGARDS TO THE PREMEDITATION AND  
20 IN A MURDER CASE THE STATE MUST SHOW PREMEDITATION, LISTEN TO  
21 INSTRUCTION NUMBER 11, IF YOU WOULD, IT'S VERY SHORT ON MURDER  
22 OF THE FIRST DEGREE. I'VE NEVER MENTIONED THAT BEFORE BUT  
23 THAT'S WHAT THE STATE IS OBVIOUSLY ASKING FOR IN THIS SITUATION:

24 MURDER OF THE FIRST DEGREE IS  
25 MURDER WHICH IS, NUMBER ONE, PERPETRATED  
26 BY ANY KIND OF WILLFUL, DELIBERATE AND  
27 PREMEDITATION KILLING; OR B, COMMITTED  
28 IN THE PERPETRATION OR ATTEMPTED PER-  
29 PETRATION OF ROBBERY.

30 SO IF DOCTOR MONAHAN WAS KILLED  
31 WHILE THE ROBBERY WAS GOING ON, YOU DON'T EVEN NEED TO WORRY  
32 ABOUT PREMEDITATION. THE LAW DOES NOT REQUIRE IT. THE FACT



OF THE KILLING IS ENOUGH WITHIN THE SCOPE OF A ROBBERY TO  
BRING IT UP TO THE LEVEL OF FIRST DEGREE MURDER AND THE LAW  
DEMANDS THAT THAT OCCUR.

INSTRUCTION 13 HAS TO DO WITH MALICE,  
AND I'LL TRY TO PARAPHRASE THIS. IN FACT, I'LL JUST -- IT  
TALKS ABOUT THAT YOU HAVE TO HAVE CONCLUSIVE EVIDENCE OF MALICE  
AND IT SAYS, THEREFORE, A KILLING WHICH IS COMMITTED IN A  
ROBBERY IS DEEMED TO BE MURDER OF THE FIRST DEGREE, WHETHER  
THAT KILLING WAS UN- -- INTENTIONAL, UNINTENTIONAL OR ACCIDEN-  
TAL, AND THAT IS IF IT'S ALSO COMMITTED WHILE THE ROBBERY IS  
GOING ON.

SO WHAT YOU HAVE HERE WITH INSTRUCTIONS 11 AND 13, IS THAT IT SAYS IF THE REQUIREMENT OF MALICE AND THE REQUIREMENT OF PREMEDITATION IS GONE, YOU DO NOT NEED -- YOU DO NOT HAVE TO WORRY ABOUT THAT. SO LONG AS YOU DECIDE THAT A ROBBERY TOOK PLACE, AND I CONTEND THAT THE EVIDENCE IS SO ABUNDANTLY CLEAR AS TO THE FACT OF A ROBBERY OF DOCTOR MONAHAN, THAT THAT QUESTION ISN'T EVEN UP FOR GRABS.

AND ONCE YOU GET TO THAT POINT, WHEN THERE'S A ROBBERY IN THE COMMISSION OF A KILLING, YOU NOT ONLY HAVE TO WORRY ABOUT -- DON'T HAVE TO WORRY ABOUT MALICE OR PREMEDITATION, BUT THE LAW TELLS YOU THAT THAT PARTICULAR MURDER WAS MURDER IN THE FIRST DEGREE, AND THAT IS THE VERDICT TO BRING BACK.

THE LAST QUESTION TO BE ANSWERED, AND I THINK HAS BEEN ANSWERED, IS: DID THE DEFENDANT SAM HOWARD DO THESE ATROCIOUS CRIMES? AND I THINK THE RECORD HAS CLEARLY ESTABLISHED THAT.

NOW, I WANT TO TALK FOR JUST A  
MOMENT, AND WE'LL BE THROUGH, ABOUT MOOD CHANGES. EVERYONE  
HAS THEM. EVERYONE GETS MOODY TO SOME DEGREE OR NOT. YOU'VE  
PROBABLY NOTICED THE ATTORNEYS IN THIS CASE. YOU'LL WALK IN

1 AND WE'RE TALKING AMONGST ONE ANOTHER AND WE'RE LAUGHING AND  
2 JOKING AND TALKING ABOUT THE DAILY THINGS, AND THE MINUTE THE  
3 JUDGE WALKS IN AND WE'RE DOING BUSINESS, IT'S DEAD SERIOUS.  
4 AND THAT'S A CHANGE OF MOOD. I'VE SEEN YOUR CHANGES OF MOOD.  
5 I'VE SEEN YOU COME IN LAUGHING AND JOKING AND THE MINUTE THAT  
6 THE JUDGE COMES IN IT'S ALL SERIOUSNESS. AND THAT'S THE WAY  
7 IT SHOULD BE. AND IT'S NORMAL. IT'S EXPECTED TO BE THAT WAY.

8 BUT SOME PEOPLE GO TOO FAR. SOME  
9 PEOPLE GO TOO FAR WITH THEIR SWINGS IN MOOD. AND I REMIND YOU  
10 OF THE OLD CLASSIC STORY BY ROBERT LEWIS STEVENSON OF DOCTOR  
11 JECKYL AND MR. HYDE. I THINK, LIKE THE MONA LISA, MOST OF US  
12 ARE FAMILIAR WITH THAT STORY. IT'S AN INTERESTING STORY AND  
13 ACTUALLY IT TAKES A COUPLE OF SHAPES. ONE OF THEM IS THAT THE  
14 DOCTOR CREATES A POTION AND HE DRINKS THE POTION AND HE TURNS  
15 INTO A HORRIBLE-LOOKING WEREWOLF AND HE GOES RUNNING AROUND THE  
16 CITY KILLING PEOPLE. THAT'S NOT THE STORY I LIKE. THE STORY  
17 I LIKE WAS ACTED OUT IN MODERN TIMES, AT LEAST BY JACK PALANCE,  
18 AND IT SHOWED A RATHER MEEK AND TIMID MR. -- DOCTOR JECKYL, WHO  
19 CREATES THE POTION AND HE TURNS INTO A SUAVE, DEBONAIR MAN OF  
20 THE EVENING, AND HE GOES OUT AND HE CONS ALOT OF THEM. AS THE  
21 POTION WORKS ON HIM, IF IT WORKS TO A GREAT ENOUGH EXTENT, THEN  
22 HE DOES THE DASTARDLY DEEDS, JUST HORRIBLE THINGS, UNIMAGINABLE;  
23 AND THEN HE REVERTS BACK TO HIS FORM A LITTLE LATER ON.

24 SAM HOWARD, I THINK THE EVIDENCE  
25 SHOWS, IS A MODERN DAY JECKYL AND HYDE. I'D SAY THAT WITH  
26 THIS IN MIND: HE'S NOT A DOCTOR AND HE HASN'T CREATED A POTION,  
27 BUT HE'S GOT A POTION, HE'S GOT AN ELIXIR, THAT WHEN HE TAKES  
28 IT, WHEN IT OPERATES ON HIM, IT CHANGES HIM AND MAKES HIM INTO  
29 SOMETHING FEARSOME. THAT POTION IS THIS (INDICATING). HE  
30 CARRIES THIS POTION, LIKE A FLASK, ON HIS HIP IN BETWEEN HIS  
31 BELT AND HIS BODY. HE CARRIES IT ALMOST EVERYWHERE HE GOES,  
32 THIS POTION HE DOES. AND SOMETIMES IT OPERATES ON HIM STRONGLY

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1 ENOUGH TO MAKE HIM DO ABSOLUTELY TERRIBLE THINGS.

2 AND I WANT TO EXPLAIN TO YOU FOR A  
3 MINUTE WITH A FEW EXAMPLES OF HOW I'VE SEEN THE EVIDENCE SHOW  
4 THAT -- THAT SAM HOWARD IN HIS DOCTOR JECKYL AND MR. HYDE ROLE  
5 HAS CONNED PEOPLE AND HAS GONE THROUGH SERIOUS CHANGES, JUST  
6 LIKE DOCTOR JECKYL AND MR. HYDE.

7 WE START OFF WITH LINDA WILSON. HE  
8 CONNED LINDA WILSON. HE TOLD LINDA WILSON IN THE SEARS STORE  
9 HERE IN LAS VEGAS THAT HE HAD THIS SANDER AND HE DIDN'T LIKE  
10 IT. HE WANTED TO RETURN IT AND GET HIS MONEY BACK, PLEASE, AND  
11 HE WAS REALLY POLITE. HE EVEN GAVE HER A NAME, AND THAT WAS  
12 MORE OF A CON BECAUSE THAT NAME WAS HAROLD STANBACK. THE  
13 POTION ISN'T WORKING TOO HARD AT THAT POINT.

14 KEITH KINSEY COMES ONTO THE SCENE  
15 AND HE CONS KEITH KINSEY. HE TELLS KEITH KINSEY, I'VE GOT A  
16 PREGNANT WIFE OUT IN THE CAR AND SHE CAN EXPLAIN THE WHOLE  
17 THING IF YOU WILL JUST LET ME GO TO SEE HER. AND KEITH WASN'T  
18 GOING TO FALL FOR THAT, AND KEITH KEPT ON DOING WHAT HE WAS  
19 DOING. AND THE CON WASN'T WORKING AND THE POTION WAS BEGINNING  
20 TO. AND SO THEN THE CON CHANGED A LITTLE BIT AND NOW THE  
21 DEFENDANT IS HOLLERING AND SCREAMING AND IT'S A RACIAL THING:  
22 YOU WHITE PEOPLE ARE DOING THINGS TO US BLACKS AND IT'S THE  
23 ONLY REASON YOU'RE PICKING ON ME. AND HE'S CONNING KEITH  
24 KINSEY IN A WAY TO TRY TO EMBARRASS KEITH KINSEY INTO LETTING  
25 HIM GO, AND THAT DOESN'T WORK.

26 THEN TOM MAJOR COMES ONTO THE SCENE  
27 AND WE SEE MORE CON: THIS -- THIS BAD GUY HERE THAT HAS GOT  
28 AHOLD OF ME IS GOING TO BEAT ME UP AND YOU'VE GOT TO SAVE ME,  
29 YOU'VE GOT TO HELP ME. AND MAJOR DOESN'T GO FOR THAT CON. AND  
30 THAT FLASK, THAT POTION IN THE BACK OF HIM IS STARTING TO REALLY  
31 WARM HIM UP. IT'S REALLY STARTING TO GET TO HIM AND IT'S  
32 MAKING THIS INTERNAL CHANGE. AND ALL OF A SUDDEN IT CREATES

1 A -- AN ANIMAL THAT REACHES BACK AND GRABS FOR IT AND PULLS  
2 IT OUT IN THE FORM OF THIS GUN AND STICKS IT UP, PUTS -- CAN  
3 YOU IMAGINE THE BUTT END OF THIS IN YOUR NOSE? I CAN'T.  
4 KEITH KINSEY CAN, EVEN THOUGH HE HAS SOME BRAVADO HERE, HE CAN  
5 REMEMBER IT. AND TOM MAJOR CAN REMEMBER IT. AND IT'S GOT TO  
6 BE A FRIGHTENING THING.

7 AND WHAT IS ON THE OTHER END OF THAT,  
8 THAT MAKES THIS HAPPEN? WELL, IT'S MR. HYDE. IT'S MR. HYDE.  
9 IN FACT, MR. HYDE IS SO ANGRY HE'S SAYING, IF YOU DON'T DO  
10 WHAT I SAY I'M GOING TO KILL YOU M.FER'S. FORTUNATELY FOR  
11 KEITH KINSEY AND THE OTHERS IN THE ROOM THAT'S AS FAR AS THAT.  
12 ONE WENT.

13 AND TRUE TO THE STORY, THE NEXT  
14 THING WE SEE, OR THINGS WE SEE A LITTLE LATER, IS A REVERSION  
15 BACK TO THE NICE GUY, BACK TO DOCTOR JECKYL. AND DOCTOR  
16 JECKYL, SAM HOWARD, IS NOW ON THE TELEPHONE AND HE'S TALKING TO  
17 MARY LOU MONAHAN, SAYING, HI, MY NAME IS KEITH AND I'M A  
18 SECURITY GUARD AT CAESARS AND I'LL BE OFF AT 8:00, AND THAT  
19 VAN OF YOURS REALLY LOOKS LIKE SOMETHING AND I'D LIKE TO WORK  
20 UP A MEETING. AND THEY WORK UP A MEETING. AND IT GOES PRETTY  
21 WELL.

22 AND THEN ANOTHER -- ANOTHER THING WE  
23 SEE IS ANOTHER CHANGE -- NO, IT WASN'T A CHANGE, I TAKE THAT  
24 BACK, IT WAS ANOTHER CON -- WITH BOB SMITH AT THE SEARS, AGAIN  
25 JUST LIKE THE CON OF LINDA WILSON: I'M A SEARS SECURITY GUARD.  
26 MY NAME IS KEITH KINSEY. AND I'VE GOT THIS SANDER HERE THAT I  
27 WANT TO RETURN. AND LOOK WHAT A NICE GUY I AM, HOW WELL  
28 SPOKEN I AM AND REASONABLE I AM.

29 AND BOB SMITH, LIKE KEITH KINSEY, IS  
30 LUCKY THAT THE POTION WAS NOT WORKING THAT DAY.

31 AND THEN WE HAVE DAWANA THOMAS. NOW,  
32 HE CONNED DAWANA THROUGHOUT, A MASTERFUL JOB: HE'S A DANCER

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1 IN A BROADWAY SHOW, HE DEVELOPS THIS RELATIONSHIP WITH HER  
2 THAT CREATES WHATEVER FEELINGS SHE HAD FOR HIM, AND THEY MUST  
3 HAVE BEEN CONSIDERABLE, AND SHE FALLS IN WITH THIS CON MAN,  
4 AND SHE'S TAKEN BY IT. AND HOW DOES HE EXPRESS HIS RAGE TO  
5 HER? HOW DOES -- HOW DOES MR. HYDE COME OUT OF THE DOCTOR  
6 JECKYL THAT DAWANA THOMAS SEES? WELL, I'VE GOT TO TELL YOU  
7 THAT WE DON'T KNOW. WE DIDN'T HEAR ANY EVIDENCE OF THAT, AND  
8 WE HAVE TO LEAVE IT TO OUR IMAGINATIONS.

9 BUT WE CAN TELL YOU HOW SHE MANIFEST-  
10 ED, HOW SHE SHOWED THE RESULT OF BEING WITH MR. HYDE, AND THAT  
11 IS THAT SHE HAD A NERVOUS BREAKDOWN AS A RESULT OF ALL THIS.  
12 SHE HAD TO HAVE PSYCHIATRIC CARE. SHE HAD TO TAKE MEDICATION.  
13 AND IT HASN'T BEEN UNTIL JUST RECENTLY THAT SHE'S COME OUT OF  
14 IT AND IS LEADING A MORE DECENT, NORMAL KIND OF LIFE.

15 AND LASTLY WE COME TO THE DEFENDANT'S  
16 CONNING OF GEORGE MONAHAN. AND HE TELLS GEORGE MONAHAN THAT  
17 HE WANTS TO MEET WITH HIM, AND HE DOES. AND IT'S A -- IT'S A  
18 NICE CONVERSATION. IT'S LIKE YOU WOULD EXPECT IF TWO PEOPLE  
19 WERE DISCUSSING THE SUBJECT OF BUYING AND SELLING A VAN. AND  
20 GEORGE MONAHAN THOUGHT THAT THIS PERSON WAS SO SINCERE THAT HE  
21 HAD HIS WIFE GIVE HIM HIS BUSINESS CARD AND ARRANGE TO HAVE A  
22 MEETING THE NEXT MORNING. AND HE THOUGHT HE WAS SO SINCERE,  
23 HE WAS CONNED SO WELL, THAT HE BROUGHT HIS TITLE WITH HIM. HE  
24 THOUGHT THE SALE WAS GOING TO GO THROUGH. LITTLE DID DOCTOR  
25 MONAHAN KNOW ABOUT THE POTION THAT SAM HOWARD HAD WAITING FOR  
26 HIM THAT WAS BEGINNING TO OPERATE. SAM WAS ALREADY TALKING  
27 ABOUT ROBBING A PIMP AND NOT BEING ABLE TO AND MAKING ARRANGE-  
28 MENTS AND GOING BACK AND BEING ABLE TO ROB HIM. THAT POTION  
29 WAS BEGINNING TO WORK LONG IN ADVANCE.

30 NOW, GEORGE GOT UP IN THE MORNING,  
31 GRABBED THE TITLE, HAD BREAKFAST PROBABLY, SAID GOOD-BYE TO  
32 MARY LOU, AND WENT ON HIS MERRY WAY TO THE OFFICE. A GREAT

1 DAY IN GEORGE MONAHAN'S LIFE, HE'S GOING TO SELL THE VAN. IT'S  
2 A MAJOR SALE IN A PERSON'S LIFE.

3 CAN YOU IMAGINE HIS REACTION WHILE  
4 OUT THERE, HE AND SAM HOWARD, OUT THERE SOMEWHERE PROBABLY ON  
5 DESERT INN ROAD, TAKING A TEST DRIVE, AND I DON'T KNOW WHO'S  
6 DRIVING, I HAVEN'T THE SLIGHTEST IDEA, BUT ALL OF A SUDDEN  
7 THAT POTION HAS WORKED SO HARD THAT IT'S -- IT'S COMING OUT  
8 AGAIN IN THE GUISE OF A GUN. AND SAM HOWARD'S GOT THAT GUN  
9 AND HE'S HOLDING IT ON GEORGE MONAHAN. THE RAGE IS BEGINNING  
10 TO WELL. CAN YOU IMAGINE WHAT GEORGE WAS THINKING?

11 NOW, GEORGE IS TOLD -- SIX FOOT  
12 THREE, 189 POUNDS, 39 YEARS OLD, FAMILY, SUCCESSFUL DENTIST --  
13 HE'S TOLD TO LAY DOWN ON THE FLOOR OF HIS VAN. WELL, NOT BEING  
14 UNINTELLIGENT, A PERSON HAVING A GUN, HE DOES JUST THAT. AND  
15 THEN THE MR. HYDE IN SAM HOWARD IS TAKING THE BELONGINGS AND  
16 ROBBING GEORGE MONAHAN AT THAT TIME. AND THEN THE POTION WORKS  
17 TO SUCH -- TO SUCH A DEGREE THAT IT EXPLODES -- NO, NOT THE --  
18 THE POTION DOESN'T EXPLODE, NOW THE GUN EXPLODES AND EXPLODES  
19 IN THE HEAD OF DOCTOR MONAHAN. THERE WAS NO PROVOCATION.

20 THERE WAS NO REASONING. IT WAS THE END RESULT OF A CON UPON  
21 WHICH THE POTION WORKED.

22 NOW, HERE'S THE INTERESTING THING,  
23 HERE'S THE INTERESTING THING: THE CON HASN'T STOPPED, DON'T  
24 EVER BELIEVE THAT. THAT CON IS GOING ON RIGHT NOW AND HAS  
25 BEEN EVER SINCE WE'VE BEEN IN THIS COURTROOM. THE POTION'S  
26 GONE. THE POTION IS OVER HERE NOW (INDICATING). IT'S NOT A  
27 FLASK BACK IN THE BACK WHERE IT CAN BE GRABBED AND SIPPED ON  
28 BY SAM HOWARD. THAT POTION IS GONE. THAT'S ALL HE'S GOT LEFT  
29 IS THE CON, AND HE'S BEEN PULLING -- HE'S BEEN PULLING IT ON  
30 YOU. HIS DEMEANOR HAS BEEN GREAT THROUGHOUT THE TRIAL. HE'S  
31 CHUCKLED APPROPRIATELY. HE'S SAT THERE. HE'S BEHAVED HIMSELF.  
32 HE LOOKED NICE. HE TOOK THE STAND. NICE JOB, OR WAS AS GOOD

1 AS IT COULD BE FOR SAM HOWARD.

2 I WILL NOT DEMEAN YOUR INTELLIGENCE  
3 BY RECOUNTING HIS TESTIMONY, WORTHLESS AS IT IS, BUT I WILL  
4 CALL TO YOUR ATTENTION TWO OR THREE THINGS THAT WE HEARD FROM  
5 HIM THAT I THINK ARE SOMEWHAT INSTRUCTIVE, AND THEY'RE NOT  
6 ONLY INSTRUCTIVE, THEY'RE ALL VOLUNTEERED. NOT ONE OF THESE  
7 THINGS I'M GOING TO TELL YOU IS IN RESPONSE TO A QUESTION. I'M  
8 HERE ONLY TO TELL YOU THE TRUTH. I'M HERE ONLY TO TELL YOU THE  
9 TRUTH.

10 HE SAT RIGHT OVER THERE IN THAT  
11 CHAIR (INDICATING) AND SAID THAT -- HE SAID, I'M NOT LIKE YOUR  
12 WITNESSES, I HAVEN'T REHEARSED THIS. SITTING IN THE COUNTY  
13 JAIL HE HASN'T REHEARSED THIS. AND THEN HE SAID AGAIN, UNASKED  
14 FOR, I'M NOT CALLOUS ENOUGH TO KILL ANYBODY.

15 LADIES AND GENTLEMEN, SAM CANNOT ONLY  
16 CHANGE HIMSELF FROM A POLITE, WELL-MANNERED, WELL-SPOKEN,  
17 ENJOYABLE TO BE AROUND, LIKABLE EVEN PERSON; HE CAN CHANGE  
18 HIMSELF FROM THAT TO A GUN WIELDING KILLER AND ROBBER WITHOUT  
19 ANY FORM OF CONSCIOUS WHATSOEVER. BUT HE HAS THE CAPABILITY  
20 OF CHANGING OTHERS.

21 HE TOOK GEORGE MONAHAN, THIS HAPPY  
22 FAMILY MAN, A GOOD SUCCESSFUL DENTIST, AND HE TURNED HIM -- HE  
23 TOOK HIM FROM THE VERY -- THE VERY HEART OF LIFE AND HE CHANGED  
24 HIM INTO THIS (INDICATING). MAKE NO DOUBT ABOUT IT. THE  
25 EVIDENCE IN THIS CASE SHOWS THAT SAM HOWARD IS RESPONSIBLE FOR  
26 THIS PARTICULAR CHANGE. SAM HOWARD IS NOT ONLY CALLOUS ENOUGH  
27 TO KILL, BUT I SUBMIT THE EVIDENCE SHOWS THAT SAM HOWARD DID  
28 KILL. AND I WOULD ASK YOU TO GO TO YOUR DELIBERATION AND COME  
29 BACK IN THIS COURTROOM AND SAY THE SAME THING TO HIM BY  
30 RETURNING TWO VERDICTS OF ROBBERY WITH USE OF A WEAPON AND ONE  
31 VERDICT OF GUILTY OF FIRST DEGREE MURDER.

32 THANK YOU.

1 THE COURT: LADIES AND GENTLEMEN, WE WILL TAKE A  
2 15 MINUTE RECESS AT THIS TIME.

3 DURING THIS RECESS YOU ARE  
4 ADMONISHED NOT TO CONVERSE AMONG  
5 YOURSELVES OR WITH ANYONE ELSE ON  
6 ANY SUBJECT CONNECTED WITH THIS  
7 TRIAL, OR READ, WATCH OR LISTEN  
8 TO ANY REPORT OF OR COMMENTARY  
9 ON THIS TRIAL WITH ANY PERSON  
10 CONNECTED WITH THIS TRIAL BY ANY  
11 MEDIUM OF INFORMATION, INCLUDING  
12 WITHOUT LIMITATION, NEWSPAPER,  
13 TELEVISION OR RADIO OR FORM OR  
14 EXPRESS ANY OPINION ON ANY  
15 SUBJECT CONNECTED WITH THIS  
16 TRIAL UNTIL THE CASE IS FINALLY  
17 SUBMITTED TO YOU.

18 WE'LL BE IN RECESS FOR 15 MINUTES.  
19 (WHEREUPON, FROM 3:25 P.M.  
20 UNTIL 3:45 P.M., A RECESS  
21 WAS HAD IN THE PROCEEDINGS,  
22 AT THE CONCLUSION OF WHICH  
23 THE FOLLOWING WAS HAD:)

24 THE COURT: WILL COUNSEL STIPULATE TO THE  
25 PRESENCE OF THE JURY?

26 MR. HARMON: THE STATE DOES, YOUR HONOR.

27 MR. COOPER: YES, YOUR HONOR.

28 THE COURT: YOU MAY PROCEED.

29 ..  
30 ..  
31 ..  
32 ..



(CLOSING ARGUMENT)

BY MR. COOPER:

YOUR HONOR, MR. SEATON, MR. HARMON, GEORGE, MR. HOWARD, LADIES AND GENTLEMEN OF THE JURY:

I WANT TO START BY JOINING MR. SEATON IN THANKING YOU FOR SITTING AS JURORS IN THIS CASE. I KNOW THAT IT'S NOT ALWAYS EASY TO TAKE TIME AWAY FROM YOUR JOBS AND YOUR FAMILIES. BUT I'M SURE YOU REALIZE THAT YOUR PURPOSE IN BEING HERE IS VERY, VERY IMPORTANT, NOT ONLY TO MR. HOWARD, BUT TO OUR PROPER OPERATION OF OUR CRIMINAL JUSTICE SYSTEM. THE ROLE THAT THE JURY PLAYS IS MOST CRUCIAL.

THIS WILL BE THE ONLY OPPORTUNITY THAT I WILL HAVE TO ADDRESS YOU. LIKE ANYONE, I WOULD LIKE TO HAVE THE LAST WORD IN AN ARGUMENT, BUT BECAUSE THE STATE HAS THE BURDEN OF PROOF IN A CRIMINAL CASE THE LAW GIVES THEM THE RIGHT TO ADDRESS YOU TWICE.

SO WHEN I'VE CONCLUDED, MR. HARMON WILL AGAIN SPEAK FOR THE STATE. I CAN ONLY ASK YOU THAT YOU -- THAT YOU SEARCH THE EVIDENCE AND IF YOU FEEL THAT SOME TELLING POINTS WERE MADE, AS TO WHAT MY RESPONSES MIGHT HAVE BEEN.

I ASK THAT YOU, WHEN YOU GO INTO YOUR DELIBERATIONS, THAT YOU START WITH THE PREMISE THAT THE DEFENDANT IS PRESUMED INNOCENT. AS YOU WERE BEING SELECTED AS JURORS IN THIS CASE, YOU WERE ASKED IF YOU HAD ANY PROBLEM WITH THAT PRINCIPLE IN OUR CRIMINAL LAW. AND YOU ALL INDICATED THAT, NO, YOU DIDN'T.

NOW, I AM GOING TO TRY AND BE VERY BRIEF. I DON'T WANT TO BORE YOU BY RECOUNTING EVERY BIT OF EVIDENCE THAT WAS PRESENTED. I KNOW YOU'RE ALL ANXIOUS TO BEGIN YOUR DELIBERATIONS.

I NOTICED THAT DURING THE VERY LONG TRIAL THAT ALL OF YOU WERE VERY ATTENTIVE. MANY OF YOU TOOK

1 NOTES. AND I'M GRATEFUL FOR THAT.

2 NOW, MR. SEATON HAS SUGGESTED TO YOU  
3 THAT, AND PERHAPS I'M WRONG BUT I GOT THE IMPRESSION THAT HE  
4 WAS SUGGESTING TO YOU, THE STATE'S BURDEN IN THIS CASE ISN'T  
5 AS HEAVY AS MOST PEOPLE MIGHT THINK. AND I RESPECTFULLY  
6 DISAGREE WITH HIM IN THAT REGARD. IT'S A VERY, VERY HEAVY  
7 BURDEN THAT THE STATE HAS HERE. MR. HOWARD'S LIBERTY HANGS IN  
8 THE BALANCE AND THE STATE HAS POINTED THE FINGER AT HIM AND HAS  
9 ACCUSED HIM SOME VERY ATROCIOUS CRIMES.

10 I WON'T ATTEMPT TO GO THROUGH ALL OF  
11 THE INSTRUCTIONS THAT WERE READ. YOU WILL HAVE THE OPPORTU-  
12 NITY TO TAKE THOSE INSTRUCTIONS INTO THE DELIBERATION ROOM  
13 WITH YOU. YOU CAN READ THEM, AND I'M SURE YOU WILL UNDERSTAND  
14 THEM. BUT I JUST WANT TO COMMENT ON THAT ONE INSTRUCTION THAT  
15 DEFINES REASONABLE DOUBT, AND THAT'S THE BURDEN THAT THE STATE  
16 HAS IN THIS CASE, TO PROVE TO YOU BEYOND A REASONABLE DOUBT  
17 THAT SAM HOWARD IS GUILTY OF EACH AND EVERY CRIME THAT THEY'VE  
18 CHARGED HIM WITH.

19 NOW, THAT INSTRUCTION, AND I DON'T  
20 RECALL OFF HAND THE NUMBER OF THE INSTRUCTION, BUT IT DEFINES  
21 REASONABLE DOUBT AND IT TALKS ABOUT AN ABIDING CONVICTION OF  
22 THE TRUTH OF THE CHARGE. AND WHAT THAT MEANS IS THAT IT'S AN  
23 ENDURING CONVICTION, A LASTING CONVICTION OF THE TRUTH OF THE  
24 CHARGE. YOU KNOW, IT'S NOT GOING TO HELP MR. HOWARD ANY IF  
25 YOU SHOULD RETURN A VERDICT OF GUILTY OF EACH OF THE THREE  
26 COUNTS AND TODAY OR TOMORROW OR NEXT WEEK OR NEXT MONTH OR NEXT  
27 YEAR YOU BEGIN TO HAVE REASONABLE DOUBTS AS TO HIS GUILT OR  
28 HIS INNOCENCE. SO I TRUST THAT YOU WILL CLOSELY SCRUTINIZE  
29 THE EVIDENCE IN THIS CASE, THAT YOU WILL USE YOUR COMMON SENSE  
30 IN ANALYZING THE EVIDENCE IN THIS CASE. AND IF YOU DO THAT  
31 I'M CONFIDENT THAT AT LEAST AS TO THE MURDER CHARGE YOU WILL  
32 RETURN A VERDICT OF NOT GUILTY.

1 NOW, MR. HOWARD ISN'T A SAINT AND WE  
2 NEVER TRIED TO PORTRAY HIM AS A SAINT. IN FACT, HE TOOK THE  
3 STAND AND ADMITTED HIS PAST AND HIS PRESENT. I CAN ONLY HOPE  
4 AND TRUST THAT YOU WON'T TAKE A LOOK AT HIS CRIMINAL PAST AND  
5 BASED ON THAT DECIDE THAT HE MUST HAVE COMMITTED THE OFFENSES  
6 THAT HE'S CHARGED WITH.

7 I AM TRULY AMAZED THAT THE STATE CAN  
8 STAND UP BEFORE YOU AND CAN SUGGEST TO YOU THAT THERE IS NOT  
9 A REASONABLE DOUBT OF HIS GUILT OF THE MURDER OF DOCTOR  
10 MONAHAN. THERE IS A DOUBT, LADIES AND GENTLEMEN. THERE IS A  
11 REASONABLE DOUBT WHETHER SAM HOWARD KILLED DOCTOR MONAHAN, AND  
12 I'LL TELL YOU WHY I BELIEVE THAT'S SO:

13 THE STATE SAID THAT THE MURDER OF  
14 DOCTOR MONAHAN OCCURRED IN THE EARLY MORNING HOURS OF MARCH  
15 27TH OF 1980. AND THEY'RE SUGGESTING TO YOU THAT HE WAS KILLED  
16 SOMETIME BETWEEN 7:00 AND 8:00 O'CLOCK THAT MORNING.

17 DAWANA HOWARD (SIC), THE STATE'S  
18 KEY WITNESS, AND I THINK YOU WILL ALL AGREE THAT SHE WAS THE  
19 STATE'S KEY WITNESS, SHE TESTIFIED THAT WHEN MR. HOWARD  
20 RETURNED TO THE MOTEL IN WHICH THEY WERE STAYING THAT THE BAGS  
21 WERE ALREADY PACKED AND THEY IMMEDIATELY LEFT FOR CALIFORNIA.  
22 NOW, SHE SAID THAT ONCE SHE DROPPED HIM OFF HE'D RETURNED  
23 APPROXIMATELY -- WELL, SHE GAVE THREE DIFFERENT TIMES. SHE  
24 SAID 30 MINUTES AT ONE TIME, I THINK AT THE GRAND JURY HEARING;  
25 SHE SAID AGAIN AT 45 MINUTES TO AN HOUR; BUT AT THE MOST IT WAS  
26 AN HOUR AFTER HE RETURNED TO THE MOTEL ROOM THAT THEY LEFT FOR  
27 CALIFORNIA. IN FACT, HE WAS -- HE WAS LATER SEEN IN CALIFORNIA  
28 THE FOLLOWING DAY, THE 28TH OF MARCH.

29 MISS THOMAS TESTIFIED THAT ONCE HE  
30 RETURNED TO THE MOTEL ROOM HE WAS CONTINUOUSLY IN HER PRESENCE,  
31 THAT FOR -- BUT FOR THE TWO OCCASIONS THAT HE HAD GONE TO THE  
32 BATHROOM, TO THE RESTROOM, HE WAS IN HER PRESENCE.

1 NOW, MR. SEATON HAS SUGGESTED TO YOU  
2 THAT THEIR CASE IS SORT OF LIKE A PUZZLE AND THEY FILLED IN  
3 THE PUZZLE AND IT MATCHES THE PICTURE ON THE PUZZLE. I SUBMIT  
4 TO YOU THAT IT DOESN'T MATCH THE PICTURE ON THE BOX. I SUBMIT  
5 TO YOU THAT THERE'S A VERY GAPING HOLE IN THEIR PUZZLE.

6 NOW, WE CALLED VERY FEW WITNESSES  
7 COMPARATIVELY SPEAKING. IT TOOK THE STATE OF NEVADA ALL OF  
8 LAST WEEK AND MOST OF THIS WEEK TO PUT ON THEIR CASE, AND THEY  
9 CALLED NUMEROUS WITNESSES, SOME OF WHOM HAD RELEVANT THINGS TO  
10 TESTIFY TO AND OTHERS TESTIFIED TO THINGS THAT WEREN'T SO  
11 RELEVANT. BUT COMPARATIVELY SPEAKING, WE PUT ON A VERY SHORT  
12 CASE.

13 NOW, WE CAN'T -- WE DON'T MANUFACTURE  
14 WITNESSES. WE PRESENT WHAT EVIDENCE THERE IS OF MR. HOWARD'S  
15 INNOCENCE. AND CERTAINLY THERE ARE TWO SIDES TO EVERY STORY.

16 NOW, WE CALLED MR. MCBRIDE. MR.  
17 MCBRIDE TESTIFIED THAT HE WAS AT HIS APARTMENT ON ARROW WAY  
18 OR SOMETHING TO THAT EFFECT, AT 8:30 A.M. ON THE MORNING OF  
19 MARCH 27 OF 1980. HE SAID AT THAT TIME HE SAW THE VAN,  
20 DOCTOR MONAHAN'S VAN, AT THAT APARTMENT. HE SAID THAT THE MAN  
21 WHO WAS DRIVING THAT VAN WAS A BLACK MAN WHO APPEARED TO HIM TO  
22 BE ABOUT 200 POUNDS. HE DIDN'T RECALL WHETHER HE ACTUALLY  
23 SAW THE MAN GET OUT OF THE VAN OR NOT, BUT HE DID TESTIFY FROM  
24 WHAT HE SAW THAT THE MAN APPEARED TO BE ABOUT 200 POUNDS. AND  
25 HE TESTIFIED THAT THE MAN HAD A VERY LARGE AFRO. AND WHEN I  
26 ASKED HIM TO INDICATE WITH HIS HANDS ABOUT HOW LARGE THIS MAN'S  
27 AFRO WAS, HE INDICATED LIKE THIS (INDICATING), THAT IT WAS A  
28 VERY LARGE AFRO. NOW, ALL OF THE WITNESSES WHO CAME INTO  
29 COURT AND TESTIFIED FOR THE STATE, THEY ALL TESTIFIED THAT ON  
30 OR ABOUT MARCH 27, AROUND THAT TIME, MR. HOWARD'S HAIR WAS VERY  
31 MUCH AS IT IS NOW, A VERY SHORT HAIRCUT.

32 MR. MCBRIDE TESTIFIED THAT HE

1 OBSERVED THIS MAN FROM A DISTANCE OF APPROXIMATELY 15 FEET FOR  
2 ALMOST FIVE MINUTES. AND I ASKED HIM TO LOOK ABOUT THE COURT-  
3 ROOM AND TELL US IF THAT MAN HE SAW IN THE VAN, IN DOCTOR  
4 MONAHAN'S VAN, WAS THE SAME PERSON SEATED RIGHT THERE (INDI-  
5 CATING). AND HE INDICATED NO, THAT THE MAN IN THAT VAN WAS NOT  
6 MR. HOWARD.

7 NOW, WHEN YOU TAKE THESE PICTURES  
8 BACK INTO THE DELIBERATION ROOM WITH YOU, I WANT YOU TO TAKE A  
9 VERY CLOSE LOOK AT THIS VAN. THIS IS A VERY UNIQUE KIND OF  
10 VAN.

11 NOW, I SUPPOSE THE STATE MIGHT ARGUE  
12 TO YOU THAT MR. MCBRIDE WAS MISTAKEN, THAT MAYBE HE DID SEE A  
13 BLACK VAN THERE AND HE CONFUSED IT WITH DOCTOR MONAHAN'S VAN.  
14 AND I ASK YOU WHAT ARE THE CHANCES OF THAT ON A VERY, VERY  
15 DISTINCTIVE VAN? HE SAID HE REMEMBERED THE VERY LARGE WINDOWS  
16 IN THE BACK. AND MR. SEATON, IN HIS ARGUMENT, INDICATED THAT,  
17 YES, THE VAN DOES HAVE VERY LARGE WINDOWS IN THE BACK. AND YOU  
18 CAN SEE THAT FROM THE PHOTOGRAPHS HERE.

19 I ALSO ASK YOU TO KEEP IN MIND,  
20 LADIES AND GENTLEMEN, THAT MR. MCBRIDE HAS NO MOTIVE TO LIE  
21 IN THIS CASE. HE HAS NO MOTIVE TO FABRICATE HIS TESTIMONY.

22 NOW, MR. CHUCK MARINO WAS CALLED BY  
23 THE STATE. HE TESTIFIED THAT HE SAW DOCTOR MONAHAN'S VAN BACK-  
24 ING INTO HIS ESTABLISHMENT AT ABOUT 7:45 A.M. ON THE MORNING  
25 IN QUESTION, AS HE WAS COMING TO WORK. HE SAW IT AGAIN AT  
26 ABOUT 8:10, WHEN HE WENT OUTSIDE TO EMPIY HIS TRASH AND SO  
27 FORTH. HE TESTIFIED HE DIDN'T SEE THE VAN AGAIN UNTIL 6:30 TO  
28 7:00 O'CLOCK THAT EVENING, THE SAME DAY. ON CROSS EXAMINATION  
29 HE WAS ASKED IF IT'S POSSIBLE THAT VAN COULD HAVE BEEN MOVED  
30 BETWEEN THE TIME THAT HE SAW IT THERE AND THE TIME THAT HE  
31 LATER SAW IT THAT EVENING, AND HE INDICATED YES, HE HAD NO WAY  
32 OF KNOWING WHETHER THE VAN WAS IN THE SAME IDENTICAL SPOT FROM

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1 WHERE HE SAW IT EARLIER THAT MORNING.

2 THE FIREMAN, MR. WILLIAMS, WAS CALLED  
3 IN AND HE TESTIFIED THAT HE SPOKE WITH MR. MARINO AT ABOUT  
4 8:10 ON THE MORNING OF THE 27TH AS HE WAS LEAVING THE BAR, AND  
5 WAS TOLD THAT THE SUSPICIOUS WHITE GUY WHO HAD BEEN IN THE DEW  
6 DROP INN WAS IN THE VAN. NOW, HE TESTIFIED THAT THAT'S WHAT  
7 MR. MARINO TOLD HIM. NOW, I DON'T KNOW AND I'M NOT GOING TO  
8 SUGGEST TO YOU THAT THAT'S THE ABSOLUTE TRUTH. I HONESTLY  
9 DON'T KNOW. BUT MY QUESTION IS: WHY WOULD MR. MARINO TELL MR.  
10 WILLIAMS THAT IF IT WEREN'T SO?

11 THE NEXT DEFENSE WITNESS TO BE CALLED  
12 WAS LORA MALLEK. AND IT'S PERHAPS LORA MALLEK WHO, MORE THAN  
13 ANY OTHER DEFENSE WITNESS, RAISED A SERIOUS DOUBT AS TO THE  
14 VALIDITY OF THE STATE'S CASE. SEE, THE STATE HAS A THEORY AS  
15 TO WHAT HAPPENED. THEY WERE LIKE HOUND DOGS. THEY FOCUSED IN  
16 ON MR. HOWARD AND IT WAS A RELENTLESS PURSUIT, AND THEY ARE  
17 BLIND TO EVERYTHING ELSE THAT CAME UP.

18 NOW, WE DIDN'T GO OUT AND GET MS.  
19 MALLEK TO MAKE A STATEMENT AND TO TESTIFY AS SHE DID. WE  
20 DIDN'T GO OUT AND GET MR. MCBRIDE. AND TELL HIM, LOOK, WHY  
21 DON'T YOU COME TO COURT AND TESTIFY TO SUCH AND SUCH. WE  
22 DIDN'T GET MR. WILLIAMS, THE FIREMAN, AND ASK HIM TO COME TO  
23 COURT AND TESTIFY TO SUCH AND SUCH. THESE ARE PEOPLE WHO CALLED  
24 THE POLICE DEPARTMENT AND THEY GAVE STATEMENTS TO THE POLICE  
25 ON THE VERY DAY THAT DOCTOR MONAHAN WAS KILLED.

26 NOW, MR. SEATON HAS CONVENIENTLY  
27 FAILED TO MENTION ANYTHING WHATSOEVER IN HIS CLOSING ARGUMENT  
28 ABOUT THIS VERY, VERY DAMAGING EVIDENCE TO THEIR CASE.

29 NOW, MR. SEATON IS A VERY ELOQUENT  
30 PROSECUTOR, AND SO IS MR. HARMON. BUT THERE IS NO AMOUNT OF  
31 ELOQUENT ORATORY THAT'S GOING TO EXPLAIN AWAY THESE WITNESSES'  
32 TESTIMONY. AND I ASK YOU TO, IF YOU CAN, THINK OF A MOTIVE

1 THAT -- A MOTIVE WHY THEY WOULD COME INTO COURT AND TESTIFY AS  
2 THEY DID. THAT'S BEYOND ME.

3 NOW, I SUPPOSE MR. HARMON IS GOING  
4 TO TELL YOU THAT MS. MALLEK JUST WANTED TO -- WANTED TO DO --  
5 WANTED TO BE SEEN OR BE HEARD. SHE WANTED TO HELP -- WANTED  
6 TO BE HELPFUL TO THE POLICE, AND THAT SHE MADE THIS WHOLE THING  
7 UP. THAT IS LUDICROUS. I MEAN WHAT REASON WOULD SHE HAVE FOR  
8 MAKING UP A STORY SUCH AS THIS?

9 AND I TRULY ANXIOUSLY AWAIT MR.  
10 HARMON'S CONCLUDING REMARK. I'M ANXIOUS TO SEE HOW THE STATE  
11 IS GOING TO EXPLAIN AWAY THIS TESTIMONY THAT THROWS THEIR  
12 ENTIRE CASE OFF TRACK. PERHAPS, THEY WILL SUGGEST TO YOU THAT  
13 THESE WITNESSES REALLY DIDN'T REMEMBER THAT FOR REASON -- FOR  
14 WHATEVER REASON AND IT'S BEEN THREE YEARS AGO. BUT I ASK YOU  
15 TO KEEP IN MIND THAT THERE WAS A MURDER HERE, A VERY VICIOUS  
16 MURDER. THESE WITNESSES WERE -- THEY WERE QUESTIONED BY THE  
17 POLICE AT A TIME WHEN THEIR RECOLLECTION OF WHAT THEY HAD SEEN,  
18 WHAT THEY HAD HEARD, WAS FRESHEST IN THEIR MINDS. AS I INDICA-  
19 TED, THEY GAVE STATEMENTS TO THE POLICE AT THAT PARTICULAR TIME.

20 NOW, WHAT DOES MS. MALLEK TESTIFY  
21 TO? SHE TESTIFIED THAT ABOUT BETWEEN 3:00 AND 4:00 O'CLOCK ON  
22 MARCH 27TH OF 1980, THE VAN PULLED INTO HER STATION, THE MOBIL  
23 STATION. SHE TESTIFIED THAT SHE REMEMBERED THE VAN BECAUSE IT  
24 WAS A VERY DISTINCTIVE VAN, HAD "BLACK OAK" WRITTEN ON THE  
25 SIDE, IT HAD SOME MURAL WORK NEAR THE BOTTOM OF THE VAN, AND  
26 IT HAD A LADDER ON THE BACK. SHE TESTIFIED THAT THE MAN  
27 DRIVING THAT VAN WAS A BLACK MAN, THAT THAT MAN HAD A VERY  
28 LARGE AFRO, JUST AS MR. MCBRIDE TESTIFIED THAT THAT MAN HE SAW  
29 IN THAT VAN HAD A VERY LARGE AFRO. SHE WAS ASKED IF THE MAN  
30 SHE SAW IN THE VAN WAS IN THE COURTROOM; AND SHE LOOKED ABOUT  
31 THE COURTROOM AND SHE SAID NO, HE WAS NOT. SHE WAS ASKED IF  
32 SHE RECALLED WHAT THE MAN WAS WEARING, WHAT THE BLACK MAN WAS

1 WEARING; SHE TESTIFIED THAT HE HAD ON A BRIGHT RED SHIRT.

2 NOW, WHEN MRS. DAWANA HOWARD (SIC)  
3 GOT ON THE STAND -- MISS DAWANA THOMAS GOT ON THE STAND AND  
4 TESTIFIED, SHE WAS ASKED, ARE YOU FAMILIAR WITH MR. HOWARD'S  
5 WARDROBE? SHE SAID YES, I WAS FAMILIAR WITH HIS WARDROBE. DID  
6 HE OWN A BRIGHT RED SHIRT? SHE SAID NO, SAMUEL DIDN'T OWN A  
7 BRIGHT RED SHIRT, AND IN FACT HE SAID HE DIDN'T CARE MUCH FOR  
8 RED CLOTHING. WHY WOULD DAWANA SAY THIS, THIS INFORMATION THAT  
9 COULD HELP SAMUEL? I SUBMIT TO YOU IT WAS BECAUSE SHE DIDN'T  
10 KNOW THE IMPORTANCE OF THAT BIT OF INFORMATION.

11 YOU MAY RECALL MR. HARMON AND MR.  
12 SEATON -- EXCUSE ME, MR. HARMON TRIED TO BREAK MS. MALLEK'S  
13 TESTIMONY DOWN. IT WAS A VICIOUS KIND OF CROSS EXAMINATION.  
14 I SUSPECT THAT THEY HADN'T -- THAT THEY HADN'T GONE OVER WITH  
15 MISS THOMAS THAT BIT OF INFORMATION AND THAT THEY WERE GENUINE-  
16 LY SURPRISED BY IT.

17 MS. MALLEK ALSO DESCRIBED THE WOMAN  
18 IN THE VAN. I THINK IT'S CLEAR THAT THE DESCRIPTION SHE GAVE  
19 DID NOT MATCH THE DESCRIPTION OF DAWANA THOMAS. SHE TESTIFIED  
20 THAT THE WOMAN HAD HAIR DOWN TO THE MIDDLE OF HER BACK. SHE  
21 HAD A MOLE ON HER RIGHT CHEEK. AND SHE WAS VERY LIGHT SKINNED,  
22 SO MUCH SO THAT SHE COULDN'T TELL WHETHER THE WOMAN WAS BLACK  
23 OR WHITE. SHE TESTIFIED THAT SHE SAW A WHITE MAN IN THE REAR  
24 OF THAT VAN, AND I SUBMIT TO YOU THAT THE MAN THAT SHE SAW IN  
25 THE REAR OF THAT VAN WAS DOCTOR MONAHAN.

26 NOW, THIS ISN'T INFORMATION THAT THE  
27 -- THAT THE DEFENSE ATTORNEYS IN THIS CASE HAD AND THE STATE  
28 DIDN'T HAVE. THESE ARE POLICE REPORTS THAT WE GOT FROM THE  
29 PROSECUTORS OWN AGENTS, THE POLICE.

30 MR. SEATON SAID THAT THEY PRESENTED  
31 THE ENTIRE PICTURE TO YOU. NO, THEY DIDN'T PRESENT THE ENTIRE  
32 PICTURE TO YOU. NOW, I DON'T KNOW WHETHER IT WAS BECAUSE OF

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1 LAZINESS OR WHAT, BUT I -- I SUSPECT THAT, AND I HONESTLY  
2 BELIEVE THAT THE REASON THAT THEY DIDN'T PUT THESE PEOPLE ON  
3 IS BECAUSE THEY WOULD HAVE A VERY DIFFICULT TIME EXPLAINING  
4 TO YOU, LADIES AND GENTLEMEN, HOW THEIR TESTIMONY -- MS.  
5 MALLEK'S TESTIMONY, MR. MCBRIDE'S TESTIMONY, MR. WILLIAMS'  
6 TESTIMONY -- HOW IT ALL SQUARED WITH THEIR CASE. AND THEY KNEW  
7 THAT IT WOULD CALL INTO VERY SERIOUS QUESTION THE VALIDITY OF  
8 THEIR CASE.

9 THERE ARE A NUMBER OF THINGS THAT  
10 TROUBLED ME ABOUT THIS CASE. YOU MIGHT RECALL THE TESTIMONY  
11 WAS THAT THERE WERE NUMEROUS FINGERPRINTS FOUND IN DOCTOR  
12 MONAHAN'S VAN, SOME OF WHICH THEY MATCHED WITH DOCTOR MONAHAN;  
13 OTHERS THAT THEY MATCHED WITH DOCTOR MONAHAN'S WIFE; BUT THERE  
14 WERE NUMEROUS PRINTS FOUND IN AND ON THAT VAN THAT THEY COULDN'T  
15 MATCH WITH ANYONE. THEY COULDN'T MATCH THEM WITH MR. HOWARD OR  
16 ANYONE ELSE. THERE WAS NO EFFORT BY THE POLICE IN THIS CASE TO  
17 MAKE FURTHER COMPARISONS, THERE WAS NO EFFORT TO MAKE ANY  
18 COMPARISONS BETWEEN THOSE PRINTS AND THE PRINTS OF DAWANA  
19 THOMAS' BROTHER, WHO SHE TESTIFIED HAD BEEN IN LAS VEGAS ON  
20 OCCASIONS.

21 I ASK YOU TO REMEMBER ALL OF THE  
22 WITNESSES WHO WERE GIVEN -- WHO WERE NEVER GIVEN THE OPPORTU-  
23 NITY TO LOOK AT A PHOTOGRAPHIC LINEUP, THE WITNESSES WHO, FOR  
24 BRIEF PERIODS OF TIME, CLAIMED THEY OBSERVED MR. HOWARD. AND  
25 IT'S NOT LIKE THEY COULDN'T HAVE PHOTOGRAPHS OF MR. HOWARD TO  
26 EXHIBIT TO THESE WITNESSES. IT WOULD HAVE BEEN VERY EASY FOR  
27 THE STATE TO PRESENT A PHOTOGRAPHIC LINEUP TO ALL OF THESE  
28 WITNESSES JUST AS THEY PRESENTED THE PHOTOGRAPHIC LINEUP TO --  
29 TO MRS. MONAHAN.

30 BUT THEY ALL CAME INTO COURT AND  
31 AFTER SOME THREE YEARS AFTER THEY LOOK ABOUT THE COURTROOM, AND  
32 WITH THE EXCEPTION OF MR. WALKER, THE ALTERNATE JUROR, AND MY-

1 SELF, SAMUEL HOWARD IS THE ONLY BLACK MAN IN THIS COURTROOM.  
2 I MEAN IT ACTUALLY BORDERED ON THE RIDICULOUS. WHEN SOME OF  
3 THESE WITNESSES WERE ASKED TO LOOK ABOUT THE COURTROOM AND SEE  
4 IF THEY COULD IDENTIFY THE MAN THAT -- THAT THEY WERE TRYING TO  
5 IDENTIFY, THEY IMMEDIATELY LOOKED AT MR. HOWARD AND, OF COURSE,  
6 THEY WERE ALL POSITIVE OF THEIR IDENTIFICATION OF HIM.

7 THE DISTRICT ATTORNEY IS ASKING YOU  
8 TO JUST PUSH ASIDE.

9 THE DISTRICT ATTORNEY IS ASKING YOU  
10 TO JUST BRUSH ASIDE THE DEFENSE'S WITNESSES. JUST BRUSH ASIDE  
11 WHAT MS. MALLEK SAYS, SWEEP IT UNDER THE RUG. JUST BRUSH ASIDE  
12 WHAT MR. MCBRIDE SAID, SWEEP THAT UNDER THE RUG. AND TO FIND  
13 MR. HOWARD GUILTY OF FIRST DEGREE MURDER. AND ONCE YOU DO  
14 THAT, THEY'RE GOING TO ASK YOU TO DECIDE THAT HE SHOULD DIE.  
15 THEY FOCUSED IN ON MR. HOWARD AND THEY DIDN'T LET GO. THEY  
16 WERE CONVINCED THAT HE KILLED DOCTOR MONAHAN. DESPITE WHAT  
17 MS. MALLEK SAID, DESPITE WHAT MR. MCBRIDE SAID, MR. HOWARD IS  
18 GUILTY.

19 NOW, PERHAPS MR. HARMON IS GOING TO  
20 ASK THE QUESTION: WHY WOULD DAWANA THOMAS LIE? AND I THINK  
21 I SHOULD ADDRESS THAT.

22 YOU MIGHT RECALL THAT THE POLICE,  
23 ACCORDING TO MRS. THOMAS, TOLD HER THAT IF SHE DIDN'T COOPERATE  
24 WITH THEM AND TELL THEM THE TRUTH, THAT SHE WAS GOING TO BE  
25 PROSECUTED, SHE WAS GOING TO BE PROSECUTED FOR MURDER, ACCOM-  
26 PLICE TO A MURDER, AND ACCOMPLICE TO THE DEATH PENALTY. IF  
27 YOU RECALL, SHE GAVE NUMEROUS STATEMENTS TO THE POLICE. AND  
28 KEEP IN MIND THAT THIS IS THE ONE WITNESS ON WHOM THE STATE  
29 IS ASKING YOU TO BASE YOUR VERDICT BASICALLY, THAT THEY'RE  
30 ASKING YOU TO BELIEVE HER RIGHT DOWN THE LINE. AND I DON'T  
31 THINK THAT YOU CAN DO THAT IF YOU OBJECTIVELY LOOK AT THE  
32 EVIDENCE.

1 SHE HAS BEEN THREATENED WITH PROSE-  
2 CUTION FOR VERY SERIOUS CRIMES. SHE GAVE NUMEROUS STATEMENTS  
3 TO THE POLICE. THE FIRST STATEMENT -- THE SECOND STATEMENT  
4 CONTRADICTED THE FIRST; THE THIRD STATEMENT CONTRADICTED THE  
5 OTHER TWO; RIGHT DOWN THE LINE. SHE GAVE NUMEROUS CONTRADIC-  
6 TIONS IN HER STATEMENT, SOME OF WHICH WERE SIGNIFICANT AND  
7 OTHERS WEREN'T SO SIGNIFICANT.

8 IN THE BEGINNING HERE -- AND I ASK  
9 YOU TO KEEP IN MIND THAT THE STATE BELIEVED THAT SAMUEL HOWARD  
10 KILLED DOCTOR MONAHAN. THEY SAT DOWN WITH THEIR EVIDENCE AND  
11 THEY ANALYZED IT AND SOME OF THE EVIDENCE THEY JUST TOTALLY  
12 DISREGARDED. IN THE BEGINNING, DAWANA THOMAS' ANSWERS DIDN'T  
13 HELP THEM IN THEIR CASE; DIDN'T HELP THE POLICE, DIDN'T HELP  
14 THE DISTRICT ATTORNEYS OFFICE. BUT THE MORE THE POLICE TALKED  
15 TO HER, THE MORE THE DISTRICT ATTORNEY TALKED TO HER, AND SHE  
16 TESTIFIED, AND TIME AND TIME AGAIN THEY TALKED TO HER, THE MORE  
17 HER STORY FELL IN LINE WITH THE THEORY OF THE PROSECUTION'S  
18 CASE.

19 YOU KNOW, YOU CAN'T ASK QUESTIONS  
20 WITHOUT IMPARTING SOME KIND OF INFORMATION, PARTICULARLY IF  
21 YOU'RE TRYING TO HAVE A STORY FIT YOUR OWN FACTS. AND LAW  
22 ENFORCEMENT IS A VERY COMPETITIVE BUSINESS.

23 YOU MIGHT REMEMBER HOW -- HOW EASILY  
24 MISS THOMAS -- HOW EASILY HER TESTIMONY ABOUT SEEING A GOLD  
25 WATCH SUDDENLY BECAME A SEIKO WATCH. SHE TESTIFIED THAT, WELL,  
26 I THOUGHT IT WAS A SEIKO WATCH ALTHOUGH SHE HAD NEVER SEEN THE  
27 BRAND NAME ON THAT WATCH. NOW, WHY WOULD SHE THINK IT WAS A  
28 SEIKO WATCH IF SHE NEVER SAW THE NAME ON THE WATCH? I SUBMIT  
29 TO YOU IT WAS BECAUSE IN THE NUMEROUS CONVERSATIONS SHE HAD  
30 WITH THE POLICE AND IN THE NUMEROUS CONVERSATIONS SHE HAD WITH  
31 REPRESENTATIVES OF THE DISTRICT ATTORNEYS OFFICE, THAT IT WAS  
32 IMPRESSED UPON HER IT WAS A SEIKO WATCH TAKEN FROM DOCTOR

1 MONAHAN. NOW, WAS IT A SEIKO WATCH? YEAH, I THINK IT WAS A  
2 SEIKO WATCH.

3 AND INCIDENTALLY, REMEMBER ABOUT  
4 THAT WATCH. SAM HOWARD WAS ARRESTED ON APRIL 1ST OF 1980 AND  
5 HE HAD A GOLD WATCH IN HIS POSSESSION BUT IT WASN'T A SEIKO  
6 WATCH. IT WAS A CITRON WATCH OR SOMETHING TO THAT EFFECT.

7 REMEMBER THE BAG OF BULLETS? THAT  
8 VERY SAME BAG OF BULLETS DAWANA THOMAS WAS SHOWN BEFORE THE  
9 GRAND JURY AND SHE DENIED THAT SHE HAD EVER SEEN THAT BAG OF  
10 BULLETS. THAT WAS BACK ON MAY 20TH OF 1981. BUT SHE CAME INTO  
11 COURT AND SHE WAS SHOWN THAT BAG OF BULLETS AND SHE SAID, YES,  
12 I'VE SEEN THAT BAG OF BULLETS BEFORE.

13 THERE WAS THE TESTIMONY ABOUT THE  
14 MASTER CHARGE CARD. FIRST SHE WENT FROM TELLING DETECTIVE  
15 LEAVITT THAT SHE HAD NEVER SEEN ANY CREDIT CARDS IN THE WALLET  
16 THAT MR. -- THAT MR. HOWARD HAD IN HIS POSSESSION, AND THAT  
17 WAS IN DIRECT RESPONSE TO A QUESTION THAT HAD BEEN PUT TO HER:  
18 DID YOU SEE ANY CREDIT CARDS IN THAT WALLET? NO, I NEVER SAW  
19 ANY CREDIT CARDS. NOW, ALL OF A SUDDEN THEY'RE DRIVING DOWN  
20 THE HIGHWAY, MR. HOWARD FLIPS OUT THE WALLET, IT ALL FALLS  
21 DOWN, AND SHE SEES A MASTER CHARGE CARD. SHE KNOWS THAT THERE  
22 WERE OTHER CREDIT CARDS, SHE DIDN'T KNOW SPECIFICALLY WHAT  
23 TYPE CARDS THEY WERE, BUT SHE DID SEE A MASTER CHARGE CARD.

24 DETECTIVE LEAVITT GOT ON THE STAND  
25 AND TESTIFIED THAT HE GOT A LIST OF THE CREDIT CARDS THAT  
26 DOCTOR MONAHAN HAD IN HIS POSSESSION WHEN HE LEFT HIS HOME ON  
27 MARCH 27TH FROM MRS. MONAHAN, AND IN THAT LIST WAS NOT A MASTER  
28 CHARGE CARD.

29 SHE TESTIFIED HERE IT WAS A BROWN  
30 WALLET. SHE TOLD THE POLICE BEFORE SHE DIDN'T KNOW WHETHER IT  
31 WAS A BROWN WALLET OR A BLACK WALLET. BUT ALL OF A SUDDEN,  
32 WHEN SHE'S IN COURT AND SHE IS TESTIFYING BEFORE YOU, THE

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1 JURY, IT BECOMES A BROWN WALLET.

2 ON MARCH 27TH SHE TOLD DETECTIVE  
3 LEAVITT THAT SHE NEVER LOOKED IN THAT WALLET, SHE NEVER LOOKED  
4 IN THE WALLET. SHE CAME TO COURT AND TESTIFIED THAT, YES, SHE  
5 LOOKED IN THE WALLET. THERE WERE NUMEROUS CREDIT CARDS IN THE  
6 WALLET, THERE WAS A PICTURE OF A FAMILY, CHILDREN.

7 YOU KNOW, THESE WEREN'T BRIEF MEETINGS  
8 THAT SHE HAD WITH THE POLICE AND WITH THE DISTRICT ATTORNEYS  
9 OFFICE. SHE TESTIFIED SHE SPENT SOME TWO HOURS OR SO ON ONE  
10 OCCASION WITH MR. SEATON. NOW, WHAT WOULD THEY BE TALKING  
11 ABOUT FOR TWO HOURS BUT WHAT SHE'S GOING TO COME INTO COURT AND  
12 TESTIFY TO?

13 I THINK THE STATE REALIZES THE WEAK-  
14 NESS OF THEIR CASE. SO THEY BRING IN MR. SCHWARTZ FROM NEW  
15 YORK, WHO COMES INTO COURT AND TESTIFIES THAT QUITE SOME TIME  
16 AGO MR. HOWARD ROBBED HIM. AND I SUBMIT TO YOU THAT THAT'S  
17 NOTHING MORE THAN A RECOGNITION FROM THE STATE THAT THEIR CASE  
18 IS WEAK. AND THEY'RE SUGGESTING TO YOU THAT BECAUSE HE MIGHT  
19 HAVE ROBBED MR. SCHWARTZ HE DID THE SAME WITH DOCTOR MONAHAN.

20 MR. SEATON TALKS ABOUT CORROBORATION,  
21 BECAUSE HE KNOWS THAT, AND THE INSTRUCTIONS WILL TELL YOU THIS,  
22 THAT IF YOU FIND THAT DAWANA THOMAS WAS AN ACCOMPLICE IN THE  
23 CASE, IT DOESN'T TAKE -- AND BY "ACCOMPLICE" YOU DON'T HAVE TO  
24 -- YOU DON'T HAVE TO BE CONVINCED THAT SHE WENT OUT AND SHE  
25 HELPED MR. HOWARD COMMIT CRIMES. IF SHE AIDED HIM IN ANYWAY,  
26 KNOWING THAT HE WAS COMMITTING CRIMES, SHE WAS AN ACCOMPLICE.  
27 AND HE TALKS ABOUT CORROBORATION BECAUSE HE KNOWS THAT WITHOUT  
28 THAT CORROBORATION OF AN ACCOMPLICE'S TESTIMONY, YOU CANNOT  
29 CONVICT MR. HOWARD OF ANY OFFENSES.

