IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN, Appellant, v. THE STATE OF NEVADA, Respondent.	)	Case No. 63703

RESPONDENT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 19, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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FILED

FEB 14 1996

LORETTA BOWMAN, CLERK
BY Linda McCuin
DEPUTY

CASE NO. C069269

DEPARTMENT FOURTEEN

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,

PLAINTIFF,

vs.

DALE EDWARD FLANAGAN, RANDOLPH MOORE AKA SMITH, JOHNNY RAY LUCKETT AND ROY MCDOWELL,

DEFENDANTS.

REPORTER'S TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE DONALD M. MOSLEY, DISTRICT JUDGE

APPEARANCES:

FOR THE STATE: MELVYN T. HARMON, ESQUIRE
&
DANIEL M. SEATON, ESQUIRE
DEPUTIES DISTRICT ATTORNEY

FOR DEFENDANT FLANAGAN: RANDALL PIKE, ESQUIRE

FOR DEFENDANT MOORE: MURRAY POSIN, ESQUIRE

FOR DEFENDANT LUCKETT: WILLIAM H. SMITH, ESQUIRE

FOR DEFENDANT MCDOWELL: ROBERT J. HANDFUSS, ESQUIRE

Reported by: Sharon J. Thielman, Official Court Reporter

LAS VEGAS, NEVADA, THURSDAY, OCTOBER 10, 1985

THE COURT: THE CONTINUATION OF CASE C69269, STATE OF NEVADA VERSUS DALE FLANAGAN, RANDOLPH MOORE, JOHN LUCKETT AND ROY MCDOWELL.

THE RECORD WILL REFLECT THE PRESENCE OF EACH OF THE DEFENDANTS, THEIR COUNSEL; MR. PIKE REPRESENTING MR. FLANAGAN, MR. POSIN REPRESENTING MR. MOORE, MR. SMITH, MR. LUCKETT, MR. HANDFUSS REPRESENTING MR. MCDOWELL.

THE RECORD WILL ALSO REFLECT THE PRESENCE OF MR. HARMON AND MR. SEATON REPRESENTING THE STATE.

MISS CLERK, WILL YOU CALL THE ROLL OF THE JURY, PLEASE.

THE CLERK: YES, YOUR HONOR.

(ROLL CALL TAKEN.)

THE CLERK: ALL PRESENT, YOUR HONOR.

THE COURT: THANK YOU. THE RECORD WILL SO REFLECT. GOOD MORNING, LADIES AND GENTLEMEN. THE STATE MAY BEGIN THEIR CLOSING REMARKS.

MR. SEATON: THANK YOU, YOUR HONOR.

LADIES AND GENTLEMEN OF THE JURY, I GIVE TO YOU CARL AND COLLEEN GORDON. CARL GORDON, 58 YEARS OLD, AN AIR TRAFFIC CONTROLLER AND HIS WIFE COLLEEN, 57 YEARS OLD, A HOUSEWIFE.

CARL AND COLLEEN GORDON, WHO, AS FAR AS WE KNOW,

MCDOWELL, JOHNNY RAY LUCKETT, ALONG WITH TOM AKERS AND MICHAEL WALSH, CONSPIRED, GOT TOGETHER, DEVISED A PLAN. TOGETHER THEY DID THIS.

AND THEY ALL HAD THEIR ROLES TO PLAY. WE HAVE NOTICED THAT AS TIME GOES ON.

DALE FLANAGAN'S ROLE WAS TO SHOOT HIS GRANDMOTHER. AND HE WAS ALSO TO ULTIMATELY GET THE INHERITANCE AND SPLIT IT WITH EVERYONE.

RANDY MOORE'S ROLE WAS TO SHOOT THE GRANDFATHER. JOHNNY RAY LUCKETT'S ROLE WAS TO BE A BACKUP TO RANDY MOORE AND TO SHOOT IF HE HAD TO.

ROY MCDOWELL'S ROLE WAS TO BRING THE .22 PISTOL AND TO GO INTO THE HOUSE EVENTUALLY AND MAKE IT LOOK LIKE A BURGLARY AND TAKE THE PURSE.

AND ALL OF THEM FULFILLED THEIR ROLES TO A "T." NOW, YOU OF THE JURY HAVE A ROLE TO PLAY. AND ON BEHALF OF CARL AND COLLEEN GORDON, I CAN ONLY HOPE AND PRAY THAT YOU FULFILL YOUR ROLE EVERY BIT AS WELL AS THEY FULFILLED THEIRS. THANK YOU.

THE COURT: THANK YOU, MR. SEATON. DEFENSE COUNSEL.

MR. SMITH: GOOD AFTERNOON, LADIES AND GENTLEMEN. FIRST OF ALL, AND MOST SINCERELY, I WANT TO THANK EACH ONE OF YOU FOR YOUR PARTICIPATION IN THIS CASE UP TO THIS POINT.

FOR THE LAST 11 DAYS, YOU HAVE SACRIFICED AND

GIVEN US YOUR TIME AND ATTENTION AND YOUR DEVOTION TO PERHAPS AS IMPORTANT A CIVIC DUTY AS AN AMERICAN CITIZEN KNOWS.

I HAVE BEEN INVOLVED IN A LOT OF JURY TRIALS AND SITTING CLOSE TO YOU THROUGHOUT OUR TIME IN COURT, I HAVE SEEN THE CAREFUL NOTES YOU HAVE TAKEN AND THE ATTENTION YOU HAVE PAID TO THE WITNESSES AND ON BEHALF OF JOHN LUCKETT, I SINCERELY APPRECIATE THAT.

I THINK YOU ARE IN A POSITION TO RENDER A FAIR VERDICT ON THE EVIDENCE AND THE LAW. AND WE REALLY CAN'T ASK FOR ANY MORE THAN THAT.

I THINK YOU HAVE NOTICED ALL OF THE PARTICIPANTS IN THIS CASE HAVE WORKED HARD. THE LAWYERS HAVE. THERE HAVE BEEN A LOT OF TIMES WHEN YOU HAVE HAD TO WAIT WHILE WE HAVE HAD TO WORK.

THE SAME IS TRUE FOR THE JUDGE. JUDGE MOSLEY KEPT THIS CASE INTACT AND ON A SINGLE TRACK. SHARON HAS PROBABLY WORKED HARDER THAN ANYBODY BECAUSE SHE HAS NEVER GOTTEN A REST AND WE HAVE DONE OUR BEST TO DO OUR JOBS.

SOON THE MOST IMPORTANT JOB IS GOING TO HAVE TO BE DONE BY YOU. AND I WISH YOU WELL IN THAT ENDEAVOR. I TOLD YOU AT THE BEGINNING OF MY OPENING REMARKS THAT I BEGAN THIS CASE WITH A CERTAIN AMOUNT OF FEAR AND TREPIDATION BECAUSE OF THE NATURE OF THE CASE.

BECAUSE IT WAS A SHOCKING, SENSELESS AND HEINOUS CRIME. THERE IS NO QUESTION ABOUT THAT AND DESPITE ALL OF --

WELL, LET ME SAY THIS. AS THIS TRIAL HAS GONE ON AND I HAVE SEEN THE ATTENTION THAT YOU HAVE PAID TO THIS CASE, MY FEAR AND TREPIDATION ABOUT YOU DOING YOUR JOB THE RIGHT WAY HAS VANISHED.

DESPITE ALL OF MR. SEATON'S THEATRICS OVER THE LAST TWO HOURS TO PUMP AS MUCH EMOTION AND SYMPATHY INTO THIS CASE AS THE STATE CAN, I THINK YOU REALIZE WHAT YOUR JOB IS AND THAT'S TO DETERMINE THE INDIVIDUAL CRIMINAL RESPONSIBILITY OF EACH ONE OF THESE FOUR YOUNG MEN AND THAT'S ALL.

WHEN I BEGAN THIS CASE AND GAVE YOU MY OPENING STATEMENT, HOWEVER, I DIDN'T REALIZE THAT I SHOULD HAVE AS MUCH FEAR AND TREPIDATION AS I DO ABOUT ANOTHER MATTER. I DIDN'T REALIZE AT THAT TIME HOW FAR THE PLOT TO INTIMIDATE AND THREATEN MY CLIENT BY THE OTHER CODEFENDANTS ON TRIAL AND THEIR CONFEDERATES WOULD REACH.

I AM AFRAID ABOUT THAT. AND I WILL MENTION THAT TO YOU MORE AS I GO ON. I KNOW THAT ALL OF YOU ARE ANXIOUS TO BEGIN YOUR DELIBERATIONS, TO COMPARE YOUR NOTES AND TO SHARE YOUR THOUGHTS WITH, I HOPE, THE FRIENDS YOU HAVE MADE ON THIS JURY THROUGH THIS EXPERIENCE.

EACH ONE OF YOU, WHO HAVE HEARD THE TESTIMONY, OBSERVED THE PHYSICAL EVIDENCE, HAS A GREAT DEAL OF WISDOM, COMMON SENSE AND GOOD JUDGMENT. I BELIEVE THAT, BASED ON WHAT YOU TOLD US IN VOIR DIRE, IN YOUR EXPERIENCE, IN THE WAYS OF

THE WORLD, COLLECTIVELY, YOU HAVE A WEALTH OF TALENT. AND I THINK THAT'S ONE OF THE TREMENDOUS VIRTUES OF OUR SYSTEM OF JUSTICE, IS TO BRING PEOPLE LIKE YOU, 12 OF YOU TOGETHER TO REACH A DECISION AND TO SPEAK FOR THE COMMUNITY.

I VENTURE TO SAY DESPITE SOME GRAY HAIR AND RECEDING HAIRLINE, THAT I AM YOUNGER THAN ANY ONE OF YOU. AND I DON'T HAVE THE AUDACITY, LADIES AND GENTLEMEN, TO STAND UP HERE AND PREACH TO YOU.

IT IS NOT RIGHT FOR ME TO STAND HERE AND TELL YOU WHAT IS RIGHT AND WHAT YOU MUST DO.

BUT, LADIES AND GENTLEMEN, BASED ON THE UNIQUE RESPONSIBILITY THAT I HAVE, THE CLOSE AND LENGTHY ASSOCIATION I HAVE HAD WITH THIS CASE, AND WITH MY CLIENT, AND ALSO, QUITE FRANKLY, BECAUSE OF MY SINCERE CONCERN ABOUT THIS YOUNG MAN, I ASK YOU TO BEAR WITH ME AND TO HEAR ME OUT.

IN MY OPENING STATEMENT, I DID EVERYTHING I COULD TO LAY MY CARDS ON THE TABLE. AND TO TELL YOU WHAT THE EVIDENCE THE STATE WOULD PRESENT WOULD SHOW AND ALSO TO TELL YOU WHAT EVIDENCE WE WOULD PRESENT.

SO IT WAS NOT A GAME OF TACTICS. IT WAS NOT A PERRY MASON SURPRISE. IT WAS AN HONEST EFFORT TO TELL YOU EXACTLY WHERE WE WERE COMING FROM AND, LADIES AND GENTLEMEN, THE EVIDENCE IN THIS CASE HAS DONE EXACTLY WHAT I TOLD YOU IT WOULD DO.

IT'S SHOWN EXACTLY THAT. WHAT IT HAS SHOWN IS

THAT MY CLIENT WAS, IN FACT, THREATENED AND COERCED INTO GOING TO THE GORDONS' RESIDENCE ON THE EVENING IN QUESTION.

IT HAS, IN FACT, SHOWN THAT HE DID NOT TAKE AN ACTIVE ROLE AS A PARTICIPANT TO INTEND TO COMMIT THE CRIMES CHARGED.

IT HAS, IN FACT, SHOWN THE CREDIBLE EVIDENCE THAT HE DID NOT ENTER THE HOUSE, REMOVE ANY PROPERTY, OR FIRE A WEAPON.

I MENTIONED IN MY OPENING STATEMENT TO YOU THAT YOU WOULD HEAR FROM TWO WITNESSES WHO WOULD BE MORE CREDIBLE THAN ANY OTHER WITNESSES, APART FROM PERHAPS DISINTERESTED POLICE OFFICERS WHO TESTIFIED IN THE TRIAL, AND I SUBMIT TO YOU THAT IS WHAT OCCURRED.

THE CREDIBLE TESTIMONY OF TOM AKERS AND THE CREDIBLE AND TRUTHFUL TESTIMONY OF JOHN LUCKETT. AND THE PROSECUTOR SIMPLY SAYING THAT THEY DIDN'T TELL THE TRUTH DON'T MAKE IT SO.

MY CLIENT WAS SUBJECT TO EXTENSIVE CROSS-EXAMINATION BY FOUR LAWYERS, ALL OF WHOM HAD GREAT INTEREST TO DESTROY HIS STORY. ALL OF THEM WERE ON NOTICE FOR A LONG TIME THAT THEY WOULD HAVE THAT OPPORTUNITY.

AND I WOULD SUBMIT TO YOU THAT HE IS THE COOLEST KID IN TOWN OR HE HAS SIMPLY TOLD THE TRUTH. I TOLD YOU IN MY OPENING STATEMENT THE EVIDENCE WOULD SHOW THAT MY CLIENT WAS THREATENED AFTER THE INCIDENT OCCURRED ON THE NIGHT IN

QUESTION. AND THAT IS WHAT THE EVIDENCE HAS SHOWN.

THE EVIDENCE HAS SHOWN THAT DALE AND RANDY AND MEMBERS OF THE ACES GANG, TO INCLUDE MICHAEL WALSH, JOHN LUCAS AND ROY MCDOWELL, THREATENED HIM. AGAIN, I DIDN'T REALIZE AT THAT TIME WHAT THE EVIDENCE WOULD SHOW IN TERMS OF THE EXTENT OF HOW FAR THESE THREATS WENT.

ANOTHER THING WHICH I COULD NOT ANTICIPATE, LADIES AND GENTLEMEN, IN MY OPENING STATEMENT WERE CERTAIN SURPRISES BY THE OTHER PROSECUTORS IN THIS CASE WHICH ARE AGAINST ME AND THAT OF THE THREE OTHER CODEFENDANTS.

BUT I SUBMIT TO YOU THAT WHAT THEY PRESENTED, THE POEM AND OTHER TESTIMONY, DOES NOTHING TO ALTER THE ESSENTIAL TRUTH WHICH WAS TOLD TO YOU BY TOM AND BY JOHN LUCKETT.

I AM GOING TO ASK YOU TO FOCUS ON WHAT EVIDENCE THE STATE HAS PRESENTED IN THEIR ATTEMPT TO PROVE THAT MY CLIENT IS GUILTY AND I WANT YOU TO FRAME OR THINK ABOUT WHAT THIS EVIDENCE IS IN LIGHT OF THE FOLLOWING QUESTION BECAUSE IT IS THE ESSENTIAL QUESTION THAT YOU WILL HAVE TO ANSWER.

HAS THE STATE PROVEN BEYOND A REASONABLE DOUBT THAT MY CLIENT IS GUILTY OF THE CRIMES WITH WHICH HE IS CHARGED?

BEFORE I HIT THAT EVIDENCE, THOUGH, THERE ARE TWO OTHER POINTS WHICH I WANT TO MAKE. THE FIRST OF WHICH IS A MATTER I COVERED BRIEFLY IN OPENING STATEMENT AND THAT IS THE MATTER OF NONISSUES.

THE POINTS IN THIS TRIAL, WHICH HAVE TAKEN UP A LOT OF TIME BUT WHICH ARE NOT IN DEBATE, THE FACT THAT THE GORDONS WERE KILLED, THE FACT THAT THE GUNS ON THE TABLE WERE USED TO KILL THEM, THE FACT THERE IS A TORN SCREEN, THE FACT THAT BALLISTICS WERE TAKEN, THE FACT THAT TOM AND DALE WENT OUT AND BOUGHT A KNIFE, A LOT OF THESE THINGS SIMPLY ARE NOT IMPORTANT AS FAR AS I AM CONCERNED.

I DON'T FAULT MR. SEATON AND MR. HARMON FOR BRINGING OUT EVERYTHING EXCEPT THE KITCHEN SINK AND LEAVING LEAVING NO STONE UNTURNED.

THEY DID A PROFESSIONAL METHODICAL JOB AND I RESPECT THEM FOR DOING THAT. BUT MR. SEATON ALLUDED TO A SNOWBALL.

I WANT TO ALLUDE TO AN AVALANCE. I DON'T WANT ALL THESE UNTURNED OR TURNED-UP STONES TO COME CASCADING DOWN UPON MY CLIENT AND BURY HIM IN THE FORM OF EVIDENCE WHICH IS ESSENTIALLY UNIMPORTANT AS FAR AS HE IS CONCERNED.

SO WHEN YOU TALK ABOUT JOHN LUCKETT, PLEASE FOCUS ON EVIDENCE WHICH GOES TO THE ISSUES AS FAR AS HE IS CONCERNED AND DON'T LUMP HIM WITH THE CROWD.

AND THE SECOND POINT THAT I FEEL IT IS IMPORTANT FOR ME TO MAKE AT THIS TIME, LADIES AND GENTLEMEN, HAS TO DO WITH THE RELATIVELY FAST MOVING AND FEARFUL SITUATION THAT OCCURRED ON THE NIGHT IN QUESTION.

WE SIT HERE IN THIS COURTROOM, YOU IN YOUR

COMFORTABLE CHAIRS OR, AT LEAST, BEARABLE CHAIRS, IN A WELL-LIGHTED SITUATION WITH A CERTAIN AMOUNT OF POMP AND CIRCUMSTANCE.

WE HAVE BAILIFFS, WE HAVE A SOLEMN SITUATION. YOU HAVE HAD MANY DAYS TO SEE EVIDENCE UNFOLD BEFORE YOU SLOWLY AND METHODICALLY. YOU HAVE HAD LOTS OF TIME TO THINK ABOUT WHAT HAS OCCURRED. AND YOU WILL HAVE ALL THE TIME YOU NEED TO USE YOUR JUDGMENT TO COME TO A COLLECTIVE DECISION IN THIS CASE.

AND ALSO BECAUSE NONE OF YOU ARE TEENAGERS, I WONDER IF YOU CAN -- WELL, FIRST, LET ME SAY THIS. IT'S THE RIGHT THING THAT WE HAVE A TRIAL PROCEED WITH DELIBERATION AND ALL THE TIME IT TAKES BECAUSE OF THE IMPORTANCE WHICH A CRIMINAL TRIAL HAS IN OUR SYSTEM OF JUSTICE AND THE ENORMOUS CONSEQUENCES THAT A CRIMINAL DEFENDANT FACES AS A RESULT OF A TRIAL.

AND MANY OF YOU ARE LONG SINCE PAST YOUR TEENAGE DAYS AND YOU MAY NOT REMEMBER HOW YOU FELT AND HOW YOU REACTED AS A TEENAGER. I SUSPECT THAT NONE OF YOU, FOR WHATEVER REASON, HAS EVER BEEN EXPOSED TO A GROUP OF PEOPLE WHO WENT OUT AND COMMITTED COLD-BLOODED MURDER.

PERHAPS NONE OF YOU HAVE EVER HAD A WEAPON POINTED AT YOU. AND AS YOU CONSIDER THE FACTS IN THIS CASE, LADIES AND GENTLEMEN, I ASK YOU TO CONSIDER THEM IN LIGHT OR RATHER IN THE SHOES OF JOHN RAY LUCKETT AS HE STOOD IN THEM

ON THAT NIGHT AND TO TRY TO PUT YOURSELF IN HIS POSITION. BECAUSE HE DIDN'T HAVE THE LUXURY OF TIME, NOR THE LIGHT OF DAY TO CONSIDER HIS ACTIONS LIKE YOU DO.

I AGREE WITH MR. SEATON THAT EVERY CRIME CHARGED WAS COMMITTED. I HAVE NO DOUBT ABOUT THAT. THE QUESTION BEING WHO COMMITTED THEM OR, IN MY CASE, DID MY CLIENT.

I AM GOING TO GO OVER CERTAIN EVIDENCE AND I SUGGEST TO YOU THAT I AM NOT GOING TO SPECULATE OR GUESS ABOUT IT AT ALL. I WOULD SUBMIT TO YOU THAT WHAT I AM TELLING YOU IS EXACTLY WHAT THE EVIDENCE SHOWED BECAUSE OF MY CAREFUL NOTES AND MY ATTENTION TO DETAIL IN THIS CASE.

AND I ASK YOU IF YOU HAVE ANY QUESTION TO CHECK YOUR NOTES AND I SUBMIT THAT YOUR NOTES WILL BEAR ME OUT.

THE FIRST WITNESS OF ANY SIGNIFICANCE OFFERED BY THE STATE WAS RUSTY HAVENS. HE IS THE YOUNG MAN, AS YOU WILL RECALL, WHO WAS PART OF AN EARLY MEETING WHO TENATIVELY AGREED TO COOPERATE AND, UNLIKE MR. SEATON SUGGESTS, ON THE NIGHT IN QUESTION HE COULD NOT BE CALLED UP BECAUSE HE WAS IN CUSTODY.

HE TESTIFIED THAT THERE, IN FACT, WAS A MEETING AT RANDY'S APARTMENT BEFORE THE MURDERS. HE TESTIFIED HE AGREED AFTER HE WAS SOLICITED TO PARTICIPATE IN IT. HE ALSO TESTIFIED WITHOUT ANY HESITATION OR RESERVATION THAT MY CLIENT WAS NOT PRESENT.

HE STATED THAT NO TIME CERTAIN WAS SET FOR THE

MURDERS. HE TESTIFIED THAT HE, TOO, WAS AFRAID OF RANDY MOORE AT THAT EARLIER MEETING.

AND THERE IS NOTHING WHICH HE SAID WHICH IMPARTS ANY CRIMINALITY TO JOHN LUCKETT.

THE SECOND WITNESS AND A VERY IMPORTANT WITNESS WHOM I AM GOING TO SPEND SOME TIME ON IS TOM AKERS. AND I WOULD LIKE TO DIVIDE HIS TESTIMONY UP, IF YOU WILL, INTO SIX CHRONOLOGICAL TIME SEGMENTS.

FIRST OF ALL, HE, TOO, WAS AT AN EARLIER MEETING AND I WOULD SUBMIT IT IS THE VERY SAME MEETING THAT RUSTY HAVENS WAS AT. HE TESTIFIED THAT THAT WAS THE FIRST TIME HE HAD HEARD ABOUT A PLAN ALTHOUGH NO TIME CERTAIN WAS SET.

HE TESTIFIED THAT ALTHOUGH AT THAT TIME JOHN LUCKETT LIVED IN RANDY'S APARTMENT, HE CANNOT RECALL IF HE WAS AT THAT MEETING. HE CERTAINLY CANNOT RECALL ANY PARTICIPATION IN THAT MEETING.

AND UP TO THIS POINT THERE IS ABSOLUTELY NO EVIDENCE IN THIS COURT WHATSOEVER, NO EVIDENCE THAT MY CLIENT KNEW ANYTHING ABOUT WHAT WAS GOING TO OCCUR PRIOR TO THE TIME THAT IT DID OCCUR.

HE ALSO TESTIFIED ABOUT THE INTERRELATIONSHIP AMONG THE CODEFENDANTS AND OTHERS. TOM TESTIFIED THAT ROY WAS THE LEADER OF THE ACES GANG. THAT MIKE WAS IN THE GANG, MIKE WALSH AND THAT MIKE WAS ESSENTIALLY A LITTLE BROTHER TO RANDY.

HE TESTIFIED THAT DALE AND RANDY TRULY WERE LIKE BROTHERS, EACH THE OTHER'S MOST TRUSTED FRIEND. AND HE ALSO TESTIFIED AND I THINK THIS IS IMPORTANT THAT DESPITE THE FACT THAT JOHN LUCKETT WAS LIVING AT RANDY MOORE'S APARTMENT, HE DIDN'T KNOW HIM VERY WELL.

HE HAD LESS CONTACT, FRIENDSHIP AND AFFILIATION, THAT IS, TOM AKERS DID, WITH JOHN LUCKETT THAN WITH ANYONE ELSE.

AND FOR THE STATE OR THE OTHER DEFENSE COUNSEL TO SUGGEST THAT TOM AKERS WOULD COME IN HERE AND CONCOCT A STORY TO LIE ON BEHALF OF JOHN LUCKETT, I SUBMIT NOT ONLY IS LUDICROUS, IT JUST SIMPLY HAS NO FOUNDATION IN THE EVIDENCE.

THE THIRD AREA WHICH IS IMPORTANT OF TOM AKERS' TESTIMONY IS WHAT OCCURRED AT THE APARTMENT ON THE EVENING IN QUESTION. HE INDICATED THAT SHORTLY AFTER HE ARRIVED, RANDY MOORE TOOK JOHN LUCKETT INTO THE BEDROOM. AND WHEN JOHN LUCKETT EMERGED, THERE WAS A DRASTIC CHANGE IN HIS ATTITUDE AND DEMEANOR.

THOSE WERE TOM'S WORDS, DRASTIC CHANGE. HE WENT FROM NONCHALANT TO QUITE SCARED AND NERVOUS.

AND AT THAT APARTMENT THAT NIGHT, TOM TESTIFIED MY CLIENT DID NOT SAY ONE WORD ABOUT WHAT HE WAS TO DO NOR DID ANY ONE ELSE.

AND, AGAIN, I SUBMIT THE STATE WISHES YOU TO SPECULATE AND TO SURMISE WHAT MUST HAVE OCCURRED. YET THEIR

OWN WITNESS GIVEN IMMUNITY -- NOT IMMUNITY, BUT GIVEN PROBATION ULTIMATELY, FIVE YEAR SUSPENDED SENTENCE FOR VOLUNTARY MANSLAUGHTER, BEFORE HE EVER TESTIFIED WITH NO MOTIVE AT ALL TO LIE, HAS GIVEN YOU THAT TESTIMONY.

AND HE HAS NO MOTIVE TO LIE, LADIES AND GENTLEMEN. OF ANY OF THE WITNESSES, I SUBMIT, HE IS THE ONE WITH THE LEAST MOTIVE TO LIE. HE TESTIFIED THAT ROY CAME IN WITH THE GUN, THAT RANDY TOOK THE GUNS TO THE CAR.

AND WHEN HE WAS ASKED BY THE STATE, I BELIEVE IT WAS, "WHY DIDN'T YOU PROTEST?" THESE WERE HIS WORDS, "NOT MUCH THAT I COULD HAVE SAID."

THAT'S WHAT HE SAID OF IT. THAT'S HOW HE EXPLAINED HIS TRIP TO THE HOUSE. AND I WOULD SUBMIT THE EVIDENCE IS CLEAR THAT PRIOR TO DEPARTURE THAT NIGHT, RANDY AND DALE AND MIKE WERE IN NO MOOD FOR DEBATE.

RANDY MOORE TOOK JOHN LUCKETT INTO THAT BEDROOM, HE POINTED A GUN AT HIM AND HE SAID, "YOU KNOW TOO MUCH, YOU ARE COMING WITH US. JOHNNY LUCAS IS INCAPACITATED. YOU ARE COMING WITH US. WE CAN'T TAKE A CHANCE. YOU ARE GOING TO DO WHAT I TELL YOU. DON'T ASK QUESTIONS."

AND I SUBMIT IT IS AS SIMPLE AS THAT. AND THERE IS NO EVIDENCE TO THE CONTRARY. BEFORE THEY LEFT, DALE TAPPED THE REVOLVER ON HIS LEG. TOM SAID IT WAS ABOUT FIVE TO TEN MINUTES AFTER JOHN CAME OUT OF THE BEDROOM THAT THEY LEFT.

AND, AGAIN, USING YOUR OWN COMMON EXPERIENCE, I WOULD SUBMIT TO YOU THAT IN TIMES OF STRESS, TIME CAN SEEM LIKE AN ETERNITY, BUT IT CAN BE A SHORT TIME. TWO OR THREE ACTUAL MINUTES CAN SEEM LIKE FIVE OR TEN.

AND I SUGGEST TO YOU THAT TIME MOVED AWFUL FAST THAT EVENING IN TERMS OF ACTUAL TIME BUT IT DID SEEM LIKE A LONG TIME TO THOSE THAT WERE THERE, PARTICULARLY, THOSE THAT WERE AFRAID.

TOM TESTIFIED THAT AS THEY DROVE IN THE CAR, HE WAS DRIVING. MY CLIENT WAS SEATED NEXT TO HIM AND DALE WAS IN THE FRONT SEAT WITH A GUN, WITH THE REVOLVER.

I WONDER WHY MR. HARMON DIDN'T ASK HIM, "WELL, ISN'T IT AMAZING THAT THERE WAS NO CONVERSATION?" LIKE HE TRIED TO ASK MY CLIENT. HE WAS CONTENT TO LET THE FACT GO THAT TOM DIDN'T TESTIFY ABOUT ANY REHEARSAL OF A PLAN.

HE WAS CONTENT TO LET THAT ISSUE SLIDE UNTIL IT GOT TO CROSS-EXAMINATION AND WHEN HE ASKED JOHN LUCKETT, JOHNNY GAVE YOU WHAT I THINK IS A VERY SENSIBLE ANSWER.

HE WAS SCARED, TOM WAS SCARED, DALE HAD THE GUN. THE OTHERS WERE IN THE BACK UNDER A CANOPY OR WHATEVER AND THAT WAS THE END OF IT.

WHEN THEY ARRIVED AT THE SCENE -- I AM GOING TO ASK YOU WHEN YOU DELIBERATE TO LOOK AT PHOTOGRAPHS WHICH HAVE BEEN MARKED AS EXHIBITS 62 AND 71 AND ASK YOU TO PLEASE STUDY THESE PHOTOGRAPHS, LADIES AND GENTLEMEN. THEY TELL YOU A LOT

MORE ABOUT WHAT HAPPENED IN THIS CASE THAN THE TWO PHOTOGRAPHS THAT MR. SEATON SHOWED YOU OF THE DEAD GRANDPARENTS.

BECAUSE THESE PHOTOGRAPHS SHOW THE SCENE AND THEY SHOW WHERE JOHN WAS AS THE WITNESSES TESTIFIED. AND WHEN YOU LOOK AT THESE PHOTOGRAPHS, LADIES AND GENTLEMEN, THE CLEAR SUGGESTION IS THAT HE DID NOT WILLINGLY PARTICIPATE IN WHAT HAPPENED AND WANT THESE CRIMES TO OCCUR BECAUSE HE IS OUT IN THE MIDDLE OF NO MAN'S LAND IN A SPOT WHERE HE CAN'T DO ANYBODY ANY GOOD.

TOM SAW HIM AFTER HE CAME BACK FROM THE TRAILER HIDING BY A BUSH. WHEN TOM TRIED TO START THE CAR, JOHN CAME OVER TO HIM AND SAID, "LET'S GET OUT OF HERE."

AND TOM SAID WHEN ASKED, "WOULD YOU HAVE LEFT WITHOUT THE OTHER FOUR?" AND HE SAID, "YOU BET, WITHOUT ANY DOUBT." JOHN LUCKETT DID EVERYTHING HE COULD TO GET OUT OF THERE THAT NIGHT, LADIES AND GENTLEMEN, TO DISASSOCIATE HIMSELF FROM WHAT OCCURRED.

HE WASN'T GIVEN A BULLET, EXTRA BULLETS. HE DIDN'T BRING BACK THE WALLET. HE DIDN'T DIVVY UP THE PROPERTY. HE DIDN'T ATTEMPT TO BURY THE RIFLES LIKE MIKE AND DALE AND RANDY DID, EITHER.

WHEN THEY GOT BACK TO THE HOUSE, TOM SAID THAT MIKE TOLD HIM THAT HE TOOK THE GUN AWAY FROM JOHN LUCKETT AND THAT HE FIRED THE SHOT.

WHY IN THE WORLD WOULD TOM AKERS TAKE THIS STAND UNDER OATH AND AFTER HIS CASE HAS BEEN DECIDED AND DISPENSED WITH AND MAKE UP THAT LIE?

HE WOULDN'T BECAUSE THAT IS WHAT HAPPENED. HE TESTIFIED WHEN THEY GOT BACK TO THE HOUSE, THAT JOHN LUCKETT WAS CRITICIZED AND UNDER PRESSURE FROM THE OTHERS.

HE WOULDN'T HAVE BEEN CRITICIZED AND UNDER PRESSURE IF HE HAD DONE WHAT THE OTHERS WANTED HIM TO DO. DALE TOLD TOM TO KEEP HIS MOUTH SHUT. NO ONE SAID JOHN LUCKETT FIRED A SHOT. TOM WAS SCARED. HE KNEW THE OTHERS WERE SERIOUS. THAT WAS HIS TESTIMONY.

HE ALSO TESTIFIED HE WAS AFRAID OF RANDY AND HE ALSO TESTIFIED THAT THAT HAD SOME EFFECT ON HIS EARLIER STATEMENT TO THE POLICE BECAUSE HE KNEW OF THE KINSHIP BETWEEN MIKE WALSH AND RANDY AND DALE. AND THAT'S WHAT HE TOLD YOU.

AND, AGAIN, LADIES AND GENTLEMEN, HE WITHSTOOD INTENSE CROSS-EXAMINATION AND I HONESTLY SUBMIT TO YOU, HE IS THE MOST TRUTHFUL, BELIEVABLE WITNESS TO TESTIFY IN THIS CASE.

WE THEN MOVE TO THE TESTIMONY OF JOHN LUCAS. HE IS THE YOUNG MAN THAT HAD THE ACES TATTOO ON HIS RIGHT SHOULDER. THE SAME GANG THAT ROY WAS THE LEADER OF AND THAT MIKE WALSH WAS A MEMBER OF.

I AM GOING TO ASK YOU TO PUT HIS TESTIMONY IN A LITTLE BIT DIFFERENT CONTEXT THAN MR. SEATON DID BECAUSE IT'S

NOT SO PRISTINE, LADIES AND GENTLEMEN. IT IS A LOT MORE SINISTER AND DIABOLICAL AND IT'S EVERY BIT AS DIABOLICAL WHAT OCCURRED AFTER THESE MURDERS AS WHAT OCCURRED BEFORE THE MURDERS, BELIEVE ME.

JOHN LUCAS GAVE A STATEMENT TO THE POLICE ON THE 10TH OF DECEMBER, AFTER HE HAD LIED TO THEM IN LATE NOVEMBER AND DETECTIVE GEARY TOLD YOU ABOUT THAT. ON MY CROSS-EXAMINATION, HE ADMITTED THAT HE HAD URGED JOHN LUCAS TO TELL THE TRUTH.

I BET HE DID MORE THAN JUST URGE HIM. I BET HE SQUEEZED HIM GOOD BECAUSE HE HAD LIED AND HE WAS CAUGHT UP IN IT AND DETECTIVE GEARY, YOU CAN BET YOUR BOTTOM DOLLAR, TOLD THAT YOUNG MAN, "YOU BETTER TELL ME ALL THE TRUTH."

AND THIS IS WHAT JOHN LUCAS TOLD DETECTIVE GEARY ON THE 10TH OF DECEMBER. HE TESTIFIED THAT HE HAD PASSED OUT AND "EVERYBODY ELSE WENT INSTEAD OF ME." I SUBMIT THAT SUGGESTS THAT IT WAS HE INSTEAD OF JOHN LUCKETT WHO WAS SUPPOSED TO GO ON THE NIGHT IN QUESTION.

HE ALSO TOLD THE POLICE WHO ELSE -- QUESTION, "WHO ELSE SHOT CARL GORDON?"

ANSWER, "I THINK MIKE WALSH SHOT THE OTHER GUY."

QUESTION, "DID MIKE WALSH HAVE THE SAWED-OFF .22?"

ANSWER, "YES, HE DID."

QUESTION, "DID MIKE WALSH TELL YOU, IN FACT, THAT

HE DID SOME OF THE SHOOTING?"

ANSWER, "HE SHOT AT HIM BUT HE MISSED."

QUESTION, "IS THAT WHAT MIKE TOLD YOU?"

ANSWER, "YES, THAT IS EXACTLY WHAT HE TOLD ME."

QUESTION, "DID JOHNNY RAY LUCKETT HAVE ANY PART IN THE SHOOTINGS?"

ANSWER, "NOT THAT I KNOW OF. HE DID NOT TELL ME ANYTHING ABOUT IT."

AND NEITHER DID ANYBODY ELSE. HE ALSO TOLD THE POLICE ON THE 10TH AND THE 11TH THAT HE WENT OUT WITH DALE AND JOHN LUCKETT AND THREW THE WEAPONS IN THE LAKE.

AND I SUBMIT TO YOU THAT ALL OF THAT IS TRUE. BECAUSE WHY IN THE WORLD WOULD HE MAKE UP THAT STORY AFTER HE WAS BEING SQUEEZED BY THE POLICE AND WAS TRYING TO EXTRICATE HIMSELF FROM THIS PROBLEM? HE TOLD THE TRUTH UNDER PRESSURE AND THAT'S WHAT HAPPENED, LADIES AND GENTLEMEN.

AND THEN WE MOVE ON TO JOHN LUCAS'S TESTIMONY AT THE PRELIMINARY HEARING IN THIS CASE. AND I DON'T MEAN TO EXAGGERATE BUT IT IS AT THAT TIME THAT YOU GET THE SICK FEELING IN YOUR STOMACH THAT THE OTHER THREE CODEFENDANTS IN THIS CASE HAVE HATCHED A SUBPLOT, IF YOU WILL, OF TREACHERY AND INTIMIDATION TO KEEP JOHN LUCKETT OFF THE WITNESS STAND BECAUSE THIS IS WHAT HE SAID DURING THE PRELIMINARY HEARING IN RESPONSE TO MY CROSS-EXAMINATION.

FIRST OF ALL, HE DENIED THAT MIKE WALSH HAD TOLD

HIM THAT HE WAS THE SHOOTER. HE CHANGED HIS STORY TO SAY THAT RANDY TOLD HIM THAT JOHN RAY WAS THE SHOOTER. OBVIOUSLY, AT THAT TIME I WAS A BIT DISTRESSED.

MY QUESTION, "YOU TELL US BECAUSE IT IS PRETTY IMPORTANT BECAUSE PEOPLE COULD BE FACING VERY SERIOUS PUNISHMENT. ARE YOU TELLING US RIGHT NOW UNDER OATH THAT YOU NEVER HAD A CONVERSATION WITH MIKE WALSH IN WHICH HE ADMITTED DOING THE SHOOTING?"

ANSWER, "EXACTLY."

QUESTION, "ID YOU EVER HAVE ANY CONVERSATION WITH JOHN LUCKETT CONCERNING THIS INCIDENT?"

ANSWER, "NO, I DIDN'T."

UNLIKE WHAT MR. SEATON HAS SUGGESTED, HE DIDN'T SIMPLY FLOP HIS TESTIMONY OVER BECAUSE HE WANTED TO PROTECT AT ONE TIME JOHN AND PROTECT AT ANOTHER TIME MIKE. HE FLOPPED IT OVER BECAUSE FROM THE POINT IN TIME HE TALKED TO THE POLICE AND THE PRELIMINARY HEARING, HIS FRIENDS HAD GOTTEN TO HIM.

IT'S INTERESTING, TOO, AT TRIAL AND AT THE PRELIMINARY HEARING HE ALSO CHANGED HIS STORY ABOUT ROY MCDOWELL. I SUBMIT THAT IS CRUCIAL, LADIES AND GENTLEMEN. BECAUSE IN HIS FIRST OR SECOND STATEMENT TO THE POLICE ON THE 10TH OF NOVEMBER, WHICH MR. HARMON, I BELIEVE IT WAS, CROSSED HIM VERY HARD ON DURING THE EXAMINATION.

THE FIRST TIME HE TALKED TO THE POLICE, NO

QUESTION ROY MCDOWELL WAS PRESENT. AND THE STATE WANTED TO MAKE SURE EVERYBODY KNEW ABOUT THAT.

BUT THEY SLID BY THE FACT THAT AT TRIAL HE CHANGED HIS STORY ABOUT OTHER THINGS TO INCRIMINATE MY CLIENT. AND IT'S AT THAT POINT THAT YOU CAN SEE THE ACES GANG BEGINNING TO TAKE CONTROL OF OUTSIDE WITNESSES AND TO EXERT PRESSURE FOR THEIR OWN END.

AND I WOULD SUBMIT THE TWO ENDS WHICH WERE IMPORTANT TO THEM, PRELIMINARILY, TO PROTECT MIKE WALSH, SECONDARILY, AND LATER MORE IMPORTANTLY TO PROTECT ROY MCDOWELL.

AND THIS IS SOMETHING, LADIES AND GENTLEMEN, WHICH I WANT YOU TO SPECIFICALLY REMEMBER. WHEN I ASKED HIM IN COURT, I GOT UP CLOSE TO HIM AND SHOWED HIM THESE STATEMENTS, AND I SAID, "WHY DIDN'T YOU TELL US AT THE PRELIMINARY HEARING THAT YOU HAD A CONVERSATION WITH JOHN LUCKETT. WHY DIDN'T YOU DO THAT?" AND YOU KNOW WHAT HE SAID? HE SAID, "I JUST REMEMBERED."

I JUST REMEMBERED. THAT'S PRETTY CONVENIENT MEMORY. HE COMES INTO COURT IN THIS TRIAL AND TELLS YOU HE NEVER WENT OUT TO THE LAKE TO THROW AWAY THE WEAPONS IN SPITE OF WHAT HE TOLD THE POLICE ON TWO OCCASIONS.

AND YET, AS THE STATE'S WITNESS, HE IS FACING NO PROSECUTION AND HAS NO FEAR OF PROSECUTION FOR FALSE STATEMENTS, ACCESSORY AFTER THE FACT TO MURDER, CONSPIRACY TO

COMMIT MURDER OR PERJURY.

HE HAS ALREADY COLLECTED $1,000 AND HE IS WAITING ON HIS NEXT $1,000 CHECK. DOESN'T THAT BOTHER YOU?

INSTRUCTION 41 READS 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 AND 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 THIS CASE, YOU MAY DISREGARD THE ENTIRE TESTIMONY OF THAT WITNESS OR ANY PORTION OF HIS TESTIMONY WHICH IS NOT PROVED BY OTHER WITNESSES OR BY OTHER EVIDENCE.

I SUBMIT TO YOU THAT YOU CANNOT HELP BUT DISREGARD JOHN LUCAS'S TESTIMONY WHEN DETERMINING WHETHER MY CLIENT IS GUILTY OR INNOCENT EXCEPT FOR THE MOTIVATIONS FOR HIS CHANGES WHICH DO, IN FACT, SUBSTANTIATE THE THREATS AND INTIMIDATIONS WHICH HAVE CONTINUED TO EXIST FROM THE TIME OF THE 5TH AND 6TH OF NOVEMBER UP THROUGH THE PRESENT DAY OF TRIAL, LADIES AND GENTLEMEN.

THE TESTIMONY OF ANGELA SALDANA. IF YOU WILL RECALL DURING MY DIRECT EXAMINATION, SHE APPEARED TO BECOME VERY IRRITATED WITH ME AND SHE SAID I MADE HER UPSET.

AND I CERTAINLY HAD OCCASION AFTER THAT TO GET A

LITTLE HOT WITH HER BECAUSE OF THE SURPRISE SHE PULLED. BUT BEFORE THEN, AND YOU CAN REMEMBER THIS AS WELL AS I CAN, I DON'T THINK I DID ANYTHING TO UPSET HER.

AFTER, SHE TOLD ME THAT PERHAPS SHE WAS UPSET BECAUSE SHE WAS BEING PROBED ABOUT HER TRUTHFULNESS. I DON'T KNOW. BUT AFTER SHE SAID SHE WAS UPSET WITH ME, SHE, LIKE JOHN LUCAS, JUST REMEMBERED THAT MY CLIENT WAS INVOLVED IN DEVIL WORSHIP.

AND WHEN I ASKED HER, "WHY AFTER I ADKED YOU SPECIFICALLY ABOUT THAT AT THE PRELIMINARY HEARING DIDN'T YOU TELL US ABOUT THAT? WHEN I IMPLORED YOU TO TELL US EVERYTHING YOU KNEW ABOUT THIS, WHY DIDN'T YOU TELL US ABOUT IT?"

SHE SAYS SHE JUST HAPPENED TO REMEMBER. I DON'T KNOW, MAYBE THEY TEACH THIS SOMEWHERE, I JUST REMEMBERED.

I WOULD SUBMIT TO YOU, LADIES AND GENTLEMEN, THAT TO SOME EXTENT SHE IS A PERFORMER AND TO SOME EXTENT SHE IS A PHONY.

SHE HAD SEX WITH TOM AND DALE FOR INFORMATION AND I WOULD SUBMIT THAT HER CHARACTER IS SUCH THAT SHE IS AS WILLING TO DANCE FOR MONEY IN THIS COURTROOM AS SHE IS ON THE STAGE AT BOGIE'S.

BUT REGARDLESS OF WHAT YOU THINK ABOUT HER, WHETHER YOU LIKE HER OR HATE HER OR FEEL SORRY FOR HER, HER TESTIMONY IS STILL NOT THAT IMPORTANT AS FAR AS JOHN LUCKETT IS CONCERNED DESPITE WHAT MR. SEATON WOULD HAVE YOU BELIEVE.

AND THE REASON IS ALL SHE CAN TESTIFY TO IS THAT DALE FLANAGAN TOLD HER THAT JOHN LUCKETT PULLED A TRIGGER. AND THE STATE CANNOT HAVE IT BOTH WAYS.

BECAUSE THE STATE KNOWS AND AN ISSUE WAS MADE OF THIS THAT DALE FLANAGAN DID NOT SAY THAT ROY MCDOWELL WAS EVEN INVOLVED.

THE SUBPLOT BEGINS TO THICKEN. A FINAL POINT WHICH IS IMPORTANT IS THAT SHE ALSO TESTIFIED THAT DALE AND MIKE HAD A .22 ONE NIGHT AFTER THESE MURDERS OCCURRED AND THEY WERE GOING DOWNTOWN. FURTHER EVIDENCE OF THE FACT THAT THEY REMAINED ARMED AND DANGEROUS TO ANYONE WHO MIGHT CROSS THEM.

FINALLY, WE HAVE THE TESTIMONY OF OFFICER MORLOCK WHO APPREHENDED MIKE WALSH IN ARIZONA ARMED WITH A .38 CALIBER PISTOL AND OVER 100 ROUNDS OF AMMUNITION, WITH RANDY MOORE'S PLANE TICKET IN THE CAR.

ARMED AND DANGEROUS AND FLEEING FELONS. AND I WOULD SUBMIT TO YOU IF MIKE WALSH WOULD GO TO THAT EXTENT TO PLEE, IT WAS HE WHO PULLED THE TRIGGER ON THE NIGHT IN QUESTION.

I SUBMIT TO YOU THAT IT IS INTELLECTUALLY DISHONEST FOR THE STATE TO ARGUE THAT THE CREDIBLE EVIDENCE IN THIS CASE SAYS THAT MY CLIENT PULLED A TRIGGER ON THE NIGHT IN QUESTION. THAT IS DISHONEST.

WHAT THE STATE WANTS IN THIS CASE, LADIES AND GENTLEMEN, AND I AM GOING TO BE VERY BLUNT, IS FOR YOU TO

CONVICT THIS MAN BECAUSE OF GUILT BY ASSOCIATION. BECAUSE THEY HAVE ASKED YOU TO SURMISE, TO SUPPOSE AND, WELL, DON'T YOU KNOW IT REALLY WAS THIS WAY.

BUT THEY HAVEN'T PRESENTED ANY EVIDENCE THAT HE KNEW ANYTHING ABOUT WHAT WAS GOING TO HAPPEN BEFORE IT DID, THAT HE WENT INTO THE HOUSE, THAT HE TOOK ANY PROPERTY AND NO CREDIBLE EVIDENCE THAT HE PULLED THE TRIGGER.

THE TESTIMONY OF TOM AKERS SHOWS HE WAS DOING EVERYTHING HE COULD DO TO GET THE HELL OUT OF THERE. AND IF YOU FORGET ABOUT INDIVIDUAL GUILT AND LUMP THEM ALTOGETHER THEN YOU WILL CONVICT BY GUILT BY ASSOCIATION BUT YOU WON'T IF YOU FOLLOW THE RULE OF PROOF BEYOND A REASONABLE DOUBT.