30 WHAT CORROBORATION IS THERE OF DAWANA  
31 THOMAS' TESTIMONY, WHO CORROBORATES MR. HOWARD COMING INTO THE  
32 MOTEL WITH A C.B. WITH WIRES DANGLING FROM IT?

1 AND THAT BRINGS UP ANOTHER POINT.  
 2 DETECTIVE LEAVITT TESTIFIED THAT THERE WAS ALSO A CASSETTE  
 3 DECK TAKEN FROM THAT CAR -- FROM DOCTOR MONAHAN'S VAN. SHE  
 4 DIDN'T SAY THAT MR. -- MR. HOWARD CAME INTO THE MOTEL ROOM WITH  
 5 A CASSETTE DECK. I MEAN WHAT DID HE DO WITH THE CASSETTE DECK?  
 6 DID HE SELL IT AS HE WALKED ACROSS FROM THE DEW DROP INN TO  
 7 THE MOTEL ROOM? DID HE DECIDE TO THROW IT AWAY? CONCEAL IT  
 8 IN HIS CAR? IT CERTAINLY WASN'T FOUND IN HIS CAR WHEN HE WAS  
 9 EVENTUALLY ARRESTED. BUT THEY'RE ASKING YOU TO ACCEPT IT,  
 10 FACE VALUE, DAWANA THOMAS' TESTIMONY. DON'T CALL INTO QUESTION  
 11 HER TESTIMONY.

12 IT'S AN INDIVIDUAL DECISION THAT EACH  
 13 OF YOU WILL HAVE TO MAKE. NO ONE CAN TELL YOU TO GO ABOUT --  
 14 HOW TO GO ABOUT YOUR DELIBERATIONS. AND I'M NOT SUGGESTING  
 15 TO YOU THAT YOU DON'T TAKE INTO CONSIDERATION THE VIEWS OF YOUR  
 16 FELLOW JURORS. YOU SHOULD, HOWEVER, IN THE FINAL ANALYSIS,  
 17 THE BOTTOM LINE IS THAT IT'S AN INDIVIDUAL DECISION THAT YOU  
 18 WILL EACH HAVE TO MAKE AND THAT YOU EACH MUST BE PREPARED TO  
 19 LIVE WITH.

20 I COULD GO ON AND ON FOR AN HOUR AND  
 21 A HALF, AS MR. SEATON DID. I DON'T KNOW WHAT GOOD IT WOULD DO.  
 22 I THINK YOU -- I THINK YOU ALL KNOW WHERE THE PROBLEMS WITH  
 23 THE STATE'S CASE LIES. I KNOW -- I THINK YOU ALL REALIZE WHERE  
 24 THE CONTRADICTIONS ARE. AND I CAN ONLY TRUST, LADIES AND  
 25 GENTLEMEN, THAT YOU WILL SIT DOWN AND THAT YOU WILL CAREFULLY,  
 26 CAREFULLY SCRUTINIZE, THAT YOU WILL CAREFULLY ANALYZE THE  
 27 EVIDENCE IN THIS CASE. IF YOU DO THAT I THINK THERE'S ONLY ONE  
 28 CONCLUSION THAT YOU CAN REACH.

29 NOW, I'M NOT GOING TO SUGGEST TO YOU  
 30 THAT THE ROBBERY OF THE SEARS DIDN'T HAPPEN AND THAT MR.  
 31 HOWARD WASN'T INVOLVED IN THAT. USE YOUR COMMON SENSE. YOU  
 32 KNOW WHAT THE EVIDENCE SHOWED.

1 ADMITTEDLY, THE EVIDENCE OF HIS  
2 INVOLVEMENT IN THE ROBBERY AT SEARS IS OVERWHELMING. THE  
3 EVIDENCE THAT HE ROBBED AND THAT HE KILLED DOCTOR MONAHAN IS  
4 CERTAINLY IN DOUBT. AND I SUBMIT TO YOU THAT BASED ON THE  
5 EVIDENCE PRESENTED THAT THERE IS A REASONABLE DOUBT AS TO HIS  
6 GUILT. AND IF YOU FOLLOW YOUR OATH AS JURORS, YOU HAVE NO  
7 ALTERNATIVE BUT TO RETURN A VERDICT OF NOT GUILTY AS TO THE  
8 ROBBERY AND THE MURDER OF DOCTOR MONAHAN.

9 I WILL SUBMIT IT WITH THAT AND I  
10 THANK YOU VERY MUCH.

11 THE COURT: COUNSEL.

12 MR. HARMON: THANK YOU, YOUR HONOR.

13  
14 (REBUTTAL ARGUMENT)

15 BY MR. HARMON:

16 JUDGE MENDOZA, COUNSEL, LADIES AND  
17 GENTLEMEN OF THE JURY:

18 IT IS A VERY IMPORTANT OCCASION THAT  
19 BRINGS US TOGETHER. I KNOW THAT YOU'VE BEEN SITTING HERE FOR  
20 A LONG TIME. I KNOW YOU PROBABLY ARE GETTING RESTLESS AND  
21 ANXIOUS TO GET ABOUT YOUR RESPONSIBILITY DECIDING THIS CASE.  
22 BUT I DO ASK YOUR INDULGENCE FOR A FEW MINUTES LONGER.

23 IT'S NOT OFTEN I HEAR A DEFENSE  
24 ATTORNEY SAY HE'S ANXIOUS TO HEAR MY REMARKS. I APPRECIATE  
25 MR. COOPER'S ENTHUSIASM ABOUT HEARING WHAT THE EXPLANATION WILL  
26 BE ABOUT CERTAIN WITNESSES THEY CALLED. I THINK MANY OF THE  
27 ANSWERS ARE RATHER APPARENT.

28 I AM ALSO INTERESTED IN THE FACT THAT  
29 MR. COOPER CONCEDES THAT SAMUEL HOWARD IS THE PERSON WHO  
30 COMMITTED A ROBBERY AT THE SEARS STORE ON MARCH THE 26TH, 1980.  
31 I FIND THAT SIGNIFICANT BECAUSE ONE LEADS TO THE OTHER. THE  
32 MAN WHO ROBBED KEITH KINSEY TOOK HIS BADGE AND HIS BADGE CASE

1 AND THAT HAD THE IDENTIFICATION OF KEITH KINSEY.

2 IT WOULD BE AMAZING IF SAMUEL HOWARD  
3 WAS USING THE NICKNAME KEITH BEFORE ABOUT NOON ON MARCH THE  
4 26TH, 1980.

5 MR. COOPER, I SAY, BASED ON THIS  
6 EVIDENCE IF SAMUEL HOWARD COMMITTED THE ROBBERY OF KEITH  
7 KINSEY, THEN HE MURDERED GEORGE MONAHAN. THAT'S BECAUSE AT  
8 4:00 O'CLOCK P.M., AFTER HE HAD ROBBED MR. KINSEY OF HIS TWO-  
9 WAY MOTOROLA RADIO AND HIS BADGE AND IDENTIFICATION, SOMEONE  
10 CALLED MARY LOU MONAHAN AT HER RESIDENCE, AND THAT SOMEONE  
11 SAID, I'M KEITH, AND I'M EMPLOYED AS A SECURITY GUARD AT  
12 CAESARS PALACE. HE SAID HE'D SEEN THE VEHICLE, HE WAS INTEREST-  
13 ED, HE WANTS TO MAKE AN ARRANGEMENT TO SEE IT CLOSER. AND THEY  
14 ARRANGED TO SEE IT. AND THEY WENT TO CAESARS PALACE AT ABOUT  
15 8:00 O'CLOCK THAT NIGHT. AND BOTH MARY LOU MONAHAN AND BARBARA  
16 ZEMAN HAVE IDENTIFIED SAMUEL HOWARD AS THE PERSON THEY SAW.  
17 AND HE HAD ON A LEATHER JACKET, WHICH IS CONSISTENT WITH THE  
18 JACKET RECOVERED FROM THE BLACK OLDSMOBILE CUTLASS IN DOWNEY,  
19 CALIFORNIA, THAT MR. HOWARD AND DAWANA THOMAS HAD BEEN IN.

20 KEITH KINSEY ALSO DESCRIBED A JACKET VERY SIMILAR TO THAT AS  
21 BEING WORN BY HIS ASSAILANT.

22 MR. HOWARD HAD A TWO-WAY RADIO WHICH  
23 MARY LOU MONAHAN STATED LOOKED LIKE THE RADIO WHICH IS IN  
24 EVIDENCE IN COURT, WHICH, IN FACT, ACCORDING TO OFFICER CONNELLY,  
25 WAS ON THE PERSON OF SAMUEL HOWARD AT THE TIME HE WAS ARRESTED  
26 IN DOWNEY, CALIFORNIA, APRIL THE 1ST, 1980.

27 IF YOU REMEMBER, HE SAID WHEN THE  
28 VAN PULLED A LITTLE PAST, AFTER HE HAD FLAGGED THEM DOWN, AND  
29 HE WALKED AROUND TO THE REAR OF THE VAN AND APPROACHED THE  
30 DRIVER'S SIDE IN RESPONSE TO GEORGE MONAHAN'S QUESTION, "ARE  
31 YOU KEITH?" "YES, I'M KEITH." AND WENT AHEAD TO REITERATE  
32 THAT HE WAS A SECURITY OFFICER AT CAESARS PALACE. AND HE GAVE



1 THAT LATER ON AS THE REASON WHY HE COULDN'T TAKE A TEST DRIVE  
2 THEN, BECAUSE HE WAS ON DUTY.

3 WELL, MR. HOWARD HAS ADMITTED ON  
4 THE STAND HE WAS NEVER EMPLOYED AS A SECURITY GUARD AT CAESARS  
5 PALACE. HE LIED TO THOSE PEOPLE THAT NIGHT. BUT HE WAS THE  
6 CONFIDENT CON MAN, AND HE CONVINCED THEM THAT HIS INTEREST IN  
7 PURCHASING THE VEHICLE WAS GENUINE. SO IN CASE THERE WAS ANY  
8 DOUBT IN HIS MIND, AND IF HE HAD SEEN THE VAN -- IN FACT, HE  
9 ALREADY KNEW HOW TO CALL MRS. MONAHAN OR HOW TO CALL THE OFFICE.  
10 IF THERE WAS ANY QUESTION ABOUT WHERE DOCTOR MONAHAN WORKED,  
11 A BUSINESS CARD WOULD GIVE IT TO HIM. AND HE ACTUALLY MADE AN  
12 APPOINTMENT THAT HE WAS TO TEST DRIVE THE VAN THE FOLLOWING  
13 MORNING.

14 HE ASKED WHEN THE BEST TIME WOULD BE  
15 TO COME BY. AND DOCTOR MONAHAN INDICATED THAT HE HAD APPOINT-  
16 MENTS IN THE MORNING, HE WAS GOING TO BE THERE IN THE MORNING  
17 AND HE HAD APPOINTMENTS IN THE AFTERNOON. IT WOULD BE HIS  
18 PREFERENCE THAT THE MAN CAME BY IN THE MORNING HOURS.

19 WELL, THERE'S NO DOUBT WHO IT WAS  
20 THAT APPEARED AT 7:10 A.M. SAMUEL HOWARD HAD MADE THE APPOINT-  
21 MENT. HE SAID HE WAS KEITH. AND WHEN HE ASKED HELENE ZUCKERMAN  
22 IF DOCTOR MONAHAN WAS IN AND SHE SAID NO, SHE SAID HE'LL BE  
23 BACK IN AT 7:30.

24 WELL, LADIES AND GENTLEMEN, IT'S  
25 APPARENT FOR THOSE REASONS WHICH ARE APPARENT THAT I FIND THE  
26 CONCESSION BY MR. COOPER THAT SAMUEL HOWARD COMMITTED THE SEARS  
27 ROBBERY TO BE VERY SIGNIFICANT, BECAUSE IT FOLLOWS THEN BY HIS  
28 USE OF KEITH, BY THE FACT THAT HE HAD THE TWO-WAY RADIO AND BY  
29 THE FACT THAT HE IS THERE AT CAESARS PALACE. HE IS OBVIOUSLY  
30 THE PERSON WHO COMMITTED THE MURDER OF GEORGE MONAHAN.

31 MR. COOPER SAYS, QUOTE, THERE IS A  
32 VERY GAPING HOLE -- GAPING HOLE IN THE STATE'S CASE. WELL,

1 THAT'S ONLY BECAUSE WE DON'T HAPPEN TO HAVE A DIRECT EYE-  
2 WITNESS TO WHAT HAPPENED BETWEEN 7:10 AND 7:45 A.M.

3 AS MR. SEATON HAS ALREADY POINTED  
4 OUT, WE KNOW GEORGE MONAHAN GOT TO WORK AND WE KNOW A MAN WHO  
5 FIT THE PHYSICAL DESCRIPTION OF THE DEFENDANT WAS THERE. THIS  
6 IS ALL INDEPENDENTLY OF THE TESTIMONY OF DAWANA THOMAS. AND  
7 WE KNOW THE MAN ALMOST CERTAINLY HAD TO BE THE DEFENDANT  
8 BECAUSE FAMILY MEMBERS OF MR. MONAHAN SAY HE WAS THE MAN WHO  
9 HAD THE APPOINTMENT TO TEST DRIVE THE CAR THE FOLLOWING  
10 MORNING.

11 WELL, WHAT HAPPENED BETWEEN 7:10 AND  
12 7:45 A.M.?

13 GEORGE MONAHAN WAS MURDERED SOMEWHERE  
14 BETWEEN 1700 DESERT INN ROAD, THE WINCHESTER PLAZA OFFICE  
15 COMPLEX, AND THE DEW DROP INN AT 4200 BOULDER HIGHWAY. AND IN  
16 THAT 35-MINUTE SPAN, THIS YOUNG, DECENT, PROFESSIONAL MAN WAS  
17 KILLED IN COLD BLOOD. SOMEBODY, AND THE EVIDENCE ESTABLISHES  
18 THAT SOMEONE IS IN THIS COURTROOM, SAM HOWARD, PUT A BULLET IN  
19 THE BACK OF HIS HEAD.

20 WELL, MR. COOPER, IF WE HAVE ANY  
21 GAPING HOLES IN THE CASE, IT'S ONLY BECAUSE WE CAN'T RESURRECT  
22 GEORGE MONAHAN TO COME INTO THIS COURT AND POINT OUT HIS  
23 KILLER. AND SO WE DID THE NEXT BEST THING, WE OFFERED A  
24 WITNESS, AND IT MAY HAVE BEEN FIVE MONTHS BEFORE, BUT WE OFFER-  
25 ED A WITNESS TO YOU, ED SCHWARTZ, TO EXPLAIN WHAT HAPPENED TO  
26 HIM WHEN HE AGREED TO GO OUT FOR A TEST OR DEMONSTRATION RIDE  
27 WITH THIS FELLOW (INDICATING). AND WHEN MR. HOWARD GOT HIM ONE-  
28 TO-ONE, HE PULLED OUT A GUN AND ROBBED HIM. HE MADE HIM TAKE  
29 HIS PANTS OFF AND HIS SHOES OFF.

30 WELL, WHAT MOTIVATES ONE INDIVIDUAL  
31 TO KILL ANOTHER?

32 MR. SEATON HAS A THEORY. I CAN'T

1 TELL YOU BECAUSE I WASN'T THERE POSITIVELY AND UNEQUIVOCALLY  
2 WHY SAM HOWARD FELT HE HAD TO KILL ANOTHER HUMAN BEING. IT'S  
3 ONE THING TO ROB, IT'S ONE THING, AS HE DID WITH MR. SCHWARTZ,  
4 TO TAKE HIS RING AND HIS WRISTWATCH AND HIS MONEY. BUT TO KILL  
5 A MAN?

6 WELL, WHY DO WE KNOW IT WAS THE SAME  
7 PERSON? WELL, IN EACH INSTANCE, AND I EMPHASIZE, AS THE COURT  
8 HAS ALREADY TOLD YOU, THE EVIDENCE OF THE CRIME AGAINST MR.  
9 SCHWARTZ CAME IN TO SHOW IDENTITY OF WHO ACTUALLY KILLED GEORGE  
10 MONAHAN, THE INTENT TO COMMIT ROBBERY AT THAT TIME, AND MOTIVE.

11 YOU'LL NOTICE IN EACH INSTANCE MR.  
12 HOWARD REPRESENTED THAT HE WAS A SECURITY OFFICER. AND HE'S  
13 ACKNOWLEDGED ON THE WITNESS STAND, AND NOT ONLY DID HE NOT WORK  
14 AT CAESARS PALACE EVER, HE NEVER WORKED AT A BURNS SECURITY  
15 AGENCY. HE'S NEVER BEEN A SECURITY OFFICER. AND EACH TIME HE  
16 WANTED A DEMONSTRATION RIDE AND EACH TIME WHEN HE GOT HIS  
17 WOULD-BE VICTIM ONE-TO-ONE, A ROBBERY OCCURRED.

18 NOW, IS IT POSSIBLE IN THE CASE OF  
19 GEORGE MONAHAN THAT A REQUEST WAS ALSO MADE TO REMOVE HIS

20 TROUSERS AND HIS SHOES? IS THAT WHAT PRECIPITATED HIS MURDER?  
21 PERHAPS DOCTOR MONAHAN DIDN'T WANT TO DO THAT, EVEN AT GUNPOINT.  
22 BUT WE KNOW HE WAS KILLED.

23 AND WHAT ED SCHWARTZ DOES IS TO GIVE  
24 US SOME INSIGHTS BECAUSE OF THE SIMILARITY OF WHAT HAPPENED.  
25 IT GIVES US SOME MEANS BY WHICH TO VIEW, IN ALL PROBABILITY,  
26 WHAT OCCURRED BETWEEN 7:10 AND 7:45 A.M. ON MARCH THE 27TH,  
27 1980, BECAUSE AT 7:45 A.M. THAT VAN PULLED INTO THE REAR OF THE  
28 DEW DROP INN. AND A CREDIBLE WITNESS, CHARLES MARINO, THE  
29 OWNER OF THE DEW DROP INN FROM 1975 UNTIL SEPTEMBER 1981, HAS  
30 TESTIFIED HE SAW IT BACK IN AND IT ATTRACTED HIS ATTENTION  
31 BECAUSE HE STATED THAT USUALLY ONLY DELIVERIES WERE MADE TO  
32 THE REAR OF THE DEW DROP INN.

1 NOW, MR. COOPER, I WANT TO GET TO THE  
2 POINT YOU WERE SO ANXIOUS TO HEAR ABOUT. HE SUGGESTS THAT THE  
3 STATE WAS GENUINELY SURPRISED BY EVIDENCE BROUGHT FORTH BY LORA  
4 MALLEK, AND I WOULD ASSUME PERHAPS JOHN MCBRIDE.

5 HE SAID "THEY" AND HE'S TALKING ABOUT  
6 THE STATE IN GENERAL, I SUPPOSE, AND THAT MUST INCLUDE THE  
7 DISTRICT ATTORNEYS OFFICE AND LAW ENFORCEMENT. THE STATE WAS  
8 LIKE A BLOODHOUND AND IT FOCUSED ON MR. HOWARD AND WAS BLIND TO  
9 EVERYTHING ELSE.

10 WELL, THE POLICE TOOK THE STATEMENT  
11 FROM LORA MALLEK AND JOHN MCBRIDE. THEY'RE PART OF THE STATE  
12 OF NEVADA. THEY WERE TAKEN AS PART OF THIS INVESTIGATION.  
13 NOW, WE CERTAINLY WEREN'T SURPRISED, WE HAD ACCESS TO THE SAME  
14 STATEMENTS GIVEN BY MCBRIDE AND LORA MALLEK AS THE DEFENSE DOES.

15 JOHN MCBRIDE SAYS THAT AT ABOUT  
16 8:30 OR PERHAPS 8:45 A.M. HE SAW A VAN HE THOUGHT WAS THE  
17 MCNAHAN VAN PARKED IN FRONT OF HIS APARTMENT AT 1457 GOLDEN  
18 ARROW. THAT'S AROUND 8:30 TO 8:45 A.M.

19 WELL, NUMBER ONE -- AND I DON'T  
20 SUGGEST THAT JOHN MCBRIDE HAS ANY INTEREST IN THIS CASE. HE'S  
21 MOVED NOW TO COLORADO. HE APPARENTLY WORKS AS A BANKER. HE'S  
22 NOT MAKING UP ANY OF THIS. THIS MAN DIDN'T COME IN HERE WITH  
23 AN AXE TO GRIND AGAINST EITHER SIDE. BUT IT STRIKES ME AS  
24 RATHER UNUSUAL STANDING THERE, AS HE HAS STATED, IN HIS APART-  
25 MENT ON THE SECOND-FLOOR THAT HE WOULD GAZE FOR FIVE MINUTES AT  
26 SOME BLACK MAN WHO WAS SITTING IN A VAN. BUT THAT'S WHAT HE  
27 SAID HAPPENED. HE SAID HE SAT THERE FOR ABOUT FIVE MINUTES AND  
28 HE JUST LOOKED AT HIM. WELL, HOW WELL COULD HE SEE THE MAN  
29 FROM A SECOND-FLOOR WINDOW AS THE MAN SAT IN THE VAN FOR FIVE  
30 MINUTES AND THEN APPARENTLY THE MAN GOT OUT OF THE VAN AND  
31 WALKED SOMEWHERE? SO HE GETS TO SEE HIM IN FULL FIGURE FOR  
32 PERHAPS SECONDS.

1 BUT THAT'S RATHER NOT THE SIGNIFICANT  
2 THING. THE SIGNIFICANT THING IS: WHERE WAS GEORGE MONAHAN?  
3 IF THAT WAS THE VAN, WHERE IS THE VICTIM?

4 AND MR. MCBRIDE TELLS US THIS  
5 ADDRESS AT 1457 GOLDEN ARROW, IF YOU'RE GOING TO GO UP TO  
6 MARYLAND PARKWAY, IT'S PERHAPS ABOUT TWO BLOCKS NORTH OF DESERT  
7 INN. AND WHEN HE WAS ASKED IN TERMS OF 1500 DESERT INN, WHICH  
8 WAS THE ADDRESS OF COURSE DAWANA THOMAS KEPT GIVING FOR THE  
9 PLAZA THAT SHE DESCRIBED AS THE WESTCHESTER PLAZA, HE SAID IT'S  
10 ABOUT A BLOCK NORTH OF THERE, 1457.

11 WELL, THIS IS MR. MONAHAN'S VAN. IF  
12 THIS IS THE PERSON WHO WENT OUT TO TEST DRIVE THE VAN -- AND  
13 WHY WOULD MR. MONAHAN BE TEST DRIVING THE VAN AT THIS POINT  
14 WITH A STRANGER, SOMEBODY HE HAD MADE NO APPOINTMENTS WITH?  
15 WHERE IS HE? WELL, PERHAPS HE'S KILLED ALREADY. BUT THE  
16 DEFENSE WOULD LIKE YOU TO THINK HE'S ALREADY BEEN MURDERED BY  
17 THIS MAN WITH A LARGE FOUR AND A HALF INCH AFRO.

18 WELL, IF THIS IS THE KILLER, WHAT IS  
19 HE DOING WITHIN AN HOUR OF THE MURDER SITTING FOR FIVE MINUTES  
20 A BLOCK AWAY FROM THE SCENE WHERE HE GOT THE VAN? CAN YOU  
21 BELIEVE THAT? THAT IS INCREDIBLE. A KILLER WOULDN'T BEHAVE  
22 THAT WAY. HE WOULDN'T HAVE STAYED IN THIS NEIGHBORHOOD AND  
23 THEN WALKED CALMLY AWAY AND LEAVE THE VAN THERE AT 8:30 TO 8:45  
24 A.M.

25 WELL, THE ONLY EXPLANATION IS, JOHN  
26 MCBRIDE IS MISTAKEN. HE THOUGHT HE SAW THE VAN AND HE CONTACT-  
27 ED THE POLICE AND THEY TOOK A STATEMENT.

28 BUT MR. COOPER IS RIGHT. IT DOES NOT  
29 SQUARE WITH THE REST OF THE EVIDENCE. THAT'S BECAUSE JOHN  
30 MCBRIDE IS MISTAKEN. HE DIDN'T SEE THE VICTIM. AND IF THE VICTIM  
31 WAS STILL ALIVE, HE MOST CERTAINLY WOULD HAVE SEEN HIM IN THIS  
32 SAME AREA. IF IT WAS THE MONAHAN VAN, IF MR. MONAHAN WAS

1 ALREADY KILLED BY THE HANDS OF THE MAN MR. MCBRIDE SAW, THE  
2 MAN WOULDN'T HAVE BEEN A BLOCK AWAY FROM DOCTOR MONAHAN'S OFFICE  
3 BUT WE ALREADY KNOW THAT, DON'T WE, BECAUSE THE VAN IS ALREADY  
4 BEHIND THE DEW DROP INN.

5 CHARLES MARINO HAS EXPLAINED AT ABOUT  
6 7:45 A.M. HE SAW IT BACK IN. THAT'S 45 MINUTES BEFORE JOHN  
7 MCBRIDE SAYS HE SAW THE VAN IN FRONT OF HIS APARTMENT.

8 WELL, MR. COOPER TELLS YOU THAT ON  
9 CROSS EXAMINATION MR. MARINO, IN RESPONSE TO THE QUESTION: IS  
10 IT POSSIBLE THE VAN COULD HAVE BEEN MOVED? RESPONDED, YES.  
11 AND THAT'S TRUE. BUT ALMOST ANYTHING IS POSSIBLE. WHEN YOU  
12 ASK: IS IT POSSIBLE OR COULD IT BE? ALMOST ANY WITNESS HAS TO  
13 SAY YES, IT COULD HAVE HAPPENED, I SUPPOSE.

14 WHAT IS HIS TESTIMONY? CHARLES  
15 MARINO SAID AT ABOUT 7:45 A.M. I NOTICED A BLACK VAN BACKING UP  
16 TO THE REAR OF THE BUILDING. IT STRUCK ME AS UNUSUAL BECAUSE  
17 ONLY DELIVERIES BACKED IN.

18 THEN HE WAS SHOWN A NUMBER OF EXHIBITS  
19 AND SPECIFICALLY EXHIBIT NUMBER 2, WHICH IS TAKEN FROM A

20 DISTANCE AND SHOWS THE RELATIONSHIP OF THE VAN GEORGE MONAHAN  
21 WAS DISCOVERED IN TO THE DEW DROP INN. AND HE STATED THAT  
22 EXHIBIT 2 IS THE SAME SPOT WHERE THE VAN WAS AT.

23 WELL, THAT PHOTOGRAPH WASN'T TAKEN  
24 AT 7:45 A.M. -- AND, MR. COOPER, THIS IS WHAT'S WRONG WITH LORA  
25 MALLEK'S TESTIMONY -- THAT PHOTOGRAPH WAS TAKEN AFTER MR.  
26 MONAHAN WAS DISCOVERED IN THE EVENING.

27 AND CHARLES MARINO SAYS NUMBER 2  
28 SHOWS THE SAME SPOT WHERE THE VAN WAS AT AT 7:45 A.M., HE SAID  
29 LATER ON IN HIS TESTIMONY. AND IT WAS HIS RECOLLECTION THAT  
30 THE BODY WAS FOUND MAYBE 6:00 TO 7:00 P.M. YOU REMEMBER HE  
31 RESPONDED TO THAT LOCATION THEN. HE SAW LIEUTENANT JOHN CONNER,  
32 WHOM HE KNOWS. AND AGAIN HE SAID THE VAN WAS IN THE SAME

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1 POSITION AS WHEN HE FIRST SAW IT.

2 NOW, IF SOMEONE SAYS: COULD IT HAVE  
3 BEEN MOVED? IS IT POSSIBLE IT WAS SIX INCHES FARTHER EAST OR  
4 WEST? HE HAS TO SAY YES. BUT IT LOOKED LIKE THE SAME POSITION  
5 TO HIM.

6 WELL, THAT'S WHAT'S WRONG ALSO WITH  
7 THE TESTIMONY OF LORA MALLEK. MR. MARINO IS OF THE OPINION THAT  
8 THE VAN WAS IN THE SAME POSITION IN THE EVENING AS IT WAS WHEN  
9 HE FIRST SAW IT. NOW, WHAT ARE THE CHANCES OF SOMEONE, WHO  
10 APPARENTLY IS INVOLVED IN A MURDER, OF CONTINUING TO DRIVE THAT  
11 VAN ALL DURING THE DAY, TAKING IT FIRST TO THE DEW DROP INN AND  
12 THEN RETRIEVING THE VEHICLE AND DRIVING IT ABOUT TOWN TO WHERE  
13 YOU COULD BE SEEN AT 3:00 OR 4:00 O'CLOCK IN THE AFTERNOON, AND  
14 THEN DRIVING IT BACK, BACKING IT IN AND PUTTING IT RIGHT IN  
15 THE SAME PLACE?

16 THEN, MR. COOPER SAID THAT THE WHITE  
17 MAN IN THE BACK SEAT, SEEN BY LORA MALLEK, IN HIS VIEW HAD TO  
18 BE MR. MONAHAN. WITH DUE RESPECT, MR. COOPER, THAT'S INCREDI-  
19 BLE. WE'RE TALKING ABOUT A PROFESSIONAL MAN WHO HAD ALREADY  
20 TOLD SAM HOWARD HE HAD APPOINTMENTS, HE WAS BUSY IN THE AFTER-  
21 NOON, HE PREFERRED HE COME IN THE MORNING; AND HE'S STILL  
22 DRIVING AROUND IN THE VAN ON THE TEST DRIVE BETWEEN 3:00 AND  
23 4:00 P.M.?

24 LORA MALLEK DIDN'T MAKE THIS UP. THE  
25 POLICE CAME IN WHEN SHE WAS OVER THERE GETTING A FEW BELTS INTO  
26 HER SYSTEM, GETTING LOOSEMED UP AFTER A LONG DAY'S WORK, AND  
27 THEY WANTED SOME INFORMATION. AND SHE WENT UP -- WHY CAN SHE  
28 DESCRIBE THE VAN SO WELL NOW? NOT BECAUSE OF WHAT SHE SAW IN  
29 THE MOBIL SERVICE STATION. BECAUSE OF WHAT SHE SAW TO THE REAR  
30 OF THE DEW DROP INN AT THE TIME THE BODY IS RECOVERED AND THE  
31 POLICE ARE THERE AND IT'S EXCITING, AND SHE THOUGHT SHE SAW THE  
32 VAN BUT SHE COULDN'T HAVE SEEN IT. THAT'S THE POINT AND THAT'S

1 THE REASON SHE WASN'T CALLED BY THE STATE OF NEVADA, BECAUSE  
2 WE DON'T WANT TO WASTE YOUR TIME.

3 NOW, THE EVIDENCE HAD SHOWED THAT  
4 VAN HAD BEEN THERE SINCE 7:45 IN THE MORNING. IT WASN'T  
5 GEORGE MONAHAN STILL DRIVING AROUND. HE WAS MURDERED BETWEEN  
6 7:10 AND 7:45.

7 WELL, MR. COOPER WANTS TO TALK ABOUT  
8 UNMATCHED PRINTS. THERE WERE ABOUT 15 LATENT PRINTS DEVELOPED  
9 AND LIFTED FROM THE 1977 DODGE VAN.

10 AS LONG AS WE'RE GOING TO TALK ABOUT  
11 PRINTS, MR. COOPER, IT WAS INTERESTING TO ME THAT WHEN SAM  
12 HOWARD TOOK THE WITNESS STAND HE DENIED EVER HAVING MET DOCTOR  
13 MONAHAN. HE DENIED BEING OVER THERE AT CAESARS PALACE. HE  
14 HAS NOT GIVEN ANY EXPLANATION FOR HOW HIS PRINT, HIS LEFT THUMB  
15 PRINT, GOT ON THE DOOR KNOB OF THE CARGO DOOR, PASSENGER'S SIDE,  
16 OF GEORGE MONAHAN'S VAN. THAT IS OVERLOOKED ENTIRELY. NO  
17 EXPLANATION AT ALL.

18 HE SAYS HE DIDN'T MURDER MR. MONAHAN,  
19 SAYS HE REMEMBERS THAT HE DIDN'T ROB HIM, BUT HE DIDN'T TELL US  
20 HOW HIS PRINT GOT THERE.

21 THE LEFT THUMB PRINT, ACCORDING TO  
22 THE EXPERTS INVOLVED, MR. MOSER AND MR. TRUSZKOWSKI WHO WERE  
23 CALLED, THAT LATENT WAS NOT SMUDGED. IT DIDN'T HAVE OVERLAY  
24 PRINTS. THERE WEREN'T PRINTS ON TOP OF IT. THE ONLY LOGICAL  
25 INFERENCE IS THE LAST PERSON BEFORE HANK TRUSZKOWSKI PROCESSED  
26 THAT DOOR KNOB ON THE PASSENGER'S SIDE OF THE VAN, WAS TOUCHED  
27 BY SAM HOWARD, THE DEFENDANT. IT HAD TO BE THAT WAY.

28 AT LEAST THREE TIMES BARBARA ZEMAN  
29 AND MARY CATHERINE MONAHAN GOT IN AND OUT OF THE CARGO DOOR.  
30 WHEN THE VICTIM AND HIS FAMILY FIRST WENT TO PICK UP THE VAN  
31 AT HIS OFFICE, THEY GOT IN. THEY WENT OUT TO HENDERSON TO HAVE  
32 DINNER WITH GEORGE MONAHAN'S PARENTS AND THEY GOT IN AND OUT



1 THERE. THEY DROVE TO CAESARS PALACE, THEY GOT IN AND OUT. AND  
2 THEY WENT BACK TO THE OFFICE. SO IT'S MORE THAN THREE TIMES.

3 THE PRINT WASN'T ON THERE BEFORE OR  
4 IT WOULD HAVE BEEN SMUDGED OR OBSCURED OR THERE WOULD HAVE BEEN  
5 PRINTS ON TOP OF IT. IT'S THE LAST PRINT. THAT'S THE PRINT  
6 SAM HOWARD PUT THERE BETWEEN 7:10 AND 7:45 A.M.

7 SO THAT ISN'T EXPLAINED AT ALL. BUT  
8 THE DEFENSE WANTS TO QUIBBLE ABOUT THE FACT THAT THERE ARE  
9 CERTAIN PRINTS NOT MATCHED TO HIM. WELL, AT LEAST THREE PRINTS  
10 WERE MATCHED TO THE VICTIM, GEORGE MONAHAN. SO THAT BRINGS US  
11 DOWN TO 11 THAT AREN'T MATCHED, AND THEY COULD HAVE BEEN ANY-  
12 BODY'S.

13 THERE'S NO EVIDENCE THAT DOCTOR  
14 MONAHAN'S DAUGHTER, MARY CATHERINE MONAHAN, WAS ELIMINATED AS  
15 SOMEONE WHO HAD PUT PRINTS THERE. THERE'S NO EVIDENCE THAT  
16 BARBARA ZEMAN WAS ELIMINATED. THERE'S NO EVIDENCE THAT FRIENDS  
17 OR BUSINESS ASSOCIATES OF MR. MONAHAN'S WERE ELIMINATED. THOSE  
18 PRINTS COULD HAVE BEEN PLACED THERE BY ANYONE. BUT THERE IS  
19 THE ONE IMPORTANT LEFT THUMB PRINT WHICH IS RIGHT THERE (INDI-  
20 CATING). IT'S FACING TO THE LEFT. IT'S RIGHT AT A POSITION  
21 WHERE A PERSON WOULD PUT HIS THUMB IF HE WAS OPENING THE DOOR,  
22 THE CARGO DOOR ON THE PASSENGER'S SIDE.

23 IT'S INTERESTING IT'S IN THAT SAME  
24 AREA WHEN THE DOORS WERE FULLY OPENED UP THAT WE FIND A PRO-  
25 JECTILE AND YOU CAN THEN SEE THE BODY OF GEORGE MONAHAN.

26 THE DEFENSE CHASTISES THE PROSECUTION  
27 BECAUSE PHOTOGRAPHIC LINEUPS WEREN'T SHOWN TO EACH OF THE  
28 WITNESSES BEFORE THEY CAME INTO THE COURTROOM, SUGGESTING THAT  
29 PEOPLE AUTOMATICALLY MAKE AN IDENTIFICATION. IT REALLY DEMEANS  
30 THE WITNESSES. IT SUGGESTS THAT THESE PEOPLE WHO COME IN HERE  
31 DON'T KNOW THAT THIS IS A MURDER CASE. THEY DON'T KNOW THIS  
32 IS A JUDICIAL PROCEEDING. AND SO THEY'RE AUTOMATICALLY GOING

1 TO IDENTIFY THE DEFENDANT.

2 WELL, IT ISN'T AUTOMATIC. LINDA  
3 WILSON DIDN'T IDENTIFY THE DEFENDANT. HELENE ZUCKERMAN DIDN'T  
4 IDENTIFY THE DEFENDANT. THAT'S BECAUSE PEOPLE COME IN AND  
5 REMEMBER WHAT THEY REMEMBER.

6 SOMEBODY, LIKE STEVE HOUCHIN, DID,  
7 HOWEVER HE ONLY GOT A FEW BRIEF GLIMPSES. BUT HE SAID, I'LL  
8 NEVER FORGET THE FACE. I CONTINUE TO DREAM ABOUT IT.

9 MR. COOPER WENT INTO A NUMBER OF  
10 EXAMPLES OF AREA HE CONTENDS ESTABLISH THAT DAWANA THOMAS LIED.  
11 HE SAID, PERHAPS THE PROSECUTION WILL SAY WHY WOULD SHE LIE?  
12 AND IMPLIED HE WAS GOING TO TELL US WHY BUT HE DIDN'T. THERE  
13 HAS BEEN NO REASON, DEVELOPED OR ADVANCED OR OFFERED, WHY DAWANA  
14 THOMAS WOULD LIE IN THIS COURTROOM.

15 APPARENTLY AT ONE TIME IT WAS SUGGEST-  
16 ED TO HER THAT UNLESS SHE COOPERATED SHE MIGHT BE CHARGED WITH  
17 CERTAIN OFFENSES, BUT IT DOESN'T FOLLOW FROM THAT THAT SHE'S  
18 GOING TO LIE UNDER OATH IN COURT. AND, IN FACT, AS MR. SEATON  
19 HAS VERY ABLY POINTED OUT IN HIS ARGUMENT, SHE IS CORROBORATED  
20 AT PRACTICALLY EVERY PHASE OF HER TESTIMONY.

21 LADIES AND GENTLEMEN, I AM NOT GOING  
22 TO BELABOR THE CASE MUCH MORE. I AM PREPARED TO SUBMIT THIS  
23 TO YOU. BUT I HAVE JUST A COUPLE OF CLOSING OBSERVATIONS.

24 I WANT TO MAKE IT CLEAR ON BEHALF OF  
25 THE STATE OF NEVADA THAT IT IS OUR POSITION, BASED UPON THIS  
26 EVIDENCE, THAT SAMUEL HOWARD IS GUILTY OF ALL THREE COUNTS FOR  
27 WHICH HE IS CHARGED.

28 HE IS CHARGED IN COUNT ONE WITH THE  
29 ROBBERY OF KEITH KINSEY WITH THE USE OF A DEADLY WEAPON. YOU  
30 HAVE TO DECIDE IF A ROBBERY OCCURRED, IF IT WAS WITH A WEAPON.  
31 ONE OF THE INSTRUCTIONS TELLS YOU A FIREARM IS A DEADLY WEAPON.  
32 AND IT IS THE POSITION OF THE STATE OF NEVADA THAT SAMUEL HOWARD

1 IS GUILTY OF ROBBERY WITH THE USE OF A DEADLY WEAPON AS TO  
2 KEITH KINSEY IN COUNT ONE.

3 MR. HOWARD IS ALSO CHARGED IN COUNTS  
4 TWO AND THREE WITH ROBBERY WITH USE OF A DEADLY WEAPON AND  
5 MURDER WITH USE OF A DEADLY WEAPON OF GEORGE STEVEN MONAHAN.  
6 IT IS THE POSITION OF THE STATE OF NEVADA, BASED UPON THIS  
7 EVIDENCE, THAT HE IS GUILTY OF BOTH OF THOSE OFFENSES AND THAT  
8 THE CRIME IS MURDER IN THE FIRST DEGREE WITH THE USE OF A  
9 DEADLY WEAPON.

10 THE COURT, IN INSTRUCTIONS 11 AND 13,  
11 HAS MADE IT CLEAR THAT WHERE A KILLING OCCURS DURING THE  
12 COMMISSION OF A ROBBERY, BECAUSE THAT IS AN INHERENTLY DANGEROUS  
13 FELONY AND BECAUSE THOSE WHO MADE OUR LAW WANTED TO DETER THAT  
14 TYPE OF CONDUCT, WHERE A KILLING OCCURS DURING A ROBBERY IT IS  
15 DEEMED TO BE MURDER IN THE FIRST DEGREE. SO IF YOU FIND THAT  
16 GEORGE MONAHAN WAS KILLED DURING THE COMMISSION OF A ROBBERY,  
17 IF YOU FIND THAT THE MOTIVE OF MR. HOWARD IN POSING AS KEITH,  
18 A SECURITY GUARD FOR CAESARS PALACE, AND IN LURING THIS MAN OUT  
19 FOR A TEST DRIVE IN A VEHICLE WHEN, ACCORDING TO HIS GIRLFRIEND,  
20 HE HAD NO MONEY, THEY WERE BROKE, WAS TO ROB HIM AND IF MR.  
21 MONAHAN WAS MURDERED DURING A ROBBERY, THEN INSTRUCTIONS 11 AND  
22 13 ESTABLISH THE OFFENSE IS MURDER IN THE FIRST DEGREE AND IT  
23 IS WITH THE USE OF A DEADLY WEAPON.

24 WHEN YOU WERE SELECTED AS JURORS, AT  
25 SOME POINT YOU RAISED YOUR RIGHT HANDS AND YOU SWORE TO THE  
26 COURT THAT YOU WOULD DECIDE THIS CASE BASED UPON THE EVIDENCE  
27 AND THE LAW WHICH HIS HONOR WAS TO GIVE YOU. YOU INDICATED  
28 THAT YOUR VERDICTS WOULD NOT BE BASED ON SYMPATHY, THEY WOULD  
29 NOT BE THE RESULT OF PREJUDICE, THAT YOU WOULD ATTEMPT TO  
30 TRULY AND JUSTLY DECIDE THIS CASE. IN A VERY TRUE SENSE YOU  
31 REPRESENT THIS COMMUNITY. IT'S NOT AN EASY TASK TO PASS  
32 JUDGMENT UPON A FELLOW HUMAN BEING. IT'S AN AWESOME RESPONSIBILITY.

1 BILITY. BUT THAT'S WHAT YOU ARE CALLED UPON TO DO THIS AFTER-  
2 NOON.

3 PERHAPS IT'S TEMPTING TO WANT TO HAVE  
4 EMPATHY FOR THE MAN WHO IS CHARGED WITH THESE SERIOUS CRIMES,  
5 EVEN THOUGH THEY ARE ATROCIOUS CRIMES. IF OUR SYSTEM OF  
6 CRIMINAL JUSTICE IS GOING TO BE WORKABLE AT ALL, PERSONS HAVE  
7 TO BE RESPONSIBLE FOR WHAT THEY DO.

8 I AM PROSECUTING THE CASE, BUT I  
9 DON'T KNOW SAMUEL HOWARD PERSONALLY. I DIDN'T ASK TO BE BROUGHT  
10 INTO THIS COURTROOM TO PROSECUTE HIM. THERE'S ONLY ONE PERSON  
11 HERE TODAY WHO IS RESPONSIBLE FOR THIS TRIAL.

12 THE MEMBERS OF THE MONAHAN FAMILY,  
13 WHO ARE HERE, DIDN'T ASK TO BE PUT IN THIS COURTROOM. MR.  
14 MONAHAN DIDN'T ASK TO BE THE OBJECT OF A MURDER TRIAL. THERE  
15 IS ONE MAN WHO PUT US HERE AND HE IS OVER THERE (INDICATING),  
16 IT'S THE DEFENDANT, SAM HOWARD. IT IS HIS FINGER THAT PULLED  
17 THE TRIGGER. HE'S THE MAN WHO DECIDED TO COMMIT ROBBERY AND  
18 HE PUT HIMSELF HERE. AND I'M ASKING YOU, BASED ON THE STATE  
19 OF NEVADA, TO FIND A ROBBER AND A KILLER GUILTY OF HIS CRIMES.

20 THE COURT: ANYTHING FURTHER TO COME BEFORE THE  
21 COURT?

22 MR. HARMON: NO, YOUR HONOR.

23 MR. COOPER: NO, YOUR HONOR.

24 MR. FRANZEN: YOUR HONOR, THERE WAS THE SETTLEMENT  
25 OF THE INSTRUCTIONS.

26 THE COURT: ALL RIGHT. WE'LL TAKE CARE OF THAT  
27 AFTER THE JURY.

28 LADIES AND GENTLEMEN OF THE JURY, THE  
29 MATTER NOW STANDS SUBMITTED TO YOU. YOU WILL GO WITH THE  
30 BAILIFF AND PROCEED TO COMMENCE YOUR DELIBERATIONS.

31 MR. BAILIFF, WOULD YOU KEEP THE  
32 ALTERNATE JURORS SEPARATE AND APART UNTIL THEIR NEED IS MADE

1 KNOWN.

2 THE BAILIFF: WE WILL, YOUR HONOR.

3 (WHEREUPON, THE JURY LEFT  
4 THE COURTROOM TO COMMENCE  
5 ITS DELIBERATIONS, AND THE  
6 FOLLOWING PROCEEDINGS WERE  
7 HAD OUTSIDE THEIR PRESENCE.)

8 THE COURT: LET THE RECORD REFLECT THIS IS OUTSIDE  
9 OF THE PRESENCE OF THE JURY.

10 COUNSEL FOR THE STATE, ARE THERE ANY  
11 OBJECTIONS TO ANY OF THE INSTRUCTIONS GIVEN?

12 MR. HARMON: NO, YOUR HONOR.

13 THE COURT: ARE THERE ANY INSTRUCTIONS WHICH WERE  
14 OFFERED BY THE STATE WHICH WERE NOT GIVEN?

15 MR. HARMON: THERE WEREN'T, YOUR HONOR.

16 THE COURT: DO YOU KNOW OF ANY ADDITIONAL  
17 INSTRUCTIONS THAT NEED BE GIVEN TO THIS JURY AS EITHER A RESULT  
18 OF ARGUMENT OR AS A RESULT OF ANYTHING FURTHER THAT'S COME  
19 BEFORE THE COURT?

20 MR. HARMON: NO, YOUR HONOR.

21 THE COURT: AND AS A MATTER OF TRIAL STRATEGY,  
22 YOU OFFER NO FURTHER INSTRUCTIONS; IS THAT CORRECT?

23 MR. HARMON: THAT'S CORRECT.

24 THE COURT: ARE THERE ANY OBJECTIONS ON THE PART  
25 OF THE DEFENSE TO ANY INSTRUCTIONS GIVEN?

26 MR. FRANZEN: YES, YOUR HONOR. THERE ARE, IF I  
27 COULD HAVE THE COURT'S INDULGENCE FOR ONE MOMENT.

28 THE COURT: ALL RIGHT.

29 MR. FRANZEN: YOUR HONOR, THERE WAS TWO PROPOSED  
30 INSTRUCTIONS.

31 THE COURT: ALL RIGHT. FIRST OF ALL, THE INSTRUCTIONS  
32 THAT YOU ARE OBJECTING TO AT THIS POINT.

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MR. FRANZEN: VERY WELL, YOUR HONOR.

INSTRUCTION NUMBER 7. OUR OBJECTION TO THAT CONFIDES WITH THE REFUSAL OF THE COURT TO GIVE PROPOSED INSTRUCTION B. WE BELIEVE THEY ARE BOTH BASICALLY BASED ON THE SAME LEGAL GROUNDS, AND THAT THE COURT INSTRUCTED THAT THE FIREARM IS A DEADLY WEAPON AS A MATTER OF LAW.

IF I MIGHT -- IF I MIGHT, PROPOSED INSTRUCTION D, THE DEFENSE PROPOSED THAT AS A MATTER OF LAW DAWANA --

THE COURT: COUNSEL, COUNSEL, LET'S JUST STICK TO 7.

MR. FRANZEN: I'M SORRY.

THE COURT: ANYTHING FURTHER WITH REGARDS TO 7?

MR. FRANZEN: NO, SIR.

THE COURT: THE STATE?

MR. HARMON: YOUR HONOR, AS A MATTER OF LAW, A FIREARM IS A DEADLY WEAPON. THE CASE LAW HAS REPEATEDLY STATED THAT AND, AS I RECALL, N.R.S. 193.163 STATES THAT.

THE COURT: I BELIEVE THE CASE LAW IN THE STATE OF NEVADA IS VERY CLEAR. THE SUPREME COURT HAS PROMULGATED THAT STATEMENT THAT A FIREARM IS A DEADLY WEAPON. AND SINCE THE SUPREME COURT HAS DECLARED IT AS THE LAW, IT'S THE LAW, AND IT IS NOW MADE BY THE DISTRICT COURT.

YOU MAY PROCEED, COUNSEL.

MR. FRANZEN: THANK YOU, YOUR HONOR.

INSTRUCTION NUMBER 7 -- OR I BEG YOUR PARDON, 13, THE LANGUAGE REQUIRING AT LINE 3, "CONCLUSIVE EVIDENCE". I REALIZE THERE WAS A RECENT DECISION APPROVING THIS TYPE OF LANGUAGE FOR DECISION, HOWEVER, I BELIEVE IT'S STILL SUBJECT TO GOOD FAITH LITIGATION AS TO THE VALIDITY OF IT, AND WE WOULD OBJECT TO THE GIVING OF IT.

THE COURT: COUNSEL?

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1 MR. HARMON: YOUR HONOR, THE CASE OF FORD V. STATE,  
2 IN FACT, HANDED DOWN IN 1983, HAS ADDRESSED THE VERY INSTRU-  
3 TION VERBATIM GIVEN BY THE COURT IN INSTRUCTION 13.

4 IF THERE WAS ANY DOUBT AS TO WHETHER THIS  
5 PREVIOUSLY WAS ALLOWED, THERE'S NO DOUBT NOW. IT PROPERLY  
6 STATES THE LAW ON THIS SUBJECT.

7 THE COURT: COUNSEL IS CORRECT. FORD VERSUS  
8 STATE OF NEVADA, DECIDED MARCH 13TH OF THIS YEAR, CLEARLY SETS  
9 FORTH THIS INSTRUCTION, WHICH HAS BEEN THE VERBATIM STATEMENT OF  
10 THE INSTRUCTION OFFERED IN THAT CASE AND APPROVED BY THE STATE  
11 OF NEVADA SUPREME COURT. IT IS THE LAW OF THE STATE AND DOES  
12 APPLY AND WAS GIVEN FOR THAT REASON.

13 ANY OTHER INSTRUCTIONS, COUNSEL?

14 MR. FRANZEN: 24, YOUR HONOR, WHERE THE COURT  
15 LISTED TO THE JURY THE REASONS FOR WHICH -- THE PURPOSES FOR  
16 WHICH THEY MIGHT CONSIDER EVIDENCE OF OTHER CRIMES.

17 IT'S OUR POSITION, AND WE URGE THE COURT  
18 THAT THERE SHOULD BE A DISTINCTION BETWEEN PURPOSES FOR WHICH  
19 EACH OF THE CRIMES WAS ADMITTED. WE BELIEVE THAT THE COURT  
20 DID MAKE A DISTINCTION AS TO WHICH CRIMES WOULD BE ADMITTED FOR  
21 THE PURPOSES OF THE IDENTITY, INTENT AND NOTICE AND MOTIVE,  
22 AND WHICH CRIMES WOULD BE ADMITTED FOR THE PURPOSE OF PLAN.  
23 THE COURT, AT OUR INFORMAL CONFERENCE PRIOR TO GIVING THE  
24 INSTRUCTIONS, INDICATED THAT THE STATE SHOULD CAREFULLY ARGUE  
25 ITS CASE IF THEY'RE GOING TO ARGUE THIS, AND NOT OVERLAP IN  
26 IMPROPER AREAS. WE DO NOT BELIEVE THAT THAT IS SUFFICIENT AS  
27 THAT INSTRUCTION FROM THE COURT TO THE JURY ARE NOT SUBSTITUTE  
28 -- ARE NOT SUBSTITUTED FOR BY ARGUMENT OF COUNSEL.

29 THE COURT: COUNSEL?

30 MR. HARMON: YOUR HONOR, IT'S THE BELIEF OF THE  
31 STATE THAT TO TRY TO MAKE THE TYPE OF DISTINCTION THAT THE  
32 DEFENSE IS ASKING FOR IN INSTRUCTIONS WOULD HAVE BEEN UNNECES-

1 SARILY CONFUSING TO THE JURY.

2 WHAT WE HAVE IN INSTRUCTION 24 IS A  
3 CONCISE INSTRUCTION WHICH PROVIDES THE LIMITATIONS FOR WHICH  
4 THE JURY WAS TO CONSIDER CERTAIN EVIDENCE. THE COURT MADE A  
5 SPECIFIC FINDING REGARDING THE OFFENSE AGAINST MR. SCHWARTZ,  
6 THAT THAT WAS ADMITTED UNDER THE INTENT, MOTIVE AND IDENTITY  
7 EXCEPTIONS, WHICH ARE SPELLED OUT IN PARAGRAPHS 1, 2 AND 3 OF  
8 INSTRUCTION 24.

9 AND THE COURT ALSO FOUND, IN THE  
10 INSTANCE OF THE SAN BERNARDINO OFFENSE, THAT THE ATTEMPT AT  
11 OBTAINING MONEY UNDER FALSE PRETENSES, THAT EXCEPTION -- ONE OF  
12 THE EXCEPTIONS WAS PLAN.

13 THE COURT: AND I SO ADVISED COUNSEL, IF THEY SO  
14 DESIRE, TO MAKE THOSE REPRESENTATIONS TO THE JURY, AND I  
15 BELIEVE THE STATE DID. AND I BELIEVE IT COVERS THE APPROPRIATE  
16 LEGAL THEORY OF THE STATE IN THIS REGARD. AND I THINK IT IS  
17 OBVIOUSLY AN APPROPRIATE INSTRUCTION.

18 NOW, LET'S PROCEED TO, ARE THERE ANY OTHER  
19 INSTRUCTIONS THAT YOU OBJECT TO, COUNSEL?

20 MR. FRANZEN: NO, SIR, THERE ARE NOT.

21 THE COURT: ALL RIGHT. FOR THE RECORD, YOU HAVE  
22 OFFERED TWO INSTRUCTIONS WHICH THE COURT HAS REFUSED: THE  
23 FIRST BEING INSTRUCTION A; "THE TESTIMONY OF AN ACCOMPLICE  
24 OUGHT TO BE VIEWED WITH DISTRUST..." YOU MAY PROCEED.

25 MR. FRANZEN: YES, SIR.

26 THIS IS TAKEN FROM CAL JUR INSTRUCTIONS,  
27 COMMONLY CALLED CAL JIC'S, 3.18. AND IN LIGHT OF THE TESTIMONY  
28 FROM THE STATE'S KEY WITNESS, WE BELIEVE THAT HER NUMEROUS-  
29 CHANGING STORIES WOULD SUBSTANTIATE VERY SOLIDLY THE NEED FOR  
30 DEFENDANT'S INSTRUCTION A. AND ON THAT WE WOULD SUBMIT AS TO  
31 INSTRUCTION A, YOUR HONOR.

32 THE COURT: COUNSEL, AT THE TIME THAT THIS WAS



1 HANDED TO THE COURT I REQUESTED OF COUNSEL IF THEY HAD ANY  
2 NEVADA LAW TO SUPPORT THIS PARTICULAR INSTRUCTION. COUNSEL  
3 ADVISED THAT THEY DID NOT.

4 THE STATE?

5 MR. HARMON: YOUR HONOR, THE JURY HAS ALREADY BEEN  
6 GIVEN THE APPROPRIATE LEGAL GUIDANCE WITH RESPECT TO ACCOMPLICE  
7 TESTIMONY. THAT WAS SPELLED OUT IN INSTRUCTIONS 18 AND 19.

8 THE DEFENSE WOULD BE GETTING A SECOND SHOT  
9 AT THE FOCUS OF THOSE INSTRUCTIONS, WHO OBVIOUSLY IS DAWANA  
10 THOMAS, IF IN ADDITION TO GETTING THE BENEFIT OF THE STATUTORY  
11 LANGUAGE IN N.R.S. 175. -- I BELIEVE IT'S -- 291, THAT THEY  
12 ALSO WERE PERMITTED TO TELL -- HAVE THE COURT TELL THE JURY  
13 THAT IN ADDITION TO HAVING TO CORROBORATE HER TESTIMONY THEY  
14 HAD TO VIEW IT WITH DISTRUST, AND THAT IS NOT THE LAW AND IT  
15 WOULD HAVE BEEN INAPPROPRIATE TO HAVE DONE SO, YOUR HONOR.

16 THE COURT: THE COURT IN THIS REGARD HAS GIVEN THE  
17 STATUTORY MANDATE, AND THAT IS FOUND IN INSTRUCTION NUMBER 18,  
18 ON THE LAW OF ACCOMPLICE, TOGETHER WITH INSTRUCTION NUMBER 19,  
19 WHICH ADVISES THAT THE DEFENDANT CANNOT BE FOUND GUILTY BASED  
20 ON THE TESTIMONY OF AN ACCOMPLICE UNLESS CORROBORATED.

21 IT DOES APPEAR THAT THIS HAS BEEN FULLY  
22 COVERED BY THE INSTRUCTIONS OF THE COURT. COUNSEL HAS NOT  
23 CITED ANY NEVADA STATUTES REMANDATING THIS. IN FACT, NEVADA  
24 STATUTES WITH REGARDS TO VIEWING THIS TESTIMONY WITH CAUTION  
25 DOES NOT CONTAIN SUCH A PROVISION.

26 IT WOULD SEEM TO THIS COURT AN  
27 IMPOSING AND OBVIOUSLY A MISSTATEMENT OF THE LAW FOR THIS COURT  
28 TO ADD AN ADDITIONAL PROVISION WHICH IS NOT REQUIRED BY NEVADA  
29 LAW AND BY NEVADA STATUTE, AND THAT IS THAT THE TESTIMONY OF  
30 AN ACCOMPLICE MUST BE VIEWED WITH DISTRUST.

31 FOR THOSE REASONS, THE COURT FELT THAT  
32 FIRST OF ALL, THE FIELD WAS ADEQUATELY COVERED AND, SECONDLY,

1 THAT THIS IS NOT THE LAW IN NEVADA AND IS IMPROPER.

2 NOW, INSTRUCTION B, WHICH WAS  
3 OFFERED, AND, COUNSEL, FOR THE RECORD, I HAVE NOTED ON THIS  
4 INSTRUCTION, "NOT GIVEN" AND SIGNED BY MYSELF.

5 AND LET'S THEN PROCEED TO INSTRUCTION  
6 B.

7 MR. FRANZEN: YOUR HONOR, INSTRUCTION B IS AN  
8 INSTRUCTION DIRECTING THE JURY TO CONSIDER DAWANA THOMAS AN  
9 ACCOMPLICE AS A MATTER OF LAW. WE BELIEVE THAT THE STATE OF  
10 THE EVIDENCE, AS TESTIFIED TO BY DAWANA THOMAS IN THE STATE'S  
11 CASE IN CHIEF AND ON THEIR REBUTTAL, ESTABLISH BEYOND A  
12 REASONABLE DOUBT THAT DAWANA THOMAS WAS AN ACCOMPLICE TO WHAT  
13 SHE DESCRIBED.

14 SHE DESCRIBED THAT SHE KNEW SAM HOWARD WAS  
15 GOING TO DO A ROBBERY. SHE DESCRIBED THAT EVEN KNOWING THIS,  
16 SHE TOOK HIM TO THE SCENE WHERE THE ROBBERY WAS GOING TO  
17 OCCUR. SHE STATED THAT SHE WAS INSTRUCTED TO RETURN TO THEIR  
18 APARTMENT AND PACK. SHE DID ALL OF THAT. WHEN SAM HOWARD  
19 RETURNED, SHE SAID THAT HE TOLD HER HE HAD DONE A ROBBERY. HE'D  
20 EVEN GIVEN HER OR SHOWN HER THE FRUITS OF THE ROBBERY. SHE  
21 FURTHER TESTIFIED THAT SHE WAS THE DRIVER WHO TOOK THEM OUT OF  
22 THE STATE OF NEVADA.

23 GIVEN ALL OF THAT, I THINK IT IS  
24 IRREFUT-- EXCUSE ME, YOUR HONOR, IRREFUTABLE THAT SHE IS,  
25 INDEED, AN ACCOMPLICE AS A MATTER OF LAW AS IS PRESENTED BY  
26 THE EVIDENCE FROM THE STATE'S OWN CASE.

27 IN LIGHT OF THAT TESTIMONY, I BELIEVE  
28 THIS COURT SHOULD HAVE INSTRUCTED THE JURY THAT SHE WAS. THE  
29 CASE THAT I'M RELYING UPON THAT WOULD DESCRIBE THIS TYPE OF FACT  
30 PATTERN AS BEING AN ACCOMPLICE IS MCKINNEY V. STATE, 95 NEVADA  
31 494, WHEREIN THE COURT STATED:  
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MCKINNEY, THE APPELLANT  
IN THAT CASE, ADMITTED THAT HE  
HAD PLANNED THE THEFT AND DRIVEN  
HIS ACCOMPLICES TO THE LOCATION  
WHERE THEY STOLE THE CAR. OTHER  
EVIDENCE SUBSTANTIATES THE CON-  
CLUSION THAT APPELLANT PARTICI-  
PATED IN A COMMON SCHEME TO  
CONCEAL THE CAR. THE KILLING OF  
THE VICTIM, ALTHOUGH NOT INTENDED  
BY APPELLANT, WAS A NATURAL AND  
PROBABLY CONSEQUENCE OF PLANNED  
ROBBERY.

IN THIS INSTANCE DAWANA THOMAS KNEW  
THE ROBBERY WAS GOING TO OCCUR. SHE PARTICIPATED IN IT. SHE  
KNEW HE HAD A GUN. AND THE DEATH OF DOCTOR MONAHAN, IF YOU  
BELIEVE DAWANA THOMAS IN THE CASE IN CHIEF AND REBUTTAL GIVEN  
BY THE STATE, MAKES HER AN ACCOMPLICE WITH THE MATTER OF LAW.  
AND WE WOULD URGE THE COURT TO VIEW IT THE SAME WAY.

MR. HARMON: WELL, YOUR HONOR, WE OBVIOUSLY  
DISAGREE WITH THAT ANALYSIS. ONLY IN THE CLEAREST CASES SHOULD  
THE COURT INVADE THE PROVINCE OF THE JURY AND TELL THEM AS A  
MATTER OF LAW SOMEONE IS AN ACCOMPLICE.

REPEATEDLY OUR NEVADA SUPREME COURT HAS  
SAID THIS IS GENERALLY A QUESTION OF FACT TO BE RESOLVED BY THE  
JURY.