IF YOU ALLOW THAT TO HAPPEN, LADIES AND GENTLEMEN, TO CONVICT THIS MAN BY GUILT OF ASSOCIATION, THE RULE OF LAW IN THIS CASE WILL BE SMASHED LIKE MOSES SMASHED THE TABLETS COMING DOWN OFF THE MOUNTAIN AND IT IS A HORRIBLE INJUSTICE AND I BEG YOU TO RESIST THAT TEMPTATION.

I BEG EACH ONE OF YOU TO RESIST THAT TEMPTATION BECAUSE THERE IS SUCH A TEMPTATION. I HAVE A FEW MORE MINUTES TO GO OR WOULD THE COURT PREFER A RECESS OR --

THE COURT: I WILL RECESS AFTER YOU HAVE FINISHED. HOW LONG DO YOU THINK?

MR. SMITH: YOUR HONOR, I NEED ABOUT ANOTHER 20 MINUTES. I SEE SOME PEOPLE ARE A LITTLE --

THE COURT: RATHER THAN BREAK THE CONTINUITY OF

WHAT YOU ARE SAYING, WHY DON'T YOU CONTINUE.

MR. SMITH: VERY WELL.

LADIES AND GENTLEMEN, I WOULD NOW LIKE TO SPEAK TO YOU ABOUT THE CASE WHICH WE PRESENTED. FIRST OF ALL, WE CALLED KEITH MCINTYRE TO THE STAND. YOU WILL RECALL HE IS THE YOUNG MAN WHO WORKED AT K-MART SPORTING GOODS DEPARTMENT, JOHN LUCKETT'S BEST FRIEND FOR A NUMBER OF YEARS.

HE IS ALSO THE YOUNG MAN WITH THE NAME OF ANIMAL. HE LOOKS AND BEHAVES AS MUCH LIKE AN ANIMAL AS MY CLIENT BEHAVES LIKE A RIPPER.

HE TESTIFIED BEING IN A TOUGH SPOT BEING HALF BLACK, PICKED ON. MY CLIENT FOR YEARS HAS RESISTED TEMPTATIONS TO GET IN FIGHTS AND TROUBLE. THERE IS AN INSTRUCTION ON NONVIOLENT BEHAVIOR. WHERE A DEFENDANT HAS OFFERED EVIDENCE OF HIS NONVIOLENT OR GOOD CHARACTER, THE JURY MAY CONSIDER SUCH EVIDENCE ALONG WITH ALL OTHER EVIDENCE IN THE CASE.

I SUBMIT TO YOU THAT THE TESTIMONY OF KEITH MCINTYRE WAS CONVINCING AND IT WENT UNCHALLENGED. AND DESPITE ALL THE RESOURCES OF THE STATE, THEY COULDN'T COME UP WITH ANYBODY, AND THEY NEEDED TO IN THIS CASE BECAUSE THEY ARE SWEATING JOHN LUCKETT'S CONVICTION, BELIEVE ME, THEY COULDN'T COME IN TO SAY THIS KID HAS A VIOLENT BEHAVIOR.

IT IS UNLIKELY HE WOULD BE THE TYPE OF PERSON TO WILLINGLY PARTICIPATE IN MURDER BASED ON THAT. KEITH ALSO

TESTIFIED, AND I THINK CONVINCINGLY, THAT HE OVERHEARD A CONVERSATION WITH JOHN LUCAS WHERE JOHN LUCAS WAS TELLING SOMEONE ABOUT HOW HE HAD LIED AT THE PRELIMINARY HEARING.

AND WHEN HE WAS CONFRONTED ABOUT IT, HE REFUSED TO TALK ABOUT IT ANYMORE. THE ONLY THING -- AND THAT HE MIGHT GET IN TROUBLE WITH IT. THE ONLY THING THAT WAS OF REAL SIGNIFICANCE THAT HE LIED ABOUT, APART FROM THE FACT THAT NOW HE SAYS HE DIDN'T GO OUT TO THE LAKE, WAS THE FACT THAT HE CHANGED HIS STORY TO SAY THAT MY CLIENT PULLED A TRIGGER.

WAYNE WITTIG, WHO WAS THE OIL PAN BUILDER, TALKED ABOUT RANDY MOORE'S VIOLENT CHARACTER AND ABOUT HIS WILLINGNESS TO SETTLE DISPUTES WITH A LOADED FIREARM.

HE ALSO TESTIFIED ABOUT DALE AND RANDY PARTICIPATING IN COVENS. AND THAT IT WAS RANDY MOORE, THE WHITE MAGICIAN, THE COERCER, WHO WAS EFFECTIVE AT COERCION. IT'S OBVIOUS THOSE TWO PEOPLE DON'T LIKE EACH OTHER BUT I WOULD FURTHER SUBMIT THAT MAN WAS AS CANDID, HONEST ON THE STAND AS ANYONE ELSE WHO TESTIFIED IN THIS COURT.

MATT MCDONOUGH, JOHNNY'S SISTER'S FIANCE', TESTIFIED THAT BEFORE JOHN WOULD GO OVER AND PICK UP HIS BELONGINGS, HE WAS AFRAID AND HE WANTED HIM TO GO WITH HIM.

FINALLY, WE PRESENTED FOR YOUR CONSIDERATION, AFTER MUCH ADO, THE TESTIMONY OF JOHN LUCKETT. AND HE TOOK THE STAND AND TOLD HIS STORY.

I AM NOT GOING TO GO THROUGH ALL OF IT BECAUSE I THINK EACH ONE OF YOU HAD AN OPPORTUNITY TO LOOK AT HIM AND JUDGE HIS CREDIBILITY.

I DON'T KNOW HOW YOU EXPECT SOMEBODY TO ACT. I DON'T KNOW HOW MR. SEATON EXPECTS SOMEBODY TO ACT OR HOW MR. HARMON WILL SAY HE EXPECTED MY CLIENT TO ACT BECAUSE IF HE HAD GOTTEN UP THERE TWISTING, SQUIRMING, NERVOUS, THEY WOULD HAVE USED THAT AGAINST HIM.

HE GOT UP THERE AFTER GREAT REASSURANCE AND I PREPARED HIM FOR TRIAL AND HE TOLD THE TRUTH AND HE STUCK BY IT. AND HE WAS NOT SHAKEN ON CROSS-EXAMINATION AT ALL.

THERE SEEMS TO BE TWO PROBLEMS THE STATE HAS WITH BELIEVING WHAT JOHN LUCKETT SAID WAS THE TRUTH. FIRST OF ALL, HOW HE GOT OUT THERE THAT NIGHT. AND SECOND OF ALL, WHY DIDN'T HE GO RUNNING TO THE POLICE AFTER THIS OCCURRED OR AFTER IT WAS OVER?

WITH RESPECT TO HOW HE GOT OUT THERE, MR. HARMON ASKED HIM IF HE HAD A CAST ON HIS LEG. NO, HE DIDN'T HAVE A CAST ON HIS LEG. WHAT HE HAD WERE TWO OTHER PEOPLE WITH GUNS AND A KNIFE WHO WERE THREATENING HIM, WHO TOLD HIM HE HAD NO CHOICE, HE WAS COMING WITH THEM AND THAT WAS THE END OF IT.

AND HE DIDN'T HAVE A CHANCE TO WALK OUT AND SLIP OUT THE BACK DOOR BECAUSE EVERYBODY WAS THERE GETTING READY TO LEAVE AND HE WAS TOLD TO GO AND HE WENT.

HE WAS ALSO ASKED, "YOU HAD A GUN, WHY DIDN'T YOU

USE IT?" THIS IS THE GUN HE HAD. THIS IS THE GUN HE LOOKED DOWN THE BARREL OF, PLUS THE REVOLVER, PLUS A KNIFE.

AND I WILL TELL YOU, LADIES AND GENTLEMEN, IF HE HAD BEEN BURIED IN A FOXHOLE WITH A HELMUT, BULLETPROOF VEST, COUPLE OF CONCUSSION GRENADES, SOME FLARES, AN UZI MACHINE GUN, MAYBE HE WOULD HAVE STOOD HIS GROUND THAT NIGHT, YOU KNOW IT.

BUT ARE YOU TELLING ME THAT HE WOULD REFUSE TO DO WHAT THEY TOLD HIM UP TO THE POINT OF COMMITTING THE CRIMES AND STAND THERE AND BE A HERO? THAT'S RIDICULOUS.

IT GOT TO THE POINT WHERE HE GOT UP TO THAT HOUSE AND IT WAS THERE HE TOLD YOU FOR THE FIRST TIME HE HONESTLY KNEW THAT THAT WAS GOING TO BE THE SCENE OF A CRIME.

HE SAID NO AND HE BACKED OFF AND HE TOLD YOU THAT IN A TRUTHFUL AND CONVINCING MANNER, I SUBMIT TO YOU, LADIES AND GENTLEMEN, AND THERE IS NO CREDIBLE EVIDENCE TO THE CONTRARY.

MR. SEATON READ PARTS OF THE INSTRUCTION 29 ON DURESS. AND I AM NOT GOING TO READ THIS WHOLE INSTRUCTION BUT I WANT YOU TO LOOK AT 29 AND 30.

AND I WILL AGREE ABSOLUTELY THAT IF YOU BELIEVE THAT HE WAS COERCED INTO GOING UP TO THAT HOUSE AND IF YOU BELIEVE THAT HE PULLED THE TRIGGER OR IF YOU BELIEVE THAT HE STOOD THERE AND ENCOURAGED THESE PEOPLE AND WENT ALONG WITH EVERYTHING, IF YOU BELIEVE THAT, THEN HE IS GUILTY OF FIRST

DEGREE MURDER. THERE IS NO DOUBT ABOUT IT BECAUSE DURESS IS NOT A DEFENSE.

IT IS A DEFENSE TO BURGLARY, IT IS A DEFENSE TO CONSPIRACY TO COMMIT MURDER BUT IT'S NOT A DEFENSE TO MURDER.

BUT I WOULD SUBMIT TO YOU, LADIES AND GENTLEMEN, THAT HE DIDN'T GO SO FAR AS TO PARTICIPATE IN MURDER. HE STOPPED WELL SHORT.

INSTRUCTION 30, LET ME READ IT TO YOU. AN ACT DONE WILFULLY, IF DONE VOLUNTARILY AND INTENTIONALLY AND WITH THE SPECIFIC INTENT TO DO SOMETHING THE LAW FORBIDS, THAT IS TO SAY, WITH A PURPOSE EITHER TO DISOBEY OR DISREGARD THE LAW.

I SUBMIT TO YOU THAT MY CLIENT DID NOT GO VOLUNTARILY TO THE GORDONS' HOUSE THAT NIGHT OR INTENTIONALLY TO COMMIT A CRIME. HE WAS TOLD TO GO, HE KNEW TOO MUCH.

THEY COULDN'T TAKE CHANCES. HE DID WHAT HE WAS TOLD TO DO. "DON'T CROSS ME, OR SOMETHING WILL HAPPEN TO YOU OR YOUR FAMILY. DON'T CROSS ME OR THERE WILL BE HELL TO PAY."

INSTRUCTION 34, TO CONSTITUTE THE CRIME CHARGED THERE MUST EXIST UNION OR JOINT OPERATION OF AN ACT FORBIDDEN BY LAW AND AN INTENT TO DO THE ACT. THE INTENT WITH WHICH THE ACT IS DONE IS SHOWN BY THE FACTS AND CIRCUMSTANCES SURROUNDING EACH CASE.

AGAIN, LADIES AND GENTLEMEN, I SUBMIT THAT HE STOPPED SHORT OF THE COMMISSION OF ANY CRIME. THERE WAS NO CRIME COMMITTED IN THIS CASE, LADIES AND GENTLEMEN, EXCEPT

CONSPIRACY TO COMMIT MURDER UNTIL SOMEBODY BROKE THAT WINDOW. NO CRIME WAS COMMITTED UP TO THAT POINT.

AND BEFORE THAT POINT, JOHN LUCKETT DID EVERYTHING HE COULD REASONABLE UNDER THE CIRCUMSTANCES TO AVOID THIS CRIME.

INSTRUCTION 21, THIS IS VERY IMPORTANT. MERE PREPARATION TO ACCOMPLISH AN UNLAWFUL ACT DOES NOT CONSTITUTE AN ATTEMPT. MERE PREPARATION TO COMMIT A CRIME CONSISTS IN DEVISING OR ARRANGING THE MEANS OR MEASURES NECESSARY FOR THE COMMISSION OF THE OFFENSE.

WHILE AN ATTEMPT TO COMMIT A CRIME INVOLVES DIRECT MOVEMENT TOWARDS THE COMMISSION OF THE OFFENSE, AFTER THE PREPARATIONS HAVE BEEN MADE.

MR. SEATON GAVE YOU A COUPLE OF EXAMPLES AND I AM GOING TO GIVE YOU A COUPLE, TOO. TAKE BURGLARY, FOR EXAMPLE. NO WAY ANYBODY COULD COMMIT A BURGLARY UNTIL YOU GET TO THE SCENE OF THE BURGLARY. THAT IS THE SCENE OF THE HOUSE.

A BURGLAR OR WOULD-BE BURGLAR COULD GATHER UP HIS TOOLS, COULD GET HIS CONFEDERATES TOGETHER, MAKE UP STORIES AND UNTIL THERE IS AN ATTEMPT TO BREAK INTO THAT HOUSE, THERE IS NOT A BURGLARY OR THERE IS NOT AN ATTEMPT, I SHOULD SAY.

YOU HAVE GOT TO GO UP TO THAT HOUSE AND TRY TO GET IN BECAUSE UNTIL THEN YOU CAN ALWAYS TURN AROUND AND GO BACK. YOU CAN ALWAYS HAVE A CHANGE OF HEART.

THE SAME IS TRUE WITH MURDER. UNTIL SOMEONE

DRAWS DOWN THAT GUN AND TRIES TO SQUEEZE THAT TRIGGER, THERE IS NO ATTEMPT AT MURDER. YOU CAN THINK ABOUT IT ALL YOU WANT TO AND MAKE ALL THE PLANS AND PREPARATIONS YOU WANT TO, BUT UNTIL SOMEBODY PULLS THE TRIGGER, THERE IS NOT AN ATTEMPT AT MURDER.

WHAT HAPPENED IN THIS CASE IS THAT IT GOT UP TO THE POINT WHERE JOHN COULD SEE WHAT WAS HAPPENING AND IT WAS AT THAT POINT HE SAID NO. AND HIS WITHDRAWAL OCCURRED BEFORE THE CRIMES WERE COMMITTED, LADIES AND GENTLEMEN. AND THERE IS NO CREDIBLE EVIDENCE TO THE CONTRARY.

INSTRUCTION 13, YOU ARE INSTRUCTED THAT PRESENCE, COMPANIONSHIP, CONDUCT BEFORE, DURING AND AFTER THE OFFENSE ARE CIRCUMSTANCES FROM WHICH ONE'S PARTICIPATION IN THE CRIMINAL INTENT MAY BE INFERRED, CERTAINLY.

BUT MERE PRESENCE AT THE SCENE OF THE CRIME AND KNOWLEDGE THAT A CRIME IS BEING COMMITTED ARE NOT SUFFICIENT TO ESTABLISH THAT A DEFENDANT AIDED AND ABETTED THE CRIME UNLESS YOU FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS A PARTICIPANT AND NOT MERELY A KNOWING SPECTATOR.

PLEASE WRITE THAT DOWN, INSTRUCTION 33, BECAUSE ALL THE EVIDENCE SHOWS IN THIS CASE IS THAT MY CLIENT WAS PRESENT AND THAT TO SOME EXTENT HE KNEW WHAT WAS HAPPENING.

YOU HAVE TO SUPPOSE IN ORDER TO GO BEYOND THAT. THERE IS NO PROOF THAT HE DID MORE THAN THAT.

TO AID AND ABET IS TO ASSIST OR SUPPORT THE

EFFORTS OF ANOTHER IN THE COMMISSION OF A CRIME. WHAT DID HE DO? THE ONLY CREDIBLE EVIDENCE IN THIS CASE SHOWS HE SAID, "STOP." HE SAID, "LET'S LEAVE." HE HIMSELF FLED AND WAS OUT BY A CAR.

HOW IS THAT ENCOURAGING ASSISTING AND SUPPORTING CRIMINAL ACTIVITY?

IF HE WAS PART AND PARCEL TO THIS PLAN, HE WOULD HAVE COME AROUND THAT HOUSE WITH THE REST OF THEM WHEN TOM AKERS WAS OUT BY HIS CAR. BUT THAT IS NOT THE CASE. AND YOU HAVE TO, LADIES AND GENTLEMEN, SUPPOSE AND GUESS THAT HE DID MORE.

I WOULD SUBMIT TO YOU AND I CHALLENGE MR. HARMON TO TELL YOU WHAT EVIDENCE THERE IS IN THIS CASE WHICH PROVES BEYOND A REASONABLE DOUBT THAT HE AIDED AND ABETTED IN THE COMMISSION OF THESE OFFENSES. HE WILL NOT BE ABLE TO DO IT.

SECOND POINT THAT SEEMS TO GIVE PEOPLE PROBLEMS IS WHY DIDN'T HE GO TO THE POLICE? MR. HARMON ASKED HIM IF HE HAD LARYNGITIS, WHY HE DIDN'T GET ON THE TELEPHONE. HE DIDN'T HAVE LARYNGITIS.

HE HAD GOOD SENSE. HE HAD GOOD SENSE TO BE AFRAID FOR HIS OWN LIFE AND THE LIVES OF HIS FAMILY. AND HE IS A YOUNG KID, NOT AS MATURE AS YOU ARE, NOT AS SMART WITH AS GOOD JUDGMENT. HE MIGHT BE GUILTY OF BAD JUDGMENT BUT I AM NOT SURE I WOULD HAVE DONE ANYTHING DIFFERENT.

BECAUSE HE HAD JUST SEEN TWO BRUTAL MURDERS

COMMITTED. HE KNEW THERE WAS A GANG CALLED THE ACES GANG WITH LONG TENTACLES. PEOPLE THAT COULD REACH OUT TO INTIMIDATE, WHO HAVE REACHED OUT AND INTIMIDATED AND THAT IS WHY HE DIDN'T GO TO THE POLICE.

IT IS JUST MAKING A MOUNTAIN OUT OF A MOLEHILL TO SUGGEST HE SHOULD HAVE GONE RUNNING TO THE POLICE. I DON'T THINK ANYBODY YOU KNOW WOULD HAVE DONE THAT.

AT LEAST, HE DIDN'T HAVE THE COUNSEL OF THIS COURT APPOINTED WHO DIDN'T GET INVOLVED UNTIL HE WAS ARRESTED, THROWN IN JAIL. I WISH THAT WASN'T THE CASE. MAYBE IT WOULD HAVE BEEN A LITTLE DIFFERENT.

THE TRIP HE MADE OUT TO THE LAKE IS NOT INCONSISTENT WITH HIS INNOCENCE EITHER, LADIES AND GENTLEMEN, BECAUSE ALL THE TESTIMONY IN THIS CASE, AND THE ONLY EVIDENCE, IS THAT HE AND RANDY WENT FOR A DRIVE.

RANDY LEFT THE CAR, GOT OUT AND HAD A CONVERSATION WITH JOHN LUCAS. THEN THEY GOT BACK INTO THE CAR AND WENT TO THE LAKE. WHY DID HE GO GET JOHN LUCAS IF JOHN LUCKETT WAS GOING TO WILLINGLY PARTICIPATE IN THE DISPOSAL OF THE WEAPONS? THERE IS NO EVIDENCE HE KNEW THAT HE WAS GOING TO. LET THE STATE CHARGE HIM WITH ACCESSORY AFTER THE FACT TO MURDER.

HE MIGHT HAVE TO PLEAD GUILTY TO THAT. BUT NOT TO MURDER, LADIES AND GENTLEMEN. NOT BECAUSE SOME TWO WEEKS LATER HE WENT OUT AND DISPOSED OF THE MURDER WEAPON.

I SUBMIT IF HE WANTED TO, LIKE MR. SEATON SAID, "JOHNNY, YOU CAN DO BETTER THAN THAT," HE COULD HAVE DONE BETTER THAN THAT. HE COULD HAVE TOLD YOU A LOT DIFFERENT STORIES.

HE COULD HAVE MADE UP THINGS. HE COULD HAVE MINIMIZED HIS OWN INVOLVEMENT MORE THAN HE DID AND HE COULD HAVE MADE THINGS A LOT WORSE.

BUT HE COULDN'T HAVE TAKEN THE WITNESS STAND AND TESTIFIED COOLLY AND CALMLY IF HE HAD DONE THAT BECAUSE HE WOULD HAVE BEEN LYING. AND THE REASON HE WAS ABLE TO GET UP THERE AND TESTIFY COOLLY AND CALMLY IS BECAUSE HE WAS TELLING THE TRUTH WITHOUT EMBELLISHMENT.

I TOLD YOU IN MY OPENING ARGUMENT I HAD TO FACE THE TWO BEST PROSECUTORS IN CLARK COUNTY AND THAT'S PROBABLY THE TRUTH. THEY HAVEN'T MISSED A BEAT.

THEY HAVE TRIED TO AROUSE YOUR PASSION AND I WILL BET YOU THEY WILL DO IT AGAIN. THEY'RE TACTICALLY SOUND AND THEY HAVE GOTTEN ALL OUT OF THIS CASE THAT THEY CAN.

AND WITH THAT IN MIND, I ASK YOU, BECAUSE I AM NOT GOING TO HAVE ANOTHER CHANCE TO TALK WITH YOU, LADIES AND GENTLEMEN, TO CONSIDER WHAT I WOULD SAY IN RESPONSE TO AN ARGUMENT THAT IS GOING TO BE PRESENTED TO YOU BY MR. HARMON BECAUSE I WILL BET YOU THE STATE HAS SAVED THE BEST FOR LAST.

I AM GOING TO ASK YOU TO CONTINUE TO HAVE PROUD SKEPTICISM JUST LIKE I DID IN THE FIRST OF THIS CASE,

BECAUSE WITHOUT IT, LADIES AND GENTLEMEN, I CAN'T REBUT WHAT IS TO COME. I ASK YOU TO CONTINUE TO BE PROUD AND SKEPTICAL.

AND SOMEONE ON THAT JURY ARGUE FOR ME WHEN YOU GO BACK THERE FOR THIS YOUNG MAN. AND I HAVE HAD MORE TO WORRY ABOUT THAN MR. HARMON AND MR. SEATON. I HAVE TWO OTHER LAWYERS WHO HAVE BEEN LIKE PROSECUTORS BECAUSE WE HAVE BEEN ON A LONE POINT IN THIS CASE.

THE ASSOCIATION BETWEEN THE THREE OTHER CODEFENDANTS IN THIS CASE IS SCARY. THE ACES GANG, ROY AS THE LEADER, RANDY AS A MEMBER, MIKE WALSH IS IN THERE. SO IS JOHN LUCAS.

THE BROTHERS, OR WHO ARE ALMOST LIKE BROTHERS, DALE, RANDY AND MIKE, THE OCCULT, DALE AND RANDY LEAD A COVEN. SELF-CONFESSED MURDERERS, AT LEAST, CONFESSED TO THEIR FRIEND MIKE, DALE AND RANDY.

IT'S NOT HARD TO UNDERSTAND HOW THEIR LOYALTIES ARE A LOT HIGHER TO THEMSELVES THAN THEY ARE TOWARD THE TRUTH AS FAR AS WHAT JOHN LUCKETT DID. AND THEY KNOW AND THEY KNEW THAT IF HE TESTIFIED, WHAT HE WOULD SAY.

I WOULD SUBMIT TO YOU THAT A CHILD OF THREAT AND INTIMIDATION WAS BORN ON THE NIGHT OF THE 5TH AND 6TH OF NOVEMBER IN THE FORM OF GENERAL THREATS TO KEEP YOUR MOUTH SHUT. WE HAVE GOT TO COVER UP THIS PLAN.

THAT CHILD GREW AS THE TESTIMONY OF JOHN LUCAS WAS DELIVERED IN COURT AT THE PRELIMINARY HEARING. IT GREW

AS THE TESTIMONY CHANGED AND TURNED AS JOHN LUCAS TESTIFIED IN COURT DURING THIS TRIAL IN AN ENDEAVOR TO PROTECT ROY MCDOWELL CONTRARY TO STATEMENTS PREVIOUSLY MADE AND ALSO WITH RESPECT TO MIKE WALSH.

AND FINALLY, LADIES AND GENTLEMEN, THAT CHILD BURST INTO THIS COURTROOM IN THE FORM OF A MONSTER AND THAT MONSTER WAS SCOTT SLOANE, CONVICTED KIDNAPER, RAPIST AND MURDERER.

AN OBVIOUS PERJURER, WHO AUTHORED THREATENING LETTERS TO MY CLIENT IN JAIL, WHO CONFEDERATED WITH ROY MCDOWELL AND THE OTHER CODEFENDANTS IN THIS CASE TO INTIMIDATE JOHN LUCKETT AND KEEP HIM OFF THE STAND. AND THAT IS HORRIBLE. IT IS THE WORST THING I HAVE EVER SEEN SINCE I HAVE BEEN PRACTICING LAW.

I AM GOING TO READ EXHIBIT C WHICH SCOTT SLOANE SENT TO MY CLIENT IN THE FIRST PART OF SEPTEMBER AND YOU LISTEN TO THIS, PLEASE.

"I AM GOING TO MAKE THIS REAL SHORT AND SIMPLE. ROY GOT BACK FROM COURT TODAY AND TOLD ME ALL THE SHIT SAID ABOUT ME. WELL, LET ME TELL YOU SOMETHING. I GO FOR AN APPEAL MOTION IN TWO WEEKS AND IF I GET OUT ON BAIL, I WON'T HAVE ANY SECOND TRIAL FOR ABOUT TWO YEARS. THAT MEANS I WILL BE OUT ON THE STREETS WHEN YOU GO TO TRIAL.

"WELL, JOHN, IF THAT HAPPENS I AM GOING TO BURN YOU AT TRIAL. I'LL MAKE SURE YOU NEVER GO HOME AGAIN AS LONG

AS YOU LIVE.

"AND IF I GO TO PRISON, I WILL BE THERE FOR ABOUT TWO YEARS UNTIL MY NEXT TRIAL. AND IF I SEE YOU THERE, I MAKE SURE YOU DON'T LIVE LONG AT ALL EVEN IF IT MEANS ME GETTING BUSTED OR GETTING MYSELF KILLED. BUT I WILL GET YOU IF IT'S THE LAST THING I EVER DO."

IT GOES ON IN ANOTHER PART, "YOU BETTER HOPE YOU DON'T GET OUT ON THE STREETS. BETWEEN YOU AND ME, YOU HAVE EVERY ONE OF THE ACES, EVERY ONE OF THE ACES AFTER YOU BECAUSE OF ALL THE SHIT YOU SAID ABOUT HIM."

PROBABLY MIKE WALSH AT THIS TIME. "AND WITHOUT LYING AT ALL, I HAVE ABOUT TEN PEOPLE WHO ARE GOING TO KILL YOU IF YOU ARE FOUND INNOCENT."

THIS IS CONVICTED MURDERER SCOTT SLOANE WRITING TO JOHN LUCKETT ABOUT HIS TESTIMONY IN THIS CASE. "WELL, JOHN, TRUST ME, AT YOUR TRIAL, I AM GOING TO BURN YOU.

"JUST TO LET YOU KNOW, DAN SEATON AND MY ATTORNEY HAVE SOMETHING SET UP TO GET ROY OFF AND TO BURN YOU. DO YOU UNDERSTAND? I WILL BE GETTING ON THE STAND AND TESTIFYING THAT YOU CONFESSED EVERYTHING TO ME. SO YOU WILL GO DOWN. SIGNED, BYE YOU ASSHOLE, SCOTTY SLOANE."

HOW DO YOU LIKE THAT? NOW, WHY IN THE WORLD WOULD SOMEBODY WRITE SOMETHING LIKE THAT IF THEY WEREN'T TRYING TO INTIMIDATE THIS YOUNG MAN. THE NEXT LETTER D COMES ABOUT A WEEK LATER AND RECANTS ALL THE EVENTS THAT HE WAS

SUPPOSED TO HAVE SAID.

IF HE HAD CONFESSED, WHY WOULD SCOTT SLOANE IN HIS SICK, STUPID WAY BRING A LETTER TO RECANT ALL OF THESE STATEMENTS. HE DID IT TO LET JOHN LUCKETT KNOW THAT IF HE TESTIFIED, HE WOULD COME IN AND THESE ARE THE LIES THAT HE WOULD SAY.

THERE IS NO OTHER, AND I RESPECTFULLY SAY THIS, THERE IS NO OTHER LOGICAL EXPLANATION.

I COULDN'T BELIEVE HOW SICK THIS SITUATION COULD BECOME. AND HOW FAR THE THREATS AND INTIMIDATION WOULD GO UNTIL I SAW WHAT SLOANE HAD TO SAY.

THERE IS POTENTIAL FOR ENORMOUS HUMAN TRAGEDY IN THIS CASE, LADIES AND GENTLEMEN, AND THAT HUMAN TRAGEDY, APART FROM THE TRAGEDY WHICH HAS OCCURRED, IS THAT A YOUNG MAN COULD BE CONVICTED ON SUPPOSITION, POSSIBILITIES AND PROBABILITIES BECAUSE HE INDEED HAPPENED TO BE A VICTIM OF CIRCUMSTANCES.

IN LAS VEGAS, I AM SURE YOU KNOW ABOUT THE GAME OF CRAPS. THAT'S WHERE PEOPLE PUT MONEY ON THE LINE, DIFFERENT PLACES TAKE DIFFERENT ODDS, THROW THE DICE AND IT IS A GOOD GAME BECAUSE YOU CAN PLAY THE ODDS.

WELL, LADIES AND GENTLEMEN, THIS TRIAL IS NOT LIKE A CRAP GAME. IT'S NOT BASED ON ODDS, NOT ON HUNCHES, POSSIBILITIES OR PROBABILITIES.

THERE IS ONE RULE BY WHICH THIS GAME IS PLAYED

AND THAT IS PROOF BEYOND A REASONABLE DOUBT. THE ONLY CRAP GAME THAT WE HAVE BEEN EXPOSED TO IS THE GAME PLAYED BY THE OTHER DEFENDANTS TO INTIMIDATE MY CLIENT AND EVIDENCE THEY HAVE PUT ON.

THE EVIDENCE BY THE LITTLE GIRL WHO CAME IN, MISS STEWART, TO SAY THAT TOM APPEARED TO MAKE UP STORIES TO LIE FOR JOHN LUCKETT. THAT WAS REFUTED BY THE OTHER GIRL THAT I CALLED.

THE TESTIMONY OF MRS. LUCAS WHO SAID SHE GAVE RANDY THE GUN ON THE 6TH OF NOVEMBER WHEN THESE CRIMES OCCURRED ON THE 5TH OF NOVEMBER. IT'S A DESPERATE CRIME. IT'S A DESPERATE GAME.

AND WITHOUT TRYING TO BE FUNNY, I SUBMIT THAT THAT IS A CRAP GAME, THAT IS A BUNCH OF CRAP BECAUSE THEY HAVE TRIED TO FRAME THIS KID, THEY HAVE TRIED TO BRING HIM DOWN TO SAY THEY MISSED. BELIEVE IT, LADIES AND GENTLEMEN, IT'S TRUE.

I WILL TELL YOU, IT'S A VERY, YOU KNOW, TOUGH THING TO CONCLUDE AN ARGUMENT WHEN YOU HAVE TRIED TO SAY ALL YOU CAN. YOU KNOW, MR. SEATON COMPLIMENTED ME THAT I AM COMPETENT, BUT I WILL TELL YOU, AT A TIME LIKE THIS WHEN I AM REPRESENTING THIS YOUNG MAN AND HIS FUTURE, I COULD NEVER FEEL MORE INADEQUATE.

ALL I CAN TELL YOU IS THAT WHEN YOU GO HOME FROM THIS CASE, YOU CAN DO SO WITH A CLEAR CONSCIENCE IF YOU FIND

THIS YOUNG MAN NOT GUILTY, BECAUSE IN YOUR HEART, YOU WILL KNOW THAT THE STATE HAS NOT PRODUCED EVIDENCE TO PROVE HIM GUILTY BEYOND A REASONABLE DOUBT.

YOU CAN BE PROUD OF THAT AND YOU CAN WALK TALL AS AMERICAN CITIZENS WHO HAVE DONE YOUR PART FOR THE AMERICAN DREAM THAT THERE CAN BE JUSTICE FOR ALL AND THAT THE RULE OF LAW HAS BEEN OBEYED. THANK YOU.

THE COURT: THANK YOU, MR. SMITH. LADIES AND GENTLEMEN, WE WILL TAKE A BREAK AT THIS TIME.

(THE ADMONITION WAS READ.)

THE COURT: I WOULD ASK OUR GALLERY, WHEN WE RETURN AS YOU SEAT YOURSELF, PLEASE MOVE TO THE END OF THE BENCH SO WE WON'T HAVE THE CROWDING THAT WE HAVE HAD. WE WILL TAKE APPROXIMATELY 20 MINUTES. COURT IS IN RECESS.

(RECESS TAKEN.)

THE COURT: THE CONTINUATION OF CASE C69269, STATE OF NEVADA VERSUS DALE FLANAGAN, RANDOLPH MOORE, JOHN LUCKETT AND ROY MCDOWELL.

THE RECORD WILL REFLECT THE PRESENCE OF EACH OF THE DEFENDANTS AND THEIR RESPECTIVE COUNSEL, MR. HARMON AND MR. SEATON REPRESENTING THE STATE AND THE ABSENCE OF THE JURY.

MR. POSIN, YOU HAVE A MOTION?

MR. POSIN: YES. IF YOUR HONOR PLEASE, AT THIS TIME I WOULD MOVE FOR A MISTRIAL PREDICATED UPON THE

STATEMENTS MADE BY MR. SEATON IN HIS OPENING REMARKS.

THE COURT: HIS CLOSING REMARKS?

MR. POSIN: HIS OPENING CLOSING REMARKS, IF YOU WOULD, YES.

HE SPOKE IN TERMS OF NO ONE COMING FORWARD TO DISPUTE CERTAIN AREAS OF EVIDENCE. AND THE IMPLICATION AS I HEARD IT, AND AS I WOULD BELIEVE THE JURY UNDERSTOOD IT, WAS THAT HE WAS MAKING IMPROPER COMMENT ON THE DEFENDANTS, PARTICULARLY, MY CLIENT, EXERCISING THEIR CONSTITUTIONAL RIGHT NOT TO TAKE THE WITNESS STAND AND NOT TO TESTIFY.

THAT WAS WHAT WE FEEL TO BE IMPLICIT IN THE STATEMENT, NOT JUST ONCE, BUT TWICE DURING THE COURSE OF THAT ARGUMENT. WE FEEL IT WAS HIGHLY PREJUDICIAL.

WE FEEL THAT IT WILL CAUSE THE JURY OR PROSPECTIVELY RESULT IN THE JURY NOT GIVING THE FULL CREDENCE TO THE COURT'S INSTRUCTION THAT IT MIGHT OTHERWISE GIVE. WE FEEL IT IS IMPROPER ARGUMENT. ON THAT BASIS, WE ASK THE COURT TO DECLARE A MISTRIAL.

THE COURT: THANK YOU, MR. POSIN.

MR. PIKE: BEFORE THE STATE RESPONDS, I JOIN IN MR. POSIN'S MOTION. IT IS NOT SO MUCH THE ARGUMENTS ABOUT UNREBUTTED TESTIMONY OR THE REST OF THAT THAT I FOUND OBJECTIONABLE. WHAT I DID FIND OBJECTIONABLE WAS THE DIRECT QUESTIONS THAT WERE PROPOUNDED TO THE DEFENDANTS THAT CHOOSE NOT TO TAKE THE STAND, "DID YOU REALLY SAY THAT?"

THAT IS A QUESTION THAT IS BEGGING FOR A RESPONSE AND THAT IS DIRECTED AT A DEFENDANT THAT NEVER TOOK THE STAND. A QUESTION THAT COULD NEVER BE ANSWERED, AND DID NOT HAVE TO BE ANSWERED BUT WAS ASKED BY THE PROSECUTOR.

ADDITIONALLY, MR. SEATON TOOK GREAT DETAIL INTO COMMENTING ON THE PORTION OF THE TESTIMONY REGARDING MAGIC, OCCULT, DEVIL WORSHIP, BLACK MAGIC, WHITE MAGIC. THEY CONCEDED PRIOR TO THE TRIAL THEY WOULDN'T BRING THAT IN AS AGAINST MY CLIENT AND I APPRECIATE THEM BEING METICULOUS ABOUT DOING IT.

BUT WHEN MR. SMITH AND THE REST OF THE DEFENDANTS QUESTION INTO THAT, IT WOVE ITS UGLY WEB AROUND DALE. AND SO WE HAVE BEEN SO PREJUDICED BY THOSE COMMENTS WHICH HAVE BEEN DIRECTED TOWARDS DALE FLANAGAN THAT EVEN AT THIS LATE DATE, THE MOTION FOR SEVERANCE SHOULD BE GRANTED. BASED UPON THE STATEMENTS BY MR. SEATON, A MISTRIAL SHOULD BE GRANTED.

THE COURT: THANK YOU.

MR. HANDFUSS: I WOULD JOIN WITH MR. POSIN AND MR. PIKE. UNDER THE FIFTH AMENDMENT, I BELIEVE MR. SEATON'S ARGUMENT SHIFTED THE BURDEN OF PROOF SO THAT THE DEFENDANTS, ESPECIALLY IN MY CASE, MR. MCDOWELL, WILL HAVE TO GET UP COMMENTING WHY MR. MCDOWELL DID NOT GET UP ON THE STAND AND PRESENT EVIDENCE TO THE OPPOSITE.

THERE WAS A STATEMENT BY THE STATE TO THE EFFECT THAT, "ROY MCDOWELL DID NOT REBUT THIS. ROY MCDOWELL DID NOT

PUT ON EVIDENCE TO REBUT THIS. THIS WAS NOT REFUTED BY MR. MCDOWELL." I THINK IT ROSE TO THE LEVEL TO SHIFT THE BURDEN OF PROOF IN THIS PARTICULAR CASE.

IN ADDITION, STATEMENTS BY THE STATE TO THE EFFECT THAT THEY WERE ALL INVOLVED IN DEVIL WORSHIP, IT WAS CLEAR FROM THE EVIDENCE THAT THE THREE DEFENDANTS, REMAINING DEFENDANTS OTHER THAN MR. MCDOWELL, MIGHT HAVE HAD SOME CONTACT, BUT THERE WAS AFFIRMATIVE EVIDENCE THAT ROY MCDOWELL HAD ABSOLUTELY NO CONTACT OR HAD NO CONTACT WITH COVENS OR DEVIL WORSHIP, WHATSOEVER.

THE TESTIMONY OF MR. WITTIG AND, I BELIEVE, MISS SALDANA WAS JUST TO THE OPPOSITE, THAT ROY MCDOWELL WAS NEVER INVOLVED IN SOMETHING LIKE THAT. THEY NEVER SAW HIM THERE.

THAT IS NOT ONLY MISCHARACTERIZATION OF THE EVIDENCE BUT THAT IS SOMETHING THEY SAID THEY WOULD NOT DO IN THEIR AFFIRMATIVE PLEADINGS.

ONE OF THE BASES FOR MY MOTION FOR SEVERANCE IS THE DEVIL WORSHIP-COVEN ISSUE. THE STATE RESPONDED IN WRITTEN PLEADINGS STATING THEY WILL NOT BRING IT UP, IT IS NOT AN ISSUE WITH THEM.

AT THE TIME OF TRIAL, THEY GO AHEAD, TELL THE JURY THAT ALL OF THE DEFENDANTS INCLUDING MR. MCDOWELL WAS INVOLVED IN THIS.

I THINK THAT IS IMPROPER. IT SHIFTS THE BURDEN OF PROOF. AND I WOULD MOVE ALSO FOR SEVERANCE. FOR A

MISTRIAL AND, IN THE ALTERNATIVE, A SEVERANCE IN THIS CASE.

THE COURT: MR. SMITH.

MR. SMITH: I WILL JOIN IN THE MOTIONS OF OTHER COUNSEL.

THE COURT: THANK YOU. COUNSEL FOR THE STATE.

MR. SEATON: THANK YOU, YOUR HONOR. AS TO MR. POSIN'S COMMENT ABOUT MY REMARKS TO THE JURY ABOUT THE FACT THAT NO ONE HAD COME FORWARD TO DENY OR TO REBUT OR ANYTHING LIKE THAT. THE CASE LAW IS ABUNDANT IN THIS STATE AND OTHER JURISDICTIONS THAT ALLOWS COMMENTS LIKE THAT AS LONG AS THERE ISN'T ALLUDING DIRECTLY TO THE DEFENDANT'S FAILURE TO TAKE THE STAND.

THAT WAS THE FURTHEST THING FROM MY MIND. WE HAD A LOT OF PEOPLE ON THE STAND WHO TOOK THE STAND AND RIGHTFULLY SO AND HAD THE OPPORTUNITY TO SAY THESE THINGS AND IT WAS UPON THEIR FAILURE OF TESTIMONY THAT I WAS COMMENTING.

I WAS REALLY SURPRISED WHEN MR. POSIN MADE HIS OBJECTION AND REALLY WHAT HAPPENED WAS HE WAS THE ONLY PERSON IN THIS TRIAL WHO HAS CALLED THE JURY'S ATTENTION TO THE FACT THAT HIS CLIENT DID NOT TESTIFY BY HIS OBJECTION.

MR. PIKE COMPLAINED ABOUT MY QUESTIONS TO THE DEFENDANTS ABOUT THINGS LIKE, "DID YOU REALLY SAY SOMETHING LIKE THAT?" MR. PIKE, I THINK, FORGETS THE DIFFERENCE BETWEEN A QUESTION WHICH CALLS FOR A RESPONSE AND A RHETORICAL QUESTION THAT IS PART OF ARGUMENT.

IT CAN BE SAID IN MANY DIFFERENT WAYS AND IT ABSOLUTELY DOES NOT CALL UPON THE DEFENDANTS TO MAKE ANY SORT OF A RESPONSE. IT RATHER IS A COMMENT ON THEIR CHARACTER. ARE THEY THE KIND OF PERSON WHO COULD HAVE SAID OR DONE SUCH A THING?

AND AS TO THE LATTER TWO COUNSELS' CONCERN THAT THE STATE IS NOW TALKING ABOUT WITCHCRAFT, IT'S TRUE; MR. HARMON AND I WENT INTO THIS TRIAL, WE SAID AND WE ALWAYS HELD TO IT, THAT AS FAR AS WE WERE CONCERNED, WITCHCRAFT WAS NOT A PART OF THIS TRIAL AND WE WERE NOT GOING TO BRING IT OUT IN ANY WAY AND WE NEVER DID.

BUT, NOW, AM I TO UNDERSTAND COUNSEL DOESN'T WANT US TO COMMENT ON SOME OF THE EVIDENCE? WHEN THAT EVIDENCE WAS RAISED, THEY MADE THEIR NEW MOTION FOR SEVERANCE. IT WAS DENIED BY THIS COURT. THE EVIDENCE CAME IN OVER THEIR OBJECTION AND HERE IT IS LAYING IN FRONT OF THE JURY.

I AM GOING TO COMMENT ON EVERY PIECE OF EVIDENCE I CAN AND SO THAT SHOULD NOT BE A PROBLEM AT ALL WITH THIS COURT. I THINK ALL OF THEIR MOTIONS FOR MISTRIALS ARE MISPLACED AT THIS TIME.

THE COURT: THANK YOU. CONCERNING MR. POSIN'S POINT, ALLUDING TO MR. SEATON'S COMMENT OF THE NATURE THAT NO ONE HAS COME FORWARD TO REFUTE, ET CETERA, I WOULD HAVE TO CONCEDE THAT IT COULD BE CONSTRUED IN A MANNER IN WHICH MR. POSIN HAS SUGGESTED.

BUT I THINK LARGELY IT WOULD BE CONSTRUED MORE AS IT WAS INTENDED AND THE TENOR OF THE COMMENT AND THE WAY IT WAS PRESENTED ON TWO OCCASIONS LED ME TO BELIEVE THERE WAS NO INTENT TO DRAW ATTENTION TO THE FACT THAT THE DEFENDANTS HAD NOT TESTIFIED. MERELY THAT THERE WAS A LACK OF EVIDENCE ON THE PART OF OTHER WITNESSES.

I THINK THE COMMENT COULD HAVE BEEN PERHAPS BETTER MADE IF IT HAD BEEN STRUCTURED IN SOMETHING OF THE FOLLOWING NATURE, "THAT NO INDEPENDENT WITNESS HAS COME FORWARD TO TESTIFY IN A PARTICULAR AREA."

BUT I DON'T THINK ON BALANCE THAT DAMAGE WAS DONE. IF I WERE TO READMONISH THE JURY AS TO THE JURY INSTRUCTION, SOMETHING OF THAT NATURE, I THINK THAT MIGHT BE AS DAMAGING AS IT WOULD BE TO AN ADVANTAGE BECAUSE IT AGAIN DRAWS ATTENTION AND I DON'T THINK THAT THAT HAS BEEN SINGLED OUT AND ENLARGED UPON TO THE EXTENT IT IS DAMAGING AT THIS JUNCTURE.

HOWEVER, IF COUNSEL MUTUALLY WOULD REQUEST SUCH AN ADMONITION, I MIGHT CONSIDER IT BUT I DON'T KNOW THAT IT WOULD BE NECESSARY AT THIS POINT.

CONCERNING THE POINT THAT MR. PIKE MAKES, SOMETHING WHEN HE ASKED THE VARIOUS DEFENDANTS, "DID YOU REALLY SAY SUCH AND SUCH?" THAT COMMENT IS CLEARLY RHETORICAL IN NATURE IN MY OPINION.

IT IS A METHOD OF EMPHASIZING A POINT AND IT IS

NOT IMPROPER TACTIC, ALTHOUGH I CAN SEE MR. PIKE'S POINT. IT IS MINUSCULE, I THINK, WHEN YOU LOOK AT THE CONTEXT IN WHICH THE QUESTION WAS USED AND THE NATURE OF WHAT WAS BEING SAID.

CONCERNING MR. HANDFUSS'S POINT THAT HIS CLIENT WAS REFERRED TO ALONG WITH ALL OTHERS ENGAGED IN THE BUSINESS OF DEVIL WORSHIP. MR. HANDFUSS, IF IN CLOSING OR IN OPENING FOR THAT MATTER, SOMETHING IS INCORRECTLY REPEATED, OR CLOSING PARTICULARLY, OR TESTIMONY IS RECALLED INACCURATELY, IT IS INCUMBENT UPON COUNSEL TO CLARIFY THE MATTER AT THAT TIME.

I THINK YOU ARE CORRECT IN YOUR RECOLLECTION OF THE TESTIMONY. I DON'T BELIEVE YOUR CLIENT WAS INVOLVED OR IMPLICATED IN ANY WAY WITH THIS DEVIL WORSHIPING AND HE WAS LUMPED IN AS ALL DEFENDANTS ON ONE OCCASION, I THINK, AT LEAST AND PERHAPS OTHERS.

YOU, I THINK, MIGHT BRING THAT POINT UP TO THE JURY IN YOUR CLOSING. BUT I THINK THE PROPER REMEDY IS TO BRING IT UP AT THE TIME SO WE CAN ALL REFLECT AND SEE WHAT THE ACCURATE TESTIMONY WAS AND WHAT OUR RECOLLECTIONS WERE.

AGAIN, IT IS, I THINK, INSIGNIFICANT REALLY PARTICULARLY SINCE YOU ARE GOING TO HAVE AN OPPORTUNITY TO REFUTE IT AT THIS JUNCTURE.

I WOULD ALSO INDICATE THAT MR. PIKE -- I BELIEVE MR. PIKE AND PERHAPS MR. HANDFUSS INDICATED THAT THE COMMENT CONCERNING BLACK MAGIC SHOULD NOT HAVE BEEN MADE BY THE

STATE.

I AGREE 100 PERCENT WITH WHAT MR. SEATON SAID. HE INDICATED HE WOULD NOT INTRODUCE THIS SUBJECT. HE DIDN'T SAY HE WOULDN'T COMMENT ON IT AFTER IT WAS BROUGHT INTO EVIDENCE. THAT IS JUST FAIR COMMENT ON THE EVIDENCE AT THIS POINT.

SO IN MY JUDGMENT THE MOTIONS FOR MISTRIAL ARE NOT WELL-FOUNDED AND WILL BE DENIED. IS THERE ANYTHING ELSE OUTSIDE THE PRESENCE OF THE JURY?