NOW, THIS WHOLE NOTION THAT WAS PROF-  
FERED BY MR. HOWARD TO DAWANA THOMAS, THAT, IN FACT, HIS  
INTENDED VICTIM WAS A PIMP, SUGGESTS IT WAS ALL A COVER AND  
SUGGESTS SHE WASN'T INVOLVED, BECAUSE HE THOUGHT HE HAD TO  
DISGUISE AT LEAST TO SOME EXTENT WHAT HE WAS REALLY UP TO.  
THERE'S NO EVIDENCE SHE EVER MET MR. MONAHAN.

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1 ROBBERY IS A SPECIFIC-INTENT CRIME  
2 AND THERE'S NO EVIDENCE DAWANA THOMAS HAD ANY SPECIFIC INTENT TO  
3 ROB GEORGE STEVEN MONAHAN.

4 THE COURT: WELL, THIS INSTRUCTION, I THINK, RUNS  
5 VERY CONTRA TO NEVADA LAW. THERE'S A RARELY-CITED STATEMENT  
6 OF THE LAW THAT CAN BE FOUND, COUNSEL, IN 3.230. PROBABLY ONE  
7 OF THE MOST VIOLATED SECTIONS WHEN IT COMES TO THE INSTRUCTION  
8 OF JURIES. I BELIEVE YOU'RE ALL AWARE OF THE FACT THAT ALOT OF  
9 INSTRUCTIONS TO JURIES TOUCH UPON, QUOTE, ISSUES OF FACT AND  
10 DECLARE THEM TO BE SUCH AS A MATTER OF LAW. BUT THIS STATUTORY  
11 PROVISION IS RATHER CONTROLLING, YET RARELY USED:

12 DISTRICT JUDGES SHALL NOT CHARGE  
13 JURIES UPON MATTERS OF FACT BUT MAY STATE  
14 THE EVIDENCE AND DECLARE THE LAW. IN  
15 STATING THE EVIDENCE THE JUDGE SHOULD NOT  
16 COMMENT UPON THE PROBABILITY OR IMPROBA-  
17 BILITY OF ITS TRUTH, NOR THE CREDIBILITY  
18 THEREOF. IF THE JUDGE STATES THE EVIDENCE,  
19 YOU MUST ALSO INFORM THE JURY THAT THEY ARE  
20 NOT TO BE GOVERNED BY HIS STATEMENT UPON  
21 MATTERS OF FACT.

22 IN THIS REGARD, WHAT I AM REQUIRED TO  
23 DO IS NOT TO CHARGE JURIES ON MATTERS OF FACT. THIS IS RATHER  
24 CLEAR. YOU HAVE ASKED ME TO STATE AS A MATTER OF FACT AND  
25 THEREFORE AS A MATTER OF LAW THAT THIS YOUNG LADY WAS AN  
26 ACCOMPLICE. THAT ISSUE IS AN ISSUE WHICH MUST BE DECLARED BY  
27 THE JURY ONLY AND NOT BY THE COURT.

28 CASES IN NEVADA ARE REplete WITH THE  
29 ISSUE OF WHETHER OR NOT A PERSON IS OR IS NOT AN ACCOMPLICE AS  
30 A MATTER OF FACT. ALTHOUGH WE FIND OCCASIONALLY SOMEONE SAYING  
31 THAT AS A MATTER OF FACT THEY'RE -- OR AS A MATTER OF FACT THEY  
32 ARE AN ACCOMPLICE. IF SOME HIGHER COURT DESIRES TO MAKE THAT

1 JUDGMENT, THEY CLEARLY HAVE THE POWER AND THE AUTHORITY TO DO  
2 SO, BUT DISTRICT JUDGES DO NOT. YOUR REQUEST IS DENIED AND WAS  
3 DENIED FOR THAT REASON.

4 ANYTHING FURTHER?

5 MR. FRANZEN: NO, YOUR HONOR. THAT CONCLUDES THE  
6 STATE'S (SIC) PRESENTATION REGARDING THE INSTRUCTIONS.

7 THE COURT: YOU MEAN THE DEFENSE'S?

8 MR. FRANZEN: THE DEFENSE'S PRESENTATION.

9 THE COURT: ALL RIGHT. ALL RIGHT.

10 IS THERE ANY OTHER INSTRUCTIONS THAT YOU,  
11 EITHER PARTY, BELIEVES -- PARDON ME, THE DEFENSE BELIEVES IS  
12 NECESSARY AS A RESULT OF THE ARGUMENT OR ANYTHING ELSE THAT'S  
13 OCCURRED SINCE WE HAVE SETTLED THE INSTRUCTIONS?

14 THERE ARE NO FURTHER INSTRUCTIONS?

15 MR. COOPER: NOTHING FURTHER.

16 THE COURT: IS IT THEN AS A MATTER OF LAW AND AS  
17 A MATTER OF TRIAL STRATEGY THAT YOU OFFER NO FURTHER INSTRU-  
18 TIONS?

19 MR. COOPER: THAT'S CORRECT.

20 THE COURT: ALL RIGHT.

21 MISS CLERK, I HAND YOU THESE TWO INSTRU-  
22 TIONS. THEY WILL BE MADE PART OF THE FILE AND FILED IN THESE  
23 PROCEEDINGS.

24 HERE ARE THE INSTRUCTIONS AND THE  
25 VERDICTS, WHICH MAY BE SENT TO THE JURY.

26 COUNSEL, IS THERE ANYTHING FURTHER  
27 TO COME BEFORE THE COURT AT THIS TIME?

28 MR. HARMON: NOT BY THE STATE, YOUR HONOR.

29 THE COURT: LEAVE YOUR NUMBERS WITH THE CLERK AND  
30 BE WITHIN MAILING DISTANCE OF AT LEAST 15 MINUTES FROM THE  
31 TIME YOU'RE CALLED. AND I WOULD SUGGEST THAT WE STICK AROUND  
32 THE COURTHOUSE OR WITHIN CLOSE PROXIMITY AT LEAST FOR AN HOUR

1 UNTIL WE DETERMINE WHAT TIME THE JURY IS GOING TO GO TO DINNER  
2 AND WE CAN FIGURE IT OUT FROM THERE.

3 MR. FRANZEN: HOW COULD WE CONTACT YOUR HONOR?

4 THE COURT: JUST CONTACT MY NUMBER IN MY OFFICE.

5 (WHEREUPON, FROM 5:10 P.M.

6 UNTIL 10:28 P.M., A RECESS

7 WAS HAD IN THE PROCEEDINGS,

8 AT THE CONCLUSION OF WHICH

9 THE FOLLOWING WAS HAD:)

10 THE COURT: LADIES AND GENTLEMEN OF THE JURY, HAVE  
11 YOU SELECTED A FOREMAN?

12 THE FOREMAN: YES.

13 THE COURT: HAVE YOU ARRIVED AT A VERDICT?

14 THE FOREMAN: YES, YOUR HONOR, WE HAVE.

15 THE COURT: WOULD YOU HAND THEM TO THE BAILIFF,  
16 PLEASE.

17 ALL RIGHT. MR. BAILIFF, WOULD YOU HAND  
18 THE VERDICTS TO THE FOREMAN, PLEASE.

19 MR. FOREMAN, WOULD YOU READ EACH OF  
20 THE VERDICTS, COMMENCING WITH THE WORDS, "WE THE JURY".

21 THE FOREMAN:

22 WE, THE JURY IN THE ABOVE  
23 ENTITLED CASE, FIND THE DEFENDANT,  
24 SAMUEL HOWARD, GUILTY OF ROBBERY  
25 WITH THE USE OF A DEADLY WEAPON,  
26 COUNT ONE.

27 WE, THE JURY IN THE ABOVE  
28 ENTITLED CASE, FIND THE DEFENDANT,  
29 SAMUEL HOWARD, GUILTY OF ROBBERY  
30 WITH THE USE OF A DEADLY WEAPON,  
31 COUNT TWO.  
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WE, THE JURY IN THE ABOVE  
ENTITLED CASE, FIND THE DEFENDANT,  
SAMUEL HOWARD, GUILTY OF FIRST  
DEGREE MURDER WITH THE USE OF A  
DEADLY WEAPON, COUNT THREE.

THE COURT: ALL RIGHT. WOULD YOU HAND THE VERDICT  
TO THE BAILIFF.

MR. BAILIFF, WOULD YOU HAND IT TO THE  
CLERK.

MISS CLERK, WOULD YOU READ THE ROLE  
OF THE JURY AND INQUIRE OF THEM IF THAT IS THEIR VERDICT.

THE CLERK: YES, SIR.

THE COURT: AND DOES COUNSEL DESIRE THAT THE JURY  
BE POLLED?

MR. FRANZEN: YES, SIR.

THE COURT: ALL RIGHT. THANK YOU.

THE CLERK:

CASE NUMBER C53867, DEPARTMENT  
NUMBER FIVE.

IN THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA, IN AND FOR  
THE COUNTY OF CLARK.

THE STATE OF NEVADA, PLAINTIFF,  
VERSUS SAMUEL HOWARD, ALSO KNOWN AS  
KEITH, DEFENDANT.

VERDICT.

WE, THE JURY IN THE  
ABOVE ENTITLED CASE, FIND  
THE DEFENDANT, SAMUEL HOWARD,  
ALSO KNOWN AS KEITH, GUILTY  
OF ROBBERY WITH THE USE OF A  
DEADLY WEAPON, COUNT ONE.

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DATED AT LAS VEGAS,  
NEVADA, THIS 22ND DAY OF APRIL,  
1983.

SIGNED BY LEO GATES, FOREMAN.

THE COURT: POLL EACH OF THE JURORS.

THE CLERK: YES, SIR.

TERRI LEE SOUKUP, IS THAT YOUR VERDICT AS  
READ?

JUROR NUMBER ONE, MS. SOUKUP: YES.

THE CLERK: JAMES KENNETH FRANCIS BRADLEY, IS THAT  
YOUR VERDICT AS READ?

JUROR NUMBER TWO, MR. BRADLEY: YES, IT IS.

THE CLERK: SALLY BOURGEOIS BRINKMANN, IS THAT YOUR  
VERDICT AS READ?

JUROR NUMBER THREE, MS. BRINKMANN: YES.

THE CLERK: THOMAS FRANCIS CAROLAN, III, IS THAT  
YOUR VERDICT AS READ?

JUROR NUMBER FOUR, MR. CAROLAN: YES.

THE CLERK: ANGELINA PEREZ, IS THAT YOUR VERDICT  
AS READ?

JUROR NUMBER FIVE, MS. PEREZ: YES.

THE CLERK: LARRY STEVEN WILLIAMS, JR., IS THAT  
YOUR VERDICT AS READ?

JUROR NUMBER SIX, MR. WILLIAMS: YES.

THE CLERK: CHARLENE MOCK JENSEN, IS THAT YOUR  
VERDICT AS READ?

JUROR NUMBER SEVEN, MS. JENSEN: YES.

THE CLERK: MICHELLE A. PAPPAS, IS THAT YOUR  
VERDICT AS READ?

JUROR NUMBER EIGHT, MS. PAPPAS: YES.

THE CLERK: BONNIE JEAN SNOUFFER, IS THAT YOUR  
VERDICT AS READ?



1 JUROR NUMBER NINE, MS. SNOUFFER: YES.  
2 THE CLERK: MARILYN CAPASSO, IS THAT YOUR VERDICT  
3 AS READ?  
4 JUROR NUMBER TEN, MS. CAPASSO: YES.  
5 THE CLERK: ESTEBAN BRUZ NOVERO, IS THAT YOUR  
6 VERDICT AS READ?  
7 JUROR NUMBER ELEVEN, MR. NOVERO: YES.  
8 THE CLERK: LEO ZACHARY GATES, IS THAT YOUR VERDICT  
9 AS READ?  
10 JUROR NUMBER TWELVE, MR. GATES: YES.  
11 THE CLERK:  
12 CASE NUMBER C53867, DEPARTMENT  
13 NUMBER FIVE.  
14 IN THE EIGHTH JUDICIAL DISTRICT  
15 COURT OF THE STATE OF NEVADA, IN AND FOR  
16 THE COUNTY OF CLARK.  
17 THE STATE OF NEVADA, PLAINTIFF,  
18 VERSUS SAMUEL HOWARD, ALSO KNOWN AS KEITH,  
19 DEFENDANT.  
20 VERDICT.  
21 WE, THE JURY IN THE  
22 ABOVE ENTITLED CASE, FIND  
23 THE DEFENDANT, SAMUEL HOWARD,  
24 ALSO KNOWN AS KEITH, GUILTY  
25 OF ROBBERY WITH THE USE OF A  
26 DEADLY WEAPON, COUNT TWO.  
27 DATED AT LAS VEGAS,  
28 NEVADA, THIS 22ND DAY OF APRIL,  
29 1983.  
30 SIGNED BY LEO GATES, FOREMAN.  
31 TERRI LEE SOUKUP, IS THAT YOUR VERDICT  
32 AS READ?

1 JUROR NUMBER ONE, MS. SOUKUP: YES.  
2 THE CLERK: JAMES KENNETH FRANCIS BRADLEY, IS THAT  
3 YOUR VERDICT AS READ?  
4 JUROR NUMBER TWO, MR. BRADLEY: YES.  
5 THE CLERK: SALLY BOURGEOIS BRINKMANN, IS THAT  
6 YOUR VERDICT AS READ?  
7 JUROR NUMBER THREE, MS. BRINKMANN: YES.  
8 THE CLERK: THOMAS FRANCIS CAROLAN, III, IS THAT  
9 YOUR VERDICT AS READ?  
10 JUROR NUMBER FOUR, MR. CAROLAN: YES.  
11 THE CLERK: ANGELINA PEREZ, IS THAT YOUR VERDICT  
12 AS READ?  
13 JUROR NUMBER FIVE, MS. PEREZ: YES.  
14 THE CLERK: LARRY STEVEN WILLIAMS, JR., IS THAT  
15 YOUR VERDICT AS READ?  
16 JUROR NUMBER SIX, MR. WILLIAMS: YES.  
17 THE CLERK: CHARLENE MOCK JENSEN, IS THAT YOUR  
18 VERDICT AS READ?  
19 JUROR NUMBER SEVEN, MS. JENSEN: YES.  
20 THE CLERK: MICHELLE A. PAPPAS, IS THAT YOUR  
21 VERDICT AS READ?  
22 JUROR NUMBER EIGHT, MS. PAPPAS: YES.  
23 THE CLERK: BONNIE JEAN SNOUFFER, IS THAT YOUR  
24 VERDICT AS READ?  
25 JUROR NUMBER NINE, MS. SNOUFFER: YES.  
26 THE CLERK: MARILYN CAPASSO, IS THAT YOUR VERDICT  
27 AS READ?  
28 JUROR NUMBER TEN, MS. CAPASSO: YES.  
29 THE CLERK: ESTEBAN BRUZ NOVERO, IS THAT YOUR  
30 VERDICT AS READ?  
31 JUROR NUMBER ELEVEN, MR. NOVERO: YES.  
32 THE CLERK: LEO ZACHARY GATES, IS THAT YOUR

1 VERDICT AS READ?

2 JUROR NUMBER TWELVE, MR. GATES: YES.

3 THE CLERK:

4 CASE NUMBER C53867, DEPARTMENT  
5 NUMBER FIVE.

6 IN THE EIGHTH JUDICIAL DISTRICT  
7 COURT OF THE STATE OF NEVADA, IN AND FOR  
8 THE COUNTY OF CLARK.

9 THE STATE OF NEVADA, PLAINTIFF,  
10 VERSUS SAMUEL HOWARD, ALSO KNOWN AS  
11 KEITH, DEFENDANT.

12 VERDICT.

13 WE, THE JURY IN THE  
14 ABOVE ENTITLED CASE, FIND  
15 THE DEFENDANT, SAMUEL HOWARD,  
16 ALSO KNOWN AS KEITH, GUILTY  
17 OF FIRST DEGREE MURDER WITH  
18 THE USE OF A DEADLY WEAPON,  
19 COUNT THREE.

20 DATED AT LAS VEGAS,  
21 NEVADA, THIS 22ND DAY OF APRIL,  
22 1983.

23 SIGNED BY LEO GATES, FOREMAN.

24 TERRI LEE SOUKUP, IS THAT YOUR

25 VERDICT AS READ?

26 JUROR NUMBER ONE, MS. SOUKUP: YES.

27 THE CLERK: JAMES KENNETH FRANCIS BRADLEY, IS  
28 THAT YOUR VERDICT AS READ?

29 JUROR NUMBER TWO, MR. BRADLEY: YES.

30 THE CLERK: SALLY BOURGEOIS BRINKMANN, IS THAT  
31 YOUR VERDICT AS READ?

32 JUROR NUMBER THREE, MS. BRINKMANN: YES.

1 THE CLERK: THOMAS FRANCIS CAROLAN, III, IS THAT  
2 YOUR VERDICT AS READ?  
3 JUROR NUMBER FOUR, MR. CAROLAN: YES.  
4 THE CLERK: ANGELINA PEREZ, IS THAT YOUR VERDICT  
5 AS READ?  
6 JUROR NUMBER FIVE, MS. PEREZ: YES.  
7 THE CLERK: LARRY STEVEN WILLIAMS, JR., IS THAT  
8 YOUR VERDICT AS READ?  
9 JUROR NUMBER SIX, MR. WILLIAMS: YES.  
10 THE CLERK: CHARLENE MOCK JENSEN, IS THAT YOUR  
11 VERDICT AS READ?  
12 JUROR NUMBER SEVEN, MS. JENSEN: YES.  
13 THE CLERK: MICHELLE A. PAPPAS, IS THAT YOUR  
14 VERDICT AS READ?  
15 JUROR NUMBER EIGHT, MS. PAPPAS: YES.  
16 THE CLERK: BONNIE JEAN SNOUFFER, IS THAT YOUR  
17 VERDICT AS READ?  
18 JUROR NUMBER NINE, MS. SNOUFFER: YES.  
19 THE CLERK: MARILYN CAPASSO, IS THAT YOUR VERDICT  
20 AS READ?  
21 JUROR NUMBER TEN, MS. CAPASSO: YES.  
22 THE CLERK: ESTEBAN BRUZ NOVERO, IS THAT YOUR  
23 VERDICT AS READ?  
24 JUROR NUMBER ELEVEN, MR. NOVERO: YES.  
25 THE CLERK: LEO ZACHARY GATES, IS THAT YOUR  
26 VERDICT AS READ?  
27 JUROR NUMBER TWELVE, MR. GATES: YES.  
28 THE COURT: COUNSEL, APPROACH THE BENCH, PLEASE.  
29 (WHEREUPON, SIDE BAR CON-  
30 FERENCE WAS HELD AT THE  
31 BENCH; NOT REPORTED. AT  
32 THE CONCLUSION OF WHICH,

THE FOLLOWING WAS HAD:)

THE COURT: LADIES AND GENTLEMEN OF THE JURY, IN VIEW OF THE VERDICT IT WILL NOW BE NECESSARY FOR ME TO SET A PENALTY HEARING DATE. AND FROM CONFERENCE WITH COUNSEL, THE COURT IS GOING TO SET MAY 2ND, THAT IS ONE WEEK FROM MONDAY, AT THE HOUR OF 10:00 O'CLOCK A.M., FOR THE PENALTY HEARING.

LADIES AND GENTLEMEN OF THE JURY, REMEMBER THAT THIS MATTER IS STILL UNCOMPLETED AT THIS POINT BECAUSE WE DO HAVE THE PENALTY HEARING TO GO THROUGH. SO I AM GOING TO ONCE AGAIN ADMONISH YOU.

DURING THIS RECESS, YOU ARE ADMONISHED NOT TO CONVERSE AMONG YOURSELVES OR WITH ANYONE ELSE ON ANY SUBJECT CONNECTED WITH THIS TRIAL, OR READ, WATCH OR LISTEN TO ANY REPORT OF OR COMMENTARY ON THIS TRIAL WITH ANY PERSON CONNECTED WITH THIS TRIAL BY ANY MEDIUM OF INFORMATION, INCLUDING WITHOUT LIMITATION, NEWSPAPER, TELEVISION OR RADIO OR FORM OR EXPRESS ANY OPINION ON ANY SUBJECT CONNECTED WITH THIS TRIAL, AND PARTICULARLY THE PENALTY PHASE OF THE TRIAL NOW THAT WE'VE COMPLETED THE TRIAL PHASE, UNTIL THE CASE IS FINALLY SUBMITTED TO YOU.

WE WILL BE IN RECESS THEN UNTIL THAT TIME.

IS THERE ANYTHING FURTHER TO COME BEFORE THE JURY AT THIS TIME, GENTLEMEN?

1 MR. HARMON: YOUR HONOR, COULD WE APPROACH THE  
2 BENCH AGAIN?

3 (WHEREUPON, SIDE BAR CON-  
4 FERENCE WAS HELD AT THE  
5 BENCH; NOT REPORTED. AT  
6 THE CONCLUSION OF WHICH,  
7 THE FOLLOWING WAS HAD:)

8 THE COURT: THE ALTERNATES, IT WOULD APPEAR THAT  
9 UNDER THE LAW THAT THE ALTERNATES MAY NOT PARTICIPATE IN THE  
10 PENALTY HEARING. HOWEVER, COUNSEL HAS RAISED THE ISSUE, AND  
11 I'M GOING TO GIVE THEM THE OPPORTUNITY TO FILE POINTS AND  
12 AUTHORITIES TO EITHER CONVINCE ME THAT YOU SHOULD SIT. WITH  
13 THAT IN MIND, I'M GOING TO ORDER AT THIS TIME THAT YOU MAKE  
14 YOURSELVES AVAILABLE, HOWEVER, FOR THIS SECOND HEARING ON THE  
15 2ND. IF YOU DO NOT HEAR FROM US BY -- WELL, IF YOU DO NOT HEAR  
16 FROM THE COURT, THEN JUST DON'T WORRY ABOUT COMING BACK AT THAT  
17 TIME. YOU WILL BE NOTIFIED AND IT MAY NOT BE UNTIL MONDAY,  
18 THE 2ND. BUT YOU WILL BE NOTIFIED IF YOU ARE GOING TO SIT.

19 IN THE MEANTIME, HOWEVER, I'M GOING TO  
20 ADMONISH YOU AS I HAVE ADMONISHED THE REST OF THE JURORS.

21 DURING THIS RECESS YOU  
22 ARE ADMONISHED NOT TO CONVERSE  
23 AMONG YOURSELVES OR WITH ANYONE  
24 ON ANY SUBJECT CONNECTED WITH  
25 THIS TRIAL, OR READ, WATCH OR  
26 LISTEN TO ANY REPORT OF OR  
27 COMMENTARY ON THIS TRIAL BY ANY  
28 MEDIUM OF INFORMATION, INCLUDING  
29 WITHOUT LIMITATION, NEWSPAPER,  
30 TELEVISION OR RADIO OR FORM OR  
31 EXPRESS ANY OPINION ON ANY  
32 SUBJECT CONNECTED WITH THIS

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TRIAL UNTIL THE CASE IS  
FINALLY SUBMITTED TO YOU.

IF THERE ARE ANY JURORS WHO NEED ANY  
TRANSPORTATION OR ASSISTANCE IN GETTING TO YOUR CARS, THE  
BAILIFF WILL BE AVAILABLE TO HELP YOU AND ASSIST YOU IN THAT  
REGARD.

AT THIS TIME YOU ARE EXCUSED AND MAY  
LEAVE THE COURTROOM. WE WILL SEE YOU ALL ON MAY 2ND AT THE  
HOUR OF 10:00 O'CLOCK A.M.

(WHEREUPON, AT THE HOUR OF  
10:40 P.M., THE JURY LEFT  
THE COURTROOM AND THE  
FOLLOWING PROCEEDINGS WERE  
HAD OUTSIDE OF THEIR  
PRESENCE:)

THE COURT: COUNSEL, THIS IS OUTSIDE OF THE  
PRESENCE OF THE JURY.

IS THERE ANYTHING FURTHER TO COME BEFORE  
THE COURT AT THIS TIME?

MR. HARMON: NOT FROM THE STATE, YOUR HONOR.

MR. FRANZEN: NOT FROM THE DEFENSE, YOUR HONOR.

THE COURT: ALL RIGHT. WE WILL STAND IN RECESS IN  
THIS MATTER.

(WHEREUPON, AT THE HOUR OF  
10:42 P.M., THE EVENING  
RECESS WAS HAD IN THE PRO-  
CEEDINGS AND THE PENALTY  
HEARING CONTINUED UNTIL THE  
TIME PREVIOUSLY STATED.)

(END OF PROCEEDINGS.)

ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE PROCEEDINGS.

RENEE SILVAGGIO, C.S.R. NO. 122

1 CASE NO. CS3867

2 DEPARTMENT NO. V

- FILED IN OPEN COURT -

10 45 PM APR 13 1963

LORETTA J. GORDON, CLERK

BY

*Loretta J. Gordon*  
Deputy

6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF CLARK

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 SAMUEL HOWARD aka Keith,

13 Defendant.

INSTRUCTIONS TO THE JURY

INSTRUCTION NO. I

18 MEMBERS OF THE JURY:

19 It is now my duty as judge to instruct you in the  
20 law that applies to this case. It is your duty as jurors to  
21 follow these instructions and to apply the rules of law to the  
22 facts as you find them from the evidence.

23 You must not be concerned with the wisdom of any rule  
24 of law stated in these instructions. Regardless of any opinion  
25 you may have as to what the law ought to be, it would be a  
26 violation of your oath to base a verdict upon any other view  
27 of the law than that given in the instructions of the Court.

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INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

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

INSTRUCTION NO. 3

An Indictment is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Indictment that between March 26, 1980 and March 27, 1980, the defendant committed the following offenses:

Count I: did, on or about March 26, 1980, then and there wilfully, unlawfully and feloniously take personal property from the person of KEITH M. KINSEY, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said KEITH M. KINSEY to wit: a Motorola 2-channel radio belonging to SEARS, ROEBUCK & COMPANY, 3450 South Maryland Parkway, Las Vegas, Clark County, Nevada, being in the rightful possession of KEITH M. KINSEY, and a wallet and contents belonging to KEITH M. KINSEY, defendant using a deadly weapon, to wit: a firearm, during the commission of said crime.

Count II: did, on or about March 27, 1980, then and there wilfully, unlawfully and feloniously take personal property belonging to GEORGE STEVEN MONAHAN, to wit: wallet and contents, from the person of GEORGE STEVEN MONAHAN, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said GEORGE STEVEN MONAHAN, said defendant using a deadly weapon, to wit: a firearm, during the commission of said crime.

Count III: did, on or about March 27, 1980, then and there, without authority of law and with malice aforethought, wilfully and feloniously kill GEORGE STEVEN MONAHAN, a human being, by shooting at and into the body of the said GEORGE STEVEN MONAHAN with use of a deadly weapon, to wit: a firearm.

INSTRUCTION NO. 4

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

INSTRUCTION NO. 5

The value of property or money taken is not an element of the crime of Robbery, and it is only necessary that the State prove the taking of some property or money.

INSTRUCTION NO. 6

If you find beyond a reasonable doubt that the defendant committed Robbery with the Use of a Deadly Weapon, then you are instructed that the verdict of Robbery with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the robbery, but you do find that the crime of robbery was committed, then you are instructed that the verdict of Robbery without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Robbery with the Use of a Deadly Weapon and Robbery Without the Use of a Deadly Weapon.

INSTRUCTION NO. 7

A deadly weapon is any object, instrument or weapon which, used in the manner in which it appears to have been used, is capable of producing, and is likely to produce, death or great bodily injury.

You are instructed that a firearm is a deadly weapon.

SHWARD-PE01043

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INSTRUCTION NO. 8

Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

INSTRUCTION NO. 9

Malice aforethought, as used in the definition of murder, means the intentional doing of a wrongful act without legal cause or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge, or from particular ill will, spite, or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.



INSTRUCTION NO. 10

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

SHWARD-PE01046

INSTRUCTION NO. 11

Murder of the First Degree is murder which is (a) perpetrated by any kind of willful, deliberate and premeditated killing, or (b) committed in the perpetration or attempted perpetration of robbery.

INSTRUCTION NO. 12

Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the Jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

INSTRUCTION NO. 13

There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed in the perpetration or attempted perpetration of robbery. Therefore, a killing which is committed in the perpetration or attempted perpetration of robbery is deemed to be murder of the first degree, whether the killing was intentional, unintentional or accidental. The specific intent to perpetrate or attempt to perpetrate robbery must be proven beyond a reasonable doubt.

INSTRUCTION NO. 14

If you find beyond a reasonable doubt that the defendant committed Murder in the First Degree with the Use of a Deadly Weapon, then you are instructed that the verdict of Murder in the First Degree with the Use of a Deadly Weapon is the appropriate verdict:

If, however, you find that a deadly weapon was not used in the commission of the Murder, but you do find that a Murder was committed, then you are instructed that the verdict of Murder in the First Degree without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder in the First Degree with the Use of a Deadly Weapon and Murder in the First Degree without the Use of a Deadly Weapon.

INSTRUCTION NO. 15

The offense of First Degree Murder, with which the defendant is charged in the Indictment, necessarily includes the lesser offense of Second Degree Murder.

If the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, but you entertain a reasonable doubt as to which offense of which the defendant is guilty, it is your duty to find him guilty only of the lesser offense.

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INSTRUCTION NO. 16

Murder in the Second Degree is murder with malice afore-  
thought, but without the admixture of premeditation.

All murder which is not Murder in the First Degree is  
Murder in the Second Degree.

INSTRUCTION NO. 17

If you find beyond a reasonable doubt that the defendant committed Murder in the Second Degree with the Use of a Deadly Weapon, then you are instructed that the verdict of Murder in the Second Degree with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Murder, but you do find that a Murder was committed, then you are instructed that the verdict of Murder in the Second Degree without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder in the Second Degree with the Use of a Deadly Weapon and Murder in the Second Degree without the Use of a Deadly Weapon.



INSTRUCTION NO. 18

An accomplice is one who is subject to prosecution for the identical offense charged against the defendant on trial.

To be an accomplice, the person must have aided, promoted, encouraged, or instigated by act or advice the commission of such offense with knowledge of the unlawful purpose of the person who committed the offense.

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INSTRUCTION NO. 19

A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

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INSTRUCTION NO. 20

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

INSTRUCTION NO. 21

The defendant is presumed to be innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 22

You are here to determine the guilt or innocence of the defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the defendant, you should so find, even though you may believe one or more other persons are also guilty.

INSTRUCTION NO. 23

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence: direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the Court and any evidence ordered stricken by the Court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 24

Evidence has been received tending to show that the defendant committed crimes other than that for which he is on trial.

Such evidence was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes.

Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

(1) The identity of the person who committed the crimes, if any, of which the defendant is accused.

(2) Whether or not the defendant had the intent to commit the crimes charged.

(3) Whether or not the defendant had a motive to commit the crimes charged.

(4) Whether or not the defendant planned to commit the crimes charged.

INSTRUCTION NO. 25

The credibility or "believability" of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.



SHAWARD-PE01061

INSTRUCTION NO. 16

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. 27

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

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INSTRUCTION NO. 28

In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the Court. Your duty is confined to the determination of the guilt or innocence of the defendant.

In the event the defendant is found guilty of Murder in the First Degree you will consider the subject of punishment at a penalty hearing.

INSTRUCTION NO. 29

When you retire to consider your verdict, you must select one of your number to act as foreman who will preside over your deliberation and will be your spokesman here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreman and then return with it to this room.

INSTRUCTION NO. 30

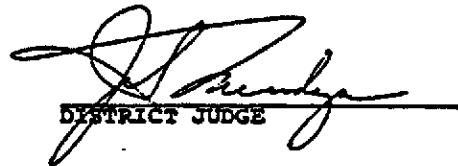
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3 If, during your deliberation, you should desire to  
4 be further informed on any point of law or hear again portions  
5 of the testimony, you must reduce your request to writing signed  
6 by the foreman. The officer will then return you to court  
7 where the information sought will be given you in the presence  
8 of, and after notice to, the district attorney and the defen-  
9 dant and his counsel.

10 Readbacks of testimony are time-consuming and are  
11 not encouraged unless you deem it a necessity. Should you  
12 require a readback, you must carefully describe the testimony  
13 to be read back so that the court reporter can arrange his notes.  
14 Remember, the court is not at liberty to supplement the evidence.  
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INSTRUCTION NO. 31

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada.

GIVEN:

  
DISTRICT JUDGE

1 CASE NO. C53867

2 DEPT. NO. V

FILED IN OPEN COURT

10:45 PM Apr 12 1983

LORETTA B. SMITH, COUNTY CLERK

By *L. B. Smith* Deputy

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6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
7 IN AND FOR THE COUNTY OF CLARK.

8  
9 THE STATE OF NEVADA, )

10 Plaintiff, )

11 -vs- )

12 SAMUEL HOWARD aka Keith, )

13 Defendant. )

14

15 VERDICT

16

17 We, the Jury in the above entitled case, find the  
18 defendant, SAMUEL HOWARD aka Keith, GUILTY of Robbery with the  
19 Use of a Deadly Weapon, Count I.

20 DATED at Las Vegas, Nevada, this 22 day of April,  
21 1983.

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*Leo J. Smith*  
FOREMAN

(R)

1 CASE NO. C53867

2 DEPT. NO. V

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FILED IN OFFICE OF  
10:45 AM April 22 1983

LORETTA BOWEN, CLERK  
By *Loretta Bowen* Deputy

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA, )  
Plaintiff, )  
-vs- )  
SAMUEL HOWARD aka Keith, )  
Defendant. )

VERDICT

We, the Jury in the above entitled case, find the  
defendant, SAMUEL HOWARD aka Keith, GUILTY of Robbery with the  
Use of a Deadly Weapon, Count II.

DATED at Las Vegas, Nevada, this 22 day of April,  
1983.

*[Signature]*  
FOREMAN

(d)



1 CASE NO. C53867

2 DEPT. NO. V

FILED  
10:45 PM April 22 1983  
LORETTA SCHWARTZ COUNTY CLERK  
Deputy

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6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
7 IN AND FOR THE COUNTY OF CLARK.

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9 THE STATE OF NEVADA, )  
10 Plaintiff, )  
11 -vs- )  
12 SAMUEL HOWARD aka Keith, )  
13 Defendant. )  
14

15 VERDICT

16  
17 We, the Jury in the above entitled case, find the  
18 defendant, SAMUEL HOWARD aka Keith, GUILTY of First Degree Murder  
19 with the Use of a Deadly Weapon, Count III.

20 DATED at Las Vegas, Nevada, this 22 day of April,  
21 1983.

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24 FOREMAN

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CASE NO. C53867  
DEPARTMENT NO. V  
DOCKET H

FILED  
JUL 11 1983  
BY *Mary Kosky*

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA, )  
PLAINTIFF, )  
VS. )  
SAMUEL HOWARD, AKA KEITH, )  
DEFENDANT. )

REPORTER'S TRANSCRIPT OF

PENALTY HEARING

BEFORE THE HONORABLE JOHN F. MENDOZA, DISTRICT JUDGE  
MONDAY, MAY 2, 1983, AT 11:10 A.M.

APPEARANCES:

FOR THE STATE:

MELVIN T. HARMON, ESQUIRE  
DANIEL M. SEATON, ESQUIRE  
200 SOUTH THIRD STREET  
LAS VEGAS, NV 89101  
DEPUTY DISTRICT ATTORNEYS

FOR THE DEFENDANT:

MARCUS D. COOPER, ESQUIRE  
GEORGE E. FRANZEN, ESQUIRE  
309 SOUTH THIRD STREET  
LAS VEGAS, NV 89101  
DEPUTY PUBLIC DEFENDERS

REPORTED BY:

RENEE SILVAGGIO, C.S.R. NO. 122

VOLUME X

2440

I N D E X

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OPENING STATEMENT BY MR. HARMON . . . . . 1462

STATE'S WITNESSES:

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
1. LYNN KENNINGTON	1431	1440	1440
2. DOROTHY WEISBAND	1464		
3. JOHN F. MCNICHOLAS	1481 1491	1488 1492	1492

DEFENDANT'S WITNESSES:

1. SAMUEL HOWARD	1512	1524
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E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>ADMITTED</u>
69	CERTIFIED COPY OF COURT MINUTES	1490

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CLOSING ARGUMENT BY MR. HARMON . . . . .	1568
CLOSING ARGUMENT BY MR. COOPER . . . . .	1581
CLOSING ARGUMENT BY MR. SEATON . . . . .	1587

1 LAS VEGAS, NEVADA, MONDAY, MAY 2, 1983, AT 11:10 A.M.

2 \* \* \* \* \*

3 THE COURT: WILL COUNSEL STIPULATE TO THE  
4 PRESENCE OF THE JURY, AND THE ALTERNATES?

5 MR. HARMON: THE STATE DOES, YOUR HONOR.

6 MR. COOPER: YES, YOUR HONOR.

7 THE COURT: LADIES AND GENTLEMEN OF THE JURY,  
8 THE ATTORNEYS HAVE ASKED THAT THIS MATTER BE CONTINUED UNTIL  
9 THIS AFTERNOON. SOME MATTERS HAVE BEEN RAISED TO THE COURT  
10 WHICH MUST BE TAKEN CARE OF AND ADDRESSED BY THE COURT AND  
11 COUNSEL BEFORE WE CAN PROCEED.

12 SO I AM GOING TO CONTINUE THIS UNTIL  
13 1:45 THIS AFTERNOON. SO I WILL HAVE TO ADMONISH YOU AT THIS  
14 TIME AND WE WILL BE PROCEEDING SOME TIME AFTER 1:45, BECAUSE  
15 I'M ASKING THE ATTORNEYS TO COME BACK AND ARGUE AT THAT TIME.

16 DURING THIS RECESS YOU  
17 ARE ADMONISHED NOT TO CONVERSE  
18 AMONG YOURSELVES OR WITH ANYONE  
19 ELSE ON ANY SUBJECT CONNECTED  
20 WITH THIS TRIAL, OR READ, WATCH  
21 OR LISTEN TO ANY REPORT OF OR  
22 COMMENTARY ON THIS TRIAL WITH  
23 ANY PERSON CONNECTED WITH THIS  
24 TRIAL BY ANY MEDIUM OF INFORMATION,  
25 INCLUDING WITHOUT LIMITATION, NEWS-  
26 PAPER, TELEVISION OR RADIO OR FORM  
27 OR EXPRESS ANY OPINION ON ANY  
28 SUBJECT CONNECTED WITH THIS TRIAL  
29 UNTIL THE CASE IS FINALLY  
30 SUBMITTED TO YOU.

31 IT WOULD PROBABLY BE BETTER FOR YOU  
32 TO COME BACK AT 2:00 O'CLOCK THIS AFTERNOON. COUNSEL WILL BE

1 BACK AT 1:45.

2 MR. HARMON: JUDGE, MAY WE APPROACH THE BENCH.

3 THE COURT: YES.

4 (WHEREUPON, SIDE BAR CONFERENCE  
5 WAS HELD AT THE BENCH, NOT  
6 REPORTED. AT THE CONCLUSION  
7 OF WHICH THE FOLLOWING WAS HAD:)

8 THE COURT: LADIES AND GENTLEMEN OF THE JURY,  
9 IT MIGHT BE BETTER TO HAVE YOU ALL BACK HERE AT 1:45. SO  
10 EVERYBODY WILL BE HERE AT 1:45. WE WILL CONTINUE THIS MATTER  
11 UNTIL THEN.

12 ANYTHING FURTHER TO COME BEFORE THE COURT  
13 AT THIS TIME, BEFORE WE RECESS, GENTLEMEN?

14 MR. HARMON: NOT BY THE STATE, YOUR HONOR.

15 MR. FRANZEN: NOT BY THE DEFENSE, YOUR HONOR.

16 THE COURT: WE WILL BE IN RECESS.

17 (WHEREUPON, FROM 11:12 A.M.  
18 UNTIL 2:00 P.M., THE NOON  
19 RECESS WAS HAD IN THE PROCEED-  
20 INGS, AT THE CONCLUSION OF  
21 WHICH THE FOLLOWING PROCEED-  
22 INGS WERE HAD OUTSIDE THE  
23 PRESENCE OF THE JURY:)

24 THE COURT: LET THE RECORD REFLECT THIS IS A  
25 HEARING OUTSIDE OF THE PRESENCE OF THE JURY.

26 GENTLEMEN, AS YOU KNOW, WE HAVE BEEN  
27 DISCUSSING IN CHAMBERS THE PROBLEM THAT HAS BEEN BROUGHT TO  
28 OUR ATTENTION, AND THAT IS THE FACT THAT ONE OF THE JURORS HAS  
29 BEEN IN CONTACT WITH THIS COURT AND APPARENTLY HAS TALKED TO  
30 REPRESENTATIVES OF THE DISTRICT ATTORNEYS OFFICE, TO THE JURY  
31 COMMISSIONER, AND I DON'T KNOW WHO ELSE.

32 I DID, OVER THE WEEK INSTRUCT MY LAW

1 CLERK, MR. GARCIA, TO NOTIFY THE JURY COMMISSIONER TO PROVIDE  
2 ME WITH A STATEMENT OF WHAT SHE RECALLS WITH REFERENCE TO ANY  
3 CONVERSATION OR CONTACT THAT HAS BEEN MADE WITH HER BY MARILYN  
4 CAPASSO, ONE OF THE JURORS IN THIS CASE. THE STATEMENT HAS  
5 BEEN PREPARED, IT IS UNSWORN, BUT A COPY OF IT HAS BEEN SUPPLIED  
6 TO BOTH THE STATE AND TO THE DEFENDANT'S COUNSEL. THE MATTER  
7 WAS CONTINUED FROM THIS MORNING TO GIVE THEM AN OPPORTUNITY TO  
8 EXAMINE THAT STATEMENT AND TO PREPARE FOR HEARING THIS AFTER-  
9 NOON.

10 THIS BEING 1:45 ON THE DATE IN  
11 QUESTION, THE COURT WILL REFLECT THAT THE JURY COMMISSIONER IS  
12 NOW PRESENT IN THE COURTROOM, MRS. KENNINGTON, AND SHE IS HERE  
13 AND AVAILABLE FOR QUESTIONING. COUNSEL FOR THE DEFENDANT HAS  
14 REQUESTED THE OPPORTUNITY TO MAKE INQUIRY AND THAT REQUEST HAS  
15 BEEN GRANTED.

16 I BELIEVE THAT THAT TAKES CARE OF  
17 EVERYTHING THAT'S TRANSPIRED TODAY.

18 COUNSEL?

19 MR. FRANZEN: YOUR HONOR, AS I ADVISED YOUR  
20 HONOR IN CHAMBERS PRIOR TO CONVENING TO COURT, MR. COOPER AND  
21 I DO HAVE A MOTION TO RENEW OUR MOTION TO WITHDRAW AS COUNSEL  
22 FOR MR. HOWARD. THAT IS BASED UPON THE PARTICULAR IRRECONCIL-  
23 ABLE DIFFERENCES WITH MR. HOWARD WE HAVE WITH MR. HOWARD AND  
24 MR. HOWARD HAS WITH US. NOT ONLY ARE THEY CONTINUING BUT NEW  
25 ONES ARE ARISING AS EACH STAGE OF THIS PROCEDURE DEVELOPS.

26 PRESENTLY MR. HOWARD HAS ADVISED US THAT  
27 HE DOES NOT WISH US TO PUT INTO EVIDENCE ANY MATTERS OF MITI-  
28 GATION. WE HAVE MATTERS OF MITIGATION, BUT HE DOES NOT WISH  
29 US TO PRESENT THEM; NOR DOES HE WISH US TO ARGUE TO THE JURY BY  
30 WAY OF MITIGATION, ALTHOUGH WE ARE GOING TO ARGUE; NOR DOES  
31 MR. HOWARD -- STRIKE THAT.

32 WE BELIEVE THAT SINCE THERE HAS BEEN

1 A SHIFTING OF STAGES BEFORE THE COURT THAT NEW COUNSEL FOR THIS  
2 INDIGENT DEFENDANT SHOULD BE APPOINTED WHO MIGHT BE ABLE TO  
3 GET ALONG WITH MR. HOWARD, PERSUADE HIM TO WHAT WE BELIEVE IS  
4 MR. HOWARD'S BEST INTEREST.

5 WE HAVE SOME MITIGATING CIRCUMSTANCES  
6 THAT MR. HOWARD DOES NOT WISH US TO PRESENT. AND I'M NOT EVEN  
7 SURE IF IT'S APPROPRIATE IN LIGHT OF THOSE INSTRUCTIONS TO  
8 INFORM THE DISTRICT ATTORNEY AND YOUR HONOR NOW AS TO WHAT THEY  
9 ARE.

10 ONE OF THEM I THINK I SHOULD TELL YOUR  
11 HONOR, PERHAPS I SHOULD TELL FURTHER, ONE OF THEM THAT WE HAVE  
12 LEARNED WITHOUT THE HELP OF MR. HOWARD, BUT THROUGH OTHER  
13 SOURCES, THAT AS A YOUNG MAN HIS FATHER KILLED HIS MOTHER AND  
14 HIS YOUNGER SISTER IN HIS PRESENCE. AND MR. HOWARD'S FATHER'S  
15 APPARENTLY INCARCERATED FOR THIS AND OTHER OFFENSES. THIS  
16 WOULD BE ADMISSIBLE UNDER OUR MITIGATING CIRCUMSTANCES STATUTE,  
17 UNDER THE LANGUAGE ALLOWING ANY OTHER MITIGATION WHICH THE  
18 DEFENDANT DID.

19 THE COURT: HOW WOULD THAT TEND TO MITIGATE,  
20 COUNSEL?

21 MR. FRANZEN: WELL, IT WOULD TEND TO MITIGATE,  
22 YOUR HONOR, IN THAT WE'VE ALSO LEARNED THAT THE DEFENDANT,  
23 AGAIN WITHOUT HIS ASSISTANCE, WAS DETERMINED TO BE INCOMPETENT  
24 SOME TIME AFTER THE -- HIS ARREST OF APRIL 11, 1980.

25 WE'VE TALKED TO DOCTOR O'GORMAN ABOUT THE  
26 EFFECT OF WITNESSING HIS MOTHER AND INFANT SISTER BEING  
27 MURDERED BY HIS FATHER BEFORE AND IN HIS PRESENCE. AND DOCTOR  
28 O'GORMAN AT THIS TIME IS UNABLE TO GIVE AN OPINION. HE'S  
29 UNABLE TO GIVE AN OPINION BECAUSE OF IRRECONCILABLE DIFFERENCES  
30 THAT MR. HOWARD HAS HAD WITH US, WHICH HAVE BEEN CONVEYED AND  
31 CARRIED OVER INTO AN IRRECONCILABLE DIFFERENCE WITH DOCTOR  
32 O'GORMAN.

1 THE COURT: BUT MR. HOWARD HAS BEEN FOUND TO BE  
2 COMPETENT.

3 MR. FRANZEN: YES, YOUR HONOR. BUT WE BELIEVE  
4 THAT THESE WOULD BE ADMISSIBLE MITIGATING FACTORS AT THE PENALTY  
5 PHASE.

6 WE HAVE HAD SOME OF THIS CONFIRMED HERE  
7 IN OPEN COURT WHEN DAWANA THOMAS HAS TESTIFIED THAT AFTER HIS  
8 ARREST SHE VISITED HIM IN A MENTAL HOSPITAL OR MENTAL WARD.  
9 I'M NOT QUITE SURE. I DON'T RECALL HER EXACT TERMINOLOGY.

10 MR. HOWARD, IN HIS CONTINUING  
11 DIFFERENCES WITH US, HAS REFUSED TO SIGN ANY MEDICAL RELEASES.  
12 THAT WOULD RELEASE THE DOCTORS IN WHOSE CARE HE WAS TO DISCUSS  
13 HIS CASE HISTORY AND HIS DIAGNOSIS.

14 ALSO DETECTIVE LEAVITT, WHEN DETECTIVE  
15 LEAVITT QUESTIONED THE DEFENDANT, STATED THAT THE DEFENDANT  
16 WAS VERY UPSET. HE REQUESTED TO MEET A PSYCHIATRIST DUE TO  
17 MENTAL ILLNESS. AND THE DEFENDANT DIDN'T KNOW WHY HE WAS  
18 DOING THESE TERRIBLE THINGS OR HURTING PEOPLE. I DON'T RECALL  
19 THE EXACT LANGUAGE USED IN DETECTIVE LEAVITT'S REPORT, BUT  
20 THAT IS THE GIST OF IT. BUT THAT HE THINKS THAT PERHAPS IT  
21 WAS SOMETHING TO DO WITH HAVING SEEN HIS FATHER KILL HIS MOTHER  
22 AND SISTER, AND ALSO POSSIBLY EXPERIENCE HE RECEIVED IN VIET  
23 NAM.

24 I BELIEVE ALL OF THESE WOULD GO TO  
25 MITIGATION. AND MR. HOWARD HAS INSTRUCTED US NOT TO PRESENT  
26 THESE AND INDEED NOT TO ARGUE THEM.

27 AND ON THOSE GROUNDS, BECAUSE OF THE  
28 IRRECONCILABLE DIFFERENCES, WE WOULD REQUEST TO BE ALLOWED TO  
29 WITHDRAW AND THAT OTHER COUNSEL BE APPOINTED TO THE INDIGENT  
30 DEFENDANT FOR THE PURPOSES OF THE PENALTY PHASE HEARING.

31 WE'D ALSO REQUEST THAT THE COURT  
32 CANVAS MR. HOWARD.

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1 THE COURT: MR. HOWARD, YOU HEARD THE STATEMENTS  
2 OF COUNSEL. DO YOU HAVE ANYTHING TO STATE TO THE COURT AT  
3 THIS TIME?

4 DEFENDANT HOWARD: EXCUSE ME, YOUR HONOR.

5 THE COURT: DO YOU HAVE ANYTHING TO STATE TO  
6 THE COURT AT THIS TIME?

7 DEFENDANT HOWARD: WELL, BASICALLY WHAT HE SAID  
8 IS TRUE. WE HAD DIFFERENCES STARTING BACK IN NOVEMBER. AND  
9 I'D RATHER NOT FOR THEM TO ENTER ANY MITIGATING FACTORS ON MY  
10 BEHALF.

11 THE COURT: ALL RIGHT. YOU ARE AWARE OF THE  
12 FACT THAT THOSE MITIGATING FACTORS MAY POSSIBLY BE OF ASSIS-  
13 TANCE TO YOU IN THIS MATTER?

14 DEFENDANT HOWARD: YES. I'M AWARE, YOUR HONOR.

15 THE COURT: AND BEING FULLY AWARE OF THAT, YOU  
16 STILL DON'T DESIRE THAT THEY PRESENT THOSE; IS THAT CORRECT?

17 DEFENDANT HOWARD: EXACTLY.

18 THE COURT: THANK YOU. YOU MAY BE SEATED.

19 THE STATE.

20 MR. HARMON: YOUR HONOR, WE OBJECT TO THE TIMING  
21 OF THE RENEWAL OF THIS MOTION.

22 IT IS TRUE, AS MR. FRANZEN SUGGESTS, THAT  
23 WE'RE MOVING INTO ANOTHER PHASE OF THE PROCEEDING. HOWEVER,  
24 N.R.S. 175.552 MAKES IT CLEAR THAT THE HEARING THAT WE'RE  
25 ABOUT THE COMMENCE, THE PENALTY HEARING, SHOULD BE CONDUCTED  
26 BEFORE THE TRIAL JURY AS SOON AS PRACTICAL. AND IT IS NOT  
27 PRACTICAL TO THINK THAT IN A TRIAL AS INVOLVED AS THIS ONE IS  
28 THAT WE COULD EXPECT TO SUBSTITUTE ADDITIONAL COUNSEL IN AND  
29 HAVE THE PENALTY HEARING IN THE NEAR FUTURE.

30 PERSONALLY, THE STATE BELIEVES THAT  
31 ALSO WOULD BE A GREAT DISADVANTAGE TO MR. HOWARD TO TRY TO  
32 GET NEW COUNSEL WHO HAVE NOT SEEN THE WITNESSES TESTIFY. I

1 ANTICIPATE THE JURY IS GOING TO BE INSTRUCTED THAT THEY MAY  
2 CONSIDER EVIDENCE INTRODUCED AT BOTH THE GUILT AND PENALTY  
3 PHASE OF THESE PROCEEDINGS.

4 IN TERMS OF MITIGATION, YOUR HONOR,  
5 THOSE FACTORS ARE CLEARLY SET FORTH IN N.R.S. 200.030. IT  
6 SEEMS TO US THAT THE ONLY THING ARGUABLY THAT MIGHT APPLY IS  
7 PARAGRAPH TWO, THAT REQUIRES THAT THE MURDER WAS COMMITTED  
8 WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL  
9 OR EMOTIONAL DISTURBANCE.

10 OF COURSE, PERHAPS THE COURT WILL  
11 HAVE TO RULE ON THIS AT SOME POINT IN THESE PROCEEDINGS, BUT I  
12 WOULD THINK IT IS CERTAINLY QUESTIONABLE AT THIS POINT THAT AN  
13 INCIDENT THAT OCCURRED YEARS AGO, IS VERY REMOTE IN TIME FROM  
14 THE MURDER OF GEORGE MONAHAN, IS GOING TO BE THE TYPE OF SITU-  
15 ATION THAT HAS PLACED THE DEFENDANT UNDER EXTREME MENTAL OR  
16 EMOTIONAL DISTURBANCE. AND IF IT DOESN'T FIT INTO THAT CATEGORY  
17 THEN IT WON'T BE ADMISSIBLE. WE DON'T THINK THAT NUMBER SEVEN,  
18 ANY OTHER MITIGATING CIRCUMSTANCE, APPLIES. IT WOULD HAVE TO  
19 BE PARAGRAPH TWO.

20 BUT THE MOTION IS UNTIMELY. MR.  
21 HOWARD HAS BEEN ABLY REPRESENTED BY COUNSEL UP TO THIS POINT,  
22 AND WE MOST CERTAINLY THINK THAT THEY SHOULD CONTINUE TO  
23 REPRESENT HIM IN THE FRUIT OF THE REMAINDER OF THESE PROCEED-  
24 INGS.

25 THE COURT: ANYTHING FURTHER, COUNSEL?

26 MR. FRANZEN: NOT FROM THE DEFENSE, YOUR HONOR.

27 THE COURT: ALL RIGHT. OF COURSE, I MUST  
28 EXAMINE INTO THE SITUATION THAT WE HAVE PRESENTLY. WE NOW HAVE  
29 A MOTION TO BE RELEASED BY COUNSEL. A SIMILAR MOTION WAS MADE  
30 AT THE COMMENCEMENT OF THESE PROCEEDINGS, AND WE ARE NOW FACED  
31 WITH A RENEWAL OF THAT MOTION.

32 THE COURT HAS HAD AN OPPORTUNITY TO SIT

1 AND OBSERVE COUNSEL AND THE DEFENDANT THROUGHOUT THESE PRO-  
2 CEEDINGS, AND I THINK THAT THE DEFENDANT HAS CLEARLY SHOWN  
3 THAT HIS STATE OF MIND IS CLEAR, ELUSIVE, THAT HE IS INTELLI-  
4 GENT, FOR I HEARD HIM TESTIFY AND I HEARD HIM STATE HIS  
5 POSITIONS ON A NUMBER OF ISSUES THROUGHOUT AND I HAVE FOUND  
6 THAT HE IS COMPETENT TO STAND TRIAL AND TO ASSIST IN HIS  
7 DEFENSE. IT IS OBVIOUS TO ME THAT HE IS AND HAS BEEN COMPETENT.  
8 HE HAS, ON MANY OCCASIONS, CONFERRED WITH COUNSEL AND HE HAS  
9 RECEIVED COMPETENT AND ABLE REPRESENTATION IN THESE PROCEEDINGS.

10 I DON'T KNOW OF AN ISSUE THAT HAS  
11 BEEN CONSIDERED BY THIS COURT THAT WASN'T CONTESTED BY THE  
12 DEFENSE THROUGH THE ATTORNEYS. AND I DON'T KNOW OF A DEFENSE  
13 THAT MAY BE SO DILIGENT IN RAISING THESE ISSUES, AND I THINK  
14 THIS HAS BEEN DONE BECAUSE COUNSEL'S PRIORITY TO PERSONAL  
15 RESPONSIBILITY; AND, SECONDLY, BECAUSE OF THE ISSUE THAT HAS  
16 BEEN RAISED RECENTLY.

17 IT APPEARS TO ME THAT MR. HOWARD  
18 UNDERSTANDS AND COMPREHENDS THE NATURE OF A PENALTY HEARING.  
19 HE HAS JUST BEEN INQUIRED WITH REGARDS TO HIS UNDERSTANDING  
20 OF THE NATURE OF MITIGATING CIRCUMSTANCES AND THE VALUE TO HIM.  
21 HE HAS RESPONDED THAT HE DOES NOT DESIRE TO HAVE THIS EVIDENCE  
22 DEDUCED, WHETHER IT IS MITIGATING CIRCUMSTANCES UNDER THE  
23 BROAD AND GENERAL CATEGORY NUMBER SEVEN OF OTHER MITIGATING  
24 CIRCUMSTANCES, THAT IS: ONE, HIS EXPERIENCE IN VIET NAM, AND  
25 TWO, THE FACT THAT AS A CHILD HE WATCHED HIS MOTHER AND SISTER  
26 BEING KILLED BY HIS FATHER. WHETHER THOSE TWO FALL INTO THAT  
27 CATEGORY, I'M NOT REALLY CERTAIN. THEY PROBABLY FALL IN THE  
28 STATE OF MIND OF THE TYPE OF EVIDENCE, CATEGORY TWO, IF THEY  
29 ARE INDEED MITIGATING CIRCUMSTANCES. AND I AM NOT CONVINCED  
30 IN MY OWN MIND, NOR HAS THERE BEEN ANY EVIDENCE OF LAW OR ANY-  
31 THING ELSE PRESENTED TO ME, THAT THEY ARE. BECAUSE WHEREVER  
32 THE NATURE OF THESE PROCEEDINGS, THERE MUST BE ONE FURTHER TIE.

1 AND THAT TIE IS THAT -- IS THE IMPACT UPON THAT PERSON WHO HAS  
2 GONE THROUGH THE CIRCUMSTANCES: THE FACT THAT WE'VE GONE  
3 THROUGH THIS PARTICULAR PHASE AND HAVING OBSERVED HIS MOTHER  
4 HAS BEEN KILLED, AND NUMBER TWO, THAT HE WAS IN VIET NAM.  
5 THERE MUST BE A FURTHER TIE AND FURTHER EVIDENCE AND THAT IS  
6 THAT THERE IS INDEED A TIE BETWEEN THE EXPERIENCE AND THIS  
7 MANIFESTATION UPON HIM AT THIS POINT OR AT THE TIME OF THE  
8 KILLING. AND NEITHER COUNSEL HAVE EVEN ELUDED TO THE FACT  
9 THAT THERE IS SUCH A TIE. SO UNLESS THERE WERE, THAT EVIDENCE  
10 WOULD NOT BE ADMISSIBLE WITHOUT THAT CONNECTION BECAUSE IT  
11 WOULD CERTAINLY TAKE, I BELIEVE, EXPERT TESTIMONY TO ESTABLISH  
12 THE CAUSE AND EFFECT UPON HIM. BUT WHATEVER THAT MIGHT BE,  
13 WE MAY NOT HAVE TO CROSS THAT BRIDGE BECAUSE AT THIS POINT HE  
14 DOESN'T WANT IT INTRODUCED.

15 AND COUNSEL ALWAYS HAVE TO UNDERSTAND  
16 THE CANON OF ETHICS OF THE PROFESSION, THAT YOU ARE THE  
17 AGENTS AND NOT THE PRINCIPALS. YOUR PRINCIPAL IS MR. HOWARD.  
18 HE IS IN EFFECT, FOR THE PURPOSES OF THIS TRIAL, YOUR BOSS.  
19 HE HAS SO INSTRUCTED YOU.

20 YOU GENTLEMEN, OF COURSE, POINTED IT  
21 OUT AND I THINK IT'S BEEN ABLY POINTED OUT AT THIS POINT, WHAT  
22 HIS ALTERNATIVES ARE. HE HAS AT LEAST PRELIMINARILY INDICATED  
23 TO THE COURT WHICH ALTERNATIVE HE DESIRES TO FOLLOW. SO YOU  
24 GENTLEMEN FOUND THAT ALTERNATIVE. YOUR MOTION TO WITHDRAW IS  
25 DENIED.

26 NOW, LET'S THEN PROCEED TO THE NEXT  
27 ISSUE.

28 MR. FRANZEN: YOUR HONOR, AS TO THE NEXT ISSUE,  
29 I BELIEVE IT HAS TO DO WITH THE JUROR WHO SPOKE WITH THE JURY  
30 COMMISSIONER.

31 THE COURT: ALL RIGHT.

32 MR. FRANZEN: AS STATED PREVIOUSLY IN CHAMBERS

1 IN THE PRESENCE OF THE DISTRICT ATTORNEY, IT'S OUR POSITION  
2 THAT HAVING ONCE BEEN SENT BY THE DISTRICT ATTORNEYS OFFICE TO  
3 THE JURY COMMISSIONER, THAT THIS JURY WAS TAINTED AND THAT THE  
4 STATE IS NOW BARRED FROM SEEKING THE DEATH PENALTY.

5 WE BELIEVE THAT A VARIETY OF STATUTES --  
6 STATUTORILY AND CONSTITUTIONAL VIOLATIONS HAVE OCCURRED AND  
7 THIS AGAIN IS BASED UPON DISCUSSION IN CHAMBERS, WHICH I THINK  
8 WILL BE FOLLOWED BY SOME STATEMENTS BY THE DISTRICT ATTORNEY  
9 AND YOU AND THE JURY COMMISSIONER.

10 WE BELIEVE THAT BY -- WELL, FIRST OFF,  
11 THE JUROR WAS UNDER THE ADMONITION OF THE COURT, UNDER N.R.S.  
12 17.141, NOT TO DISCUSS THE CASE. THE DISTRICT ATTORNEY WAS  
13 PRESENT, AS WELL AS YOURSELF.

14 UNDER STATE V. LEWIS, 59 NEVADA 262,  
15 275, THAT STATUTE AND THE WORDS OF THAT CASE SHOULD HAVE BEEN  
16 AND ALWAYS OUGHT TO BE STRICTLY COMPLIED WITH. IT HAS NOT BEEN  
17 COMPLIED WITH BY THE DISTRICT ATTORNEY DISCUSSING WITH THE JURY  
18 COMMISSIONER, NOR HAS IT BEEN COMPLIED WITH BY THE JUROR DIS-  
19 CUSSING IT WITH THE JURY COMMISSIONER OR WITH ANYONE ELSE AS IT  
20 DEVELOPS.

21 WE BELIEVE WE ARE PUT IN AN UNTENABLE  
22 POSITION. WE WOULD LIKE TO KNOW WHAT WAS SAID TO THE JUROR  
23 AND WHAT THE JUROR SAID, YET WE DON'T WISH TO PUT PRESSURE ON  
24 THIS JUROR TO BRING BACK THE DEATH PENALTY. WE WISH TO HAVE A  
25 FAIR AND IMPARTIAL JURY IMPARTIALLY COMPOSED OF THIS JUROR. SO  
26 WE HAVE A PROBLEM INQUIRING OF THE JURY, AND WE ARE SORT OF --  
27 IF WE ARE ASKING THE JURY WHAT IS YOUR NUMERICAL DIVISION BY  
28 FURTHER INQUIRY, IT WAS HERE UNDER THE SIXTH AMENDMENT TO THE  
29 CONSTITUTION THAT WE ARE ENTITLED TO A FAIR AND IMPARTIAL HEAR-  
30 ING, YET WE ARE ALSO ENTITLED TO PROCESS UNDER THE FIFTH AMEND-  
31 MENT AND WE NEED TO KNOW WHAT WAS SAID ON THIS.

32 WE BELIEVE THAT A HEARING OF THIS JUROR

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1 VIOLATES THE FIFTH -- I'M SORRY, YOUR HONOR, VIOLATES THE SIXTH  
2 AMENDMENT. WE THINK THERE IS A PER SE VIOLATION HERE AND THAT  
3 THE PUNISHMENT MATTER SHOULD BE SUBMITTED TO THE JURY AS  
4 COMPOSED, PRESENTLY COMPOSED, TO INCLUDE THIS JUROR, BUT CANNOT  
5 BE BARRED FROM SEEKING THE DEATH PENALTY.

6 THE COURT: WHY SHOULD THEY BE BARRED FROM  
7 SEEKING ANY PENALTIES?

8 MR. FRANZEN: WHY SHOULDN'T THEY?

9 THE COURT: IF YOU FOLLOWED YOUR STATEMENTS  
10 LOGICALLY, THEN THE STATE UNDER ANY CIRCUMSTANCES CAN'T ASK  
11 THAT THIS DEFENDANT BE PUNISHED FOR ANYTHING.

12 MR. FRANZEN: YOU VERY WELL MAY BE RIGHT, YOUR  
13 HONOR. BUT IT SHOULD BE RECALLED THAT WE WERE NOT THE ONES --  
14 THE DEFENSE WAS NOT THE ONES WHO SENT THE JUROR TO THE JURY  
15 COMMISSIONER. AND I BELIEVE THE STATEMENT, IF YOUR HONOR WILL  
16 RECALL, AND PERHAPS IT WILL BE REITERATED BY MR. HARMON  
17 BECAUSE HE IS THE ONE WHO SENT THE JUROR TO THE JURY COMMISSIONER

18 NOW, THIS CHANGE OCCURRED AFTER THE  
19 DEFENDANT WAS FOUND GUILTY. SO I DON'T BELIEVE WE'RE GOING  
20 TO HAVE AN EFFECT, BUT WE'RE GOING TO HAVE AN EFFECT ON THE  
21 PENALTY PHASE. AND I THINK THAT IS THE EFFECT THAT WE HAVE.

22 NOW, I REALIZE THAT THE ALTERNATIVE --  
23 WELL, I'LL LEAVE IT AT THAT FOR THE TIME BEING.

24 THE OTHER STATUTES THAT HAVE BEEN  
25 VIOLATED BY THIS ARE 175.391, WHICH STATES:

26 THE COURT SHALL NOT PERMIT  
27 ANY COMMUNICATION TO BE MADE TO  
28 THEM, MEANING THE JURORS, OR MAKE  
29 ANY HIMSELF, UNLESS BY ORDER OF  
30 THE COURT, EXCEPT TO ASK THEM IF  
31 THEY HAVE AGREED UPON THEIR  
32 VERDICT.

1                   THERE HAS BEEN MORE COMMUNICATION DONE  
2 THAN TO MERELY ASK THIS JUROR, HAS A VERDICT BEEN REACHED?  
3 AND IT WAS NOT DONE IN COURT.

4                   UNDER ANOTHER STATUTE, WHICH HAS BEEN  
5 VIOLATED, 175.451 STATES:

6                   IF A JUROR, AND I'M PARA-  
7 PHRASING, YOUR HONOR, BUT IF A  
8 JUROR DESIRES TO BE INFORMED ON  
9 ANY POINT OF LAW ARISING IN THE  
10 CAUSE, THEY MUST REQUIRE THE OFFICER  
11 TO CONDUCT THEM INTO COURT. UPON  
12 THEIR BEING BROUGHT INTO COURT, THE  
13 INFORMATION REQUIRED SHALL BE GIVEN  
14 IN THE PRESENCE OF, OR AFTER NOTICE  
15 TO, THE DISTRICT ATTORNEY, AND THE  
16 DEFENDANT OR HIS COUNSEL.

17                   WELL, IT WASN'T DONE IN THIS INSTANCE.  
18 THE DEFENDANT'S PRESENCE I BELIEVE CANNOT BE WAIVED IN THIS  
19 TYPE OF MATTER AND WE HAVE NO ORDER OF WHAT WAS ACTUALLY  
20 COMMUNICATED, ALTHOUGH WE HAVE THE UNSWORN STATEMENT, AND I  
21 PRESUME --

22                   THE COURT: WELL, COUNSEL, DON'T EVEN BELABOR  
23 THAT BECAUSE YOUR CITATION IS SO INAPPROPRIATE THAT REALLY IT  
24 DOESN'T EVEN MERIT ANY CONSIDERATION.

25                   WHAT YOU ARE REFERRING TO, 175.451,  
26 SAYS AFTER THE JURY HAS RETIRED AND ALSO REFERS TO DURING  
27 THE RELATIVE PHASE, NOT AFTERWARDS.

28                   NOW, THE REASON BY ANALOGY, THAT'S  
29 SOMETHING ELSE. BUT TO SAY IT'S A DIRECT VIOLATION, THAT  
30 DOESN'T EVEN APPLY.

31                   MR. FRANZEN: OKAY. CLEARLY, YOUR HONOR, THE  
32 ..

1 JURY IS NOT ENTITLED TO REACH A VERDICT BUT THEY ARE STILL  
2 UNDER THE ADMONITION. INDEED YOUR HONOR INSTRUCTED THEM, IF  
3 I RECALL CORRECTLY, THAT IF ANY QUESTIONS DID ARISE, THEY SHOULD  
4 GO THROUGH THE COURT OFFICERS.

5 THE COURT: THAT'S DURING THE MURDER PHASE,  
6 COUNSEL, AS POINTED OUT IN THE STATUTE.

7 MR. FRANZEN: AND YOUR HONOR ADVISED THEM NOT TO  
8 DISCUSS THE CASE.

9 THE COURT: I ADVISED THEM IN THE GENERAL  
10 ADMONITION STATUTE.

11 MR. FRANZEN: YES, YOUR HONOR.

12 NOW, ON THOSE GROUNDS, YOUR HONOR, WE  
13 THINK THE STATE IS BARRED IN THIS MATTER OF SEEKING THE DEATH  
14 PENALTY. IT SEEMS THAT IF THEY ARE ALLOWED TO PROCEED, WE WILL  
15 MOVE FOR A MISTRIAL, AND SO WE DO.

16 THE COURT: THE STATE.

17 MR. HARMON: YOUR HONOR, WE CERTAINLY CAN'T  
18 AGREE THAT THE DEFENSE HAS BEEN PLACED IN AN UNTENABLE POSITION.  
19 WE ARE BEGINNING TO WONDER WHEN WE'RE GOING TO FIND OUT

20 EXACTLY WHAT THIS JUROR HAS ON HER MIND. WE'RE CONCERNED, TOO.  
21 THE STATE HAS AN INTEREST IN HAVING 12 JURORS AT THIS POINT WHO  
22 WILL FOLLOW THE LAW WHICH THE COURT WILL GIVE THEM AND CONSIDER  
23 EQUALLY THE PUNISHMENTS PROVIDED FOR IN THIS STATE FOR MURDER  
24 IN THE FIRST DEGREE.

25 THERE HAS BEEN NOT PER SE A VIOLATION BY  
26 THIS JUROR OF THE COURT'S OR ANY STATUTE IN 175 OF THE NEVADA  
27 STATUTES.

28 A WEEK AGO TODAY, I BELIEVE BY MY  
29 CALCULATION, WOULD BE APRIL THE 25TH, 1983, QUITE EARLY IN THE  
30 MORNING, SOMEWHERE AROUND 9:00 O'CLOCK, SUDDENLY THE JUROR UNDER  
31 CONSIDERATION, I HAVE FORGOTTEN HER NAME NOW, MATERIALIZED IN  
32 THE DOORWAY OF THE MAJOR VIOLATORS UNIT OFFICE. I HADN'T ASKED



1 HER TO COME THERE. I WAS SURPRISED TO SEE HER.

2 SHE STARTED TO SAY SOMETHING TO ME,  
3 AND MY FIRST WORDS WERE, "YOU ARE STILL UNDER THE COURT'S  
4 ADMONITION. I CAN'T TALK TO YOU. I DON'T KNOW IF THE DISTRICT  
5 ATTORNEYS OFFICE CAN HAVE COMMUNICATION WITH YOU."

6 SHE THEN SAID, "I HAVE TRIED TO GET  
7 IN TOUCH WITH THE COURT OFFICERS. I HAVE A PROBLEM. I CAN'T  
8 WAIT 'TIL NEXT MONDAY."

9 AT WHICH TIME I SAID, "YOU MUST SEE  
10 THE JURY COMMISSIONER THEN BECAUSE I CAN'T HAVE ANY CONVERSA-  
11 TION WITH YOU."

12 THERE WAS NO DISCUSSION ABOUT THE CASE.  
13 THERE'S NO INDICATION THAT THE DEFENSE IS SUGGESTING THAT SOME-  
14 HOW AN INDICATION HAS BEEN GIVEN OF A NUMERICAL IN TERMS OF HOW  
15 THIS JUROR STANDS. THAT'S PREPOSTEROUS. THERE WAS NO DISCUS-  
16 SION ON JURY DELIBERATION, NO DISCUSSION ABOUT THIS CASE.

17 MR. FRANZEN CHIDES THE REPRESENTATIVE  
18 OF THE DISTRICT ATTORNEYS OFFICE NOW FOR SENDING THIS JUROR TO  
19 THE JURY COMMISSIONER. WHERE WERE WE TO SEND HER? TO A PALM  
20 READER? TO A SOOTHSAYER? SHE HAD TO GO SOMEWHERE FOR GUIDANCE  
21 AND THAT'S WHERE WE SENT HER.

22 YOUR HONOR, OUR HANDS ARE PERFECTLY  
23 CLEAN IN REGARDS TO THIS. WE WERE CONFRONTED WITH AN AWKWARD  
24 SITUATION. I THINK WE HANDLED IT IN THE BEST WAY IT COULD HAVE  
25 HAPPENED. IF IT HAPPENED BY SURPRISE AGAIN TOMORROW, WE'D DO  
26 IT THE SAME WAY.

27 WE DON'T THINK THERE'S BEEN ANY PER SE  
28 PREJUDICE TO THE DEFENDANT. IT'S RIDICULOUS TO ASSERT NOW THAT  
29 FOR SOME REASON THE PROSECUTION IS NOW FORBIDDEN TO SEEK THE  
30 DEATH PENALTY.

31 AT THE MOST IF WE DISCOVER THAT THIS  
32 JUROR, REGARDLESS OF WHAT SHE TOLD US ORIGINALLY, IS NOW UNABLE

1 TO FOLLOW THE LAW, AND UNABLE TO CONSIDER THE PUNISHMENT  
2 PROVIDED FOR IN THIS STATE BY OUR LEGISLATURE, WE ARGUE THAT  
3 N.R.S. 175.556 THEN APPLIES. IF SHE IS DISQUALIFIED, IT THEN  
4 BECOMES APPARENT THAT THE STATUTORY PROCEDURE TAKES EFFECT OF  
5 WHERE THE JURY IS UNABLE TO REACH A MANDATORY VERDICT REGARDING  
6 THE SENTENCE, THAT WOULD BRING INTO PLAY A THREE-JUDGE PANEL.  
7 BUT THERE'S NOTHING THAT HAS OCCURRED, NOR COULD IT OCCUR UNDER  
8 THE PRESENT CIRCUMSTANCES, THAT WOULD PRECLUDE THE PROSECUTION  
9 FROM SEEKING ANY OF THE THREE PUNISHMENTS WHICH MIGHT BE  
10 CONSIDERED APPROPRIATE FOR THIS CASE.

11 THE COURT: ANYTHING FURTHER?

12 MR. FRANZEN: YES, YOUR HONOR.

13 REGARDING THE SUGGESTION OF A THREE-JUDGE  
14 PANEL, THE STATE HAD THE OPPORTUNITY ON VOIR DIRE TO QUESTION  
15 THE JUROR AND DID SO; WE ALSO DID AND DID SO; AND WE BOTH  
16 ACCEPTED.

17 THE STATUTE DOES NOT PROVIDE FOR THE  
18 SUBSTITUTION OF A PANEL AT THIS STAGE UNDER THESE CIRCUMSTANCES.  
19 ONLY AFTER A PANEL IS UNABLE TO REACH A DECISION WOULD A THREE-  
20 JUDGE PANEL BE CREATED.

21 WE HAVE YET TO FIND OUT WITH THEIR  
22 DELIBERATING, WHETHER THE PANEL WOULD BE ABLE TO REACH A  
23 DECISION. THAT PANEL MIGHT COME BACK WITH HER PARTICIPATING  
24 IN ANY OF THE THREE VERDICTS.

25 THE COURT: LET ME ASK YOU THIS, AND I DON'T  
26 KNOW WHAT THIS YOUNG LADY IS GOING TO SAY BECAUSE WE'RE PRETTY  
27 MUCH ALL IN THE SAME POSITION. NONE OF US HAVE HEARD HER AND  
28 KNOW WHAT SHE WILL SAY. BUT IF SHE WERE TO TAKE THE STAND AND  
29 SAY, I DON'T INTEND TO FOLLOW THE LAW, THAT I NEVER INTENDED TO  
30 FOLLOW THE LAW, YOU MEAN THAT WE WOULD HAVE TO WAIT AND GIVE  
31 HER AN OPPORTUNITY TO GO TO A DECISION BEFORE SHE COULD BE  
32 REMOVED FROM THE PANEL?

1 MR. FRANZEN: IF SHE SAID THAT WHEN SHE WAS  
2 RESPONDING TO THE VOIR DIRE QUESTIONS THAT SHE WAS BEING  
3 DELIBERATELY UNTRUTHFUL, WHICH IS YOUR HYPOTHETICAL TO ME, THEN  
4 PERHAPS WE MOVE ON TO A THREE-JUDGE PANEL IN AN ALTERNATE  
5 PERHAPS. MY RESEARCH HASN'T -- I HAVEN'T HAD THE TIME TO  
6 RESEARCH THAT SECOND STEP.

7 THE COURT: WELL, STATUTES OF THIS TYPE ARE STILL  
8 RATHER NEW, BUT --

9 MR. FRANZEN: BUT CLEARLY, BASED ON THE UNITED  
10 STATES SUPREME COURT DECISIONS AND FEDERAL DECISIONS ON  
11 FEDERAL HABEAS REVIEWING STATE DEATH PENALTIES, DEATH PENALTY  
12 STATUTES HAVE TO BE STRICTLY CONSTRUED. THEY HAVE TO BE  
13 STRICTLY CONSTRUED TO AVOID ARBITRARY AND CAPRICIOUS DEATH  
14 SENTENCES.

15 IF YOU STRICTLY CONSTRUE OUR STATUTE, WE  
16 HAVEN'T YET GOT TO THE POINT, EVEN IF SHE SAYS NOW I CANNOT  
17 CONSIDER A DEATH PENALTY, WE HAVE NOT YET GOT TO THE POSITION  
18 OF APPOINTING A THREE-JUDGE PANEL BECAUSE THE TRIGGERING  
19 MECHANISM HASN'T OCCURRED. THE PREDICATE ISN'T THE PANEL IS

20 UNABLE TO REACH A VERDICT. IF SHE PARTICIPATES AS A PANEL  
21 MEMBER, EVEN SAYING NOW, AFTER TWO WEEKS, THREE WEEKS, I DON'T  
22 BELIEVE I CAN RETURN A DEATH PENALTY, THE DEFENDANT IS  
23 ENTITLED TO HAVE HER PARTICIPATE IN THE PANEL.

24 THE COURT: ALL RIGHT.

25 THE INQUIRY HERE, GENTLEMEN, AS YOU'RE  
26 WELL AWARE, IS WHETHER OR NOT THIS JUROR CAN SIT AND TRY THIS  
27 CASE FAIRLY AND IMPARTIALLY, BOTH TO THE STATE AND TO THE  
28 DEFENSE. THAT IS GOING TO REQUIRE INQUIRY, IN VIEW OF WHAT HAS  
29 HAPPENED TO DATE.

30 I AM GOING TO, AFTER WE FINISH THESE  
31 PROCEEDINGS THEN, HAVE HER COME IN AND WE WILL MAKE INQUIRY OF  
32 HER AS TO WHO SHE SPOKE TO, WHAT SHE TOLD THEM, WHAT THEY TOLD

1 HER, WHO WAS SHE REFERRED TO, WHO REFERRED HER, AND ANYTHING  
2 ELSE THAT MAY BE PERTINENT TO THE PROCESS THAT SHE WENT THROUGH.  
3 AND THEN I INTEND TO INQUIRE OF HER IF SHE STILL BELIEVES THAT  
4 SHE COULD SIT AND BE A FAIR AND IMPARTIAL JUROR AND WHETHER HER  
5 ANSWER WITH REGARDS TO THE RANGE OF PENALTIES, WHICH SHE  
6 ANSWERED IN HER INITIAL INQUIRY, IS HER ANSWER THE SAME NOW AS  
7 IT WAS THEN. I BELIEVE THAT THAT WOULD PROBABLY BE AS FAR AS  
8 WE WOULD HAVE TO GO TO ASCERTAIN, ONE, WHAT OCCURRED AND, TWO,  
9 WHAT HER STATE OF MIND IS WITH REGARDS TO HER ABILITY TO BE  
10 FAIR AND IMPARTIAL.

11 NOW, DOES ANYONE FIND ANY PROBLEM WITH  
12 THAT APPROACH?

13 MR. HARMON: THE STATE HAS NO PROBLEM.

14 THE COURT: COUNSEL?

15 MR. FRANZEN: YOUR HONOR, IN HOUSEKEEPING, IS  
16 THE STATEMENT, THE UNSWORN STATEMENT, GOING TO BE FILED?

17 THE COURT: WHAT?

18 MR. FRANZEN: IS THE UNSWORN STATEMENT GOING TO  
19 BE FILED?

20 THE COURT: YES. IT WILL BE.

21 MR. FRANZEN: WILL WE HAVE THE OPPORTUNITY TO  
22 SPEAK WITH THE DECLARANT OUTSIDE THE COURT?

23 THE COURT: SHE IS RIGHT HERE AND YOU WILL HAVE  
24 AN OPPORTUNITY TO SPEAK TO HER AND THE OPPORTUNITY TO PUT HER  
25 ON THE STAND.

26 MR. FRANZEN: VERY WELL.

27 THE COURT: NOW, THE QUESTIONS THAT I INTEND TO  
28 ASK OF THE JUROR, THE MATERIAL POSITION OF THOSE QUESTIONS WERE  
29 PROVIDED TO ME BY THE DEFENSE. SO WE WILL MAKE INQUIRY, FIRST  
30 OF ALL, OF THE JURY COMMISSIONER AND THEN WE WILL MAKE INQUIRY  
31 OF HER.

32 COME FORWARD.

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THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

WHEREUPON,

LYNN KENNINGTON,

CALLED AS A WITNESS HEREIN BY THE DEFENSE, WAS FIRST DULY SWORN,  
EXAMINED AND TESTIFIED AS FOLLOWS:

THE COURT: YOU MAY PROCEED.

COUNSEL, FOR THE RECORD, SINCE WE WILL BE  
FILING THE STATEMENT, WE WILL MARK THIS STATEMENT AS EXHIBIT  
NUMBER 1 -- COURT'S EXHIBIT NUMBER 1.

MR. FRANZEN: YOUR HONOR, WE'VE HAD SEVERAL  
COURT EXHIBITS ALREADY.

THE COURT: ALL RIGHT. LET'S SEE.

DO YOU HAVE ANYTHING THERE THAT WOULD  
INDICATE OUR LIST OF COURT EXHIBITS?

THE CLERK: NO. WELL, YOUR HONOR, I DON'T KNOW.

MR. FRANZEN: YOUR HONOR, DO YOU RECALL THE  
LETTERS? THERE WERE TWO LETTERS.

THE COURT: WELL, THE PROBLEM IS THAT WE'RE  
CHANGING CLERKS AND -- WHERE IS MY CLERK?

THE CLERK: I BELIEVE SHE'S ON VACATION.

THE COURT: OH. ALL RIGHT.

WELL, WE WILL MARK THIS -- I KNOW WE HAVE  
A MARKING FOR COURT'S EXHIBITS SOMEWHERE. WE WILL MARK THIS  
COURT EXHIBIT NUMBER 5. I DON'T THINK WE WENT UP THAT HIGH.

YOU MAY PROCEED, COUNSEL.

MR. FRANZEN: THANK YOU, YOUR HONOR.

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DIRECT EXAMINATION

BY MR. FRANZEN:

Q IS IT MISS KENNINGTON?

A MRS.

Q MRS. KENNINGTON?

A YES.

Q WHEN DID YOU FIRST SEE, IF YOU DID SEE, THIS JUROR, MS. CAPASSO?

A WELL, THE FIRST TIME I SEEN HER WAS ON THE MORNING SHE CHECKED IN FOR JURY -- EXCUSE ME. I CHECKED HER IN AND SHE SIGNED THE PAY VOUCHER, AND I GAVE HER HER BADGE NUMBER.

Q WHEN DID YOU NEXT SEE HER?

A WELL, I SEEN HER FREQUENTLY DURING THE TWO WEEKS -- IT WAS TWO WEEKS, WASN'T IT, YOUR HONOR, THE TRIAL WAS GOING ON?

I SEEN HER FREQUENTLY. THE JURORS WERE IN AND OUT ON RECESS AND LUNCH HOURS. AND I SEEN HER QUITE FREQUENTLY DURING THE NEXT TWO WEEKS.

PROBABLY THE DATE YOU'RE WANTING ME TO TALK ABOUT IS LAST MONDAY. AND SHE DID APPEAR IN MY OFFICE LAST MONDAY, APRIL THE 25TH.

Q HAD YOU RECEIVED ANY INDICATION FROM ANY-ONE REGARDING --

A NO. ABSOLUTELY NOT.

Q (CONTINUING) -- SHE WAS COMING?

A I HAD GONE UP TO ORIENTATION AND WE COMPLETED THAT ABOUT 10:30. IT WAS SOMEWHERE BETWEEN 11:00 AND 11:30. I HAD JUST MADE THE FINAL ROUNDS OF THE COURTS AND I WENT INTO THE OFFICE AND A MEMBER OF MY STAFF SAID, THERE IS A JUROR FROM DEPARTMENT FIVE THAT HAS A PROBLEM THAT NEEDS TO TALK

1 TO YOU.

2 Q DO YOU REMEMBER WHO THE MEMBER OF YOUR  
3 STAFF WAS?

4 A SUSAN GRIFFIN.

5 Q DID SHE RELATE TO YOU WHAT THE PROBLEM WAS?

6 A NOT A WORD. MONDAY IS TOO BUSY. SHE JUST  
7 SAID, YOU HAVE SOMEONE WAITING FOR YOU, AND SHE DID STATE THAT  
8 IT WAS A JUROR FROM DEPARTMENT FIVE.

9 Q DID YOU EVER RECEIVE A COMMUNICATION FROM  
10 THE DISTRICT ATTORNEYS OFFICE?

11 A NO.

12 Q LET ME FINISH THE QUESTION.

13 A OH. SORRY.

14 Q DID YOU EVER RECEIVE A COMMUNICATION FROM  
15 THE DISTRICT ATTORNEYS OFFICE REGARDING THIS JUROR NOT TO  
16 DISCUSS THE CASE THAT SHE WAS SITTING AS A JUROR ON?

17 A I RECEIVED NO COMMUNICATION FROM THE  
18 DISTRICT ATTORNEYS OFFICE.

19 Q DID THE JUROR, MS. CAPASSO, EXPLAIN WHO  
20 HAD SENT HER, IF ANYONE, TO THE JURY COMMISSIONER?

21 A I WENT OUT INTO THE LOUNGE AND SHE WAS THE  
22 ONLY ONE SITTING THERE. I RECOGNIZED HER AND I SAID, GOOD  
23 MORNING. MAY I HELP YOU? AND I INVITED HER INTO MY OFFICE.

24 Q BUT DID SHE EVER EXPLAIN WHO SENT HER?

25 A YES. I -- SHE BASICALLY STARTED OUT WITH  
26 THAT SHE HAD TRIED TO -- TO GET IN TOUCH WITH DEPARTMENT FIVE,  
27 OR MEMBERS OF THE COURT, AND THAT SHE HAD GONE TO THE DISTRICT  
28 ATTORNEYS OFFICE. SHE DID NOT MENTION ANY NAMES TO ME AT ALL.  
29 BUT SHE SAID THAT IT HAD BEEN RECOMMENDED THAT SHE COME AND  
30 TALK TO ME, BUT SHE DID NOT GIVE ME ANY NAMES.

31 Q DID SHE GIVE ANY INDICATION SHE TALKED TO  
32 MORE THAN ONE PARTY?

1 A NO.  
2 Q AT THE DISTRICT ATTORNEYS OFFICE?  
3 A NO. I THINK TO THE BEST OF MY RECOLLECTION  
4 SHE SAID THE DISTRICT ATTORNEYS OFFICE.

5 Q AT THAT TIME WERE YOU AWARE THAT THE -- A  
6 GUILTY VERDICT HAD COME BACK ON THE TRIAL PRESENTLY BEFORE  
7 JUDGE MENDOZA INVOLVING THAT JURY?

8 A THAT'S REALLY HARD TO ANSWER. I KNEW THAT  
9 THEY WERE OUT DELIBERATING, AND I HAD CHECKED. I KNEW THAT THEY  
10 HAD BEEN OUT DELIBERATING, YES; BUT I, NO, I CAN'T HONESTLY SAY  
11 I KNEW. WE HAD NINE TRIALS THAT WEEK.

12 Q WHAT DID YOU ADVISE HER REGARDING THE  
13 PENALTY HEARING, IF ANYTHING?

14 A OKAY. WHEN SHE -- SHE CAME INTO SEE ME  
15 AND SHE SAID SHE HAD A PROBLEM, THE FIRST THING I DID WAS  
16 ADMONISH HER. I SAID, PLEASE DO NOT DISCUSS ANYTHING.

17 Q WHAT DID YOU --

18 A OKAY. I'M JUST TRYING TO TELL YOU, COUNSEL

19 Q I'M TRYING TO FOCUS IN ON ONE AREA, MA'AM.

20 WHAT DID YOU TELL HER, IF ANYTHING,  
21 ABOUT THE PENALTY PHASE?

22 A I DON'T REALLY UNDERSTAND YOUR QUESTION.

23 Q DID YOU TELL HER HOW THE PENALTY PHASE  
24 WORKS OR DID YOU TELL HER --

25 A OH, ABSOLUTELY NOT.

26 Q (CONTINUING) -- ADDITIONAL EVIDENCE WOULD  
27 COME IN?

28 A ABSOLUTE- -- WELL, I DID MAKE THE STATE-  
29 MENT -- OKAY. WE TALKED A LITTLE BIT ABOUT IT AND I SAID, I  
30 MADE THE STATEMENT TO HER, I SAID, ARE YOU AWARE OF THE FACT  
31 THAT THERE WILL BE OTHER EVIDENCE PRESENTED TO YOU? AND THAT'S  
32 ALL I SAID.



1 Q WHAT CAUSED YOU TO -- DID SHE HAVE A  
2 QUESTION THAT CAUSED THAT RESPONSE?

3 A BECAUSE SHE WAS SO CONCERNED AS NOT TO  
4 THE VERDICT. SHE SAID SHE TRULY BELIEVED THE VERDICT. BUT SHE  
5 HAD -- SHE HAD A PROBLEM AS TO THE PENALTY OR SENTENCE. YES,  
6 THAT'S WHAT CAUSED IT.

7 Q DID SHE APPEAR TO BE MORE -- WELL, STRIKE  
8 THAT.

9 DID YOU ADVISE HER THAT -- WELL, DID  
10 SHE ASK TO BE EXCUSED?

11 A SHE CAME IN. SHE SAID SHE HAD A PROBLEM.  
12 AND SHE SAID THAT -- AND I HAVE TO JUST TELL YOU WHAT SHE SAID  
13 -- SHE SAID, I HAVE A PROBLEM. SHE SAID, I HAVEN'T BEEN ABLE  
14 TO SLEEP ALL WEEKEND. SHE SAID, I HAVE NO PROBLEM WITH THE  
15 VERDICT. I BELIEVE THE MAN IS GUILTY. BUT I HAVE A PROBLEM  
16 WITH HAVING THIS MAN ON MY CONSCIENCE.

17 Q OKAY. LET ME ASK THE QUESTION AGAIN.

18 A OKAY.

19 Q DID SHE ASK TO BE EXCUSED?

20 A SHE NEVER CAME OUT AND ASKED TO BE EXCUSED,  
21 NO.

22 Q DID YOU ADVISE HER THAT IF SHE WAS EXCUSED  
23 IT MIGHT CAUSE A MISTRIAL?

24 A I TOLD HER VERY FRANKLY I DIDN'T KNOW WHAT  
25 WOULD HAPPEN. I SAID THAT WE HAD TO BE VERY CAREFUL THAT A  
26 MISTRIAL DIDN'T HAPPEN, THAT I DO NOT KNOW WHETHER A JUROR WHO  
27 HAD NOT PARTICIPATED IN THE DELIBERATION -- YOU KNOW, BECAUSE  
28 SHE MADE THE STATEMENT OF SOMETHING ABOUT THERE ARE TWO  
29 ALTERNATES -- AND I SAID, YES, I KNEW THAT, BUT, I SAID, I WAS  
30 NOT AWARE OF WHETHER OR NOT AN ALTERNATE COULD BE SUBSTITUTED  
31 AFTER THE VERDICT HAD BEEN DELIVERED.

32 Q DID YOU ADVISE HER OF THE INCONVENIENCE OF

1 A MISTRIAL?

2 A I DON'T THINK SO.

3 Q OR ANYTHING ABOUT --

4 A SHE SEEMED TO BE VERY UPSET AND SHE SAID  
5 REPEATEDLY, I DON'T WANT TO CAUSE A MISTRIAL.

6 Q WELL, DID YOU TELL HER WHAT A MISTRIAL WAS?

7 A HEAVENS NO.

8 Q YOU TOLD HER YOU WANTED TO AVOID A MISTRIAL  
9 BUT DIDN'T EXPLAIN WHAT IT WAS?

10 A NO, I DIDN'T.

11 Q SHE SAID SHE WANTED TO AVOID A MISTRIAL?

12 A THAT'S RIGHT.

13 Q SHE APPEARED TO HAVE SOME CONCEPT OF WHAT  
14 A MISTRIAL WAS?

15 A YES.

16 Q DID YOU ADVISE HER, WHEN YOU TOLD HER THAT  
17 ADDITIONAL EVIDENCE WOULD BE PRESENTED AT THE PENALTY HEARING,  
18 DID YOU ADVISE HER AS TO WHAT KIND OF ADDITIONAL EVIDENCE?

19 A NO.

20 Q WHY DID YOU FEEL IT NECESSARY TO EVEN MAKE  
21 THAT STATEMENT THAT ADDITIONAL EVIDENCE WOULD BE PRESENTED AT  
22 THE PENALTY HEARING?

23 A I GUESS IT WAS HER CONCERN THAT SHE  
24 STRONGLY BELIEVED THE MAN WAS GUILTY BUT SHE SEEMED TO HAVE A  
25 PROBLEM WITH THE PENALTY. AND I WAS JUST TRYING TO REASSURE  
26 HER THAT, THAT, YOU KNOW, IT WOULD BE A UNANIMOUS VOTE AND THAT  
27 THERE WOULD BE OTHER FACTS BROUGHT OUT.

28 Q BUT IT WOULD BE EASIER TO RETURN A VERDICT  
29 --

30 A I DIDN'T SAY "EASIER".

31 Q I'M TRYING TO INTERPRET YOUR -- YOUR  
32 ANSWER.

1 A OKAY.

2 Q WHEN YOU WANTED TO REASSURE HER THAT SHE  
3 HAD NO PROBLEM WITH THE GUILTY PHASE, THAT SHE HAD PROBLEMS  
4 WITH THE PENALTY PHASE, YOU WISHED TO REASSURE HER -- REASSUR-  
5 ANCE MEANS, I THINK FROM YOUR CONTENT -- CONTENT OF HOW YOU ARE  
6 EXPLAINING THIS -- THAT IT WOULD BE AN EASIER DECISION TO MAKE  
7 IN THAT ADDITIONAL EVIDENCE WAS GOING TO BE PRESENTED?

8 A I DON'T THINK THAT WAS MY INTENT AT ALL.  
9 I DON'T THINK IT IS EASY. I DON'T THAT EASY WAS MY INTENT AT  
10 ALL.

11 Q WELL, HOW LONG DID THE JUROR STAY WITH  
12 YOU?

13 A SHE WAS PROBABLY IN MY OFFICE LESS THAN  
14 FIVE OR TEN MINUTES, BECAUSE I TOLD HER I HAD NO AUTHORITY TO  
15 TALK TO HER. THE ONLY THING I COULD DO WAS TO GET THE INFORMA-  
16 TION TO JUDGE MENDOZA AS FAST AS I COULD AND I WOULD FOLLOW HIS  
17 DIRECTIONS.

18 Q WHEN SHE TOLD YOU THAT SHE WAS HAVING  
19 TROUBLE WITH AN ASPECT OF THIS CASE, DID YOU AT THAT TIME TELL  
20 HER THAT SHE COULD NOT TALK WITH YOU?

21 A I TOLD HER NOT TO TALK ABOUT ANY FACTS OF  
22 THE CASE.

23 SHE SAID, I HAVE TO TALK TO SOMEONE.  
24 THE LADY WAS ALMOST IN TEARS.

25 Q LET ME -- LET ME AGAIN ASK THE QUESTIONS.

26 A OKAY. I'M SORRY.

27 Q MA'AM, WHEN SHE SAID THAT SHE WAS HAVING  
28 PROBLEMS WITH THE CASE DID YOU TELL HER THAT YOU COULD NOT TALK  
29 TO HER ABOUT THE CASE?

30 A YES.

31 Q WHEN SHE TOLD YOU THAT SHE WAS HAVING  
32 PROBLEMS WITH THE PENALTY ASPECT OF THE CASE YOU WENT ON TO

1 TELL HER THAT THERE WOULD BE ADDITIONAL EVIDENCE?

2 A YES.

3 Q AND THAT IT WOULD TAKE A UNANIMOUS VOTE?

4 A YES. I SAID THAT.

5 Q AND THAT YOU WISHED TO AVOID A MISTRIAL?

6 A COUNSEL, VERY HONESTLY I -- I DON'T KNOW

7 IF THAT IS THE RIGHT CONTEXT, BUT THOSE WORDS WERE STATED, YES.

8 Q AFTER THE CONVERSATION WITH JUROR

9 CAPASSO --

10 A UH-HUH.

11 Q (CONTINUING) -- WHAT DID YOU DO?

12 A I IMMEDIATELY CALLED DEPARTMENT FIVE. I

13 HAD NO ANSWER AND SO I CALLED COURT ADMINISTRATION. I ASKED

14 THEM, YOU KNOW, FOR A NUMBER.

15 I WAS TOLD -- I CALLED THE CLERK'S

16 OFFICE, FOR ROBERTA. SHE WAS ON VACATION. FINALLY I CALLED

17 DEPARTMENT SIX, AND I SAID, IF YOU SEE THE LAW CLERK FROM

18 DEPARTMENT FIVE, WILL YOU HAVE HIM CALL ME. HE CALLED ME ABOUT

19 1:30 THAT DAY.

20 Q DID YOU ATTEMPT TO CONTACT THE CHIEF JUDGE,

21 STEVE HUFFAKER?

22 A NO.

23 Q DID YOU ATTEMPT TO CONTACT ANY OTHER JUDGE

24 FOR GUIDANCE?

25 A NO.

26 Q AFTER YOU SPOKE WITH JUDGE MENDOZA'S LAW

27 CLERK, WHAT DID YOU DO?

28 A WELL, FOR THE REST OF THE DAY NOTHING

29 ABOUT THAT CASE.

30 THEN THE NEXT MORNING I TALKED TO

31 AGAIN HIS LAW CLERK AND WE HAD NOT BEEN ABLE TO GET THE INFOR-

32 MATION TO JUDGE MENDOZA.

1 THE ONLY THING I DID THEN WAS TO CALL  
2 MARILYN AND TELL HER THAT I HAD BEEN UNABLE TO GET ANY FURTHER  
3 DIRECTIONS.

4 AND AT THAT TIME WHEN I CALLED, SHE  
5 SAID, OH, I FEEL MUCH BETTER. I'VE BEEN ABLE TO SLEEP.

6 I SAID, WELL, WE WILL STILL FOLLOW  
7 STRICT ORDERS OF JUDGE MENDOZA. AND I TOLD HER SHE HAD TO  
8 APPEAR BY MONDAY. THAT'S IT.

9 Q YOU SAID, STILL FOLLOW THE STRICT ORDERS  
10 OF JUDGE MENDOZA?

11 A BASICALLY I WANTED HER TO FOLLOW THE  
12 ADMONISHMENT OF THE COURT.

13 Q WAIT A MINUTE. WAIT A MINUTE. WAIT A  
14 MINUTE.

15 HAD -- YOU GOT TO WAIT UNTIL I FINISH  
16 THE QUESTION, PLEASE.

17 A OKAY.

18 Q YOU SAID, FOLLOW THE STRICT ORDERS OF  
19 JUDGE MENDOZA. HAD YOU, BETWEEN THE INTERVAL OF SEEING HER IN  
20 YOUR JURY COMMISSIONER'S CHAMBERS AND THAT PHONE CALL, BEEN IN  
21 COMMUNICATION WITH JUDGE MENDOZA REGARDING INSTRUCTIONS?

22 A I -- I PERSONALLY? NO.

23 Q YOU SAY YOU PERSONALLY. DURING THAT TIME  
24 INTERVAL HAD YOU RECEIVED INSTRUCTIONS FROM ANOTHER PARTY  
25 RELATING JUDGE MENDOZA'S INSTRUCTIONS?

26 A NO.

27 Q IN YOUR CONVERSATIONS WITH JUROR CAPASSO,  
28 DID SHE EVER MENTION WHETHER SHE HAD A CONVERSATION OR DISCUS-  
29 SION REGARDING THE CASE WITH ANYONE ELSE?

30 A NO.

31 Q ONE OF THE THINGS YOU TOLD HER WHEN SHE  
32 EXPLAINED SHE WAS HAVING DIFFICULTY, WAS THAT AT THE PENALTY

1 HEARING THE STATE WOULD PRESENT OTHER FACTS NOT BROUGHT OUT  
2 DURING THE TRIAL?

3 A YES. I THINK I STATED THAT. VERY HONESTLY,  
4 YES, I DID.

5 Q DID YOU SAY ANYTHING ELSE REGARDING THE  
6 PRESENTATION OF EVIDENCE AT THE PENALTY PHASE?

7 A NO. NO. IN FACT, I DON'T EVEN KNOW IF I  
8 SAID "STATE". I MIGHT -- I WANTED HER TO KNOW THAT THERE WOULD  
9 BE OTHER EVIDENCE BROUGHT OUT.

10 Q IN YOUR STATEMENT OF APRIL 30TH -- DO YOU  
11 HAVE A COPY OF YOUR STATEMENT?

12 A NO, I DON'T.

13 Q WOULD YOU LIKE TO SEE IT?

14 A THANK YOU, YOUR HONOR.

15 Q THE PAGES ARE UNNUMBERED, BUT ON PAGE TWO  
16 AT 15 THROUGH 18 --

17 A UH-HUH.

18 Q (CONTINUING) -- YOUR EXPLANATION TO HER  
19 WAS THE STATE WOULD PRESENT OTHER FACTS; WOULD THAT BE CORRECT?

20 A WELL, WHEN YOU BROUGHT THE QUESTION UP I  
21 HAVE TO -- VERY HONESTLY, I DON'T KNOW IF I SAID "STATE" OR  
22 "COUNSEL".

23 Q DID YOU EVER SEEK TO DIRECT JUROR CAPASSO  
24 TO ANY OTHER JUDGE IN THE ABSENCE OF JUDGE MENDOZA?

25 A NO, SIR. I DID NOT.

26 MR. FRANZEN: NOTHING FURTHER, YOUR HONOR.

27 THE COURT: THE STATE.

28 MR. HARMON: VERY BRIEFLY, YOUR HONOR.

29 MAY I APPROACH THE WITNESS, YOUR HONOR?

30 THE COURT: YOU MAY.

31 ..

32 ..

CROSS EXAMINATION

BY MR. HARMON:

Q IS IT LYNN KENNINGTON, FOR THE RECORD?

A YES.

Q MRS. KENNINGTON, I AM SHOWING YOU NOW WHAT HAS BEEN PREVIOUSLY MARKED AS THE COURT'S EXHIBIT NUMBER 5.

A UH-HUH.

Q IS THAT A STATEMENT PREPARED BY YOU AND SIGNED BY YOU?

A YES, IT IS.

Q DOES THAT SET FORTH YOUR BEST RECOLLECTION OF WHAT OCCURRED --

A YES.

Q (CONTINUING) -- AT THE TIME YOU HAD THE DISCUSSION IN QUESTION WITH THE JUROR ON APRIL THE 25TH, 1983?

A YES, IT DOES.

MR. HARMON: THANK YOU.

WE HAVE NOTHING FURTHER, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. FRANZEN:

Q MA'AM, WHAT CAUSED YOU TO MAKE THE STATEMENT --

THE COURT: COUNSEL, DO YOU WANT TO HAND THAT BACK TO ME.

MR. HARMON: I'M SORRY. THAT'S MY COPY.

THE WITNESS: ON FRIDAY AFTERNOON I RECEIVED A PHONE CALL AT HOME FROM JUDGE MENDOZA'S LAW CLERK STATING THAT

1 HE HAD DISCUSSED THE MATTER WITH JUDGE MENDOZA BY PHONE, THAT  
2 JUDGE MENDOZA WANTED MY STATEMENT ON HIS DESK BY SUNDAY MORNING.  
3 I CAME TO THE COURTHOUSE ON SATURDAY AND PREPARED IT.  
4

5 BY MR. FRANZEN:

6  
7 Q SO APRIL 30TH WOULD BE THE SATURDAY  
8 FOLLOWING THE PHONE CALL?

9 A YES, SIR.

10 MR. FRANZEN: OKAY. I HAVE NO FURTHER QUESTIONS.

11 MR. HARMON: NOTHING FURTHER, YOUR HONOR.

12 THE COURT: YOU'RE EXCUSED.

13 THE WITNESS: THANK YOU, JUDGE.

14 (WHEREUPON, THE WITNESS WAS  
15 EXCUSED.)

16 THE COURT: ANY FURTHER WITNESSES?

17 MR. FRANZEN: WE HAD INITIALLY WISHED THE  
18 OPPORTUNITY TO QUESTION THE DISTRICT ATTORNEYS INVOLVED. IT  
19 WAS IF THE COURT IS NOT INCLINED TO DO THAT.

20 THE COURT: NO. THAT ISN'T WHAT I SAID AT ALL,  
21 COUNSEL. I SAID THAT IF YOU HAVE ANY QUESTIONS YOU MAY DIRECT  
22 THEM TO ME AND THEN I WILL DIRECT THEM TO THE DISTRICT ATTORNEY.

23 MR. FRANZEN: THIS WOULD BE A QUESTION FOR MR.  
24 HARMON, YOUR HONOR: KNOWING THAT MS. CAPASSO --

25 THE COURT: COUNSEL, WHY DON'T YOU JUST HAND HIM  
26 THE QUESTIONS AND THEN LET HIM READ THEM AND LET HIM RESPOND.  
27 THAT WOULD BE JUST AS EASY A WAY I KNOW.

28 MR. FRANZEN: VERY WELL, YOUR HONOR.

29 COULD THIS BE MARKED AS AN EXHIBIT, YOUR  
30 HONOR?

31 THE COURT: WHY DON'T YOU JUST GIVE IT TO HIM  
32 AND HE CAN STATE THE QUESTIONS AND GIVE THE ANSWERS.



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MR. HARMON: THANK YOU.

YOUR HONOR, FOR THE RECORD, THE QUESTION  
BY MR. FRANZEN IS:

SIR, KNOWING MS. CAPASSO  
WAS A JUROR AND UNDER THE  
COURT'S ADMONITION NOT TO  
DISCUSS THE CASE, WHY DID YOU  
SEND HER TO THE JURY COMMISSION?

I'VE ALREADY TRIED TO ANSWER THAT  
QUESTION... I'LL REPEAT IT. SHE SAID SHE HAD A PROBLEM. SHE  
SAID THAT IT COULDN'T WAIT UNTIL NEXT MONDAY. SHE INDICATED SHE  
TRIED TO GET AHOLD OF THE COURT PERSONNEL AND NO ONE WAS AVAIL-  
ABLE.

I WASN'T REALLY PREPARED FOR THIS. AS  
I THINK BACK ABOUT IT, I WAS TRYING TO GET READY FOR A 9:00  
O'CLOCK CALENDAR, I WAS ATTEMPTING TO FINALIZE ARRANGEMENTS ON  
OUT OF STATE WITNESSES FOR THE PENALTY HEARING IN THIS CASE,  
AND I ALSO HAD IN MIND FINISHING SUBPOENAS ON THE PATRICK  
LIZOTTE MURDER CASE, WHICH IS SET TO START NEXT WEEK. SHE

MATERIALIZED. THE FIRST THOUGHT IN MY MIND WAS, I HAD TO SEND  
HER SOMEWHERE. SO I SENT HER TO THE JURY COMMISSIONER'S OFFICE.

THE COURT: IS THAT THE ONLY QUESTION THAT YOU  
HAD?

MR. FRANZEN: NO, YOUR HONOR. I'M WRITING ONE  
MORE, PLEASE.

THE COURT: YOU'RE WRITING ONE MORE?

IS THIS GOING TO BE YOUR LAST QUESTION?

MR. FRANZEN: DEPENDING ON THE RESPONSE, YOUR  
HONOR.

THE COURT: WELL, WHY DON'T YOU JUST STATE IT,  
BECAUSE APPARENTLY I THOUGHT YOU HAD MORE THAN ONE QUESTION.  
SO JUST STATE YOUR QUESTION AND WE WILL HAVE HIM RESPOND.

1 MR. FRANZEN: SIR, KNOWING THE JUROR STATED SHE  
2 HAD A PROBLEM, DID YOU ADMONISH HER NOT TO DISCUSS THE CASE  
3 WITH THE JURY COMMISSION?

4 MR. HARMON: I'VE ALREADY TRIED TO ANSWER THAT  
5 QUESTION. I'D BE GLAD TO.

6 MY RECOLLECTION OF THE CONVERSATION, I  
7 TOLD HER I COULDN'T TALK WITH HER AND NO ONE IN THE DISTRICT  
8 ATTORNEYS OFFICE COULD TALK TO HER. SHE WAS STILL UNDER THE  
9 COURT'S ADMONISHMENT.

10 I TOLD HER THAT ALL I COULD DO WAS  
11 SEND HER TO THE JURY COMMISSION. THERE WAS NO FURTHER COMMENT.

12 MR. FRANZEN: I HAVE NO FURTHER QUESTIONS, YOUR  
13 HONOR.

14 THE COURT: ALL RIGHT. ANY OTHER WITNESSES  
15 BEFORE WE BRING THE JUROR IN?

16 MR. FRANZEN: NO, SIR.

17 THE COURT: WE'LL TAKE ABOUT A TEN MINUTE  
18 RECESS AND THEN HAVE THE JUROR SITTING IN HER REGULAR SPOT,  
19 JUST THE ONE JUROR, AND THAT IS JUROR NUMBER TEN, IS IT?

20 WE'LL BE IN RECESS FOR ABOUT TEN MINUTES.  
21 (WHEREUPON, FROM 3:00 P.M.  
22 UNTIL 3:20 P.M., A RECESS WAS  
23 HAD IN THE PROCEEDINGS, AT  
24 THE CONCLUSION OF WHICH THE  
25 FOLLOWING WAS HAD OUTSIDE THE  
26 PRESENCE OF THE JURY:)

27 THE COURT: LET THE RECORD REFLECT THE PRESENCE  
28 OF COUNSEL AND MS. MARILYN CAPASSO.

29 JUROR NUMBER TEN, MS. CAPASSO: CAPASSO.

30 THE COURT: MS. CAPASSO, BECAUSE OF YOUR INQUIRY  
31 APPARENTLY ON THE 25TH, THE INQUIRY TO THE COMMISSIONER AS WELL  
32 AS TO OTHER PEOPLE, A QUESTION HAS ARISEN AS TO WHO YOU SPOKE

1 TO, WHAT YOU TOLD THEM, WHO SENT YOU TO ANY OF THE OFFICES THAT  
2 YOU WENT TO, WHAT YOU SAID AT THOSE OFFICES, AND WHAT OCCURRED  
3 GENERALLY.

4 I MIGHT JUST POINT OUT TO YOU THAT WE ARE  
5 NOT INQUIRING AS TO WHAT YOUR PRESENT STATE OF MIND IS AT THIS  
6 POINT. WE MERELY WANT TO FIND OUT WHAT OCCURRED IN YOUR OWN  
7 LANGUAGE. AND IF YOU COULD JUST KIND OF TELL US WHAT DID  
8 OCCUR.

9 JUROR NUMBER TEN, MS. CAPASSO: OKAY. I CAME TO  
10 SEE YOU. AND THE COURT CLERK, I DON'T KNOW HIS NAME, INFORMED  
11 ME THAT YOU WERE OUT OF TOWN AND WOULDN'T BE BACK UNTIL THE  
12 NEXT WEEK, AND SUGGESTED THAT --

13 THE COURT: THE DATE SET FOR THE HEARING?

14 JUROR NUMBER TEN, MS. CAPASSO: RIGHT. RIGHT.

15 THE COURT: OKAY.

16 JUROR NUMBER TEN, MS. CAPASSO: AND SUGGESTED  
17 THAT MAYBE I TALK TO THE DISTRICT ATTORNEY.

18 I WENT UP TO THEIR OFFICE AND MR. HARMON  
19 SAID THAT, YOU KNOW --

20 THE COURT: WHO DID YOU TALK TO IN MY OFFICE?

21 JUROR NUMBER TEN, MS. CAPASSO: EXCUSE ME.

22 THE COURT: WHO DID YOU TALK TO IN MY OFFICE?

23 JUROR NUMBER TEN, MS. CAPASSO: NO. NO. NOT  
24 YOUR OFFICE. I WENT UP TO THE DISTRICT ATTORNEYS OFFICE.

25 I FIRST TALKED TO A COURT CLERK. OKAY.  
26 I DON'T KNOW WHAT THE GENTLEMAN'S NAME WAS.

27 THE COURT: A COURT CLERK. WHERE WAS THIS AT?

28 JUROR NUMBER TEN, MS. CAPASSO: RIGHT OUTSIDE  
29 THE DOOR HERE.

30 THE COURT: AND DO YOU KNOW WHOSE CLERK IT WAS  
31 OR WHO THE INDIVIDUAL WAS?

32 JUROR NUMBER TEN, MS. CAPASSO: NO. I -- I DON'T

1 KNOW WHO HE WAS.

2 THE COURT: THIS ROOM WAS CLOSED, WAS IT NOT?

3 JUROR NUMBER TEN, MS. CAPASSO: YES.

4 THE COURT: SO YOU DON'T KNOW WHO THE INDIVIDUAL

5 WAS THAT THEN TALKED TO YOU ABOUT THIS MATTER?

6 JUROR NUMBER TEN, MS. CAPASSO: NO. NO.

7 THE COURT: THEN WHAT DID YOU DO?

8 JUROR NUMBER TEN, MS. CAPASSO: THEN I WENT UP

9 TO THE DISTRICT ATTORNEYS OFFICE AND I SPOKE WITH THIS SECRETARY

10 SHE SAID, YOU KNOW, TO GO IN AND SEE MR. HARMON.

11 AND I WENT IN THERE AND HE TOLD ME THAT I

12 COULD NOT, YOU KNOW, SPEAK WITH HIM BECAUSE I WAS ADMONISHED

13 ABOUT IT, AND SUGGESTED THAT I WOULD COMMUNICATE WITH HIM

14 THROUGH MS. KENNINGTON.

15 I THEN WENT DOWN TO HER OFFICE AND

16 SPOKE TO HER AND TOLD HER THE PROBLEM THAT I WAS HAVING. AND

17 THAT WAS --

18 THE COURT: WHAT SPECIFICALLY DID YOU TELL HER?

19 JUROR NUMBER TEN, MS. CAPASSO: LET ME THINK.

20 I TOLD HER THAT I WAS JUST HAVING A HARD

21 TIME DEALING WITH THE SENTENCING.

22 THE COURT: WHAT DID SHE RESPOND TO YOU?

23 JUROR NUMBER TEN, MS. CAPASSO: OH, GOD. I

24 DON'T EVEN REMEMBER.

25 SHE TOLD ME THAT, YOU KNOW, OTHER EVIDENCE

26 WOULD BE GIVEN, YOU KNOW, TRIED TO REASSURE ME NOT TO FEEL BAD

27 ABOUT IT, AND THAT WAS ABOUT IT. SHE SAID THAT SHE WOULD TRY

28 AND GET IN TOUCH WITH YOU OR TRY AND CONTACT SOMEONE ELSE AND

29 GET BACK TO ME, AND THAT WAS IT.

30 THE COURT: AT ALL TIMES YOU KNEW THAT THIS

31 HEARING HAD BEEN SET FOR 10:00 O'CLOCK THIS MORNING?

32 JUROR NUMBER TEN, MS. CAPASSO: YES.

1 THE COURT: CORRECT?

2 JUROR NUMBER TEN, MS. CAPASSO: YES.

3 THE COURT: AND YOU WERE AWARE THAT ANY FURTHER

4 PROCEEDINGS -- OFFICIAL PROCEEDINGS WOULD BE CONDUCTED AT THAT

5 TIME?

6 JUROR NUMBER TEN, MS. CAPASSO: YEAH. BY TALK-

7 ING TO YOU I THOUGHT THAT I COULD BE EXCUSED BEFORE THE HEARING

8 WAS SET. THAT'S INITIALLY WHY I CAME TO SPEAK TO YOU.

9 THE COURT: ALL RIGHT.

10 NOW, YOU HAVE NEVER INDICATED YOUR FEELINGS

11 ABOUT THIS CASE, EXCEPT ABOUT YOUR OWN PERSONAL FEELINGS, TO

12 ANYONE, DID YOU?

13 JUROR NUMBER TEN, MS. CAPASSO: NO.

14 THE COURT: YOU REMEMBER THE QUESTIONS THAT WERE

15 PROPOUNDED TO YOU BY BOTH THE STATE AND THE DEFENDANT WHEN YOU

16 FIRST STARTED THIS TRIAL?

17 JUROR NUMBER TEN, MS. CAPASSO: YES.

18 THE COURT: AND IS YOUR FEELING AS EXPRESSED

19 THEN THE SAME NOW AS IT WAS THEN?

20 JUROR NUMBER TEN, MS. CAPASSO: WHOA.

21 THE COURT: WOULD YOUR ANSWERS BE THE SAME OR

22 ARE THEY THE SAME?

23 JUROR NUMBER TEN, MS. CAPASSO: THAT'S HARD TO

24 ANSWER.

25 I GUESS THE ANSWERS TO THE QUESTION WOULD

26 BE THE SAME, BUT I'M HAVING A HARD TIME BEING THE ONE TO PUSH

27 THE BUTTON.

28 THE COURT: ALL RIGHT.

29 COUNSEL, APPROACH THE BENCH.

30 ..

31 ..

32 ..

1 (WHEREUPON, SIDE BAR CONFERENCE  
2 WAS HELD AT THE BENCH; NOT  
3 REPORTED. AT THE CONCLUSION OF  
4 WHICH THE FOLLOWING WAS HAD:)

5 THE COURT: YOU HEARD THE THREE POSSIBLE PUNISH-  
6 MENTS FOR MURDER IN THE FIRST DEGREE, DID YOU NOT?

7 JUROR NUMBER TEN, MS. CAPASSO: UH-HUH.

8 THE COURT: YOU WILL HAVE TO SPEAK UP.

9 JUROR NUMBER TEN, MS. CAPASSO: YES.

10 THE COURT: CAN YOU CONSIDER THEM EQUALLY AT  
11 THIS TIME?

12 JUROR NUMBER TEN, MS. CAPASSO: I CAN CONSIDER  
13 THEM BUT I DON'T PARTICULARLY WANT TO IMPOSE THEM.

14 THE COURT: YOUR ANSWER TO THAT QUESTION WOULD  
15 BE --

16 JUROR NUMBER TEN, MS. CAPASSO: WHOA (INDICATING).  
17 YES.

18 THE COURT: IS THERE ANYTHING IN THE DISCUSSION  
19 THAT YOU HAD WITH THE JURY COMMISSIONER THAT WOULD CAUSE YOU TO  
20 CHANGE YOUR FEELING WITH REGARD TO THOSE QUESTIONS THAT I'VE  
21 PREVIOUSLY ASKED?

22 JUROR NUMBER TEN, MS. CAPASSO: IN REGARDS TO  
23 THOSE QUESTIONS?

24 THE COURT: YES.

25 JUROR NUMBER TEN, MS. CAPASSO: NO.

26 THE COURT: OR IN REGARDS TO ANY QUESTION?

27 JUROR NUMBER TEN, MS. CAPASSO: NO.

28 THE COURT: ALL RIGHT.

29 THE STATE?

30 MR. HARMON: NOTHING.

31 THE COURT: DEFENSE?

32 MR. FRANZEN: NOTHING, YOUR HONOR.

1 THE COURT: ALL RIGHT. YOU ARE EXCUSED. JUST  
2 GO OUTSIDE AND WAIT OUT THERE.

3 JUROR NUMBER TEN, MS. CAPASSO: OKAY.

4 (WHEREUPON, THE JUROR LEFT THE  
5 COURTROOM AND THE FOLLOWING  
6 PROCEEDINGS WERE HAD:)

7 THE COURT: COUNSEL, I BELIEVE IT'S YOUR MOTION,  
8 COUNSEL. ANYTHING FURTHER? ANY ADDITIONAL WITNESSES?

9 MR. FRANZEN: NO, YOUR HONOR, NOT TO MY KNOW-  
10 LEDGE.

11 THE COURT: THE STATE?

12 MR. HARMON: YOUR HONOR, WE HAVE NO ADDITIONAL  
13 WITNESSES TO CALL.

14 I PERSONALLY THINK, GIVEN THE JUROR'S  
15 RESPONSE TO THE COURT'S QUESTIONS, SHE DOESN'T WANT TO BE  
16 WHERE SHE IS, BUT IF WE WERE TO BRING THE OTHER ELEVEN IN THEY  
17 PROBABLY WOULDN'T WANT TO BE THERE EITHER.

18 I THINK WE SHOULD GO FORWARD AND ALLOW  
19 HER TO REMAIN SEATED. I DON'T THINK SHE'S STATED GROUNDS FOR  
20 DISQUALIFICATION.

21 MR. FRANZEN: YOUR HONOR, THE -- OUR POSITION  
22 IS PREVIOUSLY STATED, THAT DUE TO BEING SENT TO THE JURY  
23 COMMISSIONER'S AND, AS WAS EXPLAINED BY HER, SHE WAS TO COMMUN-  
24 ICATE TO MR. HARMON THROUGH THE JURY COMMISSIONER. I THINK THE  
25 JUROR HAS BEEN TAINTED AND WE WOULD RESPECTFULLY URGE THE COURT  
26 TO BAR THE STATE FROM SEEKING THE DEATH PENALTY UNDER A STRICT  
27 APPLICATION AS STATED IN STATE V. LEWIS AND THE OTHER ADDITIONAL  
28 STATUTE.

29 THE COURT: THE QUESTION BEFORE THE COURT IS  
30 REALLY OUT OF FAIRNESS: CAN THIS JUROR BE FAIR AND IMPARTIAL?

31 SHE, BY HER ANSWERS, CONTINUES TO MAINTAIN  
32 THAT SHE CAN. SHE SEEMS TO BE FROM THE EVIDENCE HERE PROBABLY

1 MORE INCLINED TOWARDS THE DEFENSE THAN THE STATE, AS SHE HAS  
2 SOME PROBLEM IN IMPOSING THE DEATH PENALTY, OR IMPOSING A  
3 PENALTY WITHOUT EVER STATING EXACTLY WHAT THAT PENALTY IS.

4 IT WOULD APPEAR THAT SHE WANTED TO  
5 GET OFF THIS JURY FROM HER OWN STATEMENTS, AND SHE HAS BEEN  
6 UNABLE TO DO SO.

7 IT WOULD FURTHER APPEAR TO THIS COURT  
8 THAT IF SHE WERE DISQUALIFIED, THAT NEITHER OF THE ALTERNATIVE  
9 -- NEITHER ALTERNATE JUROR COULD SIT IN THE CASE. HAVING CON-  
10 sidered THAT PROBLEM SINCE IT WAS RAISED THIS MORNING, IT  
11 APPEARS TO ME THAT THE ONLY COMPETENT JURORS WOULD BE THOSE WHO  
12 ACTUALLY HEARD THE TESTIMONY OF THE CASE IN CHIEF. THE  
13 ALTERNATE JURORS COULD NOT SIT IN THE PENALTY PHASE FOR THE  
14 OBVIOUS REASON THAT THERE WOULD BE EVIDENCE THAT WAS BROUGHT OUT  
15 IN THAT PARTICULAR PHASE AND THEN DISCUSSED BY THE JURORS.  
16 THERE THE ALTERNATES WILL BE LACKING IN THAT DISCUSSION AND IN  
17 THAT CONSIDERATION. AND IN THAT DISCUSSION AND CONSIDERATION  
18 THE JURORS ARRIVE AT THE PENALTY OF MURDER IN THE FIRST DEGREE.  
19 IT WOULD BE SHEER SPECULATION FOR US NOW TO SAY THAT THESE

20 ALTERNATE JURORS WOULD HAVE ARRIVED AT THAT SAME DECISION OR  
21 CONCLUSION.

22 THAT BEING THE CASE, IT WOULD THEREFORE  
23 BE BASICALLY UNFAIR TO THE PARTIES TO HAVE SOMEONE SIT WHO HAS  
24 NEVER DISCUSSED OR CONSIDERED THE GUILT OR INNOCENCE OF THE  
25 DEFENDANT. IT COULD VERY EASILY HAVE BEEN THAT THESE JURORS,  
26 OR THESE ALTERNATES, MAY ARRIVE AT A DIFFERENT VERDICT. THEY  
27 MAY HAVE ARRIVED AT A VERDICT ENTIRELY DIFFERENT, BUT STILL A  
28 CONVICTION OF THE DEFENDANT. AND SINCE THEY HAVE NOT CONSIDERED  
29 THE GUILT OR THE INNOCENCE PHASE, IT IS NOW NOT -- THEY ARE NOT  
30 COMPETENT NOW TO SIT IN THE PENALTY PHASE.

31 THE QUESTION STILL RESOLVES ITSELF  
32 DOWN TO A CONSIDERATION OF WHETHER OR NOT THIS JUROR CAN INDEED



1 SIT. I HAVE HEARD NOTHING AT THIS POINT THAT WOULD CAUSE ME TO  
2 DISQUALIFY HER. I THINK THAT THE DISCUSSION THAT SHE HAS HAD  
3 DID NOT IN ANYWAY TAINT HER ABILITY TO SIT IN THIS CASE FOR  
4 FAIRNESS AND IMPARTIALITY.