MR. PIKE: NO, YOUR HONOR.

THE COURT: WHO WILL BE NEXT IN CLOSING?

MR. PIKE: I WILL, YOUR HONOR.

THE COURT: WILL THE BAILIFF BRING THE JURY IN, PLEASE.

(JURY ENTERS THE COURTROOM.)

THE COURT: WILL COUNSEL STIPULATE ALL MEMBERS OF THE JURY ARE PRESENT AND PROPERLY SEATED?

MR. HARMON: THE STATE DOES, YOUR HONOR.

MR. PIKE: SO STIPULATED.

MR. HANDFUSS: YES, YOUR HONOR.

MR. SMITH: SO STIPULATED.

MR. POSIN: YES, YOUR HONOR.

THE COURT: MR. PIKE.

MR. PIKE: THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT, COUNSEL FOR THE STATE, DEFENSE COUNSEL, DEFENDANTS

AND DALE, AND, ESPECIALLY, LADIES AND GENTLEMEN OF THE JURY.

I WOULD LIKE TO JOIN ALONG WITH THE OTHER ATTORNEYS AND THANK YOU FOR THE TIME AND THE ATTENTION THAT YOU HAVE PUT INTO THIS CASE. IT SEEMS LIKE THERE WERE DAYS WHEN YOU WOULD COME AND HEAR ONE OR TWO HOURS WORTH OF TESTIMONY AND SPEND THE REST OF THE TIME GETTING TO KNOW THE HALL A LITTLE BIT BETTER. YOU KNOW THE HALL REAL WELL.

AND LIKE MR. SMITH SAID, WE ARE IN HERE AND WE WERE FIGHTING LEGAL BATTLES AND WE WERE TRYING TO ACCOMPLISH THINGS AS QUICKLY AS WE COULD SO THAT WE COULD GET THE EVIDENCE TO YOU.

AND THANKS TO THE EFFORTS OF THE ATTORNEYS, BOTH ON THE STATE, THE DEFENSE AND THROUGH HIS HONOR, YOU HAVE GOT TO CONSIDER ALL THE RELEVANT, LEGALLY ADMISSIBLE EVIDENCE BEFORE YOU.

AND NOW I AM JUST GOING TO ASK YOU TO MAKE A DECISION. I AM NOT GOING TO SPEND THE TIME THAT MR. SEATON AND MR. SMITH DID. I HAVE BEEN FIGHTING A COLD AND SO I HAVE TRIED TO REDUCE MY REMARKS DOWN AS BRIEF AS I CAN.

AT THE BEGINNING OF THE TRIAL, I TOLD YOU THAT YOU HAD A REALLY UNENVIABLE POSITION. YOU HAVE TO SIT AND SIFT THROUGH EACH AND EVERY BIT OF THAT EVIDENCE AND EACH AND EVERY WITNESS THAT GOT ON THE STAND AND DECIDE, "OKAY, THAT POINTS TOWARDS JOHNNY, THAT TENDS TO MAKE ME FEEL AS THOUGH HE IS GUILTY OR THAT EVIDENCE TENDS TO MAKE ME FEEL LIKE HE

IS NOT GUILTY."

AND THEN YOU HAVE TO DO IT FOR EACH OF THE SEPARATE ONES, JOHN, ROY, DALE AND RANDY. YOU HAVE TO DO IT FOR EACH OF THOSE FOUR YOUNG MEN AND THAT IS A MONUMENTAL TASK TO DO.

YOU HAVE NOTICED AND IT'S BEEN NO SECRET THAT WE HAVEN'T ALWAYS AGREED. IT'S A MATTER OF COURTROOM. WE ONLY HAD SO MUCH SPACE SO WE HAVE TO SIT THE WAY WE GOT TO SIT. DOESN'T MEAN THAT YOU CAN GROUP THE TWO DEFENDANTS TOGETHER. YOU CAN'T GROUP ROY AND JOHNNY RAY TOGETHER. YOU CAN'T GROUP DALE AND RANDY TOGETHER.

THAT IS JUST THE WAY WE ARE SITTING. AND YOU HAVE HEARD US ARGUE AMONG EACH OTHER AND I AM SURE YOU HAVE PROBABLY SEEN US SMILE AMONG OURSELVES.

ALL THE ATTORNEYS KNOW EACH OTHER. WE WORKED TOGETHER IN A NUMBER OF CASES AND WE HAD TO SPEND THE LAST TWO AND A HALF WEEKS GETTING TO KNOW EACH OTHER BETTER.

SO THERE ARE TIMES WE SMILED, JOKED BACK AND FORTH. THAT DOESN'T MEAN WE ARE GIVING UP OUR POSITIONS, ALIGNING OURSELVES WITH ANYBODY BECAUSE THE PERSON I AM HERE TO REPRESENT TODAY IS DALE AND THAT'S THE ONLY PERSON I AM HERE TO REPRESENT.

AT TIMES SITTING WHERE I HAVE, I HAVE FELT KIND OF LIKE THE PERSON THAT OWNED THE PROPERTY BETWEEN THE HATFIELDS AND THE MCCOYS.

AND AS MR. POSIN AND MR. SMITH FOUGHT BACK AND FORTH CONCERNING THEIR CLIENTS, AND MR. HANDFUSS AND MR. SMITH FOUGHT BACK AND FORTH ON PIECES OF EVIDENCE, ON ADMISSIBILITY, ON INTERPRETATION OF EVIDENCE, I HAVE SAT THERE WITH DALE.

NOW, DALE WASN'T A MEMBER OF THE ACES GANG. DALE WASN'T THERE WHEN THAT GUN WAS THROWN OUT. MR. SMITH INDICATED THAT HE WAS.

THAT WAS JUST A MISSTATEMENT, IT WAS A SLIP AND I AM SURE HE DIDN'T MEAN ANYTHING BY THAT. HE MERELY JUST MISSPOKE HIMSELF AND I AM SURE HE WOULD TELL YOU THAT.

I AM NOT GOING -- THE ONLY REASON I MENTION THAT IS I AM NOT GOING TO ADDRESS THE SUBPLOT THEORY BECAUSE DALE COULD NOT POSSIBLY BE INVOLVED IN ANY WAY.

HE'S NEVER ROOMED WITH SLOANE. HE'S NEVER, ACCORDING TO SLOANE'S TESTIMONY, NEVER HAD ANYTHING TO DO WITH HIM, NEVER HAD ANY PHYSICAL CONTACT WITH HIM. THE ONLY PERSON THAT SLOANE EVER ROOMED WITH WERE THE PEOPLE THAT HE MENTIONED. HE NEVER MENTIONED DALE.

DALE WASN'T A MEMBER OF THE ACES. AND WHEN MR. SMITH AND MR. SEATON ARE PAINTING SLOANE'S TESTIMONY, THEY ARE USING A BROAD BRUSH AND IT IS JUST SPILLING OVER ONTO DALE. THERE IS NO REASON THAT IT SHOULD BECAUSE THE EVIDENCE WASN'T THAT WAY.

THIS CASE IS THE TYPE OF A CASE THAT REQUIRES A

PROSECUTOR TO PRODUCE THE CLEAREST AND THE MOST CONVINCING EVIDENCE.

THE PROOF THAT YOU SHOULD REQUIRE TO REMOVE ALL THE REASONABLE DOUBTS FROM YOUR MIND SHOULD BE STRONG AND SATISFACTORY AS THE CRIMES THAT ARE CHARGED ARE THE MOST HEINOUS CRIMES THAT YOU CAN IMAGINE SAVE AND EXCEPT THE SAME CRIME THAT SCOTT SLOANE WAS CHARGED WITH.

THEY ARE ATROCIOUS, THEY ARE DETESTABLE AND A GREAT PRESUMPTION OF INNOCENCE SHOULD REST ON DALE AS THE FINDING OF GUILT IN THIS CASE INDICATES SUCH AN ENORMOUS CULPABILITY THAT YOU SHOULD STAND FIRM BY THAT PRESUMPTION OF INNOCENCE.

NO ONE'S CONTESTED THROUGHOUT THIS WHOLE PROCEEDING THAT THE GORDONS WERE KILLED, AND THE OTHER CRIMES -- I CAN JOIN WITH MR. SMITH IN SAYING THAT THOSE CRIMES OCCURRED.

THE QUESTION IS HOW ARE ANY OF THESE FOUR YOUNG MEN INVOLVED AND ARE THEY CRIMINALLY LIABLE?

WHAT THE STATE IS ASKING YOU AND WHAT THEY HAVE ALLEGED, AND WITH PARTICULARITY IN THE INSTRUCTIONS THAT YOU'LL GET, IS THAT DALE WENT INTO THAT HOUSE, HE HELD HIS GRANDMOTHER'S HEAD DOWN ON THE BED AND HE SHOT HER.

NOW, I WILL TALK A LITTLE BIT ABOUT THE EVIDENCE THAT THE STATE HAS BROUGHT TO HAVE YOU FIND THAT GUILT, TO HAVE YOU BRAND DALE A MURDERER.

IF I WERE TO TAKE A PEN AND DROP IT DOWN HERE RIGHT NOW, EVERY ONE OF YOU COULD SAY, "RANDY DROPPED A PEN" AND YOU WOULD KNOW THAT OF YOUR OWN KNOWLEDGE BECAUSE YOU SAW ME DO IT.

IF YOU WEREN'T IN THIS COURTROOM AND YOU WERE SITTING OUT IN THE HALL AND THERE WAS A PEN THAT WAS FOUND ON THE FLOOR AND SOMEBODY CAME OUT TO YOU AND SAID, "RANDY TOLD ME THAT HE DROPPED A PEN," THAT'S THE TYPE OF EVIDENCE THAT THE STATE IS BRINGING FORTH TO HAVE YOU FIND DALE GUILTY.

IT IS NOT FIRSTHAND EVIDENCE. IT'S A KIND OF A SECOND OR THIRD-HAND EVIDENCE THROUGH THE MOUTHS OF ANGELA SALDANA, JOHN LUCAS, AND TOM AKERS.

NOW, I USE THIS PEN FOR AN EXAMPLE BECAUSE IT COSTS ABOUT 89 CENTS AND IF, SAY, ANGELA SALDANA WENT OUT AND TOLD YOU THAT RANDY SAID HE DROPPED THIS PEN AND THEN YOU WOULD GIVE IT TO ME BECAUSE IT IS NOT WORTH VERY MUCH AND YOU COULD PROBABLY TRUST HER ON SOMETHING LIKE THAT.

BUT IF IT WERE A GOLD PEN AND ANGELA SALDANA, KNOWING HER AS YOU DO NOW, TOLD YOU THAT, AND WITHOUT KNOWING ME, WOULD YOU TRUST HER? WOULD YOU GIVE ME A $100 GOLD PEN BASED ON HER WORD ALONE? AND THEY'RE ASKING YOU TO PUT THE VERY LIFE OF DALE FLANAGAN INTO THE HANDS OF PEOPLE LIKE THAT.

YOUR JOB THEN, AS I SEE IT, IS TO EXAMINE ALL OF THE WITNESSES IN THIS CASE.

EXAMINE EACH AND EVERY PERSON THAT GOT UP ON THE STAND AND LOOK AT THEM AND THEN DELIBERATE AMONG YOURSELVES AND SAY, "AM I SATISFIED BEYOND A REASONABLE DOUBT? AM I SURE THAT I CAN BELIEVE THE STATE'S WITNESSES? DO I HAVE AN ABIDING AND A FIRM CONVICTION THAT I CAN BELIEVE THEM AND BELIEVE WHAT THEY SAID?"

YOU ARE THE SOLE JUDGES OF THE CREDIBILITY OF THESE WITNESSES. AND IT'S PRETTY CLEAR TO YOU THAT WE ARE FIGHTING DIFFERENT BATTLES HERE ON WHO WE WANT YOU TO BELIEVE AND WHO WE DON'T WANT YOU TO BELIEVE.

AND I HAVE BEEN DIGGING SOME OF THE SAME HOLES THAT MR. SMITH DUG CONCERNING SOME WITNESSES. AND THE OTHER ATTORNEYS THAT ARE TO FOLLOW ME WILL PROBABLY DIG SOME OF THE SAME HOLES. AND WHEN I SAY THAT, I MEAN THEY ARE GOING TO ATTACK SOME OF THE SAME WITNESSES.

A LITTLE GUIDANCE HAS BEEN GIVEN TO YOU BY MR. SEATON AND MR. SMITH. WERE THE WITNESSES CANDID? WERE THEY FRANK, FORTHRIGHT? DID THEY ANSWER THE QUESTIONS QUICKLY WITHOUT HAVING TO FIGURE OUT AN ANSWER?

HAD THEY TOLD SIMILAR STATEMENTS BEFORE OR, AS MR. SMITH SO APTLY POINTED OUT, "I JUST REMEMBERED IT. GEE, I JUST REMEMBERED IT SOME TEN MONTHS LATER."

MR. SMITH DID INDICATE THE POSSIBILITY -- IT WAS MR. SMITH OR MR. SEATON, INDICATED THE POSSIBILITY DID THESE WITNESSES GO AND DID THEY CONSPIRE TOGETHER TO DO WHAT THEY

COULD TO HANG DALE AND RANDY?

WELL, THEY HAVE HAD TEN MONTHS AND IT SEEMS LIKE ALL OF THEIR MEMORIES ARE GETTING COLLECTIVELY BETTER. IT SEEMS LIKE TOM AKERS HAS GOTTEN OUT OF JAIL AND IS WORKING FOR ANGELA SALDANA'S UNCLE.

SHE'S HAD CONTACT WITH HIM. SHE CALLED HIM WHILE HE WAS IN THE -- HE CALLED HER WHILE HE WAS IN THE JAIL. THEIR RELATIONSHIP CONTINUES, DALE'S DOES NOT.

OR LOOK AT THE OTHER HAND. DID A WITNESS SEEM TO WANT TO ANSWER AND GIVE A LITTLE BIT MORE. "I CAN GIVE YOU A LITTLE BIT MORE BECAUSE I REMEMBER IT BETTER AND I CAN HELP YOU, MR. PROSECUTOR. AFTER WE HAVE TALKED ABOUT IT A FEW TIMES, I CAN REMEMBER IT." PROBABLY REMEMBER IT ALL THE WAY TO THE BANK.

I AM CUTTING OUT A FEW THINGS BECAUSE OF TIME. IT'S GETTING LATE. I AM GOING TO DO WHAT MR. SMITH DID AND GO THROUGH JUST A FEW OF THE STATE'S WITNESSES.

RUSTY HAVENS CAME IN, A MAN WHO AGREED TO KILL MRS. GORDON, WHO SAID SHE WAS AFRAID OF RANDY, SAID THAT TOM AKERS WAS ACTIVELY INVOLVED IN THE PLANNING. THAT IS TOM THAT IS OUT AMONG SOCIETY NOW BECAUSE OF WHAT HE HAS TO SAY OR WHAT HE CAN OFFER.

LIZA'S TESTIMONY REVOLVED AROUND ONE CONVERSATION. SHE SAID, "I CALLED DALE UP THE DAY AFTER THE BODIES WERE FOUND," AND SHE WENT THROUGH WHAT SHE ALLEGEDLY

SAID IN THAT CONVERSATION. BUT, YOU KNOW, THAT CONVERSATION NEVER COULD HAVE HAPPENED. IT ABSOLUTELY COULD NOT HAVE HAPPENED.

YOU REMEMBER THAT DALE AND ANGELA WERE TOGETHER AT THAT TIME. DALE HAD LEFT LISA, SHE WAS KICKED OUT OF THE TRAILER. AND HE WAS STAYING WITH ANGELA AND STAYING WITH HIS FATHER AND OVER AT HER AUNT'S HOUSE BECAUSE HE COULDN'T GO BACK TO THE TRAILER.

YOU REMEMBER OFFICER CONNELL AND WHEN HE VERIFIED THE TRAILER WAS SEALED FOR AT LEAST THAT DAY UNTIL AT LEAST FOR A DAY AFTER THAT. DALE COULD NOT HAVE GONE BACK INTO THAT TRAILER. HE COULD NOT HAVE RECEIVED A TELEPHONE CALL THAT LISA LICATA SAID THAT SHE CALLED HIM.

WE ARE TALKING ABOUT A 16-YEAR-OLD GIRL WHOSE MOTHER TURNED HER OUT ON THE STREET AND SHE BECAME A PROSTITUTE.

AND THAT WAS THE TESTIMONY OF MICHELLE GRAY WHO'S NOW GETTING EVEN WITH DALE FOR JILTING HER, TELLING YOU ABOUT THE CONVERSATION THAT COULD NEVER, COULD NEVER HAVE OCCURRED.

I AM GOING TO GROUP TOM AND ANGELA TOGETHER BECAUSE I LOOK AT THEM AS USERS, NOT OF DRUGS, NOT OF ALCOHOL BUT OF PEOPLE, OF YOU AND OF ME AND OF THE PROSECUTORS.

THEY ARE PEOPLE THAT LIKE TO BE IN THE LIMELIGHT. ANGELA IS A DANCER, GETTING HER PAY AND, AS MR. SMITH INDICATED, SHE IS DANCING FOR IT ON THE STAGE TODAY.

I COULD COMPARE THE TWO OF THEM TO A WOMAN THAT WANTED TO BE THE BRIDE AT EVERY WEDDING AND THE MAN THAT WANTED TO BE THE CORPSE AT EVERY FUNERAL.

TOM AKERS GOT UP ON THE STAND AND HE SHOWED WHAT A SALESMAN HE WAS. THERE WASN'T A QUESTION THAT MR. SEATON ASKED HIM THAT HE DIDN'T HAVE A LONG EXPLANATION FOR.

THERE WASN'T A QUESTION THAT MR. SEATON OR ANY OF THE OTHER ATTORNEYS ASKED HIM THAT HE DIDN'T COME OUT AND WANT TO SHOW YOU, "WELL, THIS IS WHAT I KNOW. I WILL TELL YOU EVERYTHING I KNOW ABOUT GUNS. AND I LIKE TO DRINK A SPECIFIC WINE." AND HE EVEN WENT DOWN TO THE VINTAGE YEAR.

WHAT A SAD, SAD STATE IT IS, THAT IF HE WAS INVOLVED IN AS MUCH AS THE EVIDENCE INDICATES, THAT HE HAS BEEN ABLE TO SELL HIS WAY OUT, THAT HE HAD BEEN ABLE TO SELL HIS WAY THROUGH A PLEA BARGAIN TO THE STATE FOR HIS TESTIMONY. DON'T LET HIM SELL DALE'S LIFE DOWN THE RIVER.

HE IS OUT WORKING, AS I INDICATED, WITH SALDANA'S FAMILY. SO THEY'RE TIED TOGETHER. AND ANGELA AND JOHN LUCAS -- AGAIN, HERE'S WHERE I WILL GROUP THESE TWO TOGETHER BECAUSE HERE IS WHERE THE MONEY COMES IN.

THEY ARE BOTH STILL WAITING. THEY ARE BOTH STILL WAITING FOR THE MONEY TO COME INTO THEIR HANDS. THEY ARE WAITING FOR THEIR PIECES OF SILVER. THEY ARE WAITING FOR THAT WHICH THEY HAVE SOLD. THEY WANT TO BE PAID.

MR. SEATON AND MR. SMITH BOTH TALKED ABOUT SNOW.

IT MIGHT BE BECAUSE IT TURNED COLD. AS I WAS PREPARING MY ARGUMENTS, I THOUGHT OF SNOW, ALSO. I HATE TO DIG THE SAME HOLES BUT I WILL USE THE SAME ANALOGY IF YOU BEAR WITH ME.

MR. SEATON TALKED ABOUT THE SNOWBALL THAT WAS ROLLING DOWN, COMING DOWN. LOOK AT THE SNOWBALL THAT IS ROLLING DOWN ON DALE. GOT ANGELA GOING TO THE POLICE WITH RUMORS ABOUT A WILL AND ABOUT LIFE INSURANCE AND WHO CAN THEY PIN THIS ON.

AND LET'S TALK ABOUT THE MOTIVE TO GO IN THERE. WHERE IS THE WILL? THERE WASN'T ANY WILL. WHERE IS THE LIFE INSURANCE? IT WAS JUST TO MRS. GORDON.

AND THEN DALE'S ARREST AND JOHN LUCAS'S SECOND AND THIRD STATEMENTS WHERE HE SAID THAT HE LIED TO THE POLICE.

AND TOM AKERS THEN, AFTER HE HEARD ALL OF THE EVIDENCE AND AFTER HE SAT THROUGH THE PRELIMINARY HEARING, BUYING HIS WAY OUT.

AND FINALLY AFTER HE HEARD EVERYTHING THROUGH THE PRELIMINARY HEARING, THROUGH THE TRIAL, JOHN RAY LUCKETT GETTING UP AND THAT SNOWBALL IS READY TO FALL AND BURY DALE.

AND THE ONLY THING THAT IS KEEPING THAT BACK IS THE PRESUMPTION OF INNOCENCE AND YOU, LADIES AND GENTLEMEN OF THE JURY.

THAT SNOWBALL ISN'T A CLEAN SNOWBALL. IT'S NOT LIKE WHEN YOU TAKE YOUR CHILDREN UP TO LEE CANYON AND MAKE A

SNOWBALL AND THEY CAN EAT IT. THIS SNOWBALL HAS A CORE OF BILE AND IT IS BUILT ON THE REFUSE THAT THE STATE HAS BEEN ABLE TO PUT TOGETHER TO COME IN AND TESTIFY IN THIS CASE.

PEOPLE THAT HAVE GOT UP ON THE STAND AND SAY, "YEAH, I LIED TO THE POLICE, NOT ONCE, NOT TWICE BUT THREE TIMES. I WANT YOU TO BELIEVE ME."

PEOPLE THAT GOT UP ON THE STAND AND TALKED ABOUT CONVERSATIONS THAT COULDN'T HAVE HAPPENED. PEOPLE THAT GOT UP ON THE STAND THAT WERE PROVEN TO BE PROSTITUTES, STRIPPERS AND PAID WITNESSES FOR THE STATE.

AND THAT BILE, THE PROSECUTION WANTS YOU TO HAVE EAT AWAY AT THAT PRESUMPTION OF INNOCENCE.

UNFORTUNATELY, OUR SOCIETY HAS DEGENERATED TO SUCH A DEGREE THAT IT MAKES IT HARD, IT MAKES IT HARD TO GIVE A DEFENDANT AND GIVE DALE IN A CRIMINAL CASE LIKE THIS THE BENEFIT OF THE PRESUMPTION OF INNOCENCE.

WE HAVE ALL BEEN CONDITIONED BECAUSE OF THE SOCIETY THAT WE LIVE IN TO EXPECT THE WORST OUT OF EVERYBODY.

THAT ISN'T WHAT THE FRAMERS OF THE CONSTITUTION HAD TO DO. THEY LIVED IN A DIFFERENT TIME. THAT HAS BEEN SOMETHING THAT HAS DEVELOPED WITHIN OUR SOCIETY.

BUT IT'S A PRESUMPTION THAT WE HOLD AND CLING DEARLY TO BECAUSE WE WANT TO KEEP IT. WE WANT TO KEEP IT HERE.

DO YOU EXPECT TO BELIEVE THE WORST AND WOULD BE

EXPECTED BY THE GOVERNMENT OR BY THE STATE TO BELIEVE EVEN THE STATE'S WITNESSES THAT THEY HAVE PRESENTED?

ALL YOU HAVE TO DO IS READ THE PAPERS. WHEN A MAN IS CHARGED WITH A CRIME, WHERE IS IT EVER REPORTED IN THE NEWSPAPER THAT HE MIGHT BE INNOCENT?

SO WHEN I COME INTO A COURTROOM, I COME WITH A GREAT DEAL OF TREPIDATION BECAUSE YOUR FEELINGS WOULD BE WITH THE PROSECUTION AND THE MAJORITY OF YOU INDICATED THAT YOU HAD READ SOMETHING ABOUT THIS CASE BEFORE.

AND WHEN YOU WERE SELECTED AS JURORS, YOU COULD TRUTHFULLY SAY, "I CAN SET ANYTHING THAT I MIGHT HAVE HEARD ASIDE AND GIVE DALE HIS PRESUMPTION, HIS DAY IN COURT."

ALL THAT HE IS CONSTITUTIONALLY REQUIRED TO. THERE ARE MANY SMALL THINGS THAT I COULD GO THROUGH. I AM NOT GOING TO DO THAT.

LIKE MR. SMITH, I DON'T HAVE AN OPPORTUNITY TO GET UP AGAIN. WE'D ALWAYS -- EVERYBODY WOULD LIKE A CHANCE TO GET IN THE LAST WORD. THAT IS RESERVED TO THE STATE BECAUSE THEY HAVE THE BURDEN OF PROOF IN THIS CASE.

BUT, KNOW THAT THE ARGUMENTS ARE THERE AND I WOULD MAKE THEM AND CONSIDER THE EVIDENCE AND LOOK AT IT NOT THROUGH THE EYES OF A PROSECUTOR, NOT THROUGH THE EYES OF A DEFENSE ATTORNEY, BUT THROUGH YOUR EYES UNSWAYED ONE WAY OR THE OTHER AND FIND THE TRUTH.

WE CAN TALK A LOT ABOUT REASONABLE DOUBTS AND

MATTERS OF IMPORTANCE. BUYING A HOME AND GETTING MARRIED ARE PROBABLY TWO OF THE BIGGEST DECISIONS THAT WE MAKE IN OUR WHOLE LIFE.

BUT EVEN THOSE AREN'T AS IMPORTANT AS THE DECISION THAT YOU WILL MAKE IN THIS CASE. IN EACH OF THOSE DECISIONS, BUYING A HOME OR GETTING MARRIED, YOU CAN BACK OUT AT THE LAST MINUTE.

I DO DIVORCES EVERY DAY. YOU CAN BACK OUT OF CONTRACTS, YOU CAN BUY YOUR WAY OUT OF A MORTGAGE. YOU CAN SELL A LEMON CAR. IN FACT, EVEN WITH MARRIAGE YOU CAN GET A DIVORCE HERE IN LAS VEGAS IN LESS THAN 24 HOURS.

BUT YOUR DECISION HERE TODAY, THE DECISION THAT YOU WILL MAKE ON DALE'S BEHALF, IS IRREVOCABLE. IT CANNOT BE CHANGED. YOUR DECISION IS FINAL.

YOU CAN'T COME BACK TOMORROW. YOU CAN'T COME BACK NEXT WEEK. YOU CAN'T COME BACK TWO OR THREE YEARS FROM TODAY AND SAY, "I HAVE HAD SOME SECOND THOUGHTS AND I AM REALLY NOT SURE."

THAT IS A LUXURY YOU DON'T HAVE IN THIS CASE. IT IS A LUXURY THAT DALE DOESN'T HAVE IN THIS CASE.

EACH OF YOU HAVE TO MAKE YOUR OWN DECISION BACK THERE. YOU ARE GOING TO DELIBERATE ONE WITH OTHER AND LISTEN TO EACH OTHER'S ARGUMENT BUT YOU YOURSELF HAVE TO BE CONVINCED BEYOND A REASONABLE DOUBT THAT DALE SHOT HIS GRANDMOTHER.

AND THAT'S A DECISION THAT YOU HAVE TO MAKE UNINFLUENCED OR UNCOMPROMISING -- I WON'T SAY UNINFLUENCED BUT UNCOMPROMISED AS AND AGAINST EACH OF YOU. IT IS A DECISION ON YOUR OWN.

AND IT'S A DECISION THAT I HAVE INDICATED DALE IS GLAD TO LEAVE IN YOUR HANDS BECAUSE WE ARE CONFIDENT THAT YOU WILL BE FAIR, YOU ARE IMPARTIAL. AND THAT AS I TOLD YOU IN MY OPENING STATEMENTS, WE WOULD SHOW THAT THE STATE'S WITNESSES HAD LIED, THAT THEY ARE EXCHANGING THINGS FOR THEIR TESTIMONY.

I WOULD SUBMIT TO YOU, LADIES AND GENTLEMEN OF THE JURY, THAT THAT BILE IS AN ACID THAT YOU ARE NOT GOING TO LET EAT THROUGH AND DESTROY DALE. AND I SAY THESE AS MY LAST WORDS TO YOU AND LEAVE THIS CASE IN YOUR HANDS. THANK YOU.

THE COURT: THANK YOU, MR. PIKE. COUNSEL.

MR. POSIN: MAY IT PLEASE THE COURT, COUNSEL, LADIES AND GENTLEMEN OF THE JURY.

THIS HAS BEEN A RATHER LENGTHY AND RATHER COMPLEX TRIAL. I TRUST WE HAVE COME TO KNOW EACH OTHER A LITTLE BIT DURING THE COURSE OF THE TRIAL. AT LEAST, WE HAVE HAD OCCASION TO LOOK AT ONE ANOTHER.

AND BECAUSE THERE ARE FOUR DEFENDANTS WITH FOUR DIFFERING POSTURES, WE SOMETIMES HAD TO MAKE OBJECTIONS WHICH MIGHT HAVE INTERFERRED WITH THE NORMAL FLOW OF TESTIMONY OR ARGUMENT.

AND I ASSUME I AM SAYING THIS OR I BELIEVE I AM SAYING THIS FOR ALL COUNSEL THAT WHEN THAT WAS DONE, IT WAS NOT TO PRECLUDE ANYTHING COMING INTO EVIDENCE THAT SHOULD PROPERLY BE PERMITTED IN BUT SIMPLY TO EXCLUDE THAT WHICH WOULD BE, IN FACT, IMPROPER.

SO TO THE EXTENT THAT I OR OTHER COUNSEL MAY HAVE IN ANY WAY UPSET YOU, PLEASE ACCEPT MY APOLOGIES ON BEHALF OF ALL OF THE ATTORNEYS.

AND AS HAS BEEN EVIDENCED BEFORE, THERE HAS BEEN SOME SMILING FROM TIME TO TIME. AND IN ALL FAIRNESS, THERE IS A RAPPORT AMONG COUNSEL. WE DO TRY CASES WITH AND AGAINST ONE ANOTHER.

NOTWITHSTANDING THAT, EACH OF US RESPECT OUR OBLIGATIONS TO THE COURT, TO OUR CLIENTS AND TO SOCIETY. AND I WILL TRY TO LIMIT MY OBSERVATIONS WITHIN THAT FRAMEWORK.

I WILL MAKE MY OBSERVATIONS RELATIVELY SHORT. LOOKING AT THE CLOCK ABOVE YOUR HEADS, IT'S ALMOST A QUARTER PAST FOUR.

YOU HAVE YET TO LISTEN TO TWO ARGUMENTS WHEN I FINISH AND I WILL BE ADOPTING TO A LARGE EXTENT SOME OF THE THINGS OR MANY OF THE THINGS THAT COUNSEL HAS ARGUED BEFORE ME, PARTICULARLY RANDY PIKE WHO JUST ADDRESSED YOU ON BEHALF OF DALE FLANAGAN.

HE SPOKE TO YOU ABOUT THE PRESUMPTION OF INNOCENCE, AND THE BURDEN OF PROOF. AND YOU TOLD THE COURT,

AND I AM SURE THE COURT ACCEPTED IT AND ALL COUNSEL ACCEPTED IT AND ACCEPT IT NOW, THAT AT THIS MOMENT YOU ARE CHARGED WITH KEEPING AN OPEN MIND WITH REGARD TO THE GUILT OR INNOCENCE OF THE DEFENDANT.

AND YOU ARE NOT PERMITTED TO CHANGE THAT UNTIL YOU HAVE HEARD ALL THE TESTIMONY, ALL THE ARGUMENTS AND YOU GO INTO THE JURY ROOM AND PROSPECTIVELY REACH A VERDICT CONTRA.

THE PRESUMPTION OF INNOCENCE IS NOT SOMETHING TO BE LIGHTLY TAKEN AND I DON'T THINK FOR A MOMENT THAT ANY ONE OF THIS JURY PANEL TAKES IT LIGHTLY.

I WOULD LIKE TO ADDRESS MYSELF VERY BRIEFLY TO THE BURDEN OF PROOF THAT THE STATE HAS. WE COMPARE THE BURDEN OF PROOF IN CRIMINAL CASES AS DIFFERENTIATED FROM CIVIL CASES.

IN A CIVIL CASE, ONE SIDE IN ORDER TO SUSTAIN ITS BURDEN OF PROOF MERELY HAS TO CONVINCE THE JURY THAT ITS TESTIMONY IS JUST A LITTLE MORE CONVINCING AND HAS JUST A LITTLE GREATER PROBATIVE VALUE THAN THE TESTIMONY OF THE OTHER SIDE.

AND IF THE SCALES ARE TIPPED EVER SO SLIGHTLY IN ONE DIRECTION AS OPPOSED TO THE OTHER, THAT PARTY WILL HAVE SUSTAINED ITS BURDEN OF PROOF.

IN OUR SYSTEM OF JURISPRUDENCE IN CRIMINAL PROSECUTIONS, THE LAW PLACES A MUCH HEAVIER BURDEN OF PROOF

UPON THE PROSECUTION.

IT DOESN'T JUST HAVE TO TIP THE SCALES SLIGHTLY BUT IT DOES HAVE TO TIP THE SCALES, NOT JUST TIP THEM BUT WEIGH IT SIGNIFICANTLY SO THAT YOU ARE LEFT WITHOUT A REASONABLE DOUBT IF YOU ARE TO COME BACK WITH A CONVICTION.

YOU HAVE TO BE CONVINCED NOT TO BEYOND MATHEMATICAL CERTAINTY BUT BEYOND A REASONABLE DOUBT AND THE DOUBT FOR WHICH LOGICAL, RATIONAL MATURE REASON CAN BE GIVEN.

AND THE BURDEN IS UPON THE STATE. THE BURDEN IS A HEAVY BURDEN THAT THE STATE HAS TO MEET. AND THE STATE HAS CALLED A LOT OF WITNESSES IN TERMS OF MEETING THAT BURDEN.

AT LEAST FOR A SIGNIFICANT PART OF THE TESTIMONY AND A SIGNIFICANT NUMBER OF WITNESSES WHO TESTIFIED, COUNSEL HAD NO OBJECTION AND THERE WAS A GREAT DEAL OF PLAUSIBLE, CREDIBLE TESTIMONY.

NO ONE IN THIS COURTROOM QUESTIONS BUT THAT THE GORDONS WERE KILLED ON THE NIGHT OF NOVEMBER 5TH OF LAST YEAR. THAT ISN'T AN ISSUE.

NOBODY QUESTIONS THE EXPERT TESTIMONY THAT HAS BEEN BROUGHT BEFORE YOU. BUT MR. SEATON SAID SOMETHING INTERESTING IN HIS OPENING ARGUMENT. HE SAID, "COUNSEL WILL ADDRESS YOU AND MAKE SLANDEROUS REMARKS."

I WAS VERY TAKEN WITH THAT BECAUSE HE MADE IT AN AFFIRMATIVE STATEMENT, THAT COUNSEL WILL SEEK TO SLANDER THE

VERACITY AND THE INTEGRITY AND THE CREDIBILITY OF THE STATE'S WITNESSES.

AND DURING THE LUNCHEON BREAK JUST FOR MY OWN PSYCHIC GRATIFICATION, I SUPPOSE, I WENT BACK TO MY OFFICE WHICH IS JUST ACROSS THE STREET, AND I LOOKED AT THE DEFINITION OF SLANDER IN THE BIBLE THAT ALL ATTORNEYS USE, BLACK'S LAW DICTIONARY.

THEIR DEFINITION IS "THE SPEAKING OF BASE AND DEFAMATORY WORDS TENDING TO PREJUDICE ANOTHER IN HIS REPUTATION, OFFICE, TRADE, BUSINESS, OR MEANS OF LIVELIHOOD.

"OR THE SPEAKING OF FALSE AND MALICIOUS WORDS CONCERNING ANOTHER WHEREBY INJURY RESULTS TO HIS REPUTATION."

WELL, PERHAPS THAT IS TOO SOPHISTICATED BECAUSE THE WORDS WEREN'T USED AS LEGAL WORDS BUT WERE USED AS LAY WORDS. SO I WENT TO WEBSTER'S AND LOOKED FOR THEIR DEFINITION.

THEIR DEFINITION WAS "THE UTTERANCE OF FALSE CHARGES OR MISREPRESENTATIONS WHICH DEFAME AND DAMAGE ANOTHER'S REPUTATION."

LADIES AND GENTLEMEN, WALKING THROUGH THE TESTIMONY OF THE STATE'S WITNESSES, AT LEAST THAT WHICH BEARS UPON THE INVOLVEMENT OF MY CLIENT RANDY MOORE, NOTHING THAT I SAY IS SLANDEROUS.

NOTHING THAT I AM GOING TO SUGGEST TO YOU IS UNTRUE. YOU HAVE HEARD THE TESTIMONY COMING DIRECTLY FROM

THE WITNESS STAND.

YOU HAVE HEARD WITNESS AFTER WITNESS GET UP. AND I WILL MAKE APPROPRIATE REFERENCE TO THEM, MR. PIKE HAS MADE SOME SUBSTANTIAL REFERENCE TO AND OTHERS.

AND WITH REGARD TO THE CREDIBILITY -- IF I MAY BACK UP A STEP OR TWO. IF I SUGGEST TO YOU THAT THEIR TESTIMONY IS INCREDIBLE OR NOT WORTHY OF BELIEF, IT IS BECAUSE I BELIEVE THAT STATEMENT TO BE TRUE.

I BELIEVE THAT STATEMENT TO BE FACTUAL AND I BELIEVE THAT STATEMENT HAS BEEN ESTABLISHED NOT ONLY IN THE TESTIMONY THAT CAME BEFORE YOU FROM THE WITNESS STAND BUT IN ARGUMENT OF COUNSEL WHICH I WILL DISCUSS PRESENTLY.

THE SIGNIFICANCE OF CREDIBILITY, MR. SMITH IN HIS OPENING ADDRESSED TO YOU DIRECTED YOUR ATTENTION TO INSTRUCTION NUMBER 41. AND FROM MY VANTAGE POINT, THAT IS PROBABLY AS CRITICAL AN INSTRUCTION AS HAS BEEN GIVEN TO YOU BY THE COURT.

AND I URGE YOU, IN FACT, I BEG YOU UPON YOUR RETIREMENT TO THE JURY ROOM TO DELIBERATE, TO READ THAT INSTRUCTION WITH GREAT CARE. ALTHOUGH IT'S BEEN READ TO YOU AND, AGAIN, THE HOUR IS GETTING LATE, IT IS SO CRITICAL THAT IT WARRANTS BEING READ ONE MORE TIME.

THE COURT INSTRUCTED YOU THAT THE CREDIBILITY OR THE 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 OBSERVE THE MATTER TO WHICH HE TESTIFIED, THE REASONABLENESS OF HIS STATEMENTS AND THE STRENGTH OR WEAKNESS OF HIS RECOLLECTIONS.

THE COURT WENT ON TO CHARGE YOU THAT 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.

LADIES AND GENTLEMEN, IT'S UPON THAT INSTRUCTION THAT I URGE YOU TO CAUSE YOUR DELIBERATIONS TO REVOLVE. THAT IS THE CRITICAL INSTRUCTION BECAUSE OTHER THAN THE TECHNICAL WITNESSES, I FIND IT TERRIBLY DIFFICULT TO GO THROUGH THE LITANY OR THE ROSTER OF WITNESSES, WHO TESTIFIED ON BEHALF OF THE PROSECUTION AND THE ONE DEFENDANT, JOHNNY RAY LUCKETT, HAVING FOUND THEIR TESTIMONY BEING WORTHY OF CREDENCE, BECAUSE THERE IS INTEREST, MOTIVES, FEELINGS WHICH I FEEL DRAMATICALLY AND DRASTICALLY COLORED THEIR TESTIMONY.

I AM GOING TO GO THROUGH THESE MORE BRIEFLY THAN I HAD ANTICIPATED BECAUSE MR. PIKE DID TOUCH UPON THEM.

HE SPOKE OF LISA LICATA, YOUNG PROSTITUTE WITH REASON TO TESTIFY ADVERSELY. AND, INTERESTINGLY ENOUGH, HER TESTIMONY RELATED TO A CONVERSATION THAT SHE HAD WITH DALE, NOT WITH RANDY AND I FLAG THAT FOR YOU CRITICALLY.

ONE OF THE INSTRUCTIONS IS THE TESTIMONY ADMITTED

AGAINST ONE DEFENDANT IS NOT TO BE ATTRIBUTED TO ANOTHER DEFENDANT UNLESS YOU CAN ESTABLISH IN YOUR INDEPENDENT DELIBERATION THAT THAT TESTIMONY OR THOSE STATEMENTS OR THOSE ADMISSIONS WERE IN FURTHERANCE OF A CONSPIRACY.

I FIND NOTHING IN MY RECOLLECTION OF LISA LICATA'S TESTIMONY THAT SPOKE TO RANDY. IF I REMEMBER IT, SHE SAID -- SHE QUOTED DALE AS HAVING SAID, "I HAVE A PLAN. I HAVE A PLAN." NOT THAT "WE HAVE A PLAN."

NOW, I AM NOT GOING TO GO THROUGH THE TESTIMONY CHAPTER AND VERSE. I AM NOT GOING TO BURDEN YOU WITH THAT. BUT I WILL RELY UPON YOUR RECOLLECTION BECAUSE IT IS YOUR RECOLLECTION IN EACH CASE THAT CONTROLS AS TO WHETHER STATEMENTS WERE MADE AS AGAINST THE PERSON SPEAKING OR MADE AGAINST OTHERS.

AND IF THEY WERE MADE AGAINST OTHERS AND NOT RANDY MOORE, I URGE YOU TO DISREGARD IT UNLESS YOU FIRST FIND THAT IN SOME MANNER IT CAN BE PROPERLY ATTRIBUTABLE AGAINST HIM AND AS PROSPECTIVELY THE CONCEPT OF FURTHERANCE OF A CONSPIRACY.

BUT GOING DOWN THE ROSTER, AND I WILL LEAVE JOHNNY RAY LUCKETT BECAUSE THAT WARRANTS SORT OF A SPECIAL HANDLING, IF YOU WOULD.

BUT WITH REGARD TO THE TESTIMONY OF RUSTY HAVENS, YOU WERE ABLE TO SEE FOR YOURSELF THE KIND AND CALIBER OF PERSON THIS IS. AND HE SAID SOMETHING INTERESTING AND THIS

WAS SAID BY A NUMBER OF WITNESSES.

IT TURNS OUT THAT MY CLIENT MAY NOT BE THE MOST POPULAR YOUNG MAN AMONG HIS PEERS. I DON'T KNOW WHY. BUT IF SOMEONE DISLIKES HIM OR SOMEONE HATES HIM, AS THE CASE MAY BE, YOU MAY CERTAINLY AND I URGE YOU TO CONSIDER THAT AS A RATIONALE FOR DISCREDITING OR GIVING LITTLE WEIGHT OR NO WEIGHT TO THEIR TESTIMONY BECAUSE THAT OF ITSELF IS A MOTIVATION TO LIE.

WE FOUND THAT RUSTY HAVENS TOOK THE STAND AND SAID HE DIDN'T GET ALONG WITH RANDY. WE HEARD JOHN LUCAS TAKE THE STAND AND TELL US THAT HE DIDN'T GET ALONG WITH RANDY.

BY THE WAY, JOHN LUCAS'S TESTIMONY, I DON'T RECALL THE EXTENT TO WHICH -- I HOPE AT LEAST ONE OF YOU MADE NOTES TO THAT EFFECT.

BUT THE MOST INTERESTING PART OF HIS TESTIMONY THAT I FOUND WAS THAT HE SAID THAT HIS TESTIMONY WAS NOT BASED ON MEMORY ON HIS OWN INDEPENDENT RECOLLECTION, BUT WAS BASED UPON WHAT HAD BEEN TOLD TO HIM BY POLICE OFFICERS AND PROSECUTORS. I FOUND THAT MOST INTERESTING. MOST MEANINGFUL.

BUT TALKING ABOUT THIS, THE CALIBER OF A JOHN LUCAS WHO CAME HERE AND TESTIFIED. HERE IS A MAN WHO NOT ONLY LIED TO POLICE OFFICERS ON TWO DIFFERENT OCCASIONS BUT HAD THE TEMERITY TO COME BEFORE US AND TELL US THAT HE LIED

UNDER OATH IN ANOTHER PROCEEDING.

NOT ONLY THAT HE LIED UNDER OATH BUT THAT HE WAS HIGH WHEN HE TESTIFIED. THAT HE HAD SMOKED MARIJUANA PRIOR TO HIS TESTIMONY. I MEAN, JUST HOW MUCH CREDENCE COULD YOU GIVE TO ANYTHING THAT A PERSON THE LIKE OF JOHN LUCAS MIGHT TESTIFY TO.

NOT TO MENTION THE FACT THAT AS MR. PIKE INDICATED, I DARE SAY HIS TESTIMONY WAS CERTAINLY COLORED BY THE POT OF GOLD AT THE END OF THE RAINBOW, BY THE SECRET WITNESS REWARD THAT HE PARTIALLY RECEIVED AND THE BALANCE OF WHICH HE ANTICIPATES RECEIVING WHEN THE CASE IS OVER AS I UNDERSTAND IT.

TESTIMONY OF ANGIE SALDANA. AND I THINK SHE HAS BEEN CHARACTERIZED APPROPRIATELY, STRIPPER, LOOSE WOMAN, SEX WITH TOM AKERS WHILE SHE WAS LIVING WITH DALE, WANTED TO BE A PRIVATE INVESTIGATOR AND SO SHE THOUGHT THIS WOULD BE A MARVELOUS OPPORTUNITY TO BECOME AN AGENT ON HER OWN.

OF COURSE, THE FACT THAT SHE HAD SPOKEN TO HER BOYFRIEND WHO WAS A POLICE OFFICER, SPOKE TO BEECHER AVANTS AND SPOKE TO DETECTIVE LEVOS, HOW MUCH CREDENCE CAN WE PROBABLY GIVE TO THE TESTIMONY OF THAT KIND OF PERSON?

WE HAD WAYNE WITTIG TESTIFY. I THINK I MENTIONED THE FACT -- BY THE WAY, IT WAS NOT MY RECOLLECTION THAT HE HAD SAID THAT HE WAS AFRAID OF RANDY BUT SIMPLY THAT HE AND RANDY DIDN'T GET ALONG, THAT HE DISLIKED RANDY.

WITH REGARD TO TOM AKERS' TESTIMONY, WE HAVE AN INTERESTING SITUATION HERE WHERE MR. SEATON WOULD LIKE TO HAVE HIS PIE AND/OR CAKE, THAT IS THE APPROPRIATE CHARACTERIZATION, AND EAT IT.

ON THE ONE HAND, HE ASKS YOU TO BELIEVE MR. AKERS' TESTIMONY WHEN IT APPLIES TO RANDY MOORE. HE ASKS YOU TO REJECT HIS TESTIMONY WHEN IT APPLIES TO JOHNNY RAY LUCKETT.

NOW, I MEAN, THIS IS ONE OF THOSE FEW TIMES WHEN I AM IN ACCORD WITH THE PROSECUTION, BOTH WITH REGARD TO HIS CHARACTERIZATION OF THE CREDIBILITY OF TOM AKERS' TESTIMONY. I THINK MR. PIKE HAS DONE MORE THAN ADEQUATE JUSTICE TO WHETHER OR NOT WE CAN ACCEPT THAT.

BUT ALL OF THIS REALLY TAKES US DOWN TO THE FACT THAT SOME OF THE COUNSEL AND SOME OF THE DEFENDANTS WERE NOT SIMPLY CONFRONTED WITH TWO OF THE MOST TALENTED PROSECUTORS IN THIS TOWN, I SPEAK ABOUT DAN SEATON AND MEL HARMON, BUT BILL SMITH IN THIS CASE BECAME A THIRD PROSECUTOR.

AND WHY? WELL, HE WAS DOING HIS JOB THE BEST WAY HE KNEW HOW. AND THE ONLY WAY HE COULD SEEK TO ASSERT A DEFENSE FOR HIS CLIENT WAS TO POINT FINGERS AND SAY "THEY MADE ME DO IT."

POINT AWAY FROM HIS CLIENT AND PAINT THAT WONDERFUL INNOCENT PICTURE OF THE MAN WHICH HAS BEEN INDICATED TO YOU. I MEAN, WHEN I FIRST HEARD OF THE

TESTIMONY, I FELT THAT BUTTER WOULDN'T MELT IN HIS MOUTH.

I KNEW BETTER AND AS THE TESTIMONY EVOLVED, YOU KNEW BETTER. THERE WAS TESTIMONY TO THE EFFECT THAT HE HATES MY CLIENT. WHY WOULD THAT COLOR HIS TESTIMONY? WHY NOT?

WHY DOES HE HATE MY CLIENT? BECAUSE RANDY KICKED HIM OUT OF THE HOUSE, OUT OF RANDY'S APARTMENT, BECAUSE HE WAS MAKING IMPROPER OR INDECENT ADVANCES TO RANDY'S SISTER.

AS I SAY, WE ARE NOT LIVING HERE WITH A POPULARITY CONTEST. WE ARE NOT CONCERNED WITH WHETHER OR NOT ANYBODY IS DEARLY LOVED OR DISLIKED OR WHAT HAVE YOU.

WE ARE CONCERNED WITH THE BURDEN OF PROOF THAT THE STATE HAS TO MEET. AND I RESPECTFULLY SUBMIT TO YOU THAT THE STATE HASN'T MET THAT BURDEN OF PROOF.

NOW, WHY ELSE WOULD A SOPHISTICATED, EXPERIENCED PROSECUTOR LIKE DAN SEATON MENTION SIX DIFFERENT TIMES, AND I COUNTED THEM, IN HIS OPENING ARGUMENT INVOLVEMENT WITH WHITE MAGIC AND BLACK MAGIC AND ALL THAT KIND OF INTERESTING MARVELOUS STUFF?

WHAT DID HE SAY? HE CHARACTERIZED THE DEFENDANTS AS SCHOOL DROPOUTS, DRUG USERS AND DEVIL WORSHIPERS. HE SAID AT A LATER PART OF HIS SPEECH, HE SPOKE IN TERMS OF DEVIL WORSHIPING BUDDIES.

ELSEWHERE, HE SPOKE IN TERMS OF WHITE AND BLACK MAGIC SPILLING OVER A CONSPIRACY. AND WHY SHOULD HE HAVE TO CONCERN HIMSELF WITH THAT KIND OF GIBBERISH IF, IN FACT, HE

HAD A CASE WHICH COULD STAND ON ITS OWN MERIT.

BECAUSE THE ONLY TESTIMONY THAT CAME DOWN, AS I RECALL, AND, OF COURSE, YOUR RECOLLECTION CONTROLS, WAS THAT OF WAYNE WITTIG WHO SPOKE IN TERMS OF COVENS.

AND I RECALL ON CROSS-EXAMINATION MY ASKING HIM WHAT TOOK PLACE AT THESE COVENS. WAS THERE ANY SACRIFICIAL RITES, WAS THERE ANYTHING UNUSUAL, WAS THERE ANYTHING -- I MEAN, I HAVE NEVER BEEN TO A COVEN AND I WAS CURIOUS.

HE SAID, "NO, THERE WAS NOTHING UNUSUAL. THERE WAS SORT OF A SOCIAL GATHERING. WE HELD HANDS AND THERE WAS SORT OF THOUGHT TRANSFERENCE KIND OF THING," WHATEVER THAT MAY MEAN. I DON'T KNOW. I SUGGEST NO ONE KNOWS. BUT THAT IS THE EXTENT OF THE TESTIMONY THAT WE HAVE HAD HERE WITH REGARD TO ANYTHING THAT HAS GONE ON WITH COVENS.

THERE WAS SOME CONVERSATION ABOUT BLACK MAGIC AND WHITE MAGIC WHICH TOOK US NOWHERE BECAUSE IT DIDN'T SHOW THAT IN ANY FASHION THERE WAS ANYTHING ANTISOCIAL THAT TOOK PLACE WITH REGARD TO ANY WHITE MAGIC OR BLACK MAGIC.

NOW, MY HEARING IS LESS THAN WONDERFUL BUT I DIDN'T HEAR ANY DEVELOPMENT. AND WHY MR. SEATON SHOULD HAVE TO EXPOUND SO EXTENSIVELY ON THIS ILLUSORY AREA, I DON'T KNOW.

THERE WAS A WHOLE LOT OF FURTHER TALK, ALSO, ABOUT GANGS, ABOUT THE ACES AND ABOUT ALLEGED THREATS THAT WERE MADE. ALL OF WHICH TAKES US TO THE TESTIMONY OF JOHNNY

RAY LUCKETT.

JOHNNY RAY TOOK THE STAND AND HE WAS PREPARED TO DO ANYTHING, GO IN ANY DIRECTION TO CONVINCE THE WORLD AT LARGE THAT HE WAS JUST GOD'S GIFT TO HUMANITY.

WELL, I WAS THE ONE WHO CAUSED TO BE INTRODUCED TO EVIDENCE YOU MIGHT RECALL, HIS POETRY, HIS LETTER TO LEAH MOORE, WHY HIS GROSS DISLIKE FOR RANDY. NOT FOR THE REASONS THAT HE TESTIFIED TO BECAUSE I SUGGEST TO YOU THAT THIS IS A FLIGHT OF FANTASY AND A CREATION OF HIS OWN IMAGINATION AND HIS CONSPIRING WITH TOM AKERS IN TERMS OF WHAT WOULD BE TESTIFIED TO.

TOM AKERS, THE PAID WITNESS; NOT BY THE PROSECUTION, MIND YOU. NOR MY SUGGESTING THAT HE WAS A PAID WITNESS BY DIRECT PROMISES THAT WERE MADE TO HIM.

BUT THERE ARE THINGS WHICH PEOPLE UNDERSTAND WITHOUT THERE BEING SAID AND TOM AKERS EVIDENCES THAT HE HAS A VERY GOOD UNDERSTANDING OF THE WORLD IN WHICH HE LIVES.

I DON'T THINK I HAVE TO DEVELOP JOHNNY RAY LUCKETT'S TESTIMONY, THE CONFLICTS. I THINK DAN SEATON DID A GREAT JOB IN DEALING WITH THAT, THE INCONSISTENCIES, THE ILLOGICAL FACTORS.

BUT THERE IS ONE FACET OF HIS TESTIMONY THAT I MUST BRING TO YOUR ATTENTION AND MUST ARGUE TO YOU AND MUST URGE UPON YOU. MR. SMITH ARGUED LOUD AND LONG THAT HE HAD BEEN THREATENED. HE HAD BEEN THREATENED BY THE ACES GANG.

HE HAD BEEN THREATENED IN A LETTER THAT WAS WRITTEN BY THE YOUNG MAN, I FORGET, BY SCOTT SLOANE. I ARGUE NOT. THE LETTER WAS A THREATENING LETTER BUT THE LETTER WAS NOT WRITTEN BY RANDY MOORE.

THE CRITICAL THING IS THAT IN THE FINAL AREA OF MY QUESTIONING OF JOHNNY RAY LUCKETT, I ASKED SPECIFICALLY IF -- AND I AM PARAPHRASING NOW BECAUSE I DON'T RECALL THE PRECISE WORDS BUT MY MEMORY IS PRETTY GOOD WITH REGARD TO THE AREA THAT I AM DISCUSSING WITH YOU.

I SAID, "ISN'T IT TRUE THAT RANDY MOORE TOLD YOU WHEN YOU GET UP ON THE STAND TO TELL -- TO COOPERATE WITH YOUR ATTORNEY AND DO WHATEVER YOUR ATTORNEY TELLS YOU TO DO"?

AND THE BEST THING THAT HE COULD SAY WAS THAT HE WAS A LITTLE VAGUE, HE DIDN'T REMEMBER. I HAVE MADE A NOTE SOMEWHERE. I DON'T WANT TO TAKE YOUR TIME TO LOOK FOR IT. BUT AS A MATTER OF FACT, PERHAPS I WILL. NOT FAIR IN VIEW OF THE HOUR TO THE COURT OR JURY.

IN ANY EVENT, I URGE UPON YOU AND I AM NOT GOING TO -- AGAIN, I HAVEN'T FLAGGED ALL OF THE WITNESSES BUT I CAN'T THINK OF ANY OF THE WITNESSES WHO WOULD HAVE TESTIFIED WITH REGARD TO RANDY WHOSE CREDIBILITY PASSES MUSTER.

ONE OTHER THING THAT TROUBLES ME. BACK TO THE AREA OF BLACK MAGIC AND WHITE MAGIC AND ALL THOSE WONDERFUL INFLAMMATORY WORDS THAT DAN SEATON DIRECTED TO YOUR ATTENTION.

HE CALLED -- I HAVE SO MANY NOTES THAT I HAVE GOTTEN LOST IN MY NOTES. BUT HE CALLED -- HERE IT IS -- A MARILYN LUCAS TO THE STAND. AND HE ASKED HER IF, IN FACT, SHE HAD RECEIVED A CALL FROM RANDY AND RANDY ASKED IF SHE HAD FINISHED USING THE WEAPON THAT HE HAD LOANED TO HER.

AND, APPARENTLY, SHE SAID SHE HAD AND HE CAME BY AND PICKED IT UP. AND WE ALL HAD A LOT OF FUN ESTABLISHING THAT THE DATE THAT THIS HAPPENED WAS NOVEMBER 6TH, 1984, THE DAY AFTER THE DEATH OF THE GORDONS.

NOW, WHAT POSSIBLE PROBATIVE VALUE COULD THAT HAVE? I STILL NOW PONDER WHY SHE WAS CALLED. I DON'T KNOW. I DON'T KNOW THAT YOU KNOW. I DON'T KNOW,

BUT THE POINT THAT I AM MAKING THAT WHILE THAT TESTIMONY WAS TOTALLY IRRELEVANT, BECAUSE IT WAS THE DAY AFTER THE TIME FRAME WITHIN WHICH THE GORDONS MET THEIR DEATH, THE PROSECUTION SOUGHT TO BRING THAT IN.

WHY? TO FURTHER MUDDY THE WATERS TOGETHER WITH THE ARGUMENTS ABOUT WHITE MAGIC, BLACK MAGIC, COVENS AND THE LIKE.

BECAUSE THEY KNOW AND THEY KNEW THEN THAT THE WITNESSES UPON WHOM THEIR CASE IS PREDICATED COULD NOT STAND MUSTER.

LADIES AND GENTLEMEN, THE TIME IS DRAWING LATE AND I HAVE TAKEN MORE TIME THAN I REALLY ANTICIPATED IN MY CLOSING ARGUMENT.

ALONG WITH MY FELLOW COUNSEL, I DO WANT TO THANK YOU FOR YOUR PATIENCE, FOR YOUR INDULGENCE, FOR YOUR CARE THAT YOU HAVE OBVIOUSLY EXERCISED IN TAKING NOTES AND DISTINGUISH THE TESTIMONY AND SEEKING TO APPLY THAT WHICH WAS SAID.

CERTAINLY, I URGE UPON YOU IN THAT APPLICATION, TO DIFFERENTIATE, TO REMEMBER WHO WAS MAKING STATEMENTS AND TO WHOM. IN OTHER WORDS, THERE ARE A NUMBER OF STATEMENTS THAT WERE MADE BY DALE FLANAGAN WITH REGARD TO A -- OR ALLEGEDLY MADE BY DALE FLANAGAN WITH REGARD TO HIS PROSPECTIVE INVOLVEMENT IN THE PROCEEDINGS. THE STATEMENTS WERE NOT MADE BY MY CLIENT RANDY MOORE.

I KNOW THAT WHEN YOU RETIRE TO THE JURY ROOM, YOU WILL AFFORD HIM ALL THAT THE LAW GIVES TO HIM AS IT GIVES TO EVERY DEFENDANT IN EVERY CASE.

AGAIN, I APPRECIATE AND THANK YOU FOR YOUR INDULGING ME. I TRUST I HAVEN'T ABUSED YOUR TIME.

AND I WOULD ALSO LIKE TO MAKE THAT ONE OBSERVATION THAT MR. SMITH HAS MADE AND I THINK THAT OTHER COUNSEL HAVE MADE AND THAT IS THAT WHEN COUNSEL FOR THE DEFENDANTS HAVE COMPLETED THEIR ARGUMENT, YOU WILL BE ADDRESSED AT SOME LENGTH BY MR. SEATON. HE WILL BE THE LAST ATTORNEY YOU WILL HEAR FROM.

WE WILL HAVE NO OPPORTUNITY TO REPLY OR TO REBUT WHICH DOESN'T MEAN THAT WE WOULD NOT HAVE COMMENT. THE LAW

DOESN'T CONTEMPLATE IT. THE LAW DOESN'T PERMIT IT, SO I WOULD ASK YOU TO AT LEAST THINK IN TERMS OF THOSE ARGUMENTS THAT WE MIGHT HAVE MADE WERE WE AFFORDED THAT OPPORTUNITY. THANK YOU VERY MUCH.

THE COURT: THANK YOU, MR. POSIN. MR. HANDFUSS.

MR. HANDFUSS: JUDGE, COUNSEL, LADIES AND GENTLEMEN OF THE JURY. YOU HAVE SAT THROUGH ALMOST TWO WEEKS OF TESTIMONY, TWO WEEKS OF EVIDENCE AND I, AS ALL THE REST OF THE COUNSEL, OF COURSE, WOULD LIKE TO THANK YOU FOR THAT.

THIS HAS BEEN A VERY, VERY DIFFICULT TRIAL. THE LAST TRIAL I WAS INVOLVED IN WAS A FEDERAL COURT TRIAL. THERE WERE MULTIPLE DEFENDANTS. THERE WERE SIX DEFENDANTS IN THAT PARTICULAR TRIAL, NOT FOUR, AND THIS TRIAL WAS HARDER TO TRY THAN THAT PARTICULAR ONE BECAUSE OF THE ADVERSE INTERESTS THE DEFENDANTS IN THIS ONE HAVE TOWARDS EACH OTHER.

THE JUDGE CERTAINLY MADE IT EASY, AS EASY AS IT CAN BE FOR US, IN HIS HANDLING OF THE TRIAL MAKING SURE EVERYTHING WAS ON TRACK AND GOING SMOOTHLY. AND I WOULD LIKE TO THANK EVERYBODY JUST AS MR. SMITH DID AND THE OTHER COUNSEL.

IN ADDITION, I WOULD CERTAINLY LIKE TO THANK THE CLERK WHO HAS HAD TO TAKE CARE OF MORE THAN 100 PIECES OF EVIDENCE AND AT A MOMENT'S CALL WHEN ANY ATTORNEY WENT UP THERE, DEMANDED, "I WANT EXHIBIT NUMBER 25," ALL OF A SUDDEN PICK IT OUT OF NOWHERE SO I DO APPRECIATE HER EFFORTS.

I TOLD YOU WHEN I FIRST SPOKE TO YOU IN THE OPENING STATEMENT, I ASKED YOU, I BEGGED YOU NOT TO MERELY CONSIDER THE CRIMES THAT ARE COMMITTED HERE BECAUSE THE CRIMES THEMSELVES ARE NOT ON TRIAL. THERE ARE INDIVIDUALS ON TRIAL. MY PARTICULAR CASE, MY CLIENT, ROY MCDOWELL, IS ON TRIAL HERE.

MR. HARMON CALLED THEM SINISTER. HE TERMED THEM THE WORST NIGHTMARES OF CARL AND COLLEEN GORDON AND THAT IS PROBABLY TRUE. THE PROBLEM IS THAT IF YOU ALL GO BACK INTO THE JURY ROOM OR IF ANY ONE OF YOU GOES BACK IN THAT JURY ROOM AND DELIBERATES AND SAYS TO YOURSELF OR ANYBODY ELSE, "THESE CRIMES ARE TERRIBLE, LET'S CONVICT THEM," WITHOUT FIRST REALLY DECIDING THAT ROY MCDOWELL MIGHT HAVE BEEN THE ONE WHO MIGHT HAVE COMMITTED THE CRIME, THEN THE WHOLE PROCESS, ALL THE VIRTUES OF OUR AMERICAN SYSTEM OF JUSTICE HAVE JUST BEEN THROWN OUT OF THE WINDOW.

I DON'T MEAN TO TALK DOWN TO YOU. IF IT SOUNDS LIKE IT, I APOLOGIZE. IT IS SUCH A IMPORTANT POINT. I CLERKED FOR A JUDGE IN THIS COURTHOUSE FOR A YEAR. I HAVE SEEN A LOT, A LOT OF TRIALS. I WOULD THINK THAT I HAVE SEEN MORE TRIALS THAN A LOT OF COUNSEL HERE WHO ARE EVEN OLDER THAN ME.

AND SOMETIMES YOU WOULD BE SURPRISED. A JUROR COMES OUT AND YOU TALK TO THE JURORS IF THEY WANT TO AFTERWARDS ABOUT THE CASE AND HOW DID YOU ARRIVE AT THIS?

WHAT WAS YOUR THINKING? WHAT WAS YOUR RATIONALE? DID YOU TAKE THIS PIECE OF EVIDENCE INTO ACCOUNT?

TRY TO UNDERSTAND WHAT THE JURY DID AND WHY THEY DID IT. AND THERE ARE A LOT OF TIMES THAT A JUROR MEMBER MIGHT HAVE SAID OR DID SAY, "WELL, I DIDN'T LIKE THE CRIME AND THIS WAS TERRIBLE AND I THINK WE HAD TO CONVICT SOMEBODY ON IT."

AND THAT IS JUST NOT RIGHT. BECAUSE IF I WAS SITTING THERE OR IF ANYBODY ELSE WAS SITTING THERE, YOU WOULD NOT WANT A JURY PERSON WHO WOULD SAY THAT ABOUT YOU.

BECAUSE YOU HAVE RIGHTS JUST LIKE ROY MCDOWELL HAS RIGHTS OR ANYBODY. JOHN RAY LUCKETT HAS RIGHTS, DALE FLANAGAN HAS RIGHTS AND RANDY MOORE HAS RIGHTS UNDER OUR CONSTITUTION AND UNDER OUR BILL OF RIGHTS.

THAT IS WHY I AM ASKING YOU TO PLEASE DON'T GET CONFUSED WITH THIS TERRIBLE SINISTER PLOT AND THOUGHTS. MR. SEATON STOOD UP IN CLOSING ARGUMENT. THE FIRST THING HE DID, "I WOULD LIKE YOU TO MEET MR. AND MRS. GORDON." AND HE SHOWED YOU TWO GORY PICTURES.

AND I WARNED YOU ABOUT THAT IN MY OPENING STATEMENT AND IT CAME TRUE. THE FIRST THING THE STATE SAID TO YOU IS, "LOOK AT THE CRIME." LET'S NOT LOOK AT THE EVIDENCE. LET'S NOT SEE WHO MIGHT BE GUILTY BEYOND A REASONABLE DOUBT. LET'S NOT SEE WHO MIGHT NOT BE GUILTY BEYOND A REASONABLE DOUBT.

LOOK AT THE CRIME. EACH COUNSEL STOOD UP AND SAID NOBODY IS ARGUING THAT OBVIOUSLY A VERY, VERY BAD CRIME HAS TAKEN PLACE HERE. OBVIOUSLY, A MURDER HAS TAKEN PLACE. OBVIOUSLY, OTHER CRIMES HAVE TAKEN PLACE. THAT IS NOT AN ISSUE. WHAT IS AN ISSUE IS WHO DID IT. A CRIME IS NOT ON TRIAL HERE.

THERE IS NO MISTER CRIME. THERE IS NO MISTER MURDER. THERE IS MR. MCDOWELL. THERE IS A MR. OTHER DEFENDANTS. NOT A CRIME. SO THAT IS NOT AN ISSUE.

IT MIGHT BE ARGUED THAT YOU HAVE TO DETERMINE A CRIME HAS BEEN COMMITTED AND, OF COURSE, YOU DO. BUT THAT IS NOT AN ISSUE WHEN YOU PLACE IT AGAINST EACH DEFENDANT SITTING HERE.

WHAT I AM GOING TO TRY TO DO IS ATTEMPT TO BE THE 13TH PERSON IN THE JURY BOX IN THE DELIBERATION ROOM. I AM GOING TO TRY TO POINT OUT SOME THINGS THAT OCCURRED ON THAT STAND THAT YOU HAVE HEARD, SOME OF THE EVIDENCE YOU HAVE SEEN WHICH MIGHT MAKE YOU THINK ABOUT IS THE EVIDENCE VIABLE? IS IT GOOD EVIDENCE? IS IT BAD EVIDENCE? WAS THAT PERSON REALLY TELLING THE TRUTH? DID THAT PERSON HAVE A MOTIVE NOT TO TELL THE TRUTH?

MR. SEATON WHEN HE FIRST STARTED OUT ON THE EVIDENCE, HE SAID THAT ALL THE DEFENDANTS WERE INVOLVED IN DEVIL WORSHIP.

I WOULD THINK THAT MR. SEATON WOULD AGREE WITH

ME, AND I AM SURE MR. HARMON WHEN HE GETS UP WILL CORRECT ME IF I AM WRONG, THERE WAS NO TESTIMONY WHATSOEVER THAT ROY MCDOWELL WAS EVER INVOLVED IN ANY DEVIL WORSHIP.

I AM SURE THAT IS AN UNINTENTIONAL MISSTATEMENT BY MR. SEATON AND IF I AM WRONG, MR. HARMON WILL GET UP AND CORRECT ME.

IF I TELL YOU SOMETHING, MY RECOLLECTION OF WHAT THE EVIDENCE WAS OR WHAT SOMEBODY SAID, THAT IS MERELY MY RECOLLECTION AS EACH COUNSEL'S RECOLLECTION. THE ONLY RECOLLECTION THAT IS IMPORTANT IS, OF COURSE, YOURS.

YOU HAVE ALL TAKEN COPIOUS NOTES DURING THE TRIAL. IF MY RECOLLECTION DIFFERS FROM WHAT YOU SAY IN YOUR NOTES, PLEASE DO NOT LISTEN TO MY RECOLLECTION. YOU LISTEN TO YOUR NOTES BECAUSE THAT IS THE IMPORTANT THING.

YOU HEARD IT. YOU ARE SUPPOSED TO DECIDE ON IT. IF MINE DIFFERS FROM YOURS, DO NOT USE MINE. AND IF I SAY SOMETHING THAT DIFFERS, I DO NOT DO IT INTENTIONALLY. I ASSURE YOU, AS COUNSEL, ALL COUNSEL WOULD NOT DO IT AS OFFICERS OF THE COURT. IF IT DOES DIFFER, PLEASE GO BY YOUR OWN NOTES AND NOT MINE.

UNFORTUNATELY, NONE OF US HAVE THE WHOLE TRANSCRIPT OF WHAT WAS SAID SO WE CAN'T BE SURE EXACTLY WHAT WAS SAID. WE ONLY HAVE OUR NOTES JUST LIKE YOU DO.

NOW, SOME OF THE EVIDENCE THAT CAME OUT DURING MR. SEATON'S ARGUMENT. THERE WAS A TELEPHONE CALL BY RANDY

MOORE TO ROY MCDOWELL. IT IS INTERESTING TO NOTE THAT ROY MCDOWELL WAS NOT AT MR. FLANAGAN'S APARTMENT AT THIS MEETING. OTHER DEFENDANTS WERE. YOU HAVE HEARD TESTIMONY TO THAT.

WHO WAS NOT PRESENT? ROY MCDOWELL WAS NOT PRESENT. THE TELEPHONE CONVERSATION WENT SOMETHING TO THE EFFECT OF "DID YOU GET THE TOY?"

THEN, IF YOU RECALL, THE CONVERSATION WAS AFTER THAT, "ALL RIGHT, THAT'S OKAY." NOT "GOOD," NOT "BRING IT RIGHT OVER," NOT "OKAY, EVERYTHING'S SET." "ALL RIGHT. THAT'S OKAY."

IT'S MY INFERENCE FROM THAT THAT PERHAPS WHATEVER TOY THEY ARE TALKING ABOUT -- OF COURSE, MR. SMITH OR SOME OTHER ATTORNEY WOULD HAVE YOU BELIEVE IS A GUN -- THAT MR. MCDOWELL DID NOT HAVE A GUN.

AND IF I CAN TALK ABOUT THAT RIGHT NOW. THERE HAS BEEN COMMENT ON CALLING MARILYN LUCAS TO THE STAND. I CALLED MARILYN LUCAS TO THE STAND. THERE MIGHT HAVE BEEN COMMENT MR. SEATON DID. SHE WAS MY WITNESS.

I COULDN'T TELL YOU, OF COURSE, WHY I CALLED HER. THERE WAS NO ARGUMENT AT THAT TIME, JUST QUESTIONS AND ANSWERS. I DID NOT CALL HER TO SHOW YOU THAT A GUN WAS GOTTEN ON THE 5TH WHEN IT WAS REALLY GOTTEN ON THE 6TH.

WHAT I CALLED HER FOR IS TO SHOW THAT A GUN WAS GOTTEN ON THE 6TH BY A DEFENDANT OTHER THAN ROY MCDOWELL.

AND I WOULD QUESTION JUST AS IF I WOULD BE THAT

13TH PERSON, JUST AS I WAS THE 13TH PERSON IN THE DELIBERATION ROOM, IN THE JURY ROOM, IF ROY MCDOWELL BROUGHT A GUN TO THE APARTMENT AS IS ALLEGED BY MR. LUCKETT, MR. AKERS AND THE STATE, WHY WOULD THEY HAVE TO GO AND GET ANOTHER GUN THE NEXT DAY?

IF A GUN WAS AVAILABLE TO THEM, ALL THEY HAD TO DO WAS CALL MARILYN LUCAS AND SAY, "I WANT MY GUN BACK."

WHY DID THEY HAVE TO MAKE A BIG ARRANGEMENT FOR ROY MCDOWELL TO BRING A GUN. AND I WILL TELL YOU WHY THAT IS, BECAUSE ROY MCDOWELL NEVER BROUGHT A GUN. THAT'S BECAUSE THIS IS A FABRICATION.

YOU HAVE BEEN TREATED TO THE THOMAS AKERS AND THE JOHNNY RAY LUCKETT SHOW. THERE WAS CLEARLY A HANDGUN AVAILABLE. THERE WAS NO NEED FOR ROY TO BRING A GUN AND ROY DID NOT BRING A GUN. THAT IS BECAUSE ROY WAS NOT THERE WHEN THEY LEFT RANDY MOORE'S APARTMENT THAT NIGHT SUPPOSEDLY TO GO TO THE GORDONS' HOUSE.

NOW, WHEN I REFER TO DAN SEATON, IT IS NOT PERSONAL. I AM REFERRING TO THE STATE'S CASE. SO THAT WHEN ANY COUNSEL REFERS TO ANOTHER CASE, IT IS NOTHING PERSONAL.

WHEN THE STATE OR MR. SEATON SAID THAT HAVENS, LUCAS, AKERS, LUCKETT TOOK THE STAND, HE TOLD YOU THAT THEY BASICALLY TOLD THE SAME STORY ABOUT THE EVENTS THAT HAPPENED THAT NIGHT AND, THEREFORE, YOU SHOULD CONVICT THE DEFENDANTS.

I WOULD POINT OUT THAT MR. HAVENS AND MR. LUCAS

DID NOT GIVE THE SAME STORY AS MR. AKERS AND MR. LUCKETT AND THERE WAS A MINOR DIFFERENCE EVEN BETWEEN MR. AKERS AND MR. LUCKETT'S STORY.

MR. HAVENS TOLD YOU, IF YOU WILL RECALL, ON THAT MEETING IN OCTOBER, THIS MEETING WHERE SUPPOSEDLY THINGS WERE PLANNED, THAT THERE WERE INDIVIDUALS WHO WERE NOT PRESENT.

MR. SMITH TOLD YOU THAT MR. RUSTY HAVENS SAID THAT JOHNNY RAY LUCKETT WAS NOT PRESENT. MR. SMITH DID NOT TELL YOU, WHICH I AM TELLING YOU NOW, THAT MR. HAVENS ALSO SAID THAT ROY MCDOWELL WAS NOT PRESENT AT THAT MEETING. WAS NOT PRESENT. THAT IS NOT THE SAME TESTIMONY AS MR. AKERS.

MR. SEATON, MR. HAVENS ALSO TESTIFIED ABOUT A CONVERSATION BACK AT ONE OF THE DEFENDANT'S APARTMENT WHERE HE OVERHEARD ONE OF THE DEFENDANTS TALKING WITH ROY MCDOWELL.

AND THE DEFENDANT SAID -- DEFENDANT BASICALLY TOLD HIM, "IT'S TOUGH, ROY. YOU'RE IN IT UP TO YOUR HEAD. THERE IS NOTHING YOU CAN DO AND NOW YOU ARE GOING TO HAVE TO LIVE WITH IT," THAT TYPE OF THING.

WELL, I ASKED MR. HAVENS, "DID YOU HEAR A RESPONSE?" I SHOWED HIM HIS STATEMENT TO THE POLICE. AND HE SAID, "YES." HE DOES RECALL THAT ROY MCDOWELL THEN SAID, "WELL, I DIDN'T KNOW ANYTHING ABOUT THIS. I THOUGHT WE WERE JUST GOING TO GET TAPES AND BEER FOR THE PARTY."

NOW, WHY WOULD MR. HAVENS LIE ABOUT THAT ONE PARTICULAR POINT? WHY WOULD HE LIE ABOUT THAT ONE PARTICULAR

POINT AND TELL THE TRUTH ABOUT EVERYTHING ELSE?

MR. SEATON, THE STATE, WANTS YOU TO BELIEVE MR. HAVENS' TESTIMONY AND I DO, TOO. THAT'S BECAUSE MR. HAVENS' TESTIMONY IS THE MOST FAVORABLE TO ROY MCDOWELL BECAUSE MR. HAVENS' TESTIMONY SHOWS THAT ROY MCDOWELL AFTER THE FACT DIDN'T KNOW ANYTHING THAT WAS GOING TO HAPPEN THAT NIGHT.

I THINK THE EVIDENCE BASICALLY SHOWS THAT ACCORDING TO MR. LUCAS -- AND WHY WOULD MR. LUCAS LIE ABOUT THIS? MR. LUCAS SAID THAT ROY MCDOWELL WAS NOT AT MR. MOORE'S APARTMENT BEFORE THEY LEFT FOR THE GORDONS BUT HE DID SAY THAT -- I AM SORRY, THAT MR. MCDOWELL WAS NOT AT MR. MOORE'S APARTMENT BEFORE THEY LEFT FOR THE GORDONS. BUT HE DID SAY THAT MR. MCDOWELL CAME BACK WITH THEM.

NOW, IF HE WAS GOING TO LIE JUST TO HELP MR. MCDOWELL, WHY WOULDN'T HE ALSO SAY THAT MR. MCDOWELL DIDN'T COME BACK WITH THEM? WHY JUST HE DIDN'T LEAVE WITH THEM. HE DID COME BACK.

I WOULD ASK YOU THAT. THAT IS BECAUSE I DON'T THINK, AND I HOPE YOU WOULD GET THE SAME IMPRESSION, THAT WHEN MR. LUCAS SAID THAT, HE WAS NOT LYING ON THE STAND BECAUSE MR. MCDOWELL WAS NOT AT RANDY MOORE'S APARTMENT WHEN THEY LEFT FOR THE GORDONS' HOUSE.

I THINK THE EVIDENCE ALSO SHOWS THAT IT'S POSSIBLE THAT ROY MCDOWELL WAS PICKED UP ALONG THE WAY. THERE WAS TESTIMONY THAT ANOTHER INDIVIDUAL -- AFTER THE

DEFENDANTS HAD LEFT THE APARTMENT, THEY STOPPED TO PICK SOMEBODY UP.

WELL, WE KNOW THAT MR. WALSH WAS NAMED THERE AT THE APARTMENT, WE KNOW THAT THE OTHER DEFENDANTS WERE NAMED, MR. AKERS, MR. LUCKETT, THE REMAINING DEFENDANTS, HOWEVER, WHO WAS LEFT?

ROY MCDOWELL WAS LEFT. ROY MCDOWELL, ACCORDING TO THE EVIDENCE, IS PICKED UP ALONG THE WAY BY THE DEFENDANTS AND WENT WITH THEM TO THE GORDON HOUSE.

NOT HAVING BEEN AT THE OCTOBER MEETING WHERE THIS CONSPIRACY SUPPOSEDLY TOOK PLACE, NOT HAVING BEEN AT THE APARTMENT THAT MR. LUCAS WAS LIVING AT WHERE THEY WERE TALKING ABOUT WHAT WAS GOING ON. PICKED HIM UP ALONG THE WAY.

NOT HAVING HANDLED THE GUN, NOT HAVING BROUGHT THE .22 PISTOL. EVEN MR. AKERS ON THE STAND SAID HE DIDN'T SEE HIM WALK THROUGH THE DOOR. "OH, BUT IT WAS REAL CLOSE. ALMOST IMMEDIATELY AFTER HE WALKED IN THE DOOR, I SAW HIM WITH THE GUN AND HE GAVE IT TO DALE."

THAT'S BECAUSE MR. MCDOWELL DID NOT COME THROUGH THE DOOR, THAT'S BECAUSE MR. MCDOWELL DID NOT HAVE THE .22 AND THAT'S BECAUSE MR. MCDOWELL DID NOT SUPPLY THE GUN.

IF MR. MCDOWELL SUPPLIED THE GUN, WHY DIDN'T HE KEEP IT? WHY DIDN'T EVERYBODY HAVE A GUN? LET'S SEE WHO HAD A GUN AT THE GORDONS' HOUSE.

MR. LUCKETT TESTIFIED HE HAD A GUN. MR. LUCKETT TESTIFIED HE HAD THAT SAWED-OFF. LATER SAYS IT WAS TAKEN AWAY BY MICHAEL WALSH, THE 16-YEAR-OLD. OR MR. MOORE, PERHAPS. I FORGET WHO AT THE PRESENT TIME.

MR. MOORE SUPPOSEDLY HAD A GUN, DALE FLANAGAN HAD THE .22 SUPPOSEDLY, TOM AKERS WENT IN THE TRAILER. TO LOOK OUT AT SURROUNDING HOUSES, OF COURSE, THAT WAS A GOOD VANTAGE POINT. HE COULD SEE IF LIGHTS WERE COMING ON. MR. WALSH HAD A GUN AT ONE POINT. HE ALSO HAD THE STICK, THE CLUB SUPPOSEDLY THEY BROKE THE WINDOW WITH.

WALSH HAD A GUN AND A CLUB AT ONE POINT. THE REMAINING DEFENDANTS ALL HAD GUNS. MR. AKERS WAS THE LOOKOUT. MR. MCDOWELL WAS -- I DON'T KNOW WHAT MR. MCDOWELL WAS.

MR. MCDOWELL WAS NOT THERE AS A RESULT OF A CONSPIRACY. HE DIDN'T HAVE A GUN, HE DIDN'T HAVE A CLUB. HE DIDN'T GO TO BE A LOOKOUT. HE IS STANDING THERE WONDERING WHAT IS GOING ON. MAYBE HE HAS AN INKLING BY NOW. WHAT IS HE SUPPOSED TO DO?

YOU HEARD ANGELA SALDANA UP ON THE STAND. MISS SALDANA WAS A VERY INTERESTING WITNESS. I ACTUALLY HAD NO QUESTIONS AT ALL PREPARED FOR MISS SALDANA.

THAT'S BECAUSE MISS SALDANA AT HER STATEMENTS TO THE POLICE, PRELIMINARY HEARING, EVIDENTIARY HEARING DID NOT IMPLICATE ROY MCDOWELL AT ALL IN THE CONSPIRACY, THE FACT

THAT HE WAS THERE AT THE GORDON HOUSE.

ALL OF A SUDDEN, I AM SITTING THERE AND UPON QUESTIONING OF COUNSEL, MISS SALDANA SAYS THAT DALE FLANAGAN SAID THAT ROY MCDOWELL WAS AT THE APARTMENT OR ROY MCDOWELL WAS AT THE HOUSE AT THE TIME IT WAS DONE.

I AM SHOCKED. WHAT TO DO NOW. AS YOU COULD TELL, I WAS VERY PERTURBED. I WAS VERY UPSET AND I THOUGHT WE HAVE ANOTHER WITNESS WHO IS NOT TELLING THE JURY THE TRUTH.

WHAT TO DO. I GET UP AND I SAID, "MISS SALDANA, DO YOU RECALL GIVING A STATEMENT TO THE POLICE?" "YES." "YOU MENTIONED SPECIFIC NAMES. YOU SAID DALE FLANAGAN TOLD YOU SPECIFIC NAMES?" "YES, HE DID."

"YOU MENTION THE NAMES IN YOUR STATEMENT. DO YOU REMEMBER THE NAMES IN THE STATEMENT? I WILL SHOW YOU YOUR STATEMENT. DID YOU ONCE MENTION ROY MCDOWELL'S NAME?

"YOU MENTIONED THE OTHER DEFENDANTS' NAMES. THE OTHER DEFENDANT'S. DID YOU MENTION ROY MCDOWELL'S NAME?" "NO."

"AT YOUR PRELIMINARY HEARING, DID YOU MENTION ROY MCDOWELL'S NAME? DID YOU MENTION SPECIFIC NAMES? DID YOU MENTION THAT DALE FLANAGAN TOLD YOU THAT ROY MCDOWELL WAS INVOLVED OR ROY MCDOWELL WENT THROUGH THE HOUSE OR ROY MCDOWELL HAD A GUN? DID YOU MENTION THAT AT THE PRELIMINARY HEARING?" "NO."

MENTION SPECIFIC NAMES, ACTS. YOU HEARD VERY SPECIFIC AS TO WHAT WENT ON AS TO WHAT MR. FLANAGAN TOLD HER. AT A EVIDENTIARY HEARING JUST A WEEK BEFORE THE TRIAL, "DO YOU REMEMBER TESTIFYING?" "YES." "GIVING SPECIFIC NAMES?" "YES, I DO."

SHE GAVE SPECIFIC NAMES, SPECIFIC ACTS. WHERE IS ROY MCDOWELL'S NAME? WHERE IS ROY MCDOWELL'S ACT? WHERE IS ROY MCDOWELL'S PARTICIPATION IN THE CONSPIRACY?

WE BROKE FOR THE EVENING RECESS, WE CAME BACK THE NEXT DAY. MISS SALDANA THOUGHT BETTER ABOUT IT, I GUESS. WENT OVER IN HER MIND WHAT THEY ACTUALLY TESTIFIED TO AND I ASKED HER ONE OR TWO QUESTIONS. FIRST QUESTION WAS, "WERE YOU MISTAKEN WHEN YOU SAID THAT DALE FLANAGAN SAID THAT ROY WAS THERE?" "YES, I WAS MISTAKEN."

A MAIN WITNESS SAID THAT A KEY DEFENDANT, SAID THAT ROY MCDOWELL WAS NOT THERE. OR THAT ROY MCDOWELL'S NAME WAS SPECIFICALLY EXCLUDED. EVERYBODY ELSE WAS MENTIONED, WHY NOT ROY MCDOWELL?

THERE IS TWO JURY INSTRUCTIONS THAT I IN MY CASE WOULD ASK YOU TO PAY CLOSE ATTENTION TO. ONE IS NUMBER 33 WHICH IS THE SAME INSTRUCTION THAT MR. SMITH READ ABOUT MERE PRESENCE, BECAUSE THAT IS EXACTLY WHAT THE EVIDENCE IS AGAINST MR. MCDOWELL.

MERE PRESENCE, THAT'S NOT ENOUGH. THEY CAN'T SHOW HIM AT ANY CONSPIRACY, THEY CAN'T SHOW HIM AT THE

MEETINGS. MERE PRESENCE, NOT ENOUGH TO CONVICT SOMEBODY. ESPECIALLY, NOT ENOUGH TO CONVICT SOMEBODY OF FIRST DEGREE MURDER, TWO FIRST DEGREE MURDERS WITH USE OF A DEADLY WEAPON WHICH MR. MCDOWELL DID NOT HAVE ADMITTEDLY BY EVERY WITNESS AT THE GORDONS' HOUSE.

THE OTHER INSTRUCTION IS INSTRUCTION NUMBER 35. THIS IS THE INSTRUCTION ON REASONABLE DOUBT. AND THIS IS WHAT ALL DEFENSE COUNSEL TALKED ABOUT EARLIER, AND ESPECIALLY ON THE OPENING STATEMENT, THE DEFENDANT IS PRESUMED TO BE INNOCENT UNTIL THE CONTRARY IS PROVED.

I DON'T HAVE TO PROVE, MR. MCDOWELL DOES NOT HAVE TO PROVE THAT HE IS INNOCENT, NOT AT ALL.

AND I STRESSED THIS TO YOU IN MY OPENING STATEMENT AND I WOULD ASK YOU TO RECALL THAT AND STRESS IT AGAIN. AGAIN APOLOGIZE IF IT SOUNDS LIKE -- IF YOU ARE SAYING TO YOURSELF, "HE SAID THIS BEFORE, WE ARE NOT IDIOTS, WE UNDERSTAND IT."

I CAN'T STRESS IT ENOUGH AND I HAVE TO TALK ABOUT IT AGAIN AND AGAIN AND AGAIN UNTIL THERE IS NOT ENOUGH I CAN SAY ABOUT IT. AND IT IS NOT BECAUSE I AM TALKING DOWN TO YOU. IT IS NOT BECAUSE OF ANYTHING ELSE. IT IS SO IMPORTANT I CANNOT LET IT GO BY.

THIS PRESUMPTION PLACES UPON THE STATE THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT EVERY MATERIAL ELEMENT OF THE CRIME CHARGED, 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 AND IS SUCH A DOUBT AS WOULD GOVERN OR CONTROL A PERSON IN THE MORE WEIGHTY AFFAIRS OF LIFE.

IT GOES ON AND I WON'T BORE YOU, INSTRUCTION NUMBER 35, REASONABLE DOUBT. PRESUMPTION OF INNOCENCE ALONG WITH INSTRUCTION NUMBER 33. MERE PRESENCE AT THE SCENE, EVEN WITH KNOWLEDGE, EVEN WITH KNOWLEDGE, IS NOT ENOUGH TO CONVICT ANYBODY OF ANYTHING ESPECIALLY FIRST DEGREE MURDER.

MISS SALDANA TESTIFIED, AS I SAID, ABOUT WHAT MR. FLANAGAN TOLD HER. MISS SALDANA SAID THAT MR. FLANAGAN, NOT ROY MCDOWELL, ANOTHER DEFENDANT ADMITTED GOING THROUGH THE GORDON HOUSE, TAKING OUT THE PURSE AND THE WALLET FROM THE CLOSET. NOT ROY MCDOWELL.

MR. AKERS SAYS, WHO DIDN'T SEE ANYTHING, WAS NOT IN THE HOUSE ADMITTEDLY AND DIDN'T KNOW WHAT WAS GOING ON IN THE HOUSE -- I SHOULD CHANGE THAT. HE KNEW VERY WELL WHAT WAS GOING ON IN THE HOUSE. HE JUST DIDN'T SEE THE ACTUAL EVENTS.

HE CAN'T TELL YOU THAT ROY MCDOWELL TOOK A WALLET OUT OF THE CLOSET. JOHN LUCKETT CAN'T TELL YOU ROY MCDOWELL TOOK A PURSE OR WALLET OUT OF THE CLOSET AND WENT THROUGH IT. HE CAN'T TELL YOU THAT.

ANOTHER DEFENDANT IN ADMISSION THROUGH ANGELA SALDANA SAID THAT HE DID IT. NOT ROY, NOT ROY MCDOWELL. WHO IS MORE BELIEVABLE, ADMISSION FROM A DEFENDANT OR MR. LUCKETT ALSO KNOWN AS THE RIPPER AND MR. AKERS WHO HAD NO ACTUAL PERSONAL KNOWLEDGE, DID NOT SEE IT HAPPEN, ADMITTEDLY DID NOT SEE IT HAPPEN.

ROY MCDOWELL NEVER HAD THE PURSE, NEVER HAD THE WALLET, DID NOT GO INTO THE HOUSE AND DID NOT GO THROUGH THE CLOSET TO TAKE IT OUT. THAT TESTIMONY IS VERY CLEAR.

ASK YOURSELF WHY WOULD HE LEAVE -- WHY WOULD A DEFENDANT MAKING AN ADMISSION, OPEN ADMISSION TO MISS SALDANA, WHY WOULD HE LEAVE ROY'S NAME OUT?

THERE HAS BEEN TALK BY MR. LUCKETT'S ATTORNEY OF SUBPLOT, SUBCONSPIRACY, THE ACES GANG. DALE FLANAGAN IS NOT A MEMBER OF THE ACES GANG. MR. SMITH SAID THE ACES GANG, DALE'S NOT A MEMBER OF THE ACES GANG.

YOU DIDN'T HEAR ANY TESTIMONY OF THAT. NOT THAT THERE IS CONTRADICTORY TESTIMONY. NOBODY EVER SAID THAT DALE FLANAGAN WAS A MEMBER OF THE ACES GANG. ROY MCDOWELL WAS THE ALLEGED LEADER OF THE ACES GANG. HIS NICKNAME IS PLAYBOY, REAL DANGEROUS, PLAYBOY.

MR. LUCKETT, WHO SAYS HE WASN'T A MEMBER, HE ASSOCIATED WITH THEM, HE HUNG AROUND WITH THEM, HE WENT WHERE THEY WENT, THEY GAVE HIM A NICKNAME BUT "I AM NOT A MEMBER OF THE ACES GANG, OH, NO."

IF HE WASN'T HERE ON TRIAL TODAY AND SOMEBODY ASKED HIM -- IF THIS HAD NEVER HAPPENED AND IF SOMEBODY ASKED HIM IF HE WAS A MEMBER, I WONDER WHAT HE WOULD SAY. AFTER THE TRIAL IS OVER, I WONDER WHAT HE WILL SAY IF HE WAS A MEMBER.

THE GANG WHERE YOU HEARD TESTIMONY WAS ONLY FORMED BECAUSE THEY WERE HAVING TROUBLE FROM OTHER PEOPLE, OTHER PEOPLE WERE CHASING THEM. THERE WASN'T TESTIMONY THEY WENT AROUND HITTING OLD LADIES ON THE HEAD FOR THEIR PURSES, GOING THROUGH PEOPLE'S HOUSES BURGLARIZING, ROBBING, NO TESTIMONY OF THAT.

THERE IS A BIG DEAL MADE ABOUT THE ACES GANG THAT HAS ABSOLUTELY NOTHING TO DO WITH THIS CASE AND THE ACES GANG IS A SMOKE SCREEN CONCOCTED BY MR. LUCKETT AND HIS DEFENSE TO TRY TO THROW OFF HIS GUILT, TO TRY TO MAKE HIM LOOK INNOCENT BY MAKING EVERYBODY ELSE LOOK GUILTY, ESPECIALLY, MR. MCDOWELL.

NOW, WHY WOULD MR. LUCKETT AND MR. AKERS LIE? WHY WOULD THEY SAY MR. MCDOWELL BROUGHT A .22? WHY WOULD THEY SAY MCDOWELL WENT ALONG WITH EVERYBODY ELSE AT THE SAME TIME?

I WILL TELL YOU WHY. MR. AKERS HAS WALKED AWAY FROM THIS PROCEEDING, WALKED AWAY WITH A PLEA TO MANSLAUGHTER, FIVE YEARS PROBATION.

YOU HAVE HEARD, I BELIEVE, MR. POSIN OR PERHAPS

MR. SMITH READ AN INSTRUCTION ABOUT MOTIVE. IF THAT ISN'T MOTIVE ENOUGH, "YES, SIR, MR. D.A., I WILL TESTIFY AT THE TIME OF TRIAL. LET ME WALK AWAY FROM TWO FIRST DEGREE MURDERS WITH USE OF A DEADLY CHARGE, FROM A BURGLARY CHARGE, FROM A ROBBERY WITH USE OF DEADLY WEAPON CHARGE, I WILL TESTIFY AGAINST EVERYBODY ELSE. I CAN GIVE YOU EVERYTHING YOU WANT. DON'T WORRY, NOBODY ELSE WILL GET AWAY BUT I AM TELLING YOU THE TRUTH."

I MEAN, EVERYBODY WAS THERE. ROY MCDOWELL IS A PROBLEM IN THIS CASE BECAUSE HE IS NOT SHOWN AT THE CONSPIRACY, HE IS NOT SHOWN CONCLUSIVELY BRINGING THE .22.