5 I MAKE THE OBSERVATION THAT SHE WASN'T  
6 THE ONLY ONE WHO WAS CRYING WHEN THE VERDICT CAME IN. IF YOU  
7 REMEMBER, THERE WERE THREE OTHER JURORS -- TWO OTHER JURORS WHO  
8 WERE CRYING AT THE TIME THAT THE VERDICT WAS RENDERED IN THE  
9 PREVIOUS PROCEEDING. TWO OF THOSE JURORS WERE SITTING ON THE  
10 TOP ROW. SO THIS WAS -- SHE WASN'T THE ONLY ONE THAT WAS  
11 EXPRESSING SOME EMOTION WITH THE VERDICT. SHE'S BEEN THE ONLY  
12 ONE WHO APPARENTLY HAS WANTED TO GET OFF AND AT LEAST TAKEN SOME  
13 STEPS TOWARDS THAT. BUT THERE IS NOTHING IN THIS RECORD THAT I  
14 CAN FIND THAT WOULD WARRANT THAT REMOVAL.

15 THE STATE, I BELIEVE, HAS TAKEN THE  
16 POSITION THAT THERE IS NO BASIS FOR REMOVING HER. I CAN'T FIND  
17 ANY. YOUR MOTION IS DENIED.

18 LET'S NOW CALL THE JURY OR ARE WE  
19 READY FOR THAT? DO YOU HAVE ANY OTHER MOTIONS?

20 MR. FRANZEN: THERE IS ONE OTHER MOTION, YOUR  
21 HONOR.

22 THE COURT: ALL RIGHT.

23 MR. FRANZEN: REGARDING THE AGGRAVATING CIRCUM-  
24 STANCES LISTED IN THE STATE'S NOTICE AND SUPPLEMENT.

25 THE COURT: COUNSEL.

26 MR. FRANZEN: YOUR HONOR, BASICALLY THE STATUTE,  
27 AS WE'VE ARGUED ON OUR ASPECTS OF THIS CASE, IS A DEATH PENALTY  
28 SITUATION WHICH, ACCORDING TO NUMEROUS COURT DECISIONS, MUST BE  
29 STRICTLY CONSTRUED AND IT MUST BE STRICTLY CONSTRUED BECAUSE  
30 THE SUPREME COURT HAS STATED THAT WE MUST AVOID ARBITRARY AND  
31 CAPRICIOUS IMPOSITION OF THE DEATH PENALTY. AND IF A STATUTE  
32 IS NOT IN ITSELF STRICTLY WRITTEN OR IS NOT STRICTLY CONSTRUED

1 AND DOES NOT PROVIDE CLEAR AND OBJECTIVE STANDARDS TO PROVIDE  
2 SPECIFIC AND DETAILED GUIDANCE TO THE JURY OR TO THE OTHER  
3 BODY, IF IT'S A PANEL, A THREE-JUDGE PANEL, IT IS UNCONSTITU-  
4 TIONAL. AND I BELIEVE GODFREY V. GEORGIA, AT 446 U.S. WOULD  
5 ELABORATE ON IT.

6 GOING TO THE SPECIFIC -- STRIKE THAT.

7 ONE OTHER ASPECT OF REQUIRING A STRICT  
8 INTERPRETATION OF THE STATUTES ARE OUR NEVADA CASES INTERPRET-  
9 ING THE DEATH PENALTY STATUTE AND REQUIRING A STRICT APPLICA-  
10 TION: SMITH V. STATE; AND THEN YET ANOTHER ASPECT OF THIS SAME  
11 PROBLEM REQUIRED STRICT APPLICATION IS THE WELL KNOWN RULE OF  
12 CONSTRUING PENAL STATUTES STRICTLY AGAINST THE STATE AND IN  
13 FAVOR OF THE ACCUSED WITH DOUBTS AS TO ITS APPLICABILITY BEING  
14 GIVEN TO THE DEFENDANT.

15 WE FURTHER, IN THIS INSTANCE, HAVE A  
16 LEGISLATIVE HISTORY OF THE DEATH PENALTY STATUTE IN WHICH THE  
17 COURT -- I BEG YOUR PARDON, IN WHICH THE LEGISLATURE WAS  
18 DIRECTED BY THE NEVADA ATTORNEY GENERAL THAT CLEAR DIRECTIONS  
19 TO THE JURY ARE GOING TO BE REQUIRED, SOME LIMITED NUMBER OF

20 AGGRAVATING CIRCUMSTANCES. AND THE ATTORNEY GENERAL, IN  
21 ADDRESSING THE LEGISLATURE, RELIED UPON GREG V. OREGON, PROFITT  
22 V. FLORIDA, AND GORDON V. TEXAS; ALL ADDRESSED TO THIS ISSUE.

23 WITH THAT IN MIND, I GO TO THE AGGRA-  
24 VATING CIRCUMSTANCES THAT THE STATE WISHES TO INTRODUCE.  
25 FIRST OF ALL, THE STATE HAS DECIDED NOT TO INTRODUCE THOSE  
26 FACTORS THAT THEY HAVE IDENTIFIED IN THEIR SUPPLEMENTAL NOTES,  
27 AND THOSE ARE THREE ALLEGED ROBBERIES THAT OCCURRED IN THE CITY  
28 OF NEW YORK. SO WE ARE LEFT WITH A SAN BERNARDINO ROBBERY --

29 THE COURT: AND THAT'S ALREADY IN EVIDENCE,  
30 RIGHT?

31 MR. FRANZEN: NO, I DON'T BELIEVE WE HAD THE  
32 ROBBERY IN SAN BERNARDINO. WE HAD A DIFFERENT INCIDENT, A SEARS

1 STORE. BUT PERHAPS --

2 MR. HARMON: WHEN THE DEFENDANT TOOK THE  
3 WITNESS STAND IT WAS BROUGHT OUT FOR THE PURPOSE OF IMPEACHMENT  
4 ONLY THAT HE WAS CONVICTED OF UNLAWFUL --

5 THE COURT: IT'S ALREADY IN?

6 MR. HARMON: YES.

7 THE COURT: AND HE HAS SO ADMITTED?

8 MR. HARMON: RIGHT.

9 MR. FRANZEN: THEY WISH TO BRING IN EYE-WITNESS  
10 TESTIMONY REGARDING THAT OFFENSE, AND FROM THE POLICE OFFICER  
11 LIST I PRESUME THEY ALSO WISH TO BRING IN DETAILS OF THE  
12 INVESTIGATION AND APPREHENSION AND WHATEVER ELSE WOULD COME OUT  
13 OF THAT. THE STATUTE DOES NOT PROVIDE FOR THAT. WHAT THEY ARE  
14 LIMITED TO IS PROVING A PRIOR FELONY CONVICTION FOR VIOLENCE.  
15 AND THEY CAN DO THAT AS THEY ALREADY I THINK ARE PREPARED TO  
16 DO, WITH CERTIFIED COPIES OF JUDGMENTS OF CONVICTION OR  
17 CERTIFIED COPIES OF COURT MINUTES.

18 THE COURT: WELL, ISN'T OUR STATUTE SILENT AS TO  
19 HOW YOU PROVE IT?

20 MR. FRANZEN: IF IT'S SILENT, YOUR HONOR, IT  
21 HAS TO BE STRICTLY CONSTRUED, WHICH MY ARGUMENT IS THAT THEY  
22 HAVE TO PROVE IT BY THE CERTIFIED COPIES -- AND I DON'T BELIEVE  
23 IT'S SILENT -- BY A PERSON WHO HAS BEEN PREVIOUSLY CONVICTED,  
24 CONVICTION IS SHOWN BY CERTIFIED COPIES. THE EVIDENCE CONCERN-  
25 ING THE INVESTIGATION AND THE ACTUAL FACTS AND CIRCUMSTANCES DO  
26 NOT SHOW CONVICTION. THEY'RE RETRYING THE CASE BEFORE YOUR  
27 HONOR.

28 NOW, THE STATE IS ALSO CONTENDING THAT THE  
29 MURDER WAS DONE TO PREVENT A LAWFUL ARREST, THE MURDER FOR  
30 WHICH MR. HOWARD NOW STANDS CONVICTED BEFORE YOUR HONOR.

31 THE ARGUMENT BEFORE THE JURY BY MR.  
32 SEATON, IF I RECALL CORRECTLY, WAS THAT IT WASN'T DONE TO

1 PREVENT A LAWFUL ARREST, IT WAS DONE PURSUANT TO MR. HOWARD'S  
2 ALLEGED DOCTOR JECKYL AND MR. HYDE PERSONALITY, THAT WHEN HE  
3 GOT THE GUN THE POTION -- THE GUN WAS THE POTION THAT CAUSED  
4 MR. HOWARD TO KILL DOCTOR MONAHAN WHEN DOCTOR MONAHAN REFUSED  
5 TO DISROBE. THERE'S NO EVIDENCE OR THERE HAS BEEN NONE  
6 ARGUED AS OF YET THAT THIS WAS DONE TO PREVENT A LAWFUL ARREST.

7 MR. SEATON: PARDON ME FOR INTERRUPTING, YOUR  
8 HONOR, BUT I THINK I CAN SAVE THE COURT SOME TIME IN THIS  
9 PARTICULAR ISSUE. WE DO NOT PLAN TO BRING FORWARD PROOF OF  
10 THAT AS FAR AS AN AGGRAVATING CIRCUMSTANCE IS CONCERNED.

11 THE COURT: WELL, WHY DON'T YOU JUST TELL US  
12 SPECIFICALLY WHAT YOU DO INTEND TO PROVE SO MAYBE WE CAN SAVE  
13 SOME ARGUMENT TIME.

14 MR. SEATON: WELL, I THINK HE'S AWARE OF THE  
15 OTHER TWO AREAS THAT WE'RE INTERESTED IN. ONE IS, AS HE POINTS  
16 OUT, THE SAN BERNARDINO ROBBERY.

17 THE COURT: WHAT ADDITIONAL ARE YOU GOING TO  
18 BRING FORWARD ON THAT?

19 MR. SEATON: WE ARE GOING TO BRING FORWARD EYE-  
20 WITNESS TESTIMONY OR TESTIMONY OF THOSE PEOPLE WHO WERE DOWN  
21 IN SAN BERNARDINO AND ARE FAMILIAR WITH THE CRIME AND CAN TELL  
22 THE JURY A LITTLE MORE ABOUT THE FACTUAL CIRCUMSTANCES UNDER-  
23 LYING.

24 THE REASON FOR THAT, AND I'LL JUST BRIEFLY  
25 ELUDE TO IT HERE BECAUSE IT IS COUNSEL'S ARGUMENT AT THIS TIME,  
26 BUT OUR REASON FOR THAT IS BECAUSE THE STATUTE 175.554 CAUSES  
27 THE STATE TO HAVE THE BURDEN OF PROVING THESE AGGRAVATING CIR-  
28 CUMSTANCES BEYOND A REASONABLE DOUBT. AND IN ADDITION TO THAT,  
29 THAT PARTICULAR AGGRAVATING CIRCUMSTANCE HAS TO DO WITH THE  
30 USE OF FORCE OR VIOLENCE. AND THE MERE RECITATION OF WHAT THE  
31 CONVICTION WAS FOR IS NOT, IN THE STATE'S MIND, ADEQUATE TO  
32 COMPLY WITH THAT BURDEN OF PROOF.

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THE COURT: ALL RIGHT.

MR. SEATON: THE OTHER ACT THAT WE INTEND TO  
BRING FORTH HAS ALSO BEEN PUT INTO EVIDENCE AND AGAIN BY THE  
DEFENDANT'S OWN ADMISSIONS, AND THAT IS THE CONVICTION IN  
ABSENTE. IN NEW YORK OF THE ROBBERY WITH A WEAPON OF A NURSE IN  
QUEENS, NEW YORK, IN 1978. AND AS I STATED --

THE COURT: DO YOU HAVE WITNESSES?

MR. SEATON: WE HAVE WITNESSES. WE HAVE THE  
NURSE HERE AND THE DETECTIVE WHO WORKED THE CASE. WE WOULD  
WANT TO PUT THEM ON AS OPPOSED TO ANY DOCUMENTATION FOR THE  
SAME REASONS, THAT IS TO SHOW THE JURY BEYOND A REASONABLE  
DOUBT THAT THE USE OF FORCE AND/OR VIOLENCE WAS USED IN THE  
COMMISSION OF THAT PARTICULAR ROBBERY.

THOSE ARE THE ITEMS THAT WE PLAN TO BRING  
FORTH BEFORE THE COURT TO SHOW AGGRAVATING CIRCUMSTANCES.

WELL, I SHOULD ADD ONE MORE THAT IS  
TOO APPARENT AND PERHAPS THE REASON I FORGOT ABOUT IT, BUT  
ALSO THAT THIS PARTICULAR MURDER WAS COMMITTED IN THE COURSE OF  
A ROBBERY. THAT IS ANOTHER AGGRAVATING CIRCUMSTANCE THAT WE  
PLAN TO SHOW OR THAT HAS BEEN SHOWN BY VIRTUE OF THE EVIDENCE  
HERE.

THE COURT: YOU MERELY INTEND TO ARGUE?

MR. SEATON: WE'LL JUST ARGUE THAT THAT'S BEEN  
SHOWN AS CLEARLY AS IT CAN BE.

THE COURT: SO REALLY THERE ARE THREE AGGRAVATING  
CIRCUMSTANCES THAT YOU ARE BRINGING FORTH.

MR. SEATON: WELL, THERE ARE TWO AGGRAVATING  
CIRCUMSTANCES.

THE COURT: SAN BERNARDINO AND NEW YORK AND  
THE --

MR. SEATON: THOSE TWO COMBINED AND THEN THE  
MURDER DURING THE COMMISSION OF A ROBBERY.

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1 THE COURT: AND WHAT SECTION ARE THE FIRST TWO?  
2 MR. SEATON: SUBSECTION.

3 THE SUBSECTION TWO HAS TO DO WITH THE SAN  
4 BERNARDINO AND NEW YORK CASE AND SUBSECTION FOUR HAS TO DO WITH  
5 THE COMMISSION OF A MURDER DURING THE COURSE OF A ROBBERY.

6 THE COURT: ALL RIGHT. COUNSEL, PROCEED.

7 MR. FRANZEN: YES, YOUR HONOR. DURING THE  
8 DISCUSSION THE DISTRICT ATTORNEY HAS INTERRUPTED MY ARGUMENT.  
9 IF I MAY HAVE A MOMENT TO FIND MY PLACE.

10 THE COURT: ALL RIGHT.

11 MR. FRANZEN: MOST OF MY ARGUMENTS THEN HAVE  
12 BEEN DONE AWAY WITH BY THE LIMITING OF THE AGGRAVATING CIRCUM-  
13 STANCES, EXCEPT TO REITERATE, YOUR HONOR, THAT THE STATUTES  
14 SPEAKS OF CONVICTIONS AND THE RETRYING OF THE PRIOR CASE IS NOT  
15 WHAT IS SPOKEN OF IN N.R.S. 200.033.

16 THE COURT: A NEW TRIAL?

17 MR. FRANZEN: IT SOUNDS LIKE FROM THE DESCRIPTION  
18 OF THE WITNESSES THAT ARE BEING CALLED THAT THE STATE WISHES TO  
19 CALL THE POLICE OFFICERS, THE ALLEGED VICTIMS, WHO HAVE ALREADY

20 PREVIOUSLY TESTIFIED AND RESULTED IN A CONVICTION, TO DESCRIBE  
21 THE CRIME, TO RETRY IT BEFORE THIS JURY WHAT THE PRIOR -- WHAT  
22 THESE WITNESSES HAVE ALREADY DESCRIBED TO A PRIOR JURY.

23 AGAIN THE STATUTE SPEAKS OF CONVICTIONS,  
24 NOT THE RETRIAL OF THE FACTS AND CIRCUMSTANCES OF THE PRIOR  
25 CONVICTION. IT SPEAKS OF CONVICTIONS WHICH ARE PROVED BY  
26 CERTIFIED COPIES OF JUDGMENTS OF CONVICTION OR CERTIFIED COPIES  
27 OF COURT MINUTES, WHICH ACCORDING TO THEIR NOTICE OF INTENT TO  
28 SEEK THE DEATH PENALTY THEY ARE PREPARED TO PROVE THIS BY --

29 THE COURT: DOESN'T ONE JUST MERELY GO TO CORROB-  
30 ORATING THE OTHER?

31 MR. FRANZEN: THESE WITNESSES DON'T GO TO PROVE  
32 A CONVICTION. THESE WITNESSES JUST GO TO ADD, IF YOU WOULD,

1 THE UNCOMFORTABLE DETAILS WHICH FEED INTO THE ARBITRARY AND  
2 CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

3 WE ARE LIMITED BY THE STATUTE AND THAT  
4 STATUTE MUST BE STRICTLY CONSTRUED. THESE WITNESSES DON'T  
5 SPEAK OF CONVICTIONS.

6 THE COURT: ALL RIGHT. I UNDERSTAND WHAT YOU'RE  
7 SAYING.

8 MR. FRANZEN: AS TO THE ABSENTE AND AFTER THE  
9 SKIPPING OF BOND OF THE NEW YORK CONVICTION, THE FACT THAT IT'S  
10 IN ABSENTE OR IT WAS AFTER THE DEFENDANT SKIPPED BOND, ARE  
11 IRRELEVANT AND SHOULDN'T BE ALLOWED TO BE ARGUED BY THE STATE.  
12 THE FACT OF A CONVICTION IS ONE THING, BUT THE MANNER IN WHICH  
13 IT'S PROCURED, IN ABSENTE, AND AFTER THE DEFENDANT SKIPPED  
14 BOND, ARE IRRELEVANT UNDER OUR STATUTES AND UNDER U.S. SUPREME  
15 COURT CASES I'VE MENTIONED.

16 I WOULD FURTHER NOTE THAT THESE WITNESSES,  
17 I DOUBT, WERE IN COURT AT THE TIME OF THE CONVICTION. AND  
18 THEY COULD NOT FROM PERSONAL KNOWLEDGE TESTIFY THE DEFENDANT  
19 WAS CONVICTED. THIS IS GOING TO COME FROM COURT RECORDS,

20 WHICH IS, FROM THE STATE'S NOTICE, I PRESUME THEY ARE INTENDING  
21 AND ARE PREPARED TO PROVE IT IN THAT MANNER.

22 THANK YOU, YOUR HONOR.

23 MR. SEATON: YOUR HONOR, AS TO A COMMENT THAT  
24 WAS JUST MADE A MOMENT AGO ABOUT THE USE OF THE FACT OF THE  
25 DEFENDANT BEING TRIED IN ABSENTE, AND RUNNING OUT ON BOND, WE  
26 DIDN'T BRING THAT UP. THE DEFENDANT BROUGHT THAT OUT ON  
27 DIRECT EXAMINATION WHEN HE WAS ON THE STAND.

28 WE HAVE NO INTENTION OF BELABORING THAT  
29 POINT. THAT POINT HAS BEEN MADE.

30 WHAT IS IMPORTANT FOR THE STATE, IN  
31 BOTH THE SAN BERNARDINO AND THE NEW YORK CONVICTIONS, BY WAY  
32 OF BRINGING THE EYE-WITNESS TESTIMONY IN BEFORE THE JURY, IS

1 TO PROVE AGGRAVATING CIRCUMSTANCES, NUMBER TWO, BEYOND A  
2 REASONABLE DOUBT. I MIGHT JUST READ IT FOR A MOMENT. IT SAYS,  
3 AND I QUOTE:

4 THE MURDER WAS COMMITTED  
5 BY A PERSON WHO WAS PREVIOUSLY  
6 CONVICTED OF ANOTHER MURDER OR  
7 A FELONY, AND THIS IS THE IMPOR-  
8 TANT LANGUAGE, INVOLVING USE OR  
9 THREAT OF VIOLENCE TO THE PERSON  
10 OF ANOTHER.

11 NOW, THE MERE FACT OF A WEAPON BEING  
12 PRESENT IN THE NAME OF THE CHARGE UNDER WHICH THE DEFENDANT IS  
13 CONVICTED, I DON'T THINK TELLS THE JURY ENOUGH ABOUT THE NATURE  
14 OF THOSE ACTS TO ALLOW THEM TO COME TO THE CONCLUSION THAT  
15 BEYOND A REASONABLE DOUBT THE STATE HAS SHOWN THAT THERE IS A  
16 THREAT OR USE OF VIOLENCE.

17 AND IT'S IMPORTANT THAT THE STATE BE  
18 ABLE TO SHOW THE JURY THE ACTS, AND MAYBE THAT'S THE IMPORTANT  
19 THING HERE. THE JURY ISN'T DECIDING AS MUCH THE FACT OF THE

20 CONVICTION AS THEY ARE WHAT'S THE UNDERLYING FACTS OF THAT  
21 CONVICTION. WHAT WAS IT THAT THE JURY WAS ABLE TO CONSIDER IN  
22 ORDER FOR THAT JURY TO DETERMINE THAT THERE WAS A USE OR THREAT  
23 OF VIOLENCE? AND THOSE ARE THE THINGS THAT WE WISH TO BRING  
24 BEFORE THE JURY AT THIS PARTICULAR TIME.

25 THE COURT: WHAT WAS THE DATE OF YOUR FILING OF  
26 THE AGGRAVATING CIRCUMSTANCES?

27 MR. SEATON: COURT'S INDULGENCE.

28 THE NOTICE OF INTENT TO SEEK THE DEATH  
29 PENALTY, THE ORIGINAL ONE, WAS FILED ON JANUARY THE 7TH, 1983.

30 THE COURT: BUT YOU HAVE NOT FILED ANY SEPARATE  
31 DOCUMENT THAT SAYS THAT THESE ARE THE AGGRAVATING CIRCUMSTANCES

32 MR. SEATON: YES. THE AGGRAVATING CIRCUMSTANCES



1 ARE ENUMERATED IN THAT PARTICULAR DOCUMENT.

2 THE COURT: ALL RIGHT. THE DATE AGAIN?

3 MR. SEATON: JANUARY 7TH, 1983.

4 AS A MATTER OF FACT, YOUR HONOR, IF YOU  
5 HAVE A COPY OF THE POINTS AND AUTHORITIES THAT WE TURNED IN  
6 OVER THE WEEKEND, EXHIBIT "A" WOULD BE THAT PARTICULAR DOCUMENT.

7 THE COURT: ALL RIGHT.

8 MR. SEATON: AND I COULD MAKE A COPY AVAILABLE  
9 TO THE COURT.

10 THE COURT: I HAVE THAT HERE. PROCEED.

11 UNFORTUNATELY YOUR POINTS AND AUTHORITIES  
12 DID NOT HAVE THAT PENALTY PHASE, A COPY OF IT.

13 MR. SEATON: WELL, I WAS GOING TO DO THIS ANYWAY.  
14 LET ME AT THIS TIME FILE IN OPEN COURT A COPY OF BOTH THE --

15 THE COURT: GOOD. DO IT.

16 MR. SEATON: (CONTINUING) -- ITEMS THAT WE GAVE  
17 TO THE COURT. I WILL GIVE THEM TO THE COURT FIRST AND THEN  
18 THEY CAN BE FILED AT A LATER TIME.

19 THE THICKER OF THE TWO, YOUR HONOR, WOULD  
20 BE THE EXHIBITS.

21 DOES THE COURT WISH ME TO PROCEED?

22 THE COURT: PROCEED.

23 MR. SEATON: THE ONLY OTHER THING THAT I WOULD  
24 ADD AT THIS TIME IS THAT I WOULD THINK THAT COUNSEL IS CONFUSED  
25 WHAT WE'RE DOING HERE TODAY WITH THE STATUTE THAT ALLOWS  
26 DEFENDANTS TO BE IMPEACHED BY USE OF PRIOR CONVICTIONS. AND  
27 THERE THE LAW IS PRETTY CLEAR THAT YOU'RE LIMITED THE WAY HE IS  
28 TRYING TO LIMIT THE STATE IN THIS PARTICULAR ACTION. BUT  
29 THERE'S A VERY GOOD REASON AND A VERY GOOD DISTINCTION. THE  
30 REASON THAT THEY --

31 THE COURT: I DON'T HAVE TO GET INTO THAT,  
32 COUNSEL.

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MR. SEATON: YOUR HONOR?

THE COURT: I DON'T HAVE TO GET INTO THAT.

MR. SEATON: THANK YOU.

THEN THE STATE WOULD HAVE NOTHING FURTHER  
TO ADD.

MR. FRANZEN: SUBMITTED, YOUR HONOR.

THE COURT: ALL RIGHT.

YOUR MOTION TO PROHIBIT THE USE OF  
ALLEGED AGGRAVATING CIRCUMSTANCES IS DENIED.

IT DOES APPEAR THAT THE STATE IS  
ENTITLED TO BRING FORTH CIRCUMSTANCES IN BOTH TWO AND FOUR,  
SUBSECTIONS TWO AND FOUR OF 175.554 -- PARDON ME. THAT WOULD  
NOT BE THE STATUTE. THE STATUTE OF AGGRAVATION, YOU GAVE ME  
THE WRONG CITATION, COUNSEL.

WHAT IS THE STATUTE OF AGGRAVATION  
NUMBER?

MR. FRANZEN: IT'S 200.020, I BELIEVE, YOUR  
HONOR.

THE COURT: 200.020?

MR. SEATON: IT'S .033, YOUR HONOR.

MR. HARMON: IT'S .033.

THE COURT: SUBSECTION TWO SAYS THAT:

MURDER WAS COMMITTED BY A  
PERSON WHO WAS PREVIOUSLY CON-  
VICTED OF ANOTHER MURDER OR A  
FELONY INVOLVING THE USE OR  
THREAT OF VIOLENCE TO THE  
PERSON OF ANOTHER ...

IT WOULD APPEAR THAT THIS EVIDENCE IS  
SUPPLEMENTAL AND SUPPLEMENTARY TO THE ADMISSION OF THE CONVIC-  
TION IN SAN BERNARDINO.

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... THE USE OF FORCE  
AND VIOLENCE MAY BE SHOWN BY  
OTHER EVIDENCE.

THE SAME APPLIES TO THE NEW YORK  
SITUATION, WHERE HE WAS TRIED AND THEN HE ABSCONDED, AND HE WAS  
TRIED IN ABSENTE... THE PARTICULARS OF THE CASE DOES APPEAR  
THAT THE EVIDENCE WOULD GO TO THE QUESTION OF USE OF FORCE OR  
VIOLENCE, WHICH IS SUPPLEMENTARY TO THE EVIDENCE WHICH WOULD BE  
SUPPLIED BY WAY OF I BELIEVE THERE IS A CERTIFIED COPY OF CON-  
VICTION. IS THAT WHAT YOU'RE GOING TO USE, OR AS AN EXEM-  
PLIFIED COPY?

MR. HARMON: YOUR HONOR, WHAT WE HAVE IS A  
CERTIFIED COPY. WE HAVE A MINUTE ORDER OUT OF THE STATE OF NEW  
YORK.

THE COURT: ALL RIGHT.

AND SUBSECTION FOUR IS ALREADY IN EVIDENCE  
THAT REQUIRES ARGUMENT IN THAT IS APPARENTLY UNDER THE FELONY  
MURDER RULE.

SO, COUNSEL, YOUR MOTIONS ARE DENIED  
AND WE WILL TAKE ABOUT A TEN MINUTE RECESS AND START AT 4:00  
O'CLOCK WITH THE TAKING OF EVIDENCE.

NOW, IS THERE ANY FURTHER MOTIONS TO  
COME BEFORE THE COURT?

MR. HARMON: JUST AN INQUIRY OF THE COURT  
REGARDING PROCEDURE.

THE COURT: YES.

MR. HARMON: DOES THE COURT WANT US TO SIMPLY  
START BY GIVING EVIDENCE OR WILL THERE BE OPENING STATEMENTS OR  
HOW ARE WE TO PROCEED? HOW ARE WE PROCEEDING?

FROM THE STATE'S POINT OF VIEW, WE DON'T  
FEEL IT'S GOOD TO BE SO INVOLVED THAT OPENING STATEMENTS ARE  
NECESSARY. BUT WE WANT TO BE PREPARED.

1 THE COURT: WELL, I THINK YOU CAN MAKE A VERY  
2 BRIEF STATEMENT OF THE NATURE OF THE HEARING AND THE PROCEEDING,  
3 AND MAYBE STATE THE STATUTE, AND THEN STATE VERY BRIEFLY THE  
4 WITNESSES THAT YOU INTEND TO BRING AND WHAT YOU PROPOSE TO SHOW.

5 I WOULD BE VERY CAREFUL BECAUSE IF IT  
6 DOESN'T GET IN THEN YOU HAVE THAT PROBLEM. BUT THIS IS WHAT  
7 YOU INTEND TO SHOW.

8 MR. SEATON: MAY WE APPROACH THE BENCH FOR JUST  
9 A MOMENT.

10 THE COURT: YES, COUNSEL.

11 (WHEREUPON, SIDE BAR CONFERENCE  
12 WAS HELD AT THE BENCH; NOT  
13 REPORTED. AT THE CONCLUSION  
14 OF WHICH THE FOLLOWING WAS HAD:)

15 THE COURT: MISS CLERK, YOU MAY FILE THIS,  
16 PLEASE.

17 MR. FRANZEN: FOR THE PURPOSES OF CLARIFICATION  
18 OF THE RECORD, RESERVES OF THE FELLOW RIGHTS, WE WOULD AGAIN  
19 RENEW OUR MOTION FOR A MISTRIAL BASED ON THE INSTANCE INVOLVING  
20 JUROR CAPASSO.

21 THE COURT: YOUR MOTION, FOR THE RECORD, COUNSEL,  
22 IS DENIED.

23 MR. FRANZEN: THANK YOU, YOUR HONOR.

24 THE COURT: WE'LL BE IN RECESS FOR TEN MINUTES.  
25 HAVE THE JURY READY TO PROCEED AT THAT TIME. HAVE YOUR FIRST  
26 WITNESS IN THE COURTROOM.

27 MR. HARMON: THANK YOU.

28 (WHEREUPON, FROM 3:57 P.M.  
29 UNTIL 4:05 P.M., A RECESS WAS  
30 HAD IN THE PROCEEDINGS, AT  
31 THE CONCLUSION OF WHICH THE  
32 FOLLOWING WAS HAD:)

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1 THE COURT: WILL COUNSEL STIPULATE TO THE  
2 PRESENCE OF THE JURY?

3 MR. HARMON: THE STATE DOES, YOUR HONOR.

4 MR. FRANZEN: YES, YOUR HONOR.

5 THE COURT: COUNSEL, APPROACH THE BENCH, PLEASE.

6 (WHEREUPON, SIDE BAR CONFERENCE

7 WAS HELD AT THE BENCH; NOT

8 REPORTED. AT THE CONCLUSION

9 OF WHICH THE FOLLOWING WAS HAD:)

10 THE COURT: YOU MAY PROCEED, COUNSEL.

11 MR. HARMON: THANK YOU, YOUR HONOR.

12  
13 (OPENING STATEMENT)

14 BY MR. HARMON:

15 JUDGE MENDOZA, COUNSEL, LADIES AND  
16 GENTLEMEN OF THE JURY:

17 AS YOU WERE PREVIOUSLY ADVISED,  
18 POTENTIALLY THERE WERE TWO PHASES TO THIS TRIAL. YOU'VE MADE  
19 YOUR DECISION REGARDING THE GUILT OF THE DEFENDANT, AND NOW  
20 WE'RE COMMENCING THE PENALTY HEARING PHASE OF THESE PROCEEDINGS.

21 BY LAW IN THIS STATE THERE ARE CERTAIN  
22 FACTORS REFERRED TO AS MITIGATING CIRCUMSTANCES WHICH AGGRAVATE  
23 MURDER IN THE FIRST DEGREE. THE STATE OF NEVADA HAD ALLEGED  
24 THAT THERE ARE TWO SUCH AGGRAVATING CIRCUMSTANCES IN REGARD TO  
25 THIS DEFENDANT. AND DURING THIS PENALTY HEARING, EVIDENCE WILL  
26 BE INTRODUCED TO THIS PARTICULAR SUBJECT:

27 AGGRAVATING CIRCUMSTANCE NUMBER ONE,  
28 AS ALLEGED BY THE STATE OF NEVADA, IS THAT THE MURDER WAS  
29 COMMITTED BY A PERSON WHO WAS PREVIOUSLY CONVICTED OF A FELONY  
30 INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON OF ANOTHER.

31 DURING THE PENALTY PHASE OF THESE  
32 PROCEEDINGS THE STATE INTENDS TO CALL A NUMBER OF WITNESSES WHO

1 WILL ESTABLISH THAT THE DEFENDANT HAS, ON TWO PRIOR OCCASIONS,  
2 BEEN CONVICTED OF THE OFFENSES OF ROBBERY WITH THE USE OF A  
3 WEAPON:

4 SPECIFICALLY ON MAY 24, 1978, ON THE  
5 CAMPUS OF QUEENS COLLEGE, NEW YORK, THE VICTIM BEING DOROTHY  
6 WEISBAND, W-E-I-S-B-A-N-D. THE DEFENDANT, BY MEANS OF A GUN,  
7 PERPETRATED A ROBBERY. HE WAS THEREAFTER CONVICTED IN ABSENTIA  
8 IN THE QUEENS SUPREME COURT ON JULY 13, 1979, IN THE STATE OF  
9 NEW YORK. IN REGARDS TO THAT INCIDENT, THE STATE WILL  
10 INTRODUCE TESTIMONY FROM DOROTHY WEISBAND, THE VICTIM, AND  
11 ALSO DETECTIVE JOHN MCNICHOLAS, M-C- CAP N-I-C-H-O-L-A-S, WHO  
12 ALSO WAS INVOLVED IN THE INVESTIGATION OF THE CASE;

13 THE STATE OF NEVADA ALSO INTENDS TO  
14 OFFER, IN CONNECTION WITH THIS SAME AGGRAVATING CIRCUMSTANCE,  
15 EVIDENCE TO SHOW THAT IN SAN BERNARDINO, CALIFORNIA, ON MARCH 29  
16 1980, THE DEFENDANT ALSO COMMITTED ROBBERY BY USE OF A WEAPON.  
17 THE VICTIM WILL BE IDENTIFIED AS JAMES DAVID HILYER, H-I-L-Y-  
18 E-R. THE EVIDENCE WOULD SHOW IN THAT CASE THAT ON OR ABOUT  
19 MAY THE 27TH, 1982, THE DEFENDANT WAS CONVICTED OF THE OFFENSE  
20 OF ROBBERY WITH USE OF A WEAPON. AND THE STATE OF NEVADA WILL  
21 OFFER THE TESTIMONY OF SANDEE LOFGREN, L-O-F-G-R-E-N, A POLICE  
22 OFFICER WITH THE SAN BERNARDINO POLICE DEPARTMENT; AND PERHAPS  
23 EVIDENCE FROM ANOTHER OFFICER; BOTH PERSONS BEING INVOLVED IN  
24 THE INVESTIGATION OF THAT CASE.

25 ADDITIONALLY, THERE WILL BE DOCUMEN-  
26 TARY EVIDENCE OFFERED TO ESTABLISH THE COMMISSION OF THESE TWO  
27 PRIOR FELONIES OF VIOLENCE BY THE DEFENDANT MR. HOWARD.

28 ADDITIONALLY, AND THIS WAS EVIDENCE  
29 INTRODUCED DURING THE GUILT PHASE OF THESE PROCEEDINGS, THE  
30 STATE HAS ALSO ALLEGED THAT ANOTHER AGGRAVATING CIRCUMSTANCE  
31 OF MURDER IN THE FIRST DEGREE EXISTS IN THIS CASE, THAT BEING  
32 THAT THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED

1 IN THE COMMISSION OF A ROBBERY.

2 LADIES AND GENTLEMEN, THOSE ARE THE  
3 AREAS THAT YOU WILL BE CONSIDERING IN THIS PHASE OF THE PRO-  
4 CEEDINGS IN CONNECTION WITH YOUR DECISION TO IMPOSE THE  
5 APPROPRIATE PUNISHMENT. THANK YOU.

6 THE COURT: DOES COUNSEL DESIRE TO MAKE ANY  
7 STATEMENT TO THE COURT AT THIS TIME?

8 MR. COOPER: NO, YOUR HONOR. WE DO NOT.

9 THE COURT: CALL YOUR FIRST WITNESS.

10 MR. SEATON: DOROTHY WEISBAND.

11 THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

12

13 WHEREUPON,

14

15 DOROTHY WEISBAND,

16

17 CALLED AS A WITNESS HEREIN BY THE PLAINTIFF WAS FIRST DULY SWORN,  
18 EXAMINED AND TESTIFIED AS FOLLOWS:

19

20 THE COURT: BE SEATED, PLEASE.

21

PROCEED.

22

23 DIRECT EXAMINATION

24

25 BY MR. SEATON:

26

27 Q WOULD YOU PLEASE STATE YOUR NAME AND SPELL  
28 YOUR LAST NAME FOR THE RECORD.

29 A DOROTHY WEISBAND, W-E-I-S-B-A-N-D.

30 Q IS IT MISS OR MRS.?

31 A MRS.

32 Q MRS. WEISBAND, WHERE DO YOU PRESENTLY

1 RESIDE?

2 A IN BAYSIDE, NEW YORK.

3 Q WHERE IS THAT?

4 A BAYSIDE?

5 Q BAYSIDE.

6 A NEW YORK.

7 Q THAT'S IN THE STATE OF NEW YORK?

8 A YES, IN THE COUNTY OF QUEENS.

9 Q WHERE IS THAT IN NEW YORK?

10 A NEW YORK CITY, PART OF NEW YORK CITY.

11 Q I SEE.

12 HOW LONG HAVE YOU RESIDED IN THAT AREA?

13 A IN THE SAME HOUSE, 28 YEARS.

14 Q WHAT IS YOUR OCCUPATION?

15 A I'M A REGISTERED NURSE.

16 Q AND FOR WHOM ARE YOU EMPLOYED?

17 A FOR QUEENS COLLEGE, WHICH IS PART OF THE

18 CITY UNIVERSITY.

19 Q AND HOW LONG HAVE YOU BEEN EMPLOYED WITH

20 QUEENS COLLEGE?

21 A ELEVEN YEARS. JUNE WILL BE ELEVEN YEARS.

22 Q JUNE WILL BE ELEVEN YEARS.

23 WHAT ARE THE NATURE OF YOUR DUTIES AS

24 A REGISTERED NURSE WITH QUEENS COLLEGE IN NEW YORK CITY?

25 A I HANDLE TRAUMAS AND HELP WITH THE

26 ATHLETIC DEPARTMENT, HELP -- GIVE ASSISTANCE TO THE TRAINER IN

27 TREATING THE ATHLETES FOR THEIR INJURIES OR PREPARING THEM FOR

28 THEIR GAMES.

29 Q WITH REGARDS TO PREPARING THEM FOR THEIR

30 GAMES, COULD YOU ELABORATE ON THAT A LITTLE BIT? HOW DO YOU

31 HELP THE ATHLETIC DEPARTMENT AT THE QUEENS COLLEGE IN THAT

32 SENSE?



1 A WELL, IF THERE'S A WEAK ANKLE OR WEAK  
2 ELBOW OR A WEAK KNEE, I HELP TAPE IT BEFORE THEY START THE GAME  
3 --

4 MR. FRANZEN: I OBJECT AT THIS TIME AS TO  
5 RELEVANCE TO THE ISSUE BEFORE THE COURT AND THE JURY.

6 MR. SEATON: WELL --

7 THE COURT: ALL RIGHT.

8 COUNSEL, I BELIEVE YOU ARE FAR AFIELD.

9  
10 BY MR. SEATON:

11  
12 Q MRS. WEISBAND, HAVE YOU WORKED WITH ANY  
13 OF THE BOXERS AT QUEENS COLLEGE?

14 A YES. MANY OF THEM WOULD COME IN AND I --  
15 COME IN AND I'D TAPE THEIR HANDS BEFORE THEY WORKOUT.

16 Q AND WERE YOU FAMILIAR -- STRIKE THAT.  
17 HAVE YOU EVER KNOWN AN INDIVIDUAL  
18 NAMED SAM HOWARD?

19 A YES.

20 Q WOULD YOU LOOK ABOUT THE COURTROOM AND TELL  
21 US IF HE'S PRESENT IN THE COURTROOM TODAY?

22 A YES.

23 Q WOULD YOU POINT TO HIM AND DESCRIBE WHAT  
24 HE'S WEARING, PLEASE.

25 A HE'S SITTING OVER THERE. HE'S WEARING A  
26 BLUE JACKET AND A LIGHT BEIGE SHIRT (INDICATING).

27 MR. SEATON: YOUR HONOR, MAY THE RECORD REFLECT  
28 THE IDENTIFICATION OF SAM HOWARD.

29 THE COURT: THE RECORD MAY SO SHOW.

30 ..  
31 ..  
32 ..

1 BY MR. SEATON:

2

3 Q AND HOW WAS IT THAT YOU CAME TO KNOW SAM  
4 HOWARD?

5 A SAM HOWARD WAS A STUDENT AT QUEENS COLLEGE  
6 AND WITH THE BOXING CLUB. AND HE WOULD WORKOUT A FEW TIMES A  
7 WEEK AND WOULD COME INTO THE OFFICE AND I WOULD TAPE HIS HANDS  
8 BEFORE HE WOULD START WORKING OUT.

9 Q WHEN DID YOU FIRST COME TO BE ACQUAINTED  
10 WITH SAM HOWARD?

11 A SOMEWHERE AROUND '75 OR '76.

12 Q 1975 OR '76?

13 A RIGHT.

14 Q AND WAS THAT THERE AT QUEENS COLLEGE?

15 A YES.

16 Q WAS THAT THROUGH HIS INTEREST IN BOXING  
17 AT THE COLLEGE?

18 A YES.

19 Q AND HOW LONG A PERIOD OF TIME DID YOU

20 KNOW HIM?

21 A FOR ABOUT A YEAR AND A HALF OR TWO.

22 Q WOULD YOU SEE HIM ON A FAIRLY REGULAR BASIS  
23 DURING THAT YEAR AND A HALF OR TWO?

24 A FOR ABOUT A YEAR AND A HALF ON A REGULAR  
25 BASIS.

26 Q LET ME CALL YOUR ATTENTION TO MAY THE 24TH,  
27 1978. DO YOU RECALL THAT PARTICULAR DAY?

28 A YES. I CERTAINLY DO.

29 Q AND WERE YOU WORKING ON THAT PARTICULAR  
30 DAY?

31 A YES, I WAS.

32 Q WHERE WERE YOU?

1 A I WAS WORKING IN MY OFFICE. IT WAS -- IT  
2 HAPPENED TO BE THE DAY AFTER THE LAST DAY OF CLASSES AND THERE  
3 WEREN'T STUDENTS ON CAMPUS THAT DAY, ONLY A FEW THAT WERE DOING  
4 SPECIAL PROJECTS. AND I WAS DOING CLERICAL WORK. I WAS ALONE  
5 IN THE OFFICE.

6 Q ABOUT WHAT TIME IS IT THAT YOU ARE REFER--  
7 RING TO NOW?

8 A IN THE EVENING, IN THE EARLY EVENING.

9 Q OKAY.

10 A ABOUT 7:00 OR A QUARTER AFTER 7:00 OR 20  
11 AFTER 7:00. SOMETHING -- IT WAS AFTER 7:00 I KNOW BECAUSE I HAD  
12 MY DINNER HOUR BETWEEN 6:30 AND 7:00 AND THIS WAS AFTER MY  
13 DINNER.

14 Q AND YOU WERE IN YOUR OFFICE DOING CLERICAL  
15 WORK?

16 A YES.

17 Q OKAY.

18 AT THAT MOMENT WAS ANYONE IN THE OFFICE  
19 WITH YOU, ANY OTHER CLERKS?

20 A NO.

21 Q YOU WERE ALONE THERE?

22 A YES.

23 Q AND DID ANYONE COME INTO THE OFFICE ABOUT  
24 THAT TIME?

25 A YES. SAM HOWARD CAME INTO THE OFFICE. AND  
26 I ASKED HIM, WHAT CAN I DO FOR HIM?

27 AND HE SAID THAT HE HAD INJURED HIS  
28 FINGER EARLIER IN THE DAY AND THAT ANOTHER ONE OF THE NURSES HAD  
29 LOOKED AT IT, AND ASKED IF SHE WAS THERE SO SHE COULD LOOK AT IT.

30 I TOLD HIM THAT THE OTHER NURSE WAS NOT  
31 THERE. HE LOOKED AROUND THE PREMISES.

32 AND I ASKED HIM IF I COULD LOOK AT THE

1 FINGER. AND WITH THAT HE TOOK A GUN OUT OF HIS POCKET. HE  
2 WAS WEARING A -- AN ARMY FATIGUE JACKET. IT WAS A SERVICE  
3 FATIGUE JACKET. IT WAS RAINING VERY HARD THAT NIGHT, AND HE  
4 PULLED THE GUN OUT AND SAID, WHAT I REALLY WANT IS YOUR MONEY.

5 Q NOW, LET ME STOP YOU FOR A MOMENT.

6 CAN YOU DESCRIBE A LITTLE BIT CLEARLY  
7 HOW THE DEFENDANT WAS DRESSED AT THIS TIME?

8 A HE WAS WEARING A KNIT STOCKING CAP PULLED  
9 DOWN ON HIS HEAD (INDICATING), BUT HIS FACE WAS CLEARLY IDEN-  
10 TIFIABLE.

11 Q WHEN YOU SAY --

12 A I KNEW WHO IT WAS AS SOON AS HE CAME IN.

13 Q WHEN YOU SAY "PULLED DOWN" DO YOU MEAN  
14 OVER HIS EARS?

15 A OVER HIS EARS, YES.

16 Q OKAY.

17 A AND HE WAS WEARING AN ARMY FATIGUE JACKET.

18 Q DID HE HAVE PANTS ON?

19 A YES. HE WAS WEARING PANTS, BUT I DON'T

20 REALLY REMEMBER WHETHER THEY WERE BLUE DENIMS OR GREEN DENIM.

21 Q OKAY.

22 AND CAN YOU RECALL WHERE THE POCKET  
23 WAS ON THE ARMY FATIGUE JACKET WHERE HE TOOK THE GUN FROM?

24 A IT WAS RIGHT ON THE SIDE.

25 Q ON THE SIDE AS HE WORE THE JACKET?

26 A ON THE SIDE, RIGHT.

27 Q AND WHEN HE TOOK THE GUN OUT WHAT DID HE  
28 DO WITH IT?

29 A HE POINTED IT AT ME AND SAID, WHAT I  
30 REALLY WANT IS YOUR MONEY.

31 Q CAN YOU DESCRIBE THE GUN FOR US?

32 A IT WAS A SHORT SNOUTED GUN. I HAD NEVER

1 SEEN A GUN BEFORE, EXCEPT FOR A TOY GUN. SO THAT THIS WAS,  
2 YOU KNOW, ONE THAT CHILDREN PLAYED WITH.

3 AND ALL I CAN SAY, IT WAS A SHORT  
4 SNOUTED GUN THAT FIT INTO HIS HAND AND FIT INTO THE POCKET.

5 Q BY "SHORT SNOUTED" DO YOU MEAN SHORT  
6 BARRELLED?

7 A I GUESS THAT'S WHAT I MEAN. IT WASN'T A  
8 LONG ONE. IT WAS SHORT.

9 Q OKAY.

10 CAN YOU RECALL THE COLOR OF IT?

11 A I'M TRYING TO RECALL. THE DETECTIVES THAT  
12 CAME IN TO SEE ME LATER IN THE EVENING WAS WEARING A SIMILAR  
13 GUN. NOW, IT WAS VERY SIMILAR IN SIZE, BUT THEY WERE DIFFERENT  
14 COLORS.

15 NOW, I DON'T REMEMBER WHETHER THE ONE  
16 THAT SAM CARRIED WAS A GUN METAL GRAY OR A BLUISH OR A MORE  
17 BLUE COLOR. WHETHER THE DETECTIVES WAS MORE BLUE AND SAM'S  
18 WAS MORE GRAY, THAT I DON'T REMEMBER.

19 Q WHOSE --

20 A I JUST REMEMBER THERE WAS A DIFFERENCE IN  
21 THE COLOR.

22 Q THANK YOU.

23 AND WHO WAS THE DETECTIVE TO WHOM YOU  
24 REFER?

25 A DETECTIVE JOHN MCNICHOLAS.

26 Q IS THAT THE GENTLEMAN WHO'S BEEN OUT IN  
27 THE HALLWAY WITH YOU?

28 A YES, IT IS.

29 Q AND DID HE TAKE HIS GUN OUT AND SHOW IT  
30 TO YOU?

31 A YES.

32 Q AND YOU WERE ABLE TO LOOK AT IT THEN?

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1 A YES.

2 Q DID YOU TELL HIM THEN THAT THAT LOOKED  
3 SOMEWHAT SIMILAR?

4 A RIGHT.

5 Q THEN THE DEFENDANT'S GUN?

6 A EXCEPT FOR THE DIFFERENCE IN COLOR.

7 Q WHEN SAM HOWARD TOOK THE PISTOL OUT OF HIS  
8 POCKET AND POINTED IT AT YOU, WHAT EXACTLY DID HE SAY TO YOU?

9 A WELL, AT FIRST, HE SAID WHAT I REALLY WANT  
10 IS YOUR MONEY.

11 AND I TOLD HIM THAT I DIDN'T MUCH  
12 MONEY. I ONLY HAD \$2 IN CHANGE WITH ME.

13 AND HE BECAME VERBALLY VERY ABUSIVE.

14 Q AND WHAT DO YOU MEAN WHEN YOU SAY "HE  
15 BECAME VERBALLY ABUSIVE"?

16 A WELL, FOR A YEAR AND A HALF OR TWO YEARS  
17 MY CONTACT WITH HIM WAS HE'D ALWAYS BE POLITE, AND NOW HE  
18 STARTED CALLING ME A MOTHER FUCKER, A WHITE MOTHER FUCKER, A  
19 WHITE BITCH, AND KEPT REPEATING THIS OVER AND OVER.

20 Q I SEE.

21 AND WAS HE DEMANDING ANYTHING OF YOU  
22 WHEN HE WAS SAYING THESE PARTICULAR OBSCENITIES?

23 A HE KEPT TELLING ME NOT TO LOOK AT HIM AND  
24 TO CRAWL TO WHERE I HAD MY PURSE.

25 Q TO CRAWL TO WHERE YOU HAD YOUR PURSE?

26 A TO CRAWL TO WHERE I HAD MY PURSE.

27 I TOLD HIM THAT THE PURSE WAS LOCKED  
28 UP.

29 Q WHERE WAS THE PURSE LOCKED UP?

30 A IN A CLOSET IN OUR OFFICE.

31 Q IN THE OFFICE THAT YOU WERE PRESENTLY IN?

32 A WELL, IT WAS IN ANOTHER ROOM. IT WAS IN

1 ANOTHER ROOM, BUT IT WAS IN THE SAME OFFICE.

2 Q I SEE.

3 A IT WAS JUST IN ANOTHER ROOM.

4 Q WHERE WERE YOU AND SAM HOWARD FROM THAT  
5 CLOSET?

6 A APPROXIMATELY LIKE FROM HERE TO WHERE THE  
7 EXIT SIGN IS (INDICATING), I WOULD SAY, IN DISTANCE.

8 Q AND HOW CLOSE WERE YOU AND SAM HOWARD TO  
9 ONE ANOTHER AT THIS TIME?

10 A WELL, WHEN I HAD ASKED TO LOOK AT HIS  
11 FINGER I -- I -- AND HE PULLED OUT THE GUN, I WAS -- HE WAS  
12 STANDING RIGHT NEXT TO ME.

13 Q YOU COULD HAVE REACHED OUT AND TOUCHED  
14 HIM?

15 A OH, YES.

16 Q AND AFTER HE SAID ALL OF THESE THINGS TO  
17 YOU AND TOLD YOU TO GET DOWN ON THE FLOOR AND CRAWL TO THE  
18 PURSE, WHAT DID YOU DO?

19 A I GOT DOWN ON MY HANDS AND KNEES AND I  
20 CRAWLED TO MY PURSE. I --

21 Q HOW WERE YOU DRESSED AT THAT TIME?

22 A I WAS WEARING MY NURSE'S UNIFORM.

23 Q WHITE?

24 A WHITE UNIFORM, WHITE SHOES AND STOCKINGS.

25 Q AND TELL US HOW YOU WENT FROM THAT POINT,  
26 WHERE YOU AND THE DEFENDANT WERE, TO WHERE THE PURSE WAS.

27 A WELL, I WAS CRAWLING ALL THE WAY AND HE  
28 WAS BEING -- HE KEPT REPEATING THESE WORDS OVER AND OVER TO ME.  
29 AND I --

30 Q WHAT WORDS DID HE REPEAT OVER AND OVER TO  
31 YOU?

32 A MOTHER FUCKER, WHITE BITCH, OVER AND OVER.

1 AND I THOUGHT, WELL, I WOULD APPEAL TO  
2 HIM: SAM, I HAD ALWAYS BEEN SO NICE TO YOU, WHY ARE YOU  
3 ACTING THIS WAY?

4 AND HE JUST KEPT SAYING, DON'T TURN  
5 AROUND AND LOOK AT ME, YOU WHITE BITCH, YOU MOTHER FUCKER.

6 AND I WAS REALLY AT THIS POINT VERY  
7 INWARDLY HYSTERICAL. BUT I CRAWLED TO THE CLOSET, I OPENED THE  
8 CLOSET AND HANDED HIM MY PURSE.

9 Q WHEN HE CAME INTO THE OFFICE ORIGINALLY  
10 WAS HIS DEMEANOR CALM OR HOW WOULD YOU DESCRIBE IT?

11 A YES, AS NORMAL AS IT HAS ALWAYS BEEN.

12 Q AND HOW WOULD YOU DESCRIBE THIS DEMEANOR  
13 OF HIS DURING THE PERIOD OF TIME THAT HE WAS CALLING YOU ALL  
14 THESE NAMES AND MAKING YOU CRAWL ON YOUR HANDS AND KNEES TO YOUR  
15 PURSE?

16 A VIOLENT.

17 Q DID THAT CHANGE OF PACE -- DID THAT CHANGE  
18 OF ATTITUDE TAKE PLACE WHEN HE BROUGHT THE GUN OUT?

19 A AS SOON AS HE BROUGHT THE GUN OUT.

20 Q DO YOU KNOW WHY HE MADE YOU GET ON YOUR  
21 HANDS AND KNEES INSTEAD OF WALKING OVER TO YOUR PURSE?

22 A WELL, I ASSUMED THAT WE HAVE EMERGENCY  
23 DOORS THAT OPEN TO THE OUT DOORS, AND HALF THE DOOR IS GLASS.  
24 AND I ASSUMED THAT HE -- THAT HE THOUGHT THAT IF ANYBODY WOULD  
25 COME, YOU KNOW, WOULD APPROACH THE DOOR AND WOULD LOOK IN,  
26 MIGHT SEE HIM, YOU KNOW, WITH ME. SO HE HAD ME CRAWLING AND  
27 HE HAD HIS BACK TO THE DOORS SO THAT SOMEONE COULD NOT SEE HIM  
28 HOLDING THE GUN.

29 Q WHEN YOU GOT TO THE CLOSET ON YOUR HANDS  
30 AND KNEES, HOW DID YOU GET YOUR PURSE?

31 A I -- I HAD MY KEYS WITH ME AND I OPENED  
32 THE CLOSET DOOR. AND AT THAT TIME I GOT UP AND I HANDED HIM



1 MY PURSE.

2 Q DID HE COME WITH YOU AS YOU CRAWLED?

3 A OH, YES, YES. HE WAS WALKING BEHIND ME,  
4 YELLING ALL THESE ABUSIVE WORDS.

5 Q AND HOW DID YOU PHYSICALLY GET THE PURSE  
6 TO HIM?

7 A I JUST STOOD UP AND TOOK IT OUT OF THE  
8 DRAWER THAT I KEPT IT IN AND HANDED IT TO HIM.

9 Q AND WHAT HAPPENED THEN?

10 A AND THEN HE TOLD ME TO GET TO THE CORNER  
11 OF THE CLOSET. IT'S A WALK-IN CLOSET WHERE WE KEEP OUR  
12 STATIONERY SUPPLIES. AND HE TOLD ME TO GET TO THE CORNER OF THE  
13 CLOSET AND TAKE -- REMOVE MY CLOTHES.

14 AND I SAID, I'M NOT GOING -- I WALKED  
15 TO THE CORNER OF THE CLOSET, BUT I SAID, SAM, I'M NOT GOING TO  
16 REMOVE MY CLOTHES.

17 HE SAID, I'M GOING TO SHOOT YOU.

18 I SAID, YOU'LL HAVE TO SHOOT ME WITH  
19 MY CLOTHES ON. I'M NOT GOING TO TAKE MY CLOTHES OFF.

20 Q DID HE SAY ANYTHING ELSE ABOUT THIS?

21 A WELL, HE KEPT TELLING ME TO TAKE MY  
22 CLOTHES OFF, THAT HE WAS GOING TO KILL ME. HE REPEATED IT A  
23 FEW TIMES.

24 Q AND WHERE WAS THE GUN AT THIS TIME?

25 A IN HIS HAND ALL THE TIME.

26 Q AND WHERE WAS IT POINTED?

27 A AT ME.

28 Q DID YOU TAKE YOUR CLOTHES OFF?

29 A NO, I DID NOT.

30 Q AND WHEN YOU WERE SAYING THAT YOU -- TO  
31 HIM THAT YOU WOULDN'T TAKE YOUR CLOTHES OFF, WHERE WERE YOU?

32 A PROBABLY AS --

1 Q NOT IN DISTANCES, BUT WHERE?

2 A I WAS IN THE CORNER -- I WENT TO THE

3 CORNER OF THE CLOSET, AS HE INSTRUCTED ME TO GO. AND HE WAS

4 STANDING NEAR THE DOOR OF THE CLOSET.

5 Q AND DID HE HAVE THIS PURSE IN HIS HAND AT

6 THAT TIME?

7 A YES, HE DID.

8 Q DID HE GO THROUGH IT THEN?

9 A YES.

10 Q WHAT DID HE TAKE OUT OF IT?

11 A HE TOOK OUT THE CAR KEYS AND THE -- AND

12 MY, UH, WALLET.

13 Q IS THE -- DID YOU HAVE THE \$2 IN THE

14 WALLET?

15 A YES.

16 Q AND WHAT DID HE DO WITH THE WALLET?

17 A HE TOOK THE WALLET WITH HIM. I ALSO HAD

18 MY CREDIT CARDS IN THERE.

19 Q DID YOU SEE WHERE HE PUT THE WALLET?

20 A NO. I REALLY DIDN'T.

21 Q WHAT DID HE DO WITH THE CAR KEYS WHEN HE

22 GOT THEM?

23 A WHEN HE TOOK THE CAR KEYS HE ASKED ME IF

24 MY CAR WAS PARKED RIGHT OUTSIDE THE DOOR OF THE OFFICE. THE

25 EMERGENCY DOOR, THE NURSES KEEP THE CARS THERE. HE KNEW THAT

26 CAR WAS MINE.

27 Q HOW DID HE KNOW THAT CAR WAS YOURS?

28 A WELL, AT A PREVIOUS TIME WHEN HE HAD COME

29 IN ONCE WITH A GROUP OF FELLOWS TO HAVE THEIR HANDS TAPED, I

30 HAD TAKEN THE CAR TO WORK THAT DAY AND THE EMERGENCY ROOM DOORS

31 WERE OPEN AND IT WAS A NEW CAR AND IT WAS VERY ATTRACTIVE.

32 Q WHAT KIND OF A CAR WAS IT?

1 A IT WAS A, A CADILLAC, A SILVER CADILLAC  
2 WITH RED LEATHER SEATS.

3 Q WHAT YEAR WAS IT?

4 A A 1977.

5 Q SO IT WAS NEW AT THAT TIME?

6 A YES. IT WAS NEW AT THAT TIME, AND, YOU  
7 KNOW, THE FELLOWS WERE, YOU KNOW, ADMIRING THE CAR. AND I  
8 DIDN'T GENERALLY USE THAT CAR. I -- MY HUSBAND -- MY HUSBAND  
9 USED THAT CAR. I JUST GENERALLY USE THE OLD PLYMOUTH TO GO TO  
10 WORK WITH.

11 BUT THAT DAY IT WAS RAINING VERY HARD  
12 AND MY HUSBAND SUGGESTED THAT I TAKE THE CADILLAC, BECAUSE THE  
13 WINDSHIELD WIPERS ON THE OLD PLYMOUTH WERE NOT THAT GOOD.

14 Q SO IS IT YOUR TESTIMONY THAT THE DEFENDANT  
15 WAS AMONG THAT GROUP OF INDIVIDUALS EARLIER WHO HAD LOOKED AT  
16 YOUR CAR?

17 A RIGHT.

18 Q AND THAT YOU KNOW HOW HE KNEW IT WAS YOUR  
19 CAR?

20 A YES.

21 Q AND WHAT CONVERSATION DID YOU HAVE WITH  
22 THE DEFENDANT AT THE TIME OF THE ROBBERY ABOUT YOUR CAR?

23 A WHEN HE TOOK THE KEYS TO THE CAR HE ASKED  
24 ME IF THE -- THERE WAS A BURGLAR ALARM SYSTEM IN THE CAR, AND  
25 THERE WAS A STICKER ON THE CAR THAT THERE WAS A BURGLAR ALARM  
26 SYSTEM.

27 AND HE ASKED ME IF THE BURGLAR ALARM  
28 SYSTEM WAS ON.

29 AND I SAID NO, THAT IT WASN'T.

30 AND HE SAID, YOU -- SOMETHING TO THE  
31 EFFECT THAT I BETTER NOT BE LYING ABOUT THE BURGLAR ALARM  
32 SYSTEM NOT BEING ON.

1 Q DID HE SAY WHAT HE WOULD DO IF YOU WERE  
2 LYING ABOUT THE BURGLAR ALARM SYSTEM BEING ON?

3 A I CAN'T REALLY RECALL THAT. I JUST  
4 REMEMBER HIM SAYING THAT YOU BETTER NOT BE LYING, AND IT  
5 SOUNDED THREATENING.

6 Q DID YOU HAVE ANY OTHER CONVERSATIONS WITH  
7 SAM HOWARD AT THAT TIME?

8 A NO. THEN -- AT THAT TIME, WITH THAT, HE  
9 LEFT. HE LOCKED ME IN THE CLOSET.

10 Q HOW DID HE LOCK YOU IN THE CLOSET?

11 A WITH THE KEYS.

12 Q HAD YOU ALSO GIVEN THE KEYS TO HIM?

13 A WELL, HE TOOK THE KEYS.

14 Q AFTER YOU --

15 A RIGHT.

16 Q AFTER YOU HAD UNLOCKED THE CLOSET?

17 A RIGHT.

18 Q OKAY.

19 HE TOOK THE KEYS.

20 A WELL, THEY WERE IN THE DOOR OF THE -- I  
21 HAD LEFT THEM IN THE DOOR OF THE CLOSET WHEN HE HAD OPENED THE  
22 CLOSET. AND HE LOCKED THE CLOSET AND TOOK THE KEYS WITH HIM.