WHAT TO DO ABOUT MR. MCDOWELL. YOU ALSO HAVE TO SHOW EVERY OTHER SINGLE DEFENDANT IS GUILTY. LET'S PUT MR. MCDOWELL WITH THE GUN. OTHER PEOPLE ARE GOING TO SAY AT THE GORDONS' HOUSE HE DIDN'T USE A GUN.

WELL, LET'S PUT HIM BRINGING A GUN, THAT IS AS GOOD AS ANY. THAT WILL BE TESTIMONY AGAINST HIM. I DIDN'T SEE HIM BRING IT THROUGH AS FAR. AS HE BROUGHT IT THROUGH THE DOOR, I SAW HIM HAND THE GUN TO DALE.

DID YOU SEE HIM HAVE A GUN WHEN HE WALKED THROUGH THE DOOR, MR. AKERS, BUT TWO SECONDS LATER I SAW HIM HAND IT TO DALE.

THAT'S THEIR WAY OUT WITH MR. MCDOWELL. THAT'S THEIR WAY OUT, MR. AKERS' WAY OUT, MR. LUCKETT'S WAY OUT OF PUTTING ALL THE DEFENDANTS, MR. MCDOWELL, THE LAST KEY

DEFENDANT. HOW ARE YOU GOING TO STICK MR. MCDOWELL IN THIS AND THAT'S HOW.

MR. LUCKETT SITS THERE, SEES MR. AKERS WALK AWAY WITH FIVE YEARS PROBATION ON A MANSLAUGHTER CHARGE. AND HE SAYS, "NOW, HOW CAN I DO THAT?" IT IS TOO LATE TO MAKE A DEAL NOW BUT HIS STORY WAS PRETTY CONVINCING. THAT IS A GOOD IDEA, EVERYBODY ELSE IS GUILTY.

DENICE STEWART TESTIFIED ON THAT STAND. AKERS SAID, "JOHNNY RAY IS COOL. I DON'T CARE WHAT ANYBODY SAYS ABOUT HIM, HE IS MY FRIEND AND I WILL HELP HIM OUT. I WILL TESTIFY THAT ROY BROUGHT A .22."

THERE IS A REBUTTAL WITNESS LYNN, I DON'T REMEMBER HER LAST NAME, THE ONE WITH THE GUM WHO THOUGHT, I GUESS, THIS WAS A GAME SHOW WHO WAS LOOKING AT HER FRIEND AND LAUGHING. I WOULD ASK YOU TO REMEMBER MISS STEWART'S TESTIMONY AND THAT LYNN'S TESTIMONY, AND I WOULD ASK YOU WHO YOU THINK WAS MORE CREDIBLE?

THIS LYNN, SHE TESTIFIED SHE HAS BEEN VISITING JOHNNY RAY IN JAIL. SHE ADMITTED THAT SHE IS HIS FRIEND. SHE IS SITTING IN THE BACK SEAT. DENICE STEWART IS SITTING RIGHT NEXT TO TOM AKERS WHEN HE SAYS THIS. FOUR GIRLS IN THE BACK SEAT, TWO GUYS AND DENICE STEWART IN THE FRONT SEAT AND THIS LYNN COULD HEAR AND SEE EVERYTHING BETTER THAN DENICE STEWART.

I HOPE YOU DON'T THINK SO, BECAUSE I DON'T THINK

THAT IS THE WAY IT HAPPENED. RUNS UP TO ATTORNEY OR UP TO MR. LUCKETT'S ATTORNEY AFTER DENICE STEWART GETS OFF THE STAND AT THE BREAK GOING HOME AND SAYS, "I CAN TESTIFY THAT IS NOT THE WAY IT HAPPENED."

I WOULD ASK YOU -- IF I WAS A JUROR, I WOULD ASK YOU TO QUESTION WHOSE TESTIMONY SEEMS MORE CREDIBLE. I THINK AND I HOPE YOU WILL COME TO THE CONCLUSION THAT IT IS DENICE STEWART'S TESTIMONY THAT IS MORE CREDIBLE.

MR. LUCKETT ALSO SAID THAT HE SAW ROY BRING A .22. HE DIDN'T SAY HE SAW HIM BROUGHT IT. HE SAID ROY BROUGHT IT. AS SOON AS HE WALKED THROUGH THE DOOR HE SAW HIM HANDING IT TO DALE FLANAGAN.

"DID YOU SEE IT IN HIS WAIST BELT? DID YOU SEE IT IN HIS POCKET? DID YOU SEE HIM HOLDING IT AS HE WALKED THROUGH THE DOOR? DID YOU SEE HIM AS HE OPENED THE DOOR?"

"NO, BUT RIGHT AFTER THE DOOR WAS CLOSED, I SAW HIM HAND IT." THOMAS AKERS, JOHNNY RAY LUCKETT, TWO FRIENDS, TWO VERY GOOD FRIENDS, ONE WHO'S WALKED AWAY FROM THE THING, WHO HAS NO PROBLEMS NOW.

HE WILL HELP HIS OTHER FRIEND GET OFF AND TO DO THAT YOU HAVE TO SHOW THAT ALL THE OTHER DEFENDANTS ARE GUILTY, ALL OF THEM INCLUDING ROY MCDOWELL.

LET'S PLACE A GUN IN ROY'S HAND. NOT AT THE SCENE BECAUSE THERE IS GOING TO BE TOO MUCH TESTIMONY ABOUT THAT. LET'S HAVE HIM GIVE IT TO DALE. WHY DIDN'T HE KEEP IT

HIMSELF? THERE ARE ENOUGH GUNS TO GO AROUND. WHY DIDN'T THEY GET THE OTHER GUN FROM MARILYN LUCAS ON THE 5TH AND EVERYBODY COULD HAVE HAD A GUN?

THAT'S BECAUSE ROY DIDN'T BRING THE GUN. THEY DIDN'T NEED THE GUN FROM ROY. THE PHONE CONVERSATION, "OKAY, THAT'S ALL RIGHT," REGARDING A TOY.

WOULD YOU WANT TO BE CONVICTED -- WOULD YOU WANT TO CONVICT ANYBODY ON THAT TESTIMONY, ON THAT STATEMENT? I WOULDN'T WANT TO BE CONVICTED AND I WOULD HOPE YOU WILL NOT CONVICT ROY MCDOWELL ON EVIDENCE SUCH AS THAT.

MR. SMITH SAID THAT AKERS HAS NO MOTIVE. I THINK YOU WILL FIND OTHERWISE. WALK AWAY WITH FIVE YEARS PROBATION IS MOTIVE ENOUGH ON CHARGES LIKE THESE ESPECIALLY WHEN THERE IS A DEATH PENALTY HANGING OVER THE CASE. IF THAT ISN'T MOTIVE ENOUGH, I DON'T KNOW WHAT IS.

THE POSSIBILITY OF DEATH, THE POSSIBILITY OF WALKING AWAY, THAT'S MOTIVE. THERE IS TESTIMONY MR. AKERS USES MARIJUANA. HE SAID THAT IS THE HARDEST DRUG HE USES. THE HARDEST DRUG AS OPPOSED TO NONHARD DRUGS LIKE COCAINE THAT HE ADMITTED HE USES. COCAINE IS NOT AS HARD AS MARIJUANA.

I WONDER WHAT HE WOULD CONSIDER A NONHARD DRUG. MR. LUCKETT USES LSD AND MARIJUANA ADMITTEDLY. ROY MCDOWELL USES, REFER TO YOUR NOTES. WHAT DOES ROY MCDOWELL USE? DID YOU HEAR ANY TESTIMONY ABOUT THAT?

MR. LUCKETT GETS UP THERE AND SAYS, "I AM FORCED INTO TAKING ADVERSE POSITION TO MR. LUCKETT AS MR. LUCKETT IS FORCED INTO TAKING ADVERSE POSITION TO MR. MCDOWELL."

AS WE ALL STATED, AND MR. POSIN PUT IT SO WELL IN OPENING STATEMENT, THERE ARE FOUR SEPARATE TRIALS GOING ON HERE. THERE IS EVIDENCE COMING OUT THAT IS NOT ADMISSIBLE AGAINST ROY MCDOWELL THAT YOU CANNOT CONSIDER.

IF YOU RECALL, I OBJECTED TO CERTAIN TESTIMONY AND THE JUDGE HAD INSTRUCTED YOU NOT TO CONSIDER THAT TESTIMONY AGAINST ROY MCDOWELL OR CERTAIN OTHER DEFENDANTS.

IT WAS A VERY INTERESTING TRIAL, COMPLEX LEGAL TRIAL JUST FOR THAT REASON BECAUSE WE ARE AT ODDS. THE SAME THING ABOUT THE COVENS.

I BELIEVE MR. SMITH OR MR. SEATON, I DON'T RECALL WHICH AND I APOLOGIZE IF I AM MISSTATING AS TO ONE, SAID THAT THE REST OF THE DEFENDANTS, ALL THE DEFENDANTS WERE IN COVENS.

WAYNE WITTIG TESTIFIED AS TO COVENS. YOU HEARD HIM MENTION SPECIFIC DEFENDANTS' NAMES INVOLVED IN COVENS, BLACK MAGIC. YOU EVEN HEARD ROY -- I AM SORRY, JOHNNY RAY LUCKETT, THE RIPPER, HIS NAME MENTIONED WITH BLACK MAGIC, WHITE MAGIC AND COVENS.

I AM GOING TO ASK YOU -- IF I WAS IN THAT JURY ROOM, I WOULD ASK DID ANYBODY MENTION ROY MCDOWELL'S NAME WITH COVENS, WITH BLACK MAGIC?

DID ANYBODY EVER TALK ABOUT THAT? THIS IS A SUBPLOT. THIS IS A SUBPLOT MR. LUCKETT IS TALKING ABOUT. BECAUSE THE PEOPLE INVOLVED IN THE COVENS ARE TRYING TO GET AT JOHNNY RAY LUCKETT. THEY WANT TO BURN HIM. ROY MCDOWELL IS NOT IN A COVEN.

AND THE ASSOCIATION, THE ACES GANG, IS TRYING TO GET HIM. BUT, NOW, WE HAVE A PROBLEM. DALE FLANAGAN IS NOT IN THE ACES GANG. WHAT DO WE DO NOW? WE WILL THROW THEM BOTH AT YOU, THE ACES GANG AND THE COVENS, AND HOPE YOU MIGHT BELIEVE ONE OR THEY OVERLAP AND NOW THERE IS A SUBPLOT AGAINST JOHNNY RAY LUCKETT.

THERE IS ANOTHER PROBLEM THERE. ALL THIS TALK ABOUT SUBPLOTS, ALL OF THIS TALK IS TOTALLY IRRELEVANT. YOUR FUNCTION HERE IS TO DETERMINE WHETHER OR NOT ROY MCDOWELL BEYOND A REASONABLE DOUBT COMMITTED THE CRIMES WITH WHICH HE IS CHARGED.

NOT WHETHER ROY MCDOWELL HAS ANYTHING AGAINST JOHN RAY LUCKETT ALSO KNOWN AS THE RIPPER, NOT WHETHER THE RIPPER HAS ANYTHING AGAINST ROY MCDOWELL. THAT IS TOTALLY IRRELEVANT.

DON'T CONVICT ROY MCDOWELL BECAUSE JOHN RAY LUCKETT IS HAVING PROBLEMS OR BECAUSE ROY MCDOWELL IS HAVING PROBLEMS ASSUMING THEY ARE WITH EACH OTHER.

THAT IS NOT A REASON TO CONVICT THEM AND THAT IS NOT WHAT YOU ARE HERE FOR. WE HAVE APPLES AND ORANGES. NO

MATTER WHAT HAPPENS TO ROY MCDOWELL, JOHN LUCKETT, THAT HAS ABSOLUTELY NO BEARING WHATSOEVER ON WHETHER OR NOT MR. MCDOWELL COMMITTED THE CRIMES WITH WHICH HE IS CHARGED.

PLEASE DON'T GET CONFUSED. KEEP YOUR EYE ON THE BALL AS TO WHAT IS REALLY SUPPOSED TO BE GOING ON HERE. DOES MR. LUCKETT HAVE A REASON TO LIE?

LET ME REPHRASE THAT. DOES MR. LUCKETT HAVE A REASON NOT TO TELL THE TRUTH? YES, HE DOES. I REFER YOU BACK TO THE INSTRUCTIONS, MOTIVE.

HE IS SITTING HERE POSSIBLY FACING THE DEATH PENALTY AND HIS ATTORNEY IS GOING TO TELL YOU THAT HE HAS ABSOLUTELY NO REASON, NO MOTIVE TO LIE, NO REASON, NO MOTIVE NOT TO TELL THE TRUTH.

THERE IS AN INSTRUCTION IN HERE ABOUT COMMON SENSE. CAN YOU THINK OF A BETTER REASON NOT TO TELL THE TRUTH OTHER THAN FACING DEATH? CAN YOU THINK OF A BETTER REASON?

IF THAT ISN'T REASON ENOUGH, I CANNOT THINK OF ANOTHER REASON. IF YOU CAN, TALK ABOUT IT BUT EVEN IF YOU CAN, THAT SURE IS REASON ENOUGH. THAT SURE IS REASON ENOUGH, MOTIVE ENOUGH TO GET UP ON THAT STAND AND LIE.

AND THAT IS THE THEORY OF JOHNNY RAY LUCKETT'S DEFENSE. "I AM TELLING THE TRUTH. I HAVE NO REASON TO LIE. EVERYBODY ELSE IS GUILTY."

I HAVE A PROBLEM WITH ROY MCDOWELL. WHAT SHOULD

I DO. WELL, ROY TALKS TO JOHN RAY, TALKS TO THE SAME PEOPLE THAT TOM TALKS TO. MAYBE THEY TALK TO EACH OTHER. WHY DON'T WE CORROBORATE? LOOK AT THE EVIDENCE.

LOOK AT THE OTHER EVIDENCE THAT THE STATE BROUGHT YOU. LISA LICATA, ANGELA SALDANA, HAVENS, LUCAS, WITTIG, OTHERS. I AM GOING TO ASK YOU IF ANY ONE OF THEM EVER IMPLICATED ROY MCDOWELL IN THIS?

DID YOU HEAR LISA LICATA SAY ANYTHING ABOUT ROY MCDOWELL? NOT ONE WORD. DID YOU HEAR LISA LICATA SAY THAT DALE ADMITTED HE WAS INVOLVED AND ROY MCDOWELL WAS INVOLVED IN THIS THING? NOT ONE WORD. NOT ONE WORD.

ANGELA SALDANA, WE ALREADY TALKED ABOUT HER, OR I HAVE, AT LEAST. DID SHE SAY ONE WORD? NOT ONE WORD, NOT ONE WORD.

RUSTY HAVENS, HEAR HIM SAY ANYTHING? SURE, YOU HEARD HIM SAY HE WAS HAVING AN ARGUMENT WITH ONE OF THE DEFENDANTS BACK AT RANDY MOORE'S APARTMENT. THAT'S WHAT YOU HEARD.

AND YOU HEARD RUSTY HAVENS TESTIFY THAT ANOTHER DEFENDANT TOLD HIM THAT IT WAS JUST TOUGH, THAT IF THEY WOULD EVER GET BUSTED, ROY WAS GOING DOWN WITH THEM. AND IT WAS HIS TOUGH LUCK AND EVEN IF HE DIDN'T LIKE IT, THAT IS WHAT WAS GOING TO HAPPEN.

AND HE ALSO HEARD ROY SAY RIGHT BACK, NOT REHEARSED -- THIS ISN'T A PERFORMANCE LIKE WE HAVE HAD IN

COURT. OH, NO. ROY SAID RIGHT BACK THAT HE DIDN'T KNOW WHAT WAS GOING TO HAPPEN. HE DIDN'T KNOW SOMETHING LIKE THIS WAS GOING TO HAPPEN. THAT HE JUST THOUGHT THEY WERE GOING TO GET TAPES.

THAT IS WHAT RUSTY HAVENS SAID. DOES THAT IMPLICATE, DOES THAT SHOW THAT ROY MCDOWELL HAD THE STATE OF MIND TO COMMIT FIRST DEGREE MURDER, TO COMMIT BURGLARY, TO COMMIT ROBBERY? THAT DOES NOT. IT DOES NOT.

IF ANYTHING, IT TENDS TO SHOW THAT HE DID NOT HAVE THE STATE OF MIND NECESSARY, THAT HE DID NOT KNOW THAT MURDERS WERE GOING TO TAKE PLACE. THAT IS WHAT IT SHOWS.

JOHN LUCAS, HEAR HIM SAY SOMETHING ABOUT ROY? ROY WASN'T THERE WHEN THEY LEFT BUT ROY CAME BACK. ROY CAME BACK WITH THE REST OF THE DEFENDANTS.

IS THAT ENOUGH TO CONVICT ANYBODY, OF FIRST DEGREE MURDER, OF ROBBERY, OF BURGLARY, BECAUSE ROY MCDOWELL CAME BACK TO THE APARTMENT THE SAME TIME THE OTHER DEFENDANTS DID, BEYOND A REASONABLE DOUBT? THAT IS NOT ENOUGH. THAT IS NOT ENOUGH.

WAYNE WITTIG, CALLED BY JOHNNY RAY LUCKETT'S ATTORNEY, I BELIEVE. YOU HEARD WAYNE WITTIG TALK ABOUT SEVERAL OF THE DEFENDANTS. YOU DIDN'T HEAR HIM TALK ABOUT ROY MCDOWELL.

THAT IS WHERE ALL THIS COVEN AND WITCHCRAFT CAME OUT. AND I SHOWED WAYNE WITTIG A PICTURE. WAYNE WITTIG

SAID THAT IT'S CLEARLY A PICTURE OF A WIZARD. AND YOU CAN TELL -- I ASKED HIM ABOUT THE SYMBOLS AND THOSE SYMBOLS SIGNIFIED SOMETHING TO DO WITH COVENS AND THAT SAYING --

IF YOU REMEMBER THE EXHIBIT NUMBERS, THAT SAME EXHIBIT IS THE ONE THAT THOMAS AKERS ADMITTED THAT HE DREW. THOMAS AKERS DREW THAT ONE. THAT IS WHAT WAYNE WITTIG SAID.

"MR. WITTIG," I ASKED HIM, "ARE YOU SAYING HE SAID EVERYBODY, EVERYBODY HAD SOMETHING INVOLVED? ARE YOU SAYING ROY MCDOWELL HAD SOMETHING INVOLVED?" "I DON'T KNOW ANYTHING ABOUT ROY INVOLVED WITH COVENS." THAT IS WHAT WAYNE WITTIG SAID.

DOES THAT IMPLICATE ROY MCDOWELL IN A MURDER, IN TWO MURDERS OF THE FIRST DEGREE, ROBBERY WITH USE OF A DEADLY WEAPON AND BURGLARY?

LET ME TAKE OUT THOMAS AKERS AND JOHN RAY LUCKETT FOR THE TIME BEING. OTHER THAN THOSE TWO, THERE IS NO EVIDENCE WHATSOEVER, AND I AM SURE MR. HARMON WILL DIFFER WITH ME, BUT THERE IS NO EVIDENCE WHATSOEVER THAT COULD TIE IN ROY MCDOWELL WITH A CONSPIRACY, WITH THE CRIMES ACTUALLY CHARGED. THERE IS NONE.

WHAT IS IT? HE CAME BACK WITH THE OTHER DEFENDANTS AFTERWARDS. IS THAT ENOUGH? NOT ENOUGH. LOOK AT THE EVIDENCE. THEY DID PUT ON ANGELA SALDANA. ADMISSION BY ANOTHER DEFENDANT ROY MCDOWELL WAS THE ONLY ONE WHO WASN'T THERE.

ANOTHER DEFENDANT SAID HE WENT THROUGH THE CLOSET, HE GOT THE PURSE, HE GOT THE WALLET, NOT ROY MCDOWELL. THAT IS THE EVIDENCE THAT WAS PUT ON FOR YOU, NOT BY ME BUT BY THE STATE. DOES THAT TEND TO SHOW THAT HE WAS GUILTY OF ANYTHING?

IF HE IS GUILTY OF ANYTHING, HE IS GUILTY OF WHAT I CALL FELONIOUS EXISTENCE. WHAT THAT IS IS LIKE LOITERING. YOU HAPPEN TO BE IN A PLACE AT A TIME AND MERELY BECAUSE YOU EXIST YOU ARE GOING TO BE HELD ACCOUNTABLE FOR A FELONY.

BUT THEN THERE IS THE LAW. INSTRUCTION NUMBER 13, PRESENCE IS NOT ENOUGH. NOT ENOUGH. THE LAW. SO YOU CAN'T EVEN FIND ROY MCDOWELL GUILTY OF FELONIOUS EXISTENCE.

LUCKETT SAID -- AND AGAIN I AM IN A TERRIBLE POSITION BECAUSE I HAVE TO ARGUE AGAINST MR. LUCKETT JUST AS MR. SMITH HAD TO ARGUE AGAINST MR. MCDOWELL.

I AM SURE MR. SEATON DURING ALL OF THIS THAT WAS GOING ON AND THE TESTIMONY OF MR. LUCKETT ON THE STAND AND SCOTT SLOANE ON THE STAND, I AM SURE IF I WAS A PROSECUTOR, I WOULD HAVE BEEN SITTING THERE SMILING, HAPPY JUST TO SEE WHAT WAS GOING ON.

BECAUSE WE ARE PROSECUTORS. WE ARE IN A TERRIBLE POSITION TO BE PUT IN WHEN YOU ARE ON TRIAL FOR THE THINGS OF THIS MAGNITUDE.

THE COURT: MR. HANDFUSS, COULD I ASK YOU AND COUNSEL TO APPROACH THE BENCH A MOMENT.

(DISCUSSION AT THE BENCH WHICH WAS NOT REPORTED.)

THE COURT: WE ARE GOING TO TAKE A BRIEF RECESS, LADIES AND GENTLEMEN.

(THE ADMONITION WAS READ.)

THE COURT: YOU MIGHT WANT TO MAKE SOME PHONE CALLS BECAUSE WE WILL BE ANOTHER HOUR, HOUR AND A HALF PROBABLY. THAT IS JUST A ROUGH ESTIMATE.

(RECESS TAKEN.)

THE COURT: THE CONTINUATION OF CASE C69269, STATE OF NEVADA VERSUS DALE FLANAGAN, RANDOLPH MOORE, JOHN LUCKETT AND ROY MCDOWELL.

THE RECORD WILL REFLECT THE PRESENCE OF EACH OF THE DEFENDANTS, THEIR RESPECTIVE COUNSEL, MR. HARMON, MR. SEATON REPRESENTING THE STATE.

WILL COUNSEL STIPULATE ALL MEMBERS OF THE JURY ARE PRESENT AND PROPERLY SEATED?

MR. HARMON: SO STIPULATED.

MR. HANDFUSS: SO STIPULATED.

MR. POSIN: SO STIPULATED, YOUR HONOR.

MR. SMITH: SO STIPULATED.

MR. PIKE: SO STIPULATED.

THE COURT: MR. HANDFUSS, YOU MAY CONTINUE.

MR. HANDFUSS: THANK YOU. NOW, THERE IS A QUESTION. MR. LUCKETT'S ATTORNEY RAISED A QUESTION, WHO IS

ACTUALLY IN THE CONSPIRACY. THAT MR. MCDOWELL MIGHT HAVE BEEN IN THE CONSPIRACY OR HAD MORE OF A CHANCE TO BE IN THE CONSPIRACY THAN MR. LUCKETT.

I WOULD ASK YOU, WHO WAS LIVING AT MR. MOORE'S APARTMENT? WHO WAS LIVING AT THE PLACE THAT THIS CONSPIRACY, THESE TALKS SUPPOSEDLY TOOK PLACE? WAS ROY MCDOWELL LIVING THERE? WAS ROY MCDOWELL LIVING THERE ON NOVEMBER 5TH OR ROY MCDOWELL WASN'T LIVING THERE?

MR. LUCKETT WAS LIVING THERE. WHO HAD MORE OF AN OPPORTUNITY TO HEAR WHAT WAS GOING ON? MR. LUCKETT, NOT MR. MCDOWELL. YOU EVEN HEARD TESTIMONY FROM MR. AKERS. YOU REMEMBER MR. AKERS. HE IS THE ONE WHOSE FACE IS ABOVE THE NUMBERS IN EXHIBIT NUMBER 81, STATE'S EXHIBIT. HE SAID THAT MR. MCDOWELL CAME IN TEN MINUTES AFTER HE, ANYWAY.

YOU HEARD MR. LUCKETT TESTIFY THAT IT WAS ABOUT AN HOUR AND A HALF AFTER MR. AKERS CAME IN BEFORE MR. MCDOWELL SHOWED UP. HE WAS IN THE SHOWER FOR SO LONG, WHO WAS IN THE BEDROOM FOR SO LONG. FIRST, FIVE OR TEN MINUTES AND THEN TWO OR THREE MINUTES.

HE WAS CLEANING UP HIS STUFF, TAKING CARE OF HIS PERSONAL NEEDS FOR SO LONG. A LITTLE DIFFERENT FROM TEN MINUTES.

ANYWAY, DURING ALL THAT TIME EVEN MR. LUCKETT STATED UNDER MY CROSS-EXAMINATION THAT MR. MCDOWELL WAS NOT THERE YET. ONLY AFTER THEY CAME OUT OF THE BEDROOM, THIS IS

MY RECOLLECTION, DID MR. LUCKETT SAY THAT MR. MCDOWELL SHOWED UP.

MR. MCDOWELL OBVIOUSLY DIDN'T SEE WHEN MR. LUCKETT SAYS HE WAS THREATENED BY ANOTHER DEFENDANT, TAKEN INTO THE BEDROOM. THAT IS BECAUSE MR. LUCKETT SAYS THAT ROY WAS NOT THERE.

WHO IS IN THE CONSPIRACY, ALLEGED CONSPIRACY AND WHO IS NOT? WHO HAS MORE OF A CHANCE TO BE IN THE CONSPIRACY AND WHO DOES NOT? YOU WILL HAVE TO WEIGH THAT ACCORDING TO THE TESTIMONY, ACCORDING TO THE INSTRUCTIONS.

MR. MCDOWELL DID NOT HAVE THE OPPORTUNITY THAT MR. LUCKETT DID. MR. MCDOWELL DID NOT LIVE IN THE APARTMENT, MR. LUCKETT DID. FOR ANOTHER TWO WEEKS OR SO AFTER THAT, MR. LUCKETT STILL STAYED WITH MR. MOORE.

NOW, EVEN MR. SEATON IN HIS CLOSING SAID THAT AKERS MAY HAVE BEEN SHADING THE TRUTH A BIT TO PROTECT JOHNNY RAY. I THINK THAT WAS A PERFECTLY CORRECT STATEMENT. IT WAS VERY INSIGHTFUL AND I APPRECIATE THE STATE FOR BRINGING THAT OUT BECAUSE THAT IS THE TRUTH.

IF THE STATE SAYS THAT MR. AKERS IS GOING TO HELP PROTECT JOHNNY RAY LUCKETT, I WOULD ASK YOU TO JUDGE THAT SAME QUESTION.

WAS HE? YES, HE WAS. WE KNOW THEY'RE FRIENDS. EVEN THE STATE GAVE ME THAT MUCH. THAT EXPLAINS WHY THE TESTIMONY IS SO ALIKE. I MEAN, ALMOST DOWN TO THE WORDS.

THE ONLY THING THAT IS DIFFERENT IS THE TEN MINUTES AFTER AKERS WALKED IN AND HOUR TO HOUR AND A HALF AFTER AKERS WALKED IN.

EVEN TO THE WORDS A DEAD THUMP. NOT A DULL THUD, A DEAD THUMP. NOW, MR. SMITH IN HIS CLOSING FOR MR. LUCKETT SAID THAT MR. AKERS AND LUCKETT HAD CREDIBLE AND TRUTHFUL TESTIMONY.

I BELIEVE, FROM WHAT I SAID BEFORE, YOU WILL SEE THAT THEY DID NOT GIVE TRUTHFUL AND CREDIBLE TESTIMONY. MR. AKERS GOT ON THE STAND. "MR. AKERS, YOUR FIRST STATEMENT TO THE POLICE WAS A LIE, WASN'T IT?" "YEAH, IT WAS A LIE."

"YOUR SECOND STATEMENT WAS A LIE, WASN'T IT?" "YES, IT WAS A LIE."

"YOUR THIRD STATEMENT?" "YEAH, THAT WAS A LIE."

"BUT IT WAS JUST LYING, THOSE TIMES. YOU HAVE NO COMPUNCTION SAYING YOU LIED, DO YOU?" "NOT AT ALL."

"YOU HAVE NO COMPUNCTION ABOUT LYING TO THE POLICE?" HE DIDN'T HAVE ANY. WHY DO YOU THINK -- WHY WOULD ANYBODY THINK HE WOULDN'T HAVE ANY COMPUNCTION TO LIE WHEN HE GETS ON THIS STAND WHEN HE HAS SOMETHING TO GAIN NOW, TO KEEP HIS FIVE YEAR PROBATION, TO MAKE SURE HE DOESN'T GET PERJURY, TO MAKE SURE THE STATE DOESN'T GO AFTER HIM FOR ANYTHING ELSE.

HE DID NOT TELL THE TRUTH ON THAT STAND JUST LIKE HE DID NOT TELL THE TRUTH IN HIS PRIOR STATEMENTS TO THE

POLICE.

AND ACCORDING TO HIM WITH GOOD CAUSE. WALK AWAY WITH FIVE YEARS PROBATION. NOW, I AM SURE A LOT OF PEOPLE WOULD DIFFER FROM ME. FIVE YEARS PROBATION IS NOT A WALK AWAY. YOU HAVE TO DO CERTAIN THINGS. YOU HAVE TO TOE THE LINE.

WHEN YOU ARE FACING THE DEATH PENALTY, I THINK FIVE YEARS PROBATION IS A WALK AWAY. YOU JUDGE THE TWO. MR. AKERS, CLEARLY ADMITTED LIAR, ADMITTED LYING ON THE STAND.

THERE IS NO REASON TO BELIEVE HIM WHEN IT COMES TO ROY MCDOWELL. THE ONLY CORROBORATING TESTIMONY IS MR. LUCKETT.

AND IT IS JUST BY COINCIDENCE MR. AKERS' TESTIMONY AND MR. LUCKETT'S TESTIMONY ARE ALMOST EXACTLY THE SAME AND CORROBORATE EACH OTHER, TEND TO GET EACH OTHER OFF, EXCULPATE AND TO PUSH THEM BOTH FURTHER AWAY FROM THE CONSPIRACY AND THE CRIMES THAT WERE COMMITTED. VERY INTERESTING.

NOW, MR. LUCKETT'S COUNSEL SAID THAT JOHNNY RAY, THE RIPPER, DID NOT GO TO BURY THE RIFLES WITH THE OTHER DEFENDANTS. HE DIDN'T MENTION, I WILL TELL YOU, THAT NEITHER DID ROY. THERE HAS BEEN NO TESTIMONY THAT ROY MCDOWELL WENT TO BURY RIFLES IN THE DESERT. THERE HAS BEEN NO TESTIMONY.

HIS COUNSEL ALSO SAID JOHNNY RAY NEVER FIRED A SHOT. DO YOU RECALL ANY TESTIMONY WHERE ROY MCDOWELL FIRED A

SHOT?

I DON'T. I DON'T RECALL ANY. HIS COUNSEL TALKED ABOUT FLEEING, DANGEROUS FELONS. THEY WENT TO CANADA, MEXICO, WHEREVER THEY WENT. ROY MCDOWELL WAS JUST A FLEEING, DANGEROUS FELON. THEY HAD TO GO TO HIS HOUSE TO GET HIM.

I ASKED, "DID YOU GET ROY MCDOWELL UP IN CANADA?" "NO." "DID YOU GET ROY MCDOWELL IN MEXICO?" "NO." "WHERE DID YOU GET ROY MCDOWELL?" "WE GOT HIM AT HIS HOME. WE WENT TO HIS HOUSE. HE WAS THERE."

DID YOU HEAR TESTIMONY BAGS PACKED, READY TO FLY? THERE WASN'T ANY TESTIMONY ABOUT THAT. ROY MCDOWELL'S NOT A FLEEING DANGEROUS FELON. IF HE IS, NOBODY TOLD HIM ABOUT IT.

THE ONLY TESTIMONY AGAINST ROY MCDOWELL IS THAT TESTIMONY BY THOMAS AKERS AND JOHN RAY LUCKETT. THAT IS THE ONLY, I CAN PUT IT THIS WAY, CREDIBLE OR SUBSTANTIAL EVIDENCE AGAINST ROY MCDOWELL AND I WOULD SUBMIT THAT THAT IS NOT SUBSTANTIAL OR CREDIBLE.

OTHER THAN THAT, THERE IS EXTREMELY LITTLE TESTIMONY OTHER THAN THE FACT THAT MR. MCDOWELL CAME BACK WITH THE OTHER DEFENDANTS AFTER DEATHS SUPPOSEDLY HAD TAKEN PLACE. AND THEY OBVIOUSLY HAD TAKEN PLACE. I DON'T MEAN THEY DID NOT.

NOT ENOUGH TO CONVICT SOMEBODY OF FIRST DEGREE MURDER OR ANY OTHER CRIME CHARGED. THAT IS WHAT YOU HAVE TO DEAL WITH RIGHT NOW.

EVEN JOHN LUCAS -- GOING BACK TO THE GUN, THE .22, EVEN JOHN LUCAS SAID THE GUN WAS IN THE APARTMENT ALL ALONG. THE OTHER DEFENDANTS DIDN'T SEEM TO HAVE ANY PROBLEM GETTING GUNS. WHY WOULD THEY HAVE TO GET A .22 FROM ROY? I DON'T THINK THAT THAT STORY IS VERY CREDIBLE AND I HOPE YOU DON'T EITHER.

I AM ALMOST FINISHED, I PROMISE. I WILL COME NOW TO SCOTT SLOANE. I DON'T REMEMBER THE -- I THINK THE WORD WAS ABORTION OF THIS CONSPIRACY.

MR. SLOANE, I ASKED HIM, HE ADMITTED BEING FOUND GUILTY OF MURDER. HE ADMITTED, I THINK MR. SEATON OR PERHAPS MR. SMITH MIGHT HAVE QUESTIONED HIM, HE WAS FOUND GUILTY OF OTHER CHARGES, FACING SENTENCING.

THERE IS NOTHING TO SHOW HE HAS ANYTHING TO DO WITH THIS CASE. THERE HAS BEEN NO EVIDENCE TO SHOW HE WAS FRIENDS WITH ANY OF THEM. THERE HAS BEEN NO EVIDENCE -- THE EVIDENCE WAS CONTRARY THAT HE KNEW ANY OF THEM BEFORE ALL THIS. HE MET THEM IN JAIL. JOHN RAY LUCKETT IN THE DETENTION CENTER ALONG WITH TOM AKERS.

I THINK IT'S VERY INTERESTING. I AM NOT GOING TO SLAM IT DOWN. THAT LETTER HURT MY EARS SO I WON'T MAKE A SHOW FOR YOU. BUT I WILL TELL YOU THIS, I THINK IT IS VERY INTERESTING MR. LUCKETT'S ATTORNEY, THE RIPPER'S ATTORNEY, READ YOU A PORTION OF EXHIBIT C, THE LETTER BY SCOTT SLOANE TO JOHN RAY LUCKETT.

IF YOU REMEMBER, SCOTT SLOANE WAS ON THE STAND, HE WASN'T IN HIS OWN CLOTHES. HE WAS WEARING PRISON UNIFORM. HE WAS JAILED. HE WAS HANDCUFFED UP THERE. HE CAN BARELY REACH THE LETTER. "IS THIS YOURS? LOOK IT OVER. IS THIS YOURS?" "DOESN'T APPEAR TO BE MINE."

DID HE DENY HE EVER SENT HIM A LETTER? HE ADMITTED, "I SENT HIM A LETTER."

DID HE DENY HE HAD ARGUMENTS WITH JOHN RAY LUCKETT? ON THE CONTRARY, HE SAID HE HAD ARGUMENTS, HE HAD FIGHTS OR ARGUMENTS WITH HIM ABOUT EVEN THE MOST TRIVIAL THINGS, THE T.V., THE PHONE.

HE SAYS YOU GET INTO ARGUMENTS WITH JUST ABOUT EVERYBODY THERE. DID HE DENY THAT HE DIDN'T HAVE AN ADVERSE POSITION AT POINTS IN TIME TO JOHN RAY LUCKETT? AT NO TIME DID HE EVER DENY THAT.

AT NO TIME DID HE EVER DENY THAT HE SENT THE LETTER. HE SAID HE DIDN'T RECOGNIZE THIS. THESE ARE NOT HIS LETTERS AND HE DID NOT THINK THAT WAS HIS SIGNATURE.

BUT HE NEVER DENIED THAT HE SENT THE LETTER. AND MR. SMITH WENT ON TO READ YOU A PORTION OF LETTER C.

I AM GOING TO READ YOU A PORTION OF LETTER C, TOO. THE SENTENCE BEFORE "BYE, YOU ASSHOLE," IS "BUT I WILL JUST BE TELLING THE TRUTH."

GOES ON THIS LONG THING ABOUT THE FACT THAT JOHN RAY LUCKETT -- THIS LETTER C JOHN RAY LUCKETT HAS BEEN

TALKING ABOUT SCOTT SLOANE AND THAT WILL BE MORE CLEAR WHEN YOU READ LETTER D. DON'T FORGET LETTER D.

MR. SMITH DIDN'T READ IT TO YOU AND I AM UNDER TIME CONSTRAINT SO I WON'T READ IT TO YOU. LOOK AT LETTER D, EXTREMELY IMPORTANT, EXTREMELY. D LEAVE OUT AFTER ALL THAT. "JOHNNY, WHY ARE YOU SAYING THESE THINGS? I AM MAD AT YOU."

ALL THOSE THINGS MR. SMITH SAID WAS IN THE LETTER THAT IS HERE. THE FACT THAT SCOTT SLOANE SAYS "THIS IS ONLY THE TRUTH AND YOU KNOW IT IS THE TRUTH."

LETTER D GIVES THE SAME ACCOUNT THAT SCOTT SLOANE GAVE UP ON THE STAND. NOTHING CHANGED, THE SAME ACCOUNT. AND EVEN IN LETTER D, HE SAYS, "COME ON, JOHN, LET'S FACE THE TRUTH HERE. LET'S GET WITH THE TRUTH HERE."

EVEN IN LETTER D, "AND DON'T WORRY, JOHN, I AM NOT GOING TO LIE. IN FACT, I AM SURPRISED YOU DON'T REMEMBER THAT YOU TOLD ME ALL THIS STUFF IN THE DETENTION CENTER."

HE SAYS HE IS GOING TO TELL THE TRUTH, THE SAME STORY HE GAVE UP ON THE STAND.

NOW, THE PROBLEM IS JOHN RAY LUCKETT'S DEFENSE IS DON'T BELIEVE SCOTT SLOANE BECAUSE SCOTT SLOANE WOULD TEND TO INCRIMINATE JOHN RAY LUCKETT BY HIS ADMISSIONS AND LET ROY MCDOWELL OFF BY THOSE SAME ADMISSIONS.

SCOTT SLOANE'S A MURDERER, RAPIST, SO YOU CAN'T BELIEVE HIM. CAN'T BELIEVE HIM. I AM NOT ARGUING THAT SCOTT SLOANE HAS PROBLEMS AND SCOTT SLOANE IS WHATEVER ANYBODY SAYS

ABOUT HIM. I AM NOT QUIBBLING.

BUT WHY, WHY WOULD SCOTT SLOANE LIE ABOUT THIS? WHY WOULD HE IF HE WAS JUST -- IF HE HAD ANY MOTIVE AT ALL, IT WAS TO KEEP OUT OF THIS. WHY WOULD HE GET UP ON THE STAND? I SUBPOENAED HIM. WHEN I SPOKE TO HIM THE FIRST TIME WAS FRIDAY, THE FRIDAY BEFORE, WHY DIDN'T HE TELL YOU "I DON'T REMEMBER ANYTHING."

IS IT JUST BECAUSE OF WHAT HE SAID IN LETTER C THAT HE WAS GOING TO GET HIM ANYWAY HE CAN. REFER BACK TO C AND D. HE SAID, "THIS IS THE TRUTH." HE IS GOING ON TO TELL THE TRUTH AND HE DID.

HE DID BECAUSE HE TOLD YOU THAT JOHNNY RAY LUCKETT TOLD HIM THAT ROY MCDOWELL HAD NO PART IN THIS, THAT HE DIDN'T KNOW, THAT HE STAYED IN THE CAR AND HE THOUGHT THEY WERE JUST GOING TO GET SOME TAPES AND BEER OVER AT DALE FLANAGAN'S TRAILER.

THAT IS THE TRUTH. THAT IS THE TRUTH. PAY CLOSE ATTENTION TO C AND D AND DON'T GET OFF THE TRACK OF WHETHER OR NOT SCOTT SLOANE LIED ABOUT WHAT JOHN LUCKETT TOLD HIM UP HERE ON THE STAND.

I HAVE DRAWN WHAT I BELIEVE IS THE TESTIMONY THE MOST CREDIBLE FOR ROY MCDOWELL AS EACH COUNSEL HAS DONE FOR THEIR DEFENDANT, AS MR. HARMON WILL FOR THE STATE WHEN HE GETS UP AFTER ME. AND AS COUNSEL SAID, I DON'T HAVE A CHANCE TO GET BACK UP AGAIN.

MR. HARMON, THE STATE GETS THE LAST SAY. NONE OF US, MR. SMITH CANNOT REFUTE WHAT I SAY. AND I AM SURE HE WOULD WANT YOU TO REMEMBER HIS ARGUMENT JUST AS I WOULD WANT YOU TO REMEMBER MINE WHEN YOU ARE CONSIDERING HIS.

AND THE STATE IS IN THE SAME POSITION. AND AS MR. POSIN SAYS, DON'T FORGET WE CAN'T GET BACK UP. DON'T LET IT GO.

I ASKED YOU IN MY OPENING STATEMENT TO QUESTION EVERYTHING THEY PUT BEFORE YOU AS WELL AS THE THINGS THEY DON'T TELL YOU. IT IS IMPORTANT THE THINGS THEY DON'T TELL YOU, THE WITNESSES THAT DIDN'T TELL YOU THAT ROY MCDOWELL WAS INVOLVED WITH THIS.

ALL THOSE WITNESSES, THE ONLY TWO WITNESSES WHO HAVE PUT ROY MCDOWELL INVOLVED IN ANYTHING, TOM AKERS, JOHN RAY LUCKETT WITH THE CLEAR REASON NOT TO TELL THE TRUTH, VERY CLEAR.

AND JUST ONE LAST THING. I, OF COURSE, AT TIMES WAS VERY VEHEMENT, I FEEL, IN MY DEFENSE OF ROY MCDOWELL AND WHAT I CONSIDER TO TRY TO PRESERVE HIS CONSTITUTIONAL RIGHTS JUST AS IF ANYBODY WAS SITTING THERE.

IF YOU WERE ANGRY WITH ME BECAUSE OF THE QUESTIONS I ASKED OR THE WAY I ASKED THEM, BE ANGRY WITH ME, NOT WITH ROY MCDOWELL BECAUSE, I MEAN, HE DOESN'T SIT THERE AND WHISPER AND SAY "ACT MAD NOW." THAT IS MY QUESTIONING AND THAT IS NOT TO BE TAKEN AGAINST ROY MCDOWELL.

I WOULD ASK YOU PLEASE FORGIVE ME IF I HAVE INSULTED ANY OF YOU, IF MY MANNER IN THE COURTROOM YOU FOUND INSULTING BUT THAT SHOULD NOT BE TAKEN AGAINST ROY. I MEAN, IT IS VERY SERIOUS AND, OBVIOUSLY, HE HAS NO CONTROL HOW I HANDLE THE CASE AS A LAWYER.

AGAIN, I WOULD THANK ALL COUNSEL, THANK THE COURT AND THANK YOU FOR YOUR TIME AND PATIENCE.

THE COURT: THANK YOU, MR. HANDFUSS. MR. HARMON.

MR. HARMON: JUDGE MOSLEY, COUNSEL, LADIES AND GENTLEMEN. ACCORDING TO MY CALCULATIONS, YOU HAVE HEARD FIVE HOURS AND SIX MINUTES OF ARGUMENT FROM COUNSEL NOW.

I HAVE HEARD SOME OF THE ATTORNEYS SAY THAT THEY APPROACHED THIS CASE WITH TREPIDATION. FRANKLY, I DIDN'T. I APPROACHED THIS CASE HOPEFULLY WITH THE SAME ENTHUSIASM AND THE SAME SENSE OF CONVICTION THAT I APPROACH EVERY CASE.

BUT AFTER FIVE HOURS AND SIX MINUTES OF ARGUMENT, I HAVE GOT TO SAY FOR THE FIRST TIME I AM FEELING A LITTLE TREPIDATION. I AM AFRAID THAT YOU MIGHT SHARE THE FEELINGS OF SHAKESPEARE WHO'S QUOTED ONCE AS SAYING, "NOW THE FIRST THING WE DO IS HANG ALL THE LAWYERS."

LADIES AND GENTLEMEN, IT IS ALSO TEMPTING TO SAY, BECAUSE I SENSE ALL OF YOU ARE READY TO GO HOME, IT'S TEMPTING TO SAY LET'S JUST GO HOME BECAUSE, FRANKLY, I AM READY TO.

BUT I WANT TO SAY SOMETHING ELSE BEFORE I GET

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

RENEE BAKER, *et al*.,

Respondents.

Case No.: 2:09-cv-00085-KJD-GWF

MOTION TO DISMISS FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254 OR IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT

(Death Penalty Habeas Corpus Case)

Respondents, by and through legal counsel, CATHERINE CORTEZ MASTO, Nevada Attorney General, and DENNIS C. WILSON, Senior Deputy Attorney General, move this Court for an order dismissing Petitioner Dale Flanagan's ("FLANAGAN") First Amended Petition for a Writ of Habeas Corpus or in the alternative move for a more definite statement.

This Motion is based upon the pleadings and papers on file herein, the following Memorandum of Points and Authorities, and the Exhibits attached in Respondents' Index of Exhibits ("INDEX") which is being filed under separate cover.

DATED this 2nd day of September, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Dennis C. Wilson
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MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

The Nevada Supreme Court, in its May 18, 1988 Opinion (INDEX at Exhibit 132) and its February 22, 2008 Order of Affirmance (INDEX at Exhibit 521), set forth the facts of FLANAGAN's case as follows:

> On the afternoon of November 6, 1984, Carl and Colleen Gordon were found dead in their Las Vegas residence. Mr. Gordon, a fifty-eight year old air-traffic controller had been shot seven times in the back and the chest. Mrs. Gordon, a fifty-seven year old housewife, had been shot three times in the head. The record contains overwhelming evidence that nineteen-year old Flanagan and his co-defendants planned to kill the Gordons in an effort to obtain insurance proceeds and an inheritance. With the express purpose of killing the Gordons, Flanagan and the others broke into the Gordon residence and accomplished their deadly objective. [May 18, 1988 Opinion]
>
> Appellant Dale Flanagan's grandparents, Carl and Colleen Gordon, were found dead on November 6, 1984, Carl having been shot seven times in the back and chest and Colleen having been shot three times in the head. Six young men were involved in the plot to kill the Gordons. Flanagan shot Colleen, and his codefendant Randolph Moore shot Carl. Flanagan and Moore were tried in September and October 1985 along with two other codefendants, Johnny Ray Luckett and Roy McDowell. The four men were convicted, and Flanagan and Moore received death sentences. Tom Akers and Michael Walsh were also charged in the murders and pleaded guilty to manslaughter and two counts of murder, respectively.
>
> On direct appeal, this court characterized as overwhelming the evidence that Flanagan, Moore, Luckett, and McDowell killed the Gordons so that Flanagan could obtain insurance proceeds and an inheritance. Although this court affirmed Flanagan's convictions, it reversed his and Moore's sentences and remanded the matter for a new penalty hearing due to prosecutorial misconduct.[1] Flanagan and Moore were again sentenced to death, and they appealed. This court affirmed the death sentences.[2] The United States Supreme Court vacated that decision, however, and remanded for reconsideration due to evidence presented at the second penalty hearing regarding Flanagan and Moore's occult beliefs and activities.[3] Upon remand, this court held that use of such evidence had been unconstitutional and remanded the case

[1] *Flanagan v. State (Flanagan I),* 104 Nev. 105, 754 P.2d 836 (1988).