23 Q WERE YOU INSIDE THE CLOSET WHEN HE LOCKED  
24 IT?

25 A AND I WAS INSIDE THE CLOSET.

26 Q AND HOW DID YOU --

27 A WE HAVE A -- HE WAS NOT AWARE THAT THERE  
28 WAS A LOCK INSIDE THE CLOSET THAT I COULD GET OUT.

29 Q AND DID YOU USE THAT LOCK INSIDE THE  
30 CLOSET TO GET OUT?

31 A YES, I DID.

32 Q I DO HAVE ANOTHER RATHER TECHNICAL

1 QUESTION. WERE YOU AFRAID FOR YOUR LIFE DURING THIS COURSE OF  
2 EVENTS?

3 A OH, YES, I WAS. I -- AS SOON AS I SAW  
4 THAT GUN, I FIGURED I WAS DEAD. NO WAY DID I THINK THAT HE  
5 WOULD LET ME -- I HAD HIM AND I -- I -- I JUST KNEW THAT I WAS  
6 DEAD. I KNEW THAT NOTHING I COULD DO WOULD -- AND THAT TRAUMA  
7 HAS STAYED WITH ME. I STILL HAVE NIGHTMARES ABOUT IT. IT'S A  
8 HORRENDOUS KIND OF FEELING.

9 I -- I MEAN HOW -- HOW WAS HE GOING TO  
10 LET ME LIVE AFTER DOING THIS TO ME?

11 Q MRS. WEISBAND, DID YOU EVER SEE THAT  
12 CADILLAC AGAIN?

13 A YES.

14 MR. FRANZEN: YOUR HONOR, I AM GOING TO OBJECT.  
15 WE'VE ESTABLISHED THE OFFENSE. WHERE ARE WE GOING HERE?

16 MR. SEATON: I WAS JUST GOING TO TIE UP THE CAR  
17 COMING BACK TO HER.

18 THE NEXT WITNESS WILL TESTIFY, YOUR HONOR,  
19 AS A DETECTIVE, ABOUT HAVING TO DO WITH THIS CASE, PART OF  
20 WHICH WAS GOING TO THE AREA WHERE THE CAR WAS IN ORDER TO GET  
21 THE DEFENDANT BACK TO NEW YORK.

22 THE COURT: TIE HIM TO THE CAR? TIE THE  
23 DEFENDANT TO THE CAR?

24 MR. SEATON: YES.

25 THE COURT: THE OBJECTION IS OVERRULED.

26 MR. SEATON: IT WILL BE VERY BRIEF.

27

28 BY MR. SEATON:

29

30 Q DID YOU SEE THE 1977 CADILLAC AGAIN?

31 A YES, I DID. A WEEK AFTER THE ROBBERY --  
32 A DAY AFTER THE ROBBERY SAM HOWARD HAD CALLED ME AT HOME. HE

1 HAD MY DRIVER'S LICENSE AND HE KNEW MY HOME AND I WAS LISTED  
2 IN THE TELEPHONE DIRECTORY. HE CALLED ME AND ASKED HOW MUCH  
3 THE PROPERTY WAS WORTH TO ME. AND I --

4 Q BY "PROPERTY" DID HE MEAN THE AUTOMOBILE?

5 A YES.

6 AND I -- I TOLD HIM IT WAS WORTH  
7 NOTHING, BECAUSE AT THE TIME I WAS JUST SO FRIGHTENED THAT HE  
8 EVEN CONTACTED ME.

9 AND THEN I -- WHEN I SAID "NOTHING",  
10 HE SAID, HOW MUCH IS YOUR LIFE WORTH TO YOUR HUSBAND?

11 AND AT THAT POINT I -- I JUST HUNG UP.  
12 I JUST WAS SO TERRIFIED. AND I CALLED DETECTIVE MCNICHOLAS  
13 BECAUSE I DIDN'T KNOW WHAT TO DO AT THAT POINT.

14 Q AND DID THERE COME A TIME THEN WHEN YOU  
15 DID REGAIN POSSESSION OF THE 1977 CADILLAC?

16 A YES. UH, UH, A WEEK AFTER THE ROBBERY.  
17 THE ROBBERY HAPPENED ON A WEDNESDAY AND THE FOLLOWING WEDNESDAY  
18 I GOT A CALL FROM A POLICE OFFICER IN TEXAS.

19 Q DO YOU REMEMBER WHERE IN TEXAS?

20 A NO, I REALLY DON'T.

21 Q OKAY.

22 TELL US WHAT THE POLICE OFFICER SAID.

23 A HE ASKED ME IF I WAS DOROTHY WEISBAND.

24 AND I SAID, YES.

25 AND HE SAID --

26 MR. FRANZEN: YOUR HONOR, WE WOULD OBJECT.

27 THE WITNESS: HERE'S THE CADILLAC.

28 MR. FRANZEN: WE HAVE A HEARSAY OBJECTION, YOUR  
29 HONOR, AND CONFRONTATION.

30 THE COURT: SUSTAINED.

31 MR. SEATON: MAY I BE HEARD, YOUR HONOR, BRIEFLY?

32 MR. FRANZEN: OUT OF THE PRESENCE OF THE JURY,

1 YOUR HONOR, IF HE WISHES TO.

2 THE COURT: APPROACH THE BENCH.

3 (WHEREUPON, SIDE BAR CONFERENCE  
4 WAS HELD AT THE BENCH; NOT  
5 REPORTED. AT THE CONCLUSION  
6 OF WHICH THE FOLLOWING WAS HAD)

7 THE COURT: PROCEED.

8

9 BY MR. SEATON:

10

11 Q MRS. WEISBAND, DID THERE COME A TIME WHEN  
12 YOU TESTIFIED IN COURT IN NEW YORK REGARDING THESE MATTERS?

13 A YES.

14 Q AND WHAT KIND OF A PROCEEDING WAS THAT?

15 A UH, UH, A REGULAR TRIAL, UH, FOR, UH, UH,  
16 THIS. I GUESS IT WOULD BE THE CITY AGAINST SAM HOWARD FOR  
17 ROBBERY ONE. I DON'T KNOW WHAT THE TECHNICALITIES ARE.

18 Q SO --

19 A IT WAS A TRIAL.

20 Q THE SAME --

21 A SAM HOWARD WAS ON TRIAL FOR THE ROBBERY  
22 OF MY AUTOMOBILE AND THE USE OF A GUN.

23 Q AND DID YOU TESTIFY IN THAT TRIAL?

24 A YES, I DID.

25 Q AND ON THE DAY THAT YOU TESTIFIED, WAS  
26 SAM HOWARD PRESENT IN COURT?

27 A NO, HE WASN'T.

28 Q WERE YOU CROSS EXAMINED BY HIS DEFENSE  
29 ATTORNEY?

30 A YES, I WAS.

31 MR. SEATON: THAT CONCLUDES THE QUESTIONS BY  
32 THE STATE, YOUR HONOR.

1  
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THE COURT: CROSS?

MR. FRANZEN: NO QUESTIONS, YOUR HONOR.

THE COURT: YOU'RE EXCUSED.

(WHEREUPON, THE WITNESS WAS  
EXCUSED.)

THE COURT: CALL YOUR NEXT WITNESS.

MR. SEATON: JOHN MCNICHOLAS.

THE CLERK: PLEASE REMAIN STANDING AND RAISE  
YOUR RIGHT HAND.

WHEREUPON,

JOHN F. MCNICHOLAS,

CALLED AS A WITNESS HEREIN BY THE PLAINTIFF WAS FIRST DULY SWORN  
EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE BE SEATED.

THE COURT: PROCEED.

MR. SEATON: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MR. SEATON:

Q WOULD YOU PLEASE STATE YOUR NAME AND SPELL  
YOUR LAST NAME FOR THE RECORD?

A DETECTIVE JOHN F. MCNICHOLAS, CAP M-C- CAP  
N-I-C-H-O-L-A-S.

Q DETECTIVE MCNICHOLAS, WHERE ARE YOU  
EMPLOYED?

A NEW YORK CITY POLICE DEPARTMENT, 1113



1       PRECINCT, DETECTIVE UNIT.

2                   Q       AND WHAT ARE YOUR DUTIES?

3                   A       I INVESTIGATE CRIMES IN THAT IMMEDIATE  
4       AREA.

5                   Q       ANY PARTICULAR KINDS OF CRIMES?

6                   A       ALL KINDS OF CRIMES.

7                   Q       HOW LONG HAVE YOU BEEN EMPLOYED WITH THAT  
8       PARTICULAR DIVISION?

9                   A       I'VE BEEN WITH THEM 13 YEARS.

10                  Q       ARE YOU FAMILIAR WITH A MAN BY THE NAME OF  
11       SAMUEL HOWARD?

12                  A       I AM.

13                  Q       COULD YOU TELL US IF HE'S PRESENT IN  
14       COURT?

15                  A       HE IS.

16                  Q       WOULD YOU POINT HIM OUT AND DESCRIBE WHAT  
17       HE'S WEARING, PLEASE.

18                  A       (INDICATING) IT'S THE YELLOW SHIRT AND BLUE  
19       WINDBREAKER.

20                  MR. SEATON: AGAIN, YOUR HONOR, MAY THE RECORD  
21       REFLECT IDENTIFICATION OF SAM HOWARD.

22                  THE COURT: THE RECORD MAY SO SHOW.

23  
24       BY MR. SEATON:

25  
26                  Q       ARE YOU FAMILIAR WITH DOROTHY WEISBAND,  
27       THE WITNESS WHO JUST LEFT THE COURTROOM?

28                  A       I AM.

29                  Q       CAN YOU TELL US HOW YOU BECAME INVOLVED  
30       WITH THE CASE THAT HAD TO DO WITH DOROTHY WEISBAND AND THE  
31       DEFENDANT SAM HOWARD?

32                  A       ON MAY 24TH OF '78, I RECEIVED A CASE OF AN

1 ARMED ROBBERY AT QUEENS COLLEGE WITH MS. WEISBAND, WHO WAS THE  
2 COMPLAINANT. AND SHE IDENTIFIED SAM HOWARD AS THE ONE WHO  
3 ROBBED HER.

4 Q NOW, DID YOU INTERVIEW MS. WEISBAND?

5 A I DID.

6 Q AND WHEN AND WHERE DID YOU DO THAT?

7 A I INTERVIEWED HER THAT NIGHT, THE EVENING  
8 OF THE 24TH OF MAY, AT HER HOME.

9 Q AND WHAT DID SHE TELL YOU WHILE YOU WERE  
10 PRESENT IN HER HOME?

11 A SHE TOLD ME THAT THE SAM HOWARD SHE HAD  
12 KNOWN FOR A YEAR, YEAR AND A HALF, CAME IN THROUGH THE GYM AND  
13 THE NURSES QUARTERS WHERE SHE WAS, AND AFTER INQUIRING ABOUT  
14 IF THERE WAS ANOTHER NURSE THERE, WHEN SHE, MS. WEISBAND, TOLD  
15 HIM THERE WASN'T, HE WANTED HER TO LOOK AT HIS FINGER, AND WHEN  
16 SHE WENT TO LOOK AT THE FINGER HE DREW A GUN FROM THE JACKET  
17 POCKET AND DEMANDED HER MONEY AND PROPERTY.

18 Q DID YOU ASK HER TO DESCRIBE THE GUN?

19 A I DID.

20 Q WAS SHE ABLE TO?

21 A SHE SAID SHE WASN'T SURE WHAT TYPE IT WAS.  
22 BUT SHE SAID IT WAS A SMALL BARRELLED GUN. AT WHICH TIME, I  
23 SHOWED HER MY GUN, AND SHE SAID IT LOOKED LIKE THAT REVOLVER  
24 BUT IT WAS A DIFFERENT COLOR.

25 Q WHAT KIND OF GUN DO YOU HAVE?

26 A I HAVE A .38 SMITH AND WESSON SNUB NOSE.

27 Q IS THAT WHAT KIND OF A GUN YOU HAD ON THE  
28 NIGHT IN QUESTION?

29 A YES, IT IS.

30 Q ARE YOU FAMILIAR WITH A SMITH AND WESSON  
31 .357 MAGNUM --

32 A I AM FAMILIAR.

1 Q (CONTINUING) -- REVOLVER?

2 A YES.

3 Q HOW SIMILAR IS THAT KIND OF A GUN TO THE

4 WEAPON THAT YOU CARRIED ON THAT DAY?

5 A OH, VERY -- IT'S THE SAME MAKE, BUT IT'S

6 COMPLETELY DIFFERENT. IT'S A MUCH BIGGER GUN, THE MAGNUM.

7 Q THE MAGNUM IS A --

8 A WELL --

9 Q YOUR GUN IS SMALLER?

10 A IT'S THE GUN THAT I CARRY IN CIVILIAN

11 CLOTHES WHEN I'M OFF DUTY.

12 Q DID YOU TALK ABOUT, OR WERE YOU ABLE TO

13 LOCATE, THE ADDRESS OF THE DEFENDANT, SAM HOWARD?

14 A YES, I WAS. I LOCATED IT.

15 Q PLEASE GO AHEAD.

16 A I WENT TO THIS SCHOOL, QUEENS COLLEGE, AND

17 THEY GAVE ME INFORMATION ON MR. HOWARD.

18 I WENT TO HIS RESIDENCE ON FOTCH

19 BOULEVARD AND AT THAT TIME INTERVIEWED WITH A WOMAN THERE, I

20 BELIEVE SHE IDENTIFIED HERSELF AS HIS GRANDMOTHER, AND SAID

21 THAT SAM DID NOT LIVE THERE AT THAT TIME.

22 Q AND SUBSEQUENT TO THAT DISCUSSION WERE

23 YOU ABLE TO OBTAIN A PHOTOGRAPH?

24 A I WAS.

25 Q OF SAM HOWARD?

26 A I -- I DID. I OBTAINED A PHOTOGRAPH FROM

27 QUEENS COLLEGE.

28 Q AND DID YOU HAVE AN OPPORTUNITY AGAIN TO

29 TALK WITH DOROTHY WEISBAND REGARDING ANY PHONE CALLS THAT SHE

30 MAY HAVE RECEIVED?

31 A YES. THE NEXT -- THE 25TH, IN THE EVENING,

32 SHE CALLED AND SHE SAID THAT SAM HOWARD HAD CALLED HER HOUSE

1 AND THAT HE HAD THREATENED HER.

2 I NOTIFIED THE PRECINCT WHERE MS.  
3 WEISBAND LIVES, AND TOLD THEM. AND THEY SAID THAT THEY WOULD  
4 TRY TO GIVE HER HOUSE AS MUCH ATTENTION AS THEY POSSIBLY COULD.

5 Q AND DID YOU, IN YOUR CAPACITY AS A  
6 DETECTIVE IN THE NEW YORK CITY POLICE DEPARTMENT, ATTEMPT TO  
7 PUT OUT PAPERWORK THAT WOULD HELP YOU IN LOCATING SAMUEL  
8 HOWARD?

9 A YES. I -- I SENT OUT WANTED CARDS.

10 Q WHAT IS A "WANTED CARD"?

11 A A WANTED CARD IS A -- WE SEND THROUGH OUR  
12 COMMUNICATIONS BUREAU AND WE PUT IT ON A COMPUTER, A TELETYPE  
13 THROUGHOUT THE CITY, THROUGHOUT THE COUNTRY.

14 AND ON THE 30TH OF MAY WE WERE  
15 NOTIFIED THAT SAMUEL HOWARD WAS ARRESTED IN DALLAS, TEXAS.

16 Q PRIOR TO THAT TIME HAD A WARRANT OF  
17 ARREST BEEN ISSUED BY NEW YORK CITY?

18 MR. FRANZEN: YOUR HONOR, COULD WE APPROACH THE  
19 BENCH, PLEASE.

20 THE COURT: YOU MAY.

21 (WHEREUPON, SIDE BAR CONFERENCE  
22 WAS HELD AT THE BENCH; NOT  
23 REPORTED. AT THE CONCLUSION  
24 OF WHICH THE FOLLOWING WAS HAD:)

25  
26 BY MR. SEATON:

27  
28 Q LET'S CLARIFY WHERE WE WERE WHEN WE  
29 INTERRUPTED OURSELVES JUST NOW, DETECTIVE.

30 YOU SAY -- YOUR TESTIMONY IS THAT IN  
31 ORDER TO TRY TO FIND SAM HOWARD YOU PUT OUT A WANTED CARD OR  
32 CARDS?

1 A THAT'S CORRECT.

2 Q AND THEN YOUR TESTIMONY IS THAT THOSE

3 WANTED CARDS ARE PUT INTO A COMPUTER?

4 A THEY HAVE -- THEY ARE PUT IN A COMMUNICA-

5 TIONS DIVISION OF THE NEW YORK CITY POLICE DEPARTMENT.

6 Q AND DO THEY GO COUNTRY WIDE?

7 A COUNTRY WIDE.

8 Q IN EVERY STATE IN THE UNION?

9 A WELL, THAT'S RIGHT.

10 Q AND THEN MY OTHER QUESTION TO YOU EARLIER

11 WAS, HAD A WARRANT OF ARREST FOR SAM HOWARD FOR THE ROBBERY OF

12 DOROTHY WEISBAND BEEN ISSUED BY THE NEW YORK CITY POLICE DEPART-

13 MENT COURTS?

14 A AFTER I SENT OUT A WANTED CARD?

15 Q YES, AT ANYTIME?

16 A LATER ON WHEN -- AFTER WE FOUND OUT HE

17 WAS IN DALLAS, TEXAS, WE -- WE GOT AN ARREST WARRANT FOR HIM.

18 Q AND THEN WAS HE ARRESTED IN DALLAS, TEXAS,

19 FOR THAT ARREST WARRANT?

20 A YES. I -- I WENT DOWN TO DALLAS AND

21 PLACED HIM UNDER ARREST AND BROUGHT HIM BACK.

22 Q ALL RIGHT.

23 CAN YOU DESCRIBE THE MONTH AND THE

24 YEAR THAT YOU WENT BACK TO DALLAS, TEXAS?

25 A IT WAS IN JUNE OF '78, A MONTH LATER.

26 Q AND YOU SAY YOU BROUGHT THE DEFENDANT BACK?

27 A I DID.

28 Q AFTER HE CAME BACK TO THE STATE OF NEW

29 YORK WAS A TRIAL HELD ON THESE PARTICULAR CHARGES?

30 A YES, THERE WAS.

31 Q AND SAM HOWARD WAS THE DEFENDANT?

32 A HE WAS.

1 Q WERE YOU A PART OF THAT TRIAL AS A  
2 WITNESS?

3 A I TESTIFIED.

4 Q WHEN THE TRIAL PHASE FIRST BEGAN, TO YOUR  
5 KNOWLEDGE, WAS SAM HOWARD PRESENT?

6 A I WAS TOLD HE WAS PRESENT THE FIRST --  
7 MR. FRANZEN: I OBJECT AS TO HEARSAY, YOUR HONOR.  
8 THE COURT: SUSTAINED.

9  
10 BY MR. SEATON:

11  
12 Q WHEN DID YOU TESTIFY IN THE TRIAL?

13 A IT WAS THE SECOND DAY.

14 Q AND WHEN YOU TOOK THE STAND WAS SAM  
15 HOWARD PRESENT?

16 A HE WAS NOT.

17 Q DO YOU KNOW OF YOUR OWN KNOWLEDGE WHAT THE  
18 OUTCOME OF THAT TRIAL WAS?

19 A HE WAS CONVICTED.

20 Q AND WHAT WAS HE CONVICTED OF?

21 A HE WAS CONVICTED OF ROBBERY ONE.

22 Q DOES ROBBERY ONE IMPLY ANYTHING TO DO WITH  
23 THE WEAPON?

24 A WEAPON OR USE OF FORCE.

25 MR. SEATON: THAT CONCLUDES THE STATE'S  
26 QUESTIONS.

27 THE COURT: CROSS.

28 ..

29 ..

30 ..

31 ..

32 ..

CROSS EXAMINATION

BY MR. FRANZEN:

Q OFFICER, WERE YOU PRESENT WHEN THE VERDICT WAS RETURNED?

A NO, I WAS NOT.

Q YOU WERE TOLD THIS BY ANOTHER PARTY?

A THE DISTRICT ATTORNEY TOLD ME.

MR. FRANZEN: YOUR HONOR, I MOVE TO STRIKE THAT TESTIMONY FROM THE RECORD.

THE COURT: COUNSEL?

MR. SEATON: YOUR HONOR, IT'S THE SAME ARGUMENT THAT WE HAVE MADE AT THE BENCH. THE TYPES OF EVIDENCE, WHICH ARE ADMISSIBLE IN THE COURT -- THE STATE, EXCUSE ME, WOULD STAND BY REPRESENTATIONS OF THE BENCH, ACCORDING TO N.R.S. 175.552.

THE COURT: WELL, I UNDERSTAND THAT, COUNSEL. BUT YOU HAVE MORE IN THIS RECORD THAN THAT, IF YOU GO BACK AND THINK ABOUT IT.

MR. SEATON: WE UNDERSTAND THAT, YOUR HONOR.

THE COURT: ALL RIGHT.

THEN RESTATE IT FOR THE RECORD, PLEASE.

MR. SEATON: PARDON ME.

THE COURT: THEN STATE IT FOR THE RECORD WHAT ELSE YOU HAVE TO SUPPORT THE ALLEGATION.

MR. SEATON: WELL, IT'S THE DEFENDANT'S OWN ADMISSION THAT HE WAS TRIED IN ABSENTIA, IN NEW YORK. I CAN'T REMEMBER THE STATE OF THE RECORD IF HE SAID THAT HE WAS THERE AT THE BEGINNING OF THE PROCEEDING, BUT CERTAINLY WE ALL UNDERSTAND IN THIS COURTROOM WHAT BEING TRIED IN ABSENTIA IS.

MR. FRANZEN: YOUR HONOR, I THINK AT THE MOMENT

1 WE ARE COMING INTO TESTIFY TO THE WITNESS, AND THIS SHOULD BE  
2 DONE OUTSIDE THE PRESENCE OF THE JURY.

3 THE COURT: YOUR REQUEST IS DENIED.

4 MR. SEATON: SO IF THE STATE'S FEELING THAT IN  
5 LIGHT OF THE BURDEN THAT IS PLACED ON THE STATE, AS THE COURT  
6 WILL PROBABLY INSTRUCT THE JURY REGARDING BEYOND A REASONABLE  
7 DOUBT TO PROVE, THAT IT'S NECESSARY OR IT IS SUPPORTIVE FOR  
8 THE STATE'S CASE FOR THIS WITNESS TO TESTIFY TO EVENTS THAT HE'S  
9 VERY FAMILIAR WITH. HE WAS THE DETECTIVE IN CHARGE OF THE CASE.  
10 HIS TESTIMONY IS THAT HE HEARD THIS INFORMATION FROM THE  
11 DEPUTY DISTRICT ATTORNEY.

12 THE COURT: WELL, WHAT ELSE DO YOU HAVE? I KNOW  
13 THAT YOU'VE GOT SOMETHING ELSE THAT YOU HAVEN'T --

14 MR. SEATON: WE HAVE A DOCUMENT THAT WE ARE  
15 GOING TO --

16 THE COURT: WHY DON'T YOU BRING THAT FORWARD AND  
17 GET AROUND THAT ISSUE SO I WON'T HAVE TO RULE ON HALF THE  
18 EVIDENCE AT ONE TIME.

19 MR. SEATON: THE STATE WOULD MOVE FOR THE  
20 INTRODUCTION INTO EVIDENCE AT THIS TIME OF PROPOSED 1, WHICH  
21 HAS BEEN MARKED FOR IDENTIFICATION. IT SHOULD BE SOMETHING  
22 OTHER THAN STATE'S PROPOSED EXHIBIT 1 THOUGH AS I SEE IT HERE,  
23 YOUR HONOR. IT WOULD BE THE NEXT IN LINE, WHICH IS IN THE 50'S  
24 OR 60'S, I BELIEVE. AND IT PURPORTS TO BE A CERTIFIED COPY OF  
25 MINUTES FROM THE SUPREME COURT OF NEW YORK, THE HONORABLE  
26 VINCENT F. NARROW.

27 THE COURT: WHAT'S YOUR NEXT NUMBER THERE, PLEASE?

28 THE CLERK: SIXTY NINE.

29 THE COURT: IT'S NUMBER 69.

30 ALL RIGHT. THIS WILL BE REMARKED AS  
31 STATE'S 69.

32 MR. SEATON: WE ARE WONDERING NOW, YOUR HONOR,



1 IF THAT HAS BEEN PREVIOUSLY MARKED.

2 THE NUMERICAL CHANGE IS APPROPRIATE, YOUR  
3 HONOR. WHAT WAS THE NUMBER THAT THE COURT SAID?

4 THE COURT: SIXTY NINE.

5 MR. SEATON: THEN THE STATE WOULD MOVE FOR THE  
6 ADMISSION OF STATE'S PROPOSED 69.

7 MR. FRANZEN: MAY I TAKE ONE MORE LOOK AT IT,  
8 YOUR HONOR.

9 WE WOULD OBJECT, YOUR HONOR. THE  
10 CERTIFICATION DOES NOT APPEAR TO BE AN IDENTIFICATION BY THE  
11 JUDGE THAT THE PERSON WHO IS WRITING THERE WHO IS A CLERK IS  
12 INDEED A CLERK OF THAT COURT.

13 THE COURT: COUNSEL?

14 MR. SEATON: I THINK THE DOCUMENT IS PROPERLY  
15 CERTIFIED, YOUR HONOR, UNDER N.R.S. 52.125. THERE IS NO  
16 REQUIREMENT HERE OF AN EXEMPLIFIED COPY, SIMPLY A CERTIFIED  
17 COPY.

18 IF MY MEMORY SERVES ME CORRECTLY, A  
19 CLERK'S STAMP IS DIRECTLY OVER THE CLERK'S SIGNATURE, WHICH  
20 WOULD SATISFY THE REQUIREMENTS OF THE STATUTE AND THAT THIS IS  
21 APPROPRIATELY A CERTIFIED DOCUMENT OF THE MINUTES SHOWING THE  
22 CONVICTION OF THE DEFENDANT.

23 THE COURT: IT DOES CONTAIN THE WORDS, "A TRUE  
24 EXTRACT OF THE MINUTES OF 4-26-83" AND IT'S SIGNED BY THE  
25 CLERK WITH THE CLERK'S SEAL.

26 THE OBJECTION IS OVERRULED. THE SAME  
27 WILL BE RECEIVED.

28 MR. SEATON: THANK YOU, YOUR HONOR.

29 THE COURT: NOW, YOUR OBJECTION, COUNSEL, IS  
30 OVERRULED. IT APPEARS THAT THE OFFICIAL MINUTES OF THE COURT  
31 REFLECT THAT THIS INDIVIDUAL WAS CONVICTED OF THE OFFENSE  
32 WHICH IS CORROBORATED BY THIS OFFICER'S TESTIMONY.

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MR. SEATON: SO THEN MIGHT --

THE COURT: PROCEED.

MR. SEATON: THANK YOU, YOUR HONOR.

BY MR. SEATON:

Q DETECTIVE, WAS IT THE SUPREME COURT OF  
NEW YORK IN WHICH THE TRIAL OF SAM HOWARD WAS HELD?

A QUEENS COUNTY, RIGHT.

Q QUEENS COUNTY IS WHERE YOU TESTIFIED?

A YES.

Q AND AGAIN FOR THE RECORD, DO YOU KNOW OF  
THE FACT OF WHETHER OR NOT HE WAS CONVICTED?

A YES, HE WAS.

MR. FRANZEN: YOUR HONOR, AREN'T WE ON CROSS?  
WASN'T I EXAMINING THE OFFICER?

MR. SEATON: I DON'T BELIEVE I CONCLUDED.

THE COURT: NO, HE HASN'T FINISHED HIS CASE  
YET.

MR. SEATON: I'M CLOSE.

THE COURT: IT'S BEEN A LONG DAY, COUNSEL. BUT  
YOU'LL HAVE AN OPPORTUNITY.

PROCEED.

BY MR. SEATON:

Q ARE YOU AWARE, DETECTIVE MCNICHOLAS, AS  
TO WHETHER OR NOT THE DEFENDANT WAS CONVICTED OF THE CRIME OF  
ROBBERY WITH USE OF A DEADLY WEAPON AGAINST DOROTHY WEISBAND?

A YES, HE WAS.

MR. SEATON: THAT CONCLUDES THE STATE'S  
QUESTIONS, YOUR HONOR.

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THE COURT: CROSS.

CROSS EXAMINATION CONTINUED

BY MR. FRANZEN:

Q OFFICER, YOUR OPINION OF WHETHER OR NOT HE  
WAS CONVICTED IS BASED UPON WHAT THE DISTRICT ATTORNEY TOLD  
YOU?

A YES.

MR. FRANZEN: NOTHING FURTHER.

MR. SEATON: ONE QUESTION, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. SEATON:

Q WAS THAT THE DEPUTY DISTRICT ATTORNEY WHO  
TRIED THE CASE?

A IT WAS.

MR. SEATON: THANK YOU.

NOTHING FURTHER.

MR. FRANZEN: NOTHING.

THE COURT: YOU'RE EXCUSED, SIR.

(WHEREUPON, THE WITNESS WAS  
EXCUSED.)

THE COURT: COUNSEL, APPROACH THE BENCH.

(WHEREUPON, SIDE BAR CONFERENCE  
WAS HELD AT THE BENCH; NOT  
REPORTED. AT THE CONCLUSION OF  
WHICH THE FOLLOWING WAS HAD:)

THE COURT: LADIES AND GENTLEMEN OF THE JURY, WE

1 ARE GOING TO TAKE OUR AFTERNOON RECESS AT THIS TIME. WE WILL  
2 BE IN RECESS UNTIL 10:00 O'CLOCK TOMORROW MORNING. AT THE RATE  
3 IN WHICH WE ARE PROGRESSING NOW, IT APPEARS THAT THIS MATTER  
4 WILL BE SUBMITTED TO YOU TOMORROW.

5 AFTER DISCUSSION WITH THE ATTORNEYS, BOTH  
6 FOR THE STATE AND FOR THE DEFENSE, IT DOES APPEAR THAT WE WILL  
7 NOT CONTINUE TO NEED THE SERVICES OF THE ALTERNATE JURORS. SO  
8 THEY NEED NOT REAPPEAR TOMORROW. THE REST OF YOU, HOWEVER, ARE  
9 INSTRUCTED TO BE HERE AT 10:00 O'CLOCK TOMORROW MORNING.

10 DURING THIS RECESS YOU ARE  
11 ADMONISHED NOT TO CONVERSE AMONG  
12 YOURSELVES OR WITH ANYONE ELSE ON  
13 ANY SUBJECT CONNECTED WITH THIS  
14 TRIAL, OR READ, WATCH OR LISTEN  
15 TO ANY REPORT OF OR COMMENTARY ON  
16 THIS TRIAL WITH ANY PERSON  
17 CONNECTED WITH THIS TRIAL BY ANY  
18 MEDIUM OF INFORMATION, INCLUDING  
19 WITHOUT LIMITATION, NEWSPAPER,  
20 TELEVISION OR RADIO, OR FORM OR  
21 EXPRESS ANY OPINION ON ANY SUBJECT  
22 CONNECTED WITH THIS TRIAL UNTIL THE  
23 CASE IS FINALLY SUBMITTED TO YOU.

24 WE WILL BE IN RECESS UNTIL 10:00  
25 O'CLOCK TOMORROW MORNING. MAY I SEE COUNSEL IN CHAMBERS.  
26 (WHEREUPON, AT THE HOUR OF  
27 5:00 P.M. THE EVENING RECESS  
28 WAS HAD IN THE PROCEEDINGS.)  
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1 CASE NO. C53867  
2 DEPARTMENT NO. V  
3 DOCKET H  
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6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF CLARK  
8

9 THE STATE OF NEVADA, )  
10 PLAINTIFF, )  
11 VS. )  
12 SAMUEL HOWARD, AKA KEITH, )  
13 DEFENDANT. )  
14

15 REPORTER'S TRANSCRIPT OF  
16 PENALTY HEARING  
17

18 BEFORE THE HONORABLE JOHN F. MENDOZA, DISTRICT JUDGE  
19 TUESDAY, MAY 3, 1983, AT 10:45 A.M.

20  
21 APPEARANCES:

22 FOR THE STATE:	MELVIN T. HARMON, ESQUIRE
23	DANIEL M. SEATON, ESQUIRE
24	200 SOUTH THIRD STREET
	LAS VEGAS, NV 89101
	DEPUTY DISTRICT ATTORNEYS
25 FOR THE DEFENDANT:	MARCUS D. COOPER, ESQUIRE
26	GEORGE E. FRANZEN, ESQUIRE
27	309 SOUTH THIRD STREET
	LAS VEGAS, NV 89101
	DEPUTY PUBLIC DEFENDERS

28  
29  
30 REPORTED BY: RENEE SILVAGGIO, C.S.R. NO. 122  
31

32 VOLUME XI

1 LAS VEGAS, NEVADA, TUESDAY, MAY 3, 1983, AT 10:45 A.M.

2 \* \* \* \* \*

3 (WHEREUPON, THE FOLLOWING  
4 PROCEEDINGS WERE HAD OUTSIDE  
5 THE PRESENCE OF THE JURY:)

6 THE COURT: COUNSEL, YOU WERE A LITTLE --

7 MR. FRANZEN: I BEG YOUR PARDON, YOUR HONOR.

8 THE COURT: YOU WERE A LITTLE LATE GETTING OVER  
9 HERE TODAY, SIR.

10 MR. FRANZEN: WELL, I DON'T KNOW. WELL, YES, I  
11 WAS.

12 THE COURT: PROCEED.

13 MR. HARMON: THANK YOU, YOUR HONOR.

14 THE STATE HAS ONE ADDITIONAL WITNESS THAT  
15 WE WANT TO OFFER DURING THIS PHASE OF THE PROCEEDING, YOUR  
16 HONOR. SHE IS OFFICER SANDEE LOFGREN OF THE SAN BERNARDINO  
17 POLICE DEPARTMENT. THE FIRST NAME IS SPELLED S-A-N-D-E-E. THE  
18 LAST NAME IS L-O-F-G-R-E-N.

19 OFFICER LOFGREN WOULD BE OFFERED TO  
20 TESTIFY, YOUR HONOR, IN REGARDS TO THE DEFENDANT'S CONVICTION  
21 IN THE STATE OF CALIFORNIA FOR ROBBERY WITH USE OF A WEAPON.  
22 THE CONVICTION BEING IMPOSED MAY THE 27TH, 1982.

23 WE DO HAVE A CERTIFIED COPY OF RECORDS  
24 OUT OF THE STATE OF CALIFORNIA, YOUR HONOR, WHICH WE WILL ALSO  
25 OFFER IN CONNECTION WITH THIS OFFENSE. IT HAS BEEN PREVIOUSLY  
26 MARKED AS PROPOSED EXHIBIT 7. THESE RECORDS CONTAIN A PHOTO-  
27 GRAPH OF MR. HOWARD, FINGERPRINTS, THE PLEADINGS INVOLVED, AND  
28 ALSO AN ABSTRACT OF JUDGMENT WHICH DOES INDICATE THAT ON  
29 5-27-82 THAT HE WAS CONVICTED OF ONE COUNT OF THEFT AND ALSO OF  
30 ROBBERY AND SENTENCED TO SEVEN YEARS IN THE CALIFORNIA STATE  
31 PRISON SYSTEM. OFFICER LOFGREN WAS ON DUTY.

32 THE COURT: WELL, LET'S SEE WHAT OBJECTIONS

1 THERE ARE TO THAT.

2 MR. FRANZEN: YOUR HONOR, WE HAVE A NUMBER OF  
3 OBJECTIONS. N.R.S. 200.337-2.

4 THE COURT: 200 WHAT?

5 MR. FRANZEN: 200.337, SUBPARAGRAPH 2, WHICH IS  
6 THE STATUTE LISTING CIRCUMSTANCES AGGRAVATING FIRST DEGREE  
7 MURDER. IT READS:

8 THE ONLY CIRCUMSTANCE BY  
9 WHICH MURDER OF THE FIRST DEGREE  
10 MAY BE AGGRAVATED ARE...

11 AND IT LISTS A NUMBER. BUT SUBPARA-  
12 GRAPH 2 READS:

13 THE MURDER IS COMMITTED BY  
14 A PERSON WHO IS PREVIOUSLY CONVICTED  
15 OF ANOTHER MURDER OR A FELONY INVOLV-  
16 ING THE USE OF THREAT OR VIOLENCE TO  
17 THE PERSON OF ANOTHER.

18 MR. HARMON IS RELATING TO THE CONVIC-  
19 TION OF MAY 27, 1982, WHICH IS A CONVICTION SUBSEQUENT TO THE  
20 1980 MURDER OF DOCTOR MONAHAN. THAT'S OUR FIRST OBJECTION.

21 OUR NEXT OBJECTION IS THAT THIS IS  
22 HEARSAY TESTIMONY. AND PURSUANT TO THE EVOLVING LAW ON THE  
23 DEATH PENALTY AND HOW --

24 THE COURT: COUNSEL, I DON'T -- I'M NOT TOO  
25 CERTAIN WHAT STATUTE YOU CITED. YOU CITED 200.337?

26 MR. FRANZEN: I'M SORRY, YOUR HONOR. IT'S  
27 N.R.S. 200.033, SUBSECTION 2.

28 THE COURT: ALL RIGHT. ALL RIGHT.

29 NOW, WHAT'S YOUR OBJECTION TO THAT?

30 MR. FRANZEN: THAT THE CONVICTION WAS NOT PRIOR  
31 OR PREVIOUSLY. IN THE WORDS OF THE STATUTE, PREVIOUSLY CON-  
32 VICTED OF ANOTHER MURDER OR A FELONY INVOLVING THE USE OR

1 THREAT OR VIOLENCE.

2 THE COURT: YOU MUSTN'T HAVE READ THAT, DIDN'T  
3 YOU? READ FROM WHERE THE WORD "DISJUNCTIVE" COMES IN.

4 MR. FRANZEN: YOUR HONOR, IS YOUR HONOR INTER-  
5 PRETING THIS AS THE WORD "PREVIOUSLY" ONLY WOULD MODIFY THE  
6 PHRASE?

7 THE COURT: EXCUSE ME. PREVIOUSLY AS TO WHAT?

8 MR. FRANZEN: THE NUMBER --

9 THE COURT: PREVIOUSLY TO THIS HEARING?

10 MR. FRANZEN: WELL, I WOULD RESPECTFULLY DIS-  
11 AGREE, YOUR HONOR. I THINK THAT STATUTE MEANS THAT AT THE  
12 TIME OF THE MURDER FROM WHICH THE DEFENDANT IS BEING TRIED AND  
13 BEING SENTENCED ON, THAT PRIOR TO THEN HE WAS PREVIOUSLY CON-  
14 VICTED OF A CRIME OF VIOLENCE AND WITH THE USE OF A THREAT OR  
15 VIOLENCE. AND THIS AGAIN GOES BACK TO HOW STRICTLY THIS KIND  
16 OF STATUTE HAS TO BE READ IN THE LIGHT OF THE UNITED STATES  
17 SUPREME COURT DECISIONS, AND THE VARIOUS CIRCUIT COURTS OF  
18 APPEAL DECISIONS.

19 IF THIS IS VAGUE, AND IF THERE ARE TWO  
20 INTERPRETATIONS, IT IS VAGUE, THEN THIS PARTICULAR ASPECT OF  
21 THE STATUTE IS UNCONSTITUTIONAL BECAUSE THEN IT FAILS TO, IN  
22 THE WORDS OF GODFREY VERSUS GEORGIA, IT FAILS TO CHANNEL THE  
23 SUPPRESSION BY CLEAR AND OBJECTIVE STANCE THAT PROVIDES  
24 SPECIFIC AND DETAILED GUIDANCE.

25 THE COURT: WE DON'T KNOW WHAT THE UNITED STATES  
26 SUPREME COURT IS GOING TO DO TOMORROW OR THE NEXT DAY OR THE  
27 DAY AFTER THAT. THEY WILL PROBABLY GO OFF ON SOME TANGENT THAT  
28 NONE OF US EVER THOUGHT OF.

29 MR. FRANZEN: WELL, WE WERE RELYING UPON, YOUR  
30 HONOR, THE LANGUAGE THAT I JUST CITED, THAT SUCH LEEWAY AND  
31 ALLOWANCE OF THE INTERPRETATION WOULD IN AND OF ITSELF CAUSE  
32 THAT PARTICULAR STATUTE TO BE UNCONSTITUTIONAL.



1 THE COURT: WELL, I DON'T BUY THAT BUT YOU CAN  
2 CONTINUE, SIR.

3 MR. FRANZEN: YOUR HONOR, THE INTERPRETATION I  
4 AM URGING, IT'S CLEARLY BARRED OF THIS SAN BERNARDINO ROBBERY,  
5 THIS SAN BERNARDINO CONVICTION, OCCURRING TWO YEARS AFTER THE  
6 OFFENSE FOR WHICH THE DEFENSE IS NOW -- OR THE STATE IS NOW  
7 SEEKING THE DEATH PENALTY.

8 OUR NEXT OBJECTION GOES TO THE HEARSAY  
9 NATURE OF THE OFFICER'S TESTIMONY WHICH I PRESUME IS GOING TO  
10 INVOLVE, FROM WHAT THE DISTRICT ATTORNEY DESCRIBED YESTERDAY,  
11 A DESCRIPTION OF THE ALLEGED OFFENSE FOR WHICH THIS DEFENDANT  
12 WAS CONVICTED AS RELATED TO THIS OFFICER BY THE ALLEGED VICTIM.  
13 WE BELIEVE, UNDER THE CASE THAT WE HAVE PROVIDED YOUR HONOR  
14 YESTERDAY, OF PROFFITT VERSUS WAINRIGHT, 685 FED. 2ND, 1227,  
15 1982, 11TH CIRCUIT DECISION, THAT SUCH TESTIMONY WOULD BE  
16 INADMISSIBLE. THE 11TH CIRCUIT RELIED UPON THE DECISION OF THE  
17 5TH CIRCUIT IN SMITH V. ESTELL, 602 FED. 2ND, 694. THESE  
18 CASES APPEAR TO DISCUSS THE INVOLVING STANDARDS OF PROPER AND  
19 CONSTITUTIONAL APPLICATION OF THE DEATH PENALTY IN OUR COUNTRY.

20 THE COURT: ARE YOU AWARE OF THE CASE OF  
21 PROFITT VERSUS FLORIDA AT 96 SUPREME COURT 2960?

22 MR. FRANZEN: I'M AWARE OF THE NAME. I'M NOT  
23 AWARE OF WHAT PARTICULAR ASPECT --

24 THE COURT: WELL, IN THAT CASE THEY HELD THAT  
25 THE FLORIDA STATUTE, STATUTORY SCHEME, IS ALMOST IDENTICAL TO  
26 OURS AS CONSTITUTION --

27 MR. FRANZEN: I'M AWARE OF THE SIMILARITY, YES.

28 THE COURT: AND THEY'RE PRACTICALLY IDENTICAL IN  
29 THAT AREA. THERE THE FLORIDA STATUTE READS:

30 IN THE PROCEEDING EVIDENCE  
31 MAY BE PRESENTED AS TO ANY MATTER  
32 WHICH THE COURT DEEMED RELEVANT TO

1 AND SHALL INCLUDE ALL MATTERS  
2 RELATING TO ANY OF THE AGGRAVATING  
3 CIRCUMSTANCES ENUMERATED IN SECTION  
4 SIX. ANY SUCH EVIDENCE WHICH THE  
5 COURT DEEMED TO HAVE PROBATIVE  
6 VALUE, MAY BE RECEIVED, REGARDLESS  
7 OF ITS ADMISSIBILITY IN THE  
8 EXCLUSIONARY RULES OF EVIDENCE,  
9 PROVIDED THE DEFENDANT IS AFFORDED  
10 A FAIR OPPORTUNITY TO REBUT ANY  
11 HEARSAY STATEMENTS.

12 MR. FRANZEN: WHAT WAS THE NAME?

13 THE COURT: THAT'S THE STATUTE. THAT'S THE 1976  
14 UNITED STATES SUPREME COURT DECISION --

15 MR. FRANZEN: YOUR HONOR --

16 THE COURT: (CONTINUING) -- IN WHICH THEY TOOK  
17 A LOOK AT THE FLORIDA STATUTE AND THEY SAID, WE FIND NOTHING  
18 WRONG WITH IT.

19 MR. FRANZEN: THE -- OF COURSE, -- WELL, THE  
20 11TH CIRCUIT DECISION THAT I AM RELYING UPON IS SOME YEARS  
21 LATER.

22 THE COURT: I UNDERSTAND THAT.

23 MR. FRANZEN: 1982.

24 THE COURT: I UNDERSTAND THAT.

25 MR. FRANZEN: THE CASES WE RELIED UPON BY THIS  
26 11TH CIRCUIT DECISION OF PROFFITT VERSUS WAINRIGHT ARE CASES  
27 DECIDED BY THE UNITED STATES SUPREME COURT SINCE THE 197- --  
28 WAS IT '76? -- '76 DECISION THAT YOUR HONOR HAS CITED.

29 ONE OF THESE CASES WENT TO THE SUPREME  
30 COURT AND THE DECISION OF THE 5TH CIRCUIT COURT WAS AFFIRMED,  
31 REGARDING THE RIGHT OF A DEFENDANT TO CROSS EXAMINE THE  
32 ADVERSARY AT THE DEATH PENALTY HEARING. THE REASON FOR THIS

1 IS AS DISCUSSED IN PROFFITT V. WAINRIGHT, THE PRIOR SUPREME  
2 COURT RULING, RECOGNIZING CROSS EXAMINATION IN THE WORDS OF  
3 THE SUPREME COURT, QUOTE, "THE GREATEST LEGAL ENGINE EVER  
4 INVENTED FOR DISCOVERY OF THE TRUTH."

5 WE ARE GOING TO BE FACED WITH THE  
6 PROSPECT OF HAVING AN OFFICER ENGAGED IN THE COMPETITIVE  
7 BUSINESS OF LAW ENFORCEMENT, DESCRIBING WHAT SOMEONE TOLD HER  
8 IN 19 -- WELL SOME YEARS AGO. WE WOULD RESPECTFULLY OBJECT TO  
9 THE ADMISSION OF THIS TESTIMONY THROUGH THIS OFFICER ON THE  
10 GROUNDS OF CONSTITUTIONAL HEARSAY. IT CONSTITUTES A DENIAL OF  
11 THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO CONFRONT AND CROSS  
12 EXAMINE. AND ON THAT PARTICULAR ISSUE, YOUR HONOR, WE WOULD  
13 SUBMIT IT.

14 THE COURT: THE STATE.

15 MR. HARMON: YOUR HONOR, OFFICER LOFGREN  
16 RESPONDED ON MARCH THE 29TH, 1980, TO THE HARRISON RENO HONDA  
17 DEALERSHIP, AND SHE WAS THE PERSON WHO TOOK THE CRIME REPORT  
18 FROM THE COMPLAINING WITNESS, JAMES HILYER. SHE WILL TESTIFY  
19 THAT UNDER THE CIRCUMSTANCES OF HER INTERVIEW, IT HAD TO HAVE  
20 OCCURRED WITHIN AN HOUR. IT WAS PROBABLY CONSIDERABLY SHORTER  
21 FROM THE TIME THE CRIME OCCURRED. SHE WILL DESCRIBE THE VICTIM  
22 AS STILL BEING IN A VERY UPSET STATE OF MIND FROM WHAT HAD  
23 OCCURRED. IT PERMITTED HER TO TESTIFY OR AS SHE WILL RELATE,  
24 CIRCUMSTANCES DESCRIBED TO HER BY THE VICTIM WHICH ARE REMARK-  
25 ABLY SIMILAR TO THOSE WHICH HAVE OCCURRED IN THE CASE BEFORE  
26 THE BAR. FOR EXAMPLE, THE SUSPECT CAME BY THE DEALERSHIP THE  
27 NIGHT BEFORE AND REPRESENTED HIMSELF TO BE THE HEAD OF SECURITY  
28 AT SEARS.

29 THE COURT: THAT EVADES THE QUESTION. WHERE IS  
30 THE VICTIM?

31 MR. HARMON: YOUR HONOR, THE VICTIM IS IN THE  
32 STATE OF FLORIDA.

1 MR. HILYER HAS BEEN THE SUBJECT OF OUR  
2 EFFORTS FOR A SUBSTANTIAL PERIOD OF TIME, TO LOCATE HIM. WE  
3 LOCATED JAMES HILYER ABOUT A WEEK AGO. WE THOUGHT HE WAS IN  
4 SOME TRAILER PARK IN THE AREA OF NAPLES, FLORIDA. WE EXHAUSTED  
5 ALL RESOURCES THERE, EXHAUSTED ALL RESOURCES THERE. WE WERE IN  
6 TOUCH WITH IN-LAWS AT LEAST, WHO APPARENTLY HAD ONLY OCCASIONAL  
7 CONTACT WITH MR. HILYER.

8 WE FINALLY, ON THURSDAY OF LAST WEEK,  
9 ESTABLISHED THAT HE WAS IN A COMMUNITY AND, YOUR HONOR, I'M  
10 NOT -- I HAVE IN MY NOTES SOMEWHERE THAT IT'S ABOUT 40 MILES  
11 NORTH OF NAPLES.

12 AT SOME POINT ON FRIDAY AFTERNOON, I  
13 SPOKE PERSONALLY WITH MR. HILYER. AT THAT TIME HE TOLD ME THAT  
14 HE ONLY HAD \$50 IN HIS POCKET. HE JUST GOT A NEW JOB AND THAT  
15 IT WAS GOING TO BE A CONSIDERABLE FINANCIAL SACRIFICE TO COME  
16 OUT HERE. I IMPORED HIM AT LEAST TO FIND OUT WHAT TYPE OF  
17 TRAVEL ARRANGEMENTS WE COULD MAKE.

18 GINGER GARDNER OF OUR OFFICE, AND NOW  
19 THIS WAS AFTER 4:00 O'CLOCK ON FRIDAY, ASSISTED ME IN THIS  
20 MATTER. I KNOW IT WAS AFTER 4:00 BECAUSE OUR REGULAR VICTIM-  
21 WITNESS COORDINATOR FOR OUT-OF-STATE WITNESSES IS BARBARA  
22 WELLINGTON AND SHE HAD ALREADY GONE. SHE LEAVES AT 4:00 P.M.  
23 GINGER GARDNER ASSISTED IN WORKING OUT THE SCHEDULE, WHICH  
24 WOULD MEAN THAT THE WITNESS COULD WORK ALL DAY SUNDAY, WHICH  
25 WAS HIS DESIRE. HE COULD THEN FLY IN. IT WOULD MEAN THAT HE  
26 WOULD FLY A CONSIDERABLE TIME ON SUNDAY NIGHT AND HE COULD BE  
27 IN HERE BY, I THINK IT WAS GOING TO BE ABOUT 10:00 O'CLOCK IN  
28 THE MORNING ON MONDAY. HE ALSO INDICATED THAT HE WANTED TO  
29 WORK THE NEXT DAY. SO WE HAD ARRANGEMENTS FOR HIM TO FLY BACK  
30 OUT ON MONDAY AFTERNOON, AND HE AGREED TO THAT, I MUST SAY  
31 SOMEWHAT RELUCTANTLY. BUT WHEN WE INDICATED WE WERE MAKING  
32 THAT KIND OF EFFORT, HE TOLD US THAT HE WOULD RIDE UP TO FORT

1 MEADE. THAT IS WHERE HE WAS TO CATCH THE PLANE TO COME IN.

2 WHEN I CAME TO WORK ON MONDAY  
3 MORNING, YESTERDAY, I LEARNED THAT MR. HILYER'S WIFE HAD CALLED  
4 AND EXPLAINED THAT UNDER NO CIRCUMSTANCES COULD HE MAKE THE  
5 TRIP. HE WAS WORKING AT THAT VERY TIME ON THE JOB, AND SHE  
6 CALLED IN HIS PLACE. SO THAT'S WHERE HE IS, YOUR HONOR. HE'S  
7 IN THE STATE OF FLORIDA. HAD WE REALIZED HIS LOCATION SOONER,  
8 OF COURSE, WE COULD HAVE AVAILED OURSELVES OF COMPULSDRY  
9 PROCEDURES TO COMPEL HIS ATTENDANCE HERE. I CAN ONLY SAY WE'VE  
10 BEEN LOOKING FOR HIM FOR WEEKS AND WE JUST LOCATED EXACTLY  
11 WHERE HE WAS ON THURSDAY OF LAST WEEK.

12 YOUR HONOR, I THINK IN A SENSE OF ALL  
13 THIS OBJECTION TO THE HEARSAY EVIDENCE REGARDING MR. HILYER  
14 BEGS THE QUESTION IN THIS CASE THAT WE'RE GOING TO BE ABLE TO  
15 ESTABLISH, ESTABLISH THAT MR. HOWARD WAS CONVICTED OF THAT  
16 OFFENSE.

17 I NOTICED THAT WHEN WE PUT ON THE  
18 VICTIM YESTERDAY DOROTHY WEISBAND, THERE WAS NO CROSS EXAMINA-  
19 TION. NOW, THAT DOESN'T MEAN OF COURSE THAT THE DEFENSE WOULD  
20 NOT HAVE CROSS EXAMINED MR. HILYER. BUT IT SUGGESTS THAT WE  
21 ARE INVOLVED IN A PENALTY HEARING PHASE AND WE ARE TALKING  
22 ABOUT CIRCUMSTANCES OF OFFENSES FOR WHICH THE DEFENDANT HAS  
23 BEEN CONVICTED. AND IT'S PROBABLY NOT TO HIS ADVANTAGE THAT  
24 THEY WANT TO PROBE TOO DEEPLY AND BRING OUT MORE AND MORE CIR-  
25 CUMSTANCES REGARDING THE OFFENSE.

26 HE HAS BEEN CONVICTED, BUT WHAT I  
27 WANTED TO SAY TO THE COURT WAS THAT THE STATEMENTS MADE BY MR.  
28 HILYER TO SANDEE LOFGREN, WERE SHORTLY AFTER THE COMMISSION OF  
29 THE OFFENSE. HE HAD NO REASON TO BE MISLEADING THE POLICE  
30 OFFICER AS TO WHAT WAS STATED TO HIM BY HIS ASSAILANT AS TO THE  
31 CIRCUMSTANCES OF THE OFFENSE. WE SUBMIT THAT UNDER N.R.S.  
32 51.015, THAT UNDER THESE CIRCUMSTANCES THERE'S NO REASON TO

1       FALSIFY. THERE'S A STRONG ASSURANCE OF ACCURACY.

2                       WE ALSO, UNDER N.R.S. 51.015, SUBMIT  
3       WHILE THERE MAY NOT BE AN EXACT AND TECHNICAL COMPLIANCE WITH  
4       THE EXCITED UTTERANCE RULE, I KNOW FROM DISCUSSING THIS WITH  
5       THE OFFICER THAT SHE WILL TESTIFY THAT THE MAN WAS STILL IN AN  
6       EXCITED CONDITION. IT WAS WITHIN MINUTES AFTER SHE WAS DIS-  
7       PATCHED TO THE DEALERSHIP WHERE HE HAD WALKED A DISTANCE OF  
8       FIVE OR SIX BLOCKS AND SEEN THAT SOMEONE CALLED THE POLICE,  
9       THAT SHE COMMENCED HER INTERVIEW.

10                      SO WE HAVE A SITUATION, YOUR HONOR,  
11       WHERE THE DEFENDANT HAS BEEN CONVICTED. THERE ARE STRONG  
12       ASSURANCES THAT WHAT THE VICTIM HAS RELATED TO THE OFFICER IS  
13       AN ACCURATE PORTRAYAL OF WHAT OCCURRED, TO ME.

14                      THE COURT: WELL, LET ME ASK YOU, THIS ALLEGEDLY  
15       OCCURRED WHEN?

16                      MR. HARMON: THE OFFENSE OCCURRED ON MARCH THE  
17       29TH, 1980. IT OCCURRED SOMEWHERE PRIOR TO 9:30 A.M.

18                      THE COURT: AND THE PRINCIPAL OFFENSE ALLEGEDLY  
19       OCCURRED --

20                      MR. HARMON: THE OFFENSE BEFORE THE BAR OCCURRED  
21       ON MARCH THE 27TH, 1980. IT OCCURRED TWO DAYS BEFORE.

22                      NOW, I AM MINDFUL OF THE ARGUMENT RAISED  
23       BY MR. FRANZEN. VERY CANDIDLY, BUT WITH DUE RESPECT TO HIM, I  
24       THINK IT'S RIDICULOUS TO GIVE THE STATUTORY LANGUAGE THE VERY  
25       TECHNICAL AND STRICT AND RIGID CONSTRUCTION IT URGES UPON ME.

26                      THE COURT: WELL, SINCE HE HAS RAISED IT AND IN  
27       THINKING ABOUT IT AND IN SEEING THE PURPOSE OF IT --

28                      MR. HARMON: YOUR HONOR, THE PURPOSE IS THAT IF  
29       WE ARE GOING TO GIVE 12 LAY PERSONS THE RESPONSIBILITY OF  
30       IMPOSING --

31                      THE COURT: WELL, LET'S GET OFF THAT EMOTIONAL  
32       LEVEL, COUNSEL. LET'S GET DOWN TO THE ISSUE.

1 MR. HARMON: I'M NOT TRYING TO BE EMOTIONAL,  
2 YOUR HONOR.

3 THE FACT OF THE MATTER IS IT'S RIDICULOUS  
4 TO ASK THEM TO IMPOSE JUDGMENT ON MR. HOWARD IN A VACUUM. IF  
5 THE COURT WAS TO IMPOSE JUDGMENT --

6 THE COURT: WELL, COUNSEL, THAT'S AN EMOTIONAL  
7 ARGUMENT.

8 THE QUESTION REALLY IS, FROM A LEGAL POINT  
9 OF VIEW AND REFERRING TO SUBSECTION TWO, IN LOOKING AT IT, IS:  
10 WHAT DOES IT MEAN?

11 MR. HARMON: IT MEANS PRECISELY TO THIS HEARING.  
12 THAT'S THE ONLY LOGICAL CONSTRUCTIVE --

13 THE COURT: DOES IT?

14 MR. HARMON: I SAY IT DOES.

15 THE COURT: WELL, WHAT DOES THE WORD SAY?  
16 MURDER WAS COMMITTED BY A PERSON WHO WAS PREVIOUSLY CONVICTED  
17 OF ANOTHER MURDER --

18 MR. HARMON: OR OF A FELONY INVOLVING THE USE  
19 OF THREAT --

20 THE COURT: OKAY. OR VIOLENCE. ALL RIGHT.

21 LET'S TAKE A LOOK AT THAT ASPECT OF IT.  
22 THE PURPOSE OF THE STATUTE, IT'S LOGICAL CONSTRUCTION, IS THAT  
23 THERE HAS TO HAVE BEEN A PREVIOUS MURDER.

24 THERE'S NO -- THE ONLY QUESTION IS:  
25 PREVIOUS TO WHAT? OBVIOUSLY PREVIOUS TO THE MURDER --

26 MR. HARMON: WELL, WE HAVE NO PREVIOUS MURDER  
27 THAT WE HAVE PROVED.

28 THE COURT: WELL, LET'S TAKE A LOOK AT THE  
29 SENTENCE STRUCTURE. IT SAYS THAT THE ONLY CIRCUMSTANCES BY  
30 WHICH MURDER OF THE FIRST DEGREE MAY BE AGGRAVATED -- WE ARE  
31 REFERRING TO THE MURDER IN QUESTION BEING AGGRAVATED. NOW,  
32 TAKE THAT LANGUAGE AND THEN TAKE A LOOK AT THE LANGUAGE IN SUB

1 TWO, AND THEN GO ON. THE MURDER WAS COMMITTED BY A PERSON WHO  
2 WAS PREVIOUSLY CONVICTED OF ANOTHER MURDER, PREVIOUS TO THE  
3 FIRST DEGREE MURDER, TO TRYING TO SHOW THE AGGRAVATING CIRCUM-  
4 STANCES.

5 I THINK IF YOU READ THOSE TWO TOGETHER IT  
6 THEN BECOMES VERY CLEAR THAT WE ARE TALKING OF PRIOR OFFENSES,  
7 AND PRIOR OFFENSES AGGRAVATE THE EXISTING OFFENSE.

8 I THINK THE LEGISLATURE HAD IT IN MIND  
9 THAT A PERSON WHO COMMITS A SECOND OFFENSE SHOULD BE PUNISHED  
10 OR MAY BE PUNISHED BY THE IMPOSITION OF THE DEATH PENALTY.  
11 THAT IS AN AGGRAVATING CIRCUMSTANCE TO THE EXISTING OFFENSE.

12 I WILL HAVE TO SAY I WAS PROBABLY IN  
13 THE SAME FRAME OF MIND THAT YOU WERE, THAT IT WAS THE HEARING.  
14 BUT IN READING THE FIRST SENTENCE AND THEN IN READING SUBSECTION  
15 TWO, I THINK YOU ARE BARRED. I DON'T THINK YOU CAN BRING THIS  
16 IN. YOU ALREADY HAVE IT IN, SO OBVIOUSLY YOU CAN ARGUE BECAUSE  
17 IT CAME IN FOR ANOTHER REASON. BUT AS FAR AS BRINGING IT IN  
18 FOR AGGRAVATING CIRCUMSTANCES, I DON'T SEE HOW A FELONY WHICH  
19 IS COMMITTED AFTER A MURDER AGGRAVATES THE FIRST.

20 MR. HARMON: YOUR HONOR, WHAT'S UNDER CONSIDERA-  
21 TION IS THE DEFENDANT'S --

22 THE COURT: WELL, I UNDERSTAND THAT.

23 MR. HARMON: WHAT TYPE OF PERSON IS HE?

24 THE COURT: COUNSEL, THAT'S AN EMOTIONAL  
25 ARGUMENT. YOU CAN SAVE THAT FOR THE JURY. LET'S JUST --

26 MR. HARMON: BUT WE'RE TALKING ABOUT THE FACTS.  
27 HOW CAN THE JURY LOGICALLY AND OBJECTIVELY IMPOSE, HOW CAN THEY  
28 MAKE THE CHOICE BETWEEN THE LIFE SENTENCES AND DEATH, UNLESS  
29 THEY KNOW WHAT TYPE OF PERSON THIS IS?

30 THE COURT: COUNSEL, COUNSEL, I DON'T -- COUNSEL,  
31 WHAT I HEAR YOU ARGUING IS THAT HEARSAY IS ALL RIGHT AS LONG AS  
32 THE JURY GETS THE HEARSAY BEFORE THEM.



1 MR. HARMON: NO. WE'RE NOT TALKING HEARSAY.  
2 I'M NOT ASKING -- INVITING HEARSAY AT ANY PHASE OF THESE PRO-  
3 CEEDINGS.

4 THE COURT: WELL, I SUGGEST YOU READ THOSE TWO  
5 SENTENCES.

6 MR. HARMON: I HAVE READ THEM, YOUR HONOR, VERY  
7 CAREFULLY, NOT ONLY IN THIS CASE BUT IN OTHER CASES.

8 THERE IS AN AMBIGUITY REGARDING WHAT THE  
9 ANTECEDENT IS PREVIOUSLY. THIS ISN'T THE FIRST TIME I'VE CON-  
10 sidered THIS. IT'S NOT THE FIRST TIME THE ISSUE HAS BEEN  
11 RAISED.

12 AS A PRACTICAL MATTER, IT'S STILL  
13 SILLY TO SUGGEST WHEN THE JURY IS TRYING TO DECIDE, SHOULD WE  
14 GIVE HIM THE DEATH PENALTY OR SHOULD IT BE A LIFE SENTENCE,  
15 TO SAY THAT THEY ARE TO BE BARRED FROM HEARING ANY EVIDENCE  
16 THAT THIS MAN HAS COMMITTED BEFORE THIS HEARING A VIOLENT THING.