[2] *Flanagan v. State (Flanagan II)*, 107 Nev. 243, 810 P.2d 759 (1991).

[3] *Moore v. Nevada*, 503 U.S. 930 (1992).

> to the district court for a third penalty hearing.[4] After the third hearing, Flanagan and Moore once again received death sentences, and this court affirmed the sentences on appeal.[5] Flanagan filed a timely post-conviction petition for a writ of habeas corpus. The district court summarily dismissed all of Flanagan's claims save his claim that personality conflicts between his two penalty hearing counsel deprived him of the effective assistance of counsel. The district court denied this claim as well after an evidentiary hearing. This appeal followed. [February 22, 2008 Order of Affirmance.]
>
> . . . . The State presented overwhelming evidence that Flanagan and his cohorts planned and executed the murders expressly so that Flanagan would receive life insurance and inheritance proceeds. Murdering both Carl and Colleen was necessary to effectuate this objective. Flanagan, Moore, and the others devised the murderous plot at least one month prior to the killings, discussing in detail who would shoot Carl and Colleen and in what manner, how the men would gain entry into the Gordon residence, and the types of weapons to be used. The men also agreed that the murders would be made to look like a robbery or burglary gone wrong.

FLANAGAN I.

On February 11, 1985, pursuant to the filing in open court of an amended criminal complaint, the Justice Court bound FLANAGAN over on seven counts: Conspiracy to Commit Burglary, Conspiracy to Commit Robbery, Conspiracy to Commit Murder, Burglary, Robbery with Use of a Deadly Weapon, and two counts of Murder with Use of a Deadly Weapon. INDEX at Exhibit 3. On February 25, 1985, the State filed an Information charging FLANAGAN with the above seven counts; Count VI, titled Murder with Use of a Deadly Weapon, charged him with killing Colleen Gordon by shooting her and Count VII, also titled Murder with Use of a Deadly Weapon, charged him with aiding and abetting co-defendants Randolph Moore, Johnny Ray Luckett, and/or Michael Walsh to kill Carl Gordon. INDEX Exhibit 6. On October 11, 1985, the jury found FLANAGAN guilty on all counts. INDEX at Exhibits 71 through 77. On October 17, 1985, the same jury determined that FLANAGAN's punishment should be death. INDEX at Exhibit 83.

On November 27, 1985, the court entered FLANAGAN's judgment of conviction, its Order of Execution, and Warrant of Execution. On December 18, 1985, the court entered its

[4] *Flanagan v. State (Flanagan III)*, 109 Nev. 50, 846 P.2d 1053 (1993).

[5] *Flanagan v. State (Flanagan IV)*, 112 Nev. 1409, 930 P.2d 691 (1996).

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Judgment of Conviction. INDEX at Exhibits 100, 102, 103, and 106. On December 19, 1985, FLANAGAN filed his notice of appeal from said judgment of conviction. INDEX at Exhibit 108. On July 31, 1986, FLANAGAN filed his Opening Brief which raised five claims:

1. prosecutorial misconduct during argument at the penalty-hearing requires a new penalty hearing;

2. prosecutorial misconduct during guilt-phase closing argument when the prosecutor stated in two separate instances:

> No one has taken the stand in this case that I remember, no one has taken the stand and said '[W]ait a minute. Those people are lying. Those meetings didn't take place.'
>
> He thought he was going to get a $200,000 policy and it didn't even exist. He thought he was going to get the house. He thought he was going to get the RV, whatever other things were available for his greedy little purposes. And he is not so greedy. He was going to share it with all of his friends. Probably divvy it up in the middle of a coven proceeding or something;

3. the trial court committed prejudicial error in denying motions for severance, mistrial and a new trial based upon prejudicial joinder of defendants;

4. the trial court error in admitting hearsay declarations under the co-conspirator statement rule; and

5. the evidence presented at trial was not sufficient to support the imposition of the death penalty inasmuch as the proof of the mitigating factors outweighed the aggravating circumstances.

INDEX at Exhibit 121. On October 28, 1986 and January 23, 1987, respectively, the State filed its Answering Brief and FLANAGAN filed his Reply. INDEX at Exhibits 125 and 128. On May 18, 1988, the state high court entered its Order affirming FLANAGAN's conviction but reversing his death sentence based on prosecutorial misconduct and remanded the case to the district court for the second penalty hearing. INDEX at Exhibit 132.

FLANAGAN II.

The second penalty hearing began on July 10, 1989 with jury selection concluding the next day. INDEX at Exhibits 139 and 141. The first witness was called on July 12, 1989. INDEX at Exhibits 145 and 146. On July 14, 1989, after counsels' arguments, the jury imposed a sentence of death. INDEX at Exhibits 148 and 151. On July 31, 1989, the court sentenced FLANAGAN, entered a judgment of conviction, an order of execution, and a

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warrant of execution. INDEX at Exhibits 152, 153, 155, and 156. FLANAGAN timely appealed and on January 22, 1990, filed his Opening Brief (INDEX at Exhibit 176) in which he argued that 1) the trial court erred in admitting evidence of FLANAGAN's Satan worship as character evidence; 2) the trial court admitted evidence of the sentences imposed on FLANAGAN's accomplices in violation of the 8th Amendment mandate requiring consideration of the character and record of the individual offender and the circumstances of the particular offense in capital cases; 3) the trial court's anti-sympathy instruction #15 violated the 8th Amendment; 4) jury instruction #8 limited the jury's consideration of mitigating evidence to that which related to "the crime itself"; 5) the absence of instructions informing the sentencing jury that it could consider and give effect to defendant's character and background deprived the jury of a vehicle for expressing its "reasoned moral response" to mitigating evidence in rendering its sentence and violated the 8th and 14th Amendments. Respondents answered and FLANAGAN replied. INDEX at Exhibits 177 and 178. On April 30, 1991, the state high court entered its Order affirming the second imposition of the death penalty. INDEX at Exhibit 179. FLANAGAN appealed to the United States Supreme Court which on March 23, 1992 granted his petition for writ of certiorari, vacated his death sentence, and remanded the matter to the state supreme court for further consideration in light of *Dawson v. Delaware,* 503 U.S. 159 (1992). INDEX at Exhibit 201.

FLANAGAN III.

On May 20, 1992, pursuant to the state high court's order, FLANAGAN filed his Opening Brief; the State responded and FLANAGAN replied. INDEX at Exhibits 202, 203, 204, and 205. On February 10, 1993, the state supreme court reversed FLANAGAN's death sentence and remanded the matter to the state district court for the third retrial of the penalty hearing. INDEX at Exhibit 209.

On May 19, 1995, while the third penalty hearing was pending, FLANAGAN filed in district court a motion for new trial which was followed on May 31, 1995 by a postconviction petition for writ of habeas corpus and a motion to strike the death penalty. INDEX at 238, 247, and 248. In his postconviction petition, FLANAGAN alleged that the admission of

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evidence of devil worship in both the guilt phase and penalty phase of the trial entitled him to a retrial of both phases. The state answered the petition and the motions. INDEX at Exhibits 249, 250, and 254.

On June 8, 1995, in the Nevada Supreme Court, FLANAGAN filed a petition for writ of mandamus and an emergency petition for writ of prohibition/motion for stay of proceedings seeking a writ ordering the district court to grant the aforementioned petitions and motions; the state high court declined to intervene. INDEX at Exhibits 260, 261, 262, 264, 265, and 266.

FLANAGAN IV.

On June 12, 1995, the third penalty hearing began with the selection of the jury, which concluded on June 16, 1995. INDEX at Exhibits 268, 269, 270, and 271. On the same day, counsel gave opening statements and the first witness was called. INDEX at Exhibit 273. The trial lasted until June 23, 1995 when the jury returned its verdicts and special verdicts. INDEX at Exhibits 274 through 285. On July 11, 1995, the court entered FLANAGAN's judgment of conviction, an order of execution, and a warrant of execution. INDEX at Exhibits 290, 291, and 292. FLANAGAN appealed the judgment of conviction. INDEX at Exhibit 297. On November 16, 1995, FLANAGAN filed his Opening Brief; the State answered and FLANAGAN replied. INDEX at Exhibits 306, 307, and 310. In his Opening Brief he made the following arguments:

1. Appellant is entitled to a new guilt phase proceeding based upon the same considerations/evidence [Witting's coven black/white magic-devil worship testimony and six statements during closing argument] that infected the 1989 penalty phase infected the 1985 guilt phase;

2. The district court did not have jurisdiction to proceed with Appellant's penalty phase under *Robinson v. State* because prior to the penalty phase hearing, FLANAGAN filed a notice of appeal from the denial of a postconviction petition;

3. The state improperly introduced evidence of witness intimidation when it elicited from John Lucas testimony that he was worried about his safety while in prison without producing credible evidence that FLANAGAN was the source of the information;

4. The district court erred when it allowed the jury to hear evidence regarding the penalties received by other codefendants;

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5. The district court erred when it did not grant Appellant's motion to strike the death penalty in violation of the 8th Amendment;

6. The district court committed reversible error when it gave the state's "anti-sympathy" instruction (#17) and refused to give defense proposed instruction "A";

7. There was insufficient evidence adduced to justify as an aggravating circumstance that the murders created a risk of death to more than one person in violation of the 8th Amendment;

8. There was insufficient evidence adduced to justify as an aggravating circumstance that the murders were committed while Appellant was engaged in the commission of or attempt to commit a robbery, all in violation of the 8th Amendment;

9. The jury was inadequately instructed regarding the elements of burglary, robbery, escape and attempt;

10. The court committed prejudicial error in giving Instruction number 5 regarding the possibility of commutation or modification of sentences;

11. The jury was improperly instructed regarding Appellant's right to have his sentence commuted by the Pardons Board.

On December 20, 1996, the state high court entered its Opinion and held that although during guilt-phase closing argument the prosecution violated FLANAGAN's First Amendment rights by referring to his involvement with the occult; the violations were harmless beyond a reasonable doubt. On December 1, 1997, a year after entry of said order of affirmance, and after denying Appellant's petition for rehearing, the court entered its Remittitur. INDEX at Exhibits 311, 312, 313, and 314. FLANAGAN then filed a motion to recall remittitur in the state high court, and filed a concomitant petition for certiorari in the United States Supreme Court which denied said petition on April 20, 1998. The state high court then re-issued its Remittitur. INDEX at Exhibits 316 through 325.

POSTCONVICTION PROCEEDINGS.

On May 28, 1998, FLANAGAN filed a *pro per* postconviction petition for writ of habeas corpus and a request for appointment of counsel; his petition challenged his December 18, 1995 guilt phase and his July 11, 1995 penalty phase. INDEX at Exhibit 327. On June 11, 1998, the court appointed Cal Potter who associated Robert D. Newell. INDEX at Exhibit 330. On November 30, 1999, FLANAGAN, through said counsel, filed a Supplemental Petition for Writ of Habeas Corpus which contained thirty-six claims; the State responded and

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FLANAGAN replied. INDEX at Exhibits 370, 378, and 381. On May 18, 2000 and May 25, 2000, FLANAGAN filed his exhibits in support of the above Petition and Reply, and a Supplement to said Reply. INDEX at Exhibits 382 through 387.

On August 16, 2000, the court held a hearing on the petition for habeas corpus, a motion for discovery, a motion for an evidentiary hearing, and the State's motion to waive the attorney-client privilege. The court denied most of the claims in the petition but set an evidentiary hearing on the claims pertaining to Mr. Wall and Ms. Blakely, which hearing was held on February 14, 2002. INDEX 399, 403, and 424. After the parties had submitted written closing arguments, the court, on June 19, 2002, entered its order, and later findings of fact conclusions of law and order, dismissing FLANAGAN's postconviction petition for writ of habeas corpus. INDEX at Exhibits 425, 426, 427, and 433.

After numerous delays due to FLANAGAN's inability to locate transcripts, the state high court entered an order which directed the parties to file supplemental points and authorities (INDEX at Exhibits 486, 487, 488, 489, and 490), FLANAGAN filed his Opening Brief, the State its Response, FLANAGAN his Reply, and each party filed a supplemental memorandum. INDEX at Exhibits 496, 501, 504, 505, and 506. On April 2007, FLANAGAN filed a supplemental opening brief which addressed the aiding and abetting instructions, which the State answered. INDEX at Exhibits 511 and 512. In October 2007, FLANAGAN filed a Third Supplemental Memorandum to which the State responded. INDEX at Exhibits 518 and 520. In the foregoing appellate briefs and supplements, FLANAGAN argued that:

Claim 1.

a. Flanagan's convictions were obtained by pervasive prosecutorial misconduct;

b. The State manufactured critical and false testimony by intimidating and bribing witnesses;

c. The State failed to disclose exculpatory evidence, and instructed witnesses not to disclose exculpatory evidence to the defense or to the court;

d. The prosecution misused peremptory challenges;

e. The state injected irrelevant and prejudicial information;

f. The prosecution commented on his right to remain silent;

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g. The prosecution relied on biblical dogma;

h. The trial court failed to exercise its authority to control the prosecutorial misconduct.

Claim 2. The State's payment of witnesses Lucas and Saldana violated *Brady, Giglio* and *Napue*.

Claim 3. a. The guilt phase was structurally marred by the admission of irrelevant and highly prejudicial evidence regarding Flanagan's abstract beliefs;

b. The erroneous admission of Satan-worship during the guilt phase requires relief.

Claim 4. a. During the first trial, counsel was ineffective because he inadequately investigated the case, filed inadequate pre-trial motions, performed deficiently during trial, and inadequately prepared for the penalty hearing;

b. During the second trial, the court erred in allowing a conflict of interest; and counsel was ineffective because he failed to address a conflict of interest, failed to adequately investigate, failed to move to sever his trial from his co-defendant's, failed to object to the prosecution's improper use of peremptory challenges, failed to adequately investigate and present mitigation evidence, failed to hire a mitigation expert, did no psychological or psychiatric investigation and hired no psychological/psychiatric experts;

c. During the third trial, counsel were ineffective because they failed to address a conflict of interest, inadequately investigated the case, failed to communicate and co-operate with each other, failed to adequately investigate mitigation evidence, failed to hire a mitigation expert, did no psychological or psychiatric investigation, failed to move to sever Flanagan's trial from his co-defendant's, and failed to provide their mental health expert with an appropriate referral question, necessary background material and information to give him sufficient time to evaluate Flanagan.

Claim 5. Flanagan was incompetent to stand trial; counsel failed to invoke a competency hearing and the court failed to order one under *Drope*.

Claim 6. The trial court violated Flanagan's constitutional rights when it refused to rule on his motion to change venue.

Claim 7. Flanagan was sentenced by an all-white jury in violation of *Duren*, and counsel was ineffective for failing to object thereto.

Claim 8. The trial court committed reversible error by denying Flanagan his full complement of peremptory challenges.

Claim 9. The trial court erred by requiring defense counsel to make objections during recesses to the court reporter, not in open court in the presence of the jury.

Claim 10. a. Appellate counsel was ineffective because of a conflict of interest;

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b. Appellate counsel was ineffective because he failed to raise on appeal the claims set forth herein in grounds 1, 2, 3, 5 through 9, 11 through 27, and 29 through 36.

Claim 11. The Nevada Supreme Court failed to conduct an adequate and fair appellate review.

Claim 12. a. The reasonable doubt instruction is unconstitutional;

b. The jury instruction on the meaning of "deliberation and premeditation" is unconstitutional; the implied malice instruction is unconstitutional;

c. Jury instruction 47 requiring the jury to provide "equal and exact justice between the defendant and the state" is unconstitutional.

Claim 13. a. The "knowingly created a great risk of death to more than one person" statutory aggravator is unconstitutional;

b. Appellate counsel was ineffective for not arguing 13a.

Claim 14. a. The "in the commission of a burglary" statutory aggravator is unconstitutional.

b. Trial and appellate counsel were ineffective for not arguing 14a.

Claim 15. a. The "in the commission of a robbery" statutory aggravator is unconstitutional;

b. Trial and appellate counsel were ineffective for not arguing 15a.

Claim 16. The State's use of the same felony charges to support the felony-murder theory and an aggravating-factor along with the prosecutor's comments, under McConnell was unconstitutional.

Claim 17. a. The "anti-sympathy" instruction is unconstitutional;

b. The court's failure in 1985 and 1989 to instruct the jury as to the lack of unanimity requirement for mitigating circumstances was unconstitutional;

c. The court's failure in 1985 and 1989 to instruct the jury that the jurors were required to unanimously agree as to the existence of aggravating circumstances was unconstitutional;

d. The court's failure to instruct the jury that they had unlimited discretion to return a life sentence was unconstitutional;

e. The jury was misled by the commutation instruction that the State Board of Pardons Commission had the power to modify Flanagan's sentence because the instruction failed to apprise the jury of the remoteness of the chance of a sentence modification;

f. Flanagan's death sentence is constitutionally invalid because the court did not instruct the jury that it had to find that aggravation was not outweighed by mitigation beyond a reasonable doubt.

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Claim 18. Flanagan's death sentence is constitutionally invalid because: 1) during the second penalty hearing, prospective juror Jordan indicated that he was unable to consider imposing a sentence less than death, but the court improperly denied a challenge for cause forcing the defense to use a peremptory challenge to remove said juror; and 2) during the third penalty hearing, prospective juror Jacintho repeatedly stated he would impose the death sentence unless there was some overwhelming mitigating circumstances, the nature of which was beyond his comprehension, but the court improperly denied a challenge for cause.

Claim 19. Flanagan's death sentence is constitutionally invalid because during the second penalty phase, the court improperly excused for cause prospective juror Cassady because she said it would be difficult to impose the death penalty, which excusal violated Flanagan's right to an impartial jury.

Claim 20. Flanagan conviction and death sentence are invalid because he was denied a fair trial and sentencing during the second and third penalty hearing because of judicial bias.

Claim 21. Flanagan's death sentence is constitutionally invalid because Nevada's capital punishment system operates in an arbitrary and capricious manner.

Claim 22. Flanagan's conviction and death sentence are constitutionally invalid because 1) the charging document did not specifically apprise Flanagan of the acts he was alleged to have committed and that he was charged as a principal, and 2) counsel was ineffective for failing to raise said claims.

Claim 23. Flanagan's conviction and death sentence are constitutionally invalid because he was absent during numerous critical stages of the proceedings.

Claim 24. Flanagan's conviction and death sentence are constitutionally invalid because 1) the trial court failed to conduct all proceedings in public and permit Flanagan to be present during trial and failed to ensure creation of a concrete trial record by having such proceedings reported or recorded, and 2) counsel was ineffective for failing to ensure that a proper record was made and Flanagan's rights preserved.

Claim 25. Flanagan's conviction and death sentence are constitutionally invalid due to cumulative errors in the admission of evidence and unconstitutional jury instructions, misconduct by state officials and witnesses, and ineffective assistance of counsel.

Claims 26 & 27. Flanagan's death sentence is constitutionally invalid because execution by lethal injection violates the prohibition against cruel and unusual punishment and because the death penalty is cruel and unusual punishment.

Claim 28. Flanagan's death sentence is constitutionally invalid because Flanagan may become incompetent to be executed.

Claim 29. Flanagan's conviction and death sentence are constitutionally invalid because the trial court's failure to sever Flanagan's trial from his co-

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defendant's resulted in the jury's use of inadmissible evidence to convict Flanagan.

Claim 30. Flanagan's death sentence is constitutionally invalid because Nevada effectively has no mechanism to provide for clemency in capital cases.

Claim 31. Flanagan's conviction and death sentence are constitutionally invalid because jurors viewed him in shackles and were aware of armed guards in the courtroom during trial.

Claim 32. Flanagan's conviction and death sentence are constitutionally invalid because the trial and appellate judges responsible for ruling could not be impartial in that they were elected, subject to re-election and therefore beholden to the electorate.

Claim 33. Flanagan's death sentence is constitutionally invalid because during the third penalty hearing his counsel failed to challenge for cause impartial jurors.

Claims 34 & 35. Flanagan's conviction and death sentence are constitutionally invalid because the proceedings against him violated international law.

Claim 36. Flanagan's death sentence is constitutionally invalid because, as a result of the State's egregious misconduct, he has endured three trials and appeals and has been on death row for 20 years without finality, which constitutes cruel and unusual punishment.

On February 22, 2008, the state high court entered its order affirming the district court's dismissal of FLANAGAN's post-conviction petition and on March 18, 2008, entered its Remittitur. INDEX at Exhibits 521 and 522.

On January 13, 2009, FLANAGAN through counsel Newell filed the federal petition for writ of habeas corpus herein. On February 11, 2011, FLANAGAN through counsel Olive filed an amended petition for writ of habeas corpus.

In summary, in November of 1984, the Gordons were murdered. The guilt phase and the first penalty phase were held in October of 1985. On July 31, 1986, FLANAGAN filed his Opening Brief which challenged his judgment of conviction and death sentences. INDEX at Exhibit 121. On May 18, 1988, the state high court affirmed the guilt phase but remanded for a new penalty phase. INDEX at Exhibit 132.

In July of 1989, the second penalty phase was held. On July 31, 1989, the state court entered its judgment imposing the second sentence of death. On January 22, 1990, FLANAGAN filed his Opening Brief. INDEX at Exhibit 176. On April 30, 1991, the state

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supreme court affirmed the death sentence (INDEX at Exhibit 179) but on March 23, 1992, the United States Supreme Court reversed and remanded in light of *Dawson v. Delaware*. INDEX at 201. On May 20, 1992, FLANAGAN filed his Opening Brief on Remand from the Supreme Court. INDEX at Exhibit 203. On February 10, 1993, the state supreme court reversed and remanded for a third penalty phase. INDEX at Exhibit 209.

In June of 1995, the third penalty phase was held. On July 11, 1995, the state court entered its judgment imposing the third sentence of death. On November 16, 1995, FLANAGAN filed his Opening Brief. INDEX at Exhibit 306. On December 20, 1996, the state supreme court affirmed the death sentence. INDEX at Exhibit 311.

On May 28, 1998, FLANAGAN filed his *pro se* postconviction petition and on November 30, 1999, his counsels' Supplemental Petition. INDEX at Exhibits 327 and 370. On August 9, 2002, the state district court entered its Findings of Fact and Conclusions of Law. INDEX at Exhibit 433. On August 29, 2005, FLANAGAN filed his Opening Brief and on December 21, 2006, January 26, 2006, April 5, 2007, and October 12, 2007 filed his Reply and supplements. INDEX at Exhibits 496, 504, 505, and 511. On February 22, 2008, the Nevada Supreme Court filed its Order of Affirmance. INDEX at Exhibit 521.

APPLICABLE LAW

FAILURE TO STATE A CLAIM

The failure to allege specific facts that support a claim renders the claim conclusory on its face and subject to dismissal for failure to state a claim. *See Hill v. Lockhart,* 474 U.S. 52, 59 (1985). In ordinary civil proceedings, the governing rule, Rule 8 of the Federal Rules of Civil Procedure, requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts, however, requires a more detailed statement: the petitioner must "specify all the grounds for relief available" and "state the facts supporting each ground." The Advisory Committee Notes to Rule 4 of said 2254 Rules instruct that "notice pleading" is not sufficient in a habeas corpus action --- the petition is expected to state facts that point to a real possibility of Constitutional error. Advisory Committee Note to Rule 4, Rules Governing

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Section 2254 Cases, citing *Aubut v.State of Maine*, 431 F.2d 688, 689 (1st Cir. 1970), cited in *Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977).

MOTION FOR A MORE DEFINITE STATEMENT

Rule 11 of the Habeas Corpus Rules provides that "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Rule 12(e) of the Federal Rules of Civil Procedure provides, inter alia:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading…

Habeas Corpus Rule 2(c), along with the model form appended to the Habeas Corpus Rules, mandates that petitions must "specify all the grounds for relief available to the petitioner." Claims which are speculative or conclusory are summarily dismissible. *James v. Borg*, 24 F.3d 20 (9th Cir. 1994), *Jones v. Gomez*, 66 F.3d 199 (9th Cir. 1995).

EXHAUSTION

A petitioner bears the burden of showing that his claims are exhausted. *Duncan v. Henry,* 513 U.S. 364, 365 (1995). The doctrine of exhaustion requires that federal habeas petitioners adequately present their claims to the state courts before seeking relief in the federal court. 28 U.S.C. § 2254(b); *Vasquez v. Hillery*, 474 U.S. 254, 275 (1986). The "fair presentation" requirement is only satisfied when the claim has been presented to the highest state court by describing the operative facts and legal theory upon which the federal claim is based. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982). "Full factual development" is required. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992). To exhaust a federal issue, it needs to be within the four corners of the appellate brief; the court is not required to read the record. *Castillo v. McFadden*, 399 F.3d 993, 1000 (9th Cir. 2005) (citing *Baldwin v. Reese*, 541 U.S. 27, 31-32 (2004)).

A habeas petitioner must "present the state courts with the same claim he urges upon the federal court." *Picard v. Connor,* 404 U.S. 270, 276 (1971). The exhaustion requirement

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is not met when the petitioner presents to the federal court facts or evidence which place the claim in a significantly different posture than it was in the state courts, or where different facts are presented at the federal level to support the same theory. *See Nevius v. Sumner,* 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v. Sumner,* 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff,* 582 F. Supp. 455, 458 (D. Nev. 1984). A claim is unexhausted if it includes new factual allegations which were not presented to the state courts, where the new facts "fundamentally alter the legal claim already considered by the state courts." *Chacon v. Wood,* 36 F.3d 1459, 1468 (9th Cir. 1994) (quoting *Vasquez v. Hillery,* 474 U.S. 254, 260 (1986)). Under *Rose v. Lundy*, 455 U.S. 509 (1982), a mixed petition presenting both exhausted and unexhausted claims must be dismissed without prejudice unless the petitioner dismisses the unexhausted claims or seeks other appropriate relief.

MOOTNESS

Article III, Section 2 of the United States Constitution provides that the "exercise of judicial power depends on the existence of a case or controversy." *See Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n.3 (1964). The question of mootness must be resolved by the federal court before it assumes jurisdiction. *Henry v. State of Mississippi*, 379 U.S. 443, 447 (1965); *Liner v. Jafco*, 375 U.S. at 304. Mootness occurs when there is no longer a case or controversy. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). "Federal courts do not have jurisdiction under the Article III 'Case or Controversy' provision of the United States Constitution to decide questions rendered moot by reason of intervening events." *Westmoreland v. Nat'l Transp. Safety Bd.,* 833 F.2d 1461, 1462 (11th Cir. 1987).

CLAIM 1.

The Court should dismiss Claim 1 of the federal petition because it is time-barred under *Mayle v. Felix*. In the alternative, should the Court rule that Claim 1 is timely filed, the court should dismiss it because the claims therein are unexhausted in that they have not been fully and fairly presented to any state court.

FLANAGAN's original federal petition was timely filed; two years later, he filed his amended petition. Under *Mayle v. Felix*, 545 U.S. 644 (2005), habeas claims in an amended

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petition do not arise out of the same "conduct, transaction, or occurrence" as claims in the original petition merely because the claims all challenge the same trial, conviction or sentence. 545 U.S. at 655-64. Rather, under the construction of the rule approved in *Mayle*, FED. R. CIV. P. 15(c)(2) permits relation back of habeas claims asserted in an amended petition "only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in "both time and type" from the originally raised episodes." Thus, the amended ground must relate back to core facts that are actually alleged in support of a claim that is actually stated within the original petition. If the new claim clarifies or amplifies a claim or a theory already in the original petition, the new claim may relate back to the original petition. *Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001).

The amended petition's Claim 1 was not in the original petition. It is time-barred under *Mayle* because the claims therein do not relate back to any claim raised in the original petition. In said Ground 1, FLANAGAN alleges that the State knowingly presented impeachable and false testimony against him that was procured/created by a police agent using coercion, threats, promises, and money and that the State failed to disclose exculpatory information about the creation of that testimony." He alleges that Robert Peoples, born November 26, 1931, uncle of Angela Saldana, "colluded with Beecher Avants, then Chief Investigator for the Clark County District Attorney's Office, to obtain/create false and/or highly suspect and impeachable testimony from Saldana and others" against FLANAGAN. He further alleges that "Avants provided police reports to Peoples who studied them and instructed Saldana what to do and to say." The voluminous allegations about Peoples' exploits, his alleged manipulation of evidence and collusion with Avants to falsely convict FLANAGAN, are nowhere to be found in the original petition. The Court should dismiss Ground 1 under *Mayle* because the claims therein do not arise from the same core facts as the timely filed claims, and depend upon events separate in "both time and type" from the originally raised claims.

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Should the Court rule that Claim 1 is timely filed, the Court should dismiss FLANAGAN's petition because the legal claims and supporting facts in Claim 1 were not fully and fairly presented to any state court, which renders Claim 1 unexhausted and the petition mixed.

CLAIM 3.

Federal Claim 3 is similar to state claim 2 of FLANAGAN's state postconviction Opening Brief. In state claim 2, he argued that the State's payment of money and other inducements to key witnesses violated his rights to due process, equal protection, and a reliable sentence. He further argues that the State did not fully disclose to the jury or him its agreements with the witnesses in violation of *Brady*, *Giglio,* and *Napue*. He also claims that no cautionary instruction regarding the testimony was given.

In Claim 3 of his federal petition, FLANAGAN argues that the State's improper payment of money and other inducements to key witnesses produced unreliable testimony and rendered the trials fundamentally unfair. He cites to *Sheriff, Humboldt County v. Acuna* which holds that "the State may not bargain for testimony so particularized that it amounts to following a script." He raises for the first time in any court the unexhausted legal theory/claim that said payments violated his federal constitutional rights first because the payments were in violation of established, binding state precedent, i.e., *Acuna*, which he argues created a federally protected liberty interest in having the jury be provided with a cautionary instruction when the prosecution promises consideration in exchange for testifying; thus, he argues that he is entitled to federal relief because the state law created a protected liberty interest that is enforceable by the Due Process Clause of the 14th Amendment. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said claim or seeks other appropriate relief.

CLAIM 5.

Federal Claim 5 is similar to state claim 4 of FLANAGAN's state postconviction Opening Brief. In Claim 5, FLANAGAN alleges numerous allegations concerning multiple different instances of his counsels' ineffectiveness. In parts 6F and 6G of Claim 5 of his

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federal petition at pp. 89-92, FLANAGAN raises two sub-claims which he did not raise previously in state court. He argues that trial counsel Pike, and subsequent counsel, unreasonably and prejudicially failed to develop and present substantial evidence (trajectory of gunshot wounds, blood spatter on the stairway wall, same gun used to shoot the Gordons, Wound #5) to dispute the State's theories concerning Akers and Saldana's testimony regarding the shootings of the Gordons and, had they done so, they could have disproved the State's theory that Randy Moore shot Mr. Gordon. FLANAGAN further argues that said counsel, had they properly developed the evidence, could have developed physical evidence (trajectory of wounds, no stippling, FLANAGAN's right-handedness) which would have disproved the claim that FLANAGAN held Mrs. Gordon down and shot her in the head. These claims are unexhausted in that 1) they were not presented to the state courts, 2) in the alternative, they include new factual allegations which were not presented to the state courts, and said facts fundamentally alter the legal claim already considered by the state courts. This same "trajectory-evidence" claim, along with the claim that counsel was ineffective for failing to object to the reading of Dr. Green's prior testimony, is also raised for the first time in federal Claim 5 at pp. 110-111 which alleges that trial counsel failed to investigate the crime scene. The Court should dismiss his petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claims or seeks other appropriate relief.

Also in Claim 5, at page 100, FLANAGAN alleges that Mr. Dahl, counsel during the second penalty phase, was ineffective because he devoted inadequate resources to the case, failed to conduct an adequate investigation, did nothing to avoid the imposition of the death penalty, failed to move to sever FLANAGAN's penalty hearing from Randy Moore, failed to secure an impartial jury because only one woman was on the jury, did not object to the exclusion of three female jurors, did not conduct any substantial mitigation investigation, failed to hire a mitigation expert, did no psychological or psychiatric investigation and hired no such experts, did very little investigation of FLANAGAN's adaptation to prison life and presented minimal evidence on that point. As argued above, the Court should dismiss said

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ineffectiveness claims because the Court's granting FLANAGAN a third penalty hearing mooted said claims.

Should the Court rule that the granting of the new penalty hearing did not moot said claims, the Court should dismiss them under Rule 12(b)(6) because they fail to state a claim. Conclusory allegations not supported by a statement of specific facts do not warrant habeas corpus relief. *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995), *cert. denied*, 517 U.S. 1143 (1996); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). Particularized facts which entitle the petitioner to habeas relief must be presented for each ground. These facts must consist of sufficient detail to enable the court to determine, from the face of the petition alone, whether the petition merits further habeas corpus review. *Adams v. Armontrout*, 897 F.2d 332, 334 (8th Cir. 1990). FLANAGAN fails to specify which resources, if any, counsel devoted to the case and how they were inadequate. He fails to demonstrate what counsel's allegedly inadequate investigation failed to uncover. A claim of failure to investigate must show what information would be obtained, and whether, assuming the evidence is admissible, it would have produced a different result. *Hamilton v. Vasquez,* 71 F.3d 1149, 1157 (9th Cir. 1994). He also fails to show that counsel could have successfully moved to sever and how the failure to sever prejudiced him. He fails to demonstrate what evidence mitigation experts, psychological or psychiatric experts, or prison adjustment experts would have added to the case. A petitioner may not simply speculate about how an unretained expert would testify, but must adduce evidence to show what the testimony would have been." *Smith v. Schiro,* 2007 WL 779695 (D. Ariz. 2007), citing *Grisby v. Blodgett* 130 F.3d 365, 373 (9th Cir. 1997). Evidence about the testimony of a putative witness must generally be presented in the form of actual testimony or an affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim. *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991). Conspicuously absent from his claims is any analysis about how the alleged deficiencies prejudiced him or how their absence would have produced a different outcome at trial, especially in light of the fact that the court granted him a third penalty trial. A claim based upon pure speculation as to resulting

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prejudice fails to present a viable claim under *Strickland*.[6] FLANAGAN's arguments are conclusory and fail to contain the necessary detail to state a claim.

Further in paragraph 31 of Claim 5, at p. 109 of his amended petition, FLANAGAN raises claims which he did not present to the state courts. He claims trial counsel was ineffective because he unreasonably and prejudicially failed to request special instructions regarding the elements of burglary, robbery, escape, and attempt, failed to develop and present evidence that the robbery and burglary were essential to the murder and failed to object to the erroneous instructions on parole and modification of sentences. This claim stems from the state supreme court's ruling at p. 15 of its December 20, 1996 direct-appeal Opinion (INDEX at Exhibit 311) where, because counsel failed to request the above instructions, the state high court dismissed FLANAGAN's claim that the jury was inadequately instructed. See p. 42 of direct-appeal Opening Brief, INDEX at Exhibit 306. FLANAGAN did not raise this claim in his postconviction habeas Opening Brief; consequently it is unexhausted. The Court should dismiss his petition under *Rose v. Lundy* unless he cleanses it of said claim or seeks other appropriate relief. Additionally, the Nevada Supreme Court found that "no prejudice resulted from the lack of instruction on these matters." Even if trial counsel had requested the instructions, it would have made no difference to the outcome of the trial. The Court should dismiss the claim because he has failed to allege or explain how he was prejudiced.

At pp. 104-107 of federal Claim 5, FLANAGAN also claims that trial counsel was ineffective because he used peremptory challenges to remove jurors Nietsch, Rehman, Pangburn, and Seckinger instead of challenging them for cause. This ineffectiveness claim was not raised in the state courts. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claim or seeks other appropriate relief.

The Court should also dismiss as moot the claims at pp. 133-136 of Claim 5 because they all pertain to the first penalty phase. In paragraphs 40, 41, 42, 43, and 44, FLANAGAN

[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

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alleges that at the 1995 penalty phase, 1) the government prevented the court-appointed defense mental health expert from conducting a competent and reliable assessment of FLANAGAN's mental status by limiting the amount of time he had for the clinical interview and tests to just a few hours, and 2) trial counsel was ineffective because he failed to retain and present experts to review and present FLANAGAN's social history, his investigation into FLANAGAN's life and potential mitigation was inadequate, and he failed to prepare and present the testimony of a prison adjustment expert. The Court should dismiss these claims as moot because FLANAGAN was granted a second and third penalty hearing.

CLAIM 6.

Federal Claim 6 is similar to state claim 5 of FLANAGAN's state postconviction Opening Brief. At p. 40 of his state habeas Opening Brief, in state claim 5, he argued his conviction and death sentence were invalid under state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury, a reliable sentence and the effective assistance of counsel because he was incompetent to stand trial; he claimed his trial counsel's failure to invoke a formal competency hearing and the state district court's failure to order such a hearing violated his constitutional guarantees. He raised four claims: 1) he was incompetent at the time of trial; 2) he was denied his constitutional rights when the trial court failed to conduct an appropriate inquiry into his competence to stand trial; 3) trial counsel failed to alert the court of his deteriorating mental functioning and his lack of competence to stand trial; and 4) he was involuntarily medicated during trial which affected his cognitive functioning and his appearance to the jury.

In Claim 6 of the federal petition, FLANAGAN argues that, because he was unable to comprehend the nature of the proceedings or to communicate with his counsel, "the trial court and trial counsel denied him his due process right to be present at his trial and not be tried when he was unable to comprehend critical portions of the proceedings or to communicate or co-operate with counsel." In said federal Claim 6, FLANAGAN alleges for the first time in any court that, because of the readily-evident nature and extent of his mental impairments, the trial court, defense counsel, the prosecutor, and other state officials who had custody and

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control of FLANAGAN as a pre-trial detainee, unreasonably and intentionally failed to inquire into the need for or to employ readily available remedies to enable FLANAGAN to comprehend and participate in the proceedings. To the extent that this alleges a due process claim or any other claim, the Court should dismiss it because it is unexhausted in that it has never been argued to the state high court or other state court. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said claim or seeks other appropriate relief.

Additionally, the Court should dismiss Claim 6 under FED. R. CIV. P 12(b)(6) because it fails to state a claim in that it is conclusory and fails to present particularized facts, or in the alternative should require him to file a more definite statement because of vagueness. Failure to allege specific facts that support a claim renders the claim conclusory on its face and subject to dismissal. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Conclusory allegations not supported by a statement of specific facts do not warrant habeas corpus relief. *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995), *cert. denied*, 517 U.S. 1143 (1996); *James v. Borg,* 24 F.3d 20, 26 (9th Cir. 1994). Particularized facts which entitle the petitioner to habeas relief must be presented for each ground. These facts must consist of sufficient detail to enable the court to determine, from the face of the petition alone, whether the petition merits further habeas corpus review. *Adams v. Armontrout*, 897 F.2d 332, 334 (8th Cir. 1990). A petition is expected to state facts that point to a real possibility of Constitutional error.

FLANAGAN states at p. 138 and 139 of his amended petition, that he has had a life-long struggle to cope with his severe, debilitating mental illnesses, including Posttraumatic Stress Disorder, depression, suicidal ideation and despair, that his pre-existing mental illness symptoms, mental vulnerabilities and deficits, combined with jail conditions and jail medications rendered him unable to assist counsel or understand the proceedings. He fails to provide particularized facts or documentation which demonstrate this life-long struggle, the existence or diagnosis of Postraumatic Stress Disorder, or the type or existence of his other severe debilitating mental illnesses and pre-existing mental illness symptoms. He also fails to provide particularized facts which show the mental vulnerabilities and deficits he suffered,

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when and where he had suicidal ideations, which jail conditions he is referring to, and which medications he was provided.

He further alleges that "[I]n the District Court, there was a wealth of information relating to his functioning, including medical evaluations, witness accounts and numerous other documents which established his major mental dysfunctions . . . ", but he fails to specify what and where the wealth of information is and which medical evaluations, witness accounts and numerous other documents and parts thereof he is referring to. He refers to "his psychotic behavior at the time of the crime" but fails to specify what psychotic behavior he engaged in during which crime; in light of his claim of innocence, he may not want to be specific. He claims he attempted suicide multiple times and was documented with a mental illness while in the Clark County Jail but presents no evidence which demonstrates he attempted suicide or was declared mentally ill. He claims that jail psychiatric staff prescribed him medication which included powerful anti-psychotic and other psychiatric medications, but fails to specify the name of the drugs and when they were administered to him.

At paragraph 4 of page 139, he claims while in the Clark County Jail he received substantial doses of psychotropic medications to treat his mental illness but again fails to specify which drugs and dosages he received, how often he received them, and which drugs he is claiming are psychotropic. He cites to fifty-two (52) pages of medical records (29 AA 7082-7134, INDEX at Exhibit 385) to support this claim but fails to point out which particular parts of the 52 pages support his argument. This leaves Respondents in the position of guessing which specific parts of the records support his claim. The only specific fact he points to comes from trial counsel Pike's affidavit where he states that he met with FLANAGAN at the Clark County Detention Center ("CCDC") to get his assistance in preparing for trial and he did not always seem to fully track with him. Based on this statement in Mr. Pike's affidavit [which neglects to state when he met with him], and apparently based only on this statement, FLANAGAN then makes the conclusory and unsupported allegation that "[T]he record demonstrates that FLANAGAN's flat affect, appearing in a fog, and inability to follow the proceedings were apparent **at trial**." (Emphasis added.) He fails to present any

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other facts to support his conclusory claim that **at trial** he had a flat affect, was in a fog and was unable to follow the proceedings.

In paragraph 8 of Claim 6, FLANAGAN claims that he was "involuntarily medicated during his trial, which affected his cognitive functioning and his appearance to the jury." He again cites to 46 of the above-mentioned 52 pages (29 AA 7082-7128, INDEX at Exhibit 385) to support his argument. He fails to point to any specific part of the 46 pages or any other evidence that shows which medications he is referring to, which ones are anti-psychotic, and how specifically they were forced upon him.

In part 7 of Claim 6, FLANAGAN also fails to present particularized facts which support his conclusory allegation that his counsel was ineffective for not alerting the court that FLANAGAN was incompetent and for not invoking a formal competence inquiry. He fails to point to the specific facts which support his claim that he was incompetent or appeared incompetent. The conclusory allegations set forth in Claim 6 do not specify such facts and fail to state a claim.

He also claims in part 7 that his trial counsel was ineffective because he negligently, prejudicially, and unreasonably failed to investigate FLANAGAN's mental condition and the type and effect of the medication he received in jail awaiting trial. He fails to specify which mental conditions FLANAGAN had, which facts supports the claim that he had a medical condition, which medication counsel would have discovered and specifically how said medication rendered FLANAGAN incompetent to stand trial. He also fails to specify how this investigation would have resulted in a different outcome at trial.

He also claims that, had trial counsel notified the court of FLANAGAN's incompetence, the court would have appointed experts who would have concluded that he was not competent to stand trial. FLANAGAN improperly and without any factual support speculates that an appointed expert would have concluded he was incompetent. A petitioner may not simply speculate about how an unretained expert would testify, but must adduce evidence to show what the testimony would have been." *Smith v Schiro,* 2007 WL 779695 (D. Ariz. 2007), citing *Grisby v Blodgett* 130 F.3d 365, 373 (9th Cir. 1997). Evidence about the testimony of a

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putative witness must generally be presented in the form of actual testimony or an affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim. *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991).

For the same reasons, the Court should dismiss his conclusory claim that the trial court failed to conduct an appropriate inquiry into his competence and failed to declare a doubt *sua sponte* that FLANAGAN was incompetent to stand trial. He fails to state any facts which would have alerted the trial court that FLANAGAN was incompetent. He fails to support with any fact his conclusory allegation that FLANAGAN's flat affect, appearing in a fog, and inability to follow the proceedings were apparent at trial. He only cites to counsel Pike's affidavit which only provided that in CCDC, at an unspecified time, in preparation for trial, that FLANAGAN did not always seem to fully track with him. The allegations that FLANAGAN had a flat affect, was in a fog, and unable to follow the proceedings, are conclusory and not based on any fact in the record, and therefore, he fails to allege specific facts to support his claim that the trial court should have *sua sponte* inquired into his competence. He also fails to state any facts from which the state court should have been able to discern *sua sponte* that FLANAGAN was incompetent. FLANAGAN's arguments are conclusory and fail to contain the necessary detail to state a claim, or in the alternative, their lack of specificity renders them vague.

CLAIM 7.

Federal Claim 7 is similar to state claim 6 of FLANAGAN's state postconviction Opening Brief. In said claim 6, FLANAGAN claimed that the trial court's failure to change venue violated his rights to due process, equal protection, trial before an impartial jury, and a reliable sentence. In federal Claim 7, however, he raises the unexhausted claims that at his 1985 guilt and penalty phase, the trial courts failure to change venue violated his rights against cruel and unusual punishment, to the effective assistance of counsel, to confrontation and compulsory process, and to the enforcement of mandatory state law; all these legal theories/claims are unexhausted because FLANAGAN did not argue them in the state

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postconviction opening brief and the state high court did not address them. Additionally, any claim regarding the first penalty hearing is moot.

Additionally, the Court should dismiss all ineffective-assistance claims in federal Claim 7 because they are unexhausted. In said state opening-brief claim 6, FLANAGAN mentions that "counsel inexplicably and unreasonably failed to pursue or renew the motion [for change of venue] or otherwise protect FLANAGAN's rights," but he made no specific claim of ineffective assistance. He cites to Claim 4, but it contains no reference to the motion for change of venue, at least that Respondents can locate. He also mentioned in state Claim 6 that counsel failed to pursue individual sequestered voir dire which could have prevented prejudice to the remaining jurors, but again made no allegations or claim of ineffective assistance of counsel resulting therefrom. In his federal Claim 7, however, FLANAGAN argues in paragraphs 10 and 11 at p. 148, that counsel was ineffective because he failed to ensure a fair trial, failed to secure a ruling on the change of venue either before or after voir dire, failed to conduct a meaningful *voir dire* regarding prospective jurors' views on the crime, and failed to exercise peremptory challenges on obviously biased jurors. All these claims are unexhausted because they were not fully and fairly presented to the state supreme court.

In addition, the Court should dismiss Claim 7 because it fails to state a claim. At page 144 of his federal petition, he alleges that FLANAGAN's "trial and resentencing hearing in 1985 took place in an unduly prejudicial atmosphere, saturated by media coverage that included commentary on the "satanic" nature of the crimes . . . ." He cites to 44 pages of jury selection but fails to point out which particular parts or facts support his argument. At page 145, he cites to 25 pages to support his argument that "virtually all the jurors were aware of the crimes and most had been exposed to news, television, or radio reports. He also cites to 8 pages to support his allegation that several jurors, without specifying which jurors, were not able to answer definitively when first asked about their ability to remain impartial, and only when pressed, in front of others, stated that they could be impartial. The only claims which are factually adequate are those relating to prospective jurors Singer and Elder. He cites no precedent at all relative to the claims he asserts. He presents no analysis which applies the

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law to the facts of his claim. This again leaves Respondents in the position of guessing which specific parts of the records or facts support his claims and which law or standards he will argue. The Court, therefore, should dismiss Ground 7 because it fails to state a claim or require FLANAGAN to file a more definite statement.

CLAIM 8.

Federal Claim 8 is similar to state claim 7 of FLANAGAN's postconviction Opening Brief. In said state claim 7, FLANAGAN alleged that his conviction by an all-white jury violated his rights to due process, equal protection, the right to an impartial jury drawn from a fair cross-section of the community, and a reliable sentence. In federal Claim 8, he argues that Clark County has systematically excluded African-Americans from district-court juries, especially in criminal cases. In federal Claim 8, FLANAGAN adds -- to the legal theories presented to the state courts -- the unexhausted legal theories that his conviction violated his rights to effective assistance of counsel, an impartial tribunal, confrontation, compulsory process, and self-incrimination. He also adds for the first time claims relating to the improper hardship excusal of prospective jurors, and that trial counsel and appellate counsel were ineffective because they failed to properly challenge the jury selection procedures, investigate the jury composition, request a hearing and raise such issues on appeal. He further adds that "[S]tate statutory mandates were arbitrarily violated by the selection process, in violation of state law and the federal Due Process Clause's prohibition against arbitrary deprivation of state liberty interests. In paragraph 10 at page 155, FLANAGAN more specifically raises two unexhausted claims, 1) his counsel was ineffective because he failed to investigate the jury composition, failed to raise the issue at trial and on appeal, and failed to request a hearing where he could have presented evidence of these violations, and 2) the process used to select FLANAGAN's jury violated Nevada's mandatory statutory and decisional laws concerning jury selection and FLANAGAN's right to a jury drawn from a fair cross-section of the community, and thereby deprived him of a state-created liberty interest and due process of law under the 14th Amendment. These additional claims/legal theories are unexhausted because they were not fully and fairly presented to the state courts. The Court should dismiss

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FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said claim or seeks other appropriate relief. Additionally, part 2 above should be dismissed because it is vague and conclusory inasmuch as FLANAGAN fails to specify which of Nevada's mandatory statutory and decisional laws create a liberty interest, fails to offer any legal or support to show how a liberty interest was created, and further fails to show how those alleged liberty interests were violated.