17 THE COURT: COUNSEL, LET'S NOT WASTE ANY TIME.  
18 THE COURT IS GOING TO SUSTAIN THE OBJECTION.

19 I DON'T THINK YOU CAN READ THIS SENTENCE  
20 ANY WAY OTHER THAN IT IS. YOUR MISINTERPRETATION OF IT DOESN'T  
21 CHANGE IT. THE SENTENCE READS:

22 THE MURDER, WHICH IS THE  
23 MURDER UNDER CONSIDERATION, WAS  
24 COMMITTED BY A PERSON WHO WAS  
25 PREVIOUSLY CONVICTED OF ANOTHER  
26 MURDER OR A FELONY INVOLVING THE  
27 USE OR THREAT OR VIOLENCE TO THE  
28 PERSON OF ANOTHER.

29 THE REASON THE OTHER INFORMATION CAME  
30 IN OR THE OTHER FELONY CAME IN FROM NEW YORK WAS BECAUSE IT WAS  
31 A PREVIOUS FELONY INVOLVING VIOLENCE. THIS FELONY THAT WE  
32 HAVE IN CALIFORNIA IS A SUBSEQUENT FELONY INVOLVING VIOLENCE.

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YOUR OBJECTION IS SUSTAINED.

MR. FRANZEN: THANK YOU, YOUR HONOR.

MR. HARMON: BUT, YOUR HONOR, WHAT ABOUT THE OTHER DIMENSION TO THIS CASE, WHICH IS THAT THE JURY IS NOT ONLY CONSIDERING THE DEATH PENALTY BUT THAT THEY'RE ALSO CONSIDERING LIFE WITH OR WITHOUT THE POSSIBILITY OF PAROLE? IT'S SURELY --

THE COURT: DOES IT FALL WITHIN THE AREA OF AGGRAVATING CIRCUMSTANCES?

MR. HARMON: THE COURT HAS RULED IT DOES NOT, BUT IT CERTAINLY FALLS WITHIN THE CATEGORY OF A CIRCUMSTANCE THE JURY CAN TAKE INTO CONSIDERATION.

SUPPOSE THEY REJECT THE DEATH PENALTY, THEY HAVE TO DECIDE THEN IS IT GOING TO BE LIFE WITH OR LIFE WITHOUT.

THE COURT: COUNSEL, THEY HAVE THAT INFORMATION BEFORE THEM. THEY ALREADY HAVE THE SAN BERNARDINO CONVICTION BEFORE THEM. HE'S ALREADY ADMITTED TO THAT.

ALL YOU'RE TRYING TO DO IS EMBELLISH IT BY BRINGING OUT ADDITIONAL FACTS AS TO WHAT SHE SAID, THE VICTIM SAID, TO THE POLICE OFFICER AND HAVING THAT BROUGHT INTO THE RECORD.

MR. HARMON: YES, YOUR HONOR. BUT I DON'T THINK WE CAN CLOSE OUR EYES TO THE PURPOSE FOR WHICH IT WAS INTRODUCED AT THAT TIME. THE DEFENDANT WAS A WITNESS. IT WAS OFFERED SOLELY FOR THE PURPOSE OF IMPEACHMENT. IN FACT, THE JURY WAS GIVEN A LIMITING INSTRUCTION -- LET'S SEE. NO, NOT ON THAT PARTICULAR POINT THEY WEREN'T.

MR. FRANZEN: NOT YET.

MR. HARMON: STILL CONCEPTIONALLY IT WOULD REALLY NOT BE AVAILABLE FOR ARGUMENT. IT WAS ONLY TO TEST HIS VERACITY AS A WITNESS. AND WE ARE ASKING THE JURY TO DECIDE --

1 THE COURT: YOU CAN RAISE THAT ISSUE. THE ONLY  
2 THING YOU WILL NOT HAVE WILL BE THE CONVERSATION. YOU'RE  
3 GOING TO BE ABLE TO RAISE THE ISSUE THAT IT'S A FELONY OF  
4 VIOLENCE BECAUSE THAT WAS WHAT HE SAID IT WAS WHEN HE TOOK THE  
5 STAND. THAT'S ALREADY IN.

6 NOW YOU'RE TRYING TO GET THE CONVERSATION  
7 BETWEEN THE PARTY WHO ISN'T HERE UNDER THIS STATUTE, WHICH IS  
8 NOT PERMISSIBLE.

9 MR. HARMON: BUT THE PURPOSE FOR WHICH IT CAME  
10 IN WAS IMPEACHMENT.

11 THE COURT: OH, I UNDERSTAND THAT, BUT THE JURY  
12 DOESN'T KNOW THAT. THEY KNOW THAT HE'S CONVICTED OF ANOTHER  
13 FELONY.

14 MR. HARMON: WELL, AS LONG AS --

15 THE COURT: IN SAN BERNARDINO.

16 MR. HARMON: WELL, WE ARE STILL GOING TO OBJECT  
17 IF WE TRY TO ARGUE --

18 THE COURT: COUNSEL, I BELIEVE THAT ENDS THE  
19 ARGUMENT.

20 MR. FRANZEN: YOUR HONOR, I HAVE ANOTHER MOTION  
21 THAT I WOULD LIKE TO BE HEARD.

22 THE COURT: YES.

23 MR. FRANZEN: BASED UPON THE TESTIMONY ELICITED  
24 BY THE DISTRICT ATTORNEY OVER OUR OBJECTION FROM MRS. WEISBAND,  
25 THE WITNESS TESTIFIED THAT SUBSEQUENT TO THE ROBBERY THAT THE  
26 DEFENDANT TELEPHONED HER AND ATTEMPTED TO EXTORT SOME TYPE OF  
27 VALUE FROM HER.

28 THIS WAS NOT LISTED BY THE STATE AS ONE OF  
29 THE AGGRAVATING CIRCUMSTANCES THAT THEY WERE GOING TO BRING  
30 BEFORE THE COURT. THIS TESTIMONY WAS ELICITED AFTER ALL  
31 ELEMENTS OF THE FIRST DEGREE ROBBERY HAD BEEN ESTABLISHED. IT  
32 WAS RATHER EMOTIONAL IN WHICH MRS. WEISBAND SAID SHE, IF I

1 REMEMBER CORRECTLY, HAD BEEN TERRIFIED BY THIS PHONE CALL.  
2 THIS TYPE OF PROCEDURE IS IN VIOLATION OF THE AFOREMENTIONED  
3 STATUTE OF N.R.S. 033 -- AND LET ME NOTICE THAT -- I DON'T HAVE  
4 THAT AT MY FINGERTIPS, YOUR HONOR, BUT OF THE STATUTE REQUIRING  
5 NOTICE OF A LISTING OF AGGRAVATING CIRCUMSTANCES.

6 WE BELIEVE THAT THE STATE IS NOW  
7 BARRED FROM SEEKING THE DEATH PENALTY BECAUSE OF THIS, IN THAT  
8 SMITH V. STATE, A NEVADA DECISION, 93 NEVADA 82, STATES THAT,  
9 IN PARAPHRASING, THAT THE UNITED STATES SUPREME COURT, THAT THE  
10 DISCRETION -- THE DISCRETION OF A SENTENCING BODY MUST BE  
11 DIRECTED AND LIMITED. WE ALSO MUST HAVE THE OPPORTUNITY TO  
12 PREPARE FOR CROSS EXAMINATION OR REBUTTAL FOR DEMINIMIZING THE  
13 TESTIMONY GIVEN BY THIS WITNESS.

14 BY FAILING TO NOTICE THIS PARTICULAR  
15 UNNOTICED AGGRAVATING CIRCUMSTANCE, WE BELIEVE THAT THERE HAS  
16 BEEN A VIOLATION OF THE EIGHTH AMENDMENT, CRUEL AND UNUSUAL  
17 PUNISHMENT.

18 THE COURT: I DON'T BELIEVE SO, COUNSEL. YOUR  
19 MOTION IS DENIED.

20 MR. FRANZEN: I WOULD ALSO NOTE --

21 THE COURT: PROCEED ON.

22 MR. FRANZEN: (CONTINUING) -- YOUR HONOR, THAT'S  
23 THE STATE'S EXHIBIT 69 STATES THAT THE DEFENDANT WAS CONVICTED  
24 OF SOMETHING CALLED AGGRAVATED HARASSMENT, WHICH AGAIN WAS NOT  
25 ONE OF THE LISTED AGGRAVATING CIRCUMSTANCES WHICH THE STATE  
26 HAS STATED THEY WOULD BE PRESENTING TO THIS JURY.

27 THE COURT: OKAY. I THINK THAT'S BEEN  
28 CORRECTED BY THE -- SEE, STATES HAVE A FUNNY WAY OF LABELING  
29 OFFENSES. WE CALL CERTAIN TYPES OF OFFENSES BY DIFFERENT  
30 NAMES, OTHER THAN THE PRINCIPAL ELEMENTS OF THE CRIME.

31 IT'S OBVIOUS FROM THE STATEMENT OF THE  
32 WITNESS EXACTLY WHAT THE CRIME WAS. AND THE FACT THAT NEW

1 YORK GIVES IT SOME DIFFERENT EXOTIC NAME DOESN'T CHANGE IT,  
2 COUNSEL.

3 MR. HARMON: YOUR HONOR, ONE MORE MATTER, AND I  
4 REALLY MUST BEG THE COURT'S INDULGENCE. THE ISSUE REGARDING  
5 SUBSEQUENT WAS REALLY RAISED FOR THE FIRST TIME BY THE DEFENSE  
6 IN HERE AT THE TIME OF THE HEARING.

7 THE COURT: I UNDERSTAND THAT.

8 MR. HARMON: BUT WE DO HAVE AUTHORITY OUT OF  
9 THE STATE OF ARIZONA THAT I WOULD LIKE THE COURT TO EXAMINE,  
10 WHICH ADDRESSES THIS SUBJECT.

11 THE COURT: WHICH SUBJECT?

12 MR. HARMON: THE SUBJECT THE COURT HAS JUST  
13 RULED ON. THE ISSUE WAS RAISED IN THE CASE OF STATE V. STELNAN,  
14 S-T-E-L-N-A-N, REPORTED AT 612 PACIFIC SECOND, PAGE 475, A RULE  
15 FROM THE SUPREME COURT OF ARIZONA. THE ISSUE BEING --

16 THE COURT: WHERE THE DEFENDANT'S PRIOR --

17 MR. HARMON: (CONTINUING) -- STILL CONTESTED,  
18 THE AGGRAVATING CIRCUMSTANCE, BECAUSE THEY WERE COMMITTED AFTER  
19 THE SAN BERNARDINO OFFENSE. WE DO NOT AGREE. AND THEY GO

20 AHEAD AND DISCUSS IT AND THEIR STATUTORY LANGUAGE ALSO IS VERY  
21 SIMILAR TO OURS, YOUR HONOR.

22 THE COURT: DOES IT TALK ABOUT PRIOR CONVICTIONS  
23 IN THEIR STATUTORY LANGUAGE?

24 MR. HARMON: WELL, THAT WAS THE ISSUE. THEY  
25 WERE MAINTAINING THE SAME THING IN THAT CASE THAT COUNSEL  
26 ARGUES HERE.

27 THE COURT: WELL, DOES THE ARIZONA STATUTE  
28 CONCUR TO PRIOR CONVICTIONS?

29 MR. HARMON: YES. THE DEFENDANT WAS PREVIOUSLY  
30 CONVICTED OF A FELONY IN THE UNITED STATES INVOLVING THE USE OF  
31 THREAT OR VIOLENCE TO ANOTHER PERSON.

32 THE COURT: LET ME TAKE A LOOK AT IT.

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MR. FRANZEN: MAY WE HAVE A COPY OF IT ALSO,  
YOUR HONOR?

THE COURT: COUNSEL, I CAN'T SEEM TO FIND ANY-  
WHERE HERE THAT THE LANGUAGE IS SIMILAR. DO YOU HAVE A COPY  
OF THAT STATUTE THAT SAYS IT?

MR. HARMON: I THOUGHT WE HAD FURNISHED TO THE  
COURT A COPY. IT'S ON THE SECOND SHEET, YOUR HONOR.

THE COURT: OH, I SEE.

HERE'S THE STATUTE, COUNSEL.

NOW, I'VE READ THIS AND THEY AVOID THE  
ISSUE, COMPLETELY AVOID IT. I GUESS IF YOU'RE THE SUPREME  
COURT YOU CAN DO IT, OF THAT STATE.

THEY SAY THAT YES, THERE IS A STATUTE,  
AND THEN THEY GO ON TO IGNORE THE FACT THAT TALKS ABOUT PRIOR  
CONVICTIONS. THEY TALK ABOUT BURDEN OF PROOF, AND THEN THEY  
SAY, WELL, AT THE TIME OF SENTENCING THE COURT SHOULD HAVE  
EVERYTHING BEFORE IT. BUT IT DOESN'T SAY ANYTHING ABOUT THE  
LEGISLATIVE MANDATE THAT YOU CAN'T CONSIDER ANYTHING EXCEPT  
PRIOR.

NOW, MAYBE OUR COURT WILL TAKE THE  
OTHER VIEW. MAYBE THEY WILL FACE THE ISSUE. THE ARIZONA COURT  
APPARENTLY DIDN'T FACE THE ISSUE.

COUNSEL, THE RULING STANDS. LET'S  
PROCEED.

THIS WITNESS I BELIEVE WAS GOING TO  
TESTIFY AS TO A CONFESSION; IS THAT RIGHT?

MR. HARMON: NO, YOUR HONOR. THERE WAS ANOTHER  
WITNESS THAT WE WERE TRYING TO GET IN AND WE WERE UNABLE TO DO  
SO. SO IN VIEW OF THE COURT'S RULING, WE WILL HAVE NO  
ADDITIONAL EVIDENCE TO PRODUCE AT THIS TIME.

THE COURT: ALL RIGHT. ARE YOU READY TO PROCEED  
TO ARGUE AT THIS TIME?

1 MR. HARMON: YES, WE ARE, YOUR HONOR. WE HAVE  
2 SOME PROPOSED INSTRUCTIONS THAT WE MUST GO THROUGH.

3 THE COURT: WELL, WE BETTER CALL THE JURY IN.  
4 HAVE YOU EXCHANGED INSTRUCTIONS, BY THE  
5 WAY?

6 MR. COOPER: NO, YOUR HONOR, WE HAVEN'T.

7 I WOULD POINT OUT, YOUR HONOR, THAT THE  
8 DEFENDANT IS DESIROUS OF TAKING THE STAND.

9 THE COURT: ALL RIGHT.

10 DEFENDANT HOWARD: IN FRONT OF THE JURY.

11 THE COURT: AND THEN OF COURSE, YOU WILL BE  
12 DIRECTING THE EXAMINATION, COUNSEL?

13 MR. COOPER: YES, YOUR HONOR.

14 THE COURT: ALL RIGHT. CALL THE JURY.

15 (WHEREUPON, THE JURY ENTERED  
16 THE COURTROOM AND THE FOLLOW-  
17 ING PROCEEDINGS WERE HAD:)

18 MR. HARMON: YOUR HONOR, MAY I APPROACH THE  
19 BENCH?

20 THE COURT: COUNSEL STIPULATE TO THE PRESENCE  
21 OF THE JURY?

22 MR. SEATON: YES, YOUR HONOR.

23 MR. COOPER: YES, YOUR HONOR.

24 THE COURT: COUNSEL?

25 MR. HARMON: YOUR HONOR, THE STATE HAS NO  
26 ADDITIONAL EVIDENCE TO OFFER AT THIS TIME.

27 THE COURT: DEFENSE?

28 MR. COOPER: YES, YOUR HONOR. WE WOULD CALL THE  
29 DEFENDANT SAM HOWARD.

30 THE COURT: MR. HOWARD, COME FORWARD, SIR.

31 THE CLERK: RAISE YOUR RIGHT HAND, SIR.

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WHEREUPON,

SAMUEL HOWARD,

CALLED AS A WITNESS HEREIN BY THE DEFENDANT WAS SWORN TO TELL  
THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH.

THE WITNESS: NO, NO, I DON'T. BUT I CONFIRM  
(SIC) TO TELL THE TRUTH.

THE CLERK: OKAY.

THE COURT: GIVE HIM THE AFFIRMATION, PLEASE.

THE CLERK: RAISE YOUR RIGHT HAND.

WHEREUPON,

SAMUEL HOWARD,

CALLED AS A WITNESS HEREIN BY THE DEFENDANT, HAVING BEEN  
PREVIOUSLY AFFIRMED TO TELL THE TRUTH, THE WHOLE TRUTH AND  
NOTHING BUT THE TRUTH, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: YES, I DO.

THE CLERK: PLEASE BE SEATED.

THE COURT: PROCEED.

MR. COOPER: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MR. COOPER:

Q MR. HOWARD, DO YOU HAVE A MILITARY HISTORY,  
SIR?

A YES, I DO.

Q DURING WHAT TIME WERE YOU IN THE MILITARY?



1 A '68 THROUGH '70.  
2 Q I SEE.  
3 AND IN WHAT BRANCH OF THE MILITARY  
4 WERE YOU IN?  
5 A UNITED STATES MARINE CORPS.  
6 Q DID YOU GO IN AS A VOLUNTEER OR WERE YOU  
7 DRAFTED?  
8 A I VOLUNTEERED.  
9 Q WHERE DID YOU SERVE ACTIVE DUTY?  
10 A PARRIS ISLAND, CAMP LESEUNE, CAMP GIEGER,  
11 CAMP PENDLETON AND CONSEQUENTLY VIET NAM.  
12 Q HOW MUCH TIME DID YOU SPEND IN VIET NAM?  
13 A THIRTEEN MONTHS.  
14 Q DID YOU HAVE COMBAT DUTY THERE?  
15 A YES, I DID.  
16 Q DURING THE TIME THAT YOU WERE IN VIET NAM,  
17 DID YOU SUSTAIN ANY INJURIES AT ALL?  
18 A YES.  
19 Q COULD YOU TELL US WHAT THOSE INJURIES  
20 WERE?  
21 A HEAD -- HEAD INJURY, CONCUSSION, DUE TO  
22 EXPLOSION FROM A GRENADE.  
23 Q CAN YOU GIVE US A LITTLE MORE DETAIL AS  
24 TO HOW THAT HAPPENED.  
25 A YES. WE WAS ON A OPERATION OKLAHOMA, AND  
26 THE POINT MAN WAS WALKING, I CAN'T REMEMBER HOW FAR AHEAD OF  
27 ME, BUT A FEW FEET AHEAD OF ME, AND STEPPED ON A GRENADE OR  
28 ACTIVE GRENADE OR WHATEVER.  
29 Q THE POINT MAN DID?  
30 A YES.  
31 Q DID YOU RECEIVE ANY MEDICAL TREATMENT AS  
32 A RESULT OF THE INJURIES YOU SUSTAINED?

1 A YES, I DID.

2 Q I SEE.

3 WHAT MEDICAL TREATMENT WAS ADMINISTER-  
4 ED TO YOU?

5 A WELL, THEY PUT ME ON A HOSPITAL --  
6 HOSPITAL SHIP AND, UH, THEY FOUND OUT THAT IT WASN'T THAT  
7 SEVERE AT THE TIME. AND, UH, AT THE TIME I WAS GOING HOME, SO  
8 I WANTED TO REMAIN IN THE COUNTRY, IN VIET NAM.

9 Q DID YOU SUBSEQUENTLY RETURN TO COMBAT  
10 DUTY?

11 A NOT REALLY. THEY RETURNED ME TO THE  
12 STATES.

13 Q I SEE.

14 WHAT WAS YOUR TRAINING FOR? DID YOU  
15 HAVE A -- ANY SPECIAL TRAINING IN ANY PARTICULAR AREA?

16 A YES, 0311; THAT'S INFANTRY ASSISTANT  
17 MACHINE GUNNER.

18 Q I SEE.

19 WERE YOU HONORABLY DISCHARGED?

20 A YES.

21 Q DID YOU RECEIVE ANY MEDALS WHILE IN VIET  
22 NAM?

23 A YES. THE PURPLE HEART ON GALLANTRY AND  
24 THE OTHER BASIC MEDALS JUST FOR BEING IN THE COUNTRY.

25 Q I SEE.

26 UP TO THAT POINT, TO THE POINT THAT  
27 YOU WERE DISCHARGED FROM THE ARMY, DID YOU EVER RECEIVE ANY  
28 KIND OF PSYCHIATRIC TREATMENT?

29 A YES. WHEN I WAS TWO YEARS OLD MY FATHER  
30 KILLED MY MOTHER AND SISTER AND BEFORE I FINISHED SCHOOL I WAS  
31 SEEING A PSYCH.

32 Q WHERE DID THAT HAPPEN, WHERE YOUR FATHER

1 KILLED YOUR MOTHER AND YOUR SISTER?

2 A IN THE SOUTHERN AREA, ALABAMA.

3 Q IS THAT WHERE YOU WERE -- IS THAT WHERE  
4 YOUR PARENTS WERE FROM?

5 A YES.

6 Q AND THAT'S WHERE YOU'RE FROM ORIGINALLY?

7 A NOT ORIGINALLY. I'M FROM NEW YORK. BUT  
8 THAT'S WHERE THIS HAPPENED AT.

9 Q WERE YOU PRESENT WHEN THAT OCCURRED?

10 A YES.

11 Q IS IT TRUE THAT YOUR FATHER IS SERVING  
12 TIME IN PRISON IN ALABAMA FOR HIS CONVICTION OF THAT OFFENSE?

13 A WELL, HE SERVED TIME IN PRISON, BUT THEY  
14 EVENTUALLY SENT HIM TO A MENTAL HOSPITAL.

15 Q IS IT YOUR TESTIMONY THAT SHORTLY AFTER,  
16 OR SOMETIME EARLIER IN YOUR CHILDHOOD, YOU HAVE RECEIVED  
17 PSYCHIATRIC TREATMENT?

18 A YES.

19 Q WHERE DID YOU RECEIVE THE TREATMENT?

20 A A NUMBER OF HOSPITALS; CREEDMORE.

21 Q WHERE IS CREEDMORE?

22 A THAT'S IN NEW YORK; QUEENS, NEW YORK.

23 Q WHEN YOU WERE IN CREEDMORE HOSPITAL DID  
24 YOU USE -- WERE YOU A PATIENT THERE UNDER THE NAME OF SAMUEL  
25 HOWARD?

26 A OH, I USED ALIASES A COUPLE TIMES, 'CUZ  
27 I WAS EMBARRASSED BY IT; AND --

28 Q DO YOU RECALL THE ALIAS OR ALIASES THAT  
29 YOU USED WHILE YOU WERE A PATIENT AT CREEDMORE HOSPITAL?

30 A YES. I USED A NUMBER OF THEM. I'D USE  
31 DAVID HARRIS; THE ONE ON RECORD, STANBACK, TOO; AND I REVERSED  
32 MY NAME, HOWARD SAMUEL; AND A COUPLE OTHERS.

1 Q WAS THIS A VOLUNTARY ADMISSION ON YOUR  
2 PART? I MEAN DID YOU GO TO THE HOSPITAL WHEN THEY ASKED THAT  
3 YOU BE ADMITTED OR DID THAT COME AS A RECOMMENDATION OF A  
4 PSYCHIATRIST OR PSYCHOLOGIST OR SOMEONE WHO IS TRAINED IN THAT  
5 AREA?

6 A WELL, A NUMBER OF TIMES I WENT VOLUNTARILY.  
7 THE V.A. RECOMMENDED IT ALSO, AND I WAS IN THEIR HOSPITAL, THE  
8 V.A. PSYCHIATRIC UNIT.

9 Q WHERE?

10 A THAT'S, UH, THEIR ADMINISTRATION 21 --  
11 21ST AVENUE, NEW YORK CITY, MANHATTAN.

12 Q WERE YOU RECEIVING A VETERAN'S DISABILITY?

13 A YES.

14 Q AND WHAT DISABILITY HAD YOU RECEIVED?

15 A SIXTY PERCENT I WAS RECEIVING.

16 Q I SEE.

17 MY QUESTION IS: WHY WERE YOU  
18 RECEIVING DISABILITY?

19 A DUE TO THE HEAD INJURY.

20 Q DO YOU KNOW IF AT THE VETERANS ADMINISTRATION  
21 HOSPITAL, AT CREEDMORE, IF YOUR CONDITION WAS DIAGNOSED?

22 A YES. I HAVE PAPERS STATING, I THINK IT'S  
23 UNCERTIFIED, ACUTE SCHIZOPHRENIC AND DUE TO CHILDHOOD EXPER-  
24 IENCE, AND A COUPLE PSYCHIATRISTS SAID AGENT ORANGE, BUT I'M  
25 NOT CERTAIN, BUT THEY SAID CHILDHOOD EXPERIENCE, BECAUSE, UH --

26 Q DURING --

27 A GO AHEAD.

28 Q DURING YOUR TERM IN THE MILITARY, WERE  
29 YOU EVER EXPOSED TO AGENT ORANGE?

30 A YES.

31 Q CAN YOU TELL US WHAT THAT IS?

32 A THAT'S THE FALL TO STOP THE GROWTH, THE

1 VEGETABLE GROWTH. THE NAME IS DIOXANE 210, ODD 210, OR WHAT-  
2 EVER. AND THEY SPRAY IT IN ORDER TO STOP THE GROWTH OF RICE  
3 OR WHATEVER THEY HAVE, THE VIET CONG OR THE NORTH VIETNAMESE,  
4 WHATEVER THEY HAD TO SURVIVE ON. AND THE AIR WAS DONE HARD IN  
5 VIET NAM, AND WE WAS ON OPERATION THERE.

6 Q BUT IS IT YOUR TESTIMONY THAT, AND CORRECT  
7 ME IF I'M WRONG, IS IT YOUR TESTIMONY THAT WHILE THE DOCTORS  
8 MIGHT SUSPECTED THAT THAT MIGHT HAVE CAUSED YOU SOME PROBLEMS,  
9 THEY COULDN'T PINPOINT IT; IS THAT RIGHT?

10 A YES. DURING MY STAY AT ATASCADERO STATE  
11 HOSPITAL IN CALIFORNIA, THE PSYCHIATRIST, I CAN'T RECALL HIS  
12 NAME, IT WAS A WARDEN, WHATEVER, HE CHECKED INTO THE BACKGROUND,  
13 MY BACKGROUND THERE; AND MY STUFF STATED MY TOUR DUTY THERE;  
14 AND HE VERIFIED IT; AND HE SAID IT'S POSSIBLE -- HE ASKED ME THE  
15 TYPE OF SYMPTOMS THAT I WOULD HAVE RELATED TO THIS DISEASE, AND  
16 --

17 Q CAN YOU TELL US THE SYMPTOMS THAT YOU HAD?

18 A WELL, NERVOUSNESS. DAWANA WAS PREGNANT,  
19 AS I MENTIONED THROUGH TRIAL, AND SHE HAD A MISCARRIAGE. AND  
20 THAT WAS A MATTER OF RECORD HERE IN SAN BERNARDINO, CALIFORNIA.  
21 AND I GUESS OVERAGGRESSIVENESS, VIOLENT TENDENCIES, ABNORMALITY.  
22 I JUST GO INTO CRYING SPELLS AT TIMES.

23 Q NOW, WERE YOU PLACED IN ANY KIND OF --  
24 ANY KIND OF SPECIAL SCHOOLS AS A CHILD AS A RESULT OF ANY  
25 PROBLEMS YOU MIGHT HAVE HAD?

26 A I HAD A -- A TUTOR FOR AWHILE. I CAN'T  
27 REMEMBER HOW LONG THE PERIOD WAS. BUT ME AND MY OTHER SISTER,  
28 DIANE HOWARD, SHE -- ME AND HER WAS PLACED.

29 Q WHO RAISED YOU, SIR?

30 A MY GRANDMOTHER.

31 Q WOULD YOU CHARACTERIZE YOUR CHILDHOOD AS  
32 A GOOD CHILDHOOD?

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THE COURT: CALM DOWN, MR. HOWARD.

STATE ANOTHER QUESTION, COUNSEL.

BY MR. COOPER:

Q SAMUEL, WHERE DID DAWANA THOMAS VISIT YOU  
AFTER YOUR ARREST IN CALIFORNIA?

A (NO AUDIBLE RESPONSE.)

THE COURT: WE WILL BE IN RECESS.

LADIES AND GENTLEMEN OF THE  
JURY, DURING THIS RECESS YOU ARE  
ADMONISHED NOT TO CONVERSE AMONG  
YOURSELVES OR WITH ANYONE ELSE ON  
ANY SUBJECT CONNECTED WITH THIS  
TRIAL, OR READ, WATCH OR LISTEN  
TO ANY REPORT OF OR COMMENTARY ON  
THIS TRIAL WITH ANY PERSON CONNECTED  
WITH THIS TRIAL BY ANY MEDIUM OF  
INFORMATION, INCLUDING WITHOUT  
LIMITATION, NEWSPAPER, TELEVISION  
OR RADIO; OR FORM OR EXPRESS ANY  
OPINION ON ANY SUBJECT CONNECTED  
WITH THIS TRIAL UNTIL THE CASE  
IS FINALLY SUBMITTED TO YOU.

YOU ARE EXCUSED. YOU MAY LEAVE THE  
COURTROOM. WE HAVE OTHER MATTERS TO TAKE CARE OF OUTSIDE OF  
YOUR PRESENCE. THAT'S ALL.

JUROR NUMBER TEN, MS. CAPASSO: TIME?

THE COURT: YOU'RE EXCUSED. IT WILL BE ABOUT  
15 MINUTES.

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1 (WHEREUPON, THE JURY LEFT THE  
2 COURTROOM AND THE FOLLOWING  
3 PROCEEDINGS WERE HAD OUTSIDE  
4 OF THEIR PRESENCE:)

5 THE COURT: LET THE RECORD REFLECT THIS IS  
6 OUTSIDE THE PRESENCE OF THE JURY.

7 MR. HOWARD, ARE YOU READY TO PROCEED OR  
8 CAN YOU PROCEED AT THIS TIME?

9 DEFENDANT HOWARD: I'D RATHER NOT.

10 THE COURT: THE STATE WILL HAVE THE OPPORTUNITY  
11 TO CROSS EXAMINE. IF YOU REFUSE TO BE CROSS EXAMINED, YOUR  
12 TESTIMONY WILL BE STRICKEN.

13 NOW, WE WILL BE IN RECESS FOR TEN MINUTES.

14 (WHEREUPON, FROM 11:35 A.M.  
15 UNTIL 11:50 A.M., A RECESS  
16 WAS HAD IN THE PROCEEDINGS,  
17 AT THE CONCLUSION OF WHICH THE  
18 FOLLOWING PROCEEDINGS WERE HAD)

19 THE COURT: WILL COUNSEL STIPULATE TO THE  
20 PRESENCE OF THE JURY?

21 MR. SEATON: YES, YOUR HONOR.

22 MR. FRANZEN: YES, YOUR HONOR.

23 THE COURT: MR. HOWARD, RESUME THE STAND,  
24 PLEASE. WOULD YOU BE SEATED, SIR.

25 PROCEED.

26

27 BY MR. COOPER:

28

29 Q SAMUEL, FOLLOWING YOUR ARREST IN CALIFOR-  
30 NIA, I BELIEVE IT WAS 1980, LET'S SEE, APRIL 1ST, OF 1980, I  
31 BELIEVE, DID THERE COME A TIME WHEN A PSYCHIATRIST, ONE OR MORE  
32 PSYCHIATRISTS, EXAMINED YOU?

1 A YES, SIR. YEAH.  
2 Q DO YOU RECALL HOW MANY PSYCHIATRISTS  
3 EXAMINED YOU?  
4 A NO. I DON'T RECALL. ALOT OF THEM.  
5 Q WAS THERE MORE THAN TWO?  
6 A YEAH, ALOT MORE.  
7 Q NOW, THIS WAS BEFORE YOU WENT TO -- STRIKE  
8 THAT.  
9 A THEY EXAMINED ME AND THEN THEY SENT ME TO  
10 A PLACE CALLED WARD B IN SAN BERNARDINO. SO THEY CAN'T FIND  
11 OUT WHAT'S WRONG WITH ME. SO THEY SEND ME THERE.  
12 Q WAS THERE A PSYCHIATRIC UNIT?  
13 A YEAH.  
14 Q THAT WAS IN SAN BERNARDINO?  
15 A YES.  
16 Q HOW LONG DID YOU STAY THERE?  
17 A I CAN'T RECALL. I -- I THINK ABOUT A  
18 MONTH OR SO.  
19 Q DID DAWANA THOMAS VISIT YOU THERE?  
20 A SHE VISITED ME AT PATTON STATE HOSPITAL.  
21 Q I SEE.  
22 WHEN -- WELL, COURT'S INDULGENCE,  
23 PLEASE.  
24 THIS WAS AFTER APRIL 1ST OF 1980 THAT  
25 SHE VISITED YOU AT PATTON STATE HOSPITAL?  
26 A YES.  
27 Q IS THAT A MENTAL HOSPITAL?  
28 A YES.  
29 Q I SEE.  
30 HOW MANY MENTAL INSTITUTIONS WERE YOU  
31 IN IN CALIFORNIA FOLLOWING YOUR EXAMINATION BY PSYCHIATRISTS IN  
32 1980?



1 A THREE: WARD B, THE PATTON, AND ATASCADERO.  
2 Q ATASCADERO, THAT'S A MENTAL INSTITUTION IN  
3 CALIFORNIA?  
4 A YES.  
5 Q NOW, YOU TESTIFIED THAT YOU WERE DIAGNOSED  
6 AS SCHIZOPHRENIC; IS THAT RIGHT?  
7 A YES.  
8 Q WERE YOU GIVEN ANY KIND OF MEDICATION WHILE  
9 YOU WERE AT EITHER INSTITUTIONS YOU'VE MENTIONED?  
10 A YES. THEY PUT ME ON HALDOL AND MELLARIL.  
11 Q HOW LONG WERE YOU AT ATASCADERO?  
12 A I CAN'T REMEMBER, BUT AWHILE. ABOUT A  
13 YEAR, I THINK.  
14 Q HOW LONG WERE YOU AT PATTON STATE  
15 HOSPITAL?  
16 A OH, ABOUT FOUR, FIVE MONTHS, I THINK.  
17 Q HAVE YOU EVER ATTEMPTED TO COMMIT SUICIDE,  
18 SAMUEL?  
19 A WELL, UH, I BELIEVE SO, 'CUZ WHEN I WAS  
20 ARRESTED THEY SAID I HAD ALL THESE CRIMES AND THAT I WAS  
21 INVOLVED IN NATION-WIDE CRIMES. AND I KEPT TELLING THEM I  
22 WASN'T.  
23 AND THEY SAID, UH, WELL, WE ARE GOING  
24 TO KILL YOU OR WHATEVER.  
25 AND I SAID, NO. YOU WON'T DO THAT.  
26 AND I BELIEVE --  
27 Q DO YOU RECALL AN INCIDENT FOLLOWING YOUR  
28 ARREST IN CALIFORNIA WHERE YOU TRIED TO HANG YOURSELF?  
29 A YEAH.  
30 Q WAS THAT THE FIRST AND ONLY TIME YOU'VE  
31 EVER ATTEMPTED SUICIDE?  
32 A YES.

1 Q AFTER YOU WERE -- YOU WERE -- YOU ALSO  
2 SPENT SOME TIME IN THE INSTITUTION AT VACAVILLE, CALIFORNIA;  
3 DIDN'T YOU?

4 A YES. THEY PUT ME WITH CHARLIE MANSON  
5 BECAUSE THEY SAY I'M THE SAME TYPE OF PERSON. I WAS RIGHT  
6 WITH HIM.

7 Q WHEN YOU WERE SENT TO VACAVILLE, IS IT  
8 TRUE THEY PUT YOU IN THE POST PSYCHOTIC UNIT THERE?

9 A YES.

10 Q HOW LONG DID THEY KEEP YOU IN THAT CONDI-  
11 TION?

12 A UNTIL HERE, UNTIL I CAME HERE.

13 Q DO YOU RECALL ABOUT HOW LONG THAT WAS?

14 A A FEW MONTHS.

15 Q WHEN YOU WERE IN THE CUSTODY OF THE  
16 CALIFORNIA AUTHORITIES THERE CAME A TIME WHEN DETECTIVE  
17 LEAVITT FROM THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT CAME  
18 DOWN TO TALK TO YOU; ISN'T THAT TRUE?

19 A YES.

20 Q DO YOU RECALL YOUR CONVERSATION WITH  
21 DETECTIVE LEAVITT?

22 A SOME PARTS OF IT.

23 Q DO YOU RECALL, SAMUEL, TELLING DETECTIVE  
24 LEAVITT THAT YOU HURT PEOPLE AND YOU DIDN'T KNOW WHY YOU DID?

25 A YES.

26 Q DO YOU RECALL PLEADING WITH HIM TO GET  
27 YOU PSYCHIATRIC HELP?

28 A THEY SAY THEY WERE GOING TO GET IT FOR  
29 ME.

30 AND I SAID, YES, I NEEDED IT.

31 Q DID YOU TELL DETECTIVE LEAVITT THAT YOU  
32 WANTED TO COMMIT SUICIDE BECAUSE YOU WANTED TO BE WITH YOUR

2548

1 MOTHER AND YOUR SISTER?

2 A WHY DO YOU KEEP ASKING --

3 THE COURT: STATE YOUR NEXT QUESTION, COUNSEL.

4 THE WITNESS: YOU KEEP ASKING ME THAT, MAN.

5

6 BY MR. COOPER:

7

8 Q SAMUEL, HOW MANY TIMES DID DAWANA COME  
9 AND VISIT YOU WHILE YOU WERE AT THESE VARIOUS MENTAL INSTITU-  
10 TIONS IN CALIFORNIA?

11 A I DON'T REMEMBER.

12 Q WAS IT SEVERAL TIMES?

13 A NO, NOT SEVERAL. SOME TIMES BUT NOT

14 SEVERAL.

15 Q WHEN YOU SPOKE TO DETECTIVE LEAVITT, WHEN  
16 HE CAME TO CALIFORNIA TO TALK TO YOU, DID YOU TELL DETECTIVE  
17 LEAVITT THAT YOU THOUGHT YOU WERE MENTALLY ILL?

18 A NO. I NEVER SAY THAT I'M MENTALLY ILL.

19 I DON'T REMEMBER SAYING THAT.

20 Q PRIOR TO THE TIME THAT DETECTIVE LEAVITT  
21 CAME DOWN TO TALK TO YOU, YOU WERE QUESTIONED BY A POLICE  
22 OFFICER WITH THE DOWNEY POLICE DEPARTMENT, WEREN'T YOU?

23 A YES.

24 Q DURING THAT CONVERSATION WITH HIM DID YOU  
25 BECOME UPSET?

26 A YES.

27 Q DID YOU CRY?

28 A YES.

29 Q DID YOU ASK HIM TO GET YOU PSYCHIATRIC  
30 HELP?

31 A I DON'T BELIEVE SO.

32 MR. COOPER: I HAVE NOTHING FURTHER OF THIS

1 WITNESS, YOUR HONOR.

2 THE COURT: CROSS.

3 MR. HARMON: THANK YOU, YOUR HONOR.

4

5 CROSS EXAMINATION

6

7 BY MR. HARMON:

8

9 Q MR. HOWARD, ARE YOU MENTALLY ILL?

10 A NO. NO.

11 Q WERE YOU MENTALLY ILL ON MARCH THE 27TH,  
12 1980?

13 A I'M NOT MENTALLY ILL AT ALL.

14 Q YOU KNEW WHAT YOU WERE DOING, DIDN'T YOU?

15 A DO I KNOW WHAT I'M DOING?

16 Q YOU KNEW WHAT YOU WERE DOING ON MARCH THE  
17 27TH, 1980?

18 A I KNOW WHAT I'M DOING AT ALL TIMES.

19 Q INCLUDING WHAT YOU'RE DOING AS A WITNESS

20 IN THIS COURTROOM; IS THAT CORRECT?

21 A YES.

22 Q NOW, YOU'VE INDICATED ON THE WITNESS  
23 STAND THAT YOU SERVED FOR A PERIOD OF TIME IN VIET NAM.

24 A YES.

25 Q YOU SUFFERED SOME TYPE OF HEAD INJURY  
26 WHEN A GRENADE EXPLODED; IS THAT CORRECT?

27 A YES.

28 Q WEREN'T YOU TOLD THE INJURY WAS NOT  
29 SERIOUS?

30 A YES.

31 Q HOW MANY YEARS AGO WAS THAT?

32 A A FEW YEARS AGO. ALOT OF YEARS AGO.

1 Q IT WAS 1967 OR 1968?  
2 A NO. IT WAS LATER THAN THAT.  
3 Q WHEN WAS IT, SIR?  
4 A ABOUT -- IT WAS '69 OR '70.  
5 Q HOW OLD WERE YOU WHEN YOU SPENT TIME IN  
6 THE CREEDMORE HOSPITAL?  
7 A UH, I GUESS I HAD TO BE IN MY TWENTIES.  
8 Q HOW MUCH TIME DID YOU SPEND THERE?  
9 A I DON'T REMEMBER. I'VE BEEN IN THERE A  
10 FEW TIMES. I DON'T KNOW.  
11 Q WERE YOU AN IN-PATIENT OR AN OUT-PATIENT?  
12 A IN-PATIENT AWHILE, OUT-PATIENT ALSO.  
13 Q YOU SAY YOU'D BEEN THERE A FEW TIMES?  
14 A YES.  
15 Q IS THAT IN THE STATE OF ALABAMA?  
16 A THAT'S IN NEW YORK.  
17 Q DID YOU RECEIVE PSYCHIATRIC EVALUATION  
18 WHILE YOU WERE AT THE CREEDMORE HOSPITAL IN NEW YORK?  
19 A YES.  
20 Q DID YOU RECEIVE MEDICATION?  
21 A YES.  
22 Q THEY TRIED TO HELP YOU, DIDN'T THEY?  
23 A YES.  
24 Q DIDN'T YOU SPEND TIME IN OTHER HOSPITALS  
25 IN THE STATE OF NEW YORK?  
26 A YES.  
27 Q WHERE?  
28 A BELLEVIEW.  
29 Q THAT'S BELLEVIEW?  
30 A YEAH.  
31 Q WHEN DID YOU SPEND TIME THERE?  
32 A WHEN I HAD TO BE IN MY TWENTIES, TOO.

1 AND THE V.A. HOSPITAL.

2 Q THE V.A. HOSPITAL, IS THAT ALSO IN NEW

3 YORK?

4 A YEAH.

5 Q THAT WAS AFTER YOU SPENT TIME IN VIET NAM?

6 A YEAH. IT WAS RIGHT NEAR BELLEVIEW. THEY

7 RECOMMEND YOU GO THERE TO BELLEVIEW AND THEN THEY RECOMMEND YOU

8 GO TO THE -- THE ONE IN YOUR NEIGHBORHOOD, YOUR BOROUGH, WHICH

9 WAS QUEENS, WHERE I WAS FROM, AND THAT'S CREEDMORE.

10 Q DID THEY TRY TO HELP YOU?

11 A YEAH.

12 Q AT BOTH BELLEVIEW AND THE V.A. HOSPITAL?

13 A YEAH.

14 Q DID YOU RECEIVE PSYCHIATRIC COUNSELING?

15 A YES.

16 Q WERE YOU GIVEN MEDICATION?

17 A YEAH. AND -- AND E.E.G.

18 Q AN ELECTROENCEPHALOGRAM?

19 A ENCEPHALOGRAM, YEAH.

20 Q AND THEY DIDN'T FIND ANYTHING ABNORMAL

21 WITH YOUR BRAIN; ISN'T THAT CORRECT?

22 A ONE DID. THEY SAID IT HAS TO DO WITH, UH,

23 ABNORMALITY, WHATEVER. AND THEY WANTED TO GET ANOTHER TEST.

24 TO STOP TAKING DRUGS -- THEY SAID STOP TAKING DRUGS WITH THE

25 MEDICATION.

26 Q AND YOU WERE GIVEN SUBSEQUENT ELECTRO-

27 ENCEPHALOGRAMS, WEREN'T YOU?

28 A YES. OH, ALOT OF PLACES.

29 Q INCLUDING FACILITIES IN THE STATE OF

30 CALIFORNIA?

31 A YES. YES.

32 Q AND THEIR FINDINGS WERE THAT YOUR BRAIN

1 PATTERNS WERE WITHIN NORMAL LIMITS; ISN'T THAT CORRECT, SIR?

2 A YES. I TOLD THEM I WASN'T -- I WASN'T  
3 SCHIZOPHRENIC OR WHATEVER.

4 THEY SAID --

5 Q YOU TOLD THEM YOU WERE OR WEREN'T?

6 A I WASN'T.

7 Q ARE YOU?

8 A NO, I'M NOT.

9 Q WHAT IS A SCHIZOPHRENIC?

10 A THAT'S A PERSON WHO HAS WITHDRAWALS, WHO  
11 WITHDRAWS.

12 Q WHO WITHDRAWS?

13 A YES. WITHDRAWSOME (SIC).

14 Q HOW LONG DID YOU SPEND AT THE V.A.

15 HOSPITAL IN THE STATE OF NEW YORK?

16 A I DON'T REMEMBER. A FEW MONTHS, PERHAPS  
17 LONGER THAN THAT.

18 Q NOW, YOU SUGGESTED AT ONE POINT DURING  
19 YOUR DIRECT EXAMINATION THAT YOU WERE TOLD THAT WHATEVER YOUR  
20 PROBLEM, WERE RELATED TO YOUR CHILDHOOD EXPERIENCE, TO AGENT

21 ORANGE, AND PRESUMABLY TO YOUR HEAD INJURY; IS THAT CORRECT?

22 A WHAT DID YOU SAY? CAN YOU REPEAT THAT,  
23 SIR?

24 Q CERTAINLY.

25 DID YOU TESTIFY ON DIRECT EXAMINATION  
26 THAT AT SOME POINT YOU WERE TOLD, WHILE YOU WERE IN THE STATE  
27 OF CALIFORNIA, THAT WHATEVER PROBLEMS YOU HAD PERHAPS RELATED  
28 TO YOUR CHILDHOOD EXPERIENCE, AGENT ORANGE AND YOUR HEAD INJURY  
29 IN VIET NAM?

30 A YEAH. I WAS TOLD ONCE BY A PSYCHIATRIST  
31 FROM ATASCADERO THAT AGENT ORANGE COULD. BUT THE OTHER  
32 HOSPITALS ALL SAID THE CHILD -- CHILDHOOD AND DEFINITELY THE

1 WOUND I RECEIVED IN VIET NAM.

2 Q HAVEN'T YOU BEEN TOLD THAT DRUGS ALSO WERE  
3 AN ATTRIBUTING FACTOR?

4 A THEY SAY THAT'S A GOOD POSSIBILITY, BUT  
5 I -- I DIDN'T USE NO DRUGS.

6 Q YOU'VE NEVER USED DRUGS?

7 A NO. I -- I -- I NEVER USED DRUGS. BUT I  
8 DRINK ALCOHOL. BUT I NEVER USE DRUGS. I DON'T SMOKE CIGARETTES.

9 Q YOU HAVE NEVER USED PCP, HEROIN, COCAINE,  
10 ANYTHING LIKE THAT?

11 A NO. THEY PUT THAT ON THE CLASSIFICATION  
12 SHEET.

13 Q WHO PUT THAT IN YOUR CLASSIFICATION  
14 SHEET?

15 A THE PSYCHIATRIST IN CALIFORNIA. THEY  
16 SAID THAT -- THAT I HAD TO BE ON DRUGS, BEING THE TYPE OF  
17 CRIMES I WAS DOING AGAINST PEOPLE. AND THEY SAID THAT IT'S --  
18 THAT'S ALL NORMAL FOR A PERSON THAT'S ON DRUGS.

19 Q BUT YOU'RE SAYING NOW YOU'VE NEVER USED  
20 ANY TYPE OF DRUGS EXCEPT ALCOHOL, NEVER?

21 A I DRINK WINE. THAT'S ABOUT IT.

22 Q WEREN'T YOU TOLD AT ATASCADERO AND ALSO  
23 AT PATTEN STATE HOSPITAL IN CALIFORNIA THAT YOU WERE SIMPLY A  
24 MALINGERER? THERE WAS REALLY NOTHING WRONG WITH YOU.

25 A I TOLD THEM THERE WAS NOTHING WRONG WITH  
26 ME. THEY SENT ME THERE. AND CONSEQUENTLY THEY SENT ME TO  
27 THAT VACAVILLE MEDICAL FACILITY. AND AGAINST MY -- AGAINST MY  
28 CONSENT BECAUSE I WANTED TO GO TO OTHER PLACES.

29 AND THEY SAID NO, YOU HAVE A PSYCHOTIC  
30 KNACK, THAT YOU HAVE TO GO THERE.

31 I'M THE ONE WHO STATED THAT AND I'M  
32 ALSO THE ONE WHO REFUSED TO TESTIFY TO ENTER A PLEA OF NOT



1 GUILTY BY REASON OF INSANITY BECAUSE I'M NOT CRAZY.

2 Q ARE YOU ANTISOCIAL?

3 A NO.

4 Q WERE YOU DIAGNOSED AS HAVING AN ANTISOCIAL

5 PERSONALITY AT THE PATTEN STATE HOSPITAL IN CALIFORNIA?

6 A I HEARD -- I HEARD THOSE -- THOSE

7 EXPRESSED BEFORE -- THAT EXPRESSED BEFORE. BUT I'M NOT, I'M

8 NOT ANTISOCIAL.

9 Q THAT WAS DIAGNOSED BUT YOU DON'T AGREE

10 WITH IT; IS THAT WHAT YOU'RE SAYING?

11 A THERE'S ALOT OF DIAGNOSIS I DON'T AGREE

12 WITH, SIR, THAT THEY HAVE OF ME.

13 Q DO YOU HAVE A BAD TEMPER, MR. HOWARD?

14 A EXCUSE ME.

15 Q DO YOU HAVE A BAD TEMPER, SIR?

16 A I THINK IT'S AVERAGE. IT'S NOT BAD.

17 MR. HARMON: COURT'S INDULGENCE AGAIN, PLEASE.

18 THAT'S ALL WE HAVE, YOUR HONOR. THANK

19 YOU.

---

20 MR. COOPER: NOTHING FURTHER, YOUR HONOR.

21 THE COURT: YOU MAY STEP DOWN YOU'RE EXCUSED.

22 (WHEREUPON, THE WITNESS WAS

23 EXCUSED.)

24 THE COURT: CALL YOUR NEXT WITNESS.

25 MR. COOPER: WE HAVE NO ADDITIONAL WITNESSES,

26 YOUR HONOR.

27 THE COURT: THE STATE?

28 MR. SEATON: MAY WE HAVE THE COURT'S INDULGENCE.

29 THE COURT: COUNSEL, APPROACH THE BENCH, PLEASE.

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(WHEREUPON, SIDE BAR CONFERENCE  
WAS HELD AT THE BENCH; NOT  
REPORTED. AT THE CONCLUSION OF  
WHICH THE FOLLOWING WAS HAD:)

THE COURT: LADIES AND GENTLEMEN OF THE JURY,  
WE WILL TAKE OUR RECESS AT THIS TIME.

DURING THIS RECESS YOU  
ARE ADMONISHED NOT TO CONVERSE  
AMONG YOURSELVES OR WITH ANYONE  
ELSE ON ANY SUBJECT CONNECTED  
WITH THIS TRIAL, OR READ, WATCH  
OR LISTEN TO ANY REPORT OF OR  
COMMENTARY ON THIS TRIAL WITH ANY  
PERSON CONNECTED WITH THIS TRIAL  
BY ANY MEDIUM OF INFORMATION,  
INCLUDING WITHOUT LIMITATION,  
NEWSPAPER, TELEVISION OR RADIO,  
OR FORM OR EXPRESS ANY OPINION  
ON ANY SUBJECT CONNECTED WITH THIS  
TRIAL UNTIL THE CASE IS FINALLY  
SUBMITTED TO YOU.

WE WILL BE IN RECESS UNTIL 2:00 O'CLOCK  
THIS AFTERNOON.  
COUNSEL, YOU CAN LEAVE YOUR INSTRUCTIONS IN CHAMBERS.

WE'LL BE IN RECESS.

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1 LAS VEGAS, NEVADA, TUESDAY, MAY 3, 1983 AT 3:30 P.M.

2 \* \* \* \* \*

3 (WHEREUPON, FROM 12:13 A.M.  
4 UNTIL 3:30 P.M., A RECESS WAS  
5 HAD IN THE PROCEEDINGS, AT THE  
6 CONCLUSION OF WHICH THE FOLLOW-  
7 ING PROCEEDINGS WERE HAD OUT-  
8 SIDE THE PRESENCE OF THE JURY.)

9 THE COURT: LET THE RECORD REFLECT THIS IS OUT-  
10 SIDE THE PRESENCE OF THE JURY.

11 MISS CLERK, AT THIS TIME I WILL HAND YOU  
12 THE SHEET ENTITLED "PENAL LAW, ROBBERY IN THE FIRST DEGREE,  
13 SECTION 160.150," WHICH YOU WILL MARK AS THE NEXT COURT  
14 EXHIBIT NUMBER, WHICH WILL BE 6, I BELIEVE.

15 THE CLERK: I HAVE 5.

16 THE COURT: THIS WILL BE 6.

17 THE CLERK: OKAY.

18 THE COURT: ANYTHING FURTHER TO COME BEFORE THE  
19 COURT AT THIS TIME?

20 MR. COOPER: YES, YOUR HONOR.

21 YOUR HONOR MAY RECALL YESTERDAY ON THE  
22 RECORD WE BROUGHT TO THE COURT'S ATTENTION THE FACT THAT WHILE  
23 THE DISCUSSIONS WITH MR. HOWARD, IT WAS HIS DECISION THAT  
24 DURING THE PENALTY PHASE OF THIS TRIAL WE PRESENT NO EVIDENCE  
25 OF MITIGATING FACTORS, CIRCUMSTANCES, AND THAT WE MAKE NO  
26 ARGUMENT AT THE CLOSE OF THE EVIDENCE.

27 MR. HOWARD WAS CANVASSED BY YOUR  
28 HONOR AND INDICATED AT THAT TIME THAT IT WAS HIS DESIRE NOT  
29 TO HAVE US ARGUE OUR MITIGATING CIRCUMSTANCES. OF COURSE,  
30 TODAY HE TOOK THE STAND AND OFFERED WHAT WE CONSIDERED TO BE  
31 EVIDENCE OF MITIGATING CIRCUMSTANCES.

32 AFTER DISCUSSING WITH HIM LESS THAN

1 15 MINUTES AGO WHETHER IT'S STILL HIS DESIRE THAT WE NOT ARGUE  
2 IN THIS CASE, HE HAS EQUIVOCATED AND INDICATED THAT HE WOULD  
3 LEAVE IT UP TO HIS COUNSEL. I WOULD REQUEST THAT THE COURT  
4 CANVAS MR. HOWARD SO HE CAN BE PERFECTLY CLEAR ON THIS MATTER  
5 AS TO WHAT HIS WISHES ARE.

6 MAY I HAVE THE COURT'S RULING THAT HE  
7 IS COMPETENT AND IT'S HIS DECISION, AND WE WOULD CERTAINLY  
8 LIKE TO HAVE DEFINITE CONFIRMATION OF THAT.

9 THE COURT: MR. HOWARD, WOULD YOU STAND, SIR.

10 YOU HAVE HEARD THE STATEMENTS OF YOUR  
11 ATTORNEY. DO YOU DESIRE THEM TO ARGUE OR NOT AT THESE PROCEED-  
12 INGS, SIR?

13 DEFENDANT HOWARD: YESTERDAY, YOUR HONOR, I  
14 DIDN'T -- I DIDN'T UNDERSTAND MITIGATING FACTORS, WHATEVER.  
15 AND SO I -- I'M NOT QUALIFIED TO TELL THEM TO ARGUE OR NOT TO  
16 ARGUE. IT'S ENTIRELY UP TO -- UP TO THE ATTORNEY.

17 THE COURT: NO IT ISN'T, SIR. IT'S ENTIRELY  
18 UP TO YOU UPON CONFERRING WITH THEM. IT'S YOUR DECISION, NOT  
19 THEIR DECISION. AND IT'S OBVIOUS THAT YOU SHOULD SIT DOWN  
20 WITH THEM AND DISCUSS IT.

21 NOW, THEY'VE SAID THEY WOULD DISCUSS IT  
22 WITH YOU AND THE STATE IS GOING TO BE ARGUING. THEY WILL BE  
23 ARGUING THAT THERE IS AGGRAVATING CIRCUMSTANCES, AND AS THEY  
24 HAVE INDICATED, THEY WILL BE ASKING FOR THE DEATH PENALTY.

25 DEFENDANT HOWARD: YES, YOUR HONOR. I UNDER-  
26 STAND THAT.

27 BUT I'M NOT QUALIFIED TO TELL THEM WHAT  
28 TO ARGUE OR WHATEVER, YOU KNOW. SO IT'S UP TO THEM. IF THEY  
29 WANT TO ARGUE, THEY CAN; IF NOT, YOU KNOW, IT'S STILL OKAY.

30 THE COURT: WELL, YOU'RE THE ONE TO DETERMINE  
31 WHETHER THEY ARGUE OR NOT ARGUE, SIR.

32 NOW, AS FAR AS THE CONTENTS OF THEIR

1 ARGUMENT, UNDOUBTEDLY THEY WILL ARGUE AS BEST THEY CAN AS  
2 LAWYERS WITH WHAT THEY HAVE TO DEAL WITH. BUT THE DECISION IS  
3 STILL YOURS, EITHER YES OR NO, SIR.

4 DEFENDANT HOWARD: IT'S UP TO THEM, YOUR HONOR.  
5 I -- I DON'T UNDERSTAND. I REALLY STILL DON'T UNDERSTAND WHAT  
6 YOU MEAN BY ARGUING OR WHAT. I TOOK THE STAND. THAT'S THE  
7 BEST I COULD DO. SO, YOU KNOW, I'M READY FOR THE DECISION,  
8 WHATEVER.

9 THE COURT: WELL, DO YOU OPPOSE THEIR ARGUING OR  
10 NOT?

11 YESTERDAY YOU WERE OPPOSED TO THEIR  
12 ARGUING. ARE YOU OPPOSING THAT THEY ARGUE AT THIS TIME?

13 DEFENDANT HOWARD: WELL, I DIDN'T UNDERSTAND,  
14 YOUR HONOR. THE BAILIFF --

15 THE COURT: WELL, ARE YOU? JUST ANSWER THE  
16 QUESTION.

17 DEFENDANT HOWARD: OPPOSE WHAT, YOUR HONOR? I  
18 DON'T UNDERSTAND WHAT YOU MEAN. OPPOSE WHAT?

19 THE COURT: MR. HOWARD, I'M GOING TO TELL YOU  
20 ONE MORE TIME AS CLEARLY AS I CAN, SIR, AND THEN I'M GOING TO  
21 LEAVE IT TO YOU TO DECIDE WHETHER YOU'RE GOING TO INSTRUCT YOUR  
22 LAWYERS TO ARGUE OR NOT.

23 IN THE HEARING THAT IS ABOUT TO BE HELD,  
24 THE PENALTY PHASE OF THIS CASE, THE STATE HAS NOW PRESENTED  
25 EVIDENCE AND YOU HAVE NOW PRESENTED EVIDENCE.

26 THIS IS VERY SIMILAR TO THE TRIAL OF  
27 THE CASE IN WHICH THE STATE PRESENTED EVIDENCE AND YOU PRESENTED  
28 EVIDENCE. AT THAT TIME THE STATE ARGUED THEIR CASE TO THE  
29 JURY AND THAT IS AND THAT MEANS THAT THEY SUMMARIZE THE  
30 EVIDENCE TO THE JURY AND ARGUED HOW THE LAW APPLIES TO THE  
31 EVIDENCE THAT'S SUBMITTED.

32 YOUR ATTORNEYS DID THE VERY SAME THING.

1 NOW YOUR ATTORNEYS ARE GOING TO HAVE THE SAME OPPORTUNITY AS  
2 THEY HAD IN THE CASE ON THE ISSUE OF GUILT OR INNOCENCE.

3 THE STATE WILL ARGUE. THEY HAVE THE  
4 RIGHT TO OPEN AND CLOSE. THEY WILL AGAIN ARGUE THE FACTS OF  
5 THIS CASE AND THEY WILL ALSO ARGUE HOW THE LAW APPLIES. YOUR  
6 ATTORNEYS WILL ALSO HAVE THAT OPPORTUNITY.

7 DO YOU UNDERSTAND WHAT I HAVE SAID  
8 TO YOU, SIR?

9 DEFENDANT HOWARD: YES. YES, YOUR HONOR.

10 THE COURT: ALL RIGHT.

11 DO YOU HAVE ANY -- THE ONLY QUESTION THEN  
12 IS, IN VIEW OF YOUR PREVIOUS STATEMENT THAT YOU DID NOT WANT  
13 YOUR ATTORNEYS TO ARGUE THE CASE TO THE JURY, THE ONLY DECISION  
14 FOR YOU TO MAKE NOW IS WHETHER OR NOT YOU WANT THEM TO OR NOT.

15 YOU CAN BE SEATED AND YOU MAY CONFER  
16 WITH YOUR ATTORNEYS AND WHEN I CALL AND ASK IF THE DEFENSE  
17 DESIRES TO ARGUE, THEN WE SHALL HAVE A DECISION FROM YOU ONE  
18 WAY OR THE OTHER, SIR.

19 YOU MAY BE SEATED.

20 ANYTHING FURTHER OUTSIDE OF THE  
21 PRESENCE OF THE JURY?

22 MR. HARMON: NO, YOUR HONOR.

23 THE COURT: ALL RIGHT. CALL THE JURY.

24 MR. FRANZEN: YOUR HONOR, MIGHT WE CONFER WITH  
25 THE DEFENDANT BEFORE THE JURY IS BROUGHT IN?

26 THE COURT: ALL RIGHT. GO AHEAD.

27 MR. COOPER: YOUR HONOR, AFTER FURTHER DISCUS-  
28 SION WITH MR. HOWARD, IT'S HIS DECISION THAT WE ARGUE THE CASE.

29 IN LIGHT OF THAT DECISION, YOUR HONOR, I  
30 FEEL COMPELLED AT THIS TIME TO MOVE THE COURT FOR A CONTINUANCE  
31 OF ONE DAY TO GIVE US THE OPPORTUNITY TO MORE FULLY PREPARE  
32 FOR CLOSING ARGUMENT. BASED ON MR. HOWARD'S DECISION YESTERDAY,

1 IT WAS OUR IMPRESSION THAT THERE WOULD BE NO ARGUMENT BY THE  
2 DEFENSE COUNSEL.

3 I MADE SOME NOTES DURING THE LUNCH  
4 HOUR, HOWEVER, I FEEL THAT GIVEN ADDITIONAL TIME, A MORE BETTER  
5 ARGUMENT COULD BE PREPARED, SOLELY IF THE COURT WOULD DEEM US  
6 A MATTER OF ONE DAY TO GIVE US THAT OPPORTUNITY.

7 THE COURT: THE STATE?

8 MR. HARMON: YOUR HONOR, WE LEAVE THAT TO THE  
9 COURT. WE ARE PREPARED TO GO THIS AFTERNOON. WE CAN ALSO  
10 ARGUE TOMORROW.