The Court should also dismiss the exhausted portions of Claim 8 because they fail to state a claim in that they are conclusory and fail to present particularized facts supported by the record. Although FLANAGAN makes specific allegations, he cites to no evidence or proof in the record which supports these allegations. He presents no proof regarding the racial composition of the jury or the venire. He cites to the 1990 census but does not produce it or the portions which allegedly support his argument. No other evidence, except allegations based upon information and belief, support any of his claims about the Clark County jury process, the juror questionnaires, the jurors excused or disqualified, the assignment system, or the juries seated in Clark County district courts. FLANAGAN cites no legal precedent relative to the claims he asserts. He presents no analysis which applies the law to the facts of his claim. The Court, therefore, should dismiss Ground 8 or require FLANAGAN to file a more definite statement.

CLAIMS 10 and 11.

Federal Claims 10 and 11 are similar to state claims 18 and 19 of FLANAGAN's postconviction Opening Brief. FLANAGAN alleges in federal Claim 10 that during the second penalty hearing, the court improperly refused to grant a challenge for cause against prospective juror Anthony Jordan, which caused him to use his first peremptory challenge to remove said prospective juror. He also alleges in Claim 11 that during the second penalty hearing, the court improperly removed prospective juror Anne Catherine Cassidy without cause. *See* Claims 9 and 10 of his postconviction Opening Brief. The Nevada Supreme Court denied these claims as moot because FLANAGAN received a third penalty hearing, as follows:

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> Flanagan also raised a number of claims related to his first and second penalty hearings. We conclude that these claims are moot as Flanagan received a third penalty hearing.

INDEX at Exhibit 521, at page 14.

Flanagan III vacated the second penalty hearing and remanded for a third penalty hearing. The Court lacks jurisdiction to hear FLANAGAN's claims asserting alleged improprieties during the first and second penalty phases because as argued above they are moot. The Court should dismiss Grounds 10 & 11 and all claims therein stemming from the first and second penalty phases.

FLANAGAN cites *Beets v. State*, 107 Nev. 957, 961, 821 P.2d 1044, 1047 (1991), to support his argument that an error in an earlier penalty hearing cannot be cured by a grant of a new penalty hearing. *Beets* did not hold or state in *dicta* that an error in an earlier penalty hearing cannot be cured by a new penalty hearing. FLANAGAN argues that the exclusion of Ms. Cassidy requires relief but fails to state the nature of the relief he requests. His remedy, as granted by the state supreme court, would be a new penalty hearing. FLANAGAN argues no other remedy. The Court should dismiss Ground 10 and 11.

Should the court rule that FLANAGAN presents an ineffective-assistance claim in part 7 of Grounds 10 and 11, the court should dismiss them under FED. R. CIV. P. 12(b)(6) because they are conclusory, fail to state a claim, fail to specify how counsels' performances were deficient and how the absence of the deficiencies would have changed the outcome of the trial.

CLAIM 12.

Federal Claim 12 is similar to state claim 9 of FLANAGAN's habeas Opening Brief. In state claim 9, he claimed his conviction violated his rights to due process, equal protection, a public trial, the effective assistance of counsel and reliable sentence because the trial judge directed that defense objections and motions be made directly to the court reporter. In paragraph 7 of Federal Claim 12, FLANAGAN adds to the foregoing legal grounds that his rights to confrontation and to be present during all critical stages of the trial were violated because he was absent from "certain proceedings involving motions and objections made on

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his behalf." He cites to numerous bench conferences. He did not raise these confrontation and critical-stages claims in Claim 9 of the state postconviction Opening Brief. He appears to add paragraph 7 in an attempt to bolster or improve state claim 9 by adding the above facts and legal theories to improve the phrase "Flanagan's absence from the proceedings." FLANAGAN did not raise these legal theories of confrontation and the right to be present during all critical stages of the trial in the context of his state claim 9. He now adds these unexhausted arguments and facts to federal Claim 12. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said claim or seeks other appropriate relief. Additionally, these allegations fail to state a claim because FLANAGAN does not cite to any authority to support his argument that a bench conference is a critical stage of the proceedings and/or that he had a constitutional right to be present at said bench conferences. He also fails to provide any facts or legal argument or precedent to support his conclusory claims that these alleged violations or absences prejudiced him. He provides no facts which show that his presence at the bench conferences was critical to the outcome of the trial.

CLAIM 13.

Federal Claim 13 is similar to state claim 22 of FLANAGAN's habeas Opening Brief. In federal Claim 13, FLANAGAN advances a new legal theory which he did not argue to the state courts, that is, that the indefinite indictment deprived him of rights guaranteed by Nevada state law which created a liberty interest that may be enforced by the Due Process Clause of the 14th Amendment. The Court should dismiss this claim/theory because it is unexhausted. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said claim or seeks other appropriate relief. The Court should also dismiss this claim because it fails to state a claim in that FLANANGAN fails to identify which state laws created said liberty interest, fails to present any legal authority or argument as to how they created said liberty interest, and fails to show how the alleged liberty interests were violated.

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CLAIM 14.

Federal Claim 14 is similar to state claim 29 of FLANAGAN's habeas Opening Brief where he argues that the trial court improperly failed to sever his case from his co-defendants. Federal Claim 14, however, in paragraph 10 at p. 180, raises an unexhausted federal claim that was not in state claim 29 and was not presented to the state courts. In Ground IV of his direct appeal Opening Brief, FLANAGAN raised the state-law claim that the trial court committed prejudicial error in admitting John Lucas' hearsay statements under the co-conspirator statement. FLANAGAN in Claim 14 federalizes that claim by arguing for the first time in any court that the trial court violated his rights to due process, confront witnesses, present a defense, and a reliable sentence as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments by independently and unlawfully committing prejudicial constitutional error by admitting said hearsay statements of John Lucas under the guise of co-conspirator statements. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claim or seeks other appropriate relief.

CLAIM 15.

Federal Claim 15 is similar to state claim 23 of FLANAGAN's habeas Opening Brief. FLANAGAN claims in federal Claim 15 that his conviction is invalid because of violations of his right to due process, to equal protection, to confront witnesses and rebut the state's case, to a reliable sentence, and because he was absent during critical stages of the proceedings, i.e., at bench conferences. Claim 15 fails to state a claim because FLANAGAN does not cite to any authority to support his argument that a bench conference is a critical stage of the proceedings and/or that he had a constitutional right to be present at said bench conferences. He also fails to provide any facts or legal argument or precedent to support his conclusory claim that these alleged violations or absences substantially and injuriously affected the fairness of the proceedings and prejudiced him. He provides no facts which show that his presence at the bench conferences was critical to the outcome of the trial. He presents no facts or evidence which demonstrate that he requested to be present at any bench

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conference or how he was prejudiced thereby when his counsel was present at said bench conferences. The Court should dismiss Claim 15 because it fails to state a claim.

CLAIM 16.

Federal Claim 16 is similar to state claim 24 of FLANAGAN's postconviction Opening Brief. In his state postconviction opening brief, FLANAGAN alleged violations of his rights to due process, equal protection, a public trial, freedom of the press, and a reliable sentence because the trial court failed to conduct all proceedings in public and permit FLANAGAN to be present during trial and failed to ensure creation of a concrete record of the trial by having such proceedings reported or otherwise recorded in that neither he nor the public were present at numerous bench and chambers conferences. FLANAGAN, however, in federal Claim 16 adds the unexhausted legal theories that his conviction is invalid because of violations of his right to a reliable and meaningful appellate review, effective assistance of counsel at trial and on appeal, trial in front of an impartial tribunal, and his right to be free of the influence of prosecutorial misconduct as guaranteed by the 5th, 6th, 8th, and 14th Amendments. Said additional legal theories/claims that trial and appellate counsel were ineffective for not objecting to these conferences, that said conferences denied him his right to trial in front of an impartial jury and his right to be free of the influence of prosecutorial misconduct were not raised in any state court and are therefore unexhausted. To the extent that it states a claim, his claim that the Court's jury instructions were not recorded is also unexhausted because it was not raised in the state courts. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claim or seeks other appropriate relief.

The Court should also dismiss the remaining claims in Claim 16 because they fail to state a claim. FLANAGAN presents no facts or evidence which demonstrate that he requested to be present at any bench or chambers conferences. Although he alleges that the trial court persistently and willfully refused to comply with constitutional requirements that proceedings be held in public, he cites no precedent which mandates that bench and chambers conferences are constitutionally or statutorily required to be held in public. He

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makes no showing that the trial court refused to allow portions of the trial to be recorded. He offers no specific facts which show how he was prejudiced by these conferences, especially in light of the fact that his counsel was present at all of them. He fails to provide any facts which support his conclusory allegations that the appellate record was not accurate and reliable. He also fails to cite to any precedent which holds that the right to a public trial includes the right to be present at all bench and chambers conferences. He also fails to show how the lack of any transcriptions prejudiced him. The Court should dismiss Claim 16 because it fails to state a claim.

CLAIM 19.

The Court should dismiss FLANAGAN's petition because Claim 19 contains unexhausted claims. Federal Claim 19 is similar to state direct-appeal claim V and state habeas claims 13, 14, 15, and 16. However, at paragraphs H and I on p. 217, FLANAGAN advances a new legal theory which he did not argue to the state courts, that is, that the Nevada Supreme Court's narrowing of the "knowingly creating a great risk of death to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person" aggravating circumstance established under state law a state-created liberty interest in having the jury properly instructed, which is enforceable under the due process clause of the 14th Amendment, and that the violation of that rule was therefore a violation of FLANAGAN's federal due process and equal protection rights. He further argues for the first time in any court the unexhausted claims that his trial and appellate counsel were ineffective because they failed to present this issue to the trial court and the state supreme court. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claim or seeks other appropriate relief.

CLAIM 21.

Federal Claim 21 is similar to state habeas claim 20. In Claim 20 of his state postconviction habeas Opening Brief, FLANAGAN argued that Judge Mosley was biased because he 1) told defense lawyers that he would not hear defense objections and instead

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required them to make their objections during recesses to the court reporter, 2) pressed the case to trial and did not allow adequate resources for the defense, 3) refused to stay the execution after the second penalty hearing to allow an appeal and habeas proceedings, 3) stated "the convicted murderers in this case, have lived now in excess of six years longer than the two people they killed, so I don't know that we are rushing into anything here; in fact in my view, we are about five and a half years too late."

In federal Claim 21, however, FLANAGAN adds to the allegations raised in state court that the court tried to insulate its comments and rulings from scrutiny through the use of numerous off-the-record conferences, and further alleges "[M]ost importantly, Petitioner is informed and believes and on that basis alleges that during a recess in the trial[7], Judge Mosley said to counsel 'let's get back to work and get these guys executed,' or words to that effect." FLANAGAN completely changes the face of the claim by shifting the focus to the "most important" fact that Judge Mosley said "let's get back to work and get these guys executed." This egregious, unsupported, never-before-raised allegation, along with the claim that the court tried to insulate its comments and rulings from scrutiny, fundamentally alters the legal claim originally considered by the state courts. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claims or seeks other appropriate relief.

Additionally, the court should dismiss the portions of Claim 21 which stem from allegations of Judge Mosley's actions in the first and second penalty hearings because they are moot in that the state supreme court granted a new penalty hearing and Judge Guy presided over it.

Further, Claim 21 is unexhausted because it alleges new factual allegations (regarding Judge Guy) which fundamentally alter the legal claim considered by the state courts. FLANAGAN alleged in his habeas Opening Brief that at the third penalty hearing, Judge Guy demonstrated bias when during voir dire he signaled to the jurors the result he wanted by

[7] It is not clear what FLANAGAN means when he states "during a recess in the trial." Because subparagraph D comes under paragraph 2, it appears he is referring to a recess in either the first or second penalty hearing.

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saying "we're asking for the death penalty, the State's asking for the death penalty, life with or life without the possibility, and that's an awesome burden for anybody." In federal Claim 21, to support his allegations of bias, he adds new allegations that Judge Guy throughout the trial displayed a partisan relationship with Prosecutor Seaton whom he had known for twenty-five years, joked with Seaton about his senility and leaving papers in the courtroom, lectured defense counsel about tactics in front of the jury, and refused to allow defense counsel to question a juror about his opinions of the criminal justice system. These new allegations fundamentally alter the legal claim considered by the state courts by adding to Judge Guy's easily-dismissible and self-corrected slip of the tongue the above four unexhausted allegations. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claim or seeks other appropriate relief.

CLAIM 23.

Federal Claim 23 is similar to state claim 10 of FLANAGAN's postconviction Opening Brief. In state claim 10 of his postconviction appellate brief, FLANAGAN argued that in violation of his rights to due process, equal protection, effective assistance of counsel, and a reliable sentence, appellate counsel, in addition to failing to raise the conflict of interest claim, failed to raise the following thirty-three (33) claims which he asserted in his postconviction appellate brief: 1, 2, 3, 5, 6, 7, 8, 9, 11 through 27, and 29 through 36.

In federal Claim 23, FLANAGAN argues his appellate counsel were ineffective because they failed to act as zealous advocates in a capital case, in violation of his rights to due process, equal protection, the effective assistance of counsel, conflict free counsel, full fair and meaningful appellate proceedings, and a reliable determination of his guilty, death eligibility, and punishment under the 5th, 6th, 8th, and 14th Amendments. These appellate counsel were Robert L. Miller who appealed the first penalty phase, Lee Elizabeth McMahon who appealed the second penalty phase, and Michael Miller who appealed the third penalty phase. FLANAGAN alleges that said counsel were ineffective because they failed to raise on appeal or completely assert all the available arguments supporting the constitutional arguments raised in the instant federal petition, and also failed to raise all or part of all the

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claims asserted in the July 31, 1986 postconviction Opening Brief (13 AA 3064-3120, INDEX at Exhibit 121) and the Reply Brief (13 AA 3149-3169, INDEX at Exhibit 128). He further argues that [appellate] counsel failed to object to the unconstitutional objection procedure imposed by the trial court, failed to assert FLANAGAN's First Amendment rights in regard to the witchcraft evidence, failed to secure a complete record for appeal by failing to obtain settled statements of unreported bench conferences, failed to argue the inadmissibility of that evidence in the guilt phase and failed to point out the inadequacy of the jury instructions as evidenced, for example, by the failure of the first penalty phase jury to find any mitigating factors, and failed to argue the issue of the trial court's erroneous instructions on aiding and abetting.

The Court should dismiss all ineffectiveness claims related to counsel who appealed the first and second penalty phases because they are moot in that FLANAGAN was granted a third penalty phase.

The Court should also dismiss as unexhausted FLANAGAN's claim that appellate counsel were ineffective because they failed to raise on appeal or completely assert all the available arguments supporting the constitutional claims raised in the instant federal petition. FLANAGAN did not and could not have raised this claim in state court prior to filing of the instant federal petition and amended petition because the federal petition did not exist. Also, several claims raised in the federal petition are also unexhausted, time-barred, moot, not cognizable in habeas corpus, and fail to state a claim.

The Court should also dismiss Claim 23 because FLANAGAN's blanket claim of ineffective assistance, for not raising thirty-three (33) of the thirty-six (36) claims he raised in his postconviction habeas Opening Brief, fails to state a claim. He fails to present particularized facts and arguments which show how appellate counsel was ineffective in each of the grounds. He also makes no attempt to specifically argue or show how appellate counsels' failure to raise each of the claims in the petitions particularly prejudiced him, or analyze or argue that there was a reasonable probability that but for appellate counsel's failures he would have prevailed on appeal on each of the claims. The Court should dismiss

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this claim of ineffectiveness relating to the thirty-three (33) claims or require him to file a more definite statement which presents each of the thirty-three claims separately and sets forth how his counsels performance was sub-par and how, but for these deficiencies, he would have prevailed on appeal in each of them.

Similarly, the Court should dismiss his conclusory claims that appellate counsel failed to object to the unconstitutional objection procedure imposed by the trial court, failed to assert FLANAGAN's First Amendment rights in regard to the witchcraft evidence, failed to secure a complete record for appeal by failing to obtain settled statements of unreported bench conferences, failed to argue the inadmissibility of that evidence in the guilt phase and failed to point out the inadequacy of the jury instructions, as evidenced, for example, by the failure of the first penalty phase jury to find any mitigating factors, and failed to argue the issue of the trial court's erroneous instructions on aiding and abetting. He presents no arguments that show how his counsel's performance was sub-par and fails to show how he was prejudiced by these unspecified alleged deficiencies. The Court should dismiss Claim 23 because it fails to state a claim or in the alternative require FLANAGAN to file a more definite statement.

CLAIM 24.

Federal Claim 24 is similar to Claim 21 of FLANAGAN's postconviction appellate brief. The Court should dismiss Claim 24 because it is unexhausted in that it includes new factual allegations which were not presented to the state courts and the new facts and legal theories alleged therein fundamentally alter the legal claim already considered by the state courts. In Claim 21 of his postconviction appellate brief, FLANAGAN's entire claim consisted of the following:

> Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner. Although this Court has previously ruled otherwise, Flanagan makes this claim to preserve his record.

In federal Claim 24, in addition to his claim that his death sentences are invalid because the Nevada capital punishment system operates in an arbitrary and capricious manner,

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FLANAGAN, in an eight-page claim, argues among other things, that the Nevada death penalty statute violates the Eight Amendment prohibition against cruel and unusual punishment, fails to narrow the class of persons eligible for the death penalty and permits arbitrary selection for prosecution without consistent guidelines to ensure reliability. He alleges that his conviction resulted in the imposition of a freakish, wanton, arbitrary and capricious judgment of death, that Nevada prosecutors are afforded complete unguided discretion to determine whether to charge special circumstances and to seek death penalties which creates a risk of county-by-county arbitrariness, and that Nevada law fails to provide sentencing bodies with any rational method for separating the few cases that warrant the death penalty from the many that do not. To support his claim, he cites to *State v. Jonathon Daniels*, *State v. Brumfield, State v. Duckworth and Martin*, the American Bar Association, and the United States High Commissioner for Human Rights. Obviously, none of these facts, legal theories or arguments were presented to the Nevada Supreme Court. The only claim he made in state court was that the Nevada capital punishment system operates in an arbitrary and capricious manner. The addition of these new facts and legal theories render Claim 24 unexhausted. FLANAGAN further alleges in Claim 24 that his counsel's failure to object at trial and his appellate counsel's failure to raise this claim on appeal deprived him of his right to assistance of counsel; these claims are also unexhausted. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claims or seeks other appropriate relief.

CLAIM 26.

Federal Claim 26 is similar to Claim 36 of FLANAGAN's postconviction appellate brief. The Court should dismiss Claim 26 because it is unexhausted in that it includes new factual allegations which were not presented to the state courts which fundamentally alter the legal claim already considered by the state courts. In Claim 36 of his postconviction appellate brief, FLANAGAN's entire claim consisted of the following:

> Flanagan's sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because as a result of the state's egregious misconduct, he has endured three trials and appeals, and has

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> been on death row for 20 years without finality, which constitutes cruel and unusual punishment. *See e.g. Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) Claims 24 and 27 *supra*.

Lackey is a one-page memorandum where the Supreme Court again denies certiorari on this argument and Justice Stevens discusses the potential virtues of the argument; it does not support or address the many facts and legal theories raised in federal Claim 26 or give the state supreme court notice that he is raising the federal claims and arguments FLANAGAN has now raised in federal Claim 26.

In federal Claim 26, in addition to his claim that his death sentences are invalid because being on death row for 20 years constitutes cruel and unusual punishment, FLANAGAN, in a seven-page claim, argues among other things, that he has been deprived of the compelling testimony of witnesses who had died or become otherwise unavailable in the intervening years, that the jury at the third guilt-phase was unable to fully comprehend and give appropriate mitigating weight because of his age, and that the USA is the only nation that confines individuals for many periods under sentences of death. Notwithstanding the fact that the Supreme Court has never held that execution following a lengthy term of incarceration on death row constitutes cruel and unusual punishment, and has repeatedly declined to address the question, FLANAGAN cites to *Pratt v. Attorney General for Jamaica, Soering v. United Kingdom, State v. Richmond*, the dissents in *Lackey, Elledge v. Florida, Knight v. Florida, Ceja v. Stewart* , and to *In re Medley, Furman v. Georgia,* and *Gregg v. Georgia.* None of these cases and none of the arguments related thereto that are presented to this Court, were presented to the Nevada Supreme Court. Said new facts and legal theories fundamentally alter the legal claim already considered by the state courts which renders Claim 26 unexhausted. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claim or seeks other appropriate relief.

CLAIM 28.

In federal Claim 28, FLANAGAN alleges his death sentences are invalid because the death penalty is cruel and unusual punishment. FLANAGAN did not raise this particular claim and its facts and legal theories in his direct-appeal opening brief or his postconviction

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appellate brief; consequently the claim is unexhausted. The Court should dismiss FLANAGAN's petition under *Rose v. Lundy* unless he cleanses it of said unexhausted claim or seeks other appropriate relief.

CLAIM 30.

Federal Claim 30 is similar to Claims 26 & 27 of FLANAGAN's postconviction appellate brief. The Court should dismiss Claim 30 because it is not cognizable in habeas corpus. FLANAGAN argues that the means by which the State seeks to cause his death violates the Eighth Amendment prohibition against cruel and unusual punishment. FLANAGAN argues generally that lethal injection is in all cases unconstitutional, that it is specifically unconstitutional as applied to him, and that the Nevada lethal injection protocol to be used in his execution is unconstitutional. In the unpublished 2010 decision of *Riley v. McDaniel*, No. 3:01-cv-0096, 2010 WL 3786070, the court addressed the same issue. Respondents "borrow freely" from the Court's analysis of Ground 25 in said decision and argue it herein.

The Court should dismiss FLANAGAN's general challenge to lethal injection because under *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court, on an appeal from a judgment in a §1983 civil rights action ruled that Kentucky's lethal injection protocol was constitutional. *Baze*, therefore, holds that lethal injection in general is constitutional as long as it is administered in a manner which does not constitute cruel and unusual punishment. The Court, therefore, should dismiss FLANAGAN's general challenge to execution by lethal injection.

The Court should also dismiss FLANAGAN's specific challenge, as applied to him, on the basis that an as-applied challenge to a method of execution is not a challenge to the constitutionality of FLANAGAN's custody. The Court in *Riley* reasoned as follows:

> Turning to Riley's as-applied challenge, the court concludes that such a challenge to Nevada's execution protocol is not cognizable in this federal habeas corpus action.
>
> In *Nelson v. Campbell,* 541 U.S. 637 (2004), a state prisoner sentenced to death filed a civil rights action, under 42 U.S.C. § 1983, alleging that the state's proposed use of a certain procedure, not mandated by state law, to access his veins during a lethal injection would constitute cruel and unusual punishment. The U.S. Supreme Court reversed the lower courts' conclusion

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> that the claim sounded in habeas corpus and could not be brought as a section 1983 action. The Supreme Court ruled that section 1983 was an appropriate vehicle for the prisoner to challenge the particular lethal-injection procedure prescribed by state officials. *Nelson,* 541 U.S. at 645. The Court stated that **the prisoner's suit challenging "a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself [because by altering the lethal-injection procedure] the State can go forward with the sentence."** *Id.* at 64. In *Hill v. McDonough,* 547 U.S. 573 (2006), the Court reaffirmed the principles articulated in *Nelson,* ruling that an as-applied challenge to lethal injection was properly brought by means of a section 1983 action. *Hill* 547 U.S. at 580-83.
>
> Both *Nelson* and *Hill* suggest that a section 1983 claim is the more appropriate vehicle for an as applied challenge to a method of execution. *See also, Beardslee v. Woodford,* 395 F.3d 1064, 1068-69 (9th Cir.2005) (Condemned inmate's claim that California's lethal injection protocol violates the Eighth and First Amendments "is **more properly considered as a 'conditions of confinement' challenge, which is cognizable under § 1983**, than as a challenge that would implicate the legality of his sentence and thus be appropriate for federal habeas review.").
> It is possible--and, given the amount of time that passes before a death sentence is carried out, it may be likely-that execution protocols will change between the time when a death sentence is imposed and the time when the death sentence is carried out. Therefore, the constitutionality of an execution protocol may change after the judgment is entered imposing the death sentence. Habeas corpus law and procedure have not developed, and are not suited, for the adjudication of such issues.
>
> This court concludes that an as-applied challenge to a method of execution is not a challenge to the constitutionality of the petitioner's custody or sentence. *See* 28 U.S.C. § 2254; *see also Heck v. Humphrey,* 512 U.S. 477, 486-87 (1994) (habeas corpus as a means of challenging a "conviction or sentence"). An as-applied challenge to a method of execution is more akin to a suit challenging the conditions of the custody, which must be brought as a civil rights action under 42 U.S.C. § 1983.

Riley v. McDaniel, supra. (emphasis added). *Baze* "forecloses any argument that lethal injection, no matter how administered, is necessarily unconstitutional". An as-applied challenge to a method of execution is not cognizable in habeas corpus because it does not challenge the constitutionality of an inmate's custody or sentence. Based on the foregoing reasoning, the Court should dismiss Claim 30 because death by lethal injection in general is constitutional and because an "as applied" challenge to lethal injection is not cognizable in habeas corpus in that it does not call into question the fact or validity of a death sentence.

/ / /

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OTHER CLAIMS.

At the end of Grounds 1 through 29, FLANAGAN includes a paragraph which states:

> The state court improperly deprived Petitioner of the resources necessary to fully develop the facts in support of this claim, including funding for investigation and experts, discovery, and an evidentiary hearing.

To the extent that this one sentence in each of the first 29 grounds attempts to raise a claim, the Court should dismiss them under FED. R. CIV. P. 12(b)(6) because they fail to state a claim. FLANAGAN's argument is conclusory, fails to state if and how the state court violated his constitutional rights, fails to show how the state court deprived him of which resources and how this prejudiced him. The Court should dismiss any such claims.

To the extent that any claim alleges any constitutional violation during the first or second penalty phases, the Court should dismiss them because they are moot.

To the extent that any claim alleges that any state law created a liberty interest, such a claim is unexhausted. The Court should dismiss it unless FLANAGAN cleanses his petition of said claim or takes other appropriate relief.

CONCLUSION

Based on the foregoing, the Court should dismiss FLANAGAN's petition.

DATED this 2nd day of September, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Dennis C. Wilson
DENNIS C. WILSON
Senior Deputy Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***Motion to Dismiss First Amended Petition For Writ of Habeas Corpus By a Person in State Custody Pursuant to 28 U.S.C. § 2254 or in the Alternative, Motion For a More Definite Statement*** with the Clerk of the Court by using the CM/ECF system on the 2nd day of September, 2011.

The following participants in this case are registered CM/ECF users and will be served by the CM/ECF system:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

RENEE BAKER, et al.,

Respondents.

Case No.: 2:09-cv-00085-KJD-GWF

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION TO HOLD PROCEEDINGS IN ABEYANCE

(Death Penalty Habeas Corpus Case)

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Respondents, by and through legal counsel, CATHERINE CORTEZ MASTO, Nevada Attorney General, and DENNIS C. WILSON, Senior Deputy Attorney General, oppose the Motion to Hold Proceedings In Abeyance filed by Petitioner Dale Edward Flanagan ("FLANAGAN"). Said opposition is made and based upon the attached points and authorities, all papers and pleadings on file herein and any such argument as may be required by this court.

DATED this 30th day of March, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Dennis C. Wilson
DENNIS C. WILSON
Senior Deputy Attorney General

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MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND.

In its February 22, 2008 Order of Affirmance (ECF No. 77, Exhibit 521), the Nevada Supreme Court set forth the history of FLANAGAN's cases as follows:

> Appellant Dale Flanagan's grandparents, Carl and Colleen Gordon, were found dead on November 6, 1984, Carl having been shot seven times in the back and chest and Colleen having been shot three times in the head. Six young men were involved in the plot to kill the Gordons. Flanagan shot Colleen, and his codefendant Randolph Moore shot Carl. Flanagan and Moore were tried in September and October 1985 along with two other codefendants, Johnny Ray Luckett and Roy McDowell. The four men were convicted, and Flanagan and Moore received death sentences. Tom Akers and Michael Walsh were also charged in the murders and pleaded guilty to manslaughter and two counts of murder, respectively.
>
> On direct appeal, this court characterized as overwhelming the evidence that Flanagan, Moore, Luckett, and McDowell killed the Gordons so that Flanagan could obtain insurance proceeds and an inheritance. Although this court affirmed Flanagan's convictions, it reversed his and Moore's sentences and remanded the matter for a new penalty hearing due to prosecutorial misconduct[1]. Flanagan and Moore were again sentenced to death, and they appealed. This court affirmed the death sentences[2]. The United States Supreme Court vacated that decision, however, and remanded for reconsideration due to evidence presented at the second penalty hearing regarding Flanagan and Moore's occult beliefs and activities[3]. Upon remand, this court held that use of such evidence had been unconstitutional and remanded the case to the district court for a third penalty hearing[4]. After the third hearing, Flanagan and Moore once again received death sentences, and this court affirmed the sentences on appeal[5].

THE TRIAL TRANSCRIPTS

Eight individuals were involved in the murders of Colleen and Carl Gordon: Dale Flanagan, Randy Moore, Mike Walsh, Roy McDowell, Johnny Ray Luckett, Tom Akers, Rusty Havens, and John Lucas. The State filed charges against six of them: FLANAGAN, Moore,

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[1] *Flanagan v. State (Flanagan I)*, 104 Nev. 105, 754 P.2d 836 (1988).

[2] *Flanagan v. State (Flanagan II)*, 107 Nev. 243, 810 P.2d 759 (1991).

[3] *Moore v. Nevada*, 503 U.S. 930 (1992).

[4] *Flanagan v. State (Flanagan III)*, 109 Nev. 50, 846 P.2d 1053 (1993).

[5] *Flanagan v. State (Flanagan IV)*, 112 Nev. 1409, 930 P.2d 691 (1996).

McDowell, Walsh, Akers, and Luckett. Tom Akers and Mike Walsh negotiated plea bargains; Akers agreed to testify, Walsh did not. Four went to trial: FLANAGAN, Moore, McDowell, and Luckett; Luckett testified at trial. The trial testimony took place and is contained in Respondents' Index of Exhibits as follows (ECF Nos. 59 – 61):

September 30, 1985
Exhibit 53 – **Rusty Havens** direct and cross; **Lisa Licata** direct and cross; Officer **Steve Wynne** direct and cross; Officer **Daniel Connell** direct and cross; Officer **Robert Roderick** direct and cross; Exhibit 54 is opening statements; Exhibit 55 is a duplicate of part of Handfuss' cross of Havens.

October 1, 1985
Exhibit 56 – **Geneal McGregor** direct and cross; **Michelle Gray**; **Ron Flud** coroner; **Tom Akers cross**-examination; Exhibit 57 – **Tom Akers direct** examination.

October 2, 1985
Exhibit 58 – **John Lucas** direct and cross; **Yvonne Kaczmarek** direct and cross; **Bob Manring**; **Cynthia Evans**; **Angela Saldana** direct and cross. Exhibit 59 is an order for Akers Oct. 1 direct testimony and Opening Statements.

October 3, 1985
Exhibit 60 – **Saldana cross** continued; **Officer Morlock** AZ; **Officer Navarro**; **Officer Geary**; **Moser** print examiner; **Alsen Bud Inman** Park Service diver; **Alan Cabrales** Metro ID specialist; **Richard Good** firearms examiner; and Defense witness **Keith McIntyre**.

October 4, 1985
Exhibit 63 – **Johnny Ray Luckett** direct and cross all the way to end of the day; Exhibit 62 – Defense witness **Wayne Witting** direct and cross [Exhibit 61 is a transportation order for Scott Sloan].

October 7, 1985
Exhibit 64 – Continued cross of **Johnny Ray Luckett**; Exhibit 65 – Defense witness **Scott Sloane**.

October 8, 1985
Exhibit 66 – **Shelly Ballenger; Lindy Moore; Lynn Stubridge; William Leaver;** and **Johnny Ray Luckett.**

October 9, 1985
Exhibit 67 – Settling of jury instructions.

October 10, 1985
Exhibit 68 – Closing arguments.

The following is Respondents' summary of the testimony of the main witnesses at trial.

OFFICER DANIEL CONNELL.

Officer Daniel Connell testified that he examined the Gordons' entire house for signs of entry, the lower pane of the window between the stairs and the fireplace in the living room was

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broken, there were numerous pieces of glass on the inside of the room, and the screen on the broken window was cut and torn. There were no other windows broken in the house and the rear door of the house was locked. ECF No. 59, Exhibit 53, line 11 of p. 99 to line 7 of p. 101. He also testified that an apparent bullet hole was located above the second step of the stairway in the south stairway wall and another apparent bullet hole was found in the studs or framework of the house. The angle of the bullet holes showed trajectories which indicated that the bullets had been fired from outside the broken window. ECF No. 59, Exhibit 53, line 22 of p. 100 to line 17 of p. 102.

OFFICER ROBERT RODERICK.

Officer Robert Roderick testified that there were five cartridge casings at the scene. Cartidge 88-A was found next to Mr. Gordon's right foot, 88-B was near to and outside the broken window, 88-C was in the window sill of the broken window, and 88-D was on the living room floor near the broken window. A spent bullet (88-E) was also found between Mr. Gordon's legs. ECF No. 59, Exhibit 53, line 20 of p. 118 to line 10 of p. 122. The last cartridge 89-A was found between the broken window screen and the frame of the screen. ECF No. 59, Exhibit 53, lines 11-25 of p. 124. Officer Roderick also testified that he found two bullets (State's trial exhibit 90-A and 90-B) in the bloody bedsheets taken from Mrs. Gordon's bedroom. ECF No. 59, Exhibit 53, line 11 of p. 128 to line 19 of p. 133. He also testified that he found a knife (State's trial exhibit 91-A) at the scene outside the west side of the house and took it and the cut screen from the broken window into evidence. ECF No. 59, Exhibit 53, line 3 of p. 134 to line 5 of p. 138.

FIREARMS EXAMINER RICHARD GOOD.

Firearms examiner Richard Good testified as follows. The above five cartridge casings (88A-D and 89A) were .22 caliber long rifle cartridges manufactured by Omark Industries. All five were fired from the same weapon, to the exclusion of all other weapons, and that weapon was State's trial exhibit 98, the semi-automatic .22 long rifle [which was recovered in Lake Mead after Lucas showed the police where Moore had dumped the rifles]. ECF No. 60, Exhibit 60, lines 5-6 of p. 149; line 3 of p. 162 to line 3 of p. 163. All the bullets and bullet

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fragments were recovered from the autopsy examinations and the crime scene, and all were mutilated or deformed. The bullets and bullet fragments were of two different calibers and from two different manufacturers: one was consistent with the ammunition of a .22 caliber long rifle, hyper velocity hollow point, manufactured by Omark Industries; and the other with a .22 caliber short manufactured by Winchester Western. ECF No. 60, Exhibit 60, line 23 of p. 147 to line 19 of p. 148. Good concluded that the five bullets or bullet fragments bore the same class characteristics, either ammunition or in rifling characteristics, with the two rifles retrieved from Lake Mead, that is, State's trial exhibits 97 and 98. Four other recovered bullets or bullet fragments were consistent with bullets that could have been fired by a .22 caliber revolver. ECF No. 60, Exhibit 60, line 15 of p. 157 to line 20 of p. 159. The State also admitted into evidence a "pole wrapped in black tape." ECF No. 60, Exhibit 60, line 22 of page 167.

CHIEF DEPUTY CORONER FLUD.

Clark County Chief Deputy Coroner Ron Flud testified that Mrs. Gordon suffered two gunshot entry wounds to the right side of her head. ECF No. 59, Exhibit 56, lines 9-17 of p. 30.

DETECTIVE MICHAEL GEARY.

Detective Geary testified as follows. Angela Saldana's December 6, 1984 statement, John Lucas' December 10, 1984 statement, and Tom Akers December 9, 1984 statement broke the case, and Detective Geary made arrests based thereon. Lucas told the police they would find the .22 long rifle and the .22 sawed-off rifle at the first cliffs at Lake Mead. Park Ranger Bud Inman found the two rifles during the second dive which was about a month after the first dive. ECF No. 60, Exhibit 60, line 22 of p. 77 to line 12 of p. 84.

RUSTY HAVENS.

Rusty Havens was the first witness called at the guilt phase of the trial. Havens testified that he did not take part in the murders because he was locked up in Elko on November 5, 1984, but he was party to the early plans to kill the Gordons. Havens testified that one night when he was at Circus Circus a month or two before the murders, FLANAGAN asked him if he wanted to be involved in killing his grandparents so that FLANAGAN could get

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his inheritance. Havens testified that about a week and a half before the murders he met with FLANAGAN, Randy Moore, Tom Akers, and Mike Walsh at the apartment at 337 North 13th Street in Las Vegas to discuss killing the grandparents. ECF No. 59, Exhibit 53, line 16 of p. 24 to line 4 of p. 25. At the apartment FLANAGAN planned how they were going to kill his grandparents and how to make it look like a burglary. ECF No. 59, Exhibit 53, line 2 of p. 18 to line 2 of p. 21. FLANAGAN said they could get into the grandparents' house through the back door and described the house and where the grandparents slept. FLANAGAN said the grandmother would be sleeping in her room and to get to it you went through the back door, took a left through a bathroom and into her bedroom. The grandfather would be upstairs to the left in his own room. ECF No. 59, Exhibit 53, line 15 of p. 22 to line 7 of p. 23. They discussed how Randy Moore was to go into the living room where he could see the staircase going up, and Havens was to kill the grandmother with a blunt instrument, then the grandfather would hear the noise, and as the grandfather came down the stairs, Moore would shoot him. ECF No. 59, Exhibit 53, line 11 of p. 23 to line 9 of p. 24. FLANAGAN said they would use Tom Akers' car and Akers agreed they could use the car. ECF No. 59, Exhibit 53, lines 14-25 of p. 25. FLANAGAN said that once the grandparents were dead and everything had cooled off, Moore, Walsh, Akers, and Havens would be paid very well. ECF No. 59, Exhibit 53, lines 6-11 of p. 26.

TOM AKERS.

Tom Akers was initially charged with the murders but negotiated a plea. He testified at the guilt phase of the trial on direct examination to the following. Approximately one month before the murders [around September 5, 1984], Akers, at FLANAGAN's request, drove FLANAGAN to the apartment of Randy Moore, Johnny Ray Luckett, and Michael Walsh at 337 North 13th Street where they had a meeting with Randy Moore, Roy McDowell, Michael Walsh, Johnny Ray Luckett, and Rusty Havens. ECF No. 59, Exhibit 57, line 22 of p. 7 to line 16 of p. 10. About twenty to thirty minutes after they arrived, FLANAGAN started discussing the plan to rob and kill his grandparents. FLANAGAN said they would go over to his trailer, then to his grandparents' house, enter in through the back screen door because it was

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summer and his grandparents left the door open with just the screen shut. FLANAGAN would then go directly into his grandmother's room, someone would follow the kitchen around and go to the bottom of the stairs where the grandfather would be coming down, and the grandparents would be killed. FLANAGAN said he didn't want to kill his grandmother, but if he had to, he would. Moore said he didn't want to kill the grandfather, but he would if he had to. If possible, they would try to find someone else. ECF No. 59, Exhibit 57, line 21 of p. 10 to line 25 of p.11. FLANAGAN told Akers he was the only heir to will. He also said they were going to make the murders look like a robbery by moving furniture and the television as close to the front door as possible, by maybe later taking it out to the desert, and by making tire tracks in front of the house to make it look like someone had left in a hurry. ECF No. 59, Exhibit 57, line 7 of p. 12 to line 5 of p.13. FLANAGAN also said that the story they would tell the police would be that all six of them arrived at the grandparents' house, FLANAGAN went to the house and the other five went to the trailer; as FLANAGAN was walking to the house, one white male and two black males came out of the house and one of them shot FLANAGAN in the leg, then they jumped into a green Dodge truck, peeled out and left; FLANAGAN then found his grandparents' bodies in the house. ECF No. 59, Exhibit 57, line 18 of p. 13 to line 12 of p.15. Akers also testified that FLANAGAN said that his grandmother might be stabbed or shot and that his grandfather would be shot, and that a .22 caliber pistol would be used if there was to be a shooting. Roy McDowell would provide the .22 pistol. ECF No. 59, Exhibit 57, line 10 of p. 19 to line 3 of p.20, and lines 5-14 of page 21.

Akers further testified as to the events that took place about a month later on November 5, 1984, the day of the murders, as follows. Around 10 p.m., he and FLANAGAN went to the apartment of Randy Moore, Johnny Ray Luckett, and Michael Walsh at 337 North 13th Street. ECF No. 59, Exhibit 57, line 22 of p. 26 to line 13 of p. 28. There was further discussion about the grandparents. FLANAGAN said that they were going to go to the grandparents' house that night to kill them, and that he would probably wind up shooting his grandmother. Walsh said that he would hold a broomstick wrapped with black electrical tape [which Akers saw beside the small couch in the living room of the apartment] and break the

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window to gain entry. Moore said he would cut the screen, and Michael Walsh would smash the window. FLANAGAN said he would go in first and go directly to the grandmother's room. Moore said he would enter after that and wait for the grandfather to come down the stairs and shoot him. Moore said that Johnny Ray Luckett would have the other gun. FLANAGAN would have the .22 pistol, Randy Moore would have the .22 long rifle, and Luckett the sawed-off .22 rifle. ECF No. 59, Exhibit 57, line 18 of p. 30 to line 1 of p.36. FLANAGAN said that Akers would drive and Walsh and McDowell would make it look like a burglary. ECF No. 59, Exhibit 57, line 15 of p. 36 to line 17 of p. 38. FLANAGAN loaded the .22 pistol and Moore the .22 long rifle. FLANAGAN said that if anyone crossed him, he would kill them and their family. ECF No. 59, Exhibit 57, line 23 of p. 39 to line 20 of p. 42. All six of the original defendants left the apartment and got in Akers' El Camino. Akers drove, Luckett was next to Akers, FLANAGAN was next to Luckett; Moore, Walsh, and McDowell were in the back under the wooden "toner" [Tonneau] cover. In the El Camino, FLANAGAN had the pistol and Moore had both rifles. FLANAGAN told Akers where to drive. After they got off the paved portion of the road, Moore test-fired the long rifle. They then drove directly to the grandparents' house and got out of the car around midnight. FLANAGAN still had the pistol revolver, Moore had the long rifle, and Luckett had the sawed-off rifle. FLANAGAN told Akers to go to his trailer to get some cassette tapes as part of the story for the police, and wait for five or ten minutes. The other five walked together to the house; FLANAGAN still had the pistol revolver, Moore the long rifle, and Luckett the sawed-off rifle. ECF No. 59, Exhibit 57, line 21 of p. 42 to line 23 of p. 51.

Akers further testified that after he got into the trailer, he turned on the kitchen light over the sink, turned on the light in the bedroom section, saw the tape case and grabbed it, then heard a gunshot, a lady scream, another gunshot, a man yell in pain, and several more gunshots. He then left the trailer and walked very quickly towards his car. ECF No. 59, Exhibit 57, line 12 of p. 55 to line 24 of p. 58. When he got to his car, which he had trouble starting, he saw FLANAGAN, Moore, Walsh, and McDowell running from the direction of the grandparents' house; FLANAGAN had the revolver and Moore the long rifle. FLANAGAN got

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in the front [next to Luckett], and Moore, Walsh, and McDowell got in the back. ECF No. 59, Exhibit 57, line 3 of p. 62 to line 12 of p. 63, and lines 4-9 of p. 66. FLANAGAN told Akers to put the running car into drive, not turn on the lights, drive to the end of the road, make a right, drive, turn on the lights, make a right, then a left. On their way back to 337 North 13th Street, FLANAGAN told Akers to pull over and they threw away spent casings. ECF No. 59, Exhibit 57, line 15 of p. 65 to line 17 of p. 67.

Akers also testified on direct that when they got back to 337 North 13th Street, they recounted what had happened. Walsh said he hit the window twice with the stick, and then FLANAGAN put his fist through it, the window was cleared out, FLANAGAN entered, and then Moore entered. Walsh then saw the "older gentleman" coming down the stairs, took the gun from Luckett, and fired a shot through the window over Moore's shoulder. FLANAGAN said he went directly to his grandmother's room, grabbed her by the lower jaw, put her down on the bed and shot her; Akers thought FLANAGAN said he shot her in the back of the head. Moore said that he went in the house, knelt down, shot at the grandfather coming down the stairs, missed, heard a shot come over his shoulder, and then shot again hitting the grandfather, and then shot again. ECF No. 59, Exhibit 57, line 3 of p. 74 to line 20 of p. 76. After discussing the stories they would tell the police, FLANAGAN said everything would be okay and told everyone to keep their mouths shut. ECF No. 59, Exhibit 57, line 5 of p. 81 to line 2 of p. 82.

Akers further testified that he knew that FLANAGAN usually carried a boot knife but Akers didn't know if FLANAGAN had it with him the night of the murders. When they got back to the apartment, Moore said he had cut the screen with FLANAGAN's boot knife and had dropped it after he cut the screen. Akers also testified that about two weeks after the murders, he went to Cutlery World in the Meadows Mall with FLANAGAN. FLANAGAN told him they were going to replace the knife that FLANAGAN had dropped/lost [which Moore had dropped when he cut the screen]. FLANAGAN showed Akers which knife to buy, gave him the money, then went to McDonalds to pick up his check. Akers bought the knife. When FLANAGAN returned, Akers gave him the knife and the change. ECF No. 59, Exhibit 57, line 3 of p. 82 to line 5 of p. 87.

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JOHNNY RAY LUCKETT.

Johnny Ray Luckett, one of the defendants on trial, testified at trial as follows. About two and a half weeks before the murders, Luckett moved in with Randy Moore at 337 North 13th Street three or four months after he first met him. ECF No. 60, Exhibit 63, line 25 of p. 12 to line 1 of p. 13. He first met FLANAGAN and Akers at Circus Circus. ECF No. 60, Exhibit 63, lines 14-23. On the morning of the day of the murders, FLANAGAN and Akers arrived at 337 North 13th Street. Luckett, Walsh, and Moore were already there. Between approximately 11 a.m. and 1 p.m., Luckett overheard a conversation between Moore and FLANAGAN where one of them said "we have to do it this weekend since we didn't do it last weekend." ECF No. 60, Exhibit 63, line 10 of p. 25 to line 8 of p. 27. Luckett heard FLANAGAN ask Moore for McDowell's phone number, FLANAGAN then went into the living room, called the number and asked for McDowell, and then asked if he had gotten the toy, and then said "all right, that's okay." FLANAGAN and Akers then left the apartment. ECF No. 60, Exhibit 63, line 25 of p. 11 to line 14 of p. 27 to line 10 of p. 28. Around 5-6 p.m., Lucas came over to the apartment. Luckett, Walsh, and Moore were there. ECF No. 60, Exhibit 63, line 23 of p. 28 to line 7 of p. 29. LUCKETT heard Flanagan say that he had found a way in, something about hospital, and moving furniture, and something about there was supposed to have been a pickup there when we arrived. ECF No. 60, Exhibit 63, lines 2-9 of p. 33. After Moore and FLANAGAN had confronted Luckett in the apartment bedroom, Moore came out of the bedroom with the sawed-off rifle and the long rifle, and FLANAGAN said to the others in the living room, "Remember the story, when we get there, that there was to be a truck there and I was to go check out the house and I was to be shot." McDowell then showed up at the apartment and gave FLANAGAN the .22 pistol revolver. ECF No. 60, Exhibit 63, line 20 of p. 37 to line 14 of p. 39. Moore told Lucas to stay at the apartment and answer the phone, and if anyone came over or called, to tell them they went up to FLANAGAN's trailer to get some cassette tapes and to get some beer. ECF No. 60, Exhibit 63, lines 17-21 of p. 39. Before they left, Moore was loading both rifles and FLANAGAN was fiddling with the revolver and Luckett thought he saw him loading bullets into it. There was a conversation about “meet me

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at the hospital" and Randy was to shoot Dale in the leg so that it would make it look real. Randy grabbed both rifles, FLANAGAN grabbed the revolver and said "let's go." ECF No. 60, Exhibit 63, line 9 of p. 40 to line 2 of p. 41. They all went out and got in Akers' car [FLANAGAN, Moore, Walsh, McDowell, Luckett, and Akers]. Moore put the two rifles in the back of the El Camino. Luckett was in the front seat with Akers who was driving and FLANAGAN with the revolver was also in the front seat. ECF No. 60, Exhibit 63, lines 2-11 of p. 41. On the way to the Gordons' house, they stopped to get gas, Moore test-fired the rifle while he was lying down in the back of the El Camino. ECF No. 60, Exhibit 63, line 12 of p. 41 to line 17 of p. 42. When they got to the house, FLANAGAN told Tom Akers to turn off the car lights and to get his cassette tapes. ECF No. 60, Exhibit 63, line 19 of p. 42 to line 2 of p. 43. Moore got the two rifles out of the back of the El Camino. ECF No. 60, Exhibit 63, lines 1-3 of p. 44. Luckett saw Walsh grab a pole or something out of the back of the El Camino. Moore told Luckett that he was to back Moore up in case something went wrong. ECF No. 60, Exhibit 63, lines 16-25. When they got to the house, Luckett saw Moore crouching down and saw him pull the screen apart from the window. Luckett heard FLANAGAN say "Now, do it now." He then heard two dead thumps on a window and heard a window break. ECF No. 60, Exhibit 63, lines 1-19 of p. 47. FLANAGAN then said "Now, everybody in." He saw FLANAGAN and McDowell go in the house, then he heard a scream when Moore and Walsh were outside the window and heard two or three shots. He saw Moore crouch down and fire shots into the house. Walsh was behind Moore and fired one shot. During this time, he heard the man yell and scream. Walsh threw the gun to Luckett, then Moore and Walsh went into the house. ECF No. 60, Exhibit 63, line 22 of p. 47 to line 22 of p. 48. Luckett then picked up the gun Walsh had thrown at him and ran towards Tom Akers' car. ECF No. 60, Exhibit 63, lines 14-24 of p. 49. While Luckett and Akers were trying to start the car, the other four came out of the house. After all six of them had gotten in the car, Luckett asked Moore what the last final shot was and he said that Mr. Gordon had been squirming around, so he shot him in the head. Then they all got in the car and took off, drove to an isolated spot in the desert and threw away the casings. ECF No. 60, Exhibit 63, lines 4-23 of p. 50. When they got out of the car at

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the apartment, Moore had the rifles and FLANAGAN had the revolver. They had to bang on the door to get Lucas to open it. Moore put the rifles away in his room. ECF No. 60, Exhibit 63, lines 5-21 of p. 52. When they were sitting in the apartment recounting what had happened, Luckett heard FLANAGAN say that he had run into the house, grabbed his mother (sic), threw her down and shot her in the head three times. ECF No. 60, Exhibit 63, lines 19-25 of p. 54. Luckett heard Moore say that he shot Mr. Gordon when he was coming down the stairs and that Mr. Gordon still proceeded down the stairs after he shot him, Luckett thought three or four times, and so he had kept shooting. Walsh said that after he saw Moore start firing at Mr. Gordon and Gordon kept coming down the stairs and yelling, he stepped behind Moore and fired a shot at Gordon. ECF No. 60, Exhibit 63, lines 1-11 of p. 55. After they got back to the apartment FLANAGAN discovered that he didn't have his knife and Moore said he had dropped it outside the window. They talked about going back to get it but decided not to. ECF No. 60, Exhibit 63, lines 6-19 of p. 57. Luckett testified he went over to Lucas' place with Randy Moore and his girlfriend Connie to dispose of the rifles. Moore, Lucas, and Luckett all walked to the cliffs at Lake Mead. Moore then went back to the car, returned with the rifles, wiped the rifles clean with a cloth, and threw them into Lake Mead. ECF No. 60, Exhibit 63, line 19 of p. 61 to line 14 of p. 62.

JOHN LUCAS.

John Lucas testified to the following. A month or two before the murders, at the dome house on Decatur, Lucas was helping Moore move to the apartment on 13th Street; FLANAGAN was there talking about murdering his grandparents so he could get his inheritance through their will, and said that there was an easy way into the house to shoot and kill them. ECF No. 60, Exhibit 58, line 2 of p. 6 to line 8 of p. 9.

On the night of the murders, Lucas was at the apartment at 337 North 13th Street with FLANAGAN, Moore, Walsh, Luckett, and Akers when the murders were discussed. FLANAGAN and Moore did most of the talking. FLANAGAN said that they would get into the house through the side window, that FLANAGAN would shoot the grandmother and Moore the grandfather, so FLANAGAN could get his inheritance through the will. Moore said they would

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make the murders look like a burglary by messing the place up a little. ECF No. 60, Exhibit 58, line 9 of p. 9 to line 25 of p. 17. Tom Akers was to drive his El Camino from 337 North 13th Street to the Gordons' home. FLANAGAN and Moore said they would use the .22 rifle and .22 handgun to kill the grandparents. Lucas said he saw a .22 rifle, .22 sawed-off rifle, and a .22 handgun in the living room, and that FLANAGAN had the handgun/revolver in his possession. ECF No. 60, Exhibit 58, line 15 of p. 18 to line 29 of p. 21.

In the early morning hours immediately after the murders, around 1:00 - 1:30 a.m., a knock on the door woke Lucas up. He opened the door and FLANAGAN, Moore, Akers, Luckett, Walsh, and McDowell were standing there and came into the apartment. He saw the .22 pistol revolver on the table in the living room after they came in, saw the two .22 rifles in the living room and thought he saw Moore carrying the .22 long rifle. ECF No. 60, Exhibit 58, line 1 of p. 26 to line 20 of p. 28.

Lucas also saw a purse on the table; FLANAGAN took a wallet out of the purse and FLANAGAN and Moore took I.D.s out of the purse and burned the I.D.s in an ashtray on the kitchen table. FLANAGAN said the I.D.s were his grandparents. He also saw currency including a $2 bill. ECF No. 60, Exhibit 58, line 1 of p. 29 to line 18 of p. 31.

FLANAGAN told Lucas that Walsh broke the side window with a white closet pole. FLANAGAN said he went through the side window into his grandmother's room and shot her with the .22 pistol. Moore said he shot the grandfather with the .22 rifle as he came down the stairs. ECF No. 60, Exhibit 58, line 19 of p. 31 to line 24 of p. 33.

Lucas testified that FLANAGAN typically carried a double-edge boot knife that clipped onto his boot. FLANAGAN said that he had dropped his knife outside the side window they had broken to get into the grandmother's house. ECF No. 60, Exhibit 58, line 16 of p. 36 to line 7 of p. 37.

A couple of weeks after the murders, Luckett and Moore and Moore's girlfriend Connie came by Lucas' in Connie's car. Moore said they were going to get rid of the two rifles at the first cliffs at Lake Mead. Moore, Connie, and Luckett then left. Lucas later told Detective Geary about this and he went with him to the cliffs and showed them the approximate location

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where the guns might be. ECF No. 60, Exhibit 58, line 11 of p. 38 to line 9 of p. 42. Lucas also testified that after the six individuals came back to the apartment on the night of the murders, Moore told him he shot the grandfather four times in the chest and once in the head. ECF No. 60, Exhibit 58, lines 13-23 of p. 42.

LISA LICATA.

Lisa Licata discovered the bodies of the Gordons. She had moved into the trailer with FLANAGAN about two weeks before the murders and moved out about a week before. The day after the murders she went to the house to get the key to the trailer to pick up some of her clothes and found the bodies. ECF No. 59, Exhibit 53, line 15 of p. 54 to line 16 of p. 59. At the house, she noticed the broken window. ECF No. 59, Exhibit 53, lines 14-23 of p. 63. The next day she called FLANAGAN at the trailer and asked him if he knew what happened. He said yes. She then asked him how he felt about it and he said it really didn't matter, he and his grandparents didn't get along. During the call, FLANAGAN asked her if she had mentioned the inheritance to the police because he thought she had told the police that he had killed his grandparents for the inheritance. ECF No. 59, Exhibit 53, line 3 of p. 65 to line 9 of p. 69. Licata also testified that FLANAGAN always carried a knife in a pouch on the side of his pants. She testified that the knife the prosecution showed her at trial was the same kind of knife that FLANAGAN always carried. ECF No. 59, Exhibit 53, line 19 of p. 69 to line 24 of p. 71.

MICHELLE GRAY.

On direct examination, Michelle Gray testified that in a conversation which FLANAGAN had with her, Blake Watson, and Debbie Samples, FLANAGAN said that if anyone asked if he had lost a knife, to tell them he has had it with him. He showed them a similar knife and said that if anyone asked, that the similar knife was the knife that he had always carried. FLANAGAN said that the police had found his knife by the window of his grandparents' house inside the house. On cross-examination, Gray testified that she had not mentioned the knife in the written report she first gave to the police but told the prosecutors about it a couple of

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months before the trial. ECF No. 59, Exhibit 56, line 10 of p. 17 to line 2 of p. 19, and line 18 of p. 19 to line 18 of p. 20, and line 3 of p. 23 to line 10 of p. 25.

YVONNE KACZMAREK.

Yvonne Kaczmarek worked at Cutlery World in the Meadows Mall. She testified as follows. She sold Flanagan a western w-77 boot knife in October of 1984. She remembered him because he worked at McDonald's in Meadows Mall and he had been coming into the store for a while. ECF No. 60, Exhibit 58, line 8 of p. 132 to line 16 of p. 133. She also testified that she sold FLANAGAN an identical knife on November 16, 1984. He came to the store with a friend and went directly to the showcase which contained the boot and survival knives. They were there a few minutes and left. Three or four minutes later, FLANAGAN's friend came back into the store, went directly to the boot knives and asked to see it. Ms. Kaczmarek showed him the knife. The friend then bought the knife for $32.95. The prosecutor then showed her a photograph of Tom Akers and she identified him as the friend who had bought the knife. She also testified that the western boot knife she sold FLANAGAN was identical to exhibit 91-A. ECF No. 60, Exhibit 58, line 8 of p. 132 to line 18 of p. 136.

WAYNE WITTIG.

Defendant Johnny Ray Luckett called Wayne Witting as a witness. Wittig testified that after the murders he had a conversation with FLANAGAN where FLANAGAN had admitted to him that he had gone into the Gordons' house with five or six other individuals. Witting also identified exhibit 91-A [the boot knife found at the scene] as FLANAGAN's knife based on the fact that the tip of blade of the knife was discolored or burned. He testified that FLANAGAN had bought the knife to replace one that was stolen shortly before Witting left Las Vegas to go to school in Phoenix. ECF No. 60, Exhibit 62, line 22 of p. 38 to line 22 of p. 39; Exhibit 62, line 25 of p. 42 to line 5 of p. 43; Exhibit 62, line 22 of p. 38 to line 22 of p. 39.

ANGELA SALDANA.

Angela Saldana testified as follows. On November 5, 1984, she was living with her aunt and uncle in Las Vegas [Wendy Peoples a.k.a. Wendy Mazaros, wife of Robert Peoples]. The following day, she moved in with FLANAGAN. ECF No. 60, Exhibit 58, lines 4-25 of p. 155.

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Around November 13, 1984, Detective Levos and his partner came to FLANAGAN's trailer and talked to him outside the trailer while SALDANA waited in the trailer. FLANAGAN came back to the trailer a little upset and told her the detectives had told him they had found something of his that wasn't supposed to be there, that is, at the murder scene. Saldana asked what it was and FLANAGAN said, "my knife." FLANAGAN said the detectives had found the knife by the broken window on the side of the house near his grandmother's bedroom. Saldana testified that she had seen the knife before and that FLANAGAN carried it in the sheath on his belt or in his pocket. She identified exhibit 91-A as the same knife that FLANAGAN had before the grandparents' murders. ECF No. 60, Exhibit 58, line 2 of p. 157 to line 7 of p. 160.

Saldana also testified that on December 5, 1984, the day after Saldana's birthday, she and FLANAGAN were arguing in the trailer about an old boyfriend of Saldana's, FLANAGAN said he didn't care anymore and was tired of running and tired of it all. Later on, he went into a description of “what had happened” and said "how do you like this, I did it. I killed my grandparents.” ECF No. 60, Exhibit 58, line 9 of p. 161 to line 20 of p. 162. FLANAGAN's counsel Mr. Pike, for the reasons previously announced in a prior hearing, then renewed his continuing objection based on the police agent issue that was raised. ECF No. 60, Exhibit 58, lines 21-25 of p. 162. FLANAGAN told her he had planned the murders with Luckett, Akers, McDowell, Walsh, and Moore at Moore's apartment on the 5th prior to the murders, and they planned to make it look like a robbery. He said that he, Luckett, and Moore were to carry guns and that they were to break in the window instead of going in the front door. He said he killed them for she thought $200,000 in insurance money, the house, and his inheritance, and that he killed his grandparents early in the morning after midnight on November 6. ECF No. 60, Exhibit 58, line 4 of p. 163 to line 12 of p. 165. FLANAGAN told her that all six of them left Moore's apartment and went directly to the grandparents' house in Akers' car, that Moore had a rifle, Luckett had a rifle, and FLANAGAN had a handgun. When they got there, Akers went to the trailer and the others went to the house to the outside of the right side window which is next to the grandmother's room. FLANAGAN said that he gave Moore a knife to cut the

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screen open, it wasn't working well so he threw it down, and Dale himself broke the window with a stick. ECF No. 60, Exhibit 58, line 20 of p. 180 to line 22 of p. 182. He also told her that while he was wrestling his grandmother to the bed, that his grandfather was coming down the stairs yelling and that Luckett and Moore had shot him approximately seven or eight times. She clarified that FLANAGAN had said that he shot the grandmother first, then heard his grandfather coming down the stairs screaming, and Luckett and Moore shot him. ECF No. 60, Exhibit 58, line 14 of p. 183 to line 22 of p. 184. FLANAGAN also said that he had taken his grandmother's purse from the front living room closet. ECF No. 60, Exhibit 58, lines 7-24 of p. 185.

On cross-examination, Saldana testified as follows. She talked to Officer Berni around the middle of the third week in November, a week or less after FLANAGAN bought the second knife. She told him what FLANAGAN had said about the replacement knife and about the will. Berni told her to put the knife back, and if she needed help, to call. Berni was a previous boyfriend of hers. ECF No. 60, Exhibit 58, lines 1 of p. 202 to line 3 of p. 205.

She testified she talked to Beecher Avants after FLANAGAN had told her "what he had done." [By "what he had done" she meant the murders.] She was living with her aunt [Wendy Peoples] when she spoke to Beecher. She called Avants because her aunt and uncle suggested she call him. He was a friend of the family. At the time Saldana met Avants, he was running for sheriff. She didn't know where he worked. Avants suggested that she talk with Sergeant Bob Hilliard. Ray Berni and Saldana called Hilliard. On December 6, 1984, at Hilliard's home, she told Hilliard everything FLANAGAN had said. Hilliard wrote her statement down as she told him what FLANAGAN had said. That same day, she did as Hilliard had said and went downtown and spoke with Detective Levos and made a statement. ECF No. 60, Exhibit 58, line 4 of p. 205 to line 11 of p. 211.

During cross examination she also testified to the following. After FLANAGAN had the conversation with the detectives [about the knife that was found at the scene], Saldana took the second or replacement knife to Officer Berni whom she had known for two almost three years and who was her former boyfriend. Berni told her to take the knife back and see if she

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could get more information. ECF No. 60, Exhibit 60, line 18 of p. 8 to line 12 of p. 9. She also went to Beecher Avants with the information she got from FLANAGAN and Akers. ECF No. 60, Exhibit 60, lines 9-16 of p. 10. Her uncle [Robert Peoples] asked her to play along with Akers and FLANAGAN to get more information. No officer asked her to get the information. Her uncle used to be an attorney. ECF No. 60, Exhibit 60, lines 8-20 of p. 12. She testified that her uncle advised her to pump FLANAGAN for information. She said that after she found out about the reward, she was then to give any information to Berni, or Avants, or the D.A.'s Office. ECF No. 60, Exhibit 60, line 1 of p. 15 to line 10 of p. 16.

On Christmas Day of 1984, Akers phoned Saldana [from jail] and asked her to get rid of a stick. She already knew where the stick was, got it, and gave it to prosecutor Dan Seaton. She identified State's trial exhibit 96 as the same stick. ECF No. 60, Exhibit 60, line 11 of p. 16 to line 20 of p. 17. She again testified that her uncle [Peoples] used to be an attorney; she had no idea if he used to be part of law enforcement or a prosecutor. ECF No. 60, Exhibit 60, lines 8-18 of p. 25. On cross examination, she clarified that although she never saw FLANAGAN with a .22 pistol in his trailer, she had seen him and Walsh with a .22 pistol at Moore's apartment after the murders. ECF No. 60, Exhibit 60, line 1 of p. 28 to line 3 of p. 30.

On re-direct, she testified to the sequence of her involvement with the police. It began the same week FLANAGAN bought the second knife [and made the comments about outfoxing the police]. She took the knife to her old boyfriend Officer Berni who told her to put it back. Officer Berni did not suggest that she become an agent of law enforcement or elicit information from FLANAGAN; it was her idea alone. She put the knife back. She waited for FLANAGAN to talk about the murders. After FLANAGAN had told her on December 5, 1984, about the murders, she went the next day to Officer Berni, for the second time. She asked him whom she should talk to about making a statement. Berni advised her to go to Beecher Avants, which she did. Avants came to her aunt's house [Peoples wife]; they were personal friends. She then told Avants what FLANAGAN had said about murdering his grandparents and those involved. Avants told her to go to Metro Sergeant Bob Hilliard, which she did. She told him what FLANAGAN had told her. Hilliard told her to go to Detective Levos, which she

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did, and gave him the statement which began at 23:20 hours on December 6. Neither Berni, Avant, Hilliard, nor Levos asked her to be a police agent and try to get information from FLANAGAN; she did it all on her own. She never discussed with anyone the $2,000 secret witness reward until after the arrests of those involved, and was not aware of the reward until after she made her first and only written statement on December 6, 1984. ECF No. 60, Exhibit 60, line 23 of p. 31 to line 18 of p. 38.

During Mr. Pike's re-cross, she testified that she had not kept in touch with Akers. Akers came over once to the house [the aunt's] to get paid by her uncle [Peoples] who had hired Akers or was going to hire him. She confirmed that she had seen FLANAGAN [at Moore's house] with an automatic pistol which looked like a .22, that it was her idea to have sex with FLANAGAN and Akers to get information from them, and that she saw what FLANAGAN had told her as her big opportunity to become an investigator. Although she had told FLANAGAN that she wanted to be an investigator, he still told her [about murdering his grandparents]. She said she got paid nothing for her interviews with the Review Journal and the Sun. ECF No. 60, Exhibit 60, lines 1 of p. 44 to line 23 of p. 46.

APPLICABLE LAW.

1. Standard for Stay and Abeyance.

Under *Rhines v. Weber*, 544 U.S. 269 (2005), a stay of federal habeas proceedings to exhaust claims that have not been completely exhausted in the state courts is available only in limited circumstances. The Supreme Court recognized that the AEDPA has twin purposes: 1) to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 2) to vigorously encourage potential federal habeas litigants to be sure that they have taken each claim to state court before they bring any claims to federal court. *Rhines*, 544 U.S. at 276-277. The *Rhines* court stated that stay and abeyance, if employed too frequently, has the potential to undermine those purposes, as follows:

> Stay and abeyance, if employed too frequently, has the potential to undermine these twin purposes. Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also **undermines AEPDA's goal of streamlining federal habeas proceedings by decreasing a petitioner's**

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> **incentive to exhaust all his claims in state court prior to filing his federal petition**. Cf. *Duncan*, *supra*, at 180, 121 S.Ct. 2120 ("[D]iminution of statutory incentives to proceed first in state court would … increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce").
>
> For these reasons, stay and abeyance should be available in limited circumstances. **Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance in only appropriate when** the district court determines **there was good cause for the petitioner's failure to exhaust his claims first in state court**. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"). [Emphasis added].

The Supreme Court further stated,

> . . .[I]t likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition."

Id. at 278.

Therefore, in order for FLANAGAN to return to state court to exhaust Claim 1, he must demonstrate: 1) "good cause" for his failure to raise said unexhausted claim in state court previously; 2) his unexhausted claim is potentially meritorious; and 3) there is no indication that he engaged in dilatory litigation practices.

The Ninth Circuit Court of Appeals has held that the application of an "extraordinary-circumstances" does not comport with the "good cause" standard prescribed by *Rhines*. *See Jackson v. Roe,* 425 F.3d 654, 661-62 (9th Cir. 2005). This court has declined to prescribe the strictest possible standard for issuance of a stay. *See Riner v. Crawford,* 415 F. Supp. 2d 1207, 1211 (D. Nev. 2006).

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POINT 1. FLANAGAN HAS FAILED TO SHOW GOOD CAUSE FOR HIS FAILURE TO EXHAUST HIS CLAIMS FIRST IN STATE COURT BEFORE COMING TO FEDERAL COURT.

The court should deny FLANAGAN's motion to stay and abey because he has not demonstrated good cause to excuse his failure to first exhaust in state court the unexhausted claims in federal Ground 1 or any other unexhausted grounds.

FLANAGAN claims in Claim 1 that when the Gordons' murders occurred, the Clark County District Attorney's Office's Chief Investigator, Beecher Avants, supplied the police reports in FLANAGAN's case to Robert Peoples who then obtained/created false and/or highly suspect and impeachable testimony from Angela Saldana and others, and forced Saldana to testify under the threat that she would get the death penalty if she did not do and say as Peoples instructed. He also alleges in the same vein that, after Avants had provided Peoples with the police reports in FLANAGAN's case, Peoples studied them, forced Saldana to testify at trial to the information in the police reports, and further forced her to fabricate the lie that FLANAGAN had confessed to her that he had killed his grandparents. He further alleges that all the statements Saldana claimed FLANAGAN made to her were actually manufactured and provided to Saldana by Peoples. He alleges that this was material exculpatory evidence which was kept from FLANAGAN's counsel throughout the state trials, sentencings, and appellate proceedings, and that, because Saldana was the lynchpin and cornerstone of the State's case, this new evidence undermines confidence in the proceedings against FLANAGAN.

FLANAGAN alleges that good cause exists for his failure to first exhaust Claim 1 in state court because he learned for the first time in July of 2010, when he interviewed Wendy Mazaros, a.k.a. Wendy Peoples, a.k.a. Wendy Hanley, and Wendy's daughter Amy Hanley-Peoples, that the State had withheld the exculpatory evidence "that Robert Peoples, in concert with law enforcement officials, orchestrated and compelled Angela Saldana's fabricated testimony."

As support for his good cause, FLANAGAN attaches the declaration of Amy Hanley-Peoples who was born in November of 1976. The murders were committed in November of

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1984 and the trial was held in September-October of 1985, when Ms. Hanley-Peoples was eight years old. To support FLANAGAN's claim that her former step-father Robert Peoples forced Angela Saldana to testify, she recounts an incident between the dates of the Gordons' murders and the trial, when she was eight years old, when Peoples took her and Angela Saldana to Dale Flanagan's trailer when FLANAGAN was not there and pointed to a picture [apparently of FLANAGAN] and told Saldana that it was a picture of the devil and that she had to testify against FLANAGAN and say that he was a devil worshiper. She also states in conclusory fashion without any supporting facts that Robert Peoples instructed Saldana how to testify and rehearsed her testimony. It's difficult to accept that an eight-year-old would know what testifying and rehearsing testimony was and difficult to understand how an eight-year-old would know that Saldana spent time with Dale Flanagan at his trailer but never lived there with him, especially in light of the fact that Saldana didn't live there very long. With regard to being in Peoples' apartment sometime before 1989, when she was at the most 13 years old, it's difficult to believe that she remembers seeing FLANAGAN's name on papers inside a box almost 25 years ago or understand how she would know that Robert Peoples had Saldana hidden at the Blue Angel Hotel and had an investigator constantly watching her.

Wendy Mazaros, a.k.a. Wendy Peoples, a.k.a. Wendy Hanley, claims in her declaration in support of cause that Robert Peoples hatched a plan with Beecher Avants to have Saldana "solve" the case. She claims Avants came to the house two or three times to talk to Peoples about the investigation and other times they met elsewhere or talked by phone. Avants told Peoples that they needed to find the gun or get a confession. She also claims that Avants provided Peoples all of the police reports about the case. Peoples reviewed them carefully and then coerced Saldana to say exactly what he wanted her to say. Ms. Mazaros also claims Peoples told Saldana that if she did not co-operate with him and Avants, she could be charged with conspiracy and be executed. Ms. Mazaros also claims that for the last decade she has made herself difficult if not impossible to find. Her claim of making herself difficult to find is contradicted by the following: a February 2010 Review Journal article which indicates that while represented by her attorney Herb Sachs, she gave a deposition on May 18, 2009

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regarding then Governor Jim Gibbons; a February 8, 2010 Nevada News Bureau article which reported that then Governor Jim Gibbons "denied all allegations made by Wendy Mazaros (formerly Hanley) to investigative journalist George Knapp in a KLAS-TV news report last night."; in 2011, a book she co-authored was published; its title is Vegas Rag Doll—a true story of terror and survival as the wife of a mob hitman. Mazaros has made numerous public appearances to promote her book. She has also been on local investigative television reports and along with her daughter been the subject of Las Vegas newspaper columnists' articles.

The following will show that at the time Angela Saldana made her voluntary statement, no-one else had made a statement which contained the same facts Saldana's statement did; consequently, FLANAGAN's claims that "the statements Saldana claimed FLANAGAN made to her were actually manufactured and provided to Saldana by Peoples" is wholly without merit. FLANAGAN attaches to his Amended Petition for Writ of Habeas Corpus (ECF No. 46), his Appendix, ECF No. 47-1 through ECF No. 47-7, which contains seven volumes. The police reports are found in volumes 5 through 7 which are filed as ECF No. 47-5 through ECF No. 47-7. Volume 5 contains 1) Dr. Green's November 7, 1984 autopsy reports on Colleen Gordon and Carl Gordon, 2) Detective Geary's November 8, 1984 report, 3) FLANAGAN's November 6, 1984 voluntary statement, and 4) Lisa Licata's December 6, 1984 voluntary statement. Volume 6 contains 1) a November 7, 1984 property report, 2) Richard Good's November 15, 1984 ballistics report, 3) Ronald Davis' November 24, 1984 voluntary statement, 4) Wayne Wittig's December 7, 1984 (11:00 a.m.) voluntary statement, and 5) Angela Saldana's December 6, 1984 (23:20 hours) voluntary statement. Volume 7 contains Tom Akers December 7, 1984 (14:10 hours) voluntary statement and Detective Geary's January 3, 1985 report regarding the recovery of the wooden pole.

Only two voluntary statements were made before Saldana's: FLANAGAN's and Lisa Licata's. In his November 6, 1984 voluntary statement, FLANAGAN basically said 1) he knew nothing about his grandparents' murders and 2) that they had told him that if anything happened to them, he would get some portion of the house. Lisa Licata's December 6, 1984 voluntary statement was made between 4 p.m. and 6 p.m., approximately five hours before

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Saldana gave hers. Saldana attempted to make a statement earlier on December 6, 1984 by going to Berni, then Avants, then Hillier at his home, and finally to Detective Levos who took her statement. ECF No. 60, Exhibit 58, line 4 of p. 205 to line 11 of p. 211; ECF No. 60, Exhibit 60, line 23 of p. 31 to line 18 of p. 38. There is no plausible way that Saldana could have seen Licata's statement before Saldana made her statement. Licata's statement doesn't contain much about the murders anyway. So, Saldana made her statement, contrary to FLANAGAN's claims, without seeing any other statements, besides the police and autopsy reports which mention nothing about the plan to murder the Gordons, the actual murders of the Gordons, and the aftermath of the murders.

In her statement, Saldana stated the following. Around 10:30 p.m. on December 5, 1984, she got into an argument with FLANAGAN over an old boyfriend. FLANAGAN said he didn't care what she did anymore and was tired of running. Then he stopped and said, "I know what happened, who did it, how it was done, and why it was messed up." He said "How do you like this, I did it. I killed my grandparents." Then he went into a description of how it was done. He said that he planned it to look like a robbery, and that he, Akers, Luckett, Moore, and Walsh were all there. He said he gave Moore the knife to cut open the screen and that it wasn't working good, so Moore threw it down on the ground. Then FLANAGAN broke the window, got in the house, wrestled his grandmother to the bed, put his hand over her mouth and shot her once in the head. As he was doing that, Moore and Luckett shot the grandfather as he came down the stairs. FLANAGAN also said he went into the living room closet and took her purse so it would look like a robbery. He said he killed his grandparents for a part of the house and for insurance proceeds. She also said in her statement that FLANAGAN said they went back to the house on 13th Street and he was supposed to find his grandparents first but he didn't get a ride in time and Lisa Licata found them first. She said that FLANAGAN said that they thought they had shot the grandfather seven or eight times. Saldana also said that she had seen Mike Walsh with a small automatic .22 caliber chrome gun and the last time she saw it was in Walsh's room at the North 13th Street apartment.

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The court should, therefore, deny the motion to stay because FLANAGAN cannot show good cause to excuse his failure to first exhaust Claim 1 in state court because he cannot show, as he claimed, that the State withheld exculpatory evidence, that is, that Beecher Avants supplied the police reports in FLANAGAN's case to Robert Peoples, that Peoples then obtained/created false and/or highly suspect and impeachable testimony from Angela Saldana, forced Saldana to testify under the threat of the death penalty if she did not do and say as Peoples instructed, further forced her to fabricate the lie that FLANAGAN had confessed to her that he had killed his grandparents, and actually manufactured and provided to Saldana all the statements Saldana claimed FLANAGAN made to her. FLANAGAN has failed to demonstrate that, at the time SALDANA made her voluntary statement, any other reports existed which contained the statements she made. Saldana got the statements, just as she claimed, from FLANAGAN.

POINT 2. FLANAGAN HAS FAILED TO SHOW THAT CLAIM 1 IS POTENTIALLY MERITORIOUS.

FLANAGAN has failed to show that the unexhausted claims in Claim 1 potentially have merit. He alleges that Robert Peoples manufactured and provided to Saldana all the statements she claimed FLANAGAN made to her. He further alleges that this material exculpatory evidence was kept from FLANAGAN's counsel, and that, because Saldana was the lynchpin and cornerstone of the State's case, this new evidence undermines confidence in the proceedings against FLANAGAN.

Saldana made no attempt to conceal Wendy and Robert Peoples' involvement in her case because she had nothing to hide. She testified to the following about her aunt and uncle, Wendy and Robert Peoples. On November 5, 1984, she was living with her aunt and uncle in Las Vegas. The following day, she moved in with FLANAGAN. ECF No. 60, Exhibit 58, lines 4-25 of p. 155. She talked to Beecher Avants after FLANAGAN had told her what he had done. She was living with her aunt when she spoke to Avants. She called Avants because her aunt and uncle suggested she call him. Avants was a friend of the family. At the time Saldana met Avants, he was running for sheriff. ECF No. 60, Exhibit 58, line 4 of p. 205

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to line 11 of p. 211. Her uncle [Robert Peoples] asked her to play along with Akers and FLANAGAN to get more information. Her uncle used to be an attorney. ECF No. 60, Exhibit 60, lines 8-20 of p. 12. Although it is very unlikely that Peoples was an attorney, the point is that she wasn't concealing anything she thought she knew about him. Her uncle advised her to pump FLANAGAN for information. ECF No. 60, Exhibit 60, line 1 of p. 15 to line 10 of p. 16. She also testified that her uncle had employed Tom Akers. None of this was kept from counsel nor anyone else.

Neither Beecher Avants nor Robert Peoples manufactured Angela Saldana's testimony or forced her to testify to what they wanted. Saldana was the first person to provide a voluntary statement. Her statement centered on four main events: 1) the knife, 2) the plan to murder the Gordons, 3) the murder of the Gordons, and 4) the aftermath at North 13th Street. After she made her December 6, 1984 voluntary statement, almost every witness corroborated what she had said, as the following shows.

1. THE KNIFE

In her December 6, 1984 voluntary statement, Saldana stated that FLANAGAN told her that officers had told him that they had found something of his by the window at the murder scene that shouldn't have been there. She asked what it was and he said "my knife." Approximately a week later at the trailer, FLANAGAN pulled out another knife and said "Look, I found my knife." Saldana said it wasn't the same knife to which FLANAGAN said, "Yeah, but nobody else would know that. Now the cops don't have anything on me." The interviewing officer showed her the knife that was found outside the window and she said that it looked like the knife that FLANAGAN now had. She said that she went to Officer Berni and showed him the replacement knife.

The following witnesses corroborated the knife part of her statement. Officer Roderick testified that he found a knife (State's trial exhibit 91-A) at the scene outside the west side of the house and took it and the cut screen from the broken window into evidence. ECF No. 59, Exhibit 53, line 3 of p. 134 to line 5 of p. 138. Tom Akers testified that Moore said he had cut the screen with FLANAGAN's boot knife and had dropped it after he cut the screen. Akers

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also testified that about two weeks after the murders, he went to Meadows Mall with FLANAGAN to Cutlery World to replace the knife that FLANAGAN had dropped/lost. ECF No. 59, Exhibit 57, line 3 of p. 82 to line 5 of p. 87. Johnny Ray Luckett testified at trial that after they got back to the apartment, FLANAGAN discovered that he didn't have his knife and Moore said he had dropped it outside the window; they talked about going back to get it but decided not to. ECF No. 60, Exhibit 63, lines 6-19 of p. 57. John Lucas testified that FLANAGAN typically carried a double-edge boot knife that clipped onto his boot and that FLANAGAN said that he had dropped his knife outside the side window they had broken to get into the grandmother's house. ECF No. 60, Exhibit 58, line 16 of p. 36 to line 7 of p. 37. Michelle Gray testified that in a conversation which FLANAGAN had with her, Blake Watson, and Debbie Samples, FLANAGAN said that if anyone asked if he had lost a knife, to tell them he has had it with him. He showed them a similar knife and said that if anyone asked, that the similar knife was the knife that he had always carried. FLANAGAN told Gray that the police had found his knife by the window of his grandparents' house inside the house. ECF No. 59, Exhibit 56, line 10 of p. 17 to line 2 of p. 19, and line 18 of p. 19 to line 18 of p. 20, and line 3 of p. 23 to line 10 of p. 25. Yvonne Kaczmarek from Cutlery World testified she sold Flanagan a western w-77 boot knife in October of 1984. She remembered him because he worked at McDonald's in Meadows Mall and he had been coming into the store for a while. ECF No. 60, Exhibit 58, line 8 of p. 132 to line 16 of p. 133. She also testified that FLANAGAN came into the store with Akers and bought an identical knife on November 16, 1984. Wayne Wittig testified that after the murders he had a conversation with FLANAGAN where FLANAGAN had admitted to him that he had gone into the Gordons' house with five or six other individuals. Witting also identified exhibit 91-A [the boot knife found at the scene] as FLANAGAN's knife based on the fact that the tip of blade of the knife was discolored or burned. ECF No. 60, Exhibit 62, line 22 of p. 38 to line 22 of p. 39. ECF No. 60, Exhibit 62, line 25 of p. 42 to line 5 of p. 43. Saldana's statement, therefore, was amply corroborated. Any claim that Peoples took statements from other reports and force fed them to Saldana is

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meritless. FLANAGAN has failed to show good cause to excuse his failure to first file his unexhausted claims in state court.

2. THE PLAN, THE MURDERS, AND THE AFTERMATH.

Saldana also stated in her voluntary statement that FLANAGAN admitted that he had killed his grandparents. FLANAGAN alleges that Peoples and Saldana fabricated this lie. Saldana also stated that FLANAGAN had said that he planned to make the murders look like a robbery, that Akers, Luckett, Moore, and Walsh were all there, that he gave Moore the knife to cut open the window screen but it wasn't working so he threw it on the ground, that he (FLANAGAN) broke the window, got in the house, wrestled his grandmother to the bed, put his hand over her mouth, and shot her once in the head. As he was doing that, Moore and Luckett shot the grandfather as he came down the stairs. FLANAGAN also said he went into the living room closet and took her purse so it would look like a robbery. He said he killed his grandparents for a part of the house and for insurance proceeds. She also said in her statement that FLANAGAN said they went back to the house on 13th Street and he was supposed to find his grandparents first but he didn't get a ride in time and Lisa Licata found them first. She said that FLANAGAN said that they thought they had shot the grandfather seven or eight times. Saldana also said that she had seen Mike Walsh with a small automatic .22 caliber chrome gun and the last time she saw it was in Walsh's room at the North 13th Street apartment.

The above statements were corroborated by Tom Akers, John Lucas, Johnny Ray Luckett, Rusty Havens, Officer Daniel Connell, and Officer Robert Roderick. Tom Akers testified that around 10 p.m. on November 5, 1984, he and FLANAGAN went to the apartment of Randy Moore, Johnny Ray Luckett, and Michael Walsh at 337 North 13th Street. ECF No. 59, Exhibit 57, line 22 of p. 26 to line 13 of p. 28. FLANAGAN said that they were going to go to the grandparents' house that night to kill them, and that he would probably wind up shooting his grandmother. Walsh said that he would hold a broomstick wrapped with black electrical tape [which Akers saw beside the small couch in the living room of the apartment] and break the window to gain entry. Moore said he would cut the screen, and Michael Walsh would

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smash the window. FLANAGAN said he would go in first and go directly to the grandmother's room. Akers also testified on direct that when they got back to 337 North 13th Street, they recounted what had happened. Walsh said he hit the window twice with the stick, and then FLANAGAN put his fist through it, the window was cleared out, FLANAGAN entered, and then Moore entered. Walsh then saw the "older gentleman" coming down the stairs, took the gun from Luckett, and fired a shot through the window over Moore's shoulder. FLANAGAN said he went directly to his grandmother's room, grabbed her by the lower jaw, put her down on the bed and shot her; Akers thought FLANAGAN said he shot her in the back of the head.

John Lucas testified that on the night of the murders, he was at the apartment at 337 North 13th Street with FLANAGAN, Moore, Walsh, Luckett, and Akers when the murders were discussed. FLANAGAN and Moore did most of the talking. FLANAGAN said that they would get into the house through the side window, that FLANAGAN would shoot the grandmother and Moore the grandfather, so FLANAGAN could get his inheritance through the will. Moore said they would make the murders look like a burglary by messing the place up a little. ECF No. 60, Exhibit 58, line 9 of p. 9 to line 25 of p. 17. FLANAGAN told Lucas that Walsh broke the side window with a white closet pole. FLANAGAN said he went through the side window into his grandmother's room and shot her with the .22 pistol. Moore said he shot the grandfather with the .22 rifle as he came down the stairs. ECF No. 60, Exhibit 58, line 19 of p. 31 to line 24 of p. 33.

Johnny Ray Luckett, one of the defendants on trial, testified at trial, as follows. On the morning of the day of the murders, FLANAGAN and Akers arrived at 337 North 13th Street. Luckett, Walsh, and Moore were already there. Between approximately 11 a.m. and 1 p.m., Luckett overheard a conversation between Moore and FLANAGAN where one of them said "we have to do it this weekend since we didn't do it last weekend." ECF No. 60, Exhibit 63, line 10 of p. 25 to line 8 of p. 27. Luckett heard FLANAGAN ask Moore for McDowell's phone number, FLANAGAN then went into the living room, called the number and asked for McDowell, and then asked if he had gotten the toy, and then said "all right, that's okay." FLANAGAN and Akers then left the apartment. ECF No. 60, Exhibit 63, line 25 of p. 11 to line

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14 of p. 27 to line 10 of p. 28. Around 5-6 p.m., Lucas came over to the apartment. Luckett, Walsh, and Moore were there. ECF No. 60, Exhibit 63, line 23 of p. 28 to line 7 of p. 29. LUCKETT heard Flanagan say that he had found a way in, something about hospital, and moving furniture, and something about there was supposed to have been a pickup there when we arrived. ECF No. 60, Exhibit 63, lines 2-9 of p. 33. After Moore and FLANAGAN had confronted Luckett in the apartment bedroom, Moore came out of the bedroom with the sawed-off rifle and the long rifle. McDowell then showed up at the apartment and gave FLANAGAN the .22 pistol revolver. ECF No. 60, Exhibit 63, line 20 of p. 37 to line 14 of p. 39. Before they left, Moore was loading both rifles and FLANAGAN was fiddling with the revolver and Luckett thought he saw him loading bullets into it. There was a conversation about meet me at the hospital and Randy was to shoot Dale in the leg so that it would make it look real. Randy grabbed both rifles and FLANAGAN grabbed the revolver and FLANAGAN said "let's go." ECF No. 60, Exhibit 63, line 9 of p. 40 to line 2 of p. 41. They all went out and got in Akers' car [FLANAGAN, Moore, Walsh, McDowell, Luckett, and Akers. Moore put the two rifles in the back of the El Camino. When they got to the Gordons' house, FLANAGAN told Tom Akers to turn off the car lights and to get his cassette tapes. ECF No. 60, Exhibit 63, line 19 of p. 42 to line 2 of p. 43. Moore got the two rifles out of the back of the El Camino. ECF No. 60, Exhibit 63, lines 1-3 of p. 44. Luckett saw Walsh grab a pole or something out of the back of the El Camino. Moore told Luckett that he was to back Moore up in case something went wrong. ECF No. 60, Exhibit 63, lines 16-25. When they got to the house, Luckett saw Moore crouching down and saw him pull the screen apart from the window. Luckett heard FLANAGAN say "Now, do it now." He then heard two dead thumps on a window and heard a window break. ECF No. 60, Exhibit 63, lines 1-19 of p. 47. FLANAGAN then said "Now, everybody in." He saw FLANAGAN and Roy go in the house, then he heard a scream when Moore and Walsh were outside the window and heard two or three shots. He saw Moore crouch down and fire shots into the house. Walsh was behind Moore and fired one shot. During this time, he heard the man yell and scream. Walsh threw the gun to Luckett, then Moore and Walsh went into the house. ECF No. 60, Exhibit 63, line 22 of p. 47 to line 22 of p.

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48. After all six of them had gotten in the car, Luckett asked Moore what the last final shot was and he said that Mr. Gordon had been squirming around, so he shot him in the head. Then they all got in the car and took off, drove to an isolated spot in the desert and threw away the casings. ECF No. 60, Exhibit 63, lines 4-23 of p. 50. When they were sitting in the apartment recounting what had happened, Luckett heard FLANAGAN say that he had run into the house, grabbed his mother (sic), threw her down and shot her in the head three times. ECF No. 60, Exhibit 63, lines 19-25 of p. 54. He heard Moore say that he shot Mr. Gordon when he was coming down the stairs and that Mr. Gordon still proceeded down the stairs after Randy shot him, Luckett thought three or four times, and so he had kept shooting. Walsh said that after he saw Moore start firing at Mr. Gordon and Gordon kept coming down the stairs and yelling, he stepped behind Moore and fired a shot at Gordon. ECF No. 60, Exhibit 63, lines 1-11 of p. 55.

Rusty Havens testified that he did not take part in the murders because he was locked up in Elko on November 5, 1984, but he was party to the early plans to kill the Gordons. Havens testified that one night when he was at Circus Circus a month or two before the murders, FLANAGAN asked him if he wanted to be involved in killing his grandparents so that FLANAGAN could get his inheritance. Havens testified that about a week and a half before the murders he met with FLANAGAN, Randy Moore, Tom Akers and Mike Walsh at the apartment at 337 North 13th Street in Las Vegas to discuss killing the grandparents. ECF No. 59, Exhibit 53, line 16 of p. 24 to line 4 of p. 25. At the apartment FLANAGAN planned how they were going to kill his grandparents and how to make it look like a burglary. ECF No. 59, Exhibit 53, line 2 of p. 18 to line 2 of p. 21. FLANAGAN said they could get into the grandparents' house through the back door and described the house and where the grandparents slept. FLANAGAN said the grandmother would be sleeping in her room and to get to it you went through the back door, took a left through a bathroom and into her bedroom. The grandfather would be upstairs to the left in his own room. ECF No. 59, Exhibit 53, line 15 of p. 22 to line 7 of p. 23. They discussed how Randy Moore was to go into the living room where he could see the staircase going up, and Havens was to kill the grandmother with a

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blunt instrument, then the grandfather would hear the noise, and as the grandfather came down the stairs, Moore would shoot him. ECF No. 59, Exhibit 53, line 11 of p. 23 to line 9 of p. 24. FLANAGAN said they would use Tom Akers' car and Akers agreed they could use the car. ECF No. 59, Exhibit 53, lines 14-25 of p. 25. FLANAGAN said that once the grandparents were dead and everything had cooled off, Moore, Walsh, Akers, and Havens would be paid very well. ECF No. 59, Exhibit 53, lines 6-11 of p. 26.

Officer Daniel Connell testified that he examined the entire house for signs of entry, that the lower pane of the window between the stairs and the fireplace in the living room was broken, there were numerous pieces of glass on the inside of the room, and the screen on the broken window was cut and torn. There were no other windows broken in the house and the rear door of the house was locked. ECF No. 59, Exhibit 53, line 11 of p. 99 to line 7 of p. 101. He also testified that an apparent bullet hole was located above the second step of the stairway in the south stairway wall and another apparent bullet hole was found in the studs or framework of the house. The angle of the bullet holes showed trajectories which indicated that the bullets had been fired from outside the broken window. ECF No. 59, Exhibit 53, line 22 of p. 100 to line 17 of p. 102.

Officer Robert Roderick testified that there were five cartridge casings at the scene. Cartidge 88-A was found next to Mr. Gordon's right foot, 88-B was near to and outside the broken window, 88-C was in the window sill of the broken window, and 88-D was on the living room floor near the broken window. A spent bullet (88-E) was also found between Mr. Gordon's legs. ECF No. 59, Exhibit 53, line 20 of p. 118 to line 10 of p. 122. The last cartridge 89-A was found between the broken window screen and the frame of the screen. ECF No. 59, Exhibit 53, lines 11-25 of p. 124. Officer Roderick also testified that he found two bullets (State's trial exhibit 90-A and 90-B) in the bloody bedsheets taken from Mrs. Gordon's bedroom. ECF No. 59, Exhibit 53, line 11 of p. 128 to line 19 of p. 133. He also testified that he found a knife (State's trial exhibit 91-A) at the scene outside the west side of the house and took it and the cut screen from the broken window into evidence. ECF No. 59, Exhibit 53, line 3 of p. 134 to line 5 of p. 138.

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In light of the foregoing, FLANAGAN has failed to show that his unexhausted claims are potentially meritorious. Although FLANAGAN argues that Saldana was the lynchpin and cornerstone of the State's case, the fact of the matter is that the testimony of several main witnesses, along with physical evidence, sealed FLANAGAN's fate. The testimony of Tom Akers, Johnny Ray Luckett, and John Lucas, along with the recovery of the two rifles and Richard Good's testimony that the casings by the broken window could only have come from the rifle which Moore threw into Lake Mead, plus leaving the knife at the scene and buying a replacement from the same store, is just some of the evidence underscoring the Nevada Supreme Court's finding that the evidence against FLANAGAN was overwhelming. It is very likely that a jury would have convicted FLANAGAN even without Saldana's testimony. The Court should deny his motion to stay.

CONCLUSION

Under *Rhines v. Weber*, 544 U.S. 269 (2005), a stay of federal habeas proceedings to exhaust claims that have not been completely exhausted in the state courts is available only in limited circumstances. Based on the foregoing, the Court should deny FLANAGAN's motion to stay because he has failed to demonstrate that he has good cause for his failure to first take his unexhausted claims to state court and further failed to show that said unexhausted claims are potentially meritorious. The Court should deny his motion to stay.

DATED this 30th day of March, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Dennis C. Wilson
DENNIS C. WILSON
Senior Deputy Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***Respondents' Opposition to Petitioner's Motion to Hold Proceedings in Abeyance*** with the Clerk of the Court by using the CM/ECF system on the 30th day of March, 2012.

The following participants in this case are registered CM/ECF users and will be served by the CM/ECF system:

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