11 THE COURT: WELL, IT'S OBVIOUS THAT EVEN IF WE  
12 STARTED ARGUING TODAY WE PROBABLY WOULDN'T FINISH UNTIL WELL  
13 AFTER 5:00 O'CLOCK.

14 MR. HARMON: WE WOULD GO WELL PAST 5:00, YOUR  
15 HONOR.

16 THE COURT: ALL RIGHT.

17 WE WILL CALL THE JURY BACK IN AND INSTRUCT  
18 THEM AND THEN WE WILL COMMENCE WITH THE ARGUMENTS TOMORROW  
19 MORNING. THE STATE COMMENCES AT 10:00 AND YOU FOLLOW AT THAT  
20 TIME.

21 MR. HARMON: FINE.

22 THE COURT: CALL THE JURY.

23 (WHEREUPON, AT THE HOUR OF  
24 3:40 P.M., THE JURY ENTERED  
25 THE COURTROOM AND THE FOLLOW-  
26 ING PROCEEDINGS WERE HAD:)

27 THE COURT: COUNSEL, STIPULATE TO THE PRESENCE  
28 OF THE JURY?

29 MR. FRANZEN: YES, YOUR HONOR.

30 MR. SEATON: YES, YOUR HONOR.

31 THE COURT: LADIES AND GENTLEMEN OF THE JURY,  
32 IT HAS NOW BECOME MY DUTY TO INSTRUCT YOU AS TO THE LAW IN THIS

1 PENALTY HEARING. AND AS I HAVE PREVIOUSLY MENTIONED TO YOU  
2 WHEN WE WERE INVOLVED IN THE GUILT PHASE, THESE INSTRUCTIONS  
3 ARE IN WRITING AND THEY WILL BE GIVEN TO YOU. YOU WILL BE ABLE  
4 TO TAKE THEM BACK TO THE JURY ROOM WITH YOU TO DISCUSS AND TO  
5 CONSIDER AT THE TIME THAT YOU ARE DELIBERATING IN THIS MATTER.

6  
7 IT IS NOW MY DUTY AS JUDGE  
8 TO INSTRUCT YOU IN THE LAW THAT  
9 APPLIES TO THIS PENALTY HEARING.  
10 IT IS YOUR DUTY AS JURORS TO  
11 FOLLOW THESE INSTRUCTIONS AND TO  
12 APPLY THE RULES OF LAW TO THE  
13 FACTS AS YOU FIND THEM FROM THE  
14 EVIDENCE.

15  
16 YOU MUST NOT BE CONCERNED  
17 WITH THE WISDOM OF ANY RULE OF  
18 LAW STATED IN THESE INSTRUCTIONS.  
19 REGARDLESS OF ANY OPINION YOU MAY  
20 HAVE AS TO WHAT THE LAW OUGHT TO  
21 BE, IT WOULD BE A VIOLATION OF  
22 YOUR OATH TO BASE A VERDICT UPON  
23 ANY OTHER VIEW OF THE LAW THAN  
24 THAT GIVEN IN THE INSTRUCTIONS  
25 OF THE COURT.

26  
27 IF, IN THESE INSTRUCTIONS,  
28 A RULE, DIRECTION OR IDEA IS  
29 REPEATED OR STATED IN DIFFERENT  
30 WAYS, NO EMPHASIS THEREON IS  
31 INTENDED BY ME AND NONE MUST BE  
32 INFERRED BY YOU. FOR THAT



1 REASON, YOU ARE NOT TO  
2 SINGLE OUT ANY CERTAIN  
3 SENTENCE OR ANY INDIVIDUAL  
4 POINT OR INSTRUCTION AND  
5 IGNORE THE OTHERS, BUT YOU  
6 ARE TO CONSIDER ALL THE IN-  
7 STRUCTIONS AS A WHOLE AND  
8 REGARD EACH IN THE LIGHT OF  
9 ALL THE OTHERS.

11 THE ORDER IN WHICH THE IN-  
12 STRUCTIONS ARE GIVEN HAS NO SIG-  
13 NIFICANCE AS TO THEIR RELATIVE  
14 IMPORTANCE.

16 THE TRIAL JURY SHALL FIX THE  
17 PUNISHMENT FOR EVERY PERSON CON-  
18 VICTED OF MURDER OF THE FIRST  
19 DEGREE.

21 THE JURY SHALL FIX THE PUNISH-  
22 MENT AT:

- 23 1. DEATH, OR
- 24 2. LIFE IMPRISONMENT WITHOUT
- 25 THE POSSIBILITY OF PAROLE,
- 26 OR,
- 27 3. LIFE IMPRISONMENT WITH THE
- 28 POSSIBILITY OF PAROLE.

30 YOU ARE INSTRUCTED THAT THE  
31 LIFE IMPRISONMENT WITH THE POSSIBIL-  
32 ITY OF PAROLE DOES NOT EXCLUDE EXECU-

TIVE CLEMENCY.

THE STATE HAS ALLEGED THAT  
CERTAIN AGGRAVATING CIRCUMSTANCES  
ARE PRESENT IN THIS CASE.

THE DEFENDANT HAS ALLEGED THAT  
CERTAIN MITIGATING CIRCUMSTANCES  
ARE PRESENT IN THIS CASE.

IT IS YOUR DUTY TO DETERMINE:

A. WHETHER AN AGGRAVATING  
CIRCUMSTANCE OR CIRCUM-  
STANCES ARE FOUND TO  
EXIST;

B. WHETHER A MITIGATING CIR-  
CUMSTANCE OR CIRCUMSTANCES  
ARE FOUND TO EXIST; AND

C. BASED UPON THESE FINDINGS,  
WHETHER THE DEFENDANT SHOULD  
BE SENTENCED TO LIFE IMPRISON-  
MENT OR DEATH.

THE JURY MAY IMPOSE A SENTENCE  
OF DEATH ONLY IF IT FINDS AT LEAST  
ONE AGGRAVATING CIRCUMSTANCE HAS  
BEEN ESTABLISHED BEYOND A REASONABLE  
DOUBT AND FURTHER FINDS THAT THERE  
ARE NO MITIGATING CIRCUMSTANCES  
SUFFICIENT TO OUTWEIGH THE AGGRAVATING  
CIRCUMSTANCE OR CIRCUMSTANCES FOUND.  
OTHERWISE, THE PUNISHMENT IMPOSED SHALL

1 BE IMPRISONMENT IN THE STATE  
2 PRISON FOR LIFE WITH OR WITHOUT  
3 THE POSSIBILITY OF PAROLE.  
4

5 THE BURDEN RESTS UPON THE  
6 PROSECUTION TO ESTABLISH ANY  
7 AGGRAVATING CIRCUMSTANCE BEYOND  
8 A REASONABLE DOUBT.  
9

10 A REASONABLE DOUBT IS ONE  
11 BASED ON REASON. IT IS NOT  
12 MERE POSSIBLE DOUBT, BUT IS  
13 SUCH A DOUBT AS WOULD GOVERN  
14 OR CONTROL A PERSON IN THE MORE  
15 WEIGHTY AFFAIRS OF LIFE. IF THE  
16 MINDS OF THE JURORS, AFTER THE  
17 ENTIRE COMPARISON AND CONSIDERA-  
18 TION OF ALL THE EVIDENCE, ARE IN  
19 SUCH A CONDITION THAT THEY CAN  
20 SAY THEY FEEL AN ABIDING CONVIC-  
21 TION OF THE TRUTH OF THE CHARGE,  
22 THERE IS NOT A REASONABLE DOUBT.  
23 DOUBT TO BE REASONABLE MUST BE  
24 ACTUAL AND SUBSTANTIAL, NOT MERE  
25 POSSIBILITY OR SPECULATION.  
26

27 YOU ARE INSTRUCTED THAT THE  
28 FOLLOWING FACTORS ARE CIRCUMSTANCES  
29 BY WHICH MURDER OF THE FIRST DEGREE  
30 MAY BE AGGRAVATED:

- 31 1. THE MURDER WAS COMMITTED  
32 BY A DEFENDANT WHO WAS

1 PREVIOUSLY CONVICTED OF  
2 A FELONY INVOLVING THE USE  
3 OR THREAT OF VIOLENCE TO  
4 THE PERSON OF ANOTHER.

5 2. THE MURDER WAS COMMITTED  
6 WHILE THE DEFENDANT WAS  
7 ENGAGED IN THE COMMISSION  
8 OF ANY ROBBERY.

9  
10 ROBBERY IS THE UNLAWFUL TAKING  
11 OF PERSONAL PROPERTY FROM THE PERSON  
12 OF ANOTHER OR IN HIS PRESENCE, AGAINST  
13 HIS WILL, BY MEANS OF FORCE OR VIOLENCE  
14 OR FEAR OF INJURY, IMMEDIATE OR FUTURE,  
15 TO HIS PERSON OR PROPERTY. SUCH FORCE  
16 OR FEAR MUST BE USED TO OBTAIN OR RETAIN  
17 POSSESSION OF THE PROPERTY, OR TO PRE-  
18 VENT OR OVERCOME RESISTANCE TO THE  
19 TAKING, IN EITHER OF WHICH CASES THE

20 DEGREE OF FORCE IS IMMATERIAL. SUCH  
21 TAKING CONSTITUTES ROBBERY WHENEVER IT  
22 APPEARS THAT, ALTHOUGH THE TAKING WAS  
23 FULLY COMPLETED WITHOUT THE KNOWLEDGE  
24 OF THE PERSON FROM WHOM TAKEN, SUCH  
25 KNOWLEDGE WAS PREVENTED BY THE USE OF  
26 FORCE OR FEAR.

27  
28 THE VALUE OF PROPERTY OR MONEY  
29 TAKEN IS NOT AN ELEMENT OF THE CRIME  
30 OF ROBBERY, AND IT IS ONLY NECESSARY  
31 THAT THE STATE PROVE THE TAKING OF  
32 SOME PROPERTY OR MONEY.

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1 THE OFFENSE OF ROBBERY IS  
2 A FELONY UNDER THE LAWS OF THE  
3 STATE OF NEVADA.  
4

5 MURDER OF THE FIRST DEGREE  
6 MAY BE MITIGATED BY ANY OF THE  
7 FOLLOWING CIRCUMSTANCES, EVEN  
8 THOUGH THE MITIGATING CIRCUMSTANCE  
9 IS NOT SUFFICIENT TO CONSTITUTE  
10 A DEFENSE OR REDUCE THE DEGREE OF  
11 THE CRIME:

- 12 1. ANY OTHER MITIGATING  
13 CIRCUMSTANCES.  
14

15 THE JURY IS INSTRUCTED THAT  
16 IN DETERMINING THE APPROPRIATE  
17 PENALTY TO BE IMPOSED IN THIS CASE  
18 THAT IT MAY CONSIDER ALL EVIDENCE  
19 INTRODUCED AT BOTH THE PENALTY  
20 HEARING PHASE OF THESE PROCEEDINGS  
21 AND AT THE TRIAL OF THIS MATTER.  
22

23 THE LAW RECOGNIZES TWO CLASSES  
24 OF EVIDENCE. ONE IS DIRECT EVIDENCE  
25 AND THE OTHER IS CIRCUMSTANTIAL  
26 EVIDENCE.  
27

28 DIRECT EVIDENCE IS THE TESTI-  
29 MONY OF A PERSON WHO CLAIMS TO  
30 HAVE KNOWLEDGE OF THE COMMISSION  
31 OF THE CRIME WHICH HAS BEEN COMMIT-  
32 TED, SUCH AS AN EYE-WITNESS.

1 CIRCUMSTANTIAL EVIDENCE IS THE  
2 PROOF OF A CHAIN OF FACTS AND  
3 CIRCUMSTANCES WHICH TEND TO SHOW  
4 WHETHER THE DEFENDANT IS GUILTY  
5 OR NOT GUILTY. THE LAW MAKES NO  
6 DISTINCTIONS BETWEEN THE WEIGHT  
7 TO BE GIVEN EITHER DIRECT OR  
8 CIRCUMSTANTIAL EVIDENCE. THERE-  
9 FORE, ALL OF THE EVIDENCE IN THE  
10 CASE, INCLUDING THE CIRCUMSTANTIAL  
11 EVIDENCE, SHOULD BE CONSIDERED BY  
12 YOU IN ARRIVING AT YOUR VERDICT.

13  
14 ALTHOUGH YOU ARE TO CONSIDER  
15 ONLY THE EVIDENCE IN THE CASE IN  
16 REACHING A VERDICT, YOU MUST BRING  
17 TO THE CONSIDERATION OF THE EVIDENCE  
18 YOUR EVERYDAY COMMON SENSE AND  
19 JUDGMENT AS REASONABLE MEN AND  
20 WOMEN. THUS, YOU ARE NOT LIMITED  
21 SOLELY TO WHAT YOU SEE AND HEAR AS  
22 THE WITNESSES TESTIFY. YOU MAY DRAW  
23 REASONABLE INFERENCES FROM THE  
24 EVIDENCE WHICH YOU FEEL ARE JUSTI-  
25 FIED IN THE LIGHT OF COMMON EXPER-  
26 IENCE, KEEPING IN MIND THAT INFERENCES  
27 SHOULD NOT BE BASED ON SPECULATION OR  
28 GUESS.

29  
30 THE VERDICT MAY NEVER BE  
31 INFLUENCED BY SYMPATHY, PREJUDICE  
32 OR PUBLIC OPINION. YOUR DECISION

1 SHOULD BE THE PRODUCE OF SINCERE  
2 JUDGMENT AND SOUND DISCRETION IN  
3 ACCORDANCE WITH THESE RULES OF LAW.  
4

5 THE COURT HAS SUBMITTED TWO SETS  
6 OF VERDICTS TO YOU. ONE SET OF  
7 VERDICTS REFLECTS THE THREE POSSIBLE  
8 PUNISHMENTS WHICH MAY BE IMPOSED.  
9 THE OTHER SET OF VERDICTS ARE  
10 SPECIAL VERDICTS. THEY ARE TO REFLECT  
11 YOUR FINDINGS WITH RESPECT TO THE  
12 PRESENCE OR ABSENCE AND WEIGHT TO BE  
13 GIVEN ANY AGGRAVATING CIRCUMSTANCE AND  
14 ANY MITIGATING CIRCUMSTANCES.  
15

16 IT WILL BE THE JURY'S DUTY TO  
17 SELECT ONE APPROPRIATE VERDICT PER-  
18 TAINING TO THE PUNISHMENT WHICH IS  
19 TO BE IMPOSED AND ONE APPROPRIATE  
20 SPECIAL VERDICT PERTAINING TO THE  
21 JURY'S FINDINGS WITH RESPECT TO  
22 AGGRAVATING AND MITIGATING CIRCUM-  
23 STANCES.  
24

25 DURING YOUR DELIBERATION YOU  
26 WILL HAVE ALL THE EXHIBITS WHICH  
27 WERE ADMITTED INTO EVIDENCE, THESE  
28 WRITTEN INSTRUCTIONS AND FORMS OF  
29 VERDICT, WHICH HAVE BEEN PREPARED  
30 FOR YOUR CONVENIENCE.  
31

32 YOUR VERDICTS MUST BE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

UNANIMOUS. WHEN YOU HAVE AGREED  
UPON YOUR VERDICTS, THEY SHOULD  
BE SIGNED AND DATED BY YOUR  
FOREMAN.

MR. HARMON: MAY WE APPROACH THE BENCH, YOUR  
HONOR?

THE COURT: YOU MAY.

(WHEREUPON, SIDE BAR CONFERENCE  
WAS HELD AT THE BENCH; NOT  
REPORTED. AT THE CONCLUSION OF  
WHICH THE FOLLOWING WAS HAD:)

THE COURT: LADIES AND GENTLEMEN OF THE JURY,  
COUNSEL HAS BROUGHT TO MY ATTENTION THAT I MISREAD ONE OF THE  
INSTRUCTIONS. I HAVE JUST CHECKED WITH THE COURT REPORTER AND  
I HAVE.

THE INSTRUCTION SHOULD READ AS FOLLOWS:

YOU ARE INSTRUCTED THAT THE  
SENTENCE OF LIFE IMPRISONMENT WITHOUT  
THE POSSIBILITY OF PAROLE DOES NOT  
EXCLUDE EXECUTIVE CLEMENCY.

NO EMPHASIS IS INTENDED BY ME IN READING  
THIS, BUT ONLY TO CORRECT THE RECORD AND TO MAKE IT CLEAR.

ALL RIGHT. LADIES AND GENTLEMEN OF THE  
JURY, IN VIEW OF THE HOUR, COUNSEL HAS AGREED THAT THERE IS  
NO WAY THAT WE WOULD BE ABLE TO FINISH THE CASE TODAY UNLESS  
WE WENT WELL INTO THE EVENING. SO WE ARE GOING TO CONTINUE  
THIS MATTER UNTIL 10:00 O'CLOCK TOMORROW MORNING, AT WHICH TIME  
YOU WILL HEAR THE ARGUMENTS OF COUNSEL AND THEN THE MATTER WILL  
BE SUBMITTED TO YOU.



1 DURING THIS RECESS, LADIES  
2 AND GENTLEMEN, YOU ARE ADMONISHED  
3 NOT TO CONVERSE AMONG YOURSELVES  
4 OR WITH ANYONE ELSE ON ANY SUBJECT  
5 CONNECTED WITH THIS TRIAL, OR READ,  
6 WATCH OR LISTEN TO ANY REPORT OF OR  
7 COMMENTARY ON THIS TRIAL WITH ANY  
8 PERSON CONNECTED WITH THIS TRIAL BY  
9 ANY MEDIUM OF INFORMATION, INCLUDING  
10 WITHOUT LIMITATION, NEWSPAPER, TELE-  
11 VISION OR RADIO, OR FORM OR EXPRESS  
12 ANY OPINION ON ANY SUBJECT CONNECTED  
13 WITH THIS TRIAL UNTIL THE CASE IS  
14 FINALLY SUBMITTED TO YOU.

15 WE WILL BE IN RECESS UNTIL 10:00 O'CLOCK  
16 TOMORROW MORNING. WE HAVE SOME MATTERS TO TAKE CARE OF OUTSIDE  
17 OF YOUR PRESENCE. SO YOU CAN LEAVE THE COURTROOM AT THIS TIME.

18 (WHEREUPON, AT 3:55 P.M. THE  
19 JURY LEFT THE COURTROOM, AND

20 THE FOLLOWING PROCEEDINGS WERE  
21 HAD OUTSIDE OF THEIR PRESENCE:)

22 THE COURT: OUTSIDE THE PRESENCE OF THE JURY.

23 I BELIEVE, GENTLEMEN, THAT YOU HAD SOME  
24 INSTRUCTIONS THAT YOU WERE GOING TO PROPOSE?

25 MR. FRANZEN: YES, YOUR HONOR. WE HAVE THEM.

26 THE COURT: WELL, FIRST OF ALL, ARE THERE ANY  
27 OBJECTIONS ON THE PART OF THE STATE AS TO ANY INSTRUCTIONS  
28 GIVEN?

29 MR. HARMON: NO, YOUR HONOR.

30 THE COURT: DO YOU OFFER ANY ADDITIONAL INSTRU-  
31 TIONS AT THIS TIME?

32 MR. HARMON: NO, YOUR HONOR.

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1 THE COURT: AND IT'S A MATTER OF TRIAL STRATEGY  
2 THAT YOU OFFER NO FURTHER INSTRUCTIONS AT THIS TIME?

3 MR. HARMON: IT IS, YOUR HONOR.

4 THE COURT: THANK YOU.

5 COUNSEL, DO YOU HAVE ANY OBJECTION TO ANY  
6 OF THE INSTRUCTIONS GIVEN?

7 MR. FRANZEN: YES, YOUR HONOR.

8 THE COURT: ALL RIGHT. STATE THE NUMBER AND  
9 YOUR OBJECTION.

10 MR. FRANZEN: INSTRUCTION NUMBER FIVE, YOUR  
11 HONOR, WHICH INSTRUCTS THE JURY THAT THE SENTENCE OF LIFE  
12 IMPRISONMENT --

13 THE COURT: COUNSEL, STAND, PLEASE.

14 MR. FRANZEN: I'M SORRY, YOUR HONOR.

15 IT INSTRUCTS THE JURORS THAT:

16 THE SENTENCE OF LIFE IMPRISON-  
17 MENT WITHOUT THE POSSIBILITY OF  
18 PAROLE DOES NOT EXCLUDE EXECUTIVE  
19 CLEMENCY.

20 WE REALIZE THAT N.R.S. 175.161, SUB-  
21 PARAGRAPH 7, ALLOWS THE GIVING OF SOME INSTRUCTIONS WHEN THE  
22 POSSIBILITY OF SUCH A SENTENCE EXISTS. HOWEVER, I BELIEVE THE  
23 STATUTE WAS ENACTED IN THE LATE 1960'S. IT WAS ENACTED PRIOR  
24 TO THE RECENT DEVELOPMENT OF CAPITAL PUNISHMENT LAW BY THE  
25 UNITED STATES SUPREME COURT: THE FURMAN, THE GEORGIA, THE  
26 PROFFITT, AND OTHER DISCUSSIONS THAT WE HAVE PREVIOUSLY MENTION-  
27 ED IN OUR DISCUSSION OF WHAT TYPE OF AGGRAVATING CIRCUMSTANCE  
28 COULD BE GIVEN TO A SENTENCING JURY AND THAT THEIR SENTENCING  
29 DISCRETION MUST BE A CHANNELED DISCRETION, STRICTLY CONTROLLED.  
30 WE BELIEVE THAT THIS TYPE OF -- THIS TYPE OF INSTRUCTION  
31 DEMEANS THE JURY'S OWN DUTY IN THE JURY'S OWN MIND, AND  
32 ENCOURAGES THEM TO GIVE LESS -- GIVE LESS THAN THEIR COMPLETE

1 ATTENTION AND CONCERN TO THE SENTENCING OF MR. HOWARD, AND THAT  
2 THEY WILL BELIEVE THAT ANY MISTAKE THEY MAKE WILL BE CURED BY  
3 THE EXECUTIVE DEPARTMENT OF OUR STATE.

4 WE WOULD ALSO OBJECT BECAUSE THERE  
5 HAVE BEEN NO EVIDENCE PRESENTED BEFORE THIS COURT TO BE  
6 PRESENTED TO THE JURY AS TO HOW THIS EXECUTIVE CLEMENCY PROGRAM  
7 WORKS. WE BELIEVE THAT EVIDENCE WILL BE PRESENTED, IF IT WAS  
8 PREVENTED, MR. HOWARD, GIVEN HIS RECORD HAS ADMITTED ON THE  
9 STAND, WOULD NEVER GET EXECUTIVE CLEMENCY.

10 THE CURRENT GOVERNOR, OF COURSE, NEVER --  
11 THE CURRENT GOVERNOR OF COURSE DID NOT GRANT EXECUTIVE CLEMENCY.  
12 OR URGE IT WHEN HE WAS A MEMBER OF THE PARDONS BOARD WHEN HE  
13 WAS WITH THE NEVADA ATTORNEY GENERAL.

14 THE COURT: COUNSEL, LET'S STAY OFF POLITICS,  
15 PLEASE.

16 MR. FRANZEN: THE OTHER OBJECTION, YOUR HONOR,  
17 WAS AS WHEN WE APPROACHED THE BENCH WE OBJECTED TO THE REPEATING  
18 OF THE -- THE REPEATING OF THIS PARTICULAR INSTRUCTION BECAUSE  
19 OF THE UNDUE EMPHASIS SUCH A REPEATING OF IT WOULD HAVE ON THAT  
20 LANGUAGE REGARDING EXECUTIVE CLEMENCY.

21 WE REALIZE THAT THE COURT REPORTER REFLECTS  
22 THAT YOUR HONOR MISSPOKE HIMSELF REGARDING THIS INSTRUCTION,  
23 PARTICULARLY IF I RECALL CORRECTLY, YOUR HONOR INSTRUCTED THEM,  
24 "YOU ARE INSTRUCTED THAT THE SENTENCE OF LIFE IMPRISONMENT WITH  
25 THE POSSIBILITY OF PAROLE," RATHER THAN WITHOUT THE POSSIBILITY  
26 OF PAROLE, "DOES NOT EXCLUDE EXECUTIVE CLEMENCY."

27 WE BELIEVE THAT THE ERROR OR THE  
28 MISTAKE WOULD HAVE BEEN CURED BY THE PRESENTATION OF THIS  
29 INSTRUCTION TO THE JURY WHEN THEY WENT BACK FOR THEIR DELIBERA-  
30 TIONS.

31 THE COURT: COUNSEL.

32 MR. HARMON: YOUR HONOR, N.R.S. 175.176, SUB-

1 HEADING 7, MAKES IT INCUMBENT UPON THE COURT TO GIVE THIS  
2 INSTRUCTION IF IT'S REQUESTED BY EITHER PARTY. THE STATE HAS  
3 REQUESTED IT, THEREFORE THE STATUTORY LANGUAGE THAT IT SHALL BE  
4 GIVEN TAKES EFFECT.

5 THE COURT: COUNSEL, THE STATUTE VERY CLEARLY  
6 STATES THAT IT MUST BE GIVEN IF REQUESTED BY COUNSEL. THE  
7 STATE REQUESTED IT. I GAVE IT.

8 WITH REGARDS TO THE REPEATING OF THE  
9 INSTRUCTION, THIS COURT IS INTERESTED IN REVEALING THE TRUTH,  
10 RATHER THAN OBSCURING IT. FOR THAT REASON, I READ IT.

11 NOW, ARE THERE ANY OTHER INSTRUCTIONS  
12 THAT YOU OBJECT TO?

13 MR. FRANZEN: FORGIVE ME. INSTRUCTION NUMBER  
14 NINE, YOUR HONOR.

15 THE COURT: NUMBER NINE?

16 MR. FRANZEN: REGARDING THE AGGRAVATING CIRCUM-  
17 STANCES BY WHICH MURDER IN THE FIRST DEGREE MAY BE AGGRAVATED.  
18 WE DO NOT BELIEVE THAT THE STATE HAS PROVED BEYOND A REASONABLE  
19 DOUBT THE PRIOR FELONY CONVICTION IN SAN BERNARDINO.

20 THE COURT: WELL, THAT'S AN ISSUE TO BE DETER-  
21 MINED BY THE JURY, NOT BY THIS COURT OR BY THE DISTRICT  
22 ATTORNEY.

23 MR. FRANZEN: WELL, I BELIEVE, YOUR HONOR, WE  
24 HAVE A STATEMENT GIVEN BY MR. HOWARD ON DIRECT EXAMINATION AND  
25 NO CORPUS.

26 THE COURT: WELL, WE WILL LET THE JURY DECIDE  
27 THAT ISSUE.

28 ALL RIGHT. ANYTHING FURTHER?

29 MR. FRANZEN: YES, YOUR HONOR.

30 THE COURT: YES.

31 MR. FRANZEN: INSTRUCTION NUMBER TWELVE,  
32 REGARDING MITIGATING CIRCUMSTANCES, OUR OBJECTION TO THIS TIES

1 INTO THE PREVIOUSLY REJECTED INSTRUCTION. WOULD THE COURT  
2 PREFER THAT I WAIT TO PROFFER THE PROPOSED INSTRUCTION OR  
3 DISCUSS IT AT THIS TIME?

4 THE COURT: WELL, YOU CAN DISCUSS IT, I BELIEVE,  
5 AT THIS TIME.

6 MR. FRANZEN: YOUR HONOR, INSTRUCTION NUMBER  
7 TWELVE FAILS TO LIST ANY OF THE MITIGATING CIRCUMSTANCES WHICH  
8 WE BELIEVE THE JURY'S ATTENTION SHOULD BE DIRECTED TO.

9 THE COURT: CAN YOU TELL ME OF ANY CASE,  
10 STATUTE OR AUTHORITY WHERE IT CLEARLY SETS FORTH AND DEFINES  
11 ADDITIONAL MITIGATING CIRCUMSTANCES?

12 MR. FRANZEN: YOUR HONOR, THE --

13 THE COURT: IN THE STATE OF NEVADA, SIR.

14 MR. FRANZEN: I CANNOT STATE OR IDENTIFY A  
15 NEVADA SUPREME COURT DECISION ON THE ISSUE.

16 THE COURT: DO YOU KNOW WHERE THE LEGISLATURE  
17 HAS FURTHER CLARIFIED WHAT THEY MEAN BY ANY OTHER MITIGATING  
18 CIRCUMSTANCE?

19 MR. FRANZEN: I KNOW THAT AT THE TIME THE NEVADA  
20 LEGISLATURE WAS CREATING OUR NEVADA DEATH PENALTY STATUTE, I  
21 BELIEVE IN 1977, THEY WERE CONCERNED WITH A VARIETY OF SUPREME  
22 COURT DECISIONS: FURMAN, GREGG, AND THE OTHER ONE. IF I MAY  
23 HAVE THE COURT'S INDULGENCE FOR JUST ONE MOMENT.

24 THE COURT: WELL, THIS IS NEW INFORMATION THAT  
25 YOU ARE IMPARTING TO THE COURT AT THIS TIME; IS THAT CORRECT?  
26 YOU HAVE NEVER IMPARTED THIS TO ME AT ANYTIME.

27 MR. FRANZEN: WELL, I HAVE IMPARTED TO YOUR  
28 HONOR THAT WE BELIEVE WE ARE ENTITLED TO HAVE A LISTING OF THE  
29 AGGRAVATING -- OR THE MITIGATING CIRCUMSTANCES TO BRING TO THE  
30 ATTENTION OF THE --

31 THE COURT: BUT YOU HAVE NEVER STATED BEFORE  
32 THAT THERE IS ANY STATUTORY OR CASE SUPPORT FOR IT.

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MR. FRANZEN: THERE IS NO, TO MY KNOWLEDGE,  
NO NEVADA CASE AUTHORITY ON THIS.

THE COURT: ALL RIGHT. PROCEED.

MR. FRANZEN: WE DID REQUEST AN OPPORTUNITY TO  
GO TO THE OFFICE AND BRING BACK SOME AUTHORITY.

THE COURT: NO. YOU REQUESTED AN OPPORTUNITY  
TO GO HAVE THAT PARTICULAR ITEM TYPED, WHICH I GAVE YOU, AND  
EXTENDED THE TIME WITHIN WHICH YOU COULD PRESENT IT AND/OR  
THAT WE COULD GET IT INTO THE RECORD. BUT AT NO TIME HAVE YOU  
REQUESTED OF ME THAT YOU HAVE ANYTHING IN YOUR OFFICE WHICH  
WOULD SUPPORT ANYTHING TO SHOW ADDITIONAL MITIGATING CIRCUM-  
STANCES. YOU MAY HAVE THOUGHT --

MR. FRANZEN: I'M NOT ARGUING ADDITIONAL MITI-  
GATING CIRCUMSTANCES, YOUR HONOR: I'M ARGUING THAT THE LIST  
OF MITIGATING CIRCUMSTANCES THAT THE DEFENDANT IS ENTITLED TO  
HAVE PRESENTED TO THE JURY REFLECTS HIS CHARACTER AND HIS LIFE,  
AND HE IS ENTITLED UNDER THE CHANNELED DISCRETION DECISION BY  
THE UNITED STATES SUPREME COURT, AND BY, IT JUST CAME TO ME AT  
THE MOMENT, THE ONE I HAVE PREVIOUSLY CITED TO YOUR HONOR,  
WHERE THE NEVADA SUPREME COURT SPEAKS OF THIS CHANNELED  
DISCRETION.

IN ORDER TO PROPERLY CHANNEL AND DIRECT  
THE JURY'S DISCRETION TO KNOW THIS MAN'S CHARACTER AND BACK-  
GROUND, HE IS ENTITLED TO A LISTING OF THOSE CIRCUMSTANCES  
THAT HE CONSIDERS TO BE IN MITIGATION.

THE COURT: YOU SAY HE IS ENTITLED TO THAT,  
HOWEVER YOU DON'T HAVE ANY AUTHORITY THAT SAYS THAT; IS THAT  
CORRECT?

MR. FRANZEN: AT THE MOMENT, I DO NOT.

THE COURT: ALL RIGHT.

MR. FRANZEN: I'M ARGUING THAT THE CHANNELED  
DISCRETION CASES BY THE UNITED STATES SUPREME COURT WOULD

1 DIRECT YOUR HONOR TO LIST THESE MITIGATING CIRCUMSTANCES WHICH  
2 WE BELIEVE HAVE BEEN PROVEN THROUGH MR. HOWARD'S TESTIMONY.

3 THE COURT: WHERE ARE THEY, BECAUSE THIS IS  
4 THE FIRST TIME I HAVE EVER HEARD OF SUCH A PROPOSAL.

5 MR. FRANZEN: THEY'RE IN THE PROPOSED INSTRUCTIONS  
6 IN WHICH WE DISCUSSED WITH YOUR HONOR THAT THE DEFENDANT  
7 -- THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE  
8 INFLUENCE OF EXTREME MENTAL AND EMOTIONAL DISTURBANCE, WHICH  
9 WAS SUB-PARAGRAPH 2 OF N.R.S. 200.033.

10 WE ALSO WISH THAT THE JURY BE INSTRUCTED  
11 THAT A MITIGATING CIRCUMSTANCE THAT COULD BE CONSIDERED WOULD  
12 BE THAT THE DEFENDANT HAS A HISTORY OF MENTAL ILLNESS. SUB-  
13 PARAGRAPH 3 IN OUR PROPOSED INSTRUCTIONS WAS THAT THE DEFENDANT  
14 HAS BEEN IN THE PAST, IN MENTAL OR PSYCHIATRIC WARDS OR  
15 HCSPITALS. AND SUB-PARAGRAPH 4 WAS THAT THE DEFENDANT HAS  
16 HONCRABLY SERVED HIS COUNTRY IN THE MILITARY. AND SUB-PARA-  
17 GRAPH 5 WAS THAT THE DEFENDANT WAS PRESENT AND OBSERVED THE  
18 MURDER OF HIS MOTHER AND HIS SISTER BY HIS FATHER.

19 THE COURT: ALL RIGHT.

20 MAY I SEE THAT PROPOSED INSTRUCTION,  
21 COUNSEL.

22 MR. FRANZEN: YES, YOUR HONOR.

23 MAY THE RECORD REFLECT I AM PROVIDING  
24 COUNSEL FOR THE STATE WITH A COPY.

25 THE COURT: ALL RIGHT.

26 MR. HARMON: THANK YOU.

27 THE COURT: I WILL MARK THIS DEFENDANT'S  
28 PROPOSED "A", NOT GIVEN, AND SIGNED THIS DATE.

29 MR. FRANZEN: THANK YOU, YOUR HONOR.

30 YOUR HONOR, TO MAKE THE RECORD CLEAR,  
31 THIS WAS ONE OF THE PROPOSED INSTRUCTIONS THAT YOUR HONOR  
32 ALLOWED US TO SEND MR. COOPER TO HAVE TYPED.

1 THE COURT: I'M AWARE OF THAT. THAT ISN'T WHAT  
2 I WAS RAISING. I WAS RAISING THE FACT THAT YOU SAID THAT YOU  
3 HAD A LIST AT YOUR OFFICE OF THESE WITH SUPPORTING CASE  
4 AUTHORITY.

5 MR. FRANZEN: NO. NO. THAT WAS NOT WHAT I  
6 INTENDED TO SAY.

7 THE COURT: OKAY. ALL RIGHT.

8 IF YOU INTENDED TO SAY THAT YOU WERE JUST  
9 GOING TO GO OVER AND GET THEIR LIST TYPED, THEN I CONCUR THAT'S  
10 WHAT YOU ASKED ME FOR AND THAT'S WHAT I DID.

11 MR. FRANZEN: IF I -- I MISSPOKE MYSELF, IF  
12 THAT'S WHAT YOUR HONOR --

13 THE COURT: THAT'S WHAT YOU SAID.

14 MR. FRANZEN: OKAY.

15 THE COURT: NOW, DO YOU WANT ANOTHER -- DO YOU  
16 HAVE --

17 MR. FRANZEN: THAT'S OUR OBJECTION TO PROPOSED  
18 12 AND OUR PROPOSED "A", YOUR HONOR. I HAVE OTHER OBJECTIONS,  
19 IF YOU WISH ME TO.

20 THE COURT: ALL RIGHT.

21 THE STATE'S RESPONSE.

22 MR. HARMON: AS TO PROPOSED "A", YOUR HONOR?

23 THE COURT: AS TO PROPOSED "A" AND THE GIVING  
24 OF INSTRUCTION TWELVE.

25 MR. HARMON: YOUR HONOR, PROPOSED "A" IS  
26 CLEARLY A JUDICIAL COMMENT ON THE EVIDENCE. WE THINK, SINCE  
27 NO AUTHORITY WHATSOEVER HAS BEEN OFFERED, IT CERTAINLY WOULD  
28 BE UNFAIR FOR THE COURT IN EFFECT TO BE TELLING THIS JURY,  
29 FOR EXAMPLE, TO HAVE SERVED IN THE MILITARY MITIGATES MURDER  
30 IN THE FIRST DEGREE. WHILE IN THE MILITARY SERVICE, EVEN BY  
31 THE DEFENDANT'S TESTIMONY, WAS ABOUT 13 YEARS AGO. I CAN'T  
32 IMAGINE THAT THERE IS ANY AUTHORITY THAT WOULD SUGGEST AS A



1 MATTER OF LAW THAT MITIGATES MURDER IN THE FIRST DEGREE. THE  
2 SAME APPLIES TO ALL OF THESE.

3 NUMBER FIVE, THE DEFENDANT SAID HE WAS TWO  
4 YEARS OLD. WELL, PERHAPS HIS MEMORY IS BETTER THAN MINE, BUT  
5 I'M NOT COGNIZANT OF VERY MUCH THAT HAPPENED WHEN I WAS TWO.  
6 AND CERTAINLY THERE IS NONE, THERE COULD BE NO AUTHORITY WHICH  
7 WOULD-SAY AS A MATTER OF LAW THAT TYPE OF SITUATION WOULD  
8 MITIGATE A MURDER BY A 31-YEAR-OLD MAN.

9 YOUR HONOR, IT'S ALL A MATTER OF  
10 ARGUMENT. INSTRUCTION NUMBER TWELVE, WHICH INCORPORATES INTO IT  
11 THE ONLY MITIGATING CIRCUMSTANCE SET FORTH IN N.R.S. 200.035  
12 WHICH COULD POSSIBLY BE APPLICABLE; ANY OTHER MITIGATING CIR-  
13 CUMSTANCE HAS BEEN READ TO THE JURY.

14 AFTER THAT, NOW THE DEFENSE MAY  
15 ARGUE THAT EACH OF THESE FIVE CATEGORIES FALLS WITHIN THAT  
16 CIRCUMSTANCE. SO WE'RE COVERED. AND TO DO OTHERWISE WOULD BE  
17 UNFAIR TO THE STATE AND I THINK WOULD CONFUSE AND MISLEAD THE  
18 JURY.

19 THE COURT: THE LAW I THINK IS RATHER CLEAR  
20 WITH REGARDS TO THE ISSUE OF MITIGATING OFFENSES FROM A HIGHER  
21 OFFENSE TO A LOWER OFFENSE. OUR STATUTES HAVE FOR YEARS SET  
22 FORTH. THE CERTAIN TYPES OF MITIGATING CIRCUMSTANCES, SUCH AS  
23 IN THE KILLING OF A HUMAN AND THE KILLING IS WITHOUT INTENT IS  
24 SECOND DEGREE RATHER THAN FIRST DEGREE. IT IS NOTED, HOWEVER,  
25 THAT ACCIDENTAL KILLING OF ANOTHER HUMAN BEING, WHEN AN  
26 ACCIDENT OCCURS, IS NOT MURDER; FOR THE LAW SAYS THAT THE ACT  
27 CLEARLY IS INNOCENT RATHER THAN CRIMINAL IN NATURE.

28 THE REASON I MENTION THESE IS BECAUSE OF  
29 THE FACT THAT THE FOCUS OF ANY MITIGATING STATUTE SHOULD BE,  
30 AND IS, IN OUR PRESENT LAW, BASED UPON THE STATE OF MIND OR  
31 THE CIRCUMSTANCES AT THE TIME OF THE COMMISSION OF THE  
32 OFFENSE, NOT IN SOME OTHER FAR AND DISTANT TIME, AS THESE

1 EXPRESSIONS OF MITIGATING CIRCUMSTANCES WOULD DICTATE.

2 THE STATUTE 200.035 SAYS THAT MURDER  
3 IN THE FIRST DEGREE MAY BE MITIGATED BY ANY OF THE FOLLOWING  
4 CIRCUMSTANCES, EVEN THOUGH THE MITIGATING CIRCUMSTANCE IS NOT  
5 SUFFICIENT TO CONSTITUTE A DEFENSE OR REDUCE THE DEGREE OF THE  
6 CRIME.

7 IF YOU WANT TO STEP OUTSIDE, WHY DON'T  
8 YOU DO THAT.

9 THE CLERK: THANK YOU.

10 THE COURT: THE DEFENDANT HAS NO SIGNIFICANT  
11 HISTORY OF PRIOR CRIMINAL ACTIVITIES, AND THEN IT GOES ON DOWN  
12 THE LINE.

13 THESE OFFENSES OR STATEMENTS THAT ARE  
14 DEFINED HERE, THAT IF MURDER WAS COMMITTED WHILE THE DEFENDANT  
15 WAS UNDER THE INFLUENCE OF EXTREME OR EMOTIONAL DISTURBANCE,  
16 THERE IS NO EVIDENCE IN THIS RECORD, EXCEPT THE DEFENDANT'S  
17 OWN STATEMENT, THAT HE HAS HAD MENTAL PROBLEMS IN THE PAST,  
18 NOT EVEN THE DEFENDANT'S STATEMENTS, TO INDICATE THAT HE EVER  
19 HAD -- WAS MENTALLY ILL OR EMOTIONALLY DISTURBED AT THE TIME  
20 OF THE KILLING OF THE VICTIM IN THIS CASE. THE REASON VERY  
21 OBVIOUSLY HE DENIES IT.

22 FURTHER, THERE IS NO PSYCHIATRIC  
23 TESTIMONY IN THIS RECORD WHICH TIES THE DEFENDANT TO THAT  
24 EVENT AND STATES THAT AT THE TIME OF THAT EVENT HE WAS EMOTION-  
25 ALLY AND MENTALLY ILL OR DISTURBED; FOR IT IS OBVIOUS THAT HE  
26 COULD HAVE BEEN MENTALLY ILL AT ANY OTHER TIME AND STILL NOT  
27 BE A MITIGATING CIRCUMSTANCE IN THIS CASE. THAT'S WHAT WE  
28 HAVE HERE. IT SAYS THE DEFENDANT HAS A HISTORY OF MENTAL  
29 ILLNESS OR THAT THE DEFENDANT HAS IN THE PAST BEEN IN MENTAL  
30 AND PSYCHIATRIC WARDS OR THAT HE SERVED HONORABLY IN THE UNITED  
31 STATES SERVICE OR THAT HE OBSERVED THE MURDER OF HIS MOTHER  
32 AND SISTER. I DON'T THINK THE LAW HAS GONE YET TO THE POINT OF

1 SAYING THAT MERELY BECAUSE I FOUGHT FOR MY FLAG I AM ENTITLED  
2 TO HAVE MY FIRST DEGREE MURDER CONSIDERED SECOND OR MANSLAUGH-  
3 TER, OR THE FACT THAT I WAS MENTALLY ILL AT THE AGE OF 16, THAT  
4 AT THE AGE OF 30, I AM ENTITLED TO HAVE MY MURDER OF THE FIRST  
5 DEGREE CONSIDERED MANSLAUGHTER.

6 THE ISSUE I THINK IN ANY OTHER MITI-  
7 GATING CIRCUMSTANCE MUST FOCUS, PARTICULARLY IN THESE AREAS  
8 WHEN WE ARE TALKING ABOUT A MENTAL STATE OF THIS DEFENDANT,  
9 MUST FOCUS UPON THE TIME OF THE KILLING. THERE WAS NEVER A  
10 DEFENSE OF INSANITY RAISED IN THIS CASE. THIS IS MERELY, IT  
11 LOOKS TO ME LIKE, AN ATTEMPT TO RAISE AN INSANITY DEFENSE AT  
12 THIS LATE DATE UNDER SOME KIND OF LIMITED LIABILITY THEORY OR  
13 APPROACH. I FIND NONE STATED IN THE STATUTE EXCEPT TWO, AND  
14 THAT IS CLEAR THAT THERE HAS TO BE SOME EVIDENCE IN THE RECORD.  
15 AND THERE ISN'T ANY EVIDENCE IN THE RECORD THAT AT THE TIME OF  
16 THE KILLING OF THE VICTIM THE DEFENDANT WAS MENTALLY ILL OR  
17 EMOTIONALLY DISTURBED.

18 FOR THOSE REASONS, COUNSEL, THE COURT  
19 DID NOT GIVE IT, BUT DID GIVE INSTRUCTION TWELVE. I HAVE NO  
20 IDEA WHAT THE LEGISLATURE MEANT OR MEANS BY, "ANY OTHER MITIGA-  
21 TING CIRCUMSTANCE" AND I KNOW OF NO COURT, NOR DO I KNOW OF ANY  
22 LEGISLATURE -- LEGISLATOR, THAT HAS DEFINED WHAT THAT MEANS.  
23 IT'S THERE AND IT'S FOR THAT REASON I THINK YOU ARE ENTITLED  
24 AT LEAST TO ARGUE THAT THE TESTIMONY HE GAVE MAY FALL UNDER  
25 THIS CATEGORY. BUT FOR ME TO RULE, AS A MATTER OF FACT, THAT  
26 IT IS A MITIGATING CIRCUMSTANCE IS BEYOND, I BELIEVE, MY CALL.  
27 IT IS A MATTER FOR THE JURY TO MAKE THAT CONSIDERATION AND THAT  
28 DECISION. AND FOR THOSE REASONS, COUNSEL, I REFUSED TO GIVE  
29 THE INSTRUCTION. AND MAYBE SOME SUPREME COURT DOWN THE LINE  
30 MAY DEFINE THAT FOR US, BUT AS OF THE MOMENT, THAT'S THE LAW.

31 COUNSEL?

32 MR. FRANZEN: OUR NEXT OBJECTION, YOUR HONOR,

1 INSTRUCTION FIFTEEN, THE SECOND PARAGRAPH, WHICH DIRECTS THE  
2 SENTENCING AUTHORITY, IN THIS CASE THE JURY, TO HAVE NO  
3 SYMPATHY IN THE SENTENCING PROCESS. WE BELIEVE THAT THE  
4 SENTENCING PROCESS ALWAYS HAS ROOM FOR SYMPATHY AND MERCY. AND  
5 INDEED WHEN YOUR HONOR IS ENGAGED IN THE SENTENCING PROCESS  
6 HIMSELF, I'M SURE HE HEARS MANY SUCH PLEAS. WE BELIEVE THAT  
7 THE JURY SHOULD NOT BE PRECLUDED FROM EXPRESSING MERCY OR  
8 SYMPATHY FOR THE DEFENDANT.

9 THE COURT: THE STATE.

10 MR. HARMON: YOUR HONOR, I THINK THAT COUNSEL  
11 IS ASKING THE JURY TO IGNORE THE OATH THEY'VE ALREADY TAKEN,  
12 WHICH IS TO DECIDE THIS CASE ON THE FACTS AND THE LAW WHICH  
13 THE COURT GIVES THEM.

14 WE ARE IN THE PENALTY PHASE NOW, BUT WE  
15 STILL DON'T THINK THE VERDICT SHOULD BE BASED ON SYMPATHY,  
16 PREJUDICE OR PUBLIC OPINION. IT SHOULD BE BASED ON THE LAW  
17 AND THE EVIDENCE.

18 THE COURT: YOU TREEGED MY INTELLECTUAL CURIOS-  
19 ITY, COUNSEL.

20 MR. FRANZEN: THANK YOU.

21 THE COURT: SO I HAVE LOOKED AT THE AMERICAN  
22 HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE TO SEE WHAT SYMPA-  
23 THY IS. ONE OF ITS DEFINITIONS SAYS:

24 A FEELING OR EXPRESSION  
25 OF PITY OR SORROW FOR THE  
26 DISTRESS OF ANOTHER.

27 I DON'T THINK THAT'S THE FUNCTION OF  
28 THE JURY. AND I THINK THE LAW HAS BEEN VERY CLEARLY STATED  
29 OVER THE YEARS THAT WHILE WE KNOW THAT EVERYONE MUST USE THEIR  
30 COMMON SENSE IN ARRIVING AT A VERDICT, I DON'T THINK WE'LL EVER  
31 TAKE THE HUMAN EMOTION OR THE HUMAN ASPECT OUT OF IT, AND  
32 PROBABLY MORE VERDICTS ARE DECIDED BY SYMPATHY THAN THE OTHER.

1 BUT THE FACT REMAINS THAT THE LAW IS CLEAR THAT AS A MATTER OF  
2 LAW, WE ASK JURORS TO SET ASIDE THEIR PERSONAL FEELINGS AND  
3 DECIDE THE CASE UPON THE LAW AND THE FACTS AS PRESENTED TO  
4 THEM AND HOPEFULLY APPROACHING IT VERY OBJECTIVELY. WHETHER  
5 THEY DO OR NOT IS ENTIRELY THEIR OWN DECISION. HOWEVER, YOUR  
6 OBJECTION IS NOTED AND RECORDED.

7 ANYTHING FURTHER?

8 MR. FRANZEN: YES, YOUR HONOR. WE ALSO OBJECT,  
9 BECAUSE OF THE FORM OF INSTRUCTION 12 AND THE OBJECTION OF OUR  
10 PROPOSED INSTRUCTION "A", THE FORM OF THE VERDICTS IN WHICH THE  
11 CHECKLIST OF CIRCUMSTANCES GIVEN TO THE JURY REGARDING MITIGA-  
12 TING CIRCUMSTANCES DOES NOT INCLUDE THOSE THAT WE THINK SHOULD  
13 HAVE BEEN LISTED IN PROPOSED "A".

14 THE COURT: THE STATE?

15 MR. HARMON: YOUR HONOR, OUR OBJECTION IS  
16 ALREADY A MATTER OF RECORD AS IT PERTAINS TO PROPOSED "A", AND  
17 WE WOULD LIKE TO INCORPORATE THE SAME ARGUMENT AGAIN.

18 THE COURT: ALL RIGHT.

19 ANYTHING FURTHER, GENTLEMEN?

20 MR. HARMON: NOT FROM THE STATE, YOUR HONOR.

21 THE COURT: FILE THIS IN THE FILE, PLEASE.

22 MR. FRANZEN: YOUR HONOR, DOES THE SPECIAL  
23 VERDICT LISTING THE AGGRAVATING CIRCUMSTANCES, DOES THAT  
24 INCLUDE ALL OF THOSE THAT ARE IN THE STATUTE?

25 THE COURT: NO.

26 MR. FRANZEN: JUST THE TWO THAT THE STATE --

27 THE COURT: JUST THE TWO. THE VERDICTS MERELY  
28 CONTAIN THAT MURDER WAS COMMITTED BY THE DEFENDANT WHEN HE WAS  
29 PREVIOUSLY CONVICTED OF A FELONY AND THE MURDER WAS COMMITTED  
30 WHEN THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY.

31 ANYTHING FURTHER, GENTLEMEN?

32 MR. FRANZEN: YES, YOUR HONOR. THERE IS ONE

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1 MORE PROPOSED INSTRUCTION. I APOLOGIZE, THE LAST PORTION OF IT  
2 SHOULD PROBABLY BE STRICKEN. WHEN MR. COOPER TOOK IT OVER HE  
3 WAS GOING FROM SOME SCRATCH NOTES THAT I HAD DONE.

4 MAY I APPROACH THE BENCH, YOUR HONOR?

5 MAY THE RECORD REFLECT I HAVE PROVIDED  
6 COUNSEL FOR THE STATE WITH A COPY.

7 THIS PROPOSED INSTRUCTION, YOUR HONOR,  
8 SHOULD END AT "BEYOND A REASONABLE DOUBT" PERIOD, AND SHOULD  
9 READ THAT "MITIGATING CIRCUMSTANCES DO NOT HAVE TO BE PROVEN  
10 BEYOND A REASONABLE DOUBT" AND THE LANGUAGE THAT FOLLOWS IT  
11 SHOULD BE STRICKEN, TO-WIT: "BUT ARE CIRCUMSTANCES RELATING TO  
12 HIS CHARACTER."

13 THE COURT: COUNSEL, I THINK WE CAN ERASE ALL OF  
14 THAT.

15 MR. FRANZEN: THANK YOU.

16 MR. HARMON: THIS IS PROPOSED "B", YOUR HONOR?

17 THE COURT: YES.

18 MR. HARMON: WE OBJECT TO THE GIVING OF THE  
19 INSTRUCTION, YOUR HONOR. WE THINK THAT THE JURY HAS ALREADY  
20 BEEN PROPERLY INSTRUCTED.

21 YOUR HONOR, INSTRUCTION SEVEN EXPLAINS  
22 THAT THE PROSECUTION HAS A BURDEN OF ESTABLISHING ANY MITIGATING  
23 CIRCUMSTANCE BEYOND A REASONABLE DOUBT. IN CONNECTION WITH  
24 THAT, INSTRUCTION SIX HAS CLEARLY SPELLED OUT THAT BEFORE, AND  
25 I READ NOW, BEGINNING AT LINE 13:

26 THE JURY MAY IMPOSE A  
27 SENTENCE OF DEATH ONLY IF IT  
28 FINDS AT LEAST ONE AGGRAVATING  
29 CIRCUMSTANCE HAS BEEN ESTABLISHED  
30 BEYOND A REASONABLE DOUBT AND  
31 FURTHER FINDS THAT THERE ARE NO  
32 MITIGATING CIRCUMSTANCES SUFFI-

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CIENT TO OUTWEIGH THE  
AGGRAVATING CIRCUMSTANCE OR  
CIRCUMSTANCES FOUND.

WE THINK THAT'S SUFFICIENT, YOUR  
HONOR. IT'S APPARENT THERE IS NO BURDEN UPON THE DEFENSE, BUT  
IF THE JURY IS SATISFIED THAT THERE IS ONE AGGRAVATING CIRCUM-  
STANCE PROVEN BEYOND A REASONABLE DOUBT THEN IT'S A MATTER OF  
BALANCING THE WEIGHT BETWEEN THAT CIRCUMSTANCE AND ANY MITIGA-  
TING CIRCUMSTANCE.

THE COURT: WHERE WAS THAT TAKEN FROM, COUNSEL?  
WHAT'S THE STATUTORY CITE ON IT?

MR. HARMON: INSTRUCTION NUMBER SIX, YOUR HONOR,  
IS TAKEN FROM 175.554, SUB-HEADINGS 2 AND 3.

THE COURT: MAY I SEE THAT, PLEASE.

MR. HARMON: YES, YOUR HONOR.

THE COURT: COUNSEL, IT APPEARS THAT THIS  
ISSUE, AS RESOLVED BY THE NEVADA REVISED STATUTE AT 175.554,  
SUB-SECTION 3, WHICH SAYS:

WHEN A JURY OR A PANEL OF  
JUDGES IMPOSES THE SENTENCE OF  
DEATH, THE COURT SHALL ENTER ITS  
FINDINGS ON THE RECORD AND THE  
JURY SHALL RENDER WRITTEN VERDICTS  
SIGNED BY THE FOREMAN. THE FINDINGS  
OR VERDICT SHALL DESIGNATE THE AGGRA-  
VATING CIRCUMSTANCE OR CIRCUMSTANCES  
WHICH ARE FOUND BEYOND A REASONABLE  
DOUBT AND SHALL STATE THAT THERE  
ARE NO MITIGATING CIRCUMSTANCES  
SUFFICIENT TO OUTWEIGH THE AGGRAVA-  
TING CIRCUMSTANCE OR CIRCUMSTANCES  
FOUND.

1 IT IS OBVIOUS THAT THE STATE LEGIS-  
2 LATURE HAS DETERMINED THE STANDARD OF PROOF AND THE WEIGHT OF  
3 PROOF AND GIVING THIS WOULD BE CONTRARY TO THAT SECTION. IT  
4 IS MARKED "B", NOT GIVEN.

5 MR. FRANZEN: YOUR HONOR, DOES THAT -- I DON'T  
6 HAVE A COPY OF THAT STATUTE WITH ME. DOES THAT MEAN THAT THE  
7 DEFENDANT HAS THE BURDEN OF PROOF REGARDING MITIGATING CIRCUM-  
8 STANCES?

9 THE COURT: WELL, I DON'T KNOW WHAT INTERPRETA-  
10 TION YOU GIVE IT, BUT THAT'S THE LANGUAGE OF THE STATUTE:

11 THE FINDING OR VERDICT  
12 SHALL DESIGNATE THE AGGRAVATING  
13 CIRCUMSTANCE OR CIRCUMSTANCES  
14 WHICH WERE FOUND BEYOND A REASON-  
15 ABLE DOUBT, AND SHALL STATE THAT  
16 THERE ARE NO MITIGATING CIRCUM-  
17 STANCES SUFFICIENT TO OUTWEIGH  
18 THE AGGRAVATING CIRCUMSTANCE OR  
19 CIRCUMSTANCES FOUND.

20 THAT'S THE LANGUAGE OF THE STATUTE.

21 MR. FRANZEN: FOR THE RECORD THEN, YOUR HONOR,  
22 I THINK I SHOULD MAKE THE OBJECTION THAT ON RELIANCE ON THIS  
23 STATUTE I THINK WOULD BE MISPLACED, BUT THAT STATUTE, IF  
24 APPLIED, IS A BURDEN OF PROOF FOR THE DEFENDANT, THE OUTWEIGH-  
25 ING OF BEYOND A REASONABLE DOUBT OR AT LEAST EQUAL AND BEYOND  
26 A REASONABLE DOUBT OF MITIGATING CIRCUMSTANCES AND IT WOULD  
27 PLACE A BURDEN UPON THE DEFENDANT.

28 THE COURT: WELL, THAT'S A NICE LEGAL POINT YOU  
29 CAN RAISE LATER, COUNSEL.

30 FURTHER, IN 175.554, IT SAYS THAT:

31 A PANEL OF JUDGES SHALL DETERMINE,  
32 AND THEN IT GOES ON, THE JURY OR THE



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PANEL OF JUDGES MAY IMPOSE A  
SENTENCE OF DEATH ONLY IF IT  
FINDS AT LEAST ONE AGGRAVATING  
CIRCUMSTANCE AND FURTHER FINDS  
THAT THERE ARE NO AGGRAVATING  
CIRCUMSTANCES SUFFICIENT TO  
OUTWEIGH THE AGGRAVATING CIR-  
CUMSTANCE OR CIRCUMSTANCES  
FOUND.

SO IT'S A REPETITION OF THE SAME  
STANDARD.

MISS CLERK, I HAND YOU INSTRUCTION "B",  
IT MAY BE PLACED IN THE FILE, NOT GIVEN.

NOW, IS THERE ANYTHING ELSE, GENTLEMEN?

MR. HARMON: NOT BY THE STATE, YOUR HONOR.

THE COURT: WELL, I HATE TO ASK YOU, ARE YOU  
RAISING ANOTHER ONE?

MR. FRANZEN: NO. I GUESS NOT, YOUR HONOR.

THE COURT: THANK YOU, COUNSEL. WE'LL BE IN

RECESS.

(WHEREUPON, AT THE HOUR OF  
4:27 P.M. THE EVENING RECESS  
WAS HAD IN THE PROCEEDINGS.)

1 CASE NO. C53867  
2 DEPARTMENT NO. V  
3 DOCKET H  
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6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF CLARK  
8

9 THE STATE OF NEVADA, )  
10 PLAINTIFF, )  
11 VS. )  
12 SAMUEL HOWARD, AKA KEITH, )  
13 DEFENDANT. )  
14

15 REPORTER'S TRANSCRIPT OF  
16 PENALTY HEARING  
17

18 BEFORE THE HONORABLE JOHN F. MENDOZA, DISTRICT JUDGE  
19 WEDNESDAY, MAY 4, 1983, AT 10:10 A.M.

20  
21 APPEARANCES:

22 FOR THE STATE:	MELVIN T. HARMON, ESQUIRE
23	DANIEL M. SEATON, ESQUIRE
24	200 SOUTH THIRD STREET
	LAS VEGAS, NV 89101
	DEPUTY DISTRICT ATTORNEYS
25 FOR THE DEFENDANT:	MARCUS C. COOPER, ESQUIRE
26	GEORGE E. FRANZEN, ESQUIRE
27	309 SOUTH THIRD STREET
	LAS VEGAS, NV 89101
	DEPUTY PUBLIC DEFENDERS

28  
29  
30 REPORTED BY: RENEE SILVAGGIO, C.S.R. NO. 122  
31

32 VOLUME XII

1 LAS VEGAS, NEVADA, WEDNESDAY, MAY 4, 1983, AT 10:10 A.M.

2 \* \* \* \* \*

3 (WHEREUPON, THE FOLLOWING  
4 PROCEEDINGS WERE HAD OUTSIDE  
5 THE PRESENCE OF THE JURY:)

6 THE COURT: LET THE RECORD REFLECT THIS IS  
7 OUTSIDE THE PRESENCE OF THE JURY.

8 YOU MAY PROCEED.

9 MR. FRANZEN: YOUR HONOR, THERE'S TWO MATTERS.

10 FIRST, ALTHOUGH THE DEFENDANT HAS  
11 INSTRUCTED US NOT TO PRESENT THIS EVIDENCE, AND YOU HAVE  
12 INSTRUCTED US TO FOLLOW HIS INSTRUCTIONS, WE HAVE --

13 THE COURT: I HAVEN'T INSTRUCTED YOU ANY SUCH  
14 THING. I JUST ADVISED YOU. I JUST ADVISED YOU TO FOLLOW THE  
15 CANNONS OF ETHICS, AND THE CANNONS OF ETHICS TELL YOU WHAT YOUR  
16 POSITION IS.

17 YOU MAY PROCEED.

18 MR. FRANZEN: WE ARE IN POSSESSION OF CERTIFIED  
19 COPIES OF JUDGMENTS OF CONVICTION OF THE DEFENDANT'S FATHER,  
20 REFLECTING THE 1952 MURDER OF TWO INDIVIDUALS AND AN ATTEMPT  
21 MURDER ON ANOTHER INDIVIDUAL. WE THINK THAT THAT, TOGETHER  
22 WITH THE TESTIMONY OF MR. MIKE KIDD, OUR INVESTIGATOR WHO  
23 SPOKE WITH THE ALABAMA PRISON AUTHORITIES, WHO DESCRIBED THAT  
24 THE DEFENDANT -- THAT ONE SAM HOWARD IS IN THEIR CUSTODY AT  
25 THE MOMENT ON A 1975 MURDER. AND THEY HAVE IN THEIR POSSESSION  
26 A DOCUMENT DESCRIBING THE 1952 MURDER, IN WHICH IT IS STATED  
27 THAT MR. HOWARD, THE PRESENT DEFENDANT'S FATHER, MURDERED HIS  
28 WIFE, HIS DAUGHTER AND ATTEMPTED TO MURDER A THIRD INDIVIDUAL.  
29 WE THINK THAT THAT SHOULD BE INTRODUCED BEFORE THE JURY. I  
30 WOULD REQUEST PERMISSION TO REOPEN FOR THAT LIMITED PURPOSE.

31 IF YOUR HONOR IS NOT INCLINED TO ALLOW  
32 THAT, WE WOULD REQUEST PERMISSION TO FILE THAT WITH THE COURT